COURT OF APPEALS OF GEORGIA

RETURN NOTICE

May 19, 2015

To: Mr. David R. Sabby, GDC1000851346, Wheeler Correctional Institution, Post Office Box 466, Alamo, Georgia 30411

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).

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☐ **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.

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☑ **As long as you are represented by an attorney(s), you cannot file pleadings on your own behalf. Our docket indicates you are represented by Jason Swindle and Dane Garland of the Swindle Law Group. Your attorney(s) must file a Motion to Withdraw as Counsel and it must be granted, before you can file your own pleadings in this Court. Your documents are being returned to you.**

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IN THE COURT OF APPEALS

STATE OF GEORGIA

David Randy Sabby

Appellant Case No. A15A1105

Vs

STATE OF GEORGIA

Appellee

Comes now, Appellant, David Randy Sabby, requesting permission of the Court of Appeals, to file a Pre Se Supplemental Brief.

Motion and Brief are attached herein.

Dated this 18th day of May, 2015

Respectully Submitted,

David R. Sabby #1000851346

P.O.Box 466

Alamo, GA 30411

IN THE COURT OF APPEALS

STATE OF GEORGIA

DAVID RANDY SABBY

Appellant — MOTION TO ACCEPT

Vs — Pro Se Supplemental Brief

STATE OF GEORGIA — Case No. A15A1105

Appellee

Comes now, Appellant, David Randy Sabby, to motion this court to accept his Pro Se Supplemental brief due to a hostile relationship between Appellant and Appellant's court appointed Appellate counsel and the belief of the Appellant that counsel's brief lacks accuracy and preserves all Appellant's issues.

Appellant, David Randy Sabby, motions this court to accept, for consideration with counsel's brief, his Pro Se Supplemental Brief.

Dated this 14th day of May, 2015

Respectfully Submitted,

David R. Sabby #1000851346

P.O.Box 466

Alamo, GA 30411

IN THE COURT OF APPEALS

STATE OF GEORGIA

DAVID RANDY SABBY,

Appellant

vs **Case No. A15A1105**

STATE OF GEORGIA,

Appellee

PRO SE SUPPLEMENTAL BRIEF

David R. Sabby

#1000851346

P.O.Box 466

Alamo, GA 30411

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IN THE COURT OF APPEALS

STATE OF GEORGIA

DAVID RANDY SABBY,

Appellant

vs **Case No. A1511105**

STATE OF GEORGIA,

Appellee

BRIEF FOR THE APPELLANT

PART ONE

STATEMENT OF JURISDICTION

The Court of Appeals of Georgia rather the Supreme Court of Georgia has jurisdiction of this case because this is an appeal form the final judgement of a Superior Court in a noncapital felony case and does not come within any of the areas designated to be heard before the Supreme Court under Article VI, Section VI, Paragraph III, Georgia Constitution of 1983. Jurisdiction of this category of appeal is conferred upon this Court under the provision of Article VI, Section VI, Paragraph III, Georgia Constitution of 1983.

STATEMENT OF THE CASE

Appellant was indicted by the Grand Jury of Douglas County for the offenses of incest (count 1), statutory rape (count 2), two counts of aggravated child molestation (counts 3 and 4) and two counts of child molestation (counts 5 and 6).

Appellant was an Airline Captain for AirTran Airlines from July 1999 until March 2009. Appellant lived in the State of Georgia from April 2000 until August 2007, during which time had lived in Villa Rica, Douglas County, From about March 2006 until August 2007.

Appellant relocated to the State of Minnesota, still employed with the airline, due to health reasons of his spouse, and to be near family who lived there.

Appellant's step-daughter, A.H., became very angry and disruptive, in the home, and several months after the move to Minnesota became involved in an extreme and radical new age religious organization known as Country Bible; as testified to by Denise Sabby, A.H.'s Mother, (Tat 166).

A.H. wanted out the home and made comments to a member of this organization that she had had sex with Appellant. The lady A.H. told this to was Linda Wellman. Mrs. Wellman was friends with Grant County Deputy Jon Combs and reported this to him (see Grant County Sheriff's report, hereafter referred to as GCSR).

A.H. was taken to a specialist, Dr. Larry Eisinger, to determine if these statements were, in fact, true. This was directed by Deputy Jon Combs (see GCSR). This issue will materialize later in the brief.

In January 2009, Appellant was charged, in Grant County, MN, with 14 counts of criminal sexual conduct in the third degree, one for each month the Appellant had lived in Minnesota. Appellant was not arrested, but appeared at arraignment of charges and posted bail.

In February 2009, Appellant and his Wife were seeking to have A.H. removed

from the home of Linda and Gary Wellman, to which A.H. had moved, to be part of the new age religious organization. Appellant, his Wife and Step-son attended a family court hearing on February 12, 2009. The sheriff arrested appellant for being in the courthouse while A.H. was in the building, charging appellant with a violation of an existing order for protection. Appellant was arraigned and released on his own recognizance.

In March 2009, while out on bail, Appellant met with his Step-son, Derek Gilpin, and A.H. Appellant was charged with alleged kidnapping, burglary, sexual assault, tampering and negligent fire. Appellant was arrested and did not post bail on these charges. Please note that at this time, in 2009, there we NO charges or allegations made against Appellant in the State of Georgia. The authorities in Minnesota were threatening to bring charges in the State of Georgia.

Due to the number of charges levied against Appellant, and the threat of prosecution in the State of Georgia, Appellants defense counsel pursued a "global" plea deal. This included conversations with Georgia Prosecutor Eddie Barker of Douglas County, before any indictment had even been handed down. With certain "verbal" promises given, that Georgia would not prosecute, Appellant plead guilty to one count in Grant County, MN (see Marshall letters).

Afterwhich, Georgia did not honor its verbal agreement and indicted Appellant on October 2, 2009 for the offense of incest (count 1), statutory rape (count 2), two counts of aggravated child molestation (counts 3 & 4) and two counts of child molestation (counts 5 & 6).

Between October 2009 and February 2010, a new plea agreement was negotiated with Otter Tail County, MN and the State of Georgia, wherein Appellant would plead guilty to one count of first degree criminal sexual conduct, by way of an "Alford" plea, and Georgia would allow Appellant to plead guilty to one count of incest, with a sentence to run concurrent with Minnesota and where Appellant would serve. No time would be served in Georgia (see plea transcript).

In February 2011, Appellant wrote and requested defense representation from the Douglas County Public Defender's office.

Prosecutor Eddie Barker was replaced by Prosecutor Thomas Kegley, who rescinded all plea agreements when Appellant, in the State of Minnesota, exercised his Constitutional right to appeal in Feb/March 2011.

The State of Georgia sought extradition of Appellant in September 2011 and Appellant was extradited to Georgia on April 2, 2012.

In March 2011, Attorney Julie Monaghan was assigned to represent Appellant. Counsel advised Appellant that "no deals" existed, she could not get "discovery" at that time and there was little she could do until Appellant was "presented" in Georgia.

Several months later, Ms. Monaghan left the Douglas County Public Defender's office and the case was re-assigned to Alison Frutoz, who cited the same reasons for not being able to move forward, as Ms. Monaghan had stated above. Sometime early in 2012, Ms. Frutoz was replaced by Wesley Wolverton.

On April 2, 2012, Appellant was extradited to Georgia to stand trial for the charges in the indictment. Mr. Wolverton met with Appellant, stating, "I am just now receiving some of the discovery materials and I have already suggested a plea deal to the prosecutor". Appellant was upset at this because Mr. Wolverton had done this without even consulting with Appellant. When confronted with this, Mr. Wolverton said, "You need to plead this because you will not get a fair trial in Douglas County."

Three weeks after Appellants arrival in the State of Georgia, the THIRD public defender was recusing himself from the case citing a "conflict of interest."

The case was given to a street attorney, Mr. E.D. Napier, who did "conflict" work for the public defender's office. Mr. Napier advised Appellant that we should try to "compel" the State of Georgia to honor the agreement entered into with Otter Tail County, MN. This was because, again, "you will not get a fair trial

in Douglas County with these sex charges."

A "Motion to Compel" was filed and a motion hearing was held in May of 2012. The motion was denied (see motion to compel transcript).

At the same hearing, a "Similar Acts" hearing was held. Mr. Napier had only two weeks to prepare for both the Compel and Similar Acts hearings. Two weeks later Appellant was at trial.

Appellant was tried before a jury beginning on June 4, 2012 before the Honorable David T. Emerson in the Superior Court of Douglas County. The Appellant was found guilty on all six counts. (Trial Transcript at 794-795: hereafter referred to as "T"). The trial court sentenced the Appellant to thirty years to serve on Count 1, Twenty years on count 2, thirty years on Count 3, thirty years on Count 4 to run consecutively, twenty years on Count 5 to run consecutively to Count 4 and twenty years on County 6 to run concurrently to Count 5. (Sentencing Transcript at 27).

A Motion for New Trial was filed by appellate counsel and the trial court denied said motion. Appellant timely filed a Notice of Appeal.

From his conviction and the denial of his Motion for New Trial, Appellant files this appeal.

PART ONE

STATEMENT OF THE FACTS

Grant County, Minnesota

In January 2009, Appellants' then 17 year old Step-daughter, A.H., complained to a Linda Wellman, of Country Bible Church, that she (A.H.) had had sex with her Step-father (see GCSR). Mrs. Wellman reported this to Grant County Deputy Sheriff Jon Combs. A.H. was taken to Specialist Dr. Larry Eisinger, where she reportedly stated that "nothing had happened". These reports and transcripts were withheld from discovery in both Minnesota and Georgia.

The Grant County Attorney was Appellant's Uncle, so recused himself and Special Attorney Charles Glasrud was assigned the case. He charged Appellant with 14 counts of criminal sexual conduct in the 3rd degree, once a month for each month Appellant had lived in Minnesota. Under plea negotiations, as stated in Statement of Case, Appellant plead guilty to one count and received a 41 month prison sentence.

Otter Tail County, Minnesota

On March 7, 2009, while out on bail on the Grant County matter, Appellant was alleged to have kidnapped A.H. The allegation stated that Appellant and A.H. drove to a cabin at Swan Lake and while at the cabin, Appellant sexually assaulted A.H. Appellant then gave A.H. the keys to his truck and she left. Sometime after A.H.'s departure, a fire broke out in the cabin. Appellant went to a neighboring home and called 911. Appellant was arrested at the neighboring home. In a subsequent plea, as outlined in the Statement of Case, Appellant plead guilty to one count of first degree criminal sexual conduct, as an "Alford" plea, with a contingency agreement with the State of Georgia. Appellant received a 144 month sentence, to run consecutively to the 41 month sentence in Grant Co., MN.

In October 2014, the Minnesota Court of Appeals overturned the plea conviction and in November 2014, Otter Tail County, MN, dismissed "all" charges against Appellant, in this case.

DOUGLAS COUNTY, GEORGIA

On February 24, 2009, Law Enforcement in Georgia, were called regarding a sexual assault investigation ongoing in Minnesota (T.101). This investigation was being led by Grant County Deputy Sheriff Jon Combs, who had contacted a Detective Lynn Seagraves of the Villa Rica Police Department. During the conversation with Detective Seagraves, Deputy Combs alleged possible sexual misconduct between Appellant and A.H. while the lived in Georgia (T.40). An investigation by Detective Seagraves, in Georgia, disclosed no such activity or allegation of such activity.

It should be noted that Detective Seagraves did not interview A.H. until two weeks after the Grand Jury indicted Appellant AND over five months after she filed arrest warrants for Appellants arrest. It should be further noted that there is NO evidence, on record, in the State of Minnesota that A.H. [ever] made any statement or allegation of sexual impropriety in Douglas County, Georgia, while Appellant and his family lived in Villa Rica, GA.

Appellant was tried by Jury, was convicted and was sentenced to 80 years; to serve 60 in prison.

PART TWO

ENUMERATIONS OF ERROR

1.

THE TRAIL COURT ERRED BY ADMITTING ALLEGED SIMILAR TRANSACTIONS DURING THE TRIAL.

2.

THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

3.

THE TRIAL COURT ERRD BY DENYING THE APPELLANT HIS RIGHT TO CROSS-EXAMINE DENISE SABBY ABOUT UNUSUAL AND DISTURBING ACTIVITIES THAT THE ALLEGED VICTIM WAS ENGAGED IN WHILE ATTENDING CHURCH.

4.

THE TRIAL COURT ERRED BY DENYING TRIAL COUNSEL'S MOTION FOR A CONTINUANCE.

5.

THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S EX-PARTE MOTION FOR FUNDS TO HIRE AN INVESTIGATOR.

6.

THE TRIAL COURT ERRED BY APPLYING THE PROTECTIONS OF THE RAPE SHIELD STATUTE TO A.H. AND TO WITNESSES WHO WERE NOT NAMED VICTIMS IN THE STATE'S CASE IN CHIEF; SPECIFICALLY, THE COURT APPLIED THESE PROTECTIONS TO G.S., A.B. AND N.B.

7.

THE TRIAL COURT ERRED BY NOT REQUIRING THE STATE TO PROVIDE DR. LARRY EISINGER'S MEDICAL REPORTS AFTER A BRADY VIOLATION HAD BEEN MADE DURING TRIAL.

8.

TRIAL COURT ERRED BY ALLOWING PREJUDICIAL PICTURES OF A BURNT CABIN AND TESTIMONY OF A MINNESOTA FIRE MARSHALL WHICH HAD NO RELEVANCE TO THIS GEORGIA CASE.

9.

TRIAL COURT ERRED DURING SENTENCING BY GIVING APPELLANT A CONSECUTIVE SENTENCE WHEN STATUTE PRESUMPTIVE SENTENCE IS CONCURRANT, WITHOUT THE JURY'S DETERMINATION OF "SEVERE AND AGGRAVATING" FACTORS IN VIOLATION OF BLAKELY.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

1.

THE TRIAL COURT ERRED BY ADMITTNG ALLEGED SIMILAR TRANSACTIONS DURING THE TRIAL.

At the time of Trial, in June 2012, the General Assembly has passed HB24, re-enforcing the requirement to adhere to Fed.R.P.404(B) as pertains to "character" evidence to show a "propensity" to commit a crime. Furthermore, it prohibits the use of "bent of mind" or "lustful disposition" to be used to introduce such evidence. Although this Bill would not be effectual until January 2013, all consideration should have been given in light of the passage of the Bill.

Even though the effective date of the implementation of this Bill was six months [after] the trial in this instance; this does not preclude the courts in the State of Georgia from adhering to clearly established Federal law.

O.G.C.A. ~24-2-2, which was the law at the time of this case, states: [t]he general character of the parties and especially their conduct in other transactions are irrelevant matters unless the nature of the actions involves such character as renders necessary or proper an investigation of such conduct. During trial, alleged independent acts were admitted, not to show proof of motive, intent, identity, plan, prior difficulties, absence of mistake or bent of mind, but to show the jury that the Appellant had previously acted in such a manner and was continuing to do so, that is, that he had a propensity to act in such a way.

G.S.

The court allowed this witness to recount that the Appellant had, in the past, provided her with alcohol (T.285). The trial court also allowed G.S. to answer yes

to the question of whether the defendant had had sex with her (T.288).

A.B.

On page 318 of the trial transcript, this witness stated that the Appellant got into bed with her when she was 13, while in North Dakota, and had touched her vagina. She went on to state that she told him to stop and he did. The witness also stated that the Appellant had later written a letter to her, apologizing for the incident, although the letter doesn't actually say such a thing.

N.B.

This witness indicated that she was gest friends with the alleged victim in this case, and that while the Appellant was living in Villa Rica, he rubbed her shoulders, legs and one breast while they were sitting together on the couch. This witness also stated that the Appellant gave her pain killers and alcohol on occasion (T.361).

S.B.

This witness testified that when the Appellant was a prepubescent child of about 11-13 years of age, and this witness, who was in elementary school and about 5-7 years of age, that the Appellant forced her to perform oral sex on him (T.655). During the same ages, the witness stated that the Appellant penetrated her anus and vagina with his fingers. This allegedly occurred at some time in the mid 1970's.

Independent crimes are admissible if they are relevant in the subject case for some legitimate purpose other than showing the defendant's "bad character or a propensity to commit a certain type of crime." Guyton v State, 272 Ga. 529, 531 S.E.2d 94 (2000).

All of these similar transactions consisted of prejudicial and damaging testimony which prejudicially assisted the jury in reaching a verdict. Because of this, these similar transactions witnesses should have been thoroughly investigated and thoroughly cross-examined. This issue will materialize later in this brief.

It is important to keep in mind that relevant evidence may be excluded if its probative value is substantially outweighed by the prejudicial effect of such evidence. "Evidence of independent crimes is never admissible unless its relevancy to the issues on trial outweighs the prejudice it creates." *Brunson v. State*, 428 S.E.2d 428, 207 Ga. App. 523 (Ga. App., 1993).

The 11th circuit has held that, when weighing whether evidence is more probative than prejudicial, a "trial court must engage in a commonsense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic offenses and the charged offense as well as temporal remoteness." *U.S. v. Calderon*, 127 F.3d 1314 (C.A.11(Fla.), 1997). In this case it would have been impossible for a juror to judge this case fairly after the entry of such evidence.

Additionally, S.B.'s testimony should not have been admitted on additional grounds. The allegations incident occurred over 35 years ago. The time lapse between then and now is so great that the remoteness of it alone should have precluded it being entered. *Gov't of the V.I. v Pinney*, 27 V.I. 412 (3rd Cir., 1992).

Furthermore, it is incumbent upon the trial court to ensure that similar acts meet all three prongs of the Williams test to be admitted as similar acts transactions. One of those "prongs" is that "the allegations can reasonably be proven to be true". There is no evidence to remotely support these claims that have arisen in each of these witnesses.

-S.B. is over 35 years old and at an age of 5-7, Appellant would have only been 11-13 years old.

-A.B. was over 14 years old and where evidence exists, she gave conflicting stories to Minnesota Law Enforcement from what she testified to in the Georgia trial. A.B. stated to Grant County Deputy Sheriff Jon Combs that "....he did not touch my vagina". Further, A.B. made claims against Appellant that he had done this to A.B.'s Sister and another Cousin which turned out to be false. The Sister and Cousin both stated that A.B.'s statements were not true. A.B.'s Sister, Kari Peters, filed an Affidavit of Statement, stating that this allegation was not true. A.B.'s testimony was not credible.

-G.S. had never made any allegations against the Appellant prior to her testimony at trial. There was further evidence, that could have been submitted to the court, that she was sexually involved, at the time she claimed events occurred with Appellant, with Appellants Step-son, Derek Gilpin. This testimony was prohibited by wrongful application of rape shield.

-N.B. was of legal age of consent, when and if any contact took place between her and Appellant. There was no showing that this was "illegal" activity as the prosecutor outlined he could show to have her testimony admitted (see Similar Acts transcript). Judge Emerson clearly stated that "legal activity, whether prevalent or not, will not be admitted as evidence".

None of these witnesses met the three prong test of similar acts and should not have been admissible at trial.

2.

THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

At the very least, a criminal defendant possesses a Sixth Amendment right to

"reasonable effective" legal assistance. *Strickland v. Washington*, 466 U.S. 668,687 (1984). To show constitutionally ineffective assistance of counsel, an Appellant must establish that (1) counsel's representation was deficient and (2) counsel's deficient representation prejudiced him. *Strickland*, 466 U.S. at 690-92. "To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness." *Brown v. State*, 288 Ga 902 (2011).

An Appellant must show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. In regard, the Appellant must overcome the presumption that the challenged action "might be considered sound trial strategy." Id. At 689. Whether a "strategy" might have been reasonable is an objective inquiry; courts do not ask whether the trial attorney "actually made a thought-out decision," but ask "whether some reasonable attorney could have acted that way". Chandler v. United States, 218 F.3d 1305n. 14 (11th Cir. 2000).

Under the second prong, an Appellant "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different. *Towry v. State*, 304 Ga. App. 139 (2010). A reasonable probability is a "probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694.

Therefore, the Appellant has the burden of affirmatively proving prejudice.

If not "clearly erroneous", the appellate courts will uphold a trial court's factual determinations with respect to claims of ineffective assistance of counsel. A trial court's legal conclusions in this regard, however, are reviewed de novo. *Tyner v. State*, 313 Ga. App. 557 (2012).

Trial Counsel did not have enough time to prepare for trial.

Meeting with a client, thoroughly reviewing the evidence with the client, and providing sound legal advice are paramount in being effective as trial counsel in a criminal case. There is no specified amount of time which counsel must spend in preparation for trial; each situation must be judged upon its own circumstances and in light of its own degree of complexity. *Williams v. State*, 219 Ga. App. 167 (1995).

However, it has been held that a defendant is deprived of his right to effective counsel with the attorney is not prepared to try the case, regardless of the competency of counsel. *United States v. Woods*, 487 F.2d 1218 (5th Cir. 1973).

During the Motion for New Trial, (hereinafter referred to as "MFNT"), trial counsel testified that this was the first case he had ever tried which involved alleged sex crimes. (MFNT at 9). Trial counsel also said that he was appointed to this case in April 2012 and the case was

tried within a month and a half of his appointment; on June 4, 2013. (MFNT at 11).

There was an interstate compact agreement between the State of Georgia and the State of Minnesota, which required the case to be tried within a certain time period; 120 days, although Minnesota Statute ~629.294 Interstate Agreement on Detainees, Subd. 1, Article IV, Para (c), clearly states "....but for good cause shown in open court, the prisoner or is counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Trial counsel, due to the severity of the alleged crimes and the volume of information continued within the case, repeatedly asked for continuances to prepare, all of which were denied. (MFNT at 13).

Trial counsel also spoke to a newspaper reporter in Douglas County and was quoted in the Douglas County Sentinel as saying, "[j]ust the number of witnesses

and the volume of information associated with this case, there's no way I'm going to be ready by June 4th." (MFNT at 14). Due to trial counsel not being given enough time to prepare, he failed to take certain steps, an attorney with more time and experience with criminal sex cases, would have taken.

For example, with more time, trial counsel could have thoroughly investigate other allegations against the Appellant, which were alleged to have occurred outside Douglas County and were introduced during trial (MFNT at 15). Trial counsel also may have, with more time, been able to hire an expert with experience in child forensic interviews to attack the state's handling of interviews during the investigation. (MFNT at 16). Trial counsel, also, if given the time, would have been able to identify and investigate other witnesses, both in and outside the state, to support the Appellant's version of events. (MFNT at 16).

Trial counsel failed to obtain an investigator to assist him in preparation of trial.

Prior to the beginning of trial, counsel filed an untimely ex-parte motion for funds to hire and investigator. This motion was filed due to the sheer number of witnesses in the case and the limited time available to investigate the facts. (MFNT at 16). This motion was denied due to its untimeliness. (T.3). Thereafter, trial counsel failed, for unknown reasons, to hire an investigator to assist him in preparation for trial. Such an investigator would have been an invaluable tool in preparing for this complex and time intensive case.

Trial counsel failed to call a number of fact and character witnesses during trial.

Prior to the start of trial, the Appellant provided trial counsel with numerous fact and character witnesses. (MFNT at 18). However, trial counsel failed to call any of these witnesses during trial. During the MFNT, trial counsel testified, "I talked with maybe having his brother come down, things of that nature. They didn't want to come; maybe his mother." (MFNT at 19). However, when both the Appellant's brother and mother were called during the MFNT, they both indicated a willingness to appear on behalf of the Appellant. The Appellant's mother went

so far as to purchase her airplane tickets, to appear, and was told by trial counsel,not to make the trip. (MFNT at 102). According to the Appellant's mother, trial counsel indicated that her appearance would be "pointless". (MFNT at 102). Later, during the MFNT, the Appellant's mother presented testimony that, if she had been called during the original trial, she may have assisted the Appellant. That testimony included that the Appellant had a good reputation at school, during his youth, and was active in the community. (MFNT at 104). Appellant paid his own way through flight school and became a successful airline pilot (MFNT at 104). Appellant is an honest and helpful person and is known as such in his community. (MFNT at 105). Appellant was and is a good father. (MFNT at 105). This information was critical, good character evidence of the accused and would have been considered by the jury.

Further, the Appellant's brother, Gary Sabby, also testified during the MFNT. When Mr. Sabby was asked why he didn't appear at the trial, he testified that trial counsel informed him that his testimony would be of no assistance to the Appellant. When asked, Mr. Sabby indicated that, if he had been informed he was needed, he would have been "happy to come." (MFNT at 116). Mr. Gary Sabby also went on, during questioning, to say that if he had been called during the trial, he would have assisted the Appellant. Mr. Sabby stated that is brother is a good father (MFNT at 115); is helpful to his neighbors (MFNT1t 115) and is a man of responsibility and character (MFNT at 115).

Much like the unheard testimony of the Appellant's mother, this testimony could have had a vital impact on the trial where credibility of witnesses was a significant issue.

Furthermore, both of these witnesses had testimony which could have been impeaching evidence to A.H. and S.B. This testimony was not allowed at the MFNT by the prosecutor.

Additionally, there were numerous other witnesses, both fact witnesses and character witnesses, whom the Appellant presented to trial counsel, but were not called. These witnesses included individuals in both Minnesota and Georgia who, if called, would have been able to impeach the testimony of the similar transaction witnesses called by the state. (MFNT at 77).

Trial counsel failed to object when A.B., a similar transaction witness, testified about a letter she received from the Appellant "while he was in prison."

As stated above, A.B. was called by the State to present testimony regarding an alleged prior similar transaction. During her testimony, A.B. was asked whether she had received correspondence from the Appellant regarding the alleged incident. Ms. Boswell answered, "He wrote me a letter, yes, when he was in prison." (T at 327).

Trial counsel made no objection to this improper introduction of the Appellant's bad character. Therefore, the issue was not properly preserved for appeal.

At the very least, the jury should have been instructed to ignore the witnesses' statement. However, no instruction was given because no objection was made. See *Blanch v. the State*, 306 Ga.App. 631, 703 S.E.2d 48 (Ga. App., 2010).

As is stated above, to show constitutionally ineffective assistance of counsel, an Appellant must establish that (1) counsel's representation was deficient and (2) counsel's deficient representation prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 690-692 (1984).

Trial counsel's failure to prepare, to hire an investigator, to properly object to harmful similar transaction evidence being entered, to fail to object to prejudicial "fire" pictures and testimony of the Minnesota Fire Marshall, to fail to call

relevant and helpful witnesses and to properly object to a witnesses' reference to the Appellant being incarcerated, presents a clear case where counsel's representation was deficient and that deficiency cause prejudice to the Appellant. It is a "reasonable probability that, but for counsels unprofessional errors, the result of the proceedings would have been different." *Towry v. State*, 304 Ga. App. 139 (2010). A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Prejudice is, therefore, established in the case before you.

3.

THE TRIAL COURT ERRED BY DENYING THE APPELLANT HIS RIGHT TO CROSS EXAMINE DENISE SABBY ABOUT UNUSUAL AND DISTURBING ACTIVIES THAT THE ALLEGED VICTIM WAS ENGAGED IN WHILE ATTENDING A CHURCH.

During trial, there was a testimony indicating that A.H. attended an extreme and radical new age organization in Minnesota, named Country Bible Church. While cross-examining Denise Sabby, the Appellant's wife, trial counsel began to question Mrs. Sabby regarding this organization. When trial counsel asked Mrs. Sabby "have you ever witnessed anything irregular or extraordinary....at Country Bible Church," the State objected based on relevancy. The trial court held an bench conference to discuss the matter. During that conference, trail counsel made it clear he was asking the question to determine if the strange activities at the church possibly led to the allegations from the alleged victim. (T at 166). The trail court sustained the State's objection based on the Georgia Constitution prohibiting questions about religious belief.

However, trial counsel was asking the question, not because he was concerned with the alleged victim's religious beliefs, but because he wanted the jury to hear that participation in that particular organization may have led to the alleged victim's allegations against the Appellant. Trial counsel was attempting to

establish other possible causes for the allegations by the alleged victim. This was not an attack against her religion or religious beliefs.

Hall v. State. Ga. App. 523, 396 S.E.2d 271 (1990), holds that "the evidence regarding other possible causes of (an alleged victim's) behavior and injuries was necessary to prevent the jury from reaching an unwarranted conclusion that the only possible explanation for the existence of behavior consistent with the child sexual abuse accommodation syndrome was that the victim had been molested by Appellant."

Additionally, "The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him." OCGA ~24-9-64.

The right of cross-examination is a substantial right, the preservation of which is essential to the proper administration of justice and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy. This right should not be abridged. James v. State 580 S.E.2d 334 260 Ga APP. 536.

In this case, testimony regarding the behavior of the members of this organization, and the activities that transpired there, were important and necessary to allow the jury to hear that there was another possible reason for the allegations of the alleged victim. The jury could have concluded that the allegations were not caused by the Appellant's actions, but were caused by the influence of the church, its members, as well as others upon the alleged victim. Because the trail court refused to allow this line of questioning, the jury was precluded from hearing this evidence.

4.

THE TRIAL COURT ERRED BY DENYING TRIAL COUNSEL'S MOTION FOR A CONTINUANCE.

As stated above, trial counsel was appointed to this case in April 2012. The case was tried within a month and a half of that appointment, on June 4, 2012. (MFNT at 11). In between these dates, a motion to compel and other pre-trial hearings were held. Trail counsel repeatedly asked for continuances, to prepare, which were all denied. (MFNT at 13). Since trial counsel was not given enough time to prepare, he failed to property investigate certain matters later brought up against the Appellant, failed to hire an investigator or expert witness and failed to call certain witnesses. If given more time, trial counsel would have been able to prepare a defense that would have provided the Appellant a fair trial.

"[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Fretag*, 348 U.S. 3, 75 S.CT. 1, 99 L.Ed. 4." *Ungar v. Sarafite*, 376 U.S. 575, 11 L.Ed.2d 921, 84 S.Ct. 841 (1964). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trail judge at the time the request was denied." *Nilva v. United States*, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415; *Torres v. United States*, 270 F.2d 252. "undue haste in the administration of the criminal law is as much to be condemned as unnecessary delay. The true course lies between the two extremes." *Harris v. State*, 119 Ga. 114, 115, 45 S.E. 973, 974 (1903).

Trial counsel, twice, asked for continuances in this case and was twice denied. The reasoning for such denials was based on the interstate detainer agreement and the 120 day time limit the State of Minnesota place on the State of Georgia to try the Appellant. IF the Appellant were not tried within that time period, the State of Georgia would have forfeited the right to try him at all. On numerous

occasions, trial counsel attempted to verbally waive that time limit, but he was not allowed to. The trial court further failed to properly apply the provisions of the interstate detainer agreement which clearly allowed for the "necessary and reasonable" continuance. (See Minn. Stat. ~629.294, Subd 1, Article IV, Para (c)).

This interstate detainer agreement cannot trump the United States Constitution. The Appellant had a Constitutional right, under the Sixth Amendment, to effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed2d 333 (1980). Here, the trial court, incorrectly applied and deferred to the interstate detainer agreement rather than the Constitution. The two requests for continuances should have been granted, allowing trial counsel proper time to prepare his defense, particularly in light of trial counsel's willingness to waive the 120 day time limit.

5.

THE TRIAL COUT ERRED BY DENYING THE APPELLANT'S EX-PARTE MOTION FOR FUNDS TO HIRE AN INVESTIGATOR.

Prior to the beginning of the trial, trial counsel submitted an ex-parte motion for funds with which to hire an expert investigator. Trial counsel intended on hiring an investigator to assist in general preparation for trial as well as interviewing the numerous witnesses of the State as well as witnesses the Appellant had identified. Some of these defense witnesses lived out of state. Many of these witnesses lived in Minnesota. The motion was denied and no funds were dispersed to trial counsel to obtain such an investigator.

In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53(1985), the Supreme Court set forth the fundamental principal regarding the distribution of expert funds. "[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to insure that the defendant has a fair opportunity to present his defense. This elementary

principal, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal, where, simply as a result of poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which liberty is at stake."

While *Ake* primarily dealt with issues regarding mental health experts, this State has used the reasoning espoused in Ake to apply to experts and investigators who had different areas of expertise to assist indigent defendants. See also, *Thornton v. State*, 255 *Ga.* 434 (1986); *Brooks v. State Ga.* 562 (1989).

In this case, the Appellant, who was indigent, was not given opportunity to fairly present his defensed due to trial court's ruling against the dispersal of funds to hire and investigator.

In light of the case load that Mr. Napier stated he had, and the short amount of time given him to prepare for trial, it was unreasonable for the trial court to deny his request for funds, not only to hire an investigator, but for expert witnesses, thus rendering to the Appellant an unfair trial.

6.

THE TRIAL COURT ERRED BY APPLYING THE PROTECTIONS OF THE RAPE SHIELD STATUTE TO WITNESSES WHO WERE NOT NAMED VICTIMS IN THE STATE'S CASE IN CHIEF, SPECIFICALLY, THE COURT APPLIED THESE PROTECTIONS TO G.S. AND N.B.

Georgia's rape shield statute, O.G.C.A. ~ 24-2-3, provides that in any prosecution for aggravated child molestation, evidence relating to the past sexual behavior of the **complaining witness** (Emphasis supplied) shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses. The trial court, in this case, applied the protections of this code

section to three witnesses who were not complaining witnesses as the plain language of the statute provides. (Three of the similar transaction's witnesses.)"[T]he rape shield statute was enacted to protect a...**victim** (Emphasis supplied) by excluding evidence which might reflect on her character without contributing to the issues of the accused's guilt or innocence." Parks v. State, 147 Ga.App. 617, 249 S.E.2d 672 (1978) (Emphasis added). The trial court forbade trial counsel from asking these witnesses questions relating to their past sexual behavior which trial counsel intended to use to impeach them. By refusing to allow such questioning, the trial court misapplied the Rape Shield Statute and violated the Appellant's Sixth Amendment right to confront witnesses against him.

Furthermore, the court misapplied the Rape Shield Statute to A.H. A.H. admitted, in statements in both Minnesota and Georgia that she had been sexually involved with a man, known only as "Travis" during this same period of time in Douglas County. At the time, A.H. was 15 years old and "Travis" was 21. This would be child abuse, aggravated child abuse and statutory rape upon A.H. by "Travis".

Hall v. State, 196 Ga.App. 396 S.E.2d 271 (1990), hold that "the evidence regarding other possible causes of (an alleged victim's) behavior and injuries was necessary to prevent the Jury from reaching the unwarranted conclusion that the only possible explanation for the... existence of behavior consistent with the child sexual abuse accommodation syndrome was that the victim had been molested by Appellant."

In Hall, the Court of Appeals held that "failure to allow such testimony was "reversible error."

7.

Trial Court erred by not requiring the State to provide Dr. Larry Eisinger's medical reports after a Brady violation had been made during trial.

Georgia Rules of Discovery require that the prosecution turn over, to defense counsel, material in its possession, including information the prosecutor "could have known" or known by law enforcement, including information favorable to defense. The U.S. Supreme Court has upheld, in Brady v Maryland 373 U.S. 87 (1963), that failure to disclose discoverable information is a violation of a defendant's right to a fair trial.

The Brady court has established a three prong test to determine if, in fact, a Brady violation has occurred.

1. The information was willfully withheld
2. The information was exculpatory or impeachment evidence
3. The withholding of evidence was prejudicial to defendant

During trial, Defense Counsel cross examined A.H. A.H. stated that she had been taken to Dr. Larry Eisinger, and when asked by Dr. Eisinger if any sexual conduct had taken place between her and Appellant, A.H. stated "no" (see trial transcript).

During cross examination of Grant County Deputy Sheriff Jon Combs, Deputy Combs stated that the medical reports should have been in the discovery file given to the Georgia Prosecutor (see trial transcripts).

Defense Counsel filed an objection with the court, citing a Brady violation and requesting a directed verdict of a mis-trial. The motion was denied. The court made no attempt to correct the Brady violation which had occurred (see trial transcripts). All three prongs of Brady were met in the instant case.

1. The information was known to the prosecution and willfully withheld from defense.
2. The information was exculpatory. A.H. told the specialist that nothing had happened. Furthermore, without knowing the full context of the interview, more disclosure to tis specialist may have been made that could have also been exculpatory in nature, as well as may have been impeaching to her testimony at trial.
3. The failure of the Jury to hear all the evidence of this interview prejudiced the defendant; for if one Juror could have been persuaded by such testimony, the outcome of the trial would have been different.

This was a clear violation of well-established Federal law pursuant to Brady v Maryland, 373 U.S. 87 (1963), and is reversible error.

8.

Trial court erred by allowing prejudicial pictures of a burnt cabin and testimony of a Minnesota Fire Marshall, which had no relevance to this Georgia case.

The trial court, during the Pre-Trial Similar Acts Hearing, allowed the "subsequent" convictions in Minnesota, to be brought in as "prior difficulties" with limited purpose. An instruction was given to the Jury, somewhat after Prosecution had introduced the evidence, stating that the purpose was to give "credibility" to the alleged victim "if it did so" (see Similar Acts Hearing transcripts and Trial transcripts).

Several times, during the trial, the State presented pictures of the burnt out cabin, to the Jury. Objection was made as to the admissibility of "any" of the

Minnesota events during the Similar Acts Hearing, but not at trial. Appellant was never charged, in the State of Minnesota, with arson, which is a crime that requires criminal intent to destroy property.

Appellant was charged with "negligent fire" for allowing a fire to get out of control. This charge was dismissed. The fire was attributed to a kerosene heater used in the cabin. The State called a Minnesota Fire Marshall to testify. The pictures were used, extensively, during his testimony. Neither the pictures, or the Fire Marshall's testimony had any relevance to the case in Georgia. The State made no showing that these picture or testimony were being admitted to show proof of "motive, intent, destiny, plan, prior difficulties or absence of mistake", as required by O.C.G.A.~24-2-2.

The State may try to say this was part of prior difficulty with A.H., but this has no merit since A.H. had left the area prior to the break out of the fire. According to her statement to Law Enforcement in Minnesota, A.H. had no idea that a fire had even occurred (see Otter Tail County interview of Jon Combs).

The prejudice of these pictures and testimony so far outweighed the probative value; their admission had no relevance to this case. The Trial Court erred by allowing the admissibility of this, rendering to the Defendant, an unfair trial.

This Court has the supervisory power to intervene, absent objection made by counsel to preserve the issue, when defense counsel's actions are so deficient and egregious as to cause Appellant harm in the Judicial process. Thus is the case herein.

Trial Court erred during sentencing by giving Appellant a consecutive sentence when statue presumptive sentence is concurrent; without the Jury's determination of "severe and aggravating" factors in violation of Blakely.

O.C.G.A.~ 17-10-7(a) deals with sentencing when multiple charges are tried in a single trial. The statute states that if defendant is convicted of all charges in one

trial the presumptive sentence is a "concurrent" sentence. The last five words in this statute state "...unless otherwise specified herein".

These five words are unconstitutional pursuant to Blakely v Washington, 124 S.Ct. 2531-2543 (2004), in that they allow a judge to depart from the presumptive sentence, as outlined in Legislative statute, without a Jury's finding of severe or aggravating factors allowing such a departure. The Blakely Court held that any "departure" from a Legislative provision mandating a concurrent sentence requires a finding, by a jury of peers, of severe or aggravating factors that would warrant such a departure. Consecutive sentences, when a concurrent sentence is presumptive, is a "departure" pursuant to Blakely.

In the instant case, this was "single course of conduct" alleging the same individual. All the charges occurred, allegedly, over a 15 month period. All charges were tried in a single court trial. Therefore, pursuant to the stature, the sentence should have been concurrent to one charge. Defendant did not "waive" any right to a Blakely hearing, and the Judge have no showing of any severe or aggravating factors to warrant such a departure.

The sentence was illegal pursuant to clearly established Federal law under Blakely v Washington, 124 S.Ct. 2531-2543 (2004).

9.

TRIAL COURT ERRED DURING SENTENCING BY GIVING APPELLANT A CONSECUTIVE SENTENCE WHEN STATUTE PRESUMTIVE SENTENCE IS CONCURRENT, WITHOUT THE JURY'S DETERMINATION OF "SEVERE AND AGGRAVATING" FACTORS, IN VIOLATION OF BLAKELY.

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Therefore, pursuant to the statute, the sentence should have been concurrent to one charge. Defendant did not "waive" any right to a Blakely hearing and the Judge gave no showing of any "severe or aggravating" factors to warrant such a departure.

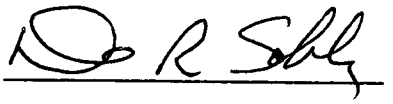
The sentence was illegal pursuant to clearly established Federal law under Blakely v. Washington, 124 S.Ct. 2531-2543 (2004).

Conclusion

The violation of Appellant's Sixth Amendment Right to Effective Counsel, the violation of Appellant's Fourteenth Amendment Right to Due Process and a Fair Trial, for the reasons stated above, and in the interest of justice, Appellant, respectfully, requests this Court to reverse the Trial Court's verdict as contrary to law and facts.

Dated this 14th of May, 2015.

Respectfully Submitted



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Certificate of Service

I hereby certify that I have, this day, served a copy of the Pro Se Supplemental Brief on opposing counsel, by placing a true copy of the same, in the ~~United States mail~~, UPS. with proper postage affixed and addressed to:

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