ORIGINAL

Case No. 20-8068

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN MARK MCDANIEL,
Petitioner-Appellant,

v.

EDWARD PHILBIN, Warden
Respondent-Appellee.

ON AN APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE FROM THE

SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

This case presents several issues of fundamental importance to the legitimacy of the United States' court system and the right of its citizens to be heard. The Constitutional right to Due Process, the right to the Effective Assistance of Counsel, and the validity of guilty pleas are implicated here.

In denying a Certificate of Probable Cause, the Supreme Court of Georgia declined to hear the appeal without issuing any explanatory Opinion. Under the Rules of the Supreme Court of Georgia and Georgia's self-established precedent in Redmon v. Johnson, 302 Ga. 763 (2018), when a petitioner shows an error in the proceeding below that, had it not occurred, would likely have caused the petitioner to prevail, the Supreme Court of Georgia has a mandatory duty to hear the case on its merits and no longer has discretion to decline to hear the case. The judge at the Habeas Court level, in the Final Order in the case (which was actually authored by Counsel for Respondent), rewrote three of the Grounds of the Habeas Petition from Ineffective Assistance of Counsel challenges into issues that may not be raised in Habeas Corpus. In ruling on the remaining Ineffective Assistance Ground, the Habeas Court applied standards of law that are in conflict with United States Supreme Court precedents.

This case provides one of the clearest sets of facts upon which this Court can resolve conflicting standards of law that have arisen in the Federal Circuit Courts of Appeal and the courts of the states regarding Weatherford v. Bursey, 429 U.S. 545 (1977), involving illegal intrusion by the government into the defense camp for the purpose of obtaining privileged Core Opinion Work Product.

A matter of first impression is also raised on the right to the Effective Assistance of Counsel where defense attorneys, due to ignorance of the law, failed to raise challenge against

the government's intentional theft of defense trial preparations and thereby waived a Constitutional right violation for which the only viable remedy was dismissal of the indictment with prejudice.

These proceedings give rise to the following questions:

1. Did the Supreme Court of Georgia abuse its discretion by refusing to grant a Certificate of Probable Cause to review the judgment of the Habeas Court?

2. Did the Habeas Court exceed its authority by altering the Grounds of the Habeas Petition so as to prevent litigation of and ruling on Petitioner's issues?

3. Did the Habeas Court apply an erroneous standard of law when it ruled that the voluntariness of a plea is determined solely by whether a defendant is advised on the record of his rights as set out in Boykin v. Alabama, 395 U.S. 238 (1969), and that performance and advice of counsel, challenged as constituting Ineffective Assistance of Counsel, cannot have bearing on the decision to accept a plea agreement?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

- *The State of Georgia v. Stephen Mark McDaniel,* 11-CR-67684, Bibb County Superior Court
- *The State of Georgia v. Stephen Mark McDaniel,* 13-CR-69874, Bibb County Superior Court. Judgment entered April 14, 2014.
- *Stephen Mark McDaniel v. Edward Philbin,* 2018-RCHM-2, Richmond County Superior Court. Judgment entered September 9, 2019.
- *Stephen Mark McDaniel v. Edward Philbin,* S20H0313, Supreme Court of Georgia. Judgment entered November 2, 2020. Rehearing denied December 7, 2020.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Grounds of the Habeas Corpus Petition (Supporting Facts omitted here due to length) are included as Appendix A. The Final Order of the Habeas Court is included herein as Appendix B. The unpublished Order of the Georgia Supreme Court denying review of the Habeas denial is included as Appendix C. The unpublished Order of the Georgia Supreme Court denying Reconsideration is included as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a), arising from violation of rights and privileges under the United States Constitution. The Habeas Court's Final Order was entered on September 9, 2019, and was timely appealed. The Georgia Supreme Court denied review on November 2, 2020. The Georgia Supreme Court denied reconsideration on December 7, 2020.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the 5th, 6th, and 14th Amendments of the United States Constitution, bearing on the rights of United States citizens to Due Process, the Voluntariness of a Plea, and the Right to Effective Assistance of Counsel.

United States Constitution, Amendment V.

> "**No person shall** be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor **be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI.

> "**In all criminal prosecutions, the accused shall enjoy the right** to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and **to have the Assistance of Counsel for his defence."**

United States Constitution, Amendment XIV (Procedural Due Process Clause only).

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall** make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State **deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was arrested on June 30, 2011 in Macon, Georgia. An indictment was issued November 15, 2011 (11-CR-67684), which was superceded by a later indictment on October 29, 2013 (13-CR-69874). On November 13, 2013, the case was reassigned from Chief Judge S. Phillip Brown to Judge Howard Z. Simms, who had participated in the investigatory phase of the case and had issued a Court Order manifesting a belief in the guilt of the accused based on *ex parte* communications prior to his assignment to the case. Defense Attorneys made no challenge seeking Judge Simms recusal.

On April 14, 2014, on advice of counsel, Petitioner accepted a plea agreement from the State and received a sentence of Life In Prison with the Possibility of Parole. In 2017, Petitioner began preparing a Habeas Corpus action. On July 11, 2017, Petitioner received portions of his case file from Defense Counsel. Petitioner discovered Defense Counsel had been in possession of documentary evidence, in the form of 9-1-1 Call Communications and paperwork, that showed the falsity of State testimony used to protect a search challenged by the Defense as violative of the 4th Amendment, yet the false testimony was not impeached by Defense Counsel. Other documents revealed that the Bibb County District Attorney prosecuting the case had communicated with the jail's Chief Deputy and had Petitioner's Legal Information Request Forms removed from the United States Postal Service, copied, and emailed to the District Attorney, who distributed the Defense Trial Preparations throughout his Office for use by the Prosecution. Defense Counsel learned of the intrusion in January 2013, but raised no challenge to the theft of Core Opinion Work Product.

Petitioner filed an Application for Writ of Habeas Corpus in the Richmond County Superior Court on February 20, 2018. Petitioner filed numerous pre-hearing motions. Both Defense Attorneys, the District Attorney, and the Chief Assistant District Attorney were subpoenaed by Petitioner and required to produce their case files at the hearing. On August 17, 2018, the first part of the bifurcated Habeas hearing took place. The District Attorney failed to appear after being told by Counsel for Respondent that he did not need to appear (8-17 Habeas Hearing Transcript page 79, lines 5-13). The remainder of the hearing took place on November 30, 2018. In the intervening time, the Habeas Court received and enacted *ex parte* proposed orders from Counsel for Respondent. All challenges by Petitioner related to that misconduct were denied.

On September 9, 2019, the Habeas Court enacted Respondent's proposed Final Order, which Petitioner had challenged when it was submitted due to its altering of the Grounds of the Habeas Petition, failure to comply with Georgia statutes, and application of incorrect standards of law. Petitioner made timely application to the Georgia Supreme Court for a Certificate of Probable Cause to appeal the denial of Habeas Corpus relief. On November 2, 2020, the Georgia Supreme Court denied review. Petitioner timely moved for Reconsideration. The Georgia Supreme Court denied Reconsideration on December 7, 2020. Both denials were by unpublished order without opinion.

This Application for Certiorari follows.

REASONS FOR GRANTING THE WRIT

The first question presented involves the availability of the right of review in a highest state court, and whether that court can refuse an appeal when an appellant has satisfied the requirements set forth in precedent by that same court.

The great writ of Habeas Corpus is intended to protect citizens from imprisonment derived from violation of Constitutional rights. When a Habeas Court departs from binding precedent set by this Court, the purpose of the writ is frustrated. State courts of highest review exist to correct lower courts when clear error has occurred. Georgia's Supreme Court has, instead, refused to correct a lower court that violated Georgia statutory and case law authority and ruled in a manner inconsistent with United States Supreme Court precedent. If state appellate courts are not bound by either their own precedents or the decisions of this Court, then the message conveyed to the public is that justice is not a right, but a favor to be bestowed at the whim of a state's high court. If there is to be faith in the integrity of our judicial system, state courts must see justice is done by upholding the Constitutional rights of citizens.

The second question bears on the extent of judicial authority and the right to seek redress of grievances from the government. The system of resolving disputes by bringing a matter before a neutral arbiter, so he or she may impartially decide the case, is a cornerstone of our society. The judge hears both sides, applies the law as set out by statute and court opinions, and enters a ruling, which resolves the dispute. That concludes any dispute between the parties with finality. In this case, that did not happen, because the judge did not enter a ruling on the matter in dispute. Instead, the Habeas judge signed into effect an order written by Counsel for Respondent that ruled on matters not presented, denying Petitioner the opportunity for resolution of the matter in dispute.

If a judge can rewrite a party's framing of a case, there is no longer a right to be heard - only a privilege granted to those favored by the one who sits the bench. If there is no right to be heard, then there is no reason for citizens to waste time by appealing to a judicial dictator, and

people will have reason to resort to baser means of settling disputes, the point sought to be avoided by establishing a neutral court system.

The third question is about whether the United States Supreme Court and the United States Constitution have authority in the State of Georgia. The ruling of the Habeas Court ignored and drastically departed from binding precedent. On matters of the Voluntariness of a Plea, this Court has set out the proper way to evaluate a claim, but the Habeas Court truncated the legal standard to bar a full and fair hearing - holding a formulaic advisory at a plea hearing is the sole determinant of voluntariness, and that the actions and advice of counsel have no possible bearing on the validity of a guilty plea.

If the Habeas Court's standard is correct, defendants may be lied to and undermined by their own lawyers, denied meaningful aid, and cannot then challenge a plea of guilty caused by their lawyer's acts and omissions, so long as they are told on the record that they have certain rights. If the standard for valid pleas has fallen so far, then there can be no public confidence in the validity of convictions come at by means of a guilty plea.

The third question also presents an opportunity for resolution of a split in authority on a matter of Constitutional law. Federal district courts, federal Circuit Courts of Appeal, and state courts of final review have arrived at widely varying standards for how to evaluate and resolve when the government intrudes into the defense camp and obtains privileged information. No court of record has ever resolved a case in which a conviction was challenged on Ineffective Assistance of Counsel arising from the failure to litigate a government invasion of the defense camp, and on that point, this is a case of first impression. This Court has crafted the framework to evaluate 'failure to litigate' claims, and the essential facts concerning the underlying claim are clear in the record, but the standard to evaluate the underlying claim has not been set forth in

clear terms by this Court. A ruling on this issue by the Court would clarify the law and put an end to contradictory rulings that make Constitutional protection dependent upon where a person lives. The facts of this case on this issue are also particularly egregious, and would deliniate clear boundaries of what constitutes impermissible prosecutorial misconduct.

Question 1: Appellate review is the only available safeguard guaranteeing the obedience to the law by lower courts. Rights of appeal are typically conferred by statute, which are then interpreted and restricted by Court Rules and case law. In Redmon v. Johnson, 302 Ga. 763 (2018), the Georgia Supreme Court set out its standard for hearing an appeal in Habeas Corpus. In short, if an appellant raises an error of arguable merit by the Habeas Court and would have had a reasonable likelihood of succeeding had the error not occurred, the Georgia Supreme Court no longer has any discretion to refuse to hear the case, but hearing the case becomes mandatory. *Id.* at FN2.

The Georgia Supreme Court, in the case below, refused to hear Petitioner's appeal. They gave no rationale for disregarding their own precedent. *See* Appendices C and D. Petioner listed six errors in his Application for Certificate of Probable Cause. The application to the Georgia Supreme Court detailed how the Habeas court did not apply the test for Effective Assistance of Counsel as set by the United States Supreme Court, how the Habeas court did not adjudicate the matters raised in the Habeas Petition (instead rewriting the Grounds to issues not able to be raised in Habeas Corpus), and how the Habeas court otherwise violated the law. The Georgia Supreme Court was shown that had the Habeas court ruled on the actual Grounds and applied the standards of law the United States Constitution requires, the Habeas Court would have been required to rule for Petitioner.

The Georgia Supreme Court goes on at length in Redmon v. Johnson, *supra.*, about their duties and diligence. While holding themselves out as the embodiment of the judicial ideal, and attempting to backhandedly demean the Justices of the United States Supreme Court, Georgia's Court tells how they have the duty of overseeing lower courts. They do not do so, and sit far from what the legal profession aspires to be. Georgia trial level courts act with little to no regard for what case precedent set by Georgia appellate courts or this Court requires, and the Georgia Supreme Court rarely, if ever, takes action to correct them.

In Kyles v. Whitley, 514 U.S. 419 (1995), this Court held that in evaluating Ineffective Assistance of Counsel claims, Prejudice was to be considered collectively. Only last year, in State v Lane, 308 Ga. 10 (2020), did the Georgia Supreme Court adopt that standard, 25 years after the fact. The Habeas Court's ruling was issued before the Cumulative Prejudice rule was applied in Georgia. Thousands have found themselves incarcerated since then and denied relief when challenging Ineffective Assistance of Counsel because Georgia courts applied a standard giving less protection to them than the Constitution required. This is one of the more glaring examples, most being, by design, surreptitious.

Georgia's practice of ignoring Supreme Court rulings is not widely publicized because, as in this case, when the misconduct is complained of, the appellate court responsible for review hides it. By issuing an unreported opinion when the Georgia Supreme Court does rule, the only people aware of it are the parties, not the public. Alternately, the Georgia Supreme Court declines to hear the case at all. When the rulings of a lower court are indefensible and embarrassing to the judicial system, the Georgia Supreme Court enters an unpublished order declining review, and the errors don't reach public knowledge.

This case is a one of the best exemplars of misconduct in case law.

The Prosecution stole Defense Core Opinion Work Product (Habeas Petition Exhibits C, E), then exploited the privileged materials to elicit false testimony to protect an illegal search. (8-17 Habeas Transcript Petitioner's Exhibit 5). Without the police claims concerning that search, police could not have established Probable Cause for the search warrants, which they obtained from the Superior Court judge for whom Petitioner had worked as a Clerk. As virtually all evidence that the Prosecution intended to present was derived from those warrants or their progeny, if the Prosecution lost the search, their case would have imploded. (11-30 Habeas Transcript Petitioner's Exhibit 23).

The defense attorneys failed to investigate by not even properly examining Discovery, overlooking an FBI memorandum that showed police submitted 'evidence' to them 2 days before police claimed to have found it. (11-30 Habeas Transcript Petitioner's Exhibit 21, pages 168-171). They failed to research the law when they learned the Prosecution had stolen privileged Defense trial preparations (11-30 Habeas Transcript page 181, lines 20-24). They failed to advocate on their client's behalf, and advised a guilty because they didn't know the law and wouldn't do their job.

The Habeas judge ignored the Grounds of the Habeas Petition and rubber-stamped a legally deficient final order written by opposing counsel. Then, the Georgia Supreme Court violated its duty by refusing to hear the case.

Petitioner showed the Georgia Supreme Court that the Habeas Court had not ruled on the Grounds of the Habeas Petition. The Grounds were set out in clear terms. (*See* Appendix A). The Final Order did not address those Grounds. (*See* Appendix B). A judge's absolute duty is to hear and decide cases within their jurisdiction brought before them. *See* United States v. Will, 449 U.S. 200, 214-215 (1980). Parties "frame the issues for decision," and the judge rules as a

"neutral arbiter of matters" presented for consideration. *See* Greenlaw v. United States, 554 U.S. 237, 243 (2008). This Court has corrected judges who rewrote statutes or administrative regulations, for exceeding their authority. *See* Jennings v. Rodriguez, 138 S.Ct. 830, 843 (2018); Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F., 526 U.S. 66 (FN6) (1999). No court of record of which Petitioner is aware has issued an opinion on a judge altering the Grounds of a Habeas Petition. If a judge can, with the flick of a pen, cast out a meritorious case by altering the issues presented, then there is no right of access to the courts - only a privilege dispensed at the whim of those who sit the bench.

When the Georgia Supreme Court had a chance to set precedent on this, it refused. (*See* Appendix C). When it had a second chance, it again refused. (*See* Appendix D). No legitimate argument could be made to defend the misconduct of Counsel for Respondent and the Habeas Court changing Petitioner's Grounds, so the Georgia Supreme Court avoided the problem by, proverbially, sweeping it under the rug. The practice of having opposing counsel write the order on a case, while not explicitly unconstitutional, certainly raises Due Process concerns when the practice allows one party to effectively act as both advocate and judge.

The Habeas Court's ruling that voluntariness of a plea is solely based on advisement of three rights under Boykin v. Alabama, 395 U.S. 238 (1969), was incorrect and contrary to the text of the case itself, yet the Georgia Supreme Court wouldn't apply its own rulings about the legal standard. The Habeas Court's Ineffective Assistance analysis did not comply with Strickland v. Washington, 466 U.S. 668 (1984), but the Georgia Supreme Court would not confer the protection of the United States Constitution on a Petitioner who shown prejudicial deficient performance by his lawyers as a matter of fact, law, and logic.

Petitioner does not seek a rule giving petitioners the same, absolute right of appeal in Habeas Corpus that is given to the State of Georgia. Petitioner only seeks that the very precedent that the Georgia Supreme Court wrote actually be enforced. When lower courts exceed their judicial authority and refuse to abide by the United States Constitution, when an applicant for review shows such error, an appellate court should comply with its self-designated duty, hear the case, and grant relief.

The greatest difficulty here is that even if the United States Supreme Court made a ruling directing the Georgia Supreme Court to apply the law as set forth in precedents, Georgia would likely not comply. Anything short of an order setting the facts to be held, the law to be applied, and the application of the law to those facts for the Georgia Supreme Court will have this case returning to this Court over the same problem raised here - that Georgia does not enforce Constitutional rights. Only by rendering a final decision itself could this Court guarantee this case be properly concluded.

Question 2: The Habeas Court did not rule on the Grounds of the Habeas Petition. Petitioner challenged his conviction as product of violation of his right to Effective Assistance of Counsel, setting forth numerous specific instances of failures by Defense Counsel. (*See* Appendix A). Rather than address these violations, the Habeas court took the first three Grounds of the Habeas Petition and changed them into other grounds, which it then ruled couldn't be raised. The Final Order held that its rewritten Grounds 1, 2, and 3 were waived by entry of a voluntary guilty plea. *See* Appendix B, pp. 20-22.

The Habeas Court's purpose in reframing Petitioner's Habeas Grounds is simple: to prevent meritorious grounds being litigated. The State used perjured testimony, based on stolen Defense opinion work product, to protect an illegal search of Petitioner's home. Defense

Attorneys allowed this, despite having irrefutable evidence of the falsity of State testimony and proof of the theft by the prosecution. Defense Attorneys allowed the theft and exploitation to go unchallenged because they were ignorant of the law and didn't perform legal research to determine what the legal effect of the misconduct was. The State had *ex parte* communications with Judge Simms prior to his assignment to the case, on the basis of which he formed an opinion toward Petitioner's guilt. Defense Attorneys raised no challenge to his assignment denying Petitioner his right to a fair and impartial judge.

Competent counsel would have litigated each of these challenges, because each would have substantially altered the case's position in favor of Petitioner. Showing the State falsely represented voluntary consent for a search when Petitioner was incapable of giving it would have deprived the State of a search that was the basis of all subsequent search warrants, and thus nearly all evidence in the State's case. With little to no evidence in the case, no competent attorney would advise a client to plead guilty.

Showing the State had tainted the impartiality of the trial judge, thereby denying a defendant the possibility of a fair trial, would have required an impartial judge be assigned. *See* In re Murchison, 349 U.S. 133 (1955). No competent lawyer would choose to subject his client to trial before a prejudiced judge instead of an impartial one.

Showing the State had intentionally invaded the Defense camp and seized Core Opinion Work Product, without any legitimate excuse, and that those prosecuting the case had been provided the privileged materials would have had the case dismissed with prejudice. No competent attorney would counsel his client to plead guilty when he could advise his client that the prosecution was irreparably tainted by prosecutorial misconduct and that the charges could be thrown out if they just raised a challenge.

The Habeas Court had to materially reframe the case, because no one could excuse such a slew of failures by defense attorneys. Any lawyer who would advise a client to plead guilty when he had the means to dismiss the case is a person unfit to practice law. To evade making such a ruling, the Habeas Court changed the Grounds. The altered Grounds couldn't be raised because 'there was a valid guilty plea' and the guilty plea couldn't be invalid because the altered Grounds 'couldn't affect the validity of the plea.'

The ruling is an Ouroboros, the snake eternally consuming itself, for it, in effect, declares 'you can't challenge your guilty plea because you pled guilty.'

A judge's job is to hear and decide cases that parties bring before them, not to decide what claims can be stated. *See* United States v. Will, 449 U.S. 200, 214-215 (1980). It is the duty of parties to set out the matters to be heard and present evidence to prove their claims, and it is the duty of the judge to make a determination of what proof has been shown and enter a ruling that complies with the law. *See* Greenlaw v. United States, 554 U.S. 237, 243 (2008).

If a judge can rewrite a complaint to make a claim invalid, then cases will be decided not on the facts and the law, but on who the judge likes more, and seldom if ever will a Habeas petitioner find himself before a judge predisposed more toward a prisoner than a fellow member of the legal profession.

Question 3: The Habeas Court did not apply the law to the facts of the case, because case law favored Petitioner. Ineffective Assistance, under Strickland v. Washington, 466 U.S. 668 (1984), requires a defendant show Error and Prejudice - that counsel performed deficiently and that the defendant was harmed as a result of counsel's unreasonable acts or omissions. In the context of a 'failure to litigate' claim, if a meritorious challenge existed but was not raised, there has been deficient performance, and Error is shown; if the meritorious challenge had been raised,

and there is a reasonable likelihood the outcome of the case would have been more favorable to the defendant as a result of the challenge, then the defendant has been harmed by the failure to litigate, and Prejudice is shown. *See* Kimmelman v. Morrison, 477 U.S. 365 (1986).

After rewriting them, the Habeas Court ruled that Grounds 1, 2, and 3 were waived by entry of a guilty plea. Looking to the actual Grounds submitted by Petitioner, there is no source of law that has held Ineffective Assistance claims attacking a guilty plea are waived by a guilty plea, and such a rule would be incompatible with the law. This Court long ago ruled a plea is subject to attack on the basis on Ineffective Assistance of Counsel. *See* McMann v Richardson, 397 U.S. 759 (1970). Challenges against guilty pleas for Ineffective Assistance of Counsel are governed by Hill v. Lockhart, 474 U.S. 52 (1985). Normally, the test is whether the defendant would have pled 'not guilty' and proceeded to trial if counsel had provided effective assistance, but there are unique instances where that test would not reach the actual issue. There are cases where a defendant pleads guilty on advice of counsel in which, had counsel been competent, there would have been no trial, because the case would have been dismissed.

The Georgia Supreme Court found Ineffective Assistance of Counsel when a defendant pled guilty on advice of counsel who failed to assert a valid Double Jeopardy claim, and where counsel failed to seek suppression of involuntary statements. *See* Gerisch v. Meadows, 278 Ga. 641 (2004); Oubre v. Woldemichael, 301 Ga. 299 (2017). In each instance, competent litigation would have either dismissed the case outright or resulted in the case being dropped for lack of essential evidence. Elsewhere, lawyers have been ineffective for failing to challenge fatally defective indictments after jeopardy attached, or failing to have a case dismissed for Speedy Trial violation. *See* Everhart v. State, 337 Ga. App. 348 (2016); Crawford v. Thomas, 278 Ga. 517 (2004). There, defendants had a means of being released by matter of law that their lawyers

didn't pursue, and won on direct appeal or in subsequent collateral appeal. Under the Habeas Court's ruling, if those defense lawyers had advised their clients to plead guilty, there would have been no Ineffective Assistance of Counsel. Had the defendant in Gerisch v. Meadows, supra., been before Petitioner's Habeas Court, the defendant could not have obtained relief.

An attorney's failure to raise a meritorious challenge has been recognized as Ineffective Assistance for well over 30 years. *See* Kimmelman v. Morrison, 477 U.S. 365 (1986). The evaluation of the Ineffective Assistance of Counsel claim is coextensive with the underlying issue. *Id. See also* Upton v. Parks, 284 Ga. 254, 255 (2008); Henderson v. Hames, 287 Ga. 534, 537 (2010); Schofield v. Palmer, 279 Ga. 848, 851 (2005). As in Gerisch v. Meadows, *supra.*, here, defense attorneys had a means of dismissal, and failed to use it.

While the Habeas Court is fond on quoting Tollett v. Henderson, 411 U.S. 258 (1973), its reading of that case is highly selective, to the point of dishonesty. A key point of Tollett that the Habeas Court would not acknowledge is:

> "If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases. Counsel's failure to evaluate properly facts giving rise to constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof." *Id.*, at 266-267.

The Habeas Court held in its Final Order that the validity of a guilty plea rested solely on whether Petitioner had been advised of his rights to a jury trial, to compulsory process of witnesses and the right to subject the Prosecution's witnesses to cross-examination, and of the privilege against self-incrimination. *See* Appendix B, pp. 22-24. A defendant relies on the advise of counsel in determining whether or not he will testify, what defenses may exist, how to plead, and when counsel fails to fully advise a defendant of available courses of action to the detriment of the client, the lawyer renders Ineffective Assistance. *See* Hill v. Lockhart, 474 U.S.

52, 59 (1985); Padilla v. Kentucky, 559 U.S. 356 (2010); Missouri v. Frye, 566 U.S. 134 (2012). The Second Circuit Court of Appeals phrased the point eloquently:

> "Everything that occurs prior to a guilty plea or entry into a plea agreement informs the defendant's decision to accept or reject the agreement. An ineffective assistance of counsel claim survives the guilty plea ... where the claim concerns the advice [the defendant] received from counsel." Parisi v. United States, 529 F.3d 134, 138 (2nd Cir. 2008).

Because defendants, once they are represented by an attorney, cannot raise any challenges before the court, the defendant is reliant upon the attorney to act in the client's best interest. If a meritorious challenge exists that would affect the case, the lawyer is the only one who may raise it. A defendant is entitled to effective assistance from his or her trial lawyer at every critical stage of the case, from arraignment to pre-trial to trial or entry of a guilty plea. *See* Lafler v. Cooper, 566 U.S. 156 (II)(B) (2012).

Here, Defense Attorneys learned the government had stolen privileged defense trial preparations. The Defense Attorneys did not know what kind of violation such theft constituted. (11-30 Habeas Transcript pages 109-110). The Defense Attorneys did not know what relief the violation of their client's rights could provide. (11-30 Habeas Transcript page 183, lines 8-13). The Defense Attorneys "didn't look up any cases" related to the violation of the 6th Amendment. (11-30 Habeas Transcript page 181, lines 20-24). When a lawyer is ignorant of a point of law essential to his client's case and fails to perform even basic legal research to evaluate a challenge's viability, the lawyer gives a "quintessential example" of deficient performance. *See* Hinton v. Alabama, 571 U.S. 263, 274 (2014). Defense Counsel's ignorance of the law, as a matter of law, satisfies the Error prong of the Strickland v. Washington analysis.

When a lawyer does not raise a valid challenge, or fails to advise the client of its existence, the effectiveness of the lawyer's performance turns on the merit of the underlying

challenge. *See* Kimmelman v. Morrison, 477 U.S. 365 (1986). If the unlitigated challenge would have altered the outcome of the case, a defendant going to trial instead of entering a guilty plea (or the case being dismissed entirely), then the defendant has been deprived of the effective assistance of counsel. *See* Hill v. Lockhart, 474 U.S. 52, 59 (1985); Lafler v. Cooper, 566 U.S. 156 (2012). *See also* Gerisch v. Meadows, 278 Ga. 641 (2004); Oubre v. Woldemichael, 301 Ga. 299 (2017).

The Habeas Court took the stance that, because the lawyers achieved a sentence of "Life With the Possibility of Parole" (requiring 30 years be served before a person may be *considered* for parole) instead of "Life Without the Possibility of Parole," their performance was effective and their ignorance of the law and failure to litigate a challenge that would have dismissed the case was "wise" trial strategy. *See* Appendix B pages 25-26. That's like saying a doctor amputating the wrong leg was good medical practice because at least he didn't kill the patient.

Petitioner argued that Defense Attorneys were ineffective by advising in favor of a plea agreement when they had an available challenge that would have dismissed the indictment with prejudice. Competent counsel would have filed a challenge against the government's intentional theft of privileged material and the case would never have reached trial. The Habeas Court looked at the matter as being only a choice of pleading out to 'Life With' or going to trial and receiving 'Life Without.' That is a false dichotomy, because it refuses to consider that competent counsel would have had the case dismissed.

The facts of the Weatherford v. Bursey-type violation are not in dispute. Following his arrest, Petitioner was held in the Bibb County Jail, where his lawyer tasked him to work on defense preparations for his case. (8-17 Habeas Transcript page 99, lines 13-16). Petitioner researched matters of involuntary statements, police custody, mental impairment, consent

obtained by deceit, consent given under duress, withholding medical care, and a substantial number of other topics. (Habeas Corpus Petition Exhibit E). On December 30, 2011, Chief Deputy Russell Nelson, at the District Attorney's behest, emailed copies of Petitioner's Legal Information Request Forms that he had taken out of the mail to the District Attorney. (Habeas Corpus Petition Exhibits C, E). The District Attorney forwarded the forms to other members of the D.A.'s Office. (Habeas Corpus Petition Exhibit C). Defense Attorneys were told of the theft of privileged material in January 2013. (11-30 Habeas Transcript pages 109-110). They filed no challenge against the theft. (11-30 Habeas Transcript pages 117-118).

On September 16 and 17, 2013, the Prosecution knowingly elicited perjured testimony from witnesses. In questioning Sgt. Chapman, the Prosecution asked if anyone did withhold care from Petitioner, an almost verbatim restatement of Petitoner's research topic from one of the stolen Legal Information Request Forms. (Habeas Corpus Petition Exhibits E, S2 page 182 lines 20-21). Dozens of questions were asked about the subjective beliefs of whether Petitioner was in custody, a topic brought up repeatedly in Petitioner's research. (Habeas Corpus Petition Exhibits E, S1, S2). The Prosecution elicited false testimony to the effect that an ambulance had been called and Petitioner, following a life-threatening loss of consciousness, had been medically cleared. (Habeas Corpus Petition Exhibit S2 page 216, lines 7-14). While an ambulance did, indeed arrive at the scene, Petitioner was never medically cleared, because police would not let EMS make contact with Petitioner. (Habeas Corpus Petition Exhibits T2, L10; 11-30 Habeas Transcript pages 63-73). Defense attorneys not only had the paperwork to show the Prosecution was exploiting stolen Defense opinion work product, but also had the evidence to prove the Prosecution was eliciting perjury about the case, and *still* the Defense attorneys did *nothing*. (Habeas Corpus Petition Exhibits T2, L10).

The State admitted Petitioner had fallen unconscious, and dropped into a non-responsive, catatonic condition, but 'cured' the lack of capacity to consent to a search by asserting an ambulance was called and the crew medically cleared him, so as to convey a recovery, 'cleared' by independent medical responders. (Habeas Corpus Petition Exhibit S2 page 216, lines 7-14). The State asserted Petitioner spoke with police and gave permission for a search of his home, which search constituted the core Probable Cause for all subsequent search warrants. (11-30 Habeas Transcript Petitioner's Exhibit 23).

Showing how Petitioner was severely disabled and incapable of communication at the same time police claimed Petitioner was 'striking up a conversation' with police to give consent for a search (11-30 Habeas Transcript Petitioner's Exhibit 23), and that police prevented those with medical expertise from examining him, guaranteeing the only accounts of what happened were by police, would have caused any rational trier of fact to find the State had searched illegally, and showed bad faith by the prosecution. Without that search, the State would have had no sufficient factual basis to establish Probable Cause for search warrants, depriving the State of every piece of evidence relied upon by the prosecution from Petitioner's home. Rather than fight, though, Defense Attorneys surrendered with only a false showing of resistance.

Weatherford v. Bursey, 429 U.S. 545 (1977), is the landmark case on government intrusion into the defense camp. In the years since this Court decided that case, several differing standards for evaluating such claims have been established throughout this nation's courts, state and federal. In United States Ex Rel. Shiflet v. Lane, 625 F. Supp. 677 (N.D. Ill. 1985), the Court held that even absent an intentional intrusion by the government, the windfall of privileged information that was used to obtain evidence was prejudicial. On appeal, in United States Ex Rel. Shiflet v. Lane, 815 F.2d 457 (7th Cir. 1987), the Circuit Court reversed not on the merits of

the holding, but on the fact that no indictment had issued, so the 6th Amendment hadn't attached when the information was conveyed. This Court declined to hear the appeal in Shiflet v. Lane, 485 U.S. 965 (1985). In Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983), the Sixth Circuit held the possession by the Prosecution of privileged defense strategy documents and their use by the Prosecution prejudiced the defendant, even though the documents were not intentionally sought.

Most cases deal with intentional intrusions, and three major standards of evaluation have emerged. The Third Circuit and the D.C. Circuit have both held that when a defendant shows the government intentionally intrudes into the defense camp without legitimate authority or lawful justification, obtains defense opinion work product, and communicates the obtained privileged material to those prosecuting the case, a *per se* violation has occurred, and the case must be dismissed with prejudice. *See* Briggs v Goodwin, 698 F.2d 486 (D.C. Cir. 1983); United States v. Levy, 577 F.2d 200 (3d Cir. 1978). *See also* United States v. Peters, 468 F. Supp. 364 (S.D. Fla. 1979). The courts have held dismissal the only viable remedy because of the impossibility of purging the taint of the misconduct, as well as the need to uphold the integrity of the justice system. Several states have held the same standard. *See* Graddick v. Alabama, 408 So.2d 533 (1981); Barber v. Municipal Court, 24 Cal.3d 742 (1979); Connecticut v. Lenarz, 301 Conn. 417 (2011); South Carolina v. Quattlebaum, 527 S.E.2d 105 (S.C. 2000).

A second standard is that a defendant must make a *prima facie* showing of an intentional intrusion by the government into the defense camp, without justification, and a realistic possibility of prejudice. This has been the holding in United States v. Mastroianni, 749 F.2d 900 (1st Cir. 1984); Shillinger v. Haworth, 70 F.3d 1132 (10th Cir. 1995); Howard v. Georgia, 279 Ga. 166 (2005); United States v. Danielson, 325 F.3d 1054 (9th Cir. 2003); United States v. Roper, 874 F.2d 782 (11th Cir. 1989); Idaho v. Robins, 431 P.3d 260 (2018); Illinois v. McRae,

959 N.E.2d 1245 (Ill. App. Ct. 2011); Wiener v. Maryland, 430 A.2d 588 (1981); Pennsylvania v. Scarfo, 611 A.2d 242 (Pa. Super. Ct. 1992); Brewer v. Texas, 649 S.W.2d 628 (1983); Morrison v. Texas, 575 S.W.3d 1 (2019); Washington v. Garza, 994 P.2d 868 (2000).

A third approach requires a defendant to show the intentional intrusion by the government, but also make a showing of actual prejudice from the intrusion. United States v. Ginsberg, 758 F.2d 823 (2nd Cir. 1985); United States v. Chavez, 902 F.2d 259 (4th Cir. 1990); United States v. Steele, 727 F.2d 580 (6th Cir. 1984); United States v. Castor, 937 F.2d 293 (7th Cir. 1991); Clark v. Wood, 823 F.2d 1241 (8th Cir. 1987); United States v. Ofshe, 817 F.2d 1508 (11th Cir. 1987); Booker v. Florida, 969 So.2d 186 (Fla. 2007); Brown v. Kentucky, 416 S.W.3d 302 (Ky. 2013); Dowbak v. Missisippi, 666 So.2d 1377 (Miss. 1996); New York v. Tomao, 121 Misc. 2d 135 (N.Y. Sup. Ct. 1983); Oregon v. Russum, 265 Or. App. 103 (Or. Ct. App. 2014).

What all the courts have in common in their varying decisions of who has what burden are that when the government intentionally intrudes into the defense camp, it cannot have had a legitimate authority for having done so. If the government keeps an undercover agent in place only to keep the agent safe, or performs a search with lawful authority, absent an affirmative showing of prejudice, there has been no violation. If the government does not obtain any privileged material from the intrusion, there is no possible benefit to the government or prejudice to the defendant, so there has been no violation. If the government obtains privileged information, but does not communicate it to those prosecuting the case, the government cannot have gained an advantage, so there has been no violation. Only where the government intentionally intrudes into the defense camp without legal justification, obtains privileged information, and communicates that information to the prosecutors has a Constitutional violation occurred.

Unlike in Weatherford, here there was no interest in preserving an informant's cover. Chief Deputy Russell Nelson removed Petitioner's Legal Information Request Forms out of federal mail. To obtain the forms required Nelson to take the papers out of their designated receptacle and halt them from transport to their intended recipient. By its very nature, the completion of the act demonstrates the intent to perform the act.

There was privileged information obtained through intentionally illegal means. This Court set out the principles of the work product privilege in Hickman v. Taylor, 329 U.S. 495 (1947). In United States v. Nobles, 422 U.S. 225 (1975), this Court stated that materials prepared at the direction of an attorney in relation to a pending or impending case are covered by the work product doctrine. *Id.*, at 238-239. At no point did the State of Georgia or Counsel for Respondent ever claim any waiver or lack of privilege. Georgia did not claim that United States Mail is not privileged, a position the law would soundly reject. *See* United States v. Van Leeuwen, 397 U.S. 249 (1970).

The Defense Core Opinion Work Product was conveyed to those who prosecuted the case. Petitioner's legal research forms were attached to an email sent from Chief Deputy Nelson to the District Attorney, who was lead counsel for the State on the case for more than a year after obtaining Petitioner's work product.

The Supreme Court has had opportunities to revisit the law governing such misconduct by government agents, but has typically declined to do so. In United States v. Morrison, 449 U.S. 361 (1981), this Court reversed a *per se* rule requiring dismissal over government intrusion into the defense camp because there was no gain to the prosecution nor detriment to the defense. In Cutillo v. Cinelli, 485 U.S. 1037 (1988), dissenting Justices noted a split in authority between the Federal Circuit Courts that was in need of resolution. This Court declined to hear the State of

Connecticut's appeal from Connecticut v. Lenarz, *supra*, where Connecticut's highest court held the government's theft of defense strategy created an irrebuttable presumption of prejudice that required dismissal of the indictment. Last year, this Court denied review in Kaur v. Maryland, 141 S.Ct. 5 (2020), and Justice Sotomayor noted the Weatherford case in her concurrence.

The facts of this case fall much closer to Lenarz than to Kaur. Had Ms. Kaur raised challenge to the disclosure of the defense file before turning it over to the prosecution, perhaps her claim would have been ripe for review, but by failing to raise the challenge when the problem first arose, an extra layer of complexity was added to the case that would have added to confusion over the law if attempt was made to correct it.

The facts of this case present no extra layer of problematic confusion. The State of Georgia seized Petitioner's legal research that was being performed at the direction of Defense Counsel. The State had no search warrant, subpoena, or court order authorizing the seizure of the opinion work product. The privileged materials were communicated to the lawyer prosecuting the case, who further spread them among the prosecution. The Prosecution questioned witnesses on topics raised in Petitioner's legal research, going so far as to nearly quote one of Petitioner's forms to elicit perjury in defense of their misconduct.

What remains is to determine what standard applies. Under the first standard, because the prosecutors illicitly obtained Petitioner's legal research, the remedy for the violation to which Petitioner was entitled was dismissal of the indictment with prejudice. Under the second standard, because the prosecutors illicitly obtained Petitioner's legal research and failed to rebut the presumption of prejudice arising from that misconduct, Petitioner would be entitled to a remedy that adequately provided relief. Disqualification of the prosecutors would not cleanse their case file. Disqualification and creation of a new case file would not purge the exploitation

of the work in the record. Disqualification, creation of a new case file, and sealing the court record would not block the record of the case in the media and the former prosecutors. Disqualification, creation of a new case file, sealing the court record, and prohibiting new prosecutors from reading about or talking with others about the case would not undo the government's preparation of witnesses' testimony based on the stolen work product. If a court disqualified the tainted witnesses from testifying, then the State could not present evidence, and there would be no case. The only viable solution, because the Prosecution stole Core Opinion Work Product, would be dismissal of the indictment with prejudice. Analysis under the third standard differs only in Petitioner having to show the exploitation of the stolen work product - as demonstrated by the State's choice of questions including matters raised exclusively in Petitioner's legal research. Even under the harshest standard, Petitioner carried his burden, and the remedy is the same as required under the others - dismissal of the indictment with prejudice.

Because the failure to research and litigate the issue constituted Error by Defense Attorneys, and because the unlitigated challenge would have resulted in dismissal of the indictment had it been raised, Petitioner was Prejudiced by counsel's failure. As no reasonably competent lawyer would advise a client in favor of a guilty plea in exchange for a Life sentence over advising the client to raise a challenge that would have dismissed the indictment and sent him home, it can be concluded that Defense Attorneys' failure to advocate for dismissal and support for the plea agreement fell below the minimum standard for Effective Assistance of Counsel under the 6th and 14th Amendments of the Constitution, and render Petitioner's plea invalid.

In resolving the split among the Circuit Courts and states, Petitioner would advocate for the following test - that when the government obtains privileged defense materials without illicit

or unjustified intrusion into the defense camp and those materials are communicated to prosecutors, the defendant must affirmatively show he has been prejudiced thereby. Upon such showing, the prosecution should have opportunity to show a source for the prejudicial matter independent of the misconduct. If the prosecution cannot show an independent source for evidence, a new trial should be granted and the ill-gotten evidence excluded. If the defendant proves the prosecution exploited defense opinion work product, the prosecutors should be disqualified from the case and, on a case-by-case basis, the trial judge should take such other remedial measures as are necessary, up to and including possible dismissal of the indictment.

When the government obtains privileged defense fact work product by illicit or unjustified intrusion into the defense camp and those materials are communicated to the prosecution, a defendant should have to make a *prima facie* showing that the stolen privileged materials could benefit the prosecution or prejudice the defense. Upon that showing, the prosecution should have a heavy burden to show an independent source for the contested evidence. If it cannot, the prosecutors should be disqualified, a new trial should be granted, and all of the illicit evidence and any evidence obtained therefrom should be excluded, along with any other remedies the trial judge deems necessary.

When the government obtains privileged defense opinion work product by illicit or unjustified intrusion into the defense camp and those materials are communicated to the prosecution, a defendant should have to make a *prima facie* showing that the stolen privileged materials could benefit the prosecution or prejudice the defense. Upon that showing, the inquiry should cease. In order to safeguard the integrity of the adversary system of justice, when those prosecuting a case illicitly obtain defense opinion work product, the case should be dismissed with prejudice. Even with some lengthy curative order by a trial court attempting to salvage the

case, the bell cannot be unrung. For the public to have faith in the criminal justice system and the integrity of the courts, such misconduct must be met with only the harshest condemnation.

The analysis of the Weatherford v. Bursey-type violation is essential to determine the Prejudice prong of Ineffective Assistance. When defense counsel fails to inform himself of the law governing a violation of his client's rights, allows the violation to go unchallenged when litigation would have dispositively concluded the case in his clients favor, and instead counsels his client to accept a plea agreement, that lawyer has rendered Ineffective Assistance of Counsel and the plea resulting from the lawyer's deficient advice and performance is invalid.

Petitioner seeks relief from the confinement brought about by the State of Georgia's blatant disregard for the rule of law and the betrayal of duty by his Defense Attorneys. Petitioner appeals to this Honorable Court in the hope that those principles enshrined in our Constitution still apply.

> "Competent prosecution is faced by perhaps one or, at the most, two acquittals with at least every hundred criminal charges where nine out of ten are resolved by plea and the remaining trials favor conviction. Within these few cases, fairness, honesty and morality are not an undue burden on accomplished justice."
> Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1995)

CONCLUSION

Petitioner earnestly prays that this Honorable Court grant a writ of certiorari.

Respectfully submitted this 3rd day of May 2021