IN THE SUPREME COURT
STATE OF GEORGIA

GARRY JOHNSON

Appellant,

vs. File no. S22A0964

STATE OF GEORGIA,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case came to the court's attention once again in 2017, seventeen years after the sentencing of Garry Johnson to Life Without Parole for the murder of Irene Shields. Between sentencing on November 17, 2000 and the appointment of new appellate counsel on December 6, 2017, the trial court had taken no action on this case.

The defendant filed a motion for new trial entitled “Extraordinary Motion for New Trial” on December 13, 2000. That motion and the subsequent amendments filed by counsel raise the overarching questions: Has Mr. Johnson been denied his rights under the Constitutions of Georgia and the United States through errors at trial or the delay of his appeal. The answer to these questions is yes, and the remedy is a new trial.

This Court has additionally asked parties to address whether a pro se filing made by the defendant who is actually or presumptively represented by counsel is always a nullity. To this question, the short answer is no. The court has the right to recognize and rule on pro se filings where counsel has abandoned representation of the defendant during a critical stage of proceedings as part of a court’s power to regulate proceedings before it.

Jurisdictional Statement

This case is a direct appeal from a criminal conviction for murder. This Court has assumed jurisdiction over all murder appeals pursuant to the Constitution of Georgia, Article VI, Sec. 6, Para. 3; *State v. Murray*, 286 Ga. 258 (2009).

Judgment Appealed

Judgment of conviction and sentence entered November 17, 2000. (R. 1028)

Statement of Material Facts

A) Facts of the Case

In November 2000, a Burke County jury heard the death penalty trial of Garry Johnson for the murder of Irene Shields. (T. 1). The jury found Mr. Johnson guilty of murder and kidnapping but declined to impose the death penalty. (R. 954, 1009). Judge William Fleming, who had presided over the trial, sentenced Mr. Johnson to life in prison without parole on November 17, 2000. (R. 1028).

The evidence at trial showed that Ms. Shields died after being run over by her own car. Testimony was that her body was found off of a dirt road in rural Burke County, having been left there to die. Investigators discovered a cigarette butt left in the same vicinity and tested it for DNA. It came back as the DNA of Garry Johnson's brother, Rickey. (T. 538). Likewise, investigators found a shoe print in the area which was casted and compared to shoes that belonged to Garry

Johnson. The shoe expert declared that the print and the shoe were a likely or probable match. (T. 514).

Further evidence was adduced regarding the relationship between Garry Johnson and Irene Shields. In particular, evidence showed that they shared a home but were no longer exclusively dating. They had an argumentative relationship. (T. 161).

The day after Ms. Shield's death, the police pulled over Mr. Johnson while he was driving his new girlfriend's car. In the car, the police found a card belonging to Irene Shields, but no evidence of Ms. Shields's death. He was questioned by the police about Ms. Shield's disappearance. Agent Morgan asked Mr. Johnson, "What if I told you she was dead?" Mr. Johnson immediately asked for a lawyer. (T. 582). This request for counsel was held by the trial court in its order denying the motion for new trial to be "compelling evidence of his consciousness of guilt." (R. 1280). At trial, the state also emphasized the evidentiary value of this request for a lawyer on its cross-examination of Mr. Johnson.

The state's primary witness was Rickey Johnson who testified that he had accompanied his brother Garry Johnson on the last day of Ms. Shield's life. (T 203). He told the jury how he had assisted his brother through the kidnapping and death of Ms. Shields and ultimately drove his brother home after the murder. (T. 214-245). Mr. Boone cross examined Rickey Johnson and asked if he had received a deal. Rickey testified that he had received no "good" deal and that he had

committed "no crime." (T. 256). The jury learned that Rickey Johnson was serving five years in prison for hindering apprehension of a felon. But the jury did not learn about any lenience given or negotiated for in exchange for this testimony.

The State introduced other evidence regarding the time and manner of Ms. Shield's death and called witnesses who had been instrumental in finding her body and her belongings.

At the conclusion of the first part of the trial, the jury returned a guilty verdict on all charges. The punishment portion of the trial then began in earnest. The death qualified jury found Mr. Johnson to have committed some aggravating factors but did not find him eligible for the death penalty. He was therefore sentenced to life without the possibility of parole. (R. 1041).

B) Facts of Post-Conviction Procedural History

On December 12, 2000, 28 days after the jury's verdict Mr. Johnson's sentence, Attorney Jack Boone filed his Motion to Withdraw from Representation to allow appellate counsel to be appointed. An order granting the motion was filed the same day. (R. 1050-1). Mr. Johnson filed pleadings purporting to be 1) a Pro-Se Preliminary Motion to Vacate Judgment, and/or Motion for New Trial on November 14, 2000, 2) a Pro se Motion for Judgment not withstanding the Verdict on November 17, 2000, and 3) a Pro se Extraordinary Motion for New Trial on December 13, 2000. (R. 1013, 1032, 1051).

The defense has incorporated the December 13th motion into all subsequent motions for new trial. It is counsel's understanding that the state considers the

December 13th motion to be timely as well. At no time, however, did the state make a motion to dismiss for failure to file a timely appeal.

The trial court held several hearings on the motions for new trial after the re-initiation of the case in 2017[1]. Through these hearings, the court was able to determine the timeline of the post-conviction case and the difficulties created by the delay in the appeal.

Mr. Johnson was convicted in November 2000. What happened the next seventeen years? Repeated attempts to have his motions heard and ruled on, attempts to communicate with counsel, and the disintegration and disappearance of witnesses to the trial and evidence admitted.

Representing Himself

In the thirty days following his sentence, Mr. Johnson saw his lead counsel move to withdraw, saw the court grant the counsel's withdrawal, and filed a motion requesting a new trial. (R. 1047, 1050, 1051). The motion enumerated several errors including ineffective assistance of counsel. He included a certificate of service naming the District Attorney. (R. 1055). He attached a letter which

[1] The post-conviction hearings span three years from 2018 until 2021. These include Motion for New Trial Hr'g Tr., May 21, 2018 (hereinafter "MNT1"); Motion for New Trial Hr'g Tr., Dec. 18, 2018 (hereinafter "MNT2"); Motion for New Trial Hr'g Tr., May 29, 2019 (hereinafter "MNT3"); Amendment to Defendant's Motion for New Trial Hr'g Tr., May 10, 2021 (hereinafter "MNT4"); Status Hrg', Jan. 8, 2018 (not transcribed); Status Hr'g, April 15, 2020 (not transcribed); Status Hr'g, Oct. 5, 2020 (not transcribed).

asked for copies of his filed motion, a transcript, and noted, "I have no attorney and wish to proceed with my appeal pro se." (R. 1056).

Less than a month later, Mr. Johnson wrote the Clerk of Court again requesting copies of some other of his pro se motions. (R. 1057). The clerk's office replied the next day attaching copies. (R. 1057). The clerk's response did not reference or copy any attorney.

Mr. Johnson received no further correspondence from the court until after he wrote the Clerk of Court on August 30, 2001 requesting a copy of his case file to "begin my appeal process." (R. 1060). Only then did the clerk inform Mr. Johnson that he now had a new lawyer, Paul David. (R. 1082).

Throughout September and October 2001, Mr. Johnson and the Clerk of Court's office exchanged correspondence related to the case file, the transcript, and the silence of the "appointed" attorney. (R. 1064-1071). On September 17, Mr. Johnson wrote, "The appointed attorney, Paul W. Davis[sic], has not responded to any of my requests at all." (R. 1069). The clerk's record does not show any response to this information, and the file shows only that Mr. Johnson paid for his own copy of the transcripts in order to work on his appeal. (R. 1078-9)

It is worth noting that former attorney Mr. David has no recollection of being appointed to this case. (MNT3, Exhibit D-4). And between April 1999 and April 2002, Mr. David was appointed to represent criminal defendants either at trial or on appeal whom he abandoned. *In re David*, 282 Ga. 517 (2007). He was

subsequently disbarred, in part because of this abandonment. *Id.* The court writes that in ten criminal cases:

> [A] court appointed David to represent a criminal defendant either at trial or on appeal. These cases span from April 1999 through April 2002. Although David accepted the appointments, he did little or no work on their cases. In many of these cases, he missed filing deadlines. In others, he filed notices of appeal but failed to notify the client of the resolution of their appeals. In some, he refused or failed to respond to inquiries from the client or their families and in others he failed to even notify the client of his appointment in the first place. *Id.* at 517-18.

In January of 2002, Mr. Johnson asked the clerk to send him a copy of his motion for new trial and any rulings that had been made. (R. 1075; MNT2 D-5). The next month, Mr. Johnson wrote the clerk again asking about his December 13, 2002 motion for new trial. (R. 1076). The clerk responded "we do not have a ruling on this motion at this time" and told him "you will need to contact the attorney representing you at this time." (R. 1077). However, the clerk's file had yet to receive an entry of appearance or any filing from any appellate attorney. The clerk's office sent Mr. Johnson an itemized cost of copies of his filings and once he paid, the clerk's office mailed him those filings, including his file stamped copy of his still pending motion for new trial. (R. 1078-9).

Mr. Johnson continued to correspond with the clerk throughout the summer of 2002. He sent money to the clerk's office who sent him multiple transcripts from UAP and motions hearings related to this case. (R. 1084-9).

In 2003, the clerk misfiled letters from another case into Mr. Johnson's case. (R. 1092-4). Per Mr. Johnson, at this time, he was continuing to contact the court and the clerk and work on his appeal on his own, to the best of his ability. (MNT2 55). In August of 2004, Mr. Johnson requested that the clerk send him opening and closing statements from his trial. (R. 1095). The clerk responded asking him to clarify which pleadings he wanted and explaining that the court reporter did not take down closing arguments. (R. 1096). The clerk did not reference any attorney in this correspondence, and advised him to contact the court reporter for more information. *Id*.

Meanwhile, on July 30, 2003, Special Agent Steven Foster wrote a letter to the GBI Case File indicating that the District Attorney's Office had told him "the appeal process in the case against Garry Deyon Johnson has been exhausted and no additional appeals are pending. This case may be put in a closed status." (MNT3 17, Exhibit D3). Property receipts from GBI file show that items of physical evidence, including the footprint casts and cigarette butt, were signed over to the District Attorney's Office but never returned. (MNT3, Exhibits D-1 and D-2). Furthermore, during this period, Mr. Johnson's second chair trial attorney was disbarred. *In re Luther McDaniel*, 276 Ga. 226 (2003). The clerk's file continues to show no entry from Paul David or any other appellate attorney. Jack Boone, the leading attorney at trial, died in 2007. (MNT1 11). Norma Rowe, the Court Reporter, died in 2013. (MNT3 24).

Around this time, Mr. Johnson married. (MNT 94). He and his wife worked together to try and obtain private counsel because they had gotten no response from the court to his pending motion and had received no correspondence or information from Paul David despite writing him. (MNT2 53, 56). In November of 2005, Mr. Johnson's wife paid one private attorney to look into the appeal, but he failed to act. No entry was filed, and ultimately the attorney returned much of the money after a bar complaint was filed. (MNT2 57). In December of 2010, Mr. Johnson's wife discussed fee arrangements with another attorney, but that attorney did not file an entry or ever meet Mr. Johnson. (MNT2 60). Mr. Johnson testified that he and his wife divorced around 2016, during this period, but that he thought these lawyers would work on his case. They either never contacted him, or they contacted him and did not take the case. (MNT2 58, 60-1; 94). Mr. Johnson believes he continued to write the clerk of court during this period, even as he held out hope that the attorneys he wrote would write back. He even wrote Judge Fleming, himself. (MNT2 56, 81-3).

On December 7, 2016, the Clerk of Court filed a letter from Mr. Johnson requesting a copy of his sentencing package. He wrote, "PLEASE HELP ME ON THIS PLEASE." (R. 1097). The clerk replied that same day with a copy of the sentencing package. Mr. Johnson was shocked to receive something back from the clerk as he had gone so many years without a response. He wrote back and told the clerk that he had yet to be brought back to court for his pending motions for new trial. (R. 1099). He referenced his attorneys "at the time" of the trial, but did not

make reference to any appellate lawyer. (R. 1099). When the clerk's office responded, it did not refer to any appointed lawyer, and the letter told Mr. Johnson that he would need to fill out an In Forma Pauperis affidavit to get a copy of his transcripts. (R. 1100).

After that letter, the court stepped in to have the Public Defender's Office file an entry of appearance. The undersigned's entry was filed on December 6, 2017. (R. 1101). A hearing on the defendant's motion for new trial was set for January 8, 2018 at the court's request, but continued to give the new defense attorney time to find and review the record in the case. (R. 1105). On May 21, 2018 the trial court held a hearing on the Motion for Discovery and the Motion for a Special Master that Mr. Johnson's new counsel had filed. (R. 1115). Thus began the attempt by all parties to recreate the case file and transcript from the trial that had occurred 18 years prior.

Belated Representation by Appointed Counsel

To understand what happened at trial and whether there were errors affecting Mr. Johnson's rights, it would behoove an attorney to look at the case file of the attorneys at trial, speak to the trial attorneys, review the physical evidence, and review the full and complete transcript. To that end, Judge Blanchard, taking over the case from Judge Fleming, who was ill in 2017 and passed away in 2019 (MNT3 25), appointed Neil Dickert to be the special master and seek the case file and existing evidence in this case. (R. 1135-1146). Additionally, defense counsel

obtained affidavits and information from staff of Court Administration and the Sheriff's Office. (MNT2 113, Affidavit of Bonnie Johnston, employee of the Office of Court Administration; MNT2 112, Affidavit of Major Chester V. Huffman Major in the Burke County Sherriff's Office). She also reached out to surviving trial attorney Luther McDaniel, Attorney Paul David, and the widow of trial attorney Jack Boone. (Affidavit of Luther McDaniel; MNT3 51-2, Affidavit of Paul W. David; MNT1 11, Affidavit of Julie Boone; MNT1 12). The District Attorney's Office reached out to the GBI and searched their own files for records of this trial. (MNT3 17; MNT1 5; and Supplemental Report of the Special Master R. 1187).

There is no existing case file from either of the trial attorneys or the District Attorney's office, as the trial attorneys' files had been lost or destroyed and the prosecutor's file, including discovery, was lost in a flood. (See Affidavits of McDaniel, David, and Boone in MNT1; and MNT1 5). The clerk's file was also searched and contained no physical evidence. (MNT2 13). The Sheriff's Office of Burke County maintained no file connected to this case. (MNT2 112, Affidavit of Major Chester V. Huffman Major in the Burke County Sherriff's Department). The GBI's file contained paperwork and paper evidence related to the case, including photographs and investigative notes, but it contained no physical evidence. (MNT3 21). Property receipts from GBI file showed that some items of physical evidence, including the footprint casts and the cigarette butt, were signed over to the District Attorney's Office but never returned. (MNT3, Exhibits D-1 and D-2).

The Court Reporter's file was also searched, and it contained reel-to-reel recordings and notes from the trial but no physical evidence. (MNT2 113-4). Because of some gaps in the transcript and the defense's objection to the failure to transcribe opening and closing statements, the court ordered that the reel-to-reel recordings be converted to a digital format for the review of all parties. (R. 1218). This was reviewed by Mr. Johnson's attorney and sections of it were played in open court in order to allow the court reporter to attempt to transcribe moments of the previous trial that were not contained in the transcript. (MNT4 22-9).

Ultimately, Mr. Johnson, through his attorney, filed another Motion for New Trial on December 17, 2018 incorporating Mr. Johnson's pro se motion of December 13, 2000. (R. 1151). This was filed with the permission of the court, to the extent it was out-of-time, because no *attorney* of Mr. Johnson's had filed any such motion earlier. (R.1147; R. 1155). The motion itself related back by reference to the timely December 13, 2000 pro se motion. This was supplemented with a brief filed December 18, 2018 and later a motion and brief styled as "Motions for Ruling, for Special Master Investigation, for Permission to Supplement the Record, for Evidentiary hearing, and for O.C.G.A. § 5-6-41 Hearing." (R. 1156, 1177). In 2019, the court ordered that the trial recording be converted to a digital format and that copies be distributed to the parties. (R. 1218). The court held a conference inquiring on the status of defense counsel's review of these recordings on April 28, 2020. (R. 1229). The court referenced the defendant's ability to participate in hearings given the COVID-19 pandemic. (R. 1229). And Mr. Johnson was not

transported to Burke County for an in-person hearing until May 10, 2021. (R. 2021).

At the last hearing, Luther McDaniel testified about his representation of Mr. Johnson in 2000. (MNT4 4). He testified that he was the second chair attorney in the case and that Jack Boone took the lead. (MNT4 7). He also testified that he did not have the file to the case and did not give it to an appellate attorney. (MNT4 19). That hearing addressed the plea deal of Mr. Johnson's brother Rickey Johnson. Mr. McDaniel testified that Mr. Boone intended to use the existence of that plea deal to impeach Rickey Johnson. (MNT4 17). He also testified as to the identity of the speakers in the trial recording where a male attorney speaking on behalf of the state tells the court that there was no evidence of or inference of lenience or immunity for Rickey Johnson, and the court agreed that Rickey's sentence was probably too harsh. (MNT4 28-29).

A newspaper article was introduced that same hearing that showed that Mr. Rickey Johnson was given lenience in exchange for his testimony. (MNT4 33). The article corresponded, in large part, with the certified copy of Rickey Johnson's sentence admitted in an earlier hearing which showed a letter from Sam Sibley, Rickey Johnson's lawyer, to District Attorney Daniel Craig outlining that "in exchange for the plea of guilty…the State will recommend … probation. The State further agrees that he will not be prosecuted for … the kidnapping and death of Irene Shields…. As a part of this plea agreement, [he] will testify for the State during the trial of his brother . . . if called upon to do so." . (MNT3 54-63).

Ultimately, the state requested the opportunity to brief the issues raised in that hearing, but never did. (MNT4 31). The court asked for proposed orders, and signed the state's proposed order on January 27, 2022. Mr. Johnson, through counsel, filed a notice of appeal on February 21, 2022. (R. 1-3).

Enumeration of Errors

1. **Ineffective Assistance of Counsel:** Mr. Johnson should be given a new trial because trial counsel was ineffective in failing to impeach witness Rickey Johnson with his plea deal and sentence which would have raised grave doubt on the state's theory of the case.
2. **Ineffective Assistance of Counsel:** Mr. Johnson should be given a new trial because the state was allowed to use Mr. Johnson's request for an attorney as evidence of guilt and his attorney was ineffective in failing to object to this line of questioning.
3. **Trial Court Error:** Mr. Johnson should be given a new trial because the court erred in allowing Mr. Johnson's request for an attorney to be used as substantive evidence of his guilt.
4. **Prosecutorial Error:** Mr. Johnson should be given a new trial because the prosecution committed error by failing to correct the testimony of its star witness, Rickey Johnson, when he was allowed to testify that he had received no leniency.

5. **Due Process:** Mr. Johnson should be given a new trial because his appeal was prejudiced by the delay of such great duration as to deny Mr. Johnson his right to due process.
6. **Insufficient Evidence:** Mr. Johnson should be acquitted and discharged due to the state's failure to prove guilt beyond a reasonable doubt.

Preservation of Error and Standard of Review

1) Ineffective Assistance of Counsel – Failure to introduce Rickey Johnson's Plea Deal

Mr. Johnson's claim of ineffective assistance of counsel was preserved when raised by his misnamed Extraordinary Motion for New Trial which was the earliest practical time possible. *Upshaw v. State*, 257 Ga. App. 199, 201 (2002). (R. 379). The Amendment to the Motion renewed this claim of error and specified the manner of the error of counsel. (R. 1251). Trial court's determination is reviewed under the clearly erroneous standard for factual issues and de novo review for legal issues. See *Wright v. State*, 291 Ga. 869, 870 (2012).

2) Ineffective assistance of counsel—failure to object to State's discussion of Mr. Johnson's right to counsel.

Mr. Johnson's claim of ineffective assistance of counsel was preserved when raised by his misnamed Extraordinary Motion for New Trial which was the earliest practical time possible. *Upshaw v. State*, 257 Ga. App. 199, 201 (2002). (R. 379). The Amendment to the Motion renewed this claim of error and specified the

manner of the error of counsel. (R. 1251). Trial court's determination is reviewed under the clearly erroneous standard for factual issues and de novo review for legal issues. See *Wright v. State*, 291 Ga. 869, 870 (2012).

3) Trial Court Error in allowing State's discussion of Mr. Johnson's Right to Counsel.

Mr. Johnson's federal and state constitutional rights were violated when the state improperly commented on his request for an attorney. The court ruled that the state's comments were appropriate evidence of the defendant's guilt (R. 1096). This is plain error unwaived, clear and obvious, affecting substantive rights, and seriously affecting the fairness and integrity of the proceedings. See *Lewis v. State*, 312 Ga. 537, 541 (2021).

4) Prosecutorial Error. State failed to correct mistaken impression that its star witness had received no lenience and committed "no crime."

This claim of error was raised in the Amendment to the Motion for New Trial which was filed on May 10, 2021. (R. 1248) after discovery of the charge conference discussion where the state allowed the court to believe that there was no lenience given to the state's witness. The court denied the motion for new trial on this basis in its order (R. 1308).

5) Due Process rights were violated due to delayed appeal.

This claim was raised during the first motion for new trial filed by counsel. The trial court's denial of the motion for new trial on this ground is reviewed for an abuse of discretion. *Bynum v. State*, 315 Ga. App. 392, 395 (2012). In evaluating a trial court's decision to deny a speedy appeal claim, "we must accept the factual findings of the trial court unless they are clearly erroneous, and we must accept the ultimate conclusion of the Trial Court unless it amounts to an abuse of discretion." *Hyden v. State*, 308 Ga. 218, 224 (2020)(citations omitted).

6) Insufficient Evidence.

The claim of insufficient evidence is preserved by statute. O.C.G.A. § 5-6-36(a). The standard of review is whether after viewing the evidence in the light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Short v. State*, 234 Ga. App. 633, 634 (1998).

Argument and Citation of Authorities

Court's Question: Is a pro se filing made by a defendant who is actually or presumptively represented by counsel always a nullity?

Short answer: No. The court has the right to recognize and rule on pro se filings where counsel has abandoned representation of the defendant during a critical stage of proceedings as part of a court's power to regulate proceedings before it.

The right to represent oneself does not evaporate when an attorney is hired. *Cherry v. Coast House, Ltd*., 257 Ga. 403, 406 (1987). But because courts have the inherent authority to regulate "the conduct of its officers and all other persons connected with a judicial proceeding before it," they have the authority to "regulate…the manner in which the constitutional right of self-representation will be exercised." *Burney v. State*, 244 Ga. 33, 36-37 (1979); O.C.G.A. § 15-1-3 (4). Prior to the 1983 Constitution, this ability to regulate was limited by the language of Georgia Constitution of 1973 that included "or both" in its Rights to the Court:

> The 1983 Ga. Const., Art. I, Sec. I, Par. XII, provides that "[n]o person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." The comparable paragraph of the 1976 Const., Art. I, Sec. I, Par. IX, provided that "[n]o person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, *or both*." (Emphasis supplied).

Seagraves v. State, 259 Ga. 36, 36–37 (1989). That meant that in *Burney*, as in other cases, the trial court could not completely prevent a defendant from representing himself. When "or both" was removed from the Georgia Constitution, the purpose was to define the right of individual to represent himself and address the problems created by the situation in *Burney* where a lawyer and a defendant acted as co-counsel at trial. *Nelms v. Georgian Manor Condo. Ass'n, Inc.*, 253 Ga. 410, 413 fn 7 (1984). The "or both" language constrained the trial court who otherwise would have almost unfettered authority to see that the trial proceeded in an orderly manner.

Prior to the 1983 constitution the Supreme Court still permitted the trial court to ignore filings by represented pro se litigants or to hear them, as judicial economy so required. See *Reid v. State*, 235 Ga. 378, 381 (1975)(holding that a lawyer's appellate decisions trump those of a non-lawyer defendant, holding that it would be illogical to require appointment of counsel but allow pro se defendant to make legal decisions at odds with the educated guiding advice of the lawyer*)*. Compare *Daniel v. State*, 248 Ga. 271, 271 (1981)(considering both the pro se appeal and the appeal filed by the lawyer because the pro se appeal included allegations of ineffective assistance of counsel which the lawyer's pleadings did not).

The confusion present when a lawyer and a defendant seek to act concomitantly at trial is not present where, as here, the lawyer has ceased working on the defendant's case. In both *Cotton* and *Brooks*, the defendant's lawyer filed

post-conviction motions after trial had resulted in a guilty verdict for the defendant. *Cotton v. State*, 279 Ga. 358, 361 (2005); *Brooks v. State*, 265 Ga. 548, 548 (1995). Derrick Brooks, in his case, filed a timely pro se notice of appeal after his attorney had also filed a notice of appeal. *Brooks* at 548. The Court held that dismissal of the pro se appeal was proper as its consideration would not contribute to judicial economy and the lawyer's representation of Mr. Derrick Brooks was still ongoing. Likewise, Derrick Brook's co-defendant Paul Brooks filed additional enumerations of error with the trial court only *after* his lawyer had filed his brief and after the time period for filing had run. *Id.* at 551. The court did not need to consider untimely pleadings, nor did it need to consider pleadings filed pro se when the lawyer and the defendant were acting simultaneously. *Id*. (Citing *Eagle v. State*, 264 Ga. 1(5) (1994)).

Similarly, the defendant's pro se filings in *Cotton v. State*, were filed while he was represented by new appellate counsel. 279 Ga. 358, 361 (2005). Cotton's lawyer filed a motion for new trial on his behalf, and the trial court considered that as the representative pleading of the defense team and did not need to address the pro se filing. *Id.*

In both of these cases, the trial and appellate courts were given two competing set of pleadings. The courts have the power to control the conduct of all persons connected with a judicial proceeding and likewise have the authority to designate a lead counsel between competing representatives. *See* O.C.G.A. § 15-1-3 (4); 15-19-10. O.C.G.A. § 15-19-10 provides that a judge may designate a

"leading counsel" where lawyers on the same side of a case disagree about the direction of the case. Case law provides that where that simultaneous "representation" is a lawyer on one side and a lay pro se defendant on the other, the lawyer's pleadings will be given all the weight and consideration,. See e.g., *Seagraves v. State*, 259 Ga. 36; *Cargill v. State*, 255 Ga. 616, 622(3) (1986).

White v. State, 302 Ga. 315, 319 (2017) paints a different picture—it shows a case that never went to trial where a trial attorney had negotiated a plea deal to save the defendant from a death penalty. The trial counsel failed to file any post-conviction motion and left the defendant alone to file his motion to withdraw guilty plea. The Court cites precedent permitting out-of-time appeals for the proposition that the plea lawyer was still the representative of the defendant for at least thirty days. *White*, 302 Ga. at 318 (citing both *Grace v. State*, 295 Ga. 657, 658 (2014) and *Stephens v. State*, 291 Ga. 837, 837–838 (2012)). The Court held that even though the defendant had been spared the death penalty, the attorney should have preserved his post-conviction rights. *Id.* c.f. *Bailey v. State*, 232 Ga. 873, 875 (1974)(no duty to preserve post-conviction rights where client was spared the death penalty and appeal would be futile).

White was wrongly decided because it leaves a client effectively unrepresented during the period after his sentencing when he must act within a short period to preserve his rights. *White*, however, is distinguishable from our case in several respects.

First, White's pro se filing came after a plea agreement where he had not only disclaimed his right to a trial but also had affirmed that he was content with his counsel. *White v. State*, Brief of Appellee, 2017 WL 2257244 (Ga. Supreme Court, May 16, 2017), 7-8. Mr. Johnson's displeasure with trial counsel was well known and recorded in the transcript of his trial, the transcript of his sentencing, and the enumerations of his motions for new trial. The trial court acknowledged that Mr. Johnson would be raising ineffectiveness of counsel and did not expect trial counsel to continue with their representation of Mr. Johnson. (S. 4-5; T. 694; R. 1051-6).

Second, the record in *White* does not show that any court considered the pleadings, as filed. Rather the trial court immediately ordered the Georgia Public Defender Council to appear and determine representation for Mr. White. In other words, the fact that the court would require a lawyer to represent Mr. White was evident to those involved in the case, and a lawyer was, belatedly, appointed. In Mr. Johnson's case, however, the Clerk of Court treated Mr. Johnson's pleadings as if they were filed by counsel, responding to requests on their status and providing Mr. Johnson with file-stamped copies. (R. 1059). The court itself, through the judge, made no ruling or order on the record either rejecting or accepting these pleadings. Mr. Johnson's trial judge, in contrast to Mr. White's, did not order those in charge of indigent defense to appear before it and clarify the representation of Mr. Johnson.

Third, Mr. White was appointed counsel within the term of court that the plea was entered, providing Mr. White's conflict free counsel with time to file necessary pleadings. *White v. State*, 302 Ga. 315, 317 (2017). This new attorney's entry was recognized in paperwork filed by the Georgia Public Defender Council more than a month before the expiration of the term of court. *Id.* On the other hand, Mr. Johnson's promised counsel never filed an entry of appearance nor did any representative of or employer of said counsel file this information with the court. Rather, the only hint at this lawyer's appointment is through a letter sent from the Clerk of Court to Mr. Johnson in response to his request for transcript, several months after his 30-day window to appeal would have passed. (R. 1064).

Fourth, Mr. Johnson's leading counsel had withdrawn from his representation prior to the filing of the pro se "extraordinary" motion for new trial. (R. 1050; 1051). White's counsel's withdrawal did not occur until months after his pro se filings were recorded. *White v. State*, 302 Ga. at 317.

Finally, in Mr. Johnson's case, although a motion for out of time motion for new trial was filed and granted, the trial court made no ruling on the propriety of the pro se motions, instead recognizing only that *counsel* did not file a motion for new trial or notice of appeal prior to the statutory deadline. (R. 1155). This stands in contrast to the state in *White* who filed a motion to dismiss prior to any hearing on the merits of the case. For Mr. Johnson, no motion to dismiss was ever filed during the 16 years he was unrepresented nor even during the pendency of the

undersigned representation, including a hearing prior to the permission for out-of-time motion. (See MNT1).

White is cited heavily in *Dos Santos v. State*, 307 Ga. 151, 154 (2019) where the defendant, once again, had plead to a case with the assistance of counsel and moved to withdraw her plea pro se. The Court's explanation is that allowing a client to act pro se while still represented by counsel will deprive them of the "guiding hand of counsel." However, such a rule does not protect the defendant when her counsel's absence is guiding her off a cliff.

The court-created rule that no litigant can represent himself if he still, even nominally, has a lawyer serves a purpose only where the lawyer and the defendant are acting simultaneously. The reason is to provide the court with the ability to control its own courtroom. To decide who it needs to listen to. To resolve conflicts between two people who are supposed to be on the same side. We see this same need for clarity in cases where co-counsel are at odds with one another. Thus, the Georgia Legislature gave the court two statutes to allow the courts to cut through the confusion that comes when a committee of two tries to make a decision. First, in O.C.G.A. § 15-19-10, the legislature tells the court that there is one lead counsel in a case—and that's the lawyer upon whom the client relies more than any other. Second, in O.C.G.A. § 15-1-10, the court has broad power to control everyone connected with a judicial proceeding. In *Burney v. State*, 244 Ga. 33, 37 (1979) the court is described as using its inherent power to limit who can cross examine a witness, how many people can make closing statements, and which person can

conduct voir dire. *See also Phillips v. State*, 278 Ga. App. 439, 443 (2006)(court permitted to exercise its discretion in prohibiting, at trial, defendant from interposing objections at the same time as he was represented by counsel). By removing "or both" from the Constitution, the drafters merely removed one limit to the court's authority to direct the behavior of those in its purview. It did not eliminate the ability of a pro se person to represent himself while also having a lawyer. For instance, *Seagraves* and its progeny continue to allow defendant-lawyers to act as co-counsel. See e.g. *Miller v. State*, 219 Ga. App. 213, 215 (1995). However, the amended Constitution removed the obligation of the court to consider both sides of a lawyer/non-lawyer-defendant conflict where it would be disruptive to the administration of justice.

Mr. Johnson's conduct in filing a pro se motion did not disrupt the otherwise orderly proceeding of the Burke County Superior Court. His timely paperwork, complete with a certificate of service naming the District Attorney, referenced his pro se status, and it was filed after the withdrawal of leading counsel. There was no question that he was representing himself, at least until the court could appoint the promised appellate counsel.

The argument propounded in the motion to reconsider remains: Mr. Johnson was not represented by trial counsel when he filed his pro se motion because his lead counsel had withdrawn. At the time of Mr. Johnson's case, Uniform Superior Court Rule 4.5 read:

> The entry of an appearance or request for withdrawal by an attorney who is a member or an employee of a law firm or professional corporation shall relieve the other members or

> employees of the same law firm or professional corporation from the necessity of filing additional entries of appearance or requests for withdrawal in the same action.

This rule prevents a law firm from having to file unique withdrawal motions for every attorney who has ever worked on a given case. Uniform Superior Court Rule 4.5 Entries of Appearance and Withdrawals by Members or Employees of Law Firms or Professional Corporations (effective date 1985). The withdrawal of one marks the termination of representation for the whole team. In this case, the team was two lawyers working for the Indigent Defense Committee and paid by the county.

The definition of a "law firm" is not defined in the Superior Court Rules or in Title 15 or 16. Instead, we have to go to the Georgia Bar Rules which say a "law firm" "denotes a lawyer or lawyers in a private firm, law partnership, professional corporation, sole proprietorship or other association authorized to practice law pursuant to Rule 1-203 (d); or lawyers employed in a legal services organization or the legal department of a corporation or other organization." From there, we must look at the definition of "other association authorized to practice law" and "firm," because the trial lawyers were not in a legally defined partnership or PC. Looking at Ga. Bar. Rule 1-203, we learn that persons can either work as sole proprietors, partners, shareholders, or members of partnerships, LLCs, PCs, PAs or LLPs.
In this case, the "Indigent Defense Committee" appointed both Mr. Boone and Mr. McDaniel to represent Mr. Johnson. (MNT4 6). Mr. McDaniel filed the entry of appearance. (R. 26). Mr. Boone filed the motion to withdraw. (R. 1047). The two

acted in concert to carry on the business of representing Mr. Johnson and were paid through the Indigent Defense System of the area. To that end, they were partners or employees of the same "association authorized to practice law." There is no evidence or finding to the contrary.

The withdrawal of Jack Boone acted as a withdrawal for both trial attorneys. Everyone in court acted like it. The Clerk of Court did not reference Luther McDaniel in its responses to Mr. Johnson, but later did mention appellate counsel, Paul David, who, she said, had been appointed. (R. 1059; R. 1062).

Mr. Johnson was unrepresented when he filed his motion for new trial on December 13, 2000. The trial court intended to appoint further indigent counsel but had not yet done so. The record shows that Paul David, who was named by the Clerk of Court as Mr. Johnson's next attorney, never filed anything in this case. In the order disbarring Mr. David, the Court indicated that abandoning indigent appeals cases was Mr. David's modus operandi at the time of Mr. Johnson's appeal. *In re David*, 282 Ga. 517, 517 (2007).

The cases regarding simultaneous pro se representation or insufficient withdrawal of trial counsel do not involve facts where counsel and co-counsel are required to file separate motions for withdrawal in order to be ordered out of the case.

Mr. Johnson was unrepresented on December 13, 2000 for all intents and purposes. The court *intended* to appoint him an appellate lawyer but had not yet done so, and the clock was ticking. Mr. Johnson's filings were accepted without

question by the Clerk of Court. The District Attorney never moved to dismiss the motion for new trial filed on December 13, 2000 and served upon it that same day. Therefore, even if Mr. Johnson still nominally had a lawyer, the court allowed him to act pro se and was within its discretion to so do. The 1983 Georgia Constitution removed the right to co-representation, but it did not prohibit it. There is no justice in attaching a missing lawyer to a defendant for all eternity like a cannonball tied to the foot of a drowning sailor. Though in this case, the chain was cut through leading counsel's withdrawal, other defendants might not be so lucky.

1) Mr. Johnson should be given a new trial because trial counsel was ineffective in failing to impeach witness Rickey Johnson with his plea deal and sentence which would have raised grave doubt on the state's theory of the case.

Mr. Johnson should be granted a new trial as the available record demonstrates that Mr. Johnson had ineffective assistance of counsel where counsel failed to introduce evidence of a plea deal between Rickey Johnson and the State, including the signed agreement between Rickey Johnson's attorney, Sam Sibley, and District Attorney Daniel J. Craig although it was filed in the Clerk of Court's Office in a neighboring county. (MNT3 27, D-5)(A copy of the sentencing paperwork in Richmond County is filed 1998 RCCR 169). This error is judged under the standard of *Strickland*. "In order to prevail on a claim of ineffective assistance of counsel, [the defendant] must show both that counsel's performance

was deficient, and that the deficient performance was prejudicial to his defense. *Smith v. Francis*, 253 Ga. 782, 783 (1985), citing *Strickland v. Washington*, 466 U.S. 668 (1984)." *Walker v. State*, 299 Ga. 250, 251 (2016). "[The] standard of review of a trial court's determination with respect to effectiveness of counsel is whether its findings are clearly erroneous." *Johnson v. State*, 266 Ga. 380, 383 (1996).

a) Trial counsel's failure to introduce the plea deal between Rickey Johnson and the state was deficient.

An attorney has a duty to investigate the facts of the case. "[R]easonable professional judgment requires proper investigation. *Turpin v. Christenson*, 269 Ga. 226, 239(12)(B) (1998)." *Turpin v. Helmeci*, 271 Ga. 224, 226 (1999). And the existence of a plea bargain between the State's primary witness and the District Attorney is relevant to that witness's potential bias and would be an important part of a defense attorney's case. *See United States v. Rosson*, 441 F.2d 242, 244 (5th Cir. 1971)(holding "The jury is entitled to consider and evaluate the interest that a witness may have as a consequence of a plea bargain.").

In this case, the scope of the trial attorney's investigation cannot be determined with certainty; however, testimony of second chair attorney, Luther McDaniel, indicated that the defense knew about a deal between Rickey Johnson and the state. (MNT4, 20). Mr. McDaniel was confused initially about counsel's question regarding the deal but clarified that Mr. Boone tried to impeach Rickey Johnson with his prior conviction—that that was his intention. (MNT4, 15-17).

Mr. Boone's "impeachment" however, fails to get into the terms of the plea deal and accepts Rickey Johnson's testimony at face value.

Q. And you understood that you were a suspect in a murder case?
A. Yes.
Q. And did they talk to you about what kind of deal you might be able to get if you helped them out a little bit?
A. No.
Q. You just decided that you would go ahead and tell them everything that they needed to hear?
A. Yes.
Q. And you expected no help; you didn't expect anybody to help you out, or give you any break on the sentence, or something?
A. No.
Q. You didn't.
A. No.
Q. Did they tell you that you were charged with murder or charged with hindering the apprehension of a criminal?
A. No.
Q. They just had you under arrest, didn't tell you what you were charged with, extradited you back over here to Georgia, and still you don't know why you were under arrest?
A. They said I was a suspect.
Q. In what?
A. In a murder case.
Q. In a murder case. So you did know that you were a suspect in a murder case, right? I mean they told you right?
A. Yes.
Q. So you don't ask for a lawyer; you didn't do anything; you just started talking to them.
A. Yes.
Q. Without expecting any type of benefit or reward for co-operating with the government.
A. No.
Q. Have you ever heard the term snitch?
A. Yeah.
Q. Are you familiar with how snitches are handled in the criminal justice system?

A. Yeah.
Q. Snitches get good deals, usually, don't they?
A. All the ones I know, they haven't.
Q. They haven't? Do you feel like you got a good deal?
A. No.
Q. You think 5 years is too much for all of this?
A. Huh?
Q. Do you think 5 years is too much for all of this?
A. Just for picking somebody up and riding them around; sure.
Q. Now, you think all you did – if the jury were to believe the testimony they've heard here today, you didn't do anything, you just picked somebody up and rode them around?
A. Yeah.
Q. Were you a little bit suspicious of what was going on when Garry comes out with a woman over his shoulder with tape on her mouth?
A. In a way, yeah.
Q. So from that point forward you're just riding around with somebody?
A. What are you trying to insinuate?
Q. I'm trying to insinuate that you're the one that killed this woman; that's what I'm trying to insinuate.
A. No I didn't.
Q. And you didn't tell the police all of this and blame it on Garry. . .
State: Objection, Your Honor . . . .
. . . .
Q. And yet when he walked out with somebody slung over him and duct tape on their mouth, you think you're just going to follow him down there on a joy ride?
A. I didn't commit no crime.

(T. 254-257).

This questioning does not get to the heart of the matter, that regardless of what Rickey Johnson told the police initially, he was offered a deal in order to testify. (MNT4 12; exhibit 1; MNT3 27, D-5).

A certified copy of Rickey Johnson's sentencing paperwork was introduced in the May 29, 2018 motion for new trial hearing, and it contains a letter from Sam Sibley, then a defense attorney for Rickey Johnson, and Daniel Craig, the District

Attorney. (MNT3 27, D-5). It reads "As part of this plea agreement, the defendant will testify for the State during the trial of his brother Garry Johnson in Burke County in connection with the aforementioned death and kidnapping, if called upon to do so." *Id*. The letter is dated May 26, 1998, more than two years before the trial.

The agreement itself seems to conflict a bit with the terms of the letter in that Rickey Johnson was promised probation but received five years incarcerated instead. *Id.* However, the contemporaneous newspaper article that was admitted in at the hearing on May 10, 2021, says that the District Attorney withdrew the recommendation for probation but that the plea was still made. (MNT4 9; D1). Even with the variance, the letter by Sam Sibley is still probative of Rickey Johnson's bias. *See Hines v. State*, 249 Ga. 257, 260 (1982) (reversing trial court for failure to allow cross examination of state's witness as to potential deal; quoting *Davis v. Alaska*, 415 U.S. 308, 216 (1974) for proposition that exposure of a witness's motivation is "a proper and important function of the constitutionally protected right of cross-examination." (cleaned up)).

The existence of the plea deal between Rickey Johnson and the state, evidence of which is a part of the certified record of Rickey Johnson's sentence to hindering apprehension of a criminal, would have been admissible.

> Because the exposure of a witness's motivation in testifying is an important function of the constitutionally protected right of cross-examination, the potential bias or partiality of a witness may always be explored at trial. "It is especially important in a case where a witness or an accomplice may have substantial

> reason to cooperate with the government that a defendant be permitted to search for an agreement between the government and the witness" and explore the details of any agreement.

Vogleson v. State, 250 Ga. App. 555, 558 (2001), aff'd, 275 Ga. 637 (2002)(citations omitted).

b) Trial counsel's failure to admit evidence of Rickey Johnson's plea deal to testify in exchange for not being charged with murder or kidnapping was not a strategic choice.

In general, "The extent of cross-examination is a strategic and tactical decision...." *Romer v. State*, 293 Ga. 339, 344 (2013). However, the available evidence points to Mr. Boone intending to question Rickey Johnson about his plea deal and forgetting to do so. For instance, Mr. Boone filed a motion requesting the transcript of Rickey Johnson's sentencing, but no such transcript is a part of this case's record. (R. 383). Mr. Boone started to ask Rickey Johnson about his sentence and parole, but he gave up on that line of questioning after a few minutes and a couple of objections (T. 252-259). Mr. McDaniel even claims that the transcript demonstrates Mr. Boone's attempt at impeaching Rickey Johnson with his plea deal. (MNT4 17).

If this Court cannot tell whether this failure was strategic or not, then that alone is an example of the prejudice due to the delay in this case. Mr. Boone died on March 18, 2007. (MNT1 D-1; Special Master Report 11). Had this hearing been held prior to his death, a concrete response to why the plea deal was ignored and not introduced could have been elicited. Instead, we are left with the testimony of a long since disbarred and retired attorney who remembers that introducing the plea deal would have been part of Mr. Boone's trial strategy. (MNT4 15). But even that

testimony is shaky because Mr. McDaniel at first seems to confuse Mr. Garry Johnson's plea deals (or prior convictions) and Rickey Johnson's. (MNT4 15).

Some cases, like *Emmons v. Bryant*, allow that failing to cross examine a witness as to her plea could be strategy where attacking the witness could alienate the jury. 312 Ga. 711 (2021). Here, however, the attorney did not hesitate to attack Rickey Johnson. In fact, his attacks were strong enough to permit the State to introduce his prior consistent statement. (T. 433). The failure to cross examine Rickey Johnson with his plea deal was a mistake, not strategy.

c) Trial Court's deficient performance in failing to impeach Rickey Johnson's testimony by exposing his potential motivation to testify in exchange for lenience was harmful.

Rickey Johnson was the state's main witness. His testimony provided the state with a timeline for their story of the events of the day of Ms. Shield's murder. On direct, the state had already adduced that Rickey Johnson was in jail for hindering apprehension of a criminal and that that charge arose from the events of the charged events in Garry Johnson's trial.

What tied Garry Johnson to the place where the victim's body was found was three things: 1) a shoe print that "probably" or "possibly" matched Garry Johnson's timberland boots (T. 514-8); 2) a cigarette butt with **Rickey Johnson**'s DNA (T. 494, 539); and 3) the testimony of Rickey Johnson. None of the DNA matched Garry Johnson (T. 539). The tape used to bind the victim came from the victim's home (T. 408, 523). The ID card found in the car Garry Johnson was

driving does not place him with the victim, only with her ID card. While Garry Johnson's history with the victim looked tumultuous, based on the state's case, Garry Johnson explained that he had no hard feelings as he was dating another woman and just wanted to break the lease with Ms. Shields. (T. 579). Thus, without Rickey Johnson's testimony, the jury would be left with only a shoe print that *may* have belonged to Garry Johnson and a cigarette butt that definitely belonged to Rickey Johnson.

If a witness's testimony is central to the state's case, then failing to employ impeachment material against that witness is harmful to the defense. Such impeachment would affect "the jury's evaluation of the State's principal witness, as well as the outcome of the trial." *Woods v. State*, 312 Ga. 405, 412 (2021).

The argument may be made that Mr. Rickey Johnson's statement to the police predated his plea agreement with the state. However, the plea agreement lays out what charges Rickey Johnson may have been looking at when he first sat down with the police. (MNT3 D-5). Also, the statement made to the police was played in full anyway, without the plea-deal impeachment. (T. 434). Therefore, any benefit that may have come from not impeaching Rickey Johnson with the plea deal was undone by the weak cross-examination that merely hinted a plea deal and failed to introduce a copy of the sentencing paperwork.

But for the deficient performance of trial counsel, there is a reasonable probability that Rickey Johnson's testimony would have not been enough to overcome the presumption of innocence for Garry Johnson. The trial court gave the

charge on lenience, despite the state's argument, with the court's concurrence, that there was no lenience shown in the case. (MNT4 28-29). If even the trial court did not believe that there was lenience, stating, "Matter of fact…..From what I've heard it may be – he might have gotten too severe a sentence." (MNT4 28-9). The court asked the attorneys where was the lenience, and the state replied, "none." (MNT4 28).

Had the court instead forbidden Mr. Boone from bringing up the plea deal, it would have committed reversible error. For instance, in *Wright v. State*, the only witnesses to a shooting had motivation to shade their testimony to favor the state, but that evidence was excluded. 279 Ga. 498, 500 (2005). In *Wright*, the exclusion was harmful and the conviction was reversed. *Id.* at 500 ("Because the credibility of these witnesses was the heart of the State's case, we conclude that the error may have influenced the verdict.").

As in, *Taylor v. Metoyer*, "[t]rial counsel's failure prevented the jury from hearing what motive the co-defendant[] had in testifying against [the defendant]; it also prevented the jury from learning that the co-defendant[] and the State had been less than forthcoming about their agreements." 299 Ga. 345, 349 (2016).

Here, although Rickey Johnson was not a named co-defendant, he was, according to his testimony, a partner in the events of that day. Why he was not named a codefendant is answered by the terms of the plea agreement that Mr. Boone failed to use for impeachment. Where such a witness is the foundation

of the state's case, the stability of that foundation is relevant to the consideration of the entire case.

2) Mr. Johnson should be given a new trial because the state was allowed to use Mr. Johnson's request for an attorney as evidence of guilt and his attorney was ineffective in failing to object to this line of questioning.

During Mr. Johnson's testimony, he mentioned that when it was suggested that Ms. Shields might be dead, he then asked for a lawyer. (T. 582). The District Attorney then used his cross-examination to comment on this request, as if it were an odd request that implied guilt, through several questions. None of which were objected to. (T. 605).

Q. He said, "what if I told you she was dead?"
A. Right.
Q. And then you said to him, "Whoa. I think I need a lawyer."
A. Yeah, because I know how police are.
Q. You didn't say, 'Well, how did she die? Was she in a wreck? Did she get electrocuted?"
A. No.

(T. 604-605)

Q. Okay. So when you got to Burke County, having been charged with a speeding ticket in Richmond County, and were told that your live-in girlfriend had died. . .
A. No, I wasn't told she had died.
Q. …you said, "I want a lawyer"?

(T. 605)

A . . . . Do you know what I mean? He was like, "Well, she's missing," and I was like, "No, Man, she ain't missing," you know.
Q. So you said, "I want a lawyer"?
A. When he said that, yes.

(T. 606).

The trial court found that this invocation of the right to counsel was "certainly" considered by the jury. (MNT2 77). Commenting on the accused's invocation of his right to counsel is error. It may have caused the jury to find his perfectly legal and reasonable request for a lawyer to be an admission of guilt. This sort of biased questioning was harmful and destroyed Mr. Johnson's presumption of innocence while it was still supposed to be intact.

Commenting on someone's invocation of their right to silence was error requiring reversal at the time of Mr. Johnson's trial. *Mallory v. State*, 261 Ga. 625, 630 (1991), *overruled by State v. Lane*, 308 Ga. 10 (2020). And this Court has distinguished invocation of counsel and invocation of silence. *Sears v. State*, 292 Ga. 64, 67 (2012). However, in both of those situations, there is error in telling people that on the one hand they have a right but on the other hand they will be punished for invoking that right. *See e.g., Doyle v. Ohio*, 426 U.S. 610, 618 (1976)("Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.").

In *Martin v. State,* the comment on the defendant's silence was not directed at undermining any of his defenses and did not purport to be evidence of his guilt. 290 Ga. 901, 903 (2012), adopted sub nom. Martin v. The State (Ga. Super. 2012).

Here, however, the right to counsel was used as substantive evidence of the defendant's guilty conscience. (R. 1280). The state commented on this invocation of the right several times. But see *Newton v. State*, 226 Ga. App. 501, 502 (1997)(holding no reversal was required where comment on silence did not point to defendant's defense, did not relate to his innocence, and was not combined with other evidence or commentary concerning this subject).

While the state is certainly entitled to a thorough and sifting cross examination of the defendant, the state does not have the right to badger a witness with a repeated question that has already been answered. *Butler v. State*, 285 Ga. 518 (2009). Similarly, the questions asked by the state regarding Mr. Johnson's invocation of his right to counsel called for cumulative evidence. *James v. State*, 270 Ga. 675 (1999). And in this case, the state used its improper questions to raise improper implications about the defendant's exercise of his Constitutional right to counsel.

Failure to object to this line of questioning and argument decimated Mr. Johnson's presumption of innocence. And the implication, that only guilty people request a lawyer, offends the very nature of the constitutions of Georgia and the United States. The initial comment that Mr. Johnson had asked for a lawyer when being asked what he would do if he found out his girlfriend were dead might have been harmless. But the continued drilling down on this reaction punishes Mr. Johnson for exercising his right to counsel and would have a chilling effect on the exercise of such right by others going forward, if allowed to stand.

Since the objections for asked-and-answered and cumulative would have had merit, the failure to object was in error. Any effective lawyer would have prepared Mr. Johnson to omit the request for a lawyer from his telling of the interaction with the police; but failing that, the lawyer would have objected when the state continued to punish Mr. Johnson for exercising that right for nearly three pages of testimony.

This error harmed Mr. Johnson because he was punished for exercising his rights and made to look guilty for merely availing himself of the constitution.

3) Mr. Johnson should be given a new trial because the court erred in allowing Mr. Johnson's request for an attorney to be used as substantive evidence of his guilt.

The trial court's denial of the motion for new trial includes the following language on page 9:

> During the direct examination of the defendant, the defendant admitted to his attorney that he had the following response when Agent Morgan informed him of Irene Shields' death:
>
> > Then he was like, "What if I told you she was dead?" And I looked at him, and I was like, "Hold up." I said, "Maybe I need to talk to a lawyer," and that's exactly what I said.
>
> (T. at 582)
>
> The defendant's nervous reply is compelling evidence of his consciousness of guilt, and it is absolutely inconsistent with the type of response one would expect upon hearing that a loved one had died.

This language not only mischaracterizes the evidence (Mr. Johnson was not informed of Ms. Shields' death through this exchange, he was given a

hypothetical), but it also makes an illegitimate inference that those who ask for a lawyer must feel guilty.

As explained above, the request for a lawyer is distinct from the invocation of the right to silence. In this case, Mr. Johnson did go on to make a statement to the police: a statement which was not introduced because the version available was in fact written by the investigator not Mr. Johnson. (T. 398).

This is plain error unwaived, clear and obvious, affecting substantive rights, and seriously affecting the fairness and integrity of the proceedings. See *Lewis v. State*, 312 Ga. 537, 541 (2021); O.C.G.A. § 24-1-103(d). Failure to object is not enough to waive plain error. See *Griffin v. State*, 309 Ga. 860, 865, (2020)(citing *Cheddersingh v. State*, 290 Ga. 680, 684 (2) (2012), and *Vasquez v. State*, 306 Ga. 216, 229-230 (2) (c) (2019)). The lack of objection combined with a strategic choice not to object might be enough to show waiver, but in this case, Mr. Johnson's request for a lawyer served no purpose for the defense.

"The violation of [Johnson's] Sixth Amendment right may be held harmless only if the court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *Wright v. State*, 279 Ga. 498, 500 (2005). Here, the state's action actively punished Mr. Johnson for asking for a lawyer. It makes the exercise of a Constitutional right into substantive evidence of guilt. This error impacts Mr. Johnson's constitutional rights and entitles him to a new trial.

4) Mr. Johnson should be given a new trial because the prosecution erred by failing to correct the testimony of its star witness, Rickey Johnson, when he was allowed to testify that he had received no leniency.

Mr. Johnson should be granted a new trial as the available record demonstrates that the state prevented Mr. Johnson from having a fair trial as the state did not correct its witness, Rickey Johnson, when he testified that he committed "no crime" and had received no "good" deal. This violates Mr. Garry Johnson's due process rights. *Allen v. State*, 128 Ga. App. 361, 363 (1973)(relying on *Giglio v. United States*, 405 U.S. 150, 153–54, 92 S. Ct. 763, 766, 31 L. Ed. 2d 104 (1972)).

Here, as in *Allen*, the state knew of the leniency it had offered Rickey Johnson. Rickey Johnson "received the prosecutor's assurance that [he] will face no other criminal charges in Richmond or Burke counties in connection with the kidnapping and killing of Irene Shields." Sandy Hodson, *Murder Suspect's Brother Pleads Guilty, Sentenced,* THE AUGUSTA CHRONICLE, 27 June 1998, p. C01. (MNT4 33-4).

Additionally, the letter from Rickey Johnson's attorney to District Attorney Daniel Craig (the prosecutor in both Rickey and Garry Johnson's cases) was filed as part of the sentencing documents for Rickey Johnson on June 29, 1998. (MNT3 54-63, exhib 5).

Despite this knowledge, the state failed to correct its witness's misleading testimony and the belief of the court and defense that there was no written deal.

During the charge conference, the state's request to charge 9 is withdrawn by the state and requested by the defense. Charge 9 is the immunity charge that the trial court gave later. (T. 633; MNT4 27). However, during the charge conference, the state said that there was no evidence of an immunity offer. And the court concurred, stating that if anything the sentence of Rickey Johnson may have been too severe. (T. 618, MNT4 27-29). The court asks "what was the immunity?" And the District Attorney replies, "none." The immunity charge was given after the defense argued that there was an inference of immunity. The proof of immunity, however, was in the state's possession.

> [E]vidence of any understanding or agreement as to future prosecution of an accomplice, on whose testimony the state's case almost entirely depends, is relevant to his credibility; the jury is entitled to know of it; the prosecutor has a duty to disclose it; and the failure to make this disclosure violates due process and requires the reversal of the conviction and a remand for a new trial.
> . . .
> However, a new trial is required if the evidence is material and could in any reasonable likelihood have affected the judgment of the jury. [The witness] was the sole eye witness testifying for the state to the aggravated battery. It follows that there is a reasonable likelihood his evidence could have affected the judgment of the jury.
> *Allen v. State*, 128 Ga. App. 361, 363-364 (1973).

Later cases expanded this requirement of disclosure to the disclosure of past agreements for leniency where the defense was not aware of their existence and could not have found them. There is no requirement that the defense cross examine

every state witness on the issue of leniency offers. *State v. Thomas*, 311 Ga. 407, 416 (2021)(citing Go*nnella v. State*, 286 Ga. 211 (2009)).

Here the court's mistaken belief that there was no lenience, shows this Court that the jury was misled as well. The significance of this impeachment material, the harm, is that the witness whose testimony stood unimpeached was the foundation for the state's case. *See e.g., Woods v. State*, 312 Ga. at 412. Where that foundation now appears shaky because of the deal offered to the witness, the rest of the case is unstable as well.

5) Mr. Johnson should be given a new trial because his appeal was prejudiced by the delay of such great duration as to deny Mr. Johnson his right to due process.

The delay in the hearing of this appeal is of such great duration and great prejudice as to deny the defendant of his due process rights under the 5th, 6th, and 14th Amendments of the U.S. Constitution as well as under the Georgia Constitution Art. 1, § 1, Par. 1. A new trial must be granted so as to allow him his right to effective assistance of counsel at trial and on appeal. Although the motion for out of time appeal was granted, this did not cure the prejudice caused by the delay in the appeal.

A delay in the hearing of an appeal may be so prejudicial so as to implicate the defendant's due process rights. *Owens v. State*, 303 Ga. 254 (2018). A modified *Barker v. Wingo* analysis may be used to determine whether a delay is so

prejudicial as to justify the dismissal of a case or the granting of a Motion for New Trial. The four elements are 1) Length of Delay, 2) Responsibility for the Delay, 3) Whether the defendant asserted his rights, 4) the prejudice to the defendant. *Glover v. State*, 291 Ga. 152, 154 (2012). See also *Tyson v. State*, 312 Ga. 585, 592 (2021).

A. The length of the delay was inordinately long.

To determine whether the length of the delay is presumptively prejudicial, the court has no case law with a firm time limit. *Shank v. State*, 290 Ga. 844 (2012). However, if not an 18 year delay, what length would trigger prejudice? In *Glover*, 291 Ga. at 154, the Court found that 8 years was prejudicial. The trial court agreed. (R. 1298).

B. The reasons for the delay are largely attributed to State

The responsibility for the delay falls upon the state, and does not fall upon Mr. Johnson who never once slept on his rights. See *Cannon v. State*, 175 Ga. App. 741 (1985)(where an out of time appeal was not permitted because a defendant had slept on his rights). The delay is instead attributable to the court system, the District Attorney, and the systemic breakdown of the indigent defense system, and thus the state itself. Since Mr. Johnson's motion was pending from December 13, 2000, and since there is no explanation for why the state failed to act, the delay must be attributed to the state. See *De La Cruz v. State*, 303 Ga. 24, 31 (2018).

The delay from December 13, 2000 until March 19, 2001 when the trial and sentencing transcripts were filed is not attributable to the defendant. The delay in

filing the transcripts, without another reason for the delay, is attributable to the state. *Chalk v. State*, 318 Ga. App. 45, 50 (2012).

The next period of delay from the filing of the transcripts until 2007 is attributable to the state. During this period of time, Mr. Johnson was representing himself pro se while he wrote the Clerk of Court about the progress of his appeal. The Clerk, however, could not send him a free copy of his transcript because she believed that he was represented by Paul David. (R. 1064). Paul David, for his part, never filed an entry in this case and has no recollection of ever being appointed to represent Garry Johnson. (MNT3 D4). The trial court abused its discretion in finding that Judge Fleming appointed Paul David to be the defendant's attorney where the only evidence of his "appointment" is a letter from the Clerk of Court asserting that fact, but the Clerk's file shows no entry from Mr. David or any other appellate counsel until 2017. The trial court's focus on the failure to call Mr. David is misplaced where Mr. David was never an attorney of record in this case.

To the extent the court intended to appoint Mr. David to represent Mr. Johnson, it failed to effectuate that appointment. Furthermore, it failed to ensure that the file was even marked as an open appeal or motion for new trial in the Clerk's record. This is known from the Memorandum in the GBI's file introduced via Special Agent Steven Foster who testified that in 2003, the case was put into closed status after a conversation with the Augusta Judicial Circuit District Attorney's Office where he learned that "no additional appeals are pending." (MNT3 16; D-3).

If no appeals were pending in July of 2003 that would certainly have come as a shock to Mr. Johnson. He had asked for and received file stamped copies of his motions for new trial. (R. 1046, 1075). And the Clerk had informed him that "we do not have a ruling on this motion at this time." (R. 1077). She referenced that he had an attorney, but it was an attorney who had never contacted him. (R.1077, 1069). Even in 2004, the Clerk of Court was still corresponding with Mr. Johnson about which paperwork from 1998-R-0058 he wanted copies of to try to work on his appeal pro se. (R. 1096).

The duty to set a hearing after a motion is filed falls on the court. As in the similar case, *Hyden*, the trial judge intended to appoint appellate counsel but did not do so. In *Hyden*, this failure was due to the death of the trial judge. Here, there is no such excuse. ". . . the failure of the Trial Court to timely appoint appellate counsel and to effectively manage its docket weighs in favor of [the defendant]." *Hyden v. State*, 308 Ga. 218, 224 (2020), cert. denied, 141 S. Ct. 275, 208 L. Ed. 2d 38 (2020)(citing *Owens v. State*, 286 Ga. 821, 826 (2) (b) n.4, "[T]he State bears the ultimate responsibility for the efficient management of court dockets.")

Here, the court failed to see that any attorney from indigent defense represented Mr. Johnson. And to the extent the court believed that Mr. David was representing Mr. Johnson, this belief could not have been sustained after Mr. David was disbarred in 2007.

The time period from 2007 through 2017 is attributable to the state. The trial court's point, that disbarment alone does not show ineffective assistance in a

particular case, is well taken. However, Mr. David was disbarred for the abandonment of appellate clients. "These cases span from April 1999 through April 2002." *In re David*, 282 Ga. 517, 517 (2007). To the extent that the trial court believed that it had effectively appointed Mr. David to represent Mr. Johnson, this 2007 order should have disabused it of this notion. The trial court uses Mr. Johnson's apparent silence during the period between 2004 and 2016 as evidence that the delay in the appeal was his fault. But Mr. Johnson had already played the ball; that is, he had filed the motion for new trial, and this meant that the state or the court had to act next. Where Mr. Johnson had a right to be represented, and was not, his inability to file a mandamus should not prejudice his defense. Nor is his reliance on the proper behavior of the court and State indicative of fault on his end.

The trial court now attempts to blame Mr. Johnson for attempting unsuccessful civil litigation during this period instead of single-mindedly pursuing a motion for new trial hearing. Far from showing that "he placed his own hopes for pecuniary gain above the assertion of his right to an appeal" (R. 1300), these pro se civil motions show that he was not being heard when he tried to pursue his motion for new trial so he flailed about using laws with which he was not familiar to try to get someone's attention. (MNT2 62).

The trial court's order also states that because Mr. Johnson and his then wife were able to gather funds to pay for a private lawyer (another lawyer who never entered an appearance or filed anything on his behalf) that he was no longer

indigent. (R. 1301). However, the trial court also noted that Mr. Johnson was found indigent for the purpose of this appeal. (MNT2 73). The attempt to hire counsel, whatever the implications for Mr. Johnson's financial status may have been in 2005, was unknown to the trial court until 2018, thus it cannot excuse the trial court's failure to act during those years.

The last four years of delay are attributable to the defendant, the state, the court, and the global health crisis of Covid-19. In a case with such age, the reconstruction of the file to determine what if any errors took place took a great amount of time. The discovery of the holes in the transcript, for instance, lead to the discovery of the reel-to-reel tapes which lead to the court's kind translation of the tapes from reel-to-reel to digital. All of these steps took time. Mr. Johnson's hearing difficulties also limited his communication with counsel and made remote hearings during 2020 and 2021 of limited value. Finally, the last hearing in this case was heard on May 10, 2021 and the ruling was not made until January 27, 2022. At the final hearing, the state asked for time to file a brief response to the amendment to the motion for new trial. (MNT4 31) However, no brief was ever forthcoming. Rather, the court signed the state's proposed order, without edit, almost eight months after the hearing. It is for those reasons that the delay between 2017 when Garry Johnson was given appellate counsel to the ruling on the motion for new trial is attributable to all parties. That part attributable to the defendant alone is negligible.

In summary, the delay attributable to the court system is not negligible. Although, the transcript for the trial was completed and filed in a little more than 4 months, no ruling was made on the motions for new trial filed by Mr. Johnson for over two decades. Despite the letters to the Clerk's office and the motions filed with the Clerk requesting resolution of his case, he received no hearing date, no appointed attorney, and lost his right to appeal.

Second, despite the trial court's assurance that conflict counsel would be appointed by the court through the indigent defense council, no conflict counsel ever filed an entry in this case, and the trial court never took any action on this failure.

Third, the District Attorney was aware that Mr. Johnson had been sentenced to life without parole in a high profile capital case. (R. 1037). Mr. Johnson also mailed a copy of his "Extraordinary Motion for New Trial" to the District Attorney, the day after trial counsel Boone had been relieved of representation. (R. 1055). Yet the District Attorney's office made no motions and evidently made no effort to set this case down for a hearing.

Finally, at the time of the trial at issue, the indigent defense system was somewhat haphazard. (MNT3 D-4). This systemic breakdown occurring at the time of Mr. Johnson's conviction was due to a confluence of events that interacted to deny him his due process right to an appeal. To begin with, the sentencing occurred before the establishment of the public defender system in Burke County (Augusta Judicial Circuit). Therefore, there was not a system in place to catch this

case, note the lack of an attorney, appoint indigent defense, place the case on the calendar, or inquire upon the status of the appeal. The fact that this case "slipped through the cracks" is evidence of a breakdown that occurred during this period of time. Such a breakdown means that even if the court would usually attribute some of these delays to the defense here they become attributable to the state writ large. See for example *Vermont v. Brillon*, 556 U.S. 81, 85, 129 S. Ct. 1283, 1287 (2009):

> Similarly, the State may bear responsibility [for the delay] if there is "a breakdown in the public defender system." Id., at 479 – 480, 955 A.2d at 1111 [*State v. Brillon*, 2008 VT 35, 183 Vt. 475, 955 A.2d 1108, 1111 (2008), rev'd and remanded, 556 U.S. 81, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009)].

C. Mr. Johnson asserted his right to an appeal immediately and continued to so assert.

The third prong of the modified *Barker* analysis is whether the defendant asserted his right. In this case, he asserted his rights through two motions for new trial, one filed immediately after his sentencing and another filed the day after his chief trial counsel withdrew from the case. (R. 1032; R. 1056). This assertion was clear and unequivocal. He continued to write letters to the Clerk of Court which asked of the status of his appeal or why he had not heard from appointed counsel. (e.g. R. 1045; 1057; 1060; 1064). In his letter of January 26, 2002 he writes:

> I would like a copy of this motion "MOTION FOR NEW TRIAL" and also any ruling on this motion. The motion was filed in general form an I ask the court could I supplement. I have not received any correspondence. So my question is whether it's

> pending? Or has an ruling been made? And may I have a copy from your office.
> (R. 1075)

He wrote again in February of 2002 asking after that same motion for new trial "that was filed pro se in your office." (R. 1076). Later, in 2004, after correspondence related to getting copies of the transcript, Mr. Johnson asked for everything filed by the District Attorney's office before, during, or after trial. (R. 1095).

The state's argument is that the years between 2004 and 2016 count against Mr. Johnson because he did not continue writing futile letters to the Clerk of Court. That Mr. Johnson tried other avenues to exercise his right to appeal does not excuse the state from marking his file closed in 2003 and filing no response to it before, during, or after Mr. Johnson engaged in correspondence with the Clerk of Court. The motion was filed, the ball was in their court.

The trial court cites three cases for the proposition that the period where no letters from Mr. Johnson are preserved by the Clerk of Court means that he gave up on his appeal. The first, *De La Cruz,* involves a man who represented himself for six years and filed nothing. *De La Cruz v. State*, 303 Ga. 24, 31 (2018). Mr. Johnson on the other hand mailed the Clerk at least twelve times. (R. 1005). There may be other letters that did not make it into the Clerk's file, as some unrelated defendant's letters made it into Mr. Johnson's file. (R. 1094). Mr. Johnson testified that he continued to write the clerk and the court while he sought a lawyer during this time. (MNT2 83).

The second case cited by the trial court is *Veal v. State*, where the defendant's motion to vacate his conviction was heard and ruled on by the court. Veal also had an appointed attorney, and the court attributed the majority of the delay to Veal's failure to communicate with trial counsel while he tried to pursue his own line of appeal. *Veal v. State*, 301 Ga. 161, 167 (2017). *Veal*, however, does not decide whether or not Mr. Veal's assertion of his right was sufficient. Rather, it denies his due process claim for failure to prove prejudice. (*Id*. 168).

Finally, the court cites *Payne v. State* for the proposition that in a case with a 15 year delay the five years of inaction on the defendant's part weighs against the defendant. 289 Ga. 691 694-5 (2011). (R. 1304). In that case, Payne had a motion for new trial denied for being untimely in 1999 and then waited for five years to file an extraordinary motion for new trial and later an out of time motion for new trial. In the *Payne* case, nothing was pending during the five years of inaction. No one could make a move except for the defendant because there was no pending motion to be heard or ruled on. In this case, however, a motion was pending from the first. And the delay was not after a motion for new trial was denied but before it was even heard.

Under the state's interpretation of the case law, the state need only wait it out until the defendant gives up hope and then it can blame the defendant for failing to continue to write multiple letters a month. In February 2002, Mr. Johnson asked the Clerk of Court about the status of his pending motions. She replied that "we do not have a ruling at this time. You will need to contact the attorney

representing you at this time." (R. 1077). But the Clerk knew, from his September 12, 2001 letter that Mr. Johnson thought his attorney was "Paul W. Davis" and that his attorney had not responded to any of his requests at all. (R. 1069). When the Clerk's file became silent, evidence shows that Mr. Johnson continued to try to contact Mr. David and he believed his motion was still pending. (MNT3 53-56)

D. Mr. Johnson's appeal was prejudiced by the delay.

The final prong is whether there was prejudice to the defendant. Under *Shank*, ""[A]ppellate delay is prejudicial when there is a reasonable probability that, but for the delay, the result of the appeal would have been different." *Shank v. State*, 290 Ga. 844, 849 (2012)(citations omitted). This Court rejects presumptions of harm from delay and that is fatal to those claims of error. See *Tyson v. State*, 312 Ga. at 592; *Dawson v. State*, 308 Ga. 613, 623 (2020). Therefore the main question for this court is: is this delay prejudicial? The passage of time has affected the outcome of this appeal in several ways.

First, the delay has made the argument for ineffective assistance of counsel almost impossible to make. "While the issue of ineffectiveness of counsel may sometimes be determined without the testimony of trial counsel, it generally cannot be done when the basis of the claim involves matters outside the record, such as discussions between counsel and client of grounds for the motion, if any, and investigation by counsel of such grounds, if any. [Cit.] *Taylor v. State*, 197 Ga.App. 678, 679-680(2) (1990)." *Wilson v. State*, 277 Ga. 195, 199 (2003). The first chair defense attorney, Jack Boone, has died, and with him, his strategy is

almost impossible to determine. Likewise, the second chair attorney, Luther McDaniel, who was disbarred in 2003, has begun to suffer from mental difficulties. In the years since the case was tried, the attorneys' case files have been destroyed or lost to time. These files may have contained notes on strategy.

To the extent that neither the trial court nor this Court can determine whether Mr. Johnson's attorneys were acting strategically when they failed to object to the state's implication that Mr. Johnson's request for an attorney implied guilt, the delay is to blame. Although Mr. McDaniel, one of the trial attorneys, was able to testify at a post-conviction hearing, he did not remember much about the case or his strategy. He testified that most of the decisions belonged to Mr. Boone because he was the attorney with the experience. (MNT4 7). Mr. Boone was not able to testify in these hearings because he died on March 18, 2007; 6 years after the motion for new trial claiming ineffective assistance of counsel was filed by Mr. Johnson.

Likewise, Mr. Boone's failure to impeach Rickey Johnson with the certified copy of his conviction, which contained the plea agreement between him and the state, would not be strategic for any lawyer. However, Mr. Boone is not available to testify about this failure, and Mr. McDaniel erroneously testified that Mr. Boone *did* impeach Rickey Johnson with this plea deal. This is despite the fact that Mr. Boone took Rickey Johnson's answer that he got no good plea deal at face value and did not impeach it with any evidence besides the implication that Rickey Johnson could have been charged with Murder. (MNT4 17). When asked why

Mr. Boone did not impeach Rickey with his plea deal, Mr. McDaniel replied, "I would imagine that Jack did impeach him or at least attempted to anyway." (MNT4 16). Mr. McDaniel further stated that he would imagine that the correct strategy would have been to impeach Rickey and that that was Mr. Boone's intention during the cross examination. (MNT4 17).

Secondly, the delay prevents appellate counsel from being appropriately diligent. Appellate counsel does not have a trial file which can be used to trace the steps of Mr. Johnson's trial counsel. The delay has made speaking with trial counsel practically impossible. It has caused the memory of those involved to fade. It has resulted in the destruction of evidence. Therefore the appellate counsel cannot find experts to reexamine the shoe print to see if newer 3D printing technology could give greater insight into the weight distribution of the person whose shoe imprint was found. Appellate counsel cannot review physical evidence of fibers or DNA to see if a different suspect could be found. And Appellate counsel cannot speak to the court reporter, the first chair defense attorney or even the original trial judge.

Third, the delay makes arguments about the court's errors at trial difficult to prove. The transcript is missing portions of the trial, including conversation with the jurors (T. 46), the charge conference (T. 618), the UAP hearings during trial (T. 623, T. 641, T. 668), and opening and closing of the sentencing portion. The production of the recordings of the trial cannot remedy these gaps, as the current court reporter cannot certify the record. She does not know who is speaking and

was not present at the trial. Even Luther McDaniel, who was present at the trial, had difficulty differentiating voices from twenty years ago. (MNT4 24ff).

Due to this prejudice, the Court should grant Mr. Johnson a new trial. Where his appellate rights have been destroyed by the passage of time, the best option is to start over so that he can have his constitutionally guaranteed rights. See *Sheard v. State*, 300 Ga. 117, 120-1 (2016).

6) Mr. Johnson should be acquitted and discharged due to the state's failure to prove guilt beyond a reasonable doubt.

Arguments that there was insufficient evidence to find the defendant guilty beyond a reasonable doubt are judged under the standard of *Manuel v. State*, 289 Ga. 383, 384 (2011), which holds, "the proper standard for review is whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."

There is a lack of evidence placing Mr. Johnson at the scene. The shoe print alone without more does not eliminate the possibility that someone besides the defendant committed the crime. The State did not provide physical evidence that eliminated every reasonable suspect besides the defendant. The burden "beyond a reasonable doubt" was not met where the state's investigation stopped the moment they saw Mr. Johnson drive by his house and they seized his shoes.

In this case, if the jury had not believed Rickey Johnson then the only evidence that Garry Johnson was even at the crime scene was "possible" or "probable" match for a shoe print from a very popular brand of shoe. (T. 514).

Rickey Johnson, however, was tied to the scene through his own DNA, (T. 538) and therefore, had motivation to pin the crime on someone else. Given Rickey Johnson's precarious position, his testimony should not have been believed. No finder of fact could have been without reasonable doubt as to who committed the murder.

Conclusion

Garry Johnson followed the rules to try to appeal his conviction and sentence. He was ignored at every turn. He has been denied due process for more than two decades. Before that, his trial counsel and the state let the jury believe that the state's primary witness had no personal motive to testify for the state. The only remedy at this point is a new trial, to allow Mr. Johnson to receive the fair trial and timely appeal that he is entitled to.

Respectfully submitted July 20, 2022.

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IN THE SUPREME COURT
STATE OF GEORGIA

GARRY JOHNSON,
Appellant,

vs. File no. 1998 R 58

STATE OF GEORGIA,
Appellee.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing BRIEF OF APPELLANT upon all interested parties by U.S. Mail, with adequate postage affixed to ensure delivery, on this day, July 20, 2022, addressed as follows:

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