



## Court of Appeals of Georgia

November 16, 2015

TO: Mr. Darryl Curry, GDC351063, Wilcox State Prison, Post Office Box 397, Abbeville, Georgia 31001

RE: **A14A2111. Darryl Bearnard Curry v. The State**

### CHECK RETURN

- Your check number \_\_\_\_\_ in the amount of \_\_\_\_\_ written on the account of your firm for the filing fee in \_\_\_\_\_ is enclosed. Please be advised that this Court is returning your check since the filing fee was already paid by \_\_\_\_\_.

### CASE STATUS - DISPOSED

- The referenced appeal was affirmed in the Court of Appeals on February 5, 2015. The remittitur issued on February 23, 2015, divesting this Court of any further jurisdiction of your case. The case is therefore, final.**

**Your Notice of Intent to Apply for Writ of Certiorari was already filed in this Court. We are returning the enclosed documents to you.**

### CASE STATUS - PENDING

- The above referenced appeal is pending in your name before this Court. The appeal was docketed in the \_\_\_\_\_ Term and a decision must be rendered by the Court by the end of the \_\_\_\_\_ Term which ends on or around \_\_\_\_\_.

### APPLICATION FOR PERMISSION TO APPEAL A PROBATION REVOCATION

- To appeal a probation revocation, you will need to file a Discretionary Application with this Court. Rule 31 of the Rules of the Court of Appeals of Georgia describes a Discretionary Application and the items you would need to include with your application.

A Discretionary Application must be filed within 30 days of the stamped filed date on the order that you are appealing and the application must be accompanied by a proper Certificate of Service and a pauper's affidavit or the \$80.00 filing fee. You must also comply with all the other applicable rules of Court regarding filing with the Court of Appeals of Georgia.

Enclosed, please find a copy of the Rules of the Court of Appeals for your review.

FILED IN OFFICE

DARAYL BEARNAAD CURRY  
PETITIONER

vs.

STATE OF GEORGIA  
RESPONDENT(S)

Civil Action  
No. A14A2111

NOV - 5 2015

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NOTICE TO SEEK APPLICATION FOR HABEAS CORPUS

CERTIORARI

Notice is hereby given that \_\_\_\_\_ applies to the Supreme Court of Georgia, rendered 5 case.

*Case is already pending cert. unnecessary filing*

\_\_\_\_\_, petitioner hereby seeks the opinion of the Court of Appeals of Georgia, rendered 20 15 in the above styled case.

I. STATEMENT OF CASE: A DeKalb Court Jacryl Curry for two  
counts of trafficking a person for sexual no counts of pimping; two counts  
of sexual exploitation of children; two counts of false imprisonment; two counts of  
cruelty to children; two counts of Aggravated Assault; two counts of contributing to the  
delinquency of a minor; one count of obstruction of an officer; and one count of conspiracy  
to commit false statements. (R. 4-25.) The Honorable Gail C. Flake conducted a jury  
trial from March 12 through March 18, 2013, and Curry was convicted on all counts  
except for the two counts of contributing to delinquency, conspiracy to commit false statements ATTACH

II. STATEMENT OF FACTS: Ariana Evans, a 17-year old run away from Texas working as a  
prostitute in Atlanta, posted an online ad on backpage.com advertising for service. In placing  
this ad Ariana acknowledged she was at least 18, and Curry replied to it. (T. 348-352; 405.)  
Evans reason for lying about her age, was nobody wants to sleep with someone that's under age.  
If she posted her real age, she would have lost a lot. (T. 351.) When Curry met Ariana  
Evans at the Hotel she stated, her name was Desiree Blount and were 19 years old. (T. 407;  
422-423; 427.) Curry drove her to a house in DeKalb County owned by Michelle LeeAnn Jones,  
John Anderson was also living there. (T. 487-488; 512-513.) Ariana Evans and Hollie Hough ATTACH

III. ARGUMENT AND CITATIONS: 1. The trial court erred by admitting the "prior bad act" testimony  
of witness Lisa Bruzzi under rule 404(b), as her testimony was not relevant to any proper  
purpose and served only as evidence of Curry's character and propensity to commit the acts

III. ARGUMENT AND CITATIONS (CONT'D): Alleged in the indictment. Prior to trial, the State filed written notice of its intent to introduce evidence under OCGA § 24-4-404(b). In its notice, the State claimed that Curry held Lisa Bruzzi, a woman under 17 years of age, in sexual servitude and forced her to take cocaine and pills. The State introduced the evidence for every purpose listed in 404(b): motive, opportunity, intent, preparation, plan, knowledge, <sup>ATTACH</sup> →

IV. WHY CERTIORARI SHOULD BE GRANTED: This Certiorari should be granted, because the extrinsic evidence was improperly admitted. The Courts made an improper ruling. Admitting the Rule 404(b) evidence unfairly tipped the scales in favor of a guilty verdict. It affected Petitioner's substantial right to due process and a fair trial, because the prejudicial impact of the evidence far outweighed its probative value. It seriously affected the fairness of the judicial proceedings. Petitioner was deprived of life, liberty and property which was a due process violation of the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution. The charge to the jury of false imprisonment deviated from the indictment violated Petitioner due process and a fair trial, which was a violation of the Fifth, Sixth and Fourteenth Amendment of the United States Constitution.

Wherefore, petitioner prays that the Court grant relief to which the petitioner may be entitled in this proceeding. This 3 day of November, 2015.

Respectfully Submitted,  
s/ Darryl Curry (Pro Se)

Darryl Curry  
GDC# 351063

I declare (or certify, verify, or state) under penalty of perjury that the foregoing statements made in this Notice to Seek Application for Writ of Certiorari are true and correct.

Executed on November 3, 2015 (Date)

s/ Darryl Curry (Petitioner)

Sworn to and subscribed before me this  
03 day of November, 2015.

[Signature]  
Notary Public or Other Person Authorized to Administer Oaths

10-29-2015

Continuation of I. Statement of case: and lesser offense of simple battery under Counts 11 and 12 (Aggravated Assault) of the indictment. (R. 187-189.) The Court sentenced Curry to a combined sentence of 60 years to serve 40 in prison. (R. 190.) He moved for a new trial on March 27, 2013 and Amended his motion on April 7, 2014. (R. 195; 235.) The court denied the motion on May 5, 2014 and Curry filed a timely notice of appeal. (R. 250; 1.) The Court denied the Notice of Appeal on February 5, 2015 and Curry filed a timely Application for Writ of Certioration February 18, 2015, now file his brief.

Continuation of II. Statement of Facts: made arrangements with Michelle Jones who was renting the room. (T. 408.) Evans claimed she made an agreement to work for Curry. (T. 408.) Evans recruited Shanita Smith and used internet ads and prior contacts to arrange clients for herself and Shanita Smith. (T. 352-353; 416.) Evans claimed she would give Curry the money she received from those clients for performing sex acts. (T. 333-334.) No one testified they witnessed Ariana give Curry any money, No log was recovered at the residence making any sort of recordings of transaction and no money was located on Mr. Curry when he was arrested. (T. 622.) Although she claimed that she did not feel free to leave the house, but left on October 4, 2011. (T. 407-411.) Evans began a consensual sexual relationship with Curry and later described him in letters as "her man." (T. 377; 614-615.)

Evans claimed that Curry beat her with a belt or a coat hanger because she contacted a rival pimp who owed him money. (T. 359.) On October 4, 2011, Evans left the house and caught a bus to New Birth Missionary Baptist Church in Lithonia. She asked the congregants for help. (T. 382.) They called the police, and a responding officer picked her up. (T. 552.) Evans stated to the police, Curry held her against her will, beat her in the face and was her Pimp. (T. 409-410.) Evans wanted the officer to get her belongings. (T. 410.) However, there was discrepancies in what Evans was telling them. (T. 553.) The officer contacted the special victims unit and was advised to release her because she was 17 and wasn't being consistent with what she was saying. (T. 554.) Evans was unclear about where she wanted to go or if she wanted to report a crime, so the officer dropped her off at a gas station. (T. 554-555.) Evans contacted Curry to pick her up; and claimed he started noticing that she wasn't really a hundred percent into doing it, she was to find another girl to take her place. (T. 352.) Evans started on backpage.com recruiting other women and was unsuccessful. (T. 353.) Evans contacted Shanita Smith, another teenager

runaway whom she had befriended the previous year. (T. 352.) Evans knew Smith was having a hard time and asked her to come work with her. She would protect, provide, feed and house her. (T. 354.) Smith agreed to meet, and Evans and Curry picked her up and took her to the house. Once there, Evans told Smith the rules to the Game. (T. 355; 416; 619.) Evans arranged all the advertisement and dates through her clientele. (T. 355; 416.) Smith never saw ads on backpage or any advertisement. (T. 472.) Evans stated that Smith was her responsibility and handed her the money and claimed she handed the money to Curry. (T. 356; 416.) No one testified they witnessed Ariana Evans give Curry any money, no log was recovered at the residence making any sort of recordings of transaction and no money was located on Mr. Curry when he was arrested. (T. 622.) This was Counts 3 and 4, Pimping for a person under 18, the State did not show that Mr. Curry offered to arrange a meeting of person under the age of 18 for the purpose of prostitution. There was no evidence that Mr. Curry posted any ads online or on any chatlines for either Evans or Smith for prostitution. (T. 355-356; 416; 794.) Curry took sexually explicit photos of Evans and Smith one of them nude in the shower together and the other of the two engaged in oral sex. (T. 370-372.) This was Counts 5 and 6, Sexual Exploitation of Children, the evidence showed that Ariana Evans told Mr. Curry that she was 19 years old, and there was some indication that Curry was led to believe that Shanita Smith was 19 years old. (T. 407; 422-423; 794.) Curry was unaware of their age. (T. 407; 422-423.) Smith claimed that Evans sold her to three to four clients during the four days she was at the house. (T. 473; 622.)

On October 8, 2011, Curry took Evans and Smith to a club in West End. (T. 481.) Evans claimed that Curry gave her and Smith pills that she identified as ecstasy. The pill affected her negatively and she asked that they leave. Curry took Smith and Evans to the house. (T. 384.) During the night, Evans opened her eyes and Curry was on top of her. (T. 331.) After he was asleep, she ran out of the house wearing a bikini top and a small jacket covering nothing but her arms and banged on neighbor's

doors, screaming for help. Curry and Smith followed her and tried to get her to come back inside, but were unsuccessful. (T. 385.) Evans tried to get Smith to come with her but she refused. (T. 385.)

The police picked up Evans and transported her to the hospital. She told the police that Curry held her against her will and that he had been her pimp. (T. 593.) An exam revealed no genital trauma, but Evans later found out she was pregnant. (T. 723; 391.) She told police that Smith was being held at the house. (T. 585.) Police obtained a search warrant and went to the house to execute it. They received no response after announcing their presence, despite seeing one of the blinds move and hearing a response after calling a phone number alleged to be Curry's. (T. 597.) Anderson and Smith both claimed Curry prevented them from answering the door. (T. 463; 498.) The police returned with a no-knock warrant based on the lack of response and on Curry's prior conviction on a weapons possession charge. (T. 597.) Ms. Evans did not indicate there were any firearms in the home and that Curry ever used a firearm on her. (MT. 33; 73-75; 76-77.) SWAT executed the warrant, and police took Curry, Anderson, and Smith into custody. (T. 598.)

Smith also claimed she were not free to leave the house because Curry keep all the doors locked. (T. 452-453.) Anderson claimed the only room in the house that had a door with a lock was his room and the other rooms did not have locks. (T. 518; 521.) The doorknobs that the police found, those were Michelle's old doorknobs. (T. 523.) This was Counts 7 and 8, False Imprisonment, confine Evans and Smith without legal authority. There was no confinement. Evans and Anderson testified that there were no locks on any doors other than Anderson's, and they were free to move around. There was an issue to whether or not they were confined against their will. (T. 794-795.) Smith told police that Curry had taken pictures of her and Evans and that he kept the camera in a sock inside a book bag, in his Ford Explorer. Police obtained a warrant for the truck, which had been seized and impound the day before, and found the camera. It contained explicit pictures of Smith and Evans. (T. 604-605.) Curry was unaware of Evans and Smith age. (T. 407; 422-423.)

Before trial, counsel moved to suppress the evidence from the searches of the house and Curry's vehicle. Both motions were denied. (MT. 89.) After Evans and Smith testified, Anderson as part of his plea agreement, plead guilty to a lesser included of another type of charge contributing to the delinquency of a minor in exchange for his testimony. (T. 511-512.) Anderson claimed Curry intimidated him, but never stated how. (T. 520.) The State also introduced DNA evidence that Curry was the father of Evan's child, who died shortly after birth. (T. 762.) Additionally, the State introduced evidence of Curry's tattoo that read, "Pimp or Die" and videos that he made explaining "pimp life." (T. 332; 673.) Over objection, the State also introduced a similar transaction witness, Lisa Bruzzi, who claimed she didn't think she was free to leave and Curry was a Pimp. (T. 745; 747.) Bruzzi claimed she didn't really want to come and testify. (T. 742.)

The state nolle prossed Count 13, as Evans was 17 years old when Curry allegedly provided her with ecstasy. (T. 792.) The Court directed a verdict on Count 16, which was based on a conversation between Curry and Holli Hough, a former associate, as neither of them made any overt act to publish to the authorities any false statement that resulted from the conversation. (T. 800.) The jury found Curry not guilty of the remaining count of contributing to delinquency, and found him guilty of the lesser included offense of simple battery for both counts of aggravated assault, but found him guilty of the remaining counts. (T. 904-905.)

Continuation of III. Argument and Citation: identity, and absence of mistake or accident. Based on the State's representations, the trial court allowed the State to introduce Bruzzi's testimony for the purposes of intent, motive, and plan. (T. 740.)

In her testimony, Bruzzi testified that she was already 18 years old when she met Curry. (T. 741.) Although she did testify that Curry employed her as a prostitute and she didn't feel free to leave, contrary to the methods testified to Evans and Smith, Bruzzi testified that he did not use chat lines; she also claimed that Curry had her walk the streets to meet potential clients. (T. 746.) She did not testify that Curry forced her to take cocaine or pills.

Curry's trial took place in 2013 under Georgia's new evidence code; therefore, the older rubric of similar transactions was not applicable to his case. Instead, the State introduced this "prior bad act" through Bruzzi's testimony under OCGA § 24-4-404(b). However, this evidence was not admissible under 404(b); and the trial court abused its discretion by allowing Bruzzi to testify.

This Court recently distinguished the old evidence scheme from the new in *Jones v. State*, A13A1940, 2014 WL 1259124 (Ga. Ct. App. Mar. 28, 2014). It held that similar transaction evidence is inadmissible where the evidence already adduced at trial was sufficient to prove intent, and no additional proof of intent was required. Even distinguishing the general intent crime contemplated in *Jones* from any of the specific intent crimes charged by the State in this case, intent was not at issue. The defense raised at Curry's trial was that the victims were not credible, not that he somehow did not "intend" the crimes charged.

"A defendant who enters a not guilty plea makes intent a material issue, imposing a substantial burden on the government to prove intent; the government may meet this burden with qualifying 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue." *Id.*

This Court in *Jones* looked to Federal interpretations of 404(b) to make it clear that intent is not meant to be a substitute for the old purposes of "bent of mind" and "course of conduct" no longer allowed under the new evidence code.

But it was allowed in the Brief of the Appellee p. 13. Indeed, the Federal courts make it clear that if intent has not been made an issue by the defendant, evidence of prior wrongs should not be admitted. "[I]f intent is undisputed by the defendant, the evidence is of negligible probative weight compared to its inherent prejudice and is therefore uniformly inadmissible." *United States v. Baker*, 432 F.3d 1189, 1205 (11th Cir. 2005)

Furthermore, the differences between the State's offer of Bruzzi's testimony and her actual testimony show that the evidence was also not relevant to "motive" and "plan." If "[t]he evidence never specified what [the defendant's] intent, motive, or modus operandi was in carrying out the [crime]... this incident is only relevant to show that [the defendant] is more likely to commit crimes because he has done so in the past, which is exactly the inference that Rule 404(b) forbids." *Baker* at 1207.

As to "plan" specifically, the term "plan" does not refer to the old evidence code's purpose of "modus operandi," which is synonymous with "identity." Where, however, extrinsic acts are admitted to show a common plan, scheme, or design, the meaning and nature of the 'similarity' requirement is different. In this context, evidence of the 'other act' is admissible only if it is so linked together in point of time and circumstances with the crime charged that one cannot be shown without proving the other. Courts have admitted extrinsic act evidence to show a defendant's design or plan to commit the crime charged, but never to show a design or plan to commit crimes of the sort with which he is charged." *United States v. Dothard*, 666 F.2d 498, 502 (11th Cir. 1982). Because Bruzzi's testimony did not have any actual link "in point of time and circumstances" with the crimes alleged in the indictment, "plan" is not a proper purpose for admission of Bruzzi's testimony under the new evidence code.

As to "motive," the purported motive for Curry to have committed the crimes alleged by the State is so obvious that the probative value of any evidence of motive would be miniscule. The motive for almost any person alleged to have engaged in sex trafficking and pimping is money. The State did not offer any motive to the

contrary, so the probative value of a prior act in which Curry received money for alleged pimping is negligible at best.

The Federal court test for 404(b) evidence adopted by this Court in Jones, supra, provides that, for such evidence to be admissible, "(1) it must be relevant to an issue other than defendant's character; (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and (3) the probative value of the evidence cannot be substantially outweighed by undue prejudice, and the evidence must satisfy Federal Rule of Evidence 403." (Emphasis added.) Because intent was not a issue in this case, the prior act was not sufficiently connected to the acts alleged in the indictment to be relevant to the purpose of plan, and the motive was obvious and required no extrinsic evidence, the prejudicial effect of Bruzzi's testimony substantially outweighed its probative value. "Evidence of a prior crime is highly and inherently prejudicial, raising, as it does, an inference that an accused who acted in a certain manner on one occasion is likely to have acted in the same or in a similar manner on another occasion and thereby putting the accused's character in issue." Id. This Court should reverse Curry's convictions and sentence and remand his case for a new trial free from the prejudicial effect of Bruzzi's testimony.

2. Where the indictment accused Curry of false imprisonment when he "did unlawfully confine Ariana Evans," the trial court erred by charging the jury, "[u]nlawful detention may mean when a victim's will is overborne by her fear of the defendant causing her physical harm," allowing it to convict Curry on a theory of guilt the grand jury never authorized.

The grand jury charged Curry with false imprisonment as: "Darryl Curry... in violation of the personal liberty of Ariana Evans, did unlawfully confine Ariana Evans without legal authority." The grand jury similarly charged Curry in the count

regarding Shanita Smith. During the charge conference, the State requested the court to instruct the jury that "[u]nlawful detention may mean when a victim's will is overborne by her fear of the defendant causing her physical harm." (T. 814.)

Trial counsel objected, arguing that the language of the charge was not part of the language used in the indictment for the false imprisonment charges. The court overruled the objection and gave the instruction. (T. 883.) Counsel did not further object before the jury retired for deliberations.

"A criminal defendant's right to due process may be endangered when... An indictment charges the defendant with committing a crime in a specific manner and the trial court's jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. The giving of a jury instruction which deviates from the indictment violates due <sup>process</sup> where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment." *Smith v. State*, 310 Ga. App. 418, 421 (2011), citing *Dukes v. State*, 265 Ga. 422, 423 (1995).

Curry was charged with confining Evans and Smith, not with detaining them. This Court has previously declined to weigh upon the "distinction between the terms 'arrest,' 'confine,' and 'detain.'" *Smith v. State*, 314 Ga. App. 583, 587 (2012). However, the Supreme Court has previously noted that: "[t]he word 'confine' has a commonly understood meaning which would place a person of common intelligence on notice of the prohibited acts. For example, Webster's Ninth New Collegiate Dictionary defines 'confine' as follows: '1. To hold within a location... 2. To keep within limits.' In turn, Black's Law Dictionary, Sixth Edition, defines the term confinement in a similar manner as: 'shut in' or 'imprisoned.'" *Alexander v. State*, 279 Ga. 683, 686 (2005). Webster's defines "detain" as: "1. To keep back or from; to withhold... 2. To restrain from proceeding; to stay or stop; to delay... 3. To hold or keep in custody." Applying the rule against surplusage, the reading that affords "detains" and "confines" different definitions should be preferred. Curry was on notice to defend against "confining"

Evans and Smith, yet his jury was charged that he could be convicted if he "detained" them by overbearing their will.

Regardless of the distinction between the manners in which a false imprisonment can be committed, nothing in the language of the indictment suggests that Curry "detained" or "confined" the two women through "overbearing" their will through "fear."

Furthermore, the charge was inappropriate under the facts of this case. The State based the non-pattern charge on language from *Grier v. State*, 218 Ga. App. 637 (1995). In *Grier*, this Court held that the evidence of false imprisonment was sufficient because "the victim's will was overborne by her fear of the brutal beatings she sustained day and night at defendant's hands." *Grier* at 638 (emphasis added). It did not hold that this language would be appropriate for a jury charge where the indictment did not charge detention.

In the present case, Evans only claimed that Curry beat her twice, not continuously over the period during which she stayed with him — once when she contacted a rival pimp, and the other when she asked to leave a club early — and neither time because she attempted to leave. (T. 359, 456.) The jury ultimately found that evidence of these beatings was not "brutal" enough to sustain a guilty verdict on the two counts of aggravated assault and found Curry guilty only of simple battery. (T. 904-905.) Furthermore, Smith did not testify that Curry ever beat her. (T. 438-486.) Under these facts, giving the charge requested by the State only served to authorize Curry's conviction for false imprisonment in a manner not consistent with the indictment.

Finally, regardless whether counsel's objection to the charge during the charge conference was sufficient to preserve the issue or not, charging the jury on a crime in a manner inconsistent with the indictment is plain error. See *Milner v. State*, 297 Ga. App. 859, 859 (1) (2009).

### CONCLUSION

For the foregoing reasons, Curry's conviction and sentence should be reversed and remanded for a new trial.



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SUPREME COURT OF GEORGIA

DARAYL BEARNARD CURRY  
APPELLANT

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CASE NUMBER

A14A211

vs.

STATE OF GEORGIA  
APPELLEE

PAUPER'S AFFIDAVIT

Comes now DARAYL BEARNARD CURRY  
(Appellant/Applicant/Petitioner Name)

and first being duly sworn, states that because of my indigence I am financially unable to pay the required filing costs in the Supreme Court of Georgia, and I request that I be permitted to file without having to pay filing fees.

This 3 day of November, 2015

DARAYL CURRY, 351063  
(Your name typed or printed)

Darayl Curry  
(Signature)

Wilcox State Prison

P.O. Box 397

Abbeville, Georgia 31001

(Print complete address and telephone number.)

Sworn to and subscribed before me,  
this 03 day of November, 2015.

[Signature] Notary Public  
SEAL

10-29-2018

# CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing document(s) upon the parties listed below by depositing a copy of the same in the United States Mail in a properly addressed envelope with adequate postage thereon to ensure that it reaches its destination.

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Courts Clerk  
47 Trinity Ave., S.W. Suite 501  
Atlanta, Georgia 30334

Supreme Court of Georgia  
Courts Clerk  
244 Washington St., Rm. 5672  
Atlanta, Georgia 30334

Attorney General of Georgia  
40 Capital Square S.W.  
Atlanta, Georgia 30334

Supreme Court of the United States  
Courts Clerk  
One First Street, N.E.  
Washington, D.C. 20543

This the 3 day of November, 20 15.

10-29-2015

x [Signature]  
notary

DARAYL CURRY, 351063  
Wilcox State Prison  
P.O. Box 397  
Abbeville, Georgia 31001

Darryl Curry

This 03 day of November 2015.