

IN THE SUPREME COURT  
STATE OF GEORGIA

KELVIN GILLIAM,

Appellant,

v.

Case No. S21 A0941

STATE OF GEORGIA,

Appellee.

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BRIEF OF APPELLANT

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**BRIEF OF APPELLANT**

**STATEMENT OF THE CASE**

In this appeal, Mr. Gilliam challenges convictions for aggravated assault, the denial of his motion for directed verdict and the denial of his motion for new trial.

Appellant was indicted by the Grand Jury of Fulton County, which indictment charged malice murder, felony murder, several counts of aggravated assault, and firearm charges, allegedly committed on September 5, 2004. (R. 2, at pp. 4 - 12.)

After a jury trial in the Superior Court of Fulton County, before the Honorable Bensonetta Tipton Lane, presiding, Appellant was convicted of some aggravated assault counts and was acquitted of the murder and other charges. He was sentenced to 15 years to serve (five years followed by another 5 years followed by yet another

five years) on April 29, 2005. (T. at pp. 2446 - 2459.) The sentencing sheet was filed with the clerk over a month later, on June 1, 2005. (R. 39 at pp. 398 – 403.)

A Motion for New Trial was timely filed on that same day, (R. 40 at 404-405), and was later amended, which amended motion was heard by the trial court on August 23, 2019.

The motion for new trial was denied on November 12, 2019. (R- 78 at pp. 534 - 3339.) A Notice of Appeal was timely filed on November 27, 2019. (R. 1.) The appeal was thereafter docketed with the Georgia Supreme Court.

### **STATEMENT OF JURISDICTION**

The Supreme Court of Georgia has jurisdiction of this appeal for reasons of judicial economy: Mr. Gilliam has a co-appellant Frederick Terrell with whom he was tried and who was convicted of murder. Counsel for the co-appellant has already filed a notice of appeal to the Supreme Court. Thus, to foster judicial economy and to avoid having two courts review the same trial, jurisdiction can lie in the Supreme Court. *Morrison v. Morrison*, 284 Ga. 112, 663 S.E.2d 714 (2008).

## **STATEMENT OF THE FACTS**

On September 5, 2008, Michael Stinchcomb (a co-defendant) and Janet Lymon purchased some crack which they planned to smoke. However, Lymon smoked Stinchcomb's portion (T. 820, 853-855), they argued about it, and he punched her. (T. 820-821, 839-840, 855, 881-882, 1857).

Soon thereafter several other people heard about the altercation, and at least four of these other people broke into Stinchcomb's apartment and beat him in retaliation. (T 1084-1085, 1088, 1615-1618, 1635-1636, 1638, 1641, 1656.)

Upset that the group had broken into the apartment, the co-appellant gathered the other three co-defendants. At another apartment, Stinchcomb identified some of the people who had beaten him, and co-appellant Terrell started shooting at them. After several moments, the four co-defendants left and returned to Stinchcomb's apartment. (Mr. Gilliam was found guilty of some, but not all, of these aggravated assaults by shooting.)

After these shootings, Tashiba Matthews and Broderick Stallings came to Stinchcomb's apartment to confront the co-appellant about the shootings. ; another shoot-out ensued, resulting in Matthews' death. Both the co-appellant and Stallings were identified as the one who shot first. (Mr. Gilliam was acquitted of all counts involving this shooting.)

**ENUMERATION OF ERRORS**

1. Insufficient evidence was presented at trial to support the jury verdict.
2. The convictions should be reversed, and the case dismissed because of the inordinate delay of this appeal.
3. The convictions which were based on Mr. Gilliam being party to the crime should be reversed because his federal and state constitutional rights were violated when the State improperly commented on the co-Appellant's right to remain silent.
4. The trial court erred by denying two motions for mistrial.
5. The trial court erred by denying the motion to sever Mr. Gilliam's trial from that of his co-defendants.
6. The trial court erred in prohibiting Mr. Gilliam's use of evidence of co-appellant's prior conviction.
7. The combined prejudicial effect of the above errors requires a new trial.

**ARGUMENT AND CITATION OF AUTHORITY**

**1. Insufficient evidence was presented at trial to support the verdict.**

The evidence presented to the jury was not sufficient to enable a rational trier of fact to find Mr. Gilliam guilty as a party to the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1971).

Here the testimony established that Mr. Gilliam never held the gun, never fired the gun, and did not know that co-Appellant Terrell would fire on those present.

This Court and the Court of Appeals have reversed convictions where, as here, the evidence was not sufficient to establish that the accused was a party to the crime. *See, e.g., Brown v. State*, 250 Ga. 862 (1), 302 S.E.2d 347; *Parker v. State*, 155 Ga. App. 617 (2), 271 S.E.2d 871 (1980).

**2. The convictions should be reversed, and the case dismissed, because of the inordinate delay of his appeal.**

The Supreme Court of Georgia has recognized that substantial delays experienced during the criminal appellate process implicate due process and equal protection rights. *See Chatman v. Mancill*, 278 Ga. 488, n. 2, 604 S.E.2d 154 (2004); *Walker v. State*, 247 Ga. 484, 277 S.E.2d 242 (1981). *Accord Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) and *Griffin v. Illinois*, 351 U.S.

12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (when a state provides a right to appeal, it must meet the requirements of due process and equal protection).

This Court routinely refuses to condone inordinate delays in the appellate process. As it wrote in *Shank v. State*, 290 Ga. 844, 849 (5)(c), 725 S.E.2d 246 (2012):

This Court is unfortunately seeing such extraordinary post-conviction, pre-appeal delays with greater frequency; for just two recent examples, see *Murphy v. State*, 290 Ga. 459, n. 2, 722 S.E.2d 51 (2012) (reversing a conviction where the motion for new trial was pending for more than a decade); and *Hill v. State*, 290 Ga. 493 n. 1, 722 S.E.2d 708 (2012) (affirming murder conviction from 1995). These delays put at risk the rights of defendants and crime victims and the validity of convictions obtained after a full trial. We therefore reiterate that it is the duty of all those involved in the criminal justice system, including trial courts and prosecutors as well as defense counsel and defendants, to ensure that the appropriate post-conviction motions are filed, litigated, and decided without unnecessary delay.

*Id.* The Court of Appeals likewise decries needless delay. *Robinson v. State*, 334 Ga. App. 646, 780 S.E.2d 86 (2015).



The 14-year delay in this case implicates Mr. Gilliam's due process and equal protection rights and his right to a speedy appeal.

The delay appears to be caused by the failure to timely appoint appellate counsel<sup>1</sup> and then the failure to schedule either a status conference or a hearing on the motion (likely due to several reassignments of the case to different judges).

The delay was not caused by Mr. Gilliam. Mr. Gilliam has instead filed correspondence concerning his motion for new trial and appeal. He has also filed a motion to have the convictions be reversed due to this delay.

Finally, he has been prejudiced by such delay. Throughout these fourteen years, law that was applicable to his case has recently changed: he does not now have the benefit of the law as it was at his trial and for many years thereafter.

Specifically, the law changed with regard to striking a juror for cause and with regard to witness's comments on a defendant's right to remain silent.

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<sup>1</sup> Undersigned is Mr. Gilliam's third appellate counsel. First the office of the conflict defender was appointed. (See Order Appointing Appellate Counsel filed June 10, 2005). Next the office of the public defender was appointed. (See Order Appointing Appellate Counsel filed February 26, 2008). Only thereafter was undersigned appointed. (See Order Appointing Appellate Counsel to Defendant Kelvin Gilliam filed November 21, 2008).

Once appointed, undersigned obtained and read the transcript, met several times with counsel for co-defendants, attempted to get a hearing on the amended motion (or a status conference) scheduled with several judges in Fulton County. (2535 – 2537.)

### The voir dire issue

During voir dire, venire-member 3, Donna Fuller, repeatedly stated that she was unable to be a fair juror for several different reasons. (T. at 164-173). Those reasons included her cousin's conviction for armed robbery, her boyfriend's shooting, and her knowledge of – and proximity to – the scene of the crime.

Ms. Fuller stated that upon hearing the charges in this case, her mind went to her boyfriend in the hospital while he was recuperating from a gunshot wound; she thought this would probably continue throughout the trial. (Id. at 168). She admitted that she would be more partial to the State: “I feel like I’m being asked the same question over and over again. Again, I can’t put aside—I can’t forget. I have to bring who I am into this courtroom. I feel like the situation would probably have in impact on my judgment.” (Id. at 173.)

Ms. Fuller further identified the scene of the crime as “pretty much in my backyard.” (Id.). She admitted again that this too would likely have an impact on her decision-making as a juror. (Id.).

The trial court denied the motion to strike Ms. Fuller for cause. (T. 403-404). Mr. Gilliam then excused Ms. Fuller by peremptory strike. (Id. at 408).

Georgia law in effect until October 2018, would have required reversal because Donna Fuller, who did not end up serving on the jury, would have been struck for cause: “causing a defendant to unnecessarily use a peremptory strike on

a juror that should have been excused for cause is per se harmful error.” *Fortson v. State*, 277 Ga. 164, 166 (2), 587 S.E.2d 39 (2003).

Then in late 2018, *Fortson* was overruled in *Willis v. State*, 304 Ga. 686, 655-59 (2018). Harm is no longer presumed, instead it must be established.

Donna Fuller repeatedly insisted that for several reasons she was unable to be a fair juror. Under O.C.G.A. § 15-12-164(a), her mind was not "perfectly impartial between the state and the accused." *Cannon v. State*, 250 Ga. App. 777, 778 (2001) (overruled on other grounds, *Jackson v. State*, 254 Ga. App. 562 (Ga. App., 2002)).

A juror should be disqualified for cause if he or she will not be able "to set the opinion aside and decide the case based upon the evidence or the court's charge upon the evidence." *Johnson v. State*, 262 Ga. 652, 653(1993). Ms. Fuller was not qualified to serve because she admitted she could not put aside her personal experiences.

Until *Willis*, harm was presumed, thus had Mr. Gilliam's appeal not been inordinately delayed through no fault of his own, he would have been granted a new trial on this ground. He has therefore shown that the inordinate delay prejudiced his appeal, and this Court should vacate his convictions and grant him a new trial.

*The Mallory issue*

While Mr. Gilliam maintains that *Mallory* is still applicable in this appeal because the case was tried before the new evidence code was enacted, he makes this argument in response to the state's contention that *Mallory* would not apply.

Under Georgia's old Evidence Code, which governed the trial of this case, this Court had established a bright-line rule prohibiting the State from commenting on a defendant's pre-arrest silence or failure to come forward, on the ground that such comments were "far more prejudicial than probative." *Mallory v. State*, 261 a. 625, 630, 409 S.E.2d 839 (1991).

This rule was changed in *State v. Orr*, 305 Ga. 729, 827 S.E.2d 892 (2019). In that case, this Court held this change in the law occurred because of Georgia's current Evidence Code.

If this Court were to agree with the state that *Mallory* is not the relevant, applicable law in this appeal, Mr. Gilliam then asserts that such change also establishes prejudice in considering whether the lengthy delay in the appellate process dictates a reversal of the convictions and a dismissal of the charges.

**3. The convictions were based on Mr. Gilliam being a party to the crime and should be reversed because his federal and state constitutional rights were violated when the State improperly commented on the co-Appellant’s right to remain silent.**

Mr. Gilliam was tried as a party to the crime, the jury was charged on party to a crime (T. 2249 – 50) and he was sentenced as a party to the crime. (T. 2455: “as a party to the crime you are going to have to pay for that”.)

As he was charged as a party to the crime, his guilt or innocence depended on whether he encouraged the acts of the actual shooter, the co-appellant. Thus, evidence about the co-appellant became evidence relevant to Mr. Gilliam and harmed Mr. Gilliam. This is especially true if the evidence about the co-appellant was unconstitutional or illegal.

At trial, the State improperly commented on, and elicited testimony regarding, the co-appellant’s right to remain silent in violation of *Mallory, supra*.

Here, the State directly and purposefully elicited testimony that the co-appellant did not give a statement to the police prior to trial. (T. at 698.) Specifically, the state asked: “Now, Frederick Terrell, did he ever give a statement?” This question was clearly a comment on the exercise of state and federal Fifth Amendment rights and was therefore improper under the bright line rule of *Mallory*. 261 Ga. at 630.

**4. The trial court erred by denying the motions for a mistrial.**

A mistrial is essential to the preservation of the right to a fair trial. *Rafi v. State*, 289 Ga. 716 (4), 715 S.E.2d 113 (2011). Relevant to whether a mistrial should be granted are the statement itself, other evidence against the accused, and the actions of the trial court and counsel dealing with the impropriety. *Martin v. State*, 240 Ga. App. 901, 902 (1999).

The trial court's refusal to grant a mistrial in two different instances warrant reversal.

First, although the trial court had specifically excluded the state's witnesses from testifying about the deceased's pregnancy (T 14-17), a witness did so testify. The mother of the deceased testified that her daughter "had just found out she was pregnant, so she was asleep." (T. 1054.) Mr. Gilliam immediately moved for a mistrial, which motion was denied. (T. 1067, 1069).

The denial was error: the mention of the pregnancy opened the door both for the jury to speculate about other, unindicted crimes (such as feticide) and for sympathy to enter the deliberations. *See Lofton v. State*, 309 Ga. 349, 363-64 (2020) ("background information about the victim that is not relevant to the issues in the guilt/innocence phase, particularly the sort of background information likely to engender the jury's sympathies, should not be presented to the jury during that phase.") (quoting *Ledford v. State*, 289 Ga. 70, 85 (2011)).

The potential for harm was never mitigated by any action by the trial court: there was no instruction cautioning the jury not to consider this information, which had already been ruled inadmissible. The state was not rebuked.<sup>2</sup> And the motion for mistrial was denied.

Therefore, because the jury was charged to consider all the evidence at the trial, it considered the victim's pregnancy; it likely acted out of sympathy, rather than considering only evidence that the trial court had ruled admissible. A mistrial should have been granted.

Second, the state elicited testimony in violation of *Mallory*, and the trial court denied the motion for mistrial. As argued above, such evidence was not admissible and should have been excluded. The jury was told to consider all the trial evidence, which included this *Mallory* evidence because the trial court did not grant a mistrial or issue a cautionary instruction or rebuke the state.

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<sup>2</sup> O.C.G.A. § 17-8-75 states:

Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender.

This code section also gives the trial judge the discretion to grant a mistrial in lieu of rebuking the prosecutor and giving an appropriate curative instruction to the jury.

**5. The trial court erred by denying the motion to sever his trial from that of his co-appellant.**

Severance of one co-defendant from another should be granted whenever it appears necessary to achieve a fair determination of the guilt or innocence of a defendant. See *Cain v. State*, 235 Ga. 128, 129 (1975).

Factors to be considered by the trial court are whether a joint trial will create confusion of evidence and law; whether there is a danger that evidence implicating one defendant will be considered against a co-defendant despite limiting instructions; and whether the defendants are asserting antagonistic defenses. *Green v. State*, 274 Ga. 686, 688 (2), 588 S.E.2d 707 (2002).

Mr. Gilliam sought severance<sup>3</sup> for two reasons: because of antagonistic defenses and to admit Terrell's prior convictions for aggravated assault to prove that Terrell was acting on his own due to "a pattern of behavior using guns and settling disputes with guns." He claimed the prior conviction was otherwise admissible to show a design, purpose, or some other rational connection with an offense at issue. See *Adams v. State*, 271 Ga. 485 (2), 521 S.E.2d 575 (1999); *Jones v. State*, 257 Ga. 753, 757-8, 363 S.E.2d 529 (1988).

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<sup>3</sup> Mr. Gilliam renewed his motion for severance during trial. (R. 610.)



The trial court denied severance and denied Mr. Gilliam from using the prior conviction in his defense (See T. 1714-1715). These rulings were error.

The trial court did not consider whether a curative instruction should have been used. It did not consider potential confusion of the law.

Evidence of Terrell's prior conviction for aggravated assault would have established that Terrell was acting on his own and that Mr. Gilliam was not a party to those actions.

**6. The trial court erred in prohibiting Mr. Gilliam's use of evidence of co-appellant's prior conviction. (R. 610 – 19; 1750 – 58.)**

Mr. Gilliam sought to introduce evidence that co-appellant Terrell had been convicted of two prior aggravated assaults. (See T 565-575, 1704-1715.) As argued above, the evidence was necessary to establish that the co-appellant was acting on his own, pursuant to a pattern, not because he had planned the crime with Mr. Gilliam.

As the trial court recognized, the evidence was comparable to a similar transaction, and that the state could have used the conviction as a similar transaction. (R. 616.) The state did not dispute that conclusion, saying only that it had not had time to review that issue.

The trial court recognized that she was “going to have to violate somebody’s rights. I’ll violate Mr. [Gilliam’s] rights if I don’t let him impeach [co-appellant Terrell], and let the jury hear about [Terrell’s] past record.” (R. 613 – 14.)

Such a violation is exactly what happened: the trial court denied Mr. Gilliam the opportunity to present the two convictions to the jury. (R. 1750 – 58.) By doing so, the trial court weighed the rights of the co-appellant heavier than Mr. Gilliam’s.

This denial was error because the court failed to consider the use of limiting instructions and failed to recognize that a severance would have ensured the rights of each co-defendant; Mr. Gilliam’s rights did not have to be violated.

Mr. Gilliam was harmed by the exclusion of this evidence. No other evidence suggested that the co-appellant had a prior history for aggravated assaults and a course of conduct of resolving disputes by resorting to violence. The jury was not given evidence separating Mr. Gilliam from the co-appellant, even though he was charged as a party to the crime.

**7. The combined prejudicial effect of the above errors requires a new trial.**

Mr. Gilliam maintains the listed errors standing alone warrant reversal. He also maintains that the cumulative effect of any combination of these errors would likewise warrant reversal. *State v. Lane*, 308 Ga. 10, 14, 838 S.E.2d 808 (2020).

“Georgia courts considering whether a criminal defendant is entitled to a new trial should consider collectively the prejudicial effect of trial court errors and any deficient performance by counsel.” *Id.*

### **CONCLUSION**

Mr. Gilliam was charged as a party to the crime, and he was sentenced because he was a party to the crime (T. 2455). He shot no one. Rather the evidence showed that co-Appellant was the sole shooter of the four co-defendants.

The 14-year delay in his appeal violated his due process rights to a speedy appeal. As a result of the delay, Mr. Gilliam suffered prejudice in that he was denied the opportunity to use the presumption of prejudice in jury selection.

His trial was not severed from the co-appellant’s, even though all recognized that his rights would be violated. Non-cumulative, relevant evidence was excluded from being presented to the jury.

Mr. Gilliam was harmed by these errors, individually and cumulatively.

For these and the other reasons set forth above, Mr. Gilliam, the Appellant, seeks reversal of his conviction on all counts. He further seeks that this Court order his case be dismissed because of the delay in his appeal.

This the 10th day of May, 2021.

Respectfully submitted,

s:\ John W. Kraus

John W. Kraus

Bar. No. 002170

Attorney for Appellant

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a copy of the foregoing BRIEF OF APPELLANT by depositing same in the United States Mail, in a properly addressed envelope with adequate postage thereon to:

Office of the Fulton County  
District Attorney  
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40 Capitol Square, S.W.  
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Dated: May 10, 2021.

s:\ John W. Kraus

John W. Kraus



**SUPREME COURT OF GEORGIA**  
Case No. S21A0941

April 30, 2021

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

**KEVIN GILLIAM v. THE STATE**

Upon consideration of the Appellant's motion for an extension of time to file a brief in the above case, it is hereby ordered that the motion be granted. An extension is given until May 10, 2021, to file.

A copy of this order **MUST** be attached as an exhibit to the document for which an extension is received.

*All the Justices concur.*

**SUPREME COURT OF THE STATE OF GEORGIA**  
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

 , Clerk

EXHIBIT "A"