Criminal Law

Franklin J. Hogue
Laura D. Hogue

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I. INTRODUCTION

The Georgia Court of Appeals and Supreme Court produce a prodigious number of opinions in criminal cases every year. We reviewed 940 cases for this reporting period. We refrained from straying outside the reporting period, even though one recent case of significance tempted us greatly.¹ Look for it in next year’s review.

We are trial lawyers, so we organized this article in roughly the order in which issues may arise in the average case. If no opinions of note came out of the appellate courts in a given area of law, such as in the area of bonds and pretrial release, we simply did not include a section with that heading.

II. PRETRIAL ISSUES

A. Right to Counsel

The issue of one's right to counsel arises most often in misdemeanor cases when defendants, following conviction in a pro se trial, appeal on the grounds that the court denied their right to counsel. Waiver of counsel requires a showing on the record that the defendant forfeited this constitutional right knowingly and intelligently.2 The court of appeals reversed four convictions in this reporting period because the record failed to show that these pro se defendants waived their right to counsel.3

"When an accused is placed on trial for any offense, whether felony or misdemeanor, for which [she] faces imprisonment, the constitutional guarantee of right to counsel attaches. As with all constitutional rights, the accused may forfeit this right by a knowing and intelligent waiver. Waiver of counsel requires more than a showing of a knowledge of right to counsel; there must also be evidence of relinquishment of this right."4

The trial judge has a "serious and weighty responsibility" to protect accused citizens "whose life or liberty is at stake" by insuring that they know the perils of proceeding to trial without a lawyer.5 The judge must determine through a dialogue with the defendants that they understand the risks and, in spite of them, desire to proceed without counsel.6 The burden shifts on appeal from the defendant to the state; the state must "prove that the defendant received sufficient information and guidance from the trial court upon which to knowingly and intelligently relinquish this right."7 And when the record is silent, waiver is never presumed.8

5. Id. at 466, 504 S.E.2d at 239 (quoting McCook v. State, 178 Ga. App. 276, 276-77, 342 S.E.2d 757, 758-59 (1986)).
7. 233 Ga. App. at 467, 504 S.E.2d at 240.
B. Jeopardy

A reversal of a conviction by the appellate court rarely means that the state cannot try the defendant again. One important exception, however, arises when a prosecutor engages in misconduct "‘intended to subvert the protections afforded by the Double Jeopardy Clause.’"\(^9\) Such misconduct occurred in *Wilson v. State*\(^10\) when the prosecutor "improperly asked Wilson during cross-examination: ‘Mr. Wilson, did you try to negotiate a nolo contendere plea in this charge?’"\(^11\) While the trial court did grant an immediate mistrial, it later denied defendant's plea in bar of double jeopardy when the State sought to retry him.\(^12\) The court of appeals reversed, finding it impossible to believe that an error which is so blatant and so contrary to the most basic rules of prosecutorial procedure and conduct could have been simply a negligent act. To allow this prosecutor's action to be categorized as a mistake would require this Court to assume that this prosecutor was totally lacking the foundational knowledge for prosecutorial conduct in a courtroom.\(^13\)

Nevertheless, we wonder.\(^14\)

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11. *Id.* at 330, 503 S.E.2d at 926.
12. *Id.* at 329-30, 503 S.E.2d at 926.
13. *Id.*
14. In one other case of note concerning double jeopardy and mistrial, *Akery v. State*, 237 Ga. App. 549, 515 S.E.2d 853 (1999), the trial judge had previously informed counsel that he would adjourn for the day at 5:00 p.m. At 4:55 p.m., while defense counsel was conducting direct examination of his expert witness, the judge recessed for the day. Defense counsel objected, informing the court that his expert witness had plans to leave the country the following day. The judge recessed anyway. When court resumed the next day, the expert witness was absent. Defense counsel presumed that he had kept his travel plans. The State moved for mistrial because it had not yet cross-examined the witness. The judge asked defense counsel for his position on the State's motion, to which counsel responded that he had no position. The judge granted the mistrial. *Id.* at 549-50, 515 S.E.2d at 854.

When the case was called for retrial, the defense filed a plea in bar of double jeopardy. The trial court denied the plea. *Id.* at 550, 515 S.E.2d at 854. The court of appeals affirmed because defendant had not objected to the State's motion for mistrial and, in fact, had acquiesced to it by his refusal to take a position on it. *Id.*, 515 S.E.2d at 854-55.
C. Demurrer and Motion to Quash

In a case of first impression, the Georgia Supreme Court ruled that O.C.G.A. section 40-6-275 was unconstitutionally vague.\textsuperscript{15} This statute requires drivers involved in a traffic accident on a multilane highway "to move [their] vehicles out of harm's way unless the accident includes personal injury, death, or extensive property damage."\textsuperscript{16} Truck driver Johnny Johnson collided with another driver on Interstate 85. The crash rendered the other driver's car inoperable, but he was able to pull it off the roadway. Johnson, however, stopped his tractor-trailer in the middle lane of the three-lane highway about two hundred feet up the road from the disabled car and began to place warning markers behind his truck. A pickup truck slammed into Johnson's truck, killing the three occupants. Johnson was accused of vehicular homicide, predicated upon his failure to comply with O.C.G.A. section 40-6-275.\textsuperscript{17}

The supreme court ruled that the phrase "extensive property damage" failed to withstand a vagueness attack because the statute did not "so definitely and certainly define the offense that a person of reasonable understanding can know at the time of the commission of the act that the law is being violated."\textsuperscript{18} The court reasoned that extensive property damage could mean different things to different people:

Does the term 'extensive property damage' depend upon the quantity of physical damage to a vehicle? If so, what percentage of the vehicle must be damaged, ten percent, twenty percent, or fifty percent? Or does the term depend upon the part of the vehicle which is damaged? If so, must the damage be more than cosmetic; does damage to a fender and door suffice; or must the damage be to a mechanical part? Or, does the term 'extensive property damage' depend upon the cost of repairs? If so, does the term mean the cost of repairs must exceed $500, $1,000, or $5,000? Reasonable people will differ in their approach to these questions—and the statute provides no answers.\textsuperscript{19}

The statute, therefore, had to be declared unconstitutional.\textsuperscript{20}

In another case involving statutory construction, the court of appeals held that the criminal abortion statute did not apply to a woman who

\begin{footnotesize}
\begin{enumerate}
\item Id. at 112, 507 S.E.2d at 444 (citing O.C.G.A. § 40-6-275(c) (1997)) (emphasis added). O.C.G.A. section 40-6-275(c) has since been amended and no longer includes the phrase "extensive property damage." See O.C.G.A. § 40-6-275(c) (Supp. 1999).
\item 270 Ga. at 111, 507 S.E.2d at 444.
\item Id. (quoting Bilbrey v. State, 254 Ga. 629, 631, 331 S.E.2d 551, 552 (1985)).
\item Id. at 112, 507 S.E.2d at 444.
\item Id. at 111, 507 S.E.2d at 444.
\end{enumerate}
\end{footnotesize}
caused the death of her near-term fetus by shooting herself in the abdomen with a handgun.\textsuperscript{21} O.C.G.A. section 16-12-140(a) says:

Except as otherwise provided in Code Section 16-12-141, a person commits the offense of criminal abortion when he administers any medicine, drugs, or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.\textsuperscript{22}

The court observed that “[t]his statute is written in the third person, clearly indicating that at least two actors must be involved.”\textsuperscript{23} Because the court must give statutory words their plain and ordinary meaning, it followed that “O.C.G.A. [section] 16-12-140 does not criminalize a pregnant woman’s actions in securing an abortion, regardless of the means utilized.”\textsuperscript{24} Jacquelyn Aretha Hillman, therefore, committed no crime under Georgia law; the trial court should have granted her motion to quash the indictment.

In a case of first impression, the supreme court again expanded the felony murder rule.\textsuperscript{25} The court stated, “A person commits felony murder when, while committing a felony, he or she causes the death of another person, irrespective of malice. O.C.G.A. § 16-5-1(c). The underlying felony must also be one that is dangerous per se; that is, its attendant circumstances must create a foreseeable risk of death.”\textsuperscript{26} Defendant led police in a high-speed chase which ended when he collided head-on with another car, killing its driver.\textsuperscript{27} The supreme court ruled that felony fleeing and eluding a police officer, which results in the death of another in a traffic accident, can serve as the underlying felony to support a charge of felony murder.\textsuperscript{28}

A successful attack on a statute occurred in Powell v. State.\textsuperscript{29} The supreme court held that the sodomy statute, O.C.G.A. section 16-6-2, infringes upon our constitutional right to privacy “insofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent.”\textsuperscript{30} Powell was indicted for rape and aggravated sodomy of his wife’s seventeen-year-old

\begin{thebibliography}{99}
\bibitem{22} O.C.G.A. § 16-12-140(a) (1999).
\bibitem{23} 232 Ga. App. at 741, 503 S.E.2d at 611.
\bibitem{24} Id.
\bibitem{26} Id. at 812, 504 S.E.2d at 690.
\bibitem{27} Id.
\bibitem{28} Id.
\bibitem{29} 270 Ga. 327, 510 S.E.2d 18 (1998).
\bibitem{30} Id. at 336, 510 S.E.2d at 26.
\end{thebibliography}
niece. The niece testified that Powell "had sexual intercourse with her and engaged in an act of cunnilingus without her consent and against her will."\textsuperscript{31} Powell admitted the acts with his wife's niece, but testified that she had consented. The trial court charged the jury on rape and aggravated sodomy, but also charged the jury on the lesser offense of sodomy. The jury acquitted Powell of rape and aggravated sodomy, but found him guilty of sodomy.\textsuperscript{32} This verdict set up the attack on the statute, because it meant the jury found the state had failed to prove that the act of cunnilingus had been performed "'with force and against the will' of the niece."\textsuperscript{33} Therefore, the court had to decide whether the statute authorized the State to intrude upon our right to engage in a private consensual act of oral sex. The Court ruled it did not, thereby throwing the State out of the bedroom.\textsuperscript{34}

D. Discovery

In State v. Glenn,\textsuperscript{35} the court of appeals held that the state did not waive its privilege to withhold the identity of a confidential informant even though the state paid the informant.\textsuperscript{36} The trial court granted the defense's request to reveal the informant's identity because the privilege against revealing, the court reasoned, comes from a desire to protect "upright citizens" who give information to the police, not "people who are willing to sell, to market the information they have for a price."\textsuperscript{37} In reversing the trial court, the court of appeals noted that the privilege belongs to the state, not the informant, and the state preserves its

\textsuperscript{31.} Id. at 327, 510 S.E.2d at 20. \\
\textsuperscript{32.} Id. \\
\textsuperscript{33.} Id. (quoting O.C.G.A. § 16-6-2(a) (1999)). \\
\textsuperscript{34.} Id. at 336, 510 S.E.2d at 26. Other cases of note concerning demurrers and motions to quash indictments include State v. Roberts, 234 Ga. App. 522, 507 S.E.2d 194 (1998) (allowing defendant to be tried as party to the crime of child molestation and cruelty to children, predicated upon her failure to act to prevent the molestation and cruelty, even though the persons charged with directly committing the crimes were acquitted); Gamble v. State, 235 Ga. App. 777, 510 S.E.2d 69 (1998) (providing no bar to prosecution pursuant to O.C.G.A. section 17-7-53.1 if both prior indictments were not quashed as a result of action by the defendant or the court); State v. Boyer, 270 Ga. 701, 512 S.E.2d 605 (1999) (finding reckless conduct statute not unconstitutionally vague when applied to day care worker accused of rough handling of a toddler); D'Auria v. State, 270 Ga. 499, 512 S.E.2d 266 (1999) (finding sexual battery accusation against a medical doctor failed to provide the specificity necessary to apprise him of what he did in violation of the law); State v. Jackson, 271 Ga. 5, 515 S.E.2d 386 (1999) (finding disparity between statute that makes it a misdemeanor to possess less than one ounce of marijuana and statute that makes it a felony to purchase less than one ounce of marijuana survived equal protection challenge). \\
\textsuperscript{36.} Id. at 514-15, 512 S.E.2d at 662-63. \\
\textsuperscript{37.} Id. at 514, 512 S.E.2d at 662.
interest in withholding the identity of informers in order to encourage the free flow of information about criminal activity even if the police pay the informant.  

E. Continuance

Trial judges have broad discretion in granting or denying motions to continue. During the past year, only three cases of interest arose in connection with rulings on such motions.

In *Brady v. State,* though the evidence was sufficient to convict James Lee Brady of statutory rape, incest, and child molestation, the court of appeals reversed his conviction because the trial court denied the defendant's motion to continue. The motion was based upon the State's failure to provide defendant with a scientific report until four days before trial rather than the ten days as required by O.C.G.A. section 17-16-4(a)(4).

In *In the Interest of D.W.*, the trial court granted the State's oral motion in the middle of trial to amend its petition to add a charge against the juvenile in a juvenile delinquency hearing. Georgia law allows the State to amend a petition against a juvenile, but only if the amended petition is served in accordance with O.C.G.A. sections 15-11-26 and -27, which require personal service at least twenty-four hours prior to the hearing. The juvenile court, in spite of these clear statutes, denied the juvenile's motion to continue and found the juvenile to be delinquent; the court sentenced him to five years, the first two to be served in custody. According to the court of appeals, this was clear error requiring reversal.

In a case concerned more with issues of criminal contempt and due process, but arising out of a denial of a motion to continue, the trial court found that two attorneys demonstrated contumacious behavior by refusing to proceed with the trial of their client, Byron Barlow, who was facing his third trial for rape after two mistrials. After two trials and two hung juries, the court called one of the attorneys to tell him to report for trial number three. The attorney appeared but filed a motion

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38. *Id.* at 515, 512 S.E.2d at 662.
40. *Id.* at 287-88, 503 S.E.2d at 907.
41. *Id.* at 288, 503 S.E.2d at 908.
43. *Id.* at 777, 503 S.E.2d at 648.
46. *Id.* at 779, 503 S.E.2d at 649.
to continue, citing personal health reasons. He presented letters from his doctor, but they did not specify that he was unable to try the case. After a recess for the day, the attorney appeared in court, and the case was called for trial. "During jury selection, [the attorney] insisted that he could not go on due to his medical condition and then turned his back on the jurors—conduct the court believed was a tactic to taint the jury."48 The second attorney was called to appear in court to take over the trial. He appeared but refused to proceed stating, "With all due respect to your honor, it would be my position if your honor forces me to trial I would at every stage stand up and announce that I am unprepared to go forward, unwilling to go forward and not being able to represent Barlow."49 He introduced over four hundred pages of documents to show that he had been occupied with another case and was not prepared for Barlow's trial.50

The trial court found the two attorneys to be in criminal contempt and sentenced them to ten days in jail and a $500 fine.51 The court of appeals affirmed the contempt finding and the sentence, commenting that the attorneys should have proceeded to trial and pursued their appellate remedies rather than "disobey a direct, lawful order of the court."52

F. Suppression

Alcohol, drugs, and automobiles combine to raise search and seizure issues in hundreds of cases every year. Add a handful of search warrant and confidential informant cases and suppression becomes one of the most litigated areas of criminal law. This year was no exception. We waded through them all with a view to selecting for review only those cases in which the court applied the law to a novel set of facts—a rare treat in suppression law—or cases in which the court distinguished a new case from established cases on factual differences so slight that we can be assured of seeing even more suppression cases next year.

1. Implied Consent Warning. In State v. Fielding,53 the court of appeals held that a 1995 amendment to O.C.G.A. section 40-5-67.1 required police officers to read the implied consent warning "exactly as

48. Id. at 154, 513 S.E.2d at 276.
49. Id.
50. Id. at 153-54, 513 S.E.2d at 275-76.
51. Id. at 155, 513 S.E.2d at 276.
52. Id. at 156, 513 S.E.2d at 277.
set forth" in the Code section.\textsuperscript{54} Trial courts, for the most part, followed this rule of strict compliance and granted motions to suppress and motions in limine to exclude the results of breath tests in hundreds of cases when police officers failed to recite the warning exactly as written in the Code. Effective March 27, 1998, however, amended O.C.G.A. section 40-5-67.1 now requires that the "notice shall be read in its entirety but need not be read exactly so long as the substance of the notice remains unchanged."\textsuperscript{55} Following the rules that the court is "obligated to apply the law as it exists at the time its opinion is rendered"\textsuperscript{56} and "where a statute governs only procedure of the courts, including rules of evidence, it is to be given retroactive effect absent an expressed contrary intention,"\textsuperscript{57} the court of appeals reversed several cases this reporting period in which the trial courts had excluded the results of chemical tests of blood-alcohol content.\textsuperscript{58}

Even though police no longer need to read the exact language of the warning, they still cannot mislead anyone into thinking that she must first post bond on the DUI charge before she can exercise her right to the independent chemical tests referred to in the warning.\textsuperscript{59} Moreover, the implied consent warning mentions drugs as one substance for which the state will test; therefore, when requesting an independent blood test, one cannot rely on a hospital consent form, which states the blood will only be tested for alcohol, to argue that the State's use of the blood test to prove the presence of drugs exceeded the scope of the consent.\textsuperscript{60} If, after hearing the warning, a driver requests a second state-administered breath test on the same intoxilyzer machine rather than the independent blood test more commonly requested, the state must comply, even though

\begin{itemize}
\item \textsuperscript{54} \textit{Id.} at 677, 494 S.E.2d at 563.
\item \textsuperscript{55} O.C.G.A. § 40-5-67.1(b) (1997 & Supp. 1999).
\item \textsuperscript{57} \textit{Id.} at 292, 508 S.E.2d at 734 (quoting \textit{Polito v. Holland,} 258 Ga. 54, 55, 365 S.E.2d 273, 273 (1988)).
\item \textsuperscript{59} \textit{State v. Terry,} 236 Ga. App. 248, 511 S.E.2d 608 (1999).
\item \textsuperscript{60} \textit{State v. Lewis,} 233 Ga. App. 390, 504 S.E.2d 242 (1998).
\end{itemize}
such a request is equivalent to buying a second copy of the newspaper to check the accuracy of a story in the first copy.  

2. Roadblocks. In *Workman v. State*, the court of appeals examined “a screening officer’s role in relation to the stop of a motorist pursuant to a properly configured roadblock.” Defendant approached a roadblock while on her way home from a New Year’s Eve party. A screening officer, whose job was to divert to the side those drivers he suspected of drinking and driving, smelled alcohol on defendant and requested that she pull over, out of the flow of traffic. When she failed the field sobriety tests administered by the investigative officer, he placed her under arrest. The question before the court was whether the diversion to the side of the road constituted a further seizure requiring independent articulable and reasonable suspicion to support it. Because the court answered “no,” it overruled *State v. Fischer* to the extent that it may be read to conflict with *Workman*.  

3. Plain View. The most significant plain view case of the reporting period concerned whether an officer could conduct a warrantless search upon seeing in plain view a piece of paper that a motorist attempted to conceal between his legs as the officer stood at his window checking his license and insurance. The paper contained cocaine, but the supreme court held that the plain view exception to a warrantless search applied only “where the incriminating character of the item is immediately apparent” and, because the “piece of paper Brown dropped could not immediately be seen to be incriminating,” the officer was not authorized to search it. Brown’s “furtive movement” in attempting to conceal the

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63. Id. at 801, 510 S.E.2d at 111.
64. Id. at 800, 510 S.E.2d at 110.
66. 235 Ga. App. at 804, 510 S.E.2d at 112-13. Two other notable roadblock cases include *State v. Manos*, 237 Ga. App. 699, 516 S.E.2d 248 (1999) (roadblock impermissibly based upon unfettered discretion of field officer when officer suspended the roadblock and allowed cars through after traffic backed up and then resumed the roadblock when traffic thinned out) and *Davis v. State*, 237 Ga. App. 890, 517 S.E.2d 115 (1999) (motorist may be stopped when turning off roadway twenty to twenty-five yards from roadblock to avoid it and happens to turn onto a dirt road with nothing on it but a chicken house where officers reasonably presumed he did not live).
68. Id. at 831, 504 S.E.2d at 445-46.
paper, moreover, did not change the object from an innocuous one to an incriminating one.\textsuperscript{69}

4. Consent. The Reagan-era anti-drug mantra “Just Say No” does not seem to have found its way into the consciousness of motorists who know full well that their vehicles or persons contain illegal drugs but still say yes when asked by police officers for permission to search. Two cases this year reveal, once again, the vast difference in results when one motorist says yes and another says no to requests to search. In Voyles \textit{v. State},\textsuperscript{70} defendant parked her van in a Wal-Mart parking lot, got out, and encountered two drug investigators who asked her for permission to search her van. She said yes; they found drugs; then she complained on appeal that the officers had no reasonable suspicion to stop her and ask to search her van.\textsuperscript{71} In language familiar from dozens of cases, the court reminded Voyles:

There are three tiers of police-citizen encounters: (1) communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, (2) brief seizures that must be supported by reasonable suspicion, and (3) full-scale arrests that must be supported by probable cause.\textsuperscript{72}

The court placed Voyles’s encounter in tier one.\textsuperscript{73} When she gave consent, rather than walking away, she gave up her Fourth Amendment protections.\textsuperscript{74}

Contrast Voyles to Parker \textit{v. State},\textsuperscript{75} in which defendant received a traffic warning, the officer told him he was free to leave, then the officer asked Parker if he could search his car for drugs “just for the hell of it.” Parker said no, then had to wait while the officer called a drug dog to the scene. After the dog alerted, the officers searched and found drugs, and the trial court convicted Parker.\textsuperscript{76} However, the appellate court reversed.\textsuperscript{77} When the traffic stop ended and Parker was free to leave, the further question about searching occurred at tier one; Parker could refuse, which he did, and leave, which he said he would like to do, but

\begin{itemize}
\item \textsuperscript{69} \textit{Id.}, 504 S.E.2d at 446.
\item \textsuperscript{70} 237 Ga. App. 886, 517 S.E.2d 113 (1999).
\item \textsuperscript{71} \textit{Id.} at 886, 517 S.E.2d at 113.
\item \textsuperscript{72} \textit{Id.}, 517 S.E.2d at 117 (quoting McClain \textit{v. State}, 226 Ga. App. 714, 716, 487 S.E.2d 471, 473 (1997)).
\item \textsuperscript{73} \textit{Id.} at 887, 517 S.E.2d at 117.
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} 233 Ga. App. 616, 504 S.E.2d 774 (1998).
\item \textsuperscript{76} \textit{Id.} at 617, 504 S.E.2d at 775.
\item \textsuperscript{77} \textit{Id.} at 619, 504 S.E.2d at 776-77.
\end{itemize}
the officer would not allow him to do so. The officer had nothing more than a hunch to search, which, of course, violated Parker’s Fourth Amendment rights.

In another consent case, a neighbor tipped off the police that nineteen-year-old Jamie West was growing marijuana in his bedroom at his parents’ house, where he lived rent free. The police went over to have a look. West was not home, but his mother told the police to go ahead and search, saying that she wanted any drugs out of her house. The trial court granted defendant’s motion to suppress, reasoning that because he kept the bedroom door locked, he had an expectation of privacy and the police needed his consent to search. The court of appeals reversed, ruling that a resident homeowner possesses the authority to consent to a search of her entire home, “including an adult child’s bedroom which the homeowner permits the child to use for free.” The authors wonder how much rent would have produced a different outcome? Furthermore, what if West “paid” his rent in household chores?

5. Search Warrants. In a rare reversal of a search warrant case, the court of appeals reversed the trial court’s denial of a motion to suppress in which defendant argued that the affidavit provided by the officer to the magistrate failed to mention that the informant was “enraged” at defendant when he provided the information. It seems defendant had expressed a romantic interest in the informant’s “old lady.” The informant had a healthy criminal history, which included some probation and parole problems looming over him, and he had asked the officer for “help” on his pending DUI charge in exchange for the tip. These omissions denied the magistrate “the opportunity to accurately assess the informant’s reliability and veracity.”

78. Id. at 617, 504 S.E.2d at 775.
79. In a “first tier” case, the court ruled that a brief encounter in a drug area justified the brief stop and inquiry of Gonzalez, but because Gonzalez did not raise the issue, the court left unanswered whether this tier justified the police ordering Gonzalez to open his mouth and lift his tongue, under which he had several pieces of crack cocaine. Gonzalez v. State, 235 Ga. App. 253, 255, 509 S.E.2d 144, 146 (1998).
81. Id. at 185, 514 S.E.2d at 257.
82. Id. at 186, 514 S.E.2d at 258.
84. Id. at 69, 510 S.E.2d at 915.
85. Id. at 68-69, 510 S.E.2d at 915.
86. Id. at 69, 510 S.E.2d at 915.
Garmon v. State 87 produced a detailed analysis by the court, along with a strong dissent, of a situation in which the police stopped a citizen who drove away from a house for which the police had obtained and were about to execute a search warrant. 88 Relying on United States Supreme Court cases Michigan v. Summers 89 and Terry v. Ohio, 90 as well as the unique facts of this case, the court concluded that

it was reasonable within the meaning of the Fourth and Fourteenth Amendments for the officers, knowing that Wilson's premises were to be the subject of the immediate execution of a search warrant, to detain temporarily the vehicle containing Garmon in order to identify the occupants and see if one of them was the person they had just overheard discussing gambling and drugs on the phone. 91

The court described the detention as "minimally intrusive" and not an "arbitrary and capricious exercise of police power." 92

6. Protected Areas. In State v. Gallup, 93 the court of appeals held that a refrigerator is a protected area, which could not be legally searched, at least on the peculiar facts of this case. 94 Someone vandalized eighty-three storage units during the night, leaving the door to each one hanging open. The next day, investigators surveyed the damage, looking in storage units for items that would identify the owners. One investigator entered defendant's storage unit, which contained a four-wheeler, a desk, and a refrigerator. When the investigator failed to spot anything that identified the owner, he opened the refrigerator, thinking he might find a prescription bottle with a person's name on it. Instead he found thirty pounds of marijuana. He closed the refrigerator and reported his discovery; then another officer obtained a search warrant. 95 Affirming and quoting the trial court, the court of appeals ruled that

opening the refrigerator by Inspector Vick was a search, i.e., a quest for information by a state agent, that "was not supported by a warrant[,] nor] based on a plain view observation from a lawful vantage point

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88. Id. at 672, 510 S.E.2d 352.
90. 392 U.S. 1 (1968).
91. 235 Ga. App. at 676, 510 S.E.2d at 354.
92. Id.
94. Id. at 323, 512 S.E.2d at 69.
95. Id. at 322, 512 S.E.2d at 68.
7. Laser Speed Detection. *Izer v. State*, 97 a speeding ticket case decided February 5, 1999, drew a quick response from the Legislature. The court in *Izer* reversed the trial court for admitting evidence of speed based upon a laser gun without any evidence from the State to establish its reliability. 98 A mere seven weeks later the Governor approved a bill, effective March 25, 1999, which says:

Evidence of speed based on a speed detection device using the speed timing principle of laser which is of a model that has been approved by the Department of Public Safety shall be considered scientifically acceptable and reliable as a speed detection device and shall be admissible for all purposes in any court, judicial, or administrative proceedings in this state. A certified copy of the Department of Public Safety list of approved models of such laser devices shall be self-authenticating and shall be admissible for all purposes in any court, judicial, or administrative proceedings in this state. 99

The authors expect several challenges to this statute in the coming year.

III. EXTRINSIC ACT EVIDENCE: SIMILAR TRANSACTIONS

We have rarely encountered a prosecutor who declines to use against a defendant so-called "similar transaction" evidence when it can be found. Just as rare is the judge who disallows its use. It constitutes one of the most pernicious weapons in a prosecutor's arsenal and "creates a high risk of a jury reaching a verdict on an improper basis, i.e., because the accused has bad character or committed some bad act in the past." 100 The trend is to continue expanding the use of similar transaction evidence, not to limit it.

The leading case of the year in this area is *State v. Belt*. 101 The court of appeals reversed the trial court for failing to give a limiting instruction, at the time the extrinsic act evidence was admitted, even though no request to give the instruction was made. 102 The supreme court granted certiorari to answer the question: "Whether it is

96. Id.
98. Id. at 283-84, 511 S.E.2d at 627-28.
reversible error for a trial court, absent a request, to fail to instruct a
jury that similar transaction evidence admitted for a limited purpose
must be considered only for the limited purpose for which it was
admitted. The supreme court answered "no," despite saying that it
would be the better practice to do so, and reversed the court of ap-
peals.

The authors question whether limiting instructions ever produce the
intended salutary effect of causing jurors to refrain from doing the very
thing the instruction is designed to prevent—using the extrinsic evidence
to conclude that an accused person committed this crime because the
accused is a bad person. We hope to see the law in this area begin
to restrict the admissibility of such evidence. To that end, defense
lawyers should never fail to greet every notice of the State's intent to
introduce extrinsic act evidence with the best arguments against it. For
excellent discussions of such evidence we recommend the dissent by
Justices Benham, Fletcher, and Sears in State v. Belt and sources

How old can the extrinsic act be before the trial court must exclude it?
In Fields v. State, the court found twenty-six years was not too

103. State v. Belt, 269 Ga. at 763, 505 S.E.2d at 1.
104. Id. at 765, 505 S.E.2d at 2.
105. A similar transaction charge can cause confusion and produce an unfair trial when
(1999).
106. One of the permissible purposes for admitting extrinsic evidence, for example, is
"bent of mind." It is difficult to see how "bent of mind" does not amount to propensity or
character evidence, which everyone concedes is an impermissible method of convicting a
which is not especially unusual, the State introduced as a "similar transaction" a videotape
of a prior DUI arrest involving defendant. Id. at 536, 507 S.E.2d at 256. The court held:
Evidence of a prior DUI offense, regardless of the circumstances surrounding its
commission, is logically connected with a pending DUI charge as it is relevant to
establish that the perpetrator has the bent of mind to operate a motor vehicle
when it is less safe for him to do so.
107. 269 Ga. at 765, 505 S.E.2d at 2.
108. 269 Ga. at 862, 506 S.E.2d at 871 (Fletcher, J., dissenting). See also IMWINKEL-REID, supra note 94, at ix; MILICH, supra note 94, at § 11.1. For other cases following Belt
and Hinson, see Turner v. State, 235 Ga. App. 331, 508 S.E.2d 786 (1998); Mobley v. State,
235 Ga. App. 151, 508 S.E.2d 778 (1998); Murphy v. State, 270 Ga. 72, 508 S.E.2d 399
old.\textsuperscript{110} However, in \textit{Tyson v. State}\textsuperscript{111} twenty-seven years was too old.\textsuperscript{112} The court reversed Tyson's conviction, citing \textit{Gilstrap v. State},\textsuperscript{113} which held evidence that was thirty-one years old was too remote.\textsuperscript{114} Extrinsic act evidence is admissible even if the prior crime being introduced was reversed on appeal.\textsuperscript{115} A certified copy of a prior conviction for the same crime as the one for which the defendant stands trial is not sufficient to be introduced as a similar transaction.\textsuperscript{116}

\textbf{IV. \textit{S\textit{peedy Trial}}}

Three cases of interest arose this period concerning demands for trial. In \textit{George v. State}\textsuperscript{117} the issue on certiorari to the supreme court was "whether a demand for speedy trial filed in a state court case is effective in a term during which no jurors that have been summoned to serve in state court are impaneled, but during which jurors summoned to serve in superior court are impaneled."\textsuperscript{118} The answer:

Because the plain language of O.C.G.A. [section] 15-12-130 provides that jurors summoned to serve in superior court are only qualified to serve in state court if the requirements of [section] 15-12-130(b) are satisfied, we hold that a demand for speedy trial is not effective during a term such as that described above unless the requirements of subsection (b) are satisfied.\textsuperscript{119}

\textsuperscript{110} \textit{Id.} at 610, 504 S.E.2d at 779. The court cited \textit{Gibbons v. State}, 229 Ga. App. 896, 899, 495 S.E.2d 46, 50-51 (1997), which held twenty to twenty-nine years was not too remote. \textit{Id.}


\textsuperscript{112} \textit{Id.} at 732, 503 S.E.2d at 641.

\textsuperscript{113} 261 Ga. 798, 410 S.E.2d 423 (1991).

\textsuperscript{114} \textit{Id.} at 799, 410 S.E.2d at 424.


\textsuperscript{117} 269 Ga. 863, 505 S.E.2d 743 (1998).

\textsuperscript{118} \textit{Id.} at 863, 505 S.E.2d at 744.

\textsuperscript{119} \textit{Id.} at 863-64, 505 S.E.2d at 744. The statute states:

(b) Subsection (a) of this Code section shall be applicable only if:

\begin{enumerate}
  \item At the time the names of trial jurors are drawn by the judge of the superior court in accordance with Code Section 15-12-120, the judge who draws the jurors shall announce in open court the name or names of the court or courts other than the superior court wherein the jurors shall be competent and qualified to serve by virtue of this Code section;
  \item The precept issued by the clerk of the superior court in accordance with Code Section 15-12-65 shows that the jurors listed thereon are qualified and competent to serve as jurors in courts other than the superior court and shows the name of such court or courts; and
  \item The summons served upon or sent to each of the jurors pursuant to Code Section 15-12-65 affirmatively shows the name of all the courts wherein the juror
Applying the balancing test established in the United States Supreme Court case of Barker v. Wingo, the court of appeals held that a thirty-month delay in prosecuting a defendant accused of DUI did not require dismissal on grounds that the delay violated defendant's constitutional right to speedy trial.

A final case establishes no new rule, but reminds us that a Uniform Traffic Citation filed in the state court clerk's office triggers the accused person's right to demand a speedy trial.

V. DEATH PENALTY CHALLENGES

David Perkins lost his bid in the Georgia Supreme Court to reverse his sentence of death by electrocution. Perkins attempted to show that the Clayton County district attorney's office discriminated against him because he is a male, claiming that the district attorney only seeks the death penalty against men. Perkins showed that the Clayton County grand jury had indicted seventy-three men and eleven women for murder between 1985 and 1995, and had sought the death penalty against nine of those men and no women. The supreme court was unmoved by these "meager statistics," concluding that they failed to show "selective prosecution because they do not provide any evidence specific to his own case that support an inference that gender considerations played a part in the district attorney's decision to seek the death penalty against him."

In another Clayton County case, the supreme court reversed David Phillip Smith's conviction for murder and possession of a firearm during the commission of a felony and his sentence to death. According to the supreme court, the trial judge committed several errors. First, she refused to allow evidence of two incidents involving the victim, which occurred two days before the fatal shooting, when, according to the supreme court, these incidents were relevant to Smith's claim of justification. Next, the trial judge refused to allow the defense to impeach a State's witness with prior inconsistent statements until they...
were introduced into evidence. Prior inconsistent statements, however, need not be admitted into evidence in order to be used for impeachment. In yet another ruling limiting the defendant’s right to a thorough and sifting cross-examination, the trial judge refused to allow defendant to impeach a witness who alleged that defendant had made a racial slur about the victim by showing that the witness himself was racist and that he had made the slur. Then the trial judge would not allow the defendant to testify that he, a Caucasian man, had dated an African-American woman, which would have tended to show that he was not the type of person who would have uttered the racial slur. Lastly, the prosecutor caused error by arguing to the jury that their sentence would be reviewed by “those even after you,” a possible allusion to the appellate court, leading the jury to believe that the responsibility for their sentence lay elsewhere.

In the final death penalty case of note for this reporting period, the supreme court reversed the death penalty for William Kenny Stephens, whose case presented an unusual procedural twist. The jury voted for Stephens’s death in 1980. In 1988 the United States Court of Appeals for the Eleventh Circuit vacated the death sentence because Stephens's lawyer failed to explore mitigating evidence of Stephens's mental problems. Upon retrial of the sentencing phase in 1989, the jury again voted for death. The Georgia Supreme Court reversed because the standard of proof to be applied to the question whether Stephens had proved mental retardation—an issue to be proved in the guilt-innocence phase of the trial—had been reduced by the Legislature in 1988 from beyond a reasonable doubt, which the court applied in the 1989 sentencing retrial, to preponderance of the evidence, which will apply on Stephens's third sentencing trial.

VI. GUILTY PLEA

In King v. State, the supreme court ruled that a preprinted form used in a guilty plea hearing in which the defendant received a sentence of imprisonment did not constitute an adequate record for appellate

128. Id. at 244-45, 510 S.E.2d at 6-7.
129. Id. at 245, 510 S.E.2d at 7 (citing Duckworth v. State, 268 Ga. 566, 568, 492 S.E.2d 201, 202-03 (1997)).
130. Id. at 245-46, 510 S.E.2d at 7-8.
131. Id. at 246, 510 S.E.2d at 8.
132. Id. at 247, 510 S.E.2d at 8.
134. Id., 509 S.E.2d at 607.
135. Id. at 356-57, 509 S.E.2d at 609-10.
The court ordered that state courts must now produce a verbatim record of guilty plea hearings when the defendant receives a sentence of imprisonment.

In Lawrence v. State, even though the defense and the State recommended a sentence to the court that they considered to be fair, the trial court disagreed, saying that the sentence was too lenient. The court imposed the maximum sentence. The problem arose, however, because the court did not make it clear to defendant that she had a right to withdraw her guilty plea before it imposed the higher sentence. The court informed the parties, prior to hearing evidence, that it would reject the recommended sentence because it was too lenient, but then told defendant to "go ahead and present your evidence and call your witnesses or whatever you want to do," leading defense counsel to believe that he still had some chance to persuade the judge to accept the recommendation. He was sorely mistaken; the court imposed the maximum. The court of appeals decided that this case "exemplif[ied] the need for a bright line test." The trial court should follow the clear dictates of Uniform Superior Court Rule 33.10, which are not optional. "The consequences are too severe to allow vague statements or implication to supplant the definitive requirements articulated by the Supreme Court of Georgia and court rules." 

VII. PROBATION REVOCATION

In another case originating in Rockdale County Superior Court, the court of appeals reversed the trial court's revocation of Hernan Villa

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137. Id. at 369-70, 509 S.E.2d at 35.
138. Id. at 372, 509 S.E.2d at 36-37.
140. Id. at 603, 507 S.E.2d at 491.
141. Id. at 604, 507 S.E.2d at 491.
142. Id. at 605, 507 S.E.2d at 492.
143. Id. at 603, 507 S.E.2d at 491.
144. Id. at 605, 507 S.E.2d at 492.
145. Id. at 603-04, 507 S.E.2d at 491. Uniform Superior Court Rule 33.10 provides as follows:

If the trial court intends to reject the plea agreement, the trial court shall, on the record, inform the defendant personally that (1) the trial court is not bound by any plea agreement; (2) the trial court intends to reject the plea agreement presently before it; (3) the disposition of the present case may be less favorable to the defendant than that contemplated by the plea agreement; and (4) that the defendant may then withdraw his or her guilty plea as a matter of right. If the plea is not then withdrawn, sentence may be pronounced.

146. 234 Ga. App. at 605, 507 S.E.2d at 492.
147. Id.
Sanchez’s probation because the trial judge had no authority to impose as a condition of probation that Sanchez leave Georgia and return to Mexico and later revoke his probation when the court found out that he had not yet left the state. The original sentence of banishment from the state violated a fundamental law of our state constitution and the order to return to Mexico exceeded the trial court’s authority, encroaching into deportation laws, which are the sole province of the federal government.

VIII. JURY SELECTION

As seems to be the case every year, the appellate courts considered several cases in which jury selection formed the central issue, almost all of them spawned by Batson v. Kentucky. Because the principles of Batson apply equally to the defense as well as to the prosecution, an African-American defendant can no more exercise peremptory strikes in a discriminatory way against Caucasian jurors than can the State against the defendant by striking African-American jurors.

"To evaluate claims that the state or defendant used peremptory challenges in a racially discriminatory manner, the trial court must engage in a three-step process. The opponent of a peremptory challenge must make a prima facie showing of racial discrimination; the burden of production shifts to the proponent of the strike to give a race-neutral reason for the strike; the trial court then decides whether the opponent of the strike has proven discriminatory intent." Applying this test in Crawford v. State, the court of appeals affirmed the trial court’s conclusion that defense counsel based two of his eleven strikes against Caucasian jurors on racial grounds and replaced them on the jury.

The defendant in Burton v. State failed to show discriminatory intent when the State struck an African-American juror who attended a church that protested against the police and the district attorney’s

154. Id. at 323, 504 S.E.2d at 19.
155. Id. at 324-25, 504 S.E.2d at 22-23.
A special concurrence and a dissent in this case took issue, however, with the form of the analysis taken by the majority, arguing that the majority had in effect added a fourth condition to the three-part test, an inquiry into whether “the trial court's decision based upon whether the opponent proved the race-neutral reason was not really neutral.” As in most Batson-like cases, the analysis is in-depth and requires close reading. The concurrence noted that such analysis has caused many trial courts to fear reversal in this area of law, and, in fact, reversals have become routine, along with lengthy majority opinions, special concurrences, and heated dissents.

IX. OPENING STATEMENTS

Darien Alexander and Rodriguez Hartry were tried together for murder. The jury convicted them both. But, in a four to three decision, Alexander's conviction was reversed while Hartry, who raised the same issue on appeal, saw his conviction affirmed. In both cases the supreme court considered whether comments made by the prosecutor in opening statement rendered the jury's verdict questionable. In Alexander, the answer was “yes;” in Hartry, “no.”

The district attorney told the jury in opening that he would show that the drive-by shooting, which killed a man who was standing on a porch, was gang-motivated, a retaliation for an earlier confrontation. But at trial he failed to offer any such evidence. Counsel for Alexander moved for a mistrial, which the court denied. The supreme court ruled that the mistrial should have been granted because the prosecutor never made any showing to support his opening statement and made no defense of his failure to provide such evidence, which led the court to conclude that his remarks during opening were not made in good

157. Id. at 430, 504 S.E.2d at 280-81.
158. Id. at 431, 504 S.E.2d at 281 (Eldridge, J., concurring specially). Id. at 434-36, 504 S.E.2d at 283-85 (Ruffin, J., dissenting).
161. Alexander, 270 Ga. at 351, 509 S.E.2d at 61; Hartry, 270 Ga. at 600, 512 S.E.2d at 255.
162. Alexander, 270 Ga. at 348-51, 509 S.E.2d at 59-61; Hartry, 270 Ga. at 597-600, 512 S.E.2d at 253-55.
Hartry’s case differed because of overwhelming evidence that he pulled the trigger that fired the fatal bullet.\textsuperscript{165}

X. STATE’S CASE IN CHIEF

A. Elements of the Crime

The State’s failure to meet its burden of proving beyond a reasonable doubt every element of the crime, despite jury verdicts of guilty, caused several reversals. The most significant case was \textit{State v. Collins}.\textsuperscript{166} The defendant was convicted of rape, statutory rape, and incest involving a twelve-year-old girl. The court of appeals affirmed the convictions of statutory rape and incest, but reversed the rape conviction, holding that the State must be required to prove the element of force in a rape conviction, regardless of the age of the victim.\textsuperscript{167} The supreme court granted certiorari to consider whether the element of force may be presumed as a matter of law to obtain a rape conviction when the victim is a minor. Relying upon \textit{Drake v. State},\textsuperscript{168} the supreme court affirmed the judgment of the court of appeals.\textsuperscript{169} The court explained that the rape statute requires the State prove that the act of carnal knowledge be committed "forcibly" and "against the will" of the victim.\textsuperscript{170} In cases of young victims, the fact that the victim is under the age of consent may supply the "against her will" element but the fact of the victim’s age “cannot supply the element of force as a matter of law in rape cases.”\textsuperscript{171}

The holding did not come easily. The majority noted several opinions between \textit{Drake} and \textit{Collins} which had denigrated the holding of \textit{Drake} to such a degree that it would have authorized the court to reconsider the requirement of force in rape of children.\textsuperscript{172} The majority, nevertheless, chose to reaffirm its holding rather than presume force based upon the victim’s age.\textsuperscript{173} The court found the rationale in \textit{Drake} to be

\begin{itemize}
\item \textsuperscript{164} \textit{Id.} at 349-50, 509 S.E.2d at 60.
\item \textsuperscript{165} \textit{Hartry}, 270 Ga. at 599, 512 S.E.2d at 254.
\item \textsuperscript{166} 270 Ga. 42, 508 S.E.2d 390 (1998).
\item \textsuperscript{167} 229 Ga. App. 658, 658, 495 S.E.2d 59, 61 (1997).
\item \textsuperscript{168} 239 Ga. 232, 236 S.E.2d 748 (1977).
\item \textsuperscript{169} \textit{Collins}, 270 Ga. at 42, 508 S.E.2d at 390.
\item \textsuperscript{170} \textit{Id.} at 42-43, 508 S.E.2d at 390-91.
\item \textsuperscript{171} \textit{Id.} at 43, 508 S.E.2d at 391.
\item \textsuperscript{173} 270 Ga. at 43, 508 S.E.2d at 391.
\end{itemize}
persuasive; if force were presumed by a victim’s age, there would be virtually no need for the crime of statutory rape.\(^\text{174}\) The court also noted that as the legal age of consent has increased, it has become necessary in rape cases to distinguish between different categories of underage girls; the kindergartner and the sexually active high-schooler, for example.\(^\text{175}\) Additionally, the court pointed out that the quantum of evidence to prove force against a child is minimal because intimidation may be substituted for force.\(^\text{176}\)

Justice Hines, concurring, expressed confidence that prosecutors would act reasonably in choosing to indict between the crime of rape and statutory rape, if the element of force were abandoned.\(^\text{177}\) Justice Hunstein dissented, arguing that the majority’s holding was contrary to the Legislature’s stated intention “to increase the protection afforded by law to the children of this State,”\(^\text{178}\) by making it “extremely difficult” for the State to obtain rape convictions for those who assault very young or very abused children.\(^\text{179}\) She attacked the \textit{Drake} holding, stating that severing the proof necessary to satisfy the two elements of “forcibly” and “against her will”\(^\text{180}\) was “clever lawyering, but poor law” and noting that in \textit{Whitaker v. State}\(^\text{181}\) and \textit{Gore v. State}\(^\text{182}\) the presumption of “constructive force” was granted to victims who are physically or mentally incapable of giving consent, while \textit{Drake} limited that principle to helpless adult victims, not children.\(^\text{183}\) Finally, Justice Hunstein attacked the majority’s concern that, without so holding, the crimes of statutory rape and rape would in effect merge.\(^\text{184}\) She noted that the statutory rape statute “was intended to apply only to cases where the act of intercourse is accomplished with the actual consent or acquiescence of the female, and is to be treated as rape merely because the female is under the age of consent as therein fixed.”\(^\text{185}\)

\(^{174}\) \textit{Id.} at 43-44, 508 S.E.2d at 391.

\(^{175}\) \textit{Id.} at 45, 508 S.E.2d at 392.

\(^{176}\) \textit{Id.}

\(^{177}\) \textit{Id.} at 46, 508 S.E.2d at 393 (Hines, J., concurring).

\(^{178}\) \textit{Id.} at 50, 508 S.E.2d at 395 (Hunstein, J., dissenting).

\(^{179}\) \textit{Id.} at 49, 508 S.E.2d at 395.

\(^{180}\) \textit{Id.} at 53, 508 S.E.2d at 398.

\(^{181}\) 199 Ga. 344, 34 S.E.2d 499 (1945).

\(^{182}\) 119 Ga. 418, 46 S.E. 671 (1904).

\(^{183}\) \textit{Collins}, 270 Ga. at 49, 508 S.E.2d at 394 (Hunstein, J., dissenting).

\(^{184}\) \textit{Id.}

\(^{185}\) \textit{Id.} at 51, 508 S.E.2d at 396-97. But see the distinction between the rape and aggravated sodomy law. In \textit{Brewer v. State}, 236 Ga. App. 546, 512 S.E.2d 30 (1999), the trial court instructed the jury that

[a] person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person. A child under the age of
In other types of cases, the State's proof failed to satisfy the necessary elements of the indicted offense. A conviction for the misdemeanor offense of converting payments for real property improvements was reversed when the court of appeals determined that the crime required proof of specific intent to defraud. Thompson was hired to do stucco work; he made arrangements with Yearty to purchase the materials. Yearty purchased the materials and delivered them to Thompson, but Thompson withheld payment for the supplies, claiming that he was setting off a previous debt Yearty owed him. The court of appeals reversed the conviction, holding that the State bears the burden of proving beyond a reasonable doubt that Thompson had the specific intent to defraud as defined by the statute.

It takes more than one's opinion to convict someone of possession of marijuana. In Adkinson v. State, defendants argued successfully for the reversal of their convictions on the crime of possession of marijuana with intent to distribute because there was no chemical analysis of the green, leafy material found in their car. Both the detective and a GBI chemist testified that they thought the material was marijuana, but as the chemist testified, he did not test it. The court of appeals found that, as a matter of law, this belief did not constitute sufficient evidence for the conviction to stand.

In the area of DUI law, the court of appeals has dealt with challenges to the admission of inspection certificates to prove that the breath test machines were in proper condition. In Jackson v. State, a case of first impression, the court held that the self-authenticating provision of O.C.G.A. section 40-6-392(f) is constitutionally valid; therefore, introduction of the certificate of inspection does not require proof of the

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fourteen years is legally incapable of consenting to sexual contact. In cases of incapacity, such as with a child under the age of fourteen years, the element of force is automatically supplied by the law.

Id. at 547, 512 S.E.2d at 31. Citing previous case law, the court distinguished the necessity for a showing of force to prove aggravated sodomy on a child from the necessity for the force element in the rape of a child, as dictated by State v. Collins, 270 Ga. 42, 508 S.E.2d 390.

187. Id.
188. Id. at 793, 505 S.E.2d at 536. See O.C.G.A. § 16-8-15(a) (1999).
191. Id. at 271, 511 S.E.2d at 529.
192. Id.
193. Id.
business records exception elements dictated by O.C.G.A. section 24-3-14.\textsuperscript{195} In \textit{Andries v. State},\textsuperscript{196} the holding was extended to allow the State to meet its burden by introduction of noncertified copies of inspection certificates.\textsuperscript{197} The court of appeals found that had the Legislature intended for O.C.G.A. section 40-6-392(f) to require certified copies, it would have expressly provided so.\textsuperscript{198}

In traffic cases, the State may not satisfy its burden of proving venue merely by introducing the Uniform Traffic Citation ("UTC").\textsuperscript{199} In \textit{Graves v. State},\textsuperscript{200} the defendant unsuccessfully appealed his convictions for traffic violations to the court of appeals.\textsuperscript{201} The supreme court granted certiorari to consider whether the court of appeals correctly determined that the City of Atlanta Traffic Court took judicial notice of venue by the conclusion that the UTCs, upon which the traffic prosecution was based, indicated that the offenses were committed in Fulton County. The supreme court concluded that the UTC is not evidence and "cannot provide the factual predicate necessary to establish venue."\textsuperscript{202} The supreme court further ordered that "henceforth, if a trial court intends to take judicial notice of any fact, it must first announce its intention to do so on the record, and afford the parties an opportunity to be heard regarding whether judicial notice should be taken."\textsuperscript{203}

\section*{B. \textit{Hearsay}}

In the state's case in chief, the most common hearsay exceptions will be the necessity exception and res gestae—the latter used primarily for the purpose of introducing hearsay from police officers to explain their conduct.

To satisfy the requirements of the necessity exception to the hearsay rule, the state must show unavailability of the witness and the reliability of the out-of-court statement. When the state's witness, usually the victim, is dead, the first tier of unavailability is, of course, satisfied. The reliability of that statement, however, must still be shown in order for it to be properly admitted. In \textit{Chapel v. State},\textsuperscript{204} state-

\begin{footnotesize}
\begin{itemize}
\item 195. \textit{Id.} at 571, 504 S.E.2d at 508.
\item 197. \textit{Id.} at 844-45, 512 S.E.2d at 687.
\item 198. \textit{Id.}
\item 201. \textit{Id.} at 628-29, 490 S.E.2d at 112-13.
\item 202. 269 Ga. at 772, 504 S.E.2d at 680.
\item 203. \textit{Id.} at 775, 504 S.E.2d at 682.
\item 204. 270 Ga. 151, 510 S.E.2d 802 (1998).
\end{itemize}
\end{footnotesize}
ments made by the murder victim to three of her friends regarding her plans to meet with defendant and the purpose for their meeting were properly admitted by the trial court. But in Azizi v. State, hearsay statements made by the deceased victim to her lover were not admissible because they were inherently unreliable. The victim’s lover testified that the deceased victim had told him that Azizi abused and neglected her and told her that he would kill her if she left him. The supreme court held that the admission of these statements constituted reversible error because “[a] married person’s complaints about that person’s spouse, made to one with whom the married person is conducting an adulterous affair, are subject to the possibility of exaggeration if not outright falsehood.”

The statements of witnesses given to police are often tendered through the police officer under the res gestae exception to the hearsay rule—ostensibly to explain the officer’s conduct. This exception has its limitations. In Harrison v. State, a husband and wife were tried and convicted in a joint bench trial. The officer testified that when he arrived, defendants, their children, and two of defendants’ parents were at their home. Both defendants had minor injuries and both told the officer that they had been involved in a dispute and had each struck the other although they both blamed the other for striking the first blow. Both defendants were arrested and, when called at their joint trial, invoked the marital privilege to avoid testifying against the other. After the officer testified to both their statements the night of the arrest, the court found both defendants guilty of battery.

The Harrisons appealed, citing as error the admission of the officer’s hearsay testimony because the State failed to demonstrate the need for the testimony. The court of appeals agreed, noting as pivotal the fact that there were two other adult witnesses at the house on the night of the arrest who, for no known reason, were never interviewed or called as witnesses. The convictions were reversed.

205. Id. at 154-56, 510 S.E.2d at 806-07.
207. Id. at 712, 512 S.E.2d at 626.
208. Id.
209. Id. (citing Carr v. State, 267 Ga. 701, 705-06, 482 S.E.2d 314, 319 (1997)).
211. Id. at 485, 518 S.E.2d at 757.
212. Id.
213. Id. at 485-86, 518 S.E.2d at 758.
214. Id. at 489, 518 S.E.2d 760.
In Weems v. State,\(^{215}\) the supreme court found the admission of the police officer's hearsay testimony in defendant's murder trial erroneous, yet affirmed the conviction, holding that the error was harmless in light of the eyewitness identification of defendant as the shooter.\(^{216}\) The investigating detective testified at trial that a police "canvass" of the area where the shooting took place resulted in the discovery "that a possible suspect was Fernando."\(^{217}\) When defense counsel made a hearsay objection to the testimony, the trial court allowed the testimony because it explained the officer's conduct.\(^{218}\) In finding error, the court noted as follows:

"It is most unusual that a prosecution will properly concern itself with why an investigating officer did something." Stated another way, unless it is the rare instance in which the conduct of an investigating officer is a matter concerning which the truth must be found, it is error to permit an investigating officer to testify, under the guise of explaining the officer's conduct, to what other persons related to the officer during the investigation.\(^{219}\)

C. Intent

In July 1998 the Georgia Supreme Court faced identical issues in their review of two different murder cases—the admissibility of fictional movies as proof of the defendant's intent. In both instances, the introduction of this evidence was approved by the majority, which drew a strong dissent by Justices Fletcher, Benham, and Sears.

In Rushin v. State,\(^{220}\) defendant was being tried for the murder of a Worth County convenience store employee. The State introduced as evidence a videotape of the movie entitled Menace II Society because defendant had viewed it at least six times and often spoke of his favorite character, "O-dog." The portion of the videotape played to the jury showed "O-dog" brutally shooting store clerks during a convenience store robbery and, as Rushin had done, taking the store's surveillance videotape. The trial court instructed the jury that the introduction of

\(^{216}\) Id. at 579-80, 501 S.E.2d at 808-09.
\(^{217}\) Id. at 578, 501 S.E.2d at 808. Weems, the defendant, was identified as "Fernando" by a witness at trial. Id.
\(^{218}\) Id.
\(^{219}\) Id. at 578-79, 501 S.E.2d at 808 (citing Teague v. State, 252 Ga. 534, 536, 314 S.E.2d 910, 912 (1984)).
the film was "for the limited purpose of any bearing on the defendant's bent or state of mind at the time of the incident on trial."\textsuperscript{221}

Defendant alleged error in the introduction of the film because it was an improper attack on his character.\textsuperscript{222} The supreme court disagreed, holding that defendant's "fascination" with the film and his having copied the conduct in the film made it relevant to the question of his bent of mind.\textsuperscript{223}

The dissent disagreed, asserting that the prejudicial effect of showing a fictitious film outweighed the probative value of the evidence.\textsuperscript{224} The dissent argued that the "real purpose" of the introduction of the film was to present a "clear and colorful image" of two brutal murders.\textsuperscript{225} And despite the limiting instruction, the impressions generated by the movie would be particularly difficult to limit.\textsuperscript{226}

In \textit{Beasley v. State},\textsuperscript{227} defendant was tried and convicted for a Toombs County murder. During the trial, the State played for the jury the entire film \textit{Natural Born Killers}. Beasley had watched the movie at least nineteen times, told people he wanted to be like the characters in the movie, and sometimes referred to himself by the names of characters in the movie. The movie depicts a violent murder, rape, kidnapping, and prison mutiny.\textsuperscript{228} The movie was allowed into evidence, without limiting instructions, to show Beasley's bent of mind.\textsuperscript{229}

Again, the dissent strongly disagreed, arguing that the prejudicial effect of misleading the jury by blurring the distinction between Beasley and the fictional character on film greatly outweighed any probative value of the movie.\textsuperscript{230}

\textbf{D. Expert Witnesses}

In cases of sexual abuse, the state may not offer expert testimony which bolsters the victim's statements. In \textit{Thompson v. State},\textsuperscript{231} the trial court erred in allowing the State's expert witness in a molestation, statutory rape, and incest case "to relate her conclusion that the victim's allegations of sexual abuse were credible and that the victim's actual

\textsuperscript{221} Id. at 600, 502 S.E.2d at 456.
\textsuperscript{222} Id. at 600-01, 502 S.E.2d at 456.
\textsuperscript{223} Id. at 601, 502 S.E.2d at 456.
\textsuperscript{224} Id., 502 S.E.2d at 457 (Fletcher, J., dissenting).
\textsuperscript{225} Id. at 603, 502 S.E.2d at 458.
\textsuperscript{226} Id.
\textsuperscript{228} Id. at 622, 502 S.E.2d at 238.
\textsuperscript{229} Id.
\textsuperscript{230} Id. at 626, 502 S.E.2d at 241 (Fletcher, J., dissenting).
descriptions of sexual activities including those with defendant were not discounted as inaccurate.\textsuperscript{232} The court concluded, nevertheless, that because the fact of the child's sexual abuse was not controverted—the defense conceded that the child had been abused by many people but he was not one of them—the error did not likely contribute to the verdict.\textsuperscript{233}

In a similar case, \textit{Parrish v. State},\textsuperscript{234} defendant was found guilty of rape. Defendant argued that the trial court erred in allowing the State to present an expert witness who had not examined defendant or the victim to testify about the profile of a typical abuser and the effects of such abuse on victims (the battered person syndrome). The evidence was introduced because, through argument and cross-examination of the victim, the defense sought to show that the victim had means and opportunity to seek help during the time period she claimed she was being held by defendant.\textsuperscript{235}

The court of appeals held the testimony regarding battered person syndrome was relevant and admissible to rebut Parrish's defense because the expert testified that failure to make an outcry made sense within the profile of a battered woman.\textsuperscript{236} However, the court agreed with defendant that the testimony regarding the profile of an abuser was not properly admitted because it improperly placed defendant's character in issue.\textsuperscript{237} Given the "overwhelming evidence" of defendant's guilt, the court held it was highly probable that the error did not contribute to the verdict and affirmed the conviction.\textsuperscript{238}

\textit{Lewis v. State}\textsuperscript{239} appears to be one prosecutor's attempt to circumvent the backlogged GBI crime lab. The State prosecuted defendant for possession of cocaine with neither a crime lab expert nor a stipulation to the identity of the drug. The State simply called upon the police officer to testify that he conducted a field test on the substance confiscated from defendant and that the test results identified the substance as cocaine. On appeal, defendant argued that the trial court erred in denying his motion for directed verdict of acquittal because the field test results did not constitute proof beyond a reasonable doubt that the substance was cocaine.\textsuperscript{240} In reversing Lewis's conviction, the

\textsuperscript{232} Id. at 364, 504 S.E.2d at 234-35.
\textsuperscript{233} Id. at 365, 504 S.E.2d at 235.
\textsuperscript{235} Id. at 276, 514 S.E.2d at 462.
\textsuperscript{236} Id. at 276-77, 514 S.E.2d at 462-63.
\textsuperscript{237} Id. at 277, 514 S.E.2d at 463.
\textsuperscript{238} Id.
\textsuperscript{240} Id. at 562, 504 S.E.2d at 735.
court held an expert witness is required. 241 The dissent disagreed, noting that the reliability of the field test would be tested by defense cross examination and the jury would determine the appropriate weight to afford such a test. 242

E. Statements of Codefendants

The state's introduction of statements of nontestifying codefendants continues to clash with the defendant's right to confront and cross-examine witnesses who testify against him. In Hanifa v. State243 and Kirk v. State244 the supreme court held that redacted statements of nontestifying codefendants violated the Confrontation Clause; nevertheless, the error was harmless.245 The statements of the nontestifying codefendants admitted into evidence identified Hanifa by nickname as a person at the scene of the crimes and as an active participant in the initial assault of the victim. Her participation after the initial assault was described as having been done by "someone" or "others" or "they," while her co-indictees who were not on trial with her were identified by name.246 While the number of participants in the crimes made it less clear that the generic terms referred to Hanifa, the jury was notified by the use of the terms and by the deletions on the typewritten statements that a name had been redacted, making the statements similar to Bruton's unredacted confessions247 and it a constitutional violation.

Following the lead of the U.S. Supreme Court, we hold that, unless the statement is otherwise directly admissible against the defendant, the Confrontation Clause is violated by the admission of a nontestifying co-defendant's statement which inculpates the defendant by referring to the defendant's name or existence, regardless of the existence of limiting instructions and of whether the incriminated defendant has made an interlocking incriminating statement. A co-defendant's statement meets the Confrontation Clause's standard for admissibility when it does not refer to the existence of the defendant and is accompanied by instructions limiting its use to the case against the confessing co-defendant. The fact that the jury might infer from the contents of the co-defendant's statement in conjunction with other evidence, that the defendant was involved does not make the admission

241. Id. at 561-62, 504 S.E.2d at 734-35.
242. Id. at 563, 504 S.E.2d at 735-36 (Ruffin, J., dissenting).
244. Id. The supreme court consolidated these two cases for review.
245. Id. at 801, 505 S.E.2d at 736.
246. Id. at 804, 505 S.E.2d at 738.
Nevertheless, the court concluded that the error was not sufficiently harmful to authorize reversal of her convictions because of the other overwhelming evidence of her guilt.\textsuperscript{249}

An interesting twist to the Confrontation Clause mandate occurred in \textit{Alexander v. State}\textsuperscript{250} when the prosecuting attorney called Alexander's co-indictee, Tucker, to the stand. Tucker had previously entered a guilty plea to the indicted crime of armed robbery, but when he took the stand he invoked his right to remain silent. He was granted immunity and received numerous contempt adjudications; nevertheless, he refused to testify. Over defendant's objection, the prosecuting attorney was permitted to ask Tucker a series of leading questions that suggested the answers sought, thus inculpating Alexander.\textsuperscript{251}

The court of appeals found that the trial court erred in permitting the prosecutor to question Tucker in that manner because such testimony "serves to abrogate a defendant's fundamental right to confront, question and secure answers from his accusers."\textsuperscript{252} Nevertheless, the court did not reverse because it found the error harmless due to the overwhelming evidence of guilt.\textsuperscript{253}

\textbf{F. Limiting Cross-examination}

The trial practitioner should take note of some types of cross-examination that are properly forbidden. In \textit{Golden v. State},\textsuperscript{254} defense counsel attempted to cross-examine a State witness—who had testified about a fact differently than a previous State witness—by asking the second witness if her testimony would change if she knew that the first witness had "sat in that very witness chair" and testified in a certain way.\textsuperscript{255} The State objected, arguing that the witness could not comment on evidence presented outside her presence.\textsuperscript{256} The trial court sustained the objection, and the court of appeals affirmed the ruling,  

\begin{itemize}
\item 248. 269 Ga. at 803-04, 505 S.E.2d at 738.
\item 249. \textit{Id.} at 804, 505 S.E.2d at 738. \textit{See also} White v. State, 270 Ga. 804, 514 S.E.2d 14 (1999) (making the same finding but also holding that the error did not mandate reversal of the conviction).
\item 251. \textit{Id.} at 143-44, 511 S.E.2d at 251-52.
\item 252. \textit{Id.} at 144-45, 511 S.E.2d at 252.
\item 253. \textit{Id.} at 146, 511 S.E.2d at 253.
\item 255. \textit{Id.} at 703, 505 S.E.2d at 243.
\item 256. \textit{Id.}
\end{itemize}
holding that the effect of the question would be to compel the witness to comment on the veracity of the prior witness’s testimony, which is an improper function of a witness.  

However, it is always proper for the defense to cross-examine a state witness about any sentencing advantage she acquired by agreeing to testify for the state and entering a plea to a lesser offense. In Massaline v. State, the trial judge refused to allow defense counsel to cross-examine the State’s witness in this manner. The court of appeals, relying upon Byrd v. State, held that the trial court abused its discretion in refusing to allow such a cross-examination. Nevertheless, the conviction was affirmed because of the other “overwhelming evidence of defendant’s guilt.”

Note, however, that in Kenney v. State the Georgia Court of Appeals allowed a trial court to limit such a cross-examination of an accomplice or state witness to the possible maximum sentence he faced while prohibiting an inquiry into mandatory minimum sentences.

G. Directed Verdict of Acquittal

In Burke v. State, defendant was charged with driving under the influence to the extent that he was a less safe driver and for making an improper left turn. At the close of evidence, the trial court directed the jury to enter a verdict of guilty on the improper turn charge. The court of appeals reversed.

XI. DEFENDANT’S CASE IN CHIEF

A. Justification

In a victory for the defense, the court of appeals in Hammond v. State reversed a conviction for voluntary manslaughter, aggravated assault, aggravated battery, and possession of a firearm during the
commission of a crime, holding that the trial court erred in excluding evidence that two months prior to the shooting, the victim threatened to kill defendant.270 Hammond and his wife were separated; his wife stayed in the marital residence with the children. After his wife began a relationship with the victim, Hammond sought a court order prohibiting the victim from spending the night in the home with Hammond's children.271

One evening, Hammond called the home to talk with his children and heard the victim's voice. A confrontation between Hammond and his wife ensued. After that, the victim called Hammond and cursed at him. The victim, over the wife's protests, stormed out of the house toward Hammond's trailer, located just a few hundred yards from the wife's house. The victim reached Hammond's driveway and called out for him. Hammond walked outside carrying a shotgun with the barrel pointed toward the ground. Evidence conflicted over how the killing happened, but the shotgun went off and the victim died.272

The trial court applied Uniform Superior Court Rule 31.6, governing evidence of prior violent acts of the victim, to the evidence that the victim had threatened to kill Hammond two months before this shooting. Because the defense did not provide notice pursuant to the Rule, the court excluded it.273 The court of appeals reversed, holding that evidence of a terroristic threat does not constitute evidence of a prior violent act and, therefore, does not require the notice dictated by Uniform Superior Court Rule 31.6.274 Because evidence of the threat was crucial to the defense, the trial court's error required reversal.275

The holding in Hammond, however, was superseded a few months later by the supreme court's ruling in Owens v. State,276 which removed entirely the notice requirements of Uniform Superior Court Rule 31.6 from those acts between the victim and defendant when a prima facie case of justification is established.277 Owens is an offshoot of Wall v. State.278 In Wall, the supreme court ruled that the State could introduce evidence of prior difficulties between the defendant and the victim without the notice requirements of Uniform Superior Court

270. Id. at 615, 504 S.E.2d at 770.
271. Id. at 614, 504 S.E.2d at 769.
272. Id. at 614-15, 504 S.E.2d at 769.
273. Id. at 615, 504 S.E.2d at 770.
274. Id.
275. Id.
277. Id. at 201-02, 509 S.E.2d at 907-08.
Rule 31.1 and 31.3(b). Relying upon the principle that due process requires "a balance of forces between the accused and his accuser," the supreme court in *Owens* applied the holding in *Wall* to remove the notice requirements on the defense for evidence of prior difficulties between the victim and defendant. As a result, Owens's murder charge was reversed because the trial court prohibited her from introducing evidence that when the victim, her husband, drank, he became aggressive toward her by waving his gun in the air.

The appellate courts gave the justification defense additional review during this reporting period. In *Nguyen v. State*, defendant sought to introduce evidence of the battered person syndrome in support of her justification defense. Thu Ha Nguyen was a Vietnamese woman who was living with her husband and her husband's daughter. She was accused and convicted of having shot both her husband and stepdaughter. In support of her claim of battered person syndrome, Nguyen conceded that she was not physically abused but claimed that both her husband and stepdaughter had been verbally abusive, disrespectful, and unkind toward her.

The court of appeals affirmed the ruling of the trial court prohibiting evidence and a charge of battered person syndrome in the absence of any evidence of actual or attempted violence committed by the victims. The court of appeals was constrained to follow supreme court authority holding that verbal threats alone, unaccompanied by actual or attempted violence, cannot authorize reliance upon the battered person syndrome.

Nguyen was also denied the opportunity to present evidence from a political scientist specializing in Asian culture to testify about differences between Asian and American cultures, in further support of her claim of justification. Nguyen contended that the expert's testimony was necessary for the jury to understand her reaction to her husband's and stepdaughter's behavior because conduct that incited fear in her might not have incited fear in a person born and raised in the United

279. *Id.* at 507-09, 500 S.E.2d at 906.
281. *Id.* at 199, 509 S.E.2d at 906.
283. *Id.* at 185, 505 S.E.2d at 847.
284. *Id.* at 186, 505 S.E.2d at 847-48.
285. *Id.*, 505 S.E.2d at 848 (citing *Chester v. State*, 267 Ga. 9, 10, 471 S.E.2d 836, 837 (1996)).
286. *Id.*
States. The court of appeals also rejected this argument, finding “the fact that verbal threats or verbal abuse might justify the use of deadly force in some cultures is not relevant to whether the use of such force is justified under Georgia law.”

However, in the period following the court’s opinion in Nguyen, the Georgia Supreme Court held in Mobley v. State that evidence reflecting a pattern of psychological abuse is a factor in determining if a self-defense claim based on the battered person syndrome has been established. Relying on Mobley, the supreme court in Nguyen v. State overruled the court of appeals, holding that psychological abuse can warrant the introduction of expert evidence on the battered person syndrome if the abuse is “of such an extreme nature that it engendered in the accused a ‘reasonable belief in the imminence of the victim’s use of unlawful force.’” Because the defendant’s evidence of psychological abuse did not rise to the requisite level, the court affirmed the exclusion of the evidence.

In Brown v. State, the question arose whether defendant was entitled to present evidence of justification, as well as have the jury charged on this defense, when the factual basis of the justification was Brown’s belief that the victim was molesting his five-year-old daughter. The victim, Clarkson, was married to Brown’s former wife. Brown admitted killing Clarkson but contended that he was justified in doing so because Clarkson was molesting his daughter. The State filed a motion in limine to exclude any evidence of the alleged molestation. The trial court granted the motion, finding that an act of molestation, without a showing of the use or threat of physical force, is not a forcible felony for which the defense of justification would be available. In an interlocutory appeal, however, the supreme court held that child

287. Id.
288. Id.
290. Id. at 740, 505 S.E.2d at 723.
292. Id. at 475-76 (quoting Smith v. State, 268 Ga. 196, 199, 486 S.E.2d 819, 822 (1997)).
293. Id. at 476.
295. There is a discrepancy in the two Brown supreme court cases regarding the name of the victim. The earlier interlocutory appeal refers to the victim as Jeff Clark. See Brown, 268 Ga. at 154, 486 S.E.2d at 178. The latter appeal refers to the victim as Jeffery Clarkson. See Brown, 270 Ga. at 601, 512 S.E.2d at 260.
Molestation is, by its very nature, a forcible and violent crime, thereby reversing the trial court's ruling. The case was remanded to give Brown the opportunity to show that Clarkson's alleged acts supported a justification defense pursuant to Chandler v. State.

At the hearing, however, the evidence showed that Brown had stalked the victim for some time and shot him as he stood in the yard. The child was not even present. Under these circumstances, the trial court held that the evidence of Clarkson's molestation was not admissible because Brown's daughter was not in imminent danger of being molested by Clarkson. Absent any other evidence of justification, the trial court was authorized to refuse Brown's charge on justification.

The supreme court affirmed Brown's conviction for malice murder, holding that "[o]nly if Brown acted in accordance with the legally recognized exculpatory motive of justification, rather than revenge, would evidence of Clarkson's bad character and specific acts of violence be admissible on Brown's behalf." In refusing Brown's charge on justification, the court avoided what Chief Justice Benham had previously referred to in the Chandler case as "trial by character assassination." Chief Justice Benham wrote, "When applied to homicide cases . . . this revolutionary change in the law of evidence is a throwback to frontier days and gives judicial sanction to a new defense to murder: the victim 'needed killing.'"

Justice Hunstein dissented, arguing that if motive for a killing is always a relevant and appropriate inquiry for the state, then fairness dictates that the defendant should, likewise, be permitted to introduce evidence relating to motive. She noted:

The object of all legal investigation is the discovery of truth . . . . The jury in this case determined Brown's guilt totally oblivious to the reasons why Brown killed Clarkson. That those reasons did not legally vindicate the killing does not justify leaving the jury blindfolded and ignorant. The erroneous omission of this evidence calls into question the fundamental fairness of Brown's trial, particularly in regard to the editing of Brown's statement to the police, a redaction which deprived

297. Id.
299. Id.
300. Id. at 603, 512 S.E.2d at 263.
301. Id. at 602, 512 S.E.2d at 262.
302. Id. at 602-03, 512 S.E.2d at 263 (citing Chandler, 261 Ga. at 409, 405 S.E.2d at 674 (Benham, J., concurring specially)).
303. Chandler, 261 Ga. at 409, 405 S.E.2d at 674 (Benham, J., concurring specially).
304. Brown, 270 Ga. at 606, 512 S.E.2d at 265 (Hunstein, J., dissenting).
the jury of the context essential for the jury to determine the "true drift, intent and meaning of what was said."\(^{306}\)

In *Casillas v. State*,\(^{306}\) the trial court prohibited the introduction of evidence of the victim’s prior reckless acts in support of the defense that the killing had been an accident. It was undisputed that on the night of the shooting, Casillas, his friend Ruiz, and the victim, Wright, who was in a wheelchair, had been drinking beer and watching a tape about combat Rangers. Casillas began to talk about his combat experience, and Wright told him that he did not believe his stories. Casillas went to his bedroom and brought out a pistol and bag of ammunition. Wright, who was paralyzed from the waist down, "jokingly" said that he would rather be dead because he was no longer able to have intercourse. Casillas "jokingly" placed the gun in Wright's mouth. Ruiz testified that he took the pistol from Wright and took all the rounds out of it.\(^{307}\)

As the evening wore on and the beer ran out, Casillas and Wright got into an argument. According to Ruiz, Wright was being "kind of obnoxious" and told Casillas to put the pistol back in his mouth. Ruiz testified that he saw Casillas reload the gun and point it at the victim while standing about three to four feet away but did not see the gun being fired. Wright was shot once in the center of his forehead.\(^{308}\)

Ruiz and Casillas tried to take Wright to the hospital but his "body fell out of the wheelchair and fell down the flight of stairs."\(^{309}\) Casillas eventually called the police. Before they arrived, Casillas told Ruiz to say that the victim had shot himself. The spent shell casing, however, was located across the room from where Wright had been shot.\(^{310}\)

Casillas's custodial statement matched Ruiz’s testimony except that Casillas adamantly denied reloading the gun. He agreed that he had pointed the gun at Wright but insisted that he made certain that it was pointed a safe distance away from his head and that when he squeezed the trigger, he believed the gun was empty.\(^{311}\) "It was an accident," Casillas insisted, "[w]e were just trying to show [the victim] a good time, 'cause he was crippled, you know."\(^{312}\)
At trial, there was additional conflicting testimony about who unloaded and reloaded the gun. Both Ruiz and Casillas testified that Wright was reaching for the gun at the time it went off. The jury acquitted Casillas of murder but found him guilty of involuntary manslaughter during the commission of an unlawful act of reckless conduct.\(^{313}\)

Casillas sought to introduce the testimony of a police officer that on several previous occasions Wright had been found intoxicated and sitting in his wheelchair in the middle of the road. This prior reckless conduct of the victim, Casillas argued, supported his defense that Wright may have acted in a way to cause his own death on this night.\(^{314}\)

The court of appeals ruled that the exclusion of this evidence was not error.\(^{315}\) Moreover, even if the ruling was erroneous, it was not harmful because the jury had heard a great deal of other evidence about that night that proved the victim was acting recklessly.\(^{316}\) Justice McMurray dissented, stating that he believed Casillas was entitled to introduce evidence of the victim's pattern of reckless behavior while under the influence of alcohol and that the exclusion of such evidence mandated reversal of the conviction.\(^ {317}\)

B. Expert Witnesses

The Georgia Supreme Court unequivocally paved the way for attacks on the manner in which alleged child victims are interviewed by the police or social workers in *Barlow v. State*.\(^ {318}\) Timothy Barlow was convicted of two counts of child molestation. He appealed, enumerating as error the trial court's refusal to permit him to introduce expert evidence attacking the techniques used by a police detective in a videotaped interview of the victim. The court of appeals affirmed.\(^ {319}\) In a case of first impression in Georgia, the supreme court granted certiorari to consider the exclusion of the expert testimony proffered by Barlow. The court concluded as follows:

"Such testimony involves an area of expertise beyond the ken of the average layman and, therefore, the defendant in a child molestation case is entitled to introduce expert testimony for the limited purpose of providing the jury with information about proper techniques for

\(^{313}\) Id. at 755, 505 S.E.2d at 254.

\(^{314}\) Id. at 755-56, 505 S.E.2d at 254-55.

\(^{315}\) Id.

\(^{316}\) Id. at 756, 505 S.E.2d at 255.

\(^{317}\) Id. at 758, 505 S.E.2d at 257 (McMurray, J., dissenting).


interviewing children and whether the interviewing techniques actually utilized were proper.\textsuperscript{320}

Barlow's conviction, as well as the order of the court of appeals, was reversed.\textsuperscript{321}

In \textit{Leonard v. State},\textsuperscript{322} the State did not call its DNA expert to testify, so defendant unsuccessfully attempted to call his own. Leonard was convicted of malice murder in the stabbing death of a woman. Evidence placed Leonard in a city south of Atlanta during the time frame of the murder, and Leonard's fingerprints were found on a blood-stained beer bottle and soda bottle resting on top of the victim's kitchen garbage. Semen samples were retrieved from the comforter on the victim's bed, and vaginal swabbings were taken from the victim's body. The State arranged for DNA tests to be conducted to compare those samples to Leonard's DNA but did not introduce the test results at trial.\textsuperscript{323}

The trial court ordered that Leonard's expert be given access to documents and the actual physical evidence of any DNA testing. Leonard's expert did not examine any of the physical evidence. Instead of calling the State's expert, Leonard planned to call his own expert to testify regarding the state crime lab's DNA tests. The court granted the State's motion to prohibit his expert's testimony because it was purely hearsay—Leonard's expert would merely relate to the jury the conclusions of the state crime lab serologist, as recorded on his notes and reports.\textsuperscript{324} The supreme court affirmed this ruling because Leonard's expert, had he testified, would merely "serve as a conduit for the opinion of others."\textsuperscript{325}

\textbf{C. Testifying Defendant}

Can a defendant who testifies in his own behalf be compelled on cross-examination to demonstrate the actions to which he testified on direct examination? According to the supreme court in \textit{Scott v. State},\textsuperscript{326} he can. Defendant was tried for malice murder in connection with the death of a fellow inmate at the Clayton County Detention Center. On the day in question, the victim, Castleberry, stabbed Scott in the neck with a piece of wood. Scott tried to get away, but Castle-

\begin{enumerate}
\item Barlow, 270 Ga. at 54, 507 S.E.2d at 417.
\item \textit{Id.}
\item \textit{Id.} at 868-69, 506 S.E.2d at 854-55.
\item \textit{Id.} at 870, 506 S.E.2d at 856.
\item \textit{Id.} at 871, 506 S.E.2d at 857.
\item 270 Ga. 93, 507 S.E.2d 728 (1998).
\end{enumerate}
berry pursued him. Scott hit Castleberry in the face, and the piece of wood flew out of his hands. Scott then kicked Castleberry repeatedly; first as he tried to get up, then as he lay on the floor. When officers arrived, Castleberry was unconscious and in a fetal position. He died later that day from head injuries, including a fractured skull and bruises on his left forehead, behind his left ear, and on the right side of his face.

At trial, Scott took the stand and testified that he kicked Castleberry in self-defense. The trial court, over objection, allowed the State on cross-examination to have Scott demonstrate how he kicked and hit Castleberry. The supreme court affirmed the conviction and ruling, holding that there was no violation of defendant's constitutional and statutory right against self-incrimination.

XII. CLOSING ARGUMENTS

Two issues arose regarding errors predicated on closing arguments: the propriety of what the lawyers say and the order in which they get to make their arguments. In Luke v. State, the court of appeals reversed a conviction for possession of marijuana with the intent to distribute after the prosecutor made an improper comment during closing argument. In closing, the prosecutor attempted to attack the defense that Luke never possessed the drugs by arguing the law of constructive possession. He said in part,

"If the law was that the marijuana actually had to get to the person's hands, I wouldn't be here today. I'd be in my office working on another case. I wouldn't be here wasting your time . . . . Common sense tells you that this defense, as stated by the defendants, is crazy, and that's all it is. Because, if that was the law, the judge would be done dismissed the case and we'd all be done gone home, because that ain't the law."

The court of appeals held that these statements constituted reversible error because they attempted to introduce to the jury the opinion of the trial judge on questions of fact.

327. Id. at 93, 507 S.E.2d at 729.
328. Id.
329. Id. at 94, 507 S.E.2d at 729-30.
331. Id. at 545, 512 S.E.2d at 41.
332. Id. at 544, 512 S.E.2d at 40.
333. Id.
334. Id. at 545, 512 S.E.2d at 40. Following Washington v. State, 80 Ga. App. 415, 415, 56 S.E.2d 119, 119-20 (1949) ("if a case had not been made out against the defendant, then
O.C.G.A. section 17-8-71 dictates the order of closing arguments in criminal cases.\(^{335}\) In *Dasher v. State*,\(^{336}\) the court of appeals found that the trial court committed reversible error by failing to follow the mandate of this code section.\(^{337}\) Dasher and the passenger in his car, Gammon, were tried together for the charge of possession of cocaine with intent to distribute. The trial court ordered that if Dasher chose to cross-examine the codefendant, Gammon, he would thereby waive his right to open and conclude the closing argument. Dasher chose to waive the cross-examination of Gammon but maintained his objection to the judge's decision forcing him to choose.\(^{338}\)

Dasher was correct. Cross-examination of a witness does not constitute the introduction of evidence pursuant to O.C.G.A. section 17-8-71.\(^{339}\) The error was harmful, moreover, because the cross-examination of Gammon would have been an important part of the defense because both defendants claimed that the other was responsible for the drugs in the car.\(^{340}\) Even had counsel chosen to engage in the cross-examination and lost the closing argument, the error would have been harmful, declared the court.\(^{341}\) The conviction was reversed.\(^{342}\)

The supreme court in *Massey v. State*\(^{343}\) held that in a capital case it is error for the trial judge to limit the defendant's closing argument to
one hour.\textsuperscript{344} In addition to failing to charge the jury on the law of circumstantial evidence, despite a written request to do so, the trial court restricted the closing argument to one hour, in derogation of O.C.G.A. section 17-8-73\textsuperscript{345} which allows counsel to argue for two hours in a capital felony case.\textsuperscript{346} Because "[t]he right to make a closing argument to the jury is an important one, and abridgement of this right is not to be tolerated,"\textsuperscript{347} the murder conviction was reversed.\textsuperscript{348}

XIII. JURY INSTRUCTIONS AND DELIBERATIONS

A. Jury Charges

Failure to give a timely written request on a criminal defendant's election not to testify is per se reversible error.\textsuperscript{349} Failure to give a timely written request on the law of circumstantial evidence when the state's case depends on both circumstantial and direct evidence\textsuperscript{350} constitutes reversible error.\textsuperscript{351} Failure to charge the jury that defendant had no duty to retreat where self-defense was the sole defense constitutes reversible error.\textsuperscript{352}

In \textit{Dunagan v. State},\textsuperscript{353} the supreme court reversed the murder conviction of a teenager, finding that the trial court erred in charging the jury, in response to their questions, whether felony murder could be committed without intent.\textsuperscript{354} Dunagan was charged with felony murder, the underlying felony being aggravated assault, for having shot a gun at another teenager while they were engaged in "horseplay."\textsuperscript{355} Overruling all cases to the contrary, the supreme court held that the

\textsuperscript{344} Id. at 78, 508 S.E.2d at 151.
\textsuperscript{345} O.C.G.A. § 17-8-73 (1997).
\textsuperscript{346} 270 Ga. at 78, 508 S.E.2d at 151.
\textsuperscript{347} Id. (quoting Hayes v. State, 268 Ga. 809, 813, 493 S.E.2d 169, 173 (1997)).
\textsuperscript{348} Id. at 79, 508 S.E.2d at 152. Justine Hines's concurring opinion points out that the "abridgement of the two hour time limit provided for closing argument in capital felonies does not always demand reversal," but he agreed in this case that the presumption of harmful error was not overcome. \textit{Id.} (citing Hayes v. State, 268 Ga. 809, 493 S.E.2d 169 (1997)) (Hines, J., concurring).
\textsuperscript{350} "To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." O.C.G.A. § 24-4-6 (1995).
\textsuperscript{354} Id. at 594-95, 502 S.E.2d at 730-31.
\textsuperscript{355} Id. at 591, 502 S.E.2d at 728.
trial court committed reversible error in charging the jury that criminal negligence can substitute for the criminal intent necessary to commit the underlying felony of aggravated assault.\(^{356}\)

However, the supreme court in *Parker v. State*\(^{357}\) held it is not error for the trial judge to charge the jury that the intent necessary for the commission of the crime of malice murder may be proven by reckless conduct.\(^{358}\) In *Parker* the State requested a charge to the jury that reckless disregard for human life may be equivalent to a specific intent to kill.\(^{359}\) The supreme court affirmed the conviction, holding that the charge was appropriate because "[i]f a reckless disregard for human life constitutes implied malice and implied malice is, in turn, the equivalent of a specific intent to kill, then it necessarily follows that reckless disregard for human life may be the equivalent of a specific intent to kill."\(^{360}\) Three Justices concurred specially, expressing their concern that such a charge "misleads juries into believing that malice murder can be committed by criminal negligence."\(^{361}\)

In reaffirming the inconsistent verdict rule, the court of appeals found it necessary to overrule their previous decision in *Strong v. State*.\(^{362}\) In *Kimble v. State*,\(^{363}\) the jury found Kimble guilty of the armed robbery of Jones (Count 1); not guilty of possession of a firearm during the commission of the armed robbery of Jones (Count 2); guilty of the armed robbery of Elkins (Count 3); guilty of possession of a firearm during the commission of the armed robbery of Elkins (Count 4); guilty of the kidnapping with bodily injury of Jones (Count 5); not guilty of possession of a firearm during the commission of the kidnapping with bodily injury of Jones (Count 6); guilty of the kidnapping of Elkins (Count 7); and guilty of possession of a firearm during the commission of the kidnapping of Elkins (Count 8).\(^{364}\)

The appellate court agreed with defendant that the verdicts were inconsistent because all the charges arose from events that occurred during the same period.\(^{365}\) The court, however, having adopted in *Milam v. State*\(^{366}\) the inconsistent verdict rule of *United States v.*

\(^{356}\) *Id.* at 593, 502 S.E.2d at 730.  
\(^{358}\) *Id.* at 259-60, 507 S.E.2d at 747-48.  
\(^{359}\) *Id.*  
\(^{360}\) *Id.* at 260, 507 S.E.2d at 748.  
\(^{361}\) *Id.* at 261, 507 S.E.2d at 749 (Hunstein, J., concurring specially).  
\(^{364}\) *Id.* at 396, 512 S.E.2d at 307.  
\(^{365}\) *Id.* at 392, 512 S.E.2d at 307.  
Powell, held that the inconsistency did not require reversal of the convictions. Kimble argued that the verdicts were not merely inconsistent, as controlled by Powell, but were instead mutually exclusive—a situation in which Strong v. State should control.

The United States Supreme Court in Powell left open the manner of handling mutually exclusive verdicts: “[n]othing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other.” In Powell defendant was convicted for a telephone facilitation count but was acquitted on the predicate felonies upon which the telephone facilitation counts were based—a classic mutually exclusive verdict situation.

The court of appeals in Kimble recognized that its 1996 opinion in Strong, in which the court reversed a conviction for possession of a firearm during the commission of a felony when the jury had acquitted on the two aggravated assaults that formed the predicate felonies for the firearm charge, was incorrect because the “inconsistent verdict issues presented in Strong and Powell [were] indistinguishable.” The court, therefore, overruled Strong and affirmed the verdicts and convictions.

B. Jury Deliberations

The appellate courts reversed convictions in several other cases because of erroneous answers the trial court gave to the deliberating juries. If an indictment specifically alleges that aggravated assault was committed by shooting at another, it is reversible error for the trial court to tell the jury that they may find the defendant guilty if they find that he placed the victim in reasonable apprehension of receiving serious bodily injury. If the indictment charges a defendant with burglary, it is reversible error for the judge to instruct the jury that the element of unlawful entry could be established solely by proof that an accused had the intent to commit a theft within the premises.

370. 236 Ga. App. at 396, 512 S.E.2d at 310.
371. Powell, 469 U.S. at 69 n.8.
372. Id. at 60.
375. Id. at 395-96, 512 S.E.2d at 309-10.
In Scroggins v. State, a dispute arose about the medical testimony that had been presented during closing argument in a child molestation case. During deliberations, the jury asked to have a transcript of the testimony of both medical doctors. The trial court denied the request for playback, instructing the jury, instead, that they were to recall the testimony of the doctors from their collective memories. The court of appeals reversed, finding that the trial court abused its discretion in denying the jury's request because the issue was one for which a serious disagreement had arisen. Allowing the jury to hear the playback, the appellate court held, "would have settled that dispute unequivocally, while causing little, if any, harm.

In Wooten v. State, defendant sought a new trial after discovering that the bailiff told the foreman during deliberations that a previous trial had ended in a mistrial. The foreman informed others on the jury. At the hearing on the motion for new trial, the jurors were questioned about the effect that this information had upon their verdict. The trial court found that the jury received this improper information, "but that although it may have spurred the jury's efforts to reach a verdict and caused them to scrutinize the evidence more carefully, it did not warrant a new trial." The court of appeals affirmed, finding that the trial court did not abuse its discretion in denying a new trial.

The result does not differ when the trial court, instead of the bailiff, informs the jury that a co-indictee has pleaded guilty and has been sentenced. Compare this holding with Pinckney v. State, in which the court reversed an armed robbery conviction because the district attorney introduced evidence that the testifying co-indictee pleaded guilty and was sentenced for the two-man robbery. The court stated:

To let the jury know that Pinckney's co-indictee [pleaded] guilty is extremely prejudicial and denies him his right to a fair trial; the only inference to be drawn from Overton's testimony is that because his co-indictee [pleaded] guilty, Pinckney must also be guilty, since he was

379. Id. at 125-26, 514 S.E.2d at 255.
380. Id.
381. Id.
383. Id. at 453, 507 S.E.2d at 203-04.
384. Id., 507 S.E.2d at 204.
387. Id. at 74-75, 510 S.E.2d at 924.
apprehended at the same time and place as Overton, who admitted being one of the two men who committed the crimes.388

In Sears v. State,389 the supreme court affirmed a death penalty sentence after the jury disclosed to the trial judge that they were eleven to one in favor of the death penalty but deadlocked.390 The trial court ordered them to continue working. On the third day, the foreman repeated that they were eleven to one and that he had ordered one of the jurors to remove the “Walkman” radio from her head and participate in deliberations. He sent out a note informing the court that the holdout had declared that she was unable to vote for death because the case did not involve a murder. The foreman, therefore, requested that the court (1) get a transcript of the jurors’ answers during voir dire regarding the death penalty, and (2) instruct the jury on the crime of perjury. At the same time, the holdout juror sent a note to the judge asking for a charge regarding the rights and duties of the foreperson because she felt she was being pressured by claims of prosecution for perjury.391

The trial judge brought the jury in and instructed the jury that they should recall the previous instructions as to the imposition of the death penalty, aggravating circumstances, and mitigating evidence. The judge told the jury that he would not read the voir dire transcript and would not define perjury. He briefly clarified the role of the foreman and then added several directions to the jury that all jurors should participate fully in deliberations. Two and one-half hours later, the jury reached a verdict sentencing Sears to death. The jury was polled and each juror affirmed his or her verdict.392

At the hearing on the motion for new trial the holdout juror testified about the coercion she experienced and explained that the reason she changed her verdict was that she feared being prosecuted for perjury.393 The supreme court affirmed the sentence, holding that the trial court did not abuse its discretion in its instructions and the pressure the holdout juror felt was no greater than the “normal dynamic of jury deliberations.”394

388. Id. at 75, 510 S.E.2d at 924-25.
390. Id. at 835, 514 S.E.2d at 430.
391. Id. at 836-37, 514 S.E.2d at 431-32.
392. Id. at 837, 514 S.E.2d at 431-32.
393. Id. at 839, 514 S.E.2d at 433.
394. Id. (quoting United States v. Cuthel, 903 F.2d 1381, 1383 (11th Cir. 1990)).
XIV. SENTENCING

A. Statutory Aggravating Circumstances

In Hughes v. State, the supreme court was faced with the following question: “Is it necessary for a judge to find beyond a reasonable doubt the existence of a statutory aggravating circumstance when, in a death penalty case, a defendant enters a plea of guilty and is sentenced to life without parole?” After the State’s opening statement, Hughes pleaded guilty to two counts of murder and was sentenced to two concurrent life sentences without parole, thereby saving himself from the death penalty. Hughes later filed a motion to vacate and set aside his plea, contending that the trial court failed to make an express finding of a statutory aggravating circumstance beyond a reasonable doubt, as required by O.C.G.A. section 17-10-32.1. The supreme court agreed and held that in the absence of an express finding of the aggravating circumstance the sentence must be set aside and the matter remanded for resentencing.

B. Serious Violent Felonies

On March 27, 1998, the Georgia Legislature responded to the 1997 decision of State v. Allmond by amending the Code sections relating to serious violent felonies and first offender sentencing to provide that no person convicted of a serious violent felony shall be sentenced as a first offender.

In Allmond the court of appeals held that once a defendant entered a plea pursuant to the First Offender Act, he was not actually “convicted” of any crime; therefore, the mandatory minimum provisions of O.C.G.A. section 17-10-6.1(b) did not apply. The court added that had the Legislature intended some felonies to be excluded from coverage under the First Offender Act, the statute would have clearly said so.

Hence came the amendment to the statutes. During this reporting period the main issue to face the courts was whether the amendment...

396. Id. at 819, 504 S.E.2d at 697.
397. Id. at 820, 504 S.E.2d at 697; O.C.G.A. § 17-10-32.1 (1997).
398. 269 Ga. at 821, 504 S.E.2d at 698-99.
401. Id. § 42-8-66 (Supp. 1998).
403. Id. at 510, 484 S.E.2d at 307.
should be applied retroactively. The court of appeals in *Fleming v. State* overruled its decision in *Allmond* and held that a defendant who was convicted prior to the amendment may not be sentenced as a first offender to any one of the serious violent felonies listed in O.C.G.A. section 17-10-6.1(b), thereby applying the amendment retroactively.

The supreme court granted certiorari in *Fleming* on the issue of whether a defendant found guilty of a serious violent felony under O.C.G.A. section 17-10-6.1 could apply for first offender status prior to the 1998 amendments. Although outside this reporting period, it is important to note that the supreme court reversed the court of appeals, concluding that the amendments did not apply retroactively. Therefore, the sentence of anyone who had received first offender treatment for a serious violent felony prior to the 1998 amendments would be affirmed.

C. Recidivist Sentencing

The trial court's discretionary authority in sentencing has been eroded as recidivist punishments continue to be legislated. In *Mikell v. State*, the supreme court considered the trial court's role when faced with a crime for which two recidivist statutes apply—the general drug offense recidivist provisions of O.C.G.A. section 17-10-7 and the specific provisions applicable to the crime of possession with intent to distribute cocaine within 1,000 feet of a public housing project under O.C.G.A. section 16-13-32.5(c)(2). The State argued that the general recidivist statute should override the more specific recidivist statute. The supreme court disagreed, holding that the more recent, specific recidivist statute prevails. The trial court, therefore, is authorized under O.C.G.A. section 16-13-32.5(c)(2) to exercise discretion in sentencing a repeat offender within the statutory range outlined in the specific recidivist statute pertaining to the crime of possession with intent to distribute cocaine within 1,000 feet of a public housing project, and is not bound by the general recidivist provisions of O.C.G.A. section 17-10-7.

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406. *Id.* at *1.
408. O.C.G.A. § 17-10-7 (1997).
409. *Id.* § 16-13-32.5(c)(2) (1999).
410. 270 Ga. at 468, 510 S.E.2d at 525.
411. *Id.*, 510 S.E.2d at 524-25.
412. *Id.* at 468-69, 510 S.E.2d at 525.
Compare this result with Blackwell v. State. In Blackwell the court of appeals reviewed the trial court's sentence for the crimes of possession of cocaine with intent to distribute and trafficking in cocaine because the sentencing court stated that it imposed the sentence pursuant to both O.C.G.A. section 16-13-30(d) and O.C.G.A. section 17-10-7(c). On appeal, Blackwell argued that the provisions of O.C.G.A. section 16-13-30(d) prohibit the court from sentencing him under O.C.G.A. section 17-10-7(c). The appellate court disagreed, holding that because O.C.G.A. section 16-13-30(d) specifically provided that "the provisions of subsection (a) Code Section 17-10-7 shall not apply to a sentence imposed for a second such offense; provided, however, that the remaining provisions of Code Section 17-10-7 shall apply for any subsequent offense," the trial court "could not sentence second time offenders under both O.C.G.A. section 16-13-30(d) and 17-10-7(a), [but] it could sentence second time offenders under both O.C.G.A. section 16-13-30(d) and any remaining provisions of O.C.G.A. section 17-10-7."

D. Cruel and Unusual Punishment

In Williams v. State, a case involving some creative sentencing, defendant was convicted of solicitation of sodomy and placed on twelve months probation. The trial court imposed a special condition of probation that defendant perform forty hours of community service by walking the portion of the street in Athens, Georgia, where the solicitation occurred, in four hour intervals on ten days, between 7:00 p.m. and 11:00 p.m., wearing a placard stating "BEWARE HIGH CRIME AREA."
Defendant appealed, arguing that the sentence constituted cruel and unusual punishment.\textsuperscript{420} The court of appeals approved of the sentence and even commended the trial judge "for having the initiative to adopt a new and creative form of sentencing which might very well have a positive effect on Williams and be beneficial to the public."\textsuperscript{421} However, the court was constrained to vacate the sentence because the special condition carried the likelihood of placing the probationer in danger without providing adequate protection for him.\textsuperscript{422}

E. Restitution

The Georgia Code dictates that before a sentence of restitution is imposed, the trial court must make factual findings of the amount pursuant to an inquiry into the factual basis for the restitution, the need of the victim, and ability of the defendant to pay.\textsuperscript{423} Failure to follow this mandate resulted in the reversal and remand of several sentences imposing a restitution component.\textsuperscript{424}

XV. APPELLATE REVIEW

A. Preservation of Errors

Failure to preserve an objection almost always constitutes waiver, except in a death penalty case.\textsuperscript{425} In Mullins v. State,\textsuperscript{426} defendant, who was being tried for malice murder, failed to object timely to a prosecutor's argument that had a reasonable probability of being harmful. On appeal, defendant argued that because the argument was improper, and likely harmful, the failure to object should not constitute waiver.\textsuperscript{427} The supreme court held that only the supreme court has the right to employ the reasonable probability test to allow an enumeration of error to survive, despite failure to object, when there is a "reasonable probability" that the error was harmful, because that test can only be employed in death penalty cases.\textsuperscript{428} Because the court of

\textsuperscript{420} Id. at 37, 505 S.E.2d at 817.
\textsuperscript{421} Id. at 39, 505 S.E.2d at 818.
\textsuperscript{422} Id.
\textsuperscript{423} O.C.G.A. §§ 17-14-8 to -10 (1997).
\textsuperscript{426} 270 Ga. 450, 511 S.E.2d 165 (1999).
\textsuperscript{427} Id. at 450-51, 511 S.E.2d at 166-67.
\textsuperscript{428} Id. at 451, 511 S.E.2d at 167.
appeals has no jurisdiction over murder cases, all cases in which they have applied the reasonable probability test were overruled because the errors should have been waived if not preserved.\textsuperscript{429} Thus, \textit{Smith v. State},\textsuperscript{430} \textit{Hopkins v. State},\textsuperscript{431} \textit{Geoffrion v. State},\textsuperscript{432} \textit{Bell v. State},\textsuperscript{433} and \textit{Wright v. State},\textsuperscript{434} were overruled.\textsuperscript{435}

\textbf{B. Insufficient Evidence to Convict}

Several reversals resulted from a finding that the state presented insufficient evidence to convict the defendant. In \textit{Johnson v. State},\textsuperscript{436} the supreme court reversed a conviction for felony murder of defendant's five-month-old nephew.\textsuperscript{437} Johnson, his sister (the victim's mother), and her boyfriend were all convicted of the murder. The child's death occurred sometime during an evening when all three adults were in the apartment with the child. Johnson was sleeping downstairs while his sister and her boyfriend were upstairs with the child. At approximately 6:00 a.m. the following morning, Johnson placed a 911 call reporting that the baby was not breathing. EMTs arrived to find the baby dead. Medical evidence indicated he had been bludgeoned to death.\textsuperscript{438}

The upstairs neighbor testified that at approximately 3:00 a.m. she heard the baby crying, then heard a loud thump, and did not hear the baby cry again. One hour later, she saw Johnson on the porch of the apartment repeating "I didn't do it."\textsuperscript{439} Another neighbor saw Johnson outside the apartment crying and saying, "They just aggravate, just aggravate, just aggravate."\textsuperscript{440} Johnson's sister reported that the crib was destroyed and placed in a dumpster, but searches of dumpsters in the area were fruitless.\textsuperscript{441} This was all the evidence presented by the State to meet their burden of proving that Johnson committed the crime of felony murder, the predicate felony being the crime of cruelty to a child. The supreme court concluded that the sum of this circumstantial

\begin{itemize}
\item \textsuperscript{429} Id.
\item \textsuperscript{430} 231 Ga. App. 68, 498 S.E.2d 561 (1998).
\item \textsuperscript{431} 227 Ga. App. 567, 489 S.E.2d 368 (1997).
\item \textsuperscript{432} 224 Ga. App. 775, 482 S.E.2d 450 (1997).
\item \textsuperscript{433} 219 Ga. App. 553, 466 S.E.2d 68 (1995).
\item \textsuperscript{434} 209 Ga. App. 128, 433 S.E.2d 99 (1993).
\item \textsuperscript{435} Mullins, 270 Ga. at 451, 511 S.E.2d at 167.
\item \textsuperscript{436} 269 Ga. 840, 506 S.E.2d at 374 (1998).
\item \textsuperscript{437} \textit{Id.} at 843, 506 S.E.2d at 377.
\item \textsuperscript{438} \textit{Id.} at 841, 506 S.E.2d at 375.
\item \textsuperscript{439} \textit{Id.}
\item \textsuperscript{440} \textit{Id.}
\item \textsuperscript{441} \textit{Id.}
evidence was not sufficient to exclude every reasonable hypothesis except that of Johnson's guilt; therefore, the conviction was reversed.\textsuperscript{442}

In Maxwell v. State,\textsuperscript{443} the court held that being a passenger in a car in which hidden contraband is discovered, without more, is insufficient to prove the passenger's constructive possession of that contraband.\textsuperscript{444} When contraband is found in a home in which others have equal access, the same principle applies.\textsuperscript{445}

In Strozier v. State,\textsuperscript{446} the court of appeals reversed a conviction for involuntary manslaughter because the only evidence linking the defendant, Patrick Strozier, to the death of the victim was a police officer's improper hearsay testimony that he had obtained the name "Patrick" from an unknown source while canvassing the neighborhood where the victim's body was found.\textsuperscript{447}

In a similar case, with an even lower standard of proof, the court of appeals reversed a probation revocation in Overby v. State.\textsuperscript{448} Overby was serving a ten-year probationary sentence for a violation of the Georgia Controlled Substances Act.\textsuperscript{449} The State subsequently petitioned to revoke his probation, alleging a new offense of cruelty to children and battery. At the probation revocation hearing, the only evidence presented consisted of pictures of defendant's sister and her son showing bruises and cuts. The responding officer testified, over a hearsay objection, that defendant's sister told the officer that defendant had "pushed her up against a tree."\textsuperscript{440} The victims were not subpoenaed and did not appear at the hearing. The officer reported that the sister contacted him a few days after the incident, reporting that she wished to "change her statement."\textsuperscript{441}

The trial court revoked probation, ordering defendant to serve four years.\textsuperscript{452} The court of appeals reversed, finding that there was no competent evidence to conclude, by a preponderance of the evidence, that defendant committed the new offenses alleged in the petition to revoke probation.\textsuperscript{453}

\begin{itemize}
\item 442. Id. at 842-43, 506 S.E.2d at 376-77.
\item 443. 238 Ga. App. 197, 518 S.E.2d 432 (1999).
\item 444. Id. at 198, 518 S.E.2d at 434.
\item 446. 236 Ga. App. 239, 511 S.E.2d 295 (1999).
\item 447. Id. at 240, 511 S.E.2d at 297.
\item 449. O.C.G.A. §§ 16-31-20 to -56 (1999).
\item 450. 237 Ga. App. at 731, 516 S.E.2d at 586.
\item 451. Id.
\item 452. Id.
\item 453. Id. at 733, 516 S.E.2d at 587.
\end{itemize}
C. Ineffective Assistance of Counsel

The court addressed the tough standard of proving ineffectiveness of trial counsel in Owens v. State.\textsuperscript{454} In Owens defendant's fiancé hired attorney Redding, an associate of Kendall, approximately six weeks before Owens stood trial for the crime of malice murder and aggravated assault. At calendar call Kendall and Redding showed up, erroneously believing that the appearance was an arraignment. When the case was called for trial, Kendall tried the case, though he had done no preparation for trial and had never even met his client.\textsuperscript{455}

The supreme court concluded that counsel's preparation was, without question, deficient.\textsuperscript{456} Owens argued that, under those circumstances, it would not be necessary for him to satisfy the second Strickland\textsuperscript{457} tier of proving harm by such deficient preparation.\textsuperscript{458} The court disagreed and refused to presume prejudice because the trial lawyer had several years experience trying felony cases and did, in fact, cross-examine witnesses and argue evidentiary issues.\textsuperscript{459} Without any evidence that the deficient preparation resulted in errors, the supreme court refused to presume that Owens was harmed and, therefore, affirmed the conviction.\textsuperscript{460}

However, the court in Fogarty v. State\textsuperscript{461} held that if a conflict of interest between the client and attorney is shown, it is presumed that the client was prejudiced; therefore, actual prejudice to the defendant need not be proven.\textsuperscript{462} The issue before the supreme court in Fogarty was whether a fee arrangement was contingent in nature. Fogarty's wife paid counsel a $25,000 fee but had an agreement that if the charges were dismissed, the fee would be reduced to $10,000. The court of appeals held that this arrangement was an improper "quasi-contingency fee" contract.\textsuperscript{463} The supreme court disagreed, citing the Standards for

\textsuperscript{455} Id. at 888, 506 S.E.2d at 861.
\textsuperscript{456} Id., 506 S.E.2d at 862.
\textsuperscript{458} 269 Ga. at 888-89, 506 S.E.2d at 862.
\textsuperscript{459} Id. at 889, 506 S.E.2d at 862.
\textsuperscript{460} Id. The court also was not persuaded by the fact that following the trial Kendall and Redding were indicted for several felony offenses and Kendall was suspended from the practice of law for three years for financial improprieties in his law practice. Id., 506 S.E.2d at 862-63.
\textsuperscript{461} 270 Ga. 609, 513 S.E.2d 493 (1999).
\textsuperscript{462} Id. at 611, 513 S.E.2d at 496.
Criminal Justice,\textsuperscript{464} holding that "[a]n agreement for payment of one amount if the case is disposed of without trial and a larger amount if it proceeds to trial is not a contingent fee but merely an attempt to relate the fee to the time and service involved."\textsuperscript{465} Because there was no improper fee arrangement, there arose no presumption of prejudice resulting from counsel's representation of Fogarty.\textsuperscript{466} The conviction was affirmed.\textsuperscript{467}

\textsuperscript{464} Standards for Criminal Justice, Standard 4-3.3, commentary at 4-37 (2d ed., 1980).
\textsuperscript{465} \textit{Fogarty}, 270 Ga. at 613, 513 S.E.2d at 497.
\textsuperscript{466} \textit{Id}.
\textsuperscript{467} \textit{Id}.