

In the
Supreme Court of Georgia

No. S09A1951

JAMIE RYAN WEIS,
Appellant,

vs.

STATE OF GEORGIA,
Appellee.

**REPLY BRIEF
FOR APPELLANT**

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INTRODUCTION

The State's brief treats this case as if it involved a typical claim of denial of a speedy trial. The State ignores completely the extraordinary deprivation of the right to counsel, the reasons for it, and the prejudice resulting from it. In addition, the State argues that because the District Attorney's office is not responsible for the lack of funding which disabled defense representation for over two years, the State of Georgia is not responsible for the resulting delay in the proceedings. That is simply not so.

The State of Georgia – the entire state, not just its prosecutors – has the constitutional responsibility to provide legal representation to people accused of crimes who cannot afford a lawyer. If the State of Georgia decides through its elected representatives not to provide for the defense required for a death penalty case, it must forgo the death penalty. And Georgia's failure to provide funding for the legal representation of Appellant for over two years certainly counts against the State for speedy trial purposes, as the United States Supreme Court recognized in *Vermont v. Brillon*, 129 S. Ct. 1283, 1287, 1292 (2009).

The State suggests that Appellant Weis should have accepted representation by the public defenders that the District Attorney tried to foist upon him,¹ despite

¹ State's Br. at 12. As set out in Appellant's opening brief, the District Attorney moved the trial court to replace the lawyers who had been representing Appellant for over a year with two public

the public defenders' repeated protests that their workloads, lack of time and lack of expertise made it impossible for them – in their words – to “perform adequately in representing the Defendant, no matter how good our intentions or diligent our efforts.”² One of the two public defenders, Tamara Jacobs, was involved as counsel in an astounding 416 cases.³ The State does not acknowledge the District Attorney's unseemly role in moving to replace defense counsel, the complete inability of the public defenders to take on the case, and the delay the District Attorney caused by depriving Mr. Weis of his counsel for a year and two months.

The replacement of attorneys Robert Citronberg and Thomas West as counsel was not the way to achieve a speedy trial unless the goal was a sham trial with representation in name only. Public defenders Joseph Saia and Tamara Jacobs made it abundantly clear in their pleadings that they could not possibly become as familiar with the case as attorneys Citronberg and West were already. Moreover, in their third pleading seeking to withdraw, defenders Saia and Jacobs reported that they had “explored avenues for funding for experts, investigation and travel” and were unable to find any. R-964.⁴ As was obvious to the trial court and the District

defenders who were overburdened with felony caseloads, and the trial court granted the motion. Appellant's Brief at 6-7.

² *Renewed Motion to Withdraw* filed by public defenders Saia and Jacobs, Jan. 28, 2008, R-962 at 964.

³ Tamara Bell Jacobs Deposition at 18, introduced at Feb. 11, 2009 hearing Tr-47.

⁴ Nevertheless, in its brief, the State asserts, without any citation to the record, that the public defenders “had funding” and were “properly funded and trained.” State's Br. at 13. This simply

Attorney even before Saia and Jacobs reported it, *there was no funding available to any defense counsel*. Mack Crawford, director of the Public Defender Standards Council, testified moments before the District Attorney moved to replace counsel that there was a crisis in funding for the defense of capital cases because the costs of the *State v. Brian Nichols* case were exhausting virtually everything the legislature had appropriated for the defense of capital cases.⁵

The remedy for the lack of funding for Appellant Weis's defense was not to switch to lawyers even less prepared and less capable of defending him, but for the State of Georgia, if it wanted to bring about the death of Appellant Weis, to provide the funds necessary for his defense so that he could have a fair, reliable, and adversarial trial.

Ignoring the realities of the case, the State baldly asserts that Mr. Weis caused the delay by filing more than sixty motions, including "nine motions for continuances." States' Br. at 14. However, all of the motions not involving continuances were heard in two days, so they clearly did not cause any delay. With

is not true, as the State acknowledges when it states that the public defenders sought to withdraw partly because of "their uncertain ability to obtain additional funds." *Id.* at 14. In fact, the public defenders were not uncertain. They made clear in their pleading that they had looked and there were no funds available.

⁵ Mr. Crawford testified that expenses in the *Nichols* case could exhaust all available funds from that date, November 26, 2007, to June 30, 2008. Tr. Nov. 26, 2007 Hearing at 22-23. He also testified that 21 capital cases were being handled by private counsel and that he had \$1.2 million to pay for defense costs. *Id.* at 9, 22-23. Funding issues in the *Nichols* case came before this Court in *Fulton County v. State*, 282 Ga. 570, 651 S.E.2d 679 (2007) (state responsible for cost of transcribing recordings of telephone calls).

respect to the motions for continuance, the State miscounts them – counting one motion three times – and does not even mention the grounds for them. None of them caused delay of the case.

Appellant was severely prejudiced beyond the “normal” anxiety of facing the death penalty for three and a half years in a county jail. His mental health deteriorated, leading him to attempt suicide and ask for the death penalty. The State argues that Appellant Weis must prove what evidence he would have found between April, 2007 and July, 2009 that is missing or no longer available. But of course it is impossible for him to do that because there was no funding for defense representation during that time. The State may not exploit the denial of counsel by erecting such a Catch-22. The opportunity for a defense team to work with Mr. Weis during this critical stage and develop a case in mitigation is lost forever. The prejudice is irreparable.

The State’s failure to fund Mr. Weis’s defense is the reason for the delay in this case. Mr. Weis’s most fundamental rights to counsel and to a speedy trial have not just been violated, but trampled upon in an offensive and unseemly manner. Those constitutional protections and the integrity of the adversary system in this State – Justice itself – require that the case against Appellant Jamie Ryan Weis be dismissed.

ARGUMENT

I. THE DELAY IS ATTRIBUTABLE TO THE STATE'S FAILURE TO PROVIDE MR. WEIS WITH COUNSEL.

The State makes four arguments as to why the delay is either not attributable to the State or attributable to Mr. Weis. First, the State contends that any delay resulting from the lack of funding for Mr. Weis's attorneys should not be attributed to the State of Georgia because the particular department of the State that is seeking to prosecute Mr. Weis – the District Attorney's office – is not responsible for funding indigent defense. Second, the State asserts that the motions filed by Mr. Weis required "multiple days of hearings to resolve," and that Mr. Weis sought a continuance "at least nine times." Third, the State argues that Mr. Weis's attorneys should have been willing to work without compensation (and, presumably, pay for investigators, mitigation specialists and experts). Finally, the State argues that Mr. Weis should have accepted the removal of his attorneys and representation by the public defenders despite the fact that the public defenders made clear that they could not competently represent him. Mr. Weis will address these arguments in turn.

A. The Delay Due to Lack of Funding for Representation is Attributable to the State of Georgia.

The State advances the novel argument that the delay is attributable to the State of Georgia only if the prosecuting attorneys themselves prevented Appellant from receiving funding for his representation. State's Br. at 11.⁶ However, it is the entire State of Georgia – through its legislature, its executive branch and its courts – that is responsible under its own Constitution and the United States Constitution to provide counsel to poor people accused of crimes.

Georgia has had that responsibility under the Fourteenth Amendment to the federal constitution since 1932, *see Powell v. Alabama*, 287 U.S. 32 (1932), and under the Sixth and Fourteenth Amendments since 1963. *See Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963). It has been similarly obligated under its own constitution since at least 1955. *See Bibb County v. Hancock*, 211 Ga. 429, 436-37, 86 S.E.2d 511, 517 (1955).⁷

⁶ The State says that prosecutors have had no role in the funding of the defense since the Supreme Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985). State's Br. at 11. But *Ake*, which recognized the right of an indigent defendant to expert assistance to contest the prosecution's case or present a defense, is irrelevant. Prosecutors have never had a legitimate role in funding the representation of their adversaries, even before *Ake*. Of course, in this case, the District Attorney moved to replace Appellant's attorneys, and thus he improperly intervened in a matter in which he plainly had no proper role. As a result, the District Attorney is directly responsible for the year and two months during which Appellant was completely without counsel.

⁷ Historically, the State has placed the responsibility for providing representation in capital cases on its counties. However, the State took responsibility for providing representation in capital cases with passage of the Indigent Defense Act of 2003. OCGA. §§ 17-12-121, -127 (2003) revised and recodified at 17-12-12 (July 1, 2008). OCGA § 17-12-12.1, adopted in 2008,

The State of Georgia decides how to appropriate its revenue for various purposes – for the prosecution of cases, for the construction and maintenance of highways, for state parks and other public purposes. It retains special assistant attorneys general at rates considerably higher than what it pays to defend a person whose life is at stake.⁸ It has funded the District Attorney’s office and various law enforcement agencies sufficiently for them to prosecute this case. But the State has not provided sufficient funding to the Public Defender Standards Council for it to provide defense representation for Appellant Weis.⁹ The State is free to allocate its resources to things other than the Council. However, if that results in the denial of counsel for an indigent defendant, as it has in this case, the constitutions of Georgia

provides that the counties shall have some responsibilities for defense costs in capital cases in excess of \$150,000.

⁸ For example, in fiscal year 2006, Georgia paid special assistant attorneys general at hourly rates between \$125 and \$225, far more than the \$95 per hour rate for counsel in this capital case. *See* Andy Peters, “State spent \$36.6M for outside legal help,” *Fulton County Daily Report*, January 10, 2007. One lawyer was paid \$1.49 million for work that he and his firm did on three separate cases, and 16 other lawyers were paid at least \$350,000 each. *Id.*

⁹ After adoption of the Indigent Defense Act of 2003, the State funded the Capital Defender at \$7.2 million for its first year, but then reduced its budget for the second year to \$4.3 million, despite the increase in costs due to the extraordinary expense of the Brian Nichols case and the Capital Defender’s increasing caseload. *See* R-853 (letter of August 30, 2007 of Capital Defender Chris Adams to Wilson DuBose, Chair of the Public Defender Standards Council (reporting those budget amounts and adding: “for the current fiscal year, we are being asked to fund 80 defenses in capital cases for \$4.3 million[;] [i]n my estimation, we are being under funded in the ballpark of 100%-200%.”) appended to Appellant’s *Renewed Motion for a 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). *See also* Deposition of Jerry Word at 15 (discussing reduction of budget from \$7.5 million to \$5.5 million and \$4.5 million) introduced at Feb. 11, 2009 Hearing at 47.

and the United States do not allow the State seek a conviction and the death penalty in the case.

Thus, as Mr. Weis noted in his opening brief, a “breakdown in the public defender system” is attributed to the State for speedy trial purposes. *Vermont v. Brillon*, 129 S. Ct. 1283, 1287, 1292 (2009). The Supreme Court made this clear as far back as 1972 when it said that delay resulting from “overcrowded court dockets” was attributable to the State because “the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Barker v. Wingo*, 407 U.S. 514, 531 (1972).¹⁰ Individual prosecuting attorneys are no more responsible for overcrowded court dockets than they are for the inadequacy of indigent defense funding. Nonetheless, because the “ultimate responsibility” for both court dockets and the funding of indigent defense is the responsibility of the government and not the defendant, delay resulting from either is attributed to the State.

In short, the State of Georgia is responsible for providing Appellant with representation in his capital case. The delay resulting from its failure to do so is completely attributable to the State.

¹⁰ See also *Ingram v. State*, 280 Ga. 467, 470, 634 S.E. 2d 430, 434 (Ga. App. 2006) (“Reasons such as negligence and overcrowded courts should be weighed against the state” in a speedy trial analysis).

B. Appellant’s Counsel Did Not Cause Delay By Filing Motions.

The State asserts without any elaboration that “Appellant filed in excess of sixty motions which required multiple days of hearings to resolve.” State’s Br. at 10-11. However, the non-evidentiary motions were litigated on March 15, 2007 and the evidentiary motions were litigated on July 8, 2009.¹¹ The reason for the lapse of time between the two hearings was that there was no funding for Appellant’s defense in the intervening period. The motions, which are a legitimate use of court time to resolve issues, were not a source of delay.

The State also asserts that Mr. Weis’s attorneys “filed nine motions for continuances,” without making any reference to the grounds for the motions, State’s Br. at 14, as if the titles of the motions alone are enough to count against him. The State is mistaken in its tally, and the grounds asserted in the motions do not count against Appellant for speedy trial purposes.

The State counts the same motion – a motion for reconsideration of the order replacing counsel and for an evidentiary hearing – three times. *See* State’s Br. at 12 (citing R-872-875, 881-884, 994-974).¹² This motion, filed by attorneys Citronberg and West after they were removed as counsel, primarily sought reconsideration of

¹¹ *See* Transcripts of hearings on March 15, 2007, and July 8, 2009.

¹² All three cites are to *Defendant’s Motion for Reconsideration of the Court’s Order Denying Defendant’s Motion for a Continuance, Removing Counsel, and Granting the State’s Counter-Motion to Substitute Counsel and for an Opportunity to Present Evidence Thereon*, which appears in the Record three times with the affidavit of Mr. Weis appended. They are three copies of the same motion.

the ruling removing them and an opportunity to present evidence and argument on it. The purpose of the motion was to maintain Citronberg and West as counsel in order to keep the case on track *so that it could be tried as soon as funds were available*. The motion clearly does not count against Mr. Weis for speedy trial purposes.

The State also counts among the “nine motions for continuances” a motion for a continuance *of time in which to file additional motions* filed by public defenders Saia and Jacobs on January 17, 2008, *see* State’s Br. at 12 (citing R-954-957), and a renewal of it on January 28, 2008, *see* State’s Br. at 12 (citing R-967-969). Those two motions, which did not seek to continue any proceedings and were filed as public defenders Saia and Jacobs were desperately trying to withdraw from representing Mr. Weis, are irrelevant to the speedy trial issue.¹³

This leaves four motions filed by attorneys Citronberg and West during 2007 about the lack of funds to defend the case. They filed a motion for a continuance in March because of the funding situation, supplemented it in April, renewed it in

¹³ The State also states that “*pro se* counsel entered the case on behalf of Appellant seeking a continuance as well as a certificate of immediate review of the trial court’s action on November 27, 2007.” State’s Br. at 7. The State’s Brief makes several references to “*pro se* counsel,” apparently referring to *pro bono* counsel who appeared on behalf of Mr. Weis to protect his right to counsel. Although *pro bono* counsel petitioned this Court for interim review, attorneys Citronberg and West sought a certificate of immediate review, R-879, which Judge Caldwell denied. R-941. *Pro bono* counsel did not move for a continuance in the trial court.

October, and then filed an emergency motion in November for a hearing.¹⁴ These pleadings advised the court that through no fault of their own, defense counsel were without the resources necessary to defend their client. They made it clear that their situation was part of a much larger crisis in funding for the defense of capital cases.

Mr. Weis can hardly be blamed in a speedy trial analysis for motions for continuance filed because his counsel lacked the means to defend him. By the summer of 2007, Mr. Weis's attorneys had *not one dollar* to defend their client. Indeed, they were owed compensation for services they had rendered.¹⁵ Appellant Weis was not required to charge into battle in this state of complete defenselessness like the Man of LaMancha. He was entitled to insist under the Georgia and United States Constitutions that his counsel be outfitted with compensation, investigative assistance, a mitigation specialist, and needed experts. Because Georgia failed completely in its constitutional responsibilities, the delay attributable to this failure counts against the State.

¹⁴ See R-165 (seeking a continuance until the Georgia Public Defender Standards Council's funding situation was resolved consistent with defendant's right to counsel); R-829 (supplemental motion seeking a continuance until funding is assured); R-847 (renewed motion seeking continuance until funding situation is assured); R-856 (emergency motion for a hearing on the previously filed motions).

¹⁵ Defense counsel notified the trial court in a motion filed on October 18, 2007, "some invoices for past services, to which no dispute exists, have not been paid to date, in one instance for over two months." R-856-858 (*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).

C. Appellant's Counsel Were Not Required to Represent Him Without Compensation or Investigative or Expert Assistance.

The State also argues that Mr. Weis's attorneys should have been willing to work without compensation, and that because they were not, the delay in this case is attributable to Mr. Weis. Specifically, the State asserts:

While Appellant laments the lack of guaranteed funds to ensure the continued participation of his current counsel, he places their refusal to work on the State.

State's Br. at 12.

As an initial matter, defense counsel have worked on this case without compensation. They continued to represent Mr. Weis in 2007 after they were no longer being paid. They prepared for the evidentiary hearing on July 8, 2009, without having been paid since 2007 and without knowing if they would ever be paid again,¹⁶ and they are representing Mr. Weis on this appeal without compensation.¹⁷ Moreover, the Council agreed in 2006 to pay them \$125 per hour for representing Mr. Weis, but then unilaterally cut the rate to \$95 per hour in 2007. So even when defense counsel have been compensated, it has been at a substantially

¹⁶ As described in Appellant's opening brief, Public Defender Standards Council director Crawford refused to sign a contract or pay attorneys Citronberg and West from September, 2007, when Mr. Crawford took office, until he appeared in court on July 8, 2009, and made the surprise announcement that he suddenly had \$115,000 available for the defense of the case.

¹⁷ Mr. Crawford paid \$75,000 for compensation of defense counsel into the registry of the trial court. Judge Caldwell has taken the position that since Mr. Weis has appealed, he has no jurisdiction to order payment for counsel, although he has handled other administrative matters such as juror excusals and removing the case from the trial calendar.

lower rate than the rate at which the Council agreed to pay them. However, at the status hearing on December 10, 2007, attorneys West and Citronberg quite reasonably declined to represent Mr. Weis *pro bono* and insisted upon being compensated at an hourly rate and paid on a monthly basis. Tr. Dec. 10, 2007 Hearing at 14, 20. As sole practitioners, they were in no position to take on expenses that the State itself was unable to pay.

In the year 2009, it is completely unreasonable, unfair, and contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution to expect attorneys to take on the most awesome and challenging duty an attorney may undertake – the defense of another human being’s life – without compensation.

As stated by the South Carolina Supreme Court over 15 years ago:

Given the extraordinary time, effort, and commitment required of defense counsel in capital cases, it is unrealistic to expect that token compensation will suffice in the future to provide an indigent defendant with the quality of legal representation mandated by the United States Supreme Court.

Bailey v. State, 424 S.E.2d 503, 508 (S.C. 1992). The Arkansas Supreme Court struck down statutory limits on fees and expenses in capital cases in recognition of the need for “highly trained and skilled counsel if indigents are to be afforded their constitutionally mandated effective assistance of counsel.” *Arnold v. Kemp*, 813 S.W.2d 770, 775 (Ark. 1991). See also *Makemson v. Martin County*, 491 So. 2d

1109, 1114 (Fla. 1986) (noting with regard to compensation in capital cases “[t]he link between compensation and the quality of representation remains too clear”).¹⁸

This Court surely recognizes that just as the judge, the prosecuting attorneys, the court personnel, the sheriff and his deputies have been getting paid on a regular basis while this case has been pending, so too the defense lawyers are to be compensated so that they can pay their mortgages and support their families. The defense lawyers are under no obligation to provide a bailout to the Public Defender Standards Council or the State of Georgia by providing their professional services and then going long periods of time without being compensated or even receiving some assurance of future compensation. Not only are they not receiving interest, they are not even being paid the modest hourly rate they were promised.

Moreover, Appellant Weis has not only been deprived of funds to compensate his counsel, but he has also been denied the funds necessary for an investigator, a mitigation specialist and experts. There is “no requirement in either law or professional ethics which requires attorneys to advance personal funds in substantial amounts for the payment of either costs or expenses of the preparation of

¹⁸ Courts throughout the country have also held in noncapital cases that “the burden for shouldering the cost of indigent defense must fall on the community at large,” not on individual attorneys. *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 906 (Mass. 2004). See also, e.g., *State ex rel Stephan v. Smith*, 747 P.2d 816, 835-36 (Kan. 1987) (“The obligation to provide counsel for indigent defendants is that of the state, not of the individual attorney”); *State v. Robinson*, 465 A.2d 1214, 1216 (N.H. 1983) (legislature and courts may not “spare the public the expense of providing the costs associated with the defense of an indigent by thrusting those expenses upon an individual who happens to be an attorney”).

a proper defense of the indigent accused.” *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 67 (Mo. 1981).

As previously noted, the State of Georgia has the responsibility for providing representation for indigent defendants. If Georgia does not meet that obligation, it should not be permitted to prosecute Mr. Weis and to attempt to sentence him to death.

D. The Trial Court’s Removal of Mr. Weis’s Attorneys, at the Instigation of the District Attorney, Was Improper.

The State argues that “Georgia law does not recognize the absolute right of an indigent criminal defendant to the attorney of his own choosing,” and thus Mr. Weis should have accepted representation by the public defenders who protested that their workloads and lack of time and resources made it impossible for them to “perform adequately in representing the Defendant, no matter how good our intentions or diligent our efforts.”¹⁹ State’s Br. at 12.

While the State’s assertion may be true with regard to the initial assignment of counsel where there is no pre-existing relationship between an attorney and a defendant, this Court has held repeatedly that trial judges are not to remove attorneys who are familiar with a particular case and have an ongoing attorney-

¹⁹ *Renewed Motion to Withdraw* filed by public defenders Saia and Jacobs, Jan. 28, 2008, R-962 at 964.

client relationship with a particular defendant.²⁰ Attorneys Citronberg and West had represented Appellant for over a year and were thoroughly familiar with his case when they were removed by the trial court. All they lacked were the funds necessary to defend Appellant. Moreover, the circuit public defenders appointed by the trial court were not authorized to represent a capital defendant,²¹ and had excessive caseloads and inadequate resources to represent Mr. Weis. As a result, their substitution would have further delayed the case, unless their appointment was to provide attorneys in name only.

What Georgia law does not recognize is a District Attorney's interference with the representation being provided to an indigent defendant. The District Attorney's successful motion to have his opposing counsel removed and replaced by lawyers of his choosing – who made clear that they could not capably defend the

²⁰ See *Williams v. State*, 279 Ga. 154, 611 S.E.2d 51 (2005); *Grant v. State*, 278 S.E. 817, 607 S.E.2d 586 (2005); *Roberts v. State*, 263 Ga. 764, 438 S.E.2d 905 (1994); *Davis v. State*, 261 Ga. 221, 403 S.E.2d 800 (1991); *Amadeo v. State*, 259 Ga. 469, 384 S.E.2d 181 (1989).

²¹ Circuit public defenders are authorized to provide representation only in the “actions and proceedings” specified in OCGA § 17-12-23(a). Those “actions and proceedings” do not include cases in which the death penalty is sought. The State asserts that the Georgia Capital Defender assigned attorneys Citronberg and West “[f]or reasons never explained.” State’s Br. at 12. However, the record is clear that the Capital Defender assumed responsibility for the case because the State filed a notice of intent to seek the death penalty. The case was assigned to attorneys Citronberg and West because the staff attorneys at the Capital Defender Office had full caseloads. See Christopher Adams Deposition at 8-9 (explaining that the case was assigned to Citronberg and West because “all the Georgia Capital Defender lawyers . . . were at the point with case load where they could not take additional cases . . . they were at their limit that they could handle ethically.”), introduced at Feb. 11, 2009 hearing Tr-47.

accused – would appear to any impartial observer to make a mockery and a farce of the adversarial process.

The District Attorney’s successful removal of defense counsel is a serious constitutional violation that weighs heavily against the State.

II. MR. WEIS HAS BEEN SEVERELY PREJUDICED.

The State argues that Mr. Weis has not been prejudiced with regard to his mental condition or his defense because his anxiety is essentially normal and he has not shown specifically how the delay prejudiced his case. Mr. Weis will address each of the State’s arguments.

A. Mr. Weis Suffers Serious Mental Illnesses Which Have Been Exacerbated by the Delay in This Case.

Quoting from this Court’s opinions, the State argues that “anxieties are always present to some extent,” and that due to the absence of “some unusual showing” Mr. Weis has not shown prejudice. State’s Br. at 17. The State does not mention Mr. Weis’s three suicide attempts, apparently considering them typical anxieties, or his repeated requests to be sentenced to death. Nor does it deal with the major mental illnesses that cause Appellant suffering and despair that can hardly be imagined by those who are not so afflicted: major depression, severe anxiety, and schizophrenia which causes both auditory and visual hallucinations.

The State asserts that the “record is absent any showing that the care Appellant has received has been lacking,” but then contradicts itself in the very next sentence by acknowledging that Mr. Weis attempted suicide after its doctor switched the medications that Central State Hospital had prescribed for him three years earlier. State’s Br. at 17. That is as bad as medical treatment gets.

The State also acts as if it is unaware of Mr. Weis’s mental illnesses, stating that “Appellant neither filed a notice to introduce mental illness as a defense nor sought a mental health evaluation.” State’s Br. at 16-17. In a footnote, it says that it has not been “provided the findings of any medical professional as to this issue.” *Id.* at 17 n.1. But Appellant introduced the testimony of a psychiatrist, Dr. Barry Scanlon, regarding his mental illnesses at the hearing on July 8, 2009, *see* Hearing July 9, 2009 Tr-43, who was cross-examined by the District Attorney. Appellant also introduced at the hearing medical and mental health records from Central State Hospital, the Spalding County Medical Center, the McIntosh Trail Community Mental Health Center, and the Personal Growth Mental Health Program. *See* Hearing July 9, 2009, Def. Exhibits 1-6. This evidence thoroughly documented Appellant’s mental illnesses with reports and findings of many mental health professionals.

B. The State Cannot Exploit the Denial of Counsel to Argue Lack of Prejudice.

The State grossly mischaracterizes the issues before this Court by stating that “Appellant only claims that his *GPDSC paid counsels*’ refusal to represent him has prejudiced his case.” State’s Br. at 17 (emphasis added). Of course, the reason this case is before this Court is because counsel *was not paid* by the Georgia Public Defender Standards Council, and the State knows it. It knows that GPDSC did not provide funding for *any* aspect of Appellant’s defense between April, 2007 and July, 2009, and even now is providing less than half of what is needed for Appellant to present a defense. Contrary to the State’s assertions, this case is not about refusal on the part of counsel to represent Mr. Weis, for the reasons already discussed.

The State builds upon its mischaracterization a Catch-22. It argues that Appellant, who was denied representation for over two years, cannot show prejudice for the time that he was denied counsel. It argues that “[t]raditionally, an accused complains that during the delay from his arrest to actual trial that evidence is missing [or] witnesses are no longer available,” yet Mr. Weis has not made such a showing. State’s Br. 17. But of course, *traditionally*, a capital defendant is not left without counsel for more than two years. *Traditionally*, a capital defendant has had attorneys with investigators and experts who document what evidence is missing and which witnesses have become unavailable. Without legal representation, it is impossible for a defendant to make such a showing.

Where a defendant is “denied counsel at a critical stage,” prejudice must be presumed. *United States v. Cronin*, 466 U.S. 648, 659 (1984); *see also* Appellant’s Br. at 33 (citing additional cases). The Supreme Court has explained that “perhaps the most critical period” for an accused is “the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important.” *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

Appellant Weis was deprived of many of the foundational elements he needed to have an active, productive relationship with his attorneys and the mitigation specialists and experts his attorneys would have retained to work on his case. At the very point Mr. Weis should have been solidifying his relationship and working with his attorneys and his defense team, he was without any attorney. During this time, counsel, the mitigation specialist and experts should have been continuously working to obtain the kind of trust-based disclosures that are essential to an in-depth investigation of mitigation circumstances, and to follow up on them immediately.²² That opportunity is lost forever.

²² *See* American Bar Association *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, § 10.5 (2003) (counsel “should make every appropriate effort to establish a relationship of trust with the client;” “should maintain close contact with the client;” and “should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case”).

Appellant has been irreparably injured in the foregoing ways by the denial of legal representation in his case. As such, the prejudice factor of the *Barker* test weighs heavily in favor of Mr. Weis.

III. MR. WEIS CANNOT BE FAULTED FOR NOT ASSERTING HIS RIGHT TO A SPEEDY TRIAL WHEN HE WAS WITHOUT COUNSEL.

The State advances another Catch-22 argument in asserting that Appellant should be penalized for not asserting his right to a speedy trial even when he did not have lawyers to assert it. However, as Mr. Weis noted in his opening brief, the United States Supreme Court and Georgia's appellate courts have long recognized that an unrepresented defendant's failure to assert his right to a speedy trial should not be counted against him in the *Barker* analysis. *See* Appellant's Br. at 38-39 (citing *Barker*, 407 U.S. at 528-29; *Jones v. State*, 283 Ga. App. 838, 840, 642 S.E.2d 865, 867 (2007); *Hester v. State*, 268 Ga. App. 94, 99, 601 S.E.2d 456, 460 (2004)).

Appellant's attorneys were unable to get funding after April, 2007 and were removed on November 26, 2007. They were not reinstated until February 11, 2009. Mr. Weis did everything he could to get his attorneys reinstated. He applied for interim review with this Court, sought a writ of mandamus or prohibition requiring the trial judge to reinstate his counsel, and sought a writ of mandamus requiring Mack Crawford and the Public Defender Standards Counsel to sign a contract with

his attorneys and fund his defense. Even after Appellant's attorneys were reinstated, Mr. Crawford refused to sign a contract with them or to provide them any compensation or any funds for investigation or experts.

Despite the lack of funding, the trial court set a hearing for July 8, 2009, on motions. Appellant filed motions asserting denial of his rights to a speedy trial, to counsel, to due process, and to a fair and reliable determination of guilt and punishment.

But the trial court and the State were on notice that there was a danger of violating Mr. Weis's right to a speedy trial as early as December 10, 2007, when Thomas West, who had been removed as counsel for Mr. Weis on November 26, 2007, acknowledged in response to a question from the trial court that if the case continued to languish, a speedy trial motion "would need to be filed." Tr. Dec. 10, 2007 Hearing at 26. The State takes this remark and argues that Appellant Weis "had notice that the trial court was concerned about a Constitutional speedy trial challenge and failed to raise the issue." State's Br. at 16. But the lawyer who acknowledged the issue, Thomas West, had just been removed as Mr. Weis's counsel and replaced with other lawyers. The trial court had refused to reconsider its decision and had denied certifying the issue for interim appeal. Mr. West was not reinstated until February 11, 2009.

The State cannot deny the Appellant, a severely mentally ill man, counsel, and then punish him for failure to carry out an attorney's responsibility – assertion of a constitutional right. Had the State provided representation to Appellant, as it was required to do, Appellant probably would not have been denied a speedy trial. This case could have been tried in 2007. But the State failed in its responsibility, Appellant was denied a speedy trial and, therefore, the case against him must be dismissed.

IV. *HUBBARD v. STATE* IS SETTLED LAW, AND THE INSTANT CASE DEMONSTRATES WHY *HUBBARD* WAS CORRECTLY DECIDED.

The State argues that this Court should overrule twenty-four years of settled precedent by ruling that a criminal defendant may not immediately appeal from the pre-trial denial of a speedy trial claim. State's Br. at 18-21. This Court has rejected the State's argument repeatedly. *See Callaway v. State*, 275 Ga. 332, 332, 567 S.E.2d 13, 14 (2002) ("Applying both settled precedent and logic, we conclude that pre-trial orders denying a constitutional speedy trial claim are directly appealable"); *Boseman v. State*, 263 Ga. 730, 730 n.1, 438 S.E.2d 626, 627 n.1 (1994) (considering a pre-trial appeal of an order denying a constitutional speedy trial

claim); *Hubbard v. State*, 254 Ga. 694, 695, 333 S.E.2d 827, 828 (1985) (holding that pre-trial orders denying a statutory speedy trial claim are directly appealable).²³

In determining that a pre-trial appeal from the denial of a speedy trial claim is appropriate, this Court has analogized speedy trial claims to double jeopardy claims.²⁴ In both situations, the defendant alleges that he “may not now be tried.” *Hubbard*, 254 Ga. at 695, 333 S.E.2d at 828. Whereas a post-trial appeal is appropriate when the question is whether the defendant was tried properly, a pre-trial appeal is necessary when the question is whether the defendant may be tried at all. The instant case demonstrates why this Court’s decisions in *Hubbard*, *Boseman*, *Callaway* and other cases addressing this issue are correct. The right to a speedy trial protects defendants from “uncertainty,” “emotional stress,” “anxiety,” and “insecurity,” among other burdens. *Hubbard*, 254 Ga. at 695, 333 S.E.2d at 828. If Mr. Weis, who has attempted suicide three times while this case has been pending, was forced to stand trial and raise his speedy trial claim in a post-trial appeal if convicted, his right to a speedy trial clearly would not protect him from

²³ See also, e.g., *Hassel v. State*, 284 Ga. 861, 861 n.1, 672 S.E.2d 627, 628 n.1 (2009) (considering a pre-trial appeal of a constitutional speedy trial claim); *Jones v. State*, 284 Ga. 320, 320 n.1, 667 S.E. 49, 51 n.1 (2008) (same); *Thomas v. State*, 274 Ga. 492, 492 n.1, 555 S.E.2d 693, 694 n.1 (2001) (same).

²⁴ See *Hubbard*, 254 Ga. at 695, 333 S.E.2d at 828 (“In double jeopardy claims the accused is saying, ‘I may not now be tried because I have previously been placed in jeopardy.’ In a [speedy trial] claim . . . the accused is saying, ‘I may not now be tried because the time during which I must have been placed on trial has passed.’ The circumstances bearing on the right to appeal are analogous.”).

the “uncertainty,” “emotional stress,” “anxiety,” and insecurity” resulting from this case.

This case is not ready for trial because Appellant Weis has been denied representation for over two years and the Public Defender Standards Council has come up with only \$115,000 for his defense when there is no dispute that an effective defense will cost at least \$255,000. Forcing this case to trial in a month or two before counsel have an opportunity to complete an investigation and prepare for trial, as the trial court attempted to do,²⁵ is not the remedy for denial of the right to counsel and a speedy trial. It simply compounds the denial of those rights with another constitutional violation – subjecting the Appellant to an unconstitutional and unfair trial.

As this Court has repeatedly recognized, and should recognize again in this case, the proper remedy for a speedy trial violation once it has been established is dismissal of the case.

²⁵ The District Attorney erroneously states that the motion to recuse Judge Caldwell was “rendered moot” when Mr. Weis’s lawyers were reinstated. State’s Br. at 7. Although the mandamus action became moot, the recusal issue based on lack of impartiality on the part of Judge Caldwell was not rendered moot. Mr. Weis continues to maintain that Judge Caldwell is not impartial. Judge Caldwell engaged in ex parte communications regarding the case, refused to notify Mr. Weis’s lawyers of hearings, and conducted what Appellant contends was a sham hearing on November 26, 2007 when he removed counsel. His effort to force the case to trial on October 5, 2009, less than two months after Mr. Crawford provided \$115,000 for defense expenses when Mr. Weis had been without representation for over two years is a further indication of Judge Caldwell’s bias, as is his refusal to compensate counsel while this appeal is pending. Mr. Weis sought to have the recusal issue certified for review pursuant to O.C.G.A. § 17-10-35.1, but Judge Caldwell refused to certify it. Should this appeal be denied and Mr. Weis tried and convicted, the issue of Judge Caldwell’s lack of impartiality will be raised on appeal.

CONCLUSION

The State of Georgia has chosen to devote its resources to things other than providing representation to those facing the death penalty. It failed to provide representation to Appellant Weis for over two years during the most critical stage of his case. It had already delayed his case unnecessarily for almost a year. The prejudice has been irreparable. What has happened in this case should not be tolerated in the courts of this State. This Court should make that clear by reversing the trial court and ordering that the indictment against Appellant be dismissed or, in the alternative, that the State is prohibited from seeking the death penalty.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 20th day of October, 2009, by first class mail upon:

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