

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

GEORGIA ASSOCIATION OF  
PROFESSIONAL PROCESS  
SERVERS; et al.,

Petitioners,

v.

THEODORE JACKSON, as Sheriff of  
Fulton County; et al.,

Respondents.

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\* CIVIL ACTION FILE  
\* NO. 2013-CV-237446  
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**PETITIONERS' RESPONSE IN OPPOSITION TO**  
**RESPONDENT SHERIFFS' MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Petitioners ("Certified Servers") oppose Respondent Sheriffs' ("Respondents") Motion for Summary Judgment ("Motion"), which is based on an interpretation of O.C.G.A. § 9-11-4.1 (the "Statute") that cannot be accepted because it effectively nullifies the purpose and intent of the Statute. This should come as no surprise since nullification of the Statute is the admitted goal of Respondents.

**II. MATERIAL UNDISPUTED FACTS PRECLUDE THE GRANTING OF RESPONDENTS' MOTION**

Petitioners contend the material facts that control the outcome of this case are not in dispute. To the extent Respondents dispute this and come forward with admissible record evidence to create issues of material fact, that would only undermine their own Motion. Those material facts which Petitioners contend are either undisputed or proven by admissions made by the Respondents are as follows:

1. The clear purpose and intent of the Statute was to create a statewide certification process for private process servers that would greatly benefit Georgia's civil justice system by standardizing the qualifications and training required before a private citizen can be certified to serve civil process statewide.

2. Under the Statute, Respondents are charged with approving and certifying applicants who meet the statutory requirements for certification as a private process server. Certification authorizes them to serve civil process statewide.

3. After certifying an applicant as qualified to work statewide as a process server, Respondents then turn around and prohibit that newly certified server from working in their county of jurisdiction ("County"). Respondents conceded that they do not provide the Certified Servers any reason for being banned from their County, nor do they afford them access to any meaningful review process through which they can challenge the ban.

4. Respondents acknowledge that all but two of the 159 Georgia Sheriffs are willing participants in a conspiracy, orchestrated by the Georgia Sheriffs' Association (the "Association"), which is intended to nullify the Statute. Respondents and their co-conspirators have achieved their goal of nullifying the Statute via implementation of a blanket ban on Certified Servers working within their County without any consideration of their individual qualifications after they file their "Forms 4" Notice of Intent to Serve ("Notice").

The controlling legal issue for the Court to decide is presented by Respondents' incredible contention that their conspiracy is lawful since the Statute grants them the unfettered "discretion" to deny all Certified Servers the right to work. Petitioners

disagree, since any interpretation of the Statute which sanctions a conspiracy that reduces a statewide certification to a worthless piece of paper is obviously contrary to the plain language of the Statute. Respondents' position also contravenes well-settled rules of statutory construction. Georgia courts do not permit the State's statutes to be interpreted in a way to negate their intent. Respondents' incorrect interpretation of the Statute also has serious constitutional implications; Respondents' blanket ban constitutes a gross abuse of the limited discretion the Statute provides Sheriffs in the context of the certification process and is imposed in a manner that denies Certified Servers due process of law. Petitioners are entitled to the relief sought in their Petition.<sup>1</sup>

### **III. RESPONDENTS CANNOT PREVAIL ON THEIR CLAIM THAT THE STATUTE GIVES THEM UNFETTERED DISCRETION TO BAN PETITIONERS FROM WORKING AFTER CERTIFICATION**

Respondents have never denied their participation in the statewide conspiracy to nullify the Statute. To the extent they now change their tune, and try to deny the existence of the conspiracy, and the Court finds such a denial to be supported by the existence of material factual disputes as to their conduct in this regard, such a finding would mandate the denial of Respondents' Motion. However, the bottom line here is that Petitioners have

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<sup>1</sup> Petitioners seek declaratory and injunctive relief in the form of a judicial construction of the Statute that will fully effectuate its purpose and intent. Petitioners seek a writ of mandamus to remedy the Sheriffs' gross abuse of the limited discretion afforded them in fulfilling their role in the statutory certification process. The writ of mandamus must require Respondents to permit a Certified Server to work in their County if they have met the statutory qualifications for certification, as amplified by the implementing rules and regulations approved by the Judicial Council of Georgia. In responding to the instant Motion, Petitioners incorporate by reference the Petitioners' Motion for Summary Judgment and supporting brief, Statement of Theories of Recovery and Material Undisputed Facts, filed on July 11, 2014.

presented overwhelming evidence of each Respondent's role in furthering the conspiracy, including Respondents' own admissions, as detailed in Petitioner's motion for summary judgment. Thus, the existence of the conspiracy cannot be seriously disputed. The case is now ripe for summary adjudication in favor of Petitioners.

**A. Respondents, Acting in Concert and Conspiracy with the Other Sheriffs, Have Effectively Nullified the Statute**

Respondents do not dispute that they have acted in concert and conspiracy with the other Sheriffs to effectively usurp the role of the General Assembly and nullify the Statute, a duly enacted law. Such misconduct flies in the faces of the express purpose and intent of the Statute,<sup>2</sup> which was articulated by the Judicial Council of Georgia ("JCG")<sup>3</sup> in Article One of the Rules implementing the Statute:

To improve the standards of practice for private service of process and to provide a list of persons eligible to serve process in courts **statewide**, the Georgia General Assembly amended O.C.G.A. § 9-11-4.1, effective July 1, 2010, to permit civil process to be served in Georgia by persons deemed by Sheriffs of any county in Georgia **to have met the criteria to be certified to serve process . . . .**

Id. (emphasis supplied).

Respondents admit they **"have not ... approved such certified process servers to actually serve process within their respective counties."** Respondents' Statement of

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<sup>2</sup> It also flies in the face of the Sheriffs' oath: "I do swear that I will faithfully execute all writs, warrants, precepts, and processes directed to me as sheriff of this county, or which are directed to all sheriffs of this state, . . . which I can lawfully execute . . . and in all things well and truly, without malice or partiality, perform the duties of the office of sheriff . . . ." O.C.G.A. §15-16-4 (emphasis added).

<sup>3</sup> The General Assembly delegated to the JCG the responsibility of establishing the implementing rules and regulations which govern the Statute's statewide Certified Process Server Program ("Rules"). See Exhibit 1 to the Petition.

Undisputed Material Facts (“Statement”) ¶ 14. Respondents openly admit that their intent is to prevent Certified Servers from ever serving process in Georgia. (See Gullledge Depo. 17; Piper Answer ¶ 45; Conway Depo. 20-22; Warren Depo. 18, 21, 48). The Association went so far as to state that its Sheriff members will never allow the law to go into practical effect unless a court forces them to do so. (Norris Depo. 66-68, 78-80).

The conspiracy has achieved its intended effect. As a result of the conspiracy, we have a certification process that is currently ignored in 157 of 159 counties in Georgia. Id. at 87. The number of Certified Servers who can use their certification on a statewide basis is zero.<sup>4</sup> Every single Notice filed by a Certified Server has been summarily denied without any consideration of the individual qualifications of the Certified Server. Id. at 91.

Respondents realize that a finding that they have in fact nullified the Statute would cost them this case. Thus, they shamelessly argue that the Statute has not been nullified “since a few [Sheriffs] have permitted certified process servers to operate within their counties.” [Respondents’ Brief in Support of Motion for Summary (“Respondents’ MSJ”) 15, n. 11)]. But, the stated purpose of the Statute is “to provide a list of persons eligible to serve process in courts **statewide**” and “**to permit civil process to be served in Georgia**

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<sup>4</sup> The Statute requires the Association to maintain a certified private process server registry listing all Certified Servers who completed the program. O.C.G.A. § 9-11-4.1(e). Terry Norris, the Executive Director of the Association, testified that there are some 130 Certified Servers on the Register, and only 46 of those on the registry, have been approved to actually serve process in Georgia. Even that number is misleading since 39 of those can only work in Cherokee County, where the Sheriff permits private Certified Servers to serve process. (Norris Depo. 85-87). The other seven Certified Servers include five that were approved by a former Sheriff of Forsyth County who has been replaced by Respondent Piper who approves no one and has withdrawn approval for the five approved by the former sheriff.

by persons deemed by Sheriffs of any county in Georgia to have met the criteria to be certified to serve process,” which obviously has been frustrated by the blanket ban being imposed by Respondents with a conspiracy participation by 157 of 159 Sheriffs.

**B. Respondents’ Purported Justifications for Their Participation in a Conspiracy to Nullify the Statute Are Baseless**

Respondents next have the temerity to contend that “a number of public safety and other considerations [led] to their policy decisions not to allow certified process servers to work in their jurisdictions.” Respondents’ MSJ 12 (emphasis added). Respondents essentially contend that they disagree with the law, and these bogus rationalizations justify their embargo against any Certified Server actually working in their respective County. Respondents ignore the undisputed fact that these “justifications” would never authorize conduct nullifying the Statute in a way that contravenes the express intent of the General Assembly.

A few Respondents have tried to justify the ban based on the contention that “trained deputies are better equipped to deal with the safety concerns relating to serving parties with undesired court papers, and are uncomfortable with the lack of control they maintain over persons certified.” Id. But, the General Assembly, in passing the Statute, clearly disagreed and created a certification program specifically designed to put private process servers to work in Georgia. Respondents do not get to “rewrite” the Statute and add “peace officer certification” to the already enumerated criteria for certification.

Not a single Respondent articulated a legitimate public safety concern based on a

specific incident involving a private process server in their County.<sup>5</sup> Nor could any Respondent recall any incident of misconduct, violence, or other safety issue that implicated a Certified Server.<sup>6</sup> Respondent Jackson did not even articulate a “safety issue.” He testified he refused to abide by the Statute because the Association mistakenly interpreted the Statute. Jackson testified he was told if he approved one Certified Server, he must “approve them all.” (Jackson Depo. 23-27, Ex. 23).

Respondents acknowledged that private process servers regularly serve process in their respective County when they are appointed by a court. The fact that private process servers are working in the Respondents’ Counties at the behest of judges without incident, belies the claimed concerns about public safety and underscores the pretextual nature of this justification. Id.

Respondents’ pretextual safety concerns are further belied by their total lack of knowledge regarding any specific training their own deputies receive in serving process which is superior to the training provided in the state certification process. Respondents remain largely ignorant of the actual certification process they are tasked by the Statute to oversee. Thus, their alleged “safety concerns” cannot rationally justify the blanket

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<sup>5</sup> Respondent Conway admitted public safety was not a consideration when he made the policy decision to ban all Certified Servers in his County. (Conway Depo. 37).

<sup>6</sup> See Warren Depo. 32 (could not recall a single issue with private servers in his 11 years as Sheriff); Gullledge Depo. 31; Piper Depo. 24-25; Hill Depo. 9-11 (no knowledge of any incidents regarding the approximately 80 private process servers who have been judicially appointed to serve process in his County)]. Sheriff Hill even admitted that while he was unaware of any complaints against appointed servers, he was aware of complaints against his deputies. (Hill Depo. 9-11).

prohibition against any Certified Server since the Sheriffs did not bother to familiarize themselves with the qualifications of the Certified Servers.

Respondents do not seriously contend the ban is based on a safety issue. For example, Sheriff **Piper** asserted that his blanket ban in his County is based solely on his belief that there is no need for private process servers in Forsyth County. (Piper Depo. 18). He could not articulate any public benefit resulting from denying Certified Servers the right to work in his County. Id. at 31-33. He admitted that he has *never bothered to review the rules and regulations* that the JCG put in place for the implementation of the Statute and the governance of the Certified Servers. Id. at 56.

Sheriff **Brown** was unaware of any training for deputies allowed to serve process. (Brown Depo. 11). While Sheriff **Hill** also claimed that public safety concerns motivate his decision, he admitted that he is unaware of any specific training for Sheriff's deputies that focuses on the service of civil process. (Hill Depo. 54-55). Sheriff **Warren** was so unaware of service of process issues that he did not even know which members of his department were responsible for serving process. (Warren Depo. 10). Sheriff **Gulledge** could not identify any specialized training that Sheriff's Department officers in his County receive related to service of process other than general P.O.S.T. training. (Gulledge Depo. 10). Sheriff **Conway** actually admitted that Certified Servers have adequate training to properly and safely serve process, but denies all of them the right to work without any investigation into their qualifications based on an allegation that he does not want to be responsible for their actions. (Conway Depo. 20-22). In fact, the statewide certification process created by the Statute trains Certified Servers to serve process far better than the *ad hoc* approach

currently used to “train” deputy Sheriffs to serve process.

Respondents’ desperation over how to justify their unlawful action is evidenced by the next contention: they say they have not harmed any Certified Server because they could seek a judicial appointment to serve process in a particular County. Id. But, Respondents’ own deposition testimony clearly refutes this after-the-fact “justification” as baseless and irrelevant. In fact, the availability of a court-appointment actually undermines the Respondents’ attempt to justify their nullification of the Statute since it only further demonstrates that Georgia law recognizes the value of the private process server option and does not believe any “safety issue” is created by providing this option. Clearly the General Assembly did not intend to limit service of process to the sole province of a Sheriff.

The role of the Association as the mastermind behind the conspiracy is acknowledged by Sheriff **Brown**. He admitted that his former refusal to allow private process servers was solely a result of his strict compliance with the directives of the Association as to how to defeat the implementation of the Statute’s certification process. (Brown Dep. 28-30). He then disclosed the true objective of the Sheriffs in nullifying the Statute: their goal is to prevent private process servers from causing Sheriff’s departments to lose some of the service fees they collect. Id. at 18-19. The Association confirmed that the “**real reason**” its members oppose private process servers working in Georgia is the Sheriffs’ fear that they may lose “millions of dollars” in service fee revenue. (Norris

Depo. 33).<sup>7</sup>

All these after-the-fact explanations by Respondents cannot justify what amounts to unlawful conduct by the chief law enforcement officers in every county in Georgia but two.

### III. ARGUMENT AND CITATION OF AUTHORITY

#### A. Respondents' Request for an Abeyance is Frivolous and Underscores the Respondents' Lack of Credibility Given the Magnitude of the Justiciable Controversy Between the Parties.

Once again, Respondents' desperation is evident from the extreme arguments being advanced to avoid the consequences of their unlawful conduct. In an apparent effort to recruit the Court into their conspiracy, Respondents have made an unbelievable request: they urge the Court hold this matter in abeyance for a year so that they can continue their efforts to nullify and thwart the purpose of the Statute with the blessing of this Court. They base this improper request on the fact that the General Assembly included in the Statute a sunset provision which requires legislative review of the Statute by July 15, 2015. The fact the Statute, and similar professional licensing legislation, routinely contain sunset provisions so to facilitate their assessment every five years has no bearing either on the viability of Petitioners' claims or their right to a prompt resolution of justiciable issues.

It is common, rather than "extraordinary" as Respondents suggest, for administrative legislation such as the Statute to contain sunset provisions. See O.C.G.A. 36-61-18; O.C.G.A. 50-4-1 et seq.; O.C.G.A. 12-8-40.1. The purpose of such a provision is to afford the General Assembly the automatic right to revisit a new statutory scheme to

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<sup>7</sup> In fact, service by Sheriffs is a financial loser. The \$50.00 fee does not begin to cover the real cost which is passed on to the taxpayers. (Norris Depo: 33; Brown Depo. 42; Conway Depo. 30-33; Jackson Dep. 31; Warren Depo. 21-22).

insure it is working and to correct any deficiencies identified during its initial five (5) year term. Respondents cannot be given “judicial dispensation” to continue to nullify the Statute and violate Petitioners’ legal and constitutional rights.

Respondents’ contention that the important issues before the Court are “mooted” or “hypothetical” by the presence of a sunset provision is a frivolous argument. The fact that Certified Servers who wish to use their state-approved license and actually work in Georgia and the determined efforts of the Sheriffs to prevent them from doing so is not hypothetical. It is real. In fact, the sunset provision only adds urgency to the need for an expedited judicial determination so that the 2015 General Assembly will have the Court’s order before it reconvenes.

**B. The Sheriffs Wrongly Claim the Statute Delegates to Them Absolute Discretion to Deny a Certified Server the Right to Work.**

**1. Respondents’ Interpretation of the Statute Would Render It Meaningless.**

Respondents’ desperation again reveals itself in their attempt to characterize Petitioners’ interpretation of the Statute as frivolous. (Respondents’ MSJ 8.) To the contrary, it is Respondents who are advancing a patently frivolous position when they ask this Court to interpret the Statute in a manner that is contrary to its plain language and the clear intent of the Legislature. Respondents say the Statute “confers **absolute discretion** upon sheriffs” and “[a] sheriff may allow certified process servers to operate in his or her jurisdiction or **prohibit all of them** from operating therein.” (Respondents’ MSJ 11) (emphasis added). This interpretation requires the Court to believe that the General Assembly created a certification program and then delegated the Sheriffs the authority to

repeal the Statute by giving them the unfettered discretion to deny all Certified Servers the right to put their certification to work. Obviously, this was not the intent of the Legislature.

The law governing this case is well-settled. “The construction of statutes must square with common sense and sound reasoning.” Tuten v. City of Brunswick, 262 Ga. 399, 404(7)(a)(i) (1992). Georgia courts “must give a statute the construction that will effectuate the legislative intent and purpose” and construe the statute “to make all its parts harmonize and to give a sensible and intelligent effect to each part.” Rock v. Head, 254 Ga. App. 382, 384 (2002). A party cannot justify their actions by relying upon an interpretation of a statute that renders the law a meaningless nullity. Georgia courts “do not construe statutes to render any provision meaningless.” State v. Luster, 204 Ga. App. 156, 160 (1992). See also Central Georgia Power Co. v. Parnell, 11 Ga. App. 779 (1912) (“Any other rule would practically nullify the statute and defeat the object sought to be accomplished by the General Assembly”). “A legislative body should always be presumed to mean something by the passage of an Act and an Act should not be so construed as to render it absolutely meaningless.” Hardison v. Booker, 179 Ga. App. 693, 695 (1986).

The Sheriffs’ blanket rule to deny all Certified Servers the right to work, regardless of individual merit, cannot be squared either with the language of the Statute or the express intent of the Legislature in passing this legislation. The Statute plainly states that Certified Servers “shall be entitled to serve in such capacity for any court of the state, anywhere in the state, provided the sheriff of the county for which process is to be served allows such servers to serve process in such county.” O.C.G.A. § 9-11-14.1(a). The Statute further mandates that a Sheriff approve any Certified Server who files a proper notice of intent to

serve civil process within their County unless the Certified Server is no longer certified, or is otherwise unqualified because they have not met the qualifications set forth in the Statute and implementing Rules. O.C.G.A. § 9-11-14.1(b-c).

It is irresponsible for Respondents to contend that the General Assembly established a statutory statewide certification process for private process servers (which costs each applicant \$700.00) and, in that same law, delegated to Georgia's Sheriffs unreviewable and unfettered discretion to nullify the certification program in their County without even having to give a reason. Respondents' avowed interpretation simply does not "square with common sense." Tuten, 262 Ga. at 404. It certainly does not result in harmonizing all of the Statute's provisions, which is the North Star of statutory construction.

This Court should reject Respondents' interpretation since the unfettered discretion they claim the Statute it affords the Sheriffs to nullify the certification process renders the Statute meaningless. See, e.g., Williamson v. The State, No. S13G1133, 2014 WL 2025127, at \*2 (Ga. May 19, 2014)<sup>8</sup>; State v. Torres, 290 Ga. App. 804, 806-07 (2008). As stated in Torres, "[n]either police officers nor this Court can nullify a legitimate statute by interpreting it so that compliance with the same is optional." (emphasis added). Respondents' self-serving interpretation of the Statute is contrary both to the Legislature's intent, and well-settled rules of statutory construction.

Respondents' strained construction of the Statute wrongly bifurcates certification

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<sup>8</sup> The Georgia Supreme Court rejected the State's suggested interpretation of the speedy trial statute because it would require a defendant to wait indefinitely for a trial since it could lawfully be held at the convenience of the State, thus rendering the speedy trial statute meaningless.

into a two-step process that was never intended by the Legislature. According to Respondents, only the first step in the certification process is based on the objective criteria set out in the Statute and the implementing rules. This interpretation inserts a second step following certification which involves the “authorization” to work, after a Certified Server submits the Form 4 Notice of Intent to serve process in a particular county. The Sheriffs contend this second stage was created to endow them with the unreviewable discretion to reject all such Notices and thereby void the Statute by precluding all Certified Servers from working within their County, regardless of qualifications. This interpretation is contrary to every applicable rule of statutory construction.

What the Statute actually says is this: “A sheriff . . . **shall review** the application, test score, criminal record check, and such other information or documentation as required by that sheriff and determine whether the applicant shall be approved for certification and **authorized to act as a process server . . .**” O.C.G.A. 9-11-4.1(b)(2) (Emphasis added).<sup>9</sup> There is only “one step,” not two, and the criteria for determining authorization to serve is clearly set forth in the Statute. Respondents are not permitted to ignore the statutory criteria or to render them meaningless by never approving a Certified Server’s Notice in order to nullify the Statute. State certification, once granted, must include the authorization to actually serve process. Under the Statute, Sheriffs are required to review

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<sup>9</sup> This language refutes Respondents’ argument that approval of one Certified Server means approval of all. The approval is in the singular. The sheriff is required to review “**the application**” (singular) “and such other information or documentation as required by that sheriff that would allow the sheriff to determine **if the applicant** (singular) is to be approved. . .” (Emphasis added).

the statutory criteria and other legitimate considerations relevant to determining an applicant's qualifications, and no more. Under the plain language of the Statute, the Form Four Notice is strictly a **notice of intent** that is filed pursuant to 9-11-4.1(h). It is not an invitation to permit a Sheriff to deny all Certified Servers the right to work if they are properly certified by refusing to accept such Notices absent proof that the certification has been revoked, expired or there is some other objective reason to challenge whether the notice was filed by a Certified Server.

Respondents have intentionally refused to comply with this provision of the Statute, claiming that the Form 4 is not a "notice," but rather it is a request for "permission" to serve in a particular county that can be rejected in the unfettered discretion of the local Sheriff. The Statute, however, does not vest such power in each Sheriff. It only requires that a Certified Server provide **notice** to the Sheriff. This section of the Statute plainly supports Petitioners' interpretation that the *authorization* for a Certified Server to serve process is made effective pursuant to O.C.G.A. 9-11-4.1(b)(2) and is not subject to the absolute discretion of the Sheriffs at the subsequent notice stage.

The certification process has become largely academic since Respondents all testified that they do not review the individual qualification of each applicant that submits a Notice despite the fact that the language of O.C.G.A. 9-11-4.1(b)(2) is mandatory. It plainly states that a Sheriff "**shall review**" the listed information on an individual basis. This process is not discretionary. But, Respondents acting in concert with the other Sheriffs, have taken the extreme position that they will not allow any Certified Servers to work in their Counties **under any circumstances**. They refuse to substantively review any

Notices or otherwise consider the qualifications of Certified Servers because the blanket ban makes any such review an exercise in futility. This refusal makes Section 9-11-4.1(b)(2) meaningless.

Respondents' interpretation of this provision of the Statute flies directly in the face of 9-11-4.1(b)(2)'s mandatory individual review process. In essence, Respondents have construed subparts 9-11-4.1(a) and 9-11-4.1(b)(2) to eviscerate the Statute. Respondents' stretched interpretation creates discord where Petitioners' common sense approach creates harmony.

## **2. The Legislative History of the Statute Supports Petitioners' Interpretation**

“In attempting to ascertain the legislative intent of a doubtful statute, a court may look to the caption of the act and its legislative history.” State v. Ware, 282 Ga. 676, 678, 653 S.E.2d 21, 23 (2007). Respondents contend the legislative history of the Statute supports an interpretation that gives the Sheriffs autocratic authority to nullify the Statute by denying all Certified Servers the right to serve process. In support of this claim, Respondents cite to HB 705, HB 545 and HB 284 (Exhibits 1, 2 and 5 to Respondents' Notice of Filing). However, leaving aside the dubious proposition that this is a “doubtful statute” whose meaning must be parsed from its legislative history, a thorough review of the legislative history shows that certification and authorization of Certified Servers was always intended by the General Assembly to be a one-step process, not the circular two step procedure the Sheriffs have created to nullify the Statute by converting the notice provision to a standardless permission provision.

Specifically, HB 705, offered in 2006, provided for the addition of paragraph (m) to Section 3 of O.C.G.A. § 9-11-4, so to create a statewide registration process for permanent process servers approved by the court. Id. It also established the requisites for obtaining a permanent appointment to serve in all courts of the state, and these requisites are included in the present Statute. Paragraph (C) provided that approval of the Certified Servers would be made by the JCG, and the JCG designated the Administrative Office of the Courts (“AOC”) to oversee the certification process, including the criminal background check, testing, and the promulgation of the rules and regulations to govern the process. Id. This provision was included in all iterations of the proposed legislation until 2010. Under HB 705, upon approval by the JCG, the Certified Server would submit that written approval via a motion filed in superior court to be sworn in as a permanently appointed process server for two years, with authority to serve statewide. Id.

HB 545, offered in 2009, first introduced Code Section 9-11-4.1. Id. Exhibits 2 and 2B. The former provisions in Section 3 in HB 705 were moved to Section 4. Section 4(b) outlined the certification procedures. Section 4(b)(2) contained the same procedure for certification as was provided in Section 3 of HB 705 and HB 292. Section 9-11-4(b)(2) again provided that it was to be the AOC that would administer the criteria for becoming a Certified Server and make the final determination “**as to whether the applicant shall be approved for certification and authorized to act as a process server in this state . . . .**” Id. (emphasis added).

HB 545 was then “piggy-backed” to Senate Bill 491. Id. Exhibit 3. At this time, Section 9-11-4.1(b)(2) was amended to replace the JCG and AOC with the sheriffs of the

various counties, **but the criteria for becoming certified remained the same.** Section 9-11-4.1(b)(2) was revised to read, “[a] sheriff of any county of this state **shall review the application, test score, criminal record check, and such other information or documentation as required by that sheriff and determine whether the applicant shall be approved for certification and authorized to act as a process server in this state.**”

(Emphasis added). Thus, just as in previous iterations of House Bills, the certification and authorization to serve were integrated into a single process to ensure an applicant’s qualifications for certification **and** authorization to work were based on the same criteria, and this process was concluded prior to the taking of the oath, and the sending out of any Notices of Intent to Serve to a Sheriff. There is nothing in the legislative history to indicate that the General Assembly intended that the decision to involve the Sheriffs in the certification process was meant to give them unfettered authority to nullify rather than implement the Statute.

There is additional evidence before the Court related to the Statute’s legislative history that buttresses Petitioners’ position. In a letter dated March 21, 2011, which was sent to all members of the General Assembly, Wendell Willard, Chairman of the Judiciary Committee and sponsor of the bill that created the Statute, clearly articulated the purpose of the Statute: it was to allow Certified Servers to perform this valuable service throughout Georgia and not just in random counties where a judge has appointed them.<sup>10</sup> See

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<sup>10</sup> Chairman Willard’s letter details the negotiations that led to the passage of the Statute, which included doubling the fees Sheriffs can charge for service of process from \$25.00 to \$50.00, a 100% increase, in exchange for its agreement not to oppose passage. Id. at 91-92. The Chairman confirmed that: “this was a major component of negotiations and of

Exhibit 15 to the Norris deposition.

In his letter, Chairman Willard chronicles how the Association, acting on behalf of the Sheriffs, reneged on virtually every promise made to the Chairman (and in turn the General Assembly) during the 2010 session regarding its willingness to support the creation of a meaningful certification process.

Given all the concessions obtained by the Association, Chairman Willard was brutally frank in his harsh criticism of the bad faith exhibited by the Association when it posted the following notice on its website after the passage of the Statute to signal the Sheriffs' intent to conspire to nullify the Statute.

“Clearly, the Association was not operating in good faith when it asked that its members be given control of the certification and licensure process. These facts address the credibility of the Association’s leadership....”

The Chairman then detailed the legislative intent behind the decision to replace the AOC and the JCG with the Sheriffs as the body that would review the certification authorization requirements:

“[A] provision was added that allowed a Sheriff the authority to deny **someone** the ability to conduct private process service in a county, **if the Sheriff had reason to believe the person was not qualified or fit for the work.**” (Emphasis added).

The Chairman’s letter makes it patently clear that the General Assembly never intended to give the Sheriffs “absolute discretion” to nullify the Statute.

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obtaining support for the bill by the Georgia Sheriffs’ Association.” *Id.* The Association also insisted on another provision that “allowed a Sheriff to collect a fee of \$80.00 for processing a process server application, \$30.00 of which is sent to the Georgia Sheriffs’ Association.”

**3. If the Court Accepts Respondents' Claim that the Statute Delegates to the Sheriffs' Unbridled Discretion to Prohibit a Certified Server from Working, the Court Should Strike that Provision as an Impermissible Vague Delegation of Legislative Authority**

While Petitioners believe it is patently obvious the General Assembly did not delegate to the Sheriffs the unfettered discretion to nullify the Statute in their County, should the Court conclude that the Statute contains a provision that, albeit unwittingly, affords the Sheriffs unfettered discretion to bar Certified Servers from ever working in their County without just cause or reason related to their qualifications, then such a provision must be stricken via "blue pencil" because it would render the Statute unconstitutional.

Any statute that delegates to non-legislative branch officers like the Sheriffs the authority to determine if a state Certified Server could work is unconstitutional unless "the General Assembly has also provided sufficient guidelines for the delegatee." Dept. of Transportation v. City of Atlanta, et al., 260 Ga 699, 703 (1990). The Statute is silent as to guidelines except for the qualifications established for certification. If the Court finds that the objective criteria for certification do not also govern authorization, then there is not sufficient guidance provided as to when and how Sheriffs can exercise their alleged absolute authority to give a "thumbs up or a thumbs down" on a citizen's right to work in a profession where the State has certified their competence.

Respondents concede that, under their interpretation of the Statute, there is an utter lack of guidance when they argue that "[t]he statute places no restrictions upon their discretion and no obligation that they promulgate rules or regulations to determine

**whether an individual statewide process server should be permitted to serve process in a particular county.”** (Respondents’ MSJ 10) (Emphasis added). In reply, Petitioners point to the statutory qualifications as the obviously correct benchmark for the exercise of this discretion. But, if this Court finds that the Statute does not in fact, provide sufficient objective standards to govern the Respondents’ exercise of their discretion, Georgia law requires that the absence of such standards equates to an unlawful delegation of legislative authority.

In Mitchell v. Wilkerson, 258 Ga. 608, 372 S.E.2d 432 (1988), the Supreme Court held that the public official recall statute amounted to an unconstitutional delegation of legislative power because it required that persons initiating a recall petition were allowed to state the basis for the recall. Because the underlying constitutional provision required that all grounds for recall be provided by law, the statute’s effective delegation of Legislative power by allowing the persons initiating the recall petition to specify the grounds for recall was unconstitutional: “The statutory attempt to transfer the selection of the reasons to the applicant amounts to an impermissible delegation of legislative authority.” Id.

In HCA Health Services of Georgia, Inc. v. Roach, 265 Ga. 501, 458 S.E.2d 118 (1995), the plaintiff contended that the agency’s construction of its authority under the Act would permit it to do far more than merely administer an existing enactment of the General Assembly. The defendant State agency was seeking unbridled authority to determine what health care facilities were subject to the Act in order to gain the power to exempt such facilities from the mandate of the Act. O.C.G.A. § 31-6-47(c). The Court rejected the

agency's claim to such broad discretion since it would constitute an unconstitutional delegation of the legislative power "to define the thing to which the statute is to be applied...." Id.<sup>11</sup>

Under the Statute, certification is the legal equivalent of qualification. When a Sheriff denies a Certified Server the ability to work in their County, it must be based on the applicant's failure to meet the criteria set forth in the Statute and implementing Rules. These are the sole sources from which the qualifications required both for certification and authorization to work in any particular County emanate. To contend otherwise would mean authorization could never be granted and that wrong never be challenged. Respondents try to circumvent this undeniable fact by contending that subpart (h) of the Statute, which states that a Certified Server can work only if ". . . the Sheriff . . . allows such servers to serve process in their county," gives them the power to nullify the Statute. Should this Court agree, and find the Statute lacks any guidance from the General Assembly as to the standards governing a Sheriffs' ability to reject a Form 4 Notice, it would render subpart (h) and the final proviso of subpart (a) of the Statute unconstitutional as an unlawful delegation of legislative authority. Faced with having the provisions Respondents depend on to justify the blanket ban on Certified Servers working in their County "blue penciled" out of the Statute, Respondents try to avoid that outcome by using

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<sup>11</sup> See also, Sundberg v. State, 234 Ga. 482, 216 S.E.2d 332 (1975) ("Statute held an unconstitutional delegation of legislative power since it authorized an executive officer to decide what is an "infringement of the law," thus vesting authority in a ministerial officer to define the thing to which the statute is to be applied."); Howell v. State, 238 Ga. 95, 230 S.E.2d 853 (1976) (legislative enactment criminalizing a violation of "any of the rules or regulations promulgated by [an executive branch] commission" was held to be an improper delegation of legislative power).

the Court to declare the entire Statute unconstitutional. Once again, the desperation Respondents are showing in trying to co-opt the Court into their efforts to nullify the Statute evidences the weakness of their position.

Invalidating the entire certification process to remedy a wrong that is actually unrelated to certification is not how the law works. Rather than striking the entire Statute, courts are strongly encouraged to “blue pencil” the law. “When a statute cannot be sustained as a whole, the courts will uphold it in part when it is reasonably certain that to do so will correspond with the main purpose which the legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, enough remains to accomplish that purpose.” Union City Board of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 404 (1996). See also Fortson v. Weeks, 232 Ga. 472 (1974). The Supreme Court of Georgia has repeatedly held this to be the law. Elliott v. State, 91 Ga. 694, 17 S.E. 1004 (1893); Hancock v. State, 114 Ga. 439 (1901).

The Respondents’ contention that “[t]he statutory scheme of O.C.G.A. § 9-11-4.1 depends upon each sheriff’s determination of what is best for his/her county” is unworkable. (Respondents’ MSJ 15). The purpose of the Statute is to establish a certification process ensure private process server are trained and qualified. Of course, the Respondents would love to have the certification process invalidated, but Petitioners have not challenged the certification process created by the Statute. Removal of the contested provisions wrongly relied upon by Respondents as the basis for the statewide ban via “blue pencil” preserves the true legislative intent behind the Statute. There is no basis upon which the statewide certification process for private process should be invalidated.

The Statute, and the implementing Rules will continue to govern the certification and re-certification process, and the purpose of the Statute, as intended by the General Assembly, will be vindicated once the arbitrary and capricious position of the Respondents and the Association is rejected.

**C. Respondents' Conspiracy to Nullify the Statute Constitutes An Abuse of Discretion That Denies Petitioners Due Process of Law and Warrants a Writ of Mandamus**

Petitioners have established that Respondents' alleged "concerns over public safety, training, background, lack of accountability, and potential litigation" have no basis in fact and are not the true drivers for the blanket ban. Respondents make no effort to determine whether the qualifications and training required by the certification process ascribed in the Statute sufficiently addresses their alleged concerns. Nor have they provided any evidence to demonstrate that these concerns exist beyond their own speculation, conjecture and presumption. In fact, the only competent evidence before the Court is the Sheriffs' admission that private process servers have been acting in their County through the judicial appointment process with no known safety, oversight, or accountability concerns.

As such, Respondents' frivolous contention that the Sheriffs have not abused their discretion, or acted arbitrarily, capriciously or unreasonably by preventing all Certified Servers from serving process is not a serious argument. Respondents' ban on Certified Servers working in their County with no individualized inquiry or analysis into the specific Certified Server's actual qualifications is the epitome of arbitrary and capricious conduct. Accordingly, the blanket rule violates Petitioners' rights to due process of law, and is redressable via a writ of mandamus.

Petitioners' position is supported by the applicable case law. In Pryor Organization, Inc. v Stewart, 274 Ga. 487 (2001), a newly elected Sheriff purported to "exercise his discretion" by prohibiting the plaintiff from continuing to write bonds. Plaintiff contended the Sheriff abused his discretion, and sought a writ of mandamus to require the Sheriff allow him to work. The Supreme Court agreed:

The Sheriff's discretion is not absolute, but is circumscribed by the statutes from which his authority derives. [cit] O.C.G.A. §17-6-50 establishes the qualifications of "professional bondspersons." *If Pryor met those statewide qualifications, then the refusal to permit it to conduct business at the county level cannot be upheld. The Sheriff's decision, under those circumstances, would be "without legal justification or excuse,....arbitrary, illegal and capricious and an abuse of discretion."*

Id. at 488. (Emphasis added). The situation hypothesized by Justice Carley now actually exists in the form of the Sheriffs' conspiracy to nullify the Statute.

Well-settled due process consideration requires far more than mere fiat—it requires the Sheriffs to employ specific objective criteria based on qualifications to determine whether a Certified Server will be permitted to serve process in their County. That approach ensures there is a legitimate statewide standard for the exercise of the Sheriffs' discretion consistent with the criteria for qualifications created by the Statute and implementing Rules. Several appellate decisions based on analogous circumstances cement this well settled point.

In Arras v. Herrin, 255 Ga. 11 (1985), plaintiff sought a license to sell alcohol. He satisfied all the objective requirements contained in the liquor sales ordinance. The County Commission, without explanation, denied the license contending the ordinance gave it

absolute discretion over the issuance of liquor licenses. While the trial court refused to issue the writ of mandamus, the Supreme Court reversed, finding the Commission's "absolute discretion" argument contravened due process:

Due process constraints dictate that . . . Commissioners may not deny Arras a license...by exercising the "absolute discretion" provided in [the ordinance]. Local . . . authorities may no longer deny liquor licenses without justification merely by labeling an alcoholic beverage license a "privilege" and not a "right." [cit] While . . . governments have the right to regulate sales of intoxicating beverages as a valid exercise of police powers, the power to regulate . . . does not exempt the state from the operation of the 14th Amendment. [cit] Absolute and uncontrolled discretion by governing authorities to issue licenses invites abuse. An exercise of discretion by . . . governments must be tempered with "ascertainable standards ... by which an applicant can intelligently seek to qualify for a license..." [cit] Thus, in Georgia a liquor licensing ordinance must provide "sufficient standards to control the discretion of the governing authority and adequate notice to applicants of the criteria for issuance of a license." [cit]

The ordinance in question contained objective standards . . . , and . . . Arras met these objective standards. Instead of relying on these standards, the Board based its denial on the vague language of the ordinance which confers an "absolute discretion" on the Board to make a "final" determination as to whether the location is "proper" and in the "best welfare" and "best interests" of Camden County. **These words contain no standard to control the discretion of the Board and thereby deny due process.**

Id. at 11. (Emphasis added).

Just as in Arras, the right to become certified as a private process server—upon satisfaction of the specified objective requirements—serves no purpose if Respondents, acting in concert and conspiracy with the other Sheriffs and Association, are allowed to

arbitrarily ban them from actually working. The Legislature plainly did not intend such an illogical and unfair result.

Numerous other decisions confirm the elementary legal principle that a public official's exercise of discretion to approve or deny a citizen the right to work in an area where licensure is provided by the State must be governed by **objective standards**. In Fulton County v. Bartendfeld, 257 Ga. 766 (1988), the Supreme Court issued the writ of mandamus, holding that:

[S]ince the applicant . . . complied with all objective conditions and prerequisites set out in the local zoning ordinance for . . . issuance of the permit, and since the board of commissioners' **denial thereof constitutes an act of discretion which is lacking in any articulable, objective ground of support**, the appellee has a clear legal right to issuance of the permit, thereby entitling applicant to issuance of the writ commanding grant of the application by the local authorities. (Emphasis added).

Id. at 770. See also Crymes v. DeKalb County, 258 Ga. 30, 364 S.E.2d 852 (1988).

The decision in Ga. Dept. Of Trans. v Peach Hill Properties Inc., 278 Ga. 198 (2004) also rejects Respondents' contention that the Statute gives them "absolute discretion" to bar all Certified Servers from working in their respective Counties, without any individual assessment. In that case, plaintiff sought a building permit so near an airport that FAA regulations required he obtain permission from the State Department of Transportation ("DOT"). The DOT imposed a blanket rule to deny all such requests, regardless of the circumstances. Following Arras, *supra*, the Supreme Court held such a blanket rule, not unlike the Sheriffs' ban, to be unlawful:

“. . . It is incumbent upon state aviation agencies to develop ascertainable standards to gauge whether landfill operators qualify for an exemption request. (The) DOT has given no guidelines . . . as to how to qualify for an exemption. Instead, DOT enacted a blanket policy refusing to seek any exemptions from the FAA on the part of landfill operators. This, DOT could not do. It could not close its eyes to the . . . exemption process. **It was required to establish objective guidelines enabling it to determine whether to request an exemption in any given case.**

Id. at 201 (emphasis added).

In passing the Statute, the Legislature established the objective requirements necessary for certification which have been augmented by the implementing Rules. Once those requirements are satisfied, and the state certification issues, the Sheriff’s discretion is constitutionally limited to circumstances where an applicant’s certification has expired or been revoked for “good cause shown.”<sup>12</sup> O.C.G.A. § 9-11-14.1(a).

**D. A Writ of Mandamus Should Issue to Compel Respondents to Perform Their Proper Legal Duty Under the Statute**

“Mandamus is the proper remedy for improper government inaction—the failure of a public official to perform a clear legal duty.” Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657, 755 S.E.2d 683 (2014). Where performance is required by law, a clear legal right<sup>13</sup>

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<sup>12</sup> A Sheriff cannot prohibit a Certified Server from working unless they lose their certification or subsequently engage in misconduct that would authorize the revocation of their certification. Under the Statute, revocation can occur in specific situations such as when the process server 1) fails to renew the certification; 2) fails to provide evidence of completion of the annual five-hour CE courses; or 3) has their certification suspended by a judge based on allegations of serious misconduct presented by a Sheriff. See O.C.G.A. § 9-11-4.1(c); Article 11 of the Rules and Regulations.

<sup>13</sup> Petitioners have a clear legal right to the relief sought and do not have any other adequate remedy at law. Baker v. Gwinnett County, 267 Ga. App. 839, 845 (2004). In Bibb County v. Monroe County, 294 Ga. 730, 734, 755 S.E.2d 760, 766 (Ga., 2014), the Georgia

to relief exists either when the public official fails entirely to act or, commits a **gross abuse of discretion** like that found here. Ga. Dept. of Transp. v. Peach Hill Properties, Inc., 278 Ga. 198(2), 599 S.E.2d 167 (2004); Persons v. Mashburn, 211 Ga. 477, 86 S.E.2d 319 (1955).

Respondents argue that a writ of mandamus should not issue based upon the *non sequitur* that a blanket rule refusing to perform their duty to review applications and authorize Certified Servers to work is not an “abuse of discretion.” It is now beyond serious debate that Respondents have clearly abused their discretion by imposing a blanket ban on Certified Servers working so to nullify the Statute. A writ of mandamus must issue if (1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief. See also Richard Ruskell, Davis & Shulman’s Ga. Practice & Procedure, § 29:2 (2013–2014 ed.); McClung v. Richardson, 232 Ga. 530, 207 S.E.2d 472 (1974).

The whole purpose of the Statute was to afford Petitioners the right to work as process servers throughout Georgia and ensure they were qualified to do so. It is axiomatic that a public official cannot exercise the “discretion” conferred upon him by statute in a manner that works to nullify the very law from which that discretion emanates. Respondents’ conspiratorial refusal to permit any Certified Server to work, regardless of merit, constitutes the grossest abuse of discretion possible since Respondents openly

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Supreme Court defined a “clear legal right to the relief sought” exists when a petitioner seeks to compel the performance of a public duty that a public official is required by law to properly perform, and has failed to do so. See Bland Farms, LLC v. Ga. Dept. of Agriculture, 281 Ga. 192, 193, 637 S.E.2d 37 (2006); Gilmer County v. City of East Ellijay, 272 Ga. 774(1), 533 S.E.2d 715 (2000).

acknowledge their collective contempt for the Statute and their commitment to nullifying the Statute. Such conduct equates to a failure to act that justifies the issuance of a writ of mandamus.

Petitioners have no avenue of review that comports with due process to challenge the exercise of the purported “absolute discretion” by the Sheriffs. The case law is clear that, absent a prescribed review process like certiorari or some other meaningful review by a neutral third-party empowered to compel the public official’s compliance with the law, mandamus will lie. See McClung v. Richardson, 232 Ga. at 533–534, 207 S.E.2d 472 (reversing grant of mandamus where decision of personnel review board reviewable by certiorari). Here, there is simply no avenue for redress for Petitioners to follow in order to seek redress for Respondents’ refusal to allow them to put their statewide certification and authorization into effect. Because the Statute requires official action by Respondents, mandamus is available to compel the taking of the discretionary act in some objective form. See, e.g., Ga. Dept. of Transp. v. Peach Hill Properties, Inc., 278 Ga. at 200–201, 599 S.E.2d 167 (mandamus appropriate where agency adopted policy barring any exemptions despite applicable law requiring agency to consider exemption requests).<sup>14</sup>

As shown by Petitioners, Respondents have not alleged, much less proven, any

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<sup>14</sup> Dougherty County v. Webb, 256 Ga. 474(1), 350 S.E.2d 457 (1986) (Mandamus was proper to compel the county commission to consider all evidence offered in connection with the plaintiff’s zoning application); Citizens & S. Nat’l Bank v. Independent Bankers Assn., 231 Ga. 421, 425, 202 S.E.2d 78 (1973) (Mandamus was proper to require banking officials to take action to enforce banking laws); and Thomas v. Ragsdale, 188 Ga. 238(3), 3 S.E.2d 567 (1939) (Mandamus was held to be proper to compel board of county commissioners to pass objective regulations to govern the sale of liquor).

legitimate reason to prohibit all Certified Servers from working in their County. Respondents' willful and gross abuse of the limited discretion afforded them under the Statute violates Petitioners' right to due process of law and justifies the issuance of a writ of mandamus to compel Respondents to individually consider each application to work as a Certified Server in their County, and deny such certification only for good cause shown or for the reasons set forth in O.C.G.A. § 9-11-4.1(c).

**E. Respondents' Conspiracy Violates Petitioners' Liberty of Interest in Their Right to Engage in a Constitutionally Protected Licensed Profession Regulated by the State**

Petitioners have a constitutional protected liberty interest in their right to work using their certification. The Statute creates a program and state certification license to serve process "statewide," and Respondents have acted in concert to prevent the Certified Servers from exercising their right to use their state certification to earn a living. This right to use the certification that Petitioners paid for and earned is not an unfounded expectation or an inchoate claim. It was established by a Statute passed by the General Assembly. "[Liberty] denotes not merely freedom from bodily restraint, but also the right of the individual....to engage in any of the common occupations of life..." Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).<sup>15</sup>

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<sup>15</sup> See also Fairfax MK Inc. v. City of Clarkston, 274 Ga. 520, 555 S.E.2d 522 (2001) (In order to satisfy the requirements of substantive due process, the ordinance must "serv[e] some public purpose and....the means adopted by the ordinance are reasonably necessary for the accomplishment of the purpose, and are not unduly oppressive upon the persons regulated..."); City of Lilburn v. Sanchez, 268 Ga. 520, 522(2), 491 S.E.2d 353 (1997) ("[A] municipal ordinance is a valid exercise of the police power if it is substantially related to the public health, safety, or general welfare.... So long as an ordinance realistically serves a legitimate public purpose, and it employs means that are reasonably

The principles established in these cases make clear that Respondents' wholesale ban prohibiting Certified Servers from plying their trade for reasons that are utterly devoid of any legitimate underlying rationale or justification, is unreasonable, arbitrary, and capricious, and therefore denies Petitioners their liberty and constitutes a substantive due process violation. See Silverstein v. Gwinnett Hosp. Auth., 861 F.2d 1560 (11th Cir. 1988). Such a violation is redressable both by declaratory and injunctive relief achieved via issuance of a writ of mandamus.

**F. Respondents Hill and Piper Are Subject to a Writ of Mandamus**

Respondents Hill's and Piper's testimony and conduct to date demonstrate they not only have refused to allow Certified Servers to serve process in contravention of their clear legal duty to authorize them, but that they will continue to do so. For example, Sheriff Hill testified in his deposition that he has a blanket rule that no private process server will ever be approved to serve process in Clayton County. (Hill Depo. 47-48). Similarly, Piper admitted he has adopted a blanket policy of denying all requests by Certified Servers to serve process in Forsyth County and he does not permit Certified Servers to work in his County. (Piper Depo. 22-24). Moreover, the evidence shows that Petitioner McClellan recently was told by members of Sheriff Piper's office staff, as well as a specific member of his office staff whose name is "Pat", that Sheriff Piper was refusing to process applications for certification and was also refusing to process requests for fingerprint background checks." (See McClellan Affidavit, attached hereto as Exhibit 1). As a result,

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necessary to achieve that purpose, without unduly oppressing the individuals regulated, the ordinance must survive a due process challenge.").

McClellan had to have his surety bond amended from being payable to the Sheriff of Forsyth County to payable to the Sheriff of Cherokee County. Id., Exhibit 1A, 1B and 1C.

With respect to Sheriff Hill, the actions of his Department make it clear that his admitted blanket rule to prevent private process servers from working in Clayton County remains in effect. (See Hill Depo. 47-48). Attached as Exhibit 2 hereto is the affidavit of GAPPS Director and former Vice-President Jayne Rauser. In addition to other duties, Ms. Rauser was also assigned to be liaison with the Association's Executive Staff Member Brent Loeffler. Ms. Rauser would bring to Mr. Loeffler's attention any concerns that were being raised by process servers regarding certification problems. In her affidavit, Ms. Rauser describes the e-mail chain she received from GAPPS President Duchon regarding the refusal by the Clayton County Sheriff's Office to accept and process an application for certification submitted by process server Steve Basham in February 2013.<sup>16</sup> (Ex. 2, ¶¶ 3-6).

Ms. Rauser forwarded the e-mail to the Association via Mr. Loeffler to inquire as to why Sheriff Hill's office was ignoring the certification process. Id. Mr. Loeffler responded on February 22, 2013, making it clear that, "Hill has mounting legal issues and it is apparent he has made a decision **to avoid the certification process altogether.**" Id.

Moreover, there is substantial evidence that Sheriff Hill would have no knowledge of whether his department received certification requests since 2013. Sheriff Hill candidly admitted, "The way we operate now, the chief deputy operates the day-to-day

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<sup>16</sup> The e-mail from Mr. Basham is offered only to explain the actions taken by then Vice-President Rauser.

operations of the sheriff's office. [Hill handles] more the community, the politics. People call it shaking hands-kissing babies. The only time something would come to [Hill's] attention is if the public made a complaint . . . . So the chief operates the day-to-day operations and he crunches those numbers whereas I maintain a public persona . . ." (Hill Depo. 20-21).

Sheriff Piper and Sheriff Hill have continued to impose a blanket rule prohibiting Certified Servers from working in their County. It is apparent that they are rejecting all certification requests. As such, they are not entitled to summary judgment on Petitioners' request for a writ of mandamus.

**G. Petitioners are Entitled to Attorney's Fees**

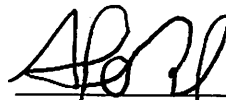
Attorney's fees may be recovered by plaintiff if defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense; it is only necessary to the plaintiff's recovery that he show any one of these three conditions exists. O.C.G.A. § 13-6-11. Attorney's fees are also available under O.C.G.A. § 9-15-14 for the Sheriffs' defense of this litigation which, as shown above, lacks substantial justification. Here, the bad faith of the Respondents and the lack of substantial justification of their position are evident in their refusal to abide by a clear statutory mandate to allow Certified Servers to serve in their County absent a particularized determination that the individual Certified Server should not be allowed to do so. Bad faith is also found in the Respondents' reversal of their negotiation positions during the legislative debate over the statute and their twisting of the agreed upon language of the Statute to drive their present conspiracy to deprive Respondents of a legal right.

This case for fees is guided by Southland Outdoors, Inc. v. Putnam Respondents, 265 Ga. App. 399 (2004), wherein the Court of Appeals reversed a trial court's determination not to allow the recovery of attorneys' fees. In Southland Outdoors, the court issued a writ of mandamus compelling the Respondents to issue building permits to Southland Outdoors. Id. at 400. The zoning ordinance permitted the proposed use. Southland Outdoors moved for attorneys' fees under O.C.G.A. § 9-15-14 for having to file the petition for a writ of mandamus. Because the trial court granted the plaintiff's petition for mandamus, the Court of Appeals ruled that the plaintiff should recover attorneys' fees. Id. at 402. Southland Outdoors dictates that this Court must award attorneys' fees to Petitioners in this case after an evidentiary hearing is conducted to determine the amount.

#### IV. CONCLUSION

The concerted actions of Respondents acting in conspiracy with Georgia's Sheriffs and the Association to deny Petitioners their ability to make a living is plainly in violation of the Statute and Petitioners' rights to due process of law. The Court is requested to deny Respondents' Motion for Summary Judgment in its entirety, and grant Petitioners' Motion for Summary Judgment.

Respectfully submitted this 11<sup>th</sup> day of August, 2014.



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**IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA**

GEORGIA ASSOCIATION OF )  
PROFESSIONAL PROCESS SERVERS et al )  
 )  
Petitioners, )  
 )  
v. )  
 )  
THEODORE JACKSON, as Sheriff of )  
Fulton County; et al )  
 )  
Respondents. )

CIVIL ACTION FILE  
NO. 2013CV237446

**AFFIDAVIT OF PETITIONER RODNEY J. MCCLELLAN**

COMES NOW RODNEY J. MCCLELLAN, who, after being duly sworn,  
deposes and states as follows:

1.

I am over the age of eighteen (18) years, a citizen of the United States and a resident of the State of Georgia. I am a member of Petitioner, Georgia Association of Professional Process Servers (GAPPS), and have been certified by Cherokee County Sheriff Roger Garrison pursuant to O.C.G.A. §9-11-4.1 and the Rules and Regulations issued by the Judicial Council of Georgia (JCG). I am presently appointed pursuant to O.C.G.A. § 9-11-4(c) as a permanent process server in many of the Metropolitan Atlanta Area County Courts, including the Superior and State Courts of Fulton and DeKalb County. I am a resident of Forsyth County, Georgia.

2.

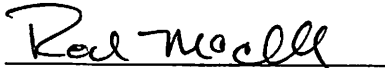
In July, 2013, after successfully completing the twelve-hour pre-certification training and passing the examination administered by the Administrative Office of the Courts, I completed all the remaining requisites for

obtaining certification pursuant to O.C.G.A. §9-11-4.1 and the Rules issued by the Judicial Council of Georgia, including the issuance of the \$25,000.00 surety bond made payable to the Forsyth County Sheriff's Office (Exhibits B and C) and application fee of \$80.00, and sought certification from the Forsyth County Sheriff Hill's Office.

3.

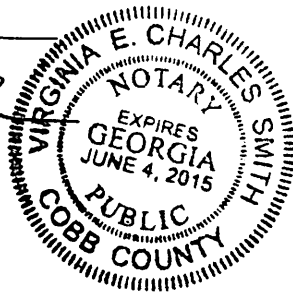
Staff at Sheriff Piper's office, including a staff member named "Pat" who I was led to understand works directly for Sheriff Piper, informed me that Sheriff Piper was not allowing anyone to be sworn in as a certified process server. I informed GAPPS President Deborah Duchon and past president Paul Tamaroff by e-mail July 19, 2013 (Exhibit A). As a result, I had to have a new surety bond issued by the insurance company made out to the Cherokee County Sheriff's Office where I was thereafter certified.

FURTHER AFFIANT SAYETH NAUGHT.

  
RODNEY J. MCCLELLAN

Sworn to and subscribed before  
me this the 7th day of August,  
2014, at Atlanta, Georgia.

  
Notary Public



Rod McClellan <rmcclellan@explegalservices.com>

July 19, 2013 10:19 AM

To: Deborah Duchon <deb@aps-ga.net>, "PAUL K. TAMAROFF" <ptamaroff@aps-ga.net>,

Elizabeth Smith <esmith@aps-ga.net>

Forsyth Certification

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Well, I finally have the answer. I've talked with several people with the Forsyth County Sheriff's office who have in one way or another said the same thing. They are not swearing in process servers. I talked with Pat this morning who I understand works directly for Sheriff Piper who said the new sheriff has not allowed anyone to be sworn in recently.

I guess I will be going to Cherokee.

Rod

**Rod McClellan**  
Process Server

**Express Legal Services LLC**  
860 Johnson Ferry Rd.  
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Atlanta, GA 30342

(678)648-6330  
(678)802-6384 Fax

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[www.explegalservices.com](http://www.explegalservices.com)

Ex. / A

# CNA SURETY

## FOR PROCESS SERVER APPLICANTS

PLEASE PRINT OR TYPE.

Name RODNEY J MOCLELLAN  
Residence Address 4895 ROSAWOOD LAKE DR  
CUMMINGS GA 30040  
Telephone # 678-648-6330

County of the Sheriff's Office Where You Applying for Certification: FOLSTON

Date: 7-16-2013

Rod McCell  
Signature  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Agency: National Surety Services, Inc.	
Address: 1534 Dunwoody Village Pkwy., Suite 220	
<small>Street</small>	
Atlanta	Georgia 30338
<small>City</small>	<small>State Zip</small>
Agent's Code	1 0 - 1 7 3 8 3

Check here if this correspondence was previously faxed or emailed.  
PHONE: 1-800-853-8899      FAX: 770-394-6888  
Email: michael@nationalsurety.com

EX. 1 B

# NSSI

NATIONAL SURETY SERVICES, INC.

"Professional Providers Of All your Contract & Commercial Surety Needs"

## INVOICE

Date: July 16, 2013

To:

Rodney J. Mclellan  
4895 Rosewood Lake Dr.  
Cumming, GA 30040

### Description of Premium Due

Process Server Bond	\$100.00
Obligee: Georgia Administrative Office of the Courts	
Bond Number: 61749462	
Bond Term: 07/16/13 to 07/16/14	
Bond Amount: \$25,000.00	
Surety: Western Surety Company	

TOTAL AMOUNT DUE: \$100.00

PAID

1534 Dunwoody Village Parkway - Suite 220 - Atlanta, Georgia 30338  
1-800-953-6699 - (770) 394-9444 - FAX (770) 394-6888

EX. 1C

**IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA**

GEORGIA ASSOCIATION OF	)	
PROFESSIONAL PROCESS SERVERS et al	)	
	)	CIVIL ACTION FILE
Petitioners,	)	NO. <u>2013CV237446</u>
	)	
v.	)	
	)	
THEODORE JACKSON, as Sheriff of	)	
Fulton County; et al	)	
	)	
Respondents.	)	

**AFFIDAVIT OF JAYNE RAUSER**

COMES NOW JAYNE RAUSER, who, after being duly sworn, deposes and states as follows:

1.

I am over the age of eighteen (18) years, a citizen of the United States and a resident of the State of Georgia. I am past vice-president of Petitioner, Georgia Association of Professional Process Servers (GAPPS), am presently a director on the GAPPS Board of Directors and have been certified by Sheriff Butch Conway pursuant to O.C.G.A. §9-11-4.1 and the Rules and Regulations issued by the Judicial Council of Georgia (JCG). I am presently appointed pursuant to O.C.G.A. § 9-11-4(c) as a permanent process server in many of the Metropolitan Atlanta Area County Courts, including the Superior and State Courts of Fulton and DeKalb County.

2.

Subsequent to the approval by the Judicial Council of Georgia of the Rules and Regulations governing the certification program established by O.C.G.A. §9-11-4.1, GAPPS was approved by the Administrative Office of the

Courts (AOC) as the sole provider of the twelve-hour pre-certification training program required by the statute. I was designated by GAPPS as liason with the Georgia Sheriffs' Association (GSA) to deal with any problems that arose in the implementation of the certification program. My counterpart with the GSA is Executive Staff Officer Brent Loeffler.

3.

On February 21, 2013, I received an e-mail notification from GAPPS President Deborah Duchon that process server Steve Basham was being informed by personnel in the Clayton County Sheriff's Office that Sheriff Hill was refusing to accept applications for certification pursuant to O.C.G.A. §9-11-4.1.

4.

That same day, at 11:41 a.m, I contacted Brent Loeffler via e-mail, asking for his assistance in getting Sheriff Hill's office to comply with the certification procedures. Mr. Loeffler replied to me by e-mail that same day at 2:20 p.m., instructing me to advise Mr. Basham to go to the Fulton County Sheriff's Office for certification.

5.

I responded to Mr. Loeffler at 3:25 p.m. that same day asking why Mr. Basham could not get certified by Sheriff Hill's office, questioning if there was a connection with Sheriff Hill's legal problems. There had been many news accounts of criminal indictments having been issued against Sheriff Hill. I also expressed my concern for other process servers who try to obtain their certification from the Clayton County Sheriff. The Clayton County Courts had already issued notification that beginning July 1, 2013, neither Superior or State Courts would issue permanent appointments to process servers who were not certified. There were already a number of process servers appointed by these

courts who were residents of Clayton County, and there would be substantial inconvenience if they were required to obtain certification from another county.

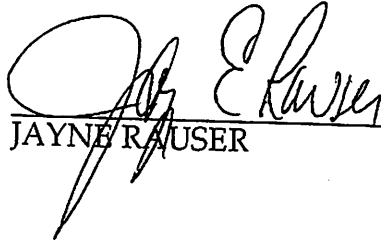
6.

Mr. Loeffler's reply came by e-mail the following day at 2:07 p.m. He made it clear that the GSA could not demand Sheriff Hill to provide certifications; that Sheriff Hill's had made it apparent that "he has made a decision to avoid the certification process altogether [and] [Mr. Loeffler's] attempt to contact a member of [Sheriff Hill's] legal staff [went] without response." As for the decision of the Clayton County Courts to issue appointments only to certified process servers, Mr. Loeffler suggested the appropriate administrative staff "reach out to the sheriff and advise him and his staff of the details in the law so they can work together to resolve the issue." A copy of that five-page chain e-mail is attached as Exhibit A.

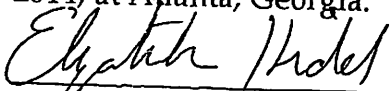
7.

As a result of Sheriff Hill's position, and the inability of the GSA representative to assist in the matter, all process servers taking the twelve-hour, pre-certification training have since been advised that they should seek certification in counties other than Clayton.

FURTHER AFFIANT SAYETH NAUGHT.

  
JAYNE RAUSER

Sworn to and subscribed before  
me this the 12 day of August,  
2014, at Atlanta, Georgia.



Notary Public

My Commission Expires  
August 1, 2017

Jayne Rauser <jrauser@diversifiedlegal.com>  
To: Deborah Duchon <deb@aps-ga.net>  
FW: Certified Process Servers Info

July 10, 2013 2:24 PM

Below is our email correspondence from Brent regarding Clayton

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**From:** Brent Loeffler [mailto:BLoeffler@georgiasheriffs.org]  
**Sent:** Friday, February 22, 2013 2:07 PM  
**To:** 'Jayne Rauser'  
**Subject:** RE: Certified Process Servers Info

Jayne

As you know, I am well aware of what the law requires. What you must understand is that GSA cannot demand a sheriff to take or not to take action. If you feel you are entitled to an answer of why Mr. Basham must seek certification elsewhere, I suggest you contact Mr. Hill.

Mr. Hill has mounting legal issues and it is apparent he has made a decision to avoid the certification process altogether. Mr. Hill has not and will not utilize the abundant resources the Georgia Sheriffs' Association has to offer. I have made an attempt to contact a member of his legal staff who is knowledgeable on this law, however, there has been no response.

As far as the administrative staff of the Clayton Superior Court requiring process servers to become certified by July of this year, I would suggest they reach out to the sheriff and advise him and his staff of the details in the law so they can work together to resolve the issue.

As far as any other questions/issues you have with any of the other 158 sheriffs, please, do not hesitate to contact me. As you know, I am more than willing to assist with any questions/issues.

Best Regards  
Brent

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**From:** Jayne Rauser [<mailto:jrauser@diversifiedlegal.com>]  
**Sent:** Thursday, February 21, 2013 3:25 PM  
**To:** Brent Loeffler  
**Cc:** 'PAUL K. TAMAROFF'  
**Subject:** RE: Certified Process Servers Info

Hi Brent,

Is there some reason why Mr. Basham cannot get certified by the Sheriff of Clayton County?  
Does this have some connection with Sheriff Hill's legal problems?

The law does specifically require all sheriffs to participate in the certification program, at least to the extent they must provide certification to qualified process servers. I believe we are entitled to an explanation as to why Mr. Basham must seek certification in Fulton County.

What about the other process servers who try to obtain their certification from Clayton – what are they to do?  
Clayton Superior Court administration is requiring that all process servers who wish to serve out of their court become certified by July 1, 2013 -so I'm sure that Mr. Basham will not be the only process server that runs into this problem.

Best regards,

# Jayne

Jayne E. Rauser

Vice - President, Georgia Association of Professional Process Servers

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**From:** Brent Loeffler [<mailto:BLoeffler@georgiasheriffs.org>]

**Sent:** Thursday, February 21, 2013 2:20 PM

**To:** 'Jayne Rauser'

**Subject:** RE: Certified Process Servers Info

Hi Jayne

Please advise Mr. Basham to go to the Fulton County Sheriff's Office to get certified.

Thanks

Brent

---

**From:** Jayne Rauser [<mailto:jrauser@diversifiedlegal.com>]

**Sent:** Thursday, February 21, 2013 11:41 AM

**To:** Brent Loeffler

**Cc:** [stevebasham@bellsouth.net](mailto:stevebasham@bellsouth.net); 'Deborah Duchon'

**Subject:** FW: Certified Process Servers Info

Good morning Brent,

Below is an email that was forwarded to me from a GAPPS board member regarding a process server (Steve Basham) who is trying to obtain certification out of Clayton County.

Might you be able to assist him in completing the process at Clayton and provide a contact who can assist?

Regards,

# Jayne

Jayne E. Rauser

Vice - President, Georgia Association of Professional Process Servers

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**From:** Deborah Duchon [<mailto:deb@aps-ga.net>]

**Sent:** Thursday, February 21, 2013 10:23 AM

**To:** paul tamaroff; Jayne Rauser; Elizabeth Smith

**Subject:** Fwd: Certified Process Servers Info

Thought you would be interested in this. Sheriff in Clayton County refusing to even register certified process servers.

Deb

Begin forwarded message:

**From:** <[stevebasham@bellsouth.net](mailto:stevebasham@bellsouth.net)>

**Subject:** Certified Process Servers Info

**Date:** February 21, 2013 9:06:53 AM EST

**To:** Deborah Duchon <[deb@aps-ga.net](mailto:deb@aps-ga.net)>

Deb

I completed the paperwork that clayton county said they wanted for the certified process servers program. Took it down to them and was informed that the Sheriff is refusing to sign off on any Certified Process Servers. Go figure since they sent me a letter stating that we had to get certified through them.

You said that you were able to get certified in Fulton. How did you do the fingerprint based criminal. Do we bring the cards to them or do we do a CODIS based check? And do we take the application to the Court Administrator or to the Sheriffs office?

Steve Basham  
Dial Services, Inc.  
3520 Stoney Creek Way  
Loganville, Georgia 30052

e-mail: [Dialservices@bellsouth.net](mailto:Dialservices@bellsouth.net)  
web: [www.dialservicesinvestigations.com](http://www.dialservicesinvestigations.com)  
phone: 770-466-5885  
fax: 770-466-5865

State License No.: PDSC000042

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No virus found in this message.

Checked by AVG - [www.avg.com](http://www.avg.com)

Version: 2013.0.2899 / Virus Database: 2639/6113 - Release Date:  
02/18/13

No virus found in this message.

Checked by AVG - [www.avg.com](http://www.avg.com)

Version: 2013.0.2899 / Virus Database: 2639/6113 - Release Date:  
02/18/13

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

GEORGIA ASSOCIATION OF  
PROFESSIONAL PROCESS  
SERVERS; et al.,

Petitioners,

v.

THEODORE JACKSON, as Sheriff of  
Fulton County; et al.,

Respondents.

\*  
\*  
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\* CIVIL ACTION FILE  
\* NO. 2013-CV-237446  
\*  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day, August 11, 2014, served counsel of record with the foregoing ***PETITIONERS' RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT*** by placing copies of same in the United States mail with proper postage thereon addressed to the following counsel of record:

Richard A. Carothers, Esq.  
Michael E. Hobbs, Esq.  
Carothers & Mitchell, LLC  
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Buford, GA 30518  
***Attorneys for Respondent Conway***

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O'Quinn & Cronin, LLC  
103 Keys Ferry Street  
McDonough, GA 30253  
***Attorneys for Respondent Gullede***

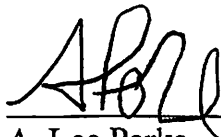
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Cobb County Attorney's Office  
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***Attorneys for Respondent Jackson***



---

A. Lee Parks  
Georgia Bar No. 563750  
PARKS, CHESIN & WALBERT, P.C.