

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN JOSEPH BREWNER, *Petitioner*

vs.

STATE OF GEORGIA, *Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

O.C.G.A. § 24-4-403 provides that “[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”

Whether the Supreme Court of Georgia erred by concluding that the trial court did not err in admitting other crimes/wrongs evidence based on its failure to make a reasoned, recorded statement of the Federal Rule 403 balancing test as the Third, Sixth, Seventh, Eighth, and Tenth Circuits have held, or only if a party requests on the record findings of the Federal Rule 403 balancing test, as the First, Fifth, Ninth, D.C. Circuit, and, in the decision below, the Eleventh Circuit have held.

Whether the Supreme Court of Georgia was authorized to conduct the O.C.G.A. § 24-4-403 balancing test for the first time on appeal to uphold the trial court’s admission of other crimes/wrongs evidence where the trial court’s ruling was not express or discernible from the record.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Brewner respectfully petitions for a writ of certiorari to review the judgment of the Georgia Supreme Court.

OPINION AND ORDER BELOW

The opinion of the Georgia Supreme Court affirming Petitioner's judgment of conviction is published at 302 Ga. 6 (2017). Pet. App. 1a-22a. The order of the Georgia Supreme Court denying motion for reconsideration is unpublished. Pet. App. 23a.

JURISDICTION

The Supreme Court of Georgia affirmed Petitioner's judgment of conviction on August 14, 2017. Pet. App. 1a-22a. The Supreme Court of Georgia denied Petitioner's motion for reconsideration on September 13, 2017. Pet. App. 23a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 24-4-403 provides:

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule 403 states:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: undue prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

INTRODUCTION

The circuits are divided on whether Huddleston v. United States, 485 U.S. 681, 691 (1988) requires a trial court to make a reasoned recorded statement of its Federal Rule 403 balancing test prior to admitting other crimes/wrongs evidence for extrinsic purposes under Federal Rule 404 (b). Five circuits have answered the question in the affirmative, and five circuits including the Eleventh Circuit have answered the question, “no.” But, even within the Eleventh Circuit, several decisions expressly hold that a district court must conduct the balancing test under Federal Rule 403 and weigh the probative value of other crimes/wrongs evidence against its prejudice.

Under Federal Rule 104, the district court is the gatekeeper of evidence and determines preliminary questions of law regarding the admission of evidence, such as the State’s 404 (b) evidence. Specifically, the district court must conduct a commonsense assessment and consider relevant factors such as the State’s need for the evidence, the availability of other methods of proof, the temporal remoteness of the other crimes, and the purpose(s) of the evidence. It must weigh these factors against the prejudicial effect of other crimes/wrongs and determine if the probative value of the other crimes/wrongs evidence is substantially outweighed by its prejudicial effect, confusion of the issues, misleading the jury, undue delay, wasting time, or needless presentation of cumulative evidence.

This case presents the appropriate vehicle to resolve the question because the trial court’s ruling was not express, and Petitioner objected to both aspects of evidence on the grounds that the

probative value of said evidence was substantially outweighed by its prejudicial effect.

The writ should issue to resolve the question and create uniformity in the treatment of a fundamental rule regarding the admission of prejudicial evidence in civil and criminal cases. As it stands, the law is splintered concerning the trial court's duty to make a reasoned recorded statement of the Federal Rule 403 balancing test *sua sponte* prior to admitting other crimes/wrongs evidence at trial. The circuits are also split as to whether an appellate court can conduct a post hoc Federal Rule 403 balancing test for the first time on appeal when the trial court's ruling was not express and the trial court did not consider Federal Rule 403 or conduct the requisite commonsense balancing analysis.

STATEMENT OF THE CASE

On November 2014, Petitioner was jointly indicted by a Gwinnett County grand jury with four other co-indictees for murder and other crimes stemming from an August 2014 incident. Pet. App. 1a. After an eight-day jury trial in October 2015, Petitioner was convicted of all 17 counts in which he was named. Pet. App. 1a. Following a hearing, the trial court denied Petitioner's motion for new trial. Pet. App. 1a.

Petitioner filed a timely notice of appeal and the judgment of his conviction was affirmed by the Georgia Supreme Court on August 14, 2017 following oral argument. Pet. App. 1a-2a. On September 13, 2017, the Supreme Court denied Petitioner's motion for reconsideration. Pet. App. 23a.

Prior to trial, the trial court held a pre-trial motions hearing at which time several motions were argued, including the State's motion to admit 404 (b) evidence. Pet. App. 8a, 24a-44a. The State proffered two distinct types of evidence for 404 (b) purposes: (1) testimony regarding Petitioner's involvement in past drug dealings and (2) testimony regarding Petitioner's participation in a 2013 alleged home invasion and robbery of Jamie Staples. Pet. App. 8a. The State proffered evidence that Petitioner participated in a home invasion and robbery of Staples, which was admissible to prove his motive, opportunity, intent, participation and plan in the charged crimes; the State alternately argued it was admissible as intrinsic evidence. Pet. App. 35-36a, 38a. With respect to the Petitioner's alleged drug involvement and activities, the State argued that it was admissible to show his motive and intent in the charged crimes and alternately, as intrinsic evidence. Pet. App. 31a-34a, 36a. Petitioner objected to both pieces of evidence as improper intrinsic evidence. argued that the prior incident with Staples only involved a beating, not a robbery or home invasion, and objected to both types of evidence on Rule 403 grounds, the probative value of the evidence was substantially outweighed by its prejudicial effect. Pet. App. 38-39a.

At the conclusion of the hearing, the trial court reserved ruling on the motion and requested that the parties provide the recordings of Detective Johnson's phone

conversations with Brewner and his interview with Staples, for its consideration in deciding the motion. Pet. App. 8a-9a. The trial court never issued an express ruling on the 404 (b) motion, orally in open court or in writing. Pet. App. 9a, 24a-44a. Nothing in the trial transcript reveals the trial court's analysis of the relevance of the two pieces of evidence for the purposes stated, its materiality to the State's case or a balancing of its probative value against the prejudicial effect. *Id.*

The trial court *sub silentio* granted the motion by allowing both types of evidence to be offered during the trial. Pet. App. 9a.

At trial, the State relied on a conspiracy theory as the sole basis of Petitioner's culpability of the crimes of which he was convicted, which Petitioner denied. There was no direct evidence that Petitioner was present at the scene of the crimes at the time of their commission and did not communicate with his co-indictees during their commission of the crimes. Pet. App. 1a-2a, 6a.

Petitioner appealed to the Georgia Supreme Court, arguing that (1) the trial court erred in admitting both aspects of the 404 (b) evidence and (2) the trial court failed to make on the record findings regarding the 404 (b) prongs, including the 403 balancing test. Pet. App. 12a, 16a. While the Supreme Court acknowledged that the trial court's ruling was not express and could not say whether the trial

court admitted evidence of Petitioner's alleged drug dealings for extrinsic or intrinsic purposes, it conducted the balancing test under O.C.G.A. § 24-4-403 for the first time on appeal, determined that the probative value of the other crimes/wrongs evidence was not substantially outweighed by its prejudicial effect, employing an abuse of discretion standard of review. Pet. App. 15a-16a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision deepens an acknowledged circuit split regarding the district court's duty to make a reasoned, recorded statement weighing the probative value of other crimes/wrongs evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury pursuant to Federal Rules of Evidence 403 and 404 (b) prior to admitting other crimes/wrongs evidence at trial. Here, Petitioner specifically objected to the admission of other crimes/wrongs evidence on the grounds that the probative value of the evidence was substantially outweighed by its prejudicial effect. Pet. App. 39a.

In the Third, Sixth, Seventh, Eighth, and Tenth Circuits, the district court's failure to make a reasoned, recorded statement of the 403 balancing test regarding the admission or exclusion of other crimes/wrongs evidence mandates reversal of a defendant's convictions and/or remand. Other state courts of last resort agree with

this interpretation of the trial court's duties pursuant to parallel statutes to Federal Rules 403 and 404 (b).

But, in the First, Fifth, Ninth, D.C., and Eleventh Circuits, a district court does not err by failing to make on the record findings pursuant to Rule 403 if a party does not request the findings. These decisions hold that an appellate court can conduct a post hoc balancing test based on a cold record even though it is impossible to determine from the record the trial court's rationale and reasoning for admitting or excluding other crimes/ wrongs evidence or whether it even considered Rule 403.

This conflict, which strikes at the heart of the district court's duty to decide a preliminary question of law regarding the admission of other crimes/wrongs evidence, will not be resolved without this Court's review. Additionally, the rule adopted by the court below, and previously by the Eleventh Circuit makes no sense, as record findings ensure that the district court made the requisite commonsense assessment of the other crimes/wrongs evidence and balancing test in support of its ruling. Furthermore, the Eleventh Circuit decisions are inapposite where, as here, Petitioner objected on O.C.G.A. § 24-4-403 grounds.

The Court's decision in this case invites arbitrary and inconsistent results, shifts the burden to the parties to ask the trial court to do what the trial court is

required by law to do, and jeopardizes a defendant's ability to seek meaningful appellate review of a district court's ruling.

This case presents an ideal vehicle to resolve the issue with finality.

I. The Decision Below Deepens a Longstanding Circuit Split Over The Trial Court's Duty to Decide a Fundamental Rule of Evidence.

The issue presented in this case is a preliminary question of law concerning the admissibility of other crimes/wrongs evidence: whether the trial court must conduct the commonsense balancing test under O.C.G.A. § 24-4-403 *sua sponte* and on the record, weighing the probative value of other crimes/wrongs evidence against its prejudicial effect prior to admitting or excluding said evidence.

If the trial court's ruling is not express as here, an appellate court is not authorized to balance the probative value of other crimes/wrongs evidence against its prejudicial effect for the first time on appeal under the guise of an abuse of discretion standard. U.S. v. Bailey, 840 F.3d 99, 117 IV. A. 1. (i) (3rd Cir. 2016).

Ten circuits have resolved the question presented, dividing evenly on the issue.

1. The Third, Fourth, Seventh, Eighth and Tenth Circuits hold that the trial court must weigh the probative value of the 404 (b) evidence against its prejudicial effect and make a reasoned, recorded statement of its findings under the 403 balancing test.

The Third Circuit holds that “[w]hen determining whether evidence violates Rule 403, district courts must balance the probative value of the [other crimes/wrongs] evidence against its prejudicial effect, clarifying its reasoning on-the-record.” Bailey, 840 F.3d at 117 IV A. 1. i. “This requirement not only provides the defendants with an explanation of the district court’s reasoning, but also enables appellate courts to understand the district court’s logic.” *Id.* *See also*, U.S. v. Herman, 589 F.2d 1191, 1197-98 (3rd Cir. 1978) (the appellate court “needed a clear and straightforward assessment of the question from the trial judge[,] [and] in order for the appellate court to perform our function properly, we must have a statement of reasons”; case was remanded “so that the district court can give us the benefit of its reasoning[.]”); U.S. v. Caldwell, 760 F.3d 267, 277 (II) (A) (3rd Cir. 2014), citing U.S. v. Sampson, 980 F.2d 883, 887 (3rd Cir. 1992) (a

district court's reasoning for admitting 404 (b) evidence "should be detailed and on the record; a mere recitation of the purpose in Rule 404 (2) is insufficient[]"); Seeley v. Chase, 443 F.3d 1290, 1295 (10th Cir. 2006) (holding that courts must "make a reasoned, recorded statement of its 403 decision when it admits evidence under Rules 413-415" and failure to make these findings on the record requires a limited remand); U.S. v. Castillo, 140 F.3d 874, 884 (10th Cir. 1998) (same). *See also*, U.S. v. Youts, 229 F.3d 1312, 1318 (10th Cir. 2000) ("[T]he court's Rule 404 (b) articulation must occur prior to its decision whether to admit the evidence." This is "to ensure that the decision to admit or exclude be made only after issues and reasons are exposed and clearly stated.").

The Fourth, Seventh, Eighth, and Tenth Circuits agree. *See*, U.S. v. Laufermilt, 576 Fed. Appx. 177, 181 (A) (4th Cir. 2014); U.S. v. Loughry, 660 F.3d 965, 972 (7th Cir. 2011) (district court erred in admitting 404 (b) evidence "when it failed to articulate its reasoning in considering a 403 challenge[;] . . . [the] court reviewed the transcript and could find no portion within it where the court explained its bare-bones conclusion that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice[]"); U.S. v. Ciesiolka, 614 F.3d 347, 357 (7th Cir.

2010). In the Eighth Circuit, “[r]eversal is appropriate only if the trial court failed to engage in the required balancing process or when it is impossible to determine from the record whether it did or not.” U.S. v. Pierson, 544 F.3d 933, 941 (8th Cir. 2008).

Several state courts of last resort have reached this same conclusion. *See, State v. McFarland*, 721 S.E.2d 62, 73 (W. Va. 2011) (“[t]he balancing necessary under Rule 403 must affirmatively appear on the record[]” and where the record fails to show that the trial court conducted the balancing test, defendant’s conviction was reversed); State v. Spears, 403 S.C. 247, 258-259 (2013) (when the trial court fails to conduct a Rule 403 balancing test on the record to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to defendant, case was remanded to the trial court to conduct an on-the-record Rule 403 balancing test). *See also, Towles v. State*, 168 So. 3d 133, 142 (Ala. 2014) (“[A] balancing test must be applied. The probative value of the evidence of other offense must also be balanced against its ‘prejudicial nature’ to determine its admissibility.”).

2. On the other hand, the First, Fifth, Ninth, Eleventh, and D.C. circuits hold that the district court has no obligation to state its Rule 403 balancing analysis on the record to support the admission of evidence under Rule 404 (b) absent a party's request for such findings. *See, United States v. Rosa*, 705 F.2d 1375, 1378 (1st Cir. 1983); *United States v. Zabaneh*, 837 F.2d 1249, 1262 (5th Cir. 1988); *United States v. Bradshaw*, 690 F.2d 704, 708-709 (9th Cir.), cert denied, 463 U.S. 1210, 77 LEd. 2d 1392, 103 S. Ct. 3543 (1982); *United States v. Braithwaite*, 709 F.2d 1450, 1455-1456 (11th Cir. 1983); *United States v. Sutton*, 255 U.S. App. D.C. 307, 801 F.2d 1346, 1362 (D.C. Cir. 1986) ("Reversal . . . for failure to make such a balancing on the record is inappropriate . . . if defense counsel failed to request such balancing. . . .").

3. Contrary to the Eleventh Circuit's holding, the Third and Tenth Circuits hold that, if an appellate court cannot discern from the record the analysis or reasoning employed by the trial court or whether it considered Rule 403, it would be wrong for the appellate court to "speculate about the possible considerations which might have informed the [trial] court's judgment." *Castillo*, 140 F.3d at 884. There would be "no way of understanding the basis of its decision." *Id.* *See also, Sampson*, 980 F.2d at

889 (where district court failed to perform Rule 403 balancing analysis or where its rationale is not apparent from the record, “there is no way to review its discretion”).

4. The Second Circuit does not reach the question presented, but finds that where “there was inadequate consideration of the probative value of the evidence, or a failure to adequately consider the risk of unfair prejudice and to balance this risk against probative value, [an appellate court] will reverse an evidentiary determination as an abuse of discretion.” U.S. v. Morgan, 786 F.3d 227, 232 (2nd Cir. 2015). The Court has held that the trial court “arbitrarily and abuses its discretion in admitting other crimes/wrongs evidence when it fails to make a ‘conscientious assessment’ of whether unfair prejudice of admitting other crimes/wrongs evidence substantially outweighs its probative value.” U.S. v. Salameh, 152 F.3d 88, 110 (2nd Cir. 1998). *See also*, United States v. Borello, 766 F.2d 46, 59 & n. 22 (2nd Cir. 1985) (“the court’s remarks” reflected that it had not made the careful assessment required by Rule 403); Haynes v. Acquino, 692 Fed. Appx. 670, 671 2017 U.S. App. LEXIS 11658 (“Application of . . . [Federal] Rule [of Evidence 403] requires a balancing analysis.”).

5. On the other hand, the Fifth and Eleventh Circuits hold that the appellate court can conduct the Rule 403 and 404 (b) balancing for the first time on appeal where the record did not indicate that the district court conducted the proper review under Rules 403 and 404 (b), even though these circuits also hold that the district court must conduct the 403 balancing test. *Compare*, U.S. v. Turquitt, 557 F.2d 464 (5th Cir. 1977) (“a balancing test must be applied[]”), U.S. v. Goodwin, 492 F.2d 1141 (5th Cir. 1974) (holding that there must be a determination that evidence of another similar crime “must also be reasonably necessary to the government’s case[] . . . before its probative value will be held to outweigh its prejudicial effects[]”) and U.S. v. Simmons, 503 F.2d 831, 835 (5th Cir. 1974) with Beechum, 582 F.2d at 914-915. *Compare*, U.S. v. Dothard, 666 F.2d 498, 502 (11th Cir. 1982) (The trial court “must determine that the probative value of the evidence is not outweighed by undue prejudice[.]”) with U.S. v. Veltmann, 6 F.3d 1483, 1499 (11th Cir. 1993).

6. The Third Circuit takes a hybrid approach: “If a district court does not conduct this on-the-record balancing, we either remand the case to the district court or, where practical, undertake this balancing ourselves.” Bailey, 840 F.2d at 117-118 IV. A. 1. (i).

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE AND IS AN IDEAL VEHICLE FOR RESOLVING THE ISSUE.

The interpretation of a trial court's duty with respect to Federal Rules 403 and 404 (b) has widespread influence and impact in virtually every case regarding the admission of prejudicial evidence, whether the case is civil, criminal, domestic, intellectual property, tax, and the list goes on.

O.C.G.A. § 24-1-104 (a), derived from Federal Rule 104, provides:

“Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court[.] . . . Preliminary questions shall be resolved by the preponderance of the evidence.”

The question of whether other crimes/wrongs evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury or by consideration of undue delay, waste of time or needless presentation of cumulative evidence[.]” is a preliminary question of law. O.C.G.A. § 24-4-403. The plain language of the statute places the sole duty and responsibility upon the trial court, not the appellate court, to conduct a “commonsense

assessment of all the circumstances surrounding the extrinsic offense. As the Advisory Committee Notes to rule 404 (b) state: ‘No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.’” U.S. v. Beechum, 582 F.2d 898, 914 (1978), citing 28 U.S.C.A. Rules of Evidence at 109 (1975).

The point of the balancing test under O.C.G.A. § 24-4-403 is to ensure that the trial court knows to apply it and understands that relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. *See, U.S. v. Robinson*, 560 F.2d 507, 514 (2d Cir. 1977) (Federal Rule 403 is intended to prevent “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one[,]” which might “arouse the jury’s passions to a point where they would act irrationally in reaching a verdict”), quoting Fed. R. Evid. 404 advisory committee note.

Here, Petitioner’s trial counsel objected to the admission of both prongs of the other crimes/wrongs evidence on grounds that it was not intrinsic evidence and the prejudicial effect of the evidence substantially

outweighed any probative value. Pet. App. 39a. Thus, Petitioner made a specific 403 objection. *Compare, Laudermilt*, 576 Fed. Appx. at 181 (A) (defendant's failure to object at trial obviated the need for the district court to conduct a Rule 403 inquiry on the record).

Aside from the trial court's independent duty to weigh the probative value of the other crimes evidence against its prejudicial effect under O.C.G.A. §§ 24-1-104 (a), 24-4-403, and 24-4-404 (b), Petitioner's O.C.G.A. § 24-4-403 objection placed the burden squarely on the trial court to determine if each prong of the other crimes/wrongs evidence was admissible for extrinsic or intrinsic purposes since this was a matter in dispute. See, Pet. App. 31a-36a, 38a-40a). If the other crimes/wrongs evidence was admissible for extrinsic reasons, which aspect of the evidence fell within this scope and what was the limited purpose(s) for admitting this evidence? Did it apply with respect to all 17 counts in the indictment or just certain specific counts?

Furthermore, the trial court was required to consider the strength of the State's evidence with respect to the counts of the indictment for which the State was seeking to introduce the other crimes/wrongs evidence, determine whether the State had a need for the other crimes/wrongs evidence

with respect to those counts, the availability of other methods of proof, the temporal remoteness of the other crimes/wrongs evidence, and the resulting prejudicial effect of the evidence upon a fair determination of Petitioner's innocence if it admitted the other crimes/wrongs evidence for specified purposes of proving certain counts in the indictment. Old Chief v. United States, 519 U.S. 172, 184-185, 117 S. Ct. 644, 136 L.Ed. 2d 574 (1997); Beechum, 482 F.2d at 914; Bradley, 433 F.2d at 1113; Robinson, 560 F.2d at 514, quoting Fed. R. Evid. 404 advisory committee note.

The trial court is in the best position to conduct this commonsense analysis under O.C.G.A. § 24-4-403 since it is a heartbeat away from the evidence and has a pulse for the witnesses testifying in court and evidence admitted at trial. Salameh, 152 F.3d at 88. In exercising its discretion to admit potentially inflammatory and prejudicial other crimes/wrongs evidence, the trial court must explain its rationale, reasons and findings in support of its ruling on the record, so the parties can understand the ruling. It can then be determined whether the trial court will give the jury a limiting instruction consistent with its ruling prior to the admission of the other crimes/wrongs evidence at trial as well as at the trial's conclusion.

There are many benefits to the trial court's on-the-record findings under O.C.G.A. §§ 24-4-403 and 24-4-404 (b). Unfortunately, the record makes no mention of any of the foregoing considerations.

Contrary to the Supreme Court's conclusion, nothing in the plain language of Federal Rules 403 and 404 (and O.C.G.A. §§ 24-4-403 and 24-4-404 (b)) requires a party to request that the trial court make Rule 403 findings on the record. Given the circuit split on this issue, with several circuits, including the Eleventh Circuit, engrafting language upon Federal Rule 403 requiring a party to request 403 findings on the record where this language does not otherwise exist, the question presented is important and recurring. This case provides an appropriate vehicle to resolve the question presented.

III. THE GEORGIA SUPREME COURT'S DECISION IS WRONG.

A. The Georgia Supreme Court's decision conflicts with the plain meaning of O.C.G.A. §§ 24-4-403 and 24-1-104 (a).

The Supreme Court of Georgia relied on Eleventh Circuit decisions to conclude that a trial court does not err in failing to make on-the-record findings in support of its admission of 404 (b) unless a party requests it. *See,*

Braithwaite, 709 F2d at 1455-56; U.S. v. Schatz, 545 Fed. Appx 934, 936 (11th Cir. 2013). Pet. App. 16a-17a.

These decisions, however, fail to acknowledge that a trial court's decision to admit other crimes/wrongs evidence is a preliminary question of law, which the court must decide by a preponderance of the evidence. *See*, O.C.G.A. § 24-1-104 (a).

Because Federal Rules 404 (b) and 403 directly speak to relevant evidence that is subject to exclusion and given that Rule 403 “confers discretion [on the trial court] by providing that evidence ‘may’ be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item’s twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.” Old Chief, 519 U.S. at 184-185. “This balancing requires great care on the part of the district court because few categories of evidence bring greater risk of prejudice to the accused under Rule 403.” Mueller, Federal Evidence § 4:28, at 731. “If other evidence, which does not carry the same dangers with it, could be used to establish the same fact, then the marginal probative value of the evidence in question is slight or nonexistent.” 1 McCormick on Evid. § 185 (7th ed.).

The district court must also consider whether the other crimes/wrongs evidence has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one[,]” which might “arouse the jury’s passions to a point where they would act irrationally in reaching a verdict.” Robinson, 560 F.2d at 514, quoting Fed. R. Evid. 404 advisory committee note.

Schatz, *supra*, and Braithwaite, *supra*, misconstrue the plain language of Federal Rules 104, 403 and 404 (b), improperly shifting the burden to the defendant to ask the trial court to do what the trial court is required by law to do.

Additionally, decisions within the Eleventh Circuit are inherently inconsistent. For example, the Court in U.S. v. Larios-Trujillo, 403 Fed Appx 442, 444 (11th Cir.2017) held:

This Court’s Rule 404 (b) jurisprudence dictates that evidence of prior acts may be admitted so long as (1) it is submitted as something other than propensity evidence (such as proving one of the 404 (b) exceptions just mentioned), (2) there is sufficient proof for the jury to determine that the defendant committed the prior act, and (3) *the evidence does not fail the Rule 403 balancing test.*” (Emphasis supplied).

O.C.G.A. § 24-4-403, which parallels Federal Rule 403, is not only an independent relevant consideration, but also part and parcel of the trial court's responsibilities under Federal Rule 404 (b) or O.C.G.A. § 24-4-404 (b). U.S. v. LaFond, 783 F.3d 1216, 1222 (III) (A) (11th Cir. 2015); U.S. v. Ellisor, 822 F.3d 1255, 1267 (11th Cir. 2008).

B. The Eleventh Circuit decisions are inapposite.

Where, as here, Petitioner objected to the admission of both aspects of the State's 404 (b) evidence on grounds that the probative value of the evidence was substantially outweighed by its prejudicial effect, this act was the functional equivalent of a request for on the record findings pursuant to O.C.G.A. §§ 24-4-403 and 24-4-404 (b). Pet. App. 39a. The Supreme Court of Georgia's reliance on Schatz, *supra*, Braithwaite, *supra*, and other Eleventh Circuit decisions which similarly hold that the district court does not err in failing to make on-the-record findings of its 404 (b) decision, including 403, absent a party's request for such findings is unavailing.

C. The Supreme Court of Georgia erred in failing to remand the case to the trial court for an on-the-record balancing test under O.C.G.A. § 24-4-403 or reverse Petitioner's judgment of conviction because the trial court's ruling was not express and there was nothing to review.

As a general rule, “[w]hen a [trial] court engages in a Rule 403 balancing and articulates on the record a rational explanation, [the appellate court] will rarely disturb its ruling.” Sampson, 980 F.2d at 889 II B. The trial court “must evaluate pursuant to Rule 403 whether the evidence is sufficiently probative, such that its probative value is not outweighed by the inherently prejudicial nature of prior bad act evidence.” *Id.* at 889. “In making a Rule 403 determination, courts should ask whether the evidence’s proper value ‘is more matched by [the possibility]. . . that it will divert the jury from the facts which should control their verdict.’” Bensen v. Am. Ultramar, Ltd., No. 92 CIV-4420, 1996 U.S. Dist. LEXIS 10647, 1996 WL 422262, at *6 (S.D.N.Y. July 29, 1996) (quoting U.S. v. Krulewitch, 145 F.2d 76, 80 (2d Cir. 1944)). Necessity of the other crimes/wrongs evidence “is part of the Court’s analysis of extrinsic evidence under Rule 404 (b)[.]” as well as the availability of other methods of proof. Bradley v. U.S., 433 F.2d 1113, 140 U.S. App. D.C. 7 (D.C. Cir. 1969); Turquitt, 557 F.2d at 464

(evidence of another similar crime “must also be reasonably necessary to the government’s case[] . . . before its probative value will be held to outweigh its prejudicial effect.”)

It is undisputed that the trial court’s ruling was not express. Pet. App. 9a. The trial court said nothing about the State’s need for both aspects of the other crimes/wrongs evidence. It does not appear that the trial court gave any consideration to balancing the need and probative value of the evidence against its prejudicial effect. The record does not demonstrate that the trial court admitted both prongs of the other crimes/wrongs evidence for extrinsic or intrinsic purposes. All we know is that both prongs of the evidence were admitted at trial without a curative instruction and the trial court gave the jury a limiting instruction at the conclusion of the eight-day trial.

While the Supreme Court of Georgia suggests in a footnote that evidence of Petitioner’s alleged drug dealings “might be viewed as ‘intrinsic’ evidence not subject to the 404 (b) requirements” (Pet. App. 16a), this conclusion is contrary to well-established authority. The O.C.G.A. § 24-4-403 balancing test is incorporated into one of the three prongs of O.C.G.A. § 24-4-404 (b). Ellisor, 522 F.3d at 1267. Moreover, “[e]ven if evidence is determined to be intrinsic, it is still subject to the balancing test established

by Rule 403 and may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” Larios-Trujillo, 403 Fed. Appx. at 444 (2015). *See also*, U.S. v. Baker, 432 F.3d 1189, 1205 n. 9 (11th Cir. 2005), abrogated on other grounds by Davis v. Washington, 574 U.S. 813 (2006).

Thus, “[t]o avoid acting arbitrarily, the [trial] court must make a ‘conscientious assessment’ of whether unfair prejudice substantially outweighs probative value.” U.S. v. Birney, 686 F.2d 102, 106 (2d Cir. 1982). As such, the appellate court “cannot infer such a rational explanation” where, as here, the “reasoning underlying the Court’s Rule 403 balancing was not apparent from the record.” U.S. v. Smith, 725 F.3d 340, 348 (3rd Cir. 2013).

Accordingly, the Georgia Supreme Court erred in applying the deferential abuse of discretion standard of review to uphold the trial court’s ruling; there was nothing to review. U.S. v. Green, 648 F.2d 587, 593 (9th Cir. 1981) (holding that where “the record does not disclose that the trial judge performed the necessary weighing . . . the deference customarily accorded the trial court’s ruling is inappropriate”); Ciesiolka, 614 F.3d at 357 (even “[a] pro-forma recitation of the Rule 403 balancing test does not

allow an appellate court to conduct a proper review of the district court's analysis"). The trial record "cannot support an inference that an appropriate balancing was performed[.]" United States v. Morgan, 786 F.3d 227, 232 (2nd Cir. 2015). "Because the court gave no explanation for its conclusion that the [two aspects of the other crimes/wrongs] evidence should be admitted [and for what purpose or purposes][.], [the Georgia Supreme Court was] in no position to assume that the court appreciated the seriousness of the risk that introducing the evidence would undermine the fairness of the trial." United States v. McCallum, 584 F.3d 471, 477 (2nd Cir. 2009). *Compare*, U.S. v. Finley, 726 F.3d 483 (3rd Cir. 2013) ("Under deferential standard, if it is clear that the district court did in fact conduct a Rule 403 analysis, then the appellate court will uphold the ruling unless the district court has abused its discretion.").

Furthermore, the Georgia Supreme Court could not conduct the 403 balancing test in the first instance to rectify the trial court's failings. Castillo, 140 F.3d at 884; Laudermilt, 567 Fed. Appx. at 181 ("Rule 403 judgments are preeminently the province of the trial courts[.]"). For example, the State did not show, and the trial court did not find that there was a probative connection between Petitioner's alleged drug dealings and the charged

offenses. Petitioner was not charged with a drug offense in the indictment. *See, United States v. Mayans*, 17 F.3d 1174, 1182-83 (9th Cir. 1994) (reversing the admission of Rule 404 (b) evidence because there was not a close connection between the past drug deals and the charged offense).

Consequently, because the evidence of Petitioner's guilt was not overwhelming, the Supreme Court of Georgia "cannot say the erroneously admitted evidence was inconsequential to the verdict." *Caldwell*, 760 F.3d at 285 (II) (C). It was constrained to reverse Petitioner's convictions. *Morgan*, 786 F.3d at 232; *Smith*, 725 F.3d at 348; *Sampson*, 980 F.2d at 889; *McFarland*, 721 S.E.2d at 73. *See also, U.S. v. Haas*, 184 Fed. Appx. 230 (2006) (holding that where proper balancing of evidence's probative value against prejudicial effect did not occur, admission of robbery evidence was reversible error).

In the alternative, it was required to remand the case to the trial court for a reasoned recorded statement of the O.C.G.A. § 24-4-403 balancing test weighing the probative value of other crimes/wrongs evidence against its prejudicial effect *See, Loughry*, 660 F.3d at 972; *Pierson*, 544 F.3d at 941; *Seeley*, 443 F.3d at 1295; *Castillo*, 140 F.3d at 884; *Sampson*, 980 F.2d at 887; *U.S. v. Pinney*, 967 F.2d 912, 917-918 (3rd Cir. 1992); *Caldwell*, 760

F.2d at 285 (III) (C); Green, 648 F.2d at 593; Herman, 589 F.2d at 1197-1198; U.S. v. Gassew, 42 F. Supp. 3d 686, 695 (2) (2014); U.S. v. Willis, 66 V.I. 754, 777 (2) (2015).

Absent any factual findings from the trial court concerning the O.C.G.A. § 24-4-403 balancing test, there can be no meaningful appellate review of the trial court's admission of 404 (b) evidence. Smith, 725 F.3d at 348 (the district court failed to conduct "the meaningful balancing required by [its] precedent[]" and reversed defendant's conviction); U.S. v. LeMay, 260 F.3d 1018, 1022 (9th Cir. 2001) (holding that "district courts must apply the balancing test of Rule 403 in a manner that allows for meaningful appellate review[]"). *Cf.* U.S. v. Repak, 852 F.3d 230, 247 (3rd Cir. 2017) ("An evaluation under Federal Rule 403 is not meaningful if it merely states a bare conclusion. More is required.")

CONCLUSION

The petition for a writ of certiorari should be granted.

This 12th day of December, 2017.

Respectfully submitted,

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