

CASE NO. 19-5209

IN THE
SUPREME COURT OF THE UNITED STATES

—
THERIAN WIMBUSH
Petitioner

V.

STATE OF GEORGIA
BRIAN KEMP, Governor
TIMOTHY WARD, Corrections Commissioner
WILLIE SUE MICKENS, Warden

ORIGINAL

Supreme Court, U.S.
FILED

JUN 19 2019

OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

—
PETITION FOR WRIT OF CERTIORARI
—

THERIAN WIMBUSH
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JUNE 18, 2019

QUESTIONS PRESENTED

1. Does the timely and legally sufficient filing of a Notice of Appeal of a Directly Appealable pretrial statutory speedy trial motion preclude the trial court of jurisdiction to impose and execute a judgment of conviction and sentence?
2. When a VOID JUDGMENT of conviction and sentence is imposed and executed, can habeas corpus relief be PREMATURE?
3. When a state habeas petitioner provides the state courts, including the state's highest court, with one full round of appellate review, is the petitioner required to file repetitious state petitions for relief before entering the federal forum?
4. What is the "Barker v. Wingo", "Doggett v. United States" type of criteria for excusing the federal habeas exhaustion requirement?

BRIEF INTRODUCTION

On January 30, 2017, petitioner filed a timely and legally sufficient Notice of Appeal challenging the Gwinnett County Superior Court's January 6, 2017 denial of her directly appealable statutory speedy trial motion for discharge and acquittal. Two days later, the Gwinnett County Superior Court imposed a VOID JUDGMENT of conviction and sentence on February 1, 2017. Two days later, ~~the~~ on February 3, 2017, the Gwinnett County Superior Court executed said VOID JUDGMENT of conviction and sentence.

On March 13, 2017, petitioner filed her first instant state habeas corpus petition in Pulaski County Superior Court. On April 11, 2017, said habeas corpus

petition was denied and dismissed on the merits stating petitioners due process claim had no basis for relief because the filing of a Notice of Appeal did NOT deprive the trial court of jurisdiction to impose a judgment of conviction and sentence. On April 30, 2017, petitioner docketed an Application for a Certificate of Probable Cause in the Supreme Court of Georgia and filed a Notice of Appeal in the Pulaski County Superior Court on May 5, 2017 pursuant to OCGA § 9-14-52, in order to fully exhaust her state habeas remedy.

Petitioner also docketed appeals in the Court of Appeals of Georgia where she also raised the due process ground in order to fully exhaust her state court remedies. In fact, petitioner docketed two appeals stemming from the Notice of Appeal filed on January 30, 2017 (A17A1901) and from the Notice of Appeal filed on February 3, 2017 challenging the judgment of conviction and sentence (A17A2056).

Hence, petitioner shows that she fully exhausted her state court remedies, yet, the United States District Court for the Northern District of Georgia dismissed her § 2254 habeas petition for failing to exhaust state court remedies and denied her a Certificate of Appealability. *Kirkcaldy* (1:18-cv-2085) (11-18-cv-2957). Likewise, the United States Court of Appeals for the Eleventh Circuit denied them a Certificate of Appealability (18-14665-1D, 18-14667-D).

Thus, petitioners seek relief from this Court to not only review these state and federal court decisions, but also to establish precedence concerning the exhaustion doctrine, as the varying federal Courts of Appeals do NOT agree on what constitutes exhaustion.

LIST OF PARTIES

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinions of the United States Court of Appeals appears at Appendix A to the petition and ~~is~~ are unpublished.

The opinions of the United States district court appear at Appendix B to the petition and are unpublished.

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is unpublished.

The opinion of the Pulaski County Superior Court appears at Appendix D to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided ~~my~~^{our} cases was March 1, 2019.

No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

An extension of time to file the petition for writ of certiorari was granted to and including July 29, 2019 on May 7, 2019 in Application No. 18 A 1106

STATEMENT OF THE CASE

On June 27, 2014, petitioners surrendered to the Gwinnett County Sheriff's Office in response to Criminal arrest warrants accusing them of the offenses of Cruelty to Children in the first degree part b and False Imprisonment of their eldest son.

Although both offenses are noncapital offenses and were bailable before a court of inquiry and pursuant to Uniform Superior Court Rule (U.S.C.R.) 26.1(H) bail SHALL have been set no later than the first appearance hearing, petitioners were denied bail and remained incarcerated in the county jail until their transfer to the Department of Corrections, as early as, February 3, 2017.

On September 4, 2014, a FRAUDULENT indictment was filed in the Gwinnett County Superior Court charging petitioners with two counts of Cruelty to Children in the first degree part b. (Case no. 14-B-03660-3). Later, on November 2, 2017, a superseding FRAUDULENT indictment was filed in the Gwinnett County Superior Court charging petitioners with a total of seven counts of cruelty to children in the first degree parts a and b and in the second degree, adding petitioners' second son as a new alleged victim. (16-B-04000-3)

Petitioners were Pro Se in all of their criminal proceedings.

The first Motions Hearing was held on December 27, 2016 and the last motions hearing was held on January 5, 2017, with a trial date of January 23, 2017.

On January 5, 2017, the trial court orally denied petitioners' Motion for Discharge and Acquittal pursuant

to OCGA § 17-7-170, that had been filed in the original indictment on August 28, 2015. Said oral order was reduced to writing, signed by the judge and filed with the clerk on January 6, 2017. However, petitioners were NOT served with this directly appealable order until the first day of trial, January 23, 2017.

On January 30, 2017, petitioners filed a Notice of Appeal challenging the January 6, 2017 denial of the statutory speedy trial motion, thereby divesting the Guinnett Superior Court of Jurisdiction of their criminal case and conferred jurisdiction on the Court of Appeals of Georgia.

However, on February 1, 2017, the Guinnett County Superior Court imposed a judgment of conviction and sentence and subsequently transferred petitioner to the custody of ~~the~~ the Georgia Department of Corrections, just TWO DAYS LATER, on February 3, 2017 for subjection to forced slavery (i.e. execution of the sentence imposed.)

On March 13, 2017, petitioner Therian Wimbush filed an instant state habeas corpus petition in the Pulaski County Superior Court. On April 11, 2017, the Pulaski County Superior Court dismissed said petition stating: "Petitioner contends that the filing of her Notice of Appeal of the trial court's order denying her [statutory speedy trial] motion for discharge and Acquittal operated as a supersedeas of her case and stripped the trial court of the necessary jurisdiction to enter a final order in her case or justify the imposition of a sentence following her [jury verdict]... This ground [denial of due process] provides no basis for relief."

Pursuant to OCGA § 9-14-52, petitioner filed an Application for Certificate of Probable Cause to Georgia's highest Court, the Supreme Court of Georgia, and filed her Notice of Appeal in the Pulaski County Superior Court on May 5, 2017, in order to appeal said order. Said Application was docketed on April 30, 2017, and was docketed to the August 2017 Court Term.

Petitioners also filed a Notice of Appeal ~~of the~~ challenging the Gwinnett Superior Court's February 1, 2017 judgment of conviction and sentence on February 3, 2017.

The January 30, 2017 Notice of Appeal was docketed in the Court of Appeals of Georgia on June 16, 2017 and was assigned to judges Miller, Doyle, and Reese. The February 3, 2017 Notice of Appeal was docketed on July 3, 2017 and was also assigned to judges Miller, Doyle, and Reese. The case numbers are A17A1901 and A17A2056, respectively.

Although, according to records of the Court of Appeals of Georgia, petitioners filed their appellants' brief on August 9, 2017, appeal A17A1901, was dismissed on August 11, 2017 alleging that petitioners had ~~ABANDONED~~ said appeal because no appellants' brief had been filed.

On March 8, 2018, appeal A17A2056 was affirmed by the Court of Appeals of Georgia, by the assigned judges (Miller, Doyle and Reese) and no response was given to the issue of the void judgment of conviction that was raised under the due process enumeration of error.

While said appeals were pending, petitioner Recardo Wimbush filed a state habeas corpus on the day, October 18, 2017, that he was dismissed from Appeal number A17A2056, in the Washington County Superior Court. Only after filing a federal petition for writ of habeas corpus did the Washington County Superior Court hold a hearing on the petition, on July 31, 2018.

Since that hearing date, petitioner Recardo Wimbush has moved the Court twice for compliance with OCGA § 15-6-21(a) which requires a ruling within 30 days and for an immediate ruling, on August 20, 2018 and March 21, 2019, respectively. Yet, the Washington County Superior Court has failed and refused to rule on the habeas petition.

Petitioner Therman Wimbush filed her second instant state habeas petition in the Pulaski County Superior Court on June 30, 2017 listing the exact same grounds that petitioner Recardo Wimbush raised in his state habeas petition:

GROUND ONE: VOID JUDGMENT OF CONVICTION for Lack of Jurisdiction pursuant to U.S. Constitution Amendment XIV

GROUND TWO: DENIAL OF DUE process including Kidnapping and False Imprisonment pursuant to U.S. Constitution Amendment XIV

GROUND THREE: SUBJECTION TO FORCED SLAVERY in violation of U.S. Constitution Amendments XIII and XIV

A hearing was finally held on October 2, 2018 and subsequently on November 3, 2018 an order denying petitioner habeas relief was entered stating: "Petitioner contends that the trial court lacked the jurisdiction to CONVICT and SENTENCE her

because she filed a Notice of Appeal prior to Sentencing. A jury trial commenced on January 23, 2017 and continued until January 27, 2017. The jury returned a verdict of conviction on January 27, 2017 and the trial court deferred Sentencing. Prior to the start of trial, petitioner raised no objection to the trial proceeding or gave any indication that she was pursuing a direct appeal to the denial of her motion for discharge and acquittal. Petitioner filed a Notice of Appeal from the January 6, 2017 denial of her Motion for Discharge and Acquittal on January 30, 2017. The denial of a motion for acquittal on statutory grounds speedy trial grounds is immediately appealable. See Hubbard v. State, 254 Ga. 694 (1985). However, a criminal defendant's right to a direct appeal from the denial of acquittal on statutory speedy trial grounds exists prior to trial and ceases at the conclusion of trial. See, e.g., Gifford v. State, 301 Ga. App. 50 (2009); Hubbard v. State, 254 Ga. 694 (1985) ("a criminal defendant is not required to follow interlocutory procedures of OCGA § 5-6-34(a) when appealing, prior to the conclusion of a trial on the merits, from the denial of a plea in bar based on OCGA § 17-7-170); Adams v. State, 189 Ga. App. 345 (1988). Here petitioner did not file a notice of appeal until after the jury had returned a verdict. Petitioner's premise that the trial court was then divested of jurisdiction to sentence her lacks merit."

Petitioner docketed her Application for Certificate of Probable Cause in the Supreme Court of Georgia on December 28, 2018 and filed a Notice of Appeal in the Pulaski County Superior Court on December 10, 2018 in

Strict compliance with OCGA 9-14-52. (S19H0628)

Petitioner, Therman Winbush, also filed her third state habeas corpus petition in the Pulaski County Superior Court on October 16, 2018 due to the Gwinnett County's Superior Court's denial of her Motion for Bond Pending Appeal without a hearing and for the refusal of the Gwinnett County Superior Court clerk to transmit the Notice of Appeal and the record in order for an appeal to be docketed on the Bond pending appeal issue.
Kearner number

A hearing was finally held on said petition on March 21, 2019, and to date no ruling has been issued.

On June 18, 2018, AFTER petitioner filed the federal habeas petition, the Supreme Court of Georgia issued an order granting the Application for Certificate of Probable Cause, ~~perma~~ vacating the court's order and remanding the case back with instructions to dismiss the petition as PREMATURE.

On ~~Peter~~ May 11, 2018, petitioners docketed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia pursuant to 28 USC § 2254, jointly. (1:18-cv-2085; 1:18-cv-2957)
On October 12, 2018, the district court issued orders in both cases dismissing the petitions for failure to exhaust state court remedies and denied petitioners a Certificate of Appealability.

On October 23, 2018, petitioners filed Notices of Appeals and said habeas appeals were docketed in the United States Court of Appeals for the Eleventh Circuit on October 25, 2018. (18-14465-D and 18-14467-D) On March 1, 2019, the United States Court of Appeals for the Eleventh Circuit denied petitioners application

for Certificate of Appealability, from which petitioners seek this Court to review.

It must be noted that petitioners do NOT come to this Court with frivolous, dilatory, nor subjective grounds, but objective grounds where the state concedes to the facts and where the VOID JUDGMENT OF CONVICTION and sentence MUST BE VACATED, REVERSED and VOIDED under operation of well established federal law. Moreover, petitioners show that there has been a GROSS DENIAL OF DUE PROCESS OF LAW.

REASONS FOR GRANTING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States states:

"A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States Court of appeals has entered a decision in conflict with the decision of another United States Court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (1) a state court or a United States Court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Right of Direct Appeal - Georgia

The Notice of Appeal shall be filed within 30 days after the entry of the appealable decision or judgment complained of. OCGA § 5-6-38(a) When a defendant filed a Notice of Appeal within 30 days of the judgment, the appellate court had jurisdiction to consider the merits of the defendant's appeal. Hann v. State, 292 Ga. App. 719 (2008) Unless jurisdiction of an appellate court is invoked within the 30 day period following the filing of a judgment of the trial court by a party to the case, the appellate court is without jurisdiction to review the judgment of the trial court. Patterson v. Professional Resources, Inc., 140 Ga. App. 315 (1976)

The denial of a motion for acquittal on statutory speedy trial grounds is IMMEDIATELY appealable, Hubbard v. State, 254 Ga. 694 (1985)

Effect of Filing of a Notice of Appeal

The United States Supreme Court has asserted that the filing of a Notice of Appeal is an event of JURISDICTIONAL SIGNIFICANCE in that it confers jurisdiction on the Court of Appeals and divests the trial court of jurisdiction of the case. Griggs v. Provident Consumer Discount Co., 459 US 56 (1982) On questions of federal constitutional law, state courts MUST adhere to the decisions of the United States Supreme Court. Oregon v. Hass, 420 US 714 (1975) The US Court of Appeals for the Eleventh Circuit has also asserted that the timely and legally sufficient filing of a Notice of Appeal acts to divest the trial court of jurisdiction over the matters at issue in the appeal, except to the extent that the trial court must act in aid of the appeal. More specifically, the trial court is WITHOUT AUTHORITY during the pendency of an appeal. Hence, the filing of a Notice of Appeal, of virtually ANY SORT, acts to FREEZE ALL PROCEEDINGS in the trial court pending resolution of the appeal. Shewchun v. U.S. 797 F. 2d 941 (11th Cir 1986)

Historically, the filing of a Notice of Appeal has generally given the appellate court SOLE jurisdiction and divested the trial court of jurisdiction, to proceed with the case. US v. Dunbar, 611 F.2d 985 (5th Cir. 1980)

Although a Notice of Appeal MUST be filed in the court below, the appellate court ALONE has the authority to determine whether such filing is sufficient to invoke its jurisdiction.

Scruggins v. State, 288 Ga. 346 (2010) A superior court VS WITHOUT JURISDICTION to alter a judgment while an appeal of that judgment is pending. This RULE has been applied even when the pending appeal is dismissed for LACK OF JURISDICTION. Under ordinary circumstances a trial court does NOT have JURISDICTION to take ANY ACTION in a case prior to receiving the remittitur from the appellate court. Styles v. State, 245 Ga. App. 90 (2000) An appellate court's JURISDICTION over a case is at an end AFTER the remittitur therefrom has been filed in the office of the court below and the resumption of JURISDICTION by a trial court follows immediately. The Supreme Court of Georgia precedents indicate that a JURISDICTIONAL defect due to a supersedeas from the filing of a Notice of Appeal CANNOT be waived. Any proceeding so conducted in the trial court is CORAM NON JUDICE, and the resulting WANT OF JURISDICTION CANNOT be waived so as to give effect to the VOID JUDGMENT. Chambers v. State, 262 Ga. 200 (1992) where a trial court enters a judgment where it does NOT have JURISDICTION, such judgment is a mere NULLITY, but an appeal from such an ILLEGAL JUDGMENT will NOT be dismissed, but instead, the VOID JUDGMENT will BE REVERSED. Wetherington v. State, 295 Ga. 172 (2014)

Once a Notice of Appeal is timely filed, ALL parties to the proceedings in the lower court SHALL be parties on APPEAL. OCEA § 5-6-37. Whenever two or more parties are defendants or plaintiffs in an action, and a judgment, verdict, or decree has been rendered against ~~them~~ each of them, jointly or severally, the plaintiffs

or defendants, as the case may be, SHALL BE ENTITLED TO FILE JOINT APPEALS. OCGA § 5-6-44(a) The Court of Appeals of Georgia has held that ANY ATTEMPTED ACTION by the trial court AFTER the case is on appeal to the Georgia Court of Appeals or the Supreme Court of Georgia is a NULLITY. Jinks v. State, 163 Ga. App. 841 (1982)

Argument

Question 1: Does a timely and legally sufficient filing of a Notice of Appeal of a Directly Appealable pretrial Statutory Speedy trial motion preclude the trial court of jurisdiction to impose and subsequently, execute a judgment of conviction, while the appeal is pending?

Not only has the Supreme United States Supreme Court and the U.S. Court of Appeals for the Eleventh Circuit answered this question by asserting that the filing of a Notice of Appeal of virtually ANY SORT, is a event of jurisdictional significance in that it confers jurisdiction ~~of~~ on the Appellate Court and divests the trial court of jurisdiction ~~on~~ by FREEZING ALL proceedings pending resolution of the appeal, but the Georgia Supreme Court addressed the type of superseeding in the present case in Tolbert v. Tolle, 296 Ga. 357 (2014) Groggs supra, Stewchen supra.

In Tolbert, the Supreme Court of Georgia held:

If the notice of appeal was effective, however, its filing would have acted as a superseeding, depriving the trial court of the power to affect the judgment appealed. Wetherington v. State, 295 Ga. 172, 173 (2014)

The judgment appealed was the OAC denial of Tolbert's statutory speedy trial motion for acquittal discharge and acquittal, and reversal of that ruling by the Court of Appeals would result in Tolbert's acquittal, thereby barring any subsequent trial or conviction based on double jeopardy.

Thus, here, Georgia's highest state court confirms that the timely and legally sufficient filing of a Notice of Appeal of a Directly Appealable pretrial statutory speedy trial motion for discharge and acquittal precludes the trial court of jurisdiction to impose and execute a judgment of conviction and sentence until the appeal was resolved and the trial court received and FILED the remittitur from the appellate court.

The January 30, 2017 Notice of Appeal resulted in the docketing of case number A17A1901 in the Court of Appeals of Georgia. Said Petitioners filed their Joint Appellants Opening Brief in case number A17A1901 on August 9, 2017. Yet, the Court of Appeals of Georgia ~~did not~~ dismissed the appeal alleging that petitioners failed to file their appellants brief on August 11, 2017. However, NO REMITTITUR from Court of Appeals Casenumber A17A1901 has been filed in the Gwinnett County Superior Court in Criminal case 16-B-04000-3. Hence, the Court of Appeals of Georgia, to date, retains jurisdiction of petitioners underlying Criminal case, although a remittitur has been filed in the trial court from appeal number A17A2056, resulting from the February 3, 2017 Notice of Appeal challenging the February 1, 2017 judgment of conviction and sentence, on May 15, 2018.

Habeas Corpus Remedy - Georgia

Pursuant to OCGA § 9-14-1(a), any person restrained ~~and~~ of his liberty under any pretext whatsoever except under a sentence of a state court of record, may seek a writ of habeas corpus to inquire into the legality of the restraint. Pursuant to OCGA § 9-14-1(c), any person restrained of his liberty, as a result of a sentence imposed by any state court of record, may seek a writ of habeas corpus to inquire into the legality of the restraint. Pursuant to OCGA § 9-14-47, except as otherwise provided

in Code section 9-14-47.1 with respect to petitions challenging for the first time state court proceedings resulting in a sentence of death, WITHIN 20 DAYS AFTER THE FILING and docketing of a petition under this article, the respondent SHALL answer or move to dismiss the petition. The Court SHALL set the case for a hearing on the issues within a REASONABLE time after the filing of defensive pleadings.

The Supreme Court of Georgia has asserted that, absent special circumstances, 30 DAYS is an entirely REASONABLE TIME period between petition and hearing, for the sake of BOTH the state and the offender. McElroy v. State, 247 Ga. 355 (1981) In all counties with less than 100,000 inhabitants, it SHALL be the duty of the judge of the superior state, or city court, unless providentially hindered or unless counsel for the plaintiff and the defendant agree in writing to extend the time, to decide PROMPTLY, WITHIN 30 DAYS, after the same has been submitted to him, ALL petitions or motions of ANY NATURE. OCGA § 15-6-21(a)

The Supreme Court of Georgia held that the State is interested in seeing that NO citizen is ILLEGALLY deprived of his liberty, and the law is designed to MAKE EASY and EXPEDITIOUS, inquiry into the cause of an imprisonment whenever its legality is brought into question. Nguyen v. State, 282 Ga. 483 (2007) A deprivation of liberty for even a moment longer than the law permits is a serious wrong of constitutional magnitude. Dixon v. State, 2017 Ga. LEXIS 967

State Court Convictions - Finality

Generally, a petition for writ of habeas corpus may not be filed until the conviction is FINAL. A writ of habeas corpus looks only to the lawfulness of the present confinement. It does NOT deal with the lawfulness of a possible future imprisonment. Kearse v. Paulk, 264 Ga. 509 (1994) The premature filing of a state habeas petition does NOT fairly present an issue to the state

habeas courts because they may not entertain a state habeas proceeding until petitioner's direct review is complete and his conviction is final. A person imprisoned by virtue of a sentence of a state court of record CANNOT institute a petition for habeas corpus until the conviction is FINAL. Horton v. Wilkes, 250 Ga. 902 (1983) A conviction is not final until there are no appellate proceedings pending in any court. (Id.)

Likewise, the Georgia Department of Corrections CANNOT, without a valid request from the prisoner or the prisoner's attorney, take LAWFUL custody of a prisoner during the 30 DAY PERIOD in which an appeal may be filed, nor until the conviction is FINAL. 1973 Op. Atty Gen no. 73-153, 1973 Ga. AG LEXIS 153 Execution of a sentence imposed in a criminal case is SUSPENDED when a Notice of Appeal is filed. 1975 Op. Atty Gen no. 75-30, 1975 Ga. AG. LEXIS 30. A Notice of Appeal acts as a SUPERSEDES and generally divests the trial court of JURISDICTION. Reedman v. State, 265 Ga. App. 162 (2003) During the pendency of an appeal, a trial court CANNOT execute a sentence, Porter v. State, 308 Ga. App. 121 (2011) The pending of an appeal merely deprives the trial court of its POWER to EXECUTE the sentence. Strickland v. State, 258 Ga. 764 (1988); Isaac v. State, 237 Ga. App. 723 (1999) Recall, a conviction is NOT FINAL until there are no appellate proceedings pending in any court. Horton supra.

Argument

The ~~to~~ United States Court of Appeals for the Eleventh Circuit, in its order, argues that, "In Georgia, a court may not entertain a premature ~~filing~~ state habeas petition until the petitioner's direct appellate review is complete and her conviction is final." Horton supra.

The apparent issue with this assertion is that in petitioner's case, there was a Notice of Appeal of a directly appealable order denying their statutory speedy

trial motion for discharge and acquittal pending at the time that the VOID judgment of conviction and sentence was filed, rendering said judgment a LEGAL NULLITY. Recall that when a trial court enters a judgment where it does NOT have JURISDICTION, such judgment is a mere NULLITY, but an appeal from such an illegal judgment will NOT be dismissed, but instead, the VOID JUDGMENT will be REVERSED. Wetherington v. State, 295 Ga. 172 (2014) A void judgment or opinion, rendered WITHOUT JURISDICTION can NEVER be made valid by a subsequent expression of opinion by the same or any other court. Estate v. Brown, 235 US 342 (1914) A void judgment is a LEGAL NULLITY. United Student Aid Funds v. Espinosa, 559 US 260 (2010) A [judgment] which is VOID, because ~~the~~ it is issued by a court WITHOUT JURISDICTION, may be treated as ~~a~~ having NO EXISTENCE, and as a DENIAL OF DUE PROCESS under the FOURTEENTH Amendment. Houat v. Kansas, 258 US 181 (1922) A petitioner's detention and sentence pursuant to the VOID JUDGMENT is in violation of the Constitution of the U.S. and he is therefore ENTITLED to be FREED. Lewis v. Dand, 366 US 717 (1961)

Hence, FIRST, in petitioner's case, the judgment of conviction is VOID on its face, even a LEGAL NULLITY, due directly to the supersedeas of the January 30, 2017 Notice of Appeal challenging the ~~at~~ January 6, 2017 directly appealable order denying the statutory speedy trial motion for discharge and acquittal.

Second, petitioners filed a second Notice of Appeal on February 3, 2017 challenging the judgment of conviction and sentence rendered on February 1, 2017. Noting, specially, that petitioner was transferred to the Georgia Department of Corrections on February 3, 2017, WITHIN the 30 DAY TIME PERIOD from the February 1, 2017 judgment of conviction and when an appeal was already pending. Petitioners were and still

are Pro Se litigants, ALL THE WAY THRU this superceding Indictment, including arraignment, trial and on appeal. Petitioners NEVER made ANY request to be transferred to the custody of the Department of Corrections and neither had their convictions become final. Therefore, the transfer, that is the execution, of the VOID JUDGMENT of conviction and sentence which was NOT, and still is NOT, FINAL constituted an UNLAWFUL confinement. Petitioners assert that the transfer to execution of the judgment of conviction and sentence rendered the conviction final and therefore ACTIVATED their habeas corpus remedy.

Hence, if the judgment and sentence CANNOT be executed until it becomes final, when no appellate proceedings are pending, and ~~the~~ a habeas court cannot entertain a ~~premature~~ habeas corpus petition until the conviction is final, then it logically follows that if the state executes the conviction that is not final, the petitioner's habeas corpus petition CANNOT be premature, because the detention is UNLAWFUL.

This fact is bolstered in the fact that in Horton Supri. Counsel for Respondent, Sheriff, argued that, under the statute, habeas corpus lies only from a final judgment of conviction, and they support this argument by pointing out that a contrary determination would mean that two courts here the U.S. Supreme Court and the Superior Court, would be considering the same case (although not all the same issues) at the same time, with the possibility that the two courts might reach inconsistent results or that the action of one might moot the action of the other; that the habeas petitioner here raises ineffective assistance of the counsel representing him on appeal, and that counsel CANNOT, while

representing him, on appeal, testify as to the adequacy of his representation; and that while his habeas petition is pending, the petitioner remains incarcerated in the local jail when he should be in the State prison system where the Attorney General's office would represent the warden in the habeas action.

Unlike in Horton, petitioners do not raise a subjective ground in their habeas corpus petition, of ineffective assistance of counsel, but instead raise an objective ground of a VOID JUDGMENT for LACK OF JURISDICTION, where the state concedes to all the facts relating thereto, which leaves the issue a matter of well established federal and state law. Petitioners further assert that the habeas corpus petition is not premature because they were UNLAWFULLY transferred to the custody of the Georgia Department of Corrections, not only within the 30 DAY TIME period in which a notice of appeal could be filed, but where Notices of appeal were filed before and AFTER the judgment of conviction was filed, rendering such VOID. Petitioners, being in the State prison system, show that the Attorney General's office is representing the warden.

Furthermore, the importance of the expeditiously resolving a VOID CONVICTION claim in a habeas corpus is bolstered in Tolbert v. Tule, 296 Ga. 352 (2014) and Chambers v. State, 262 Ga. 200 (1992).

In Tolbert, the Supreme Court of Georgia granted a Certificate of Probable Cause to answer the question of whether or not the customary procedural rules pursuant to OCGA § 9-14-48(d) applied to a VOID-CONVICTION claim. The Court found that under OCGA § 9-14-48(d), a habeas corpus petitioner must have made a timely motion or objection or otherwise complied with Georgia procedural rules of trial and on appeal with regards to the claims asserted in their habeas

petition, or they must overcome that procedural default through a showing of cause and prejudice or a miscarriage of justice. However, Georgia's customary procedural default rule which holds that claims not raised at trial and enumerated on appeal are waived does NOT APPLY to a claim that a criminal conviction or sentence is VOID on JURISDICTIONAL GROUNDS. Such claims may be decided on appeal even where the issue was not raised in the trial court and is not enumerated on appeal. The Court concluded that a petitioner raising a VOID-CONVICTION claim is an extraordinary circumstance, that entitles the petitioner to raise for the FIRST time a VOID-CONVICTION claim in his FIRST, timely filed habeas corpus action and to have it decided on the merits.

Likewise, in Chambers, the Supreme Court of Georgia granted a writ of certiorari to the Court of Appeals to determine whether a trial court has jurisdiction to take any action in a case prior to receiving the remittitur from the appellate court. The Supreme Court of Georgia held that it does NOT.

Typically there is a two step procedure followed by a trial court with a remittitur from an appellate court: first, the remittitur issued by the appellate court is received and filed in the clerk's office. ~~and~~ Second, the remittitur is entered upon the minutes of the trial court. An appellate court's JURISDICTION over a case is at an end AFTER the remittitur therefrom has been FILED in the office of the Court below and the resumption of jurisdiction by a trial court follows immediately. The Supreme Court of Georgia's precedents indicate that a JURISDICTIONAL DEFECT due to SUPERSEDITIONS from the filing of a Notice of Appeal CANNOT be waived. Any proceeding so conducted in the trial court is CORAM NON JUDGE, and the resulting WANT of JURISDICTION CANNOT be waived so as to give

effect to the VOID JUDGMENT.

Furthermore, in Wetherington v. State, 295 Ga. 172 (2014), the Supreme Court of Georgia established that when a trial court enters a judgment where it does NOT have JURISDICTION, such judgment is a mere NULLITY; but on appeal, from such judgment an ILLEGAL JUDGMENT, will not be dismissed, but instead, the VOID JUDGMENT WILL BE REVERSED.

Petitioners note that although appeal number A17A1901, which resulted from the January 30, 2017 Notice of Appeal, was docketed on June 16, 2017 and assigned to judges M. Yvette Miller, Sara Doyle and Clyde Reese of the Court of Appeals of Georgia, when the appeal number A17A2056, which resulted from the February 3, 2017 Notice of Appeal, was docketed on July 3, 2017 and assigned to the exact same three judges, the VOID JUDGMENT of Conviction was NOT REVERSED but was affirmed. Further, the Court of Appeals dismissed appeal number A17A1901 on August 11, 2017, but did NOT issue a remittitur for said case until AFTER the appeal number A17A2056 was affirmed on March 8, 2018. Both remittiturs were issued on May 15, 2018, however, the Clerk of the Guinneth County Superior Court only filed the remittitur from appeal number A17A2056 and the assigned judge entered it in the minutes of the Court on May 18, 2018. However, to date, the remittitur issued on May 15, 2018 from the appeal number A17A1901, which divested the Guinneth County Superior Court of jurisdiction, still has NOT been filed nor entered in the minutes of the Court in order that the trial court could resume jurisdiction. Hence, the Guinneth County Superior Court is STILL WITHOUT JURISDICTION of Petitioners' Criminal Case and, technically, the Conviction CANNOT be final.

Question 2: When a VOID JUDGMENT of conviction and sentence is imposed and executed, can habeas corpus relief be PREMATURE?

B-1 definition, a VOID JUDGMENT is a judgment that has NO LEGAL FORCE OR EFFECT, the validity of which may be assented at ANY time and ANY place, whether directly or collaterally. From its inception, a VOID JUDGMENT continues to be absolutely NULL. It is incapable of being continued, ratified, or enforced in ANY manner or to ANY degree. Black's Law Dictionary (9th Ed.)

The United States Supreme Court and the Supreme Court of Georgia agree.

A judgment which is void, because it is issued by a court WITHOUT JURISDICTION, may be treated as having no existence, and as a denial of due process under the Fourteenth Amendment. Howat v. Kansas, 258 US 181 (1992)

A VOID JUDGMENT or opinion, rendered WITHOUT JURISDICTION can NEVER be made valid by a subsequent expression of opinion by the same or any other court. Estate v. Brown, 235 US 342 (1914)

A VOID JUDGMENT is a LEGAL NULLITY. Although the term "VOID" describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a VOID JUDGMENT is one so affected by a fundamental INFIRMITY that the infirmity may be raised even AFTER the judgment becomes final. United Student Aid Funds v. Espinoza, 559 US 260 (2010) Hence, petitioner's detention and sentence pursuant to the VOID JUDGMENT is in violation of the Constitution of the United States and she is therefore ENTITLED to be FREED therefrom. Irvin v. Dowd, 366 US 717 (1961)

A claim that a criminal conviction is VOID may be considered ONLY in a traditionally recognized

proceeding to challenge criminal convictions, but habeas corpus is undoubted such a proceeding; indeed, a claim that the sentencing court LACKED JURISDICTION is one of the ~~TRADITIONAL~~ grounds for the writ of habeas corpus ROUTED in basic principles of DUE PROCESS. A petitioner's claim that his pretrial, prose, Notice of Appeal acted as a supersedeas, depriving the trial court of JURISDICTION to CONVICT him, is ~~plausibly asserted~~ ~~canonically correct~~, is plainly a VOID-CONVICTION claim, and he was therefore ENTITLED to raise it for the first time in his first, timely habeas corpus action and to have it decided on the merits. Tolbert v. Tule, 296 Ga. 357 (2014) When a trial court enters a judgment where it does not have JURISDICTION, such judgment is a mere NULLITY, but on appeal, from such an illegal judgment, will not be dismissed but instead, the VOID JUDGMENT WILL BE REVERSED. Wetherington v. State, 295 Ga. 172 (2014) A petitioner raising a VOID-CONVICTION claim is ENTITLED to raise for the first time a VOID-CONVICTION claim in his first, timely filed, habeas corpus action and to have it decided on the merits. Georgia's customary procedural default rule which holds that claims not raised at trial and enumerated on appeal are WAIVED does NOT APPLY to a claim that a criminal conviction or sentence is VOID on JURISDICTIONAL GROUNDS. Such claims may be decided on appeal even where the issue was not raised in the trial court and is not enumerated on appeal. Tolbert, supra.

An oral order is neither final nor appealable until and unless it is reduced to writing signed by the judge and filed with the clerk. Tolbert, supra Judgment, not verdict; is the appealable decision. Herrington v. Herrington, 230 Ga. 94 (1973) A criminal case is NOT FINAL, but is PENDING in the trial court until a WRITTEN JUDGMENT OF CONVICTION AND SENTENCE IS

entered in the trial court. Keller v. State, 275 Ga. 680 (2002)

Thus, when a VOID JUDGMENT of conviction is imposed and, especially, executed, where the trial court LACKED the requisite jurisdiction, the habeas corpus remedy CAN NEVER be PREMATURE. This would have been bolstered if petitioners had been sentenced to death. They would have been EXECUTED, even lethally injected, DEAD, before they could raise the VOID-CONVICTION claim, when the Georgia Court of Appeals failed and refused to REVERSE, VACATE, and NULLIFY the CLEARLY VOID JUDGMENT of conviction. This clarity of the VOID JUDGMENT to the Court of Appeals is shown in the fact that the same panel of judges were assigned BOTH appellate cases and while BOTH were docketed, dismissed the first, and yet, did NOT issue a REMITTANCE for BOTH cases until they AFFIRMED the VOID JUDGMENT of conviction. Recall, that the Supreme Court of Georgia, the state's highest court established precedent that when a trial court enters a judgment where it does NOT have JURISDICTION, such judgment is a mere NULLITY; on appeal from such an ILLEGAL JUDGMENT, the appeal will NOT be dismissed, but instead, the VOID JUDGMENT WILL BE REVERSED, whether or not it is enumerated on appeal. Wetherington, Tulbert Supra.

Hence, habeas corpus relief could NEVER be PREMATURE when the claim is a VOID CONVICTION for WANT OF JURISDICTION.

State Habeas Corpus Exhaustion - Georgia

State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the states established appellate

review process. O'Sullivan v. Boerckel, 526 US 838 (1999) The requirements of the exhaustion concept are simple. An applicant must fairly apprise the highest court of his state of the federal rights which are allegedly violated. The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court. Piccard v. Conner, 404 US 270, (1971) Pursuant to OCGA § 9-14-52(a), appeals in habeas corpus cases brought under this article shall be governed by chapter 6 of Title 5 except that as to final orders of the Court which are adverse to the petitioner, no appeal shall be allowed unless the Supreme Court of this state issues a Certificate of Probable Cause for the appeal. Pursuant to OCGA § 9-14-52(b), if an unsuccessful petitioner desires to appeal, he must file a written application for a Certificate of Probable Cause to appeal with the clerk of the Supreme Court within 30 DAYS from the entry of the order denying him relief. The petitioner shall also file within the same period a Notice of Appeal with the Clerk of the concerned superior court. The Supreme Court shall either grant or deny the application within a REASONABLE TIME after filing.

Pursuant to the Georgia Constitution of 1983, Article VI, Section ~~IX~~, Paragraph II and OCGA § 15-2-4, the Supreme Court of Georgia shall dispose of EVERY case at the term for which it is entered on the Court's docket for hearing or at the next term. Pursuant to Rule 3 of the Rules of the Supreme Court of Georgia, the Supreme Court of Georgia has three Court terms each year: (1) December Term - beginning the first Monday in December and ending March 31st
(2) April Term - beginning the first Monday in May and ending on July 17th
(3) August Term - beginning the first Monday in August and ending November 18th

Argument.

Question 3: When a state habeas petitioner provides the state courts, including the state's highest court, with one full round of appellate review, is the petitioner required to file repetitious state petitions for relief before entering the federal forum?

Exhaustion is designed to give the state an initial opportunity to pass upon and correct alleged violations of its prisoners federal rights. Once the state has been afforded a full opportunity to adjudicate the matter, the exhaustion requirement has been met. Petitioners are NOT required to file repetitious applications in the state courts. Nor does the mere possibility of success in additional proceedings bar federal relief. Codispoti v. Howard, 589 F. 2d 135 (1978)

Petitioner, Therian Wimbush, after having been transferred to the Georgia Department of Corrections on February 3, 2017, filed her first state habeas corpus petition in the Pulaski County Superior Court on March 13, 2017. Petitioner was NEVER produced for a hearing, the respondent NEVER filed ANY defensive pleadings, and on April 11, 2017, the Pulaski County Superior Court entered an order denying on the merits and dismissing the habeas corpus petition. Petitioner raised the void conviction claim under her first ground of a denial of DUE PROCESS OF LAW. On May 5, 2017, petitioner filed her Notice of Appeal in the Pulaski County Superior Court. ~~and~~ On April 30, 2017, petitioner docketed her Application for Certificate of Probable Cause in the Supreme Court of Georgia, in strict compliance with OCHA § 9-14-52(b). Said Application was calendared for hearing in September 2017, during the August 2017 Term of Court for the Supreme Court of Georgia.

Based on the Georgia Constitution of 1983, Article VI,

Section IX, Paragraph II and Rule 3 of the Rules of the Supreme Court of Georgia, the Application for Certificate of Probable Cause shall have been decided no later than March 31, 2018. No opinion was issued until AFTER petitioner filed her petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia on May 11, 2018. The Supreme Court of Georgia granted the ~~the~~ Certificate of Probable Cause to Appeal on June 18, 2018 and in the same order vacated the Pulaski County Court's order, ruling on the merits, and remanded the case back with instructions to dismiss the habeas petition as premature. No appeal EVER ensued.

While the Application for Certificated Probable Cause was pending in the Supreme Court of Georgia, petitioner filed her second state habeas corpus petition in the Pulaski County Superior Court raising three grounds:

- (1) VOID JUDGMENT of conviction for LACK of JURISDICTION pursuant to U.S. Constitution Amendment XIV
- (2) DENIAL of DUE PROCESS, including kidnapping and false imprisonment pursuant to U.S. Constitution Amendment XIV
- (3) SUBJECTION TO FORCED SLAVERY in violation of U.S. Constitution Amendments XIII and XIV

Said petition was filed on June 30, 2017. A hearing was held on the petition on October 2, 2018 and the habeas Court entered an order denying relief, yet, again alleging that the January 30, 2017 filing at the Direct Appeal challenging the Gwinnett County Superior Court's January 6, 2017 order denying the statutory speedy trial motion for discharge and acquittal did NOT direct the trial Court of JURISDICTION to convict and sentence petitioner.

Petitioner, Therian Winbush, filed her Notice of Appeal challenging the Pulaski County Superior Court's December 3, 2018 denial of her habeas corpus petition on December 10,

2018. Petitioner also filed her Application for Certificate of Probable Cause in the Supreme Court of Georgia, which was docketed on December 26, 2018 and calendared for hearing in May 2019.

Petitioner, Therian Wimbush filed her 4th habeas corpus petition in the Pulaski County Superior Court on October 16, 2017 challenging the denial of her Motion for Bond Pending Appeal, without a hearing, by the Guinneth County Superior Court. Additionally, petitioner was challenging the refusal of the Guinneth Superior Court to transmit her Notice of Appeal and the record to the Court of Appeals, challenging the denial of appellate bond without a hearing. Said petition was heard on March 21, 2019, and despite petitioner's requests for the Court's compliance with OCSA § 15-6-21(c) which requires a decision within 30 days, no decision has been made.

Petitioners note that some of the facts included in this Petition were NOT presented to the U.S. Court of Appeals, nor to the U.S. District Court and assert that, normally, an appellate court will NOT consider facts that were NOT presented to the district court. We are, however, free to take judicial notice of subsequent developments in cases that are a matter of public record and are relevant to the appeal. Rothberg v. Security Mgmt Co., 667 F.2d 958 (11th Cir. 1982)

Petitioners also raised the VOID-CONVICTION claim in BOTH Appellant Briefs in the Court of Appeals of Georgia under the Denial of Due Process enumeration of error. Said error was NOT addressed by the Court of Appeals of Georgia. Hence, petitioners show that the Georgia appellate, and the State's HIGHEST court, the Supreme Court of Georgia, has ~~had~~ been afforded more than one COMPLETE and FULL opportunity to pass upon, ~~and~~ adjudicate, and correct the fairly presented VOID-CONVICTION claim and

failed and refused to do so. Petitioners further show that the State's highest Court has also failed and refused to comply with its own Constitution and statutory law, having failed to decide petitioner's Application for Certificate of Probable Cause within the requisite two terms.

The denial of a certificate of probable cause is an adjudication on the merits under 28 USC § 2254 Wilson v. Warden, Georgia Diagnostic Prison, 834 F.3d 1227 (2016). When a state habeas petitioner seeks a certificate of probable cause from the Georgia Supreme Court and the Court denies the request, the petitioner's case becomes complete when the Court issues the remittitur for the denial. OCGA § 9-14-52(a). This means that the case remains pending and tolled under 28 USC § 2244(d) (2) until the Court issues the remittitur. Dolphy v. Warden, Central State Prison, 823 F.3d 1342 (2016).

Hence, if the denial of a certificate of probable cause is considered an adjudication on the merits under 28 USC § 2254, and COMPLETES the requisite ONE FULL ROUND afforded to the state's highest court for exhaustion, then likewise the granting of the certificate of probable cause shall be considered a full exhaustion of the state's appellate review process. Again, petitioners are NOT required to file repetitious applications in the state courts. Nor does the mere possibility of success in additional proceedings bar federal relief. Cadispoti supra.

Federal Habeas Exhaustion Requirement - Futility

Under the federal habeas corpus statute, federal courts have been granted the power to provide relief for state prisoners held in custody in violation of the federal Constitution, laws, or treaties. The powers ~~are~~ were broadly designed so that they might sweep aside procedural constraints, jurisdictional limitations and resistant courts and release a prisoner unjustly constrained. While the habeas corpus power is plenary, 28 USC § 2254 mandates a GENERAL RULE of

abstention which requires a petitioner to exhaust ~~the~~ his state court remedies before resorting to the federal system. Abstention, however, is not to be exercised in every instance. Indeed, the statute itself provides that when state remedies are ineffective in the protection of a prisoner's rights, a federal court may hear the petition. It would be nothing less than abdication of the court's constitutional duty and function to rebut petitioners with this mechanical formula of failure to exhaust state court remedies whenever it may become clear that the alleged state remedy is nothing but procedural morass offering no substantial hope of relief. Deference to an available state court remedy does NOT imply powerlessness to afford the petitioner a prompt hearing when by reason of delay, the state process may prove to be ineffective to protect the rights of the prisoner. Exhaustion is designed to give the state an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights. Once the state has been afforded a full opportunity to adjudicate the matter, the exhaustion requirement has been met. Codisp v. Howard, 589 F. 2d 135 (A78)

The exhaustion requirement of 28 USC § 2254 (b) is NOT JURISDICTIONAL, and does NOT restrict a court's power to GRANT REVIEW in appropriate cases where the state remedies have not effectively protected the rights of a prisoner. State remedies will be found INEFFECTIVE and a federal habeas petitioner will be excused from exhausting them in the case of unreasonable, unexplained state delays in acting on the petitioner's motion for state relief. Cook v. Florida Parole and Probation Commission, 749 F. 2d 678 (11th Cir. 1985). A federal habeas petitioner need not wait until his state habeas petitions for relief are exhausted if the state court unreasonably or without explanation fails to address petitions for relief. 28 USC § 2254 (b) makes explicit exceptions that exist to the exhaustion requirement, when there is either an absence of existence

or circumstances rendering such process ineffective to protect the rights of the prisoner. Hollis v. Davis, 941 F.2d 1471 (11th Cir. 1991) State remedy found ineffective and exhaustion excused where the state habeas petition has been completely dormant for over a year, and the state has offered no reason for delay. Breazeale v. Bradley, 582 F.2d 5 (5th Cir. 1978) The forbearance required of the federal courts is based on the ASSUMPTION that the state remedies available to petitioner are ADEQUATE and EFFECTIVE to vindicate federal constitutional rights. When those state procedures become ineffective or inadequate, the foundation of the exhaustion requirement is undercut and the federal courts may take action. Pursuant to 28 USC § 2254(b), habeas relief generally should not be granted until the prisoner has exhausted his state court ~~remedies~~ remedies, UNLESS there exist circumstances rendering such process ineffective to protect the rights of the prisoner. Inordinate delay in adjudicating the state court claims can be such a circumstance rendering such state process ineffective to protect the rights of the prisoner and grant relief. Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992) This exception to the exhaustion requirement avoids reducing the GREAT WRIT to a sham and a mockery when the state process ~~seems~~ appears interminable. Mucie v. Mo. Dept. of Corr., 543 F.2d 633 (8th Cir. 1978)

Based upon section 2254, if a state fails to satisfactorily protect a prisoner's rights to review, federal courts are allowed to bypass the exhaustion requirement, for the exhaustion doctrine assumes that state remedies are ADEQUATE and AVAILABLE. Rose v. Lindy, 455 US 509 (1982) ~~ex~~ In analyzing exhaustion in each case, courts are to excuse noncompliance with the exhaustion doctrine ONLY if the inordinate delay is WHOLLY and COMPLETELY the fault of the state. Carter v. Estelle, 677 F.2d 427 (5th & 11th Cir. 1982) The exercise by the federal courts of their jurisdiction to entertain an application for habeas corpus by one confined under a judgment of a state court is not confined to those

rare cases where exceptional circumstances of peculiar urgency are shown to exist, but extends to any case in which the petitioner, having exhausted his state remedies, makes a substantial showing of a denial of a federal right either because the state affords no remedy, or because in the particular case the remedy afforded proves in practice unavailable or seriously inadequate. Ex parte Hawk, 321 US 114 (1944) Exceptional circumstances of peculiar urgency exist in several circumstances, most importantly for our purposes, the exhaustion doctrine will not be applied when the state system inordinately and unjustifiably delays review of a petitioner's claims, so as to impinge upon his due process rights. Shelton v. Hearn, 696 F.2d 1127 (5th Cir. 1983) An inordinate delay in the state court corrective process may well result in the frustration of petitioner's rights and be such a circumstance as to render that process ineffective. Rheunark v. Wade, 540 F.2d 1282 (5th Cir. 1976)

Argument

Question 4: What is the "Burker v. Wingo", "Doggett v. United States" type of criteria for excusing the non-jurisdictional federal habeas exhaustion requirement?

Under 28 USC § 2254(c) a petitioner must exhaust remedies available in courts of the state before seeking federal habeas relief. See 28 USC § 2254(b)(1)(A); O'Sullivan v. Boeckel, 526 US 838 (1999) The exhaustion requirement is not a jurisdictional obligation; it is a rule of comity that reduces friction between state and federal court systems by avoiding the unseenliness of a federal district court overturning a state court conviction without the state court having had an opportunity to correct the constitutional violation in the first instance. (Id.); See also Granberry v. Green, 481 US 129 (1987)

Although exhaustion of state remedies is mandatory, it

is well-established that a federal habeas petitioner need not wait until his state petitions for relief are exhausted if the state court has unreasonably or without explanation failed to address her claims for relief. Hollis v. Davis, 941 F.2d 1471 (11th Cir. 1991); see also Dixon v. Florida, 388 F.2d 424 (5th Cir. 1986). Reynolds v. Wainwright, 460 F.2d 1026 (5th Cir. 1972); Slater v. Chatman, 147 F. App'x 959 (11th Cir. 2005). This exception to the exhaustion requirement avoids reducing the GREAT WRIT to a sham and a muckery when a state process appears interminable. See Murrie v. Mo. Dept. of Corrs., 543 F.2d 633 (8th Cir. 1978).

Courts regularly find delays sufficient to trigger the exception to the exhaustion requirement. Indeed, the Court of Appeals for the Eleventh Circuit, when it was the old Fifth Circuit, found delays of as little as one year to be inordinate and particularly unjustifiable. See Breazele v. Bradley, 582 F.2d 5 (5th Cir. 1978) (finding that a case that was dormant for one year requires us to find say that the state remedy is INEFFECTIVE) Rhebeck, 540 F.2d @ 1283 (finding that a 15 month unexcused delay rendered that avenue of state relief practically unavailable); St. Jules v. Beto, 462 F.2d 1365 (5th Cir. 1972) (finding that a 17 month delay, if not justifiable, could serve as the basis for excusing the exhaustion requirement); Dixon, 388 F.2d @ 426. The Fifth Circuit still follows these pre-AEDPA cases when the exhaustion requirement and the undue delay exception were materially the same, compare 28 USC § 2254 (b) (1994) with 28 USC § 2254 (b) (2010).

Other Courts of Appeals have likewise found delays of similar and lesser lengths to be inordinate and potentially sufficient to excuse exhaustion. See O'Donnell v. Brill, 188 F.3d 519 (10th Cir. 1999) (noting that a delay beyond two years in the tenth circuit creates a presumption of ineffective state process) when the state court process has been so delayed the burden shifts to the state to demonstrate why exhaustion should still be required. Stony v. Kindt, 26

F.3d 402 (3rd Cir. 1994); see also Rhebeck, 540 F.2d @ 1283 (remanding for district court to determine whether delay was justifiable where petitioner had demonstrated inordinate delay.) This is a burden that is difficult to meet. In this case, the district court erred because it never required the state to meet its burden and show how a delay in ruling on a state habeas corpus petition and an Application for Certificate of Probable Cause that by statute, should be resolved WITHIN 30 DAYS, see. and within two court terms, see. OCGA § 15-6-21(a) and Ga. Const. of 1983 Art. VI, Sec. IX, Para. II, could possibly be justified. Had the Court required the state to justify the state court's lengthy delay in resolving habeas corpus petitions, especially given the VOID CONVICTION claim where the state CONCEDES to ALL the facts, there was but one conclusion it could have reached: there was no justification at all.

Since becoming the 11th Circuit, the district court and the Court of Appeals alike have cited Hughes v. Stafford, 780 F.2d 1580 (11th Cir. 1986) (refusing to waive exhaustion despite an EIGHT YEAR delay in adjudicating a habeas petition) and Jayner v. Baker, No. 1:07-CV-3737-JWT (2008) (finding that a ten month period that elapsed since the filing of a state habeas petition is not unreasonable.) to support the notion that even after a long delay has passed, if it is clear that the state court has awakened to its duties and that visible progress toward disposition of the case is being made, the federal court should typically require the petitioner to complete the available state procedures. Sloan v. Chatman, 2011 US Dist LEXIS 138988 (S. D. Ga. Jan. 31, 2011); see also Slater v. Chatman, 147 Fed App'x 959 (11th Cir. 2008).

It is important to recall that statutorily a state habeas corpus petition is to be RULED on within 30 DAYS, in small counties, and within 90 DAYS, in large counties. Furthermore, under the Georgia

Constitution and statutory law, the Supreme Court of Georgia is required to dispose of all its cases at the term for which it is docketed for hearing or in the next term. See OCGA § 15-6-21 (a) and (b) and Ga. Const. of 1983 Art. VI, Sect. IX, Para II. Thus, petitioners assert that any delay beyond 3 months for the ruling on a state habeas and beyond 8 months for a ruling on an Application for a Certificate of Probable Cause, raises a presumptively prejudicial threshold, requiring that the state meet its burden of justifying the delay.

Recall, that the forbearance required of the federal courts is based on the ASSUMPTION that the state remedies available to petitioner are ADEQUATE and EFFECTIVE to vindicate federal Constitutional rights. When those state procedures become ineffective or inadequate, the foundation of the exhaustion requirement is UNDERCUT and the federal courts may take action. Edwards v. Workman, Supra. It would be nothing less than ABDICATION of the Courts Constitutional duty and function to rebut petitioner's with this mechanical formula of failure to exhaust state remedies whenever it may become clear that the alleged state remedy is nothing ~~less~~ but procedural morass offering no substantial hope of relief.

Because this Court has no published authority addressing whether circumstances like petitioners' meet or excuse the exhaustion requirement, petitioners respectfully request that this Court exercise its Supervisory power and settle the important federal question of what constitutes extraordinary, or the like, circumstances sufficient to overcome or waive the federal habeas exhaustion requirement.

CONCLUSION

For the foregoing reasons and by addressing the important federal questions, this Court should GRANT the writ.