IN THE COURT OF APPEALS
STATE OF GEORGIA

THE STATE OF GEORGIA,	:	
	:	
Appellant,	:	Appeal No. A19A0129
	:	
v.	:	
	:	
STEVEN D. JONES,	:	
(a.k.a. STEPHEN D. JONES),	:	
	:	
Appellee.	:	
	:	

BRIEF OF APPELLEE

COMES NOW Appellee Stephen D. Jones, through undersigned counsel, and submits his brief, showing the following:

Part One: Statement of Material Facts and Proceedings Below

The State, in its brief that fails to comply with the simple direction of Court of Appeals Rule 25(a), lacks an objective grasp on the evidence presented to the jury and the settled nature of Georgia law. As is true with all aspects of this appeal, the trial court's substantive order granting Appellee a new trial speaks for itself as to the relevant facts as seen by the trial court. (R2-89-91). Specifically, the trial court's order recounts the facts as follows:

> Law enforcement became aware of a package shipped from [the country of] Holland containing a large amount of drugs. The package was addressed to a Steve Jones at a listed address in Hall County. Law enforcement arranged for a 'controlled delivery' and a postal worker approached the house indicated on the package. The Defendant

> answered the door, identified himself as Stephen Jones, and the postal worker told him there was a package he would need to sign for. The evidence was that the Defendant was not able to inspect the package he would need to sign for. The evidence was that the Defendant was not able to inspect the package in any way before signing it. When asked to sign for the package, the Defendant used some other name, despite having just identified himself to the postal worker by his real name. The Defendant placed the package in a chair out on the porch, tried unsuccessfully to open a car door, then went back into the house and was arrested.
>
> It was never established that the Defendant was a resident of the house, or connected to it in any way other than the address label on the package and his presence at the time of delivery…
>
> The charges in this case involved Trafficking MDMA. Before trial, a hearing was held on the State's notice of other crimes, which dealt with a prior case [from 2002-03] where this Defendant was charged with and plead guilty to Trafficking MDMA. Trial Counsel for the Defendant mentioned in passing that it was a first offender sentence, but nothing else was said about that. The Court allowed the prior to be introduced at trial, and the State elected to do so by admitting a certified copy of the paperwork and did not call any fact witnesses to testify about the prior case.

(R2-89-91).

In fact, the State made the prior 2002-03 similar the centerpiece of its case, erroneously referring to it as a conviction on multiple occasions. Immediately after the trial court charged the jury on the similar, the State said the following:

> MR. AKINS: Your Honor, at this time, I would tender what has been marked as State's Exhibit 36, that being a certified copy of the conviction of Stephen D. Jones in DeKalb County Superior Court, Case Number 03-CR-1047, for possession of MDMA with intent to distribute.

(T-188: 2-6). In closing, the State tells the jury what evidence was the primary ingredient in the recipe for Appellee's guilt:

> MR. AKINS: The main issue in this case is the intent, the defendant's knowledge. And here is the recipe for the Kool-Aid. Number one, the defendant has a prior conviction for possession of MDMA, this very substance, with intent to distribute. This is the sort of thing that you intend to distribute, almost two pounds net weight.
>
> The certified copy you will have, yes, does have a miscellaneous page on the back. I don't know what the clerk was thinking there. But what it does have is his sentence with his date of birth, his age is the same. It has a sheet where all of his rights were addressed, where his attorney was there with him, and it has his signature on the rights waiver. It has his signature on the face of the indictment charging him with possessing and having under his control -- possess with intent to distribute and have under his control MDMA. One sheet is wrong; the rest are him.
>
> This also involves MDMA, not your more common marijuana or cocaine or, unfortunately these days, heroin, but MDMA, kind of a bit more unusual drug. And I would suggest to you, ladies and gentlemen, that if anybody -- not just Detective Higginbotham -- if anybody should be suspicious of a package arriving that's a surprise, it's somebody who has a prior felony conviction for drugs...

(T-215-16).

These are the relevant facts which underlie the trial court's detailed and correct ruling, which is addressed by Appellee in Part Two, *infra*.

Part Two: Legal Argument and Citation to Authority

The State applies the incorrect standard of review. A motion for new trial granted on special grounds (i.e. ineffective assistance of counsel) involves a mixed question of law and fact, requiring this Court to apply two standards: reviewing *de*

novo any questions of law, and the trial court's factual findings and credibility determinations under the clearly erroneous standard. *State v. Shelton*, 329 Ga. App. 582, 583 (2014).

The ruling of the trial court is perfectly clear. It applies *Davis v. State*, 269 Ga. 276 (1998) to defense counsel's deficient performance in failing to object to the State's central use of a certified first offender disposition as a "conviction." The trial court correctly points out that, under Georgia law, fact witnesses must have been used to introduce this similar, and the certified disposition cannot alone be used and called a conviction. The trial court then clearly finds that the use of the certified documents referenced by the State, and the numerous times the State references a non-conviction as a "conviction," was harmful and, thus, prejudicial to Appellee given the thin nature of the evidence.

Despite this clear ruling, the State, in its first enumeration of error, simply fails to address why or how *Davis v. State*, 269 Ga. 276 (1998) is no longer good law, simply choosing to avoid the fundamental point underlying deficiency on appeal. Perhaps this is because the case of *Williams v. State*, 301 Ga. 829 (2017) demonstrates that Georgia's highest court still views *Davis v. State*, 269 Ga. 276 (1998) as good law. In 2017, the Georgia Supreme Court cited *Davis* and recited its holding as active and applicable: a first offender plea is not a conviction, and it is error to admit it as such. This, alone, shuts down any attempt to discredit *Davis*

as bad law, and is likely why the State avoids the issue of *Davis* all together in its first enumeration.

Instead, undaunted by the hierarchy of Georgia's appellate courts and their respective authority, and conflating the applicability of deficiency in its second enumeration of error, the State attempts to argue that a 2017 case from this Court, *Whaley v. State*, 343 Ga. App. 701 (2017), somehow obviates *Davis* due not to what this Court said, but what this Court did not say. The State contends that because *Whaley* contains no prohibition against the use of a certified copy alone, the clear law of *Davis v. State*, 269 Ga. 276 (1998), is somehow overruled.

What the State conveniently fails to point out is that in *Whaley* the appellant only challenged the admission of the similar transaction based on its prejudicial nature and trial counsel's failure to make that objection. *Whaley*, 269 Ga. at 705-06. The case is entirely irrelevant to the law of *Davis*, which is why the *Whaley* court neither cited *Davis* nor mentioned the law surrounding how first offender cases must be admitted as similars. The only relevance of *Whaley* is that his appellate and trial counsel were also both ineffective for failing to raise the *Davis* issue—if, in fact, the first offender similar was not admitted through fact witnesses, which cannot be concluded from reading this Court's decision in *Whaley*.

Finally, regarding the actual issue of harmful error, which also equates to prejudice under the *Strickland* framework, the trial court gets it exactly right. The

trial court, who heard the witnesses testify live and listened to the argument and evidence, concluded that there was a reasonable probability of a different outcome had defense counsel properly objected under *Davis* and the State been required to call fact witnesses—and not erroneously belabor a "conviction" that did not exist. (R2-91).

Despite the State's hyperbolic attempts to call the evidence overwhelming, the record makes clear that the State relied heavily on the similar that it erroneously introduced through certified documents and labeled a previous "conviction" to make its case. As recounted in Part One, *supra*, the State told the jury loud and clear how it was proving intent: "[t]he main issue in this case is the intent, the defendant's knowledge. And here is the recipe for the Kool-Aid. Number one, the defendant has a prior conviction for possession of MDMA…" (T-215-16). The trial court correctly recognized this was harmful error and, thus, that there was a reasonable probability of a different outcome under the prejudice prong of *Strickland* had defense counsel properly objected.

CONCLUSION

Based on the foregoing, the trial court's order, which speaks for itself, is legally and factually sound, and this Court must affirm the grant of a new trial.

Respectfully submitted, this 27th day of September, 2018.

/s/ Stephen M. Reba
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STATE OF GEORGIA

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CERTIFICATE OF SERVICE AND WORD COUNT

I hereby certify that I have served a copy of the within and foregoing *Brief of Appellee* on William C. Akins, Hall County District Attorney's Office, P.O. Box 1690, Gainesville, GA 30503, by depositing said copy in the United States Mail in a properly addressed envelope with adequate postage thereon.

I further certify that this brief complies with Court of Appeals Rules 24(f) and 27(a).

This 27th day of September, 2018.

/s/ Stephen M. Reba
STEPHEN M. REBA
Georgia Bar No. 532158
Counsel for Appellee

Court of Appeals
of the State of Georgia

ATLANTA, September 12, 2018

The Court of Appeals hereby passes the following order

A19A0129. THE STATE v. STEVEN D. JONES.

The APPELLEE'S motion for AN EXTENSION OF TIME in which to file a brief in the above-styled case is hereby GRANTED until 09/27/2018.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, September 12, 2018.

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

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

Stephen E. Castlen , *Clerk.*