IN THE COURT OF APPEALS
STATE OF GEORGIA

VICTOR GRAHAM,	**:**	
Appellant,	**:**	
v.	**:**	**CASE NUMBER A22A1698**
STATE OF GEORGIA,	**:**	
Appellee.	**:**	

BRIEF OF APPELLANT

COMES NOW VICTOR GRAHAM, Appellant in the above-styled matter, and hereby files this brief. Appellant seeks to appeal the Order issued by the Superior Court of Lowndes County, Hon. Frank D. Horkan presiding, in the case styled State of Georgia v. Victor Graham, Indictment No.: 2009CR0148, which denied Defendant Victor Graham's Motion for New Trial. The Order was entered on November 1, 2021. Appellant was granted leave to file an out-of-time appeal by Order of the Superior Court of Lowndes County entered on January 25, 2022, and a Notice of Appeal was filed on February 21, 2022. This case was docketed in the Court of Appeals on July 6, 2022. This brief is filed within twenty (20) days of the above-styled case being docketed.

I.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant Victor Graham was represented at trial by Ms. Latesha Bradley. Ms. Bradley met with Appellant in person only twice prior to trial – once at Appellant's preliminary hearing, and once on the Thursday prior to Appellant's trial. Trial transcript, 9:22-25. As such, Ms. Bradley agreed during her testimony at the hearing on Appellant's Motion for New Trial that she met with Appellant in-person only once in the ninety days preceding his trial. Motion for New Trial transcript ("Motion transcript"), 44:10-13.

Ms. Bradley also indicated at the motion hearing that she received a plea offer from the State on Appellant's case, and that the offer was for fewer years in prison than what Appellant ultimately received following his conviction at trial. Motion transcript, 14:10-11. Ms. Bradley further testified that she did not recall discussing the plea offer with Appellant in-person, and definitively testified that she would have mailed said plea offer to Appellant. Motion transcript, 12:11-12. Additionally, Ms. Bradley testified that she did not make any counter-offers to the State in terms of plea bargaining. Motion transcript, 16:19-22.

Ms. Bradley also testified that she did not review the jury list with the Appellant until the day that jury selection was to occur, nor did she ever obtain a list of witnesses from the Appellant. Motion transcript, 19:1; 20:2. Although Ms.

Bradley did discuss potential witnesses with Appellant at their in-person meeting on the Thursday before trial, there were fewer than ten days until the date that the trial was to begin. Motion transcript, 19:24 – 20:2.

Prior to the trial beginning, Defendant wished to address the Court himself, and was given the opportunity to do so. Defendant asked the Court for a continuance, based on his belief that his trial counsel was not adequately prepared to try the case at this time. Trial transcript, 8:13-25. Defendant indicated that he had only met with his lawyer once, that they had not had time to get their trial witnesses together, and emphasized to the Court the importance of the two witnesses that he identified to Ms. Bradley at their only in-person meeting other than at the Defendant's preliminary hearing. Trial transcript, 14:12-19. The two witnesses were Defendant's girlfriend (Terri Whitlock) and her mother (Sarah Whitlock), both of whom resided with Defendant during the dates alleged in the indictment.

Following Defendant's request for a continuance and reasons given for the same, Ms. Bradley insisted to the Court that she was ready for trial. Defendant was thereafter convicted of incest and statutory rape, and was sentenced to a total of fifty years in prison.

Defendant/Appellant timely filed a Motion for New Trial on June 30, 2009, with an Amended Motion for New Trial being filed on June 28, 2021. On July 16, 2021, a hearing was held in the Superior Court of Lowndes County before the

Honorable Frank D. Horkan on Defendant/Appellant's Motion for New Trial. On November 1, 2001, Judge Horkan entered an Order denying Defendant/Appellant's Motion for New Trial.

Upon anticipation of it being addressed by this Court, Appellant would submit that the recent holdings by the Supreme Court of Georgia in Cook v. State, 313 Ga. 471 (2022) and Rutledge v. State, 313 Ga. 460 (2022) do not apply to the instant appeal, and that an out-of-time appeal accepted by the trial court under the circumstances of this case should stand as proper and timely. V2-4.

In Rutledge v. State, the Supreme Court of Georgia held that a defendant's remedy, if any, was through habeas corpus when his trial counsel failed to inform him of his right to appeal his guilty plea or withdraw his guilty plea within thirty days of the same, despite the appellant's claim of ineffective assistance by his trial counsel.

In the instant case, counsel for Appellant did not ever receive notice of the trial court's ruling on Appellant's Motion for New Trial. V2-102. Appellant's Motion for Out-of-Time Appeal was granted by the trial court via Consent Order. V2-4.

Each enumeration of error herein was preserved by argument through briefs filed with the Superior Court of Lowndes County prior to a hearing on Defendant/Appellant's Motion for New Trial.

II.

ENUMERATIONS OF ERROR

1. The trial court erred in denying Defendant/Appellant Victor Graham's Motion for New Trial because the trial court improperly determined that Defendant/Appellant failed to carry his burden of proof as to his claim of ineffective assistance of his trial counsel. V2-6.

The Court of Appeals of the State of Georgia has appellate jurisdiction over this matter pursuant to Article VI, Section VI, Paragraph III of the Georgia Constitution, as the subject matter is not expressly reserved for the Supreme Court of the State of Georgia. O.C.G.A. § 15-3-3.1.

III.

SUMMARY OF ARGUMENT

1. The trial court erred in determining that Appellant did not meet his burden of proof as to his claim of ineffective assistance of counsel. Courts, when considering a defendant's motion for new trial, "should consider collectively the prejudicial effect of trial court errors and any deficient performance by counsel." State v. Lane, 308 Ga. 10, 14 (2020). Appellant demonstrated a number of errors by trial counsel that, when considered cumulatively pursuant to Lane, demand that Appellant receive a new trial.

IV.

ARGUMENT AND CITATION OF AUTHORITY

1. Appellant received ineffective assistance from his trial counsel.

To establish a claim of ineffective assistance of counsel, a defendant must show the following: (1) a deficiency in counsel's performance in representation of the defendant, and (2) prejudice to the defendant resulting from said deficiency, such that a reasonable probability exists that the outcome would have been different. Strickland v. Washington, 466 U.S. 668 (1984). More recently, the Georgia Supreme Court overruled the prior long-standing rule in Georgia, and held that courts, when considering a defendant's motion for new trial, "should consider *collectively* the prejudicial effect of trial court errors and any deficient performance by counsel." State v. Lane, 308 Ga. 10, 14 (2020). In the present case, Appellant can demonstrate a number of errors by trial counsel that, when considered cumulatively pursuant to Lane, demand that Appellant receive a new trial.

A. Appellant's trial counsel was deficient in her trial preparation – specifically, due to her lack of interaction and communication with Appellant prior to trial.

I. Time spent with Appellant and meeting with Appellant in person

At the hearing on Appellant's motion for new trial, Ms. Bradley agreed that she had only met with Appellant in-person twice prior to trial (at Appellant's

preliminary hearing, and on the Thursday prior to trial). Trial transcript, 9:22-25. She further agreed that she likely met with Appellant on the Thursday before trial for approximately thirty to sixty minutes. Motion transcript, 45:7-13. Given the timeline of the case, Ms. Bradley also agreed that she had met with the Appellant in-person one time in the ninety days preceding Appellant's trial.

In Jividen v. State, the Georgia Court of Appeals rejected the appellant's argument that his trial counsel was ineffective. The appellant/defendant indicated to the trial court that he had only met with his trial counsel once, but his trial counsel indicated that they had met twice to discuss the case. The trial court resolved the conflict in testimony and elected to lend more credibility to the trial counsel, and the Court of Appeals held that the trial court was authorized to do so. Jividen v. State, 256 Ga. App. 642, 644 (2002). However, this demonstrates that Georgia courts have considered and will consider the number of times that an attorney has met with his/her client in making a determination as to whether counsel's performance was deficient.

This number of in-person meetings, especially considering one meeting in the ninety days immediately preceding the trial, constitutes deficient performance, especially when the Appellant in this case was facing a potential sentence in excess of life in prison. This deficiency in the amount of time spent with Appellant and

amount of communication with Appellant led to other distinct deficiencies, as discussed below. The prejudice suffered by the Appellant is also discussed below.

II. Plea offer and negotiations

Ms. Bradley testified at the hearing on Appellant's motion for new trial that she received a plea offer from the State on Appellant's case. She indicated that she did not recall the exact terms of the offer, but that she was sure that it was for fewer years in prison than what the Appellant ultimately was sentenced to upon his conviction at trial. Motion transcript, 14:10-11. Ms. Bradley further testified that she did not recall ever discussing this plea offer with the Appellant in-person, but that she believed she would have mailed the offer to him. Ms. Bradley also indicated that she never made any counter-offers to the State following the State's initial plea offer.

Defendants are entitled to effective assistance of counsel during plea negotiations. Turner v. State, 345 Ga. App. 894, 895 (2018). To establish ineffective assistance in this regard, a defendant must show that (1) but for the ineffective assistance, there is a reasonable probability that the offer would have been presented to the court; (2) that the court would have accepted its terms; and (3) that the sentence under the terms of the offer would have been less severe than the sentence that was actually imposed. Id. Further, the Georgia Supreme Court has held that "[o]bjective professional standards dictate that a defendant, absent extenuating circumstances, is

entitled to be told that an offer to plead guilty has been made *and to be advised of the consequences of the choices confronting him*. For counsel to do otherwise amounts to less than reasonably professional assistance." Lloyd v. State, 258 Ga. 645, 648 (1988) (emphasis added).

Here, the Appellant was perhaps mailed a plea offer, but the record does not reflect any in-person discussions of the plea offer between the Appellant and trial counsel. Nonetheless, a plea offer was extended, and were it accepted, it is likely that the court would have accepted its terms, as both parties would have agreed to the terms and it would have involved a substantial prison sentence. Ms. Bradley testified that she was sure that the offer was for a less severe sentence than the Appellant ultimately received. Thus, the remaining prong, number (1), requires the Appellant to demonstrate a reasonable probability that the offer would have been presented to the court but for the ineffective assistance. The Appellant here can make such a showing. The record reflects that Ms. Bradley understood the gravity of the charges and potential sentence that the Appellant was facing, and that in her opinion, he was fighting an uphill battle in terms of the evidence against him. Motion transcript, 46:1-6. Given these facts, it is incumbent upon defense counsel to not only inform a defendant of a plea offer, but to advise him of the risks of going to trial, as well as the benefits of accepting a plea offer in lieu of proceeding to trial, as the Georgia Supreme Court held in Lloyd. The record is devoid of any such

discussions between Ms. Bradley and Appellant. Had those discussions occurred, and entailed professional legal advice in terms of the benefits of accepting such an offer, there is a reasonable probability that Appellant would have accepted the State's offer.

Furthermore, it is entirely possible, and arguably likely, that Ms. Bradley could have obtained an even better offer for the Appellant; however, she elected to not make any counter-offers and to forego any plea discussions outside of the initial offer received from the State. Motion transcript, 16:19-22. This failure to engage in plea negotiations, in addition to failure to *fully* inform the Appellant of the plea offer and its benefits, constituted ineffective assistance of counsel.

Finally, had Ms. Bradley met with the Appellant more than once in the ninety days preceding trial, she would have had additional time and opportunity to discuss this plea offer with the Appellant and advise him accordingly. This certainly presents a reasonable probability that the Appellant would have accepted the State's plea offer, had his trial counsel taken the opportunity to meet with him in person sometime between his preliminary hearing and the Thursday before trial.

III. Appellant's request for a continuance

The trial transcript reflects that on the day of trial, the Appellant elected to address the Court directly, and stated his belief that his trial counsel was not fully prepared to proceed to trial. Trial transcript, 8:13-25. He further indicated that they

had not had time to get their witnesses together. Ms. Bradley then expressed her belief that she was prepared to proceed to trial, and that she did not believe it was wise for the Appellant's "character witnesses" to testify. Trial transcript, 12:10-15. However, the Appellant corrected her, and stated that these two witnesses were not character witnesses, but were actually fact witnesses. Trial transcript, 14:12-19. He further expressed their importance to the case, stating that these two witnesses lived at the residence with him during the time that the victim also lived at the residence.

One of these witnesses, Ms. Sarah Whitlock, testified at the hearing on Appellant's motion for new trial. She indicated that she lived with the Appellant, along with Appellant's girlfriend (Terri Whitlock), and Appellant's daughter. Motion transcript, 49:14-21. Ms. Whitlock further testified as to her work schedule and Appellant's girlfriend's work schedule, which existed in such a way that either Sarah Whitlock or Terri Whitlock would have almost always been home, as Sarah worked nights, and Terri worked in the daytime. Motion transcript, 50:11-15. These facts present a reasonable probability of a different outcome at trial, as testimony that someone would have always been home with the Appellant and his daughter would have presented reasonable doubt to the jury. Ms. Bradley's failure to interview these witnesses constituted a deficiency in her performance, and Appellant was prejudiced by their absence at his trial.

The State argues that Ms. Bradley did not become aware of these witnesses' existence until she met with the Appellant on the Thursday before trial, and that by this time, it was too late to interview them or to disclose them as potential trial witnesses. By arguing so, the State concedes that Ms. Bradley was ineffective by not meeting with him in such a time to investigate, disclose, and subpoena witnesses. Had Ms. Bradley met with Appellant sometime in between his preliminary hearing and the Thursday before trial, it is almost certain that she and the Appellant would have discussed these witnesses, and had more time to investigate them and the facts that they could testify to. However, the timing of Ms. Bradley's meetings with the Appellant at the preliminary hearing and mere days before trial doomed her ability and willingness to investigate these witnesses.

Alternatively, even under the circumstances of Ms. Bradley's meetings with Appellant, she should have joined Appellant's request for a continuance following Appellant's insistence that they had not had time to investigate and interview these critical witnesses who lived in the home during the time that the criminal acts were alleged to have occurred. However, instead of joining in her client's request for a continuance, Ms. Bradley went against him, and indicated that she was prepared for trial, despite Appellant's protestations and his specific reasoning as to why a continuance was necessary. Trial transcript, 11:20-24.

Ms. Bradley's failure to meet with Appellant in time to discuss potential witnesses constituted deficient performance, as did her failure to join in his request for a continuance. Both of these facts prejudiced the Appellant, as he was forced to proceed to trial without testimony from witnesses who were present in the home at virtually all times, and would have given the jury a reason to doubt the Appellant's guilt.

IV. Appellant's trial counsel's failure to file a special demurrer.

Ms. Bradley acknowledged that she did not file a special demurrer in Appellant's case, despite each count of Appellant's indictment having a date range of May 1, 2007 to August 17, 2007 for when the charged crimes were alleged to have occurred. Motion transcript, 21:1-3; V2-27. This is in spite of the fact that the child alleged to have been conceived and born as a result of Appellant's alleged crimes was born on March 3, 2008. Motion transcript, 22:10-18. Given the human gestation period of roughly nine months, a special demurrer could have potentially led the trial court to require the State to re-indict Appellant with a more narrow date range, which then would have created more opportunity for Appellant's trial counsel to explore or pursue an alibi defense.

B. The circumstances of Appellant's experience with his trial counsel, and subsequent conviction, warrant a change in standing law such that a certain amount of time spent with a client or in communication with a client by his trial counsel is per se deficient performance.

The Georgia Rules of Professional Conduct permit attorneys to make claims through their representation of a client if, among other circumstances, they can be supported by good faith arguments "for an extension, modification, or reversal of existing law." Rules and Regulations of the State Bar of Georgia, Rule 3.1.

The present case warrants a change in existing law to protect criminal defendants from insufficient time or effort by their attorneys. For the various reasons discussed above, Appellant's trial counsel exhibited deficient performance that prejudiced Appellant before trial and at trial. In light of the current state of the criminal justice system, the general public's waning confidence in the courts and criminal justice system[1], and the litigation and political wars that have evolved in recent years, the judicial system absolutely cannot be willing to say that meeting with a client for as little as thirty minutes before trial within the ninety days before trial is sufficient to provide effective assistance of counsel regardless of the facts related to the case, especially, when plea negotiations could have been explored.

[1] Forbes. "Confidence in U.S. Institutions Down; Average at New Low." 5 July, 2022. https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx

CONCLUSION

Appellant has established that (1) his trial counsel's performance was deficient, and (2) that he was prejudiced by said deficiency, such that a reasonable probability exists that the outcome would have been different but for Ms. Bradley's deficiency. Appellant has shown that Ms. Bradley's in-person meetings with Appellant – only at his preliminary hearing and on the Thursday before trial – handicapped her ability to present a viable defense, to obtain a more favorable result for the Appellant at trial, or to obtain a more favorable result for Appellant through the plea-bargaining process.

Ms. Bradley could have met with the Appellant sometime in between those two meetings, which would have provided opportunity to discuss the two fact witnesses for the defense, as well as given time to Ms. Bradley to investigate and interview these witnesses. An additional in-person visit would have also provided Ms. Bradley and the Appellant with an opportunity to discuss the State's plea offer, which Ms. Bradley admits was for fewer years in prison than what the Appellant ultimately received. Ms. Bradley also could have proposed a counter-offer and attempted to obtain an even better offer from the State. In any event, the record is devoid of any meaningful attempt by Ms. Bradley to counsel the Appellant regarding the State's plea offer, including advising him of the benefits of accepting the offer and the risks of proceeding to trial.

Finally, given Ms. Bradley's lack of advisement regarding the State's plea offer, her lack of in-person interaction with the Appellant, and her lack of investigation into critical witnesses, she should have joined the Appellant's request for a continuance in order to have more time to cure these deficiencies. However, she indicated that she was ready for trial, against her client's wishes.

Deficient performance as in this case, if repeated, has the potential to seriously undermine the public's confidence in the American legal system as it relates to the process of criminal defense. Should this performance be ratified by this Court, the message to the public will be that it is acceptable for a criminal defense attorney to spend an extremely limited amount of time with his/her client, put forth minimal to no effort in attempting to negotiate a plea bargain, and leaving the client with the result, whatever it may be. If trial counsel is to meet with a client only twice (and only once in the ninety days prior to trial), then serious and informed plea discussions are unlikely to occur. If plea discussions have been minimal or nonexistent, then trial counsel certainly needs more than two in-person meetings with a client in order to effectively prepare a defense at trial. In any event, given the general public's declining faith in the criminal justice system, it is imperative that criminal defense attorneys be held to a standard that requires a certain amount of time and effort. A criminal defense attorney not relaying a plea offer to a defendant, much less not even remembering the plea offer for purposes of a hearing on a Motion for New Trial, is

inexcusable.

Given these facts and circumstances, but for Ms. Bradley's deficient performance, there is certainly a reasonable probability that the Defendant would have obtained a better result in this case. Appellant was certainly prejudiced given the sentence he actually received, in light of the State's plea offer and his trial counsel's opportunities to alleviate her deficient performance. The Georgia Supreme Court has indicated in Lane that these deficiencies may be considered cumulatively, and not merely individually, in determining whether trial counsel's performance was deficient. Appellant submits that these decisions and errors cumulatively render his trial counsel's performance deficient, and that he was prejudiced by this deficiency.

For the foregoing reasons, the trial court's denial of Appellant's Motion for New Trial was improper under existing law. Therefore, Appellant respectfully requests that the Superior Court of Lowndes County's Order on Defendant/Appellant Victor Graham's Motion for New Trial be vacated and reversed. Appellant also requests that this Court extend and/or modify existing law and hold that a certain amount of time and/or communication that trial counsel has had with a criminal defendant may constitute deficient performance as a matter of law in the ineffective assistance of counsel analysis.

This the 24th day of July, 2022.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have this day served a true and accurate copy of the within and foregoing **BRIEF OF APPELLANT** upon the following persons by hand-delivery:

Michelle Harrison
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/s/ Jody D. Peterman
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