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Frank C. Mills III

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Criminal Law

by Frank C. Mills, III*

I. INTRODUCTION

In the hundreds of cases reviewed for this survey, there were few earthshaking decisions. DNA evidence has arrived in Georgia,¹ and the yearand-a-day rule has left.² Nevertheless, there are more noteworthy cases than can be adequately addressed in this survey. There are plenty of pitfalls for the unwary. In fact the most notable trend is the ever-increasing number of challenges to former counsel. Prosecutors, defense counsel, and courts are well-advised to use the Checklist for Unified Appeal³ as a guide in any criminal case.

Due to the significance of the Checklist for Unified Appeal, the author uses a format similar to that of previous authors of this survey, but the format of the section on procedure has been changed to correspond roughly to the Checklist for Unified Appeal. The author does not fancy himself a scholar, but a "nuts and bolts" person. Hopefully this survey will be scholarly enough in content, if not in style, to be of interest to law students and members of the bar and bench, who slug it out daily in the "trenches:" the criminal trial courts of this state.

¹ See infra notes 544-50 and accompanying text.
² See infra notes 109-17 and accompanying text.
³ See infra note 537 and accompanying text; see also GA. SUP. CT. RULES (1991).

* Chief Judge of the Cherokee and Forsyth Superior Courts, Blue Ridge Judicial Circuit. Emory University (B.A., 1970); University of Georgia (J.D., 1973). Member, State Bar of Georgia. Member, Pattern-Jury Instruction Committee.

The Author expresses gratitude to his law clerk, Bonnie M. Baer (Tulane University, B.A., 1985; Emory University, J.D., 1988) for her able assistance, and to the following law students for research support: Benjamin L. Bagwell from the University of Georgia; Jennifer M. Crain, Tally Frankel, and Betsy Roberson from Emory University; and Douglas L. Kirkland from Mercer University. I am also deeply indebted to Marilyn Maxwell for her assistance above and beyond the call of duty.
II. SUBSTANTIVE CRIMES AND RELATED ISSUES

A. Constitutional Challenges

**Free Speech.** Masks are out; bumper stickers are in. In what were probably the two most highly publicized constitutional challenges of the year, Georgia’s Anti-Mask Act (the “Act”) was upheld, and its bumper sticker law was struck down. Both cases dealt with the First Amendment right of free speech and other challenges.

In *State v. Miller*, the trial court sustained Miller’s challenge to the Act before trial, and the state appealed. In a lengthy opinion, the supreme court reversed the trial court and held that wearing a mask was not “immune from governmental regulation... if the regulation furthers a substantial governmental interest that is unrelated to the suppression of free expression; and the incidental restriction on First Amendment freedom is no greater than necessary to further the governmental interest.” The Georgia Supreme Court held that the Act is “content-neutral” and that “the statute’s incidental restriction on freedom of expression” is de minimis. The court further held that the statute, when read with the Statement of Public Policy, is neither unconstitutionally vague nor

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9. O.C.G.A. § 16-11-38(a) and (b) (1988) provide:
   (a) A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.
   (b) This Code section shall not apply to:
      (1) A person wearing a traditional holiday costume on the occasion of the holiday.
      (2) [Occupational or athletic safety masks];
      (3) A person using a mask in a theatrical production including use in Mardi gras celebrations and masquerade balls; or
      (4) A person wearing a gas mask ... in ... drills and ... emergencies.

11. *Id.* at 673, 398 S.E.2d at 551.
12. 1951 Ga. Laws 9 provides:
    All persons residing in the State are entitled to the equal protection of their lives and property.
overbroad. Moreover, the court found that the Act did not violate Miller's right to freedom of association. Though the courts have protected anonymity in the distribution of handbills and pamphlets, "the statute's effect on the Klan's [Miller's] ability to advocate . . . anonymously is negligible." Finally, the court held that the Act did not violate the Equal Protection Clause of the Fourteenth Amendment. Miller also challenged the Act as a violation of the right of free speech under the Georgia Constitution, and the supreme court opined without citation of authorities that "[t]he 1983 Constitution of Georgia provides even broader protection than the First Amendment." The Georgia Constitution is not otherwise addressed in the opinion.

"S____ HAPPENS." You know what I mean. This now familiar bit of nastiness led to a $100 fine and the appeal in Cunningham v. State when the expression appeared in the form of a bumper sticker on Cunningham's car. In 1988 the Georgia General Assembly enacted a law to prohibit such conduct. The bumper sticker law underwent an analysis similar to that of the Anti-Mask Act in Miller. The supreme court noted that profane words could only be regulated in the context of "fighting words" or to "protect a captive audience or minors." Georgia's Bumper Sticker Law "reaches a substantial amount of constitutionally protected speech" and therefore violates the First and Fourteenth Amendments. The court further held that the statute was overbroad and vague and that in order to salvage the statute, the court would have to "excise the prohi-

The law protects all, not only against actual physical violence but also against threats and intimidations from any person or group of persons. The General Assembly cannot permit persons known or unknown to issue either actual or implied threats, against other persons in the State. Persons in this State are and shall continue to be answerable only to the established law as enforced by legally appointed officers.

14. Id. at 675, 398 S.E.2d at 552 (citing Talley v. California, 362 U.S 60 (1960)).
15. Id., 398 S.E.2d at 553.
16. Id. at 676, 398 S.E.2d at 553.
19. O.C.G.A. § 40-1-4 (1991) provides: "No person owning, operating, or using a motor vehicle in this state shall knowingly affix or attach to any part of such motor vehicle any sticker, decal, . . . containing profane or lewd words describing sexual acts, excretory functions, or parts of the human body." Id. "Violation of this provision is a misdemeanor with fine not to exceed $100." Id.
21. 260 Ga. at 831, 400 S.E.2d at 920.
22. Id.
bition of profane words” and “equate lewd with obscene.” Based on Webster's International Dictionary and Georgia's law prohibiting the distribution of obscene materials, the court found the statute unsalvageable.

Traffic Laws. Georgia's Habitual Violator law was one of several traffic laws that survived constitutional challenge. In a rather unusual equal protection challenge, the court in Gaines v. State held that rendering a habitual violator guilty of a felony if he operates a vehicle on private or public property, while holding a driver with a suspended license guilty of a misdemeanor only when he operates a vehicle on a public highway, was not a violation of equal protection. The court found that the Georgia General Assembly could have reasonably concluded that habitual violators are more dangerous than those who merely have had their licenses suspended; therefore, Gaines failed to show that the classification was arbitrary and not related to the objective of the statute.

The presumptions of intoxication set out in Official Code of Georgia Annotated ("O.C.G.A.") section 40-6-392(b)(3) were attacked in Lat-
In *Lattarulo* defendant claimed that the presumptions were burden-shifting. The court held that the challenged provision, "although it is worded in terms of a presumption, actually has the effect of defining the level of blood-alcohol that is sufficient to permit an inference that the driver is 'under the influence.'" The court further noted that, based on appellate court precedents, "the statute may not be charged to the jury using the word 'presumption.'" Therefore, the statute does not create an unconstitutional presumption.

**Vagueness.** If a statute "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices," it is not unconstitutionally vague. The supreme court, in *Cleveland v. State*, held that O.C.G.A. section 42-5-37(a), which prohibits a warden from profiting from inmate labor, meets the vagueness test and therefore is constitutional. The prohibited interest is clearly a personal interest or benefit from inmate labor and not the permissible interest in the inmates' performance of labor that will benefit the county or state.

Applying the same vagueness test, the supreme court in *Satterfield v. State* found O.C.G.A. section 16-11-39(3) to be unconstitutionally vague. This statute makes it a misdemeanor to engage "in indecent or disorderly conduct in the presence of another in any public place." The phrase "indecent or disorderly conduct" is not defined and provides no

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hol, as prohibited by paragraphs (1), (2), and (3) of subsection (a) of Code Section 40-6-391.

Id. The statute was amended in 1991 to change the concentration requirement to .08. Previously it was .10. See 1991 Ga. Laws 1886, 1894 § 10(b)(3).


33. Id. at 125, 401 S.E.2d at 518.


35. Id.


37. Id.


39. O.C.G.A. § 42-5-37(a) (1991) provides: "No warden . . . who has charge, control, or direction of inmates shall be interested in any manner whatever in the work or profit of the labor of any inmate . . . ." Id.

40. 260 Ga. at 772, 399 S.E.2d at 473.

41. Id.


43. Id. at 428, 395 S.E.2d at 817. O.C.G.A. § 16-11-39(3) (1988) provides: "A person who commits any of the following acts commits a misdemeanor: . . . (3) Engages in indecent or disorderly conduct in the presence of another in any public place . . . ." Id.

"fair warning to persons of ordinary intelligence as to what [the statute] prohibits so that they may act accordingly." By comparison, O.C.G.A. section 16-6-8, which prohibits public indecency, defines such acts as sexual intercourse and exposure of sexual organs. Although child molestation is defined in similar terms as an "immoral and indecent act," it has been upheld against similar vagueness challenges.

Sentencing. Previously, while upholding Georgia’s sodomy law, five United States Supreme Court Justices expressed concern that the Georgia Sodomy Statute might present an Eighth Amendment problem. Thereafter, Georgia’s Supreme Court upheld a less than maximum sentence (ten years to serve, followed by ten years on probation) for a sodomy conviction. In Rodgers v. State, the supreme court refused to substitute its judgment for that of the legislature, declined to review the proportionality of sentences (which is appropriate only in death penalty cases), and held that a sentence of twenty years for a sodomy conviction did not shock the conscience and therefore was not cruel and unusual. All the justices concurred.

In Tillman v. State, the supreme court upheld the trial court’s decision to impose life imprisonment for a second conviction of possession of

45. 260 Ga. at 428, 395 S.E.2d at 817.
46. O.C.G.A. § 16-6-8(a) (Supp. 1991) provides in part:
   (a) A person commits the offense of public indecency when he or she performs
   any of the following acts in a public place:
   (1) An act of sexual intercourse;
   (2) A lewd exposure of the sexual organs;
   (3) A lewd appearance in a state of partial or complete nudity; or
   (4) A lewd caress or indecent fondling of the body of another person.
Id.
47. 260 Ga. at 428 n.1, 395 S.E.2d at 816 n.1.
48. O.C.G.A. § 16-6-4(a) (1988) provides: "A person commits the offense of child molestation when he does any immoral or indecent act to or in the presence of or with any child under the age of 14 years with the intent to arouse or satisfy the sexual desires of either the child or the person." Id.
50. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
54. Id. at 37, 401 S.E.2d at 738.
55. Id. at 36, 401 S.E.2d at 737.
cocaine with intent to distribute,\textsuperscript{57} as opposed to a potential maximum sentence of thirty years for trafficking cocaine.\textsuperscript{58} Even though there were no more than 0.3 grams, the court held that the trial court did not employ an irrational statutory sentencing scheme.\textsuperscript{59} Therefore, due process and equal protection rights were not violated. The General Assembly, suggested the court, may have perceived repeated possession of cocaine with intent to distribute to be a greater threat than the mere possession of large amounts.\textsuperscript{60} In \textit{Edwards v. State},\textsuperscript{61} the same sentencing provision withstood an equal protection and due process challenge that alleged that not all second drug sale convictions receive such a sentence.

\textbf{Miscellaneous.} In \textit{Sims v. State},\textsuperscript{62} the supreme court held that child molesters were not denied equal protection or due process merely because children, not permitted to testify in a civil case, could testify against them.\textsuperscript{63} Therefore, Georgia’s “molested child witness” exception\textsuperscript{64} to the requirement that a witness “understand the meaning of an oath” is constitutional. A witness has no fundamental right to testify, and the legislature may set threshold requirements for a witness who wishes to testify.\textsuperscript{65} The legislature may also except witnesses under appropriate circumstances.\textsuperscript{66}

The court in \textit{Murphy v. State},\textsuperscript{67} which was a weak attempt at a constitutional challenge, held that Murphy’s equal protection rights were not violated when he was prosecuted and convicted for incest and child molestation.\textsuperscript{68} Murphy claimed several other persons were engaging in sexual intercourse with his daughter. They were not prosecuted, nor was his

\setcounter{footnote}{57}
\begin{footnotes}
57. \textit{Id.} at 801, 400 S.E.2d at 632.
59. 260 Ga. at 801, 400 S.E.2d at 632.
60. \textit{Id.} at 802, 400 S.E.2d at 632-33.
63. \textit{Id.} at 783, 399 S.E.2d at 926.
64. O.C.G.A. § 24-9-5(a), (b) (Supp. 1991) provide:
\begin{itemize}
\item[(a)] Except as provided in subsection (b) of this Code section, persons who do not have the use of reason, such as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, shall be incompetent witnesses.
\item[(b)] Notwithstanding the provisions of subsection (a) of this Code section, . . . in criminal cases involving child molestation, and in all other criminal cases in which a child was a victim of or a witness to any crime, any such child shall be competent to testify, and his credibility shall be determined as provided in Article 4 of this chapter.
\end{itemize}
\textit{Id.}
65. \textit{Id.} § 24-9-5(a).
66. \textit{Id.} § 24-9-5(b).
68. \textit{Id.} at 879, 395 S.E.2d at 77.
daughter, for fornication. Murphy failed even to allege that he was prosecuted on the basis of some unjustifiable standard founded on intentional and purposeful discrimination.69

B. Offenses Defined

Felony Murder. The felony murder law in Georgia does not include any limitations as to which felonies may support a conviction for felony murder.70 In Georgia the courts have long held that a felony murder conviction can be supported by the integrally related felony of aggravated assault with a deadly weapon71 and even nondangerous felonies like possession of a firearm by a convicted felon.72 In Baker v. State,73 the merger doctrine and the nondangerous felony aspect of Georgia’s felony murder rule were discussed at length. Partly because Georgia has no negligent or reckless homicide statute, the court in Baker rejected the merger doctrine espoused by some states and held that felony murder could be predicated upon any felony; otherwise, many homicides would go unpunished.74 In a special concurrence in Johnson v. State,75 Justice Hunt had previously declared his misgivings about the applicability of the felony murder rule in status offenses such as possession of a firearm by a convicted felon.76 The court in Lewis v. State77 upheld a felony murder conviction predicated upon an integral aggravated assault.78 The case was unremarkable except for a footnote in which Justice Hunt criticized the court’s rationale in Baker for rejecting the merger doctrine as “hardly grounded in logic.”79 One reason given for this criticism was that “such killings can never be reduced, on the ground of mitigation, to manslaughter.”80 In another footnote in Towns v. State,81 Justice Hunt compared the felony murder in

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69. Id. at 878, 395 S.E.2d at 76.
70. O.C.G.A. § 16-5-1(c) (1988) provides: “A person also commits... murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.” Id.
74. Id. at 757-58, 225 S.E.2d at 271-72.
76. Id. at 859-60, 376 S.E.2d at 359-60 (Hunt, J., concurring).
78. Id. at 405, 396 S.E.2d at 213.
79. Id. at 405 n.2, 396 S.E.2d at 213 n.2.
80. Id. But see Malone v. State, 238 Ga. 251, 252, 232 S.E.2d 907, 908 (1977), in which the court held that “because an act done in passion involves a less culpable mental state than the state of real or imputed malice which is the foundation of the felony murder rule... where the facts warrant it, a charge on voluntary manslaughter may indeed be given in a felony murder trial.” Id. (emphasis added).
Towns, predicated upon an aggravated assault on a third party, to that in Lewis. He found the application of the felony murder rule in Towns "proper" but "unnecessary" in Lewis because the facts there were sufficient for malice murder.82

In Byrer v. State,83 Justice Hunt again affirmed a conviction of felony murder, this time based upon a predicate offense of cruelty to a child.84 Cruelty to a child merged into the greater offense of felony murder, but the doctrine of merger was not an issue on appeal.85 Justice Hunt did note, however, the particularly gruesome nature of the wounds the child received.86 Perhaps Justice Hunt’s enthusiasm for the doctrine of merger was tempered by the realization that if the doctrine were adopted, cases of cruelty to a child resulting in the death of the victim, such as in Byrer and Arnett v. State,87 wherein the actual intent to kill may be difficult to prove, would not be susceptible to any type of homicide prosecution in Georgia.

In any event, Justice Weltner, recognizing the problems with existing law and noting that the remedy should lie with the General Assembly, upheld a similar felony murder conviction in Sumpter v. State,88 which was predicated on aggravated assault. Furthermore, in King v. State,89 Justice Hunt, writing for a unanimous court, affirmed a felony murder conviction predicated upon aggravated assault80 with one last note about the merger doctrine.91 Interestingly enough, in King Justice Hunt realized that felony murder is reducible to voluntary manslaughter,92 thereby solving a concern that caused him to espouse the merger doctrine.

Finally, in Rainwater v. State,93 the court affirmed a conviction for felony murder predicated in part on possession of a firearm by a convicted felon.94 There was no mention of status offenses, and the justices specifi-
cally declined to adopt the position espoused in Justice Hunt's special concurrence in Johnson v. State. All the justices concurred.

What is the upshot of all this? At least some of the justices do not like felony murders predicated on integral felonies like aggravated assault on the same victim or upon nondangerous or status offenses. The rule in Baker appears to be safe for now, until and unless the General Assembly enacts a negligent or reckless homicide statute. This is significant for two reasons. First a major portion of all murders on appeal this year included felony murder counts. Prosecutors appear to use this tactic because it alleviates the difficult-to-prove element of the specific intent to kill. Second, while several cases hold that it is not error for the Court to give a voluntary manslaughter charge on a felony murder indictment, none hold that it would be error for the court to fail to give such a charge if requested by the defense. Based on the previous discussion and the holdings of King, State v. Stonaker, and State v. Alvarado, the court will probably find error when the trial judge fails to give such a charge if properly requested.

In an unrelated felony murder ruling, the supreme court in State v. Cross held that in order to constitute felony murder, the death need not occur during the felony, but only that the death be caused by an injury that occurred during the res gestae of the felony.

Finally, in Heard v. State, Justice Hunt held that the defense of justification in defense of self is applicable in felony murder cases "regardless of the felony specified by the state as the underlying felony." Furthermore, even if guilty of an underlying "status offense" felony, an individual defendant is not precluded from asserting self defense.

96. 260 Ga. 807, 376 S.E.2d at 356.
102. Id. at 847, 401 S.E.2d at 512.
103. Id. at 847, 401 S.E.2d 907.
105. Id. at 438.
106. Id.
O.C.G.A. section 16-3-21(b)(2) does not preclude such a defense and previous cases to the contrary are overruled.

Other Homicide and Assault Rulings. In one of the most publicized opinions of the year, the supreme court ruled in State v. Cross that the year-and-a-day rule, which evolved from English common law, previously adopted in Georgia, was abolished with the adoption of the 1968 Criminal Code, despite dicta to the contrary in Manning v. State. Justice Benham, in a strong dissent, noted that the year-and-a-day rule is archaic and should be abolished due to advances in the medical field, but disagreed that the legislature abolished the rule with enactment of the 1968 Criminal Code. He further noted that since the rule was judicially created, it could and should be judicially abolished in the case then being considered. However, such ruling could only be prospective, and, therefore, could not salvage the prosecution of Cross.

Is intent to kill a defense to involuntary manslaughter? This seemingly absurd and dangerous idea appears to be the inadvertent holding of Byrer v. State. Byrer concerned a felony murder conviction in which the victim, a child, died from multiple blows. Defendant requested a charge on involuntary manslaughter because the initial blow might have caused the death of the child. The trial court refused. While the request to charge was oral, the supreme court reached the merits and held that a charge on involuntary manslaughter was not required because "[t]o warrant instructions on involuntary manslaughter . . . there must be evidence to authorize a determination that death occurred unintentionally..."
from the commission of an unlawful act other than a felony." Thus, the court treats the code language "without any intention to do so" as an element of the offense which must be proven before an individual can be convicted of involuntary manslaughter. If that is the case, then in a different set of circumstances, a defendant charged with involuntary manslaughter can take the stand, defend his case, and receive a directed verdict by merely stating "I meant to kill the little so and so." This was clearly not intended by the General Assembly. Rather, the language "without any intention to do so" should be seen as analogous to the language "irrespective of malice" in felony murder. The issue of intent thus becomes irrelevant. The charge on involuntary manslaughter in Byrer, if not waived by the oral request, should have been given.

Having previously tested positive for the AIDS (HIV) virus, defendant in Scroggins v. State was charged with aggravated assault with intent to murder after biting an officer. The appeals court held that the evidence supported the verdict that the court could preclude defendant from subpoenaing expert witnesses who would have cast doubt on whether the virus could have been so transmitted and that the State was not required to prove that the bite was a deadly weapon. The court held that "[i]t is no defense to a charge of criminal attempt that the crime the accused is charged with attempting was, under the attendant circumstances, factually or legally impossible of commission if such crime could have been committed had the attendant circumstances been as the accused believed them to be." The defense of impossibility "is even less a defense to the charge of assault 'with intent to murder' than it would be to an accusation of attempt to murder, since an 'attempt' requires a more substantial act towards completion than does mere 'intent.'""
Since the actual death-producing capability of the bite was irrelevant as charged, the expert witnesses would not have helped defendant. What mattered was that Scroggins believed that the bite was deadly, and the evidence adequately supported that conclusion. In addition, the trial judge erroneously charged the jury that they must find the use of a deadly weapon. Finding the charge to be harmless, the court, in apparent dicta, stated that there was ample evidence to find the bite to be a deadly weapon beyond a reasonable doubt.

The State got caught in a merger problem of its own creation by overcharging in Redding v. State. In Redding the State charged defendant with attempted armed robbery and with assault with intent to rob in circumstances arising out of the same offense. The jury convicted, and the trial court entered judgment on both counts. In a previous appeal, the court of appeals in Redding v. State had reversed and remanded in part because the two offenses merged as a matter of fact. On remand, the trial court entered judgment and sentenced Redding to the twenty-year maximum on the aggravated assault count. On appeal from the remand, the court of appeals again reversed and remanded, holding that aggravated assault merged into attempted armed robbery, not the other way around. In reaching this result, the court of appeals relied on Hambrick v. State. This ruling was important to Redding because the maximum sentence for attempted armed robbery is ten years. The maximum sentence for the same conduct under aggravated assault is

132. Id. at 35, 401 S.E.2d at 19.
133. Id.
134. Id. at 36, 401 S.E.2d at 20. “So long as medical science concedes this ‘theoretical possibility’ [transmittal of the virus], the jury was well within the evidence to consider the human bite of a person infected with the AIDS virus to be ‘deadly.’” Id.
136. Id. at 751, 397 S.E.2d at 34.
138. Id. at 52-53, 386 S.E.2d at 909.
139. 196 Ga. App. at 751, 397 S.E.2d at 35.
140. Id.
141. 256 Ga. 148, 344 S.E.2d 639 (1986), aff'd, 257 Ga. 345, 360 S.E.2d 719 (1987). It is not clear that Hambrick requires such a result. In Hambrick the supreme court merely held that both convictions could not stand and that the aggravated assault convictions merged into the attempted armed robbery convictions. It does not appear that there was an issue of which conviction merged into which. 256 Ga. at 149, 344 S.E.2d at 641.
142. O.C.G.A. § 16-4-6(a) (1988) provides: “A person convicted of the offense of criminal attempt to commit a crime punishable by death or by life imprisonment shall be punished by imprisonment for . . . [not] more than ten years.” Id. O.C.G.A. § 16-8-41(b) (1988) provides: “A person convicted of . . . armed robbery shall be punished by death or imprisonment for life or . . . [not] more than 20 years.” Id.
twenty years.\textsuperscript{144} Thus, Redding's sentence was cut in half because he was charged with two crimes arising out of the same conduct: attempted armed robbery and aggravated assault.

Some still believe that using excessive force (a gun) in the commission of a lawful act (self defense) might be involuntary manslaughter, and, therefore, involuntary manslaughter (misdemeanor) should be charged as a lesser offense.\textsuperscript{144} The court of appeals signaled its disagreement with this belief in \textit{Bangs v. State}.\textsuperscript{146} Citing \textit{Willis v. State},\textsuperscript{148} the court of appeals specifically overruled any prior cases which would hold contrary to \textit{Willis}.\textsuperscript{147}

\textbf{Sex Crimes.} A rape conviction in \textit{Ranalli v. State}\textsuperscript{148} did not merge into a kidnapping with bodily injury conviction legally or factually when the bodily injury alleged in the indictment was not the rape, but "a laceration to the vaginal and perineal area" that occurred in the rape.\textsuperscript{148} Since corroboration of the victim's testimony concerning the rape is not required, proof of vaginal injury or trauma is not required to prove rape and, therefore, can support the bodily injury element.\textsuperscript{150}

In \textit{Clark v. State},\textsuperscript{151} defendant was convicted of raping a victim whom he met at a bus stop and to whom he had offered a ride. He claimed consent and appealed the trial judge's refusal to charge that the jury must find the victim's fear was reasonable.\textsuperscript{152} Clark contended that "'[i]f the [victim's] intimidation or fear is not evident to the reasonable person, then it would not be evident to the putative rapist,'" thereby negating

\textsuperscript{143} O.C.G.A. § 16-5-21(b) (Supp. 1991) provides: "[A] person convicted of the offense of aggravated assault shall be punished by imprisonment for . . . [not] more than 20 years."

\textit{Id.}

\textsuperscript{144} See O.C.G.A. § 16-5-3(b) (1988).


\textsuperscript{146} 258 Ga. 477, 371 S.E.2d 376 (1988).

\textsuperscript{147} 198 Ga. App. at 405, 343 S.E.2d at 168.

"The use of [any deadly implement] negates any argument that the death occurred during the commission of a lawful act in an unlawful manner because if it is self-defense it is no crime at all, and if it is not self-defense it is reckless conduct, which is a crime rather than a lawful act."


\textsuperscript{149} \textit{Id.} at 363, 398 S.E.2d at 423.

\textsuperscript{150} \textit{Id.}


\textsuperscript{152} 197 Ga. App. at 320, 398 S.E.2d at 379.
the element of criminal intent. The court of appeals found that the question of intent which the jury must resolve is determined according to the "reasonableness of her testimony as to lack of consent, not the reasonableness of her fear." Further, on motion for rehearing, the court held that "[a]s to the issue of consent, the victim's testimony as to her fears may be examined for its credibility, but not for its reasonableness." While in context the ruling may seem obvious, it may take on great significance in date or spouse rape cases, in which a jury might be more prone to try the victim, than in cases in which the parties are unknown to each other.

**Offenses Against Public Order, Administration and Related Crimes.** In *Whatley v. State,* which concerned the possession of a firearm during the commission of a felony, the court of appeals dodged the question of whether a nexus must be found between the firearm and the felony committed. The court found a nexus between the drug violation and the firearm. It is unknown whether courts will require a nexus. Theoretically, the predicate felony might even be "habitual violator."

In *Moon v. State,* the court stretched the law prohibiting intimidation of an officer of the court "while in the discharge of such . . . officer's duties" to encompass the facts of the case. The victim, a judge, had been threatened and his family had been intimidated. All of this occurred more than one year after the judge had recused himself and was no longer involved in defendant's pending misdemeanor case. The judge had previously taken action in the pending case, and defendant apparently blamed the judge (and others) for things that occurred to him while he was in jail.

The court of appeals rejected Moon's contention that the phrase "while in the discharge of such . . . officer's duties" meant a violation could occur only "while the case is actually pending before the court officer." The court held instead that the language limited

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153. Id. at 321, 398 S.E.2d at 379-80.
154. Id., 398 S.E.2d at 380.
155. Id. at 323, 398 S.E.2d at 381.
157. Id. at 76, 395 S.E.2d at 585.
160. O.C.G.A. § 16-10-97 (Supp. 1991) provides, in part: "A person who by threat or force or by any threatening letter or communication . . . endeavors to intimidate or impede . . . any officer . . . of any court of this state . . . who may be serving at any proceeding in any such court while in the discharge of such . . . officer's duties . . . shall . . . be punished by a fine . . . ." Id.
161. 199 Ga. App. at 94, 404 S.E.2d at 274.
162. Id. at 96, 404 S.E.2d at 275.
the application of O.C.G.A. § 16-10-97 (1) to those situations which arise out of or are related to the performance of the court officer's official duties, whether the proscribed activities occur while the court officer is actively engaged on the matter giving rise to the offense or whether the proscribed activities occur at some other juncture.\textsuperscript{165}

**Property Crimes and Paper.** In *Cooley v. State*,\textsuperscript{164} Cooley wrote a check to a creditor to pay a judgment in magistrate court against him for past due rent. Cooley gave no additional consideration at the time of the check, and knew that the check would not be honored. The facts were stipulated.\textsuperscript{166} O.C.G.A. section 16-9-20(f)(2)(A) defines "present consideration" as including "an obligation or debt of rent which is past or presently due."\textsuperscript{166} The court of appeals affirmed Cooley's conviction. The fact that the debt had been rendered to a judgment did not negate the "present consideration" as defined.\textsuperscript{167}

"I'll gladly pay you Tuesday for a hamburger today." If the ever hungry cartoon character Wimpey succeeds in getting fed by his friend Popeye, we know that Popeye will have to resort to his spinach to collect because the courts, at least the criminal courts, will not help him. Merchants, prosecutors, and trial judges, however, must be frequently reminded of this fact. The court of appeals made three such reminders in three reversals during the survey period.

In *Gill v. State*,\textsuperscript{168} defendant bought a cellular telephone but failed to pay for it within the agreed time. No security interest existed, and the sale was complete. The merchant no longer had an interest in the property so it could not be the subject of theft; therefore, the court of appeals reversed the theft by taking conviction.\textsuperscript{169}

The prosecution approached the problem differently in *Robinson v. State*.\textsuperscript{170} In *Robinson* defendant was indicted and convicted of theft by

\textsuperscript{163} Id. at 97, 404 S.E.2d at 275-76. Whatever happened to strict construction of penal statutes? See Palmer v. State, 260 Ga. 330, 331, 393 S.E.2d 251, 252 (1990).


\textsuperscript{165} Id. at 340, 398 S.E.2d at 415.

\textsuperscript{166} O.C.G.A. § 16-9-20(a), (f)(2)(A) (Supp. 1991) provide:

(a) A person commits the offense of criminal issuance of a bad check when he makes, draws, utters, or delivers a check . . . in exchange for present consideration . . . knowing that it will not be honored by the drawee.

(f) As used in this Code Section, the term: (2) "Present consideration" shall include without limitation:

(A) An obligation or debt of rent which is past due or presently due;

\textsuperscript{Id.}

\textsuperscript{167} 197 Ga. App. at 340, 398 S.E.2d at 415.


\textsuperscript{169} Id. at 560, 398 S.E.2d at 835.

Defendant had received investments on the basis of his promise to repay with a dividend in the future. Defendant went bankrupt and did not repay as promised. The court of appeals first held that the evidence failed to prove that Robinson "obtained property" because the state presented no evidence that he diverted or personally used the funds. Second, the statements of defendant which prompted the investments were promises of a future payment. "While the breach of that promise may give rise to a civil action, it cannot be the basis for a conviction under OCGA § 16-8-3(b)(1)."

Theft by conversion fared no better in Hill v. State. Hill obtained a fee on the promise that he would assist the victim in obtaining financing for a purchaser of the victim's property and that if he failed, he would return the fee. When he failed, Hill returned the money by a bad check; in other words, Hill never repaid. The court held that since the money was obtained as a fee for services in the future, the victim had no more interest in the cash with which he had parted. No agreement existed with respect to how the funds would be applied and, therefore, the victim's only interest was in performance of the future promised services. The victim might have a civil case, but the State had not proved conversion. In reversing the conviction, the court noted authority in the previous case of Byrd v. State, which might have supported the conviction. However, four of the judges, Carley, Birdsong, Sognier, and Cooper, would overrule that case. Judge Beasley, with whom Judges

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171. O.C.G.A. § 16-8-3(a), (b)(1), (b)(5) (1988) provide:

(a) A person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property.

(b) A person deceives if he intentionally:

1. Creates or confirms another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;

2. Promises performance of services which he does not intend to perform or knows will not be performed. Evidence of failure to perform standing alone shall not be sufficient to authorize a conviction . . . .

Id. (emphasis added).

172. 198 Ga. App. at 432, 401 S.E.2d at 622.
173. Id.
174. Id. at 434, 401 S.E.2d at 622-23.
175. Id. at 432, 401 S.E.2d at 623.
177. Id. at 1, 401 S.E.2d at 48.
178. Id. at 2, 401 S.E.2d at 49.
180. 198 Ga. App. at 2, 401 S.E.2d at 49.
181. Id. at 3-4, 401 S.E.2d at 49-50.
Deen, McMurray and Pope joined, dissenting.\textsuperscript{182} Although the court concluded that no agreement existed with respect to application of the funds; according to the dissenter, that an agreement to repay had been made in \textit{Hill} should have been a distinguishing fact that would salvage \textit{Hill, Byrd}, and future similar prosecutions.\textsuperscript{183} Whether or not an agreement for application of the funds was in place should be determined by the jury regardless of the terminology that the funds were a fee for services. As pointed out by Judge Beasley: "[defendant] promised to return the victim's money, . . . but kept it."\textsuperscript{184}

The court of appeals found reversible error in the trial judge's instruction in \textit{Brown v. State}.\textsuperscript{185} The trial judge gave a charge on theft by receiving on a theft by taking indictment, and the jury returned a verdict of guilty of theft by receiving.\textsuperscript{186} The court of appeals stressed that theft by receiving is not a lesser included offense of theft by taking. "They are two completely different crimes, having different elements, and are in fact, so mutually exclusive that the thief and the receiver cannot even be accomplices."\textsuperscript{187} Since one may not be convicted of a crime not charged in the indictment and theft by receiving is not included in theft by taking (nor in burglary, larceny, or robbery),\textsuperscript{188} it is error for the judge to charge and for the jury to convict of theft by receiving on a theft by taking indictment.\textsuperscript{189}

\begin{itemize}
\item \textsuperscript{182} Id. at 4-5, 401 S.E.2d at 50-51 (Deen, McMurray, Pope & Beasley, JJ., dissenting).
\item \textsuperscript{183} Id. at 3, 401 S.E.2d at 50.
\item \textsuperscript{184} Id. at 5, 401 S.E.2d at 50 (Deen, McMurray, Pope & Beasley, JJ., dissenting).
\item \textsuperscript{185} 199 Ga. App. 18, 404 S.E.2d 154 (1991).
\item \textsuperscript{186} Id. at 19, 404 S.E.2d at 156.
\item \textsuperscript{187} Id. at 21, 404 S.E.2d at 158 (quoting Plummer v. State, 126 Ga. App. 482, 483, 191 S.E.2d 333, 333 (1972)).
\item \textsuperscript{188} Id. at 22, 404 S.E.2d at 158.
\item \textsuperscript{189} Id. This should have never occurred because the prosecutor can easily anticipate and remedy this situation. In any case in which the prosecutor has some doubt about whether the defendant is the actual thief, he only needs to include in the theft by taking (or burglary or robbery) indictment the following: "[A]nd said accused did retain said property (describe) which he knew was stolen, without intent to restore it to the owner." O.C.G.A. § 16-8-7 (1988). While one may not be a thief and a receiver of the same property, either or both can be a retainer of stolen property. The problem then becomes one of evidence, not a limitation in the indictment. Theft by "receiving" by "retaining stolen property" would then be included (but not lesser included, since they carry the same penalty, O.C.G.A. § 16-8-12 (1988)) as a matter of fact, and having been charged in the indictment, would support the jury charge and conviction of theft by receiving. (This is commonly done in malice/felony murder indictments. Jolley v. State, 254 Ga. 624, 627, 331 S.E.2d 516, 518-19 (1985); Middlebrooks v. State, 253 Ga. 707, 324 S.E.2d 192, 193 (1985); \textit{but see} McCrary v. State, 252 Ga. 521, 314 S.E.2d 662 (1984) where, as here, there were insufficient allegations in the indictment to allow the other charge.)
\item In the alternative, an indictment charging both theft in one count, and receiving in another count, for each item or batch of property, could be returned. Only one of the two
Drugs. The court of appeals in Jones v. State held that "'[a] sale of drugs is complete when the seller delivers the drugs to the feigned buyer'" and that proof of an exchange of money was not necessary in the context of a cocaine trafficking case. The usual indictment for trafficking would allege "possession;" however, in Jones, the sale had been arranged so that an accomplice made the delivery. For some reason the prosecutor must have felt that the evidence would prove that Jones was a party to the sale but not to possession. In any event, this problem should not arise in trafficking or any other drug type cases. A prosecutor need merely allege in any sale or trafficking case predicated upon sale that the defendant "did sell and deliver" the drug, since "deliver" certainly does not require proof of a money exchange. The prosecutor may then prove either sale or delivery or both.

There is only one cocaine trafficking offense. Possession of twenty-eight grams of cocaine sufficiently establishes that offense, regardless of jury charges on different quantities and gradations of the offense, and regardless of an erroneous amount alleged in the indictment. In that regard, trafficking in cocaine is like theft because the different quantities only affect punishment. Probably, as in theft, only in a case of dispute as to quantity above twenty-eight grams would the jury be required to assist the court in determining quantity and hence, indirectly, sentence.

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convictions may stand, but both may be submitted to the jury. Callahan v. State, 148 Ga. App. 555, 557, 251 S.E.2d 790, 792 (1978) ("Theft by taking must be considered an included offense in theft by receiving in this case as a matter of fact."); see also Thomas v. State, 199 Ga. App. 586, 405 S.E.2d 512 (1991) (mutually exclusive armed robbery and theft by receiving verdicts, in which either or both would have been supported by the evidence).

191. Id. at 882, 403 S.E.2d at 868-69 (quoting Robinson v. State, 164 Ga. App. 652-54, 297 S.E.2d 751 (1982)). O.C.G.A. § 16-13-31(a)(1) (Supp. 1991) provides: "Any person who knowingly sells, . . . delivers, . . . or who is knowingly in possession of 28 grams or more of cocaine . . . in violation of this article commits the felony offense of trafficking in cocaine . . . ."
193. O.C.G.A. § 16-13-21(7) (1988) provides: "'Deliver' . . . means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." Id.
197. Id. at 327, 370 S.E.2d at 175.
198. Knight, 197 Ga. App. at 253, 398 S.E.2d at 204.
Racketeer Influenced And Corrupt Organizations ("RICO"). The State may not use as predicate offenses for a RICO prosecution any prior offenses for which the defendant has been previously or concurrently adjudicated guilty. Therefore, in Bethune v. State, the court of appeals held that some of the predicate offenses to which Bethune had previously plead guilty in another county would not support the RICO conviction. However, plenty of other predicate offenses were alleged and proven. As the State is "not required . . . to prove all the predicate offenses alleged in the indictment, but is required to prove only two beyond a reasonable doubt," the court held that the conviction need not be reversed. Bethune further argued that the other predicate offenses should be barred by the previous convictions and O.C.G.A. section 16-1-8(b)(1). The court held that such a ruling would "destroy the purpose of the Act . . . [and] the body of criminal law in this state, including the RICO Act, by requiring the State to instigate a RICO prosecution wherever any offense is committed, if it might conceivably have been a predicate act.

C. Defenses Defined

Justification. The trial judge in Wainwright v. State erred in failing to give a charge on self-defense in defense of a third person on de-
defendant's request. This was so even though the judge agreed to give the charge requested if defense counsel would agree to the State's requested charge on mutual combat; and defense counsel declined to agree. "If an affirmative defense is raised by the evidence, including the defendant's own statements, the trial court must present the affirmative defense to the jury as part of the case in its charge, even absent a request." The court's general charge on self-defense did not adequately cover the affirmative defense of protection of third persons.

Prosecutors have long argued, usually successfully, that self-defense and accident are mutually exclusive. In Smith v. State, defendant fired two shots; the first, which was fired to scare his wife because defendant feared for his life, killed an unintended victim. The supreme court held that it was not error for the trial court to fail to charge on self-defense as defendant did not intend to hit anyone. Defendant's actions may have resulted in an accident but not self-defense. It should be noted, however, that the trial court also did not charge on self-defense as to the separate offense of aggravated assault on his wife with the same shots. As to that count, the self-defense charge clearly would have been authorized, but was not given because defense counsel withdrew the request for self-defense on the trial court's suggestion that self-defense and acci-

208. Id. at 44, 397 S.E.2d at 458. O.C.G.A. § 16-3-21(a) (1988) provides:
   (a) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person or to prevent the commission of a forcible felony.

210. 197 Ga. App. at 44, 397 S.E.2d at 457 (quoting Booker v. State, 247 Ga. 74, 274 S.E.2d 334 (1981)). Affirmative defenses are defined in O.C.G.A. § 16-3-28 (1988) as all those covered by Title 16, Chapter 3, Article 2, including justification, entrapment, coercion, and others.
211. 197 Ga. App. at 44, 397 S.E.2d at 457.
214. Id. at 277, 393 S.E.2d at 231.
215. Id.
216. Id. at 277-78, 393 S.E.2d at 232.
217. Id. at 278, 393 S.E.2d at 232.
dent were inconsistent. Thus, the issue of inconsistency was not clearly reached.

**Other Defenses.** In *Hill v. State,* the supreme court held that the State must present evidence to contradict the defense of entrapment in order to avoid a directed verdict of acquittal. It may not merely impeach the defendant's testimony. The court of appeals had refused to adopt such a construction of the entrapment defense on the grounds that it "would automatically allow the entrapment defense to prevail for every first offense wherein law enforcement had any involvement in the transaction." However, Justice Smith wrote that if the court were to rule otherwise "the entrapment defense would be worthless." Justices Hunt, Weltner, and Fletcher dissented. Where does this leave the practitioner?

Apparently, after solicitation by a state agent, neither the relish, speed, and ease with which a substantial sale of drugs is made, nor boastful statements of large available quantities, nor offers by the defendant of future sales with less difficulty will be sufficient to rebut the defense of entrapment provided that the defendant claims no predisposition to sell drugs. The supreme court would hold that such evidence is merely impeachment and "not independent acts subsequent to the inducement but

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218. *Id.* at 276, 393 S.E.2d at 231.
219. *Id.* at 276 n.3, 393 S.E.2d at 231 n.3. One is inclined to wonder what would have happened on these facts if there had been no prosecution of the assault on the wife, and the defense counsel had not withdrawn the request for the self-defense charge. If for no reason other than an abundance of caution, but probably because it will be required, both charges should be given in such cases.
221. *Id.* at 377, 405 S.E.2d at 259. The entrapment defense is defined in O.C.G.A. § 16-3-25 (1988) which provides:

> A person is not guilty of a crime if, by entrapment, his conduct is induced or solicited by a government officer or employee, or agent of either, for the purpose of obtaining evidence to be used in prosecuting the person for commission of the crime. Entrapment exists where the idea and intention of the commission of the crime originated with a government officer or employee, or with an agent of either, and he, by undue persuasion, incitement, or deceitful means, induced the accused to commit the act which the accused would not have committed except for the conduct of such officer.

*Id.*
222. *Id.* at 377-78, 405 S.E.2d at 259-60.
224. 261 Ga. at 377, 405 S.E.2d at 259.
225. *Id.* at 378-79, 405 S.E.2d at 260.
226. See 197 Ga. App. at 261-62, 398 S.E.2d at 228. A characterization of the facts as purported in *Hill* which the supreme court found were insufficient evidence of predisposition.
part of a cause of conduct which was the product of the inducement,"227 and, therefore, "cannot be used to show predisposition."228 In the context of the drug trade, it is difficult to conceive of what kind of admissible "factual evidence of predisposition"229 would survive a directed verdict of acquittal except a previous conviction of a sale of drugs (probably recent), a traceable ad in the paper, or an informant who would be willing to testify to prior sales.

"Mere presence at the scene of the crime" at the time of its commission is not a defense,230 per se, but it is a frequently requested and given charge231 and is still a valid principle of law. Nevertheless, one must won-

227. 261 Ga. at 377, 405 S.E.2d at 259 (citing Sherman v. United States, 356 U.S. 369, 374 (1958)).
228. Id.
229. What is troubling about Hill is that the supreme court seemingly ignores the "second element" of entrapment. In Keaton v. State, 253 Ga. 70, 316 S.E.2d 462 (1984), the supreme court held that three distinct elements embodied the entrapment defense: "(1) the idea for the commission of the crime must originate with the state agent; (2) the crime must be induced by the agent's undue persuasion, incitement, or deceit; and (3) the defendant must not be predisposed to commit the crime." Id. at 72, 316 S.E.2d at 454 (emphasis added).

In Hill the supreme court seems to conclude that if the state's agent makes the initial contact (element 1, supra) and the defendant claims no predisposition (element 3, supra), the burden shifts to the State to disprove entrapment. The second element, supra, and more particularly the modifier undue in the phrase "undue persuasion, incitement, or deceit" is part of O.C.G.A. § 16-3-25 (1988) and should appear somewhere in the evidence before the State should be required to rebut the entrapment defense. What amount of "persuasion, incitement, or deceit" is "undue"? We already have a clue. Keaton, supra, struck down part of a previous pattern jury instruction on entrapment dealing with the subjective intent of the officer but let stand a portion of that charge. 253 Ga. at 71, 316 S.E.2d at 454. The court also held that "[t]he agent's conduct is to be viewed objectively, and evaluated by the jury in light of the standard of conduct exercised by reasonable persons generally." Id. at 72, 316 S.E.2d at 455. This author recommends that in order to facilitate an objective evaluation utilizing a reasonable person standard, a definition of "undue persuasion, incitement, or deceit" should be adopted as follows: "persuasion, deceit, or trickery of such a kind or degree as could reasonably cause an otherwise innocent ordinary person to commit the crime." This is similar to language already approved by the court in Keaton. See id. at 71 & n.1, 316 S.E.2d at 454 & n.1.

230. Muhammad v. State, 243 Ga. 404, 254 S.E.2d 356 (1979). The rule is "really a corollary to the requirement that the state prove each element of the offense charged." Id. at 406, 254 S.E.2d at 358. Even if it is the sole defense, and is requested, it is not error to fail to give the "mere presence" charge. Id.; see also Bowley v. State, 261 Ga. 278, 404 S.E.2d 97 (1991).

231. Suggested Pattern Jury Instructions Volume II, Criminal Cases, State of Georgia, by Council of Superior Court Judges of Georgia, Part 3 D, p. 23 provides:

Mere presence of a person, at the scene of the commission of a crime, at the time of its perpetration, without more, will not, of itself, authorize a jury to find the person who was merely present, guilty of consent in, and concurrence in, the commission of the crime; unless the evidence shows, beyond a reasonable doubt,
der about its validity in view of the decisions of two appeals decided the
same day by different panels in the court of appeals. In the Interest of A. H., in which Judge Beasley wrote a strong dissent, concerned a witness who observed defendant juvenile arriving at a residence fifteen to twenty minutes before crack cocaine was delivered there. One half hour after the delivery, the police raided the residence. Defendant was found in the ten-by-twelve foot living room with others. The cocaine had been altered and was easily visible in the room, as were a razor blade and glassine bags. Defendant claimed to have been watching television. The court of appeals affirmed the conviction.

In Deal v. State, defendant was one of several men arrested in a motel room where a search revealed guns and money. A large quantity of cocaine was also found inside the box springs of the bed in another motel room apparently occupied by the parties. Defendant had been traveling with the other men and was related to some of them. All of the men denied any knowledge of the guns and money. As in A.H., the appellate court affirmed the convictions.

III. CRIMINAL PROCEDURE

A. Pre-trial

Arrest. Although an officer was given the option of issuing a citation for a traffic violation, he was not precluded from making a custodial arrest in Brock v. State. In the same case, it was held that the warrantless arrest of defendant in the doorway of his house was proper because defendant was retreating from an arrest which began in his front yard.

that such person committed the alleged crime, or that such person aided and abetted in the actual perpetration of the crime, or participated in the criminal endeavor.


233. Id. at 179-80, 404 S.E.2d at 342 (Beasley, J., dissenting). "Knowledge of the presence of, and activity surrounding, the cocaine, and even approval of it which does not amount to encouragement, is not sufficient." Id. (citing Ridgeway v. State, 187 Ga. App. 381, 370 S.E.2d 216 (1988)).


235. Id. at 181, 404 S.E.2d at 346.


237. Id. at 184-86, 404 S.E.2d at 343-44.

238. Id. at 188, 404 S.E.2d at 346.

239. O.C.G.A. § 17-4-23(a) (1990) provides: "A law enforcement officer may arrest a person accused of violating any law or ordinance governing the operation, licensing, registration, maintenance or inspection of motor vehicles by the issuance of a citation . . . ." Id.


241. Id. at 607, 396 S.E.2d at 786.
"'[A] suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place.'" 242 This was a lawful "hot pursuit" arrest.

In *Hamrick v. State*, 243 another "hot pursuit" case, police pursued a speeding motorcyclist who was driving without lights on his vehicle and was refusing to stop. The police lost sight of the vehicle several times. However, by following directions from civilians and by following the motorcycle's tracks, they found the motorcycle against defendant's house within a short time. The motor was "very hot and the motorcycle was dripping mud and water." 244 Three policemen knocked on the door and told the woman who answered the door that they wanted to see the operator of the motorcycle. When she stated that her husband was asleep, the policemen told her to wake him up. The police entered the house without invitation. 245 The court held that defendant's wet muddy boots and the results of his blood alcohol test were illegally obtained and, therefore, must be suppressed. 246 This "hot pursuit" apparently was not hot enough. "'Exigency' faded from the picture, and left defendant's right to prevent an unwarranted invasion of his home superior." 247 Warrantless arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. 248

License checks and roadblocks without any particularized suspicion of wrongdoing are alive and well in Georgia, according to *Kan v. State*. 249

**Search and Seizure: Terry Stops.** Technically, a *Terry stop* 250 should probably come under the heading of arrest; however, *Terry* issues only arise when a defendant has made an incriminating statement, or police have seized property through consent or plain view, or made subsequent arrest and search incident to that arrest, or made an inventory search. Therefore, the *Terry* cases, and they are legion, will be included under this heading.

"'Theoretically, there are at least three kinds of police-citizen encounters: verbal encounters involving no coercion or detention [which do

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242. *Id.*, 396 S.E.2d at 786-87 (quoting United States v. *Santana*, 427 U.S. 38, 43 (1976)). The court also cited to *Santana* for the proposition that "a person standing in the open doorway of her house was in a public place subject to arrest by police upon probable cause and without violating the Fourth Amendment." *Id.*, 396 S.E.2d at 787.


244. *Id.* at 125, 401 S.E.2d at 26.

245. *Id.* at 124, 401 S.E.2d at 26.

246. *Id.* at 126, 401 S.E.2d at 27.

247. *Id.*


not invoke the Fourth Amendment]; brief 'stops' or 'seizures' which must be accompanied by a reasonable suspicion; and 'arrests' which must be supported by probable cause.\textsuperscript{151} The least intrusive of these are the verbal encounters. Most airport drug cases begin in this way. The problem lies in determining when certain thresholds of intrusiveness are crossed with reference to similar thresholds of articulable suspicion or probable cause.

In \textit{State v. Grant},\textsuperscript{251} the government agent had articulable suspicion (the usual airport, Miami connection, nervous appearance, etc. factors), but insufficient probable cause to arrest or search. The agent asked defendant if he would allow him to search defendant's bag; defendant responded that "he would cooperate if the agents possessed a search warrant."\textsuperscript{251} The agents notified defendant that he was free to leave, but that they would detain his luggage. They gave him a receipt. The agents promptly sent for the drug detecting dog in another county. When the dog arrived, it alerted to defendant's bag. Now with probable cause, the agents obtained a search warrant, searched the bag, and found cocaine.\textsuperscript{252}

The principles of \textit{Terry} have been extended to luggage reasonably suspected of containing narcotics.\textsuperscript{253} In cases of luggage detention, a two-fold inquiry must be made: (1) Did the police have reasonable cause to detain the luggage? (2) Was the detention so minimally intrusive as to be justifiable upon reasonable cause?\textsuperscript{252} In addressing the former question and finding "reasonable cause," the court of appeals in \textit{Grant} noted that in cases of this kind, "courts should treat the judgment of experienced officers with a considerable amount of deference. Because of their expertise, these officers are 'able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.'"\textsuperscript{257} More than one hour passed between the time defendant's bag was seized and the time that the drug detecting dog supplied probable cause.\textsuperscript{258} Noting a similar case in which a detention of ninety minutes was held to be too lengthy,\textsuperscript{259} the court distinguished that case from \textit{Grant} because unlike in \textit{Grant}, the agents had prewarning of the courier's arrival and made

\begin{itemize}
\item \textsuperscript{252} 195 Ga. App. 859, 394 S.E.2d 916 (1990). This is one of many cases during the survey period in which the trial judge was reversed for granting a motion to suppress.
\item \textsuperscript{253} Id. at 860, 394 S.E.2d at 917.
\item \textsuperscript{254} Id. at 861, 394 S.E.2d at 918.
\item \textsuperscript{255} United States v. Place, 462 U.S. 696 (1983).
\item \textsuperscript{256} United States v. Sharpe, 470 U.S. 675 (1985).
\item \textsuperscript{257} 195 Ga. App. at 862, 394 S.E.2d at 919 (quoting Brown v. Texas, 443 U.S. 47, 48 (1979)).
\item \textsuperscript{258} Id. at 859, 394 S.E.2d at 917.
\item \textsuperscript{259} United States v. Place, 462 U.S. 696 (1983).
\end{itemize}
no preparation; in Grant the agents acted diligently. These cases are lengthy because the facts are always subtle, and each case will, of necessity, turn on its own facts.

"Flight" has been outlawed as a charge to the jury, but it has taken on new life in the area of search and seizure. In Jamison v. State, the Drug Enforcement Agency ("DEA") agent admitted that "the circumstances surrounding the stop of [Jamison] did not present . . . articulable suspicion that [Jamison] was committing a crime until the moment [Jamison] "broke and ran,"" The previous intrusion had been minimal. Because of the suspicious circumstances (Miami connection, baggy clothes, one way flight reservation, paid for in cash, and no call-back number), casually dressed agents displaying no weapons approached the defendant in a conversational tone. Defendant cooperated until he was asked to submit to a body search, which he declined to do. Upon being asked two more times, defendant became nervous and ran two steps before being tackled and handcuffed. A body search revealed drugs. In a six-three opinion, the court of appeals affirmed Jamison's conviction. This case jumps from a non-Fourth Amendment conversation directly to arrest, bypassing Terry altogether. The forcible detention and handcuffing could only be characterized as an arrest, not a Terry stop. Therefore, probable cause, not merely articulable suspicion, would be required. The court of appeals agreed with the trial court that the circumstances "ripened into probable cause at the moment [defendant] ran, taking in all the other facts and circumstances." Judges Carley and Cooper joined Chief Judge Sognier in a lengthy dissent.

In Jones v. State, a valid Terry stop of an automobile based on marginal information from a concerned citizen "ripened" into probable cause by flight. An officer, having an informant's or concerned citizen's tip or personal observation not amounting to probable cause, makes a vehicle approach or stop. Based on a Terry pat down, a plain view observation, or

263. Id. at 407, 405 S.E.2d at 86 (Sognier, C.J., dissenting).
264. Id. at 404, 405 S.E.2d at 84.
265. Id. at 405, 405 S.E.2d at 85.
266. Id.
267. Id. at 406, 405 S.E.2d at 85-88 (Sognier, C.J. & Carley & Cooper, JJ., dissenting).
269. Id. at 869, 395 S.E.2d at 70-71. Compare Salter v. State, 198 Ga. App. 242, 401 S.E.2d 541 (1990). In Salter flight provided articulable suspicion, but not probable cause, when added to marginal information from a concerned citizen; therefore a Terry stop would have been authorized, but not the arrest and search performed.
an admission by defendant, probable cause often develops after the stop. These facts are similar to many cases during the survey period. In those cases in which the officer(s) went through a progression rather than jumping immediately to arrest, as in Salter v. State, all searches were affirmed.

"Merely observing a can of beer in the hand of one who is otherwise driving a car or . . . boat in a safe manner" does, in and of itself, constitute articulable suspicion that driving under the influence or "boating under the influence" may be occurring so as to authorize a brief investigatory stop. Although it is not probable cause, such an observation does warrant further investigation regarding whether the driver is under the influence.

In Patterson v. State, a similar but stronger ruling that may be of concern to the National Rifle Association, the court held that proof that a person carried a pistol in public establishes not only articulable suspicion or probable cause, but also a prima facie case of carrying a pistol without a license, carrying a concealed weapon, or both. The court found probable cause to arrest existed when the officer saw Patterson toss an object he removed from his clothing into a vehicle, since the object appeared to the officer to be a weapon. Therefore, the search was lawful as a search incident to arrest. The probable cause "existed . . . even before he was asked whether he had a license to carry the pistol," because the person


273. O.C.G.A. § 52-7-12(a) (Supp. 1991) provides: "No person shall operate, navigate, steer or drive any vessel, or be in actual physical control of any moving vessel, . . . while: (1) Under the influence of alcohol; . . . ." Id.


275. Id. at 2, 397 S.E.2d at 555. Note, this decision predates the new "open container" law. O.C.G.A. 40-6-253(b) (1991).


277. Id. at 755, 397 S.E.2d at 38-39 (citing Jordan v. State, 166 Ga. App. 417, 304 S.E.2d 522 (1983)). O.C.G.A. § 16-11-128(a) (1988) provides: "A person commits the offense of carrying a pistol without a license when he has or carries on or about his person, outside of his home, motor vehicle, or place of business, any pistol or revolver without having on his person a valid license . . . ." Id. O.C.G.A. § 16-11-128(a) (1988) provides: "A person commits the offense of carrying a concealed weapon when he knowingly has or carries about his person, unless in an open manner and fully exposed to view, any . . . firearm . . . outside of his home or place of business . . . ." Id. Exceptions are also provided.

278. 196 Ga. App. at 754, 397 S.E.2d at 38.
carrying a weapon has the burden of proving he has a valid license. Apparently, no Terry approach and inquiry was required.

At least one court held that an anonymous tip, with no detail or verification by independent observation, was not sufficient for even a Terry stop of an automobile. The subsequent consent gained through threat of a search warrant was not valid, and the court suppressed the evidence. In Johnson v. State, the court held that police investigation was warranted but "further observation and corroboration was required before a forcible stop was authorized."

Search and Seizure: Search Incident to Lawful Arrest. Frequently, a Terry stop will produce additional probable cause, thereby leading to an arrest. Also, arrests are frequently made upon probable cause to arrest or with an arrest warrant. In New York v. Belton, the United States Supreme Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." This is true in Georgia even if the police removed the arrestee from the vehicle and handcuffed him.

In Daniel v. State, defendant challenged the search of an automobile, which was incident to arrest, under Georgia statutory law. The statutory law provides that in such instances, the officer is authorized to search the person and the immediate vicinity for the officer's protection, to prevent escape, and to seize fruits and instrumentalities of crime. Daniel

279. Id. (citing Jordan v. State, 166 Ga. App. 417, 304 S.E.2d 522 (1983)).
281. Id. at 538, 398 S.E.2d at 827.
283. Id. at 539-40, 398 S.E.2d at 828.
285. Id. at 460.
288. O.C.G.A. § 17-5-1(a) (1990) provides:

When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within the person's immediate presence for the purpose of:

(1) Protecting the officer from attack;
(2) Preventing the person from escaping;
(3) Discovering or seizing the fruits of the crime for which the person has been arrested; or
(4) Discovering or seizing any instruments, articles or things which are being used or which may have been used in the commission of the crime for which the person has been arrested.

Id.
also urged that an officer be required to make two inquiries, one under state law and one under federal law, before deciding to conduct a search incident to arrest. The court of appeals rejected these contentions, noting that such a ruling would frustrate the stated purpose of the supreme court "to establish . . . a single familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they may confront." The state rule is the same as the federal rule.

In a special concurrence, Judge Beasley pointed out that this challenge was under state law and did not address the Georgia Constitution.

In Sanchez v. State, a nuance on an automobile pretext stop, the officers had probable cause to arrest and search, but, apparently lacking confidence in their probable cause or the law, they chose to arrest for a no-insurance violation. Unfortunately, defendant was from out of state, and the insurance requirement was inapplicable, thereby rendering the arrest invalid. Recognizing that the initial no insurance charge was "merely . . . a pretext for taking [defendant] in custody," the court held that, since the officers had probable cause to arrest for the drug charge, on which defendant was ultimately charged and convicted, the mere fact that the officers used an unnecessary pretext did not invalidate the arrest and subsequent search. This appears to be the opposite of the good faith rule, in that bad faith did not invalidate what would have been a lawful arrest.

Inventories. In Reed v. State, police arrested the driver of a van for driving without a license. The driver said the van had been lent to him. The van was not reported stolen, and one of the passengers present had a driver's license. Nevertheless, the officers impounded the vehicle to "secure it for the owner." Naturally, an inventory was conducted, which revealed stolen property. The court held that it was unnecessary

289. 199 Ga. App. at 181, 404 S.E.2d at 467.
290. Id. at 181-82, 404 S.E.2d at 468 (quoting State v. Hopkins, 163 Ga. App. 141, 144, 293 S.E.2d 529, 531 (1982)).
292. Id., 404 S.E.2d at 468 (Beasley, J., concurring).
294. Id. at 471-72, 398 S.E.2d at 741.
295. Id., 398 S.E.2d at 742.
296. Id. at 472, 398 S.E.2d at 742.
298. Id. at 822-23, 395 S.E.2d at 295.
299. Id.
and therefore an error to impound the vehicle, when a reliable third party was present to drive. Consequently, the rule seems to require the officer to turn an automobile over to a third party without the owner's permission. The evidence indicates, however, that the officer did allow the third party to drive the vehicle to the sheriff's office. That argument, therefore, is somewhat precluded.

In Gooden v. State, the court clarified that the rule against impoundment may not prevail when countervailing policy considerations are present. In Gooden, a similar license and speed violation case in which the car also had an illegal tag, there was no third party present, and the officer and driver dickered over calling a third party to pick up the automobile since that would have taken forty to forty-five minutes. The officer impounded the car pursuant to a departmental policy that required such vehicles be impounded after ten to fifteen minutes. The court of appeals found that the policy was not unreasonable and upheld the inventory. Judge Beasley, with whom Judges Sognier and Cooper joined, dissented. Apparently, the dissent would have had the officer make further efforts to find a third party whom defendant had not named, seemingly ignoring that the vehicle had an illegal tag and, therefore, it would have been illegal for even the third party to drive the van. The car itself, with the illegal tag, constituted evidence of the violation and could have been seized for that reason.

Plain View. In State v. Almond, a law enforcement officer, acting in his moonlighting capacity as a maintenance man, entered defendant's apartment pursuant to a work order. After noting contraband, the officer finished his work order, exited, and reported the contraband. A search warrant was executed, and the contraband was recovered. In his other capacity as a law enforcement officer, the officer had previously been advised to keep a look out on the apartment, presumably for illegal activity. The officer entered legally and did not exceed the scope of his invitation. The court held that there was no state action at which the exclusionary rule is aimed. "An officer is not required to ignore what he ob-

300. Id. at 823, 395 S.E.2d at 295.
301. Id.
303. Id. at 296-97, 395 S.E.2d at 635-36.
304. Id. at 297, 395 S.E.2d at 636.
305. Id. at 295, 395 S.E.2d at 635.
306. Id. at 297, 395 S.E.2d at 636 (Sognier, C.J., Cooper & Beasley, JJ., dissenting).
308. Id. at 40-41, 395 S.E.2d at 609-10.
309. Id. at 41, 395 S.E.2d at 610.
serves [in plain view] when legitimately acting in another capacity."\textsuperscript{310} Noting that there is no "inadvertence" requirement for the plain view doctrine,\textsuperscript{311} the court further held that despite the officer's possible ulterior or dual motive in entering the apartment, a finding of no impermissible invasion was merited.\textsuperscript{312}

**Search Warrants.** In *Harris v. State*,\textsuperscript{313} the Dougherty County Magistrate issued a search warrant to be executed in Fulton County for dental impressions of defendant's teeth for bite mark comparison. After the warrant was executed, the court suppressed the fruits of the search because the Dougherty County Magistrate had no jurisdiction to issue a search warrant to be executed in another county. Police obtained another search warrant in Fulton County and likewise executed it.\textsuperscript{314} The supreme court rejected defendant's argument that the results of the second search warrant should be excluded because the evidence was previously suppressed, since there was no link between the evidence of the second warrant and the first.\textsuperscript{315} The court also ruled that it was not error for the State to enlist the aid of a nonlaw enforcement officer technician, in this case a dentist, to execute the search warrant.\textsuperscript{316}

In *State v. Morris*,\textsuperscript{317} common sense and good faith salvaged a search based on a marginal affidavit for a search warrant. The affidavit stated that a "confidential reliable informant" had given true and correct information in the past. The informant's tips had not previously resulted in any arrests or convictions, and the investigator's independent investigation produced negligible results.\textsuperscript{318} The court of appeals, nevertheless, determined that the magistrate had a substantial basis for issuing the warrant.\textsuperscript{319}

Calling someone a "concerned citizen," however, does not make it so. In *State v. White*,\textsuperscript{320} the affiant referred to an anonymous tipster as a "concerned citizen."\textsuperscript{321} The court of appeals noted that the statement was merely conclusory, giving the magistrate nothing by which to gauge the credibility of the source, and that there was no other information in the

\textsuperscript{310} Id.; see also Coolidge v. New Hampshire, 403 U.S. 443 (1971).
\textsuperscript{311} 196 Ga. App. at 42, 395 S.E.2d at 610.
\textsuperscript{312} Id. at 41, 395 S.E.2d at 610.
\textsuperscript{314} Id.
\textsuperscript{315} Id., 401 S.E.2d at 266.
\textsuperscript{316} Id. at 863, 401 S.E.2d at 266.
\textsuperscript{318} Id. at 442, 402 S.E.2d at 289.
\textsuperscript{319} Id. at 443, 402 S.E.2d at 390.
\textsuperscript{321} Id. at 686, 396 S.E.2d at 602.
affidavit showing the basis of the informant’s knowledge. Because the issuing magistrate had no "substantial basis for concluding" that probable cause existed, the court held that the affidavit was defective, and not even the good faith of the officer in relying on the issued search warrant could salvage the search.

Good faith ventured into a new realm in *Hamil v. State.* The search warrant in *Hamil* was issued for the "premises known as Hamil Clearing and Grading, 9765 Brumbelow Road, Alpharetta, Ga. 30201 . . . and . . . adjacent buildings and vehicles on said premises." Police found contraband in a residential building, rather than the commercial building apparently described. Since the warrant also extended to adjacent buildings, and the officers were acting in good faith, the court, relying on *Maryland v. Garrison,* upheld the search.

In *Reeves v. State,* the search warrant affidavit provided ample probable cause to believe that knives had been used in a child molestation case, but failed to mention knives in connection with defendant’s home. The court noted, however, that it was not unreasonable to conclude that items of continuing utility and legal to own, such as knives, would be kept at home for a substantial period of time. The court thus held that there was no staleness or other probable cause problem in a warrant issued eleven months after they were allegedly used in commission of a crime.

While state-certified campus police officers may not execute powers of arrest more than 500 yards from campus property, they may obtain search warrants for property outside the 500 yard limit. Anything to the contrary in *Hill v. State,* insofar as it relates to obtaining extra-territorial search warrants, is overruled. Since the officers executed the

322. *Id.* at 686-87, 396 S.E.2d at 603.
324. *Id.* at 666-87, 396 S.E.2d at 603.
326. *Id.* at 869, 403 S.E.2d at 828.
327. *Id.*, 403 S.E.2d at 828-29.
328. 480 U.S. 79 (1987). The Court in *Garrison* held that "a good-faith mistaken belief on the part of the officers that the area being searched is within the scope of the warrant that is being executed does not mandate suppression." *Id.* at 88.
329. 198 Ga. App. at 870, 403 S.E.2d at 829.
331. *Id.* at 107, 397 S.E.2d at 602.
332. *Id.* at 108, 397 S.E.2d at 602.
333. *Id.*, 397 S.E.2d at 603.
337. 198 Ga. App. at 173, 401 S.E.2d at 59.
search warrant in conjunction with county police, the issue of execution of extra-territorial search warrants by campus police was not reached.\(^{388}\)

**Motions to Suppress.** It should be remembered that we are not dealing with the Fourth Amendment directly, but rather with an exclusionary rule.\(^{389}\) The exclusionary rule in Georgia is codified.\(^{390}\) In order to utilize the exclusionary rule in Georgia, there are statutorily required technical requirements.\(^{391}\) In *Taylor v. State*,\(^{392}\) and *Ferrell v. State*,\(^{393}\) the motions to suppress were properly denied because the motions did not contain facts but merely conclusory assertions.\(^{394}\)

**Defendant’s Statements.** Generally, cases dealing with the admissibility of statements of the defendant (admissions or confessions)\(^{395}\) fall into three categories: those coming under advice of rights;\(^{396}\) those coming under determination of voluntariness;\(^{397}\) and those in which denial of Sixth Amendment right to counsel\(^{398}\) (including, but not limited to, those

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388. *Id.*
391. O.C.G.A. § 17-5-30(b) (1990) provides in part: “The motion shall be in writing and state facts showing that the search and seizure were unlawful . . . .” *Id.*
392. 197 Ga. App. 678, 399 S.E.2d 213 (1990). If no facts are stated, the court is not required to grant an evidentiary hearing. *Id.* at 679, 399 S.E.2d at 214 (citing Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977)).
394. *Id.* at 271, 401 S.E.2d at 302-03; 197 Ga. App. at 679, 399 S.E.2d at 214.
395. An “admission” has been defined as “a statement by a party . . . which is relevant [and aids] the case of his adversary.” *Brooks v. Sascoms*, 47 Ga. App. 554, 555, 171 S.E. 222, 223 (1933). They are usually thought of in the context of civil cases and bring to mind all the additional code sections dealing with admissibility of admissions: O.C.G.A. §§ 24-3-30 to -38 (1982). Indeed, confusion is added to this area by section 24-3-15, which provides: “The term ‘admissions’ usually refers to civil cases. The term ‘confessions’ usually refers to criminal cases.” O.C.G.A. § 24-3-15 (1982). However, a “confession” is an admission that admits every element of the offense or the main fact, and does not raise a defense. *Wells v. State*, 247 Ga. 792, 797, 279 S.E.2d 213, 217 (1981) (citing *Johnson v. State*, 242 Ga. 822, 251 S.E.2d 663 (1979); *Robinson v. State*, 232 Ga. 123, 205 S.E.2d 210 (1971)). The true test is whether it is inculpatory or exculpatory. *Robinson*, 232 Ga. at 126, 205 S.E.2d at 210. Although a somewhat esoteric difference (except to lawyers and judges), it has been held to be error to charge on “confession” when only an admission has been given. *Pressley v. State*, 201 Ga. 267, 271, 39 S.E.2d 478, 481 (1946). Lay persons frequently use the terms “confessed” and “plead guilty” interchangeably. It is probably best to just use the term “statements” in a charge to the jury.
397. O.C.G.A. § 24-3-50 (1982) provides: “To make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.” *Id.*
398. U.S. Const. amend. VI. The Sixth Amendment provides:
cases arising under Edwards v. Arizona is an issue. In Metheney v. State, defendant was placed in custody after a traffic accident. Before his Miranda rights were read, defendant made a voluntary statement that he was not the driver. Because the statement was made as a result of the "functional equivalent of express questioning," the court held that it was error to admit the statements because they were obtained in violation of Miranda. The exculpatory nature of the statement made no difference, "since the state seeks to benefit from the incriminating impact" of the statement with other conflicting statements. On the facts as presented, however, the court found the error to be harmless. Even constitutional error can be harmless if it is found beyond a reasonable doubt not to have contributed to the verdict.

Most noteworthy statement cases in this survey period dealt with the right to counsel. In Brown v. State, the court of appeals held it error to admit a statement by defendant obtained by an undercover informant working for police after an indictment had been initiated and after defendant had exercised his right to counsel under the Sixth Amendment. "[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state [undercover] agent."

But that was not the case in Buttersworth v. State, in which the State used defendant's father to find out from defendant the location of the body in a murder case. In Buttersworth the court found that the distinguishing factor was that defendant was only under arrest and upon questioning had "refused to cooperate, saying he would not be taken ad-

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

Id. (emphasis added).

351. Id. at 885, 400 S.E.2d at 28.
352. Id., 400 S.E.2d at 27.
353. Id.
354. Id. at 887, 400 S.E.2d at 29.
355. Id. at 886, 400 S.E.2d at 29 (citing Rose v. Clark, 478 U.S. 570 (1986)).
357. Id. at 19, 404 S.E.2d at 157.
358. Id. (citing Maine v. Moulton, 474 U.S. 159 (1985)).
360. Id. at 796, 400 S.E.2d at 909.
Thereafter, defendant's father, acting at the sheriff's request, talked to defendant and obtained the information without advising defendant of his Miranda rights.

Though recognizing that defendant had invoked his Fifth Amendment right to remain silent, the court noted that no formal charges had been initiated, and defendant had not asked for counsel. Therefore, the court found that there was no right to counsel implicated and that there was no requirement that defendant's father advise him of his Miranda rights under these circumstances.

"[W]here a suspect makes an ambiguous statement . . . with reference to his desire for an attorney, such as 'maybe I should call my attorney,' an equivocal request for counsel has been made and the request must be clarified before proceeding with the interrogation." In Byrd v. State, however, the court refused to find that the mere asking by defendant of the questioning officer whether he needed an attorney was such an "equivocal request." Nor did the court find an equivocal request in Harris v. State, when the defendant said he would talk, but would not put anything on paper until he talked to an attorney.

In Green v. State, defendant was required to give a urine sample at the request of a police officer pursuant to a special condition of his probation. Defendant challenged the results of the test under the Georgia Constitution. While the Fifth Amendment of the United States Constitution applies only to "testimony," the Georgia courts have long recognized that there is greater protection afforded under the Georgia Constitution. "'[T]he Georgia Constitution has been construed to limit
the State from forcing the individual to present evidence, oral or real . . . . You cannot force a defendant to act, but you can, under proper circumstances, produce evidence from his person."[74] Nevertheless, the court upheld this "production of evidence" and adopted the following rule: "[T]he use of a substance naturally excreted by the human body does not violate a defendant's right against self-incrimination under the Georgia Constitution."[75]

S.E. 659 (1899); Day v. State, 63 Ga. 668 (1879). In Elder and Day, a person was forced to place a shoe into a track for comparison. Elder, 143 Ga. at 369, 85 S.E. at 98; Day, 63 Ga. at 668. In Evans, a person was forced to reach into a pocket and pull out a gun. Evans, 106 Ga. at 520, 32 S.E. at 659. This should be examined in historical context. At the time of these opinions, there was no exclusionary rule in Georgia for unlawful search and seizure. Calhoun v. State, 144 Ga. 679, 692, 87 S.E. 893, 893 (1916) (citing Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897)). Those decisions, Day, Elder, and Evans, appear to be result oriented, based on bad facts, with no other remedy available. They are not founded on just the Georgia Constitution, but upon an interpretation of the constitution derived from "the common law principle, 'Nemo tenetur seipsum accusare,' that no man is bound to accuse himself of any crime or to furnish any evidence to convict himself of any crime." Calhoun, 144 Ga. at 690, 87 S.E. at 893 (citing Marshall v. Reiley, 7 Ga. 367, 370 (1849)). Recently, the court held that the common law "year-and-a-day rule" in homicide and other death cases is no longer the law in Georgia, recognizing that it is no longer valid under today's technology. State v. Cross, 260 Ga. 845, 846, 401 S.E.2d 510, 511 (1991). There is nothing about the language of GA. CONST. art. I, § 1, para. 16 which requires a construction that the Georgia Constitution provides greater protection than the Fifth Amendment. See Cross, 260 Ga. 845, 401 S.E.2d 510. Indeed, a common English reading would dictate the contrary. The most compelling reason for such a continued construction is that which is noted in Creamer v. State, 229 Ga. 511, 517, 192 S.E.2d 350, 354 (1972), and that, with knowledge of the supreme court's prior rulings, the same language was included in the 1945 constitution. However, as long as the language is construed to mean something other than what it says, we will continue to have confusion, inconsistency, and tortured opinions such as those in note 374. We now have an exclusionary rule for unlawful search and seizure. Perhaps it should again be considered whether the Georgia Constitution provides "greater protection" than the Fifth Amendment for the same reasons stated in Daniel v. State, 199 Ga. App. 180, 404 S.E.2d 466 (1991), for rejecting a dual state-federal standard for automobile searches. Id. at 181, 404 S.E.2d at 467.

In Christenson v. State, the State offered into evidence defendant's prior custodial statement, which was made concerning another case in which defendant had pled guilty. The State argued that by pleading guilty in the earlier case, defendant waived a Jackson-Denno determination on the issue of Miranda compliance and voluntariness concerning statements made about that case. The Georgia Supreme Court disagreed and reversed.

There apparently is no res judicata rule on the admissibility of statements. In Kitchens v. State, in a previous trial that ended in a mistrial, the trial court ruled a statement was inadmissible. At the second trial, the trial court held a Jackson-Denno hearing and ruled the statement admissible. The court of appeals found no error.

Counsel: Effectiveness of Trial Counsel. The prevalence of the issue of effectiveness of trial counsel is probably the most obvious trend during the survey period. Literally dozens of cases deal with the subject from one aspect or another. While the issue of effectiveness of counsel usually comes up only after the trial is over, that should not be the case. It should be incumbent upon the trial judge to inquire at every stage of the proceedings in every case, and not just those in which such a procedure is required. This is not just a prophylactic measure, but may actually ensure a fairer trial. Indeed, a similar suggestion has been made by the courts. In McJunkin v. State, Judge Pope, concurring specially, noted the confusion resulting from the various challenges to prior counsel's representation at different stages of the appellate or post appellate procedure and suggested that "perhaps the best procedure would be to have the trial court determine the effectiveness of counsel as a matter of course following every criminal trial in this State." In any event, effectiveness of counsel is included at this point in the Article because the

377. Id. at 91, 402 S.E.2d at 51.
378. 378 U.S. 368 (1964). In Jackson the Court held that a defendant is entitled to a state court hearing on the issue of voluntariness of the confession by a body other than the one trying his guilt or innocence. Id. at 391-96.
379. 261 Ga. at 91, 402 S.E.2d at 51.
380. Id.
382. Id. at 285, 401 S.E.2d at 553.
383. Id. at 286, 401 S.E.2d at 554.
384. Id.
385. Unified Appeal, Sec. II, (A)(7) and (B)(4), Section III (A), (1)(d), (2)(e) and (3)(c); and (B)(2)(c) and (3)(c). Ga. Sup. Ct. Rules (1991).
387. Id. at 353-54, 405 S.E.2d at 111 (Pope, J., concurring specially).
issue should be broached by the court at about this point in any case in order to avoid an unfair result or a reversal.

In Cobble v. State, the court of appeals found that there was not a conflict of interest and, therefore, not ineffective counsel merely because defendant previously had sued his lawyer in federal court. Consequently, the court held that it was not error for the trial court, upon defendant's complaint, to order the public defender to continue. Defendant's subsequent decision to represent himself was a voluntary waiver of right to counsel.

An over-abundance of lawyers can be as troubling as if there are none. If the family of the accused hires one lawyer, and the court, doubting his effectiveness, appoints another, who is lead counsel? What if they each pursue mutually exclusive defenses: one defense, denial, and the other, mental illness? What if one counsel suggests staying off the witness stand, while the other suggests that defendant testify? These are the facts of Ross v. Kemp, which arose on appeal from a denial of the writ of habeas corpus. Neither counsel "prepared" defendant for cross-examination. As a consequence, the State shot holes in defendant's alibi defense on cross-examination, thereby damaging his credibility, and defendant was convicted. The supreme court found ineffective assistance of counsel and reversed. But what will happen on retrial when the defense is insanity and the State offers into evidence his previous alibi? What should the trial judge have done? Should he have presumed to designate one lawyer as lead counsel or sua sponte disqualified the chosen lawyer because of the judge's doubts? Should he have invaded the sessions in which counsel did or did not discuss strategy with defendant? Should he have required each counsel to disclose his theory of the case to ensure that there was no inconsistency?

Counsel: Indigent Defense. While it is true that indigent defendants do not have a right to pick and choose their own counsel, when a defendant's choice of counsel is "supported by objective considerations" favoring the appointment of the preferred counsel, "and there

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389. Id. at 30, 404 S.E.2d at 135-36.
390. Id., 404 S.E.2d at 136.
391. Id.
393. Id. at 313, 393 S.E.2d at 245. One might wonder what "preparation" of defendant would have changed. Should he have been told not to lie about his alibi? His alibi was unknown to counsel.
394. Id. at 312-13, 393 S.E.2d at 244.
are no countervailing considerations of comparable weight, it is an abuse of sound judicial discretion to deny the defendant’s request to appoint the counsel of his preference.” In *Davis v. State*, the court also found error in the trial court’s refusal to appoint for the second retrial (after two reversals) of defendant’s death penalty sentencing trial defendant’s counsel of choice, Millard Farmer and Carla Friend. Farmer had previously represented Davis without compensation in earlier phases of the trial. The trial judge would have allowed Farmer to withdraw and appointed other counsel, but declined to appoint Farmer, in part because of Farmer’s perceived record of “antagonizing the court.” The trial judge further noted a federal court policy of not appointing previously retained counsel. The supreme court found that Farmer and Friend were experienced, familiar with the case, closely associated with defendant, and available. The negative factors simply were “not of comparable weight.” Justice Hunt concurred in part and dissented in part.

The right to appointed counsel is not automatic. A defendant has a right to appointed counsel only if he is indigent; the right may be waived, however, if the defendant is not diligent. In *Wood v. State*, for instance, defendant evaded the court’s inquiries into his financial status. Defendant also admitted not previously having sought counsel. Despite the absence of an express election, the supreme court held the trial court did not abuse its discretion in ordering defendant to trial without a lawyer.

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398. Id. at 222, 403 S.E.2d at 801.
399. Id.
400. Id.
401. Id.
402. Id.
403. Id. at 223, 403 S.E.2d at 802 (Hunt & Fletcher, JJ., concurring in part, dissenting in part). In concurring, Justice Hunt noted hypothetical countervailing measures for future cases: (1) geographical remoteness of defendant’s preferred lawyer’s office; (2) court conflict which might cause delay; (3) recent documented pattern of disruptive behavior in court; (4) competent local counsel also has previous connection in case. Id. at 223, 403 S.E.2d at 802. In dissent, Justice Hunt would remand with direction that the trial court consider appointing both requested attorneys, or one requested attorney and one local attorney. Id. In a footnote to the concurrence, he questioned whether the trial court must defer to lead defense counsel’s request of associate counsel. Id. at 223 n.2, 403 S.E.2d at 802 n.2.
406. Id. at 253, 404 S.E.2d at 590.
407. Id. at 254, 404 S.E.2d at 591.
Similarly, in *Irby v. State*, the supreme court refused to find error when the trial court denied funds for an expert. The court reasoned that defendant was only marginally indigent, had only marginally shown a need for an expert witness pathologist, and could have hired an expert out of his own funds.

**Grand Jury.** In *State v. Byrd*, after the court discharged the grand jury, they later met, considered, and returned an indictment. The jurors were not resummoned by the clerk, ordered back into session by the court, resworn, or recharged. The judge did not attend until later in the day. The trial court, therefore, quashed the indictment. The court of appeals agreed, noting that “[p]ublic confidence and respect for the institution of the grand jury require that it operate only in conjunction with the institution of the superior court,” and held “that a grand jury, properly drawn, duly summoned and sworn and then discharged, may reconvene in the same term only upon order of the superior court and must be recharged.”

In *Fields v. State*, the court upheld a second indictment when returned by a grand jury, based only on the evidence it heard at the previous presentation of the first indictment. The first indictment had been adjudged nolle prosequi because it failed to state the day and month of the offense. In the same case, the court also held that the array of the grand jury could not be challenged simply because four of six jury commissioners were government employees. Finally, in *State v. Auerswald*, the court of appeals held that a tabling of an indictment by the

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409. Id. at 402, 396 S.E.2d at 212.
410. Id. at 403-04, 396 S.E.2d at 211.
412. Id. at 661, 399 S.E.2d at 267.
413. Id. at 662, 399 S.E.2d at 268.
414. Id. at 663, 399 S.E.2d at 269.
416. Id. at 332, 393 S.E.2d at 255.
417. Id. But see *State v. Williams*, 181 Ga. App. 204, 351 S.E.2d 727 (1986), holding that an indictment must be present (apparently not necessarily a valid indictment if the date is omitted) for a witness to receive a valid oath. Id. at 206, 351 S.E.2d at 727 (citing *Switzer v. State*, 7 Ga. App. 7, 65 S.E. 1079 (1909)).
418. 260 Ga. 332, 393 S.E.2d at 254.
grand jury or the "‘mere failure of the grand jury to [return an] indict[ment] does not constitute the return of a no bill.’"420

**Indictment.** Under the heading of Indictments, there are several of the usual "allegata vs. probata" problems.421 In most instances, if the indictment had been properly worded, these problems would not have occurred. In *Coursey v. State,* 422 the indictment for financial credit card theft423 created an unnecessary venue problem.424 Although the indictment alleged that defendant did obtain the card, the evidence indicated that the card was obtained in another county.425 Therefore, under O.C.G.A. section 17-2-2(a), the general venue provision,426 the indictment failed to assert appropriate venue.427 The problem could have been avoided by the simple expedient of alleging that defendant obtained and withheld the card. The State need then only prove that defendant obtained the card in the correct county or withheld the card in the correct

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(a) A person commits the offense of financial transaction card theft when:

(1) He takes, obtains, or withholds a financial transaction card from the person, possession, custody, or control of another without the cardholder's consent; or who, with knowledge that it has been so taken, obtained, or withheld, receives the financial transaction card with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder.

*Id.* (emphasis added).

424. O.C.G.A. § 17-2-2(a) (1990) provides: "Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided by law." *Id.*


427. See infra text accompanying note 460. However, a strong argument, not raised by the state, nor addressed by the case, could be made that venue was correct. O.C.G.A. § 16-9-31(b) (1988) provides: "Taking, obtaining, or withholding a financial transaction card without consent of the cardholder or issuer is included in conduct defined in Code Section 16-8-2 as the offense of theft by taking." *Id.* (emphasis added).

If this also has the effect of conferring on financial credit card theft the totally different venue provisions of theft by taking, venue was proper. See O.C.G.A. § 16-8-11 (1988), which provides: "In a prosecution for [theft by taking] . . . the crime shall be considered as having been committed in any county in which the accused exercised control over the property which was the subject of the theft." *Id.* (emphasis added). Thus, even if the property were actually "obtained" in another county than the county of trial, venue for "obtaining" the property (not just withholding) would be in any county in which the accused exercised control over the property. See, e.g., Chandler v. State, 138 Ga. App. 128, 225 S.E.2d 726 (1976); David v. State, 135 Ga. App. 128, 219 S.E.2d 581 (1975); Sanders v. State, 67 Ga. App. 706, 21 S.E.2d 276 (1942).
county. Similar remediable problems leading to reversals occurred in Sanchez v. State and Talbot v. State.

In Tarver v. State, the district attorney tried to amend a lost accusation. An accusation, unlike an indictment, may be amended before trial. In this case, however, the original accusation was lost. The docket verified such an accusation had been filed, charging defendant with "DUI" and "Left of Center," with no detail as to the date of the offense. The problem arose because the amendment was filed over two years after the offense and thus would be barred by the statute of limitations, unless it could be shown to be a true amendment to a previously filed accusation pertaining to this case. Since the subject matter of the first case could not be shown, the State could not prove it to be an amendment to a previously filed case. Therefore, the court found the amendment barred and dismissed the accusation.

Competency/Insanity. After defendant in Talbot v. State filed notice of an insanity defense under Uniform Superior Court Rule 31.5, the State moved for a psychiatric examination. The trial court found

428. See supra text accompanying note 420.
429. 197 Ga. App. 470, 474, 398 S.E.2d 740, 744 (1990). The State alleged "actual possession" of drugs after the "actual possession" requirement for trafficking in cocaine had been statutorily removed. However, having alleged actual possession, the State had to "prove actual" possession, and it was error for the judge not to so charge. Id. at 474, 398 S.E.2d at 743.
430. 198 Ga. App. 636, 638, 402 S.E.2d 366, 369 (1991). The indictment alleged aggravated assault with a knife; however, the evidence only described something shiny. Id. at 636, 402 S.E.2d at 367. The court of appeals speculated that if the indictment merely alleged "offensive weapon," the evidence might have been sufficient, but having alleged a knife, the court held that the State must prove a knife, which they were unable to do. Id. at 638, 402 S.E.2d at 367-68.
434. O.C.G.A. § 17-3-1(d) (1990) provides: "Prosecution for misdemeanors must be commenced within two years after the commission of the crime." Id.
436. Id. at 636, 402 S.E.2d at 366.
439. 260 Ga. at 527, 397 S.E.2d at 439. O.C.G.A. § 17-7-130.1 (1990) provides:
   At the trial of a criminal case in which the defendant intends to interpose the defense of insanity, evidence may be introduced to prove the defendant's sanity or insanity at the time at which he is alleged to have committed the offense charged in the indictment or information. When notice of an insanity defense is filed, the court shall appoint at least one psychiatrist or licensed psychologist to examine the defendant and to testify at the trial. This testimony shall follow the presentation of the evidence for the prosecution and for the defense, including testimony
no independent examination necessary and ordered defendant examined by a state psychiatrist.\textsuperscript{440} The state psychiatrist found defendant had acted under delusional compulsion. The State then moved for, and the court granted, a second evaluation, leading to this interlocutory appeal.\textsuperscript{441} The court first noted that "[a] court-appointed medical expert cannot be classified as an agent of the [S]tate, but must be considered as an independent and impartial witness."\textsuperscript{442} The court then found that the trial court did not abuse its discretion.\textsuperscript{443}

**Discovery: Statements of Accused.** When a demand under O.C.G.A. section 17-7-210\textsuperscript{444} is properly filed, oral statements must be reduced to writing and supplied to the defense; otherwise they are inadmissible.\textsuperscript{445} Unfortunately, statements submitted are sometimes incomplete. A series of cases during the survey period helped flesh out the parameters of this rule. Summaries of statements have been approved, and the rule does not require production of the actual videotape of a statement.\textsuperscript{446}

\begin{itemize}
  \item of any medical experts employed by the state or by the defense. The medical witnesses appointed by the court may be cross-examined by both the prosecution and the defense, and each side may introduce evidence in rebuttal to the testimony of such a medical witness.
\end{itemize}

\textit{Id.}

\textsuperscript{440} 260 Ga. at 527, 397 S.E.2d at 439.

\textsuperscript{441} \textit{Id.} O.C.G.A. § 16-3-3 (1988) provides:
A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which over mastered his will to resist committing the crime.

\textit{Id.}

\textsuperscript{442} 260 Ga. at 528, 397 S.E.2d at 440.

\textsuperscript{443} \textit{Id.} The court further noted that "a contrary rule would make the opinion of the single expert witness determinative of the issue," contrary to legislative intent in O.C.G.A. § 17-7-130.1. 260 Ga. at 528, 397 S.E.2d at 440.

\textsuperscript{444} O.C.G.A. § 17-7-210(a), (c), (d) (1990) provides:
(a) At least ten days prior to the trial of the case, the defendant shall be entitled to have a copy of any statement given by him while in police custody. The defendant may make his request for a copy of any such statement, in writing, within any reasonable period of time prior to trial . . . .

(c) Failure of the prosecution to comply with a defendant's timely written request for a copy of his statement, whether written or oral, shall result in such statement being excluded and suppressed from the prosecution's use in its case-in-chief or in rebuttal.

(d) If the defendant's statement is oral, no relevant and material (incriminating or inculpatory) portion of the statement of the defendant may be used against the defendant unless it has been previously furnished to the defendant, if a timely written request for a copy of the statement has been made by the defendant . . . .

\textit{Id.}

\textsuperscript{445} \textit{Id.} § 17-7-210(b).

Sometimes, however, supplied statements omit material details. In *Cook v. State*, for instance, the statement contained defendant's admissions concerning the cutting, but omitted his description about lying in ambush. The court held it error to admit that portion of the statement dealing with hiding in the bushes, although the error was harmless. However, in *Johnson v. State*, the court refused to find error in admitting a statement dealing with the number of blows in an assault, when the statement submitted to defendant described generally multiple blows over a period of time.

Nevertheless, in *Byars v. State*, the court determined that a statement sought to be used by the State, concerning a similar previous transaction, but not directly about the case on trial, did not abrogate the State's necessity of compliance with the rule by providing a copy of the statement. Furthermore, an unfurnished statement could not be used even for impeachment in *Davis v. State*. The exclusion provided by the statute is not, however, absolute. In *Adams v. State*, when the defense asked a question so broad as to leave the "field wide open for a reply," the court found no error when the witness responded with evidence from an unfurnished statement.

**Discovery: Scientific Reports.** In *Conyers v. State*, a traffic fatality case, defendant made certain statements to the treating emergency
room physician. The State sought to offer these statements into evidence. The State supplied a copy of the emergency room report pursuant to proper demand, but the statements to the physician were not included.\textsuperscript{461} The supreme court held that, although emergency room reports are often scientific reports, discoverable under the code,\textsuperscript{462} this was not scientific evidence and, therefore, was not so discoverable.\textsuperscript{463}

Pursuant to a demand for scientific reports under the Code,\textsuperscript{464} the defense was not entitled to dental impressions, photographs, and x-rays in \textit{Harris v. State}.\textsuperscript{465} The requested materials “did not contain the [scientist’s] conclusions and findings, but had to be interpreted by him to attain significance.”\textsuperscript{466}

\textbf{Discovery: Subpoena/Motion to Produce.}\textsuperscript{467} Although the intermediate reports and tests may not be discoverable under the demand for scientific reports as just noted, they can be obtained through other means. In \textit{Eason v. State},\textsuperscript{468} the supreme court granted certiorari to consider whether a defendant has “the right to subpoena all the work product of the State Crime Lab chemist [or other scientist] connected to the analysis of the alleged [substance].”\textsuperscript{469} Writing for a unanimous court, Justice Smith concluded that cross-examination is controlled by Georgia

\begin{footnotesize}
\item (c) Failure by the prosecution to furnish the defendant with a copy of any written scientific report, when a proper and timely written demand has been made by the defendant, shall result in such report being excluded and suppressed from evidence in the prosecution’s case-in-chief or in rebuttal.

\begin{itemize}
\item \textit{Id.}
\item 461. \textit{Id.} at 508, 397 S.E.2d at 427.
\item 462. O.C.G.A. § 17-7-211 (1990).
\item 463. 260 Ga. at 508, 397 S.E.2d at 427.
\item 464. O.C.G.A. § 17-7-211 (1990).
\item 466. \textit{Id.} at 864, 401 S.E.2d at 267.
\item 467. O.C.G.A. § 24-10-22(a) (1982) provides: “A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.” \textit{Id.} O.C.G.A. § 24-10-26 (1982) provides:

Where a party desires to compel production of books, writings, or other documents or tangible things in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party . . . . The notice shall be in writing, signed by the party seeking production of the evidence, or his attorney, and shall be directed to the opposite party or his attorney.

\item \textit{Id.}; see also \textit{Brown v. State}, 238 Ga. 98, 231 S.E.2d 65 (1976).
\item 469. \textit{Id.} at 445, 396 S.E.2d at 493.
\end{itemize}
\end{footnotesize}
law and not by United States v. Owens. Noting that in order to conduct cross examination and to pursue impeaching evidence, the defense must be able to subpoena certain materials relevant to testing by the expert. "Those items which may be subpoenaed are limited to those memos, notes, graphs, computer print-outs, and other data the [expert] relied upon to support her testimony and opinion during . . . direct examination."

In Walker v. State, defendant was being tried for a murder as to which another party had previously been tried and acquitted. Defendant subpoenaed certain polygraph and statement records of the previous accused to show that there were other suspects with opportunity and motive. The State moved to quash the subpoena, alleging that such evidence was irrelevant and "not germane to the [defendant's] involvement in the case." The trial court agreed. The supreme court reversed, holding that, although the evidence sought might have been inadmissible for other reasons, it was not inadmissible for the reason urged by the State. To the extent others were implicated by the materials, the court found it relevant to defendant's sole defense in that it "makes the inference that someone other than [defendant] committed the crimes more probable." Therefore, the trial court erred in quashing the subpoenas.

Discovery: Similar Transactions. Service of defendant with a copy of the State's file, which included evidence of the similar transaction, did not comply with the notice requirements of the Uniform Supe-

470. O.C.G.A. § 24-9-64 (1982) provides: "The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him. If several parties to the same case have distinct interests, each may exercise this right." Id.
472. O.C.G.A. § 24-9-82 (1982) provides: "A witness may be impeached by disproving the facts testified to by him." Id.
473. 260 Ga. at 446, 396 S.E.2d at 494. "A basic principle of scientific testing is that careful records of test procedures and results are to be scrupulously maintained. A scientific test without an accompanying report of the testing environment, number of trials, raw results and analyzed data is in reality no test at all." Id. (quoting Law v. State, 251 Ga. 525, 530, 307 S.E.2d 904, 908 (1983)).
474. Id. at 446-47, 396 S.E.2d at 494.
476. Id. at 739, 399 S.E.2d at 201.
477. Id. at 738, 399 S.E.2d at 200.
478. Id. at 738-39, 399 S.E.2d at 201.
479. Id. at 739, 399 S.E.2d at 202.
480. Id. at 740, 399 S.E.2d at 202.
481. Id.
rior Court Rules. In Story v. State, the court of appeals held that notice must show the State's intent to use the evidence of similar transaction, and it made no difference that the evidence was offered only to prove bent of mind.

There are, however, exceptions to the applicability of the notice requirement. Uniform Superior Court Rule 31.3 does not apply to the extent that the similar transactions are within the statute of limitations and would support a conviction of the offense charged. The notice requirement also does not apply to evidence admitted for the purpose of showing conduct between the same parties in order to show the relationship of the parties.

When the state does give notice, the court must have a hearing to determine the admissibility of the evidence. Nevertheless, the court of appeals held in McGowan v. State that the hearing need not be an evidentiary one. In the discretion of the court, the prosecutor may merely "state in his place" what the evidence will show.

**Discovery: Other.** Confidential files in which there may be found mitigating or impeaching evidence must be reviewed in camera by the court on request. Absent a reasonably specific request, however, it was not error for the court to refuse to conduct an in camera review of the parole files of persons other than defendant in Stripling v. State, or of the victim's psychiatric counseling files in Bartlett v. State.

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482. UNIF. SUPER. CT. R. 31.3 (1991). Rule 31.3 requires the State to give written notice of similar transactions or occurrences which the State intends to use in evidence. The requirements specify when notice must be given as well as what the notice must include. Id.
484. Id. at 589-90, 396 S.E.2d at 548.
488. UNIF. SUPER. CT. R. 31.3(B) (1991) provides in part:

> The judge shall hold a hearing at such time as may be appropriate, and may receive evidence on any issue of fact necessary to determine the request [to admit evidence of similar crimes], out of the presence of the jury. The burden of proving that the evidence of similar transactions ... should be admitted shall be upon the prosecution ...

Id.
490. Id. at 576, 402 S.E.2d at 330.
491. Id. at 577, 402 S.E.2d at 330.
Severance/Joinder (Counts). In *Head v. State*, the supreme court created a bifurcated trial procedure for cases in which one count charges defendant with possession of a firearm by a convicted felon. In order to prove the count of possession of a firearm by a convicted felon, the State would have to introduce evidence of previous convictions, which would be immaterial to the other charges, and which would be unduly prejudicial to defendant. In *Kellam v. State*, and *Cauley v. State*, the supreme court confirmed what it had contemplated in *Head*, that if one of the counts is felony murder, of which possession of a firearm by a convicted felon is a predicate offense, the bifurcated procedure contemplated in *Head* need not be followed. The court should be careful, however, to give limiting instructions that the prior convictions are to be considered only as to the charge of possession of the firearm.

When counts were charged in separate indictments, the court previously found error in consolidating the indictments for trial absent a defendant's consent, even if evidence of one would be admissible in the other. That rule was distinguished in *Bridges v. State* and *Langston v. State*. Finally, in *Smith v. State*, the rule established in *Bradford v. State* was overruled. Judges Carley and Cooper joined Judge Beasley in dissenting.

*Nolle Prosequi*. Apparently, the prosecutor in *Davis v. State* had a habit of announcing that a case was nolle prossed. However, he later failed to live up to the announcement. In *Davis* the prosecutor orally announced the case was ready for trial, then later moved to nolle prosequi, which the trial court granted. The district attorney later told defense counsel that the case would be on the trial calendar. It seems the necessary orders had not been prepared. The trial court was disturbed at the
state's "trifling with the court," and found that the nolle prosequi was granted, and entered an order to that effect. The State appealed. The court of appeals sustained the trial judge by presuming that since the trial court was a court of record, the oral nolle prosequi was recorded in the record for that day, and the trial court's entry of consent to the nolle prosequi was conclusive.

B. Trial

Voir Dire: Disqualifications. A juror may be challenged "for cause" if he is related by blood (consanguinity) or by marriage (affinity) within the sixth degree. This is always mind-boggling to compute, and cases like Alexander v. State, are sometimes of assistance. In Alexander the court held that individuals are related to a spouse and his or her blood relatives, and are related to their own families by blood or marriage, but are not related to the spouse's relatives who are related to the spouse only by marriage.

In Lowman v. State, the court of appeals held that it was reversible error for the court not to disqualify for cause all members of an Electric Membership Corporation ("EMC"), when the EMC was the owner of the property damaged and, therefore, the victim. The members of an EMC are considered the equivalent of stockholders, and it made no difference that the EMC was not the named prosecutor. The court did not answer the question whether relatives of members of the EMC would be disqualified, but it seems implicit in the ruling. There are counties in this state where virtually everyone is a member of an EMC. One cannot help but wonder what one would do in such instances.

Law enforcement officers were held to be disqualifiable per se in criminal cases in Hutcheson v. State. The disqualification was based on "in-
herent . . . questions regarding [the officers'] possible bias, fairness, prejudice or impermissible influence upon jury deliberations . . . . These questions cannot be erased by a mere subjective, albeit sincere, declaration by the officer that he or she can be fair."524 In Beam v. State,525 the supreme court extended this same disqualification to all employees of the district attorney's office, thereby causing a reversal of a murder case.526 Beam was a case that was otherwise fault free. Justice Hunt wrote a dissent in which he reiterated the distinction between challenges for cause and challenges for favor. He would have considered this a challenge for favor to be decided in the discretion of the judge.527

Voir Dire: Batson.528 The most noteworthy cases concerning Batson took place outside the state or outside the survey period. Last year, two Georgia cases held that, under Batson, in order to raise an issue of the state's discriminatory use of peremptory challenges, one had to be a member of the class against which discrimination was being exercised; for example, a white defendant could not raise a challenge to the use of pe-

524. Id. at 14, 268 S.E.2d at 644. It may be a little blunt, but in essence the court held that officers cannot be trusted when they claim they can be fair to a defendant as jurors, and a judge is abusing his discretion in believing any officer who so states. Either that, or the court is concerned about public confidence in the integrity of the court from a standpoint of appearance. This is a proper concern, but we know this is not an overriding concern to the supreme court. See State v. McCollum, 261 Ga. 473, 405 S.E.2d 688 (1991).

At the time of Hutcheson, police officers had to request to be in the jury box. Since that time, the law was revised to eliminate the previous exceptions. 1984 Ga. Laws 1697 (codified at O.C.G.A. § 15-12-1 (1990)). If the General Assembly had wanted to disqualify officers from criminal jury service, they could easily have done so.


526. Id. at 786, 400 S.E.2d at 329. In last year's survey, the authors took Justice Weltner and the supreme court to task for announcing rulings prospectively, i.e., not applicable as to the case being decided. See D. Samuel & K. Duffield, Criminal Law and Procedure, 42 Mercer L. Rev. 141, 149 n.78 (1990). If there were ever a case for a legitimate use of such a procedure, it was Beam. All other challenges for cause are statutory, and their parameters can be somewhat discerned. Disqualification of employee's of the district attorney's office is a judge-made rule, and was entirely unpredictable. What does the future portend? What about "sheriff's posse" members? What about employees of the victim? Does the same hold true for the state? Are public defenders and their staff disqualified on motion by the state? On motion by the defense when the public defender represents a codefendant? As the state cannot appeal a not guilty verdict, it will not likely ever arise to the level of a challenge for cause as in Beam, but possibly a challenge for favor could be granted in the court's discretion. See in this connection Wells v. State, 261 Ga. 282, 404 S.E.2d 106 (1991).

527. 260 Ga. at 786, 400 S.E.2d 327 (Hunt, J., dissenting).

remptory strikes against blacks. A Georgia case has not yet held to the contrary, but Powers v. Ohio makes it clear that standing does not depend on the defendant’s membership in the class against whom the peremptory strikes are exercised. Skipper v. State and Congdon v. State are no longer controlling, and a member of any race can challenge discriminatory exercise by the state of peremptory strikes against one’s own or another race.

The obvious question raised by the foregoing is: Can the defense use their peremptory challenges to exclude jurors because of race? Though not yet answered on the federal level, the Georgia Supreme Court, in State v. McCollum, declined to extend Batson and Edmonson v. Leesville Concrete Co., to the discriminatory use of strikes by the defense. This leaves the defense with the totally unbridled ability to manipulate the demographics of the jury.

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531. Id. at 1366.
534. 111 S. Ct. at 1366.
538. It takes 42 qualified jurors to strike a jury in a felony case. O.C.G.A. § 15-12-160 (1990). The defense has twenty peremptory strikes, almost one-half of the venire and, by definition, twice as many as the state. Id. § 15-12-165. The defense exercises its strikes last, thereby not wasting any strikes. O.C.G.A. § 15-12-166 (1990). The defense has the additional assistance of the judge-created challenges for “cause” of law enforcement officers and who knows who else. Hutcheson v. State, 246 Ga. 13, 14, 268 S.E.2d 643, 644 (1980); Beam v. State, 260 Ga. 784, 400 S.E.2d 327 (1991). The state is limited in its use of peremptory strikes, Batson v. Kentucky, 476 U.S. 79 (1985), while the defense is not. State v. McCollum, 261 Ga. 473, 405 S.E.2d 688 (1991). It would not be race neutral for the state to even try to balance the defense’s discriminatory strikes. Thus the defense can totally eliminate, any class of citizens approaching 50% of the venire; e.g., in black defendant on white victim crimes, the defense can and frequently does remove white jurors. In a white defendant on black victim crime, the defense can and frequently does remove all black jurors. Under such a system, wherein the total peremptory challenges of state and defense amount to two and one half times the number of jurors who will serve, the notion of a “jury of one’s peers” consisting of a cross-section of the community is ludicrous. If strikes are not equalized, they should certainly be vastly reduced in number. This would have the collateral benefit of decreasing cost and juror time, and increasing actual trial time.

Among state courts, even for capital felonies, only California offers the defense more (26) and five states offer the defense as many as twenty peremptory strikes. Of those, only two do not give the state equal strikes. All other states have far fewer and/or equal strikes. In noncapital felonies, Georgia stands alone in the number and the proportion of peremptory
Another obvious question is: What about discrimination based on sex? The only cases on this issue in Georgia thus far have been erroneously decided for lack of standing or have held that the defendant failed to show the use of strikes to exclude "women with children" was unconstitutional. Although the Georgia Supreme Court has cautioned against using a raw number analysis, the supreme court and court of appeals have proceeded to do just that by finding that no prima facie case of discrimination has been made out; this abrogates the necessity of race-neutral explanations by the state.

Opening Remarks. In *Berryhill v. State*, the supreme court had previously held that the decision to allow defense council to reserve opening remarks until after the state's case has been presented is a matter within the trial court's discretion. Therefore, the trial court had not abused its discretion in requiring the defense to make its opening remarks at the beginning of trial. Failure to make opening remarks at the beginning of the trial operated, therefore, as a waiver.

After the decision in *Berryhill*, the Uniform Superior Court Rules were adopted. In *Mason v. State*, the trial court also tried to require the defense to make its opening statement immediately after that of the State. Defense counsel consequently made no opening statement. The court of appeals intimated that this was an apparent violation of Uniform

545. 235 Ga. at 553, 221 S.E.2d at 190.
546. *Id.* at 550-51, 221 S.E.2d at 187-88.
Superior Court Rule 10.2, but was harmless in this case since defendant offered no evidence.

Evidence: Scientific. The highly publicized case of Caldwell v. State affirmed the trial court’s ruling, in a case of first impression, that DNA identification evidence was admissible. Caldwell is a lengthy opinion and includes a "brief genetic and biological primer," which explains in great detail the theory and proper procedure of making a DNA identification. The trial court correctly decided the admissibility of this new scientific principle under the test set forth in Harper v. State, namely, whether the technique "has reached a scientific stage of verifiable certainty," which may be determined from expert testimony, "exhibits, treatises or the rationale of cases in other jurisdictions." Due to the novelty of this type of evidence, the supreme court also held that the trial court was correct in making a determination of whether the testing itself was done in an acceptable manner. This is a new area, and there are many pitfalls. The criminal practitioner would be well advised to become thoroughly familiar with this opinion in its entirety.

When multiple identical or nearly identical bags of a questioned substance were submitted for analysis to the crime laboratory, in Adams v. State and Sams v. State, the court of appeals determined that it was permissible for the technician to test some of the bags and give a weight

549. Unif. Super. Ct. R. 10.2 (1991) provides in part: "Defense counsel may make an opening statement immediately after the state's opening statement and prior to introduction of evidence, or following the conclusion of the state's presentation of evidence." Id.
550. 197 Ga. App. at 536, 398 S.E.2d at 824.
552. Id. at 285, 393 S.E.2d at 445.
553. Id. at 279, 393 S.E.2d at 437 (quoting People v. Wesley, 533 N.Y.S.2d 643 (County Ct. 1988)).
555. Id. at 525, 292 S.E.2d at 395.
556. Id.
557. For example, the population data used in Caldwell made several unsupported assumptions, randomness being one, in order to make a statistical conclusion as to the probability of identity. These conclusions were not supported by the evidence and, therefore, weaker data had to be used, weakening the probability of identification. 260 Ga. at 289-90, 393 S.E.2d at 444. A similar objection might be made in a more conventional blood or bodily substance identification case.
for all the bags on the assumption that they were all the same sub-
stance. These rulings are somewhat case specific.

Evidence Implicating Others. While it is not necessary to one's de-
defense to prove that someone else committed the crime, evidence tending
to implicate others in the case is not irrelevant when it may tend to raise
a reasonable doubt concerning the defendant's guilt. In Walker v. State, the Georgia Supreme Court found exclusion of this type of evi-
dence to be reversible error.

Evidence: Syndromes. In Hall v. State, the court ruled that when
the State offers evidence of the child abuse accommodation syndrome, it
is error to deny the defense the opportunity to offer evidence or cross-
examine on prior instances of molestation or sexual activity on the part of
the victim, in order to explain other possible causes for the behavioral
symptoms exhibited by the child. This evidence is limited to that pur-
pose only and should not be admitted for other purposes.

In Jennette v. State, it was not error to deny the defense expert's
proffered testimony on the "lying child syndrome" because determination
of credibility is not beyond the ken of the jury.

Evidence: False Allegations. In Shelton v. State, the trial court
did not properly follow the procedure in Smith v. State, but instead
excluded evidence of prior false allegations on the part of the victim. The
court of appeals remanded for a post-trial hearing for the trial court to
determine if a reasonable probability of falsity existed. If the answer is
yes, a new trial must be granted. If the determination is negative, the
defense has thirty days to file a new appeal on that matter.

562. Id. at 739-40, 399 S.E.2d at 202.
564. Id. at 523, 396 S.E.2d at 271. For more on the child abuse syndrome, see Allison v.
565. 196 Ga. App. 525-26, 396 S.E.2d at 273; see also Stancil v. State, 196 Ga. App. 530,
567. Id. at 581-83, 398 S.E.2d at 736-37.
569. 259 Ga. 135, 377 S.E.2d 158 (1989). When the defense offers evidence that the vic-
tim made prior allegations of sexual misconduct against other parties, then the court may
not exclude such evidence without making a threshold ruling (outside the presence of the
jury) that there is no reasonable probability of falsity. Id. at 137-38, 377 S.E.2d at 160.
570. 196 Ga. App. at 164, 395 S.E.2d at 620.
571. Id.
In *Ellison v. State,* the trial court properly followed the *Smith* procedure, but concluded that there was no reasonable probability of falsity in the prior allegations. The court of appeals reversed based on the evidence and defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." In *Spivey v. State,* a child molestation case, the court extended the ruling in *Smith* to prior false allegations of a nature other than sexual. Is such evidence only admissible in sex crime prosecutions? Surely not. If the *Smith* and *Spivey* rulings hold, then every trial will degenerate into many trials concerning all sorts of extraneous false accusations.

**Evidence: Acts of Violence by Third Party Victim.** In *Cook v. State,* when the defense was denial of the assault, the evidence of prior acts of violence by the victim against third parties was not admissible. Such evidence was likewise not admissible in *Stoudemire v. State,* when the defense was accident.

**Evidence: Similar Transactions.** As usual there were dozens of similar transactions cases. The most elucidating opinion was Judge Beasley's long overdue special concurrence in *Johnson v. State.* The concurrence points out the confusion of issues that exist in determining the admissibility of evidence of similar transactions. Judge Beasley urges that the state be required to declare the purpose of the evidence, not merely throw in the usual smorgasbord of possibilities. This will enable the trial judge to properly gauge admissibility by the application of the balancing test of undue prejudice versus relevancy to an issue in the case.

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573. *Id.* at 76, 400 S.E.2d at 361 (quoting Lloyd v. State, 258 Ga. 645, 647, 373 S.E.2d 1, 2 (1988)).
575. *Id.* at 13, 397 S.E.2d at 589-90.
578. *Id.* at 16, 404 S.E.2d at 128.
580. *Id.* at 50, 401 S.E.2d at 484.
583. 199 Ga. App. at 145-46, 404 S.E.2d at 456-57 (Beasley, J., concurring). This should be obvious, and with the prevalence of these cases, should have been clarified before now. The confusion is compounded by the pattern jury instruction on this issue which merely
Closing Argument. In Cooper v. State, it was permissible and not grounds for a mistrial that the State in closing arguments recalled, over objection, two unrelated cases involving other defendants who were teenagers like defendant. While it is improper for either counsel to make reference to the possibility of parole, it was not error for the State to argue that "defendant's probable future behavior 'indicates a need for the most effective means of incapacitation, i.e., the death penalty'" or that defendant was an escape risk based on his record.

In Hammond v. State, when the prosecutor brazenly argued that "[t]here is no life without parole in Georgia[,] [s]o one day he will be a

throws into one pot all the possible reasons for consideration of similar transactions. Both the bar and the bench are using the pattern instruction for authority without thinking. The charge reads in part as follows: "[A]ny evidence . . . with reference to any other alleged offense . . . is admitted . . . solely and only under the provision of law that where knowledge, common design, modus operandi, motive, intent, good or bad faith, bent of mind, plan, scheme and course of conduct, identity, or other matters dependent upon a person's state of mind, are involved as material elements in the offense for which he is on trial, evidence of defendant's conduct, with reference to similar transactions . . . is admitted solely for the jury to consider only as it might tend to illustrate the defendant's state of mind . . . ."

Suggested Pattern Jury Instructions, Volume II, Criminal Cases, State of Georgia, by Council of Superior Court Judges of Georgia, p. 33-34. This charge, which is a jumbled mess, comes from several cases, is rarely applicable to the facts of the individual case, and causes confusion.

For example, "plan" or "scheme" is never an "element in the offense" unless the offense is conspiracy. Rather it is evidence by which one tries to prove intent or knowledge. Basically, all of the elements which must be proved by similar transactions can be boiled down to: (1) identity or (2) knowledge or intent. Therefore, the charge should be rewritten to read: "[E]vidence of transactions, similar in terms of common design, modus operandi, plan, scheme and course of conduct is admitted solely for your consideration as it relates to (identity of the perpetrator) (knowledge or intent of the defendant) . . . ." One could easily see that proof that one committed an armed robbery 10 years earlier in Miami with a codefendant might have little legitimate relevancy to the identity of a similar robbery in Atlanta with a different codefendant, but it might very well be relevant to knowledge or intent if the defendant had made a statement that he was an unknowing participant. It would be virtually impossible for a trial judge to perform an accurate balancing test without being able to articulate the real purpose for which the evidence is offered. The charge should be adjustable and adjusted accordingly.

584. 260 Ga. 549, 397 S.E.2d 705 (1990). "'Counsel may bring to his use . . . well-established historical facts and may allude to such principles of divine law . . . as may be appropriate.'" Id. at 550, 397 S.E.2d at 706 (quoting Conner v. State, 25 Ga. 113, 122, 303 S.E.2d 266, 276 (1983)); see also Carroll v. State, 143 Ga. App. 230, 237 S.E.2d 703 (1977).

585. 260 Ga. at 530, 397 S.E.2d at 706.

586. O.C.G.A. § 17-8-76(a) (1990) provides: "'[N]o attorney shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty . . . because [of] pardon [or] parole . . . .'" Id.


free man" in a death penalty sentencing trial, defense counsel merely objected and asked for remedial instructions, which the court granted. Therefore, it was not error for the trial court to fail to grant a mistrial when none was requested. The State won the battle, but could easily lose the war on review of effective assistance of counsel.

**Charge of the Court: General.** Loose lips sink ships! This was good advice during World War II, and it is good advice to a trial judge. In *Edmonds v. State*, the trial judge succumbed to the temptation (as we all have) of trying to break up the boredom for the jury panels during a lull. In doing so, he explained plea bargaining, prior records generally, and other subjects on and off the record. While finding such effort to enlighten and educate the citizenry commendable "under different circumstances," and while not questioning the good intentions of the judge, the court of appeals held the comments to create reversible error.

In making objections to charges, or in not making them, defense counsel need to be precise. In *Towns v. State* and *Jones v. State*, defense counsel were held not to have reserved their objections as they obviously intended, but to have waived objections to the instructions given. In both instances, when asked whether there were objections, defense counsel responded with words to the effect of "not at this time." Such language has been construed to be a waiver.

Going one step further, *Thomas v. State* held that defense counsel "must either state his objections or reserve his right to object on motion

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589. Id. at 598-99, 398 S.E.2d at 174-75.
590. Id. at 599, 398 S.E.2d at 175. O.C.G.A. § 17-8-76(b) (1990) provides:
   
   If counsel for either side in a criminal case argues to or in the presence of the jury as provided in subsection (a) of this Code section, opposing counsel shall have the right immediately to request the court to declare a mistrial, in which case it shall be mandatory upon the court to declare a mistrial. Failure to declare a mistrial shall constitute reversible error.

*Id.*

591. If defense counsel had made a motion for mistrial based on the prosecutor's statement, one would have been mandatory. O.C.G.A. § 17-8-76(b) (1990). It is almost inconceivable that a prosecutor trusted with as difficult and complex a case as *Hammond* would not know better than to make such an argument, leading one to the seemingly inexorable conclusion that it was intentional misconduct. If intentional, then a subsequent retrial on the death penalty may have been barred. United States v. Tateo, 377 U.S. 463 (1964); United States v. Dinitz, 424 U.S. 600 (1976).
593. Id. at 195, 395 S.E.2d at 570.
for new trial or on appeal'" if asked. He "cannot elect to object at trial to some of the charges and reserve his right to object to additional charges later . . . [he] must make all of his objections immediately or else he must reserve his right to object until later. He cannot do both." He must make all of his objections immediately or else he must reserve his right to object until later. He cannot do both.

In Butts v. State, the court of appeals held that reserving objections will preserve any appellate points for the record concerning a charge given or not given, but it will not preserve an objection to a judge's intimating an opinion as to what has been proved, in violation of the Code.

When the jury asked the judge in Grimes v. State to recharge on all possible verdicts, the court did so. There was a multitude of offenses and lesser included possible verdicts. Unfortunately, the court neglected to reinstruct the jury about not guilty and its underlying principles as one of the options. The court also provided a written excerpt of the charge to the jury over objection; both of these constituted reversible error.

In an interesting concurrence in Bentley v. State, Justice Weltner suggests the entire trial procedure should be rearranged. It would be better practice for the court to give a substantial charge as to most issues at the commencement of trial. After the evidence is closed, the court would give the main charge to the jury, followed by argument of counsel. Finally, the court would give brief instructions about the verdict.

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599. Id. at 53, 404 S.E.2d at 319 (quoting Laster v. State, 196 Ga. App. 854, 397 S.E.2d 191 (1990)). This is a bad rule in that it penalizes counsel who might actually otherwise be inclined to correct an inadvertent error by the court. Counsel now would almost always be foolish to do anything other than "reserve objections." From a policy standpoint, such a rule is indefensible; see also Grissett v. State, 199 Ga. App. 547, 405 S.E.2d 542 (1991).


602. Id. at 369, 401 S.E.2d at 765. O.C.G.A. § 17-8-57 (1990) provides:

It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. Should any judge violate this Code section, the violation shall be held by the Supreme Court or Court of Appeals to be error and the decision in the case reversed, and a new trial granted in the court below with such directions as the Supreme Court or the Court of Appeals may lawfully give.

Id.


604. Id. at 153-54, 404 S.E.2d at 326-27. Note, however, that an objection to sending a written charge to the jury is procedural, not substantive, and, therefore, may not be reserved by a general reservation of objections to the charge. Anderson v. State, 199 Ga. App. 595, 596, 405 S.E.2d 504, 507 (1991).


606. Id. at 231, 404 S.E.2d at 103 (Weltner, J., concurring).
Charge of the Court: Lesser Included Offenses. In Peebles v. State, the supreme court made short work of denying appellant's contention that the trial court erred in failing to charge false imprisonment as a lesser included offense of kidnapping. The court held that when "the evidence shows either the . . . completed offense . . . or . . . no offense, the trial court is not required to charge the jury on a lesser included offense." All justices concurred except Weltner, who did not participate.

The court of appeals made similar decisions in Millis v. State, Brooks v. State, and Sima v. State. Approximately a month after the decision in Peebles was handed down, the supreme court decided State v. Alvarado. In that case, the supreme court expressly overruled the language in Leeks v. State and similar cases. The rule stated in Alvarado is that "a written request to charge a lesser included offense must always be given if there is any evidence that the defendant is guilty of the lesser included offense." All the justices concurred.

Charge of the Court: Equal Access/Presumption of Possession. Previously, in Lance v. State, the court held that there was no error in failing to give the "equal access" charge when under the circumstances, there was no presumption of ownership. This proposition was

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608. Id. at 433, 396 S.E.2d at 232. Kidnapping, O.C.G.A. § 16-5-40 (1988), differs from false imprisonment, O.C.G.A. § 16-5-41 (1988), only as to the asportation element, which is present in kidnapping and absent in false imprisonment.
609. Id. at 433, 396 S.E.2d at 232 (citing Hambrick v. State, 174 Ga. App. 444, 330 S.E.2d 383 (1985)).
610. Id.
612. 197 Ga. App. 194, 397 S.E.2d 622 (1990) (simple battery requested in a child molestation case differing only in the presence or absence of an intent to satisfy sexual desires).
615. 188 Ga. App. 625, 373 S.E.2d 777 (1988). Leeks held: "It is never error for a trial court to refuse to charge on a lesser included offense even though requested in writing when the evidence does not reasonably raise the issue that the defendant may be only guilty of the lesser crime." Id. at 628, 373 S.E.2d at 780 (emphasis added).
616. 260 Ga. at 564, 397 S.E.2d at 551.
617. Id. It seems now that if requested, any and every lesser included offense must be given because by definition, having proved the greater offense, the lesser offense would also be proved by the evidence. The only exception will be lesser offenses that have differing or exclusive elements, e.g., voluntary manslaughter need not be given in a murder case if there is no evidence of provocation. There are still plenty of questions in this area.
619. Id. at 703, 382 S.E.2d at 729.
reiterated in *Barnwell v. State*\(^6\) and *Kan v. State*.\(^5\) The court of appeals also held in *Bozeman v. State*\(^2\) and *Ancrum v. State*\(^8\) that the equal access charge is unnecessary when all persons allegedly having "equal access" to the contraband are alleged to have been in joint possession of the contraband.\(^4\)

In *Ancrum*, however, when possession was the central issue of the case, the court found reversible error in the trial court's failure to charge on "actual possession and constructive possession," with or without a request.\(^5\) Likewise, in *Walden v. State*\(^6\) failure to give, upon request of defendant, the charge of presumption of possession when the sole defense was that defendant was merely a passenger was held to be reversible error.\(^5\)

**Charge of the Court: Recent Possession.** The charge and concept of inference of guilt, in theft or theft related (e.g., burglary and robbery) offenses, from recent possession of goods stolen in the theft survived another round of challenges for a multitude of reasons in *Dearmure v. State*.\(^6\) Possibly, the right challenge has not yet been made. Recent possession is a particularization of circumstantial evidence and should be subject to the same challenge as that made against the flight charge.

**Charge of the Court: Flight.** The time honored and time dishonored charge on flight was abolished prospectively in *Renner v. State*,\(^6\) even when requested by the defense in *Yarbrough v. State*.\(^6\) This is a

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"The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is in actual possession of it. A person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing is then in constructive possession of it."

*Id.*, 364 S.E.2d at 575-76 (quoting *Lockwood*, 257 Ga. at 797, 364 S.E.2d at 575-76).
627. *Id.* at 845, 397 S.E.2d at 183.
troubling decision, not so much because flight was a valuable charge but because it leaves so many questions about what will become of similar charges such as recent possession. In abolishing the charge, the court is adopting Justice Bell’s concurrence in Cameron v. State by finding that the charge is a “particularization of the general charge on circumstantial evidence, and . . . carries with it the potential of being interpreted by the jury as an intimation of opinion by the court that there is evidence of flight and that the circumstances of flight imply . . . guilt.” Justice Bell further noted that “the trial court does not give specific charges on other circumstances from which guilt or innocence may be inferred,” although several such charges readily come to mind.

**Charge of the Court: Mistake of Fact.** The supreme court in Adcock v. State held that even when it is not the sole defense, the court must charge on “mistake of fact” when it is requested and appropriate.

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631. Flight is merely a common sense charge that can as easily be argued by the state rather than be charged by the court. It is hard to fault the statement by Justice Bell in Cameron that criminal charges are “overlong and abstruse” and should be shortened, and that the charge on the flight is “unnecessary.” 256 Ga. at 228, 345 S.E.2d at 578. In so noting, however, he further stated that the charge is “technically correct.” *Id.* If the charge is “technically correct” it should not be reversible unless improperly used, which heretofore has been the usual problem. The charge was “abused” by the state and the courts by giving it every time the defendant was not found at the scene of the crime. See *Renner*, 260 Ga. at 519, 397 S.E.2d at 687 (Clarke & Smith, JJ., dissenting). It appears that the supreme court has merely grown tired of line drawing as to when the charge is appropriate and not appropriate.


633. 256 Ga. at 227-28, 345 S.E.2d at 578 (Bell J., concurring).

634. *Id.* at 227, 345 S.E.2d at 578.

635. *Id.* at 228, 345 S.E.2d at 578. The court frequently gives other such “particularizations.” Omitting “particularizations” that may also be limiting instructions, such as “similar transactions,” there are several state requested particularizations often given. The most obvious is “recent possession.” The defense often requests and the court often gives the charge on “mere presence at the scene of the crime” and “guilt by association.” Indeed, what is the charge on the “defense of good character” but the ultimate particularization of circumstantial evidence, albeit a sometimes required charge?


637. O.C.G.A. § 16-3-5 (1988) provides: “A person shall not be found guilty of a crime if the act or omission to act constituting the crime was induced by a misapprehension of fact which, if true, would have justified the act or omission.” *Id.*

Jury Misconduct. In *Evans v. State*, a juror, who previously knew defendant, was selected, but indicated she could be fair. After deliberations began, other jurors notified the court that the juror was improperly trying to influence the jury. The juror was questioned, and she denied such conduct. Nevertheless, she was removed by the court. The other jurors were not questioned about the matter. The court of appeals, therefore, reversed. Against the presumption of prejudice from an irregularity in the conduct of a juror, the court found that the State had not carried its burden of proving beyond a reasonable doubt that there was no harm.

C. Sentencing

At a sentencing hearing in *Hammond v. State*, the State was not precluded from offering as evidence in aggravation of punishment the facts of a prior offense that had been nolle prossed pursuant to a plea agreement on other charges. In *Jackson v. State*, defendant was convicted of vehicular homicide, which was predicated upon reckless driving. The same reckless driving which caused the death also injured a third party, who was not the direct victim of the vehicular homicide. Since reckless driving was an essential element of the vehicular homicide, it was not error for the court to order, as a condition of probation, restitution to the injured third party who was a victim of the included reckless driving.

A conviction and suspended sentence for abandonment can have child support provisions modified. A modification is not barred by res judicata when the circumstances have changed. Furthermore, since the child support condition of suspension of the sentence is neither part of the sentence nor a punishment, it is not improper to use the child support guidelines in computing the amount of support.

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640. Id. at 1-2, 395 S.E.2d at 343.
641. Id. at 2, 395 S.E.2d at 343.
642. Id.
644. Id. at 597, 398 S.E.2d at 174.
647. Id. § 40-6-390.
649. Id.
653. Vogel, 196 Ga App. at 516, 396 S.E.2d at 264.
At the commencement of trial in *Wade v. State*, a retrial of a death penalty sentencing, the trial court gave preliminary instructions to the jury that another jury had found defendant guilty and also instructed the jury that “you will not be considering the issue of guilt or innocence.” The supreme court found no error, but Justice Clarke dissented on this issue. Justice Hunt, with Justice Smith joining, concurred because defendant did not object. Defendant’s reservation of objections at the end of trial did not preserve the matter because the Unified Appeal does not allow objections to be reserved in a death penalty sentencing trial. Justice Hunt further noted that these were preliminary instructions to which a reservation of objections may not apply. Finally, Justice Hunt recommended that *Suggested Pattern Jury Instructions, Vol. 2, Criminal Cases* be revised to include pattern preliminary instructions on death penalty sentencing retrials.

D. Post Trial (Motion for New Trial/Appeal)

**State’s Appeal.** The court of appeals held in *State v. Jones*, that the State cannot appeal a directed verdict of acquittal, even if erroneously granted. In *State v. Seignon*, the trial court granted a new trial because of a “fatal variance between allegata and probata,” and the court of appeals held that regardless of the nomenclature “new trial,” the trial court’s actions were tantamount to a directed verdict of acquittal. Therefore, the State could not appeal.

The state may appeal an adverse ruling in a pretrial motion to exclude evidence that was unlawfully obtained. In *State v. McKenna*, the
trial court excluded the evidence because it had been altered, not because
it was illegally seized. Therefore, the State's appeal was not authorized by
law and was dismissed.\footnote{671}

**Appeal Waived.** In *Mergel v. State*,\footnote{672} a procedural nightmare of a
case, the court of appeals affirmed defendant's conviction based on his
negotiated plea in which he gave up his right to appeal for a reduced
sentence.\footnote{673}

**Remand.** In *Ponder v. State*,\footnote{674} the court of appeals remanded the
case to the trial court for a post trial, in camera hearing consistent with
*Moore v. State*,\footnote{675} to determine whether the identity of the informant
should have been disclosed.\footnote{676} The court held a *Moore* hearing in camera,
with the district attorney present and examining the informant; it was
not error nor was defendant denied confrontation by the exclusion of de-
fendant and defendant's counsel from the hearing.\footnote{677} To hold otherwise
would necessarily require disclosure of the informant's identity.\footnote{678}

In a seldom used, but useful procedure, the court of appeals in *Talbot
v. State*\footnote{679} reversed a conviction of armed robbery but then remanded,
giving the trial court the option of sentencing for robbery by intimidation

\footnote{671}{Id. at 207, 404 S.E.2d at 279.}
\footnote{672}{198 Ga. App. 759, 402 S.E.2d 800 (1991).}
\footnote{673}{Id. at 760, 402 S.E.2d at 801. The supreme court had previously ruled similarly in
Thomas v. State, 260 Ga. 262, 392 S.E.2d 520 (1990), a nondeath penalty case:

Inasmuch as a criminal defendant may forfeit his right to appeal by his conduct,
there can be no public policy that would forbid a criminal defendant from making
a voluntary, knowing, and intelligent waiver of the same right. Furthermore there
is no constitutional or statutory provision that prohibits a criminal defendant
from waiving his statutory right to appeal. Thus, the right to appeal may be
waived.

Id. at 264, 392 S.E.2d at 522. The court further noted that O.C.G.A. § 17-10-35 (1990) man-
dates review of death penalty cases. Therefore, appeal could not be waived where the death
penalty was imposed. 260 Ga. at 264, 392 S.E.2d at 522.}
\footnote{674}{197 Ga. App. 21, 397 S.E.2d 596 (1990).}
when the trial judge fails to make a proper balancing decision under Roviaro v. United
whether an informant's identity must be disclosed. The purpose of the hearing is to deter-
mine whether the error is prejudicial and requires disclosure to the court of the identity of the
informant as well as other in camera proceedings.}
\footnote{676}{197 Ga. App. at 22, 397 S.E.2d at 598.}
\footnote{677}{Id. at 22-23, 397 S.E.2d at 597.}
\footnote{678}{Id. at 23, 397 S.E.2d at 598.}
S.E.2d 455 (1981).}
rather than conducting a new trial.\textsuperscript{680} It is unclear whether this procedure is limited to cases in which the court remands specifically with that option.

**Ineffective Assistance of Counsel Claims.** Perhaps the most predominant trend of the year, though certainly not new, was the ever increasing number of claims of ineffective assistance of counsel, arising at every stage of various types of proceedings. In possibly the most unusual case, the supreme court on its own motion remanded *Hammond v. State*,\textsuperscript{681} a death penalty case, to the trial court for a hearing on ineffective assistance of counsel. The matter had not been raised on appeal.\textsuperscript{683} This is authorized under the Unified Appeal Procedure.\textsuperscript{685} Justice Smith wrote a scathing dissent, referring to the remand as "a travesty of justice, a waste of judicial resource, and an insult to the victims."\textsuperscript{684} Although possibly true, such a review is inevitable due to the trend and facts of this case. Therefore, the sooner the better.

When the issue of ineffective assistance of counsel was raised in *DeLoach v. State*,\textsuperscript{688} the court held that it was error not to conduct an evidentiary hearing on the issue of appointment of substitute counsel, so that the matter could be properly aired.\textsuperscript{686} This case was also remanded for such a hearing.\textsuperscript{687}

A claim of ineffective assistance of counsel is waived if it is not raised "at the earliest practicable moment."\textsuperscript{688} It is also waived if the defendant does not ask for an evidentiary hearing.\textsuperscript{689} There were several cases which tried to interpret these holdings with reference to appointment of new counsel and other factors.\textsuperscript{680} In *Ponder v. State*,\textsuperscript{691} the supreme court held that the issue of effective assistance must be brought up, or else waived,

\textsuperscript{680} 198 Ga. App. at 638, 402 S.E.2d at 369. The State had proved robbery by intimidation but had failed to prove the existence of a knife as alleged in the indictment. \textit{Id.}


\textsuperscript{682} \textit{Id.} at 599, 398 S.E.2d at 175.

\textsuperscript{683} Unified Appeal Procedure § I (A) (1) and (2), Georgia Court and Bar Rules 9-3, and Unified Appeal Procedure (B) (1), Georgia Court and Bar Rules 9-15 (1989).

\textsuperscript{684} 260 Ga. at 600-603, 398 S.E.2d at 175-79 (Smith, J., dissenting).


\textsuperscript{686} \textit{Id.} at 882, 403 S.E.2d at 867.

\textsuperscript{687} \textit{Id.}


\textsuperscript{690} Weems v. State, 196 Ga. App. 429, 431, 395 S.E.2d 863, 865 (1990) (holding that Dawson did not apply where new counsel did not represent the defendant at the motion for new trial wherein the issue of effective assistance was not raised); see also Hulett v. State, 198 Ga. App. 89, 400 S.E.2d 386 (1990).

\textsuperscript{691} 260 Ga. 840, 400 S.E.2d 922 (1991). The supreme court discussed the history and policy of this line of cases.
in a motion for out-of-time appeal. In such a case, the grant of an out-
of-time appeal will also include the right to proceed with a motion for new trial, at which an evidentiary hearing on the matter may be held. These cases are potentially a procedural snake pit in that it is very easy to inadvertently waive the issue of ineffective assistance of previous counsel.

IV. MISCELLANEOUS

A. Forfeiture

In State v. Jackson, a case of first impression, the court of appeals allowed the State to condemn a one-half undivided interest in a vehicle where one of two co-owners of the one-half undivided interest in the vehicle successfully defended her innocent claim to the vehicle. The court held the property may be forfeited to the extent of wrongdoer's interest, and may not be forfeited to the extent of the interest of the innocent owner, except where the innocent owner fails to contest the forfeiture in the usual case. It should be noted that the General Assembly entirely rewrote the Georgia Controlled Substance Forfeiture Law this year, resulting in changes in many areas, such as jurisdiction, procedures, notice, time requirements, and distribution of proceeds.

B. D.U.I.

Jackson v. State held that an alcohol test performed by a hospital for purposes of treatment was admissible and not controlled by the Implied Consent Law. In Jackson the report was admitted pursuant to the Code as a hospital business record. However, one should be mindful

692. Id. at 841, 400 S.E.2d at 924.
693. Id. at 841-42, 400 S.E.2d at 924.
694. See, e.g., McJunkin v. State, 199 Ga. App. 353, 405 S.E.2d 110 (1991) (Judge Pope, concurring, lists the many procedural variables recognized thus far, and cautions the defense bar.)
696. Id. at 622, 399 S.E.2d at 92.
697. Id. at 621, 399 S.E.2d at 91.
701. O.C.G.A. §24-3-14(b) (1982) provides:
Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible in evidence in proof of the act, transaction, occurrence, or event, if the trial judge shall find that it was made in the regular course of any
that, arguably if the test is not performed under the Implied Consent Law, it is doubtful as to whether the presumptions of intoxication apply.702

Finally, the General Assembly in 1991 added an "open container" law which changed the statutory presumption of .10 grams percent to .08 grams percent blood alcohol content and the per se violation blood alcohol content from .12 grams percent to .10 grams percent.703 A person under the age of 18 is a per se violator if he drives with a blood alcohol content of .06 grams percent or more.704 A vehicle seizure section was added for habitual violators.705

Business and that it was the regular course of such business to make the memorandum or record at the time of the act, transaction, occurrence, or event or within a reasonable time thereafter.


704. Id. § 40-6-391(k).

705. Id. § 40-6-391.2.