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Criminal Law

by Franklin J. Hogue*
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I. INTRODUCTION

This year we surveyed hundreds of criminal law cases to select those we thought most worthy of inclusion in this survey. We have no doubt that other lawyers practicing criminal law would have included other cases and left out some we included. This is a survey of the vast ever-changing landscape of criminal law, and the practitioner may use this article as a starting point for the careful and detailed research that must be done in actual cases.

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Special thanks to Robert W. Chestney and his firm, The Chestney-Hawkins Law Firm, in Atlanta, Georgia, for contributing the DUI summaries for this year's review. The authors do not practice in the DUI field, so we went to Bob, one of the best practitioners in this area of law. We appreciate him for sharing his time and knowledge for the benefit of this Article.

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II. PRETRIAL ISSUES

A. Jeopardy

In Hooker v. State, jeopardy attached when defendant pleaded guilty in state court to failing to stop at the scene of an accident, DUI, and following too closely, thereby precluding the State from prosecuting defendant in superior court for an aggravated assault that arose out of the same incident. The sheriff, in a "compassionate measure," advised defendant to complete an alcohol treatment program quickly and to plead guilty to the misdemeanor charges in state court in order to save his driver’s license. The sheriff, in a further attempt to help defendant, requested that the secretary in the district attorney’s office send the misdemeanor paperwork to state court so that defendant could plead guilty there. She did so without conferring with the district attorney.

Defendant entered his plea in state court. Some time later, the district attorney sought an indictment against defendant for the felony charge. Defendant filed a plea of former jeopardy, which the superior court granted on the misdemeanors. The court of appeals reversed, observing established law that

the acceptance of a defendant’s misdemeanor plea constitutes a bar to his prosecution on felony charges arising from the same transaction where an assistant district attorney having jurisdiction over all the offenses had made an election, whether intentionally or by default, to dispose of the charges separately rather than requiring all the offenses to be bound over to superior court.

The result would have been different had defendant, through his attorney, attempted to manipulate the system by pleading guilty in state court in an effort to create a bar to prosecution in superior court. But, in this case, defendant pleaded guilty pro se in state court, and superior court trial counsel had not attempted to manipulate the system in any

2. Id. at 143, 522 S.E.2d at 724.
3. Id. at 142, 522 S.E.2d at 724.
4. Id.
5. Id. at 143, 522 S.E.2d at 724.
The "well-intended but misguided acts of commission and omission by Sheriff Stephens and the secretary who assisted him in the district attorney's office" barred the state from further prosecution. The sheriff is unlikely to take such a "compassionate measure" the next time.

The Supreme Court of Georgia faced a jeopardy question of first impression in Buice v. State. Buice had been indicted in 1994 and again in 1996 for child molestation. Just before the cases were to be called for trial, the State moved to nol pros the 1994 indictment and proceed on the 1996 indictment. When the case was called for trial, the State moved the court to vacate the nolle prosequi order and to reinstate the 1994 indictment because the State had meant to nol pros the 1996 indictment, not the 1994 indictment. Over objection, the court vacated its order to nol pros the 1994 indictment and, without requiring the State to re-indict defendant, allowed the 1994 case to proceed to trial.

The supreme court ruled that

in light of well-established Georgia law regarding the plenary control courts of record retain to revise or vacate orders and judgments during the term at which they were entered, we hold that an order of nolle prosequi may be vacated within the same term of court in which it was rendered in those instances where the State has demonstrated a meritorious reason and there is no prejudice to the accused which would constitute a manifest abuse of the trial court's discretion in vacating the order.

In Buice the State demonstrated a meritorious reason—the prosecutor mistakenly tendered the wrong indictment—and Buice suffered no prejudice because he knew that the State was prepared to proceed against him at trial on either indictment. The supreme court added that its "holding likewise applies to nol prossed accusations."

B. Demurrer

In Johnson v. Athens-Clarke County, a case that illustrates that no law, however minor, should stand unchallenged in the hands of a thorough defense lawyer, the supreme court struck down a municipal

8. Id. at 430, 352 S.E.2d at 785.
11. Id. at 323, 528 S.E.2d at 789.
12. Id. at 326, 528 S.E.2d at 790-91.
13. Id.
14. Id.
loitering ordinance for vagueness. A police officer observed Johnson sitting on a wall at the same intersection in a drug area four times over two days, after having been told to move along. On the fifth sighting, the officer asked Johnson whether he was visiting anyone, to which Johnson answered no and informed the officer that he lived a mile away. The officer asked Johnson why he was there; Johnson asked the officer why he was harassing him. The officer answered Johnson by arresting him.

Johnson was convicted in municipal court on a charge of loitering. He appealed to the superior court, arguing that the ordinance should be declared void for vagueness, but the court affirmed his conviction. Because he raised a constitutional challenge, Johnson appealed to the Georgia Supreme Court. The court declared the ordinance to be vague because, unlike the Georgia loitering statute that has withstood a vagueness attack, the ordinance added the phrase “or under circumstances which cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity.”

The ordinance failed to withstand the scrutiny of the supreme court because

an innocent person unfamiliar with the drug culture could stand or sit in a “known drug area” without knowing the area had such a designation, and could return to the area for a legitimate reason, or for no reason at all, and, as the facts of this case show, be subject to arrest and conviction.

The ordinance, therefore, “does not provide fair warning to persons of ordinary intelligence as to what it prohibits so that they may act accordingly.” The ordinance also failed because it “affords too much discretion to the police” to act in an arbitrary and discriminatory way.

16. Id. at 384, 529 S.E.2d at 614.
17. Id.
18. Id.
20. 272 Ga. at 385, 529 S.E.2d at 615 (quoting ATHENS-CLARKE COUNTY, GA., MUN. ORDINANCE § 3-5-23).
21. Id. at 386, 529 S.E.2d at 616.
22. Id. at 387, 529 S.E.2d at 616 (quoting Satterfield v. State, 260 Ga. 427, 428, 395 S.E.2d 816, 817 (1990)).
23. Id. at 388, 529 S.E.2d at 617 (quoting City of Chicago v. Morales, 527 U.S. 41, 64 (1999)).
In another attack on a local ordinance, the supreme court in Thelen v. State\textsuperscript{24} struck down as vague a Clayton County ordinance that prohibits "any . . . unnecessary or unusual sound or noise which . . . annoys . . . others."\textsuperscript{25} Pete Thelen was convicted for violating this ordinance after neighbors complained that he was repeatedly taking off and landing his helicopter on his private dock on Lake Spivey.\textsuperscript{26} The supreme court concluded that the ordinance did not put Thelen on notice because the adjectives "unnecessary" and "unusual" modifying "noise" were "inherently vague."\textsuperscript{27} These vague words leave it to people of ordinary intelligence to guess at what they mean and allow police, judges, and juries to apply them on an ad hoc basis and perhaps in arbitrary and discriminatory ways.\textsuperscript{28} So, while the supreme court did not condone any interference with the tranquility and sanctity of Thelen's neighbors, it believed that Clayton County could do a better job in drafting its noise ordinance.

In last year's Georgia Survey,\textsuperscript{29} we wrote about Powell v. State's\textsuperscript{30} expansion of the state from interference in consensual sodomy between adults in a private place.\textsuperscript{31} Defendant in Howard v. State\textsuperscript{32} attempted to persuade the court to extend its reasoning in Powell to strike down the solicitation of sodomy statute.\textsuperscript{33} The court declined to do so.\textsuperscript{34} Perhaps Howard was not the best case in which to make such an argument.

Howard entered the men's restroom in a restaurant while a waitress was cleaning it. Howard locked the door, would not let the waitress leave, then offered her "$20 for a blow job."\textsuperscript{35} She refused, so he attempted to force her to perform sodomy. She escaped from the restroom, and Howard was later convicted of solicitation of sodomy, attempt to commit aggravated sodomy, and false imprisonment.\textsuperscript{36} The court's decision in Powell, however, does not extend the right to privacy to sodomy generally, nor does it protect the solicitation of sodomy in

\begin{itemize}
\item 24. 272 Ga. 81, 526 S.E.2d 60 (2000).
\item 25. \textit{Id.} at 82, 526 S.E.2d at 60, 62 (internal quotations omitted).
\item 26. \textit{Id.} at 81, 526 S.E.2d at 61.
\item 27. \textit{Id.} at 82, 526 S.E.2d at 62.
\item 28. \textit{Id.}
\item 31. \textit{Id.} at 336, 510 S.E.2d at 26.
\item 32. 272 Ga. 242, 527 S.E.2d 194 (2000).
\item 33. \textit{Id.} at 242, 527 S.E.2d at 195.
\item 34. \textit{Id.}
\item 35. \textit{Id.}
\item 36. \textit{Id.}
\end{itemize}
particular. The court “can narrowly construe the solicitation of sodomy statute to only punish speech soliciting sodomy that is not protected by the Georgia Constitution’s right to privacy.”

Therefore, offering to pay for oral sex in a public place is not protected speech. Justice Sears dissented, arguing, in essence, that it makes no sense to permit two people to engage in sodomy but to prohibit them from talking about it beforehand. She argued that the statute should have failed constitutional muster because it is overbroad.

C. Calendaring Cases and Continuance

In Cuzzort v. State, the district attorney for the Lookout Mountain Judicial Circuit assigned cases to particular judges and then placed those cases on the court calendar. Cuzzort appealed this procedure, claiming that it violated Uniform Superior Court Rule 3.1. The rule provides, in pertinent part:

In multi-judge circuits, unless a majority of the judges in a circuit elect to adopt a different system, all actions, civil and criminal, shall be assigned by the clerk of each superior court according to a plan approved by such judges to the end that each judge is allocated an equal number of cases.

The supreme court agreed with Cuzzort and found that the Lookout Mountain Judicial Circuit violated the clear mandate of the rule by allowing the district attorney to make case assignments and set the calendar. The court went on to find that this method constituted an abuse of discretion under Official Code of Georgia Annotated (“O.C.G.A.”) section 17-8-1 because it allowed the district attorney to call cases out of order rather than in accord with the statute, which says that cases on a criminal docket should be “called in the order in which they stand on the docket unless the defendant is in jail or, otherwise, in the sound discretion of the court.”

The question presented on appeal in Kellebrew v. State was whether the trial court committed reversible error by requiring Kellebrew to proceed to trial on less than seven days notice in violation of Uniform

37. Id. at 244, 527 S.E.2d at 196.
38. Id. at 245, 527 S.E.2d at 197 (Sears, J., dissenting).
39. Id. at 246, 527 S.E.2d at 197-98.
41. Id. at 464, 519 S.E.2d at 688.
42. UNIF. SUPER. CT. R. 3.1 (2000).
43. 271 Ga. at 465, 519 S.E.2d at 689.
44. Id. (quoting O.C.G.A. § 17-8-1 (1997)).
Superior Court Rule 32.1 after Kellebrew refused to withdraw his demand for speedy trial. The court of appeals answered no. Kellebrew's demand for trial would have resulted in an acquittal had the State not tried him before December 31, 1995. Kellebrew received notice from the trial court on December 19, 1995, that his case would be called for trial the next day, December 20, 1995. Kellebrew refused to withdraw his demand and to allow the case to go to trial on January 2, 1996, so the court proceeded with his trial. His conviction and two consecutive twenty-year sentences were affirmed.

D. Demand for Trial

In Vedder v. State, a DUI case, defendant Vedder filed a demand in municipal court for a speedy trial by jury. Because municipal courts do not empanel juries, the case was transferred to state court. Defendant did not file a speedy trial demand in the state court. Defendant made a motion for a plea in bar (noncompliance with the original speedy trial demand) in the state court. The court of appeals upheld the trial court's denial of the plea in bar. It held that a speedy trial demand in a municipal court is ineffective and that defendant did not refile an effective demand in the state court.

E. Suppression

As in previous years, Fourth Amendment and state statutory proscriptions against unlawful searches and seizures generated the largest number of opinions concerning a single topic. Because the vast majority of these opinions turn on the peculiar facts of each case, this year we offer a cursory review by highlighting what we consider to be some of the more interesting cases having to do with the various configurations of search and seizure issues.

1. Waiver of Fourth Amendment Rights as Probation Condition. In Fox v. State, the Georgia Supreme Court held that David Fox did not waive his Fourth Amendment right to privacy when he was on probation and a probation officer required him to sign a waiver
allowing a search of his person, houses, papers, or effects any time of day or night with or without a search warrant whenever such a search was requested by a probation officer or a law enforcement officer. A deputy received a tip that Fox was selling marijuana out of his house. The deputy did a criminal records search and discovered that Fox was on probation. Armed with Fox's signed search waiver, the deputy appeared at Fox's house and requested a search. Fox consented because he "didn't think [he] had any choice." The deputy found marijuana and a firearm.

While a probationer's standing Fourth Amendment waiver can be valid, Fox's was not. The only time such a waiver will support a search is when the defendant agrees to that waiver as a part of his negotiated plea. The record in this case showed that the issue never arose in Fox's plea hearing or in negotiations and that he was first presented with the waiver by his probation officer, who required Fox to sign it. Such a waiver will not withstand a Fourth Amendment attack.

2. **Scope of Search.** When a police officer makes a lawful stop of an automobile based upon the driver's failure to wear a seat belt, warns the driver about that infraction—at which time the driver is free to leave—then asks the passenger if he can search her purse, and discovers drugs, will the court of appeals uphold that search as lawful? Yes, it will, but it should not according to Judges Ruffin and Blackburn who dissented in *State v. Milsap*.

The dissenting judges argued that the police exceeded the scope of their authority to ask the search question when the basis for the stop ended. "[P]olice officers do not have carte blanche to question motorists after having stopped them for a traffic violation. Rather, in order to justify additional questioning of motorists following a routine traffic stop, 'an officer must have reasonable

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54. *Id.* at 163, 527 S.E.2d at 848.
55. *Id.* at 164, 527 S.E.2d at 849.
56. *Id.*
57. *Id.*
58. *Id.* at 165, 527 S.E.2d at 849.
59. *Id.* at 164, 527 S.E.2d at 849.
60. *Id.* at 165, 527 S.E.2d at 849.
61. *Id.* at 167, 527 S.E.2d at 850-51.
63. *Id.* at 520, 528 S.E.2d at 867 (Ruffin, J., dissenting).
suspicion of criminal conduct. But, of course, this was not the majority view in this case.

Milsap is difficult to accord with Migliore v. State, in which an officer pulled over Migliore's car for weaving. Migliore explained that he had been traveling from South Carolina and was tired. He produced a valid driver's license and a rental contract. He told the officer that his boss had rented the car and then loaned it to him. Migliore described his passenger, Tootle, as his girlfriend. The officer then questioned Tootle. She told the officer that she did not know who rented the car. Unlike Migliore, she described him as her friend. She indicated that she had been in South Carolina for less time than Migliore had mentioned he had been there. The officer then walked his drug dog around the car. When the dog alerted, the officer and the dog went into the car. The officer found drugs and $40,000.

The court of appeals concluded that the officer exceeded the scope of a permissible investigatory stop because he had no reasonable suspicion to detain Migliore to search for drugs.

Reasonable suspicion to detain and investigate for illicit drug activity does not arise from nervousness, differing statements regarding whether a relationship is romantic, or the length of time spent at a previous destination. The statements attributed to Tootle and Migliore are not meaningful inconsistencies. Tootle and Migliore may have gone to South Carolina at different times, and it is not uncommon for individuals to have different perceptions of the nature of their relationship. Also, Tootle did not say someone other than Migliore's boss had rented the car. She said she did not know. Under the totality of the circumstances, we find that [the officer] exceeded the scope of permissible investigation.

The court of appeals reached a similar result in State v. Blair. In Blair a state trooper stopped a vehicle for speeding. The vehicle had a drive out tag and contained four occupants. The trooper questioned the driver and the front seat passenger as to ownership of the vehicle. The trooper testified that he became suspicious when neither produced proof of ownership, they provided conflicting explanations concerning the purpose of their journey, all four appeared very nervous, and defendant,

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64. Id. at 521, 528 S.E.2d at 868 (quoting Edwards v. State, 239 Ga. App 44, 45, 518 S.E.2d 426, 428 (1999)).
66. Id. at 783, 525 S.E.2d at 167.
67. Id. at 786, 525 S.E.2d at 169.
68. Id.
who was seated in the rear, clutched a black bag. The trooper then asked the purported owner, the front seat passenger, for permission to search the car. He respectfully declined. The four were detained while a canine unit was summoned.\textsuperscript{70}

While waiting for the dog, defendant fled with his bag, was apprehended and found to be in possession of marijuana, baggies, and scales.\textsuperscript{71} The trial court held that the detention of the occupants in order to search for drugs was unlawful. The court of appeals agreed.\textsuperscript{72}

In a case that seems to be at odds with \textit{Milsap}, the court of appeals affirmed the granting of a motion to suppress in \textit{State v. Hanson}.\textsuperscript{73} An officer stopped a car that was weaving within its own lane. The officer learned that the driver was not intoxicated and found no basis for detaining him. He told the driver he was free to leave, but as Hanson put his hand on the door to go, the officer ordered him to halt. He then requested and got permission to search Hanson's car, in which he found marijuana.\textsuperscript{74} The trial court reached the following pertinent conclusions of law, to which the court of appeals, Judge Blackburn presiding, gave its imprimatur:

4. The investigatory encounter authorized by the officer's observation of the weaving of Defendants' vehicle ended when the officer told Defendant Hanson he was free to leave and said Defendant left the location where he had spoken with the officer and put his hand on his vehicle door.

5. The conversation between Defendants and the officer, which disclosed that Defendant Hanson was a professional musician, the fact that said Defendant had long hair and a full beard, and the fact he was driving a vehicle with tinted windows and appeared to be nervous did not constitute probable cause for an additional investigatory encounter.

6. The consent of Defendants to a search of the vehicle was obtained outside the scope of a permissible investigatory encounter with a law enforcement officer. It was the product of an improper restriction placed upon their freedom of movement, because it occurred after the justifiable restriction on their freedom of movement warranted by the investigatory stop for weaving had been terminated, pursuant to the officer's representation that the encounter had ended. The officer

\textsuperscript{70} \textit{Id.} at 340, 521 S.E.2d at 381.

\textsuperscript{71} \textit{Id.} at 341, 521 S.E.2d at 381-82.


\textsuperscript{74} \textit{Id.} at 533, 532 S.E.2d at 717.
therefore had no legal basis for ordering Defendant Hanson to interrupt his departure from the scene after he had begun to do so.75

3. Visitors on Premises Where Search Warrant Executed. In State v. Holmes,76 police officers executed a search warrant at the McClendon home based upon probable cause to believe that they would find cocaine. When the police arrived, they saw McClendon standing in the yard talking to Willie Holmes. The search warrant did not name Holmes, nor did the officers know who he was.77 The warrant did authorize the officers to search “the entire premises and any persons found therein or thereupon.”78 An officer approached Holmes and identified himself, at which time Holmes turned to run. The officer caught him and ordered him to remove his hands from his pockets. The officer then conducted a pat-down search, felt a cookie of crack cocaine, removed it, and arrested Holmes. At Holmes’ suppression hearing, the officers testified that Holmes was detained because he was on premises subject to a search warrant, and it was the policy of the drug task force to conduct a weapons pat-down search of anyone on premises subject to a search warrant.79 However,

[when executing a search warrant, it is illegal to search a person not named in the warrant but found on the premises to be searched, without independent justification for a personal search. The only justifications for such a search include: (1) protecting the executing officer from attack; or (2) preventing the disposal or concealment of items described in the search warrant. The inclusion of language in the warrant authorizing the search of “any persons present” on the premises does not broaden the powers of the searching authorities beyond the limited terms of OCGA § 17-5-28.]80

The search of Holmes, therefore, was illegal.81

4. Reasonable Suspicion and Probable Cause. In State v. Williams,82 the only thing that separated Malik Williams from freedom and a conviction for trafficking in cocaine was the absence of a bulge in his pants. Had the Drug Enforcement Authority (“DEA”) officer seen a bulge, the court of appeals would have reversed the trial court’s

75. Id. at 534, 532 S.E.2d at 718.
77. Id. at 333, 525 S.E.2d at 699.
78. Id.
79. Id. at 333, 525 S.E.2d at 700.
80. Id.
81. Id. (citations omitted).
suppression of the evidence that Williams was carrying 407 grams of cocaine taped to his leg while departing a plane that had just carried him from Miami to Atlanta.  

Officer Shelton of the DEA Task Force in Atlanta, along with his partner, sought information at the Atlanta airport on persons who met their drug courier profile. They were looking for people who "flew on short notice, paid for their tickets in cash and checked no baggage."

Williams met this description, so the officers approached him as he came out of the gate area and asked to speak to him. He agreed. Shelton asked for Williams' ticket; he provided it. Shelton asked a few other questions, all of which Williams answered, even though he changed one of his answers when pressed. Shelton noticed that Williams was nervous: His hands shook, his jaw clenched; and Shelton could see Williams' heart pounding through his shirt.

Williams consented to Shelton's request to search his backpack and his person. After searching his backpack, Williams withdrew his consent to any further search. Shelton and his partner then took him to their office in Fulton County, where a drug dog alerted on Williams' backpack. An hour and a half later, the officers acquired a search warrant from a Clayton County magistrate. Upon searching Williams, they found the cocaine taped to his leg, some marijuana in his shoe, and more than one thousand dollars in his pocket.

The court of appeals concluded that Williams' detention was not supported by probable cause based upon the facts cited above. Presence of a bulge would have given the officers probable cause, thus distinguishing this case from two others that went against the defendants solely because of the bulge factor.

In the DUI arena, the court of appeals evaluated a traffic stop for reasonable suspicion of criminal activity. In Howden v. State, the court of appeals ruled that the trial court erred in denying the motion to suppress and reversed the conviction. Based upon the evidence, defendant stayed late at work and consumed alcohol. About 10:15 p.m.

83. Id. at 37, 528 S.E.2d at 557.
84. Id. at 34, 528 S.E.2d at 555.
85. Id.
86. Id. at 35, 528 S.E.2d at 555.
87. Id., 528 S.E.2d at 556.
88. Id. at 37, 528 S.E.2d at 557.
92. Id. at 141, 522 S.E.2d at 281.
he got in his van and headed home but was stopped by the police and arrested for DUI. The officer testified that he stopped defendant because it was late and the warehouse where defendant did business was located in an area known for criminal activity. The officer further testified that his suspicions were first aroused because “defendant's van was backed into one of the [closed warehouse's] doors.” The officer did not state any particular fact indicating that the occupant of the van was or was about to be engaged in criminal activity. The court of appeals held that a warehouse in an area known for criminal activity and a van leaving that warehouse late at night did not justify a traffic stop.

5. Surreptitious Audio-taped Telephone Conversations. In Bishop v. State, a case that caused the court of appeals much consternation and prompted the General Assembly to change the law, Kyle Richard Bishop persuaded the court to reverse the trial court's denial of his motion to suppress audio-taped phone conversations between himself and a thirteen-year-old female neighbor he was accused of molesting. Suspicious that Bishop had evil intent toward her daughter, the girl's mother listened in a phone conversation between Bishop and her daughter, only to hear them talking in sexual terms and plotting the girl's parents' deaths. The parents contacted the police, who refused to wiretap their phone line. So, the parents bought a recorder and tapped the phone themselves. They recorded numerous incriminating phone calls from Bishop.

The parents turned over the tapes to the police, who eventually arrested Bishop. Bishop filed a motion to suppress, citing O.C.G.A. section 16-11-62, which prohibits the interception or recording of phone calls by any person who is not a party to the conversation. If one party to the conversation is a minor, then phone calls may be intercepted, but only after application to the superior court and only after the superior court makes certain findings of probable cause and determines that the child will not be harmed. The remedy for a violation of these statutes is suppression of the taped phone calls. The court

93. *Id.* at 140, 522 S.E.2d at 280.
94. *Id.*
95. *Id.*, 522 S.E.2d at 281.
96. *Id.*
98. *Id.* at 517, 526 S.E.2d at 918.
99. *Id.* at 518, 526 S.E.2d at 918.
100. *Id.* at 519, 526 S.E.2d at 919.
“reluctantly” agreed with Bishop and reversed the trial court’s denial of his motion to suppress. The court went on, however, to invite legislative change of the law in order to avoid this result. The Georgia General Assembly obliged, amending O.C.G.A section 16-11-66 several weeks after Bishop. The statute now expressly allows parents to tape their children’s conversations from an “extension phone located within the family home.” But can a parent secretly tape a phone call from a neighbor’s phone? We should find out this year.

6. Exigent Circumstances. The propriety of police entry into a suspect’s home was analyzed in Threatt v. State. In Threatt a citizen saw a man driving in an erratic manner. While speaking with police, the citizen followed defendant to his home. The police arrived at defendant’s home nearly twenty minutes after the citizen began watching the car. The officers knocked on the door and a woman answered. Without a warrant or consent, the officers entered the home to investigate the man who matched the description. The officers began questioning defendant inside his home. Then the officers asked defendant to exit his home and continued their DUI investigation.

The court held that if exigent circumstances exist, an officer can enter a home without a warrant. Here, the exigent circumstances, the dangerous operation of a car, had ceased. Thus, all evidence discovered inside the home should have been suppressed. However, the evidence discovered outside the home was not considered part of the unlawful search and seizure and was therefore admissible.

7. Chemical Tests and Implied Consent. In the field of DUI law, there were several important cases focusing on the issue of the admissibility of tests for alcohol and drugs and whether the warnings preceding the testing were administered lawfully. One of the most significant of these decisions was Love v. State. In Love the Georgia Supreme Court held that the portion of the DUI statute that distinguished between medically prescribed marijuana and recreational use

103. 241 Ga. App. at 519, 526 S.E.2d at 919.
104. Id. at 524, 526 S.E.2d at 922.
106. The authors have one such case pending now in the court of appeals.
108. Id. at 594, 524 S.E.2d at 279.
109. Id. at 596, 524 S.E.2d at 280.
110. Id. at 597, 524 S.E.2d at 281.
marijuana is unconstitutional. Prior to this case, a blood or urine test revealing marijuana metabolites in a driver's system when there was no prescription for the marijuana, constituted a per se violation of the DUI statute. On the other hand, a blood or urine test revealing marijuana metabolites, when the driver had a prescription for marijuana, required the State to prove that the ingestion of marijuana caused the defendant to be incapable of driving safely.

This case does not necessarily mean that a DUI marijuana case goes away. It only means that the State cannot make a per se case based on the presence of marijuana. Note that in DUI prescription drug cases the standard of proof is higher than in other alcohol and drug cases.

In State v. Becker, four persons were killed when a tractor trailer forced their van into oncoming traffic. A witness got the tag number of the tractor trailer, which left the scene. A trooper stopped the truck, but the circumstances of the stop are unknown. Another trooper met defendant and followed him ten miles back to the Tifton patrol post. The trooper read the implied consent notice and asked for a urine sample, which defendant provided. The trooper subsequently drove defendant to the hospital, reread the implied consent notice for commercial drivers, and asked for a blood test, to which defendant submitted. Based on the results of the blood and urine tests, defendant was charged with DUI and vehicular homicide. He moved to suppress the test results on several grounds, and the trial court granted his motion. The State appealed.

The first issue was whether the implied consent notice was read in a timely manner. The court of appeals ruled that the evidence was insufficient for the trial court to determine whether the implied consent notice was read in a timely manner. The case was remanded to the trial court for further evidence to determine this issue.

A second issue in this case is interesting because the court of appeals never has ruled on it. Defendant's attorney argued that the implied consent notice for commercial drivers notified defendant that he would be disqualified from operating a commercial vehicle for one year if he refused the testing but did not notify him that he would also be
disqualified from operating a personal vehicle. The court of appeals found that defendant agreed to take the test after hearing that a refusal to take the test could result in a suspension of his commercial driver’s license for a year. The court reasoned that being told that he would also lose his personal driving privileges could only have tipped the balance further in favor of consenting. Therefore, the omission was immaterial.

The training manual for the Intoxilyzer 5000 requires a twenty-minute wait in a controlled environment to ensure that the breath sample is not contaminated with extraneous alcohol. Does a violation of this rule go to the weight or the admissibility of the results? In Casey v. State, the court of appeals, in dicta, said that the State must follow the published guidelines for the breath test to be admissible.

Until Casey the appellate courts have held that noncompliance with the waiting period goes to the weight and credibility of the test result, not its admissibility. However, in Casey defendant’s initial breath test indicated the presence of mouth alcohol, and the officer did not wait the required twenty minutes before retesting. The court of appeals said that the failure to observe the twenty-minute waiting period prior to retesting “compromised the very foundation for admission of defendant’s breath test.” Yet, it was harmless error given “the overwhelming evidence of Defendant’s guilt.”

Even suppressed breath test results can be admitted to impeach the defendant’s testimony. In Jones v. State, the State’s breath test was not admitted into evidence at trial. On cross examination during the trial, defendant testified that he had one beer at 8:30 p.m. and two beers between 10 p.m. and 12 p.m. He also testified that he weighed two hundred pounds. On rebuttal the trial court allowed the State to admit the test result to impeach defendant’s testimony. The court of appeals held that the test result (0.09g) was admissible to impeach defendant’s testimony. This opinion is remarkable because there is no

120. Id. at 270, 523 S.E.2d at 101.
121. Id.
122. Id. at 272, 523 S.E.2d at 102.
123. Id.
126. Id. at 331, 523 S.E.2d at 396.
127. Id. at 331 n.1, 523 S.E.2d at 396 n.1.
128. Id.
129. Id.
131. Id. at 516, 527 S.E.2d at 224.
indication that the State introduced any evidence that the test result was inconsistent with defendant's testimony other than the result itself.\textsuperscript{132}

Must a defendant receive \textit{Miranda} warnings prior to being asked to participate in breath or urine tests? In \textit{State v. Coe},\textsuperscript{133} the court of appeals reversed \textit{State v. Warmack},\textsuperscript{134} holding that the state does not have to prove the administration of \textit{Miranda} warnings for the results to be admissible.\textsuperscript{135}

In \textit{Coe} the court of appeals reversed the trial court's suppression of the results of defendant's urine test.\textsuperscript{136} After being arrested, defendant was read the implied consent notice and agreed to take a breath test. The officer read implied consent notice again, requesting a urine test. Defendant agreed, but never received \textit{Miranda} warnings. The trial court relied on \textit{Warmack} in suppressing the results of the urine test.\textsuperscript{137} The court of appeals overruled \textit{Warmack} by holding that an arrestee is not entitled to \textit{Miranda} warnings before deciding whether to submit to the State's request for an additional test of breath, blood, or urine.\textsuperscript{138} The court distinguished between submitting to chemical testing and performing incriminating acts such as field sobriety tests.\textsuperscript{139} Accordingly, an arrestee is entitled to \textit{Miranda} warnings before submitting to field sobriety tests.

\textbf{F. Extrinsic Evidence}

While the notice and hearing requirements of Uniform Superior Court Rules 31.1 and 31.3 no longer apply to the admissibility of prior difficulties between the accused and the alleged victim, the trial court bears an obligation to conduct an inquiry into the circumstances of such prior difficulties when the accused has been tried and acquitted of them.\textsuperscript{140} In \textit{Scott v. State},\textsuperscript{141} defendant Scott beat and pistol whipped a woman he lived with; the State sought to introduce prior difficulties, among which was a 1993 acquittal of simple battery involving Scott and the same woman. The court allowed this evidence without examining the case file to determine what facts were in issue and resolved in

\begin{itemize}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} 243 Ga. App. 232, 533 S.E.2d 104 (2000).
\item \textsuperscript{134} 230 Ga. App. 157, 495 S.E.2d 632 (1998).
\item \textsuperscript{135} 243 Ga. App. at 234, 533 S.E.2d at 107.
\item \textsuperscript{136} \textit{Id.} at 234-35, 533 S.E.2d at 107.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.} at 234, 533 S.E.2d at 107.
\item \textsuperscript{139} \textit{Id.} at 235, 533 S.E.2d at 107.
\item \textsuperscript{141} 243 Ga. App. 383, 532 S.E.2d 141 (2000).
\end{itemize}
defendant's favor at trial. The State's avowed purpose for using this prior difficulty was to prove Scott's course of conduct and bent of mind. Scott, however, had received a general verdict of not guilty on the prior difficulty.142 Because the State bears the burden of proving that defendant committed the extrinsic act, and the prior jury acquitted him of it, the court committed error by admitting this evidence without further proof by the State that defendant committed it.143 The error was harmless, however, because overwhelming evidence of defendant's guilt existed without the prior difficulties evidence, rendering it highly probable that the error did not contribute to the verdict.144

G. Discovery

By far the most important case in the area of discovery during this reporting period was State v. Lucious.145 In this case the Georgia Supreme Court, in a 4-3 decision, upheld the constitutionality of the Criminal Discovery Act146 and held that a defendant who opted not to participate in the Act was not entitled to the state's scientific reports, scientific work product, or witness lists.147 The court overruled Eason v. State148 in so holding.149

An election not to invoke the reciprocal discovery provisions of the Act entitles a defendant only to “that discovery specifically afforded by the Georgia and United States Constitutions, statutory exceptions to the Act, and nonconflicting rules of court.”150 Scientific reports and scientific work product are not afforded to a defendant anywhere outside the Act, so the trial court erred in requiring the State to provide these to Lucious when he had not invoked the Act.151 The trial court also erred in requiring the State to provide its witness list to Lucious pursuant to Uniform Superior Court Rule 30.3 because this rule conflicts with O.C.G.A. sections 17-16-3 and 17-16-8, thereby rendering the rule unenforceable.152

While cases may exist in which the defendant perceives a strategic advantage in not invoking the Criminal Discovery Act, Lucious seems to

142. Id. at 386-87, 532 S.E.2d at 144-46.
143. Id., 532 S.E.2d at 146.
144. Id.
149. 271 Ga. at 365, 518 S.E.2d at 681.
150. Id. at 364, 518 S.E.2d at 681.
151. Id. at 365, 518 S.E.2d at 681.
152. Id. at 365-66, 518 S.E.2d at 681-82.
limit those cases to ones in which scientific evidence does not exist and those in which the defendant already knows the identity and location of the State’s witnesses without having received their names on a witness list. In our view the better approach after Lucious is to begin with a presumption in favor of invoking the Act unless that presumption can be rebutted by sound strategic reasons to the contrary.

The court of appeals reversed a conviction in Harridge v. State,\(^\text{153}\) a vehicular homicide case, because of a Brady violation by the State.\(^\text{154}\) Whether the court will reverse a Brady violation turns on the facts of each case, but in every instance the defendant must prove the existence of four factors:

1. the state possessed evidence favorable to the defense,
2. the accused did not possess the evidence and could not have obtained it through reasonable diligence,
3. the state suppressed the favorable evidence, and
4. a reasonable probability exists that disclosure of the evidence would have altered the outcome of the proceedings.\(^\text{155}\)

Harridge met all four of these conditions. The prosecutor possessed exculpatory evidence concerning the presence of cocaine and marijuana in the decedent driver’s urine, Harridge could not have obtained it, the state did not reveal it to Harridge, and the court concluded that the evidence may have altered the outcome of the case.\(^\text{156}\) This last condition, in many cases, may be the most difficult to meet. Note that the court in Harridge said, “[W]e cannot say with any degree of certainty that the jury’s verdict would not have been different if it had heard evidence that Smith may have been under the influence of cocaine and marijuana at the time of the accident.”\(^\text{157}\) We wonder if, in effect, this way of putting it dilutes the defendant’s burden by requiring the court to find that the verdict would not have resulted in an acquittal rather than requiring the defendant to prove that the verdict would have resulted in an acquittal. Is there a real difference in burdens?

In a case that reminds all defense lawyers how easy it is to waive an issue for appeal that would have reversed a conviction, Dickerson v. State\(^\text{158}\) involved a failure by defense counsel to seek an appropriate remedy—in this case a continuance—when confronted with the State’s failure to comply with the Criminal Discovery Act. The State failed to


\(^{154}\) Id. at 659, 534 S.E.2d at 115.

\(^{155}\) Id. at 660, 534 S.E.2d at 116 (citations omitted).

\(^{156}\) Id. at 660-62, 534 S.E.2d at 116-17.

\(^{157}\) Id. at 662, 534 S.E.2d at 117.

give the defense the birth date of a witness. Defendant filed a motion to compel the information, but the State did not comply. At trial defendant failed to move for a continuance. The witness testified, and Dickerson discovered after trial that the witness had a conviction for a crime of moral turpitude, which defendant could have used to impeach her.\footnote{159} We suppose that trial counsel will have the opportunity to discuss the matter further at the habeas hearing that is sure to follow.

H. Jurisdiction

In \textit{Weatherbed v. State},\footnote{160} somebody missed a crucial phrase in O.C.G.A. section 17-7-70(a)\footnote{161} when the Crisp County Superior Court accepted a guilty plea to malice murder by defendant, whose counsel advised him to waive indictment by the grand jury and plead guilty to an accusation carrying a life sentence by the district attorney.\footnote{162} The supreme court reversed the denial of defendant Weatherbed's motion for an out-of-time appeal, noting that the trial court did not have subject matter jurisdiction to accept the guilty plea in the first place.\footnote{163} The court based its decision on O.C.G.A. section 17-7-70(a) and (b), which provide: "In all felony cases, other than cases involving capital felonies, ... the district attorney shall have authority to prefer accusations, and such defendants shall be tried on such accusations, provided that defendants going to trial under such accusations shall, in writing, waive indictment by a grand jury," and

\begin{quote}
Judges of the superior court may open their courts at any time without the presence of either a grand jury or a trial jury to receive and act upon pleas of guilty in misdemeanor cases and in felony cases, except those punishable by death or life imprisonment, when the judge and the defendant consent thereto. The judge may try the issues in such cases without a jury upon an accusation filed by the district attorney where the defendant has waived indictment and consented thereto in writing and counsel is present in court representing the defendant either by virtue of his employment or by appointment by the court.\footnote{164}
\end{quote}

Thus, without an indictment, the trial court possessed no subject matter jurisdiction to accept Weatherbed's guilty plea or to impose a sentence on him.

\begin{footnotes}
\item 159. \textit{Id.} at 595, 526 S.E.2d at 446.
\item 160. 271 Ga. 736, 524 S.E.2d 452 (1999).
\item 161. O.C.G.A. § 17-7-70(a) (1997).
\item 162. 271 Ga. at 736, 524 S.E.2d at 452.
\item 163. \textit{Id.} at 738, 524 S.E.2d at 453.
\item 164. O.C.G.A. § 17-7-70(a), (b).
\end{footnotes}
III. GUILTY PLEA

Maybe he changed his mind after he heard the evidence. Maybe he never had his mind made up at all until he heard the evidence. Either way, a judge who gets involved in plea negotiations runs the risk of enticing a defendant to give up an important right in the belief that things will turn out better in the end, only to find out that things could not have turned out worse. In McDaniel v. State, while high on cocaine, defendant shot each of his grandparents and his ten-year-old brother in the head, killing all three. He confessed to the murders and pleaded guilty believing that the court would impose a sentence of life without parole only to hear the judge pronounce a death sentence.

The supreme court reversed his conviction and death sentence because during plea negotiations the trial judge virtually assured McDaniel that if he pleaded guilty and allowed the court to impose sentence, he would get life without parole rather than death. McDaniel's decision to plead and dispense with a jury during the penalty phase was induced by these comments by the judge:

I have indicated to [all counsel] that the court would be reluctant as an individual or as a judge to impose a death sentence. My personal philosophy is that if that is done it ought to be done by a jury and not by a judge. Now that's completely my opinion. I'm not saying I'm not committing to that. There was some indication that if the court reversed that decision based on the facts and circumstances the counsel would request an immediate withdrawal but I am not—I am not in a mind to impose a death sentence as an individual. I just think that is something that should be relegated and the duties that a jury should—that's their sworn duty. Of course, I would be the jury and the judge all at the same time. That's the court's feeling and I will listen to both sides, I'll listen about life, I'll listen to life without parole and I'll listen to the recommendation for death but I'm 90 percent certain that I would impose a life without parole sentence.

For good reason, state and federal rules prohibit judicial participation in plea negotiations. "Due to the force and majesty of the judiciary, a trial court's participation in the plea negotiation may skew the defendant's decision-making and render the plea involuntary because a

166. Id. at 553, 522 S.E.2d at 649.
167. Id. at 554, 522 S.E.2d at 650.
168. Id. at 553, 522 S.E.2d at 649.
defendant may disregard proper considerations and waive rights based solely on the trial court’s stated inclination as to sentence.\textsuperscript{170}

IV. JURY SELECTION

While the court must grant a defendant’s motion to strike for cause when a potential juror works in the very district attorney’s office who is prosecuting the case, no such motion must be granted if the potential juror is a prosecutor for another jurisdiction.\textsuperscript{171} In \textit{Floyd v. State},\textsuperscript{172} a potential juror worked for the local federal prosecutor, so there was no error in denying a motion to strike for cause on that basis alone.\textsuperscript{173}

V. STATE’S CASE IN CHIEF

A. Hearsay

The Georgia Supreme Court reversed a malice murder conviction in \textit{Lindsey v. State}\textsuperscript{174} because the trial court improperly permitted prejudicial and unreliable hearsay evidence that incriminated Lindsey.\textsuperscript{175} Over objection the trial court admitted the hearsay testimony of a witness who stated that after the shooting and while he was talking to police officers investigating the crimes, he heard a member of the crowd gathered around the victim’s residence yell at him to tell the police that Lindsey was the shooter.\textsuperscript{176} The Georgia Supreme Court held that the testimony did not fit into any articulated exception to the prohibition against hearsay\textsuperscript{177} and reversed the conviction.\textsuperscript{178} The inadmissible hearsay evidence was so incriminating and not cumulative of other admissible evidence that the court was unable to conclude that the testimony did not contribute to the verdict.\textsuperscript{179}

An essential element of a crime may not be proven by hearsay alone. In \textit{Ledford v. State},\textsuperscript{180} the Georgia Court of Appeals reversed Ledford’s

\begin{footnotesize}
\begin{enumerate}
\item[170.] 271 Ga. at 554, 522 S.E.2d at 650 (citing Skomer v. State, 183 Ga. App. 308, 310, 358 S.E.2d 886, 887 (1997)).
\item[172.] 272 Ga. 65, 525 S.E.2d 683 (2000).
\item[173.] \textit{Id.} at 67, 525 S.E.2d at 685.
\item[175.] \textit{Id.} at 659, 522 S.E.2d at 461.
\item[176.] \textit{Id.}
\item[177.] O.C.G.A. § 24-3-1 (1995).
\item[178.] 271 Ga. at 659, 522 S.E.2d at 460.
\item[179.] \textit{Id.}, 522 S.E.2d at 461.
\end{enumerate}
\end{footnotesize}
conviction of intentionally inhaling paint fumes.\textsuperscript{181} The elements of this offense are codified in O.C.G.A. section 16-13-91.\textsuperscript{182} The State had to prove that the paint inhaled by defendant contained the chemical toluene. To do so, the State introduced the contents label from the spray paint can Ledford had used.\textsuperscript{183} This label, alone, the court of appeals ruled, is insufficient as a matter of law to prove an essential element of the crime because it is hearsay.\textsuperscript{184} Absent a recognized exception for this evidence, the State cannot prove the truth of the matter it asserts simply by the introduction of hearsay.\textsuperscript{185}

The chemical toluene also made an appearance in a DUI case as an element of the defense's case. In \textit{Cornell v. State},\textsuperscript{186} defendant's breath test results were .157. At trial the owner of a body shop testified that defendant spent the day of his arrest in the paint shop while a car was being painted. The owner testified that the paint contained toluene and that defendant must have inhaled that substance. Although defendant's attorney labeled certain documents regarding the paint as defense exhibits, they were never admitted into evidence because the attorney did not lay a proper foundation for their admission. Defendant's attorney called an expert witness to testify about the effect of inhaling paint fumes on breath tests. The trial court ruled that the expert could testify only about the effect of toluene because that was the only substance proved to be in the paint.\textsuperscript{187} In holding that defendant's argument was without merit, the court of appeals said that "not even an expert can give an opinion based entirely upon reports which have been prepared by others and which are not in evidence."\textsuperscript{188}

Also in the area of DUI law, the qualifications of the person who draws the defendant's blood to test for alcohol level is an essential element of the State's case. Therefore, as the court held in \textit{Peek v. State},\textsuperscript{189} it cannot be proven exclusively through hearsay.\textsuperscript{190} Charged with DUI, Peek agreed to submit to a state-administered blood test. At trial the court permitted the State to introduce, as a business record, a "computer print-out" of an employee education cumulative report to show

\begin{thebibliography}{99}
\bibitem{181} \textit{Id.} at 241, 520 S.E.2d at 229.
\bibitem{183} 239 Ga. App. at 238, 520 S.E.2d at 226.
\bibitem{184} \textit{Id.} at 241, 520 S.E.2d at 228-29.
\bibitem{185} \textit{Id.}, 520 S.E.2d at 229.
\bibitem{187} \textit{Id.} at 127, 520 S.E.2d at 783.
\bibitem{189} 272 Ga. 169, 527 S.E.2d 552 (2000).
\bibitem{190} \textit{Id.} at 170, 527 S.E.2d at 554.
\end{thebibliography}
that the drawer of blood was qualified.191 The supreme court reversed defendant's conviction, holding that the trial court erred in permitting the State to introduce the print out to satisfy its burden of proving the qualifications of the blood drawer.192 The supreme court held that because the established methods for proving the qualifications of persons who draw blood infringe on defendant's confrontation rights, the courts must resist the temptation to expand the class of acceptable methods.193 Accordingly, the methods established in O.C.G.A. section 40-6-392(e)194 are the exclusive methods, other than testimony from the blood drawer, of proving the qualifications of the person who draws blood.195 The trial court thus erred in allowing the State to admit the private hospital records for the purpose of proving the qualifications.196

B. Prejudicial Evidence

To reverse a conviction based upon the improper admission by the trial court of prejudicial evidence, the reviewing court must first conclude that the evidence was improperly admitted and then conclude that the admission of the evidence called for the granting of a mistrial. In Martin v. State,197 a jury convicted Martin of armed robbery.198 During the trial defense counsel cross-examined the officer who took Martin's recorded confession as follows:

MARTIN'S COUNSEL: What was talked about before the tape turned on . . . ?

REDLINGER: More than likely I went in and, of course, introduced myself. I described the situation to him as far as what we had, what the victim said, what witnesses said, asked him if he would like to speak to us about the situation, and these are things he needs to think about when he makes his decision on whether he wanted to talk to us or not. And I also mentioned that I was familiar with his criminal history.199

191. Id. at 169, 527 S.E.2d at 553.
192. Id. at 172, 527 S.E.2d at 555.
193. Id. at 171, 527 S.E.2d at 554.
195. 272 Ga. at 171, 527 S.E.2d at 555.
196. Id. at 172, 527 S.E.2d at 555.
198. Id. at 901, 525 S.E.2d at 729.
199. Id. at 902, 525 S.E.2d at 730.
Defendant's counsel objected and moved for a mistrial. The trial judge sternly admonished the officer for his comment and instructed the jury to disregard his statement but denied the motion for mistrial.\textsuperscript{200} The court of appeals agreed that the comment was improper and unnecessary but found that the trial judge did not abuse its discretion in denying the motion for mistrial because of the overwhelming evidence of Martin's guilt, including identification by the victim, by the witnesses who chased down defendant, and by the officer who apprehended defendant with the stolen money and gun, and Martin's own confession.\textsuperscript{201}

Similarly, the court of appeals in \textit{Benford v. State}\textsuperscript{202} found error in the trial court's admission of evidence that at the time the murder defendant was apprehended, one and one-half months after the crime, he was carrying and discarded a .22 caliber pistol and a can containing seventy-six hits of crack cocaine.\textsuperscript{203} Reiterating the rule that evidence is not automatically admissible simply because it was "incident to an accused's arrest," the court declared that the State should have been given the burden of proving the relevance and materiality of the evidence.\textsuperscript{204} The court of appeals held that the crack cocaine was relevant and material because of the role crack cocaine played in the factual predicate of the murder charge.\textsuperscript{205} The court found, however, that the evidence of the .22 caliber pistol was not relevant because the State's evidence established that the murder was committed with a shotgun obtained from a third party.\textsuperscript{206} Nevertheless, the court found the error harmless, "given the overwhelming evidence of Benford's guilt."\textsuperscript{207}

Accordingly, in \textit{Roberson v. State}\textsuperscript{208} the court of appeals sanctioned the State for prosecuting a child molestation case.\textsuperscript{209} The court

\begin{itemize}
  \item \textsuperscript{200} \textit{Id.}
  \item \textsuperscript{201} \textit{Id.} The court of appeals also admonished the officer and stated its position regarding the increasing frequency of this type of error: "Although we do not condone what has become a far too frequent practice when a law enforcement officer takes the stand—an improper reference to a defendant's prior criminal history—we do not find that these particular circumstances warrant a reversal of Martin's conviction." \textit{Id.} at 903, 525 S.E.2d at 731.
  \item \textsuperscript{202} 272 Ga. 348, 528 S.E.2d 795 (2000).
  \item \textsuperscript{203} \textit{Id.} at 350, 528 S.E.2d at 797.
  \item \textsuperscript{204} \textit{Id.}
  \item \textsuperscript{205} \textit{Id.}
  \item \textsuperscript{206} \textit{Id.}
  \item \textsuperscript{207} \textit{Id.}
  \item \textsuperscript{208} 241 Ga. App. 226, 526 S.E.2d 428 (1999).
  \item \textsuperscript{209} \textit{Id.} at 226, 526 S.E.2d at 430.
\end{itemize}
nevertheless held that the resulting error was harmless and affirmed the
conviction. The defense moved for a pretrial evidentiary hearing on
the reliability of the child witness, pursuant to O.C.G.A. section 24-3-
16. The State objected to a hearing and, instead, used the trial
arena to present its proof of the reliability of the victim. This
amounted to nothing more than bolstering the credibility of one witness
through the testimony of other witnesses, which is strictly prohib-
ed. The State, however, relied upon its burden of proving the child's
credibility and veracity as dictated by the Child Hearsay Statute. Over objection the trial court allowed the testimony.

The court of appeals strongly admonished the prosecutor for so
blatantly circumventing the necessity of a pretrial evidentiary hearing
to improperly bolster the victim's credibility before the jury. But, in
analyzing the evidence that the State procured from the victim's mother,
the court found that the prosecutor's desired bolstering effect was
undone by the fairly unresponsive nature of the witness' answers,
primarily the fact that her child did lie about the "normal things that
children lie about." The court of appeals held that the error was
harmless and affirmed the conviction for child molestation.

In contrast, the court of appeals in Booker v. State found that
permitting the state to bolster its witness' testimony rose to the level of
harmful error. Booker's accomplice in a burglary, aggravated
assault, and armed robbery had implicated Booker in a statement he
gave to police shortly after the crime. When called by the state to
testify, the accomplice admitted making the statements but disavowed
the truth of Booker's involvement, testifying that he had been coerced
into implicating Booker.

In an effort to rehabilitate its witness, the State introduced two other
statements made by the accomplice in which he had named the
perpetrators of five other murders and evidence that, in all the matters
in which the accomplice had named a perpetrator, the State secured

210. Id.
211. O.C.G.A. § 24-3-16 (1995).
212. 241 Ga. App. at 226, 526 S.E.2d at 430.
213. Id., 526 S.E.2d at 431.
216. Id. at 227, 526 S.E.2d at 430.
217. Id.
218. Id. at 230, 526 S.E.2d at 432.
220. Id. at 80, 528 S.E.2d at 850.
221. Id. at 82, 528 S.E.2d at 851.
guilty pleas by all the named parties except Booker.222 The court of appeals held that the trial court erred by admitting this evidence because it was an improper attempt to bolster the credibility of the witness using otherwise inadmissible facts.223 Further, the court found that the evidence of the accomplice's testimony necessarily implicated Booker in several other criminal matters and showed Booker's association with people who had committed infamous crimes, both of which made the trial court's error harmful, requiring reversal.224

In Bryan v. State,225 the Georgia Supreme Court reviewed the admissibility of evidence that defendant's husband had increased his automobile liability insurance three months before defendant was alleged to have staged a car accident in which she doused the car with ignitable liquids and set it on fire, killing her mother, who was a passenger in the car.226

Relying upon Stoudemire v. State,227 the court held that the trial court erred in admitting evidence of the insurance policy because the State failed to prove independent evidence of a nexus between the crime and the existence of the insurance policy.228 The court had reaffirmed Stoudemire two years later in Woodham v. State,229 cautioning prosecutors that they “undertake severe risk of reversal when attempting to inject evidence of an insurance policy without first establishing the required nexus.”230 Because the State in Bryan failed to present evidence that defendant was aware of the policy change her husband made, or that defendant would ever benefit in any pecuniary way from the insurance policy, the trial court erred in denying defendant's pretrial motion to exclude this evidence, warranting reversal.231

C. Expert Witnesses

In Odom v. State,232 the court of appeals gave the appellate bar a thrashing for “utterly meritless” and “far-fetched” claims in child sexual abuse cases in which “the expert's testimony invaded the province of the

222. Id.
223. Id. at 83, 528 S.E.2d at 852.
224. Id. at 84, 528 S.E.2d at 852.
226. Id. at 232, 518 S.E.2d at 672.
228. 271 Ga. at 232, 518 S.E.2d at 673.
230. Id. at 582, 439 S.E.2d at 473.
231. 271 Ga. at 233, 518 S.E.2d at 673.
jury and improperly bolstered the credibility of the victim.\textsuperscript{233} Acknowledging that this allegation of error has seen some reversal "success," Justice Eldridge chastised the overuse of the claim when the distinction between proper opinion testimony by the expert—the victim's examination was consistent with sexual abuse—versus improper bolstering opinion that invades the province of the jury—the victim was sexually abused—is so clear.\textsuperscript{234}

But the criticism was even-handed. Justice Eldridge also chastised those prosecutors "who will not learn the distinctions" between proper and improper opinion testimony, thereby eliciting improper expert testimony by asking open-ended questions and failing to prepare their expert witnesses.\textsuperscript{235} The result, Justice Eldridge warned, will be the continued raising by the defense bar of meritless and meritorious appellate allegations, "thereby putting the child/victim through the trauma of retrial."\textsuperscript{236}

In \textit{Odom v. State},\textsuperscript{237} it seemed clear to the court of appeals that the opinions rendered by most of the various experts in the case were proper.\textsuperscript{238} The court did find a meritorious claim as the result of an open-ended question to the State's psychiatric witness: "Have you been able to attribute a source to the child's problems?"\textsuperscript{239} The expert replied: "[T]his child, in my opinion, had been sexually abused."\textsuperscript{240} Although the court found the opinion to be improper, it held that the trial court's sustaining of the defense objection and subsequent admonition to the jury to disregard the answer sufficiently addressed defendant's objection.\textsuperscript{241} Defendant never moved for a mistrial; therefore, the convictions for aggravated sodomy and aggravated child molestation were affirmed.\textsuperscript{242}

\textbf{D. Bruton Problem}

The admission of a statement of a nontestifying codefendant that inculpates a defendant unconstitutionally deprives that defendant of the Sixth Amendment right to cross-examine witnesses, even when the jury is instructed to limit its consideration of the statement to the codefen-

\textsuperscript{233} Id. at 227, 531 S.E.2d at 208.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 230, 531 S.E.2d at 210.
\textsuperscript{236} Id., 531 S.E.2d at 211.
\textsuperscript{238} Id. at 231, 531 S.E.2d at 211.
\textsuperscript{239} Id. at 230, 531 S.E.2d at 210.
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 231, 531 S.E.2d at 211.
\textsuperscript{242} Id.
dant who made it. Therefore, the trial court must scrutinize any attempted redaction by the State to determine whether the redacted version of the statement is still capable of being interpreted as implicating the defendant. If so, it is not admissible.

The trial court in Collins v. State had trouble with this rule. When the State tendered a redacted statement by the nontestifying codefendant in which the name of defendant was redacted and, in its place, the words “anyone else,” “anybody,” “somebody,” “this individual,” “this other individual,” and “the man” were substituted, the trial court ruled it admissible. To further compound the error, the court gave the following “curative instruction” to the jury:

There’s a Constitutional rule, I mean, you know, I’m just going to tell the jury what the law is. The Supreme Court of the United States in 1984, decided that when one defendant made a statement that implicates another defendant, even though—in other words, if Victor Lyles’ statement says something bad about Bruce Collins, y’all are not supposed to hear it under the theory of the Supreme Court of the United States that it violates the defendant’s right to confront any witnesses against them which would be a violation of the Sixth Amendment, I believe. Is that correct? Now officer, can you go through that statement and say what Lyles said about himself and not make any reference to Collins?

Holding that the statement, as redacted, did not protect defendant against the Bruton problem, the court of appeals reversed defendant’s conviction for burglary because the court’s admonition to the jury all but instructed them that the redacted name was, in fact, that of defendant.

The trial court in Hill v. State made the same mistake by admitting into evidence the statement made by a nontestifying codefendant by simply changing defendant’s name to “someone.” The Georgia Supreme Court held that this error was harmful, warranting reversal of Hill’s conviction for murder, because the State went a step further by eliciting testimony from the arresting officer that it was the codefendant’s statement that led them to arrest Hill. “Thus, any doubt the

245. Id. at 450, 529 S.E.2d at 413.
246. Id. at 451, 529 S.E.2d at 413-14.
247. Id. at 452, 529 S.E.2d at 414.
249. Id. at 331, 528 S.E.2d at 805.
250. Id. at 332, 528 S.E.2d at 806.
jury may have had that Hill was the ‘someone’ whom Davis maintained committed the murder was eradicated by testimony the state deliberately elicited from its own witness.\textsuperscript{261}

\section*{E. Elements of the Crime}

Last year’s debate over the requirement of force in cases of sexual offenses against children was still brewing this reporting period. In \textit{Durham v. State}\textsuperscript{252} and \textit{Patterson v. State},\textsuperscript{253} the court of appeals concluded that the State must prove the element of force in rape cases and aggravated sodomy cases rather than presuming force as a matter of law based on the victim’s age.\textsuperscript{254}

The new crop of internet crime cases precipitated a constitutional challenge to the essential elements of the crimes of attempted child molestation and attempted statutory rape. The Houston County Vice Squad began a crack down of internet pornography sites at which adult males place messages seeking minors for explicit sex acts. The agents respond to these inquiries, posing as young girls, engage in computer dialogue with the suspect, and agree to meeting the suspect at the designated time and place for the purpose of engaging in various sexual acts. The meeting place is ordinarily the Houston County Mall. When the suspect shows up for the meeting, he is arrested and charged with attempting to commit the sexual acts for which he had previously described as the purpose for the meeting.

One of these subjects was Samuel Dennard. In \textit{Dennard v. State},\textsuperscript{255} the sting took place like all the others. Dennard posted a message on an Internet site that said he was seeking girls between the ages of fifteen and eighteen who were interested in asphyxiation, strangulation, smothering, drowning, and hanging. Sergeant Darin Meadows replied to this message, pretending to be a fifteen-year-old girl named “Shari.” Dennard and Shari communicated via the Internet, at which time

\begin{footnotesize}
\begin{itemize}
\item 251. \textit{Id.}
\item 254. 241 Ga. App. at 25, 525 S.E.2d at 758; 242 Ga. App. at 885, 531 S.E.2d at 761. Durham’s conviction for rape was reversed because the trial judge, over objection, erroneously instructed the jury that sex acts directed to children less than sixteen years old were forcible as a matter of law. 241 Ga. App. at 25, 525 S.E.2d at 758. Patterson’s conviction for aggravated sodomy was affirmed by the court of appeals, which held that there was “more than sufficient” evidence of force to justify a jury instruction on aggravated sodomy rather than simple sodomy. 242 Ga. App. at 886, 531 S.E.2d at 761.
\end{itemize}
\end{footnotesize}
Dennard indicated that he sought a sexual relationship involving asphyxiation.\textsuperscript{256}

Dennard and Shari discussed meeting at a nearby mall. During their Internet conversations Dennard expressed that he wanted to smother Shari with a chloroform-soaked pillow and have sex with her after she passed out. Dennard arranged to meet Shari at the mall on November 25. He indicated that he wished to take Shari to his house and make a videotape of him smothering her and then having sex with her while she lay unconscious. Dennard stated that he would be holding a Sprite and a flower when they would meet at the mall. He also sent Shari an e-mail confirming their arrangement and describing the clothes he would be wearing. Sgt. Meadows and other officers found Dennard at the mall holding a Sprite and a rose in his hand, and they arrested him there. Sgt. Meadows obtained a search warrant for Dennard's home, and upon searching the home he found a considerable amount of child pornography and a photograph of "Shari" that Sgt. Meadows had mailed to him over the Internet.\textsuperscript{257}

Dennard was charged with attempted child molestation, attempted statutory rape, attempting to entice a child for indecent purposes, and attempted child exploitation. Dennard filed a general and special demurrer to the indictment. The trial court overruled both demurrers, and the appellate court granted interlocutory appeal of the trial court's order.\textsuperscript{258}

Dennard's general demurrers were predicated upon one argument: Because the crime of child molestation must be committed in the presence of the child, the act of Internet communication cannot, as a matter of law, form the basis for this crime.\textsuperscript{259} Relying upon \textit{Vines v. State},\textsuperscript{260} which held in 1998 that the act of child molestation could not be committed over the telephone,\textsuperscript{261} Dennard argued that the telephone prohibition should be applied to Internet communications, which are not factually distinguishable from sexual contact over the telephone.\textsuperscript{262}

The court agreed that the crime of child molestation could not have been completed exclusively through Internet contact; however, the court found that the crime of attempted child molestation, as well as

\begin{itemize}
\item \textsuperscript{256} Id. at 869, 534 S.E.2d at 185.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Id. at 868-69, 534 S.E.2d at 184.
\item \textsuperscript{259} Id. at 870, 534 S.E.2d at 186.
\item \textsuperscript{260} 269 Ga. 438, 499 S.E.2d 630 (1998).
\item \textsuperscript{261} Id. at 438, 499 S.E.2d at 631.
\item \textsuperscript{262} 243 Ga. App. at 871, 534 S.E.2d at 186.
\end{itemize}
attempted statutory rape, requires proof only of a substantial step toward the crime. That substantial step does not need to be committed in the presence of the child and, from the facts alleged in the indictment, a fact finder would be authorized to conclude that the predicate acts alleged could constitute a substantial step toward the commission of the attempt crimes for which Dennard was charged.

The appellate court did, however, conclude that the trial court erred in overruling the special demurrers to the indictment on the ground that the indictment failed to set forth the name of the victim. The court noted that crimes against society in general, such as drug offenses or prostitution, do not require the inclusion of the victim's name on the charging document. However, a crime against an individual does require the prosecution to allege the aggrieved party. This holding poses an interesting question: If the fifteen-year-old Shari did not exist, is the undercover agent the victim?

VI. DEFENSE CASE

A. Defendant's Testimony

Can a defendant be questioned regarding the veracity of other testifying witnesses? In Green v. State, the court of appeals changed its previous position because recent Georgia Supreme Court cases have rejected the long-standing prohibition against such a line of questioning. According to Cargill v. State, decided in 1986, the rule in Georgia was that asking one witness about the veracity of another witness was impermissible. The supreme court in Cargill held that "it is improper for counsel to ask a witness whether another witness is lying. It is generally the function of witnesses to testify as to their personal knowledge of relevant facts; it is not the function of witnesses to determine the veracity of other witnesses." But, in 1990 and

263. Id.
264. Id. at 872, 534 S.E.2d at 186-87.
265. Id. at 876, 534 S.E.2d at 189.
266. Id. at 876-77, 534 S.E.2d at 189.
267. Id. at 876, 534 S.E.2d at 189.
269. Id. at 871, 532 S.E.2d at 115.
271. Id. at 631, 340 S.E.2d at 906.
272. Id.
again in 1998, two Georgia Supreme Court opinions effectively abandoned that holding, without expressly overruling Cargill.273

Relying upon the holdings expressed in those 1990 and 1998 cases, the Georgia Court of Appeals affirmatively did what the supreme court had impliedly done for almost the past ten years: It rejected the Cargill opinion, allowing the State to cross-examine a testifying defendant regarding his opinion of the veracity of the testimony provided by the State’s witnesses.274 With all the other prohibitions against using a witness to bolster or comment upon the veracity of another witness and the legal principle that the jury will be the one to determine witness credibility, we are hard pressed to follow the logic in forcing the defendant, at his peril, to explain why his testimony differs from that of the State’s witnesses.

B. Expert Witnesses

A significant holding for all criminal practitioners comes with the Georgia Supreme Court decision of Johnson v. State.275 The court held that the admissibility of expert testimony regarding the reliability of eyewitness evidence was left to the sound discretion of the trial court.276 In doing so the court overruled long-standing precedent prohibiting such expert testimony.277

Keith Johnson was tried and convicted of the crimes of armed robbery, aggravated battery, and aggravated assault in an attack at an ATM upon a sixty-two-year-old woman, who was attacked from behind by a black male who cut her throat, knocked her to the ground, stabbed her

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273. Dorsey v. State, 259 Ga. 809, 809, 387 S.E.2d 889, 890 (1990). Affirming a conviction for murder, the Georgia Supreme Court wrote,

Dorsey next contends that the trial court erred in allowing the prosecutor to ask Dorsey during cross examination, “So, everybody’s lying about this whole thing but you, is that right?” He contends that the question improperly calls for the defendant to make credibility determinations about the testimony of other witnesses. We do not agree. The state may challenge the defendant’s truthfulness on cross-examination. While the form of the question was somewhat argumentative, we cannot conclude that the court erred in allowing it. Id. at 809, 387 S.E.2d at 890. Eight years later, in Whatley v. State, the Georgia Supreme Court upheld another death penalty conviction in which the defendant was asked to comment on the veracity of the state’s witnesses. 270 Ga. 296, 301, 509 S.E.2d 49, 51-52 (1998). The appellant cited Cargil, but the court held that the State’s cross-examination was not reversible error, especially in light of the fact that the defense attorney never objected to this line of questioning. Id. at 301, 509 S.E.2d at 51.

274. 242 Ga. App. at 871-72, 532 S.E.2d at 115.
276. Id. at 254, 526 S.E.2d at 551.
repeatedly, and then fled. The attack was captured on the bank video camera. The victim chose Johnson’s photo out of a photo lineup five months after the crime. Within a month of the crime, she had been shown several photo lineups that did not contain Johnson’s photo and declined to identify any of the photographs as that of her attacker. Additionally, a witness who had been parked near the ATM before the attack stated that her attention had been drawn to a black man who was standing near the ATM and who “kind of jumped” behind some bushes when he noticed that the witness was watching him. She assisted a police artist in preparing a composite picture of the man, and she gave very specific descriptions of his eyebrows and one of his ears. The witness also declined to choose from photographic lineups that did not contain a photograph of Johnson but did select Johnson’s photo the first time it was presented to her in a lineup.

The defense sought to introduce testimony by an expert in the field of eyewitness identification. Relying upon Norris v. State, the trial court and court of appeals in Johnson v. State held that the evidence is inadmissible as a matter of law because a witness may not disparage the memory of another witness to impeach testimony. The Georgia Supreme Court granted certiorari to consider whether the trial court should retain discretion to admit proffered expert testimony regarding the reliability of eyewitness identifications. The court noted that, despite Norris, it has “strongly approved the trial court’s exercise of its discretion in regard to determining the admissibility of this type of expert testimony . . . and has explicitly applied an abuse of discretion standard when reviewing the trial court’s ruling.” Accordingly, the court held that such expert evidence is admissible when the State has no other corroborating evidence and the problems with the eyewitness identifications cannot be shown through cross-examination alone.

Another interesting avenue of expert testimony was paved in Porter v. State. A four-year-old boy spent one month of summer visitation with his mother, Andrea Porter, and her husband, Thomas. During the

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278. 272 Ga. at 257-58, 526 S.E.2d at 553-54.
279. Id. at 258, 526 S.E.2d at 553.
280. Id., 526 S.E.2d at 554.
281. Id. at 254, 526 S.E.2d at 550-51.
284. Id. at 257, 511 S.E.2d 603, 608.
285. 272 Ga. at 254, 526 S.E.2d at 551.
286. Id. at 255, 526 S.E.2d at 551.
287. Id.
boy's visit, Thomas committed numerous acts of physical and sexual abuse against the child. Thomas admitted his crime and was convicted. His wife also was indicted for cruelty to children and child endangerment, and she appealed that conviction.\textsuperscript{288}

Before trial the State moved to exclude defendant Andrea Porter's expert witness, a clinical psychologist who had conducted an examination of defendant.\textsuperscript{290} The doctor was prepared to testify that Andrea Porter's "whole psychological makeup is almost designed to not see things that are too painful to see."\textsuperscript{291} Because Andrea Porter's entire defense was that she had no knowledge of the physical abuse her husband inflicted upon her son, she wanted to show that although a reasonable person would have seen the signs, her psychological condition caused her to block out the signs of abuse. The State objected to the admissibility of the evidence with a two-fold argument. First, the evidence was inadmissible because it was in the nature of evidence of diminished capacity, yet the defense had failed to provide notice to the State, pursuant to Uniform Superior Court Rule 31.1, that defendant would invoke an insanity defense. The defense responded by arguing that the evidence did not go to the issue of diminished capacity but, instead, to impaired perception.\textsuperscript{292} "His argument was that such evidence was admissible, just as evidence of a vision impairment or other sensory difficulty would be admissible, not as evidence of diminished mental capacity but as evidence of impaired perception."\textsuperscript{293} Second, the State argued that the evidence invaded the province of the jury by addressing the ultimate issue in the case. The trial court granted the motion to exclude the testimony. The defense responded by arguing that the evidence was essential to the sole defense of lack of knowledge. The trial court excluded the testimony.\textsuperscript{294}

On appeal the court of appeals reversed the conviction, finding that the trial court abused its discretion in excluding this psychological testimony.\textsuperscript{295} It affirmed the trial court's ruling on the State's motion for reconsideration.\textsuperscript{296} First, the court found that the defense did not have to file a notice pertaining to insanity, agreeing with defendant that the issue does not relate to insanity but, instead, to the issue of whether

\textsuperscript{288} Id. at 498, 532 S.E.2d at 410.
\textsuperscript{290} Id. at 503, 532 S.E.2d at 413.
\textsuperscript{291} Id.
\textsuperscript{292} Id. at 505, 532 S.E.2d at 414.
\textsuperscript{293} Id.
\textsuperscript{294} Id.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 508, 532 S.E.2d at 415.
defendant knew that her husband was abusing her son. Second, the court agreed with the defense that the testimony supported its sole defense and that the defense did not invade the province of the jury because, although the testimony bore upon the ultimate issue in the case, it is clear that the jury would have no way of reaching a conclusion on this issue without the testimony of the expert.

VII. Sentencing

A. Violent Felonies

_Fleming v. State_ definitively answered the question of whether the March 1998 amendment to O.C.G.A. section 17-10-6.1(b), ordering that anyone convicted of one of the enumerated serious violent felonies may not be afforded first offender treatment, would be applied retroactively. The Georgia Supreme Court held that it would not. The court determined that "a crime is to be construed and punished according to the provisions of the law existing at the time of its commission." Applying this holding and rationale, the court of appeals vacated the sentences of two appellants who had been convicted of armed robbery. In _Riley v. State_, defendant pleaded guilty to armed robbery. The trial court sentenced him to fifteen years of which he was to serve eight. The Department of Corrections refused to take custody of Riley, declaring that the sentence was illegal because it did not comport with the minimum mandatory ten years to serve, as dictated by O.C.G.A. section 17-10-6.1(b). The trial court then ordered Riley to serve ten years of the fifteen-year sentence.

Riley appealed the constitutionality of his sentence, asserting an ex post facto argument. By this time, however, the _Fleming_ decision had already addressed this issue, so the case was remanded to the court of appeals to rule in accordance with _Fleming_. Because the crime committed by Riley occurred in January of 1998 and the amendment to the statute was effective in March 1998, the sentence was reversed, and

297. _Id._ at 507-08, 532 S.E.2d at 415-16.
298. _Id._, 532 S.E.2d at 416.
300. _Id._ at 587, 523 S.E.2d at 316.
301. _Id._ at 589, 523 S.E.2d at 317.
302. _Id._, 523 S.E.2d at 318.
304. _Id._ at 697, 534 S.E.2d at 438.
305. _Id._ at 698, 534 S.E.2d at 438.
the trial court was ordered to resentence Riley in accordance with Fleming. 306

B. Recidivist Punishment

The Georgia Supreme Court was asked to reconsider its position regarding the question of who has the burden of production in proving that a prior felony conviction was valid in order for it to form the basis for recidivist punishment. 307 Until July 1999 the rule, pursuant to Pope v. State, 308 was that the State bore the burden of proving to the trial court that every prior felony conviction upon which the State relied in seeking recidivist punishment was legally obtained. 309 A legally obtained conviction required the State to prove the defendant had been properly advised of his rights. 310

In 1992, however, the United States Supreme Court decided Parke v. Raley. 311 The Court held that if a defendant raises the issue of involuntary waiver in opposing recidivist treatment, he should bear the burden of production to support his claim. 312 The Court reasoned that after almost twenty-five years of using Boykin v. Alabama 313 colloquies, there is no reason to presume from the mere unavailability of a transcript that the defendant was not advised of his rights. 314

This logic was invoked by the Georgia Supreme Court in Nash v. State. 315 In Nash the court overruled Pope to hold that the burden of production is placed upon the recidivism defendant to challenge the validity of a prior guilty plea to enhance a sentence. 316 The court established a three-part test to be applied. 317 First, the burden is on the State to prove the existence of a prior guilty plea that was assisted by counsel. 318 Second, the burden shifts to the defendant to produce

306. Id. Similarly, in Horton v. State, 241 Ga. App. 605, 527 S.E.2d 254 (1999), the court of appeals remanded Horton’s sentence for armed robbery to the trial court to be given first offender consideration in accordance with Fleming. Id. at 606, 527 S.E.2d at 256.
307. A felony conviction is valid if it was made pursuant to a voluntary waiver of rights.
309. Id. at 209, 345 S.E.2d at 844.
312. Id. at 24.
316. Id., 519 S.E.2d at 894.
317. Id. at 284, 519 S.E.2d at 896.
318. Id. at 285, 519 S.E.2d at 896.
evidence showing that the plea was invalid because it was uninformed.\textsuperscript{319} Third, if the defendant satisfies his burden, the State must show that the plea was constitutionally sound, either by the transcript or any extrinsic evidence.\textsuperscript{320}

In \textit{Nash} defendant was convicted of aggravated assault. At his sentencing, the State introduced a certified copy of a prior guilty plea to a felony. Defendant asserted that he had not been properly advised prior to his plea, pursuant to the decision in \textit{Boykin}. The State conceded that there was no transcript of the plea hearing but presented evidence by the prosecutor who was present at the plea hearing that the proper plea colloquy always accompanied guilty pleas in that court. Defendant was sentenced as a recidivist, and his sentence was affirmed by the court of appeals.\textsuperscript{321} The Georgia Supreme Court granted certiorari to consider its holding in \textit{Pope} regarding the burden of production.\textsuperscript{322} The supreme court remanded the case and ordered that Nash be resentenced according to the three-part method that it established.\textsuperscript{323}

To invoke the provisions of recidivist punishment, the State must be able to offer proof that the defendant has been convicted of at least one prior felony. In \textit{Brantley v. State},\textsuperscript{324} the State invoked O.C.G.A. section 17-10-7(c),\textsuperscript{325} arguing that Brantley had three prior felony convictions. It relied, however, upon one first offender conviction that, as a matter of law, cannot form the basis for recidivist treatment.\textsuperscript{326} The State argued that the first offender status had been revoked "by operation of law" because defendant had committed two more felonies while under his first offender probation.\textsuperscript{327}

The court of appeals reversed and remanded, holding that there is no such thing as revocation of first offender status by operation of law.\textsuperscript{328} The State must initiate revocation proceedings, which they did not do; therefore, Brantley had only two prior felony convictions and needed to be resentenced according to O.C.G.A. section 17-10-7(a).\textsuperscript{329}

\begin{itemize}
\item \textsuperscript{319} \textit{Id.}
\item \textsuperscript{320} \textit{Id.}
\item \textsuperscript{321} \textit{Id.}, 519 S.E.2d at 897.
\item \textsuperscript{322} \textit{Id.} at 281, 519 S.E.2d at 894.
\item \textsuperscript{323} \textit{Id.} at 286, 519 S.E.2d at 897.
\item \textsuperscript{324} 242 Ga. App. 85, 528 S.E.2d 264 (2000).
\item \textsuperscript{325} O.C.G.A. § 17-10-7(c) (1997).
\item \textsuperscript{326} 242 Ga. App. at 87-88, 528 S.E.2d at 266-67.
\item \textsuperscript{327} \textit{Id.} at 87, 528 S.E.2d at 267.
\item \textsuperscript{328} \textit{Id.}
\item \textsuperscript{329} \textit{Id.}
\end{itemize}
C. **Sex Offender**

The Sex Offender Registry promulgated by O.C.G.A. section 42-1-12 orders certain conditions of probation and makes available to the public certain information regarding defendants who are accused of crimes involving sexual acts.\(^3\) In *Sequeira v. State*,\(^3\) defendant pleaded guilty to two counts of simple battery for having placed his hands on the breasts and between the legs of a fifteen-year-old girl. As a condition of probation, Sequeira was ordered to register as a sex offender. The trial court based this condition upon the language of the statute that directs registration in the event of any conviction resulting from an underlying sexual offense against a victim who is a minor.\(^3\) The court of appeals reversed the order directing his registration, holding that the phrase "underlying sexual offense" must be given its literal construction to require that the underlying offense be one that is delineated under the "sexual offenses" portion of the Georgia Code.\(^3\) Because the crime of simple battery, regardless of the underlying sexual facts, is not one of those enumerated crimes, the trial court was not authorized to require Sequeira to register as a sex offender.\(^3\)

D. **Merger**

In *Taylor v. State*,\(^3\) defendant was convicted of violating the DUI statute\(^3\) by driving (1) under the influence of alcohol, (2) under the influence of drugs, and (3) under the combined influence of alcohol and drugs. The judge sentenced defendant to four consecutive twelve-month jail sentences on the DUI counts.\(^3\) The court of appeals held that the three counts of DUI are merely three different modes of committing the single offense of DUI.\(^3\) The trial court thus erred in subjecting him to multiple punishments for one offense.\(^3\)

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302. Id. at 718, 534 S.E.2d at 166.
303. Id. at 719, 534 S.E.2d at 167.
304. Id.
307. 238 Ga. App. at 753, 520 S.E.2d at 268.
308. Id. at 755, 520 S.E.2d at 269.
309. Id. (citing Hogan v. State, 178 Ga. App. 534, 343 S.E.2d 770 (1986)).
E. Probation Revocation

When probation is revoked for anything other than a new felony conviction, the Georgia Code dictates that the probation may be revoked for no more than two years.\textsuperscript{340} If, however, the defendant violated his probation by "the violation of a special condition imposed pursuant to this Code section," the court may revoke the balance of his probation.\textsuperscript{341} It is the phrase, "the violation of a special condition imposed pursuant to this Code section," that has resulted in opinions scattered all over the board by the appellate courts. Does any condition imposed by the court, outside of those general conditions placed upon all probationers, qualify as a "special condition imposed pursuant to this Code section"? If not, what distinguishes one special condition from another?

This issue was addressed in \textit{Glover v. State}.\textsuperscript{342} Defendant had been convicted in 1989 for child molestation. He was given a thirty-year sentence and ordered to serve seven years in prison and the remainder on probation. The trial court also ordered him to abide by an additional seven conditions while on probation that included restrictions on contact with children and required participation in counseling. One year after being released from prison, Glover was arrested for violating three of the seven special conditions. After a probation revocation hearing, the trial court found that defendant had violated his probation by contact with children and failure to participate in counseling. The trial court revoked ten years of his probation. Glover appealed, arguing that O.C.G.A. section 42-8-34.1 only authorizes the revocation of two years of his probation but not having committed a new felony offense. He argued that the conditions he violated were not special conditions "pursuant to this Code section."\textsuperscript{343}

The court of appeals analyzed the four cases that had construed that clause.\textsuperscript{344} The court concluded that the clause, as it held in \textit{Gearinger v. Lee}\textsuperscript{345} and \textit{Manville v. Hampton},\textsuperscript{346} was meaningless.\textsuperscript{347} This conclusion means that any violation of a special condition imposed upon a probationer can result in the full revocation of his probation. In so

\begin{itemize}
\item \textsuperscript{340} O.C.G.A. § 42-8-34.1 (1997).
\item \textsuperscript{341} \textit{Id.}
\item \textsuperscript{342} 239 Ga. App. 155, 521 S.E.2d 84 (1999).
\item \textsuperscript{343} \textit{Id.} at 155-56, 521 S.E.2d at 85.
\item \textsuperscript{344} \textit{Id.}
\item \textsuperscript{345} 266 Ga. 167, 465 S.E.2d 440 (1996).
\item \textsuperscript{346} 266 Ga. 857, 471 S.E.2d 872 (1996).
\item \textsuperscript{347} 239 Ga. App. at 158, 521 S.E.2d at 86.
\end{itemize}
ruling the court overruled *Lawrence v. State*[^348] and *Dunlap v. State*[^349] two cases in which the court had previously given some meaning to the phrase, "imposed pursuant to this Code section."[^350]

VIII. APPELLATE REVIEW

A. *Ineffective Assistance of Counsel*

It took habeas corpus proceedings for two appellants to get a ruling that they had been deprived of effective representation. In *Sloan v. Sanders*,[^351] defendant’s trial attorney filed a demand for trial, but when the case was not tried within the statutory time frame, the trial attorney failed to move for dismissal. Defendant was later convicted. His appellate attorney also failed to raise the error on appeal.[^352] The court of appeals affirmed the conviction.[^353] In a habeas proceeding, the issue was raised and argued. The Georgia Supreme Court held that the issue of trial counsel’s effectiveness had been waived by failure to raise the issue on appeal.[^354] However, the failure to raise the obvious issue rendered appellant counsel’s representation ineffective, and the lower court’s denial of the habeas petition was reversed.[^355]

In *Turpin v. Bennett*,[^356] defendant’s expert witness had taken the stand on defendant’s behalf, testifying on the issue of defendant’s insanity.[^357] Instead of testifying to the opinion he had previously rendered,

> the witness abandoned his former diagnosis without explanation, appeared "deathly ill," made "cartoonish" facial expressions, volunteered testimony that whoever committed the murder was a “vicious maniac,” and stated that appropriate psychiatric treatment for Bennett would have been nothing more than Tylenol for his headache, Zantac for his stomach ailment, and follow-up care. The jury laughed out loud at his testimony.[^358]

[^352]: Id. at 299, 519 S.E.2d at 220.
[^354]: 271 Ga. at 300, 519 S.E.2d at 220.
[^355]: Id., 519 S.E.2d at 220-21.
[^357]: Id. at 58, 525 S.E.2d at 355.
[^358]: Id., 525 S.E.2d at 355-56.
It was determined that the witness' behavior was due to his own impaired mental condition.\(^{359}\) The trial lawyer failed to move for a continuance in order to locate another expert witness or take some other remedial measure. Defendant was convicted.\(^{360}\) The supreme court affirmed.\(^{361}\) He filed a habeas petition, which was granted at the trial level based upon defendant's expert having rendered ineffective assistance.\(^{362}\) The Georgia Supreme Court reversed the granting of the habeas petition, holding that there is no constitutional right to the effective assistance of an expert witness. The petition was remanded to consider the remaining claims.\(^{363}\) The trial court again granted the petition, this time resting its decision upon the ineffective assistance of trial counsel for having failed to move for a continuance.\(^{364}\) The Georgia Supreme Court affirmed.\(^{365}\)

B. Failure to Preserve Issue for Appellate Review

The long-standing and erratically imposed reliance by the Georgia Court of Appeals upon O.C.G.A. section 5-6-40, which requires that each enumeration of error be set out separately to prevent the risk of waiver,\(^{366}\) was finally clarified. In Felix v. State,\(^{367}\) defendant, charged with possession of cocaine, argued a suppression motion at the trial level. The motion was overruled and defendant was convicted. On appeal defendant raised the trial court's denial of his suppression motion as an allegation of error. Defendant made four arguments in support of his contention.\(^{368}\) Citing O.C.G.A. section 5-6-40, the court of appeals addressed only one of the four grounds supporting this allegation of error, ruling that the other grounds were waived because they were not separately alleged in the enumeration of errors.\(^{369}\)

The Georgia Supreme Court granted certiorari to consider this practice.\(^{370}\) The supreme court attacked the "multifarious" and "disparate" approach to employing O.C.G.A. section 5-6-40 to render a

\(^{359}\) Id., 525 S.E.2d at 355.
\(^{360}\) Id. at 57, 525 S.E.2d at 355.
\(^{363}\) Id. at 590, 513 S.E.2d at 483.
\(^{364}\) 272 Ga. at 58, 525 S.E.2d at 355.
\(^{365}\) Id.
\(^{368}\) Id. at 534, 523 S.E.2d at 2.
\(^{369}\) Id.
\(^{370}\) Id.
The court clarified the difference between an enumeration of error, which is a challenge to an error of law, and an argument in support of a legal position, which is an appellant's contention of why the court erred. The former is the only allegation that must be laid out separately as an enumeration. The latter may consist of a number of arguments in support of the enumeration of error.

In Felix the enumeration of error was properly presented as a challenge to the trial court's ruling on the motion to suppress. The arguments, likewise, were the "individual facets of appellants' attack on the legal ruling . . . and are not, in and of themselves, errors of law." The case was remanded to the court of appeals to address the appellant's remaining arguments in support of his claim that the trial court erred in denying his motion to suppress.

C. Presence of the Defendant

Two malice murder convictions, from two different counties, were reversed by the Georgia Supreme Court on September 13, 1999. In both cases the error was the same—the defendant was not present at a proceeding at which he had a right to be and had not waived his constitutional right to be there. In Pennie v. State, the Cobb County trial court was notified by a juror that a spectator in the courtroom had attempted to speak with him. The juror was brought into chambers, along with the prosecutor and defense attorney, but defendant was absent. The juror was questioned, and both counsel agreed to allow the juror to remain in deliberations. At the conclusion of the in-chambers questioning, defense counsel announced that he waived his client's presence at that conference.

However, the waiver right does not belong to the attorney; it belongs only to the defendant. Defendant did not waive his presence; therefore, the trial court violated article I, section 1, part 12 of the Georgia Constitution, which imparts to every criminal defendant the "right to be present and see and hear, all the proceedings which are had..."
against him on the trial before the Court.\textsuperscript{380} A colloquy between the trial judge and jury is one such proceeding.

In \textit{Brooks v. State},\textsuperscript{381} the DeKalb County Superior Court held two in-chambers conferences at which the judge, the prosecutor, and Brooks’ defense counsel struck prospective jurors for cause, discussed and resolved defense counsel’s \textit{Batson} challenge, and conducted a portion of the jury strikes. Defendant had not waived his presence.\textsuperscript{382} Again, a conviction for malice murder was reversed.\textsuperscript{383}

\textbf{D. Abuse of Discretion}

In \textit{Kier v. State},\textsuperscript{384} the court of appeals held that the Lowndes County Superior Court abused its discretion by denying an indigent defendant’s request for a trial transcript of his mistrial in preparation for his retrial.\textsuperscript{385} Two factors “are relevant to evaluating an indigent defendant’s claim to a free transcript: (1) the transcript’s value in connection with the defendant’s trial or appeal; and (2) the accessibility of other means that would fulfill the same functions as a transcript.”\textsuperscript{386} Noting that a transcript of the first trial would allow the defense to impeach the State’s witnesses at the retrial and that the first trial ended in a hung jury based upon the jury’s apparent reluctance to accept the testimony of one or more State witnesses, the court should have provided the transcript to defendant free of charge.\textsuperscript{387}

\textbf{IX. MANDAMUS}

The creative lawyering award goes to those attorneys who represented the defendant in \textit{Dean v. Gober},\textsuperscript{388} who got caught in a reverse sting when he bought methamphetamine from an undercover cop. Gober, the defendant, filed a mandamus petition to require the chief of police to destroy all the drugs the police had seized and were storing for use in reverse stings. Gober cited the forfeiture statute, which required destruction of schedule I drugs and controlled substances when the owner was unknown. The chief possessed a safe full of such drugs, which he was required to destroy. Unfortunately for Gober, however, the

\textsuperscript{381} 271 Ga. 456, 519 S.E.2d 907 (1999).
\textsuperscript{382} \textit{Id.} at 456, 519 S.E.2d at 908.
\textsuperscript{383} \textit{Id.} at 457, 519 S.E.2d at 909.
\textsuperscript{385} \textit{Id.} at 154, 525 S.E.2d at 103.
\textsuperscript{386} \textit{Id.} at 153, 525 S.E.2d at 103 (citing Britt v. North Carolina, 404 U.S. 226 (1971)).
\textsuperscript{387} \textit{Id.}
\textsuperscript{388} 272 Ga. 20, 524 S.E.2d 722 (1999).
statute exempts from the flames those drugs held as evidence in a pending case. And Gober's mandamus did not end all reverse stings, only those involving schedule I drugs and drugs whose owners the police no longer know.

X. CONCLUSION

This reporting period saw some important new law, especially in the field of demurrers, the admissibility of audio-taped telephone conversations, the discovery statute, expert witnesses, and sentencing of recidivists and violent felons. Our thanks to those practitioners who have continued to challenge the law and who have remained creative and vigilant in their representation of accused citizens.

389. Id. at 20, 23, 524 S.E.2d at 723, 725.
390. Id. at 23, 524 S.E.2d at 725.