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Lilly B. Nickels*

I. INTRODUCTION

A defendant is indicted on two criminal counts, is found guilty on one of those counts, and is sentenced to time in prison. However, the jury could not come to a decision on the other count, so the trial court judge places the count on the court's dead docket where the count could remain for an indefinite period of time, deeming the defendant's case pending in the trial court. Due to the defendant's case being classified as pending, the defendant does not have the right to a direct appeal. The defendant must helplessly serve prison time without any idea as to when the count will come off the dead docket[1] or when the defendant will be able to appeal the conviction and sentence. This outcome is a product of the General Assembly's language in section 5-6-34(a)(1) of the Official Code of Georgia

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1. In Danforth v. State, the Georgia Supreme Court mentioned the typical length of time for cases to remain on the dead docket (specifically discussing what happens when arrests are not made for persons who have bench warrants and instead announcing "no appearance" at several different terms of court). Justice Hall noted that not arresting individuals on bench warrants "carried [cases] to the 'dead docket,' where they, in most instances, slept the sleep of death, and knew no resurrection . . . ." 75 Ga. 614, 621 (1885).

Annotated.[2] After a defendant attempted to appeal his sentence while one of his criminal counts was on the dead docket and was subsequently denied, the Georgia Supreme Court set out to analyze and clarify the meaning of O.C.G.A. § 5-6-34(a)(1) in *Seals v. State*.[3]

When the defendant in *Seals* was found guilty on one count of his two-count indictment while the other count was placed on the dead docket, he directly appealed his conviction and sentence.[4] The Georgia Court of Appeals denied his appeal because the dead-docketed count caused the defendant's entire case to remain pending in the lower court. After granting a writ of certiorari, the Georgia Supreme Court reviewed the appellate court's dismissal and subsequently upheld the dismissal after it interpreted the final judgment rule set out in O.C.G.A. § 5-6-34(a)(1) and held that a dead-docketed count was undecided and left the entire case pending in the lower court.[5]

The supreme court's analysis of the final judgment rule in O.C.G.A. § 5-6-34(a)(1) and the rule's treatment of dead-docketed counts provides clarity as to when a defendant can directly appeal their conviction, as well as a defendant's alternative options when a direct appeal is not available.

II. FACTUAL BACKGROUND

Demarquis Seals was indicted by a grand jury in June of 2017 on one count of rape and one count of child molestation.[6] In October of 2018, Seals was tried before a jury on both counts, and he was found guilty of child molestation. However, the jury was unable to reach a verdict on the rape count, so the Superior Court of Douglas County declared a mistrial as to that count. The trial court sentenced Seals to twenty years in prison on the count of child molestation and noted that the count of rape was to be re-tried due to the declaration of a mistrial. Shortly after, the trial court placed the count of rape on the "dead docket."[7]

On the day of his sentencing, Seals filed a motion for a new trial, but in August of 2019, the trial court denied the motion.[8] Seals filed a notice of appeal to the Georgia Court of Appeals, and the court later dismissed the appeal. The appellate court determined that since Seals had a dead-docketed count, his case was still pending in the trial court under

2. O.C.G.A. § 5-6-34(a)(1) (2021).
3. 311 Ga. 739, 860 S.E.2d 419 (2021).
4. *Id.* at 739, 860 S.E.2d at 421.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

O.C.G.A. § 5-6-34(a)(1), and therefore, Seals was required to follow the procedures for an interlocutory appeal under O.C.G.A. § 5-6-34(b)[9] as to the child molestation conviction and sentence.[10]

The Georgia Supreme Court granted certiorari to review whether the court of appeals erred in dismissing Seals's appeal.[11] Since the trial court's ruling did not constitute a final judgment under O.C.G.A. § 5-6-34(a)(1), and Seals did not follow the required procedures to seek an interlocutory appeal under O.C.G.A. § 5-6-34(b), the supreme court affirmed the appellate court's dismissal of Seals's appeal.[12]

III. LEGAL BACKGROUND

A. Defendant's Right to Appeal Under O.C.G.A. § 5-6-34(a)(1)

Immediate appeals may be taken from final judgments, which O.C.G.A. § 5-6-34(a)(1) describes as "where the case is no longer pending in the court below[.]"[13] The concept of this statute is longstanding in statutory law. Georgia Code of 1868, section 4191,[14] the predecessor to O.C.G.A. § 5-6-34(a)(1), stated:

> No cause shall be carried to the Supreme Court upon any bill of exceptions, so long as the same is pending in the Court below, unless the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause.[15]

Twenty years after the enactment of section 4191, the Georgia Supreme Court interpreted its meaning in *Zorn v. Lamar*.[16] The court held that the statute meant "as long as a defendant remains in the court below or other issues remain untried there, the case is pending there, and

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9. O.C.G.A. § 5-6-34(b) (2021).

10. On January 11, 2021, the trial court entered an order taking the rape count off the dead docket and, on the same day, entered an order of *nolle prosequi* ("[a]n entry made on the record, by which the prosecutor . . . declares that he will proceed no further[,]") as to the count, leading Seals's case to have a final judgment on the child molestation conviction and sentence. A notice of appeal was filed to the Georgia Court of Appeals on February 10, 2021, and Seals's appeal was on the appellate court's calendar for January 2022. Supplemental Brief of Petitioner at 2, Seals v. State, 311 Ga. 739, 860 S.E.2d 419 (2021) (No. S20C0931); *Nolle Prosequi*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (6th ed. 1856).

11. *Seals*, 311 Ga. at 739, 860 S.E.2d at 421.

12. *Id.*

13. O.C.G.A. § 5-6-34(a)(1).

14. Georgia Code of 1868 section 4191.

15. *Id.*

16. 71 Ga. 80 (1883).

no final judgment has been had[.]"[17] In 1965, the language of section 4191 was replaced by the enactment of the *Appellate Practice Act*.[18] Although the language of the current O.C.G.A. § 5-6-34(a)(1) has evolved throughout the years, no decision indicates that the meaning of the statute has been materially changed regarding the embodiment of a final judgment. [19]

1. Interpreting Statutes

The issue in *Seals* is one of statutory construction, so it was necessary for the court to carefully and accurately interpret O.C.G.A. § 5-6-34(a)(1). When the Georgia Supreme Court was interpreting a statute in *Deal v. Coleman*,[20] the court noted that "[w]hen we consider the meaning of a statute, 'we must presume that the General Assembly meant what it said and said what it meant.'"[21] The court then said that statutory text should be given its "'plain and ordinary meaning[]'"[22] and read in its "most natural and reasonable way, as an ordinary speaker of the English language would."[23] In order to give a statute its ordinary public meaning, courts must read the words of the statute in context rather than in isolation, which includes the "structure and history of the text . . . [and] statutory and decisional law that forms the legal background of the written text."[24]

The court applied these standards when answering the issue in *Seals*. First, it had to determine whether a "case" that consists of multiple counts is still "pending" when one or more of the counts remains unresolved.

2. Ordinary Public Meaning of "Case" and "Pending"

The ordinary public meaning of the word "case," when used in a legal capacity, is a "legal action or suit[.]"[25] When courts refer to a case, it is generally thought to encompass all charges against a defendant.

17. *Id.* at 82.

18. *Appellate Practice Act* (1965).

19. O.C.G.A. § 5-6-34(a)(1).

20. 294 Ga. 170, 751 S.E.2d 337 (2013).

21. *Id.* at 172, 751 S.E.2d at 341 (quoting Arby's Restaurant Group, Inc. v. McRae, 292 Ga. 243, 245, 734 S.E.2d 55, 57 (2012)).

22. *Id.* (quoting City of Atlanta v. City of College Park, 292 Ga. 741, 744, 741 S.E.2d 147, 149 (2013)).

23. *Id.* at 172–73, 751 S.E.2d at 341.

24. City of Guyton v. Barrow, 305 Ga. 799, 805, 828 S.E.2d 366, 371 (2019).

25. *Case*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 219 (2d college ed. 1980); "[A] single proceeding, regardless of whether the proceeding involves one or multiple counts." *Seals*, 311 Ga. at 743, 860 S.E.2d at 423.

Similarly, "pending," when used generally, means "not decided, determined, or established."[26] This term is widely used throughout legal proceedings when a case or individual count is unresolved. Applying these terms to a case that includes multiple counts, it follows that if one of the counts in the case is pending, the case is also pending, thus the judgment is not final.

B. Georgia Supreme Court's Prior Decisions Regarding Final Judgments

The Georgia Supreme Court has issued several decisions regarding the final judgment rule embodied in O.C.G.A. § 5-6-34(a)(1). In *Keller v. State*,[27] the Cobb County Superior Court failed to enter a written conviction and sentence on the last count of Gerald Keller's multi-count indictment after the jury announced the verdict.[28] At this time, Keller's case was "not ripe for appeal . . . even though the trial court did enter a written judgment of conviction and sentence on the other counts of the indictment."[29] Once the trial court entered a written sentence on the last count of the indictment, Keller filed a timely appeal to the Georgia Court of Appeals. This appeal was subsequently dismissed. A writ of certiorari was then granted by the Georgia Supreme Court to determine whether the dismissal of Keller's appeal by the court of appeals was erroneous. The supreme court held that "when multiple counts of an indictment are tried together and the trial court does not enter a written sentence on one or more of the counts, the case is still pending in the trial court and is not a final judgment under O.C.G.A. § 5-6-34(a)(1)."[30] Thus, since Keller filed a timely appeal after the trial court entered a written judgment on the last count, the supreme court held that the court of appeals erred in dismissing the appeal.[31]

Similar to *Keller*, the Georgia Supreme Court in *State v. Outen*,[32] interpreted O.C.G.A. § 5-7-2,[33] which sets out the state's required procedures for appealing when no final judgment has been entered.[34] In

26. *Pending*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1050 (2d college ed. 1980).

27. 275 Ga. 680, 571 S.E.2d 806 (2002).

28. *Id.* at 681, 571 S.E.2d at 808.

29. *Id.*

30. *Id.* at 681, 571 S.E.2d at 807–08.

31. *Id.* at 681, 571 S.E.2d at 808.

32. 289 Ga. 579, 714 S.E.2d 581 (2011).

33. O.C.G.A. § 5-7-2 (2021).

34. *Id.*

that case, David Outen filed a special demurrer[35] on count one of the indictment which was subsequently granted by the Clarke Superior Court, and the state appealed.[36] The Georgia Court of Appeals affirmed the trial court's grant of a special demurrer and filed a petition for a writ of certiorari to the supreme court. After granting the writ of certiorari, the supreme court held that "[t]he trial court's order dismissing [c]ount [one] of the indictment [was] not a final order[.] Count [two] remain[ed] in the trial court. Accordingly, by the plain terms of O.C.G.A. § 5-7-2, a certificate of immediate review was required."[37] Since the state did not follow the required procedures for a certificate of immediate review laid out in O.C.G.A. § 5-7-2,[38] the court of appeals did not have appellate jurisdiction to affirm the trial court's dismissal.[39]

Although *Keller* and *Outen* concern different circumstances than those in *Seals* and do not explicitly reference the dead docket, these cases show that if one or more counts of a multi-count indictment are pending in the court below, there is not a final judgment, and none of the counts can be appealed.[40]

1. The Final Judgment Rule as Applied in Civil Cases

The final judgment rule in O.C.G.A. § 5-6-34(a)(1) is also applicable in civil cases.[41] In *Keck v. Harris*,[42] the appellant filed a complaint for modification of child support, and he also sought for the Cobb County Superior Court to declare that Georgia's Child Support Guidelines were unconstitutional under the United States Constitution's Supremacy Clause.[43] After the trial court issued an order denying the appellant's constitutional challenge, the appellant filed a motion for discretionary review of the order to the Georgia Supreme Court. The supreme court

35. "In a special demurrer, a defendant claims that the charges in the indictment are 'imperfect as to form or that the accused is entitled to more information.'" Hinkson v. State, 310 Ga. 388, 392, 850 S.E.2d 41, 47 (2020) (quoting Bullard v. State, 307 Ga. 482, 486, 837 S.E.2d 348, 353 (2019)).

36. *Outen*, 289 Ga. at 580, 714 S.E.2d at 582.

37. *Id.* at 581, 714 S.E.2d at 583.

38. O.C.G.A. § 5-7-2.

39. *Outen*, 289 Ga. at 579, 581, 714 S.E.2d at 582–83.

40. Additionally, if one or more counts of a defendant's multicount indictment are pending in the court below, the defendant is barred from state and federal habeas corpus review. *Seals*, 311 Ga. at 753, 860 S.E.2d at 430 (LaGrua, J., dissenting).

41. O.C.G.A. § 5-6-34(a)(1).

42. 277 Ga. 667, 594 S.E.2d 367 (2004).

43. *Id.* at 667, 594 S.E.2d at 368–69.

held that "[t]he trial court's order [did] not constitute a final judgment, as the claim for modification remain[ed] pending below."[44]

In another civil case, *Tyrones v. Tyrones*,[45] the appellant held joint title to land in DeKalb County, Georgia with his brother.[46] After the appellant's brother died, the DeKalb County Probate Court gave a 50% interest in the land to his brother's widow, the appellee. The appellee filed a complaint for statutory partition of the property, and the parties agreed to have the property appraised, and if needed, the property would be subject to a partition sale. Almost four years later, the DeKalb County Superior Court entered an order for the partition-sale process to begin, and the property was subsequently purchased at the partition sale by the appellee. Shortly after, the trial court found that the appellant's purchase of the property was proper, and it ordered the appellant to turn over the deed to the property to the appellee.[47]

The appellee asserted that in order to challenge the partition sale, the appellant had to file an appeal because the trial court's order was a final judgment.[48] However, the Georgia Supreme Court held that since there were unresolved issues—"namely the confirmation of the partition sale and disposition of the funds from the sale"—and remaining recourse for the appellant in the trial court—"namely his objection to [the partition] sale and request for a new one"—the trial court's order did not constitute a final judgment.[49] The trial court used the following rule to determine what constitutes a final judgment:

> Even if an order does not specify that it is a grant of final judgment, it nevertheless constitutes a final judgment within the meaning of O.C.G.A. § 5-6-34(a)(1) where it leaves no issues remaining to be resolved, constitutes the court's final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court.[50]

C. Criminal Cases and Counts on the Dead Docket

A dead docket is a "procedural device by which the prosecution is postponed indefinitely but may be reinstated any time at the pleasure of the court."[51] Placing criminal cases on the dead docket was first

44. *Id.* at 667, 594 S.E.2d at 369.

45. 300 Ga. 367, 792 S.E.2d 398 (2016).

46. *Id.*

47. *Id.* at 369 n.2, 792 S.E.2d at 399.

48. *Id.*

49. *Id.* at 370 n.2, 792 S.E.2d at 400.

50. *Id.* (quoting Forrister v. Manis Lumber Co., 232 Ga. App. 370–71, 501 S.E.2d 606, 608 (1998)).

51. 1 Georgia Criminal Law Case Finder § 22-7 (2021).

statutorily authorized in Georgia by an 1883 statute which provided that the superior court clerk was required to keep "a docket of criminal cases, to be known as the dead docket, to which cases shall be transferred, at the discretion of the providing judge, and which shall only be called at his pleasure . . . ."[52] That statute was later codified in the 1895 and 1910 Georgia Penal Codes, as well as in the 1933 Georgia Code, and now, with the exception of some changes in the language, it is known as O.C.G.A. § 15-6-61(a)(4)(B).[53]

Dead-docketing a case does not mean that the case has been terminated or dismissed, so the defendant's case remains pending "which can be called for trial at the judge's pleasure, or upon which the accused can make a demand for trial."[54] Because placing a case on the dead docket does not constitute termination or dismissal, in addition to a defendant not having the ability to file a direct appeal, a court's order to dead-docket a case cannot be appealed by the state pursuant to O.C.G.A. § 5-7-1(a).[55]

If a defendant's case has been placed on the dead docket, the defendant has the right to demand a speedy trial by using either (1) the statutory right to demand a speedy trial under O.C.G.A. § 17-7-170,[56] or (2) the constitutional right to demand a speedy trial under the Sixth Amendment of the United States Constitution.[57] Thus, to place a case on the dead docket over a defendant's objection[58] is an abuse of the trial court's discretion.[59]

Since the dead docket is a primary focus in *Seals*, the supreme court used Georgia statutes and case law to determine whether any authority exists that would cause an unresolved, dead-docketed count to be treated differently when applying the final judgment rule in O.C.G.A. § 5-6-34(a)(1).

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52. Act of Sept. 25, 1883, § 1, 1882–83 Ga. Laws 55–56; Georgia Penal Code § 797 (1895); Georgia Penal Code § 797 (1910); The Code of Georgia of 1933 § 24-2714(5)(7) (1933).

53. Act of Sept. 25, 1883, § 1, 1882–83 Ga. Laws 55–56; Georgia Penal Code § 797 (1895); Georgia Penal Code § 797 (1910); The Code of Georgia of 1933 § 24-2714(5)(7); O.C.G.A. § 15-6-61(a)(4)(B) (2019).

54. Courtenay v. Randolph, 125 Ga. App. 581, 583, 188 S.E.2d 396, 398 (1972) (citing Newman v. State, 121 Ga. App. 692, 175 S.E.2d 144 (1970)).

55. O.C.G.A. § 5-7-1(a) (2021).

56. O.C.G.A. § 17-7-170 (2021).

57. U.S. CONST. amend. VI.

58. Seals did not object to the trial court placing the rape count on the dead docket. Brief of Petitioner at 3, Seals v. State, 311 Ga. 739, 860 S.E.2d 419 (2021) (No. S20C0931).

59. *Newman*, 121 Ga. App. at 694, 175 S.E.2d at 146.

1. Statutory Authority for Different Treatment of Dead-Docketed Counts

No statutory authority exists in Georgia law that suggests that untried, dead-docketed counts should be treated differently when applying the final judgment rule set out in O.C.G.A. § 5-6-34(a)(1).[60] There are three Georgia statutes that explicitly reference the dead docket, but none of these statutes indicate that dead-docketing a count would result in a final judgment for the count.

The first statute, O.C.G.A. § 15-6-61(a)(4)(B), provides that maintaining a criminal case management system that reflects "entries of cases which are ordered dead docketed[]" is the duty of the superior court clerk.[61] The second statute, O.C.G.A. section 17-6-31(c),[62] declares that a principal will be surrendered if the case is dead-docketed before a judgment is entered,[63] and section 17-6-31(d)(1)[64] states that a surety will be released from liability if the case is dead-docketed before a judgment is entered.[65] The third statute, O.C.G.A. section 35-3-37(j)(3),[66] relates to a defendant being able to restrict access to their criminal history.[67] Section 35-3-37(j)(3) allows the restriction of criminal history for a dead-docketed charge when (1) the charge has stayed on the dead docket for more than twelve months; (2) the individual petitions the court to restrict access to the criminal history, and the court examines the reasoning for dead-docketing and the suitability for restricting access; and (3) the individual does not have any pending active warrants.[68]

When reading these statutes, there is nothing that indicates that a dead-docketed count should be treated as a final judgment. Actually, the manner in which O.C.G.A. § 35-3-37(j)(3) treats dead-docketed counts—the court requiring a count to have been on the dead docket for a time period of twelve months before analyzing the reasoning for placing the count on the dead docket[69]—insinuates that the mere action of placing a count on the dead docket does not automatically establish a final judgment.

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60. O.C.G.A. § 5-6-34(a)(1).
61. O.C.G.A. § 15-6-61(a)(4)(B).
62. O.C.G.A. § 17-6-31(c) (2021).
63. *Id.*
64. O.C.G.A. § 17-6-31(d)(1) (2021).
65. *Id.*
66. O.C.G.A. § 35-3-37(j)(3) (2021).
67. *Id.*
68. *Id.*
69. *Id.*

2. Georgia Case Law Authority for Different Treatment of Dead-Docketed Counts

The Georgia Supreme Court has explicitly referenced using the dead docket in only two cases. In the first case, *Beam v. State*,[70] a female companion was with the defendant on the night of his alleged crime and witnessed the events, and the two individuals had unrelated pending armed robbery charges.[71] Before the defendant's trial, the Assistant District Attorney offered to drop the armed robbery charges against the female companion if she would testify against the defendant regarding the events that she witnessed. She agreed to this offer, and during the trial, the Fulton County Superior Court ruled that the jury could be made aware that the female companion had the charges dismissed, but the defense could not question her about the armed robbery because that would allow the state to question the defendant about that unrelated crime. Two weeks after the female companion testified, her armed robbery charge was placed on the dead docket.[72]

Upon review by the Georgia Supreme Court, the court held that because the female companion was considered to be a key witness against the defendant, and the armed robbery count on the dead docket did not constitute a dismissal of the count, the trial court erred in ruling that questioning of the female would lead to questioning of the defendant.[73] When determining that the count on the dead docket was still pending, the court relied on the Georgia Court of Appeals decision *State v. Creel*,[74] and noted that "[p]lacing a case upon the dead docket certainly constitutes neither a dismissal nor a termination of the prosecution in the accused's favor."[75]

In the second case, *Phillips v. State*,[76] the Fulton County Superior Court placed the defendant's case on the dead docket.[77] Sixteen months later, the defendant's case was retried. The defendant appealed and argued that he was not given sufficient notice of his case being taken off the dead docket. Emphasizing the fact that the defendant's attorney did not request a continuance or cite any precedent supporting the defendant's alleged entitlement to heightened notice, the Georgia

70. 265 Ga. 853, 463 S.E.2d 347 (1995).

71. *Id.* at 853–54, 463 S.E.2d at 348–49.

72. *Id.* at 855, 463 S.E.2d at 349.

73. *Id.* at 857, 463 S.E.2d at 350.

74. 216 Ga. App. 394, 454 S.E.2d 804 (1995).

75. *Beam*, 265 Ga. at 855 n.3, 463 S.E.2d at 349 (quoting *Creel*, 216 Ga. App. at 395, 454 S.E.2d at 805).

76. 279 Ga. 704, 620 S.E.2d 367 (2005).

77. *Id.* at 704, 620 S.E.2d at 368.

Supreme Court held that the argument was not preserved for appellate review and quoted *Beam*: "Although the case was placed on the dead docket after the original trial ended in a mistrial as to the murder charges that 'certainly constitute[d] neither a dismissal nor a termination of the prosecution in the accused's favor.'"[78]

Although these two cases do not explicitly address the dead docket's applicability to the final judgment rule in O.C.G.A. § 5-6-34(a)(1), they make it clear that placing a case or count on the dead docket does not mean that it is being dismissed or terminated. As a result, the case or count is still pending regardless of its placement on the dead docket.

IV. COURT'S RATIONALE

Justice Peterson wrote for the majority in *Seals*, and he examined several sources and rules of law when analyzing O.C.G.A. § 5-6-34(a)(1) as it applies to counts that have been placed on the dead docket. [79] First, the court emphasized the imperativeness of affording the language of O.C.G.A. § 5-6-34(a)(1) its plain and ordinary meaning as understood by an average speaker of the English language. [80] When doing so, it follows that when one count of a multicount indictment is pending, the entire case is pending and cannot be appealed.

Second, it is noted that when the current O.C.G.A. § 5-6-34(a)(1) was enacted by the legislature in 1984, the Georgia Court of Appeals had already determined in *Courtenay v. Randolph*,[81] *McCord v. Jones*,[82] and *Webster v. City of East Point*,[83] that a case on the dead docket was still pending.[84] These cases held that "[p]lacing a case upon the dead docket certainly constitutes neither a dismissal nor a termination of the prosecution in the accused's favor. A case is still pending which can be called for trial at the judge's pleasure, or upon which the accused can make a demand for trial."[85] The General Assembly decided to enact O.C.G.A. § 5-6-34(a)(1) in the midst of these cases, indicating that the

78. *Id.* at 705, 620 S.E.2d at 368–69 (2005) (quoting *Beam*, 265 Ga. at 855 n.3, 463 S.E.2d at 349).

79. *Seals*, 311 Ga. 739, 860 S.E.2d 419.

80. *Id.* at 740, 860 S.E.2d at 421–22.

81. 125 Ga. App. 581, 188 S.E.2d 396.

82. 168 Ga. App. 891, 311 S.E.2d 209 (1983).

83. 164 Ga. App. 605, 294 S.E.2d 588 (1982).

84. *Seals*, 311 Ga. at 748, 860 S.E.2d at 427.

85. *Courtenay*, 125 Ga. App. at 583, 188 S.E.2d at 397–98 (citing *Newman*, 121 Ga. App. 692, 175 S.E.2d 144); *McCord*, 168 Ga. App. at 892, 311 S.E.2d at 211 (quoting *Courtenay*, 125 Ga. App. at 583, 188 S.E.2d at 397–98); *see Webster*, 164 Ga. App. at 609, 294 S.E.2d at 591 (citing *Courtenay*, 125 Ga. App. at 583, 188 S.E.2d at 397–98).

General Assembly did not intend for dead-docketed cases to be treated differently.[86]

Third, even under the language of O.C.G.A. § 5-6-34(a)(1), defendants still have the right to file a certificate of immediate review under O.C.G.A. § 5-6-34(b).[87] Although this process has narrower time constraints for filing, defendants nevertheless retain this option if they have not obtained a final judgment. Interpreting O.C.G.A. § 5-6-34(a)(1) to mean that defendants cannot appeal without a final judgment does not negate a defendant's right to file for a certificate of immediate review under O.C.G.A. § 5-6-34(b).[88]

Finally, "the motion for new trial statute uses completely different language that allows the filing of such a motion."[89] The way that O.C.G.A. § 5-6-34(a)(1) is construed by the court does not disturb a defendant's right to file a motion for a new trial under O.C.G.A. § 5-5-40(a).[90] Along with a defendant's right to file a motion for a new trial, the court noted that it is possible for a "trial court [to] sever the mistried count to allow the immediate appeal of the counts on which a judgment was entered[]"[91] under O.C.G.A. § 16-1-7(c).[92]

Justice LaGrua, writing for the dissent, stressed that "[o]nce a count is moved to the dead docket, the count is *dead*."[93] She discussed the procedure for placing a count on the dead docket, highlighting that once the count is on the dead docket, it is no longer on the court's *active* docket. Explaining how a count on the dead docket has the potential to be reinstated and called for trial at any time, Justice LaGrua noted that the count could also stay on the dead docket for an indefinite period of time, not allowing the defendant to appeal his conviction. Her opinion is that at the time Seals filed a direct appeal to the court of appeals for the child molestation conviction, the rape count was *dead*. Justice LaGrua asserted that "to conclude otherwise would render the dead docket

86. *Seals*, 311 Ga. at 748, 860 S.E.2d at 427.

87. *Id.* at 750 n.6, 860 S.E.2d at 428.

88. *Id.*

89. *Id.* at 750, 860 S.E.2d at 428.

90. O.C.G.A. § 5-5-40(a) (2021) ("All motions for new trial, except in extraordinary cases, shall be made within [thirty] days of the entry of the judgment on the verdict . . . .").

91. *Seals*, 311 Ga. at 750 n.8, 860 S.E.2d at 428.

92. O.C.G.A. § 16-1-7(c) (2021) ("When two or more crimes are charged as required by subsection (b) of this Code section, the court in the interest of justice may order that one or more of such charges be tried separately.").

93. *Seals*, 311 Ga. at 751, 860 S.E.2d at 428 (LaGrua, J., dissenting) (emphasis in original).

meaningless, raise serious due process concerns, and potentially thwart appellate review until an indeterminate, or even non-existent time."[94]

To demonstrate that the supreme court has long considered direct appeals in cases similar to *Seals*, Justice LaGrua relied on a number of prior supreme court cases.[95] Justice LaGrua strongly encouraged the General Assembly to amend O.C.G.A. § 5-6-34(a)(1) to grant defendants the right to directly appeal counts that have been placed on the dead docket.[96] She believes that if the statute is not amended, it will "upend years of trial court practice where the dead docket procedure has been utilized for a myriad of practical, strategic, and economic reasons and will leave defendants without a meaningful and effectual method to appeal their convictions."[97] Concluding that Seals's case was not pending after his rape count was placed on the dead docket and his motion for new trial was denied, Justice LaGrua declared that Seals had the right to a direct appeal under O.C.G.A. § 5-6-34(a)(1).[98]

V. IMPLICATIONS

While the meaning of a final judgment under O.C.G.A. § 5-6-34(a)(1) has been addressed by the courts many times throughout the years, the matter in *Seals* regarding whether a dead-docketed count impacts a final judgment was one of first impression for the Georgia Supreme Court. There are at least four implications that stem from the court's decision in *Seals*.

First, the court's interpretation of O.C.G.A. § 5-6-34(a)(1) provides clarity in the law for defendants and their counsel when determining the proper motions and notices to file in the defendant's case. Although Seals's appeal of the child molestation conviction and sentence was on the Georgia Court of Appeals's calendar for January 2022,[99] if a certificate of immediate review would have been properly filed when he was convicted in 2018, he could have been granted an appeal much sooner and avoided the years of litigation that he has endured. The court's

94. *Id.* at 753, 860 S.E.2d at 430 (LaGrua, J., dissenting).

95. *See* Pender v. State, 311 Ga. 98, 856 S.E.2d 302 (2021); Terrell v. State, 304 Ga. 183, 815 S.E.2d 66 (2018); Faust v. State, 302 Ga. 211, 805 S.E.2d, 826 (2017); Walker v. State, 295 Ga. 688, 763 S.E.2d 704 (2014); Jones v. State, 284 Ga. 672, 670 S.E.2d 790 (2008); Taylor v. State, 282 Ga. 44, 644 S.E.2d 850 (2007); Thomas v. State, 279 Ga. 363, 613 S.E.2d 620 (2005); Grier v. State, 273 Ga. 363, 541 S.E.2d 369 (2001).

96. *Seals*, 311 Ga. at 756, 860 S.E.2d at 432 (LaGrua, J., dissenting).

97. *Id.*

98. *Id.*

99. The fact that Seals obtained a final judgment before he was granted a direct appeal further affirms the appropriateness of the court's ruling. Supplemental Brief of Petitioner at 2, Seals v. State, 311 Ga. 739, 860 S.E.2d 419 (2021) (No. S20C0931).

clarification in the law will help future defendants avoid unnecessary and extended litigation, and it will also help to decrease the number of motions and other related filings coming through the courts.

Second, although the court ruled that dead-docketed counts are pending in the trial court and prevent defendants from successfully seeking a direct appeal, other routes for recourse remain available to criminal defendants. The court's interpretation of O.C.G.A. § 5-6-34(a)(1) brings to light a defendant's alternate options, which include the ability to file for a certificate of immediate review under O.C.G.A. § 5-6-34(b),[100] the right to file a motion for new trial under O.C.G.A. § 5-5-40(a),[101] the statutory right to demand a speedy trial under O.C.G.A. § 17-7-170,[102] and the constitutional right to demand a speedy trial under the Sixth Amendment of the United States Constitution.[103] Clarifying the meaning of O.C.G.A. § 5-6-34(a)(1) allows for the proper use of other statutes that are applicable to defendants that have not obtained a final judgment on their case.

Third, the supreme court's interpretation of O.C.G.A. § 5-6-34(a)(1) and its result for defendants raises policy concerns regarding the General Assembly potentially amending O.C.G.A. § 5-6-34(a)(1) to grant defendants the right to a direct appeal where unresolved counts are on the dead docket. Amending the statute's language to allow these immediate appeals would eliminate the appellate prerequisites of a count being ordered nolle prosequi, dismissed, or the need for a retrial. Additionally, with the current language of O.C.G.A. § 5-6-34(a)(1)[104] that gives a dead-docketed count the ability to indefinitely postpone an appeal, there is a risk that some judges and prosecutors could abuse the statute by placing a count on the dead docket to interfere with a defendant's appellate rights. However, addressing those concerns is only appropriate for the General Assembly.

Finally, if the court had ruled in line with the defendant's and dissent's position in *Seals*, it is possible that the result would have led to some "unwanted piecemeal appeals." A criminal defendant having the right to directly appeal a case without a final judgment is inconsistent with appellate procedure. Under the court's ruling, the court of appeals has jurisdiction to hear a direct appeal only when the case has a final judgment—a concept that has been longstanding for over 150 years in criminal and civil law.

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100. O.C.G.A. § 5-6-34(b).
101. O.C.G.A. § 5-5-40(a).
102. O.C.G.A. § 17-7-170.
103. U.S. CONST. amend. VI.
104. O.C.G.A. § 5-6-34(a)(1).