

In the
Supreme Court of Georgia

No. S09A1951

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JAMIE RYAN WEIS,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

**MOTION FOR
RECONSIDERATION**

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MOTION FOR RECONSIDERATION

Appellant Jamie Ryan Weis moves this Court to reconsider its decision in this case to address several questions of fact and law that were not correctly decided in the majority opinion.¹

First, the majority faults Weis for not accepting the removal of the lawyers who had represented him for over a year and the substitution of public defenders who protested that they were “overburdened with their current caseloads and other obligations” and could not provide effective assistance “no matter how good [their] intentions or diligent [their] efforts.” R-964. However, the majority does not fault the State for creating the crisis which led to the removal of Weis’ lawyers – its failure to fund Weis’ legal representation for eight months from March to November, 2007. Nor does it acknowledge that Weis was not required to accept the substitution of counsel. He had the right to assert his constitutional right to counsel by pursuing available legal remedies before trial and he did so. He raised the issue at the earliest opportunity, as this Court and other courts have admonished litigants to do. The majority attributes 15 months of delay to Weis’ efforts to retain his original attorneys, Robert H. Citronberg and Thomas M. West, and uses that to resolve the second of the four factors under *Barker v. Wingo*, 407

¹ The Court’s opinions are attached to this Motion for Reconsideration pursuant to Ga. S. Ct. R. 27. References to the opinions are to the page numbers in the attached manuscript opinions.

U.S. 514 (1972). However, Weis was successful in getting his original attorneys back on the case in five months, not 15. But even that time cannot be charged against him because he cannot be faulted for exercising his legal rights, particularly where his efforts to do so were ultimately vindicated.

Second, the majority faults all of Weis' lawyers – the lawyers initially appointed to represent Weis, the public defenders, and his *pro bono* counsel² – for causing delay. However, the lawyers originally appointed to represent Weis, Citronberg and West, had an ethical duty to “take steps to the extent reasonably practicable to protect [Weis'] interests.” Ga. R. Prof'l Conduct 1.16 (d). They did so by seeking rehearing of the order removing them and by seeking interim review of that order in this Court. That was legally and ethically appropriate. Neither they nor Weis can be faulted for it.

Nor can Weis be blamed for the conduct of the public defenders. The public defenders lacked the authority to represent a defendant in a capital case, and they were never accepted by Weis as his counsel. Moreover, they acted upon their ethical duty not to undertake representation “unless it [could] be performed competently.” Ga. R. Prof'l Conduct 1.16; *see also* Rule 1.1. They represented to

² Weis was represented *pro bono* with regard to his right to counsel by Edward T. M. Garland, Donald F. Samuel and Stephen B. Bright.

the trial court that it was “impossible” for them to represent Weis competently on account of their workloads, limited staff, and lack of resources.

One of the public defenders appointed was not certified to handle a capital case and was involved in more than 400 other cases. The other public defender was the chief of the circuit defender office, had extensive administrative responsibilities, and was carrying almost 100 felony cases. Both were legally and ethically prohibited from undertaking representation in a capital case. Accordingly, they were compelled to move *three times* to withdraw. In doing so, they cited their workloads, lack of resources, and inability to provide effective assistance, as well as *Amadeo v. State* 259 Ga. 469, 384 S.E.2d 181 (1989), and its progeny, and the impropriety of the District Attorney “hand picking” them to represent Weis. R-962-969. The trial court should have granted the public defenders’ motions to withdraw. As for *pro bono* counsel, they simply assisted Weis in pursuing his lawful remedies and vindicating his constitutional rights.

Third, the majority erroneously states throughout its opinion that the parties knew as early as September 2007 – and at various other times – that funding would not be available until June 2009. It also states that attorneys Citronberg and West pursued being reinstated as counsel knowing that there was no funding. In fact, *there was no suggestion at any time that funding would not be available until June 2009. Funding was available in April 2008.* Mack Crawford, director of the

Public Defender Standards Council, testified at the November 26, 2007 hearing that he would not know until the “middle of March to the middle of April” what funding would be available. Nov. 26, 2007 Hearing Tr-15. The following April, Interim Capital Defender Gerald Word testified that the legislature had provided the Capital Defender with a supplemental appropriation and increased its funding for the fiscal year starting July 1, 2008 so that it “got back on track” and was making funding available for cases.³ Attorneys Citronberg and West resumed their representation of Weis on April 25, 2008, *because funding was available then*, even though the Standards Council later refused to give it to them. Thus, the major factual premise of the majority’s opinion is not supported by the record.

Fourth, because the majority mistakenly believed that funds were not available until June 2009, it failed to correctly assess prejudice. Even after its failure to fund the case in 2007, if Georgia had funded the case in 2008, which it could have done according to Word’s testimony, the case would have been tried in early 2009, well before the death of Weis’ mother in November 2009. Moreover, had Georgia provided funds for this case in a timely manner from April to November 2007, the case would have been tried even earlier, *in March 2008*, when it was originally scheduled for trial. Additionally, the majority seriously

³ Deposition of Gerald Word at 35, 37, 68, 114-16, 141-45 (introduced at the February 11, 2009 hearing Tr-47) [hereinafter “Word Depo.”].

discounted the oppressiveness of Weis' pretrial incarceration. The State takes the defendant like a civil plaintiff: as it finds him. Weis, who is severely mentally ill, has suffered grievously while confined in a county jail intended for short-term detention.

Fifth, the majority failed to make a distinction between a defendant's choice of counsel at the outset of a criminal proceeding, where countervailing considerations of comparable weight may outweigh the defendant's choice, and the interruption of an ongoing attorney-client relationship of more than one year of duration, where only compelling considerations may override his interest in the preservation of that relationship and justify the removal of counsel.

Finally, this Court should reconsider the repercussions of its decision. The majority's decision will result in the removal of lawyers from cases and the appointment of circuit public defenders in capital cases whenever there is delay in those cases. This will have a devastating impact on the circuit public defender offices that are struggling with enormous caseloads. It will have an equally devastating impact on the quality of representation in capital cases, as lawyers already handling hundreds of cases attempt to take on the responsibility of defending someone whose life is at stake. The lawyers who have been willing to take on the thankless job of public defense should not be punished by having capital cases dumped upon them. It will eventually become virtually impossible to

find conscientious, ethical lawyers willing to work in circuit public defender offices because such lawyers will not want to take positions where they cannot represent their clients capably and ethically.

INTRODUCTION

Appellant Jamie Ryan Weis was in no way responsible for the funding crisis which led to the removal of his lawyers. The crisis, rather, was the direct result of Georgia's failure to provide funding for his representation. The legislature reduced the budget for the Office of the Capital Defender⁴ from \$7.5 million for July 1, 2005 to June 30, 2006, to \$5.5 million the following year and \$4.5 million the next year.⁵ As Interim Director Word testified, as the funding steadily decreased, the caseload steadily increased.⁶ As a result, the Office of the Capital Defender broke down completely in its ability to provide for representation in this case and the cases of *State v. Khahn Dinh Phan*,⁷ *State v. Stacey Sims*,⁸ *State v. Frank Ortegon*,⁹

⁴ The office has since been renamed the "Georgia capital defender division." O.C.G.A. § 17-12-12 (July 1, 2008).

⁵ Word Deposition at 18.

⁶ *Id.*

⁷ *See Phan v. State*, Ga. S. Ct. No. S10A0374 (pending following oral argument on March 9, 2010).

⁸ *State v. Sims*, No. 2006-CR-91, Tift Co. Superior Court, Hearing of Dec. 22, 2008 (second set of lawyers for defendant in capital case allowed to withdraw because they had not been paid in a year and a half; earlier team of lawyers had similarly been allowed to withdraw after not being paid for a year and a half).

and other cases.¹⁰ Mr. Weis' case cannot be viewed in isolation. It has been delayed because of lack of funding, not the reasons set out in the majority opinion. The lack of funding in this case is part of a larger, widely known and serious crisis in representation in capital cases that has existed since the decrease in appropriations, the costs incurred in the case of *State v. Brian Nichols* in 2006 and 2007,¹¹ and the legislature's failure to respond adequately by providing sufficient funding to the Georgia Office of the Capital Defender so that all people facing the death penalty would receive timely, competent, and effective representation.

⁹ *State v. Ortegon*, Forsyth Co. Superior Court. At the end of May, 2009, lawyers for Ortegon had not been paid since October, 2007 for their work on the case which involved a murder that occurred on March 19, 2006. Julie Arrington, "Funds avert fears of 'constitutional crisis,'" FORSYTH COUNTY NEWS, May 31, 2009, available at www.forsythnews.com/news/article/2631/. The case is still pending trial.

¹⁰ See, e.g., testimony of Mack Crawford at Hearing of Nov. 27, 2007 Tr-7-30 (describing inability to fund pending capital cases); Word Depo. at 90-95 (describing attending court hearings regarding lack of funding for various capital cases); Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, N.Y. TIMES, March 22, 2007 (reporting that "[a] high-profile multiple-murder case has drained the budget of Georgia's public defender system and brought all but a handful of its 72 capital cases to a standstill").

¹¹ Mack Crawford testified at the hearings where Weis' counsel were removed that if an order in *Nichols* "stands all of the money that I have available for the balance of this fiscal year, June 30 of 08, would technically be embargoed, or committed, in that one case." Nov. 26, 2007 Hearing Tr-23. See also Greg Land, *Public defense system eyed for an overhaul*, FULTON COUNTY DAILY REPORT, Feb. 16, 2007 (reporting the Public Defender Standards Council faced a \$9.5 million shortfall); Greg Bluestein, *Speaker calls for reform in public defender funding; rips Nichols judge*, ASSOCIATED PRESS, March 9, 2007 (describing impact of costs of Nichols case on the public defender system); Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, N.Y. TIMES, March 22, 2007 (reporting that the "Public Defender Standards Council . . . has run out of money.").

The judiciary has a responsibility to enforce the right to counsel. It is not powerless to respond to the failure of the legislature to meet its constitutional responsibilities with regard to representation in capital cases. The remedy is apparent. The legislature created the Office of the Georgia Capital Defender “to undertake the defense of all indigent persons charged with a capital felony for which the death penalty is sought in any court in this state,”¹² and circuit public defender offices to represent indigent defendants “prosecuted in a superior court . . . in which there is a possibility that a sentence of imprisonment or probation or a suspended sentence of imprisonment may be adjudicated,”¹³ as well as in probation revocation hearings, juvenile courts and in appeals.¹⁴ Because the legislature did not appropriate sufficient funding for Georgia to meet its constitutional responsibility to provide competent counsel in cases where people’s lives are at stake, the courts have a duty to order that those cases be prosecuted non-capitally. Representation could then be handled by the circuit public defenders, but without the enormous task of preparing for a capital sentencing hearing and the awesome consequences of life or death.

¹² O.C.G.A. § 17-12-121 (2003), 2003 Ga. Laws Act 32 (HB 770), revised and recodified at O.C.G.A. § 17-12-12 (July 1, 2008).

¹³ O.C.G.A. § 17-12-23(a), 2003 Ga. Laws Act 32 (HB 770).

¹⁴ *Id.* (b)-(d).

That is what the trial court should have ordered on November 26, 2007 when it was established that the Office of the Capital Defender had failed to provide funding for Weis' defense for eight months and could provide no assurance that it could provide funding for *any* lawyers to try the case. The answer to the breakdown in capital representation caused by the lack of funding was not to make do with lawyers struggling with overwhelming caseloads at the circuit public defender office.

Weis' speedy trial rights were violated because the State did not make funds available even after it was agreed on April 25, 2008 that Weis would be represented by his original lawyers, who were ready, willing and able to prepare the case for trial during 2008 if only they could resume their investigation and retain the experts they had identified.

I. WEIS CANNOT NOT BE PENALIZED FOR PURSUING HIS RIGHT TO COUNSEL.

Beginning on October 12, 2006, Appellant Jamie Weis was represented by two of Georgia's most capable and respected capital defense litigators, Robert H. Citronberg and Thomas M. West. Both have been practicing law for over 30 years, specializing in criminal practice. Both have handled a number of capital trials – on occasion representing clients together, as in this case – and have handled some of the state's most difficult and challenging cases. Feb. 11, 2009 Hearing Tr-48-49,

91-92. They had an attorney-client “relationship of trust and confidence” with Weis and were thoroughly familiar with the “legal and factual complexities of the case.”¹⁵ They met with Weis; reviewed his mental health records; employed an experienced and well-qualified mitigation specialist who made trips to West Virginia and obtained records and interviewed witnesses; and filed and litigated 60 motions on Weis’ behalf. Citronberg visited Weis’ home in West Virginia on more than one occasion and interviewed “family, friends, former employers, school personnel” and others both to get information and assess them as potential witnesses, Feb. 11, 2009 Hearing Tr-94-54. Judge Caldwell commended Citronberg and West for their “impeccable credentials to try this case,” Tr-47, and for “quite capably” representing Weis. R-868.

Then, on November 26, 2007, Weis was deprived of his lawyers without warning on the motion of the man who is trying to take his life, Pike County District Attorney Scott Ballard. Weis saw the experienced death penalty lawyers with whom he had developed a relationship of trust and confidence and who knew him and his case suddenly replaced by circuit public defenders hand-picked by Ballard. Weis further saw the public defenders, as officers of the court, represent to the trial judge in *three different pleadings* that they were unable to represent him

¹⁵ See *Grant v. State*, 278 Ga. 817, 817, 607 S.E.2d 586, 587 (2005), quoting *Amadeo v. State*, 259 Ga. 469, 469, 384 S.E.2d 181, 181 (1989). These factors, critical to this Court’s holding in *Amadeo* and its progeny, were not acknowledged in the majority opinion.

because of their workload, that they and their investigators “lack[ed] the time and expertise to conduct the extensive investigation” required for constitutionally effective representation,¹⁶ that they could not capably defend him “no matter how good [their] intentions or diligent [their] efforts,” and that they were unable to get funding for experts, investigation, a mitigation specialist, travel and the costs of bringing witnesses to the trial. R-964.¹⁷ Under these circumstances, Weis had every reason to be concerned about his legal representation and every right to pursue every legal remedy at his disposal to ensure that his Sixth Amendment rights were protected.

A. Weis Was Entitled to Pursue His Legal Remedies.

No law required Weis to accept termination of an ongoing attorney-client relationship and agree to representation from lawyers who represented to the court, consistent with their ethical and professional obligations, that they could not provide effective representation. Weis did what any person would do in those

¹⁶ In making this representation the public defenders cited *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), all cases in which defense counsel were held to be ineffective for failing to conduct adequate investigations into mitigating circumstances and present mitigating factors to the jury.

¹⁷ The majority states the “public defenders did not receive all the funds that they requested.” Majority Op. at 14. They did not receive *any funds at all*. Thus, they had no ability to go to West Virginia and meet Weis’ family, teachers, neighbors, and community members as Citronberg had done. They had no ability to consult with an expert about Weis’ severe mental illnesses, the medications he was on, and his mental health records. Nor did they have the ability to have him evaluated by a mental health expert. Nor could they retain a mental health expert or any other expert for possible testimony. In short, they could not defend Weis.

circumstances – what a person *has every right to do in those circumstances*, a right *recognized and sustained in five cases by this Court*. He did what Tony Amadeo,¹⁸ Curfew Davis,¹⁹ Victor Roberts,²⁰ Aundra Dermaine Grant,²¹ and Floyd Wayne Williams did.²² He sought to keep the capable lawyers who had been representing him for over a year and were thoroughly familiar with his case.

Weis’ right to retain Citronberg and West was more compelling than a defendant expressing a preference for a particular lawyer at the outset of a case because Citronberg and West had been representing him *for over one year*. He would suffer irreparable harm if he lost them; they knew him and his case and had investigated his background for mitigation.

“Under well established Georgia law,” Weis was required to raise his right to counsel issue “at the earliest practicable moment to avoid it being deemed waived.” *Garland v. State*, 283 Ga. 201, 203, 657 S.E.2d 842, 844 (2008); *see also Trauth v. State*, 283 Ga. 141, 143-44, 657 S.E.2d 225, 227 (2008) (finding that pro se defendant waived ineffective assistance of counsel issue by not raising it after

¹⁸ *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989).

¹⁹ *Davis v. State*, 261 Ga. 221, 403 S.E.2d 800 (1991).

²⁰ *Roberts v. State*, 263 Ga. 764, 438 S.E.2d 905 (1994).

²¹ *Grant v. State*, 278 Ga. 817, 607 S.E.2d 586 (2005).

²² *Williams v. State*, 279 Ga. 154, 611 S.E.2d 51 (2005).

taking over his own case after hearing on motion to withdraw his guilty plea); *Bailey v. State*, 264 Ga. 300, 300, 443 S.E.2d 836, 837 (1994) (finding ineffectiveness claim barred because not raised “at the earliest practicable moment.”).

As Justice Charles Weltner once stated for this Court, “It is a requisite of a sound system of criminal justice, serving alike the proper ends of defendants and of the public, that any contention concerning the violation of the constitutional right of counsel should be made at the earliest practicable moment.” *Smith v. State*, 255 Ga. 654, 655, 341 S.E.2d 5, 7 (1986). That is precisely what Weis did in moving on December 5, 2007 for the trial court to reconsider the order granting the District Attorney’s motion to replace his counsel and to certify its order to this Court for interim review. R-872-875, 879. He quite appropriately supported the motion for reconsideration with an affidavit in which he expressed his objection to the removal of his counsel and stated that he could “trust Mr. West and Mr. Citronberg with my case and actually with my life. They truly care about me and I believe they have the knowledge and skill to prepare a defense for me. I want them to continue as my attorneys. I do not want Tamara Jacobs, Joseph Saia or other counsel to represent me.” R-876-77. Weis, who is seriously mentally ill,

also had every right to decline to speak to the public defenders until the counsel issue was resolved.²³

Weis also moved to vacate the appointment of the public defenders. R-894. Appended to the motion were affidavits from the public defenders describing their enormous workloads, stating that the three investigators in the circuit defender office were very busy and had no training or experience in investigating for mitigating circumstances, and stating that they had not been asked before being appointed whether they had the time and resources to undertake a capital case with their existing caseloads. R-926-30, 934. The trial court never ruled on the motion.

After the trial court denied the motion to reconsider the removal of counsel and the motion to certify the issue for review,²⁴ Weis exercised his right to petition this Court for interim review.²⁵ This Court denied the petition on January 16,

²³ The public defenders had Weis sign a statement on January 24, 2008 saying that on the advice of *pro bono* counsel he did not wish to speak with the public defenders until the counsel issue was resolved. R-966. At the time, Weis' case was pending in this Court on his motion seeking to have the Court reconsider its denial of his Petition for Interim Review. It was not denied until February 25, 2008. *Weis v. State*, No. S08I0639 (Order of Feb. 25, 2008).

²⁴ Dec. 10, 2007 Hearing Tr-25-26 (Judge Caldwell commented, "I'm always told that I'm going to get reversed. . . . I'm sure there's no decision that I can make that . . . the Supreme Court of this state cannot correct if I'm wrong. . . . I guess the Supreme Court will have to earn their money."); R-941, 951 (denying certificate of appeal); R-891 (denying motion to reconsider).

²⁵ *Weis v. State*, Ga. S. Ct. No. S08I0639 (filed Dec. 20, 2008). Having been denied a certificate by the trial judge, Weis sought review pursuant to *Waldrip v. Head*, 272 Ga. 572, 575, 532 S.E.2d 380, 384-85 (2000), in which this Court recognized its inherent authority to exercise interlocutory review in "those exceptional cases that involve an issue of great concern, gravity, and importance to the public and no timely opportunity for appellate review." This Court exercised that authority and reversed a trial court's removal and replacement of trial counsel in

2008, over the dissent of Chief Justice Sears.²⁶ Weis sought rehearing, which the Court denied on February 25, 2008 over the dissents of Chief Justice Sears and Justice Hunstein.²⁷

Possessing a clear legal right to counsel recognized by five decisions of this Court, yet cut off from review in this Court by Judge Caldwell's refusal to certify the issue for interim review, Weis *promptly* exercised his right to file a petition for a writ of mandamus on February 7, 2008 against Judge Caldwell seeking to compel him to comply with *Amadeo*, *Davis*, *Roberts*, *Grant* and *Williams* and other applicable law. Weis re-secured the representation of Citronberg and West on April 25, 2008, within three months of filing the petition and five months after Citronberg and West had been removed from the case. Weis cannot be faulted for exercising his legal right to maintain representation by lawyers who were capable of defending capital cases, were not overburdened with hundreds of other cases, and were thoroughly familiar with his case.

Williams v. State, Ga. S. Ct. No. S05A0071, Order of Sept. 29, 2004 (granting interim review despite lack of certification by trial judge), 279 Ga. 154, 611 S.E.2d 51 (2005) (reversing the trial court's removal and replacement of trial counsel).

²⁶ *Weis v. State*, Ga. S. Ct. No. S08I0639 (Order of Jan. 16, 2008) (citing *Williams* and *Waldrip*, but stating: "It appearing that [this case] is not among those rare cases wherein this Court is authorized to exercise its discretion to review an interlocutory order even without certification of the trial judge of the need for immediate review, the same is hereby dismissed for lack of compliance with the requirements of O.C.G.A. § 5-6-34(b).")

²⁷ *Weis v. State*, Ga. S. Ct. No. S08I0639 (Order of Feb. 25, 2008).

The majority characterizes Weis’ exercise of a legal right to protect his fundamental right to counsel – filed just 10 days after the denial of rehearing by this Court – as a “lack of cooperation” by Weis. Majority Op. at 12 (“Weis made no effort to work with his replacement attorneys . . . *even going so far as filing a mandamus action* against the trial judge in an attempt *to force the judge* to put Citronberg and West back on the case. . . .”) (emphasis added).²⁸ Quoting from *Vermont v. Brillon*, 129 S.Ct. 1283 (2009), the majority even compares Weis to Brillon: “[a]bsent [Weis’] deliberate efforts to *force* the withdrawal of his [replacement attorneys], no speedy trial issue would have arisen.” Majority Op. at 12, quoting *Vermont v. Brillon*, 129 S.Ct. at 1292 (emphasis added). But Brillon forced the withdrawal of his attorneys not by exercising his legal rights but by firing his very first attorney on the eve of trial by yelling at a hearing, “You’re fired, Rick,” and *threatening to kill* another lawyer assigned to represent him. *Id.* at 1287-88, 1292. Weis’ exercise of his legal rights in an effort to retain the qualified lawyers he had is in no way comparable to Brillon’s improper and disruptive behavior.²⁹ Brillon tried to *delay* proceedings by trying to *discharge*

²⁸ The word “force” gives a negative connotation to the filing of the mandamus action. One could say that every plaintiff who files a civil suit seeks to *force* the court to order the remedy sought, and every litigant who files a motion seeks to *force* the court to order the relief requested. But these characterizations do not help in the legal analysis. People have a right to seek remedies in the legal system and should not be penalized for exercising it.

²⁹ The majority also cites *Jones v. State*, 273 Ga. 231, 233, 539 S.E.2d 154, 159 (Ga. 2000), a case in which a defendant who “frequently refused to cooperate” with his appointed counsel was

lawyers. Weis was trying to *keep* lawyers in order to secure a fair and speedy resolution of his case. Had Weis accepted the public defenders who repeatedly asserted their inability to represent him, he undoubtedly would have been held to have waived any right to assert denial of counsel by the removal of Citronberg and West.

Within *five months* – not 15 as stated in the majority opinion³⁰ – Weis was once again represented by West and Citronberg. As discussed at greater length in Section II, Interim Capital Defender Gerald Word testified *that funds were available for Weis’ representation in April 2008*³¹ – not June 2009, as the majority mistakenly states in its opinion.³² Thus, if Weis is to be blamed for any delay, the five-month period between November 26, 2007 and April 25, 2008 is the only time that could conceivably be charged to him.

But even for that five-month period, penalizing Weis for asserting his right to continuous and competent counsel is improper. As the California Supreme Court recognized in *Barsamyan v. Appellate Div. of Superior Court of Los Angeles County*, 189 P.3d 271, 281 (Cal. 2008), the State cannot, through its “failure to

penalized for speedy trial purposes. The reasons for Jones’ lack of cooperation were never addressed, but it does not appear that he was reasonably pursuing available legal remedies.

³⁰ Majority Op. at 12.

³¹ Word Depo. at 35, 37, 68, 114-16, 141-45.

³² Majority Op. at 2, 13.

provide enough public defenders or appointed counsel,” require an indigent defendant to “choose between the right to a speedy trial and the right to representation by competent counsel.” Similarly, the Georgia Court of Appeals has held that the State cannot force a defendant to choose between two of his rights. *See Ditman v. State*, 301 Ga. App. 187, 192, 687 S.E.2d 155, 160 (Ga. App. 2009) (holding that due process was violated where the State demanded that the defendant waive his statutory speedy trial right in order to obtain discovery to which he was entitled). Weis should not be penalized for pursuing his right to counsel.

B. No Delay Can Be Attributed to the Lawyers.

Once they had been removed as counsel in what was certainly an arguable violation of *Amadeo* and other cases reversing trial courts for removing counsel, Citronberg and West had an ethical responsibility not to abandon Weis, but to “take steps to the extent reasonably practicable to protect [his] interests.” Ga. R. Prof’l Conduct 1.16 (d). They did that by filing a motion for reconsideration of the trial court’s order removing them and a motion to certify the order for interim review on December 5, 2007. R-872-875, 879. Judge Caldwell denied both motions on December 10, 2007. R-941, 951 (denying certificate of appeal); R-891 (denying motion to reconsider). Citronberg and West then sought interim review

in this Court, filing a petition on December 20, 2007,³³ which was denied on January 16, 2008.³⁴ Rehearing was denied on February 25, 2008.³⁵

The majority states that Citronberg and West “fought to be placed back onto the case” and their efforts “to be placed back onto the case, instead of allowing the case to move forward with replacement counsel, also caused additional delay.” Majority Op. at 12-13. The total extent of their “fighting” involved the efforts described in the previous paragraph which took place between December 5, 2007 and February 25, 2008. After rehearing was denied on February 25, 2008, the efforts to have Citronberg and West reinstated as counsel were *by Weis* through *other counsel*. Thus, even if Citronberg and West could be faulted for exercising their ethical responsibilities with regard to Weis, it could only be for three months.

The majority also faults the public defenders who were never accepted by Weis as his counsel, stating that defendants must “bear the risk of attorney error.” Majority Op. at 16. But Weis appropriately rejected the risk of error by the public defenders, knowing that his life hung in the balance. He cannot be blamed for the actions of attorneys whom he never accepted as his agents. *See Farretta v. California*, 422 U.S. 806, 820-21 (1975) (holding that in order for an attorney to

³³ *Weis v. State*, No. S08I0639 (filed Dec. 20, 2007).

³⁴ *Id.* (Order of Jan. 16, 2008).

³⁵ *Id.* (Order of Feb. 25, 2008).

act for a defendant, the defendant must “consent, at the outset, to accept counsel as his representative”).³⁶ This is especially true given that the public defenders were neither authorized by statute nor competent to represent Weis.

The majority fails to consider that the Indigent Defense Act of 2003 did not authorize circuit public defender offices to provide representation in capital cases. Rather, it authorized them to provide representation in cases in which “a sentence of imprisonment . . . may be adjudged,”³⁷ but it created the Office of the Capital Defender “to undertake the defense of *all* indigent persons charged with a capital felony for which the death penalty is sought in any court in this state.”³⁸ This is a rational distinction because of the severe and qualitative difference between a death sentence and even the lengthiest sentence of imprisonment.³⁹ Gerald Word, who is the Coweta Circuit Defender and serves as Interim Capital Defender, when asked about the order appointing the public defenders in this case, responded that it was “an illegal order” because “I didn’t feel like the Statute authorized the Public

³⁶ The Court further stated in *Faretta*: “An unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction.” *Faretta*, 422 U.S. at 820-21.

³⁷ O.C.G.A. § 17-12-23 (a) (1) (2003), 2003 Ga. Laws Act 32 (HB 770).

³⁸ O.C.G.A. § 17-12-121 (2003), 2003 Ga. Laws Act 32 (HB 770), revised and recodified at O.C.G.A. § 17-12-12 (effective July 1, 2008) (emphasis added).

³⁹ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1972) (“The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”)

Defender to be appointed to represent indigents in cases where the State is seeking the death penalty, because the Statute specifically assigns that to the Georgia Capital Defender.” Word Depo. at 137. He also testified:

Q. And the assigning [of] a death penalty case to a Circuit Defender office was unprecedented at this time?

A. Yes.

Q. Nobody had ever done that before?

A. No.

Id. at 138. Thus, the circuit public defenders were not statutorily authorized to accept representation of Weis in this case.

The majority further states that “[e]ven though the public defenders did not receive all the funds that they requested” – in fact, the public defenders made it clear that they could not secure *any* funds from *any source* – “they had a responsibility to move the case forward by representing Weis to the best of their ability.” Majority Op. at 14-15 (citing Ga. R. Prof’l Conduct 1.3 regarding diligence).⁴⁰ But lawyers have no responsibility to exercise diligence until they are

⁴⁰ The majority also cited *Miller v. State*, 245 Ga. 137, 263 S.E.2d 441 (1980); *Arrington v. State*, 286 Ga. 335, 687 S.E.2d 438 (2009); and *McMichen v. Hall*, ___ Ga. ___, 684 S.E.2d 641 (2009), but those cases do not support finding fault with the public defenders and attributing it to Weis. *Miller* involved a trial attorney’s motion to withdraw based on the viability of a particular defense. *Miller*, 245 Ga. at 137, 687 S.E.2d at 441. The motion to withdraw in *Miller* had nothing to do with the attorney’s ability to handle the case, which was the public defenders’ problem here. *Arrington* and *McMichen* involved the denial of funding for a mitigation specialist and an expert because the lawyers in those cases made insufficient showings for why

actually representing the client. Moreover, the public defenders testified that they responded to a more fundamental ethical requirement in moving to withdraw – Rule 1.1’s requirement that “[a] lawyer shall provide competent representation to a client,” and “a lawyer shall not handle a matter” unless he can do so effectively. Ga. R. Prof’l Conduct 1.1.⁴¹

One public defender, Tamara Jacobs (Bell),⁴² testified that she was not certified to handle capital cases,⁴³ and stated in an affidavit that it was “*impossible* for me to undertake the representation of Weis in a capital case” while representing her other clients. R-934 (emphasis added). Jacobs was lead counsel in 222 cases, 103 of them felonies, and the total number of cases in which she was “co-counsel, second chair and fill-in” was “about 416” – divided about 50-50 between felonies

the specialist and the expert were necessary. *Arrington*, 286 Ga. at 337-38, 687 S.E.2d at 445-46; *McMichen*, 684 S.E.2d at 646. No such issue was presented here.

⁴¹ Deposition of Joseph Saia (4/4/2008) at 40 (introduced at the February 11, 2009 hearing, Tr-47) [hereinafter “Saia Depo.”]; Deposition of Tamara Jacobs Bell (4/4/2008) at 22 (introduced at the February 11, 2009 hearing, Tr-47) [hereinafter “Jacobs Depo.”]; Rule 1.1 further states that in order to handle a case competently, a lawyer must have “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *See also* Ga. R. Prof’l Conduct 1.16 Comment (“A lawyer should not accept representation in a matter unless it can be performed competently.”); American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.3 and accompanying commentary (“It is each attorney’s duty under the Model Rules of Professional Conduct neither to accept employment when it would jeopardize the lawyer’s ability to render competent representation nor to handle cases ‘without adequate preparation.’”), reprinted at 31 HOFSTRA L. REV. 913, 997 (2003).

⁴² Tamara Jacobs Bell goes by the name Tamara Jacobs professionally.

⁴³ Jacobs Depo. at 28-29; *see also* Unified Appeal, Rule II.A.1 (requiring certification).

and misdemeanors.⁴⁴ She also had supervisory, mentoring and training responsibilities in the circuit public defender office.⁴⁵ By any measure of reasonable attorney caseloads,⁴⁶ she was legally and ethically prohibited from taking on another case of any kind.

Jacobs testified that she received an e-mail from an administrator in the Public Defender Standards Council office in August of 2007, three months before being appointed to represent Weis, asking if she was certified and willing to take capital cases.⁴⁷ She responded in an e-mail that her certification had lapsed because she had not had any training for handling capital cases since 2004. She also wrote, “my caseload and training duties for my Circuit take up far more than 40 hours a week of my time, and I do not feel that I can handle a ‘second job’, even if it were legal. The policy against PDs serving in death penalty cases is, unfortunately, essential, so long as our caseloads remain this high and our staffing this low.”⁴⁸ Jacobs explained that by “even if it were legal” she meant that circuit

⁴⁴ R-932-34; Jacobs Depo. at 17-18.

⁴⁵ Jacobs Depo. at 5-10.

⁴⁶ *See supra* n.41 (quoting the Georgia Rules of Professional Conduct and the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases).

⁴⁷ Jacobs Depo. at 28-30.

⁴⁸ Exhibit 1 to Jacobs Depo. (e-mail dated Aug. 28, 2007 from Tamara Jacobs to Nolan Martin); *see also* Jacobs Depo. at 29.

defenders were not legally authorized to handle capital cases.⁴⁹ She also explained that when she applied for and was hired for her job, she was told explicitly that she would not be handling any capital cases because the authority of the circuit public defenders offices did not extend to capital cases:

Q. Was it your understanding that the Circuit Defender office would not be responsible for doing capital cases?

A. It was a very clear understanding. I was specifically instructed that it wouldn't before I joined and then again at one point when there were cases that we had started that as soon as they went capital we were not allowed to proceed on them and shouldn't have.

Q. Why not?

A. Because Capital Defenders office was set up specifically to do that.

...

Q. You said that the death penalty cases you had had in private practice had taken a great toll on you. Tell us what you mean.

A. Essentially, death penalty cases are a second job. To bring one all the way through trial becomes a full-time job, plus I had been trying to juggle a private practice, a contract defense job and do that. My health had suffered when I was trying to handle two death penalty cases plus private practice. And they take, besides an overwhelming toll in terms of time, effort and energy, they take an emotional toll. And I had sort of figured I paid my dues.⁵⁰

⁴⁹ Jacobs Depo. at 29-30.

⁵⁰ *Id.* at 11-12. *See also id.* at 29-30.

The other public defender, Joseph Saia, was carrying 91 felony cases and was running a four-county circuit public defender office with 12 full-time lawyers and one part-time lawyer. The “biggest part” of Saia’s job was dealing with the judges and the district attorneys on administrative matters.⁵¹ He recognized that if he became involved in a capital case, he would be “put in a Hobson’s choice between the clients [he] already represented and the enormous job of handling a death penalty case.”⁵²

Because it was “impossible” for Jacobs and Saia to provide effective assistance to Weis, the only professionally responsible thing for them to do was to seek to withdraw. Rule 6.2 states that “[f]or good cause a lawyer may seek to avoid appointment by a tribunal to represent a person,” Ga. R. Prof’l Conduct 6.2, and the comment to the rule clarifies that “[g]ood cause exists if the lawyer could not handle the matter competently,” Ga. R. Prof’l Conduct 6.2 cmt. The public defenders were compelled by the Rules of Professional Conduct to seek to withdraw from Weis’ case. Accordingly, they filed three motions to withdraw. R-888-890, 962-969. The trial court should have granted them.

⁵¹ R. 926-30; Saia Depo. (4/4/2008) at 9-10 (introduced at the February 11, 2009 hearing, Tr-47).

⁵² *Id.* at 40.

C. Weis Was Not Required to Wait Until After Trial to Assert His Right to Counsel.

The Court should surely reconsider its holding that Weis is to be faulted for asserting his right to counsel at the earliest practicable moment, and that any concerns about the ability of the public defenders to represent Weis *effectively* could be addressed “if necessary, *after* trial.” Majority Op. at 15 (emphasis in original). This Court has admonished litigants to assert their right to counsel at the earliest practicable moment,⁵³ and it has rewarded those who have promptly raised the issue.⁵⁴ In doing so, this Court has recognized that the right to a speedy trial is the right to a constitutional trial. It is not the right to an unconstitutional trial, followed by a reversal for ineffective assistance of counsel, followed by a retrial. The majority opinion also presents something of a Catch-22. In all likelihood, if Weis had accepted representation by the public defenders, he would have been found to have waived any right to complain about the substitution of counsel under

⁵³ See *Garland v. State*, 283 Ga. 201, 203, 657 S.E.2d 842, 844 (2008); *Trauth v. State*, 283 Ga. 141, 143-44, 657 S.E.2d 225, 227 (2008); *Smith v. State*, 255 Ga. 654, 655, 341 S.E.2d 5, 7 (1986).

⁵⁴ See *Grant v. State*, 278 Ga. 817, 607 S.E.2d 586 (2005) (reversing in pretrial appeal where trial judge removed counsel who was familiar with the case and had an established attorney-client relationship with the defendant); *Williams v. State*, 279 Ga. 154, 611 S.E.2d 51 (2005) (same); *Roberts v. State*, 263 Ga. 764, 438 S.E.2d 905 (1994) (same); *Davis v. State*, 261 Ga. 221, 403 S.E.2d 800 (1991) (same); and *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989) (same).

Smith v. State, 255 Ga. 654, 655, 341 S.E.2d 5, 7 (1986), and the many cases that have followed it.

Moreover, Weis has rights under the Indigent Defense Act of 2003, which established the Capital Defender, and under the Unified Appeal, which requires that defendants in capital cases be represented by two attorneys who meet minimum qualifications “[i]n order to insure that persons are adequately represented in death penalty cases.” Unified Appeal, Rule II, A. Weis was no more required to accept representation by the public defenders than he was required to accept representation by only one lawyer when Georgia law requires appointment of two.

Finally, because of the highly deferential standard of *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984),⁵⁵ it would have been suicidal for Weis

⁵⁵ Under *Strickland*, courts must be “highly deferential” in evaluating counsel’s performance and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” 466 U.S. at 689. See, e.g., *Bell v. Cone*, 535 U.S. 685, 702-703 (2002) (attorney diagnosed with mental illness who committed suicide after trial found not to have rendered ineffective assistance of counsel even though he did not interview witnesses who could have provided mitigating evidence, did not introduce available mitigating evidence, and did not make a closing argument at the penalty phase). The difficulties of prevailing on an ineffectiveness claim are illustrated by recent decisions of this Court. See, e.g., *Head v. Hill*, 277 Ga. 255, 266, 587 S.E.2d 613, 625 (Ga. 2003) (rejecting ineffectiveness claim); *Hall v. Lee*, 286 Ga. 79, 684 S.E.2d 868 (Ga. 2009) (same); *Hall v. Terrell*, 285 Ga. 448, 451, 679 S.E.2d 17, 21 (Ga. 2009) (reversing habeas court’s finding of ineffective assistance of counsel, finding counsel did not perform deficiently); *Hall v. Brannan*, 284 Ga. 716, 721-24, 670 S.E.2d 87, 93-95 (Ga. 2008) (same). Even where trial lawyers are found to have performed deficiently, this Court has reversed ineffectiveness findings, holding that there was no prejudice. See *Hall v. Lance*, 286 Ga. 365, 366-76, 687 S.E.2d 809, 811-18 (Ga. 2010) (reversing habeas court’s finding of ineffective assistance of counsel in a capital case for lack of prejudice); *Schofield v. Cook*, 284 Ga. 240, 253,

to accept whatever subpar representation he would have received from the public defenders in the hope of prevailing on an ineffectiveness claim after trial. But even assuming that he could prevail on an ineffectiveness claim and win reversal, it is contrary to every notion of judicial economy to go forward with *a death penalty trial* with the risk that it may be infected by the most fundamental error – inadequate legal representation – only to have to try the case again. This Court has corrected violations of the right to counsel prior to trial in *Amadeo* and the cases that have followed it. For the reasons this Court corrected the constitutional violations in those cases prior to trial and for same reason this Court corrects speedy trial violations prior to trial,⁵⁶ Weis was not required to wait until after trial to seek to protect his right to counsel.

II. THE MAJORITY OPINION IS BASED ON AN ERROR REGARDING THE AVAILABILITY OF FUNDING.

The majority opinion states that “by September 2007,” the Public Defender Standards Council “believed that additional funds would not be available to pay for the case until June of 2009,”⁵⁷ that, at the evidentiary hearing on November 26, 2007, “it became clear . . . that more funds would not be available until at least

663 S.E.2d 221, 231 (Ga. 2008) (“assuming trial counsel performed deficiently regarding this issue, no prejudice . . . resulted”).

⁵⁶ See *Hubbard v. State*, 254 Ga. 694, 695, 333 S.E.2d 827, 828 (1985).

⁵⁷ Majority Op. at 2.

June of 2009,”⁵⁸ that Citronberg and West “knew as early as November 2007 that no funds would be available for them for at least another year and a half,”⁵⁹ that Citronberg and West “knew that no funds would be available to pay them until at least June 2009,”⁶⁰ and that Citronberg and West “insist[ed] on being reassigned to a case in which they knew they could not be paid.”⁶¹ There is no support in the record for these statements. No one knew that funding would be available in July 2009 until Mack Crawford announced at the July 8, 2009 hearing that he had come up with \$115,000 for the case – \$75,000 for attorney fees and \$40,000 for investigative and expert assistance.⁶²

At the hearing on November 26, 2007, Mack Crawford testified that he had approximately \$1.2 million for between 85 and 90 capital cases. Nov. 26, 2007 hearing Tr-22-23. He had required 21 private attorneys, who were handling capital cases, to submit budgets, as Citronberg and West had done,⁶³ in order “to know

⁵⁸ Majority Op. at 8.

⁵⁹ Majority Op. at 13.

⁶⁰ Majority Op. at 13.

⁶¹ Majority Op. at 14.

⁶² July 8, 2009 *Ex Parte* Hearing, Tr-23-25. Crawford gave no explanation of how he had arrived at this figure. The budget for the case was \$255,000.

⁶³ Citronberg and West provided Crawford with a budget for the anticipated cost of defending the case by letter of Sept. 26, 2007, after receiving a letter from Crawford dated Sept. 18, 2007, requesting a budget and stating that the Council would not process any future bills until a signed contract was in place. R-860 (appended to Defendant’s *Emergency Motion for a Hearing . . .*,

which cases are further along that might require money in this fiscal year . . . the 2008 fiscal year . . . and what moneys would be needed to keep cases moving during the 2009 budget year.” *Id.* at 9. He explained:

What we’re trying to do is we’re trying to take all of these 21 budgets, arrange them in priority as to trial dates first; then, second, arrange them into evidentiary hearing motion dates, being secondary; and then to sit down, once we have them all, and to talk to the defense counsel in each one as to how and to why what is requested is needed; and then to try to reach some type of agreement and then to try to reach some type of approval.

Id. at 11. Crawford reiterated this later in response to questions from the judge, but expressed some uncertainty because of an order regarding funding for the Brian Nichols case. *Id.* at 24-27. He said that because only 18 of the 21 budgets had been returned, he was not putting any of the budgets on the Public Defender Standards Council agenda for approval on November 30, 2007. The next meeting would not be until January, 2008. *Id.* at 11-12. Although *Weis* was set for trial in March, 2008, when asked when there might be funds for it, Crawford replied that it would have to come through the legislature; that it would be the middle of March or April, 2008, before a budget was approved; and that he did not know what the appropriation would be. *Id.* at 15, 27-28.

filed Nov. 14, 2007, R-856). Gerald Word testified that the budget submitted by Citronberg and West was found to be “a reasonable budget . . . within the range of other budgets that were submitted.” Feb. 11, 2009 Hearing Tr-124.

Interim Capital Defender Gerald Word provided further information in a deposition on April 17, 2008. Word testified that the Capital Defender had received supplemental appropriations from the Legislature of approximately \$500,000 to \$600,000 and its budget for the next fiscal year, starting July 1, 2008, had been increased by “around a million dollars.”⁶⁴ As a result, the Capital Defender had resumed paying for representation in some cases and had established priorities for payments, giving preference to the oldest cases that were ready for trial.⁶⁵ Word testified that there was no reason that the *Weis* case could not be scheduled for trial with funding provided as needed to meet the schedule:

Q. And with regard to the *Weis* case, or any other case in that situation with private lawyers, you would be in a position at this point to sit down and figure out a time frame, and pay the lawyers, and pay the experts, is that true?

A. Oh, yes, I believe so. Because they [Citronberg and West] did submit a budget. . . . I think it was a very reasonable budget. . . .

Q. And knowing that it was a priority for the Judge that it’s two years old, I mean, all those things could put it toward the top of the list in terms of getting money?

A. Oh, yes. You know, I think that any case, whether it be this one, or the *Rucker* case, or Judge McCorvey’s situation down in Tifton, that we definitely listen to the Judges and the priority issues of those cases that are ripe to be tried, and want to be tried, and we would have given that a fairly high priority.

⁶⁴ Word Depo. at 35, 37, 68.

⁶⁵ *Id.* at 73, 112, 114-117.

Q. And you no longer have this outstanding Order in the *Nichols* case, which sort of left you in a quandary as to whether you could pay money in other cases, right?

A. That is my understanding, is that . . . once we entered into the Consent Order with regard to *Nichols*, I think that that funding issue, if not totally went away, virtually went away in that we're limited in our exposure and it's something that they budgeted for.

Q. So if . . . Mr. West and Mr. Citronberg just were reinstated on this case, it would actually be possible to fund their fees, the experts, the mitigation specialists going forward?

A. Right. With what I have as far as budget information, I believe it would be.

Q. It would not hold the case up?

A. No.

Q. It wouldn't cause any delay?

A. Not in my belief.

Q. In fact, given their familiarity with the case, they already know the client, know the case, and had investigated it and identified experts, they would be in a position to move the case forward more promptly?

A. I believe they would be. I mean, that would be my opinion.⁶⁶

Based on this information, an agreement was reached on April 25, 2008 to restore Citronberg and West as counsel provided they were given a contract and funding. West placed a telephone call to Word from the Pike County Courthouse

⁶⁶ *Id.* at 142-44.

on April 25, 2008, to confirm that funding was available. Word told West that a contract could be signed and funding provided for an amount only slightly less than what was in the budget proposed by Citronberg and West in their letter dated September 26, 2007, if Citronberg and West were to resume representing Weis.⁶⁷ Based on those representations, a stipulation was reached that provided that Citronberg and West would be reinstated. However, the stipulation was conditioned upon Citronberg and West obtaining a contract and funding from the State. Feb. 11, 2009 Hearing Tr-88.

As Judge Caldwell related at a status hearing on January 5, 2009, “a contract was to be signed between the Public Defender Standards Council and counsel representing Weis in the criminal proceeding so we could then move the case forward.” Jan. 5, 2009 Status Hearing Tr-3.

Citronberg and West were on a conference call to Word and Sarah Haskin, chief of staff of the Public Defender Standards Council, the following week, on April 30, 2008, to finalize the budget for the case. They were told that \$255,000 had been approved for the representation of Weis.⁶⁸

⁶⁷ Feb. 11, 2009 Hearing Tr-83-84, 124-25.

⁶⁸ Hearing of Feb. 11, 2009 Tr-103, 108-09, 140, 256, Ex. 4 (e-mail from Gerald Word to Citronberg, West, Haskin, and others confirming the \$255,000 figure).

However, despite the clear agreement between the State and Weis' lawyers, Crawford refused to make funds available to Citronberg and West for the next eight months. Crawford also declined to respond to repeated efforts by Citronberg and West to sign a contract for Weis' representation. As related to the trial court at a status hearing on January 5, 2009:

MR. BRIGHT: . . . And when we were all here on April 25th and we were going back and forth about whether we were going to reinstate the lawyers, a telephone call was made.

THE COURT: And I agreed to do so.

MR. BRIGHT: You agreed to it, and we all agreed to it. And a telephone call was made and said to Mr. Word . . . can a contract be signed. And I'll tell you, Judge, my thought about it was I thought they were going to drive up that afternoon and sign the contract; if not, certainly the next day or within the next week. . . . Mr. Crawford had insisted that every case have a contract. They were all –

THE COURT: That was part of the hearing that we had had prior to that.

MR. BRIGHT: Part of the hearing we had had, that you can't have a case without a contract. . . .

You may recall from the hearing that the lawyers in this case had very promptly, within a week of being asked to submit a budget, in September of '07 they had submitted a budget.

Right after that hearing, on [April] 25th, Judge, within a week of that hearing, they had been on the telephone to Mrs. Sara Haskin and to the interim capital defender, Jerry Word, about it. So they had followed up, the lawyers had followed up. And they had sent an e-mail and sent a letter . . . and then just for the last eight months didn't hear anything.

And your lawyer, Alan Connell, had twice written letters about it. I had written to the council about it, made telephone calls about it.

Mr. West and Mr. Citronberg had made telephone calls and sent e-mails to the council about it. Members of the council themselves had made comments about why is this case, why is – why, of all of the cases, is this one young man without counsel; something has to be done.

And for whatever reason Mr. Crawford, from April 25th until today, not only, Judge, didn't sign a contract, wouldn't even negotiate about a contract, wouldn't propose anything different, and therefore here we are.

If what had been anticipated had happened, Judge, if we had signed the contract on April 26th, 7th, 8th, 9th, within a few days, this case would be ready for trial right now, this month.

THE COURT: Well, that's what all our agreements were.

MR. BRIGHT: You're exactly right.

THE COURT: And that this court would take no action and do anything –

MR. BRIGHT: Right.

THE COURT: – until January of '09.

MR. BRIGHT: That's right.

THE COURT: As far as I know you've lived up to what y'all had talked about. This court has lived up to what it talked about and said it would do.

Jan. 5, 2009 Hearing Tr-6-8.

MR. BRIGHT: I'll tell you, Judge, one of the reasons why this – why that didn't happen was because nobody thought this was going to drag on for eight months. . . . Of course Mr. Crawford wouldn't return phone calls and wouldn't return e-mails and never said I'm not going

to sign it. So everybody thought it was just being put off or it was in the basket but it just hadn't been signed yet. And then we look back and we see that – I sent an e-mail to the council three weeks, Judge, after we had our April 25th hearing. And I said three weeks have gone by and this contract still hasn't been signed, and this is jeopardizing this case and jeopardizing what's going on; and I can't believe that we've let this much time go by. . . .

Jan. 5, 2009 Hearing Tr-17-18

The majority opinion states:

. . . [D]espite the fact that (1) Citronberg and West asserted that they could not go forward without additional funding; (2) Citronberg and West knew as early as November 2007 that no additional funding would be available for them for at least another year and a half; and (3) the trial court had appointed competent attorneys from the public defender's office in order to move the case forward; Citronberg and West nevertheless fought to be placed back onto the case. Being placed back on the case, however, did not change the fact that *no funds were immediately available to pay them*, and did not change the fact that *they knew that no funds would be available to pay them until at least June 2009*. In short, Citronberg and West fought to place themselves back onto a case that they claimed that they could not move forward due to a lack of funding, *knowing that no additional funding would be immediately available to them* to allow them to move forward with the case in the manner that they desired.

Majority Op. at 13 (emphasis added) (footnote omitted). The record makes clear, however, that this is simply not so. Citronberg and West filed a motion for reconsideration of the order removing them, a motion to certify the order for interim review, a petition for interim review and a motion for rehearing when it

was denied. Rehearing was denied on February 25, 2008.⁶⁹ They were told by the Interim Capital Defender that funds *were immediately available to them* on April 25, 2008.

In footnote 2, which appears in the paragraph quoted above, the majority emphasizes that Citronberg and West agreed on April 25, 2008 that they would not seek continuances based on any “*lack of funds* or manpower or time to prepare said case for trial.” Majority Op. at 13 n.2 (emphasis in original). However, this was because it was the understanding of all involved that funding was *immediately available*; that Citronberg and West would have funds in the eight months remaining in 2008 to prepare the case and, as related in the status hearing to Judge Caldwell, *that the case would be ready for trial in January of 2009*, and they would not need any further funding to try the case. The plan was to make funding available for Weis just as had been done in another case that West had in Douglas County before Judge Emerson which had been funded and went to trial in August, 2008.⁷⁰ The plan was to fund the *Weis* case throughout 2008 so that it could be tried at the start of 2009.

⁶⁹ *Weis v. State*, Ga. S. Ct. No. S08I0639 (Order of Feb. 25, 2008).

⁷⁰ Word described that funding was being scheduled for the case so that it could be tried in August, 2008. Word Depo. at 68. At the status hearing in January 2009, the trial court in *Weis* was told, “And that case that I mentioned, the Douglas County case, was in fact – Judge Emerson’s case was in fact tried last August, just like it was testified to.” Jan. 5 Status Hearing Tr-5-6.

That, however, did not happen. Thus, the central premise of the majority opinion is based on a fundamental misunderstanding of the facts. Had the Standards Council signed a contract and provided the funding in 2008, as Word said it could, Weis would have gone to trial in early 2009 with Citronberg and West as his counsel.⁷¹ That trial would have occurred long before the death of Weis' mother, and it would have avoided the continued detention of this mentally ill man in a county jail ill-equipped to handle the mentally ill.⁷² The reason this case was not tried in early 2009 was the failure of the Standards Council to provide the funding that Word said was available during 2008.

It is important to note, however, that this case would have been tried *in 2008* had the Public Defender Standards Council not run out of funding in April of 2007. The case was on track for the investigation to be completed and motions to be heard and decided in 2007 and trial was set for March of 2008. Had there been no

⁷¹ Feb. 11, 2009 Hearing Tr-102. Citronberg testified that if funding had been provided starting in April of 2008 and he had been able to retain expert witnesses and complete the investigation in West Virginia, he would have been able to try the case in January 2009.

⁷² It is undeniable that a short-term detention facility is no place for a severely mentally ill man like Weis. As the detention changed from short term to long term, Weis' condition deteriorated, as evidenced by his three suicide attempts. He had no control over his medications. One suicide attempt came just days after he was taken off 800 milligrams of Seroquel. Sent to Central State Hospital by the court, the doctors there restored him to the dosage immediately. This confirms that, as has been found at most county jails, "proper diagnosis, treatment and rehabilitation are essentially non-existent." See Georgia Appleseed Center for Law and Justice, *Justice for People with Mental Illness in Georgia* 27-28 (June 26, 2007) <http://www.gmhc.org/files/handbook.pdf>. See also Mental Health America, *Position Statement 53: Mental Health Courts* (Sept. 15, 2009), <http://www.nmha.org/go/position-statements/53> ("[J]ail experiences tend to exacerbate underlying symptoms of mental illness.").

breakdown in funding, motions would have been heard at the November 26, 2007 hearing – instead of counsel being removed – and the case would have been on schedule for trial in March, 2008. The *only* reason this case was not tried in 2008 was because of the lack of funding from the State for eight months in 2007. That delay – like the time it took the State to decide to seek the death penalty, which was almost a year, and the time after the April 25, 2008 hearing – is entirely attributable to the State of Georgia.

III. BECAUSE WEIS HAD BEEN REPRESENTED FOR OVER A YEAR, HIS ATTORNEY-CLIENT RELATIONSHIP COULD BE INTERRUPTED ONLY FOR THE MOST COMPELLING REASONS.

An indigent defendant accused of a crime has no right to compel a trial court to appoint an attorney of his choice. *Davis v. State*, 261 Ga. 221, 403 S.E.2d 800 (1991); *Lipham v. State*, 257 Ga. 808, 364 S.E.2d 840 (1988). However, this Court, like many others, has recognized that “when a defendant’s choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no countervailing considerations of comparable weight, it is an abuse of discretion to deny the defendant’s request to appoint the counsel of his preference.” *Davis*, 261 Ga. at 222, 384 S.E.2d at 801, citing *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989). The majority found that such “countervailing considerations” existed in this case even though the chain of events that led to

removal of counsel was set in motion by the State's inability to fund Weis' counsel from April to November, 2007. However, *Amadeo* and *Davis* involved the appointment of counsel at the outset of the case. This case involves the removal of two lawyers who had been representing Weis for over one year, had met with him, visited his family in West Virginia, retained a mitigation specialist, reviewed records, litigated motions, and become involved in an attorney-client relationship.

Once counsel is appointed, an attorney-client relationship is established and "is no less inviolable than if counsel had been retained by the defendant himself." *McKinnon v. State*, 526 P.2d 18, 24 (Ala. 1974). "[A]ny meaningful distinction between indigent and non-indigent defendants' right to representation by counsel ends once a valid appointment of counsel has been made." *State v. Huskey*, 82 S.W.3d 297, 305 (Tenn. Crim. App. 2002). The California Supreme Court, after acknowledging that an indigent defendant may not demand the appointment of counsel of his choice, concluded that a defendant had a right to maintain an attorney-client relationship, once established:

[W]e must consider whether a court-appointed counsel may be dismissed, over the defendant's objection, in circumstances in which a retained counsel could not be removed. A superficial response is that the defendant does not pay his fee, and hence has no ground to complain as long as the attorney currently handling his case is competent. But the attorney-client relationship is not that elementary: it involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This

is particularly essential, of course, when the attorney is defending the client's life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service. It follows that once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.

Smith v. Superior Court of Los Angeles County, 440 P.2d 65, 74 (1968) (citations omitted). As the California Court of Appeals put it, "Criminal defense lawyers are not fungible." *Boulas v. Superior Court*, 188 Cal. App.3d 422, 430, 233 Cal.Rptr. 487 (Cal. Ct. App. 1987). Thus, "once counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of that counsel at trial." *English v. State*, 259 A.2d 822, 826 (1969) (emphasis in original). See also *Stearnes v. Clinton*, 780 S.W.2d 216, 223 (Tex. Crim. App. 1989) (stating that the power of the trial court to appoint counsel to an indigent defendant does not carry with it the concomitant power to remove counsel); *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. Cir. 1978) ("[o]nce counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of that counsel at trial").

The majority's reliance upon the Louisiana Supreme Court's opinion in *State v. Reeves*, 11 So.3d 1031 (La. 2009), is misplaced. The Louisiana Supreme

Court held that the constitutional right to counsel of choice is limited to a defendant who “hired his own counsel” and whose counsel “volunteered his services,” but not to a “defendant who has been appointed counsel, whether a private attorney or a public defender.” *Reeves*, 11 So.3d at 1056. These distinctions are contrary to this Court’s holdings in *Amadeo*, *Davis*, *Roberts*, *Grant* and *Williams*, which made no such distinctions. *See, e.g., Grant*, 278 Ga. at 817, 607 S.E.2d at 587, quoting *Davis*, 261 Ga. at 222, 403 S.E.2d at 801. *See also Brooks v. State*, 259 Ga. 562, 385 S.E.2d 81 (1989) (recognizing right to *ex parte* applications for funds for expert assistance so indigent defendant is not put at disadvantage by being required to reveal his strategy and work product in order to apply for expert assistance).

The Louisiana Supreme Court analyzed the nature of the representation *Reeves* was receiving to determine what rights he had. *Id.* at 1055. Upon determining that *Reeves* had appointed counsel, it decided he had no right to counsel of choice. *Id.* at 1062. The Louisiana Supreme Court did not recognize any right to continuity of counsel at all. *Id.* at 1065. Thus, the trial court in *Reeves* was not addressing a constitutional issue such as the one presented here, but taking on a “management role” and discharging its “fiduciary obligation” to manage the representation. *Id.* at 1049.

Reeves is different in other ways as well, some of them instructive. The hearing on counsel in *Reeves* was held with notice and the right to be heard, unlike the District Attorney's surprise motion in this case.⁷³ The Louisiana Supreme Court also emphasized that unlike one of the lawyers assigned to Weis, the lawyers appointed to represent Reeves were certified to represent defendants in capital cases. *Id.* at 1051-52. Unlike the public defender who was involved in over 400 cases appointed to represent Weis, the public defender appointed to represent Reeves was carrying 35 cases. *Id.* at 1070. And the prosecutor in *Reeves* had no comment on the issue of counsel for the defendant. *Id.* at 1052.

This Court should reconsider the critical constitutional significance of the continuity of the attorney-client relationship once established.

IV. PROPER CONSIDERATION OF THE *BARKER* FACTORS CLEARLY ESTABLISHES A SPEEDY TRIAL VIOLATION.

An appropriate application of the *Barker* test to this case must start with the following observation: this case would have gone to trial in a timely manner if the

⁷³ The judge in *Reeves* had conducted "a number of informal conferences" with the parties, the lawyers who had represented Reeves at his first trial acknowledged their familiarity with the court's proposal, and the public defender who was being considered to replace them came to the hearing represented by counsel. *Reeves*, 11 So. 3d at 1049-50. Before making a ruling, the judge "wished to establish a record and to obtain evidence." *Id.* at 1050. After an extensive hearing, where evidence was taken and everyone had an opportunity to present evidence and be heard, the judge informed counsel they would be allowed to seek a writ of review in the appellate court. *Id.* at 1054. That was due process, something that was completely missing at the hearing where Weis' lawyers were removed.

State of Georgia had simply appropriated sufficient funding to pay for indigent defense representation in capital cases. It is the State of Georgia, and not Weis or his lawyers, that played the pivotal role “in the chain of events that started all this.” *Brillon*, 129 S.Ct. at 1292. Absent the State’s failure to adequately fund the public defender system, “no speedy-trial error would have arisen.” *Id.*

It was improper for the State to remove Weis’ original attorneys, and when it did so and appointed public defenders who were neither authorized nor competent to handle a capital case, Weis was entitled to pursue his right to counsel. He pursued that right, and he successfully secured representation by his original attorneys in five months. He cannot be blamed for successfully pursuing his right to counsel. He also cannot be blamed for failing to assert his right to a speedy trial when he and his attorneys were being denied the means to defend his case. With regard to prejudice, he has been denied his most fundamental right during the critical period from “the time of [his] arraignment until the beginning of [his] trial, when consultation, thorough-going investigation and preparation [are] vitally important.” *Powell v. Alabama*, 287 U.S. 45, 57 (1932). This case would have gone to trial before the death of Weis’ mother if the State had funded the public defender system adequately. Because he is severely mentally ill, Weis has suffered in ways unimaginable to the rest of us. Every *Barker* factor weighs in favor of Weis. Therefore, Weis has established a speedy trial violation.

V. THE COURT SHOULD RECONSIDER THE REPERCUSSIONS OF ITS DECISION.

Gerald Word, who was appointed Coweta Circuit Defender when Georgia's public defender system was created and has served as Interim Capital Defender since September 2007, was asked about the impact of appointing public defenders to capital cases:

Q. And would it be fair to say you've been a Circuit Public Defender, you're the Capital Defender, you're familiar with the ethical responsibilities of Public Defenders?

A. Yes.

Q. And would it be fair to say that one of your concerns would be that they would have somewhat of a Hobson's choice between either devoting the time necessary to this death penalty case, and perhaps short-changing their Circuit Public Defender clients, or devoting the professional and ethical responsibilities they have to those clients and short-changing the client, Mr. Weis, in the death penalty case?

A. I would agree with that. And then there is a third concern. And that is, that if they transfer their cases in the Public Defender realm to other Public Defenders who are already overworked, that the clients get short-changed in another way, or some other clients get short-changed. Because all of a sudden the other Public Defenders in the office are now carrying a far greater case load than they were even before. So there are three Hobson choices there.

...

As a Circuit Public Defender, I certainly believe that if somebody dumped a death penalty case on my office it would be extremely disruptive to the operation of that. And I have no reason in talking to Mr. Saia to believe that it would be any different in his office. And I

know Ms. Jacobs has expressed that concern, that it would be very disruptive to her and her clientele to me.

Word Depo. at 145-47.

Georgia's circuit public defender offices are struggling with huge caseloads and inadequate resources. One Georgia public defender, upon resigning to go work as a public defender in another state, wrote that she resigned because she "drove home on a daily basis with the knowledge that I was not providing effective representation to my clients . . . due to overwhelming caseloads, being required to represent clients with conflicting interests, a woefully insufficient budget for experts, lack of adequate training and supervision and an insufficient investigative staff with little to no training."⁷⁴

Assigning capital cases to circuit public defender offices is bad for the circuit public defender offices and bad for the quality of representation in capital cases. Georgia has a strong public interest in strengthening both.

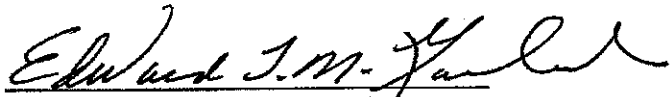
CONCLUSION

This speedy trial case involves the highest stakes – the life of a human being – and the most fundamental constitutional right – the right to counsel. Georgia is still overcoming a history of neglect in both areas. Today it is at a crossroads in its

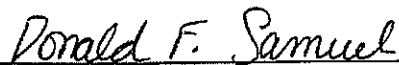
⁷⁴ Marie-Pierre Py, *Without funds, PD system will deteriorate further*, FULTON COUNTY DAILY REPORT, March 19, 2009.

history. This case is primarily about the denial of Jamie Ryan Weis' right to counsel which resulted in the denial of a speedy trial. But the impact of this Court's decision will be felt beyond this case. It is critical to get the facts right and the law right. For that reason, Appellant most respectfully urges this Court to grant this Motion for Reconsideration, to invite *amicus* briefing from the Public Defender Standards Council, the Georgia Bar, and other interested *amici*, and, upon full reconsideration of the case, to reverse its decision.

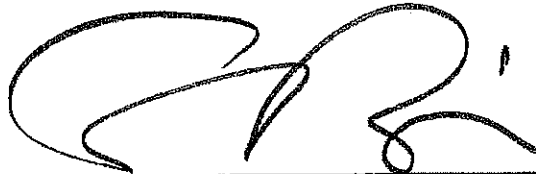
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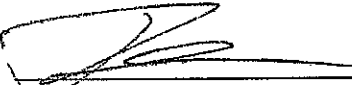
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