

In the
Supreme Court of Georgia

No. S09A1951

JAMIE RYAN WEIS,
Appellant,

vs.

STATE OF GEORGIA,
Appellee.

BRIEF FOR APPELLANT

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IN THE SUPREME COURT OF GEORGIA

JAMIE RYAN WEIS,)	
)	
Appellant,)	
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vs.)	No. S09A1951
)	
STATE OF GEORGIA)	
)	
Appellee.)	

BRIEF FOR APPELLANT

Appellant Jamie Ryan Weis appeals to this Court from the denial of his right to a speedy trial in the Superior Court of Pike County.

Mr. Weis has suffered not only extraordinary delay – three and a half years – but extraordinary prejudice. The lawyers who were assigned to represent him in 2006 diligently went about their responsibilities in that regard for six months, but were first denied funding and then illegally removed from representing him altogether. They were not reinstated until a year and two months later. For over two years, there was no funding for his defense, *i.e.*, for legal representation, an investigator, a mitigation specialist or any expert witnesses. Funding was not restored until July 8, 2009, and then defense counsel were assured of receiving less than half of what had been recognized as necessary for the defense of Mr. Weis.

But Jamie Weis has suffered other prejudice as well from the delay. Mr. Weis, who suffers from psychosis, depression and anxiety, and is heavily medicated, has been detained in a county jail, a short-term detention facility, and has experienced anxiety and concern beyond that of a mentally sound defendant represented by counsel. Mr. Weis has attempted suicide three times, and, on occasion, has reached a point of despair so severe that he sent word to the District Attorney and his lawyers that he would like to give up and be given the death penalty.

Not a moment of the delay is attributable to Mr. Weis. It took the State almost a year to properly file its Notice of Intent to Seek the Death Penalty. Mr. Weis received about six months of legal representation before his lawyers were unable to obtain funds for experts in April 2007. His lawyers were removed on motion by the District Attorney without the most basic elements of due process – notice that removal of his counsel was even being contemplated or opportunity to be heard. In efforts to obtain prompt resolution of his case, Mr. Weis sought reinstatement of his lawyers and funding of his defense through several motions, two mandamus actions and an application for interim appeal to this Court.

What has happened in this case is unconscionable and unconstitutional. The delay without counsel was *per se* prejudicial and the entire delay was prejudicial to his right to a fair and reliable determination of his guilt and punishment.

JUDGMENT APPEALED

Appellant Weis appeals from the Orders of the Superior Court of Pike County denying his *Motion to Dismiss the Indictment, or in the Alternative, the Death Penalty, Because of Denial of Right to Counsel and Speedy, Fair and Reliable Trial*, filed on June 24, 2009, which appears at R-1063-73,¹ and his *Motion for Discharge and Acquittal*, filed on July 2, 2009, which appears at R-1118-20. The trial court's summary denial of the *Motion to Dismiss* appears on a copy of the first page of the Motion and was entered on July 20, 2009. It appears at R-1183. The court's order summarily dismissing the *Motion for Discharge and Acquittal*, also entered on July 20, 2009, appears at R-1178.

JURISDICTION

This is the appeal in a capital case of the denial of motions to dismiss the indictment and to discharge the defendant for denial of his rights to a speedy trial guaranteed by Art. I, § 1, ¶ XI (a) of the Georgia Constitution and the Sixth and Fourteenth Amendments of the United States Constitution, as well as other state and federal constitutional rights. *See Hubbard v. State*, 254 Ga. 694, 695, 333 S.E.2d 827, 828 (1985) (recognizing right to pretrial appeal of denial of speedy trial

¹ "R-" refers to the Clerk's Record of filings of pleadings and orders in the case; transcripts are referred to by the date of the transcript and "Tr-" in accordance with this Court's Rule 19 n. 1.

motion). Jurisdiction is proper with this Court as it has exclusive jurisdiction over cases in which the death penalty is sought. Ga. Const. Art. 6, § 6, Par. III (8).

STATEMENT OF THE CASE

Jamie Weis was arrested on February 2, 2006 in Pike County for the murder of Catherine King. The body of Mrs. King had been discovered earlier in the day at her home by her daughter. Mrs. King died as a result of blunt force injuries and two gunshot wounds to the head. Her automobile had been taken. Mr. Weis was ultimately indicted for murder, felony murder, aggravated assault, possession of a firearm, theft by taking of a motor vehicle, armed robbery and burglary. R-4.

The State did not file a Notice of Intent to Seek the Death Penalty until August 25, 2006, R-24, and, because its first indictment was defective, it filed a second Notice on December 11, 2006. R-68. The undersigned attorneys, Robert Citronberg and Thomas West, entered their appearances as counsel for Mr. Weis on October 12, 2006, after agreeing with the Georgia Public Defender Standards Council to undertake the defense of Mr. Weis. The first appearance hearing was held on January 24, 2007.

Defense counsel filed over 60 motions and commenced an investigation, which included retaining the services of a mitigation specialist and visiting Mr. Weis's home in rural West Virginia to interview family, friends, teachers and others. They litigated non-evidentiary motions in March 2007. However, they

were compelled to move for a continuance in mid-March because the Public Defender Standards Council had informed them that it did not expect to be able to pay them after March 31, 2007.² The trial court denied the motion “at this time” but said that it would “revisit” the issue if necessary. R-784.

On April 24, 2007, defense counsel moved for a continuance because the Standards Council could not provide funding for expert witnesses.³ Counsel moved again for a continuance on October 18, 2007, on the grounds that they were not being paid, that they were unable to obtain the services of experts, and that “some invoices for past services, to which no dispute exists, have not been paid to date, in one instance having been held for almost two months.”⁴

On November 12, 2007, defense counsel filed an “Emergency Motion” for a hearing on their motions for a continuance. In the motion they stated:

² *Motion for Continuance Until Such Time as the Georgia Public Defender Standards Council Funding Imbroglia is Settled Consistent with Defendant’s Right to Adequately Compensated Counsel*, filed on March 12, 2007, R-165 (quoting Mike Mears, director of the Public Defender Standards Council, saying, “We’re funded ’till mid-or-late February, and after that we’ll have to stop paying for outside lawyers” (which included Mr. Weis’s counsel) and that without more funding from the legislature, the Council would run out of money on March 31, 2007.)

³ *Supplemental Filings in Support of Motion for Continuance Until Such Time as the Georgia Public Defender Standards Council Funding Imbroglia is Settled Consistent with Defendant’s Right to Adequately Compensated Counsel*, filed on April 24, 2007, R-829 (relating that the Governor had vetoed the budget and that Mr. Mears, director of the Public Defender Council, had told counsel for Mr. Weis that no funds for experts would be approved until a budget had been approved).

⁴ *Renewed Motion for Continuance Until Such Time as The Georgia Public Defender Standards Council Funding Issue is Settled Consistent with Defendant’s Right to Funds for an Adequate Defense*, filed Oct. 18, 2007, R-847, 849.

The defense has no investigator.

Counsel for the defense have been told verbally that there is no money in the [Georgia Public Defender Standards Council] or [Georgia Capital Defender] budget to pay counsel.

Counsel for the defense have been told verbally that there is no money in the [Georgia Public Defender Standards Council] or [Georgia Capital Defender] budget to pay defense experts.⁵

At a hearing on November 26, 2007, defense counsel presented evidence and argument in support of the motions to continue due to suspension of funding for the defense. They presented the testimony of Mack Crawford, director of the Public Defender Standard Council, who testified that the Council was unable to provide funds for the representation of Mr. Weis and could not say when funds would be available. Hearing of Nov. 26, 2007 Tr.-15-16. After the completion of Mr. Crawford's testimony, counsel for Mr. Weis argued in support of continuing the case until funding became available. *Id.* at 32-39. In response, the District Attorney made an oral motion to remove Mr. Citronberg and Mr. West as counsel for Mr. Weis and replace them with local public defenders he named. *Id.* at 38-39. Defense counsel had been given no notice that such a motion would be made or considered.

⁵ *Emergency Motion for a Hearing on Defendant's Renewed Motion for Continuance Until Such Time as the Georgia Public Defender Standards Council Funding Issue is Settled Consistent with Defendant's Right to Funds for an Adequate Defense*, filed Nov. 12, 2007, R-856, 858.

Nevertheless, Judge Caldwell – after reciting a detailed chronology of the case and summarizing three decisions,⁶ providing the citations to each one – announced his legal conclusion that defendant Mr. Weis was not entitled to counsel of choice, removed attorneys West and Citronberg, and replaced them with two public defenders named by the District Attorney, Joseph Saia and Tamara Jacobs. Nov. 26, 2007 Hearing Tr.-40-50. The next day, the court issued a written *Order Confirming and Clarifying the Oral Pronouncement of this Court on Monday, Nov. 26, 2007*, R-862, stating, “The State’s motion to appoint the staff attorneys of the public defender’s office as counsel is hereby **GRANTED.**” R-864.

Judge Caldwell made it clear in both his statements from the bench and his written order that he had no problem with the quality of representation provided by Citronberg and West, stating in the written order, “both attorneys have **quite capably** served both their client and this court in all prior proceedings in this case.” R-868 [emphasis in original]. *See also* Hearing Nov. 26, 2007 Tr-36 (stating that Citronberg’s and West’s ability was “above standard”), Tr-47 (stating that counsel had “explicit and impeccable credentials to try this case”).

Mr. Weis filed a motion for reconsideration on December 5, 2007, arguing that the removal of defense counsel who were thoroughly familiar with the case and had a well established attorney-client relationship with Mr. Weis was in clear

⁶ *Wilson v. Southerland*, 258 Ga. 479, 371 S.E.2d 382 (1988); *Wheat v. United States*, 486 U.S. 153 (1988), and *Strickland v. Washington*, 466 U.S. 688 (1984).

violation of this Court's decisions in *Grant v. State*, 278 Ga. 817, 607 S.E.2d 586 (2005) (reversing 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). R-872-875. Counsel also noted that no evidence had been presented on whether counsel should remain on the case because that was not an issue presented by the defendant's motions and no notice had been provided that it would be before the Court. R-873.

The motion for reconsideration was supported by an affidavit of Mr. Weis expressing his objection to the removal of his counsel and his belief 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.

On December 10, Tamara Jacobs and Joseph Saia, the local public defenders who had been appointed, filed the first of three motions to withdraw as counsel. R-888. Ms. Jacobs and Mr. Saia also cited *Grant v. State* and the other cases cited in Mr. Weis's motion for reconsideration and noted "it appears it would be error to

refuse to allow [attorneys Citronberg and West] to continue to represent Defendant.” R-889. They also expressed their concern about “the circumstances of their appointment” at the suggestion of the District Attorney and their inability to duplicate the familiarity with the case of attorneys Citronberg and West. *Id.*

Nevertheless, Judge Caldwell orally denied both Mr. Weis's motion for reconsideration and Ms. Jacobs's and Mr. Saia's motion to withdraw at a hearing on December 10, 2007, commenting, “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.” Dec. 10, 2007 Hearing Tr-25-26. The written orders denying the motions appear at R-891, 893.

Mr. Weis also moved the trial court on December 5, 2007 for an order certifying its order removing his counsel for appellate review. R-879. However, Judge Caldwell denied the motion, R-941, 951, and this Court denied the application for interim review in the absence of the trial court’s certification. *Weis v. State*, Ga. S. Ct. No. S08I0639 (Jan. 16, 2008); R-972.

On December 20, 2007, Mr. Weis, with the assistance of *pro bono* counsel, moved to vacate the appointment of the local defenders. R-894. Appended to the motion was an affidavit of Joseph Saia, the public defender for the circuit, describing the enormous workload of his office; stating that in addition to his

administrative duties he carried over 100 cases, 91 of them felonies; and stating that his three investigators were very busy and had no training or experience in investigating the life and background of a defendant for mitigating circumstances. R-926-30. Also appended was an affidavit of public defender Tamara Jacobs, who had also been appointed, stating that she was lead attorney in 222 cases, 103 of them felonies, and that “[i]t is impossible for me to undertake the representation of Weis in a capital case and continue to represent over 200 defendants in felony and misdemeanor cases.” R-931-34. Both Saia and Jacobs stated that they had not been asked whether they had the time and resources to undertake a capital case with their existing caseloads before being appointed. R-929, 934. The trial court never ruled on Mr. Weis’s motion to vacate the appointment of the local public defenders.

Saia and Jacobs filed a *Renewed Motion to Withdraw* on January 17, 2008, and a *Supplement to Renewed Motion to Withdraw* on January 28, 2008. R-962-66. In the *Supplement*, they related to the Court that they too were unable to get funds so that the mitigation specialist could complete her investigation of mitigating factors. *Id.* In addition, they informed the trial court, “[a]lthough the undersigned have explored avenues for funding for experts, investigation and travel in this case, neither the Capital Defenders Office, the Georgia Public Defender Standards Council, nor anyone else has been willing to commit resources for same There

[are] no funding resources available at the Griffin Circuit Defenders Office to cover such expenses.” R. 964. Finally, they reiterated:

As stated in previous pleadings, even if funds were available, the attorneys and investigators employed by the Griffin Circuit Public Defenders Office *lack the time and expertise* to conduct the extensive investigation that is necessary under the current, above-cited case law [*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)]⁷ and to which Defendant is entitled.

The *undersigned remain overburdened with their current caseloads* and other obligations to the circuit. Due to the need to attend court hearings and otherwise represent their many other clients, counsel has had a very limited amount of time to become familiar with this case, review the clerk’s file and the limited files received to date from Mr. Citronberg, and make our own independent assessment of the case.

* * *

For all of the reasons stated above and for all the reasons stated in the earlier pleadings, *counsel cannot, under the current state of affairs, perform adequately in representing the Defendant*, no matter how good our intentions or diligent our efforts.

It violates Defendant’s right to due process under the United States and Georgia’s Constitutions to force counsel to proceed under these circumstances. No person should face the death penalty unrepresented by adequate counsel, simply because of a funding stalemate in Atlanta.

R-964 [emphasis added].⁸ The trial court did not rule on the motion.⁹

⁷ In each of the three cases cited, defense counsel were held to be ineffective for failing to conduct sufficient investigations into mitigating circumstances and present mitigating factors to the jury.

⁸ Public Defenders Saia and Jacobs also described their caseloads and limited investigative resources in depositions introduced at the Feb. 11, 2009 hearing Tr-47. Jacobs testified that she

Mr. Weis then filed a petition for mandamus and prohibition on February 7, 2008 against Judge Caldwell, arguing that he was prohibited from interfering with Appellant's attorney-client relationship and that he had a mandatory duty to reinstate Mr. Citronberg and Mr. West as counsel.¹⁰ *See, e.g., Stearnes v. Clinton*, 780 S.W.2d 216, 221 (Tex. Crim. App. 1989) (granting mandamus relief where trial judge removed defense counsel and ordering reinstatement of counsel). Mr. Weis also sought the recusal of Judge Caldwell on the grounds that he was not impartial in removing his counsel, that he had engaged in *ex parte* communications regarding their removal and it was planned in advance, and that he had directed that Mr. Weis's *pro bono* counsel not be notified of court proceedings. R-975. Judge Thomas Wilson, who was designed to hear the motion, denied it after a hearing on February 11, 2009. R-1027.

The issue of counsel appeared to be resolved on April 25, 2008, when the parties agreed to a stipulation providing for the reinstatement of Mr. Citronberg and

took the public defender job so that she would never be appointed to another capital case, Tamara Jacobs Bell Deposition at 10-12, 29-30, that she was involved as lead counsel or second chair in 416 cases, *id.* at 18, that the investigators in her office lacked the training and time to handle a capital case, *id.* at 37, and that, in answer to an e-mail from a representative of the Council asking public defenders whether they would be willing to take capital cases, she had written back and said that she was not able to take a capital case so long as "our caseload remains this high and our staffing this low." *Id.* at 27, Ex. 1 to her Deposition.

⁹ Because the counsel issues were never resolved, an attorney-client relationship was never formed between Appellant and attorneys Saia and Jacobs.

¹⁰ *Weis v. Caldwell*, Superior Court of Pike County, No. 2008-CV-070 (filed Feb. 7, 2008). The Petition was denied and found moot on February 11, 2009, the same day that Judge Caldwell ordered the reinstatement of attorneys Citronberg and West.

Mr. West as counsel based upon the deposition testimony of the interim capital defender, Gerald Word, that funding was available for this case.¹¹ In order to confirm that funding was available, attorney Tom West placed a telephone call to Mr. Word from the Pike County Courthouse on April 25, 2008.¹² Mr. Word told Mr. West that it appeared funding could be provided for an amount only slightly less than that proposed by Mr. Citronberg and Mr. West in a letter dated September 26, 2007,¹³ and that a contract could be signed with them and funding provided if Citronberg and West were to resume representing Mr. Weis.¹⁴

The following week, on April 30, 2008, Mr. West and Mr. Citronberg had a conference call with interim capital defender Jerry Word and Sarah Haskin, chief of staff of the Public Defender Standards Council, and were told that \$255,000 had

¹¹ The Stipulation appears at R-1023-26. Mr. Word testified at a deposition on April 17, 2008, introduced at the February 11, 2009 hearing, Tr-47, that the Capital Defender had received supplemental appropriations from the Legislature of approximately \$500,000 to \$600,000, Word Deposition at 35, 37. Mr. Word also testified that the Council had been able to resume paying for costs in some capital cases, Word Deposition at 68; and that it had established priorities for payments, giving preference to the oldest cases that were ready for trial. *Id.* at 73, 112, 114-117. Mr. Word testified that there was no reason that this case could not be scheduled for trial with funding provided as needed to meet the schedule.

¹² Feb. 11, 2009 Hearing Tr.-83, 124-25.

¹³ Feb. 11, 2009 Hearing Tr.-124-25. Before they were removed from the case, Mr. Citronberg and Mr. West had provided Mr. Crawford with a budget for the anticipated cost of defending the case by letter of Sept. 26, 2007, after receiving a letter from Mr. 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 . . .*, filed Nov. 14, 2007, R-856). Mr. Word testified that the budget submitted by Mr. Citronberg and Mr. West was found to be "a reasonable budget . . . within the range of other budgets that were submitted." Feb. 11, 2009 Hearing Tr.-124.

¹⁴ *Id.* at 83-84

been approved for the representation of Mr. Weis.¹⁵ Nonetheless, Mr. Crawford refused to sign a contract or provide any funding for the next eight months.¹⁶ Finally, on December 31, 2008, Appellant Weis filed a petition for a writ of mandamus against Mr. Crawford and the Public Defender Standards Council, seeking to compel them to sign a contract with counsel and provide funds so that the case could proceed.¹⁷

On February 11, 2009 – a year and two months after he removed them – Judge Caldwell ordered the reinstatement of Mr. Citronberg and Mr. West as counsel for Mr. Weis. R-1022. Even then, Mr. Crawford and the Public Defender Standards Council refused to sign a contract with Mr. Citronberg and Mr. West, which Mr. Crawford had made an essential prerequisite to the payment of any funds.¹⁸

Over the course of this three-year period, Mr. Weis continuously struggled with symptoms of major mental illnesses, which were exacerbated by the trial

¹⁵ Hearing of Feb. 11, 2009 Tr-103, 108-09, 140, 256, Ex. 4 (e-mail from Jerry Word to Mr. Citronberg, Mr. West, Ms. Haskin, and others confirming the \$255,000 figure).

¹⁶ Although Mr. Crawford stated in a letter to Mr. West dated September 18, 2007, that the Council “will not process any future bills until a signed contract is in place[,]” R-860 – and even though Mr. Citronberg and Mr. West complied in all respects with Mr. Crawford’s letter, submitting a budget and other information requested by Mr. Crawford eight days later – Mr. Crawford has refused to this day to sign a contract with Mr. Citronberg and Mr. West for the defense of Appellant.

¹⁷ *Weis v. Crawford*, Superior Court of Fulton County, No. 2008-CV-162217 (filed Dec. 31, 2008). The parties agreed to dismiss the action as moot after Judge Caldwell reinstated the attorneys on February 11, 2009.

¹⁸ *See supra* n. 16.

court's removal of his appointed counsel and Mr. Weis's ongoing uncertainty about the status of his legal representation and his case. Three months after his arrest, Mr. Weis was treated and evaluated at Central State Hospital from May 12-26, 2006, by a team of mental health professionals. He was sent to Central State following a suicide attempt while he was taking the drug Thorazine.¹⁹ He was diagnosed as psychotic, experiencing auditory and visual hallucinations, major depression, and severe anxiety. He was placed on 800 mg. of Seroquel for his psychotic symptoms, and 40 mg. of Prozac and 1 mg. of Klonopin for his depression and anxiety.²⁰

Even with these medications, Mr. Weis continued to struggle with symptoms of his mental illnesses. Dr. Monica Smith, a psychiatrist who evaluated Mr. Weis on January 18, 2007, found "depressed mood," "hopelessness which worsened into hallucinations, 'bunches of voices – couldn't make out what was said,'" and "hyper vigilance, memories/anxiety surrounding the murder."²¹ Mr. Weis made a second suicide attempt by cutting his right forearm on October 18, 2007, and was treated at the Spalding Regional Medical Center.²²

¹⁹ Hearing of July 8, 2009 Tr. Vol. II, Defense Ex. 1 (Central Hospital Records) (Final Summary/Discharge Plan, dated May 30, 2006).

²⁰ *Id.* July 8, 2009 Motion Tr.-54; R-56.

²¹ Hearing of July 8, 2009, Def. Ex. 3 (records of Pine Woods Crisis Stabilization Program), Evaluation of Monica Smith, M.D., January 18, 2007.

²² Hearing of July 8, 2009, Def. Ex. 2 (records from the Lamar County Jail), Spalding Regional Medical Center, "General Emergency Department Discharge Instructions" pages 1, 3.

Mr. Weis's frustration and despair about the removal of his counsel, the uncertainty regarding his legal representation, the long period of time during which he was without counsel, and the lack of resolution of his case reached the point that on several occasions he was ready to give up and accept the death penalty. R.-1129, 1140 (affidavit of counsel regarding Mr. Weis's despair and decisions to accept death penalty followed by changes of heart); July 8, 2009 Hearing Tr-86 (District Attorney informs the court of "a recurring event" that "once again the defendant has requested that he be allowed to plead guilty and receive the death penalty" if he could have seven years to say good-bye to his family).

On April 17, 2009, at the behest of the Pike County Sheriff's office,²³ a doctor abruptly took Mr. Weis off Seroquel, substituted Thorazine, Haldol and Cogentin, and continued him on Prozac and Klonopin. Having had bad experiences previously with Thorazine and Haldol due to their side effects, Mr. Weis did not take them.²⁴ Ten days later, Mr. Weis was found hanging in his cell. He fought deputies who tried to hold him up to release the noose. He had also cut his right wrist. He was taken to Spalding Regional Medical Center for treatment.²⁵

²³ July 8, 2009 Hearing Tr.-59-62, 78-80.

²⁴ *Id.* at 63. The side effects of Haldol were jaw clenching and akathisia, "a motor restlessness that's directly a result of that particular kind of drug on certain motor areas of his brain." *Id.* at 67. Thorazine caused memory impairments, dry mouth, constipation, and heavy sedation. *Id.* at 68. (Testimony of Psychiatrist Barry Scanlon.)

²⁵ The Court ordered Mr. Weis evaluated again at Central State, R-1156, which directed that the Seroquel be restored in place of the Thorazine, Haldol and Cogentin.

Despite the lack of any funding since 2007, the trial court entered orders on June 1, 2009, setting the case for evidentiary motions on July 8, 2009 and trial on August 3, 2009. Although they had not been compensated since 2007 and had no assurance of being compensated, counsel for Mr. Weis filed a number of motions, including ones seeking dismissal of the case for denial of his right to a speedy trial,²⁶ restoration of his medication,²⁷ an order requiring the Council to contract with Mr. Citronberg and Mr. West,²⁸ and funds for counsel, a mitigation specialist, an investigator and experts.²⁹

On July 8, 2009, Public Defender Standards Council director Mack Crawford appeared before the trial court and committed, for the first time since 2007, to providing funds for the defense of Mr. Weis.³⁰ Mr. Crawford agreed to pay into the registry of the court \$75,000 for attorney fees and \$40,000 for investigative and expert assistance³¹ – less than half of the \$255,000 that defense counsel, the interim capital defender Gerald Word, and the chief of staff of the Public Defender

²⁶ *Motion to Dismiss the Indictment, or in the Alternative, the Death Penalty, Because of Denial of Right to Counsel and Speedy, Fair and Reliable Trial*, filed on June 24, 2009, R-1063; *Motion for Discharge and Acquittal*, filed on July 2, 2009, R-1118,

²⁷ *Motion to Restore Proper and Appropriate Medications*, filed July 6, 2009, R-1129.

²⁸ *Defendant's Motion to Order Public Defender Standards Council to Contract with Counsel for Legal Services or Dismiss Indictment*, filed on July 2, 2009, R-1099.

²⁹ *Motion for Funds Necessary for Mitigation Investigation, Expenses and Effective Counsel*, filed on June 24, 2009, R-1050.

³⁰ July 8 *Ex Parte* Hearing Tr-17, 23-25.

³¹ *Id.* at 23-25.

Standards Council, Sara Haskin, had earlier agreed was necessary for the defense of Mr. Weis.³²

At the July 8, 2009 hearing, the trial court denied the motions to dismiss the indictment and to discharge and acquit Mr. Weis because of denial of his constitutional right to a speedy trial. R-1178, 1183. The Court ordered Mr. Weis examined at Central State Hospital with regard to the appropriate medication. R-1156.

ENUMERATION OF ERRORS

1. The trial court erred in denying Appellant Weis's motions to dismiss the indictment and to discharge and acquit because Appellant Jamie Ryan Weis was denied his constitutional right to a speedy trial due to, *inter alia*, violations of his rights to counsel and to due process, and to a fair and reliable determination of guilt and sentence guaranteed by Art. I, §1, ¶¶ I (due process), XI (a) (speedy trial), XII (right to the courts), XIV (right to counsel) and XVII (protection from cruel and unusual punishment) of the Georgia Constitution, and the Sixth (speedy trial, right to counsel), Eighth (protection from cruel and unusual punishment) and Fourteenth (due process) Amendments of the United States Constitution.

2. Alternatively, the trial court erred in refusing to bar the prosecution from seeking the death penalty because Appellant Jamie Ryan Weis was denied his

³² See *supra* ns. 13, 15.

constitutional right to a speedy trial due to, *inter alia*, violations of his rights to counsel and to due process, and to a fair and reliable determination of guilt and sentence guaranteed by Art. I, §1, ¶¶ I, II, XI (a), XII, XIV and XVII of the Georgia Constitution, and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

ARGUMENT AND CITATIONS OF AUTHORITY

Appellant Jamie Ryan Weis has been denied a speedy trial in the Superior Court of Pike County. Among the reasons for the delay was the denial of any funding for his representation for two years. During the delay, he was completely deprived of his counsel for over a year, causing incalculable prejudice in making it impossible for him to prepare for trial. This mentally ill man also suffered other forms of prejudice – incarceration in a county jail not equipped to deal with the mentally ill, and anxiety and concern that drove him to such despair that he attempted suicide three times and repeatedly expressed a willingness to give up and accept the death penalty. As a result of the delay and the denial of counsel, there is no way that Mr. Weis can receive the fair and reliable determination of guilt and punishment. These violations of fundamental rights are interrelated in their impact on the delay, the reason for it, the prejudice, and the inability of Mr. Weis to assert his right to a speedy trial. Considered and weighed together, they clearly establish a

speedy trial violation and require dismissal of the indictment or, in the alternative, dismissal of the Notice to Seek the Death Penalty.

I. DENIAL OF A SPEEDY TRIAL, THE RIGHT TO COUNSEL AND OTHER CONSTITUTIONAL VIOLATIONS REQUIRE DISMISSAL OF THE INDICTMENT.

The length of the delay – three and a half years – is presumptively prejudicial and more than sufficient to trigger the speedy trial analysis adopted in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The four *Barker* factors – the length of the delay, the reason for the delay, the prejudice to the accused, and the assertion of the right – when weighed and considered together “in a balancing test of the conduct of the prosecution and the defendant” clearly establish a speedy trial violation. *State v. Redding*, 274 Ga. 831, 832, 561 S.E.2d 79, 80 (2002) (malice murder, felony murder and aggravated assault charges dismissed due to constitutional speedy trial violation), quoting *Boseman v. State*, 263 Ga. 730, 731, 438 S.E.2d 626 (1994). *See also, e.g., State v. Carr*, 278 Ga. 124, 126, 598 S.E.2d 468 (2004) (malice murder and arson charges dismissed due to constitutional speedy trial violation); *Jones v. State*, 283 Ga. App. 838, 642 S.E.2d 865 (2007) (constitutional speedy trial violation found after consideration of *Barker* factors, including a delay of over three years).

The prejudice suffered by Appellant Weis is more egregious than in any reported case. This mentally ill man was deprived of counsel while facing the death penalty. Such a deprivation is *per se* prejudicial. All of the delay is attributable to the State. Without representation, Mr. Weis could not assert his right to a speedy trial, but he made every effort to restore representation once it had been denied and, once represented, his attorneys asserted the right.

The trial court tried to rush the case to trial after the prolonged deprivation of legal representation, but that is not what it means to have a “speedy trial.” The trial must be a fair one, where defense counsel have the time and resources to prepare adequately, to conduct an investigation into the facts of the crime and any mitigating circumstances, to be in a position to contest the prosecution’s case and present a defense, and to present evidence in mitigation. *See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1027 (2003), cited with approval in *Rompilla v. Beard*, 545 U.S. 374 (2005) (finding defense counsel ineffective), *Wiggins v. Smith*, 539 U.S. 510 (2003) (finding defense lawyers ineffective). Where a defendant’s life is at stake, a court must be “particularly sensitive to insure that every safeguard is observed.” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). *See also Deck v. Missouri*, 544 U.S. 622, 633 (2005); *Monge v. California*, 524 U.S. 721, 732 (1998); *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (collecting cases

recognizing the need for “‘reliability in the determination that death is the appropriate punishment’ in any capital case.”).

The time for a fair trial for Mr. Weis passed long ago. Accordingly, a trial is now barred by the speedy trial guarantees of the Georgia and United States Constitutions.

A. DELAY OF THREE AND A HALF YEARS IS PRESUMPTIVELY PREJUDICIAL AND TRIGGERS THE *BARKER V. WINGO* ANALYSIS.

Delay is presumptively prejudicial “at least as it approaches one year.” *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992); *Barker v. Wingo*, 407 U.S. at 530-31. *See also Ruffin v. State*, 284 Ga. 52, 663 S.E.2d 189 (2008) (delay of two years and two months “long ago passed the presumptive prejudice threshold”); *Boseman v. State*, 263 Ga. at 732, 438 S.E.2d at 628 (delay of 27 months raises a threshold presumption of prejudice); *Perry v. Mitchell*, 253 Ga. 593, 594, 322 S.E.2d 273, 275 (1984) (delay of two years and three months from arrest to trial “deplorable”).

Over a year had passed from Mr. Weis’s arrest on February 2, 2006, when it became clear in April of 2007 that funding was not going to be provided for experts and was running out for counsel. More than two more years passed before Mack Crawford, director of the Public Defender Standards Council, finally agreed on July 8, 2009 to provide at least partial funding for the defense.

Once the delay passes this threshold test of “presumptive prejudice,” then the *Barker* inquiry is triggered. *Doggett*, 505 U.S. at 651-52. The delay is then considered a second time by factoring it into the prejudice prong of the *Barker* analysis as “part of the mix of relevant facts.” *Id.* at 656. In this case, as will be shown in Section C, the prejudice goes considerably beyond delay; it involved the complete denial of counsel for over a year and the complete inability to prepare the defense for over two years. Another relevant factor – that all of the delay is attributable to the State – discussed in Section B, also weighs heavily in Appellant’s favor. Finally, Mr. Weis did everything he could to obtain counsel and funding and, upon the reinstatement of counsel, asserted his right to a speedy trial. Thus, the balancing of the *Barker* factors clearly establishes a speedy trial violation.

B. THE DELAY IS ATTRIBUTABLE TO THE DENIAL OF COUNSEL AND THE TIME IT TOOK THE STATE TO DECIDE TO SEEK THE DEATH PENALTY.

The reason for two years of delay was failure to provide funding for the defense of the case and the removal of defense counsel. Another year was spent by the prosecution deciding to seek the death penalty. *None* of the delay is attributable to Appellant Weis.

1. Delay Attributable to Violation of the Right to Counsel and the Denial of Funding for Representation.

The Public Defender Standards Council secured counsel for Appellant Weis and initially provided funding which enabled them to file motions, begin an investigation into mitigating circumstances and litigate non-evidentiary motions between their entry in the case on October 12, 2006 and the end of March, 2007. But counsel found in April, 2007 that they were unable to go any further – to retain experts and an investigator – due to the lack of funding for the defense.³³

On September 18, 2007, the Council’s director, Mack Crawford, demanded that defense counsel submit a budget and sign a written contract. He refused to provide any funding without such a contract.³⁴ Even though Mr. Citronberg and Mr. West promptly submitted what the Council staff found to be “a reasonable budget . . . within the range of other budgets that were submitted,”³⁵ they were never offered a contract and not a penny was provided to them until July 8, 2009.

Defense counsel, representing a mentally ill defendant in a capital case without the ability to even retain a mental health expert or complete their

³³ *Supplemental Filings in Support of Motion for Continuance Until Such Time as the Georgia Public Defender Standards Council Funding Imbroglia is Settled Consistent with Defendant’s Right to Adequately Compensated Counsel*, filed on April 24, 2007, R-829 (seeking a continuance because unable to secure experts; Michael Mears, director of the Public Defender Council, informed counsel that no funds for experts would be approved until a state budget had been approved).

³⁴ Letter from Mack Crawford to Thomas M. West, dated September 18, 2007 (appended to Defendant’s *Emergency Motion for a Hearing . . .*, filed Nov. 12, 2007, R-856).

³⁵ Feb. 11, 2009 Hearing Tr.-124 (testimony of Interim Capital Defender Gerald Word).

investigation into mitigating circumstances, did the only thing they could do. They notified the trial court in a motion filed April 24, 2007 that they were unable to secure expert assistance and sought a continuance until such assistance was available.³⁶ On October 18, 2007, they again moved for a continuance on the grounds that they were not being paid and that they were unable to obtain the services of experts.³⁷ They received no response from the trial court to either motion. On November 12, 2007, defense counsel filed an “Emergency Motion” for a hearing on their motions for a continuance.³⁸ As grounds, they stated that they were not being paid, had no investigator and had no ability to hire experts.³⁹ In short, they lacked any ability to prepare for a capital trial.

At a hearing on November 26, 2007, defense counsel presented the testimony of Mack Crawford with regard to the Public Defender Standards Council’s inability to provide funding for representation in the case, Nov. 26 Hearing Tr-6-32, and then argued their motions for a continuance until funding became available. *Id.* at 32-38. The District Attorney did not respond to the pending motions, but instead moved to

³⁶ *Supplemental Filings in Support of Motion for Continuance Until Such Time as the Georgia Public Defender Standards Council Funding Imbrogio is Settled Consistent with Defendant’s Right to Adequately Compensated Counsel*, filed on April 24, 2007, R-829.

³⁷ *Renewed Motion for Continuance Until Such Time as The Georgia Public Defender Standards Council Funding Issue is Settled Consistent with Defendant’s Right to Funds for an Adequate Defense*, filed Oct. 18, 2007, R-847, 849.

³⁸ *Emergency Motion for a Hearing on Defendant’s Renewed Motion for Continuance Until Such Time as the Georgia Public Defender Standards Council Funding Issue is Settled Consistent with Defendant’s Right to Funds for an Adequate Defense*, filed Nov. 12, 2007, R-856, 858.

³⁹ *Id.*

remove Mr. Citronberg and Mr. West and to substitute one of three public defenders that he named as counsel for Mr. Weis. *Id.* at 38-39. The prosecutor’s argument for such a drastic and momentous ruling on an issue that had not even been before the court covers only two pages of transcript. *Id.*

Although the State provided no notice to Mr. Weis or defense counsel of its intent to move for the substitution of counsel, the trial judge appeared to be prepared for it. Judge Caldwell gave a detailed chronology of the case, discussed *Wilson v. Southerland*, 258 Ga. 479, 371 S.E.2d 382 (1988); *Wheat v. United States*, 486 U.S. 153 (1988), and *Strickland v. Washington*, 466 U.S. 688 (1984) – even providing citations as he discussed them – before concluding that Mr. Weis had no right to counsel of his choice and removing Mr. Citronberg and Mr. West, and appointing two of the public defenders named by the District Attorney, Joseph Saia and Tamara Jacobs. Nov. 26, 2007 Hearing Tr-40-50. The next day the court entered a written order reiterating its reasoning and stating, “The State’s motion to appoint the staff attorneys of the public defender’s office as counsel is hereby **GRANTED.**” R-862, 864.

Mr. Weis moved for reconsideration. R-872-875. The public defenders moved to withdraw. R-888-890. Both brought to the court’s attention this Court’s decisions starting with *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989), through *Grant v. State*, 278 Ga. 817, 607 S.E.2d 586 (2005), in which this Court

reversed trial judges who removed defense counsel who had attorney-client relationships and were familiar with the cases from representing their clients.

The public defenders also stated that they were “deeply troubled by the circumstances of their appointment” because “a District Attorney who has notified a Defendant of his intent to seek the death penalty should not be permitted to hand-pick his opponents in the case.” R-889. Moreover, as in *Amadeo*, the public defenders urged the retention of the lawyers already representing the accused, pointing out that attorneys Citronberg’s and West’s “contacts with potential witnesses, as well as their familiarity with the case itself, *cannot be duplicated by the undersigned within a reasonable period of time.*” *Id.* [emphasis added.] In *Amadeo*, this Court stated:

[N]ot only did the defendant[] argue that [he] had developed a relationship of trust and confidence with prior counsel, but, also, the defendant’s newly appointed counsel argued in favor of representation by the prior lawyers based on the legal and factual complexities of the case, which they knew they would have to master.

259 Ga. 469, 384 S.E.2d at 182-83. Here, the public defenders not only argued that continuity was in the defendant’s best interest for the reasons recognized in *Amadeo* and its progeny, but that the District Attorney’s and the court’s reason for substituting them – ending the delay – would not be served by appointing them because they could not familiarize themselves with the case and client in a reasonable period of time. Indeed, their motions to withdraw made it clear that they

were so busy and so lacking in resources to try a capital case that no continuance, no matter how long, would enable them to provide constitutionally adequate representation.⁴⁰

Nevertheless, Judge Caldwell summarily denied the motion for reconsideration and the public defenders' motion to withdraw with the comment, "I guess the Supreme Court will have to earn their money." Dec. 10, 2007 Hearing Tr.-26-27; *see also* R-891 (trial court's order denying reconsideration), R-893 (trial court's order denying motion to withdraw).

Thus, the delay caused by lack of funding from the Public Defender Council was severely compounded by a series of egregious constitutional errors.

First, the trial court violated Mr. Weis's right to counsel and to due process by allowing the District Attorney to interfere with his legal representation. "Implicit in the concept of [the right to counsel] is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Polk County v. Dodson*, 454 U.S. 312, 322 (1981). *See also Georgia v. McCollum*, 505 US 42, 64-65 (1992) (the independence of defense counsel from state authority is "a constitutionally

⁴⁰ *See Supplement to Renewed Motion to Withdraw*, R-962-66 (stating "the attorneys and investigators employed by the Griffin Circuit Public Defenders Office lack the time and expertise to conduct the extensive investigation" required by *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), cases in which counsel were held to be ineffective for failing to conduct sufficient investigations into mitigating circumstances, and that "counsel cannot, under the current state of affairs, perform adequately in representing the Defendant."

mandated attribute of our adversarial system”). Moreover, granting a District Attorney’s motion to pick his adversary in a capital trial creates “an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.” *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987). *See also Offutt v. United States*, 348 U.S. 11 (1954) (“Justice must satisfy the appearance of justice.”).

Second, the trial court denied the most basic principles of due process by ruling on the motion to remove and replace counsel without providing Appellant notice and an opportunity to be heard. Appellant would have been provided greater due process protections if he were to face revocation of his driver’s license or welfare benefits. *See Bell v. Burson*, 402 U.S. 535 (1971) (right to notice and a hearing before driver’s license is revoked); *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970) (welfare benefits). Caught by surprise by the District Attorney’s motion to remove them and replace them with the local public defenders, defense counsel were unprepared to address the issue. The relevant cases were not brought to the trial court’s attention until after he had made his ruling.⁴¹

⁴¹ While Judge Caldwell discussed three cases in ordering the substitution of counsel, he apparently did not recall *Roberts v. State*, 263 Ga. 764, 438 S.E.2d 905 (1994), in which this Court reversed the removal of counsel who had an attorney-client relationship with the defendant and were familiar with the case. Judge Caldwell represented the State as District Attorney in the case.

Finally, and most egregiously, the trial court’s removal of counsel, who had capably represented Mr. Weis for over a year, was completely contrary to this Court’s decisions in *Grant v. State*, 278 Ga. 817, 607 S.E.2d 586 (2005) (reversing 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); *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989) (same).⁴² These cases were brought to the trial court’s attention after the ruling, but to no avail.

Delay attributable to denial of counsel and lack of funding for counsel constitutes a major “breakdown in the public defender system,” charged to the State. *Vermont v. Brillon*, ___ U.S. ___, 129 S. Ct. 1283, 1287, 1292 (2009).⁴³ The

⁴² Courts in other jurisdictions have reached the same conclusion. *See, e.g., Harris v. People*, 567 P.2d 750 (Cal. 1977), which this Court quoted from and relied upon in *Amadeo*; *Michigan v. Johnson*, 547 N.W.2d 65 (Mich. App. 1996) (reversing conviction because removal of court-appointed counsel before trial was “a structural error that infect[ed] the entire trial mechanism. . . [and] a harmless-error analysis [was] not applicable”); *Stearnes v. Clinton*, 780 S.W.2d 216, 221 (Tex. Crim. App. 1989) (granting mandamus relief requiring reinstatement of defense counsel and holding, “once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the court may not arbitrarily remove the attorney over the objections of both the defendant and his counsel.”); *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. 1978) (reversing conviction because trial court replaced court-appointed counsel and stating “[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”) (quoting *English v. State*, 259 A.2d 822, 826 (Md. 1969)).

⁴³ While recognizing that a breakdown of the public defender system is attributable to the State, the Court in *Vermont v. Brillon* found that much of the delay there – less than three years between arrest and trial – was attributable to the defendant, who fired his first attorney and threatened to kill another of his attorneys, who was allowed to withdraw. *Brillon*, 129 S.Ct. at 1291-93.

State has the responsibility of providing counsel,⁴⁴ as well as “the raw materials integral to the building of an effective defense,”⁴⁵ and maintaining the continuity of counsel once the attorney-client relationship is established.⁴⁶

As with overcrowded dockets, *see Strunk v. United States*, 412 U.S. 434, 436 (1973); *State v. Carr*, 278 Ga. 124, 126, 598 S.E.2d 468 (2004), delays attributable to the State’s failure to provide funding “should be weighed against the state because the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Ingram v. State*, 280 Ga. App. 467, 470 634 S.E.2d 430, 434 (2006).

The State is not allowed to justify the delay “by simply asserting that the public resources provided by the State’s criminal-justice system are limited and that each case must await its turn.” *Barker*, 407 U.S. at 538 (White, J., concurring).⁴⁷

⁴⁴ *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Wilson v Southerland*, 258 Ga. 479, 480, 371 S.E.2d 382, 383 (1988) (adequate funding for prosecution and indigent defense “constitutionally mandated”); *Bibb County v. Hancock*, 211 Ga. 429, 436-37, 86 S.E.2d 511, 517 (1955) (recognizing the right to counsel under the Georgia Constitution).

⁴⁵ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). *See also Roseboro v. State*, 258 Ga. 39, 41, 365 S.E.2d 115 (1988) (recognizing right of indigent defendant to expert assistance); *Bright v. State*, 265 Ga. 265, 455 S.E.2d 37 (1995) (vacating death sentence because defendant denied expert assistance).

⁴⁶ *See Grant v. State*, 278 Ga. 817, 607 S.E.2d 586 (2005) (and cases cited therein); *supra* n. 42.

⁴⁷ Nor is the right to continuous representation by the attorneys with whom he has established a relationship so feeble that it is trumped by a temporary lack of funding. In *Birt v. State*, 259 Ga. 800, 387 S.E.2d 879 (1990), the trial court ordered the attorneys who had previously represented Birt to represent him without payment of fees. In reversing that order, this Court held that counsel could not be forced to try the case without compensation and were entitled to “reasonable and adequate compensation.” 259 Ga. at 800, 387 S.E.2d at 879-80.

See also Ruffin v. State, 284 Ga. 52, 60, n.37, 663 S.E.2d 189, 198 n.37 (quoting Justice White's *Barker* concurrence with approval).

Thus, the reason for the delay from April, 2007 to the present is attributable to the State and weighs strongly in Appellant Weis's favor.

2. Delay Attributable to the State's Decision to Seek the Death Penalty.

A number of other delays are also attributable to the State.

First, although the victim, Mrs. King, was found in her home on February 2, 2006, and Mr. Weis was arrested the same day, the State did not file a Notice of Intent to Seek the Death Penalty until August 25, 2006. R-24.

Second, the indictment charging Mr. Weis was defective because it did not contain the names of the grand jurors. R-4-7. On October 17, 2006, the State moved to continue the first appearance hearing to give it time to correct the defect. R-64.

Third, an additional two months passed the State filed a second Notice on December 11, 2006. R-68. The first appearance hearing was not held until January 24, 2007 – one week short of a year after Mr. Weis's arrest. Hearing of Jan. 24, 2007. Thus, the prosecution was responsible for the initial year of delay in the case, and, for that reason, the "reason for the delay" factor weighs even more heavily in Mr. Weis's favor.

C. APPELLANT WEIS WAS SEVERELY PREJUDICED.

Prolonged delay produces several types of harm – “oppressive pretrial incarceration,” “anxiety and concern of the accused,” and “the most serious . . . the inability of a defendant adequately to prepare his case [which] skews the fairness of the entire system.” *Doggett v. United States*, 505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532). *See also Smith v. Hooey*, 393 U.S. 374, 377-379 (1969). Appellant Weis was prejudiced in all three regards.

Mr. Weis was most severely prejudiced by the illegal deprivation of his counsel from November 26, 2007 to February 11, 2009 – a period of a year and two months while he was facing the death penalty. The United States Supreme Court has repeatedly held that the complete denial of counsel during a critical stage of the proceedings is constitutional error that does not require a particularized showing of prejudice. *United States v. Cronin*, 466 U.S. 648, 658-59, 859 n.25 (1984) (citing *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam)).

The time between arrest and a capital trial could hardly be more critical. These circumstances “are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *Cronin*, 466 U.S. at 658. Nor would it be fair or just to require Appellant to make a showing of particularized

prejudice during the time he was without representation since he was deprived of counsel and the resources needed to document the prejudice and make such a showing.

The Supreme Court held in *Rothgery v. Gillespie County*, ___ U.S. ___, 128 S. Ct. 2578 (2008), that a defendant is entitled to the prompt appointment of counsel at or near the first appearance hearing because “a defendant subject to accusation after initial appearance is headed for trial *and needs to get a lawyer working*” on his case. *Id.* at 2590 (emphasis added). Once counsel is assigned, a person accused of a crime is entitled to the “guiding hand of counsel at every step in the proceedings against him.” *Gideon*, 372 U.S. at 344-5 (1963). Indigent defendants are also entitled to “the basic tools of an adequate defense” because a criminal trial is unfair if the State “proceeds against an indigent defendant without making certain he has access to the raw materials integral to the building of an effective defense.” *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

There is no precedent for attorneys being assigned to represent a client and, after some work on a case, being suspended from any further work for one or two years. “[L]awyers in criminal courts are necessities, not luxuries.” *Gideon*, 372 U.S. at 344. “Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 654 (1984).

Lawyers are essential so that they may interview their clients, obtain valuable information, and use it to begin an investigation into the facts of the crime as well as any circumstances in mitigation. That investigation must begin at once before the trail is cold.⁴⁸ As it continues, lawyers meet with their clients in “an intimate process of consultation and planning”⁴⁹ which continues throughout and beyond trial. Lawyers are also essential because they counsel and advise the accused with regard to his case, his rights, and his choices. *See Id.; Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

Even when Mr. Citronberg and Mr. West were representing Mr. Weis, the delay caused by the lack of funding from the Public Defender Standards Council was prejudicial. Their ability to prepare was stymied starting in April 2007, when they could not obtain expert assistance, a critical need in a case involving a mentally ill defendant, and ended altogether by September 2007, when the Council would no longer even pay them. After that, no funds were made available to the defense until July 8, 2009. Of course, throughout this period, the State continued to pay its prosecutors and their staff, Georgia Bureau of Investigation agents, Sheriff’s deputies, laboratory technicians and other personnel – all of whom were available, without interruption, to prepare for the prosecution of Mr. Weis.

⁴⁸ *See, e.g.,* American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, § 10.7 comment (2003) (“[t]he mitigation investigation should begin as quickly as possible.”)

⁴⁹ *Smith v. Superior Court of Los Angeles County*, 440 P.2d 65, 74 (Ca. 1968) (en banc).

Severe imbalances of power between the State and the accused are prejudicial and violate the Constitution. *See, e.g., Wardius v. Oregon*, 412 U.S. 470, 476 (1973) (invalidating an Oregon statute that forced criminal defendants to provide notice of their alibi to the State yet made no provision for reciprocal discovery). The United States Supreme Court has been “particularly suspicious . . . when the lack of reciprocity interferes with the defendant’s ability to secure a fair trial.” *Id.* at 475 n.6 (citing *Washington v. Texas*, 388 U.S. 14, 22 (1967) and *Gideon*, 372 U.S. at 344 (1963)). This rationale applies with much greater force in this instance.

Appellant Weis has also suffered the other forms of prejudice identified in *Barker*. Since his arrest he has been confined in a county jail, a facility designed for short-term detention of people awaiting trial. The lengthy pre-trial detention has had a particularly detrimental impact on him. Mr. Weis, who is from West Virginia, is jailed far from friends and family. A jail is not an appropriate facility for a person suffering from major mental illnesses, as demonstrated by Mr. Weis’s three suicide attempts and his repeated decision to give up and receive the death penalty.

The “anxiety and concern” that anyone who faced the death penalty would experience has been magnified many times for Mr. Weis. It was magnified by his mental illnesses – his psychosis, depression and anxiety – and, most of all, it has

been magnified by the patently unconstitutional deprivation of his right to counsel. For a year and two months after Judge Caldwell illegally removed Mr. Citronberg and Mr. West as his lawyers, Jamie Weis was left defenseless in a county jail with his life hanging in the balance. He did not know whether he would ever see his lawyers again, how long it would be until he would know who would represent him, what would happen in his case, or whether he would be hustled off to death row after a new, unknown, perhaps overburdened lawyer gave him perfunctory representation.⁵⁰

It is contrary to every notion of fairness, due process and the proper working of an adversary system for one side to be deprived of all resources until right before trial and then suddenly given some funding and told to make up in two or three months for two years – all while the opposing side remains fully staffed, funded, and able to prepare for trial. It not only “skews the fairness of the entire system,” *Doggett*, 505 U.S. at 654, quoting *Barker*, 507 U.S. at 532, it makes a mockery of the system. Such treatment of the rights to counsel and to a speedy trial – as well as a human being, Mr. Weis – is unconscionable as well as unconstitutional. Thus, the unprecedented prejudice in this case weighs very heavily in favor of Appellant Weis.

⁵⁰ *Pro bono* counsel assisted Mr. Weis for the limited purpose of trying to reinstate his counsel by applying to this Court for interim review of the order removing his counsel and filing mandamus actions against Judge Caldwell and Mack Crawford and the Public Defender Standards Council. However, those efforts were unsuccessful. They had no impact on the speedy trial issues.

D. APPELLANT WEIS SOUGHT COUNSEL, A TRIAL AND, UPON BEING REPRESENTED, A SPEEDY TRIAL.

Once his counsel were removed, Appellant sought their prompt reinstatement by applying for interim review with this Court, by seeking a writ of mandamus or prohibition requiring Judge Caldwell to reinstate his counsel, and by seeking a writ of mandamus requiring Mack Crawford and the Public Defender Standards Council to sign a contract with his lawyers and provide them with the funds necessary to defend the case. In short, Mr. Weis did everything that could reasonably be expected of an unrepresented defendant to seek reinstatement of counsel so his right to a speedy trial could be observed.

Once counsel had been reinstated and the trial court had set a date for motions, counsel, though still uncompensated, filed motions asserting denial of Appellant's rights to a speedy trial, as well as to counsel, to due process and to a fair and reliable determination of guilt and punishment. R-1063-73, 1118-20. Appellant had not previously asserted his speedy trial rights because he was illegally deprived of the "guiding hand of counsel at every step in the proceedings against him." *Gideon*, 372 U.S. at 344-45 (1963) (internal quotations omitted).

The Supreme Court adopted a flexible approach in *Barker* to assessing the "assertion of the right" factor. 407 U.S. at 528-29. It said in attaching weight a court could distinguish between "a situation in which the defendant knowingly fails

to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed.” *Id.* at 529. Appellant Weis is like the defendant who has no counsel. *See also Jones v. State*, 283 Ga. App. 838, 840, 642 S.E.2d 865, 867 (2007) (speedy trial violation found; failure to assert not weighted against defendant who was “shuffled among five different attorneys during the three-year period that she waited to be tried”); *Hester v. State*, 268 Ga. App. 94, 99, 601 S.E.2d 456, 460 (2004) (speedy trial violation found; defendant’s five-year delay in asserting her right to a speedy trial could not be weighed heavily against her, given the State’s failure to indict for three years following her arrest and subsequent delay in appointing her counsel). *See also United States v. Dyson*, 469 F.2d 735, 740 (5th Cir. 1972) (“[w]hile it is true that [defendant] never demanded trial it is not clear that he was aware of his right to do so since counsel was not appointed to represent him until . . . just four days before trial”).

Once his counsel were reinstated – even through they remained unfunded – they asserted his right to a speedy trial and moved to dismiss the indictment and for discharge.

Mr. Weis, a mentally ill man facing a capital trial without counsel, did everything he could to assert his rights. The final *Barker* factor weighs in his favor or, at the very least, does not weigh against him. All of the other factors – the

length of the delay, the reason for the delay, and the prejudice to the accused – weigh heavily in his favor and demonstrate a clear violation of his right to a speedy trial.

II. IN THE ALTERNATIVE, APPELLANT IS ENTITLED TO DISMISSAL OF THE DEATH PENALTY.

If this Court were to reach the conclusion that Mr. Weis has not established a speedy trial violation with regard to the State’s pursuit of convictions, it should hold, in the alternative, that Mr. Weis has established a speedy trial violation with regard to the State’s pursuit of the death penalty. After all, the funding issues which are the source of two years of delay exist because this is a capital case and the State is required to provide counsel pursuant to OCGA § 17-12-12⁵¹ and payment of counsel OCGA § 17-12-12.1.⁵²

If the prosecution had not sought the death penalty, this case would have been handled by the circuit public defender office pursuant to OCGA §§ 17-12-1 *et seq.* If the State is going to seek the death penalty, it must provide funding for the defense of those cases. If the State is unwilling or incapable of meeting its

⁵¹ OCGA § 17-12-12 replaced part of OCGA § 17-12-121 on July 1, 2008. It renames the “Georgia Capital Defender” the “Georgia capital defender division,” but contains the same language designating it as the sole agency responsible for the defense of capital cases.

⁵² OCGA § 17-12-12.1 provides for the appointment of two private attorneys where the capital defender division is unable to represent a defendant due to a conflict. The statute provides funding for attorneys fees and expenses up to \$150,000 to be paid by the state and costs above that amount to be shared by the state and the counties as allocated in the statute.

obligations under *Gideon v. Wainwright* and its progeny in capital cases, it should not be allowed to pursue the death penalty.

A. A CAPITAL SENTENCING TRIAL WOULD VIOLATE APPELLANT’S RIGHT TO A SPEEDY TRIAL.

The speedy trial guarantee of the United States Constitution applies not only to trials on the question of guilt, but also to capital sentencing. *See Moore v. Zant*, 972 F.2d 318, 320 (11th Cir. 1992) (“In this case, if Georgia waits too long, the state could lose the right to sentence [the defendant] to death. [The defendant] has speedy trial rights under the sixth amendment that would cover a death penalty proceeding.”); *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978) (“[t]he constitutionally guaranteed right to speedy trial applies to sentencing”).

In fact, the four speedy trial considerations – the length of the delay, the reason for the delay, the assertion of the right, and the prejudice to the accused, *see Barker*, 407 U.S. at 530 – apply with even greater force to the penalty phase of a capital case than to a regular criminal trial. The Supreme Court has repeatedly emphasized that “[d]eath, in its finality,” is a unique penalty in our society, “qualitative[ly] differen[t]” from all other forms of punishment. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). “Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Id.* *See also Monge v.*

California, 524 U.S. 721, 732-33 (1998); *Lankford v. Idaho*, 500 U.S. 110, 125-28 (1991); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). Accordingly, the Supreme Court has imposed heightened procedural protections in capital cases that are not required in other types of criminal trials. *See, e.g., Green v. Georgia*, 442 U.S. 95, 97 (1979) (certain evidence must be admitted at the penalty phase of a capital case even though it would not be admissible under a state's rules of evidence); *Turner v. Murray*, 476 U.S. 28 (1986) (certain voir dire procedures must be employed in capital cases even though they are not required in other criminal cases).

In recognition of the applicability of the speedy trial guarantee to capital sentencing and the heightened importance of procedural safeguards at the penalty phase of a capital case, courts can prevent the government from seeking the death penalty on the basis of speedy trial considerations even in the absence of a speedy trial violation requiring dismissal of the entire case. *See, e.g., United States v. Colon-Miranda*, 985 F. Supp. 36, 39-40 (D.P.R. 1997) (invoking the “[b]asic due-process principles of speedy trial jurisprudence” in prohibiting the government from seeking the death penalty).

In Mr. Weis's case, three of the four *Barker* factors – the length of the delay, the reason for the delay, and the assertion of the right – as described in Section I,

are essentially the same in the penalty-phase context. However, the critical prejudice factor, and particularly its focus on whether “the inability of [the] defendant adequately to prepare his case [which] skews the fairness of the entire system,” *Doggett*, 505 U.S. at 654, warrants special scrutiny in the penalty-phase context.

The delay in this case was marked by a total denial of counsel for over a year and the absence of funding for representation for over two years. The Supreme Court has made clear that a capital defense team must develop a penalty-phase strategy and presentation based on all available information. *See Rompilla*, 545 U.S. at 380-90; *Wiggins*, 539 U.S. at 519-34. As such, “[t]he mitigation investigation should begin as quickly as possible.” American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, § 10.7 comment (2003). The defense team has a “continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution’s case in aggravation.” *ABA Guidelines*, § 10.11(A); *see also Hall v. McPherson*, 284 Ga. 219, 232-33, 663 S.E.2d 659, 668 (2008) (upholding habeas court’s conclusion that trial counsel was ineffective in investigating and presenting mitigating circumstances; habeas court did not err in relying on the *ABA Guidelines*).

The prolonged delay in Mr. Weis's case has "introduce[d] a level of uncertainty or unreliability into the factfinding process." *Beck v. Alabama*, 447 U.S. 625, 643 (1980). The denial of counsel and the inability to investigate for two years actually results in prejudice or, at the very least, significantly increases the risk of prejudice beyond what is acceptable when the choice is between life and death. *See Lockett v. Ohio*, 438 U.S. at 605 (1978). Moreover, as noted above, the unrepresented and unfunded Mr. Weis had no ability to document adverse occurrences that may have eliminated possible approaches or avenues of investigation or prejudiced him in other ways.

This Court is not presented with an "all or nothing" situation in this case. Appellant submits that, as set out in Section I, the constitutions of Georgia and the United States require that the indictment be dismissed. But the Court can also order that the death penalty be dismissed, allowing the State to proceed with a non-capital prosecution and leaving behind the prejudicial funding problems that have plagued Mr. Weis's case for three-and-a-half years.

B. IF THE STATE CANNOT PROVIDE FOR THE DEFENSE OF CAPITAL CASES, IT SHOULD NOT BE ALLOWED TO PURSUE THE DEATH PENALTY.

As testimony in the trial court at several hearings established, this is one of several capital cases which involves substantial delays because of denials of the right to counsel because the Public Defender Standards Council has been unable to

provide the necessary funding.⁵³ The pattern that has emerged in these cases is that there is no funding for defense representation for a substantial period of time – often years⁵⁴ – but as the date of trial approaches Mr. Crawford comes up with some last-minute funding, the defense hurriedly tries to make up for months or years when nothing was (nor could be) done, and the case is forced to trial.⁵⁵ Questions of whether the last-minute funding was adequate and whether defense counsel were able to make up for lost time in a few weeks or months will be litigated in habeas corpus cases in the years to come.

Of course, the State had its prosecutors, law enforcement officers, crime laboratory employees and any experts it retains throughout the pretrial period. The normal advantage that the State has in prosecuting indigent defendants is turned into an enormous one. Such trials are not and do not appear to be reliable adversarial proceedings. They are closer to the “sacrifice of unarmed prisoners to

⁵³ See, e.g., testimony of Mack Crawford at Hearing of Nov. 27, 2007 Tr.-7-30 (describing inability to fund pending capital cases); testimony of Mack Crawford at Ex Parte Hearing of July 8, 2009 Tr.-13-19 (saying he had \$800,000 to pay for the defense of 12 pending capital cases).

⁵⁴ See, e.g., *State v. Sims*, Tift Superior Court No. 2006-CR-91, Hearing of Dec. 22, 2008 (second set of lawyers for defendant in capital case allowed to withdraw because they had not been paid in one and a half years; earlier team of lawyers had similarly been allowed to withdraw after not being paid for one and a half years; thus, defendant at square one with regard to lawyers three years after arrest).

⁵⁵ See, e.g., Bill Rankin & Rhonda Cook, “Jury selection in Silver Comet case may be delayed,” *Atlanta J.-Const.*, April 13, 2009 (funding issues were still being resolved during jury selection of capital trial); Julie Arrington, “Funds avert fears of ‘constitutional crisis,’” www.forsythnews.com/news/article/2631/, May 31, 2009 (reporting that Mr. Crawford informed the judge that money was available for the defense of a capital case involving a murder that occurred on March 19, 2006; the *defense lawyers had not been paid since October, 2007* for their work on the case).

gladiators”⁵⁶ than the fair trials that the constitutions of Georgia and the United States guarantee.

The Utah Supreme Court recently stated:

It is the duty of the legislative branch to provide for adequate defense of capital defendants, *including sufficient resources to attract, train, compensate, and support legal counsel*. It is left to the legislative branch to determine how best to accomplish this goal. However, it falls to us, as the court of last resort in this state, to assure that no person is deprived of life, liberty, or property, without the due-and-competent-process of law. *Without a sufficient defense, a sentence of death cannot be constitutionally imposed*. This basic concept is bedrock upon which our constitutional government stands.

If, in the future, we find that the unavailability of competent and willing counsel impedes prompt, constitutionally sound resolution in capital cases, we may be forced to hold that the lack of such counsel is sufficient grounds for outright reversal of a capital sentence and remand for the imposition of a sentence of life in prison without the possibility of parole, for which the required degree of sophistication and skill reposed in counsel is slightly less.

Archuleta v. Galetka, 197 P.3d 650, 654 (Utah 2008) [emphasis added].

Other courts have held, in both capital and non-capital cases, that the prosecution cannot go forward unless and until the defense is adequately funded. *See, e.g., State v. Young*, 172 P.3d 138, 144 (N.M. 2007) (holding that “[p]rosecution of the death penalty is stayed unless the State makes adequate funds available for the defense”); *State v. Citizen*, 898 So.2d 325, 339 (La. 2005) (where

⁵⁶ *See United States v. Cronin*, 466 U.S. 648, 667 (1984) (“While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”) (quoting *United States ex rel Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975), *cert. denied*, 423 U.S. 976 (1975)).

sufficient funds not available for defense of case, trial court was to “prohibit the State from going forward with the prosecution until he or she determines that appropriate funding is likely to be available”); *State v. Peart*, 621 So.2d 780, 783, 791-92 (La. 1993) (holding that where sufficient funds are not available, trial court “shall not permit the trial of such cases to be conducted”). That is the approach that some Georgia trial courts have taken in response to lack of funds for capital cases at Georgia Public Defender Standards Council.⁵⁷

But that remedy is inadequate. As demonstrated herein, defendants cannot be held for indefinite periods of time without counsel or with counsel in name only, without the funds to actually provide representation. People facing the death penalty cannot be deprived of any real legal representation for two or three years and then treated as if the denial of the most fundamental right is inconsequential. That is not an adversary system. It is not fair and it will not produce reliable results. And it lacks credibility and legitimacy as a method of deciding who lives and who dies.

As the Utah Supreme Court pointed out, the costs and demands of a capital case are much greater than a non-capital murder case. Georgia may decide to devote its resources to the prosecution and defense of capital cases, or to other government functions. However, it may not devote resources to the prosecution of

⁵⁷ See, e.g., *supra* note 54.

capital cases while withholding resources for the defense of those cases. It is most respectfully submitted that this Court in granting relief in this case should make it clear that this one-sided practice – so completely at odds with due process and basic principles of fairness – must come to an end at once.

CONCLUSION

For the foregoing reasons, Appellant Jamie Ryan Weis prays that this Court reverse the rulings of the trial court and remand this case with instructions to dismiss the indictment and discharge Appellate Weis. In the alternative, Appellant asks that this Court reverse the rulings of the trial court and remand this case with instructions to bar the prosecution from seeking the death penalty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 2nd day of
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