APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

SUPREME COURT OF GEORGIA

Case No. S21H0527

[Filed: August 24, 2021]

TRAVIS PARROTT	)
	)
v.	)
	)
MURRAY TATUM, WARDEN.	)
	)

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

TRAVIS PARROTT v. MURRAY TATUM, WARDEN.

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

All the Justices concur.

Trial Court Case No. 18HC-0464K

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.

/s/_____, Clerk

APPENDIX B

IN THE SUPERIOR COURT OF DODGE COUNTY STATE OF GEORGIA

Habeas Action File No. 18HC-0464K

[Filed: December 7, 2020]

TRAVIS PARROTT,	)
GDC # 1304760,	)
	)
Petitioner,	)
	)
v.	)
	)
MURRAY TATUM, Warden,	)
	)
Respondent.	)
	)

FINAL ORDER

Travis Parrott ("Petitioner") filed an Application for Writ of Habeas Corpus ("Writ") on November 13, 2018 challenging the validity of his March 8, 2013 Clayton County jury conviction. The Court, as a preliminary finding, determines that Petitioner's Writ was timely filed within the provisions of O.C.G.A. § 9-14-42 (e) and was filed on the appropriate, required Administrative Office of the Courts ("A.O.C.") forms and the allegations therein have been verified. At the time of filing, Petitioner was a state prisoner incarcerated in

Dodge State Prison located in Dodge County, Georgia. Venue and jurisdiction are proper in the Superior Court of Dodge County under O.C.G.A. § 9-14-43. Legal service was perfected on the Warden of Dodge State Prison on December 17, 2018. Based on the foregoing findings, the Court has jurisdiction over the parties and subject matter to adjudicate the allegations set out in Petitioner's Writ. An evidentiary hearing ("Hearing") was held on June 28, 2019 in Dodge County, Georgia. After reviewing Petitioner's Writ, the entire record of the case, and applicable law, the Court makes the following findings:

PROCEDURAL HISTORY

On February 13, 2013, a Clayton County grand jury indicted Petitioner and co-defendant Terrence Smith ("Co-defendant") for the following five (5) charges: (Count 1): Armed Robbery (O.C.G.A. § 16-8-41); (Count 2): Hijacking a Motor Vehicle (O.C.G.A. § 16-5-44.1); (Count 3): Aggravated Assault (O.C.G.A. § 16-5-21); (Count 4): Aggravated Assault (O.C.G.A. § 16-5-21); and (Count 5): Battery (O.C.G.A. § 16-5-23.1). (Transcript from Habeas Corpus Evidentiary Hearing, hereinafter "HT," 702-704). Kevin Shumaker ("trial counsel") represented Petitioner at trial. (HT 692). Petitioner and Co-defendant were tried jointly before a jury March 6, 7, and 8, 2013. (HT 123). The jury found Petitioner guilty as to all counts of the indictment. (HT 693-694). Petitioner was sentenced to serve twenty (20) years for Count 1 and ten (10) consecutive years for Count 2. (HT 692). Counts 3, 4, and 5 merged with Count 1. (HT 692). Trial counsel filed a preliminary Motion for New Trial ("MNT") on March 28, 2013. (HT

682-683). On May 13, 2013, Tyler Conklin ("appellate counsel") was appointed to represent Petitioner. (HT 674-675). On December 11, 2013, appellate counsel amended Petitioner's MNT ("AMNT") to add one additional ground, (HT 660). On February 20, 2014, the Superior Court of Clayton County ("trial court") entered an Order denying Petitioner's AMNT. (HT 648-649). On February 27, 2014, appellate counsel filed a timely Notice of Appeal raising four enumerations of error: (1) trial counsel rendered ineffective assistance by failing to adequately investigate the case, and to subsequently call Maurice Trammell at trial to refute the State's evidence; (2) the State presented insufficient evidence to sustain Petitioner's hijacking conviction because it did not present any evidence that he used an object having the appearance of an offensive weapon; (3) the State presented insufficient evidence to sustain Petitioner's battery conviction; and (4) the State presented insufficient evidence to sustain Petitioner's armed robbery conviction. (HT 644-647, HT 743-754). On November 19, 2014, Petitioner's convictions and sentence were affirmed by the Court of Appeals of Georgia in an unpublished opinion. (HT 743-754); *Parrott v. State,* A14A1301 (Ga. App. Nov. 2014).

Petitioner filed this Writ alleging the following twenty-seven (27) grounds:

1. "Trial counsel was ineffective in deciding not to object to the admission of highly prejudicial and inflammatory evidence of other uncharged crimes, which evidence was not relevant and necessary to prove anything other than Petitioner's propensity to commit crimes, and

this decision by trial counsel not to object was not part of any reasonable and deliberative trial strategy";

2. "Appellate counsel was ineffective in not raising the above issue set forth in Ground One in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

3. "The trial court committed error in not granting trial counsel's motion for a mistrial that was made following the admission into evidence of all of the highly prejudicial and inflammatory evidence of other crimes, as set forth above in Ground One";

4. "Appellate counsel was ineffective in not raising the above issue set forth in Ground Three in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

5. "The trial court committed error in giving the jury an ineffective limiting instruction regarding the prior crimes evidence and wrongful acts evidence discussed in above Grounds One and Three";

6. "Trial counsel was ineffective for deciding not to object to the inefficacy of the limiting instruction given by the trial court to the jury following the admission of evidence of other crimes and unlawful acts, as discussed in Grounds One, Three and Five, and this decision by trial

counsel not to object was not part of any reasonable and deliberative trial strategy";

7. "Appellate counsel was ineffective in not raising the above issues set forth in Grounds Five and Six in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

8. "Trial counsel was ineffective for deciding not to move for a severance when the court determined before voir dire examination had commenced that it would permit the State to admit similar transaction evidence through witness testimony against codefendant, and a request for a severance also was not made by trial counsel before and/or after the similar transaction evidence witness had testified, and these decisions by trial counsel not to move for a severance were not part of any reasonable and deliberative trial strategy";

9. "The trial court committed error in failing to address Petitioner's pro se motion for a severance, which Petitioner raised after the testimony of the similar transaction evidence witness";

10. "Appellate counsel was ineffective in not raising the above issues set forth in Grounds Eight and Nine in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

11. "The trial court committed error in giving the jury two ineffective instructions regarding that

the similar transaction evidence was admissible only as to Petitioner's codefendant and these instructions did not clearly direct the jury not to consider the evidence against Petitioner";

12. "Trial counsel was ineffective for deciding not to object to the inefficacy of the two limiting instructions given by the trial court to the jury concerning the use of the similar transaction evidence, as these instructions did not clearly direct the jury no to consider the evidence against Petitioner, and such decisions by trial counsel not to object were not part of any reasonable and deliberative trial strategy";

13. "Appellate counsel was ineffective in not raising the above issues set forth in Grounds Eleven and Twelve in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

14. "Trial counsel was ineffective in deciding not to impeach Maricus Parks (who, as the victim of Petitioner's alleged criminal conduct, was the State's main witness) with at least two felony convictions, and this decision by trial counsel not to so impeach Parks was not part of any reasonable and deliberative trial strategy";

15. "Appellate counsel was ineffective in not raising the above issue set forth in Ground Fourteen in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

16. "Trial counsel was ineffective in deciding not to impeach the girlfriend of alleged victim Maricus Parks, with evidence that a few years before the alleged hijacking of Parks' vehicle by Petitioner she used her cell phone to make a false report to 911 of the theft of a vehicle, and this decision by trial counsel not to elicit this evidence was not part of any reasonable and deliberative trial strategy";

17. "Appellate counsel was ineffective in not raising the above issue set forth in Ground Sixteen in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

18. "Trial counsel was ineffective in deciding not to impeach Ayana Jakes with her multiple convictions for shoplifting, and this decision by trial counsel not to so impeach Ayana Jakes was not part of any reasonable and deliberative trial strategy";

19. "Appellate counsel was ineffective in not raising the above issue set forth in Ground Eighteen in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

20. "Trial counsel was ineffective in deciding not to move to suppress the in-court identification of Petitioner by alleged victim Maricus Parks as being the product of two impermissibly suggestive pretrial identification procedures,

and this decision by trial counsel was not part of any reasonable and deliberative trial strategy";

21. "Appellate counsel was ineffective in not raising the above issue set forth in Ground Twenty in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

22. "Trial counsel was ineffective for deciding not to object to irrelevant and prejudicial evidence besides the evidentiary matters set forth in the above Grounds, and these decisions by trial counsel not to object were not part of any reasonable and deliberative trial strategy";

23. "Appellate counsel was ineffective in not raising the above issue set forth in Ground Twenty-Two in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals";

24. "Petitioner is entitled to a new trial, as his right to have a complete and fair judicial review by this Court of his trial proceeding has been frustrated because his pretrial proceedings and critical phases of his trial proceeding were not reported, and because some items of physical evidence may not have been preserved by the State, as well as by Petitioner's trial and appellate lawyers";

25. "Trial counsel was ineffective in deciding not to have Petitioner's pretrial proceedings reported and in deciding not to have certain phases of Petitioner's trial proceeding reported, as

discussed in Ground Twenty-Four, and in failing to insure that the audio/video recording of Petitioner's post-arrest interview had been preserved";

26. "Appellate counsel was ineffective in not raising the above issues set forth in Grounds Twenty-Four and Twenty-Five in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals"; and

27. The cumulative effect of the trial court's errors, as discussed in the above Grounds, and the cumulative effect of trial counsel's errors, as discussed in the above Grounds, deprived Petitioner of his constitutional right to a fair trial, and appellate counsel was ineffective in failing to present or appeal this cumulative error in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals."

At the Hearing, trial counsel and appellate counsel testified, were cross-examined, and documentary evidence was admitted. Petitioner filed a "Post Hearing Brief in Support of Application of Habeas Corpus Pursuant to O.C.G.A. §§ 9-14-40, *et. seq."* ("Petitioner's Brief") on July 2, 2020. Respondent filed "Respondent's Post-Hearing Brief" ("Respondent's Brief") on July 1, 2020. Petitioner then filed "Petitioner's Reply Brief to Respondent's Post-Hearing Brief" ("Petitioner's Reply") on July 23, 2020. In Petitioner's Reply, Petitioner withdrew Grounds Eleven, Twelve, Thirteen, Eighteen,

and Nineteen. (Docket No. 25, Petitioner's Reply, p. 5, 12).

GROUNDS 1 AND 2

In Ground One, Petitioner alleges that "trial counsel was ineffective in deciding not to object to the admission of highly prejudicial and inflammatory evidence of other uncharged crimes, which evidence was not relevant and necessary to prove anything other than Petitioner's propensity to commit crimes." In Ground Two, Petitioner alleges that appellate counsel was ineffective for not raising the ineffective assistance of trial counsel claim set forth in Ground One in either the motion for new trial or on appeal.

Any allegation of a violation of the right to counsel should be made at the earliest practicable moment. *Smith v. State,* 255 Ga. 654, 655 (1986). The Supreme Court of Georgia has delineated,

> [i]n order to avoid a waiver of a claim of ineffective assistance [of] counsel, the claim must be raised at the earliest practicable moment, and that moment is "before appeal if the opportunity to do so is available . . . ." The pre-appeal opportunity is "available" when the convicted defendant is no longer represented by the attorney who represented him at trial.

Williams v. Moody, 287 Ga. 665, 666 (2010) (quoting *Glover v. State,* 266 Ga. 183, 184 (1996)).

Essentially, new counsel must raise the ineffectiveness of previous counsel at the first possible stage of post-conviction review. *White v. Kelso,* 261 Ga.

32, 32 (1991). Here, trial counsel became "previous" counsel, and was no longer representing Petitioner, when appellate counsel was appointed to represent Petitioner, and appellate counsel was required to raise ineffective assistance of trial counsel at this point. See *id.*

Claims that could have been raised on direct appeal but are raised for the first time in habeas corpus proceedings are procedurally defaulted, unless the petitioner can demonstrate cause for the failure to raise the issue at the earliest practicable moment and actual prejudice arising therefrom, or if the procedural default will work a miscarriage of justice. *Schofield v. Meders,* 280 Ga. 865, 865 (2006) (citing *Turpin v. Todd,* 268 Ga. 820, 829 (1997)), Thus, Petitioner's allegation of ineffective assistance of trial counsel in Ground One is procedurally defaulted.

Petitioner's procedurally defaulted ineffective assistance of trial counsel claim may nevertheless be considered here if Petitioner can satisfy the "cause and prejudice" test. See *Turpin,* 268 Ga. at 825. "A common method of satisfying the cause and prejudice test is to show that trial and direct appeal counsel rendered ineffective assistance." *Humphrey v. Walker,* 294 Ga. 855, 858 (2014). A habeas petitioner seeking to overcome a procedural default by alleging ineffective assistance of appellate counsel must show professionally deficient performance and that the deficiencies had a reasonable probability of changing the outcome of the proceeding. *Hall* v. *Lewis,* 286 Ga. 767, 769 (2010) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). That is, Petitioner could

overcome the procedural default if he establishes that he failed to raise this issue at the earliest practicable moment due to the ineffective assistance of appellate counsel. *Id*.

Here, Petitioner alleges appellate counsel was ineffective for failing to raise this ineffective assistance of trial counsel claim at the earliest practicable moment. See Ground Two. To demonstrate that appellate counsel rendered ineffective assistance of counsel, Petitioner must establish that appellate counsel was deficient in failing to raise this issue on appeal and that, if appellate counsel had raised this issue, there is a reasonable probability that the outcome of the appeal would have been different. *Benton v. Hines,* 306 Ga. 722, 724 (2019). "It is the attorney's decision as to what issues should be raised on appeal, and that decision, like other strategic decisions of the attorney, is presumptively correct absent a showing to the contrary by the defendant." *Hooks v. Walley,* 299 Ga. 589, 591 (2016) (quoting *Arrington v. Collins,* 290 Ga. 603, 604 (2012)).

When appellate counsel's performance is alleged to be ineffective because of a failure to raise ineffective assistance of trial counsel, the following "two layers of fact and law are involved in the analysis":

> To find that appellate counsel provided ineffective assistance, a reviewing court must find appellate counsel's failure to raise trial counsel's ineffectiveness on appeal represents deficient professional conduct. Even if deficient performance of appellate counsel is shown, a demonstration of prejudice requires a showing

> that, had the ineffective assistance of trial counsel been raised on direct appeal, a reasonable probability exists that the outcome of the appeal would have been different. This, in turn, requires a finding that trial counsel provided deficient representation and that the defendant was prejudiced by it.

Gramiak v. Beasley, 304 Ga. 512, 513 (2018).

If Petitioner fails to show trial counsel provided ineffective assistance of counsel, then Petitioner also fails to show ineffective assistance of appellate counsel, because "an attorney is not deficient for failing to raise a meritless issue on appeal." *Id.;* see also *Shelton v. Lee,* 299 Ga. 350, 357 (2016).

"Because the ineffectiveness of trial counsel plays a role in both prongs of the test of ineffectiveness of appellate counsel, we start by examining whether [Petitioner] has demonstrated that trial counsel was ineffective." *Gramiak,* 304 Ga. at 514. To demonstrate that trial counsel rendered ineffective assistance of counsel, a petitioner must prove both that trial counsel's performance was deficient and that he was prejudiced by this deficient performance, pursuant to the two-prong test of *Strickland,* 466 U.S. at 694. To prove that the performance of trial counsel was deficient, Petitioner must show that counsel "performed [his] duties in an objectively unreasonable way, considering all the circumstances, and in the light of the prevailing professional norms. This is no easy showing." *Walker,* 294 Ga. at 859. The law recognizes a "strong presumption" that counsel performed reasonably, and Petitioner bears the burden of

overcoming this presumption. *Id.* To carry this burden, Petitioner must show that no reasonable lawyer would have done what counsel did or would have failed to do what counsel did not. *Humphrey v. Nance,* 293 Ga. 189, 192 (2013). "Even when a petitioner has proved that the performance of his lawyers was deficient in a constitutional sense, he must also prove prejudice by showing 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Walker,* 294 Ga. at 860 (citing *Strickland,* 466 U.S. at 694). It is not enough to show that the errors of counsel had some conceivable effect on the outcome of the proceeding; rather, the petitioner must show a probability sufficient to undermine confidence in the outcome. See, e.g., *Harrington v. Richter,* 562 U.S. 86 (2011); *Strickland,* 466 U.S. at 694. Since a petitioner claiming ineffective assistance of counsel must show both deficient performance and prejudice stemming from that deficiency, an insufficient showing on either of these prongs relieves the reviewing court of the need to address the other prong. *Cain v, State,* 277 Ga. 309, 311 (2003). "In all, the burden of proving a denial of effective assistance of counsel is a heavy one." *Walker,* 294 Ga. at 860; see also *Kimmelman v. Morrison,* 477 U.S. 365, 382 (1986).

Here, Petitioner's underlying ineffective assistance of trial counsel claim is trial counsel's failure to object to the admission of "highly prejudicial and inflammatory evidence of other uncharged crimes." At trial, evidence was admitted showing that when Petitioner's hotel room was searched, officers located social security cards, financial transaction cards,

digital scales, car keys, and cell phones belonging to persons other than Petitioner or Co-defendant. (HT 363-383). Evidence was also admitted showing that one set of car keys belonged to a vehicle stolen in another car theft. (HT 373). Trial counsel moved to exclude evidence of the digital scales because of the prejudicial effect that the scales could be viewed by the jury as being evidence of drug dealing, but the trial court denied this motion, explaining that "facts and circumstances of the arrest and surrounding and illustrating the circumstances of the arrest, are relevant even though they may incidentally place the defendant's character at issue." (HT 220-221). Additionally, although not contemporaneously, trial counsel moved for a mistrial based on the admission of the stolen car keys from the "Riverdale" case. (HT 387). The trial court denied the motion for mistrial, but provided the following curative instruction:

> You may recall from the evidence and testimony in this case that a statement was made respecting keys to a Focus automobile taken from a Riverdale car theft.
>
> I specifically instruct you to disregard that testimony in its entirety. You're to give it no consideration whatsoever.
>
> You will consider the remainder of the evidence which has been presented unless I tell you otherwise. All right?
>
> (HT 394-395).

Trial counsel did not object to the language of the curative instruction[1] nor to the admission of the remainder of the items found in the hotel room. At the Hearing, Trial counsel testified that he did not object to the admission of this evidence because "it did not appear to be necessarily evidence of other crimes . . . this was a hotel room with a lot [of] stuff in it. There were ID's and things like that that belonged to other people, but there was no indication that any of them had been stolen or anything like that. It was just a room with a bunch of crap in it . . . And so it looked like people had been going in and out of that hotel room. I didn't feel they were ever going to be able to say this was stolen stuff. It didn't seem like something I needed to make an issue of." (HT 16-17).

Pretermitting whether such an objection would have been successful, Petitioner has failed to establish that trial counsel's decision to forego objecting to this evidence was objectively unreasonable, as required to establish deficient performance. See e.g., *Scott v. State,* S20A0880, 2020 WL 5357972 (Ga. Sept. 2020) (holding defendant failed to show trial counsel's failure to object to evidence was objectively unreasonable in light of counsel's explanations); *Richards v. State,* 306 Ga, 779, 782-783 (2019) (decision to forgo objecting to testimony was objectively reasonable because the evidence did not speak to the defendant's involvement in the murder and counsel thought that objections would not be well received by the jury).

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[1] Trial counsel's alleged ineffectiveness for failing to object to the curative instruction is raised in Ground Six below.

Petitioner has failed to establish that trial counsel performed deficiently in failing to object to this evidence. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Cushenberry,* 300 Ga. at 197 (quoting *Strickland,* 466 U.S. at 700). Accordingly, Petitioner has failed to carry his burden to show he was deprived of effective assistance of trial counsel due to trial counsel's failure to object.

Based on Petitioner's failure to establish that trial counsel rendered ineffective assistance of counsel, Petitioner has also failed to establish that appellate counsel rendered ineffective assistance of counsel for failing to raise this issue on appeal because, as explained above, "an attorney is not deficient for failing to raise a meritless issue on appeal." *Gramiak,* 304 Ga. at 513. Additionally, Appellate counsel testified that he considered this issue and decided not to raise it "primarily . . . because the evidence the State had from the motel room they couldn't specifically connect it to [Petitioner] and I thought that was a problem as far as an appellate issues goes." (HT 60). He further explained that he did not think "it was a[n] especially strong issue especially going through ineffective assistance of counsel," so he chose instead to proceed on issues he believed to be more meritorious. (HT 61). Thus, appellate counsel strategically decided not to raise this issue, and Petitioner has not shown that it was an unreasonable decision which no competent attorney would have made. *Shorter v. Waters,* 275 Ga. 581, 581 (2002).

Based on the foregoing, Petitioner does not establish a claim of ineffective assistance of appellate counsel so as to satisfy the "cause and prejudice" test. Accordingly, Petitioner has not canied his burden as to the cause and prejudice test and has not overcome the procedural default to consideration of this issue. See *Griffin,* 291 Ga. at 327.

In addition to the cause and prejudice test, O.C.G.A. § 9-14-48 (d) also provides an exception to the procedural default rule where necessary "to avoid a miscarriage of justice." This exception has been interpreted as a very narrow exception tied to evidence of actual innocence:

> [Miscarriage of Justice] is by no means to be deemed synonymous with procedural irregularity, or even with reversible error. To the contrary, it demands a much greater substance, approaching perhaps the imprisonment of one who, not only is not guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry.
>
> *Valenzuela v. Newsome*, 253 Ga. 793, 796 (l 985).

Petitioner has not argued that the miscarriage of justice exception applies to these claims. Further, the record does not reflect any miscarriage of justice. In fact, the Court of Appeals held the evidence was "sufficient evidence for a rational trier of fact to find [Petitioner] guilty beyond a reasonable doubt of the crimes for which he was convicted." (HT 751).

Based on Petitioner's failure to satisfy the cause and prejudice test and failure to establish that an exception to procedural default is necessary to avoid a miscarriage of justice, this ground remain procedurally defaulted. See *Schofield,* 280 Ga. at 869.

As to Petitioner's allegation in Ground Two, although the ineffective assistance of appellate counsel claim is appropriately raised here at the earliest practicable moment, for the reasons stated above, Petitioner has failed to establish that appellate counsel rendered ineffective assistance of counsel by failing to raise this issue on appeal. *Benton,* 306 Ga. at 724.

Accordingly, Grounds l and 2 provide no basis for relief.

GROUNDS 3 AND 4

In Ground Three, Petitioner alleges "the trial court committed error in not granting trial counsel's motion for a mistrial that was made following the admission into evidence of all of the highly prejudicial and inflammatory evidence of other crimes, as set forth above in Ground One." In Ground Four, Petitioner alleges appellate counsel was ineffective in not raising the above issue set forth in Ground Three in either the motion for new trial or on appeal.

As previously stated, claims that could have been raised on direct appeal but are raised for the first time in habeas corpus proceedings are procedurally defaulted, unless the petitioner can demonstrate cause for the failure to raise the issue at the earliest practicable moment and actual prejudice arising therefrom, or if the procedural default will work a

miscarriage of justice. *Schofield,* 280 Ga. at 865 (citing *Turpin,* 268 Ga. at 829). Thus, Petitioner's allegation that the trial court erred in not granting a mistrial is procedurally defaulted due to appellate counsel's failure to raise it on appeal. See *White,* 261 Ga. at 32. Whether this ground remains procedurally defaulted will be analyzed using the same standard as above. See *Schofield,* 280 Ga. at 869.

Here, Petitioner alleges appellate counsel was ineffective for failing to raise this issue on appeal. See Ground Four. To demonstrate that appellate counsel rendered ineffective assistance of counsel, Petitioner must establish that appellate counsel was deficient in failing to raise this issue on appeal and that, if appellate counsel had raised this issue, there is a reasonable probability that the outcome of the appeal would have been different. *Benton,* 306 Ga. at 724.

> A trial judge has broad discretion when ruling on a motion for mistrial, and his ruling will not be disturbed on appeal unless there has been a manifest abuse of discretion and a mistrial is essential to the preservation of the right to a fair trial.

Cooper v. State, 352 Ga. App. 783, 789 (2019) (quoting *Ivey v. State,* 284 Ga. App. 232, 233 (2007)).

To preserve an allegation of error pertaining to a mistrial, a defendant must move for a mistrial contemporaneous with the evidence or testimony complained of. See e.g., *Coley v. State,* 305 Ga. 658, 662 (2019) ("[I]f the defendant did not make a contemporaneous motion for a mistrial at the time the

defendant became aware of the matter giving rise to the motion, then the defendant has waived review of this issue on appeal."); *Moore v. State*, 294 Ga. at 450, 451 (2014) (allegation of error pertaining to mistrial not preserved because defendant did not move for mistrial based on improper evidence of defendant's prior felony conviction until after Stated rested); *Lowe v. State,* 287 Ga. 314, 315 (2010) (allegation of error pertaining to mistrial not preserved because defendant did not move for mistrial based on witness's testimony about alleged improper character evidence, despite a contemporaneous sustained objection, until after several other witnesses finished testifying).

At Petitioner's trial, the motion for mistrial was not made contemporaneous with the admission of the evidence complained of. (HT 386-387). The trial court denied the mistrial as untimely:

> The Motion for Mistrial in this case was not contemporaneous, it was long after the evidence of which the defendants complained had been testified to and much more testimony occurred after that with no objection to the evidence having been interposed.
>
> (HT 392).

Because the motion for mistrial was not made contemporaneously, appellate review of the issue was waived. See *Coley,* 305 Ga. at 662. As a result, Petitioner has failed to establish that appellate counsel performed deficiently in failing to raise a waived issue on appeal. See *Gramiak,* 304 Ga. at 514 ("An attorney is not deficient for purposes of ineffective assistance of

counsel for failing to raise a meritless issue on appeal."). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Cushenberry,* 300 Ga. at 197 (quoting *Strickland,* 466 U.S. at 700). Accordingly, Petitioner has failed to carry his burden to show he was deprived of effective assistance of appellate counsel. *Benton,* 306 Ga. at 724.

Based on the foregoing, Petitioner does not establish a claim of ineffective assistance of appellate counsel so as to satisfy the "cause and prejudice" test. Accordingly, Petitioner has not carried his burden as to the cause and prejudice test and has not overcome this procedural default. See *Griffin,* 291 Ga. at 327.

Additionally, Petitioner bas not argued that the miscarriage of justice exception applies to his claim of ineffective assistance of counsel nor does the record reflect any miscarriage of justice. *Valenzuela,* 253 Ga. at 796. In fact, the Court of Appeals held the evidence was "sufficient evidence for a rational trier of fact to find [Petitioner] guilty beyond a reasonable doubt of the crimes for which he was convicted." (HT 751).

Based on Petitioner's failure to satisfy the cause and prejudice test and failure to establish that an exception to procedural default is necessary to avoid a miscarriage of justice, this ground remain procedurally defaulted. See *Schofield,* 280 Ga. at 869.

As to Petitioner's allegation in Ground Four, although the ineffective assistance of appellate counsel claim is appropriately raised here at the earliest practicable moment, for the above stated reasons,

Petitioner bas failed to establish that appellate counsel rendered ineffective assistance of counsel by failing to raise this issue on appeal. *Benton,* 306 Ga. at 724.

Accordingly, Grounds 3 and 4 provide no basis for relief.

GROUNDS 5, 6 AND 7

In Ground Five, Petitioner alleges "the trial court committed error in giving the jury an ineffective limiting instruction regarding the prior crimes evidence and wrongful acts evidence discussed in above Grounds One and Three." In Ground Six, Petitioner alleges trial counsel was ineffective "for deciding not to object to the inefficacy of the limiting instruction given by the trial court to the jury following the admission of evidence of other crimes and unlawful acts, as discussed in Grounds One, Three and Five." In Ground Seven, Petitioner alleges appellate counsel was ineffective in not raising the above issues set forth in Grounds Five and Six in either the motion for new trial or on appeal.

As previously stated, claims that could have been raised on direct appeal but are raised for the first time in habeas corpus proceedings are procedurally defaulted, unless the petitioner can demonstrate cause for the failure to raise the issue at the earliest practicable moment and actual prejudice arising therefrom, or if the procedural default will work a miscarriage of justice. *Schofield,* 280 Ga. at 865 (citing *Turpin,* 268 Ga. at 829). Additionally, any allegation of ineffective assistance of counsel must be raised at the earliest practicable moment. *Smith,* 255 Ga. at 655. Thus, Petitioner's allegation of trial court error in

Ground Five and ineffective assistance of trial counsel in Ground Six are both procedurally defaulted due to appellate counsel's failure to raise them on appeal. See *White,* 261 Ga. at 32. Whether these grounds remain procedurally defaulted will be analyzed using the same standard as above. See *Schofield,* 280 Ga. at 869.

Here, Petitioner alleges appellate counsel was ineffective for failing to raise these issues on appeal. See Ground Seven. To demonstrate that appellate counsel rendered ineffective assistance of counsel, Petitioner must establish that appellate counsel was deficient in failing to raise these issues on appeal and that, if appellate counsel had raised these issues, there is a reasonable probability that the outcome of the appeal would have been different. *Benton,* 306 Ga. at 724.

"[W]here the court gives a curative instruction and the defendant neither objects to the curative instruction nor renews his motion for mistrial, the issue is not preserved for appellate review." *Rice* v. *State,* 351 Ga. App. 96, 102 (2019) (quoting *Harris v, State,* 340 Ga. App. 865 (2017)). As explained above, the trial court provided a curative instruction after denying Petitioner's motion for mistrial. (HT 392, 394-395). After the curative instruction was given, trial counsel did not object or renew the motion for mistrial. (HT 395). As a result, any allegation of error pertaining to the curative instruction was not preserved for appellate review. See *Hartsfield* v. *State,* 294 Ga. 883, 886 (2014) (where defendant failed to renew his motion for mistrial following the trial court's admonishment and curative instruction, the issue was waived on

appeal); *McCoy v. State,* 273 Ga. 568, 572 (2001) (where the court gave a curative instruction and the defendant neither objected to the curative instruction or renewed his motion for mistrial, the issue was not preserved for appellate review).

As the alleged trial court error pertaining to the curative instruction was not preserved for appeal, Petitioner has failed to establish that appellate counsel perfonned deficiently in failing to raise the waived issue on appeal. See *Gramiak,* 304 Ga. at 514 ("An attorney is not deficient for purposes of ineffective assistance of counsel for failing to raise a meritless issue on appeal."). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Cushenberry,* 300 Ga. at 197 (quoting *Strickland,* 466 U.S. at 700). Accordingly, Petitioner has failed to carry his burden to show he was deprived of effective assistance of appellate counsel due to appellate counsel's failure to raise the trial court's alleged error on appeal. *Benton,* 306 Ga. at 724.

Petitioner also alleges that trial counsel rendered ineffective assistance of counsel by failing to object to the curative instruction. This claim will be analyzed using the two-layer analysis set forth above. *Gramiak,* 304 Ga. at 513-514. Here, the underlying ineffective assistance of trial counsel claim, which Petitioner argues should have been raised on appeal, is trial counsel's failure to object to the curative instruction.

Petitioner argues the curative instruction was incorrect because the trial court did not instruct the jury to disregard the other evidence in the hotel room

of prior crimes and unlawful acts, such as "at least one other set of apparently stolen car keys, multiple apparently stolen cell phones, social security cards belonging to other people, a Georgia driver's license belonging to another person, and stolen cash." At the Hearing, trial counsel testified, "I thought it should have been a mistrial, but if all I was given was the instruction, I felt the wording of the instruction was proper." (HT 28). Trial counsel explained that his motion for mistrial was not based on any of the items in the hotel room: "I wasn't making a motion for mistrial based on all of that. It was based on the admission of testimony about the car keys being related to a specific crime." (HT 18). The curative instruction mandated the jurors disregard the testimony regarding keys belonging a Riverdale car theft. (HT 394-395). "Qualified jurors under oath are presumed to follow the instructions of the trial court." *Hill v. State,* S20A0781, 2020 WL 6122196 (Ga. Oct. 2020) (quoting *Morris v. State,* 308 Ga. 520, 530 (2020)).

As a general rule, matters of reasonable trial strategy and tactics do not amount to ineffective assistance of counsel. *Lynch v. State,* 291 Ga. 555, 558 (2012) (citing *Wright v. State,* 274 Ga. 730, 732 (2002)). "The decision of whether to interpose certain objections is a matter of trial strategy and tactics." *Henry v. State,* 316 Ga. App. 132, 135 (2012) (quoting *Gray v. State,* 291 Ga. App. 573, 579 (2008)). Based on trial counsel's testimony, Petitioner has failed to establish that trial counsel's decision to forego objecting to the curative instruction was objectively unreasonable, as required to establish deficient performance. *Walker,* 294 Ga. at 859.

Due to Petitioner's failure to establish trial counsel performed deficiently, Petitioner has failed to carry his burden to show he was deprived of effective assistance of trial counsel. *Cushenberry,* 300 Ga. at 197 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.") As a result, Petitioner has failed to establish that appellate counsel performed deficiently in failing to raise a waived issue on appeal. See *Gramiak,* 304 Ga. at 514 ("An attorney is not deficient for purposes of ineffective assistance of counsel for failing to raise a meritless issue on appeal."). Accordingly, Petitioner has failed to establish he was deprived of effective assistance of appellate counsel due to appellate counsel's failure to raise this claim of ineffective assistance of trial counsel on appeal. *Benton,* 306 Ga. at 724.

Based on the foregoing, Petitioner does not establish a claim of ineffective assistance of appellate counsel so as to satisfy the "cause and prejudice" test. Accordingly, Petitioner has not carried his burden as to the cause and prejudice test and has not overcome this procedural default. See *Griffin,* 291 Ga. at 327.

Additionally, Petitioner has not argued that the miscarriage of justice exception applies to his claim of ineffective assistance of counsel nor does the record reflect any miscarriage of justice. *Valenzuela,* 253 Ga. at 796. In fact, the Court of Appeals held the evidence was "sufficient evidence for a rational trier of fact to find [Petitioner] guilty beyond a reasonable doubt of the crimes for which he was convicted." (HT 751).

Based on Petitioner's failure to satisfy the cause and prejudice test and failure to establish that an exception to procedural default is necessary to avoid a miscarriage of justice, these grounds remain procedurally defaulted. See *Schofield,* 280 Ga. at 869.

As to Petitioner's allegation of ineffective assistance of appellate counsel in Ground Seven, although it is appropriately raised here at the earliest practicable moment, for the above stated reasons, Petitioner has failed to establish ineffective assistance of appellate counsel for failing to raise these issues on appeal. *Benton,* 306 Ga. at 724.

Accordingly, Grounds 5, 6 and 7 provide no basis for relief.

GROUNDS 8, 9 AND 10

In Ground Eight, Petitioner alleges "trial counsel was ineffective for deciding not to move for a severance when the court determined before voir dire examination had commenced that it would permit the State to admit similar transaction evidence through witness testimony against codefendant, and a request for a severance also was not made by trial counsel before and/or after the similar transaction evidence witness had testified." In Ground Nine, Petitioner alleges "the trial court committed error in failing to address Petitioner's pro se motion for a severance, which Petitioner raised after the testimony of the similar transaction evidence witness." In Ground Ten, Petitioner alleges appellate counsel was ineffective in not raising the above issues set forth in Grounds Eight

and Nine in either the motion for new trial or on appeal.

As previously stated, claims that could have been raised on direct appeal but are raised for the first time in habeas corpus proceedings are procedurally defaulted, unless the petitioner can demonstrate cause for the failure to raise the issue at the earliest practicable moment and actual prejudice arising therefrom, or if the procedural default will work a miscarriage of justice. *Schofield,* 280 Ga. at 865 (citing *Turpin,* 268 Ga. at 829). Additionally, any allegation of ineffective assistance of counsel must be raised at the earliest practicable moment. *Smith,* 255 Ga. at 655. Thus, Petitioner's allegation of ineffective assistance of trial counsel in Ground Eight and trial court error in Ground Nine are both procedurally defaulted due to appellate counsel's failure to raise them on appeal. See *White,* 261 Ga. at 32. Whether these grounds remain procedurally defaulted will be analyzed using the same standard as above. See *Schofield,* 280 Ga. at 869.

Here, Petitioner alleges appellate counsel was ineffective for failing to raise these issues on appeal. See Ground Ten. To demonstrate that appellate counsel rendered ineffective assistance of counsel, Petitioner must establish that appellate counsel was deficient in failing to raise this issue on appeal and that, if appellate counsel had raised this issue, there is a reasonable probability that the outcome of the appeal would have been different. *Benton,* 306 Ga. at 724.

Whether appellate counsel was ineffective for failing to raise trial counsel's ineffective assistance of counsel for failing to move for a severance will be analyzed

using the two-layer analysis set forth above. *Gramiak,* 304 Ga. at 513-514. Here, the underlying ineffective assistance of trial counsel claim, which Petitioner argues should have been raised on appeal, is trial counsel's failure to move for a severance.

"The failure to file a motion to sever docs not require a finding of ineffective assistance since the decision whether to seek severance is a matter of trial tactics or strategy, and a decision amounting to reasonable trial strategy does not constitute deficient performance." *Powell v. State,* 297 Ga. 352, 356 (2015) (quoting *Harris v. State,* 279 Ga. 522, 529 (2005)).

At the Hearing, trial counsel testified that he made a strategic decision not to move for a severance:

> There were at least two instances in which this issue comes up. One is before trial, here is what we are doing, do we ask for, you know, are we ready to go forward? We discussed we couldn't ask for a severance because of the 404 (b). He decided to go forward, he didn't want to wait. It was the issue of that car being stolen. We were given the opportunity and I think the decision came down to we could have more time to investigate, but that also meant that the law enforcement was going to have more time to investigate. They did not have a great connection now but the feeling was, and I know co-counsel shared this, if we get a continuance on this we know they are sending cops out there that day to gather more evidence that will now be admissible. . . . I could not imagine it was

> going to get better for us to continue and if anything it could get worse.
>
> (HT 24-25).

Petitioner has not established that this strategic decision was unreasonable under the circumstances. See *Blackmon v. State,* 302 Ga. 173, 175-176 (2017). As a result, Petitioner has not established deficient performance. *Id*.

> A trial court has the discretion to grant or deny a severance in a joint trial. In exercising its discretion, the trial court looks to three factors: (1) whether the number of defendants will confuse the jury as to the evidence and the law applicable to each defendant; (2) whether, despite cautionary instructions from the court, there is a danger that evidence admissible against one defendant will be improperly considered against another defendant; and (3) whether the defenses of the defendants are antagonistic to each other or to each other's rights of due process. Furthermore, "it is incumbent upon the defendant who seeks a severance to show clearly that he will be prejudiced by a joint trial, and in the absence of such a showing, the trial court's denial of a severance motion will not be disturbed."

Ballard v. State, 297 Ga. 248, 255 (2015) (citing *Green v. State,* 274 Ga. 686, 687-688 (2002) and *Rhodes v, State,* 279 Ga. 587, 589 (2005)).

Petitioner was tried with only one co-defendant, and "with only two defendants there was virtually no

likelihood that the jury would confuse the evidence or the law, or that the evidence against one defendant would be considered against the other." *Callender v. State,* 275 Ga. 115, 116 (2002). The trial court instructed the jury prior to the admission of the similar transaction evidence that such evidence "will relate solely and only to the Defendant Terrance Smith. The evidence . . . do[es] not relate, and you are not to consider it with respect to the Defendant Travis Levi Parrott." (HT 408), Additionally, at the conclusion of trial, the trial court instructed the jury that evidence of other crimes had been offered against only Co-defendant and that such evidence could only be considered as it related to Co-defendant. (HT 454). The jury is presumed to have heeded these instructions. *Ballard,* 297 Ga. at 256 (citing *Moss v. State,* 275 Ga. 96 (2002)). Considering the showings required by Petitioner to prevail in a motion to sever, Petitioner has failed to establish that a motion to sever would have succeeded if made by trial counsel. See *Bradshaw v. State,* 300 Ga. 1, 5 (2016) (holding defendant failed to show that his attorney's decision not to file a motion to sever was deficient performance because trial counsel cannot be found ineffective for failing to pursue a meritless motion).

Due to Petitioner's failure to establish trial counsel performed deficiently, Petitioner has failed to carry his burden to show he was deprived of effective assistance of trial counsel. *Cushenberry,* 300 Ga. at 197 ("Failure to make the required showing of either deficient perfonnance or sufficient prejudice defeats the ineffectiveness claim.") As a result, Petitioner has failed to establish that appellate counsel performed

deficiently in failing to raise this issue on appeal. See *Gramiak,* 304 Ga. at 514 (" An attorney is not deficient for purposes of ineffective assistance of counsel for failing to raise a meritless issue on appeal."). Additionally, Appllate counsel testified that he did not raise ineffective assistance of trial counsel for failing to file a motion to sever because he believed any error in failing to sever the defendants would have been harmless because the similar transaction evidence against Co-defendant did not name Petitioner as the person who committed the similar transaction with Co-defendant. (HT 66). Accordingly, Petitioner has failed to establish he was deprived of effective assistance of appellate counsel due to appellate counsel's failure to raise this claim of ineffective assistance of trial counsel on appeal. *Benton,* 306 Ga. at 724.

Petitioner also alleges that appellate counsel rendered ineffective assistance by failing to raise on appeal the trial court's alleged error of failing to consider Petitioner's pro se motion to sever. The portion of the trial transcript which Petitioner cites to as his pro se motion to sever provides as follows:

> [TRIAL COUNSEL]: Your Honor, my client has expressed to me that he wishes to address the Court about a great concern he has with my representation.
>
> [TRtAL COURT]: All right. Sir, go ahead.
>
> [PETITIONER}: How you doing today, sir? My concern is yesterday, as far as the last witness against [Co-defendant], I understand that it was on record that I had, you know, you let the jury

know that it had nothing to do with me, but my concern is due to the case and the charges, I mean, it's kind of like I feel like it's – I'm not going to get treated fair.

For the simple fact that I never knew in my discovery about this witness. This is my first time hearing about it. And if I knew that it was going to come to that, then I would have asked for a severance, for us lo be tried, you know, different on this case, sir.

Like I said, I'm just concerned about, you know, since he was the last witness and the jury, even though I know I'm not a part of that, but it is an issue due to the charges.

[TRIAL COURT]: All right. Let me – let me thank you for your comments. I appreciate them. The court reporter has taken them down. This is not the precise time for those kinds of issues to be addressed. There will be an appropriate time perhaps for those sorts of concerns to be expressed. But right now is just not the right time. So, your comments are of record and I appreciate what you've said.

[PETITIONER]: Thank you, sir.

(HT 441-442).

The record establishes that Petitioner only stated that he "would have" asked for a severance had he known that Co-defendant's similar transaction evidence was to be admitted at trial. To the extent that Petitioner's statements could have been taken as a pro

se motion, "[t]he Sixth Amendment right docs not afford the defendant the hybrid right to simultaneously represent himself and be represented by counsel." *Hance v. Kemp,* 258 Ga. 649, 650 (1988). Motions made pro se despite being represented by counsel are legal nullities. *Nelson v. State,* A20A1412, 2020 WL 4914670 (Ga. App. Aug. 2020) (citing *Ricks v. State,* 307 Ga. 168, 169 (2019)). Although a trial court should dismiss such motions as legal nullities rather than deny them, as long as the trial court did not address the merits of the motion in denying it, there is no error in affirming the denial. *Nelson,* 2020 WL 4914670 (citing *Brooks v. State,* 301 Ga. 748, 752 (2017) (we may affirm rather than vacate trial court's "denial" of motion that should have been dismissed if trial court did not rule on motion's merits). Here, the trial court did not rule on the merits of Petitioner's pro se motion to sever and, thus, there is no trial court error. Consequently, Petitioner has failed to establish that appellate counsel performed deficiently in failing to raise this issue on appeal. See *Gramiak,* 304 Ga. at 514 ("An attorney is not deficient for purposes of ineffective assistance of counsel for failing to raise a meritless issue on appeal.").

Based on the foregoing, Petitioner does not establish a claim of ineffective assistance of appellate counsel so as to satisfy the "cause and prejudice" test. Accordingly, Petitioner has not carried his burden as to the cause and prejudice test and has not overcome this procedural default. See *Griffin,* 291 Ga. at 327.

Additionally, Petitioner has not argued that the miscarriage of justice exception applies to his claim of

ineffective assistance of counsel nor does the record reflect any miscarriage of justice. *Valenzuela,* 253 Ga. at 796. In fact, the Couit of Appeals held the evidence was "sufficient evidence for a rational trier of fact to find [Petitioner] guilty beyond a reasonable doubt of the crimes for which he was convicted." (HT 751).

Based on Petitioner's failure to satisfy the cause and prejudice test and failure to establish that an exception to procedural default is necessary to avoid a miscarriage of justice, these grounds remain procedurally defaulted. See *Schofield,* 280 Ga. at 869.

As to Petitioner's allegation of ineffective assistance of appellate counsel in Ground Ten, although it is appropriately raised here at the earliest practicable moment, for the above stated reasons, Petitioner has failed to establish ineffective assistance of appellate counsel for failing to raise these issues on appeal. *Benton,* 306 Ga. at 724.

Accordingly, Grounds 8, 9 and 10 provide no basis for relief.

GROUNDS 14 AND 15

In Ground Fourteen, Petitioner alleges "trial counsel was ineffective in deciding not to impeach Maricus Parks (who, as the victim of Petitioner's alleged criminal conduct, was the State's main witness) with at least two felony convictions." In Ground Fifteen, Petitioner alleges appellate counsel was ineffective in not raising the above issue set forth in Ground Fourteen in either the motion for new trial or on appeal.

As previously stated, any allegation of ineffective assistance of counsel must be raised at the earliest practicable moment. *Smith,* 255 Ga. at 655. Thus, Petitioner's allegation of ineffective assistance of trial counsel in Ground Fourteen is procedurally defaulted due to appellate counsel's failure to raise it at the earliest practicable moment. See *White,* 261 Ga. at 32. Whether this ground remains procedurally defaulted will be analyzed using the same standard as above. See *Schofield,* 280 Ga. at 869.

Here, Petitioner alleges appellate counsel was ineffective for failing to raise this ineffective assistance of trial counsel claim at the earliest practicable moment. See Ground Fifteen. To demonstrate that appellate counsel rendered ineffective assistance of counsel, Petitioner must establish that appellate counsel was deficient in failing to raise this issue on appeal and that, if appellate counsel had raised this issue, there is a reasonable probability that the outcome of the appeal would have been different *Benton,* 306 Ga. at 724.

At the Hearing, Petitioner established that Parks, the victim, had two prior felony convictions, one in 2000 and one in 2006, and one prior misdemeanor conviction in 1998 for Deposit Account Fraud/Bad Checks. (HT 760-762, HT 763-765, HT 772-774, HT 775-779).

O.C.G.A § 24-6-609 (a) provides as follows:

> (1) Evidence that a witness other than an accused has been convicted of a crime shall be admitted subject to the provisions of Code

> Section 24-4-403 if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted . . . ; or (2) Evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of such crime required proof or admission of an act of dishonesty or making a false statement.

O.C.G.A. § 24-6-609 (b) prohibits impeachment by a felony conviction if a period of more than ten years has elapsed since the date of the conviction or the release from confinement imposed for such conviction, whichever is the later date, unless the court determines that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. Additionally, the proponent is required to give sufficient notice to the adverse party to give him a fair opportunity to contest the use of the evidence. O.C.G.A. § 24-6-609 (b).

The beginning point of determining whether a conviction is more than ten years old is the date from which a defendant is convicted or released from confinement, whichever is later, and "confinement" does not include probation or parole. *Peak v. State,* 330 Ga. App. 528, 530 n.2 (2015) (citing *Allen v. State,* 286 Ga. 392, 396 (2010)). On November 27, 2000, Parks was sentenced to serve one (1) year in confinement and three (3) years on probation. (HT 762). Thus, under O.C.G.A. § 24-6-609 (b), Parks' 2000 conviction would have been inadmissible at Petitioner's 2013 trial because more than ten years had elapsed since Parks'

release from confinement in 2001. On January 4, 2006, Parks was sentenced to serve two (2) years in confinement. (HT 765). Thus, under O.C.G.A. § 24-6-609 (b), Parks' 2006 conviction would have been admissible at Petitioner's 2013 trial as ten years had not elapsed since Parks' release from confinement in 2008. Parks' 1998 conviction would have been admissible at trial as it falls under O.C.G.A. § 24-6-609 (a)(2) because the elements of such crime require proof or admission of an act of dishonesty or making a false statement.

Despite the admissibility of two of Parks' prior convictions, Petitioner has failed to establish that he was prejudiced by trial counsel's failure to impeach Parks with the same. At trial, the State presented evidence to show that it had a bench warrant on Parks lifted prior to trial. (HT 201-204). Trial counsel then proceeded to impeach Parks on cross-examination with infonnation that the lifted bench warrant related to seven (7) underlying misdemeanor charges from two (2) cases. (HT 265). He further established that when the victim came to court the week of trial, the prosecutor took him to the courtroom where his bench warrants and probation case were pending, at which point the victim was given documents indicating the bench warrants were set aside. (HT 266). Trial counsel properly impeached Parks with evidence of bias by showing that as a result of Parks' encounter with the prosecutor and court personnel the week of Petitioner's trial, the bench warrants for his arrest were lifted. (HT 266-267).

Petitioner has not established that there is a reasonable probability that additional impeachment of Parks with his prior convictions would have made a difference to the outcome of Petitioner's trial. See *Clark v. State,* 307 Ga. 537, 542 (2019) (holding trial counsel did not provide ineffective assistance of counsel for failing to impeach the victim with felony convictions where that victim was already impeached based on other evidence showing inconsistencies in testimony and bias).

Based on the foregoing, Petitioner does not establish a claim of ineffective assistance of appellate counsel so as to satisfy the "cause and prejudice" test. Accordingly, Petitioner has not carried his burden as to the cause and prejudice test and has not overcome this procedural default. See *Griffin,* 291 Ga. at 327.

Additionally, Petitioner has not argued that the miscarriage of justice exception applies to his claim of ineffective assistance of counsel nor does the record reflect any miscarriage of justice. *Valenzuela,* 253 Ga. at 796. In fact, the Court of Appeals held the evidence was "sufficient evidence for a rational trier of fact to find (Petitioner] guilty beyond a reasonable doubt of the crimes for which he was convicted." (HT 751).

Based on Petitioner's failure to satisfy the cause and prejudice test and failure to establish that an exception to procedural default is necessary to avoid a miscarriage of justice, this ground remains procedurally defaulted. See *Schofield,* 280 Ga. at 869.

As to Petitioner's allegation of ineffective assistance of appellate counsel in Ground Fifteen, although it is

appropriately raised here at the earliest practicable moment, for the above stated reasons, Petitioner has failed to establish ineffective assistance of appellate counsel for failing to raise these issues on appeal. *Benton,* 306 Ga. at 724; see also *Burgess v. Hall,* 305 Ga. 633, 637 ("Because Burgess cannot demonstrate that he was prejudiced by trial counsel's failure to obtain additional impeachment evidence and cross-examine [the victim] with it, he cannot establish that appellate counsel was ineffective for not pursuing an ineffectiveness claim against trial counsel).

Accordingly, Grounds 14 and 15 provide no basis for relief.

GROUNDS 16 AND 17

In Ground Sixteen, Petitioner alleges "trial counsel was ineffective in deciding not to impeach the girlfriend of alleged victim Maricus Parks, with evidence that a few years before the alleged hijacking of Parks' vehicle by Petitioner she used her cell phone to make a false report to 911 of the theft of a vehicle." In Ground Seventeen, Petitioner alleges appellate counsel was ineffective in not raising the above issue set forth in Ground Sixteen in either the motion for new trial or on appeal.

As previously stated, any allegation of ineffective assistance of counsel must be raised at the earliest practicable moment. *Smith,* 255 Ga. at 655. Thus, Petitioner's allegation of ineffective assistance of trial counsel in Ground Sixteen is procedurally defaulted due to appellate counsel's failure to raise it at the earliest practicable moment. See *White,* 261 Ga. at 32.

Whether this ground remains procedurally defaulted will be analyzed using the same standard as above. See *Schofield,* 280 Ga. at 869.

Here, Petitioner alleges appellate counsel was ineffective for failing to raise this ineffective assistance of trial counsel claim on appeal. See Ground Seventeen. To demonstrate that appellate counsel rendered ineffective assistance of counsel, Petitioner must establish that appellate counsel was deficient in failing to raise this issue on appeal and that, if appellate counsel had raised this issue, there is a reasonable probability that the outcome of the appeal would have been different. *Benton,* 306 Ga. at 724.

At the Hearing, Petitioner established that Ayana Jakes, the victim's girlfriend, pled nolo contendere under Georgia's first offender statute to a misdemeanor false report of a crime, as a result of a 2007 incident in which she allegedly identified herself as a different person and made a report of a stolen vehicle. (HT 794). Jakes was discharged as a first offender in July 2009. (HT 801-802). As Jakes' nolo contendere plea was made under Georgia's first offender statute, it was not admissible to impeach Jakes pursuant to both O.C.G.A. § 24-6-609 (c) ("Evidence of a final adjudication of guilt and subsequent discharge under any first offender statute shall not be used to impeach any witness . . ..) and O.C.G.A. § 24-6-609 (d) ("A conviction based on a plea of nolo contendere shall not be admissible to impeach any witness under this Code section."). Absent a showing that this prior conviction would have been admissible at trial, Petitioner cannot prove that trial counsel rendered ineffective assistance when he failed

to present evidence of this prior conviction. See *Wofford v. State,* 305 Ga. 694, 698-699 (2019).

In support of this Ground, Petitioner argues that the facts concerning Jakes' first offender nolo contendere plea could have been used as similar transaction evidence under "reverse 404 (b)." (Petitioner's Brief, p. 51). Because the laneuage of O.C.G.A. § 24-4-404 mirrors that of Rule 404 of the Federal Rules of Evidence; this Court can look for guidance in the judicial decisions of the federal courts construing Rule 404. See *State v. Almanza,* 304 Ga. 553, 556 (2018) ("Thus, the rule is simple: if a rule in the new Evidence Code is materially identical to a Federal Rule of Evidence, we look to federal case law."). Petitioner cites to the following federal cases which discuss "reverse 404 (b)": *U.S. v. South,* 295 Fed. Appx. 959 (11th Cir. 2008); *U.S. v. Savage,* 505 F.3d 754 (7th Cir. 2007); *U.S. v. Williams,* 458 F.3d 312 (3rd Cir. 2006); *U.S. v. Montelongo,* 420 F.3d 1169 (10th Cir. 2005); and *U.S. v. Lucas,* 357 F.3d 599 (6th Cir. 2004). (Docket No. 23, Petitioner's Brief, p. 51).

The federal case law provides the following guidance for determining the admissibility of "reverse 404 (b)" evidence:

> Unlike the usual circumstance in which the prosecution seeks to introduce evidence of the accused's conduct on another occasion, the evidence in question was offered by the defense and involves behavior of a witness other than the defendant.

> Although the standard of admission is relaxed when the evidence is offered by a defendant, the party advancing the evidence must demonstrate that it is not offered "to prove the character of a person in order to show action in conformity therewith.

South, 295 Fed. Appx. at 969-970 (quoting *US. v. Cohen,* 888 F.2d 770, 776 (11th Cir. 1989).

Here, Petitioner has not presented evidence to show a permissible purpose for which Jakes' first offender nolo contendere plea could be admitted. As a result, Petitioner has failed to establish that this evidence would have been admissible as "reverse 404 (b)" evidence against Jakes. As previously stated, absent a showing of admissibility, Petitioner cannot prove that trial counsel rendered ineffective assistance. See *Wofford,* 305 Ga. at 698-699.

Due to Petitioner's failure to establish trial counsel performed deficiently, Petitioner has failed to carry his burden to show he was deprived of effective assistance of trial counsel. *Cushenberry,* 300 Ga. at 197 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.") As a result, Petitioner has failed to establish that appellate counsel performed deficiently in failing to raise this issue on appeal. See *Gramiak,* 304 Ga. at 514 ("An attorney is not deficient for purposes of ineffective assistance of counsel for failing to raise a meritless issue on appeal."). Accordingly, Petitioner has failed to establish he was deprived of effective assistance of appellate counsel due to appellate counsel's failure to raise this claim of

ineffective assistance of trial counsel on appeal. *Benton,* 306 Ga. at 724.

Based on the foregoing, Petitioner has not established a claim of ineffective assistance of appellate counsel so as to satisfy the "cause and prejudice" test. Accordingly, Petitioner has not carried his burden as to the cause and prejudice test and has not overcome this procedural default. See *Griffin,* 291 Ga. at 327.

Additionally, Petitioner has not argued that the miscarriage of justice exception applies to his claim of ineffective assistance of counsel nor does the record reflect any miscarriage of justice. *Valenzuela,* 253 Ga. at 796. In fact, the Court of Appeals held the evidence was "sufficient evidence for a rational trier of fact to find [Petitioner] guilty beyond a reasonable doubt of the crimes for which he was convicted." (HT 751).

Based on Petitioner's failure to satisfy the cause and prejudice test and failure to establish that an exception to procedural default is necessary to avoid a miscarriage of justice, these grounds remain procedurally defaulted. See *Schofield,* 280 Ga. at 869.

As to Petitioner's allegation of ineffective assistance of appellate counsel in Ground Seventeen, although it is appropriately raised here at the earliest practicable moment, for the above stated reasons, Petitioner has failed to establish ineffective assistance of appellate counsel for failing to raise this issue on appeal. *Benton,* 306 Ga. at 724.

Accordingly, Grounds 16 and 17 provide no basis for relief.

GROUNDS 20 AND 21

In Ground Twenty, Petitioner alleges "trial counsel was ineffective in deciding not to move to suppress the in-court identification of Petitioner by alleged victim Maricus Parks as being the product of two impermissibly suggestive pretrial identification procedures." In Ground Twenty-One, Petitioner alleges appellate counsel was ineffective in not raising the above issue set forth in Ground Twenty in either the motion for new trial or on appeal.

As previously stated, any allegation of ineffective assistance of counsel must be raised at the earliest practicable moment. *Smith,* 255 Ga. at 655. Thus, Petitioner's allegation of ineffective assistance of trial counsel in Ground Twenty is procedurally defaulted due to appellate counsel's failure to raise it at the earliest practicable moment. See *White,* 261 Ga. at 32. Whether this ground remains procedurally defaulted will be analyzed using the same standard as above. See *Schofield,* 280 Ga. at 869.

Here, Petitioner alleges appellate counsel was ineffective for failing to raise this ineffective assistance of trial counsel claim on appeal. See Ground Twenty-One. To demonstrate that appellate counsel rendered ineffective assistance of counsel, Petitioner must establish that appellate counsel was deficient in failing to raise this issue on appeal and that, if appellate counsel had raised this issue, there is a reasonable probability that the outcome of the appeal would have been different. *Benton,* 306 Ga. at 724.

Whether appellate counsel was ineffective for failing to raise trial counsel's ineffective assistance of counsel for failing to move to suppress the in-court identification will be analyzed using the two-layer analysis set forth above. *Gramiak,* 304 Ga. at 513-514. Here, the underlying ineffective assistance of trial counsel claim, which Petitioner argues should have been raised on appeal, is trial counsel's failure to move to suppress the in-court identification.

At the Hearing, trial counsel testified that he did not move to suppress the pre-trial identification procedures because identity was not a defense at trial. (HT 46). Petitioner did not dispute that he and the victim were involved in a car accident, he simply maintained that he did not carjack and rob the victim. (HT 46-47). Instead, the strategy at trial was to show the victim falsely reported the robbery because he was unlawfully driving the rental car. (HT 46-47). Trial counsel explained that the pre-trial identification procedures did not concern him because the victim did see Petitioner at the accident scene. (HT 52).

"Counsel's trial decisions are presumed to be strategic, and, absent some evidence to the contrary, an appellant fails to overcome the strong presumption that trial counsel's performance fell within the range of reasonable professional conduct and was not deficient." *Smith v. State,* 300 Ga. 532, 536 (2017). Based on the foregoing, Petitioner has not overcome the presumption that trial counsel's performance was reasonable and, thus, has not established that trial counsel's performance was deficient. *Id.*

Due to Petitioner's failure to establish trial counsel performed deficiently, Petitioner has failed to carry his burden to show he was deprived of effective assistance of trial counsel. *Cushenberry,* 300 Ga. at 197 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.") As a result, Petitioner has failed to establish that appellate counsel performed deficiently in failing to raise this issue on appeal. See *Gramiak,* 304 Ga. at 514 ("An attorney is not deficient for purposes of ineffective assistance of counsel for failing to raise a meritless issue on appeal."). Accordingly, Petitioner has failed to establish he was deprived of effective assistance of appellate counsel due to appellate counsel's failure to raise this claim of ineffective assistance of trial counsel on appeal. *Benton,* 306 Ga. at 724.

Based on the foregoing, Petitioner does not establish a claim of ineffective assistance of appellate counsel so as to satisfy the "cause and prejudice" test. Accordingly, Petitioner has not carried his burden as to the cause and prejudice test and has not overcome this procedural default. See *Griffin,* 291 Ga. at 327.

Additionally, Petitioner has not argued that the miscarriage of justice exception applies to his claim of ineffective assistance of counsel nor does the record reflect any miscarriage of justice. *Valenzuela,* 253 Ga. at 796. In fact, the Court of Appeals held the evidence was "sufficient evidence for a rational trier of fact to find [Petitioner] guilty beyond a reasonable doubt of the crimes for which he was convicted." (HT 751).

Based on Petitioner's failure to satisfy the cause and prejudice test and failure to establish that an exception to procedural default is necessary to avoid a miscarriage of justice, these grounds remain procedurally defaulted. See *Schofield,* 280 Ga. at 869.

As to Petitioner's allegation of ineffective assistance of appellate counsel in Ground Twenty-One, although it is appropriately raised here at the earliest practicable moment, for the above stated reasons, Petitioner has failed to establish ineffective assistance of appellate counsel for failing to raise this issue on appeal. *Benton,* 306 Ga. at 724.

Accordingly, Grounds 20 and 21 provide no basis for relief.

GROUNDS 22 AND 23

In Ground Twenty-Two, Petitioner alleges "trial counsel was ineffective for deciding not to object to irrelevant and prejudicial evidence besides the evidentiary matters set forth in the above Grounds." In Ground Twenty-Three, Petitioner alleges appellate counsel was ineffective in not raising the above issue set forth in Ground Twenty-Two in either the motion for new trial or on appeal.

As previously stated, any allegation of ineffective assistance of counsel must be raised at the earliest practicable moment. *Smith,* 255 Ga. at 655. Thus, Petitioner's allegation of ineffective assistance of trial counsel in Ground Twenty-Two is procedurally defaulted due to appellate counsel's failure to raise it at the earliest practicable moment. See *White,* 261 Ga. at 32. Whether this ground remains procedurally

defaulted will be analyzed using the same standard as above. See *Schofield,* 280 Ga. at 869.

Here, Petitioner alleges appellate counsel was ineffective for failing to raise this issue on appeal. See Ground Twenty-Three. To demonstrate that appellate counsel rendered ineffective assistance of counsel, Petitioner must establish that appellate counsel was deficient in failing to raise this issue on appeal and that, if appellate counsel had raised this issue, there is a reasonable probability that the outcome of the appeal would have been different. *Benton,* 306 Ga. at 724.

Whether appellate counsel was ineffective for failing to raise trial counsel's ineffective assistance of counsel for failing to object to "irrelevant and prejudicial evidence" will be analyzed using the two-layer analysis set forth above. *Gramiak,* 304 Ga. at 513-514. Here, the underlying ineffective assistance of trial counsel claim, which Petitioner argues should have been raised on appeal, is trial counsel's failure to object to the following testimony:

1. Trial counsel failed to object to testimony from Parks, Jakes, and law enforcement witnesses regarding the Toyota Camry keys recovered from the hotel room on the basis there was no showing that the keys belonged to that vehicle;

2. Trial counsel failed to object to testimony from Jake regarding Sprint's tracking of the victim's cell phone as hearsay evidence;

3. Trial counsel failed to object to testimony from Detective MacGillivary explaining that

a search warrant is "issued upon a showing of probable cause that items are connected to a crime"; and

4. Trial counsel failed to object to testimony from Jakes that she moved out of Clayton County for the safety of her family even though the "people were in jail."

First, Petitioner has not shown any objectionable evidence regarding the Toyota Camry keys from Parks, Jakes, or law enforcement witnesses. Evidence based on a witness' personal knowledge is admissible. *Wesley v. State,* 286 Ga. 355, 357 (2010). Parks and Jakes had personal knowledge of the Toyota Camry keys prior to the incident. At trial, Parks testified that he recognized the keys as "the rental car keys," and that the keys were in the same condition as when he saw them that night. (HT 199). Jakes also testified that the keys looked familiar, that they were the keys from the rental car, and described the keys as a "regular key and then there was a key that had like, the unlock remote on there. And then it had the tag on there from the . . . rental car." (HT 164.) Trial counsel's failure to file a motion to exclude admissible evidence or to object to such evidence at trial does not demonstrate deficient performance by counsel. *Hudson v. State*, 234 Ga. App. 895, 901-902 (1998). Therefore, Petitioner cannot show that trial counsel performed deficiently in failing to object to Parks' or Jakes' testimony. Further, because Parks and Jakes testified based on their personal knowledge to identify the keys, any other evidence presented by officers constituted cumulative evidence. Therefore, Petitioner cannot show trial counsel's failure

to object prejudiced him. *Alexander v. State,* 348 Ga. App. 859, 868 (2019).

Second, Jakes testimony regarding Parks' cell phone being tracked was not hearsay evidence. "'Hearsay' means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." O.C.G.A § 24- 8-801 (c). Jakes testified that she downloaded an application to her phone after she reported the victim's phone stolen, as he was on her phone plan. (HT 277-278). The application allowed her to send a text message to the stolen phone to automatically pull up the stolen phone's GPS, which the phone then automatically texted back to her. (HT 278-279). Jakes' testimony was offered to show why she and the victim went to the motel to look for the stolen car and confront the perpetrators. (HT 278-279). Jakes' testimony was not offered to prove the truth of the matter asserted, as required to be hearsay. O.C.G.A. § 24-8-801 (c); see *Mosley v. State,* 307 Ga. 711, 719 (2020) (finding testimony explaining why witness left his residence was not offered for the truth of the matter asserted and therefore was not hearsay). Thus, this testimony does not constitute hearsay. As this testimony was not hearsay, Petitioner has failed to establish that trial counsel's failure to object was deficient. See *Jackson v. State,* 288 Ga. 213 (2010) (holding trial counsel is not ineffective for failing to object to admissible testimony because such objection would be without merit) and *Sims v, State,* 281 Ga. 541 (2007) ("Since the testimony was admissible, an objection to it would have been made without merit,

and failure to make a meritless objection does not constitute ineffective assistance of counsel.").

Third, Petitioner presents no evidence and makes no argument in support of this allegation, Detective MacGillivary testified that a search warrant "allows us to go and search a piece of property . . . where . . . we believe and the Court believes that there's probable cause, that there is items in there that are connected to a crime." (HT 352). As previously stated, the decision of whether to interpose certain objections is a matter of trial strategy and tactics which generally do not amount to ineffective assistance of counsel. *Lynch,* 291 Ga. at 558 (citing *Wright,* 274 Ga. at 732); *Henry,* 316 Ga. App. at 135 (quoting *Gray,* 291 Ga. App. at 579). Petitioner has failed to establish that trial counsel's decision to forego objecting to the curative instruction was objectively unreasonable, as required to establish deficient performance. *Walker,* 294 Ga. at 859.

Fourth, Petitioner has failed to establish that trial counsel was ineffective for failing to object to Jakes' statement that she moved out of the county because she was scared even though the defendants were in jail. "Evidence that an accused has been confined to jail in connection with the case at issue does not place his character in evidence." *Bright v. State,* 292 Ga. 273, 275 (2013) (quoting *Jackson v. State,* 284 Ga. 484, 486 (2008)). In *Bright,* the Supreme Court of Georgia held that trial counsel's failure to object to statements showing that a defendant was in jail pending trial did not constitute ineffective assistance. *Id.*

Due to Petitioner's failure to establish trial counsel performed deficiently in any of the above alleged

manners, Petitioner has failed to carry his burden to show he was deprived of effective assistance of trial counsel. *Cushenberry,* 300 Ga. at 197 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.") As a result, Petitioner has failed to establish that appellate counsel performed deficiently in failing to raise this issue on appeal. See *Gramiak,* 304 Ga. at 514 ("An attorney is not deficient for purposes of ineffective assistance of counsel for failing to raise a meritless issue on appeal."). Accordingly, Petitioner has failed to establish he was deprived of effective assistance of appellate counsel due to appellate counsel's failure to raise this claim of ineffective assistance of trial counsel on appeal. *Benton,* 306 Ga. at 724.

Based on the foregoing, Petitioner does not establish a claim of ineffective assistance of appellate counsel so as to satisfy the "cause and prejudice" test. Accordingly, Petitioner has not carried his burden as to the cause and prejudice test and has not overcome this procedural default. See *Griffin,* 291 Ga. at 327.

Additionally, Petitioner has not argued that the miscarriage of justice exception applies to his claim of ineffective assistance of counsel nor does the record reflect any miscarriage of justice. *Valenzuela,* 253 Ga. at 796. In fact, the Court of Appeals held the evidence was "sufficient evidence for a rational trier of fact to find [Petitioner] guilty beyond a reasonable doubt of the crimes for which he was convicted." (HT 751).

Based on Petitioner's failure to satisfy the cause and prejudice test and failure to establish that an exception to procedural default is necessary to avoid a

miscarriage of justice, these grounds remain procedurally defaulted. See *Schofield,* 280 Ga. at 869.

As to Petitioner's allegation of ineffective assistance of appellate counsel in Ground Twenty-Three, although it is appropriately raised here at the earliest practicable moment, for the above stated reasons, Petitioner has failed to establish ineffective assistance of appellate counsel for failing to raise this issue on appeal. *Benton,* 306 Ga. at 724.

Accordingly, Grounds 22 and 23 provide no basis for relief.

GROUNDS 24, 25 AND 26

In Ground Twenty-Four, Petitioner alleges he "is entitled to a new trial, as his right to have a complete and fair judicial review by this Court of his trial proceeding has been frustrated because his pretrial proceedings and critical phases of his trial proceeding were not reported, and because some items of physical evidence may not have been preserved by the State, as well as by Petitioner's trial and appellate lawyers." In Ground Twenty-Five, Petitioner alleges "trial counsel was ineffective in deciding not to have Petitioner's pretrial proceedings reported and in deciding not to have certain phases of Petitioner's trial proceeding reported, as discussed in Ground Twenty-Four, and in failing to insure that the audio/video recording of Petitioner's post-arrest interview had been preserved." In Ground Twenty-Six, Petitioner alleges appellate counsel was ineffective in not raising the above issues set forth in Grounds Twenty-Four and Twenty-Five in either the motion for new trial or on appeal.

As previously stated, any allegation of ineffective assistance of counsel must be raised at the earliest practicable moment *Smith,* 255 Ga. at 655. Thus, Petitioner's allegation of error in Ground Twenty-Four and ineffective assistance of trial counsel claim in Ground Twenty-Five are both procedurally defaulted due to appellate counsel's failure to raise them at the earliest practicable moment. See *White,* 261 Ga. at 32. Whether these grounds remain procedurally defaulted will be analyzed using the same standard as above. See *Schofield,* 280 Ga. at 869.

Here, Petitioner alleges appellate counsel was ineffective for failing to raise this issue on appeal. See Ground Twenty-Six. To demonstrate that appellate counsel rendered ineffective assistance of counsel, Petitioner must establish that appellate counsel was deficient in failing to raise this issue on appeal and that, if appellate counsel had raised this issue, there is a reasonable probability that the outcome of the appeal would have been different. *Benton,* 306 Ga. at 724.

Whether appellate counsel was ineffective for failing to raise trial counsel's ineffective assistance of counsel for failing to object to "irrelevant and prejudicial evidence" will be analyzed using the two-layer analysis set forth above. *Gramiak,* 304 Ga. at 513-514. Here, the underlying ineffective assistance of trial counsel claim, which Petitioner argues should have been raised on appeal, is trial counsel's decision to not have Petitioner's pre-trial proceedings and critical phases of Petitioner's trial proceedings reported. Specifically, Petitioner argues the following portions of Petitioner's trial were not reported: a pretrial hearing to consider

Co-defendant's motion to suppress the search of the hotel room and similar transaction evidence, a pre-trial conference, the voir dire examination, the opening statements and closing arguments, some side bar conferences, and the returning of the jury verdict and polling of the jury. (Petitioner's Brief, p. 56).

As to pre-trial proceedings, there is no evidence of any pre-trial motions for Petitioner's case, though his co-defendant may have had a pre-trial motion. (HT 21). Thus, Petitioner has failed to establish that trial counsel failed to have any pre-trial proceedings reported.

As to the critical phases of Petitioner's trial proceedings he alleges trial counsel failed to have reported, O.C.G.A. § 17-8-5 provides:

> On the trial of all felonies the presiding judge shall have the testimony taken down and, when directed by the judge, the court reporter shall exactly and truly record or take stenographic notes of the testimony and proceedings in the case, except the argument of counsel.

The transcript of Petitioner's trial complies with the requirements of O.C.G.A. § 17-8-5. Petitioner has not established that the remaining portions of his trial which were not transcribed, were required to be transcribed. To the contrary, "[t]he arguments of counsel at trial are not required to be transcribed." *Curtis v. State,* 330 Ga. App. 839, 842 (2015). Additionally, "there is no requirement that the entire jury selection be reported and made part of the record in a nondeath penalty felony case." *Id.* (citing *Brinkley*

v. State, 320 Ga. App. 275, 280 (2013)). As these portions of Petitioner's trial were not required to be transcribed, Petitioner has failed to establish that trial counsel's failure to ensure the same constitutes deficient performance. "Accordingly, the failure to request that opening and closing statements and voir dire be reported does not constitute a basis for an ineffective assistance of counsel claim." *Curtis,* 330 Ga. App. at 842; see also *Dunlap v. State,* 291 Ga. 51, 53 (2012) (defendant's speculation that error may have occurred during unrecorded opening or closing statements or voir dire is "insufficient to show any deficiency on the part of counsel, or prejudice therefore, and is insufficient to show reversible error").

Petitioner also alleges that trial counsel rendered ineffective assistance of counsel by failing to insure an audio/video recording of Petitioner's post-arrest interview was preserved. At the Hearing, trial counsel did not recall having an audio recording of Petitioner's interview but testified "[t]here was nothing indicated in discovery that I did not get copies of." (HT 50). Trial counsel further testified "If it was named in discovery it would have been produced. I would not have gone to trial without it[,] without making light of that." (HT 50).

Petitioner presents no evidence and makes no argument in support of this Ground. Petitioner has not presented evidence to establish that audio or video of Petitioner's post-arrest interview exists, that such video or audio is missing, or why the audio or video's alleged absence prejudiced his trial or his appeal.

> A petition for habeas corpus must set out the facts upon which it is predicated, as distinguished from allegations of mere conclusions, and these facts should be specific and not merely general. A mere allegation that one has been denied a constitutional right, without setting forth facts substantiating a violation of such right, is not a sufficient reason for setting aside a sentence on habeas corpus.
>
> *Salisbury v. Grimes,* 223 Ga. 776, 777 (1967).

Thus, Petitioner's bare allegation that trial counsel failed to insure the audio/video of Petitioner's post-arrest interview was preserved, and that appellate counsel failed to raise the same on appeal, without any facts being alleged in support thereof presents no basis for habeas corpus relief. See *Farmer v. Smith,* 228 Ga. 310 (1971).

Due to Petitioner's failure to establish trial counsel performed deficiently in any of the above alleged manners, Petitioner has failed to carry his burden to show he was deprived of effective assistance of trial counsel. *Cushenberry,* 300 Ga. at 197 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.") As a result, Petitioner has failed to establish that appellate counsel performed deficiently in failing to raise these issues on appeal. See *Gramiak,* 304 Ga. at 514 ("An attorney is not deficient for purposes of ineffective assistance of counsel for failing to raise a meritless issue on appeal."). Accordingly, Petitioner has failed to establish he was deprived of effective assistance of appellate counsel due to appellate

counsel's failure to raise this claim of ineffective assistance of trial counsel on appeal. *Benton,* 306 Ga. at 724.

Based on the foregoing, Petitioner does not establish a claim of ineffective assistance of appellate counsel so as to satisfy the "cause and prejudice" test. Accordingly, Petitioner has not carried his burden as to the cause and prejudice test and has not overcome this procedural default. See *Griffin,* 291 Ga. at 327.

Additionally, Petitioner has not argued that the miscarriage of justice exception applies to his claim of ineffective assistance of counsel nor does the record reflect any miscarriage of justice. *Valenzuela,* 253 Ga. at 796. In fact, the Court of Appeals held the evidence was "sufficient evidence for a rational trier of fact to find [Petitioner] guilty beyond a reasonable doubt of the crimes for which he was convicted." (HT 751).

Based on Petitioner's failure to satisfy the cause and prejudice test and failure to establish that an exception to procedural default is necessary to avoid a miscarriage of justice, these grounds remain procedurally defaulted. See *Schofield,* 280 Ga. at 869.

As to Petitioner's allegation of ineffective assistance of appellate counsel in Ground Twenty-Six, although it is appropriately raised here at the earliest practicable moment, for the above stated reasons, Petitioner has failed to establish ineffective assistance of appellate counsel for failing to raise this issue on appeal. *Benton,* 306 Ga. at 724.

Accordingly, Grounds 24, 25 and 26 provide no basis for relief.

GROUND 27

In Ground Twenty-Seven, Petitioner alleges "the cumulative effect of the trial court's errors, as discussed in the above Grounds, and the cumulative effect of trial counsel's errors, as discussed in the above Grounds, deprived Petitioner of his constitutional right to a fair trial, and appellate counsel was ineffective in failing to present or appeal this cumulative error in either the motion for new trial or in the direct appeal of Petitioner's convictions to the Georgia Court of Appeals."

In *State v. Lane,* 308 Ga. 10 (2020), the Supreme Court of Georgia held that "Georgia courts considering whether a criminal defendant is entitled to a new trial should consider collectively the prejudicial effect of trial court errors and any deficient performance by counsel – at least where those errors by the court and counsel involve evidentiary issues." *Id.* at 14. However, in *Crider v. State,* 356 Ga. App. 36 (2020), the Court of Appeals of Georgia, citing *Lane,* held:

> [N]othing in *Lane* has changed our analysis where we have found no examples of ineffective assistance of counsel. See 308 Ga. 10 (1), (4), 838 S.E.2d at 812-813, 817-818 (explaining that we will consider cumulative effect of counsel's errors when counsel was deficient in two distinct respects and the trial court committed at least one evidentiary error). Accordingly, where Crider has failed to show error, she has likewise failed to show cumulative error.

Crider, 356 Ga. App. at 50.

Here, Petitioner has failed to show cumulative error, as he has not presented any trial court errors or deficient performance by counsel to be considered collectively for their prejudicial effect. *Lane,* 308 Ga. at 14; *Crider,* 352 Ga. App. at 50.

Petitioner has also failed to establish that appellate counsel rendered ineffective assistance of counsel for failing to raise this issue on appeal because, as explained above, "an attorney is not deficient for failing to raise a meritless issue on appeal." *Gramiak,* 304 Ga. at 513. Thus, although Petitioner is appropriately raising this ineffective assistance of appellate counsel claim at the earliest practicable moment, for the above stated reasons, Petitioner has failed to establish appellate counsel rendered ineffective assistance by failing to raise this issue on appeal. *Benton,* 306 Ga. at 724.

Accordingly, Ground 27 provides no basis for relief.

CONCLUSION

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

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

SO ORDERED, this 13th day of November, 2020.

/s/ Howard C. Kaufold, Jr.
Howard C. Kaufold, Jr., Judge
Dodge County Superior Court

APPENDIX C

IN THE SUPERIOR COURT OF CLAYTON COUNTY
STATE OF GEORGIA

CASE NO: 2013-CR-0355-5

[Filed: April 16, 2013]

STATE OF GEORGIA	)
	)
-vs-	)
	)
TERRENCE TYRONE SMITH	)
AND	)
TRAVIS LEVI PARROTT	)
	)

CHARGES: Armed Robbery; Hijacking A Motor Vehicle; Aggravated Assault; Battery

JURY TRIAL

SECTION I

* * * * * * * * * *

The above entitled matter came on for hearing before the HONORABLE HAROLD BENEFIELD, Judge, Clayton Superior Court, on March 6, 7, 8, 2013, in the Clayton County Superior courtroom.

Section I will comprise those matters which transpired on Wednesday, March 6, 2013.

Section II will comprise those matters which transpired on Thursday, March 7, 2013.

Section III will comprise those matters which transpired on Friday, March 8, 2013.

* * * * * * * * *

APPEARANCES:

For the state of Georgia:	Caroline Owings, Assistant District Attorney
	Jason Green, Assistant District Attorney
For Defendant Smith:	Karlyn Skall, Attorney at Law
For Defendant Parrott:	Kevin Schumaker, Attorney at Law

[*Index to Witnesses Has Been Omitted for Purposes of Printing*]

TRANSCRIPT OF PROCEEDINGS
WEDNESDAY, MARCH 6, 2013
SECTION I

(The following transpired out of the presence of the prospective jurors:)

THE COURT: This is the case of the State of Georgia versus Terrence Tyrone Smith and Travis Levi Parrott.

Is the State ready?

MS. OWINGS: Yes, Your Honor. The State's ready.

THE COURT: Is Defendant Smith ready?

MS. SKALL: Yes, Your Honor.

THE COURT: Is Defendant Parrott ready?

MR. SCHUMAKER: We are, Your Honor.

THE COURT: Is there anything that I need to speak with Counsel about before we begin jury selection?

MS. OWINGS: Yes, Your Honor. There are a couple of issues from the State.

First and foremost, we do have a Notice of Intent to Introduce Prior Bad Acts, which is formerly known as Similar Transactions.

Also, I have two Motion In Limines. One is to prevent any self-serving hearsay made by either defendant during any portion of the case unless and until the door is opened by the State or the defendants take the stand.

The second one is --

THE COURT: Let me just pause. Does the Defense have any objection to that Motion In Limine as made?

MS. SKALL: None from Mr. Smith, Your Honor.

MR. SCHUMAKER: None on behalf of Mr. Parrott.

THE COURT: Very well. It's granted. Next?

MS. OWINGS: The second one is a Motion In Limine regarding preventing the Defense from making opening statements or cross examination questions regarding any possible criminal history that Maricus Parks might have.

I understand this needs further discussion regarding what we just went over in pre-trials, but beyond the scope of what we discussed in pre-trials, which we can get into in a second, the State would ask if nothing additional come in as that's just merely character evidence of the witness.

THE COURT: Anything from Mr. Smith on that point?

MS. SKALL: Your Honor, we just would ask that we be allowed to cross examine on the issue as discussed at pre-trial, regarding the status of the Bench Warrant.

THE COURT: All right. Let me just ask, does either defendant intend to try and impeach that witness by the introduction of prior convictions, which the law would allow for that purpose?

MR. SCHUMAKER: On behalf of Mr. Parrott, we have no such intention.

MS. SKALL: No, Your Honor.

THE COURT: Very well. Then except for the matter relating -- that we discussed in the pre-trial conference, the Motion In Limine is granted.

MS. OWINGS: Thank you, Your Honor. Also, we'd like to invoke the Rule of Sequestration at this time.

THE COURT: The Rule of Sequestration has been invoked. Therefore, all witnesses, both for the State and for the Defendant shall exit the courtroom and stay sufficiently away from doors and windows so that you shall neither see nor hear any of the proceedings as they take place.

No witness shall discuss their testimony with or in the presence or hearing of any other witness. Counsel for the State and for the Defendant are instructed to assist the Court in assuring that this Rule of Sequestration is kept in force and effect.

If you're a witness in this case, please leave the courtroom at t his time. All right.

MS. OWINGS: And then the final issue is that the State did locate additional items of discovery, specifically, a report regarding a fingerprint analysis. It did come back inconclusive. We did turn that over to the Defense Counsel today.

There was also a report indicating that the vehicle that is the subject matter of this case, which the State contends was stolen by these two people, it has been located. Back in December of 2012, it was located and

we served that on both Defense counsel this morning, as well.

THE COURT: All right. Anything either defendant wants to say about any of that?

MS. SKALL: Your Honor, on behalf of Mr. Smith, I have discussed that evidence with Mr. Smith. I have told him that based upon the location of the car, there may be some further investigation that could be necessary, but that would require a continuance. Mr. Smith has advised that he is ready to go forward today, just on the evidence as presented by the State.

THE COURT: Mr. Smith, is that correct, sir?

DEFENDANT SMITH: Yes, sir. That's correct.

THE COURT: Thank you. What's with Mr. Parrott?

MR. SCHUMAKER: Your Honor, same situation. I discussed with Mr. Parrott this new evidence, that the car was recovered on December 6th of last year. That we do not have the name of the person at whose residence it was located. That it would take additional investigation to get that name and to do criminal history checks and other investigation related to that person and that location.

I explained to Mr. Parrott that to do so would require us to ask for a continuance. At this time, he does -- he has instructed me not to ask for a continuance and he wishes to proceed on as we have already prepared.

THE COURT: Is that correct, Mr. Parrott?

DEFENDANT PARROTT: Yes, sir. That's correct.

THE COURT: All right. Thank you. Anything else?

MS. OWINGS: Nothing from the State at this time.

THE COURT: Anything for Mr. Parrott?

MR. SCHUMAKER: Nothing at this time, Your Honor.

THE COURT: Nothing for Mr. Smith?

MS. SKALL: No, Your Honor.

THE COURT: Very well. Once the jury is up, we'll begin with the jury selection process.

(Thereupon, a brief pause occurred,
after which the following transpired:)

THE COURT: At this time, we'll hear State's presentation concerning what used to be called similar transactions, but is now Prior Bad Acts.

MS. OWINGS: Your Honor, the State does intend on introducing a prior bad act in reference to Terrence Smith.

It's the State's understanding it's pretty similar law-wise as it was before. The main issue is that bent of mind and course of conduct are no longer permissible reasons. However, the permissible reasons include motive, opportunity, intent, preparation, plan, knowledge, identity and actions of mistake or accidents.

The main reason the State is choosing to introduce this includes plan, knowledge and identity. The facts of this case are back in January 7 of 2007, on that date, the victim, Michael James Lewis, was going to visit a friend. He advised that he parked his vehicle and got out of his vehicle. At that time, the suspect, who is Terrence Smith, asked him to come over to him. And the victim said he recognized the suspect. He remembered going to middle school with him.

So, he willingly approached Terrence Smith and at that time, Terrence Smith told him to go ahead and get in a white Pontiac GT. The victim did, in fact, get into the Pontiac and at that time, there was a second individual, who was never apprehended or caught, located in the backseat.

At that time, Terrence Smith asked him if he had any money. He told Terrence that he did, in fact, have money. After he acknowledged he had money, both Terrence Smith and the unknown black male pointed two guns at him. At that time they said, give me your money, give me your keys. The suspect did, in fact, give him his money, his cell phone, as well as his keys. He had approximately $290 in cash. His cell phone was approximately worth $100. And he gave them the keys to his car.

At that time the suspect told him to get out of the vehicle. He did, in fact, get out of the vehicle. The second individual, the unknown black male, also got out of the vehicle and the -- that male got into the victim's vehicle and drove away in the victim's vehicle. And Terrence Smith remained in the Pontiac and drove away in that Pontiac.

At trial, the State does intend on introducing a certified copy of Terrence Smith's conviction. It's labeled as State's Exhibit Number 76.

(Unless otherwise noted, all State's Exhibits were marked for identification purposes prior to the beginning of the trial by the District Attorney's office.)

MS. OWINGS: He entered a plea of guilty to that on February 4th of 2008. He was sentenced to ten years to serve five in jail. so, based on that, the State does intend to have the victim come and testify at trial.

The State understands that under the new law, that one of the main things, of course, is still proving identity. And obviously, the State feels as though State's Exhibit Number 76, which is the certified copy of the conviction, does, in fact, prove that this is the person who committed the crime.

The State feels as though this is relevant to show the approved means of introducing a prior bad act, which includes as I stated earlier, intent, preparation, plan and knowledge, as well as identity. And for that reason, the State asks that this be admissible.

THE COURT: All right. Anything from Mr. Smith in response to that?

MS. SKALL: Yes, Your Honor. Your Honor, as the State pointed out, we are traveling, not under the old Georgia concept of similar transactions, but now under the Federal 404(b) concept of prior bad acts.

Your Honor, the 11th Circuit has delineated a three part test for determining whether or not prior bad acts should be admitted. The first part of that test is that the act must be relevant to an issue other than the defendant's character. That is the first hurdle the State must overcome.

And looking at what the State has argued in this case, Your Honor, the State has not overcome that hurdle. For prior bad acts to be admissible, the State, Your Honor, must show more than a generalized statement of its being offered for identity, plan, motive. They've got to show a specific, relevant reason for submitting this evidence. Here the State has just generalized and said it goes to plan, knowledge and identity.

But then they also talk about motive, scheme, kind of plan -- it's not sufficient, Your Honor. They've got to specify what they intend to use it for. If not, all it's being offered for is to bring in his character.

And specifically, Your Honor, looking at the three, just in general -- plan, knowledge and identity -- that the State has said that they're offering it for, Your Honor, for plan to be admissible, the 11th Circuit has said that 404(b) evidence to prove a common plan, scheme, or design is, quote, admissible only if it so linked together in point of time and circumstance with the crime charged that one cannot be shown without proving the other. And that is United States versus Dothard, 666 F.2d 498.

The Court must not overextend the use of plan to include other crimes that are merely the same sort as

the crime charged, otherwise the unrelated charged offense -- hang on. I'm sorry, Your Honor, I lost my space -- must not overextend the plan to include other crimes that are merely the same as the crime charged.

For example, where the defendant is charged with burglary, a prior burglary, otherwise unrelated to the charged offense, must not be admitted to prove the defendant's to support himself through burglary. Such a use amounts to nothing more than asserting that the defendant has a propensity to commit burglary. Here, a propensity to commit car jacking.

And that, Your Honor, is -- they ask you to see United States versus Goodwin, 492 F.2d 1141. That is a 1974 5th circuit case. So, I mean, this is old law in the Federal circuit.

Independent crimes may not be used to show design or plan to commit crimes of the sort of what he is charged. It has to be -- for a plan to be it, it has to be so closely connected that there is a nexus. That has not been shown by the State.

With regards to knowledge, Your Honor, for the State to use a similar transaction or prior bad act to prove knowledge, you have to be using it to show that the defendant has a special knowledge that the perpetrator of the charge conned would need to know. That is the knowledge they're discussing with 404 prior bad act evidence.

Here, what has been proffered by the State is that he used a gun, had a co-defendant put a gun to someone's head, took keys, cell phone and someone drove away with the car. There has been nothing

offered to show that this crime, this prior bad act, in any way, establishes any kind of specific, specialized knowledge to commit this crime.

And as an example of that, Your Honor, United States versus Garcia, 880 F.2d 1277, which is a 1989 11th Circuit case, defendant's skill in forging documents was relevant to show knowledge. Another example, United States versus Walters, 351 F.3d 159, which is a 5th Circuit 2003 case, they talk about a defendant having -- their's is not a criminal act -- but his possession of the Anarchist's Cookbook, to show knowledge of how to make bombs in a case.

Here, Your Honor, this offense does not show any specified knowledge, it's not a crime where there's a similarity in him hot-wiring the car or something like that. So therefore, it is not admissible for purposes of knowledge.

Finally, Your Honor, they say identity. Identity, Your Honor, is probably one of the most delicate issues when looking at 404(b) evidence. And again, it's because you've got to try and keep prejudicial information from coming in just to show a propensity. And when you're looking at identity, you have to look at whether or not specific, distinctive details of the other crime or act are the same as the details in the charged offense in order to prove identity.

And looking at that, proof of the perpetrator's modus operandi is admissible only if it is so unusual as to qualify as unique, as a signature, to a crime. And Your Honor, that is United States versus Carroll, 207 F.3d 465, out of an 8th Circuit case from 2000.

And when you're looking at that, you must make a threshold determination that, based solely on the evidence comparing the past acts and the charged offense, a reasonable juror could conclude that the same person committed both crimes.

Here, Your Honor, what has been proffered, again, is not such a specific modus operandi as to make this, the 2007 case, so clear to identify the client. In that case, Your Honor, the -- according to the proffer, the victim says that my client walked up to him, spoke with him, asked him to get into his car and he did. That is not the situation in this case.

In this case, what the allegations are, are that the victim was rear-ended, that when he got out of his car he was attacked, he was struck and his car was -- was stolen. These are not so unique as to establish a modus operandi that it would allow this information to come in for identity.

As I said, Your Honor, this is a three part test. That is part one. The State has to provide a relevant basis for the admission of the evidence. They have not provided -- they have not overcome that hurdle. They have not provided a relevant basis.

The second part of the test -- give me a second to find that -- the 11th Circuit test, Your Honor, is there must be sufficient proof to enable a jury to find, by a preponderance of the evidence, that the defendant committed the acts in question.

Your Honor, that hurdle is overcome with the certified copy. That's not an issue. But then, we've got to look at part/prong one and part/prong three. Prong

three of the test is that the probative value of the evidence cannot be substantially outweighed by undue prejudice, pursuant to Rule 403.

And Your Honor, given that the State is just coming in, offering a generalized litany of what is contained in Rule 404(b) as exceptions for inclusion of this evidence at trial, including just saying, it goes to plan, knowledge and identity, we're not going to tell you how it goes to plan, knowledge and identity, but it does.

And as I said, this case law says that it doesn't. They come in offering that generalized litany, Your Honor -- this is extraordinarily prejudicial evidence, it is not being offered for a legitimate purpose, it is being offered to show propensity. Once a car thief, always a car thief.

And Your Honor, based upon that, the probative value of this evidence is not substantially outweighed. It is prejudicial, it is solely prejudicial, it has no basis and should not be admitted.

THE COURT: Thank you. Anything further from the other defendant?

MR. SCHUMAKER: Yes, Your Honor. Although Mr. Parrott, I think, can object to the general question of whether or not this is a prior bad act of Mr. Smith, I'm troubled by the introduction of this evidence in a case with Mr. Parrott.

THE COURT: Well, I just want to make sure that your -- your comments at this time are properly alluded to the rights and interests of Mr. Smith. I don't believe he has the right -- you have the right to represent Mr.

Parrott on the substance of the question of whether or not the State's tendered evidence constitutes prior bad acts.

You don't -- you don't represent -- well, if you're concerned --

MR. SCHUMAKER: I represent Mr. Parrott.

THE COURT: That -- correct. I had it backwards, but you understand. Similar -- the similar transaction, as it were, evidence relates to him. And I'm sure you're concerned that I was -- if I admit it, that I make sure that the jury understands it is limited to him.

MR. SCHUMAKER: I do. And if -- just briefly, further than that, because part of the allegation here is that Mr. Smith did it with some unknown black male. I'm concerned that -- how we're going to limit that without the implication that Mr. Parrott is the other black male. Unless the State's willing to make a stipulation that he, in fact, is not that black male.

Now additionally, we have not been served with who this witness was, because it's not our -- our defendant that this evidence, that they're seeking it against. So, I've not had a chance to interview that person to see if, in fact, that is what they're intending to do with it.

Insofar as the State's willing to present this evidence and stipulate that Mr. Parrott is not one of the individuals in that case, then obviously we have no dog in this fight. Insofar as they're not willing to make that stipulation and allow the implication that Mr.

Parrott is the other black male, we would object as being highly prejudicial against Mr. Parrott.

THE COURT: Okay. Thank you. Anything the State wants to say in closing?

MS. OWINGS: Yes, Your Honor. I do have some additional things to add in closing. And I do apologize to the Court for us relying a little too heavily on what was already presented to the Court during the Motion to Suppress. But just as some clarification regarding the facts of this case and the facts of the similar transaction, there are some similarities. And one additional key piece of information that I left out during the similar transaction is that car was also a rental car.

In this case, what we have is a car accident that occurred in which these defendants rear-ended our victim. Our victim got out of the vehicle and made contact with these two defendants. At that time, these two defendants jumped on my victim, robbed him also of cell phones, money, keys and ultimately his rental car.

It is true that there are two defendants in this case and that there are two suspects in the prior bad acts. The second suspect in that case is unknown and has remained unknown to the State.

The reason that all of this is pertinent to this, it is not being offered to show that Defendant Terrence smith is operating in conformity with an armed robbery. It's being offered to show, as I stated earlier, these other permissible uses. Number one, the

opportunity and their intent, what they're doing. Going after -- Mr. Smith going after an additional rental car.

If, in fact -- it's the State's belief that if they do testify or if, for whatever reason, the statements of the defendants ultimately come into play -- Terrence Smith claims that he was asleep at the time that this occurred. That he had had a couple beers and was asleep, doesn't know what happened, he was in the car with Mr. Parrott.

The State feels as though this prior bad act is relevant to prove that he knew what was going on. That there was a plan to go after this additional rental car. That it's not a mistake or an accident, that they rear-ended these people. And that all of this is part of an overarching plan to go after people who have these rental vehicles and then to take the same type of items from person.

And for all of that, Your Honor, the State asks that this does come into evidence as a prior bad act to show all of these additional motives, opportunity, intent, preparation, plan, knowledge, absence of mistake or accident.

THE COURT: All right. Thank you.

MS. SKALL: Your Honor, if I may, since she raised some new issues in that, can I address that, Your Honor?

THE COURT: Sure.

MS. SKALL: Just briefly. And just briefly, Your Honor, what I want basically want to just say, because

now we're getting into mistake, accident -- making a mistake or accident, opportunity, intent.

So, Your Honor, we're back to the State not overcoming that first prong of the test. And specifically, the prosecution, Your Honor, must be prepared to answer the concerns about what the relevance of this evidence is. And that must be, not just a litany of what 404(b) says.

I'm not going to get into the case law regarding mistake or accident opportunity or intent, but they haven't shown it. They have not shown its relevance. They have not overcome that hurdle. They have not shown that it's not prejudicial, that there is any probative value. And so we would ask that it be denied and again, Your Honor, I ask you to look at the fact that they are just reciting 404(b). It's admissible for these reasons, we find these reasons to let it in, Judge. And they have not passed that hurdle.

THE COURT: Thank you. The Court finds that the State has offered the prior bad act for the proper purposes. That is to say, purposes which are allowed under the statute. And that they have offered the prior bad act for the purpose of demonstrating the defendant's intent, preparation, plan, knowledge, identity and absence of mistake or accident. And that those are proper purposes.

The Court finds that the statements made by Counsel for the State regarding the similarities between the events alleged in the case before the court today and the prior event are, when considering the similarities rather than the differences between the

two events, sufficiently similar such that proof of the prior is extremely relevant to the potential proof of the case before the Court today.

Such that the proof of the prior bad act would tend to establish the appropriate purposes for which that evidence is being tendered. And the Court finds that that relevance substantially outweighs any prejudice which might inure to the defendants by the introduction of the prior.

That this is perhaps particularly true, but only perhaps particularly true, with respect to the issue of identity, if the defendant's taking the position that he was not there, he was not a participant in such an event as is alleged in the indictment in this case.

But it's also relevant for all the other purposes. Therefore, the State's supposed motion to allow the uncharged bad acts evidence in is granted. The objections are overruled.

Anything else, before I bring the jury in?

MS. OWINGS: Nothing further from the State, Your Honor.

THE COURT: Very well. If you'll please bring the jury in.

MS. SKALL: And Your Honor, if I may just have a standing objection?

THE COURT: Absolutely. Under the -- under those blessed new rules, you have them anyway. You no longer have to continue to object.

MS. SKALL: Thank you, Judge.

(Thereupon, a brief pause occurred,
after which the following transpired:)

THE COURT: All right. Does the State wish to have voir dire taken down by the court reporter?

MS. OWINGS: NO, Your Honor.

THE COURT: Does Mr. Parrott desire to have voir dire taken down by the court reporter?

MR. SCHUMAKER: No, Your Honor.

THE COURT: Does Mr. Smith?

MS. SKALL: No, Your Honor.

THE COURT: Gentlemen, do each of you understand that you have the right to have the court reporter take down verbatim all the questions that are going to be asked of potential jurors and their answers?

I would simply ask Mr. Smith, as your lawyer says, is it okay with you that the court reporter does not do that?

DEFENDANT SMITH: Yes, sir.

THE COURT: And Mr. Parrott, is it likewise okay with you?

DEFENDANT PARROTT: Yes, sir.

THE COURT: Okay. Thank you. If you'll please bring them in.

(Thereupon, at approximately 10:15 a.m., the voir dire examination of the prospective jurors commenced.)

(Thereupon, at approximately 11:57 a.m., a lunch break was taken, after which the following transpired:)

(Thereupon, at approximately 1:10. p.m., the following transpired:)

THE COURT: All right. I learned earlier that a new indictment had been returned in the case. So, the case properly before the jury at this time is Indictment Number 2013-CR-00355.

It's my further understanding that there had been previous discussions between Counsel for the defendants and Counsel for the State in which it was agreed that the defendants would wave formal arraignment and all rights to notice of arraignment and other notice rights that they may have had and consent to simply having the issue joined and having the defendants plead not guilty to the new indictment at this time.

Am I correct, from the defendant's point of view?

MS. SKALL: Yes, Your Honor.

MR. SCHUMAKER: That's correct, Your Honor. For the record, this is a -- this new indictment was something we anticipated. The State had made us aware that it was coming, prior to the new indictment. We knew the contents of it. We anticipated it. As soon as it was filed, I was given a chance to review it.

So, at this point, we waive any further notice requirements. We're prepared to enter a not guilty plea.

THE COURT: All right. I'm going to ask the deputy to give you this indictment. If y'all would please have it signed appropriately.

(Thereupon, a brief pause occurred, after which the following transpired:)

(Thereupon, at approximately 1:16 p.m., voir dire examination of the prospective jurors resumed.)

(Thereupon, Counsel approached the Bench and a discussion transpired out of the hearing of the prospective jurors as follows:)

THE COURT: I would like to say that it is my observation that the voir dire which has occurred in this trial has extended well beyond the proper purpose of voir dire, which is merely to determine whether or not a potential juror is qualified to serve as a juror in the case. And whether or not they hold any specific bias against the defendants in the case.

There is much education, much subtle advocacy, occurring, which is not proper. It has not been objected to. But mainly because everybody in town wants to do it.

But the present set of circumstances illustrate the danger of going too far down that path. This is not the point and this is not the proper time to supply -- well, ultimately, the evidence, to a potential juror in this

case. Couched in -- in terms of general life familiarity with the issues.

It is the Court's instruction to all of the lawyers engaged in voir dire at this point that we restrict the voir dire at this point, to issues contemplated by law. Is the person qualified to be a juror in this case? They have all answered the statutory voir dire questions and without any exception from any of the parties in this case, it is determined that they are qualified to serve as jurors in this case. As a matter of law, excepting any potential strikes or calls which might arise as a result of the individual party.

But my friends, your inquiries are -- are going well beyond the purpose of voir dire. And you know exactly what I'm talking about. Now, I have been a trial lawyer and I understand that it's desirable to do what you can do in order to till the soil for your client's benefit. Even prior to evidence being submitted. But surely we all understand that we need to move on. The point most recently at hand illustrates the danger of not doing so.

Now, in light of that, I probably will be -- I will probably be more active than I have been, heretofore, in managing the individual voir dire questions that are asked from this point on. We simply need to move on to the point that the law wants us to get to. And that is selection of a qualified jury, as distinguished from an educated jury. Okay. Thanks.

(Thereupon, at approximately 1:51 p.m., voir dire examination of the prospective jurors resumed.)

(Thereupon, at approximately 3:13 p.m., voir dire examination of the prospective jurors was concluded.)

THE COURT: If your name was not called, I thank you for your patience and for your willingness to sit through this. And at this time, if you'll just go back down with the clerk. Thank you very much.

(Thereupon, the jury selected in this case was seated in the box and the following transpired.)

CASE IN CHIEF

THE COURT: All right. Ladies and gentlemen, if you'll please raise your right hands, I'll administer an oath to you. You shall well and truly try the issues formed upon this Bill of Indictment between the State of Georgia and Travis Levi Parrott and Terrence Tyrone Smith, Junior and a true verdict give according to the evidence, so help you God.

Thank you. You're -- you can take your hands down.

Ladies and gentlemen, you are now official participants in these proceedings and in just a few moments we will begin the actual trial of the case.

Before we do, I think that it would be appropriate for me to give you some preliminary instructions as to how the trial will proceed and what your duties as jurors will consist of.

The instructions that I'm about to give you are merely preliminary. At the end of the case, after all the evidence has been presented, I will give you the law that applies to this case in much greater detail. But at this time, if you'll please just listen to these instructions.

Now, I read the indictment to you earlier, setting out the charges which the State has brought in this case. And to this indictment the defendants have plead not guilty, denying each and every allegation therein. This is what forms the issue that you've been selected, sworn and empaneled to try. I'm going to give some preliminary instructions. I will also instruct you on the role of the Judge, the jury and the lawyers and give you an overview of the trial procedure.

Many of you have never served on a jury before, it's therefore necessary that these instructions be given, so that you have a general understanding of the procedure in a criminal trial, what will be expected of you and how you are to conduct yourself during the trial.

The defendants are charged in the indictment with crimes that are violations of certain laws of the State of Georgia. I want to emphasize to you that the indictment, including all the counts therein and the pleas of not guilty, are the legal procedures by which these criminal charges are brought against the defendants. The charges and plea of not guilty are not evidence of guilt and you should not consider them as evidence or implication of guilt of any crime, whatsoever.

The defendants are presumed to be innocent until proven guilty. The defendants enter upon the trial of this case with a presumption of innocence in their favor and this presumption remains with the defendants until it is overcome by the State, with evidence which is sufficient to convince you, beyond a reasonable doubt, that the defendant is guilty of the crime or crimes charged.

Under our system, it is my duty as the Trial Judge to determine the law that applies to this case and to instruct you the jury on the specific rules of law that you must apply to the facts in arriving at a verdict. I'm giving you some of those instructions now and I'll give you more detailed instructions at the end of the case.

During the trial, I may be called upon to rule on motions or objections to evidence. Nothing I say in making these rulings or at any time during the trial is evidence and should not be considered as any indication that I might have any leaning in this case, whatsoever. My only interest in the case is to see that it's fairly tried, according to the laws and the Constitution of the State of Georgia and the Constitution of the United States.

As you might expect, the lawyers serve as advocates for their clients and are duty bound to represent them to the best of their ability. The lawyers also serve as Officers of this Court and as such, are bound to follow applicable laws, trial procedure and rules of evidence during the trial. If, at any time, the lawyers believe that any law, procedure or rule of evidence is being violated, they may make motions regarding the conduct of the trial or objections to the admission of evidence.

In making these motions or objections, the lawyers are simply seeking to fulfill their duties to their clients and to the Court. Sometimes these motions or objections may require me to consider, outside your presence, the questions that have been raised. And in that event, you will be excused from the jury room. We'll try to minimize the number and length of these interruptions and ask for your patience in this regard.

Members of the jury, trial procedure in a criminal trace -- case is generally as follows:

First, the attorneys for both sides have the opportunity to make what is called an opening statement. This opening statement is not evidence. Remember that what the lawyers say is not evidence, but rather the opening statement is a preview or an outline of what the lawyer expects the evidence will show.

Following the opening statements, the evidence will be presented. Evidence can be in the form of testimony given by witnesses or physical evidence that will be labeled with exhibit numbers for identification.

After the presentation of all the evidence, the lawyers have the opportunity to make a closing argument or summation. And at that time, they will suggest which laws are applicable and how they should be considered in light of the evidence and point out to you certain parts of the evidence that they think are favorable to their position. The goal of a closing argument is to persuade you to decide the case in their favor.

Following the closing arguments, I will charge you more specifically on the law that applies in this case. And I will then ask you to retire to the jury room to deliberate and reach your verdict. The jury has a very important role. It's your duty to determine the facts of the case and to apply the law to those facts. I will instruct you on the laws that apply to this case, but you must determine the facts from the evidence.

Evidence by definition is the means by which any fact put in issue is established or disproved. The evidence consists of the testimony and exhibits. Testimony is that which you hear under oath, from those who take the witness stand. Exhibits are those documents, photographs or other physical evidence that are admitted into evidence.

The object of this trial is to discover the truth. During the trial, the admission of evidence will be governed by rules of evidence. Those rules were drafted with the prominent purpose in mind of the discovery of truth. Consequently, these rules seek to assure that only the best and highest evidence is admitted for your consideration.

During the trial, the lawyers have a right to object to the admission of evidence if they think its admission would violate a rule. I will admit or exclude the evidence according to those rules. If I overrule an objection, that means that you are allowed to consider the evidence being offered. On the other hand, if I sustain an objection, that means that you may not consider the evidence being offered. You should consider only that testimony and only those exhibits that are admitted and you should not draw any inferences or make any assumptions about any evidence objected to, if the objection was sustained.

In the event that you hear or see inadmissible evidence before an objection can be made and ruled upon, if the objection is sustained, I will instruct you to disregard it and you should disregard that evidence entirely in your deliberations and in arriving at your verdict.

You, the jury, must determine the credibility or believability of the witnesses. It's for you to determine which witness or witnesses you will believe and which witness or witnesses you will not believe, if there are some that you don't believe.

In determining the credibility or believability of witnesses, you may consider all of the facts and circumstances of the case, the manner in which the witness testifies, their intelligence, their interest or lack of interest in the outcome of the case, their means and opportunity for knowing the facts they testify about, the nature of the facts about which they testify, the probability or improbability of their testimony and of the occurrences about which they testify. You may also consider their personal credibility, insofar as it may appear to you from the trial of the case right here in front of you.

As the fact finder, it is your duty to believe the witnesses whom you think most entitled to your belief. It is for you alone to determine what testimony you will believe and what testimony you will not believe.

Now, it's very important that you pay close attention to the evidence as it is presented during the trial. If at any time you are unable to hear or see any evidence being presented or if you're suffering from any discomfort

APPENDIX D

IN THE SUPREME COURT

STATE OF GEORGIA

Case#_____

[Filed: December 7, 2020]

TRAVIS PARROTI, petitioner	)
	)
Vs.	)
	)
MURRAY TATUM, Warden	)
	)
Respondent	)
	)

CERTIFICATE OF PROBABLE CAUSE

Lloyd J. Matthews
Ga. Bar No. 477620
Attorney for Petitioner

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(404)642-7350

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to OCGA § 9-14-52 since it is an appeal from denial of a habeas corpus entered on Nov. 13, 2020 in the Dodge County Superior Court, Case# 18HC-0464K. A copy of the habeas judge's

final order denying the habeas corpus petition is attached.

STATEMENT OF THE PARTIES

Murray Tatum in his official capacity as Warden of a Georgia State Prison is restraining Petitioner's liberty as he was the warden of the prison where Petitioner was incarcerated at the time the habeas corpus petition was heard.

STANDARD FOR GRANTING

"A certificate of probable cause to appeal a final judgment in a habeas corpus case involving a criminal conviction will be issued where there is arguable merit..." Supreme Court Rule 36.

STATEMENT OF THE CASE

On Feb. 13, 2013, a Clayton County grand jury indicted petitioner and co-defendant Terence Smith on five charges. (R. 702-704). In count 1 of the indictment petitioner and Smith were charged with armed robbery, in that it was alleged they took a cell phone, cash and a motor vehicle from Maricus Parks using a device having the appearance of an offensive weapon. Count 2 charged them with vehicle hijacking in that, while they had a device appearing to be an offensive weapon, and using force and violence they took a Toyota from Parks. Counts 3 and 4 charged them jointly with aggravated assault, and count 5 charged them with battery upon Parks(causing visible bodily harm by hitting him in the head with the object).

Petitioner was placed on trial, along with Smith, in March of 2013, they were convicted on all charges, and Petitioner received 30 years in prison. (R. 468-471, 568-570, 693-695). The 30 years consisted of 20 years in prison for armed robbery plus a consecutive 10 years in prison for hijacking of a motor vehicle. A timely motion for new trial was filed and after a new counsel was appointed it was amended to include grounds alleging deprivation of the effective assistance of counsel. (R. 660-663). That motion was heard and denied, and the direct appeal was also denied in an unpublished opinion. (R. 743-754). A timely application for a writ of habeas corpus was filed, and after a hearing, and the lapse of some time, on November 13, 2020, Judge Kaufold denied the petition holding there were no instances of ineffective assistance of counsel, either at the trial level or at the appellate level.

FACTS OF THE CASE

On July 18, 2012, Maricus Parks attended a block party at the Southern Springs Apartments in Clayton county, Georgia. (R. 169-170). Parks spent some time at the party, and he knew several people there, and then he returned to a silver 2012 Toyota Camry that his girlfriend Ayana Jakes had let him use, and he was intending on picking her up at her friend's apartment. (R. 170-173, 224, 244-245). Jakes had rented the car from Enterprise and Parks was not an authorized driver even though Jakes had let him use the car that evening. (R. 170-171, 224, 280, 290). As Parks drove away to get Jakes a white Buick struck the rear of the Camry causing some damage to the front grille of the Buick, and Parks stopped and got out to examine the

damage, and he was anxious since he realized he was not authorized to drive the rented Toyota Camry, (R. 174). The passenger in the Buick jumped out and grabbed Parks, and the driver of the Buick also exited and struck Parks in the head with an object he thought was a gun. (R. 180-182, 227-228). They took $400 from Parks' pants pocket.

One of the assailants drove off in the Camry and the person driving the Buick followed the Camry as it departed the scene, so both cars departed at the same time. (R. 185-187). Parks then sought assistance, he contacted his girlfriend Jakes, she came to the scene, and with the assistance of Sprint they were able to trace Parks' cell phone to the Super 8 motel on Old Dixie Highway in Clayton County, Georgia. (R. 187-189,232-234, 270-272, 276-279, 291-292). Parks went to the Super 8 and saw the same Buick and called 911 to report the hijacking of the Camry and the armed robbery. (R. 189-190). There was an ID procedure engaged in with the police, then officer Michael Roberts and fellow officers knocked on the motel room door, announced their presence, and when petitioner came to the door they detained him pending further investigation. (R.306, 307). The co-defendant Smith was also in the room.

REASONS TO GRANT THE CERTIFICATE

Petitioner was denied his right to effective assistance of counsel for his direct appeal as guaranteed him under the 6th amendment to the U.S. Constitution and the 1983 Georgia Constitution, article I, section I, paragraph XIV.

Ineffective assistance of trial counsel can serve as cause under the "cause and prejudice" test applied to procedurally defaulted claims. Turpin v. Todd, 268 Ga. 820, 826 (1997); OCGA § 9-14-48(d). The prejudice portion of the test is satisfied only where the omission or waiver resulted in actual and substantial prejudice infecting the entire trial with error of constitutional dimensions. Schofield v. Palmer, 279 Ga. 848 (2005). So if the appellate counsel desires to raise the issue, he has to do so at the earliest practicable time. This will be at the motion for new trial and at the direct appeal stage. The petitioner touched on this issue in his petition for writ of habeas corpus. In Judge Kaufold's final order, denying the petition, he quotes petitioner as raising that trial counsel was ineffective in deciding...(not to object to prejudicial evidence). Even granting that the motion for mistrial was not timely, the habeas lawyer pointed out that's attributable to trial counsel's ineffectiveness (and appellate counsel did not raise this issue). So the fact that the appellate lawyer did not raise this issue, and whereas it should have been raised, that satisfies the cause and prejudice showing needed to defeat procedural default.

However, the habeas court simply held, in a very conclusory manner, that the mistrial motion was not made contemporaneously with the reception of the evidence, so appellate review is waived, citing to Coley at 305 Ga. 658, 662. The habeas court further held that appellate counsel cannot be chargeable with deficiency in failing to raise a waived issue, citing to Gramiak v. Beasley, 304 Ga. 512, 514 (2018). But there is a lack of any discussion about the reasonableness of NOT making a contemporaneous mistrial motion and a

notable absence of any application of the cause and prejudice test.

If appellate counsel had raised the issue (any issue he is called "deficient" for not raising), and if there is a reasonable probability the outcome of the appeal would have been different (and more favorable) if the issue had been raised, then that satisfies the cause and prejudice test. A lawyer's failure to raise a claim on appeal "might" be unreasonable if that claim had clear and strong merit under the law as it existed at the time of the appeal. Benton v. Hines, 306 Ga. 722, 724 (2019).

The desirability of objecting to the testimony and moving for a mistrial arises from the harm to Petitioner from the jury hearing the evidence. It appears that the jury got to hear evidence suggesting another carjacking, and evidence suggesting the defendants were in a motel room where other stolen items were located. Faced with an untimely motion for mistrial, the trial Judge did issue a curative instruction telling them to disregard that, but they were allowed to consider all other evidence found in the motel room, which again consisted of other stolen items involved (taken) in previous crimes.

As far as the Respondent's argument concerning items found in the motel room, eg. Digital scales, respondent says even if defendant had objected the trial court would have overruled him just as He did vis a vis the digital scales, under the reasoning that facts and circumstances of the arrest and surrounding and illustrating the circumstances of the arrest are "relevant" even though they may incidentally place the defendant's character in issue. (HT, 221). Respondent

implies that this rationale for admitting the scales is sound. (HT, 362). But this argument does not take into account what the analysis would be under the legally correct standard which would consider Rule 404(b), OCGA § 24-4-404(b), the issue of "other acts and other wrongs" evidence not applying where the evidence is "intrinsic evidence", and all the cases that treat of these foregoing issues. The Edouard case has 3 circumstances where evidence of criminal activity other than the charged offense is not extrinsic under rule 404(b), and the 3rd circumstance is when it is "inextricably intertwined" with the evidence regarding the charged offense. U.S. v. Edouard 485 F3d 1324 (11th circuit, 2007). In the following scenario the Williams court held that the evidence was "intrinsic": evidence about the defendant's sexual assault on the victim's sister and the defendant's HIV status, where the defendant was challenging it as inadmissible under 404(b), was arguing the harmful evidence was not "intrinsic" and using rule 403 to argue that the probative value was substantially outweighed by unfair prejudice. Williams v. State S17A1216, decided Oct. 30, 2017. None of those factors was mentioned by the trial court; he simply held that as long as it's relevant, if it incidentally places the character in issue that will not negate admissibility.

That is pre-January 2013 evidence law whereas this trial took place post-Jan. 2013 when the new evidence rules took effect. He allows the digital scales to come in and (absent objection) everything else found in the motel room with the exception of the car keys (where objection is made) which gave rise to an inference this pair had stolen another car earlier. The lawyer on the

direct appeal did not see this as a good issue, so he chose a weak issue urged by the defendant, and chose to challenge a battery conviction, on appeal, where a sentence had not even been imposed (and where the elephant was the 30 years in prison!). Speaking in favor of the trial court, a trial judge is not required to intervene further than the exact objection he's faced with. But speaking in favor of the Petitioner, he has the right to effective trial counsel who will timely object to highly prejudicial evidence; and appellate counsel who will ignore the issues with no likelihood of success and instead urge those with the best chance on appeal.

Ground 14, 15,16,17 bearing on an IAC claim for not impeaching Parks and Jakes with their criminal convictions: The underlying facts(speaking of Jakes) of a crime can be used as reverse 404(b) as similar transactions relevant to "knowledge", "intent" and "motive" even if it was a first offender plea, and the actual convictions (vis a vis victim Parks) can be used to attack the credibility of the alleged victim and show him to be unworthy of belief. False reporting of a crime (addressing Jakes' past record) would have been arguably similar to falsely reporting or embellishing the alleged misdeeds of Parrott and co-defendant Smith.

Maricus Parks' criminal convictions would have been admissible if they had been discovered and offered into evidence by trial counsel or by appellate counsel. Parks had a 2000 felony conviction for VGCSA. He also had a 2006 conviction for possession of a firearm by a convicted felon and possession of an item with an altered ID mark; the marks are typically altered to

conceal the fact that the item is stolen. The habeas court found that the 2006 conviction would have been admissible. The convictions would have cast grave doubt of Parks' credibility. Neither the trial counsel nor appellate counsel ran the criminal histories, which was constitutionally inadequate investigation. At trial there was questioning of Parks about bias created by the state lifting bench warrants but that's nowhere near the same potency as impeachment that he is a "convicted felon", that he's committed deposit account "fraud", that he's concealed a serial number on a stolen particle.

The decision not to investigate and uncover the histories was not strategic and counsel offered no reason for this failure. All along the strategy was not to claim Petitioner had no contact with Parks but rather to say that he did not violently deprive Parks of his property using a gun or facsimile of it. Any attack on Parks' credibility would raise the chances of an acquittal. (R. 46, page 20 of post habeas hearing brief of Petitioner; HT 46-47). Petitioner's strategy was to argue Parks and Jakes were embellishing. The past convictions and transactions tending to show instances of dishonesty would have supported the strategy. Being that Parks was involved in a car accident as an "unauthorized driver" of the rental car, he could deflect attention from that by concocting his story of being violently robbed, his rental car taken at gun point. With his girlfriend's recounting of blood streaming down his face, he could garner sympathy from the jurors. The strength of the showing of ineffectiveness is sufficient to undermine confidence in the outcome of

the trial, and the appeal, and prejudice to Petitioner has been amply shown.

As pointed out in petitioner's post-habeas hearing brief in support of the application for writ of habeas corpus (efiled 07/02/2020 in Superior Court of Dodge County), the trial counsel did not really cite a strategic reason for not doing a criminal history check. This same brief cites to the Tezeno case and the Douglas case, respectively at 343 Ga. App. 623, 630 (2017), and 327 Ga. App. 792,795 (2014). The reversal of the conviction followed from the court finding that the failure to investigate resulted from inattention and not from a reasoned strategic judgment. Id. This was said to give rise to a reasonable probability of a different outcome (if the necessary investigation had been done that would have allowed the impeachment). Id. Note that appellate counsel did not do a background check either, and he passively relied on the record that came to him from the transcript of the testimony and also spoke with his client and obtained a "non-starter" issue that perhaps should not even have been raised.

Evidentiary Errors of the Trial Court

The law regarding cumulative error suggests that the reviewing court on a habeas appeal will look at possible instances of ineffective assistance, but will also look to see if the case is made that the trial court made one or more "evidentiary errors". State v. Lane 308 Ga. 10 (2020). On page 7 of respondent's post habeas hearing brief they mention that prior to trial, trial counsel moved to exclude evidence in the motel room (the digital scales- indicia of drug use or possibly sale). The trial court denied the motion. It's just an incidental

placement of the defendant's character in issue. (HT 221). The evidence of the scales was admitted (HT 362) and it's very likely trial counsel believed any further objection to other items found would be met with a similar overruling. Petitioner knows of no rule that says if you have a good objection don't make it because the Judge will only deny it. It was not res gestae even under the pre-2013 evidence law (which as stated, was not applicable). The issue is governed by State v. Jones, 297 Ga. 156,158 (June 1, 2015); Bradshaw v. State, 296 Ga. 650,656 (2015); the distinction between intrinsic and extrinsic evidence- The State vs. Battle A17A1753 (02/14/2018) ; OCGA § 24-4-401, OCGA § 24-4-403, OCGA 24-4-404(b).

UNAVAILING ARGUMENT OF RESPONDENT AND ERROR OF HABEAS COURT

On page 21 of the respondent's post-habeas hearing brief Clark v. State 307 Ga. 537 (2019) is cited to argue that no IAC can be assigned for failing to impeach the alleged victim where the victim was already impeached from other evidence which showed bias and pointed out inconsistencies. But Clark supra, was a fairly clear cut murder case where self-defense did not reasonably appear from the evidence. The jury found Clark's shooting of the unarmed victim did not result from "the fears of a reasonable person" and therefore self-defense was not viable. The odds are vanishingly small that a reviewing court (such as the Georgia Supreme Court) would substitute its view of the evidence in place of the jury's. By contrast to the Clark case, Petitioner's case involved a car collision caused by the assailants, a head injury to Parks inflicted by one of the assailants,

tracking of a cell phone that had been taken during the incident, evidence discovered in a motel room after the incident (a room occupied by the defendant and co-defendant), and other circumstances which the jury was convinced proved armed robbery and hijacking of a motor vehicle. The alleged victim's credibility surely loomed large as a factor, and the means were there to attack that credibility if reasonable diligence had been used.

Parks was the only witness (aside from the 2 defendants who did not testify) to the interactions between Parks and the Petitioner. The State relied heavily on Parks' credibility to prove armed robbery and motor vehicle hijacking. Petitioner emphasized that fact, of Parks being the sole identifying witness, on page 2 and 3, of their brief in reply to Respondent's post-hearing brief. Petitioner's reply brief was efiled in the Dodge Co. Superior Court on July 23, 2020. The Georgia Supreme Court will apply the law to the facts de novo to determine whether counsel performed deficiently and whether any deficiency was prejudicial. Gramiak v. Beasley 304 Ga. 512 (2018).

ARGUABLE MERIT TO PETITIONER'S CLAIM OF CUMULATIVE ERROR

On page 69 of his "post hearing brief", the Petitioner raised the issue of cumulative errors that infected the trial and appellate process. Then in its final order the habeas court cited Crider v. State 356 Ga. App. 36 (2020), in response to the Lane case, 308 Ga. 10,21 (2020) which was said to announce a new rule. Petitioner argues that the Crider case is distinguishable. In Crider the appellate court held that

all the decisions of trial counsel were strategic in nature. Id. In that way they were insulated from being declared instances of ineffective assistance of counsel(IAC). And all of trial counsel's decisions were guided and controlled by her decision to "keep out" Cattrina Crider's 404(b) incident where she attacked her ex-husband Bart Beasley, after consuming large quantities of alcohol, and also guided by the trial court's ruling that he probably would not give a self-defense instruction if Crider declined to testify.

In Petitioner's case, the case *sub judice,* neither trial counsel nor appellate counsel pulled the alleged victim's prior criminal history and discovered his felonies and crimes involving dishonesty. Yet the overarching trial strategy, affirmed by the trial lawyer at the habeas hearing, and presumed (as per case law) to be "reasonable", was for the Defense to concede that there had been an interaction between Petitioner and the alleged victim, there had indeed been a car collision involving their respective vehicles, there had indeed been a scuffle between the two, but the (false) armed robbery and vehicle hijacking accusations arose from an attempt to conceal that the victim had been driving a rental car as an unauthorized and uninsured driver – in brief, the aim was to say that the serious violent crimes were fabricated and concocted by the alleged victim and his girlfriend, to avoid consequences for his wrongdoing. Of course it would always be up to the jury whether to credit this scenario, but they should be allowed to see it through the lens of the significant criminal histories that only the habeas lawyer discovered. For the jury to know about the felonious

and larcenous past conduct of Parks could only help Petitioner's cause.

Allen v. State of Georgia, S20A1081 (decided Nov. 16, 2020) does not demand a result different than what Petitioner urges is the correct result. Allen was an appeal from a murder conviction where the Ga. Supreme Court observed that the evidence "against him was very strong". With that kind of opinion about the evidence (with the Ga. Supreme Court reviewing the record *de novo* and weighing the evidence as a jury would be expected to) just about any error (in the Allen case, the admission of the "other acts" evidence to the effect that Allen committed another similar robbery), or accumulation of errors, will be deemed to be harmless error (that is to say, the appellate court will hold there was no reasonable likelihood it affected the outcome). Once one views the facts and circumstances of Petitioner's case, with the overlay of the reverse 404(b) evidence, the possession of a firearm by a convicted felon, and the other felonious and/or larcenous misconduct ofthe alleged victim and his girlfriend, one would be hard-pressed to characterize the State's case for guilt as "very strong" (a la the Allen case). The Ga. Supreme Court only adopts the habeas court's fact-findings; they apply the law to the facts *de nova* when assessing IAC claims. Gramiak v. Beasley 304 Ga. 512 (2018).

Note that Lane v. State expanded the cumulative error rule. It seemed like overnight the courts would be receptive to "cumulative error" and not just say Georgia does not recognize cumulative error. Lane was granted a new trial based on a number of evidentiary errors

and ineffective assistance of counsel. The idea behind the rule is that although none of the errors standing alone would have caused sufficient prejudice to overcome the harmless error doctrine, all the errors combined add up to harmful (reversible) error.

ARGUABLE MERIT TO GROUND 8 OF PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS ALLEGING TRIAL COUNSEL INEFFECTIVENESS FOR NOT MOVING TO SEVER CO-DEFENDANTS AND APPELLATE LAWYER INEFFECTIVENESS (GROUND 10) FOR NOT RAISING THIS ISSUE FOR THE DIRECT APPEAL

The standard for granting a certificate of probable cause is, it will be issued where there is arguable merit in the Petitioner's contentions. The trial judge ruled that he would allow similar transaction evidence as against the co-defendant, through witness testimony, and would instruct the jury that they were only to consider that evidence against the co-defendant.

Here the petitioner will quote part of the habeas petition: " the similar transaction evidence involved a car hijacking, assault and armed robbery of that victim Michael Lewis, 5 1/2 years prior to the alleged hijacking, assault and armed robbery in the instant prosecution of victim Maricus Parks by petitioner and the codefendant Tyrone (does he mean Terence? Sic-) Smith. Petitioner and Smith are African American males. The similar transaction evidence concerned two black males, one who was codefendant Smith and known to victim Lewis. The other black male, who wore a hoodie, was never identified or apprehended by law enforcement. The two black males in the similar

transaction each were armed with a firearm.....The victim in the similar transaction case, like the alleged victim Parks in Petitioner's prosecution, was driving an Enterprise Rental car, and both victims had their cell phone and cash stolen, in addition to the theft of their vehicles. Although trial counsel had objected to the introduction of the similar transaction evidence..... the court nonetheless denied the objection. Trial counsel then decided not to move for a severance..... These decisions.... were not part of any reasonable and deliberative trial strategy...."

The final order of the habeas court , starting at page 20 (of 46 pages) sets out the ruling on the severance issue. The Court cites Powell v. State, 297 Ga. 352, 356 (2015): the failure to request a severance of defendants was trial strategy (and a strong presumption exists that actions taken or not taken amount to trial strategy, and not IAC). But note that in Powell, the defendants William Powell and Sharmilla Powell (husband and wife) wanted to be tried together and that decision appears to be a legitimate strategic decision, collaboratively reached among the 2 defendants and their respective counsel. Powell 773 SE2d at 767.

The Powell situation is a far cry from Parrott's situation. Parrott made a mid-trial *pro se* motion for a severance and he said this was the first time he was hearing of a similar transaction against codefendant Terrence Smith and he expressed concern that, notwithstanding jury instructions, it would be used against him. His trial counsel said nothing on the record to dispute Petitioner (and yet there is a duty of

candor to the Court, R. 441-442). Parrott's version of it is the more credible when one factors in trial counsel's admission about not interviewing the similar transaction witness (R. 147). The danger is too great that, despite limiting instructions, the evidence will also be considered against Petitioner.

The Respondent argues that trial could not have satisfied all 3 prongs of the showing required to obtain a severance and therefore there's no IAC for failing to file a motion to sever. [see page 15 of respondent's post-habeas-hearing brief and see Ballard v. State 297 Ga. 248,255 (2015)]. However (and this is arguable), Respondent may be over-stating the law as strictly requiring an all-3-prongs showing a defendant moving for a severance must make. Arguably, when you trace the handling of this issue back to the 1970's, you come up with a split of authority- you run up against Cain v. State 235 Ga. 128, 129, 130 (1975).

If the defendant can show the court by some facts that failure to sever will prejudice him under one or more of these considerations, his motion should probably be granted. Cain v. State 235 Ga. 128, 129-130 (1975). The "these considerations" that Cain refers to are the 3 factors Ballard lays out. Ballard 297 Ga. 248, 255. In deciding whether a clear showing has been made that the defendant will be prejudiced by joinder, the 3 factors to consider are:

1. Whether joinder creates a danger of confusion of the evidence and the law; (2) [and this is the one that weighs strongly in favor of severance in the case sub judice] whether there is a danger that evidence implicating one defendant (insert

> Terrence Smith here) will be considered against a codefendant (insert Travis Parrott here) despite limiting instructions; and (3) whether the defendants are asserting antagonistic defenses. Petitioner submits that these are factors that go into the determination, but the ultimate issue is whether the person moving for a severance has clearly shown that he will be prejudiced by a joint trial. In support of this argument see Cain 235 Ga. 128 (1975), see Satterfield 256 Ga. 593, 596 (1987), see Jones 243 Ga. 584 (1979).

Travis Parrott could have made the required showing. He was joined for trial with another person who, acting in concert with and as an accomplice of an unidentified person, had committed a strikingly similar offense in Clayton County some 5 years prior to 2012. Human nature being what it is, Parrott was that unknown person. He was tarred and tainted with that guilt by the association he had with Terrence Tyrone Smith. Parrott's due process right to a fair trial was violated by joinder for trial with Terrence Smith. And Party to a Crime liability was instructed to the jury by the trial court (see page 340-341 of the trial transcript): if you aid in the commission of the crime you are chargeable as a party to the crime.

So the party to a crime charge would lead the jury to see the situation with the alleged victim Maricus Parks in the same light as the previous one where they "know", to a high degree of certainty, that Terrence Smith was guilty and pled guilty to violent crimes during which personal property was taken and a car

was hijacked at gunpoint. There's very little doubt as to Smith's guilt on the previous incident even though when he did his plea in 2008 the carjacking charge was nolle prossed in exchange for his plea to armed robbery (reduced to robbery) and aggravated assault (he assaulted Michael Lewis with a handgun, a deadly weapon).

But it is clear he acted in concert with an unknown individual. The limiting instruction purported to limit the jury's consideration to Terrence Smith and said that, since the State was required to prove the "identity" and "intent" of the perpetrator, w.r.t. the charged offenses, the jury would be entitled to consider the previous incident only insofar as it may bear upon the identity of Smith as the perpetrator and the "intent" of Terrence Smith (and only w.r.t. Terrence Smith- do not consider it w.r.t. Travis Parrott). That limiting instruction is not enough to eliminate the danger that the jury will "see" the big picture and complete the portrait- that Terrence Smith committed a very similar offense in 2007 with the complicity of an unidentified person (Parrott?). The prejudice to Petitioner is easily detectible.

The 2 co-defendants' trials should have been separated out of concern for Petitioner's due process right to a fair trial and out of respect for Petitioner's presumption of innocence. The odds were very high going in that Terrence Smith was going to be convicted, given the prior similar transaction and the other evidence the State was planning to introduce at trial. Petitioner had better chances, he didn't have the albatross of the similar transaction, but his trial

counsel rendered deficient performance and his appeal counsel failed to select and develop the appellate issues that carried the best likelihood of winning reversal of his conviction.

Petitioner earlier in this brief referred to what he believes is a "split" of authorities and also indicated that Respondent's argument on severance has support in recent cases that perhaps have departed from Cain , specifically from the flexibility of the rule discussed in Cain. The more recent rigidified rule seems to imply or outright state that all three prongs must be argued to prevail either at the trial level or at the appellate level (on the issue of severance). Bradshaw's appeal was denied because "Bradshaw has failed to argue all 3 prongs of the severance test". Bradshaw v. State 300 Ga. 1 (2016). But Cain holds that "if the defendant can show the court by some facts that the failure to sever will prejudice him *under one or more of these considerations* , his motion should probably be granted". Cain v. State 235 Ga. 128, 129-130 (1975). So we appear to have a lack of definitiveness and uniformity in the Georgia Supreme Court case law on an important issue, one that recurs again and again, and will continue to rear its head into the future. And the Ballard/Soun cases, which the respondent cites, 297 Ga. 248, 255 (2015), also use the phrase "3 prong test" , and are consistent with the rule on severance set out in Bradshaw . It should also be noted that contrary to Cain , the Ballard case implies that the 3 factors constitute an exhaustive list of the factors the trial court should take into account. This unsettledness in the law suggests that at some point it may become

necessary to clear things up with a definitive pronouncement on this issue.

If Cain sets out the "true and correct" law, then upon a proper motion the trial court would've been required to sever the defendants.

Under this view of the case (with Cain seen as stating the true and correct law), it follows that IAC was shown by the failure to request a severance; it further follows that, in omitting to raise trial counsel's ineffectiveness in this regard, the appellate counsel rendered ineffective appellate assistance of counsel.

Parrott made a pro se motion for a severance at mid-trial

In his own inarticulate but authentic way the Petitioner made a midtrial pro se motion for a severance, "for us to be tried....different on this case". (R. 441-442). He used the layman's phrase "tried different" but he meant to say "tried separately" (that's how a lawyer would have worded it, perhaps). Petitioner realized that with Michael Lewis' testimony strongly implicating Terrence Smith in the prior similar, and testifying to the participation of a mystery co-perpetrator, the door had just been shut on his hopes for a fair trial. He gamely tried to protect himself in court but the trial court merely stated that the timing was not appropriate and continued with the proceedings.

Petitioner submits that he could have rebutted any presumption that the jury would follow the trial court's instruction to only consider Michael Lewis' testimony against Terrence Smith, the codefendant. With a

pretrial motion the issue would have been squarely before the court and given the parties a chance to brief this issue, instead of plunging ahead to Petitioner's detriment. Petitioner would also submit that considerations of judicial economy (less cost involved with a joint trial) should not trump Petitioner's right to a fair trial, one wherein he will not be found guilty, and there is no danger he will be so found, because he is associated with another (Terrence Smith) who committed a similar violent crime in the past.

Concerning the Similar Transaction

The State called witness Michael Lewis, who identified the codefendant Terrence Tyrone Smith Jr. as one of the two individuals who attacked him, robbed him at gunpoint, and hijacked his rental car in January 2007. (R. 409-423). The witness Michael Lewis testified that he could not ID the other assailant, who was wearing a black hoodie. (R. 412, 422). The certified copies of the sentencing papers were introduced by the State w.r.t. the plea that Terrence Smith had tendered pursuant to a negotiated plea (thereby cementing that the "prior similar transaction" had indeed occurred, and that Smith had resolved the case with a guilty plea to reduced charges, and received a split sentence, including time in the penitentiary). (R. 414-420, 549-554).

These trial events, this evidence of a similar transaction, would undoubtedly have set off rampant speculation in the jurors' minds that the unidentified co-perpetrator was none other than Travis Parrott. That is only human nature to try to mentally connect the dots. Moreover, the jury knowing or suspecting that

Parrott escaped justice for the Clayton Co. 2007 carjacking, they would be that much more inclined to hold him accountable for the Clayton Co. July 2012 carjacking (the one he was on trial for "now"). Any trial court instructions not to do that are likely to be futile and unavailing.

Inasmuch as trial counsel was ineffective for not vigorously pursuing a severance, the question arises whether appellate counsel was ineffective for not raising this on appeal. To quote from appellate counsel's own words: "I absolutely think it was a problem (that trial counsel did not file a pretrial severance motion) and if it's something that I should have raised, then I should have done it." (R. 65). Clearly Appellate Counsel did not attempt to justify this omission as "reasonable appeal strategy". If the matter had been raised at the motion for new trial and the direct appeal, there is a reasonable likelihood that the outcome of the appeal would have been different.

And even if this IAC instance standing alone was not sufficient to undermine confidence in the trial outcome or the appellate outcome, when considered cumulatively with the other trial counsel and appellate counsel omissions and trial court errors it all adds up to reversible error. State v. Lane 308 Ga. 10, 14 (2020).

CONCLUSION

For the foregoing reasons this Court should grant the application for a certificate of probable cause to appeal, should find that the habeas court erred in denying the writ, and the conviction should be set

aside, being obtained, as it was, in violation of Petitioner's constitutional rights.

/s/ Lloyd J. Matthews
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CERTIFICATE OF SERVICE

I do hereby certify that I have served, by U.S. mail, a copy of the foregoing certificate of probable cause, to the respondent's attorney

Elizabeth Rosenwasser
Assistant A.G.
Georgia Department of Law
40 Capitol Square S.W.
Atlanta, Georgia 30334,

and by email transmission to erosenwasser@law.ga.gov. This the 7th day of December, 2020.

/s/ Lloyd J. Matthews
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