

# APPENDICE "A"

IN THE SUPERIOR COURT OF WHEELER COUNTY  
STATE OF GEORGIA

LARRY CASH,  
GDC 650243  
PETITIONER,

VS  
VANCE LAUGHLIN, WARDEN, and  
COMMISSIONER, GEORGIA  
DEPARTMENT OF CORRECTIONS  
RESPONDENTS

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CIVIL ACTION NO: 16CV010

CERTIFICATE OF SERVICE

I, Janet Ashley, Deputy Clerk, do hereby certify that I have this day mailed a true and accurate copy of the FINAL ORDER to the below-named parties\*, with sufficient postage thereon to assure delivery.

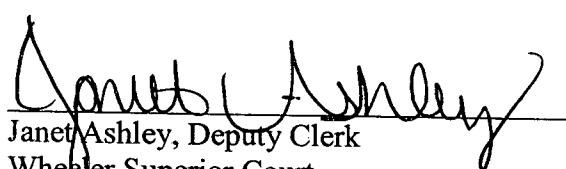
Larry Cash, GDC 650243  
Wheeler Correctional Facility  
P. O. Box 466  
Alamo, GA 30411

Vance Laughlin, Warden  
Wheeler Correctional Facility  
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Alamo, GA 30411

Commissioner,  
Georgia Department of Corrections  
State Offices South at Tift College  
P. O. Box 1529  
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Franklin D. Miller  
of Counsel to  
Daniel M. King, Jr., SAAG  
P.O. Box 4329  
Dublin, GA 31040

This the 3<sup>rd</sup> day of December, 2018

  
Janet Ashley, Deputy Clerk  
Wheeler Superior Court

IN THE SUPERIOR COURT OF WHEELER COUNTY  
STATE OF GEORGIA

2018 DEC -3 AM 10:27

LARRY CASH, )  
Petitioner, )  
GDC No. 650243, )  
v. ) Habeas Corpus  
VANCE LAUGHLIN, Warden, and ) File No. 16CV010  
HOMER BRYSON, Commissioner, )  
Georgia Department of Corrections, )  
Respondents. )

*Carol W. Berry*  
CLERK OF COURT

**FINAL ORDER**

Petitioner, LARRY CASH, filed the instant Application for Writ of Habeas Corpus on February 8, 2016 challenging the validity of his July 23, 2008 Haralson County jury trial conviction. An evidentiary hearing occurred on April 12, 2017. After reviewing the Petition, the entire record of the case, and applicable law, the Court makes the following findings:

**PROCEDURAL HISTORY**

A Haralson County grand jury indicted Petitioner on May 3, 2005 on two counts of murder, two counts of felony murder, and two counts of aggravated assault. (Transcript of Habeas Corpus Evidentiary Hearing on April 12, 2017, hereinafter "HT," p. 87-90). On September 22, 2005, the State filed a notice of intent to seek the death penalty. (HT 99). Following a jury trial, Petitioner was convicted of two counts of felony murder and one count of aggravated assault and received two consecutive sentences of life imprisonment. (HT 2424-2425).

Petitioner, through counsel, filed a Motion for New Trial on August 7, 2008 based on 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; and,
3. The verdict is contrary to law and the principles of justice and equity.

(HT 2444). On January 11, 2012, Petitioner, through counsel, filed an Amended Motion for New Trial raising the following grounds:

1. The Defendant should be acquitted and discharged due to the State's failure to prove his guilt beyond a reasonable doubt;
2. The verdict is contrary to the evidence and without evidence to support it;
3. The verdict is contrary to law and the principles of justice and equity;
4. The jury's verdict is inconsistent and violates the exception to the inconsistent verdict rule;
5. The jury's verdict is mutually exclusive;
6. The Court instructions to the jury were inaccurate and misleading. Specifically, the trial court instructed the jury as to alternate ways they could find the Defendant guilty and did not limit the charges to the manner alleged by the Grand Jury;
7. The trial court erred in denying Defendant's Motion to Suppress the Arrest Warrant (Motion 121);
8. The trial court erred in denying Defendant's Motion to Suppress (Motion 85 as amended);
9. The trial court erred in denying Defendant's Motion to Recuse Certain Prosecutors (Motion 136);
10. The trial court erred in denying Defendant's Motions regarding the selection of the Grand and Traverse jurors (Motions 4 and 102);
11. The trial court erred in denying Defendant's Motion to Dismiss the Indictment (Motions 68 and 69);
12. The trial court erred in failing to grant the Defendant's demurrer;
13. The trial court erred in allowing the State to violate the rule of sequestration;
14. The trial court erred in failing to charge the jury on involuntary manslaughter (Defendant's Request 64);

15. The trial court erred in failing to charge the jury on involuntary manslaughter; (Defendant's Request 65);
16. The State's secret and unauthorized meeting with the Defendant's former investigator violated the Defendant's attorney-client privilege;
17. The trial court erred in failing to charge the jury on conspiracy (Defendant's Request 63);
18. The trial court erred in failing to correctly charge the definition of knowledge as applied to this case;
19. The trial court erred in failing to provide the jury with a copy of the indictment and allowing the jury to review the charges as set out in the indictment;
20. The trial court erred in charging the jury in language different from the indictment in the court's pre-charge and final charge;
21. The trial court's charge on conspiracy was erroneous;
22. The trial court failed to properly instruct the jury on parties to a crime;
23. The trial court erred in allowing the State to rebut statements of Jimmy Wright by use of Chris Cash;
24. The trial court erred in allowing the State to introduce evidence it intentionally withheld;
25. The trial court's charge on character and reputation was incorrect; and,
26. The State's actions regarding witnesses Woodham, Davis, Collins and Cash violated the Defendant's due process and equal protection rights.

(HT 2451-2453). On March 16, 2012, Petitioner, through counsel, filed an Amended Motion for New Trial adding the following grounds:

1. The trial court's jury charges and the verdict as they relate to Michelle McAdams are a violation of the Defendant's due process rights; and,
2. The trial court's jury charges and the verdicts as they relate to Jimmy Jackson are a violation of the Defendant's due process rights.

(HT 2471). The trial court denied Petitioner's motion for new trial on September 4, 2014 following a hearing. (HT 2524-2534). Petitioner, through counsel, filed a Notice of Appeal from

the verdict of conviction and from the order denying his motion for a new trial. (HT 2536). On appeal, Petitioner alleged the following grounds:

1. The evidence is insufficient to sustain his convictions; and,
2. The trial court mischarged the jury by omitting an instruction on "intent to murder" in regards to the felony murder counts and for failing to charge the jury on the lesser-included offense of involuntary manslaughter.

The Supreme Court of Georgia affirmed Petitioner's conviction on October 19, 2015. Cash v. The State, 297 Ga. 859 (2015). (HT 2597-2609, 4438-4441).

In his Application for Writ of Habeas Corpus, Petitioner raised the following grounds for relief:

1. Petitioner was denied his due process rights under the Fourteenth Amendment because the indictment is defective for failing to state the essential elements of the charged offenses;
2. Petitioner was denied his due process rights under the Fifth and Fourteenth Amendments because the indictment charged multiple counts for the same crime causing the possibility that the "multiplicitous" counts created double jeopardy;
3. Petitioner was denied his rights under the Equal Protection Clause of the Fourteenth Amendment because the verdict form created confusion as to the presumption of innocence when the jury was faced with deciphering multiple counts of the same crime;
4. Petitioner was subjected to "plain error" by the trial court's failure to charge the jury with a lesser included offenses in a capital felony case;
5. Petitioner was denied his Sixth Amendment right to effective assistance of counsel because trial counsel failed to argue the defects in the indictment including charging *mens rea* or *actus reus* as well as the "multiplicitous" counts of aggravated assault;
6. Petitioner was denied his Sixth Amendment right to effective assistance of counsel in that trial counsel failed to request a jury charge of a lesser included offense, nor did counsel

offer an affirmative defense when the Petitioner's theory was contrary to the State's allegations;

7. Petitioner was denied his Sixth Amendment rights to effective assistance of counsel because trial counsel convinced Petitioner to continue representation on appeal at no charge, without informing Petitioner of the fact that he would lose the ability to claim ineffective assistance of counsel during the trial stage;
8. Petitioner was denied effective assistance of appellate counsel because Larry Vo failed to raise defects in the indictment or any claim of ineffectiveness against trial counsel; and,
9. The trial court violated Petitioner's Due Process Clause rights because the trial judge failed to instruct the jury on a lesser included offense.

On February 22, 2016, Petitioner filed an "Amendment to Habeas Corpus Petitioner" adding the following ground for relief:

10. Petitioner was denied his due process right to a fair trial because the trial judge was a direct family member with the deceased victim in this criminal case and refused to recuse himself from the case.

On August 19, 2016, Petitioner filed a "Petition to Supplement Claims" in which he raised the following additional grounds for relief:

11. Petitioner's rights to impartial, fair-minded jurors under the Sixth, Eighth, and Fourteenth Amendments and the laws of the State were violated by the sensitive, emotional issues of violence, the size of the community, and the personal ties of the judge and district attorney to the prospective jurors;
12. The trial court erred by not granting Petitioner's motion for change of venue;
13. The trial court erred by allowing prejudicial security measures;
14. The trial judge had a personal bias or prejudice concerning Petitioner and should have recused himself from the case;

15. Petitioner received ineffective assistance of trial counsel due to counsel's failure to file a motion to disqualify the district attorney;
16. Trial counsel was ineffective and committed reversible error when he failed to afford Petitioner a fast and speedy trial;
17. The admission of gruesome and highly prejudicial color photographs of the deceased violated Petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment Rights and other applicable law;
18. The trial court erred by not granting a new trial on the ground that the verdict of guilt was against the great weight of the evidence;
19. Petitioner was compelled and tricked into believing that it was in his best interest not to take the witness stand;
20. Petitioner adopts all issues presented in his motion for new trial; and,
21. Petitioner adopts all grounds raised in the Supreme Court of Georgia.

On December 8, 2016, Respondent filed a Motion for More Definite Statement in regards to Ground Eight that appellate counsel was ineffective. In response, Petitioner filed an "Addendum to the Petition for Writ of Habeas Corpus" on December 12, 2016 clarifying Ground Eight of his Petitioner in the following manner:

8. Petitioner received ineffective assistance of appellate counsel due appellate counsel's failure to raise on direct appeal the following issues:
  - a. Trial counsel failed to object during the motion for new trial to Judge Murphy hearing the case;
  - b. Trial counsel continuing to represent him on appeal without informing him that he would not be able to raise ineffective assistance of trial counsel grounds on direct appeal; and,
  - c. Appellate counsel informing Petitioner via a letter that he was procedurally barred from raising any claim against trial counsel.

An evidentiary hearing occurred on April 12, 2017 in which attorney Long Vo and Kenneth McAdams testified and documentary evidence was received.

### **GROUND ONE**

In Ground One, Petitioner alleges that he was denied his due process rights under the Fourteenth Amendment because the indictment is defective for failing to state the essential elements of the charged offenses.

Failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin, 255 Ga. 239 (1985); Perkins v. Hall, 288 Ga. 810 (2011). "Cause" may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland v. Washington, 466 U.S. 668 (1984). "Actual prejudice" may be shown through satisfying the prejudice prong of Strickland or by satisfying the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982), which requires "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

The indictment against Petitioner charged the following:

THE GRAND JURORS selected, chosen and sworn for the County of HARALSON [...] in the name and behalf of the citizens of Georgia, charge and accuse JIMMY WAYNE WRIGHT and LARRY CRAIG CASH with the offense of MURDER, for that the said accused, in the County aforesaid, on the 3<sup>rd</sup> day of March, 2005, they did unlawfully and with malice aforethought, either express or implied, cause the death of another human being, in violation of O.C.G.A. § 16-5-1, when they unlawfully and with malice aforethought caused the death of James William Jackson, a human being, by shooting him with a firearm, contrary to the laws of said State, the good order, peace, and dignity thereof.

COUNT TWO

The Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse JIMMY WAYNE WRIGHT and LARRY CRAIG CASH with the offense of MURDER, for that the said accused, in the County aforesaid, on the 3<sup>rd</sup> day of March, 2005, they did unlawfully and with malice aforethought, either express or implied, cause the death of another human being, in violation of O.C.G.A. § 16-5-1, when they unlawfully and with malice aforethought caused the death of Tina Michelle McAdams, a human being, by shooting her with a firearm, contrary to the laws of said State, the good order, peace, and dignity thereof.

#### COUNT THREE

The Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse JIMMY WAYNE WRIGHT and LARRY CRAIG CASH with the offense of MURDER, for that the said accused, in the County aforesaid, on the 3<sup>rd</sup> day of March, 2005, they did unlawfully, while in the commission of a felony, caused the death of another human being irrespective of malice, in violation of O.C.G.A. § 16-5-1, when they unlawfully caused the death of James William Jackson, a human being, while committing an Aggravated Assault, a felony, by assaulting James William Jackson with the intent to murder and while assaulting him with a firearm, a deadly weapon, contrary to the laws of said State, the good order, peace, and dignity thereof.

#### COUNT FOUR

The Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse JIMMY WAYNE WRIGHT and LARRY CRAIG CASH with the offense of MURDER, for that the said accused, in the County aforesaid, on the 3<sup>rd</sup> day of March, 2005, they did unlawfully, while in the commission of a felony, caused the death of another human being irrespective of malice, in violation of O.C.G.A. § 16-5-1, when they unlawfully caused the death of Tina Michelle McAdams, a human being, while committing an Aggravated Assault, a felony, by assaulting Tina Michelle McAdams with the intent to murder and while assaulting her with a firearm, a deadly weapon, contrary to the laws of said State, the good order, peace, and dignity thereof.

#### COUNT FIVE

The Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse JIMMY WAYNE WRIGHT and LARRY CRAIG CASH with the offense of AGGRAVATED ASSAULT, for that the said accused, in the County aforesaid, on the 3<sup>rd</sup> day of March, 2005, they did assault another with the intent to murder and with a deadly weapon, in violation of O.C.G.A. § 16-5-21, when they assaulted James William Jackson with the intent to murder and with a firearm, a deadly weapon, an object, device or instrument which, when used offensively against a person, is likely to and actually does result in serious bodily injury, contrary to the laws of said State, the good order, peace, and dignity thereof.

## COUNT SIX

The Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse JIMMY WAYNE WRIGHT and LARRY CRAIG CASH with the offense of AGGRAVATED ASSAULT, for that the said accused, in the County aforesaid, on the 3<sup>rd</sup> day of March, 2005, they did assault another with the intent to murder and with a deadly weapon, in violation of O.C.G.A. § 16-5-21, when they assaulted Tina Michelle McAdams with the intent to murder and with a firearm, a deadly weapon, an object, device or instrument which, when used offensively against a person, is likely to and actually does result in serious bodily injury, contrary to the laws of said State, the good order, peace, and dignity thereof.

(HT 87-90). "A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." O.C.G.A. § 16-5-1(a). The indictment tracks the statutory language and charged Petitioner with malice aforethought. "A person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice." O.C.G.A. § 16-5-1(b). Felony murder does not require that the accused possess malice or intent to kill; rather, the accused must possess the criminal intent to commit the underlying felony. Holliman v. State, 257 Ga. 209 (1987). "A person commits the offense of aggravated assault when he or she assaults [ . . . ] with intent to murder [ . . . or w]ith a deadly weapon." O.C.G.A. § 16-5-21. Therefore, the indictment sets out the essential elements of the charged offenses as outlined by the applicable statutes. See, Jackson v. State, 301 Ga. 137 (2017). Petitioner's reliance on Henderson v. Hames for the assertion that a charge of felony murder includes an essential element of "consciously disregarding a substantial unjustifiable risk" is misplaced because that case involved a conviction for felony murder based upon misuse of a firearm while hunting which requires proof of a different mens rea than aggravated assault. 287 Ga. 534 (2010). As the indictment was not defective, Petitioner cannot show that counsel was ineffective for failing to challenge the indictment via demurrer. Lizana v. State, 287 Ga. 184 (2010). Petitioner has therefore failed to establish cause and prejudice sufficient to overcome the procedural bar to this ground.

Accordingly, Ground One provides no basis for relief.

## GROUND TWO

In Ground Two, Petitioner alleges that he was denied his due process rights under the Fifth and Fourteenth Amendments because the indictment charged multiple counts for the same crime causing the possibility that the “multiplicitous” counts created double jeopardy.

Petitioner failed to raise this issue on appeal. Failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin, 255 Ga. 239 (1985). “Cause” may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland v. Washington, 466 U.S. 668 (1984). “Actual prejudice” may be shown through satisfying the prejudice prong of Strickland or by satisfying the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982), which requires “not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

The district attorney has broad discretion in deciding “[whom] to prosecute, what charges to bring, and which sentence to seek.” State v. Wooten, 273 Ga. 529 (2001); Knight v. State, 243 Ga. 770 (1979); State v. Perry, 261 Ga. App. 886 (2003). Petitioner has failed to show any abuse of discretion in the instant case as evidence was presented to support each of the charges brought against Petitioner. “Multiplicity” is the charging of a single offense in more than one count. United States v. De la Torre, 634 F.2d 792, 792 (5th Cir.1981); United States v. Free, 574 F.2d 1221, 1224 (5th Cir.), cert. denied, 439 U.S. 873, 99 S.Ct. 209, 58 L.Ed.2d 187 (1978). Generally, the test for determining whether an indictment is multiplicitous is that set forth by the Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). “Whether each provision requires proof of an additional fact which the other does not.” 284 U.S. at 304, 52 S.Ct. at 182; see United States v. De la Torre, 634 F.2d at 795 (1981). Here, the indictment was not multiplicitous as each count required an element which the other did not.

To the extent that Petitioner claims the indictment confused the jury leading to an inconsistent verdict rule, Georgia has abolished the inconsistent verdict. *See, Robinson v. State*, 257 Ga. 194 (1987); *Taylor v. State*, 327 Ga. App. 288 (2014). Petitioner has therefore failed to show that he received ineffective assistance of counsel in failing to contest the indictment via demurrer or pursue this issue on appeal. Therefore, Petitioner has failed to establish cause and prejudice sufficient to overcome the procedural default of this issue.

Accordingly, Ground Two provides no basis for relief.

### **GROUND THREE**

In Ground Three, Petitioner alleges that he was denied his rights under the Equal Protection Clause of the Fourteenth Amendment because the verdict form created confusion as to the presumption of innocence when the jury was faced with deciphering multiple counts of the same crime.

Petitioner failed to raise this issue on appeal. Failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); *Black v. Hardin*, 255 Ga. 239 (1985). "Cause" may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of *Strickland v. Washington*, 466 U.S. 668 (1984). "Actual prejudice" may be shown through satisfying the prejudice prong of *Strickland* or by satisfying the actual prejudice test of *United States v. Frady*, 456 U.S. 152 (1982), which requires "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Turpin v. Todd*, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

As discussed in Ground Two, *supra*, Petitioner has failed to show any error regarding the indictment charging him with multiple counts for the same offense as each count of the indictment required proof of an additional fact which the other did not. Petitioner has not shown that the verdict form was improper or confused the jury. The verdict form presented the charged

offenses against Petitioner in the order in which they were charged and requested that the jury indicate “guilty” or “not guilty” for each of the counts. (HT 2424). Additionally, Petitioner has failed to show any confusion on the part of the jury based on the verdict convicting him of felony murder but acquitting him of murder and the predicate offense of aggravated assault as it related to victim Tina Michelle McAdams. Georgia has abolished the inconsistent verdict rule. *See, Robinson v. State*, 257 Ga. 194 (1987); *Taylor v. State*, 327 Ga. App. 288 (2014). Petitioner has therefore failed to show either cause or prejudice sufficient to overcome the procedural default of this ground.

Accordingly, Ground Three provides no basis for relief.

#### **GROUND FOUR**

In Ground Four, Petitioner alleges that he was subjected to “plain error” by the trial court’s failure to charge the jury with a lesser included offense in a capital felony case.

Petitioner raised this issue on direct appeal. On appeal, Petitioner alleged that the trial court erred when it declined to charge the jury on the lesser included offense of involuntary manslaughter. The Supreme Court of Georgia affirmed the denial of the requested charge as being inconsistent with the evidence introduced at trial. Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. *Bruce v. Smith*, 274 Ga. 432 (2001); *Walker v. Penn*, 271 Ga. 609 (1999); *Crowder v. State*, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action. Additionally, Petitioner has failed to argue that some alternative lesser included charge should have been given to the jury.

Accordingly, Ground Four provides no basis for relief.

## GROUND FIVE

In Ground Five, Petitioner alleges that was denied his Sixth Amendment right to effective assistance of counsel because trial counsel failed to argue the defects in the indictment including charging *mens rea* or *actus reus* as well as the “multiplicitous” counts of aggravated assault.

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.

As discussed in Ground One and Ground Two, *supra*, Petitioner has failed to show any defects in the indictments that would sustain a demurrer. Specifically, the indictment charged all the essential elements of the offenses and was not “multiplicitous.” “A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.” O.C.G.A. § 16-5-1(a). The indictment tracks the statutory language and charged Petitioner with malice aforethought. “A person commits the offense of murder when, in the commission of a felony, he or she causes the death of another human being irrespective of malice.” O.C.G.A. § 16-5-1(b). Felony murder does not require that the accused possess malice or intent to kill; rather, the accused must possess the criminal intent to commit the underlying felony. Holliman v. State, 257 Ga. 209 (1987). “A person commits the offense of aggravated assault when he or she assaults [ . . . ] with intent to murder [ . . . or w]ith a deadly weapon.” O.C.G.A. § 16-5-21. Therefore, the indictment sets out the essential elements of the charged offenses as outlined by the applicable statutes. *See, Jackson v. State*, 301 Ga. 137 (2017). Petitioner’s reliance on Henderson v. Hames for the assertion that a charge of felony murder includes an essential element of “consciously disregarding a substantial unjustifiable risk” is misplaced because that case involved a conviction for felony murder based upon misuse of a firearm while hunting which requires proof of a different mens rea than aggravated assault. 287 Ga. 534 (2010).

The district attorney has broad discretion in deciding “[whom] to prosecute, what charges to bring, and which sentence to seek.” State v. Wooten, 273 Ga. 529 (2001); Knight v. State, 243 Ga. 770 (1979); State v. Perry, 261 Ga. App. 886 (2003). “Multiplicity” is the charging of a single offense in more than one count. United States v. De la Torre, 634 F.2d 792, 792 (5th Cir.1981); United States v. Free, 574 F.2d 1221, 1224 (5th Cir.), cert. denied, 439 U.S. 873, 99 S.Ct. 209, 58 L.Ed.2d 187 (1978). Generally, the test for determining whether an indictment is multiplicitous is that set forth by the Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). “Whether each provision requires proof of an additional fact which the other does not.” 284 U.S. at 304, 52 S.Ct. at 182; *see* United States v. De la Torre, 634 F.2d at 795; United States v. Free, 574 F.2d at 1224. Here, the indictment was not multiplicitous as each count required an element which the other did not. To the extent that Petitioner claims the indictment confused the jury leading to an inconsistent verdict, Georgia has abolished the inconsistent verdict rule. *See*, Robinson v. State, 257 Ga. 194 (1987); Taylor v. State, 327 Ga. App. 288 (2014).

Petitioner has therefore failed to show that he received ineffective assistance of counsel in failing to contest the indictment via demurrer or pursue this issue on appeal. As the indictment was not defective, Petitioner cannot show that counsel was ineffective for failing to challenge the indictment via demurrer. Lizana v. State, 287 Ga. 184 (2010). Petitioner has also alleged that trial counsel was ineffective for not filing a motion for directed verdict. However, a motion for directed verdict on this basis would not have prevailed.

Accordingly, Ground Five provides no basis for relief.

## GROUND SIX

In Ground Six, Petitioner alleges that he was denied his Sixth Amendment right to effective assistance of counsel in that trial counsel failed to request a jury charge of a lesser included offense, nor did counsel offer an affirmative defense when the Petitioner’s theory was contrary to the State’s allegations. Specifically, Petitioner contends that trial counsel should have requested a charge of involuntary manslaughter.

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.

Contrary to Petitioner's assertions, trial counsel requested a charge of involuntary manslaughter, the trial court rejected the charge, trial counsel objected to the omission, and raised the denial of the requested charge on appeal. The Supreme Court of Georgia affirmed the denial of the requested charge as being inconsistent with the evidence introduced at trial. Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. Bruce v. Smith, 274 Ga. 432 (2001); Walker v. Penn, 271 Ga. 609 (1999); Crowder v. State, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action. Additionally, Petitioner has failed to identify that some alternative lesser included charge or affirmative defense should have been given to the jury. Petitioner has therefore failed to satisfy either prong of Strickland in regards to this issue.

Accordingly, Ground Six provides no basis for relief.

## **GROUND SEVEN**

In Ground Seven, Petitioner alleges that he was denied his Sixth Amendment rights to effective assistance of counsel because trial counsel convinced Petitioner to continue representation on appeal at no charge, without informing Petitioner of the fact that he would lose the ability to claim ineffective assistance of counsel during the trial stage.

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. A defendant is required to raise any issue relating to ineffective assistance of counsel at the earlier practical moment. *See, Garland v. State*, 283 Ga. 201 (2008). Petitioner has failed to show that a retained trial attorney's continued representation through the motion for new trial stage constitutes ineffective assistance of counsel.

Petitioner did not lose his right to raise the issue of ineffective assistance of trial counsel due to failure to raise the claim on direct appeal because Petitioner retained trial counsel through the motion for new trial stage. In determining whether trial counsel rendered ineffective assistance by remaining on case through appeal, the habeas court must determine if counsel was in conflict that infringed upon Petitioner's right to conflict-free appellate representation.

*Williams v. Moody*, 287 Ga. 665 (2010). The ultimate decision as to which issues to raise on appeal are strategic decisions belonging to the attorney. *Gaither v. Cannida*, 258 Ga. 557 (1988). As discussed in Petitioner's claims related to ineffective assistance of trial counsel, Petitioner has failed to establish that he had a valid claim of ineffective assistance of counsel which a reasonable attorney would have pursued on appeal and Petitioner has failed to show that he attempted to assert any right to conflict-free counsel prior to appeal. *See, Shorter v. Waters*, 275 Ga. 581 (2002). Therefore, Petitioner has failed to show the existence of any conflict of interest in trial counsel's continued representation of Petitioner on appeal.

Accordingly, Ground Seven provides no basis for relief.

## **GROUND EIGHT**

In Ground Eight, Petitioner alleges that he received ineffective assistance of appellate counsel due appellate counsel's failure to raise on direct appeal the following issues: (a.) Trial counsel failed to object during the motion for new trial Judge Murphy hearing the case; (b.) Trial counsel continuing to represent him on appeal without informing him that he would not be able to raise ineffective assistance of trial counsel grounds on direct appeal; and, (c.) Appellate counsel informing Petitioner via a letter that he was procedurally barred from raising any claim against trial counsel.

The test for establishing ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this two-prong test, Petitioner must show (1) the

attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense, that is, counsel's errors were so serious as to deprive Petitioner of a fair trial with a reliable result. Strickland. "[A]ny ineffective assistance inquiry [must begin] with a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Humphrey v. Nance, 293 Ga. 189 (2013) *quoting* Waters v. Thomas, 46 F.3d 1506 (11<sup>th</sup> Cir. 1995). To establish that an appellate attorney was ineffective, a habeas corpus 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).

Petitioner was represented at trial by attorney Frank C. Winn and Kevin Drummond. (HT 108). Petitioner was represented on appeal by attorney Long Vo. (HT 7-8, 2556). Appellate counsel graduated from the University of North Carolina at Chappell Hill law school in 2006 and was admitted to the Georgia Bar in 2009. (HT 8). Appellate counsel has always focused on criminal defense law and has handled approximately 70 direct appeals. (HT 8). In the instant case, appellate counsel entered the case after the motion for new trial stage and began working on the case by reviewing the record, transcript, and client letters. (HT 9-10). Appellate counsel interviewed trial counsel and Petitioner in preparing for the appeal. (HT 10). Due to entering the case after the motion for new trial had already been denied, appellate counsel testified that he was limited to raising issues that appeared on the record. (HT 10-11). Specifically, appellate counsel was precluded from raising ineffective assistance of counsel claims on appeal because Petitioner retained trial counsel through the motion for new trial stage. (HT 13-14). Appellate counsel testified that he raised every issue that he believed had merit and were most likely to lead to a reversal of Petitioner's convictions. (HT 14).

As discussed more fully in Ground Ten, *infra*, Petitioner has failed to show that Judge Murphy should have voluntarily recused himself from the case. As discussed more fully in Ground Seven, *supra*, Petitioner has failed to show any error in trial counsel's continued representation of him through the motion for new trial stage. Petitioner has failed to show that

appellate counsel was ineffective for failing to raise issues related to ineffective assistance of trial counsel as those issues were not raised at the motion for new trial hearing wherein trial counsel continued to represent counsel. Appellate counsel properly informed Petitioner that those issues could be raised and developed in the instant habeas corpus action. As discussed more fully in Ground Six, *supra*, trial counsel did seek a charge on the lesser included offense of involuntary manslaughter and appellate counsel raised the issue on appeal. Petitioner has therefore failed to show any error related to these issues or that appellate counsel was unreasonable in failing to raise an issue on appeal.

Accordingly Ground Eight provides no basis for relief.

#### GROUND NINE

In Ground Nine, Petitioner alleges that the trial court violated Petitioner's Due Process Clause rights because the trial judge failed to instruct the jury on a lesser included offense.

Petitioner raised this issue on direct appeal. On appeal, Petitioner alleged that the trial court erred when it declined to charge the jury on the lesser included offense of involuntary manslaughter. The Supreme Court of Georgia affirmed the denial of the requested charge as being inconsistent with the evidence introduced at trial. Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. Bruce v. Smith, 274 Ga. 432 (2001); Walker v. Penn, 271 Ga. 609 (1999); Crowder v. State, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action. Additionally, Petitioner has failed to argue that some alternative lesser included charge should have been given to the jury.

Accordingly, Ground Nine provides no basis for relief.

## GROUND TEN

In Ground Ten, Petitioner alleges that he was denied his due process right to a fair trial because the trial judge was a direct family member with the deceased victim in this criminal case and refused to recuse himself from the case.

Petitioner failed to raise this issue on appeal. Failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin, 255 Ga. 239 (1985). "Cause" may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland v. Washington, 466 U.S. 668 (1984). "Actual prejudice" may be shown through satisfying the prejudice prong of Strickland or by satisfying the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982), which requires "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

Prior to trial, trial counsel moved for the disclosure of any possible basis for recusal of the judge. (HT 936-941). Judge Murphy disclosed no possible basis for recusal from the case. (HT 1921). Petitioner has claimed that Judge Murphy was related to victim Tina Michelle McAdams within the sixth degree. At the evidentiary hearing, Kenneth McAdams testified to being married to Lynn Murphy McAdams making Judge Murphy his brother-in-law. (HT 37-38). Mr. McAdams testified that the victim was his second cousin but that Judge Murphy was no relation to Michelle McAdams. (HT 39). Contrary to Petitioner's assertions, he has failed to show that Judge Murphy was related to the victim in any fashion. Where an individual marries into a family, he becomes legally related to the family. However, his family members are not considered to be related to the family of his spouse. See, Baldwin v. State, 120 Ga. 188 (1904) ("The groom and bride each comes within the circle of each other's kin; But kin and kin are still no more related than they were before."). As Petitioner has not asserted a valid basis for Judge Murphy's recusal, Petitioner has failed to show that counsel was ineffective for failing to

pursue the issue on appeal and has failed to establish cause and prejudice sufficient to overcome this procedural default.

Accordingly, Ground Ten provides no basis for relief.

### **GROUND ELEVEN**

In Ground Eleven, Petitioner alleges that his rights to impartial, fair-minded jurors under the Sixth, Eighth, and Fourteenth Amendments and the laws of the State were violated by the sensitive, emotional issues of violence, the size of the community, and the personal ties of the judge and district attorney to the prospective jurors.

Petitioner failed to raise this issue on appeal. Failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin, 255 Ga. 239 (1985). "Cause" may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland v. Washington, 466 U.S. 668 (1984). "Actual prejudice" may be shown through satisfying the prejudice prong of Strickland or by satisfying the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982), which requires "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

Whether to strike a juror for cause is within the sound discretion of the trial court, and its exercise of that discretion is not to be interfered with absent a manifest abuse with the presumption that potential jurors are impartial. Poole v. State, 291 Ga. 848, 734 S.E.2d 1 (2012). Petitioner has failed to show partiality on the part of the any jurors selected for trial or that the trial court failed to excuse a juror for cause. Prior to trial, counsel filed a motion for the disclosure of past and present relationships, associations, and ties between the district attorney and prospective jurors. (HT 1041-1048). The State did not oppose this motion and the trial court ordered that the district attorney disclose any possible ties with prospective jurors ten days prior

to the start of voir dire. (HT 1927-1929). The jury questionnaire adopted by the trial court asked potential jurors if they or their family were involved in any way with the district attorney's office, judges, court personnel, or law enforcement. (HT 2314). Therefore, the trial court pursued all reasonable methods to assure that any and all ties between prospective jurors and the judicial system was revealed. Petitioner has identified several jurors that were referred to on a first-name basis by the judge or district attorney. However, Petitioner has failed to show that these jurors were impermissibly permitted to serve or that referring to a juror by his or her first name provides a basis for disqualification of the juror. During voir dire, the trial court inquired into any familial relations of prospective jurors with the prosecutors or investigators on the case. (HT 2760). Petitioner and trial counsel conducted voir dire of all prospective jurors and had the opportunity to explore any potential biases held by the prospective jurors. The trial court asked if any prospective juror had formed and expressed any opinion regarding Petitioner's guilt or innocence, had any prejudice or bias for or against Petitioner, and whether their minds were perfectly impartial. (HT 2761). The trial court excused all prospective jurors who were not impartial. (HT 2762). Petitioner has failed to show that any juror was permitted to serve who could not act in a fair and impartial manner.

Accordingly, Ground Eleven provides no basis for relief.

## GROUND TWELVE

In Ground Twelve, Petitioner alleges that the trial court erred by not granting Petitioner's motion for change of venue.

Petitioner failed to raise this issue on appeal. Failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin, 255 Ga. 239 (1985). "Cause" may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland v. Washington, 466 U.S. 668 (1984). "Actual prejudice" may be shown through satisfying the prejudice prong of Strickland or by satisfying the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982), which requires "not merely that the

errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

Georgia law provides for a change of venue upon request of the accused where an impartial jury cannot be selected in the county. O.C.G.A. § 17-7-150. In order to show that the trial court erred in denying a motion for a change of venue, the accused must show (1) that the setting of the trial was inherently prejudicial or (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. Gear v. State, 288 Ga. 500 (2011). To establish prejudice, the prospective jurors must not be able to lay aside their opinions and fairly consider the evidence. Id. Arguments relating to the small size of the community, acting alone, provide insufficient basis for a change of venue. Williams v. State, 272 Ga. 335 (2000).

Prior to trial, trial counsel moved for a change of venue based on the relative size of the community, the notoriety of the charges, and negative pretrial prejudice. (HT 974-987; 1682-1694). The local newspaper published articles covering the trial. (HT 253-255). During voir dire, trial counsel questioned the prospective jurors about potential bias and questions relating to pretrial publicity were included in the jury questionnaire. Following voir dire, trial counsel presented Petitioner’s motion for change of venue to the trial court with newspaper articles in support of the motion. (HT 2899). Trial counsel acknowledged that sufficient jurors were qualified to impanel a jury but argued that the jurors knew too much background information about the case. (HT 2900-2901). The trial court denied the motion for change of venue finding that a sufficiently qualified pool of jurors had been selected. (HT 2902). In order to further ensure Petitioner received a fair trial, the trial court agreed to provide additional instructions to the jurors regarding publicity and outside information. (HT 2902-2903). Petitioner has not shown that publicity surrounding the trial was excessive so as to render any trial inherently prejudicial nor has he shown actual prejudice arising from the jury selection process. Therefore, Petitioner has failed to establish either cause or prejudice sufficient to overcome the procedural default of this issue.

Accordingly, Ground Twelve provides no basis for relief.

## GROUND THIRTEEN

In Ground Thirteen, Petitioner alleges that the trial court erred by allowing prejudicial security measures. Specifically, Petitioner has contended that the trial court should not have approved of the use of a stun belt device or the use of uniformed officers in the courtroom for security.

Petitioner failed to raise this issue on appeal. Failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin, 255 Ga. 239 (1985). "Cause" may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland v. Washington, 466 U.S. 668 (1984). "Actual prejudice" may be shown through satisfying the prejudice prong of Strickland or by satisfying the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982), which requires "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

The trial court has discretion to use "extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial." Young v. State, 269 Ga. 478 (1998). However, those security measures must not be excessive so as to infringe upon the accused's presumption of innocence. Collins v. State, 164 Ga. App. 482 (1982). The use of a "shock device" has been upheld where the device is shielded from the jury's view. *See, Nance v. State*, 280 Ga. 125 (2005). Here, the shock belt was hidden from the juror's view under Petitioner's clothes. The presence of uniformed officers for courtroom security is not inherently prejudicial. *See, Butts v. State*, 273 Ga. 760 (2001). Petitioner has failed to identify how many officers were present or that the amount of security was unnecessarily prejudicial.

At the request of counsel, the trial court prohibited Petitioner from being exhibited in jailhouse clothing and chains. (HT 125, 1392-1395, 1906). The trial court also instructed that all members of law enforcement attending the trial for observational purposes must attend in plain

clothes and provided that it would monitor the proceedings to “avoid excessive presence of uniformed officers.” (HT 1904). Petitioner did not raise an objection to any excessive present of uniformed officers at trial.

Trial counsel challenged the use of a stun belt in the proceedings due to the psychological impact of the device on Petitioner. (HT 898-919). To the extent that Petitioner has renewed an argument based on the psychological impact of the device and his right to be present and participate in the trial, Petitioner did not raise the issue at trial or show that he actually suffered any psychological impact from the use of the device. *See, Weldon v. State*, 297 Ga. 537 (2015). While Petitioner argues that the outline of the device was visible under Petitioner’s clothing, Petitioner has not shown that the device was actually visible to the jury or that the jury would have recognized the nature of the device. Petitioner has not shown how many uniformed officers were present in the courtroom or that the number of officers was unnecessary or prejudicial. Petitioner has therefore failed to establish either cause or prejudice sufficient to overcome the procedural default of this issue.

Accordingly, Ground Thirteen provides no basis for relief.

#### GROUND FOURTEEN

In Ground Fourteen, Petitioner alleges that the trial judge had a personal bias or prejudice concerning Petitioner and should have recused himself from the case.

Petitioner failed to raise this issue on appeal. Failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); *Black v. Hardin*, 255 Ga. 239 (1985). “Cause” may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of *Strickland v. Washington*, 466 U.S. 668 (1984). “Actual prejudice” may be shown through satisfying the prejudice prong of *Strickland* or by satisfying the actual prejudice test of *United States v. Frady*, 456 U.S. 152 (1982), which requires “not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.”

Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

Prior to trial, trial counsel moved for the disclosure of any possible basis for recusal of the judge. (HT 936-941). Judge Murphy disclosed no possible basis for recusal from the case. (HT 1921). At the evidentiary hearing, Kenneth McAdams testified to being married to Lynn Murphy McAdams making Judge Murphy his brother-in-law. (HT 37-38). Mr. McAdams testified that the victim was his second cousin but that Judge Murphy was no relation to Michelle McAdams. (HT 39). Contrary to Petitioner's assertions, he has failed to show that Judge Murphy was related to the victim in any fashion. Where an individual marries into a family, he becomes legally related to the family. However, his family members are not considered to be related to the family of his spouse. *See, Baldwin v. State*, 120 Ga. 188 (1904) ("The groom and bride each comes within the circle of each other's kin; But kin and kin are still no more related than they were before.").

Petitioner has failed to show that the trial judge acted with prejudice. Petitioner has cited to two instances wherein the trial judge indicated that he hoped to get through voir dire quickly and the judge's instructions to the jury regarding the co-defendant's guilty plea as proof of his partiality. Prior to the start of trial, the trial court instructed the prospective jurors that they were not considering the case against co-defendant Jimmy Wayne Wright because Mr. Wright entered a guilty plea to each count, been sentenced, and the case disposed of entirely. (HT 2750-2754). The trial court reiterated this in its charge to the jury at the close of the evidence. (HT 4120). The trial court instructed that the jurors were "to give absolutely no consideration whatsoever to any charge as it pertains to Jimmy Wayne Wright." (HT 2754-2755). After going through the initial juror qualifications and separating the jury pool into panels, the trial judge expressed his intent to go through at least four panels per day. (HT 2791). This statement referenced the trial court's management of the administration of the case and to set a timeline for the start of the trial. The record reveals no intent to limit or otherwise hinder the thoroughness of voir dire. The desire to quickly complete voir dire is not evidence of bias and the trial judge's instruction to the jury regarding the co-defendant's guilty plea was proper under the circumstances. *See, Pinckney v. State*, 236 Ga. App. 74 (1999). As Petitioner has not asserted a valid basis for Judge Murphy's recusal, Petitioner has failed to show that counsel was ineffective for failing to pursue the issue

on appeal and has failed to establish cause and prejudice sufficient to overcome this procedural default.

Accordingly, Ground Fourteen provides no basis for relief.

### **GROUND FIFTEEN**

In Ground Fifteen, Petitioner alleges that he received ineffective assistance of trial counsel due to counsel's failure to file a motion to disqualify the district attorney.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under this two-prong test, Petitioner must show (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense, that is, counsel's errors were so serious as to deprive Petitioner of a fair trial with a reliable result. Strickland. "[A]ny ineffective assistance inquiry [must begin] with a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Humphrey v. Nance, 293 Ga. 189 (2013) quoting Waters v. Thomas, 46 F.3d 1506 (11<sup>th</sup> Cir. 1995). To establish that an appellate attorney was ineffective, a habeas corpus 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).

Petitioner contends that the district attorney's office had personal ties with the two victims as they were confidential informants. (HT 2350). Petitioner has failed to show that the victim's work as a confidential informant provides any basis for recusal for the district attorney.

As evidence of the district attorney's office bias, Petitioner claims that the district attorney offered immunity to Karen Wright in exchange for her testimony. Contrary to Petitioner's assertion, the State put on record that no deal had been offered to Karen Wright in exchange for testimony. (HT 2925). Petitioner has therefore failed to satisfy either prong of the Strickland test.

Accordingly, Ground Fifteen provides no basis for relief.

## GROUND SIXTEEN

In Ground Sixteen, Petitioner alleges that trial counsel was ineffective and committed reversible error when he failed to afford Petitioner a fast and speedy trial.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under this two-prong test, Petitioner must show (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense, that is, counsel's errors were so serious as to deprive Petitioner of a fair trial with a reliable result. Strickland. "[A]ny ineffective assistance inquiry [must begin] with a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Humphrey v. Nance, 293 Ga. 189 (2013) quoting Waters v. Thomas, 46 F.3d 1506 (11<sup>th</sup> Cir. 1995). To establish that an appellate attorney was ineffective, a habeas corpus 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).

In all criminal prosecutions, "the accused shall enjoy the right to a speedy [ . . . ] trial." U.S. CONST. Amend. VI.; *see also*, GA. CONST. 1983, Art. I, Sec. I, Par. XI (a). Petitioner did not file a statutory demand for a speedy trial and has not met the criteria for a constitutional speedy trial violation. The test for a constitutional speedy trial violation includes four factors: (1) the length of the delay, (2) the reason for the delay, (3) the prejudice to the defendant, and (4) any waiver by the defendant of his right to a speedy trial. Henry v. State, 263 Ga. 417 (1993); Ruffin v. State, 284 Ga. 52 (2008). Contrary to Petitioner's assertions, he was not entitled to have the charges against him dismissed following two terms of court because a statutory demand for speedy trial was never filed. "[T]he decision to file a speedy trial demand is usually tactical in nature, and with regard to trial strategy, effectiveness should not be evaluated in hindsight."

Jenkins v. State, 282 Ga. App. 55 (2006); Riggs v. State, 319 Ga. App. 189 (2012). Petitioner has failed to show that trial counsel's decision not to file a speedy trial demand was not tactical in nature as trial counsel had no way of knowing that Petitioner's co-defendant would enter a guilty plea. Additionally, the jury was instructed that the co-defendant's guilty plea was not evidence against Petitioner and could not be considered as such.

Petitioner has alleged that with a speedy trial demand, his co-defendant would have been available to testify. At trial, the State attempted to call co-defendant Wright to testify against Petitioner but as he had a pending motion to withdraw his guilty plea the attorney for co-defendant objected to his testimony. (HT 2932-2933). In fact, the available testimony introduced at trial indicated that co-defendant would not testify on Petitioner's behalf until he was convicted. Petitioner has not shown that his co-defendant would have been able to testify in his defense had the trial occurred within two terms of court. Petitioner has therefore failed to establish ineffective assistance of trial counsel in regards to either prong of Strickland. Additionally, Petitioner has failed to show that it was not a reasonable tactical move for appellate counsel to forego this issue on appeal.

Accordingly, Ground Sixteen provides no basis for relief.

## GROUND SEVENTEEN

In Ground Seventeen, Petitioner alleges that the admission of gruesome and highly prejudicial color photographs of the deceased violated Petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment Rights and other applicable law.

Petitioner failed to raise this issue on appeal. Failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin, 255 Ga. 239 (1985). "Cause" may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland v. Washington, 466 U.S. 668 (1984). "Actual prejudice" may be shown through satisfying the prejudice prong of Strickland or by satisfying the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982), which requires "not merely that the

errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

Prior to trial, counsel filed a motion to preclude the admission of gruesome and highly prejudicial color photographs of the deceased. (HT 1366-1373). At trial, the State introduced photographs of the scene of the crime as it was discovered by law enforcement which included the body of Jimmy Johnson. (HT 3280-3281). The State also introduced photographs taken of the victims at the crime scene to which trial counsel objected on the basis that they were unnecessary because the defense was not contesting the cause of death. (HT 3375-3376). The trial court admitted the photographs over objection. (HT 3376). During the direct examination of the forensic examiner who performed the autopsy of victim Jimmy Johnson, the State moved to introduce autopsy photographs of the victim and trial counsel objected to the photographs on the basis that they were not contesting that Jimmy Wright shot the victim with a shotgun and the photographs had no relevance to the case. (HT 3615-3616). The trial court overruled the defense’s objection admitted the photographs. (HT 3616). Trial counsel likewise objected to the introduction of autopsy photographs of victim Michelle McAdams which the trial court denied as the photographs depicted the extent of the injuries to the victim. (HT 3624-3625). “The admission of photographs into evidence is a matter within the discretion of the trial court. Unless the potential for prejudice in the admission of evidence substantially outweighs its probative value, the Georgia rule favors the admission of any relevant evidence, no matter how slight its probative value.” Williams v. State, 269 Ga. App. 512 (2004). The trial court did not err in admitting the photographs of the scene of the crime and the autopsy photographs as they established the location of the victims at the scene and the extent of the injuries. *See, Folson v. State*, 278 Ga. 690 (2004); James v. State, 274 Ga. App. 498 (2005). The fact that the defense stipulated to the cause of death does not render the photographs excludable. Jones v. State, 253 Ga. 640 (1984). Petitioner has therefore failed to establish cause and prejudice sufficient to overcome the procedural default of this issue.

Accordingly, Ground Seventeen provides no basis for relief.

## GROUND EIGHTEEN

In Ground Eighteen, Petitioner alleges that the trial court erred by not granting a new trial on the ground that the verdict of guilt was against the great weight of the evidence.

The trial court conducted a hearing on Petitioner's motion for new trial on March 16, 2012 and issued an order denying the same on September 4, 2014. (HT 2524). The trial court considered the general grounds raised by Petitioner and declined to exercise its discretion as the "thirteenth juror" to find that the jury's verdict was strong against the weight of the evidence. (HT 2524). The trial court found that the evidence was sufficient to support the verdict. (HT 2524).

Petitioner raised this issue on appeal. Specifically, Petitioner alleged that the evidence was insufficient to sustain his convictions but the Georgia Supreme Court affirmed the conviction. Cash v. State, 297 Ga. 859 (2015). Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. Bruce v. Smith, 274 Ga. 432 (2001); Walker v. Penn, 271 Ga. 609 (1999); Crowder v. State, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action. Additionally, Claims related to the sufficiency of evidence at trial may be raised on direct appeal but may not be raised in a habeas corpus proceeding. Littles v. Balkcom, 245 Ga. 285 (1980); Kreps v. Gray, 234 Ga. 745 (1975).

Accordingly, Ground Eighteen provides no basis for relief.

## GROUND NINETEEN

In Ground Nineteen, Petitioner alleges that he was compelled and tricked into believing that it was in his best interest not to take the witness stand. Specifically, Petitioner asserts that the trial court misrepresented his right to testify and trial counsel used "psychological weapons" to convince Petitioner not to testify.

As it relates to the trial court's statements to Petitioner regarding his right to testify at trial, Petitioner failed to raise this issue on appeal. Failure to object or enumerate any alleged

error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin, 255 Ga. 239 (1985). “Cause” may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland v. Washington, 466 U.S. 668 (1984). “Actual prejudice” may be shown through satisfying the prejudice prong of Strickland or by satisfying the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982), which requires “not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

As it relates to Petitioner’s claim of ineffective assistance of trial counsel for compelling Petitioner not to testify at trial, the test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under this two-prong test, Petitioner must show (1) the attorney’s performance was deficient, meaning that counsel made errors so serious that he was not functioning as “counsel” guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense, that is, counsel’s errors were so serious as to deprive Petitioner of a fair trial with a reliable result. Strickland. “[A]ny ineffective assistance inquiry [must begin] with a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Humphrey v. Nance, 293 Ga. 189 (2013) quoting Waters v. Thomas, 46 F.3d 1506 (11<sup>th</sup> Cir. 1995). To establish that an appellate attorney was ineffective, a habeas corpus 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).

An attorney’s advice to a client to remain silent generally constitutes a strategic or tactical decision and does not automatically rise to the level of ineffective assistance. *See, Domingues v. State*, 277 Ga. 373 (2003); *Collins v. State*, 300 Ga. App. 657 (2009). At trial, the following exchange occurred between Petitioner and the trial court:

THE COURT: All right. Mr. Cash, you understand that you have the absolute right to testify if you choose to do so. But you also have the absolute right not to testify if you choose to do. That's your decision.

And I just want to inquire of you, have you discussed this issue with your counsel in great detail about whether or not you should or should not testify?

DEFENDANT CASH: Yes, sir.

THE COURT: Okay. Are you satisfied with their advice?

DEFENDANT CASH: Yes, sir.

THE COURT: And have they made a recommendation to you? Without telling me which way, have they made a recommendation to you?

DEFENDANT CASH: No.

THE COURT: They have not made any recommendation; they've told you that it's your call?

(Counsel confers with Defendant.)

THE COURT: I'm not asking you to tell me what they have told you --

DEFENDANT CASH: Yes, yes, sir.

THE COURT: -- But have they made a recommendation --

DEFENDANT CASH: Yes.

THE COURT: -- to you?

DEFENDANT CASH: Yes, sir.

THE COURT: Have you considered whatever that recommendation is, because I don't want to know it is?

DEFENDANT CASH: Yes, sir.

THE COURT: And you've thought about it carefully?

DEFENDANT CASH: Yes, sir.

THE COURT: And having had the opportunity to listen to what they had to tell you, and to think of it on your own, independently of whatever it is they may have told you, have you made a decision about whether or not you want to testify?

DEFENDANT CASH: Yes, sir.

THE COURT: All right. And what is that decision?

DEFENDANT CASH: Not to testify.

THE COURT: All right. And you understand that I'm going to charge the jury with regard to your failure to testify. And I've done that at the outset of this trial. You do understand that -- unless you counsel should suggest to me that they don't want me to do that. But I'll leave that up to them when we get to that point in the trial.

DEFENDANT CASH: Yes, sir.

THE COURT: Okay. And you're sure that's your decision?

DEFENDANT CASH: Yes, sir.

(HT 3979-3981). As shown above, the trial court properly instructed Petitioner on his right to testify on his own behalf.

The exchange cited by Petitioner in which he claims the trial court misrepresented his right to testify occurred after the conclusion of trial and during the trial court's sentencing. (HT 4223). Contrary to Petitioner's assertion, the trial judge did not express an opinion regarding Petitioner's decision not to testify and did not intimate that Petitioner would successfully appeal the verdict based on not testifying. Rather, the trial court respected Petitioner's decision not to make a statement during sentencing because he would be appealing the case. (HT 4223). Petitioner has therefore misrepresented the trial court's statements in that regard and has failed to show that the trial court erred in informing Petitioner of his right to testify. The record shows that Petitioner was apprised of his right to testify and reached the decision not to testify after consulting with trial counsel. Petitioner has failed to establish that trial counsel coerced him into not exercising his right to testify, utilized "psychological warfare," or that counsel's advice was unreasonable in any way. Petitioner has therefore failed to establish the existence of either prong of Strickland or show cause and prejudice necessary to overcome the procedural default of this issue.

Accordingly, Ground Nineteen provides no basis for relief.

## GROUND TWENTY

In Ground Twenty, Petitioner adopts all grounds raised in the motion for new trial. At the motion for new trial, Petitioner raised the following grounds: (a) The Defendant should be acquitted and discharged due to the State's failure to prove his guilt beyond a reasonable doubt; (b) The verdict is contrary to the evidence and without evidence to support it; (c) The verdict is contrary to law and the principles of justice and equity; (d) The jury's verdict is inconsistent and violates the exception to the inconsistent verdict rule; (e) The jury's verdict is mutually exclusive; (f) The Court instructions to the jury were inaccurate and misleading. Specifically, the trial court instructed the jury as to alternate ways they could find the Defendant guilty and did not limit the charges to the manner alleged by the Grand Jury; (g) The trial court erred by denying Defendant's Motion to Suppress the Arrest Warrant (Motion 121); (h) The trial court erred in denying Defendant's Motion to Suppress (Motion 85 as amended); (i) The trial court erred in denying Defendant's Motion to Recuse Certain Prosecutors (Motion 136); (j) The trial

court erred in denying Defendant's Motion to Dismiss the Indictment (Motions 68 and 69); (k) The trial court erred in failing to grant the Defendant's demurrer; (l) The trial court erred in allowing the State to violate the rule of sequestration; (m) The trial court erred in failing to charge the jury on involuntary manslaughter (Defendant's Request 64); (n) The trial court erred in failing to charge the jury on involuntary manslaughter (Defendant's Request 65); (o) The State's secret and unauthorized meeting with the Defendant's former investigator violated the Defendant's attorney-client privilege; (p) The trial court erred in failing to charge the jury on conspiracy (Defendant's Request 63); (q) The trial court erred in failing to correctly charge the definition of knowledge as applied to this case; (r) The trial court erred in failing to provide the jury with a copy of the indictment and allowing the jury to review the charges as set out in the indictment; (s) The trial court erred in charging the jury in language different from the indictment in the court's pre-charge and final charge; (t) The trial court's charge on conspiracy was erroneous; (u) The trial court failed to properly instruct the jury on parties to a crime; (v) The trial court erred in allowing the State to introduce evidence it intentionally withheld; (w) The trial court's charge on character and reputation was incorrect; (x) The State's actions regarding witnesses Woodham, Davis, Collins and Cash violated the Defendant's due process and equal protection rights; (y) The trial court's jury charges and the verdicts as they relate to Michelle McAdams are a violation of the Defendant's due process rights; (z) the trial court's jury charges and the verdicts as they relate to Jimmy Jackson are a violation of the Defendant's due process rights; (aa) the trial court erred in denying Defendant's Motions regarding the selection of the Grand and Traverse jurors (Motions 4 and 102); and, (bb) The trial court erred in allowing the State to rebut statements of Jimmy Wright by use of Chris Cash.

To the extent that Petitioner failed to pursue these issues on appeal, failure to object or enumerate any alleged error on appeal results in a waiver of said issue and a procedural bar to its consideration in a habeas corpus action, absent a showing of cause and actual prejudice sufficient to overcome the default, or to avoid a miscarriage of justice. O.C.G.A. § 9-14-48(d); Black v. Hardin, 255 Ga. 239 (1985). "Cause" may be constitutionally ineffective assistance of counsel under the Sixth Amendment standard of Strickland v. Washington, 466 U.S. 668 (1984). "Actual prejudice" may be shown through satisfying the prejudice prong of Strickland or by satisfying the actual prejudice test of United States v. Frady, 456 U.S. 152 (1982), which requires "not

merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Turpin v. Todd, 268 Ga. 820 (1997). Petitioner has failed to show cause and actual prejudice or the need to avoid a miscarriage of justice sufficient to overcome this default.

To the extent that Petitioner is seeking to relitigate issues that were raised and denied on appeal, issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. Bruce v. Smith, 274 Ga. 432 (2001); Walker v. Penn, 271 Ga. 609 (1999); Crowder v. State, 265 Ga. 719 (1995).

*(a) The Defendant should be acquitted and discharged due to the State's failure to prove his guilt beyond a reasonable doubt.*

Petitioner challenged the sufficiency of the evidence on appeal. Specifically, Petitioner alleged that the evidence was insufficient to sustain his convictions but the Georgia Supreme Court affirmed the conviction. Cash v. State, 297 Ga. 859 (2015). Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. Bruce v. Smith, 274 Ga. 432 (2001); Walker v. Penn, 271 Ga. 609 (1999); Crowder v. State, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action. Additionally, claims related to the sufficiency of evidence at trial may be raised on direct appeal but may not be raised in a habeas corpus proceeding. Littles v. Balkcom, 245 Ga. 285 (1980); Kreps v. Gray, 234 Ga. 745 (1975).

*(b) The verdict is contrary to the evidence and without evidence to support it.*

Petitioner challenged the sufficiency of the evidence on appeal. Specifically, Petitioner alleged that the evidence was insufficient to sustain his convictions but the Georgia Supreme Court affirmed the conviction. Cash v. State, 297 Ga. 859 (2015). Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. Bruce v. Smith, 274 Ga. 432 (2001); Walker v. Penn, 271 Ga. 609

(1999); Crowder v. State, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action. Additionally, claims related to the sufficiency of evidence at trial may be raised on direct appeal but may not be raised in a habeas corpus proceeding. Littles v. Balkcom, 245 Ga. 285 (1980); Kreps v. Gray, 234 Ga. 745 (1975).

*(c) The verdict is contrary to law and the principles of justice and equity.*

Petitioner Georgia law provides that "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." O.C.G.A. § 5-5-20. Petitioner has not shown that the verdict in the instant case was contrary to either the law or the principles of justice and equity. To the extent that this ground seeks a review of the sufficiency of the evidence, claims related to the sufficiency of evidence at trial may be raised on direct appeal but may not be raised in a habeas corpus proceeding. Littles v. Balkcom, 245 Ga. 285 (1980); Kreps v. Gray, 234 Ga. 745 (1975). Petitioner has failed to meet his burden of proof on this issue.

*(d) The jury's verdict is inconsistent and violates the exception to the inconsistent verdict rule.*

Georgia has abolished the inconsistent verdict. *See, Robinson v. State*, 257 Ga. 194 (1987); Taylor v. State, 327 Ga. App. 288 (2014). Courts generally do not speculate on the reasoning of juries in reaching their verdict. *See, United States v. Powell*, 469 U.S. 57 (1984). An exception exists where courts are not "left to speculate about the unknown motivations of the jury." Turner v. State, 283 Ga. 17 (2008). In the instant case, the jury acquitted Petitioner on both counts of malice murder, convicted on both counts of felony murder, but convicted on only one count of aggravated assault. Nothing in the record supports the assertion that the jury misunderstood or incorrectly applied the law. The mere fact that the jury convicted Petitioner of felony murder but acquitted Petitioner on the aggravated assault charge does not trigger an exception to the abolished inconsistent verdict rule. Martin v. State, 271 Ga. 301 (1999).

*(e) The jury's verdict is mutually exclusive.*

A verdict is mutually exclusive “where a guilty verdict on one count logically excludes a finding of guilt on the other.” Jackson v. State, 276 Ga. 408, 410(2), 577 S.E.2d 570 (2003). “Mutually exclusive verdicts, which cannot both stand, result in two positive findings of fact which cannot logically mutually exist.” Id. at n. 3; *see also*, Clark v. State, 289 Ga. App. 612 (2008). In the instant case, the jury acquitted Petitioner on both counts of malice murder, convicted on both counts of felony murder, but convicted on only one count of aggravated assault. Petitioner has not shown that the verdict was mutually exclusive. *See, Martin v. State*, 271 Ga. 301 (1999); Knight v. State, 271 Ga. 557 (1999).

*(f) The Court instructions to the jury were inaccurate and misleading. Specifically, the trial court instructed the jury as to alternate ways they could find the Defendant guilty and did not limit the charges to the manner alleged by the Grand Jury.*

Petitioner raised on appeal the claim that the trial court erred in its instructions to the jury. Specifically, Petitioner contended that the trial court impermissibly amended the indictment and undermined the defense by failing to instruct the jury on “intent to murder” as indicted. The Georgia Supreme Court held that the aggravated assault statute authorizes convictions on alternate methods of assault in the disjunctive. The State need only show that aggravated assault had been committed in any of the separate ways listed in the indictment, even if the indictment uses the conjunctive rather than the disjunctive form. Cash v. State, 297 Ga. 859 (2015). Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. Bruce v. Smith, 274 Ga. 432 (2001); Walker v. Penn, 271 Ga. 609 (1999); Crowder v. State, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action.

*(g) The trial court erred by denying Defendant's Motion to Suppress the Arrest Warrant (Motion 121).*

Petitioner, through counsel, filed a Motion to Suppress Arrest Warrant (Motion 121) on March 10, 2006. (HT 1727-1731). The defense argued that the affidavits and warrants must be suppressed and any and all evidence acquired as a result of the issuance and execution of these void arrest warrants must be suppressed and excluded. (HT 1729). The defense argued that the warrants were illegally issued because the information contained in the affidavits was false and based upon hearsay. The trial court conducted a hearing on this motion on April 4, 2008 and denied the motion on May 5, 2008. (HT 2262). In its order, the trial court outlined the sequence of events leading up to the issuance of the arrest warrants and the information provided to the issuing magistrate. (HT 2262-2264). Eyewitness Christopher Cash contacted law enforcement and provided two recorded statements detailing how he and the two victims were lured to a wooded area by Petitioner's claims of automobile trouble and ambushed by co-defendant Wright. (HT 2262-2264). After being presented with Christopher Cash's statement, investigators visited the scene and corroborated the account. (HT 2264). Captain Arp presented the affidavit in support of the arrest warrant for Petitioner and Investigator Culver presented a search warrant for Petitioner's residence. (HT 2265). Based on the information provided, the magistrate issued both warrants. (HT 2265). Petitioner has failed to show that the trial court erred in denying the Motion to Suppress as the magistrate had sufficient information for a finding of probable cause to issue the warrant through the affidavits and testimony of investigators. *See, State v. Palmer, 285 Ga. 75 (2009).*

*(h) The trial court erred in denying Defendant's Motion to Suppress (Motion 85 as amended).*

Petitioner filed a Supplemental Motion to Suppress on April 3, 2008 claiming that law enforcement obtained an arrest warrant for Petitioner without sufficient evidence or probable cause rendering any search incident to the arrest invalid. (HT 2253). Additionally, the defense contended that law enforcement serving the warrant searched unrelated and unnecessary areas including Petitioner's personal property, home, and curtilage. (HT 2254). The trial court heard

arguments on this motion on April 4, 2008 and issued an order denying the same on May 8, 2008. (HT 2269). Trial counsel renewed the motion to suppress during trial but the motion was denied. (HT 3337-3345). The only eyewitness to the shooting deaths of Jimmy Jackson and Tina Michelle McAdams was Christopher Cash. (HT 2270). Christopher Cash contacted law enforcement and provided two recorded statements detailing that Petitioner lured him and the two victims to a wooded area where they were ambushed by co-defendant Wright. (HT 2271). Christopher Cash saw Wright shoot Jimmy Jackson and heard two additional shots after fleeing the scene. (HT 2271). This information was corroborated by law enforcement following a visit to the scene of the crime. (HT 2271-2272). Law enforcement raided Petitioner's residence and brought Petitioner into custody. (HT 2272). While approaching the premises, law enforcement observed a blue hatchback that they believed could have been the vehicle described by Christopher Cash (HT 2272-2273). Law enforcement secured the area and observed a shotgun shell in the ashtray in plain view of the passenger side window and a piece of human jawbone on the windshield. (HT 2273-2274). *See, Bellamy v. State, 134 Ga. App. 340 (1975)*. No further search was conducted until after a search warrant was obtained. (HT 2273). The residence was cleared and secured but no search was conducted until a search warrant was obtained. (HT 2273). Based on the information provided by investigators, the magistrate issued a search warrant for the residence and the vehicle. (HT 2274). As valid search warrants were obtained, Petitioner has failed to show that the trial court erred in denying the Motion to Suppress. (HT 2269-2279).

*(i) The trial court erred in denying Defendant's Motion to Recuse Certain Prosecutors (Motion 136).*

Petitioner, through counsel, filed a Motion to Recuse Certain Prosecutors (Motion 136) on January 8, 2007. (HT 2099). The defense alleged that the prosecution had met with Joe Albright in the first half of 2006 regarding a burglary of Mr. Albright's home in which a shotgun had been stolen. (HT 2099). Mr. Albright was an investigator hired by defense attorney Kurt Thomas who represented Petitioner prior to the State's notice of intent to seek the death penalty. (HT 2100). The defense contended that the meeting violated attorney-client privilege. The trial

court conducted an *in camera* hearing involving testimony from witnesses and arguments by counsel. (HT 2195). The trial court found:

At some point prior to the shooting of the victims in this case, Albright's home was burglarized and a quantity of firearms and ammunition, including a 20-gauge shotgun, was taken. During the investigation of the burglary, the police recovered fingerprints from the glass of a gun cabinet where some of the weapons had previously been stored. During the hearing it was established that the fingerprints do not belong to either Co-Defendant Wright or Defendant Cash. Albright initiated the contact with the State by contacting Rooks [a member of the prosecution's team]. Albright informed Rooks that he wanted to talk with the State about one of his shotguns that was stolen in the burglary. Albright informed Rooks that he believed that this shotgun was used to kill the victims in this case. Albright wanted Rooks to provide him the name of the person whose fingerprints were found on the gun cabinet.

(HT 2195-2196). Attorney Kurt Thomas was informed of the meeting prior to its occurrence and admonished Mr. Albright not to divulge any information related to Petitioner's case. (HT 2196). Forensic evidence acquired by the State revealed that the shotgun did not belong to Mr. Albright. (HT 2196-2197). The trial court denied the defense motion on the grounds that attorney-client privilege had not been breached. (HT 2198-2200). Based on the record available, the prosecutors did not initiate contact with Mr. Albright and Mr. Albright did not divulge any privileged information to the State or any information applicable to the case. Mr. Albright did not contact the prosecution as an investigator for the defense; rather, he contacted the prosecution as a lay witness whose home had been burglarized. Petitioner has therefore failed to show that the trial court erred in denying Petitioner's motion to disqualify certain prosecutors from the case.

*(j) The trial court erred in denying Defendant's Motion to Dismiss the Indictment (Motions 68 and 69).*

The defense filed two motions to dismiss the indictment on the basis that the indictment was too vague, ambiguous, and indefinite, and was insufficient to place Petitioner on notice of the charges. (HT 1166-1176). Specifically, the defense challenged that the State alleged alternative forms of malice and did not specify if Petitioner was merely a party to the crimes. (HT 1174). The general rule is that "[a]n indictment which charges a defendant with the

commission of a crime in the language of a valid statute is sufficient to withstand a [general] demurrer charging that the indictment is insufficient to charge the defendant with any offense under the laws of this state.” Stewart v. State, 246 Ga. 70, 72(2), 268 S.E.2d 906 (1980). As discussed in Ground One, *supra*, the indictment stated the necessary elements of each of the charged offenses. An indictment need not specify whether a defendant is being charged as a party to the crime. *See, John v. State*, 282 Ga. 792 (2007). Likewise, the indictment need not elect between express or implied malice. *See, Hughley v. State*, 337 Ga. App. 145 (2016). Petitioner has therefore failed to show that the trial court erred in denying Defendant’s Motion to Dismiss.

*(k) The trial court erred in failing to grant the Defendant’s demurrer.*

The general rule is that “[a]n indictment which charges a defendant with the commission of a crime in the language of a valid statute is sufficient to withstand a [general] demurrer charging that the indictment is insufficient to charge the defendant with any offense under the laws of this state.” Stewart v. State, 246 Ga. 70, 72(2), 268 S.E.2d 906 (1980). As discussed in Ground One, *supra*, the indictment stated the necessary elements of each of the charged offenses. An indictment need not specify whether a defendant is being charged as a party to the crime. *See, John v. State*, 282 Ga. 792 (2007). Likewise, the indictment need to elect between express or implied malice. *See, Hughley v. State*, 337 Ga. App. 145 (2016). Petitioner has failed to show that the trial court erred in failing to grant the demurrer.

*(l) The trial court erred in allowing the State to violate the rule of sequestration.*

Prior to the start of trial, counsel requested that the trial court prohibit Investigator Arp from remaining in the courtroom during trial. (HT 2915). Trial counsel argued that the experience of the prosecution and their familiarity with the case precluded the assertion that Investigator Arp was needed to assist the State with trial management. (HT 2916-2918). The prosecution countered that Investigator Arp was needed to assist with the complexities of the case and to ensure that prosecutor did not develop “tunnel vision.” (HT 2919). The State agreed

to sequester Investigator Arp during the testimony of the witness whose statement he took. (HT 2920). The trial court overruled defense counsel's motion and permitted Investigator Arp to remain in the courtroom. (HT 2921). At trial, Investigator Arp left the room when witnesses that he interviewed testified. (HT 3493). The trial court has discretion to permit an investigator to remain in the courtroom where the prosecution states a need for the investigator's presence. *See, Howard v. State*, 263 Ga. App. 593 (2003). Here, the prosecution stated a need for Investigator Arp's presence and sequestered him during the testimony of particular witnesses. Therefore, the trial court did not err in excepting Investigator Arp from the rule of sequestration.

*(m) The trial court erred in failing to charge the jury on involuntary manslaughter (Defendant's Request 64).*

Petitioner raised on appeal that the trial court impermissibly declined to charge the jury on the lesser included offense of involuntary manslaughter. The Georgia Supreme Court affirmed the trial court's decision to not charge the jury on involuntary manslaughter on the basis that the evidence showed either the commission of a completed offense or the commission of no offense. *Cash v. State*, 297 Ga. 859 (2015) *citing Brown v. State*, 288 Ga. 364 (2010). Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. *Bruce v. Smith*, 274 Ga. 432 (2001); *Walker v. Penn*, 271 Ga. 609 (1999); *Crowder v. State*, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action.

*(n) The trial court erred in failing to charge the jury on involuntary manslaughter (Defendant's Request 65).*

Petitioner raised on appeal that the trial court impermissibly declined to charge the jury on the lesser included offense of involuntary manslaughter. The Georgia Supreme Court affirmed the trial court's decision to not charge the jury on involuntary manslaughter on the basis that the evidence showed either the commission of a completed offense or the commission of no

offense. Cash v. State, 297 Ga. 859 (2015) *citing* Brown v. State, 288 Ga. 364 (2010). Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. Bruce v. Smith, 274 Ga. 432 (2001); Walker v. Penn, 271 Ga. 609 (1999); Crowder v. State, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action.

*(o) The State's secret and unauthorized meeting with the Defendant's former investigator violated the Defendant's attorney-client privilege.*

Petitioner, through counsel, filed a Motion to Recuse Certain Prosecutors (Motion 136) on January 8, 2007. (HT 2099- ). The defense alleged that the prosecution had met with Joe Albright in the first half of 2006 regarding a burglary of Mr. Albright's home in which a shotgun had been stolen. (HT 2099). Mr. Albright was an investigator hired by defense attorney Kurt Thomas who represented Petitioner prior to the State's notice of intent to seek the death penalty. (HT 2100). The defense contended that the meeting violated attorney-client privilege. The trial court conducted an *in camera* hearing involving testimony from witnesses and arguments by counsel. (HT 2195). The trial court found:

At some point prior to the shooting of the victims in this case, Albright's home was burglarized and a quantity of firearms and ammunition, including a 20-gauge shotgun, was taken. During the investigation of the burglary, the police recovered fingerprints from the glass of a gun cabinet where some of the weapons had previously been stored. During the hearing it was established that the fingerprints do not belong to either Co-Defendant Wright or Defendant Cash. Albright initiated the contact with the State by contacting Rooks [a member of the prosecution's team]. Albright informed Rooks that he wanted to talk with the State about one of his shotguns that was stolen in the burglary. Albright informed Rooks that he believed that this shotgun was used to kill the victims in this case. Albright wanted Rooks to provide him the name of the person whose fingerprints were found on the gun cabinet.

(HT 2195-2196). Attorney Kurt Thomas was informed of the meeting prior to its occurrence and admonished Mr. Albright not to divulge any information related to Petitioner's case. (HT 2196). Forensic evidence acquired by the State revealed that the shotgun did not belong to Mr. Albright.

(HT 2196-2197). The trial court denied the defense motion on the grounds that attorney-client privilege had not been breached. (HT 2198-2200). Based on the record available, Mr. Albright did not divulge any privileged information to the State or any information applicable to the case. Mr. Albright did not contact the prosecution as an investigator for the defense; rather, he contacted the prosecution as a lay witness whose home had been burglarized. Petitioner has therefore failed to show that attorney-client privilege had been breached.

*(p) The trial court erred in failing to charge the jury on conspiracy (Defendant's Request 63).*

The trial court did charge the jury on conspiracy, *infra*. (HT 4134). Petitioner has not shown that the trial court erred in its charge to the jury.

*(q) The trial court erred in failing to correctly charge the definition of knowledge as applied to this case.*

The trial court charged the jury:

Knowledge on the part of the Defendant that any of the crimes alleged was being committed and that the Defendant knowingly and intentionally participated in or helped in the commission of such crime must be proved by the State beyond a reasonable doubt. If you find from the evidence in this case that the Defendant had no knowledge that any crime was being committed, or that the Defendant did not knowingly and intentionally commit, participate, or help in the commission of and was not a co-conspirator -- or not a conspirator in any alleged offenses, then it would be your duty to acquit the Defendant as to that charge.

On the other hand, should you find beyond a reasonable doubt that the Defendant had knowledge that any of the crimes alleged was being committed, and that the Defendant knowingly and intentionally participated or helped in the commission of the crime alleged, then you would be authorized to convict the Defendant.

(HT 4133). The trial court's charge on knowledge largely tracks the pattern jury charge but expands the instruction as it relates to the knowledge of a conspirator. As the language of the charge when viewed as a whole accurately explained the law to the jury, Petitioner has not shown

that the trial court erred in its charge on the definition of knowledge as applied to this case. *See, Potts v. State*, 331 Ga. App. 857 (2015).

*(r) The trial court erred in failing to provide the jury with a copy of the indictment and allowing the jury to review the charges as set out in the indictment.*

The trial court did not send a copy of the indictment back with the jury for deliberation and trial counsel objected. (HT 4143). The basis for this objection was the indictment contained language involving “aggravated assault with intent to murder” and the trial court “cleaned that up with its verdict form and by not sending the indictment out.” (HT 4143). As the indictment is not evidence, the trial court did not err in refusing to provide a copy of the indictment to the jury for deliberations. *Crowe v. State*, 265 Ga. 582 (1995); *Bostick v. Ricketts*, 236 Ga. 304 (1976). The trial court read the indictment to the jury and charged them with the law relating to each charged offense. Petitioner has not shown that the trial court erred in this regard.

*(s) The trial court erred in charging the jury in language different from the indictment in the court's pre-charge and final charge.*

The indictment set forth two methods of committing aggravated assault (intent to murder and with a deadly weapon) while the jury instructions were limited to aggravated assault with a deadly weapon. Petitioner has not shown error in the trial court’s jury charge or prejudice from the omitted charge. Petitioner raised on appeal the claim that the trial court erred in its instructions to the jury. Specifically, Petitioner contended that the trial court impermissibly amended the indictment and undermined the defense by failing to instruct the jury on “intent to murder” as indicted. The Georgia Supreme Court held that the aggravated assault statute authorizes convictions on alternate methods of assault in the disjunctive. The State need only show that aggravated assault had been committed in any of the separate ways listed in the indictment, even if the indictment uses the conjunctive rather than the disjunctive form. *Cash v. State*, 297 Ga. 859 (2015).

*(t) The trial court's charge on conspiracy was erroneous.*

The trial court charged the jury on conspiracy as follows:

Now, I charge you that a conspiracy is an agreement between two or more persons to do an unlawful act. And the existence of a conspiracy may be established by proof of acts and conduct, as well as proof of an express agreement. When persons associate themselves in an unlawful enterprise, any act done by any party to the conspiracy to further the unlawful enterprise is considered to be the act of all the conspirators. However, each person is responsible for the acts of others only insofar as such acts are naturally and necessarily done to further the conspiracy. Whether or not a conspiracy existed in this case is a matter for each one of you ladies and gentlemen to determine.

(HT 4134). Trial counsel objected to the charge as given by the court. (HT 4145). Sufficient evidence was presented at trial to support the jury's charge of conspiracy. The trial court did not err in charging the jury on both conspiracy and party to the crime. Mangum v. State, 274 Ga. 573 (2001). Petitioner has not shown that the trial court presented the jury with an erroneous charge on conspiracy. *See, Johnson v. State*, 299 Ga. 706 (2009).

*(u) The trial court failed to properly instruct the jury on parties to a crime.*

Contrary to Petitioner's assertion, the trial court did charge the jury on parties to a crime and informed the jury that "every party to a crime may be charged with and convicted of the commission of the crime. A person is a party to a crime only if that person directly commits the crime or intentionally helps in the commission of the crime alleged." (HT 4133). Based on the evidence presented at trial, the trial court properly instructed the jury on the law relating to parties to a crime. *See, Greene v. State*, 257 Ga. App. 837 (2002). The trial court further instructed the jury that mere presence at the scene of the crime was insufficient alone to convict a person. (HT 4134).

*(v) The trial court erred in allowing the State to introduce evidence it intentionally withheld.*

Prior to the start of trial, the State presented the defense with an updated witness list that included a witness by the name of Pocahontas (also known as April Hogan) that the State indicated they had been unable to communicate with prior to trial. (HT 2740-2741, 2781, 3516). The State provided the defense with her statement on the morning of trial but did not previously provide the defense with prior statements made by the witness. (HT 2381, 2742-2743). The trial court initially withheld ruling on the motion to exclude the testimony or in the alternative for a continuance until the witnesses could be produced for the court. (HT 2745-2746). The witness was produced for defense counsel to interview at the courthouse. (HT 2777-2778). Thereafter, the trial court took up the defense's motion to exclude. (HT 2778). The State proffered that they knew of the existence of a witness early in their investigation but had no particulars regarding what information she knew and did not locate the witness until the week prior to trial. (HT 2780-2781). Prior to hearing from the witness, the State only had multiple layers of hearsay to indicate that she possessed information relevant to the case. (HT 2782). The prosecution never informed the defense that they were trying to locate this witness because they did not know what, if any, information the witness possessed. (HT 2784). Trial counsel acknowledged that the State did not act in bad faith regarding this witness because the witness was not cooperative with the State's investigation but requested a continuance to investigate her statement. (HT 2786-2788). Based on the defense's concession that the State did not act in bad faith, the trial court permitted the State to call the witness. (HT 2790). Petitioner has not challenged the trial court's denial of the continuance.

At trial, April Hogan testified to a conversation with Petitioner and co-defendant Wright after the murders. (HT 3487-3504). April Hogan had difficulty remembering the conversation or the events of the night in question. Captain Arp then testified to his efforts in searching for an individual known as Pocahontas and his efforts to get information from that person. (HT 3673). Captain Arp testified that April Hogan informed him that Petitioner and Jimmy Wright spoke with her after the incident and stated that "We did it." (HT 3675). According to Captain Arp, April Hogan changed her account of events and was not fully cooperative. (HT 3675-3676, 3730-37031).

Petitioner has failed to show that the State intentionally withheld evidence from the defense or that the trial court erred in permitting the State to introduce said evidence.

*(w) The trial court's charge on character and reputation was incorrect.*

The trial court charged the jury on character and reputation as follows:

I charge you that when evidence of the good character of the Defendant is offered, the jury has the duty to take that testimony, with all other evidence in the case, in determining the guilt or innocence of the Defendant. Good character is a positive, substantive fact and may be sufficient to produce in the minds you ladies and gentlemen a reasonable doubt about the guilt of the Defendant.

You have the duty to take any evidence of general good character with all of the other evidence in the case and if, in doing so, you should entertain a reasonable doubt about the guilt of the Defendant, it would be your duty to acquit the Defendant. However, if you should believe that the Defendant is guilty beyond a reasonable doubt, you would be authorized to convict despite the evidence about general good character.

(HT 4135). Petitioner has failed to show that the trial court's charge to the jury was erroneous. *Compare, State v. Hobbs*, 288 Ga. 551 (2010).

*(x) The State's actions regarding witnesses Woodham, Davis, Collins and Cash violated the Defendant's due process and equal protection rights.*

Christopher Cash testified as Petitioner's cousin who witnessed the murder of Jimmy Jackson and Tina Michelle McAdams. (HT 3010-3057). On cross-examination, Christopher Cash confirmed that he had met with trial counsel for an interview but did not answer his phone calls after that meeting because he had poor phone service. (HT 3058-3059). Christopher Cash was subsequently recalled as a rebuttal witness to testify as to a statement by Petitioner regarding the aftermath of the incident and that Petitioner thought there was going to be a fight that night. (HT 4009-4029). Petitioner has not shown that any misconduct occurred with this witness.

Trial counsel indicated that he wanted to call John Woodham who had been imprisoned in Carroll County and shared a pod with Jimmy Wright. (HT 3888-3889). Trial counsel proffered

that Jimmy Wright told John Woodham that Petitioner had no knowledge that he was going to shoot Jimmy Johnson. (HT 3890-3891). On another occasion, John Woodham overheard Jimmy Wright tell Petitioner that if he was convicted he would tell everyone that Petitioner did not know what was going to happen but that he would not help Petitioner before a conviction. (HT 3892). Randy Collins was also a prisoner who overheard a conversation where Jimmy Wright told Petitioner that he would ultimately "own up to doing this when the time came." (HT 3894-3895). The third conversation trial counsel attempted to admit involved Ed Lamar Davis who testified at Jimmy Wright's similar transaction hearing about a conversation he had with Jimmy Wright. (HT 2374, 3895). Trial counsel obtained a transcript of the interview between the prosecution and Mr. Davis wherein in the prosecution does not question Mr. Davis about Petitioner and, according to trial counsel, avoid the subject of Petitioner altogether. (HT 3896). Trial counsel alleged that the prosecution had withheld information on Mr. Davis and had promised Mr. Davis assistance in obtaining a travel permit in exchange for a favorable statement. (HT 3898-3899). Trial counsel argued that because he could not call Jimmy Wright to the stand due to the challenge to his guilty plea and the application of the Fifth Amendment, he should be able to call Mr. Davis under the necessity exception to the hearsay rule as the prosecution had the opportunity to interview Mr. Davis and could have questioned them about Petitioner. (HT 3900-3902).

In response, the prosecution indicated that they could not ask Jimmy Wright questions at the guilty plea hearing per an agreement with Mr. Wright's attorney. (HT 3905). The statements by Mr. Woodham and Mr. Collins were hearsay and could not be corroborated. (HT 3905-3906). The prosecutor informed the trial court that when they interviewed Mr. Davis they did not question him about Petitioner and did not inter-mingle the two cases. (HT 3906, 3912). The State spoke with Mr. Davis twice, once regarding Mr. Wright and once regarding Petitioner. (HT 3906-3907). Trial counsel requested that the trial court limit the second conversation from being admitted because it did not have the reliability of the first statement. (HT 3907-3908).

Randy Collins testified to the conversation between Jimmy Wright and Petitioner wherein Jimmy Wright said "after this is all said and done, I just want you to know that I'm going to own up to everything." (HT 3958, 3960). John Woodham testified that Jimmy Wright

informed him that Petitioner had nothing to do with the murders and fled the scene. (HT 3961, 3965-3966). Mr. Davis was not called to testify.

Petitioner has not shown how the State's actions regarding these witnesses violated his due process or equal protection rights.

*(y) The trial court's jury charges and the verdicts as they relate to Michelle McAdams are a violation of the Defendant's due process rights.*

Petitioner has not shown that the trial court's jury charges or the verdicts as they relate to victim Michelle McAdams violated his due process rights.

*(z) The trial court's jury charges and the verdicts as they relate to Jimmy Jackson are a violation of the Defendant's due process rights.*

Petitioner has not shown that the trial court's jury charges or the verdicts as they relate to victim Jimmy Jackson was a violation of his due process rights.

*(aa) The trial court erred in denying Defendant's Motions regarding the selection of the Grand and Traverse jurors (Motions 4 and 102).*

Prior to trial, the defense argued that the jury selection process used in Haralson County violated equal protection and due process. Petitioner has failed to show that the trial court erred in its denial of this motion or present any additional evidence that the jury pool was not representative or properly constituted.

*(bb) The trial court erred in allowing the State to rebut statements of Jimmy Wright by use of Chris Cash.*

Christopher Cash testified as Petitioner's cousin who witnessed the murder of Jimmy Jackson and Tina Michelle McAdams. (HT 3010-3057). On cross-examination, Christopher

Cash confirmed that he had met with trial counsel for an interview but did not answer his phone calls after that meeting because he had poor phone service. (HT 3058-3059). The defense introduced hearsay statements by Jimmy Wright indicating that he would take full responsibility for the murders and that Petitioner had no knowledge of what Jimmy Wright was planning to do. Christopher Cash was subsequently recalled as a rebuttal witness to testify as to a statement by Petitioner regarding the aftermath of the incident and that Petitioner thought there was going to be a fight that night. (HT 4009-4029). The trial court properly permitted the State to recall Christopher Cash rebut the hearsay statement of Jimmy Wright that Petitioner had no prior knowledge that would kill the two victims. *See also, Riley v. State*, 311 Ga. App. 445 (2011)(permitting the trial court to reopen evidence).

In relation to each of the above-stated issues, Petitioner has failed to show that appellate counsel's decision not to pursue the issue on appeal was unreasonable. One those issues from the motion for new trial that were pursued on appeal, Petitioner has not shown a change in either the facts or the law sufficient to justify relitigation of the issue.

Accordingly, Ground Twenty provides no basis for relief.

### **GROUND TWENTY-ONE**

In Ground Twenty-One, Petitioner adopts all grounds raised before the Georgia Supreme Court. On appeal, Petitioner contended that the evidence is insufficient to sustain his convictions; and the trial court mischarged the jury by omitting an instruction on "intent to murder" in regards to the felony murder counts and for failing to charge the jury on the lesser-included offense of involuntary manslaughter.

Issues decided on direct appeal constitute *res judicata* may not be relitigated in a habeas corpus action unless there has been a change in the facts or the law. *Bruce v. Smith*, 274 Ga. 432 (2001); *Walker v. Penn*, 271 Ga. 609 (1999); *Crowder v. State*, 265 Ga. 719 (1995). Petitioner has failed to show either a change in the facts or the law sufficient to relitigate the instant issue in this habeas corpus action.

Accordingly, Ground Twenty-One provides no basis for relief.

**CERTIFICATE OF SERVICE**

Petitioner received a copy of the transcript of the April 12, 2017 hearing on June 6, 2016. A copy of the Sheriff's Entry of Service Form is attached herein.

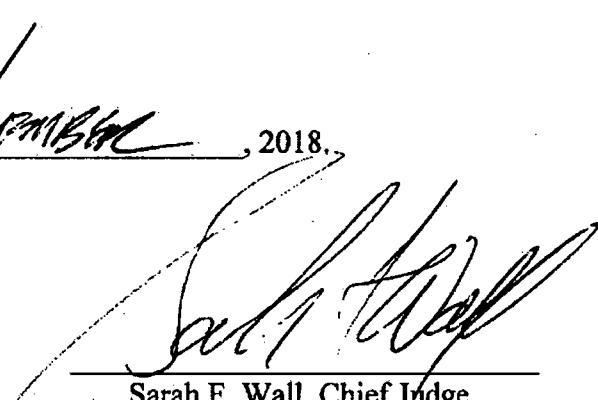
**CONCLUSION**

WHEREFORE, the instant Petition for Writ of Habeas Corpus is **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 Counsel of Record, Respondent, and Special Assistant Attorney General Daniel M. King, Jr.**

SO ORDERED, this 26 day of November, 2018.



Sarah F. Wall, Chief Judge  
Wheeler County Superior Court

**SHERIFF'S ENTRY OF SERVICE — SC-85-2**

Recorded from Clyde Castleberry Co., P.O. Box 1187, Covington, GA 30015-1800-222-1250

**SHERIFF'S ENTRY OF SERVICE**

SC-85-2

Civil Action No.

16CVO10

Date Filed

5/16/17

Superior Court  
State Court  
Juvenile Court

CLYDE CASTLEBERRY CO., COVINGTON, GA 30015

Magistrate Court  
Probate CourtGeorgia, Wheeler

COUNTY

Larry Craig Cast

GDC 1650243

Plaintiff

Vance LaughlinWarder

Defendant

Name and Address of Party to be Served.

Larry Craig Cast  
GDC 1650243Wheeler Correctional

Garnishee

**SHERIFF'S ENTRY OF SERVICE**

PERSONAL

I have this day served the defendant Larry Craig Cast personally with a copy of the within action and summons. Transcript of 4/12/17 Habeas Hearing (18 volumes)

NOTORIOUS

I have this day served the defendant \_\_\_\_\_ by leaving a copy of the action and summons at his most notorious place of abode in this County.

CORPORATION

Delivered same into hands of \_\_\_\_\_ described as follows: age, about \_\_\_\_\_ years; weight \_\_\_\_\_ pounds; height, about \_\_\_\_\_ feet and \_\_\_\_\_ inches, domiciled at the residence of defendant.

TACK &amp; MAIL

Served the defendant \_\_\_\_\_ by leaving a copy of the within action and summons with \_\_\_\_\_ in charge of the office and place of doing business of said Corporation in this County.

NON EST

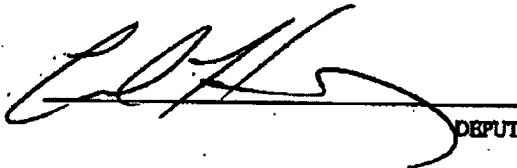
I have this day served the above styled affidavit and summons on the defendant(s) by posting a copy of the same to the door of the premises designated in said affidavit, and on the same day of such posting by depositing a true copy of same in the United States Mail, First Class in an envelope properly addressed to the defendant(s) at the address shown in said summons, with adequate postage affixed thereon containing notice to the defendant(s) to answer \_\_\_\_\_ summons at the place stated in the summons.

Diligent search made and defendant \_\_\_\_\_ not to be found in the jurisdiction of this Court.

This 6 day of June, 2017.

BK 11

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 DEPUTY

 2017 JUN 20 PM  
 CLERK SUPERIOR COURT  
 WHEELER COUNTY, GEORGIA  
 FILED IN OFFICE  
 CLERK'S OFFICE

# APPENDICE "B"



SUPREME COURT OF GEORGIA

Case No. S19H0585

August 05, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

**LARRY CASH v. VANCE LAUGHLIN, WARDEN.**

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

*All the Justices concur.*

Trial Court Case No. 16CV010

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.

*Thiisse N. Banne*, Clerk