PAIGE REESE WHITAKER

[redacted]

PROFESSIONAL EXPERIENCE:

Judge, Superior Court of Fulton County *February 2017 - present*
I preside over complex criminal felony, civil, family, and equity matters as well as appeals from magistrate court and administrative agencies. I preside over trials, including dispositive and evidentiary motions and all other proceedings, and I determine whether to grant certificates of immediate review. I serve on our bench's Executive Committee and Case Management Committee as well the Atlanta Circuit's Joint Governance Committee. I also serve on the Judicial Council of Georgia's Committees on Legislation and Pattern Jury Charges and on the Georgia Commission on Family Violence. I am a certified mediator/neutral and have received intensive training at the National Judicial College.

Deputy District Attorney, Appeals Division, Fulton County District Attorney's Office *2010-2017*
I led a 12 person team providing legal expertise, briefing, and argument on pretrial and trial matters and litigating all of Fulton County's felony post-trial matters in the trial court and on direct appeal to Georgia's Supreme Court and Court of Appeals. I made assignment and staffing decisions, analyzed legal issues, determined whether to appeal adverse rulings, wrote and edited appellate briefs, and presented oral argument in the appellate courts. I advised the elected District Attorney on legal, policy, fiscal, and personnel matters and served on his Executive Leadership Team. I monitored and drafted legislation, managed record restrictions and open records requests, developed and presented in-house training, and acted as liaison to other government and law enforcement entities, community partners, and outside counsel. Under my leadership, the Appeals Division consistently achieved a high success rate upholding Fulton's felony convictions against challenge in the trial and appellate courts and securing reversal of adverse rulings.

Senior Assistant Attorney General,Criminal Justice Division, Georgia Dept. of Law *2003-2006*
I handled a special project drafting final orders for superior court judges throughout Georgia in active habeas corpus cases originally litigated by others, securing 100% adoption and backlog elimination.

Senior Assistant Attorney General,Capital Litigation Section, Georgia Dept. of Law *1995-2002*
I acted as sole or lead counsel in complex post-conviction cases brought by death-sentenced inmates in state and federal court, including 10 superior court bench trials and a robust motions and deposition practice. I practiced regularly before the Georgia Supreme Court and United States Supreme Court as both the appealing and responding party, including authoring over 20 death penalty merits briefs and handling numerous oral arguments before the Georgia Supreme Court. I trained and advised district attorneys and prosecutors throughout Georgia on constitutional, criminal, and capital law.

Assistant Attorney General,Criminal Division, Georgia Dept. of Law *1992-1995*
I acted as sole counsel for the State in over 200 habeas corpus cases filed in state and federal courts in Georgia, including preparing all legal filings and representing the State in evidentiary hearings before judges throughout Georgia. I also authored and filed over 60 briefs on direct appeal and presented 3 oral arguments in the Georgia Supreme Court, and I regularly filed briefs in the United States Supreme Court.

EDUCATION:

Duke University School of Law, J.D. *1989-1992*
College of Charleston, B.A. Political Science (*magna cum laude*) *1985-1989*

BAR ADMISSIONS:

Supreme Court of the United States; Eleventh Circuit Court of Appeals; United States District Courts for all Georgia Districts; Supreme Court of Georgia; Court of Appeals of Georgia; all Georgia trial courts

This questionnaire is submitted in connection with a vacancy on the Georgia Court of Appeals

---

1. Give your full name.

   Paige Reese Whitaker

2. State both your office and home addresses.

   185 Central Avenue, S.W.
   Suite T-5755
   Atlanta, GA 30303

   State your office telephone number, home telephone number, and cell phone telephone number.

   Office: 404-612-3740
   Home:
   Cell:

   State your e-mail address.

   Office:
   Home:

3. Give the date and place of your birth.

   Charleston, SC

4. If you are a naturalized citizen, please give the date and place of naturalization.

   n/a

5. Indicate your marital status; if married, the name of your spouse; and the names and ages of your children.

   I am married. My husband is

6. Indicate the periods of your military service, including the dates, and the branch in which you served, your rank or rate. n/a

7. List each college and law school you attended, including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.

   Duke University School of Law, August 1989 - May 1992, JD
   College of Charleston, August 1985 - May 1989, BA Political Science

8. List all courts in which you are presently admitted to practice, including the dates of admission in each case. Give the same information for administrative bodies having special admission requirements.

Supreme Court of the United States, June 3, 1996
Eleventh Circuit Court of Appeals, July 16, 1997
Federal District Court for the Northern District of Georgia, May 20, 1993
Federal District Court for the Middle District of Georgia, December 19, 1995
Federal District Court for the Southern District of Georgia, January 20, 1998
Supreme Court of Georgia, January 11, 1993
Court of Appeals of Georgia, October 19, 2010
Superior Courts of Georgia, November 30, 1992

9. Are you actively engaged in the practice of law at the present time? If you are connected with a law firm, a corporate law department or a governmental agency, please state its name and indicate the nature and duration of your relationship.

I am a sitting superior court judge in the Atlanta Judicial Circuit.

10. If in the past you have practiced in other localities or have been connected with other law firms, corporate law departments or governmental agencies, please give the particulars, including the locations, the names of the firms, corporate law departments or agencies and your relationship thereto, and the relevant dates. Indicate also any period in the past during which you practiced alone.

I practiced in the Fulton County District Attorney's Office, Atlanta Judicial Circuit, 136 Pryor St., S.W. Atlanta, Georgia, from 2010 - 2017. I was the Deputy DA in charge of the twelve person Appeals Division of that office.

I practiced in the Georgia Attorney General's Office (Department of Law), 40 Capitol Square, S.W., Atlanta, Georgia, from 1992 - 2006. I started as a Staff Attorney in the Criminal Division and advanced to Assistant Attorney General while with the Criminal Division. In June 1995, I was chosen as one of three attorneys comprising the newly-formed Capital Litigation Section within the Criminal Justice Division of the office. At the end of 2002, I resigned from that position after the birth of my second child. I was asked to return, and I did so in a part-time capacity, in 2003 as a Senior Assistant Attorney General, remaining until 2006.

While awaiting my bar results in 1992, I was a contract litigation associate with McCalla Raymer, 6 Concourse Parkway, NE, Atlanta, GA 30328.

11. Do you presently hold judicial office, or have you in the past held any such office?

Yes.

8. List all courts in which you are presently admitted to practice, including the dates of admission in each case. Give the same information for administrative bodies having special admission requirements.

Supreme Court of the United States, June 3, 1996
Eleventh Circuit Court of Appeals, July 16, 1997
Federal District Court for the Northern District of Georgia, May 20, 1993
Federal District Court for the Middle District of Georgia, December 19, 1995
Federal District Court for the Southern District of Georgia, January 20, 1998
Supreme Court of Georgia, January 11, 1993
Court of Appeals of Georgia, October 16, 2010
Superior Courts of Georgia, November 30, 1993

9. Are you actively engaged in the practice of law at the present time? If you are connected with a law firm, a corporate law department or a governmental agency, please state its name and indicate the nature and duration of your relationship.

I am a sitting superior court judge in the Atlanta Judicial Circuit.

10. If in the past you have practiced in other localities or have been connected with other law firms, corporate law departments or governmental agencies, please give the particulars, including the locations, the names of the firms, corporate law departments or agencies and your relationship thereto, and the relevant dates. Indicate also any period in the past during which you practiced alone.

I practiced in the Fulton County District Attorney's Office, Atlanta Judicial Circuit, 136 Pryor St. S.W. Atlanta, Georgia, from 2010 - 2017. I was the Deputy DA in charge of the Appeals Division of that office.

I practiced in the Georgia Attorney General's Office (Department of Law), 40 Capitol Square, S.W., Atlanta, Georgia, from 1996 - 2002. I started as a Staff Attorney in the Criminal Division and advanced to Assistant Attorney General while with the Criminal Division. In June 1998, I was chosen as one of three attorneys comprising the newly-formed Capital Litigation Section within the Criminal Justice Division of the office. At the end of 2002, I resigned from that position after the birth of my second child. I was asked to return, and I did so in a part-time capacity, in 2003 as a Senior Assistant Attorney General, remaining until 2006.

While awaiting my bar results in 1982, I was a contract litigation associate with Rogalla Poynor, 1 Concourse Parkway, NE, Atlanta, GA 30328.

11. Do you presently hold judicial office, or have you in the past held any such office?

Yes.

If so, give the details, including the court or courts involved, whether elected or appointed, and the period of service. Also state whether you have been an unsuccessful candidate for election to judicial office, stating the court and date involved.

I was appointed to a judgeship on the Superior Court of Fulton County, Atlanta Judicial Circuit, on February 7, 2017 and was sworn in on February 27, 2017. I have served in that capacity since that time. I was subsequently elected to that same seat without opposition on May 22, 2018.

I have never been an unsuccessful candidate for judicial office.

12. What is the general character of your practice? Indicate the character of your typical clients and mention any legal specialties which you possess. If the nature of your practice has been substantially different at any time in the past, give the details, including the character of such and the periods involved.

a) As a sitting superior court judge in Fulton County, I preside over complex felony criminal cases; civil cases, including contract and business disputes, malpractice, personal injury, premises liability, and title to land; equity matters, including TRO's; adoptions; divorce, custody and other family law matters; and appeals from magistrate court and administrative agencies. I preside over jury trials and bench trials, dispositive and evidentiary motions, and all other proceedings. I make evidentiary and legal rulings based on oral argument, written submissions, and independent research, ruling from the bench as well as issuing orders and judgments. I also preside over Fulton's Parental Accountability Court. I am certified as a registered mediator/neutral, and I have received intensive training at the National Judicial College.

b) My prior practice as a Fulton County Deputy District Attorney was focused primarily in the area of criminal appellate litigation, with a secondary focus in criminal pretrial, motions, and post-trial practice. My client was the State of Georgia, including its citizens generally and crime victims and their families more specifically. In this position, I utilized my skills as a practiced and proficient legal researcher, writer, analyst, and advocate and as an excellent editor of legal writing, having filed hundreds, if not thousands, of my own briefs, pleadings, motions, and responses and actively supervised hundreds more. I also argued pretrial, trial stage, and post-trial motions.

I led a 10 lawyer, 2 staff member team which comprised the Appeals Division of the office, and I and also served on the elected District Attorney's Executive Leadership Team. I oversaw approximately 100 appeals each year to the Georgia Supreme Court and Court of Appeals. I drafted legislation, led task forces within the office, and advised the DA on legal and policy matters, including high profile and sensitive prosecution decisions. I regularly provided time-critical legal advice to prosecutors and judges, developed and presented in-house training on legal issues and new legal developments, and presented legal argument in the trial and appellate courts.

As head of the Appeals Division, I also managed record restrictions, open records requests, bond validations, and civil commitment reviews. In addition, I acted as liaison to the County Attorney's Office, the Attorney General's Office, the Prosecuting Attorneys' Council, other law enforcement entities, and outside counsel. I fielded more atypical matters as well, from subpoenas to and lawsuits against our employees, to Rule 22 motions, to requests to film employees for documentaries and review of the accompanying releases.

Under my leadership, the Appeals Division consistently achieved a high success rate in upholding Fulton County's felony convictions against challenge in the trial and appeals courts as well as in winning appeals which we filed on behalf of the State.

c) During my time with the State Attorney General's Office, I acted as lead counsel in complex post-conviction civil habeas corpus cases brought by death-sentenced inmates in state and federal court. This included being sole counsel in 10 superior court multi-day bench trials in such cases, including a related motions practice and deposition practice with both expert and fact witnesses. I also engaged in regular appellate practice before the Georgia Supreme Court and United States Supreme Court as both the appealing and responding party in capital cases, including authoring over 20 death penalty merits briefs and handling numerous oral arguments before the Georgia Supreme Court. In this capacity, I also trained junior attorneys and advised district attorneys throughout Georgia on constitutional and criminal law matters. I presented a formal training to North Carolina prosecutors regarding mental retardation issues in capital cases and provided informal training on capital law issues to in-state prosecutors.

Before being tapped as one of the three attorneys tasked with developing that office's first Capital Litigation Section, devoted solely to litigating death penalty cases post-trial, I acted as sole counsel for the State in over 200 habeas corpus cases filed in state and federal courts throughout Georgia and challenging any Georgia felony. This work included preparing all legal filings and representing the State in evidentiary hearings before judges throughout Georgia. I also handled direct appeals in murder cases and authored and filed over 60 briefs and presented 3 oral arguments in the Georgia Supreme Court. I regularly filed briefs in the United States Supreme Court as well, typically in opposition to certiorari. I also provided legal advice to prosecutors throughout the state on questions of criminal or constitutional law.

My clients during this time were the State of Georgia (including the public generally and crime victims and their families more particularly) and the wardens of the various prisons throughout Georgia.

d) For a few months prior to securing my bar results, I worked as a contract litigation associate in a regional real estate law firm. I handled typical entry level litigation associate tasks, such as drafting and responding to discovery, drafting pleadings, motions, and responses, and conducting legal research.

13. (a) Have you regularly appeared in court during the past five years? **Yes.**

(b) What percentage of your appearances in the last five years was in:

(1) Federal Courts (list each court): **0%**

(2) State Courts (list all courts): **100%**

Superior Courts of Fulton and Cobb County, Court of Appeals of Georgia, Supreme Court of Georgia

(3) other courts (please list all states other than Georgia in which you have appeared): **n/a**

(c) What percentage of your court appearances in the last five years was:

(1) civil? **70% as a judge; 1% as a lawyer.**

(2) criminal? **30% as a judge; 99% as a lawyer.**

(d) What percentage of your trials in the last five years was:

(1) jury? **As a judge since February 27, 2017, I have presided over 12 jury trials, 6 civil and 6 criminal. 11 of these were in my first 16 months as a judge, during which time I carried a mixed docket of approximately half civil and half criminal cases.**

At the Fulton DA's Office prior to my time on the bench, I was an appellate as opposed to a trial attorney, but I second chaired portions of several jury trials; I argued motions and legal issues during the course of the prosecution of numerous felony cases; and I regularly advised trial prosecutors on criminal law, evidentiary issues, constitutional law, appeals, and trial matters.

(2) non-jury? **As a judge, I have presided over 85 civil bench trials. I am currently serving a 24 month term on our bench's family division, and the majority of the trials in our family cases are bench trials.**

(e) State the approximate number of cases you have tried to conclusion in courts of record during <u>each</u> of the past five years, indicating whether you were sole, associate, or chief counsel.

As a judge thus far in 2019, I have presided over 60 trials which were tried to conclusion.

As a judge in 2018, I presided over 28 trials which were tried to conclusion, 1 which resulted in a hung jury, and 1 which ended in a plea.

As a judge in 2017, I presided over 6 trials which were tried to conclusion and 1 which resulted in a hung jury.

As a lawyer in 2016-2017, I was an appellate attorney as opposed to a trial attorney, but I second chaired portions of several jury trials; I argued motions and legal issues during the course of the prosecution of numerous felony cases; and I regularly advised trial prosecutors on criminal law, evidentiary issues, constitutional law, appeals, and trial matters in ongoing cases before the Superior Court of Fulton County.

(f) Describe five of the more significant litigated matters which you have handled.

The following are matters within the last five years while I have been a judge:

1) State v. Keith Zackery, Case No. 16SC146790: I was the first judge to rule, post-Ricks v. State, 301 Ga. 171 (2017), on whether Fulton County's 2015 master jury list violates Georgia's Jury Composition Rule, state statute, and/or the Constitution and, if so, whether that warrants the quashing of a criminal indictment. My ruling was not appealed.

2) Patel v. Georgia Lottery Corp., Case No. 2017CV293427: In a case of first impression for the Georgia appellate courts, I granted a certificate of immediate review from my order ruling, *inter alia*, that a Georgia lottery ticket is a contract (which impacts GLC's assertion of sovereign immunity). The Court of Appeals thereafter granted GLC's application for interlocutory appeal and affirmed my denial of GLC's motion to dismiss on sovereign immunity grounds and my determination that a Georgia lottery ticket is a valid contract under Georgia law. Georgia Lottery Corp. v. Patel, 349 Ga. App. 529 (2019) (physical precedent only).

3) Amazing Amusements Group v. Robert Wilson and Georgia Lottery Corp., Case No. 2016CV283948: This case, currently on discretionary appeal (A19A0991), concerns the interplay between agency rules, the Administrative Procedure Act, and the Georgia Lottery for Education Act, and whether appeal is permitted to the superior court despite failure to exhaust administrative appeal remedies.

4) City of Atlanta v. McCord, et al, Case No. 2016CV282031: This case concerned matters of statutory construction and the interplay between Title 22 condemnations and the landowner's bill of rights. I declined to set aside a condemnation which would have halted a basin-wide green infrastructure storm-water project to ameliorate flooding in the Peoplestown area of Atlanta based on the landowner's argument that the project was a hybrid "park" project. The parties ultimately settled.

5) I also handled three murder trials, State v. Franklin, Case No. 16sc140500, State v. Martinez and Whitehead, Case No. 17sc150106, and State v. Edwards, Case No. 17sc152869, which are by their nature significant.

The following are matters within the last five years while I was a practicing attorney:

1) State v. Cohen, et al., Case No. 16SC144430: Pretrial matters in the "Waffle House" prosecution of two lawyers and their client, the former housekeeper to the CEO of Waffle House, for unlawful surveillance and conspiracy to commit extortion. I was lead counsel for the substantial pretrial litigation which occurred in the case. The trial court dismissed the prosecution, and, though I did not handle the appeal of that dismissal because I had assumed the bench by that time, the Georgia Supreme Court's opinion reinstating the surveillance charges, (State v. Cohen,302 Ga. 616, 2017), largely adopted the legal positions which I had advanced in the trial court.

2) State v. Hayes, 301 Ga. 342 (2017): This cert grant, reversing the Court of Appeals, corrected the jurisprudence regarding trial court participation and responsibilities in the guilty plea realm to establish that informing a defendant of potential recidivist sentencing consequences is not improper interference in a guilty plea. (I was involved in the Court of Appeals litigation and cert petition, but the briefs following the cert grant were filed after I had assumed the bench.)

3) Carter v. State, 298 Ga. 867 (2016): This cert grant established that voluntary manslaughter as a lesser included offense of malice murder is not the same offense as voluntary manslaughter as a lesser included offense of felony murder.

4) State v. Brown, 333 Ga. App. 643 (2015): This case was the first to establish what procedural requirements will satisfy the prerequisites of then-new O.C.G.A. § 5-7-1(a)(5) to permit the State to effectuate its appeal rights under that statute.

5) The companion State's appeal in this same case clarified limits on what law enforcement is required to preserve for production under Georgia's Criminal Procedure Reciprocal Discovery Act, O.C.G.A. § 17-16-1 et seq., and reversed the trial court for excluding State's evidence as a sanction where there was no discovery violation.

This case also helped refine the proper application of Georgia's new evidence code, particularly O.C.G.A. § 24-4-404(b) and O.C.G.A. § 24-4-403, concerning the admission of other acts evidence by the State. My motion for reconsideration of the Court of Appeals' earlier-issued

unpublished opinion resulted in a significant change to the Court's opinion on this issue. The unpublished opinion had upheld the trial court's exclusion of the State's 404(b) evidence; however, on reconsideration, the published opinion vacated that ruling and remanded for reconsideration under the proper standard.

(Please see item 14 as well for significant litigated matters from my time at the Georgia Attorney General's office prior to the past five years.)

(g) State with reasonable detail your experience in adversary proceedings before administrative boards or commissions during the past fiveyears.

As a superior court judge, I have presided over several appeals from administrative hearings. As a Deputy District Attorney, I directed outside counsel and was heavily involved in the handling of two separate serious and contentious disciplinary matters before the State Bar against Assistant District Attorneys. Each matter was ultimately resolved favorably to the ADA.

14. (a) Summarize your experience in court prior to the last five years. If during any prior period you appeared in court with greater frequency than during the last five years, indicate the periods during which this was so and give for such prior periods the same data which was requested in item 13 above.

(Please see item 12 above which includes a general summary of my practice prior to the past five years.)

What percentage of your appearances prior to the last five years was in:

(1) Federal Courts (list each court): 15%. Federal District Courts for the Northern, Middle, and Southern Districts of Georgia, Eleventh Circuit Court of Appeals, Supreme Court of the United States

(2) State Courts (list all courts): 85%. Superior Courts of Baldwin, Bibb, Butts, Calhoun, Chatham, Chattooga, Dawson, DeKalb, Dodge, Dooly, Dougherty, Floyd, Fulton, Gwinnett, Habersham, Hall, Hancock, Houston, Lowndes, Mitchell, Monroe, Muscogee, Richmond, Sumter, Talbot, Tattnall, Telfair, Toombs, Ware, and Wilcox Counties; Supreme Court of Georgia

(3) other courts (please list all states other than Georgia in which you have appeared): **n/a**

What percentage of your court appearances prior to the last five years was:

(1) civil? 30% (habeas corpus)

(2) criminal? 70%

What percentage of your trials prior to the last five years was:

unpublished opinion, resulted in a significant change to the Court's opinion on this issue. The unpublished opinion had upheld the trial court's exclusion of the State's 404(b) evidence; however, on reconsideration, the published opinion vacated that ruling and remanded for reconsideration under the proper standard.

(Please see Item 14 as well for significant litigated matters from my time at the Georgia Attorney General's office prior to the past five years.)

(j) State with reasonable detail your experience in adversary proceedings before administrative boards or commissions during the past five years.

As a superior court judge, I have presided over several appeals from administrative hearings. As a Deputy District Attorney, I directed outside counsel and was heavily involved in the handling of two separate serious and contentious disciplinary matters before the State Bar against Assistant District Attorneys. Each matter was ultimately resolved favorably to the ADA.

14. (a) Summarize your experience in court prior to the last five years. If during any prior period you appeared in court with greater frequency than during the last five years, indicate the periods during which this was so and give for such prior periods the same data which was requested in Item 13 above.

(Please see Item 13 above which includes a general summary of my practice prior to the past five years.)

What percentage of your appearances prior to the last five years was in:

(1) Federal Courts (list each court): 15% Federal District Courts for the Northern, Middle, and Southern Districts of Georgia, Eleventh Circuit Court of Appeals, Supreme Court of the United States

(2) State Courts (list all courts): 85% Superior Courts of Baldwin, Bibb, Butts, Calhoun, Chatham, Chattooga, Dawson, DeKalb, Dodge, Dooly, Dougherty, Floyd, Fulton, Gwinnett, Habersham, Hall, Hancock, Houston, Lowndes, Mitchell, Monroe, Muscogee, Richmond, Sumter, Talbot, Tattnall, Telfair, Toombs, Ware, and Wilcox Counties; Supreme Court of Georgia

(3) other courts (please list all states other than Georgia in which you have appeared): n/a

What percentage of your court appearances prior to the last five years was:

(1) civil? 30% (habeas corpus)

(2) criminal? 70%

What percentage of your trials prior to the last five years was:

(1) jury? 0%

(2) non-jury? 100%

State the approximate number of cases you have tried to conclusion in courts of record prior to the past five years, indicating whether you were sole, associate, or chief counsel.

215 trials. I was sole counsel in virtually all of them.

Describe five of the more significant litigated matters which you have handled.

1) Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed. 2d 827 (1996): This case, handled under an expedited briefing schedule in the United States Supreme Court, was the first to apply the newly-passed 28 U.S.C.S. § 2244(b) of the substantially revamped federal habeas corpus scheme in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.S. § 2241 et seq. The United States Supreme Court held that the Act precluded the Court from reviewing, by appeal or certiorari, decisions of federal courts of appeals exercising the "gatekeeping" function for second habeas petitions but did not deprive the Court of jurisdiction to entertain an original habeas corpus petition. The Court upheld the constitutionality of the Act against claims that it violated the Suspension Clause of the United States Constitution and denied the petition for an original writ of habeas corpus, holding that the petitioner had not satisfied even the requirements of § 2244(b), much less shown "exceptional circumstances" to justify its grant. I co-authored the merits brief with my supervisor and was the primary author of certain sections of the brief.

2) Gibson v. Turpin, 270 Ga. 855, 513 S.E.2d 186 (1999): This case, which I litigated in the superior court contemporaneously with much of the Felker litigation discussed above, established that there is no constitutional entitlement by indigent death-row defendants to court-appointed counsel to pursue post-conviction civil collateral attacks on their otherwise final convictions and sentences in habeas proceedings; lack of appointed counsel at this stage does not deny them meaningful access to the courts, and their nature as capital cases does not alter this conclusion.

3) Head v. Hill, 277 Ga. 255, 587 S.E.2d 613 (2003): In this case, I single-handedly litigated the mental retardation bench trial on the State's behalf at the superior court level in this post-conviction habeas corpus case brought by the death-sentenced inmate. The bench trial followed remand by the Georgia Supreme Court in Turpin v. Hill, 269 Ga. 302, 498 S.E.2d 52(1998), for such a trial, with the burden of proof on the defendant beyond a reasonable doubt. At the conclusion of the bench

(1) [illegible]

(2) [illegible]

State the approximate number of cases you have cited in conclusion in court of record prior to the past five years, indicating whether you were sole, associate, or chief counsel.

[illegible] I was sole counsel in virtually all of them.

Describe five of the more significant litigated matters which you have handled.

1) [illegible] v. [illegible], 615 U.S. 667, ; 19 S.Ct. 2333, 153 L.Ed. 2d 827 (2002): This case, handled under an expedited briefing schedule in the United States Supreme Court, was the first to apply the newly-passed 28 U.S.C.S. § 2244(c) of the substantially revamped federal habeas corpus sections in the Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C.S. § 2241 et seq. The United States Supreme Court held that the Act precluded the Court from reviewing, by appeal or certiorari, decisions of federal courts of appeals exercising the "gatekeeping" function for second habeas petitions but did not deprive the Court of jurisdiction to entertain an original habeas corpus petition. The Court rejected the constitutionality of the Act, again claiming that it violated the Suspension Clause of the United States Constitution and denied the petition for an original writ of habeas corpus, holding that the petitioner had not satisfied even the requirements of § 2244(b). much less shown "exceptional circumstances" to justify its grant. I co-authored the merits brief with my supervisor and was the primary author of certain sections of the brief.

2) Gibson v. Turpin, 270 Ga. 555, 513 S.E.2d 158 (1999): This case, which I litigated in the supreme court contemporaneously with most of the Felker litigation discussed above, established that there is no constitutional entitlement by indigent death-row defendants to counsel appointed counsel to pursue post-conviction civil collateral attacks on their criminal trial convictions and sentences in habeas proceedings; lack of appointed counsel at this stage does not deny them meaningful access to the courts, and their desire to exhaust cases does not alter this conclusion.

3) Head v. Hill, 277 Ga. 776, 597 S.E.2d 613 (2003): In this case, I single-handedly litigated the normal retardation bench trial on the State's behalf at the superior court level in this post-conviction habeas corpus case brought by the death-sentenced inmate. The bench trial followed remand by the Georgia Supreme Court in Turpin v. Hill, 269 Ga. 702, 496 S.E.2d 82 (1998), for such a trial, with the burden of proof on the defendant beyond a reasonable doubt. At the conclusion of the bench

trial, the trial court ruled that the petitioner did not carry the burden to establish his mental retardation claim.

4) Sears v. State, 268 Ga. 759, 493 S.E.2d 180 (1997): This case developed parameters for litigants to contact jurors post-trial to investigate a claim of misconduct.

5) Burgess v. State, 264 Ga. 777, 450 S.E.2d 680 (1994): This case upheld the constitutionality of O.C.G.A. § 17-7-131 (c)(3) and (j) that death penalty defendants tried after the effective date of those 1988 amendments carry the burden of proving their mental retardation beyond a reasonable doubt at the guilt phase of trial. This case also established that a death penalty defendant is not entitled to a sentencing phase jury instruction that a finding of mental retardation by a lesser standard of proof would bar imposition of a death sentence.

(b) Summarize your experience in adversary proceedings before administrative boards or commissions prior to the last five years.

My earlier positions did not involve a practice before administrative boards or commissions.

15. Describe your appellate practice during the past five years in detail and give citations if your cases were reported.

As a superior court judge, I was invited to sit by designation on the Georgia Supreme Court in Holt v. Ebinger, 303 Ga. 804, 814 S.E.2d 298 (2018). I participated in the oral argument, preliminary discussion, and vote; banc discussion and vote; and motion for reconsideration vote on this case.

Also as a superior court judge, I sit as an appellate court for appeals and cert petitions involving magistrate court and administrative agency decisions. In addition, I make determinations whether to grant certificates of immediate review of my decisions to Georgia's Court of Appeals or Supreme Court.

As Deputy District Attorney for the Appeals Division of the Fulton County District Attorney's Office I reviewed, edited, and refined approximately 100 appellate briefs each year for filing in the Georgia Supreme Court and Georgia Court of Appeals. Sometimes, my edits were minor; other times, they were substantial. I also authored and filed my own briefs, typically in cases in which I determined that the State should appeal a trial court's ruling or should file a petition for certiorari, though in other circumstances as well.

I also reviewed many and varied adverse rulings by trial courts which occurred in the course of the office's felony criminal prosecutions, including evidence suppressions and exclusions, immunity grants, dismissals of cases, irregularities in guilty pleas, and grants of motions for new trial, and determined whether the State should appeal. I additionally decided whether a certificate of immediate review should be sought and whether a petition for

certiorari review should be filed.

I am on the briefs for over 350 reported decisions over the course of my career, including a United States Supreme Court merits brief. However, I have included only citations for cases from my last five years as a practitioner and in which I was the sole author or a primary author, heavily involved in drafting, as opposed to simply the supervisory editor.

State v. Hayes, 301 Ga. 342, 801 S.E.2d 50 (2017) (petition for cert)
Dimauro v. State, 341 Ga. App. 710, 801 S.E.2d 568 (2017)
Johnson v. State, 341 Ga. App. 384, 801 S.E.2d 82 (2017)
State v. Clark, 301 Ga. 7, 799 S.E.2d 192, 2017
Nall v. State, 300 Ga. 659, 797 S.E.2d 916 (2017)
Issa v. State, 340 Ga. App. 327, 796 S.E.2d 725 (2017)
State v. T. M. H., 339 Ga. App. 628, 794 S.E.2d 201 (2016) (rev'd on cert)
Sheard v. State, 300 Ga. 117, 793 S.E.2d 386 (2016)
Carter v. State, 298 Ga. 867, 785 S.E.2d 274 (2016)
Amos v. State, 298 Ga. 804, 783 S.E.2d 900 (2016)
State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138 (2016)
State v. Kelley, 298 Ga. 527, 783 S.E.2d 124 (2016) (post-argument brief)
Otis v. State, 298 Ga. 544, 782 S.E.2d 654 (2016) (post-argument brief)
Lockhart v. State, 298 Ga. 384, 782 S.E.2d 245 (2016)
Smith v. State, 298 Ga. 406, 782 S.E.2d 269 (2016)
Tye v. State, 298 Ga. 474, 782 S.E.2d 10 (2016)
Shockley v. State, 297 Ga. 661, 777 S.E.2d 245 (2015)
State v. Brown, 333 Ga. App. 643, 777 Ga. App. 27 (2015)
Alexander v. State, 297 Ga. 59, 772 S. E.2d 655 (2015)
State v. Mobley, 296 Ga. 876, 770 S.E.2d 1 (2015)
Leleune v. McLaughlin, 296 Ga. 291, 766 S.E.2d 803 (2014) (amicus curiae brief)
State v. Owens, 296 Ga. 205, 766 S.E.2d 66 (2014)
State v. Jackson, 295 Ga. 825, 764 S.E.2d 395 (2014)
State v. Munoz, 324 Ga. App. 386, 749 S.E.2d 48, (2013)
State v. Jackson, 294 Ga. 9, 748 S.E.2d 902 (2013)
State v. James, 292 Ga. 440, 738 S.E.2d 601 (2013)

16. Please submit a representative sample of your writing (e.g. brief, order, opinion, opinion letter).

Please see attached. (I have provided one sample as a judge and one as a practitioner.)

17. Describe your practice other than trial practice during the past five years in some detail as it may relate to office and business practice, as well as any other phases of your practice.

I was elected by my brethren to serve on our superior court's Executive Committee, which makes policy and governance recommendations to our

certiorari review should be filed.

I am on the briefs for over 250 reported decisions over the course of my career, including a United States Supreme Court merits brief. However, I have included only citations for cases from my last five years as a practitioner and in which I was the sole author or a primary author, heavily involved in drafting, as opposed to simply the supervisory editor.

State v. Hayes, 301 Ga. 342, 801 S.E.2d 50 (2017) (petition for cert)
Dinguro v. State, 341 Ga. App. 710, 801 S.E.2d 568 (2017)
Johnson v. State, 341 Ga. App. 384, 801 S.E.2d 82 (2017)
State v. Clark, 301 Ga. 7, 799 S.E.2d 192, 2017
Nail v. State, 300 Ga. 669, 797 S.E.2d 916 (2017)
Iesa v. State, 340 Ga. App. 237, 796 S.E.2d 729 (2017)
State v. T. M. H., 339 Ga. App. 628, 794 S.E.2d 201 (2016) (rev'd on cert)
Binard v. State, 300 Ga. 117, 793 S.E.2d 380 (2016)
Carter v. State, 298 Ga. 867, 785 S.E.2d 274 (2016)
Amos v. State, 298 Ga. 694, 783 S.E.2d 900 (2016)
State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138 (2016)
State v. Kelley, 298 Ga. 527, 783 S.E.2d 124 (2016) (post-argument brief)
Otis v. State, 298 Ga. 544, 782 S.E.2d 654 (2016) (post-argument brief)
Lockhart v. State, 298 Ga. 384, 782 S.E.2d 245 (2016)
Smith v. State, 298 Ga. 406, 782 S.E.2d 269 (2016)
Eye v. State, 298 Ga. 474, 782 S.E.2d 10 (2016)
Stuckey v. State, 297 Ga. 861, 777 S.E.2d 242 (2015)
State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015)
Alexander v. State, 297 Ga. 59, 772 S.E.2d 655 (2015)
State v. Mobley, 296 Ga. 876, 770 S.E.2d 1 (2015)
Lejeune v. McLaughlin, 296 Ga. 291, 766 S.E.2d 803 (2014) (amicus curiae brief)
State v. Owens, 296 Ga. 205, 766 S.E.2d 66 (2014)
State v. Jackson, 295 Ga. 825, 764 S.E.2d 393 (2014)
State v. Munoz, 324 Ga. App. 385, 749 S.E.2d 48 (2013)
State v. Jackson, 294 Ga. 9, 751 S.E.2d 302 (2013)
State v. James, 292 Ga. 440, 738 S.E.2d 601 (2013)

15. Please submit a representative sample of your writing (e.g. brief, order, opinion, opinion letter).

Please see attached. (I have provided one sample as a judge and one as a practitioner.)

17. Describe your practice other than trial practice during the past five years in some detail as it may relate to office and business practice, as well as any other phases of your practice.

I was elected by my brethren to serve on our superior courts Executive Committee, which makes policy and governance recommendations to our

bench, and I serve on our Case Management Committee, which monitors and recommends improvements and policy changes surrounding case management across our court divisions. I was appointed by our chief judge to serve on the Atlanta Circuit's Joint Governance Committee, comprised of representatives from the Superior, State, Magistrate, Probate, and Juvenile court benches, and I serve on the Superior Court's Community Outreach Committee as well. Further, as a bench, we oversee our court administrator's office as well as our juvenile court.

I serve on the Standing Committees on Legislation and Pattern Jury Charges for the Council of Superior Court Judges. I am an appointed Commissioner and Executive Committee member with the Georgia Commission on Family Violence. I am registered with our Court's ADR program to voluntarily preside over judicially-hosted settlement conferences in cases docketed in other divisions of the superior court. I manage a staff of five chambers professionals and a judicial officer, with hiring and firing authority over all of my employees, and I control a $375,000 annual chambers budget. I have been an invited presenter at various CLE programs, Bar programs, and training events, and I have been a guest lecturer at Emory Law School. I have served as a judge for our Georgia High School Mock Trial program, privately-sponsored high school mock trial programs, undergraduate mock trial programs, and the Prosecuting Attorneys Council's BASIC mock trial/training program.

Previously, as the Deputy District Attorney supervising the Appeals Division of the Fulton County District Attorney's Office, I had direct supervisory responsibilities over 10 attorneys and 2 staff members. This entailed all case, workload, and special project assignments; involvement in personnel matters, including any disciplinary matters, hiring, promotions, transfers, demotions, and firing; goal-setting, tracking, and accountability for the unit; leading regular team meetings; and day-to-day management.

I acted as a close advisor to the elected District Attorney on numerous matters, including high profile and sensitive prosecution decisions; conflict cases; office personnel matters; statements to the media and responses to media inquiries; special projects; hiring and management of outside counsel; and interactions with criminal justice, government, and community partners.

I also interfaced with and advised Deputies of other divisions, investigators, and many of the other 100+ Assistant District Attorneys in the office.

I drafted policies and legislation; provided training materials and lectures; developed and revised written materials and forms; and led or participated on various task forces and committees within the office, including the finance committee, budget committee, case integrity/DNA evidence task force, competency restoration committee, and electronic evidence committee.

In addition, as a member of the elected District Attorney's Executive Leadership Team, we met weekly to discuss office matters and management, determine and revise policies, and generate and implement new projects and ideas for effective prosecution, accountability, and partnership with criminal justice, government, and community partners to keep our community safer.

18. Have you ever been engaged in any occupation, business or profession other than the practice of law? If so, please give the details including dates. **No.**

19. Are you presently acting in a fiduciary capacity? If so, state details. **No.**

20. Please describe your opinion of the role a law clerk or a staff attorney should serve with respect to assisting a judge.

Law clerks and staff attorneys are critical to the efficient operation of a judge's chambers and the overall court, whether at the trial or appellate level. At the appellate level, these attorneys should screen and prepare cases to highlight novel legal issues, issues which present conflicting lines of caselaw, cases asking that the court overrule prior precedent, and other non-routine matters which may warrant special attention by the judge. Law clerks and staff attorneys should also process cases in a way which keeps things moving in a timely manner, providing clear and culled summaries of relevant law and facts (with cites), and be skilled at preparing draft opinions in their judge's preferred writing style. These members of chambers can also help a judge stay abreast of trends in the law and the pulse of the court on various legal issues. They should be able to listen critically, express themselves well, and communicate effectively with fellow clerks and their judge. It may also be effective for law clerks and staff attorneys to have prior experience working for the court and to have areas of relative legal expertise which complement those of their judge.

21. Please describe how a judge of the court for which you are applying might improve the efficiency and effectiveness of the legal system in administering justice.

An agile and prepared Court of Appeals judge should stay abreast of opinions from the Georgia Supreme Court and the United States Supreme Court in addition to the opinions of the various panels of her own court, should regularly review cert grants for percolating legal issues, and should be familiar with newly-enacted legislation.

Given the Court of Appeals' fairly heavy caseload, the judge and her staff should work to focus time, effort, and resources where they are most merited. Cases which are merely routine application of settled law can be decided in unpublished opinions; however, unpublished opinions should not be used to lessen the potential for certiorari review.

The judge should be knowledgeable about legal trends, developments, and

best practices and be willing to serve actively on various law-related task forces and commissions to improve our court system for litigants, practitioners, the business community, and the public.

The judge should go into the legal community to demystify appellate practice, since a better-trained attorney who knows the ropes of appellate procedure and practice will ultimately present a better-honed and more user-friendly (and useful) brief to the appellate courts. The judge should also be an engaged member of the community at large and should embrace opportunities to make our court system understandable and approachable, including by continuing to hold oral argument at various statewide locations.

Finally, a Georgia Court of Appeals judge should be cautiously open to careful experimentation within the Court of Appeals in terms of internal operating procedures and rules.

22. Have you ever held public office, other than judicial office, or have you ever been a candidate for such an office? If so, give the details, including the offices involved, whether elected or appointed, and the length of your service. **n/a**

23. Have you ever been sued by a client? If so, please give particulars. **n/a**

24. Have you ever been a party or otherwise involved in any other legal proceedings? If so, give the particulars. Do not list proceedings in which you were merely a guardian ad litem or stakeholder. Include all legal proceedings in which you were a party in interest, a material witness, were named as a co-conspirator or a co-respondent, and any grand jury investigation in which you figured as a subject, or in which you appeared as a witness.

While in the Fulton County District Attorney's Office, I testified as a legal expert before the Fulton County grand jury on certain legal issues relevant to the charges set forth in the indictments in several cases involving the prosecution of police officers for crimes. These cases include State v. Burns, Superior Court of Fulton County Indictment No. 16SC146204, State v. Eberhart and Weems, No. 15SC136846, and State v. Blaise, No. 15SC136101.

25. Have you published any legal books or articles? If so, please list them, giving the citations and dates.

Atlanta Bar Fall 2017 "Litigator" entitled "Practice Tips and Pointers: Can We Talk?"

26. List any honors, prizes, awards, or other forms or recognition which you have received.

- **Leadership Award, 2018, awarded by the Georgia Association of Women Lawyers**
- **Chair, Fulton County Law Day, 2018**

best practices and be willing to serve actively on various law-related task forces and commissions to improve our court system for litigants, practitioners, the business community, and the public.

The judge should go into the legal community to demystify appellate practice, since a better-trained attorney who knows the ropes of appellate procedure and practice will ultimately present a better-honed and more user-friendly (and useful) brief to the appellate courts. The judge should also be an engaged member of the community at large and should embrace opportunities to make our court system understandable and approachable, including by continuing to hold oral argument at various statewide locations.

Finally, a Georgia Court of Appeals judge should be cautiously open to careful experimentation within the Court of Appeals in terms of internal operating procedures and rules.

22. Have you ever held public office, other than judicial office, or have you ever been a candidate for such an office? If so, give the details, including the offices involved, whether elected or appointed, and the length of your service. n/a

23. Have you ever been sued by a client? If so, please give particulars. n/a

24. Have you ever been a party or otherwise involved in any other legal proceedings? If so, give the particulars. Do not list proceedings in which you were merely a guardian ad litem or stakeholder. Include all legal proceedings in which you were a party in interest, a material witness, were named as a co-conspirator or a co-respondent, and any grand jury investigation in which you figured as a subject, or in which you appeared as a witness.

While in the Fulton County District Attorney's Office, I testified as a legal expert before the Fulton County grand jury on certain legal issues relevant to the charges set forth in the indictments in several cases involving the prosecution of police officers for crimes. These cases include State v. Burns, Superior Court of Fulton County Indictment No. 16SC146204, State v. Shelhart and Weems, No. 16SC138646, and State v. Eichle, No. 15SC136161.

25. Have you published any legal books or articles? If so, please list them, giving the citations and dates.

Atlanta Bar Fall 2017 "Litigator" entitled "Practice Tips and Pointers: Can We Talk?"

26. List any honors, prizes, awards, or other forms of recognition which you have received.

- Leadership Award, 2018, awarded by the Georgia Association of Women Lawyers
- Chair, Fulton County Law Day, 2018

- Outstanding contributor to the GAWL Leadership Committee, 2017-2018
- Employee of the Year, 2016, awarded by the Fulton County District Attorney
- Law and Justice Award, Most Powerful and Influential Female Attorneys, 2016, selected by Women Looking Ahead News Magazine
- Georgia Women's Policy Institute Fellow, 2016-2017, selected by the YWCA of Greater Atlanta
- Outstanding contributor to the GAWL Public Affairs Committee, 2015-2016;
- Top Manager of the Year, 2015, awarded by the Fulton County District Attorney
- GAWL Leadership Academy, 2014, selected by the Georgia Association of Women Lawyers' Leadership Committee
- Top Manager of the Year, 2013, awarded by the Fulton County District Attorney
- Appellate Lawyer of the Year, 2010, awarded by the Fulton County District Attorney
- Appellate Advocacy Award, 2000, awarded by the Association of Government Attorneys in Capital Litigation for Excellence in the Litigation of Capital Cases

27. List all bar associations and professional societies of which you are a member and give the titles and dates of any offices which you have held in such groups. List also chairmanships of any committees in bar associations and professional societies, and memberships on any committees which you believe to be of particular significance.

- State Bar of Georgia: Board of Governors 2016-18 and 2018-20 terms; Advisory Committee on Legislation; Disciplinary Rules and Procedure Committee; JQC Nominating Committee; Bench and Bar Committee; Criminal Law Section; Appellate Law Section; Family Law Section
- Federalist Society: Board of Advisors
- Bleckley Inn of Court: Master
- Weitner Inn of Court: Master
- Judicial Council of Georgia: Ad Hoc Committee on Criminal Justice Reform
- Council of Superior Court Judges: Standing Committee on Legislation; Standing Committee on Pattern Jury Charges
- Atlanta Bar Association: Judicial Section Vice-chair; Litigation Section; Family Law Section; Public Interest Law Section; Criminal Law Section; Women in Practice Section
- Lawyers Club of Atlanta: Executive Committee; Nominating Committee; Membership Committee
- Georgia Association of Women Lawyers: Leadership Committee; Judicial Applicant Review Committee; Public Affairs Committee
- Old War Horse Lawyers Club: Board of Directors
- National Association of Women Judges
- American Bar Association
- Gate City Bar Association
- North Fulton Bar Association
- St. Thomas More Society

28. Have you read and carefully studied the Code of Judicial Conduct? **Yes.**

29. Will you adhere to the letter and the spirit of such Code should you be appointed as judge? **Yes.**

30. You are requested to execute and transmit to the Chairman of the Commission two copies of the form of Authorization for Access to Information Concerning Disciplinary Matters included with this questionnaire.

31. If you are now an officer or director of any business organization or otherwise engaged in the management of any business enterprise, please give details, including the name of the enterprise, the nature of the business, the title of your position, the nature of your duties, and the term of your service. If it is not your intention to resign such positions and give up any other participation in the management of any of the foregoing enterprises, please so indicate, giving reasons. List all companies in which you, your spouse or minor children hold stock.

I currently hold stock in Acuity, Amazon, Centurylink, Coca Cola, Fiserv, Fed Ex Corporation, Home Depot, Microsoft, Pfizer, Sprint, and Windstream. (Other stocks are held in mutual funds.)

32. List the non-professional organizations to which you belong and civic and service activities in which you have participated in the past two years.

Junior League of Atlanta
Garden Hills Civic Association
Garden Hills Garden Club
Pink Ribbon Story Foundation Ambassador
Saint Pius X High School Mothers' Group
Cathedral of Christ the King parishioner and volunteer

33. Have you ever been arrested, charged, or held by federal, state or other law-enforcement authorities for violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations for which a fine of $50.00 or less was imposed.

1988, assault arrest, dismissed by arresting agency, the SC Ports Authority. The charge involved my friend having parked in front of a driveway which was chained closed during the time the ports facility was closed for the night. When I later returned to the car and entered it, a Ports Authority security guard opened the car door but blocked me from exiting the car, while claiming concern that the Ports Authority might be sued for damage to the car from the chain, though the chain was not touching the car and there was no damage to the car. As I was not the owner, I wanted to be permitted to leave the car to secure the owner. After unsuccessfully attempting several times to explain this, I cursed at the guard for preventing me from exiting the car, the basis for the charge. As noted, this charge was dismissed by the arresting agency.

34. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group? If so, please give the particulars.

I have never been disciplined or cited for any sort of ethical breach or unprofessional conduct. To my knowledge, I have had one inmate complaint to the JQC and one to the State Bar, both of which were summarily dismissed.

35. The Governor's Ethics Order prohibits the appointment by the Governor of any person to fill a judicial vacancy:

(a) who has made a contribution to, or expenditure on behalf of, the Governor or the Governor's campaign committee at any time after the vacancy occurs; or

(b) who has made a contribution to, or expenditure on behalf of, the Governor or the Governor's campaign committee within the 30 days preceding the vacancy, unless such person requests and is granted a refund of such contributions or reimbursement of such expenditure.

36. Have you made a contribution or expenditure as described in 35(a) above? **No.**

37. (a) Have you made a contribution or expenditure as described in 35(b) above? **No.**

(b) If you answered yes to 37(a), have you been granted a refund or reimbursement? **n/a**

Applicant's Signature

Date: Oct. 18, 2019

IN THE COURT OF APPEALS OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. A15A0456
	)	
JAVARIS BROWN,	)	
MEYETTA KING, and	)	
KEVIN ROUSE,	)	
	)	
Appellees.	)	

STATE'S MOTION FOR RECONSIDERATION

PAUL L. HOWARD, JR.
DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
GEORGIA STATE BAR NO. 371088

PAIGE REESE WHITAKER
DEPUTY DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT
GEORGIA STATE BAR NO. 598190

Please serve:
Paige Reese Whitaker
Fulton County Courthouse, 4th Floor
136 Pryor Street SW
Atlanta, Georgia 30303
(404) 612-4972
paige.whitaker@fultoncountyga.gov

IN THE COURT OF APPEALS OF GEORGIA
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. A15A0456
	)	
JAVARIS BROWN,	)	
MEYETTA KING, and	)	
KEVIN ROUSE,	)	
	)	
Appellees.	)	

STATE'S MOTION FOR RECONSIDERATION

Appellant hereby moves for Reconsideration of Division 3 of this Court's June 12, 2015 opinion which affirmed the trial court's exclusion of the State's O.C.G.A. §§ 24-4-404(b) other acts evidence.

Under this Court's Rules, reconsideration is required because Division 3 of this Court's opinion entirely overlooks the Georgia Supreme Court's June 1, 2015 State v. Jones opinion, 2015 Ga. LEXIS 349, reversing on certiorari review another of this Court's other acts opinions, and disregards the binding authority of the Georgia Supreme Court's other recent jurisprudence on other acts evidence.

Reconsideration is also required because Division 3 of this Court's opinion misconstrues O.C.G.A. §§ 24-4-404(b) as a rule of exclusion.

Finally, reconsideration is required because Division 3 of this Court's opinion disregards both the General Assembly's directive that our new Evidence Code is essentially an adoption of the Federal Rules of Evidence, as interpreted by the United States Supreme Court and the Eleventh Circuit Court of Appeals, and the Georgia Supreme Court's holdings that our courts must follow Eleventh Circuit precedent. The opinion acknowledges its obligation to follow the Eleventh Circuit, but it then fails to abide by that obligation. Instead, this Court offers as support for its incorrect outcome only one of its own opinions in which certiorari review has been applied for; a United States Supreme Court opinion which predated adoption of the Federal Rules of Evidence by decades; opinions – including a dissent – from other circuits that fail to comport with the Eleventh Circuit's approach to other acts evidence; a commentator whose opinion on other acts evidence the Georgia Supreme Court has rejected as too narrow; and a ten year old special concurrence by an Eleventh Circuit judge which itself acknowledged that the approach that judge was discussing (and which this Court cited as support for its outcome in this case) was not in accord with Eleventh Circuit 404(b) jurisprudence.

This Court's Division 3 opinion on O.C.G.A. § 24-4-404(b) other acts evidence is markedly out of step with the Georgia Supreme Court's controlling

jurisprudence on O.C.G.A. §§ 24-4-404(b), and reconsideration should be granted. Further, this opinion also directly conflicts with opinions from other panels of this Court. Given these realities, and the fact that only two of this panel's three judges endorsed the majority opinion and reasoning in Division 3, the Court may want to consider *en banc* the proper reasoning and analysis to be applied to other acts evidence in accord with the controlling authority of the Georgia Supreme Court, and through that Court and the General Assembly, the controlling authority of the Eleventh Circuit.

THIS OPINION OVERLOOKS GEORGIA SUPREME COURT JURISPRUDENCE WHICH REQUIRES A DIFFERENT RESULT

I. Bradshaw v. State, 296 Ga. 650 (2015)

The Georgia Supreme Court recently established the framework and approach to analyzing the admissibility of other acts evidence in Bradshaw v. State, 296 Ga. 650 (2015), and it expounded on that approach in State v. Jones, 2015 Ga. LEXIS 349 (Ga., June 1, 2015). Bradshaw adopted the Eleventh Circuit's three-part test to determine admissibility of evidence of other crimes and acts under Rule 404 (b): (1) the evidence must be relevant to an issue other than defendant's character; (2) the probative value must not be substantially outweighed

by its undue prejudice; (3) the government must offer sufficient proof so that the jury could find that defendant committed the act. Bradshaw, supra, 296 Ga. at 656.

On the first prong, Bradshaw instructs:

> "[a] defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying Rule 404 (b) evidence absent affirmative steps by the defendant to remove intent as an issue."[1] "Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant's state of mind in perpetrating both the extrinsic and charged offenses." Thus, **where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404 (b) test is satisfied.**

Id. at 656-657 (3) (emphasis added) (quoting United States v. Edouard, 485 F3d 1324, 1345 (11th Cir. 2007) (internal citations omitted)).[2] In Bradshaw, the Georgia Supreme Court explained that because the other act crime and the crime at issue there involved the same mental state and the defendant did not take steps to remove intent as an issue, evidence of the other act was relevant to establish his intent under the first prong.

---

[1] Prior to the Georgia Supreme Court's opinion in Bradshaw, another panel of this Court had already adopted this Eleventh Circuit holding in Curry v. State, 330 Ga. App. 610, 614 (2015).

[2] This Court acknowledged the quoted "explanation" from Bradshaw, but did not otherwise follow Bradshaw's roadmap for analyzing other acts admissibility.

This Court cited the quoted "explanation" from Bradshaw, but did not otherwise follow Bradshaw's roadmap for analyzing other acts admissibility. In fact, this Court's opinion does not even acknowledge that because the other acts and the crimes at issue in this case involved the same mental state and the defendants did not take steps to remove intent as an issue, evidence of the other acts was relevant to establish intent under the first prong of Bradshaw's test for the admissibility of other acts evidence.[3] Instead, this Court found, incorrectly, that the State's proffered other acts evidence "authorized the trial court to find that the jury could *only* use the evidence to find that Brown and Rouse had intended to deal drugs before and ...all that it proves is that, because there is some evidence that they dealt drugs in the past, they are likely to have committed the present crime. The only logical link between the two allegedly common mental states is the

[3] Here Appellees were all three charged with trafficking in cocaine and with possession of marijuana with intent to distribute and, additionally, Brown was charged with possession of a schedule I drug with intent to distribute and Rouse was charged with trafficking in heroin. One uncharged extrinsic act involved Brown and Rouse being arrested together for trafficking in cocaine, the same charge as in the instant case, and the second other act involved Brown being arrested for possession of marijuana with intent to distribute, the same charge as in the instant case. The charged offense and the prior uncharged offenses involved the same mental state, and the Appellees did not take steps to remove intent as an issue. Therefore, the other acts were relevant under the first Bradshaw prong.

defendants' alleged propensity towards dealing in drugs." Brown, supra at *34 (emphasis added).

This finding is in direct contravention of the Georgia Supreme Court's controlling authority in Bradshaw and additionally wholly misapprehends the approach adopted from the Eleventh Circuit and promulgated by the Georgia Supreme Court for analyzing the admissibility of other acts evidence.

With regard to the second prong, the Bradshaw Court upheld the lower court's determination in that case that the probative value of evidence of the other act crime was not substantially outweighed by its prejudicial effect. In so doing, the Georgia Supreme Court instructed that the assessment by the trial court "calls for a common sense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic act and the charged offense,[4] as well as temporal remoteness." Id. at 657-658 (quoting Eleventh Circuit cases).

---

[4] "The probative value of the extrinsic offense correlates positively with its likeness to the offense charged." United States v. Cardenas, 895 F.2d 1338, 1343-1344 (11th Cir. Fla. 1990) (quoting Beechum, supra, 582 F.2d at 915). In fact, "[a] similarity between the other act and a charged offense will make the other offense highly probative with regard to a defendant's intent in the charged offense." United States v. Ramirez, 426 F.3d 1344, 1354 (11th Cir. 2005); United States v. Hogan, 986 F.2d 1364, 1367 (11th Cir. 1993).

In endorsing this approach, Bradshaw cited with approval United States v. Merrill, 513 F3d 1293, 1301 (11th Cir. 2008), which held that a trial court's discretion to exclude evidence under the balancing test of "'Rule 403 is an **extraordinary remedy which should be used only sparingly** since it permits the trial court to exclude concededly probative evidence'" and United States v. Terzado-Madruga, 897 F2d 1099, 1119 (11th Cir. 1990), which held that in close cases, **the balance under Rule 403 should be struck in favor of admissibility.** Id. at 658 (emphasis added, internal citations omitted). Accord Williams v. State, 328 Ga. App. 876, 879-880 (2014) (Dillard, J., author) (characterizing Georgia's new approach to admissibility of other acts evidence as "in stark contrast" to its prior approach to probativity/prejudice evaluations, noting that now "'the balance should be struck in favor of admissibility'" (quoting 11th Cir. caselaw), and recognizing Rule 403 as "an extraordinary remedy which the ... court[s] should invoke sparingly" and whose "primary function ... is to exclude evidence of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect" (quoting 11th Cir. caselaw)).[5] See also Powell v. State, 2015

[5] In Williams, this Court held that the abuse-of-discretion standard "does not permit a 'clear error of judgment' or the application of 'the wrong legal standard.'" Id. (quoting Eleventh Circuit caselaw). In that case, because the trial court merely found the probative value of a prior

Ga. App. LEXIS 319, *7-8 (2)(b) (June 8, 2015) (following Bradshaw's instruction that O.C.G.A. § 24-4-403 be used only sparingly to exclude concededly probative intent evidence and Bradshaw's endorsement of the Eleventh Circuit's "common sense assessment" for 403 balancing; holding that similarity of other act and crimes at issue made other act "highly probative of the defendant's intent" (quoting Eleventh Circuit caselaw); and rejecting argument that because the other act was exactly the same crime as charge at issue, other act evidence was only probative of a propensity for doing that exact thing and too prejudicial to admit).

In this case, by contrast, the Court did not engage in Bradshaw's three part test to evaluate the admissibility of other acts evidence. Further, its overall approach evinced a complete rejection of the Georgia Supreme Court's directive, adopted from the Eleventh Circuit, that O.C.G.A. § 24-4-403 (which is the second

---

(continued...)

conviction to be outweighed by prejudicial effect, without requiring the opponent of its admission to show that prejudice *substantially* outweighed any probative value, the Court of Appeals held that the trial court did not analyze the admissibility of the proffered other acts evidence under O.C.G.A. § 24-4-403, thus abusing its discretion. Id. In Brown, the trial court likewise did not conduct a proper 403 (Bradshaw second prong) analysis when it merely found probative value of the other acts evidence to be outweighed by prejudicial effect, without requiring the opponent of its admission to show that prejudice *substantially* outweighed any probative value. Of course, in Brown, the trial court also did not conduct a proper 404(b) (Bradshaw first prong) analysis either.

prong of the Bradshaw test) "should be used only sparingly" or that its "balance should be struck in favor of admissibility." Had the Georgia Supreme Court's directives in Bradshaw been followed, this Court would necessarily have come to the conclusion that the trial court's other acts ruling warranted reversal.

II. State v. Jones, 2015 Ga. LEXIS 349 (Ga., June 1, 2015)

In its June 1, 2015 opinion in State v. Jones, which reversed on certiorari review this Court's other acts opinion in that case, the Georgia Supreme Court reaffirms its Bradshaw approach and expounds on it.

Though this Court noted in Division 3 of its Brown opinion its own, now reversed, Jones opinion in which the Georgia Supreme Court had granted cert, the Court did not cite or in any way acknowledge the Georgia Supreme Court's State v. Jones other acts opinion, which had issued within the two weeks prior to this Court's Brown opinion. State v. Jones, like Bradshaw, requires reconsideration and reversal of the trial court's other acts ruling.

As the Georgia Supreme Court in State v. Jones highlighted in discussing the first prong of the Bradshaw test, "Rule 404 (b) explicitly recognizes the relevance of other acts evidence offered for a permissible purpose and, at the same time, prohibits the admission of such evidence when it is offered *solely* for the

impermissible purpose of showing a defendant's bad character or propensity to commit a crime." State v. Jones, 2015 Ga. LEXIS 349, *6-7 (emphasis in original). The Georgia Supreme Court concluded: "**Rule 404 (b), therefore, is, on its face, an evidentiary rule of inclusion** which contains a non-exhaustive list of purposes other than bad character for which other acts evidence is deemed relevant and may be properly offered into evidence. Id. at *7 (emphasis added) (citing United States v. Jernigan, 341 F3d 1273, 1280 (11th Cir. 2003) (**describing Federal Rule 404 (b) as a rule of inclusion**); 2 Weinstein's Federal Evidence § 404.20 (2014) (Federal "**Rule 404 (b) adopts an inclusionary approach,** generally providing for the admission of all evidence of other acts that is relevant to an issue at trial")).

State v. Jones then explained that because the charged crimes there (as here) were general intent crimes, the State had the burden of proving the defendant's intent beyond a reasonable doubt. "The Court of Appeals holding in this case failed to give any legal significance to the State's burden of proving as an essential element Jones' general intent to do the prohibited acts." State v. Jones, supra, at *7. The same is true here: This Court's holding in Brown also fails to give any

legal significance to the State's burden of proving as an essential element Appellees' general intent to do the prohibited acts.

"Intent, therefore, was a material issue in the State's prosecution and because the same state of mind was required for committing the prior act and the charged crimes, ... evidence of [defendant's] prior conviction was relevant under Rule 404 (b) to show[defendant's]' intent on this occasion." State v. Jones, supra at *10 (citing United States v. Beechum, 582 F2d 898, 913 (5th Cir. 1978) ('[Once] it is determined that the extrinsic offense requires the same intent as the charged offense and that the jury could find that the defendant committed the extrinsic offense, the evidence satisfies the first step under rule 404 (b).")

The Georgia Supreme Court instructed further, "a defendant puts his intent in issue when he pleads not guilty unless he takes affirmative steps to withdraw intent as an element to be proved by the State." Id. at n. 4 (citing caselaw examples). Accord Curry, supra, 330 Ga. App. at 614 (2015) (Dillard, J., author) ("a defendant who enters a not-guilty plea "makes intent a material issue which imposes a substantial burden on the 'government to prove intent, which it may prove by qualifying Rule 404 (b) evidence absent affirmative steps by the

defendant to remove intent as an issue'") (quoting Eleventh Circuit caselaw); Powell v. State, 2015 Ga. App. LEXIS 319, *6 (2)(a) (June 8, 2015) (same).

Here, the charges against all three Appellees included charges of possession with intent to distribute certain drugs, and the other acts involved charges of possession with intent to distribute the same type of drugs. As the Georgia Supreme Court instructed: "The relevancy of evidence of a prior state of mind and the introduction of evidence of repetitive conduct to allow a jury to draw logical inferences about a defendant's knowledge and state of mind from such conduct is well-established." State v. Jones, supra at *12-13 (citing caselaw examples). The Georgia Supreme Court noted the United States Supreme Court's directive that "extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct" id. at *13 (quoting Huddleston v. United States, 485 U. S. 681, 685 (108 SCt 1496, 99 LE2d 771) (1988)), and also cited commentary by legal scholars explaining other acts' relevance to intent under on the doctrine of chances. Id. at n.7. This Court's Brown opinion did not even acknowledge this controlling authority, much less abide by it.

Finally, the Georgia Supreme Court in State v. Jones reaffirmed the approach to evaluating the second Bradshaw prong, which is essentially the Rule 403 analysis. For this prong, the Georgia Supreme Court again instructed that the trial court's exercise of discretion "calls for a common sense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness. Id. at *17-18" (quoting United States v. Perez, 443 F3d 772, 780 (11th Cir. 2006)). The Court also again noted, as it had in Bradshaw, that the "trial court's discretion to exclude evidence under the balancing test of 'Rule 403 is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence' " id. at 18 (quoting United States v. Merrill, 513 F3d 1293, 1301 (11th Cir. 2008), and that "in close cases, balance under Rule 403 should be struck in favor of admissibility." Id. (citing United States v. Terzado-Madruga, 897 F2d 1099, 1119 (11th Cir. 1990)).

Were this controlling authority followed in Brown, the trial court's other acts ruling would have been reversed.

THIS OPINION MISCONSTRUES O.C.G.A. §§ 24-4-404(b)

This Court interpreted O.C.G.A. § 24-4-404(b) as a rule of *exclusion*, when it is actually a rule of *inclusion*. Brown, supra, at *25-26 ("The State's argument glosses over the significant exclusionary impact of the prohibition against propensity evidence that survives in OCGA § 24-4-404 (b)") and ("the intent exception must not be allowed to swallow the general rule against admission of prior bad acts). Rule 404(b) is only exclusionary on the issue of "prov[ing] the character of a person in order to show action in conformity therewith." (O.C.G.A. § 24-4-404(b). For "almost infinite" other purposes, Rule 404(b) is a rule of **inclusion**. See, e.g., United States v. Ellisor, 522 F.3d 1255, 1267 (11th Cir. 2008); United States. v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989).

As the Georgia Supreme Court noted in State v. Jones, **"Rule 404 (b), therefore, is, on its face, an evidentiary rule of inclusion** which contains a non-exhaustive list of purposes other than bad character for which other acts evidence is deemed relevant and may be properly offered into evidence") (citing United States v. Jernigan, 341 F3d 1273, 1280 (11th Cir. 2003) **(describing Federal Rule 404 (b) as a rule of inclusion)**; 2 Weinstein's Federal Evidence § 404.20 (2014) (Federal **"Rule 404 (b) adopts an inclusionary approach**, generally providing for

the admission of all evidence of other acts that is relevant to an issue at trial")). State v. Jones, 2015 Ga. LEXIS 349, *7 (emphasis added).

This same directive is repeated in numerous Eleventh Circuits cases. See, e.g., United States v. Culver, 598 F.3d 740, 748 (11th Cir. 2010) (quoting United States. v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989)) ("Rule 404(b) 'is one of inclusion which allows [other act] evidence unless it tends to prove only criminal propensity'");[6] United States v. Sanders, 668 F.3d 1192, 1314 (11th Cir. 2012). See also State v. Frost, 2015 Ga. LEXIS 439, *8 (Ga. June 15, 2015) (reversing this Court on certiorari review) ("As we explained in *Jones II*, Rule 404 (b) is "an evidentiary rule of inclusion") and id. at *10 ("Although Rule 417 (a) (1) may have a far more limited application than Rule 404 (b), it too is a "rule of inclusion").

Even a prior opinion of this Court recognizes that O.C.G.A. § 24-4-404(b) is a rule of inclusion. Ashley v. State, 331 Ga. App. 794, 798 (2015) (cert. applied for) (McFadden, J., author) (stating that though it no longer lists bent of mind or course of conduct specifically, "the new Evidence Code's treatment of similar

[6] As the United States Supreme Court itself observed, "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." Cohen, supra, 888 F.2d at 776-777 (quoting Huddleston, supra, 108 S.Ct. at 1501).

transaction evidence is, as one commentator has noted, a rule of inclusion that expands the admission of such evidence. See R. Carlson et al., Carlson on Evidence, p. 120 (3d ed. 2015)").

Because this Court's Brown opinion misconstrued O.C.G.A. § 24-4-404(b), its review of the trial court's other acts ruling is flawed, and reconsideration, under the proper understanding of O.C.G.A. § 24-4-404(b), is warranted.

THIS OPINION FAILS TO ABIDE BY ITS OBLIGATION TO FOLLOW THE ELEVENTH CIRCUIT

In reaching its other acts decision in this case, the Court fails to look to a single applicable Eleventh Circuit holding for instruction, despite being told to do so by both the General Assembly, in its enacting of our State's new Evidence Code, and by the Georgia Supreme Court. And this deficiency is even more remarkable considering the sources which the Court chooses to rely on to reach the result it reaches. The Court cites First, Sixth, and Seventh Circuit caselaw, including even a dissent in a First Circuit case, but this caselaw is not in accord with the Eleventh Circuit's approach to other acts evidence. Yet as this Court itself has acknowledged, our courts are to follow the Eleventh Circuit in the event of conflict. Amey v. State, 331 Ga. App. 244, 248 (2015) (cert. applied for) (citing

the Georgia Supreme Court's directives in Parker v. State, 296 Ga. 586, 592 (3) (2015), and Bradshaw, supra, that it must follow the Eleventh Circuit on 404(b) and 403 matters).

The Court also cites a United States Supreme Court opinion as support for its approach, but that opinion was issued decades before the Federal Rules of Evidence, which our evidence code intends to largely adopt, was enacted. Therefore, it could provide no useful guidance to this Court in how to interpret the Federal Rules of Evidence.

The Court cites the opinions of local Georgia legal commentator Paul S. Milich on how to interpret Rule 404(b). But our Georgia Supreme Court has rejected that commentator's understanding of the proper other acts approach under another other acts statute, and this Court's endorsement of that understanding, as too narrow. State v. Frost, supra, 2015 Ga. LEXIS 439, *4-13. The Georgia Supreme Court has signaled the proper approach to take, citing with approval the work of several preeminent legal scholars who take an approach to other acts evidence that differs from the current Brown approach and that understands other acts evidence to be relevant and admissible to intent, as well as absence of mistake or accident, based on the doctrine of chances. See, e.g., State v. Jones, supra at

*13, n. 7. Yet, Brown, as it currently stands, fails to heed the Georgia Supreme Court's embrace of this scholarship and of the Eleventh Circuit's approach to other acts evidence.

The only Eleventh Circuit opinion which this Court does cite in reaching its other acts decision is a special concurrence in a case decided ten years ago, and that concurrence itself acknowledged that Eleventh Circuit precedent, even in 2005, would admit the other acts evidence at issue as relevant to intent and not excluded under Rule 403. And the opinion to which the judge concurred did indeed admit the evidence. The General Assembly is presumed to have known the Eleventh Circuit's position when it directed in 2013 that our courts should follow the Eleventh Circuit approach to our new Evidence Code. So while the view expressed in the concurrence cited by Brown may be the view preferred by the two judges who joined in Division 3 of the opinion, it is not the view which our courts have been instructed to utilize in evaluating the admissibility of other acts evidence.

Eleventh Circuit caselaw is clear: Rule 404(b) is a rule of inclusion; where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404 (b) test is satisfied; the more similar the other acts are to

the charged crime, the more highly probative they are under the Rule 403 evaluation; Rule 403 is to be used only sparingly; and "It is not designed to permit the court to 'even out' the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none." United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979). Rather, Rule 403 requires courts to "look at the evidence in a light most favorable to admission, maximizing its probative value and minimizing its undue prejudicial impact." United States v. Lopez, 649 F.3d [1222] at 1247 (11th Cir. 2011) (quotation marks omitted). Therefore, "while a district court has broad discretion to admit relevant evidence, its 'discretion to exclude evidence under Rule 403 is narrowly circumscribed.' United States v. Smith, 459 F.3d 1276, 1295 (11th Cir. 2006) (quotation marks omitted); accord United States v. Norton, 867 F.2d 1354, 1362 (11th Cir. 1989)." United States v. Patrick, 513 Fed. Appx. 882, 887 (11th Cir. 2013).

The result reached in Division 3 of this Court's Brown opinion is premised on inapplicable "authority." The opinion seemingly took pains to avoid reliance on any applicable Eleventh Circuit caselaw. However, a proper evaluation of the trial court's other acts ruling – under the approach promulgated by the Eleventh Circuit and endorsed by the Georgia Supreme Court, which this Court is obligated

to follow – would result in a reversal of the trial court's ruling and admission of the State's other acts evidence. Reconsideration must therefore be granted.

THIS OPINION IS SERIOUSLY OUT OF STEP WITH CONTROLLING GEORGIA SUPREME COURT JURISPRUDENCE AS WELL AS OTHER COURT OF APPEALS' OPINIONS

As established above, Division 3 of this Court's opinion overlooks and disregards controlling caselaw which dictates a different approach to evaluating the admissibility of other acts evidence. This Court's Division 3 analysis embraces a misguided approach to evaluating a trial court's other acts rulings. That approach and analysis should not be left to stand but should be reconsidered and corrected.

As also established above, Division 3 of this Court's opinion is inconsistent with some of this Court's own other acts opinions as well. These opinions include primarily Powell, supra, Williams, supra, and Curry, supra, but also legal pronouncements of this Court in Amey, supra, and Ashley, supra. As it currently stands, Brown is almost diametrically opposed in both its approach and its outcome to the approach and outcome of another panel of the Court of Appeals only four days earlier in Powell, supra. There, this Court followed the approach endorsed by the Georgia Supreme Court and adopted from the Eleventh Circuit to reject an argument that because the other act was too similar, the other act evidence was

only probative of a propensity for doing that exact thing and too prejudicial to admit. In Brown, by contrast, this Court failed to utilize the proper approach to evaluating the admissibility of other acts evidence and upheld a trial court conclusion that other act evidence which involved the same crimes as those charged was offered only as propensity evidence and excluded as too prejudicial.

Division 3 of this opinion should be reconsidered and corrected so that the judges of this State are not led astray from the proper approach to the admissibility of other acts evidence and so that our State's other acts jurisprudence under our new Evidence Code will be a clear and cohesive body of law.

CONCLUSION

WHEREFORE, Appellant prays that this Court RECONSIDER Division 3 of its June 12, 2015 opinion in this case and REVERSE the trial court's exclusion of the State's other acts evidence.

Respectfully submitted this 22nd day of June, 2015.

Paul L. Howard, Jr.
District Attorney
Atlanta Judicial Circuit
Georgia State Bar No. 371088

/s/ Paige Reese Whitaker
Paige Reese Whitaker
Deputy District Attorney
Georgia State Bar No. 598190

Fulton County Courthouse, 4th Floor
136 Pryor Street SW
Atlanta, Georgia 30303
TEL: (404) 612-4972

CERTIFICATE OF SERVICE

I certify on this day, I have served a copy of the within and foregoing Motion for Reconsideration by depositing a copy of the same in the United States Mail with adequate postage to assure delivery to opposing counsel as follows:

Kristin Howell, Esq.
100 Peachtree St., NW
Ste. 1600
Atlanta, GA 30303
(Counsel of Record for Javaris Brown)

Larry Korn, Esq.
438 Edgewood Ave., SE
Atlanta, GA 30312
(Counsel of Record for Meyetta King)

David Jones, Esq.
659 Auburn Ave., Ste. 141
Atlanta, GA 30312
(Counsel of Record for Kevin Rouse)

This 22nd day of June, 2015.

By: /s/ Paige Reese Whitaker
Deputy District Attorney
Georgia State Bar No. 598190

Fulton County Courthouse, 4th Floor
136 Pryor Street SW
Atlanta, Georgia 30303
(404) 612-4972

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

State of Georgia	)	INDICTMENT NO. 17SC148989
	)	
v.	)	JUDGE WHITAKER
	)	
BRIAN KEITH STANDRIDGE	)	

ORDER ON DEFENDANT'S MOTIONS TO SUPPRESS HIS STATEMENT AND THE SEARCH OF HIS VEHICLE

Following a series of entering auto violations in a particular area of Milton in Fulton County, including one on December 24, 2016 which captured on surveillance video a distinctive black SUV entering and leaving the cul de sac area where that entering auto occurred, the Milton Police Department put out a BOLO for a black SUV, Jeep Grand Cherokee, with black wheels and a silver roof rack. In addition to the BOLO information, Detective Chelsea Walters of the Milton Police Department personally watched the December 24, 2016 video showing a black SUV which she described as a "very distinct car." From the video, she could see that there were at least 2 people, a driver and a passenger, and that the passenger was a white male. She could also see and that there was "a large, silver something on the roof," and she observed the particular black wheels on the vehicle.

On December 28, 2016, at approximately 1:45 a.m., Detective Walters was on patrol when she noticed a black SUV similar in description to the BOLO and to the SUV from the video. She followed the vehicle and observed that it was occupied by two white males and that it had black wheels, large off-road lights, and the same something silver strapped to its roof as the SUV in the video (which ended up being scrap metal), all matching the vehicle captured on the December 24,2016 surveillance video which she had watched. She observed it drive through a

red traffic light at the intersection of Broadwell Road and Rucker Road within the bounds of Fulton County. After observing the traffic violation and witnessing that this SUV had many similarities not only to the BOLO but to the suspect vehicle which she herself had seen in the surveillance footage, Detective Walters relayed to radio dispatch a detailed description of the vehicle, an older Black Toyota Forerunner, including the tag number and that its back window was missing and covered with a trash bag, as well as her observations of the red light violation.

Officer McDowell of the Alpharetta Police Department, who was patrolling in the vicinity, heard this information via radio dispatch and observed the suspect SUV at the intersection of Old Milton Parkway and Haynes Bridge Road. After observing the vehicle proceed through the intersection, Officer McDowell activated his emergency lights in order to initiate a traffic stop. This initiation was based upon the red light violation, as well as the articulable suspicion of the SUV having similar characteristics to the surveillance video vehicle.

The suspect SUV pulled into a parking lot located at 2365 Old Milton Parkway, and as the vehicle came to a stop, passenger Justin Warren fled from the passenger seat of the vehicle into an adjacent wood line. Officer McDowell observed the driver, Mr. Standridge, unsheathe a knife and toss it to the floorboard of the SUV and observed at least one other weapon in the vehicle at that time. Officer McDowell had Mr. Standridge exit the vehicle and lie prone on the ground and handcuffed him. After checking Mr. Standridge for weapons (a search of which yielded a knife), Officer McDowell placed Mr. Standridge inside of his patrol vehicle for a brief detention period. In the meantime, Detective Walters appeared on scene with a number of other police officers to assist with the search for the passenger who fled and to assess the scene. Officers noticed a backpack that had been dropped by Mr. Warren on the way to the woods, which contained a 9mm handgun.

Officers can be seen on Officer McDowell's patrol car video of the stop to be conducting a plain view examination of the vehicle from the outside prior to entering the vehicle. Detective Walters can also be seen on this video at certain points on the passenger side of the vehicle. At this time, the passenger's whereabouts were still unknown. During this examination of the SUV from outside of the vehicle, officers noticed in plain view in the open front passenger door, which had been left open when Mr. Warren fled, a small open case, possibly a hard eyeglass case, with a crystal like substance and a needle. Due to her knowledge, training, and experience in the field of narcotics, Detective Walters immediately recognized this substance to be crystal methamphetamine. Due to the presence of crystal methamphetamine clearly visible inside the vehicle, officers searched the vehicle for further drugs and drug paraphernalia while Mr. Standridge was being detained. During this search of the vehicle for further drugs, officers located a bag or purse containing a school paper belonging to the daughter of an Entering Automobile victim, Mr. Martin Garcia.

Approximately 28 minutes into the stop, Officer Walters spoke to Mr. Standridge while he was in the back of the police vehicle. Her interview with Standridge was recorded. She started by saying that she was sure he could see the officers searching his vehicle and would want to tell them what was his and not his but before she did that, she wanted to go over his *Miranda* warnings. She did not have her *Miranda* card and recited the warnings from memory as best she could. She told Mr. Standridge that he had the right to talk to a lawyer and the right to remain silent. She also said "If you want to stop answering my questions and talk to a lawyer you can do that as well." Mr. Standridge responded, "Mmm hmm." Then she asked, "So, what is going on tonight?" Mr. Standridge engaged in the conversation with Detective Walters. Detective Walters

failed to advise Mr. Standridge that anything he said could be used against him in court and did not advise that if he could not afford a lawyer, one would be appointed for him.

THE SEARCH

Though it would be a close question whether the BOLO alone would have provided sufficient articulable suspicion to stop the vehicle which Mr. Standridge was driving, that was not the only basis for the stop in this case. Here, Detective Walters had viewed on videotape the actual black SUV which was the subject of the BOLO and which was suspected to be involved in the entering autos occurring in the area of her patrol just days prior to the stop in this case. Thus, she had the benefit of knowing more than simply what was included in the BOLO. She saw the actual car, the actual black wheels, and the actual large silver something on the roof of the SUV and could compare that to the vehicle she saw. This fact distinguishes this case from others, such as *Vansant v. State*, 264 Ga. 319 (1994), and *Allen v. State*, 325 Ga. App. 156 (2013), cited by the defense, with just a generally descriptive BOLO. Further, Detective Walters also witnessed a traffic violation when the subject SUV ran a red light in her presence, and she communicated that information, along with the SUV's tag and a more detailed description of the vehicle, over the radio to other officers. Officer McDowell heard that dispatch and was aware of the traffic violation. It is well settled that reasonable articulable suspicion can be based "collective knowledge" of the police when there is reliable communication between an officer supplying the information and an officer acting on that information. *See, e.g., Gonzalez v. State*, 334 Ga. App. 706, 711, 780 S.E.2d 383 (2015); *Burgeson v. State*, 267 Ga. 102, 105(3)(a), 475 S.E.2d 580 (1996). The stop of the vehicle was therefore valid.

To any extent the defense might be seeking suppression of the backpack outside of the SUV, thrown down by the co-defendant Warran as he fled, that item is not subject to suppression

because it is abandoned property. *See, e.g., Newman v. State*, 336 Ga. App. 760(2) 786 S.E.2d 688 (2016); *Burgeson*, 267 Ga. at 105(3)(b).

The methamphetamine and needle were seized pursuant to a plain view observation of the open passenger door and are admissible on that basis. *See, e.g., Parker v. State*, 229 Ga. App. 217, 219, 493 S.E.2d 558 (1997) (plain view observation of interior of vehicle assisted by flashlight shone through window does not violate Fourth Amendment); *Stinson v. State*, 254 Ga. App. 810, 812 (2002) ("When it is immediately apparent that an item is contraband, an officer may seize what is in plain sight if he is in a place in which he is constitutionally entitled to be.") Once this contraband was discovered, police had probable cause under the automobile exception to conduct a warrantless search of the interior of the vehicle for other drug contraband, even if no exigency prevented the securing of a search warrant. *Blitch v. State*, 323 Ga. App. 677, 678-679, 747 S.E.2d 863 (2013);[1] *Arnold v. State*, 315 Ga. App. 798, 728 S.E.2d 317 (2012); *Brown v. State*, 311 Ga. App. 405, 407 (2) (715 SE2d 802) (2011). As noted in *State v. Sarden*, 305 Ga. App. 587, 589 (699 SE2d 880) (2010), "[b]ecause there is no exigency requirement in this context, the warrantless search of an automobile will be upheld so long as there was probable cause to suspect it contained contraband, even if the driver was arrested and handcuffed and the keys were taken from him before the car was searched.

Because the search of the interior of the car for drug contraband was justified under the automobile exception to the Fourth Amendment, the seizure of the bag containing the

---

[1] As recognized in *Blitch*, while *Arizona v. Gant*, 556 U. S. 332, 343 (2009), limited the search-incident-to-arrest exception to those situations where "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," or where "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle," the automobile exception is a separate and distinct rationale for upholding the search of a vehicle under the Fourth Amendment. *Blitch*, 323 Ga. App. At 679, n.1 (citing *Gant, supra*, 556 U. S. at 347 (IV) (reaffirming the viability of the automobile exception)).

schoolwork of the daughter of the December 24 entering auto victim was proper. Defendant's motion to suppress evidence from the search of the SUV is therefore DENIED.

THE STATEMENT

Miranda warnings are required when a person is interviewed by an investigating officer while in custody. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). For purposes of *Miranda*, "custody" specifies circumstances that are thought to present "a serious danger of coercion." The initial step in determining whether a person is in custody is to ascertain whether, in light of "the objective circumstances of the interrogation," the person is either formally arrested or restrained to the degree associated with a formal arrest. *Stansbury* v. *California*, 511 U.S. 318, 322-323, 325 (1994) *(per curiam)*. This is evaluated from the perspective of how a reasonable person would have perceived the situation, their freedom of movement, and whether the restraint was more than temporary. *Id. See also Thompson* v. *Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).

However, not all restraints on freedom of movement amount to custody for purposes of *Miranda*. The additional inquiry is whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. *Howes v. Fields*, 565 U.S. 499, 509, 132 S. Ct. 1181 (2012). Relevant factors include the location of the questioning, see *Shatzer*, 559 U.S. at 105-106, 130 S. Ct. at 1220-1221, 175 L. Ed. 2d at 1054-1055, its duration, see *Berkemer* v. *McCarty*, 468 U.S. 420, 437-438, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), statements made during the interview, see *Mathiason*, 429 U.S., at 495, 97 S. Ct. 711, 50 L. Ed. 2d 714; *Yarborough* v. *Alvarado*, 541 U.S. 652, 665, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004); *Stansbury*, 511 U.S., at 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293, the presence or absence of physical restraints during the questioning, see *New York* v. *Quarles*, 467 U.S. 649,

655, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984), and the release of the interviewee at the end of the questioning, see *California* v. *Beheler*, 463 U.S. 1121, 1122-1123, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) *(per curiam)*. Though most typical traffic stops do not amount to custodial interrogations, this is true partly because of the presumption that the stop is temporary, the public nature of the stop – with passersby able to witness the interaction, and the usual limited number of officers involved. *Berkemer v. McCarty*, 468 U.S. 420, 438-439 (1984).

Under the circumstances of this case, where Mr. Standridge was removed from the SUV at gunpoint (albeit after his passenger fled and after the officer witnessed several weapons in the SUV), was placed in handcuffs, was concededly not free to leave, was placed in the back of a patrol car for almost 30 minutes, and was surrounded by numerous law enforcement officers in a parking lot in the middle of the night, and was told that he would want to let police know what was his and not his in the SUV, the Court concludes that a reasonable person would have perceived himself to be in custody for *Miranda* purposes, and *Miranda* warnings were required.

Miranda warnings are not themselves constitutional rights. However, they safeguard the constitutional privilege to be free from self-incrimination. Thus, while the mandates of *Miranda* do not require a recitation of particular words, *California v. Prysock*, 453 US 355 (1981), *Miranda* does require a "fully effective equivalent" in order to ensure a valid waiver of the privilege against self-incrimination. *Miranda*, 384 U.S. at 476. And critical to a knowing and voluntary waiver of that privilege is fully advising a suspect of the privilege, "including the critical advice that whatever he chooses to say may be used as evidence against him." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). The State's citation to *Eubanks v. State*, 240 Ga. 166, 167-168 (1977), recognizing that every oversight surrounding the warnings does not result in automatic exclusion for all purposes and all time, is unavailing since in that case, the suspect was

advised he did not have to say anything to the officers; if he did, what he told them could and would be used against him in a court of law; that he had a right to an attorney; and if he couldn't afford an attorney, one would be provided. Here, two of those four statements were omitted.

Under these circumstances, where there was no advice, or its functional equivalent, that anything said by Mr. Standridge could be used against him in court and no advice that if Mr. Standridge could not afford an attorney, one would be appointed for him, there is insufficient evidence to permit the Court to conclude that there was a knowing and voluntary waiver of Mr. Standridge's constitutional rights pursuant to *Miranda*. Defendant's motion to suppress his statement is therefore GRANTED, and Mr. Standridge's statement to Detective Walters is SUPPRESSED.

SO ORDERED, this 15th day of August, 2017.

PAIGE REESE WHITAKER
JUDGE, SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT

STATE OF GEORGIA

COUNTY OF Fulton

The undersigned, being a nominee for appointment by the Governor of the State of Georgia, to a position of Judge in one of the courts in this State and being fully cognizant of the responsibility to the public, the Bench and the Bar of this State, lodged with the Judicial Nominating Commission of the State of Georgia in the selection of persons to be submitted to the Governor for any such appointment do hereby:

1. Authorize the State Bar of Georgia and its Disciplinary Board (and the disciplinary authority of any other state in which the undersigned may have practiced law) and/or the Judicial Qualifications Commission of the State of Georgia to answer any inquiries, questions or interrogatories concerning the undersigned which may be submitted to them by the Judicial Nominating Commission of the State of Georgia or its authorized representative, and to give full and complete information regarding the undersigned in any of their files and to permit said Commission or its authorized representative to inspect and make copies of any documents, records and other information concerning the undersigned and any complaint which might have been made against the undersigned at any time whatsoever:

2. Does hereby release and exonerate the Governor of the State of Georgia, the State Bar of Georgia, the Judicial Nominating Commission of the State of Georgia, the Judicial Qualifications Commission of the State of Georgia, and every other person, firm, officer, corporation, association, organization or institution which might be involved in complying with, or receiving information under, the authorization and request made herein from any and all liability of every nature and kind growing out of or in any wise pertaining to compliance with this authorization and request.

IN WITNESS WHEREOF the undersigned has set his/her hand and seal this 15 day of October, 2019

Please fill in: Date of birth [redacted]

State Bar Num [redacted]

Print Name Paige Reese Whitaker

Subscribed before me this 15th **day of** October, 20 19

Notary Public

GWENDOLYN G. GREEN NOTARY PUBLIC My Commission Expires 07-04-2023 NEWTON COUNTY, GEORGIA

GWENDOLYN G. GREEN
NOTARY PUBLIC
MY
Commission
Expires
07-04-2023
NEWTON COUNTY, GEORGIA

STATE OF GEORGIA

COUNTY OF Fulton

The undersigned, being a nominee for appointment by the Governor of the State of Georgia, to a position of Judge in one of the courts in this State and being fully cognizant of the responsibility to the public, the Bench and the Bar of this State, lodged with the Judicial Nominating Commission of the State of Georgia in the selection of persons to be submitted to the Governor for any such appointment do hereby:

1. Authorize the State Bar of Georgia and its Disciplinary Board (and the disciplinary authority of any other state in which the undersigned may have practiced law) and/or the Judicial Qualifications Commission of the State of Georgia to answer any inquiries, questions or interrogatories concerning the undersigned which may be submitted to them by the Judicial Nominating Commission of the State of Georgia or its authorized representative, and to give full and complete information regarding the undersigned in any of their files and to permit said Commission or its authorized representative to inspect and make copies of any documents, records and other information concerning the undersigned and any complaint which might have been made against the undersigned at any time whatsoever:

2. Does hereby release and exonerate the Governor of the State of Georgia, the State Bar of Georgia, the Judicial Nominating Commission of the State of Georgia, the Judicial Qualifications Commission of the State of Georgia, and every other person, firm, officer, corporation, association, organization or institution which might be involved in complying with, or receiving information under, the authorization and request made herein from any and all liability of every nature and kind growing out of or in any wise pertaining to compliance with this authorization and request.

IN WITNESS WHEREOF the undersigned has set his/her hand and seal this 15 day of October, 2019.

Please fill in: Date of birth [redacted]

State Bar Num [redacted]

Print Name Paige [illegible] Whitaker

Subscribed before me this 15th day of October 2019

Notary Public

GWENDOLYN G. GREEN NOTARY PUBLIC My Commission Expires 07-04-2023 NEWTON COUNTY, GEORGIA

GWENDOLYN G. GREEN
NOTARY PUBLIC
My Commission Expires 07-04-2023
NEWTON COUNTY, GEORGIA