IN THE SUPREME COURT
STATE OF GEORGIA

GARRY JOHNSON, Appellant, V. STATE OF GEORGIA, Appellee.	)))))))))	CASE NO. S22A0964 On appeal from the Superior Court of Richmond County

BRIEF ON BEHALF OF APPELLEE BY THE DISTRICT ATTORNEY

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GARRY JOHNSON,	)	CASE NO. S22A0964
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Appellant,	)	
	)	
Versus,	)	On appeal from the Superior
	)	Court of Richmond County
	)	
	)	
STATE OF GEORGIA,	)	
	)	
Appellee.	)	

RESPONSE BRIEF ON BEHALF OF APPELLEE BY THE DISTRICT ATTORNEY

Part I

STATEMENT OF FACTS

The State presented testimony from several friends and family members describing the fraught and volatile relationship between the defendant and his girlfriend Irene Shields, one in which the defendant repeatedly threatened to kill Irene, her children, and even her children's grandmother. For example, Irene's 13-year-old daughter T.F. testified that she overheard the defendant threaten to kill her mother, adding that the defendant said "the blood wouldn't be on his hands." (Transcript at page 69, hereafter cited as "T. at-"). Sharon Smith testified that several times her daughter Irene had confided in her that the defendant had threatened to kill

her and her children. (T. at 160-161). According to Irene Shield's mother (Sharon Smith) right before her death, Irene was forced to move herself and her children in with a friend named Rhonda Bailey because Irene feared that the defendant would carry out these repeated threats of violence. (T. at 163). The testimony of Irene Shield's daughter, mother, and best friend, detailing the defendant's repeated violent threats, were corroborated by testimony from 911 operator Kathleen Daniel, who told the jury that on December 23, 1997, *four days prior to her murder*, Irene had called the Richmond County Sheriff's Office stating that she was afraid to go inside her own home because she was afraid of the defendant. Deputy Linda Banks of the Richmond County Sheriff's Office, who rendered aid to Irene Shields in response to this 911 call, testified that when she encountered her, Irene was "very, very, frightened," facts which corroborate the testimony of several witnesses, including Irene's daughter, mother, and best friend, all of whom described both the defendant's repeated threats and Irene Shields' terror caused by these threats.

According to Rhonda Bailey, the tension between the defendant and Irene Shields increased considerably in late November of 1997, when Irene discovered that the defendant had pawned some of her belongings. (T. at 181). Rhonda Bailey was present when Irene told the defendant that she

would report these thefts to his probation officer. The defendant's response, which the jury learned was not unusual, was a death threat: "He threatened to kill her and the kids. He was that upset." (T. at 182). The defendant's brother, Ricky Johnson, also recounted the defendant's fuming rants in response to Irene's threat to report the defendant to his probation officer. (T. at 868), where Ricky recounts to the police that the defendant told Irene Shields, "You done called my parole officer and tried to fuck me up, so I'm going to fuck you up…. I ain't gonna kill you, I'm just going to put tape around your mouth, tie you up, [and] drop you off on the side of the road."

Ricky Johnson's testimony, that the defendant was particularly angered by Irene's threat to call his probation officer, was corroborated by the defendant's own testimony during trial. When the district attorney commented during cross-examination that the consequence of missing a curfew would be "a violation of your probation," the defendant interrupted the district attorney and interjected, "No, the consequences would be, they would lock you up. That's the consequences. If you be one or two minutes late, they're going to lock you up. That's just all [there is] to it." (T. at 601). This telling outburst revealed the defendant's motive for kidnapping and murdering Irene Shields.

In his custodial interview, Ricky Johnson told the police that right before the defendant kidnapped Irene Shields, he heard them fight about the situation with the probation officer. According to the defendant's brother Ricky Johnson, the defendant told Irene,

> You done called my parole officer and tried to fuck me up, so I'm [gonna] fuck you up. So… she asked Garry what you gone do, what you [gonna do], you ain't [gonna] kill me is you? Gary said, I ain't gone kill you, I'm just [gonna], you know, put tape around your mouth or tie you, tie you up, drop you off on the side of the road. (T. at 868).

Ricky Johnson, in both his testimony and in his custodial interview (which was also presented to the jury), described in graphic detail each step the defendant took to deprive Irene Shields of her life. Ricky testified that just prior to his brother's initial act of kidnapping, he waited outside their bedroom while Irene and the defendant argued. After the argument ended, Ricky saw the defendant exit the bedroom carrying the bound and gagged Irene across his shoulder. (T. at 233). Ricky's testimony, that Irene "had duct tape across her mouth," was corroborated by photographs taken of Irene's lifeless body on Boll Weevil Road in Burke County:

· Irene's mouth was stuffed with a sock and a piece of duct tape was found on her mouth. (T. at 461, 708, 711, and 796).

· Her hands were bound behind her back with telephone wire, gray duct tape, socks, and shoestrings. (T. at 463 and 720).

· Irene's ankles were tightly bound with duct tape, shoe strings, and athletic socks. (T. at 718).

· Her body was covered in abrasions, lacerations, contusions, and scrape marks, and most disturbingly, a large flap of skin from her left eye to her left forehead was torn off.

(T. at 546, 707, 708, 709, 710, 711, and 800).

Boll Weevil Road is an unpaved dirt road located in a remote and rural area of Burke County. Photographs of Irene Shields taken at Boll Weevil Road, along with testimony from the medical examiner, several crime-scene investigators, and Ricky Johnson, the defendant's brother, revealed that the appellant used the victim's own Ford Explorer to murder Irene Shields. Dr. Neil Hellman, the forensic pathologist who performed the autopsy, testified to the "considerable amount of injury" the defendant inflicted upon Irene Shields, including bruises, scrapes, lacerations, contusions, and numerous bone fractures. (T. at 546). Dr. Hellman concluded that Irene Shields died from multiple blunt-force injuries caused when the defendant used the SUV

as a murder weapon. Special Agent David Leonard of the Georgia Bureau of Investigation examined the undercarriage of the vehicle the appellant used as a deadly weapon, finding Irene's blood, hair, and flesh in the truck's suspension and in the underside of the truck's right front bumper. (T. at 487). Leonard's examination of the crime scene indicated the presence of tire tracks and drag marks in the dirt road which led him to conclude that the defendant repeatedly ran over Irene Shields with the Ford Explorer. He described "drag marks… going back across the roads to the area where [Irene Shields'] gold earring and… hair [were] located." (T. at 489). Although Leonard was unable to determine how many times the vehicle went back and forth across Shields' body, his analysis of the tire tracks at the crime scene revealed that the Ford SUV crossed and re-crossed the point in the dirt where the defendant struck Irene's body, which Leonard called "the area where the impact took place," a number of times. (T. at 489-490).

A disturbing aspect of Dr. Hellman's testimony related to his findings that Irene Shields was alive when she received the multiple injuries described in the autopsy report:

> Now one of the things important to note is there is hemorrhage in the left eye; and this indicates that the deceased was alive at the time that these injuries took place. You can also see that

there is bruising and scraping over the right shoulder region, right upper arm. And this also is indicative that the deceased was alive when the injuries took place. (T. at 554).

The police found several items of evidence which corroborated his brother Ricky Johnson's testimony which pointed to the defendant as the culprit who had murdered Irene Shields. During a search warrant of the defendant's home, police found gray duct tape which matched the duct tape found on Irene Shield's body. (T. at 408 and 523). At the scene of the murder, they also found a footprint which Special Agent Leonard stated was located in the "area where… the body [of Irene Shields] was when the vehicle struck it." (T. at 471). A plaster cast impression was made of this footprint, and when compared to the defendant's boots, revealing that he was wearing the same kind of boots as the boot which left the footprint at the crime scene. (T. at 327 & 471). Further analysis of the shoe print revealed a particular important detail related to the crime scene boot print, as will be discussed below.

Larry Peterson of the G.B.I. Crime Laboratory found a minute but crucial aspect of the defendant's right shoe which singled out this Timberland boot as the one worn by Irene Shields' killer: comparing the plaster cast of the shoe impression found near Irene Shields' body with the

right boot the police collected from the defendant's person when he was arrested, Peterson found a small rock stuck in one of the treads in the heel of the defendant's right Timberland boot. (T. at 512). The right boot, with its tiny tell-tale rock stuck in the heel, matched the plaster cast of the shoe impression found near Irene Shields' lifeless body. As mentioned above, the police collected this boot upon the defendant's arrest, as the record reflects the defendant was actually wearing this boot when he was arrested. (T. at 327). Peterson's testimony directly contradicts the defendant's assertion at the motion-for-new-trial hearing that someone else had committed the murder of Irene Shields:

> My conclusion from that examination was… I felt it highly unlikely that another shoe could have picked up a rock or an obstruction in the exact same placement as that particular boot did and be the same tread design boot as that. (T. at 512).

Peterson's testimony was corroborated by the defendant himself, who acknowledged at trial that he owned and wore the Timberland boots which Peterson (from the G.B.I. crime lab) had compared with the boot-print found at the crime scene. (T. at 590). Other witnesses, including Ricky Johnson, Carolyn Hampton, and Deputy Chad Cheek, all testified that they observed

the defendant wear Timberland boots before, during, and shortly after the murder of Irene Shields. (T. at 250, 286, 327).

Although many of the details of the appellant's crimes were described by his brother Ricky Johnson, in many respects the defendant, in his own testimony at trial, provided startling insight into the defendant's frame of mind which corroborated Ricky Johnson's account. During the direct-examination of the defendant, the defendant admitted to his attorney that he had 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. Ricky Johnson also recounted the efforts that the defendant used to hide the evidence of his crimes. Johnson recounted on the return trip to Augusta after his brother committed the murder, they stopped at a gas station where the defendant used money from Irene's purse to pay for gasoline. (T. at 237). Ricky explained that the defendant "got out, wiped the Explorer

down, and got back in with her purse." *Id.* He further explained that when they returned to the home the defendant shared with Irene Shields, the defendant said, "Man, I need to change clothes," and then put his jeans in one trash bag and his shirt and the duct tape in another trash bag. (T. at 242). Ricky explained that the defendant disposed of these evidence-filled trash bags at an apartment complex on Washington Road, placing one bag in one trash can and the other in another trash can. (T. at 243). Ricky told the police that "we dumped the plastic bag that got tape in it. Now he pulls off, pulls off to a car wash and rinse the car down." (T. at 864).

The State presented further evidence of the defendant's efforts to hide evidence of his criminal conduct. The record reflects that the police discovered the abandoned Ford Explorer the defendant used to murder Irene Shields on a remote dirt road called Cox Place Road, which like Boll Weevil Road, remains an unpaved dirt road. (T. at 388). The appellant also threatened his brother Ricky in an attempt to prevent him from revealing the truth about his crimes. His brother testified that the defendant repeatedly threatened to kill him. (T. at 873). Ricky told the police "I wouldn't want to be around him 'cause I feel like it's a threat to my life to be around him." (T. at 872). According to Ricky, the appellant told him, "I'm not taking the rap for this," and "Man, keep your mouth closed, 'cause, if you say

anything, the same thing will happen to you that happened to her." (T. and 243). The defendant later repeated to his brother, "You're all right as long as you don't say nothing." (T. at 244).

Another crucial piece of evidence revealing the defendant's consciousness of guilt is his effort to avoid apprehension on December 28, 1997. On that day, Deputy Chad Cheek was in front of the home the defendant shared with Irene Shields, attempting to perform a welfare check for Ms. Shields. As the defendant returned home, he witnessed Deputy Cheek's patrol vehicle parked at his home, and the defendant proceeded to pass his own driveway, circle around the cul-de-sac, and pass the patrol car again without stopping. (T. at 325). Further facts will be added to address the enumerations of error.

Part II

ARGUMENT AND CITATION OF AUTHORITY

A. A trial court is not obliged to recognize a pro se filing when the defendant is represented by counsel.

Introduction: Fantasy Sports

Part of the pleasure of watching sports is the ego gratification that comes with watching your own team fail.[1] Perhaps a different feeling than *Schadenfreude*, a home-team failure can summon a fan's unshakeable belief that if only given the chance—to coach, to manage, to carry the ball—the right call would have been made, the correct deed done.

George Plimpton entertained this fantasy in his book *Paper Lion*,[2] which recounts the thirty-six-year-old literary magazine editor's attempt to become the third-string quarterback for the 1963 Detroit Lions. A variation of George Plimpton's fantasy has become big business—the Fantasy Sports

[1] Taking joy in watching a hated team (like the New York Yankees) fail is better described as *Schadenfreude*, as explained by author Joseph Epstein: "Nothing seems to bring *Schadenfreude* out more vigorously than the spectacle of the mighty fallen." From Epstein's *Envy: The Seven Deadly Sins (New York Public Library Lectures in Humanities*.) Oxford University Press, 2003.
[2] Plimpton, George. *Paper Lion: Confessions of a Last-String Quarterback*. New York: Harper & Row, 1967.

& Gaming Association claims that 60 million adults participate in fantasy sports in the United States and Canada alone.[3]

Fantasy sports offers the wish of both power and substitution, the desire to replace whoever's in charge with oneself, and take over. Maybe the most poignant expression of this fantasy was James Thurber's classic story, *The Secret Life of Walter Mitty*,[4] in which the day-dreaming protagonist imagined himself to be a calm-in-a-crisis surgeon, a fearless pilot ("The Old Man ain't afraid of Hell!"), and a deadly assassin being tried for murder, indignantly disregarding his attorney's advice by waiving his right to remain silent to give himself the pleasure of describing to the jury the expert and (literally) sinister method he employed to complete the crime.

To be satisfying, this fantasy of empowerment must be total and complete, never partial—one wants the spot behind the plate, or on the mound, not just a place in the bullpen or on the bench. Ronald Reagan rejected as ludicrous an idea floating around the 1980 Republican National Convention in Detroit that he should offer the job of "co-president" to former President Gerald Ford, understanding that such a power-sharing arrangement would not only be unworkable, but contrary to both the

[3] See https://thefsga.org

constitution and the realities of power—there's a reason President Truman had a sign on his desk reading "The Buck Stops Here," the same reason Gandalf reminded Saruman, "only one hand at a time can wield the One, and you know that well, so do not trouble to say *we*!"[4]

The law takes a similarly dim view of one particular type of power-sharing arrangement, the kind between a *pro se* defendant and defense counsel in a criminal case, as reflected in the following excerpt from the Maryland Supreme Court Reports:

> There is no right vested in a defendant who has effectively waived the assistance of counsel to have his responsibilities for the conduct of the trial shared by an attorney… Nor is there a right bestowed upon a defendant who has not effectively waived his entitlement to the assistance of counsel to share the responsibilities for the management of the trial with his attorney. As we have noted, the right to counsel and the right to defend *pro se* cannot be asserted simultaneously. The two are disjunctive. There can be but one captain of the ship, and it is he alone who must assume responsibility for its passage,

[4] See https://www.trumanlibrary.gov/education/trivia/buck-stops-here-sign for information about President Truman's favorite desk ornament. Tolkien, J.R.R., The Fellowship of the Ring,

> whether it safely reaches the destination charted or founders on a reef.

Parren v. State, 309 Md. 260, 264-265, 523 A.2d 597 (1987). Both the United States Supreme Court and the Supreme Court of Georgia have taken a similar view. McKaskle v. Wiggins, 465 U.S. 168, 187-188, 104 S. Ct. 944 (1984)(holding that *Faretta* does not require a judge to permit "hybrid" representation, further noting that "A defendant does not have a constitutional right to choreograph special appearances by counsel."); Seagraves v. State, 259 Ga. 36, 376 S.E.2d 670 (1989)(holding that because the Constitution of 1983 eliminated language which gave a defendant the right to representation "in person, by attorney, *or both*," a criminal defendant must choose either representation by counsel or self-representation.); *Accord* Dos Santos v. State, 307 Ga. 151, 154, 834 S.E.2d 733 (2019)(explaining that appellant has no right to represent one's self *pro se* while also represented by counsel.) Other states have taken a similar view. See People v. Russell, 471 Mich. 182, 188 (2004)(holding that the "right to self-representation and the right to counsel are mutually exclusive and courts must make every reasonable presumption against waiver of the right to counsel."); Whitehead v. State, 593 So. 2d 126, 129 (Ala. 1991)("This Court has held repeatedly that an individual does not have a right to hybrid

representation…. Rather, the decision to permit to proceed as co-counsel rests in the sound discretion of the trial court."); *Accord* Walker v. State, 2000 Del. LEXIS 424, 763 A. 2d 92 (2000)("The Superior Court has no duty to consider a defendant's *pro se* motions, if the defendant is represented by counsel. Counsel is the only person who is authorized to act on behalf of the defendant, unless the Court otherwise grants permission for the defendant to act as co-counsel.")

Why have courts concluded that the right to self-representation cannot be exercised at the same time as the right to be represented by competent counsel? Part of these conclusions is based on the assumption that a defendant wants not collaboration or even participation during a criminal trial, but complete control, as one federal judge put it:

> A criminal defendant's motion to represent himself involves two mutually exclusive constitutional rights: the right to be represented by an attorney, and the right not to be represented by an attorney.

Hamilton v. Groose, 28 F. 3d 859, 861 (8th Cir. 1994). The above excerpt reveals the all-or-nothing paradigm which underlies many of the cases addressing the issue of *pro-se* advocacy, such that the "right not to be

represented by counsel" describes a *pro se* defendant's right not to help or assist in making strategic decisions during a criminal jury trial, but rather to make them him or herself. See McKaskle v. Wiggins, 465 U.S. 168, 177 (1984)("At the core of a defendant's rights under *Faretta* is a 'fair chance to present his case in his own way.'"); Faretta v. California, 422 U.S. 806, 821 (1975)("An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced to such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.")

Due to the seeming incompatibility of these two rights, courts generally view the valid invocation of one's right to self-representation to necessarily include the relinquishment of one's right to be represented by counsel, and vice versa. See Cargill v. State, 255 Ga. 616, 622, 340 S.E.2d 891 (1986)(rev'd on other grounds)(noting that "Under the Sixth Amendment, it has been held that the assertion of the right to be represented by counsel constitutes a waiver of the Sixth Amendment right of self-representation."); Faretta, *supra*, at 825 (1975)("The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation.") This waiver to the right of counsel is viewed as a way to give force to the *pro se* defendant's wish to

engineer the course of his or her own defense, to choose its themes and textures, and to demonstrate to the jury that her or she is willing to exert the effort and energy to advocate in his or her own behalf. See Weaver v. Massachusetts, 582 U.S.—, 137 S. Ct. 1899, 1908 (2017)(noting that the right to proceed *pro se* is based upon "a fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.")

Because the choice to represent oneself in a criminal trial includes the relinquishment of the right to be represented by counsel, the *Faretta* court ruled that before a defendant can represent himself, the record must reflect that he or she was fully informed of the risks of foregoing the assistance of counsel:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the defendant must "knowingly and intelligently" forgo those relinquished benefits…. Although a defendant need not himself have the skill or experience of a lawyer in order to competently or intelligently choose self-representation, he should be made aware of the dangers and

> disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Faretta, *supra*, at 835. Although the *Faretta* court viewed the decision to represent oneself as a simultaneous rejection of the assistance of counsel, a trial court still has the power to appoint a trained lawyer to assist the *pro se* defendant, so long as the defendant agrees and the stand-by counsel does not leave the jury with the impression that the lawyer, not the defendant, is in charge. McKaskle v. Wiggins, 465 U.S. 168, 187-188, 104 S. Ct. 944 (1984)("We recognize that a *pro se* defendant may wish to dance a solo, not a *pas de duex*. Standby counsel must generally respect that preference. But counsel need not be excluded altogether, especially when the participation is outside the presence of the jury or is with the defendant's express or tacit approval.") This discretion to appoint standby counsel originates from the trial court's duty to ensure a fair trial to the defendant while at the same time avoiding any appearance of partiality, which might occur if the jury witnessed the trial court explaining to the *pro se* defendant how to admit a piece of evidence or how to properly voir dire an expert witness. Accompanying the trial court's duty to the defendant is its duty to the judicial system itself, which is served by the appointment of standby

counsel. See State v. Rater, 568 N.W.2d 655, 658, 1997 Iowa Sup. LEXIS 223 (1997)(explaining that "Essentially, standby counsel has two purposes—to act as a safety net to ensure the litigant receives a fair hearing of his claims and to allow the trial to proceed without the undue delays likely to arise when a layman presents his own case."); Wheat v. United States, 486 U.S. 153, 160, 108 S. Ct. 1692 (1988)(noting that a trial court "has an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.")

As will be explained below, two exceptions to the general prohibition to hybrid representation have been recognized by Georgia courts: situations in which the defendant is facing the death penalty, and situations in which the defendant is a member of the bar.

1. **Richmond County, Georgia, where a new relationship between attorney and client is born.**

Two important cases, both before Judge Albert Picket of the Augusta Judicial Circuit, helped to redefine the relationship between attorney, defendant, and the trial court within that special context of a death-penalty case. In both Morrison v. State, 258 Ga. 683, 686, 373 S.E.2d 506 (1988)

and Rivera v. State, 282 Ga. 355, 362, 647 S.E.2d 70 (2007), lawyers[5] for the defendants refused to comply with their clients' literally self-defeating wishes—to the consternation of their lawyers, these two defendants wanted to convince their juries to recommend the death penalty. The Supreme Court of Georgia first in Morrison and then in Rivera, held that a criminal defendant in a death-penalty case has certain prerogatives to over-ride his lawyers' wishes, as long as the defendant has been properly informed by his lawyers and the trial court:

> …after being informed, the defendant, and not his attorney, makes the ultimate decision about, for example,… what line of defense to pursue… whether or not to testify in his own behalf,… whether or not to plead guilty,… and whether or not to present witnesses in mitigation. Even if he is represented by counsel, the attorney "is still only an *assistant* to the defendant and not the master of the defense." Mulligan v. Kemp, 771 F. 2d 1436, 1441 (11th Cir. 1985). We conclude that where a properly-informed, competent defendant insists that he prefers a

[5] Earnest Morrison had two lawyers, Percy Blount and O.L. Collins. Attorney Blount argued in his brief that Morrison expressed a wish to receive the death penalty after falling under the influence of Attorney Collins, thus implying that although he represented Morrison at trial, he did not agree with his client's suicidal strategy. Morrison, *supra*, at 685. The record in the Rivera case indicates conflict between his attorneys, Peter Johnson and Jacque Hawk, over this same issue.

> death sentence to life imprisonment, his attorney does not violate any right of the defendant by attempting to "comply with his client's wishes," Foster v. Strickland, 707 F. 2d 1339, 1343 (11th Cir. 1983) and by arguing to the sentencer in favor of a death sentence.

The U.S. Supreme Court, in McCoy v. Louisiana, 584 U.S.—, 138 S. Ct. 1500, 1507 (2018) further developed the legal principles related to personal autonomy which Georgia courts have long recognized, holding that "The right to defend is personal, and a defendant's choice in exercising that right must be honored out of that respect for the individual which is the lifeblood of the law." *Id*. In an opinion preceding McCoy by many years, the Supreme Court of Georgia in Rivera, citing both Morrison and Hance v. Kemp, 258 Ga. 649, 650, 373 S.E.2d 184 (1988), stated that the trial court did not abuse its discretion in allowing the defendant to over-ride his lawyers' trial strategy by asking the jury to recommend a sentence of death, and by also abiding by the defendant's wish that his lawyers not call certain mitigation witnesses. Rivera v. State, 282 Ga. 355, 362, 647 S.E.2d 70 (2007). Although the Rivera decision rejected the defendant's claim that he had become co-counsel with his lawyers, the decision did cite language from Hance v. Kemp, *supra*, which states that "While a defendant has the right to

represent himself, he does not have the right to act as co-counsel, although the trial court may allow him to do so." *Id.*, 258 Ga. at 650. Like Reinaldo Rivera and Earnest Morrison, William Henry Hance was convicted of a brutal murder and sentenced to death, and the Hance decision should be viewed within the special circumstances of a death-penalty trial in which the defendant must contend with the possible total elimination of his or her rights and privileges. See also Potts v. State, 259 Ga. 812, 815, 388 S.E.2d 678 (1990)(in which the trial court, also within the context of a death-penalty trial, allowed the defendant to be considered as "co-counsel" with his stand-by counsel.)

Although lawyers are often in the company of murderers for professional reasons, the law lumps attorneys with death-penalty defendants when it decided who can self-represent and also be represented by an attorney. Compare Cherry v. Coast House, 257 Ga. 403, 359 S.E.2d 904 (1987)(permitting a member of the bar to both represent himself and be represented by counsel in a civil suit) with Romich v. All Secure, Inc., 361 Ga. App. 505, 863 S.E.2d 179 (2021)(holding that "A layperson does not have the right to represent himself and also be represented by an attorney.")

It makes sense that the law treats these two classes of defendants—those who are trained in the law, and those facing the death penalty,

differently than laypersons accused of a crime. See, e.g., Lumpkin v. Upton, 2015 U.S. Dist. LEXIS 41263 (S.D.Ga. 2005)(holding that because Lumpkin, who was "a seasoned defense attorney," chose to follow the advice of his counsel, with full knowledge and information as to the consequences of such advice, the District Court could not find that defense counsel was ineffective.) This differing treatment to lawyer-defendants recognizes that the primary goal of the Sixth Amendment was to guarantee crucial legal assistance to defendants untrained in the law. *See* Johnston v. Zerbst, 304 U.S. 458, 462-463, 58 S. Ct 1019 (1938)(in which Justice Black noted that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with the power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.")

Defendants in a death-penalty case also receive different treatment, both at the trial and appellate level, due to the statutory requirements of the Unified Appeal Procedure, as set forth in O.C.G.A. § 17-10-36. For example, although the average defendant has no right to be present at a motion-for-new-trial hearing, a defendant facing the death penalty does have that right. Brown v. State, 250 Ga. 66, 75, 295 S.E.2d 727 (1982)("under

Rule IV (A)(5)(c) of the Unified Appeal Procedure, however, the defendant is given the right to be present during the entire hearing on the motion for new trial unless he knowingly, voluntarily, and intelligently waives his right in writing.") The rules of voir dire are dramatically changed when the death penalty is at play. *See* O.C.G.A. § 15-12-164 (a)(3) & (4)(which permits the parties to ask prospective jurors whether they are "conscientiously opposed" to the death penalty.) At the appellate level, the Supreme Court is obliged to review the sufficiency of the evidence in all death penalty cases, something it is not obligated to do in other murder cases, and must also review the record to ensure that the death penalty was not imposed due to passion, prejudice, or some other arbitrary factor. O.C.G.A. § 17-10-35 (c). For the above reasons, it makes sense that a trial court conducting a death penalty trial is obliged to provide greater autonomy and authority to the criminal defendant, especially during the penalty phase of the trial.

2. **The trial court, rather than dismissing the defendant's pro se motions, considered them at the final unified appellate proceeding on August 31, 2000**.

In the present death-penalty case, the jury found statutory aggravated factors to support a penalty of death but chose instead to recommend life without parole. Prior to trial, at the final Unified Appellate Proceeding, the

trial court heard several *pro se* motions the appellant filed, including essentially a motion to dismiss and a motion to have the trial court recused. (*See* August 21, 2000 transcript.) Before the trial court ruled on these motions, defense counsel Jack Boone informed the court, "I have explained to Mr. Johnson that I didn't see what I considered to be reasonable grounds to file these motions. That's why he filed *pro se*." (August 31, 2000 motions hearing transcript.)

Judge William H. Fleming did not summarily dismiss these motions, despite the fact that the appellant was represented by counsel. Instead the trial court denied these motions, albeit summarily with little argument form either side. At the end of the hearing, Judge Fleming asked the defendant personally whether he was satisfied with his attorneys, prompting the appellant to insist that the court consider his motion for recusal, and to reply that other than the recusal issue, he had no problem with his attorneys' performance or continued representation of him. (August 31, 2000 motions hearing transcript at 18). At no time did the appellant indicate that he wished to represent himself, and at no time did the trial court provide the full warnings mandated by *Faretta*; nor did the trial court make a finding that Garry Johnson had waived his right to counsel and therefore had the right to represent himself. Under these circumstances, the trial court should have

dismissed the appellant's *pro se* filings rather than consider them and deny them. See Walker v. State, 308 Ga. 749, 749 n.1, 753-754, 843 S.E.2d 561 (2020)(An appellant's pro se filing is not a nullity if there is a finding on the record that the defendant knowingly, willingly, and intelligently waived his right to counsel and chose to represent himself.); Smith v. Robbins, 528 U.S. 259 (2000)(holding that each state has the power to fashion their own methods and procedures to ensure that indigent defendants have effective appellate counsel.)

Conclusion

The right to self-representation is not absolute: as noted in Faretta v. California, *supra*, a defendant must "voluntarily and intelligently" elect to represent his or herself, *Id*., 422 U.S. at 835, and must be informed of the dangers involved in self-representation. If the record reflects that a represented defendant has been warned of the dangers of self-representation, and has voluntarily and intelligently chosen to handle his own appeal, than the court would have the discretion to recognize a *pro se* filing, even if that defendant is ostensibly represented by counsel. See Walker v. State, 308 Ga. 749, 749 n.1, 753-754, 843 S.E.2d 561 (2020)(holding that because the record reflected a knowing and intelligent waiver of the right to counsel at the end of trial, it was proper for the trial court to recognize a *pro se* filing,

even before an order to withdraw appeared in the record.) Such an intelligent waiver should be preceded by warnings from counsel and the trial court about some of the pitfalls of appellate practice, such as the deadlines involved, the necessity of raising certain issues at the earliest possible moment, the duty to make sure all the relevant transcripts and filings be made a part of the record, and the risks involved with choosing one post-conviction avenue over another, e.g., the fact that filing a notice of appeal divests the trial court of the ability to hear a motion for new trial. See, e.g., Walker v. State, 2000 Del. LEXIS 424, 763 A. 2d 92 (2000)(where the Delaware Court noted that "It is clear that the Superior Court's refusal to act upon Walker's *pro se* motion for a new trial was entirely appropriate. Walker's direct appeal [filed by counsel] divested the Superior Court of jurisdiction to address the merits of a motion for new trial.")

Perhaps the greatest danger of self-representation is the *pro se* filing that includes inculpatory statements from the defendant, a common aspect of pro se filings and appeals. Defendants should be warned with the utmost caution that such filings could be used as adverse evidence by the prosecution, and therefore considered by the jury and the sentencing court as substantive evidence, especially if the defendant wins his appeal and a re-trial is ordered.

B. There is no merit to the appellant's various *Strickland* claims.

As noted above, this matter was originally a death-penalty case, in which Attorney Jack Boone was "death qualified" to serve as lead counsel in such a case, and ultimately proved successful in the aim of most of these types of proceedings—to convince the jury to not recommend the death penalty. The defendant has represented various complaints above aspects of Mr. Boone's performance, many of which do not accurately reflect what happened at trial, as will be explained below.

1. The claim that trial counsel did not raise a potential plea deal during the cross-examination of Ricky Johnson.

The appellant claims that Mr. Boone failed to bring to the jury's attention a possible plea deal offered to Ricky Johnson, the appellant's brother and accomplice. This argument is contradicted by the record, which reflects Attorney Boone pointedly asking Ricky Johnson, "Snitches get good deals, usually, don't they?," and when Ricky answered no, Mr. Boone followed up with, "Do you think five years is too much for all of this?," referring to the light sentence Ricky received for his role in the brutal murder by vehicle of Irene Shields. (Trial Transcript, Vol. 6, page 256). Because the claim that defense counsel did not adequately raise the issue of possible leniency in

exchange for Ricky's testimony is contradicted by the trial record, this allegation of error is without merit. The related claim that either the trial court or Mr. Boone should have somehow "corrected" Ricky Johnson's claim that he did not receive leniency for serving as a State's witness is also without merit. Ricky Johnson's fairly lenient treatment—five years in prison on a lesser charge—despite fully assisting his brother in the kidnapping and murder of Irene Shields, and the subsequent destruction and concealment of some of the evidence, was properly presented to the jury, and it was up to Mr. Boone to decide how to present Ricky's testimony in which he denied receiving leniency, as evidence of his lack of credibility, and up to the jury to decide whether Ricky's claim was true or not. The idea that the jury did not receive enough information from Mr. Boone's cross-examination of Ricky Johnson, in which Boone exposed that Ricky received only five years in prison for his role in the murder, is simply not true.

The appellant also complains in his brief that Attorney Boone did not cross-examine Ricky Johnson about the District Attorney's earlier (and then withdrawn) recommendation for probation in exchange for his truthful testimony. According to the appellant's own exhibit (an Augusta Chronicle newspaper article), in 1998, more than two years prior to the appellant's death-penalty trial, the trial court rejected this plea agreement as too lenient

and then sentenced Ricky Johnson to five years in prison. (Record, Vol. 15, page 2). As Ricky Johnson received five years in prison, not the promised probation, yet still chose to testify adversely to his brother, one can hardly fault Attorney Boone for failing to introduce evidence which would serve to enhance and even bolster the credibility of the State's sole eyewitness. This allegation of *Strickland* error necessarily fails.

2. The State's cross-examination of the defendant, including asking him about his comment, "Do I need a lawyer?" after being informed of Irene Shields' death.

The State only raised this issue of the defendant's statement, "Do I need a lawyer?," which was in response to receiving the news of Irene Shields' death, after the defendant raised this issue himself during his direct examination. (Trial Transcript, Vol. 7, page 582). As the appellant himself raised this issue during his direct testimony, it was entirely proper for the district attorney to raise this issue on cross-examination. Taylor v. State, 302 Ga. 176, 180, 805 S.E.2d 851 (2017)("…the State had a right to a thorough and sifting cross-examination of defendant's direct testimony.") For this reason, this allegation of error is without merit. Because cross-examination on this subject was entirely appropriate, the trial court likewise did not err in allowing such cross-examination.

C. There is no merit to the appellant's claim that he was denied the right to a speedy appeal.

Because this was originally a death penalty case, and subject to the Unified Appeal Procedure, many of the potential issues related to the fairness of his trial were in fact raised and already adjudicated by this Honorable Court. See Johnson v. State, 272 Ga. 468, 532 S.E.2d 377 (2000)(holding that under the discovery rules, a defendant has no obligation to disclose to the State the contents of his own testimony related to a possible alibi.)

The trial court properly counted strongly against the appellant his failure to assert his right to a motion for a new trial for a twelve-year period, from 2004 until 2016. Payne v. state, 289 Ga. 691, 694-695, 715 S.E.2d 104 (2011).

The trial court, taking into consideration evidence that the defendant had the means to hire his own appellate attorney—a canceled $10,000 check—also properly attributed the delay in seeking a new trial largely to the appellant.

Finally, the trial court properly found that the appellant's allegations of prejudice were largely speculative and not established by the record. See also Veal v. State, 301 Ga. 161, 168, 800 S.E.2d 325 (2017)(holding that

"generalized speculation about the delay's effect on witness memories and evidence is not the kind of 'specific evidence' required to show prejudice in the appellate-delay context"). For the above-stated reasons, the trial court did not abuse its discretion in finding that the appellant was not denied his right to an appeal due to the delay in conducting his motion for new trial.

D. The State established guilt beyond a reasonable doubt.

Garry Johnson's reason for kidnapping and murdering Irene Shields was made plain during the District Attorney's cross-examination of him. Through various witnesses, the State had established that Shields had threatened to call his parole officer after she discovered that Johnson, a compulsive gambler, had stolen and then essentially gambled away the Christmas presents she had bought for her family members. Johnson's fear of returning to prison was starkly revealed when he interrupted the district attorney, who was commenting about the consequences of a probation violation during cross-examination. The jury was witness to the appellant, Gary Johnson, sharply interrupting District Attorney (later Judge) Daniel J. Craig, who was referring to a possible "parole violation." The appellant sharply said to District Attorney Craig, *"No, the consequences [of a probation violation] would be, they would lock you up. That's the*

consequences. If you be one or two minutes late, they're going to lock you up. That's just all [there is] to it." (T. at 601). The law defines motive as "the reason that nudges the will and prods the mind to indulge the criminal intent." Brooks v. State, 298 Ga. 722, 726, 783 S.E.2d 895 (2016), quoting United Statesv. Beechum, 582 F.2d 898, 912, n.15 (5th Cir. 1978). The defendant's abrupt interruption of the district attorney was crucial evidence of the defendant's motive or reason for his commission of Irene Shields' murder, as it corroborated Ricky Johnson and Rhonda Bailey's testimony that the victim's announcement, that she would report his theft and pawning of her property to the defendant's probation officer, as the catalyst to the defendant's decision to murder Irene Shields. This evidence of the defendant's uniquely-held motive to murder Irene Shields makes it exceedingly unlikely that anyone other than the defendant was responsible for her murder, as the record reflects that at the time of her murder, no one other than the defendant had a similar motive to murder Irene Shields.

The defendant's consciousness of guilt and criminal intent were also evidenced in his words and actions before, during, and after he committed the kidnapping, robbery, and murder of Irene Shields. Repeatedly the defendant had threatened to kill Irene Shields and her children. His brother testified that the defendant repeatedly threatened to kill him. (T. at 873).

Ricky told the police "I wouldn't want to be around him 'cause I feel like it's a threat to my life to be around him." (T. at 872).

The threats the defendant used to silence Ricky Johnson are also evidence of the defendant's guilt. The defendant told Ricky, "I'm not taking the rap for this," and "Man, keep your mouth closed, 'cause, if you say anything, the same thing will happen to you that happened to her." (T. and 243). The defendant later repeated to his brother, "You're all right as long as you don't say nothing." (T. at 244). The trial court properly considered evidence that the defendant repeatedly threatened Ricky Johnson to prevent his brother from reporting the appellant's crimes as evidence of the defendant's guilt, particularly in light of corroborating evidence from Rhonda Bailey and Irene's teen-aged daughter that the defendant had expressed a series of threats to various individuals, including Irene Shields. Lindsey v. State, 295 Ga. 343, 348, 760 S.E.2d 170 (2014)(rev'd on other grounds)("Evidence of a defendant's attempt to influence or intimidate a witness is circumstantial evidence of guilt…."). Ricky's testimony that the defendant had threatened to kill him was also corroborated by testimony from Irene's mother, who testified that Irene moved herself and her children into her house because she was afraid the defendant would kill her. A 911 call Irene made days before her murder and testimony from Deputy Linda

Banks, describing Irene's frantic fear that the defendant would kill her, also corroborates Ricky Johnson's testimony that the defendant repeatedly used violent threats for the purpose of control and intimidation. The appellant's efforts to dispose of the victim's handbag and S.U.V., and to wipe his fingerprints from this vehicle at a car wash, is further evidence of his guilt. Richardson v. State, 308 Ga. 70, 72, 838 S.E.2d 759 (2017)("Richardson's attempt to conceal his involvement in the crimes was evidence of his guilt.")

As noted above, the defendant, upon seeing the police car in front of Irene Shields' home, tried to avoid interaction with the police, further evidence of guilt. This Court finds that the defendant's attempt to avoid interaction with the police is circumstantial evidence of guilt. See Rush v. State, 294 Ga. 388, 390, 754 S.E.2d 63 (2014)(evidence showing a defendant attempted to evade arrest is admissible as circumstantial evidence of guilt); Michael v. State, 335 Ga. App. 579 585, 782 S.E.2d 479 (2016)(a defendant's attempt to hide from or elude police constitutes circumstantial evidence of consciousness of guilt.).

Ultimately, the appellant's brother Ricky testified as to witnessing the appellant argue with the victim in her bedroom, exit the same room shortly thereafter carrying her bound (but still live) body over his shoulder, and then deposit her into the back of her own S.U.V. which the appellant began to

drive. Ricky testified that he following the appellant (in a second car) to a remote part of Burke County where he witnessed his brother deposit her by the side of a dirt road. Although Ricky denied witnessing the act of murder itself, in light of the extensive evidence that Irene Shields was crushed and trampled by the S.U.V. the appellant had used to also kidnap the victim, the jury was authorized to conclude that the appellant himself was responsible for the Irene's murder, especially in light of the police's discovery of boot prints (with a matching pebble in the tread) which matched the boots the appellant was wearing when he was arrested. The appellant's argument to the contrary lacks validity.

Conclusion

Wherefore, for all of the above reasons the State prays that this Court affirm the appellant's convictions and sentence.

This 22nd day of August, 2022.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this date served a copy of the foregoing brief via U.S. mail with adequate postage to:

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This 22nd day of August, 2022.

/S/ Joshua B. Smith
Joshua B. Smith
Assistant District Attorney
Augusta Judicial Circuit

SUPREME COURT OF GEORGIA

Case No. S22A0964 August 08, 2022

The Honorable Supreme Court met pursuant to adjournment. The following order was passed: GARRY DEYON JOHNSON v. THE STATE. Your request for an extension of time to file the brief of appellee in the above case is granted until August 19, 2022. A copy of this order MUST be attached as an exhibit to the document for which the appellee received this extension.