IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
vs.	)	CASE NO. CR-1200318-063
	)	
GUY WILLIAM HEINZE,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on Defendant Guy Heinze's motion for new trial, including all amendments thereto. On May 23, 2012, the Glynn County Grand Jury indicted Heinze for eight counts of malice murder, one count of aggravated assault, one count of unlawful possession of a narcotic, and one count of possession of marijuana. The State sought the death penalty. The case was tried before a jury in October 2013, and on October 25, 2013, the jury found Heinze guilty on all counts. Pursuant to an agreement reached between the parties during the course of trial, the death penalty ultimately was withdrawn, and a sentencing hearing was held by the Court on October 31, 2013. Heinze was sentenced to, *inter alia*, eight life sentences without the possibility of parole.

A hearing on Heinze's motion for new trial was held on December 11, 2018, where both parties appeared represented by counsel. While Heinze has delineated

18 separate enumerations of error in his motion, including but not limited to, all the general grounds therefore and ineffective assistance of counsel, Heinze's main complaint appears to be related to the removal of Juror 152 from the jury panel. Irrespective of this, all alleged enumerations of error are discussed below.

The evidence adduced at trial shows that on August 29, 2009 at about 8:18 a.m., Glynn County Police received a 911 call from Guy Heinze, Jr., wherein he was yelling that his family had been beaten to death and he needed help. The police responded to Lot 147 in the New Hope trailer park in Glynn County, where Heinze lived, to find Heinze and another person on the steps trying to remove "Buddy," the family dog, from the front porch of that residence. Buddy did not allow strangers into the trailer, so Heinze had to secure the dog so that the police officers could get inside. Heinze told police that he had gone into the home and checked everyone and they were all dead. There were nine victims total inside - two in one bedroom, one in the kitchen, one in the living room, one in another bedroom, and four more in a back bedroom. Eight victims were deceased and one, Michael Toler, was alive but severely injured.

Initially, the police thought the victims had been shot to death because of the severity of the injuries and the amount of blood present at the scene. It was later determined, however, that the victims had been severely beaten about the head,

eight of them to death, with a blunt, cylindrical object. The police questioned Heinze at the scene and he told them that his father was dead because he checked him by putting his hand on his stomach, and that Michael was alive because he saw him breathing. He could not find a cell phone or house phone to call police so he ran to a neighbor's to call. He also told police that because Michael was too heavy to lift, he sat down on the bed next to him until the police arrived. However, various neighbors who came to the scene that morning testified that he never stayed in the house long enough to do that. Notably, the evidence showed that there was no blood on the shirt or on the seat of the khaki shorts Heinze was wearing when police arrived, and there was no blood on his hands. However, there was a smear of blood found on the bottom of his outer cargo shorts. Heinze also wore sandals and reversible black and silver gym shorts under the khaki shorts.

The photographs of the crime scene show blood spattered all over the trailer, up the walls, and the beds where the victims were sleeping at the time appeared saturated with blood. Inside, the police found a deceased Guy Heinze, Sr. just inside the front door lying on a mattress under a sheet, beaten to death. The body of Russell Toler, Jr., was found in the kitchen lying underneath the kitchen table on his stomach with his arm behind him and clothes spilled on him and all over the floor. He was beaten about the head and stabbed with a knife, which the autopsy

revealed occurred after he was already dead. Another family member, Brenda Flanigan, was found in one of the bedrooms in bed, beaten to death about the head.

In the master bedroom the police found Michael Toler in bed, who was alive but severely beaten about the head, and who later died at the hospital. In that same bedroom at the foot of the bed on the floor was Russell Toler, Sr. laying in a pool of blood, who was beaten to death about the head. Notably, the evidence shows that Defendant Heinze retrieved a 20 gauge shotgun from the closet in the master bedroom, and would have had to step over Russell Toler, Sr. to get to the closet. The butt of the 20 gauge was found at the head of Russell Toler, Sr., but the barrel of the shotgun, a long, cylinder, blunt object, was missing and has never been found.

At the other end of the trailer there was a back bedroom that had four people in it: Byron Jimerson, a three or four-year-old child who was lying in bed beaten about the head, but was alive. Laying on the floor next to him was Michelle Toler, who had defensive wounds on her hands and arms, but who also has been beaten to death about the head. Joe West was found lying faced down where he slept, beaten to death about the head, appearing to have never moved. Against the wall in the same back bedroom was Chrissy Toler, also beaten to death about the head.

At the scene, the police initially believed the victims to have been shot to

death, so they questioned Heinze regarding where any weapons might be. He reported the 20-gauge shotgun, and then reported that a 16-gauge shotgun was located in the trunk of the car he was driving. Heinze gave the police permission to look in the trunk and told them the keys were in the car. The police found the keys still in the ignition, checked the trunk and found the 16-gauge shotgun there, covered in blood. Testing revealed that the blood on the shotgun belonged to Russell Toler, Sr. A print found in the blood on the shotgun belonged to Defendant Heinze. The police also found in the car a pill bottle belonging to Michael Toler for a prescription for propoxyphene, the opiate pain killer later determined by toxicology to be found in Defendant Heinze's system at the time. None was found in Michael Toler's system, however. Michelle Toler's cell phone was also found in the car, covered with blood which was later determined to be the blood of Joe West.

DNA testing revealed that the blood on Heinze's khaki shorts belonged to Russel Toler, Sr. The blood found on the black and silver shorts Heinze was wearing under the khaki shorts, belonged to Russell Toler, Sr., and Chrissy Toler. There was blood found on his sandals that belonged to Joe West and Guy Heinze, Sr., but no other victim's blood was found on his clothing, despite the fact he said he was wearing those shoes when he went into the house and walked into all the

rooms. The police found a document in one of the bedrooms that had been in a drawer, which had no blood spatter on it, but did have a smear of blood on it that came back belonging to Russel Toler, Sr. In the blood smear was a fingerprint and palm print belonging to Defendant Heinze.

When questioned by police as to his whereabouts the night before the murders, Heinze told police officers, *inter alia*, that the evening before he bought crack from Joe West, then smoked crack and marijuana with West that evening at home in the trailer. Notably, toxicology showed that Joe West did not have cocaine or marijuana in his system when he died. Heinze, however, was found to have cocaine, marijuana and propoxyphene in his system. When police questioned Heinze about his whereabouts between the hours of 12:30 a.m. and 5:30 a.m. on August 29, 2009, he gave inconsistent stories and claimed he could not remember much of the time period because he was "drugged up." There was witness testimony that Defendant Heinze and his brother Tyler Heinze, at some point, visited a friend at a motel in McIntosh County in the evening hours, they were acting nervous, looking around constantly and acting odd. They borrowed a pair of plyers and left. Heinze had been driving Russell Toler's car at the time.

At about 5:00 or 5:30 a.m. on August 29, 2009, Defendant and Tyler Heinze ended up at the Huddle House on St. Simons Island to eat breakfast. Defendant

then dropped his brother back at a motel on St. Simons where Tyler was staying, drove home to the trailer at Lot 147 in New Hope, got out and went inside, and came out screaming that his family has been beaten to death. While there was some testimony that police had a lead at one point on an individual named Andy Anderson who previously had threatened to kill the entire Heinze family; further investigation revealed that Andy Anderson was incarcerated at all times relevant to the murders. Moreover, fingerprinting and DNA analysis revealed that, other than the victims, Defendant Heinze was the only other person present in that trailer during the time preceding the murders.

I.Sufficiency of the Evidence and the General Grounds.

Not only does the Court find the evidence against Heinze to be legally sufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979), but after exercising its discretion under O.C.G.A. §§ 5-5-20 and 5-5-21 sitting as the thirteenth juror, the Court further concludes that the jury's verdict was not contrary to the law or the evidence, and was not decidedly and strongly against the weight of the evidence as presented at trial.[1] Accordingly, Heinze's motion for new trial on these bases is hereby **DENIED**.

[1] See *Conley v. State*, 329 Ga. App. 96, 100 (2014).

II. Ineffective Assistance of Counsel.

Heinze contends that his trial counsel, as well as his prior appellate counsel, all were ineffective. At trial, Heinze was represented by a legal team consisting of three attorneys: Newell Hamilton, April Herbert, and Jerry Word, all of whom were with the Capital Defenders Office. Lead counsel, Newell Hamilton, practiced only criminal defense at the time of trial, with 100% of his practice devoted solely to criminal practice.[2]

To prevail on a claim for ineffective assistance of counsel, Heinze must prove both that his counsel's performance was professionally deficient in some way and that this deficiency resulted in prejudice to his case.[3] To show his counsel's performance was deficient, Heinze must show that his attorneys' actions as counsel were objectively unreasonable, considering all of the circumstances at the time and in light of prevailing professional norms.[4] This is no easy showing, as the law recognizes a "strong presumption" that counsel performed reasonably, and Heinze bears the burden of overcoming this presumption.[5] To carry this burden, he must show that no reasonable lawyer would have done what his lawyer did, or would have failed to do what his lawyer did not.[6] To establish prejudice, Heinze

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[2] Motion for New Trial Transcript ("MNTT"), p. 4.
[3] *Owens v. State*, 303 Ga. 254, 256 (2018), *citing Strickland v. Washington*, 466 U.S. 668 (1984).
[4] *Id.*
[5] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
[6] *Id.*

must show a reasonable probability that, but for counsel's unprofessional errors, the result of his trial would have been different; and a "reasonable probability" is a probability sufficient to undermine confidence in the outcome.[7] Heinze's burden of proving his counsel was ineffective is a heavy one,[8] and he has failed to carry it here.

A. <u>Failure to Investigate.</u>

Heinze contends his trial counsel failed to adequately investigate the guilt/innocence phase of this case by allowing his zeal to spare Heinze the death penalty overshadow a strategy of proving his actual innocence. However, Heinze has not pointed to anything in the record to show *how* attorney Hamilton's investigation of the guilt/innocence phase was deficient. While it may be implied that Heinze is referring to the agreement to remove Juror 152 in exchange for the State's withdrawal of the death penalty, there is no evidence whatsoever to support the position that this strategic decision made by Heinze's legal team was unreasonable in any way, especially under the factual circumstances of this case. Moreover, Heinze himself agreed to it after consultation with his legal team.[9]

At the hearing on the motion for new trial, Heinze's counsel addressed the issue specifically when he attempted to pigeon hole attorney Hamilton by asking

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[7] *Owens,* 303 Ga. at 257, *citing Strickland v. Washington*, 466 U.S. 668 (1984).
[8] *Id.*
[9] TT at p. 5942.

him, "Would you agree with me in that generally speaking the mission of the capital defender's office is to save a life?"[10] Hamilton testified that his obligation to the client is to assure each and every defense in each stage of the process, stating "their presumed innocent until they are convicted and that's what we do. We represent indigent defendants."[11]

As for his underlying investigation into the case, Hamilton further testified that he had four separate investigators involved: two mitigation investigators and two fact investigators.[12] He was "given every necessary resource and ...the support of the best of the ability my office could give."[13] Hamilton was directly involved in the DNA testing of evidence collected and the gathering of raw data in preparation of a defense for Heinze.[14] Hamilton employed a crime scene investigation expert as part of the defense, who testified at trial on Heinze's behalf.[15]

Indeed, the record reflects that attorney Hamilton and his team spent the better part of a year investigating and preparing Heinze's defense. And the agreement to remove Juror 152 in exchange for withdrawal of the death penalty as a sentencing option was a purely strategic decision by the defense team. As such,

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[10] MNTT at p. 14.
[11] *Id.* at p. 15.
[12] Id. at p. 34.
[13] Id.
[14] Id. at p. 35.
[15] Id. at p. 40.

there simply is no evidence that Hamilton's performance was deficient in any way. Because the Court "need not address both components of the inquiry if the defendant makes an insufficient showing on one," the Court's inquiry ends there.[16]

B. Appellate Counsel.

1. Heinze first asserts his initial appellate counsel, Christina Rudy, was ineffective because her delay denied Heinze a hearing on his motion for new trial within a reasonable amount of time. The Court finds this position to be without merit under the post-conviction circumstances of this case.

It is true that five years passed before a hearing was held on Heinze's current motion, despite a multitude of status conferences throughout that time period. The record reflects that Heinze, through various counsel, has filed no less than five motions for new trial or amended motions for new trial, as the case may be, that with each filing required the State be given time to respond. Heinze also has had new appellate counsel appointed twice, and the record reflects that multiple continuances were requested by the defense over the years, with the most recent continuance being requested by Heinze himself. Heinze filed an affidavit on September 27, 2018, wherein he requested a 12-month continuance so that his new appellate lawyer, Richard Allen, had sufficient time to become familiarized with

[16] *See Brown v. State*, 302 Ga. 454, 457 (2017).

the case, stating "I am aware of the dictates of Owens v. State, S17A1905, but feel that the time constraints therein do not reflect the gravity, complexity and extensive litigation expended in my case."[17]

Thus, Heinze is alleging as error a delay that he himself, as well as his current counsel, contributed to. Moreover, he still must prove both prongs of the ineffective assistance of counsel test with regard to Christina Rudy's professional performance. Regardless of the fact that Heinze has failed to show any evidence of a deficient performance by appellate counsel, he cannot possibly prove the prejudice prong of the analysis because the actions or inactions of appellate counsel could have had no bearing whatsoever on the outcome of his trial. It cannot be said that a delay in a hearing on a motion for new trial, in and of itself, would have changed the outcome of Heinze's trial; thus, he could not have been prejudiced by Christina Rudy's actions or inactions as appellate counsel.

2. Heinze next asserts he was deprived of effective assistance by appellate counsel Rudy because she promised to "organize the files and separate duplicates" before handing off the file to his current counsel, Richard Allen; but then several weeks later she failed to do so. The Court finds this contention of error to be wholly without merit. The condition of appellate counsel's file is completely

[17] *See* Heinze Affidavit.

immaterial to what occurred at trial in this case and is not a proper basis for an alleged error that might entitle Heinze to a new trial.

C. Replacement of Juror 152.

Heinze contends he was deprived of his right to effective assistance of counsel and his constitutional right to due process when his trial counsel, after jury deliberations had begun, agreed to remove Juror 152 in exchange for the State's withdrawal of the death penalty. Heinze's argument is that he had the right to have this juror remain on the jury, and Juror 152 had the right to serve on that jury, especially given his apparent position that he would not convict Defendant.

The record reflects that jury qualification began in this case on September 16, 2013, and continued through October 4, 2013, with the jury ultimately being empaneled and sequestered on October 15, 2013, the first day of trial.[18] During the extensive individual voir dire of Juror 152 he disclosed the relationship between his daughter and the Heinze family, stating that his daughter had gone to school with Defendant Heinze, was friends with him, was sad hearing about the incident and did not understand how something like it could happen.[19] Despite this disclosure, neither party moved for cause to strike Juror 152, nor exercised a peremptory strike to remove him.

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[18] *See* Jury Selection Transcript ("JST").
[19] JST at. pp. 1068-1072.

This notwithstanding, concerns regarding Juror 152 began practically at the outset of trial. Sheriff's Deputy Rocky Moiteret, one of the deputies charged with chaperoning the sequestered jury, testified that on October 16, 2013, after the first full day of the State's evidence, Juror 152 stated to him that "there was absolutely no way I can convict this gentleman, there is no evidence against him."[20] This was on the second day of trial. The State continued to put up evidence for four more days and did not rest its case until October 18, 2013. Regardless, Deputy Moiteret instructed Juror 152 that per the Court's instructions they should not be discussing the case, which ended that conversation.[21]

Then on October 18, 2013, day four of trial, Juror 152 stated to Deputy Moiteret that before the trial started "he contacted a homicide detective in California to ask his advice on how to rate the trial."[22] The homicide detective instructed Juror 152 to rate each interview with the suspect from 1 to 5 or 1 to 10, on guilt or innocence, and then use some convoluted formula to add up the interviews and divide them by some number, which would more or less give him a rating of guilt versus innocence.[23]

Again two days later, while at lunch where all jurors and four deputies were

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[20] TT at p. 5161.
[21] *Id.*
[22] TT. at p. 5162.
[23] *Id.* at pp. 5162 and 5164.

present and while the jurors were able to see their family members in a group setting, Deputy Moiteret instructed all jurors that there could be "zero conversation about the trial with anybody."[24] After loved ones arrived and Juror 152 sat down with his wife, another deputy overheard Juror 152 begin speaking with his wife about the trial almost immediately.[25] That deputy made contact with Juror 152 and shook her head "no" to indicate he could not talk about the trial.[26] Deputy Moiteret arrived about five minutes later to overhear Juror 152 talking to his wife about certain evidence in the case.[27]

Deputy Moiteret testified further:

The Court:	Have you had any conversations with any of the jurors about juror ...152's conduct?
Deputy Moiteret:	Yes, sir. They stated that when he's in the jury deliberation room, he takes his note pad, sticks it up beside his head while he's talking to other jurors so they can't see what he's saying and its got to the point to where the other jurors are irritated about him doing this because what they said was they know what he was doing.[28]

Later that same day on October 21, 2013, the Court brought in Juror 152 to inquire directly as to whether he had formed any opinions about the case:

The Court: Have you expressed to any of your fellow jurors any opinion

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at p. 5163.
[28] *Id.* at pp. 5156 and 5163.

about the guilt or innocence of the defendant?

Juror 152: No, sir.

The Court: All right. Have you expressed to any fellow juror any opinion as to the believability or credibility of any witness who has testified in this case?

Juror 152: No.

* * *

The Court: .... If you have received anything outside of this courtroom in any information with regards to investigations or that type of thing? If you have, would you be able to set that aside and solely decide this case based upon the evidence?

Juror 152: I received nothing, absolutely nothing.

The Court: And so as you sit here today, you can decide this case based solely on the evidence that you've heard in this courtroom and the law the Court will instruct you?

Juror 152: Yes, sir.

The Court: And as you're sitting here today, you feel you can be both fair and impartial?

Juror 152: Yes, sir.

The Court: Both to the state and the defense?

Juror 152: Yes, sir.[29]

Following this colloquy, the State moved for a second time to remove Juror

[29] TT. at pp. 5392-5394.

152, contending he had expressed an opinion about the guilt or innocence of the defendant, which the Court denied based on the evidence.[30] The defense rested its case on October 22, 2013,[31] closing arguments were heard the next morning on October 23, 2013, and the jury began deliberations that afternoon after the State, for a third time, renewed its objection to Juror 152.[32]

Not long into deliberations that afternoon, Juror 152 sent a written note to the Court informing the Court that his daughter was present in the courtroom and Tyler Heinze, Defendant's brother, had moved to sit with her. He further informed the Court that his daughter and Tyler Heinze had gone to school together and were friends, that he was concerned for her safety and did not want her sitting with Tyler Heinze.[33] Juror 152 also correctly noted to the Court that he had explained this connection to all involved during jury selection.[34]

Jury deliberations continued into the following day, beginning at 9:00 a.m. on October 24, 2013.[35] At about 1:00 p.m., the foreman sent a written note to the Court informing it that the jury was hung as to counts 1 through 9 of the indictment, with the breakdown being 9 to 3 on those counts.[36] After inquiry,

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[30] *Id.* at p. 5395.
[31] *Id.* at p. 5768.
[32] *Id.* at pp. 5917, 5919-5922.
[33] Record, Note from Jury 2, 10-23-13; and *see* TT. at pp.5919 - 5922.
[34] *Id.*
[35] TT. at p. 5930.
[36] TT. at pp. 5931- 5934. The Court notes that, at that time, a unanimous verdict had been reached as to counts 10

however, the Court determined the jury was not hopelessly deadlocked at that point, and deliberations continued.[37] Around dinner time that day, it was reported to the Court in written correspondence from two different jurors that they were questioning the impartiality of Juror 152 due to his daughter's relationship with the Heinzes.[38] After discussion with the jury on the record, with everyone present, the foreman determined they would take a dinner break, and then ultimately would break for the night it was determined they wanted to break for dinner and then ultimately for the night.[39]

When the proceedings reconvened the next morning on October 25, 2013, the Court was informed by the parties that they had reached an agreement as to Juror 152.[40] Specifically, the State agreed to withdraw the death penalty as a possible sentence for Defendant in exchange for the defense's agreement to the removal of Juror 152, to be replaced by the first alternate.[41] Defendant specifically consented to the terms of the agreement:

> The Court: All right. Mr. Heinze, have you had an opportunity to speak with your team about this agreement?
>
> Mr. Heinze: Yes, Your Honor.

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and 11, which were the drug charges.
[37] *Id.* at pp. 5933 – 5934.
[38] Record, Note from Jury 4, 10-24-13 and Note from Jury 5, 10-24-13; and *see* TT. at pp.5937 – 5940.
[39] TT. at pp. 5940 - 5941.
[40] *Id.* at p. 5942.
[41] *Id.*

The Court: And do you need some more time with them or are you ready for me to ask you whether or not that's your agreement?

Mr. Heinze: I'm fine.

The Court: Okay. So you're okay. All right. And you agree with it. Do you have any questions about it?

Mr. Heinze: No.[42]

Consequently, Juror 152 was excused from service and replaced with the first alternate juror, the death penalty was withdrawn as a sentencing option, and the jurors were instructed to begin their deliberations totally anew as to all counts in the indictment. They proceeded with their deliberations at 10:28 that morning.[43] Approximately four hours later the jury came back with a guilty verdict on all counts.[44]

Indeed, Juror 152's impartiality and willingness to comply with the Court's instructions came into question early on in the proceedings. However, based on the evidence before it at the time, particularly the fact of Juror 152's daughter's relationship with and knowledge of Defendant Heinze having been fully disclosed during voir dire, the Court ultimately did not excuse Juror 152 until after defense counsel and the District Attorney presented their compromise to the Court – the State's withdrawal of the death penalty in exchange for the replacement of the

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[42] TT. at pp. 5942 – 5945; and *see* Transcript of MNT hearing ("MNTT") at p. 44.
[43] TT. at pp. 5946 -5947.
[44] *Id.* at p. 5948.

allegedly biased juror. Defendant expressly consented to the Court's replacement of that juror. And as a result, Heinze no longer faced the possibility of a death sentence, regardless of what the verdict might have been, whether in this case or any potential subsequent trial.[45]

The Court finds this was a strategy call on the part of Heinze's defense team to save Heinze's life in the event of a guilty verdict. Defendant surely benefitted from this decision. This is especially true given the fact that Juror 152 was not the lone hold-out juror. To the contrary, the record reflects the jury was divided with a 9 to 3 count at some point during their deliberations. The Court will not, with the benefit of hindsight, second-guess defense counsel's trial strategy decisions where, as here, there has been no showing that the decision was unreasonable under the circumstances.[46] Defense counsel was not ineffective for agreeing to remove Juror 152.

In addition, the Court finds that because Heinze himself agreed to remove Juror 152 in exchange for withdrawal of the death penalty, he invited the error he now complains of. Error that is invited by a defendant is affirmatively waived for purposes of appeal.[47] "Affirmative waiver, as opposed to mere forfeiture by failing

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[45] MNTT at p. 44.
[46] *Chavez v. State*, WL 129458 (Ga., Jan. 13, 2020).
[47] See *Wallace v. State*, 303 Ga. 34 (2018);

to object, prevents reversal."[48]

Finally, the Court had sufficient legal basis to remove Juror 152 *sua sponte*, the agreement of the parties notwithstanding. Considering the totality of the circumstances of Juror 152's conduct throughout the proceedings, which culminated in his alleged bias during jury deliberations that led to the October 24, 2013 juror communications with the Court, the Court had sufficient legal cause to remove Juror 152 under O.C.G.A. § 15-12-172.

Although the Court has determined Heinze waived any claim of error for the removal of Juror 152, the Court feels his claim that his due process rights were violated should be addressed nonetheless. Our Supreme Court discussed the trial court's discretion to replace a juror on grounds the juror may not be impartial:

> We acknowledge that alternate jurors generally should not serve to substitute for minority jurors who cannot agree with the majority, as taking such a minority position does not by itself render a juror incapacitated or legally unfit to serve, and making such a substitution may constitute an abuse of discretion. See Semega v. State, 302 Ga. App. 879, 881-882 (2010); compare Moon v. State, 288 Ga. 508, 512-513 (2011) (no abuse of discretion in removing holdout juror when concerns arose regarding her truthfulness and impartiality).[49]

The right to be tried by the juror selected to try a case is an important right. But other equally important rights may be waived. The Georgia Supreme Court

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[48] *Id.* at 37.
[49] *Id.* at 38.

has opined as to the correct criteria for determining whether a defendant in a criminal case has made a valid waiver of a constitutionally or statutorily protected right:

> The fact that a waiver of the right to appeal is voluntary, knowing, and intelligent may be shown in two ways. First, a signed waiver may indicate that the defendant understands the right he is waiving. Second, and more important, detailed questioning of the defendant by the trial court that reveals that he was informed of his right to appeal and that he voluntarily waived that right is sufficient to show the existence of a valid, enforceable waiver.[50]

The record establishes that Defendant was fully aware he had the right to object to the removal of the juror in question, and that he understood the substantial benefit he would obtain if he chose to waive that right. "If there is no constitutional, statutory, or public policy prohibition against waiver, an accused may validly waive any right."[51] The right to a unanimous verdict can be waived,[52] and there is no reason a waiver of the right to object to the replacement of a juror should be viewed differently. The Court finds that Defendant's waiver of the right to object to the removal of the allegedly biased juror was voluntary, knowing and intelligent.

Accordingly, Defendant is not entitled to a new trial on the ground that replacement of Juror 152 was error.

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[50] *Rush v. State*, 276 Ga. 541, 542 (2003).
[51] *Id.*
[52] *Johnson v. State*, 277 Ga. App. 41, 48 (2005).

D. Use of the "Colorado Method."

Heinze contends he was deprived of effective assistance of counsel because attorney Hamilton utilized a certain jury voir dire strategy, known commonly as the "Colorado Method," which is designed to locate and strike from the jury panel in a death penalty case those individuals that may be "pro-death." Heinze argues use of this method fails to consider that some of these stricken "killers" may also acquit in a well defended guilt/innocence phase of trial. The Court disagrees.

Attorney Hamilton testified that the so called Colorado Method is merely a guide, which he used as such to put in place proper voir dire questioning of the jury panel.[53] Hamilton noted the questions his team asked were outside the Colorado Method, as that method is used to vior dire only about death views, and nothing else.[54] Because this was about the guilt/innocence of Defendant, his focus was picking jurors the defense team hoped would acquit, "and at the end of the day in order to be a juror in a death case you've got to say you can impose death."[55]

Indeed, the transcript indicates the defense team asked vior dire questions equally with regard to all issues: whether there were any preconceived opinions about guilt or innocence; their exposure to media coverage of the case; their ability to consider all of the evidence presented; their ability to deliberate openly and be

[53] MNTT at pp. 16-17.
[54] *Id.* at p. 17.
[55] *Id.*

respectful of other juror's opinions; the effect sympathy might have on their decisions; their feelings toward law enforcement; and importantly, their views on the death penalty, their ability to consider mitigating factors, and their ability to consider life with and without parole in addition to the death penalty.[56] The Court is mindful that defense attorneys in capital trials face an extremely difficult task in jury selection. They must identify proponents of the death penalty who could be subject to challenges for cause while at the same time they must attempt to rehabilitate and protect those who prefer a life sentence, all while bearing in mind the prejudicial impact of voir dire about punishment and the death penalty long before the trial on the merits of the charges.[57]

With that in mind, the Court finds the scope of voir dire in this case was broad enough to ascertain the fairness and impartiality of the prospective jurors with regard to the guilt or innocence of Heinze, as well their ability to consider all potential sentencing options.[58] Regardless of whether defense counsel used some component of the Colorado Method in jury voir dire, the questions, as asked, were not so restrictive so as to single out potential "killers" that otherwise may have acquitted in the guilt/innocence phase, as Heinze contends. To the contrary, the voir dire questions properly accounted for the potential juror's impartiality, ability

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[56] *See e.g.,* Jury Selection Transcript ("JST"), pp. 3154 – 3164.
[57] *See* Jurywork, *supra*, at § 23:17.
[58] *See Gissender v. State*, 272 Ga. 704, 709 (2000).

and willingness to consider the evidence and possibly acquit, and ability and willingness to consider all possible sentencing options.

Trial counsel was not ineffective in his voir dire of prospective jurors and Defendant is not entitled to a new trial on this ground.

E. IAC Claims Related to the Condition of Trial Counsel's File.

In paragraphs 8 and 15 of Heinze's Second Amended Motion for New Trial, he asserts he was deprived of his right to effective assistance of counsel and due process because trial counsel "dumped 41 bankers' boxes of files and transcripts and dozens of compact discs" on his appellate counsel in no discernable order. He argues this somehow delayed the "the limited amount of time" available for his appeal. As the Court noted above, this position is without merit.

F. Length of Time Awaiting Trial.

Heinze argues he was denied effective assistance of counsel and due process because he "waited 5½ years to go to trial." The Court disagrees. The record reflects Heinze was initially indicted on the murder charges involved in this case on September 14, 2009. That indictment was *nolle prosequi* in its entirety due to a procedural defect in the grand jury, and Heinze was re-indicted on the same charges on May 23, 2012.[59] The matter was tried to a jury in October, 2013.[60] No

[59] *See* Record, CR-0900512-063 and CR-1200318-063.
[60] *Id.* at CR-1200318-063.

demand for speedy trial was filed.[61] Heinze was incarcerated for the vast majority of time he was awaiting trial. At most, there was a four-year delay between Heinze's initial arrest in 2009 and his trial.

The Sixth Amendment of the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial... ." This right is enshrined in the Georgia Constitution and is co-extensive with the federal guarantee made applicable to the states by virtue of the Fourteenth Amendment of the United States Constitution.[62] Every constitutional speedy trial claim is subject to a two-tiered analysis.[63] As for the first tier of the analysis, it must be determined if the delay in question is presumptively prejudicial. If not, there has been no violation of the constitutional right to a speedy trial and the second tier of analysis is unnecessary. If, however, the delay is determined to be presumptively prejudicial, then the court must engage the second tier of analysis by applying a four-factor balancing test to the facts of the case.[64] Those four factors include: (1) whether the delay is uncommonly long; (2) the reasons for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice to

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[61] *Id.*
[62] Ga. Const. of 1983, Art. I, Sec. I, Par. XI(a); *Ruffin v. State,* 284 Ga. 52(2), 663 S.E.2d 189 (2008).
[63] *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182 (1972); *Doggett v. United States,* 505 U.S. 647(II), 112 S.Ct. 2686, (1992).
[64] *Jakupovic v. State,* 287 Ga. 205 (2010).

the defendant.[65]

Our appellate courts have consistently held that a delay approaching one year awaiting trial is generally deemed to be presumptively prejudicial to a criminal defendant.[66] Thus, the four-year delay in this case is presumptively prejudicial, thereby triggering the *Barker-Doggett* four factor analysis, which would weigh against the State in this case. Whether the defendant or the State bears the primary responsibility for the delay in reaching trial is "pivotal in evaluating the strength of a constitutional speedy trial claim, as it can color the consideration of all other factors." Deliberate delay is weighed heavily against the State; delay resulting from "neutral" causes, such as negligence, has lighter weight; and of course, delay caused by the defense weighs against the defendant.[67]

Here, there is no evidence of record that any delay caused by the State was deliberate or for the sole purpose of delay. To the contrary, this is a death penalty case involving the murder of eight different victims, which necessitated a lengthy law enforcement investigation, as well as a lengthy investigation by Heinze's defense team. Moreover, there were more than 60 pretrial motions filed in the case by the defense. Defendant had various lawyers involved on his behalf at various times. While the charges ultimately had to be reindicted due to an eligibility issue

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[65] *Ruffin v. State,* supra, 284 Ga. at 56(2)(b).
[66] *Crosson v. State*, 318 Ga.App. 449 (2012), *citing State v. Pickett*, 288 Ga. 674 (2011).
[67] *Sosniak v. State,* 292 Ga. 35, 41 (2012).

with the first grand jury, there were no changes in the charges between the two indictments and all motions and hearings already heard at the time were transferred to the new indictment, thereby alleviating any undue delay that might otherwise have resulted from the reindictment. Thus, under the circumstances any delay in this case is, at best, neutral, and at worst would weigh against Defendant.

As for the speedy trial factor, "[t]he relevant question for purposes of the third factor is whether the accused has asserted the right to a speedy trial 'in due course.'"[68] This factor "requires a close examination of the procedural history of the case with particular attention to the timing, form, and vigor of the accused's demands to be tried immediately."[69] Because delay often works to the defendant's advantage, this factor is afforded strong evidentiary weight.[70]

Here, the record reflects that Heinze never asserted his right to a speedy trial at any point prior to his 2013 trial. He only now asserts it for the first time on appeal. While failure to assert the right to speedy trial does not act as an outright waiver of this right,[71] it does weigh strongly against Heinze in this case.

Lastly, to determine whether the defendant has been prejudiced by the delay, one must consider whether there has been oppressive pre-trial incarceration,

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[68] *Id.*
[69] *Id.*
[70] *Id.*, quoting *Barker v. Wingo*, supra.
[71] State v. Thompson,

whether the defendant has suffered undue anxiety, and, most importantly, whether the defense has been impaired by the passage of time.[72] Although Heinze was incarcerated for a lengthy period of time awaiting trial, there has been no oppressive pre-trial incarceration as he has made no showing that he was subjected to substandard conditions in the county jail where he was housed.[73] Furthermore, Heinze has not shown that any anxiety he may have suffered was greater than that always present to some extent, especially in a death penalty case. Finally, with regard to whether the defense was impaired in some way, Heinze has made no such showing. Thus, Defendant has failed to satisfy his burden of showing prejudice. He is not entitled to a new trial on this basis.

III. Obstruction of Justice/Tainted Evidence.

In paragraphs 7 and 9 of Heinze's Second Amended Motion, he Contends that the police chief, Mathew Doering, and detective Mike Owens somehow denied him access to exculpatory evidence in this case. It appears Heinze is trying to argue that they both somehow obstructed justice as the result of their professional negligence in investigating this case. The Court finds that these contentions arise to no more than vague, conclusory statements unsupported by

[72] *Sosniak*, 292 Ga. at 42-43.
[73] *See id.*

argument or any citation to the record or authority.[74] Moreover, Defendant does not identify what exculpatory evidence, if any, would have resulted if the investigation was handled any differently. In order for a defendant to rely on error relative to exculpatory evidence, necessity requires at the very least that he show the court *what* the evidence is and *how* it is exculpatory.[75] Heinze has done neither here.

Similarly, in paragraph 12, Heinze contends that the files of two investigators hired by the public defender's office were "suppressed and hidden," but makes no argument nor cites to authority in support of this contention. Accordingly, for the reasons stated the Court finds these enumerations of error to be without merit, and further finds them to have been abandoned by Defendant for his failure to provide citation to authority or meaningful argument.

IV. Georgia's Death Penalty Statute is Not Unconstitutional, Arbitrary or Capricious.

The Georgia Supreme Court has long held that Georgia's death penalty is not unconstitutional.[76] That notwithstanding, Defendant contends that, as applied, it constitutes cruel and unusual punishment. The Court finds no merit in

[74] See *Brittain v. State*, 329 Ga.App. 689 (2014).
[75] See *Barnes v. State*, 157 Ga.App. 152 (1981).
[76] *Gissender v. State*, 272 Ga. 704 (2000).

this enumeration of error.[77]

Defendant further contends that he was deprived of a fair trial because the death penalty is arbitrary and capricious, as it is disproportionately applied by prosecutors. However, our appellate courts have long held that prosecutors do not have unfettered discretion to seek the death penalty, and have "repeatedly rejected challenges to the legislature's determination that district attorneys should have the discretion to decide whether a murder defendant meets the statutory criteria for the death penalty and whether to pursue the death penalty when a defendant is eligible."[78] Likewise, the Court finds no merit in Defendant's position.

V. The Attorney General and the Separation of Powers Clause.

Defendant argues he is entitled to a new trial because the Attorney General's office routinely violates Georgia's Separation of Powers Clause by representing the State of Georgia as appellate counsel and then later representing the accused in habeas corpus proceedings. However, the Court notes that Defendant does not point to any specific violation that occurred in this case, nor does he put forth any evidence or argument relative to any such alleged violation. Nor is the Court able to make any meritorious connection between the Separation

[77] See generally, *Dawson v. State*, 274 Ga. 327 (2001).
[78] *Walker v. State*, 281 Ga. 157, 161 (2006).

of Powers clause, which mandates one person cannot perform both executive and judicial functions,[79] and the Attorney General Office's involvement in this case. Accordingly, the Court finds this enumeration of error to be without merit.

For all of the above stated reasons, Defendant's motion for new trial is hereby **DENIED** in its entirety.

SO ORDERED, this 20th day of February, 2020.

STEPHEN G. SCARLETT, SR.
Chief Judge, Superior Courts
Brunswick Judicial Circuit

[79] Ga Const Art. 1, §2, ¶ III; and see generally, *Ga. Dept. of Human Svcs. v. Steiner*, 303 Ga. 890 (2018).