

**IN THE SUPREME COURT**

**STATE OF GEORGIA<sup>1</sup>**

**STATE OF GEORGIA**

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**COURT OF APPEALS  
CASE NO. A12B3456**

**v.**

**CHICK MALLISON**

**PETITION FOR A WRIT OF CERTIORARI**

COMES NOW CHICK MALLISON, by and through undersigned counsel, who moves this Honorable Court to grant a writ of certiorari to the Court of Appeals of Georgia to review that court's decision reversing the trial court's decision granting his motion to suppress in *The State of Georgia v. Chick Mallison*, A12B3456 (decided March 27, 2014) (Exhibit A, attached). Petitioner's motion for reconsideration was denied on April 10, 2014. A Notice of Intention to Apply for

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<sup>1</sup> All names in this brief have been changed to protect client privacy. This holding can be found at *State v. Richards*, 327 Ga.App. 58, 755 S.E.2d 367 (Ga. App., 2014).

Certiorari was filed in the Court of Appeals on April 16, 2014. An affidavit of indigence is attached. (Exhibit B).

## I.

### **ISSUE FOR WHICH A WRIT OF CERTIORARI IS SOUGHT:**

Where the trial court found the officers testimony during a motion to suppress hearing to be incredible, the trial court's findings should be upheld unless clearly erroneous.

**II.**

**MERIT OF ISSUE FOR CERTIORARI REVIEW:**

This case presents issues of great concern, importance and gravity to the public. It is longstanding and uncontroverted precedent that “[o]n a motion to suppress, the credibility of witnesses, resolution of any conflict or inconsistency, and weight to be accorded testimony are solely the province of the [trial] judge.” *King v. State*, 267 Ga. App. 546, 548 (2004). By overturning the trial court’s factual findings based on testimonial evidence in a motion to suppress, the lower court usurped the trial court’s position as finder of fact.

Petitioner respectfully requests that this court issue a writ of certiorari in the instant case.

**III.**

**THE CASE BELOW:**

Petitioner Chick Mallison successfully moved to suppress five milliliters of ketamine discovered in his car after an unlawful search. (Record of the case, hereinafter “R.” pages 39-40). The trial court’s holding on the motion was based on a credibility issue. The trial court found that Officer Ratliff’s testimony – that he merely asked Mr. Mallison to display his arms so that the officer could examine his track marks – to be incredible. The court found that Officer Ratliff’s request amounted to an order that Mr. Mallison was not free to refuse. (R.<sup>2</sup> 39-40). The trial court found that this order escalated the encounter to an investigatory stop unsupported by reasonable suspicion. As such, the trial court found that the ketamine recovered as a result of this illegal escalation was fruit of the poisonous tree and should be suppressed.

When overturning the trial court’s ruling, the lower court gave no deference to the trial court’s findings on fact and credibility. By overturning a trial court’s findings of fact and credibility, the lower court’s decision runs afoul of clear, unequivocal precedent—that the Court of Appeals “*never second-guess[es]* the

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<sup>2</sup> Order Granting Motion to Suppress dated April 8, 2013 by Honorable Patrick Lightfoot, Jefferson Judicial Circuit.

trial court’s factual findings where they are based on testimonial evidence.” *The State v. Mallison*, A13A2010, Slip op. Dissent at 2. [Emphasis added].

**IV.**  
**ARGUMENT IN SUPPORT**  
**OF PETITION FOR A WRIT OF CERTIORARI:**

This Court should grant a writ of certiorari to clarify that, as the court of first impression, the trial court makes rulings on facts and witness credibility that should be upheld unless clearly erroneous.

**A. Based on testimonial evidence, the trial court determined that Officer Ratliff’s testimony was incredible and that the officer’s request for Mr. Mallison to display his arms amounted to an order.**

“[T]he trial court’s decision on the motion to suppress [...] must be affirmed if *any* evidence supports it.” *The State v. Mallison*, A13A2010, Slip op. Dissent at 1. [Emphasis added]. Facts that were elicited during Officer Ratliff’s testimony support the trial court’s findings that his testimony was incredible.

As the dissent points out, Officer Ratliff’s testimony was “contradictory and inconsistent.” *The State v. Mallison*, A13A2010, Slip op. Dissent at 4. Officer Ratliff testified that he remembered some facts clearly—like where Mr. Mallison said he was going and whether or not Mr. Mallison track marks appeared fresh.

(MT. 7-8, 11). But Officer Ratliff testified that he could not remember those facts that would support that his detention of Mr. Mallison lacked reasonable suspicion or probable cause. Specifically, Officer Ratliff testified that he could not remember whether the backup officers were on the scene when he asked Mr. Mallison to display his arms so that he, Officer Ratliff, could examine his track marks. (MT. 12). However, as the dissent points out, Officer Ratliff testified that he asked Mr. Mallison whether he had drugs in his car or on his person immediately after he asked Mr. Mallison to display his arms. *The State v. Mallison*, A13A2010, Slip op. Dissent at 5. And Officer Ratliff testified that the officers were on the scene when he asked Mr. Mallison whether he had any drugs in his car or on his person. (MT. 14). Based on this testimonial evidence, the trial court could justly infer that backup officers were in fact on the scene when Officer Ratliff asked Mr. Mallison to display his arms. This inference supports the trial court's finding that Mr. Mallison was in custody at the point when he was asked to display his arms.

During the state's closing arguments, the court grappled with the question of whether Officer Ratliff's request amounted to an order, in an attempt to clarify the tone and gravity of the officer's request. The trial court reiterated the state's phrasing of Officer Ratliff's question as: "[w]ould you mind rolling up your sleeves [?]" (MT. 28). The trial court goes on to say that, if this is in fact the way

the question was posed, Mr. Mallison would have been free to say, “[N]o, I don’t want to roll up my sleeves or yes I will go ahead and do that.” (MT. 28). But ultimately the trial court decided that, based on the totality of the circumstances, Mr. Mallison would not have felt as though he was free to refuse the officer’s request. The testimonial evidence showed that before Officer Ratliff ordered Mr. Mallison to roll up his sleeves, Mr. Mallison had already been asked a series of intrusive questions designed to confirm Officer Ratliff’s hunch that Mr. Mallison was engaged in illegal drug activity. The testimonial evidence also showed that Officer Ratliff had called for backup officers despite never observing Mr. Mallison engage in any criminal activity, and, if Officer Ratliff’s testimony is to be taken as credible, then the backup officers were already on the scene with Officer Ratliff ordered Mr. Mallison to display his arms. All of this evidence supports the trial court’s finding that Mr. Mallison was seized at the moment that Officer Ratliff ordered him to roll up his sleeves. As the dissenting Court of Appeals judges pointed out, “the circumstances in this case would have placed any reasonable person in fear of imminent harm and certain detention.” *The State v. Mallison*, A13A2010, Slip op. Dissent at 1.

“The trier of fact is not obligated to believe a witness even if the testimony is uncontradicted and may accept or reject any portion of the testimony.” *Tate v.*

*State*, 264 Ga. 53, 56 (1994). The trial court had the opportunity to hear Officer Ratliff’s testimony on direct and cross-examination and observe his behavior and demeanor on the stand. The trial court later made factual findings and determinations based on its observations of Officer Ratliff and the testimonial evidence elicited from Officer Ratliff while he was on the stand. Despite the Officer’s testimony that he simply requested that Mr. Mallison display his arms during a consensual police-citizen encounter, the trial court had the right not to believe the officer’s testimony and, based on all of the testimonial evidence before the court, decide that Officer Ratliff’s request amounted to an order that resulted in an illegal seizure.

The lower court should have given deference to the trial court’s factual determinations unless the record “demand[ed] a contrary result.” *State v. McKinney*, 276 Ga.App. 69, 74 (2005) [Emphasis added]. Nothing in the record demanded such a contrary result. In overturning Mr. Mallison’s motion, the lower court relied solely on the narrative testimony elicited from Officer Ratliff on direct examination. Evidence that came out during cross-examination support the trial court’s findings on facts and credibility. A trial court’s “decision with regard to questions of fact and credibility [in a motion to suppress] must be accepted unless clearly erroneous.” *Miller v. State*, 288 Ga. 286, 287 (2010). This Court should

grant the writ to underscore the trial court's position as the finder of fact and credibility in a motion to suppress hearing.

## **CONCLUSION**

Wherefore, Petitioner respectfully requests that this Court should grant the petition for a writ of certiorari.