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## Criminal Law

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# Criminal Law

by Franklin J. Hogue\*  
and Laura D. Hogue\*\*

## I. INTRODUCTION

This year we selected a small number of significant cases and amendments to Georgia criminal law on which to focus this Survey.<sup>1</sup> This narrower focus allows slightly more in-depth treatment within the space limitations and may be more useful, so we hope, to practicing trial lawyers in the ever-changing area of criminal law.

## II. PRETRIAL ISSUES

### A. *Right to Counsel*

In 2002 in *Alabama v. Shelton*,<sup>2</sup> the Supreme Court of the United States mandated that the right to counsel, guaranteed by the Sixth

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1. For analysis of Georgia criminal law during the prior survey period, see Franklin J. Hogue, *Criminal Law, Annual Survey of Georgia Law*, 61 MERCER L. REV. 79 (2009).

2. 535 U.S. 654 (2002).

Amendment to the United States Constitution,<sup>3</sup> required the appointment of counsel to any person who could face a sentence of incarceration, including a sentence in which the term of imprisonment was to be probated because the probation could one day be revoked.<sup>4</sup> The Georgia Supreme Court followed suit, stating “that absent a knowing and intelligent waiver, no indigent person may be imprisoned for any offense, or sentenced to a probated or suspended prison term, unless he was represented by counsel at his trial.”<sup>5</sup>

During this reporting period, the question arose in *Alford v. State*<sup>6</sup> whether this directive applied retroactively. In 1995 Alford was convicted of DUI and of being a minor in possession of alcohol following a bench trial in Muscogee County, Georgia. The trial judge sentenced him to twelve months probation. Some time after the Supreme Court of the United States’ decision in 2002, Alford filed a petition for habeas corpus challenging the validity of his plea and conviction because he was not provided appointed counsel. The habeas court denied the petition, finding that Alford was not entitled to appointed counsel because he was not sentenced to any term of imprisonment.<sup>7</sup> The Georgia Supreme Court granted a certificate of probable cause to review the habeas court’s order, expressly to determine whether *Alabama v. Shelton*<sup>8</sup> should be applied retroactively to Alford, as he was unrepresented by counsel.<sup>9</sup>

In deciding whether a case should be applied retroactively, the court must first determine whether the rule announced by the new case is, indeed, a “new rule” or simply a declaration of a rule “dictated by precedent [that existed] at the time the [appellant’s] conviction became final.”<sup>10</sup> The Georgia Supreme Court agreed with the holdings of the United States Court of Appeals for the Eleventh Circuit and the South Carolina Supreme Court that concluded *Shelton* did apply retroactively because it was a “new rule.”<sup>11</sup> Accordingly, the Georgia Supreme Court likewise announced that *Shelton* must be applied retroactively in Georgia.<sup>12</sup> For Alford, though, this was not the end of the inquiry.

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3. U.S. CONST. amend. VI.

4. *Shelton*, 535 U.S. at 664, 672-74.

5. *Barnes v. State*, 275 Ga. 499, 501, 570 S.E.2d 277, 279 (2002).

6. 287 Ga. 105, 695 S.E.2d 1 (2010).

7. *Id.* at 105, 695 S.E.2d at 2.

8. 535 U.S. 654 (2002).

9. *Alford*, 287 Ga. at 105, 695 S.E.2d at 2.

10. *Teague v. Lane*, 489 U.S. 288, 300-01 (1989).

11. *Alford*, 287 Ga. at 106, 695 S.E.2d at 3 (citing *Howard v. United States*, 374 F.3d 1068, 1081 (11th Cir. 2004); *Talley v. South Carolina*, 640 S.E.2d 878, 882 (S.C. 2007)).

12. *Id.* at 108, 695 S.E.2d at 4.

Retroactive application of a rule on collateral—as opposed to direct—review (a habeas corpus petition being collateral) is limited to only two situations: (1) if the new “rule places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” or (2) if it “requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.”<sup>13</sup> The Georgia Supreme Court held that the right to counsel is implicit in the concept of ordered liberty as it directly affects the accuracy of the conviction and “alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”<sup>14</sup> The denial of the habeas petition was reversed, and *Shelton* will be applied retroactively.<sup>15</sup>

With only one dissent,<sup>16</sup> the Georgia Supreme Court opinion reminds us of the letter penned by Clarence Earl Gideon to the United States Supreme Court in January 1962 in which he wrote, “The question is very simple. I requested the court to appoint me attorney and the court refused.”<sup>17</sup> The next year, the Supreme Court of the United States declared in its landmark decision of *Gideon v. Wainwright*,<sup>18</sup> “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”<sup>19</sup>

## B. Search and Seizure

**1. Search Incident to Arrest.** In *Simmons v. State*,<sup>20</sup> John Henry Simmons Jr. was riding in the backseat of his friend’s Buick when they pulled into the parking lot of a fast food restaurant. A police officer recognized the car because the day before he had discovered that it was not registered or insured. Armed with that information, the officer arrested the driver as the driver walked from the car toward the restaurant. He then ordered the front seat passenger and Simmons out of the car so that he could search it. The officer found a small amount

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13. *Talley v. South Carolina*, 640 S.E.2d 878, 882 (S.C. 2007) (quoting *Teague*, 489 U.S. at 311) (internal quotation marks omitted).

14. *Alford*, 287 Ga. at 107-08, 695 S.E.2d at 4.

15. *Id.*

16. *See id.* at 108-11, 695 S.E.2d at 4-6 (Carley, P.J., dissenting).

17. ANTHONY LEWIS, *GIDEON’S TRUMPET* 82 (Vintage Books ed. 1989) (internal quotation marks omitted).

18. 372 U.S. 335 (1963).

19. *Id.* at 344.

20. 299 Ga. App. 21, 681 S.E.2d 712 (2009).

of marijuana in the armrest between the front seats. He then arrested Simmons, handcuffed him behind his back, and put him in the back seat of a patrol car.<sup>21</sup>

An officer drove Simmons to jail while Simmons sat alone in the back seat.<sup>22</sup> After placing Simmons in jail, the transporting officer then searched the back seat of his patrol car and found a paper bag wedged into the seat with “79.67 grams of a substance containing 72.4 percent cocaine.”<sup>23</sup> Simmons was indicted and convicted for trafficking in cocaine after losing a motion to suppress the drug evidence against him.<sup>24</sup>

Recognizing that Simmons lacked standing because he had no possessory interest in the car itself or anything inside it, the Georgia Court of Appeals concluded that Simmons could challenge the search anyway because his argument was that he was illegally detained during the search.<sup>25</sup> The court then discussed its holding in the driver’s appeal.<sup>26</sup> Relying on *New York v. Belton*,<sup>27</sup> the court held that after having legally arrested the driver, the officer was authorized to search the car and any containers in it incident to the arrest of the driver.<sup>28</sup> After the court had reached this conclusion in the driver’s case, however, the Supreme Court of the United States issued its opinion in *Arizona v. Gant*.<sup>29</sup> The Court’s decision in *Gant* limited its decision in *Belton* by holding that the police may “search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>30</sup> Thus, the court of appeals remanded *Simmons* to the trial court to reconsider its denial of Simmons’s motion to suppress in light of *Gant*.<sup>31</sup>

**2. Collateral Estoppel in Search and Seizure.** In *Thackston v. State*,<sup>32</sup> a Douglas County, Georgia judge placed Hulon Thomas

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21. *Id.* at 21-22, 681 S.E.2d at 713-14.

22. *Id.* at 22, 681 S.E.2d at 714.

23. *Id.*

24. *See id.* at 21-22, 681 S.E.2d at 713-14.

25. *Id.* at 26, 681 S.E.2d at 716-17.

26. *Id.* at 26, 681 S.E.2d at 717.

27. 453 U.S. 454 (1981).

28. *Simmons*, 299 Ga. App. at 26, 681 S.E.2d at 717 (quoting *Swicord v. State*, 293 Ga. App. 545, 547, 667 S.E.2d 401, 403 (2008)).

29. 129 S. Ct. 1710 (2009).

30. *Simmons*, 299 Ga. App. at 26, 681 S.E.2d at 717 (quoting *Gant*, 129 S. Ct. at 1719 (2009)) (internal quotation marks omitted).

31. *Id.* at 26-27, 681 S.E.2d at 717.

32. 303 Ga. App. 718, 694 S.E.2d 136 (2010).

Thackston Jr. on probation in 2001 for distribution of methamphetamine. In March 2007, Paulding County, Georgia law enforcement stopped Thackston for a traffic violation, searched his car and his person, and found methamphetamine in his pants. Paulding County charged him with the new offense of possession of methamphetamine while Douglas County issued a probation arrest warrant for the new crime.<sup>33</sup>

In October 2007, while executing the probation arrest warrant at Thackston's Paulding County home, officers found more methamphetamine, this time on Thackston's kitchen table. Using that discovery, the officers acquired a search warrant for Thackston's house and then found more methamphetamine and drug paraphernalia. Paulding County then charged Thackston with trafficking in methamphetamine. Douglas County subsequently amended its petition to revoke probation by adding the drugs found in Thackston's house to the drugs found in his pants during the traffic stop.<sup>34</sup>

In the Paulding County case, Thackston moved to suppress the drugs from both the traffic stop and the house search.<sup>35</sup> The trial court granted Thackston's motion, finding that the traffic stop search violated Thackston's Fourth Amendment<sup>36</sup> privacy right and that the house search "had to be suppressed as fruit of the poisonous tree."<sup>37</sup> The Paulding County prosecutor did not appeal the trial court's decision and dismissed the pending drug case.<sup>38</sup>

Thackston then filed an identical motion to suppress in the Douglas County case along with a plea in bar.<sup>39</sup> In the plea in bar, Thackston asserted that the State was precluded from pursuing a probation revocation because the successful motion to suppress in Paulding County settled the matter of the legality of the searches and seizures for Douglas County as well.<sup>40</sup> He based his position on the common law doctrine of collateral estoppel, a doctrine that "applies where an issue of fact or law is actually litigated and determined by a valid judgment, and the determination is essential to the judgment."<sup>41</sup> Further, "[t]hat determination is then conclusive in a subsequent action between the

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33. *Id.* at 718-19, 694 S.E.2d at 137.

34. *Id.* at 719, 694 S.E.2d at 137-38.

35. *Id.* at 719, 694 S.E.2d at 138.

36. U.S. CONST. amend. IV.

37. *Thackston*, 303 Ga. App. at 719, 694 S.E.2d at 138.

38. *Id.*

39. *Id.* at 720, 694 S.E.2d at 138.

40. *Id.*

41. *Id.* (quoting *Dickerson v. Dickerson*, 247 Ga. App. 812, 813, 545 S.E.2d 378, 380 (2001)) (internal quotation marks omitted).

same parties.<sup>42</sup> The probation court in Douglas County disagreed, denied the motion to suppress, and revoked Thackston's probation.<sup>43</sup>

The court of appeals reversed the probation court, holding that Thackston's case involved the same issues of fact and law in both Paulding and Douglas Counties, that these issues were actually litigated in Paulding County, that the determination of the legality of the searches was essential to resolving the motion to suppress, and that both cases "involved the same parties—Thackston and the State."<sup>44</sup> In reaching this result, the court reversed two of its cases that held that the State could relitigate a motion to suppress in a subsequent probation revocation matter.<sup>45</sup>

**3. Inadmissible Confession: Hope of Benefit.** In *Canty v. State*,<sup>46</sup> Tara Marquez was working outside as a carhop at the local Sonic Drive-In one night when she noticed four males in the dim light. Fearing that something bad was up, she began to run for the back door of the restaurant. The four men chased her, and one of them grabbed her shirt just as she escaped into the restaurant. She could not identify any of them.<sup>47</sup>

About seven months later, two detectives interviewed Alfonzo Canty, who was in the Bulloch County, Georgia jail on charges unrelated to the attempted robbery at the Sonic. Neither detective gave Canty the Miranda warnings,<sup>48</sup> which have been standard in custodial interrogations since 1966.<sup>49</sup> One of the detectives, Katrina Marson, "asked Canty if he knew anything about the attempted robbery at the Sonic."<sup>50</sup>

42. *Id.* (quoting *Dickerson v. Dickerson*, 247 Ga. App. 812, 813, 545 S.E.2d 378, 380 (2001)) (internal quotation marks omitted).

43. *Id.*

44. *Id.* at 720-21, 694 S.E.2d at 138-39.

45. *Id.* at 723, 694 S.E.2d at 140 (reversing *Harvill v. State*, 190 Ga. App. 353, 378 S.E.2d 917 (1989), and *Aikens v. State*, 143 Ga. App. 891, 240 S.E.2d 117 (1977)).

46. 286 Ga. 608, 690 S.E.2d 609 (2010).

47. *Id.* at 608-09, 690 S.E.2d at 610.

48. *Id.* at 609 & n.1, 690 S.E.2d at 610 & n.1.

49. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

*Id.* at 444.

50. *Canty*, 286 Ga. at 609, 690 S.E.2d at 610.

Without implicating himself at first, Canty said he believed that Levi and Lenzie Wilkerson were in on it.<sup>51</sup>

Marson read Canty's demeanor to indicate that he was involved in the Sonic robbery attempt. Accordingly, she began to encourage him to tell all by explaining to him that he could "hope for a shorter term" if all his criminal behavior—including the crimes for which he was being held and the Sonic crime—were wrapped up together and handled at one time by the district attorney. Additionally, Marson told Canty that the district attorney would receive a favorable report from Marson about Canty's cooperation if he went ahead and told on himself. Motivated by Marson's encouragement, Canty confessed to his role in the Sonic crime.<sup>52</sup>

Under Georgia law, section 24-3-50 of the Official Code of Georgia Annotated (O.C.G.A.)<sup>53</sup> requires that to be admissible at trial against the defendant, a confession "must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury."<sup>54</sup> Further, "[t]he promise of a hope or benefit that will render a confession involuntary under [O.C.G.A.] § 24-3-50 must relate to the charge or sentence facing the suspect."<sup>55</sup> The "hope of benefit" alluded to in the statute is generally construed to mean hope of lighter punishment.<sup>56</sup> It was clear to the Georgia Supreme Court—though not so clear to the trial court and the Georgia Court of Appeals, both of which concluded that Canty's confession was voluntarily given—that "Canty's confession was induced by a hope of benefit."<sup>57</sup> As a consequence, Canty's confession "must be 'presumed to be legally false[] and cannot be the underlying basis of a conviction.'<sup>58</sup>

### III. OPEN COURTROOM

It seems a cardinal rule in American jurisprudence that every individual is entitled to have his case tried in a courtroom open to the public. The Sixth Amendment to the United States Constitution<sup>59</sup> provides that "[i]n all criminal prosecutions, the accused shall enjoy the

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51. *Id.*

52. *Id.* at 609-10, 690 S.E.2d at 610.

53. O.C.G.A. § 24-3-50 (2010).

54. *Id.*

55. *Canty*, 286 Ga. at 610, 690 S.E.2d at 611 (quoting *White v. State*, 266 Ga. 134, 134, 485 S.E.2d 277, 279 (1996)) (internal quotation marks omitted).

56. *See id.*

57. *Id.* at 608, 610-11, 690 S.E.2d at 610-11.

58. *Id.* at 610-11, 690 S.E.2d at 611 (quoting *State v. Ritter*, 268 Ga. 108, 109, 485 S.E.2d 492, 494 (1997)).

59. U.S. CONST. amend. VI.

right to a . . . public trial.<sup>60</sup> The Georgia Constitution likewise mandates that “[i]n criminal cases, the defendant shall have a public . . . trial.”<sup>61</sup> Yet it took a trip all the way to the Supreme Court of the United States to remind the court in DeKalb County that this constitutional directive is not discretionary.

In *Presley v. State*,<sup>62</sup> the defendant was tried for the offense of trafficking in cocaine. When voir dire began, the judge directed that the defendant’s uncle wait outside the courtroom because the courtroom had limited seating. Trial counsel objected, arguing that the court was violating the defendant’s right to a public trial by excluding the public from the courtroom during voir dire.<sup>63</sup> The trial court denied the motion, and the court of appeals affirmed.<sup>64</sup> The court applied an abuse of discretion standard and held that the trial court gave legitimate reasons for needing to clear the courtroom for voir dire and that the court was prepared to let the spectators return after jury selection.<sup>65</sup> It appears that the trial court and the court of appeals considered the issue simply within the framework of the trial judge’s ministerial role in making decisions about courtroom security and comfort and did not consider the broader inquiry of whether these decisions were infringing upon constitutional rights.<sup>66</sup>

Presley sought and was granted certiorari on this single issue by the Georgia Supreme Court.<sup>67</sup> The supreme court identified this issue as one of constitutional significance, safeguarded by the Sixth and Fourteenth Amendments to the United States Constitution.<sup>68</sup> The supreme court acknowledged that the right to a public trial extended to jury voir dire and jury selection.<sup>69</sup> In order to exclude the public from jury selection, the supreme court noted, “[T]here must be ‘an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider

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60. *Id.*

61. GA. CONST. of 1983 art. I, § 1, para. 11(a).

62. 290 Ga. App. 99, 658 S.E.2d 773 (2008).

63. *Id.* at 99-100, 658 S.E.2d at 775.

64. *See id.* at 100-01, 658 S.E.2d at 775.

65. *See id.*

66. *See generally* *Presley v. Georgia*, 130 S. Ct. 721, 722 (2010) (“[I]t’s up to the individual judge to decide . . . what’s comfortable. . . . It’s totally up to my discretion whether or not I want family members in the courtroom to intermingle with the jurors and sit directly behind the jurors where they might overhear some inadvertent comment or conversation.”).

67. *Presley v. State*, 285 Ga. 270, 270, 674 S.E.2d 909, 910 (2009).

68. U.S. CONST. amend. XIV; *see Presley*, 285 Ga. at 272, 674 S.E.2d at 911.

69. *Presley*, 285 Ga. at 272, 674 S.E.2d at 911.

reasonable alternatives to closing the [courtroom], and it must make findings adequate to support the closure.<sup>70</sup> The supreme court concluded that the trial court must have legitimately believed there was no reasonable alternative to closing the courtroom and that the defense counsel's request for accommodations, which would have enabled Presley's uncle to remain in the courtroom, was too "nebulous."<sup>71</sup> The supreme court put the burden on the defense counsel to provide a specific alternative to courtroom closure for the trial court to consider.<sup>72</sup> Defense counsel failed to do so; therefore, the trial court did not abuse its discretion in failing to sua sponte advance its own alternatives to courtroom exclusion.<sup>73</sup>

Justice Sears wrote a dissent that was joined by Justice Hunstein.<sup>74</sup> The dissent put the burden squarely back upon the court, stating, "A room that is so small that it cannot accommodate the public is a room that is too small to accommodate a constitutional criminal trial."<sup>75</sup> The dissenting justices pointed out that the only decision that made the courtroom too small to accommodate the public was the trial court's "sole decision" to conduct voir dire with all forty-two potential jurors in the courtroom at the same time.<sup>76</sup>

The Supreme Court of the United States accepted the case on certiorari.<sup>77</sup> The Supreme Court first noted from the record that there was certainly enough room for both the jurors and the spectators to be seated in the courtroom.<sup>78</sup> The Supreme Court criticized the majority decision by the Georgia Supreme Court, noting that "despite [the Supreme Court's] explicit statements to the contrary," the Georgia Supreme Court concluded that the trial court need not consider alternatives to closing the proceeding absent an opposing party's proffer of some alternatives.<sup>79</sup> Yet the mandate of *Waller v. Georgia*<sup>80</sup> and *Press-Enterprise Co. v. Superior Court of California, Riverside County*<sup>81</sup> was clear: it is the trial court's duty to consider alternatives to closing the courtroom; thus, there is no burden placed upon the opponent to

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70. *Id.* (quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984)).

71. *Id.* at 272-73, 674 S.E.2d at 911.

72. *See id.* at 273, 674 S.E.2d at 912.

73. *Id.* at 274, 674 S.E.2d at 912.

74. *Id.* (Sears, C.J., dissenting).

75. *Id.*

76. *Id.*

77. *Presley*, 130 S. Ct. at 722.

78. *Id.*

79. *Id.* at 724.

80. 467 U.S. 39 (1984).

81. 464 U.S. 501 (1984).

come up with those alternatives.<sup>82</sup> Further eviscerating the Georgia Supreme Court opinion, the Supreme Court of the United States sided with Justices Sears and Hunstein in challenging any defense of closing the courtroom during voir dire based upon a broad, nonspecific risk of jurors hearing prejudicial remarks.<sup>83</sup> The Supreme Court noted that such concerns are present in every instance of voir dire in a public courtroom, meaning that the Georgia Supreme Court's opinion essentially "permit[ted] the closure of voir dire in *every criminal case* . . . whenever the trial judge decides . . . that he or she would prefer to fill the courtroom with potential jurors rather than spectators."<sup>84</sup>

#### IV. VENUE

In every criminal case, the state must prove the essential element of venue—that the crime occurred in the county in which the case is being tried.<sup>85</sup> Many new prosecutors learn this the hard way by resting and then hearing the trial judge grant the defense's motion for directed verdict of acquittal because the prosecutor failed to ask the all-important question: "and Detective, in what county did that occur?" Perhaps fearing that result, a trial judge in Muscogee County began assisting the state in making sure that this critical fact did not go unproven. These nudges by the judge resulted in two very different outcomes.

In *Gardner v. State*,<sup>86</sup> the State was prosecuting Gardner for the offense of armed robbery.<sup>87</sup> After the State's direct examination of its first witness, the following exchange took place:

State: That's all we have, Judge.

The Court: Prove venue. Did you prove venue?

State: I have not as of yet.

The Court: Why don't we go ahead and do that before we forget it.<sup>88</sup>

On appeal, Gardner asserted that pursuant to O.C.G.A. § 17-8-57,<sup>89</sup> this exchange constituted an improper comment on the evidence by the

82. *Presley*, 130 S. Ct. at 724 (citing *Waller*, 467 U.S. at 48; *Press-Enterprise*, 464 U.S. at 511).

83. *Id.* at 725.

84. *Id.* (quoting *Presley*, 285 Ga. at 276, 674 S.E.2d at 913 (Sears, C.J., dissenting)) (internal quotation marks omitted).

85. *Jones v. State*, 272 Ga. 900, 901, 537 S.E.2d 80, 83 (2000).

86. 296 Ga. App. 792, 676 S.E.2d 258 (2009).

87. *Id.* at 792, 676 S.E.2d at 260.

88. *Id.* at 793, 676 S.E.2d at 261.

89. O.C.G.A. § 17-8-57 (2008). "It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused." *Id.*

court.<sup>90</sup> The Georgia Court of Appeals agreed, noting that what escalated the error was the trial court's selection of the word "we" instead of "you"—"[w]hy don't *we* go ahead and do that before *we* forget it"—which implied that he was aligned with the state instead of an impartial arbiter.<sup>91</sup> The court of appeals held that the directive of O.C.G.A. § 17-8-57 that prohibited the trial court from commenting on the evidence is mandatory; therefore, a violation of this rule required reversal and a new trial for Gardner.<sup>92</sup>

But that wasn't the end of the story. The State sought and was granted certiorari.<sup>93</sup> The first question the Georgia Supreme Court addressed was whether, as the State argued, the defense had waived its challenge to the trial court's comment by failing to object at trial.<sup>94</sup> The supreme court held "that a violation of [O.C.G.A.] § 17-8-57 will *always* constitute 'plain error,' meaning that the failure to object at trial will not waive the issue on appeal."<sup>95</sup> The supreme court expressly disapproved of previous cases that had not clearly articulated the court's position.<sup>96</sup>

Nevertheless, the supreme court reversed (albeit with a two-member dissent), holding that while it "strongly discourage[s] the giving of direction or the use of language that could create the appearance of alignment between the trial court and either the prosecution or defense," the trial judge's inquiry into whether venue had been proved did not constitute a comment on the evidence.<sup>97</sup> The two-member dissent stood by the court of appeals conclusion that the trial court's inquiry into whether venue had been proved was necessarily an expression of the judge's opinion concerning the state's proof and should have required reversal.<sup>98</sup>

Despite the supreme court's holding in *Gardner*, the court of appeals in *Anderson v. State*<sup>99</sup> held differently.<sup>100</sup> *Anderson* involved another armed robbery trial (though this time with an added financial transac-

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90. *Gardner*, 296 Ga. App. at 793, 676 S.E.2d at 260.

91. *Id.* at 793, 676 S.E.2d at 261 (emphasis added).

92. *Id.* at 794-95, 676 S.E.2d at 262.

93. *State v. Gardner*, 286 Ga. 633, 634, 690 S.E.2d 164, 165 (2010).

94. *Id.*

95. *Id.*

96. *Id.* (disapproving of *Lopez v. State*, 297 Ga. App. 618, 625, 677 S.E.2d 776, 781 (2009); *Sims v. State*, 296 Ga. App. 368, 369-70, 674 S.E.2d 392, 394-95 (2009); and *Birkbeck v. State*, 292 Ga. App. 424, 434-35, 665 S.E.2d 354, 363-64 (2008)).

97. *Id.* at 635, 690 S.E.2d at 166.

98. *Id.* at 635-36, 690 S.E.2d at 166 (Hines, J., dissenting).

99. 297 Ga. App. 733, 678 S.E.2d 498 (2009).

100. Compare *Gardner*, 286 Ga. 633, 690 S.E.2d 164, with *Anderson*, 297 Ga. App. 733, 678 S.E.2d 498.

tion—credit card fraud) in the same county as *Gardner* and before the same trial judge (only six weeks later). In this trial, during the testimony of one of the state's witnesses, the trial judge asked, "Did we establish venue on this one?"<sup>101</sup> The following exchange then took place:

STATE: I asked her if it was in Muscogee County.

THE COURT [to the witness]: The store where you were working on the 13th where the shoes were bought using the transaction card was in Muscogee County, is that accurate?

[WITNESS]: Yes.

THE COURT: All right. I know we had some confusion because she had worked at one store and she's now working in another one. I just wanted to make sure.<sup>102</sup>

The court of appeals held that the trial judge had violated O.C.G.A. § 17-8-57 by improperly expressing his opinion on what had been proved, just as he had in *Gardner*.<sup>103</sup> Noting that the defense's failure to object at trial did not waive the error because the trial court's remarks constituted plain error, the court of appeals reversed the conviction and remanded the case for a new trial.<sup>104</sup> But for *Anderson* the outcome was quite different than for *Gardner*.

Again the State took the case up on certiorari to the supreme court.<sup>105</sup> The supreme court's opinion was issued two months after the opinion in *Gardner*.<sup>106</sup> This time the supreme court held that the trial judge's comments *did* improperly constitute an expression of opinion that venue had been proved in violation of O.C.G.A. § 17-8-57.<sup>107</sup> The distinction that the majority of the court drew between its decisions in *Gardner* and *Anderson* was the line, "I just wanted to make sure."<sup>108</sup> This statement, the supreme court held, unequivocally expressed an "opinion that venue had in fact been proven."<sup>109</sup> The two justices who dissented in *Gardner* concurred specially in the opinion in *Anderson*, making it clear that they did not see any critical distinction between the impropriety of the trial judge's comments in both cases and maintained

101. *Id.* at 734, 678 S.E.2d at 500.

102. *State v. Anderson*, 287 Ga. 159, 160, 695 S.E.2d 26, 28 (2010).

103. *Anderson*, 297 Ga. App. at 735-36, 678 S.E.2d at 500-01.

104. *Id.*

105. *Anderson*, 287 Ga. at 159, 695 S.E.2d at 27.

106. *Compare Anderson*, 287 Ga. 159, 695 S.E.2d 26, with *Gardner*, 286 Ga. 633, 690 S.E.2d 164.

107. *Anderson*, 287 Ga. at 160-61, 695 S.E.2d at 28.

108. *Id.* (internal quotation marks omitted).

109. *Id.*

their opinion that the reversal by the court of appeals in *Gardner's* case should have also been affirmed.<sup>110</sup>

## V. AMENDMENTS IN RESPONSE TO DECISIONS

### A. *The Short-Lived Defense of Consent*

For sex offenses against children, consent is never a defense because Georgia law presumes that until a person reaches the age of sixteen, he or she is unable to give legal consent to engaging in sexual activity.<sup>111</sup> For sex offenses against persons over the age of sixteen, the law requires that the sexual offense be non-consensual in order to be criminal except in certain circumstances.<sup>112</sup> One of those circumstances had been sexual offenses between teachers and students.<sup>113</sup> That dynamic was altered in *Chase v. State*;<sup>114</sup> however, the change was short-lived.

Melissa Lee Chase was a high school physical education teacher<sup>115</sup> who was convicted at a bench trial of violating O.C.G.A. § 16-6-5.1<sup>116</sup> for having committed the offense of sexual assault against a student.<sup>117</sup> She was sentenced to ten years in prison followed by five years of probation and was required to register as a sex offender.<sup>118</sup> The offense arose out of her consensual sexual relationship with a sixteen-year-old female student.<sup>119</sup> The evidence was uncontroverted that the student began the relationship with Chase and still had romantic feelings toward her even after the prosecution and conviction. Chase argued on appeal that consent remained a viable defense under the statute governing this offense.<sup>120</sup>

Chase's argument rested on the express language of O.C.G.A. § 16-6-5.1, which has three sections: (a), (b), and (c).<sup>121</sup> Section (a) sets forth all the definitions (what is a "sexual offense," what constitutes "intimate parts," what behavior equates with "psychotherapy," and so forth).<sup>122</sup>

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110. *Id.* at 161, 695 S.E.2d at 28 (Hines, J., concurring specially).

111. *See* O.C.G.A. § 16-6-3(a) (2007).

112. *See* O.C.G.A. § 16-6-1(a)(1) (2007).

113. *See* O.C.G.A. § 16-6-5.1(b) (2007).

114. 285 Ga. 693, 681 S.E.2d 116 (2009).

115. *Chase v. State*, 293 Ga. App. 415, 417, 667 S.E.2d 195, 197 (2008).

116. O.C.G.A. § 16-6-5.1 (2007).

117. *Chase*, 293 Ga. App. at 415, 667 S.E.2d at 196.

118. *Chase*, 285 Ga. at 694-95, 681 S.E.2d at 117.

119. *Id.* at 694, 681 S.E.2d at 117.

120. *Chase*, 293 Ga. App. at 417, 667 S.E.2d at 197.

121. *Id.* at 417-18, 667 S.E.2d at 197; *see* O.C.G.A. § 16-6-5.1(a)-(c).

122. O.C.G.A. § 16-6-5.1(a).

Section (b) sets forth the offense of sex with a probationer or parolee or sex with a student as follows:

A probation or parole officer or other custodian or *supervisor of another person* referred to in this Code section commits sexual assault when he or she engages in sexual contact with another person who is a probationer or parolee under the supervision of said probation or parole officer or who is in the custody of law or *who is enrolled in a school* or who is detained in or is a patient in a hospital or other institution *and such actor has supervisory or disciplinary authority over such other person.*<sup>123</sup>

Section (c) addresses sexual assault with a person over whom the actor has supervisory or disciplinary authority when the person is in the actor's custody or when the person is detained in a hospital or institution.<sup>124</sup> It is under this section—section (c)—that there are three subsections: 1, 2, and 3.<sup>125</sup> It is under section (c)(3) that the consent language appears: "Consent of the victim shall not be a defense to a prosecution under this subsection."<sup>126</sup> Chase's argument was that the legislature eliminated consent as a defense with respect to only those acts described in subsection (c).<sup>127</sup> Chase argued that sex with a student appeared only in section (b) and, therefore, consent was a viable defense.<sup>128</sup> The court of appeals disagreed and affirmed her conviction.<sup>129</sup>

The supreme court granted certiorari to address this issue.<sup>130</sup> Applying all the tried-and-true rules of statutory construction, the matter boiled down to one question: "Did the [c]ourt of [a]ppeals err in ruling that subsection (c)(3) of [O.C.G.A.] § 16-6-5.1 applies to prosecutions under subsection (b) of the statute?"<sup>131</sup> The language of the statute was clear and unambiguous—"The General Assembly intended to eliminate consent as a defense to the crimes created by subsection (c) only."<sup>132</sup> The supreme court reasoned that the trial court and court of appeals made a public policy leap to apply one subsection's limitations

123. *Id.* § 16-6-5.1(b) (emphasis added).

124. *Id.* § 16-6-5.1(c).

125. *Id.* § 16-6-5.1(c)(1)-(3).

126. *Id.* § 16-6-5.1(c)(3) (emphasis added).

127. *See Chase*, 293 Ga. App. at 418, 667 S.E.2d at 197.

128. *See id.* at 417-18, 667 S.E.2d at 197.

129. *Id.* at 418, 667 S.E.2d at 197.

130. *Chase*, 285 Ga. at 695, 681 S.E.2d at 117.

131. *Id.* at 695, 681 S.E.2d at 117-18.

132. *Id.* at 697, 681 S.E.2d at 119.

to another, characterizing those decisions as nothing more than “judicial sleight of hand.”<sup>133</sup> The conviction was reversed.<sup>134</sup>

But the Georgia General Assembly was listening. Effective May 20, 2010, O.C.G.A. § 16-6-5.1 was rewritten.<sup>135</sup> The various offenses contained in the statute were more specifically defined, and most significantly, there was a new section (e) that reads, “Consent of the victim shall not be a defense to a prosecution *under this Code section*.”<sup>136</sup>

### B. Kidnapping: The Slight Movement Standard

On a related note, in direct response to the supreme court’s holding in *Garza v. State*,<sup>137</sup> the General Assembly amended the kidnapping statute covered in last year’s criminal law survey.<sup>138</sup> In *Garza* the supreme court overruled the “slight movement” standard in assessing what conduct could satisfy the asportation element of the offense of kidnapping.<sup>139</sup> Instead, the supreme court held that for asportation to sufficiently form the basis for the offense of kidnapping, the factfinder must assess four factors: “(1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense.”<sup>140</sup> As a result, *Garza*’s kidnapping conviction was reversed.<sup>141</sup>

The legislature responded. Effective July 1, 2009, O.C.G.A. § 16-5-40<sup>142</sup> was amended to undermine the *Garza* holding.<sup>143</sup> The new legislation amends section (b)(1) of the statute to read as follows: “For the offense of kidnapping to occur, slight movement shall be sufficient; provided, however, that any such slight movement of another person which occurs while in the commission of any other offense shall not

133. *Id.*

134. *Id.* at 699, 681 S.E.2d at 120.

135. Ga. H.R. Bill, 571, § 2, Reg. Sess., 2010 Ga. Laws 168 (codified at O.C.G.A. § 16-6-5.1 (Supp. 2010)).

136. O.C.G.A. § 16-6-5.1 (Supp. 2010) (emphasis added).

137. 284 Ga. 696, 670 S.E.2d 73 (2008).

138. See Hogue, *supra* note 1, at 94-96.

139. 284 Ga. at 701-02, 670 S.E.2d at 78.

140. *Id.* at 702, 670 S.E.2d at 78 (relying upon the test articulated in *Gov’t of the Virgin Islands v. Berry*, 604 F.2d 221, 227 (3d Cir. 1979)).

141. *Id.* at 704, 670 S.E.2d at 79.

142. O.C.G.A. § 16-5-40 (Supp. 2010).

143. Ga. H.R. Bill 575, Reg. Sess., 2009 Ga. Laws 331 (codified at O.C.G.A. § 16-5-40).

constitute the offense of kidnapping if such movement is merely incidental to such other offense.<sup>144</sup>

## VI. SENTENCING

### A. *First Offenders*

It is error to disqualify an individual who is serving a sentence under the First Offender Act<sup>145</sup> from serving as a prospective juror.<sup>146</sup> O.C.G.A. § 15-12-163(b)(5)<sup>147</sup> provides that in felony jury trials, the state or the accused may object to the seating of a juror who “has been convicted of a felony in a federal court or any court of a state of the United States and the juror’s civil rights have not been restored.”<sup>148</sup> In a case of first impression, the supreme court in *Humphreys v. State*<sup>149</sup> was asked to consider whether that statute applied to individuals serving a sentence under the First Offender Act.<sup>150</sup> The supreme court noted that the juror disqualification statute expressly applies to those who have been convicted of a felony offense, and the First Offender Act expressly provides for punishment “without entering a judgment of guilt.”<sup>151</sup> Accordingly, the supreme court “conclude[d] that a person who has been placed on probation or sentenced to a term of confinement pursuant to the First Offender Act is not incompetent to serve as a petit juror under [O.C.G.A.] § 15-12-163(b)(5) either before or after being discharged without an adjudication of guilt.”<sup>152</sup>

### B. *Death Penalty*

On interim review of a death penalty case, the supreme court in *Pope v. State*<sup>153</sup> addressed the question of whether the trial court could order a psychological evaluation of the defendant over his objection.<sup>154</sup> During the pretrial phase of the case, “[t]he trial court repeatedly inquired of defense counsel if they anticipated presenting expert mental

144. O.C.G.A. § 16-5-40(b)(1).

145. O.C.G.A. §§ 42-8-60 to -66 (1997 & Supp. 2010).

146. *Humphreys v. State*, 287 Ga. 63, 71, 694 S.E.2d 316, 327 (2010).

147. O.C.G.A. § 15-12-163(b)(5) (2008).

148. *Id.*

149. 287 Ga. 63, 694 S.E.2d 316 (2010).

150. *Id.* at 69, 694 S.E.2d at 326.

151. *Id.* at 70, 694 S.E.2d at 326-27; see O.C.G.A. § 42-8-60(a).

152. *Humphreys*, 287 Ga. at 71, 694 S.E.2d at 327.

153. 286 Ga. 1, 685 S.E.2d 272 (2009).

154. *Id.* at 3, 685 S.E.2d at 274.

health testimony at trial.”<sup>155</sup> The defense “repeatedly responded that they had no present intention of doing so” but assured the trial court that they would advise the court if and when they made any decision to seek a mental health examination of their client.<sup>156</sup> The trial court was very concerned that defense counsel might forego an evaluation, only to have a mental retardation claim raised in later habeas corpus proceedings. So over defendant’s objection, the trial court ordered the defendant to undergo a competency and mental retardation evaluation. The court also ordered that a copy of the report be provided to the State after defense counsel had reviewed it and advised the trial court of the findings and whether they related to the underlying case.<sup>157</sup>

In the next hearing, the State informed the trial court that it had instructed Central State Hospital not to provide the State with a copy of the report, so the State had not seen the report. At that time, the defense made a copy of the report and provided it to the trial court. There was no further discussion regarding the State’s access to that report.<sup>158</sup>

The law does place a duty upon the trial court to conduct sua sponte a competency hearing “when there is information which becomes known to it, prior to or at the time of the trial, sufficient to raise a bona fide doubt regarding the defendant’s competence.”<sup>159</sup> The problem here, the supreme court reasoned, was that the trial court’s motivation in ordering the mental evaluation was not a concern for the defendant’s competence but was instead “solely for the purpose of ensuring that claims regarding mental health are not eventually raised on habeas corpus.”<sup>160</sup> This motivation is not sufficient to trump the defendant’s Fifth Amendment<sup>161</sup> right to remain silent and to protect his privilege against self-incrimination.<sup>162</sup> The supreme court ruled that the trial court’s order for the psychological evaluation was an error and ordered that the report be kept under seal unless the defense elected to present any mental health expert testimony at defendant’s trial.<sup>163</sup>

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 4, 685 S.E.2d at 274-75.

160. *Id.* at 4, 685 S.E.2d at 275.

161. U.S. CONST. amend. V.

162. *Pope*, 286 Ga. at 3-4, 685 S.E.2d at 274.

163. *Id.* at 4-5, 685 S.E.2d at 275.

## VII. CONCLUSION

Criminal law and constitutional law, which go hand in hand, are dynamic and ever-changing fields of study thanks to the work of creative practitioners (many of whose cases are highlighted in this Article) who have challenged the status quo to help develop and define the landscape within which prosecutors and defense attorneys implement our criminal justice system.