

COURT OF APPEALS OF GEORGIA

RETURN NOTICE

November 3, 2015

To: Mr. Hernán Elias Morán, ID#99514101, Gwinnett County Jail, 2900 University Parkway,
Lawrenceville, Georgia 30043

Case Number: _____ Lower Court: _____ County Superior Court _____

Court of Appeals Case Number and Style: _____

Your document(s) is (are) being returned for the following reason(s).

- Again, there is no case pending in the Court of Appeals of Georgia under the name of Hernán Elias Morán. This Court cannot schedule oral argument if there is no appeal.**
- A Notice of Appeal is filed with the clerk of the trial court and not with the Court of Appeals of Georgia. See OCGA §5-6-37.** Once the trial court clerk has received and filed the Notice of Appeal, the trial court clerk will prepare a copy of the record and transcripts as designated by the Notice of Appeal and transmit them to this Court. Once the Notice of Appeal is docketed in the Court of Appeals of Georgia, a Docketing Notice with the Briefing Schedule and other important information is mailed to counsel for the parties or directly to the parties, if the parties are representing themselves. You do not need to provide this Court with a copy of the Notice of Appeal you filed with the superior court.
- The Notice of Appeal must include a proper Certificate of Service.** A Certificate of Service must show service to the opposing counsel and contain the counsel's full name and complete mailing address. The opposing counsel must actually be served with a copy of your filing.
- An Application for Writ of Habeas Corpus should be filed in the superior court of the county in which you claim you are illegally detained.** An appeal from a denial of an Application for Writ of Habeas Corpus is to the Supreme Court and not the Court of Appeals.
- An Application for Writ of Mandamus should be filed in the superior court of the county official whose conduct you intend to mandate.** An appeal from a denial of an Application for Writ of Mandamus is to the Supreme Court and not the Court of Appeals. The mailing address for the Supreme Court of Georgia is: 244 Washington Street, S.W., Suite 572, Atlanta, Georgia 30334.
- Your appeal was disposed by opinion (order) on _____.** The Court of Appeals _____
_____ The remittitur issued on _____
divesting this Court of jurisdiction. The case decision is therefore final.
- Your mailing/documents indicate that you intended to file your papers in another court rather than the Court of Appeals of Georgia.** The address of the Clerk of the _____ is:
- If an attorney has been appointed for you and you are concerned with the representation provided by that attorney, you should address that issue to the trial court.** As long as you are represented by an attorney, you cannot file pleadings on your own behalf. Your attorney must file a Motion to Withdraw as Counsel and it must be granted, before you can file your own pleadings in this Court.

To: Honorable Court of Appeals

10/27/2015

Georgia State

2015 NOV 2

From: Hernán Elias morán

ID# 1001533330

CASE# 14B-04840-2

REQUEST FOR ORAL HEARING

Honorable Court of Appeal, By this letter I want to request the court for a oral hearing.

⇒ I have sent several letters to this court looking for investigation on my case, now I want to request this honorable court to allow me to go in front of the judge and give my oral testimony. This case has been misunderstanding and manipulate for Gwinnett County Court against me, all my civil right has been violated and my right to have a fair and clear trial were denied.

⇒ For example: my ex-attorney never mention me about First Offender Act before my trial started I attached now some of the law that could be in my benefits and never I were advised.

⇒ In my claims for justice, the district attorney brought back from North Carolina to Jose Juan Avila, one of my co-defendant that were lefted free before my trial got over.

⇒ On October 19 and 20, I were brought back to Gwinnett from prison, cause I suppose to have a hearing, but that never happen. I still in Gwinnett County Jail.

Print ⇒

⇒ I HAVE PLACED SEVERAL CALLS TO MY APPOINT ATTORNEY: ANGELA BROWN, BUT SHE NEVER ANSWERED ALSO I HAVE SENT COUPLE LETTER AND NEITHER HAVE HAD ANSWER.

⇒ MY CLAIMS TO THIS HONORABLE COURT IS ABOUT THE BAD FAITH IN THIS CASE, I ASKED FOR MY TRANSCRIPTS BEFORE THE APPEAL PROCESS START AND I HAVE RECEIVED NOTHING. I HAVE INFORMATIC BY A PRIVATE INVESTIGATOR THAT GWINNETT COUNTY COURT MAY ALTERED THOSE AND CHANGE PARAGRAPH THAT IS ON MY BENEFITS.

⇒ TO WARNING THIS HONORABLE COURT ABOUT THIS BADNESS AGAINST ME, I CAN'T DO MORE THAN WRITE MY CLAIMS AND REQUEST THIS ORAL / VERBAL HEARING

I PRAY MY REQUEST BE GRANTED AND THIS MATTER COULD HAVE A SETTLEMENT FAIR AND CLEAN

Honestly,

HERNAN ELIAS MORAN

16-13-31 - CRIMINAL OFFENSES.

10/28/2015

⇒ LOCKWOOD V. STATE, THE SUPREME COURT IN REVIEWING THE COURT OF APPEAL DECISION HELD THAT § 16-13-31 CLEARLY REQUIRED A FINDING OF "ACTUAL" POSSESSION AND NOT "CONSTRUCTIVE" POSSESSION. THE SUPREME COURT DECISION APPLIED RETROACTIVELY.

⇒ INDEED, WHERE THE CENTRAL ISSUE FOR THE JURY IS WHETHER THE DEFENDANTS HAD ACTUAL OR CONSTRUCTIVE POSSESSION OF THE CONTRABAND, THE TRIAL COURT MUST CHARGE THE JURY ON THE LAW OF POSSESSION.

⇒ A PERSON CAN NOT BE IN CONSTRUCTIVE POSSESSION OF AN ENTIRE KILOGRAM OF COCAINE WHEN HE CONDUCTS AN INSPECTION, BECAUSE HE INDISPUTABLY LACKS THE INTENTION TO EXERCISE DOMINION OR CONTROL OVER IT UNTIL HE HAS TESTED THE SAMPLE. UPON TENDERING THE PURCHASE PRICE TO THE SELLER, A PERSON CLEARLY POSSESSES THE INTENT TO EXERCISE CONTROL OVER ALL THE COCAINE, BUT UNLESS HE ACQUIRES THE POWER OF CONTROL OVER IT, HE DOES NOT CONSTRUCTIVELY POSSESS IT. WITHOUT PROOF OF THIS POWER OF CONTROL, THE EVIDENCE WOULD BE INSUFFICIENT TO SUPPORT A CONVICTION FOR TRAFFICKING IN COCAINE.

Consideration of first offender status mandatory. - Trial court's use of a mechanical sentencing formula or policy whereby first offender status consideration was automatically refused violated O.C.G.A. § 42-8-60. *Jones v. State*, 208 Ga. App. 472, 431 S.E.2d 136 (1993).

Trial court violated O.C.G.A. § 42-8-60(a) by failing to exercise the court's discretion and refusing to consider sentencing defendant as a first offender because the defendant opted for a jury trial; the use of a mechanical sentencing formula was an abdication of judicial responsibility. *Cook v. State*, 256 Ga. App. 353, 568 S.E.2d 482 (2002).

Defendant's sentence for numerous threat, obstruction, and fleeing convictions could not stand since the trial court abdicated the court's judicial responsibility by adopting an inflexible rule in not hearing the defendant's oral motion for first offender treatment. *Ramage v. State*, 259 Ga. App. 616, 578 S.E.2d 245 (2003).

Mere reminder insufficient to request sentencing under first offender act. - Merely reminding the sentencing judge that the conviction is the defendant's first offense is not equivalent to a request for sentencing under the Georgia First Offender Act, O.C.G.A. § 42-8-60 et seq. *Powell v. State*, 271 Ga. App. 550, 610 S.E.2d 178 (2005).

Attorney must request first offender treatment. - Defendant's 10-year sentence for forgery was affirmed as the defendant attorney twice reminded the sentencing court of defendant's first offender status, but did not request that the defendant be sentenced under the Georgia First Offender Act, O.C.G.A. § 42-8-60; absent clear, i.e., unambiguous, statements in the record showing: (1) an explicit request for First Offender Act treatment at the time of sentencing; and (2) a failure to exercise discretion as evidenced by a misunderstanding of the law or a general policy against First Offender Act treatment, a defendant's sentence must be upheld. *Powell v. State*, 271 Ga. App. 550, 610 S.E.2d 178 (2005).

Trial court was authorized to consider the defendant's indifference to both the terms of the bond requirements imposed and the underlying charges filed in the court's decision regarding whether or not to treat the defendant as a first offender; hence, the court did not err in declining to impose sentence under the first offender statute. *Collins v. State*, 281 Ga. App. 240, 636 S.E.2d 32 (2006).

First offender treatment may not be granted after defendant has been sentenced. *Lewis v. State*, 217 Ga. App. 758, 458 S.E.2d 861 (1995).

After the defendant was found guilty of arson and sentenced for that offense, the plain language of O.C.G.A. § 42-8-60(a) barred a trial court from considering the defendant's motion to be granted first offender treatment. *Burchette v. State*, 274 Ga. App. 873, 619 S.E.2d 323 (2005).

After a defendant was convicted for statutory rape, the trial court lacked jurisdiction to resentence the defendant as a first offender or to rescind the conviction or confinement portion of the sentence. First offender treatment was only permitted before a defendant had been adjudicated guilty and sentenced. *State v. Stulb*, 296 Ga. App. 510, 675 S.E.2d 253 (2009).

Out of state conviction. - Trial court did not err by denying defendant first-offender treatment as

eligible for sentencing as a first offender. When imposing a sentence, the court shall ensure that, if a defendant is sentenced as a first offender, he or she is made aware of the consequences of entering a first offender plea pursuant to the terms of this article.

(Ga. L. 1968, p. 324, § 3; Ga. L. 1982, p. 1807, § 2; Ga. L. 2015, p. 422, § 5-74/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of this Code section for the former provisions, which read: "The defendant shall be informed of the terms of this article at the time of imposition of sentence." See editor's note for applicability.

Editor's notes. - Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides that: "This Act shall become effective July 1, 2015, and shall apply to sentences entered on or after such date."

JUDICIAL DECISIONS

Defendant informed of consequences if probation violated. - Trial court did not err in increasing the sentence originally imposed upon the defendant because the defendant was informed when the first offender probation sentence was pronounced that, upon an adjudication of guilt, the defendant could be sentenced to the maximum allowable under the law; although the sentencing form was ambiguous since both the first offender treatment box and the felony sentence box were checked, the ambiguity in the form was not fatal to the trial court's imposition of a sentence greater than the original one. *Otuwa v. State*, 303 Ga. App. 410, 693 S.E.2d 610 (2010).

Cited in *Bethea County v. Dixon*, 72 Ga. App. 384, 33 S.E.2d 723 (1945); *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); *Johnson v. GMC*, 144 Ga. App. 305, 241 S.E.2d 30 (1977); *Dominy v. Mays*, 150 Ga. App. 187, 257 S.E.2d 317 (1979).

42-8-62. Discharge of defendant without adjudication of guilt.

(a) Upon fulfillment of the terms of probation, upon release by the court prior to the termination of the period thereof, or upon release from confinement, the defendant shall be discharged without court adjudication of guilt. Except for the registration requirements under the state sexual offender registry and except as otherwise provided in Code Section 42-8-63.1, the discharge shall completely exonerate the defendant of any criminal purpose and shall not affect

16-13-2. Conditional discharge for possession of controlled substances as first offense and certain nonviolent property crimes; dismissal of charges; restitution to victims.

(a) Whenever any person who has not previously been convicted of any offense under Article 2 or Article 3 of this chapter or of any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug, the court may without entering a judgment of guilt and with the consent of such person defer further proceedings and place him on probation upon such reasonable terms and conditions as the court may require, preferably terms which require the person to undergo a comprehensive rehabilitation program, including, if necessary, medical treatment, not to exceed three years, designed to acquaint him with the ill effects of drug abuse and to provide him with knowledge of the gains and benefits which can be achieved by being a good member of society. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may occur only once with respect to any person.

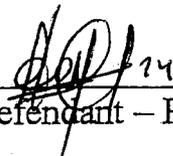
(b) Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed 12 months or a fine not to exceed \$1,000.00, or both, or public works not to exceed 12 months.

(c) Persons charged with an offense enumerated in subsection (a) of this Code section and persons charged for the first time with nonviolent property crimes which, in the judgment of the court exercising jurisdiction over such offenses, were related to the accused's addiction to a controlled substance or alcohol who are eligible for any court approved drug treatment program may, in the discretion of the court and with the consent of the accused, be sentenced in accordance with subsection (a) of this Code section. The probated sentence imposed may be for a period of up to five years. No discharge and dismissal without court adjudication of guilt shall be entered under this subsection until the accused has made full restitution to all victims of the charged offenses. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.

CERTIFICATE OF SERVICE

I hereby certify service of the enclosed motion to the Clerk of Superior Court, via U.S. Mail, with adequate amount of copies to be distributed by the Clerk's Office, to all involved parties.

This 28 day of October, 20 15.


Defendant – Pro Se

Hernán Elias Moran
Print Name
ID# 99514101
GDC# 100153330
I.D. Number

Gwinnett County Jail
2900 University Parkway
Lawrenceville, GA. 30043