

**FOURTH DIVISION
SMITH, P. J.,
MIKELL and ADAMS, JJ.**

**NOTICE: Motions for reconsideration must be
physically received in our clerk's office within ten
days of the date of decision to be deemed timely filed.
(Court of Appeals Rule 4 (b) and Rule 37 (b), February 21, 2008)
<http://www.gaappeals.us/rules/>**

June 17, 2008

In the Court of Appeals of Georgia

A08A0733. BURROUGHS v. THE STATE.

SM-028C

SMITH, Presiding Judge.

Camari Burroughs pled guilty to one count of pimping and was sentenced to 20 years, with 10 years to be served in confinement and the remaining 10 years on probation. Following the denial of his motion to withdraw his guilty plea, Burroughs appeals, asserting several enumerations of error. For the following reasons, we affirm.

1. Burroughs first argues that the indictment alleges only a misdemeanor count of pimping and that he therefore could not be sentenced for a felony. He argues that the indictment "lists a form of pimping activity NOT [sic] enumerated in the felony statute," and that pimping only becomes a felony when the act alleged occurs "before the act of prostitution."

The indictment alleged that Burroughs “did instruct . . . a child under the age of eighteen years, to commit prostitution and did receive money from said [child].”

OCGA § 16-6-11 provides that

[a] person commits the offense of pimping when he or she performs any of the following acts: (1) Offers or agrees to procure a prostitute for another; (2) Offers or agrees to arrange a meeting of persons for the purpose of prostitution; (3) Directs or transports another person to a place when he or she knows or should know that the direction or transportation is for the purpose of prostitution; (4) Receives money or other thing of value from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution; or (5) Aids or abets, counsels, or commands another in the commission of prostitution or aids or assists in prostitution where the proceeds or profits derived therefrom are to be divided on a pro rata basis.

Further, under OCGA § 16-6-13 (b), a person convicted of pimping “when such offense involves . . . the pimping for . . . a person under the age of 18 years to perform an act of prostitution . . . shall be guilty of a felony. . . .” Here, Burroughs was charged with instructing a person to commit prostitution and receiving money therefrom knowing that it was earned from prostitution, a clear violation of OCGA § 16-6-11 (4), and arguably also a violation of OCGA § 16-6-11 (5). Because the indictment further alleged that the person Burroughs instructed and from whom he received

money was under the age of 18, the crime of pimping was elevated to a felony under OCGA § 16-6-13 (b). The trial court therefore did not err in sentencing Burroughs for a felony.

2. Burroughs contends that his sentence should have been reduced because the State reneged on its agreement to seek reduction of the sentence. The record reveals, however, that there was no agreement by the State to seek reduction of Burroughs's sentence. Burroughs entered a non-negotiated plea and agreed to testify against his original co-defendants with the hope that the trial court would consider his cooperation at sentencing. He acknowledged at the hearing on his guilty plea that the State had made no promises with regard to his sentence. Following Burroughs's plea and sentencing, the State agreed to be "truthful about any assistance [Burroughs] may have provided" if he were to be resentenced. Burroughs did not have an opportunity to testify against the others involved, however, because they each pled guilty. Since there was no promise by the State to seek reduction of Burroughs's sentence, his argument here is without merit.

3. Burroughs argues that the trial court erred in refusing to allow him to withdraw his guilty plea. He contends that the court stated that it would allow him to withdraw his plea if he was not satisfied with the sentence, but then later refused to

allow him to withdraw that plea. In general, “[t]here is no absolute right to withdraw a guilty plea after sentence is orally pronounced. The decision whether to allow such withdrawal of a plea in the same term of court is within the discretion of the trial court, and will not be disturbed on appeal absent a manifest abuse of such discretion.” (Citations and punctuation omitted.) *Freeman v. State*, 211 Ga. App. 716, 717 (2) (440 SE2d 490) (1994).

Following Burroughs’s plea of guilty and prior to sentencing, the trial court stated, “if you should disagree with the Court’s sentence, this Court would allow you to withdraw your plea and just go to trial on this case” When the court then sentenced Burroughs to 20 years to serve 10 in confinement, Burroughs did not object immediately. Instead, Burroughs waited nearly three weeks following his conviction to file a motion to withdraw his guilty plea. Burroughs’s motion was based in part upon the statement by the court that he could withdraw his plea if he was not satisfied with the sentencing imposed. The trial court denied the motion and explained that the offer to allow Burroughs to withdraw his plea and proceed to trial was to be “exercised immediately or not at all” after the court announced the sentence.

Here,

[w]e agree with the trial court that once sentence was pronounced, the defendant or his counsel was obligated to respond if the sentence was not acceptable to them. By their silence, clearly reflected in the transcript, they indicated acceptance of the sentence. The offer then expired, because knowing the sentence and having had the benefit of counsel, [the defendant] freely and voluntarily let his guilty plea stand.

Id. Under these circumstances, the trial court did not abuse its discretion in denying Burroughs's motion to withdraw his guilty plea. Id.

4. Burroughs contends that he received ineffective assistance of counsel because counsel: (1) only consulted with him for a few minutes prior to trial, (2) did not review discovery, (3) did not advise him of applicable defenses or the possibility of quashing the indictment, (4) did not inform him of the consequences of pleading guilty and (5) did not discuss the consequences of the fact that there had been no arraignment on the indictment. To prevail on an ineffective assistance of counsel claim, a defendant who pled guilty to an offense must show that his trial counsel's performance fell below an objective standard of reasonableness and that, but for that deficient performance, he would have rejected the plea and insisted on going to trial. *Rollins v. State*, 277 Ga. 488, 491 (2) (591 SE2d 796) (2004).

Trial counsel testified that he received Burroughs's case one day before trial and that he only had time to read the police reports and the indictment. He stated further that he spoke to Burroughs for the first time on the morning of trial, and that because he did not have time to fully prepare for trial, he filed a written motion for a continuance. Because counsel admitted that he was not prepared for trial and testified that he advised Burroughs to enter a non-negotiated plea, we analyze only Burroughs's claims of ineffective assistance concerning his guilty plea.

Burroughs contends that trial counsel did not inform him of the consequences of pleading guilty and did not adequately consult with him about the plea. Trial counsel stated that after reviewing the police reports and witness statements,¹ he believed the State had a strong case. He stated further that he had been served with the State's recidivist notice on the morning of trial, which included two incidents of pimping, one resulting in a conviction, as well as a conviction for statutory rape. Counsel then decided to discuss the possibility and consequences of a non-negotiated plea with Burroughs because he believed a plea was in Burroughs's best interest. He testified in the motion for new trial hearing that he was not informed of anything

¹These documents are not part of the record here on appeal.

subsequent to the guilty plea that would change his impression that the State had a strong case.

Not only has Burroughs failed to show how further consultation with counsel somehow would have impacted his decision to enter a plea, see *Rios v. State*, 281 Ga. 181, 181-182 (2) (637 SE2d 20) (2006), he has failed to show any information that would or should have changed counsel's recommendation to enter a plea. Moreover, we do not have the police reports and witness statements that counsel reviewed in making his decision that a plea was in Burroughs's best interest. As a result, we must assume that the information was sufficient for counsel to make that determination. Under these particular facts and circumstances, we cannot say that counsel's performance in advising Burroughs to plead guilty was inadequate. See *Brantley v. State*, __ Ga. App. __, Slip Op. at 3-4 (Case No. A08A0107; decided April 4, 2008) (record shows that prior to entering the guilty plea, defendant's counsel explained to him the nature of the non-negotiated plea and the consequences).

Even if we assume that counsel's performance was somehow deficient, Burroughs failed to show that, but for counsel's performance, he would have pleaded not guilty and proceeded to trial. Although it is clear the Burroughs did not wish to proceed with trial with counsel who had received his case only a day before trial, he

knew that counsel had filed a motion for a continuance. After consulting with counsel about all of his options, he decided to plead guilty rather than wait for the trial court to rule on his continuance request. Under these circumstances, Burroughs has failed to demonstrate how he was prejudiced by counsel's advice to enter a guilty plea. *Rios*, supra, 281 Ga. at 181-182 (2).

Judgment affirmed. Mikell and Adams, JJ., concur.

FILED IN OFFICE

JUN 27 2008

CLERK, COURT OF
APPEALS OF GEORGIA

IN THE COURT OF APPEALS

STATE OF GEORGIA

CAMARI BURROUGHS,
Appellant,

v.

Case No.

STATE OF GEORGIA,
Appellee.

A08 A0733

MOTION FOR RECONSIDERATION

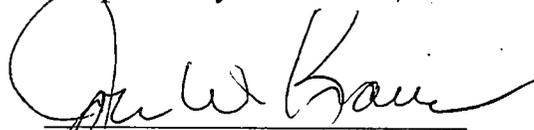
The Appellant, Camari Burroughs, moves pursuant to Rule 37 of the Rules of the Court of Appeals for reconsideration of the opinion in this case dated June 17, 2008.

In division 1 of the opinion, the Court does not address the statutory construction argument set forth as Mr. Burroughs' first enumeration of error. In division 3, the Court did not recognize that the trial court allowed Mr. Burroughs' trial counsel time after the plea to confer with him concerning the possible

withdrawal of the guilty plea. In division 4, the Court did not analyze each instance of claimed ineffective assistance of counsel.

For the foregoing reasons, Mr. Burroughs respectfully asks this Court to reconsider its decision and to reverse the decision of the trial court.

Respectfully submitted,



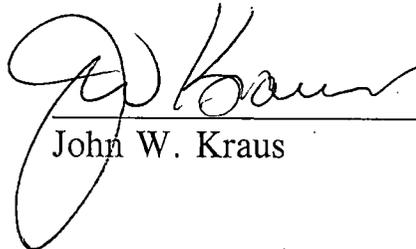
JOHN W. KRAUS
Georgia Bar No. 002170
Attorney for the Appellant

508 Midtown Place, N.E.
Atlanta, Georgia 30308
(404) 323-4444

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of this pleading upon the Office of the District Attorney of Fulton County, Atlanta, Georgia, 30303 by hand delivery.

Dated: June 27, 2008.



John W. Kraus

RECEIVED IN OFFICE

2008 JUN 27 PM 2:41

William Z. Metzger

CLERK/COURT ADMINISTRATOR
COURT OF APPEALS OF GA.

**Court of Appeals
of the State of Georgia**

ATLANTA, JULY 09, 2008

The Court of Appeals passed the following order

Case No. A08A0733

CAMARI BURROUGHS V. THE STATE

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL 09, 2008

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Willi Z. Mart, Jr.

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90-028

FILED IN OFFICE

JUL 18 2008

CLERK, COURT OF APPEALS OF GEORGIA

IN THE COURT OF APPEALS
STATE OF GEORGIA

CAMARI BURROUGHS,
Appellant,

v.

Case No.

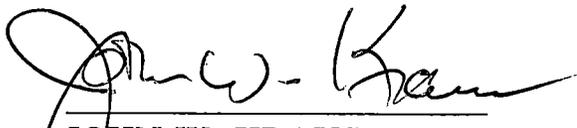
STATE OF GEORGIA,
Appellee.

A08 A0733

NOTICE OF INTENTION TO PETITION FOR CERTIORARI

The Appellant, Camari Burroughs, pursuant to Rule 38 of the Rules of the Court of Appeals of Georgia gives notice of his intention to petition for certiorari to the Supreme Court of Georgia from the denial of reconsideration (dated July 9, 2009) of the opinion of this court in the captioned case.

Respectfully submitted,



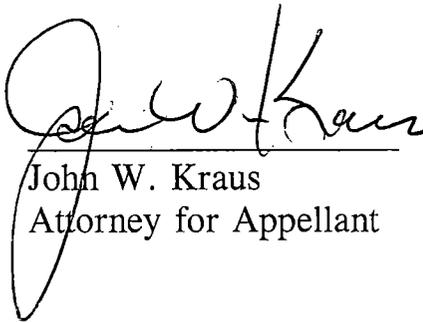
JOHN W. KRAUS
Georgia Bar No. 002170
Attorney for the Appellant

508 Midtown Place N.E.
Atlanta, Georgia 30308
(404) 323-4444

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of this pleading upon the Office of the District Attorney, Fulton County, Pryor Street, 4th floor, Atlanta, Georgia, 30303 by hand delivery.

Dated: July 18, 2008.



John W. Kraus
Attorney for Appellant

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08 JUL 18 PM 2:25

William K. Matz Jr.
CLERK ASSISTANT ADMINISTRATION

FILED IN OFFICE

JUL 29 2008

CLERK, COURT OF
APPEALS OF GEORGIA

IN THE COURT OF APPEALS
STATE OF GEORGIA

CAMARI BURROUGHS,
Appellant,

v.

Case No.

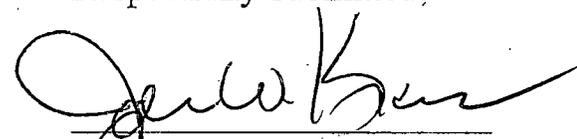
STATE OF GEORGIA,
Appellee.

A08 A0733

NOTICE OF FILING OF PETITION FOR CERTIORARI

The Appellant, Camari Burroughs, pursuant to Rule 38(a)(2) of the Rules of the Court of Appeals of Georgia gives notice that he has this day filed a petition for certiorari to the Supreme Court of Georgia from the denial of reconsideration (dated July 9, 2009) of the opinion of this court in the captioned case.

Respectfully submitted,



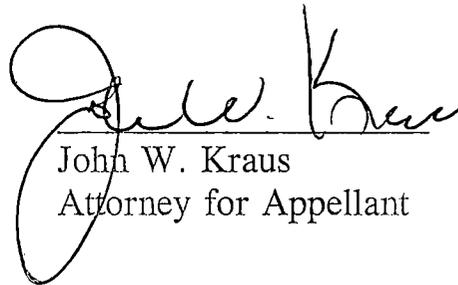
JOHN W. KRAUS
Georgia Bar No. 002170
Attorney for the Appellant

508 Midtown Place N.E.
Atlanta, Georgia 30308
(404) 323-4444

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of this pleading upon the Office of the District Attorney, Fulton County, Pryor Street, 4th floor, Atlanta, Georgia, 30303 by hand delivery.

Dated: July 29, 2008.


John W. Kraus
Attorney for Appellant

RECEIVED IN OFFICE

2008 JUL 29 PM 3:29

Will L. McCallister

CLERK/COURT ADMINISTRATOR
COURT OF APPEALS OF GA.

CLERK'S OFFICE

SUPREME COURT of GEORGIA

244 Washington Street, Room 572

Atlanta, Georgia 30334

(404) 656-3470

Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

Docketing Date: July 29, 2008

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day a petition to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of **S08C1930**

CAMARI BURROUGHS v. THE STATE

Clerk, Supreme Court of Georgia

Case No. A08A0733

Court of Appeals of Georgia

Notice of Petition for Certiorari

filed in office

Clerk, Court of Appeals of Georgia

5937

SUPREME COURT OF GEORGIA

Remittitur, Case No. S08C1930

Atlanta, October 27, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

CAMARI BURROUGHS v. THE STATE

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

All the Justices concur.

Bill of Costs, \$80.00
Court of Appeals Case No. A08A0733

RECEIVED IN OFFICE
08 NOV 19 PM 12:21
C. J. K. [Signature]
CLERK'S OFFICE



SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta November 18, 2008

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Nathaniel J. Middleton, Clerk.

REMITTITUR

Court of Appeals of the State of Georgia

ATLANTA, JUNE 17, 2008

The Court of Appeals having met, the following judgment was rendered:

COURT OF APPEALS CASE NO. A08A0733
CAMARI BURROUGHS V. THE STATE

This case came before this court on appeal from the SUPERIOR Court of FULTON County; it is considered and adjudged that

THE JUDGMENT OF THE COURT BELOW BE AFFIRMED.

SMITH, P.J., MIKELL AND ADAMS, JJ., CONCUR.

LC NUMBERS: 06SC47930

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, NOV 20, 2008

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

Clerk.

*Court of Appeals Cost \$80.00. O.C.G.A. Sec. 5-6-10.
No costs are payable to the Court of Appeals.*

Will. Z. Mart

COURT OF APPEALS OF GEORGIA

47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

APPEAL SUMMARY PAGE

CLASSIFICATION: ENTICING A CHILD

CASE NUMBER: A08A0733 DATE OF DOCKETING: DECEMBER 07, 2007

STYLE: CAMARI BURROUGHS V. THE STATE

LOWER COURT SUMMARY INFORMATION:

FULTON County SUPERIOR COURT 06SC47930

TRIAL JUDGE: HON. URAL GLANVILLE

RECORDS	DESCRIPTION:	PARTS:
2007-12-07	LOWERCOURT RECORDS.	01
2007-12-07	TRANSCRIPTS.	03

DATE OF JUDGMENT: 2007-09-26 NOTICE OF APPEAL DATE: 2007-10-05

COURT OF APPEALS CODE: 90-028 C
TERM: Jan. Cal. Mo.: MAR/08

DIVISION 4 PANEL CIR PATH: 90, 92, 94.
DIVISION 4 PANEL CIR PATH: 90, 92, 94, 95, 97, 99, 96.

COURT OF APPEALS OF GEORGIA

47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

APPEAL SUMMARY PAGE

CASE NUMBER: A08A0733 DATE OF DOCKETING: DECEMBER 07, 2007

STYLE: CAMARI BURROUGHS V. THE STATE

ATTORNEY REGISTER:

FOR APPELLANT:

Mr. John Walter Kraus
ATTORNEY AT LAW
508 MIDTOWN PLACE, N. E.
ATLANTA GA 30308

FOR APPELLEE:

Mr. Paul L. Howard
DISTRICT ATTORNEY
136 PRYOR STREET, S.W.
3RD FLOOR
ATLANTA GA 30303

FOR OTHER:

COURT OF APPEALS OF GEORGIA

47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

NOTICE OF DOCKETING

Mr. John Walter Kraus
ATTORNEY AT LAW
508 MIDTOWN PLACE, N. E.
ATLANTA GA 30308

APPEAL CASE NUMBER: A08A0733 DATE OF DOCKETING: DECEMBER 07, 2007

STYLE: CAMARI BURROUGHS V. THE STATE

IMPORTANT RULE REQUIREMENTS AND INFORMATION

Appellant's brief, including as Part II an Enumeration of Errors, shall be filed within 20 days of docketing. No appellant's brief shall be received for filing without the \$80.00 filing fee or sufficient pauper's affidavit.

Appellee's brief shall be filed within 40 days after the docketing date or 20 days after the filing of the appellant's brief, whichever is LATER.

Failure to timely file briefs or to follow any Court rules or orders may cause the appeal to be dismissed or may cause non-consideration of the brief, and may subject the offender to contempt.

The contents of a properly addressed registered or certified mailing shall be deemed filed on the U.S. Postal Service hand stamped, postmark date if it is stamped on the envelope or container. A document received from an overnight delivery service is deemed filed on the date it was delivered to the Post Office or a commercial delivery company as shown by the receipt of the U.S. Postal Service or overnight delivery company.

Motions for reconsideration are deemed filed on the date actually received in the clerk's office.

If oral argument is requested and approved by this Court this case will be scheduled for oral argument on MAR 27, 2008. before the FOURTH Division: Smith, P.J., Mikell, J., Adams, J. A printed calendar showing the exact date of argument will be mailed to counsel of record. If a calendar is not received at least ten days prior to the tentative oral argument date, contact the Clerk's Office.

There shall be no communications relating to pending appeals to any judge or member of the judge's staff.

**FOR MORE INFORMATION CONTACT OUR WEBSITE AT WWW.GAAPPEALS.US.
IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.**

WILLIAM L. MARTIN, III, CLERK

COURT OF APPEALS OF GEORGIA

47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

NOTICE OF DOCKETING

Mr. Paul L. Howard
DISTRICT ATTORNEY
136 PRYOR STREET, S.W.
3RD FLOOR
ATLANTA GA 30303

APPEAL CASE NUMBER: A08A0733 DATE OF DOCKETING: DECEMBER 07, 2007

STYLE: CAMARI BURROUGHS V. THE STATE

IMPORTANT RULE REQUIREMENTS AND INFORMATION

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Appellee's brief shall be filed within 40 days after the docketing date or 20 days after the filing of the appellant's brief, whichever is LATER.

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IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.**

WILLIAM L. MARTIN, III, CLERK

90-028
92
94

IN THE COURT OF APPEALS

STATE OF GEORGIA

FILED IN OFFICE

MAR 03 2008

CLERK, COURT OF
APPEALS OF GEORGIA

CAMARI BURROUGHS,
Appellant,

v.

Case No.

STATE OF GEORGIA,
Appellee.

A08 A0733

REPLY BRIEF OF THE APPELLANT

JOHN W. KRAUS
Georgia Bar No. 002170
Attorney for the Appellant

508 Midtown Place N.E.
Atlanta, Georgia 30308
(404) 323-4444

IN THE COURT OF APPEALS OF GEORGIA

CAMARI BURROUGHS,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

Case No.

A08 A0733

REPLY BRIEF OF THE APPELLANT

Appellant Camari Burroughs respectfully submits this his reply brief addressing below the State's response to each of his four enumerations of error enumerated in his original brief.

1. Pimping is a misdemeanor unless the indictment specifies the two enhancing factors found in the felony sentencing statute, § 16-6-13. Because one of those factors was not alleged in the indictment, Mr. Burroughs should have been sentenced to no more than twelve months as allowed for misdemeanors.

In this case of first impression as to the interpretation of a Georgia statute, the Appellant, Camari Burroughs, appeals his felony sentence for pimping because the applicable sentencing statute provides for misdemeanor punishment for the charge set forth in the indictment to which he pled guilty.

Pimping can be committed in any one of five ways enumerated by statute. In its brief, the state agrees with Mr. Burroughs that the indictment in this case "clearly charges a violation of OCGA § 16-6-11 (4)." Appellee's brief at ap. 3. This sub-section provides that pimping can be committed by one who "receives money or other thing of value from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution." The language is clear that the prostitution must have already occurred before this type of pimping

can occur, i.e., the defendant must receive money knowing the money "was earned" from prostitution.

In contrast, the other four forms of pimping all require that the pimping cause, or occur before, the prostitution. These other forms include procuring a prostitute, arranging a meeting with a prostitute, transporting another for the purpose of prostitution and aiding another in the commission of prostitution expecting that the proceeds from the prostitution are to be divided on a pro rata basis. Each of these four other forms necessarily occurs before the prostitution.

The language of the code section (O.C.G.A. § 16-6-13 (b)) at issue in this appeal makes pimping a felony only when the pimping occurs before the prostitution: that section allows for felony sentencing only when "the pimping for ... a person under the age of 18 years ... [is] to perform an act of prostitution." [Emphasis supplied.]

The language of the felony-enhancing statute does not include those instances when the alleged acts of pimping occur after the prostitution.¹ Because the statute

¹ The language of the statute determines its interpretation. As the State acknowledges in its brief at page 4, "there is no need to discern legislative intent." In any event, the State presented no evidence (rather only hearsay statements by counsel) at the hearing in the trial court as to what the legislative intent may have been.

only includes those instances of pimping before the prostitution (i.e., those instances of pimping "to perform" the prostitution), the statutory interpretation rule of "expressio unius exclusio alterius" (which provides that when a statute mentions certain things, those things not mentioned are excluded from application of the statute²), dictates that those instances of pimping occurring after the prostitution are not covered by the statute and are thus not felonies.

Relevant too is the maxim that criminal statutes must be construed strictly against the state and liberally in favor of human liberty. State v. Luster, 204 Ga. App. 156, 419 S.E.2d 32 (1992). Further, statutes are to be construed in favor of less punishment. Bankston v. State, 258 Ga. 188, 367 S.E.2d 36 (1988).

Because the language of the statute must be construed most favorably to Mr. Burroughs, his felony sentence should be vacated and he should be re-sentenced to no more than twelve months as allowed for misdemeanors.

² See, e.g., Gillen v. State, 286 Ga. App. 616, 649 S.E.2d 832 (2007); Long v. State, 271 Ga. App. 565, 610 S.E.2d 74 (2004).

2. Mr. Burroughs' sentence should have been reduced because the state reneged on its agreement to seek reduction after Mr. Burroughs, in consideration of the state's agreement, pled guilty, made a proffer of the evidence against the codefendants (which the state subsequently used) and was ready to testify at their trials.

Although the state and Mr. Burroughs agreed before entry of his plea that his sentence would be reduced after the completion of the codefendants' cases, the state reneged on its agreement and instead recommended a denial of any reduction, and the trial court did not modify his sentence.

The state admits that such a reduction was contemplated. See pages 1 and 8 of the response brief. (Curiously, it also claims that there was "No Proffer" (Appellee's brief at p. 5), but then immediately thereafter notes that Mr. Burroughs was indeed cross-examined by the state's attorney when the proffer was made). As found by the trial court below, this proffer (or cross examination in the terms of the state) was used by the state to obtain guilty pleas from each of the codefendants. This was the exact result contemplated by the state and Mr.

Burroughs before he entered the plea -- that Mr. Burroughs' testimony would be used against the co-defendants either at their trial or during plea negotiations.³

Without any evidence in the record, the state next claims that the presiding judge knew that Mr. Burroughs refused to cooperate during the revocation hearing of co-defendant Hutchins. Because there is no evidence in the record to establish this claim, other than counsel's statement, it is hearsay, and this Court must ignore it. (If this Court should choose to consider it nevertheless, then too must this Court consider the fact that Mr. Burroughs had merely requested to speak with his attorney before the revocation hearing to ensure proper effectuation of the deal with the state. (T. 17-18).)

The state improperly reneged on its agreement, and the trial court erred by failing to reduce Mr. Burroughs' sentence.

³ On page 14 of the transcript of the hearing on the motions, the trial court found that Mr. Burroughs "was willing to testify, and of course, the State used his potential testimony or the threat of potential testimony as leverage."

3. Mr. Burroughs' plea was not entered knowingly and voluntarily because although the trial court advised Mr. Burroughs that he could withdraw his plea should he be dissatisfied with the sentence imposed, the trial court refused to allow it to be withdrawn.

The burden is on the state to show that a plea was entered knowingly and voluntarily. Knight v. Sikes, 269 Ga. 814, 504 S.E.2d 686 (1998).

A defendant's guilty plea can be involuntary in a number of different situations. See, e.g., Gerisch v. Meadows, 278 Ga. 641 (2004) (defendant's plea was not voluntary when he was not properly advised of a defense); Rollins v. State, 277 Ga. 488 (2004) (defendant's plea was not voluntary when he was misadvised of effect of first offender); Barber v. State, 231 Ga. App. 176, 498 S.E.2d 758 (1998) (defendant's plea was not voluntary when defendant believed that he could enter a guilty plea and preserve for appellate review his suppression motion); McDaniel v. State, 271 Ga. 552 (1999) (defendant's plea was not voluntary when trial court improperly participated in plea negotiations); Thompson v. Greene, 265 Ga. 782 (1995) (defendant's plea was not voluntary

when it was entered with the hope of benefit); and Brown v. State, 201 Ga. App. 473 (1991) (defendant's plea was not voluntary when the prosecutor erroneously informed defendant that a case in another county would be dismissed).

In this case, the trial court advised Mr. Burroughs that he could withdraw his plea if the sentence was not to his liking. On page 19 of the transcript, the trial court told Mr. Burroughs: "If you should disagree with the Court's sentence, this Court would allow you to withdraw your plea."

Further, the plea was entered with the hope of the future benefit of reduction. On page 17 of the plea transcript, Mr. Burroughs' lawyer stated that "We're entering this non-negotiated sentence -- plea today with the hopes that Mr. Burroughs' participation in the prosecution of the codefendant and his truthful testimony in regards to the actions of the other persons will lead the Court to reconsider whatever sentence is given here at the conclusion of all the cases."

Also Mr. Burroughs was not advised of certain procedural defenses (detailed in Enumeration 4). Thus, his plea was not voluntary. Gerisch, supra.

There is no doubt that the trial court offered Mr. Burroughs the opportunity to withdraw his plea, that Mr. Burroughs entered his plea with a hope of a benefit

adn that he was not advised of certain defenses. The state's claim that there is "nothing in the record" is wrong. The state's burden of showing that the plea was voluntary has not been met.

4. Because trial counsel was not prepared for trial and because he had not advised Mr. Burroughs of viable defenses, Mr. Burroughs received ineffective assistance of counsel, requiring the plea to be allowed withdrawn.

Mr. Burroughs received ineffective assistance because his counsel had not investigated the case and was not aware of obvious defenses to the charges. As such, his plea should be allowed withdrawn.

His counsel had only one day's notice of trial and thus had no time to investigate the case or to gave it thoughtful consideration. The state would have this Court believe that in lieu of its own investigation and consideration, the defense should be satisfied with merely "familiarizing [itself] with the police reports and witness statements provided in discovery." Appellee's brief at pp. 8-9.

This assertion, however, runs counter to the law that "counsel has a duty to make the investigations" in a defendant's case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).⁴

This assertion is also especially unbelievable because discovery was incomplete: the alleged victim's videotaped statement had NOT been provided to the defense. (T. 60.) Surely this videotape was important to the defense, but it was not available to Mr. Burroughs or his counsel because the state had not turned it over, in violation of its duties under the discovery statutes. At the motion hearing, the state acknowledged its failure to provide complete discovery (T. 60), thus its statement that there has been no contention that discovery was incomplete is just wrong.

Further the state unbelievably states that "there is no contention that Burroughs had a valid defense which counsel overlooked." Id. The defenses which trial counsel overlooked are enumerated in Mr. Burroughs' first brief; they

⁴ "It is reasonable to expect a defendant's attorney to conduct an investigation to determine the facts upon which all future decisions would be made. ... [A] lawyer is duty-bound to investigate so that he can properly advise his client. This showing satisfies the prejudice showing as provided in Hill v. Lockhart." Heath v. State, 268 Ga. App. 235, 242, 601 S.E.2d 758 (2004).

include seeking a dismissal via demurrer, the lack of proper notice of trial and the lack of arraignment on the second indictment. Mr. Burroughs who is not a lawyer relied on counsel to recognize and raise procedural defenses, but counsel failed. “Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with [a] crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.” Heath v. State, 268 Ga. App. 235, 239, 601 S.E.2d 758 (2004) (citing Gideon v. Wainwright).

It is clear from the record “that trial counsel was ineffective in failing to recognize and fully investigate a [defense], and in failing to reasonably inform [Mr. Burroughs] of the merits of that defense prior to the entry of his guilty plea.” Gerisch v. Meadows, 278 Ga. 641, 641-42 (2004) (Supreme Court reversed trial court’s finding that there had been effective assistance of counsel).

Further the record reflects that trial counsel had not prepared for a trial in routine ways, such as preparing and filing proposed jury instructions. See, e.g., Cochran v. State, 262 Ga. 106 (fn. 2), 414 S.E.2d 211 (1992) (ineffective

assistance found where inter alia proposed jury charges had not been filed).⁵

To the extent that trial counsel had not considered the defense that the indictment alleged only a misdemeanor (as alleged in Enumeration 1), Mr. Burroughs was also not provided with effective counsel as to the possible sentence.

His trial counsel's performance fell below an objective standard of reasonableness, as that counsel admitted at the hearing. The state admitted at the hearing that counsel had not been aware of certain procedural defenses which would have precluded trial. Finally, Mr. Burroughs maintained his innocence before he entered his plea (to trial counsel) and after the plea (to the trial court in his letter), as the state recognized in its brief. (Appellee's brief at p. 9). Thus, there is a probability that Mr. Burroughs would not have pled guilty and would have insisted on continuing to the motions hearings to seek a dismissal and, if no dismissal, then to the trial.

Here, as in Cochran v. State, 262 Ga. 106, 414 S.E.2d 211 (1992):

The record establishes counsel's failure to prepare adequately for trial. Counsel admitted these failures to act during testimony at

⁵ Also not filed by trial counsel in Mr. Burroughs' case was a request for a sentence review as then allowed by law, although this "right" was promised by the state to Mr. Burroughs during the plea proceedings. (T. 8-9).

the motion [to withdraw his guilty plea] and attributed them to a lack of time to work on this case. Whatever the reason for counsel's failure to prepare, we conclude that Cochran has made the first showing required under *Strickland*.

(b) The second component of *Strickland* requires the defendant to show prejudice. The total failure of trial preparation in this case requires [a finding of ineffectiveness,] a disposition like that in *Ross v. Kemp*, 260 Ga. 312, 393 S.E.2d 244 (1990).”

Id. at 107-08.

Because Mr. Burroughs was not properly informed of applicable law, because his trial counsel had had the case for less than 24 hours and was thus unprepared for trial and because proper pleadings were not filed by trial counsel in his case, Mr. Burroughs was constructively denied effective representation. This court should direct that the plea be withdrawn.

CONCLUSION

Mr. Burroughs should have been sentenced for a misdemeanor because the charges in the indictment did not fall within the language of O.C.G.A. § 16-6-13.

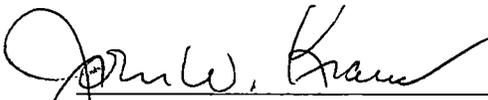
If this Court finds otherwise, then in the alternative, the trial court should have reduced Mr. Burroughs' sentence because the state had agreed to recommend such reduction, all conditions (i.e. acceptance and consideration via the proffer on

the record and the willingness to testify at trial) were met by Mr. Burroughs.

If this Court finds that no reduction was implicated, then Mr. Burroughs should have been allowed the opportunity to withdraw his plea because it was not entered knowingly and voluntarily and because he had received ineffective assistance of counsel before entering the plea.

For the foregoing reasons, Mr. Burroughs respectfully asks this Court to reverse the decision of the trial court.

Respectfully submitted,


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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of this pleading upon the Office of the District Attorney of Fulton County, Atlanta, Georgia, 30303 by hand delivery.

Dated: March 3, 2008.


John W. Kraus

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**CLERK, COURT OF
APPEALS OF GEORGIA**

IN THE COURT OF APPEALS

STATE OF GEORGIA

CAMARI BURROUGHS)	PIMPING A MINOR
)	
vs.)	CASE NO. A07A0733
)	
THE STATE)	

STATE'S BRIEF OF APPELLEE

Indictment No. 06SC47930, a re-indictment of 06SC43726, charged Camari Burroughs with one count each of pimping; enticing a child for indecent purposes; and prostitution, for allegedly using a 16-year-old female in an ongoing prostitution enterprise. Mr. Burroughs was represented by Brian A. Hobbs of the Fulton County Public Defender's Office. At 7:25 p.m. on the day of trial, Burroughs entered a non-negotiated guilty plea to Count 1, Pimping, with the expectation that he could request a subsequent sentence reduction if he testified truthfully against his co-conspirators. As a recidivist, Burroughs was sentenced 20 years, to serve ten, plus probation. In four related enumerations, he contends the indictment alleges only a misdemeanor; that his sentence should have been reduced; that his guilty plea was invalid; and that trial counsel was ineffective.

Summary of the State's Argument: Pimping a minor is a felony in Georgia. There was no sentencing "deal" for the State to renege on. Sentence modification under OCGA 10-7-1 (f) is entirely committed to the discretion of the presiding; and that discretion will not be controlled on appeal, period. Burroughs' guilty plea to one felony count was knowing and voluntary; and trial counsel was reasonably effective, using the limited time he had to prepare, read the witness statements, and recommend an non-negotiated Alford plea.

1. Indictment Alleges A Felony: Burroughs' motion to modify his felony sentence contended Count 1 of the indictment alleges only a misdemeanor.

Count 1 charged "CAMARI JABREL BURROUGH, KARI MICHELLE HARGROVE and STARLENE MCCLAIN with the offense of PIMPING O.C.G.A. §16-6-11, for the said accused, in the County of Fulton and State of Georgia, between the 28th day of January, 2006 and the 23rd day of February, 2006, THE EXACT DAYS BEING UNKNOWN TO THE GRAND JURORS, DID INSTRUCT SADE MITCHELL, A CHILD UNDER THE AGE OF EIGHTEEN YEARS, TO COMMIT PROSTITUTION AND DID RECEIVE MONEY FROM SAID SADE MITCHELL WITHOUT LAWFUL CONSIDERATION, KNOWING THAT IT WAS EARNED IN WHOLE OR IN PART FROM PROSTITUTION[.]"

Burroughs argues pimping is generally punishable as a misdemeanor, and the

allegations do not allege a felony. "It is not the name, but the description of the crime, which characterizes the offense charged. . . . An alleged variance between the offense as named or the Code section cited and the allegations specified in the indictment goes only to the form of the indictment. *State v. Eubanks*, 239 Ga. 483, 489 (238 SE2d 38) (1977)." *Jones v. State*, 240 Ga. App. 484, 486 (2) (523 SE2d 73) (1999). Under OCGA § 16-6-11, a person commits the offense of pimping when he or she performs any of the following acts:

- (1) Offers or agrees to procure a prostitute for another;
- (2) Offers or agrees to arrange a meeting of persons for the purpose of prostitution;
- (3) Directs or transports another person to a place when he or she knows or should know that the direction or transportation is for the purpose of prostitution;
- (4) **Receives money** or other thing of value from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution;
- or (5) Aids or abets, counsels, or commands another in the commission of prostitution or aids or assists in prostitution where the proceeds or profits derived therefrom are to be divided on a pro rata basis."

This indictment clearly charges a violation of OCGA § 16-6-11 (4), and further alleges the involvement of a minor under the age of 18. OCGA § 16-6-13 (b) provides that "the pimping for, or the solicitation of a person under the age of 18

years to perform an act of prostitution or the assembly of two or more persons under the age of 18 years at a fixed place for the purpose of being solicited by others to perform an act of prostitution shall be guilty of a felony[.]” There is no need to discern legislative intent. Under the plain meaning of the statute, pimping, pandering, or soliciting a minor for acts of prostitution is punishable as a felony.

2. Sentence Modification: OCGA 10-7-1 (f) confers upon the presiding judge the “jurisdiction, power and authority to correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed.” This authority can be exercised even after a conviction has been affirmed on appeal.

Burroughs argues that he made an offer of proof, after the guilty plea was accepted and that the State “renege” on the deal to modify his sentence.

[Ant’sBr,p.17]

(A) No Deal: First, the very record Burroughs relies upon refutes the existence of any concrete deal. The transcript of the September 7, 2006 guilty plea shows that Burroughs confirmed on the record that, while the State agreed to be truthful about any assistance that Burroughs gave in the case against co-defendant Hutchins, the State expressly had “not made any promise that we would recommend a reduction in your case[.]” [T.28] There simply was no deal to renege.

(B) No Proffer: After the plea was accepted, [T.18] and the non-negotiated sentence imposed, [T.19] Burroughs was briefly cross-examined by the State's Attorney. [T.21 et seq.] This testimony itself is inadmissible against anyone except Burroughs himself because no other party was present to confront and cross-examine Burroughs. Moreover, the presiding judge knew that Burroughs refused to cooperate at the revocation hearing of co-defendant Hutchins, as a consequence of which, Hutchins remained free and committed a new act of pimping.

(i) Standard of Review: “[W]here the sentences imposed are within the statutory limits, as they are here, they are not unconstitutional.’ *Jones v. State*, 232 Ga. 771 (208 SE2d 825) (1974). Furthermore, ‘the sentence received by one joint defendant is irrelevant on the trial of another.’ *Hill v. Stynchcombe*, 225 Ga. 125 (166 SE2d 729) (1969).” *Johnson v. State*, 246 Ga. 126, 128 (IV) (269 SE2d 18) (1980). The State submits that, so long as the sentence imposed is not void, the appellate courts will not control whether or how the trial courts exercise the authority to reduce or modify a previously imposed sentence. It should be likened to the authority of the presiding judge to grant a new trial on the discretionary ground that the verdict – although legally authorized - is against the weight of the evidence. “No court except the trial court is vested with the authority to grant a

new trial in a matter relating to the weight of the evidence. See *Perryman v. State*, 63 Ga. App. 819, 820 (5) (12 SE2d 388) (1940). ‘The appellate courts are not vested with discretion in this regard as are the judges of the trial courts.’ *Gledhill v. Brown*, 44 Ga. App. 670, 671 (1) (162 SE 824) (1932).” *Allstate Ins. Co. v. Brannon*, 214 Ga. App. 300, 304 (5) (447 SE2d 666) (1994) (whole court).

(ii) No Review of Sentencing Discretion: “[T]he trial court has the discretion to impose sentence within the parameters prescribed by the statute and if the sentence is within the statutory limits, the appellate courts will not review it.” *Jackson v. State*, 284 Ga. App. 619, 627 (10) (644 SE2d 491) (2007). “If the sentence of the court is within the limits prescribed by law for the offense charged, this court has *no jurisdiction* to review the sentence or the court's refusal to reduce it.” *Brown v. State*, 8 Ga. App. 691 (hn. 2) (70 SE 40) (1911) (emphasis supplied). This rule antedates the existence of the Sentence Review Panel, former OCGA § 17-10-6 [1933 Code Anno., § 27-2511.1, enacted by Ga. L. 1974, p. 352, § 8], and the rule presumably survives the repeal of the Sentence Review Panel.

3. Motion to Withdraw Guilty Plea: Burroughs contends that his plea to the new indictment was not knowing and voluntary, pointing to the fact that he was originally represented by Assistant Public Defender Keith Gammage and that Mr.

Hobbs was substituted when Mr. Gammage left the Public Defender's Office. Also, Burroughs contends he was coerced by facing sentence as a recidivist; and that the trial court stated that Burroughs would be permitted to withdraw his plea if not satisfied.

Valid Guilty Plea: “[T]he rights that are conferred by our state constitution upon one who pleads guilty [are] coextensive with those granted by the comparable provision of the federal constitution.” *Britt v. Smith*, 274 Ga. 611, 614 (556 SE2d 435) (2001). Here, the transcript demonstrates that Burroughs was apprised of the trial rights he would waive by a guilty plea, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. The plea is voluntary under the Boykin standard.” *Motley v. State*, 273 Ga. 732 (546 SE2d 468) (2001). [T.7-8] Any “claim that counsel spent inadequate time conferring with [Burroughs] ‘is not dispositive, as there exists no magic amount of time which counsel must spend in actual conference with his client. [Cits.]’ *Harris v. State*, 279 Ga. 304, 307 (3) (b) (612 SE2d 789) (2005). Moreover, [Burroughs] has failed to demonstrate how additional communication with counsel would have changed his decision to enter a guilty plea.” *Rios v. State*, 281 Ga. 181, 182 (2) (637 SE2d 20) (2006). The transcript further shows that

Burroughs understood the consequences of entering a non-negotiated plea. *Price v. State*, 280 Ga. App. 869 (635 SE2d 236) (2006). Considering the totality of the circumstances, the offer by the presiding judge to permit Burroughs to withdraw his plea and proceed to trial was to be exercised immediately or not at all. The parties contemplated a possible petition to modify sentence after Burroughs testified truthfully against his co-conspirators. But there is nothing in the record to show that the presiding judge granted Burroughs any right to unilaterally withdraw the non-negotiated plea.

3. Ineffective Assistance: In context of a guilty plea, ineffective assistance of counsel is established under the test of Strickland v. Washington, 466 U.S. 668 (104 SC 2052, 80 LE2d 674) (1984), by showing that counsel's performance fell below an objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the defendant would not have pled guilty. Hill v. Lockhart, 474 U.S. 52 (106 SC 366, 88 LE2d 203) (1985); *Brantley v. State*, 268 Ga. 151, 152 (1) (486 SE2d 169) (1997).

While Public Defender Brian Hobbes had only 24 hours' notice that *this* case would be on a trial calendar, this was his *only* case on that calendar and he used that time to familiarize himself with the police reports and witness statements provided

in discovery. While his written motion for a continuance was pending, Mr. Hobbes interviewed Mr. Burroughs and they discussed the case. Mr. Burroughs' sworn testimony at the plea colloquy indicates that Burroughs had an adequate opportunity to review the indictment and discuss the case, including the fact that the State was seeking recidivist punishment. Although Mr. Burroughs had claimed he was not guilty of the crimes alleged, Mr. Hobbes was of the opinion that the State had a strong case, including similar transactions. Nothing was produced at the hearing on this motion to change Mr. Hobbes' opinion. For example, there was no showing that the State's witnesses recanted, or that the information provided in discovery was inaccurate or incomplete. And there is no contention that Burroughs had a valid defense which counsel overlooked. Compare *Heyward v. Humphries*, 277 Ga. 565 (592 SE2d 660) (2004). After discussions with the State's attorney failed to reach an agreement for a negotiated guilty plea, Mr. Hobbes was of the opinion that Mr. Burroughs' best option was to enter a non-negotiated guilty plea, with the State still prepared to acknowledge any cooperation Burroughs provided in cases against the co-defendants. There is no allegation that Mr. Hobbes gave gravely erroneous advice on a material point regarding the elements of the crimes, or the possible sentence. Compare *Harden v. Johnson*, 280 Ga. 464 (629 SE2d 259) (2006). The

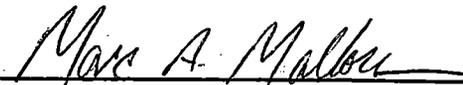
plea was taken at 7:25 p.m., indicating that the parties stayed late because Mr. Burroughs wanted to enter the plea. Under the totality of the circumstances, the trial court was authorized to find that the representation of Mr. Burroughs by Public Defender Brian Hobbes was not inadequate under the Strickland/Lockhart standard. Moreover, the Court found as fact that there was no credible evidence that Mr. Burroughs would have rejected the plea and insisted on going to trial that day. Consequently, the trial court as the trier of fact was authorized to conclude that Burroughs failed to show that Mr. Hobbes assistance fell outside the broad range of reasonably effective assistance that members of the Bar in good standing are presumed to render. The court was further authorized to conclude that there was no credible evidence that Burroughs would have rejected the non-negotiated plea and gone to trial, facing a possible twenty years to serve for pimping a minor.

CONCLUSION

Pimping a minor is a felony in Georgia. There was no sentencing "deal" for the State to renege on. Sentence modification under OCGA 10-7-1 (f) is entirely committed to the discretion of the presiding; and that discretion will not be controlled on appeal, period. Burroughs' guilty plea to one felony count was knowing and voluntary; and trial counsel was reasonably effective using the limited time he had to prepare, read the witness statements, and recommend a non-negotiated Alford plea. **WHEREFORE** the judgment of conviction and felony sentence based on Camari Burroughs' guilty plea should be **AFFIRMED**.

RESPECTFULLY SUBMITTED

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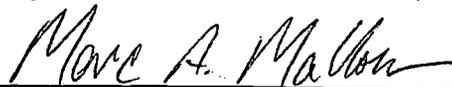
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CERTIFICATE OF SERVICE

This is to certify that I have served Camari Burroughs with the foregoing State's Brief of Appellee by E-MAIL and by MAILING the same with adequate postage to assure delivery to his counsel of record:

John W. Kraus, Esq.
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This 11th day of February, 2008.



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IN THE COURT OF APPEALS
STATE OF GEORGIA

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CLERK, COURT OF
APPEALS OF GEORGIA

CAMARI BURROUGHS,
Appellant,

v.

Case No.

STATE OF GEORGIA,
Appellee.

A08 A0733

BRIEF OF THE APPELLANT

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IN THE COURT OF APPEALS OF GEORGIA

CAMARI BURROUGHS,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

Case No.

A08 A0733

BRIEF OF THE APPELLANT

PART ONE

STATEMENT OF JURISDICTION

The Court of Appeals of Georgia rather than the Supreme Court of Georgia has jurisdiction of this matter as this is an appeal from the final judgment of a Georgia Superior Court in a non-capital felony case and does not fall within any area designated to be heard before the Supreme Court of Georgia under Article VI, Section VI, Paragraph III of the Georgia Constitution of 1983.

STATEMENT OF THE CASE

This is a case of first impression as to the interpretation of a Georgia statute. Specifically the Appellant, Camari Burroughs, appeals the trial court's ruling upholding Mr. Burroughs' felony sentence for pimping although the applicable sentencing statute provides for misdemeanor punishment for the charges as set forth in the indictment to which he pled guilty.

In the alternative, Mr. Burroughs also appeals the court's rulings that; 1) although the parties agreed that his sentence would be reduced after the completion of the codefendants' cases, the state reneged on its agreement and instead recommended a denial of any reduction and the trial court did not modify his sentence; 2) although the trial court advised him that it would allow him to withdraw his guilty plea should the sentence imposed not be to his satisfaction, the trial court did not allow the plea to be withdrawn; and 3) the trial court also erred in refusing to allow the withdrawal due to ineffective assistance of counsel.

Timely motions for modification of Mr. Burroughs' sentence and for withdrawal of his guilty plea were filed, reconsideration of which the trial court denied on September 26, 2007.

STATEMENT OF THE FACTS

In 2006, Mr. Daniel was indicted for pimping¹ and enticing a child for indecent purposes with two co-defendants who were also indicted for prostitution. Under a separate indictment, an alleged fourth co-perpetrator Antoine (aka Anthony) Hutchins was indicted for the same incidents.

Thereafter, Mr. Burroughs who was in jail, was brought to court for a plea and arraignment, at which he was assigned to be represented by Keith Gammage. (Hearing on Motion on September 20, 2007 [hereinafter "T"] at page 27.) Mr. Gammage conducted an initial interview with his client and at some point filed

¹ That section reads: "A person commits the offense of pimping when he or she performs any of the following acts:

- (1) Offers or agrees to procure a prostitute for another;
- (2) Offers or agrees to arrange a meeting of persons for the purpose of prostitution;
- (3) Directs or transports another person to a place when he or she knows or should know that the direction or transportation is for the purpose of prostitution;
- (4) Receives money or other thing of value from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution; or
- (5) Aids or abets, counsels, or commands another in the commission of prostitution or aids or assists in prostitution where the proceeds or profits derived therefrom are to be divided on a pro rata basis."

consolidated motions for discovery. (T. 27.)²

There was a problem in getting all the discovery from the state. (T. 27.) Mr. Gammage did not prepare the case for trial (T. 27) because it was never on a trial calendar during his involvement in the case and because of the outstanding discovery matters. (T. 28.) Thereafter Mr. Gammage became a senior assistant solicitor in Clayton County and ended his representation of Mr. Burroughs. (T. 26.)

On September 1, 2006, the state reindicted the case against Mr. Burroughs and the two codefendants. The reindictment charges them in count one "with the offense of pimping O.C.G.A. § 16-6-11, for the said accused, in the County of Fulton and State of Georgia, between the 28th day of January, 2006 and the 23rd day of February, 2006, the exact days being unknown to the grand jurors, did instruct Sade Mitchell, a child under the age of eighteen years, to commit prostitution and did receive money from said Sade Mitchell without lawful

² Because the indictment to which Mr. Burroughs pled is a reindictment, these preliminary motions were filed in the prior case. It is clear from the index from the trial court that no special demurrer was ever filed.

consideration, knowing it was earned in whole or in part from prostitution."³

Mr. Burroughs was never arraigned on the second indictment, instead his case was scheduled for trial on September 7, 2006.

On September 6, 2006, a Thursday, the day before the case was scheduled for trial, Brian Hobbs inherited Mr. Burroughs' case, along with approximately 140 other cases from Mr. Gammage. (T. 31-32.)

On that Thursday afternoon, within 24 hours of trial, Mr. Hobbs for the first time looked at Mr. Burroughs' case: he did no investigation, spoke with no witnesses and was unable to develop any defenses. (T. 31-33.) He did not speak with Mr. Burroughs that day. (T. 31-32.) He spoke with Mr. Burroughs for the first time in the courthouse on the morning of September 7, 2006, the scheduled trial date (T. 33) after having "simply read the police reports and the indictment." (T. 33.)

Mr. Hobbs acknowledged that he was not prepared to go to trial on the case. (T. 33.) There were still outstanding discovery, (T. 40), which the court did not

³ The indictment also charged Mr. Burroughs with another count which is irrelevant to this appeal because he pled only to the pimping charge.

order the state to produce ten days before trial, as required by statute. (T. 41.) No special demurrer based on an insufficient date in the indictment was ever filed. (T. 49-50; and absence in record of such a filing.) Mr. Hobbs first became aware that the indictment was the second indictment on that day; he did not seek an arraignment on the second indictment.

Mr. Hobbs filed a motion for continuance. (T. 34, 42; R-3 at p. 9). That motion was denied, leaving Mr. Burroughs only with the options of entering a plea of guilty or of going to trial with an attorney he had just met and who was not prepared.

Mr. Hobbs, the state and the trial judge had a conference. (T. 35.) Mr. Hobbs and the state agreed that Mr. Burroughs could move for a modification of his sentence if he would cooperate with the state by making a proffer of the facts against the other three people involved and by making himself available to testify during the trial of the others. (T. 36.) The state was "interested in using [Mr. Burroughs'] testimony to strengthen their case, obviously, against the other three codefendants." (T. 36.)

Although upset with the fact that he was being forced to "go to trial with an attorney he had never met [before that day] and who didn't know anything about his case," (T. 39, 40), Mr. Burroughs, in accordance with the understanding of, and in consideration of, a future modification, entered a plea of guilty and made the proffer under oath of facts implicating the other three defendants. (T. 36.) The sentence imposed was twenty years to serve ten with the balance on probation.⁴ The plea proceedings began at 7:25 p.m. on Friday evening. (See the cover sheet of the transcript of plea proceedings from September 7, 2006.)

⁴ The punishment for pimping is set forth in § 16-6-13, the code section at issue herein which reads in pertinent part:

"(a) Except as otherwise provided in subsection (b) of this Code section, a person convicted of any of the offenses enumerated in Code Sections 16-6-10 through 16-6-12 shall be punished as for a misdemeanor of a high and aggravated nature. A person convicted of the offense enumerated in Code Section 16-6-9 shall be punished as for a misdemeanor.

(b) A person convicted of keeping a place of prostitution, pimping, or pandering when such offense involves keeping a place of prostitution for, the pimping for, or the solicitation of a person under the age of 18 years to perform an act of prostitution or the assembly of two or more persons under the age of 18 years at a fixed place for the purpose of being solicited by others to perform an act of prostitution shall be guilty of a felony and shall be punished by imprisonment for a period of not less than five nor more than 20 years and such convicted person shall be fined not less than \$2,500.00 nor more than \$10,000.00."

During the plea proceedings, the court invited Mr. Burroughs to move to withdraw his guilty plea should he disagree with the court's sentence. (Transcript of plea proceedings at page 19). Specifically the court advised Mr. Burroughs: "If you should disagree with the Court's sentence, this Court will allow you to withdraw your guilty plea and just go to trial on this case."

After the proffer was made, the trial court again addressed the issue of the withdrawal and/or modification, telling Mr. Hobbs: "you can certainly advise [Mr. Burroughs] as to anything that would [effect his decision]." Mr. Hobbs agreed saying that he "would like to [speak with Mr. Burroughs] ... before making that decision." (Plea transcript at p. 30.) The court then took a recess, and Mr. Burroughs was returned to the Fulton County jail for the night.

Mr. Burroughs had no time to further discuss his case with Mr. Hobbs that evening. After Mr. Burroughs next spoke with Mr. Hobbs, Mr. Hobbs filed a timely motion to withdraw plea of guilty. (R. 8.) This was done also to perfect Mr. Burroughs' understanding of a reduction in sentence at the conclusion of the state's case against the three other codefendants. Mr. Burroughs followed up with his own letter to the court concerning that motion on January 24, 2007. (R. 10.)

Thereafter, the state used the threat of Mr. Burroughs' testimony as set forth in his proffer as leverage against the remaining three defendants (T. 14.) who eventually also pled guilty. The two codefendants named in the same indictment as Mr. Burroughs received misdemeanor sentences. (T 11, R. 2.) The fourth codefendant, Antoine Hutchins, had a worse record than did Mr. Burroughs and pled to this case plus another (as opposed to Mr. Burroughs' plea to just this one case); yet he received a sentence of twenty years to serve only five years, approximately one-half the sentence given Mr. Burroughs. (T. 12-13.)

Undersigned was appointed to represent Mr. Burroughs and subsequently argued, as part of the reduction/modification motion that the sentence should have been a misdemeanor based on the language of the reindictment as compared with the language of the penalty code section.

Later, at the hearing on Mr. Burroughs' motion to modify or reduce his sentence, the state did not request a reduction, but rather "ask[ed the trial court] to exercise the discretion -- your discretion, and deny the request for any modification or reduction." (T. 16.) By doing so, the state reneged on its deal

with Mr. Burroughs, saying that "that's the benefits of the trade and negotiation."
(T. 16.)

The trial court denied to sentence as a misdemeanor, to reduce the felony sentence and to allow Mr. Burroughs to withdraw his plea.

A timely notice of appeal was filed.

PART TWO

APPELLANT'S ENUMERATIONS OF ERROR

1. In Georgia, pimping is a misdemeanor, unless the state specifically alleges in the indictment the factors found in the felony enhancement statute, § 16-6-13. Because those factors were not alleged in the indictment, Mr. Burroughs should have been sentenced to no more than twelve months as allowed for misdemeanors. (T. 1-8.)

2. Mr. Burroughs's sentence should have been reduced because the state reneged on its agreement to seek reduction even after Mr. Burroughs, in

consideration of the state's offer pled guilty and made a proffer of the evidence against the codefendants (which the state subsequently used) and otherwise was ready to testify at their trials. (T. 10-11; see also R. 13.)

3. Mr. Burroughs' plea was not entered knowingly and voluntarily because although at the sentencing hearing, the trial court advised Mr. Burroughs that he could withdraw his plea should he be dissatisfied with the sentence imposed, the trial court refused to allow it to be withdrawn.

4. Because the trial counsel was not prepared for trial and because he had not advised Mr. Burroughs of viable defenses, Mr. Burroughs received ineffective assistance of counsel, requiring the plea to be allowed withdrawn.

PRESERVATION OF ERRORS

Mr. Burroughs through his trial counsel timely filed the appropriate motion to withdraw plea and for sentence modification.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

1. In Georgia, pimping is a misdemeanor, unless the state specifically alleges in the indictment the factors found in the felony enhancement statute, § 16-6-13. Because those factors were not alleged in the indictment, Mr. Burroughs should have been sentenced to no more than twelve months as allowed for misdemeanors. (T. 1-8.)

Standard of Review: Inasmuch as this is a case of first impression of the interpretation of this code section, it is legal question, and no deference is owed to the trial court's ruling. Instead it requires a de novo or independent review on appeal, Suarez v. Halbert, 246 Ga. App. 822, 824 (1), 543 S.E.2d 733 (2001), with the statute construed most favorably to Mr. Burroughs. Goldberg v. State, ___ Ga. ___, S06G2054 (September 24, 2007).

Mr. Burroughs should have been sentenced only for a misdemeanor and not for a felony because the state failed to list in the indictment the aggravating facts necessary to make pimping into a felony. This is a case of first impression of the interpretation of the statute (O.C.G.A. § 16-6-13) making pimping a felony under certain circumstances.

"Where any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of the two penalties administered. ... In interpreting criminal statutes, it is axiomatic that any ambiguities must be construed most favorably to the defendant." Goldberg v. State, ___ Ga. ___, S06G2054 (September 24, 2007) (emphasis supplied).

Furthermore, "criminal statutes are construed strictly against the State, they must be read according to the natural and obvious import of their language, and their operation should not be limited or extended by application of subtle and forced interpretations." State v. Langlands, 276 Ga. 721, 724 (2), 583 S.E.2d 18 (2003) (emphasis supplied).

The court in Foster v. State, 273 Ga. 555-556 (1), 544 S.E.2d 153 (2001) noted that federal and state constitutional due process implications require that

criminal statutes must be construed in favor of the defendant and explained that:

[T]he principle that due process requires that criminal statutes give sufficient warning to enable individuals to conform their conduct to avoid that which is forbidden is one of the great bulwarks of constitutional liberty. This Court and the United States Supreme Court have consistently equated the "sufficient warning" of prohibited conduct required of criminal statutes to the provision of "fair notice" that by engaging in such conduct, one will be held criminally responsible. . . . [T]he Due Process Clause requires that the law give a person of ordinary intelligence fair warning that her specific contemplated conduct is forbidden, so that she may conduct herself accordingly. All persons are entitled to be informed as to what the State commands or forbids.

Id.

Here the statute enhancing the penalty for pimping requires that for pimping to be considered a felony, two factors must be alleged and proven. First it requires that the alleged victim was under the age of 18; Mr. Burroughs does not contest that this was done. Next, the language of the statute also requires that the pimping as charged be of the type enumerated therein. However, the convoluted language⁵ of the code section enumerates only three (or four) types, while the

⁵ Because this is a case where the statute is not entirely clear and this is the first judicial interpretation of this statute, Mr. Burroughs should not have been sentenced as a felon because of the lack of notice of the law's parameters. See Reynolds v. State, 209 Ga. App. 628, 434 S.E.2d 166 (1993).

pimping statute lists five types.

Thus, for an indictment to set forth a felony pimping charge sufficiently, it must include that the alleged victim was a juvenile and that the activity described is among the three (or four) enumerated in the felony-enhancing statute. This was not done here: the reindictment lists a form of pimping activity NOT enumerated in the felony statute, although it is enumerated in the misdemeanor statute. Mr. Burroughs was indicted for, and pled guilty to the type of pimping by receiving money knowing that it was earned from prostitution.⁶

Because the language of the indictment did not charge one of the felony types of pimping, Mr. Burroughs should not have been charged as a felon.

A second argument supporting the conclusion that Mr. Burroughs should not have been sentenced as a felon also exists: the enhancing statute speaks in terms of felony punishment only where the acts which are to be considered felonies cause the prostitution. The language of that section, pertinent to pimping, supports this view: "A person convicted of ... pimping ... when such offense involves ... the

⁶ The indictment also alleges that Mr. Burroughs "did instruct Sade Mitchell ... to commit prostitution." This language is not among the types of pimping as defined by statute in that it omits the requirement of intent to divide the proceeds on a pro rata basis. O.C.G.A. § 16-6-11 (5).

pimping for ... a person under the age of 18 years to perform an act of prostitution ... shall be guilty of a felony" (Emphasis supplied.)

This language is clear in that pimping becomes a felony only when the acts occur before the act of prostitution, i.e. when the alleged act is "to perform an act of prostitution." The language "to perform" covers only acts occurring before the act of prostitution; it does not cover acts occurring after the act of prostitution. The language does not cover alleged criminal acts when the act of prostitution has already occurred; thus acts of pimping which occur after the prostitution are not felonies.

Here Mr. Burroughs was charged with receiving money after the prostitution occurred. The act of receiving money knowing that it was earned from prostitution necessarily must occur after the prostitution. Thus, Mr. Burroughs was charged with -- and pled to -- the misdemeanor pimping of receiving money knowing the money was earned from prostitution.⁷

⁷ The issue of the pimping statute being overbroad is also implicated in that the language seems to include even legitimate businesses which take money in exchange for goods or legal services from a known prostitute.

At best, the felony language is ambiguous as to whether all types of pimping (even those not enumerated are included) and as to whether it includes acts done after the fact of prostitution. Because language in a statute must be construed most favorably to Mr. Burroughs, he should be re-sentenced to a maximum of twelve months, as allowed for misdemeanors. Howard v. State, 281 Ga. App. 797, 803-04 (5), 637 S.E.2d 448 (2006) (where the trial court imposes a sentence that exceeds the statutory maximum, the sentence must be vacated and the case be remanded for resentencing).

2. Mr. Burroughs's sentence should have been reduced because the state reneged on its agreement to seek reduction even after Mr. Burroughs, in consideration of the state's agreement pled guilty and made a proffer of the evidence against the codefendants (which the state subsequently used) and otherwise was ready to testify at their trials. (T. 10-11; see also R. 13.)

Standard of Review: When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be

said to part of the inducement or consideration, such promise must be fulfilled. Thompson v. Greene, 265 Ga. 782, 462 S.E.2d 747 (1995) (citing Santobello v. New York, 404 U.S. 257 (1971)). See McDaniel v. State, 172 Ga. App. 562, 323 S.E.2d 866 (1984) (plea agreement would be enforced, despite the failure to place the deal on the record at the plea hearing).

Here Mr. Burroughs relied on the state's offer to seek a reduced sentence after the conclusion of the cases against the codefendants by making a proffer during his plea colloquy and by being ready to testify at their trials, if needed. He met his part of the bargain. The state used that proffer as leverage to obtain the pleas of guilty from the others. It was through no fault of his, that Mr. Burroughs was not needed to testify.

Yet at the sentence reduction hearing, the state reneged on its promise -- after having taken full advantage of Mr. Burroughs' proffer. The state must honor its promise to seek reduction. Thompson v. Greene, 265 Ga. 782, 462 S.E.2d 747 (1995) (citing Santobello v. New York, 404 U.S. 257 (1971)). See McDaniel v.

State, 172 Ga. App. 562, 323 S.E.2d 866 (1984) (plea agreement would be enforced, despite the failure to place the deal on the record at the plea hearing). Cf. Sparks v. State, 232 Ga. App. 179, 501 S.E.2d 562 (1998) (state was not forced to follow plea agreement where there was no consideration and no acceptance; here Mr. Burroughs gave consideration by making the proffer and entered his plea thereby accepting the state's agreement).

Such reduction is also called for because of the lighter sentences given to the three codefendants against whom Mr. Burroughs testified in his proffer. Mr. Hutchins who had a worse record than Mr. Burroughs and who pled guilty to the case involving Mr. Burroughs plus another felony case, received considerably less: approximately one-half of the time to serve in prison. The two female codefendants received even less, i.e. misdemeanor sentences. (The fact that these codefendants were indicted under the same language as Mr. Burroughs, lends some additional weight to the argument made above that Mr. Burroughs under the language of the indictment should have been sentenced to a misdemeanor.)

Defendants who plead guilty may receive lighter sentences than those who are tried and convicted, because they have acknowledged guilty and shown a

willingness to assume responsibility for their conduct which is the first step toward rehabilitation. Lee v. State, 199 Ga. App. 246, 404 S.E.2d 598 (1991). Mr. Burroughs was the first of the four codefendants to plead guilty, made a proffer of the others' involvement which proffer the state used to leverage pleas from the others. Thus, he took the first step to rehabilitation.

Further, fairness and equal protection would seem to also mandate a reduction.

3. Mr. Burroughs' plea was not entered knowingly and voluntarily because although at the sentencing hearing, the trial court advised Mr. Burroughs that he could withdraw his plea should he be dissatisfied with the sentence imposed, the trial court refused to allow it to be withdrawn.

Standard of Review: Because a guilty plea may be withdraw "only if the issue on appeal can be resolved by the facts appearing in the record," Smith v. State, 266 Ga. 687, 470 S.E.2d 436 (1996), this Court must review the facts in the record de novo.

The record of the plea colloquy clearly states that the trial court would allow Mr. Burroughs the opportunity to withdraw his plea of guilty should he not be satisfied with the sentence. Yet when Mr. Burroughs requested just that opportunity at the first time available to him, the trial court denied him what it had previously assured him.

The state indicates its misunderstanding of the offer by the court to Mr. Burroughs to seek a withdrawal of his plea: the state at the motions hearing said

that the trial court's "offer was to do it [withdraw the plea] that morning or not at all." (T. 59.) However, the plea was entered well into the evening at 7:25 p.m., not in the morning.

Mr. Burroughs and his attorney understood before the sentence was pronounced that the trial court would allow the plea to be withdrawn and that the state would recommend a reduced sentence after the conclusion of the state's cases against the codefendants. But neither occurred: the state reneged on its agreement and the trial court refused to allow the withdrawal of the plea, thereby rendering Mr. Burroughs's plea not knowing and not voluntary. In Carroll v. State, 222 Ga. App. 560, 474 S.E.2d 737 (1996), the court found that the defendant should have been allowed to withdraw the guilty plea when the state had not done what it was supposed to do (i.e. to disclose information).

Mr. Burroughs proceeded with an understanding of the two future events, and he relied on them in proceeding. His reliance was made with the hope of future benefit, i.e. the reduction of his sentence and/or the withdrawal of his plea. Because neither occurred, he entered the plea not knowingly and not voluntarily. In Rollins v. State, 277 Ga. 488, 591 S.E.2d 796 (2004), the defendant entered

a guilty plea without knowing about two different factual matters (i.e., the immigration status and the inability to enter into law school), the supreme court set aside the guilty plea.

The case of Thompson v. Greene, 265 Ga. 782, 784 (2), 462 S.E.2d 747 (1995) also underscores that Mr. Burroughs' plea was not made knowingly and voluntarily and thus should be allowed withdrawn. At the time the plea was entered, Mr. Burroughs was told that if he cooperated, including testifying against the other codefendants, the state would move to reduce the sentence. In reliance, he made his proffer under oath at the same time as entering his plea. However, through no fault of his own, he never testified at the trials of the others, because they chose to enter pleas (in part after the state used Mr. Burroughs' proffer as leverage). Thus, the plea was not entered voluntarily: it was entered with the hope of benefit which he did not receive. Id. (citing Santobello v. New York, 404 U.S. 257 (1971)). Cf. McDaniel v. State, 172 Ga. App. 562, 323 S.E.2d 866 (1984) (plea agreement would be enforced, despite the failure to place the deal on the record at the plea hearing).

This court should order that the guilty plea be set aside.

4. Because the trial counsel was not prepared for trial and because he had not advised Mr. Burroughs of viable defenses, Mr. Burroughs received ineffective assistance of counsel, requiring the plea to be allowed withdrawn.

Standard of review: "In reviewing a trial court's determination regarding a claim of ineffective assistance of counsel, this court upholds the trial court's factual findings unless they are clearly erroneous; we review a trial court's legal conclusions de novo." Espinosa v. State, 285 Ga. App. 69, 72 (2), 645 S.E.2d 529 (2007). "Furthermore, the cumulative effect of counsel's errors should be considered with regard to the prejudice test." Allen v. State, A07 A0133 (7-10-07) (2) (citing Schofield v. Holsey, 281 Ga. 809, 811, n.1, 642 S.E.2d 56 (2007)).

Even a defendant who waives his right to trial and enters a guilty plea is entitled to effective legal representation and assistance. Thompson v. Greene, 265 Ga. 782, 784 (2), 462 S.E.2d 747 (1995). Mr. Burroughs was not afforded

effective assistance because his counsel was not prepared for trial inasmuch as he had just inherited this case (along with about 140 others) the day before. He had not reviewed the discovery he had, and some discovery from the state had not yet been turned over to the defense at all. Further, he did not advise Mr. Burroughs of applicable defenses to the charges in the second indictment, such as the demurrer issues, the possibility of a dismissal due to the quashing of both indictments and the issues surrounding the lack of arraignment and of proper notice of trial.

Trial counsel had only met and discussed the case with Mr. Burroughs for the first time on the morning of trial. There is a presumption of ineffectiveness where counsel has spoken to his client for only a few minutes. See, e.g., Grant v. State, 131 Ga. App. 759, 206 S.E.2d 709 (1974).

Trial counsel had had no time to conduct any investigation in the case; thus there is another presumption of ineffectiveness. Stapp v. State, 273 Ga. App. 899, 616 S.E.2d 215 (2005) (ineffective assistance found where trial counsel had done no investigation); Tenorio v. State, 261 Ga. App. 609, 583 S.E.2d 263 (2003) (same).

To compound the problem of not knowing the facts of the case, Mr. Burroughs and Mr. Hobbs were confronted with the two facts that the state had not turned over all discovery⁸ and the state had just reindicted the case. Obviously the decision made to plead guilty was not made after being reasonably informed. "Decisions that are not reasonably informed have emphatically not been made after thorough investigation of law and facts." Pavel v. Hollins, 261 F.3d 210 fn.11 (2001). See Hester v. State, 268 Ga. App. 94, 601 S.E.2d 456 (2004) (state failed to turn over discovery causing delay in case, which delay could not be held against defendant).

At the hearing on the motion, Mr. Burroughs through counsel indicated that he had always wanted to go to trial (this fact is also in a letter to the court, R. 10)

⁸ The state acknowledges that the failure to turn over discovery was harmful. At the motion hearing, the state said: "I speculate to say that the absence of this tape is harmful." (T. 60.) It then attempts to discount the harm by asserting that "Mr. Hobbs did have the opportunity to go over the police report and the [written] witness statements and he had an informed idea of what the State would have been able to prove." (T. 60.) However, Mr. Hobbs had no idea of the contents of the videotape. The importance of subsequent witness statements to the defense was discussed -- and proved pivotal -- in the recent case of State v. White, S07A1308 (January 8, 2008) in which the Supreme Court recognized that harm resulted to the defense when the defense had only a prior written statement and not a transcript of the witness's second statement even though it knew of the gist of that second statement.

and importantly that had he been properly advised, he would have filed a special demurrer seeking that the indictment be dismissed because it alleged a window of time. (T. 49-50, 54). The authority for such dismissal is found in cases such as Blackmon v. State, 272 Ga. App. 854, 614 S.E.2d 118 (2005), South v. State, 268 Ga. App. 110, 601 S.E.2d 378 (2004), State v. Gamblin, 251 Ga. App. 283, 553 S.E.2d 866 (2001) and State v. Layman, 279 Ga. 340, 613 S.E.2d 639 (2005).

The indictment to which Mr. Burroughs pled (06sc47930) is a reindictment of 06sc43726 (T. 55-56), and if both indictments had been quashed or dismissed under this line of cases, the state would have been barred from ever proceeding against Mr. Burroughs concerning the incident alleged. State v. Dorsey, 251 Ga. App. 788, 555 S.E.2d 141 (2001); O.C.G.A. § 17-7-53.1. Yet Mr. Hobbs was not aware of this fact and did not advise Mr. Burroughs of it.⁹

⁹ Inasmuch as the trial court's order states that no viable defense to the charges was articulated at the hearing, it is clearly erroneous. On page 49 of the transcript, undersigned raised this issue. Further, inasmuch as the trial court nowhere in its order considered the cumulative effect of counsel's errors room must be considered as to the prejudice prong, as required by Allen v. State, A07 A0133 (7-10-07) (2) (citing Schofield v. Holsey, 281 Ga. 809, 811, n.1, 642 S.E.2d 56 (2007)), the order is again clearly erroneous. Thus this Court's deference to it is diminished. See, e.g., Hester v. State, 268 Ga. App. 94, 601 S.E.2d 456 (2004).

Mr. Hobbs also did not discuss with Mr. Burroughs the consequences of the fact that there had been no arraignment on the second indictment. Instead he allowed Mr. Burroughs to plea guilty on the day they first met. Had Mr. Hobbs raised this issue, no trial could have occurred on that day. See, e.g., Hardwick v. State, 231 Ga. 181, 183, (6), 200 S.E.2d 728 (1973) (no jury can be empaneled and sworn until the defendant has been arraigned). Further, Mr. Burroughs was entitled to written notice of at least five days before his arraignment date. O.C.G.A. § 17-7-21. Rule 32.1 of the Uniform Rules for the Superior Courts provides that after arraignment a defendant is entitled to at least seven days notice of trial.¹⁰

Where erroneous or no advice is given by counsel, ineffective assistance of counsel has been found. State v. Patel, 280 Ga. App. 181, 626 S.E.2d 121 (2006) (ineffective assistance found due to lack of proper advice concerning immigration issues; Davis v. Murrell, 279 Ga. 585, 619 S.E.2d 662 (2005); Clue v. State, 273 Ga. App. 672, 615 S.E.2d 800 (2005).

¹⁰ At the motion hearing, the state concedes that "Mr. Hobbs was not aware of any procedural defects [regarding the reindictment] that would prevent him from going forward with the plea today." (T. 61.)

Likewise in Gerisch v. State, 278 Ga. 641, 604 S.E.2d 462 (2004), the defendant's guilty plea was tainted by the ineffective assistance of trial counsel who failed to advise properly concerning a viable double jeopardy claim. Here, too, trial counsel failed to advise as to the demurrer issue, the lack of arraignment issue and the notice of trial after arraignment issue. See also Petty v. Smith, 279 Ga. 273, 612 S.E.2d 276 (2005).

If the constitutional requirements of effective assistance are to mean anything, they must include advising defendants of all applicable law. Due process is violated if the defendant pleads guilty without understanding the sentence which may or must be imposed. U.S. v. Finkbeiner, 551 F.2d 180 (7th Cir. 1977). See Allen v. State, ___ Ga. App. ___, A07A0133 (2a) (July 10, 2007) ("Effective assistance of counsel ... mean[s] that [a defendant] must have such assistance as will assure him due process of law). See also Zant v. Mullenix, 245 Ga. 299, 264 S.E.2d 229 (1980) (guilty plea was coerced where defendant was mistaken as to the law) and Henderson v. Morgan, 426 U.S. 637, 647, 96 S.Ct. 2252, 49 L.Ed.2d 108 (1976) (plea vacated because defendant was not informed of the law concerning elements of the crime).

Because Mr. Burroughs was not properly informed of applicable law and because his trial counsel had had the case for less than 24 hours and was thus unprepared for trial, Mr. Burroughs was constructively denied effective representation. This court should direct that the plea be withdrawn.

CONCLUSION

Mr. Burroughs should have been sentenced for a misdemeanor because the charges in the indictment did not implicate each enhancement requirement found in O.C.G.A. § 16-6-13.

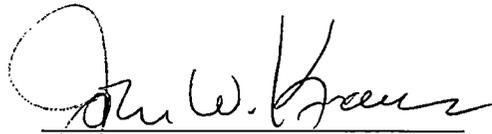
If this Court finds otherwise, then in the alternative the trial court should have reduced Mr. Burroughs' sentence because the state had agreed to recommend such reduction, all conditions (i.e. the proffer on the record and the willingness to testify at trial) were met by Mr. Burroughs.

If this Court finds that no reduction was implicated, then Mr. Burroughs should have been allowed the opportunity to withdraw his plea because he had promptly requested such action after the trial court offered withdrawal during the

plea colloquy and because he had received ineffective assistance of counsel before entering the plea.

For the foregoing reasons, Mr. Burroughs respectfully asks this Court to reverse the decision of the trial court.

Respectfully submitted,



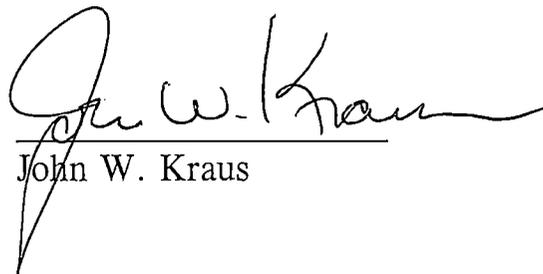
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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of this pleading upon the Office of the District Attorney of Fulton County, Atlanta, Georgia, 30303 by hand delivery.

Dated: January 16, 2008.



John W. Kraus

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C. Jill L. Montez

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