No. _____

In the
Supreme Court of the United States

October Term, 2010

JAMIE RYAN WEIS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a court, on motion of the prosecutor, may remove appointed counsel who has developed an attorney-client relationship with an indigent defendant in circumstances in which a retained counsel could not be removed and, if so, whether any procedural protections apply?
2. Whether leaving a poor, mentally ill man facing the death penalty virtually defenseless – without counsel and without investigative and expert assistance – for over two years between arrest and trial because the state indigent defense agency could not pay for his representation constitutes a "systemic breakdown of the public defender system," *Vermont v. Brillon*, 129 S.Ct. 1283, 1292 (2009), which should be weighed against the State for speedy trial purposes?
3. Whether the denial of counsel by failing to provide resources for representation for over two years during the critical pre-trial period and the removal of defense counsel for a period of time on motion of the prosecutor despite an ongoing attorney-client relationship, which irreparably harmed the defendant's ability to prepare for trial, present issues of violations of the rights to counsel and a speedy trial directly appealable under the collateral order doctrine?

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jamie Ryan Weis respectfully petitions for a writ of certiorari to review the judgment of the Georgia Supreme Court in this case.

OPINIONS BELOW

The decision of the Georgia Supreme Court is reported at *Weis v. State*, __ S.E.2d __, 2010 WL 1077418 (Ga. 2010), and attached as Appendix A. The Court's order denying a motion for reconsideration is attached as Appendix B. The Court's order denying leave to file a motion to reconsider its revised opinion is attached as Appendix C. The Court's order refusing to consider the motion to reconsider the revised opinion is attached as Appendix D.

JURISDICTION

The Supreme Court of Georgia, by a vote of 4-3, entered judgment affirming the rulings of the trial court on March 25, 2010. It filed a revised opinion on April 9, 2010, but dated that opinion March 25, 2010. The Court entered an order denying Petitioner Weis' timely Motion for Reconsideration on April 9, 2010. The Court denied leave to file a Motion to Reconsider the Revised Opinion on May 3, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The judgment below is final for all practical purposes and subject to immediate review as a collateral order. *Sell v. United States*, 539 U.S. 166, 176 (2003); *Coopers &*

Lybrand v. Livesay, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The Georgia Supreme Court decision (1) conclusively resolves the issue of whether the pretrial denial of counsel for all but about six months over a period of three and a half years – including the removal of Petitioner's counsel for a period on motion of the prosecutor – has made it impossible for Petitioner to receive a fair trial. That issue is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen,* 337 U.S. 541, 546 (1949).

The decision also (2) "resolve[s] an important issue completely separate from the merits of the action" – the prolonged denial of counsel for an indigent defendant facing the death penalty prior to trial – that is (3) "effectively unreviewable on appeal from a final judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. at 468); *accord, e.g., Johnson v. Jones*, 515 U.S. 304, 310 (1995); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988). Moreover, this Court can reserve its decision with regard to jurisdiction to the hearing on the merits. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975) ("We postponed decision as to our jurisdiction over this appeal to the hearing on the merits."). *See also Sell v. United States*, 539 U.S. 166 (2003).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the Constitution:

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const. Amend. XIV:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents the question of whether poor people accused of crimes have a right to continued representation by counsel once an attorney-client relationship has been established. Most state courts that have considered the question have held that they do. Georgia and Louisiana, however, have held that even after an attorney-client relationship has been well established, the poor have only a minimal right to counsel, inferior to that of the person who can afford to retain counsel. In Georgia and Louisiana, defense lawyers are fungible. They may

be removed from cases despite the trust and confidence they have built with their clients and the knowledge of the cases they have acquired over the course of the representation. In this case, the District Attorney successfully moved to have his opposing counsel replaced with lawyers he chose. Thus, with regard to the most fundamental right of an accused in a criminal case, this case presents the question of whether "Equal Justice Under Law" is just an etching on the front of the Supreme Court building or an actual part of the Sixth and Fourteenth Amendments.

This case also presents the question of whether the complete inability of Georgia's indigent defense system to provide legal representation for Petitioner for over two years because of lack of funding from the Georgia legislature, which left Petitioner completely defenseless – without counsel, investigators or experts and even resulted in the trial judge removing his lawyers for a period because the indigent defense agency could not pay them – constitutes the kind of "systemic breakdown of the public defender system" that this Court recognized in *Vermont v. Brillon*, ___ U.S. ___, 129 S.Ct. 1283, 1292 (2009), counts against the state for speedy trial purposes.

Finally, it presents the question of whether these issues are appealable under the collateral order doctrine.

Petitioner Jamie Ryan Weis has been confined in a county jail since February 2, 2006, charged with the murder of Catherine King during a burglary of

her home. He received only nominal legal representation until October 12, 2006, six weeks after the State announced its intention to seek the death penalty on August 25, 2006.[1] Attorneys Robert H. Citronberg and Thomas M. West entered their appearances as counsel for Weis on October 12, 2006, after agreeing with the state indigent defense agency, the Georgia Public Defender Standards Council ("GPDSC"), to represent him. They represented him for about six months during the next three years because Georgia did not provide the necessary funding.

Citronberg and West diligently undertook their responsibilities. They filed over sixty motions and commenced an investigation, which included retaining the services of a mitigation specialist and visiting Weis' home in rural West Virginia to interview family, friends, former employers, teachers and others. However, in mid-March, the Public Defender Standards Council informed Citronberg and West that it did not expect to be able to pay them after March 31, 2007.

Defense counsel were forced to move for a continuance on April 24, 2007, because the GPDSC could not provide funding for an investigator or expert witnesses. The lawyers moved again for a continuance on October 18, 2007, on the grounds that they had not been paid or reimbursed and that they were unable to

[1] The State's first Notice of Intent to Seek the Death Penalty was filed August 25, 2006. R-24. However, because the first indictment was defective, the State filed a second Notice on December 11, 2006. R-68. "R-" refers to the Record on Appeal of filings in the trial court. "Tr" refers to transcripts of hearings in the trial court. They are identified by the date of the hearings.

obtain the services of experts.[2] On November 12, 2007, defense counsel filed an "Emergency Motion" for a hearing on their unresolved motions for a continuance, stating:

> The defense has no investigator.
>
> Counsel for the defense have been told verbally that there is no money in the GPDSC or [Georgia Capital Defender] budget to pay counsel.
>
> Counsel for the defense have been told verbally that there is no money in the GPDSC or [Georgia Capital Defender] budget to pay defense experts.

R-856, 858.

At a hearing on November 26, 2007, the director of the GPDSC testified that it was unable to provide funds for the representation of Weis and that he could not say when funds would be available. Nov. 26, 2007 Hearing Tr.-15-16. Instead of responding to the motion for a continuance, the District Attorney made an oral motion to remove Citronberg and West as counsel for Weis and replace them with local public defenders he specified by name. *Id.* at 38-39. Defense counsel had been given no notice that such a motion would be made or considered. Nevertheless, the trial judge announced his legal conclusion that Weis was not entitled to counsel of choice, removed attorneys Citronberg and West, and replaced

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[2] *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.

them with two public defenders named by the District Attorney, Joseph Saia and Tamara Jacobs. *Id.* at 40-50.

Attorneys Citronberg and West promptly filed on December 5, 2007 a motion on behalf of Weis for reconsideration. R-873. Public defenders Jacobs and Saia filed the first of three motions to withdraw as counsel on December 10, 2007. R-888, 931-34.[3] The Trial Court Judge orally denied both Petitioner's motion for reconsideration and the public defenders' motion to withdraw at a hearing on December 10. Dec. 10, 2007 Hearing Tr-25-26.

Like the counsel they were to replace, public defenders Jacobs and Saia were provided no funds for experts, investigators or a mitigation specialist. They filed a *Renewed Motion to Withdraw* on January 17, 2008, followed by a *Supplement to Renewed Motion to Withdraw* on January 28, 2008. R-962-66. In these motions, they pointed out that "[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

[3] In their motions, the public defenders asserted that their appointment violated Georgia Supreme Court cases regarding the defendant's right to continuity of counsel where there was an established attorney-client relationship, *Grant v. State*, 278 Ga. 817, 607 S.E.2d 586 (2005); *Williams v. State*, 279 Ga. 154, 611 S.E.2d 51 (2005); *Davis v. State*, 261 Ga. 221, 403 S.E.2d 800 (1991); *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989); that the "District Attorney who has noticed a Defendant of his intent to seek the death penalty should not be permitted to hand-pick his opponents in the case," that the defendant objected to their representation, that they were unable to duplicate the preparation of Citronberg and West, that they had enormous caseloads making it "impossible" to represent a defendant in a capital case. R-888, 931-34.

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 and to which Defendant is entitled.
>
> The *undersigned remain overburdened with their current caseloads* and other obligations to the circuit.
>
> * * *
>
> 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).

When the trial court failed to rule on this motion,[4] Weis filed a petition for mandamus and prohibition on February 7, 2008 against the trial judge, arguing that

[4] Weis also sought interim review to the Georgia Supreme Court, but the trial judge refused to certify the issue of removal of counsel for review and the Georgia Supreme Court declined to review the case in the absence of certification. R-941, 951 (trial court's orders denying certification); *Weis v. State*, Ga. S. Ct. No. S08I0639 (Order of Jan. 16, 2008) (denying interim review).

the judge was prohibited from interfering with Petitioner's attorney-client relationship and that he had a mandatory duty to reinstate Citronberg and West as counsel.[5]

In April 2008, it appeared that funding had finally become available due to a supplemental appropriation by the legislature and an increase in the funding for capital cases for the next fiscal year.[6] As a result, the parties agreed on April 25, 2008, that Citronberg and West would be reinstated as counsel for Weis.[7] Nevertheless, the Director of the GPDSC refused to sign the required contract with Citronberg and West, and no funds were dispersed until July 2009. R-860.

Despite the lack of any funding for the defense of Weis 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 ever being compensated, attorneys Citronberg and West filed a number of motions, including ones seeking

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[5] *Weis v. Caldwell*, Superior Court of Pike County, No. 2008-CV-070 (filed Feb. 7, 2008). Weis also sought the recusal of the Trial Court Judge on the grounds that he was not impartial in removing his counsel, and that he had engaged in *ex parte* communications regarding their removal and it was planned in advance. R-975. The motion was denied. R-1027. The motions were filed by *pro bono* counsel who appeared for the limited purpose of trying to reinstate Weis's counsel.

[6] Feb. 11, 2009 Hearing Tr-83-84, 124-25.

[7] On February 11, 2009, during a hearing on the Petition for a Writ of Mandamus or Prohibition before another judge, the trial court entered an order formally appointing Citronberg and West as counsel for Weis. R-1022.

funds for counsel, a mitigation specialist, an investigator and experts, as well as dismissal of the case or, alternatively, the death penalty, due to the denial of Weis' rights to counsel and a speedy trial.[8]

On July 8, 2009, the Director of the Public Defender Standards Council appeared before the trial court and—for the first time since March 2007—agreed to provide funds for the defense of Petitioner Weis. However, he agreed to provide less than half of what had been recognized by GPDSC and Petitioner's counsel in April 2008, as necessary for the defense. July 8, 2009 *Ex Parte* Hearing Tr-17, 23-25. At the same hearing, the trial court denied the motions to dismiss the indictment and to discharge and acquit. R-1178, 1183.

Four months later, Petitioner's mother passed away. She would have been a valuable informant with regard to his life and background as well as a witness in mitigation.[9] Her death was the most apparent prejudice to Weis' case from the deprivation of counsel and the prolonged delay with only a brief period of investigation during the initial six months of representation by Citronberg and

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[8] *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.

[9] *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Cofield v. State*, 247 Ga. 98, 111-112, 274 S.E.2d 530, 542 (1981) (holding that "in Georgia, a mother's testimony that she loved her son and did not wish to see him executed was admissible in mitigation in a death penalty case"); *Romine v. State*, 251 Ga. 208, 217, 305 S.E.2d 93, 101 (1983).

West.[10] In addition, Weis suffered from his mental illnesses while being held in a county jail that was not equipped to meet the needs of a severely mentally ill person to the point that he attempted suicide on three occasions.

On March 25, 2010, the Supreme Court of Georgia, by a vote of 4-3, affirmed the denial of the motion to dismiss, holding that Weis and his attorneys were responsible for the delay because they did not cooperate with the substitution of the public defenders as counsel and that there had not been a complete breakdown of the public defender system because the local public defenders were available. *Weis v. State*, __ S.E.2d ___, 2010 WL 1077418 (2010) (Appendix A). Justice Thompson, joined by Chief Justice Hunstein and Justice Benham, dissented, stating: "The failure to move this case forward is the direct result of the government's unwillingness to meet its constitutional obligation to provide Weis with legal counsel and the funds necessary for a full investigation." *Weis v. State*, 2010 WL 1077418 at * 12, Appendix A at 10 (Thompson, J., dissenting).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner asserted that his Sixth, Eighth and Fourteenth Amendment rights were violated in objecting to the removal of his counsel, in seeking reconsideration of the removal, in seeking interim review of the removal, and in filing for

[10] The Georgia Supreme Court was advised of her death in a supplemental brief on prejudice.

mandamus to compel the trial court to reinstate his counsel. Petitioner also asserted that the prolonged deprivation of counsel while capital charges were pending against him and the denial of speedy, fair, and reliable trial violated his Sixth, Eighth, and Fourteenth Amendment rights in 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 in the trial court on June 24, 2009. R-1063. Included therein, Petitioner again raised, as he had in previous pleadings, that his counsel had been improperly removed despite an ongoing attorney-client relationship and that he had sought reinstatement of counsel through pleadings and a mandamus action. *Id.* at 3. The trial court denied the motion by writing "Denied 7-20-09" across the face of the motion and signing it. It was filed the same day by the clerk of the Court. R-1183.

Petitioner also asserted that his right to a speedy trial had been violated, citing the Sixth and Fourteenth Amendments and this Court's decision in *Barker v. Wingo*, 407 U.S. 514 (1972), as well as other cases, in his *Motion for Discharge and Acquittal* filed in the trial court on July 2, 2009. R-1118. The trial court summarily denied the motion on July 9, 2009. R-1178.

In his opening brief to the Georgia Supreme Court, Petitioner Weis set out the following 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 [provisions 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 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 [provisions of the Georgia Constitution], and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

Brief for Appellant at 18-19.

Petitioner asserted in his briefs in the Georgia Supreme Court that he was denied his right to counsel guaranteed by *Powell v. Alabama*, 287 U.S. 45 (1932), and *Gideon v. Wainwright*, 372 U.S. 335 (1963) and their progeny; to "the basic tools of an adequate defense" as established by *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); and that there was a complete breakdown in Georgia's indigent defense system which this Court recognized in *Vermont v. Brillon*, ___ U.S. ___, 129 S. Ct. 1283 (2009), as counting against the State for speedy trial purposes.

A bare majority of the Supreme Court of Georgia affirmed, using the balancing test outlined in *Barker v. Wingo*, 407 U.S. 514 (1972). As previously stated, the majority blamed Petitioner and his lawyers for some of the delay for asserting his right to counsel, "although the lack of funding contributed to some of

the delay ...." *Weis v. State*, 2010 WL 1077418 at *3 (Appendix A at 3). The majority held that the removal of counsel despite an existing attorney-client relationship was acceptable because the trial court's desire to move the case forward "qualifies as a 'countervailing consideration' justifying the appointment of replacement counsel, even over the defendant's objection." 2010 WL 1077418 at *4 (Appendix A at 3).

The three justices in dissent found that Georgia denied Petitioner adequate representation and a speedy trial.

> [I]f the State wants to seek the death penalty against an indigent defendant, it must provide adequate funds for a full and vigorous defense. The State cannot shirk this responsibility because it is experiencing budgetary constraints. It still must fulfill its constitutional obligation to bring those accused of committing crimes to trial in a speedy manner.
>
> * * *
>
> The failure to move this case forward is the direct result of the government's unwillingness to meet its constitutional obligation to provide Weis with legal counsel and the funds necessary for a full investigation. This failure cannot be justified, and it casts doubt upon the fairness and reliability of a trial....

2010 WL 1077418 at *10, *12 (Appendix A at 9-10) (Thompson, J., dissenting) (footnote omitted).

The dissent found the denial of representation to be a "breakdown in the public defender system" as described in *Vermont v. Brillon*. "[C]ontrary to the majority's reasoning, this case does fall within the . . . 'breakdown in the public

defender system,' which should be attributed to the State.... That is because, were it not for the State's failure to provide funds, the statewide public defender system would have worked to provide Weis with counsel, and permit him to continue with counsel of his choice." 2010 WL 1077418 at *10 (Appendix A at 8) (Thompson, J., dissenting).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A DIVISION AMONG LOWER COURTS WITH REGARD TO WHETHER AN INDIGENT DEENDANT MAY BE DENIED CONTINUITY OF REPRESENTATION.

This Court should grant certiorari to decide whether a trial court may remove counsel for an indigent defendant in the midst of an ongoing attorney-client relationship and, if it can, what procedures, if any, govern the determination to remove counsel. The trial court granted the prosecution's motion to substitute counsel without giving Weis notice or an opportunity to be heard. The Georgia Supreme Court faulted Petitioner Weis for not accepting representation by the public defenders, who protested their appointment because of their overwhelming caseloads and lack of time and expertise, and instead seeking to maintain his attorney-client relationship with lawyers who were experienced in the defense of capital cases, thoroughly familiar with his case, and who had the time and expertise to defend his case competently. The Georgia Supreme Court's decision conflicts

with decisions of other state appellate courts, which have held that once an attorney-client relationship has been established, courts may not interfere with it except for the most compelling reasons such as conflict of interest, physical disability, or egregious misconduct.

A. Most Lower Courts Have Treated the Removal of Appointed Counsel the Same as the Removal of Retained Counsel.

While an indigent defendant may have no right to counsel of choice in initially selecting counsel, *see Caplin & Drysdale v. United States*, 491 U.S. 617, 624 (1989), most courts that have considered the question have held 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." *Smith v. Superior Court of Los Angeles County*, 440 P.2d 65, 74 (Cal. 1968) (emphasis added); *accord Morris v. Slappy*, 461 U.S. 1 (1983) (Brennan, J., concurring) (quoting *Smith*, 440 P.2d at 74); *Lane v. State*, 2010 WL 415248 at *14, 2010 Ala. Crim. App. LEXIS 2, at *42 (Feb. 5, 2010) (finding substitution of counsel violated Sixth Amendment, quoting *Smith v. Superior Court*); *McKinnon v. State*, 526 P.2d 18, 22-23 (Aka. 1974) (same); *State v. Madrid*; 468 P.2d 561, 563 (Ariz. 1970) (same); *Clements v. State*, 817 S.W.2d 194, 200 (Ark. 1991) (reversing removal of counsel in interlocutory pretrial appeal); *Harling v. United States*, 387

A.2d 1101, 1105 (D.C. App. 1978) (reversing conviction because of substitution of counsel over defendant's objection); *People v. Davis,* 449 N.E.2d 237, 241 (Ill. 1983) (finding that defense counsel was improperly removed and holding "for purposes of removal by the trial court, a court-appointed attorney may not be treated differently than privately retained counsel"); *In re Welfare of M.R.S.*, 400 N.W.2d 147, 152 (Minn. Ct. App. 1987) (finding attorney improperly removed as counsel for a juvenile in delinquency proceedings because "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 objection of both the defendant and counsel"); *In re Civil Contempt Proceedings Concerning Richard*, 373 N.W.2d 429, 435 (S.D. 1985) (relying on Sixth Amendment cases to reverse removal of counsel for person incarcerated for civil contempt for refusing to testify before a grand jury); *State v. Huskey*, 82 S.W.3d 297, 305 (Tenn. 2002) ("[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."); *cf. Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (stating that "[e]xcept for the source of payment" the relationship between an indigent defendant and appointed counsel is "identical to that existing between any other lawyer and client").[11]

[11] *See also Weaver v. State*, 894 So. 2d 178, 188 (Fla. 2004) ("To allow trial courts to remove an

Courts have recognized a strong presumption in favor of the defendant's right to continue being represented by the counsel appointed for him with removal justified only in the most compelling circumstances such as (1) a severe conflict of interest, *e.g.*, *Wheat v. United States*, 486 U.S. 153, 164 (1988); *Rodriguez v. District Court*, 719 P.2d 699, 707 (Colo. 1986), (2) the defendant's preferred counsel is not authorized to practice law, *see, e.g.*, *Wheat*, 486 U.S. at 159, or (3) counsel has some physical incapacity, is grossly incompetent, or has engaged in contumacious conduct, *see, e.g.*, *Harling*, 394 A.2d at 1105; *Weaver*, 894 So.2d at 189; *Burnette v. Terrell*, 905 N.E.2d 816, 824-25 (Ill. 2008). *See also People v. Johnson*, 547 N.W.2d 65, 69 (Mich. App. 1996) (removal of defense counsel violated the Sixth Amendment because it was not for gross incompetence, physical incapacity or contumacious conduct).

None of these reasons were implicated here. The prosecutor moved to remove Weis' counsel because the state could not pay for the lawyers originally

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indigent defendant's court-appointed counsel with greater ease than a non-indigent defendant's retained counsel would stratify attorney-client relationships based on defendants' economic backgrounds."); *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); *English v. State*, 259 A.2d 822, 826 (Md. App. 1969) ("[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. . . . So the accused cannot be forced to be heard at trial through counsel other than the one employed by him or appointed by the court, as the case may be, to represent him, no matter how competent, experienced and conversant with the case other counsel may be and regardless of the fact that in retrospect the other counsel afforded him a genuine and effective representation.").

appointed to defend Petitioner and the public defenders were "on salary."[12] Thus, the only reason for removal was to reduce costs.

The trial court would not have been in a position to remove Weis' counsel but for the fact that Weis is indigent and his counsel was appointed, rather than retained. Thus, the courts cited above would consider removal of appointed counsel simply to save money—a reason that could not apply to or be justified in the case of retained counsel—the product of impermissible differentiation between the attorney-client relationship of an appointed as opposed to retained counsel.

B. Some Courts Have Treated the Removal of Appointed Counsel Differently from the Removal of Retained Counsel.

In this case, the Georgia Supreme Court relied upon the Louisiana Supreme Court's decision in *State v. Reeves*, 11 So. 3d 1031 (La. 2009), which held that "there is nothing in either the federal or state constitutions which would provide Reeves with the right to maintain a particular attorney-client relationship in the absence of a right to counsel of choice." *Id.* at 1062. The Sixth Circuit has likewise held that because an indigent defendant does not have the right to counsel of choice, he or she has no cognizable complaint if appointed counsel is replaced

[12] However, as the public defenders soon made clear, they were carrying such huge workloads that they were ethically prohibited from taking on Weis' case. *See* Ga. Rule Prof'l Conduct 1.1 (prohibiting lawyers from handling a matter unless they can do so competently). Rule 6.2 states that "[f]or good cause a lawyer may seek to avoid appointment by a tribunal to represent a person." 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.

absent a showing of prejudice. *See Daniels v. Lafler*, 501 F.3d 735 (6th Cir. 2007); *see also Gonzalez v. Knowles*, 515 F.3d 1006, 1012 (9th Cir. 2008) (holding that absent a showing of prejudice, "since Gonzalez was appointed *an* attorney who was at least facially competent, no Sixth Amendment violation occurred as a result of the court's appointment of someone other than Gonzalez's first-choice counsel" when counsel who represented the defendant on appeal was replaced on remand). The Second Circuit has recognized that "the criminal defendant does . . . retain some interest in continuous representation," though "courts are afforded considerable latitude in their decisions to replace appointed counsel." *United States v. Parker*, 469 F.3d 57, 61 (2d Cir. 2006); *see also United States v. Van Anh*, 523 F.3d 43, 48 n.3 (1st Cir. 2008) (stating that no continuity of counsel issue arises when an indigent defendant's appointed counsel is replaced because this issue only arises when a defendant has been denied his "paid counsel of . . . choosing."). Thus, there is a division among state and federal courts with regard to a defendant's right to continuity of counsel.

C. This Court Should Clarify its Dicta in *Morris v. Slappy*, Which Some Lower Courts Have Construed to Mean That Indigent Defendants Have No Right to Continuity of Counsel.

Some lower courts have concluded that there is no right to continuity of counsel due in part to dicta in this Court's decision in *Morris v. Slappy*, 461 U.S. 1

(1983), in which the majority states, "[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel." *Id.* at 14. Several courts have taken this language to mean that the defendant has no right to continuity of counsel. *See Knowles*, 515 F.3d at 1012; *Van Anh*, 523 F.3d 43 at 48; *Parker*, 469 F.3d 57 at 61; *Reeves*, 11 So.3d at 1065-66.[13] However, this Court's holding in *Morris* addresses the trial court's discretion in granting continuances, not continuity of counsel. Furthermore, the context of this language in *Morris* suggests that this Court was concerned about the creation of a new and unworkable right of "meaningful representation." As this Court said, "[n]o court *could possibly guarantee* that an accused will develop the kind of rapport with his attorney . . . that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel." *Id.* at 13 (emphasis added). Moreover, defense counsel was replaced due to an emergency hospitalization and the defendant

[13] Other courts have interpreted this language simply as rejecting a heightened subjective standard of effectiveness. *See, e.g., United States v. Verdin-Garcia*, 2010 U.S. Dist. LEXIS 38715 at *30 (Apr. 20, 2010) (citing *Morris* to support a statement that it is possible for a defendant to receive effective assistance of counsel in the face of no communication with his attorney); *Brawner v. Epps*, 2010 U.S. Dist LEXIS 7487 at *35 (rejecting petitioner's claim that attorney's failure to develop a meaningful relationship with him prejudiced his case) (Jan. 27, 2010); *Helton v. Ruan*, 2009 U.S. Dist. LEXIS 124032 at *32 (Dec. 30, 2009) (rejecting petitioner's claim that his counsel was ineffective because the attorney met with him only once); *McCord v. California*, 2010 U.S. App. LEXIS 8295 at *2 (Apr. 21, 2010) (supporting holding that an irreconcilable conflict between a defendant and his attorney does not necessarily render that attorney ineffective); State *v. Clark*, 772 P.2d 263, 265 (Ida. 1989) (holding that a defendant's loss of faith in his attorney does not render that attorney ineffective); *United States v. Close*, 2009 U.S. Dist. LEXIS 74146 at *10 (Aug. 20 2009) (citing *Morris* to explain that competence, as opposed to a meaningful relationship with the defendant, is required of appointed counsel).

waived the issue of continuing with that attorney. *Morris*, 461 U.S. at 12*; see also Morris*, 461 U.S. at 15 (Brennan and Marshall, JJ., concurring) (noting that the only issue properly before the Court was the trial court's discretion in granting the continuance); *Morris,* 461 U.S. at 29 (Blackmun & Stevens, JJ., concurring) (same). This case provides the Court an opportunity to clarify its precise holding in *Morris*.

D. This Court Should Determine What Procedural Protections Are Required When Counsel is Removed Over a Defendant's Objection.

This Court should also determine what process is due to a defendant when a prosecutor seeks to remove counsel with whom there is an established attorney-client relationship over the objection of the defendant. Obviously, a prosecutor gains a significant strategic advantage if he or she can select counsel for the defendant that results in poor representation. Yet even though the integrity, legitimacy and credibility of the legal system were at stake, Weis received no notice or opportunity to be heard. This Court has recognized a right to greater due process protections for revocation of a driver's license, *Bell v. Burson*, 402 U.S. 535 (1971), or termination of welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970). Surely, some process is due before a person facing the loss of his life is stripped of lawyers qualified to represent him and familiar with him and his case. The Court should grant certiorari in this case and decide what notice, opportunity

to be heard and other procedural protections an indigent defendant is entitled to before his adversary can take away effective representation in a capital case.

II. THIS COURT SHOULD DECIDE WHETHER GEORGIA'S FAILURE TO PROVIDE FUNDING FOR REPRESENTATION FOR WEIS FOR OVER TWO YEARS WAS A "BREAKDOWN" OF THE INDIGENT DEFENSE SYSTEM.

Petitioner Weis, who suffers auditory and visual hallucinations, deep depression and severe anxiety, was virtually without legal representation for all but six months of the first three and a half years that he faced the death penalty. He was arrested on February 2, 2006, but not assigned counsel qualified to represent him in a capital case until October 12 of that year. Counsel began to investigate his case and file motions on his behalf, but by the following March, Georgia's indigent defense agency, the Public Defender Standards Council, could not provide funding for investigation or experts. Shortly thereafter, it could not even pay defense counsel.

The State's response, through its District Attorney, was to move to replace the lawyers who were representing Weis with two hopelessly overworked public defenders who protested that they could not possibly take on a capital case. One

public defender testified that she was not even certified to handle a capital case[14] and that she 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," half of them felonies.[15] The other public defender 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.[16]

Although Petitioner eventually secured an agreement to reinstate his original lawyers after filing a mandamus action against the trial judge, no funding was provided for his defense until July 2009, over two years after funding ran out. Petitioner was one of many people facing the death penalty who received no representation for a substantial period of time because the Georgia legislature did not allocate sufficient funding to provide for the timely, competent, and effective representation the Sixth Amendment requires.[17] The Interim Director for the

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[14] Georgia requires that lawyers assigned to defend capital cases take a certain amount of continuing legal education courses on the defense of capital cases each year. Ga. Unified Appeal, Rule II.A.1.

[15] R-932-34; Deposition of Tamara Jacobs Bell, April 4, 2008, at 17-18, 28-29 (introduced at the Feb. 11, 2009 hearing at Tr-47).

[16] Deposition of Joseph Saia, April 4, 2008, at 9-10 (introduced at the February 11, 2009 hearing at Tr-47). Saia testified that the "biggest part" of his job was dealing with the judges and the district attorneys on administrative matters. R. 926-30; Saia Deposition at 9-16. 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." Id. at 40.

[17] *See* Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, NY TIMES, Mar. 22, 2007, *available at* http://www.nytimes.com/2007/03/22/us/22atlanta.html (reporting

Office of the Capital Defender testified that as the caseload of capital cases steadily increased, funding from the legislature steadily decreased.[18]

This 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 v. Wainwright*, 372 U.S. 335, 344-45 (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). None of this

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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*" (emphasis added)). Some of the cases include *State v. Khahn Dinh Phan,* Ga. S. Ct. No. S10A0374 (pending decision) (capital case pending five years since arrest because of lack of funding for the defense since 2007); *State v. Sims,* Tift Co. Super. 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 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). *State v. Ortegon,* Forsyth Co. Super. 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.).

[18] Deposition of Interim Capital Defender Gerald Word, April 27, 2008, at 90-95 (describing attending court hearings regarding lack of funding for various capital cases) (introduced at the Feb. 11, 2009 hearing at Tr-47).

happened after Petitioner was accused of murder and was facing the death penalty. He had no lawyer working on his case, no guiding hand, none of the basic tools of an adequate defense. Instead, he experienced the most severe imbalance of power between the State and the accused imaginable. *See Wardius v. Oregon*, 412 U.S. 470, 476 (1973) (holding that such imbalances violate the Constitution).

This case squarely presents the question of whether the failure to provide representation for Weis constitutes a "systemic breakdown in the public defender system" that his Court stated in *Vermont v. Brillon*, ___ U.S. ___, ___, 129 S. Ct. 1283, 1292-93 (2009), should be charged to the State for speedy trial purposes. The Georgia Supreme Court majority said it did not. It said that Weis should have acquiesced in the District Attorney's selection of his counsel without complaint; that he should not have asserted his right to continuous representation by the lawyers who had been representing him; and that because *some lawyers* were available within the public defender system, the system had not broken down. *Weis v. State*, 2010 WL 1077418 at *3, *4, *5 (Appendix A at 3-5).

The Georgia Supreme Court majority penalized Weis for exercising his legal rights and even compared him to the defendant in *Vermont v. Brillon*: "'[a]bsent [Weis'] deliberate efforts to force the withdrawal of his [replacement attorneys], no speedy trial issue would have arisen.'" *Weis*, 2010 WL 1077418 at *4 (Appendix A at 4), quoting *Vermont v. Brillon*, 129 S.Ct. at 1292. Brillon went through six

lawyers. He fired his first attorney on the eve of trial by yelling "You're fired, Rick" at a hearing. He *threatened to kill* another lawyer assigned to represent him. *Id.* at 1287-88, 1292. Weis' successful exercise of his legal rights is in no way comparable to threatening to kill one's attorney.

The reality is that absent GPDSC's failure to provide funding for the case from April 2007 to July 2009, no speedy trial issue would have arisen. This case would have gone to trial in a timely manner if Georgia had simply appropriated sufficient funding to pay for indigent defense representation in capital cases.[19] 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. At the time, GPDSC was not providing funds for *any other capital cases with private counsel.* This critical fact – not mentioned in the majority opinion – puts the case in the context of the larger funding crisis and leaves no doubt that the delay was not the fault of Weis, his original lawyers, the public defenders who never even represented him, or *pro bono* counsel who assisted him in asserting his rights.

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[19] As Weis argued in Motion to Reconsider: "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 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 nine months in 2007.* That delay is entirely attributable to Georgia." *Motion for Reconsideration* filed in the Georgia Supreme Court April 5, 2010 (emphasis in original).

Everything that Weis and that his lawyers did was *in response* to the chain of events started by the State's failure to adequately fund the public defender system.

This Court should clarify what qualifies as a "systemic breakdown in the public defender system," and address the implications of the Georgia Supreme Court's decision on the adversary system and equal justice.

III. THIS COURT SHOULD DETERMINE WHETHER THE ISSUES REGARDING THE DENIAL OF COUNSEL AND SPEEDY TRIAL ARE APPEALABLE BEFORE PETITIONER IS PUT ON TRIAL FOR HIS LIFE.

Petitioner Weis has suffered irreparable harm as a consequence of the virtually complete denial of his most fundamental right—the right to counsel—during "the most critical period of the proceedings, ... from arraignment ... until ... trial, when consultation, thorough-going investigation and preparation [are] vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). It is clear that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Maine v. Moulton*, 474 U.S. 159, 170 (1985). "[I]t is through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84 (1988).[20]

[20] Thus, the denial of the right to counsel also denies the defendant his ability to exercise other basic rights, especially his rights to consult with counsel about his case, to investigate his case and to retain such experts as necessary to contest the prosecution's case and to present a defense, and, in the case of this Petitioner, to receive adequate medical and mental health care while awaiting trial.

The complete denial of counsel during a critical stage of the proceedings for a substantial period of time is an instance in which prejudice is so apparent that it is presumed:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. *See United States v. Cronic*, 466 U.S. [648,] at 659, and n.25 [1984]. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

Strickland v. Washington, 466 U.S. 668, 692 (1984). However, once Petitioner has been subjected to a capital trial, no matter how perfunctory, the denial of counsel will become unreviewable because of the highly deferential post-trial standard of *Strickland v. Washington*. Under *Strickland*'s post-trial standard, 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.

A defendant faces even more hurdles in attempting to establish ineffectiveness before a federal court under the provisions of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254. *See, e.g., Wood v. Allen*, ___ U.S. ___, 130 U.S. 841 (2010) (deferring to state court's finding that counsel's failure to investigate defendant's mental retardation was a "strategic decision" and,

therefore, the failure to present special education teachers to show that Wood was reading on the third grade level and classified as "educable mentally retarded" was not ineffective); *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).

A defendant has a fundamental right not to be subjected to an unconstitutional trial. This Court has said, "the clear intent of the [Sixth and Fourteenth] amendments is that these specific rights be enjoyed *at a constitutional trial*.... [T]hough 'every form [be] preserved,' the forms may amount to no 'more than an empty shell' when considered in the context or setting in which they were actually applied." *Estes v. Texas*, 381 U.S. 532, 560 (1965) (quoting *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting)) (emphasis added).

This case presents an important jurisdictional question, whether the complete breakdown of an indigent defense system causing the denial of counsel and a fair, speedy and reliable trial is appealable pre-trial. This Court should clarify the collateral order doctrine and distinguish this case from *United States v. MacDonald*, 435 U.S. 850 (1978) (holding that the denial of a motion to dismiss on speedy trial grounds is not immediately appealable under the collateral order

exception). This case involves the question of whether there is such a complete breakdown in providing counsel for the accused that a fair trial is impossible.

The requirement that a court's decision be final before it can be appealed is "to be given a practical rather than a technical construction," *Abney,* 431 U.S. 651, 658 (1977) (citing *Cohen*, 337 U.S. at 546). Indeed, this Court has based its jurisprudence on the "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered...." *Matthews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976).

This Court has recognized that certain pre-trial decisions in criminal proceedings are immediately appealable under the collateral order exception, where post-trial relief would not remedy the harms suffered. *See Stack v. Boyle*, 342 U.S. 1 (1951) (approving immediate appeal of bail determination); *Abney v. United States*, 431 U.S. 651, 656-62 (1977) (approving immediate appeal on double jeopardy claims); *Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981) (same); *Richardson v. United States*, 468 U.S. 317 (1984) (same); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (recognizing that a Congressman's claim of privilege under the Speech or Debate Clause is immediately appealable); *Sell v. United States*, 539 U.S. 166, 176 (2003) (approving immediate appeal of pre-trial forced medication). This Court has also determined that it may postpone its decision on

jurisdiction until it decides the merits. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975).

The federal courts of appeals have applied the collateral order doctrine to review appeals in additional criminal contexts. The Fourth Circuit Court of Appeals heard a defendant's appeal from a District Court order denying his motion to strike and bar the United States' notice of intention to seek the death penalty. *United States v. Ferebe*, 332 F.3d 722, 726 (4th Cir. 2003). Several circuits have applied the collateral order exception to decisions committing a defendant to hospitalization when found incompetent to stand trial. *See United States v. Friedman*, 366 F.3d 975, 979 (9th Cir. 2004) (noting that no circuit has ruled otherwise); *United States v. Ferro*, 321 F.3d 756, 759 (8th Cir. 2003). *See also United States v. Filippi*, 211 F.3d 649, 650-51 (1st Cir. 2000); *United States v. Boigegrain*, 122 F.3d 1345, 1348-49 (10th Cir. 1997); *United States v. Davis*, 93 F.3d 1286, 1289 (6th Cir. 1996) (stating that "[a]n order of commitment for psychiatric examination easily satisfies the requirements of the collateral order doctrine"); *United States v. Donofrio*, 896 F.2d 1301, 1303 (11th Cir. 1990); *United States v. Gold*, 790 F.2d 235, 238-39 (2d Cir. 1986). The Ninth Circuit Court of Appeals recently allowed immediate appeal under the collateral order doctrine when a District Court upheld a requirement that defendants wear leg shackles while making their first appearances before a magistrate judge. *United*

States v. Howard, 480 F.3d 1005, 1011 (9th Cir. 2007) (noting that "An acquittal ... would favorably terminate the prosecution of the defendant, but would not affect the deprivation of liberty that occurred during the pretrial hearing.").

This case involves the denial of the most fundamental right—the right to counsel—and the ultimate punishment—death. Weis, who suffers from schizophrenia, anxiety and depression, has been jailed for more than four years, denied representation during most of that time, has had his counsel removed altogether from his case at one point, and has suffered to the point that he has resorted to three suicide attempts. This Court should not require Weis to endure an unconstitutional trial before he can obtain relief. His chances of acquittal have been extinguished by the denial of counsel, investigators, and experts at the most critical stage of his case. He faces not a "trial," as that term is understood as contest between adversaries, but the fate of those thrown to the lions. Because the denial of his most fundamental Sixth Amendment rights and the prejudice resulting from it are unreviewable after such a sham, the decision of the Georgia Supreme Court is subject to immediate review as a collateral order.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks that this Court issue a writ of certiorari to review the decision below.

Respectfully submitted,

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