

DOCKET NO: 08-9230

IN THE SUPREME COURT OF THE UNITED STATES

DARRELL BROWN,

Petitioner in Certiorari,

v.

STATE OF GEORGIA,

Respondent in Certiorari.

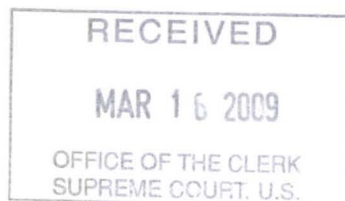
ON PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT



PETITION FOR A WRIT OF CERTIORARI

COUNSEL OF RECORD:

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Attorney for Petitioner



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CCBY

QUESTIONS PRESENTED

1. Whether the recidivist exception set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) remains viable under this Court's evolving Sixth Amendment jurisprudence as set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005) and *Cunningham v. California*, 549 U.S. 270 (2007), and if not, whether it should be overruled; and
2. Whether Georgia's Two Strike law, O.C.G.A. §17-10-7(b), which mandates the imposition of the sentence of life without parole for the conviction of certain violent felonies, upon a finding of recidivism by the trial court, violates Petitioner's Sixth Amendment right to a trial by jury in that the trial court, not a jury, finds the predicate fact of recidivism which is the only basis for the imposition of the sentence of life without parole.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS – APPENDIX	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	8
REASONS TO GRANT THE WRIT	11
CONCLUSION	22

TABLE OF CONTENTS – APPENDIX

	Page
Order on Motion for Reconsideration and Revised Opinion	1
General Demurrer; Amended General Demurrer and Order	8
Second Amendment to General Demurrer	15
Verdict and Redacted Indictment	18
Transcript of Sentencing Hearing	22
Judgment, Sentence and Final Disposition	27
Motion for New Trial and Amended Motion for New Trial	31
Brief In Support on the Issue of Sentencing	36
Motion for New Trial Hearing Transcript	48
Order on Motion for New Trial	64
Federal Question Portion of Brief before the Georgia Supreme Court	66
Original Indictment	75
Certified Conviction for Armed Robbery from Louisiana	79
1777 Constitution of the State of Georgia	88
1777 Georgia Statute of Reception	98

TABLE OF AUTHORITIES

	Page
<u>Cases:</u>	
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998)	i, 9, 11, 13, 14, 16
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	i, 11, 13, 15, 17
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004)	i, 11, 18, 19
<i>Cunningham v. California</i> , 549 U.S. 270 (2007)	i, 11, 12
<i>Jones v. United States</i> , 526 U.S. 227 (1999)	16, 17
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	15, 20
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	12, 16
<i>Walton v. Arizona</i> , 497 U.S. 639 (1990)	20
<u>Constitutions:</u>	
United States Constitution Amendment VI	2
The Constitution of the State of Georgia, ¶XLI (1777)	19
The Constitution of the State of Georgia, ¶XLIII (1777)	19
The Constitution of the State of Georgia, ¶LVI (1777)	19
<u>Statutes:</u>	
O.C.G.A. §17-10-7(b)	i, 2, 8, 12, 13
O.C.G.A. §17-10-6.1	3, 8, 12
O.C.G.A. §17-10-2(a)(1)	4
O.C.G.A. §16-10-41	4

	Page
O.C.G.A. §16-5-40	6
Georgia Act No. 236, An Act to Extend and enforce the authority . . . (1777)	98

OPINION BELOW

Darrell Brown v. State of Georgia, Georgia Supreme Court Docket No. S08A1878, November 3, 2008, *Motion for Reconsideration Denied*, December 15, 2008, with substitute opinion. App. p. 3.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a). The opinion upon which review is sought was issued by the Georgia Supreme Court, the highest court for the State of Georgia. The Petitioner calls into question whether O.C.G.A. §17-10-7(b) is repugnant to the Sixth Amendment of the United States Constitution. This Petition is timely filed in that the opinion in question was issued on November 3, 2008 with a motion for reconsideration denied on December 15, 2008. The questions presented here were properly raised below and ruled upon by the trial court and the Georgia Supreme Court.

STATUTORY PROVISIONS

U.S. Const. Amend. VI.:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

O.C.G.A. §17-10-7(b):

- (1) As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1.
- (2) Any person who has been convicted of a serious violent felony in this state or who has been convicted under the laws of any other state or of the United States of a crime which if committed in this state would be a serious violent felony and who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death shall be sentenced to imprisonment for life without parole. Any such sentence of life without parole shall not be suspended,

stayed, probated, deferred, or withheld, and any such person sentenced pursuant to this paragraph shall not be eligible for any form of pardon, parole, or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or any other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the sentence of life imprisonment without possibility of parole, except as may be authorized by any existing or future provisions of the Constitution.

O.C.G.A. §17-10-6.1:

(a) As used in this Code section, the term "serious violent felony" means:

(1) Murder or felony murder, as defined in Code Section 16-5-1;

(2) Armed robbery, as defined in Code Section 16-8-41;

(3) Kidnapping, as defined in Code Section 16-5-40;

(4) Rape, as defined in Code Section 16-6-1;

(5) Aggravated child molestation, as defined in subsection (c) of Code Section 16-6-4, unless subject to the provisions of paragraph (2) of subsection (d) of Code Section 16-6-4;

(6) Aggravated sodomy, as defined in Code Section 16-6-2; or

(7) Aggravated sexual battery, as defined in Code Section 16-6-22.2. . . .

The balance of this code section is set out in the Appendix, *supra*.

O.C.G.A. §17-10-2(a)(1):

Except in cases in which the death penalty or life without parole may be imposed, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the defendant, or the absence of any prior conviction and pleas.

O.C.G.A. §16-10-41:

(a) A person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.

(b) A person convicted of the offense of armed robbery shall be punished by death or imprisonment for life or by imprisonment for not less than ten nor more than 20 years.

(c)(1) The preceding provisions of this Code section notwithstanding, in any case in which the defendant commits armed robbery and in the course of the commission of the offense such person unlawfully takes a controlled substance from a pharmacy or a wholesale druggist and intentionally inflicts bodily injury upon any person, such facts shall be charged in the indictment or accusation and, if found to be true by the court or if admitted by the defendant, the defendant shall be punished by imprisonment for not less than 15 years.

(2) As used in this subsection, the term:

(A) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through V of Code Sections 16-13-25 through 16-13-29.

(B) "Pharmacy" means any place licensed in accordance with Chapter 4 of Title 26 wherein the possessing, displaying, compounding, dispensing, or retailing of drugs may be conducted, including any and all portions of any building or structure leased, used, or controlled by the licensee in the conduct of the business licensed by the State Board

of Pharmacy at the address for which the license was issued. The term pharmacy shall also include any building, warehouse, physician's office, or hospital used in whole or in part for the sale, storage, or dispensing of any controlled substance.

(C) "Wholesale druggist" means an individual, partnership, corporation, or association registered with the State Board of Pharmacy under Chapter 4 of Title 26.

(d) Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

O.C.G.A. §16-5-40:

(a) A person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

(b) A person convicted of the offense of kidnapping shall be punished by:

(1) Imprisonment for not less than ten nor more than 20 years if the kidnapping involved a victim who was 14 years of age or older;

(2) Imprisonment for life or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life

imprisonment, followed by probation for life, if the kidnapping involved a victim who is less than 14 years of age;

(3) Life imprisonment or death if the kidnapping was for ransom; or

(4) Life imprisonment or death if the person kidnapped received bodily injury.

(c) Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

STATEMENT OF THE CASE

Petitioner was convicted on two counts of armed robbery, three counts of kidnapping and one count of possession of a firearm during the commission of a crime. Upon the conviction, the trial court received evidence of Petitioner's criminal history including a certified conviction for armed robbery in Louisiana. App. p. 78. For possessing a prior conviction for a "serious violent felony", O.C.G.A. 17-10-6.1(a), the trial court was mandated to invoke the special sentencing provisions set forth in O.C.G.A. §17-10-7(b). Petitioner received five life sentences without parole and a term of fifteen years for the weapons count consecutive. App. p. 27. Had Petitioner been sentenced on the facts found solely by the jury, the maximum sentence available to the trial court was for a term of life for each of the armed robbery counts and twenty years to serve for each of the kidnapping counts. And the Petitioner would be eligible for parole.

The crimes occurred on June 16, 2005. The indictment was filed on July 15, 2005. App. p.75. Counsel waived arraignment and filed a General Demurrer challenging the constitutionality of O.C.G.A. §17-10-7(b). App. p.8. The Demurrer raised Eighth Amendment grounds, violation of separation of powers and , " Section 17-10-7 also violates the Defendants due process rights to a jury trial, in that the sentence will be based, in part, on facts not determined by a jury rendering the conviction which results in a sentence of life without parole." *Id.* An

Amended General Demurrer was filed prior to the motions hearing. The amended demurrer was heard and overruled on August 18 – 19, 2005. App. p.14.

Trial began on September 19 and ended September 22, 2005. Prior to trial, counsel renewed his attack on Section 17-10-7(b) by filing a Second Amendment to General Demurrer which raised again the federal question and also alleged adequate and independent state grounds. App. p. 15. Upon the verdict of guilty, prior to sentencing, counsel again argued the unconstitutionality of Section 17-10-7(b) and was overruled. App. pp. 22.

On September 23, 2005, Petitioner filed a motion for new trial which was amended on December 20, 2007 and heard on December 21, 2007. App. p. 31. Amended grounds in the motion for new trial included the federal and state grounds attacking the constitutionality of Section 17-10-7(b) as a violation of the Petitioner's right to trial by jury. Counsel also filed a brief in support of his motion. There, the recidivist exception outlined in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) was acknowledged but it was also stated, "[W]e contest the continued viability of the *Almendarez* exception and take exception to its holding. We believe it must be overruled". App. p. 41. The motion for new trial was overruled and appeal to the Georgia Supreme Court followed. App. p. 64.

On appeal, Petitioner raised three questions for review. The second issue renewed the federal grounds attacking Section 17-10-7(b) as unconstitutional in

violation of Petitioner's Sixth Amendment right to a right to trial by jury. App. p. 67. In rejecting this argument, the Georgia Supreme Court cited *Almendarez-Torres*, 523 U.S. 224 (1998), as controlling and quoted *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. App. p. 6. (emphasis original). The Georgia Supreme Court held the trial court did not err in overruling the General Demurrer.

Petitioner filed a request for a Motion for Reconsideration, which was denied on December 15, 2008. App. p. 1. With the denial, the Georgia Supreme Court issued a slightly revised opinion making clear their holding included the state as well as the federal grounds.

Having raised the federal issue at the earliest opportunity, and receiving rulings from the trial court and the Georgia Supreme Court on the issue raised, Petitioner now brings the Sixth Amendment issue to this Court for consideration.

REASONS TO GRANT THE WRIT

This case presents the Court with an opportunity to revisit its holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) in light of its seminal holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. Further, unlike *Almendarez-Torres*, the Sixth Amendment issue presented herein involves the right to have a jury determine all the facts necessary for the imposition of a criminal sentence. The pleading requirements of the Fifth Amendment are not implicated, nor raised in this matter. Thus, this case offers the Court the ability to address the ambivalence it expressed in *Apprendi* with respect to the holding in *Almendarez-Torres* when the issue is solely that of the right to trial by jury. *Apprendi*, 530 U.S. at 488 - 489.

The facts of this case fit neatly within this Court's recent Sixth Amendment jurisprudence. The Petitioner's sentence is greater than the statutory maximum that can be imposed by facts found only by the jury. *Apprendi*, 530 U.S. at 470, 471. *Blakely v. Washington*, 542 U.S. 296, 303 (2004). The trial judge finds the fact justifying the imposition of the enhanced or mandated sentence. *Id.*, at 304, 305; *Cunningham v. California*, 549 U.S. 270, 279 (2007). Finally, upon conviction and once the trial court determines the defendant is a recidivist, life without parole is mandated. The trial court has no discretion in determining the sentence. *United*

States v. Booker, 543 U.S. 220, 233 – 234 (2005); *See Cunningham*, 549 U.S. at 285).¹

But this case is also unique. Unlike *Apprendi*, *Crawford* and *Cunningham* where the Court confronted determinate sentencing schemes, Georgia is old school. Under Georgia law, almost all sentencing is indeterminate. *Cf. Cunningham*, 549 U.S. at 276-277. Unlike the other cases, the only fact that can trigger enhanced sentencing (life without parole) is recidivism. The question then, is starkly and simply presented; "[u]pon notice by the State of its intent introduce the Appellant's criminal history as a recidivist at sentencing, does a defendant indicted for a serious violent felony, have the constitutional right to have the jury determine beyond a reasonable doubt, whether he is, in fact, a recidivist, and therefore subject to enhanced or mandatory sentencing?" App. p. 67. This issue pertains to the very important individual due process rights of the accused.

But a corollary issue is equally compelling; has the Constitution reserved to the jury, the power to determine whether a defendant is a recidivist before the trial court can impose mandatory or enhanced sentencing? That issue pertains to the allocation of power among the three branches of our government. Or more

¹ The opinion of the Georgia Supreme Court acknowledges this, " Brown's prior conviction for armed robbery, and present conviction of five serious violent felonies as defined by OCGA § 17-1 0-6.1 (a), required the trial court to consider Brown a recidivist offender and impose five life sentences under OCGA § 17-1 0-7 (b)." App. at 6.

precisely, what role does the institution of the jury have in restraining the power of the three governing branches?

But for the *Almendarez-Torres* recidivist exception, *Apprendi* mandates the affirmative for the above two inquiries. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 489 – 490. It is the first phrase of that oft cited sentence Petitioner petitions this Court to excise from its jurisprudence by overruling the recidivist holding of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), hold O.C.G.A §17-10-7(b) repugnant to the Sixth Amendment and vacate Petitioner's sentences of life without parole.

In doing so, this Court completes setting forth the bright line rule of *Apprendi* thereby eliminating an exception that is inconsistent with the legal premises of that case. "Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today" *Apprendi*, 530 U.S. at 489 – 490. The passage quoted clearly indicates this Court's intention to revisit *Almendarez-Torres* when the issue of recidivism is properly raised and placed before the Court. *Almendarez-Torres* must be measured

against the new precedent of *Apprendi* and subsequent holdings, to secure its position in this Court's Sixth Amendment jurisprudence or, as Petitioner contends, lose its precedential value.

Almendarez-Torres concerned construing a federal criminal statute regarding the illegal reentry of previously deported aliens. Reentry was a crime. If the initial deportation was the result of the commission of an aggravated felony, conviction for illegal reentry could be punished by up to an additional 18 years over and above the two year maximum for just illegal reentry. *Almendarez-Torres*, 523 U.S. at 226. *Almendarez-Torres* argued that for the enhanced sentence to apply, his recidivism must first be plead in the indictment. Therefore, the trial court could not impose a sentence exceeding the statutory two year maximum. *Id.*, at 227. The opinion turned on whether Congress intended to create a new crime when it enacted the recidivist enhancement or was simply authorizing an increased sentence based upon a sentencing factor, i.e., recidivism. *Id.*, at 227 – 228.

Applying normal rules of statutory construction, the Court held that Congress intended to enhance the maximum available sentence in the presence of recidivism as a sentencing factor, and did not intend to create a separate crime. *Id.*, at 235. Thus, *Almendarez-Torres* is primarily a holding concerning statutory construction. The constitutional questions are subsidiary to the holding and do not precisely address the question presented in the case *sub judice*.

Almendarez-Torres contended that the Constitution imposed three requirements in setting forth elements of crimes; 1) the indictment must state the element; 2) the Government must prove the element to the jury, and; 3) it must do so beyond a reasonable doubt. *Id.*, at 238. The Court responded to this contention by holding that recidivism is not an "element" but a "sentencing factor" and therefore the pleading requirements do not apply. "[D]ue process does not require advance notice that trial for substantive offense will be followed by accusation that the defendant is a habitual offender." *Id.*, at 244, quoting, *Oyler v. Boles*, 368 U.S. 448, 452 (1962). In so holding, the *Almendarez-Torres* Court did not reach the second and third requirements; whether a jury must pass on the fact and whether the fact must be proved beyond a reasonable doubt. Therefore, *Almendarez-Torres* has little precedential value in deciding the issue raised herein.

The case *sub judice* measures state law against federal constitutional requirements. The pleading requirements of the Fifth Amendment are not imposed on the States via the Fourteenth Amendment. *Ring v. Arizona*, 536 U.S. 584, 597 (2002); *Apprendi*, 530 U.S. at 477, n.3. This aspect also limits application of *Almendarez-Torres* inasmuch as it construes federal law and not state law. Unlike *Almendarez-Torres*, this case turns on whether the jury should find the fact of recidivism.

Almendarez-Torres holds that recidivism is simply a sentencing factor, and as such, does not trigger the due process requirements of the Fifth and Sixth Amendments. *Almendarez-Torres*, 523 U.S. at 245. The basis for this conclusion is historical tradition, "the sentencing factor at issue here-recidivism-is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence. . . ." *Id.*, at 243. *Accord*, *Jones v. United States*, 526 U.S. 227, 248 - 249 (1999). *Apprendi* vitiates this contention. "Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478 and 520 -521 (J.Thomas, concurring).

Further, *Apprendi* and subsequent decisions make clear that labeling a fact a sentencing factor rather than an element to avoid Sixth Amendment protection, cannot avoid its rule. *United States v. Booker*, 543 U.S. 220, 231 (2005). Thus it is clear substance takes precedence over form, and that any fact that mandates an increased sentence over and above what is authorized by the facts found by the jury must be submitted to the jury.

If the historical basis justifying excluding recidivism is no longer valid, what, if anything, justifies the exceptions continued application? *Almendarez-Torres* does not provide one. But in *Jones v. United States*, 526 U.S. 227 (1999),

the Court discussed *Almendarez-Torres* and provided additional reasoning for the recidivist exception:

The Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing. [cites omitted] One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.

Id., at 249.

This then, is the last refuge for the recidivist exception to the rule of *Apprendi*. Recidivism is different from all other facts because it comes into existence through judicial process. The point has superficial appeal but in the end, it is a plea for judicial economy. In short, it is a justification and not a legitimate reason to forego the protections of the Sixth Amendment.

As noted above, two amaranthine principles undergird and motivate this Court's Sixth Amendment jurisprudence; concern for individual due process rights and; the allocation power between the executive, legislative and judicial branches and the role of the jury in restraining those powers. As *Apprendi* noted,

At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law,"

Amdt. 14, and the guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,” Amdt. 6. [footnote omitted]. Taken together, these rights indisputably entitle a criminal defendant to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”

Apprendi, 530 U.S. at 466 – 477, quoting from *United States v. Gaudin*, 515 U.S. 506, 510, (1995).

In *Blakely v. Washington*, 542 U.S. 296, 305 -306 (2004), the Court stated:

Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981) (describing the jury as “secur[ing] to the people at large, their just and rightful controul in the judicial department”); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 *Works of John Adams* 252, 253 (C. Adams ed. 1850) (“[T]he common people, should have as complete a control ... in every judgment of a court of judicature” as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 *Papers of Thomas Jefferson* 282, 283 (J. Boyd ed. 1958) (“Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative”); *Jones v. United States*, 526 U.S. 227, 244-248, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the

jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

The founding document of the State of Georgia illustrates perfectly the importance attached by the founding fathers to trial by jury. On February 5, 1777, the United States was 217 days old and the outcome of the Revolution was very much in doubt. On that day, Georgia adopted its first constitution. Within the document the jury is mentioned three times. "The jury shall be judges of law, as well as of facts, and shall not be allowed to bring in a special verdict; but if all, or any of the jury, have any doubts concerning points of law, they shall apply to the bench, who shall each of them in rotation give their opinion." The Constitution of the State of Georgia, ¶XLI (1777), WATKINS, ROBERT & GEORGE, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA, p. 14, (R. Atkin, No. 22 Market Street, Philadelphia) 1800, reprinted in THE FIRST LAWS OF THE STATE OF GEORGIA, Michael Glazier, Inc. 1981. App. p. 95. Further, "The jury shall be sworn to bring a verdict according to law, and the *opinion they entertain of the evidence*, provided it be not repugnant to the rules and regulations contained in this constitution." *Id.*, ¶XLIII, App. p. 95. (emphasis supplied). Finally, "Freedom of the press, and trial by jury, to remain inviolate *forever*." *Id.*, ¶LXI, App. p. 97(emphasis original). 'Remain inviolate *forever*'. Thus the framers inform us,

over two centuries later, how important trial by jury is to the protection of our liberties.²

While the fact that recidivism comes into being as a result of judicial process, its basis as an exception to the rule of *Apprendi* is merely a nod to the first principle. It utterly fails to vindicate the equally important principle of the powers reserved to the jury. In the case *sub judice* the Georgia statute being challenged, eliminates judicial discretion upon the presentation of certain facts not found by the jury. And it ignores the powers reserved to the jury in its role as the last arbiter of facts that will send a man to prison for life without parole.³

In sum, the recidivist exception adopted by the *Almendarez-Torres* Court does not survive contact with policies and principles set out in *Apprendi* and its progeny.

Finally, *stare decisis* does not prevent the Court from granting the relief sought by Petitioner. This Court in *Ring v. Arizona*, 536 U.S. 584, 608 - 609 (2002), overruled *Walton v. Arizona*, 497 U.S. 639 (1990) as irreconcilable to the rule of *Apprendi*. In doing so, the Court made clear that precedent contrary to *Apprendi's* policies and principles will not be permitted to stand.

² See Also, Georgia Reception Statute, No. 236 , App. p. 99.

³ Compare the sentence of the Petitioner with that of his co-defendant. Petitioner received 5 life without parole sentences; Andre Lee received a total of 30 years. App. p. 27. , Lee's sentence is based only on facts found by the jury and the trial court exercising its discretion.

In *United States v. Booker*, 543 U.S. 220, this Court explained its reasoning in bringing *Apprendi* and its progeny into being:

As it thus became clear that sentencing was no longer taking place in the tradition that Justice BREYER invokes, the Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.

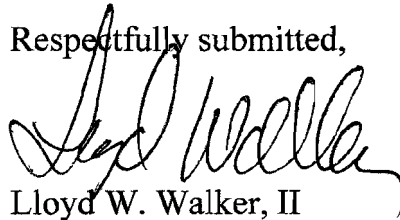
543 U.S. at 237.

CONCLUSION

Eliminating the recidivist exception of *Almendarez-Torre* serves the goal of preserving Sixth Amendment substance. There is no historical basis for treating recidivism differently than other sentencing factors. While recidivism may be the most typical sentencing factor, that in and of itself is not a sufficient reason to exclude it from jury control. This Court has made clear through its recent Sixth Amendment cases that the rule of *Apprendi* is to be considered a bright line, not to be transgressed by notions of judicial economy or efficiency. This case offers the Court the means to complete the contours of its Sixth Amendment jurisprudence and render that jurisprudence coherent and consistent with the intent of those who insisted over two centuries ago that the right to trial by jury remain inviolate *forever*.

This 11th day of March, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lloyd W. Walker, II". The signature is fluid and cursive, with the first name "Lloyd" being particularly prominent.

Lloyd W. Walker, II

119 Shadowood Lane
Peachtree City, GA 30269
Tel. 770-631-8187
Fax. 770-783-1458

Attorney for Petitioner Darrell Brown

SUPREME COURT OF GEORGIA

Case No. S08A1878

Atlanta, December 15, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DARRELL BROWN v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Therese S. Barnes, Clerk

December 15, 2008

TO: ALL COUNSEL
FROM: Lynn M. Stinchcomb, Chief Deputy Clerk
RE: S08A1878. Brown v. The State

Please substitute the enclosed opinion for the one previously sent to you.

If you should have any questions, please call me at 404/651-9387.

In the Supreme Court of Georgia

Decided: **NOV 3 2008**

S08A1878. BROWN v. THE STATE.

THOMPSON, Justice.

Defendant Darrell Brown was convicted of two counts of armed robbery, three counts of kidnapping and one count of possession of a firearm during the commission of a crime.¹ He was sentenced to five consecutive life terms without parole, plus an additional 15 consecutive years for the firearms count. Brown appeals, asserting, inter alia, that the trial court erred in overruling his motion to change venue and his general demurrer attacking the constitutionality of OCGA § 17-10-7 (b), a subsection of Georgia's repeat offenders' sentencing statute.

¹ The crimes were committed on June 14, 2005. The indictment was returned on July 13, 2005. Trial commenced in the Superior Court of Fayette County on September 19, 2005, and concluded on September 22, 2005, when defendant was found guilty and sentenced. Defendant's motion for new trial was filed on September 23, 2005, amended on December 20, 2007, and denied on December 21, 2007. Defendant filed a notice of appeal on January 10, 2008. The case was docketed in this Court on July 21, 2008, and orally argued on October 20, 2008.

In 2005 Brown and his co-defendant Andre Lee held at gunpoint three employees of the Cinemark Tinseltown theater in Fayetteville, seeking access to the building safe. Pressed to open the safe, the manager of the theater used the duress code, alerting the police. When officers arrived at the scene, the two defendants attempted to secure escape by climbing into the ceiling. Lee was arrested when a ceiling tile disintegrated beneath him and he fell to the floor. Brown remained in a ceiling crawl space for several hours, garnering significant media publicity, before finally surrendering to police.

At trial, potential jurors were polled as to their knowledge of the case through the media. Of the 57 potential jurors questioned by the court, only six claimed to have no knowledge of the case. One juror was excused for indicating pretrial publicity had tainted his view of the case, and a second was excused for indicating he could not be impartial. After individualized questioning, an additional 13 jurors were excused for cause. Of the jurors selected, all assured the trial court that they had no bias or prejudice against Brown and had not formed or expressed any opinion in regard to his guilt or innocence.

1. The evidence is sufficient to enable any rational trier of fact to find

defendant guilty beyond a reasonable doubt of the crimes for which he was convicted. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. Brown contends the trial court erred in refusing to grant his motion for change of venue. The motion was predicated on the existence of extensive pretrial publicity, demonstrated by a significant percentage of prospective jurors being excused for cause. Brown asserts that such a statistical cluster makes it unreasonable to assume the remaining venire was not similarly influenced by the media.

A motion for change of venue based upon excessive pretrial publicity invokes the trial court's discretion, and its ruling will not be disturbed absent an abuse of that discretion. Dixson v. State, 269 Ga. 898 (506 SE2d 128) (1998). Here, it cannot be said that the trial court abused its discretion in denying Brown's motion for change of venue. Simply put, Brown failed to show that the pretrial publicity created an inherently prejudicial atmosphere or affected the remaining jurors' ability to be fair and impartial. See Eckman v. State, 274 Ga. 63, 68 (4) (548 SE2d 310) (2001); Roundtree v. State, 270 Ga. 504, 505 (2) (511 SE2d 190) (1999).

3. Brown's prior conviction for armed robbery, and present conviction of five serious violent felonies as defined by OCGA § 17-10-6.1 (a), required the trial court to consider Brown a recidivist offender and impose five life sentences under OCGA § 17-10-7 (b). Brown contends that the sentencing requirements imposed by OCGA § 17-10-7 (b) violate his right to trial by jury as guaranteed by the Sixth Amendment to the United States Constitution and Art. I, Sec. 1, Para. XI of the Georgia Constitution.

In Almendarez-Torres v. United States, 523 U. S. 224 (118 SC 1219, 140 LE2d 350) (1998), the United States Supreme Court held that the imposition of enhanced sentencing under federal law based solely upon a defendant's prior criminal history does not exceed constitutional limitations. More specifically, the court stated in Apprendi v. New Jersey, 530 U. S. 466, 490 (120 SC 2348, 147 LE2d 435) (2000), that “[o]ther than the fact of a *prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (Emphasis supplied.) Because Brown's sentence was enhanced by his *prior conviction* for armed robbery, the trial judge did not err in overruling Brown's general demurrer attacking the

constitutionality of OCGA § 17-10-7 (b) under either the United States Constitution or the Georgia Constitution.

Judgment affirmed. All the Justices concur.

IN THE SUPERIOR COURT OF FAYETTE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,)
)
)
 v.)
)
)
 DARRELL BROWN,)
)
)
 DEFENDANT,)
)
)
 _____)

CASE NO.
2005 R 0435

FILED IN OFFICE
 CLERK OF SUPERIOR COURT
 FAYETTE COUNTY, GA.
 05 AUG 3 AM 10 28
 SHEILA STUBBARD, CLERK

GENERAL DEMURRER

COMES NOW, the above referenced defendant, by and through undersigned counsel, and files his General Demurrer to O.C.G.A. §17-10-7(b). Defendant is charged with three counts of armed robbery and three counts of kidnaping. Section 17-10-7(b) mandates life without parole for the second conviction of a serious violent felony. Upon information and belief, the State intends to seek life without parole for the defendant using a Louisiana conviction for armed robbery as the predicate felony for the imposition of Section 17-10-7(b), should the Defendant be convicted.

Section 17-10-7 is unconstitutional in that it violates the Defendant's right against cruel and unusual punishment guaranteed in the Eighth Amendment to the United States Constitution, as applied to Georgia law through the Fourteenth Amendment to the United States Consitution. Said section also violates the separation of powers between the executive and the legislative branches of the government of the State of Georgia. Section 17-10-7 also violates the Defendants due process rights to a jury trial, in that the sentence will be based, in part, on facts not determined by a jury rendering the conviction which results in a sentence of life without

parole.

Defendant prays that the court take inquiry into the matters raised herein and declare
O.C.G.A. §17-10-7(b) unconstitutional and inapplicable to the sentencing in this case, should the
Defendant be convicted of a predicate felony.

This 3 day of August, 2005.

Respectfully submitted,



Lloyd W. Walker
Georgia Bar No. 723336

119 Shadowood Lane
Peachtree City, GA 30269
Tel. 770-631-8187
Fax. 770-487-4299

Attorney for Defendant

CERTIFICATE OF SERVICE


This is to certify that the foregoing pleading was served upon the following parties and/or counsel on the following:

Scott Ballard, Esq.
District Attorney for Fayette County
P.O. Box 1498
Fayetteville, GA 30214

Thurbert Baker, Esq.
Georgia Attorney General
40 Capital Square
Atlanta, GA 30334

By depositing a true and correct copy in the United States Mails, First Class, with adequate postage affixed thereto.

This 3 day of Aug, 2002.


Lloyd W. Walker
Georgia Bar No. 723336
Attorney for Defendant

21

IN THE SUPERIOR COURT OF FAYETTE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,)
)
)
 v.)
)
)
 DARRELL BROWN,)
)
)
 DEFENDANT,)
)
)
 _____)

CASE NO.
 2005 R 0435

FILED IN OFFICE
 CLERK OF SUPERIOR COURT
 FAYETTE COUNTY, GA.
 '05 AUG 8 PM 1 00
 SHEILA STUDDARD, CLERK

AMENDED GENERAL DEMURRER

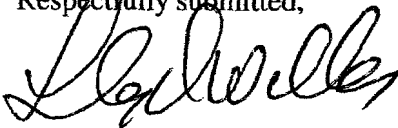
COMES NOW, the above referenced Defendant, by and through counsel, and amends the General Demurrer previously filed and adds as follows:

This indictment setting forth the predicate offenses, (three counts armed robbery and three counts of kidnaping) for the imposition of life without parole, fails to state all the facts necessary for the application of Section 17-10-7 to the sentencing on this case. As such, the indictment must be dismissed. "[t]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted" *United State v. Reese*, 92 U.S. 214, 232-233.

(1876) quoted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)(FN 15)

This 7 day of August 2000

Respectfully submitted,



Lloyd W. Walker
Georgia Bar No. 723336

119 Shadowood Lane
Peachtree City, GA 30269
Tel. 770-631-8187
Fax. 770-487-4299

Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was served upon the following parties and/or counsel on the following:

Scott Ballard, Esq.
District Attorney for Fayette County
P.O. Box 1498
Fayetteville, GA 30214

Thurbert Baker, Esq.
Georgia Attorney General
40 Capital Square
Atlanta, GA 30334

By depositing a true and correct copy in the United States Mails, First Class, with adequate postage affixed thereto.

This 8 day of Aug, 2005.



Lloyd W. Walker
Georgia Bar No. 723336
Attorney for Defendant

IN THE SUPERIOR COURT OF FAYETTE COUNTY

FILED ~~STATE OF~~ GEORGIA
CLERK OF SUPERIOR COURT
FAYETTE COUNTY, GA.

STATE OF GEORGIA,

VS.

DARRELL BROWN

05 AUG 19 AM 9 21 INDICTMENT NO. 05R-0435-A

SHEILA STUDDARD, * CLERK

ORDER

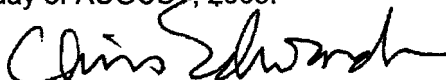
The Defendant, having brought the following Motions before this Court for hearing:

- Motion to Quash, General Demurrer and/or Special Demurrer (As to _____)
- Motion to Sever
- Motion to Raise Issue of Competency
- Motion in Limine
- Motion in Limine to Exclude Statements
- Motion to Suppress
- Motion to Reveal the Deal
- _____

IT IS HEREBY ORDERED that the

- Motion to Quash, General Demurrer and/or Special Demurrer (As to _____) is hereby: Withdrawn Granted, Denied Waived Reserved Continued until _____;
- Motion to Sever is hereby: Withdrawn Granted, Denied Waived Reserved Continued until _____;
- Motion to Raise Issue of Competency is hereby: Withdrawn Granted, Denied Waived Reserved Continued until _____;
- Motion in Limine is hereby: Withdrawn Granted, Denied Waived Reserved Continued until _____;
- Motion in Limine to Exclude Statements is hereby: Withdrawn Granted, Denied Waived Reserved Continued until _____;
- Motion to Suppress is hereby: Withdrawn Granted, Denied Waived Reserved Continued until _____;
- Motion to Reveal Deal is hereby: Withdrawn Granted, Denied Waived Reserved Continued until _____;
- _____ is hereby: Withdrawn Granted, Denied Waived Reserved Continued until _____;

SO ORDERED this 18TH day of AUGUST, 2005.



JUDGE, SUPERIOR COURTS
GRIFFIN JUDICIAL CIRCUIT

7-29

IN THE SUPERIOR COURT OF FAYETTE COUNTY.

STATE OF GEORGIA

STATE OF GEORGIA,

v.

DARRELL BROWN,

DEFENDANT,

CASE NO.

2005 R 0435

FILED IN OFFICE
CLERK OF SUPERIOR COURT
FAYETTE COUNTY, GA.
05 SEP 19 AM 8 51
SHEILA STUBBARD, CLERK

SECOND AMENDMENT TO GENERAL DEMURRER

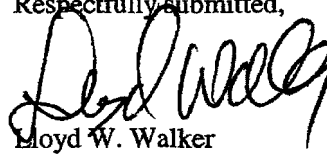
COMES NOW, the above reference Defendant and files his second Amendment to his General Demurrer against the application of O.C.G.A. §17-10-7(b) to this case. As additional grounds Defendant asserts his right that all facts necessary to the imposition of life without parole, must be plead and proven by the State and decided by a jury. To have the trial court sentence the Defendant to life without parole, without first having the jury consider and affirmatively decide whether he has been convicted of a serious violent felony, (as defined by O.C.G.A. §17-10-6.1), is a violation of Defendants right to a jury trial set forth in the 5th and 6th Amendments to the United States Constitution and made applicable to Georgia state law via the 14th Amendment of the United States Constitution. Further, adequate and independent state grounds for this motion are set forth in Art. I, §1, ¶XI of the Georgia Constitution guaranteeing the Defendant a trial by jury.

Defendant further shows the court that the constitutionality of §17-10-7(b) has not been decided upon the grounds set forth above. See, *Ortiz v. State*, 266 Ga. 752 (1996)(Federal Constitution); *Stephens v. State*, 261 Ga. 467 (1991)(Georgia Constitution).

Therefore, Defendant demands that the court hold O.C.G.A. §17-10-7(b) is unconstitutional upon the grounds set forth above, and, should the Defendant be convicted of a predicate felony upon this indictment, not impose the sentence of life without parole, but rather impose a sentence as otherwise provided by law.

This 19 day of Sept, 2005.

Respectfully submitted,



Lloyd W. Walker
Georgia Bar No. 723336

119 Shadowood Lane
Peachtree City, GA 30269
Tel. 770-631-8187
Fax. 770-487-4299

Attorney for Defendant

CERTIFICATE OF SERVICE

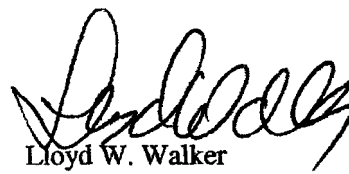
This is to certify that the foregoing pleading was served upon the following parties and/or counsel on the following:

Scott Ballard, Esq.
District Attorney for Fayette County
P.O. Box 1498
Fayetteville, GA 30214

Thurbert Baker, Esq.
Georgia Attorney General
40 Capital Square
Atlanta, GA 30334

By depositing a true and correct copy in the United States Mails, First Class, with adequate postage affixed thereto.

This 19 day of Sept, 2005.



Lloyd W. Walker
Georgia Bar No. 723336
Attorney for Defendant

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

CASE NUMBER: 2005R-0435

vs.

DARRELL BROWN, and
ANDRE LEE,

Defendants.

FILED IN OPEN COURT, THIS THE
22 DAY OF Sept, 2005.
[Signature], CLERK
FAYETTE COUNTY SUPERIOR COURT

VERDICT
DARRELL BROWN

We the jury by unanimous votes find defendant Darrell Brown:

Guilty on Count 1,
armed robbery;

Guilty on Count 2,
armed robbery;

Guilty on Count 3,
kidnapping;

Guilty on Count 4,
kidnapping;

Guilty on Count 5,
kidnapping, and

Guilty on Count 6,
possession of a firearm during
commission of crime of armed robbery.

9/22/05
Date

[Signature]
Foreperson

FAYETTE County Superior Court
 MARCH Term, 2005
 CCE
 No. 2005R-0435

Griffin
 Judicial
 Circuit

Brown v. Georgia Appendix 19
 DET. DEBBIE CHAMBERS
 Prosecutor True Bill
 Foreman Jim [Signature]

SCOTT BALLARD
 District Attorney

State of Georgia
 vs.
 DARRELL BROWN (A)
 3161 PALOMINO DRIVE
 POWDER SPRINGS, GA 30127
 AND
 ANDRE LEE (B)
 2445 HOPKINS DRIVE
 POWDER SPRINGS, GA 30702

Witnesses
 *indicates Grand Jury Witness
 *DET. DEBBIE CHAMBERS
 OFFICER J. LAKEMAN
 LT. LYNN CRAWSHAW
 OFFICER DAVID CAGLE
 LT. JEFF HARRIS
 DET. BOB BAUTISTA
 DET. SCOTT GIBSON
 DET. MELISSA PEACOCK
 OFFICER SCOTT PITTS
 OFFICER JOJOLA
 DET. MARVIN VINSON
 OFFICE STAVENGER
 SGT. STANLEY
 OFFICER BRIAN BISHOP
 CASE # 050604667
 FAYETTEVILLE POLICE DEPARTMENT
 760 JIMMY MAYFIELD BLVD
 FAYETTEVILLE, GA 30214
 S/LARRY ALDEN
 FAYETTE COUNTY SHERIFF'S DEPARTMENT
 155 JOHNSON AVENUE
 FAYETTEVILLE, GA 30214
 770-460-6353
 SEE ADDITIONAL WITNESS LIST

Charge:
 COUNTS 1-2 ARMED ROBBERY- O.C.G.A. §16-8-41
 COUNT 3-5 KIDNAPING- O.C.G.A. §16-5-40
 COUNT 6: POSSESSION OF A FIREARM DURING THE
 COMMISSION OF A CRIME - O.C.G.A. §16-11-106

Returned in open court this 13th day
 of July, 2005
 [Signature] Clerk, Superior Court

Plea of Defendant

The defendant(s) DARRELL BROWN AND ANDRE LEE waives formal arraignment and plead(s)

NOT GUILTY
 This 21st day of July, 2005

[Signature] Defendant
 [Signature] Defendant

[Signature] (Assistant) District Attorney
 [Signature] Defendant's Attorney
 [Signature] Defendant's Attorney

Verdict

We, the jury, find the defendant
 This _____ day of _____, 20__

BILL OF INDICTMENT

GEORGIA, FAYETTE COUNTY:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen, and sworn for the County of FAYETTE, to wit:

- 1. Sara Mac Germano, Foreman
- 2. Suellen R. Ivey
- 3. T. Adam Reid
- 4. Jeffrey L. Eure
- 5. Peter Torres
- 6. Deborah S. Hollandsworth
- 7. Julia Shauw Chang
- 8. Bridget L. Davis
- 9. Lydia M. Rapp
- 10. ~~Robert L. Clough~~ *S.M.G.*
- 11. Glen A. Kinzly
- 12. Laura W. Griffith
- 13. William R. Adams
- 14. Thomas W. Graf
- 15. Robert S. Rowe, Jr.
- 16. Mari B. McCoy
- 17. Maureen R. Wheble
- 18. Susan Paulsen
- 19. Mahlon Henly Donald, III
- 20. Janie P. Wright
- 21. Verolyn M. Kennebrew
- 22. Kathy Goss Padovano
- 23. William A. Davis

21

In the name and behalf of the citizens of Georgia, charge and accuse **DARRELL BROWN AND ANDRE LEE** with the offense of **ARMED ROBBERY** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did then and there unlawfully with intent to commit theft; take property of another, Cinemark USA, Inc. d/b/a Tinseltown Theaters, to wit: United States Currency from the person and immediate presence of Dair Bradley, Caitlin Williams and Alton Brown by use of an offensive weapon, to wit: a handgun, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 2: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **ARMED ROBBERY** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did then and there unlawfully with intent to commit theft, take property of another, Dair Bradley, to wit: a cellular phone from the person of said Dair Bradley by use of an offensive weapon, to wit: a handgun, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 3: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **KIDNAPPING** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did then and there unlawfully abduct Dair Bradley, a person, without lawful authority and hold said person against her will, contrary to the laws of said State, the good order, peace and dignity thereof.

CONTINUED INDICTMENT

COUNT ~~4~~: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **KIDNAPPING** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did abduct Caitlin Williams, without lawful authority or warrant and hold said person against her will, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT ~~5~~: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **KIDNAPPING** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did abduct Alton Brown, without lawful authority or warrant and hold said person against his will, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT ~~6~~: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did have on their person a firearm, to wit: a handgun, during the commission of a crime of Armed Robbery, said crime being against the person of another, and which crime was a felony, contrary to the laws of said State, the good order, peace and dignity thereof.

SCOTT BALLARD
District Attorney

1 five years and say, you know, guess what, you know, this
2 is a do-over.

3 MR. COGGIN: That's obviously --

4 THE COURT: Not nearly as difficult to do now.
5 But considering that, you want to -- you still --

6 MR. COGGIN: And in consultation with the
7 district attorney himself --

8 THE COURT: Well, I --

9 MR. COGGIN: So I'm --

10 THE COURT: No, you're -- I'm sure that
11 Mr. Ballard's leaving this squarely in your lap. I'm not
12 seeking for the District Attorney, but I --

13 MR. COGGIN: Judge, I don't think a mistrial is
14 warranted in this case. And I'm willing to stand on what
15 we've got now.

16 THE COURT: Okay, well, thank you.

17 Mr. Walker, do you have any evidence to offer
18 in mitigation?

19 MR. WALKER: None in mitigation, Judge. I have
20 my motion, the general demurrer that I had filed.

21 THE COURT: Oh, yes, I remember you said you
22 wanted to argue that now. Okay.

23 MR. WALKER: Well, I've argued it once before,
24 Your Honor, and I would like to reassert the issue, if
25 that's all right with the Court.

1 THE COURT: Sure.

2 MR. WALKER: Judge, with respect to my client,
3 there has been submitted to the Court, I don't believe --
4 well, let's go ahead. I did not object to the admission
5 of a certified copy. It looked to be okay, so -- I don't
6 think it was actually admitted. We got into this other
7 discussion so --

8 THE COURT: All right. Any objection?

9 MR. WALKER: No, I don't have any objection.

10 THE COURT: All right, it's admitted.

11 MR. WALKER: It looked to be in proper form.
12 It has raised seals on all of the --

13 THE COURT: I'm talking about the Armed Robbery
14 conviction now, not the other one.

15 MR. WALKER: Oh, yes. No. It had raised
16 seals. I didn't see any problems with the document
17 itself.

18 However, Judge, as I have stated before, the
19 application of 17-10-7(b) to this case, that that
20 statute, based on the cases previously cited, *The United*
21 *States v. Reese* and *Prindy v. The United States*, or,
22 *Prindy v. New Jersey*, that the jury was required to pass
23 on whether -- to apply the -- this sentence, enhanced
24 sentenced, the jury had to consider whether or not my
25 client had been convicted of a prior seven deadly sin.

1 The statutory scheme does not provide for that. And it's
2 my contention that the 17-10-7 (b), as it is currently
3 configured within the statutory scheme of the Georgia
4 punishment, that it is unconstitutional, because whether
5 or not that individual has a prior conviction sufficient
6 to enhance the sentence over and above what is normally
7 applied in this case, requires a jury to decide those
8 issues, not the Court. And a certified copy is
9 insufficient, insufficient. And your acceptance of a
10 certified copy is not sufficient, a factual predicate.
11 That certified copy has to be ruled upon by the jury who
12 was present in this case before any application of the
13 sentence. And it's my contention that therefore
14 17-10-7(b) is not applicable in this case. It is not
15 constitutional, as currently based on developing federal
16 law.

17 I also indicate that the adequate independent
18 state grounds also exist in the right to trial by jury
19 found in the Georgia Constitution, Article 1, Section 1,
20 Paragraph 11. If you take a look at the older case law,
21 you will find that recidivist statutory sentencing
22 schemes while juries were involved in sentencing required
23 that the jury pass on whether or not the individual had
24 been previously convicted. That changed when the Georgia
25 -- when the Constitution was amended and judges were

1 given the sentencing prerogative. But I have not been
2 able to find anywhere under Georgia law this precise
3 issue as has been presented in the federal courts. And I
4 think it's an open issue within -- given the developments
5 in federal law in the last two years, I think that's an
6 issue that's ripe for decision on the state level, as
7 well. And I would argue that there is independent state
8 grounds too, that the sentencing scheme is not
9 constitutional, as currently procedurally set forth in
10 the statutes of the State of Georgia, and that you should
11 not use 17-10-7(b) as grounds for imposing life without
12 parole against my client. That would be my argument.

13 THE COURT: All right. Any rebuttal from the
14 State?

15 MR. COGGIN: Just very briefly, Judge. The
16 federal courts can set the sentencing guidelines for
17 themselves if they want to and that's a matter for them
18 to deal with at sentencing of defendants who appear
19 before the federal courts. But I don't believe that's
20 applicable to state law. I don't think that's a
21 prohibition.

22 THE COURT: All right, anything to offer in --
23 I think I'll overrule the Motion for mistrial. Anything
24 to offer in mitigation, Mr. Saia?

25 MR. SAIA: No, sir.

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THE COURT: Okay. All right. Well, let's see.

MR. WALKER: Judge, may I have a ruling on my motion?

THE COURT: The same as before, overruled.

MR. WALKER: Okay.

THE COURT: And denied. Thank you.

MR. WALKER: Thank you, Judge.

ORIGINAL

37

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

vs.

DARRELL BROWN, and
ANDRE LEE,

Defendants.

CASE NUMBER: 2005R0486

FILED IN OFFICE
CLERK OF SUPERIOR COURT
FAYETTE COUNTY, GA.
05 SEP 22 PM 3 08
SHEILA STULLARD, CLERK

JUDGMENT AND SENTENCE

Upon jury verdict entered today, defendant Darrell Brown is adjudicated guilty of all six counts of the indictment, with the original Count 3 being nolle prosequi, and therefore Darrell Brown is guilty of 2 counts of armed robbery, 3 counts of kidnapping, and 1 count of possession of a firearm during the commission of the crime of armed robbery.

Upon jury verdict entered today, defendant Andre Lee is adjudicated guilty of all six counts of the indictment, with the original Count 3 being nolle prosequi, and therefore Darrell Brown is guilty of 2 counts of armed robbery, 3 counts of kidnapping, and 1 count of possession of a firearm during the commission of the crime of armed robbery.

Upon jury trial and sentencing hearing, defendant Darrell Brown is sentenced as follows:

- Count 1: Life imprisonment without parole;
- Count 2: Life imprisonment without parole;
- Count 3: Life imprisonment without parole;
- Count 4: Life imprisonment without parole;
- Count 5: Life imprisonment without parole;
- Count 6: 15 years to serve in prison, consecutive to Counts 1, 2, 3, 4 and 5;

and defendant Andre Lee is sentenced as follows:

- Count 1: 15 years imprisonment;
- Count 2: 15 years imprisonment, concurrent to Count 1;
- Count 3: 10 years imprisonment, consecutive to Counts 1 and 2;
- Count 4: 10 years imprisonment, concurrent to Counts 1, 2, and 3;
- Count 5: 10 years imprisonment, concurrent to Counts 1, 2, 3, and 4;
- Count 6: 5 years imprisonment, consecutive to Counts 1, 2, 3, 4, and 5,
- totalling: 30 years of imprisonment for defendant Andre Lee.

Both defendants are advised they have the right to seek sentence review by the Sentence Review Panel of Georgia. The Sentence Review Panel of Georgia consists of three Superior Court judges, not within this circuit, and this Panel has the authority to review any sentence exceeding 12 years and to reduce any such sentence in its discretion as provided by law.

Both defendants are advised they have the right to file notice of appeal of this conviction and sentence by filing a notice of appeal within 30 days. Both defendants are further advised they have the right to file application for writ of habeas corpus to challenge the validity of their conviction or sentence, or both, within 4 years.

A copy of this sentence shall be served on both defendants immediately in the Fayette County jail, on their respective counsel, and upon the district attorney's office.

SO ORDERED AND ADJUDGED this 22nd day of September, 2005.

A handwritten signature in black ink, reading "Christopher C. Edwards". The signature is written in a cursive style with a large, prominent initial "C".

CHRISTOPHER C. EDWARDS
Judge, Superior Court
Griffin Judicial Circuit

CERTIFICATE OF SERVICE

I certify that I have forwarded a true and correct copy of the foregoing Judgment and Sentence on counsel for the parties, as follows:

Randall K. Coggin
Fayette County D.A.'s Office
Fayette County Justice Center
One Center Drive
Fayetteville, Georgia 30214

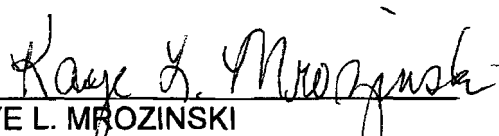
Joe Saia
Fayette County Public Defender's Office
145 Johnson Avenue
Fayetteville, Georgia 30214

Lloyd W. Walker
Attorney at Law
119 Shadowood Lane
Peachtree City, Georgia 30269

Darrell Brown
Fayette County Jail
2 Center Drive
Fayetteville, Georgia 30214

Andre Lee
Fayette County Jail
2 Center Drive
Fayetteville, Georgia 30214

This 22nd day of September, 2005.


KAYE L. MROZINSKI
Judicial Assistant to Judge Edwards

FINAL DISPOSITION

REORDER #04-2497

CLYDE CASTLEBERRY CO., COVINGTON, GA 30014

SUPERIOR COURT OF FAYETTE COUNTY, GEORGIA

FINAL DISPOSITION

September Term, 20 05

CRIMINAL ACTION NO. 2005R-0435-A

THE STATE VS.

Darrell Brown

FILED IN THE OFFICE OF THE CLERK OF SUPERIOR COURT, FAYETTE COUNTY, GEORGIA AT 3:03 O'CLOCK P.M. THE 22nd DAY OF Sept, 2005 Ct. 1-3: Armed Robbery Ct. 4-6: Kidnapping; Ct. 7: Possession of a Firearm During Commission of a Crime

OTN: 125571143

- PLEA: [] NEGOTIATED [] GUILTY ON COUNT(S) [] NOLO CONTENDERE ON COUNT(S) [] TO LESSER INCLUDED OFFENSE(S) ON COUNT(S) [] NON JURY [X] JURY

- VERDICT: [X] VERDICT: [] GUILTY ON COUNT(S) 1,2,4,5,6, & 7 [] NOT GUILTY ON COUNT(S) [] GUILTY OF INCLUDED OFFENSE(S) OF ON COUNT(S)

- OTHER DISPOSITION [X] OTHER DISPOSITION [] NOLLE PROSEQUI ORDER ON COUNT(S) 3 [] DEAD DOCKET ORDER ON COUNT(S)

DEFENDANT WAS ADVISED OF HIS/HER RIGHT TO HAVE THIS SENTENCE REVIEWED BY THE SUPERIOR COURT SENTENCE REVIEW PANEL.

[X] FELONY SENTENCE

[] MISDEMEANOR SENTENCE

WHEREAS, the above-named defendant has been found guilty of the above-stated offense, WHEREUPON, it is ordered and adjudged by the Court that: The said defendant is hereby sentenced to confinement for a period of Cts. 1, 2, 4, 5, & 6: Life imprisonment without parole; Ct. 7: 15 years imprisonment, consecutive to cts. 1,2,4,5, & 6

in the State Penal System or such other institution as the Commissioner of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court.

- [] 1) THAT the above sentence may be served on probation [] 2) THAT upon service of of the above sentence, the remainder of may be served on probation PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as a part of this sentence.

[] FIRST OFFENDER TREATMENT

WHEREAS, said defendant has not previously been convicted of a felony nor availed himself of the provision of the First Offender Act (Ga. Laws 1968, p. 324). NOW, THEREFORE, the defendant consenting hereto, it is the judgment of the Court that no judgment of guilt be imposed at this time, but that further proceedings are deferred and defendant is hereby sentenced to confinement for the period of

in the State Penal System or such other institution as the Commissioner of the State Department of Corrections or Court may direct, to be computed as provided by law. HOWEVER, it is further ordered by the Court.

- [] 1) THAT the above sentence may be served on probation [] 2) THAT upon service of of the above sentence, the remainder of may be served on probation PROVIDED that said defendant complies with the following general and special conditions herein imposed by the Court as part of this sentence:

PROVIDED, further, that upon violation of the terms of probation, the Court may enter an adjudication of guilt and proceed to sentence defendant to the maximum sentence provided by law. Upon fulfillment of the terms of probation, or upon release of the defendant by the Court prior to the termination of the Period thereof, the defendant shall stand discharged of said offense charged and shall be completely exonerated of guilt of said offense charged.

Let a copy of this Order be forwarded to the Office of the State Probation System of Georgia, and the identification Division of the Federal Bureau of Investigation.

IT IS THEREFORE ORDERED that the Defendant pay a fine in the amount of \$ plus: POPTF \$ POPIDF \$ JCSA \$ CVAP \$ CRIME LAB \$ DRUG FEE \$ DUI (CVFF) \$ BSITF \$

Restitution \$ payable to

Monthly Probation Fee \$ payable to Fayetteville Probation Office beginning

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition or probation herein granted. If such probation is revoked, the Court may order the execution of this sentence which was originally imposed or any portion thereof in the manner provided by the law after deducting therefrom the amount of time the defendant has served on probation.

The defendant was represented by the Honorable Lloyd Walker Attorney at Law, by (Employment) (Appointment)

So ordered this 22nd day of September, 20 05

Christopher C. Edwards Judge, Fayette Superior Court

IN THE SUPERIOR COURT OF FAYETTE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,)
)
)
 v.)
)
 DARRELL BROWN,)
)
 DEFENDANT,)
)
)

CASE NO.
 2005 R 0435 A

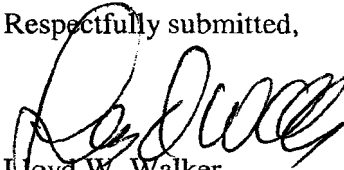
FILED IN OFFICE
 CLERK OF SUPERIOR COURT
 FAYETTE COUNTY, GA.
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 SHEILA STUBBARD, CLERK

MOTION FOR NEW TRIAL

COMES NOW, the Defendant Darrell Brown, by and through undersigned counsel, and moves the court to grant a new trial upon the verdict and sentence entered in this court against the Defendant, on September 23, 2005. Grounds for this Motion are that the verdict is against the weight of the evidence and other grounds which will be presented by amendment prior to a hearing on this motion. Defendant prays that a hearing be scheduled on this motion; evidence taken and arguments heard, and upon such, a new trial be ordered.

This 23 day of Sept, 2005

Respectfully submitted,


 Lloyd W. Walker
 Georgia Bar No. 723336

119 Shadowood Lane
 Peachtree City, GA 30269
 Tel. 770-631-8187
 Fax. 770-631-3430
 Attorney for Defendant


CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was served upon the following parties and/or counsel on the following:

Scott Ballard, Esq.
District Attorney for Fayette County
P.O. Box 1498
Fayetteville, GA 30214

By depositing a true and correct copy in the United States Mails, First Class, with adequate postage affixed thereto.

This 23 day of Sept, 2005


Lloyd W. Walker
Georgia Bar No. 723336
Attorney for Defendant

IN THE SUPERIOR COURT OF FAYETTE COUNTY

FILED IN OFFICE
CLERK OF SUPERIOR COURT
FAYETTE COUNTY, GA

STATE OF GEORGIA

2007 DEC 20 AM 9 03

STATE OF GEORGIA,)
)
)
v.)
)
)
DARRELL BROWN,)
)
DEFENDANT,)
)
_____)

SHEILA STUDDARD, CLERK

CASE NO. 2005 R 0435

AMENDED MOTION FOR NEW TRIAL

COMES NOW, the Defendant, by and through undersigned counsel, and amends his Motion for New Trial by asserting that the court erred in overruling Defendant's demurrer to O.C.G.A. §17-10-7(b), in that Defendant's sentence violates Defendant's right to a jury trial as set forth in the Sixth Amendment of the United States Constitution made applicable to the State proceedings via the 14th Amendment of the United States Constitution and his right to as trial by jury guaranteed in Art.I, § 1, ¶XI of the Georgia Constitution. Further, the trial was unfair in that the jury was influenced by pretrial publicity and the court erred in overruling Defendant's Motion

for a Change in Venue. All other objections and errors during motions and trial are reserved.

This 20 day of Dec, 2007.

Respectfully submitted,



Lloyd W. Walker
Georgia Bar No. 723336

119 Shadowood Lane
Peachtree City, GA 30269
Tel. 770-631-8187
Fax. 770-487-4299

Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was served upon the following parties and/or counsel on the following:

Scott Ballard, Esq.
District Attorney for Fayette County
P.O. Box 1498
Fayetteville, GA 30214

Thurbert Baker, Esq.
Georgia Attorney General
40 Capital Square
Atlanta, GA 30334

By depositing a true and correct copy in the United States Mails, First Class, with adequate postage affixed thereto.

This 27 day of Feb, 2007.



Lloyd W. Walker
Georgia Bar No. 723336
Attorney for Defendant

50

FILED IN O.C.G.A.
COURT OF SUPERIOR JUDICATURE
IN THE SUPERIOR COURT OF FAYETTE COUNTY
FAYETTE COUNTY, GEORGIA

2007 DEC 21 AM 8 55 STATE OF GEORGIA

STATES OF GEORGIA, CLERK)
)
)
v.)
)
DARRELL BROWN,)
)
DEFENDANT,)
)
_____)

CASE NO. 2005 R 0435

BRIEF IN SUPPORT ON THE ISSUE OF SENTENCING IN DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW, the Defendant, by and through undersigned counsel, and files his Brief in Support on the Issue of Sentencing in Defendant's Motion for New Trial. This Brief is limited to the issue of the constitutionality of O.C.G.A. §17-10-7(b). Other issues relating to prejudicial errors made during pre-trial motions and trial are reserved.

FACTS AND PROCEDURAL HISTORY

Defendant Darrel Brown stands convicted of two counts of armed robbery; three counts of kidnapping and one count of possession of a firearm during the commission of a crime. Based upon the admission of a certified copy of a Louisiana conviction for armed robbery, pursuant to O.C.G.A. §17-10-7(b), this Court sentenced Defendant to five life sentences, each to be served without possibility of parole, each consecutive to the other, plus 15 years for the last felony, consecutive to the prior five sentences. Defendant received the maximum sentence possible under the law.

Defendant challenged the constitutionality of O.C.G.A §17-10-6(b) per a General

Demurrer filed August 5, 2005; an Amended General Demurrer filed August 5, 2005; and a Second Amended Demurrer filed September 5, 2005. Counsel argued this issue at pretrial motions and at the sentencing hearing conducted by this Court. Each pleading raising the issue was served upon the Georgia Attorney General. This issue is properly raised and is ripe for determination.

ARGUMENT AND CITATION OF AUTHORITY

The issue is stated thus: Upon notice by the State of its intent introduce the Defendant's criminal history as a recidivist at sentencing, does a Defendant indicted for a serious violent felony, have the constitutional right to have the jury determine beyond a reasonable doubt, whether he is, in fact, a recidivist, and therefore subject to enhanced or mandatory sentencing? If the answer to that inquiry is yes, then Georgia's two strike mandatory sentencing scheme is unconstitutional, and the Defendant's sentence of life without parole must be vacated. The rights involved are the Defendant's right to a trial by jury as guaranteed in the 6th Amendment of the United State Constitution made applicable to State proceedings via the due process clause of the 14th Amendment of the United States Constitution and the corresponding guarantee found in Art. I, §1, ¶XI of the Georgia Constitution. As demonstrated below, Defendant's sentence must be vacated.

I. GEORGIA'S STATUTORY FRAMEWORK:

Defendant's life without parole sentences were imposed pursuant to O.C.G.A. §17-10-7(b) which states:

- (1) As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1.
- (2) Any person who has been convicted of a serious violent felony in this state or

who has been convicted under the laws of any other state or of the United States of a crime which if committed in this state would be a serious violent felony and who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death *shall be sentenced to imprisonment for life without parole*. Any such sentence of life without parole shall not be suspended, stayed, probated, deferred, or withheld, and any such person sentenced pursuant to this paragraph shall not be eligible for any form of pardon, parole, or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or any other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the sentence of life imprisonment without possibility of parole, except as may be authorized by any existing or future provisions of the Constitution. (Italics supplied).

O.C.G.A. §17-10-6.1(a)(2) defines armed robbery as a serious violent felony and §17-10-6.1(a)(3) defines kidnapping as a serious violent felony.

In reaching the sentencing decision, the court conducts a presentence hearing pursuant to O.C.G.A. §17-10-2(a)(1):

Except in cases in which the death penalty or life without parole may be imposed¹, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, *including the record of any prior criminal convictions* and pleas of guilty or nolo contendere of the defendant, or the absence of any prior conviction and pleas. (Italics supplied).

This section mandates a presentence hearing upon return of the verdict. The court upon receipt of evidence of a prior conviction via certified copies, is required to apply §17-10-7(b)(2). Thus, Defendant's conviction on the two counts of armed robbery and

¹ The exception stated in the first phrase does not apply to this case, even though life without parole was imposed. Read in conjunction with §17-10-2(c), the exception applies only to cases where the State is seeking the death penalty. This case has nothing to do with capital murder, or the procedural rules governing the application of the death penalty.

three counts of kidnapping resulted in the five life sentences without parole. In following the statutory dictate, this court had no alternative but to impose the sentence it did.

II. LIFE WITHOUT PAROLE EXCEEDS THE STATUTORY MAXIMUM FOR ARMED ROBBERY AND KIDNAPPING.

Life Without Parole (LWP) is a unique sentence. It can only be imposed under two distinct circumstances. The first is in a capital murder trial where the State seeks the death penalty. The jury, as an alternative to death, is empowered to impose LWP.

O.C.G.A. §17-10-30.1. However, in order to impose LWP the jury must find at least one of the aggravating factor set forth in O.C.G.A. §17-10-30 for the imposition of the death penalty. Therefore, a murder defendant facing the death penalty is granted jury consideration on the factors which may lead to LWP as a sentence.

The second circumstance is which LWP may be imposed is pursuant to O.C.G.A. §17-10-7(b) as set forth above. In that instance, the jury has no role in determining whether LWP is imposed.

Outside these two circumstances, individuals convicted of kidnapping are subject to a minimum of ten and a maximum of twenty years in prison provided the victim was older than 14, and neither ransom or bodily injury resulted from the event. If the victim is under 14 or bodily injury or ransom are found, a life sentence is authorized. O.C.G.A. §16-5-40. In the case at bar, absent application of §17-10-7(b), the most the Defendant could receive was 20 years. For armed robbery, the individual may be sentenced to either 20 years or life. O.C.G.A. §17-8-41(b). In the case at bar, the Defendant was eligible for life sentences on the armed robbery verdicts. Therefore, LWP is outside the statutory maximums for armed robbery and kidnapping. Thus, LWP is a special, enhanced

sentence based upon circumstances not found in the underlying crimes.

III. FEDERAL LAW:

The leading case involving this issue is *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the court invalidated a New Jersey sentencing scheme where a Defendant pled guilty to two counts of second degree possession of a firearm, and one count of unlawful possession of a personnel bomb. The State reserved the right to seek an enhanced sentence pursuant to New Jersey's hate crime statute. *Id.*, at 470 – 471. The Defendant received a 12 year sentence, which was outside the limits of the sentence normally imposed for these types of crimes. The sentencing court based its decision on the hate crime statute where, if the judge found by a preponderance of the evidence that crime was motivated by hate against race, creed or nationality, an additional number of years was applied to the sentence. Hence, the defendant there received a sentence “enhanced” by the finding of an additional fact by the trial judge. *Id.*, at 471. The Supreme Court reversed. In doing so, the Supreme Court held that every fact essential to the verdict and sentence must be determined by a jury. *Id.*, at 490.

THE ALMENDAREZ EXCEPTION:

While the holding in *Apprendi* appears to support Defendant's position here, there is an exception to its holding directly on point. That case is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In *Almendarez*, the Supreme Court affirmed an enhanced sentence under federal law, which was based solely on the defendant's prior criminal history. In addition, the *Apprendi* court, as well as more recent decisions, acknowledged this exception. Thus it appears the holding in *Almendarez* is fatal to our argument.

However, dicta in the *Apprendi* decision clearly indicates this exception is on shaky ground with the Supreme Court.

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, [footnote omitted] and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence. In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U. S., at 252–253 (opinion of Stevens, J.); see also *id.*, at 253 (opinion of Scalia, J.).

Id., at 490. See, *Blakely v. Washington*, 542 U.S. 296 (2004); *Cunningham v. California*, U.S. Supreme Court Docket No. 05-6551.

It is also worth noting that in each of the cases decided subsequently to *Apprendi*, the Supreme Court very carefully defined each issue being decided concerning and stated clearly what was not being decided. The Supreme Court seems to be moving incrementally, case by case, in this area, and has not had the *Almendarez* holding directly contested by any petitioner. Therefore, we contest the continued viability of the *Almendarez* exception and take exception to its holding. We believe it must be overruled.

THE PUBLIC POLICY AT STAKE:

In *Blakely, supra*, Justice Scalia articulated the policies the Supreme Court is seeking to protect in its holding:

Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 *Works of John Adams* 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe' Arnoux (July 19, 1789), reprinted in 15 *Papers of Thomas Jefferson* 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones v. United States*, 526 U. S. 227, 244–248 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely, 542 U.S. at 305-306.

Therefore, under federal constitutional law, Defendant was denied due process of law by sentencing him to life without parole without first pleading and submitting his recidivism to the jury for their determination. Defendant's sentence must be vacated.

IV. ADEQUATE AND INDEPENDENT STATE GROUNDS:

Normally, when considering state constitutional provisions as compared to similar federal provisions, there exists parallel jurisprudence so that one may compare state with federal on the same issue. That is not the case here. Until 1974, in Georgia, juries fixed the sentence, as well as the issue of guilt or innocence:

The jury in their verdict on the trial of all cases of felony not punishable by life imprisonment shall prescribe a minimum and maximum term, which shall be within the minimum and maximum prescribed by laws as the punishment for said crime, and the judge in imposing the sentence shall commit said convicted person to the penitentiary in accordance with the verdict of the jury.

Ga. Code Ann. §27-2502 (repealed 1974).

The foregoing statute was replaced by today's O.C.G.A. §17-10-1 and §17-10-2. It is important to note that the judge had no ability to reject the jury sentence. He was bound by their finding.

Nonetheless, it is difficult to ascertain the contours of Georgia law on this particular issue.

In 1798, Georgia adopted the state constitution. Art. IV, §V states; "Freedom of the press, and trial by jury, as heretofore used in this State, shall remain inviolate; and no post facto law shall be passed." Today, the similar section reads:

The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.

Georgia Const. Art. I, §1 ¶XI.

There appears to be no Georgia case law directly on point regarding this issue as it is presented in the U.S. Supreme Court opinions discussed above. The answer, then, lies in the phrase “the jury shall be the judges of the law and the facts.” Today, it is standard criminal procedure for the judge to charge the jury on its role in ascertaining the true facts of a particular case, and then gives the jury the law the court believes the jury should apply to those facts in rendering its verdict. In the case at bar, the jury was not the judge of the facts with respect to whether the Defendant was a recidivist. And whether the Defendant was a recidivist was critical to his sentence of LWP. Therefore, pursuant to Paragraph XI, Defendant’s constitutional right to have the jury determine the law and facts of his case decided by a jury was violated. His sentence must be vacated.

As allegorical support, the kidnapping statute is illustrative. As noted above, O.C.G.A. §16-5-40 has different levels of punishment. What triggers these differences are the facts of a particular case. §16-5-40(b)(1) mandates a twenty year sentence when the victim is above the age of 14. §16-5-40(b)(2) mandates a life sentence or a split sentence of 25 years followed by probation for life, if the victim is under the age of 14. Similarly, §16-5-40(b)(3) mandates life or death if the kidnapping was for ransom and Section 40(b)(4) mandates life or death if the victim received bodily injury. The State, if it wishes to see the imposition of the higher degrees of punishment it must plead and prove the facts giving rise to a life sentence (injury/ransom). See *Roberts v. State*, 158 Ga.App. 309 (1981). Therefore, it’s the jury that finds the facts necessary to impose the higher sentence.

In *Jones v. State*, 63 Ga. 141 (1879)(cited in *Apprendi* 530 U.S., 514 (J. Thomas concurring)), the Georgia Supreme Court held that it was necessary to allege all the facts necessary for the jury to determine whether a larceny was committed at night, or during the day, in order for the jury to fix the sentence. Doing crime at night in Georgia, back in the day, got the criminal some extra time in the hoosegow.

Finally, the Georgia Supreme Court has considered *Apprendi* in death penalty cases. The most recent opinion is *Jones v. State*, Ga. Supreme Court Docket No. S07A0573 (October 29, 2007). See also, *Terrell v. State*, 276 Ga. 34 (2002). In these cases, the court has uniformly held that the pleading requirements found in *Apprendi* do not apply under Georgia law. That is; it is not required to list the aggravating factors necessary for the imposition of the death penalty in the defendant's indictment. In doing so, the court relies on the fact that the Federal constitutional law regarding grand jury and indictments are found in the 5th Amendment of the U.S. Constitution and that these requirements have not been made applicable to the state via the due process clause of the 14th Amendment. Further, in *Jones*, the court held that Georgia law does not require the listing of the aggravating factors in an indictment where the State is seeking the death penalty. Notice requirements are satisfied in the Uniform Procedure Act. But, in all such cases, the jury, not the court, finds the existence of those factors. And that is precisely the issue advanced here; the jury must determine recidivism before LWP can be imposed.

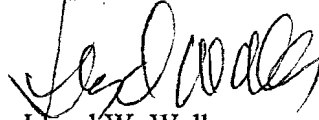
CONCLUSION

In sum, our position is as follows; under federal constitutional law via the 6th and 14th Amendments, Georgia is required to have the jury determine whether the Defendant is a recidivist for sentencing under O.C.G.A. §17-10-7(b) and that the *Almendarez* exception is no longer valid

under existing precedent and court dicta, and should be overruled. As to Georgia law, the jury is to be “judge of the law and the facts” according to our state constitution. Section 17-10-7(b) invades the province of the jury in that life without parole is imposed upon a finding of a fact by the judge, not the jury. And, under Georgia law, we are not claiming that recidivism must be plead as a matter of state law, but, as with statutory factors in death penalty cases, a procedure must be found that permits the jury to ascertain all the facts necessary to the sentence imposed. Therefore, the Defendant’s sentence must be vacated.

This 20th day of December, 2007.

Respectfully submitted,



Lloyd W. Walker
Georgia Bar No. 723336

119 Shadowood Lane
Peachtree City, GA 30269
Tel. 770-631-8187
Fax. 770-487-4299

Attorney for Defendant

FILED IN OFFICE
CLERK OF SUPERIOR COURT
FAYETTE COUNTY, GA
2007 DEC 21 AM 8 57
SHEILA STUDDARD, CLERK

CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was served upon the following parties and/or counsel on the following:

Scott Ballard, Esq.
District Attorney for Fayette County
P.O. Box 1498
Fayetteville, GA 30214

Thurbert Baker, Esq.
Georgia Attorney General
40 Capital Square
Atlanta, GA 30334


By depositing a true and correct copy in the United States Mails, First Class, with adequate postage affixed thereto.

This 20 day of Dec, 2007

FILED IN OFFICE
CLERK OF SUPERIOR COURT
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2007 DEC 21 AM 8 55

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Lloyd W. Walker
Georgia Bar No. 723336
Attorney for Defendant

IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	:	2005R-0435-A & B
	:	
Plaintiff,	:	Charges:
	:	1-3: Armed Robbery
-v-	:	4-6: Kidnaping
	:	7: Possession of a firearm
DARRELL BROWN &	:	during the commission
ANDRE LEE,	:	of a crime
	:	
Defendants.	:	

HEARD BEFORE THE HONORABLE CHRISTOPHER C. EDWARDS
JUDGE, SUPERIOR COURT
GRIFFIN JUDICIAL CIRCUIT
FAYETTE COUNTY COURTHOUSE
FAYETTEVILLE, GEORGIA
DECEMBER 21, 2007

COPY

MOTION FOR NEW TRIAL

APPEARANCES OF COUNSEL:

For the State:	Mr. Gregory Stein Office of the District Attorney 1 Center Drive Fayetteville, Georgia 30214 770-716-4250
For Defendant Lee:	Mr. George Weldon 145 Johnson Avenue Fayetteville, Georgia 30214 770-716-4340
For Defendant Brown:	Mr. Lloyd W. Walker 119 Shadowood Lane Peachtree City, Georgia 30269 770-631-8187

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P R O C E E D I N G S

THE COURT: Okay. Let's get the motion for a new trial out of here. That last matter took a little longer than I thought. Mr. Walker.

MR. WALKER: Yes, Judge.

THE COURT: Your, your motion.

MR. WALKER: Thank you, Judge.

Judge, I filed a brief on the, the issues. I filed an amended motion for new trial yesterday, and I filed a brief with the Court this morning. I faxed a copy of the brief to you and the District Attorney yesterday afternoon.

Judge, this is the fourth time we've discussed this issue, I think, and it's maybe the third time in these hearings. This brief and the motion for new trial is directed to my attack on O.C.G.A. 17-10-7(b), the life without parole statute under which my client was sentenced, given five consecutive life sentences without parole.

I've broken it down into two distinct areas. There is federal case law on this and then there is, very little in fact, Georgia case law on this.

The federal case law is not, as I point out in the brief, the federal case law has an exception in it. The lead case is the -- in, under federal law is the --

1 hold on just a second -- now I'm having a problem --

2 Yeah, the Apprendi case, Apprendi v. New
3 Jersey, 530 U.S. 466, which states, has stated, absent a
4 prior conviction, an individual's -- in order for a
5 sentencing court to impose a sentence that is enhanced or
6 is above the statutory maximum, that the Court -- the
7 jury must find all facts necessary to that particular --
8 to impose that sentence.

9 Now, in this case the Georgia, the Georgia
10 statutory framework, as you well know, as we did in this
11 case, 17-10-7(b), you sentenced him to life without
12 parole based on the conviction in Louisiana that he
13 received for armed robbery back in the '80s.

14 what I am saying, Judge, is that the federal
15 case law, although it hasn't reached the point I think it
16 should be at, is, is saying that the jury must determine
17 whether or not an individual is a recidivist in order for
18 you to use that sentence, in order for you to impose that
19 sentence. Now, under -- and that's under federal law.

20 Now, there is one case though, that is against
21 me under federal law; it's the Almendarez-Torres case.
22 That's at 523 U.S. 224. Basically it says that the issue
23 that I'm talking about, whether a jury should pass on all
24 the facts necessary for the sentence imposed, is, does
25 not include prior convictions, recidivist. That would

1 seem to be, under federal law, fatal to the argument I'm
2 making. However, if you take a look at the Apprendi
3 case, you will see in their dicta where the majority in
4 that case has criticized Almendarez-Torres and if you
5 take a look at the voting, the voting -- and I know
6 reading tea leaves as to who's going to vote during the
7 next based on prior votes is not really, a really good
8 way to analyze it. But the, the, the Apprendi case very
9 seriously criticized the Almendarez-Torres exception and
10 -- but did not reach it, because it wasn't before them.

11 The Supreme Court has been very careful.
12 Because obviously they're going through a process by
13 which they're reviewing all this enhanced sentencing by
14 judges, all these sentencing schemes, and they're doing
15 it incrementally. They take each case as it comes to
16 them; they focus on particular issues that are important
17 to that case, and they very clearly and very carefully
18 exclude everything else. And they have said in dicta, in
19 Almendarez-Torres, and Justice Thomas, who was -- voted,
20 was in the majority on the Almendarez-Torres case, has
21 changed his mind. It says so in his concurrence in the
22 Apprendi case, which would basically change, would have
23 changed the outcome of the, the exception that is --
24 right now, current federal law, is favorable to what I--

25 THE COURT: Was this a constitutional

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principle?

MR. WALKER: Yes, sir. It's the Sixth Amendment right to trial by jury.

And at Georgia -- and, and the issue is, the precise issue is what facts need to be found by the jury for a sentence to be imposed. And what they're focusing on are basically what they call sentencing factors, and the use in both federal courts and in the state courts of factors that are not part of the crime itself in order to determine the sentence. And the question is whether or not a judge can take an outside fact, Blakely v. Washington --

THE COURT: Even a, even a conviction.

MR. WALKER: The exception is convictions, which is what my problem is.

THE COURT: Yeah, that's the problem.

MR. WALKER: That's the problem.

THE COURT: I mean, this isn't like a, an aggravating circumstance in a death case --

MR. WALKER: There's, there's similarities.

THE COURT: But, I mean, it's not a --

MR. WALKER: It's not something a jury finds.

THE COURT: An aggravating circumstance in a death case goes to the circumstance of the crime itself, so there necessarily can have been no prior conviction --

1 MR. WALKER: That's, that's correct, Your
2 Honor.

3 THE COURT: -- for that. But, but here when
4 there's a prior conviction of record from a court of
5 competent jurisdiction, I mean, the statute says that I'm
6 to cognize that, I think.

7 MR. WALKER: That's right.

8 THE COURT: All right.

9 MR. WALKER: I think -- I'm not criticizing the
10 Court's decision under federal law to impose the sentence
11 it did, because the federal law hasn't quite reached the
12 point where I'm at where I'm arguing this case. But
13 Judge, nothing ever happens in law if someone doesn't
14 challenge it.

15 So my point here is, in federal law, that the,
16 that the Supreme Court may, and I think at some point
17 will, get rid of the recidivist exception to the, to the
18 general rule that all facts necessary to the sentence
19 would have to be found by the jury.

20 State law on this issue -- and I've also
21 brought independent adequate state grounds as a, as a, as
22 an alternative consideration of this. Actually, that
23 becomes, it becomes difficult to ascertain and difficult
24 to, difficult to analyze, because up until 1974 in
25 Georgia, juries fixed the sentences and judges didn't.

1 So we don't have the type of case law in
2 Georgia that exists elsewhere, that exists in the federal
3 law as to what, what is within the province of the, of a
4 jury under state constitutional law and what is not.
5 Because up until '74 the jury decided everything. And,
6 and, and that means that we don't have a body of law we
7 can look at.

8 So what I've done in, in analyzing this issue
9 as to adequate independent state grounds is, I went back
10 to the Constitution itself, the Georgia Constitution,
11 which basically says that the right to a jury trial shall
12 remain inviolate. But it also says one other thing, that
13 the jury shall be the judges of the law and the facts.

14 Now, what I argue in my brief and what I'm
15 reiterating here, is that that phrase has to have some
16 meaning. We don't -- a phrase that appears in the
17 Constitution must have some meaning.

18 We all know that a jury is the judge of the
19 facts in every case. What the, what the -- the way it
20 works, of course -- we are all familiar with that -- is
21 that the jury decides the facts, the Court gives the jury
22 the law that it thinks should be applied to the facts,
23 and the jury then applies, judges the law and the facts
24 and combines them and reaches a verdict.

25 I'm saying that that phrase mandates that the

1 jury be included in the, in the decision, in the finding
2 of whether or not he is a recidivist, that the jury must
3 -- that in order for the jury to be the judge of the law
4 and the facts it, completely for, for the case, must be
5 done, those, those facts must be found by the jury.

6 Now, I don't have any Georgia case law directly
7 on point in that regard. Because, like I said, it's not
8 an issue that's ever been considered by our courts. And,
9 and frankly these, these, these -- federal case law
10 involving the state sentencing schemes really didn't
11 start to develop until the '80s and the '90s. So we're
12 in an area that's kind of gray.

13 I will, I will state that the Georgia Supreme
14 Court is, is quite aware of the federal case law and they
15 deal with it in death penalty cases. And what they've
16 said -- the Apprendi case has two, two things in it.
17 It's one that it, that you have to have jury passing on
18 facts. But Apprendi also says you've got to plead it in
19 some fashion.

20 The Georgia Supreme Court has said the pleading
21 requirement in Apprendi is not applicable to us in death
22 penalty cases, because that's a Fifth Amendment right and
23 those -- that, that right has not been made applicable to
24 the states via the Fourteenth Amendment of the U.S.
25 Constitution. Therefore we can turn, we can focus solely

1 on Georgia law with respect to what has been pled, to
2 make it, make an indictment good. And that the notice
3 provisions of the Uniform Procedures Act adequately give
4 notice and adequately protect due process rights under
5 Georgia law, so we don't have to plead it, in the, in
6 the, in the indictment, just so long as those --

7 THE COURT: You're saying this is Sixth
8 Amendment, which is incorporated.

9 MR. WALKER: In the Sixth Amendment, which is
10 incorporated. So I --

11 THE COURT: I understand the argument.

12 MR. WALKER: What I'm saying is that not under
13 state law am I asking the Court to impose pleading
14 requirements. What I'm saying is that we have to come up
15 with a procedure whereby -- bifurcated trial, something
16 like that, like they do with a death penalty case, where
17 the jury finds guilt or innocence, and then is given the
18 option of determining whether or not the individual's a
19 recidivist. Once that determination is made, then the
20 judge applies the law to those findings. And that is
21 essentially the, the argument.

22 One other -- in my amended motion for new
23 trial, I did raise the issue of the pretrial publicity.
24 You developed a procedure for that. I may or may not
25 test that. I just want to make sure that the issue is

1 resolved, or is, is reserved for, for appeal.

2 THE COURT: well, it is. Is there any other
3 evidence or anything else that needs to be put in the
4 record, on that or any other point?

5 MR. WALKER: No, sir. No. The only other
6 ground is that -- not, not mentioned in my brief -- there
7 is one case, there is one principle of law that states
8 that if you had the right to a --

9 When The Georgia Constitution was enacted, the
10 -- all the rights that were, that you had when that
11 Constitution was enacted in 1798, including the right to
12 trial by jury, were preserved and cannot be changed by
13 the legislature. And my argument would be that we would,
14 that if we go back that far and find out, we will find
15 that the juries were involved in the sentencing, as well
16 as the --

17 THE COURT: You're a strict constructionist,
18 Mr. Walker?

19 MR. WALKER: well, in this case I might have to
20 be.

21 THE COURT: Today?

22 MR. WALKER: The, the state argument -- again,
23 I don't feel that the federal argument is, is one that
24 this Court can address itself to, because it's a federal
25 issue. I don't expect you to anticipate a Supreme Court

1 hearing, a decision that hasn't happened yet under
2 federal law.

3 The state issue is a little more interesting
4 and, and it's going to take a little bit of thinking to
5 resolve, I think, if we get it up there.

6 THE COURT: Well, well, thank you. I, I want
7 to, I do want to say this about this, this business Mr.
8 Walker. I, I want to be real clear about this, this
9 order that I entered November 13 with regard to bringing
10 Mr. Brown back.

11 MR. WALKER: Yes, sir.

12 THE COURT: I -- if -- I want, I want you to
13 understand, when I, when I signed that order to bring him
14 back and then I thought, hold on a second that guy is in
15 prison; I'm not sure I want to send the Sheriff after
16 him. And I thought better of it and studied it and
17 decided to, to vacate it.

18 And I entered this order saying you hadn't
19 filed it, or that you may not have filed it. Actually,
20 it says, "On checking the ICON system today" -- and I
21 think that was a Monday -- "it appears Mr. Walker had not
22 filed this order." Well, I think I signed it on a
23 Friday, and you promptly took it to the Clerk and filed
24 it, I think like a Friday afternoon --

25 MR. WALKER: Yes, sir.

1 THE COURT: -- and it didn't get on the ICON
2 system, just like it says.

3 MR. WALKER: I understand, Judge.

4 THE COURT: And so my apprehension was that
5 maybe you took them back to the office, as a lot of
6 lawyers do, made copies of them, mailed them to the
7 Sheriff and the Clerk. And if that happened, I thought,
8 the Sheriff may get this thing and think, well, I've
9 nothing else to do, or I have a free man today, and, and
10 send somebody on to bring Mr. Brown back, when the law
11 didn't require the county be responsible for that
12 expense.

13 And so I was in no way insinuating that you had
14 done something dilatory or negligent or, or in any -- or
15 certainly not in any way manipulative, by not filing the
16 order.

17 MR. WALKER: I understand.

18 THE COURT: And to the extent that this order
19 created that impression, I'm sorry.

20 MR. WALKER: I, I, --

21 THE COURT: I have the greatest respect for
22 you. And I, I -- on rereading it, it occurred to me,
23 well, that could be taken the wrong way to say that you
24 were holding the order. And you didn't do that, and I
25 wasn't trying to imply that. I was, to the contrary,

1 just -- and I think we called the office and got a voice
2 mail or something from you --

3 MR. WALKER: Yes, sir.

4 THE COURT: But, you know, I want you to
5 understand the reason I did it, and, and the way that I
6 wrote it. And I was, I was in no means suggesting that,
7 that you weren't doing anything but presiding, you know,
8 providing the most zealous representation for Mr. Brown.
9 So I hope you understand that.

10 MR. WALKER: Absolutely, Judge.

11 THE COURT: Okay. Thank you. Yes, sir. Yes,
12 sir.

13 MR. WALKER: Thank you.

14 THE COURT: Okay. And, if I could hear from
15 Mr. Weldon for a moment, please.

16 MR. WELDON: Your Honor, as we discussed
17 previously, I think, they were co-defendants probably
18 with the same case number. As far as Mr. Lee goes, he
19 doesn't have a dog in the fight that was just before the
20 Court.

21 THE COURT: Right. I understand that.

22 MR. WELDON: And we're just asking -- I'm
23 appearing today on behalf of Mr. Saia, whose case it is.
24 We're just asking the Court to rule on the motion as
25 submitted.

1 THE COURT: All right, thank you. And for the
2 State?

3 MR. STEIN: Just briefly, Your Honor.

4 THE COURT: Sure.

5 MR. STEIN: Your Honor, this Court was very
6 thorough in debating this issue before. And contrary to
7 what Mr. Walker said, this is not a gray area of the law,
8 this is a very black and white area of the law.

9 I've got a case here, Schuman v. State; it's a
10 Court of Appeals of Georgia case, citation is 244 Ga.
11 App. 335. And this case says -- in this case the
12 defendant had challenged the O.C.G.A. 17-10-7(b), the
13 crux of this matter, was unconstitutional. And the Court
14 in this case held that, hinted that the case of Ortiz,
15 which is the Georgia Supreme Court case, had foreclosed
16 this argument and that 17-10-7(b) was constitutional
17 under both the United States Constitution and the Georgia
18 Constitution.

19 Ortiz was decided in 1996. The citation is 266
20 Ga. 752. Chief Justice, at the time, Benham, wrote the,
21 the majority opinion and said that the choice of
22 sentencing via legislature is not subject to judicial
23 review unless it's grossly disproportionate to the
24 sentence received. And Chief Justice Benham further
25 opined that keeping, keeping recidivists from keeping,

1 from committing more dangerous crimes is certainly
2 proportionate to a life sentence under a recidivist
3 statute, and that these people need to be isolated from
4 society.

5 This case also said that the -- a recidivism
6 statute is not unconstitutional just because it is
7 mandatory. And this case also cited the U.S. Supreme
8 Court case of Rummel v. Estelle; it's 445 U.S. 263. And
9 again, this just stated that, this case stated that it
10 wasn't unconstitutional because the punishment was
11 proportionate to the crime committed and had the goal of
12 protecting people from recidivists, and that the
13 punishment wasn't unconstitutional because it was
14 mandatory.

15 THE COURT: Okay. Well, I'll take it under
16 advisement and issue an order in both cases.

17 (Whereupon, the above-titled matter was
18 concluded.)
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C E R T I F I C A T I O N

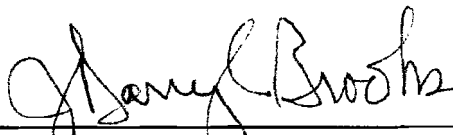
STATE OF GEORGIA:
COUNTY OF FAYETTE:

I, J. Darryl Brooks, (Certificate No. B-1543),
Official Court Reporter, certify that the foregoing transcript
in the matter of STATE OF GEORGIA -v- DARRELL BROWN & ANDRE
LEE, Indictment No. 2005R-0435 (A&B), consisting of pages one
through 15, was taken down and then transcribed by me, and
that the same is a true, correct and complete transcript of
said matter as reported by me.

I further certify that I am a disinterested party
to this action and that I am neither of kin nor counsel to any
of the parties thereto.

This certification is expressly withdrawn and
denied upon the disassembly or photocopying of the foregoing
transcript, or any part thereof, unless said disassembly or
photocopying is done by the undersigned official court
reporter and original signature and seal is attached thereto.

In witness thereof, I have hereby affixed my hand
and seal on this 11th day of June, 2008.



J. DARRYL BROOKS, CCR
Official Court Reporter, B-1543
Griffin Judicial Circuit


IN THE SUPERIOR COURT OF FAYETTE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,)	
)	
Plaintiff,)	
)	Case No.
v.)	2005R-0435A
)	
DARRELL BROWN,)	
)	
Defendant.)	

ORDER

Upon argument of counsel today on the defendant's motion for new trial, the motion for new trial is denied.

SO ORDERED this 21st day of December, 2007.



 CHRISTOPHER C. EDWARDS
 Superior Court Judge
 Griffin Judicial Circuit

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 FAYETTE COUNTY, GA
 2007 DEC 21 PM 2 44
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CERTIFICATE OF SERVICE


This is to certify that I have served the following counsel of record with a copy of the Order by depositing in the United States Mail a copy of same in an envelope with adequate postage thereon addressed as follows:

Lloyd Walker
119 Shadowood Lane
Peachtree City, GA 30269

Joe Saia
145 Johnson Avenue
P. O. box 1659
Fayetteville, GA 30214

Randall Coggin
Office of the District Attorney
One Center Drive
Fayetteville, GA 30214

This 21st day of December, 2007.



KAYE L. MROZINSKI
Judicial Assistant to Judge Edwards

FILED IN OFFICE
CLERK OF SUPERIOR COURT
FAYETTE COUNTY, GA
2007 DEC 21 PM 2 44
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IN THE SUPREME COURT
STATE OF GEORGIA

STATE OF GEORGIA)	
)	
Appellee,)	
)	DOCKET NO:
v.)	
)	S 08 A 1878
DARRELL BROWN)	
)	
Appellant.)	
_____)	

BRIEF OF APPELLANT DARRELL BROWN

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Attorney for Appellant Darrell Brown

B) DID THE TRIAL COURT ERR IN OVERRULING THE GENERAL DEMURRER REGARDING THE CONSTITUTIONALITY OF O.C.G.A. §17-10-7(b) IN VIOLATION OF APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT TO A TRIAL BY JURY AS GUARANTEED BY THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION MADE APPLICABLE TO STATE PROCEEDINGS VIA THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The issue is stated thus: Upon notice by the State of its intent introduce the Appellant's criminal history as a recidivist at sentencing, does a defendant indicted for a serious violent felony, have the constitutional right to have the jury determine beyond a reasonable doubt, whether he is, in fact, a recidivist, and therefore subject to enhanced or mandatory sentencing? If the answer to that inquiry is yes, then Georgia's two strike mandatory sentencing scheme is unconstitutional, and the Appellant's sentence of life without parole must be vacated. The rights involved are the Appellant's right to a trial by jury as guaranteed in the 6th Amendment of the United State Constitution made applicable to State proceedings via the due process clause of the 14th Amendment of the United States Constitution. As demonstrated below, Appellant's sentence must be vacated.

I. GEORGIA'S STATUTORY FRAMEWORK:

Appellant's life without parole sentences were imposed pursuant to O.C

G.A. §17-10-7(b) which states:

(1) As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1.

(2) Any person who has been convicted of a serious violent felony in this state or who has been convicted under the laws of any other state or of the United States of a crime which if committed in this state would be a serious violent felony and who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death *shall be sentenced to imprisonment for life without parole*. Any such sentence of life without parole shall not be suspended, stayed, probated, deferred, or withheld, and any such person sentenced pursuant to this paragraph shall not be eligible for any form of pardon, parole, or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or any other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the sentence of life imprisonment without possibility of parole, except as may be authorized by any existing or future provisions of the Constitution. (Italics supplied).

O.C.G.A. §17-10-6.1(a)(2) defines armed robbery as a serious violent felony and §17-10-6.1(a)(3) defines kidnapping as a serious violent felony.

In reaching the sentencing decision, the court conducts a presentence hearing pursuant to O.C.G.A. §17-10-2(a)(1):

Except in cases in which the death penalty or life without parole may be imposed⁸, upon the return of a verdict of "guilty" by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing

⁸ The exception stated in the first phrase does not apply to this case, even though life without parole was imposed. Read in conjunction with §17-10-2(c), the exception applies only to cases where the State is seeking the death penalty. This case has nothing to do with capital murder, or the procedural rules governing the application of the death penalty.

at which the only issue shall be the determination of punishment to be imposed. In the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, *including the record of any prior criminal convictions* and pleas of guilty or nolo contendere of the defendant, or the absence of any prior conviction and pleas. (Italics supplied).

This section mandates a presentence hearing upon return of the verdict. The court upon receipt of evidence of a prior conviction via certified copies, is required to apply §17-10-7(b)(2). Thus, Appellant's conviction on the two counts of armed robbery and three counts of kidnapping resulted in the five life sentences without parole. In following the statutory dictate, the trial court had no alternative but to impose the sentence it did.

II. LIFE WITHOUT PAROLE EXCEEDS THE STATUTORY MAXIMUM FOR ARMED ROBBERY AND KIDNAPPING.

LWP is a unique sentence. It can only be imposed under two distinct circumstances involving serious violent felonies.⁹ The first is in a capital murder trial where the State seeks the death penalty. The jury, as an alternative to death, is empowered to impose LWP. O.C.G.A. §17-10-30.1. However, in order to impose LWP the jury must find at least one of the aggravating factor set forth in O.C.G.A. §17-10-30 for the imposition of the death penalty. Therefore, a murder defendant

⁹ There is a third means by which LWP may be imposed which involves the imposition of a life sentence under O.C.G.A. §16-13-30(d) and O.C.G.A. §17-10-7(c). *See Butler v. State*, 281 Ga. 310 (2006).

facing the death penalty is granted jury consideration on the factors which may lead to LWP as a sentence.

The second circumstance in which LWP may be imposed is pursuant to O.C.G.A. §17-10-7(b) as set forth above. In that instance, the jury has no role in determining whether LWP is imposed.

Outside these two circumstances, individuals convicted of kidnapping are subject to a minimum of ten and a maximum of twenty years in prison provided the victim was older than 14, and neither ransom or bodily injury resulted from the event. If the victim is under 14 or bodily injury or ransom are found, a life sentence is authorized. O.C.G.A. §16-5-40. In the case at bar, absent application of §17-10-7(b), the most the Appellant could receive was 20 years. For armed robbery, the individual may be sentenced to either 20 years or life. O.C.G.A. §17-8-41(b). In the case at bar, the Appellant was eligible for life sentences on the armed robbery verdicts. Therefore, LWP is outside the statutory maximums for armed robbery and kidnapping. Thus, LWP is a special, enhanced sentence based upon circumstances not found in the underlying crimes.

III. FEDERAL CASE LAW:

The leading case involving this issue is *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the court invalidated a New Jersey sentencing scheme where a Defendant pled guilty to two counts of second degree possession of a

firearm, and one count of unlawful possession of a personnel bomb. The State reserved the right to seek an enhanced sentence pursuant to New Jersey's hate crime statute. *Id.*, at 470 – 471. The Defendant received a 12 year sentence, which was outside the limits of the sentence normally imposed for these types of crimes. The sentencing court based its decision on the hate crime statute where, if the judge found by a preponderance of the evidence that crime was motivated by hate against race, creed or nationality, an additional number of years was applied to the sentence. Hence, the defendant there received a sentence “enhanced” by the finding of an additional fact by the trial judge. *Id.*, at 471. The Supreme Court reversed. In doing so, the Supreme Court held that every fact essential to the verdict and sentence must be determined by a jury. *Id.*, at 490.

A) THE ALMENDAREZ EXCEPTION:

While the holding in *Apprendi* appears to support Appellant's position here, there is an exception to its holding directly on point. That case is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In *Almendarez*, the Supreme Court affirmed an enhanced sentence under federal law, which was based solely on the defendant's prior criminal history. In addition, the *Apprendi* court, as well as more recent decisions, acknowledged this exception. Thus it appears the holding in *Almendarez* is fatal to our argument. However, dicta in the *Apprendi* decision clearly indicates this exception is on shaky ground with the Supreme Court.

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, [footnote omitted] and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.” 526 U. S., at 252–253 (opinion of Stevens, J.); see also *id.*, at 253 (opinion of Scalia, J.).

Id., at 490. See, *Blakely v. Washington*, 542 U.S. 296 (2004); *Cunningham v. California*, U.S. Supreme Court Docket No. 05-6551.

It is also worth noting that in each of the cases decided subsequently to *Apprendi*, the Supreme Court very carefully defined each issue being decided concerning and stated clearly what was not being decided. The Supreme Court seems to be moving incrementally, case by case, in this area, and has not had the

Almendarez holding directly contested by any petitioner. Therefore, we contest the continued viability of the *Almendarez* exception and take exception to its holding.

B) THE PUBLIC POLICY AT STAKE:

In *Blakely, supra*, Justice Scalia articulated the policies the Supreme Court is seeking to protect in its holding:

Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981) (describing the jury as “secur-[ing] to the people at large, their just and rightful controuling the judicial department”); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 *Works of John Adams* 252, 253 (C.Adams ed. 1850) (“[T]he common people, should have as complete a control . . . in every judgment of a court of judicature” as in the legislature); Letter from Thomas Jefferson to the Abbe’ Arnoux (July 19, 1789), reprinted in 15 *Papers of Thomas Jefferson* 282, 283 (J. Boyd ed. 1958) (“Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative”); *Jones v. United States*, 526 U. S. 227, 244–248 (1999). *Apprendi* carries out this design by ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely, 542 U.S. at 305-306.

Therefore, under federal constitutional law, Appellant was denied due process of law by sentencing him to life without parole without first pleading and submitting his recidivism to the jury for their determination. Appellant's sentence must be vacated.

We recognize that we are urging this Court under this Enumeration to anticipate a change in federal constitutional law by the U.S. Supreme Court. Whether this Court is willing to do so, is entirely within its discretion. However, nothing prevents this Court from issuing the ruling we are seeking here based upon evolving federal constitutional principles. But it is clear the Supreme Court has a profound and deep concern for the protections afforded by the right to trial by jury. This Court should share that concern and issue an opinion consistent the relief sought herein.

FAYETTE County Superior Court
MARCH Term, 2005
CCE
No. 2005R-0435

Griffin Judicial Circuit

DET. DEBBIE CHAMBERS
Prosecutor
True Bill
Foreman *Jim Williams*

SCOTT BALLARD
District Attorney

State of Georgia
vs.

DARRELL BROWN (A)
3161 PALOMINO DRIVE
POWDER SPRINGS, GA 30127

AND

ANDRE LEE (B)
2445 HOPKINS DRIVE
POWDER SPRINGS, GA 30702

Charge:

COUNTS 1-3: ARMED ROBBERY- O.C.G.A. §16-8-41
COUNT 4-6: KIDNAPING- O.C.G.A. §16-5-40
COUNT 7: POSSESSION OF A FIREARM DURING THE
COMMISSION OF A CRIME - O.C.G.A. §16-11-106

Returned in open court this 13th day
of July, 2005
Scott Ballard Clerk, Superior Court

Witnesses

*indicates Grand Jury Witness

*DET. DEBBIE CHAMBERS
OFFICER J. LAKEMAN
LT. LYNN CRAWSHAW
OFFICER DAVID CAGLE
LT. JEFF HARRIS
DET. BOB BAUTISTA
DET. SCOTT GIBSON
DET. MELISSA PEACOCK
OFFICER SCOTT PITTS
OFFICER JOJOLA
DET. MARVIN VINSON
OFFICE STAVENGER
SGT. STANLEY
OFFICER BRIAN BISHOP
CASE # 050604667
FAYETTEVILLE POLICE DEPARTMENT
760 JIMMY MAYFIELD BLVD
FAYETTEVILLE, GA 30214

D/S LARRY ALDEN
FAYETTE COUNTY SHERIFF'S DEPARTMENT
155 JOHNSON AVENUE
FAYETTEVILLE, GA 30214
770-460-6353

SEE ADDITIONAL WITNESS LIST

Plea of Defendant

The defendant(s) DARRELL BROWN AND ANDRE LEE waives formal arraignment and plead(s)

NOT GUILTY

This 21st day of July, 2005

Scott Ballard
(Assistant District Attorney)

Darrell Brown
Defendant
Andre Lee
Defendant

Ken Wells
Defendant's Attorney
Stacy Flynn
Defendant's Attorney

Verdict

We, the jury, find the defendant

This _____ day of _____, 20__

BILL OF INDICTMENTGEORGIA, FAYETTE COUNTY:**IN THE SUPERIOR COURT OF SAID COUNTY**The Grand Jurors, selected, chosen, and sworn for the County of FAYETTE, to wit:

1. Sara Mac Germano, Foreman
2. Suellen R. Ivey
3. T. Adam Reid
4. Jeffrey L. Eure
5. Peter Torres
6. Deborah S. Hollandsworth
7. Julia Shauw Chang
8. Bridget L. Davis
9. Lydia M. Rapp
10. ~~Robert L. Clough~~ *SMC*
11. Glen A. Kinzly
12. Laura W. Griffith
13. William R. Adams
14. Thomas W. Graf
15. Robert S. Rowe, Jr.
16. Mari B. McCoy
17. Maureen R. Wheble
18. Susan Paulsen
19. Mahlon Henly Donald, III
20. Janie P. Wright
21. Verolyn M. Kennebrew
22. Kathy Goss Padovano
23. William A. Davis

In the name and behalf of the citizens of Georgia, charge and accuse **DARRELL BROWN AND ANDRE LEE** with the offense of **ARMED ROBBERY** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did then and there unlawfully with intent to commit theft; take property of another, Cinemark USA, Inc. d/b/a Tinseltown Theaters, to wit: United States Currency from the person and immediate presence of Dair Bradley, Caitlin Williams and Alton Brown by use of an offensive weapon, to wit: a handgun, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 2: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **ARMED ROBBERY** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did then and there unlawfully with intent to commit theft, take property of another, Dair Bradley, to wit: a cellular phone from the person of said Dair Bradley by use of an offensive weapon, to wit: a handgun, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 3: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **ARMED ROBBERY** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did then and there unlawfully with intent to commit theft, take property of another, Caitlin Williams, to wit: a cellular phone from the person of said Caitlin Williams by use of an offensive weapon, to wit: a handgun, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 4: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **KIDNAPPING** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did then and there unlawfully abduct Dair Bradley, a person, without lawful authority and hold said person against her will, contrary to the laws of said State, the good order, peace and dignity thereof.

CONTINUED INDICTMENT

COUNT 5: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **KIDNAPPING** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did abduct Caitlin Williams, without lawful authority or warrant and hold said person against her will, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 6: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **KIDNAPPING** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did abduct Alton Brown, without lawful authority or warrant and hold said person against his will, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT 7: And the Grand Jurors aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse the said **DARRELL BROWN AND ANDRE LEE** with the offense of **POSSESSION OF A FIREARM DURING THE COMMISSION OF A CRIME** for that the said **DARRELL BROWN AND ANDRE LEE** in the County and State aforesaid, on the 14TH day of JUNE, Lord Two Thousand Five, did have on their person a firearm, to wit: a handgun, during the commission of a crime of Armed Robbery, said crime being against the person of another, and which crime was a felony, contrary to the laws of said State, the good order, peace and dignity thereof.

SCOTT BALLARD
District Attorney

IN THE SUPERIOR COURT OF FAYETTE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA : INDICTMENT NO: 05R-0435(A)
 V. : a(B)
 (A) (B)
 DARRELL BROWN & ANDRE LEE :

ADDITIONAL WITNESS LIST

OFFICER TURNIPSEED
CLAYTON COUNTY POLICE DEPARTMENT

E. DAIR BRADLEY
401 LAKESIDE VILLA DRIVE
HAMPTON, GA 30228

ALTON BROWN
8104 WEBB ROAD
RIVERDALE, GA 30277

CAITLIN WILLIAMS
9115 MANDARIN DIRVE
JONESBORO, GA 30236

LYNETTE MONTGOMERY
10245 DEEP CREEK PLACE
UNION CITY, GA 30291

JACOB GENTRUP
105 MORNING CREEK CT
JONESBORO, GA 30238

REYNALDO FRANCO
GUADALUPE FRANCO
2816 RIDGEVIEW TRL
JONESBORO, GA 30238

0 9 1 4 4 0 1 7 2 6 3

Parish of Jefferson

THE STATE OF LOUISIANA

s.s.

Twenty-Fourth Judicial District

Twenty-Fourth Judicial District Court

JOHN M. MAMOULIDES, District Attorney, of the Twenty-Fourth Judicial District Court of the State of Louisiana, who, in the name and by the authority of the said State, prosecutes in its behalf, in proper person comes into the Twenty-Fourth Judicial District Court of the State of Louisiana, in and for the PARISH OF JEFFERSON and gives the said Court here to understand and be informed that one

Not a 100% good 10B
DARREL A. BROWN 33
JERRY BROWN 33
10B

late of the Parish aforesaid, on or about the TWENTY-SECOND day of AUGUST in the year of our Lord One Thousand Nine Hundred SEVENTY-EIGHT with force and arms, in the Parish aforesaid, and within the jurisdiction of the Twenty-Fourth Judicial District Court of Louisiana, in and for the Parish aforesaid, violated R.S. 14:64 in that they did rob Stuart A. McClain of U. S. currency and property valued at \$100:00 while armed with a dangerous weapon, to-wit: a gun,

A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

Laura Clark
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.

contrary to the form of the Statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the State.

Shirley C. Wambler, Jr.
Assistant District Attorney of the Twenty-Fourth Judicial District Court

COMPLAINT NUMBER 8-12698-78

STATE'S EXHIBIT

11150000196

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER 79-2120

DIVISION C

STATE OF LOUISIANA

vs.

Darrel Brown

Filed 11-8-78

Edward [Signature]

DEFENDANT'S ACKNOWLEDGEMENT OF CONSTITUTIONAL RIGHTS AND WAIVER OF RIGHTS ON ENTRY OF A PLEA OF GUILTY

TO THE DEFENDANT, BY THE TRIAL JUDGE PERSON-TO-PERSON:

Your attorney has indicated to me that he has advised you of your rights (1) to a trial by jury, (2) to confront your accusers, and (3) against self-incrimination and that by entering a plea of guilty, you are waiving or giving up these rights. He has also indicated to me that you have advised him that you understand these things. Is that correct?

I want you to convince me also that you understand what you are doing by entering this plea of guilty. Consequently, I am going to explain the nature of the crime to which you are pleading guilty and I will also explain the consequences of a plea of guilty. If you have any questions, or if you do not understand anything I say, stop me and I will answer your questions and give you any additional instructions which you may desire.

First, tell this court how old you are? And how much schooling have you had?

1. You are pleading guilty to the crime of Armed Robbery

which occurred on the 22nd day of August, 19 78. The maximum sentence which I can impose is _____ years at hard labor. There is no probation, parole or suspension of sentence for the crime of Armed Robbery or Attempted Armed Robbery. Do you understand that?

2. Do you understand that the plea of guilty is your decision, and no one can force you to so plead? To plead guilty is your voluntary act and must be free from any vice or defect which would render your ability to plead guilty inadequate? Has anyone used any force, intimidation, coercion or promise or reward against either you or any member of your family for the purpose of making or forcing you to plead guilty?

11150000197

Have you been advised by your counsel that in the event I accept your plea of guilty, that you will be sentenced as follows:

Four horizontal lines for handwritten text.

3. You have the right to a trial by jury, which jury may either find you guilty as charged, guilty of a lesser crime, or not guilty. You have the right to hire an attorney of your choice to defend you at that trial. If you cannot afford an attorney, one will be appointed for you, which will cost you nothing. By entering a plea of guilty, you are waiving or giving up these rights. Do you understand that?

4. At any jury trial, you have the right to confront your accusers and to compel testimony on your behalf from your witnesses. By entering this plea of guilty, you are waiving or giving up these rights. Do you understand that?

5. If you were to go on trial, and in the event of a conviction, that is, if the jury finds you guilty, you would have the right to appeal. Again, in the event of a appeal, if you could not afford an attorney, one would be appointed for you, which would not cost anything. By entering a plea of guilty, you are waiving or giving up these rights. Do you understand that?

6. If you plead guilty, and this court accepts your plea, you do not have the right to assert any allegations of defects, such as: (a) an illegal arrest; (b) an illegal search and seizure; (c) an illegal confession; (d) an illegal line-up, and (e) the fact that the state might not be able to prove said charge or that a jury would find you guilty. Do you understand that by pleading guilty you are waiving or giving up these rights?

7. Do you understand that by pleading guilty, you are telling this court that you have in fact committed the crime to which you are pleading guilty?

BY DEFENDANT'S ATTORNEY:

I, as attorney for the defendant, was present during the recitation of the foregoing colloquy between the defendant and the trial judge at the time of the defendant's plea of guilty.

I, also, have informed the defendant of his or her rights, particularly the nature of the crime to which he or she is pleading guilty, the maximum sentence the court could impose under the law, and the fact that the defendant, by entering this plea of guilty, is waiving his or her right to trial by jury his or her right to confront his accusers, his or her right against self-incrimination, and lastly, that his or her only appeal is for review of jurisdictional defects; and I am entirely satisfied that the defendant knowingly, willingly, intelligently and voluntarily has entered this plea of guilty knowing the consequences.

Raymond L. Barnett
ATTORNEY

1 1 1 5 0 0 0 0 1 9 7

BY THE DEFENDANT:

I, as the defendant in this case, acknowledge that the foregoing has been read to me, that my attorney and the trial judge have explained the nature of the crime to which I am pleading guilty, all of my rights to me, and what rights I am waiving or giving up, as listed above, and that I have been given every opportunity by the trial judge to ask questions in open court about anything I do not understand and about all of the consequences regarding my plea of guilty. I am completely satisfied with the explanations of my attorney and the judge.

I FURTHER ACKNOWLEDGE THAT MY ACT OF PLEADING GUILTY IS A KNOWING INTELLIGENT FREE AND VOLUNTARY ACT ON MY PART. I know that no one can force me to plead guilty I know that by pleading guilty I admit I committed the said crime. I know this plea of guilty is more than a confession. It is also a conviction. Nothing remains except for the Judge to give judgment and give me my punishment. I waive all delays for sentencing and acknowledge I am ready for sentencing.

Samuel Brown
DEFENDANT

BY THE TRIAL JUDGE:

I, as trial judge, have entered into the foregoing colloquy with the defendant. I am entirely satisfied that the defendant was aware of the nature of the crime to which he or she has plead guilty, that the defendant did in fact commit said crime, understands the consequences of said plea of guilty and has made a knowing, intelligent, free and voluntary act of pleading guilty to above mentioned crime. I, therefore, accept the defendant's plea of guilty

11-8-77
DATE

Walter K. Smith
J U D G E

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
Gene Marie
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF IMPERSON, LA.

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TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NUMBER 78-2120

DIVISION C

STATE OF LOUISIANA

vs.

Darrel A. Brown

Filed 8-19-79

Edward P. [Signature]

DEFENDANT'S ACKNOWLEDGEMENT OF CONSTITUTIONAL RIGHTS AND WAIVER OF RIGHTS ON ENTRY OF A PLEA OF GUILTY

TO THE DEFENDANT, BY THE TRIAL JUDGE PERSON-TO-PERSON:

Your attorney has indicated to me that he has advised you of your rights (1) to a trial by jury, (2) to confront your accusers, and (3) against self-incrimination and that by entering a plea of guilty, you are waiving or giving up these rights. He has also indicated to me that you have advised him that you understand these things. Is that correct?

I want you to convince me also that you understand what you are doing by entering this plea of guilty. Consequently, I am going to explain the nature of the crime to which you are pleading guilty and I will also explain the consequences of a plea of guilty. If you have any questions, or if you do not understand anything I say, stop me and I will answer your questions and give you any additional instructions which you may desire.

First, tell this court how old you are? And how much schooling have you had?

1. You are pleading guilty to the crime of Armed Robbery

which occurred on the 2nd day of August, 19 78.
The maximum sentence which I can impose is 99 years at hard labor.
There is no probation, parole or suspension of sentence for the crime of Armed Robbery or Attempted Armed Robbery. Do you understand that?

2. Do you understand that the plea of guilty is your decision, and no one can force you to so plead? To plead guilty is your voluntary act and must be free from any vice or defect which would render your ability to plead guilty inadequate? Has anyone used any force, intimidation, coercion or promise or reward against either you or any member of your family for the purpose of making or forcing you to plead guilty?

0 1 0 0 0 0 1 0 9 6

Have you been advised by your counsel that in the event I accept your plea of guilty, that you will be sentenced as follows:

3. You have the right to a trial by jury, which jury may either find you guilty as charged, guilty of a lesser crime, or not guilty. You have the right to hire an attorney of your choice to defend you at that trial. If you cannot afford an attorney, one will be appointed for you, which will cost you nothing. By entering a plea of guilty, you are waiving or giving up these rights. Do you understand that?

4. At any jury trial, you have the right to confront your accusers and to compel testimony on your behalf from your witnesses. By entering this plea of guilty, you are waiving or giving up these rights. Do you understand that?

5. If you were to go on trial, and in the event of a conviction, that is, if the jury finds you guilty, you would have the right to appeal. Again, in the event of an appeal, if you could not afford an attorney, one would be appointed for you, which would not cost anything. By entering a plea of guilty, you are waiving or giving up these rights. Do you understand that?

6. If you plead guilty, and this court accepts your plea, you do not have the right to assert any allegations of defects, such as: (a) an illegal arrest; (b) an illegal search and seizure; (c) an illegal confession; (d) an illegal line-up, and (e) the fact that the state might not be able to prove said charge or that a jury would find you guilty. Do you understand that by pleading guilty you are waiving or giving up these rights?

7. Do you understand that by pleading guilty, you are telling this court that you have in fact committed the crime to which you are pleading guilty?

BY DEFENDANT'S ATTORNEY:

I, as attorney for the defendant, was present during the recitation of the foregoing colloquy between the defendant and the trial judge at the time of the defendant's plea of guilty.

I, also, have informed the defendant of his or her rights, particularly the nature of the crime to which he or she is pleading guilty, the maximum sentence the court could impose under the law, and the fact that the defendant, by entering this plea of guilty, is waiving his or her right to trial by jury, his or her right to confront his accusers, his or her right against self-incrimination, and lastly, that his or her only appeal is for review of jurisdictional defects; and I am entirely satisfied that the defendant knowingly, willingly, intelligently and voluntarily has entered this plea of guilty knowing the consequences.

[Handwritten Signature]
ATTORNEY

Page 3

BY THE DEFENDANT:

I, as the defendant in this case, acknowledge that the foregoing has been read to me, that my attorney and the trial judge have explained the nature of the crime to which I am pleading guilty, all of my rights to me, and what rights I am waiving or giving up, as listed above, and that I have been given every opportunity by the trial judge to ask questions in open court about anything I do not understand and about all of the consequences regarding my plea of guilty. I am completely satisfied with the explanations of my attorney and the judge.

I FURTHER ACKNOWLEDGE THAT MY ACT OF PLEADING GUILTY IS A KNOWING INTELLIGENT FREE AND VOLUNTARY ACT ON MY PART. I know that no one can force me to plead guilty I know that by pleading guilty I admit I committed the said crime. I know this plea of guilty is more than a confession. It is also a conviction. Nothing remains except for the Judge to give judgment and give me my punishment. I waive all delays for sentencing and acknowledge I am ready for sentencing.

Donald Brown
DEFENDANT

BY THE TRIAL JUDGE:

I, as trial judge, have entered into the foregoing colloquy with the defendant. I am entirely satisfied that the defendant was aware of the nature of the crime to which he or she has plead guilty, that the defendant did in fact commit said crime, understands the consequences of said plea of guilty and has made a knowing, intelligent, free and voluntary act of pleading guilty to above mentioned crime. I, therefore, accept the defendant's plea of guilty

4-19-79
DATE

Walter H. ...
J U D G E

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
Edna ...
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24th Judicial District Court

State of Louisiana

vs.

No. 78-2120

Division "C"

DARRELL BROWN

Date 3-19-79

E. LEBLANC

DISTRICT ATTORNEY DONELON JUDGE CURRAULT

SENTENCE

The defendant BROWN appeared before the bar of the court this day represented by JOHN ALES Attorney. The defendant withdrew his former plea of NOT GUILTY and tendered to the State a plea of GUILTY TO ARMED ROBBERY

The Court advised the defendant of all of his rights, including his right to a trial by jury, his right to confront his accusers and his right against self-incrimination and the defendant acknowledged that he understood. The defendant waived these rights and a waiver of rights was executed and filed into the record. The defendant waived all legal delays and requested immediate sentencing. The court sentenced the defendant to imprisonment at hard labor for a term of TEN (10) YEARS giving the defendant credit for the time served from The defendant is committed to the Louisiana Department of Corrections for execution of sentence in conformity with L.S.A. - R.S. 15:824. The defendant reported his date of birth as 2-5-60 and his age as SAID SENTENCE IS WITHOUT BENEFIT OF PAROLE, PROBATION OR SUSPENSION.

A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE

DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.

Deputy Clerk

Entry No. 12

STATE OF LOUISIANA

TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

DIVISION "C"
NO. 78-2120

DOB: 2-5-60
ITEM NO. 8-12698-78

COMMITMENT

WHEREAS DARREL A. BROWN

was by due form of law lately PLEAD before our 24th Judicial District Court for the Parish of Jefferson of Violating Revised Statute 14:64
(ARMED ROBBERY)

and was thereupon sentenced to imprisonment at hard labor, for _____
TEN (10) YEARS [WITHOUT BENEFIT OF PAROLE, PROBATION, OR SUSPENSION OF SENTENCE]

and defendant is committed to the Louisiana Department of Corrections for execution of said sentence in conformity with L.S.A.-R.S. 15:824.

DEFENDANT TO BE GIVEN CREDIT FOR TIME SERVED FROM AUGUST 22, 1978 TO DATE OF TRANSFER.

NOW, THEREFORE, You, the said Sheriff, are hereby commanded to carry out in full every part of the aforesaid sentence. And for so doing this shall be your sufficient warrant and authority.

WITNESS, NESTOR L. CURRAULT, JR., JUDGE
presiding in the 24th Judicial District Court,
Division "C", Parish of Jefferson, at the Hall
of Sittings of the same, in the City of Gretna, this
19TH day of MARCH
in the year of our Lord, one thousand nine hundred
and SEVENTY-NINE

FILED
MAR 23 9 01 AM '79
24TH JUDICIAL DISTRICT COURT
JEFFERSON PARISH, LOUISIANA

Nate H. Small Jr.

J U D G E

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
Loanne Blain
DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.

*THE CONSTITUTION

OF THE

State of Georgia.

WHEREAS the conduct of the legislature of Great-Britain for many years past, Preamble.
has been so oppressive on the people of America, that of late years, they have plainly
declared, and asserted a right to raise taxes upon the people of America, and to make
laws to bind them in all cases whatsoever, without their consent; which conduct be-
ing repugnant to the common rights of mankind, hath obliged the Americans, as free-
men, to oppose such oppressive measures, and to assert the rights and privileges they
are entitled to, by the laws of nature and reason; and accordingly it hath been done
by the general consent of all the people of the States of New-Hampshire, Massachu-
setts-Bay, Rhode-Island, Connecticut, New-York, New-Jersey, Pennsylvania, the
counties of New-Castle, Kent and Sussex on Delaware, Maryland, Virginia, North-
Carolina, South-Carolina, and Georgia, given by their representatives met together
in General Congress, in the city of Philadelphia.

And whereas it hath been recommended by the said Congress on the fifteenth of
May last, to the respective assemblies and conventions of the United States, where no
government, sufficient to the exigencies of their affairs, hath been hitherto establish-
ed, to adopt such government, as may, in the opinion of the representatives of the
people, best conduce to the happiness, and safety of their constituents in particular,
and America in general.

And whereas the independence of the United States of America has been also de-
clared, on the fourth day of July, one thousand seven hundred and seventy six, by
the said Honorable Congress, and all political connection between them, and the
crown of Great Britain, is in consequence thereof dissolved.

We therefore the representatives of the people, from whom all power originates,
and for whose benefit all government is intended, by virtue of the power delegated
to us, Do ordain and declare, and it is hereby ordained and declared, that the follow-
ing rules and regulations be adopted for the future government of this State.

I. The

* This Constitution gave place to the Constitution of 1786.—p. 29.

Legislative, executive and judiciary departments distinct.

I. The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.

Election of Representatives.

II. The legislature of this State shall be composed of the representatives of the people, as is herein after pointed out: and the representatives shall be elected yearly, and every year, on the first Tuesday in December; and the representatives so elected shall meet the first Tuesday in January following, at Savannah, or any other place or places where the House of Assembly for the time being shall direct.

Governor & executive council, how chosen.

On the first day of the meeting of the representatives so chosen, they shall proceed to the choice of a Governor, who shall be styled *Honorable*; and of an executive council, by ballot out of their own body; viz. two from each county, except those counties which are not yet entitled to send ten members. One of each county shall always attend, where the governor resides, by monthly rotation; unless the members of each county agree for a longer or shorter period; this is not intended to exclude either member attending; the remaining number of representatives shall be called the House of Assembly: and the majority of the members of the said house shall have power to proceed on business.

Assembly to be annual.

III. It shall be an unalterable rule, that the House of Assembly shall expire, and be at an end yearly and every year, on the day preceding the day of election mentioned in the foregoing rule.

Ten members from each county except Liberty—fourteen.

IV. The representation shall be divided in the following manner, ten members from each county, as is herein after directed, except the county of Liberty, which contains three parishes, and that shall be allowed fourteen.

Wilkes county.

The ceded lands north of Ogechee shall be one county, and known by the name of Wilkes.

Richmond.

The parish of St. Paul shall be another county, and known by the name of Richmond.

Burke.

The parish of St. George shall be another county, and known by the name of Burke.

Effingham.

The parish of St. Matthew, and the upper part of St. Philip, above Canouchee, shall be another county, and known by the name of Effingham.

Chatham.

The parish of Christ Church, and the lower part of St. Philip, below Canouchee, shall be another county, and known by the name of Chatham.

Liberty.

The parishes of St. John, St. Andrew, and St. James, shall be another county and known by the name of Liberty.

Glynn.

The parishes of St. David and St. Patrick shall be another county, and known by the name of Glynn.

Camden.

The parishes of St. Thomas and St. Mary shall be another county, and known by the name of Camden.

Port and town of Savannah, four members.

The port and town of Savannah shall be allowed four members to represent their trade.

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LAWS OF GEORGIA.

The port and town of Sunbury shall be allowed two members to represent their trade. Sunbury, two members.

V. The two counties of Glynn and Camden shall have one representative each, and also they, and all other counties that may hereafter be laid out by the house of assembly, shall be under the following regulations, viz. At their first institution, each county shall have one member, provided the inhabitants of the said county shall have ten electors; and if thirty, they shall have two; if forty, three; if sixty, four; if eighty, six; if an hundred and upwards, ten; at which time two executive councillors shall be chosen from them, as is directed for the other counties. Glynn & Camden, one representative each. Representatives of new counties apportioned.

VI. The representatives shall be chosen out of the residents in each county, who shall have resided at least twelve months in this State, and three months in the county where they shall be elected; except the freeholders of the counties of Glynn and Camden, who are in a state of alarm, and who shall have the liberty of choosing one member each, as specified in the articles of this constitution, in any other county, until they have residents sufficient to qualify them for more: And they shall be of the protestant religion, and of the age of twenty one years, and shall be possessed in their own right of two hundred and fifty acres of land, or some property to the amount of two hundred and fifty pounds. Qualification of Representatives

VII. The house of assembly shall have power to make such laws and regulations as may be conducive to the good order and well being of the State; provided such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in this constitution. Assembly to make laws and regulations.

The house of assembly shall also have power to repeal all laws and ordinances they find injurious to the people: And the house shall choose its own speaker, appoint its own officers, settle its own rules of proceeding, and direct writs of election for supplying intermediate vacancies; and shall have power of adjournment to any time or times within the year. May repeal laws, choose its own speaker, and appoint its officers, &c.

VIII. All laws and ordinances shall be three times read, and each reading shall be on different and separate days, except in cases of great necessity and danger; and all laws and ordinances shall be sent to the executive council after the second reading, for their perusal and advice. Manner of passing laws and ordinances.

IX. All male white inhabitants, of the age of twenty one years, and possessed in his own right of ten pounds value, and liable to pay tax in this State, or being of any mechanic trade, and shall have been resident six months in this State, shall have a right to vote at all elections for representatives, or any other officers, herein agreed to be chosen by the people at large; and every person having a right to vote at any election, shall vote by ballot personally. Qualifications of electors; election by ballot.

X. No officer whatever shall serve any process, or give any other hindrance to any person entitled to vote, either in going to the place of election, or during the time of the said election, or on their returning home from such election; nor shall any military officer, or soldier, appear at any election in a military character, to the intent that all elections may be free and open. Elections to be free and open.

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Persons to vote where they reside; title of nobility disqualification.

XI. No person shall be entitled to more than one vote, which shall be given in the county where such person resides, except as before excepted; nor shall any person who holds any title of nobility be entitled to a vote, or be capable of serving as a representative, or hold any post of honor, profit or trust in this State, whilst such person claims his title of nobility; but if the person shall give up such distinction, in the manner as may be directed by any future legislature, then, and in such case, he shall be entitled to a vote, and represent, as before directed, and enjoy all the other benefits of a free citizen.

Persons not voting subject to fine.

XII. Every person absenting himself from an election, and shall neglect to give in his or their ballot, at such election, shall be subject to a penalty not exceeding five pounds; the mode of recovery, and also the appropriation thereof, to be pointed out and directed by act of the Legislature; provided nevertheless, that a reasonable excuse shall be admitted

Representatives to be elected by ballot.

XIII. The manner of electing representatives shall be by ballot, and shall be taken by two or more justices of the peace, in each county, who shall provide a convenient box for receiving the said ballots; and on closing the poll, the ballots shall be compared in public, with the list of votes, that have been taken, and the majority immediately declared; a certificate of the same being given to the persons elected, and also a certificate returned to the house of representatives.

Elector's oath.

XIV. Every person entitled to vote shall take the following oath, or affirmation, if required, viz. 'I A. B. do voluntarily and solemnly swear, or affirm as the case may be, that I do owe true allegiance to this State, and will support the constitution thereof. So help me God.'

Representatives oath how administered.

XV. Any five of the representatives elected, as before directed, being met, shall have power to administer the following oath to each other; and they or any other member, being so sworn, shall in the house administer the oath, to all other members that attend, in order to qualify them to take their seats, viz.

Oath.

'I A. B. do solemnly swear, that I will bear true allegiance to the State of Georgia, and will truly perform the trusts-reposed in me; and that I will execute the same to the best of my knowledge, for the benefit of this State, and the support of the constitution thereof; and that I have obtained my election without fraud or bribe whatever. So help me God.'

Continental delegates to be appointed annually, and deemed a part of the assembly.

XVI. The continental delegates shall be appointed annually by ballot, and shall have a right to sit, debate and vote, in the house of assembly, and be deemed a part thereof; subject however to the regulations contained in the twelfth article of the confederation of the United States.

What persons incapable of a seat.

XVII. No person bearing any post of profit under this State, or any person bearing any military commission, under this or any other State or States, except officers of the militia, shall be elected a representative. And if any representative shall be appointed

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LAWS OF GEORGIA.

appointed to any place of profit or military commission, which he shall accept, his seat shall immediately become vacant, and he shall be incapable of re-election whilst holding such office.

By this article, it is not to be understood that the office of a justice of the peace is a post of profit.

XVIII. No person shall hold more than one office of profit, under this State, at one and the same time.

No person to hold more than one office of profit.

XIX. The governor shall, with the advice of the executive council, exercise the executive powers of government, according to the laws of this State and the constitution thereof; save only in the case of pardons, and remission of fines, which he shall in no instance grant; but he may reprieve a criminal, or suspend a fine, until the meeting of the assembly, who may determine therein as they shall judge fit.

Powers of governor and executive council.

XX. The governor, with the advice of the executive council, shall have power to call the house of assembly together, upon any emergency, before the time which they stand adjourned to.

May convene the assembly.

XXI. The governor, with the advice of the executive council, shall fill up all intermediate vacancies that shall happen in offices 'til the next general election: And all commissions, civil and military, shall be issued by the governor, under his hand, and the great seal of the State.

Fill up all vacancies in office and issue all commissions.

XXII. The governor may preside in the executive council at all times, except when they are taking into consideration, and perusing the laws and ordinances offered to them by the house of assembly.

Governor when to preside in council.

XXIII. The governor shall be chosen annually by ballot, and shall not be eligible to the said office for more than one year out of three, nor shall he hold any military commission under any other State or States.

How chosen & when eligible.

The governor shall reside at such place as the house of assembly for the time being shall appoint.

His residence.

XIV. The governor's oath:

Oath.

'I, A. B. elected governor of the State of Georgia, by the representatives thereof, do solemnly promise and swear, that I will, during the term of my appointment, to the best of my skill and judgment, execute the said office faithfully and conscientiously, according to law, without favor, affection, or partiality; that I will, to the utmost of my power, support, maintain, and defend the State of Georgia, and the constitution of the same; and use my utmost endeavors to protect the people thereof in the secure enjoyment of all their rights, franchises and privileges; and that the laws and ordinances of the State be duly observed, and that law and justice in mercy be executed in all judgments. And I do further solemnly promise and swear, that I will peaceably and quietly resign the government to which I have been elected, at the period to which my continuance in the said office is limited by the constitution:

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e, or any person bear- States, except officers- representative shall be appointed

- And lastly, I do also solemnly swear, that I have not accepted of the government whereunto I am elected, contrary to the articles of this constitution. So help me God.
 This oath to be administered to him by the speaker of the assembly.
- President's oath The same oath to be administered by the speaker to the president of the council.
 No person shall be eligible to the office of governor who has not resided three years in this State.
- President & officers of council now appointed. XXV. The executive council shall meet the day after their election, and proceed to the choice of a president out of their own body—they shall have power to appoint their own officers, and settle their own rules of proceedings.
- Council to vote by counties. The council shall always vote by counties, and not individually.
- Protest how entered. XXVI. Every counsellor, being present, shall have power of entering his protest against any measures in council he has not consented to; provided he does it in three days.
- Powers of council respecting laws and ordinances. XXVII. During the sitting of the assembly, the whole of the executive council shall attend, unless prevented by sickness, or some other urgent necessity; and in that case, a majority of the council shall make a board to examine the laws and ordinances sent them by the house of assembly; and all laws and ordinances sent to the council shall be returned in five days after, with their remarks thereon.
- Proposed amendments how delivered. XXVIII. A committee from the council, sent with any proposed amendments to any law or ordinance, shall deliver their reasons for such proposed amendments, sitting and covered; the whole house at that time, except the speaker, uncovered.
- President when to act as governor. XXIX. The president of the executive council, in the absence or sickness of the governor, shall exercise all the powers of the governor.
- Governor may administer oath of secrecy to council. XXX. When any affair that requires secrecy shall be laid before the governor, and the executive council, it shall be the duty of the governor, and he is hereby obliged to administer the following oath, viz.
- Oath. 'I A. B. do solemnly swear, that any business that shall be at this time communicated to the council, I will not, in any manner whatever, either by speaking, writing, or otherwise reveal the same, to any person whatever, until leave given by the council, or when called upon by the house of assembly; and all this I swear without any reservation whatever. So help me God.'
- To secretary &c. And the same oath shall be administered to the secretary and other officers necessary to carry the business into execution.
- Executive power how long to exist. XXXI. The executive power shall exist 'til renewed as pointed out by the rules of this constitution.

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LAWS OF GEORGIA.

XXXII. In all transactions between the legislative and executive bodies, the same shall be communicated by message, to be delivered from the legislative body to the governor, or executive council, by a committee; and from the governor to the house of assembly, by the secretary of the council; and from the executive council, by a committee of the said council.

Legislature and executive transactions between them how managed.

XXXIII. The governor, for the time being, shall be captain general and commander in chief over all the militia, and other military and naval forces belonging to this State.

Governor's military title.

XXXIV. All militia commissions shall specify, that the person commissioned shall continue during good behaviour.

Militia commissions how long to continue.

XXXV. Every county in this State that has, or hereafter may have, two hundred and fifty men, and upwards, liable to bear arms, shall be formed into a battalion; and when they become too numerous for one battalion, they shall be formed into more, by bill of the legislature; and those counties that have a less number than two hundred and fifty, shall be formed into independent companies.

Battalions how formed.

XXXVI. There shall be established in each county a court, to be called a Superior Court, to be held twice in each year. On the first Tuesday in March in the county of Chatham;

Superior court how established and where to be held.

The second Tuesday in March, in the county of Effingham;

The third Tuesday in March, in the county of Burke;

The fourth Tuesday in March, in the county of Richmond;

The next Tuesday in the county of Wilkes;

And Tuesday fortnight, in the county of Liberty;

The next Tuesday in the county of Glynn;

The next Tuesday in the county of Camden;

The like courts to commence in October, and continue as above.

XXXVII. All causes and matters of dispute, between any parties residing in the same county, to be tried within the county.

Matters in dispute.

XXXVIII. All matters in dispute between contending parties, residing in different counties, shall be tried in the county where the defendant resides, except in cases of real estates, which shall be tried in the county where such real estate lies.

Where tried.

XXXIX. All matters of breach of the peace, felony, murder, and treason against the State, to be tried in the county where the same was committed. All matters of dispute, both civil and criminal, in any county where there is not a sufficient number of inhabitants to form a court, shall be tried in the next adjacent county where a court is held.

Criminals where tried.

XXXII.

XL. All causes, of what nature soever, shall be tried in the supreme court, except as hereafter mentioned; which court shall consist of the chief justice, and three

Superior court jurisdiction.

three

- three or more of the justices residing in the county; in case of the absence of the chief justice, the senior justice on the bench shall act as chief justice, with the clerk of the county, attorney for the state, sheriff, coroner, constable, and the jurors. And in case of the absence of any of the aforementioned officers, the justices to appoint others in their room *pro tempore*. And if any plaintiff or defendant in civil causes shall be dissatisfied with the determination of the jury, then, and in that case, they shall be at liberty within three days to enter an appeal from that verdict, and demand a new trial by a special jury, to be nominated as follows, viz. each party, plaintiff and defendant, shall choose six, six more names shall be taken indifferently out of a box provided for that purpose, the whole eighteen to be summoned, and their names to be put together into the box, and the first twelve that are drawn out, being present, shall be the special jury to try the cause, and from which there shall be no appeal.
- Appeals how to be tried. XXI. The jury shall be judges of law, as well as of fact, and shall not be allowed to bring in a special verdict; but if all, or any of the jury, have any doubts concerning points of law, they shall apply to the bench, who shall each of them in rotation give their opinion.
- Jury, judges of law and fact.
- How sworn. XLII. The jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence; provided it be not repugnant to the rules and regulations contained in this constitution.
- Special jury how sworn. XLIII. The special jury shall be sworn to bring in a verdict according to law, and the opinion they entertain of the evidence; provided it be not repugnant to justice, equity, and conscience, and the rules and regulations contained in this constitution, of which they shall judge.
- Captures by sea and land where and how tried. XLIV. Captures, both by sea and land, to be tried in the county where such shall be carried in; a special court to be called by the chief justice, or in his absence, by the then senior justice in the said county, upon application of the captors, or claimants, which cause shall be determined within the space of ten days. The mode of proceeding and appeal shall be the same as in the superior courts; unless after the second trial, an appeal is made to the Continental Congress; and the distance of time between the first and second trial shall not exceed fourteen days: And all maritime causes to be tried in like manner.
- Grand jury. XLV. No grand jury shall consist of less than eighteen, and twelve may find a bill.
- Court of conscience. XLVI. That the court of conscience be continued as heretofore practised, and that the jurisdiction thereof be extended to try causes not amounting to more than ten pounds.
- Executions how stayed. XLVII. All executions exceeding five pounds, except in the case of a court merchant, shall be stayed until the first Monday in March; provided security be given for debt and costs.

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LAWS OF GEORGIA.

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XLVIII. All the costs attending any action in the superiour court shall not exceed the sum of three pounds, and that no cause be allowed to depend in the superior court longer than two terms. Superior court costs, causes how long to continue.

XLIX. Every officer of the State shall be liable to be called to account by the house of assembly. Officers how called to account.

L. Every county shall keep the public records belonging to the same, and authenticated copies of the several records now in the possession of this State shall be made out and deposited in that county to which they belong. Public records where kept.

LI. *Estates shall not be entailed; and when a person dies intestate, his or her estate shall be divided equally among their children; the widow shall have a child's share, or her dower, at her option; all other intestates estates to be divided according to the act of distribution, made in the reign of Charles the second, unless otherwise altered by any future act of the legislature. Estates not to be entailed, how divided.

LII. A register of probates shall be appointed by the legislature in every county, for proving wills, and granting letters of administration. Register of probates how appointed.

LIII. All civil officers in each county shall be annually elected on the day of the general election; except justices of the peace, and registers of probates, who shall be appointed by the house of assembly. County officers how appointed.

LIV. Schools shall be erected in each county, and supported at the general expence of the State, as the legislature shall hereafter point out. Public schools.

LV. A court house and jail shall be erected at the public expence in each county, where the present convention, or the future legislature shall point out and direct. Court houses and jails.

LVI. All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher, or teachers, except those of their own profession. Religious toleration.

LVII. The great seal of this State shall have the following device: on one side a scroll, whereon shall be engraved, The Constitution of the State of Georgia; and the motto, *Pro bono publico*;—on the other side, an elegant house, and other buildings, fields of corn, and meadows covered with sheep and cattle; a river running through the same; with a ship under full sail, and the motto, *Deus nobis hæc otia fecit*. Great seal its device.

LVIII. No person shall be allowed to plead in the courts of law in this State, except those who are authorized so to do by the house of assembly; and if any person so authorized shall be found guilty of mal practice before the house of assembly, they shall have power to suspend them. This is not intended to exclude any person from that inherent privilege of every *freeman*, the liberty to plead his own cause. Attornies how admitted.

LIX. Excessive fines shall not be levied, nor excessive bail demanded. Fines & bail not to be excessive.

LX.

* See act of 1785. No. 307.

XLVIII.

- Habeas Corpus. LX. The principles of the habeas corpus act shall be a part of this constitution.
- Freedom of prefs & trial by jury. LXI. Freedom of the prefs, and trial by jury, to remain inviolate forever.
- Clergymen ineligible. LXII. No clergyman, of any denomination, shall be allowed a seat in the legislature.
- This constitution how altered. LXIII. No alteration shall be made in this constitution, without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of voters in each county within this State: At which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid.

DONE at Savannah, in Convention, the fifth day of February, in the year of our Lord one thousand seven hundred and seventy-seven, and in the first year of the Independence of the United States of America.

An act for the better settling of Intestates Estates.

A. D. 1670.

22 & 23 C. 2. c. 10.
All ordinaries who have power to grant administrations, have power to take bond.
Vaughan, 96. 31 Ed. 3. c. ii.

The condition of the bonds.

BE it enacted, That all ordinaries, as well the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administrations of the goods of persons dying intestate, after the 1st day of June, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis, viz.*

"II. The condition of this obligation is such, That if the within bounded A. B. administrator of all and singular the goods, chattels and credits of C. D. deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hands, possession or knowledge of him the said A. B. or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of _____ court, at or before the _____ day of _____ next ensuing; (2) and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said A. B. or into the hands and possession of any other person or persons for him, do well and truly administer according to law: (3) And further, do make or cause to be made, a true and just account of his said administration, at or before the _____ day of _____. And all the rest and residue of the said goods, chattels and credits which shall be found remaining _____ upon

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DIGEST OF THE

A. D. 1777. *An Act to amend the several acts for regulating the pilotage of vessels into the several ports of the then Province, now State of Georgia.*

No. 234.

June 7, 1777.

This act was made to continue in force only for one year, and until the end of the next session, and has not been continued or revised.

No. 235. *An Act to discourage desertion, and to punish all such persons as shall harbor or conceal deserters.*

June 7, 1777.

Obsolete.

No. 236. *An Act to extend and enforce the authority of the several laws heretofore passed in the then province, but now State of Georgia, to and throughout the territory thereof.*

Preamble.

WHEREAS it has been deemed necessary by the representatives of the people of the thirteen United Colonies of North America in general congress assembled, to declare the said colonies free and independent States, and thereby have dissolved all political connection between them and the crown of Great Britain: *And whereas* it hath been recommended by the said congress to adopt such government as might in the opinion of the representatives of the people of the said States best conduce to the safety of their constituents in particular and America in general: *And whereas* in consequence thereof, the representatives of the people of this State in convention assembled on the fifth day of February in the year of our Lord one thousand seven hundred and seventy-seven, have fixed on, and agreed to, a constitution for the rule and government of the said State and people thereof: *And whereas* divers good and wholesome laws were heretofore made and passed in this State (then province) and to the end that disputes and difficulties may not arise touching the present validity of the said laws so made and passed as aforesaid, within the said territory of Georgia.

Provincial laws, laws of England as well statute as common, relative to criminal matters, except treason, heretofore used in this State, and not repugnant to the constitution and form of our government: declared to be in full force.

I. *Be it enacted by the representatives of the freemen of this State in general assembly met, and by the authority of the same,* That from and after passing this act, all laws heretofore made in the (then province) now State of Georgia, and have not been repealed, and all the laws of England, as well statute as common, relative to criminal matters, and heretofore used and adopted in the courts of law in this State (then province of Georgia) except in cases of treason, shall be of full force, virtue and effect, to all intents and purposes, as were heretofore had, used and received as the law of this land, any law, usage, custom, article, matter or thing at present adopted in a change of government to the contrary in any wise notwithstanding, so far as the same do not contradict, weaken, hurt, or interfere with the resolves and regulations of the honorable the continental congress, or of any resolves and regulations of this or any former assembly, congress or convention held in and for this State, and in particular

particular of the constitution of the people in convention assembled in this State, and the same shall be in as full and as complete force and effect in the then province) as if the same had been made and passed such

II. *And be it enacted by the representatives of the people of this State, with*

III. *And be it further enacted that the first day of the month of August, and*

Savannah, Septe

See acts of 1778, No

An Act for opti

WHEREAS it is necessary that all the settlers in this State, and by the authority of the general assembly, after the passing of the said act, and obtaining vacant lands and regulations and rules of a family for the land, and for every acre for ever the said white persons they have not more than ten negroes; and the advice and consent of the general assembly be authorized to grant the said lands as aforesaid to the said settlers, provided they shall be distributed

Altered by act of 1

LAWS OF GEORGIA.

particular of the constitution of the same, made and agreed to by the representatives of the people in convention assembled, and ordered to be the rule and government of this State, and the same shall extend to and be in as full force, power and effect, and in as full and ample a manner as the same were formerly of force in this State (then province) as if the said territory were an independent State at the time of making and passing such laws.

II. *And be it enacted*, That this act shall be a general act, and shall be taken notice thereof as such by all judges and other officers of justice or government within this State, without the same being specially pleaded.

III. *And be it further enacted*, That this act shall be and continue and be in force until the first day of January in the year of our Lord one thousand seven hundred and seventy-eight, and from thence to the end of the next session of assembly.*

N. W. JONES, *Speaker*.

Savannah, September 16, 1777.

* See acts of 1778, No. 257—1781, No. 263—1783, No. 279—and 1784, No. 287.

An Act for opening the land office, and for the better settling and strengthening this State. No. 257.

WHEREAS there remains much vacant and uncultivated land in this State, the settlement of which is of the highest importance, wherefore it becomes necessary that all due encouragement should be given to persons to come and settle in this State, and by that means promote the increase of its inhabitants.

I. *Be it therefore enacted by the representatives of the freemen of the State of Georgia in general assembly met, and by the authority of the same*, That from and immediately after the passing of this act, an office shall be opened for the purpose of applying for and obtaining vacant lands, by persons entitled to the same in this State under the regulations and rules herein set forth, that is to say: Every free white person or head of a family shall be entitled to, allotted and granted him,† two hundred acres of land, and for every other white person of the said family fifty acres of land, and fifty acres for every negro, the property of such white person or family: *Provided*, the said white person or family shall not have rights for more than ten negroes, and that they have not had land heretofore granted them, in virtue of and in right of the said ten negroes; and the governor or commander in chief for the time being with the advice and consent of the executive council shall have full power, and are hereby authorized to grant such tracts or lots of land to such person or persons so obtaining lands as aforesaid under and by virtue of this act, and he or they shall within six months settle, plant, cultivate, and live on the same; or in case such person or persons shall be disturbed in time of alarm or annoyance by any enemy and obliged to remove

† Altered by act of 1780, No. 259, sect. IX.

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A. D. 1777.
 No. 256.
 General Act.
 Continuation.
 Preamble.
 Enacted.
 Land office opened.
 Head rights.
 Proviso.
 Governor to grant lands.
 To be settled within six months.
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DOCKET NO: _____

IN THE SUPREME COURT OF THE UNITED STATES

DARRELL BROWN,

Petitioner in Certiorari,

v.

STATE OF GEORGIA,

Respondent in Certiorari.

AFFIDAVIT OF SERVICE

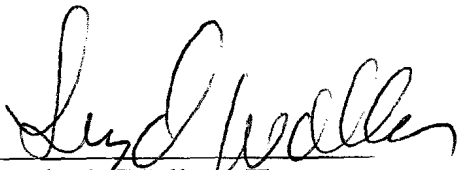
This is to certify that on March 11, 2009, I served the foregoing Petition for A Writ of Certiorari on:

Scott Ballard, Esq.
District Attorney for Fayette County
P.O. Box 1498
Fayetteville, GA 30214

Thurbert Baker, Esq.
Georgia Attorney General
40 Capital Square
Atlanta, GA 30334

by depositing same in the United States Postal Service with adequate First Class postage affixed thereto:

So sworn under penalty of perjury.



Lloyd W. Walker, II
Attorney for Petitioner