No. 22-7877

ORIGINAL

FILED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

COREY BLAINE COGGINS, Petitioner

Vs.

MURRAY TATUM, Warden, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF GEORGIA, CASE 20H0188

PETITION FOR WRIT OF CERTIORARI

COREY BLAINE COGGINS
#1127482
DODGE STATE PRISON
2971 OLD BETHEL ROAD
CHESTER, GEORGIA 31012

QUESTIONS PRESENTED

1. Is it ineffective assistance of counsel (guaranteed under the Sixth Amendment to the United States Constitution) for a client's court-appointed attorney, without the client's consent, to enter into a joint defense agreement with the paid attorneys of a client's co-defendant thereby unilaterally waiving the client's Fourth Amendment rights; and under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), or can those actions be classified as effective trial strategy?

2. When a District Attorney knowingly makes material misrepresentations to a trial court resulting in an adverse ruling substantially affecting a defendant, do those actions constitute structural ineffectiveness of counsel?

3. Did the Georgia courts improperly apply this Court's decision in Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972), in not setting aside Coggins' conviction based upon the State's failure to reveal the tacit or implied agreement with Timothy Wayne Osborne, a jailhouse informant who testified about an alleged "jailhouse confession", thereby resulting in a denial of Coggins' 14th Amendment due process rights?

4. Was Coggins afforded effective assistance of trial counsel and appellate counsel; and, did the Superior Court of Dodge County err in holding Coggins' legal representation was based upon trial strategy, was not prejudicial, and was not in

violation of Coggins' 6th Amendment right to have effective representation at his criminal trial and in his appeal to the Supreme Court of Georgia?

5. Did Appellate Counsel Peter Johnson provide ineffective assistance of appellate counsel by not raising ineffective assistance of Trial Counsel David Weber as requested by Coggins; in not raising the Brady-Giglio issue; in advising Johnson's former client, Timothy Osborne, of the penalty for perjury following Osborne's admission to giving perjured testimony in Coggins' case; and in not withdrawing from representing Coggins in Coggins' Motion for New Trial in order to become a witness for Coggins in order to impeach Osborne?

6. Do the provisions of O.C.G.A. § 9-14-42 giving the State of Georgia the right to appeal the grant of a petition for *habeas* relief, but requiring that a Petitioner file an Application for Appeal, result in a denial of one's 14th Amendment procedural and substantive due process rights, which in this case resulted in an additional forty (40) month delay in the resolution of the *habeas* appeal and, when added to the other delays in the handling of the motion for new trial and appeal, have resulted in a total time from conviction to denial of the Application for Appeal of 203 months that were raised in the motion before the Georgia Supreme Court and denied on February 7, 2023?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Petitioner is COREY BLAINE COGGINS (hereinafter "Coggins"), who is currently confined in Dodge State Prison in Chester, Georgia and has been in custody since June, 2005.

The Honorable Carl C. Brown, Jr. (now retired), the judge in Coggins' 2006 criminal trial and the judge who sentenced Timothy Osborne in the case of State vs. Timothy Wayne Osborne in August of 2006.

Scott Connell, Esq., co-counsel for Barry Tabor.

The Honorable Daniel J. Craig, who was the District Attorney in Coggins' 2006 criminal case and in the prosecution of Timothy Wayne Osborne in the Osborne case.

Peter Johnson, Esq., court-appointed appellate counsel for Coggins and also counsel for Timothy Wayne Osborne.

The Honorable Howard C. Kaufold, Jr., Judge, Superior Court of Dodge County, Georgia.

John B. Long, Esq., Tucker Long, P.C., *pro bono* attorney who began representing Coggins in his Application for Writ of *Habeas Corpus* and who

represented Coggins at the evidentiary hearing held in Dodge County on December 4, 2018.

Ashley Smith Robinson, f/k/a Ashley Smith, widow of Mack Smith, whose interaction with Brian Nichols is portrayed in a movie entitled "Captive".

The late Mack Smith, victim and husband of Ashley Smith Robinson, f/k/a Ashley Smith.

Barry Tabor, Co-Defendant in Coggins' 2006 criminal trial.

Murray Tatum, Warden of the Dodge State Prison, holds the body of Coggins.

Andrew J. Tisdale, Esq., co-counsel for Barry Tabor in Coggins' 2006 criminal trial.

The late David D. Weber, Esq., court-appointed trial defense attorney for Coggins in Coggins' 2006 criminal trial.

Rule 2.9.6 requiring a Corporate Disclosure is not applicable to this case in that there is no non-governmental corporation involved in this case.

RELATED CASES

To the knowledge of the Petitioner there are no related cases.

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ORDERS AND OPINIONS BELOW

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

Coggins' was March 23, 2005 conviction in Columbia County, Georgia for the 2001 stabbing of Smith.

Coggins' Motion for New Trial was belatedly filed by David Weber on April 23, 2006 and the Order denying same was entered on January 31, 2012.

Order appointing Peter Johnson for Motion for New Trial filed August 16, 2007. (HR139).

An Order allowing an out of time appeal by Peter Johnson was entered on March 30, 2012 by the court that had appointed Appellate Counsel.

Coggins' conviction was affirmed by the Georgia Supreme Court on October 21, 2013. Coggins v. State, 293 Ga. 864, 750 S.E.2d 331 (2013).

This Court denied Coggins' Petition for Certiorari from that conviction on May 19, 2014. Coggins v. State, 572 U.S. 1119 (2014).

A Petition for *Habeas Corpus* was timely filed *pro se* by Coggins on July 11, 2014 in the Superior Court of Macon County, Georgia. That case was then transferred to the Hancock County Superior Court by Order entered on October 20, 2014 and then subsequently transferred to the Superior Court of Dodge County by Order entered on April 17, 2017. A hearing on the July 11, 2014 Petition was set

for November 7, 2017 and then continued until March 26, 2018. The March 26, 2018 hearing was continued at the request of the State and the case was finally heard on December 4, 2018. An Amended and Recast Petition was filed on April 23, 2018 and amended again on May 30, 2018. On August 19, 2019, the Superior Court of Dodge County denied Coggins' Petition. (GSCA3-38).

As required by O.C.G.A. § 9-14-52(b), a written Application for a Certificate of Probable Cause was timely filed with the Georgia Supreme Court on September 13, 2019. The Superior Court of Dodge County did not send up the record to the Supreme Court of Georgia as required by O.C.G.A. § 5-6-43 for more than 22 months and it was necessary for the Supreme Court of Georgia to specifically request that the record be sent. In a letter dated July 28, 2021, the Clerk of the Supreme Court of Georgia requested that the Clerk of the Superior Court of Dodge County send the record on the Coggins case and other cases that were more than two (2) years old to the Supreme Court. The Georgia Supreme Court denied Coggins' Petition to Appeal the denial of his *habeas* Petition on January 10, 2023 and denied Coggins' Motion for Reconsideration by Order dated February 7, 2023 in Case No. S20HO188.

JURISDICTION

The date on which the highest state court decided my case was January 10, 2023. A copy of that opinion appears in Appendix B.

A timely petition for rehearing was thereafter denied on the following date: February 7, 2023.

This Court has jurisdiction over this petition under 28 U.S.C. § 1257. This petition does not raise issues as to the constitutionality of an act of Congress but does raise due process issues relevant to how the review of the denial of a petition for *habeas* relief is applied and the time delays that result from its application. For that reason, the Attorney General of the State of Georgia is being served with a copy of this Petition.

The date of the Order denying the Motion for Reconsideration by the Georgia Supreme Court was February 7, 2023 in S20HO188. The provisions of 28 U.S.C. § 2403(b) apply and notification to the Attorney General of the State of Georgia, Christopher Carr, has been given to him pursuant to Rule 29(c) of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **Sixth Amendment to the United States Constitution**:

"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 defense."

2. **Fourteenth Amendment to the United States Constitution**:

"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."

3. **Fifth Amendment to the United States Constitution**

"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 offence 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."

STATEMENT OF THE CASE

A. Statement of the Facts

This case seeks the review of a *habeas* action that was filed *pro se* on July 11, 2014 following a murder conviction on March 23, 2006 involving an August 18, 2001 stabbing. (HR17-34, 35-44, 48-183). Coggins testified both at trial and at the *habeas* hearing and avers to this day that he did not stab or cause the death of Daniel "Mack" Smith (hereinafter "Smith"). (TT, pp.596-629, pp.862-895; HT, pp. 51-56).[1] Coggins' wrongful conviction and its affirmance by the Georgia Supreme Court were brought about by the ineffective assistance of both Coggins' trial counsel and his appellate counsel; by the State's failure to reveal the implied or tacit deal with Timothy Osborne (hereinafter "Osborne") as the result of an alleged "jailhouse confession"; and the District Attorney's actions in dismissing Coggins' co-defendant Barry Tabor (hereinafter "Tabor") in the middle of the trial without disclosing to the trial court the fact that Tabor had told Deputy Dennis Mack that he was the one who hurt Smith, that it was in self-defense, and that blood evidence showed the deceased's blood on Tabor's clothing. (HR132, HR87-90). The *Habeas court* ruled

[1] The record below consists of the 82-page *Habeas* Transcript (HT) included in the *Habeas* Record, which includes the Trial Transcript (TT) which begins at HR268 is 683 pages and with exhibits includes pages HR268 to HR1013, the Jury Verdict; the *Habeas* Record, which is 1009 pages (HR) and the Appendix before the Supreme Court of Georgia filed by Coggins. (GSCA). The documents referred to herein will include those references. As can be seen, the *Habeas* Record belatedly sent by the Clerk to the Supreme Court was not assembled or sent in any reasonable order.

that the failures of Coggins' appointed counsel were justifiable as reasonable trial strategy and tactics under Strickland. (GSCA3-38 at 16).

Smith was stabbed on August 18, 2001 following his initiation of a fight with Tabor and Christopher Jarrard. Shortly thereafter, Tabor and Jairo Humberto Lopez (hereinafter "Lopez") were arrested and charged with involuntary manslaughter. (HR163-186). The prosecution of Tabor and Lopez was subsequently dismissed on September 5, 2001. (HR174).

A review of all of the statements taken by the Columbia County Sheriff's Department in 2001 reveals that the melee was caused by Smith's going to Jarrard's apartment and attacking Jarrard and Tabor with a baseball bat. Smith was angered that Jarrard had made statements referring to Smith as a "snitch". The witness statements obtained by the Columbia County Sheriff's Department in 2001, included an admission made by Tabor directly to Deputy Sheriff Dennis Mack (hereinafter "Deputy Mack") that Tabor stabbed Smith in self-defense! (HR137, Ex. P-7; GSCA143-144). This statement was in the Public Defender's file. (HR189-283 at HR202). Co-defendant Tabor was the one who more than likely stabbed Smith and told Deputy Mack on the night of the stabbing that "he was responsible for hurting Mack Smith, that he put him into the cement and that he acted in self-defense when Mack entered Barry's apartment carrying a baseball bat." The *habeas court* in citing that statement omitted the self-defense portion of Tabor's statement and then held

that not calling Deputy Mack was "reasonable trial strategy". (GSCA15-16). The fact that Tabor stabbed Smith in self-defense was supported by the interview of Whitney Varna, Tabor's then-girlfriend, who stated this to investigators on March 15, 2005. (GSCA120-126; HR184-187, 267, 268-274). Tabor's admission was supported by the physical blood evidence which placed Smith's blood on the clothing of Tabor, Jarrard and Lopez. (HR203-205; GSCA55-56). No physical evidence connected Coggins to the stabbing, even though he and others were at the scene of the fight between Tabor, Jarrard and Smith. Scott Brown, who was one of the witnesses present at the melee, stated on August 18, 2001 that he did not see Coggins do anything. Brown's statement was contained in the Public Defender's file. (GSCA68). Tabor was the person who had tackled Smith to the ground. (GSCA90). No blood was seen on Coggins. (GSCA106). All of these statements and evidence were in the Public Defender's file and were available to both Trial Counsel Weber and Appellate Counsel Johnson. (GSCA40-133).

No action was taken in this case for 4.5 years until Smith's widow, Elizabeth Ashley Smith, came to nationwide attention following the March 11, 2005 shooting deaths of Superior Court Judge Rowland Barnes, his court reporter, a deputy sheriff and a federal officer at the hand of Brian Nichols in Atlanta, Georgia. *See,* "Man Flees After Killing Judge and 2 Others at Atlanta Court", New York Times, March 11, 2005; "Unlikely Angel: The Untold Story of the Atlanta Hostage Hero" by

Ashley Smith, published by Zondervan, 2005; "Captive: The Untold Story of the Atlanta Hostage Hero".

Following Brian Nichols' surrender (which was allegedly based upon Ashley Smith's persuasion following their using illegal drugs together), the Columbia County Sheriff's Department reopened its investigation in March of 2005 and took additional statements from previous witnesses and others. In a rush to judgment, Tabor was rearrested and charged with murder. For the first time, Coggins was arrested and also charged with murder. Tabor's parents retained experienced legal counsel (Andrew Tisdale and Scott Connell) for their son. Coggins requested and received a court-appointed attorney through the Public Defender's Office, David D. Weber. (Aff. of K. Mason, HR189-283; GSCA40-134).

This rush to judgment was fueled by the media and Smith's widow being classified as a "hero" because of her alleged persuasion of Nichols to surrender. In reopening the Sheriff's investigation in 2005 and re-interviewing those individuals, no new evidence came to light from those present at the 2001 stabbing incident. (GSCA58-95).

Prior to Coggins' March, 2006 trial, Osborne, who was a career criminal, and another inmate in the Columbia County Jail wrote letters to the local newspaper relating to an alleged "jailhouse confession" by Coggins that supposedly implicated both Coggins and Tabor. Osborne's letter dated October 14, 2005 titled "Confession

from Inside" was Trial Exhibit S-23 and another letter, S-39, can be found at TT, pp.971-975 and 987-989 (handwritten page number). The Robinson letter is found at TT, p. 970. During Coggins' trial, the jury asked to have these letters sent out. (TT, p.1006, handwritten page number). Trial Counsel Weber did not object, even though he later acknowledged that it never occurred to him to make an objection to the letters going out. (HR84, Response No. 5). Osborne was then facing a mandatory 20-to-life imprisonment term and testified against Coggins at trial. As acknowledged by Appellate Counsel Johnson at Coggins' *habeas* hearing, Osborne's testimony recited facts that were blatantly inconsistent with the way co-defendants are housed in the Columbia County Jail. The alleged jailhouse confession could easily have been attacked at trial by Weber because of the jail's policy of not keeping co-defendants housed in the same jail pods. (HT, pp.21-22). When Coggins' *pro bono habeas* lawyer, Long, attempted to obtain the records from the jail, they were not available due to the lapse of time (8 years) that Coggins Motion for New Trial was pending. (GSCA8). The *habeas* court stated that Coggins had nine (9) years to obtain those records, but failed to mention that fact during this period of time he was represented by Appellate Counsel Johnson! (GSCA3-38 at 7-8). In Coggins' Motion for New Trial, Johnson never raised these facts.

The Public Defender Office's file shows that Defense Counsel Weber met with Coggins on only two (2) occasions prior to trial, even though Weber later

testified that he had visited Coggins on more than two occasions. (HR189 at HR194-198; GSCA40-46; 50; HT, p.83). During that time Coggins had asked Weber to subpoena a number of people for trial, including two (2) witnesses who would have implicated Tabor. (HT, p.61, lns.1-8). One of those witnesses was Deputy Mack, who had taken Tabor's statement on the night of the stabbing statement in which Tabor admitted hurting Smith. Deputy Mack was never interviewed or called as a witness. (GSCA144). Another witness, Tabor's then-girlfriend, Whitney Varna, had made a statement to deputies in 2005 in which she said that Tabor had admitted to her that he had stabbed Smith, that it was in self-defense, and that she was never interviewed. (GSCA119-126). When the Petitioner's *pro bono* counsel found Ms. Varna years later, that was still her testimony. Trial Counsel Weber did not subpoena Ms. Varna, Deputy Mack, or other witnesses who would refute any testimony that Coggins was the stabber, even though Coggins requested that Trial Counsel Weber call those witnesses. (HT, p.61, lns.1-8; p.61, ln. 24 – p.62, ln. 7). (HR189 at 202; GSCA142-145). There was ample evidence in the Public Defender's file with which to defend Coggins. (GSCA64-65, 68). Trial Counsel Weber mounted no defense because, unknown to Coggins, he had entered into some informal joint defense agreement with Tabor's paid attorneys. (HT, pp.83-84). Coggin's was never asked, nor ever knew of any joint defense agreement. (HT, p.63, lns.11-12).

Weber later admitted that when the District Attorney dismissed Tabor, Weber should have moved for a mistrial. (HR84, Answer to Question 7). Weber admitted that he should have focused on Tabor as being the stabber. (HR8, Answer to Question 10). No motion for a mistrial was made by Weber at that stage of the trial. However, the *habeas* court has held that these actions or the lack thereof did not constitute ineffective assistance of counsel, even though Weber himself has admitted he was ineffective. The *habeas* court eld that hindsight has no place in the assessment of the performance of trial counsel and thus rejected that argument. (GSCA29-30).

Upon the dismissal of Tabor, the jury at that point was left with only one choice -- to find Coggins not guilty (or in essence hold that the actual stabber was unknown). By dismissing Tabor and leaving Coggins as the sole defendant, the District Attorney implied that Coggins stabbed Smith, and Coggins was found guilty of murder. (TT, p.485-493).

More disturbing than Weber's failure to prepare for trial is the fact that when the District Attorney moved to dismiss Tabor (TT, p.485-489), the District Attorney never mentioned to the trial court that Tabor had made the admission to Deputy Mack or that the blood evidence showed Smith's blood on Tabor. Defense counsel Weber did nothing to correctly point out to the trial court Tabor's admission to Deputy Mack or the lack of blood evidence; thus, Weber consented to the District

Attorney's actions. (TT, p. 489). The case then continued with Osborne's alleged jailhouse statement being the primary evidence against Coggins. Why didn't the District Attorney reveal to the trial court the Deputy Mack statement and the blood evidence when he requested a dismissal of Tabor? Why didn't Defense Counsel Weber point those factors out to the trial court? Tabor was a convicted felon, Coggins was not. (Exhibit S- 40, TT, pp. 990-1003, handwritten page numbers).

In dismissing Tabor, the District Attorney justified his decision by telling the Court that Whitney Varna had failed a polygraph test. (TT, p.486). The *habeas* court likewise held that not calling Varna was reasonable trial strategy because she failed a polygraph test. (GSCA3-38 at 22-23). However, polygraph evidence would have been inadmissible at trial to attack Varna's testimony. The District Attorney said that "there is *no other witness* that has in any way provided any information consistent with that". (TT, p. 487). That representation by the State to Judge Brown was false and had the effect of suppressing facts from the trial court before the Court granted the State's motion to dismiss Tabor. In addition, Weber should have known that Deputy Mack had interviewed Tabor the night of the stabbing and his report was consistent with Tabor's stabbing Smith in self-defense. That statement was in the Public Defender's file and should have been pointed out to the trial court. The District Attorney's position was that two jailhouse snitches had placed the stabbing on Coggins. (TT, p.488). Robinson's letter to the Augusta Chronicle stated that

Coggins told him that Tabor and Jarrard held Smith and that any stabbing was only meant to wound him. (TT, pp.500-501).

Osborne testified at trial about a so-called confession by Coggins (TT, pp.511-527) and about the two letters he had written to the Augusta Chronicle, Exs. S-23 and S-39. Other than these so-called confessions, there was no evidence that Coggins stabbed anyone, other than an alleged statement made following Smith's death that was easily refuted.

Following the trial, Coggins wrote a letter to Weber and asked that Weber file a Motion for New Trial raising ineffective assistance of counsel and asking that Weber be released from handling Coggins' case. (HR275-276). It took Weber nearly a year to file his motion to withdraw on August 1, 2007. (HR277-278). Johnson, who had represented Osborne in his armed robbery case, was then appointed to represent Coggins on his Motion for New Trial and appeal. Johnson admitted at the *habeas* hearing that he did not disclose to Coggins that he had previously represented Osborne. (HT, p.28). As will be set forth below, there arose an actual conflict of interest when Osborne, while Johnson was handling Coggins' Motion for New Trial, told Johnson that <u>he had lied during Coggins' trial</u>! Rather than disqualify himself at that time and become a witness for Coggins, Johnson advised Osborne of the penalty for perjury, after which Osborne took the Fifth

Amendment and refused to testify. The *habeas* lower court failed to recognize Johnson's ineffective representation as explained below. (HR313-35).

Contained in the Public Defender's file, which was available to both Weber and Johnson, was critical evidence that supported the claim that Tabor had stabbed Smith. Also contained in that file was Coggins' request that the ineffectiveness of trial counsel be raised in the Motion for New Trial and appeal. (HR275-276). Johnson had the Public Defender's file. Johnson testified at the *habeas* hearing that Defense Counsel Weber had been ineffective. This evidence supports the fact that it was not only an unreasonable defense strategy to enter into any informal joint defense agreement with Tabor's lawyers, but it was unreasonable defense strategy to ignore both Deputy Mack's report of Tabor's admission to him, the admission by Tabor to Whitney Varna, and the blood evidence. The *habeas* court below found that this was not ineffectiveness of counsel, but a reasonable defense strategy and held that trial tactics and strategy, no matter how mistaken, in hindsight, are almost never adequate grounds for finding trial counsel ineffective unless they are so patently unreasonable that no competent attorney would have chosen them. (GSCA3-33 at 16). Here, Trial Counsel never prepared and had no strategy other than to ride on the tails of the Co-Defendant's paid counsel!

As stated above, during Coggins' criminal trial, jailhouse snitches Robinson and Osborne, testified. Both wrote letters to the local newspapers. Osborne's

October 14, 2005 letter to Mr. Edwards of the Augusta Chronicle Osborne speaks of Osborne being in the same cell block where Tabor and Coggins were being held and it was reported by Osborne that Coggins said "Tabor grabbed him and I stuck him with my knife a couple of times. I didn't mean to kill him." (GSCA146-148).

Over twelve (12) years after Coggins' conviction, Coggins' previous *pro bono* counsel found Osborne again incarcerated in another county jail. Osborne stated that he never met Barry Tabor or talked to him because co-defendants are separated between B-Max and A-Max pods in the jail. (GSCA151-158). In Osborne's affidavit of August 28, 2018 he said he could not testify about the truthfulness of his trial testimony because he would be subject to further prosecution – advice he had received from Coggins' Appellate Counsel Johnson. (*See*, O.C.G.A. § 16-10-70(b). Osborne then knew that he could receive a life sentence if he admitted to perjury.) (GSCA, pp.150-153).

The *habeas* court acknowledged that there was some agreement with Osborne but that Coggins failed to show that it was in place prior to his testifying, holding that "Osborne's assistance was not acknowledged in relation to an existing agreement in place at the time Osborne testified against Petitioner". (GSCA2-38 at 11-12). Johnson knew this fact and testified to that fact at the *habeas* hearing but failed to point out to the trial judge that fact during the hearing on the Motion for New Trial and failed to raise raising ineffective assistance of counsel by Weber on

appeal. (HT24). The *habeas* court apparently ignored the fact that Osborne admitted to lying in the Coggins case and admitted to the fact that he never saw Tabor because he was separated from him in jail.

When Coggins previous *pro bono* attorney made efforts in 2018 to obtain jail records from the Columbia County Jail for the 2005-2006 period which would have shown when Weber met with Coggins and the fact that Coggins and Tabor were never housed together, the *habeas* court found that Coggins had nine (9) years after his conviction to obtain those records. (GSCA3-39 at 8). However, during those 9 years from 2007 until 2014, Coggins had a lawyer, Johnson, and Johnson knew that co-defendants were not housed together. It was ineffective on Johnson's part not to seek those records during that time and to point out this fact to Judge Brown. Johnson knew that Osborne had made up the story about Coggins' confession from the admission made by Osborne to Johnson that he lied, nonetheless while representing Coggins, Johnson advised Osborne of the provisions of O.C.G.A. § 16-10-70(b).

Osborne stated in his affidavit the District Attorney had told him he could not promise anything, but he implied that if he offered favorable testimony in Coggins' case, he would receive favorable treatment in his own case. (GSCA, p.153, ¶8). At Osborne's sentencing, a deal that had been struck with Osborne by former Assistant District Attorney Davis was acknowledged, and this deal was acknowledged by the

current District Attorney of Hall County, Georgia, Mr. White. (HT, pp. 26-27). Osborne did in fact receive favorable treatment, that is, he received a 10-year sentence as opposed to 20 years to life without the possibility of parole. (GSCA, pp.151-153; HR350-390). (Exactly what was said to Osborne before trial by the District Attorney or to his Assistant District Attorney Davis is unknown, but what it known is that Osborne expected and received favorable treatment by the court based upon his testimony in Coggins' trial. What is also known is that the entire Public Defender's file was produced by Ms. Katherine Mason of the Public Defender's Office and it contained no record of any meetings between the District Attorney or Assistant District Attorney Davis and Osborne prior to Coggins' trial. (GSCA40-299).

The trial judge in Osborne's case, Judge Brown (who also tried Coggins), pointed out at Osborne's sentencing that the court took into consideration the fact that Osborne had testified for the State in the Coggins trial and approved the deal with the State, and then gave him favorable treatment in his sentence. (GSCA, pp.151-153). Osborne received the benefit from his help at the Coggins trial. (HT, p.24, ln.21-22). Unfortunately Osborne's co-defendant, who had no criminal record, received a 25-year year sentence as opposed to the sentence that Osborne received. (*See*, Hasty aff.).

In ruling on the Brady and Giglio issues, the *habeas* court merely focused on whether or not Coggins had shown the existence of an expressed agreement, not an implied or tacit understanding as shown in the transcript of Osborne's sentencing. (HR10-12, GSCA10-12).

As requested by Coggins in his August 21, 2008 letter, Johnson did not raise the ineffectiveness of Weber in the Motion for New Trial or on appeal to the Supreme Court of Georgia. (GSCA127-128). Johnson said he reviewed the Public Defender's file and he may or may not have seen the letter written by Coggins to Weber. (HT, p.20-21). Furthermore, despite the fact that a review of the Sheriff's Department statement in 2001 and 2005 revealed that Coggins never admitted to stabbing Smith, Johnson made an *in judicio* admission in his brief that the Supreme Court of Georgia found as a fact that Coggins had made statements on two occasions that he stabbed someone. (Coggins v. The State, 293 Ga. 864, 750 S.E.2d 331 (2013); Brief filed by Coggins in Dodge Co., 7/7/19, pp.30-32). This *in judicio* admission by Johnson apparently came from a statement copied from the State's brief opposing Coggins' Motion for a New Trial. The information in the Public Defender's file refutes any such admission by Coggins. (GSCA64-65, 68-71, 81).

The Georgia Supreme Court adopted the admission made by Johnson *in judicio* in its opinion. Coggins v. State, 293 Ga. 864, 750 S.E.2d 331 (2013). Coggins did not admit and to this date has never admitted that "he had stabbed and

killed Smith" and a review of various witness statements would have supported that fact. *See*, Brief filed June 7, 2019 with Superior Court of Dodge County; *see also,* Application for Discretionary Appeal filed with Supreme Court of Georgia, 9/13/2019, ¶14. This was explained without effect in a brief filed with the *habeas* court.

Shortly after Coggins' Petition for *Certiorari* was denied by this Court. Coggins filed his *pro se* application for *habeas* relief in the Superior Court of Macon County, Georgia on July 1, 2014. Following the *habeas* trial court's denial of Coggins' petition, it took the Supreme Court of Georgia more than 3.5 years to deny the Petition. Both trial counsel Weber and Johnson have admitted before the *habeas court* that they were ineffective and the habeas court has held that hindsight has no place in an assessment of the performance of trial counsel and a lawyer's second guessing his own performance with the benefit of hindsight has no significance for an ineffective assistance of counsel claim. (GSCA3-38 at 28).

Both Weber and Johnson have admitted to their errors in defending Coggins. *See*, Weber's admission that he should have focused on Tabor being the stabber. (HT, pp. 20, 21-22, p.24, lns.4-7). Johnson admitted that Osborne received the benefit of testifying against Coggins. (HT, p.14). Johnson admitted that there was a Giglio-Brady violation and that should have been brought upon a Motion for New Trial. (HT, pp.27-28). He admitted that he should have raised this issue, that he

never told Coggins about his representation of Osborne, and that he should have disqualified himself from representing Coggins. (HT, pp.28-38). Johnson was aware that Coggins wanted him to raise ineffective assistance of trial counsel but failed to do so. (HT, pp.30-33). Johnson has no notes in his file that he ever sent Coggins a copy of his appellate brief. (HT, p.34).

REASONS FOR GRANTING THE PETITION

1. The *habeas* court acknowledged that Trial Counsel Weber had entered into an informal "joint defense" agreement and then held that under Georgia law the attorney's actions could be justified, even though made without the client's approval, citing Blackwell v. State, 302 Ga. 820 (2018). (GSCA, p.16).

In the Public Defender's file two investigators interviewed Amanda Michelle Low, f/k/a Amanda Jarrard, on March 23, 2005 and she stated at the time that Tabor told her that "Corey did it" (GSCA, p.105). That statement contained in the Public Defender's file, the statement Tabor made to Deputy Mack, the statement Tabor made to Whitney Varna, and the other evidence in the public defender's file shows that it was not a reasonable trial strategy to enter into any informal joint defense agreement and that doing so prejudiced Coggins and resulted in his conviction. This Court should address the issue of whether or not an attorney has the authority to waive a defendant's Fifth Amendment right to remain silent by sharing privileged

communications with a co-defendant's counsel without the specific consent of the client and without the approval of the Trial Judge; as well as whether or not Weber's action in entering into an informal joint defense agreement with Tabor's paid lawyers without Coggins' consent was "reasonable trial strategy" and prejudicial to Coggins under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

There has been no guidance from this Court and little guidance from the lower courts about "joint defense agreements" and how trial courts should deal with these issues to insure all parties to such agreements know the effect of same. *See,* U.S. v. Almeida, 341 F.3d 1318 (11th Cir. 2003), where the Court held that communications by one co-defendant to another co-defendant's attorneys are not privileged. The California District Court in United States v. Stepney, 246 F.Supp.2d 1069 (N.D. Cal. 2003), set forth certain guidelines when a trial court is faced with such issues and held that any joint defense agreement must be in writing, signed by the defendants and their attorneys and that the agreement must be submitted *in camera* to the court for review prior to going into effect. Since these agreements result in a defendant's waiving constitutionally protect rights, this Court should adopt the procedures used in United States v. Stepney, *supra,* and require all federal and state courts when defendants and their counsel are considering a joint defense agreement to have a colloquy similar to that required in the waiver of rights in connection with guilty pleas required by this Court in Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23

L.Ed.2d 274 (1969). The danger of a joint defense agreement in a criminal case occurs when one defendant is dismissed or reaches a plea agreement with the government, and this occurs quite often. At that point of trial in those cases, a defendant has shared confidential information with a co-defendant who no longer has a joint interest since the co-defendant has already worked out a deal to his own benefit. Not only were Weber's actions not reasonable trial strategy, but in this case Coggins' court-appointed counsel relied upon paid co-counsel to carry the weight of the defense; and as shown during the trial and the public defender's file there was minimal preparation by Weber. The effect of Weber's unilateral decision to rely on Tabor's paid defense team left Coggins without any defense. In any case in which there is a joint defense agreement, there needs to be a requirement that the trial court approve the joint defense agreement, insure that the co-defendant knows that he or she may be waiving certain Fifth Amendment rights, and have a colloquy *in camera* that is recorded insuring the trial court can determine that there has been a knowing and intelligent waiver of constitutional rights just like when a guilty plea is being entered.

The lack of a lower court's oversight of a joint defense agreement poses the same problem that one representing co-defendants poses. Holoway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980). The second prong of prejudice need not be required to be shown, even though it is highly unlikely Coggins

would have been convicted if Weber had focused on Tabor's stabbing Smith. (GSCA135-141 at 137-138). Joint defense agreements like the one here create more than the possibility of a conflict. Without court oversight, approving such joint defense agreements can result in structural ineffectiveness of counsel like that in this case. See, Disaggregating Infective Assistance of Counsel Doctrine Four Forms of Constitutional Ineffectiveness, 72 STNLR 1581 (June 2020).

If the requirements of the Sixth Amendment that defendants such as Coggins are to be afforded adequate and effective representation, the lower courts need to be instructed by this Court as to the proper procedures to be followed when there is any joint defense agreement. This must be done in order to ensure that individuals like Coggins know that evidence relating to the guilt of their co-defendant will be suppressed and that the suppression of that evidence will be considered part of that individual's trial strategy. The facts in this case show that Weber was dumbfounded when the District Attorney moved to dismiss Tabor and did not think about even moving for a mistrial at that point. (GSCA136-138). This was in part caused by the difficult position that he was faced with by virtue of the joint defense agreement. If this Court had directed lower courts to follow the procedures used by the District Court in United States v. Stepney, 246 F.Supp.2d 1069 (N.D. Cal. 2003) or similar procedures, the trial judge (Judge Brown), would have known of Officer Mack's report made on the night of the stabbing about Tabor's admission; the fact that Tabor

had told his girlfriend, Whitney Varna, that he had stabbed Smith in self-defense; and would have seen the blood evidence showing Smith's blood on Tabor's clothing. (GSCA105). Only if such procedures are required will lower courts be able to determine if there is a conflict of interest when joint defense agreements are used.

The Georgia courts have held that the American Bar Association Standards for Criminal Defense should be used in in determining reasonable trial strategy. Alexander v. State, 297 Ga. 59, 772 S.E.2d 655 (2015). The ABA Standards are generally accepted by most courts.. Those standards provide that a defendant like Coggins be given the right to make the final decisions as to strategy and tactics. (ABA Standard for Defense 4-3, 3-03-2, 4-5.2). Coggins was not given that right. This Court needs to use the facts in this case to give more guidance to the lower courts as to what constitutes effective representation under the 6th Amendment and when and under what circumstances can joint defense agreements be used.

Weber did not prepare for trial and was relying on Tabor's defense team to do the work. This Court should emphasize to the Bench and to the Bar this Court's holding that failure to investigate and prepare for trial is ineffectiveness of counsel as held in Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005); Porter v. McCollum, 558 U.S. 30 (2009), Andrus v. Texas, 140 S.Ct. 1875 (2020). Furthermore, this Court should emphasize that the failure to raise inefficient representation and the late filing of an appeal, and the late filing of a motion for new

trial have the same effect as the failure to file an appeal is presumptively prejudicial. Garza v. Idaho, 540 U.S. 526, 139 S.Ct. 738 (2019).

2. This Court should reverse the decision of the Georgia courts and hold that when material misrepresentations made to the trial court by the State are prejudicial to a defendant, then sufficient misconduct on the State exists and the verdict must be set aside.

In this case, for reasons still totally unclear, the State dismissed the charges against co-defendant Barry Tabor without disclosing to the trial judge all of the material evidence that tied Tabor to the stabbing. (TT, pp.485-493; HR751-759). Coggins' defense counsel, without pointing out all the facts to the trial court, agreed to Tabor's dismissal. (TT, p.489; HR755). This was a structural ineffective assistance of counsel strategy that in itself should require the granting of this petition and, at the least, a holding that prejudice is presumed. In this case, Tabor made statements to law enforcement that he was the one who put Smith on the concrete and who told his then-girlfriend that he stabbed Smith in self-defense when Smith attacked him with a baseball bat. Tabor had Smith's blood on his clothing. The main fight was between Tabor, Jarrard and the deceased, Mack Smith. Tabor was the last person on Smith.

When this Court has found that a conviction is based upon known perjured testimony, this Court has granted relief. Pyle v. Kansas, 317 U.S. 213 (1942); Kyles v. Whitney, 115 S.Ct. 1555 (1995).

If this conviction was not the result of prosecutorial misconduct, it was the result of Weber's ineffectiveness in not considering Tabor as the stabber. Weber acknowledged that he should have focused on Tabor as being the stabber. (HR85-86). The question of why the District Attorney moved to dismiss Tabor and why he did not inform the trial judge of the evidence remains unanswered. The District Attorney even wanted Judge Brown to release the probation hold on Tabor and approve his bond. (HR756, TT, pp.490-491). Tabor was, for reasons still unclear today, given special treatment by the State.

3. The Bench and the Bar need guidance from this Court as to what evidence is sufficient to show an implied agreement to require disclosure of a deal.

From Osborne's affidavit that Coggins' previous *pro bono* counsel obtained after finding Osborne in the county jail, it is apparent that Osborne "expected a benefit" from his testimony. Under Georgia law evidence has been held to find the existence of an implied agreement when four (4) elements are met: 1) services were valuable to the other party, in this case, the State; 2) the services of Osborne were knowingly accepted by the State; 3) the acceptance of this testimony without a benefit would be unfair to Osborne; and 4) Osborne expected to receive a benefit.

Terrell v. Pippart, 314 Ga. App. 483, 724 S.E.2d 802 (2012); One Bluff Drive, LLP v. K.A.P., Inc., 330 Ga. App. 45, 766 S.E.2d 508 (2014); *see also*, Williams v. Mercer University, 542 F.Supp. 3d 1366 (M.D. Ga. 2021) at 1376. The same standard used in civil litigation to show an implied agreement should be used here. Legal commentators have pointed out the dangers of relying upon jailhouse informants. *See,* "Abolishing Jailhouse Snitch Testimony", by Russel D. Casey, 49 Wake Forest Law Review 1375 (2014). As stated in that article, jailhouse snitch testimony is unreliable and the use of such testimony leads to countless false convictions. Without that testimony here, Coggins would not have been convicted.

There appears to be some confusion as to what is required by this Court's decisions in Brady and Giglio to show such a violation of due process. While a prosecutor may strike hard blows, he is not at liberty to strike foul ones. It is as much of his duty to refrain from improper methods calculated to procure a wrongful conviction as its use of legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). There exists an understanding that in some circuits an implied or tacit agreement to provide a benefit to a jailhouse inmate need not be disclosed under Brady and Giglio. Andrew v. White, 62 F.4th 1299 (10th Cir. 2023). As stated in the dissent in Bell v. Bell, 512 F.3d 223 (6th Cir. 2008), the majority, like several of our sister circuits, do not take issue with the general principle that tacit agreements, like explicit agreements, must

be disclosed under Giglio, citing R. Michael Cassidy, "Soft Words of Hope: Giglio, Accomplice Witness and the Problem of Implied Inducement", 98 NW.U.L.REV. 1129, 1154 (2004). The dissent in Bell v. Bell stated that Brady-Giglio requires that any implied or tacit understanding about favorable treatment be disclosed. In the case at hand, it was not. In Bell v. Bell, the prosecutor stated that he did not have a good case without the snitch, Davenport. In Coggins' case, the District Attorney Craig told Judge Brown that the jailhouse snitch was his reason for dismissing Tabor. In Bell v. Bell, the prosecutor wrote a letter to the parole board. Here, a deal for a lighter sentence was given to Osborne as shown by Osborne's sentencing transcript.

The facts show that Osborne's testimony was, in the words of the District Attorney, "crucial"; that the State accepted a benefit; and that it would have been unfair not to reward Osborne. He in fact received a benefit when compared to the sentence of his co-defendant. This is apparent from both Osborne's sentencing and the sentencing received by Osborne's co-defendant. (HR 94-103, *see also,* Hasty aff. HR448-477). This Court should hold that in an analysis of whether or not an implied agreement of an undisclosed deal can be shown by the effects required to be disclosed under Brady-Giglio can be adequately shown by the effect of that implied agreement.

The facts show that Johnson's former client, Osborne, told Johnson that he lied in his testimony. Johnson owed no duty to Osborne at that point in time, his

duty was to Coggins. Why did Johnson advise him about the penalty for perjured testimony? This dilemma troubles Johnson to this day. (HR30). Why Johnson did not disqualify himself at that point and become a witness for Coggins in his Motion for New Trial is unknown. (Under the Georgia Rules of Evidence, Johnson could have been a witness in the Motion for New Trial hearing under O.C.G.A. § 24-8-801(d)(1)(B) and O.C.G.A. § 24-6-213). The conflict arose clearly when Osborne admitted to Johnson that he lied, because in Georgia a conviction based upon perjury can only be set aside if Osborne had been convicted of perjury. O.C.G.A. § 17-1-4. had been convicted of perjury. O.C.G.A. § 17-1-4; Taylor v. State, 358 Ga. App., 773, 856 S.E.2d 368 (2021). Even if Johnson were to have been willing to testify against his former client, there would be very little incentive for the State to prosecute. However, Johnson admitted in the *habeas* hearing that he now at least acknowledges that he owed a moral duty to Coggins. (HT30-31).

The Ninth Circuit has recognized the unreliability of jailhouse informants who are themselves incarcerated criminals with significant motivation to garner favor. Hall v. Director of Corrections, 343 F.3d 976 (9th Cir. 2003); Jackson v. Brown, 513 F.3d 1057 (9th Cir. 2008); Maxwell v. Roe, 628 F.3d 486 (9th Cir. 2010). There appears to be a split in the circuits in that in the Fifth Circuit the courts have held that in order for a due process claim to arise that the State had to have contemporaneous knowledge that false evidence was used. Kutzner v. Cockrell, 303

F.3d 333, 337 (5th Cir. 2002); Canales v. Stephens, 765 F.3d 5551, 573 (5th Cir. 2014). In this case, while it may be argued that Osborne's telling Johnson before Coggins' motion for new trial that he lied, the State knew that there was evidence obtained from a Deputy Mack on the night of the stabbing and knew that blood evidence connected Tabor to the stabbing but failed to reveal that evidence in seeking a dismissal. The prosecutor was subject to the Georgia Rules of Professional Conduct Rule 3.3 requiring candor toward the tribunal which are based upon the ABA Rules of Professional Conduct. This rule is enforced in Georgia and all federal courts to the knowledge of the undersigned. In re Boudreaux, 2018 WL 1532669, United States v. Scott, 2007 W.L. 1101241 (2007), In re Wilkinson, 284 Ga. 548, 668 L.Ed2d 707 (2008).

4. The time delays in handling Coggins' appeal and in handling his *habeas* case should be unacceptable under our Constitution or by this Court.

This Court should address the time it has taken for Coggins' direct appeal to be heard, coupled with the time it has taken for this case to be filed. Weber took almost a year to file a motion for new trial and Johnson was late in appealing the case to the Supreme Court. While this is not the same as failing to file an appeal as this Court was faced with in Garza v. Idaho, __ U.S. __ (2019), 139 S.Ct. 738 (2019), when the delays are combined it shows that how Coggins' case was mismanaged and neglected by our judicial system. The time delays here trigger a violation under

the due process clause of the 14th Amendment. *See* Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). The only way to address such delays is to hold that the rights given to the state and the Defendant must be the same. While the Georgia Supreme Court has held that O.C.G.A. § 9-14-52's requirement of an application to appeal does not violate the equal protection clauses of the United States Constitution and that of the Georgia Constitution, the logic is flawed. Reed v. Hopper, 235 Ga. 298, 219 S.E.2d 409 (1975). What this statute does is to encourage a speedy resolution of *habeas* claims that are adverse to the state while in essence deferring to the *habeas* trial judge the power to make a final decision as to the merits. The practical effect of this can be seen when this Court sees that the habeas court did not even send the record up for approximately two (2) years, which meant that in filing the Application for Permission to Appeal Coggins could not refer to the official record and only the docket sheet in the *habeas* case. When the State is required to appeal from the grant of *habeas* relief, the record is prepared after the Notice of Appeal is filed, the case is docketed, the record prepared and both parties file briefs citing the lower court record, and the Supreme Court of Georgia is under a mandate to decide the case within two terms. In the application process, delays are encouraged. Delays caused in this case show that due process rights were lost.

Lower courts have held that excessive delays in the appellate process give rise to a due process violation. Coe V. Thurman, 922 F.2d 528 (9th Cir. 1990). The

Georgia Constitution provides that the Supreme Court has to rule on cases within two terms or the case is affirmed. *See,* Art. 6, §9, ¶11. The significance of that is that under the provisions of O.C.G.A. § 9-14-52 if the lower court were to grant a petition for *habeas* relief it would be affirmed if the Supreme Court did not rule within eight (8) months. In Coggins' case, he had to go through the application process that in this case resulted in over a three and one-half (3.5) year wait from the *habeas* court's decision and the time that the application was denied. During this 3.5 year delay, witnesses have died or moved away and evidence has been lost.

The State and indigent defendants should be treated alike. This is especially so as long as the policy of this Court is that indigents in post-conviction cases are not entitled to representation. Unless this Court is willing to expand the right to counsel under Gideon v. Wainwright, 372 U.S. 335 (1963), indigents should not be treated differently than the State. The Georgia Constitution grants the right of *habeas* relief, Art. 1, Sec. 1, para. 1. In the formation of the United States, our founding fathers did not debate the privilege of the writ of *habeas corpus* since they wanted to keep that right that existed in English law. "The Federalist No. 84" Hamilton and Blackstone referred to this writ as the bulwark of the British Constitution. However, this is a meaningless right if the Georgia procedure is acceptable as comports with due process. This Court should fashion a remedy for

these types of delays which have the effect of denying individuals like Coggins any meaningful remedy.

This Court needs to hold that the delays in Coggins' Motion for New Trial, appeal and *habeas* action are in violation of the due process clause and that when delays like these are shown relief will be granted by this Court. Otherwise, our system of justice will be no better than those of Russia, Iran, Syria, Venezuela, China and elsewhere where we see individuals wrongfully detained without any due process of law.

Our nation's attention has recently been focused on individuals such as former Marine Paul Whelan (held in Russia), Brittany Griner (recently released from Russia), Wall Street Journal reporter Evan Gershkovich (Russia), as well as Austin Tice (Syria) and Maj. Kamalmay (Syria), and Green Beret Airan Benj (Venezuela). The list goes on and on. It is difficult to criticize these nations for their lack of due process when faced with the time delays seen here and elsewhere, which time delays are in part created by a policy that favors the State.

Americans have seen scores of individuals who, after decades in prison, were released from jail as a result of the actions of the Innocence Project. Somes of those individuals were on death row because of the failure of our justice system. A substantial number of these wrongful convictions were based upon "jailhouse

confessions" and statements by jailhouse snitches whose statements are self-serving at best.

This Court should address this issue now so that time delays do not cause prejudice due to the loss of evidence as seen by the jail record retention policy seen here.

CONCLUSION

For the reasons stated herein, this Court should grant this Petition and order that Coggins be released from detention unless the Georgia courts retry him within ninety (90) days of this Court's Order granting the writ or grant this petition and appoint Coggins a lawyer under the Criminal Justice Act to argue these issues before this Court.

This 28 day of April, 2023.

Respectfully submitted,

C Coggins

COREY BLAINE COGGINS