

Mercer Law Review

Volume 63
Number 1 *Annual Survey of Georgia Law*

Article 7

12-2011

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Recommended Citation

Hogue, Franklin J. and Hogue, Laura D. (2011) "Criminal Law," *Mercer Law Review*: Vol. 63 : No. 1 , Article 7.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol63/iss1/7

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Criminal Law

by Franklin J. Hogue*
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I. INTRODUCTION

We have culled through the most important criminal cases of this reporting period¹ and selected those that resulted in changes to criminal case law that will likely have an effect upon the way prosecutors and defense attorneys approach criminal cases in Georgia.

II. THE APPLICABILITY OF THE EXCLUSIONARY RULE TO PROBATION CASES

In the case of *State v. Thackston*,² Hulon Thackston was a probationer in Douglas County. In March 2007, he was stopped in Paulding County; his car was searched, and he was charged with possession of methamphetamine. In October 2007, Douglas County issued a probation violation warrant. When law enforcement showed up at Thackston's

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1. This Survey chronicles developments in Georgia criminal law from June 1, 2010 to May 31, 2011. For an analysis of Georgia criminal law during the prior survey period, see Franklin J. Hogue & Laura D. Hogue, *Criminal Law, Annual Survey of Georgia Law*, 62 MERCER L. REV. 87 (2010).

2. No. S10G1337, 2011 WL 2118928 (Ga. May 31, 2011).

apartment to arrest him, they saw methamphetamine on a table. They acquired a search warrant and found more methamphetamine and some drug paraphernalia.³

Thackston moved to suppress the drug evidence in the new Paulding County case. The Superior Court of Douglas County, Georgia, granted that motion on the grounds that the drugs found in the apartment "constituted fruit of the poisonous tree" from the bad traffic stop search.⁴ Paulding County then dismissed its case. Thackston filed a plea in bar in the Douglas County probation revocation case, arguing that collateral estoppel prevented Douglas County from contesting the successful motion to suppress, based upon the same searches, in Paulding County. The trial court agreed, and the Georgia Court of Appeals affirmed.⁵

The Georgia Supreme Court, however, reversed the court of appeals, declaring, for the first time in Georgia, that the exclusionary rule does not apply to a probation revocation hearing.⁶ The court observed that the United States Supreme Court adopted a balancing test when deciding whether to extend the exclusionary rule to a context other than a criminal trial.⁷ On the one side, the exclusion may deter law enforcement from trampling on citizens' right to privacy.⁸ On the other side of the scale are the costs of withholding information in the process of seeking the truth.⁹

The Georgia Supreme Court weighed these two concerns and looked at the results of this balancing test in several other jurisdictions, taking into account the purpose of probation, which is to promote rehabilitation and integration back into society, and concluded that

[b]ecause application of the exclusionary rule to probation revocation proceedings would achieve only marginal deterrent effects and would significantly alter and affect the proper administration of the probation system in this state, we find the deterrence benefits of the exclusionary rule do not outweigh the costs to the system. Therefore, under the proper balancing test, neither the federal nor state constitutions require application of the exclusionary rule in state probation revocation proceedings.¹⁰

3. *Id.* at *1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at *2 (citing *Illinois v. Krull*, 480 U.S. 340, 347-48 (1987)).

8. *See id.* at *1.

9. *Id.* at *3.

10. *Id.*

III. MANDATORY MINIMUM SENTENCES FOR JUVENILE OFFENDERS

In *Adams v. State*,¹¹ Mitchell Lee Adams was indicted and convicted for the crimes of aggravated child molestation and child molestation against a toddler.¹² Pursuant to the mandatory sentencing provisions of section 16-6-4(d)(1) of the Official Code of Georgia Annotated (O.C.-G.A.),¹³ Mitchell was sentenced to life imprisonment for aggravated child molestation, the first twenty-five years of the sentence to be served in prison without the benefit of parole and the remainder of his life to be spent on probation.¹⁴ Mitchell was twelve years old at the time the indicted offenses were alleged to have occurred.¹⁵ The Georgia Supreme Court considered two constitutional challenges to Mitchell's sentence: (1) a challenge to the constitutionality of the mandatory sentencing provision, as applied to a fourteen-year-old, and (2) whether Mitchell could have been too young to be prosecuted as an adult.¹⁶

As a matter of first impression, the court considered the constitutionality of the mandatory sentencing provisions of O.C.G.A. § 16-6-4(d)(1), as applied to a minor.¹⁷ Adams propounded an Eighth Amendment¹⁸ challenge to the constitutionality of his sentence, asserting that such a sentence constituted "cruel and unusual punishment as applied to him."¹⁹ The court noted that during the time that Adams's appeal was pending, the United States Supreme Court decided the case of *Graham v. Florida*,²⁰ which held that the Eighth Amendment to the United States Constitution "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."²¹ As Adams's sentence provided for his eventual reentry into society—albeit after twenty-five years—unlike a life without parole sentence, the court found no categorical Eighth Amendment violation, turning instead to an analysis of whether Adams's sentence was "grossly disproportionate" to

11. 288 Ga. 695, 707 S.E.2d 359 (2011).

12. *Id.* at 695-96, 707 S.E.2d at 361. The actual age of the victim was never clear from the record, though the supreme court's best guess was that she was around four years old. *Id.* at 704 n.3, 707 S.E.2d at 367 n.3 (Hunstein, C.J., concurring specially).

13. O.C.G.A. § 16-6-4(d)(1) (2011).

14. *Adams*, 288 Ga. at 696, 707 S.E.2d at 361 (majority opinion).

15. *Id.* at 704, 707 S.E.2d at 367 (Hunstein, C.J., concurring specially).

16. *Id.* at 696, 707 S.E.2d at 361-62 (majority opinion).

17. *Id.* at 696, 707 S.E.2d at 361.

18. U.S. CONST. amend. VIII.

19. *Adams*, 288 Ga. at 700, 707 S.E.2d at 364.

20. 130 S. Ct. 2011 (2010).

21. *Adams*, 288 Ga. at 700-01, 707 S.E.2d at 364 (quoting *Graham*, 130 S. Ct. at 2034).

his crime.²² The court noted that sentencing was a job for the legislative branch of government, and that the judiciary must defer to the discretion of the legislature “unless the sentence imposed shocks the conscience.”²³ The court determined that the evidence presented at trial was that Adams committed numerous acts of molestation upon a young child, including acts of sodomy, which, in their minds, did not make his sentence grossly disproportional to his crime; therefore, the court rejected Adams’s Eighth Amendment challenge to his sentence.²⁴

Additionally, the court addressed the applicability of the juvenile’s challenge to his prosecution, as it may have resulted in his being illegally prosecuted for offenses that occurred before he had reached the age of thirteen.²⁵ Under Georgia law, a child under the age of thirteen “shall not be considered or found guilty of a crime.”²⁶ The indictment under which Adams was prosecuted listed a range of dates for the criminal behavior, all involving time frames during which Adams would have been at least thirteen years old.²⁷ But at trial, “Adams moved for a directed verdict, arguing that the State failed to prove that the crimes occurred during the period of time set forth in the indictment.”²⁸ The trial court ruled that the dates set forth in the indictment were not essential elements of the charging document, thereby instructing the jury that the State would have met their burden of proof so long as the evidence supported a finding that the charged offenses were committed at any time within the applicable seven-year statute of limitations.²⁹

The ruling was an appropriate one, except that it now opened up the possible time frame for the commission of those offenses to a time when Adams could have been less than thirteen years old and, therefore, ineligible for adult prosecution. Consequently, before sentencing, Adams filed a motion to dismiss the indictment.³⁰ The majority of the supreme court held that the burden of production of evidence supporting the affirmative defense of “infancy” lay upon the defendant, “unless the

22. *Id.* at 696, 701, 707 S.E.2d at 361, 365 (quoting *Graham*, 130 S. Ct. at 2022) (internal quotation marks omitted).

23. *Id.* at 702, 707 S.E.2d at 365 (quoting *Widner v. State*, 280 Ga. 675, 676, 631 S.E.2d 675, 677 (2006)) (internal quotation marks omitted).

24. *Id.*

25. *Id.* at 696, 707 S.E.2d at 361-62.

26. O.C.G.A. § 16-3-1 (2011).

27. *Adams*, 288 Ga. at 695, 707 S.E.2d at 361.

28. *Id.*

29. *Id.* at 695-96, 707 S.E.2d at 361.

30. *Id.* at 696, 707 S.E.2d at 361-62.

[S]tate's evidence raised the issue."³¹ Finding that the record from the trial did not demonstrate that appellant's age was proven, the defense bore the burden of producing such evidence in order to properly raise an infancy challenge, and the defense failed to do so; therefore, the challenge was not properly asserted.³²

Justice Hunstein, joined by Justice Melton, concurred specially to the majority's conclusion that infancy must be raised as an affirmative defense in order not to waive it.³³ The concurrence asserted that the legislature's proscription against adult prosecution of children—those persons under the age of thirteen—is a mandate and not an affirmative defense.³⁴ Justice Hunstein wrote,

I would hold that a child under the age of 13 who commits a criminal offense is no more able to “waive” the legal bar to prosecution set forth in [O.C.G.A.] § 16-3-1 than a defendant who commits a capital offense when under the age of 18 can “waive” the constitutional proscription against the execution of a death sentence.³⁵

Justice Hunstein's opinion was a concurrence, however, because under the record evidence she concluded that there was no possibility that the jury's guilty verdict reflected any behavior committed by Mitchell Adams before he turned thirteen years old.³⁶ Nevertheless, the concurring opinion cautioned prosecutors to take care in drafting indictments to avoid “any possibility” of the jury resting a verdict upon acts or omissions that occurred before the accused had reached the age of thirteen.³⁷

IV. THE REPETITIVE OBJECTION RULE FOR SIMILAR TRANSACTION EVIDENCE

In *Whitehead v. State*,³⁸ the Georgia Supreme Court unanimously abandoned its “unusual” rule concerning the preservation of challenges to similar transaction evidence.³⁹ In the 1998 case of *Young v. State*,⁴⁰

31. *Id.* at 697, 707 S.E.2d at 362-63 (quoting *Cheesman v. State*, 230 Ga. App. 525, 528, 497 S.E.2d 40, 44 (1998)); *see also* O.C.G.A. § 16-1-3(1) (2011).

32. *Adams*, 288 Ga. at 697-98, 707 S.E.2d at 362-63.

33. *Id.* at 703, 707 S.E.2d at 366 (Hunstein, C.J., concurring specially).

34. *Id.* at 703-04, 707 S.E.2d at 366-67.

35. *Id.* at 703, 707 S.E.2d at 366.

36. *Id.* at 704, 707 S.E.2d at 367.

37. *Id.* at 705, 707 S.E.2d at 367.

38. 287 Ga. 242, 695 S.E.2d 255 (2010).

39. *Id.* at 242, 695 S.E.2d at 256.

40. 269 Ga. 478, 499 S.E.2d 60 (1998), *overruled by* *Whitehead v. State*, 287 Ga. 242, 695 S.E.2d 255 (2010).

the court established the rule that preservation of challenges to the introduction of similar transaction evidence under Uniform Superior Court Rule 31.3(B)⁴¹ required the defendant to propound a pretrial objection to the State's notice of intent to introduce similar transaction evidence and then, "object[] to the introduction of the similar transaction evidence" at trial.⁴² During the reporting period, Justice Nahmias analyzed this "repetitive objection rule[,] " which he determined is "unique to similar transaction evidence," but without good reason.⁴³ Noting the criticism of this rule in several Georgia Court of Appeals opinions,⁴⁴ as well as criticism from Professor Milich,⁴⁵ the court abandoned the repetitive objection rule, holding that objections to similar transaction evidence should conform to all other pretrial challenges to the admissibility of evidence, which, when properly asserted at pretrial, preserves the challenge for appellate review.⁴⁶

V. DEFINING CAUSATION IN FELONY MURDER CASES

In the case of *State v. Jackson*,⁴⁷ Carlester Jackson, Warren Smith, and Jerold Daniels conspired to rob a drug dealer. Daniels brought a gun, but the drug dealer, who also had a gun, shot and killed Daniels in self-defense during the robbery. Jackson and Smith were charged with felony murder for their co-conspirator Daniels's death.⁴⁸ The defense moved the trial court to dismiss the felony murder count pursuant to *State v. Crane*,⁴⁹ a twenty-nine-year-old case in which the supreme court held, on facts almost identical to *Jackson*, "that the word 'causes' in the felony murder statute requires not proximate causation, but that the death be 'caused directly' by one of the parties to the underlying felony."⁵⁰ The trial court granted the motion, and the State appealed

41. UNIF. SUP. CT. R. 31.3(B).

42. *Young*, 269 Ga. at 479, 499 S.E.2d at 61.

43. *Whitehead*, 287 Ga. at 245, 695 S.E.2d at 258.

44. *Id.* at 247, 695 S.E.2d at 259.

45. *Id.* at 248, 695 S.E.2d at 260; PAUL S. MILICH, GEORGIA RULES OF EVIDENCE § 11.14 n.2 (2d ed. 2002).

46. *Whitehead*, 287 Ga. at 248-49, 695 S.E.2d at 260. Unfortunately for Mr. Whitehead, the supreme court proceeded to analyze his similar transaction challenge but concluded that the trial court did not abuse its discretion in admitting the evidence, thereby affirming his conviction. *Id.* at 249, 695 S.E.2d at 261.

47. 287 Ga. 646, 697 S.E.2d 757 (2010).

48. *Id.* at 646-47, 697 S.E.2d at 758.

49. 247 Ga. 779, 279 S.E.2d 695 (1981), *overruled by State v. Jackson*, 287 Ga. 646, 697 S.E.2d 757 (2010).

50. *Jackson*, 287 Ga. at 646, 697 S.E.2d at 758 (quoting *Crane*, 247 Ga. at 779, 279 S.E.2d at 696).

pursuant to O.C.G.A. § 5-7-1(a)(1),⁵¹ asking the supreme court to reverse *Crane*.⁵²

In a 4-3 decision, the supreme court reversed *Crane*.⁵³ The opinion, written by Justice Nahmias, provided that the question in *Jackson* was “whether a defendant who commits a felony whose intended victim kills a co-conspirator ‘causes’ that death.”⁵⁴ The majority noted that “the term ‘cause’ is customarily interpreted in almost all legal contexts to mean ‘proximate cause’—‘[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred.’”⁵⁵ The majority then cited cases to support the conclusion that, even in homicide cases, proximate cause is the standard.⁵⁶

The majority wrote that if it were not for *Crane*, the case would have been easy to decide.⁵⁷ But *Crane* had to be analyzed and discarded in order to reach the decision in *Jackson*. The majority concluded that the court in *Crane* got it wrong when it determined that “cause” meant directly or indirectly caused the death, and, given this interpretation, the rule of lenity required the court in *Crane* to say that the statute meant directly caused the death.⁵⁸ The present court concluded that its predecessors had erroneously jumped to this conclusion and completely failed to consider proximate cause.⁵⁹

Since *Crane* got it wrong and has been inconsistently applied over the years, the supreme court reversed, holding that “*Crane* is . . . no longer good law.”⁶⁰ The majority wrote in defense of this reversal against concerns that stare decisis and the silence of the legislature for nearly three decades weighed against it.⁶¹ With respect to stare decisis, Justice Nahmias wrote: “In considering whether to reexamine a prior erroneous holding, we must balance the importance of having the question *decided* against the importance of having it *decided right*.”⁶²

51. O.C.G.A. § 5-7-1(a)(1) (Supp. 2011).

52. *Jackson*, 287 Ga. at 648, 697 S.E.2d at 758-59.

53. *Id.* at 660, 697 S.E.2d at 767.

54. *Id.* at 648, 697 S.E.2d at 759.

55. *Id.*; BLACK'S LAW DICTIONARY 1103 (5th ed. 1979).

56. *Jackson*, 287 Ga. at 649, 697 S.E.2d at 759 (citing *James v. State*, 250 Ga. 655, 655, 300 S.E.2d 492, 493 (1983)).

57. *Id.* at 652-53, 697 S.E.2d at 761-62.

58. *Id.* at 653-54, 697 S.E.2d at 762-63 (quoting *Crane*, 247 Ga. at 779-80, 279 S.E.2d at 696).

59. *Id.* at 654-55, 697 S.E.2d at 763-64.

60. *Id.* at 658, 697 S.E.2d at 766.

61. *Id.*

62. *Id.*

The factors to be weighed include “the age of the precedent, the reliance interests at stake, the workability of the decision, and, most importantly, the soundness of its reasoning.”⁶³

Having concluded that *Crane’s* reasoning was flawed, that it was inconsistently applied—making it unworkable in practice—and that it created no meaningful reliance interests, the majority then commented on its age by discussing why the silence of the legislature since *Crane* did not mean that the legislature has acquiesced to the correctness of *Crane*.⁶⁴ The court surmised that the legislature has been silent in response to *Crane* because its inconsistent application “has not had the sort of obviously far-reaching effects that are likely to stimulate a legislative response.”⁶⁵ In addition, legislative silence “frequently betokens unawareness, preoccupation, or paralysis.”⁶⁶ Alternatively, the majority, in this instance, reasoned that the General Assembly would simply not know how to address *Crane* and would not know what to fix in the statute.⁶⁷ Finally, the court concluded that it should not lay on the legislature the responsibility to fix a mistake perpetrated by the court itself.⁶⁸

VI. ELEMENTS OF THE OFFENSE: AGGRAVATED STALKING

Can a single violation of a court’s no-contact provision be sufficient behavior to constitute the felony offense of aggravated stalking? In *State v. Burke*,⁶⁹ the defendant was tried and convicted for the offense of aggravated stalking when, in violation of a permanent protective order prohibiting Burke from having “any contact whatsoever” with his ex-girlfriend, he mailed “her an envelope containing a card, a letter, and a handwritten poem.”⁷⁰ At trial, the State introduced evidence of similar transactions showing scores of letters Burke had sent and calls he had made that led up to the permanent protective order, but the only act upon which the charges were based was the single act of mailing the envelope described above.⁷¹

63. *Id.*

64. *Id.* at 658-60, 697 S.E.2d at 766-67.

65. *Id.* at 660, 697 S.E.2d at 767.

66. *Id.* at 659 n.8, 697 S.E.2d at 766 n.8 (quoting *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969)).

67. *Id.* at 660, 697 S.E.2d at 767.

68. *Id.* (quoting *Girouard v. United States*, 328 U.S. 61, 69-70 (1946)).

69. 287 Ga. 377, 695 S.E.2d 649 (2010).

70. *Id.* at 377, 695 S.E.2d at 649-50 (internal quotation marks omitted).

71. *Id.* at 377, 695 S.E.2d at 650.

After conviction, appellant propounded on appeal a challenge to the trial court's conclusion that a single violation of a protective order was sufficient to constitute the offense of aggravated stalking.⁷² The court of appeals agreed with the challenge and reversed the conviction.⁷³ The State appealed and the supreme court granted certiorari to consider the question.⁷⁴ The elements of the offense of aggravated stalking, set forth in O.C.G.A. § 16-5-91(a),⁷⁵ are as follows: "A person commits the offense of aggravated stalking when such person, in violation of a . . . permanent protective order . . . contacts another person . . . without the consent of the other person for the purpose of harassing and intimidating the other person."⁷⁶

The supreme court looked to the definition of the phrase "harassing and intimidating" as set forth in the simple stalking statute⁷⁷ and determined that such behavior was defined as requiring "a *pattern* of harassing and intimidating behavior . . ."⁷⁸ Moreover, the legislature declared that this definition was to apply to the aggravated stalking provision as well.⁷⁹ As a result, the supreme court affirmed the court of appeals by holding, "[b]ased upon the plain terms of the stalking statutes, a single violation of a protective order, by itself, does not amount to aggravated stalking."⁸⁰

VII. CONSTITUTIONALITY OF THE CHARGE OF DRIVING UNDER THE INFLUENCE OF ALPRAZOLAM

In *Sandlin v. State*,⁸¹ Jason Sandlin challenged the constitutionality of O.C.G.A. § 40-6-391(a)(6),⁸² which the State used to prosecute him for driving under the influence of a controlled substance, in this case, alprazolam (Xanax).⁸³ The court of appeals noted that *Sandlin* was governed by *Love v. State*,⁸⁴ which struck down this statute as uncon-

72. *Burke v. State*, 297 Ga. App. 38, 41, 676 S.E.2d 766, 769 (2009).

73. *Id.* at 38, 676 S.E.2d at 767.

74. *Burke*, 287 Ga. at 377, 695 S.E.2d at 650.

75. O.C.G.A. § 16-5-91(a) (2011).

76. *Id.*

77. O.C.G.A. § 16-5-90 (2011).

78. *Burke*, 287 Ga. at 378, 695 S.E.2d at 650 (internal quotation marks omitted); O.C.G.A. § 16-5-90(a)(1).

79. *Burke*, 287 Ga. at 378, 695 S.E.2d at 650.

80. *Id.* at 378, 695 S.E.2d at 650-51.

81. 307 Ga. App. 573, 707 S.E.2d 378 (2011).

82. O.C.G.A. § 40-6-391(a)(6) (2011).

83. *Sandlin*, 307 Ga. App. at 573-74, 707 S.E.2d at 379.

84. 271 Ga. 398, 517 S.E.2d 53 (1999).

stitutional on equal protection grounds.⁸⁵ In *Love*, the supreme court held that O.C.G.A. § 40-6-391(a)(6) was “unconstitutional as it pertained to persons with detectable levels of marijuana in their systems” because the level of “legislative distinction between users of legal and illegal marijuana was not directly related to the public safety purpose of the legislation.”⁸⁶

Likewise, O.C.G.A. § 40-6-391(a)(6) authorizes a conviction upon proof that a person has driven a vehicle under the influence of a controlled substance in any amount, while O.C.G.A. § 40-6-391(b)⁸⁷ says that a person can be convicted if that person “is rendered incapable of driving safely as a result of using a drug other than alcohol which such person is legally entitled to use.”⁸⁸ Since the statute “disparately treats legal and illegal users of alprazolam,” *Love* controlled, leading the court to reverse Sandlin’s conviction.⁸⁹

VIII. A DEFENDANT’S RIGHT TO AN INTERPRETER

One is effectively absent from trial if the proceedings are conducted in English and the accused speaks and understands only a language other than English. For this reason, in 2005, the Georgia Supreme Court “promulgate[d] rules establishing a statewide plan for the use of interpreters in [courtroom] proceedings”⁹⁰ Failure to provide adequate interpretation services to a non-English speaking defendant violates the Sixth Amendment to the United States Constitution,⁹¹ which provides the right to be present at all critical stages of one’s trial.⁹² The deprivation of an interpreter to an accused who needs one also implicates the due process clause of the Fourteenth Amendment to the United States Constitution,⁹³ which prohibits the trial and conviction of an incompetent individual.⁹⁴ Just as one is not truly “present” if he or she cannot understand what is happening at trial because of the language barrier, one who cannot rationally communicate with his or her

85. *Sandlin*, 307 Ga. App. at 574, 707 S.E.2d at 379; see *Love*, 271 Ga. at 402, 517 S.E.2d at 57.

86. *Sandlin*, 307 Ga. App. at 574, 707 S.E.2d at 379 (citing *Love*, 271 Ga. at 402, 517 S.E.2d at 57).

87. O.C.G.A. § 40-6-391(b) (2011).

88. *Sandlin*, 307 Ga. App. at 574, 707 S.E.2d at 379 (internal quotation marks omitted); O.C.G.A. § 40-6-391(b).

89. *Sandlin*, 307 Ga. App. at 574-75, 707 S.E.2d at 379-80.

90. *Ramos v. Terry*, 279 Ga. 889, 891-92, 622 S.E.2d 339, 341-42 (2005).

91. U.S. CONST. amend. VI.

92. *Tennessee v. Lane*, 541 U.S. 509, 523 (2004).

93. U.S. CONST. amend. XIV; see also GA. CONST. art. I, § 1, para. 1.

94. *Medina v. California*, 505 U.S. 437, 439 (1992).

attorney or communicate effectively in English, is “no more competent to proceed than an individual who is incompetent due to mental incapacity.”⁹⁵

In *Ling v. State*,⁹⁶ Annie Ling was indicted for cruelty to children in the first degree.⁹⁷ Ling went to trial, was convicted, secured new counsel, and then “filed a motion for new trial, arguing that her trial counsel was ineffective in failing to secure an interpreter” for her because her native language was Mandarin Chinese and she did not understand English well enough to understand the trial proceedings or “the State’s last minute plea agreement offer.”⁹⁸ The trial court denied the motion, and the Georgia Court of Appeals affirmed.⁹⁹ The Georgia Supreme Court granted certiorari to address whether Ling’s presence at trial without an interpreter rendered her, in effect, incompetent and legally absent from the trial and whether trial counsel can be said to render effective representation without seeking an interpreter for a non-English-speaking client.¹⁰⁰

In a 4-3 opinion, Justice Hunstein, writing for the majority, vacated the trial court’s order denying Ling’s new trial and remanded the case back to the trial court for a determination of her claim that she was not able to understand the proceedings or the last-minute plea discussions.¹⁰¹ The majority and the dissent agreed upon the law to be applied in assessing the interpretation needs of a non-English-speaking defendant and agreed that depriving such a defendant of an interpreter could constitute constitutional violations, effectively rendering the defendant not competent or present during the critical phases of her own trial.¹⁰² However, the majority and dissent disagreed upon whether the trial court carried out its duty to make the factual assessment of Ling’s needs at the hearing on the motion for new trial because the trial judge denied the motion for new trial without findings of fact or conclusions of law.¹⁰³ The dissent examined the record from the new trial hearing and concluded that the trial court “implicitly” made the findings of fact and conclusions of law necessary to hold that Ling did

95. *Ling v. State*, 288 Ga. 299, 301, 702 S.E.2d 881, 883 (2010); see *Gonzalez v. Phillips*, 195 F. Supp. 2d 893, 903 (E.D. Mich. 2001); *Louisiana v. Lopes*, 805 So. 2d 124, 128 (La. 2001); *United States v. Mosquera*, 816 F. Supp. 168, 173 (E.D.N.Y. 1993).

96. 288 Ga. 299, 702 S.E.2d 881 (2010).

97. *Id.* at 299, 702 S.E.2d at 882.

98. *Id.*

99. *Ling v. State*, 300 Ga. App. 726, 726, 686 S.E.2d 356, 356 (2009).

100. *Ling*, 288 Ga. at 299, 702 S.E.2d at 882.

101. *Id.* at 299-300, 702 S.E.2d at 882.

102. See *id.* at 305, 702 S.E.2d at 886 (Hines, J., dissenting).

103. See *id.* at 303-04, 702 S.E.2d at 885.

not need an interpreter at her trial and was, therefore, present and competent; thus, the dissent supported a denial of her new trial motion.¹⁰⁴ The dissent relied upon the appellate presumption that the trial court knows the law and faithfully and lawfully performs the duties that the law places upon the court.¹⁰⁵

Conversely, the majority held that a silent order denying the claims raised in this motion for new trial was not sufficient to satisfy the appellate court's constitutional concerns that the trial court made proper findings of fact and conclusions of law to support a charge that a non-English-speaking defendant was present and competent during her trial.¹⁰⁶ Justice Hunstein stated the majority's concerns as follows: "But when an appellate court is left to imply, assume, or surmise the nature of the trial court's findings, its ability to guard against violations of constitutional rights is compromised."¹⁰⁷ For that reason, the supreme court established a new rule, holding that "trial courts must state and explain their findings when an issue concerning the need for an interpreter that implicates foundational due process rights is raised and decided at the motion for new trial stage."¹⁰⁸ This holding now requires trial courts to make express findings of fact in the orders they execute concerning new trial motions wherein the issue of a client's need for the services of an interpreter is raised.¹⁰⁹

IX. CLOSING ARGUMENTS

We include the following cases because of their lessons for trial lawyers and trial courts in the conduct of trials and the preservation of error for appeal. In *Smith v. State*,¹¹⁰ Sonya and Joseph Smith were convicted for murder and other acts of violence in the death of their eight-year-old son, Josef.¹¹¹ The facts proven at trial of the heinous and unjustifiable treatment of their son were enough to support the convictions.¹¹² During the State's closing argument, however, the prosecuting attorney

"clicked" her fingers at which signal one of the deputies in the courtroom turned out the lights and an associate prosecutor "popped

104. *Id.* at 304-05, 702 S.E.2d at 885-86.

105. *Id.* at 305, 702 S.E.2d at 886.

106. *Id.* at 302, 702 S.E.2d at 884 (majority opinion).

107. *Id.*

108. *Id.* at 299, 702 S.E.2d at 882.

109. *Id.*

110. 288 Ga. 348, 703 S.E.2d 629 (2010).

111. *Id.* at 348, 703 S.E.2d at 632.

112. *Id.* at 356, 703 S.E.2d at 638.

out a cake out of a grocery bag” complete with eight candles, which were then lit with a lighter brought into the courtroom; the prosecutor and her associate then proceeded to sing to “dear Josef,” i.e., the deceased victim, the celebratory words to “Happy Birthday.”¹¹³

Court TV was in the courtroom filming the trial.¹¹⁴

The majority concluded that counsel for the defense was not ineffective in failing to object to the “prosecutor’s antics” by making a strategic decision that the “‘Happy Birthday’ song was so ‘preposterous,’ ‘absurd,’ and ‘over the top’ that ‘it would turn the jurors off,’ and that he should not call any more attention to it by objecting to it.”¹¹⁵ The court did not commit error by failing to stop the prosecutor’s actions even without a defense objection, moreover, even though it “would have been well within its right to control the courtroom by putting an end to the display of the prosecutor.”¹¹⁶

In her dissent, Justice Hunstein, joined by Justice Benham, wrote that “judges have not only the *right* to control their courtrooms,” as the majority noted, but “they have the *duty* to do so.”¹¹⁷ In Justice Hunstein’s view, that duty in this case required the court to stop the prosecutor’s antics even without a defense objection.¹¹⁸ The birthday stunt “offended the dignity and decorum of the court and violated every precept of professionalism and fair play. Yet the trial court did absolutely nothing. The event played itself out without the trial judge performing his duty to maintain decorum in the courtroom.”¹¹⁹ The dissent reasoned that the court should have rebuked the prosecutor, told the jury to “ignore the spectacle,” then charged the jury “that sympathy for the victim was to play no role in their verdict.”¹²⁰ Instead, “he took no action to stop an out-of-control prosecutor from turning his courtroom into a theater stage for her unprofessional behavior.”¹²¹

The dissent also believed that it was ineffective for defense counsel to have failed to object.¹²²

113. *Id.* at 358, 703 S.E.2d at 639 (Hunstein, C.J., dissenting).

114. *Id.* at 359 n.6, 703 S.E.2d at 639 n.6. At the hearing on the motion for new trial, defense counsel stated: “I understand the cameras were rolling and everybody wants to be Nancy Grace’s friend.” *Id.* (internal quotation marks omitted).

115. *Id.* at 354-55, 703 S.E.2d at 636-37 (majority opinion).

116. *Id.* at 356, 703 S.E.2d at 637.

117. *Id.* at 357, 703 S.E.2d at 638 (Hunstein, C.J., dissenting).

118. *Id.*

119. *Id.* at 359, 703 S.E.2d at 640-41.

120. *Id.* at 359, 703 S.E.2d at 640.

121. *Id.*

122. *Id.* at 360, 703 S.E.2d at 640.

A reasonable attorney does not stand by silently and allow the prosecutor to figuratively toss the victim into the jury box, with the resulting prejudice to counsel's clients, out of concern that an objection essential to protecting the impartiality of the jury might "give the impression" that he was "disruptive." No reasonable attorney would sacrifice a client's fundamental right to a fair trial for such a ridiculous reason.¹²³

In addition, the dissent disagreed with the majority's view that it was a reasonable strategy for the defense counsel to sit by silently figuring that the prosecutor's stunt would backfire on her.¹²⁴

The prosecutor's stunt was intended to evoke sympathy for the victim so that the jury, diverted from the facts, would return a verdict based on passion, not the evidence and the law. How is it "reasonable" strategy for defense counsel to use the prosecutor's improper stunt to elicit the opposite but equally improper effect in the jury?¹²⁵

While the prosecutor's theatrics and "unprofessional attempt to obtain guilty verdicts at any cost"¹²⁶ did not result in a reversal in this case, both the majority and the dissent disapproved of this sort of demeaning behavior by a lawyer in a criminal trial.¹²⁷

The case of *O'Neal v. State*¹²⁸ dealt with a challenge to the State's closing argument, in which the prosecutor in an armed robbery trial stated: "I'm going to invite y'all to come back to DeKalb County Superior Court courtroom—you can come to this courtroom or any of the other Superior courtrooms—watch trials for the next year. Okay. Come back and see how many times we have this much evidence."¹²⁹ The defense objected, the court sustained the objection, the defense requested a curative instruction to be given to the jury, but the trial judge merely said, "All right. All right. Just proceed on."¹³⁰ The court of appeals, in an unpublished opinion, held that O'Neal waived the issue of the court's failure to give a curative instruction because he did not get a ruling from the court denying his request.¹³¹

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 359 n.6, 703 S.E.2d at 639 n.6.

127. *Id.* at 356, 362, 703 S.E.2d at 637, 642.

128. 288 Ga. 219, 702 S.E.2d 288 (2010).

129. *Id.* at 219, 702 S.E.2d at 289-90.

130. *Id.* at 219, 702 S.E.2d at 290 (internal quotation marks omitted).

131. *Id.* at 219-20, 702 S.E.2d at 290.

The supreme court reversed the court of appeals on this issue, however, holding that O.C.G.A. § 17-8-75¹³² is plain: the trial judge had a duty to give a curative instruction; the defense made a proper objection, and based upon “recent precedents interpreting the statute,” the objection was sufficient to preserve the issue for appeal.¹³³ When a proper objection has been made, as it was here, the trial court then has a duty to rebuke the offending lawyer and give curative instructions, or if a rebuke and instructions are insufficient to cure the harm, then the trial court is to declare a mistrial.¹³⁴ Yet, in this case, the supreme court concluded that the error was harmless because “it is highly probable that the trial court’s error did not contribute to the verdict.”¹³⁵

X. PATTERN JURY INSTRUCTIONS

The Council of Superior Court Judges promulgates pattern jury instructions to be read to the jury in an effort to provide them the rules necessary to consider the evidence presented and reach a proper verdict.¹³⁶ In *State v. Hobbs*,¹³⁷ the pattern jury instruction for good character of the defendant was the subject of appeal.¹³⁸ Hobbs was convicted of rape, aggravated child molestation, aggravated sexual battery, child molestation, and cruelty to children for offenses he was accused of committing against his daughter.¹³⁹ Hobbs presented evidence of his good character during his case-in-chief, so he sought and was granted a jury instruction on good character. What Hobbs requested, however, was the pattern jury instruction.¹⁴⁰ The trial court ruled that the pattern charge on good character was “improperly argumentative,” so the court crafted a charge on good character, modeled

132. O.C.G.A. § 17-8-75 (2008). The statute states the following:

Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender.

Id.

133. *O’Neal*, 288 Ga. at 220, 702 S.E.2d at 290.

134. *Id.* at 221, 702 S.E.2d at 291.

135. *Id.* at 223, 702 S.E.2d at 292.

136. See COUNCIL OF SUPERIOR COURT JUDGES, SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II: CRIMINAL CASES (4th ed. 2007).

137. 288 Ga. 551, 705 S.E.2d 147 (2011).

138. 288 Ga. at 551, 705 S.E.2d at 148.

139. *Id.* at 553-54, 705 S.E.2d at 149 (Melton, J., dissenting).

140. *Id.* at 551, 705 S.E.2d at 148 (majority opinion).

after *Sapp v. State*,¹⁴¹ a Georgia Supreme Court opinion.¹⁴² Trial counsel preserved his objection to this charge.¹⁴³ The Georgia Court of Appeals agreed that the trial court's charge was insufficient and held that the error required reversal of Hobbs's conviction.¹⁴⁴ The Georgia Supreme Court granted certiorari.¹⁴⁵

The court of appeals found two errors with the trial court's instruction: first, the trial court erroneously instructed the jury that they "may" consider the good character evidence while the pattern instruction stated that they "should[,] " and second, the trial court's charge failed to include the instruction that good character was a substantive fact, sufficient on its own "to create a reasonable doubt as to the guilt of the accused."¹⁴⁶ The supreme court affirmed the reversal of the conviction, but only upon the second prong.¹⁴⁷

Justice Benham, writing for the four-justice majority, and Justice Melton, writing for the three-justice dissent, agreed that the court of appeals erred in its first holding concerning the trial court's charge.¹⁴⁸ The trial court instructed the jury that "[w]hen evidence of good character is admitted, you *may* consider it in determining whether or not you have a reasonable doubt about the guilt of the accused."¹⁴⁹ Yet the pattern charge provides that "[w]hen evidence of the good character of the defendant is offered, the jury has *the duty* to consider that testimony . . . in determining the guilt or innocence of the defendant."¹⁵⁰ The court of appeals held that the difference between the charge given and the pattern charge required reversal of the conviction.¹⁵¹ The supreme court determined that this holding was erroneous because the language from the case upon which the pattern jury instruction was predicated, *Sapp*, tracks the language of the instruction that the trial court gave to the jury.¹⁵² The court in *Hobbs*, relying on *Sapp*, stated that "[w]hen- ever a defendant's good character is introduced at trial and the

141. 271 Ga. 446, 520 S.E.2d 462 (1999).

142. *Hobbs*, 288 Ga. at 554-55, 705 S.E.2d at 149-50 (Melton, J., dissenting).

143. *Hobbs v. State*, 299 Ga. App. 521, 523 n.10, 682 S.E.2d 697, 700 n.10 (2009).

144. *Id.* at 521, 682 S.E.2d at 698.

145. *Hobbs*, 288 Ga. at 551, 705 S.E.2d at 148.

146. *Id.* at 552, 705 S.E.2d at 148 (quoting *Hobbs*, 299 Ga. App. at 523-24, 682 S.E.2d at 700) (internal quotation marks omitted).

147. *Id.* at 552-53, 705 S.E.2d at 148-49.

148. *Id.* at 553, 705 S.E.2d at 149 (Melton, J., dissenting).

149. *Id.* at 551-52, 705 S.E.2d at 148 (majority opinion) (emphasis added).

150. *Id.* at 551 n.1, 705 S.E.2d at 148 n.1 (emphasis added); COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 136, at § 3.35.10.

151. *Hobbs*, 288 Ga. at 552, 705 S.E.2d at 148.

152. *Id.*

defendant timely requests a charge on good character, the trial court must instruct the jury that it 'may consider good character evidence in its deliberations.'¹⁵³ Tracking the language of *Sapp*, as the trial court did here, was sufficient.¹⁵⁴

It was the significance of the absence of the rest of the court's holding in *Sapp* that the supreme court justices disagreed upon.¹⁵⁵ The court of appeals also held that the trial court's good character instruction was deficient because it omitted the following critical language from the pattern jury instruction, also tracking the holding in *Sapp*: "Good character is a positive, substantive fact and may be sufficient to produce in the minds of a jury a reasonable doubt about the guilt of the defendant."¹⁵⁶ The majority and dissent agreed that it was not necessary for the trial court to give the pattern jury charge verbatim, but disagreed upon the significance of the absence of this critical statement of the law.¹⁵⁷ Determining that the trial court did not adequately charge on good character, the majority affirmed the court of appeals in reversing Hobbs's conviction.¹⁵⁸

The dissent criticized the holding, stating that the majority was "creating new law" by requiring the adherence to the pattern jury instruction because the trial court's charge, the dissent argued, sufficiently tracked the law set forth in *Sapp*.¹⁵⁹ The dissent noted that the majority failed to address whether the charge, even if erroneous, constituted harmful and, therefore, reversible error, as the court of appeals held.¹⁶⁰ The dissent disagreed that the language at issue was essential to the holding in *Sapp*, which meant the dissent concluded that the majority was now elevating a pattern jury instruction over the actual requirements of the law.¹⁶¹ Neither the majority nor the dissent addressed the reason that the trial court had given for *not* using the language in the pattern instruction, and neither the majority nor the dissent addressed the sufficiency and strength of the evidence of Hobbs's good character.

The pattern jury instruction for good character remains intact. However, practitioners must be aware that, while the trial court has

153. *Id.* (quoting *Sapp*, 271 Ga. at 448, 520 S.E.2d at 465).

154. *Id.*

155. *Id.* at 553, 705 S.E.2d at 149 (Melton, J., dissenting).

156. *Id.* at 551 & n.1, 552, 705 S.E.2d at 148 & n.1 (majority opinion); COUNCIL OF SUPERIOR COURT JUDGES, *supra* note 136.

157. *Hobbs*, 288 Ga. at 553, 705 S.E.2d at 149 (Melton, J., dissenting).

158. *Id.* (majority opinion).

159. *Id.* (Melton, J., dissenting).

160. *Id.* at 554, 705 S.E.2d at 150.

161. *See id.* at 553, 705 S.E.2d at 149.

some leeway concerning the exact method of conveying it to the jury, it is now mandatory that the court instruct the jury that good character is a substantive fact and may, on its own, be sufficient to create a reasonable doubt as to the guilt of the accused.