No. S21A1270

In the Supreme Court of Georgia

CADEDRA LYNN COOK,
Appellant,

v.

THE STATE,
Appellee.

On direct appeal from the Superior Court of Polk County
in no. 12CR546S

BRIEF FOR THE GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Other sources

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INTRODUCTION

On 3 November, this Court invited the parties and amici, including the Georgia Association of Criminal Defense Lawyers (GACDL), to submit briefs on two questions pertaining to motions for out-of-time appeals: (1) whether it should reconsider the longstanding Georgia practice of exercising appellate jurisdiction when a sentencing court restores a defendant's frustrated right to an appeal, as opposed to when a habeas court does so; as well as (2) whether stare decisis

would favor retaining that practice, should the Court find its reasoning unsound. GACDL urges the Court to stay its hand. The motion for out-of-time appeal is both an efficient vehicle for restoring the unconstitutionally frustrated appellate rights of criminal defendants and an inextricable component of criminal-appellate practice. Its sudden absence would upset criminal-appellate and post-conviction practice statewide. More disconcerting, though, it would require the immediate dismissal of appeals and post-judgment motions by people who are relying on that mechanism to reclaim the rights to appeal that they were cheated of. The better course would be to await a comprehensive solution from the General Assembly or to at least retain the practice until all cases with now-pending motions for out-of-time have reached finality.

INTEREST OF AMICUS CURIAE

A frequent friend of this Court, GACDL is a domestic nonprofit corporation whose members routinely execute the only office of the Court dignified in the Bill of Rights: defending the life and liberty of the accused against the powers of organized society and ensuring the processes of law that they are due. GACDL's membership comprises both public defenders and private counsel. They are united in their dedication to the rule of law, the fair and impartial administration of criminal justice, the improvement of our adversarial system, the

reasoned and informed advancement of criminal jurisprudence and procedure, and the preservation and fulfillment of our great constitutional heritage.

STATEMENT OF THE CASE

(1) Georgia's motion for out-of-time appeal procedure.

When a state establishes a right of appeal from a judgment in a criminal prosecution, it invokes certain constitutional protections, including rights to due process, to counsel, and to the equal protection of the law.[1] *Griffin v. Illinois*, 351 U.S. 12, 18–19 (1956); *Douglas v. California*, 372 U.S. 353, 357–58 (1963); *Evitts v. Lucey*, 469 U.S. 387, 393–94 (1985). And when trial-level defense counsel frustrates a defendant's right to appeal, the Constitution requires the state to provide a remedy.[2] *Lucey*, 469 U.S. at 399–400. The preferred remedy in Georgia has long been the motion for out-of-time appeal.

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[1] Not all those protections fully attach to discretionary procedures, like certiorari. *See Ross v. Moffitt*, 417 U.S. 600, 614–16 (1974); *but see Halbert v. Michigan*, 545 U.S. 605, 616–24 (2005) (obliging states to provide counsel for indigent defendants seeking first-tier review of a criminal judgment, even when review is discretionary).

[2] The federal constitutional inquiry when counsel has failed to invoke the right to appeal at the trial level is different from when counsel has failed to file a brief at the appellate level. In the former case, defendants are entitled to relief if there is a reasonable probability that they would have appealed. *Roe v. Flores-Ortega*, 528 U.S. 470, 476–78, 480, 484 (2000). In the latter, a defendant is entitled to relief only if there is a reasonable probability that an unraised assignment of error would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). That is not the case in Georgia, however. Unlike other jurisdictions, *see Anders v.*

Defendants who aver and prove that counsel's deficient performance (or "other error[s] of constitutional magnitude," *Bailey v. State*, 306 Ga. 364, 364, 828 S.E.2d 300, 301 (2019)) frustrated their rights to appeal may, without the aid of counsel, *Pierce v. State*, 289 Ga. 893, 894, 717 S.E.2d 202, 204 (2011) (quoting *Thompson v. State*, 275 Ga.App. 566, 569, 621 S.E.2d 475, 478 (2005)), move the sentencing court to restore those rights, *Rowland v. State*, 254 Ga. 872, 875–76, 452 S.E.2d 756, 760 (1995).[3]

> Should, upon the defendant's application for out-of-time appeal, it be established to the trial court's satisfaction that the appellate procedural deficiency was due to appellate counsel's failure to perform routine duties, appellant is entitled to an out-of-time appeal. A defendant granted an out-of-time appeal by the trial court will

California, 386 U.S. 738, 744–45 (1967), appellate counsel here discharge their constitutional obligations only by filing an appellate brief—regardless of whether the record discloses any nonfrivolous issue, *Huguley v. State*, 253 Ga. 709, 710, 324 S.E.2d 729, 730–31 (1985); *Fields v. State*, 189 Ga.App. 532, 533, 376 S.E.2d 912, 913–14 (1988). And a defendant whose counsel deficiently fails to file an appellate brief may net an out-of-time appeal, regardless of what the outcome would have been. *Reese v. State*, 216 Ga.App. 773, 774–75, 456 S.E.2d 271, 272–73 (1995).

[3] This Court and the Court of Appeals have entertained grants of out-of-time appeals without apparent constitutional basis. *See, e.g.*, *Fann v. State*, 254 Ga. 514, 515 n.1, 333 S.E.2d 547, 548 n.1 (1985) (disclosing no constitutional basis for the grant of out-of-time appeal); *Johnson v. State*, 182 Ga.App. 477, 477, 356 S.E.2d 101, 102 (1987) (stating that the Court of Appeals, "'for proper reasons' … would entertain an out-of-time appeal, without imposing a constitutional limitation.") (quoting *Mitchell v. State*, 157 Ga.App. 181, 182, 276 S.E.2d 864, 866 (1981), *overruled by Gable v. State*, 290 Ga. 81, 720 S.E.2d 170 (2011)), *overruled by Gable*, 290 Ga. 81, 720 S.E.2d 170; *see also Veasley v. State*, 272 Ga. 837, 839, 537 S.E.2d 42, 44 (2000) (explaining that a defendant who does "not receive timely notice under OCGA § 15-6-21(c) … can either request an out-of-time appeal or move to set aside the" appealable order).

> have 30 days from the grant to file a notice of appeal to the appellate court with subject-matter jurisdiction.
>
> *Id.*, 452 S.E.2d at 760.

(2) The underlying motion for an out-of-time appeal here.

The questions presented in this matter arise from the alleged failure of Appellant Cededra Lynn Cook's plea counsel to discharge his constitutional obligations with regard to her rights to seek review of the judgment entered on her guilty plea. Six years after her plea, Cook sought to avail herself of the trial courts' long-recognized equitable power to restore defendants' rights to seek appellate review on proof of defense counsels' ineffectiveness. She moved in the sentencing court and under her original indictment number for an out-of-time appeal.

(3) A brief history of the out-of-time-appeal remedy.

In seeking an out-of-time appeal from the sentencing court, Cook followed that well-trod path for securing appellate jurisdiction—which this Court has blessed since the Nixon administration. *See Cunningham v. State*, 232 Ga. 416, 416, 207 S.E.2d 48, 48–49 (1974). In *Cunningham*, this Court reversed a decision of the Court of Appeals dismissing a criminal defendant's premature appeal because

the procedural error was attributable to her counsel.[4] *Id.*, 207 S.E.2d at 48–49. Before then, the only recognized vehicle for restoring defendants' wrongly forfeited appellate rights was habeas corpus. *Neal v. State*, 232 Ga. 96, 96, 205 S.E.2d 284, 285 (1974); *see also Roberts v. Caldwell*, 230 Ga. 223, 223, 196 S.E.2d 444, 444–45 (1973); *McAuliffe v. Rutledge*, 231 Ga. 1, 2–3, 200 S.E.2d 100, 101–02 (1973) *and* 231 Ga. 745, 745–46, 204 S.E.2d 141, 142 (1974).

In the time following *Cunningham* and through the 1980s, however, courts relied increasingly on direct grants of out-of-time appeals to cure for constitutional infirmities, which would normally have been grounds for habeas corpus relief. *See Shirley v. State*, 188 Ga.App. 357, 359–60, 373 S.E.2d 257, 259 (1988) (explaining the evolution of the out-of-time-appeal process and collecting citations). This Court later formalized that expedited (if procedurally incorrect) process in *Rowland*. Striking a balance between the necessary constitutional remedy for a frustrated right of appeal and adherence to jurisdictional and procedural rules, this Court held that it and the Court of Appeals should dismiss untimely criminal appeals and allow defendants to move for the restoration of their appellate rights in the courts that sentenced them. 264 Ga. at 875–76; 452 S.E.2d at 759–60.

[4] The rule at the time was that a premature notice of appeal was ineffectual. *Bozenheim v. Bozenheim*, 227 Ga. 478, 478, 181 S.E.2d 363, 364 (1971). This Court corrected that rule in 1975. *Gillen v. Bostick*, 234 Ga. 308, 309–11, 215 S.E.2d 676, 678 (1975).

Since the Court decided *Rowland* 26 years ago, grants of out-of-time appeals have become an indelible part of criminal-appellate practice. To be sure, this Court has relied on granted motions for out-of-time appeals as a basis for jurisdiction 16 times in the last 12 months. *See Williams v. State*, No. S21A1171, slip op. at 1 n.1, 863 S.E.2d 44, 45 n.1 (Ga. Sept. 8, 2021); *Baker v. State*, No. S21A0686, slip op. at 1–2 n.1, 863 S.E.2d 55, 57 n.1 (Ga. Sept. 8, 2021); *Walker v. State*, No. S21A0965, slip op. at 1 n.1, 862 S.E.2d 542, 544 n.1 (Ga. Sept. 8, 2021); *Williams v. State*, No. S21A0504, slip op. at 1–2 n.1, 862 S.E.2d 108, 109 n.1 (Ga. Aug. 10, 2021); *Thompson v. State*, No. S21A0854, slip op. at 1–2 n.1, 862 S.E.2d 317, 317 n.1 (Ga. Aug. 10, 2021); *Walker v. State*, S21A0779, slip op. at 1 n.1, 862 S.E.2d 285, 288 n.1 (Ga. Aug. 10, 2021); *Sullivan v. State*, No. S21A0229, slip op. at 1 n.1, 860 S.E.2d 576, 578 n.1 (Ga. Jun. 21, 2021); *Holmes v. State*, 311 Ga. 698, 698 n.1, 859 S.E.2d 475, 476 n.1 (2021); *Rogers v. State*, 311 Ga. 634, 634 n.1, 859 S.E.2d 92, 93 n.1 (2021); *Waller v. State*, 311 Ga. 517, 518 n.1, 858 S.E.2d 683, 684 n.1 (2021); *Abbott v. State*, 311 Ga. 478, 478 n.1, 858 S.E.2d 696, 698 n.1 (2021); *Felts v. State*, 311 Ga. 547, 547 n.1, 858 S.E.2d 708, 711 n.1 (2021); *Thomas v. State*, 311 Ga. 280, 280 n.1, 857 S.E.2d 223, 224 n.1 (2021); *Kirkland v. State*, 310 Ga. 738, 738 n.1, 854 S.E.2d 508, 509 n.1 (2021); *Lynn v. State*, 310 Ga. 608, 608 n.1, 852 S.E.2d 843, 846 n.1 (2020); *Armstrong v. State*, 310 Ga. 598, 598 n.1, 852 S.E.2d 824, 828 n.1 (2020).

A reliable count from the Court of Appeals is not available since that Court does not report all of its decisions, *see* Ga. Ct. App. R. 34, and, even in published opinions, it does not always note the procedural history.

In any event, this Court has continually tinkered with out-of-time appeals, particularly regarding the scope of the remedy. In the early 90s, for instance, a grant of out-of-time appeal was held to embrace a renewed right to move for a new trial—perhaps even where one had already been timely filed and ruled upon. *Maxwell v. State*, 262 Ga. 541, 542–43, 422 S.E.2d 543, 544–45 (1992), *overruled by Kelly v. State*, No. S21A0184, slip op. at 10–11, 860 S.E.2d 740, 744 (Ga. Jun. 21, 2021). Last term, however, this Court limited the right to an out-of-time motion for a new trial to cases where defense counsel was constitutionally ineffective for having failed to timely file such a motion. *Kelly*, slip op. at 10–11, 860 S.E.2d at 744. And it recently declined to recognize an out-of-time motion to withdraw a guilty plea predicated on plea counsel's ineffectivenes, *Schoicket v. State*, No. S21A0840, slip op. at 4–12 (Ga. Nov. 2, 2021), though a motion to withdraw a plea is in all respects analogous to a motion for a new trial, *Collier v. State*, 307 Ga. 363, 380–81, 834 S.E.2d 769, 783–84 (2019) (Peterson, J., concurring specially).

AMICUS'S VIEWS

(1) The out-of-time appeal is a jerry-rigged remedy, illegitimate but practical.

There can be little doubt at this point that the Court was without authority to craft the out-of-time-appeal remedy in the first instance. "[T]he right to appeal, even in criminal cases, is not constitutional but 'purely a creature of statute.'" *Sosniak v. State*, 292 Ga. 35, 44, 734 S.E.2d 362, 370 (2012) (Nahmias, J., concurring) (quoting *Abney v. United States*, 431 U.S. 651, 656 (1977)). "[C]ompliance with the statutory deadline for filing a notice of appeal is an 'absolute requirement' to confer jurisdiction on an appellate court." *Gable*, 290 Ga. at 82, 720 S.E.2d at 171. No provision of the Appellate Practice Act permits any court to restore a forfeited right to appeal, only to extend the time for taking an appeal prior to its expiration.[5] *See* OCGA § 5-6-39(a) & (d). And "courts have 'no authority to create equitable exceptions to jurisdictional requirements' imposed by statute." *Gable*, 290 Ga. at 85, 720 S.E.2d at 173 (quoting *Bowles v. Russell*, 551 U.S. 205, 214 (2007)); *see also Duke v. State*, 306 Ga. 171, 174–81, 829 S.E.2d 348, 353–61 (2019) (abandoning a judicially-created equitable

[5] But no court may extend the time for filing a motion for a new trial. OCGA § 5-6-39(b). Nor does the Appellate Practice Act prescribe any mechanism for a court to restore a right to file any paper after it has lapsed, as would be possible, for instance, in the federal system, *see* Fed. R. App. P. 4(b)(4).

exception to OCGA § 5-6-34(b)), *overruling Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000).

Even if the 14th Amendment requires states to provide a remedy for a frustrated right of appeal, *see Lucey*, 469 U.S. at 399, the exclusive vehicle for securing equitable relief for constitutional violations is a petition for a writ of habeas corpus, *Mitchum v. State*, 306 Ga. 878, 882–85, 834 S.E.2d 65, 69–71 (2019). This Court recognized as much in the early spring of 1974. It affirmed then the dismissal of a motion for leave to take an out-of-time appeal (which sounded in habeas corpus) because the prisoner filed it in the county where he was prosecuted, rather than in the county where he was detained. *Neal*, 232 Ga. at 96, 205 S.E.2d at 285. But by late spring, the Court had already started down the parallel path of restoring frustrated appellate rights without requiring a habeas petition. *Cunningham*, 232 Ga. at 416, 207 S.E.2d at 48–49. Still, it continued to acknowledge that the out-of-time appeal was a court-constructed device: "'Out of time appeal' in Georgia appears to have had its genesis in *Byrd v. Smith*, 407 F.2d 363 (5th Cir. 1969). Although it has no codical basis, it is granted where the deficiency involves not the trial but the denial of the right of appeal." *Lay v. State*, 242 Ga. 225, 225, 248 S.E.2d 611, 611 (1978).

(a) When first recognized, a motion for out-of-time appeal was practically identical to a petition for a writ of habeas corpus.

Allowing the parallel remedies in the 70s and 80s was less consequential than the distinction would become in the 2000s and beyond. When the Court first recognized the out-of-time-appeal remedy outside the habeas context, the only difference was venue. "Prior to 1986 [when the General Assembly limited the period for seeking habeas corpus relief from traffic convictions] there were no time limits on applying for habeas relief in Georgia[,]" even laches. Donald E. Wilkes, Jr., *The Great Writ Hit: The Curtailment of Habeas Corpus in Georgia Since 1967*, 7 J. Marshall L.J. 415, 462 (2014). In fact, the General Assembly did not impose a limitations period for seeking habeas corpus relief from felony sentences until 2004, Ga. Laws 2004, p. 917, § 1—almost a decade after *Rowland* cemented the procedure. So now, the motion for an out-of-time appeal is a markedly broader remedy than habeas corpus. *See Collier*, 307 Ga. at 369–70, 834 S.E.2d at 776–77.

But that is a consequence of recent legislation. And there are good reasons to prefer the more expeditious motion for out-of-time appeal to a petition for a writ of habeas corpus. In particular, the motion for out-of-time appeal has long been more expeditious than the "procedurally correct … route." *Shirley*, 188 Ga.App. at 359–60, 373 S.E.2d at 259. It permits the underlying ineffectiveness claim to "be

promptly resolved by the judge who presided over the trial as opposed to having it resolved by a habeas [corpus] court somewhere down the road." *Ponder v. State*, 260 Ga. 840, 842, 400 S.E.2d 922, 924 (1991) (quoting *Lloyd v. State*, 258 Ga. 645, 645 n.1, 373 S.E.2d 1, 1 n.1 (1988)), *disapproved of by Kelly*, No. S21A0184, 860 S.E.2d 740.

(b) The out-of-time appeal is one thread in Georgia's Gordian knot of criminal-appellate and post-conviction practice.

What is more, the motion for out-of-time appeal is far from the only aspect of appellate procedure that this Court has invented. To be sure, members of this Court and the Court of Appeals have themselves recognized that the precedents in this area have "led to the creation of a confusing tangle of procedural rules," *Maxwell*, 262 Ga. at 543, 422 S.E.2d at 545 (Fletcher, J., concurring specially), which only the General Assembly could "unweave," *King v. State*, 208 Ga.App. 77, 81, 430 S.E.2d 640, 644 (1993) (Pope, C.J., concurring specially), *overruled by Glover v. State*, 266 Ga. 183, 465 S.E.2d 659 (1996).

As a direct consequence of this Court's precedents, for example, a defendant must raise claims of trial counsel's ineffectiveness at the "earliest practicable moment," *Smith v. State*, 255 Ga. 654, 655, 341 S.E.2d 5, 7 (1986), which in Georgia, this Court has held, is "*before appeal* if the opportunity to do so is available," *Glover*, 266 Ga. at 184,

465 S.E.2d at 660 (emphasis original). A timely motion for a new trial under OCGA § 5-5-40(a) "represents such an opportunity[,] and … the failure to seize that opportunity is a procedural bar to raising the issue at a later time." *Id.* So a defendant who wishes to assign error to trial counsel's ineffectiveness, must move for a new trial—notwithstanding OCGA § 5-6-36(a)'s direction that "[a] motion for new trial need not be filed as a condition precedent to appeal or consideration of any judgment." *But see Wilson v. State*, 277 Ga. 195, 198, 586 S.E.2d 669, 672 (2003) ("[W]here the 'ineffectiveness' relates to alleged errors made during the course of the trial as shown by the transcript, then trial counsel's testimony may not be re-quired; the record speaks for itself. (quoting *Dawson v. State*, 186 Ga.App. 718, 721, 368 S.E.2d 367, 370 (1988), *rev'd*, *Dawson v. State*, 258 Ga. 380, 369 S.E.2d 897 (1988)). And when a defendant who has not interposed a motion for a new trial between the final judgment of conviction and the notice of appeal assigns error to trial counsel's conduct, the appellate court will remand the matter for an evidentiary hearing. *E.g.*, *Peterson v. State*, 274 Ga. 165, 171, 549 S.E.2d 387, 393 (2001); *Ponder*, 260 Ga at 840–42, 400 S.E.2d at 923–24.

Of course, this Court has held, the opportunity to assign error to trial counsel's ineffectiveness is ripe only when appellate counsel is independent from trial counsel. *Ryan v. Thomas*, 261 Ga. 661, 662, 409 S.E.2d 507, 508–09 (1991); *White v. Kelso*, 261 Ga. 32, 32, 401

S.E.2d 733, 734 (1991). Thus, independent counsel who first appears after the motion for a new trial has been ruled on may still seek remand to urge trial counsel's ineffectiveness. *Maxwell*, 262 Ga. at 543, 422 S.E.2d at 545; *but see* OCGA § 5-5-40(b) (precluding successive motions for new trials); *Kelly*, slip op. at 16–18 (Warren, J., concurring specially) (suggesting that *Maxwell* may have contravened § 40(b) by authorizing a second motion for a new trial). Moreover, when appellate and motion-for-new-trial counsel are each independent from the other and from trial counsel, appellate counsel may seek a remand to challenge motion-for-new-trial counsel's ineffectiveness. *E.g.*, *Elkins v. State*, 306 Ga. 351, 362–64, 830 S.E.2d 217, 227–28 (2019) . But this Court will not indulge appellate counsel's bootstrapping new ineffective-assistance-of-trial-counsel claims through ineffective-assistance-of-appellate-counsel claims, as to do so "'would eviscerate the fundamental rule that ineffectiveness claims must be raised at the earliest practicable moment' and would 'promote serial appellate proceedings.'" *King v. State*, 304 Ga. 349, 351, 818 S.E.2d 612, 615 (2018) (quoting *Wilson v. State*, 286 Ga. 141, 145, 606 S.E.2d 104, 108 (2009)).

Looking at all this, defense lawyers—especially public defenders—might think that they could avoid this thicket by employing appellate counsel who was at least associated with trial counsel, thus reserving ineffectiveness claims for later habeas proceedings, should

they be necessary. Not so, says the Court. Defendants may insist on new, independent appellate counsel by simply incanting the words "ineffective assistance," notwithstanding whether any such claim would have merit. *Garland v. State*, 283 Ga. 201, 205, 657 S.E.2d 842, 845–46 (2008). That rule frequently leads to the casual jettisoning of trial counsel, who is familiar with the record, and equally casual substitution of appellate counsel, who is a stranger to the case. As one of the most venerable members of Georgia's criminal-appellate bar explained in *Garland*'s immediate wake:

> Let me start with the defendant. Many who become entangled in the criminal law do not have the best judgment or social skills. In addition to the common disadvantages of poverty, many suffer from personality disorders or mental impairments. Many are unsophisticated and ill-educated, wholly unequipped to navigate alone through the intricacies of the law. An accused is rightly presumed to need the guiding hand of counsel throughout his prosecution.
>
> Just tried and convicted, his anxiety should be at its apex and his confidence in his trial counsel at its nadir. He probably has little legal experience except as an accused and no legal training except what he can pick up so dubiously at the feet of the jail-house lawyers who might have his ear. There is no reason to suppose that he has ever read *Strickland v. Washington*, [466 U.S. 668 (1984)], that he would understand it if he has, or that he would have the detachment to be able to apply it to his own circumstances in any event. He would ordinarily have no basis to understand what is "reasonable professional judgment" and what is not. Unequipped to peer through the mysteries of the law, to perceive the difference between good claims and poor ones,

> and to understand the benefits of dumping the latter to concentrate on the former, his natural predilection will be to raise as many issues as he can think of, to throw them all against the wall, and to let the courts see which stick.
>
> The many decisions his lawyer made in his disappointing trial are a natural object of his views of what went awry. Any trial may present or omit various errors, but virtually every convicted defendant had a lawyer whose defense failed. And it always feels better to blame a sorry plight not on what one did himself did but on what someone else did. The remarkable thing is not that convicted defendants complain about their lawyers—it is that some of them do not.[6]

To be sure, the Georgia Public Defender Council, which has the onus of appointing and paying appellate lawyers for indigent defendants who wish to assert the ineffectiveness of their trial-level public defenders, OCGA § 17-12-22(a), took an instant hit. The Council "first attempted to convert its central office appellate division from a training and consultancy [sic] to handling conflict appeals. Its staff—two lawyers, one retired and half-time lawyer, and one paralegal—was quickly overwhelmed with a caseload which rapidly reached 400 cases scattered all over the state." Bonner, *supra*, at 13. It then attempted to recruit private lawyers and later, to shuffle appellate matters between circuits. *Id.* Only after having been sued over its failure

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[6] James C. Bonner Jr., *The Decline, Fall and Possible Resurrection of Indigent Appellate Advocacy in Georgia*, THE APPELLATE REVIEW: THE NEWSLETTER OF THE APPELLATE PRACTICE SECTION OF THE STATE BAR OF GEORGIA, Winter 2011, at 11, https://www.gabar.org/committeesprogramssections/sections/appellatepractice/upload/APS_Winter_2011.pdf.

to provide counsel on appeal *see Flournoy v. The State of Georgia, et al.*, Fulton County No. 2009CV178947, did the Council arrive at its present, hybrid model comprising staffed appellate specialists and conflict lawyers, *see* Website of the Georgia Public Defender Council, Appellate Division, http://www.gapubdef.org/index.php/divisions/appellate-division (last visited Dec. 3, 2021).

Once appellate counsel have been substituted under *Garland*, they are squeezed by two sets of precedents into converting each client's motion for a new trial into "a second trial, this one of [trial] counsel's unsuccessful defense." *Strickland v. Washington*, 466 U.S. at 690. The first of these, discussed immediately above, compels appellate counsel to consider and assign error to every colorable claim of ineffective assistance, else they be procedurally defaulted for later proceedings.[7] The second, referenced in footnote two, obliges counsel

[7] As the special concurrence in *Collier* noted, Georgia is an outlier in this regard. 307 Ga. at 380–81, 834 S.E.2d at 769. Furthermore, appellate counsel's decision not to urge an ineffectiveness claim generally bars consideration of that claim not just in later state proceedings, but also in collateral federal proceedings under 28 USC § 2254(b)(1)(A), which requires a petitioner to have, in most cases, exhausted available state-court remedies. Strictly applied and paired with this Court's precedents, that provision would require defendants not only to raise every colorable ineffectiveness claim that they might later want a federal court to consider, but also to petition for writs of certiorari on those claims when direct appellate jurisdiction lay in the Court of Appeals. *Nelson v. Schofield*, 371 F.3d 768, 770–71 (11th Cir. 2004), *superseded by state rule*, Ga. Sup. Ct. R. 40, *as recognized in Hills v. Washington*, 441 F.3d 1374 (11th Cir. 2006). Though there may be some doubt whether a state court can bind its executive into waiving a federal defense, *see Hills*, 441 F.3d at 1378–79 (Carnes, J., concurring), to their credit, the Attorney General's Office and Georgia's federal courts have gone with it, *e.g.*, *Skillern v. State of Georgia*, 202 F. App'x 403, 408 (11th Cir. 2006).

to assign at least some error, even where to do so would be frivolous. *Huguley*, 253 Ga. at 710, 324 S.E.2d at 730–31; *Fields*, 189 Ga.App. at 533, 376 S.E.2d at 913–14. In a jurisdiction with limited plain-error review, *see Gates v. State*, 298 Ga. 324, 328–29, 781 S.E.2d 772, 776–77 (2016), appellate counsel's only recourse is often to urge a predecessor's ineffectiveness.

And to come full circle, the casual jettisoning of trial counsel increases the likelihood that someone will miss a jurisdictionally necessary filing in the handoff. Indeed, in each of the 16 instances since December 2020 when this Court has based its jurisdiction on a grant of out-of-time appeal, the underlying motion appears to have been an attempt by appellate counsel to cure for the oversight of a predecessor. Yes, since this Court in *Collier* opened the floodgates to out-of-time appeals from guilty pleas, it has been awash with attempts to overturn judgments long since final. *E.g.*, *Sims v. State*, No. S21A0587, 862 S.E.2d 507 (Ga. Aug. 24, 2021); *Harvey v. State*, No. S21A0871, 862 S.E.2d 120 (Ga. Aug. 10, 2021); *McDaniel v. State*, 311 Ga. 367, 857 S.E.2d 479 (2021); *Davis v. State*, 310 Ga. 547, 852 S.E.2d 517 (2020). But that is no reason to reconsider the procedural vehicle now, not when it means a far more expeditious means of restoring frustrated rights of review to legitimately entitled defendants. Shuffling all those claims off to habeas will injure legitimate claimants (whose proceedings will only be further protracted) far more

than it will prevent a windfall to illegitimate ones (who should not get relief in either posture). The only benefit to reconsidering the motion for out-of-time appeal now would be a reallocation of court resources.

(2) Stare decisis favors retaining the motion for out-of-time appeal.

Even if the Court is inclined to reconsider whether to stick with motions for out-of-time appeals, it should also consider whether the policy of stare decisis supports its retention.

> Under the doctrine of stare decisis, courts generally stand by their prior decisions, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Stare decisis, however, is not an inexorable command. Courts, like individuals, but with more caution and deliberation, must sometimes reconsider what has been already carefully considered, and rectify their own mistakes. In reconsidering [its] prior decisions, [the Court] must balance the importance of having the question decided against the importance of having it decided *right*. To that end, [this Court has] developed a test that considers the age of precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning.
>
> *Olevik v. State*, 302 Ga. 228, 244–45, 806 S.E.2d 505, 519 (2017) (emphasis original, citations omitted, and punctuation altered).

On balance, the stare decisis factors lean strongly toward staying the course here: Amicus does not contend that the practice of

granting out-of-time appeals was well reasoned at the outset. In fact, no opinion that amicus dug up revealed any reasoning at all. But the genius of the out-of-time appeal lies not in its pedigree, but its practicality. For nearly five decades, courts, litigants, and lawyers have relied on motions for out-of-time appeals because they are an efficient and workable means of addressing an obvious, if all too common, problem—that lawyers can't count to 30.

(a) The age of motions for out-of-time appeals favors their retention.

At nearly 50, direct grants of out-of-time appeal have been with us since the eldest sitting member of this Court was in high school. The original precedents would, thus, predate the oldest decisions that this Court has revisited in more than a decade. *Cf. Olevik*, 302 Ga. 228, 806 S.E.2d 505 (overruling a then-17-year-old precedent); *State v. Springer*, 297 Ga. 376, 774 S.E.2d 106 (2015) (overruling a then-12-year-old precedent); *State v. Hudson*, 293 Ga. 656, 748 S.E.2d 910 (2013) (overruling a then-38-year-old precedent); *State v. Jackson*, 287 Ga. 646, 697 S.E.2d 757 (2010) (overruling a then-29-year-old precedent).

(b) The legal system's reliance on motions for out-of-time appeals favor their retention.

Procedural rules do not normally create the kinds of reliance interests that stare decisis is concerned with because they "affec[t] no property or contract issues and establis[h] no substantive rights." *Jackson*, 287 Ga. at 658, 697 S.E.2d at 766; *see* Bryan A. Garner, et al., *The Law of Judicial Precedent*, 370–72, 421–39 (2016). That is not so here, however. Here, the criminal legal system has arranged itself around the availability of the direct, out-of-time remedy. To abandon them now would increase the obvious and hidden costs of criminal appeals. For one thing, even non-indigent defendants pay nothing to file a motion for an out-of-time appeal. *See* OCGA § 16-6-77(h). Nor need they pay (up front, at least) to secure the necessary testimony of counsel whose deficiencies they allege. *See* OCGA § 24-13-25. Neither is the case when the issue is raised via habeas corpus, in which a petitioner must pay for filing, service, and up front for witnesses (including mileage to often remote jurisdictions). Add to that the personnel costs of having the Attorney General (as opposed to the local District Attorney) in most cases respond, *see* OCGA § 9-14-45, as well as the incalculable value of the time lost waiting for a habeas court that is a stranger to the parties and the subject matter to decide in a formal proceeding what a sentencing court can decide promptly on a motion. Maintaining the motion for out-of-time appeal is by far a

cheaper option for the State, the courts, and defendants than insisting on formal habeas proceedings in every case.

(c) The workability of motions for out-of-time appeals favors their retention.

Most significant perhaps is how efficient motion-for-out-of-time-appeal practice is, especially when compared to habeas corpus practice.

To start, a post-judgment motion in a criminal case does not require the arbitrary procedural dressing that a habeas corpus petition does—particularly for an issue as uncomplicated as whether counsel failed to timely file a jurisdictionally necessary document. *See*, *e.g.*, OCGA § 9-10-14(a); *Heaton v. Lemacks*, 266 Ga. 189, 189, 466 S.E.2d 7, 8 (1996) (affirming the dismissal of a habeas petition because it was not on the preprinted form promulgated by the Administrative Office of the Courts).

More to the point, though, a motion for out-of-time appeal need not involve the transfer of the records to another jurisdiction, or even involved litigation, when the underlying issue is clear, as it often is. Were it otherwise, this Court and the Court of Appeals would not so often rely on them as an unremarkable basis for asserting jurisdiction.

Last on this point, and not to be forgotten, is that the restoration of appellate rights in most cases is a procedural hiccup, the correction of an obvious ministerial error that is necessary for an appellate court to reach the merits of a case. How workable is it to tell someone, particularly one who may otherwise be entitled to a reversal of a conviction, that they must wait for relief because they asked the wrong court to correct an obvious procedural mistake?

(3) If this Court opts to abandon motions for out-of-time appeals,it should not do so immediately.

Finally, if this Court disagrees with the points above, amicus urges it to defer any abandonment of motions for out-of-time appeals to a later date. There is no way to determine how many people in the pipeline are relying on motions for out-of-time appeal to secure the rights to review that their lawyers cheated them of. To require the immediate dismissal of all pending motions for out-of-time appeal statewide would unfairly punish individuals for legitimately relying on this Court's precedents. When the Court has opted to abandon other established practices, it has announced its intent well ahead of the change. *E.g.*, *Davenport v. State*, 309 Ga. 385, 399, 846 S.E.2d 83, 94 (2020). Should the Court choose a new course here, amicus urges it to do likewise and set a date certain after which no motion for out-of-time appeal may be filed.

CONCLUSION

The year after this Court decided *Rowland*, Fox aired "Hurricane Neddy," the eighth episode of the eighth season of its long-running animated sitcom, *The Simpsons*. There, in a feat of comedic Samaritanism, Springfield's denizens shoddily reconstruct Ned Flanders's home, which a hurricane had leveled the day before. When they ran out of flooring, for example, they painted the dirt. And they installed a toilet in the kitchen rather than lug it upstairs. At one point, Bart brags to Ned's older son, Rod, that he and his sister Lisa built his bedroom. Rod tears down a poster that they had hung, explaining that he did not like the clown it depicted. Bart warns Rod against it—"I wouldn't take it down if I were you; it's a load-bearing poster"—just before the wall and ceiling begin to crumble.

For decades, iterations of this Court have tinkered with criminal-appellate and post-conviction practice in the name of policies—policies of requiring that collateral constitutional claims be urged in motions for new trial, else they be forfeited; of unburdening Court resources by foreclosing *Anders* motions, incentivizing specious claims, particularly of ineffective assistance; of allowing casual substitution of counsel post judgment so that such claims may be investigated and raised; of dictating when federal courts should determine that § 2254 claims have been exhausted; and of allowing trial courts to restore appellate rights that counsel has forfeited, notwithstanding the lack

of statutory authority. Lawyers and litigants have learned to live in the house that the Court has made for them. They give advice, allocate resources, and make strategic decisions based on the Court's floorplan. Unseemly as the motion for out-of-time appeal is, they ask the Court not to rip down a load-bearing poster until someone has a plan to rebuild.

Respectfully submitted on 3 December 2021 by

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