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## Criminal Law

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# Criminal Law

by Frank C. Mills, III\*

## I. INTRODUCTION

This year's legislatively enacted criminal discovery law<sup>1</sup> will be the most influential change in criminal law in many years. Only slightly less significant is the Georgia constitutional enactment of a true life-without-parole sentence.<sup>2</sup> Both changes will vastly increase the cost of the criminal justice system to the taxpayer. The latter will probably increase the cost of crime to the criminal. These legislative events dwarf any changes by the courts.

Nevertheless, there are many cases of substantial note in the survey period for this year.<sup>3</sup> The procedure and proper charge to the jury for an abandonment trial was changed.<sup>4</sup> Apparently one may "escape" from civil or criminal contempt custody without incurring criminal sanction.<sup>5</sup> There appears to be no defense of "abandonment" for a charge of "criminal attempt" to commit a crime.<sup>6</sup> Lawyers should probably avoid motions to adopt other attorneys' motions<sup>7</sup> and requests to charge by

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The Author expresses gratitude to his law clerk, Bonnie M. Baer (Tulane University, B.A., 1985; Emory University, J.D., 1988) for her able assistance. I am also deeply indebted to Marilyn Maxwell without whom this effort would not have been possible.

1. See *infra* notes 375-88 and accompanying text.

2. See *infra* notes 605-11 and accompanying text.

3. For continuity and future reference. The author included in this year's survey all cases from 263 Ga. 168, 429 S.E.2d 921 (June 7, 1993) through 264 Ga. 300, 443 S.E.2d 836 (May 31, 1994) and from 208 Ga. App. 787, 432 S.E.2d 808 (April 15, 1993) through 213 Ga. App. 520, 444 S.E.2d 875 (June 9, 1994).

4. See *infra* notes 106-11 and accompanying text.

5. See *infra* notes 113-15 and accompanying text.

6. See *infra* notes 156-60 and accompanying notes.

7. See *infra* notes 257-62 and accompanying text.

reference only to the Pattern Jury Instructions.<sup>8</sup> Mass arraignments are a mess,<sup>9</sup> and the court of appeals abolished the "plea reserving an appeal."<sup>10</sup>

## II. SUBSTANTIVE CRIMES AND RELATED ISSUES

### A. Constitutional Challenges

In what may be one of the more significant constitutional challenges in several years, the supreme court upheld Georgia's Life-Without-Parole statute.<sup>11</sup> In *Freeman v. State*,<sup>12</sup> a death penalty case on interim review,<sup>13</sup> both the state and defense challenged the constitutionality of Georgia's new Life-Without-Parole statute.<sup>14</sup> Freeman was charged with a murder which occurred before May 1, 1993, the effective date of the Life-Without-Parol statute.<sup>15</sup>

The Georgia Supreme Court rejected the claim by the defense that the statute violates the Equal Protection Clause of the Fourteenth Amendment because it "places discretion to withhold the presentation of a life-without-parole sentence in cases of crimes committed before May 1, 1993, in the hands of the prosecutor."<sup>16</sup> In short, the court held that "prosecutorial discretion in this situation is no different from prosecutorial discretion in any other . . . . [S]ince prosecutorial discretion comes into play under every criminal statute, it is not, of itself, grounds for striking a given statute down as unconstitutional."<sup>17</sup>

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8. See *infra* notes 561-64 and accompanying text.

9. See *infra* notes 356-63 and accompanying text.

10. See *infra* notes 623-31 and accompanying text.

11. O.C.G.A. § 17-10-16 (Supp. 1994) provides:

(a) Notwithstanding any other provision of law, a person who is convicted of an offense committed after May 1, 1993, for which the death penalty may be imposed under the laws of this state may be sentenced to death, imprisonment for life without parole, or life imprisonment as provided in Article 2 of this chapter.

(b) Notwithstanding any other provision of law, any person who is convicted of an offense for which the death penalty may be imposed and who is sentenced to imprisonment for life without parole shall not be eligible for any form of parole.

12. 264 Ga. 27, 440 S.E.2d 181 (1994).

13. *Id.* at 27, 440 S.E.2d at 182.

14. *Id.* at 29, 440 S.E.2d at 183.

15. *Id.* at 27, 440 S.E.2d at 183.

16. *Id.* at 29, 440 S.E.2d at 183.

17. *Id.* 440 S.E.2d at 184.

More significantly, the court also denied the challenge by the prosecution that the Life-Without-Parole statute violates Separation of Powers by impinging on certain Georgia constitutional powers and duties<sup>18</sup> of the Georgia Pardon and Parole Board.<sup>19</sup> In a cursory opinion which surprised many,<sup>20</sup> the court made short work of the argument by merely holding that "the power to create crimes and to prescribe punishment therefore is legislative."<sup>21</sup> There is no restriction on the power of the Pardon and Parole Board because the "statute providing for a sentence of life without parole, like the passage of legislation establishing the death penalty . . . renders the defendant ineligible for parole in the first instance."<sup>22</sup>

This may or may not be the final word on the subject.<sup>23</sup> Regardless, the opinion takes on added significance as "due process requires that the sentencing jury be informed that the defendant is parole ineligible

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18. GA. CONST. art. IV, § 2, para. 2(a) provides:

Except as otherwise provided in this Paragraph, the State Board of Pardons and Paroles shall be vested with the power of executive clemency, including the powers to grant reprieves, pardons, and paroles; to commute penalties; to remove disabilities imposed by law; and to remit any part of a sentence for any offense against the state after conviction.

*Id.*

GA. CONST. art. IV, § 7, para. 2 provides: "The powers and duties of members of constitutional boards and commissions provided for in this article, except the Board of Pardons and Paroles, shall be as provided by law." *Id.*

19. 264 Ga. at 29, 440 S.E.2d at 184.

20. The author must eat substantial quantities of crow for the opinion in Frank C. Mills, III, *Criminal Law*, 45 MERCER L. REV. 135, 147 (1993).

21. 264 Ga. at 29, 440 S.E.2d at 184 (quoting *Johnson v. State*, 169 Ga. 814, 817, 152 S.E. 76, 78 (1929)).

22. *Id.* However, the language of the statute is no different from that of O.C.G.A. § 17-10-7(b) (1990), Georgia's general recidivist statute which provided that "any person who, after having been convicted . . . for three felonies . . . commits a felony within this state . . . must, upon conviction for such fourth offense . . . serve the maximum time provided . . . and shall *not be eligible for parole* until the maximum sentence has been served." (emphasis added).

23. The court pretermitted the issue of whether the state had standing to appeal the matter. 264 Ga. at 29, 440 S.E.2d at 184. Furthermore, the powers to reprieve or commute remain as distinct possibilities when space and budgets tighten and there is a threat or reality of federal action. While this may seem speculative, in the not too distant past it would have been hard to imagine the power to parole being used on a grand scale to alleviate prison overcrowding.

...<sup>24</sup> where the jury is weighing a decision between death and life without parole.

The statute prohibiting inducement of a parent or parents to part with their children<sup>25</sup> withstood a vagueness challenge under the Due Process Clauses of State and Federal Constitutions in *Douglas v. State*.<sup>26</sup> The term "inducement" is statutorily defined.<sup>27</sup> Overall, the language conveyed a "sufficiently definite warning as to the proscribed conduct when measured by common understanding . . . and provide[d] explicit standards to those who enforce the law in order to prevent arbitrary enforcement."<sup>28</sup> In this instance, the meaning was "sufficiently precise for a person of ordinary intelligence to understand that offering an automobile to a parent in exchange for physical custody or control of a child is proscribed."<sup>29</sup>

Georgia's drug forfeiture law,<sup>30</sup> rewritten in 1991,<sup>31</sup> specifically provides that drug forfeiture proceedings are to be held before a judge without a jury.<sup>32</sup> Appellant, in *Swails v. State*,<sup>33</sup> nevertheless demanded a jury trial in a forfeiture action. He pursued an interlocutory appeal when the trial court denied his constitutional challenge to the provisions of the statute mandating a bench trial.<sup>34</sup> The court held that Georgia's constitutional provisions regarding the right to a trial by jury<sup>35</sup> are not as broad as those of the United States Constitution. The

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24. *Simmons v. South Carolina*, 114 S. Ct. 2187, 2189 (1994) (overturning a South Carolina death sentence wherein the judge declined to charge the jury about the effect of a life without parole sentence where future dangerousness was an issue).

The Georgia Life Without Parole Statute itself in O.C.G.A. § 17-10-31.1(d) (1994 Supp.) provides that the "trial judge may instruct the jury: (1) That life without parole means that the defendant shall be incarcerated for the remainder of his or her natural life and shall not be eligible for parole."

25. O.C.G.A. § 19-8-24(a) (1991) provides: "It shall be unlawful for any person . . . which has not been established as a child-placing agency by the department to . . . directly or indirectly hold out inducements to parents to part with their children." *Id.*

26. 263 Ga. 748, 438 S.E.2d 361 (1994).

27. "As used in this subsection, 'inducements' shall include . . ." O.C.G.A. § 19-8-24 (1991).

28. 263 Ga. at 749, 438 S.E.2d at 362.

29. 263 Ga. at 750, 438 S.E.2d at 362.

30. O.C.G.A. § 16-13-49 (1992).

31. 1991 Ga. Laws 886.

32. O.C.G.A. § 16-13-49(o)(5) and (p)(6) in identical language provide: "If an answer is filed a hearing must be held within 60 days after service of the complaint unless continued for good cause and must be held by the court without a jury." *Id.*

33. 263 Ga. 276, 431 S.E.2d 101 (1993).

34. *Id.* at 276, 431 S.E.2d at 102.

35. GA. CONST. art I, § 1, para. 11(a) provides:

Georgia Constitution protects only the right to a trial by jury as it existed when the first Georgia Constitution was adopted in 1798.<sup>36</sup> The court noted that there were no drug forfeiture proceedings in 1798. Therefore, there is no state constitutional right to a jury trial for this "new remedy."<sup>37</sup> This was a split decision with Justice Hunstein writing a strong dissent joined by Justices Sears-Collins and Benham.<sup>38</sup>

### B. Offenses Defined

**Homicide.** *Coker v. State*<sup>39</sup> was a case with strange facts. The defendant was convicted in a bench trial of voluntary manslaughter. He had been involved in a gunfight over gambling winnings. During the shootout, a stray bullet from someone other than defendant killed an innocent unintended victim (that is, someone who personally had done nothing to provoke the attack).<sup>40</sup> Thus, defendant was not the trigger man, and the victim was not the provoker. There was a whole lot of shooting going on, and a whole lot of imputing going on. (That is, the intent of the slayer was imputed to the defendant party to the crime, and the provocation of the intended victim was imputed to the actual victim with the transfer of defendant's vicarious intent to kill from the intended victim to the actual victim.) The court held that "[w]here one shoots at another, intending to kill him, under such circumstances that the killing, if accomplished, would be voluntary manslaughter, but the shot misses him and accidentally kills an innocent third person, the

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The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts. =ft

*Id.*

36. 263 Ga. at 278, 431 S.E.2d at 103. "There is no State Constitutional right to a jury trial with respect to proceedings of statutory origin unknown at the time the Georgia Constitution was adopted." *Id.*

37. *Id.*

38. *Id.* at 279, 431 S.E.2d at 104. Justice Hunstein noted that though drug forfeitures did not exist prior to 1798, the remedy of forfeiture in other contexts did pre-date 1798. Therefore a jury trial should be required. She also pointed out that the majority of other jurisdictions addressing this issue found a right to trial by jury exists in similar forfeitures.

39. 209 Ga. App. 142, 433 S.E.2d 637 (1993).

40. *Id.* at 143, 433 S.E.2d at 638.

homicide will be voluntary manslaughter.<sup>41</sup> Therefore, the conviction withstood appeal on the general grounds.

**Crimes Against Persons.** There are several offenses in our criminal code which proscribe various types of unintentional homicides, or at least homicides where an actual intent to kill is not an essential element. All are predicated upon some other violation and contain differing language specifically as it pertains to the relationship between the violation and the cause of death.<sup>42</sup> This makes it difficult to

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41. *Id.* (citing *Strickland v. State*, 9 Ga. App. 552, 71 S.E.2d 919 (1911)). This seems simple enough, *but see Foster v. State*, 264 Ga. 369, 444 S.E.2d 296 (1994), a case which dealt primarily with the issue of merger. In that case the supreme court held it was not error for the trial judge to refuse to "merge" the felony murder conviction into the voluntary manslaughter conviction for the same death. *Id.* at 369, 444 S.E.2d at 296-97. Apparently trying to limit the holding of *Edge v. State*, 261 Ga. 865, 414 S.E.2d 463 (1992), the court expressed doubt that a charge on voluntary manslaughter was even appropriate where provocation was by the third party unintended victim. 264 Ga. at 370, 444 S.E.2d at 297. This is probably not dicta, because it is the underlying basis for the court's upholding of the felony murder conviction.

If the charge is not authorized, because provocation cannot be supplied by a person other than the victim, then the conviction in *Coker* was probably not authorized, and it would be error to give the charge unless requested by the defense. *See Robinson v. State*, 109 Ga. 506, 34 S.E. 1017 (1899).

The court concluded in *Foster* that "it appears that the voluntary manslaughter statute, O.C.G.A. § 16-5-2(a), should be construed so as to authorize a conviction for that form of homicide only where the defendant can show provocation by the homicide victim." (emphasis added). Justice Sears-Collins wrote a strong, well-reasoned dissent. 264 Ga. at 370, 444 S.E.2d at 297. This area is rife with conflicting case law and gray fuzzy opinions and is in bad need of clarification.

At present, it appears to the author that it would not be error to refuse to give the voluntary manslaughter charge in such cases. It would be error to give the charge on request by the state. If the defense joins or independently requests the charge it would not be error. At a bench trial such as that in *Coker*, where requests to charge are not made, and therefore waiver would not be an issue, it would appear that a conviction for voluntary manslaughter under these facts would not be authorized.

42. O.C.G.A. § 16-5-1 defines felony murder as follows: "A person . . . commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice." O.C.G.A. § 16-5-1(c) (1992).

O.C.G.A. § 16-5-3 defines involuntary manslaughter as follows:

(a) A person commits the offense of involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony . . . (b)

A person commits the offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner when he causes the death of another human being without any intention to do so, by the commission of a lawful act in an unlawful manner likely to cause death or great bodily harm.

O.C.G.A. § 16-5-3(a)-(b) (1992).

ascertain whether case law dealing with the issue of causation in one violation is applicable to another.

Having said all that, there were a number of cases dealing loosely with the issue of "cause," or "proximate cause," or maybe even the issue of "nexus." It was not error in *Mote v. State*,<sup>43</sup> a homicide by vehicle case, for the trial judge to fail to give a requested charge on "proximate cause."<sup>44</sup> The judge adequately covered the issue through the language defining vehicular homicide and also charged the jury that "causation was a material element . . . which the State was required to prove . . . . For this reason, and because the requested charge contained some misleading language, it was not error to fail to give the charge."<sup>45</sup> The court further declined to require the "proximate cause" charge approved in *Johnson v. State*<sup>46</sup> to be given in every vehicular homicide case.<sup>47</sup> Judge Beasley, in a special concurrence, would have required such a charge if a proper request had been made.<sup>48</sup>

In *Lefler v. State*,<sup>49</sup> a first degree vehicular homicide case, the court found it was an error for the trial court to fail to charge on the lesser offense of vehicular homicide in the second degree predicated on a traffic signal violation and speeding.<sup>50</sup> In so holding, the court noted that the

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O.C.G.A. § 40-6-393(a) (Supp. 1993) defines homicide by vehicle in the first degree as follows: "Any person who, without malice aforethought, causes the death of another person through the violation of (specified traffic violations) commits the offense of homicide by vehicle in the first degree . . . ."

Homicide by vehicle in the second degree is defined similarly, but it is predicated on different underlying traffic violations. However, it differs further in that it is limited to those instances "*when such violation is the cause of said death . . . .*" O.C.G.A. § 40-6-393(b) (Supp. 1993) (emphasis added).

In contrast, homicide by vehicle is defined as follows: "Any person who, after being declared a habitual violator . . . causes the death of another person, without malice aforethought, *by operation of a motor vehicle*, commits the offense of homicide by vehicle in the first degree . . . ." O.C.G.A. § 40-6-393(c) (Supp. 1993) (emphasis added).

43. 212 Ga. App. 551, 442 S.E.2d 799 (1994).

44. *Id.* at 553, 442 S.E.2d at 801.

45. *Id.*

46. 170 Ga. App. 433, 317 S.E.2d 213 (1984). The court defined proximate cause as follows:

[A]n injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

*Id.* at 434, 317 S.E.2d at 214.

47. 212 Ga. App. at 553, 442 S.E.2d at 801.

48. *Id.* at 554, 442 S.E.2d at 802.

49. 210 Ga. App. 609, 436 S.E.2d 777 (1993).

50. *Id.* at 610-11, 436 S.E.2d at 779.

evidence did not demand a finding by the jury that defendant's "driving under the influence and/or reckless driving were the proximate cause of the victim's death . . ." <sup>51</sup> Therefore the first degree vehicular homicide conviction was reversed. <sup>52</sup>

The language of the felony murder statute <sup>53</sup> that the death be caused "in the commission of a felony" does not mean that the victim must die during the commission of the underlying felony. The court in *Dunbar v. State* <sup>54</sup> upheld a felony murder conviction wherein the victim died eighteen days after, but as a result of, gunshot injuries caused by the defendant. <sup>55</sup>

Practicers of "S/M," beware! Consent on the part of the victim, in *Ogletree v. State*, <sup>56</sup> made no difference for a conviction of the offense of battery. <sup>57</sup> "It is the act and intent and results of the defendant's act which constitute the crimes as charged; the attitude of the victim is not called into issue by these elements." <sup>58</sup>

Consent can be a defense to kidnapping because it negates the element of "against one's will." <sup>59</sup> However, in *Williams v. State*, <sup>60</sup> the victim apparently only consented to go "to find a friend." "The victim did not knowingly and willingly consent to go . . . to the remote area of woods where the co-defendant and appellant attacked and abandoned him." <sup>61</sup> Therefore, the kidnapping conviction was upheld. <sup>62</sup>

The defendant in *Strickland v. State* <sup>63</sup> was convicted of cruelty to children for depriving his illegitimate child of necessary sustenance. <sup>64</sup>

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51. *Id.* at 610, 436 S.E.2d at 778.

52. *Id.* at 612, 436 S.E.2d at 780.

53. *See supra* note 42.

54. 263 Ga. 769, 438 S.E.2d 356 (1994).

55. *Id.* at 769, 438 S.E.2d at 356.

56. 211 Ga. App. 845, 440 S.E.2d 732 (1994).

57. O.C.G.A. § 16-5-23.1(a) (1992) provides: "A person commits the offense of battery when he: intentionally causes substantial physical harm or visible bodily harm to another." *Id.*

58. 211 Ga. App. at 846, 440 S.E.2d at 733.

59. O.C.G.A. § 16-5-40(a) (1992) provides: "A person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will." *Id.*

60. 211 Ga. App. 393, 439 S.E.2d 11 (1993).

61. *Id.* at 394, 439 S.E.2d at 15.

62. *Id.* at 399, 439 S.E.2d at 18.

63. 211 Ga. App. 48, 438 S.E.2d 161 (1993).

64. O.C.G.A. § 16-5-70(a) (1992) provides:

A parent, guardian, or other person supervising the welfare of or having immediate charge or custody of a child under the age of 18 commits the offense of cruelty to children when he willfully deprives the child of necessary sustenance to the extent that the child's health or well-being is jeopardized.

Defendant urged that he had no authority over and no duty toward the child because the child was illegitimate. He also tried to pass it off on his wife, who was not the child's mother, by contending she was in charge of the cooking. The jury was not impressed by such a sexist defense, nor apparently was Judge Smith. He noted "[i]t is the joint and several duty of each parent of a child born out of wedlock to provide for the maintenance, protection, and education of the child . . . [i]t is clear . . . that the putative father is also a parent."<sup>65</sup> In this case, the defendant father also had "immediate charge and custody" of the child.<sup>66</sup> It was therefore not error for the trial judge to deny a directed verdict.<sup>67</sup>

**Crimes Against Property.** Two remarkably similar cases illustrated the distinction between the definition of a charge of robbery and theft by taking insofar as it relates to the taking "from the person" element of robbery.<sup>68</sup>

In *McNearney v. State*,<sup>69</sup> defendant snatched the victim's purse from a grocery cart within three feet of the victim while the victim was unloading the cart. The victim was unaware of the crime at the time, but found out after a third party notified her. The victim saw a small grey car travelling fast leaving the parking lot (presumably containing defendant).<sup>70</sup> The jury was given the option of robbery by snatching or theft by taking. The astute jurors asked for a clarification on the issue of the victim's awareness of the crime and timing.<sup>71</sup> The jurors convicted defendant of robbery by snatching.<sup>72</sup> The court of appeals reversed.<sup>73</sup> The court rejected the state's argument that numerous cases of robbery had been upheld wherein the victim was unconscious.<sup>74</sup>

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*Id.*

65. 211 Ga. App. at 49, 438 S.E.2d at 162. O.C.G.A. § 19-7-24 (1991) provides: "It is the joint and several duty of each parent of a child born out of wedlock to provide for the maintenance, protection, and education of the child until he reaches the age of majority, except to the extent that the duty of one parent is otherwise or further defined by court order." *Id.*

66. *Id.*

67. *Id.*

68. O.C.G.A. § 16-8-40(a) (1992) provides: "A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another . . ." *Id.*

69. 210 Ga. App. 582, 436 S.E.2d 585 (1993).

70. *Id.* at 582-83, 436 S.E.2d at 586.

71. *Id.* at 583, 436 S.E.2d at 586.

72. *Id.* at 582, 436 S.E.2d at 585.

73. *Id.* at 584, 436 S.E.2d at 587.

74. *Id.*, 436 S.E.2d at 586.

The court found those cases distinguishable.<sup>75</sup> Finding no evidence that the victim was aware of the taking before the crime was complete, the court vacated the robbery conviction and remanded for sentencing for theft by taking.<sup>76</sup>

*Bryant v. State*<sup>77</sup> was almost identical factually. Defendant snatched the victim's purse from her shopping cart while she was looking in the meat counter of the grocery store. In contrast, however, the victim turned in time to see defendant lifting her purse. The victim screamed and chased defendant. Defendant was caught before he got out of the store.<sup>78</sup> This conviction was upheld because the victim became aware before the crime was complete.<sup>79</sup>

If one commits an armed robbery of two tellers at the same bank in the same incident, one may be convicted of two counts of armed robbery. This was the holding of *McCloskey v. State*<sup>80</sup> in which the court noted that "[o]ne may only rob a person, and not a corporate entity . . . . Each employee who was robbed is a victim regardless who owned the money."<sup>81</sup>

The court in *McCloskey* also held that it is not necessary for the victim to see the weapon used in the armed robbery.<sup>82</sup> The defendant in *McCloskey* told a teller that he had a gun in his pocket and then placed his hand in his pocket. He also exhibited a note that said the bag or folder he was carrying had a bomb in it. No weapon was ever seen nor accurately described, nor was a weapon recovered.<sup>83</sup> The conviction for armed robbery was nevertheless upheld. Armed robbery may be

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75. *Id.*, 436 S.E.2d at 586-87.

76. *Id.*, 436 S.E.2d at 587.

77. 213 Ga. App. 301, 444 S.E.2d 391 (1994).

78. *Id.* at 301, 444 S.E.2d at 391.

79. *Id.* at 302, 444 S.E.2d at 391-92 (quoting *Williams v. State*, 9 Ga. App. 170, 171, 70 S.E. 890 (1911)).

[I]n order to prove a case of robbery . . . [by snatching] . . . it is only necessary to show that the person robbed was conscious that something was being taken away from him, and that for any reason he was unable to prevent it; and consequently the only difference now between robbery of this class and larceny from the person is that in the latter case the property is abstracted without the knowledge of its possessor; but if the possessor becomes conscious, even in the taking, that his property is being taken away from him, and this knowledge is obtained before the taking is complete, the offense of robbery is committed.

*Id.*

80. 211 Ga. App. 205, 438 S.E.2d 679 (1993).

81. *Id.* at 206, 438 S.E.2d at 679.

82. *Id.* at 207, 438 S.E.2d at 681.

83. *Id.*

committed with replicas of weapons or objects having that "appearance."<sup>84</sup> The word "appearance" is not limited to visual perception. "[I]t is immaterial whether such apprehension is created by use of the sense of vision or by any other sense, provided that the apprehension is reasonable under the circumstances."<sup>85</sup>

In *Stevens v. State*,<sup>86</sup> two undercover agents gave defendant \$600 with which he was to buy cocaine for the agents. The defendant skipped out, keeping the money, or at least not returning with the money or the drugs.<sup>87</sup> The agents arrested him later for theft by taking for being in lawful possession of the money but unlawfully appropriating it.<sup>88</sup> The court of appeals did not buy defendant's argument that no crime was committed because the money he received was part of an unenforceable illegal contract. The conviction was affirmed.<sup>89</sup>

In this country and state, we may not be imprisoned for debt.<sup>90</sup> However, it seems annually that judges, prosecutors, and jurors need to be reminded of this, by the reversal of two or three unwarranted convictions. This year was no exception. In *Myrick v. State*,<sup>91</sup> defendant had accepted \$4,000 cash to make certain property improvements. Defendant did not do the work and refused to communicate.<sup>92</sup> In reversing this theft by conversion<sup>93</sup> case the court of appeals held:

The evidence in this case . . . shows the existence of an enforceable contract, the breach of which would be civilly actionable [but it] does not show the existence of a [theft by conversion] . . . . Even if appellant failed a duty to make a specified application of the \$4,000,

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84. O.C.G.A. § 16-8-41 provides: "A person commits the offense of armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon." *Id.*

85. 211 Ga. App. at 208, 438 S.E.2d at 681.

86. 213 Ga. App. 293, 444 S.E.2d 840 (1994).

87. *Id.* at 293, 444 S.E.2d at 840.

88. O.C.G.A. § 16-8-2 (1992) provides: "A person commits the offense of theft by taking when . . . being in lawful possession thereof, unlawfully appropriates any property of another with intention of depriving him of the property . . . ."

89. 213 Ga. App. at 295, 444 S.E.2d at 842.

90. Constitution of Georgia, Art. I, § 1, para. 23 provides: "There shall be no imprisonment for debt." *Id.*

91. 210 Ga. App. 393, 436 S.E.2d 100 (1993).

92. *Id.* at 394, 436 S.E.2d 101-02.

93. See O.C.G.A. § 16-8-5 (1992) which provides: "A person commits the offense of theft of services when by deception and with the intent to avoid payment he knowingly obtains services, accommodations, entertainment, or the use of personal property which is available only for compensation."

the evidence does not prove . . . appellant knowingly converted the funds to his own use.<sup>94</sup>

In *Scarber v. State*,<sup>95</sup> defendant was convicted of theft by conversion for failing to account for furniture left on consignment or the proceeds thereof. Again, defendant played "tar baby," that is he refused to talk.<sup>96</sup> The court of appeals reversed because there was no evidence of conversion to the defendant's own use.<sup>97</sup> Judges Beasley and Andrews dissented.<sup>98</sup>

Robbery, or theft by taking, and theft by receiving are mutually exclusive.<sup>99</sup> Where mutually exclusive verdicts of guilty are returned, it is "not sufficient to vacate one conviction and allow the other to stand."<sup>100</sup> *Camsler v. State*<sup>101</sup> took the ruling one step further. In order to avoid the results dictated by *Thomas*, the state argued that *Camsler* was distinguishable because the defendant was indicted for theft by receiving for "receiving and retaining"<sup>102</sup> the property. The state contended a conviction for retaining would not be mutually exclusive with the robbery or theft. The court of appeals avoided that issue. Though the court conceded that where one is indicted with receiving and retaining in the conjunctive, only one method of commit-

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94. 210 Ga. App. at 394-95, 436 S.E.2d at 101-02.

95. 211 Ga. App. 260, 439 S.E.2d 83 (1993).

96. *Id.* at 260, 439 S.E.2d at 84.

97. *Id.* at 261, 439 S.E.2d at 85.

98. *Id.* at 262, 439 S.E.2d at 85.

99. *Thomas v. State*, 261 Ga. 854, 856, 413 S.E.2d 196, 198 (1992).

100. *Id.* It is hard to reconcile this ruling with the abolition of the inconsistent verdict rule (See *Milam v. State*, 255 Ga. 560, 562, 341 S.E.2d 216, 218 (1986) and *Alexander v. State*, 263 Ga. 474, 435 S.E.2d 187 (1993)) and cases like *Cleveland v. State*, 212 Ga. App. 361, 441 S.E.2d 820 (1994). In *Cleveland* the jury convicted the defendant of possession of a firearm during the commission of a crime (aggravated assault) yet acquitted the defendant of aggravated assault, the only offense which would have supported such a ruling. *Id.* at 361, 441 S.E.2d at 820. *Cleveland* does not require speculation. The verdicts cannot be reconciled but the conviction was affirmed because the inconsistent verdict rule has been abolished. *Id.* Yet in *Camsler*, the jury found the defendant guilty of both offenses. The verdicts can be reconciled using common sense, yet both convictions must be vacated.

It is also difficult to understand how a reversal based on such speculation could square with the presumption that "jurors are . . . intelligent men and women . . ." *Hollis v. State*, 215 Ga. App. 35, 39, 450 S.E.2d 247, 251 (1994).

101. 211 Ga. App. 826, 440 S.E.2d 681 (1994).

102. O.C.G.A. § 16-8-7(a) (1992) provides: "A person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen unless the property is received, disposed of, or retained with intent to restore it to the owner. 'Receiving' means acquiring possession or control or lending on the security of the property." *Id.*

ting the offense or the other must be proven,<sup>103</sup> the court speculated that the jury "may well have convicted Camsler of theft by receiving . . . on evidence that he received the stolen car."<sup>104</sup> This would be mutually exclusive with the robbery conviction. Therefore, both convictions were reversed.<sup>105</sup>

**Abandonment.** Although the offense itself has remained unchanged, the procedure for trying an abandonment case received some clarification. In *Whitman v. State*,<sup>106</sup> defendant was acquitted of abandonment in a bench trial. The case was tried upon "stipulated evidence" which the state conceded was insufficient to show paternity or abandonment.<sup>107</sup> Nevertheless, the court merely adjudicated the defendant not guilty and declined defendant's request to render a binding judgment that he was not the father of the child.<sup>108</sup> The court of appeals affirmed, holding that in order for the trier of fact to render a judgment of nonpaternity, it must be convinced by a preponderance of the evidence

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103. 211 Ga. App. at 827, 440 S.E.2d at 682 (citing *Minter v. State*, 170 Ga. App. 801, 802, 318 S.E.2d 226 (1984)).

104. *Id.*

105. *Id.* This is important because frequently a prosecutor who has a case based on recent possession of stolen property will indict for both the theft and theft by receiving. The usual defense is that the defendant received the property from some un-identifiable individual. The prosecutor therefore hedges his bets. From cases such as this it can be seen that the *prosecutor* should request a charge that the jury convict of one or the other but not both, pursuant to *Thomas v. State*, 261 Ga. at 855-56, 413 S.E.2d at 197. In the alternative the prosecutor should indict for the theft and theft by receiving by retaining only.

106. 212 Ga. App. 523, 442 S.E.2d 313 (1994).

107. *Id.* at 523, 442 S.E.2d at 314. It is difficult to understand why the state would call or allow to be called for trial a case in which it knew so positively that it could not establish paternity that it would be willing to stipulate that "the evidence would not be sufficient to show . . . defendant's paternity . . ." The state should have never charged on such evidence or should have nolle prossed. A procedure such as was used in this case could totally deprive the child of his or her rights without even having any say in the matter.

108. O.C.G.A. § 19-10-1(f)(1) provides:

Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged parent cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged parent is not the natural parent.

*Id.*

that the defendant is not the father of the child.<sup>109</sup> In short, while a finding of guilty does establish paternity, the converse does not hold true. In so holding, the court disapproved the pattern jury instruction on the subject.<sup>110</sup> The court suggested that the trier of fact, if it had a reasonable doubt as to paternity, should render a general verdict of not guilty.<sup>111</sup> Therefore, the trial court was affirmed.<sup>112</sup>

**Traffic and Offenses Against Public Order.** If a person is arrested and confined for civil or criminal contempt, what happens if he "escapes"? May he be prosecuted for the criminal offense of "escape"? The court of appeals in *Flanagan v. State*<sup>113</sup> decided this question in the negative. The escape statute<sup>114</sup> is limited by its own terms to cases

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109. 212 Ga. App. 524, 442 S.E.2d at 314-15.

110. *Id.* at 524, 442 S.E.2d at 314, referring to COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II CRIMINAL CASES 148 (1991) which reads in part:

If you should find that the defendant is not the parent of the child, or if you have any reasonable doubt as to the defendant being the parent of the child, then, and in that event, you should acquit the defendant, and the form of your verdict would be: "We, the jury, find the defendant not guilty by reason of the fact that he/she is not the parent of the child."

If you find beyond a reasonable doubt that the defendant is the parent of the child, but do not believe beyond a reasonable doubt that he/she is guilty of the crime of abandonment, then the form of your verdict would be: "We, the jury find the defendant to be the parent of the child, but not guilty of the crime of abandonment."

*Id.*

111. 212 Ga. App. at 524, 442 S.E.2d at 314. However the suggestion by the court of appeals would require, in a jury trial, that the court charge the jury on the issue of burden of proof and preponderance of the evidence in a manner totally antithetical to criminal law and all the other charges the jury receives. This has the danger of confusing the jury in the guilty-innocence determination on the most fundamental issues of the state's burden and proof of guilt beyond a reasonable doubt.

The author suggests bifurcating the trial. The first phase would deal with guilty-innocence with the usual burden and standard of proof beyond a reasonable doubt charges.

In the event of an acquittal, the issue of paternity would be re-submitted. This would allow the court to re-charge on the different burden and standard of proof. Incidentally, it might also allow a defendant who previously opted not to testify, to offer evidence in his own behalf on the issue of paternity. After acquittal, the state could even call the defendant for cross examination. The state would offer prior felony convictions for impeachment because of the civil nature of this phase. Many other questions might arise, however. Does appointed counsel withdraw after the adjudication of not guilty?

112. *Id.* at 525, 442 S.E.2d at 315.

113. 212 Ga. App. 468, 442 S.E.2d 16 (1994).

114. O.C.G.A. § 16-10-52 provides in part:

(a) A person commits the offense of escape when he:

in which a person is charged with or convicted of a criminal offense, whether felony or misdemeanor. The court noted this gap in our law but left it for the general assembly to correct.<sup>115</sup>

Last year we learned that one may commit the offense of D.U.I. on a bicycle.<sup>116</sup> This year, we found out in *Bridgers v. State*<sup>117</sup> that one may commit the offense of D.U.I. in a vehicle being towed, as long as "it was necessary for the defendant to steer the vehicle to keep it within the traffic lane."<sup>118</sup>

Even though the statute does not mention knowledge or intent, in order to be found guilty of failure to stop and report an accident,<sup>119</sup> there must be evidence that the defendant knew or should have known about the accident.<sup>120</sup> The court of appeals in *Dworkin v. State*<sup>121</sup> found sufficient evidence of such knowledge in that case and affirmed the conviction.<sup>122</sup>

**Lesser Included Offenses.** There were a number of cases that dealt with what offenses were or were not included within another. For example, frequently, for expediency's sake, driving under the influence defendants are allowed to "plead down" to public drunkenness when there is a weakness in the state's case. However, if the case goes to trial, public drunkenness is not an option for the jury or judge on a regularly

(1) Having been convicted of a felony or misdemeanor or of the violation of a municipal ordinance, intentionally escapes from lawful custody or from any place of lawful confinement;

(2) Being in lawful custody or lawful confinement prior to conviction, intentionally escapes from such custody or confinement . . . .

*Id.*

115. 212 Ga. App. at 469, 442 S.E.2d at 17.

116. *Jones v. State*, 206 Ga. App. 604, 426 S.E.2d 179 (1992).

117. 213 Ga. App. 157, 444 S.E.2d 330 (1994).

118. *Id.* at 158, 444 S.E.2d at 331.

119. O.C.G.A. § 40-6-270(a) provides:

The driver of any vehicle involved in an accident resulting in injury to or the death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or shall stop as close thereto as possible and forth with return to the scene of the accident . . . .

120. Under the authority of *Chandler v. State*, 204 Ga. App. 816, 820, 421 S.E.2d 288, 293 (1992), which required a charge on knowledge in the similarly defined offense of aggravated assault on a police officer, the pattern jury instruction defining "failure to stop and render aid" should also be revised to include the requirement of knowledge. See COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II CRIMINAL CASES 143 (1991).

121. 210 Ga. App. 461, 436 S.E.2d 665 (1993).

122. *Id.* at 463, 436 S.E.2d at 668.

drawn D.U.I. charge.<sup>123</sup> In *State v. Tweedell*,<sup>124</sup> the court of appeals reversed the nonjury judgment of the trial court of guilty of public drunkenness.<sup>125</sup> The original charge had been driving under the influence.<sup>126</sup> The court of appeals held that public drunkenness is not a lesser included offense of driving under the influence either as a matter of fact or of law.<sup>127</sup>

In three cases the court of appeals held that the offense of sexual battery<sup>128</sup> is not a lesser included offense of a charge of child molestation.<sup>129</sup> In *Duck v. State*,<sup>130</sup> defendant was convicted of aggravated child molestation for the completed act of sodomy with a child.<sup>131</sup> In *Landrum v. State*,<sup>132</sup> defendant was convicted of child molestation and aggravated child molestation.<sup>133</sup> In *Perkins v. State*,<sup>134</sup> defendant was convicted of child molestation. The reported facts of *Perkins* are unclear, but the act of molesting appears to be predicated on the defendant's acts of peering at a thirteen-year-old child when she entered

123. *State v. Tweedell*, 209 Ga. App. 13, 13-14, 432 S.E.2d 619, 620 (1993).

124. 209 Ga. App. 13, 432 S.E.2d 619 (1993).

125. *Id.* at 14, 432 S.E.2d at 620.

126. *Id.*, 432 S.E.2d at 619.

127. *Id.* at 13, 432 S.E.2d at 620. O.C.G.A. § 16-1-6 (1992) provides two alternative tests:

An accused may be convicted of a crime included in a crime charged in the indictment or accusation. A crime is so included when:

(1) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged; or

(2) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

*Id.*

128. O.C.G.A. § 16-6-22.1 (1992) provides:

(a) For the purposes of this Code section, the term "intimate parts" means the primary genital area, anus, groin, inner thighs, or buttocks of a male or female and the breasts of a female.

(b) A person commits the offense of sexual battery when he intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person.

*Id.*

129. *See infra* note 141.

130. 210 Ga. App. 205, 435 S.E.2d 725 (1993).

131. *Id.* at 205, 435 S.E.2d at 726.

132. 210 Ga. App. 275, 436 S.E.2d 40 (1993).

133. *Id.* O.C.G.A. § 16-6-4(c) (1992) provides: "A person commits the offense of aggravated child molestation when he commits an offense of child molestation which act physically injures the child or involves an act of sodomy." *Id.*

134. 212 Ga. App. 225, 441 S.E.2d 511 (1994).

a public bathroom and trying to open the stall door.<sup>135</sup> In all three cases the court of appeals relied on *Teasley v. State*<sup>136</sup> in affirming the trial courts' refusal to give requested charges for sexual battery as a lesser included offense of child molestation.<sup>137</sup> All of these cases should be seen, at most, as fact specific. However, the court resorted to unnecessary language, even going so far as to hold that "there would never be any reason for the court to charge the jury on sexual battery as a lesser included offense [of child molestation]. Such a charge would be error."<sup>138</sup> Such language is, at best, dicta and at worst very dangerous.<sup>139</sup> In *Teasley* the court gave as part of its rationale that "[t]he crimes of child molestation and sexual battery have different elements and protect different classifications of victims."<sup>140</sup> It would seem that the court is overlooking another and possibly more significant distinction between the two crimes, that of the specific intent in child molestation to "arouse or satisfy the sexual desires of either the child or the [defendant]."<sup>141</sup> If that element is lacking, disputed, or even dependent upon circumstantial evidence, as intent almost always is,<sup>142</sup> it should

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135. *Id.* at 226, 441 S.E.2d at 513. If these are the only facts, clearly no touching took place and a battery of any kind would not be supported by the evidence.

136. 207 Ga. App. 719, 429 S.E.2d 127 (1993). In *Teasley* the defendant apparently merely placed his hand on the victim's breast. *Id.* at 719, 429 S.E.2d at 127.

137. *Id.* at 719-20, 429 S.E.2d at 128.

138. 212 Ga. App. at 227, 441 S.E.2d at 513 (citing *Proper v. State*, 208 Ga. App. 471, 431 S.E.2d 133 (1993)). *Proper* was a case in which the defendant had "fondled [the victim's] vagina, placed his penis between her legs, and tried to place his penis in her mouth." *Id.* at 472, 431 S.E.2d at 134.

139. Judges may rely on such language which is clearly dicta to the detriment of everyone concerned. Recently the appellate courts have resolved an ongoing problem caused by the use of unnecessary language in prior opinions. In several cases, appellate courts had affirmed trial courts who refused to give charges on accident and self-defense in the same case. In doing so the appellate courts had unnecessarily injected that the offenses of accident and self-defense were "mutually exclusive." See, e.g., *Todd v. State*, 149 Ga. App. 574, 254 S.E.2d 894 (1979); *Culbreath v. State*, 258 Ga. 373, 369 S.E.2d 29 (1988); *Boling v. State*, 244 Ga. 825, 262 S.E.2d 123 (1979). This led to reversals and a necessary clarification in *Turner v. State*, 262 Ga. 359, 418 S.E.2d 52 (1992); *Goodwin v. State*, 262 Ga. 903, 427 S.E.2d 271 (1993); and *Koritta v. State*, 263 Ga. 703, 438 S.E.2d 68 (1994), which now make it clear that the defenses are not mutually exclusive and the court should analyze each request based on the facts and not based on some "bright line" rule.

Use of the word "never" in appellate opinions appears to be unwise.

140. 207 Ga. App. at 719, 429 S.E.2d at 128.

141. O.C.G.A. § 16-6-4(a) provides: "A person commits the offense of child molestation when he does any immoral or indecent act to or in the presence of or with any child under the age of 14 years with the intent to arouse or satisfy the sexual desires of either the child or the person." *Id.*

142. *Mims v. State*, 264 Ga. 271, 273, 443 S.E.2d 845, 847 (1994) (Hunt, J., concurring) (citing *Johnson v. State*, 210 Ga. App. 99, 435 S.E.2d 458 (1993)). See also *Hathcock v.*

be error not to give a requested charge for the lesser offense of sexual battery (which requires no such intent), in a trial for child molestation where an actual touching takes place.<sup>143</sup>

Compare these cases with *Gordon v. State*<sup>144</sup> in which the court likewise held that sexual battery is not as a matter of law a lesser included offense of statutory rape.<sup>145</sup>

### C. *Defenses Defined*

**Entrapment.** No matter what means are used, there can be no entrapment unless the person who induced the defendant to sell contraband or otherwise violate the law is an agent of the state or government.<sup>146</sup> In *Bowman v. State*,<sup>147</sup> defendant made a sale of marijuana to officers after repeated requests of a person named "Chris."

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State, 214 Ga. App. 188, 447 S.E.2d 104 (1994) in which the court of appeals reversed a conviction of a case wherein the defendant admitted the act of exposing himself to a child but submitted expert testimony that the defendant had no intent to arouse or satisfy sexual desires. This case, like *Perkins*, 212 Ga. App. 225, 441 S.E.2d 511 (1994), did not involve a touching, but is offered by the author only to illustrate that the issue of intent cannot be taken for granted as the court of appeals seems to do in these cases. *Hathcock*, 214 Ga. App. at 188, 447 S.E.2d at 105.

143. It would appear that the intent to arouse and satisfy the sexual desires of the accused was well established in *Duck, supra*, by the completed act of sodomy, and maybe in *Landrum, supra*, by whatever evidence made the child molestation aggravated. In *Parkins, supra*, where no touching took place, a charge of any kind of battery could not given.

However, in the seminal case of *Teasley v. State, supra*, a charge on sexual battery should have been given. While fondling a breast would certainly support an inference of intent to arouse or satisfy sexual desires, such an inference is not demanded as a matter of law. Another obvious inference might be an intent to insult or scare. To rule otherwise is tantamount to directing a verdict of guilty as to that issue on the basis of circumstantial evidence.

144. 210 Ga. App. 224, 435 S.E.2d 742 (1993).

145. *Id.* at 227, 435 S.E.2d at 745. See also O.C.G.A. § 16-6-3 (1992) which provides: "A person commits the offense of statutory rape when he engages in sexual intercourse with any female under the age of 14 years and not his spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the female." *Id.*

146. O.C.G.A. § 16-3-25 provides:

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

*Id.*

147. 210 Ga. App. 831, 437 S.E.2d 840 (1993).

Defendant claimed entrapment. The officers, however, denied that "Chris" was a state agent and stated that they did not know him by name or by sight. They further maintained that they had not paid him and that he was not an informant. He had merely approached the officers and asked them what they wanted. "Chris" then conducted the officers to the defendant for the transaction.<sup>148</sup> The court dodged the issue of sufficiency of the evidence to implicate the informant as a state agent. The court merely decided that "[w]hile [the defendant] may have presented enough evidence to raise a defense of entrapment, the evidence did not demand a finding of entrapment as a matter of law."<sup>149</sup>

However, in *Gilbert v. State*,<sup>150</sup> the trial court refused to charge on entrapment. Defendant had finally acceded to numerous requests by a person known to him as Cathy Cobb to deliver amphetamines to her. The police used one unidentified female informant who had spoken to defendant shortly before the arrest. Although there was no direct evidence that Cathy Cobb was the police informant, there were sufficient circumstances to allow, but not require, the jury to infer that she was a state agent for purposes of establishing entrapment.<sup>151</sup> Since the defendant claimed not to be pre-disposed to sell drugs, this was a sufficient prima facie case to require the judge to charge on the defense of entrapment. The conviction was reversed.<sup>152</sup>

In reverse sting operations, undercover police officers pose as drug dealers in an area known for drug activity and sell [drugs] to purchasers. Following the purchase . . . the buyer is arrested for possession of [the drug]. The law enforcement officers use this operation as a means of attempting to prevent street level drug activities.<sup>153</sup>

The defendant in *Givens* challenged this procedure as "illegal and so outrageous as to constitute a violation of due process."<sup>154</sup> The court of appeals denied the challenge to "reverse stings" and upheld the conviction.<sup>155</sup>

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148. *Id.* at 832, 437 S.E.2d at 840.

149. *Id.* at 832-33, 437 S.E.2d at 841.

150. 212 Ga. App. 308, 441 S.E.2d 785 (1994), *cert. granted*.

151. *Id.* at 309, 441 S.E.2d at 787.

152. *Id.* at 310, 441 S.E.2d at 788.

153. *Givens v. State*, 211 Ga. App. 290, 291, 439 S.E.2d 22, 24 (1993), *rev'd on other grounds*, 264 Ga. 522, 448 S.E.2d 687 (1994).

154. 211 Ga. App. at 292, 439 S.E.2d at 24.

155. *Id.* at 293, 439 S.E.2d at 25. In response to the defense challenge the court opined that "[t]here was no criminal intent or act on the part of the undercover officers, and it is the targeted illicit trade of drugs that properly may be described as outrageous, rather than the reverse sting operations designed and conducted to combat that trade." *Id.* at 292, 439 S.E.2d at 24.

**Abandonment.** It is a defense to a charge of criminal attempt<sup>156</sup> that a person "abandon[s] his effort to commit the crime or in any other manner prevent[s] its commission under circumstances manifesting a voluntary and complete renunciation of his criminal purpose."<sup>157</sup> In *Givens v. State*,<sup>158</sup> defendants were charged with and convicted of attempt to possess cocaine. After ordering cocaine from the undercover officers, they actually took possession of the drugs. However they handed the drugs back to the agents and proceeded to drive away.<sup>159</sup> The court of appeals found that these facts not only did not demand a finding of abandonment, but it did not even require a charge on the subject because they had already taken a "substantial step" toward committing the crime.<sup>160</sup>

**Accident and Self Defense.** The defenses of accident<sup>161</sup> and self defense<sup>162</sup> are not always mutually exclusive.<sup>163</sup> The usual scenario

156. O.C.G.A. § 16-4-1 (1992) provides: "A person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime." *Id.*

157. O.C.G.A. § 16-4-5(a) (1992):

When a person's conduct would otherwise constitute an attempt to commit a crime under Code Section 16-4-1, it is an affirmative defense that he abandoned his effort to commit the crime or in any other manner prevented its commission under circumstances manifesting a voluntary and complete renunciation of his criminal purpose.

*Id.*

158. 211 Ga. App. 290, 439 S.E.2d 22 (1993), *rev'd on other grounds*, 264 Ga. 522, 448 S.E.2d 687 (1994).

159. 211 Ga. App. at 290, 439 S.E.2d at 24.

160. *Id.* This seems to imply that once a "substantial step" has been taken, then the crime of attempt is complete and it is therefore too late to abandon the criminal enterprise. Such an interpretation would render the section on abandonment meaningless and unnecessary. If one has not yet taken the "substantial step" there is no need for the defense of abandonment as no attempt has taken place. On the other hand if one has taken the "substantial step," the crime of attempt is complete, and therefore it is too late to abandon. This "catch-22" is noted by Judge McMurray in a strong dissent. *Id.* at 294, 439 S.E.2d at 26. What makes this entire case difficult to analyze, however, is that it is difficult to understand why the charge was attempt rather than the completed crime of possession. As previously noted, the defendants actually took possession of the drugs. *Id.* at 291, 439 S.E.2d at 23. Compare *Guzman v. State*, 206 Ga. App. 170, 171 (199\_).

161. O.C.G.A. § 16-2-2 (1992) provides: "A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence."

*Id.*

162. O.C.G.A. § 16-3-21(a) provides:

A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to

where both defenses may be present is when a person is armed with a weapon which he claims accidentally discharged while he was defending himself from another's attack.<sup>164</sup> However, in *Koritta v. State*,<sup>165</sup> defendant had succeeded in wresting a gun from the victim. The victim then rose to re-engage with the defendant. The gun fired accidentally when defendant flinched from the victim's anticipated blow.<sup>166</sup> "The defendant unequivocally testified that he 'did not intend to use the gun to defend [himself].'"<sup>167</sup> Under these facts, the supreme court held that it was reversible error for the trial judge to refuse to charge on self-defense along with the charge on accident that was given.<sup>168</sup> Justice Carley, joined by Justices Sears-Collins and Hunstein, dissented,<sup>169</sup> pointing out that this is a substantial extension of the ruling of *Turner v. State*.<sup>170</sup> The dissent suggested that this was not one of the "rare" cases to which the rule in *Turner* was intended to apply.<sup>171</sup>

**Agency.** While it is true that corporations may be prosecuted for criminal violations,<sup>172</sup> the existence and involvement of a corporation

defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person or to prevent the commission of a forcible felony.

*Id.*

163. *Turner v. State*, 262 Ga. 359, 418 S.E.2d 52 (1992) (correcting and overruling a long line of cases which, presumably, in dicta had indicated that these defenses were in fact mutually exclusive).

164. *Koritta v. State*, 263 Ga. 703, 704, 438 S.E.2d 68, 70 (1994) (citing *Turner, supra*).

165. 263 Ga. 703, 438 S.E.2d 68 (1994).

166. *Id.* at 704, 438 S.E.2d at 70.

167. 263 Ga. at 706, 438 S.E.2d at 71 (Carley, J., dissenting).

168. *Id.* at 705, 438 S.E.2d at 70.

169. *Id.*

170. 262 Ga. 359, 418 S.E.2d 52 (1992).

171. 263 Ga. at 706, 438 S.E.2d at 70. The dissent suggests that under *Koritta*, "[a] charge on both defenses must now be given in every case wherein there is some evidence of an initial defensive struggle over a gun and a subsequent accidental shooting, regardless of whether the defendant had undisputed control of the gun at the time the shot is fired." *Id.* at 707, 438 S.E.2d at 71.

172. O.C.G.A. § 16-2-22(a) (1992) provides:

(a) A corporation may be prosecuted for the act or omission constituting a crime only if:

(1) The crime is defined by a statute which clearly indicates a legislative purpose to impose liability on a corporation, and an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his office or employment and in behalf of the corporation; or

in a criminal enterprise did not shield or provide a defense for the defendant who was an officer of the corporation in *Arnold v. State*.<sup>173</sup> Defendant had defrauded investors. At trial he suggested that there was a fatal variance between the indictment and the proof because it was his corporation that was the guilty party and not he.<sup>174</sup> The court affirmed his conviction for theft by deception, holding that "[a]n officer or an agent of a corporation cannot shield himself from criminal responsibility for his own acts on the ground that they were done in his official capacity as an officer or agent of such corporation."<sup>175</sup>

**Insanity.** In *Johnson v. State*,<sup>176</sup> defendant had not filed a plea of incompetence prior to the start of trial.<sup>177</sup> At the call of the case, counsel for defendant notified the court of defendant's bizarre conduct and the fact that defendant had recently been admitted to a mental health facility. The court inquired into the matter, found that defendant was faking, and proceeded to trial.<sup>178</sup> After conviction, defendant contended in a motion for new trial and on appeal that he was denied an adequate hearing on the issue of competency.<sup>179</sup> The court of appeals noted that even when the issue has not been raised by the defense, the court has an "inherent duty"<sup>180</sup> to inquire into the issue of competency, "sua sponte . . . when the information known to the court at the time of the trial . . . is sufficient to raise a bona fide doubt regarding the defendant's competence."<sup>181</sup> The duty exists "even where the doubt

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(2) The commission of the crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation.

*Id.*

173. 210 Ga. App. 843, 437 S.E.2d 844 (1993).

174. *Id.* at 846, 437 S.E.2d at 847.

175. *Id.* (citing *Thompson v. State*, 85 Ga. App. 298, 69 S.E.2d 206 (1952)).

176. 209 Ga. App. 514, 433 S.E.2d 717 (1993).

177. *Id.* at 515, 433 S.E.2d at 718. See also O.C.G.A. § 17-7-130(a) (1992) which provides:

Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be tried first by a special jury. If the special jury finds the defendant mentally incompetent to stand trial, the court shall retain jurisdiction over the defendant but shall transfer the defendant to the Department of Human Resources.

*Id.*

178. 209 Ga. App. at 515, 433 S.E.2d at 718.

179. *Id.* at 515, 443 S.E.2d at 719.

180. *Id.*, 443 S.E.2d at 719 (citing *Baker v. State*, 250 Ga. 187, 297 S.E.2d 9 (1982)).

181. *Id.* at 515-16, 443 S.E.2d 719 (citing *Pate v. Robinson*, 383 U.S. 375 (1966)).

regarding a defendant's competency arises during the course of a trial.<sup>182</sup> The court further identified three factors to consider in determining whether the trial court should have conducted an inquiry into the issue of competence: "1. evidence of the defendant's irrational behavior; 2. the defendant's demeanor at trial; and 3. prior medical opinion regarding the defendant's competence to stand trial."<sup>183</sup>

Finally, however, the court held that where no special pretrial plea of insanity has been filed "the trial court ha[s] no mandatory duty to impanel a special jury to determine that issue."<sup>184</sup> Therefore, in *Johnson* the trial court did not abuse its discretion by refusing to conduct a special trial on the issue. The informal inquiry was sufficient absent more compelling evidence of incompetence.<sup>185</sup>

In a sequel to an opinion from last year,<sup>186</sup> the supreme court in *Nagel v. State*<sup>187</sup> affirmed the trial court's denial of Nagel's application for release after having been found not guilty by reason of insanity.<sup>188</sup> The case had been remanded for rehearing after previous clarification of evidentiary issues by the supreme court.<sup>189</sup> The remanding court had previously held that the presumption of continuing insanity alone would be insufficient to withstand undisputed medical evidence.<sup>190</sup> It also established a new appellate standard of review on the issue: "whether after reviewing the evidence in the light most favorable to the state, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was [sane]."<sup>191</sup>

The interesting thing about the sequel was the "Catch-22" result.<sup>192</sup>

182. *Id.* at 516, 443 S.E.2d at 719 (citing *Bowden v. Francis*, 733 F.2d 740 (11th Cir. 1984)).

183. *Id.* (citing *Drope v. Missouri*, 420 U.S. 162 (1975)).

184. *Id.* (citing *Dowdy v. State*, 169 Ga. App. 14, 311 S.E.2d 184 (1983)).

185. *Id.*

186. *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490 (1993). See also Frank C. Mills, III, *Criminal Law and Procedure*, 45 MERCER L. REV. 135, 163 (1993).

187. *Nagel v. State*, 264 Ga. 150, 442 S.E.2d 446 (1994).

188. *Id.* at 151, 442 S.E.2d at 448. See also O.C.G.A. § 17-7-131(f) (Supp. 1994) which provides:

A defendant who has been found not guilty by reason of insanity at the time of the crime and is ordered committed to the Department of Human Resources under subsection (e) of this Code section may only be discharged from that commitment by order of the committing court in accordance with the procedures specified in this subsection.

*Id.*

189. 262 Ga. at 891-93, 427 S.E.2d at 492-93.

190. *Id.* at 889, 427 S.E.2d at 491.

191. *Id.* at 892, 427 S.E.2d at 493.

192. 264 Ga. at 155, 442 S.E.2d at 451 (Sears-Collins, J., dissenting). She states:

The defense experts at the release hearing expressed the opinion that defendant was not now nor had he ever been insane and that the jury verdict acquitting him by reason of insanity had been a mistake. Therefore defendant did not meet the criteria for civil commitment.<sup>193</sup> The joke was on the defendant, however, as the supreme court concluded that "the opinions of appellant's experts that he had never really been insane were obviously entitled to *no* weight whatsoever, since the jury's verdict was *res judicata* as to appellant's insanity at the time of the murders."<sup>194</sup> Therefore there was no evidence defendant's sanity had been restored.<sup>195</sup> Being careful not to base its opinion entirely on that premise, the supreme court pointed out other evidence of defendant's history in the record and a lack of certainty on the part of some of defendant's experts. The supreme court, therefore, affirmed.<sup>196</sup>

In an incisive, meticulously crafted dissent, Justice Sears-Collins roundly chastised the majority for being swayed by fears and passions into overlooking their duty in this unusually brutal case.<sup>197</sup>

### III. CRIMINAL PROCEDURE

#### A. *Pretrial*

#### Search and Seizure

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the majority's analysis would confine Nagel for life, no matter how overwhelming the evidence that he is not now mentally ill. The only way for Nagel to overcome this particular burden would be to convince a psychiatrist to testify falsely that he or she is of the opinion that Nagel was mentally ill at that time and that the jury reached the correct result. Such a *Catch-22* could not possibly have been the intent of our release statutes.

*Id.*

193. 264 Ga. at 151, 442 S.E.2d at 448.

194. *Id.* (emphasis in original).

195. *Id.* at 152, 442 S.E.2d at 448.

196. *Id.* at 153, 442 S.E.2d at 449.

197. 264 Ga. at 153, 442 S.E.2d at 449 (Sears-Collins, J., dissenting).

This court has seen few other cases that are as repulsive and brutal as this one. Because of the circumstances of his crimes, Nagel's request for release has caused much anxiety and apprehension. Nevertheless, this court is required by law not to act on such passions, but rather to apply the laws of this state to this delicate situation.

*Id.* She then seemingly reminds the majority of the motto over their bench "Fiat justitia, ruat caelum." (Let justice be done, though the sky should fall.) Her dissent seems irrefutable and may ultimately carry the day. The majority opinion may be a good example of the old maxim "bad facts make bad law."

*Terry Stops.* As usual, this year's crop of cases includes many in which the ultimate issue of the validity of a search or admissibility of a statement turns on the legality of the initial encounter with the police. "Theoretically, there are at least three kinds of police-citizen encounters: verbal encounters involving no coercion or detention [which do not invoke the Fourth Amendment]; brief 'stops' or 'seizures' which must be accompanied by a reasonable suspicion; and 'arrests' which must be supported by probable cause."<sup>198</sup> *Terry*,<sup>199</sup> or investigative, stops fall into the second category.

In *Goodman v. State*,<sup>200</sup> the police received information from a woman who described drug selling activity of two black males at a given intersection. The police proceeded to that location and began an inquiry of a black male in a parked automobile. The police checked his driver's license and moved him to the patrol car while completing the license check. Meanwhile defendant's cohort returned, a chase ensued, and eventually cocaine was found.<sup>201</sup>

The defendant challenged the initial stop as pretextual. There had been no showing of reliability of the informant.<sup>202</sup> The court held that "the fact that the informant was not shown to be reliable" is not relevant to our inquiry. An inquiry into the indicia of reliability of the informant is appropriate when determining the presence or absence of probable cause, but is inapplicable to evaluating information prompting a mere investigatory stop.<sup>203</sup> The officer's suspicion was reasonable and corroborated by the basic facts found on the scene. The court, therefore, affirmed.<sup>204</sup>

*Burdette v. State*<sup>205</sup> was a similar challenge involving slightly different facts. The informant in *Burdette* had been caught with drugs. The police drove to the informant's apartment to conduct a consent search. The informant pointed out defendant Burdette, seated in an automobile at Burdette's apartment complex, as his supplier. Burdette attempted to leave and was stopped. He had committed no traffic violation or any other offense. Nor had the informant, even if reliable, given any indication that defendant would presently have drugs in his

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198. *Jamison v. State*, 199 Ga. App. 401, 404, 405 S.E.2d 82, 84 (1991) *cert. granted*.

199. So named after *Terry v. Ohio*, 392 U.S. 1 (1968).

200. 210 Ga. App. 369, 436 S.E.2d 85 (1993).

201. *Id.* at 369-70, 436 S.E.2d at 86.

202. *Id.*

203. *Id.*

204. *Id.* at 370, 436 S.E.2d at 87.

205. 210 Ga. App. 471, 436 S.E.2d 502 (1993).

possession or be engaged in any criminal activity.<sup>206</sup> In affirming, the court re-iterated that a showing of reliability of the informant was not required in this kind of stop.<sup>207</sup> The court held, "The inquiry must focus on whether unconfirmed information regarding past activity can give rise to an articulable suspicion of present or future criminal activity sufficient to justify an investigative stop."<sup>208</sup> The court held that the information in this case was sufficient "[to] remove the police's actions beyond the realm of either the 'unparticularized suspicion or hunch' standard . . . or 'mere caprice or arbitrary harassment.'"<sup>209</sup> The court found the officers could have reasonably inferred present or future drug activity and therefore affirmed.<sup>210</sup>

Compare *Postell v. State*<sup>211</sup> in which the supreme court reversed the court of appeals<sup>212</sup> based on an illegal investigative stop. In *Postell* the officers had similar information about a planned drug transaction at a specific address. They also had a list of names of couriers. Defendant's name was not on the list. As defendant approached the address, the surveilling officers made an investigative stop. As a result of the stop the officers found illegal drugs.<sup>213</sup> The supreme court reversed because the information was not sufficiently particularized as to that defendant, and "Postell's presence 100 yards from the staked-out target [did] not link him to the purported delivery of contraband."<sup>214</sup>

Standing alone, the fact that a person is of the same race (and sex) as a suspect is insufficient to authorize a *Terry* stop. In *Wheeler v. State*,<sup>215</sup> the officer who stopped a suspected burglar admitted that he did so solely because the defendant was a black man, as was the described perpetrator. The police had no other description of the suspect.<sup>216</sup> The court reversed, finding such information not sufficiently "particularized."<sup>217</sup>

"Investigative stops of vehicles are analogous to Terry Stops . . ."<sup>218</sup> Frequently, automobile investigative stops are made for minor traffic

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206. *Id.* at 472, 436 S.E.2d at 503.

207. *Id.*

208. *Id.* at 473, 463 S.E.2d at 504.

209. *Id.* (citing *State v. Watson*, 205 Ga. App. 313, 422 S.E.2d 202 (1992)).

210. *Id.*

211. 264 Ga. 249, 443 S.E.2d 628 (1994).

212. See *Postell v. State*, 209 Ga. App. 462, 433 S.E.2d 588 (1993).

213. 264 Ga. at 250, 443 S.E.2d at 629.

214. *Id.* at 251, 443 S.E.2d at 629.

215. *Wheeler v. State*, 210 Ga. App. 653, 437 S.E.2d 823 (1993).

216. *Id.*

217. *Id.* at 653, 437 S.E.2d at 824.

218. *Burdette v. State*, 210 Ga. App. 471, 472, 436 S.E.2d 502, 504 (1993).

violations, after which plain view or consent result in a finding of contraband. One such frequently used traffic violation is failure to use a turn signal.<sup>219</sup> However, in *Clark v. State*,<sup>220</sup> the use of that violation as a pretext for making a stop was somewhat curtailed. When the defendant in *Clark* changed lanes to exit, no other vehicle was within 300 feet of his vehicle.<sup>221</sup> In reversing, the court found the stop to be illegal because "the legislature anticipated occasions when a signal was not required."<sup>222</sup> The court construed the "turn signal" statute to mean that a turn signal was required only "when required" to enable a lane change or turn to be made with "reasonable safety."<sup>223</sup> As defendant's lane change endangered no one, there was no violation, and no valid reason to stop. Therefore the alleged turn signal violation was merely a pretext. The evidence found as a result of the illegal stop should have been suppressed.<sup>224</sup>

*Consent Searches.* "Once a voluntary consent [to search] is legally obtained, it continues until it either is revoked or withdrawn."<sup>225</sup> However, in *Kendrick v. State*,<sup>226</sup> the court of appeals held that once a valid consent had been given by defendant's wife, only she could revoke it.<sup>227</sup> It was undisputed that defendant's wife had common authority over defendant's house as she had invited the officers in. Defendant asked the officers to leave. However, there was no evidence that defendant's wife joined in the request that they leave nor in any

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219. See O.C.G.A. § 40-6-123(a) & (b) (1991) which provides:

(a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in Code Section 40-6-120 or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or change lanes or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate and timely signal in the manner provided in this Code section.

(b) A signal of intention to turn right or left or change lanes when required shall be given continuously for a time sufficient to alert the driver of a vehicle proceeding from the rear in the same direction or a driver of a vehicle approaching from the opposite direction.

*Id.*

220. 208 Ga. App. 896, 432 S.E.2d 220 (1993).

221. *Id.* at 897, 432 S.E.2d at 221.

222. *Id.*

223. *Id.* at 899, 432 S.E.2d at 222.

224. *Id.*, 432 S.E.2d at 223.

225. *Calixte v. State*, 197 Ga. App. 723, 726, 399 S.E.2d 490, 493 (1990).

226. 211 Ga. App. 599, 440 S.E.2d 53 (1993).

227. *Id.* at 601, 440 S.E.2d at 55.

other way revoked her prior consent.<sup>228</sup> As she was the only one who could revoke the consent she had given, the officers' continued presence and the defendant's arrest were lawful.<sup>229</sup>

*Plain View.* In a case which contains a good discussion of the present state of the law on "plain view," the court of appeals upheld a seizure by an officer who had walked around to the back of the house to see if anyone was home and saw marijuana.<sup>230</sup> The court in *Gilbreath v. State*<sup>231</sup> held that this did not make the officer a trespasser where the officer "merely tak[es] the same route as would any guest or caller."<sup>232</sup> Nor would the result be any different if the officer "suspected that he might find incriminating evidence when he walked around to check the back door."<sup>233</sup> The court identified modified criteria<sup>234</sup> "which . . . must exist before plain view is applicable to authorize a warrantless seizure of evidence."<sup>235</sup> They are:

1. That there must be a prior valid intrusion onto a person's property before evidence is observed or seized;
2. Discovery of the evidence must be the result of its being in plain view and not the result of an investigatory search; and
3. It must be immediately apparent that the item seized is evidence or contraband.<sup>236</sup>

*Search Warrants.* The court of appeals held in *State v. Kirkland*<sup>237</sup> that a magistrate cannot issue a search warrant for a locality outside his jurisdiction, and this is not just a meaningless technical defect.<sup>238</sup> The warrant issued by an Atlanta City Court judge for defendant's home in Coweta County was a nullity.<sup>239</sup>

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228. *Id.*

229. *Id.*

230. *Gilbreath v. State*, 213 Ga. App. 80, 82, 443 S.E.2d 664, 666 (1994).

231. 213 Ga. App. 80, 443 S.E.2d 664 (1994).

232. *Id.* at 83, 443 S.E.2d at 667.

233. *Id.* (inadvertence requirement has been abolished).

234. *Id.* 443 S.E.2d at 666 (citing *Horton v. California*, 496 U.S. 128 (1990)).

235. *Id.* at 82, 443 S.E.2d at 666 (noting that "'plain view' is best understood not as an independent exception to the Warrant Clause but simply as an extension of whatever prior justification might exist for an officer's access to an object or situation." *Id.* (quoting *State v. Echols*, 204 Ga. App. 630, 631, 420 S.E.2d 64, 65 (1992))).

236. *Id.* at 83, 443 S.E.2d at 666.

237. 212 Ga. App. 672, 442 S.E.2d 491 (1994).

238. *Id.* at 673, 442 S.E.2d at 492. See also O.C.G.A. § 17-5-31 (1990) which provides: "No search warrant shall be quashed or evidence suppressed because of a technical irregularity not affecting the substantial rights of the accused." *Id.*

239. 212 Ga. App. at 672-73, 442 S.E.2d at 492.

A deliberately false or misleading affidavit for a search warrant can result in suppression of the evidence. In *Peters v. State*,<sup>240</sup> the affidavit for a search warrant indicated the informant from whom the information was gained was reliable because the informant had given information in the past which had led to the seizure of drugs. The defense, however, figured out who the informant was. The only information the informant had ever given dealing with the seizure of drugs was when the informant himself was arrested and drugs were seized from him.<sup>241</sup> Excising from the affidavit that deliberately or recklessly false support for the veracity of the informant,<sup>242</sup> the court found insufficient evidence to establish probable cause.<sup>243</sup>

Courts have held that a search warrant for a dwelling extends to automobiles on the curtilage of the premises to be searched.<sup>244</sup> However, defining the curtilage, especially in an apartment complex, mobile home park, or similar area, can be tricky. In *Bayshore v. State*,<sup>245</sup> the police had a search warrant for defendant's apartment. They executed the search warrant with no luck. They next searched defendant who had been leaning against a car in a common area of the parking lot and a bag on the hood of the car. The officers found stolen property.<sup>246</sup> Unfortunately, the court found the common area was not part of the curtilage and reversed because the search of the defendant, the car, and the bag within defendant's constructive possession were not authorized by the search warrant.<sup>247</sup> "When the area in question is a common area serving multiple dwellings, it is less likely that the residents of any one unit have an expectation of privacy or reasonably consider the area to be an extension of the dwelling."<sup>248</sup>

But what if the officers had seized Bayshore where he stood, in close proximity to his apartment, and returned him, and possibly the bag in his constructive possession, to the apartment for the execution of the

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240. 213 Ga. App. 488, 445 S.E.2d 290 (1994).

241. *Id.* at 489, 445 S.E. at 291.

242. *Id.* (citing *Franks v. Delaware*, 438 U.S. 154 (1978)).

243. *Id.* at 490, 445 S.E.2d at 292.

244. *Bellamy v. State*, 134 Ga. App. 340, 214 S.E.2d 383 (1975).

245. 208 Ga. App. 828, 432 S.E.2d 251 (1993).

246. *Id.* at 828, 432 S.E.2d at 252.

247. *Id.* at 829, 432 S.E.2d at 253.

248. *Id.*, 432 S.E.2d at 252. The court noted that this area presents

a "unique twist in the law" because in the usual case the government argues the area searched was not within the curtilage of a home and therefore could be searched without a warrant . . . however, [in *Bayshore*] the state argues that the common area where the defendant was standing during the search was part of the curtilage and thus defendant and the bag in his constructive possession were covered by the search warrant for the apartment. *Id.*

search warrant? The facts in *Martin v. State*<sup>249</sup> are similar to these; however, the search warrant included the defendant's person in *Martin*, and Martin was seen leaving the premises. The seizure, return of less than one mile, and subsequent search of Martin and his automobile were upheld<sup>250</sup> under the authority of *Michigan v. Summers*.<sup>251</sup> However, the court reached an opposite result in *State v. Crank*.<sup>252</sup> In *Crank* the facts were somewhat similar; however, the distance from the residence to where the car was stopped was two to three miles.<sup>253</sup> The court distinguished this case from *Michigan v. Summers* because in *Crank* there was a greater distance, greater public stigma on a public road, and no magistrate had found that Crank likely had contraband on his person or in his car at that location.<sup>254</sup> The court also noted that Crank had not been the driver of the automobile, and Crank had not been given the option of allowing the driver to leave with his car.<sup>255</sup> The search of Crank's car was therefore illegal and the suppression order affirmed.<sup>256</sup>

Frequently, either out of deference to the wisdom of codefendant's counsel, in order to expedite, or out of laziness, a lawyer will file a motion adopting a codefendant's motions, including possibly a codefendant's motion to suppress. This is a dangerous practice for defense counsel, as illustrated in *Tackett v. State*.<sup>257</sup> In *Tackett* codefendant Adams adopted Tackett's motion to suppress. The search warrant executed by the officers had been aimed primarily at Tackett and his residence. The officers incidentally searched Adams' purse and found marijuana.<sup>258</sup> Adams argued in the motion to suppress that there was no basis to search her or her purse because she was not named in the warrant and there was no independent probable cause for the search of her purse.<sup>259</sup> The trial court made short work of Adams' argument, finding that her challenge was not stated in the motion to suppress.<sup>260</sup>

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249. 211 Ga. App. 849, 440 S.E.2d 736 (1994).

250. *Id.* at 850-51, 440 S.E.2d at 737.

251. *Michigan v. Summers*, 452 U.S. 692 (1981).

252. 212 Ga. App. 246, 441 S.E.2d 531 (1994).

253. *Id.* at 248, 441 S.E.2d at 532.

254. *Id.* at 249, 441 S.E.2d at 533.

255. *Id.* at 250, 441 S.E.2d at 534.

256. *Id.*

257. 211 Ga. App. 664, 440 S.E.2d 74 (1994).

258. *Id.* at 665, 440 S.E.2d at 75.

259. *Id.* at 667, 440 S.E.2d at 76.

260. *Id.* See also O.C.G.A. § 17-5-30(b) (1990) which provides:

The motion shall be in writing and state facts showing that the search and seizure were unlawful. The judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion; and the burden of proving that the search and seizure were lawful shall be on the state. If the

"Although the motion to suppress contained details regarding Tackett's arguments, neither the arguments asserted . . . [by Adams] nor the pertinent facts thereto were presented in the motion to suppress."<sup>261</sup> The court therefore affirmed the trial court's denial of Adams' motion to suppress.<sup>262</sup>

The exclusionary rule in Georgia is not merely based on constitutional principles, but was enacted by the legislature and is codified at Official Code of Georgia Annotated ("O.C.G.A.") section 17-5-30.<sup>263</sup> For this reason, the court in *Gary v. State*<sup>264</sup> last year held that the "Good Faith" exception to the exclusionary rule of *United States v. Leon*<sup>265</sup> is not applicable in Georgia.<sup>266</sup> However, good faith may have regained at least some vitality in *King v. State*.<sup>267</sup>

In *King* the officers made a stop and arrest of defendant with an arrest warrant for a domestic violence offense.<sup>268</sup> On making the stop, the officer noted a strong odor of alcohol on defendant. As a result, defendant was arrested and convicted for D.U.I.<sup>269</sup> The defense challenged the arrest and breath test as the product of an illegal warrant not supported by probable cause in the affidavit.<sup>270</sup> The court essentially pretermitted that issue and upheld the stop, arrest, and resulting breath test for a number of rather vague reasons.<sup>271</sup> At least

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motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant in any trial.

*Id.*

261. 211 Ga. App. at 667, 440 S.E.2d at 76.

262. *Id.*

263. O.C.G.A. § 17-5-30 (1990) provides:

A defendant aggrieved by an unlawful search and seizure may move the court for the return of property, the possession of which is not otherwise unlawful, and to suppress as evidence anything so obtained on the grounds that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face, there was not probable cause for the issuance of the warrant, or the warrant was illegally executed.

*Id.*

264. 262 Ga. 573, 422 S.E.2d 426 (1992).

265. 468 U.S. 897 (1984).

266. 262 Ga. at 574, 422 S.E.2d at 428.

267. 211 Ga. App. 12, 438 S.E.2d 93 (1993).

268. *Id.* at 13, 438 S.E.2d at 94.

269. *Id.* at 12, 438 S.E.2d at 94.

270. *Id.* at 13, 438 S.E.2d at 94.

271. In addition to good faith, the case was partly decided on deficiencies in the defense motion to suppress, and on attenuation. *Id.* at 14-15, 438 S.E.2d at 95. A "but for" analysis is not appropriate under the "fruit of the poisonous tree" doctrine, "[r]ather, the

one of those reasons was that the officer made the stop in good faith reliance on the warrant, and the arrest was the result of an independent investigation of the defendant's driving offense after the stop.<sup>272</sup> The court conceded that *Gary* would require the suppression of tangible property seized as a result of such an arrest.<sup>273</sup> However, the court held that "although the compelled administration of a breath test implicates Fourth Amendment rights, O.C.G.A. section 17-5-30 does not govern motions to suppress such evidence."<sup>274</sup> Inasmuch as the holding in *Gary* is specifically based upon the application of O.C.G.A. section 17-5-30, it is inappropriate here.<sup>275</sup>

*Electronic Surveillance.* In order for wiretap evidence to be admissible, there must be strict compliance by law enforcement with both state and federal law.<sup>276</sup> In *Porter v. State*,<sup>277</sup> state agents failed to immediately turn the recordings over for sealing to the judge who had issued the intercept orders.<sup>278</sup> The agents rendered the tapes incapable of further recording and sealed the tapes themselves. They delivered the sealed tapes to the judge some three weeks after the wiretap operation ceased. Thereupon the judge inspected and sealed the tapes.<sup>279</sup> No explanation for the delay was made. This was insufficient compliance. The seals by the police do not substitute for judicial seals.<sup>280</sup> The later judicial seals were not placed on the tapes immediately after the operation ceased,<sup>281</sup> and there was no burden on defendant to show

more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 13, 438 S.E.2d at 95 (quoting from *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)).

272. *Id.* at 13, 438 S.E.2d at 95.

273. *Id.* at 14, 438 S.E.2d at 95.

274. *Id.* (citing *Johnston v. State*, 249 Ga. 413, 291 S.E.2d 543 (1982)).

275. *Id.*

276. *Ellis v. State*, 256 Ga. 751, 754, 353 S.E.2d 19, 22 (1987).

277. 209 Ga. App. 27, 432 S.E.2d 629 (1993).

278. *Id.* at 27, 432 S.E.2d at 630. See also 18 U.S.C. § 2518 (8)(c):

[t]he recording of the contents of any wire, oral, or electronic communications under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed

under his directions. Custody of the recordings shall be wherever the judge orders.

*Id.*

279. 209 Ga. App. at 27-28, 432 S.E.2d at 630.

280. *Id.* at 29, 432 S.E.2d at 631.

281. *Id.* at 28, 432 S.E.2d at 63 (citing *United States v. Ojeda Rios*, 495 U.S. 257, 260 (1990)).

tampering or prejudice.<sup>282</sup> Therefore the tapes should have been suppressed, and the court reversed.<sup>283</sup>

Not every defect in wiretap procedure results in suppression of the evidence. In *Williams v. State*,<sup>284</sup> the state neglected to make a return on an investigation warrant for a pen register until thirty days after the deadline.<sup>285</sup> However, the subject of the pen register was not the defendant Williams, but rather his mother. The district attorney used information from defendant's mother's pen register to get a wiretap order for defendant. Defendant moved to suppress the evidence because of the defect in the pen register procedure.<sup>286</sup> The court found defendant had no standing to assert the illegality of the pen register placed on his mother's telephone.<sup>287</sup> "When the voice of an individual is not heard and the tap is not on his premises, he has no standing."<sup>288</sup>

The investigation of a solicitation to commit murder in *Jordan v. State*<sup>289</sup> was commenced as a result of an illegal taping of defendant's conversation by the intended victim. Defendant's husband suspected her of infidelity and placed a tape machine on an office phone she would use. This produced a tape of a conversation between defendant and a third party in which defendant discussed overdosing her husband on his heart medication. The intended victim sought assistance from the Georgia Bureau of Investigation ("G.B.I."). The G.B.I. supplied an undercover "hit man," and ultimately defendant was arrested and convicted of solicitation to commit murder.<sup>290</sup> Defendant moved to suppress the evidence obtained by the intended victim's illegal phone surveil-

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282. *Id.* at 29-30, 432 S.E.2d at 631-32.

283. *Id.* at 31, 432 S.E.2d at 633.

284. 211 Ga. App. 8, 438 S.E.2d 126 (1993).

285. *Id.* at 9, 438 S.E.2d at 127. *See also* O.C.G.A. § 16-11-64(b)(6) which provides:

The applicant for the warrant shall return same and report back to the judge issuing same within 30 days of the issuance of the warrant. In the event no evidence of one of the specific crimes set forth in this Code section has been obtained through the use of such device or devices, it shall be the duty of the applicant physically to destroy all evidence obtained by surveillance and to certify that fact in writing to the judge under oath.

286. 211 Ga. App. at 9-10, 438 S.E.2d at 127.

287. *Id.*

288. *Id.* (quoting *Ellis v. State*, 256 Ga. 751, 755, 353 S.E.2d 19, 22 (1987)).

289. 211 Ga. App. 86, 438 S.E.2d 371 (1994).

290. *Id.* at 90, 438 S.E.2d at 374. *See also* O.C.G.A. § 16-4-7(a) (1992) which provides: "A person commits the offense of criminal solicitation when, with intent that another person engage in conduct constituting a felony, he solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct."

lance.<sup>291</sup> Evidence seized unlawfully by a private individual is not covered by the Fourth Amendment; therefore, there was no constitutional basis for exclusion of the evidence.<sup>292</sup> While government wiretaps in Georgia must comply with both federal and state requirements,<sup>293</sup> the wiretap exclusionary provisions of state and federal law for illegal private surveillance are entirely different.<sup>294</sup> The Georgia statute would prohibit the actual illegal tape,<sup>295</sup> but the statute contains no prohibition of evidence *derived* from the illegal surveillance.<sup>296</sup> "Even under the federal provisions, if an improper wiretap is initiated by a private individual without the pre-knowledge and acquiescence of law enforcement authorities, this will not preclude use by the government of the knowledge obtained thereby."<sup>297</sup> Therefore the subsequent investigation and tapes, all derived from the initial illegal surveillance by the intended victim, were admissible.<sup>298</sup>

*Defendant's Statements.* "To make a confession admissible, it must have been made voluntarily, without being induced by another by the

291. 211 Ga. App. at 88, 438 S.E.2d at 373. *See also* O.C.G.A. § 16-11-62(1), (5) (1992) which provides:

It shall be unlawful for:

(1) Any person in a clandestine manner intentionally to overhear, transmit, or record or attempt to overhear, transmit, or record the private conversation of another which shall originate in any private place.

(5) Any person to divulge to any unauthorized person or authority the content or substance of any private message intercepted lawfully in the manner provided for in Code Section 16-11-65.

*Id.*

292. 211 Ga. App. at 91, 438 S.E.2d at 375.

293. *See supra* note 292.

294. 18 U.S.C.A. § 2515 (1994) provides in part:

[W]herever any wire or oral communication has been intercepted, no part of the contents of such communications and no evidence derived therefrom may be received in evidence in any trial, . . . before any court . . . of the United States, a State, . . . if the disclosure of that information would be in violation of this chapter.

*But see* O.C.G.A. § 16-11-67 (1992) which provides in part: "[n]o evidence obtained in any manner which violates any of the provisions of this part shall be admissible in any court of this state . . ." *Id.* (There is no language prohibiting evidence derived from illegal surveillance).

295. Actually this was not an issue as the trial judge found it would have been inevitably discovered because the third party to the taped conversation voluntarily became a state witness before she was arrested. 211 Ga. App. at 89, 438 S.E.2d at 373.

296. *Id.* at 89, 438 S.E.2d at 374.

297. *Id.* at 90, 438 S.E.2d at 374 (citing *United States v. Manning*, 542 F.2d 685, 686 (6th Cir. 1976); *United States v. Clegg*, 509 F.2d 605, 609 (5th Cir. 1975)).

298. *Id.* at 91, 438 S.E.2d at 375.

slightest hope of benefit or remotest fear of injury."<sup>299</sup> Nevertheless, the use of "artifice, trick, or deception" by the state does not render a confession inadmissible, "so long as the means employed to procure them are not calculated to elicit an untrue statement."<sup>300</sup> In *Berry v. State*,<sup>301</sup> defendant's claim that his custodial statement was the result of lies and deceit by the officers did not necessitate exclusion of the evidence.<sup>302</sup> The factual details, however, are not reported in the decision.<sup>303</sup>

Judge Beasley and the defendant in *Adcock v. State*<sup>304</sup> were vindicated in "Chapter Two" of that case.<sup>305</sup> When last we left Adcock,<sup>306</sup> she had prevailed in her paternity and child support suit against her father, only to be convicted of incest herself.<sup>307</sup> In her paternity action the trial court had compelled her to answer questions on cross examination about instances of incest which occurred within the statute of limitation even though such instances had no bearing on the issue of paternity. The compulsion threatened by the court was dismissal of her action if she did not respond.<sup>308</sup> Though Adcock had an attorney, he did not know she could refuse to answer or was too meek to press an objection.<sup>309</sup> Defendant's confessions of incest at the paternity trial were used in a criminal action to convict her of incest. The court of appeals affirmed.<sup>310</sup>

The supreme court reversed the court of appeals and the conviction in *Adcock v. State*,<sup>311</sup> adopting Judge Beasley's dissent as the reason for the decision.<sup>312</sup> Judge Beasley's dissent was based entirely on the Fifth and Fourteenth Amendments and not the state constitutional protection.<sup>313</sup> The trial judge's determination that the confessions were voluntary was clearly erroneous: the confessions were compelled by threat of economic sanction when the trial judge erroneously advised Adcock that the consequences of not answering the irrelevant questions

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299. O.C.G.A. § 24-3-50 (1982).

300. *Berry v. State*, 210 Ga. App. 789, 790, 437 S.E.2d 630, 632 (1993).

301. *Id.*

302. *Id.* at 790, 437 S.E.2d at 632.

303. *Id.*

304. 208 Ga. App. 346, 430 S.E.2d 606 (1993).

305. 208 Ga. App. at 350, 430 S.E.2d at 609 (Beasley, J., dissenting).

306. Frank C. Mills, III, *Criminal Law*, 45 MERCER L. REV. 135, 177-78 (1993).

307. 208 Ga. App. at 348, 430 S.E.2d at 608.

308. *Id.* at 347-48, 430 S.E.2d at 607-08.

309. *Id.* at 352, 430 S.E.2d at 611 (Beasley, J., dissenting).

310. *Id.* at 350, 430 S.E.2d at 609.

311. *Adcock v. State*, 263 Ga. at 760, 438 S.E.2d at 911.

312. *Id.*

313. 208 Ga. App. at 351-53, 430 S.E.2d at 609-11 (Beasley, J., dissenting).

about subsequent episodes of incest would be the dismissal of her suit.<sup>314</sup>

"[I]f the individual [being questioned] states that he wants an attorney, the interrogation must cease until an attorney is present."<sup>315</sup> Furthermore, "once a suspect invokes his Fifth Amendment right to counsel, not only must the interrogation cease, but the police cannot reinterrogate or otherwise initiate contact designed to produce incriminating statements."<sup>316</sup> In *Wilson v. State*,<sup>317</sup> the police questioned defendant about a murder four times, each time advising him of his rights. At the third interview, defendant invoked his right to counsel. Sometime thereafter defendant was arrested on an unrelated matter. He was questioned for the fourth time one year after the murder. Defendant terminated the interview "by indicating only that he did not want to talk to investigators any more."<sup>318</sup> Thereafter, defendant was transferred to a state prison where the police planted an informant in his prison cell. The informant succeeded in eliciting incriminating statements.<sup>319</sup> Under the principles of law cited above, the statements seemingly should have been suppressed as violative of defendant's right to counsel. However, one additional distinguishing factor made a big difference. There was a break in custody of seven months between defendant's invoking of his right to counsel and the successful interrogation.<sup>320</sup> The court held that

[an] exception to the requirement that all police interrogation cease after the right to counsel is invoked arises where there is a break in custody. Because of the absence or dissipation of coercion once a suspect is released from custody, subsequent confessions obtained from even police initiated interrogation are admissible without violating the suspect's fifth amendment rights if there has been an intervening break in custody.<sup>321</sup>

On rebuttal, the defendant in *Smith v. State*<sup>322</sup> rather insistently contended that his statement to police had been coerced. Defendant had not objected to admissibility nor had he insisted on a *Jackson-Denno*

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314. *Id.* at 347-48, 430 S.E.2d at 606-07.

315. *Wilson v. State*, 264 Ga. 287, 289, 444 S.E.2d 306, 309 (1994) (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

316. *Id.* (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

317. *Id.*

318. *Id.* at 288, 444 S.E.2d at 308.

319. *Id.*

320. *Id.* at 290, 444 S.E.2d at 309.

321. *Id.* at 289, 444 S.E.2d at 309.

322. 263 Ga. 782, 439 S.E.2d 483 (1994).

hearing. The court granted the state's motion for mistrial because the jury had heard defendant's contentions.<sup>323</sup> The trial court determined such matters were irrelevant for the trial jury because no objection to admissibility had been made.<sup>324</sup> Not only was such evidence not mistrial material, it was highly relevant and material to the probative value of the statement and, therefore, to the issue of guilt or innocence.<sup>325</sup> Consequently, there was no manifest necessity for mistrial. Jeopardy had attached, barring retrial.<sup>326</sup>

*Representation by Counsel: Indigent Defense.* The Sixth Amendment guarantees appointment of counsel to an indigent defendant if the defendant may be sentenced to imprisonment.<sup>327</sup> However, "the right to appointed counsel in misdemeanor cases arises only when a defendant is actually sentenced to a term of imprisonment."<sup>328</sup> This is true even if the misdemeanor conviction is used to aggravate a subsequent sentence or revoke a previously probated sentence.<sup>329</sup> The right to appointed counsel continues only through direct appeal and does not extend to the filing of a petition for certiorari.<sup>330</sup>

*Disqualification of Counsel.* Motions to disqualify opposing counsel are increasing. In *Stinson v. State*,<sup>331</sup> the trial court disqualified retained counsel for the defendant because counsel's wife was a supervisor for the DFACS agency which originated the child molestation charge against the defendant.<sup>332</sup> She signed an official document which concluded defendant was guilty of the offense. The trial court disqualified defense counsel, not because of an actual conflict, but because of the potential for the appearance of impropriety.<sup>333</sup> The court of appeals reversed.<sup>334</sup> It is "improper to disqualify an attorney based solely on an appearance of impropriety, particularly when the appearance of impropriety resulted not from the attorney's conduct but from his status as the spouse of an attorney affiliated with the opposing

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323. *Id.* at 783-84, 439 S.E.2d at 485.

324. *Id.*

325. *Id.* at 784, 439 S.E.2d at 486.

326. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

327. *Id.* at 37.

328. *Peters v. State*, 210 Ga. App. 211, 213, 435 S.E.2d 731, 733 (1993).

329. *Id.* at 213, 435 S.E.2d at 733 (citing *Sams v. State*, 162 Ga. App. 118, 119, 290 S.E.2d 321, 322 (1982)).

330. *Paino v. State*, 263 Ga. 331, 435 S.E.2d 24 (1993).

331. 210 Ga. App. 570, 436 S.E.2d 765 (1983).

332. *Id.* at 570, 436 S.E.2d at 766.

333. *Id.*

334. *Id.* at 571, 436 S.E.2d at 767.

party.<sup>335</sup> "Absent a showing that special circumstances exist which prevent the adequate representation of the client, disqualification based solely on marital status is not justified."<sup>336</sup> The court applied this rule even though counsel's wife was not an attorney. In a criminal case, "the client's interest in representation by his counsel of choice . . . is, if anything, greater rather than less than that of a client in a civil action."<sup>337</sup> The court recognized that if the spouse became a witness, counsel could be disqualified rather than face the choice of whether or not to cross examine his wife.<sup>338</sup>

On the other hand, in *Chapel v. State*<sup>339</sup> the court affirmed the trial court's disqualification of retained and later appointed counsel, partly because of the appearance of impropriety.<sup>340</sup> Defense counsel had frequently represented the county and had access to county policies, procedures, and even personnel files of state's witnesses. Because counsel was a former attorney for the county there was "a serious potential for a post-trial claim of ineffectiveness' . . . based on the possibility that [counsel's] loyalty to or efforts on behalf of Chapel could be threatened by his responsibilities to the county."<sup>341</sup> Since the defendant initially chose and retained this particular counsel, the court balanced objective considerations in favor of counsel's representation against the counter balancing conflict.<sup>342</sup> The conflict, appearance of impropriety, and potential for serious ineffectiveness claim outweighed any objective reasons supporting counsel's continuing in the case.<sup>343</sup> Therefore, the lower court was affirmed.<sup>344</sup>

In *Billings v. State*,<sup>345</sup> the shoe was on the other foot. The defense moved to disqualify the entire district attorney's office because an assistant prosecutor, while previously a public defender, had at one time represented a codefendant who testified for the state.<sup>346</sup> The defendant had also been represented by the public defender. The court of appeals conceded an appearance of impropriety existed, but refused to find that

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335. *Id.* at 570, 436 S.E.2d at 766.

336. *Id.* (citing *Blumonfeld v. Borenstein*, 247 Ga. 406, 276 S.E.2d 607 (1981)).

337. *Id.* at 570-71, 276 S.E.2d at 766.

338. *Id.* at 571, 276 S.E.2d at 766-67.

339. 264 Ga. 267, 443 S.E.2d 271 (1994).

340. *Id.* at 270, 443 S.E.2d at 274.

341. *Id.*

342. *Id.* at 268-69, 443 S.E.2d at 272-73. This balancing of interests is mandated by *Davis v. State*, 261 Ga. 221, 403 S.E.2d 800 (1991).

343. 264 Ga. at 270, 443 S.E.2d at 273-74.

344. *Id.*, 443 S.E.2d at 274.

345. 212 Ga. App. 125, 441 S.E.2d 262 (1994).

346. *Id.* at 128, 441 S.E.2d at 265.

the district attorney's entire office should be disqualified.<sup>347</sup> The court acknowledged that Georgia Code of Professional Responsibility Directory Rule 5-105(D)<sup>348</sup> requires that partners and associates in the same firm as a disqualified attorney are likewise disqualified. That rule, however, was "not meant to encompass governmental law offices . . . [because] [t]he salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice."<sup>349</sup>

In *Jefferson v. State*,<sup>350</sup> defendant was before the court for re-sentencing. He asked the court to appoint different counsel claiming that he had discharged previous counsel.<sup>351</sup> The trial court declined. Defendant thereupon refused to cooperate with counsel.<sup>352</sup> The court of appeals affirmed the trial court in denying additional counsel stating:

A defendant may not refuse to co-operate with appointed counsel and then claim he was not effectively represented. "[A]ny act of defendant which effectively terminated his counsel would not have had the effect of 'triggering' a duty upon the part of the trial court to appoint another attorney for defendant . . ." If the defendant does not have a good reason for discharging his court-appointed attorney, the trial court does not err in requiring him to choose between representation by an attorney and proceeding pro se.<sup>353</sup>

*Ineffectiveness of Counsel.* Also in *Jefferson*, the fact that a client had an ineffectiveness of counsel claim against appointed counsel or pro bono retained counsel was not a conflict of interest,<sup>354</sup> nor was it an objective consideration sufficient to require the court to appoint different counsel.<sup>355</sup>

*Arraignment.* There were two reversals of convictions as a result of "mass arraignments." Apparently some courts, because of the volume of cases, have taken to advising all or batches of defendants of their rights as a group. Subsequently, the cases are taken up individually for

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347. *Id.* at 129, 441 S.E.2d at 266.

348. GA. RULES OF CT. ANN., Georgia Code of Professional Responsibility, DR 5-105(D) (1994) provides: "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his firm may accept or continue such employment."

349. 212 Ga. App. at 129, 441 S.E.2d at 266.

350. 209 Ga. App. 859, 434 S.E.2d 814 (1993).

351. *Id.* at 861, 434 S.E.2d at 816.

352. *Id.* at 860-61, 434 S.E.2d at 816.

353. *Id.* at 861, 434 S.E.2d at 816 (quoting *Durham v. State*, 185 Ga. App. 163, 164, 363 S.E.2d 607, 609 (1987)).

354. *Id.*

355. *Id.* at 862, 434 S.E.2d at 817.

arraignment. In *Waire v. State*,<sup>356</sup> defendant first pleaded not guilty with appointed counsel. Later she pleaded guilty at a mass arraignment without counsel.<sup>357</sup> Apparently, the court's standard questions did not satisfactorily inquire into whether she intended to waive her right to counsel. The lower court was reversed for not allowing her to withdraw her plea.<sup>358</sup>

In *Jones v. State*,<sup>359</sup> defendant, at a mass arraignment, was presented with official documents informing her of her rights in great detail, including the right to trial by jury. The judge discussed these documents with defendant and others at the mass arraignment. Defendant was not asked specifically about whether she desired a jury trial or an attorney. Her case was called, proceeded to bench trial, and she was convicted of shoplifting.<sup>360</sup> In reversing the conviction, the court rejected the state's contention that a waiver could be inferred by the fact that she was advised of her rights and did not request counsel.<sup>361</sup> The record was also insufficient to show a waiver of jury trial.<sup>362</sup> In both cases the court stated "[i]t is difficult to imagine a mass arraignment procedure which could satisfy the trial court's burden of establishing that a proper waiver of counsel has occurred."<sup>363</sup>

*Guilty Pleas.* "Notwithstanding the acceptance of a plea of guilty, the judge should not enter judgment upon such plea without making such inquiry on the record as may satisfy him that there is a factual basis for the plea."<sup>364</sup> In *Collum v. State*,<sup>365</sup> the trial court went to great lengths to document that it had informed defendant of his various rights and inquired into his voluntary and intelligent waiver of those rights prior to defendant's plea of guilty and sentence. However, the record did not reflect that the court had ascertained a factual basis for the plea.<sup>366</sup> It was reversible error for the court to deny defendant's subsequent motion to withdraw the plea.<sup>367</sup>

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356. 211 Ga. App. 69, 438 S.E.2d 142 (1993).

357. *Id.* at 70, 438 S.E.2d at 143.

358. *Id.* at 70-71, 438 S.E.2d at 143.

359. 212 Ga. App. 676, 442 S.E.2d 908 (1994).

360. *Id.* at 677-78, 442 S.E.2d at 909-10.

361. *Id.* at 678, 442 S.E.2d at 910.

362. *Id.* at 679, 442 S.E.2d at 910.

363. *Jones v. State*, 212 Ga. App. 676, 679, 442 S.E.2d 908, 910 (1994).

364. GA. RULES OF CT. ANN., Unif. Super. Ct. R. 33.9 (1994).

365. 211 Ga. App. 158, 438 S.E.2d 401 (1993).

366. *Id.* at 160, 438 S.E.2d at 403.

367. *Id.* Compare *Holland v. State*, 209 Ga. App. 821, 434 S.E.2d 808 (1993), wherein the conviction was affirmed because the state did make a showing of a "factual basis" for the plea. What makes *Holland* interesting, though, is that the court considered contact between the defendant's penis and the victim's anus through clothes and no "skin-to-skin"

*Demurrer.* There is no such thing as a motion for summary judgment in Georgia criminal law.<sup>368</sup> When a demurrer to an indictment is filed which inserts facts not apparent on the face of the indictment, it is referred to as a "speaking demurrer."<sup>369</sup> This is commonly used when defense counsel wants to actually reveal the defense and demonstrate to the court that the charge cannot be proven as a matter of law because of some factual or legal defect in the state's case should it go to trial. In *State v. Schuman*,<sup>370</sup> the defense contended that the case was a civil case over a debt; in *State v. Givens*,<sup>371</sup> the defense challenged the legal status of a "navigable stream" in a "no boating zone" violation.<sup>372</sup> Both trial judges dismissed the indictments. In both cases the court of appeals reversed, holding that "speaking demurrers are void."<sup>373</sup> The court further noted that "such a demurrer presents no question for decision, and should never be sustained."<sup>374</sup>

*Discovery.* All developments in previous years in the area of discovery pale to insignificance in light of the 1994 discovery bill.<sup>375</sup> Indeed, the new discovery law is probably the development of the decade in criminal law in Georgia. Effective January 1, 1995, it will revolutionize the practice of criminal law in Georgia as no other development of case or statutory law has recently. The scope of this article does not allow detailed discussion of all aspects of the bill.<sup>376</sup> However, here are some of the more significant provisions:

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contact to be a sufficient factual basis for a sodomy plea. *Id.* at 823, 434 S.E.2d at 809. In this connection compare *Elrod v. State*, 208 Ga. App. 787, 432 S.E.2d 808 (1993), in which the court of appeals held that insertion of the defendant's naked penis in the victim's naked "crack" was insufficient evidence to sustain a conviction of sodomy. *Id.* at 788, 432 S.E.2d at 809.

368. *State v. Givens*, 211 Ga. App. 71, 72, 438 S.E.2d 387, 389 (1993).

369. *State v. Schuman*, 212 Ga. App. 231, 233, 441 S.E.2d 466, 467 (1994), *rev'd*, *Schuman v. State*, 264 Ga. 526, \_\_ S.E.2d \_\_ (1994).

370. *Id.*

371. 211 Ga. App. 71, 438 S.E.2d 387 (1993).

372. *Id.* at 71. 438 S.E.2d at 387.

373. *Id.*

374. *Id.*, 438 S.E.2d at 389, and 212 Ga. App. at 233, 441 S.E.2d at 468; *but see Schuman v. State*, 264 Ga. 526, 448 S.E.2d 694 (1994) wherein the supreme court reversed the court of appeals. The reasoning of the court of appeals was correct as far as it went; however, in *Schuman*, the state and defense agreed to submit the case to the court on an equivalent to a motion for summary judgment. Therefore the state was bound by the procedure to which it had agreed. The case was remanded to the trial court for a proper determination. *Id.*

375. 1994 Ga. Laws 1895-1915.

376. The new discovery law alone could and no doubt will be the subject of numerous such articles in the future. The author will attempt to hit the high spots.

1. Present use of the Official Code of Georgia Annotated without familiarity with the new law is difficult. Previous code sections long relied upon have been repealed and are not in the pocket parts. The new discovery provisions are in new chapters with new code designations. There is no easy cross reference to the new substitutes which may correspond to the old provisions.<sup>377</sup>

2. Discovery in felony cases is optional with the defendant.<sup>378</sup>

3. Discovery of what is in the possession of the state is extended to "any law enforcement agency involved in the investigation of the case being prosecuted," not just the district attorney's file.<sup>379</sup>

4. In addition to custodial statements, discovery of defendant's statements is extended to pre-custodial statements made by the defendant to a person he knows to be a law enforcement officer or prosecutor.<sup>380</sup>

5. The state must furnish a copy of the defendant's G.C.I.C. report if in the "control of the state or prosecution."<sup>381</sup>

6. The state must produce all tangible objects it intends to use in evidence in the case-in-chief, or rebuttal, or which belonged to defendant.<sup>382</sup>

7. The state is provided with reciprocal discovery of tangible objects and some other matters.<sup>383</sup>

8. The state is provided alibi discovery.<sup>384</sup>

377. For example, O.C.G.A. § 17-7-110 in the pocket parts is shown as repealed with reference to Ga. L. 1994, p. 1895 § 1, effective January 1, 1995. There is no cross reference to the new comparable provision O.C.G.A. § 17-6-3 dealing with supplying a copy of the indictment and list of witnesses.

378. Future O.C.G.A. § 17-6-2 (1995), applicable only where there is at least one felony count. However if one defendant opts for discovery, others must also comply. This will increase the number of severance hearings.

379. Future O.C.G.A. § 17-6-1(1) (1995). *See generally* 1994 Ga. Laws 1895-1915.

380. Future O.C.G.A. § 17-6-4(a)(1) (1995). *See generally* 1994 Ga. Laws 1895-1915. Apparently this does not apply to statements made to undercover agents or informants even within the jail. That will be the subject of litigation.

381. Future O.C.G.A. § 17-6-4(a)(2) (1995). *See generally* 1994 Ga. Laws 1895-1915. Such records are by definition in control of the state.

382. Future O.C.G.A. § 17-6-4(G)(3) (1995). *See generally* 1994 Ga. Laws 1895-1915.

383. Future O.C.G.A. § 17-6-4(G)(1)(2) (1995). *See generally* 1994 Ga. Laws 1895-1915.

384. Future O.C.G.A. § 17-6-5 (1995). *See generally* 1994 Ga. Laws 1895-1915. For a clue as to what extent this discovery may be enforced by the state, *see Johnson v. State*, 262 Ga. 527, 529-30, 422 S.E.2d 648, 649-50 (1992), wherein it was reversible error for the court to disallow defendant's psychiatrist's testimony and insanity defense because of late compliance with Unif. Super. Ct. R. 31.4. *Id.* *See also Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) and *Green v. Georgia*, 442 U.S. 95, 97 (1979), which held that state evidentiary requirements may not work to deprive a defendant of due process. *Id.* As a practical matter, unless there is ironclad documented

9. Production of witness statements by both the state and the defense is required, even at pretrial hearings.<sup>385</sup>

10. There is a separate article for misdemeanor discovery.<sup>386</sup>

11. There is an extensive revision of the provisions for depositions in criminal cases.<sup>387</sup>

12. There are many additional provisions—some major, some vague, some of indeterminable effect.<sup>388</sup>

*Change of Venue.* Two cases of note dealt with procedural issues in changes of venue, both resulting in reversals of trial court decisions. In *Freeman v. State*,<sup>389</sup> the trial judge denied the motion for change of venue in the case then before the court; but on its own motion the court announced that venue would be changed for trials of defendant's two subsequent cases.<sup>390</sup> The supreme court reversed because a judge is only authorized to change venue on his own motion when "in his judgment, there is danger of violence being committed on the defendant."<sup>391</sup> This must be based on circumstances as of the time of trial.<sup>392</sup>

In *Hardwick v. State*,<sup>393</sup> the supreme court clarified the construction of O.C.G.A. section 17-7-150(a)<sup>394</sup> and ruled that if a trial court granted a change of venue, the judge was not bound to change venue to a county agreed upon by the state and the defense.<sup>395</sup> The trial court is authorized to consider factors such as "financial, travel, security and

evidence of the defendant's personal decision to forego an alibi defense, a judge will be hard pressed to exclude a late alibi based upon late or no compliance with this discovery provision. A decision or negligence by the attorney would likely lead to a successful ineffective assistance claim if later challenged.

385. Future O.C.G.A. § 17-6-7. *See generally* 1994 Ga. Laws 1895-1915.

386. Future O.C.G.A. § 17-6-20. *See generally* 1994 Ga. Laws 1895-1915.

387. Future O.C.G.A. § 24-10-130. *See generally* 1994 Ga. Laws 1895-1915.

388. The effect of much of this statute is difficult to determine. In the author's opinion, the biggest effect will be not in the substance of what is gained or lost by either the state or defense, but in the cost in man power or delays caused by myriads of additional hearings dealing with sanctions for failure to comply or failure to comply timely with the new disclosure requirements and deadlines. In addition, this statute will be a shot in the arm for appellate counsel as it will take years for an appellate record to clarify much of the discovery law.

389. 264 Ga. 27, 440 S.E.2d 181 (1994).

390. *Id.* at 29, 440 S.E.2d at 184.

391. *Id.* at 29-30, 440 S.E.2d at 184.

392. *Id.*

393. 264 Ga. 161, 442 S.E.2d 236 (1994).

394. O.C.G.A. § 17-7-150(a) (1990) provides in part: "the judge shall transfer [the case] to any county that may be agreed upon by the prosecuting attorney and the defendant or his counsel . . ." *Id.*

395. 264 Ga. at 162, 442 S.E.2d at 238.

logistical burdens."<sup>396</sup> However, the lower court erred in proposing to utilize Uniform Superior Court Rule 19.2(B) in changing venue by picking a jury in the receiving county and transporting the jury back to the originating county for trial.<sup>397</sup> The supreme court concluded that Uniform Superior Court Rule 19.2(B) is inconsistent with O.C.G.A. section 17-7-150(a) and therefore unenforceable.<sup>398</sup>

*Speedy Trial.* In a multi-count indictment, the correct speedy trial provision is determined by the more serious offense.<sup>399</sup> Thus, in *Bailey v. State*,<sup>400</sup> because the defendant was on trial for multiple offenses including rape, the state had to comply with O.C.G.A. section 17-7-171.<sup>401</sup> The law also requires that a case be commenced within the statutory period, not that it be concluded.<sup>402</sup>

It is not a valid challenge to our speedy trial laws that other counties of similar size have more terms of court. Therefore, the defendant in *Henry v. State*<sup>403</sup> was not denied equal protection even though other

396. *Id.* at 164, 442 S.E.2d at 238.

397. GA. RULES OF CT. ANN., Unif. Super. Ct. R. 19.2(B) (1994) provides:

When there has been an order granting change of venue to the superior court of a county other than that in which the action theretofore pended, the trial jury shall be selected from qualified jurors of the transferee county although trial of the action may, in the discretion of the presiding judge, take place in the transferor county.

*Id.*

398. 264 Ga. at 164, 442 S.E.2d at 239.

399. *Baily v. State*, 209 Ga. App. 390, 433 S.E.2d 610 (1993).

400. 209 Ga. App. 390, 433 S.E.2d 610 (1993).

401. *Id.*, 433 S.E.2d at 612; *see also* O.C.G.A. § 17-7-171 which provides:

(a) Any person accused of a capital offense may enter a demand for trial at the term of court at which the indictment is found or at the next succeeding regular term thereafter; or, by special permission of the court, he may at any subsequent term thereafter demand a trial.

(b) If more than two regular terms of court are convened and adjourned after the term at which the demand is filed and the defendant is not given a trial then he shall be absolutely discharged and acquitted of the offense charged in the indictment, provided that at both terms there were juries impaneled and qualified to try the defendant and provided, further, that the defendant was present in court announcing ready for trial and requesting a trial ont he indictment.

(c) In cases involving a capital offense for which the death penalty is sought, if a demand for trial is entered, the counting of terms under subsection (b) of this Code section shall not begin until the convening of the first term following the completion of pretrial review proceedings in the Supreme Court under Code Section 17-10-35.1.

*Id.*

402. 209 Ga. App. at 392, 433 S.E.2d at 613.

403. 263 Ga. 417, 434 S.E.2d 469 (1993).

courts held court more frequently than in Douglas County (where his case was pending).<sup>404</sup>

Once a demand for speedy trial is filed, “[a] waiver of the demand would result from a continuance granted on motion of the accused, or from any other act on his part showing affirmatively that he consented to passing the case until a subsequent term.”<sup>405</sup> Filing a motion to suppress is not such a waiver,<sup>406</sup> and if successful and appealed by the state, it, at most, tolls the time requirements of the statute.<sup>407</sup> In *Ballew v. State*,<sup>408</sup> the state did not appeal, so the time limit for trial was not tolled.<sup>409</sup> As defendant was not tried within the time limits, defendant was entitled to discharge.<sup>410</sup>

If a case goes up on appeal of some issue after a demand for speedy trial has been filed and is returned for trial, when does a previously pending demand for speedy trial become effective: when the remittitur is filed, or when the judgment on remittitur is filed? In *Ramirez v. State*,<sup>411</sup> the court of appeals ruled that the demand became operative when the remittitur was made the order of the lower court.<sup>412</sup> As the defendant was tried within two terms of that date, he was not entitled to discharge and acquittal.<sup>413</sup>

A demand for speedy trial is not defective because it fails to use the magic words “speedy trial” or other such similar heading in the motion.<sup>414</sup> Thus in *Aranza v. State*,<sup>415</sup> defendant’s demand for speedy trial was not defective for having the caption “Demand for Trial by Jury.”<sup>416</sup> However, the demand for speedy trial was defective for failing

404. *Id.* at 417, 434 S.E.2d at 470.

405. *Ballew v. State*, 211 Ga. App. 672, 673, 440 S.E.2d 76, 78 (1994); *see also* *Riley v. State*, 212 Ga. App. 511, 520, 442 S.E.2d 7, 8 (1994).

406. 211 Ga. App. at 673, 440 S.E.2d at 78.

407. *Id.*

408. 211 Ga. App. 672, 440 S.E.2d 76 (1994).

409. *Id.*

410. *Id.* at 674, 440 S.E.2d at 78.

411. 211 Ga. App. 356, 439 S.E.2d 4 (1993).

412. *Id.* at 356, 439 S.E.2d at 4. *But see* *Henry v. State*, 264 Ga. 527, 449 S.E.2d 79 (1994). *Henry* held that the demand becomes effective on filing the remittitur, but allows “. . . the remainder of that term and one additional regular term of court in which to try the defendant pursuant to his demand for trial . . .” *Id.* at 531, 449 S.E.2d at 82.

413. *Id.* *See also* *Fletcher v. State*, 213 Ga. App. 401, 403, 445 S.E.2d 279, 281 (1994) (holding that after a remittitur has been returned, any partial term of court remaining in which no jurors are impanelled does not count for purposes of terms allowed for trial under a demand for speedy trial). *Id.*

414. *Aranza v. State*, 213 Ga. App. 192, 193, 444 S.E.2d 349, 349 (1994).

415. *Id.*

416. *Id.* at 193, 444 S.E.2d at 349. Compare the requirement in discovery motions for just such magic words. In *Delay v. State*, 213 Ga. App. 199, 200, 444 S.E.2d 140, 141

to specify "the charges upon which Aranza demanded a speedy trial by 'name, date, term of court, or case number.'"<sup>417</sup> Therefore, defendant was not entitled to discharge and acquittal as "[s]uch a demand cannot reasonably be construed as sufficient to put the authorities on notice of a defendant's intention to invoke the extreme sanction' of O.C.G.A. § 17-7-170."<sup>418</sup>

*Defendant's Presence, Pre-trial Motions.* It has long been held that the defendant may be found to have waived his presence by voluntarily absenting himself during trial after the jury has been selected.<sup>419</sup> However, in *Deal v. State*,<sup>420</sup> defendant, who was free on bond, failed to appear for a pretrial *Jackson-Denno* hearing. Defense counsel agreed to proceed with the hearing in defendant's absence. The trial court ruled the defendant's statement was admissible.<sup>421</sup> Defendant on appeal challenged the holding of the *Jackson-Denno* hearing in his absence. The court of appeals reversed holding that "[p]rior to trial a defendant's failure to appear is handled with bench warrants and bond forfeitures . . . . During trial, a voluntary absence is treated as a waiver of the right of confrontation."<sup>422</sup> It was, therefore, error for the court to hold the *Jackson-Denno* hearing in defendant's absence.<sup>423</sup>

*Continuances.* Is a defendant entitled, at trial, to a transcript of a previous preliminary hearing or previous trial? That is still an unanswered question in Georgia. In *Moreland v. State*,<sup>424</sup> defendant, who was indigent, asked for a continuance for time to obtain a copy of a transcript of a prior mistrial. The trial court acknowledged that defendant would be entitled to a free transcript, if at all, but denied a continuance due to the simplicity of the case.<sup>425</sup> The court of appeals noted "as a matter of equal protection an indigent defendant must be provided with a transcript of prior proceedings when the transcript is

(1994), the defendant's demand for statements of the accused was defective for failing to refer to the appropriate code section (O.C.G.A. § 17-7-210) and for failure to state that the statements should be supplied 10 days before trial. *Id.*

417. 213 Ga. App. at 193, 444 S.E.2d at 349.

418. *Id.* (quoting *Ferris v. State*, 172 Ga. App. 729, 731, 324 S.E.2d 762, 764 (1984)).

419. *Winfield v. State*, 210 Ga. App. 849, 437 S.E.2d 849 (1993); *Gee v. State*, 212 Ga. App. 422, 442 S.E.2d 290 (1994); *Byrd v. Ricketts*, 233 Ga. 779, 780, 213 S.E.2d 610, 611 (1975); *Fictum v. State*, 188 Ga. App. 348, 349, 373 S.E.2d 54, 55 (1988).

420. 213 Ga. App. 131, 443 S.E.2d 713 (1994).

421. *Id.* at 131, 443 S.E.2d at 714.

422. *Id.* at 132, 443 S.E.2d at 714-15 (citing *Pollard v. State*, 175 Ga. App. 269, 270, 333 S.E.2d 152, 153 (1985)).

423. 213 Ga. App. at 132, 443 S.E.2d at 715.

424. 213 Ga. App. 75, 443 S.E.2d 701 (1994).

425. *Id.* at 75, 443 S.E.2d at 702.

needed for an effective defense . . . .<sup>426</sup> An argument that the defendant should have a good memory or take perfect notes will not prevail, and it can be assumed that a transcript is a valuable right for discovery and for impeachment.<sup>427</sup> However, in *Moreland*, the issue was not equal protection, but a continuance. As the defendant showed no harm, the denial of the continuance was at most harmless error.<sup>428</sup>

In order to prevail in a motion for continuance for absence of a witness, there must be technical compliance with O.C.G.A. section 17-7-192.<sup>429</sup> In *Grant v. State*,<sup>430</sup> the trial court was overly technical in denying a continuance because the defense did not show that its missing witness was under subpoena. However, defendant had obtained an order of production for the witness who was under state incarceration.<sup>431</sup> The court of appeals reversed the trial court and the conviction holding that "[t]he production order of the superior court issue pursuant to O.C.G.A. § 24-10-61 was sufficient, in lieu of a subpoena . . . to demonstrate appellant's due diligence in compliance with the requirements of O.C.G.A. § 17-8-25."<sup>432</sup>

### B. Trial

**Voir dire. Reduced Strikes.** In 1992 the general assembly changed the number of strikes in felony cases from ten for the prosecution and twenty for the defense to six and twelve respectively.<sup>433</sup>

426. *Id.* at 76, 443 S.E.2d at 702 (quoting *Britt v. North Carolina*, 404 U.S. 226 (1971)).

427. *Id.*

428. *Id.* at 77, 443 S.E.2d at 703.

429. O.C.G.A. § 17-8-25 (1990) provides:

In all applications for continuances upon the ground of the absence of a witness, it shall be shown to the court that the witness is absent; that he has been subpoenaed; that he does not reside more than 100 miles from the place of trial by the nearest practical route; that his testimony is material; that the witness is not absent by the permission, directly or indirectly, of the applicant; that the applicant expects he will be able to procure the testimony of the witness at the next term of the court; that the application is not made for the purpose of delay but to enable the applicant to procure the testimony of the absent witness; and the application must state the facts expected to be proved by the absent witness.

*Id.*

430. 212 Ga. App. 565, 442 S.E.2d 898 (1994).

431. *Id.* at 566, 442 S.E.2d at 900.

432. *Id.* at 567, 442 S.E.2d at 900.

433. 1992 Ga. Laws 1981. See also O.C.G.A. § 15-12-160 (1994):

When any person stands indicted for a felony, the court shall have impaneled 30 jurors from which the defense and prosecution may strike jurors; provided, however, in any case in which the state announces its intention to seek the death penalty, the court shall have impaneled 42 jurors from which the defense and

Naturally, a number of questions arose as to whether this new jury selection process was prospective, that is, applicable only to crimes committed after enactment of the new law or retroactive to all cases not yet tried. A number of cases resolved this issue, most significantly *Barner v. State*.<sup>434</sup> The court held since "peremptory strikes are a procedural rather than a substantive right" the new statute was retroactive to all cases pending regardless of the date on which the crime occurred.<sup>435</sup>

**Batson.** There was not much new development in the area of *Batson*<sup>436</sup> under state law.<sup>437</sup> However in *Lingo v. State*,<sup>438</sup> there was an "overwhelming pattern" of strikes against blacks by the state, requiring the prosecutor to present "'concrete, tangible, race-neutral and neutrally applied' reasons for strikes exercised against black venire members."<sup>439</sup> The supreme court paid lip service to the court of appeals case of *Strozier v. Clark*<sup>440</sup> to the effect that "where racially-neutral and neutrally applied reasons are given for a strike, the simultaneous existence of any racially motivated explanation results in a *Batson* violation."<sup>441</sup> The supreme court refused to extend *Strozier*

state may strike jurors. If, for any reason, after striking from the panel there remain less than 12 qualified jurors to try the case, the presiding judge shall summon such numbers of persons who are competent jurors as may be necessary to provide a full panel. In making up the panel or successive panels, the presiding judge shall draw the tales jurors from the jury box of the county and shall order the sheriff to summon them.

*Id.*

434. 263 Ga. 365, 434 S.E.2d 484 (1993); see also *Lysfjord v. State*, 208 Ga. App. 811, 432 S.E.2d 247 (1993) (which upheld striking from a full panel of 30 instead of 42); *Seats v. State*, 210 Ga. App. 74, 435 S.E.2d 286 (1993); *Stargel v. State*, 210 Ga. App. 619, 436 S.E.2d 786 (1993).

435. 263 Ga. at 367, 434 S.E.2d at 487.

436. *Batson v. Kentucky*, 476 U.S. 79 (1986).

437. *But see J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) (*Batson* made applicable to peremptory challenges based on gender).

438. 263 Ga. 664, 437 S.E.2d 463 (1993).

439. *Id.* at 665-66, 437 S.E.2d at 466 (quoting *Ford v. State*, 262 Ga. 558, 560, 423 S.E.2d 245, 247 (1992)).

440. 206 Ga. App. 85, 424 S.E.2d 368 (1992).

441. 263 Ga. at 668, 437 S.E.2d at 467. Noting that

*Strozier* . . . states that a racially motivated explanation for striking a juror will invalidate the entire jury selection, even though the racially-neutral explanation is also given . . . . [W]here it can be determined that the racially-neutral explanation is, in fact, pretextual since there is a racially motivated reason that can be independently determined, the jury selection process is invalid under *Batson*.

*Id.* at 669 n.4, 437 S.E.2d at 468 n.4.

to a "presumption that any reason for striking a black juror, not also used against a white juror—regardless of other reasons for striking a black juror—is per se racially motivated."<sup>442</sup> Rather, the court held "[w]here there are multiple reasons for striking a juror, white or black, it cannot be presumed that a reason applied to one juror, of one race, but not applied to another juror of another race, is racially motivated."<sup>443</sup> The determination remains very subjective and in *Lingo*, the supreme court deferred to the trial court's determination as to several relatively weak explanations by the prosecutor.<sup>444</sup>

But what about totally subjective explanations, for example "I didn't like his looks" or "he acted suspicious" or "she had a bad attitude?" In *Berry v. State*,<sup>445</sup> the state offered as a racially neutral explanation for many strikes that it admittedly struck women over the age of fifty. The state struck these women because they may be less likely to believe the state's "jail-bird witnesses" and that the defense counsel may be more appealing to older women. Another black juror was excused because she was "hostile." Finally, the state excused one juror to get to the next juror. The trial court found these reasons to be neutral, and the supreme court affirmed.<sup>446</sup> What is interesting about this case is the irony of the "racially neutral" explanation which is sexually non-neutral, that is, admittedly striking women because of their sex.<sup>447</sup> In Justice Benham's concurrence,<sup>448</sup> he proposes that the court adopt a rule adopted in Arizona that "a facially neutral, but wholly subjective, reason for a peremptory strike. . . must be coupled with some form of objective verification before it can overcome the prima facie showing of discrimination."<sup>449</sup> He would also make it the burden of the party relying on such a subjective reason to be sure that such objective supporting evidence is in the record.<sup>450</sup> Although this rule was not adopted by the court, it is imminently reasonable and, if nothing else, good advice to the practitioner.

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442. *Id.* at 668, 437 S.E.2d at 467.

443. *Id.* at 668-69, 437 S.E.2d at 468.

444. *Id.* at 669, 437 S.E.2d at 468.

445. 263 Ga. 493, 435 S.E.2d 433 (1993).

446. *Id.* at 493-94, 435 S.E.2d at 435.

447. *But see* *J.E.B. v. Alabama*, ex. rel. T.B., 114 S. Ct. 1419 (1994) (though apparently the defense did not challenge sex strikes).

448. 263 Ga. at 909, 435 S.E.2d at 435 (Benham, J., concurring).

449. *Id.* at 910, 435 S.E.2d at 436 (quoting *State v. Cruz*, 857 P.2d 1249, 1253 (Ariz. 1993)).

450. *Id.*

### Evidence.

*Hearsay.* Hearsay evidence is incompetent and may not be used as evidence even to revoke probation if admitted without objection.<sup>451</sup> In *Goodson v. State*,<sup>452</sup> the evidence of defendant's alleged probation violation (commission of a new offense of felony murder) was hearsay; therefore, the revocation was reversed.<sup>453</sup>

Nevertheless, what is seemingly hearsay is often admitted into evidence, not under any exception to the hearsay rule, and not to explain conduct, but for the truth of the content of the statement.<sup>454</sup> When a witness attends a lineup and identifies a suspect, the fact of the identification is often admitted as a vocal fact. Such a procedure was affirmed reluctantly by the court of appeals in *Neal v. State*.<sup>455</sup> In that case, the court of appeals acknowledged that such evidence is hearsay, recalled criticism of such evidence in *Wade v. State*,<sup>456</sup> reaffirmed such criticism, but nevertheless was "constrained" to affirm<sup>457</sup> the use of such evidence based on *Woodard v. State*<sup>458</sup> and *Haralson v. State*.<sup>459</sup> The court of appeals invited the supreme court to reverse the court of appeals decision and these old precedents.<sup>460</sup>

There is no requirement of showing unavailability of the declarant for the traditional codified exceptions to the hearsay rule such as res gestae.<sup>461</sup> However, a showing of unavailability is typically the means of showing "necessity" when a party seeks to admit a hearsay statement from "necessity."<sup>462</sup> What does it take to show unavailability? In *Rosser v. State*,<sup>463</sup> the state offered and the trial court admitted a hearsay statement from a missing witness out of "necessity." The court

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451. *Barnett v. State*, 194 Ga. App. 892, 893, 392 S.E.2d 322, 323 (1990).

452. 213 Ga. App. 283, 444 S.E.2d 603 (1994).

453. *Id.* at 284, 444 S.E.2d at 604.

454. *Id.* at 284, 444 S.E.2d at 603-04.

455. 211 Ga. App. 829, 440 S.E.2d 717 (1994).

456. 208 Ga. App. 700, 431 S.E.2d 398 (1993).

457. 211 Ga. App. at 830, 440 S.E.2d at 719.

458. 175 Ga. App. 449, 333 S.E.2d 645 (1985).

459. 234 Ga. 406, 216 S.E.2d 304 (1975).

460. 211 Ga. App. at 830, 440 S.E.2d at 719. It is likely that the supreme court will soon take them up on their invitation. This evidence is highly questionable when used to establish the truth of the "vocal fact." These cases are ripe for reversal. *But see* *Harper v. State*, 213 Ga. App. 444, 449, 445 S.E.2d 303, 308 (1994) (officer's testimony as to vocal fact admissible).

461. *Barnett v. State*, 211 Ga. App. 651, 652-53, 440 S.E.2d 247, 248 (1994).

462. *McKissick v. State*, 263 Ga. 188, 429 S.E.2d 655 (1993) (declarant deceased); *Roper v. State*, 263 Ga. 201, 429 S.E.2d 668 (1993) (declarant deceased).

463. 211 Ga. App. 402, 439 S.E.2d 72 (1993).

of appeals noted that "necessity" is usually shown by death or noncompellability of the declarant.<sup>464</sup> The court also recognized authority that "necessity" may be shown by the inability to find a witness.<sup>465</sup> However, in *Rosser* the state's missing witness was known to the state from the day of the alleged offense, was not on a witness list, and had not been served with a subpoena. Apparently an investigator began looking for the declarant four days before trial and spent about "four-and-a-half to five hours" looking for her.<sup>466</sup> The court found insufficient evidence of unavailability to satisfy the "necessity" requirement and reversed the conviction because of the admission of inadmissible hearsay.<sup>467</sup>

Even where a declarant is demonstrably "unavailable," a hearsay statement is not admissible unless there are indicia of reliability or trustworthiness about the proffered evidence.<sup>468</sup> In *Roper v. State*,<sup>469</sup> hearsay statements from the murder victim were admitted through the testimony of the victim's sister. *Roper* is unusual because the supreme court apparently bypassed the state's arguments for admissibility and on its own determined that the statements were admissible from "necessity."<sup>470</sup> While the victim was indisputably deceased and therefore unavailable, the supreme court seems to have usurped the initial trial court function of determining that there were sufficient indicia of reliability.<sup>471</sup> The conviction was affirmed.<sup>472</sup>

*Business Records.* In *Jackson v. State*,<sup>473</sup> a conspiracy to commit theft by deception and arson case, the court of appeals affirmed the admission into evidence of documents from defendant's mortgage loan package.<sup>474</sup> These documents were loan documents which originated with the initial lender, but were admitted through the testimony of the loan purchaser through the loan purchaser's business records. Thus, no one appeared to qualify the records from the original lender.<sup>475</sup> In affirming, the court of appeals followed *Lewis v. United California*

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464. *Id.* at 404, 439 S.E.2d at 73.

465. *Id.* (citing *Adams v. State*, 191 Ga. App. 16, 381 S.E.2d 69 (1989)).

466. *Id.* at 405-06, 439 S.E.2d at 74.

467. *Id.* at 406, 439 S.E.2d at 75.

468. *Id.* at 404, 439 S.E.2d at 73.

469. 263 Ga. 201, 429 S.E.2d 668 (1993).

470. *Id.* at 202, 429 S.E.2d at 670.

471. *Id.* at 203, 429 S.E.2d at 670. In this instance "the statements were made by the victim to a sister in whom she placed great confidence and to whom she turned for help with her problems . . . ." *Id.*

472. *Id.*

473. 209 Ga. App. 217, 433 S.E.2d 655 (1993).

474. *Id.* at 222, 433 S.E.2d at 660.

475. *Id.* at 218, 433 S.E.2d at 657.

*Bank*<sup>476</sup> which allows "the records of one business to be admitted as business records of another business where routine, factual documents made by one business are transmitted and delivered to a second business, and there entered in the regular course of business of the receiving business."<sup>477</sup>

*Scientific Evidence.* The results of a penile plethysmograph test (a test whereby a measuring gauge is placed on a subject's penis to measure change in circumference and blood flow as a result of certain stimuli) are not admissible in Georgia.<sup>478</sup> It was reversible error in *Gentry v. State*<sup>479</sup> for the trial court to admit such evidence.<sup>480</sup> In *Gentry* what little evidence that was offered in an attempt to qualify the test showed that reliability has not been established.<sup>481</sup>

The prosecution discovery tool and tactical advantage created by *Sabel v. State*<sup>482</sup> has been sharply curtailed. Under *Rower v. State*,<sup>483</sup> no longer does the defense have to supply to the state a list of defense experts or supply reports unless the defense intends to call the witness.<sup>484</sup> Furthermore, under *Blige v. State*,<sup>485</sup> the supreme court ruled that while the state may call as a witness an expert hired by the defense, the state may not refer to the fact that the witness was hired by the defense.<sup>486</sup> In response to the state's argument that the state should be able to show the interest of the witness by source of the

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476. 143 Ga. App. 126, 242 S.E.2d 581 (1978).

477. 209 Ga. App. at 219, 433 S.E.2d at 658.

478. *Gentry v. State*, 213 Ga. App. 24, 443 S.E.2d 667 (1994).

479. *Id.*

480. *Id.* at 25-26, 443 S.E.2d at 669.

481. *Id.* at 25, 443 S.E.2d at 668-69.

The test for admissibility of novel scientific evidence is whether the procedure or technique in question has reached a scientific stage of verifiable certainty, or, in the words of Professor Irving Younger, whether the procedure "rests upon the laws of nature . . . ." Once a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty, or that it rests upon the laws of nature.

*Id.* (quoting *Harper v. State*, 249 Ga. 519, 525, 292 S.E.2d 389, 395 (1982)). None of the above was shown in *Gentry*.

482. 248 Ga. 10, 282 S.E.2d 61 (1981). The state was entitled, on demand, to a list of defense expert witnesses and a copy of the expert's report(s). *Id.* at 18, 282 S.E.2d at 68. Furthermore, the court in *Sabel* opined that "[i]f the defendant does not call the expert as a witness, the state may call the defendant's expert without adding his or her name to the list of witnesses . . . ." *Id.* at 18, 282 S.E.2d at 69.

483. 264 Ga. 323, 443 S.E.2d 839 (1994) (after the survey period).

484. *Id.*

485. 264 Ga. 166, 441 S.E.2d 752 (1994).

486. *Id.* at 166-67, 441 S.E.2d at 752-53.

witness' original employment, the court held that this would be an impermissible attempt by the state to "bolster" its witness.<sup>487</sup>

*Marital Privilege. State v. Peters*<sup>488</sup> was a murder case in which the police offered immunity in order to compel the testimony of a likely witness/codefendant.<sup>489</sup> Defendant married the witness for the purpose of making the witness uncompellable.<sup>490</sup> The trial court ruled that the witness-spouse could not be compelled to testify, and the state appealed.<sup>491</sup> The court of appeals conducted an extensive review of the legislative history of Georgia's "competent, but not compellable" law and that of other states.<sup>492</sup> Finally, the court concluded that there was a potential for abuse, but the solution lay with the general assembly, not with the courts.<sup>493</sup> The witness-husband of the accused could not be compelled to testify.<sup>494</sup>

A similar tactic was attempted in *Hamilton v. State*,<sup>495</sup> in which the defendant married the twelve-year-old victim of his statutory rape.<sup>496</sup> Unfortunately for defendant, there is an exception to the privilege where the defendant is charged with an offense against a minor child.<sup>497</sup> In this case, the spouse was the "minor child" victim. The court of appeals

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487. *Id.* at 168, 441 S.E.2d at 753-54. Does this mean that if the defense calls a witness from the State Crime Laboratory, the defense will not be permitted to refer to the fact that the witness is an employee of the state and therefore a disinterested witness?

488. 213 Ga. App. 352, 444 S.E.2d 609 (1994).

489. *Id.* at 353, 444 S.E.2d at 609.

490. *Id.* See also O.C.G.A. § 24-9-23(a) (Supp. 1994) which provides: "Husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other." *Id.*

491. 213 Ga. App. at 354, 444 S.E.2d at 610-11.

492. *Id.* at 355-56, 444 S.E.2d at 612.

493. *Id.* at 357, 444 S.E.2d at 612-13.

494. *Id.*, 444 S.E.2d at 613. There is certainly some incentive on the part of defendant to make her husband a happy partner. The privilege begins and ends with the marriage as the crucial time is not when the offense took place, but rather when the testimony is sought to be compelled. There is no protection after divorce. *Id.* at 354, 444 S.E.2d at 611.

495. 210 Ga. App. 398, 436 S.E.2d 522 (1993).

496. *Id.* at 398, 436 S.E.2d at 523.

497. O.C.G.A. § 24-9-23(b) (Supp. 1994) provides:

The privilege created by subsection (a) of this Code section or by corresponding privileges in paragraph (1) of Code Section 24-9-21 or subsection (a) of Code Section 24-9-27 shall not apply in proceedings in which the husband or wife is charged with a crime against the person of a minor child, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged.

*Id.*

construed the two statutes together and held that the witness "minor-spouse-victim" was compellable.<sup>498</sup>

Privileged communications between husband and wife are covered by a different statute and can be invoked by the defendant (originator of the communication) to prevent a spouse-witness from revealing communications made pursuant to the marital relationship.<sup>499</sup> "Communications" are not limited to conversations but include acts performed by a spouse attributable to the marital relationship. Such acts include "that which might not be spoken or done openly in public as tending to expose personal feelings and relationships or tending to bring embarrassment or discomfiture to the participants if done outside the privacy of the marital relation."<sup>500</sup> In *White v. State*,<sup>501</sup> defendant was convicted of several sex crimes including aggravated sodomy of his granddaughter.<sup>502</sup> His wife testified on cross examination to defendant's acts of anal sodomy with the wife during their marriage. Defendant objected, invoking the marital communication privilege.<sup>503</sup> The court noted exceptions to the privilege but found none applicable.<sup>504</sup> The court found the acts described by the spouse to be privileged and therefore reversible when admitted over defendant's objection.<sup>505</sup> The fact that defendant called her as a witness for unrelated matters was not a waiver of the privilege.<sup>506</sup>

*Rape Shield.* In *Lemacks v. State*,<sup>507</sup> the court previously held that prior instances of rape by other perpetrators on a victim is not "sexual behavior" of the victim and therefore not evidence precluded by the "Rape Shield" statute.<sup>508</sup> In *Berry v. State*,<sup>509</sup> the trial court did not

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498. 210 Ga. App. at 399, 436 S.E.2d at 523.

499. *Georgia Int'l Life Ins. Co. v. Boney*, 139 Ga. App. 575, 228 S.E.2d 731 (1976).

500. *Id.* at 579, 228 S.E.2d at 735.

501. 211 Ga. App. 694, 440 S.E.2d 68 (1994), *cert. granted*.

502. *Id.* at 694, 440 S.E.2d at 69.

503. *Id.* at 695-96, 440 S.E.2d at 70.

504. *Id.* at 696, 440 S.E.2d at 70. The following factors were listed: "(1) conversations to or with third parties; (2) instances where the communication is actionable by one spouse against the other; and (3) impersonal communications or actions performed without regard to special confidence between spouses in the marital relation." *Id.* (quoting *Boney*, 139 Ga. App. 575, 579, 228 S.E.2d 731, 735-36 (1976)).

505. *Id.*

506. *Id.* at 696-97, 228 S.E.2d at 71.

507. 207 Ga. App. 160, 427 S.E.2d 536 (1993). *See also* *Raines v. State*, 191 Ga. App. 743, 382 S.E.2d 738 (1989).

508. 191 Ga. App. at 745, 382 S.E.2d at 739; *see also* O.C.G.A. § 24-2-3(b) (Supp. 1994) which provides:

In any prosecution for rape, evidence relating to the past sexual behavior of the complaining witness may be introduced if the court, following the procedure

allow defendant to introduce previous instances of statutory rape on the victim by other perpetrators.<sup>510</sup> The court of appeals agreed with the trial court that the rule in *Lemacks* does not apply to statutory rape as such.<sup>511</sup> Instances of statutory rape may, in fact, be sexual behavior and, as such, covered by the rape shield law, making it inadmissible without compliance with that law.<sup>512</sup>

*Impeachment.* The supreme court held in *Vincent v. State*<sup>513</sup> that when the state impeaches a defense witness by establishing prior convictions of crimes of moral turpitude, it may not bolster its impeachment by gratuitously inquiring into the facts of the prior conviction.<sup>514</sup>

In *Paradise v. State*,<sup>515</sup> defendant called his ex-wife as a witness, but was ambushed by unexpected damaging testimony.<sup>516</sup> Defendant never had her declared a hostile witness. After she was excused, he attempted to impeach her with prior convictions of misdemeanor bad check. The trial court refused.<sup>517</sup> The court of appeals ruled that misdemeanor bad check<sup>518</sup> is a crime of moral turpitude for purposes of impeachment, but there was no error here.<sup>519</sup> Although "entrapment" or surprise is no longer a necessary predicate to impeaching one's

described in subsection (c) of this Code section, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.

*Id.*

509. 210 Ga. App. 789, 437 S.E.2d 630 (1993).

510. *Id.* at 789, 437 S.E.2d at 632.

511. *Id.*

512. *Id.*

513. 264 Ga. 234, 442 S.E.2d 748 (1994).

514. *Id.* at 235, 442 S.E.2d at 750. The ruling would likely be different if the witness volunteered an explanation of the facts and the state pursued the matter on further cross. The court in describing the facts refers to a witness "[who has not] attempt[ed] to rehabilitate her character by explaining the circumstances of [the] conviction. . . ." *Id.*

515. 212 Ga. App. 166, 441 S.E.2d 497 (1994).

516. *Id.* at 169, 441 S.E.2d at 500.

517. *Id.*

518. O.C.G.A. § 16-9-20(a) (1992) provides:

A person commits the offense of criminal issuance of a bad check when he makes, draws, utters, or delivers a check, draft, or order for the payment of money on any bank or other depository in exchange for a present consideration or wages, knowing that it will not be honored by the drawee. For the purposes of this Code section, it is prima-facie evidence that the accused knew that the instrument would not be honored.

*Id.*

519. 212 Ga. App. at 169, 441 S.E.2d at 500.

own witness with contradictory statements,<sup>520</sup> that is the *only* way one may impeach one's own witness without declaring the witness hostile. Therefore, crimes of moral turpitude were not admissible.<sup>521</sup>

Finally, it was not an abuse of discretion for the trial court in *Gardner v. State*<sup>522</sup> to allow the state to re-open the evidence in response to jury questions "seventeen minutes into [the jury's] deliberations."<sup>523</sup>

*Similar Transactions.* Once again, the largest single category of evidence appeals dealt with the admissibility of evidence of similar or connected crimes. This category now includes evidence of "conduct between the parties" or "prior difficulties" between the parties<sup>524</sup> for purposes of applicability of the Uniform Superior Court Rules discovery provisions.<sup>525</sup> Although there were dozens of such appeals, there was

520. O.C.G.A. § 24-9-81 (1982) provides:

A party may not impeach a witness voluntarily called by him, except where he can show to the court that he has been entrapped by said witness by a previous contradictory statement. However, in the trial of all civil cases, either plaintiff or defendant shall be permitted to make the opposite party, or anyone for whose immediate benefit the action is prosecuted or defended, or any agent of said party, or agent of any person for whose immediate benefit such action is prosecuted or defended, or officer or agent of a corporation when a corporation is such party or for whose benefit such action is prosecuted or defended a witness, with the privilege of subjecting such witness to a thorough and sifting examination and with the further privilege of impeachment, as if the witness had testified in his own behalf and were being cross-examined.

*Id.*

521. 212 Ga. App. at 169, 441 S.E.2d at 500.

522. 263 Ga. 197, 429 S.E.2d 657 (1993).

523. *Id.* at 198, 429 S.E.2d at 659.

524. *Stewart v. State*, 263 Ga. 843, 440 S.E.2d 452 (1994); *but see* a strong dissent by Justice Hunt, joined by Justices Hunstein and Carley. *Id.* at 847, 440 S.E.2d at 456; *see also Loggins v. State*, 260 Ga. 1, 388 S.E.2d 675 (1990); *Barrett v. State*, 263 Ga. 533, 436 S.E.2d 480 (1993).

525. GA. RULES OF CT. ANN., Unif. Super. Ct. R. 31.1 (1994) provides:

All motions, demurrers, and special pleas shall be made and filed at or before time of arraignment, unless time therefor is extended by the judge in writing prior to trial. Notices of the state's intention to present evidence of similar transactions or occurrences and notices of the intention of the defense to raise the issue of insanity or mental illness, or the intention of the defense to introduce evidence of specific acts of violence by the victim against the defendant or third persons, shall be given and filed at least ten (10) days before trial unless the time is shortened or lengthened by the judge. Such filing shall be in accordance with the following procedures.

*Id.*

Unif. Super. Ct. R. 31.3 provides in part:

(A) The prosecution may, upon notice filed in accordance with 31.3 of these rules, request of the court in which the accusation or indictment is pending leave to present during the trial of the pending case evidence of similar transactions or

not much earthshaking in the area of similar transactions during the survey period. A few cases were notable.

Failure to object to the omission by the court of a hearing to determine the admissibility of similar transactions does not waive that objection for purposes of appeal.<sup>526</sup> However, if the defense does not object to a failure by the state to disclose the purpose<sup>527</sup> for such evidence so as to enable the court to conduct its balancing test,<sup>528</sup> that issue may be deemed waived.<sup>529</sup>

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occurrences.

(B) The notice shall be in writing, served upon the defendant's counsel, and shall state the transaction, date, county, and the name(s) of the victim(s) for each similar transaction or occurrence sought to be introduced. Copies of accusations or indictments, if any, and guilty pleas or verdicts, if any, shall be attached to the notice. The judge shall hold a hearing at such time as may be appropriate, and may receive evidence on any issue of fact necessary to determine the request, out of the presence of the jury. The burden of proving that the evidence of similar transactions or occurrences should be admitted shall be upon the prosecution. The state may present during the trial evidence of only those similar transactions or occurrences specifically approved by the judge.

(C) Evidence of similar transactions or occurrences not approved shall be inadmissible. In every case, the prosecuting attorney and defense attorney shall instruct their witnesses not to refer to similar crimes, transactions or occurrences, or otherwise place the defendant's character in issue, unless specifically authorized by the judge.

*Id.*

526. *Riddle v. State*, 208 Ga. App. 8, 11, 430 S.E.2d 153, 156 (1993); *White v. State*, 213 Ga. App. 429, 430, 445 S.E.2d 309, 311 (1994).

527. In *Barrett v. State*, 263 Ga. 533, 436 S.E.2d 480 (1993), Justice Fletcher listed a number of the legitimate reasons evidence of similar transactions can be offered:

that the crime charged is one in a series of mutually dependant crimes . . . ; guilty knowledge on the part of the accused; the identity of the person who has committed the crime charged; prior attempts by the accused to commit the same crime against the victim of the crime charged; that the crime charged was not committed accidentally as is contended by the accused; the motive for the crime charged; and the requisite specific intent for the crime charged.

*Id.* at 534, 436 S.E.2d at 482 (citing *Cawthon v. State*, 119 Ga. 395, 46 S.E. 897 (1904); and *KENNETH S. BROWN ET.AL., MCCORMICK ON EVIDENCE* (John W. Strong ed. 4th ed. 1992).

In addition to those listed by Justice Fletcher, the author lists the following: That the accused was a conspirator or party to a crime, *Bradford v. State*, 261 Ga. 833, 412 S.E.2d 534 (1992); *Bradford v. State*, 262 Ga. 512, 421 S.E.2d 523 (1992); predisposition of a defendant to commit a crime to rebut the entrapment defense, *Sheppard v. State*, 205 Ga. App. 373, 422 S.E.2d 66 (1992); corroboration required for rape or for testimony of an accomplice, *Rash v. State*, 207 Ga. App. 585, 428 S.E.2d 799 (1993), and *Bradford, supra*. Basically all the above can be boiled down to identity, state of mind, or a combination of the two.

528. *Williams v. State*, 261 Ga. 640, 409 S.E.2d 649 (1991).

529. *Cole v. State*, 211 Ga. App. 236, 239, 438 S.E.2d 694, 697 (1993); *Corey v. State*, 211 Ga. App. 333, 439 S.E.2d 513 (1993). "Similar transactions" has become a very

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technical and complex area of the law of evidence; it would behoove the practitioner to have a handy checklist of objections so as not to waive an objection by making a wrong or imprecise one. It is always risky to compile a "laundry list" of important matters because of the likelihood of embarrassment for omitting something momentous. Nevertheless, the author shall assail such a list:

1. Failure to Comply with Unif. Super. Ct. R. 31.1.
  - a. No notice filed.
  - b. Notice untimely (10 days before trial).
  - c. Court abused discretion by shortening notice under the facts of the particular case (State why an abuse in *this case*).
2. Failure to Comply with Unif. Super. Ct. R. 31.3.
  - a. Notice not in writing.
  - b. Notice not served on defendant's counsel or not served timely.
  - c. Notice not sufficient.
    1. Does not state with sufficient particularity or omits any of the following: the transaction, date, county, names of victim(s) for each transaction. Unif. Super. Ct. R. 31.3 (B); *but see* Bohanon v. State, 208 Ga. App. 576, 431 S.E.2d 149 (1993).
    2. Omission of copies of accusations or indictment, guilty pleas, or verdicts. Unif. Super. Ct. R. 31.3 (B); *but see* Sweatman v. State, 181 Ga. App. 474, 352 S.E.2d 796 (1987).
  3. Hearing.
    - a. Failure to hold hearing. Not waived by failure to object. Riddle v. State, 208 Ga. App. 8, 10, 430 S.E.2d 153, 154 (1993).
    - b. Abuse of discretion in failure to hold hearing early enough to prepare.
    - c. Failure of the state to state a purpose to enable the court to make a balancing decision. Williams v. State, 261 Ga. 640, 409 S.E.2d 649 (1991) (however this case can be waived by failure to object. See *Cole, supra.*).
    - d. Stated purpose is not a permissible one.
    - e. Failure of the state to offer evidence, but rather stating in its place. (Though cases have upheld this practice, see Harris v. State, 210 Ga. App. 366, 368(2), 436 S.E.2d 231, 233 (1993)).
    - f. Transaction is too remote. See Gilstrap v. State, 261 Ga. 798, 799, 410 S.E.2d 423, 424 (1991).
    - g. The transaction is outside the statute of limitations, uncharged and unadjudicated. (So far, no authority, *but see* Moore v. State, 207 Ga. App. 412, 416, 427 S.E.2d 779, 783 (1993) and Gilstrap v. State, 261 Ga. 798, 798-99, 410 S.E.2d 423, 424 (1991) for possibly useful dicta.)
    - h. The defendant was acquitted of the transaction. *But see* Dowling v. United States, 493 U.S. 342 (1990).
    - i. Undue prejudice outweighs probative value. Williams v. State, 261 Ga. 640, 409 S.E.2d 649 (1991). In this connection, remember the acknowledged higher standard of similarity for admissibility in a case where the purpose is to prove identity. White v. State, 203 Ga. App. 889, 418 S.E.2d 149 (1992); Smith v. State, 206 Ga. App. 557, 426 S.E.2d 23 (1992).
4. Trial.
  - a. Proof at trial does not conform to notice or D.A. offer of proof. (If objection fails, show why a continuance or mistrial is necessary for preparation.) *But see* Dacus v. State, 213 Ga. App. 180, 444 S.E.2d 110 (1994), where a date error in the notice did not, per se, prevent admissibility.

In *Davis v. State*,<sup>530</sup> the court of appeals found that it was not necessary for the admissibility of evidence of a similar transaction for the state to show that a plea of guilty to the similar transaction was freely and voluntarily entered.<sup>531</sup> The court of appeals declined to extend the rule for evidence in aggravation of punishment for sentencing<sup>532</sup> to similar transactions.<sup>533</sup>

In *Hilliard v. State*,<sup>534</sup> the defense objected to the state's evidence of similar transactions on the theory that the state's evidence was "so strong without it."<sup>535</sup> The court of appeals said there was no authority

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b. Insufficient or no proof that the defendant is the same person who committed the similar transaction. *Adams v. State*, 208 Ga. App. 29, 430 S.E.2d 435 (1993).

c. Insufficient evidence of similarity at trial, such as an attempt to prove the other transaction with conviction alone, which does not adequately show the facts of the other transaction. *Stephens v. State*, 261 Ga. 467, 405 S.E.2d 483 (1991); *but see Rindone v. State*, 210 Ga. App. 639, 437 S.E.2d 338 (1993) (D.U.I. and Habitual Violator); *Braddy v. State*, 205 Ga. App. 424, 422 S.E.2d 260 (1992); *Bookout v. State*, 205 Ga. App. 530, 423 S.E.2d 7 (1992); *Adams v. State*, 208 Ga. App. 29, 430 S.E.2d 35 (1993) (sexual molestation of children); and *Parrott v. State*, 206 Ga. App. 829, 427 S.E.2d 276 (1992) (conspiracy indictment for exceptions to the rule in *Stephens*).

d. The proof of similar transactions includes additional prejudicial transactions which are not similar or connected or in notice. *Sessions v. State*, 207 Ga. App. 609, 428 S.E.2d 652 (1993).

e. Witnesses to prove the similar transaction are not on the witness list and not otherwise shown in the notice.

f. Proof of the similar transactions preceded evidence of the case on trial and could cause confusion. *Gilstrap v. State*, 261 Ga. 798, 410 S.E.2d 423 (1991).

g. The judge failed to give or gave inadequate limiting instructions, *Stephan v. State*, 205 Ga. App. 241, 244, 422 S.E.2d 25, 27 (1992). *But see Morris v. State*, 212 Ga. App. 779, 780, 442 S.E.2d 792, 794 (1994). (The courts seem to be backing away from strictly limiting the evidence to a specific articulable purpose in favor of the usual "smorgasbord of possibilities," i.e., identity, knowledge, intent, bent of mind, course of conduct, etc.).

530. 209 Ga. App. 572, 434 S.E.2d 132 (1993).

531. *Id.* at 573, 434 S.E.2d at 133.

532. *Pope v. State*, 256 Ga. 195, 345 S.E.2d 831 (1986); *Gadson v. State*, 198 Ga. App. 315, 398 S.E.2d 409 (1990).

533. *Davis v. State*, 209 Ga. App. 572, 434 S.E.2d 132 (1993).

534. 211 Ga. App. 842, 440 S.E.2d 729 (1994).

535. *Id.* at 843, 440 S.E.2d at 730. This same theory might cause a judge to hesitate and decide to reserve a ruling on admissibility until the defense materializes so that a better balancing decision could be made. There are three things wrong with such a procedure: (1) It improperly denies the state the opportunity to prove or disprove a material point using more than one source of evidence, *Floyd v. State*, 233 Ga. 280, 283, 210 S.E.2d 810, 813 (1974); *Redd v. State*, 141 Ga. App. 888, 890, 234 S.E.2d 812, 815 (1977); (2) The defense may rest, thereby denying the state the opportunity to offer relevant evidence in rebuttal; and (3) Most importantly, the defense may rest and claim on appeal or habeas that it was chilled in putting on its defense or denied due process by the threat that the court might admit the evidence in the event the defendant offered evidence. The probable result of such a claim is anybody's guess.

for such an objection and found such a practice of gauging admissibility by need neither "sensible or desirable."<sup>536</sup>

*Mistrial.* "Once [a jury is] impanelled and sworn, jeopardy attach[es], and [a defendant is] entitled to be acquitted or convicted by that jury . . . . If a mistrial is declared without a defendant's consent or over his objection, the defendant may be retried only if there was a 'manifest necessity,' for the mistrial."<sup>537</sup>

Where the state moves for a mistrial without defendant's consent because of some activity of the defendant or defense counsel, the judge should call a recess, count to ten (or maybe 100), take a deep breath, and think long and hard about it. The judge should then document the fact that he or she thought long and hard, considering several alternatives such as precautionary instructions, a continuance, or other alternatives. Why? Because in several cases this year, one of them a murder case, retrial was barred after a mistrial was granted hastily on state's motion. In *Smith v. State*,<sup>538</sup> the court erroneously concluded that defendant was improperly offering evidence that his custodial statement was coerced after the statement was admitted without objection.<sup>539</sup> Such evidence was relevant and admissible;<sup>540</sup> therefore, the mistrial was error and retrial was barred.<sup>541</sup>

In *Dotson v. State*,<sup>542</sup> the defense, by continually offering evidence which had been ruled out, goaded the state into moving for a mistrial, and the judge hastily granted it.<sup>543</sup> In *Bradfield v. State*,<sup>544</sup> the court granted a similar hasty mistrial.<sup>545</sup> In neither case did the court give the defense the opportunity to object or suggest alternatives. The record did not reflect that the court considered alternatives. The court of appeals in both cases concluded that manifest necessity had not been shown, and therefore a retrial was barred.<sup>546</sup>

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536. 211 Ga. App. at 843, 440 S.E.2d at 730.

537. *Smith v. State*, 263 Ga. 782, 783, 439 S.E.2d 483, 485 (1994).

538. *Id.*

539. *Id.* at 782, 439 S.E.2d at 484.

540. *Id.* at 784, 439 S.E.2d at 486. The court also noted that ". . . the trial court should give careful, deliberate, and studious consideration to whether the circumstances demand a mistrial, with a keen eye toward other, less drastic, alternatives, calling for a recess if necessary and feasible to guard against hasty mistakes." *Id.* at 783, 439 S.E.2d at 485.

541. *Id.* at 785, 439 S.E.2d at 486.

542. 213 Ga. App. 7, 443 S.E.2d 650 (1994).

543. *Id.* at 8, 443 S.E.2d at 652.

544. 211 Ga. App. 318, 439 S.E.2d 100 (1993).

545. *Id.* at 319, 439 S.E.2d at 102.

546. *Dotson*, 213 Ga. App. 7, 10-11, 443 S.E.2d 650, 653-54 (1994); *Bradfield*, 211 Ga. App. 318, 320, 439 S.E.2d 100, 102 (1993).

The trial court in *Venson v. State*<sup>547</sup> was a model for all judges of how to consider a state's motion for mistrial. The facts in *Venson* were somewhat similar to those in *Dotson*. The court of appeals noted that the trial judge took a recess, heard extensive argument from defense counsel, and was "reluctant" to grant the mistrial, although grant it she did.<sup>548</sup> The court of appeals held, "A trial judge has acted within his sound discretion in rejecting possible alternatives and in granting a mistrial, if reasonable judges could differ about the proper disposition . . . . This great deference means that the availability of another alternative does not without more render a mistrial order an abuse of sound discretion."<sup>549</sup> It thus appears to be more important that a judge be careful and consider all options than it is for the judge to be completely correct in the judge's choice of options.<sup>550</sup>

*Closing Remarks.* In the past, it has been permissible for counsel to argue and make analogies to "highly-publicized cases" in closing remarks in order to illustrate a point.<sup>551</sup> The practice has been upheld as recently as this year in *Curtis v. State*.<sup>552</sup> However, in *Bell v. State*,<sup>553</sup> the supreme court seems to have drawn the line on this practice by reversing a trafficking in heroin case in which the state had, in argument, referred to some highly publicized drug-related murder cases.<sup>554</sup> The basis for the reversal was the "longstanding prohibition against 'the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence.'"<sup>555</sup>

Where there are multiple defendants with separate counsel and none offer evidence in addition to the defendants themselves, counsel for each defendant is entitled to make both opening and concluding argu-

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547. 212 Ga. App. 540, 441 S.E.2d 893 (1994).

548. *Id.* at 541-42, 441 S.E.2d at 894.

549. *Id.* at 542, 441 S.E.2d at 895.

550. *Id.* at 541, 441 S.E.2d at 894. The court also noted that "[t]he manifest necessity for a mistrial can exist alongside less drastic alternatives, so long as the record discloses that the trial court considered alternatives before declaring mistrial." *Id.*

551. *Carroll v. State*, 143 Ga. App. 230, 237 S.E.2d 703 (1977).

552. 212 Ga. App. 237, 240, 441 S.E.2d 776, 780 (1994) (citing *Cooper v. State*, 260 Ga. 549, 550, 397 S.E.2d 705, 706 (1990)).

553. 263 Ga. 776, 776-77, 439 S.E.2d 480, 480 (1984).

554. *Id.*

555. *Id.* at 777, 439 S.E.2d at 481 (citing *Conner v. State*, 251 Ga. 113, 303 S.E.2d 266 (1983)). All the justices concurred except Hunt, who dissented. It is not clear whether this is a *per se* prohibition or a fact specific case. A prosecutor would do well to use discretion. Does this mean that defense counsel in a death penalty case will not be permitted to argue well-publicized instances where innocent people have been wrongly convicted?

ments<sup>556</sup> under O.C.G.A. section 17-8-71.<sup>557</sup> Thus, it was error for the trial court, under these facts, to require one counsel to open and the other to conclude the closing argument. In *Givens v. State*,<sup>558</sup> the court of appeals found the error harmless.<sup>559</sup>

*Charge of the Court.* The pattern jury instructions<sup>560</sup> can certainly be convenient. Counsel, though, should avoid the increasingly common practice of requesting charges by reference to the pattern jury instruction using page and number or even by submitting a copy of the pattern instruction. While such a practice seems logical, easy, and harmless, it can be dangerous for one's client. In *James v. State*,<sup>561</sup> an armed robbery case, defendant requested a lesser included offense charge on theft by taking from the "pattern jury instructions," more particularly, "Part 4G1 et. seq. (specifically 4G5(b)—value less than \$500.00)."<sup>562</sup> The request was ambiguous and overly broad in that it included an instruction defining financial institutions, a totally inapplicable charge. "If any portion of a requested charge is inapt, incorrect, misleading, confusing, not adequately adjusted or tailored, or not reasonably raised . . . by the evidence, denial of the charge request is proper."<sup>563</sup> The court of appeals ruled that there was no proper request to charge; therefore, it was not error for the court to refuse to give the lesser offense in charge.<sup>564</sup>

If requests to charge are submitted after the commencement of trial, it may be too late. In *Walker v. State*,<sup>565</sup> defendant requested an easily anticipated charge on circumstantial evidence on the final day of

556. *Givens v. State*, 211 Ga. App. 290, 292, 439 S.E.2d 22, 24 (1993), *rev'd on other grounds*, 264 Ga. 522, 448 S.E.2d 687 (1994).

557. O.C.G.A. § 17-8-71 (1990) provides: "After the evidence is closed on both sides, the prosecuting attorney shall open and conclude the argument to the jury. If the defendant introduces no evidence, his counsel shall open and conclude the argument to the jury after the evidence on the part of the state is closed." *Id.*

558. 211 Ga. App. 290, 439 S.E.2d 22 (1993).

559. *Id.* at 293, 439 S.E.2d at 25; *but see Givens v. State*, 264 Ga. 522, 448 S.E.2d 687 (1994) (reversing the court of appeals) which held that the error was reversible, not harmless. *Id.*

560. COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II, CRIMINAL CASES (1991).

561. 210 Ga. App. 454, 436 S.E.2d 565 (1993).

562. *Id.* at 454, 436 S.E.2d at 566.

563. *Id.*, 436 S.E.2d at 567 (quoting *Harris v. State*, 202 Ga. App. 618, 621, 414 S.E.2d 919, 922 (1992)).

564. *Id.*

565. 213 Ga. App. 407, 444 S.E.2d 824 (1994).

trial.<sup>566</sup> This was a violation of Uniform Superior Court Rule 10.3;<sup>567</sup> therefore, it was not error for the trial judge to refuse to give the charge.

The court in *Metts v. State*<sup>568</sup> held that where the defense of accident is the only defense and there is evidence to support such a charge, it is error for the court to fail to give it in charge even without request.<sup>569</sup>

*Charge of the Court: Circumstantial Evidence.* In *Mims v. State*,<sup>570</sup> the supreme court finally put an end to the arguing and construing regarding its opinion in *Robinson v. State*.<sup>571</sup> A number of cases had seized on the word "depends" in *Robinson* and other interpretations to avoid reversals where trial judges had not charged on "circumstantial evidence." It is as if the court of appeals did not believe the supreme court meant what it said in *Robinson* about the necessity of the "magic" charge on circumstantial evidence.<sup>572</sup> The supreme court eliminated the word "depends" and held that the charge on circumstantial evidence<sup>573</sup> must be given on request in any case in which there is any circumstantial evidence.<sup>574</sup> The best thing to come out of this case is Justice Hunt's concurrence.<sup>575</sup> What if, on a trial of two codefendants where there is direct and circumstantial evidence, one defendant requests a charge on circumstantial evidence, but the other defendant objects because the charge required under *Robinson* and *Mims* conveys to the jury that they may convict on a lesser standard of proof on direct

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566. *Id.* at 413, 444 S.E.2d at 830.

567. GA. RULES OF COURT ANNOTATED, Unif. Super. Ct. R. 10.3 (1994) provides:

All requests to charge shall be numbered consecutively on separate sheets of paper and submitted to the court in duplicate by counsel for all parties at the commencement of trial, unless otherwise provided by pre-trial order; provided, however, that additional requests may be submitted to cover unanticipated points which arise thereafter.

*Id.*

568. 210 Ga. App. 197, 435 S.E.2d 525 (1993).

569. *Id.* at 198, 435 S.E.2d at 526.

570. 264 Ga. 271, 271, 443 S.E.2d 845, 846 (1994).

571. 261 Ga. 698, 410 S.E.2d 116 (1991) (which required that the charge on circumstantial evidence be given on every case which depends in whole or in part on circumstantial evidence, whether or not any direct evidence has been impeached). *Id.*

572. See *Mims*, 209 Ga. App. 901, 434 S.E.2d 832 (1993); *Johnson v. State*, 209 Ga. App. 632, 434 S.E.2d 169 (1993); *Chandler v. State*, 204 Ga. App. 512, 419 S.E.2d 751 (1992); *Rash v. State*, 207 Ga. App. 585, 428 S.E.2d 799 (1993).

573. O.C.G.A. § 24-4-6 (1982) provides: "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."

574. 264 Ga. at 272, 443 S.E.2d at 846-47.

575. *Id.* at 273 (Hunt, J., concurring) (joined by Fletcher and Sears-Collins, JJ).

evidence?<sup>576</sup> This was noted in Justice Hunt's concurrence, and he suggested a solution.

Because [the usual circumstantial evidence charge coinciding with O.C.G.A. § 24-4-6] implies, erroneously, that direct evidence requires a lesser standard of proof, that is, that direct evidence would not have to exclude every other reasonable theory, I would substitute the following:

You would be authorized to convict only if the evidence proves the guilt of the accused beyond a reasonable doubt and the evidence excludes all reasonable theories of innocence. It is the state's burden to produce such evidence.<sup>577</sup>

Additional cases have held that the "two theories" charge should never be given.<sup>578</sup> More importantly, a defense counsel should not put all his eggs in one basket by requesting only the "two equal theories" circumstantial evidence charge. This charge does not even qualify for the record as a request to charge circumstantial evidence so as to invoke the requirement of *Mims* that the charge be given.<sup>579</sup>

*Verdicts.* The inconsistent verdict rule was abolished in *Milam v. State*.<sup>580</sup> Therefore, the results of *Cleveland v. State*<sup>581</sup> are not terribly surprising. In *Cleveland* defendant was charged with aggravated assault and possession of a firearm in the commission of a felony,<sup>582</sup>

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576. This will happen. See *McGuire v. State*, 209 Ga. App. 813, 816, 434 S.E.2d 802, 804 (1993) (Beasley, J., concurring) (citing *Davis v. State*, 74 Ga. 869, 880 (1885)), in which she notes circumstantial evidence "requires a higher quantum and quality to support a conviction." *Id.*

577. 264 Ga. at 274, 443 S.E.2d at 848 (Hunt, J., concurring). Note no reference to the terms direct or circumstantial evidence, thus the emphasis is shifted to *sufficiency* of the evidence as it should be.

578. *Cantrell v. State*, 212 Ga. App. 288, 441 S.E.2d 879 (1994); *Johnson v. State*, 210 Ga. App. 99, 435 S.E.2d 458 (1993). See also *Langston v. State*, 208 Ga. App. 175, 430 S.E.2d 365 (1993).

579. *Kelly v. State*, 212 Ga. App. 278, 442 S.E.2d 462 (1994) (a full court opinion).

580. 255 Ga. 560, 562, 341 S.E.2d 216, 218 (1986).

581. 212 Ga. App. 361, 441 S.E.2d 820 (1994).

582. *Id.* See also O.C.G.A. § 16-11-106(b) (1992) which provides:

Any person who shall have on or within arm's reach of his person a firearm or a knife having a blade of three or more inches in length during the commission of, or the attempt to commit:

- (1) Any crime against or involving the person of another;
- (2) The unlawful entry into a building or vehicle;
- (3) A theft from a building or theft of a vehicle;
- (4) Any crime involving the possession, manufacture, delivery, distribution, dispensing, administering, selling, or possession with intent to distribute any controlled substance as provided in Code Section 16-13-30; or

the felony being the aggravated assault. The jury inexplicably found defendant not guilty of the aggravated assault, but guilty of possession of a firearm during the commission of the very same aggravated assault.<sup>583</sup> The court of appeals could not reconcile the verdicts, but, because there is no inconsistent verdict rule, it affirmed the lower court.<sup>584</sup>

Compare *Harrison v. State*<sup>585</sup> in which the defendant was charged with possession of a firearm during commission of a felony armed robbery. The jury convicted the defendant of the firearm charge, but instead of armed robbery, the jury found the defendant guilty of the lesser included offense of theft by taking.<sup>586</sup> The court of appeals never discussed the inconsistent verdict rule but merely found that it must reverse on the basis of *Jefferson v. State*<sup>587</sup> because the jury had determined there was no felony, only a misdemeanor.<sup>588</sup>

May a jury return a verdict for a lesser included offense even though the lesser offense was not defined nor charged to the jury as one of their options? That is what the jury did in *Freeman v. State*,<sup>589</sup> a murder case, when they returned a verdict of involuntary manslaughter absent a formal charge on that offense. The trial judge would not accept the verdict, but sent the jury back to deliberate further. The jury then returned a verdict for voluntary manslaughter, an option authorized by the jury charge.<sup>590</sup> The court of appeals reversed, relying on some ancient authority<sup>591</sup> and finding that the verdict of guilty of involun-

(5) Any crime involving the trafficking of cocaine, marijuana, or illegal drugs as provided in Code Section 16-13-31, and which crime is a felony, commits a felony and, upon conviction thereof, shall be punished by confinement for a period of five years, such sentence to run consecutively to any other sentence which the person has received.

*Id.*

583. 212 Ga. App. at 361, 441 S.E.2d at 820.

584. *Id.*

585. 213 Ga. App. 366, 444 S.E.2d 613 (1994).

586. *Id.* at 367, 444 S.E.2d at 613.

587. 196 Ga. App. 770, 397 S.E.2d 129 (1990). *Jefferson* is merely a case that deals with jury charges on when a jury would be authorized to find the defendant guilty of possession of a firearm during the commission of a felony. It does not deal with a verdict such as in *Harrison*, *supra*.

588. 213 Ga. App. at 368, 444 S.E.2d at 615. Ironically, if the jury had acquitted the defendant of armed robbery in similar fashion to the jury in *Cleveland*, 212 Ga. App. 361, 441 S.E.2d 820 (1994), the firearm conviction in *Harrison* would have been upheld as in *Cleveland*, *supra*. See also *Camsler*, *supra* notes 101-05, dealing with armed robbery and theft by receiving of the same property.

589. 210 Ga. App. 183, 435 S.E.2d 461 (1993), *rev'd*, 264 Ga. 276, 444 S.E.2d 80 (1994).

590. 210 Ga. App. at 183-84, 435 S.E.2d at 462.

591. *Register v. State*, 10 Ga. App. 623, 74 S.E.2d 429 (1911).

tary manslaughter was an acquittal of voluntary manslaughter.<sup>592</sup> The court of appeals found the trial judge was not authorized to reject the involuntary manslaughter verdict and remanded to the trial court with direction.<sup>593</sup> Fortunately, the supreme court reversed the court of appeals and overruled the ancient authority.<sup>594</sup> The supreme court further established a correct procedure for receiving verdicts: The trial judge and counsel should review the verdict before it is published to see that it is appropriate; if not, send it back with direction for further deliberation.<sup>595</sup>

*Sentencing: Probation Conditions.* It was not error for the trial judge in *Ballenger v. State*<sup>596</sup> to require a person convicted of driving under the influence of alcohol and habitual violator to wear a florescent bracelet, identifying him as a "D.U.I. CONVICT" as a condition of probation.<sup>597</sup> Conditions of probation need not be expressly authorized by statute.<sup>598</sup> Furthermore, it did not violate equal protection nor constitute cruel and unusual punishment. The court noted that the two purposes of probation are rehabilitation of the offender and protection of society. The court could not find that the bracelet condition of probation was not reasonably related to both of those purposes.<sup>599</sup>

In order to invoke the mandatory life sentence provisions of O.C.G.A. section 16-13-30(d)<sup>600</sup> for a recidivist sale of cocaine, does the state have to notify the defense of intent to use prior drug convictions for that

592. *Freeman*, 210 Ga. App. at 184, 435 S.E.2d at 462.

593. *Id.*

594. *State v. Freeman*, 264 Ga. 276, 278, 444 S.E.2d 80, 82 (1994). The court noted "[i]t is the province of the court to construe the law applicable in the trial of a criminal case, and of the jury to apply the law so construed to the facts in evidence. While the impanelled jurors are made absolutely and exclusively judges of the facts in the case, they are, in this sense only, judges of the law." (quoting *Berry v. State*, 105 Ga. 683, 31 S.E. 592 (1898)). *Id.*

595. *Id.*

596. 210 Ga. App. 627, 436 S.E.2d 793 (1993).

597. *Id.*

598. *Id.* at 628, 436 S.E.2d at 794. The court noted other unusual conditions of probation that had been approved, particularly Boy Scout requirements in *Mangiapane v. State*, 178 Ga. App. 836, 344 S.E.2d 756 (1986).

599. 210 Ga. App. at 629, 436 S.E.2d at 794.

600. O.C.G.A. § 16-13-30(d) (1992) provides:

Except as otherwise provided, any person who violates subsection (b) of this Code section with respect to a controlled substance in Schedule I or a narcotic drug in Schedule II shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five years nor more than 30 years. Upon conviction of a second or subsequent offense, he shall be imprisoned for life.

*Id.*

purpose?<sup>601</sup> The court of appeals said no in *Armstrong v. State*.<sup>602</sup> However, the supreme court said yes and reversed the court of appeals.<sup>603</sup> Furthermore, notice of evidence of similar transactions does not satisfy the notice requirements invoking the recidivist provision.<sup>604</sup>

As previously noted,<sup>605</sup> life without parole as an alternative to the death penalty, passed by the general assembly in 1993,<sup>606</sup> was upheld in *Freeman v. State*.<sup>607</sup> Whether or not one agrees with *Freeman*, it will likely soon become a moot point. On November 8, 1994, the people of Georgia voted approval of a state constitutional amendment<sup>608</sup> which will authorize the general assembly to create mandatory minimum sentences for certain offenses,<sup>609</sup> life without parole for additional offenses and repeat offenses,<sup>610</sup> and ratify the previous life-without-parole statute.<sup>611</sup>

*Post-trial.* In *Rhyne v. State*,<sup>612</sup> after a hung jury on the trial of the first indictment, the state re-indicted the defendant adding additional counts,<sup>613</sup> ("upping the ante"). The court of appeals reversed the convictions on the new counts because O.C.G.A. section 16-1-7(b)<sup>614</sup>

601. Such notice is required for sentencing under the general recidivist statute, O.C.G.A. § 17-10-7(a) (1990) which provides for maximum punishment in the courts discretion. See *Mitchell v. State*, 202 Ga. App. 100, 413 S.E.2d 517 (1991) and O.C.G.A. § 17-10-2(b) (1990).

602. 209 Ga. App. 796, 434 S.E.2d 560 (1993), *aff'd*, 264 Ga. 237, 442 S.E.2d 759 (1994).

603. *Armstrong v. State*, 264 Ga. 237, 238, 442 S.E.2d 759, 760 (1994).

604. *Id.*

605. See *supra* notes 11-22 and accompanying text.

606. 1993 Ga. Laws 1654 § 3; O.C.G.A. § 17-10-16 (Supp. 1994).

607. 264 Ga. 27, 28, 440 S.E.2d 181, 183 (1994).

608. 1994 Ga. Laws 2015.

609. *Id.* at 2016, Article IV, Section II, Paragraph II, subparagraph (b)(2) authorizing the general assembly to enact mandatory minimum and no parole sentence for armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, and aggravated sexual battery. *Id.*

610. *Id.* Article IV, Section II, Paragraph II, Subparagraph (b)(3) authorizing the general assembly to enact statutes requiring life without parole for murder and for armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery if previously convicted of one of those offenses, the so-called "two strikes and you're out" provision. *Id.*

611. *Id.* Article IV, Section II, Paragraph II, Subparagraph (b)(4), which ratifies O.C.G.A. § 17-10-16. *Id.*

612. 209 Ga. App. 548, 434 S.E.2d 76 (1993).

613. *Id.* at 552, 434 S.E.2d at 80.

614. O.C.G.A. § 16-1-7(b) provides:

If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided in subsection (c) of this Code section.

prohibits multiple prosecutions for crimes arising out of the same conduct.<sup>615</sup> The court further held that the defendant "is not to be penalized, by the addition of new charges, for the state's failure to obtain a conviction upon the first trial."<sup>616</sup>

Is there such a thing as a motion for directed verdict of acquittal notwithstanding a mistrial? Also in *Rhyne*, after the same mistrial due to hung jury, the defense moved for judgment of acquittal notwithstanding a mistrial.<sup>617</sup> The state nolle prosequi without defendant's consent before the court ruled on the defense motion.<sup>618</sup> A nolle prosequi without defendant's consent after a case has been submitted to a jury will result in an acquittal on a plea of former jeopardy.<sup>619</sup> But if there is a mistrial, then the status goes back to the way it was before trial, that is, the case can be nolle prosequi without defendant's consent.<sup>620</sup> Therefore, a retrial was not barred. The court also held there is no such procedure in Georgia as a motion for judgment notwithstanding mistrial.<sup>621</sup> Any previous authority seemingly to the contrary was exposed as mere dicta and was disapproved.<sup>622</sup>

*Pleas of Guilty Reserving Appeal.* In 1991, the court of appeals began an experiment allowing parties to enter pleas of guilty reserving the right to appeal certain issues on the express approval of the trial judge.<sup>623</sup> There were many problems, much confusion, and considerable litigation with this new procedure.<sup>624</sup> One such problem was seen in *Veal v. State*,<sup>625</sup> in which the defendant entered a plea of guilty and reserved the right to appeal the trial court's denial of a motion to suppress.<sup>626</sup> Unfortunately, the defense filed a motion for new trial. Within 30 days after the denial of the motion for new trial, but more than 30 days after the plea, the defendant filed an appeal.<sup>627</sup> The

*Id.*

615. 209 Ga. App. at 552, 443 S.E.2d at 80.

616. *Id.* (quoting *Curry v. State*, 248 Ga. 183, 184, 281 S.E.2d 604, 606 (1981)).

617. *Id.* at 549, 434 S.E.2d at 77-78.

618. *Id.* at 550, 434 S.E.2d at 78.

619. *Id.* (citing *Jones v. State*, 55 Ga. 625 (1876)).

620. 209 Ga. App. at 550, 434 S.E.2d at 78.

621. *Id.*, 434 S.E.2d at 79.

622. *Id.* at 551, 434 S.E.2d at 79 (disapproving *King v. State*, 246 Ga. 386, 271 S.E.2d 630 (1980); *Glass v. State*, 250 Ga. 736, 300 S.E.2d 812 (1983)).

623. *Mims v. State*, 201 Ga. App. 277, 279, 410 S.E.2d 824, 825 (1991).

624. See *Chambers v. State*, 210 Ga. App. 71, 435 S.E.2d 291 (1993); *Parker v. State*, 211 Ga. App. 187, 438 S.E.2d 664 (1993); *Woody v. State*, 212 Ga. App. 186, 441 S.E.2d 505 (1994).

625. 211 Ga. App. 815, 440 S.E.2d 714 (1994).

626. *Id.* at 815, 440 S.E.2d at 714.

627. *Id.*

court of appeals dismissed the appeal because "[a] motion for a new trial is not the proper vehicle for contesting a guilty plea; rather it may be challenged for the first time on appeal."<sup>628</sup> Therefore, the motion for new trial did not extend the time for appeal. The appeal was therefore untimely.<sup>629</sup>

The court of appeals spent more time and print litigating and clarifying the procedural issues in a plea reserving appeal than it did actually resolving the issues to be appealed.<sup>630</sup> The court of appeals literally threw up its hands, abandoned the *Mims* experiment, and abolished the "plea reserving appeal" in *Hooten v. State*.<sup>631</sup>

Another appeal which was lost due to confusion over extensions of time was *Hughes v. State*.<sup>632</sup> In *Hughes* the trial judge granted two extensions of time to file the notice of appeal. The defendant actually filed his notice of appeal within the second extension but over twenty-eight days after expiration of the first extension.<sup>633</sup> Unfortunately, O.C.G.A. section 5-6-39(a)<sup>634</sup> only allows one extension and that for no more than the original time for filing an appeal. The appeal was untimely and, therefore, dismissed.<sup>635</sup>

*Revocation.* In *Perry v. State*,<sup>636</sup> a defendant's probated sentence was partially revoked due to a violation. Thereafter, the balance of his

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628. *Id.*

629. *Id.*

630. 211 Ga. App. 815, 440 S.E.2d 714 (1994). See *supra* note 609.

631. *Hooten v. State*, 212 Ga. App. 770, 775, 442 S.E.2d 836, 840 (1994). This holding is effective 30 days after the date the decision in *Hooten* is first published in the advance sheets; the effective date is therefore July 9, 1994. Georgia Advance Sheets, Vol. 10, No. 47 (June 9, 1994). However, counsel may still try stipulating the evidence and a verdict in order to avoid a wasteful trial, but preserve an appeal.

632. 210 Ga. App. 833, 437 S.E.2d 841 (1993).

633. *Id.*

634. O.C.G.A. § 5-6-39(a) (1982) provides:

Any judge of the trial court or any justice or judge of the appellate court to which the appeal is to be taken may, in his discretion, and without motion or notice to the other party, grant extensions of time for the filing of:

- (1) Notice of appeal;
- (2) Notice of cross appeal;
- (3) Transcript of the evidence and proceedings on appeal or in any other instance where filing of the transcript is required or permitted by law;
- (4) Designation of record referred to under Code Section 5-6-42; and
- (5) Any other similar motion, proceeding, or paper for which a filing time is prescribed.

*Id.*

635. 210 Ga. App. at 833, 437 S.E.2d at 841.

636. 213 Ga. App. 220, 444 S.E.2d 150 (1994).

sentence was revoked based on additional violations.<sup>637</sup> It would make no difference if the prosecutor knew about the subsequent violations at the time of the first hearing. A proceeding to revoke probation is not a criminal proceeding, and "there is no double jeopardy protection against revocation of probation and the imposition of imprisonment."<sup>638</sup>

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637. *Id.* at 220, 444 S.E.2d at 151.

638. *Id.* at 221, 444 S.E.2d at 151.