

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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HEMY NEUMAN,  
*Petitioner,*

v.

THE STATE,  
*Respondent.*

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**On Petition for Writ of Certiorari  
to the Georgia Supreme Court**



**Petition for Writ of Certiorari**

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## QUESTION PRESENTED

Where a defendant is found guilty at a second trial after reversal of the first trial's verdict of guilty but mentally ill: 1) Is a double jeopardy claim as to the second trial's guilty verdict substantive or procedural, and thus waived by a failure to raise prior to trial; and 2) Is the guilty verdict barred by the double jeopardy doctrine of collateral estoppel?

## PARTIES TO THE PROCEEDING

Petitioner is Hemy Neuman, who was appellant in the Georgia Supreme Court. Respondent is the State of Georgia, which was appellee in the Georgia Supreme Court. Neither party is a corporation.

## RELATED PROCEEDINGS

This case arises from the following proceedings in Georgia state courts:

- *State v. Neuman*, No. 11CR1364-5 (Superior Court of DeKalb County, Georgia) (entering first judgment of conviction on March 15, 2012; denying the first motion for new trial on March 17, 2014; entering second judgment of conviction after retrial on remand on August 23, 2016; denying motion for new trial on July 31, 2019).
- *Neuman v. State*, No. S15A0011 (297 Ga. 501, 773 S.E.2d 716) (Supreme Court of Georgia) (reversing the first trial convictions on June 15, 2015).
- *Neuman v. State*, No. S20A1143 (311 Ga. 83, 856 S.E.2d 289) (Supreme Court of Georgia) (affirming the second trial convictions on March 15, 2021).

There are no other proceedings in state or federal trial or appellate courts or in this Court that are related to this case.

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## PETITION FOR WRIT OF CERTIORARI

This Court first held in *Ashe v. Swenson*, 397 U.S. 436 (1970), that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Hemy Neuman respectfully petitions for a writ of certiorari to the Georgia Supreme Court to determine if the “guilty but mentally ill” verdict reached by the jury at his first trial bars litigation of an unqualified “guilty” verdict at his second trial under the doctrine of collateral estoppel, and, if so, whether the issue is a matter of “substantive” or “procedural” jeopardy for purposes of determining waiver. On appeal, the Georgia Supreme Court failed to reach the collateral estoppel issue, as it determined that the issue was “procedural” and thus waived. Such a finding is in direct contravention of this Court’s prior holdings on what constitutes a “substantive” versus a “procedural” double jeopardy claim. Furthermore, because nearly a quarter of states provide for the “guilty but mentally ill” verdict and only one state has reached the double jeopardy claim raised here, this Court should grant review to provide guidance to the states on the application of constitutional principles to this species of verdict.

## OPINION BELOW

The published opinions of the Georgia Supreme Court can be found at 773 S.E.2d 716 and 856 S.E.2d 289. (App. C and A, respectively.) The relevant trial court proceedings and order are unpublished.

## JURISDICTION

The Georgia Supreme Court affirmed Petitioner's convictions on March 15, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). On March 19, 2020, considering the health concerns created by the spread of COVID-19, this Court issued an Order, which is still in effect, providing that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment[.]" Misc. Order, 589 U. S. \_\_\_ (Mar. 19, 2020).

## RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution states:

No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.

The Fourteenth Amendment to the United States Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

A DeKalb County, Georgia Grand Jury indicted Hemy Neuman for malice murder and possession of a firearm during commission of a felony. (Record 2, V1–4–7, hereinafter “R2.”)<sup>1</sup> At Mr. Neuman’s first trial, the jury returned a guilty-but-mentally-ill verdict on the murder count and a guilty verdict on the firearm count, and the trial court imposed a sentence of life imprisonment without the possibility of parole followed by five years to serve. (R2.V1–706.) But the Georgia Supreme Court reversed those convictions, holding that the trial court had erred by allowing the DeKalb County District Attorney’s office to have access to pretrial evaluations by experts that Mr. Neuman’s counsel had retained, as those records were protected by attorney-client privilege. *See generally, Neuman v. State*, 773 S.E.2d 716 (hereinafter “*Neuman I*”).

At Mr. Neuman’s second trial, the jury returned unqualified guilty verdicts on both counts and the trial court reimposed the previous sentence. (R1.V1–247–249.) The trial court subsequently overruled Mr. Neuman’s timely motion for a new trial, as amended. (R1.V2–305–310, 315–317, 324–331.) Mr. Neuman thereafter timely appealed from that order. (R1.V1–1.) The Georgia Supreme Court affirmed Mr. Neuman’s convictions on March 13, 2021.

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<sup>1</sup> Records, which will be transmitted upon grant of the writ, are cited in the format “R(#)” followed by “V(#),” then page numbers.

## STATEMENT OF FACTS

In the previous appeal, the Georgia Supreme Court found the basic facts underlying the charges in this case, when viewed in the light most favorable to the State, to be as follows:

Shortly after 9:00 a.m. on November 18, 2010, [Randy] Sneiderman was walking to his car outside of a Dunwoody daycare center after having just dropped off his son, when Neuman approached and shot him four to five times in the neck and torso. Sneiderman was pronounced dead approximately an hour later.

Neuman does not dispute that he planned and perpetrated Sneiderman's murder. He admitted that he had an affair with Sneiderman's wife [Andrea], planned Sneiderman's murder, purchased a disguise and a gun, rented a car, shot Sneiderman, threw the gun in a lake, disposed of the disguise, asked the person from whom he had purchased the gun to lie to the police, and lied to the police himself. Additionally, witnesses from the scene at the daycare identified Neuman as the shooter during trial. Ballistic evidence showed that the bullets that killed Sneiderman matched the gun Neuman had purchased.

*Neuman I*, 773 S.E.2d at 718.

In the second trial, the evidence concerning the acts themselves did not significantly differ, except that the decedent's wife did not testify during the second trial and thus no witnesses were presented for the express purpose of contradicting her testimony.

Mr. Neuman again presented an insanity defense and was reevaluated before the second trial by one of the two experts who testified during his first trial. Psychologist Dr. Andrea Flores testified that Mr. Neuman suffered from "bipolar disorder with psychosis, experiencing delusions," which, as

established in the first trial, “made him believe he needed to kill Sneiderman in order to protect Sneiderman’s children from harm by their father,” and made him “lie to police and take efforts to conceal his identity so that Sneiderman’s wife would not know he killed her husband.” (T.V9–1773–V10–2092, V11–2497–2557;<sup>2</sup> *Neuman I*, 773 S.E.2d at 718.)

As in the first trial, “the State presented testimony from numerous friends and co-workers of Neuman who stated that they had never witnessed any symptoms or behaviors consistent with a mental illness involving manic episodes, delusional thinking, or hallucinations.” *Neuman I*, 773 S.E.2d at 718. The State also had Mr. Neuman reevaluated by a new team of experts, who opined that he was malingering and not suffering from a mental illness. (T.V10–2154–2234, V11–2272–2392.) Additionally, the State presented a “jail phone call” between Mr. Neuman and his sister, during which he expressed a preference for being found not guilty by reason of insanity over being found guilty. (State’s Exhibit 131, introduced at T.V11–2406.)

Ultimately, the jury found Mr. Neuman guilty on both counts at the conclusion of the retrial.

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<sup>2</sup> Transcripts, which will be transmitted upon grant of the writ, are cited in the format “T” followed by “V(#),” then page numbers.

## REASONS FOR GRANTING THE PETITION

1. **The Georgia Supreme Court erred in its finding that a “guilty but mentally ill” verdict is a matter of procedural rather than substantive double jeopardy and was waived by the failure to raise the claim prior to the second trial.**

In its opinion affirming Mr. Neuman’s convictions, the Georgia Supreme Court correctly recognized that the question of waiver should be predicated on the distinction between a “procedural” or a “substantive” double jeopardy claim:

The doctrine of double jeopardy has two components: the “procedural” bar on double jeopardy, which places limitations on “multiple prosecutions for crimes arising from the same conduct,” and the “substantive” bar, which protects against “multiple convictions or punishments” for such crimes.

*Neuman v. State*, 856 S.E.2d 289, 295 (Ga. 2021).

However, it incorrectly found that the first jury’s verdict of “guilty but mentally ill” was a “procedural” double jeopardy claim because it “entailed a successive prosecution.” *Neuman v. State*, 856 S.E.2d 289, 295 (Ga. 2021) (hereinafter “*Neuman II*”). While merely “procedural” double jeopardy claims are waivable, substantive claims based on the jury’s verdict — such as the first jury’s finding that Mr. Neuman was “guilty but mentally ill” rather than “guilty” but of sound mind — are not waived by the defendant’s mere failure to have raised the claim before a second trial.

This Court has previously explained the distinction as follows: “In contrast to procedural rulings, which lead to dismissals or mistrials on a basis unrelated to factual guilt or innocence, acquittals are substantive rulings

that conclude proceedings absolutely, and thus raise significant double jeopardy concerns.” *Evans v. Michigan*, 568 U.S. 313 (2013). Although a finding of “guilty but mentally ill” is certainly not an acquittal — quite the opposite — it is nevertheless unique in that it is a special verdict of guilt determined by the jury based on a specific finding of fact. “In contrast, a [procedural termination is a] termination of the proceedings against [a defendant] on a basis *unrelated* to factual guilt or innocence of the offense of which he is accused,” *Id.* at 319 (emphasis added).

Despite the Georgia Supreme Court’s insistence to the contrary, it does not matter that Mr. Neuman moved for a new trial: “[I]t makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person ‘waives’ his right to a judgment of acquittal by moving for a new trial.” *Burks v. U.S.*, 437 U.S. 1, 17 (1978). Moreover, Mr. Neuman also did not strategically or expressly waive the issue in favor of some other advantage at trial, and the issue does not involve the relitigation of an issue involving a different offense. *See, e.g., Currier v. Virginia*, 138 S. Ct. 2144 (2018).

Because the Georgia Supreme Court’s holding that a jury’s verdict is a matter of procedural double jeopardy rather than substantive double jeopardy contradicts this Court’s holdings regarding the nature of a jury’s verdict, this Court should grant this writ to correct the error.

2. **Because a “guilty but mentally ill” verdict is a finding of fact by a jury in the defendant’s favor barring relitigation of that fact in a subsequent trial, and because this verdict is available in a quarter of the states, this Court should decide the question of whether collateral estoppel bars a subsequent verdict of guilt after a prior jury has found a defendant guilty but mentally ill.**

“[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). This concept, referred to as “collateral estoppel,” is “embodied in the Fifth Amendment guarantee against double jeopardy.” *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). In Mr. Neuman’s case, the “ultimate fact” at issue is whether Mr. Neuman was “mentally ill” as a condition of the verdict — the same issue, decided under the same standard of proof, that was decided by the first trial jury. *See, e.g., Turner v. Arkansas*, 407 U.S. 366 (1972) (where first jury’s only logical conclusion at the first trial was that defendant was not present at the scene, relitigation of issue of presence barred in retrial)

Although the application of collateral estoppel in the context of a “guilty but mentally ill” verdict appears to be an issue of first impression for this Court, the basic principles that give rise to the collateral estoppel doctrine should be applied to a finding of guilt after a previous jury has found a defendant guilty but mentally ill. And, when properly applied, the doctrine should mandate reversal of the guilty verdict in Neuman’s case.

Because of the novelty of the question and the wide-reaching impact of the answer to this issue, this Court should grant the writ. Currently, 11 of

the 50 states, nearly a quarter, provide for the verdict of “guilty but mentally ill” as an alternative verdict to “not guilty by reason of insanity.”<sup>3</sup> Of those 11 states, most allowing juries to choose the verdict also provide separate sentencing and treatment conditions for it;<sup>4</sup> or, as Georgia courts have, recognize some benefit to the defendant over an unqualified guilty verdict: “[T]he ‘guilty but mentally ill’ plea is for the benefit of the defendant, because (1) it provides for mental health treatment during the sentence, and (2) it recognizes a reduced level of culpability.” *Poole v. State*, 756 S.E.2d 322, 327 (Ga. 2014) (quoting *Barber v. State*, 522 S.E.2d 528 (Ga. 1999)). In other words, the first jury’s finding that a defendant is mentally ill as part of the “guilty but mentally ill” verdict is an “issue of ultimate fact” found in Mr. Neuman’s favor by a prior jury and should not have been relitigated at the second trial.

The finding by the first jury, which related to the conditions of Mr. Neuman’s confinement and treatment by the Department of Corrections, is analogous to the finding of a jury in the sentencing phase of capital case,

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<sup>3</sup> The number of states which have enacted the “guilty but mentally ill” verdict has remained the same since this Court’s opinion in *Clark v. Arizona*, with the exception that New Mexico has since repealed its statute: “See, e.g., Alaska Stat. §§ 12.47.020(c), 12.47.030 (2004); Del. Code Ann., Tit. 11, § 401 (1995); Ga. Code Ann. § 17–7–131 (2004); Ill. Comp. Stat., ch. 720, § 5/6–2 (West 2004); Ind. Code §§ 35–35–2–1, 35–36–1–1, 35–36–2–3 (West 2004); Ky. Rev. Stat. Ann. § 504.130 (West 2003); Mich. Comp. Laws Ann. § 768.36 (West Supp. 2006); N.M. Stat. Ann. § 31–9–3 (2000); 18 Pa. Cons. Stat. § 314 (2002); S.C. Code Ann. § 17–24–20 (2003); S.D. Codified Laws § 23A–26–14 (2004).” 548 U.S. 735, 752 n. 19. See also Utah Code Ann. § 76–2–305 (2003) (plea only).

<sup>4</sup> See, e.g., Alaska Stat. § 12.47.050; Del. Code Ann., Tit. 11, § 401(b) (2014); Ill. Comp. Stat. ch. 730 § 5/5-2-6 (2019); Ind. Code §§ 35-36-2-5 (2018); Ky. Rev. Stat. Ann. § 504.150 (2003); Mich. Comp. Laws Ann. § 768.36(3) (2014); 42 Pa. Cons. Stat. § 9727 (2021); S.C. Code Ann. § 17–24–70 (1988); S.D. Codified Laws § 23A–27–38 (2011).

where a jury must consider aggravating and mitigating factors to determine if a defendant is death-eligible. As this Court has held, the fact that the jury makes findings of fact during the capital-sentencing hearing prevents the prosecution from relitigating these findings in front of a second jury: “By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, [the State] explicitly requires the jury to determine whether the prosecution has ‘proved its case.’” *Bullington v. Missouri*, 451 U.S. 430, 444–45 (1981). “[T]he sentence of life imprisonment which petitioner received at his first trial meant that the jury has already acquitted the defendant of whatever was necessary to impose the death sentence.” *Id.* (internal citations omitted). The key difference here is that these facts were litigated during the trial itself.

Furthermore, recent limitations on collateral estoppel in criminal cases do not apply to this case. True, this Court in *Bravo-Fernandez v. U.S.*, 137 S. Ct. 352 (2016), held that inconsistent verdicts are not barred by collateral estoppel. And in *Currier v. Virginia*, *supra*, this Court held that a prior acquittal on a charge does not prevent introduction of evidence pertaining to the acquitted charge as a collateral matter in another proceeding. But the matter here is not one of mere “issue preclusion” as it was in *Bravo-Fernandez* and *Currier*; rather the issue at bar concerns the entry of a specific verdict in the same matter, on the same charges, by a subsequent jury after a prior jury had already rejected that verdict.

Seemingly, only one other jurisdiction has weighed in on whether collateral estoppel precludes a subsequent “guilty” verdict after a previous jury found a defendant “guilty but mentally ill.” In *People v. Jackson*, 37 N.E.3d 883 (Ill. 2015), an Illinois appellate court found that collateral estoppel did not bar a second jury’s “guilty” verdict after a previous jury’s “guilty but mentally ill” verdict was reversed on appeal due to a separate legal issue. That Court’s formulation of the collateral estoppel doctrine required that the second matter in which the prior jury’s finding is relitigated be a “separate cause of action,” which directly contradicts this Court’s holdings in *Burks* and *Bullington* cited above. Indeed, both cases involved the relitigation of matters in a *second* trial of the *same cause of action*, and in both cases this Court found that collateral estoppel barred relitigation of the issues the first jury had already decided.

So too here. The jury at Mr. Neuman’s first trial affirmatively concluded in his favor that he was mentally ill. A second jury considering the same cause was without authority to reject that finding or to return a more severe verdict. Here, the evidence at the second trial, as well as the jury’s consideration of that evidence and the jury instructions relating to the verdicts the jury was allowed to consider, all were oriented towards the consideration of a “guilty” verdict, which should never have been in play. Because this violated Mr. Neuman’s right to due process, this Court should grant this writ, and decide the issue of whether collateral estoppel under the double jeopardy

clauses of the Fifth and Fourteenth amendments bars a subsequent verdict of guilty after a prior verdict of guilty but mentally ill.

#### CONCLUSION

Because so many states provide for a “guilty but mentally ill” verdict, yet the only two to reach the application of double jeopardy principles to the verdict have widely missed the mark, this Court should grant review to provide guidance to state courts to prevent the states from relitigating the findings of juries that a defendant is mentally ill after that determination has already been made.

Respectfully submitted on 12 August 2021 by



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In the Supreme Court of Georgia

Decided: March 15, 2021

S20A1143. NEUMAN v. THE STATE.

BETHEL, Justice.

In August 2016, a DeKalb County jury found Hemy Neuman guilty of the malice murder of Russell Sneiderman and possession of a firearm during the commission of a felony. This was the second jury to return guilty verdicts against Neuman as to those offenses. We reversed Neuman's convictions following his first trial because the State had improper access to privileged notes and records of Neuman's mental health experts during preparation of the State's case. See *Neuman v. State*, 297 Ga. 501 (773 SE2d 716) (2015).

Neuman now appeals his convictions from his second trial.<sup>1</sup> He

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<sup>1</sup> Neuman's first trial in 2012 resulted in a guilty but mentally ill verdict on the malice murder count and a guilty verdict on the firearm possession count. Following our remand in 2015, Neuman was retried from August 1 to 23, 2016, and found guilty on both counts. On August 23, 2016, the trial court

contends that because the first jury returned a verdict of guilty but mentally ill on the malice murder count,<sup>2</sup> the second jury was collaterally estopped from returning a guilty verdict that did not include a finding of mental illness on that count. Neuman further contends that the District Attorney's Office for the Stone Mountain Judicial Circuit should have been disqualified from representing the State in his second trial because the office had access to the privileged information that resulted in the reversal of his first convictions. He also alleges that the trial court erroneously limited his counsel's examination of two defense witnesses. Finally, Neuman argues that, to the extent his trial counsel did not preserve objections during examination of these witnesses, such failure

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sentenced Neuman to serve life in prison without parole for the malice murder count and five consecutive years for the firearm possession count. On September 19, 2016, Neuman filed a motion for a new trial, which he subsequently amended twice. Following a hearing, the trial court denied Neuman's motion on July 31, 2019. Neuman filed a timely notice of appeal on August 29, 2019. This case was docketed to this Court's August 2020 term and was orally argued on September 16, 2020.

<sup>2</sup> In Georgia, juries presented with evidence of a defendant's mental illness may return a verdict of guilty but mentally ill. See OCGA § 17-7-131 (b) (1) (D); see also *Morgan v. State*, 307 Ga. 889, 891 (1) (838 SE2d 878) (2020).

constituted ineffective assistance of counsel. Seeing no reversible error, we affirm.

### *Sufficiency of the Evidence*

1. Although not raised by Neuman as error in this appeal, as has been our customary practice, we consider the sufficiency of the evidence presented against him at his second trial.<sup>3</sup> The evidence of how the fatal shooting occurred was similar in the two trials. As set forth by this Court in our first review of Neuman's case, this evidence is summarized as follows:

Shortly after 9:00 a.m. on November 18, 2010, Russell Sneiderman was walking to his car outside of a Dunwoody daycare center after having just dropped off his son, when Neuman approached and shot him four [or] five times in the neck and torso. Sneiderman was pronounced dead approximately an hour later.

Neuman does not dispute that he planned and perpetrated Sneiderman's murder. He admitted [to police and psychologists that] he had an affair with Sneiderman's wife, planned Sneiderman's murder, purchased a disguise and a gun, rented a car, shot

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<sup>3</sup> We remind litigants that the Court will end its practice of considering sufficiency *sua sponte* in non-death penalty cases with cases docketed to the term of court that began in December 2020. See *Davenport v. State*, 309 Ga. 385, 399 (4) (846 SE2d 83) (2020). The Court began assigning cases to the December Term on August 3, 2020.

Sneiderman, threw the gun in a lake, disposed of the disguise, asked the person from whom he had purchased the gun to lie to the police, and lied to the police himself. Additionally, witnesses from the scene at the daycare identified Neuman as the shooter during trial. Ballistic evidence showed that the bullets that killed Sneiderman matched the gun Neuman had purchased.

*Neuman*, 297 Ga. at 501-502 (1).

The key issue during both trials involved evidence of Neuman's mental condition at the time of the shooting. To support Neuman's plea of not guilty by reason of insanity, Neuman engaged the services of psychologist Dr. Andrea Flores. In the second trial, Dr. Flores testified (largely as she did in the first trial) that Neuman suffered from bipolar disorder with psychosis. Dr. Flores opined that Neuman experienced delusions, which made him believe he needed to kill Sneiderman in order to protect Sneiderman's children from harm by their father. She testified that the delusions also compelled Neuman to lie to the police and make efforts to conceal his identity so that Sneiderman's wife would not know how Neuman killed her husband. Dr. Flores testified that she formed her professional opinions following an extensive review of Neuman's medical records,

review of documents and correspondence from Neuman, interviews with Neuman and others, and a review of tests administered to Neuman by other professionals. As she did at the first trial, Dr. Flores testified about her qualifications and the extent of her investigation and findings in regard to Neuman's mental health.

As in the first trial, to counter Dr. Flores's testimony, "the State presented testimony from numerous friends, family members, and co-workers of Neuman who stated that they had never witnessed any symptoms or behaviors consistent with mental illness involving manic episodes, delusional thinking, or hallucinations." Id. at 502 (1). Additionally, for the second trial, forensic psychologist Dr. Don Hughey and forensic psychiatrist Dr. Joseph Browning were engaged by the State to evaluate Neuman's ability to distinguish right from wrong at the time of the crimes and whether Neuman was acting under a delusional compulsion when he killed Schneiderman. During these evaluations, Neuman admitted killing Schneiderman. Both State experts testified that there was no evidence that Neuman suffered from a major mental health disorder or was

delusional on the day of the shooting and explained to the jury that Neuman's actions showed that he could distinguish between right and wrong. Both experts also testified that Neuman showed signs of malingering<sup>4</sup> during evaluations and was not suffering from any mental illness. Both testified that Neuman's hyper-sexuality, the elaborate nature of the shooting, the efforts Neuman made to cover it up, and the inconsistent manner in which Neuman described his delusions made it clear that Neuman was not suffering from any mental delusions at the time of the shooting.

At the second trial, the State also presented a recording of a jail phone call between Neuman and his sister that occurred on August 4, 2016, during the first trial. In the recording, Neuman expressed a preference for being found not guilty by reason of insanity because he would prefer to stay in a mental health facility instead of a prison.

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<sup>4</sup> As defined by Dr. Hughey at trial, “[m]alingering is the deliberate fabrication or exaggeration of psychiatric or physical symptoms of the person for secondary gain. Secondary gain could be something like evading criminal prosecutions, or in a civil litigation, to obtain disability without just cause.”

As with the evidence presented during Neuman's first trial, we conclude that the evidence presented during his second trial and summarized above was sufficient to authorize a rational trier of fact to find Neuman guilty of malice murder and possession of a firearm during the commission of a felony. See *Jackson v. Virginia*, 443 U.S. 307, 319 (III) (B) (99 SCt 2781, 61 LE2d 560) (1979); *Neuman*, 297 Ga. at 502 (1). The jury was likewise authorized to reject Neuman's insanity defense and find no mental illness based on its assessment of the credibility of the witnesses and of any conflicts in the evidence. See *id.*; see also *Choisnet v. State*, 295 Ga. 568, 571 (1) (761 SE2d 322) (2014); *Durrence v. State*, 287 Ga. 213, 217 (1) (b) (695 SE2d 227) (2010).

### *Collateral Estoppel*

2. At Neuman's first trial, the jury rejected his insanity defense and found him "guilty but mentally ill" of malice murder. See *Neuman*, 297 Ga. at 501 n.1. At Neuman's second trial, the jury found him guilty of malice murder with no finding of mental illness. Neuman urges this Court to determine that the second jury was

collaterally estopped from finding him guilty with no finding of mental illness on the malice murder count because the first jury found that he suffered from mental illness. We agree with the State, however, that this claim was not preserved for appellate review.

The Fifth Amendment to the United States Constitution guarantees criminal defendants protection against double jeopardy. U. S. Const. amend. V. The Fifth Amendment's bar against double jeopardy encompasses the doctrine of collateral estoppel, which precludes the re-litigation of an ultimate fact issue that was determined by a valid and final judgment. See *Giddens v. State*, 299 Ga. 109, 112-113 (2) (a) (786 SE2d 659) (2016).<sup>5</sup>

Following his first trial, Neuman appealed from his convictions on the malice murder and firearms possession counts, which resulted in this Court reversing both of his convictions based on trial court error. See *Neuman*, 297 Ga. at 510 (2). He was then re-tried

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<sup>5</sup> Neuman has not argued in this appeal that the jury's verdict on the malice murder charge in the second trial was barred by the double jeopardy clause of the Georgia Constitution. See Ga. Const. of 1983, Art. 1, Sec. 1, Par. XVIII. Thus, we limit our review of his claim to whether the verdict was barred by the Fifth Amendment to the United States Constitution.

on those same counts. Neuman did not file a plea in bar prior to the second trial, nor did he raise the alleged collateral estoppel claim in any other way at any time during the trial.

The doctrine of double jeopardy has two components: the “procedural” bar on double jeopardy, which places limitations on “multiple prosecutions for crimes arising from the same conduct,” and the “substantive” bar, which protects against “multiple convictions or punishments” for such crimes. *Stephens v. Hopper*, 241 Ga. 597, 598-599 (1) (247 SE2d 92) (1978); see also *Carman v. State*, 304 Ga. 21, 26 (2) n.3 (815 SE2d 860) (2018); *Keener v. State*, 238 Ga. 7, 8 (230 SE2d 846) (1976). Here, it is clear that Neuman’s retrial on the same charges entailed a successive prosecution. Accordingly, any resulting double jeopardy claim was procedural in nature. By failing to file a plea in bar or otherwise contest the initiation of the second trial on the basis of former jeopardy, Neuman did not preserve this question for our review, and this enumeration fails. See *McCormick v. Gearinger*, 253 Ga. 531, 533 (3) (322 SE2d 716) (1984) (“[Defendant’s] failure to file a written plea in bar before

his second trial operates as a waiver of his subsequent challenge on double jeopardy grounds.” (citations omitted)); see also *Prince v. State*, 299 Ga. App. 164, 171 (4) (682 SE2d 180) (2009) (holding that failure to file a plea in bar waives appellate review of collateral estoppel claim); *Collins*, 266 Ga. App. at 874-875 (2) n.10 (claim based on procedural double jeopardy was not preserved for appeal because no plea in bar was filed).

#### *Disqualification of District Attorney*

3. Neuman next argues that the District Attorney’s Office for the Stone Mountain Judicial Circuit should have been disqualified from representing the State in his second trial because it had improper access to privileged mental health records, which he argues created a conflict of interest and an appearance of impropriety. For reasons discussed below, we disagree.

Prior to his first trial, Neuman’s counsel hired Dr. Peter Thomas, a licensed psychologist, and Dr. Julie Rand Dorney, a forensic psychologist, to evaluate Neuman for any psychological issues to assess the viability of an insanity defense. See *Neuman*,

297 Ga. at 502-503 (2). Upon learning that both Dr. Dorney and Dr. Thomas had met with Neuman, the State sought the doctors' records. See *id.* at 503 (2). The trial court conducted an in camera review of the records and ultimately provided the State with the doctors' notes and records. See *id.* The records that were disclosed to the State included notes from both psychologists of their impressions of Neuman after several hours of in-person evaluations and their notes on Neuman's own self-reports. See *id.* Notably, the prosecutors quoted from the doctors' notes during closing arguments in the first trial to support the State's theory that Neuman was malingering. See *id.* at 509 (2). On appeal, we held that the trial court erred in disclosing these records to the State because they were protected by the attorney-client privilege. See *id.* at 508 (2). We also determined that the error was not harmless and reversed Neuman's convictions. See *id.* at 509-510 (2).

Prior to Neuman's second trial, the State announced that Neuman would be tried by the same two assistant district attorneys who had prosecuted Neuman during his first trial. In response,

Neuman filed a motion to disqualify the entire office of the District Attorney for the Stone Mountain Judicial Circuit from participating in the retrial. Neuman noted that the prosecutors were in possession of and had read the information this Court deemed protected by attorney-client privilege and should be disqualified from participating at the retrial. At the hearing on the motion, Neuman argued that the prosecutors' possession of this information affected their preparation of his case, creating a disqualifying interest or relationship under OCGA § 15-18-5 (a).<sup>6</sup> In response, the State argued that this situation did not constitute a disqualifying interest or relationship and that the remedy for the State's possession and use of privileged information was not disqualification, but rather complete exclusion of the improper evidence from the second trial.

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<sup>6</sup> Neuman argues that OCGA § 15-18-5 (a) establishes that a district attorney may be disqualified by motion of the defendant due to an “interest or relationship.” But that is incorrect. OCGA § 15-18-5 (a), instead, provides the procedure that the Attorney General follows to designate or appoint another prosecuting attorney to handle a prosecution “[w]hen a district attorney’s office is disqualified from interest or relationship.” Put another way, OCGA § 15-18-5 (a) is not the source of a test for disqualification. Rather, it is a procedure used to address a disqualification. The grounds for disqualification come from other sources of law.

The trial court agreed with the State, denied Neuman’s motion to disqualify, and allowed the two assistant district attorneys to represent the State again at the second trial. Their representation, however, was subject to strict limitations on the use of the privileged material, including excluding the privileged information from evidence, hiring new experts with no access to the privileged information, erecting an “ethical screen” within their office, and destroying all copies of the privileged information.

We review the trial court’s ruling on a motion to disqualify a prosecutor for abuse of discretion. See *Amusement Sales, Inc. v. State*, 316 Ga. App. 727, 735 (2) (730 SE2d 430) (2012). “Such an exercise of discretion is based on the trial court’s findings of fact which we must sustain if there is any evidence to support them.” *Ventura v. State*, 346 Ga. App. 309, 310 (2) (816 SE2d 151) (2018).

Neuman argues that disqualification of the district attorney’s office from the second trial was the only proper remedy for the State’s receipt of the privileged information. To support this position, Neuman cites two cases from other states: *State ex rel.*

*Winkler v. Goldman*, 485 SW3d 783, 790-791 (Mo. Ct. App. 2016) (holding that the prosecutor should be disqualified from the case due to bad faith conduct in receipt of privileged information), and *State v. Marks*, 758 S2d 1131, 1137 (Fla. Dist. Ct. App. 2000) (affirming disqualification of prosecutor's office after it received extensive, "unfettered access" to over 250 confidential case files held by defendant's attorney). But we do not view either of these cases as persuasive in the situation before us.

Disqualification of the prosecuting attorneys might be appropriate in a case like *Marks*, where the privileged information disclosed to the prosecution was so voluminous that it would cast doubt on the fairness of the trial absent disqualification of the prosecuting attorneys who had reviewed the files. In this case, however, the disclosed information was relatively limited. The privileged information provided to the prosecutors in this case consisted only of notes and records from experts who were not called as witnesses in the second trial. And, per the order of the trial court, the prosecutors here were barred from making any use of those notes

in the second trial. Further, unlike the situation in *Winkler*, the record in this case does not indicate any evidence of bad faith conduct on the part of the prosecuting attorneys or the District Attorney's office, and Neuman conceded at oral argument before this Court that the State did not engage in *any* misconduct in obtaining the privileged information.

Instead of disqualifying individual prosecutors or a district attorney's entire office, the trial court denied the State the benefit of the privileged evidence at trial and provided the appropriate remedy for a situation like this. See, e.g., *Inman v. State*, 294 Ga. 650 (755 SE2d 752) (2014) (after the State received information protected by the attorney-client privilege, there was no harm from such disclosure and disqualification of the prosecutor was not required because the State agreed not to present any of the privileged information). Therefore, we see no abuse of the trial court's discretion in its decision to deny the motion to disqualify.

Moreover, the record shows that the trial court also took other reasonable steps before Neuman's second trial to prohibit the

prosecutors from relying on the information, and it specifically found that the prosecutors had no unfair advantage in the second trial based on it. During the hearing on Neuman's motion for new trial, the prosecutors represented to the trial court that, as ordered by the court before the second trial, they had not used the information in their preparation for the second trial and that they had erected an "ethical screen" by hiring new experts, destroying all copies of the documents, and not discussing or otherwise communicating about the privileged information with each other or anyone in the office of the District Attorney. Because the trial court was best positioned to judge the credibility of the prosecutors' statements, we cannot say that the trial court erred in relying on these assurances regarding the additional procedures the State followed to prevent use of the privileged information. Finally, the same judge presided over both trials. As with the question of the prosecutors' credibility, the trial court was in the best position to determine whether access to the privileged information infected or tainted the second trial. The trial court determined that it did not, and we see no abuse of discretion

in that determination. See *Inman*, 294 Ga. at 653 (2) (a) (no harm where there is no evidence that the State used — at trial or otherwise — the privileged information it was provided).

For these reasons, we see no abuse of discretion in the trial court's denial of Neuman's motion to disqualify the prosecutors who represented the State in Neuman's trials. Further, because Neuman has not demonstrated a basis for disqualification of the specific prosecutors who handled his case, it follows that disqualification was not warranted as to the office of the District Attorney as a whole. This enumeration fails.

#### *State Objections to Defense Witness Testimony*

4. Neuman complains of numerous alleged errors connected to the testimony of Neuman's sister, Monique Matsch, and Dr. Adriana Flores, a psychologist who examined Neuman. For reasons discussed below, we identify no reversible error in the trial court's management of the defense's examination of these two witnesses.

##### *(a) Objections during the Testimony of Monique Matsch*

With regard to Matsch's testimony, Neuman contends that the

trial court abused its discretion by excluding relevant evidence in response to objections by the State and that the trial court did not provide Neuman's counsel an opportunity to respond to the State's objections. We disagree with both contentions.

(i) Neuman first argues that the trial court erred by sustaining the State's relevance objections to Matsch's testimony regarding Neuman's family history as Holocaust survivors, his childhood, and his personal behavior around the time of the crimes. Neuman claims that Matsch's testimony on these points was either relevant to his defense or would have rebutted testimony of State witnesses.

Under OCGA § 24-4-401 ("Rule 401"), "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." OCGA § 24-4-402 ("Rule 402") provides that, generally, "[a]ll relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules[.]" For example, even "[r]elevant evidence may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” OCGA § 24-4-403.

We review a trial court’s evidentiary rulings under an abuse of discretion standard of review. And even where an abuse of discretion is shown, there are no grounds for reversal if the error did not affect a substantial right, and thus harm, the defendant.

(Citations and punctuation omitted.) *Venturino v. State*, 306 Ga. 391, 393 (2) (830 SE2d 110) (2019). A trial court error that does not implicate a constitutional right is harmless if the State shows that it is “highly probable that the error did not contribute to the verdict,” an inquiry that involves consideration of the other evidence heard by the jury. *Bozzie v. State*, 302 Ga. 704, 708 (808 SE2d 671) (2017); see also *Williams v. State*, 302 Ga. 147, 153-155 (3) (805 SE2d 873) (2017); OCGA § 24-1-103 (a) (“Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]”). “In determining whether the error was harmless, we review the record de novo and weigh the evidence as

we would expect reasonable jurors to have done so.” (Citation and punctuation omitted.) *Kirby v. State*, 304 Ga. 472, 478 (3) (c) (819 SE2d 468) (2018).

In evaluating whether the trial court’s management of Matsch’s testimony included an abuse of discretion, it is helpful to consider some of the testimony Matsch gave during her extended time on the witness stand. Among other things, Matsch testified that Neuman had a bad childhood, which included physical and verbal abuse from his father. Matsch testified that Neuman’s father drank alcohol irresponsibly and that Neuman bore the brunt of his father’s abuse in the home and acted to protect his sister from their father’s abuse. Matsch recounted a particular incident of abuse that featured their father knocking a bowl of ice cream from Neuman’s hands as he initiated an abusive assault. Matsch also described a strained relationship between Neuman’s parents that included multiple periods of separation during Neuman’s childhood. With respect to another childhood relationship and experience, Matsch recounted an incident in which Neuman acted to create a distraction

or diversion that interrupted an attempted sexual assault on Matsch by her cousin. With respect to Neuman's behavior later in life, Matsch relayed details of a prolonged period during a summer while Neuman was a college student when he was withdrawn and lethargic. She also relayed stories about interactions with Neuman, his wife, and children when Neuman was an adult. Matsch also provided testimony concerning what she perceived as an unusual email communication she received from Neuman as well as her perception of Neuman's unusual demeanor while attending a family funeral in 2010.

In the context of Matsch's entire testimony, the trial court's rulings on the State's relevance objections did not improperly prohibit the defense from exploring Matsch's view of the siblings' shared childhood being raised by Holocaust survivors, the abuse of Neuman witnessed by Matsch, specific behaviors witnessed by Matsch, or even Matsch's perception of Neuman's demeanor and behavior. By granting the State's relevance objections, the trial court acted to keep Matsch's testimony focused on the questions

asked by counsel, limited to Matsch's personal knowledge, and relevant to the issues being tried. Even with the minor limitations imposed by the trial court, Neuman was allowed an extensive and wide-ranging examination of Matsch.

But, even assuming that the trial court erred in some regard by sustaining some of the State's relevance objections and limiting Matsch's testimony, all of the additional evidence Neuman suggests should have been admitted was presented to the jury during the testimony of Dr. Adriana Flores, the defense's expert psychologist who examined Neuman. Dr. Flores testified on these topics based on information she collected during interviews with Neuman and others. Accordingly, we determine that even if the trial court abused its discretion to some extent by excluding Matsch's testimony on these issues on relevance grounds, such error was harmless because the testimony excluded by the trial court on the State's objections was duplicative of other portions of Matsch's own testimony and the testimony of Dr. Flores. It is therefore highly probable that the verdicts would have been the same had all of Matsch's testimony

been admitted over the State's relevance objections. See *Foster v. State*, 272 Ga. 69, 71 (6) (525 SE2d 78) (2000) (excluded testimony was cumulative of other expert witness's direct testimony such that any error in its exclusion was harmless).

(ii) Neuman also claims that the trial court erred by sustaining the State's objection that Matsch's statements of opinion about Neuman's behavior were non-responsive to questions asked by defense counsel. Specifically, Neuman's counsel asked Matsch whether she recalled a time when Neuman had protected Matsch from their cousin; Matsch said that she did. Matsch was then asked what Neuman did to protect her, and she began to describe years of abuse she had suffered at the hands of their cousin. The State objected to these statements as being non-responsive, and the trial court sustained the objection.

Neuman argues that Matsch was merely beginning to answer the question and providing context for her answer and that the trial court erred by limiting her response. However, in this instance, we see no abuse of the trial court's discretion in its determination that

Matsch's answer was unresponsive to the specific question asked, and Neuman never made additional efforts to have Matsch answer the question directly. Because OCGA § 24-6-611 (a) (2) provides the trial court with broad discretion to exercise "reasonable control" over the presentation of witnesses and evidence "to avoid needless consumption of time," we see no abuse of discretion in the trial court's decision to sustain this objection by the State. See *Rickman v. State*, 304 Ga. 61, 64 (2) (816 SE2d 4) (2018).

(iii) As to the remaining objections made by the State during Matsch's testimony that were sustained by the trial court and of which Neuman now complains, Neuman argues that the trial court sustained these objections without providing the basis for sustaining them and failed to provide the defense an opportunity to respond to the objection before ruling. However, the record shows several instances in which the trial court offered reasons for sustaining the objections that Neuman claims were not provided. Further, nothing in the record supports the allegation that Neuman was not provided an opportunity to respond to these objections. In each such instance,

Neuman's counsel simply proceeded to a different line of questioning without responding to the State's objection or to the trial court's ruling on the record. Neuman has objected to these rulings only on the basis that his counsel was not afforded an opportunity to respond to the trial court's rulings and has not offered this Court any argument for why we should determine that the trial court's rulings on these objections constituted an abuse of discretion. Having failed to carry his burden of demonstrating error, Neuman's enumerations of error regarding the trial court's handling of these objections fail.

*(b) Objections during the Testimony of Dr. Adriana Flores*

Neuman also argues that the trial court erred by sustaining numerous objections made by the State during the direct testimony of Dr. Flores and during Dr. Flores's surrebuttal testimony.

(i) Neuman first claims that the trial court erred by limiting Dr. Flores's testimony while Neuman's counsel was qualifying Dr. Flores as an expert witness. Neuman vaguely argues that testimony about the details of the assessment protocol for patients in a hospital

unit where Dr. Flores previously worked was relevant under Rule 401 to qualify Dr. Flores as an expert in the field of psychology. We disagree.

First, the specific assessment protocols used in Dr. Flores's previous employment seem to have little bearing on her qualification as an expert. Despite excluding testimony about those protocols, the trial court accepted Dr. Flores as an expert for the defense. Moreover, the trial court did not expressly limit this testimony or indicate that Neuman was prohibited from revisiting the subject. Instead, the record shows that the trial court merely granted the State's relevance objection to a question about protocols utilized in her previous role and authorized Neuman's counsel to rephrase a question about these protocols during Dr. Flores's voir dire. The record shows that Neuman's counsel declined to do so. For these reasons, we see no abuse of the trial court's discretion in its ruling on this objection.

(ii) Neuman also claims that the trial court erred by refusing to allow Dr. Flores to testify in response to questions about

Neuman's statements regarding his family's history of mental illness and actions and statements of the victim's wife, Andrea Sneiderman, leading up to the shooting. Neuman argues that the statements were admissible under the hearsay exception contained in OCGA § 24-8-803 (4) ("Rule 803 (4)") because they were made for the purposes of medical diagnosis or treatment, and under OCGA § 24-7-703 ("Rule 703") because Dr. Flores relied on those statements in concluding that Neuman suffered from severe mental illness and was not malingering. We conclude that Neuman has failed to demonstrate reversible error.

During the defense's case-in-chief, Dr. Flores discussed her evaluation and her diagnosis of Neuman's bipolar disorder. At one point during the trial, the court refused to allow Dr. Flores to discuss third-party statements about Neuman's medical and psychological history from Neuman's colleagues, family, and friends that she had interviewed, and what she had learned about Andrea Sneiderman's actions and statements. However, the trial court repeatedly clarified that Dr. Flores could testify about what Neuman told her regarding

both of these subjects.

Even if we assume that the trial court abused its discretion by limiting Dr. Flores's testimony about these subjects, such error was harmless because the excluded testimony was cumulative of other admitted evidence. First, when the State's objection was sustained regarding the statements made by third parties to Dr. Flores, Dr. Flores had *already* testified about the contents of the statements made by those she interviewed concerning Neuman's mental health history. Second, after Dr. Flores was limited from discussing Neuman's family mental health history during her direct examination, Neuman's counsel re-asked these questions during Dr. Flores's surrebuttal testimony and was able to elicit this testimony without objection from the State. The people that Dr. Flores interviewed about Neuman also testified at trial, and their testimony largely tracked what they had told Dr. Flores during their interviews. Finally, Dr. Flores also described Andrea Sneiderman's actions and statements without objection during her surrebuttal testimony. Accordingly, Neuman has failed to demonstrate how the

specific testimony sought from Dr. Flores would have changed the outcome of the trial if it had been given at the time of the sustained objections. See *Shealey v. State*, 308 Ga. 847, 853-854 (2) (b) (843 SE2d 864) (2020) (erroneous exclusion of evidence was harmless because excluded evidence was cumulative of other evidence admitted at trial); *Reaves v. State*, 292 Ga. 545, 548 (2) (d) (739 SE2d 368) (2013) (same).

We note that Neuman has also represented that, had the trial court overruled such objections in the second trial, Dr. Flores would have testified in the second trial precisely as she did in the first trial. Given the overwhelming evidence from numerous witnesses — including expert witnesses and Neuman’s family, colleagues, and friends — that Neuman displayed no signs of mental illness and was malingering, we see no reasonable probability that the second trial’s outcome would have differed had Dr. Flores’s testimony been presented exactly as it was in the first trial. See *Walker v. State*, 306 Ga. 44, 47 (2) (306 SE2d 121) (2019) (any error in excluding evidence was harmless because such evidence was cumulative of other

evidence presented as to appellant's defense at trial); see also *Harris v. State*, 256 Ga. 350, 377 (3) (349 SE2d 374) (1986) (court's assumed error in handling of expert testimony was harmless because of overwhelming evidence of defendant's guilt and against his defense of insanity).

(iii) Neuman further claims that the trial court erred by excluding as irrelevant Dr. Flores's testimony about the housing protocol in correctional facilities for individuals found not guilty by reason of insanity,<sup>7</sup> about whether Dr. Flores thought Andrea Sneiderman's actions in sending Neuman pictures were appropriate, about Neuman's statements to Dr. Flores about how Neuman felt about Andrea Sneiderman prior to the shooting, and about whether Dr. Flores had any concerns that Neuman could be malingering. Neuman argues that such evidence was relevant under Rule 401.

First, we note that a review of the nearly two trial days' worth

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<sup>7</sup> These are the same sort of protocols that formed the basis of the State's objection during the voir dire of Dr. Flores discussed above in Division 4 (b) (i).

of Dr. Flores's testimony reveals that she did testify, to some extent, about each of these issues during her direct testimony and later during her surrebuttal testimony without objection by the State. Additionally, the record shows that when the trial court granted the State's objections, it regularly suggested that Neuman's counsel could rephrase the question, and the court consistently allowed counsel to revisit lines of questioning. Further, as with the objections above, even assuming trial court error with regard to the specific objections, we find no reasonable probability that any error in the trial court's exclusion of the statements at issue contributed to the verdicts, especially considering the exhaustive testimony Dr. Flores did provide and the overwhelming evidence that Neuman was malingering. Thus, any error in this regard was harmless. See *Kirby*, 304 Ga. at 478; see also *Walker*, 306 Ga. at 47 (2).

(iv) As to the State's remaining objections during the defense's examination of Dr. Flores, Neuman provides neither argument nor citation of authority as to why it was error for the trial court to sustain such objections or how Neuman was harmed by such alleged

errors. It is not the function of this Court to cull the record for a party to find alleged errors or to form arguments on the appellant's behalf. See *Henderson v. State*, 304 Ga. 733, 739 (2) (e) (822 SE2d 228) (2018); *Roberson v. State*, 300 Ga. 632, 636 (III) (797 SE2d 104) (2017) ("It is well established that the burden is on the party alleging error to show it by the record[.]" (citation and punctuation omitted)). This Court's Rule 22 provides that "[a]ny enumerated error not supported by argument or citation of authority in the brief shall be deemed abandoned." We deem these portions of Neuman's claim of error to be abandoned.

#### *Ineffective Assistance of Counsel*

5. With respect to the objections discussed in Divisions 4 (a) (iii) and (b) (iv) above, Neuman contends that his trial counsel provided constitutionally ineffective assistance by failing to respond to these objections by the State. We disagree.

To succeed on his claims, Neuman must show that his counsel's performance was professionally deficient and that he suffered prejudice as a result. See *Strickland v. Washington*, 466 U. S. 668,

687 (III) (104 SCt 2052, 80 LE2d 674) (1984). To establish deficient performance, Neuman must prove that his lawyer “performed his duties in an objectively unreasonable way, considering all the circumstances and in the light of prevailing professional norms.”

*Thornton v. State*, 307 Ga. 121, 126 (3) (834 SE2d 814) (2019).

Further, “[t]o establish prejudice, [Neuman] must prove that there is a reasonable probability that, but for counsel’s deficiency, the result of the trial would have been different.” Id. “It is not enough ‘to show that the errors had some conceivable effect on the outcome of the proceeding.’” *Harrington v. Richter*, 562 U. S. 86, 104 (IV) (131 SCt 770, 178 LE2d 624) (2011) (quoting *Strickland*, 466 U. S. at 693 (III) (B)). Rather, Neuman must establish a “reasonable probability” of a different result, which means “a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U. S. at 694 (III) (B). We need not address both components of this test if Neuman has not proved one of them. See *Walker v. State*, 301 Ga. 482, 489 (4) (801 SE2d 804) (2017).

*Strickland* places a heavy burden on the defendant to

“affirmatively prove” prejudice. *Pierce v. State*, 286 Ga. 194, 198 (4) (686 SE2d 656) (2009). Even assuming that trial counsel’s failure to respond to the State’s objections constituted deficient performance, Neuman has not shown — or even argued — how the failure by trial counsel to respond to the objections individually or cumulatively prejudiced him. He has thus failed to demonstrate that there is a reasonable probability the trial would have had a different outcome had counsel provided responses to the State’s objections. Because Neuman has not satisfied his burden of demonstrating prejudice, his claim of ineffective assistance of counsel fails.<sup>8</sup>

*Judgment affirmed. All the Justices concur.*

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<sup>8</sup> Neuman makes no argument that all the errors we assume today, though individually harmless, nevertheless harmed him when aggregated. And no such cumulative prejudice is apparent to us on this record. See *State v. Lane*, 308 Ga. 10, 18 (1) (838 SE2d 808) (2020) (“[A] defendant who wishes to take advantage of the [cumulative error rule] should explain to the reviewing court just how he was prejudiced by the cumulative effect of multiple errors.”); *Armstrong v. State*, \_\_ Ga. \_\_ (5) n.13 (852 SE2d 824) (2020).

IN THE SUPERIOR COURT OF DEKALB COUNTY  
STATE OF GEORGIA

STATE OF GEORGIA )  
 )  
 ) ) CASE 11CR1364-5  
vs. )  
 ) ) Judge Gregory A. Adams  
 )  
HEMY NEUMAN )  
Defendant

**ORDER DENYING DEFENDANT'S AMENDED MOTION FOR NEW TRIAL**

This matter came before the Court on Defendant's Amended Motion for New Trial on July 9, 2019. Having considered the record of the case, the trial testimony, the pleadings and the arguments of the parties, this Court finds and orders as follows:

I. **The evidence was sufficient to sustain Defendant's conviction for Malice Murder and Possession of a Firearm during the Commission of a Felony under both the Jackson v. Virginia standard and O.C.G.A. §§ 5-5-20 and 5-5-21 general grounds.**

Defendant's initial motion for new trial filed September 19, 2016 raises the general grounds challenging the sufficiency of the evidence introduced against him. The evidence adduced at trial was sufficient to authorize a rational trier of fact to find Defendant guilty beyond a reasonable doubt of the crimes for which he was convicted. *Jackson v. Virginia*, 443 U.S. 307 (1979). The Court further finds that after weighing the evidence and the credibility of the witnesses, the verdict was not contrary to the weight of the evidence such that a miscarriage of justice resulted. Thus, sitting as the thirteenth juror and in the exercise of its discretion the Court finds that the evidence does not heavily preponderate against the verdict. *Alvelo v. State*, 288 Ga. 437, 438 (2011).

## II. The Jury's Verdict of Guilty is not Barred by the Doctrine of Collateral Estoppel.

Relying on *Ashe v. Swenson*, 397 U.S. 436 (1970), Defendant maintains that any guilty verdict returned in the 2016 retrial should have been barred by the doctrine of collateral estoppel. Specifically, he argues that the March 2012 jury verdict of “guilty but mentally ill” amounts to a finding of fact in Neuman’s favor, and the State should have been barred from relitigating the question of Neuman’s mental illness. That argument misapplies relevant precedent, and lacks support in the law.

*Ashe v. Swenson* holds that the rule of collateral estoppel “is embodied in the Fifth Amendment guarantee against double jeopardy,” which is applied to the states through the Fourteenth Amendment. *Ashe*, 397 U. S. at 445. Under this doctrine, “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Id.* at 443. The protection against double jeopardy fundamentally protects against a second prosecution for the same offense after acquittal. See *Giddens v. State*, 299 Ga. 109 (2016), citing *Schiro v. Farley*, 510 U.S. 222, 229 (1994). *Ashe* extended this principle by applying collateral estoppel to preclude retrial of the factual decisions that necessarily underlie the legal determination of acquittal. See *United States v. Kramer*, 289 F.2d 909, 916 (2d Cir. 1961) (“The very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar.”). To effectuate this preclusion, the defendant has the burden of proving from the record what facts were “actually and necessarily decided in [his] favor.” *Schiro*, 510 U. S. at 236.

As a preliminary matter, the Court finds that Defendant’s failure to raise this issue through a written plea in bar prior to the retrial of the case constitutes a waiver. A defendant’s failure to file a written plea in bar prior to the second proceeding generally waives the right to

later raise a challenge on procedural double jeopardy grounds. *Prince v. State*, 299 Ga. App. 164, 171 (2009) (double jeopardy/collateral estoppel ground first raised in a motion for reconsideration of the trial court's denial of defendant's motion to suppress waives the issue for appeal), citing *Alexander v. State*, 279 Ga. 683, 685 (2) (b) (2005).

Moreover, upon consideration of the merits of Defendant's claims, the Court finds that the first jury's verdict of guilty but mentally ill is not akin to an acquittal or final judgment such that collateral estoppel might apply. Mental illness is not an element of the underlying criminal offense, *see Poole v. State*, 326 Ga. App. 243, 243 (2014), citing *Spivey v. State*, 253 Ga. 187, 189 (2) (1984), and nor is mental illness less than legal insanity or incompetency a defense to the crime. *State v. Abernathy*, 289 Ga. 603, 608 (2011). A defendant found guilty but mentally ill should be sentenced "in the same manner as a defendant found guilty of the offense," except in death penalty cases. OCGA § 17-7-131 (g) (1), (j). *Poole v. State*, *supra*, citing *Snyder v. State*, 201 Ga. App. 66, 70 (10) (1991). "[T]he guilty but mentally ill verdict merely allows for accommodation to the mental health needs of those defendants who are guilty, but have a mental disorder which falls short of insanity and delusional compulsion." (Citation, punctuation and emphasis omitted.) *Dimauro v. State*, 185 Ga. App. 524, 526 (4) (1988).

While there appears to be no direct Georgia authority that addresses this specific factual scenario, the well settled principles outlined do not support Defendant's claim of error. Defendant sought—and obtained—appellate relief from his first conviction based on trial error, and not insufficiency of the evidence. *Neuman v. State*, 297 Ga. 501, 502 (2015) ("[W]e find that the evidence... was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Neuman was guilty of the crimes of which he was convicted. The jury was likewise authorized to reject Neuman's insanity defense"). Unlike reversals due to

evidentiary insufficiency, reversals based on trial error do not offend principles of double jeopardy. *See State v. Caffee*, 291 Ga. 31, 34 (2012) (“The Double Jeopardy Clause precludes a second trial after a reviewing court determines that the evidence introduced at trial was insufficient to sustain the verdict. It does not preclude the State from retrying a criminal defendant whose conviction is set aside due to trial error, such as the incorrect admission of evidence or improper instructions.” (citations omitted)).

Contrary to Neuman’s argument, the issue of his mental illness was not fully adjudicated in a final judgment on the merits in this action. Unlike an acquittal on a criminal charge, or where the jury has acquitted on a greater offense and convicted on a lesser included charge, a guilty but mentally ill verdict that is subject to an appeal is not a final judgment. The first jury necessarily found Defendant guilty of the crimes charged with their verdict, and merely went on to find that Defendant had also proven the added fact of mental illness. Such is not a “final judgment” within the meaning of the Fifth Amendment. *Ashe v. Swenson*, *supra*; see generally *People v. Jackson*, 37 NE3d 883 (2015) (reasoning that reversal of defendant’s initial conviction for trial error did not limit second jury’s consideration of a guilty verdict, despite the first jury’s determination that he was guilty but mentally ill). Just as Neuman was not barred from re-submitting the issue of insanity to the jury in the second trial despite the first jury’s rejection of the affirmative defense, Double Jeopardy did not preclude the jury’s consideration of a verdict of guilty in the retrial.

### **III. Defendant’s Motion to Disqualify the District Attorney’s Office**

Upon remand of the case, Defendant moved to disqualify the Office of the District Attorney, based on the prosecutors’ access to and review of the documents subsequently found to have been protected by the codified attorney-client privilege. See § O.C.G.A. 24-7-

707, formerly O.C.G.A. § 24-9-67. However, O.C.G.A. § 15-18-5 (a) provides that a District Attorney may be disqualified from the prosecution of a case only be "from interest or relationship." Disqualified from interest means a 'personal interest,' and ... a [district attorney] is not disqualified by personal interest in a case where he 'was not acting in his personal or individual character, or for his personal or individual interest, but in his character as an officer of the law specially charged by statute to perform this particular duty.' [Cits.]" *State v. Sutherland*, 190 Ga. App. 606, 607 (1989); See also *State v. Davis*, 159 Ga. App. 537, 538 (1981).

Defendant does not suggest any disqualifying personal interest on the part of the District Attorney, nor any misconduct. He alleges only that the State's access to the information subsequently deemed privileged creates a disqualifying relationship between himself and the District Attorney, and likens that relationship to that of an attorney who once represented the opposing party in the same action. See *Registe v. State*, 287 Ga. 542 (2010); *Tyree v. State*, 262 Ga. 395 (1992).

The Court is not persuaded, however, that the relatively limited disclosure of mental health information otherwise protected by attorney client privilege establishes the type of disqualifying relationship contemplated by O.C.G.A. § 15-18-5 (a). The Court notes that it did a pretrial *in camera* review of the documents at issue and is familiar with the material from Drs. Thomas and Rand Dorney. The Court makes the specific factual finding in the exercise of its discretion that in this case, in light of all of the evidence presented at the first trial and the specific documents at issue, the State's review of those documents did not garner it an unfair advantage such that disqualification is appropriate to remedy the infraction. Nor does this Court find that a de facto attorney client relationship was created

between the District Attorney and the Defendant such that the provisions of O.C.G.A. § 15-18-5 (a) demand the District Attorney's recusal.

Instead, caselaw suggests that the appropriate remedy is to deny the State the benefit of the improper disclosure. *Inman v. State*, 294 Ga. 650 (2014) (amid allegation that the prosecution had information that was protected by the attorney client privilege, no harm where State agreed not to present any of the disputed information); *United States v. Morrison*, 449 U.S. 361 (1981) (in cases involving Sixth Amendment deprivations "the remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression).

Prior to the retrial of the case, the State was ordered to instruct its witnesses to avoid all reference to the improperly disclosed material at trial, to destroy any copies of the documents still in existence, and to restrict opinion testimony to that based on material reviewed prior to the disclosure of the protected documents. Defendant has not identified any violation of the Court's order, and upon the Court's independent review of the record, the Court finds that the State complied with these directives. Defendant Neuman has shown neither harm nor error in the Court's pretrial ruling denying his Motion to Disqualify the District Attorney's Office from the retrial of the case.

**IV. There was no error in the admission of relevant, material admissions from Defendant on a recorded call from the DeKalb County Jail.**

During the trial of the case, the State sought to introduce evidence in the form of a recorded jail call between Defendant Neuman and his sister. The call included Defendant stating his preference for being housed in a mental facility, should he be found Not Guilty by Reason of

Insanity, as opposed to being held in custody in any other State Department of Corrections penal institution. Upon review of the substance of the call, the arguments of the parties, and an evaluation of the probative value of the evidence as compared to any potential prejudice (Rule 403), the Court permitted the admission of the evidence in an exercise of its discretion. Defendant has shown no error, nor any harm, in the admission of the evidence, and his motion is denied on this ground.

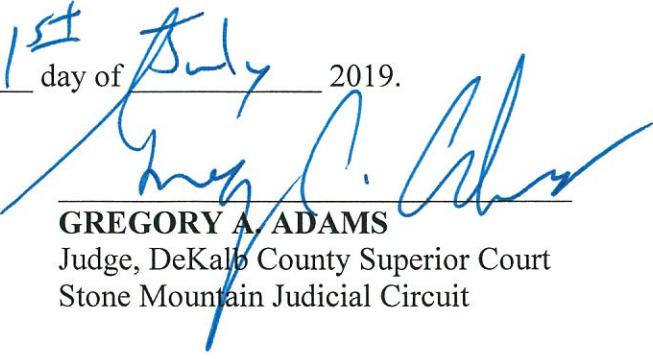
#### **V. The Testimony of Defense Witnesses was not Unduly Limited**

The direct and rebuttal testimony of defense expert psychologist Dr. Adriana Flores took up hundreds of pages of trial transcript, consisted of more than entire day of testimony, and included opinions supporting Defendant Neuman's affirmative defense of Not Guilty by Reason of Insanity. Upon review of the transcript, and in an exercise of this Court's discretion, the Court find that there has been no showing of any improper limitation of Dr. Flores' testimony or that of defense witness Ms. Mirium Matsch. Given the scope of the defense witness's testimony, Defendant has identified no substantive testimony that was improperly excluded and has not substantiated his claim of error. Much of the allegations of improper limitation actually consisted in testimony that was cumulative of testimony otherwise admitted and before the jury. *Breedlove v. State*, 291 Ga. 249, 251 (3) (2012) (the exclusion of what would have been cumulative evidence is harmless).

The remainder of Defendant's allegations are similarly without merit, and provide no basis for reversal. Defendant's Amended Motion for New Trial and Second Amended Motion for New Trial is hereby DENIED on each and every ground therein.

(Signature on following page)

SO ORDERED this 31<sup>st</sup> day of July, 2019.

  
**GREGORY A. ADAMS**

Judge, DeKalb County Superior Court  
Stone Mountain Judicial Circuit

cc: Michael Tarleton, Attorney for Defendant  
Veronica O'Grady, Attorney for Defendant  
Deborah Wellborn, Deputy Chief DA  
Anna Green Cross, Special ADA

297 Ga. 501  
Supreme Court of Georgia.

NEUMAN

v.

The STATE.

No. S15A0011.

|

June 15, 2015.

**Synopsis**

**Background:** Defendant was convicted in the Superior Court, DeKalb County, [Gregory A. Adams](#), J., of murder and firearm possession but mentally ill. Defendant appealed.

**Holdings:** The Supreme Court, [Hunstein](#), J., held that:

[1] evidence was sufficient to enable the jury to conclude beyond a reasonable doubt that defendant was guilty of the crimes of murder and firearm possession, and to reject defendant's insanity defense;

[2] in an apparent matter of first impression, raising insanity defense did not waive attorney-client privilege, and thus, notes and records of doctors which the court ordered turned over to the state were protected by the privilege;

[3] defense counsel's decision to call doctors to testify after trial court ordered their records and notes disclosed did not void attorney-client privilege;

[4] any error by the trial court in ordering the records disclosed was not harmless; and

[5] statements made by defendant's wife during individual counseling sessions with psychotherapist constituted privileged communications.

Reversed.

[Melton](#), J., filed dissenting opinion.

West Headnotes (11)

[1] **Homicide**

    🔑 [Homicide in General](#)

**Homicide**

    🔑 [Insanity](#)

**Weapons**

    🔑 [Possessory crimes in general](#)

Evidence was sufficient to enable the jury to conclude beyond a reasonable doubt that defendant was guilty of the crimes of murder and firearm possession, and to reject defendant's insanity defense; defendant admitted that he planned victim's murder, purchased a disguise and gun, shot victim, threw the gun in a lake, and lied to police, witnesses identified defendant as the shooter, and the state presented testimony of experts who opined that defendant was faking symptoms of mental illness, and that he showed no signs of mental illness, hallucinations, or delusions while in jail.

Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**

    🔑 [Waiver of privilege](#)

Raising insanity defense did not waive attorney-client privilege with regard to communications between defendant, defendant's attorney and a licensed psychologist and a forensic psychiatrist who met with defendant to initially evaluate his psychological issues, and thus, notes and records of the psychologist and psychiatrist which the trial court ordered be turned over to the state, were protected by the attorney-client privilege; neither of defendant's expert witnesses at trial relied on the notes of the psychologist or the psychiatrist in the formulation of their expert opinion, neither the psychologist or the psychiatrist conducted an independent investigation of the facts of the case, nor did they review any discovery, and the communications between

defendant, the psychologist and psychiatrist, and defendant's attorney were intended to be confidential because it would foster an environment in which the doctors could probe defendant for the truth as part of assessing the viability of an insanity defense.

[Cases that cite this headnote](#)

**[3] [Privileged Communications and Confidentiality](#)**

🔑 [Agents or employees of attorney or client in general](#)

In order that the attorney may properly prepare his or her case, the attorney-client privilege includes, by necessity, the network of agents and employees of both the attorney and client, acting under the direction of their respective principals, to facilitate the legal representation.

[Cases that cite this headnote](#)

**[4] [Privileged Communications and Confidentiality](#)**

🔑 [Experts and professionals in general](#)

**[Privileged Communications and Confidentiality](#)**

🔑 [Waiver of privilege](#)

The attorney-client privilege applies to confidential communications, related to the matters on which legal advice is being sought, between the attorneys, their agents, or their client, and an expert engaged by the attorney to aid in the client's representation; the privilege is not waived if the expert will neither serve as a witness at trial nor provide any basis for the formulation of other experts' trial testimony.

[1 Cases that cite this headnote](#)

**[5] [Privileged Communications and Confidentiality](#)**

🔑 [Waiver of privilege](#)

Defense counsel's decision to call psychiatrist and psychologist to testify at defendant's trial after the court ordered their records and notes

be disclosed to the state did not void the attorney-client privilege that applied to those records and notes; defense counsel made a strategic trial decision to call the doctors as part of the case-in-chief only after the trial court ordered the records to be turned over to the state, and did so in an effort to contain potentially damaging testimony, rather than waiting for the state to call the doctors as rebuttal witnesses.

[Cases that cite this headnote](#)

**[6] [Privileged Communications and Confidentiality](#)**

🔑 [Physicians and mental health professionals](#)

The attorney-client privilege is vital in cases where the defendant's sanity is at issue because the privilege allows the attorneys to consult with the non-testifying expert in order to familiarize themselves with central medical concepts, assess the soundness and advantages of a insanity defense, evaluate potential specialists, and probe adverse testimony.

[Cases that cite this headnote](#)

**[7] [Criminal Law](#)**

🔑 [Capacity to commit crime;insanity or intoxication](#)

Only a foolhardy lawyer would determine tactical and evidentiary strategy in a case with psychiatric issues without the guidance and interpretation of psychiatrists and others skilled in this field.

[Cases that cite this headnote](#)

**[8] [Privileged Communications and Confidentiality](#)**

🔑 [Physicians and mental health professionals](#)

**[Privileged Communications and Confidentiality](#)**

🔑 [Waiver of privilege](#)

A blanket waiver of attorney-client privilege by raising an insanity defense would chill a defendant's willingness to confide in his attorneys or any defense-employed consultants or experts; additionally, without the protection of privilege, the defendant's attorneys run the risk that the psychiatric expert they have hired to evaluate the defendant will render an opinion inconsistent with the defense's insanity theory and the expert will then be made an involuntary witness for the State.

[Cases that cite this headnote](#)

**[9] [Privileged Communications and Confidentiality](#)**

↳ [Experts and professionals in general](#)

Attorneys must be free to make an informed judgment about the best course for the defense and should not be restricted from consulting multiple experts holding possibly conflicting views due to the fear that they are creating a witness for the State.

[Cases that cite this headnote](#)

**[10] [Criminal Law](#)**

↳ [Discovery and disclosure; transcripts of prior proceedings](#)

Any error by the trial court in ordering records and notes of psychologist and psychiatrist who met with defendant at the direction of defense counsel for the purpose of evaluating a possible insanity defense was not harmless, where the state used the evidence to argue that defendant was malingering and to impeach statements defendant made to defense expert witnesses who evaluated his sanity.

[Cases that cite this headnote](#)

**[11] [Privileged Communications and Confidentiality](#)**

↳ [Waiver of privilege](#)

Statements made by defendant's wife during individual counseling sessions with a psychotherapist with a doctorate in

counseling and psychological services constituted privileged communications between a patient and a licensed professional counselor, regardless of whether wife waived any privilege with regard to joint counseling sessions she and defendant attended with the psychotherapist.

[1 Cases that cite this headnote](#)

**Attorneys and Law Firms**

\*\*717 Miller & Key, [J. Scott Key](#); Peters, Rubin & Sheffield, [Douglas N. Peters](#), [Robert G. Rubin](#), for appellant.

[Robert D. James, Jr.](#), Dist. Atty., Anna G. Cross, Deborah D. Wellborn, Asst. Dist. Atty.; [Samuel S. Olens](#), Atty. Gen., \*\*718 Patricia B. Attaway Burton, Deputy Atty. Gen., Paula K. Smith, Senior Asst. Atty. Gen., Clint C. Malcolm, Asst. Atty. Gen., for appellee.

**Opinion**

[HUNSTEIN](#), Justice.

\*501 Appellant Hemy Neuman was indicted and tried for murder and firearm possession in connection with the shooting death of Russell "Rusty" Sneiderman. Neuman pled not guilty by reason of insanity, claiming that he suffered from mental illness that rendered him incapable of distinguishing between right and wrong in relation to his crimes. The jury found Neuman guilty but mentally ill, and Neuman now appeals, contending that the trial court erred in ruling on the admission and exclusion of certain evidence. Because the trial court erred in admitting evidence, which was protected by the attorney-client privilege, we now reverse. <sup>1</sup>

[1] Viewed in the light most favorable to the jury's verdict, the evidence adduced at trial established as follows. Shortly after 9:00 a.m. on November 18, 2010, Sneiderman was walking to his car outside of a Dunwoody daycare center after having just dropped off his son, when Neuman approached and shot him four to five times in the neck and torso. Sneiderman was pronounced dead approximately an hour later.

Neuman does not dispute that he planned and perpetrated Sneiderman's murder. He admitted that he had an affair with Sneiderman's wife, planned Sneiderman's murder, purchased a disguise and a gun, rented a car, shot Sneiderman, threw the gun in a lake, disposed of the disguise, asked the person from whom he had purchased the gun to lie to the police, and lied to the police himself. Additionally, witnesses from the scene at the daycare identified Neuman as the shooter during trial. Ballistic evidence showed that \*502 the bullets that killed Sneiderman matched the gun Neuman had purchased.

At trial, both Neuman and the State presented expert witnesses who opined on Neuman's mental capacity at the time of the shooting. Neuman's experts concluded that he suffered from "bipolar disorder with psychosis, experiencing delusions," which made Neuman (1) incapable of distinguishing between right and wrong, (2) believe he needed to kill Sneiderman in order to protect Sneiderman's children from harm by their father, and (3) lie to police and take efforts to conceal his identity so that Sneiderman's wife would not know he killed her husband. Neuman's experts concluded that he was not malingering and had suffered depressive and *manic episodes* throughout his life consistent with their diagnosis of *bipolar disorder*. In rebuttal, the State presented experts who concluded that Neuman was able to distinguish right from wrong at the time of the shooting and that the symptoms and behaviors he reported were inconsistent with genuine mental illness. In particular, one of the State's experts believed Neuman was faking symptoms of mental illness, while another State expert opined that Neuman showed no signs of mental illness, hallucinations, or delusions while in jail. Additionally, the State presented testimony from numerous friends and co-workers of Neuman who stated that they had never witnessed any symptoms or behaviors consistent with a mental illness involving *manic episodes*, delusional thinking, or hallucinations, and that to the contrary, Neuman was high functioning.

1. Though Neuman has not 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 Neuman was guilty of the crimes of which he was convicted. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The jury was likewise authorized to reject Neuman's \*\*719 insanity defense.<sup>2</sup> See *Choisnet v. State*, 295 Ga. 568(1),

761 S.E.2d 322 (2014); *Durrence v. State*, 287 Ga. 213(1)(b), 695 S.E.2d 227 (2010).

[2] 2. Neuman contends that the trial court erred in its failure to quash the subpoenas of Dr. Peter Thomas, a licensed psychologist, and Dr. Julie Rand Dorney, a forensic psychiatrist. After Neuman entered a plea of not guilty, his counsel began investigating Neuman's psychological state at the time of the shooting. At the request of Neuman's attorneys, Dr. Rand Dorney and Dr. Thomas met with Neuman to initially evaluate his psychological issues, and they \*503 reported their findings to Neuman's attorneys. Upon the advice of these doctors, Neuman's attorneys then hired an expert witness to conduct a forensic psychological evaluation of Neuman to assess his criminal responsibility. After this expert's evaluation, Neuman changed his plea of not guilty to not guilty by a reason of insanity.

Upon learning that both Dr. Rand Dorney and Dr. Thomas had met with Neuman, the State sought the doctors' records, over Neuman's objections. After two hearings, the court ordered that both Dr. Rand Dorney and Dr. Thomas "turn over all records in [their] possession concerning [their] evaluation(s) and interview(s)" of Neuman for an *in camera* review. After this review, the court provided the State with the doctors' notes concerning their evaluations of Neuman and Neuman's statements to them. It is undisputed that up until this time, Neuman's attorneys had never intended to call Dr. Rand Dorney or Dr. Thomas to testify at trial. However, in light of the court's rulings, the defense anticipated that the State would call the doctors as rebuttal witnesses, and therefore, needed to call them as part of the defense's case-in-chief.<sup>3</sup>

Neuman argues that the trial court erred in allowing the State access to the doctors' notes and evaluation of him and statements he made to the doctors because this evidence is protected by the attorney-client privilege.<sup>4</sup> For reasons explained below, we agree, and we reject the State's contention that merely raising an insanity defense waives the attorney-client privilege for these communications.

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law," *Upjohn Co. v. United States*, 449 U.S. 383, 389(II), 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), and has long been recognized in Georgia. See *Fire Ass'n of Philadelphia*

v. *Fleming*, 78 Ga. 733(3), 3 S.E. 420 (1887). The privilege allows for open communications between an attorney and his or her client, free from apprehension of compelled disclosures, thereby enabling the attorney to gather complete and accurate \*504 information about the client's situation. See Paul S. Milich, *Georgia Rules of Evidence*, § 21:1, at 857–858 (2014–2015 ed.).

[3] From a practical standpoint, lawyers could not represent the best interests of their clients and gather complete and accurate information without assistance from a variety of individuals. In order that the attorney may properly prepare his or her case

[i]t has long been the law of Georgia, in keeping with that of other United States jurisdictions, that the attorney-client privilege “includes, by necessity, the network of agents and employees of both the attorney \*\*720 and client, acting under the direction of their respective principals, to facilitate the legal representation.”

*Davis v. State*, 285 Ga. 343, 350, 676 S.E.2d 215 (2009) (Sears, C.J., concurring); see *Taylor v. Taylor*, 179 Ga. 691, 692–693, 177 S.E. 582 (1934); *Fire Ass'n of Philadelphia*, 78 Ga. at 738, 3 S.E. 420; Milich, § 21:3, at 861.

[4] Consistent with this general principle, and after a review of authority from other states on this issue, we join numerous other jurisdictions in holding that the attorney-client privilege applies to confidential communications, related to the matters on which legal advice is being sought, between the attorneys, their agents, or their client, and an expert engaged by the attorney to aid in the client's representation; the privilege is not waived if the expert will neither serve as a witness at trial nor provide any basis for the formulation of other experts' trial testimony. See, e.g., *United States v. Alvarez*, 519 F.2d 1036, 1045–1047 (3d Cir.1975) (attorney-client privilege applies to a defendant's communications with a non-testifying psychiatric expert); *People v. Knuckles*, 165 Ill.2d 125, 209 Ill.Dec. 1, 650 N.E.2d 974, 981(II) (1995) (attorney-client privilege “protects communications between a defendant who raises an insanity defense and a psychiatrist employed by defense counsel to aid in the preparation of the defense, if the psychiatrist will not testify and the psychiatrist's notes and opinions will not be used in the formulation of the other defense experts' trial testimony”); *State v. Hitopoulos*, 279 S.C. 549, 309 S.E.2d 747 (1983) (a

defendant's communications to a psychiatrist employed by the defendant's attorney to aid in his defense are covered by the attorney-client privilege); *Houston v. State*, 602 P.2d 784, 789–790 (Alaska 1979) (in order for defense counsel to ascertain whether there is a valid insanity defense, an expert's examination of the defendant is protected by the attorney-client privilege, as long as testifying experts do not rely upon that expert's report); *State v. Pratt*, 284 Md. 516, 398 A.2d 421, 424 (1979) (in criminal cases, “communications made by a defendant to an expert in order to equip that expert with the necessary information \*505 to provide the defendant's attorney with the tools to aid him in giving his client proper legal advice are within the scope of the attorney-client privilege”); *People v. Hilliker*, 29 Mich.App. 543, 185 N.W.2d 831, 833–834 (1971) (confidential communications made to an attorney by a doctor or psychiatrist on behalf of the client are protected by attorney-client privilege).<sup>5</sup> If counsel later elects to call the expert as a witness at trial, the cloak of privilege ends.

Here, Neuman's counsel engaged both Dr. Rand Dorney and Dr. Thomas to assist in evaluating an insanity defense for Neuman. Neuman's attorneys called Dr. Rand Dorney and asked her to evaluate the case and assess whether Neuman presented any psychological issues. Dr. Rand Dorney agreed to assist Neuman's attorneys, but only as a consultant and not as an expert witness, due to her full practice load at the time. She understood her role as a consultant to entail working for Neuman's attorneys as an agent for the defense team, screening Neuman to assess whether there were any psychological issues, and collecting objective testing to determine if there were mental issues that needed to be explored further. Pursuant to her understanding of her role as a consultant, she met with Neuman for a few hours for a screening in an effort to find major areas of psychopathology; she did not perform a forensic evaluation for insanity or review all of the evidence in the case.

After this initial review, Dr. Rand Dorney called Dr. Thomas and asked him to perform objective testing on Neuman to see if there were any signs of major psychopathology or malingering. Dr. Thomas agreed to help Dr. Rand Dorney but emphasized that “there was no way [he] could testify because this [was not his] area.” Dr. Thomas spoke with Neuman's attorneys and informed them about the nature of his expertise and what he was

willing to do, and Neuman's attorneys instructed Dr. Thomas to administer some tests to Neuman and help them develop their case with a better understanding of Neuman's \*\*721 psychological issues. Dr. Thomas met with Neuman and explained to him that he was there at the behest of his lawyers in order to help the lawyers develop their case and that whatever Neuman discussed with Dr. Thomas was between Dr. Thomas, Dr. Rand Dorney, and Neuman's attorneys. He performed a very brief clinical interview of Neuman as well as a psychological personality inventory. Dr. Thomas reported his results to Dr. Rand Dorney, who in turn met with Neuman's attorneys to discuss possible next steps.

\*506 At the request of Neuman's counsel, Dr. Rand Dorney and Dr. Thomas then met with Neuman at the jail for approximately three hours to review some of his test results. After this meeting, Dr. Rand Dorney informed Neuman's attorneys that further exploration of Neuman's mental issues was necessary and recommended doctors who might be able to serve as expert witnesses at trial and conduct a full evaluation of Neuman. Thus, the doctors worked at the direction of Neuman's counsel to evaluate him and assess whether he presented any psychological issues, and the doctors communicated their impressions and assessments and Neuman's own statements to his attorneys.

Neither Dr. Thomas nor Dr. Rand Dorney conducted an independent investigation of the facts of the criminal case, nor did they review any discovery. Neither doctor prepared an evaluation of Neuman's mental capacity with regard to insanity to be used in court, nor did they professionally treat Neuman. Finally, neither of Neuman's expert witnesses at trial relied on Dr. Rand Dorney's or Dr. Thomas' notes in the formulation of their expert opinions.

The State argues that communications between Dr. Rand Dorney, Dr. Thomas, and Neuman are not protected by the attorney-client privilege because they were not confidential. See *Davis*, 285 Ga. at 347, 676 S.E.2d 215 (letters were not protected by the attorney-client privilege because they did not contain confidential communications). The State contends that Neuman signed a form, presented to him when Dr. Thomas and Dr. Rand Dorney met with him at the jail, waiving any confidentiality. The form reads, in pertinent part, as follows:

You have been referred by Mr. Robert Rubin [Neuman's trial counsel] for an independent medical examination. The purpose of this examination is to [sic] criminal responsibility & psych testing. The examination is not confidential, nor is it for the purpose of treatment. Anything we discuss in the examination may be included in the written report or may be disclosed in court. Therefore, nothing is off the record and anything you say or do during the evaluation is not a secret. When the evaluation is complete a written report will be provided to your attorney. You do not have to participate in the examination or answer any questions you do not wish to answer. If you have questions or concerns you may ask at any time and if you want to stop the examination, you may stop at any time.

Importantly, Dr. Rand Dorney specifically explained to Neuman that she and Dr. Thomas were going to "explore ... some of these \*507 issues on his testing, but also to report that information directly back to" only Neuman's attorneys, and his attorneys would then decide how to use the information. Although the form states that the exam would not be confidential, it also states that the exam is at the referral of Neuman's attorney and information would be reported to trial counsel. When a client authorizes his lawyers or their agents, expressly or impliedly, to waive his confidential communications as necessary to carry out his representation, that does not authorize *the other party* to the litigation to demand that the waiver be exercised. See [Georgia Rules of Professional Conduct, Rule 1.6\(a\)](#) ("[a] lawyer shall maintain in confidence all information gained in the professional relationship with a client ... except for disclosures that are impliedly authorized in order to carry out the representation") and comment [6].

In addition, Dr. Rand Dorney testified that she was required to get Neuman's signature in order for him to

discuss his psychological health with her, and this form, which she typically used for forensic evaluations, was the only form that she had at the time; she \*\*722 rarely did consulting work and did not have a form specifically for a consultation. Based on her and Dr. Thomas' roles as consultants to the defense team and her explanation to Neuman, Dr. Rand Dorney did not understand this form to be Neuman's consent to a "full criminal responsibility evaluation."

After a review of this evidence, we conclude that the communications between Dr. Thomas, Dr. Rand Dorney, and Neuman at this jail meeting were intended to be confidential within the defense team and to be reported to Neuman's attorneys to better assess how to prepare his insanity defense. Our conclusion is further supported by the fact that only after Dr. Rand Dorney communicated her assessment from this meeting to Neuman's attorneys did his attorneys then seek out an expert witness to testify at trial and to conduct a forensic psychological evaluation of Neuman.

Moreover, this form only covered the one jail meeting. It did not cover the prior meetings that each doctor had with Neuman or the communications between Dr. Rand Dorney, Dr. Thomas, and Neuman's attorneys. There is no evidence to support a conclusion that these communications were intended to be anything but confidential.<sup>6</sup>

**\*508 [5]** We find that the communications between Neuman, Dr. Thomas, Dr. Rand Dorney, and Neuman's attorneys were intended to be confidential because it would foster an environment in which the doctors could probe Neuman for the truth, as part of the attorneys' assessment of the viability of an insanity defense. Thus, we conclude that the notes and records of Dr. Rand Dorney and Dr. Thomas, which the trial court ordered be turned over to the State, were protected by the attorney-client privilege.<sup>7</sup>

**[6] [7] [8] [9]** The State asserts that Neuman waived all privileges by raising an insanity defense.<sup>8</sup> However, the attorney-client privilege is vital in cases such as this one where the defendant's sanity is at issue because the privilege allows the attorneys to consult with the non-testifying expert in order to familiarize themselves with central medical concepts, assess the

soundness and advantages of an insanity defense, evaluate potential specialists, and probe adverse testimony. *Pratt*, 398 A.2d at 424. "Only a foolhardy lawyer would determine tactical and evidentiary strategy in a case with psychiatric issues without the guidance and interpretation of psychiatrists and others skilled in this field." *Houston*, 602 P.2d at 790, n. 11. Moreover, a blanket waiver of attorney-client privilege by raising an insanity defense would chill a defendant's willingness to confide in his attorneys or any defense-employed consultants or experts. *Knuckles*, 209 Ill.Dec. 1, 650 N.E.2d at 981; \*\*723 *Houston*, 602 P.2d at 792; *Pratt*, 398 A.2d at 424-425. Additionally, without the protection of privilege, the defendant's attorneys run the risk that the psychiatric expert they have hired to evaluate the defendant will render an opinion inconsistent with the defense's insanity theory and the expert will then be made an involuntary witness for the State. \*509 *Alvarez*, 519 F.2d at 1046-1047.<sup>9</sup> We are mindful of the prejudice that would result if the trier of fact learns that a mental health professional, who is testifying for the State, was originally consulted and then rejected by the defense. *Knuckles*, 209 Ill.Dec. 1, 650 N.E.2d at 981; *Pratt*, 398 A.2d at 425. The attorneys must be free to make an informed judgment about the best course for the defense and should not be restricted from consulting multiple experts holding possibly conflicting views due to the fear that they are creating a witness for the State. *Alvarez*, 519 F.2d at 1046-1047; *Knuckles*, 209 Ill.Dec. 1, 650 N.E.2d at 981; *Pratt*, 398 A.2d at 425. For these reasons, we align ourselves with other jurisdictions that have rejected a waiver of attorney-client privilege merely because the defendant has placed his sanity at issue. See *Alvarez*, 519 F.2d at 1046-47; *Knuckles*, 209 Ill.Dec. 1, 650 N.E.2d at 980-981; *Houston*, 602 P.2d at 791-792; *Pratt*, 398 A.2d at 424-426.

**[10]** Finally, the State argues that any error in providing it access to the doctors' files and in allowing them to testify was harmless. We disagree. The State used the evidence from Dr. Rand Dorney and Dr. Thomas to argue that Neuman was malingering and to impeach the statements Neuman made to defense expert witnesses who evaluated his sanity. The State cross-examined both doctors on the flaws in their assessments, including brevity and a lack of thoroughness, as well as on the issue of malingering. The State also quoted from Dr. Thomas' notes during its closing argument to support the theory that Neuman was lying or faking his symptoms of mental illness. In addition, the jury specifically requested to see Dr. Thomas' notes,

which contained statements that Neuman was possibly malingering and that Neuman had told Dr. Thomas that he knew what he had done was wrong.<sup>10</sup> This evidence was directly contrary to the conclusions reached by Neuman's expert witnesses. In this way, Dr. Rand Dorney and Dr. Thomas, although engaged by the defense to evaluate Neuman, became involuntary witnesses for the State, whose testimony, at least in part, ultimately undercut Neuman's defense. See *Alvarez*, 519 F.2d at 1047; *Knuckles*, 209 Ill.Dec. 1, 650 N.E.2d at 981; *Pratt*, 398 A.2d at 425. Thus, we reject the State's contention that Dr. Rand Dorney's and Dr. Thomas' testimony was merely cumulative of other evidence and that any error was harmless.

Accordingly, we conclude that the trial court erred in disclosing to the State Dr. Rand Dorney's and Dr. Thomas' notes and records \*510 concerning Neuman. This evidence was not harmless, and therefore, we must reverse Neuman's conviction.

[11] 3. We now address Neuman's only other enumeration of error that may recur on retrial.<sup>11</sup> Neuman argues that the trial court erred by not allowing the defense to introduce statements from Dr. George Warsaw, a psychotherapist. In the months prior to the shooting, Neuman and his wife participated in joint *marital counseling* sessions as well as individual counseling sessions with Dr. Warsaw. Neuman intended for his expert witness to state that she based her opinion in part on statements that Neuman's wife made to Dr. Warsaw, which Dr. Warsaw then recorded in his files. Neuman contends that the statements were not hearsay because \*\*724 they were made for medical diagnosis or treatment, see former OCGA § 24-3-4,<sup>12</sup> and even if they were hearsay, his expert may rely on hearsay to form the basis for her opinions. See former OCGA § 24-9-67.<sup>13</sup>

However, we agree with the State that communications between Dr. Warsaw and Neuman's wife were privileged. Former OCGA § 24-9-21(7),<sup>14</sup> in effect during Neuman's trial, protected as privileged communications between a patient and a licensed professional counselor during the psychotherapeutic relationship.<sup>15</sup> The privilege is held only by the patient, and therefore, only the patient may waive it. *Cooksey v. Landry*, 295 Ga. 430(2), 761 S.E.2d 61 (2014). It is clear from the record that although Neuman's wife waived any privilege with regard to the

joint counseling sessions she and Neuman attended with Dr. Warsaw, she did not waive any privilege regarding her individual sessions with Dr. Warsaw. Thus, statements she made during those individual sessions are privileged, and the trial court properly excluded them.

*Judgment reversed.*

All the Justices concur, except **MELTON**, J., who dissents.

**MELTON**, Justice, dissenting.

\*511 Because there is nothing unclear about Neuman's waiver of confidentiality with respect to his communications with Dr. Thomas and Dr. Rand Dorney, I cannot agree with the majority's erroneous conclusion that these communications were protected by attorney-client privilege. I therefore must respectfully dissent.

As the majority points out, Neuman signed a form when he met with Dr. Thomas and Dr. Rand Dorney at the jail, and this form stated in part:

You have been referred by Mr. Robert Rubin for an independent medical examination. The purpose of this examination is to [sic] criminal responsibility & psych testing. *The examination is not confidential*, nor is it for the purpose of treatment. *Anything we discuss in the examination may be included in the written report or may be disclosed in court. Therefore, nothing is off the record and anything you say or do during the evaluation is not a secret.* When the evaluation is complete a written report will be provided to your attorney. You do not have to participate in the examination or answer any questions you do not wish to answer. If you have questions or concerns you may ask at any time and if you want to stop the examination, you may stop at any time.

This document speaks for itself, and the majority has not given any persuasive reason to support its conclusion that the document would somehow do anything other than convey a clear intention to show that the communications between Neuman and Drs. Thomas and Rand Dorney were “not confidential.” It does not matter that this form “was the only [one] that [Dr. Rand Dorney] had [available] at the time.” Maj. Op. at 721. What matters is that this is the document that was actually used, and that this specific document signed by Neuman informed him that “nothing [was] off the record and anything [he said] or d[id] during the evaluation [was] not a secret.” Nor does it matter that the written report from the evaluation was to be provided to Neuman’s attorneys, because the form clearly stated that anything included in the written report from the evaluation may also “*be disclosed in court*.” The fact that the attorneys would receive the report first is to be expected, but it does nothing to change the fact that the waiver form indicated \*\*725 that any such report could also be later disclosed in court and would not otherwise be confidential.

Furthermore, because Dr. Rand Dorney and Dr. Thomas met with Neuman at the jail to specifically discuss Neuman’s test results that were included in their records and notes, it cannot be said that \*512 the form’s statement that “[a]nything … discuss[ed] … may be included in [a] written report or may be disclosed in court” was not broad enough to cover the entirety of the communications between Neuman and the doctors. Indeed, the prior communications between Neuman and Drs. Rand Dorney and Thomas only served as the basis for any written materials that the waiver form made clear would not be confidential. The majority’s efforts to minimize the impact of this waiver form are unpersuasive.

In this connection, contrary to the majority’s reasoning, the waiver form simply does not say that Neuman was only waiving “his confidential communications as necessary to carry out his representation.” Maj. Op. at 721. The form states much more broadly that the communications were “not confidential” and that “[a]nything” discussed “may be disclosed in court,” *without specifying that only Neuman’s attorneys would be authorized to make such court disclosures*. Further underscoring the broad nature of the waiver, the form then goes on to indicate that “nothing is off the record” and that anything said or done with Drs. Rand Dorney

and Thomas would “not [be] a secret.” In the absence of this waiver form signed by Neuman, I would agree with the majority that the communications between Neuman and Drs. Rand Dorney and Thomas were protected by attorney-client privilege. However, I cannot ignore the plain language of the broadly drafted waiver form indicating otherwise. The majority, on the other hand, is straining to narrowly interpret the plain language of the waiver form in an effort to broaden the scope of the attorney-client privilege here when we should instead be construing the attorney-client privilege as narrowly as possible:

The attorney-client privilege protects communications between the client and the attorney that are *intended to be confidential*; the protection does not extend to communications which are not of a confidential nature. ... Indeed, the statutes outlining the attorney-client privilege are not broadly construed; the attorney-client privilege embodied in [former] OCGA § 24-9-24 has been confined “to its narrowest permissible limits.” Inasmuch as the exercise of the privilege results in the exclusion of evidence, a narrow construction of the privilege comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is the object of all legal investigation.

(Citation and punctuation omitted; emphasis supplied.)

*Davis v. State, 285 Ga. 343, 347(6), 676 S.E.2d 215 (2009)*

(Letters that did not contain confidential information and were not between client and his \*513 attorneys, but were between private investigator and client’s attorneys, were not protected by attorney-client privilege). Because I believe that the majority is incorrect for having concluded that the notes and records of Drs. Rand Dorney and Thomas were subject to the attorney-client privilege under the circumstances of this case, I must respectfully dissent.

#### All Citations

297 Ga. 501, 773 S.E.2d 716

## Footnotes

1 On February 8, 2011, a DeKalb County grand jury indicted Neuman for malice murder and possession of a firearm during the commission of a felony. During February 13 through March 15, 2012, Neuman was tried before a jury. On March 15, 2012, the jury returned a verdict of guilty but mentally ill on the count of malice murder and guilty on the possession count. On the same day, the court sentenced Neuman to life without the possibility of parole for the murder conviction and five consecutive years to serve on the possession conviction. Neuman filed a motion for new trial on March 20, 2012, which was subsequently amended. The trial court held a hearing on Neuman's motion for new trial on March 4, 2014, and denied the motion in an order filed March 17, 2014. Neuman filed a notice of appeal on April 10, 2014. The appeal was docketed to the January 2015 term of this Court and orally argued on January 20, 2015.

2 See [OCGA § 17-7-131\(c\)](#) (distinguishing between verdict of "not guilty by reason of insanity" and verdict of "guilty but mentally ill").

3 Before calling the doctors to testify, as well as throughout the trial, Neuman reiterated his objections to the State having access to the doctors' notes and records and to presenting this evidence to the jury.

4 Although on appeal Neuman frames the trial court's alleged error as a failure to quash the doctors' subpoenas, there was no express ruling by the trial court on Neuman's motion to quash the subpoena for Dr. Thomas and Neuman did not file a motion to quash with regard to Dr. Rand Dorney. However, the court's orders directing that the doctors turn over their files were effectively the same ruling as a denial of a motion to quash, and Neuman continued to object to the State's access to the doctors' records and the admission of evidence at trial. Additionally, the State has not argued that Neuman did not properly preserve this issue for appeal or otherwise object to the manner in which the issue has been framed. Accordingly, we consider Neuman's enumeration of error on appeal to have been properly raised.

5 Our holding accords with the view expressed by Professor Milich in his treatise on Georgia evidence. Milich, § 21:3, at 862 ("When the expert is not hired to be a witness but only to assist the attorney or client with a legal matter, the expert is part of the privileged network.").

6 The State relies on [Weakley v. State](#), 259 Ga. 205(2), 378 S.E.2d 688 (1989), to support its argument that the attorney-client privilege does not apply when an expert's report, material, or testimony does not contain confidential communications between the defendant and the defendant's attorney. In *Weakley*, the attorney-client privilege did not apply to the testimony of a firearms expert, who had been retained by the defense, because we found that none of the testimony concerned confidential communications between the defendant and the defendant's attorney. [259 Ga. at 205, 378 S.E.2d 688](#). Here, however, Drs. Rand Dorney and Thomas relayed Neuman's own statements, and their notes based on these statements, directly to Neuman's attorneys. These were confidential communications.

7 Our conclusion that the attorney-client privilege applies is not voided by the defense's decision to call the doctors to testify at trial. Neuman's attorneys made a strategic trial decision to call the doctors as part of their case-in-chief only after the trial court ordered the doctors' records be turned over to the State; they did so in an effort to contain potentially damaging testimony, rather than waiting for the State inevitably to call the doctors as rebuttal witnesses. See [Harley-Davidson Motor Co. v. Daniel](#), 244 Ga. 284(2), 260 S.E.2d 20 (1979) (noting that once it is known that the court will admit evidence over objection, trial strategy may include introducing the highly prejudicial evidence to ameliorate its effect on the jury).

8 The State contends that when a criminal defendant raises a defense challenging his mental capacity, he waives any physician-patient privilege, and that confidential communications between a psychologist and a client enjoy the same status as those between attorney and client. See [State v. Herendeen](#), 279 Ga. 323, 327, 613 S.E.2d 647 (2005). However, the issue of a physician-patient privilege is not before us because the privilege only arises when the client is being seen for treatment, which did not occur in this case. See [Rogers v. State](#), 282 Ga. 659(6)(b), 653 S.E.2d 31 (2007).

9 As discussed *infra*, this is essentially what occurred here.

10 Neuman objected to sending these notes to the jury. After hearing argument on the issue and further probing of the jury, the court seemed satisfied that the jury no longer wanted to see the notes, and therefore, they were not sent out to the jury. However, the jury's specific request shows that Dr. Thomas' evaluation may have factored into their deliberations.

11 To be clear, we do not address Neuman's contentions that (1) the trial court erred by failing to allow a witness to testify about what happened with Schneiderman's wife outside the courtroom after the witness testified; and (2) the trial court erred in its failure to grant a new trial after it was disclosed that the State had used testimony from Schneiderman's wife during Neuman's trial and that she was later convicted of perjury for this testimony.

12 Effective for proceedings on and after January 1, 2013, this exception is now codified at [OCGA § 24-8-803\(4\)](#).

13 Effective for proceedings on and after January 1, 2013, this is now codified at [OCGA § 24-7-707](#).

14 Effective for proceedings on and after January 1, 2013, this is now codified at [OCGA § 24-5-501\(7\)](#).

15 Dr. George Warsaw identifies himself as a psychotherapist with a Ph.D. in counseling and psychological services. Regardless of whether he is actually a psychologist, psychiatrist, a social worker, or some other therapist, communications between him and his patient would be covered by the privilege. See former OCGA § 24-9-21 (5)-(7) (now [OCGA § 24-5-501\(5\)-\(7\)](#)).

IN THE SUPERIOR COURT OF DEKALB COUNTY  
STATE OF GEORGIA

STATE OF GEORGIA )  
 )  
 v. ) 11CR1364-5  
 )  
 HEMY NEUMAN, ) Judge Gregory A Adams  
 )  
 Defendant. )

**ORDER DENYING DEFENDANT'S  
MOTION FOR NEW TRIAL**

The Defendant's Motion for New Trial and Amended Motion for New Trial in the above-styled case having come before this Court for consideration on March 4, 2014, and the Court having considered the record, evidence and argument presented by both parties the Court finds as follows:

**FACTS**

On November 18, 2010, Defendant shot and killed Russell "Rusty" 'Sneiderman. The shooting occurred as Mr. Sneiderman was walking to his car after dropping his child off at the Dunwoody Prep daycare facility. After initially denying any knowledge or involvement in the murder, Defendant eventually admitted to the shooting, but raised the affirmative defense of not guilty by reason of insanity. After a lengthy jury trial, Defendant was found guilty but mentally ill of malice murder and possession of a firearm during the commission of a felony.

**I      The Evidence Presented at Trial More than Supported Defendant's Convictions.**

The evidence was more than sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Defendant was guilty of the crimes for which he was convicted. Jackson v. Virginia, 443 U. S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979). The State introduced evidence that Defendant rented a van the day before the murder, that he purchased a

disguise and a gun just prior to the murder, and that the van he rented was seen leaving the scene just after the shooting. Further, ballistics from the gun Defendant purchased matched the bullets that killed Russell 'Rusty' Schneiderman. Finally, the State presented evidence that the Defendant and the victim's wife were having a romantic relationship that provided motive for the killing.

O.C.G.A. § 5-5-20 authorizes the trial court to grant a new trial "[i]n any case when the verdict of the jury is found contrary to evidence and the principles of justice and equity[.]" and O.C.G.A. § 5-5-21 empowers the trial court to grant a new trial "where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding." These statutes afford the trial court broad discretion to sit as a "thirteenth juror" and weigh the evidence on a motion for new trial alleging these general grounds. Walker v. State, 292 Ga. 262, 264 (2) (737 SE2d 311) (2013). When faced with a motion for new trial based on these general grounds, the trial court has the duty to exercise its discretion and weigh the evidence. Id., see also White v. State 293 Ga. 523, 524-25 (2) (753 SF2d 115) (2013).

Here, after considering the entire record and after weighing the evidence independently as a "thirteenth juror," the Court finds that the weight of the evidence was heavily in favor of the verdict and, further, that the verdict was not contrary to the evidence or the principles of justice and equity. Therefore, in the exercise of its sound discretion, this Court denies Defendant's motion for new trial on the general grounds set out in O.C.G.A. §§ 5-5-20 and 5-5-21; Alvelo v. State, 288 Ga. 437 (1) (704 SE2d 787) (2011).

## II Motion to Close Pretrial Hearings to the Public was Properly Denied.

The Court finds Defendant failed to support his motion to close the courtroom to the public for pretrial hearings with evidence sufficient to constitute "clear and convincing proof" that no means available other than closure of the hearings will serve to protect his rights.

Rockdale Citizen Publishing Company, Inc., v. State of Georgia, 266 Ga. 579 (468 SE2d 764) (1996). Defendant was able to offer nothing other than news articles related to the crime, arrest and pretrial proceedings in support of his motion, along with speculation that any news coverage was inflammatory and would prejudice the prospective jurors against him. However, "assumptions and speculation cannot provide the 'clear and convincing proof' required to justify closure." Rockdale County, 266 Ga. at 580. see also R. W. Page Corp. v. Lumpkin, 249 Ga. 576 (292 SE2d 8150 (1982)). Defendant's motion for new trial is denied on this ground.

### **III. The Court Properly Denied Defendant's Motion to Suppress Statements**

On August 15, 2011 and continuing on August 24, 2011, the Court held a Jackson-Denno hearing concerning Defendant's statement to police on January 4, 2011. Jackson v. Denno 378 U. S. 368 (84 S. Ct. 1774, 12 L.Ed2d 908) (1964). Prior to the hearing, the Court viewed the recording of the police interview with Defendant. After considering the video recording the testimony of the witnesses, and argument of counsel, the Court finds that Defendant was not in custody at the time he was questioned. The Court further finds that after being given his Miranda rights, Defendant understood his rights and freely and voluntarily continued to speak with police. Miranda v. Arizona, 384 U. S. 436 (86 S. Ct. 1602, 16 L. E2d 694) (1966). Thus, at no time did Defendant unequivocally and unambiguously invoke his rights. For these reasons, Defendant's motion for new trial on this ground is denied.

### **IV. The Court Properly Denied Defendant's Special Demurrers and Motions to Dismiss.**

A. The Court finds that it properly denied Defendant's special demurrer based on the indictment containing several references to "Robert D. James District Attorney." As conceded by Defendant, this issue was ruled against him in South v. State, 268 Ga. App. 110 (601 SE2d 378) (2004). The Court finds no merit in the unsupported speculation that repetition of the District Attorney's name lent any undue weight to the charges against Defendant or otherwise prejudiced him in any way.

B. The Court finds that it properly denied Defendant's special demurrer based on the inclusion of the Dunwoody Police department case number and the Superior Court's "D" or warrant number on the indictment. The Court finds both numbers served a legitimate purpose in assuring Defendant's case properly proceeded through the prosecution process. The Court further finds that Defendant was not harmed by the inclusion of those case reference numbers on the indictment, and any speculation to the contrary is without support.

C. The Court finds that it properly denied Defendant's special demurrer based on the fact that the indictment contained the notation "on or about" the 18<sup>th</sup> day of November as the day the crime is alleged to have occurred. The Court finds the indictment did not create confusion or questions concerning when the alleged offense occurred and did not impair the Defendant's ability to prepare a defense. The language in the indictment was reasonably specific, protected the Defendant from further jeopardy and informed him with reasonable specificity of the time and place of the acts charged sufficiently to allow Defendant to prepare his defense intelligently. Jones v. State, 289 Ga. 111, 115-116 (709 SE2d 773) (2011).

Accordingly, Defendant's motion for new trial on the failure to grant his special demurters is denied.

V. The Court Properly Denied Defendant's Motion in Limine Concerning any Reference to the terms "Murder" and "Victim."

The Court finds that it properly denied Defendant's motion in limine to prevent the State's witnesses from using the terms "murder" and "victim." The Court notes that the State argued that it only intended to use the terms when necessary and proper in the prosecution of the case. Stinski v. State, 286 Ga. 839, 843 (9) (691 SE2d 854) (2010). The Court also considered that if a State witness used the terms improperly, the defense had an obligation to make a contemporaneous objection. Tennyson v. State, 282 Ga. 92, 94 (4) (646 SE2d 219) (2007) ("In the absence of a contemporaneous objection, a mistrial motion is untimely and will not be considered on appeal") (citation and punctuation omitted).

Defendant does not contend that the State or any specific witness improperly used the terms. The Court further notes that Defendant has pointed to no such objection being made during the trial of the case nor any improper use of the terms. Accordingly, Defendant's motion for new trial is denied on this ground.

**VI. The Court Properly Denied Defendant's Motion Number 16 Titled "Motion in Limine" filed on May 5, 2011.**

The Court finds that it properly denied Defendant's motion for a blanket order to prevent the State from tendering, reading from, or referring to a statement or report of anyone not present in court. The Court notes that in certain instances such references are permissible. Defendant had the obligation to make a contemporaneous objection to any alleged improper testimony, and the Court would have ruled on any such objection. See Tennyson, 282 Ga. at 94. Defendant fails to identify any portion of the transcript where a meritorious objection on this ground was made, or any Court ruling that was in error.

Likewise, the Court finds that it properly denied Defendant's motion for a pretrial order instructing the prosecutor and the State's witnesses not to comment on any witness' credibility or

present a personal opinion about the crime. The Court finds that Defendant had an obligation to make a contemporaneous objection to an improper expression of opinion on the part of the State's attorneys or any witness. Sanders v. State, 289 Ga. 655, 659 (2) (715 SE2d 124) (2011).

The Court finds that it properly denied Defendant's motion for an order requiring the State to tender pictures or films it intended to introduce into evidence prior to the testimony by the witness outside the presence of the jury, and before informing the jury of the existence of the evidence or tendering the evidence. The Court finds that since the State provided the defense with all pictures and videos it intended to use at trial, Defendant had the opportunity to raise any objection to a specific piece of evidence prior to trial. The Court finds that dismissing the jury prior to the State seeking to introduce every item of evidence—as Defendant requested—would be onerous, burdensome, and impractical.

Finally, the Court notes that Defendant's Amended Motion for New Trial does not allege that his rights were violated or that he was harmed by the Court's rulings on the motions in limine in any specific instance. He identifies no transcript cite, no ruling of this Court nor any improper action of the prosecutor that would have been grounds for a meritorious objection. Consequently, Defendant's motion for new trial on these grounds is denied.

## **VII. The Court Properly Denied Defendant's Motions to Suppress Evidence Obtained Pursuant to Various Search Warrants.**

The Court finds that State's Exhibits 4-19, which includes various search warrants obtained following Defendant's arrest, were supported by probable cause.

A search warrant will only issue upon facts "sufficient to show probable cause that a crime is being committed or has been committed." O.C.G.A. § 17-5-21 (a). The magistrate's task in determining if probable cause exists to issue a search warrant is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband

or evidence of a crime will be found in a particular place. State v. Stephens, 252 Ga. 181, 182 (311 SE2d 823) (1984). Our duty in reviewing the magistrate's decision in this case is to determine if the magistrate had a "substantial basis" for concluding that probable cause existed to issue the search warrants. Grier v. State, 266 Ga. 170, 172 (465 SE2d 655) (1996). A magistrate's decision to issue a search warrant based on a finding of probable cause is entitled to substantial deference by a reviewing court. McClain v. State, 267 Ga. 378, 388 (477 SE2d 814) (1996).

DeYoung v. State, 268 Ga. 780, 786 (7) (493 SE2d 157) (1997).

The Court finds that there was a sufficient nexus between the information sought and the crimes alleged to support the magistrate's finding of probable cause.

Moreover, the information in the supporting affidavits was not stale, as Defendant argues.

"Staleness" as [it] relates to probable cause is not always measured by the interval between the commission of the crime and the issuance of the search warrant. "Staleness" as [it] relates to probable cause is measured by the probability that the thing to be seized is located at the place to be searched and it involves the interval between (i) the time when the thing to be seized is indicated by the evidence or information to be at the place to be searched and (ii) the time when the search warrant is issued.

Lemon v. State, 279 Ga. 618 622 (2) (619 SE2d 613) (2005), citing Mitchell v. State, 239 Ga. 456, 458 (2) (238 SE2d 100) (1977). In so finding, the Court has considered the warrants, the affidavits supporting the warrant requests, as well as the testimony of witnesses and argument of counsel at the August 24, 2011 hearing. Defendant's motion for new trial on this ground is denied.

### **VIII. The Court Properly Denied the Motions filed on May 5, 2011.**

Defendant sets forth in Enumeration of Error VIII in his Amended Motion for New Trial a catch-all allegation concerning this Court's denial of all of his pre-trial motions. However, Defendant fails to state with any particularity the basis for any such error, citations to authority to support his allegation of error, or even the preservation of any specific legal issue. Accordingly, the motion for new trial on this ground is denied.

**IX The Court Properly Denied Defendant's Motion to Quash the Subpoenas of Dr. Peter Thomas and Dr. Julie Rand Dorney.**

The Court finds that it properly denied Defendant's motions to quash the subpoenas of Dr. Peter Thomas and Dr. Julie Rand Dorney and permitted the State limited access to the psychological evaluations conducted by the doctors. On January 4, 2012 and February 8, 2012, this Court held hearings on the relevant motions. Following Defendant's "Notice of Intent to Raise Issue of Insanity," the State requested information concerning Dr. Thomas and Dr. Rand Dorney's evaluation of Defendant and any opinions reached as a result the evaluation. The Defendant objected contending the disclosure violated his attorney/client privilege.<sup>1</sup>

The Court granted the State's request; however, prior to disclosing any information, the Court viewed the information *in camera* in order to redact and protect any privileged material. The Court finds that the information provided to the State was limited to the notes and opinions of the doctors concerning their evaluation of Defendant and Defendant's own statements, and that no attorney/client information was disclosed.

The Court notes that at the January 4, 2012 hearing, Defendant conceded that everything Dr. Thomas knew about Defendant "he learned from speaking with Mr. Neuman and from his – his testing of Mr. Neuman." (January 4, 2012 Hearing T. 9). The Court also finds that at the February 8, 2012 hearing Defendant's counsel stated that they consulted with Dr. Rand Dorney in July 2011, but that Dr. Rand Dorney had met with Defendant at the jail in June, 2011, prior to the consultation with Defendant's attorneys. (February 8 2012 Hearing T. 6). The Court finds that at no time did Defendant assert Dr. Thomas or Dr. Rand Dorney were provided confidential attorney/client information prior to their evaluation of Defendant and the State did not seek

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<sup>1</sup> Defendant conceded that he never intended to seek treatment from Dr. Thomas or Dr. Rand Dorney; therefore, there was no doctor/patient privilege that attached. (January 4 2012 Hearing T. 15).

anything other than the doctors' notes and opinions based upon their expert evaluation of the Defendant and his statements to them. Thus, the Court finds that evaluations and opinions by Dr. Thomas and Dr. Rand Dorney were independent of the attorney/client relationship. Accordingly, the motion for new trial on this ground is denied.

**X. The Court Properly Quashed the Subpoena to Esther Panitch.**

The Court finds that it properly quashed the defense subpoena that was served on prospective witness Esther Panitch. The Court finds that Defendant failed to establish that Ms. Panitch would be able to provide any relevant evidence in this case outside her representation of the ex-wife of Defendant. Defendant did not proffer the alleged materiality of the proposed testimony when given an opportunity at the pretrial hearing on this issue held January 4, 2012, and did not otherwise specify why the witness's motion to quash should not be granted.

Further, at the evidentiary hearing held on Defendant's Amended Motion for New Trial, Defendant again failed to include any proffer of what the testimony of Ms. Panitch would have been had the motion to quash not been granted. Accordingly he has not established nor even articulated any prejudice or harm as a result of the quashing of the defense subpoena. "In order to have reversible error, there must be harm as well as error [Cit.] ' Inman v. State, 281 Ga. 67, 73 (5) (635 SE2d 125) (2006). As Defendant fails to allege harm, or attempt to support a finding of such by the evidence his Amended Motion is denied on this ground.

**XI. The Court Properly Granted the State's Motion in Limine.**

The Court finds that it properly granted the State's Motion to Limine to restrict the Defendant's attempt to elicit evidence in front of the jury concerning courtroom conduct between State witnesses Andrea Schneiderman and Shayna Citron, as well as an out-of-court conversation between the two following Ms. Citron's testimony.

As an initial matter, the Court notes that the defense did not request a curative instruction resulting from any in-court behavior. (T. at 1800-1802). Further, the Court fails to see the relevance of a short, non-confrontational embrace in the courtroom between two witnesses who had been excused from their subpoenas. See generally Walton v. State, 293 Ga. 607, 612 (4) (748 SE2d 866) (2013). The Court makes the specific finding that there was no outburst, no confrontation in the jury's presence, and no demonstration that would cause a reasonable juror to conclude anything prejudicial to Defendant or to any witness from the conduct that occurred in court.

Regarding conduct that occurred out of court, Defendant proffered the testimony of Ms. Citron regarding a conversation that took place between herself and Andrea Sneiderman in the hallway of the courthouse. (T. 1984-1992). The Court finds that nothing in the proffer of Ms. Citron was relevant to the issues before the jury, or otherwise admissible. The conversation, even as relayed by Ms. Citron, was not overtly threatening nor did it impact the evidence before the jury. Defendant has established no harm or prejudice from the Court's order, and his Amended Motion is denied on these grounds.

## **XII. The Court Properly Denied Defendant's Motion for Mistrial.**

In a related enumeration of error, the Court finds that it properly denied Defendant's motion for mistrial regarding Ms. Sneiderman's in-court conduct toward Ms. Citron following Ms. Citron's testimony. Walton, 293 Ga. at 612. "Whether to declare a mistrial is in the discretion of the trial court and will not be disturbed on appeal unless it is apparent that a mistrial is essential to the preservation of the right to a fair trial." Rafi v. State, 289 Ga. 716, 720 (4) (715 SE2d 113) (2011) (citations and punctuation omitted). Neither the nature of Ms. Sneiderman's in court conduct nor its likely effect—if any—on the jury, warranted a mistrial or any corrective

instruction. As noted above, the defense did not request that any curative instruction be given. See Walton, 293 Ga. at 612 (trial court did not abuse its discretion in failing to grant a mistrial following a commotion occurring in the courtroom); Forney v. State, 255 Ga. 316, 318 (3) (338 SE2d 252) (1986) (finding no abuse of discretion when trial court denied a motion for a mistrial after the victim's wife cried openly during closing argument and had to be escorted from the courtroom).

### **XIII. The Court Properly Denied Defendant's Motion in Limine Concerning Hypothetical Questions of Experts and the Motion for Mistrial.**

The Court finds that it properly permitted the State to question expert witnesses with hypothetical questions. "An expert . . . may give an opinion based upon his own examination . . . , upon his observation . . . , or upon any state of facts, *supported by some evidence in the case*, which he assumes as true." (emphasis in original) Leonard v. State, 269 Ga. 867, 870 (30 (506 SE2d 853) (1998) (citation omitted)). The Court further finds that it properly exercised its discretion in denying the motion for mistrial. Defendant's objection amounted to a complaint that the State's cross-examination questions to the defense experts lacked a good faith basis. Insofar as the questions posed were not objected to contemporaneously, the Court finds they are waived. Tennyson 282 Ga. at 94 ("In the absence of a contemporaneous objection, a mistrial motion is untimely and will not be considered on appeal").

Further, the State represented that the complained of questions were based on the testing and report done by defense expert Dr. Thomas, and computer analysis done on Defendant's personal computer devices. (T. 2280-82). While the defense and the State may have had different interpretations of the evidence and facts presented in the case, the Court finds each question posed had a good faith basis and/or was supported by some evidence in the case.

Leonard, 269 Ga. 870. Defendant's motion for mistrial was properly denied, as was the motion

to prevent the State from asking hypothetical questions.

**XIV. The Court Properly Quashed the Subpoena Issued to Dr. Warsaw.**

The Court finds that it properly quashed the subpoena issued to Dr. Warsaw, a counselor who treated both Defendant and Defendant's then-wife Ariela Neuman in joint marital counseling prior to Defendant's arrest. The Court finds that Dr. Warsaw's proposed testimony attempting to elicit hearsay from Ms. Neuman was protected by the doctor/patient privilege and the marital privilege. Defendant has not provided any evidence of a waiver of those privileges on behalf of Ms. Neuman.

The evidence was that Defendant and his then-wife Ariela Neuman were jointly seeking psychiatric counseling for marital problems from Dr. Warsaw. As such, the Court finds that both spouses were necessary participants in the psychiatric sessions, and Ms. Neuman's communications to the psychiatrist are entitled to protection. Sims v. State, 251 Ga. 877, 881 (5) (311 SE2d 161) (1984). Dr. Warsaw's treatment notes related to conversations with Ms. Neuman alone and with Defendant are privileged, and no legal waiver or exception has been presented to the Court. Defendant's subpoena was properly quashed.

**XV – XX. The Court Properly Charged the Jury.**

The Court finds that in response to enumerations of error 15-18, it properly charged the pattern jury charge approved by the Supreme Court of Georgia in each instance. As to Enumeration of Error 19, the Court finds that it properly charged a correct statement of Georgia law concerning the burden of proof when a defendant presents a defense of not guilty by reason of insanity. Kirk v. State, 252 Ga. 133 (311 SE2d 821) (1984). Further, the instruction was consistent with the presumption of sanity charge to which the Defendant did not object. For these reasons, the motion for new trial is denied.

**XXI. The Court Properly Sustained the State's Objection to Defendant's References to facts ruled not in evidence during the defense Closing Argument.**

The Court finds that the references to Dr. Warsaw during Defendant's closing argument were improper; therefore the Court properly sustained the State's objection. The Court finds that it had previously ruled that Dr. Warsaw's treatment of Defendant and his then-wife were subject to doctor/patient privilege. In response to the State's objection Defendant acknowledged that the information pertaining to Dr. Warsaw had not been admitted at trial; therefore, the Court finds the reference to inadmissible evidence was improper. See Barnes v. State, 269 Ga. 345, 354-55 (16) (496 SE2d 674) (1998) (defense closing argument properly limited to facts and inferences from facts in evidence). Accordingly, the motion for new trial on this enumeration of error is denied.

**XXII. Andrea Schneiderman's Conviction for Perjury does not Entitle Defendant to a New Trial.**

Defendant raises two grounds in urging this Court to grant him a new trial based on the perjury conviction of State witness Andrea Schneiderman. The first is an alleged violation of his Due Process rights. The second is based on an alleged violation of O.C.G.A. § 17-1-4. For the reasons set forth below, neither argument is persuasive.

Andrea Schneiderman, wife of the victim Russell "Rusty" Schneiderman was a fact witness for the State in the prosecution of Defendant for the shooting death of Mr. Schneiderman. While she was on the witness stand and under oath, Ms. Schneiderman made numerous statements—largely related to her relationship with Defendant and details of their communication—that were challenged and impeached by both the State and the defense. Ms. Schneiderman was subsequently convicted of perjury stemming from her testimony in State v. Hemy Neuman, among other crimes. See State v. Andrea Schneiderman, 13CR2413. The particular testimony found to be false

was 1) Ms. Schneiderman's denial of a romantic relationship with Defendant, 2) Ms. Schneiderman's denial that she shared a hotel room with Defendant in Longmont, Colorado, 3) Ms. Schneiderman's belief that Defendant was in Longmont, Colorado for business purposes, and 4) Ms. Schneiderman's denial that she and Defendant kissed each other in Greenville, South Carolina.

This Court finds no Due Process violation as a result of Ms. Schneiderman's conviction. This is not a situation where the State hid or attempted to conceal information that would impeach its own witness. To the contrary, both the State and the defense vigorously challenged Ms. Schneiderman's testimony in these particulars, based on information that was available to both sides. The State and the defense produced numerous witnesses, documents, phone records and email exchanges to impeach Ms. Schneiderman on the facts related to her relationship with Defendant. The jury was fully informed of the evidence that contradicted Ms. Schneiderman's testimony on these particular points and was properly instructed on how to weigh the credibility of each witness. Nations v. State, 290 Ga. 39, 41-42 (2) (717 SE2d 634) (2011); see also Peake v. State, 247 Ga. App. 374, 376 (2) (545 SE2d 309) (2000) ("this is not a situation wherein the State allowed a witness to give false testimony which defense counsel had no means of correcting.") The Court finds Defendant has failed to establish any Due Process violation.

Finally, the Court finds that there was no violation of O.C.G.A. § 17-1-4. O.C.G.A. § 17-1-4 mandates the setting aside of a verdict or judgment obtained or entered as a result of perjury "when the judgment could not have been obtained without the perjured evidence and the perjurer has been duly convicted thereof." John v. State, 282 Ga. 792, 795 (4) (653 SE2d 435) (2007). The Court finds that there was more than sufficient evidence to convict Defendant without Ms. Schneiderman's testimony. Defendant admitted to shooting Russell "Rusty" Schneiderman, and alleged only that he was insane at the time of the crime. Defense presented numerous mental

health experts to substantiate his defense, and the State rebutted that testimony with experts of its own. The jury weighed the testimony and evidence, and returned a verdict of guilty but mentally ill. The complained of testimony did not go to any actual element of either offense charged, but provided only context and motive for the crime. Nations, 290 Ga. at 41-42. The Court makes the specific factual finding that the evidence of Defendant's guilt was overwhelming, and not dependent on Ms. Schneiderman's testimony. See Day v. State, 242 Ga. App. 899 901 (3) (531 SE2d 781) (2000) (declining to find a violation of O.C.G.A. § 17-1-4 where defendant failed to show that the testimony at issue was essential for his conviction and noting the overwhelming evidence of the defendant's guilt).

For these reasons, the Court denies Defendant's motion for new trial on the grounds asserted in this enumeration of error.

### **XXIII. The Court Properly Ruled on all Motions and Objections**

For the reasons set forth in its rulings both before trial and during trial, the Court denies Defendant's motion for new trial on any other ground not specifically enumerated in its motion for new trial and amended motion for new trial.

**IT IS HEREBY ORDERED THAT the Defendants Motion for New Trial is DENIED  
ON EACH AND EVERY GROUND THEREOF.**

This 17<sup>th</sup> day of March, 2014

HONORABLE GREGORY A. ADAMS  
JUDGE, DEKALB SUPERIOR COURT  
STONE MOUNTAIN JUDICIAL CIRCUIT

03/14/2014 2:14:25 PM  
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