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Criminal Law and Procedure: A Two-Year Survey

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by James P. Fleissner*

I. INTRODUCTION

During the two-year survey period, the Georgia Court of Appeals and the Georgia Supreme Court issued well over a thousand published opinions addressing issues of criminal law and procedure.[1] The primary purpose of this Article is to summarize judicial decisions constituting noteworthy developments in the law. Given the scope of survey, the constraint of limited space imposed difficult choices concerning what to include. As in past years, this survey will focus on highlights, such as cases of first impression and cases presenting close or controversial issues. The Author hopes this Article will provide useful information for busy practitioners seeking to keep abreast of developments in Georgia criminal law and procedure. Beyond providing summaries of the cases, it is the further hope of the Author that the accompanying analysis and commentary will contribute to the public discourse on these important legal issues.

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The Author wishes to state that it was with some trepidation that he accepted the invitation of the Georgia Survey editors to prepare this Article. My apprehensiveness resulted from being a newcomer to Georgia and was compounded by following several years' authorship by a distinguished member of the Georgia bench. The Author hopes the Article will be of some small service to those involved in the criminal justice system of the state despite the Author's recent introduction to Georgia criminal law. The Author also expresses his appreciation to C. Todd Ross, an outstanding member of the Mercer Law School Class of 1997, who provided diligent and able research assistance.

1. The Author selected cases for the survey by reviewing cases from 264 Ga. 255, 443 S.E.2d 619 (June 6, 1994) through 266 Ga. 849, 471 S.E.2d 507 (June 17, 1996) and from 213 Ga. App. 520, 444 S.E.2d 875 (June 9, 1994) through 221 Ga. App. 768, 472 S.E.2d 435 (May 9, 1996).

Of course, the body of two years' worth of criminal appellate decisions on myriad issues of law defies a general characterization. However, it is possible for a particular issue to stand out from the rest and assume a status of prominence as a "defining issue" of the period. During the survey period, several factors combined to push one issue confronting the Georgia criminal justice system to the forefront: the vexing problem of racial and socio-economic bias, both real and perceived.

The litigation that culminated with the Supreme Court of Georgia's opinion in *Stephens v. State*[2] was illustrative of the difficulty inherent in the race issue and the sharp divisions to which the issue gives rise. *Stephens* involved allegations that prosecutors had applied the Georgia statute requiring mandatory life imprisonment for two-time drug offenders disproportionately against African-American defendants.[3] The *Stephens* saga involved a bitter and complex legal debate, allegations of racism and the hard feelings such charges engender, fears of paralyzing the criminal justice system with endless litigation, and concerns over hindering the fight against crime. As will be discussed below, the Georgia Supreme Court acknowledged there was an apparent problem, but declined to impose a judicial solution. The court's decision shifted the debate to the halls of the legislature where something remarkable happened: Despite political trends towards ever-tougher penalties for drug crimes, the legislature eliminated the mandatory life term for two-time drug offenders, thereby defusing the explosive issue raised in *Stephens*. The controversy represented the most prominent legal debate of the survey period. The ultimate outcome of the controversy represented a meaningful step towards reducing the perception of racial unfairness in the Georgia criminal justice system.

Here is how *Stephens* unfolded: Defendant was an African-American convicted in Hall County for selling cocaine.[4] Defendant was eligible to be sentenced under the provision that required life imprisonment upon conviction for a second drug offense,[5] and the prosecution opted to seek

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2. 265 Ga. 356, 456 S.E.2d 560 (1995), *cert. denied*, 116 S. Ct. 144 (1995).
3. 265 Ga. at 357, 456 S.E.2d at 564.
4. *Id.* at 356, 456 S.E.2d at 560.
5. O.C.G.A. § 16-13-30(d) (1982). The statute, now repealed, provided in pertinent part:

> (b) Except as authorized by this article, it is unlawful for any person to manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute any controlled substance . . . .
>
> (d) 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.

O.C.G.A. § 16-13-30(b), (d) (1982).

a life sentence under the mandatory life sentence provision.[6] Citing statistics that suggested that the application of the mandatory life sentence law was racially skewed against African-Americans, defendant challenged the use of the law in his case as a violation of the equal protection guarantees of the United States and Georgia Constitutions.[7]

On March 30, 1995, a sharply divided Supreme Court of Georgia denied defendant's challenge, holding that the statistics presented by defendant were insufficient to establish an equal protection violation in his case.[8] The four-justice majority also refused to hold that defendant's statistics established a sufficiently strong inference of discriminatory application of the mandatory life sentence provision so that the prosecution should be required to present the sentencing court with assurances that the provision was applied to defendant for race-neutral reasons.[9]

Two of the three dissenting justices joined in a strident response to the majority.[10] The dissent characterized defendant's statistical evidence of discrimination as "numbing and paralyzing" and urged that the proper course would be to establish a procedure requiring prosecutors to respond to such a showing by coming forward with proof that the selection of the defendant for sentencing under the mandatory life sentence law was based on permissible race-neutral reasons.[11]

The closeness of the outcome can be seen in the special concurrence of Justice Thompson, who cast the deciding fourth vote.[12] Of defendant's statewide statistical data regarding racial application of the mandatory life sentence law, Justice Thompson stated that "only a true cynic can look at these statistics and not be impressed that something is amiss."[13] Further, Justice Thompson was open to the dissenters' view that the court might require the prosecutor to provide a justification for a decision to apply the law in some circumstances.[14] Justice Thompson's vote, however, was premised on his conclusion that defendant's statistical evidence was insufficient to show discrimination in the critical jurisdiction, Hall County, where defendant was prosecuted.[15] Justice Thompson's concurrence, which included an overt request that the

6. *Stephens*, 265 Ga. at 356, 456 S.E.2d at 561.
7. *Id.* at 356-57, 456 S.E.2d at 560-61.
8. *Id.* at 356, 456 S.E.2d at 561.
9. *Id.* at 358-59, 456 S.E.2d at 562-63.
10. *Id.* at 372, 456 S.E.2d at 566-71.
11. *Id.* at 364-67, 456 S.E.2d at 566-67.
12. *Id.* at 361-65, 456 S.E.2d at 564-67.
13. *Id.* at 362, 456 S.E.2d at 564.
14. *Id.*, 456 S.E.2d at 565.
15. *Id.*

General Assembly consider amending the mandatory life sentence law,[16] clearly leaves one with the sense that the outcome of this racially charged case could have been different.

What added to the public controversy over the ultimate decision in *Stephens* is that the outcome *had* been different. Thirteen days before the issuance of the final opinion in *Stephens*, the supreme court had issued a slip opinion in the case with a different result.[17] In that opinion, Justice Thompson provided the decisive vote for a majority that found the statistics presented by the defense "numbing and paralyzing" and "so grossly disproportionate to prosecution percentages as to shock the conscience."[18] In what the short-lived majority termed a "watershed case," the March 17, 1995 opinion held that the United States and Georgia constitutional guarantees of equal protection require a prosecutor, in light of the statistical proof of discriminatory application of the mandatory life sentence law, to provide a race-neutral explanation for the decision to apply it to defendant Stephens.[19] The three justices who were soon to join Justice Thompson in the majority dissented in the initial decision in *Stephens*.[20] Following angry and public protests, mainly from prosecutors,[21] the Supreme Court took the unusual step of reconsidering and reversing its prior decision.[22]

Needless to say, the controversy surrounding *Stephens* galvanized opinion on both sides of the public debate and helped to bring the issue of discrimination in the criminal justice system to the forefront. The decision in *Stephens* took place while another significant event was occurring: The Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System was finishing its work. The Commission, established by the Supreme Court of Georgia in 1993 to study the issue of bias, issued its final report in August 1995, several months ahead of schedule.[23] Upon the release of the report, Commission co-chairman and court of appeals Judge Jack Ruffin said, "[l]et the word go

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16. *Id.* at 363, 456 S.E.2d at 565.

17. Stephens v. State, No. 594A1854, 1995 WL 116292 (Ga. March 17, 1995) (vacated upon reconsideration).

18. *Id.* at 1-2.

19. *Id.* at 8, 10.

20. *Id.* (four-page dissent following majority opinion).

21. *See* Emily Heller, *Racial Test Put to the Test*, FULTON COUNTY DAILY REP., March 30, 1995, at 1 (noting motion for reconsideration filed by the Attorney General and all 46 district attorneys).

22. Stephens v. State, 265 Ga. 356, 456 S.E.2d 560 (1995).

23. LET JUSTICE BE DONE: EQUALLY, FAIRLY, AND IMPARTIALLY, GEORGIA SUPREME COURT COMMISSION ON RACIAL AND ETHNIC BIAS IN THE COURT SYSTEM (August 1995). *See id.* at 229 (Appendix A) (Supreme Court Order creating the Commission and requiring completion of report by January 1996).

If the Commission's report was admirable, the effort to repeal the mandatory life term for two-time offenders was heroic. The legislation, which reportedly was the result of negotiations between prosecutors and the defense bar,[34] became law on July 1, 1996.[35] The amended law provides that a second or subsequent drug felony may be punished by a sentence of ten to forty years or life imprisonment, at the discretion of the court.[36] Despite the acrimony of the controversy and risks of being perceived as being soft on crime, prosecutors and legislators, with the urging of the Supreme Court, reached common ground with the defense bar on this reform. In this case, the common ground was also the high ground.

II. SUBSTANTIVE CRIMES AND RELATED ISSUES

A. Constitutional Challenges

Equal Protection: Race. This survey begins with a close examination of the legal issues in *Stephens*. Freddie Stephens, an African-American, was convicted of selling cocaine in the Hall County Superior Court.[37] The prosecution exercised its discretion to request that Stephens be sentenced under O.C.G.A. section 16-13-30(d), which required imposition of a sentence of imprisonment for life upon conviction of a second narcotics felony.[38] Stephens contended that the mandatory life term provision was applied to him in a racially discriminatory manner in violation of the equal protection guarantees of the

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34. Trisha Renaud, *DAs, Defenders Joined on Drug Bill*, FULTON COUNTY DAILY REP., March 22, 1996, at 1. ("A quiet alliance of prosecutors and criminal defense attorneys has succeeded in changing one of Georgia's most controversial sentencing laws, one requiring life sentences for second-offense drug dealers.").

35. Ga. H.R. Bill 1555, Reg. Sess. (1996) (codified at O.C.G.A. § 16-13-30(d), (f)). The amended statute provides in pertinent part:

> (b) Except as authorized by this article, it is unlawful for any person to manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute any controlled substance . . . .
>
> (d) Except as otherwise provided, any person who violates subsection (b) of this Code section with respect to a controlled substance in Schedule I or 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 or she shall be imprisoned for not less than ten years nor more than 40 years or life imprisonment.

O.C.G.A. § 16-13-30(b), (d) (1996).

36. *Id.*

37. Stephens v. State, 265 Ga. 356, 456 S.E.2d 560 (1995).

38. O.C.G.A. § 16-13-30(d).

forth that racism is not allowed a captaincy on the ship of justice."[24] Of course, this statement denies that racism is in command of the vessel, but allows that it is aboard. The Commission's final report, while praising the fairness of most persons involved in the criminal justice system, forthrightly acknowledged the role of racial and class bias.[25] Although the Commission found open and intentional bias only in isolated instances, it "concluded from all the evidence it considered that there are still areas within the state where members of minorities, whether racial or ethnic, do not receive equal treatment from the legal system."[26] More frequent than intentional acts of discrimination, the Commission noted, "there are incidences of bias which appear to result from unintentional conduct resulting from a lack of awareness."[27]

The Commission also concluded "that the system is biased against economically disadvantaged individuals."[28] The Commission further noted that socio-economic bias "more seriously affects minorities since they compose a greater portion of the economically and educationally disadvantaged."[29] The Commission also found that the criminal justice system in Georgia "parallels the national picture" of disproportionately high numbers of minorities involved in the system as arrestees, defendants, and inmates.[30] And the problem of perceptions is even greater: The Commission's research showed that minorities (and women) "see a totally different justice system than non-minority males."[31] Not surprisingly, negative perceptions of the system breed distrust.[32]

The Commission's final report, which is an admirable effort at a reflective self-study by the justice system, clearly serves to make the issue of race and class bias a pre-eminent concern of the survey period. The ongoing national debate over issues of race and class in the criminal justice system engendered by the O.J. Simpson trial underscores the importance, and timeliness, of the Commission's work. Significantly, the Commission's final report contains many constructive proposals for addressing the current state of affairs.[33]

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24. Bill Rankin, *Courts Cleared of Racism*, ATLANTA JOURNAL-CONSTITUTION, Sept. 27, 1995, at C1.
25. LET JUSTICE BE DONE, *supra* note 23, at 9.
26. *Id.*
27. *Id.*
28. *Id.* at 10.
29. *Id.*
30. *Id.* at 129-30.
31. *Id.* at 41.
32. *Id.* at 41-45, 130-32.
33. *Id.* at 13-37 (Summary of Recommendations).

United States and Georgia Constitutions.[39] In support of his claim of discrimination, Stephens cited these statistics, which the trial court accepted:

- In Hall County, 14 of 14 (100%) of the persons serving life sentences under O.C.G.A. section 16-13-30(d) were African-American, although African-Americans made up less than 10% of the county's population and about 57% of the persons arrested in drug investigations.[40]
- 369 of 375 (98.4%) of the persons serving life sentences for drug offenses in Georgia (as of May 1, 1994) were African-American, although African-Americans make up only 27% of the State's population.[41]
- 1 of 168 (under 1%) of the whites sentenced for 2 or more narcotics convictions was serving a life sentence, compared to 202 of 1219 (16.6%) of the blacks.[42]

The ultimate decision in *Stephens*, issued on March 30, 1995, rejected defendant's equal protection claims.[43] The four votes to reject Stephens's claims were cast by two justices concurring in the opinion of Justice Fletcher and by Justice Thompson, who concurred in the judgment and filed a special concurring opinion.[44] Three justices dissented, with Justice Benham filing a dissenting opinion.[45] All the justices seemed to agree that for Stephens to convince the court to preclude application of the mandatory life sentence to his case, he would have to show intentional racial discrimination *in his case*.[46] Stephens conceded that he did not have direct evidence of discriminatory intent against him.[47] All the justices also appeared to believe that the statistics, by themselves, presented by Stephens were insufficient to conclusively establish that the prosecution had the forbidden discriminatory intent.[48]

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39. 265 Ga. at 356, 456 S.E.2d at 560. Stephens also argued that the sentencing statute violated due process and equal protection because the sentencing scheme was irrational. *Id.* at 359, 456 S.E. 2d at 563. The supreme court's rejection of this claim was not a major point of contention between the justices. *Id.*

40. *Id.* at 356-57, 456 S.E.2d at 561.

41. *Id.* at 357, 456 S.E.2d at 561.

42. *Id.*

43. *Id.* at 356-60, 456 S.E.2d at 561-63.

44. *Id.* at 361, 456 S.E.2d at 564.

45. *Id.* at 364, 456 S.E.2d at 566.

46. *Id.* at 357-58, 361, 365, 456 S.E.2d at 561-62, 564, 566 (noting that intentional discrimination must be shown).

47. *Id.* at 357, 456 S.E.2d at 561-62.

48. *Id.* at 357-58, 456 S.E.2d at 562.

The principal issues in *Stephens* were: Where a defendant produces statistical evidence establishing a prima facie case of discrimination, should the court interpret the equal protection guarantees of the United States and Georgia Constitutions to require the prosecution to come forward with assurances that a defendant was selected for the mandatory life term on a race neutral basis? If so, did the statistical evidence presented by Stephens constitute a sufficient prima facie showing to trigger such a required assurance by the state?

The dissenters in *Stephens* answered both of these questions in the affirmative.[49] The dissenters argued for a middle course between finding an equal protection violation and total rejection of defendant's claim. The principal legal authority for this middle course was the Supreme Court's approach to statistical proof of discrimination in the use of peremptory challenges during jury selection as outlined in *Batson v. Kentucky*.[50] Under *Batson*, a party may allege that the opposing party is exercising peremptory challenges in a pattern that gives rise to a discriminatory purpose.[51] If such a prima facie showing is made, then the burden shifts to the party exercising the peremptory challenge to demonstrate that the challenge was based on permissible racially neutral selection criteria.[52] Using the *Batson* model, the dissenters contended that where a defendant can establish, through statistical evidence, a prima facie showing that the decision to seek the mandatory life sentence may have been racially motivated, the court should require the prosecution to show that the defendant's selection for the aggravated sentence was based on race-neutral criteria.[53] As for the adequacy of Stephens's statistical showing, the dissenters found the numbers presented to be "numbing and paralyzing" and to constitute a "stark pattern," and thereby sufficient to shift the burden to the state.[54] Thus, the dissenters concluded that Stephens "was entitled by the Fourteenth Amendment to the U.S. Constitution to have the prosecution make race-neutral explanation for its application of the aggravated sentencing procedure."[55] In the alternative, the dissent stated that even if federal constitutional law did not require the result, that the *Batson*-style procedure should be required under the state constitution.[56]

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49. *Id.* at 365, 369-70, 56 S.E.2d at 567, 569.
50. 476 U.S. 79 (1986).
51. *Id.* at 93.
52. *Id.* at 94.
53. *Stephens*, 265 Ga. at 369, 456 S.E. 2d at 569.
54. *Id.* at 364, 369, 456 S.E.2d at 566, 569.
55. *Id.* at 369-70, 456 S.E.2d at 569 (bracketed material omitted).
56. *Id.* at 370, 456 S.E.2d at 569-70.

The three justices joining in the opinion of the court emphasized that statistical evidence of discrimination had often been rejected as inadequate to prove the presence of improper racial motives in individual cases.[57] Justice Fletcher's opinion portrays the Supreme Court's decision in *McCleskey v. Kemp*[58] as the key source of authority for rejecting Stephens's claim, as well as several Georgia decisions subsequent to *McCleskey*.[59]

In *McCleskey*, the Supreme Court considered an equal protection claim based on a statistical study purporting to show that the application of the death penalty in Georgia was racially skewed, with more frequent application to cases involving white victims and black defendants.[60] The Supreme Court held that the statistics were insufficient to meet defendant's burden of establishing the existence of purposeful discrimination in his case.[61] In rejecting defendant's claim, the Supreme Court emphasized that discretionary judgments are an inherent part of a criminal justice system: "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[62] The Supreme Court also rejected a middle course, advanced by Justice Blackmun's dissent,[63] that would have accepted defendant's statistics as establishing a prima facie case and shifted the burden to the prosecution to provide race-neutral reasons for the exercise of discretion.[64] The *Batson* approach was rejected as impractical: It is simple to require a prosecutor to provide an explanation in response to a contemporaneous challenge to the prosecutor's exercise of a peremptory challenge during jury selection, but judicial inquiries into the prosecutor's exercise of charging discretion in a given case, which would often involve a review of past conduct by prosecutors, would be cumbersome.[65]

McCleskey provided a strong legal precedent supporting the outcome in *Stephens*. The opinion of the court found the statistics presented by Stephens insufficient to establish discrimination in his case, and noted

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57. *Id.* at 357, 456 S.E.2d at 561.

58. 481 U.S. 279 (1987).

59. *Stephens*, 265 Ga. at 357, 456 S.E.2d at 561. *See* Cain v. State, 262 Ga. 598, 422 S.E.2d 535 (1992); Hall v. State, 262 Ga. 596, 422 S.E.2d 533 (1992), *cert. denied*, 507 U.S. 1055 (1993); Hailey v. State, 263 Ga. 210, 429 S.E.2d 917 (1993), *cert. denied*, 510 U.S. 1048 (1994).

60. *McCleskey*, 481 U.S. at 286-87.

61. *Id.* at 297.

62. *Id.*

63. *Id.* at 351-65. (Blackmun, J., dissenting).

64. *Id.* at 296-97.

65. *Id.* at 296.

the absence of any direct proof of discrimination.[66] The opinion discounted the value of state-wide statistics because of their limited value in assessing the motives of individual prosecutors.[67] *McCleskey* also lent support to the *Stephens* decision's rejection of the *Batson* model because of the serious practical problems associated with conducting hearings into prosecution decisions.[68] Thus, the opinion of the court in *Stephens* was well grounded in precedent as to the federal equal protection claim.

Regarding Stephens's parallel state equal protection claim, the opinion of the court concluded that Stephens's statistical evidence was insufficient, and noted that there was no evidence on the critical issue of the race of persons eligible for the mandatory life sentence in Hall County, but against whom the prosecutor chose not to seek the mandatory sentence.[69] While dispensing with the state constitutional claim in a manner similar to the federal claim, the opinion left the door open just a crack: "Without more adequate information about what is happening both statewide and in Hall County, we defer deciding whether statistical evidence alone can ever be sufficient to prove an allegation of discriminatory intent in sentencing under the Georgia Constitution."[70] However, one of the three Justices joining the lead opinion in *Stephens* wrote a concurring opinion stating the view that the Georgia Constitution should not be interpreted more broadly than the federal constitution on the equal protection issue presented by the case.[71]

With three justices adhering to *McCleskey* and three justices favoring the *Batson* model (if only as a matter of state constitutional law), the special concurrence of Justice Thompson may provide the crucial clues about the future of statistically based equal protection challenges to prosecution decisions. Justice Thompson began by acknowledging the troubling statistics presented by Stephens concerning the application of the mandatory life sentence provision, stating that "only a true cynic can look at these statistics and not be impressed that something is amiss."[72] Justice Thompson's next point was good news to prosecutors worried about the implications of equal protection claims in death penalty cases. Justice Thompson stated his belief that the court should continue to adhere to *McCleskey* in death penalty cases, where the prosecutor's

66. *Stephens*, 265 Ga. at 357-58, 456 S.E.2d at 561-62.
67. *Id.* at 358-59, 456 S.E.2d at 562-63.
68. *Id.* at 359, 456 S.E.2d at 562.
69. *Id.* at 358, 456 S.E.2d at 562.
70. *Id.*
71. *Id.* at 360-61, 456 S.E.2d at 563-64.
72. *Id.* at 362, 456 S.E.2d at 564.

discretion to seek the death penalty is checked by the jury's decision whether to impose that penalty.[73]

However, Justice Thompson suggested a different approach for evaluating prosecutorial discretion under the law allowing a mandatory life sentence for two-time drug offenders, which became automatic once the prosecutor opted for it and obtained a conviction.[74] Justice Thompson stated that he was persuaded that *Batson* "could be used to supply a general framework in analyzing cases of this kind," although he qualified this by saying it "will need more careful study."[75] A definitive decision about use of the *Batson* model was unnecessary for Justice Thompson because he found Stephens' statistical showing inadequate to establish a prima facie showing of discrimination under *Batson*.[76] Of particular concern was the lack of statistics concerning the racial makeup of the group of eligible defendants in Hall County who were not chosen for enhanced sentences.[77] Thus Justice Thompson, who had signed on to the majority opinion in the first *Stephens* opinion requiring a *Batson*-style inquiry, changed his position based on a re-evaluation of the statistical evidence. His special concurrence left open the possibility that the court would adopt the *Batson* model upon a more complete statistical account of prosecutions under the mandatory life sentence law, but tended to close off the possibility of a similar approach in death penalty cases.

The ultimate outcome of the *Stephens* case was that the supreme court declined to require scrutiny of the decision to seek the mandatory life sentence for Stephens.[78] It was left open whether another defendant might succeed by marshalling more complete statistics. But Justice Thompson made it clear that he believed the legislature should step in

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73. *Id.*, 456 S.E.2d at 564-65.

74. *Id.*, 456 S.E.2d at 565.

75. *Id.*

76. *Id.* at 363, 456 S.E.2d at 565.

77. *Id.*

78. The United States Supreme Court recently reached a similar result on a similar issue. In *United States v. Armstrong*, 116 S. Ct. 1480 (1996), the court addressed the issue of what showing a defendant must make to be entitled to discovery to support a claim of racial discrimination in the exercise of prosecutorial discretion. Citing separation of powers concerns and a reluctance to burden the prosecution, the court adopted a rigorous standard, holding that discovery would not be ordered unless the defendant produces evidence that similarly situated defendants of other races could have been prosecuted, but were not. *Id.* at 1487-88. The Supreme Court rejected the *Batson* model, contrasting the supervision of jury selection, where "the entire res gestae take place in front of the trial judge," and scrutiny of prosecution charging decisions, which would involve scrutiny of many other prosecutions. *Id.* at 1488.

and address the situation, making further judicial intervention unnecessary.[79] In his view, because prosecutors sought life sentences under O.C.G.A. section 16-13-30(d) for only fifteen percent of eligible offenders, the mandatory life sentence provision already had "been repealed de facto."[80] Among the alternative courses of action for the legislature, Justice Thompson appeared to favor the modification of the law to allow judges the discretion of imposing sentences less than life imprisonment for two-time drug offenders.[81]

Subsequent to the decision in *Stephens*, the prospect of a successful equal protection challenge based on *Batson* improved because of newly published data. The *Final Report of the Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System* published statewide data comparing the race of defendants eligible for the mandatory life term for two-time drug offenders.[82] Those figures show that 0.5% of eligible white defendants received life sentences, while 5.7% of eligible black defendants were chosen for the mandatory life term.[83] While the Commission report recommended a detailed, circuit by circuit study of the law's use, the report concluded that the currently available statistics "obviously demonstrate that the outcome of these drug offense cases differ significantly along racial lines."[84]

Of course, the new data, with the promise of more to come, added to the momentum for legislative action to curb prosecutorial discretion in applying the mandatory life provision. But there were political realities in the way: Giving the sentencing judge discretion, as suggested by Justice Thompson,[85] might be perceived as being "soft on crime." On the other hand, no one advocated eliminating prosecutorial discretion by requiring the life term for all eligible defendants.[86] That would have been "tough on crime" in a way that would have exceeded the preferences of prosecutors, who sought the mandatory life sentence for only 5% of eligible defendants.[87] Obviously, the best course was to shift discretion from the prosecutors to the courts, even if the action was wrongly perceived as "soft on crime." Naturally, the easy course for the legislature would have been to preserve the status quo. Ultimately, the

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79. 265 Ga. at 363-64, 456 S.E.2d at 565-66.
80. *Id.* at 363, 456 S.E.2d at 565.
81. *Id.* at 363-64, 456 S.E.2d at 565-66.
82. LET JUSTICE BE DONE, *supra* note 23, at 164-65.
83. *Id.* at 164.
84. *Id.* at 165.
85. *Stephens*, 265 Ga. at 363-64, 456 S.E.2d at 565-66 (Thompson, J., specially concurring).
86. *Id.* at 363, 456 S.E.2d at 565; LET JUSTICE BE DONE, *supra* note 23, at 166.
87. LET JUSTICE BE DONE, *supra* note 23, at 164.

legislature, supported by the defense bar and prosecutors, made the enlightened and politically courageous choice of abandoning the mandatory life term.[88] The new law gives judges discretion to impose appropriate sentences on repeat drug offenders, including the option of life imprisonment. The damage to crime control will be negligible; the benefit to the perception of racial fairness will be substantial.[89]

Equal Protection: Gender. The Georgia Supreme Court rejected an equal protection challenge to the state's statutory rape law[90] in *In the Interest of B.L.S., a child.*[91] Appellant was found to be delinquent because he committed statutory rape.[92] Appellant argued that he was subject to being found delinquent for having intercourse with an underage female, while there is no corresponding sanction for females.[93] The court found no equal protection problem because a female engaging in sexual intercourse with a male under age fourteen may be found in violation of the child molestation statute.[94] Even though the delinquency proceeding against a female would concern the violation of the child molestation statute, the court reasoned that she would be subject to the same penalties and the same delinquency adjudication as a male who commits statutory rape.[95]

Justice Sears dissented from the majority's analysis. She wrote that "in its present form, Georgia's statutory rape law is blatantly discrimina-

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88. O.C.G.A. § 16-13-30(d).

89. The new law is not retroactive, so the over 300 defendants serving sentences under the old law are not affected. Those defendants may raise legal claims or seek relief from the Georgia Board of Pardons and Paroles. *See* Renaud, *supra* note 34, at 3.

90. O.C.G.A. § 16-6-3 (1996). The statute provides as follows:

> (a) 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.
>
> (b) A person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years.

Id.

91. 264 Ga. 643, 449 S.E.2d 823 (1994).

92. *Id.* at 643, 449 S.E.2d at 823.

93. *Id.*

94. *Id.* O.C.G.A. § 16-6-4(a) provides as follows:

> A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person.

O.C.G.A. § 16-6-4(a) (1996).

95. 264 Ga. at 643-44, 449 S.E.2d at 823-24.

tory and manifestly unfair and is, therefore, unconstitutional."[96] As for the court's equal protection reasoning, Justice Sears took issue with the contention that the punishments for statutory rape and child molestation are equal. In fact, the child molestation statute[97] provides lenient sentencing options for first offenders not available under the statutory rape statute.[98] Justice Sears concluded that equal protection required that the statutory rape statute be gender neutralized to include female perpetrators.[99] Justice Sears went further, stating that the statutory rape law violates due process by, in effect, establishing an irrebuttable presumption that females in their age groups were incapable of consenting to sex.[100] This presumption, the justice wrote, simply does not comport with reality.[101] Perhaps to encourage the legislature, Justice Sears pointed out that during the last decade, over forty states have reworked their statutory rape laws, with many eliminating gender-based classifications and excluding relations among young peers from the proscribed conduct.[102]

Privacy: Criminalizing Sodomy. In 1986, the United States Supreme Court found that Georgia's criminal proscription against consensual sodomy did not violate the due process rights conferred by the federal constitution.[103] In that ruling, the Supreme Court declined to find a fundamental right for homosexuals to engage in consensual sodomy and refused to insulate sodomy between consenting adults from state proscription.[104] In 1996, the Georgia Supreme Court addressed the question of whether the Georgia sodomy statute[105] infringes on the privacy rights conferred by the Georgia Constitution.[106] The defendant

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96. *Id.* at 645, 449 S.E.2d at 824.
97. O.C.G.A. § 16-6-4(b).
98. *Id.* § 16-6-3(b).
99. 264 Ga. at 646, 449 S.E.2d at 825.
100. *Id.*
101. *Id.* at 647, 449 S.E.2d at 826.
102. *Id.* at 648, 449 S.E.2d at 826.
103. Bowers v. Hardwick, 478 U.S. 186, 189 (1986).
104. *Id.* at 191-92.
105. O.C.G.A. § 16-6-2(a) (1996). The statute provides as follows:

> A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he or she commits sodomy with force and against the will of the other person. The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy.

Id.

106. *See* GA. CONST. art. I, § 1, para. 1: "No person shall be deprived of life, liberty, or property except by due process of law." *See also* Pavesich v. New England Life Ins. Co.,

in *Christensen v. State*[107] was convicted of solicitation of sodomy.[108] Defendant was caught by a police sting operation; he was arrested after he asked a male undercover officer to engage in oral sex.[109] Defendant argued that the solicitation statute and the sodomy statute violated his privacy rights under the due process clause of the Georgia Constitution.[110] The court rejected this claim and upheld the statutes. The court noted that the state has a right to exercise its police power "to promote the public health, safety, morals, and welfare of its citizens."[111] The court concluded: "We hold that the proscription against sodomy is a legitimate and valid exercise of state police power in furtherance of the moral welfare of the public."[112] The court stated that if the law is to be changed, it will have to be changed by the legislature.[113]

Two justices dissented. Justice Sears, noting the long history of expansive interpretation of Georgia's right of privacy, chided the majority in heated language:

> Unfortunately, today the majority eviscerates the rights of privacy and free speech by applying the wrong constitutional standards to them, and by ignoring relevant precedent from this Court. For these reasons, I believe that the result of the majority opinion is pathetic and disgraceful, and has tragic implications for the constitutional rights of the citizens of this State.[114]

Justice Sears pointed out that defendant and the undercover officer had agreed to proceed to the privacy of a motel room and that there was never any hint that money would be exchanged.[115] In her analysis of the privacy issue, Justice Sears argued that society was not really harmed by private consensual sexual acts, and that criminalizing the conduct amounts to the majority imposing its morals on a minority.[116] She branded this result "a mark of despotism, and a step backward

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122 Ga. 190, 198, 50 S.E. 68, 71 (1905).

107. 266 Ga. 474, 468 S.E.2d 188 (1996).

108. *Id.* at 474, 468 S.E.2d at 189; O.C.G.A. § 16-6-15(a) (1996).

109. 266 Ga. at 475, 468 S.E.2d at 189.

110. *Id.* Defendant also argued that the statutes violated his right to free expression. *Id.* However, the fate of this claim was bound up with the court's decision whether the act of solicitation could be criminalized. The court stated, "[r]easonable prohibitions against soliciting unlawful acts do not violate free speech rights." *Id.* at 476, 468 S.E.2d at 190.

111. *Id.* at 476, 468 S.E.2d at 190.

112. *Id.*

113. *Id.* at 477, 468 S.E.2d at 190.

114. *Id.* at 479, 468 S.E.2d at 192.

115. *Id.* at 478, 468 S.E.2d at 191.

116. *Id.* at 482, 468 S.E.2d at 193-94.

toward the majoritarian tyranny that our founders sought to escape."[117] Justice Sears further argued that the majority had erred in its legal reasoning by requiring only a rational basis for the limitation on privacy rather than requiring a compelling interest.[118] She pointed to prior cases suggesting that the sodomy statute implicates Georgia's right to privacy, thus requiring the showing of a compelling interest to override the right.[119] In her separate dissenting opinion, Justice Hunstein agreed that the state had failed to provide the required compelling justification.[120] Despite the vigorous and often passionate dissents, the decision in *Christensen* closes the most recent chapter of the battle over morality, privacy, and sexual freedom in Georgia. The question now is when, and how, the next chapter will be written.

Excessive Fines: Forfeitures. Civil forfeitures have become a favorite weapon in the war on drug trafficking. In recent years, the courts have begun to be receptive to the notion that provisions long thought to be creatures of the criminal justice system, like the excessive fines clauses of the United States and Georgia Constitutions,[121] should be interpreted to limit civil forfeitures.[122] In *Austin v. United States*,[123] the United States Supreme Court applied the excessive fines clause of the United States Constitution to civil forfeitures under the federal statute authorizing forfeitures of property used in drug crimes.[124] The Supreme Court reasoned that because the forfeitures were, in part, designed to punish, that application of the excessive fines clause was appropriate.[125] The decision in *Austin* explicitly declined to articulate a test to determine excessiveness, leaving that task in the first instance to the lower courts.[126] However, Justice Scalia, in a

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117. *Id.*, 468 S.E.2d at 194.
118. *Id.*
119. *Id.* at 483, 468 S.E.2d at 196, n.31.
120. *Id.* at 489, 468 S.E.2d at 199.
121. U.S. CONST. amend VIII; GA. CONST. art. I, § 1, para. 17.
122. The other constitutional guarantee that has been applied as a limit on civil penalties and taxes is the protection against double jeopardy. United States v. Halper, 490 U.S. 435 (1989) (civil penalty violated double jeopardy clause); Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1993) (state tax violated double jeopardy clause). However, the Supreme Court recently stopped the trend toward application of the double jeopardy clause to in rem civil forfeitures, holding that such forfeitures are neither punishment nor criminal for purposes of the double jeopardy clause. United States v. Ursery, 116 S. Ct. 2135 (1996).
123. 509 U.S. 602 (1993).
124. *Id.* at 602. *See* 21 U.S.C. § 881 (1996).
125. 509 U.S. at 622.
126. *Id.* at 622-23.

concurring opinion, offered his view that the excessiveness analysis for in rem forfeitures should be different from that applicable to monetary fines, where the proportionality of the fine to the offense is relevant.[127] Justice Scalia stated, "[t]he question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense."[128] Thus, scales used to measure illegal drugs are an instrumentality of the offense, and may be forfeited "whether made of the purest gold or basest metal."[129] But if the property has an insufficient connection to the offense, such as a building "in which an isolated drug sale happens to occur," the forfeiture would be excessive.[130]

In *Thorp v. State,*[131] the Georgia Supreme Court, consistent with *Austin,* held that the Eighth Amendment's prohibition against excessive fines applies to civil in rem forfeitures under Georgia law.[132] As for the issue of defining the test to be applied, the court stated, "[w]e decline to adopt Justice Scalia's single-factor instrumentality test as the sole test for determining if a forfeiture is excessive. We conclude that other factors relating to proportionality are also relevant."[133] Noting that the majority in *Austin* declined to adopt Justice Scalia's approach, the Georgia Supreme Court in *Thorp* found that the very notion of "excessiveness" implies a comparison of the amount of the forfeiture to the conduct being punished.[134] The court expressed disfavor of Justice Scalia's test because it is based on the legal fiction that forfeiture is warranted because the property is "guilty."[135] The court went on to adopt a three-factor test.[136] The test considers (1) the inherent gravity of the offense compared with the harshness of the forfeiture; (2) whether the property was an instrumentality; and (3) whether the property was significantly involved in the crime "in terms of time and/or spatial use."[137] The court stated, "[w]e conclude that an evaluation of these three general factors well serves the scrutiny demanded by the Excessive

127. *Id.* at 627 (Scalia, J., concurring).
128. *Id.* at 628.
129. *Id.* at 627.
130. *Id.* at 628.
131. 264 Ga. 712, 450 S.E.2d 416 (1994).
132. *See* O.C.G.A. § 16-13-49 (1996).
133. 264 Ga. at 714, 450 S.E.2d at 417.
134. *Id.* at 715, 450 S.E.2d at 418.
135. *Id.* at 714-15, 450 S.E.2d at 417-18.
136. The test was taken from *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725 (C.D. Cal. 1994).
137. 264 Ga. at 717, 450 S.E.2d at 420 (quoting *6625 Zumirez Drive*, 845 F. Supp. at 734-35).

Fines Clause, and adopt them as minimal guidelines for excessiveness inquiries in this State . . . ."[138] Like the decision in *Austin*, *Thorp* left the difficult case-by-case determination of excessiveness to the lower courts.[139]

Justice Carley, joined by Justice Thompson, concurred on the applicability of the Excessive Fines Clause to in rem forfeitures, but dissented as to the proper test.[140] The dissenters sided with Justice Scalia and stated a preference for the traditional test based on the notion that the property was "guilty" because of its involvement in the offense.[141] If the dissent's point of view is subject to the charge that the traditional test is based on a legal fiction, it can be defended on the ground that the test is deeply rooted in long-standing precedent.[142] The beauty of the traditional instrumentality test is the ease with which it can be applied. The dissenting opinion contrasted the subjective guidelines established by the majority: "The 'proportionality' test adopted by the majority is, in fact, no test at all, but sets an uncharted course which the litigants and the courts now are required to navigate without any degree of certainty."[143] The force of this argument will be demonstrated as the courts grapple with the *Thorp* test.

B. Offenses Defined and Related Issues

Murder: Merger Issues. In several decisions, the supreme court interpreted its 1992 opinion in *Edge v. State*.[144] In *Edge*, the court addressed the situation where a defendant was charged with malice murder[145] and with a felony murder[146] charge, which was based on the felony of aggravated assault,[147] for the same attack that caused the death of the victim.[148] Edge was found guilty of voluntary manslaugh-

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138. *Id.* at 718, 450 S.E.2d at 420.

139. *Id.* at 718 n.1, 450 S.E.2d at 420 n.1.

140. *Id.* at 718, 450 S.E.2d at 420 (Carley, J., concurring in part and dissenting in part).

141. *Id.* at 719-20, 450 S.E.2d at 420-21.

142. *Id.* at 720, 450 S.E.2d at 421.

143. *Id.*

144. 261 Ga. 865, 414 S.E.2d 463 (1992).

145. O.C.G.A. § 16-5-1(a) (1996). The statute states that "[a] person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." *Id.*

146. *Id.* § 16-5-1(c). "A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice." *Id.*

147. *Id.* § 16-5-21.

148. *Edge*, 261 Ga. at 865, 414 S.E.2d at 464.

ter[149] rather than malice murder, meaning that the jury found defendant was acting subject to passions resulting from provocation.[150] However, Edge also was convicted of felony murder despite the fact that the felony murder charge was predicated on the felonious assault that led to the death.[151] The court held that "if there is but one assault and that assault could form the basis of either felony murder or voluntary manslaughter, a verdict of felony murder may not be returned if the jury finds that the assault is mitigated by provocation and passion."[152] The court noted that a contrary holding would effectively deprive the defendant of the opportunity to be sentenced for the lesser offense of voluntary manslaughter, because every voluntary manslaughter also would constitute felony murder.[153] However, the court declined to adopt a rule precluding a felony murder conviction based on any aggravated assault by the defendant on the victim.[154] Instead, the court adopted a rule precluding "a felony murder conviction only where it would prevent an otherwise warranted verdict of voluntary manslaughter."[155] This is Georgia's "modified merger rule."

In *Foster v. State*,[156] the supreme court confronted these facts: The defendant, Foster, was engaged in a shoot-out with another person, Perry, during which Foster accidently shot and killed an innocent third party, Harderson.[157] Foster was convicted of both voluntary manslaughter and felony murder for the killing of Harderson.[158] The voluntary manslaughter conviction resulted when the jury apparently found that provocation and passion, caused by Foster's fight with Perry, mitigated the aggravated assault on Harderson, precluding a felony murder conviction.[159] However, the jury *did* convict Foster of felony murder for causing Harderson's death while committing aggravated assault *on Perry*.[160] Thus, the jury found Foster's aggravated assault on Harderson to be mitigated by provocation and passion caused by Perry, but did not find Foster's assault on Perry himself to be so

149. O.C.G.A. § 16-5-2 (1996).
150. 261 Ga. at 865-66, 414 S.E.2d at 464-65.
151. *Id.*
152. *Id.* at 866, 414 S.E.2d at 465.
153. *Id.*
154. *Id.* at 867, 414 S.E.2d at 465.
155. *Id.*
156. 264 Ga. 369, 444 S.E.2d 296 (1994).
157. *Id.* at 369, 444 S.E.2d at 296.
158. *Id.*
159. *Id.* at 369-70, 373, 444 S.E.2d at 297, 299 (Sears, J., dissenting).
160. *Id.*

mitigated.[161] Foster's argument on appeal was that *Edge* precluded his conviction on felony murder because the jury found the assault mitigated by provocation and passion, as reflected in the voluntary manslaughter verdict.[162]

The supreme court made two important pronouncements. First, the court held that *Edge* was limited to the situation where the "evidence is presented that would support both a voluntary manslaughter and felony murder conviction based on an aggravated assault *against the homicide victim*."[163] The court refused to extend the holding in *Edge* to situations where the evidence supports both a voluntary manslaughter and felony murder conviction based on an aggravated assault *against someone other than the homicide victim*.[164] In a dissenting opinion, Justice Sears took issue with the majority's interpretation of *Edge* and argued that the assaults against Harderson (the homicide victim) and Perry (the nonvictim) were not independent "because only one act and one intent formed the basis of the two assault charges."[165] It follows, according to the dissent, that the jury's finding of voluntary manslaughter for the assault on Harderson necessarily meant that the jury found the assaults on both Harderson and Perry to be mitigated.[166] Justice Sears concluded that the rationale of *Edge* compels the conclusion that Foster's felony murder conviction, and life sentence, cannot stand.[167]

The debate between the majority and the dissent on whether *Edge* should be held to preclude Foster's felony murder conviction is a close one. However, because of the supreme court's other pronouncement in *Foster*, the court is unlikely to face a similar situation in the future. In a footnote, the supreme court stated that the jury should not have been instructed on voluntary manslaughter for the felony murder charge based on the assault against Harderson.[168] The court adopted the view that the voluntary manslaughter statute[169] "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."[170] Of course,

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161. The opinion in *Foster* does not explicitly say that the jury was instructed on voluntary manslaughter as to the felony murder charge based on the assault on Perry, but it does say the "trial court charged the jury on voluntary manslaughter, transferred intent [sic] and felony murder." *Id.* at 369, 444 S.E.2d at 296.

162. *Id.*

163. *Id.*, 444 S.E.2d at 297 (emphasis added).

164. *Id.* at 370, 444 S.E.2d at 297.

165. *Id.* at 374, 444 S.E.2d at 299-300 (Sears, J., dissenting).

166. *Id.*

167. *Id.*

168. *Id.* at 370, 444 S.E.2d at 297 n.2.

169. O.C.G.A. § 16-5-2(a).

170. *Foster*, 264 Ga. at 370, 444 S.E.2d at 297 n.2.

this footnote is arguably of greater import than the rest of the opinion, because it means the jury would not have to be authorized to find that Perry's provocation mitigated Harderson's death from felony murder to manslaughter. Put another way, a defendant who is provoked within the meaning of the voluntary manslaughter statute, but who kills someone other than his intended victim, will be guilty of felony murder. The court recognized that prior decisions had allowed a voluntary manslaughter instruction for the death of an unintended victim based on the theory of transferred mitigated intent.[171] The court dismissed those decisions as outdated after the adoption of the current felony murder statute, which allows a conviction to be based on any felony.[172] Justice Sears, in her dissent, argued that the pronouncement contained in footnote two was not consistent with prior Georgia decisions, the position of many other jurisdictions, and the rule of lenity.[173]

In *Jones v. State*,[174] the supreme court reversed the felony murder conviction of a defendant who had been acquitted of an accompanying malice murder charge because the jury charge failed to meet the requirements set forth in *Edge*.[175] Jones was charged with malice murder and felony murder based on the same aggravated assault that led to the death of the victim.[176] The trial court properly instructed the jury on the malice murder count, including a charge on voluntary manslaughter, which was supported by the evidence.[177] However, the trial court did not give the jury a separate admonishment concerning the role of provocation and passion with respect to the felony murder count.[178] *Edge* required a distinct charge to the jury authorizing a voluntary manslaughter conviction on the felony murder count if the jury "finds provocation and passion with respect to the act which caused the killing."[179] In *Jones*, the omission of this instruction was held to be reversible error.[180]

The supreme court's decision in *Hayes v. State*[181] also involved issues arising from the jury's consideration of multiple charges based on a single killing. Defendant was convicted of malice murder, felony

171. *Id.*
172. *Id.*
173. *Id.* at 371-73, 444 S.E.2d at 298-99 (Sears, J., dissenting).
174. 265 Ga. 203, 455 S.E.2d 34 (1995).
175. *Id.* at 204-05, 455 S.E.2d at 36.
176. *Id.*
177. *Id.* at 205, 455 S.E.2d at 36.
178. *Id.*
179. *Edge*, 261 Ga. at 868 n.3, 444 S.E.2d at 466 n.3.
180. *Jones*, 265 Ga. at 205, 455 S.E.2d at 36.
181. 265 Ga. 1, 453 S.E.2d 11 (1995).

murder, and aggravated assault.[182] The facts were that over several minutes Hayes attacked a man named Hillman and stabbed him, chased Hillman down when he fled, and then stabbed him to death.[183] Despite adequate evidence to support all three counts of conviction, the trial court merged the malice murder conviction into the felony murder conviction and sentenced Hayes to a life term.[184] The trial court also sentenced Hayes to a concurrent term of years on the aggravated assault count.[185]

With respect to the merger of the malice murder count into the felony murder count, the court did not find reversible error.[186] The penalties for malice murder and felony murder are the same,[187] so the decision of which count sentence should be imposed is a matter of form. However, the majority indicated that the preferred approach is to impose sentence on the malice murder charge, except in the rare instance where the trial court finds the evidence sufficient to support the felony murder conviction, but not the malice murder verdict.[188] The majority also reversed Hayes's concurrent sentence on the aggravated assault charge because that count should have merged with the felony murder count.[189]

Only three justices concurred in these two portions of the court's opinion, which were both contained in division two.[190] Justice Carley wrote a dissenting opinion joined by one other justice.[191] The dissent contended that the trial court should have sentenced Hayes on the malice murder count, and that the court should have reversed and remanded for sentence to be imposed on the proper count.[192] The dissent found the discussion of "merger" misplaced, because the alternative felony murder count is statutorily vacated under O.C.G.A. section 16-1-7.[193] The dissent also took issue with the vacating of the

182. *Id.* at 1, 453 S.E.2d at 11.
183. *Id.*, 453 S.E.2d at 13.
184. *Id.* at 2, 453 S.E.2d at 13.
185. *Id.* at 1, 453 S.E.2d at 12.
186. *Id.* at 2, 453 S.E.2d at 13.
187. O.C.G.A. § 16-5-1(d) (1996).
188. *Hayes*, 265 Ga. at 2 n.2, 453 S.E.2d at 13 n.2.
189. *Id.* at 2, 453 S.E.2d at 13.
190. *Id.* at 3, 453 S.E.2d at 14-16.
191. *Id.* at 3-6, 453 S.E.2d at 14-16.
192. *Id.* at 4-5, 453 S.E.2d at 14-15.
193. *Id.* at 4, 453 S.E.2d at 14-15. See O.C.G.A. § 16-1-7, which provides as follows:
(a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if:
(1) One crime is included in the other; or

defendant's concurrent sentence for aggravated assault, stating that there was evidence that Hayes engaged in two successive knife attacks on the victim over a span of time, the second of which was the fatal attack.[194] Under this view, the first nonfatal attack was sufficient basis to support the separate sentence for assault.[195]

Felony Murder: Predicate Felony. Wayne Chapman was convicted of felony murder after he shot a hunting companion while hunting for deer.[196] The predicate, or underlying, felony for the felony murder charge was the crime of misuse of a firearm while hunting.[197] That offense "requires a conscious disregard of a substantial and unjustifiable risk that an act or omission 'will cause harm to or endanger' the bodily safety of another person."[198] Where serious bodily harm actually results, the crime is a felony.[199] In *Chapman v. State*, the Georgia Supreme Court held that the crime of misuse of a firearm while hunting was a proper predicate for a felony murder charge.[200] Justice Sears, joined by Justice Fletcher, dissented. The dissent argued

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(2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.
(b) 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.
(c) When two or more crimes are charged as required by subsection (b) of this Code section, the court in the interest of justice may order that one or more of such charges be tried separately.

O.C.G.A. § 16-1-7 (1996).

194. 265 Ga. at 5-6, 453 S.E.2d at 15-16.

195. *Id.* at 5, 453 S.E.2d at 15.

196. Chapman v. State, 266 Ga. 356, 467 S.E.2d 497 (1996).

197. *Id.* at 356, 467 S.E.2d at 498.

198. *Id.* at 357, 467 S.E.2d at 499 (quoting O.C.G.A. § 16-11-108(a)). O.C.G.A. § 16-11-108(a) states as follows:

Any person who while hunting wildlife uses a firearm or archery tackle in a manner to endanger the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm to or endanger the safety of another person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty of a misdemeanor; provided, however, if such conduct results in serious bodily harm to another person, the person engaging in such conduct shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than $5,000.00 or by imprisonment for not less than one nor more than ten years, or both.

O.C.G.A. § 16-11-108(a) (1996).

199. 266 Ga. at 358, 467 S.E.2d at 499.

200. *Id.*, 467 S.E.2d at 499-500.

that the legislature had not intended the crime to be a felony murder predicate, reasoning that the legislature had specified lower penalties for misuse of a firearm while hunting that caused serious bodily harm.[201] However, the statute refers only to "serious bodily injury" and it is unclear whether the legislature intended to preclude the charge of felony murder where the serious bodily injury results in death.

Homicide: Lesser Included Offenses. In *State v. Freeman*,[202] the supreme court had occasion to reconsider the question of whether a trial court should accept a verdict on a lesser included homicide offense on which the jury had not been charged. At Freeman's murder trial, the jury brought back a verdict convicting defendant of involuntary manslaughter, even though the trial court had not given instructions on that offense.[203] The judge refused to accept that verdict and sent the jury back to deliberate.[204] The jury later convicted Freeman of voluntary manslaughter.[205] The court of appeals reversed, finding that the jury's initial verdict of involuntary manslaughter was, in effect, an acquittal of voluntary manslaughter.[206] In so ruling, the court of appeals relied on a longstanding precedent, *Register v. State*, where the court of appeals decided a case in which the supreme court was evenly divided.[207] *Register* held that even a verdict that is nonresponsive to the jury charge should be accepted if it is a verdict on a lesser included offense of the crime charged.[208]

In *Freeman*, the supreme court unanimously overruled *Register*.[209] The basis of the supreme court's decision was nonresponsive verdicts are a violation of the jury's duty to accept the trial court's instructions.[210] The court held that "the proper procedure henceforth is for the trial court and counsel to review the verdict prior to its publication," and if the verdict is nonresponsive, the trial court should have the jury resume deliberations and return a verdict "within the range of the instructions originally given to it."[211]

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201. *Id.* at 359, 467 S.E.2d at 500.
202. 264 Ga. 276, 444 S.E.2d 80 (1994).
203. *Id.* at 276, 444 S.E.2d at 80.
204. *Id.*, 444 S.E.2d at 80-81.
205. *Id.*, 444 S.E.2d at 81.
206. *Id.*
207. *Id.*; Register v. State, 10 Ga. App. 623, 74 S.E. 429 (1911).
208. 264 Ga. at 276-77, 444 S.E.2d at 81.
209. *Id.* at 277-78, 444 S.E.2d at 81-82.
210. *Id.* at 277, 444 S.E.2d at 81.
211. *Id.* at 278, 444 S.E.2d at 82.

The related issue of the quantum of evidence needed to request a charge on a lesser included offense was at issue in *Moses v. State*.[212] Defendant was convicted of malice murder for suffocating his girlfriend's infant son.[213] Central to the state's case were statements defendant made to a detective. Those statements included defendant's claim that he placed his hand over the infant's mouth to stop him from crying and that the infant went limp.[214] Defendant argued that he was entitled to a charge on misdemeanor involuntary manslaughter[215] because the statements to the detective are consistent with his commission of a lawful act in an unlawful manner.[216] The trial court did instruct the jury on felony involuntary manslaughter,[217] which requires proof that a death was caused during the commission of a misdemeanor. In addressing the trial court's failure to charge the jury on misdemeanor involuntary manslaughter, the supreme court restated the test: "[W]here even the slightest evidence shows that the defendant may be guilty of a lessor included offense, then a requested charge on that offense must be given."[218] In *Moses*, the supreme court hinted at the limits of the very broad "slightest evidence" test with respect to a requested charge of misdemeanor involuntary manslaughter, finding that defendant's conduct in putting his hand over the infant's mouth could not qualify as a "lawful act."[219] The court reasoned that defendant's act was not lawful because he prevented the child's breathing long enough to cause brain damage, which was reckless conduct within the meaning of the criminal statute making reckless endangerment of

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212. 264. Ga. 313, 444 S.E.2d 767 (1994).

213. *Id.* at 313, 444 S.E.2d at 768.

214. *Id.* at 314, 444 S.E.2d at 769.

215. O.C.G.A. § 16-5-3(b) (1996). The statute provides as follows:

> 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. A person who commits the offense of involuntary manslaughter in the commission of a lawful act in an unlawful manner, upon conviction thereof, shall be punished as for a misdemeanor.

Id.

216. *Moses*, 264 Ga. at 315, 444 S.E.2d at 769.

217. O.C.G.A. § 16-5-3(a).

218. 264 Ga. at 315, 444 S.E.2d at 769-70 (citing Edwards v. State, 264 Ga. 131, 442 S.E.2d 444 (1994)).

219. *Id.*, 444 S.E.2d at 770.

another a misdemeanor.[220] The presence of the reckless endangerment statute will prevent most reckless conduct from qualifying as a "lawful act," thereby precluding a charge on misdemeanor voluntary manslaughter, even under the "slightest evidence" test.[221]

The supreme court discussed the permissible methods for the state to formulate indictments charging alternative theories of liability for a single act in *Lumpkins v. State*.[222] Defendant had been charged in alternative counts with three crimes arising out of a single homicide: malice murder, felony murder while in the commission of an aggravated assault, and felony murder while in the commission of an armed robbery.[223] The supreme court held that the state has the option of framing the indictment in such a case as a single count with alternative allegations, or as alternative counts.[224] The court noted that the state is justified in preferring the alternative count method because it reduces the chance of ambiguous verdicts.[225] The court was unimpressed with the claim that alternative count indictments are confusing to the jury.[226] However, Chief Justice Hunt wrote a concurring opinion in which he suggested submitting a detailed verdict form to the jury instead of the indictment.[227]

Vehicular Homicide. Georgia's vehicular homicide statute[228] allows for conviction of drivers causing death while violating several other code sections. Some of the code violations upon which a vehicular homicide charge may be predicated require proof of "driving under the influence," while others merely require proof of driving with any amount

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220. *Id. See* O.C.G.A. § 16-5-60(b), which provides as follows:

> A person who causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty of a misdemeanor.

O.C.G.A. § 16-5-60(b) (1996).

221. The relationship of the reckless endangerment statute, O.C.G.A. § 16-5-60(b), to the availability of a charge on misdemeanor involuntary manslaughter is illustrated by another case from the survey period, *Howard v. State*, 213 Ga. App. 542, 445 S.E.2d 532 (1994), *cert. denied.*

222. 264. Ga. 255, 443 S.E.2d 619 (1994).

223. *Id.* at 255, 443 S.E.2d at 619.

224. *Id.* at 255-56, 443 S.E.2d at 620.

225. *Id.* at 257, 443 S.E.2d at 621.

226. *Id.* at 258, 443 S.E.2d at 621.

227. *Id.* at 259, 443 S.E.2d at 622.

228. O.C.G.A. § 40-6-393 (1996).

of illegal drugs in driver's system.[229] In *Kevinezz v. State*,[230] the supreme court held that an indictment accusing a defendant with driving "under the influence" of alcohol or drugs did not put defendant on notice that she could be convicted under the provision prohibiting the act of driving a motor vehicle with "any amount of marijuana or a controlled substance . . . present in the person's blood or urine, or both."[231]

Kevinezz had been indicted for one count of vehicular homicide (Count 1) and for one count of "driving under the influence to the extent it is less safe for the person to drive" (Count 2).[232] The trial court found insufficient evidence of impaired driving ability and directed a verdict on Count 2.[233] The jury considered Count 1. Although the indictment alleged that Kevinezz caused the death of the victim "'in reckless disregard for the safety of persons and property by driving under the influence of drugs,'" the trial court instructed the jury that it could convict defendant of Count 1 if it found she was driving with "any amount" of marijuana or cocaine in her system.[234] The jury convicted defendant of vehicular homicide.[235] Defendant argued that she was not on notice that she could be convicted on a theory not requiring impaired driving ability.[236] Kevinezz contended that the indictment was limited to "driving under the influence" of drugs, a phrase which

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229. O.C.G.A. § 40-6-391 (1995) (statute's numbering has subsequently changed from (5) to (6)). The statute provides as follows:

> (a) A person shall not drive or be in actual physical control of any moving vehicle while: . . .
>
> (2) under the influence of any drug to the extent that it is less safe for the person to drive; . . .
>
> (5) The person's alcohol concentration is 0.10 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such driving or being in actual physical control ended;
>
> (6) Subject to the provisions of subsection (b) of this Code section, there is any amount of marijuana or a controlled substance, as defined in Code Section 16-13-21, present in the person's blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood.

Id.

230. 265 Ga. 78, 454 S.E.2d 441 (1995).

231. *Id.* at 79, 454 S.E.2d at 443. *See* O.C.G.A. § 40-6-391.

232. 256 Ga. at 79-80, 454 S.E.2d at 443 (quoting O.C.G.A. § 40-6-361(a)(2)).

233. *Id.* at 80, 454 S.E.2d at 443.

234. *Id.*

235. *Id.* at 78, 454 S.E.2d at 442.

236. *Id.* at 79, 454 S.E.2d at 443.

requires proof that she was under the influence to the extent that it made it less safe for her to drive.[237]

The supreme court accepted this interpretation of the statutory language "driving under the influence" and held that the vehicular homicide count using that language did not put Kevinezz on notice that she could be convicted based on a violation of the code section prohibiting driving with any amount of illegal drugs in her system.[238] In reaching this conclusion, the supreme court overruled a prior court of appeals decision[239] that held the "driving under the influence" language was sufficient to put the defendant on notice under the code section prohibiting driving with a certain blood-alcohol count, although the blood-alcohol count provision did not require proof of impaired driving ability.[240] The supreme court found that the prior decision ran "headlong into the rule that when a crime can be committed in more than one way, the prosecution cannot be permitted to prove that crime in a different manner than that alleged in the indictment."[241] Furthermore, the supreme court held that defendant had not waived her challenge to the indictment by failing to specially demur.[242] The court reasoned that the indictment did charge Kevinezz with an offense, and she was not required to specially demur to avoid waiving a claim that the jury instructions allowed conviction for a crime not charged.[243] Prosecutors should easily be able to avoid the problem that beset the prosecution of Kevinezz. Indictments for vehicular homicide should be drafted to specify each code section forming a basis for liability. The decision in *Kevinezz* should not pose a significant impediment to future vehicular homicide prosecutions.[244]

Attempted Stalking. In *State v. Rooks*,[245] the supreme court declared that there is a crime of attempted stalking in Georgia. The

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237. *Id.* at 80, 454 S.E.2d at 443.

238. *Id.* at 82, 454 S.E.2d at 444.

239. Scott v. State, 207 Ga. App. 533, 428 S.E.2d 359 (1993).

240. *Id.* at 534-35, 428 S.E.2d at 361. *See* O.C.G.A. § 40-6-391(a)(4) (statute's numbering has subsequently changed to (a)(5)). At the time of the *Scott* decision, the statute prohibited driving with a .12% blood-alcohol count; it has since been changed to .10%. *Id.*

241. 265 Ga. at 81, 454 S.E.2d at 444.

242. *Id.* at 83, 454 S.E.2d at 445.

243. *Id.*

244. It should be noted that *Kevinezz* also held that O.C.G.A. § 40-6-391(a)(5) (statute's numbering subsequently changed to (a)(6)), which prohibits driving with "any amount" of illegal drugs in one's system, is not unconstitutionally vague. 265 Ga. at 78-79, 454 S.E.2d at 442.

245. 266 Ga. 528, 468 S.E. 2d 354 (1996).

court of appeals had found that it was legally impossible to attempt to stalk, reasoning that stalking is a form of assault and that Georgia does not recognize a crime of attempted assault.[246] The supreme court disagreed, holding that there are important differences between the crime of stalking and the crime of assault.[247] In particular, the stalking statute does not require proof of fear of immediate injury.[248] Also, stalking may be committed by threatening a member of the victim's family, while assault requires a threat against the assault victim.[249] Based on these differences, the supreme court concluded that stalking is not purely an assault crime.[250] Recognizing that it had previously dismissed the crime of attempted assault as absurd and impractical, the supreme court stated:

> To attempt to stalk, however, is to attempt to follow, place under surveillance or contact another person. It is neither absurd nor impractical to subject to criminal sanction such actions when they are done with the requisite specific intent to cause emotional distress by inducing reasonable fear of death or bodily injury.[251]

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246. State v. Rooks, 217 Ga. App. 643, 458 S.E.2d 667 (1995), *rev'd*, 266 Ga. 528, 468 S.E.2d 354 (1996).

247. 266 Ga. at 529, 468 S.E.2d at 355-56.

248. *Id.*, 468 S.E.2d at 356. *See* O.C.G.A. § 16-5-90, which states as follows:

> (a) A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person. For the purpose of this article, the term "place or places" shall include any public or private property occupied by the victim other than the residence of the defendant. For the purposes of this article, the term "harassing and intimidating" means a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear of death or bodily harm to himself or herself or to a member of his or her immediate family, and which serves no legitimate purpose. This Code section shall not be constued to require that an overt threat of death or bodily injury has been made.
>
> (b) Except as provided in subsection (c) of this Code section, a person who commits the offense of stalking is guilty of a misdemeanor.
>
> (c) Upon the second conviction, and all subsequent convictions, for stalking, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than five years.

O.C.G.A. § 16-5-90 (1996).

249. 266 Ga. at 529, 468 S.E.2d at 356.

250. *Id.* at 530, 468 S.E.2d at 356.

251. *Id.* at 529, 468 S.E.2d at 356.

Cruelty to Children. The supreme court faced two questions in *Brewton v. State.*[252] The first question was whether the crime of cruelty to children[253] can be committed by raising a child in unsanitary conditions. The court answered this legal question with ease, stating, "[w]e have no hesitation in holding that the offense may be committed by raising a child in such unsanitary conditions that the child suffers cruel or excessive physical or mental pain."[254] The second question proved more difficult: May evidence of unsanitary conditions, by itself, prove that the conduct of the defendant was malicious?[255] The court considered a variety of hypothetical situations involving a single parent who was ill, a parent who was young and ignorant, and a parent who was attempting to teach a child to clean by requiring the child to live in the unclean area.[256] The court concluded that "there are conceivable justifications for the existence of unsanitary conditions" and that "it is clear that such conditions, alone, cannot serve to prove the element of malice in a prosecution for cruelty to children."[257] Finding no corroborating evidence in the record, the supreme court reversed the conviction.[258] In essence, the court grafted onto the cruelty to children statute a rule that malice cannot be found based only on the nature of the unsanitary conditions, but that the circumstances must establish the lack of a justification.

Sexual Offenses Against Children. The court of appeals reversed defendant's conviction for aggravated child molestation in *Johnston v. State,*[259] but used the case to announce a new rule governing tolling of the statute of limitations in cases involving sexual offenses against children. Richard Johnston was indicted on May 5, 1993 for aggravated child molestation.[260] The conduct for which Johnston was indicted

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252. 266 Ga. 160, 465 S.E.2d 668 (1996).

253. O.C.G.A. § 16-5-70(b) (1996). The statute provides as follows:

> Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain. Any person commits the offense of cruelty to children in the second degree when such person intentionally allows a minor to witness the commission of a forcible felony.

Id.

254. *Brewton*, 266 Ga. at 160, 465 S.E.2d at 669.

255. *Id.* at 161, 465 S.E.2d at 669.

256. *Id.* at 161-62, 465 S.E.2d at 669-70.

257. *Id.* at 162, 465 S.E.2d at 670.

258. *Id.*

259. 213 Ga. App. 579, 445 S.E.2d 566 (1994).

260. *Id.* at 579, 445 S.E.2d at 566. *See* O.C.G.A. § 16-6-4 (1996).

ceased in May 1985, over seven years before his indictment.[261] Because the statute of limitations applicable to Johnston's offense[262] requires prosecution within seven years, the court reversed the conviction.[263] However, the court of appeals noted that the legislature had extended the statute of limitations for sexual offenses against children committed after July 1, 1992, the law's effective date.[264] While that legislature's action did not apply to Johnston's case, it was the impetus for the court of appeals to reconsider its prior decision in *Sears v. State*,[265] which held that the infancy of the victim does not toll the running of the statute of limitations period.[266] The court acknowledged the wisdom of extending the statute of limitations for crimes against children, who may not be able to understand the crime until becoming more mature.[267] Therefore, the court held that as of June 17, 1994, "infancy shall toll the statute of limitations for those crimes until the victim is 16 years of age or until the violation is reported to law enforcement authorities, whichever is earlier."[268] The court's holding tracks the legislative extention of the limitations period for

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261. 213 Ga. App. at 579, 445 S.E.2d at 566.

262. O.C.G.A. § 17-3-1(c) (1990 & Supp. 1996).

263. *Johnston*, 213 Ga. App. at 579, 445 S.E.2d at 567.

264. *Id.* at 579 n.1, 445 S.E.2d at 567 n.1. *See* O.C.G.A. § 17-3-2.1, which provides as follows:

> (a) If the victim of a violation of:
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> (1) Code Section 16-5-70, relating to cruelty to children;
>
> (2) Code Section 16-6-1, relating to rape;
>
> (3) Code Section 16-6-2, relating to sodomy and aggravated sodomy;
>
> (4) Code Section 16-6-3, relating to statutory rape;
>
> (5) Code Section 16-6-4, relating to child molestation and aggravated child molestation;
>
> (6) Code Section 16-6-5, relating to enticing a child for indecent purposes; or
>
> (7) Code Section 16-6-22, relating to incest,
>
> is under 16 years of age on the date of violation, the applicable period within which a prosecution must be commenced under Code Section 17-3-1 or other applicable statute shall not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency, prosecuting attorney, or other governmental agency, whichever occurs earlier. Such law enforcement agency or other governmental agency shall promptly report such allegation to the appropriate prosecuting attorney.
>
> (b) This Code section shall apply to any offense designated in paragraphs (1) through (7) of subsection (a) of this Code section occurring on or after July 1, 1992.

O.C.G.A. § 17-3-1.2 (1990 & Supp. 1996).

265. 182 Ga. App. 480, 356 S.E.2d 72 (1987).

266. *Johnston*, 213 Ga. App. at 579, 445 S.E.2d at 567.

267. *Id.*

268. *Id.* at 580, 445 S.E.2d at 567.

offenses committed after July 1, 1992.[269] The court limited its holding to cases, unlike Johnston's, in which the statute of limitations had not yet expired.[270] Therefore, the court's holding extends the statute of limitations period for sexual offenses against children that occurred between June 17, 1987 and July 1, 1992, the effective date of the legislative extention. The limitation period for offenses occurring more than seven years before the decision in *Johnston* "has already expired and cannot now be revived."[271]

In *Davis v. State*,[272] the court of appeals addressed merger issues raised by the charging of multiple counts for a single episode involving sexual abuse of a child. Davis was charged, among other things, with aggravated sexual battery,[273] child molestation,[274] and aggravated assault with intent to rape.[275] Defendant argued that the aggravated sexual battery charge and the aggravated assault charge merged with the child molestation charge and that the trial court was in error to sentence him on each count.[276] Under the statute governing convictions for lesser included offenses, offenses merge only if one of them "is established by proof of the same or less than all the facts" used to establish the other.[277] With respect to the claim that the aggravated sexual battery charge merged with the child molestation charge, the court in *Davis* noted that the sexual battery charge involved proof of penetration of the victim with a foreign object while the child molestation charge involved defendant's separate acts of removing the panties

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269. *See* O.C.G.A. § 17-3-2.1.

270. *Johnston*, 213 Ga. App. at 580, 445 S.E.2d at 567.

271. *Id.*

272. 214 Ga. App. 360, 448 S.E.2d 26 (1994).

273. O.C.G.A. § 16-6-22.2 (1996). The statute provides as follows:

> (a) For the purposes of this Code section, the term "foreign object" means any article or instrument other than the sexual organ of a person.
>
> (b) A person commits the offense of aggravated sexual battery when he intentionally penetrates with a foreign object the sexual organ or anus of another person without the consent of that person.
>
> (c) A person convicted of the offense of aggravated sexual battery shall be punished by imprisonment for not less than ten nor more than 20 years. Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

Id.

274. O.C.G.A. § 16-6-4 (a) (1996). The statute states that "[a] person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of 16 years with the intent to arouse or satisfy the sexual desires of either the child or the person." *Id.*

275. *Davis*, 214 Ga. App. at 361-62, 448 S.E.2d at 28. O.C.G.A. § 16-5-21(a)(1) (1996).

276. 214 Ga. App. at 361, 448 S.E.2d at 27-28.

277. O.C.G.A. § 16-1-6(1) (1996).

of the victim and exposing his sex organ.[278] Similarly, the court found that the aggravated assault charge involved proof of separate acts from those underlying the child molestation charge, such as the defendant's attempt to penetrate the victim with his sex organ.[279] The analysis of the sexual battery and child molestation charges appears sound because each crime involves proof of facts that the other does not. However, the court's analysis of the aggravated battery charge is open to question because the facts supporting the child molestation charge (i.e., defendant pulling down the victim's panties and exposing himself) appear to be "less than all the facts" needed to prove the crime of aggravated assault with intent to commit rape.[280] In any event, *Davis* provides support for multi-count charging strategies in cases based on single episodes of sexual abuse. Multiple charges can complicate a case, but they allow prosecutors to present several theories upon which guilt can be determined.

An example of an overly aggressive multi-count charging strategy can be found in *Bragg v. State*.[281] Prosecutors charged Bragg with several counts of aggravated child molestation and child molestation, and added two counts charging Bragg with enticing two of the children for indecent purposes.[282] The crime of enticing a child for indecent purposes has an "asportation" element requiring that the defendant "take" the child from one place to another, however slight the distance, by force, enticement,

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278. *Davis*, 214 Ga. App. at 361, 448 S.E.2d at 28.
279. *Id.* at 361-62, 448 S.E.2d at 28.
280. *Id.* at 361, 457 S.E.2d at 28. *See* O.C.G.A. § 16-1-6(2).
281. 217 Ga. App. 342, 457 S.E.2d 262 (1995).
282. *Id.* *See* O.C.G.A. § 16-6-5, which provides as follows:

> A person commits the offense of enticing a child for indecent purposes when he or she solicits, entices, or takes any child under the age of 16 years to any place whatsoever for the purpose of child molestation or indecent acts. A person convicted of the offense of enticing a child for indecent purposes shall be punished by imprisonment for not less than one nor more than 20 years. Upon a first conviction of the offense of enticing a child for indecent purposes, the judge may probate the sentence; and such probation may be upon the special condition that the defendant undergo a mandatory period of counseling administered by a licensed psychiatrist or a licensed psychologist. However, if the judge finds that such probation should not be imposed, he shall sentence the defendant to imprisonment. Upon a second or third conviction of such offense, the defendant shall be punished by imprisonment for not less than five years. For a fourth or subsequent conviction of the offense of enticing a child for indecent purposes, the defendant shall be punished by imprisonment for 20 years. Adjudication of guilt or imposition of sentence for a conviction of a third, fourth, or subsequent offense of enticing a child for indecent purposes, including a plea of nolo contendere, shall not be suspended, probated, deferred, or withheld.

O.C.G.A. § 16-6-5 (1996).

or persuasion.[283] The state based the enticing charge on the theory that defendant had caused the children to enter a certain room.[284] The court of appeals reversed defendant's convictions of the two counts of enticing the children for indecent purposes because the record lacked any evidence concerning how the children came to be present in the room with defendant.[285] The court rejected the state's argument that the asportation element was met because defendant threatened to punish the children if they attempted to *leave* the room.[286] The state's argument obviously stretched the concept of asportation beyond recognition.

Robbery/Theft. Melvin Lewis Bland was convicted of murder and two counts of armed robbery arising out of Bland's robbing and shooting his victim.[287] Although this was a single armed robbery, Bland was charged with taking the victim's wallet in one robbery count and taking the victim's pick-up truck in the other robbery count.[288] Bland was convicted of both counts and received consecutive twenty year terms of imprisonment on each of the robbery counts.[289] In *Bland v. State*,[290] the supreme court found that the trial court erred when it failed to join the two robbery counts and directed that the second robbery sentence be vacated.[291] The court reaffirmed the rule that "where there is only one victim who is robbed of more than one item in a single transanction, only one robbery may be charged."[292]

A similar issue was raised before the court of appeals in *Snelling v. State*,[293] with a similar outcome. During the robbery of a restaurant, it was alleged that defendant took money belonging to the restaurant from the presence of an employee by use of a gun.[294] In a separate count, it was alleged that during the same robbery, defendant, using a gun, took credit cards belonging to the restaurant employee from the

283. *Bragg*, 217 Ga. App. at 342, 457 S.E.2d at 262.
284. *Id.* at 343, 457 S.E.2d at 262.
285. *Id.*, 457 S.E.2d at 263.
286. *Id.*
287. Bland v. State, 264 Ga. 610, 449 S.E.2d 116 (1994). Bland was also charged with escape and aggravated assault of a jailer for his conduct after being captured for the murder and robbery. *Id.* at 610, 449 S.E.2d at 116-17.
288. *Id.* at 612, 449 S.E.2d at 118.
289. *Id.*
290. *Id.* at 610, 449 S.E.2d at 116.
291. *Id.* at 612, 449 S.E.2d at 118.
292. *Id.*
293. 215 Ga. App. 263, 450 S.E.2d 299 (1994).
294. *Id.* at 263, 450 S.E.2d at 300.

employee.[295] The court found that there was a single robbery and held that it was error to enter judgment and sentence on two armed robbery counts.[296]

King v. State[297] addressed the issue of what crimes are lesser included offenses of the crime of robbery by sudden snatching.[298] The incident at issue was as follows: Defendant entered a convenience store and asked if the store accepted credit cards. When the store clerk answered in the affirmative, defendant asked for six cartons of cigarettes, worth eighty-six dollars. The store clerk placed the cartons on the counter. While the store clerk glanced away, defendant took the cigarettes and ran out of the store.[299] Defendant was convicted of robbery by sudden snatching, which requires proof that defendant, with intent to commit theft, took property from the presence of another by sudden snatching.[300]

The court of appeals considered defendant's claim that the trial court had committed error by refusing to instruct the jury on several lesser included offenses. Specifically, defendant requested instructions on three other offenses, namely, theft by taking,[301] theft by deception,[302] and theft by shoplifting.[303] Although the court found no evidence or conduct by defendant to support the instruction on theft by deception,[304] the court held that the facts required granting requests for instructions on theft by taking and theft by shoplifting.[305] The difference between the crime of robbery by sudden snatching and the crimes of theft by taking and deception is that robbery requires the taking be from the person or presence of another.[306] The court certainly was correct in concluding that the theft offenses are established by "proof of the same or less than all the facts" required to prove robbery.[307] The analytical problem with the court's position is that it is inconceivable that the finder of fact could find that the evidence did not support the

295. *Id.*
296. *Id.* at 268, 450 S.E.2d at 304.
297. 214 Ga. App. 311, 447 S.E.2d 645 (1994).
298. O.C.G.A. § 16-8-40(a)(3) (1996).
299. *King*, 214 Ga. App. at 311, 447 S.E.2d at 646.
300. *Id. See* O.C.G.A. § 16-8-40(a)(3).
301. O.C.G.A. § 16-8-2 (1996).
302. *Id.* § 16-8-3.
303. *Id.* § 16-8-14(a).
304. *King*, 214 Ga. App. at 313-14, 447 S.E.2d at 648-49.
305. *Id.*
306. *Compare* O.C.G.A. § 16-8-40(a)(3) *with* O.C.G.A. §§ 16-8-2, -3 & -14(a).
307. *King*, 214 Ga. App. at 311, 447 S.E.2d at 648. *See* O.C.G.A. § 16-1-6 (1996).

conclusion that the taking was from the presence of another person.[308] If that is so, the instructions on the lesser included theft offenses become a recipe for a compromise verdict that ignores the uncontroverted fact that the taking was from the presence of the store clerk. The state urged the court to adopt a rule limiting lesser included offense instructions to cases where there is a real issue of whether the greater offense has been completed.[309] The court's rejoinder to this argument was that the general rule is that an instruction on a lesser included offense should be given where there is *any* evidence that the defendant is guilty of the lesser offense.[310] The court's rejoinder, however, appears to miss the mark because the facts of *King* do not suggest any evidence on which the jury could conclude that King was guilty of the lesser theft offense but not guilty of the greater robbery offense.

In *Dukes v. State,*[311] the supreme court confronted a constitutional issue raised by the form of the indictment in a theft case. Dukes, who ran a wrecking service and body shop, was convicted of stealing two cars. He was charged with two counts of theft by taking.[312] The indictment charged Dukes in each count with the unlawful taking of another's property.[313] Neither count of the indictment charged Dukes under the second clause of the theft by taking statute, which proscribes the unlawful appropriation of the property of another while in lawful possession of it.[314] However, the trial court gave a jury instruction quoting the entire theft by taking statute, including the appropriation clause, thus creating the possibility that the jury might have convicted Dukes on a legal basis not included in the indictment.[315] This possibility may well have become reality in Dukes's case because the evidence showed that he had been asked to store one of the allegedly stolen cars, thereby coming into lawful possession of that car.[316] The supreme court reversed Dukes's conviction for theft of the car he had been asked to store, holding that his conviction on a basis for liability not set forth in the indictment was a denial of due process.[317]

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308. Indeed, the court rejected defendant's claim that the store clerk was unaware of the theft. 214 Ga. App. at 311-12, 447 S.E.2d at 647.

309. *Id.* at 312, 447 S.E.2d at 647.

310. *Id.*

311. 265 Ga. 422, 457 S.E.2d 556 (1995).

312. *Id.* at 422, 457 S.E.2d at 557.

313. *Id.*

314. *Id. See* O.C.G.A. § 16-8-2 (1996).

315. 265 Ga. at 422, 457 S.E.2d at 557.

316. *Id.*

317. *Id.* at 423-24, 457 S.E.2d at 558.

Burglary. In Georgia, a person commits "burglary when, without authority and with the intent to commit a felony or theft therein," he enters the house of another person.[318] In 1993, the supreme court was confronted with a case in which a man charged with burglary could not have entered the house of the victim "without authority" because he and the victim either lived together or were married.[319] In that case, the court held that the trial court should have instructed the jury that if defendant lived with or was married to the victim, that the jury must acquit defendant of burglary.[320] In *State v. Kennedy*,[321] the supreme court reconsidered this holding and disapproved the prior decision to the extent that it stated that, as a matter of law, a married defendant cannot commit burglary against a spouse.[322] In doing so, the court expressed its concern over the current Georgia theft statutes, which exempt the unauthorized taking of property from a spouse.[323] The court explicitly asked the legislature to consider whether the marital exemption under the theft statutes should be abolished.[324] The court's interpretation of the burglary statute is a welcome development; legislative action changing the theft statute would be another.

Firearms Offenses. The defendant in *Jones v. State*[325] was charged with the following six crimes: malice murder, felony murder with aggravated assault as the underlying offense, two counts of aggravated assault, possession of a firearm during commission of a crime, and possession of a firearm by a felon.[326] Jones moved to bifurcate the trial on the felon-in-possession charge from the other charges. The trial court denied the motion.[327] Jones was convicted of the felony murder charge and the felon-in-possession charge.[328] On appeal, defendant challenged the trial court's denial of the motion to bifurcate.[329]

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318. O.C.G.A. § 16-7-1 (1996).
319. Mitchell v. State, 263 Ga. 129, 130-31, 429 S.E.2d 517, 518 (1993), *overruled by* State v. Kennedy, 266 Ga. 195, 467 S.E.2d 493 (1996).
320. *Id.*
321. 266 Ga. 195, 467 S.E.2d 493 (1996).
322. *Id.* at 195-96, 467 S.E.2d at 493-94.
323. *Id.* at 196, 467 S.E.2d at 494 n.1. *See* O.C.G.A. § 16-8-1 (1996).
324. *Id.*
325. 265 Ga. 138, 454 S.E.2d 482 (1995).
326. *Id.* at 138, 454 S.E.2d at 484.
327. *Id.*
328. *Id.*
329. *Id.*

Under a prior decision of the supreme court, *Head v. State,* a motion to bifurcate should be granted where a felon-in-possession charge is unrelated to other charges in the indictment.[330] In *Head*, the supreme court held that it was error not to bifurcate a felon-in-possession count from an armed robbery count because the defendant's prior convictions had "nothing to do with any element of the robbery charge, except the forbidden (albeit perhaps the most illuminating) realm of character and propensity for violent crimes."[331] *Head* stated that a bifurcation motion should be denied if the felon-in-possession offense "might be material to a more serious charge" such as where "the possession charge might conceivably become the underlying felony to support a felony murder conviction."[332]

In *Jones*, the supreme court addressed the situation anticipated by the dicta in *Head*, namely, a case in which the defendant seeks bifurcation of a felon-in-possession count from murder charges. What must the relationship of a felon-in-possession charge be to the other charges to allow a joint trial of all the charges? The supreme court opted for the following approach: If the facts supporting the gun possession charge are bound up with the facts of the homicide such that the possession charge might have served as the felony underlying a felony murder charge, then the relationship of the charges justifies a joint trial.[333] One reason for the court's approach was that the existence of such a factual relationship would allow the trial court to instruct the jury that felony murder based on the possession offense is a lesser included offense of malice murder, even where no felony murder charge based on the possession offense is contained in the indictment.[334] The court viewed the failure of the trial court to give such an instruction at Jones's trial an omission that benefited defendant.[335] The court's approach appears to open the door to joint trials of murder and felon-in-possession charges whenever the gun possession occurs during the transaction leading to the death.

A strong dissenting opinion, joined by two justices, protested the majority's approach.[336] The dissent emphasized that the interest advanced by *Head* was the interest in minimizing prejudice to defendants resulting from the admission of prior convictions that, despite limiting instructions, may improperly be used by the jury as propensity

330. 253 Ga. 429, 431-32, 322 S.E.2d 228, 232 (1984).
331. *Id.* at 431, 322 S.E.2d at 231.
332. *Id.* at 432, 322 S.E.2d at 232.
333. *Jones*, 265 Ga. at 139-40, 454 S.E.2d at 484-85.
334. *Id.* at 139, 454 S.E.2d at 484.
335. *Id.* at 140, 454 S.E.2d at 485.
336. *Id.* at 142-44, 454 S.E.2d at 486-88.

evidence.[337] In the case under consideration, the State offered evidence of Jones's prior conviction for possession of cocaine in his murder trial.[338] The dissent argued that bifurcation should occur unless the indictment or jury instructions make the felon-in-possession charge a predicate for a felony murder charge.[339] The dissent did not remark about the majority opinion's statement that the trial court erred when it failed to instruct the jury that felony murder based on the felony of gun possession is a lesser included offense of malice murder, even though that charge is not set forth in the indictment.[340] This directive to trial courts may be as significant as the supreme court's holding on bifurcation.

In *Fields v. State*,[341] defendant was charged with four episodes of kidnapping and rape as well as four counts of possessing a firearm while committing the kidnapping and rape felonies.[342] Defendant challenged the firearms possession counts on the ground that he had used a B-B pistol during the abductions and that the B-B pistol is not a "firearm" under the statute.[343] The court of appeals agreed and reversed defendant's convictions on the firearms possession counts.[344] In coming to this conclusion, the court found that for purposes of the statute in question, a "firearm" is a weapon "capable of discharging a projectile via force of gunpowder."[345] Since B-B pistols don't meet that definition and aren't otherwise mentioned in the statute, the convictions were reversed.[346] Perhaps as interesting as the court's holding is its discussion distinguishing cases where convictions for gun possession during a felony have been affirmed based only on witness testimony

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337. *Id.* at 143, 454 S.E.2d at 487 (Fletcher, J., dissenting).
338. *Id.*
339. *Id.* at 143-44, 454 S.E.2d at 488.
340. *Id.* at 142-44, 454 S.E.2d at 486-88.
341. 216 Ga. App. 184, 453 S.E.2d 794 (1995).
342. *Id.* at 184, 453 S.E.2d at 795. *See* O.C.G.A. § 16-11-106(b), which provides as follows:

> 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;
>
> . . . 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.

O.C.G.A. § 16-11-106(b) (1996).
343. 216 Ga. App. at 184, 453 S.E.2d at 795.
344. *Id.* at 186-87, 453 S.E.2d at 797.
345. *Id.* at 187, 453 S.E.2d at 797.
346. *Id.*

about the presence of a firearm.[347] In cases where no gun is recovered, it is always possible that a witness might mistake something that is not a firearm, like a B-B pistol, for a firearm. The court cited several cases affirming convictions in such cases.[348] The court distinguished the case before it on the basis that the record included evidence that the "gun" seen by the witnesses was really a B-B pistol.[349] While the result in *Fields* is sound, the analysis calls into question the sufficiency of the evidence in cases where there is not proof that the "gun" seen by the witnesses is a working firearm. The standard seems to be that the witnesses' testimony alone will be sufficient to support a verdict unless there is evidence to the contrary. This standard may be viewed as shifting the burden of proof by declaring a witness account of a "gun" adequate unless evidence to the contrary is produced.

The defendant in *Asberry v. State*[350] was charged with possession of a firearm during the commission of a crime involving the possession of a controlled substance.[351] Defendant was caught with some marijuana.[352] In order to be convicted, it was necessary that defendant possess a firearm in relation to possession of a controlled substance "as provided in O.C.G.A. [section] 16-13-30."[353] Unfortunately for the State, section 16-13-30 distinguishes between "controlled substances" and "marijuana."[354] The court of appeals rejected the State's contention that the legislature intended that marijuana be considered a controlled substance.[355] Although it is possible that the legislature intended to punish the use of a firearm during a drug offense involving marijuana, the court's statutory construction was certainly sound and there was no clear legislative history pointing to a different result. If it

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347. *Id.* at 185-86, 453 S.E.2d at 795-96.
348. *Id.* at 185, 453 S.E.2d at 795.
349. *Id.* at 185-86, 453 S.E.2d at 796.
350. 220 Ga. App. 40, 467 S.E.2d 225 (1996).
351. O.C.G.A. § 16-11-106(b)(4) (1996). The statute provides as follows:

> 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:
>
> . . . (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;
>
> . . . 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.

352. 220 Ga. App. at 40, 467 S.E.2d at 226.
353. *Id.* at 41, 467 S.E.2d at 226. *See* O.C.G.A. § 16-13-30 (1996).
354. 220 Ga. App. at 40-41, 467 S.E.2d at 226.
355. *Id.* at 41-42, 467 S.E.2d at 227.

desired to do so, the legislature could easily remedy this gap in the law by adding a reference to marijuana to the firearm possession statute.

Violation of Oath by Public Officer. In *State v. Tullis*,[356] the court of appeals considered the reach of the crime of violation of an oath by a public officer.[357] Defendant was a police officer who was charged with misdemeanor theft by shoplifting for taking a candy bar from a convenience store without paying for it.[358] The State charged defendant with violation of his oath, a felony, because he took the candy bar while on duty.[359] The trial court dismissed the count charging violation of the officer's oath and the State appealed.[360] The court of appeals affirmed.[361] The court expressed concern that any conduct by a public officer constituting a misdemeanor would automatically be converted into a felony by the state's interpretation of the statute.[362] The court also noted that prior decisions require "some connection between the offense and the public officer's official duties."[363] The court implicitly found that the commission of a misdemeanor while on duty is not a sufficient connection to the officer's duties. This conclusion was reinforced by the wording of the oath taken by defendant in the case, in which the officer swears to discharge his duties as a police officer without explicitly acknowledging a duty to uphold the laws of Georgia.[364] The implicit duty of police officers to uphold the law was found by the court to be an inadequate basis for converting all misdemeanors into conduct chargeable as a felony. The court's analysis, however, raises the question of whether the result would have been different if the oath at issue had explicitly stated a duty to comply with all criminal laws while on duty.

The Anti-Mask Act. In *Daniels v. State*,[365] the supreme court had occasion to define the mens rea needed to establish a violation of

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356. 213 Ga. App. 581, 445 S.E.2d 282 (1994), *cert. denied*.

357. *See* O.C.G.A. § 16-10-1 (1996). The statute states that "[a]ny public officer who willfully and intentionally violates the terms of his oath as prescribed by law shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years." *Id.*

358. *Tullis*, 213 Ga. App. at 581-82, 445 S.E.2d at 282.

359. *Id.* at 582, 445 S.E.2d at 283.

360. *Id.*, 445 S.E.2d at 282.

361. *Id.*

362. *Id.*, 445 S.E.2d at 283.

363. *Id.*, 445 S.E.2d at 282-83.

364. *Id.*

365. 264 Ga. 460, 448 S.E.2d 185 (1994).

Georgia's Anti-Mask Act,[366] which makes it a misdemeanor, under certain circumstances, to conceal one's identity by wearing a mask or hood. The law was intended to address the problem of "intimidation and violence against racial and religious minorities carried out by mask-wearing Klansman and other 'hate' organizations."[367] Before the decision in *Daniels*, the supreme court had limited the reach of the Anti-Mask Act to cases where the offender wears a mask with the intent to conceal his or her identity and where the offender "knows *or reasonably should know* that the conduct provokes a reasonable apprehension of intimidation, threats or violence."[368] The principal legal holding in *Daniels* was to require either actual knowledge that the conduct resulted in apprehension by the victim or reckless disregard as to that fact.[369] The court rejected the notion that negligence short of recklessness would satisfy the requirements of the statute.[370] Thus, the court held that

> to obtain a conviction under the Anti-Mask Act, the state must show that the mask-wearer (1) intended to conceal his identity, and (2) either intended to threaten, intimidate, or provoke the apprehension of violence, or acted with reckless disregard for the consequences of his conduct or a heedless indifference to the rights and safety of others, with reasonable foresight that injury would probably result.[371]

The interpretation of the Anti-Mask statute's required mental state is the rule of law for which *Daniels* stands; that rule will be significant to

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366. O.C.G.A. § 16-11-38 (1996). The statute provides as follows:

(a) A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.

(b) This Code section shall not apply to:

(1) A person wearing a traditional holiday costume on the occasion of the holiday;

(2) A person lawfully enganged in trade and employment or in a sporting activity where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade, or profession, or sporting activity;

(3) A person using a mask in a theatrical production including use in Mardi Gras celebrations and masquerade balls; or

(4) A person wearing a gas mask prescribed in emergency management drills and exercises or emergencies.

Id.

367. State v. Miller, 260 Ga. 669, 672, 398 S.E.2d 547, 550 (1990).

368. *Id.* at 674, 398 S.E.2d at 552.

369. *Daniels*, 264 Ga. at 464, 448 S.E.2d at 189.

370. *Id.*, 448 S.E.2d at 188.

371. *Id.*, 448 S.E.2d at 189.

future prosecutions under the act. However, the unusual history of *Daniels* is worthy of some comment. One aspect that stands out is the stark contrast between the social evil in the minds of the framers of the Anti-Mask Act and the conduct of Roy Daniels on May 24, 1992. Daniels, who regularly searched trash cans in Athens looking for aluminum to recycle, found a discarded football helmet and wrestling mask.[372] Daniels put on the mask and helmet to entertain some children in the neighborhood.[373] Daniels's costume apparently made a couple of young girls look "uneasy" just as a police officer drove down the street.[374] The officer arrested Daniels and charged him with a violation of the Anti-Mask Act.[375] The supreme court found that Daniels's sole purpose was to entertain the children, a fact that is in contrast with the sort of racial terrorism that was in the minds of the authors of the Anti-Mask Act.[376] One is left with the impression that the supreme court was very uncomfortable with the application of the Anti-Mask Act to Roy Daniels.[377] This impression is bolstered when one considers the unusual procedural posture of the case: Daniels was convicted in a bench trial and the supreme court took the rare step of reversing the conviction based on insufficient evidence.[378] The court's route to that result was to re-interpret the statute's mens rea requirement and then to conclude that, under the newly announced standard, no reasonable trier of fact could have convicted Daniels.[379] Appellate reversal of a conviction based on application of an improper legal standard usually results in a new trial under the proper standard; the supreme court's willingness to engage in the necessary fact finding put an end to the prosecution. Two of the justices on the unanimous court may have been uncomfortable with more than Daniels's conviction;

372. *Id.* at 460, 448 S.E.2d at 186.
373. *Id.* at 461, 448 S.E.2d at 186.
374. *Id.*
375. *Id.*
376. *Id.* at 463, 448 S.E.2d at 188.
377. One fact that may have heightened the court's unease with Daniels's conviction under the Anti-Mask Act is a fact that is not mentioned in the court's opinion: Defendant Roy Daniels is an African-American. *See Daniels*, 264 Ga. at 460-65, 448 S.E.2d at 186-89; Emily Heller, *Court Reverses Conviction for Violating Anti-Mask Law*, FULTON COUNTY DAILY REP., September 26, 1994, at 1. It is left to speculation whether the symbolism of the prosecution of an African-American man under a rarely used statute aimed primarily at Klan activities, especially for such innocuous conduct, influenced the outcome of the case. Also unmentioned in the court's opinion is any reference to aggravating factors, such as prior criminal history, that may have prompted the State to pursue the prosecution.
378. 264 Ga. at 460, 464-65, 448 S.E.2d at 186, 189.
379. *Id.* at 463, 448 S.E.2d at 188-89.

Justice Carley and Chief Justice Hunt concurred in the judgment only.[380]

III. CRIMINAL PROCEDURE

A. *Investigation Phase*

The Concept of Curtilage. In *Espinoza v. State*,[381] the supreme court had an opportunity to clarify the protection afforded to apartment residents by the concept of curtilage under Georgia law.[382] The facts of the case read like a carefully constructed law school hypothetical: The Espinoza brothers, Alejandro and Lorenzo, lived in the two apartments at 251 Dickson Road in Marietta.[383] Lorenzo lived in Unit A and Alejandro lived in Unit B.[384] Access to the two apartments was provided by a private driveway in the shape of a stethoscope; the left side of the stethoscope-shaped driveway led to Unit A and the right side led to Unit B.[385] Law enforcement agents obtained a valid search warrant authorizing a search of *Unit B*, Alejandro's apartment.[386] When the search of Unit B yielded nothing, the agents searched Unit A, which clearly was beyond the authority granted by the warrant.[387] Finding nothing in Unit A, the agents searched the grounds surrounding the apartments.[388] The agents found a garbage bag containing five pounds of marijuana located in some bushes that were about eight feet outside the left side of the stethoscope-shaped driveway, which led to Unit A.[389] The resident of Unit A, Lorenzo Espinoza, was indicted for possession of marijuana with intent to distribute; his brother was not charged.[390]

The trial court suppressed the marijuana on the ground that the agents did not have a legal right to enter Unit A and that evidence

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380. *Id.* at 465, 448 S.E.2d at 189.

381. 265 Ga. 171, 454 S.E.2d 765 (1995).

382. The decision in *Espinoza* was based on Georgia law, with reference to federal law for guidance. Ga. Const. art. I, § 1, para. 13; *Espinoza*, 265 Ga. at 172 n.1, 454 S.E.2d at 767 n.1.

383. *Espinoza*, 265 Ga. at 171-73, 454 S.E.2d at 765-68.

384. *Id.*

385. *Id.* at 173, 454 S.E.2d at 768.

386. *Id.* at 172, 454 S.E.2d at 767.

387. *Id.* at 171, 454 S.E.2d at 767.

388. *Id.*, 454 S.E.2d at 766.

389. *Id.* at 173, 454 S.E.2d at 768.

390. *Id.* at 171, 454 S.E.2d at 766.

found in the curtilage of Unit A must be suppressed.[391] The court of appeals reversed the suppression order, finding that the marijuana was found in the "common area curtilage" of Unit B, for which the agents had a valid warrant.[392] The supreme court reversed, upholding the suppression of the evidence.[393] The court explicitly disapproved the use of the term "common area curtilage" to describe the area surrounding the duplex apartments.[394] The court found that the proper test for determining whether the marijuana was found within the curtilage of Unit B (and therefore within the reach of the search warrant), is whether the resident of Unit B had a reasonable expectation of privacy in the area where the contraband was found.[395] Under this test, the court held that the resident of Unit B "would have no reasonable expectation of privacy in a portion of the yard that was not directly connected to that unit, its driveway, or its side of the duplex."[396] Thus, the evidence was not found within the curtilage of the apartment named in the search warrant, and there was no authority to seize it. Three justices, while accepting the court's legal analysis, dissented from the factual finding as to the limits of the curtilage of Unit B and favored remand to the trial court on that issue.[397] Despite the odd factual scenario involving a search warrant for one unit of the duplex and the discovery of evidence in the curtilage of the other unit, *Espinoza* is a significant development in that it clarifies the need to define the limits of the curtilage of an apartment in light of the facts of each case suggesting a reasonable expectation of privacy.

Consent Searches. In *Ford v. State,*[398] the court of appeals upheld the denial of a suppression motion in a case where defendant Ford's sister, lessee of the apartment, consented to a search of Ford's bedroom and cocaine was discovered therein.[399] Ford claimed that he paid rent for use of the apartment and that he had a reasonable expectation of privacy in his bedroom.[400] The court concluded that the

391. *Id.* at 171-72, 454 S.E.2d at 767.
392. State v. Espinoza, 212 Ga. App. 814, 818, 442 S.E.2d 911, 914 (1994), *rev'd,* 265 Ga. 171, 454 S.E.2d 765 (1995).
393. *Espinoza,* 265. Ga. at 174-75, 454 S.E.2d at 769.
394. *Id.* at 174, 454 S.E.2d at 769.
395. *Id.*
396. *Id.*
397. *Id.* at 175, 454 S.E.2d at 769.
398. 214 Ga. App. 284, 447 S.E.2d 334 (1994).
399. *Id.* at 284, 447 S.E.2d at 335.
400. *Id.*

sister had the authority to consent to a search of the entire apartment.[401] In reaching this conclusion, the court of appeals deferred to the trial court's findings that defendant had only recently moved into his sister's apartment and that the alleged agreement about the rent, if it existed at all, was extremely informal.[402] With respect to this conclusion, a dissenting opinion contended that Ford's payment of money to his sister in connection with the apartment, although informal in nature, was sufficient to elevate Ford from "guest" to "tenant."[403] The majority opinion responded that the "question is not whether a guest gives his host money but whether he had a reasonable expectation of privacy which would render *unreasonable* a search consented to by the host."[404] Given the fact-sensitive nature of the inquiry and the requirement that the appellate court defer to the factual findings of the trial court, the affirmance of the denial of Ford's suppression motion was not surprising.

Of potentially greater interest is the alternative basis for affirmance set forth by the court of appeals. Relying on the United States Supreme Court opinion in *Illinois v. Rodriguez*,[405] the court found that the evidence from Ford's bedroom was admissible because the police officers were acting in good faith and reasonably believed the consent was valid.[406] Of course, the Georgia Supreme Court has rejected the good faith exception to the exclusionary rule in cases in which police officers rely on a search warrant that is later found to lack probable cause.[407] The rejection of the good faith exception was based on the statutorily required exclusion of illegally seized evidence under Georgia law.[408] In *Ford*, the majority stated that the application of the good faith exception to warrantless consent searches is "on an entirely different footing" from its application to cases involving search warrants.[409] As the dissent pointed out, this conclusion appears to be invalid in light of the plain wording of Georgia's statutory exclusionary rule, which applies to searches conducted with or without warrants.[410]

Sufficiency of Search Warrant Affidavit. In two interesting cases, the court of appeals declared search warrant affidavits largely

401. *Id.* at 285, 447 S.E.2d at 336.
402. *Id.*
403. *Id.* at 288-89, 447 S.E.2d at 338.
404. *Id.* at 286, 447 S.E.2d at 336.
405. 497 U.S. 177 (1990).
406. *Ford*, 214 Ga. App. at 286-87, 447 S.E.2d at 336-37.
407. Gary v. State, 262 Ga. 573, 577, 422 S.E.2d 426, 430 (1992).
408. *Id. See* O.C.G.A. § 17-5-30 (1990).
409. *Ford*, 214 Ga. App. at 287, 447 S.E.2d at 337.
410. *Id.* at 289-90, 447 S.E.2d at 339; O.C.G.A. § 17-5-30(a)(1) (1990).

based on information from anonymous sources to be insufficient. In *Davis v. State*,[411] the court of appeals considered an affidavit supporting a search warrant that was based on information provided by an anonymous "concerned citizen" to a police officer and relayed to another officer, who was the affiant.[412] The concerned citizen claimed to have observed two persons at a residence in possession of crack cocaine and drug paraphernalia. The residence described checked out. The description of the drugs and other items seemed accurate. The officer who interviewed the source said that the source "displayed a truthful demeanor." Finally, one of the persons described by the source, Robert Maddox, was known to the affiant as a person previously convicted for cocaine trafficking.[413]

In assessing the sufficiency of this affidavit, the court of appeals employed "the totality of the circumstances analysis" used in *Illinois v. Gates*.[414] The court found the affidavit insufficient under this test.[415] First, the court rejected the characterization of the anonymous source as a "concerned citizen."[416] The source had no track record and there were no facts suggesting the source was a disinterested citizen.[417] No facts were presented concerning the circumstances leading to the source's provision of the information.[418] No specific facts were set forth to support the conclusion regarding the source's "truthful demeanor."[419] The court found that the lack of information about the source rendered the source a mere anonymous tipster and reduced the information to the status of rumor.[420] The court expressed its concern that the investigating officers had failed to heed the admonition of the Georgia Supreme Court "to make every effort to see that supporting affidavits reflect the maximum indication of reliability."[421]

In the end, the lack of effort by the police to strengthen the affidavit seems to have tipped the scales against upholding the affidavit. A dissenting opinion complained that the majority was not applying the totality of the circumstances approach.[422] To the dissent, "a practical,

411. 214 Ga. App. 36, 447 S.E.2d 68 (1994).
412. *Id.* at 36, 447 S.E.2d at 69.
413. *Id.*
414. 462 U.S. 213 (1983).
415. *Davis*, 214 Ga. App. at 37, 447 S.E.2d at 70.
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.* at 39, 447 S.E.2d at 71 (Andrews, J., dissenting).

common-sense analysis indicated that there was a fair probability that contraband would be found in the residence."[423] The dissent contended that the source's accurate and detailed description of the drugs, the paraphernalia, and the residence, combined with the naming of a suspect with a prior cocaine conviction, was enough.[424]

Wood v. State[425] involved the sufficiency of a search warrant affidavit relying on information provided by an unidentified person to a reliable police informant. The trial court denied the motion to suppress, finding that the warrant established probable cause.[426] The affidavit supporting the warrant was based on these facts: The unidentified person told the reliable informant that he had seen illegal drugs at Wood's home.[427] The reliable informant passed this information on to the police, telling the police that the unidentified person did not know that the police would be informed.[428] The only steps taken by the police to corroborate the information from the unidentified person was to confirm Wood's address, the make of her car, and her hair color.[429] That was it. The unidentified person had no track record of providing reliable information.[430] The reliable informant had no independent knowledge of the presence of drugs in Wood's home.[431]

This information supporting the warrant in *Wood* lacks the detail and weight of the information that failed to pass muster in *Davis*. Not surprisingly, the court of appeals held that the trial court erred when it denied Wood's motion to suppress.[432] The potentially significant portion of the court's reasoning in *Wood*, as in *Davis*, is the court's focus on the failure of the police to take additional investigative steps to corroborate the unidentified person's information.[433] By suppressing the evidence in cases like *Wood* and *Davis*, the court is sending a clear message: The police must make more of an effort to check out the information.

The dissent in *Wood* took issue with the criticism of the efforts by the police.[434] The dissent contended that the police had done everything

423. *Id.* at 38, 447 S.E.2d at 71.
424. *Id.* at 38-39, 447 S.E.2d at 71.
425. 214 Ga. App. 848, 449 S.E.2d 308 (1994).
426. *Id.* at 848, 449 S.E.2d at 309.
427. *Id.*
428. *Id.*
429. *Id.* at 849, 449 S.E.2d at 310.
430. *Id.*
431. *Id.* at 848, 449 S.E.2d 309.
432. *Id.* at 849, 449 S.E.2d 310.
433. *Id.*
434. *Id.* at 849-51, 449 S.E.2d at 310-11 (Andrews, J., dissenting).

they could to check the information without risking alerting Wood by, perhaps, having the reliable informant seek additional information from the unwitting unidentified person.[435] The dissent concluded, as in *Davis*, that under the totality of the circumstances, there was a fair probability the contraband would be found in Wood's house.[436] The majority's emphasis on the failure of the police to take additional steps to check the information, without citing any specific steps that should have been taken,[437] suggests that the court was troubled, in part, by a perceived lack of effort.

Both *Wood* and *Davis* should serve notice on the police that avenues for obtaining corroboration should be pursued. Search warrant affiants also might consider including an account of investigative steps considered and rejected as impractical or risky. A brief discussion of the lack of viable avenues for further investigation might allay the court's apparent concern that the police were not trying to fortify the information available but instead were presenting whatever was at hand. A showing by the affiant that effort was made to augment the information available, even if unsuccessful, might affect the court's application of the expansive totality of the circumstances test.

Another development that will affect litigation over the sufficiency of search warrant affidavits is the supreme court's decision in a case entitled *Davis v. State*.[438] In that case, the court clarified the law concerning which party has the burden of proof when a challenge is made to a warrant. The court disapproved language suggesting that the challenger of a search warrant has the burden of proof.[439] The court concluded, "[t]hus, under Georgia law, the challenger of a search warrant does not have the burden of proving its invalidity. Once a motion to suppress has been filed, the burden of proving the lawfulness of the warrant is on the state and that burden never shifts."[440]

Investigatory Stops. There were several interesting decisions concerning the propriety of investigatory stops by the police, or so-called "*Terry* stops."[441] The general rule is that police may make brief investigatory stops of persons but that the stops must be justified by "specific and articulable facts which, taken together with rational

435. *Id.* at 850-51, 449 S.E.2d at 310.
436. *Id.* at 849-50, 449 S.E.2d at 309.
437. *Id.* at 848-49, 449 S.E.2d at 309.
438. 266 Ga. 212, 465 S.E.2d 438 (1996).
439. *Id.* at 212-13, 465 S.E.2d at 439-40.
440. *Id.* at 213, 465 S.E.2d at 440.
441. Terry v. Ohio, 392 U.S. 1 (1968).

inferences from those facts, reasonably warrant that intrusion."[442] Thus, the police must have a reasonable suspicion "that criminal activity may be afoot" before briefly seizing persons for the purpose of investigation.[443]

These general principles have been applied to stops of vehicles, and several cases from the survey period involved investigatory stops of vehicles. In *Vansant v. State*,[444] the supreme court upheld a suppression of evidence because the police had an insufficient basis for stopping a vehicle. The court conducted a de novo review[445] on these uncontested facts: At a little after one in the morning on March 8, 1993, police received a call from a person who had seen Vansant, who appeared to be intoxicated, get into a white General Motors van, back into another vehicle, and drive away.[446] The caller identified himself to police, provided Vansant's name, described the color and manufacturer of the van, and indicated the direction the van was traveling.[447] The police officer responding to the call, however, only knew two facts: that a hit and run recently had occurred in the vicinity and that the suspect was in a white van.[448] Among the few vehicles on the road at that hour, the officer spotted a white van on a main road leading from the scene of the accident.[449] The officer was then provided with Vansant's name, but the officer did not know him and did not check the van's licence plate number.[450] Although the officer saw no traffic violations or damage to the white van, the officer stopped the van.[451] Indeed, the record reflected that the officer "would have stopped any white van he had seen in the area because of the proximity to the incident location."[452] The officer's observation of the van's driver after the stop lead him to conclude that Vansant was intoxicated.[453] Vansant was convicted of driving under the influence of alcohol.[454]

The court concluded that "the detaining officer did not have the requisite particularized basis for suspecting the driver of this particular

442. *Id.* at 21.
443. *Id.* at 31.
444. 264 Ga. 319, 443 S.E.2d 474 (1994).
445. *Id.* at 320, 443 S.E.2d at 475.
446. *Id.* at 319, 443 S.E.2d at 475.
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.* at 320, 321 n.2, 443 S.E.2d at 476 n.2.
451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.* at 319, 443 S.E.2d at 475.

white van of criminal activity."[455] The court found that the information possessed by the officer, which was limited to the recent, nearby occurrence of a hit and run involving a white van, was inadequate to allow a stop of the vehicle.[456] Three dissenting justices disagreed. The dissent contended that the description of a white van, the proximity in time and space to the accident, the lack of traffic, and the van's presence on a road leading from the scene were sufficient to justify the stop.[457] Obviously, this was a close case. Once again, the lesson is that the police need to try to get the extra fact that will tip the scales decidedly, such as by checking Vansant's vehicle registration. However, the press of time on the police officer often will not allow for the reflection or investigation to obtain that extra fact.

The court of appeals also decided several cases in which the police were without the facts needed to justify the stop of a vehicle. *Streicher v. State*[458] involved a stop of a pick-up truck with a driver and a passenger after a policeman on patrol saw the pick-up come to a stop on the road, after which the passenger got out and walked around the back of the truck to the driver's door while the driver slid over to the passenger's seat.[459] The police officer observed that while the original passenger walked around the truck, he got a startled look on his face when he saw the officer.[460] After the two men switched drivers, the truck turned onto a different road.[461] The policeman pulled over the pick-up and both men were charged with crimes for driving on suspended licenses, not having insurance, and possession of a small quantity of marijuana.[462]

The trial court denied defendants' motion to suppress the evidence.[463] The trial court based its ruling on the fact that defendants' "unusual behavior" of stopping to switch drivers, although apparently not criminal, aroused the police officer's suspicions.[464] The court of appeals

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455. *Id.* at 321, 443 S.E.2d at 476.

456. *Id.*

457. *Id.* at 322, 443 S.E.2d at 477 (Hunstein, J., dissenting in part).

458. 213 Ga. App. 670, 445 S.E.2d 815 (1994).

459. *Id.* at 670, 445 S.E.2d at 815.

460. *Id.*, 445 S.E.2d at 815-16. The testimony of the police officer in the trial court was unclear about why he believed he had been recognized as a law enforcement officer. At one point, the officer said he was in an unmarked car. *Id.*, 445 S.E.2d at 816. At another point, he said it was marked. *Id.* at 671, 445 S.E.2d at 816. It is possible that the officer was close enough to the pick-up truck that his uniform was visible, but this is not made clear.

461. *Id.* at 670, 445 S.E.2d at 816.

462. *Id.*, 445 S.E.2d at 815.

463. *Id.* at 671, 445 S.E.2d at 816.

464. *Id.*

reversed, holding that the stop was invalid.[465] The court focused on the officer's testimony that he was going to stop "to find out why they stopped there in the middle of the road while they changed drivers."[466] The court found this reason for stopping the pick-up inadequate, and concluded that the stop was based on a hunch rather than particular facts giving rise to an inference of criminal activity.[467] It is interesting that the court rejected the State's argument that the stop was justified because defendants' conduct violated several laws that forbid stopping on the roadway, crimes defendants were charged with *after they filed their motions to suppress.*[468] The court dismissed this argument because the police officer did not articulate stopping on the roadway as a reason for stopping the pick-up.[469] Thus, defendants' commission of crimes that the officer did not have in mind could not justify the stop.

State v. Jones[470] provides a different twist on the same theme. In *Jones*, the police officer stopped defendant when defendant excecuted a U-turn without signalling.[471] Defendant was charged with driving under the influence and turning without a signal.[472] The trial court found the stop unjustified because defendant's failure to signal was not a crime under Georgia law, which does not require a signal if no other drivers are on the road.[473] The court of appeals rejected the State's contention that the subsequent determination that the signal was not required should not invalidate the stop.[474] The State's position was really a good faith argument: If the police officer mistakenly, but in good faith, believes that conduct may violate a state law, the officer's legal mistake should not cause suppression of evidence from a stop based on that mistaken belief. The court of appeals held that the criminal activity justifying a stop must *really be* criminal activity.[475] Thus, the court in *Streicher* says that only real criminal activity, not merely criminal activity in the mind of the police, will justify a stop, and the court in *Jones* says that the criminal activity in the mind of the police must be real to justify a stop.

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465. *Id.* at 672, 445 S.E.2d at 817.
466. *Id.* at 671-72, 445 S.E.2d at 817.
467. *Id.* at 673, 445 S.E.2d at 817.
468. *Id.* at 670, 673, 445 S.E.2d at 816, 817.
469. *Id.* at 673, 445 S.E.2d at 817.
470. 214 Ga. App. 593, 448 S.E.2d 496 (1994).
471. *Id.* at 593, 448 S.E.2d at 497.
472. *Id.*
473. *Id.*
474. *Id.*
475. *Id.* at 594, 448 S.E.2d at 498.

The court of appeals also decided some cases where *Terry* stops were based on anonymous tips. The following three cases, in which the court suppressed evidence, are instructive. In *VonLinsowe v. State*,[476] the police received an anonymous call in which the caller claimed to have witnessed a drug deal. The caller gave a description of the car used by one of the parties to the drug deal, including the license plate number, and further stated that there were drugs in the car.[477] The caller also indicated the route of the car and that the driver was a white female.[478] A police car waited on the route and followed the car when it passed.[479] When the car parked at a shopping center and the driver got out, the police officer approached her and requested indentification.[480] The police officer asked for consent to search the car, and the driver refused.[481] The officer then told the driver that she would be detained while another law enforcement officer came to the shopping center.[482] The driver later consented to the search, but only after the police told her that the refusal to consent would mean a longer time in custody while a search warrant was obtained.[483] Drugs were found in the car.[484] The court of appeals held that, while the initial encounter was lawful, the police did not have a basis for detaining the driver.[485] This meant that the consent to search, even if voluntary, was tainted by the illegal detention.[486] The court emphasized that the anonymous tip was uncorroborated and did not contain information not available to the general public.[487]

McKinley v. State[488] is similar. In that case, police received an anonymous tip that four black males in a white Chevrolet Lumina van with Florida plates from Hillsborough County were selling drugs on a certain street.[489] Police spotted the van in the vicinity described and approached the two men riding in the van.[490] The driver produced a driver's license and a rental agreement for the van which did not name

476. 213 Ga. App. 619, 445 S.E.2d 371 (1994).
477. *Id.* at 619, 445 S.E.2d at 371.
478. *Id.*
479. *Id.* at 620, 445 S.E.2d at 371-72.
480. *Id.*, 445 S.E.2d at 372.
481. *Id.*
482. *Id.*
483. *Id.* at 622, 445 S.E.2d at 373.
484. *Id.* at 619-20, 445 S.E.2d at 371.
485. *Id.* at 621, 445 S.E.2d at 373.
486. *Id.* at 622-23, 445 S.E.2d at 373.
487. *Id.* at 621, 445 S.E.2d at 372.
488. 213 Ga. App. 738, 445 S.E.2d 828 (1994).
489. *Id.* at 738, 445 S.E.2d at 829.
490. *Id.*, 445 S.E.2d at 829-30.

him as the renter or additional driver.[491] The police asked whether there were drugs in the van and the driver said no.[492] The driver then consented to a search of the van.[493] The officers found cocaine in the van.[494] The court of appeals rejected the notion that the two men were not seized, finding that neither was free to leave.[495] The court also concluded that the police lacked sufficient reasons to detain the men.[496] The uncorroborated tip was insufficient to justify the stop and the consent search was therefore tainted.[497]

An unknown tipster also played a role in *State v. Sapp*.[498] The police received a report from an unidentified person that "some guys," described as "young black males," were selling drugs at a location known for such activity.[499] When the police arrived at the location, Sapp, who is a young black male, acted suspiciously by apparently starting to run and then stopping and returning.[500] The police asked for Sapp's identity and one police officer recognized Sapp as having a prior record.[501] At that point, the police directed Sapp to put his hands on a wall and police did a pat-down search that yielded a crack pipe found in Sapp's back pocket.[502] After the police discovered the pipe, Sapp admitted that he was on probation and made several very incriminating statements, such as stating that he was a "crack head."[503] The police took Sapp to jail, where he tested positive for cocaine.[504] On these facts, the trial court suppressed the evidence obtained from the encounter with Sapp, and the court of appeals affirmed.[505] First, the court of appeals found that the initial stop was invalid, "not being grounded on a legitimate articulable suspicion."[506] Second, the court found that the pat-down search leading to the discovery of the crack pipe exceeded the scope of the limited search for weapons allowed under

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491. *Id.*, 445 S.E.2d at 830.
492. *Id.* at 738-39, 445 S.E.2d at 830.
493. *Id.* at 739, 445 S.E.2d at 830.
494. *Id.*
495. *Id.*
496. *Id.* at 739-40, 445 S.E.2d at 830.
497. *Id.* at 740, 445 S.E.2d at 830-31.
498. 214 Ga. App. 428, 448 S.E.2d 3 (1994).
499. *Id.* at 428, 448 S.E.2d at 4.
500. *Id.*
501. *Id.* at 429, 448 S.E.2d at 4.
502. *Id.*
503. *Id.*
504. *Id.*
505. *Id.* at 430-31, 448 S.E.2d at 5.
506. *Id.* at 430, 448 S.E.2d at 5.

Terry.[507] Third, the court suggested that the evidence from the drug test given to Sapp would also be tainted if the police did not discover that he was on probation until after the illegal investigative stop had commenced.[508] The record was unclear on whether the drug test should be suppressed, thus the case was remanded on this issue.[509]

State v. Crisanti[510] involved an investigatory stop in another context. In that case, Crisanti and two companions named Dubnoff and Rivera purchased airline tickets for a flight from Brunswick, Georgia to San Francisco, with a stop in Atlanta.[511] As the men went through security in Brunswick, employees noticed that one of the men was carrying an electronic device in a briefcase.[512] The man with the briefcase stated that the device was for carrying jewelry and that it had an alarm that could be operated by remote control.[513] In a separate carry-on bag in the possession of one of the other men, an employee saw a large sum of currency and a jar containing white powder, which the man said was powdered caffeine.[514] The trio eventually were allowed to pass through security, but upon second thought, the employees reported to other airport officials concerning what they had seen.[515] By this time, the flight from Brunswick was in the air, so flight control advised Atlanta law enforcement officials about the situation.[516]

When the flight landed in Atlanta, officers and agents were on the tarmac to meet the plane.[517] When the men got off the plane, the agents approached and identified themselves.[518] Crisanti made several statements: He acknowledged that the briefcase, which was in Rivera's possession, contained an electronic device.[519] Crisanti explained that the device, which could emit an electronic shock, was a security device for transporting jewelry and it was operated by remote control.[520] He also said that the men were in the jewelry business and that was why they were carrying lots of cash.[521] When Crisanti said he did not know

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507. *Id.* at 431, 448 S.E.2d at 6.
508. *Id.* at 432, 448 S.E.2d at 6-7.
509. *Id.*, 448 S.E.2d at 7.
510. 220 Ga. App. 705, 470 S.E.2d 314 (1996).
511. *Id.* at 705-06, 470 S.E.2d at 315.
512. *Id.* at 706, 470 S.E.2d at 315.
513. *Id.*
514. *Id.*
515. *Id.*, 470 S.E.2d at 316.
516. *Id.*
517. *Id.*
518. *Id.*
519. *Id.*
520. *Id.*
521. *Id.*

where the remote control was, an agent patted him down, finding $10,000 in cash, but no remote control.[522] The agents declined Crisanti's offer to open the briefcase because they feared an explosive device of some sort.[523] One agent asked Crisanti if he would consent to the search of the briefcase and his carry-on bag and Crisanti answered, "[n]o problem."[524] The agents ordered Rivera to put down the briefcase and told him he was being detained while the briefcase was examined.[525] An agent, searching for the remote control, patted down Rivera; when the agent felt a rectangular object in Rivera's pocket, the agent handcuffed Rivera.[526] Meanwhile, another agent searched Dubnoff and found a crack pipe with drug residue.[527] Dubnoff was arrested and, along with his two companions, taken to the airport police department, where the agents intended to look for the remote control.[528]

At the police department, an agent asked Crisanti for permission to search his carry-on bag.[529] Crisanti gave his consent.[530] In the bag, the agent found a pair of electronic scales with white powdery residue, a woman's make-up compact with white residue, and a pill bottle with white powder in it.[531] One of the agents eventually decided to open the briefcase and found the remote control.[532]

Before trial, Crisanti moved to suppress the currency found during the pat-down on the tarmac and the items found in his carry-on bag at the police station.[533] The trial court denied the motion to suppress the currency on the ground that the pat-down occurred during a valid investigatory stop.[534] The trial court granted the motion to suppress the contents of the bag on the ground that Crisanti was arrested without probable cause at the time the bag was searched.[535] The court of appeals reversed the trial court's order suppressing the contents of the carry-on bag.[536] The court cited two reasons. The first was that the agents' removal of Crisanti from the tarmac to the police station was

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522. *Id.*
523. *Id.* at 706-07, 470 S.E.2d at 316.
524. *Id.* at 711, 470 S.E.2d at 319.
525. *Id.* at 707, 470 S.E.2d at 316.
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.*
530. *Id.*
531. *Id.*
532. *Id.*
533. *Id.*
534. *Id.*, 470 S.E.2d at 316-17.
535. *Id.*, 470 S.E.2d at 317.
536. *Id.*

reasonable and was a valid investigatory stop.[537] The court based this conclusion on the unusual circumstances confronting the agents and the high stakes involved in the work of maintaining airport security.[538] The court noted the need for the agents to find and check the remote control device: "To reasonably carry out their investigation, these officers had to carefully and cautiously search until they found this remote device."[539] Given the suspicious circumstances, including the presence of an electrical device which was said to be capable of shocking a person, the court concluded that removing Crisanti to the police station was reasonable.[540] The removal to the station was not only reasonable as a step in the investigation, but was justified by safety concerns.[541]

The second reason given by the court concerned testimony at the suppression hearing that Crisanti had consented to the search of his carry-on bag while still on the tarmac.[542] The trial court apparently discounted this testimony, but the court of appeals found it to be very important. The court of appeals reasoned that if Crisanti consented to the search while still on the tarmac, the search of the bag was valid even if the removal from the tarmac was beyond the bounds of a legal investigatory stop.[543] Interestingly, the court also suggested that the consent Crisanti, like all air travelers, gave to search his bags before boarding extended to his arrival in Atlanta.[544] The court stated that "once Crisanti presented himself at airport security in Brunswick and allowed agents to search his carry-on bag, he could not withdraw that consent until authorities were satisfied he posed no security risk."[545] In its discussion, the court did not explicitly make one other point that flows from its reasoning: If the removal of Crisanti was a valid investigatory stop, Crisanti's second consent to search, given at the police station, was valid.

The position of the dissenting judges was certainly reasonable. The key to the dissent's analysis was that the "time and scope" of the investigatory stop was not "sufficiently limited."[546] The dissent pointed out that more questioning and investigation on the tarmac may have

537. *Id.* at 707-09, 470 S.E.2d at 317.
538. *Id.* at 709, 470 S.E.2d at 318.
539. *Id.*
540. *Id.* at 710, 470 S.E.2d at 318-19.
541. *Id.* at 710-11, 470 S.E.2d at 319.
542. *Id.* at 711, 470 S.E.2d at 319.
543. *Id.*
544. *Id.* at 707-08, 712, 470 S.E.2d at 317, 319-20.
545. *Id.* at 712, 470 S.E.2d at 320 (Ruffin, J., dissenting).
546. *Id.*

been sufficient.[547] Why had the agents not allowed Crisanti to open the briefcase when he offered? Why did the agents not use a drug sniffing dog? Why was Rivera, who was carrying the briefcase, not asked about the remote control? In short, the dissent found that the investigatory stop was not minimally intrusive and exceeded the length of time necessary to fulfill the purpose of the stop.[548] As for the issue of Crisanti's consent to search, the dissent said that Crisanti had been arrested without probable cause, resulting in a taint on his consent at the police station.[549] The dissent expressed concern that the court of appeals was not deferring to the trial court's finding that the evidence did not show that Crisanti had consented while on the tarmac.[550] Furthermore, the dissent argued, even if Crisanti had consented, the agents' failure to act promptly negated the consent.[551] Although the dissent did not specifically address the majority's broad theory of consent based on a passenger's initial security check, the dissent's position on the lapsing of Crisanti's consent on the tarmac, if correct, would refute the majority on that point.

Pretextual Arrest. May the police make an arrest of a suspect, supported by probable cause, when the police would not have made the arrest but for a desire to gather evidence of another crime? In *Ortiz v. State*[552] the supreme court was confronted with that question. Police received reports that Ortiz was looking into a woman's window, but did not pursue the matter because the woman was reluctant to be involved.[553] However, the police pursued the peeping tom charge when Ortiz became a suspect in a rape investigation; the police admitted that but for the rape investigation they would not have charged Ortiz with being a peeping tom.[554] When police arrested Ortiz on the peeping tom charge, they took blood, hair, and saliva samples as part of the rape investigation.[555] After the rape victim identified a photo of Ortiz as her attacker, police obtained a warrant to search Ortiz's home and found additional evidence to support the rape charge, of which Ortiz eventually

547. *Id.*
548. *Id.* at 713, 470 S.E.2d at 320-21.
549. *Id.* at 714, 470 S.E.2d at 321.
550. *Id.* at 715, 470 S.E.2d at 322.
551. *Id.* at 714, 470 S.E.2d at 321.
552. 266 Ga. 752, 470 S.E.2d 874 (1996).
553. *See id.* at 754-55, 470 S.E.2d at 876 (Sears, J. dissenting).
554. 266 Ga. at 752, 470 S.E.2d at 875.
555. *Id.* at 755, 470 S.E.2d at 877 (Sears, J., dissenting).

was convicted.[556] The majority opinion, in somewhat cryptic language, declared that Ortiz's arrest was not pretextual.[557]

Justice Sears dissented. She contended that the arrest on the peeping tom charge clearly was pretextual inasmuch as the police admitted that the arrest would not have occurred but for the rape investigation.[558] Citing a prior decision declaring a pretextual investigatory stop impermissible, Justice Sears reasoned that a pretextual arrest is similarly impermissible.[559] Although Justice Sears's dissent has some logical force, four days after the court issued its opinion in *Ortiz*, the United States Supreme Court issued its decision in *Whren v. United States*,[560] rejecting the position that a traffic stop based on probable cause could be rendered invalid because it was pretextual. In *Whren*, the Supreme Court stated that it would not countenance complex inquiries into the motivations behind police conduct where the actions are based on probable cause: "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[561] While Georgia is free to embrace a different rule as a matter of state law, the decision in *Ortiz* does not suggest that is likely to happen.

Warrantless Arrests in the Home. In *Carranza v. State*,[562] the supreme court held:

> [W]here an individual commits an offense in his or her home and that offense is committed "in [the] presence or within [the] immediate knowledge" of a law enforcement officer, the officer is authorized to arrest the individual in the home without a warrant only where the officer's entry into the home is by consent or where there are exigent circumstances. Absent exigent circumstances or consent, a neutral officer must be allowed to assess whether the police have probable cause to make an arrest in the home.[563]

This holding resolved an important issue in Georgia. By statute, Georgia authorizes warrantless arrests for crimes where the offense is committed in the presence or immediate knowledge of the police,[564] which has been interpreted to include cases where the police overhear

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556. 266 Ga. at 755-56, 470 S.E.2d at 877.
557. *Id.* at 753, 470 S.E.2d at 875.
558. *Id.* at 757, 470 S.E.2d at 878 (Sears, J., dissenting).
559. *Id.* at 756, 470 S.E.2d at 877 (Sears, J., dissenting). *See* United States v. Smith, 799 F.2d 704, 710-11 (11th Cir. 1986).
560. 116 S. Ct. 1769 (1996).
561. *Id.* at 1771.
562. 266 Ga. 263, 467 S.E.2d 315 (1996).
563. *Id.* at 268, 467 S.E.2d at 318-19.
564. O.C.G.A. § 17-4-20(a) (1990).

a crime through a listening device concealed by an informant.[565] That is exactly what had happened in the investigation leading to Carranza's arrest.[566] The unresolved issue was whether, in the absence of exigent circumstances, the police may make a warrantless arrest in the suspect's home pursuant to the authority to make a warrantless arrest upon overhearing the commission of a crime in the home. The holding in *Carranza*, which is based on the special protections afforded a person's home, stands for the proposition that whenever circumstances permit, the state should be required to obtain a warrant so that a neutral judge may evaluate the basis for entering the home.

Good Faith Errors and the Exclusionary Rule. In 1984, the United States Supreme Court recognized a "good faith exception" to the exclusionary rule.[567] Under the good faith exception, evidence seized by police conducting a search pursuant to a warrant issued by a magistrate may be admitted at trial despite a later finding by a reviewing court that the warrant was not supported by probable cause.[568] The theory behind this exception is that as long as the police are relying in good faith and their reliance is objectively reasonable, the deterrent purpose of the exclusionary rule is not served by the exclusion of the evidence.[569] The exception is also rooted in the notion that the exclusionary rule is not aimed at modifying the behavior of magistrates, as long as they maintain their neutral, detached status.[570] The Supreme Court recently applied the good faith exception to a case where a police officer arrested the defendant based on a warrant that appeared on a computer check, but turned out to have been previously quashed.[571] In that case, the Court concluded that the error, which had been made by a court clerk, did not require exclusion of evidence found in the search incident to arrest because the police officer had relied in good faith on the erroneous computer check.[572]

Several years ago in *Gary v. State*,[573] the Georgia Supreme Court declined to adopt the good faith exception, holding that Georgia's

565. 266 Ga. at 265-66, 467 S.E.2d at 317.
566. *Id.* at 263-64, 467 S.E.2d at 316.
567. United States v. Leon, 468 U.S. 897 (1984).
568. *Id.* at 913.
569. *Id.* at 918-19.
570. *Id.* at 916-17.
571. Arizona v. Evans, 115 S. Ct. 1185 (1995).
572. *Id.* at 1194.
573. 262 Ga. 573, 422 S.E.2d 426 (1992).

statutory exclusionary rule,[574] by its terms, recognizes no exception. After the supreme court's recent opinion in *Harvey v. State*,[575] it is appropriate to ask the following question about Georgia's recognition of the good faith exception: Does she or doesn't she? In *Harvey*, a police officer arrested defendant when a computer check showed an outstanding warrant.[576] In the search incident to arrest, the police discovered cocaine.[577] It turned out the computer check was wrong; in fact, the bench warrant had been recalled four days before the arrest.[578] Harvey moved to suppress the evidence on the ground that it was seized during an unlawful arrest.[579]

The supreme court's opinion began by reaffirming its prior holding: Georgia does not recognize the good faith exception.[580] The court also noted that it was undisputed that Harvey was "not lawfully arrested pursuant to the bench warrant itself, since that bench warrant had been recalled several days before Harvey was arrested."[581] These opening points by the court seem to pre-ordain the outcome. However, in what can only be called highly questionable logic, the court concluded that the police officer had probable cause to make a warrantless arrest: "Thus, Harvey's arrest was lawful since the evidence shows that the officer was

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574. O.C.G.A. § 17-5-30 (1990). The statute provides as follows:

(a) 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.

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

(c) The motion shall be made only before a court with jurisdiction to try the offense. If a criminal accusation is filed or if an indictment or special presentment is returned by a grand jury, the motion shall be made only before the court in which the accusation, indictment, or special presentment is filed and pending.

Id.

575. 266 Ga. 671, 469 S.E.2d 176 (1996).

576. *Id.* at 671, 469 S.E.2d at 177.

577. *Id.*

578. *Id.*

579. *Id.*

580. *Id.* at 672, 469 S.E.2d at 178.

581. *Id.*

acting on reliable information that there was an outstanding felony warrant against Harvey."[582] Of course, the information was not "reliable," and the court later referred to the computer check as "misinformation."[583] Also, the court does not suggest that the arresting officer knew anything about the conduct that led to the issuance of the bench warrant. The only information the officer had was the erroneous report that there was an outstanding warrant.[584] The court's analysis sounds a lot like the analysis supporting the good faith exception, but the court's opinion insisted that the good faith exception "is not implicated by this case."[585]

Three justices dissented. In short, the dissenters accused the majority of overruling its prior ruling in *Gary* sub silentio.[586] The dissenters stated:

> [T]he majority opinion, in its effort to avoid the effect of binding precedent without facing up to the necessity of overruling it, indulges in circular reasoning: the arrest pursuant to the warrant was invalid, but the search is valid if there was probable cause to arrest, and the warrant provided that probable cause. What the majority opinion asserts, in plain language, is that the warrant, although entirely invalid, provided sufficient probable cause to arrest.[587]

The dissenters' argument is compelling. After *Harvey*, the status of the good faith exception in Georgia is uncertain. Does she or doesn't she?

Interrogation: Right to Counsel. Under *Miranda v. Arizona*[588] and *Edwards v. Arizona*,[589] police must terminate the interview of a suspect once the suspect invokes the right to counsel, and may not re-interview the suspect or initiate contacts for the purpose of obtaining incriminating statements. In *Wilson v. State*,[590] the Supreme Court of Georgia was confronted with the following situation: Wilson was convicted of murder, robbery, and kidnapping.[591] At his trial, the State introduced incriminating statements made by Wilson to a fellow inmate while incarcerated on an unrelated offense.[592] Wilson's fellow inmate

582. *Id.* at 673, 469 S.E.2d at 179.
583. *Id.*
584. *Id.*
585. *Id.* at 674, 469 S.E.2d at 179.
586. *Id.* at 675, 469 S.E.2d at 180 (Benham, J., dissenting).
587. *Id.*
588. 384 U.S. 436 (1966).
589. 451 U.S. 477 (1981).
590. 264 Ga. 287, 444 S.E.2d 306 (1994).
591. *Id.* at 287, 444 S.E.2d at 308.
592. *Id.* at 288, 444 S.E.2d at 308.

engaged Wilson in conversation at the request of state authorities.[593] By itself, the use of a jailhouse informant is unremarkable because it is settled that state authorities may initiate indirect contact with a suspect through a fellow inmate without giving *Miranda* rights to the suspect.[594] The issue concerning the use of the jailhouse informant in *Wilson* was whether the State violated the suspect's right to counsel by initiating the jailhouse contacts after the suspect had invoked his right to counsel.[595] In fact, Wilson had been interviewed by police on four occasions before the jailhouse contacts were initiated.[596] At each interview, Wilson was read his *Miranda* rights.[597] During the third interview, which occurred seven months before the jailhouse contacts, Wilson invoked his right to counsel, ending the interview.[598] The fourth interview took place at a state prison where Wilson was being held on unrelated charges.[599] That interview ended when Wilson, without explicitly invoking his right to counsel, told police he did not want to talk.[600] Within days, state officials transfered Wilson to a different prison, placing him in a cell next to the inmate who served as the informant.[601]

The supreme court upheld the admission of Wilson's statements to the jailhouse informant. The court relied on the precedents holding that police may initiate contact after the invocation of the right to counsel where there is a "break in custody."[602] The court stated:

> 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 . . . . In the instant case, there was a seven-month break in custody between [the third] interrogation when Wilson invoked his right to counsel and the time Wilson made the incriminating statements to [the informant] and Wilson did not reassert his right to counsel at the [fourth] interrogation.[603]

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593. *Id.*
594. *See* Illinois v. Perkins, 496 U.S. 292 (1990).
595. 264 Ga. at 288, 444 S.E.2d at 308.
596. *Id.* at 287-88, 444 S.E.2d at 308.
597. *Id.*
598. *Id.* at 288, 444 S.E.2d at 308.
599. *Id.*
600. *Id.*
601. *Id.*
602. *Id.* at 289, 444 S.E.2d at 309.
603. *Id.* at 289-90, 444 S.E.2d at 309 (citations omitted).

In a footnote, the court noted that there was no evidence that "Wilson's release from custody," presumably referring to the termination of the third interview at which Wilson invoked his right to counsel, was a ploy to later seek a waiver of Wilson's rights.[604]

The application of the "break in custody" exception in cases involving indirect contact by jailhouse informants is problematic. The court applied the "break in custody" exception to the subsequent statements made to a jailhouse informant despite the fact that no *Miranda* warnings are required during the undercover contacts. This is because questioning by a fellow inmate is not classified as "custodial interrogation."[605] Wilson's case is different from the major precedent on the "break in custody" exception relied upon by the court, *State v. Bymes*,[606] in which the suspect was read his *Miranda* rights before the second interview following a twenty-one month break in custody.[607] The court could have simply relied on the cases holding that questioning by a jailhouse informant is not custodial interrogation, a point raised by Justice Carley in his concurrence in *Wilson*.[608] Perhaps the court was reluctant to rely on a characterization of the state's actions as noncustodial interrogation, since the state used its custodial control of Wilson to bring him in contact with the informant. In any event, the "break in custody" theory seems most appropriate where police give *Miranda* warnings after initiating a re-interview of a suspect who previously invoked his right to counsel.

It can also be questioned whether the state's orchestrated secret contacts with Wilson amounted to the state doing indirectly what it is forbidden to do directly. Wilson had invoked his right to counsel. The state was forbidden to re-interview him unless, after a break in custody, he again was advised of his rights and waived them. The state then arranged for Wilson to come into contact with an informant who elicited statements on behalf of the state without the requirement of advising Wilson of his rights and obtaining a waiver. In discussing the "break in custody" exception, the court noted that Wilson's "release" from the third interview was not a "ploy" to set up another attempt to get him to waive his rights.[609] The troubling aspect of the result in *Wilson* is that the state's use of the informant allowed them to initiate contact with a

604. *Id.* at 290 n.3, 444 S.E.2d at 309 n.3; *see also id.* at 291, 444 S.E.2d at 310 (Carley, J., concurring specially).

605. *Id.* at 291-92, 444 S.E.2d at 311 (Carley, J., concurring specially).

606. 258 Ga. 813, 375 S.E.2d 41 (1989).

607. *Id.* at 814, 375 S.E.2d at 41.

608. 264 Ga. at 291-92, 444 S.E.2d at 311.

609. *Id.* at 290 n.3, 444 S.E.2d at 309 n.3.

suspect who had invoked his right to counsel and to do so without re-advising him of his rights. This seems to be the kind of ploy to end-run the suspect's rights that the court often rejects.

Another case involving interrogation in the absence of counsel was *State v. Hatcher*.[610] That case involved the police practice of presenting arrestees with a form on which they can request court-appointed counsel.[611] The question was whether requesting appointed counsel on the form amounted to an invocation of the right to counsel, thereby preventing questioning by the police in the absence of counsel.[612] In *Hatcher*, the defendant completed the pre-printed form, thereby adopting a statement on the form: "I CANNOT afford a lawyer to assist me. I DO WANT the Court to provide me with a lawyer."[613] Two days later, the police interviewed Hatcher after advising him of his *Miranda* rights.[614] Hatcher confessed to burglary during the interview.[615] The court held that the form was not an invocation of rights, but was "a housekeeping measure" to screen applicants for financial eligibility and a "prospective request for counsel" when court proceedings began and the Sixth Amendment right to counsel attached.[616]

B. Litigation Phase

Pretrial Proceedings: Press Coverage. In *Southeastern Newspapers Corp. v. Georgia*,[617] the supreme court approved a trial court's order closing most pretrial proceedings in a capital murder case. The trial court found that pretrial publicity threatened the fairness of the trial because prejudicial matters might be disclosed to potential jurors.[618] The supreme court applied the applicable standard under Georgia law, which states that proceedings shall be open to the press

> unless the defendant or other movant is able to demonstrate on the record by "clear and convincing proof" that closing the hearing to the press and public is the only means by which a "clear and present

610. 264 Ga. 556, 448 S.E.2d 698 (1994), *cert. denied*, 115 S. Ct. 1405 (1995).
611. 264 Ga. at 556, 448 S.E.2d at 698.
612. *Id.* at 557-58, 448 S.E.2d at 699.
613. *Id.* at 556, 448 S.E.2d at 698.
614. *Id.* at 557, 448 S.E.2d at 699.
615. *Id.*
616. *Id.* at 558, 448 S.E.2d at 699.
617. 265 Ga. 223, 454 S.E.2d 452 (1995).
618. *Id.* at 223, 454 S.E.2d at 453.

> danger" to his right to a fair trial or other asserted right can be avoided.[619]

The court noted that the burden on a movant is less at the pretrial phase because of the lack of certain alternatives to reduce the effect of publicity, such as sequestration of jurors.[620] Without much discussion, the majority concluded that the record in the trial court established clear and convincing proof that closing pretrial proceedings was the only way to ensure a fair trial.[621]

Three justices joined in a sharp dissent.[622] The essence of the dissenters' position was that the pretrial publicity leading to the trial court's order was insufficient to warrant limiting public access to the proceedings.[623] The dissenters pointed out that the trial court's order was issued because of two newspaper articles reporting on the prior day's proceedings in the case, neither of which contained inaccurate or highly prejudicial information.[624] The dissent contrasted the situation faced by the trial court with other high profile cases, including the O.J. Simpson case.[625] The dissent made a persuasive case that the evidence was insufficient to warrant closure of the proceedings. The majority's analysis would appear to apply to almost any case receiving moderate coverage by the press. Perhaps the majority decision is a sign of the increasing concern over the effects of the "media circus" surrounding the Simpson case.

Discovery. The supreme court modified the law concerning what scientific reports must be turned over to the state by the defense in *Rower v. State*.[626] The prosecution is required by statute to provide the defense with scientific reports "which will be introduced in whole or in part against the defendant by the prosecution in its case-in-chief or in rebuttal."[627] Although the statute puts no discovery obligation on the defense, the supreme court created such a duty in *Sabel v. State*.[628] However, the language in *Sabel* and other decisions appeared to create a greater discovery obligation on the defense than the state's obligation

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619. R.W. Page Corp. v. Lumpkin, 249 Ga. 576, 579, 292 S.E.2d 815, 819 (1982).
620. 265 Ga. at 223, 454 S.E.2d at 453.
621. *Id.* at 223-24, 454 S.E.2d at 453.
622. *Id.* at 224-28, 454 S.E.2d at 453-56.
623. *Id.*
624. *Id.* at 225-26, 454 S.E.2d at 454-55.
625. *Id.* at 226, 454 S.E.2d at 455.
626. 264 Ga. 323, 443 S.E.2d 839 (1994).
627. O.C.G.A. § 17-7-211(b) (1990).
628. 248 Ga. 10, 282 S.E.2d 61, *cert. denied*, 454 U.S. 973 (1981).

under the statute.[629] For example, the defense in *Rower* was ordered to turn over information without reference to whether the expert's testimony would be introduced.[630] The supreme court decision in *Rower* remedied this situation, holding that the obligations of the state and defense would be reciprocal and limited to those defined in the statute governing discovery by the state.[631]

Speedy Trial. During the survey period, the supreme court resolved several issues concerning the speedy trial rights of a criminal defendant. Under Georgia's statutory speedy trial scheme, defendants who file a demand for a speedy trial must be tried within a certain number of court terms or they are entitled to acquittal. In capital cases, a defendant must be acquitted if he demands trial and is not tried within the first two regular terms of court that are convened after the term in which the demand is filed, if juries were impaneled and qualified and the defendant is present and ready for trial.[632] In noncapital cases the rule is similar, except that the trial must occur in the term during which the demand is made or the next court term.[633] Inherent in such a statutory scheme are many difficult questions concerning compliance with the time requirements, such as deciding when the "speedy trial clock" begins to run and when it will be deemed to stop and restart.

Two such issues were resolved in *Henry v. James*.[634] The first question in *Henry* was this: In a case where a defendant files a demand

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629. 264 Ga. at 325, 443 S.E.2d at 842.

630. *Id.* at 324, 443 S.E.2d at 841.

631. *Id.* at 325, 443 S.E.2d at 841-42.

632. O.C.G.A. § 17-7-171(b) (1990). The statute provides as follows:

> 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 on the indictment.

Id.

633. O.C.G.A. § 17-7-170(b) (1990). The statute provides as follows:

> If the person is not tried when the demand is made or at the next succeeding regular court term thereafter, provided at both court terms there were juries impaneled and qualified to try him, he shall be absolutely discharged and acquitted of the offense charged in the indictment or accusation. For purposes of computing the term at which a misdemeanor must be tried under this Code section, there shall be excluded any civil term of court in a county in which civil and criminal terms of court are designated; and for purposes of this Code section it shall be as if such civil term was not held.

Id.

634. 264 Ga. 527, 449 S.E.2d 79 (1994).

for a speedy trial, and then pursues an interlocutory appeal, when does the "speedy trial clock" resume ticking after the appellate court denies the appeal?[635] This question arose because of a technicality. In *Henry*, the remittur from the court of appeals was filed in the Superior Court's clerk's office, but was not entered on the minutes of the trial court.[636] The court acknowledged that language in some prior cases seemed to suggest that the remittur must be entered on the minutes of the trial court before the clock restarts, but expressed concern that such a rule would allow the trial court to "effectively eviscerate the demand by failing to enter the remittur upon the minutes of the court."[637] The court held that "the filing of the remittur in the lower court should be the point in time at which the demand clock should resume ticking."[638]

The second question in *Henry* was how soon after the filing of the remittur the trial would have to occur.[639] The appellant argued that the clock should simply resume ticking at the point that the appeal stopped the clock.[640] The court rejected this position, noting that such a rule could create significant scheduling problems for the courts and prosecutors.[641] However, the court expressed concern that a speedy trial demand should not be ineffective because a defendant exercises the right to appeal.[642] The court held:

> [U]pon the filing of the remittur from the appellate court by the clerk's office of the trial court, the State shall have the remainder of that term and one additional regular term of court in which to try the defendant pursuant to his demand for trial, provided there are juries impaneled and qualified to try the defendant.[643]

In effect, this holding restarts the speedy trial clock after appeal in noncapital cases, as the statute imposes the same time limit at the outset of the case. However, the court's holding does strike a balance of the competing interests in capital cases, where the state is given two court terms beyond the term in which the defendant files the demand.

Another speedy trial issue confronted the court in *Rice v. State*.[644] In that capital case, defendant's lawyer filed a speedy trial demand, but

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635. *Id.* at 528-29, 449 S.E.2d at 81.
636. *Id.*
637. *Id.* at 529, 449 S.E.2d at 81.
638. *Id.* at 530, 449 S.E.2d at 81.
639. *Id.*
640. *Id.*, 449 S.E.2d at 82.
641. *Id.* at 530-31, 449 S.E.2d at 82.
642. *Id.* at 531, 449 S.E.2d at 82.
643. *Id.*
644. 264 Ga. 846, 452 S.E.2d 492 (1995).

later asked for a one-month continuance when the case was scheduled for trial during the second term of court following the demand.[645] The trial court granted the motion, but ruled that the request for continuance constituted a waiver of the speedy trial demand.[646] Although the one-month continuance expired during the same term of court, defendant was not tried in that term, or the next, as would have been required if the demand had not been deemed waived.[647] Defendant argued that because the one-month continuance did not take the case outside the term in which the continuance was granted, he was ready for trial within that term and did not waive his speedy trial demand.[648] The court declined, however, to equate the lapsing of the period of continuance with the requirement of being "present in court announcing ready for trial," as required in capital cases.[649] The court held that "any continuance granted at the defendant's request will operate as a waiver of a speedy trial demand."[650]

State v. McKnight[651] focused on a difference between the speedy trial statute governing capital cases and the speedy trial statute for noncapital cases: In noncapital cases, there is no requirement that the defendant be present in court and announce ready for trial.[652] In *McKnight*, a noncapital case, the trial court found a waiver of a speedy trial demand where defendant was present, but his lawyer was absent.[653] The court of appeals held that the absence of defendant's lawyer did not waive the demand because the lawyer reasonably believed he was "on call."[654] The supreme court noted that the statutory rule in capital cases may be superior because it requires that counsel be present in court and avoids inquiries into the reasons for counsel's absence.[655] The court stated, however, that rewriting the statute is a legislative matter.[656] Under the speedy trial statute for noncapital cases, the unjustified absence of counsel will result in a waiver, but a justified absence, as in *McKnight*, would not create a waiver.[657]

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645. *Id.* at 846-47, 452 S.E.2d at 493.
646. *Id.* at 847, 452 S.E.2d at 493.
647. *Id.*
648. *Id.*
649. *Id.*
650. *Id.*
651. 265 Ga. 701, 462 S.E.2d 142 (1995).
652. *Id.* at 702, 462 S.E.2d at 143.
653. *Id.* at 701, 462 S.E.2d at 143.
654. *Id.*
655. *Id.* at 702, 462 S.E.2d at 143.
656. *Id.*
657. *Id.*

Prosecutions of Juveniles. Like all criminal jurisdictions, Georgia is faced with the growing problem of juveniles engaged in violent crime. Like many criminal jurisdictions, Georgia has moved in the direction of dealing harshly with juvenile offenders and away from the traditional model of maintaining a wholly separate juvenile justice system aimed at rehabilitation. In *Bishop v. State*,[658] the supreme court rejected several constitutional challenges to Georgia's procedures for determining when juveniles may be tried as adults. Under the existing procedural statutes, the superior court is given exclusive jurisdiction over juveniles thirteen to seventeen years old who are alleged to have committed certain serious crimes.[659] The prosecutor is given pre-indictment discretion to decline to prosecute an eligible juvenile in the superior court, and the court is given post-indictment discretion to transfer cases to the juvenile court.[660] In *Bishop*, the supreme court held that the statutory scheme does not violate the separation of powers doctrine, the due process rights of juveniles, or the equal protection provisions of the state and federal constitutions.[661] In an eloquent concurring opinion, Chief Justice Benham called on the legislature to set statutory guidelines regulating the prosecutor's exercise of discretion in selecting the forum for prosecution.[662] The Chief Justice stated:

> As we cope with the reality that society has begotten some children who boastfully, remorselessly stride across the line which separates right from wrong, we must not forget that there are young people who only stray onto the wrong side of the law. We, as a society, must remember that some children are only strayers and we must actively work to rescue, rehabilitate, and nurture them. Our laws must give

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658. 265 Ga. 821, 462 S.E.2d 716 (1995).

659. O.C.G.A. § 15-11-5(b) (1994). The statute provides as follows:

> (1) Except as provided in paragraph (2) of this subsection, the court shall have concurrent jurisdiction with the superior court over a child who is alleged to have committed a delinquent act which would be considered a crime if tried in a superior court and for which the child may be punished by loss of life, imprisonment for life without possibility of parole, or confinement for life in a penal institution.
>
> (2) (A) The superior court shall have exclusive jurisdiction over any matter concerning any child 13 to 17 years of age who is alleged to have committed any of the following offenses: (i) Murder; (ii) Voluntary manslaughter; (iii) Rape; (iv) Aggravated sodomy; (v) Aggravated child molestation; (vi) Aggravated sexual battery; or (vii) Armed robbery if committed with a firearm.

Id.

660. *Id.*

661. 265 Ga. at 822-24, 462 S.E.2d at 717-19.

662. *Id.* at 824, 462 S.E.2d at 719 (Benham, C.J., concurring).

> direction to those responsible for the enforcement of the laws who determine which child shall be set on a course of rehabilitation in the juvenile court system, and which child shall be sent to superior court for punishment.[663]

Right to Counsel. Several decisions from the survey period addressed issues concerning the right to counsel during the litigation phase of the criminal process. In *Hasty v. State*,[664] the court of appeals reversed a kidnapping conviction because the trial court improperly required defendant to represent himself at trial, finding that defendant had not diligently attempted to retain counsel by the date of trial. Defendant had been set for trial in May 1991, at which time he was to be represented by appointed counsel.[665] Before the trial began, Hasty stated that he wanted to fire his appointed lawyer.[666] The court discharged the lawyer after Hasty asked for time to retain counsel.[667] The trial court set the trial for the following July and warned Hasty that he would be tried in July, either with his hired lawyer or pro se.[668] When Hasty, who was in custody, was brought to court in July, he had not retained counsel.[669] The trial commenced with Hasty representing himself.[670] Hasty was convicted and sentenced to life in prison.[671]

At a post-conviction hearing, evidence was presented that Hasty had, in fact, attempted to find a lawyer, but was not successful.[672] Hasty testified that when he was brought to court in July, he told the court he could not afford an attorney and wanted one.[673] The court of appeals concluded that the evidence at the hearing showed that defendant had acted with due diligence in attempting to retain a lawyer.[674] The court stated, "[t]he reason for no retained counsel was lack of funds, not lack of diligence."[675] The court of appeals expressed dissatisfaction with the trial court's handling of the matter. The court of appeals pointed out that the trial court had not inquired at the time of Hasty's first scheduled trial about how Hasty, who had been found indigent, expected

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663. *Id.*
664. 215 Ga. App. 155, 450 S.E.2d 278 (1994).
665. *Id.* at 155, 450 S.E.2d at 279.
666. *Id.* at 155-56, 450 S.E.2d at 279.
667. *Id.* at 156, 450 S.E.2d at 279-80.
668. *Id.*, 450 S.E.2d at 280.
669. *Id.* at 157, 450 S.E.2d at 280.
670. *Id.*
671. *Id.*
672. *Id.* at 156-57, 450 S.E.2d at 280.
673. *Id.* at 157, 450 S.E.2d at 280.
674. *Id.*
675. *Id.*

to hire a lawyer.[676] The court of appeals also stated that the trial court did an inadequate job of explaining the dangers of self-representation and failed to inform Hasty that if he could not afford a lawyer, one could not be appointed.[677] The court of appeals held that Hasty had not knowingly, voluntarily, and intelligently waived his right to counsel and that a new trial was necessary.[678] Trial judges have a very difficult task when faced with indigent defendants who are unhappy with their appointed counsel. Allowing clients to fire appointed counsel leads to delays and may provide a means for defendants to manipulate the system. The decision in *Hasty* is a reminder to trial judges of the care, and patience, that must be exercised in ensuring that the balance is struck between the need to expedite cases and the defendant's right to counsel.

The court of appeals ruled on another right to counsel issue in *Parker v. State*.[679] In *Parker*, defendant testified in his own defense, completing his direct testimony on a Friday afternoon.[680] The trial judge ordered defense counsel not to consult with defendant about his testimony during the weekend recess.[681] The court of appeals noted that the United States Supreme Court has held that an order preventing any consultation during an overnight recess violates the right to counsel,[682] but that the Court has held there is no violation when a judge enters a similar order during a short recess.[683] In *Parker*, the rule relating to overnight recesses, which is designed to allow full consultation on trial related matters, obviously was the relevant rule.[684] Thus, the trial court should not have issued the order restricting defendant's consultations with his attorney during the weekend break. However, the court of appeals refused to reverse defendant's conviction on this basis because there was no objection to the order and no indication in the trial record that any consultation was desired.[685] The court dismissed defendant's post-trial testimony, in which he claimed that he had wanted to confer with his lawyer over the

676. *Id.* at 156, 450 S.E.2d at 280.
677. *Id.*
678. *Id.* at 159, 450 S.E.2d at 281-82.
679. 220 Ga. App. 303, 469 S.E.2d 410 (1996).
680. *Id.* at 304, 469 S.E.2d at 412.
681. *Id.*
682. *Id.*, 469 S.E.2d at 413. *See* Geders v. United States, 425 U.S. 80 (1976).
683. 220 Ga. App. at 304, 469 S.E.2d at 413. *See* Perry v. Leeke, 488 U.S. 272 (1989).
684. 220 Ga. App. at 305, 469 S.E.2d at 413.
685. *Id.* at 304-05, 469 S.E.2d at 413.

weekend recess.[686] The court stated that this testimony "was given long after the fact and does not serve to resurrect this claim."[687]

Another right to counsel decision, *Johnson v. State*,[688] is of a very rare species. *Johnson* reversed a conviction based on a claim of ineffective assistance of counsel.[689] Johnson was convicted of murder despite a claim of was self defense.[690] Johnson's lawyer knew of evidence of other acts of violence by the victim, but thought the evidence inadmissible and cumulative, and therefore did not file the notice required before presenting such evidence.[691] The court of appeals applied the familiar test of *Strickland v. Washington*:[692] Did counsel's performance fall below an objective standard of reasonableness and thereby prejudice his defense?[693] As for the first prong of the test, the court concluded that the lawyer's error was so bad that it was outside the broad range of professional conduct.[694] The court was troubled by the lawyer's failure to marshall evidence going to the heart of the defense as well as the lawyer's inept post-trial explanations.[695] The court was blunt: "Counsel was clearly unprepared to defend appellant."[696] The court's finding on the second prong of the *Strickland* test was equally unusual. The defendant must demonstrate that there is a reasonable probability that counsel's performance changed the outcome of the trial.[697] The court concluded that the evidence of the victim's prior violence may well have resulted in acquittal or conviction on a lesser offense.[698] Therefore, the court reversed the conviction, finding the trial court's contrary ruling to be clearly erroneous.[699] The *Strickland* test has been criticized as a paper tiger. The reluctance of courts to engage in Monday-morning quarterbacking is part of the reason why many apparent lawyering errors are held to be within the range of competent conduct or are dismissed as harmless. The decision in

686. *Id.*
687. *Id.*
688. 266 Ga. 380, 467 S.E.2d 542 (1996).
689. *Id.* at 381-82, 467 S.E.2d at 544.
690. *Id.* at 380-81, 467 S.E.2d at 543-44.
691. *Id.* at 382, 467 S.E.2d at 544.
692. 466 U.S. 668 (1984).
693. 266 Ga. at 381, 467 S.E.2d at 544.
694. *Id.* at 383, 467 S.E.2d at 545.
695. *Id.* at 382-83, 467 S.E.2d at 545.
696. *Id.* at 383, 467 S.E.2d at 545.
697. *Id.*
698. *Id.*
699. *Id.*

Johnson may mean that successful claims of ineffective assistance of counsel in Georgia will not be so rare as to be virtually extinct.

Guilty Pleas. Guilty pleas play a critical role in the criminal justice system. The vast majority of criminal cases are disposed of through this mechanism. In *State v. Evans*,[700] the supreme court interpreted Uniform Superior Court Rule 33.9, which states, "[n]otwithstanding the acceptance of a plea of guilty, the judge should not enter a judgment upon such plea without making such inquiry on the record as may satisfy him that there is a factual basis for the plea."[701] In *Evans*, the court was faced with a case where the plea hearing contained no statements by anyone as to the facts of the alleged rape.[702] The legal question before the court was whether Uniform Superior Court Rule 33.9 is mandatory, thereby requiring the trial court to follow it.[703] The supreme court held that the rule was mandatory and that trial courts are obliged to inquire as to the factual basis during the plea hearing.[704] The supreme court offered some guidance for trial courts concerning compliance with the rule. The court stated that the law "would clearly permit a trial court to glean the factual basis for a plea from facts put on the record at the guilty plea hearing, such as through the trial court questioning the defendant or through the prosecutor stating what he expected the evidence to show at trial."[705] The court expressed its preference for trial courts to engage defendants in a colloquy to establish the factual basis for the plea.[706] The court also indicated that it is permissible for the trial court

> to learn the factual basis from material contained in parts of the record other than the guilty plea hearing so long as the trial court makes clear on the plea hearing record that he is relying on those parts of the record and so long as those parts of the record are made part of the record for appeal.[707]

The court also stated that there is no requirement that the trial court affirmatively state its finding that the factual basis is sufficient.[708]

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700. 265 Ga. 332, 454 S.E.2d 468 (1995).
701. *Id.* at 332, 454 S.E.2d at 470.
702. *Id.*
703. *Id.* at 333, 454 S.E.2d at 471.
704. *Id.* at 333-34, 454 S.E.2d at 471.
705. *Id.* at 334-35, 454 S.E.2d at 472.
706. *Id.* at 335 n.1, 454 S.E.2d at 472 n.1.
707. *Id.* at 335, 454 S.E.2d at 472.
708. *Id.*

There was one final lesson in *Evans*. Despite finding a clear failure to follow Rule 33.9, the court refused to allow defendant to withdraw his plea of guilty, finding that defendant had not demonstrated "manifest injustice."[709] The court based this holding on the presence in the record of an affidavit of an investigator which, although not part of the plea hearing, described the rape victim's version of the crime.[710] The court stated that although the affidavit could not cure the violation of Rule 33.9, it could be relied upon in the analysis of the manifest injustice issue.[711] Thus, while Evans encourages trial courts to carefully abide by Rule 33.9, it signals that reversals for violating the rule will be infrequent, because other portions of the record, perhaps added for this purpose, will serve to assure the appellate courts of the defendant's factual guilt.

State v. Barrett[712] addressed the issue of whether the state and a defendant may enter into a plea agreement including a provision that the defendant will waive the statute of limitations as to charges dismissed as part of the plea agreement, thereby allowing the charges to be reinstated after the normal period of limitations in the event of a breach by the defendant.[713] In 1991, Tommy Lee Barrett, the Mayor of the City of Baldwin, was indicted on six counts charging various theft crimes.[714] Barrett entered a guilty plea to two counts pursuant to a plea agreement.[715] Under the agreement, the other counts were dismissed.[716] However, the agreement also provided that defendant would resign his post as mayor and "never again seek, run for, nor accept election or appointment to any public office."[717] To enforce this promise, Barrett agreed that if he ever defaulted on the agreement, the state would be allowed to prosecute him "regardless of any statute of limitations, right to speedy trial, or any other bar to prosecution."[718]

Barrett was discharged from probation in 1992.[719] In 1993, Barrett was elected again as Mayor of Baldwin.[720] A few weeks later, Barrett was re-indicted on all charges; the State conceded that the normal

709. *Id.* at 336-37, 454 S.E.2d at 473.
710. *Id.* at 332, 336-37, 454 S.E.2d at 470, 473.
711. *Id.* at 336, 454 S.E.2d at 473.
712. 215 Ga. App. 401, 451 S.E.2d 82 (1994).
713. *Id.* at 404-07, 451 S.E.2d at 85-87.
714. *Id.* at 401, 451 S.E.2d at 83.
715. *Id.*
716. *Id.*
717. *Id.*, 451 S.E.2d at 83-84.
718. *Id.*, 451 S.E.2d at 84.
719. *Id.*
720. *Id.*

statute of limitations period had expired.[721] The court upheld the validity of the plea agreement, stating, "[w]e see no absolute bar to a defendant's waiver of the protection afforded him by the statutes of limitation."[722] The court further stated, "[a]s Barrett can and did waive the statutes of limitation, the indictments can proceed without regard to the periods of limitation."[723] There were two limitations to this holding. First, as to the two counts to which Barrett pleaded guilty and completed his sentence of probation, the court ruled that reprosecution on those counts would constitute double jeopardy and an invasion of the court's sentencing authority.[724] This was an important qualification to the court's reasoning, because it meant that Barrett could only be reprosecuted on the charges dismissed at the time of the plea agreement. This seems a curious result. It means that the state would have no way to enforce its agreement if Barrett had pleaded guilty to all the charges. If Barrett received his original sentence in the context of a plea agreement, why is it unfair to reprosecute on the counts to which he pleaded guilty? In fact, Barrett had agreed to this result in the plea agreement by waiving the right to raise *any* bar to prosecution, which includes the double jeopardy bar. The other limitation on the court's holding was that the court left open the question of whether plea agreements may contain provisions of unlimited duration, such as Barrett's promise that he would never seek office.[725] The court found that the agreement in *Barrett* was acceptable because it was within the ten-year bar from seeking office allowed in the Georgia constitution.[726]

Venue. In *Mega v. State,*[727] the court of appeals issued a reminder to prosecutors and pointed to an opportunity for defense attorneys. The reminder to prosecutors was this: Don't forget to offer evidence establishing venue! The opportunity for defense counsel is that a prosecutor who forgets to prove venue has a fatally defective case. In *Mega*, defendant was charged with selling beer to an underage person in Cobb county.[728] The testimony identified the address of the package store ("2084 South Cobb Drive . . . right off Pat Mell Road") and the fact that the investigators were with the Cobb County Police Depart-

721. *Id.* at 401-02, 404, 451 S.E.2d at 84, 85.
722. *Id.* at 405, 451 S.E.2d at 86.
723. *Id.* at 406, 451 S.E.2d at 87.
724. *Id.* at 403, 451 S.E.2d at 84.
725. *Id.* at 404, 451 S.E.2d at 86.
726. *Id. See* GA. CONST. 1983, art. II, § 2, para. 3.
727. 220 Ga. App. 481, 469 S.E.2d 771 (1996).
728. *Id.* at 481-82, 469 S.E.2d at 771-72.

ment.[729] Although defendant did not challenge venue at trial, the court of appeals held that the evidence was insufficient to allow a rational trier of fact to find beyond a reasonable doubt that the crime occurred in Cobb County.[730] The court reached this conclusion despite some prior precedent suggesting that slight evidence is sufficient to prove venue when the defendant does not challenge venue at trial.[731] The court also declined the State's invitation to take judicial notice of the location of the package store.[732]

Double Jeopardy/Due Process. The supreme court's decision in *Griffin v. State*[733] addressed several thorny issues concerning double jeopardy and due process. In 1992, Griffin was indicted in McIntosh County for the murder of Jenny Rhames.[734] The prosecution did not seek the death penalty.[735] Griffin's first trial ended in a mistrial and the State reindicted Griffin for murder, intending to try him again.[736] When the trial court denied Griffin's plea of former jeopardy, Griffin appealed.[737] While that appeal was pending, prosecutors in Thomas County charged Griffin with murdering and kidnapping Jenny Rhames and announced they were seeking the death penalty.[738] After the court of appeals denied the former jeopardy claim and remitted the case to the court in McIntosh County, the prosecution dismissed the case.[739] When the Thomas County prosecution proceeded, Griffin filed an interim appeal.[740]

The first issue was whether the Thomas County murder charge should have been quashed.[741] Because the Thomas County murder charge was filed while the McIntosh County murder charge was still pending, the supreme court ruled that the Thomas County charge must be quashed.[742] The subsequent dismissal of the McIntosh County charge did not matter; the Thomas County charge was invalid because it was

729. *Id.* at 482, 469 S.E.2d at 772.
730. *Id.*
731. *Id.*
732. *Id.*
733. 266 Ga. 115, 464 S.E.2d 371 (1995).
734. *Id.* at 115, 464 S.E.2d at 372.
735. *Id.*
736. *Id.*
737. *Id.*
738. *Id.*
739. *Id.* at 116, 464 S.E.2d at 373.
740. *Id.* at 115, 464 S.E.2d at 372.
741. *Id.*
742. *Id.* at 115-16, 464 S.E.2d at 373.

initiated during the pendency of the McIntosh charge.[743] The court stated: "To permit this action to proceed under the present indictment would erode the protection of criminal defendants from having to defend themselves simultaneously in two State courts for the same alleged offense."[744] The court also pointed out that Griffin's appeal in the McIntosh County case was a double jeopardy claim and that allowing Thomas County to proceed with a murder charge would force Griffin to defend against a charge involving the same murder before his double jeopardy claim was resolved.[745] While the court quashed the murder charge, its ruling was not much of a victory for Griffin. The court made it clear that the state was free to reindict Griffin for murder in any county having jurisdiction, including Thomas County.[746]

A second issue was whether the kidnapping charge filed in Thomas County, which had exclusive venue of the kidnapping crime, was procedurally barred.[747] Griffin argued that the State violated the "single prosecution" requirement of O.C.G.A. section 16-1-7(b), which requires that, if possible, all crimes arising out of the same conduct be brought in a single case.[748] Griffin contended that it was improper to indict him for murder in one county and kidnapping in another when both charges could have been brought in one jurisdiction.[749] The supreme court rejected this argument, holding that O.C.G.A. section 16-1-7(b) did not require that the murder charge be brought in the same county as the kidnapping charge.[750] Three justices dissented on this point, stating that they would interpret the statute so that the state would be required to bring all the related charges in one jurisdiction.[751]

The third issue was whether the State's filing of the kidnapping charge or its decision to seek the death penalty were improper. Griffin argued that both actions were vindictive and that the decision to seek

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743. *Id.* at 116, 464 S.E.2d at 373.

744. *Id.*

745. *Id.*

746. *Id.* at 117, 464 S.E.2d at 373.

747. *Id.*

748. *Id.* *See* O.C.G.A. § 16-1-7(b), which states as follows:

> 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.

O.C.G.A. § 16-1-7(b) (1996).

749. 266 Ga. at 117, 464 S.E.2d at 374.

750. *Id.* at 118, 464 S.E.2d at 374.

751. *Id.* at 121-22, 464 S.E.2d at 376-77 (Thompson, J., concurring in part and dissenting in part); *id.* at 125-27, 464 S.E.2d at 379-80 (Fletcher, P.J., dissenting in part).

the death penalty created double jeopardy.[752] As for the claim that the State was violating Griffin's due process rights by vindicative prosecution, the court concluded that Griffin's rights were not violated.[753] The court said the kidnapping charge was a separate offense from the murder charge and that the State was not obligated to bring the charges together.[754] The court also said that the decision to seek the death penalty was not a vindictive effort by the State to punish Griffin, reasoning that this was unlike a case where the state "ups the ante" after a successful appeal by a defendant.[755] In this case, the court stated, the event that created the opportunity to seek an enhanced penalty was a mistrial, which "is not subject to chilling as is the exercise of the right to appeal."[756] Two of the dissenters disagreed, arguing that the lodging of the kidnapping charge and the decision to seek the death penalty should be presumed to be vindictive.[757]

The remaining argument was Griffin's claim that the decision to seek the death penalty constituted double jeopardy because the State did not seek the death penalty in the original McIntosh County case. This was an issue of first impression.[758] Griffin argued that the failure of the State to seek the death penalty at the first trial should be treated as a concession that the State could not prove the aggravating circumstances required to obtain the death penalty.[759] The court rejected this claim, holding that the mistrial did not say anything about whether the State had sufficient evidence to establish the required aggravating circumstances.[760] Justice Sears dissented on this holding, stating that she believed the double jeopardy clause prevents the State from seeking the death penalty in the second trial, especially in light of the tactical advantages of having seen Griffin's defense in the first trial.[761]

The most troubling aspect of the *Griffin* case is the court's analysis of the State's decision to seek the death penalty in the second case. As the dissent pointed out, there was no new evidence or other justification for the State's changed position concerning the death penalty.[762] The only intervening events were that the McIntosh County trial ended in a

752. *Id.* at 118-21, 464 S.E.2d at 375-76.
753. *Id.* at 119, 464 S.E.2d at 375.
754. *Id.* at 118-19, 464 S.E.2d at 375.
755. *Id.* at 120, 464 S.E.2d at 376.
756. *Id.*
757. *Id.* at 122-25, 464 S.E.2d at 377-79 (Fletcher, P.J., dissenting in part).
758. *Id.* at 119, 464 S.E.2d at 375.
759. *Id.*
760. *Id.*
761. *Id.* at 127-28, 464 S.E.2d at 380-81 (Sears, J., dissenting).
762. *Id.* at 124-25, 464 S.E.2d at 379 (Fletcher, P.J., dissenting in part).

mistrial and that Griffin had pursued an appeal. This appears to be an appropriate situation to presume vindictiveness by the prosecution and to require that presumption to be effectively rebutted. This seems particularly appropriate where the state "ups the ante" by deciding to pursue the death penalty. As Justice Fletcher argued in dissent, Griffin probably felt minimal pressure to plead guilty after the mistrial, but "a defendant newly confronted with even a remote chance of execution may feel forced to plead guilty and accept a life sentence."[763]

The were several other noteworthy cases addressing double jeopardy issues. *Bailey v. State*[764] presented the question whether there was "manifest necessity" for declaration of a mistrial, thereby allowing a retrial without implicating the double jeopardy bar. What was unusual was that *Bailey* involved a mistrial declared at a *bench trial*.[765] Bailey was charged with driving under the influence, and had a bench trial in August 1994.[766] During the brief trial, Bailey challenged the admissibility of the blood alcohol test.[767] The judge took the motion and the verdict under advisement. In November 1994, the court ruled that the test results were inadmissible and that the court could not remove the test results from its consideration of the case.[768] Therefore, the court, on its own motion, declared a mistrial.[769] Bailey, who had not requested or consented to the mistrial, argued that a retrial would be double jeopardy.[770] The court of appeals noted that "[i]t is highly unusual for a judge to declare that he is unable to disregard inadmissible evidence."[771] The court concluded, however, that "the trial judge's inability to disregard evidence he ruled inadmissible constitutes a manifest necessity for a mistrial."[772] The dissent argued that the problem that caused the mistrial was not the sort of unforeseeable event that amounts to manifest necessity.[773] The dissent also took the trial judge to task for the long delay in reaching the decision to declare a mistrial.[774] One dissenter expressed concern that the judge had conceded he could not be fair, stating,

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763. *Id.* at 124, 464 S.E.2d at 379.
764. 219 Ga. App. 258, 465 S.E.2d 284 (1995).
765. *Id.* at 259, 465 S.E.2d at 285.
766. *Id.*
767. *Id.*
768. *Id.*
769. *Id.*
770. *Id.*
771. *Id.* at 261, 465 S.E.2d at 286.
772. *Id.*
773. *Id.* at 261-62, 465 S.E.2d at 287 (Blackburn, J., dissenting); *id.* at 262-63, 465 S.E.2d at 287, 288 (Ruffin, J., dissenting).
774. *Id.*

> a judge trained in the law is expected to be able to distinguish between admissible and inadmissible evidence. While the trial court's candor is commendable, this is not a case where the inadmissible evidence is so emotionally charged that no reasonable person could disregard it. If the ability to make this distinction is not required of trial courts as a matter of course, how can we ever expect a jury to follow a trial court's curative instructions to disregard evidence in similar circumstances?[775]

That question really goes to the crux of the matter. The ruling in *Bailey* recognizes that judges sometimes have a hard time compartmentalizing admissible and inadmissible proof, just like lay jurors. One gets the impression that the court of appeals, which called the situation "highly unusual," was discouraging this sort of judicial conduct and hoping that such conduct would remain "highly unusual."[776] This case provides an interesting perspective on a major premise of our system of trials: the presumption that the trier of fact can disregard inadmissible material. That presumption is vital to the ability of the criminal justice system to dispose of cases. *Bailey* is a case in point. Because the judge was unable to disregard the evidence, a new trial was needed to cure the prejudice. Has the need to process cases caused the system to be grounded on a presumption that in many cases is a myth and a fiction? Consider the evidence in *Bailey*. When deciding whether to convict Bailey of drunk driving, could the judge put out of mind the fact that Bailey had flunked the blood test? Our system embraces the belief that judges can do that. The ultimate result in *Bailey* was that defendant was to have a new trial before a jury that would not be told about the blood test. Given the judge's forthright concern about his ability to be fair, that seems the better result. Perhaps the court should have been more supportive of the judge's decision.

In *State v. Williams*,[777] the court of appeals also confronted the double jeopardy issue that arises in prosecutions for serious offenses arising out of the operation of motor vehicles. Like most states, Georgia allows citations to be issued for traffic offenses, and these citations are often resolved with dispatch. When more serious charges relating to the same conduct are filed, the defendant can argue that the penalty recieved on the traffic citation creates a double jeopardy bar to prosecution on more serious charges. The traditional test is the *Blockburger*[778]

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775. *Id.* at 263, 465 S.E.2d at 288 (Ruffin, J., dissenting).
776. *Id.* at 261, 465 S.E.2d at 286.
777. 214 Ga. App. 701, 448 S.E.2d 700 (1994).
778. Blockburger v. United States, 284 U.S. 299 (1932).

test, which states that crimes are separate for double jeopardy purposes if each offense requires proof of an element or fact that the other does not.[779]

In *Williams*, defendant was issued a citation for improper passing after he was involved in a traffic collision.[780] The day after the collision, warrants were issued for improper passing and serious injury by vehicle.[781] When the injured victim of the crash died, the warrant for serious injury by vehicle was lifted and a warrant for vehicular homicide was issued.[782] However, the original citation for improper passing was not lifted.[783] Defendant appeared in probate court, pleaded guilty to the improper passing citation, and paid a fine of forty-eight dollars.[784] When the State indicted defendant for improper passing and vehicular homicide, defendant argued double jeopardy.[785] Under the *Blockburger* test, the charge of improper passing, the very charge to which the guilty plea was entered, was barred.[786] As for the vehicular homicide charge, that was also barred because "proof of improper passing requires proof of no element or fact which is not also necessary to prove vehicular homicide, and the former is necessarily a lesser included offense of the latter."[787]

Four judges joined a dissenting opinion.[788] The dissent expressed concern that defendant had escaped a prosecution for vehicular homicide by paying a forty-eight dollar fine. The dissent tried mightily to find a way around the majority's straightforward application of the *Blockburger* test. The dissent argued that defendant was not "prosecuted" when he went to probate court; that the probate court had exclusive jurisdition over the matter, rendering the superior court's double jeopardy ruling a nullity, and even that defendant's plea in the probate court was not knowingly and voluntarily entered.[789] The dissenters' frustration was understandable, even if the arguments were unavailling. Given the

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779. The United States Supreme Court, in a case arising in a successive prosecution under Florida's system of prosecuting traffic related offenses, expanded double jeopardy protections of *Blockburger* in 1990. Grady v. Corbin, 495 U.S. 508 (1990). However, that experiment was short-lived. The court overuled *Grady v. Corbin* in 1993, restoring the *Blockburger* test as the exclusive test. United States v. Dixon 509 U.S. 688 (1993).

780. 214 Ga. App. at 701, 448 S.E.2d at 700. *See* O.C.G.A. § 40-6-44.

781. *Id. See* O.C.G.A. § 40-6-394 (1996).

782. 214 Ga. App. at 701-02, 448 S.E.2d at 700. *See* O.C.G.A. § 40-6-393(b).

783. 214 Ga. App. at 702, 448 S.E.2d at 701.

784. *Id.*

785. *Id.*

786. *Id.*

787. *Id.*

788. *Id.* at 702-04, 448 S.E.2d at 701-02.

789. *Id.*

current state of double jeopardy law, the focus must be on ensuring vigilance on the part of the law enforcement establishment in the management of the two-tiered traffic court system.

A final noteworthy double jeopardy decision was issued in *Preist v. State*.[790] Defendant was acquitted of malice murder, but found guilty of felony murder, predicated on the commission of the felonies of armed robbery and aggravated assault.[791] The trial court granted defendant's motion for a new trial, finding that the evidence was insufficient to prove the predicate felonies of armed robbery and aggravated assault.[792] Defendant subsequently sought to bar his further prosecution for felony murder.[793] The trial court denied the double jeopardy motion, but certified its ruling for interlocutory review.[794] The supreme court reversed, holding that the trial court's findings that the evidence was insufficient precluded further prosecution under the double jeopardy doctrine.[795]

Peremptory Challenges: *Batson*. The criminal justice system's struggle to deal with racial bias is graphically illustrated by litigation over allegations that peremptory challenges are being used to strike prospective jurors on account of their race. In *Batson v. Kentucky*,[796] the United States Supreme Court held that the Equal Protection Clause precluded a prosecutor from striking prospective jurors on account of their race.[797] Under the now familiar procedure, if the party raising the *Batson* objection makes a prima facie case that a peremptory challenge was racially motivated, the burden shifts to the party making the challenge to provide a race-neutral explanation for the strike.[798] Experienced litigators know that the *Batson* procedure is not without problems. One problem is that the proceedings can become emotionally charged; no one likes to be called a racist. Another problem is that the required threshold prima facie showing by the moving party is not

790. 265 Ga. 399, 456 S.E.2d 503 (1995).
791. *Id.* at 399, 456 S.E.2d at 504.
792. *Id.*
793. *Id.*
794. *Id.*
795. *Id.* at 399-400, 456 S.E.2d at 504.
796. 476 U.S. 79 (1986).
797. Since *Batson*, it has been held that the prohibition against racially motivated peremptory challenges also applies to the defendant. Georgia v. McCollum, 505 U.S. 42 (1992). The prohibition has also been expanded to apply to peremptory challenges motivated by factors other than race. *See, e.g.*, Hernandez v. New York, 500 U.S. 352 (1991) (Hispanics); J.E.B. v. Alabama, 511 U.S. 127 (1994) (gender).
798. *Batson*, 476 U.S. at 97.

difficult to meet. In fact, upon the making of a *Batson* motion, many trial judges simply assume a prima facie case has been made and protect the record by requiring race-neutral explanations to be stated. The third problem is that even a racially motivated attorney will rarely be at a complete loss to suggest a reason for the strike that is race neutral, and sorting the sincere reasons from the pretextual is difficult for the court. It is a rare case in which there is a "smoking gun" that clearly establishes the racial motivation behind the strike. Furthermore, the court's task is complicated because the race-neutral explanation for a peremptory challenge does not have to rise to the level of a challenge for cause. The Supreme Court recently emphasized the minimal nature of the required explanation, stating that race-neutral reasons need not be persuasive or even plausible, although the implausibility of the reason may be considered in determining whether the strike amounted to purposeful racial discrimination.[799] *Batson* litigation is a thicket.

Three cases from the survey period serve to demonstrate the difficulties of *Batson* litigation and how the Georgia courts have addressed the problems. In *Smith v. State,*[800] the supreme court rejected several *Batson* claims, finding that the trial court's acceptance of the prosecutor's race-neutral reasons was not clearly erroneous. In *Smith*, defendant challenged the following explanations: that a potential juror lived in public housing; that a potential juror lived near defendant, the witnesses, or the crime scene; and that a potential juror was divorced or childless.[801] Defendant claimed that these reasons were pretextual and, in the case of the explanations concerning where the jurors lived, facially obvious surrogates for race.[802] Defendant bolstered his argument by pointing out that the prosecutor did minimal questioning of the black prospective jurors and failed to strike some white jurors who had the race-neutral traits that had been used to justify the strikes of black jurors.[803] The supreme court, reviewing the record under the deferential clear error standard, upheld the trial court's conclusion that the peremptory challenges were not racially motivated.[804] The record in *Smith* included a thorough account of the prosecutor's reasons for striking some jurors and not others.[805] One clear lesson of *Smith* is that when a *Batson* issue arises, the trial court should carefully develop the record concerning the basis for peremptory challenges. That did not

799. Purkett v. Elem, 115 S. Ct. 1769 (1995).
800. 264 Ga. 449, 448 S.E.2d 179 (1994).
801. *Id.* at 449, 451-52, 448 S.E.2d at 181-82.
802. *Id.* at 450-53, 448 S.E.2d at 181-83.
803. *Id.* at 452-53, 448 S.E.2d at 182-83.
804. *Id.* at 454, 448 S.E.2d at 184.
805. *Id.* at 450-53, 448 S.E.2d at 181-83.

occur in *Smith* until there was a remand for that purpose.[806] The better practice would be to develop the record during jury selection, so that the statements of counsel are spontaneous and untainted by after-the-fact justification.

Two court of appeals decisions from the survey period contrast with *Smith*. In *Parker v. State*,[807] the court reversed defendant's robbery convictions because the prosecutor improperly used peremptory challenges to strike black jurors. During jury selection, the State had used four of its six peremptory challenges against black prospective jurors.[808] As often happens, the issue of whether Parker had met the threshold requirement of a prima facie case was moot because the trial court went forward and elicited the prosecutor's reasons.[809] The prosecution explained that it struck one black juror because the juror was a college student studying criminal justice, and the prosecution feared that the student "would take a microscopic view of the evidence" and "an extremely narrow perspective of reasonable doubt."[810] The court of appeals affirmed the trial court's finding that this was a sufficient race-neutral explanation.[811]

With respect to the other three jurors, the court of appeals held that the trial court's acceptance of the prosecutor's reasons constituted clear error.[812] According to the court, the prosecutor's reasons for striking the three jurors were nothing more than guesses about the jurors' attitudes based on their demeanor, and failed to overcome the prima facie showing of racial motivation.[813] The prosecutor stated that one juror was unhappy to be a juror, inattentive, unfocused, and hostile.[814] Another juror was said to be dour, frowning, and refused to make eye contact with the prosecutor, who concluded that the juror was annoyed to be called to court.[815] The third juror seemed to be sleeping and had been a babysitter for relatives of a fellow prosecutor.[816] The court of appeals was "troubled by such complete reliance on bare hunches drawn from jurors' demeanor and the apparent absence of any inquiry into

806. *Id.* at 449, 448 S.E.2d at 180.
807. 219 Ga. App. 361, 464 S.E.2d 910 (1995).
808. *Id.* at 362, 464 S.E.2d at 911.
809. *Id.*
810. *Id.*
811. *Id.*
812. *Id.* at 363-64, 464 S.E.2d at 912.
813. *Id.*
814. *Id.* at 362-63, 464 S.E.2d at 911.
815. *Id.* at 363, 464 S.E.2d at 912.
816. *Id.* at 362, 464 S.E.2d at 911.

whether these jurors actually held any biases."[817] The court stated that the prosecutor's reasons "reflected unacceptable stereotypical attitudes as to particular groups."[818] The court also stated that it failed to see how the reasons were related to the case.[819]

One may question whether the court of appeals was sufficiently deferential to the trial judge. The court of appeals seems to have engaged in a practice like the one it was criticizing, namely judging the attitude of the prosecutor on scant evidence. Indeed, the court of appeals did this without the benefit of personally observing the prosecutor and the jurors demeanor, something the trial judge had the opportunity to do. When the prosecutor presents the reasons for a strike, the trial judge, to some extent, is making a credibility determination. This is the sort of determination appellate courts rarely reverse as clear error. Of course, the court of appeals could objectively evaluate the prosecutor's statements. But even on this score, questions may be raised. Trial lawyers know that jury selection, or, as it is sometimes called, de-selection, involves trying to eliminate jurors whose attitudes may prevent them from being fair. Prosecutors worry about the common problem of jurors who are angry over having to serve or who harbor attitudes hostile to the criminal justice system. That concern is legitimate, and it is difficult to say it does not "relate to the case." As for the failure to inquire further, specific questions going to bias ("Are you angry about being called for jury duty?") are rarely fruitful and may serve to alienate the questioned juror and the jury panel. As the concurring opinion in *Parker* pointed out, recent federal precedent, not cited by the majority, would have required affirmance.[820] The concurring opinion characterized the judgment in *Parker* as being based on prior Georgia opinions establishing a requirement that the reasons for a peremptory challenge be "case related."[821] Recognizing the *Batson* thicket, the concurring opinion joined those who have expressed the view that the best course would simply be to eliminate the peremptory challenge.[822]

Another court of appeals decision concerning *Batson* issues was *Mattison v. State*.[823] In that case, the venire included eighteen blacks

817. *Id.* at 363, 464 S.E.2d at 912.
818. *Id.*
819. *Id.*
820. *Id.* at 364-65, 464 S.E.2d at 913 (Pope, P.J., concurring specially). *See* Purkett v. Elem, 115 S. Ct. 1769 (1995).
821. *Id.*
822. *Id.* at 365, 464 S.E.2d at 913.
823. 215 Ga. App. 635, 451 S.E.2d 807 (1994).

and seventeen whites.[824] Eight blacks ended up on the jury; one other black served as an alternate.[825] The prosecution used five of its six peremptory challenges against black prospective jurors.[826] The court of appeals stated, "[t]his overwhelming pattern of strikes establishes a prima facie inference of racial discrimination."[827] The court went on to scrutinize the race-neutral reasons given by the prosecution and accepted by the trial court. The court of appeals held that the trial court was clearly erroneous in its assessment of the prosecution's explanations.[828] The dominant theme of the court of appeals decision was that the race-neutral reasons given by the prosecution for striking blacks did not result in the striking of white jurors who might have been struck on the same basis.[829] While the court of appeals noted the deference to be accorded the trial court's findings, the court said it did not want to be a "rubber stamp" approving "all nonracial reasons no matter how whimsical or fanciful."[830] It is hard to conclude that the prosecution's stated reasons deserve to be described as "whimsical" or "fanciful." By way of example, the prosecution struck two jurors who knew persons who were mistakenly accused of a crime and one juror who had a relative who had been beaten by police.[831] These reasons are not farfetched. The argument that other jurors were not struck for similar reasons overlooks the fact that the number of peremptory challenges is limited; the choice of how to expend the challenges is often a choice between a lesser of evils. The willingness of the appellate courts to second guess the trial court's assessment of the reasons and motivations of the party exercising a peremptory challenge is likely to further complicate the *Batson* thicket. If *Batson* litigation continues to grow more unmanagable and expensive, it may well mean that the era of the peremptory challenge may be coming to a close.

Right to Confrontation. Is it a violation of a defendant's right to confront witnesses to remove the defendant from the courtroom during the testimony of a witness based on a substantial threat made by the defendant against the witness? In *Perry v. State*,[832] the court of

824. *Id.* at 636, 451 S.E.2d at 808.
825. *Id.*
826. *Id.*
827. *Id.*
828. *Id.* at 638, 451 S.E.2d at 809.
829. *Id.* at 636-37, 451 S.E.2d at 809.
830. *Id.* at 638, 451 S.E.2d at 809 (quoting Gamble v. State, 257 Ga. 325, 326, 327 S.E.2d 792, 794 (1987)).
831. *Id.* at 636-37, 451 S.E.2d at 809.
832. 216 Ga. App. 749, 456 S.E.2d 89 (1995).

appeals did not foresclose that the answer to that question might be "yes," but found it unnecessary to answer the question. In *Perry*, two defendants were removed from the courtroom while three witnesses testified at their kidnapping and armed robbery trial.[833] The prosecution raised a concern about whether the three rebuttal witnesses had been threatened by defendants and were fearful.[834] The trial judge agreed to speak to the witnesses, and ordered that defendants be removed from the courtroom during the three hour session.[835] The testimony of the witnesses showed that they were not fearful and had not been threatened.[836] Two of the witnesses later testified before the jury, with defendants present.[837]

The court of appeals held that under the circumstances, the refusal to allow defendants to attend the judge's preview of the witness's testimony violated defendants' confrontation rights.[838] The court called the trial court's action an "unprecedented and drastic curtailment of the right of confrontation."[839] The court emphasized that the witnesses, when examined, "testified that no threats had been made against them and they were not in actual fear for their lives."[840] At the same time, the court said it would "not foreclose the possibility that other circumstances might warrant an inquiry into real and verifiable threats against a witness."[841] That leaves the question of how a trial court should proceed when information of possible threats is brought to its attention. Are the defendants entitled to be present for the initial inquiry in any case in which there is a possible threat? The court expressly reserved the issue of "[w]hat inquiries may be necessary and what remedies may be crafted to protect a witness from the threat of imminent physical harm."[842] At a minimum, the judge should request a detailed proffer from the prosecution. In *Perry*, the prosecution requested the hearing based on a potential threat, but the testimony of the witnesses did not support the claim. Certainly the *Perry* decision requires that the judge obtain more solid information before removing the defendants.

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833. *Id.* at 749-50, 456 S.E.2d at 90.
834. *Id.* at 749, 456 S.E.2d at 90.
835. *Id.* at 749-50, 456 S.E.2d at 90.
836. *Id.* at 750, 456 S.E.2d at 90.
837. *Id.*
838. *Id.* at 750-52, 456 S.E.2d at 90-91.
839. *Id.* at 751, 456 S.E.2d at 91.
840. *Id.* at 751-52, 456 S.E.2d at 91.
841. *Id.* at 751, 456 S.E.2d at 91.
842. *Id.* at 752, 456 S.E.2d at 91.

Sentencing. The supreme court addressed several difficult issues concerning the scope of proper argument and evidence at sentencing hearings in capital cases. In *Fleming v. State*,[843] the court held that the prosecution may argue that the death penalty has a deterrent effect, and that the defendant may rebut the argument, but neither side has a right to introduce expert testimony on the issue. Of course, allowing expert testimony on the issue of the deterrent value of the death penalty would involve complex, time consuming, and (probably) inconclusive testimony.[844] In a concurring opinion, Chief Justice Hunt stated that the prosecution might open the door to empirical data on deterrence by phrasing its deterrence argument in a way that suggests that data supports the theory of deterrence.[845] In his dissenting opinion, Justice Fletcher argued that all deterrence arguments should be excluded.[846] In Justice Sears's dissenting opinion, in which she was joined by Justices Benham and Fletcher, she argued that if deterrence arguments are allowed, the defendant must be afforded the right to introduce evidence on the issue.[847] The dissenting opinions have substantial force. The majority's approach is an uneasy compromise: Allow arguments about deterrence, but do not allow the complex and voluminous evidence that supports both sides in the debate. It seems that the defendant should be able to attack the empirical basis of the prosecution's argument. Perhaps Justice Fletcher's approach makes the most sense. His position was that on the issue of deterrence it should be all or nothing.[848]

The supreme court addressed the emotional issue of victim impact testimony in *Livingston v. State*.[849] In *Livingston*, the court upheld the constitutionality of O.C.G.A. section 17-10-1.2, which governs the admissibility of victim impact evidence.[850] The court agreed with the United States Supreme Court's opinion in *Payne v. Tennessee*[851] that the prohibition against cruel and unusual punishment in the Eighth Amendment does not create a per se bar to the admission of victim

843. 265 Ga. 541, 458 S.E.2d 638 (1995).

844. For example, see the lengthy citation of literature on the topic of deterrence in Justice Fletcher's dissenting opinion. *Id.* at 545 n.10, 458 S.E.2d 642 n.4 (Fletcher, J., dissenting).

845. *Id.* at 543-44, 458 S.E.2d at 640 (Hunt, C.J., concurring).

846. *Id.* at 544-46, 458 S.E.2d at 641-42 (Fletcher, J., dissenting).

847. *Id.* at 546-47, 458 S.E.2d at 642 (Sears, J., dissenting).

848. *Id.* at 546, 458 S.E.2d at 642 (Fletcher, J., dissenting).

849. 264 Ga. 402, 444 S.E.2d 748 (1994).

850. *Id.* at 404, 444 S.E.2d at 751.

851. 501 U.S. 808 (1991).

impact evidence.[852] The court added, "[h]owever we also recognize that under certain circumstances victim impact evidence could render a defendant's trial fundamentally unfair and could lead to the arbitrary imposition of the death penalty."[853] The court questioned language in *Payne* suggesting that the state should be able to offer evidence on every characteristic of the victim that the defense may offer as to the defendant.[854] The court also held that some evidence admissible under the statute may be inadmissible under the Georgia constitution, such as evidence of the victim's class or wealth.[855] In upholding the victim impact statute, the court pointed to the various safeguards provided in the statute, such as the requirement that victim impact evidence "shall be permitted only in such a manner and to such a degree as not to inflame or unduly prejudice the jury."[856] The court therefore upheld the constitutionality of the statute as written under the Georgia constitution.[857] The court stressed that it was only upholding that statute as written and that it would entertain challenges to unconstitutional *applications* of the statute as necessary.[858] To guide the trial courts in the application of the statute, the court went on to hold "that the trial court must hear and rule prior to trial on the admissibility of victim impact evidence sought to be offered."[859]

Not surprisingly, this controversial issue evoked several separate opinions from members of the court. Justice Fletcher concurred, urging prosecutors "to cautiously approach the use of victim impact evidence."[860] He suggested that the use of such evidence carries with it the risk of reversal by the appellate courts, which would mean more cost and delay and pain for the victim's family.[861] Justice Carley concurred specially, protesting the court's interpretation of the statute as allowing less than equal evidentiary treatment for victims and defendants; the standard suggested in *Payne*.[862] He stated, "I cannot concur in the majority's rewriting of that statute so as to thwart the legislative intent, which was to authorize the admission of victim impact evidence in

852. 264 Ga. at 402-03, 444 S.E.2d at 750.
853. *Id.* at 403, 444 S.E.2d at 751.
854. *Id.* at 403 n.3, 444 S.E.2d 750 n.3.
855. *Id.* at 404 n.5, 444 S.E.2d at 751 n.5.
856. *Id.* at 404-05, 444 S.E.2d at 751. *See* O.C.G.A. § 17-10-1.2(a)(1) (1990 & Supp. 1996).
857. 264 Ga. at 405, 444 S.E.2d 751.
858. *Id.* at 405 n.7, 444 S.E.2d at 751 n.7.
859. *Id.* at 405, 444 S.E.2d at 751.
860. *Id.* at 409, 444 S.E.2d at 754 (Fletcher, J., concurring).
861. *Id.*
862. *Id.* at 409-13, 444 S.E.2d at 754 (Carley, J., concurring specially).

accordance with the broad mandate of the decision of the Supreme Court in *Payne v. Tennessee*."[863] Finally, Justice Benham dissented, arguing that the court should have declared the use of victim impact evidence in violation of the Georgia constitution.[864] He stated:

> The prohibition against admission of a victim impact statement is rooted in the belief that all people stand equal before the law, defendants and victims alike . . . . With the victim impact statement, we begin a journey down the treacherous path of determining the relative worth of citizens in seeking the death penalty for the accused.[865]

Justice Benham expressed the fear "that the virus of the victim impact statement will so infect the sentencing process that the trial will be rendered fundamentally unfair, thereby greatly increasing the likelihood of appellate reversals of otherwise valid convictions."[866]

In *Mobley v. State*,[867] the supreme court held that "offers by defendants to plead guilty and testimony of prosecutors regarding their reasons for rejecting such offers are no longer admissible" in death sentencing proceedings.[868] This was a switch of positions by the court. In a previous decision, the court had ruled that Mobley was entitled to introduce evidence at his sentencing that he had offered to plead guilty to all charges in exchange for the State's dropping the death penalty.[869] After seeing what transpired on remand, the court changed its mind. In rebuttal to Mobley's evidence that he offered to plead guilty, the State offered the testimony of Judge Andrew Fuller, who had been Mobley's prosecutor before becoming a judge.[870] Fuller testified about the factors he considered in determining to seek the death penalty against Mobley.[871] The court found that Fuller's testimony was not unduly inflammatory or prejudicial, but decided that such testimony was not a good idea, stating:

> By allowing the defense to introduce evidence of a conditional offer to plead guilty, [our prior holding] virtually mandates that counsel for both the defense and prosecution testify at trial. As a result, counsel

863. *Id.* at 413, 444 S.E.2d at 756.
864. *Id.*, 444 S.E.2d at 757 (Benham, J., dissenting).
865. *Id.* at 419-20, 444 S.E.2d at 761.
866. *Id.* at 420, 444 S.E.2d at 761.
867. 265 Ga. 292, 455 S.E.2d 61 (1995).
868. *Id.* at 300, 455 S.E.2d at 70.
869. Mobley v. State, 262 Ga. 808, 426 S.E.2d 150 (1993).
870. 265 Ga. at 298-99, 455 S.E.2d at 69.
871. *Id.* at 299, 455 S.E.2d at 69-70.

> are forced into ethical conflicts, their credibility is improperly placed in issue, and advocacy rules are impaired.[872]

However, the court declined to overturn Mobley's sentence of death.[873] Justice Hunstein dissented, arguing that the court had compounded its error in its prior decision by upholding Mobley's death sentence.[874]

The supreme court also decided cases concerning the defendant's rights to use mental health evidence and secure financial support for retaining experts for that purpose. In *Jenkins v. State*,[875] the court held that defendants who refuse to submit to a psychiatric examination by a state-selected examiner are not entitled to utilize psychiatric testimony at the sentencing phase of a capital case. The court previously had held that it was appropriate to exclude the defendant's psychiatric evidence at the guilt phase when the defendant refused to submit to the state's examination.[876] This was based on the prosecution's "overwhelming difficulty" in countering such evidence without its own examination of the defendant.[877]

Abernathy v. State[878] clarified several rules of law governing the use of mental health evidence. First, the supreme court held that pretrial notice of the defendant's intention to use mental health evidence is only required when the evidence is in the form of expert testimony.[879] Second, the court in *Abernathy* held that the prosecution is not entitled to obtain an independent mental health examination to rebut lay mental health testimony.[880] Third, the court in *Abernathy* reiterated that "the State may offer expert mental health testimony only in the sentencing phase and strictly in rebuttal of the expert mental health evidence offered in mitgation by the defense."[881]

In *Bright v. State*,[882] the supreme court considered the question of when a defendant qualifies for expert assistance at state expense for preparing his defense for the sentencing phase of a capital case. The court noted that the required showing for obtaining free expert psychiatric services at the guilt and sentencing phases is that the

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872. *Id.*, 455 S.E.2d at 70.
873. *Id.*
874. *Id.* at 303, 455 S.E.2d at 72 (Hunstein, J., dissenting in part).
875. 265 Ga. 539, 458 S.E.2d 477 (1995).
876. Lynd v. State, 262 Ga. 58, 414 S.E.2d 5 (1992).
877. *Id.* at 64, 414 S.E.2d at 11.
878. 265 Ga. 754, 462 S.E.2d 615 (1995).
879. *Id.* at 754, 462 S.E.2d at 616.
880. *Id.* at 754-55, 462 S.E.2d at 616.
881. *Id.* at 756, 462 S.E.2d at 617.
882. 265 Ga. 265, 455 S.E.2d 37 (1995).

defense establish that sanity will be a "significant factor."[883] The court further stated that the defense is entitled to make its motion in secret, and that the defendant's right to make the motion cannot be predicated on a requirement to submit to a state mental health examination.[884] While the court held that Bright had not made a sufficient showing to obtain free services for use in the guilt phase of his trial, the court held that he had made a sufficient showing for the sentencing phase.[885] The difference in these conclusions was rooted in the difference between the guilt and sentencing phases. The sentencing phase involves consideration of evidence of mitigation, and that category of evidence is substantially wider than the evidence that is relevant to guilt.[886] The court concluded that Bright's evidence of depression, suicidal thoughts, poor impulse control, and substance abuse, coupled with the fact that he murdered two relatives with whom he had a good relationship, was sufficient to show that "his capacity to understand the cruelty of the acts he committed" would be a significant issue at the penalty phase of his trial.[887] The court found that Bright had made the requisite showing with regard to his requests for a toxicologist and a psychiatrist.[888] In a dissenting opinion, Justice Hunstein, joined by Justice Thompson, questioned the conclusion that funding for experts had been justified.[889] Given the nature of the showing made by Bright, the open question is whether the decision will lead to a significant expansion of funding for experts based on arguments in mitigation citing drug use, depression, and the like.

The supreme court also had occasion to interpret two important sentencing statutes in noncapital cases. In *State v. Ingram*,[890] the supreme court interpreted O.C.G.A. section 17-10-16(a), which states that a person convicted of crime "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." The issue in *Ingram* was whether life without parole is a sentencing option in a case in which the state does not seek the death penalty, or whether life without parole is only available as an alternative in cases where the state seeks the death penalty.[891] The State claimed that O.C.G.A.

883. *Id.* at 270, 455 S.E.2d at 46.
884. *Id.* at 271-72, 455 S.E.2d at 47.
885. *Id.* at 273-74, 455 S.E.2d at 49.
886. *Id.* at 274-75, 455 S.E.2d at 49.
887. *Id.* at 275-76, 455 S.E.2d at 50.
888. *Id.* at 276, 455 S.E.2d at 51.
889. *Id.* at 289-291, 455 S.E.2d at 57-61 (Hunstein, J., dissenting).
890. 266 Ga. 324, 467 S.E.2d 523 (1996).
891. *Id.* at 324-25, 467 S.E.2d at 524.

section 17-10-16(a) authorizes the sentence of life without parole irrespective of whether the state seeks the death penalty.[892] The supreme court disagreed, holding that life without parole is only an option when the state seeks the death penalty.[893] The court noted that the statute in question was adopted as part of a "coherent statutory plan whereby death provisions are and must be utilized in order to implement the life without parole sentencing option."[894] The court concluded that the legislature intended to limit the life without parole option to capital cases.[895] The court acknowledged that its holding denied the state an alternative for aggravated murder cases where the death penalty might be inappropriate, but stated the "matter is best raised before the Legislature."[896] Justice Carley filed a strident dissenting opinion in which he argued that the legislature meant to make the sentence of life without parole an alternative in cases where the death penalty is not sought.[897] If Justice Carley is right, the situation will be easy for the legislature to remedy.

In *Echols v. Thomas*,[898] the supreme court addressed a semantic quirk in the laws applying to sentencing in armed robbery cases. The question was whether a defendant may be sentenced to life imprisonment for armed robbery.[899] The armed robbery statute seems to provide an easy answer: It states that a person convicted of armed robbery may be punished by "imprisonment for life or by imprisonment for not less than five nor more than 20 years."[900] However, the state's general sentencing statute has conflicting language: It states that a court must fix a "determinate sentence for a specific number of months or years" except in cases in which life imprisonment *must* be imposed.[901] Does the general sentencing statute trump the language of the robbery statute by requiring a determinate sentence of months or years? The supreme court said no.[902] The court concluded that the general sentencing statute was not intended to alter substantive

892. *Id.* at 325, 467 S.E.2d at 524.
893. *Id.* at 325-26, 467 S.E.2d at 525.
894. *Id. See* O.C.G.A. §§ 17-10-16; 17-10-30.1; 17-10-31.1; 17-10-32.1.
895. 266 Ga. at 326, 467 S.E.2d at 525.
896. *Id.* at 326-27, 467 S.E.2d at 525.
897. *Id.* at 327-30, 467 S.E.2d at 526-28 (Carley, J., dissenting).
898. 265 Ga. 474, 458 S.E.2d 100 (1995).
899. *Id.* at 475, 458 S.E.2d at 100-01.
900. O.C.G.A. § 16-8-41(b) (1996).
901. *Id.* § 17-10-1(a).
902. 265 Ga. at 475-76, 458 S.E.2d at 101.

criminal provisions, and that "judicial construction is required when words construed literally would defeat the legislature's purpose."[903]

903. *Id.* *See* Worley v. State, 265 Ga. 251, 454 S.E.2d 461 (1995).