Criminal Law

Laura D. Hogue

Franklin J. Hogue

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Criminal Law Commons

Recommended Citation
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol58/iss1/6

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Criminal Law

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

I. INTRODUCTION

The tension between prosecuting those charged with violating the laws of this state and defending the rights of those accused of having committed crimes sets the stage for the multitude of opinions from the Georgia Court of Appeals and the Georgia Supreme Court in the field of criminal law. As always, we strive to present cases that will assist attorneys in their practice, either by surveying cases that present careful reiteration of age-old principles or by surveying cases that alter old rules or establish new ones. We limit our Article to cases that affect the practice of criminal law but omit criminal law cases that deal with general evidentiary issues and death penalty issues because those specific issues are addressed in other survey articles in this book.

* Partner in the law firm of Hogue & Hogue, LLP, Macon, Georgia. Adjunct Faculty, Walter F. George School of Law, Mercer University. Columbus College (B.A., cum laude, 1986); Walter F. George School of Law, Mercer University (J.D., magna cum laude, 1991). Member, State Bar of Georgia; Regional Vice-President, Georgia Association of Criminal Defense Lawyers, Macon Association of Criminal Defense Lawyers.

** Partner in the law firm of Hogue & Hogue, LLP, Macon, Georgia. Faculty, National Criminal Defense College; Adjunct Faculty, Walter F. George School of Law, Mercer University. Atlanta Christian College (B.A., magna cum laude, 1980); Emmanuel School of Religion (M.A., summa cum laude, 1983); Georgia State University (M.A., summa cum laude, 1988); Walter F. George School of Law, Mercer University (J.D., cum laude, 1991). Member, State Bar of Georgia; Past-President, Macon Association of Criminal Defense Lawyers; Georgia Association of Criminal Defense Lawyers; Member, National Association of Criminal Defense Lawyers.
II. PRETRIAL ISSUES

A. Competency

The predicate to any criminal prosecution is a determination that the defendant is competent to stand trial. This reporting period, the Georgia Supreme Court reviewed two cases and made important changes to the review procedures in a competency determination.

First, in Sims v. State, the Georgia Supreme Court abolished the "any evidence" standard of review for competency determinations and held instead that the correct standard of review for such verdicts was the preponderance of the evidence standard. In Sims the defendant asserted that he was mentally retarded and, pursuant to Official Code of Georgia Annotated ("O.C.G.A.") section 17-7-130, filed a plea of mental incompetency to stand trial for the offense of aggravated sodomy. After a special jury found him to be competent, Sims, along with his codefendant, was tried for the indicted offense. Sims was found guilty but mentally retarded. He appealed and the court of appeals upheld the verdict, holding that there was "some evidence" to support the special jury’s verdict that Sims was competent.

On review, the Georgia Supreme Court noted that a competency hearing is in the nature of a civil proceeding. As a result, the defendant bears the burden of persuading the jury by a preponderance of the evidence that he is not competent to stand trial, and like any civil trial, the verdict must be affirmed if there was "any evidence" to support it. The defendant's attorneys acknowledged the existing standard of review but sought to replace it with a less deferential standard of review, arguing that the "significantly deferential civil standard of review is inadequate to protect the constitutional standard implicated in a competency trial because it creates an insurmountable obstacle to meaningful appellate review of competency determinations."
The supreme court agreed.\textsuperscript{10} The supreme court noted that because there is a statutory presumption in Georgia that the defendant is competent, there would always be "some" evidence of the defendant's competency, which would render the current civil standard of review meaningless when applied to a competency proceeding.\textsuperscript{11} Instead, the supreme court held that as a "quasi-criminal" proceeding, the appropriate standard of review should now be "whether after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was incompetent to stand trial."\textsuperscript{12} Reversing long-standing precedent,\textsuperscript{13} the supreme court then applied the new standard to Sims and reversed the verdict and the court of appeals opinion because the evidence presented had sufficiently shown that Sims was not competent.\textsuperscript{14}

The issue of competency arose again in \textit{Traylor v. State}.\textsuperscript{15} Traylor was convicted of felony murder and argued at his motion for new trial that he had not been competent to stand trial.\textsuperscript{16} The issue was originally presented in the context of ineffective assistance of trial counsel, but Traylor later dropped the ineffectiveness claim and asserted substantive and procedural denials of due process.\textsuperscript{17}

Traylor argued that although he did not raise the issue of his competency either prior to or during the trial, the trial court, nonetheless, had information that should reasonably have raised a doubt about Traylor's competence, and thus the trial court should have conducted a hearing to determine his competence.\textsuperscript{18} The information that Traylor referred to was a colloquy between the trial court and Traylor when he was questioned, outside the presence of the jury, about his decision not to testify.\textsuperscript{19} Traylor gave "somewhat inconsistent" responses to questions from the court about whether he agreed with his own decision not to testify.\textsuperscript{20} Following this exchange, Traylor's attorney told the court that Traylor sometimes had difficulty understanding and

\textsuperscript{10} Id. at 393, 614 S.E.2d at 77.
\textsuperscript{11} Id. at 391, 614 S.E.2d at 76.
\textsuperscript{12} Id.
\textsuperscript{14} \textit{Sims}, 279 Ga. at 393, 614 S.E.2d at 77.
\textsuperscript{15} 280 Ga. 400, 627 S.E.2d 594 (2006).
\textsuperscript{16} Id. at 400, 627 S.E.2d at 596.
\textsuperscript{17} Id. at 403, 627 S.E.2d at 598.
\textsuperscript{18} Id. at 404, 627 S.E.2d at 598.
\textsuperscript{19} Id., 627 S.E.2d at 598-99.
\textsuperscript{20} Id. at 405, 627 S.E.2d at 599.
enunciating, that he "has certain disabilities," and that he took special education classes, but he was not retarded or "psychiatrically challenged." 21

The trial court asked for any documentation the attorney had concerning these issues. Traylor's trial attorney told the court that he had educational records containing psychological testing but that counsel's review of the records, as well as his meetings with Traylor, satisfied the attorney that his client was not incompetent. The trial court also reviewed the records and found no reason to dispute counsel's assessment of his client's competence. 22 The Georgia Supreme Court agreed that based upon the colloquy with the court, the records, and Traylor's pretrial and trial behavior, the trial court did not violate Traylor's procedural due process rights in failing to conduct a competency hearing. 23

But Traylor also raised a substantive due process claim, arguing that his constitutional rights were violated because he was tried when he was, in fact, incompetent to stand trial. In support of this claim, Traylor called a clinical psychologist and clinical neuropsychiatrist, both of whom testified that Traylor was not competent at the time of trial. 24 The trial attorney testified for the State that his observations of Traylor led him to believe that Traylor was competent. 25 The trial court denied the motion, finding that Traylor failed to present "clear and convincing evidence to warrant an evidentiary hearing' on his substantive claim of incompetency." 26 The Georgia Supreme Court held that applying this standard of proof was reversible error. 27 Traylor had the burden of proving his incompetency by a preponderance of the evidence. 28 Because the trial court failed to apply the proper standard of proof, the case was remanded for a determination by the trial court consistent with the appropriate burden of proof. 29

B. Interpreters

In Ramos v. Terry, 30 Ramos, who was of Mexican descent and did not speak or understand English very well, filed a motion seeking the

21. Id.
22. Id.
23. Id.
24. Id. at 405-06, 627 S.E.2d at 599.
25. Id. at 406, 627 S.E.2d at 600.
26. Id. at 408, 627 S.E.2d at 601.
27. Id.
28. Id.
29. Id.
services of an interpreter for his habeas hearing. No interpreter was appointed by the time the hearing commenced four months later. An unsuccessful scramble to locate the regular interpreter was followed by the discovery of a prison employee who spoke Spanish. The court administered the oath to the prison employee who swore to translate into Spanish everything that was said in English.\textsuperscript{31}

In his certificate of probable cause to appeal, Ramos argued that he was denied his right to meaningful access to the court when the court appointed an interpreter with whom he was not able to communicate. The interpreter, he argued, was not of Mexican descent and spoke a different dialect of Spanish than Ramos, which significantly affected their communications.\textsuperscript{32} The Georgia Supreme Court certified the question and considered whether Ramos had been denied his constitutional rights in the habeas proceeding.\textsuperscript{33}

The Georgia Supreme Court noted the rules they had adopted establishing a state-wide plan for the use of interpreters in cases involving non-English speaking witnesses and parties.\textsuperscript{34} The court observed that the rules contemplate the situation that presented itself at Ramos's habeas hearing where a certified or registered interpreter was unavailable.\textsuperscript{35} When a certified or registered interpreter is unavailable, the court stated that the rules require the court to "weigh the need for immediacy in conducting a hearing against the potential compromise of due process, or the potential of substantive justice, if interpreting is inadequate."\textsuperscript{36} The supreme court also observed that when the habeas court in Ramos's case proceeded without a certified or registered interpreter, it did not conduct a meaningful inquiry into the interpreter's background in language skills.\textsuperscript{37} For example, the court did not obtain information about:

whether [the interpreter] was a native of a country where Spanish is spoken, whether she was fluent in English, whether she previously had translated in a court proceeding, whether she had taken and passed the interpreter exams administered by Georgia or another state, whether the Spanish she spoke was compatible with the Spanish
spoken by Ramos, and her professional standing in the interpreter community.\textsuperscript{38}

The court stated that the interpreter's only qualifications were "her ability to speak Spanish and her presence."\textsuperscript{39} Accordingly, the Georgia Supreme Court held that:

\begin{quote}
[I]t is an abuse of discretion to appoint someone to serve as interpreter who is neither certified nor registered as an interpreter without ensuring that the person appointed is qualified to serve as an interpreter, without apprising the appointee of the role s/he is to play, without verifying the appointee's understanding of the role, and without having the appointee agree in writing to comply with the interpreters' code of professional responsibility.\textsuperscript{40}
\end{quote}

Unfortunately for Mr. Ramos, he failed to preserve this issue, and for him, these rights were waived.\textsuperscript{41} But for future non-English speaking defendants, the Georgia Supreme Court has made clear through this opinion that courts must strictly comply with the rules it promulgated concerning the use of interpreters.

C. Demurrers: Sufficiency and Constitutionality of the Charging Documents

The constitutionality of O.C.G.A. section 16-11-34(a),\textsuperscript{42} the law that criminalizes any reckless or knowing disruption of a lawful meeting or gathering, was successfully challenged in \textit{State v. Fielden}.\textsuperscript{43} Mr. Fielden and Mr. Touchton were arrested for violating this statute after they attended a Valdosta City Council meeting and "stood silently as a show of support for another citizen who, after speaking during the 'Citizens to be Heard' portion of the meeting, had then refused the mayor's request to step down from the podium."\textsuperscript{44} The defendants challenged the statute as unconstitutionally vague and overbroad. The trial court agreed, finding that the statute contained terms that were not defined in the O.C.G.A. and that the language was not sufficiently clear.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id. at 893, 622 S.E.2d at 343.}
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} O.C.G.A. § 16-11-34(a) (2003).
\item \textsuperscript{43} 280 Ga. 444, 629 S.E.2d 252 (2006).
\item \textsuperscript{44} \textit{Id. at 444, 629 S.E.2d at 254.}
\item \textsuperscript{45} \textit{Id.}
\end{itemize}
The Georgia Supreme Court agreed in part but disagreed in part, holding that the language of the statute was not vague but that it was overbroad because it "stifles expression or conduct that is otherwise protected by the Constitution." The court stated that in balancing the First Amendment protection of free speech against the fundamental right of free assembly, any statute seeking to criminalize acts of free speech must be narrowly tailored and reasonably balance the rights of those wishing to express opposing points of view. As this statute did not conform to these requirements, it was properly invalidated.

D. Search and Seizure

1. Warrantless Searches. In the search and seizure area, we begin with a review of the law of warrantless searches provided by O'Neal v. State, a case that otherwise says nothing new but happens to be the first opinion rendered in this year's reporting period. Thus, to review: "There are at least three tiers of police-citizen encounters: (1) consensual encounters; (2) brief investigatory stops that require reasonable suspicion; and (3) arrests that must be supported by probable cause." In the automobile context, it is a first-tier encounter if a police officer approaches a stopped car to "inquir[e] into the situation," which presumably means to ask the occupants why the car is stopped at that place or some similar inquiry, but it is a second-tier encounter if that car is stopped because the police officer has blue-lighted it. A second-tier encounter violates the Fourth Amendment when the officer who stops or seizes the citizen cannot articulate a suspicion of criminal activity. In determining whether officers possess an articulable suspicion, the court evaluates the claimed suspicion within the context of all the existing circumstances—the so-called "totality of the circumstances" analysis. No exhaustive list of such circumstances exists, but one may add to the many that arise following the circumstances from

46. Id. at 445, 629 S.E.2d at 254-55 (citing Johnson v. State, 264 Ga. 590, 591, 449 S.E.2d 94, 95-96 (1994)).
47. U.S. CONST. amend. I.
48. Fielden, 280 Ga. at 446, 629 S.E.2d at 256.
49. Id.
51. Id. at 690, 616 S.E.2d at 481.
52. Id. (quoting Carrera v. State, 261 Ga. App. 832, 834, 584 S.E.2d 2, 4 (2003)).
53. Id. (citing Holmes v. State, 252 Ga. App. 286, 287, 566 S.E.2d 189, 190 (2001)).
54. U.S. CONST. amend. IV.
56. Id. at 691, 616 S.E.2d at 482.
O'Neal: (1) O'Neal's nervousness when approached by officers (which alone, however, is insufficient to justify a seizure of a citizen); (2) presence in a neighborhood known for drug activity; (3) the officers' observations of suspected drug deals having taken place at a specific house in the neighborhood; and (4) the officers having seen O'Neal drive to that house and interact briefly with the individuals suspected of selling drugs there.57 Accordingly, the trial court's denial of O'Neal's motion to suppress was affirmed.58

The next case, Ward v. State,59 "graphically illustrates that liberties and rights are always an interpretation away from extinction, unless jealously and zealously guarded."60 In Ward Officer Reuben Beltran noticed a car parked in front of a closed gas station very early one morning, its driver's door ajar. Thinking that someone might be breaking into the car, he stopped and, upon approaching the car, noticed two women sitting in it. Thinking that the women may need assistance, Officer Beltran asked the driver, Ward, why she was parked there. Ward told Officer Beltran that she was looking for the Super Wal-Mart. When Beltran noted to Ward that according to the route she described, she had just driven past the Super Wal-Mart, Ward admitted that she had lied. She and her friend were actually going to a game room behind the gas station.61

Beltran took the ladies' identification cards from them and went to check Ward's driver's license. It came back valid and she had no outstanding warrants. Beltran then asked Ward to step out of the car.62 Even though fifteen minutes had passed since the initial encounter, at the point when Beltran had Ward get out of her car,63 the court noted that Beltran moved from a first-tier to a second-tier encounter.64 While standing at the rear of her car, Ward gave consent to Beltran to pat her down for weapons. Upon Beltran feeling a bulge in her pants pocket, he asked her if she had drugs in there. Ward replied that she did not and she gave consent for Beltran to search her pockets. Of course, Ward did have drugs in her pocket (or else we would have no case to report). The search of Ward's pockets revealed a plastic bag that contained methamphetamine. Ward was arrested, indicted, and
after an unsuccessful motion to suppress, convicted of possession of methamphetamine.\textsuperscript{65}

The court of appeals reversed the denial of the motion to suppress.\textsuperscript{66} The violation of Ward's right to privacy occurred when Beltran had her step out of the car and asked for and received consent to search her, even though all he knew was that she had lied about the Super Wal-Mart destination.\textsuperscript{67} This was an unlawful detention, thus abrogating any request for and grant of consent to search.\textsuperscript{68} The Super Wal-Mart lie did not give Beltran any evidence of criminal activity or reason to believe that any further investigation of that lie would yield evidence of criminal activity.\textsuperscript{69}

As an aside, the standard of review for a case in which the facts are not in dispute, as in Ward, is de novo.\textsuperscript{70} As the next case shows, if the facts are in dispute, then the standard of review is that the "trial court's findings on disputed facts and credibility are adopted unless they are clearly erroneous."\textsuperscript{71}

In Debord v. State,\textsuperscript{72} police officers stopped a truck for a defective tag light. Debord was a passenger. The driver had an outstanding warrant and Debord had been drinking. The officer told Debord to get out of the truck and testified that he saw a pocketknife clipped to Debord's pants. The officer testified that he took the knife and conducted a pat-down search for weapons, during which he found a marijuana pipe in Debord's shirt pocket. A further search turned up methamphetamine. Debord was arrested, his motion to suppress was denied, and he was convicted.\textsuperscript{73}

The court of appeals reversed because a video tape of the event showed that the officer's testimony was inaccurate.\textsuperscript{74} The court, while taking officer safety seriously, saw no threat by Debord to justify a pocket-by-pocket search, supposedly for weapons.\textsuperscript{75} Indeed, the video tape did not even show the pocketknife at all, and no pocketknife was ever introduced into evidence at the suppression hearing.\textsuperscript{76} The officer testified further

\begin{enumerate}
\item \textit{Id.} at 791, 627 S.E.2d at 864.
\item \textit{Id.} at 793, 627 S.E.2d at 866.
\item \textit{Id.} at 792-93, 627 S.E.2d at 865.
\item \textit{Id.} at 793, 627 S.E.2d at 865.
\item \textit{Id.}
\item \textit{Id.} at 790, 627 S.E.2d at 863.
\item \textit{Debord v. State, 276 Ga. App. 110, 110, 622 S.E.2d 460, 461 (2005).}
\item 276 Ga. App. 110, 622 S.E.2d 460.
\item \textit{Id.} at 110-11, 622 S.E.2d at 461.
\item \textit{Id.} at 112, 622 S.E.2d at 462.
\item \textit{Id.} at 113, 622 S.E.2d at 462.
\item \textit{Id.} at 112-13, 622 S.E.2d at 462.
\end{enumerate}
that he would have only gone into Debord's pockets with consent, but the court held that "'consent that is the product of an illegal detention is ineffectual.'" As a result, the court of appeals reversed the trial court.

In *Lyttle v. State*, the Georgia Court of Appeals held that "the act of driving at night, lawfully, on a public road in a high crime area does not justify an investigative stop in the absence of additional circumstances." In Cherokee County, there exists a dark and desolate road called Old Shoal Creek Trail. Without outlets, it leads from a subdivision to an old church and cemetery, then dead ends into the woods. Several crimes had occurred there, so the Sheriff's Department ordered one of its deputies to patrol the area and interdict those of nefarious intent. Though he had received no reports of illicit behavior on that lonely road on May 19, 2005, the deputy was ready to stop any car he saw there, including the trial judge, had the judge made the unfortunate decision to travel the desolate trail that night.

While driving from the church toward the subdivision, the deputy encountered Rossie Lyttle driving her pickup truck toward the dead end. She had her headlights on—it was 1:00 a.m.—and the deputy could not see who was in the truck. He blue-lighted the truck, Lyttle stopped, and upon request, produced identification. Then the deputy, surmising that nobody would be traveling that road without an illicit purpose, requested permission to search Lyttle's person and purse. He found a medicine bottle with marijuana seeds in Lyttle's purse, and in the truck he found a "hollowed out cigar containing marijuana," commonly known as a blunt. The trial court denied Lyttle's motion to suppress, and she was convicted of misdemeanor possession of marijuana. The court of appeals reversed the conviction. Lyttle's "act of driving at night, lawfully, on a public road in a high-crime area [did] not justify an

---

77. *Id.* at 114, 622 S.E.2d at 463 (quoting Eaves v. State, 236 Ga. App. 279, 280, 511 S.E.2d 621, 623 (1999)).
78. *Id.* at 115, 622 S.E.2d at 463.
80. *Id.* at 661, 632 S.E.2d at 396.
81. *Id.* at 660, 632 S.E.2d at 395.
82. *Id.*, 632 S.E.2d at 396.
83. *Id.*, 632 S.E.2d at 395.
84. *Id.*
85. *Id.*
86. *Id.* at 662, 632 S.E.2d at 396-97.
investigative stop.\textsuperscript{87} The deputy had only a generalized suspicion, and that was not good enough.\textsuperscript{88}

In \textit{Castleberry v. State},\textsuperscript{89} Castleberry ran a red light while driving his Chevy Blazer in Gainesville back in May 2003. Two officers stopped him, and upon approaching from the passenger side, Officer Ottoway saw the barrel of a shotgun on the floor of Castleberry's truck. The officers ordered Castleberry out of his truck, and Ottoway patted him down for weapons, finding some shotgun shells. The officers then searched the truck and took the shotgun. They concluded that the shotgun was sawed off and too short to be legal—though they turned out to be wrong in this assessment when they got to the police station and measured it—but before they arrested Castleberry, a third officer showed up, Officer Rutledge, to back up his colleagues. Rutledge ordered Castleberry to keep his hands out of his pockets, but Castleberry continued to put them in and fidget. Rutledge patted him down. He felt a hard object in one of Castleberry's pockets, so he reached in and took it. It was a glass pipe, which contained methamphetamine residue.\textsuperscript{90}

Of course, the initial traffic stop was legal because Castleberry had run a red light in full view of two police officers. The brief detention to investigate the shotgun did not offend Fourth Amendment principles either, because there was a reasonable and articulable suspicion of a possible crime.\textsuperscript{91} Both pat-downs of Castleberry were fine as well, because officer safety is a reasonable concern that can be addressed by frisking a person who may be armed and dangerous.\textsuperscript{92} Even going into a citizen's pocket to retrieve what the officer believes to be a weapon is permissible:

\begin{quote}
Under \textit{Terry}, an officer is authorized to pat down a suspect's outer clothing. He may intrude beneath the surface in only two instances: (1) if he comes upon something that feels like a weapon, or (2) if he feels an object whose contour or mass makes its identity as contraband immediately apparent, i.e., the "plain feel" doctrine.\textsuperscript{93}
\end{quote}

But the trouble in this case was that Rutledge testified that he did not know what the hard object in Castleberry's pocket was.\textsuperscript{94} According to

\begin{itemize}
\item \textsuperscript{87} \textit{Id.}, 632 S.E.2d at 396.
\item \textsuperscript{88} \textit{Id.} at 661, 632 S.E.2d at 396.
\item \textsuperscript{89} 275 Ga. App. 37, 619 S.E.2d 747 (2005).
\item \textsuperscript{90} \textit{Id.} at 37-38, 619 S.E.2d at 748-49.
\item \textsuperscript{91} \textit{Id.} at 38-39, 619 S.E.2d at 749.
\item \textsuperscript{92} \textit{Id.} at 39, 619 S.E.2d at 749.
\item \textsuperscript{93} \textit{Id.} (quoting \textit{Howard v. State}, 253 Ga. App. 158, 160, 558 S.E.2d 745, 748 (2002)).
\item \textsuperscript{94} \textit{Id.}, 619 S.E.2d at 749-50.
\end{itemize}
Rutledge, "It could have been anything," weapon or otherwise. The court held that if hardness alone justified intrusion into Castleberry's pocket, the Fourth Amendment would be eviscerated. The court therefore reversed the denial of Castleberry's motion to suppress. The cynical among us—those who have done scores of suppression hearings in which an officer's account can hardly be challenged—wonder whether this case will make the rounds among traffic patrol officers for the clear lesson that "hard" equals "weapon," not just "anything." The outcome of the case turns on it.

In *Rucker v. State*, a police officer received a phone call from a person he had arrested in the past. The person gave the officer the following information: "'Rook,' a black male slightly over six feet tall with a muscular build, would be behind the wheel of a 1988 beige and brown Delta at a local health department with his girlfriend as a passenger. The tipster told the officer that 'Rook' had some cocaine in his possession." The officer found a man named Rucker at the health department in a car with a woman, just as described by the tipster. A stop and search turned up cocaine in the woman's clothing. Rucker was charged with trafficking and convicted after an unsuccessful motion to suppress.

The court of appeals reversed, focusing upon the key distinction between a tip by a "concerned citizen," as the State argued the tipster was, and an "informant of unknown reliability," as the court held the tipster to be. Tipster law works like this: The threshold question is whether the police officer possesses specific and articulable facts that give rise to a reasonable suspicion of criminal activity. If so, the officer may briefly detain a suspect to investigate. The source of those specific articulable facts, however, is crucial. If the source is a concerned citizen, then the tip is deemed to be reliable. If the source is a known but untested informant, the information must be "of sufficient detail to predict the future behavior of third parties that

95. *Id.* at 40, 619 S.E.2d at 750.
96. *Id.*
97. *Id.*
99. *Id.* at 683-84, 624 S.E.2d at 260-61.
100. *Id.* at 683, 624 S.E.2d at 260-61.
101. *Id.*
102. *Id.* at 684, 624 S.E.2d at 261.
103. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).
104. *Id.*
CRIMINAL LAW

otherwise would not be easily predicted; in other words, it must consist of inside information that is unavailable to the general public.”

The court noted that an anonymous tip is less reliable than information provided by a known but untested informant. However, in this case, the known but untested informant gave details that anyone could observe and that did not predict any future behavior.

Therefore, the denial of Rucker's motion to suppress was reversed.

2. Consensual Searches. We reported in last year's edition of this survey that the court of appeals had remanded a case in which a teenage son had responded “sure” to a police officer's request to search the teenager's father's bedroom, holding that the trial court record had failed to establish the so-called Atkins factors: Whether (1) the minor giving consent to search a parent's private place lives at that place, (2) has right of access and the right to invite others over, (3) has reached an age to exercise at least minimal discretion, and (4) whether officers acted reasonably in believing that the minor had sufficient control over the premises to give a valid consent to search.

On remand, the trial court heard additional evidence in State v. McKinney. After hearing the additional evidence, the trial court concluded that factors (2) and (4) were not met by the State and again granted the defendant's motion to suppress. The court of appeals affirmed.

3. School Searches. In State v. K.L.M., a student reported to the principal that he overheard fellow student K.L.M. say that he planned to sell drugs while serving in-school suspension. The principal called for assistance from local law enforcement and a Peace Officer

---


108. Id.; see also Baker v. State, 277 Ga. App. 520, 522-23, 627 S.E.2d 145, 148-49 (2006) (holding that the State failed to meet its burden of demonstrating that the confidential informant's tip and the officer's own observations were sufficient to support the stop).


112. Id. at 72-73, 622 S.E.2d at 433.

113. Id. at 74, 622 S.E.2d at 434.

Standards and Training ("P.O.S.T.") certified peace officer showed up. The principal then called K.L.M. to the office, where he denied any plans to sell drugs and denied any possession of drugs. The principal told the police officer to search the student, and the officer found a stash of marijuana. The court of appeals affirmed the trial court’s granting of the juvenile’s motion to suppress because the involvement of the law enforcement officer raised the standard for a nonconsensual, warrantless search of a student to probable cause, which did not exist. The court of appeals cited the Georgia Supreme Court case of State v. Young, in which the supreme court observed that with respect to the Fourth Amendment, "there are really three groups: private persons; governmental agents whose conduct is state action invoking the Fourth Amendment; and governmental law enforcement agents for whose violations of the Fourth Amendment the exclusionary rule will be applied." School officials fall within the second category, and the exclusionary rule does not apply. But when, as here, the school official involves law enforcement, then probable cause must exist. If probable cause does not exist, then the evidence will be excluded.

4. Search Warrants. It is almost always noteworthy when the courts exclude evidence seized pursuant to a search warrant. This is never more so than when evidence is excluded in a murder case in which the State seeks the death penalty. That is exactly what happened this reporting period in Miley v. State. Ashley Neves went missing, and her body was discovered in May 2000. Police had asked for information about the case. In response, Miley showed up at the police station one day. During his interview of Miley, Detective Scott asked him if he could go to Miley’s house to search a book bag that a witness had said that Miley was wearing when he was last seen with Neves. Miley agreed to retrieve the book bag for Scott, but he would not give consent to Scott to enter his house to retrieve it himself. Scott did not like that plan, so he applied for a search warrant from the local magistrate judge.
The affidavit used to support Scott's contention of probable cause mentioned two grounds: (1) Miley refused to give consent to the search and (2) Miley was the last person seen with Neves on the date and place of her death and he had a book bag with him. The supreme court concluded that the first ground was constitutionally improper, as every citizen enjoys the absolute right to refuse to give consent to any police intrusion into their private spaces, and such refusal can never be used as a basis for probable cause to believe that the citizen is involved in crime. But even the second, and only legitimate, consideration of the existence of probable cause failed. As the Georgia Supreme Court noted:

These assertions were insufficient to show probable cause to believe that Miley was the perpetrator, because they failed to detail how close to the time of the murder's commission Miley had been seen with the victim, because they failed to describe the circumstances under which Miley and the victim had been seen together, and because an innocent person could have had a book bag at the unspecified scene of the murder. Nothing of a properly probative nature in the affidavit, other than this inadequate suggestion of Miley's guilt, even attempted to make a connection between the murder and the house to be searched.

As a result, any evidence seized from Miley's book bag or home which could have shown that he was Neves's killer was excluded from his death penalty trial. While reasonable people can differ over whether the exclusionary rule is the best way to handle evidence illegally seized, all can agree that so long as we have that rule in place—and it has been with us a long time—police, magistrate judges, and any others in law enforcement who seek to solve crimes should give the Fourth Amendment all the deference it deserves, especially in these times when civil liberties are in decline.

E. Right to Counsel

The Sixth Amendment right to counsel extends the constitutional right to "representation that is free from conflicts of interest.” In
Howerton v. Danenberg, the Georgia Supreme Court affirmed the habeas court's decision to grant Danenberg's pro se petition on the ground that Danenberg's trial counsel was operating under an actual conflict of interest. Danenberg had been indicted for the offense of murder and the district attorney was seeking the death penalty. Yet at the same time Danenberg's trial counsel was representing Danenberg, he was also defending the district attorney in a well-publicized federal challenge to the district attorney's use of peremptory strikes to remove minorities from his juries.

The supreme court held that "an actual conflict of interest existed because of defense counsel's concurrent representation of Danenburg and the district attorney, and given the enormity of the penalty, the conflict was completely impermissible." The court noted that although there had been no indication that the trial attorney had performed deficiently or dishonorably in his representation of Danenberg, "even the performance of the most honorable attorney under similar circumstances could be subtly or unknowingly affected in ways difficult to detect on review." As a result, the supreme court held that the defendant's conviction and sentence should be reversed and that he should be afforded the right to a new trial with representation free from any conflict of interest.

F. Grand Jury

Although, as the Georgia Court of Appeals acknowledged, it is "'almost inconceivable' that any prosecutor would believe that remaining in the grand jury room during deliberations was permissible, the prosecutors in Effingham County proved otherwise in Colon v. State. In challenging his convictions for multiple sexual offenses against a child, Colon argued that his case required reversal because the sanctity of the grand jury process had been violated by the presence of prosecutors remaining in the room as the grand jurors deliberated. At the motion for new trial, the defense offered testimony from a grand juror that the prosecutor remained in the room during deliberations. The district

132. Id. at 861, 621 S.E.2d at 739.
133. Id.
134. Id. at 862, 621 S.E.2d at 740.
135. Id. at 863, 621 S.E.2d at 740.
136. Id. at 864, 621 S.E.2d at 741.
137. Id.
139. Id. at 73, 619 S.E.2d at 776.
attorney and assistant district attorney further agreed that they often remained in the grand jury room during deliberations as they prepared their next case.\footnote{140}

There was no evidence that the presence of the prosecutors had any actual affect upon the deliberative process.\footnote{141} Nevertheless, the court of appeals held that it was harmful “as a matter of law” for a prosecutor to remain in the jury room when the jurors were deliberating or voting on an indictment.\footnote{142} However, because trial counsel failed to raise a challenge to the grand jury process, the error was not preserved and Colon’s convictions were affirmed.\footnote{143}

G. Discovery

In Schofield v. Palmer,\footnote{144} a vigilant appellate attorney fought the system for years to recover from the State what the Georgia Supreme Court has now declared to be significant, material evidence for impeachment—the Georgia Bureau of Investigation (“GBI”) records evidencing the amount of money paid to a testifying informant.\footnote{145} After Palmer was convicted of murder and sentenced to death, his appellate attorneys made numerous requests to the GBI for records pertaining to the confidential, testifying informant.\footnote{146} All attempts, including a civil lawsuit under the Open Records Act,\footnote{147} were unsuccessful until the state habeas court ordered the production of the records for an in camera inspection.\footnote{148}

In camera inspection of the records revealed that five days after Palmer’s arrest, the informant had been paid $500 for providing information implicating Palmer in the murder—information that had never been provided to the defense.\footnote{149} In an excellent common-sense approach to analyzing the significance of this evidence, the habeas court concluded that there was a reversible Brady error by determining that (1) the State possessed this evidence (because the GBI is an arm of the State); (2) the State had not provided the defense with the evidence nor could the defense have obtained it on their own; (3) the State

\begin{footnotes}
\item[140] Id. at 73, 75-76, 619 S.E.2d at 776, 777.
\item[141] Id. at 76, 619 S.E.2d at 777.
\item[142] Id. at 77, 619 S.E.2d at 778.
\item[143] Id. at 78-79, 619 S.E.2d at 779.
\item[144] 279 Ga. 848, 621 S.E.2d 726 (2005).
\item[145] Id. at 853, 621 S.E.2d at 731.
\item[146] Id. at 848, 850-51, 621 S.E.2d at 728, 729-30.
\item[148] Schofield, 279 Ga. at 850-51, 621 S.E.2d at 729-30.
\item[149] Id. at 851, 621 S.E.2d at 730.
\end{footnotes}
suppressed the evidence; and (4) had the evidence been provided to the defense, there is a reasonable probability that the outcome of the trial would have been different—often referred to as the materiality tier.\textsuperscript{151} The habeas court found that the suppressed evidence was material because it deprived Palmer from impeaching the informant with “an age-old, logical, pecuniary argument that [he] had a motive to lie” when he testified.\textsuperscript{152} The habeas court took issue with the State’s argument against materiality by pointing out the “great lengths” to which the state had gone to conceal the evidence of payment.\textsuperscript{153} The supreme court opinion vacating the conviction and sentence was strong: “We cannot countenance the deliberate suppression by the State of a payment to a key witness, and its attendant corruption of the truth-seeking process, in any case, and especially in a death penalty case.”\textsuperscript{154}

III. STATE’S CASE IN CHIEF

A. Elements of Proof

The State is required to prove each and every element of the crime beyond a reasonable doubt. Yet the Georgia Legislature, in promulgating O.C.G.A. section 16-8-4(a),\textsuperscript{155} imposed a mandatory presumption of intent that unconstitutionally relieved the State of proving intent—an essential element of the offense of theft by conversion of leased property. In Sherrod v. State,\textsuperscript{156} Ms. Sherrod, who shared an apartment with her boyfriend, leased a stereo from a “Rentown” store. Soon after leasing the stereo, Sherrod got into an argument with her boyfriend and moved out. Her boyfriend would not let her back into the apartment to retrieve the stereo, and it is assumed that he later pawned the stereo.\textsuperscript{157} Rentown sent Sherrod a demand letter pursuant to O.C.G.A. section 16-8-4, but Sherrod did not respond.\textsuperscript{158} She was arrested for the offense of theft by conversion of leased property.\textsuperscript{159} At trial, the State relied upon the mandatory presumption set forth in the statute, which provided that Sherrod’s failure to return the property within five days of the properly delivered demand letter meant that Sherrod “shall be

\begin{flushleft}
151. Schofield, 279 Ga. at 852, 621 S.E.2d at 731.
152. Id. at 853, 621 S.E.2d at 731 (brackets in original).
153. Id.
154. Id.
157. Id. at 277, 627 S.E.2d at 38.
158. Id. at 276-77, 627 S.E.2d at 38.
159. Id. at 275, 627 S.E.2d at 37.
\end{flushleft}
CRIMINAL LAW

presumed to have knowingly converted such personal property to such person's own use."\(^{160}\)

Sherrod challenged the constitutionality of the mandatory presumption in the Georgia Supreme Court, and her conviction was overturned.\(^{161}\) The court held that the mandatory presumption was unconstitutional because it "subvert[s] the presumption of innocence accorded to accused persons," thereby removing from the State's burden of proof the essential element of intent to commit the theft.\(^{162}\) Had the presumption been permissive, the statute would have passed constitutional muster; it was the "shall be" language of a mandatory presumption that invalidated this provision.\(^{163}\)

B. Hearsay

Permitting one witness to testify as to their opinion concerning the veracity of another witness is known as bolstering the credibility of the other witness. It is now, and has always been, impermissible. Yet in the area of child sexual offenses, this rule is often violated. And in this reporting period, the appellate courts reversed two convictions for this violation. In Patterson v. State,\(^ {164}\) the defendant was being tried for the offenses of child molestation and aggravated battery.\(^ {165}\) The alleged victim was a fifteen-year-old girl.\(^ {166}\) At trial, the State called Dr. Battle, an "expert" in clinical psychology and forensic interviewing,\(^ {167}\) to testify to the substance of the forensic interview of the child.\(^ {168}\) The problem began when the State asked Dr. Battle, "'And at any time did you ever feel like [the victim] made up the story that she told you to get back at her father?'"\(^ {169}\) Dr. Battle replied, "'No.'"\(^ {170}\) On redirect examination, the prosecutor asked Dr. Battle "if she believed that the victim made up the allegations against Patterson 'for any reason.'"\(^ {171}\) Again, Dr. Battle responded, "'No.'"\(^ {172}\)

---

160. Id. (quoting O.C.G.A. § 16-8-4(c)(2) (2003)).
161. Id.
162. Id. at 276, 627 S.E.2d at 37, 38 (quoting Carella v. California, 491 U.S. 263, 265 (1989)).
163. Id.
165. Id. at 168, 628 S.E.2d at 619.
166. Id. at 168 n.1, 628 S.E.2d at 619 n.1.
167. Id. at 168 n.2, 628 S.E.2d at 619 n.2.
168. Id. at 168, 628 S.E.2d at 619.
169. Id. at 169, 628 S.E.2d at 619 (brackets in original).
170. Id.
171. Id.
172. Id.
Defense counsel objected, but the trial court ruled that the State could elicit such testimony to rehabilitate the credibility of the child because the defense had attacked her credibility on cross-examination. The trial court's ruling had some support in the case law. In 2002 the Georgia Court of Appeals decided the case of Smith v. State, “a departure from well-established case and statutory law prohibiting the admission of expert opinion testimony that bolsters the credibility of a witness or expresses an opinion on the ultimate issue of whether the defendant is guilty of the crime charged.” Recognizing their mistake in Smith, the court of appeals overruled the case and stated, yet again, the long-standing rule that “a witness, even an expert, can never bolster the credibility of another witness as to whether the witness is telling the truth.” Accordingly, the court of appeals reversed Patterson’s conviction.

It is no more improper for the judge to comment on the witness’s credibility than it is for another witness to do so. In Craft v. State, the defendant was tried and convicted of two counts of child molestation. Two fifteen-year-old girls testified that while walking to school, they passed Craft’s home and Craft said, “Hey, look over here,” as he stood naked, masturbating. The girls testified that they ran from Craft’s home to school and immediately told the assistant principal what they had seen.

At trial, after the assistant principal testified regarding the report from the girls, the trial court asked the assistant principal a number of questions concerning “what kind of students” the two girls were. The witness testified that one of the girls was a cheerleader, though both victims were actually cheerleaders. The witness also testified that the girls were “very good students[,] ... mannerable[, and] very

173. Id.
175. Patterson, 278 Ga. App. at 170, 628 S.E.2d at 619-20.
176. Id., 628 S.E.2d at 620 (quoting Mann v. State, 252 Ga. App. 70, 72, 555 S.E.2d 527, 529 (2001)) (citation and punctuation omitted in original).
177. Id. at 173, 628 S.E.2d at 621.
179. Id. at 410, 618 S.E.2d at 105.
180. Id.
181. Id.
182. Id. at 410-11, 618 S.E.2d at 105-06.
183. Id. at 411, 618 S.E.2d at 106.
184. Id. at 411 n.3, 618 S.E.2d at 106 n.3.
polite young ladies," and that they could not fail a class or they would no longer be cheerleaders.\textsuperscript{185}

Trial counsel did not object to this testimony but, instead, sought to cross-examine the witness with evidence that contradicted such a characterization of the victims.\textsuperscript{186} The defense had evidence that both girls had failed at least two classes, one had been disciplined for disrespect and had been placed on administrative detention, and the other had been disciplined for screaming in the hallways, which directly contradicted the witness's testimony that "they are not ones that are real wild and real, you know, loud in the halls and everything."\textsuperscript{187}

The trial court curtailed the defense from developing this cross-examination and admitting the documents to contradict the witness's testimony by stating, "[Y]ou're not going to make these victims look bad."\textsuperscript{188} The court of appeals held that the trial court erred in two significant ways.\textsuperscript{189} First, the court violated O.C.G.A. section 17-8-57\textsuperscript{190} by intimating to the jury, through the questions the court posed to the assistant principal, its opinion that the girls were credible.\textsuperscript{191} And second, the court improperly foreclosed a relevant and permissible cross-examination to contradict the witness's testimony concerning her description of the girls, further demonstrating that the court had already made up its mind concerning the veracity of the State's witnesses.\textsuperscript{192} The second error, coupled with the first, was sufficient in the minds of four of the appellate judges to require reversal.\textsuperscript{193}

\section*{IV. JURY INSTRUCTIONS}

The landscape of an eyewitness identification case was substantially changed in 2000 with the opinion of \textit{Johnson v. State},\textsuperscript{194} which overruled prior opinions and permits expert testimony regarding eyewitness identification in cases where (1) eyewitness identification of the defendant is a key element of the State's case; (2) there is no substantial corroboration of the identification by other evidence; and (3) expert eyewitness testimony is the only effective way to reveal any weakness

\textsuperscript{185} \textit{Id.} at 411, 618 S.E.2d at 106 (last alteration in original).
\textsuperscript{186} \textit{Id.} at 412, 618 S.E.2d at 107.
\textsuperscript{187} \textit{Id.} at 411, 413, 618 S.E.2d at 106, 107.
\textsuperscript{188} \textit{Id.} at 412, 618 S.E.2d at 107.
\textsuperscript{189} \textit{Id.} at 412-13, 618 S.E.2d at 106-07.
\textsuperscript{190} O.C.G.A. § 17-8-57 (2004).
\textsuperscript{191} \textit{Craft}, 274 Ga. App. at 412, 618 S.E.2d at 106-07.
\textsuperscript{192} \textit{Id.} at 413, 618 S.E.2d at 107.
\textsuperscript{193} \textit{Id.}, 415, 618 S.E.2d at 107, 108.
\textsuperscript{194} 272 Ga. 254, 526 S.E.2d 549 (2000).
in an eyewitness identification.\textsuperscript{195} Since that opinion, scores of eyewitness identification experts have testified in Georgia and throughout the country, and those experts are consistent in the opinion that an eyewitness's assessment of how "certain" he or she is about the identification is a poor indicator of the validity of the identification.\textsuperscript{196} Yet until this reporting period, the pattern jury instruction still directed the jury to consider "the level of certainty showed by the witness about his/her identification" in assessing the reliability of the identification.\textsuperscript{197}

In \textit{Brodes v. State},\textsuperscript{198} a successful challenge was launched against this provision in the pattern charge. Brodes was convicted of two counts of armed robbery based entirely on the testimony of two eyewitnesses.\textsuperscript{199} At trial, both witnesses testified repeatedly that they were "'absolutely certain'" that Brodes was the perpetrator.\textsuperscript{200} The trial court gave the pattern charge containing the "level of certainty" language.\textsuperscript{201} Brodes was convicted, appealed to the Georgia Court of Appeals, and his convictions were affirmed.\textsuperscript{202}

The Georgia Supreme Court granted certiorari to answer the question, "'[W]hether a trial court errs in using the "level of certainty" charge in instructing the jury on assessing the reliability of eyewitness identification.'\textsuperscript{203} The eyewitness identification expert testified at Brodes's trial that "there is not a good relationship between a witness's level of confidence in his identification and the accuracy."\textsuperscript{204} Drawing upon a wealth of studies, the expert showed that the accuracy of one's recollection is not highly correlated with the person's confidence in that memory.\textsuperscript{205} Yet the expert proved that the intuition of lay persons

\textsuperscript{195} \textit{Id.} at 257, 526 S.E.2d at 552-53 (citing United States v. Downing, 753 F.2d 1224, 1230-31 n. 6 (3d Cir. 1985)).


\textsuperscript{197} \textit{COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS: CRIMINAL CASES} § 206.00 (2d ed. 2001).

\textsuperscript{198} 279 Ga. 435, 614 S.E.2d 766 (2005).

\textsuperscript{199} \textit{Id.} at 435, 614 S.E.2d at 767.

\textsuperscript{200} \textit{Id.}

\textsuperscript{201} \textit{Id.} at 435-36, 614 S.E.2d at 767.

\textsuperscript{202} \textit{Id.} at 436, 614 S.E.2d at 767.

\textsuperscript{203} \textit{Id.}

\textsuperscript{204} \textit{Id.} at 438, 614 S.E.2d at 769.

\textsuperscript{205} \textit{Id.}, 614 S.E.2d at 768-69.
(that is, jurors) is that a person’s certainty in the reliability of their identification does correlate with the accuracy of that identification.\(^\text{206}\)

The tension between science and common understanding compelled the supreme court to discontinue the use of the “level of certainty” instruction.\(^\text{207}\) Accordingly, the court in \textit{Brodes} held that the error was harmful because the instruction undoubtedly affected the outcome of the trial.\(^\text{208}\) As a result, \textit{Brodes}—and any other defendant against whom the State presents eyewitness testimony—gets a new trial where the “level of certainty” will no longer be charged to the jurors who must assess the reliability of the eyewitness testimony.\(^\text{209}\)

\section*{V. \hspace{1em} CLOSING ARGUMENT}

In \textit{Palma v. State},\(^\text{210}\) the trial court improperly prohibited the defense from arguing in closing the specific sentence from which a cooperating codefendant was spared by testifying against Palma.\(^\text{211}\) Palma was tried and convicted of murder and possession of a firearm during the commission of a felony. The shooting was gang-related, and the evidence of Palma’s involvement was that he supplied the murder weapons to the codefendant shooters. The codefendants struck a deal with the State and testified against Palma.\(^\text{212}\) During their direct testimony, they each described the sentences they were facing and the deals they had received by cooperating with the State.\(^\text{213}\)

In his closing argument, the prosecutor urged the jury to believe the codefendants by asking, “Why would they lie?”\(^\text{214}\) The defense responded in its closing argument by reminding the jury of the evidence concerning the possible sentence the witnesses could have received had they not aligned themselves with the State. The State objected, arguing that a discussion of punishment was not a proper subject for closing argument. The trial court agreed and prohibited the defense from making any specific references to possible punishment.\(^\text{216}\)

\begin{itemize}
  \item\(^\text{206}\) \textit{Id.}, 614 S.E.2d at 769.
  \item\(^\text{207}\) \textit{Id.} at 442, 614 S.E.2d at 771.
  \item\(^\text{208}\) \textit{Id.}
  \item\(^\text{209}\) \textit{Id.} at 442-43, 614 S.E.2d at 771. Relying upon \textit{Brodes}, another conviction based entirely on eyewitness identification was reversed for the trial court’s error in charging the “level of certainty” language to the jury. \\
  \item\(^\text{210}\) 280 Ga. 108, 624 S.E.2d 137 (2005).
  \item\(^\text{211}\) \textit{Id.} at 110, 624 S.E.2d at 138-39.
  \item\(^\text{212}\) \textit{Id.} at 108-09, 624 S.E.2d at 138.
  \item\(^\text{213}\) \textit{Id.} at 109, 624 S.E.2d at 138.
  \item\(^\text{214}\) \textit{Id.}
  \item\(^\text{215}\) \textit{Id.} at 109-10, 624 S.E.2d at 138.
\end{itemize}
The supreme court held that the trial court committed reversible error in not permitting the defense to argue the extent of the benefit the witnesses received by testifying against Palma, as the evidence was properly admitted and rationally related to an argument that the witnesses were biased.216

VI. SENTENCING

A. Recidivist Punishment

In order for a prior conviction to serve as the basis for enhanced sentencing under any of the recidivist statutes, the burden is placed upon the State to prove "both the existence of the prior guilty pleas and that the defendant was represented by counsel in all felony cases and those misdemeanor proceedings where imprisonment resulted."217 The Georgia Court of Appeals expanded the proof of representation for misdemeanors in Simmons v. State.218 Simmons was sentenced as a repeat shoplifter after the State admitted into evidence, without objection, copies of two previous felony shoplifting convictions. The State also admitted into evidence, over Simmons's objections, two additional felony shoplifting convictions and three misdemeanor shoplifting convictions, which Simmons argued were uncounseled.219

On appeal, the State conceded its failure to prove that Simmons was counseled with regard to the two felony convictions to which Simmons objected.220 But the State argued that it was not required to demonstrate that Simmons was represented by counsel in the misdemeanor cases because there was no evidence that "'imprisonment resulted,'" and thus the State had no burden to prove that Simmons was represented.221 The court of appeals acknowledged that the State's argument was supported by the law in Georgia but concluded that Georgia law had to be expanded to "take into account the recent expansion of the right to counsel to include those misdemeanor cases in which the defendant receives a suspended or probated sentence of imprisonment,"222 as the

216. Id. at 110, 624 S.E.2d at 138-39.
219. Id. at 374, 629 S.E.2d at 88.
220. Id.
221. Id. (quoting Nash, 271 Ga. at 285, 519 S.E.2d at 896).
222. Id.
United States Supreme Court had done in Alabama v. Shelton, and the Georgia Supreme Court had decided in Barnes v. State.

Applying Shelton and Barnes, the court of appeals held that valid use of a prior misdemeanor conviction required proof that the defendant was represented by counsel if imprisonment resulted from the misdemeanor conviction or "the defendant received a probated or suspended sentence." As a result, Simmons's case was remanded for sentencing according to the new rule.

B. Conditions of Probation

A condition of probation cannot exceed the length of the sentence that is imposed. In Kaiser v State, when Dr. Kaiser pleaded guilty to over sixty counts of unauthorized manufacture and dispensation of controlled substances pursuant to a plea agreement in which he agreed to surrender his medical license, it was illegal for the trial court to impose a special condition of probation that the "[d]efendant shall not ever practice Medicine in the State of Georgia or in any State contiguous with the State of Georgia."

During the same reporting period, the Georgia Supreme Court granted an application for certificate of probable cause in Harvey v. Meadows, a habeas case, to answer the question, "[W]hether a sentencing court's oral warning to a defendant of the consequences of violating a special condition of probation substantially complies with the statutory requirement of O.C.G.A. [section] 42-8-34.1(a)(2) that the sentencing court give the warning in writing in the court's sentence." After pleading guilty to the offense of theft by taking, the petitioner received a sentence that included a period of probation. While on probation, the petitioner committed the new offense of driving under the influence. The sentencing court revoked six months of his probation and kept his probation conditions the same, but stated that "hereafter all of the

225. Simmons, 278 Ga. App. at 375, 629 S.E.2d at 88.
226. Id., 629 S.E.2d at 88-89.
229. Id. at 684, 621 S.E.2d at 803. In the wake of additional increased punishment and reporting requirements for sex offenders, the Authors question whether life-long registration requirements violate this mandate.
232. Harvey, 280 Ga. at 166, 626 S.E.2d at 93.
233. Id.
conditions of your sentence are special conditions of probation which will, if you violate them, subject you to the possibility that all of your probation could be revoked and you could be sent to prison for the balance of whatever term remains. The written order accompanying this oral sentence did not warn the petitioner that if he violated a special condition of probation, he would face the possibility of having all of his probation revoked.

Approximately six months later, the petitioner was back before the court for various misdemeanors. The court revoked the balance of his probation, which amounted to five years and six months. The petitioner filed an unsuccessful habeas, arguing that the sentencing court's failure to comply with O.C.G.A. section 42-8-34.1(a)(2), which requires that the effect of violating a special condition of probation be placed in writing, effectively kept the probation conditions as general conditions, thereby limiting the sentencing court to two-years revocation for a misdemeanor violation.

The Georgia Supreme Court agreed and reversed the full revocation of the petitioner's probation, holding that the statutory language requiring that trial courts warn defendants in writing of the consequences of violating a special condition of probation is an essential requirement for imposition of the punishments associated with violating a special condition of probation.

VII. APPELLATE ISSUES

In Andrews v. State, the defendant, Andrews, pleaded guilty to possession of cocaine and marijuana and was sentenced pursuant to the Drug Court Program provided for in O.C.G.A. section 16-13-2(a). As a condition of the Drug Court Program, Andrews agreed to avoid contact with "drug users and drug dealers." A year and a half later, however, Andrews was stopped by the police while driving a car in which his passenger had set up a drug sale and was transporting 126 grams of cocaine to a confidential informant. The court found that Andrews had violated the conditions of the Drug Court Program, removed him from it, adjudicated him guilty of the drug charges to which he had
previously pleaded guilty, and sentenced him to ten years, five to serve. 241
Andrews filed a direct appeal to this ruling. 242 The Georgia Court of
Appeals considered for the first time, "When a defendant is adjudicated guilty and sentenced after the trial court finds he violated a Drug Court Contract made pursuant to O.C.G.A. section 16-13-2(a), is he entitled to a direct appeal, or is an application for discretionary appeal required under O.C.G.A. section 5-6-35(a)(5)? 243 The court of appeals concluded that, like revocation of probation proceedings pursuant to the first offender statute, 244 a Drug Court Program is a deferred adjudication, violations of which are appealable only after compliance with the discretionary appeal provisions of O.C.G.A. section 5-6-35(a)(5). 245 As this was a case of first impression, the court agreed to hear Andrews's appeal on direct appeal. 246 However, the court affirmed the violation of the Drug Court provisions and corresponding adjudication of guilt and sentence. 247

VIII. CONCLUSION

During this reporting period, some strides were made in protecting the rights of incompetent and non-English speaking defendants. Payment records for cooperating government witnesses now constitute material evidence and must be provided to the defense. An erroneous court of appeals opinion permitting bolstering of a State's witness was finally overruled. The use in recidivist sentencing of uncounseled misdemeanor pleas has been further narrowed. And juries in eyewitness identification cases are now receiving better, more accurate jury instructions to guide their deliberations. The continued vigilance and creativity of those trying criminal cases insures that the landscape of criminal jurisprudence continues to evolve. Our hope remains that the evolution of criminal law preserves the liberties we all cherish and achieves justice.

241. Id. at 429-30, 623 S.E.2d at 249-50.
242. Id. at 428, 623 S.E.2d at 249.
246. Id. at 431, 623 S.E.2d at 251.
247. Id. at 432-33, 623 S.E.2d at 251-52.