DEIMEYON ALLEN

PETITIONER

VS.

VANCE LAUGHLIN
WARDEN,
RESPONDENT.

Appendix To The Petition for a Writ of Certiorari

Deimeyon Allen, Pro Se

GDC# 1000420167

Wheeler Correctional Facility

195 Broad St.

Alamo, Ga. 30411

XIII. APPENDIX TABLE OF CONTENTS

PAGE

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	CRIMINAL CASE NO. 09-SC-83565
v.	
DEIMEYON X. ALLEN	JUDGE NEWKIRK

ORDER DENYING MOTION FOR NEW TRIAL

This case came before this Court for hearing on May 30th and August 2nd, 2012, on the Defendant's motion for new trial, as amended. This Court finds that, after a jury trial held in November 2010, the Defendant was found guilty of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony, for which he received a total sentence of life plus five years.

After considering the record in this case, the Defendant's amended motions for new trial, the State's response in opposition at the hearing in this case, and the arguments by both the Defendant and State on the issues contained therein, the Defendant's motion for new trial is hereby **DENIED.**

SO ORDERED this 23 day of April, 2013.

HONORABLE HENRY M. NEWKIRK
FULTON COUNTY SUPERIOR COURTS
ATLANTA JUDICIAL CIRCUIT

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II. APPENDIX B MOTION FOR NEW TRIAL

C.

ALLEN v. STATE

Supreme Court of Georgia.

ALLEN v. The STATE.

No. S14A1884.

Decided: March 16, 2015

Deimeyon X. Allen ("Allen") appeals from his convictions and sentences for the malice murder of Keith Booker, the aggravated assault of David Armour, and possession of a firearm during the commission of a crime. For the reasons that follow, we affirm.[1]

Construed to support the verdicts, the evidence showed that Allen and his brother Antoine Allen ("Antoine") lived in the same housing complex; Antoine lived with his mother, and Allen lived in a separate unit. Roger Armour ("Roger") lived in a nearby unit, across a parking area; at the time of the crimes, Roger was outside his apartment with murder victim Booker, David Armour ("David"), and several others, including Allen and Antoine.

David and others teased Antoine about a previous incident in which Antoine had called the police, and David and Antoine began arguing; a suggestion was made that the two men engage in fisticuffs, but Antoine said he would shoot his tormentors instead, and he and Allen ran toward their mother's apartment, pursued by David and Booker.

Allen went in his mother's apartment and emerged firing a Glock .40 caliber pistol at David and Booker, who fled to Roger's apartment. Roger retrieved his .380 caliber pistol and attempted to return fire, but the pistol jammed. Inside the apartment, it was learned that Booker had been shot. Booker was taken to a hospital, where he died of a single gunshot wound to his heart; the bullet entered from his back. Allen told investigating law enforcement officers that: he engaged the men in conversation when he went outside to take out the trash; an argument ensued and continued as the men followed him toward his mother's apartment, with men pushing and pulling him; Roger was the first to produce a pistol and pointed it at Allen and Antoine; Allen went to his mother's apartment to retrieve his .40 caliber Glock pistol, saw through the window that the men were still outside, exited his mother's apartment and found one of the men pointing a pistol at him; he pulled his pistol from his waistband and fired at the men, while they faced him; he ran and tossed his pistol away before climbing a fence. Ten shell casings were found in the parking area between the housing units of Allen's mother and Roger, which casings were from the same .40 caliber weapon; the projectile taken from Booker's body was also fired from a .40 caliber weapon. Allen's .40 caliber Glock pistol was not recovered.

1. The evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that Allen was guilty of the crimes of which he was convicted. See Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

2. In his motion for new trial, Allen relied in part on OCGA §§ 5-5-20[2] and 5-5-21,[3] contending that the verdicts were decidedly and strongly against the weight of the evidence, and contrary to the principles of equity and justice, such as to warrant the exercise of the trial court's discretion to grant a new trial. Allen now contends that, in addressing his motion for new trial, the trial court did not apply the correct standard, claiming that the trial court's order denying the motion found only that the evidence was sufficient to support the verdicts under Jackson, supra, and thus, the case should be remanded.

As this Court has noted,

[e]ven when the evidence is legally sufficient to sustain a conviction, a trial judge may grant a new trial if the verdict of the jury is "contrary to . the principles of justice and equity," OCGA § 5-5-20, or if the verdict is "decidedly and strongly against the weight of the evidence." OCGA § 5-5-21. When properly raised in a timely motion, these grounds for a new trial—commonly known as the "general grounds"—require the trial judge to exercise a "broad discretion to sit as a 'thirteenth juror.' " Walker v. State, 292 Ga. 262, 264(2), 737 S.E.2d 311 (2013). In exercising that discretion, the trial judge must consider some of the things that she cannot when assessing the legal sufficiency of the evidence, including any conflicts in the evidence, the credibility of witnesses, and the weight of the evidence. See Choisnet v. State, 292 Ga. 860, 861, 742 S.E.2d 476 (2013). Although the discretion of a trial judge to award a new trial on the general grounds is not boundless—it is, after all, a discretion that "should be exercised with caution [and] invoked only in exceptional cases in which the evidence preponderates heavily against the verdict," Alvelo v. State, 288 Ga. 437, 438(1), 704 S.E.2d 787 (2011) (citations and punctuation omitted)—it nevertheless is, generally speaking, a substantial discretion. See State v. Harris, 292 Ga. 92, 94, 734 S.E.2d 357 (2012).

White v. State, 293 Ga. 523, 524(2), 753 S.E.2d 115 (2013) (Footnote omitted.)

Allen's characterization of the trial court's order denying his motion for new trial as incorrect because it did not apply the correct standard of review is misplaced. The court did not simply state that the evidence was sufficient to allow the jury to find Allen guilty, rather, the court's order states:

After considering the record in this case, the Defendant's amended motions for new trial, the State's response in opposition at the hearing in this case, and the arguments by both the defendant and State on the issues contained therein, the Defendant's motion for new trial is hereby DENIED.

Nothing in this order indicates that the trial court failed to "perform [ ] its 'duty to exercise its discretion and weigh the evidence' in its consideration of the general grounds. [Cit.]" White, supra at 525, 753 S.E.2d 115. The court did not state the incorrect standard in its order, see Choisnet, supra; Manuel v. State, 289 Ga. 383, 386(2), 711 S.E.2d 676 (2011), and nothing in the record indicates that the court was unaware of its responsibility. See Copeland v. State, 327 Ga.App. 520, 525(2), 759 S.E.2d 593 (2014). Indeed, the record demonstrates the opposite; during the hearing on the motion for new trial, the court's attention was specifically called to OCGA §§ 5-5-20 & 5-5-21, and that consideration of the general grounds thereunder involved different issues than merely the sufficiency of the evidence, and the court responded that it would not grant a new trial as "the thirteenth juror." The court clearly recognized that, in its discretion, it could grant a new trial under the authority of OCGA §§ 5-5-20 and 5-5-21, and chose not to do so. Compare Alvelo, supra.

Allen also argues that the verdicts were against the weight of the evidence, and that the trial court should have granted a new trial on the general grounds, noting that there were inconsistencies in the evidence, and positing that Roger had accidentally shot Booker. However,

[a] motion for new trial based on OCGA § 5-5-20, i.e., that the verdict is contrary to the evidence, addresses itself only to the discretion of the trial judge. Witt v. State, 157 Ga.App.

564(2), 278 S.E.2d 145 (1981). Whether to grant a new trial based on OCGA § 5–5–21, i.e., that the verdict is strongly against the evidence, is one that is solely in the discretion of the trial court, and the appellate courts do not have the same discretion to order new trials. Willis v. State, 263 Ga. 597(1), 436 S.E.2d 204 (1993).

Smith v. State, 292 Ga. 316, 317(1)(b), 737 S.E.2d 677 (2013). Thus, even when an appellant asks this Court to review

a trial court's refusal to grant a new trial on the general grounds, this Court must review the case under the standard set forth in Jackson v. Virginia [supra], that is, if the evidence viewed in the light most favorable to the prosecution, supports the verdict or verdicts. [Cit.]

Williams v. State, --- Ga. ----, ----, --- S.E.2d ---- (2015) (Case no. S14A1937, decided Feb. 16, 2015). And, as noted in Division 1, supra, under the standard set forth in Jackson, supra, the evidence authorized the jury to find Allen guilty of the crimes of which he was convicted.

3. Allen contends that the court should have, sua sponte, granted a mistrial because of unclear verdicts and other improprieties concerning the rendering of the verdicts.[4] The verdict form presented to the jury read, in pertinent part:

Count One–Murder. We, the jury, find the Defendant _

Or

We, the jury, find the Defendant _ of Voluntary Manslaughter.

And, it is uncontroverted that when the verdicts were initially presented to the court, the verdict form had both of the above blanks filled in with the word "Guilty." The jury foreman then requested the verdict form be returned to him, and he then wrote, on the back of it: "Change Voluntary Manslaughter to NOT GUILTY," but no change was made to the front of the form. The form was presented to the court, and the foreman affirmed that the verdicts had been agreed to by all 12 jurors. The foreman read the verdicts as follows:

Count one, murder, we, the jury find the defendant guilty.

Count two, felony murder, we, the jury find the defendant guilty.

Count three, aggravated assault, we, the jury find the defendant guilty.

Count four, possession of a firearm during the commission of a felony, we, the jury find the defendant guilty.

Count five, aggravated assault, we, the jury, find the defendant guilty.

The verdicts were then reviewed by Allen's counsel and the prosecutor. Allen requested that the jury be polled; each juror answered affirmatively to three questions: "Is this your verdict?"; "Was this your verdict in the jury room?"; and, "Is this now your verdict?"

Although Allen argues that the completion of the verdict form shows that the jury did not properly understand the crimes charged, he points to nothing in the record other than the initial scrivener's error, which was corrected. Allen also asserts that he was deprived of unanimous verdicts. He specifically contends that the trial court did not address any issue regarding the "unanimity of the verdict" until a later hearings at which the jury foreman testified that he made the notation on the back of the verdict form so as to reflect the jury's vote,[6] but this contention is not correct. Rather, the court polled the jurors as to whether the verdicts of guilty were indeed the verdicts of each juror.

"In criminal cases the privilege of polling a jury is the legal right of the defendant, and does not depend upon the discretion of the court." [Cit.] The purpose of the rule is to insure that each member of the jury assents to the verdict, and for the court to discern possible coercion.

Benefield v. State, 278 Ga. 464, 466, 602 S.E.2d 631 (2004). "[A] negative response to a poll question 'is enough to raise the inference that the finding of the jury was not concurred in by each of the jurors, and, this being true, there was no legal verdict.' [Cit.]" Id. When the jury was polled, there were no negative responses, and the court did not err in determining that the jury reached unanimous verdicts.

Judgments affirmed.

HINES, Presiding Justice.

All the Justices concur.

IN THE SUPREME COURT OF GEORGIA
CASE NUMBER: S14A1884

DEIMEYON XAVIER ALLEN, *
*
Appellant, *
*
vs. *
*
THE STATE OF GEORGIA *
*
Appellee, *

BRIEF OF APPELLANT

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RESPONDENT EXHIBIT 5

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I. JURISDICTIONAL STATEMENT

Supreme Court of Georgia rather than the Court of Appeals of Georgia has general jurisdiction of this case on appeal for the reason that this is a murder case in which a sentence of death could have been imposed. Ga. Const. (1983), Art. 6, Sec. 6, Par. 3 (8).

II. STATEMENT OF MATERIAL FACTS

This is a direct appeal on a murder conviction. The primary theory of the Defense, clearly established within their Motion for New Trial, is that the Appellant was running from known gang members on the night at issue who admitted to being armed at the time the events transpired. The Defense theory contends that the Appellant discharged a weapon in an attempt to scare away these armed individuals and to halt their pursuit of him and his brother. The victim and the victim's brother, Roger Armour, went to their apartment to engage the Appellant in a shoot out during which time the victim was accidentally shot by his brother, Roger Armour. ***The evidence clearly and unequivocally supports the Defense theory of events.***

A. The Defendant was convicted of murder on November 10, 2010. (*TT: Jury verdict).*

B. The Defendant had no criminal history, had "led a pretty good life" according to the Trial Court and was gainfully employed prior to this incident at issue. *(MNT Page 35, lines 1-3).*

C. The victim and his brothers had a history of violence, gang affiliation, and were in possession of weapons on the night at issue. (*TT Page 284 Lines 3-6; TT Page 261 Lines 9-10; TT Page 261 Lines 3-6*)

D. The State's star witnesses, Roger Armour and "Diesel", admitted to being

intoxicated and having difficult remembering events on the night of his brother's death. (*TT page 233 Lines 9-12; TT Page 303 Lines 14-18; TT Page 303 Lines 18-25 and Page 304 Lines 1-4*).

OVERVIEW OF MATERIAL FACTS

This is clearly a case of grave injustice wherein a law abiding citizen, has been wrongfully convicted of murder for the death of the victim for which he could not possibly be responsible based on forensic evidence. Specifically, this case involves a Defendant in his mid-thirties without any criminal history whatsoever who was gainfully employed with the City of Atlanta government at the time of the events at issue. The victim in this case was a 17 year old male with a history of violence and gang affiliation residing within the same apartment complex as the Defendant. On the night of the death at issue the Defendant was running away from armed gang members who were chasing both him and his brother, Antoine Allen. Testimony was given by numerous individuals residing in the apartment complex regarding the victim and his brother's propensity towards violence and general trouble making.

The night of the victim's death he and was with a group of individuals, including his brothers Roger and David, that were teasing and chasing the Defendant's brother with guns The victim and his brother were involved in an incident weeks prior to his death involving shots fired in the neighborhood as well.

The Defendant responded to this threat of harm to himself and his brother by firing shots into the air to break up the crowd that was coming after them.

At trial it was made clear that the victim was congregated outside with several associates on the night of his death and the parties were passing around a gun The State's primary witnesses admitted to being intoxicated during the events in question . Their stories were rife with numerous inconsistencies such as whether the victim was dragged inside the apartment or whether he walked in the apartment after sustaining a shot and fell down.

This discrepancy is important because the Defense contends that the victim sustained his injury from his own brother who shot him inside the apartment by accident. There were no blood stains found outside the apartment from the victim that would indicate he sustained his injury outside and was dragged inside. However, police did see a blood splatter pattern against the wall typically associated with impact inside the apartment. Furthermore, there was numerous shell casings from a discharged firearm recovered within the victim's apartment.

While the Defendant admits to having a firearm and utilizing it against the victim, it was done for purpose of self defense. The Defendant had been fired upon by the victim and his brothers as evidenced by the bullet holes sustained by the Defendant's vehicle and the shell casings recovered outside his residence.

It was made clear at trial that there were no shell casings found in the

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Defendant's home, but shell casings were found in the home of the victim indicating shots fired from within the victim's residence.

It was further established at trial and within the Motion for new trial that the location of the bullet on the wall, combined with the blood splatter on the wall, necessarily means that the victim sustained his fatal injury within his apartment and not from a shooter outside the apartment. Moreover, the position of the Defendant when he was firing the weapon would have required his bullet to make a 90 degree turn to strike the victim.

III. PROCEDURAL HISTORY

The Defendant, DEIMEYON XAVIER ALLEN was tried by jury in Fulton County Superior Court on November 2010. The Honorable Henry M. Newkirk, Judge, Superior Court, Atlanta Judicial Circuit, presided over the trial. The jury reached its verdict on November, 2010, finding Defendant guilty of murder (count 1), felony murder (Count 3), aggravated assault (Count 4), and possession of a firearm during the commission of a felony (Count 5). (Volume V, p. 2-3; see also Amendment to Volume IV; R-296). Defendant's felony murder and aggravated assault convictions merged into his conviction for murder (Volume V, p.9). Defendant was, therefore, sentenced on Counts 1 and 5 (Volume V, p. 10). He was sentenced to life imprisonment for murder and a consecutive five year term of imprisonment for his conviction for the firearm offense. (Volume V, p. 11; R-294-

295).

Defendant timely filed his motion for new trial on November, 2010 (R – 299-301), subsequent to the verdict returned by the jury, and this Court's judgment of conviction and sentence entered on November, 2010 (Trial Transcript Volume V p. 2-3, 10-11; see also Amendment to Volume IV). Defendant then amended his motion for new trial on October 4, 1999, and filed a brief in support (R-307-407). A hearing was held on Defendant's motion and amended motion for new trial on May and August, 2012 (R-402). Defendant's Motion for New Trial was denied on April 22, 2013 (R-403). Defendant's counsel consequently filed a notice of appeal on April 22, 2013. Pursuant to O.C.G.A. 17-1-1 and the rules of the Supreme Court, the undersigned counsel forwarded a copy of Defendant's notice of appeal to the Futon County District Attorney's Office as well as the Attorney General's Office of Georgia.

It is the undersigned counsel's desire to have oral argument, particularly addressing the issue which this court left open in footnote 6 in Johnson v. State, S99G0759 (February 28, 2000), *aff'g*, 236 Ga. App. 252, 511 S.E.2d 603 (1999): whether a witness' level of certainty or confidence in their identification is a factor which a witness should be allowed to testify, and which the jury should be instructed to consider when considering the reliability of a witness' identification.

Defendant is currently incarcerated at Macon State Prison, P.O Box 426, Oglethorpe, Georgia 31068. Defendant is GDC ID # 1000420167.

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IV. TRIAL INDEX

All Pre-trial motions will be reflected as "PT". Trial transcripts will be noted as "TT". Motion for New Trial Transcripts will be reflected as "MNT" .

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V. ENUMERATIONS OF ERROR

A. The Trial Court Applied the Wrong Standard in Evaluating the Defendant's Motion for New Trial;
B. The Verdict is Against the Weight of the Evidence;
C. The Appellant's Due Process Rights were violated in that the Jury verdict and their intent was inconsistent and not unanimous.

VI. ARGUMENT AND CITATION TO AUTHORITY

A. The Trial Court Applied the Wrong Standard in Assessing the Defendant's Motion for New Trial.

If the Court fails to apply the appropriate standard in assessing the Defendant's Motion for New Trial, the Motion should be remanded.

Even when the evidence is legally sufficient to sustain a conviction, a trial judge may grant a new trial if the verdict of the jury is "contrary to ... the principles of justice and equity," OCGA § 5-5-20, or if the verdict is "decidedly and strongly against the weight of the evidence." OCGA § 5-5-21. When properly raised in a timely motion, these grounds for a new trial — commonly known as the "general grounds" — require the trial judge to exercise a "broad discretion to sit as a 'thirteenth juror.'" *Walker v. State*, 292 Ga. 262, 264 (2) (737 SE2d 311) (2013). In exercising that discretion, the trial judge must consider some of the things that she cannot when assessing the legal sufficiency of the evidence, including any conflicts in the evidence, the credibility of witnesses, and the weight of the evidence. See *Choisnet v. State*, 292 Ga. 860, 861 (742 SE2d 476) (2013). Although the discretion of a trial judge to award a new trial on the general grounds is not boundless — it is, after all, a discretion that "should be exercised with caution [and] invoked only in exceptional cases in which the evidence preponderates heavily against the verdict," *Alvelo v. State*, 288 Ga. 437, 438 (1) (704 SE2d 787) (2011)(citations and punctuation omitted) — it

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nevertheless is, generally speaking, a substantial discretion. See State v. Harris, 292 Ga. 92, 94 (734 SE2d 357) (2012).

In White v. State, 293 Ga. 523 (2013) the Defendant properly raised the general grounds in a timely motion for new trial. The Supreme Court held that the trial court applied the wrong standard in its consideration of the general grounds, erroneously applying the standard by which a court assesses the legal sufficiency of the evidence. For instance, the trial court explained in its order that it was viewing the evidence "in the light most favorable to [the] verdict," and the trial court explained its rejection of the general grounds in these terms: "The evidence supported the verdict. ... The evidence was sufficient to support the verdict. ... [T]he evidence was sufficient under *Jackson v. Virginia* ... to support the verdict." Nothing in the order of the trial court indicates to us that the trial court performed its "duty to exercise its discretion and weigh the evidence" in its consideration of the general grounds. Walker, 292 Ga. at 264 (2) (citations omitted). Instead, its repeated statements that the evidence is sufficient to sustain the verdict "denotes that the trial court failed to apply its discretion, as the determination if there is sufficient evidence to support the verdict is a matter of law, not discretion." Manuel v. State, 289 Ga. 383, 386 (2) (711 SE2d 676) (2011) (citations and punctuation omitted). The same is true of the citation to *Jackson* and the statement that the trial court viewed the evidence in the light

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most favorable to the verdict. *Walker*, 292 Ga. at 264 (2). Accordingly, the Court could only conclude that the trial court "failed to apply the proper standard in assessing the weight of the evidence as requested by [White] in his motion for new trial." *Manuel*, 289 Ga. at 385 (2)(citation and punctuation omitted). For this reason, the Supreme Court vacated the denial of the motion for new trial, and remanded for the trial court to apply the proper standard to the general grounds and to exercise its discretion to sit as a "thirteenth juror" pursuant to [526] OCGA §§ 5-5-20 and 5-5-21. *Choisnet*, 292 Ga. at 862; *Walker*, 292 Ga. at 265; *Manuel*, 289 Ga. at 387 (2); *Alvelo*, 288 Ga. at 439 (2).

In the present case before the Court, the Order on the Motion for new trial stated that the evidence at trial was sufficient to support the verdict. *(MNT Order pg. 2)*. Nothing was stated in the order about the Court weighing the evidence or exercising its discretion to sit as a 13th juror. Indeed, weighing the evidence as a whole would have required the Court to look at the inconsistencies in testimony, admitted intoxication of the State's witnesses at the time of the incident, the felony conviction of the State's witnesses, the splatter stains on the wall of the victim's apartment, shell casings in the victim's apartment, and other pertinent issues not properly redressed by the Court.

B. The Verdict is Against the Weight of the Evidence

If the Court finds that the weight of the evidence is contrary to the verdict, then the trial Court, in its discretion, should grant Defendant a new trial. It is important to note in the instant case before the Court that the Defendant's contention is that the victim was shot accidentally by his own brother within the apartment after the argument that transpired between the parties. (see MNT transcripts, generally). While the State contends that the victim was shot outside by the Defendant the evidence presented at trial and at the motion for new trial show this is simply not possible.

In the present case the following evidence was presented at trial:

- The State's witness Roger Armour had conflicting account of events in that originally it was written in his witness statement that he dragged his brother in the house after his brother was shot but in his testimony in open court he stated that his brother walked in the house;
- Shell casings were recovered from within the residence of the victim indicating that much of the shooting occurred within his own residence and he may have been shot accidentally by his brother;
- The blood splatter on the wall of the victim's apartment indicates the point of impact was in the victim's residence;
- The position of the bullet hole within the victim's apartment would have required the Defendant's weapon to have fired a bullet that went straight and then made a 90 degree turn once inside the victim's residence;
- State witness and victim's brother Roger Armour admitted to having a weapon on his person at the time of the incident;
- Police testified that rounds were fired at the Defendant due to the shell casings located outside his home and the impact on his vehicle; There were shell casings located in front of the Defendant's mother's building as if someone had been shooting in his direction ((*TT Page 336 Lines 9 -14 and TT Page 337 Lines 6-8*).

- The car next to the Defendant's mother's car sustained a bullet hole in the driver's side, front panel and had several pieces of projectile on the ground beside it suggesting a string of shootings in the direction of the Defendant (*TT Page 336 Lines 9 -14 and TT Page 337 Lines 6-8*).
- Numerous shell casings were found inside Roger's apartment where the victim was found along with blood splatter on the wall of the interior of the apartment inconsistent with the testimony of the State's primary witness who stated he was shot outside. Furthermore, the ballistics report on the .40 caliber bullets found at the Defendant's home and the bullet from the victim's gunshot wound was inconclusive *Page 409 Lines 19-25 and Page 410 Lines 1-2*).
- State Witness Roger Armour has convictions for crimes of moral turpitude on his record;
- State Witness Roger Armour was known for having a gun and showing it off regularly (TT pg. 261 lines 9-10).

Under the current fact pattern, the Judge, in his sound discretion, should find that the verdict is against the weight of the evidence. Indeed, if the evidence in its totality was weighed, the weight would clearly fall in favor of the Defendant. In the Order on Motion for New Trial, drafted by the State, the Court noted that the Defendant ran back to his house to get a gun due to being angry that the group of boys were making fun of his brother (*TT 238, MNT Order pg. 1*). The Order then states that the Defendant began shooting his gun and that the victim was shot in the back. (*MNT order pg. 1 and 2*). The Order makes no effort at weighing the evidence. No mention is made that the victim and his brother were originally in possession of guns at the original argument, that there were numerous shell casings recovered inside the victim's apartment and that the blood splatter and bullet hole in the wall indicate that it came from inside the apartment, nor was any mention

made of the witnesses intoxication or inconsistent statements regarding where and when the injury was inflicted.

On a motion for new trial the power of the court is very broad. The Court may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. Ricketts v. Williams; 242 Ga. 303 (1978). "It has been said that on such a motion the court sits as a thirteenth juror. The motion, however, is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." 2 Wright & Miller, Federal Practice and Procedure: Criminal 486-487, § 553 (1969). See also Merino v. State, 230 Ga. 604 (198 SE2d 311) (1973); Kramer v. Hopper, 234 Ga. 395, 396 (216 SE2d 119) (1975); Davis & Shulman's Georgia Practice and Procedure 294-295, § 19-4 (2) (1975).

In the present case before the Court the trial Court did not look at the conflicts in evidence and credibility of witnesses in making its determination. The trial Court did not conduct any assessment of the respective weight of the evidence and solely focused on the evidence being sufficient to support the verdict. Indeed, when viewed in its totality in the present case, the verdict is clearly against the

weight of the evidence.

C. The Trial Court should have granted a mistrial due to improper jury conduct and an unclear verdict not properly reviewed by the Court prior to publication. The Defendant's due process rights were violated in that the jury felt rushed in making their decision, misunderstood the charges thus causing them to fail to meet their constitutional and statutory obligations.

If the Appellant can show such defects in the juror's conduct so as to taint the trial mechanism itself, then the Appellant should be granted a mistrial. In the present case, the juror foreman quickly changed the verdict form as he was returning to the Courtroom with the verdict. At the close of the trial, the Judge requested to meet with the jury Foreperson to inquire about the status of their deliberation. The foreperson was brought into the courtroom and asked if the jury wished to adjourn and continue deliberations the following day, or if they wished to stay a little longer. The foreperson advised the Judge that they were close and wished to stay and then left the courtroom at 5:05 p.m. to return to the deliberation room. At 5:20 p.m., a mere 15 minutes later, the jury returned and offered their verdict (*Page 509 Lines 1-25* and *Page 510 Lines 1-17*). The jury then notified the Court that they had reached a verdict. During deliberations, three questions were asked during which time the foreman was given the information by the Judge. *(MNT page 6, lines 4-9).* On the way back into the Courtroom, it appeared as if the foreman made hasty changes to the juror forms. The Judge noticed writings which were scratched out and written over by the foreperson causing a return of a

conviction for manslaughter and murder. It was the concern of the Appellant, raised by his attorney at the Motion for new trial, that the jury completely misunderstood the charges. This is evidenced by the three questions asked during the deliberation process which were only addressed through the foreman's interpretation of the answer, it is evidenced by the inconsistent verdicts in that mens rea necessary for manslaughter is entirely different than that for murder, and finally, it is evidenced through the writings on the back of the forms indicating that the jurors were confused about the charges. *(MNT page 5 lines 17-25, page 6 lines 1-25, page 7 lines 1-17).* The foreman was called back weeks later and the Court relied exclusively on his testimony as to whether a unanimous verdict had been reached. *Id.*

Groves v. State is a Georgia Supreme Court case which addresses this issue at length. The Groves Court, citing cases in surrounding states, held:

"An accused's right to a fair trial, impartial, and unimpaired jury is not like measuring the effect of erroneous evidentiary rulings against the overall weight of properly admitted evidence. Errors involving the composition of the court or jury affect the legitimacy of the entire proceeding, leaving nothing to measure or weigh and requiring reversal. Chief Justice Rehnquist stated in Arizona v. Fulminante 499 U.S. 279 , "Errors that occur "during the presentation of the case to the jury" are susceptible to a harmless error analysis because they

may "be quantitatively assessed in the context of [the] other evidence." Id. at 307-08, 111 S.Ct. at 1264. "But errors that create "defects . . . in the trial mechanism" itself affect the "entire conduct of the trial from beginning to end," damage "the framework within which the trial proceeds," and are therefore not subject to harmless error analysis". Id., at 309-11, 11 S. Ct. at 1265. An earlier U.S. Supreme Court decision in Grey v. Mississippi, 481 U.S. 648, 668 (1987) (plurality opinion) stated: "Because . . . the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman [, 386 U.S. at 23, 87 S. Ct. at 827-28, 17 L. Ed. 2d at 710]. What is a verdict and what does it mean? In Anthony v. Anthony, 103 Ga.250, at p. 251 (29 S.E. 923), this court said, the meaning of the word verdict is a "true saying." "A verdict is the ascertained truth to which effect is given by the judgment of the court." Vaughan v. Cade, 2 Rich. (S. C.) 49, 52. "A verdict is a declaration of the truth as to the matters of fact submitted to the jury." Shenners v. West Side St. Ry. Co., 78 Wis. 382, 387 (47 N.W. 622); McBean v. State, 83 Wis. 206, 211 (53 N.W. 497 . ."

It would appear that a verdict delivered into court by a jury, which does not comport with the findings of that jury, is not a true saying. It would not speak the truth as the jury found it. The jury's oath is to give a "true verdict."

A verdict declaring contrary to the findings of the jury is not a true verdict. To hold otherwise would be to treat a solemn legal investigation as a game where victory may be won by inadvertence and methods that are worse. We do not overlook the fact that there are certain fundamental safeguards properly thrown around the defendant in a criminal case, which may free a guilty man; such as the constitutional inhibition against placing one in jeopardy a second time, the necessity for receiving verdicts in open court, the privilege and necessity of the presence of the accused at all stages of the trial, the benefit of counsel, etc. The principles above stated are not contrary to any of these. Though the powers of judges are more limited in this State than those possessed by the English judges, yet it has always been recognized in Georgia, and, so far as we are aware, in other American States, that the trial judge has the power to send the jury back for further consideration of the case where it is uncertain that the jury intended to find their verdict purports. Cook v. State, 26 Ga. 593; Mangham v. State, 87 Ga.549, 552 (13 S.E. 558); 16 C. J. 1098, § 2576; 38 Cyc. 1874, notes 56, 60; 25 Standard Enc. Proc. 1031 (5); compare Williams v. State, 46 Ga. 647.

A similar case is Harris v. State, 31 Ark. 196, where it was held: "The object in polling the jury is to ascertain if the verdict announced by the foreman is the verdict of all the jurors; and if there is any reason to doubt that all the jurors concur, it is competent for the court, of its own motion, to cause the jury to be

polled." Another case in which the question was elaborately considered is Grant v. State (Fla.), supra. There the jury returned into court a verdict in the following words: "We, the jury, find the defendant guilty of manslaughter in the first degree." The court stated to the jury that there were no degrees of manslaughter, and that accordingly the verdict was not in form, requiring them to return to their room for further consideration. The jury returned to their room, and afterwards, on the same day, returned a verdict as follows: "We, the jury, find the defendant guilty of murder in the first degree, and recommend him to the mercy of the court." The defendant filed a motion for new trial, one ground of which was that the court erred in rendering judgment on the second verdict and refusing to accept the first one, "for the reason that the verdict for manslaughter in the first degree operated as an acquittal of said offense of murder, the latter being a higher offense and embracing the former." The Supreme Court of Florida affirmed the judgment of the trial court, but agreed with the contention of the plaintiff in error that the verdict first rendered might have been lawfully received, as the words "in the first degree" after the word "manslaughter" could have been treated as surplusage. The ruling of the court was summed up as follows: "We can not say, however, that the court erred in referring the matter to the jury for correction in the particular mentioned; and when this was done, they had the right to reconsider the case and bring in a new verdict." " Groves v. State 162 Ga. 161 (1926).

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In the present case at issue the trial Court had a duty to review the form before the verdict was recorded. The Court then noticed the defective forms and called the foreman back weeks later to determine the unanimity of the verdict.

The Court abused its discretion in failing to grant the Appellant a New trial on this issue in that the Court should have polled the jury at the time the verdict was given and sent the jury back into the deliberation room to reach if it determined that the jury misunderstood the instructions, charges, or needed further deliberation.

CONCLUSION

When considering the totality of the evidence that weighted in favor of the Defendant's innocence and/or justification of the crime at issue, combined with the confusion and uncertainty surrounding the issuance of the jury's verdict, it is clear that a manifest injustice has occurred. In order to remedy this injustice, the only solution is to remand this case to the trial court with instructions for a new trial.

This the 29 day of October, 2014

Respectfully submitted,
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C E R T I F I C A T E

STATE OF GEORGIA,

COUNTY OF FULTON:

I DO HEREBY CERTIFY THAT THE FOREGOING PAGES REPRESENT A TRUE, COMPLETE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE AFORESAID.

THIS CERTIFICATION IS EXPRESSLY WITHDRAWN AND DENIED UPON THE DISASSEMBLY OR PHOTOCOPYING OF THE FOREGOING TRANSCRIPT OR ANY PART THEREOF, INCLUDING EXHIBITS, UNLESS SAID DISASSEMBLY OR PHOTOCOPYING IS DONE BY THE UNDERSIGNED OFFICIAL COURT REPORTER AND ORIGINAL SIGNATURE AND SEAL IS ATTACHED THERETO.

THIS, THE 27TH DAY OF OCTOBER, 2012.

MELANIE M. FISHER, RPR, RMR, CRR
B-727
OFFICIAL COURT REPORTER
FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

C.

ALLEN v. STATE

Supreme Court of Georgia.

ALLEN v. The STATE.

No. S14A1884.

Decided: March 16, 2015

Deimeyon X. Allen ("Allen") appeals from his convictions and sentences for the malice murder of Keith Booker, the aggravated assault of David Armour, and possession of a firearm during the commission of a crime. For the reasons that follow, we affirm.1

Construed to support the verdicts, the evidence showed that Allen and his brother Antoine Allen ("Antoine") lived in the same housing complex; Antoine lived with his mother, and Allen lived in a separate unit. Roger Armour ("Roger") lived in a nearby unit, across a parking area; at the time of the crimes, Roger was outside his apartment with murder victim Booker, David Armour ("David"), and several others, including Allen and Antoine.

David and others teased Antoine about a previous incident in which Antoine had called the police, and David and Antoine began arguing; a suggestion was made that the two men engage in fisticuffs, but Antoine said he would shoot his tormentors instead, and he and Allen ran toward their mother's apartment, pursued by David and Booker.

Allen went in his mother's apartment and emerged firing a Glock .40 caliber pistol at David and Booker, who fled to Roger's apartment. Roger retrieved his .380 caliber pistol and attempted to return fire, but the pistol jammed. Inside the apartment, it was learned that Booker had been shot. Booker was taken to a hospital, where he died of a single gunshot wound to his heart; the bullet entered from his back. Allen told investigating law enforcement officers that: he engaged the men in conversation when he went outside to take out the trash; an argument ensued and continued as the men followed him toward his mother's apartment, with men pushing and pulling him; Roger was the first to produce a pistol and pointed it at Allen and Antoine; Allen went to his mother's apartment to retrieve his .40 caliber Glock pistol, saw through the window that the men were still outside, exited his mother's apartment and found one of the men pointing a pistol at him; he pulled his pistol from his waistband and fired at the men, while they faced him; he ran and tossed his pistol away before climbing a fence. Ten shell casings were found in the parking area between the housing units of Allen's mother and Roger, which casings were from the same .40 caliber weapon; the projectile taken from Booker's body was also fired from a .40 caliber weapon. Allen's .40 caliber Glock pistol was not recovered.

1. The evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that Allen was guilty of the crimes of which he was convicted. See Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

2. In his motion for new trial, Allen relied in part on OCGA §§ 5–5–20[2] and 5–5–21,[3] contending that the verdicts were decidedly and strongly against the weight of the evidence, and contrary to the principles of equity and justice, such as to warrant the exercise of the trial court's discretion to grant a new trial. Allen now contends that, in addressing his motion for new trial, the trial court did not apply the correct standard, claiming that the trial court's order denying the motion found only that the evidence was sufficient to support the verdicts under Jackson, supra, and thus, the case should be remanded.

As this Court has noted,

[e]ven when the evidence is legally sufficient to sustain a conviction, a trial judge may grant a new trial if the verdict of the jury is "contrary to . the principles of justice and equity," OCGA § 5–5–20, or if the verdict is "decidedly and strongly against the weight of the evidence." OCGA § 5–5–21. When properly raised in a timely motion, these grounds for a new trial—commonly known as the "general grounds"—require the trial judge to exercise a "broad discretion to sit as a 'thirteenth juror.' " Walker v. State, 292 Ga. 262, 264(2), 737 S.E.2d 311 (2013). In exercising that discretion, the trial judge must consider some of the things that she cannot when assessing the legal sufficiency of the evidence, including any conflicts in the evidence, the credibility of witnesses, and the weight of the evidence. See Choisnet v. State, 292 Ga. 860, 861, 742 S.E.2d 476 (2013). Although the discretion of a trial judge to award a new trial on the general grounds is not boundless—it is, after all, a discretion that "should be exercised with caution [and] invoked only in exceptional cases in which the evidence preponderates heavily against the verdict," Alvelo v. State, 288 Ga. 437, 438(1), 704 S.E.2d 787 (2011) (citations and punctuation omitted)—it nevertheless is, generally speaking, a substantial discretion. See State v. Harris, 292 Ga. 92, 94, 734 S.E.2d 357 (2012).

White v. State, 293 Ga. 523, 524(2), 753 S.E.2d 115 (2013) (Footnote omitted.)

Allen's characterization of the trial court's order denying his motion for new trial as incorrect because it did not apply the correct standard of review is misplaced. The court did not simply state that the evidence was sufficient to allow the jury to find Allen guilty, rather, the court's order states:

After considering the record in this case, the Defendant's amended motions for new trial, the State's response in opposition at the hearing in this case, and the arguments by both the defendant and State on the issues contained therein, the Defendant's motion for new trial is hereby DENIED.

Nothing in this order indicates that the trial court failed to "perform [ ] its 'duty to exercise its discretion and weigh the evidence' in its consideration of the general grounds. [Cit.]" White, supra at 525, 753 S.E.2d 115. The court did not state the incorrect standard in its order, see Choisnet, supra; Manuel v. State, 289 Ga. 383, 386(2), 711 S.E.2d 676 (2011), and nothing in the record indicates that the court was unaware of its responsibility. See Copeland v. State, 327 Ga.App. 520, 525(2), 759 S.E.2d 593 (2014). Indeed, the record demonstrates the opposite; during the hearing on the motion for new trial, the court's attention was specifically called to OCGA §§ 5–5–20 & 5–5–21, and that consideration of the general grounds thereunder involved different issues than merely the sufficiency of the evidence, and the court responded that it would not grant a new trial as "the thirteenth juror." The court clearly recognized that, in its discretion, it could grant a new trial under the authority of OCGA §§ 5–5–20 and 5–5–21, and chose not to do so. Compare Alvelo, supra.

Allen also argues that the verdicts were against the weight of the evidence, and that the trial court should have granted a new trial on the general grounds, noting that there were inconsistencies in the evidence, and positing that Roger had accidentally shot Booker. However,

[a] motion for new trial based on OCGA § 5–5–20, i.e., that the verdict is contrary to the evidence, addresses itself only to the discretion of the trial judge. Witt v. State, 157 Ga.App.

564(2), 278 S.E.2d 145 (1981). Whether to grant a new trial based on OCGA § 5–5–21, i.e., that the verdict is strongly against the evidence, is one that is solely in the discretion of the trial court, and the appellate courts do not have the same discretion to order new trials. Willis v. State, 263 Ga. 597(1), 436 S.E.2d 204 (1993).

Smith v. State, 292 Ga. 316, 317(1)(b), 737 S.E.2d 677 (2013). Thus, even when an appellant asks this Court to review

a trial court's refusal to grant a new trial on the general grounds, this Court must review the case under the standard set forth in Jackson v. Virginia [supra], that is, if the evidence viewed in the light most favorable to the prosecution, supports the verdict or verdicts. [Cit.]

Williams v. State, --- Ga. -----, -----, --- S.E.2d ----- (2015) (Case no. S14A1937, decided Feb. 16, 2015). And, as noted in Division 1, supra, under the standard set forth in Jackson, supra, the evidence authorized the jury to find Allen guilty of the crimes of which he was convicted.

3. Allen contends that the court should have, sua sponte, granted a mistrial because of unclear verdicts and other improprieties concerning the rendering of the verdicts.[4] The verdict form presented to the jury read, in pertinent part:

Count One–Murder. We, the jury, find the Defendant _

Or

We, the jury, find the Defendant _ of Voluntary Manslaughter.

And, it is uncontroverted that when the verdicts were initially presented to the court, the verdict form had both of the above blanks filled in with the word "Guilty." The jury foreman then requested the verdict form be returned to him, and he then wrote, on the back of it: "Change Voluntary Manslaughter to NOT GUILTY," but no change was made to the front of the form. The form was presented to the court, and the foreman affirmed that the verdicts had been agreed to by all 12 jurors. The foreman read the verdicts as follows:

Count one, murder, we, the jury find the defendant guilty.

Count two, felony murder, we, the jury find the defendant guilty.

Count three, aggravated assault, we, the jury find the defendant guilty.

Count four, possession of a firearm during the commission of a felony, we, the jury find the defendant guilty.

Count five, aggravated assault, we, the jury, find the defendant guilty.

The verdicts were then reviewed by Allen's counsel and the prosecutor. Allen requested that the jury be polled; each juror answered affirmatively to three questions: "Is this your verdict?"; "Was this your verdict in the jury room?"; and, "Is this now your verdict?"

Although Allen argues that the completion of the verdict form shows that the jury did not properly understand the crimes charged, he points to nothing in the record other than the initial scrivener's error, which was corrected. Allen also asserts that he was deprived of unanimous verdicts. He specifically contends that the trial court did not address any issue regarding the "unanimity of the verdict" until a later hearings at which the jury foreman testified that he made the notation on the back of the verdict form so as to reflect the jury's vote,[6] but this contention is not correct. Rather, the court polled the jurors as to whether the verdicts of guilty were indeed the verdicts of each juror.

"In criminal cases the privilege of polling a jury is the legal right of the defendant, and does not depend upon the discretion of the court." [Cit.] The purpose of the rule is to insure that each member of the jury assents to the verdict, and for the court to discern possible coercion.

Benefield v. State, 278 Ga. 464, 466, 602 S.E.2d 631 (2004). "[A] negative response to a poll question 'is enough to raise the inference that the finding of the jury was not concurred in by each of the jurors, and, this being true, there was no legal verdict.' [Cit.]" Id. When the jury was polled, there were no negative responses, and the court did not err in determining that the jury reached unanimous verdicts.

Judgments affirmed.

HINES, Presiding Justice.

All the Justices concur.

IV. APPENDIX D APPELLANT'S BRIEF

IN THE SUPERIOR COURT OF WHEELER COUNTY
STATE OF GEORGIA

DEIMEYON ALLEN,	)
	)
Petitioner,	)
GDC No. 1000420167,	)
	) Habeas Corpus
v.	) File No. 18CV109
	)
VANCE LAUGHLIN, Warden,	)
	)
Respondent.	)

FINAL ORDER

Petitioner, DEIMEYON ALLEN, filed the instant Application for Writ of Habeas Corpus on April 18, 2016 in Macon County challenging the validity of his Fulton County jury trial conviction. The case was transferred to the Wheeler County Superior Court on November 26, 2018. An evidentiary hearing occurred on April 11, 2019 and concluded on October 8, 2019. After reviewing the Petition, the entire record of the case, and applicable law, the Court makes the following findings:

PROCEDURAL HISTORY

A Fulton County grand jury indicted Petitioner on November 16, 2020 on charges of murder, felony murder, aggravated assault with a deadly weapon, possession of a firearm during the commission of a crime, and aggravated assault. (Transcript of Habeas Corpus Evidentiary Hearing held on April 11, 2019, hereinafter "HT," pp. 106-109). Following a jury trial, Petitioner was convicted on all counts and sentenced to life plus five years to serve. (HT 673-682). Petitioner, though counsel, filed a Motion for New Trial based on the general grounds. (HT 683). Petitioner, through counsel, filed a Particularized Motion for New Trial based on the following grounds:

1. The verdict is against the weight of the evidence;
2. The court erred in admitting certain evidence;

3. Jury misconduct in rendering a verdict before it was ready; and,
4. The Defendant had ineffective assistance of counsel.

(HT 757-770). Following her appointment to the case, appellate counsel filed a supplemental motion for new trial raising the following additional grounds on July 31, 2012:

1. There was not sufficient evidence to support the verdict;
2. The verdict is against the weight of the evidence;
3. The Defendant received ineffective assistance of counsel during the pre-trial process;
4. The defense counsel was deficient in failing to seek to introduce prior bad acts and such ineffectiveness prejudiced Defendant's ability to argue self-defense or justification;
5. Defense counsel was ineffective at trial; and,
6. Improper publication of the verdict and polling of the jurors.

(HT 815-821). Following a hearing, the trial court denied Petitioner's motion for new trial as amended. (HT 823). Petitioner, through counsel, filed a Notice of Appeal on April 25, 2013 from the judgment of conviction raising the following issues:

1. The trial court did not apply the correct standard in addressing the motion for new trial;
2. The verdicts were against the weight of the evidence; and,
3. The trial court should have *sua sponte* granted a mistrial because of unclear verdicts and other improprieties concerning the rendering of the verdicts;

(HT 103-104, 1621-1625). The Supreme Court of Georgia affirmed Petitioner's on March 16, 2015 in a published opinion. Allen v. The State, 296 Ga. 738 (2015).

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

1. Trial counsel was grossly ineffective pursuant to Strickland v. Washington. Specifically, said counsel was not an adversary to the State, interviewed no one, and did not employ an investigator;

2. Appellate counsel was grossly ineffective pursuant to Evitts v. Lucey. Specifically, appellate counsel failed to include Petitioner in his direct appeal. Counsel failed to subpoena witnesses requested, did not move the trial court for recusal, and misled Petition on the grounds that were submitted to the Supreme Court;
3. The trial court committed numerous errors that denied Petitioner a constitutionally viable trial pursuant to Berger v. United States. The trial court acted as a second prosecutor and failed to serve as a thirteenth juror. The trial court was biased in the State's favor; and,
4. The prosecutor committed numerous errors which denied Petitioner a fair trial pursuant to Brady v. Maryland. Specifically, the prosecutor withheld evidence and testified via his questions to witnesses. The prosecutor sought a conviction rather than justice.

On September 14, 2018, Petitioner amended his Application for Habeas Corpus in the following ways:

1. Trial counsel was grossly ineffective. Counsel was a disgrace to the judiciary. Counsel's representation mirrored her pay, next to nothing. Counsel was not an adversary to the State, did not interview anyone, and did not employ an investigator;
    a. Trial counsel failed to file a demurrer which would have led to the dismissal of counts in his indictment in violation of his 6th, 5th, and 14th Amendment rights;
    b. Trial counsel failed to interview critical witness for the defense violating his 6th Amendment rights to effective counsel;
    c. Trial counsel was ineffective for failing to object to an Edge violation in violation of his 5th, 6th, and 14th Amendment rights;
    d. Trial counsel was ineffective when she failed to object to an improper jury charge that omitted a critical element of the manslaughter charge;
    e. Trial counsel was ineffective for failing to object during the State's closing argument for commenting on Petitioner's failure to come forward to the police violating his 6th, 5th, and 14th Amendment rights;

f. Trial counsel was ineffective for not filing a motion to suppress items illegally obtained when officers searched his mother's residence violating his 4th, 5th, 6th, and 14th Amendment rights;

g. Trial counsel was ineffective for failing to investigate the number of blacks and black males on the jury rolls when there was possibly a violation of the JSSA Act of 1968 violating his 5th, 6th, and 14th Amendment rights to due process;

h. Appellate counsel was ineffective for failing to seek an evidentiary hearing at the motion for new trial;

i. Trial counsel failed to argue at sentencing; and,

j. Petitioner argues cumulative error at trial and on appeal violating his due process rights and a fair trial which are guarantees of the 5th and 14th Amendments.

2. Appellate counsel was grossly ineffective in that counsel failed to include Petitioner in his appeal, did not subpoena witnesses requested, did not move the trial court for recusal; and misled Petitioner on the grounds submitted to the Supreme Court;

   a. Appellate counsel was ineffective and her performance fell below an objective standard and, but for counsel's actions, the omitted issues would have had a reasonable probability of success on appeal violating his 6th Amendment rights.

3. The trial court committed numerous errors that denied him a constitutionally viable trial, the trial court acted as a second prosecutor rather than as the thirteenth juror, and was biased in the State's favor;

   a. The trial court abused its discretion by not making a ruling on the prima facie issue pertaining to his Batson/Wheeler challenge violating the Equal Protection Clause of the Fourteenth Amendment;

   b. The trial court abused its discretion in admitting evidence of guns and ammunition which had no relevance to the charges against Petitioner violating his 4th, 5th, 14th, and 6th Amendments for not objecting when the firearms were allowed to go back with the jury during deliberations;

   c. The trial court abused its discretion when a communication took place outside of Petitioner's presence and without his knowledge violating Petitioner's 5th, 6th, and 14th Amendment rights;

d. The trial court erred in failing to allow defense counsel to read and respond to note sent out during deliberations violating Petitioner's 5th, 6th, and 14th Amendment rights; and,

e. The trial court violated Petitioner's 5th and 14th rights when it charged the jury on three methods of aggravated assault set out in his indictment.

4. The prosecutor committed numerous errors that denied Petitioner a fair trial, the prosecutor withheld evidence in violation of Brady v. Maryland, the prosecutor testified via her questions to witnesses and that the prosecutor sought a conviction rather than justice;

a. The prosecution improperly commented on Petitioner's right to remain silent during closing arguments violating his 5th and 14th Amendment rights;

b. The prosecutor withheld exculpatory evidence favorable to the defense violating the Due Process clauses of the 5th and 14th Amendments; and,

c. The prosecution improperly commented on Petitioner's failure to come forward to the police violating his 5th, 6th, and 14th Amendment rights.

On September 27, 2019, Petitioner amended his Application for Writ of Habeas Corpus to include the following additional ground:

5. Appellate counsel was ineffective for failing to raise on appeal that trial counsel was ineffective for failing to request during closing that the jury should consider the lesser included offense of voluntary manslaughter if they determined the Petitioner's acts were justified.

On October 3, 2019, Petitioner amended his Application for Writ of Habeas Corpus to include the following additional ground:

6. Appellate counsel was ineffective for failing to challenge trial counsel's ineffectiveness for failing to interview and subpoena a critical witness on behalf of the defense violating the 6th and 14th Amendments;

7. Appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to object to the State's improper argument during closing;
8. Appellate counsel was ineffective for failing to raise that trial counsel was ineffective for failing to investigate and challenge the underrepresentation of African American males on the jury roll;
9. Appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to obtain a ruling on the Batson challenge violating the Equal Protection Clause and the 6th Amendment;
10. Appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to object to the multiple firearms tendered into evidence that were irrelevant to the case;
11. Appellate counsel was ineffective for failing to raise on direct appeal the State's violation of Brady, i.e., withheld the 911 call from the defense;
12. Appellate counsel was ineffective for failing to raise on appeal the denial of Petitioner's right to be present during a critical stage of the proceedings;
13. Appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to argue during closing that the jury should also consider whether Petitioner's acts satisfied the essential elements of voluntary manslaughter;
14. Appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to request an immunity from prosecution hearing pursuant to O.C.G.A. § 16-3-24.2;
15. Appellate counsel was ineffective for failing to raise the grounds in Petitioner's habeas corpus;
16. Appellate counsel's conduct was in violation of the Bar Committee rules on character and fitness while she was representing Petitioner;
17. Appellate counsel was ineffective for failing to raise on appeal that the trial counsel was ineffective for failing to challenge on appeal that the collective prejudice from all of trial counsel's deficiencies shall be considered in weighing prejudice; and,
18. Appellate counsel was ineffective for omitting the claims raised in the Petitioner's writ of habeas corpus.

An evidentiary hearing was held on April 11, 2019 in which attorneys Chevada McCamy and Monique Walker testified and documentary evidence was admitted. The evidentiary hearing concluded on October 8, 2019. Petitioner filed a Brief in Support on March 13, 2020 and an Amended Post-Hearing Brief in Support on September 18, 2020 in which he presented the following grounds and specifically withdrew his previous grounds raised:

1. Appellate counsel was ineffective for failing to challenge the trial counsel's ineffectiveness for failing to interview and subpoena a critical witness on behalf of the defense violating the Sixth and Fourteenth Amendment;
2. Appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to argue during closing that the jury should also consider whether the defendant's acts satisfied the elements of voluntary manslaughter;
3. Appellate counsel was ineffective for failing to challenge the trial court's infringement upon Petitioner's right to be present at a critical stage of the proceedings;
4. Appellate counsel was ineffective for failing to raise on appeal that the trial counsel rendered deficient performance for failing to obtain the 9-1-1 call with due diligence;
5. Appellate counsel rendered ineffective assistance of counsel by failing to raise on appeal that the trial counsel was ineffective for failing to conduct a thorough and sifting cross-examination of Mattie Anderson regarding her description of the victim that she witnessed brandishing a firearm;
6. Appellate counsel was ineffective for failing to raise on appeal that the trial counsel was ineffective for failing to file a motion in limine to the introduction of weapons that were irrelevant to the shooting incident and the trial court's abuse of discretion for admitting the evidence over defense objection;
7. Appellate counsel rendered ineffective assistance of counsel by failing to raise on appeal that trial counsel was ineffective for failing to object to the prosecutor's improper comment on Petitioner's failure to come forward;

8. Appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to request a pre-trial immunity hearing pursuant to O.C.G.A. § 16-3-24(2);
9. Appellate counsel was ineffective for failing to raise on appeal that trial counsel was ineffective for failing to challenge on appeal that the collective prejudice from all of trial counsel's deficiencies shall be considered in weighing prejudice; and,
10. Appellate counsel was ineffective for omitting the claims raised in the Petitioner's writ of habeas corpus.

BACKGROUND

The Georgia Supreme Court summarized the evidence presented at trial, construed to support the verdict, as follows:

> Construed to support the verdicts, the evidence showed that Allen and his brother Antoine Allen ("Antoine") lived in the same housing complex; Antoine lived with his mother, and Allen lived in a separate unit. Roger Armour ("Roger") lived in a nearby unit, across a parking area; at the time of the crimes, Roger was outside his apartment with murder victim Booker, David Armour ("David"), and several others, including Allen and Antoine.
>
> David and others teased Antoine about a previous incident in which Antoine had called the police, and David and Antoine began arguing; a suggestion was made that the two men engage in fisticuffs, but Antoine said he would shoot his tormentors instead, and he and Allen ran toward their mother's apartment pursued by David and Booker.
>
> Allen went in his mother's apartment and emerged firing a Glock .40 caliber pistol at David and Booker, who fled to Roger's apartment. Roger retrieved his .380 caliber pistol and attempted to return fire, but the pistol jammed. Inside the apartment, it was learned that Booker had been shot. Booker was taken to a hospital, where he died of a single gunshot wound to his heart; the bullet entered from his back. Allen told investigating law enforcement officers that he engaged the men in conversation when he went outside to take out the trash; an argument ensued and continued as the men followed him toward his mother's apartment, with men pushing and pulling him; Roger was the first to produce a pistol and pointed it at Allen and Antoine; Allen went to his mother's apartment to retrieve his .40 caliber Glock pistol, saw through the window that the men were still outside and found one of the men pointing a pistol at him; he pulled his pistol from his waistband and fired at the men, while they faced him; he ran and tossed his pistol away

before climbing a fence. Ten shell casings were found in the parking area between the housing units of Allen's mother and Roger, which casings were from the same .40 caliber weapon; the projectile taken from Booker's body was also fired from a .40 caliber weapon. Allen's .40 caliber Glock pistol was not recovered.

(HT 1621-1622).

GROUND ONE

In Ground One, Petitioner alleges that appellate counsel was ineffective for failing to challenge the trial counsel's ineffectiveness for failing to interview and subpoena a critical witness on behalf of the defense violating the Sixth and Fourteenth Amendment. Specifically, Miranda Robinson provided a statement to law enforcement but was not subpoenaed to testify.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner was represented at trial by attorney Monique Walker and on appeal by attorney Jennifer Knight. Trial counsel testified that she has been licensed to practice law in Georgia for over 25 years and began work as a judicial law clerk before working in insurance defense, starting a private practice, and ultimately joining the Atlanta Judicial Circuit Public Defender's Office where she has worked for 15 years. (HT 38-39). Prior to representing Petitioner, counsel testified to having experience on at least ten murder trials. (HT 40). Appellate counsel did not testify.

Miranda Robinson gave a statement to the East Point Police Department regarding the events surrounding the shooting involving Petitioner. (HT 86-88). To prepare for trial, counsel employed an investigator in reviewing the crime scene and following up on the evidence. (HT 41). Trial counsel recalled attempting to locate witnesses, reviewing the discovery information and visiting the crime scene. (HT 42-43). Counsel testified that she attempted to locate favorable witnesses by canvassing the area of the crime scene, running searches using addresses or social security numbers, and running criminal history background on all known witnesses. (HT 47). However, counsel could not recall if Mr. Robinson could be located to testify regarding her statement in the police report. (HT 54). According to Ms. Walker, had she been able to locate Ms. Robinson, she would have called her to testify. (HT 54).

Petitioner has failed to show that Miranda Robinson could be located to testify. The available testimony indicates that trial counsel investigated the case and attempted to locate favorable witnesses such as Ms. Robinson. As Petitioner could not demonstrate that trial counsel was ineffective in this regard, Petitioner has failed to show that appellate counsel's decision not to raise this issue on appeal was an unreasonable tactical move.

Accordingly, Ground One provides no basis for relief.

GROUND TWO

In Ground Two, Petitioner alleges that appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to argue during closing that the jury should also consider whether the defendant's acts satisfied the elements of voluntary manslaughter.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle

being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner was represented at trial by attorney Monique Walker and on appeal by attorney Jennifer Knight. Trial counsel testified that she has been licensed to practice law in Georgia for over 25 years and began work as a judicial law clerk before working in insurance defense, starting a private practice, and ultimately joining the Atlanta Judicial Circuit Public Defender's Office where she has worked for 15 years. (HT 38-39). Prior to representing Petitioner, counsel testified to having experience on at least ten murder trials. (HT 40). Appellate counsel did not testify.

Trial counsel testified that she developed and pursued a justification theory of defense which she introduced to the jury during opening statements. (HT 42, 1027-1029). In closing arguments, trial counsel argued for self-defense and a full acquittal. (HT 1283-1293). While counsel did not argue for the jury to return a verdict of voluntary manslaughter as a lesser included offense, counsel did request that charge be given to the jury for consideration and the trial court agreed to so charge the jury. (HT 1300-1302). Trial counsel then had another opportunity to address the jury regarding voluntary manslaughter in which she explained the nature of a lesser-included offense but reiterated that self-defense is an absolute defense to voluntary manslaughter as well. (HT 1303). Therefore, the record shows that while counsel argued for a full acquittal on the basis of self-defense, counsel still presented the option of a lesser-included offense to the jury for consideration.

"An attorney's decision about which defense to present is a question of trial strategy." Hendrix v. State, 298 Ga. 60 (2015). The pursuit of an all-or-nothing strategy is permissible. Wells v. State, 295 Ga. 161 (2014). Here, counsel's decision to argue for justification as an absolute defense while still presenting the option of a lesser-included charge to the jury was reasonable and the evidence introduced at trial supported this decision. *See*, Blackwell v. State, 302 Ga. 820 (2018). The Court views counsel's decision based on the circumstances in which it was made and not through the distorting lens of hindsight. So viewed, counsel's strategy was reasonable and warranted by the evidence. Petitioner has therefore failed to show that appellate counsel acted unreasonably in not raising this issue on appeal as Petitioner did not establish that

trial counsel rendered ineffective assistance of counsel or that this ground had reasonable likelihood of success on appeal.

Accordingly, Ground Two provides no basis for relief.

GROUND THREE

In Ground Three, Petitioner alleges that appellate counsel was ineffective for failing to challenge the trial court's infringement upon Petitioner's right to be present at a critical stage of the proceedings.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner was represented at trial by attorney Monique Walker and on appeal by attorney Jennifer Knight. Trial counsel testified that she has been licensed to practice law in Georgia for over 25 years and began work as a judicial law clerk before working in insurance defense, starting a private practice, and ultimately joining the Atlanta Judicial Circuit Public Defender's Office where she has worked for 15 years. (HT 38-39). Prior to representing Petitioner, counsel testified to having experience on at least ten murder trials. (HT 40). Appellate counsel did not testify.

Attorney Chevada McCamy testified as the assistant district attorney that tried Petitioner's case. (HT 10). Ms. McCamy did not recall the reason for Petitioner's absence on November 16, 2010 but speculates that he may have waived his right to be present. (HT 36).

Counsel testified that bringing the juror back was an unusual situation and that she did not waive Petitioner's presence at the proceeding. (HT 73). However, upon reviewing the transcript on cross-examination, counsel testified that it appears Petitioner was present for the hearing. (HT 74). Comparing the testimony at the hearing with Petitioner's brief, there appears to be some confusion regarding the specific instance Petitioner claims to have been absent from the proceedings. Therefore, the Court has reviewed the entirety of the trial transcript, particularly those portions following the jury charge.

The jury initially returned a verdict of guilty as to felony murder and voluntary manslaughter but took the jury form back and clarified in writing that they found Petitioner not guilty of voluntary manslaughter. (HT 1357-1359). In response to a jury issue, the trial court reviewed the verdict form and reiterated that voluntary manslaughter was a lesser-included offense of felony murder. (HT 1331-1332). The trial transcript clearly indicates that Petitioner was returned to the courtroom and present during this conference. (HT 1331). The trial court recessed following the verdict and returned for sentencing on November 16, 2010. (HT 1347-1348). At the sentencing hearing, counsel objected to Petitioner being sentenced on felony murder as the jury had written "guilty" next to voluntary manslaughter. (HT 1357). The trial court explained that the jury had written "not guilty" as to voluntary manslaughter on the reverse of the verdict form and sentenced Petitioner for felony murder rather than voluntary manslaughter. (HT 1357-1358). Petitioner was present during sentencing. Then, on January 4, 2011, the trial court convened a hearing to clarify the issue of the verdict form and the writing on the back of the form. (HT 1476). The transcript of this hearing indicates that Petitioner was present and addressed the trial court. (HT 1476). During the testimony at that hearing, the jury foreman testified that she hastily wrote guilty next to all counts, gave the verdict to the bailiff, realized her mistake, and then asked for the verdict to be returned so that she could correct the clerical error. (HT 1478). The bailiff took the verdict form to the judge for direction and the judge instructed the bailiff to return the form to the jury where they could correct their verdict on the back of the page. (HT 1478). The only portion of these events that Petitioner may not have been present for was the bailiff taking the incomplete verdict form to the judge and then returning said form to the jury for correction as this conversation was not reported.

Criminal defendants have a constitutional right to be present at all proceedings of his trial. Hanifa v. State, 269 Ga. 797 (1998). Assuming that the Petitioner was not present for the conversation between the judge and bailiff, said discussion was purely an administrative function which did not contribute to the verdict and was therefore harmless. See, Carter v. State, 308 Ga. 589 (2020). Georgia courts have explained the right to be present to attach to any trial proceeding "that is critical to its outcome if [his or her] presence would contribute to the fairness of the procedure." Huff v. State, 274 Ga. 110, 111 (2001). There is no transcript or testimony regarding the exchange between the judge and bailiff but the testimony at the January 4, 2011 hearing indicates that the trial judge merely handled an administrative matter and the apparent totality of the communication was allowing the bailiff to return the verdict form to the jury as they had requested. This communication did not contribute to the verdict and was harmless. *See*, Lowery v. State, 282 Ga. 68 (2007); *see also*, Styles v. State, 309 Ga. 463 (2020). Therefore, Petitioner's constitutional right to be present was not violated and Petitioner has failed to show that appellate counsel was ineffective for not raising this issue on appeal.

Accordingly, Ground Three provides no basis for relief.

GROUND FOUR

In Ground Four, Petitioner alleges that appellate counsel was ineffective for failing to raise on appeal that the trial counsel rendered deficient performance for failing to obtain the 9-1-1 call with due diligence.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any

competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner was represented at trial by attorney Monique Walker and on appeal by attorney Jennifer Knight. Trial counsel testified that she has been licensed to practice law in Georgia for over 25 years and began work as a judicial law clerk before working in insurance defense, starting a private practice, and ultimately joining the Atlanta Judicial Circuit Public Defender's Office where she has worked for 15 years. (HT 38-39). Prior to representing Petitioner, counsel testified to having experience on at least ten murder trials. (HT 40). Appellate counsel did not testify.

Attorney Chevada McCamy testified as the assistant district attorney that tried Petitioner's case. (HT 10). Ms. McCamy testified that her office provided the defense discovery including the 911 tapes referenced by Petitioner. (HT 11, 14). Trial counsel filed pre-trial motions to compel the production of the 911 tape but did not pursue the motion. (HT 417-418). At trial, the State called Russell Walters to testify as the operator East Point 9-1-1 call center who maintained the 9-1-1 call records. (HT 1051). Upon tendering the recording of the 9-1-1 call into evidence, trial counsel noted that she received the CAD report but did not receive the DVD of the call and objected to its introduction. (HT 1054). The trial court overruled the objection and the recording was played for the jury. (HT 84-85, 1054).

Petitioner has failed to establish that he received ineffective assistance of counsel due to counsel's failure to obtain the 9-1-1 call recording prior to trial. While counsel did not pursue the motion to compel prior to trial, she had the CAD report along with witness statements prior to trial and was aware that the 9-1-1 operator would be testifying. Ultimately, the entirety of the 9-1-1 call was played for the jury and Petitioner has not shown that obtaining the 9-1-1 recording prior to trial would have impacted the course of the proceedings in any way. Petitioner has failed to show that he received ineffective assistance of counsel or that he was prejudiced by the alleged ineffectiveness. Additionally, Petitioner has failed to demonstrate that appellate counsel was ineffective for not pursuing this issue on appeal.

Accordingly, Ground Four provides no basis for relief.

GROUND FIVE

In Ground Five, Petitioner alleges that appellate counsel rendered ineffective assistance of counsel by failing to raise on appeal that the trial counsel was ineffective for failing to conduct a thorough and sifting cross-examination of Mattie Anderson regarding her description of the victim that she witnessed brandishing a firearm.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner was represented at trial by attorney Monique Walker and on appeal by attorney Jennifer Knight. Trial counsel testified that she has been licensed to practice law in Georgia for over 25 years and began work as a judicial law clerk before working in insurance defense, starting a private practice, and ultimately joining the Atlanta Judicial Circuit Public Defender's Office where she has worked for 15 years. (HT 38-39). Prior to representing Petitioner, counsel testified to having experience on at least ten murder trials. (HT 40). Appellate counsel did not testify.

Mattie Anderson testified as Petitioner's neighbor who witnessed the altercation and shooting and called 9-1-1. (HT 1135). Ms. Anderson testified that it was dark before the shooting and she could only hear the argument and see sparks from the guns. (HT 1137). Ultimately, Ms. Anderson could not identify any of the participants other than one individual which she recognized based on his voice. (HT 1141). Counsel cross-examined Ms. Anderson to clarify the locations and sequence of events of the altercation leading to the shooting. (HT 1142-1143).

During closing arguments, counsel argued that the 9-1-1 call and Ms. Anderson's testimony indicated that the victim was armed and aggressive in support of their self-defense theory. Petitioner contends that counsel should have cross-examined Ms. Anderson further regarding her 9-1-1. However, Georgia courts have repeatedly held that the manner and scope of cross-examination is grounded in trial strategy and tactics which rarely constitutes ineffective assistance of counsel. *See*, Austin v. Carter, 248 Ga. 775 (1985); Sullivan v. State, 301 Ga. 37 (2017). Counsel's handling of Ms. Anderson's cross-examination clearly falls within the realm of trial strategy and tactics, Petitioner has not shown that her handling was unreasonable as the 9-1-1 call was played to the jury in its entirety, and Petitioner has failed to show that appellate counsel was ineffective for not raising this ground on appeal.

Accordingly, Ground Five provides no basis for relief.

GROUND SIX

In Ground Six, Petitioner alleges that appellate counsel was ineffective for failing to raise on appeal that the trial counsel was ineffective for failing to file a motion in limine to the introduction of weapons that were irrelevant to the shooting incident and the trial court's abuse of discretion for admitting the evidence over defense objection.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner was represented at trial by attorney Monique Walker and on appeal by attorney Jennifer Knight. Trial counsel testified that she has been licensed to practice law in Georgia for over 25 years and began work as a judicial law clerk before working in insurance defense, starting a private practice, and ultimately joining the Atlanta Judicial Circuit Public Defender's Office where she has worked for 15 years. (HT 38-39). Prior to representing Petitioner, counsel testified to having experience on at least ten murder trials. (HT 40). Appellate counsel did not testify.

David Armour testified at trial that Petitioner's brother was showing off a shotgun at a gathering during the time prior to the shooting. (HT 1070). Officer Weatherhold testified at trial as to the crime scene investigation and evidence recovered. (HT 1144-1175). One of the weapons recovered from the scene was a shotgun which the State moved to introduce into evidence. Trial counsel objected to the evidence primarily on the basis of relevance but also as to foundation. (HT 1175). The objection was overruled and the shotgun was permitted into evidence with the clarification that weapon was obtained in Petitioner's brother's apartment. (HT 1175). Petitioner has failed to show that trial counsel was ineffective by not filing a pre-trial motion in limine as to this evidence as trial counsel did properly and timely object to the evidence at the time it was presented for admission. Petitioner has failed to establish that appellate counsel was ineffective for failing to raise this issue and Petitioner has not shown any prejudice from this ground as alleged as he cannot show that a pre-trial motion in limine would have had merit or a reasonable likelihood of prevailing.

Accordingly, Ground Six provides no basis for relief.

GROUND SEVEN

In Ground Seven, Petitioner alleges that appellate counsel rendered ineffective assistance of counsel by failing to raise on appeal that trial counsel was ineffective for failing to object to the prosecutor's improper comment on Petitioner's failure to come forward.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious

that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002). In reviewing the arguments of attorneys, closing arguments are judged within the context of the statement and prosecutors are granted wide latitude to conduct their closing arguments bound by the trial court's discretion and encompassing arguments based on reasonable inferences from the evidence. *See*, Menefee v. State, 301 Ga. 505 (2017); Scott v. State, 290 Ga. 883 (2012). Further, the decision of whether or not to raise an objection generally constitutes trial strategy and tactics. Snipes v. State, 309 Ga. 785 (2020).

Petitioner was represented at trial by attorney Monique Walker and on appeal by attorney Jennifer Knight. Trial counsel testified that she has been licensed to practice law in Georgia for over 25 years and began work as a judicial law clerk before working in insurance defense, starting a private practice, and ultimately joining the Atlanta Judicial Circuit Public Defender's Office where she has worked for 15 years. (HT 38-39). Prior to representing Petitioner, counsel testified to having experience on at least ten murder trials. (HT 40). Appellate counsel did not testify.

During closing arguments, the prosecutor argued about Petitioner's credibility in his interview with law enforcement and that Petitioner would not have had the opportunity to match his statement with his brother's. (HT 1296). The prosecutor stated:

> Because remember, Antoine Allen was picked up that very same day, morning, on the 14th. Deimeyon Allen didn't turn himself in until the 15th. And in those hours he has got time to change clothes, got time to throw away a weapon, think about the best thing to say, and then go talk to the police.

(HT 1297). The prosecutor was not commenting on Petitioner's silence and the statement fell within the broad scope of acceptable arguments. Petitioner has failed to show that trial counsel's

decision not to object to this statement was unreasonable or to overcome the procedural default of this ground by showing that appellate counsel was ineffective for failing to raise this issue on appeal.

Accordingly, Ground Seven provides no basis for relief.

GROUND EIGHT

In Ground Eight, Petitioner alleges that appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to request a pre-trial immunity hearing pursuant to O.C.G.A. § 16-3-24(2).

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner was represented at trial by attorney Monique Walker and on appeal by attorney Jennifer Knight. Trial counsel testified that she has been licensed to practice law in Georgia for over 25 years and began work as a judicial law clerk before working in insurance defense, starting a private practice, and ultimately joining the Atlanta Judicial Circuit Public Defender's Office where she has worked for 15 years. (HT 38-39). Prior to representing Petitioner, counsel testified to having experience on at least ten murder trials. (HT 40). Appellate counsel did not testify.

Counsel did not recall why she did not request an immunity from prosecution hearing. (HT 55). However, Petitioner has failed to show prejudice from counsel's decision not to request

a pre-trial immunity hearing as the evidence would have supported the trial court's denial of immunity. Specifically, the available evidence shows that the victim was shot in the back while fleeing from Petitioner, insufficient evidence exists that Petitioner was threatened with a firearm prior to shooting, and all the bullets recovered at the scene matched Petitioner's firearm. (HT 1254) *See*, Goodson v. State, 305 Ga. 246 (2019). Therefore, Petitioner has failed to establish any prejudice from trial counsel's decision not to request an immunity hearing and Petitioner has failed to show that appellate counsel was ineffective by not pursuing this issue on appeal.

Accordingly, Ground Nine provides no basis for relief.

GROUND NINE

In Ground Nine, Petitioner alleges that appellate counsel was ineffective for failing to raise on appeal that trial counsel was ineffective for failing to challenge on appeal that the collective prejudice from all of trial counsel's deficiencies shall be considered in weighing prejudice.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner was represented at trial by attorney Monique Walker and on appeal by attorney Jennifer Knight. Trial counsel testified that she has been licensed to practice law in Georgia for over 25 years and began work as a judicial law clerk before working in insurance defense, starting a private practice, and ultimately joining the Atlanta Judicial Circuit Public Defender's

Office where she has worked for 15 years. (HT 38-39). Prior to representing Petitioner, counsel testified to having experience on at least ten murder trials. (HT 40). Appellate counsel did not testify.

Petitioner has failed to demonstrate collective prejudice from the assistance received by trial counsel. An examination of the totality of the record reveals that trial counsel delivered reasonably effective assistance in preparing the case, cross-examining the witnesses, and presenting argument to the jury. Therefore, Petitioner has failed to meet his burden of proof as he has not shown that appellate counsel was ineffective for not pursuing this issue on appeal.

Accordingly, Ground Nine provides no basis for relief.

GROUND TEN

In Ground Ten, Petitioner alleges that appellate counsel was ineffective for omitting the claims raised in the Petitioner's writ of habeas corpus.

The test for establishing ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under the Strickland two-prong test, Petitioner must show that (1) the attorney's performance was deficient, meaning that counsel made errors so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment and (2) that this deficient performance prejudiced the defense thereby depriving Petitioner of a fair trial with a reliable result. To establish that an appellate attorney was ineffective, a habeas corpus petitioner must show that his appellate counsel's decision to not raise a particular issue was an unreasonable one which only an incompetent attorney would make, with the controlling principle being whether appellate counsel's decision "was a reasonable tactical move which any competent attorney in the same situation would have made." Shorter v. Waters, 275 Ga. 581 (2002).

Petitioner has failed to establish that any of the issues raised *supra* were meritorious or had a reasonably likelihood of chance on appeal. Therefore, Petitioner has failed to carry his burden of showing that appellate counsel's decision on which issues to raise was not "a reasonable tactical move which any competent attorney in the same situation would have made." Id.

Accordingly, Ground Ten provides no basis for relief.

CERTIFICATION

Petitioner received copies of the transcript of the April 11, 2019 and October 8, 2019 evidentiary hearings on or about July 12, 2019 and July 21, 2020 respectively. Copies of the Sheriff's Entry of Service Form are attached hereto.

CONCLUSION

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

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

The Clerk of the Superior Court of Wheeler County is hereby DIRECTED to mail a copy of this Order to Petitioner, Petitioner's attorney of record, Respondent, and Special Assistant Attorney General Ronald Daniels.

SO **ORDERED**, this 12 day of April, 2020.

Sarah F. Wall, Chief Judge
Wheeler County Superior Court

SHERIFF'S ENTRY OF SERVICE — SC-85-2

SHERIFF'S ENTRY OF SERVICE SC-85-2 CLYDE CASTLEBERRY CO., COVINGTON, GA 30015

Civil Action No. 18CV109

Date Filed 7/5/19

Superior Court ☑ Magistrate Court ☐
State Court ☐ Probate Court ☐
Juvenile Court ☐

Georgia, Wheeler COUNTY

Return to:
~~Attorney's Address~~
Jennifer Anderson
1909 Scotland Rd
Dublin, GA 31021

Diemeyon Allen
GDC: 1000420167
Plaintiff

VS.

Vance Laughan
Warden
Defendant

Name and Address of Party to be Served.
Diemeyon Allen
GDC: 1000420167
Wheeler Correctional

~~GDC~~:
Garnishee

SHERIFF'S ENTRY OF SERVICE

PERSONAL

I have this day served the defendant Diemeyon Allen of the within action and summons. Habeas transcript from hearing on 4/11/19. (7 volumes) personally with a copy

NOTORIOUS

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

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

CORPORATION

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

TACK & MAIL

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

NON EST

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

This 2nd day of July, 20 19.

BOOK 12
Page 68

Clerk

Bobby Sapp

DEPUTY

CLERK SUPERIOR COURT
WHEELER COUNTY, GEORGIA
FILED IN OFFICE
2019 JUL 10 AM 10:46

SHERIFF'S ENTRY OF SERVICE SC-85-2 CLYDE CASTLEBERRY CO., COVINGTON, GA 30015

Civil Action No. 18CV109

Date Filed 3/13/20

Superior Court ☑ Magistrate Court ☐
State Court ☐ Probate Court ☐
Juvenile Court ☐

Georgia, Wheeler COUNTY

Return to:
Attorney's Address
Jennifer Anderson
1909 Scotland Rd
Dublin, GA 31021

Diemejon Allen
GDC: 1000420167

Plaintiff

VS.

Name and Address of Party to be Served.
Diemejon Allen
GDC: 1000420167
Wheeler Correctional

Vance Laughlin
Warden

Defendant

Garnishee

SHERIFF'S ENTRY OF SERVICE

PERSONAL

☒ I have this day served the defendant Diemejon Allen personally with a copy of the within action and summons. Habeas transcript for 10/8/19.

NOTORIOUS

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

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

CORPORATION

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

TACK & MAIL

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

NON EST

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

This 21 day of July, 20 20.

WHEELER COUNTY, GEORGIA
FILED IN OFFICE
2020 JUL 22 PM 12:50
Carol J. Knox
CLERK SUPERIOR COURT

Clerk Marquis Cook
DEPUTY

SHERIFF DOCKET 12 PAGE 186

IN THE SUPERIOR COURT OF WHEELER COUNTY
STATE OF GEORGIA

DEIMEYON ALLEN - GDC 1000420167 PETITIONER	§	
Vs.	§	CIVIL ACTION NO. 18CV109
VANCE LAUGHLIN, WARDEN, WHEELER CORRECTIONAL FACILITY DEFENDANTS	§	Petition for Writ of Habeas Corpus

CERTIFICATE OF SERVICE

I, Carol W. Bragg, Clerk of the Superior Court of Wheeler County, Georgia, certify that I have this day served the within and foregoing FINAL ORDER by mailing a true and accurate copy of the same, postage prepaid, to the following.

Deimeyon Allen GDC 1000420167
c/o Wheeler Correctional Facility
P. O. Box 466
Alamo, GA 30411

Vance Laughlin, Warden
Wheeler Correctional Facility
P. O. Box 466
Alamo, GA 30411

I also certify that I have served a true and accurate copy of the above document(s) to the individual(s) below via electronic mail to the address on record:

Georgia Dept of Corrections
State Offices South at Tift College
Offender Administration
P. O. Box 1529
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This the 12th day of April, 2021.

Carol W Bragg

CLERK, SUPERIOR COURT
WHEELER COUNTY, GEORGIA

IN THE SUPERIOR COURT OF WHEELER COUNTY
STATE OF GEORGIA

DEIMEYON ALLEN
Petitioner, Pro Se
V.
WARDEN VANCE LAUGHLIN
Respondent

CIVIL ACTION NO. 18CV109

AMENDED POST-HEARING BRIEF

Comes Now Deimeyon Allen the petitioner in the above styled matter and files this, his Amended Post Hearing Brief. The petitioner received the transcript of the evidentiary hearing held on the 8th of October , 2019 on the 21 day of July 2020 and was unable to include these issues in his original post hearing brief. The sheriff department was unable to deliver the transcript to Wheeler Correctional Facility due to the pandemic. The petitioner received the Respondents Brief In Opposition to Petitioner's Application for a Writ Of Habeas Corpus on the 3rd day of June 2020, The clerk of Wheeler County Superior Court notified the Petitioner that he will have 30 days to amend his brief. Due to the ongoing pandemic and lockdown at the Petitioner's facility the court and attorney general was put on notice of his inability to go to the law library. The petitioner prays that the court grants his extension to submit this brief in opposition to the Respondent's brief. The petitioner demonstrates to the Court that he is entitled to Habeas Corpus relief as a result of the violation of Petitioner's right to a fair trial under due process of law to the trial by jury and effective assistance of counsel. U.S. Const. Amends. VI, XIV Ga Const Art. 1 Secl, Pars 1, XI, and XIV(1983).

Findings of Facts And Conclusion Of Law

Petitioner's trial counsel. Monique Walker, is a member of the Georgia Bar but this does not immunize her duty as counsel to provide effective assistance of counsel. (HT V 12: 9-11). The petitioner successfully subpoenaed the lead prosecutor and his trial counsel for the evidentiary hearing. (HT 34.25; HT 62:9-10) The petitioner was unable to locate the appellate counsel for numerous years: notified the court of this matter and a confiance was granted to secure the witness for attendance at the evidentiary hearing . Motion For Continuance Filed May 13th 2019. (HTp. 81) The petitioner was able to locate the appellant counsel regardless of her use of numerous last names and her efforts to avoid being discovered. See MFNT pg 3: Lines 17- 20 (Jennifer, your maiden name or married name is Knight, Family Name, Moore was my maiden name But you can call me anything : I'll call you what you want to be called:) Also See (HT Voll pg 4:15-23)(You say you subpoenaed Jennifer Long? No: Monique Walker: Okay But your appellate counsel you mentioned Jennifer, Jennifer L. Wright: Okay because I Know the petition says Knight: Yeah : it says Knight, Wright, she's been Knight, Wright, Moore. Also See (HT Volpg 6-7). It is evident after a review of the record that petitioner properly subpoenaed the trial counsel and the prosecutor for attendance. (HT pq 82) Therefore, it is evident that the appellant counsel, after being disbarred for her violation of the Bar's Committee on Character and Fitness, refused to appear at the evidentiary hearing after she was successfully Subpoenaed. The underlying ineffective assistance of counsel claims have been established by a preponderance of the evidence Stynchcombe V. Rhodes 238 GA. 74 (1976) The petitioner has proven that his constitutional right to effective assistance of counsel, right to a fair trial, and due process of law were violated in obtaining the judgement of conviction. Gaither V. Gibby 267 Gq 96 (1996): Caldwell V. Beard 229 Ca. 901 (1974). The petitioners appellant

counsels decision to omit the claims raised in the petitioner's writ of habeas corpus was not a reasonable tactical move which any competent attorney in the same situation would have made. See Shorter V. Waters 275Ga 581(2002). There is a reasonable probability but for counsel's unprofessional errors the result of the appeal would have been different. The petitioner has

demonstrated that counsel's performance was deficient and how the deficiency prejudiced the outcome of appeal. Taylor V. Metoyer 299 Ga 345 : 348 (2016). **(1)Petitioner has established by a preponderance of the evidence that the appellate counsel was ineffective for failing to interview and subpoena a critical witness on behalf of the defense that subsequently violated the petitioner's rights under both the sixth and fourteenth amendments** .Miranda Robinson was an eyewitness to the shooting incident that voluntarily provided the investigating officers of the East Point Police Department with a statement. See (Exhibit P 2.) Ms Robinson's statement corroborated with the defense theory that the victim was the aggressor, and was in possession of a weapon and was following , threatening and brandishing a weapon in the direction of the petitioner. During the motion for a new trial the appellate counsel had initially raised this claim but abandoned the issue on appeal . See (MFNT tr. pq 7-8) During the habeas evidentiary hearing, Monique Walker, the trial counsel, provided that she did not recall the defense having witnesses (1HT pg 44: 3-13) Ms. Walker stated she did an independent search for witnesses but didn't recall whether she interviewed or subpoenaed Ms. Robinson prior to trial. (HT pg 46:20-24) Walker also failed to provide the petitioner and appellate counsel with investigation requests that were requested per subpoena. (MFNTtr. p. 43-48) Appellant counsel did not follow up on the investigative requests and these documents were not a part of the petitioner's case record. Ms. Robinson's testimony contradicted the states theory that the petitioner was the aggressor and shot an unarmed victim See (HT P2p. 86-88A) Counsels deficient performance for failure to call Robinson , a witness that was helpful to the defense is equivalent to failing to call a Key witness. See Blouin V. State 255 GA. App 788

(2002) (The appellate court found the attorney's failure was equivalent of simply forgetting to call a key witness .) The petitioner has made an affirmative showing that specifically demonstrates how counsel's failure affected the outcome of his case. Robinson's statement was favorable and material to the petitioner's case . The petitioner has identified the witness that provided a statement voluntarily to the East Point Police Department. The statement contradicts the states theory that the petitioner was the aggressor and shot an unarmed victim. Respondent alleges that the petitioner must demonstrate that the witness has

agreed to testify. However, had this witness been subpoenaed to trial, the petitioner would have had the right to request that the trial court to compel the witness to testify under the right to compulsory process. See VI Amendment of U.S. Const. To require an indigent prisoner that lacks resources to now locate a witness that provided her social security number, address, and phone number would deny the petitioner his right to present a defense compel a witness to testify , access to the courts, a fair trial and due process of law. VI & XIV Amends U.S. Constitution. The petitioner has carried his evidentiary burden with respect to ground one. There is a reasonable probability that the outcome of the appeal would have been different had the appellant counsel not abandoned and omitted this issue on appeal. See Shorter V. Waters 275 G. 581 / 2002).

(2)The petitioner has established by a preponderance of the evidence that the appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to argue during closing that the jury should also consider whether the defendant's acts satisfy the elements of voluntary manslaughter. Ms. Walker: Your Honor, Before you bring them out, in light of the court's decision to not give the request on involuntary.manslaughter , The defense is requesting a request on voluntary manslaughter. See (HT1300; 8- 11) The trial court also commented on the evidence, during the charge conference. "Well Ms. Walker, I wish you had taken me up on my offer earlier about voluntary manslaughter. I know it was during closing that I instructed each of you that involuntary manslaughter would not be charged. However, Ms McCamy, I think the facts coupled with the request warrant the charge. I think the jury could find, based upon the evidence, that he was excited, went in there , got the gun, and came out in the heat of passion and discharged the gun, and I think the jury would be authorized to find him guilty of voluntary manslaughter." See (HT 1300 Line 25-1301 line 1-9) The district attorney argued that the charge should not be given and the trial court responded: "I understand that, but the bottom line is that I think the facts warrant it. As I told you. I would charge if you decided to request it. Perhaps I should have told you based upon the facts I'm going to charge it. But I'll give you a moment to argue why you think it's not voluntary manslaughter if you would like to do that. "See (HT 1302) An additional

closing argument was given in which the trial counsel advised the jury not to consider the lesser included charge of voluntary manslaughter. No competent attorney in the same situation would have informed the jury to disregard a charge on a lesser included after arguing with the state during a lengthy colloquy that the evidence requires a charge on the lesser included. The Respondent takes the position that the trial counsel was pursuing an all or nothing defense. See Blackwell V. State 302 Ga 820 (2018) (Blackwell asserts that his trial counsel rendered ineffective assistance by pursuing an all or nothing strategy and waiving a jury charge on voluntary as a lesser included without consulting Blackwell.) The decision not to request a jury charge on a lesser included offense in order to pursue an all-or-nothing defense is a matter of trial strategy. See Wells V. State 295 Ga 161, 162 (2) (b) (2014). This argument is unreasonable, upon the basis that the trial counsel specifically requested a charge on voluntary manslaughter. The petitioner has shown that counsel's performance was deficient and that the deficient performance so prejudiced the petitioner and there is a reasonable likelihood that, but for counsel's unprofessional error, the jury would have returned a verdict of guilty of voluntary manslaughter. See Hutto V. State 320 Ga App 235 (2013) Counsel's actions or inactions prejudiced the petitioner, the jury was considering the charge of voluntary manslaughter during

deliberations and this is evident because there was a discrepancy whether the petitioner had been found guilty of voluntary manslaughter. See (HT 1358) Trial counsel's decision to forego requesting the jury to consider voluntary manslaughter was a patently unreasonable choice only an incompetent counsel would have chosen. There is a reasonable probability that but for counsel's unprofessional errors the jury could have easily concluded the petitioner acted in a manner that amounted to voluntary manslaughter. The appellant counsel rendered ineffective assistance of counsel for omitting this issue on appeal. There is a reasonable probability a reversal of the conviction would have been granted had counsel raised this issue on appeal. See Shorter V. Water 275 Ga 581

(2002).

(3)Petitioner has established by a preponderance of the evidence that the appellate counsel was ineffective for failing to challenge the trial court's infringement upon the petitioner's right to be present at a critical stage of the proceedings. During trial, the jury, the bailiff, and the court conducted a communication outside the presence of the petitioner and counsel. Court: "Well, you know, they wrote guilty, guilty and then they took the verdict form back and wrote voluntary

manslaughter, not guilty , and they wrote that after they wrote the guilty on the front. " See (HT pg 1357 Lines **23- 251358** Line 1-10) "Ms. Walker: Okay, I'm sorry, I didn't see that on the back." The Court : "And they offered the verdict form and asked for it back and said they had to change something and the thing they changed is they wrote on the back not guilty as to voluntary manslaughter. And I know from my personal observation that that's what they did." See (HTpg1358 Lines 4-8) There was no waiver of the petitioner's right to attend , nor does the record reflect that the petitioner personally acquiesced in the exclusion and the trial counsel was also unaware of the communication. Is this -- I don't have a specific recollection. I do recall one case where the jury marked something on voluntary, was that your case? Yes, that was my case. Okay and evidently there was some discrepancies with it because the problem back seats me to later, and in regards to that I was never present, you know, when they -- when they

gave formulation on it . Yeah . And we didn't realize it until November 16th, on the day of my sentencing. Right. Right Yeah I don't remember any- any of the specifics but I thought that he should have sentenced you on voluntary. See (HT evidentiary hearing pg. 70 Lines 3- 17.)

I don't recall how this came about . I don't recall. I thought it was unusual for the Judge to call the juror back -- And this was just -- You probably should have been present , if it was something- I mean you definitely - I didn't waive your appearance, so I think it was unusual. I am often confronted with situations in which I have no control over, but I deem to be not particularly fair to the defense that I don't have any control over and that's one of those situations. See (HT evidentiary hearing pg. 73 Lines 10-18.) The petitioner has the right to be present and notified whenever any action is taken which materially affects the accused's case Morris V. State 257 Ga 781(4) (1988) The Respondent alleges the petitioner argued on

the issue regarding the jury's verdict on direct appeal and therefore this issue is barred by res judicata. The Respondents argument is inapplicable. The petitioner contends he was not present when the communication transpired, not that the jury was rushed to make a decision or that the jury did not properly understand the crimes charged. The petitioner has proven that an actual communication occurred. See (HTpg 1357 Lines 23-25, 1358 Lines 1-8) On appeal a claim

alleging a violation of an appellant's right to be present mandates a reversal. See Lyde V. State 311 Ga App. 512 (2011) also see Hanifah V. State 269 Ga 797,807(6)(1998) (Harm is presumed from violation of a state constitutional right to be present at all critical stages of the trial.) When an accused is absent from the proceedings no one should have any communications with the jury except regarding matters relating to the comfort and convenience of the jury Wilson V. State 212 Ga 73, 78 (1955) Pennie V. State 271 Ga 419, 421-422(2)(1999) The United States and the Georgia Constitutions secure the right of criminal defendants to be present at all critical stages of the process against them unlike the federal constitutional right, the violation of the state constitutional right to be present is prejudicial, and absent a waiver, triggers a reversal, had the appellant counsel properly raised the issue on appeal. The appellate counsel's decision was not a reasonable tactical move which any competent attorney in the same situation would have made. The presumption of effective assistance of counsel has been overcome, the ignored issue was clearly stronger than the errors presented that the tactical decision must be deemed an unreasonable one only an incompetent attorney would have adopted. There is a reasonable probability the outcome of the appeal would have been different had the appellate counsel raised this issue on appeal. Shorter V. Waters 275 Ca 58 1 (2002) **(4)Petitioner has established by a preponderance of the evidence that the appellate counsel was ineffective for failing to raise that the trial counsel rendered deficient performance for failing to obtain the 9-1-1 call with due diligence and in failing to conduct a thorough and sitting cross examination of Mattie Anderson.** Trial counsel, Monique Walker, failed to obtain the 9-1-1 recording that entailed an eyewitness giving a detailed description of the victim, the victims attire, of the victim brandishing a weapon, following the petitioner and arguing with the petitioner.

It is evident , from the record , that counsel was unaware that Anderson identified the victim because the trial counsel did not inquire about the contents of the all recording during cross-examination. No competent attorney in the same situation would have foregone questioning the state's unbiased witness regarding evidence that supports the defense theory and contradicts the state's theory that the petitioner was the aggressor and shot an unarmed man. The petitioner's sole defense was self defense. O. C. GA. 16-3 - 21(a) States that : "A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself against such other's imminent use of unlawful force. " The victims actions in brandishing a weapon in the direction of the petitioner is a felony and an imminent use of unlawful force. O. C. G. A. 16-5-21 (a) " A person commits the offense of aggravated assault when he or she assaults: (2) With a deadly weapon ... which when used offensively against a person, is likely to or actually does result in serious bodily injury. To constitute such an assault an actual injury need not be made the aggressor only has to place the individual in reasonable apprehension of receiving a violent injury . Patterson V. State 299 Ga 491 (2016) Counsel has a duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary. Strickland V. Washington 466 U. S. 668 (1984) Strategic choices made after less than complete investigations are reasonable only to the extent that reasonable professional judgement justify the curtailment of counsel's investigation. In this instant counsel had not received the 911 recording and did not make the minimal inquiries to ensure the defense was in possession of the evidence. During trial the following transpired. " Your Honor, at this time the State would move into evidence State's exhibit 2. Any objection? Your Honor , I did receive the CAD report. However, I did not receive the DVD of it and I had noticed that the 911 operator was Patricia Adams. I understand he's a director so that would be my objection. " See (TTP 227 Lines 1-10) During this 911 call a description of the victim brandishing a firearm was given to the 911 operator. The trial counsel has a duty to obtain any and all evidence that is relevant, pertinent, material, and favorable to the defense. During the Habeas evidentiary hearing, the following transpired, "In your examination of the records are you familiar with the 911 call of Mattie

Anderson? I haven't examined the record. Alright. This will be Exhibits-Exhibits 2 trial transcript. What page of the trial transcript Mr. Allen? Let me see. This will be page 203 and 204. Excuse me I'm sorry it's 225 and 227. Okay, I reviewed it. Your question? It's on page 225 and 227 of my trial transcript, you objected to not being able to provide certain parts of the 911 record. Did you have access to the 911 call of Mattie Anderson calling the East Point Police Department prior to trial? Throughout the trial? Prior to trial? Prior to trial? It states here that -- did not receive a DVD of it . Would you consider this exculpatory evidence if it was favorable to the defense? If it was favorable." "Objection. Judge. that's speculative. I'm going to overrule. May I speak, your Honor? You may. " The contents of this 911 recording contained favorable evidence to the defense that the individuals were armed during the time of the incident and described when she dispatched the 911 caller what the individual was wearing which is Exhibit 63. " Alright. Mr. Allen you're testifying now, giving your position regarding the 911 call . That is not admissible at this point, you'll be given an opportunity to testify at a later time. "Okay. " Now's the time to question this witness. "Alright. Did I inform you at trial that this recording contained evidence favorable to the defense? I don't recall. But if the 911 operator was there, I would assume that the 911 call was played for the jury. Well this particular recording was Mattie Anderson dispatching 911, cause it's not the dispatcher dispatching an officer but the state witness Mattie Anderson dispatching the East Point Police." "And your question is ? Do you remember that the contents of this recording will refute the Prosecution's theory of the case that the shooting was unprovoked - Objection, Judge, its cause for speculation and the question that was before was a jury question. "" I think you're going to have to rephrase Mr. Allen." Do you think the contents of this call was material relevant- relevant to my guilt or punishment or favorable to affirmative defense of self defense? If it contained information that the shooter was armed when I guess the- victim was armed that would be relevant. So the trial transcript says you didn't have access to it. By you not being provided this information prior to trial, would you consider it exculpatory? I believe the State is required to provide all Brady information and if they did not , then that would be a violation . It should have been . Your Honor , if I may I'm sorry. Our discovery I would like to provide the first page

of my discovery of what the State everything they provided to her."" You wish to show the document to? Ms Walker if I may. Let's mark it for purposes of identification. Which would be Petitioner's 5? You may show that to counsel to see if she recognizes or can .... identify it . Ms Wall, may I speak ? That would be Judge Wall, and you may ask her if she recognizes it or questions relevant to that document? I'm - I'm observing that it is the Certificate of Discovery and for Deimeyon Allen case. Does it have anything pertaining to a 911 recording? It does not. See (HT evidentiary hearing pg. 48- 52) The document (Petitioner5) was presented at the evidentiary hearing to refresh the trial counsel's memory (Monique Walker what had been provided to the defense by the District Attorney's Office prior to trial. Sec(Petitioner 5 Certificate of Discovery p. 96) which doesn't contain the 911 recording requested from previous counsel (Alixe Steinmetz) multiple times. See (Petitioner 3 Defendant's Second Motion to Compel. If trial counsel would have performed a proper pretrial investigation and not "only"rely on what previous counsel had done she would have had a proper understanding of the facts of the case and the relevance of the 911 recording See (MFNTp. 38 Lines 19- 25 p. 39 Lines 1-4. p.51 Lines 2-25 p. 52 Lines 1-9. Counsel could not have properly understood the facts of the case because if she knew the contents of this recording before the trial she could have refuted the States theory of the case and properly cross-examined the States witness Mattie Anderson in regards to the 911 recording, namely the description pertaining to the victims clothing and being armed at the time of the shooting. See (Exhibit 2) of the trial transcript recording of Mattie Anderson and compare to (Exhibit 63.) There is a reasonable probability had this information been presented in the face of the jury properly there is a reasonable probability the outcome of the proceedings would have been different. Georgia Rules of " Professional Conduct 3. 8. (d) specifically requires prosecutors to make timely disclosure to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense." A violation of this ethical rule, however , is not in itself a constitutional violation and thus not alone a ground for Habeas Corpus. Sec O. C. G. A. § 9 - 14 - 42 (g) (limiting post sentencing Habeas Corpus proceedings to claims that the petitioner suffered "a substantial denial of his rights under the Constitution of the United

States or this State." Also see Britt V. Smith 274 Ga 6 11, 612 (2001)(holding that a violation of the Uniform Superior Court Rules, which, like the Rules of Professional Conduct, are promulgated by this Court, is not in itself cognizable in Habeas). The state's withholding or omission of this evidence from the petitioner's discovery subsequently denied the petitioner's right to a fair trial, frustrated counsel's ability to effectively represent the petitioner, and denied the petitioner his constitutional right to due process. The state breached its constitutional duty to disclose information to the defense which overcomes the procedural default applied to Habeas Corpus claims. See Humphrey V. Lewis, 291 Ga 202 (2012). The suppressed evidence was favorable to the defense and the trial counsel rendered deficient performance by failing to obtain the evidence on her own. See (Exhibit Petitioner 3) Defendant's Second Motion to Compel. Previous trial counsel requested the 911 recording prior to trial. 911 calls are matters of public record and could have been obtained by the trial counsel with reasonable diligence. Sec. O. C. G. A. §, 50 - 18 - 72 (g) (24) allowing disclosure of 911 recordings to criminal defendant's via an open records act). Also see Heidler V. State 273 Ga 54(2) (2000)(No Brady violation where defendant could and did obtain records by means of his own, separate subpoena). The 911 call qualities as Brady's material, the trial counsel admitted she was not provided this evidence prior to trial, the existence of the 911 call came out during trial which surprised the petitioner and the trial counsel. Furthermore trial counsel was not aware of this evidence during cross-examination of Mattie Anderson . See (TTP 315 Lines 16 - 25, 316 Lines 1-11. Ms Anderson, how are you doing? I'm fine . My name is Monique Walker. We spoke about this. And you just described to the jury a couple things I wanted to go through. Now you said that - why don't you come back down just for one second. You said you heard the voices and the arguing behind your apartment? On one side. Okay. So that was here is that right? Yes And then you saw the shots, and that was here ? Yes, And then you saw three young men running that way, right? Yes. Before the shot ? Yes, thank you. That's all I have your Honor. It is obvious from the record that the trial counsel was not aware of the description of the victim brandishing a firearm prior to the shooting because no competent attorney would have failed to address this matter during cross- examination. The State presented testimony that the

petitioner was the aggressor. See (TTP 196 - 200, 439- 454) that the victim was not armed. See (TTP 450 line 11-22) that the shooting was unprovoked (TTP 229 - 255 , 256 - 273, 274-279.)

In the face of the State's theory, it was unreasonable for the trial counsel to fail to obtain the 911 recording and cross-examine Mattie Anderson regarding the contents of the call. There is a reasonable probability that had the trial counsel elicited testimony from Mattie Anderson regarding the victim brandishing a firearm and following the petitioner and his brother to their mother's residence, that the jury would have returned a verdict of acquittal or a lesser included offense of voluntary manslaughter. Furthermore, the state argued during closing that the petitioner did not turn himself in immediately after the shooting and specifically pointed out that this gave the petitioner time to change clothes. See (TTP. 468 Lines 2-6) The prosecutors argument could have easily left the jury with the impression that the petitioner was the individual that Anderson witnessed brandishing the weapon. See (Exhibit2 , State's Exhibit 63)The testimony of a live witness that identified the victim with a weapon and chasing the petitioner is favorable and material to the claim of self defense and contradicts the state's theory that the petitioner shot an unarmed man. The trial counsel was ineffective for failing to obtain the recording prior to trial which would have enabled counsel to conduct a thorough a sitting cross-examination subsequently denying the petitioner of the right to effective cross examination Davis V. Alaska 415 U. 5. 308 (1974) Trial counsel deficient performance prejudiced the petitioner and denied the petitioner's right to a fair trial and due process of law. The manner in which the counsel dealt with the witness or cross -examination was ineffective, was not a strategic decision and prejudiced the petitioner's defense. There is a reasonable probability had the appellate counsel raised this issue on appeal a new trial would have been granted. Shorter V. Water 275 Ga 381 (2002). **(5)Petitioner has established by a preponderance of the evidence that the appellate counsel was ineffective for failing to raise that the trial counsel rendered deficient performance for failing to obtain the 9-1-1 call with due diligence and in failing to conduct a thorough and sitting cross examination of Mattie Anderson.** Trial counsel, Monique Walker, failed to obtain the 9-1-1 recording that entailed an eyewitness giving a detailed description of the victim, the

victims attire, of the victim brandishing a weapon, following the petitioner and arguing with the petitioner. It is evident , from the record , that counsel was unaware that Anderson identified the victim because the trial counsel did not inquire about the contents of the all recording during cross-examination. No competent attorney in the same situation would have foregone questioning the state's unbiased witness regarding evidence that supports the defense theory and contradicts the state's theory that the petitioner was the aggressor and shot an unarmed man. The petitioner's sole defense was self defense. O. C. GA. 16-3 - 21(a) States that : "A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to defend himself against such other's imminent use of unlawful force. " The victims actions in brandishing a weapon in the direction of the petitioner is a felony and an imminent use of unlawful force. O. C. G. A. 16-5-21 (a) " A person commits the offense of aggravated assault when he or she assaults: (2) With a deadly weapon ... which when used offensively against a person, is likely to or actually does result in serious bodily injury. To constitute such an assault an actual injury need not be made the aggressor only has to place the individual in reasonable apprehension of receiving a violent injury . Patterson V. State 299 Ga 491 (2016) Counsel has a duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary. Strickland V. Washington 466 U. S. 668 (1984) Strategic choices made after less than complete investigations are reasonable only to the extent that reasonable professional judgement justify the curtailment of counsel's investigation. In this instant counsel had not received the 911 recording and did not make the minimal inquiries to ensure the defense was in possession of the evidence. During trial the following transpired. " Your Honor, at this time the State would move into evidence State's exhibit 2. Any objection? Your Honor , I did receive the CAD report. However, I did not receive the DVD of it and I had noticed that the 911 operator was Patricia Adams. I understand he's a director so that would be my objection. " See (TTP 227 Lines 1-10) During this 911 call a description of the victim brandishing a firearm was given to the 911 operator. The trial counsel has a duty to obtain any and all evidence that is relevant, pertinent, material, and favorable to the defense. During the Habeas evidentiary hearing, the

following transpired, "In your examination of the records are you familiar with the 911 call of Mattie Anderson? I haven't examined the record. Alright. This will be Exhibits-Exhibits 2 trial transcript. What page of the trial transcript Mr. Allen? Let me see. This will be page 203 and 204. Excuse me I'm sorry it's 225 and 227. Okay, I reviewed it. Your question? It's on page 225 and 227 of my trial transcript, you objected to not being able to provide certain parts of the 911 record. Did you have access to the 911 call of Mattie Anderson calling the East Point Police Department prior to trial? Throughout the trial? Prior to trial? Prior to trial? It states here that -- did not receive a DVD of it . Would you consider this exculpatory evidence if it was favorable to the defense? If it was favorable." "Objection. Judge. that's speculative. I'm going to overrule. May I speak, your Honor? You may. " The contents of this 911 recording contained favorable evidence to the defense that the individuals were armed during the time of the incident and described when she dispatched the 911 caller what the individual was wearing which is Exhibit 63. " Alright. Mr. Allen you're testifying now, giving your position regarding the 911 call . That is not admissible at this point, you'll be given an opportunity to testify at a later time. "Okay. " Now's the time to question this witness. "Alright. Did I inform you at trial that this recording contained evidence favorable to the defense? I don't recall. But if the 911 operator was there, I would assume that the 911 call was played for the jury. Well this particular recording was Mattie Anderson dispatching 911, cause it's not the dispatcher dispatching an officer but the state witness Mattie Anderson dispatching the East Point Police." "And your question is ? Do you remember that the contents of this recording will refute the Prosecution's theory of the case that the shooting was unprovoked - Objection, Judge, its cause for speculation and the question that was before was a jury question. "" I think you're going to have to rephrase Mr. Allen." Do you think the contents of this call was material relevant- relevant to my guilt or punishment or favorable to affirmative defense of self defense? If it contained information that the shooter was armed when I guess the- victim was armed that would be relevant. So the trial transcript says you didn't have access to it. By you not being provided this information prior to trial, would you consider it exculpatory? I believe the State is required to provide all Brady information and if they did not , then that would be a violation . It

should have been . Your Honor , if I may I'm sorry. Our discovery I would like to provide the first page of my discovery of what the State everything they provided to her."" You wish to show the document to? Ms Walker if I may. Let's mark it for purposes of identification. Which would be Petitioner's 5? You may show that to counsel to see if she recognizes or can .... identify it . Ms Wall, may I speak ? That would be Judge Wall, and you may ask her if she recognizes it or questions relevant to that document? I'm - I'm observing that it is the Certificate of Discovery and for Deimeyon Allen case. Does it have anything pertaining to a 911 recording? It does not. See (HT evidentiary hearing pg. 48- 52) The document (Petitioner5) was presented at the evidentiary hearing to refresh the trial counsel's memory (Monique Walker what had been provided to the defense by the District Attorney's Office prior to trial. Sec(Petitioner 5 Certificate of Discovery p. 96) which doesn't contain the 911 recording requested from previous counsel (Alixe Steinmetz) multiple times. See (Petitioner 3 Defendant's Second Motion to Compel. If trial counsel would have performed a proper pretrial investigation and not "only"rely on what previous counsel had done she would have had a proper understanding of the facts of the case and the relevance of the 911 recording See (MFNTp. 38 Lines 19- 25 p. 39 Lines 1-4. p.51 Lines 2-25 p. 52 Lines 1-9. Counsel could not have properly understood the facts of the case because if she knew the contents of this recording before the trial she could have refuted the States theory of the case and properly cross-examined the States witness Mattie Anderson in regards to the 911 recording, namely the description pertaining to the victims clothing and being armed at the time of the shooting. See (Exhibit 2) of the trial transcript recording of Mattie Anderson and compare to (Exhibit 63.) There is a reasonable probability had this information been presented in the face of the jury properly there is a reasonable probability the outcome of the proceedings would have been different. Georgia Rules of " Professional Conduct 3. 8. (d) specifically requires prosecutors to make timely disclosure to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense." A violation of this ethical rule, however , is not in itself a constitutional violation and thus not alone a ground for Habeas Corpus. Sec O. C. G. A. § 9 - 14 - 42 (g) (limiting post sentencing Habeas Corpus proceedings

to claims that the petitioner suffered "a substantial denial of his rights under the Constitution of the United States or this State." Also see Britt V. Smith 274 Ga 6 11, 612 (2001)(holding that a violation of the Uniform Superior Court Rules, which, like the Rules of Professional Conduct, are promulgated by this Court, is not in itself cognizable in Habeas). The state's withholding or omission of this evidence from the petitioner's discovery subsequently denied the petitioner's right to a fair trial, frustrated counsel's ability to effectively represent the petitioner, and denied the petitioner his constitutional right to due process. The state breached its constitutional duty to disclose information to the defense which overcomes the procedural default applied to Habeas Corpus claims. See Humphrey V. Lewis, 291 Ga 202 (2012). The suppressed evidence was favorable to the defense and the trial counsel rendered deficient performance by failing to obtain the evidence on her own. See (Exhibit Petitioner 3) Defendant's Second Motion to Compel. Previous trial counsel requested the 911 recording prior to trial. 911 calls are matters of public record and could have been obtained by the trial counsel with reasonable diligence. Sec. O. C. G. A. §, 50 - 18 - 72 (g) (24) allowing disclosure of 911 recordings to criminal defendant's via an open records act). Also see Heidler V. State 273 Ga 54(2) (2000)(No Brady violation where defendant could and did obtain records by means of his own, separate subpoena). The 911 call qualities as Brady's material, the trial counsel admitted she was not provided this evidence prior to trial, the existence of the 911 call came out during trial which surprised the petitioner and the trial counsel. Furthermore trial counsel was not aware of this evidence during cross-examination of Mattie Anderson . See (TTP 315 Lines 16 - 25, 316 Lines 1-11. Ms Anderson, how are you doing? I'm fine . My name is Monique Walker. We spoke about this. And you just described to the jury a couple things I wanted to go through. Now you said that - why don't you come back down just for one second. You said you heard the voices and the arguing behind your apartment? On one side. Okay. So that was here is that right? Yes And then you saw the shots, and that was here ? Yes, And then you saw three young men running that way, right? Yes. Before the shot ? Yes, thank you. That's all I have your Honor. It is obvious from the record that the trial counsel was not aware of the description of the victim brandishing a firearm prior to the shooting because no competent attorney

would have failed to address this matter during cross- examination. The State presented testimony that the petitioner was the aggressor. See (TTP 196 - 200, 439- 454) that the victim was not armed. See (TTP 450 line 11-22) that the shooting was unprovoked (TTP 229 - 255 , 256 - 273, 274-279.) In the face of the State's theory, it was unreasonable for the trial counsel to fail to obtain the 911 recording and cross-examine Mattie Anderson regarding the contents of the call. There is a reasonable probability that had the trial counsel elicited testimony from Mattie Anderson regarding the victim brandishing a firearm and following the petitioner and his brother to their mother's residence, that the jury would have returned a verdict of acquittal or a lesser included offense of voluntary manslaughter. Furthermore, the state argued during closing that the petitioner did not turn himself in immediately after the shooting and specifically pointed out that this gave the petitioner time to change clothes. See (TTP. 468 Lines 2-6) The prosecutors argument could have easily left the jury with the impression that the petitioner was the individual that Anderson witnessed brandishing the weapon. See (Exhibit2 , State's Exhibit 63)The testimony of a live witness that identified the victim with a weapon and chasing the petitioner is favorable and material to the claim of self defense and contradicts the state's theory that the petitioner shot an unarmed man. The trial counsel was ineffective for failing to obtain the recording prior to trial which would have enabled counsel to conduct a thorough a sitting cross-examination subsequently denying the petitioner of the right to effective cross examination Davis V. Alaska 415 U. 5. 308 (1974) Trial counsel deficient performance prejudiced the petitioner and denied the petitioner's right to a fair trial and due process of law. The manner in which the counsel dealt with the witness or cross -examination was ineffective, was not a strategic decision and prejudiced the petitioner's defense. There is a reasonable probability had the appellate counsel raised this issue on appeal a new trial would have been granted. Shorter V. Water 275 Ga 381 (2002).

(6)Petitioner has established by a preponderance of the evidence that the appellate counsel was ineffective for failing to raise that the trial counsel was ineffective for failing to file a motion in limine to the introduction of weapons that were irrelevant to the shooting incident and the trial court's abuse of discretion for admitting the evidence over the defense objection . During trial the state

introduced a 25 caliber pistol and a shotgun. HT pg 1169 Lines 5 - 18, 1175 Lines 7-20) It is undisputed that the weapons and ammunition discovered in the petitioner's mother residence were not relevant to the shooting incident nor were they admissible as res gestae. The state's reason for the introduction of the evidence was as follows:" Your Honor, this was evidence that was collected at the scene. This is also the apartment Antoine Allen was seen coming out of. (HT p. 1169 Lines 11-13) These weapons presented are subject to the standard of relevance and materiality applicable to other evidence. The evidence surrounding the arrest was wholly unrelated to the charged crime, and the evidence was not shown to be relevant and should not have been admitted. Crosby V. State269 Ga 434, 435 (3) (1998). It is uncontroverted that the victim was shot with a 40 caliber handgun which the Respondent also acknowledges. See (Section III of Respondent's Brief In Opposition) Circumstances connected with a defendant's arrest are admissible, even if such circumstances incidentally places the defendant's character in issue. Benford V. State 272 Ga 348, 350 N. 2 (2000) (The evidence must still be shown to be relevant.) Benford at 350 (3) The prosecutor's reason for the introduction of the evidence after the trial counsel objected were : Your Honor , this was evidence that was collected at the scene . This is also the apartment that Antoine Allen was arrested coming out of. " (HT p. 1169 Line 11-13) The court stated . " But there's no evidence that the gun was used or seen by anybody, it just happened to be in the apartment. (HT pg 1169 Lines 14-16) The state did not establish that the evidence was relevant or of any illegality regarding the presence of the weapons in the home, or that the petitioner owned the weapons . Furthermore , the fact that the petitioner may have possessed other firearms at another time, not involved in any manner in the shooting was not probative of the issue of whether he validly acted in self - defense or of the question of his intent in firing the pistol at the victim . Traylor V. State 280 Ga. 400, 403 (2) (2006). The state sought to introduce these weapons for the sole purpose to demonstrate that the petitioner owned multiple weapons and stored them at his mother's house (HTpg. 1274 Lines 1 - 2. 1295 Lines 5-8) Didn't want him to get to his mother's house where his guns are.) (The only time a weapon is produced, pointed, and fired is when they get down to the defendant's mother house where he stores his guns and where he went to get a

gun.) The state did not elicit any testimony that the victim or his brother's were aware that the petitioner allegedly stored weapons at his mother's house. The trial counsel was aware or should have anticipated that the state would introduce this evidence at trial. A motion in limine should have been filed to move the court to exclude the introduction of irrelevant prejudicial evidence. Glass V. State 255 (Ga App 390 (2002) (Trial court did not err in excluding evidence of the victims first offender plea.) Evidence of the circumstances surrounding an arrest is subject to the same standards of relevance and materiality that govern the admission of all other evidence. 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 than it would be without the evidence. O.C. G. A. 24- 4- 401. The decision whether to admit evidence connected to an arrest lies within the discretion of the trial court. Dukes V. State 273 Ga 890, 893 (2001) The trial counsel made a timely objection to the introduction of this evidence. "Ms Walker: I don't see the relevance of 47. I believe it's a weapon . There's no evidence that that was a. 20 or. 22 used, or, I mean, other than that. Sec (HT pg. 1169 Lines 7-10) "Ms. Walker: Your Honor, At this time I'm going to object. We do have an evidence sheet. It doesn't indicate where that shotgun was found. And the photos that we have of the shotgun were taken in the back of the police cruiser. So, we would object as to relevance, first a foremost, and then we really don't know -- See (1Hing 1175 Lines 9-14) The trial court was aware that the guns were not used. nor were they seen by anybody and that they just happened to be in the apartment. (HTpg 1169 Lines 14-16) These weapons were not probative of the petitioner's guilt and the trial court abused his discretion in admitting the Weapons over counsel's objection. The firearms were not of the same caliber and did not shed any light whatsoever on the circumstances of the shooting nor did they have any logical relation to the offense. There is a reasonable probability that the introduction of this evidence contributed to the verdict. The appellant counsel rendered ineffective assistance of counsel in omitting this issue on appeal. Shorter V. Waters 275 Ga 581 (2002). The petitioner has carried his evidentiary burden with respect to ground six. There is a reasonable probability that the outcome of the appeal would have been different had the appellant counsel raised this issue on appeal.

(7)Petitioner has established by a preponderance of the evidence that the appellate counsel was ineffective for failing to raise that trial counsel was ineffective for failing to object to the prosecutor's improper comment on the defendant's failure to come forward. During closing the prosecutor stated "Deimeyon Allen didn't turn himself in until the 15th, and in those hours he has got time to change clothes, got time to throw away a weapon, think about the best thing to say and then go talk to the police. " (HT p. 1297 Lines 2-6). Respondent contends that the prosecutor's comment was regarding the time period Petitioner turned himself in. This argument is belied by the state's improper comment. The prejudicial comment was directed at the petitioner's failure to turn himself in the following day to authorities and his alleged actions prior to turning himself in. Acquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to admission. O.C.G.A. 24- 3-6. The comment on the petitioner's silence and failure to come forward immediately was far more prejudicial than probative and such comments are not permitted. Mallory V. State 261 Ga 625 (1991). The trial counsel was ineffective for failing to object. During the habeas evidentiary hearing the prosecutor and the trial counsel both believed that the prosecutor statement to be a statement of when the petitioner turned himself in. (HT p. 34: Lines 18- 25; HT 62: Lines 9-10 evidentiary hearing) After a review of the prosecutor's comment it's obvious the prosecutor's comment was intended to highlight the petitioner turning himself in at a later date and his alleged actions taken after the shooting transpired. The trial counsel should have made a timely objection, requested a mistrial, or curative instructions and that the prosecutor is reprimanded for the improper comment if a mistrial wasn't deemed necessary. State V. Sims 296 Ga 465 (2015) Trial court did not err in determining that the trial counsel was deficient for failing to object to the states comments during opening argument referencing defendant's pre-arrest silence and failure to come forward to police after the shooting and in granting defendant a new trial.) There is a reasonable probability that the prosecutor's comment to view the petitioner's actions prior to arrest as an indication of guilt. prejudiced the defense, and contributed to the verdict. State V. Sims Supra (b). (Also upon reviewing the record,We agree with the trial court's assessment that the evidence presented on the self-defense issue was somewhat

conflicting, such that the jury may have been influenced to the appellant's detriment by the prosecutor's improper comment.) The comments were not isolated and were specifically aimed at the petitioner's actions or inactions prior to turning himself in. Given the petitioner's claim of self defense, his choice not to take the stand , which cannot be used against him , the state's comment of silence amounting to guilt or hiding the truth, the petitioner having time to prepare a story, and the trial counsel's failure to object. severely prejudiced the petitioner. This issue was significantly stronger than any of the issues raised on appeal and the appellant counsel rendered ineffective assistance of counsel for omitting this issue on appeal. There is a reasonable probability the outcome of the appeal would have been different had the appellant counsel raised this issue on appeal. Shorter V. Waters 275 Ga 581 (2002)

(9)Petitioner has established by a preponderance of the evidence that the appellate counsel was ineffective for failing to allege That The collective prejudice from all of the trial counsel's deficiencies should have been considered in weighing prejudice. The combined effect of all of counsel's errors prejudiced the defense. Schofield v. Holsey,281GA. 809, 811, n1(642, SE, 2d, 56)

(2007), also see State V. Lane S19A1424 (2020),Georgia Supreme Court adopts the Cumulative error Rule in determining whether a criminal defendant is entitled to a new trial.) The cumulative effect of two or more harmless errors has the potential to prejudice the petitioner to the same extent as a single reversible error. The relevant question (when a defendant challenges a conviction is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt ." Strickland, 466 US .668 at 695(111)(B). The Court must consider the totality of the evidence before the judge and jury, while reviewing the record de novo and weighing the evidence as it is expected reasonable jurors would have done. See Woodard V. State, 296 Ga. 803,810(3)(b), n. 5. (2015) The trial counsel's errors in the context of the case where the jury heard the prosecutor essentially testify that the petitioner shot an unarmed man, that the petitioner was the aggressor , that the petitioner failed to turn himself in immediately as indication of guilt. Trial counsel's errors in failing to introduce evidence into the record that directly contradicted the states theory that the petitioner shot an unarmed victim, the court's admission

of inadmissible irrelevant prejudicial evidence that further challenged the petitioner's character, the combined effect of these errors severely undercut the defense's case. The evidence of guilt was not overwhelming and clearly supported at a minimum, a verdict of a lesser included charge of voluntary manslaughter. Evidence of voluntary manslaughter may be found in Certain situations in which sudden passion was aroused in the person killing so that rather than defending himself he willfully killed the attacker albeit without malice aforethought when it was necessary for him to do so in order to protect himself. Syms V. State173 Ga. App 179 (1985) Under these circumstances, the petitioner has shown the required prejudice to prevail on his ineffective assistance claim. See Kennebrew V. State, 299 Ga. 864, 873 - 74 (2) (b) (2016) : Fisher V. State, 299 Ga. 478, 486 (2)(b) (2016).

(10) Petitioner has established by a preponderance of the evidence that the appellate counsel was ineffective for omitting on appeal the claims raised in his writ of habeas corpus. During the Motion For News Trial the appellant counsel raised the following: **(A) The verdict is against the weight of the evidence.** See (HT 764 -765) Appellate counsel contended that there was incriminating and damaging evidence located at the victim's residence compared to the lack of evidence at the petitioner's mother's home. Empty shell casings at the victim's home does nothing more than demonstrate that a firearm had been fired in the past. Furthermore, the petitioner admitting to firing a weapon in the direction of the victim, therefore the lack of evidence located at the petitioner's mother's home was an argument no competent attorney in the same situation would have made. The inconsistencies in the witnesses statements did not abrogate the fact that the petitioner shot at the victim. This argument was significantly weaker than the issues raised in The petitioner's writ of habeas corpus. **(B) The Court erred in admitting evidence**. See (HT 765 - 767) The appellate counsel alleged that the court erred in admitting the statement of the petitioner. The petitioner voluntarily made a statement after reading the petitioner his Miranda rights. See HTp.576) The Respondent ignores that the appellate counsel clearly omitted that the court erred in admitting inadmissible, Irrelevant prejudicial bad character evidence (ammunition, firearm, shotgun) over the trial counsel's objection . No competent attorney in the same situation would have

chosen to forego raising a meritorious issue of an abuse of discretion in admitting inadmissible prejudicial evidence over raising error in admitting a statement when the petitioner was informed of his Miranda rights. **(C) Jury misconduct in rendering the verdict before it was ready.** Appellate counsel alleged that the jury was rushed to make their decision, and thereby, made numerous errors on the verdict form. The appellate counsel made general assertions That the jury admitted being rushed to render a verdict with no reference to any portion of the record that demonstrated this admission actually occurred.

See (HT 767-768) The Respondent ignores the fact that the petitioner violation of the right to be present during this critical proceeding would have required a reversal had the appellant counsel had properly raised the issue on appeal. Lyde v. State 311Ga. App. 512 (2011) **(D)The defendant had ineffective assistance of counsel.** (1) Appellant counsel alleged that the trial counsel was ineffective for failing to locate and present evidence of specific acts of violence by the alleged victim against third parties. See (H1 769- 770) (2) Appellant counsel alleged that the trial counsel's statement as to unsuccessfully attempting to locate these witnesses did not negate the possibility that a failure to do so constitutes deficient performance. See (HT 769 - 770) (3) That an evidentiary hearing is required. See (HT 769-770) Appellant counsel was aware that Miranda Robinson was living in South Carolina and failed to present the witness or an affidavit from the witness to demonstrate to the court that the witness was available and willing to testify. After raising these Issues the appellant counsel abandoned the claim of ineffective assistance of counsel on the direct appeal. It is obvious, after a review of the record that the appellant counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker. Battles V. Chapman 269 Ga 702, 794(1998) Shorter V. Waters 275 Ga 581 (2002) The Petitioner has established by a preponderance of the evidence that the appellate Counsel was ineffective for omitting on appeal the claims raised in this, his writ of habeas corpus. **(11) Petitioner has established by a preponderance of the evidence that the appellant counsel was in violation of the Bar's Committee on Character, and Fitness while representing the petitioner and that counsel's consumption of Alprazolam Marijuna and Alcohol impaired her judgement and there is a reasonable probability**

That counsel's ability to properly represent the petitioner was impaired which severely prejudiced the petitioner's appeal. During representation of the petitioner the appellant counsel was serving a term of probation. Counsel I had a history of arrests for driving under the influence, she also failed to take responsibility for her actions and or show remorse, had a tendency to blame others and circumstances for her problems, and counsel possessed a lack of candor with a counselor conducting an alcohol and drug abuse assessment which constituted a violation of Ga. State Bar Rule 4-102(a) 8.4(a)(2) also see In The Matter of Jennifer L. Wright 299 Ga.139 (2016) A high percentage of disbarments stems from untreated substance abuse and it has been statistically proven that lawyers suffer from alcoholism and illegal drug abuse at a much higher rate than non-lawyers. In addition. Georgia weighs unlawful conduct more heavily and requires an applicant to prove full and complete rehabilitation subsequent to conviction ... by clear and convincing evidence which appellant counsel in the instant case failed to do. In Re Carson 294 S. E.2d 520, 522 (1982) Appellate counsel was disbarred following her guilty plea conviction in the Superior Court of Douglas County for Felony

possession of Alprazolam, a Schedule IV Substance. O.C. G. A. 16-13- 30. A hearing was held by The Special Master Margaret Washburn, and it was established that counsel was not in compliance with her probation , which included the requirement that she participate in a substance abuse treatment program and discontinue her use of marijuna. Appellant counsel was appointed to represent the petitioner at the motion for new trial stage on May 30, 2012 and August 2, 2012. Wright filed an entry of appearance and it is uncontroverted That counsel continued the representation of the petitioner's appeal while under the influence of Alprazolam, Marijuana and Alcohol. There is a reasonable probability that counsel's personal life had an affect on her ability to properly represent the petitioner. Alprazolam is used to treat anxiety disorders, panic disorders and anxiety caused by depression. This drug is prohibited

from being taken with alcohol and counsel has been known to use Alprazolam, Marijuana and Alcohol. Drinking alcohol while taking alprazolam increases the effects of alcohol. Alaprazolam itself impairs thinking judgement, reactions, and other cognitive functions such as paranoid or suicidal ideation,

impaired memory, judgement, and Coordination. The petitioner's "life, liberty, and property" interests are guaranteed by the Ga. and U. S. Constitution and are unprofessional Keeping of lawyers. From a profession charged with such responsibility, there is exacted (1) qualities of truth speaking: (2) high sense of honor: (3) granite discretion of the strictest observance of fiduciary responsibility: that have, for centuries, been compendiously described as moral character Schware V. Bd of Bar Exams rs 353 U.S. 232, 247 (1957) (Frankfurt concurring) Appellate counsel failed to appear at the habeas evidentiary hearing. See HT dated Oct. 8, 2019 (Docket Entry No. 94) Counsel was using numerous last names in an attempt to avoid being located and this tactic is normally used when an individual is involved in a criminal enterprise. (MFNTp. 1483: Lines 17- 22) (HTp 1559). 1582) The petitioner had successfully subpoenaed the trial Counsel and prosecutor therefore he was aware of how to properly subpoena the witnesses (HTp. 34 Line 25HTp. 62Lines 9-10) See. Post Office documents and affidavit from petitioners niece enclosed with this Amended Brief. Appellate counsel cashed The money order, Oct 2. 2019. This was six days before the petitioner's evidentiary hearing and appellate Counsel failed to appear. The appellate counsel's failure to comply with the subpoena has rendered the petitioner unable to establish ineffective assistance with an inquiry of his individual grounds. However the petitioner has established that. Counsel's failure to fulfill the necessary moral, and character and fitness while representation further calls into question whether counsel was able to properly advocate the petitioners cause . The petitioner has demonstrated that the appellate counsel ignored clearly significant stronger issues than those raised on appeal and the petitioner's appeal was severely prejudiced. Shorter

V. Waters 275 Ga 581(2002).

Certificate of Service

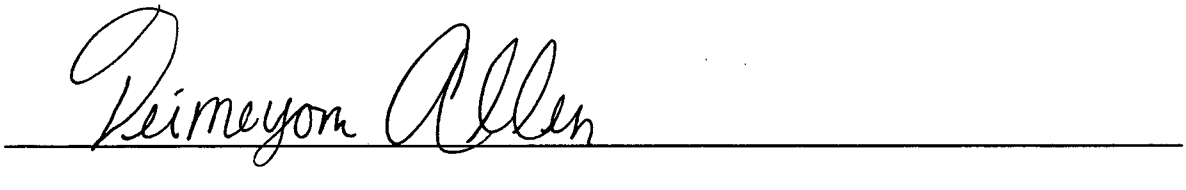
This is to certify that I have this day served a true and correct copy of the within and foregoing document(s) upon the parties listed below by depositing a copy of the same in the United States Mail in a properly addressed envelope with adequate postage thereon to the below addresses.

Clerk Of Superior Court Of Wheeler County
Carol Bragg
P.O. Box 38
Alamo. Ga 30411

Attorney General.
40 Capitol Square.
Atlanta, Ga 30334

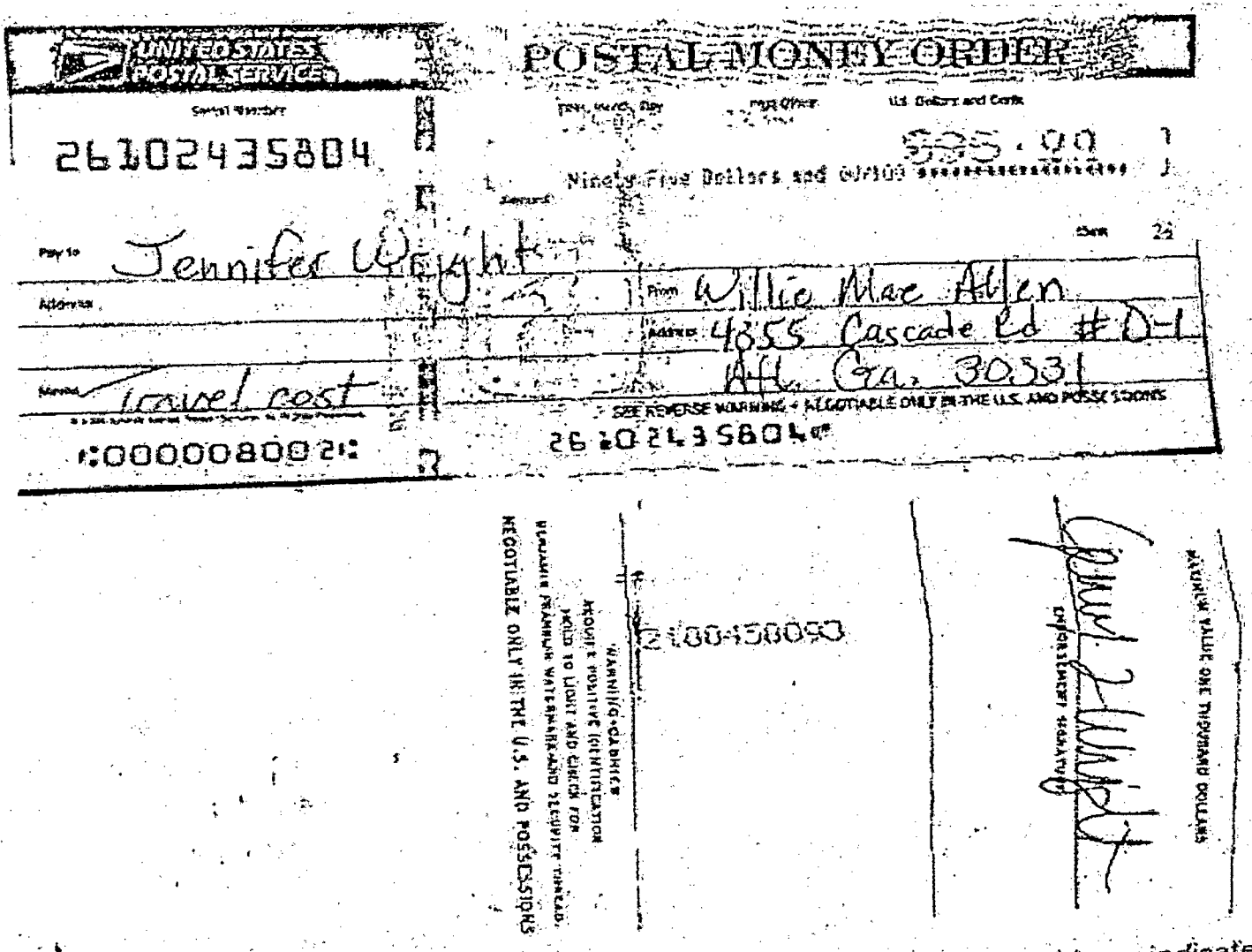
Sarah F. Wall, Chief Judge
Superior Courts
Eighth Judicial Administrative District
Oconee Judicial Circuit
Pulaski County Courthouse
P.O Box 1096
Hawkinsville, Ga 31036

GDC # 1000420167
Deimeyon Allen



VI. APPENDIX F APPELLANT'S HABEAS CORPUS BRIEF

VII. APPENDIX G INMATE REQUEST FORM THAT WAS SUBMITTED TO THE HABEAS COURT ON MARCH 17th, 2021 DEMONSTRATING THE PETITIONER'S EFFORTS IN OBTAINING EVIDENCE THROUGH THE PRISON AND BUSINESS PROCEDURES



If you have any additional concerns or questions, write to us at the address indicated below and enclose a copy of your customer receipt and this letter.

14-1A

Inmate Request Form

Facility Name:	Wheeler Corrections
Date of Request:	February 19, 2021
Housing Location:	700 X
Inmate Printed Name:	Deimeyon Allen — ID#: 1000420167
Inmate Signature:	Deimeyon Allen

To: Mailroom

I was writing you in regards to a copy of a United States Postal Money order that was mailed here about three weeks ago that I have'nt recieved. This Postal Money order was mailed to me by Porsha Gay. Its suppose to come to me and I have to mail it to Sarah F. Wall the Wheeler County Judge. This Info is critical to my ca

Staff Response Only Below This Line Unless Otherwise Indicated

If referred to another staff member/area: _____

We have not seen a Postal money order come through the mail room yet and I checked with the Business office they have not received anything either

Staff Signature: L. Gabe Date: 2-22-21

If the response received is unsatisfactory sign below and resubmit this letter to the Warden/Designee.

Inmate Signature/Date:

Warden/Designee Signature/Date: _____ Date: _____

Original: Inmate; Copy: Staff / Institutional File

VIII. APPENDIX H ORIGINAL APPLICATION FOR HABEAS CORPUS RELIEF

SUPREME COURT OF GEORGIA
Case No. S21H1149

September 21, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DEIMEYON ALLEN v. VANCE LAUGHLIN, WARDEN.

The habeas court denied applicant's petition for writ of habeas corpus on April 12, 2021. In order to obtain appellate review of that order, he was required to file both a notice of appeal in the habeas court and an application for a certificate of probable cause to appeal in this Court no later than May 12, 2021. See OCGA § 9-14-52 (b). Although applicant timely filed his application for a certificate of probable cause to appeal in this Court on May 3, 2021, he never filed a notice of appeal in the habeas court, and the time for doing so has passed. Because the failure to comply with OCGA § 9-14-52 (b) is jurisdictional, the Court dismisses this application for a certificate of probable cause to appeal. See *Crosson v. Conway*, 291 Ga. 220, 222 (728 SE2d 617) (2012); *Fullwood v. Sivley*, 271 Ga. 248, 250 (517 SE2d 511) (1999).

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk

X. APPENDIX J SUPREME COURT ORDER DISMISSING THE APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

THE SUPREME COURT OF GEORGIA

S21H1149

INDEX TO RECORD

IN THE CASE OF:

DEIMEYON ALLEN GDC 1000420167

VS.

VANCE LAUGHLIN, WHEELER CORRECTIONAL FACILITY

CASE NO. 18CV109

PLAINTIFF PRO SE

ATTORNEY FOR DEFENDANT

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GA. STATE BAR NUMBER 662160

JUDGE

HON. SARAH F. WALL, CHIEF JUDGE

OCONEE JUDICIAL CIRCUIT

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HAWKINSVILLE, GA 31036

PHONE: (478) 783-2900

CLERK

HON. CAROL W. BRAGG

WHEELER COUNTY SUPERIOR COURT

P O BOX 38

ALAMO, GA 30411

PHONE: (912) 568-7137

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IN THE SUPERIOR COURT OF WHEELER COUNTY STATE OF

GEORGIA

DEIMEYON ALLEN
GDC# 1000420167
PETITIONER

v. HC# 18CV109

VANCE LAUGHLIN
WARDEN,
RESPONDENT.

NOTICE OF APPEAL

Comes Now Deimeyon Allen, pro se, the Petitioner in the above-styled case and files this his Notice Of Appeal of the Superior Court's Order Denying the Petitioner's Writ Of Habeas Corpus on the 12th of April 2021, which is within the 30 day time limitation for filing an appeal. **O.C.G.A. § 9-14-52**

JURISDICTION

O.C.G.A. 9-14-52 (b) If an unsuccessful petitioner desires to appeal, he must file a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court within 30 days from the entry of the order denying him relief. The petitioner shall also file within the same period a notice of appeal with the clerk of the concerned superior court.

The clerk of court shall omit nothing from record and shall forward, the record and transcript, to the clerk of the Supreme Court.

Respectfully Submitted, this 3rd day of May, 2021.

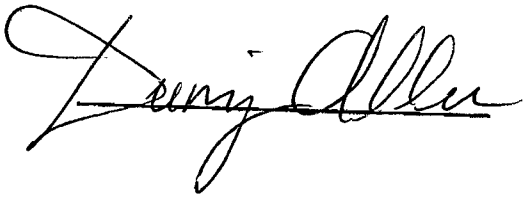
CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing Notice Of Appeal upon the persons listed below, by the United States Postal Service in properly addressed envelopes with adequate postage attached thereon.

PERSONS SERVED:

CLERK OF SUPERIOR COURT OF WHEELER COUNTY
CAROL BRAGG
P.O. BOX 38
ALAMO GA. 30411

ATTORNEY GENERAL OFFICE
40 CAPITOL SQUARE
ATLANTA, GA 30334



DEIMEYON ALLEN
GDC# 1000420167
WHEELER CORRECTIONAL FACILITY
195 N BROAD ST.
ALAMO, GEORGIA 30411

XII. APPENDIX L SUPERIOR COURT DOCKET SHEET DEMONSTRATING THAT A NOTICE OF APPEAL WAS TIMELY FILED

XIII. APPENDIX M SUPREME COURT ORDER DENYING MOTION FOR RECONSIDERATION

IN THE SUPREME COURT OF

GEORGIA

DEIMEYON ALLEN

GDC#1000420167 CASE NO 18CV109

S. PETITIONER

ANCE LAUGHLIN WARDEN

MOTION FOR RECONSIDERATION

Comes now the petitioner in the above styled action by Deimeyon Allen Pro se, and hereby notifies the Honorable Supreme Court of Georgia to reconsider its order passed Sep 21, 2021 in light of the Wheeler County Superior Courts claim of not recieving my Notice of Appeal. The Notice of Appeal was mailed out certified mail May 3, 2021 at 1:00Pm in accordance with Georgia's Court Rules and Procedure. I've enclosed a copy of the

INDEX TO CASE FILE ON APPEAL that I recieved June 16, 2021 from the Wheeler County Superior Court Clerk Carol Bragg. According to rule 37(e) A reconsideration shall be granted on motion only when it appears that the Court overlooked a material fact in the record, a statue, or a decision which is controlling as authority and which would require a different judgement from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority. I pray that this honorable court dismiss the order that was passed on the 21 of September in this court and hear my certificate of probable cause. Petitioner further moves the Court to embrace the mandate of Haines V. Kerner, 925 Ct. 594. all prose pleadings are to be liberally construed.

XIV. APPENDIX N MOTION FOR RECONSIDERATION

IN THE SUPREME COURT

STATE OF GEORGIA

DEIMEYON ALLEN

GDC# 1000420167 CASE NO. 18CV109

'S. PETITIONER

IANCE LAUGHLIN WARDEN

NOTICE OF INTENT AND MOTION FOR STAY OF REMITTITUR

Deimeyon Allen, hereby provides notice of his intent to file a petition for writ of certiorari to the United States Supreme Court and moves this Court to enter an order, staying remittitur in this Court while Petitioner seeks said writ of certiorari in the United States Supreme Court. Georgia Supreme Court Rule 61 provides: STAY OF REMITTITUR. Any party desiring to have the remittitur stayed

in this Court in order to appeal to, or seek a writ of certiorari in the United States Supreme Court shall file in this Court a motion to stay the remittitur with a concise statement of the issues to be raised on appeal or in the petition for certiorari. Such notice shall be filed at the time of filing a motion for reconsideration or, if no motion for reconsideration is filed, within the time allowed for the filing of the same. See Rule 27. A stay of remittitur will not be granted by this Court from denial of a petition for certiorari. In addition, 28 U.S.C. § 2101 provides, in pertinent part: (f) In any case in which the final judgement or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of

certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefore, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. Petitioner hereby provides notice of his intent to file a petition for writ of certiorari to the United States Supreme Court for review of this Court's decision dated September 21, 2021. Petitioner's petition must be filed no later than ninety (90) days from the date of the

judgment or a decision on reconsideration of the judgement. 28 U.S.C. § 2101(c). The filing of the petition for writ of certiorari to the United States Supreme Court does not prevent judgment of this Court from becoming final until the United States Supreme Court acts upon the petition, where no stay of mandate has been issued. Glick V. Ballentine Produce, Inc., 397 F.2d 590 (8th Cir. 1968). The petition for writ of certiorari alone does not stop remittitur. Byrne V. Roemer, 847 F.2d 1130 (5th Cir. 1988). However, Rule 61 of the Rules of the Georgia Supreme Court and 28 U.S.C. § 2101(f) empower this Court to stay remittitur, pending a decision by the United States Supreme Court on Petitioner's petition for writ of certiorari. Petitioner respectfully moves this Court to excercise its power to stay remittitur in this important case.

pending petitioner's application for review by the United States Supreme Court.

I. Statement Of The Issues To Be Raised By Writ Of Certiorari.

In it's petition for writ of certiorari to the United States Supreme Court, Petitioner intends to raise the following issues:

A. Whether This Court Erroneously Dismissed Petitioner's Certificate Of Probable Cause.

B. Whether the United States Supreme Court Should Resolve the Conflicting Opinions of Numerous High Courts & disregarding the combined effect of multiple errors that prejudiced the petitioner. State V. Lane S19A1424 (2020). This Cour should stay remittitur to conserve Georgia's judicial resources. Petitioner further moves the Court to embrace the mandate of Hanes V.

Kerner, 925 Ct. 594. all pro se pleadings are to be liberally construed.

XVI. APPENDIX P MOTION TO STAY OF REMITTITUR