INDEX TO APPENDICES

Page

APPENDIX G – Prosecutor William Clark, Orally Amending Indictment, September 26, 2011.....Trial Transcript.....Cover, 63-lines 17-25, 64 line 1

APPENDIX -H –1 Notice of Appointment, Gerard Kleinrock, January 18, 2012..1-5

APPENDIX -H – 2 Notice of Appointment , Teri Smith, August 23, 2012.....1-3

APPENDIX -I- Stipulation of State, Trial Court and Leonora Grant, February 12,2013..... Cover, 9-10

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10802-H

MARK RUDOLPH ARSENIO REED,

Petitioner-Appellant,

versus

ROBERT TOOLE,
MARTY ALLEN,
WARDEN,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

Mark Reed is a Georgia prisoner serving a life sentence for malice murder, concealing the death of another, and possessing a firearm during the commission of a felony. He filed a *pro se* 28 U.S.C. § 2254 petition, alleging the following claims:

(1) the trial court failed to timely provide counsel for sentencing, appoint counsel for his direct appeal, or appoint counsel for his post-conviction proceedings;[1]

(2) the state impermissibly amended his indictment;[2]

(3) his conviction was beyond the statute of limitations; and

(4) the trial court erred in denying his motion for a new trial.

---

[1] Due to the repetition of Mr. Reed's arguments, this Court follows the district court in combining his Claims 1-3 and 7, as they are substantively the same or similar.

[2] This is a combination of Mr. Reed's Claims 4-6, 8, and 10-13, 15.

A magistrate judge issued a report and recommendation ("R&R"), recommending that Mr. Reed's petition be denied on its merits. The district court adopted the R&R over Mr. Reed's objections, denied his claims, and denied him a certificate of appealability ("COA") and *in forma pauperis* ("IFP") status. Mr. Reed appealed, and now moves this Court for both.

Mr. Reed's first claim does not warrant a COA. First, to the extent that Mr. Reed argued that he was not provided counsel at various stages, the record contradicts him, as the state court provided him the necessary warnings regarding representing himself on direct appeal, such that he knowingly and voluntarily chose to represent himself. *See United States v. Berger*, 375 F.3d 1223, 1226 (11th Cir. 2004); *Faretta v. California*, 422 U.S. 806, 835 (1975). Second, to the extent that he challenged his lack of counsel during the time in which he could have timely moved for arrest of judgment, Mr. Reed failed to explain why he could not file the motion without counsel. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Third, a prisoner does not have a constitutional right to counsel in a habeas proceeding, and thus, he cannot warrant habeas relief on such a claim. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Next, Mr. Reed's second claim does not warrant a COA because the Georgia Supreme Court relied on Georgia caselaw requirements for its findings on the statute of limitations and proper indictments, and those findings warrant deference from the federal courts. *See Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1355 (11th Cir. 2005). Otherwise, the indictment satisfied the Sixth Amendment requirements, in that it sufficiently "informed [him] of the nature and cause of the accusation," even if it did not have the correct date. *See* U.S. Const. amend. VI.

Finally, Claims Three and Four do not warrant a COA because Mr. Reed failed to base those claims on the denial of a constitutional right, as statute of limitations and denial of a motion

for a new trial are issues of pure state law, and he otherwise failed to argue that his federal due process rights were violated. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Mr. Reed's motion for a COA is DENIED and his IFP motion is DENIED AS MOOT.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

APPENDIX A-2- Order of the United States Court of Appeal for the Eleventh Circuit denying reconsideration for issuance of Certificate of Appealability,

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 22, 2020

Mark Rudolph Arsenio Reed
Georgia SP - Inmate Legal Mail
300 1ST AVE S
REIDSVILLE, GA 30453

Appeal Number: 20-10802-H
Case Style: Mark Reed v. Robert Toole, et al
District Court Docket No: 1:18-cv-03970-AT

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10802-H

MARK RUDOLPH ARSENIO REED,

Petitioner-Appellant,

versus

ROBERT TOOLE,
MARTY ALLEN,
WARDEN,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before: JILL PRYOR and BRASHER, Circuit Judges.

BY THE COURT:

Mark Reed has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 3, 2020, order denying a certificate of appealability and leave to proceed *in forma pauperis* in his appeal from the denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Reed's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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

MARK RUDOLPH ARSENIO REED, Petitioner, v. ROBERT TOOLE, *et al*, Defendants.	:	CIVIL ACTION NO. 1:18-cv-3970-AT

ORDER

This action is before the Court on petitioner's Application for Leave to Appeal in Forma Pauperis [Doc. 18] and Motion for Certificate of Appealability [Doc. 19].

On December 17, 2019, the Magistrate Judge issued a Final Report and Recommendation that the instant petition be denied and that a certificate of appealability also be denied. Petitioner filed a notice of appeal on January 2, 2020, and objections to the Report and Recommendation on January 6, 2020. The Court had not issued a ruling on the Report and Recommendation prior to the filing of the notice of appeal.

Accordingly, plaintiff's application to appeal *in forma pauperis* [Doc. 18] and Motion for Certificate of Appealability [Doc 19] are **DENIED**. Any

further request to proceed *in forma pauperis* on appeal should be directed, on motion, to the United States Court of Appeals for the Eleventh Circuit, in accordance with Rule 24(a)(5) of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED this 4th day of February, 2020.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE

Orders on Motions

1:18-cv-03970-AT Reed v. Toole et al

0months,2254,APPEAL,ATLC1,CMS,SLC4,SUBMDJ

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was entered on 2/4/2020 at 1:41 PM EST and filed on 2/4/2020

Case Name: Reed v. Toole et al
Case Number: 1:18-cv-03970-AT
Filer:
Document Number: 21

Docket Text:
ORDER: Plaintiff's [18] application to appeal in forma pauperis and [19] Motion for Certificate of Appealability are DENIED. Further requests to proceed in forma pauperis should be directed by motion to the circuit court within 30 days pursuant to Fed.R.App.P.24. Signed by Judge Amy Totenberg on 2/4/2020. (bnp)

1:18-cv-03970-AT Notice has been electronically mailed to:

Meghan Hobbs Hill mhill@law.ga.gov, psmith@law.ga.gov

Paula K. Smith psmith@law.ga.gov

1:18-cv-03970-AT Notice has been delivered by other means to:

Mark Rudolph Arsenio Reed
1000664635
Georgia State Prison
300 1st Avenue
Reidsville, GA 30499

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
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] [13ae3859971ab98f46224ec37ad20933656876e8f0e0f3376e12753a65fc7d4813a
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARK RUDOLPH ARSENIO REED,
Petitioner,

vs.

ROBERT TOOLE, MARTY ALLEN, WARDEN,
Respondents.

CIVIL ACTION FILE

NO. 1:18-cv-03970-AT

JUDGMENT

This petition for a writ of habeas corpus having come before the Court, Honorable Amy Totenberg, United States District Judge, for consideration of the Magistrate Judge's Report and Recommendation, and the Court having adopted said recommendation, it is

Ordered and Adjudged that the petition for a writ of habeas corpus be, and the same hereby is, **denied** and **dismissed**.

Dated at Atlanta, Georgia, this 21st day of February, 2020.

JAMES N. HATTEN
CLERK OF COURT

By: s/Brittany Poley
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
February 21, 2020
James N. Hatten
Clerk of Court

By: s/Brittany Poley
Deputy Clerk

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

MARK RUDOLPH ARSENIO REED, Petitioner, v. ROBERT TOOLE, et al., Respondents.	:	CIVIL ACTION NO. 1:18-CV-3970-AT

ORDER

Presently before the Court is the Magistrate Judge's Report and Recommendation (R&R) recommending that the instant habeas corpus petition be denied and the case dismissed. [Doc. 13]. Petitioner has filed his objections in response to the R&R. [Doc. 17].

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. United States v. Raddatz, 447 U.S. 667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a *de novo* basis and any non-objected portion under a "clearly erroneous" standard. "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive or general objections need

not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988).

Petitioner, an inmate at the Georgia State Prison in Reidsville, Georgia, filed the instant 28 U.S.C. § 2254 petition for a writ of habeas corpus challenging the constitutionality of his October 11, 2011, convictions by a jury serving in DeKalb County Superior Court for malice murder, concealing the death of another, and possession of a firearm during the commission of a felony.[1] After the trial court denied Petitioner's motion for a new trial, the Georgia Supreme Court affirmed. Reed v. State, 757 S.E.2d 84 (Ga. 2014). The Tattnall County Superior Court denied Petitioner's state habeas corpus petition, [Doc. 7-4], and the Georgia Supreme Court denied Petitioner's certificate of probable cause to appeal the denial of habeas corpus relief, [Doc. 7-5].

Petitioner next filed the instant § 2254 petition raising fifteen overlapping grounds for relief. In her extensive and well-reasoned R&R, the Magistrate Judge determined that Petitioner had failed to demonstrate that he is entitled to relief. His Grounds 4-6, 10, 13, and 15, raised claims related to the fact that Petitioner's

[1] The jury also found Petitioner guilty of malice murder, aggravated assault, theft by taking, and theft by receiving stolen property. The trial court vacated Petitioner's convictions for theft by taking and theft by receiving stolen property. [Doc. 7-6 at 194-95]. The felony murder and aggravated assault convictions merged by operation of law. Reed, 757 S.E.2d at 86 n.1.

indictment stated that the murder occurred on or about May 7, 2007, while evidence at Petitioner's trial established that the murder occurred sometime after March 6, 2007 through March 10, 2007. The Magistrate Judge determined that Petitioner's claims related to the date recited on the indictment failed to state a constitutional violation because the Fifth Amendment right to presentment or indictment by a grand jury has not been incorporated under the Due Process Clause of the Fourteenth Amendment to apply against the states. Moreover, Petitioner was adequately informed of the nature of the charges against him to satisfy due process concerns, and the state courts' rejections of his related claims are entitled to deference under § 2254(d).

Petitioner's Grounds 1-3 and 7 raise claims related to the fact that, for a short period after his sentencing Petitioner was not represented by counsel, depriving him of an opportunity file a motion in arrest of judgment in which he could have raised his claim regarding the dates recited in his indictment. The Magistrate Judge concluded that Petitioner failed to demonstrate prejudice for this claim because he had ample opportunity to raise his claim before the Georgia courts while he was represented by counsel or in a later proceeding, and the Georgia Supreme Court performed a merits review of his claim regarding the indictment and that court found no reversible error. Put simply, Petitioner's claim that the indicment was faulty (or that there was an impermissible variance in or amendment to his indictment) is unavailing, and he thus

cannot demonstrate prejudice arising from the fact that he was not represented by counsel during the period that he could have filed his motion for an arrest of judgment.

In his Ground 9, Petitioner contends that the incorrect date on his indictment somehow resulted in his having been convicted of his crimes after the statute of limitations had run. However, the record is clear that, as found the by Georgia Supreme Court, his prosecution for all of the enumerated crimes "was well within the application limitation period." Reed, 757 S.E.2d at 88 n.3. In his Ground 14, Petitioner contends that the trial court abused its discretion in denying his motion for a new trial. This claim is again related to the fact that the date of the crime in the indictment did not match the date presented in the evidence at Petitioner's trial. The Magistrate Judge concluded that Petitioner's Ground 14 fails to raise a cognizable constitutional claim.

In his objections, Petitioner first contends that there was no evidence presented at his trial that established the date or even the year of his crimes. Petitioner is incorrect. The Georgia Supreme Court held that the evidence at Petitioner's trial was sufficient for the jury to find that Petitioner shot Marlon Green in the chest with a shotgun. Reed, 294 757 S.E.2d at 86. Green was Petitioner's landlord, and the two were in a dispute regarding the fact that Petitioner had stopped paying rent. Id. Green

had stopped by the house Petitioner was renting from Green, and Petitioner shot Green in the livingroom of that house and buried Green's body nearby. Id. The first witness to testify at Petitioner's trial was Green's mother, Ann Beard. Beard testified that Green disappeared on March 7, 2007, and that she reported his disappearance to the police. [Doc. 7-8 at 15]. Beard's testimony was sufficient to establish that Green's murder occurred on or around March 7, 2007.

Also in his objections, Petitioner repeats his arguments that the defect in the indictment regarding the dates of the crimes renders his conviction void. However, the Georgia courts and the Magistrate Judge squarely addressed those arguments. Unless the criminal statute under which a crime is charged expressly includes time as an element, time is not a material element of a criminal offense, and "a variance between the date alleged and the date proved will not trigger reversal as long as the date proved falls within the statute of limitations and before the return of the indictment." United States v. Reed, 887 F.2d 1398, 1403 (11th Cir. 1989). This Court thus concludes that the Magistrate Judge is correct and Petitioner has failed to establish that he is entitled to relief under § 2254.

Accordingly, the R&R, [Doc. 13], is hereby **ADOPTED** as the order of this Court, and the petition is **DENIED**. The Clerk is **DIRECTED** to close this action.

This Court further agrees with the Magistrate Judge that Petitioner has failed to raise any claim of arguable merit, and a Certificate of Appealability is **DENIED** pursuant to 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED, this 21st day of February, 2020.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE

APPENDIX-C Order of the United States District court , Magistrate, Northern Dist. Of Georgia, denying writ of habeas corpus R&R,
December 7, 2019 1-28

Other Orders/Judgments

1:18-cv-03970-AT-CMS Reed v. Toole et al

0months,2254,ATLC1,SLC4

U.S. District Court

Northern District of Georgia

Notice of Electronic Filing

The following transaction was entered on 12/17/2019 at 9:23 AM EST and filed on 12/17/2019

Case Name: Reed v. Toole et al
Case Number: 1:18-cv-03970-AT
Filer:
Document Number: 13

Docket Text:
FINAL REPORT AND RECOMMENDATION: IT IS RECOMMENDED that the instant petition [1] be DENIED, that a certificate of appealability be DENIED, and that this action be DISMISSED. The Clerk is DIRECTED to withdraw the reference to the Magistrate Judge. Signed by Magistrate Judge Catherine M. Salinas on 12/17/19. (bnp)

1:18-cv-03970-AT Notice has been electronically mailed to:

Meghan Hobbs Hill mhill@law.ga.gov, psmith@law.ga.gov

Paula K. Smith psmith@law.ga.gov

1:18-cv-03970-AT Notice has been delivered by other means to:

Mark Rudolph Arsenio Reed
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Georgia State Prison
300 1st Avenue
Reidsville, GA 30499

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

MARK RUDOLPH ARSENIO REED, Petitioner, v. ROBERT TOOLE, et al., Respondents.	: : : : : : : :	HABEAS CORPUS 28 U.S.C. § 2254 CIVIL ACTION NO. 1:18-CV-3970-AT-CMS

UNITED STATES MAGISTRATE JUDGE'S
FINAL REPORT AND RECOMMENDATION

Petitioner Mark Rudolph Arsenio Reed challenges via 28 U.S.C. § 2254 the constitutionality of his 2011 DeKalb County convictions. The matter is before the Court for consideration of the petition [1]; Respondent's answer-response [6]; Petitioner's reply [8]; Petitioner's motion to amend [9], construed by the Court as a supplement to Petitioner's grounds four through fifteen [12]; and Petitioner's supplemental brief in support [11].[1] For the reasons stated below, the undersigned

---

[1] After he filed his reply, Petitioner filed a motion to amend, and the Court construed the grounds therein (grounds sixteen through twenty-seven) as supplemental argument on Petitioner's grounds four through fifteen. (See Mot. for Leave to File Amended Pet. at 9-11, ECF No. 9; Order of Mar. 20, 2019, ECF No.

recommends that the petition and a certificate of appealability be denied and that this action be dismissed.

I. Background

In March 2007, Marlon Green died by a gunshot wound to the chest. Reed v. State, 294 Ga. 877, 877-78, 757 S.E.2d 84, 86-87 (2014). The DeKalb County grand jury indicted Petitioner and his co-defendant Lashawn Chanel Payne (Petitioner's girlfriend at the time of the crime) with malice murder, felony murder, aggravated assault, theft by taking, theft by receiving stolen property, concealing the death of another, and possession of a firearm during the commission of a felony, crimes that occurred "on or about the 21st day of May, 2007[.]" (Resp't Ex. 6(a) at 26-35 [7-6

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12). Also, over a month after filing his motion to amend, and without obtaining permission to file an additional pleading, Petitioner also filed a supplemental brief in support. (Suppl. Br., ECF No. 11). In accord with the Court's March 20, 2019 Order, the Court construes argument on grounds sixteen through twenty-seven as additional argument on Petitioner's grounds four through fifteen. Further, based on Petitioner's ample opportunity to present arguments in his petition, reply, and construed supplement and based on the Court's local rules, the Court considers only the first twenty-five pages of the supplemental brief. Unless specifically mentioned and cited in this Report and Recommendation, the construed supplemental argument and supplemental brief add nothing that warrants particular discussion.

at 26-35]).[2] Petitioner pleaded not guilty and proceeded to trial represented by Karlyn Skall. (Id. at 52 [7-6 at 52]; Resp't Ex. 6(b) at 216 [7-7 at 3]).

The evidence at trial established the following.

> In 2006, [Petitioner] moved from California to Atlanta with his girlfriend, LaShawn Payne, and her 13-year-old son, Cameron Thomas. They began renting a home in DeKalb County from Marlon Green. During their occupancy, [Petitioner] became suspicious that Green did not actually own the property and was perpetrating a fraud on them. After discovering that Green's name was not on the deed to the property, [Petitioner] and Payne stopped paying rent.
>
> In early March 2007, Green drove to the home. Seeing Green drive up, [Petitioner] told Payne to retrieve his shotgun. The two men argued in the yard for some time and then entered the house together, still arguing. [Petitioner] directed Green to sit down, asked Green who he really was, and then grabbed the shotgun and shot Green in the chest. Green fell to the floor, bleeding, and quickly died. Thomas, who was surreptitiously watching the confrontation from the stairwell leading to the second floor of the house, witnessed the shooting, though he feigned ignorance when his mother came upstairs to check on him shortly thereafter.
>
> [Petitioner], who told Payne she "[didn't] have any choice in this," directed Payne to clean up the blood and other evidence of the crime. [Petitioner] removed Green's body, wrapped it in a tarp, and loaded it into the trunk of Green's car. [Petitioner] and Payne next drove to a nearby abandoned home with a large wooded lot, where they buried the body. [Petitioner] then drove Green's car to Queens, New York, where

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[2] When citing to Respondent's exhibits six(a) through (f), the state habeas record, the Court includes in brackets a citation to the Court's electronic docket number and pagination.

> he abandoned it. At [Petitioner's] direction, Payne followed him in her car to New York, and the two drove back to Georgia together. They continued living in the DeKalb County home and took further measures to conceal all traces of the crime, repainting the interior walls and sanding down the floors. In September 2007, after receiving notice of the pending foreclosure on the property, they returned to California.
>
> At some point after returning to California, Thomas confided in his father about what he had witnessed. Local law enforcement were contacted, and both Thomas and Payne were questioned. Payne gave authorities a detailed statement about the crime and drew a map of the location where Green's body was buried. DeKalb police were notified, whereupon they searched the location Payne had provided and found skeletal remains, with shotgun pellets embedded therein, as well as a plastic tarp and some items of jewelry and decayed clothing. Green's mother later identified the jewelry as having belonged to her son, and mitochondrial DNA analysis further corroborated the identity of the remains.

Reed, 294 Ga. at 877-78, 757 S.E.2d at 86-87.

The jury found Petitioner guilty on all charges, and on October 11, 2011, the court imposed a total sentence of life plus twenty-five years. (Resp't Ex. 6(a) at 107-08, 110 [7-6 at 107-08, 110]). Counsel filed a motion for a new trial, as amended by new counsel Teri L. Smith, and as later amended by Petitioner *pro se*. (Id. at 111, 137-38, 148-50, 174-80 [7-6 at 111, 137-38, 148-50, 174-81]). On February 26, 2013, the trial court denied the motion for a new trial. (Id. at 187-92 [7-6 at 188-93]). Also on February 26, 2013, the trial court vacated Petitioner's convictions for theft by

taking and theft by receiving stolen property and, *nunc pro tunc*, adjusted Petitioner's sentence to life plus fifteen years.[3] (Id. at 193-94 [7-6 at 194-95]).

Petitioner appealed, and, on March 28, 2014, the Georgia Supreme Court affirmed the judgment against Petitioner. Reed, 294 Ga. at 882, 757 S.E.2d at 89. On November 26, 2014, Petitioner filed a state habeas corpus petition, as later amended, in the Superior Court of Tattnall County. (Resp't Exs. 2, 3, ECF Nos. 7-2, 7-3). By order filed on April 13, 2017, the state habeas court denied relief. (Resp't Ex. 4, ECF No. 7-4). On June 4, 2018, the Georgia Supreme Court denied further review. (Resp't Ex. 5, ECF No. 7-5).

Petitioner now seeks federal relief and raises fifteen grounds for relief: grounds one to three and seven, based on the trial court's failure to assign counsel during a limited amount of time after sentencing; grounds four to six, eight, ten to thirteen, and fifteen, based on the incorrect date in the indictment; ground nine, based on an alleged time bar against the prosecution; and ground fourteen, based on the trial court's denial of the motion for a new trial. (Pet. at 6A – 6G, ECF No. 1).

---

[3] The Court does not discuss the theft charges, and, to the extent that Petitioner's grounds include any challenge to the vacated convictions for theft, those challenges are moot and are not discussed.

Respondent has filed an answer response; Petitioner has filed his reply; and the matter is ready for disposition.

II. Federal Habeas Corpus Standard

A federal court may issue a writ of habeas corpus on behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). The opportunity for federal relief, however, is limited. The Antiterrorism and Effective Death Penalty Act (AEDPA), requires a petitioner to exhaust his state court remedies and requires federal courts to give deference to state court adjudications. 28 U.S.C. § 2254(b)-(e).

Exhaustion requires a petitioner to "fairly present[] every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." Pope v. Sec'y for Dep't of Corr., 680 F.3d 1271, 1284 (11th Cir. 2012) (quoting Mason v. Allen, 605 F.3d 1114, 1119 (11th Cir. 2010)) (internal quotation marks omitted). Further, federal relief under the AEDPA is limited to petitioners who demonstrate that the state court adjudication resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[,]" 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of

the evidence presented in the State court proceeding[,]" 28 U.S.C. § 2254(d)(2). A state court's factual determinations are presumed correct unless the petitioner presents clear and convincing evidence that those determinations were erroneous. 28 U.S.C. § 2254(e)(1).

"A state court's adjudication is contrary to federal law if it 'arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.'" Wellons v. Warden, 695 F.3d 1202, 1206 (11th Cir. 2012) (alterations in original) (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)). "A state court's adjudication is unreasonable if the state court 'identifies the correct governing legal principle from th[e] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" Id. (alteration in original) (quoting Williams, 529 U.S. at 413). To show unreasonableness, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Clark v. Attorney Gen., Fla., 821 F.3d 1270, 1282 (11th Cir. 2016) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)) (internal quotation marks omitted),

cert. denied, _ U.S. _, 137 S. Ct. 1103 (2017); see also Sexton v. Beaudreaux, _ U.S. _, _, 138 S. Ct. 2555, 2558 (2018) ("When . . . there is no reasoned state-court decision on the merits, the federal court 'must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.' . . . If such disagreement is possible, then the petitioner's claim must be denied." (quoting Harrington, 562 U.S. at 86)).

In sum, the availability of collateral relief is limited, and the habeas petitioner – now presumed guilty, not innocent – bears the burden of demonstrating his or her right to collateral relief. See Ross v. Moffitt, 417 U.S. 600, 610-11 (1974) (stating that a person once convicted is deemed guilty and "stripped of his presumption of innocence"); Blankenship v. Hall, 542 F.3d 1253, 1274 (11th Cir. 2008) (stating that "in habeas proceedings, unlike direct appeals, the petitioner bears the burden of establishing his right to relief").

This Court has reviewed the pleadings and exhibits and finds that the record contains sufficient facts upon which the issues may be resolved. A federal evidentiary hearing is not required. See 28 U.S.C. § 2254(e)(2).

III. Discussion

A. Grounds Four - Six, Eight, Ten – Thirteen, and Fifteen, Based on Challenge to Indictment

The indictment charged Petitioner with malice murder, felony murder, aggravated assault, concealing the death of another, and possession of a firearm during the commission of a felony, crimes committed "on or about the 21st day of May, 2007[.]" (Resp't Ex. 6(a) at 29-35 [7-6 at 29-35]). As set forth by the trial court,

> Law enforcement first learned of the murder in 2009, when accomplice LaShawn Payne came forward and gave a police statement implicating [Petitioner] and confessing her involvement in the concealment of the body. The victim's body was then exhumed from the makeshift grave in an abandoned wooded area where [Petitioner] and Payne had buried it in 2007. LaShawn Payne could not remember the exact date on which [Petitioner] shot the victim in the chest but thought that it occurred in May of 2007. The indictment alleged that [Petitioner] murdered the victim "on or about the 21st day of May, 2007".

(Resp't Ex. 6(a) at 188 n.4 [7-6 at 189]).

On July 6, 2011, more than two months before trial commenced on September 26, 2011, the state provided Petitioner with a demand for written notice of Petitioner's intent to offer an alibi defense. (Resp't Ex. 6(a) at 48 [7-6 at 48]; Resp't Ex. 6(b) at 216 [7-7 at 3]). Therein, the state clarified the location of the crimes and

the crime dates – March 3, 2007 through March 10, 2007. (Resp't Ex. 6(a) at 48 [7-6 at 48]). As indicated elsewhere, Petitioner did not raise an alibi defense. Additionally, "the prosecutor during opening argument informed the jury that the date in the indictment was 'incorrect' and that the evidence would show the murder occurred as early as March of 2007." (Resp't Ex. 6(a) at 188 n.4 [7-6 at 189]).

In his motion for a new trial, Petitioner raised several claims based on the incorrect date in the indictment. (See id. at 188 [7-6 at 189]). The trial court rejected those claims and found, *inter alia*, (1) that a fatal-variance challenge to the indictment was waived by failure to raise the issue at trial and that the challenge was meritless because the indictment alleged a non-material date on which the offense occurred, (2) that there was no amendment to the essential elements of the offense or constructive amendment to the indictment by the prosecutor, and (3) that Petitioner's date-related claims were meritless and could not have provided a basis for quashing or dismissing the indictment. (Id. at 189 [7-6 at 190]).

On direct appeal, Petitioner enumerated errors three, five, and ten based on the incorrect murder date in the indictment: there was insufficient evidence based on the date in the indictment; the prosecution improperly amended the indictment to conform to the evidence; the prosecution's improper amendment obstructed

Petitioner's defense and violated due process; and trial counsel failed to properly challenge the void indictment, by objection, motion to quash, or motion in arrest of judgment. (Resp't Ex. 6(f) at 893-96, 901-06, 922-29 [7-11 at 15-18, 23-28, 44- 51]).

The Georgia Supreme Court stated and found as follows –

> Several of [Petitioner's] enumerations of error center on the fact that the indictment cites the date of the murder as "on or about the 21st day of May, 2007," when in fact the evidence shows that the murder occurred in early March of 2007. However,
>
> > [e]ven though it has been held that a definite date of an offense should be alleged in an indictment, the state is not restricted to proof of the date stated. It is sufficient if the evidence demonstrates that the offense was committed at any time within the statute of limitations.
>
> (Footnotes omitted.) Jack Goger, Daniel's Ga. Criminal Trial Practice, § 13-6 (2013–2014 ed.). Thus, except where the exact date of the offense is alleged to be an essential element thereof or where the accused raises an alibi defense, any variance between the date listed in the indictment and the date on which the crime is proven to have occurred is of no consequence. Id.; accord Eberhardt v. State, 257 Ga. 420(2), 359 S.E.2d 908 (1987).
>
> Here, the May 21, 2007 date was not alleged to be an essential element of any of the offenses charged, and [Petitioner] did not assert an alibi defense. In addition, the allegations were sufficiently clear and specific to afford [Petitioner] adequate notice of the charges he was facing and to preclude future prosecution for the same offenses. See Roscoe v. State, 288 Ga. 775(3), 707 S.E.2d 90 (2011) (fatal variance between allegations and proof will be found only if allegations do not sufficiently inform the accused of the charges so as to enable him to present a

> defense or are not adequate to protect the accused against future prosecution for the same crimes). Therefore, the erroneous date cited in the indictment provides no basis for reversal of [Petitioner's] convictions.

Reed, 294 Ga. at 879-80, 757 S.E.2d at 88. With regard to trial counsel's assistance on the incorrectly dated indictment, the court found, "we have already determined . . . that the error did not render the indictment fatally defective. For this reason, trial counsel did not render deficient performance in failing to object on this basis." Id., 294 Ga. at 882, 757 S.E.2d at 89.

Petitioner in his state habeas corpus petition again challenged the indictment in regard to the incorrect date – the prosecutor impermissibly amended the indictment, denying Petitioner a fair trial, and the indictment was constructively and impermissibly amended and void, which resulted in Petitioner's convictions being defective and void. (See Resp't Ex. 4 at 2-4, ECF No. 7-4). The state habeas court rejected all of Petitioner's claims and determined that Petitioner could not relitigate matters that had been decided on direct appeal and that Petitioner's claims were meritless because the murder date was not an element of the charged offenses, because there was no impermissible amendment to the indictment, and because the verdict was consistent with the law and evidence. (Id. at 2-5).

In this Court, Petitioner raises the following grounds, all of which are based on the incorrect May 2007 crime date in the indictment and the prosecutor's subsequent statement that crimes occurred as early as March 2007.

(4) The State prosecutor conducted an impermissible amendment of the indictment.

(5) An impermissible amendment to the indictment prejudiced and deprived Petitioner of a defense at trial and denied him the right to a fair trial in violation of his right to due process.

(6) There was a constructive amendment of the indictment.

(8) There was an impermissible amendment of the indictment to conform to the evidence.

(10) The indictment was impermissibly amended to correct defects in the indictment by striking from its allegations.

(11) The indictment in Petitioner's case is void.

(12) "Defective verdict, as a matter of law, jury verdict not consistent with the law and evidence, verdict invades the province of the court" because, in light of the void indictment, the court was required to enter a directed verdict in Petitioner's favor.[4]

(13) The sentence is void and unconstitutional based on the incorrect date in the indictment.[5]

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[4] (See Mot. for Leave to File Amended Pet. at 9-11).

[5] (See Mot. for Leave to File Amended Pet. at 11-12).

(15) The allegations in the indictment, based on an incorrect date, and the proof adduced at trial do not correspond.[6]

(Pet. at 6D – 6G; Mot. for Leave to File Amended Pet. at 2-11).

Respondent asserts that this Court should defer to the state court's decision. (Resp't Br. at 7-14, ECF No. 6-1). In reply, Petitioner appears to assert that the state habeas court incorrectly deferred to the Georgia Supreme Court's decision on the indictment claims and that deference by this Court is unwarranted because the Georgia Supreme Court lacked authority to rule on a challenge to the indictment that was not properly preserved at the trial level. (Pet'r Reply at 8, 13, ECF No. 9). Petitioner, without detail or explanation, also contends that he could have shown an alibi if he had received notice of the correct time of the crime. (Suppl. Br. at 19).

The Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V. The Fifth Amendment right to indictment by a grand jury, however, has not been incorporated via the Fourteenth Amendment's Due Process Clause to apply against the states. Heath v. Sec'y, Fla. Dep't of Corr.,

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[6] (See Mot. for Leave to File Amended Pet. at 13-14).

717 F.3d 1202, 1204-05 (11th Cir. 2013) (citing Grim v. Sec'y, Fla. Dep't of Corr., 705 F.3d 1284, 1287 (11th Cir. 2013)). Under the Due Process Clause and the Sixth Amendment, "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ." U.S. Const. amend. VI; see also In re Oliver, 333 U.S. 257, 273 (1948) (stating that this Sixth Amendment right to be informed is applicable to the states through the Due Process Clause of the Fourteenth Amendment).

Petitioner's claims based on the indictment fail to state a constitutional claim because the Fifth Amendment right to presentment or indictment by a grand jury has not been incorporated under the Due Process Clause of the Fourteenth Amendment to apply against the states. Further, under due process requirements, Petitioner was adequately informed of the nature and cause of the charges against him. Petitioner fails to show that no reasonable reviewing court could have concluded that Petitioner received adequate notice of the charges he was facing, including notice in regard to the times and place that would be relevant to an alibi defense.[7] See Hall v. Adult

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[7] Even if the state habeas court was not required to defer to the Georgia Supreme Court's decision on the indictment, the state habeas court otherwise found that Petitioner's claims based on the indictment were meritless. Petitioner does not show that either the Georgia Supreme Court's or the state habeas court's determination is unreasonable under United States Supreme Court precedent.

Parole Auth., 1:10CV1359, 2012 WL 1571519, at **18-19 (N.D. Ohio Apr. 11, 2012) (construing state petitioner's challenge to the indictment as a Sixth-Amendment notice challenge and finding that charge for conduct occurring on an unstated date within a sixteen-year period did not violate due process when other material – including discovery material – provided the defendant with a clear understanding of the charges and specifics thereon so that he could plan a defense), report and recommendation adopted, 1:10CV1359, 2012 WL 1571518 (N.D. Ohio May 1, 2012). Petitioner fails to show that the state's rejection of his indictment claims was contrary to or involved an unreasonable application of federal law. Petitioner's federal grounds based on his challenge to the indictment fail.

B. Grounds One through Three and Seven, Based on Temporary Lack of Counsel

Skall, who represented Petitioner at trial and sentencing, informed the sentencing court that she would be filing Petitioner's motion for a new trial immediately after sentencing and asked to be excused. (See Resp't Ex. 6(a) at 111 [7-6 at 111]; Resp't Ex. 6(e) at 788, 796 [7-10 at 3, 11]). The court excused Skall, and Skall timely filed the motion for a new trial. (Resp't Ex. 6(a) at 111 [7-6 at 111]; Resp't Ex. 6(e) at 796 [7-10 at 11]).

In a document received by the court in May 2012, Petitioner, *pro se*, requested substituted counsel of record, and new counsel Teri L. Smith filed an entry of appearance in July 2012. (Resp't Ex. 6(a) at 113-15, 131 [7-6 at 113-15, 131]). Smith subsequently filed two amendments to the motion for a new trial. (Id. at 137-38, 148-50 [7-6 at 137-38, 148-50]).

On January 8, 2013, at the initial hearing on the motion for a new trial, the trial court allowed Petitioner to proceed *pro se* after giving the full panoply of warnings under Faretta v. California, 422 U.S. 806 (1975), and continued the hearing.[8] (See Resp't Ex. 6(a) at 188 [7-6 at 187]). Also at the hearing, Petitioner filed a *pro se* motion for leave of court to file a motion in arrest of judgment,[9] which the trial court considered and denied. (Id. at 153-54, 164 [7-6 at 153-54, 164]).

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[8] Petitioner asked for a continuance to prepare an amended motion that would "contain all the issues to be explored before this court," and the court granted the continuance. (Resp't Ex. 6(e) at 808-10 [7-10 at 23-25]).

[9] Therein, Petitioner asked that the time for filing a motion in arrest of judgment be extended because he had been without counsel during the time for filing a motion in arrest of judgment. (Resp't Ex. 6(a) at 154 [7-6 at 154]). As stated in the discussion below, any motion in arrest of judgment should have been filed by November 6, 2011.

Petitioner, *pro se*, subsequently amended his motion for a new trial. (Id. at 174-80 [7-6 at 174-81]). The continued hearing was held on February 12, 2013, and on February 26, 2013, the trial court denied the motion for a new trial. (Id. at 187-92 [7-6 at 188-93]).

On direct appeal, in enumeration of error seven, Petitioner argued that he was deprived of due process and court access, under the Fifth, Sixth, and Fourteen Amendments, when the trial court excused trial counsel and he was without counsel after sentencing until July 2012, which made Petitioner unable to file a timely motion in arrest of judgment in order to challenge the indictment.[10] (Resp't Ex. 6(f) at 913-15 [7-11 at 35-37]).

The Georgia Supreme Court explicitly rejected the access to courts claim and implicitly rejected the Sixth Amendment and due process claim –

> Contrary to [Petitioner's] assertion, his right of access to the court was not improperly limited when the trial court denied his request to file an untimely motion in arrest of judgment. [Petitioner] has been afforded ample opportunity, both through counsel and pro se, to assert all of his enumerations of error in his motion for new trial and now on appeal.

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[10] In enumeration of error ten, alleging ineffective assistance of trial counsel, Petitioner indicated that the motion in arrest of judgment would have served to challenge the indictment. (Resp't Ex. 6(f) at 929 [7-11 at 51]).

Reed, 294 Ga. at 881, 757 S.E.2d at 88.

Petitioner raised the matter again in his state habeas proceedings, and the state habeas court declined addressing the issue again as it had been addressed by the Georgia Supreme Court. (Resp't Ex. 4 at 3).

In his federal grounds one through three and seven, Petitioner challenges the state trial court's failure to provide counsel during the time when a motion in arrest of judgment (which he asserts is the proper vehicle for raising challenges to the indictment) could have been filed, which (1&2) deprived Petitioner of the opportunity to pursue such motion, (3) provides cause for the default of grounds (challenges to the indictment) that should have been raised in such motion, and (7) restricted Petitioner's access to the court to file a motion in arrest of judgment. (Pet. at 6A, 6B, 6E; see Pet'r Reply at 10).

Respondent argues that grounds one through three are new and procedurally defaulted, that ground three fails to state a constitutional claim, and that ground seven fails to state a claim for relief as it deals with an infirmity in state collateral proceedings. (Resp't Br. at 4-7, 15). Petitioner replies that he did raise the issue in state court. (Pet'r Reply at 1-4).

Ground three fails as Petitioner's challenge to the indictment was addressed by both the Georgia Supreme Court and the state habeas court. See supra III. A. Petitioner does not need to overcome a default. Accordingly, ground three provides no ground for relief.

Otherwise, to the extent that the state provides for direct post-conviction review, "[t]he fourteenth amendment guarantees a constitutional right of access to state courts which assures the indigent defendant an adequate opportunity to present his claims fairly." Byrd v. Wainwright, 722 F.2d 716, 718 (11th Cir. 1984) (citing Ross v. Moffitt, 417 U.S. 600, 606-09, 616 (1974)). Federal due process guarantees fundamental fairness – the "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." Lisenba v. People of State of California, 314 U.S. 219, 236 (1941). "[A] trial is unfair if the accused is denied counsel at a critical stage of his trial." United States v. Cronic, 466 U.S. 648, 659 (1984). Generally, under the Sixth Amendment, the right to counsel extends to a pre-appeal, motion for a new trial and to direct appeal. See United States v. Berger, 375 F.3d 1223, 1226 (11th Cir. 2004). However, "it does

not follow that every lapse in representation, however brief and inconsequential, deprives a criminal defendant of his rights under the Sixth Amendment. If the lapse (though always regrettable) does not prejudice the defendant in defending himself against the criminal charge, it does not justify nullifying his conviction." Young v. Duckworth, 733 F.2d 482, 483-84 (7th Cir. 1984) (dealing with lapse in representation between first court appearance and arriagnment); see also United States v. Espinoza-Guerrero, 205 Fed. Appx. 759, 760 (11th Cir. 2006) (finding that court's failure to appoint new counsel within seven-day time period allowed for bringing a motion for a new trial to attack trial counsel's assistance was not plain error when the defendant would be able to challenge trial counsel's assistance in a 28 U.S.C. § 2255 motion).

Under Georgia law, a challenge to the substantive sufficiency of an indictment may be raised in a general demurrer and, if no demurrer is raised before judgment, the remedies are arrest of judgment or habeas corpus. Harris v. State, 258 Ga. App. 669, 670-71, 574 S.E.2d 871, 872-73 (2002); O.C.G.A. § 17-9-61(a) ("When a judgment has been rendered, either party may move in arrest thereof for any defect not amendable which appears on the face of the record or pleadings."). A motion in arrest of judgment must be made during the term in which the judgment was obtained.

O.C.G.A. § 17-9-61(b). The term of Court for DeKalb County commences on the first Monday in January, March, May, July, September, and November. O.C.G.A. § 15-6-3(37). Petitioner's October 11, 2011 sentence was imposed within the term of court that began on September 5, 2011, and ended on November 6, 2011, and any motion in arrest of judgment was due by November 6, 2011.

There is no controversy that Petitioner was represented through trial and sentencing and for his proceedings on the motion for a new trial (until he voluntarily decided to proceed *pro se* on the motion for a new trial and appeal). The issue is whether a lapse in active representation between October 11 and November 6, 2011, when Petitioner could have filed a timely motion in arrest of judgment, deprived him of his Sixth Amendment right to counsel or due process and right to court access, which constitutional claims the Court construes Petitioner to raise in federal grounds one, two, and seven and that he fairly raised in the Georgia Supreme Court.

Petitioner has not shown that the lapse denied him the right to counsel under the Sixth Amendment, prejudiced him, or deprived him of fundamental fairness or an adequate opportunity to present his claims fairly. The post-sentencing lapse did not deprive Petitioner of the opportunity, while represented by trial counsel, to contest the substance of the indictment via a demurrer or via a motion to quash during

trial. See McKay v. State, 234 Ga. App. 556, 559, 507 S.E.2d 484, 488 (1998) (discussing demurrers and motion to quash). There is nothing to indicate that trial counsel was prohibited from filing a protective motion in arrest of judgment, as she did with the motion for a new trial.[11] Further, Petitioner filed a *pro se* request for substitute counsel in May 2012, and there appears to be no reason that he could not have done so before November 6, 2011 or that an earlier request would have been disregarded. Additionally, Petitioner was able on direct appeal to challenge the indictment, and the Georgia Supreme Court found no defect in the indictment. Petitioner also was able to raise the indictment issue in the state habeas court, which found the indictment claims to be without merit. Therefore, a demurrer or a post-judgment motion in arrest of judgment would not have been successful. Petitioner fails to show that no reasonable reviewing Court could have rejected a claim that the lapse violated Petitioner's right to counsel, court access, and/or due process. Grounds one through three and seven fail.

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[11] Trial counsel's failure to do so would be a matter related to counsel's effectiveness not a matter related to the denial of counsel.

C. **Ground Nine**

On direct appeal, Petitioner argued that by admitting that the date in the indictment was incorrect, the state "set the time bar against its own prosecution" and failed to show that the offenses were prosecuted within the statute of limitations. (Resp't Ex. 6(f) at 907-12 [7-11 at 29-34]). The Georgia Supreme Court found that the argument was without merit :

> There is no limitation period for murder, see OCGA § 17-3-1(a), and the other offenses of which Reed was charged and convicted are subject to a four-year limitation period. . . . As Reed was indicted in August 2009 for offenses occurring in March 2007, his prosecution was well within the application limitation period.

Reed, 294 Ga. at 880 n.3, 757 S.E.2d at 88 n.3.

In federal ground nine, Petitioner again asserts that as a result of the incorrect date in the indictment the state "set the time bar" against prosecuting Petitioner on the charged offenses, in violated of federal due process. (Pet. at 6E; Mot. for Leave to File Am. Pet. at 6-7). Respondent urges the Court to defer to the Georgia Supreme Court's decision. (Resp't Br. at 14-15).

"We have stated many times that federal habeas corpus relief does not lie for errors of state law." Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (quoting Estelle v. McGuire, 502 U.S. 62, 67 (1991)) (internal quotation marks omitted). State law

statutes of limitations for the prosecution of state crimes, and the interpretation of those statutes, are matters of state law and provide no grounds for federal habeas corpus relief. See Belvin v. Addison, 561 F. App'x 684, 686 (10th Cir. 2014) ("[A] state's misapplication of its own statute of limitations does not violate federal due process per se." (citing cases including Erickson v. Sec'y for Dep't of Corr., 243 F. App'x 524, 527 (11th Cir. 2007))). To the extent that a state-law matter has been exhausted as a federal due process claim, the federal court reviews a state law issue only to determine whether it "so infused the trial with unfairness as to deny due process of law." Taylor v. Sec'y, Florida Dep't of Corr., 760 F.3d 1284, 1295 (11th Cir. 2014) (quoting Lisenba, 314 U.S. at 228) (internal quotation marks omitted).

It does not appear that Petitioner exhausted ground nine as a federal due process claim in state court. Further, the Court perceives no error in the state court's decision on a matter of state law that rises to the level of offending due process. Ground nine fails.

D. Ground Fourteen

In his state habeas petition, Petitioner argued that the trial court abused its discretion in denying the motion for a new trial. (See Resp't Ex. 4 at 5). The state habeas court denied the claim as meritless. (Id.).

In federal ground fourteen, Petitioner again asserts that the trial court abused its discretion in denying the motion for a new trial – Petitioner asserts that the court should have reversed his conviction when the state, at the hearing on the motion for a new trial, stipulated that no exact date was established for the crimes. (Pet. at 6G; Mot. for Leave to File Amended Pet. at 13; see also Resp't Ex. 6(e) at 827 [7-10 at 42] (state stipulating, at hearing on motion for a new trial, that the date of the exact date of the murder was not established). Respondent states that this claim presents a matter of state law and provides no ground for federal relief. (Resp't Br. at 16).

The Court agrees with Respondent that whether the trial court abused its discretion in denying the motion for a new trial is a matter of state law. See Swarthout, 562 U.S. at 219. Further, as elsewhere discussed, Petitioner has not shown that his federal constitutional rights were violated in regard to the underlying issue of the incorrect date in the indictment.

IV. Certificate of Appealability

Under Rule 11 of the Rules Governing § 2254 Cases, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." The Court

will issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The applicant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Melton v. Sec'y, Fla. Dep't of Corr., 778 F.3d 1234, 1236 (11th Cir. 2015) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)) (internal quotation marks omitted).

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, the prisoner in order to obtain a COA, still must show both (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Lambrix v. Sec'y, DOC, 872 F.3d 1170, 1179 (11th Cir.) (quoting Slack, 529 U.S. at 484), cert. denied, _ U.S. _, 138 S. Ct. 312 (2017).

The undersigned recommends that a COA be denied because it is not reasonably debatable that Petitioner has failed to meet his burden under the AEDPA. If the Court adopts this recommendation and denies a COA, Petitioner is advised that he "may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Rule 11(a), Rules Governing § 2254 Cases in the United States District Courts.

V. Conclusion

For the reasons stated above,

IT IS RECOMMENDED that the instant petition [1] be **DENIED**, that a certificate of appealability be **DENIED**, and that this action be **DISMISSED**.

The Clerk is **DIRECTED** to withdraw the reference to the Magistrate Judge.

IT IS SO ORDERED, RECOMMENDED, and DIRECTED, this 17th day of December, 2019.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE

SUPREME COURT OF GEORGIA
Case No. S17H1626

Atlanta, June 04, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

MARK R.A. REED v. ROBERT TOOLE, WARDEN

From the Superior Court of Tattnall County.

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

Trial Court Case No. 2014-HC-99

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.

Sue C. Fulton, Chief Deputy Clerk

APPENDIX-D- 2 Order of the Georgia Supreme Court, denying Direct Appeal,

March 8, 2014.....No subject matter juridiction.....1-11

In the Supreme Court of Georgia

Decided: March 28, 2014

S13A1583. REED v. THE STATE.

HUNSTEIN, Justice.

Appellant Mark Reed was convicted of malice murder and other offenses in connection with the 2007 shooting death of Marlon Green. Proceeding pro se, Reed appeals the denial of his motion for new trial on numerous grounds. Finding no error, we affirm.[1]

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[1]The crimes were committed in March 2007. Reed and co-indictee LaShawn Payne were indicted in August 2009 by a DeKalb County grand jury for malice murder, felony murder, aggravated assault, theft by taking, theft by receiving, concealing the death of another, and possession of a firearm during commission of a felony. At the conclusion of a September 2011 jury trial in which Payne testified under a plea deal for the State, Reed was convicted on all counts. Reed was sentenced to life imprisonment for murder, a consecutive ten-year term for theft by taking, another consecutive ten-year term for concealing a death, a concurrent ten-year term for theft by receiving, and a consecutive five-year term for firearm possession, for a total term of life plus 25 years. The remaining charges merged or were vacated by operation of law. A timely motion for new trial was filed on October 11, 2011. After appointment of new appellate counsel, the new trial motion was amended on November 27, 2012 and again on January 3, 2013. Reed then filed a pro se motion for leave to file an untimely motion in arrest of judgment, which was denied. At a hearing held on January 8, 2013, Reed requested leave to proceed pro se, which the trial court granted. Thereafter, Reed filed two amended motions for new trial, and a hearing was held on February 12, 2013. The new trial motion was denied on February 26, 2013; by separate order on the same date, the trial court vacated Reed's convictions and sentences for theft by taking and theft by receiving on the ground that they were mutually exclusive, Ingram v. State, 268 Ga. App. 149

Viewed in the light most favorable to the verdict, the evidence adduced at trial established as follows. In 2006, Reed moved from California to Atlanta with his girlfriend, LaShawn Payne, and her 13-year-old son, Cameron Thomas. They began renting a home in DeKalb County from Marlon Green. During their occupancy, Reed became suspicious that Green did not actually own the property and was perpetrating a fraud on them. After discovering that Green's name was not on the deed to the property, Reed and Payne stopped paying rent.

In early March 2007, Green drove to the home. Seeing Green drive up, Reed told Payne to retrieve his shotgun. The two men argued in the yard for some time and then entered the house together, still arguing. Reed directed Green to sit down, asked Green who he really was, and then grabbed the shotgun and shot Green in the chest. Green fell to the floor, bleeding, and quickly died. Thomas, who was surreptitiously watching the confrontation from the stairwell leading to the second floor of the house, witnessed the shooting, though he feigned ignorance when his mother came upstairs to check on him shortly

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(5) (601 SE2d 736) (2004), and ordered Reed resentenced to life plus a 15-year consecutive term. Reed filed a pro se notice of appeal on March 27, 2013. The appeal was docketed to the September term of this Court and was thereafter submitted for decision on the briefs.

thereafter.

Reed, who told Payne she "[didn't] have any choice in this," directed Payne to clean up the blood and other evidence of the crime. Reed removed Green's body, wrapped it in a tarp, and loaded it into the trunk of Green's car. Reed and Payne next drove to a nearby abandoned home with a large wooded lot, where they buried the body. Reed then drove Green's car to Queens, New York, where he abandoned it. At Reed's direction, Payne followed him in her car to New York, and the two drove back to Georgia together. They continued living in the DeKalb County home and took further measures to conceal all traces of the crime, repainting the interior walls and sanding down the floors. In September 2007, after receiving notice of the pending foreclosure on the property, they returned to California.

At some point after returning to California, Thomas confided in his father about what he had witnessed. Local law enforcement were contacted, and both Thomas and Payne were questioned. Payne gave authorities a detailed statement about the crime and drew a map of the location where Green's body was buried. DeKalb police were notified, whereupon they searched the location Payne had provided and found skeletal remains, with shotgun pellets embedded therein, as

well as a plastic tarp and some items of jewelry and decayed clothing. Green's mother later identified the jewelry as having belonged to her son, and mitochondrial DNA analysis further corroborated the identity of the remains.

1. Though Reed has not specifically enumerated the general grounds, we find that the evidence as summarized above was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Reed was guilty of the crimes for which he was convicted and sentenced. Jackson v. Virginia, 443 U. S. 307 (99 SCt 2781, 61 LE2d 560) (1979).

2. Reed contends that the trial court erred in allowing Payne to testify regarding Reed's threats to harm her and her family if she failed to cooperate with him after the murder, as well as physical and sexual abuse Reed inflicted upon her both before and after the murder. Reed moved in limine to exclude such testimony, arguing that it was not relevant to the issues in the case and that it improperly placed his character in issue. The trial court held the testimony admissible to explain Payne's state of mind and conduct in the aftermath of the murder.

We find no abuse of discretion in this ruling. Payne was clearly the State's star witness, and the defense's strategy was primarily to attack her

credibility by questioning why she had failed to report the crimes for so long and suggesting that she came forward only when she needed leverage with police regarding another matter. The State thus properly sought to adduce Payne's testimony regarding Reed's abuse and threats to rebut this line of attack by showing that Payne's conduct was driven by fear. As we have noted, "[e]vidence that is material in explaining the conduct of [a] witness does not become inadmissible simply because defendant's character is incidentally put in issue." Hall v. State, 264 Ga. 85, 86 (2) (441 SE2d 245) (1994); accord Dyers v. State, 277 Ga. 859 (2) (596 SE2d 595) (2004). The defense made an issue of Payne's conduct in failing to come forward, and the evidence of Reed's threats and abuse was relevant to explaining that conduct.[2]

3. Several of Reed's enumerations of error center on the fact that the

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[2]To the extent Reed now asserts error, with regard to this evidence, in the trial court's failure to comply with Uniform Superior Court Rule 31.3 (requiring prior notice and hearing as to admissibility of similar transaction evidence), this argument was waived, as Reed's counsel conceded at the hearing on the motion in limine that "[t]his is not similar transaction evidence." See Goodman v. State, 293 Ga. 80 (3) (742 SE2d 719) (2013) (defendant waived argument regarding non-compliance with Rules 31.1 and 31.3 by failing to object on such grounds at trial); Jones v. State, 239 Ga. App. 832 (1) (a) (521 SE2d 614) (1999) (trial counsel's concession at trial that the Rule 31.1 and 31.3 notice and hearing requirements did not apply constituted an affirmative waiver of the issue on appeal).

indictment cites the date of the murder as "on or about the 21st day of May, 2007," when in fact the evidence shows that the murder occurred in early March of 2007. However,

> [e]ven though it has been held that a definite date of an offense should be alleged in an indictment, the state is not restricted to proof of the date stated. It is sufficient if the evidence demonstrates that the offense was committed at any time within the statute of limitations.

(Footnotes omitted.) Jack Goger, Daniel's Ga. Criminal Trial Practice, § 13-6 (2013-2014 ed.). Thus, except where the exact date of the offense is alleged to be an essential element thereof or where the accused raises an alibi defense, any variance between the date listed in the indictment and the date on which the crime is proven to have occurred is of no consequence. Id; accord Eberhardt v. State, 257 Ga. 420 (2) (359 SE2d 908) (1987). Here, the May 21, 2007 date was not alleged to be an essential element of any of the offenses charged, and Reed did not assert an alibi defense. In addition, the allegations were sufficiently clear and specific to afford Reed adequate notice of the charges he was facing and to preclude future prosecution for the same offenses. See Roscoe v. State, 288 Ga. 775 (3) (707 SE2d 90) (2011) (fatal variance between allegations and proof will be found only if allegations do not sufficiently inform the accused of

the charges so as to enable him to present a defense or are not adequate to protect the accused against future prosecution for the same crimes). Therefore, the erroneous date cited in the indictment provides no basis for reversal of Reed's convictions.[3]

4. Reed also claims that the State failed to prove definitively the identity of the victim's skeletal remains and therefore failed to establish the corpus delicti by proof beyond a reasonable doubt. See Benson v. State, __ Ga. __ (1) (754 SE2d 23, 27) (2014) ("corpus delicti is established by proof 'that the person alleged in the indictment to have been killed is actually dead, and second, that the death was caused or accomplished by violence, or other direct criminal agency of some other human being'"). Here, the State's DNA expert testified that, though mitochondrial DNA testing is not capable of establishing a definitive "match" to a single individual, her testing in this case established that the DNA sequence from the femur bone recovered from the burial site was the

[3]To the extent Reed also contends in this regard that his prosecution occurred outside the statute of limitations, this argument is meritless. There is no limitation period for murder, see OCGA § 17-3-1 (a), and the other offenses of which Reed was charged and convicted are subject to a four-year limitation period. See id. at (c). As Reed was indicted in August 2009 for offenses occurring in March 2007, his prosecution was well within the application limitation period.

same as the sequence revealed from testing a DNA sample from Green's mother. Based on this finding, the expert testified that she "cannot exclude" Green as being the source of the DNA sample she tested, and that such a finding is the most definitive conclusion this type of DNA testing can generate. This evidence, together with Green's mother's testimony that the ring and beads recovered from the burial site belonged to her son, was plainly sufficient to establish beyond a reasonable doubt that the victim whose remains were recovered was, in fact, Green. See Edgehill v. State, 253 Ga. 343 (1) (320 SE2d 176) (1984) (testimony that jewelry and clothes found on the victims were articles belonging to them, together with forensic expert's conclusions based on dental records, held sufficient to identify the victims); Reddick v. State, 202 Ga. 209 (2) (42 SE2d 742) (1947) (corpus delicti proven in part by the ring worn by the victim and identified by the victim's children).

5. Contrary to Reed's assertion, his right of access to the court was not improperly limited when the trial court denied his request to file an untimely motion in arrest of judgment. Reed has been afforded ample opportunity, both through counsel and pro se, to assert all of his enumerations of error in his motion for new trial and now on appeal.

6. Reed contends that there was insufficient evidence to corroborate the testimony of Payne, an admitted accomplice. Under former OCGA § 24-4-8,[4] "[i]n felony cases where the only witness is an accomplice, the testimony of a single witness is not sufficient and must be supported by the testimony of at least one other witness or by corroborating circumstances." (Citations and punctuation omitted.) Hamm v. State, S13A1696, slip op. at 6 (decided March 17, 2014). Here, the murder, aggravated assault, and firearm possession offenses were corroborated by the testimony of Payne's son, Cameron Thomas, an eyewitness to the shooting. With regard to the concealing of a death offense, though there were no witnesses other than Payne with firsthand knowledge about the secreting and burial of Green's body, there was ample circumstantial corroboration in the form of the skeletal remains unearthed from the precise location where Payne told police they had buried the body. See id. (corroborating evidence may be circumstantial). This enumeration is without merit.

7. Reed also asserts that trial counsel was ineffective (a) for failing to

[4]Under the new Georgia Evidence Code, effective for trials conducted on or after January 1, 2013, this concept is now codified at OCGA § 24-14-8.

seek to quash or otherwise object to the indictment, based on its citing an erroneous date of offense, and for failing to request a limiting instruction as to the error; and (b) for failing to request a jury instruction on voluntary manslaughter. To establish ineffective assistance of counsel, a defendant must show that his trial counsel's performance was professionally deficient and that but for such deficient performance there is a reasonable probability that the result of the trial would have been different. Strickland v. Washington, 466 U. S. 668, 695 (104 SCt 2052, 80 LE2d 674) (1984); Wesley v. State, 286 Ga. 355 (3) (689 SE2d 280) (2010). To prove deficient performance, one must show that his attorney "performed at trial in an objectively unreasonable way considering all the circumstances and in the light of prevailing professional norms." Romer v. State, 293 Ga. 339, 344 (3) (745 SE2d 637) (2013). Courts reviewing ineffectiveness claims must apply a strong presumption that counsel's conduct fell within the wide range of reasonable professional performance. Id. Thus, decisions regarding trial tactics and strategy may form the basis for an ineffectiveness claim only if they were so patently unreasonable that no competent attorney would have followed such a course. Id. If the defendant fails to satisfy either the "deficient performance" or the "prejudice" prong of the

Strickland test, this Court is not required to examine the other. See Green v. State, 291 Ga. 579 (2) (731 SE2d 359) (2012).

(a) With regard to the date listed in the indictment, we have already determined in Division 3 that the error did not render the indictment fatally defective. For this reason, trial counsel did not render deficient performance in failing to object on this basis. See Wesley, 286 Ga. at 356 (failure to make meritless objection does not constitute deficient performance).

(b) As to the failure to request an instruction on voluntary manslaughter, even if we were to find that there was slight evidence necessitating the giving of such an instruction upon request, see Harris v. State, 263 Ga. 492 (2) (435 SE2d 671) (1993), we cannot find that trial counsel's performance was objectively unreasonable given Reed's failure to adduce any testimony from trial counsel at the new trial hearing. See Davis v. State, 280 Ga. 442, 443 (2) (629 SE2d 238) (2006) (where trial counsel does not testify at new trial hearing, "it is extremely difficult to overcome th[e] presumption" that trial counsel's conduct fell "within the wide range of reasonable professional assistance").

Accordingly, all of Reed's enumerations of error lack merit, and we therefore affirm.

Judgment affirmed. All the Justices concur.

TATTNALL COUNTY GA
CLERK'S OFFICE
2017 APR 13 AM 9:03
CLERK OF COURTS

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

MARK RUDOLPH ARSENIO REED, GDC 100066435	)	
Petitioner,	)	**CASE NO. 2014-HC-99-CR**
vs.	)	
ROBERT TOOLE, WARDEN,	)	
Respondent.	)	**HABEAS CORPUS**

sent copy to Pet, Ags law clerks warden asst 4-13-17

FINAL ORDER

Petitioner, Mark Rudolph Arsenio Reed, (the "Petitioner") filed the instant petition on November 26, 2014, challenging his October 2011 DeKalb County jury trial convictions for malice murder, theft by taking, theft by receiving, concealing the death of another, and possession of a firearm during the commission of a felony, for which Petitioner received an aggregate sentence of life plus twenty-five years. Having reviewed the transcript and evidence presented at the February 17, 2016 hearing in this case, and based on the entire record herein, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner originally filed ten grounds for relief in his original petition. He then filed an amendment on February 4, 2016, withdrawing grounds 1, 2, 3, 5, 7, 8, and 10, and adding other grounds for a total of fourteen grounds for relief. Petitioner's convictions and sentences were affirmed on direct appeal. Reed v. State, 294 Ga. 877, 757 S.E.2d 84 (2014).

I. **Impermissible Amendment of the Indictment by the Prosecutor.**

Petitioner argues that the original indictment alleged that all offenses occurred on May 21, 2007. During trial the State said that the date on the indictment was incorrect. Petitioner argues that the State never established the correct date on the record or otherwise making the indictment void. The Court finds that this issue was decided adversely to Petitioner on direct appeal and may not be re-litigated in habeas corpus. Reed v. State, 294 Ga. 877, 757 S.E.2d 84 (2014), Gaither v. Gibby, 267 Ga. 96, 97, 475 S.E.2d 603 (1996). The appellate court ruled that an erroneous date of murder on the indictment did not render the indictment invalid. The date of the offense was not alleged to be an essential element of any of the offenses charged. Given the facts in this case, Petitioner buried the body and it was not discovered until later; the State was not able to prove the exact date on which the victim died. The prosecution was allowed to state that the date was incorrect. The Court finds this claim to be without merit.

II. **Impermissible Amendment to the Indictment Denying Petitioner of a Fair Trial.**

Petitioner argues that the impermissible amendment to the indictment denied Petitioner of his defense, right to a fair trial, and right to due process. Again, the Court does not find an impermissible amendment to the indictment. The Court finds this claim to be without merit.

III. **Constructive Amendment to the Indictment.**

Petitioner argues that the trial court admitted to the jury that the date in the indictment was incorrect. The Court finds that this issue was decided adversely to Petitioner on direct appeal and may not be re-litigated in habeas corpus. Reed v. State,

294 Ga. 877, 757 S.E.2d 84 (2014), Gaither v. Gibby, 267 Ga. 96, 97, 475 S.E.2d 603 (1996). The Court finds this claim to be without merit.

IV. **Court Restricted Petitioner Access to the Court to File Motion in Arrest of Judgment.**

Petitioner argues that his trial counsel was dismissed after trial but did file a skeleton motion for new trial. Petitioner states that he was prevented from filing a motion in arrest of judgment himself because he was still represented. The Court finds that this issue was decided adversely to Petitioner on direct appeal and may not be re-litigated in habeas corpus. Reed v. State, 294 Ga. 877, 757 S.E.2d 84 (2014), Gaither v. Gibby, 267 Ga. 96, 97, 475 S.E.2d 603 (1996). The Court finds this claim to be without merit.

V. **Impermissible Amendment of the Indictment.**

The Court has already addressed this ground above. The Court does not find an impermissible amendment to the indictment. The Court finds this claim to be without merit.

VI. **"State Set the Time Bar Against the Prosecution of the Offenses Petitioner Convicted for."**

Petitioner argues that that the indictment had an incorrect date and the State never provided a correct date. Therefore, Petitioner argues that the State never proved a date for the statute of limitations. The appellate court ruled that the erroneous date did not render the indictment invalid. There is no applicable statute of limitation for the offense of murder. State v. Jones, 274 Ga. 287, 553 S.E.2d 612 (2001). Additionally, when crimes are concealed or unknown, the applicable statute of limitations begins when the crime becomes known to the State. State v. Crowder, 338 Ga.App. 642, 791 S.E.2d

423 (2016). The statute of limitations did not begin for Petitioner's crimes other than murder until the crimes were discovered. The Court finds this claim to be without merit.

VII. **Indictment Impermissibly Amended to Correct Defects.**

Petitioner argues that the State struck defects from the indictment. The Court finds that this issue was decided adversely to Petitioner on direct appeal and may not be re-litigated in habeas corpus. Reed v. State, 294 Ga. 877, 757 S.E.2d 84 (2014), Gaither v. Gibby, 267 Ga. 96, 97, 475 S.E.2d 603 (1996). The Court finds this claim to be without merit.

VIII. **Void Indictment.**

Petitioner argues that the indictment is void. The Court finds that this issue was decided adversely to Petitioner on direct appeal and may not be re-litigated in habeas corpus. Reed v. State, 294 Ga. 877, 757 S.E.2d 84 (2014), Gaither v. Gibby, 267 Ga. 96, 97, 475 S.E.2d 603 (1996). The Court finds this claim to be without merit.

IX. **Defective Verdict as a Matter of Law.**

Petitioner argues that the verdict was not consistent with the law or evidence. The appellate court held that the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Petitioner was guilty of the crimes for which he was convicted and sentenced. Reed v. State, 294 Ga. 877, 757 S.E.2d 84 (2014). The Court finds that the verdict was consistent with the law and evidence in this case. The Court finds this claim to be without merit.

X. **Judgment and Conviction Void.**

Petitioner argues that the indictment does not allege the correct date. The Court finds that this issue was decided adversely to Petitioner on direct appeal and may not

be re-litigated in habeas corpus. Reed v. State, 294 Ga. 877, 757 S.E.2d 84 (2014), Gaither v. Gibby, 267 Ga. 96, 97, 475 S.E.2d 603 (1996). The Court finds this claim to be without merit.

XI. **The Year-and-a-Day Rule Applies.**

The Petitioner argues that the year-and-a-day rule applies and that the trial court violated the common law principle and its application in Petitioner's case. Under common law, the year-and-a-day rule states that a defendant cannot be indicted for homicide if death did not occur within one year and one day of the injury caused by defendant. That common law rule was abolished in Georgia in 1968 and is inapplicable to Petitioner's case. Furthermore, the evidence shows that the victim was killed immediately; it was discovery of his murder and body that occurred later, making that rule irrelevant even if it was indeed good law. The Court finds this claim to be without merit.

XII. **Void and Unconstitutional Sentence.**

The Petitioner argues that the sentence is not valid because there was not a correct date on the indictment. The Court has repeatedly addressed the issue of the erroneous date on the indictment in earlier grounds. The Court finds this claim to be without merit.

XIII. **The Trial Court Abused Discretion in Denying Motion for New Trial.**

The Petitioner argues that the court abused its discretion in denying the Motion for New Trial because Petitioner's arguments in that Motion were regarding the incorrect date. The Court has repeatedly addressed the issue of the erroneous date on the indictment in earlier grounds. The Court finds this claim to be without merit.

XIV. **The Allegations in the Indictment and Evidence do not Correspond.**

Petitioner argues that the prosecution admitted that the date on the indictment was incorrect violating Petitioner's right to due process. The Court has repeatedly addressed the issue of the erroneous date on the indictment in earlier grounds. The Court finds this claim to be without merit.

CONCLUSION

Having fully considered all of Petitioner's claims and finding that he has failed to prove that he is entitled to relief, IT IS HEREBY ORDERED that Petitioner's Application for Writ of Habeas Corpus be **DENIED.**

If Petitioner desires to appeal this Order, he must file a written application for a certificate of probable cause to appeal within thirty (30) days from the date of the filing of this Order and also file a Notice of Appeal with the Clerk of the Superior Court of Tattnall County within the same thirty (30) day period. The Clerk of the Superior Court of Tattnall County is hereby directed to mail a copy of this Order to Petitioner, Respondent, and the office of the Attorney General of Georgia.

This 6th day of April, 2017.

Charles P. Rose, Jr.
Judge, Superior Courts of Georgia
Atlantic Judicial Circuit

APPENDIX F – 1 Order of the Dekalb County Superior Court, denying Motion for New Trial, February 26, 2013 .....No subject matter jurisdiction..... 1-6

IN THE SUPERIOR COURT

OF DEKALB COUNTY

STATE OF GEORGIA,

v.

MARK REED,

Defendant.

CASE NO. 09CR4282-4

ORDER DENYING MOTION FOR NEW TRIAL

A DeKalb County jury found Mark Reed guilty on all counts of the above styled indictment.[1] He was sentenced on October 11, 2011.[2] A timely motion for new trial was filed on Reed's behalf. An amended motion and a second amended motion for new trial were also filed on Reed's behalf. At a January 8, 2013 evidentiary hearing on the motions for new trial, after being given the full panoply of warnings prescribed by Faretta v. California,[3] Reed elected to proceed pro se during post conviction proceedings. The January 8, 2013 evidentiary hearing was continued at Reed's request in order for him to research and submit additional claims of error.

[1] Count 1, malice murder (victim Marlon Green); Count 2, felony murder (aggravated assault); Count 3, aggravated assault (shooting with shotgun); Count 4, theft by taking (Chevrolet Impala); Count 5, theft by receiving stolen property (Chevrolet Impala); Count 6, concealing the death of another; and Count 7, possession of a firearm during the commission of a felony.

[2] Subsequently, Reed's conviction and sentence on Counts 4 and 5 were vacated pursuant to Ingram v. State, 268 Ga. App. 149, 151 (2004).

[3] Faretta v. California, 422 U.S. 806 (1975).

Thereafter, following the submission of a third amended motion for new trial and two supplements to the third amended motion for new trial, an evidentiary hearing was held on February 12, 2013. After consideration of the record and evidence, the claims of error, and the arguments of the parties, this Court finds as follows.

1. The majority of the claims raised by Reed in his amended motions for new trial concern the date on which the murder of the victim occurred. These claims are based primarily on the fact that the indictment alleged that the murder occurred "on or about the 21st day of May, 2007," although the State did not know the date on which the murder actually occurred, and the prosecutor admitted as much at trial during opening argument.[4] Throughout the third amended motion for new trial and the two supplements thereto, Reed's date-related claims have been framed in a variety of ways that have been carefully reviewed by this Court. Each of these claims is without merit. Specifically,

[4] Reed murdered victim Marlon Green in 2007 when he shot the victim in the chest with a sawed-off shotgun. Law enforcement first learned of the murder in 2009, when accomplice LaShawn Payne came forward and gave a police statement implicating Reed and confessing her involvement in the concealment of the body. The victim's body was then exhumed from the makeshift grave in an abandoned wooded area where Reed and Payne had buried it in 2007. LaShawn Payne could not remember the exact date on which Reed shot the victim in the chest but thought that it occurred in May of 2007. The indictment alleged that Reed murdered the victim "on or about the 21st day of May, 2007". The prosecutor during opening argument informed the jury that the date in the indictment was "incorrect" and that the evidence would show the murder occurred as early as March of 2007. (T. 63-64).

(a) There is no statute of limitations as to murder, and the State proved that the offenses alleged in the remaining counts of the indictment occurred at an "appropriate date previous to the finding in the indictment and within the statute of limitation for the prosecution of the offense charged."[5]

(b) Any claims related to a "fatal variance" between alegata and probata are waived for failure to raise the claim at trial.[6] Moreover, there was no "fatal variance" simply because the indictment alleged a non-material date on which the offenses occurred.[7]

(c) There was no "constructive amendment" of the indictment when the prosecutor informed the jury during opening argument that the immaterial date alleged in the indictment may be incorrect.[8]

(d) Because Reed's date-related claims are legally meritless, they would not have provided a basis for either quashing the indictment, granting a directed verdict, or dismissing the indictment as "void."

For all of these reasons, Reed's allegations related to the date alleged in the indictment provide no basis for granting a motion for new trial.

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[5] Eberhardt v. State, 257 Ga. 420, 421 (1987); Williams v. State, 304 Ga. App. 592, 593-594 (2010).

[6] Shindorf v. State, 303 Ga. App. 553, 555-556 (2010).

[7] Id.; Lovelace v. State, 241 Ga. App. 774, 775 (2000).

[8] See Morris v. State, 310 Ga. App. 126, 128-129 (2011) ("a constructive amendment occurs when the *essential elements* of the offense contained in the indictment are altered").

2. The evidence in this case did not support a jury charge on the offense of voluntary manslaughter because there was no evidence of serious provocation within the meaning of OCGA 16-5-2 (a).[9] Consequently, Reed's claims related to a jury charge on voluntary manslaughter provide no basis for granting a motion for new trial.

3. Reed's trial defense made relevant the episodes of violence by Reed against LaShawn Payne, which established the reasonableness of her fear for her life and the lives of her family members if she came forward to tell the police about Reed's murder of the victim.[10] Accordingly, Reed's claims that this evidence was improperly "bolstering" and "irrelevant to the indicted offenses" provide no basis for granting a motion for new trial.

4. Reed claims error in the introduction of "similar transaction evidence." However, no similar transaction evidence was introduced in this case. The evidence about which Reed complains was admissible either as part of the res gestae of the indicted offenses or as part of the prior difficulties evidence between LaShawn Payne and Reed, as discussed in Division 3 above. No basis for granting a motion for new trial has been shown.

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[9] Merritt v. State, 2013 Ga. LEXIS 69 (decided January 22, 2013).
[10] Cannon v. State, 288 Ga. 225, 228 (2010); Carroll v. State, 255 Ga. App. 514, 515 (1980).

5. This Court finds that Reed received effective assistance of counsel under the standard established in Strickland v. Washington.[11] None of Reed's legal claims of error have merit so as to render his trial attorney "ineffective" for failing to raise them. Moreover, Reed did not call his trial attorney to testify at the motion for new trial hearing, and he "failed to present any evidence to overcome the strong presumption that counsel's conduct f[ell] within the wide range of reasonable professional assistance."[12] No basis for granting a new trial has been shown on Reed's claims of ineffective assistance of trial counsel.

6. This Court finds that the testimony of eyewitness Cameron Thomas as to what occurred after Reed shot the victim - inclusive of his testimony that he smelled "Pine Sol"; that Reed and LaShawn were "cleaning"; that Reed and LaShawn used a "dollie"; that the victim's body and car were gone when he woke up; that LaShawn and Reed disappeared for almost two days and then returned together in the same car - was sufficient to corroborate the accomplice testimony of LaShawn Payne as to the offense of concealing the death of another as charged in the indictment. (T. 364-371).[13] Additionally, the evidence as a whole was sufficient for a rational trier of fact to have found Reed

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[11] Strickland v. Washington, 466 U.S. 668 (1984).
[12] Judkins v. State, 282 Ga. 580, 583-584 (2007); Boykin v. State, 264 Ga. App. 836, 841 (2003).
[13] Brown v. State, 291 Ga. 750, 752 (2012).

guilty beyond a reasonable doubt of the offenses for which he was convicted.[14] No basis for granting a new trial has been shown.

7. The mitochondrial DNA expert's testimony provided a sufficient basis for a reasonable juror to have found beyond a reasonable doubt that the victim was Marlon Green. (T. 403-404).[15]

8. This Court finds that Reed failed to establish that any of the errors he alleges in his motions for new trial affected the verdict in any way.[16]

For all of the above and foregoing reasons, the motions for new trial filed in the above styled case are hereby **DENIED**.

SO ORDERED, this 26 day of February, 2013.

Gail C. Flake

GAIL C. FLAKE, JUDGE
SUPERIOR COURT OF DEKALB COUNTY
STONE MOUNTAIN JUDICIAL CIRCUIT

cc: Leonora Grant, Assistant District Attorney
Mark Reed, Defendant

[14] Jackson v. Virginia, 443 U. S. 307 (1979).
[15] Jackson v. Virginia, supra.
[16] See, e.g., Madison v. State, 281 Ga. 640, 642 (2007) ("harm as well as error must be shown to authorize a reversal").

APPENDIX F – 2 Order of the Dekalb County Superior Court, denying Motion for production of court records etc., October ,5 2012 pg.1,2

FILED

IN THE SUPERIOR COURT OF DeKALB COUNTY
STATE OF GEORGIA

2012 OCT -5 A 11:49

CLERK OF SUPERIOR COURT
DEKALB COUNTY GA

STATE OF GEORGIA,	)	
	)	
	)	**Case No.: 09-CR-4282 -4**
vs.	)	
	)	
MARK REED,	)	
	)	
Defendant.	)	

ORDER DISMISSING MOTION TO COMPEL PRODUCTION OF DOCUMENTS, RECORDS AND TRANSCRIPTS

Defendant's pro se Motion to Compel Production of Documents, Records and Transcripts (filed July 30, 2012) came regularly before the Court for consideration. Upon review of the pleading and other matters of record, the Court finds as follows:

Defendant Reed was convicted by a jury on October 4, 2011, on all counts in the indictment. He was sentenced by this Court on October 11, 2011. Mr. Reed has a pending motion for new trial and is represented by counsel, Teri L. Smith. As a matter of law, all motions filed by the Defendant in a criminal case while he is represented by counsel have no legal effect whatsoever. Voils v. State, 266 Ga. App. 738, 742, 598 S.E.2d 38 (2004); Pless v. State, 255 Ga. App. 95, 96, 564 S.E.2d 508 (2002). As the Defendant is represented by counsel, the pro se motion is hereby **DISMISSED.**

SO ORDERED, this 4 day of October, 2012.

Gail C. Flake

GAIL C. FLAKE, Judge
DeKalb County Superior Court
Stone Mountain Judicial Circuit

cc: Lee Grant, Deputy Chief Assistant District Attorney
Teri L. Smith, Esq.

APPENDIX G – Prosecutor William Clark, Orally Amending Indictment, September 26, 2011.....Trial Transcript.....Cover, 63-lines 17-25, 64 line 1

IN THE SUPERIOR COURT FOR THE COUNTY OF DEKALB
STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
vs.	)	Indictment No.
	)	09CR4282-4
MARK REED	)	

JURY TRIAL
VOLUME I (Pages 1 - 80)

Proceedings before the Honorable Gail C. Flake, Superior Court Judge, and a jury, at the Dekalb County Courthouse, Decatur, Dekalb County, Georgia on September 26, 2011.

- - -

Appearances:

FOR THE STATE:	WILLIAM CLARK, Esq. Assistant District Attorney
FOR THE DEFENDANT:	KARLYN SKALL, Esq. Attorney at Law

Amanda Upton
Certified Court Reporter
P.O. Box 466343
Lawrenceville, Georgia 30042
678-683-5488

from a necklace.

The ME's office asked Ms. Beard if she could come and attempt to identify these items. And she was able to identify those items as having belonged to her son and described the clothes that he was wearing at the time of the disappearance. And those things matched up.

We found Mr. Green's body because of the information that Lashawn Payne gave to the police. Ms. Lashawn Payne will be here. And she will testify to you that she thought it was around May 21st of 2007.

And let me point that out at this point in time. The Judge read the indictment to you. And it has in there May 21st of 2007. Again, that came from what Ms. Payne told the police.

But the evidence is gonna show you that Mr. Thomas (SIC) was dead before that, around the beginning of March. So the date in the indictment is not correct.

But the date in the indictment does not have to be proved. Only that it's not an exact date but within the statute of limitations. And the Judge will give you some detailed instructions about that.

I don't want you as you're listening to the evidence to be waiting for what happened on May 21st because I believe all the evidence is gonna show the events took place between the beginning of March and March 7th as to

Mr. Thomas (SIC) being killed.

Ms. Payne will tell you that when Mr. Reed found out that, in essence, he was being ripped off he called the victim to the location at 4473 Flakes Mill Road.

She will tell you that Mr. Reed went outside and confronted Mr. Thomas and they had an argument outside. She will also tell you that she saw Mr. Reed place a shotgun close to the entrance to the house.

She will tell you that Mr. Marlon Green came into the house and sat down in what's like a breakfast nook, just sat in one of the tables at -- in one of the chairs at the table, Mr. Reed retrieved shotgun and shot Mr. Marlon Green one time in the chest.

Ms. Payne will also tell you that at that point in time Mr. Reed made her help in disposing of the body. They put Mr. Green's body into a tarp.

She will tell you that they put the body into the -- his vehicle, the rental vehicle. And she will tell you that she picked out the area in which to bury the body.

She will tell you that she was familiar with this location because it was another location that Mr. Green had showed them as being available for them to rent.

She picked this area because it was secluded and it was peaceful, it ran next to the river -- the river ran right next to it and that's where she wanted Mr. Green to

APPENDIX -H –1 Notice of Appointment, Gerard Kleinrock, January 18, 2012..1-5

OFFICE OF THE PUBLIC DEFENDER FOR THE
STONE MOUNTAIN JUDICIAL CIRCUIT
408 CALLAWAY BUILDING
120 WEST TRINITY PLACE
DECATUR, GA 30030
(404) 371-2222 • FAX (404) 371-2298

CLAUDIA S. SAARI
INTERIM CIRCUIT DEFENDER

January 18, 2012

Mark Reed
X0432524
DeKalb County Jail
8 NE 102

Dear Mr. Reed:

I have been appointed to represent you for your appeal. This letter is to explain the general appellate process, in case you are not familiar with it.

Karlyn Skall filed your motion for new trial on October 11, 2011. I will file all other appellate filings for you. We now have to wait to receive a transcript of your trial from the court reporter, which can sometimes take months. Unfortunately Georgia law only provides one free transcript, which of course is provided to your lawyer and not to you. See Heard v. Allen, 234 Ga. 409 (216 S.E.2d 306) (1975). Transcripts are very expensive, but if you want a copy you can purchase your own from the court reporter – I can give you the name of the court reporter if you are considering this. Note that immediately after my representation of you for your direct appeal has ended, I will send you my copy of the transcript.

The first possible court action in your appeal is a hearing on the motion for new trial. This hearing is scheduled by Judge Flake, and I cannot control the hearing date. The speed at which these hearings are reached varies considerably. Some cases have a hearing on the motion for new trial within just a few months, and some cases do not have a hearing scheduled for over a year.

Occasionally, prior to a hearing on a motion for new trial, we waive the hearing, and request the trial judge to rule on the record. This is because most motions for new trial simply repeat issues that the trial judge has already ruled on at trial. We cannot, in most cases, expect a different decision from the same judge, unless there are significant new factors for the judge to consider. In fact, in some cases arguing the motion in court can actually hurt our case rather than help it, because there is a danger that the trial judge will expressly find additional facts, in order to give further support to the judge's rulings at trial. If this happens, it can make the appeal much harder for us, because appellate courts generally have to give great weight to any factual findings by a trial judge.

The decision of whether to waive the hearing on the motion for new trial can only be made after carefully weighing the specific factors in your case, and is often made only shortly before the hearing itself. If we do request the trial judge to rule on the record, Judge Flake will only read the motion for new trial that I have filed and then make a decision without oral argument.

Most of the time the trial judge will not admit to making mistakes in the trial, and the appeal will have to proceed beyond the motion for new trial. In this case, the judge will file an order denying the motion for new trial. I will then file a notice of appeal within 30 days. The clerk, usually within a month or two, will then transmit their entire file to the appellate court. Once the appellate court receives the file, I will have 20 days to file your brief, and the state will have 20 more days to reply. I will of course send you copies of these briefs. The appellate court will usually issue its decision from six to nine months later, and I will forward it to you.

Our office represents you for your "direct appeal" only, meaning your initial appeal to the appellate court. We will not represent you for any further appeals you wish to pursue, such as motions for reconsideration, petitions for certiorari, or habeas corpus proceedings. As I mentioned above, however, I will provide you with the transcript so you will be able to pursue any of these avenues of appeal by yourself.

It is important that you understand what kinds of appellate arguments we can and cannot raise. The issues that we can raise on appeal are generally limited to mistakes of law made at your trial, such as rulings by Judge Flake on the admissibility of evidence, responses to objections, etc. Arguments about mistakes of fact are generally impossible to win. This is because

> [o]n appeal from a criminal conviction, [the appellate court] view[s] the evidence in the light most favorable to the verdict and an appellant no longer enjoys the presumption of innocence. [The appellate court] ... does not weigh the evidence or determine witness credibility. Any conflicts or inconsistencies in the evidence are for the jury to resolve.

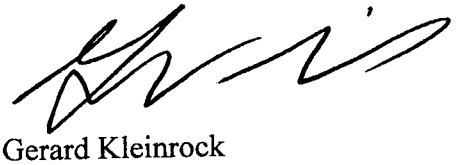
Rankin v. State, 278 Ga. 704, 705, 606 S.E.2d 269 (2004) (citations omitted).

And perhaps the most important point: usually, you only get one chance to raise an issue with an appellate court. If you do not raise an issue at the first opportunity, it may be waived forever. For this reason, you must tell me now about any specific mistakes that you think happened at your trial. As I pointed out above, this generally cannot include mistakes of fact made by the jury. But it does include mistakes made by Judge Flake, as well as any mistakes made by, or ineffectiveness of, your trial attorney. Particularly with any ineffective assistance of counsel issues, you must notify me as quickly as possible to avoid delaying your appeal or, worse, waiving the issue. I will of course review your entire trial to try to discover any appealable issues, whether you mention them or not, but I certainly want to hear about any issues that seem important to you. Please understand, however, that it will ultimately be my responsibility to decide what issues are appropriate to raise on appeal.

Finally, O.C.G.A. § 15-21A-6(b) requires our office to collect a $50 application/ representation fee. This fee should be paid at the earliest opportunity unless payment is impossible or it would create a hardship for you and your family. We are only authorized to receive payment in the form of a money order. The money order should be payable to "DeKalb County." The name of the defendant and a contact telephone number should be written on the money order. Make sure to keep the receipt.

I hope this letter makes the appellate process more clear. If you have any further questions, or if you want to point out any potential errors in your trial, please contact me at the above address. I will do my best to keep you informed at every stage of your case. In the meantime, I wish you well and encourage you to keep your spirits up.

Sincerely,



Gerard Kleinrock
Assistant Public Defender

APPENDIX -H – 2 Notice of Appointment , Teri Smith, August 23, 2012.....1-3

ALCOVY JUDICIAL CIRCUIT PUBLIC DEFENDER OFFICE

Walton County Office
Walton Co. Annex 4, 203 Milledge Avenue
Monroe, Georgia 30655
Telephone 770-266-1540
Facsimile 770-266-1545

Newton County Office
1160 Pace Street P.O. Box 430
Covington, Georgia 30014
Telephone 770-788-3750
Facsimile 770-788-3757

Anthony Carter
Public Defender

August 23, 2012

Mr. Mark Rudolph Arsenio Reed, GDC # 0001210370
Telfair State Prison
P.O. Box 549
Helena, GA 31037

Re: 09CR4282-4

Dear Mr. Reed,

This letter is to inform you that Attorney Teri L. Smith will be handling your appeal case. I have enclosed for you her business card and a copy of the Entry of Appearance. You should soon be hearing from her most likely by mail.

If by chance you are transported from Telfair State Prison, please inform us of your new location as soon as possible. Also in the meantime if you have any questions, please feel free to write Mrs. Smith using the Walton County Office address above.

Sincerely,

Terri Hall
Office Manager

enc.

IN THE SUPERIOR COURT OF CLARKE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

CASE NO.: 09CR4282-4

VS.

MARK RUDOLPH ARSENIO REED,
Defendant

ENTRY OF APPEARANCE

Now comes the undersigned attorney and pursuant to court appointment by the Georgia Public Defender Standards Council enter this appearance as appointed Appellate Counsel for the defendant in the above-styled matter(s).

This the 23rd day of August, 2012.

Respectfully submitted,

Anthony S. Carter, Public Defender
Alcovy Judicial Circuit

By: Teri L. Smith
Teri L. Smith
Attorney for Defendant
Georgia Bar # 663665

wep 4L

203 Milledge Avenue, Annex 4
Monroe, Georgia 30655
Phone: (770) 266-1540

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing *ENTRY OF APPEARANCE* on the following by placing it in the U.S. Mail, properly addressed with sufficient postage thereon to:

Dekalb County District Attorney's Office
556 North McDonough St., Suite 700
Decatur, GA 30030

This the 24th day of July, 2012.

Teri L. Smith

wep 4L

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.
U.S. Constitution, Amendment VI - December 15, 1791

APPENDIX -I- Stipulation of State, Trial Court and Leonora Grant, February 12, 2013..... Cover, 9-10

IN THE SUPERIOR COURT FOR THE COUNTY OF DEKALB
STATE OF GEORGIA

COPY

STATE OF GEORGIA	)	
	)	
VS.	)	FILE: 09-CR-4282
	)	
MARK REED	)	

TRANSCRIPT OF MOTION FOR NEW TRIAL IN THE ABOVE-CAPTIONED MATTER, BEFORE THE HONORABLE GAIL C. FLAKE, SUPERIOR COURT JUDGE, DIVISION 4, HELD ON FEBRUARY 12, 2013, DECATUR, GEORGIA.

APPEARANCES OF COUNSEL:

FOR THE STATE: LEONORA GRANT, ESQ.

FOR THE DEFENDANT: PRO SE

DIANNE KARAMPELAS
CERTIFIED COURT REPORTER
DEKALB COUNTY COURTHOUSE
DECATUR, GEORGIA 30030

THE COURT: SHE CAN STAND UP AND MAKE OBJECTIONS, YES.

THE DEFENDANT: OH, OKAY. I MEAN, I WASN'T FIXIN' TO READ FROM THE TRANSCRIPT, BUT AT ONE POINT DURING THE OPENING ARGUMENT -- I MEAN NOT OPENING ARGUMENT, BUT ONE POINT DURING DIRECT EXAMINATION, LASHAWN PAYNE WAS ASKED ABOUT THE DATE, AND SHE GAVE AN ANSWER THAT SHE DIDN'T KNOW WHAT THE DATE WAS DURING THE CROSS-EXAMINATION. SHE WAS ASKED FOUR DIFFERENT TIMES WITHIN THE TRANSCRIPT CONCERNING THE DATE, AND SHE DIDN'T KNOW WHAT THE DATES WERE OF THE OFFENSE, THE CRIMINAL OFFENSE. NO ONE ELSE THAT TESTIFIED OUT OF THE OTHER EIGHT PEOPLE THAT THE STATE PUT ON AS WITNESSES TESTIFIED TO IT.

MS. GRANT: JUDGE, WE WILL STIPULATE THAT THE EXACT DATE WAS NEVER ESTABLISHED, SO WE DON'T NEED TO GO THROUGH THAT ANYMORE.

THE COURT: THEY'VE STIPULATED THAT THE EXACT DATE WAS NOT ESTABLISHED. I THINK THE LEGAL ISSUE IS WHETHER THAT CONSTITUTES REVERSIBLE ERROR.

THE DEFENDANT: LET ME GET SOMETHING UNDERSTOOD. THE STIPULATION IS BECAUSE IT WAS ACTUALLY STIPULATED DURING -- DURING THE OPENING ARGUMENT, OR IS THIS STIPULATION BEING TAKEN RIGHT NOW?

THE COURT: THEY'RE STIPULATING, FOR THE PURPOSE OF YOUR MOTION FOR NEW TRIAL, THAT THE DATE OF THE MURDER WAS

NEVER SPECIFICALLY ESTABLISHED AT TRIAL.

THE DEFENDANT: WAS NEVER ESTABLISHED AT TRIAL DURING THE EVIDENCE AND WAS NEVER ESTABLISHED IN THE INDICTMENT.

THE COURT: THEY'VE INDICATED THAT THE DATE IN THE INDICTMENT WAS NOT THE CORRECT DATE.

THE DEFENDANT: I'M TRYING TO UNDERSTAND. THERE'S TWO ISSUES. I WANT TO KNOW WHAT THE STIPULATION IS TO, SO --

MS. GRANT: THE JUDGE CORRECTLY STATED IT. THE STATE STIPULATES TO THE FACT THAT THE TRANSCRIPT AND THE TESTIMONY NEVER ESTABLISHED THE EXACT DATE ON WHICH YOU KILLED MARLON GREENE.

THE DEFENDANT: THAT'S A STIPULATION?

THE COURT: YOU HEARD HER.

THE DEFENDANT: OKAY.

THE COURT: LET'S GO FORWARD. MAKE YOUR ARGUMENT.

THE DEFENDANT: OKAY. SO BY THE EVIDENCE NEVER DEMONSTRATING THE DATE IN THIS PARTICULAR ENUMERATION OF ERROR AND THE FACT THAT THE DATE WAS ACTUALLY STRICKEN IN THE INDICTMENT, THERE'S ABSOLUTELY NO WAY TO ESTABLISH THE DATE OF THE OCCURRENCE OF THE OFFENSE, AND THAT'S THE REASON FOR MENTIONING THE DATE AND TO SHOW THE DIFFERENCE IN THE TWO. THE CHANGE OF THE DATE FROM THE INDICTMENT LEFT -- LEFT YOU NO DATE TO GO UPON, AND NEVER ESTABLISHING IT BY ANY PARTICULAR POINT OF EVIDENCE DURING