

In the
Supreme Court of Georgia

No. S09A1951

JAMIE RYAN WEIS,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

**APPELLANT'S
SUPPLEMENTAL
BRIEF ON PREJUDICE**

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I. APPELLANT HAS SUFFERED ADDITIONAL PREJUDICE DUE TO THE DEATH OF HIS MOTHER.

Since the briefing and argument in this case, Appellant Jamie Ryan Weis's mother died on November 15, 2009,¹ significantly adding to the prejudice resulting from the delay of this case. "Impairment of the defendant's ability to prepare his case is the most serious form of prejudice." *State v. Redding*, 274 Ga. 831, 833, 561 S.E.2d 79, 81 (2002). *See also Barker v. Wingo*, 407 U.S. 514, 532 (1972); *Doggett v. United States*, 505 U.S. 647, 654 (1992). "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U.S. at 532.

In *Cofield v. State*, 247 Ga. 98, 111-112, 274 S.E.2d 530, 542 (1981), this Court held that, whether or not required by *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), "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). This Court applied *Cofield* in *Romine* and reversed a death sentence where the trial judge had refused to grant a continuance so

1. Attached to this brief as Appendix A is Social Security Administration Form 0960-0242, Statement of Death by Funeral Director, regarding the death of Kimberly Carol Bailey, Mr. Weis's mother, as well as the obituary from the *Bluefield Daily Telegraph*, which is appended as Appendix B. Undersigned counsel hereby represent to this Court based upon their knowledge of this case, including review of official documents, that Ms. Bailey, who was married to Fred Weis on May 28, 1975 in Tazwell, Virginia, gave birth to Appellant Jamie Ryan Weis on October 10, 1977. She and Mr. Weis were divorced on Feb. 20, 1980 in the Circuit Court of Mercer County, West Virginia. Appellant was two years of age at the time. She subsequently remarried. The death certificate is still being prepared, but will be filed with the Court when completed.

that the defendant's grandfather could testify that he did not wish to see his grandson executed. This was the only offer of proof that defense counsel made as to what the grandfather would testify. *Romine*, 251 Ga. at 216, 305 S.E.2d at 100-101. *See also Barnes v. State*, 269 Ga. 345, 359, 496 S.E.2d 674, 688 (Ga. 1998) ("It is reversible error to prevent a friend or relative of the defendant from taking the stand and pleading with the jury for mercy."); Unified Appeal Procedure checklist, Section III (2)(b) (evidence to be presented at penalty phase includes "[t]estimony of friend or relative asking for mercy.")

The delay in this case has, at the very least, denied Appellant Weis of this compelling testimony at the penalty phase. But Appellant's mother was also an indispensable source of information about other mitigating evidence that the defense will now be foreclosed from investigating. Mr. Weis has already demonstrated that he has been severely prejudiced by the delay caused by the extraordinary deprivation of legal representation and the State's failure to promptly file its Notice of Intent to Seek the Death Penalty. Appellant's Brief at 33-37. The loss of his mother establishes beyond any doubt the irreparable prejudice that Appellant Weis has suffered as a result of the delay.

II. THE ADDITIONAL PREJUDICE CLEARLY ESTABLISHES A SPEEDY TRIAL VIOLATION AND THAT DISMISSAL IS REQUIRED.

The United States Supreme Court stated in *Barker v. Wingo*, there are “three interests which the speedy trial right was designed to protect: (a) to prevent oppressive pre-trial incarceration; (b) to minimize anxiety and concern of the accused; and (c) to limit the possibility that the defense will be impaired.” *Barker*, 505 U.S. at 532. “Of these forms of prejudice, ‘the most serious is the last, because the inability of a defendant adequately to prepare his case 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 *State v. Carr*, 278 Ga. 124, 127, 598 S.E.2d 468, 471 (2004) (affirming trial court’s dismissal of malice murder and arson charges due to denial of speedy trial where defense witnesses had died or become impaired, notwithstanding the availability of transcripts of their testimony from an earlier trial); *State v. Redding*, 274 Ga. 831, 833, 561 S.E.2d 79, 81-82 (2002) (affirming dismissal of malice murder, felony murder and aggravated assault charges due to denial of speedy trial where witnesses and files no longer available).²

2. See also *Hardeman v. State*, 280 Ga.App. 168, 170-71, 633 S.E.2d 595, 598 (2006) (holding a speedy trial right violated due to death of witness during delay of two years); *Hester v. State*, 268 Ga.App. 94, 100, 601 S.E.2d 456, 461 (2004) (noting the “powerful impact of a live witness testifying from the stand” in finding prejudice and holding speedy trial right violated, requiring dismissal of vehicular homicide and hit and run charges); *State v. Johnson*, 274 Ga. 511, 514, 555 S.E.2d 710, 713 (2001) (holding that the State’s loss of original 911 tape was “analogous to the death or disappearance of witnesses, where ‘the prejudice is obvious,’” and required dismissal of malice murder, felony murder, and aggravated assault charges due to speedy trial violation.)

Mr. Weis has clearly demonstrated the first two – the severe oppressiveness of his detention in a county jail and the heightened anxiety he has suffered, both of which have been exacerbated by the major mental illnesses from which he suffers.³

The State has not seriously contested this prejudice, but argued that Appellant has not established that his defense has been impaired.⁴ Appellant has already shown that this argument is not valid because of the impossibility of recreating the period of over two years when he was without any legal representation, but the State’s argument is clearly not valid now. The death of Mr. Weis’s mother – a witness who has a unique standing that no other witness has – severely damages his ability to prepare for the penalty phase⁵ and prevents him from presenting testimony that this Court has found

3. Appellant's Opening Brief at 33-37; Reply Brief at 17-21.

4. See State’s Brief at 16-18 (arguing that Appellant’s prejudice was with regard to “anxiety and concern” but not that “witnesses are no longer available or similar issues”).

5. See, e.g., American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Commentary to Guideline 10.7, published at 31 HOFTSTRA L. REV. 913, 1022-26 (requiring prompt interview with family members, obtaining releases in order to get school, social service and welfare records, juvenile dependency and family court records, medical records, military records, employment records, criminal and correctional records, family, birth, marriage and death records, and alcohol and drug abuse assessment or treatment records because records of family members may be relevant to mental impairments, substance dependency or other mitigating factors regarding the client); *Libberton v. Ryan*, 583 F.3d 1147, 1171-73 (9th Cir. 2009) (finding trial counsel ineffective for failing to conduct proper investigation and discovering evidence which “would have dramatically transformed the case for mitigation,” including testimony of defendant’s mother and sister, who were “available to testify, and could have painted a sympathetic portrait of” the defendant); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985) (finding trial counsel ineffective for failing to present testimony of various mitigation witnesses, including defendant’s mother).

of critical importance in *Cofield* and *Romine*. There is no adequate substitute for the testimony that the Appellant's mother could have offered the jury.

The unique value of a mother's testimony was recognized by the Missouri Supreme Court in upholding an attorney's decision to present a "mitigating defense [that] consisted solely of [the client's] mother's testimony which emphasized the fact that she loved her son, missed him at holidays, would continue to love him if he served life in prison, and would draw value from a continued relationship with him." *State v. Simmons*, 955 S.W.2d 729, 750 (Mo. 1997). The defense strategy was "to demonstrate that there was a person, his mother, who would draw value from [the client's] continued existence, and who would suffer a loss from his death." *Id.* The Court found this to be a sound strategy.

This case would have gone to trial in a timely manner if funding had been available. Counsel for Mr. Weis, in their first five months of representing him between October 12, 2006 and mid-March, 2007, filed over 60 motions, litigated all of the non-evidentiary motions, met on numerous occasions with Mr. Weis, and retained a mitigation specialist. Counsel and the mitigation specialist traveled to Mr. Weis's home in rural West Virginia, and started to investigate his life and background so they could present evidence in mitigation.

Until they were notified that there were no funds for the mitigation specialists, experts or other expenses in the case in April, 2007, this case was on schedule to

resolve the remaining motions by the summer of 2007 and to be tried in the fall or winter of 2007. Even if the case had not been tried then, defense counsel – if funded – certainly could have been ready for motions hearings on November 26, 2007, and for trial on February 9, 2008, the dates set by the trial court on August 2, 2007. The only reason that the case was not tried on this schedule was lack of funding for Mr. Weis’s legal representation. The case could have been on an even earlier schedule had it not taken the District Attorney almost a full year to indict the case and file the Notice of Intent to Seek the Death Penalty.

The State ignores reality and misrepresents the facts in arguing “it was the actions of the private attorneys that created this problem.”⁶ The lack of funding “problem” does not exist in this one case, but in every capital case being handled by private counsel. The reason, as Mack Crawford explained to the trial court, is that “[t]he Senate zeroed out [appropriations for representation in such cases]. The conference committee zeroed it out. *So it left no state appropriations to pay for the defense of Mr. Weis.*”⁷

The State falsely accuses Mr. Citronberg and Mr. West of “demand[ing] . . . to be paid in full for their services *prior to . . . trial,*” “declin[ing] to perform their

6. State’s Letter Brief, dated Nov. 23, 2009, at 3.

7. July 8, 2009 *Ex Parte* Hearing at 14 (emphasis added).

duties when a partial payment is made,” and going “on strike.”⁸ However, as the record makes clear, there was no funding for defense representation for over two years. There were no “partial payments” at any time. The State ignores completely the fact that the funding problem arose when there were no funds in the spring of 2007 for *expert witnesses, an investigator* and to continue to pay the *mitigation specialist*.⁹ This was not about attorneys declining to do their duties; it was about the impossibility of attorneys representing their client without the “the basic tools of an adequate defense.”¹⁰ The State also ignores the fact that the “salaried, competent public defenders” it says were available to represent Appellant had the same problem – they could not get funds for these essential elements of a defense either. *See* R-964 (public defenders state in supplemental motion to withdraw, “There [are] no funding resources available at the Griffin Circuit Defenders Office to cover such expenses.”) The State also ignores the protests of the public defenders that they were not capable

8. State’s Letter Brief at 2-3 [emphasis added].

9. Without explaining the relevance, the State says that “the sum sought for just this one case would provide the funds to employ a full-time attorney and investigator for the Georgia Capital Defenders who could then work on eight death penalty cases” State’s Letter Brief at 2. However, the budget for this case was not just for the services of lawyers and a single investigator. It was for the services of a number of expert witnesses, a mitigation specialist, an investigator, the cost of bringing witnesses from out of state to Georgia to testify, providing for their lodging and meals; providing lodging and travel for all members of the defense team; and other costs that would be incurred by any lawyers in a capital case whether from the Capital Defenders or elsewhere.

10. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

of representing Appellant due to their overwhelming caseloads and that they were not statutorily authorized to handle capital cases.

The pleadings filed by Mr. Citronberg and Mr. West, cited in Appellant's Opening Brief at 5-6, and the transcript of the November 26, 2007 hearing, make it quite clear that Mr. Citronberg and Mr. West wanted only to be paid within a reasonable time after services were performed (*e.g.*, monthly) for their professional services. Like salaried employees, attorneys in private practice have financial obligations that must be met on a timely and regular basis. However, even when they were not being paid, Mr. Citronberg and Mr. West continued to work on behalf of Mr. Weis and attempt to obtain the resources to provide a defense for him.¹¹ It is simply preposterous to say that they went "on strike."¹²

Because the delays of over three years were all attributable to the State and resulted in irreparable prejudice to Mr. Weis, his constitutional right to a speedy trial

11. For example, Mr. Citronberg and Mr. West represented Appellant at the November 26, 2007 hearing and at the December 10, 2007 hearing despite not having been paid for months for their services; they negotiated with Interim Capital Defender Jerry Word and Public Defender Standard Council Chief of Staff Sarah Haskin in April of 2008 in an effort to get the case back on track, even though they were not being paid at the time; they represented Mr. Weis at the motions hearing on July 8, 2009 even though they had not been paid for their services for well over two years; and they are representing him on this appeal even though they are not being paid for their services.

12. In the circumstances he was in, Appellant Weis can hardly be faulted for not asserting his right to a speedy trial any more than he did. Attorney West confirmed to the trial judge at the Dec. 10, 2007 hearing that failure to try the case could violate Appellant's right to a speedy trial. Dec. 10, 2007 Hearing Tr-26. Appellant, who could not *prepare for trial because he had no legal representation and no resources for his defense* was hardly in a position to demand a speedy trial. He had to first demand and obtain counsel and the "basic tools of an adequate defense" as necessary steps toward a speedy trial. He vigorously sought those things from March, 2007 until July 9, 2009.

was violated. Accordingly, the charges against him must be dismissed or, alternatively, the State must be barred from seeking the death penalty.

CONCLUSION

The testimony of Appellant's mother alone could have been decisive to the outcome at the penalty phase of his trial. It is lost forever because of inexcusable delays that are all attributable to the State. The prejudice is irreparable. For the foregoing reasons as well as all of those previously advanced in Appellant's previous submissions, Appellant Jamie Ryan Weis asks this Court to reverse the rulings below and to remand this case with instructions to dismiss the indictment, or, alternatively, to bar the State 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 ____ day of

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APPENDIX A

APPENDIX B