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I. INTRODUCTION

In this year's criminal law survey, I have taken a cue from my colleagues of past years and included only the most significant cases and statutory amendments.[1] A body of law born from resolving the inherent conflicts between prosecutors and defenders is necessarily in a constant state of change. It is, therefore, impossible to comment on every development within a specific time period. To that end, this Survey limits the discussion to those legal developments with the widest application to Georgia criminal law practitioners for the time period from June 1, 2013 through May 31, 2014.

II. STATUTORY CRIMINAL JUSTICE REFORM

This survey period is significant for one of the most expansive statutory overhauls in the criminal justice system in decades.[2] In what is arguably Governor Nathan Deal's most valuable gubernatorial achievement to date, a "one-two" punch was delivered to both Georgia's adult and juvenile justice systems via the enactment into law of House Bills 349[3] and 242[4] with the assistance of the Georgia General Assembly.[5] In addition, an ongoing commitment to reform was exhibited via

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1. For an analysis of Georgia criminal law during the prior survey period, see Franklin J. Hogue, *Criminal Law, Annual Survey of Georgia Law*, 65 MERCER L. REV. 79 (2013).
2. *See* Ga. H.R. Bill 349, Reg. Sess. (2013); Ga. H.R. 242, Reg. Sess. (2013).
3. Ga. H.R. Bill 349, Reg. Sess. (2013).
4. Ga. H.R. Bill 242, Reg. Sess. (2013).
5. Ga. H.R. Bill 349; Ga. H.R. Bill 242.

creation of the Georgia Council on Criminal Justice Reform, a board of fifteen appointees tasked with conducting biennial reviews of both the adult and juvenile justice systems.[6]

A. *Statutory Reform—Adult Criminal Justice*

Adult criminal legislation became effective July 1, 2013, and applies to all criminal offenses occurring on or after that date.[7] As a general overview, more liberal appeal rights were given to the prosecution,[8] and trial courts were provided sentencing options below the mandatory minimums for trafficking in drugs,[9] as well as for serious violent felonies and sex offenses.[10] Provisions regarding a defendant's knowledge of the weight of the drugs they possessed were clarified.[11] In addition, defendants are now permitted to retain otherwise lost driving privileges while they are enrolled in rehabilitative programs,[12] incarcerated individuals can use Helping Outstanding Pupils Educationally General Education Development (HOPE GED) vouchers after release,[13] and more lenient options are available for expungement of criminal records.[14] Each category will be discussed in turn.

Rather than being limited only to the appeal of the grant of a defendant's motion to suppress, prosecutors can now appeal any trial court order excluding evidence. Further, a certificate of immediate review is no longer needed in any instance.[15]

The drug trafficking statutes were amended to remove the "knowingly" requirement, which previously required prosecutors to prove that defendants had knowledge of the weight of the controlled substance they possessed.[16] This amendment closed the gap left open by former section 16-13-31(a)-(f) of the Official Code of Georgia Annotated (O.C.G.A.),[17] which required that a person "knowingly" sell, manufacture, deliver or possess a trafficking amount of a particular drug, and

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6. O.C.G.A. §§ 17-19-1(a), -2(a), -4(a)(1) to (2), -5 (2013).

7. *See* Ga. H.R. Bill 349; Ga. H.R. Bill 242; *see also Appeal or Certiorari by State in Criminal Cases HB 349*, 30 GA. ST. U. L. REV. 16, 19 (2013).

8. *See* O.C.G.A. §§ 5-7-1 to -2 (2013); *Appeal or Certiorari by State in Criminal Cases HB 349*, *supra* note 7, at 26.

9. O.C.G.A. § 16-13-31(g)(2)(A),(B)(i) to (x) (Supp. 2014).

10. O.C.G.A. § 17-10-6.1(e) (2013 & Supp. 2014); O.C.G.A. § 17-10-6.2(c)(1) (2013).

11. O.C.G.A. §§ 16-13-31, -31.1 (2011 & Supp. 2014).

12. O.C.G.A. § 40-5-76 (2013).

13. O.C.G.A. § 20-3-519.6 (Supp. 2014).

14. O.C.G.A. § 35-3-37(a)(6) (Supp. 2014).

15. O.C.G.A. § 5-7-1(a)(5), -2(b).

16. O.C.G.A. § 16-13-31(a) to (f) (Supp. 2014).

17. O.C.G.A. § 16-13-31(a) to (f) (2011).

subsequent court interpretations of that statute.[18] In addition, the trafficking statutes now permit a judge to deviate from mandatory minimum sentences if the judge finds certain conditions are met.[19] This discretion is not unfettered, however, because the court is limited in how much it can deviate.[20] Although the statute continues to cap a prison sentence at a maximum of thirty years,[21] it does expressly provide the court with a loophole that permits it to deviate downward from any mandatory minimum sentences whenever the prosecutor and the defendant agree to such deviation.[22] There are mirror provisions for trafficking the drug ecstacy.[23]

Mandatory minimum sentences for both serious violent felonies and sexual offenses were also eviscerated, permitting the court to depart downward whenever the prosecutor and the defense agree.[24] The prior rules prohibiting parole and early release remain relatively untouched; however, defendants are now permitted early release to participate in a transitional center or work-release program during their final year of incarceration.[25]

Other notable provisions include availability of HOPE GED vouchers to incarcerated people within twenty-four months of release.[26] Practitioners should also note additional lenient expansions to expungement

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18. *See* O.C.G.A. § 16-13-31(a) to (f) (Supp. 2014); O.C.G.A. § 16-13-31(a) to (f) (2011); *see also* Scott v. State, 295 Ga. 39, 42, 757 S.E.2d 106, 107 (2014) (holding that in cases prosecuted under the prior version of the statute, the State must prove the defendant knew the amount of drugs he possessed due to the express inclusion of the word "knowingly").

19. O.C.G.A. § 16-13-31(g)(2)(A)(i) to (v). The court can deviate from the mandatory minimum sentences if it finds (1) the defendant was not a leader; (2) the defendant did not use a weapon; (3) the conduct did not result in death or serious bodily injury to a victim; (4) the defendant has no prior felony convictions; and (5) the interest of justice will be served by the deviation downward. *Id.*

20. O.C.G.A. § 16-13-31(g)(2)(B)(i) to (x). The ranges are from two years and six months of prison time (plus a monetary fine) to twenty-five years of prison time (plus a monetary fine), all dependent upon the quantity of drugs. *Id.*

21. O.C.G.A. § 16-13-31(h).

22. O.C.G.A. § 16-13-31(g)(2)(D)(3). This appears to be notwithstanding any other findings or lack of findings by the court. *See id.* For example, if it were not the defendant's first felony (thereby precluding a deviation under subsection (g)(2)(A)), the court could still deviate downward if the state and defendant agreed upon a particular sentence. *See id.*

23. O.C.G.A. § 16-13-31.1.

24. O.C.G.A. §§ 17-10-6.1(e), -6.2(c)(1). However, in the case of sexual offenses, if the prosecution and the defense cannot agree to a downward deviation, the court may still depart from the mandatory minimum sentences if it finds certain statutory requirements are met. O.C.G.A. § 17-10-6.2(c)(1)(A)-(F).

25. O.C.G.A. § 16-13-31.1(e); O.C.G.A. § 17-10-6.1(f) (2013 & Supp. 2014).

26. O.C.G.A. § 20-3-519.6.

rules.[27] The statute further allows defendants to retain otherwise lost driving privileges while enrolled in rehabilitative programs.[28]

The adult criminal code amendments are arguably pro-defendant.[29] The amendments illustrate an overall trend in Georgia away from strict mandatory minimum sentencing and toward a more balanced approach that expressly encourages cooperation and agreement between prosecutors and defendants, as well as offender rehabilitation.[30] It is hopeful these revisions will have a positive effect on Georgia's racially disproportionate and overcrowded prison population.[31]

B. Statutory Juvenile Justice Reform

House Bill 242 (the Act) rounds out the Governor's criminal justice reform with a focus on the juvenile code.[32] Juvenile justice reform was a process that began in 2004 with work by, among others, the Georgia State Bar's Young Lawyer's Division and JUSTGeorgia, a statewide juvenile justice coalition, which eventually completed a model juvenile justice code.[33] In 2012, Governor Deal issued an executive order reassembling the Special Council on Criminal Justice Reform to continue its recommendations to the legislature,[34] and through House Bill 242, the code was ultimately amended during the 2013 session.[35]

The largest portion of the Act amends Title 15 of the Juvenile Code.[36] These new provisions took effect on January 1, 2014 and apply to all offenses and juvenile proceedings that occur on or after that date.[37]

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27. O.C.G.A. § 35-3-37 (2012 & Supp. 2014). A misdemeanor may now be expunged if originating from a felony precursor if the misdemeanor is not a lesser included offense. O.C.G.A. § 35-3-37(j)(1). Expungement is also automatic for any offense if the prosecutor does not respond to an expungement request within 90 days. O.C.G.A. § 35-3-37(n)(2). Further, if the prosecutor objects to a request, they must state their reasons with specificity and attach evidence in support thereof. *Id.*

28. O.C.G.A. § 40-5-76. Driving privileges may be retained while the defendant is enrolled in drug court or mental health court. *Id.*

29. *See supra* notes 22-28 and accompanying text.

30. *Id.*

31. *See generally* GA. SUPREME COURT COMM'N ON RACIAL AND ETHNIC BIAS IN THE COUERT SYSTEM, *Let Justice Be Done: Equally, Fairly, and Impartially*, 12 GA. ST. U. L. REV. 687 (1996).

32. Ga. H.B. 242.

33. *See* Jason Carruthers & Jessica Sully, *Juvenile Justice Reform HB 242*, 30 GA. ST. U. L. REV 62, 68-69 (2013).

34. *2012 Executive Orders*, OFFICE OF THE GOVERNOR (May 24, 2012), http://gov.georgia.gov/2012-executive-orders.

35. *See* Ga. H.B. 242.

36. *Id.*

37. Ga. H.B. 242.

The first portion of the Act outlines the legislative policy behind the reform.[38] This includes protection of the community, accountability for violations of law, treatment and rehabilitation for the juvenile offender, and guarantees of due process of law.[39] These principles are recurrent throughout the statutory scheme.

Highlights of the Act include a new and comprehensive seventy-six item definition section, and the creation of an entirely new designation of juvenile as a child in need of services (CHINS).[40] The least restrictive custody possible for a CHINS is favored, and any detention ordered must be extremely limited and temporary in nature.[41]

A new two-tiered class of designated felonies (Class A and Class B) was also created.[42] This two-tiered classification provides adjustment of penalties based on the severity of the offense and limits sentencing for the less severe offenses to no more than eighteen months in confinement.[43] For example, for Class A felonies, a maximum of sixty months in confinement, followed by twelve months of intensive supervision, is mandated.[44] For Class B felonies, confinement must be for a maximum term of eighteen months, followed by six months of supervision.[45] In all circumstances, the court must be guided by the policy that the least restrictive facility is always favored.[46] Further, the court must consider certain factors before ordering restrictive custody for any child adjudicated of committing a Class A or B felony, including: the child's age and maturity; the child's needs and best interests, record, background, and risk level; the nature of the offense; the community needs; and the victim's characteristics.[47]

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38. *Id.*

39. O.C.G.A. § 15-11-1 (2014).

40. O.C.G.A. § 15-11-2(11) (2014). CHINS is a new designation that replaces the previous designation of "unruly child." *See* O.C.G.A. § 15-11-2(2) (2012). It is a child "in need of care, guidance, counseling, structure, supervision, treatment, or rehabilitation and who is adjudicated to be . . . [h]abitually disobedient" or a status offender, that is, an offender who commits an act that would not be against the law if committed by an adult, such as skipping school or running away. O.C.G.A. § 15-11-2(11)(A)(1)-(vii) (2014).

41. *See* O.C.G.A. §§ 15-11-410 to -413, -601(a) (2014).

42. O.C.G.A. § 15-11-2(12) to (13) (2014).

43. O.C.G.A. § 15-11-602(c) to (d) (2014).

44. O.C.G.A. § 15-11-602(c). In addition, the time must be served at a Youth Detention Center (YDC). O.C.G.A. § 15-11-602(f)(2)(A) (2014).

45. O.C.G.A. § 15-11-602(d). For Class B felonies, there is flexibility in placement depending upon a designated risk level. *Id.* Medium- and high-risk juveniles must serve half of their disposition at a youth detention center, and low-risk juveniles may be sentenced to a non-secure residential facility. *Id.*

46. O.C.G.A. § 15-11-601(a).

47. O.C.G.A. § 15-11-602(b) (2014).

The delinquency provisions of the code were also completely revamped, paying particular attention to due process considerations.[48] Included are requirements regarding the parties to a proceeding,[49] a limited right to waive representation by an attorney,[50] and new provisions mandating the appointment of a guardian ad litem.[51] New procedural guidelines include the use of a detention assessment to determine if a child must be detained prior to adjudication,[52] the procedures for intake and arraignment,[53] and the procedures for service and discovery.[54]

There are likewise new guidelines regarding the transfer of juvenile cases to superior court.[55] Although former rules regarding exclusive and concurrent jurisdiction of superior and juvenile courts are retained, when making optional transfers, the court must consider new criteria.[56] Further, when a transfer order is issued, it is now immediately appealable by the juvenile.[57]

In addition, once a child is adjudicated delinquent, the Act provides new guidelines for disposition.[58] For example, if directed by the court, a probation officer or other designee must prepare a written report to assist the court in determining the proper disposition, including the need for rehabilitation, and it must include the results of any ordered exams.[59] Further, as required throughout the Code, the court is instructed to make the least restrictive disposition order appropriate in view of the seriousness of the delinquent act, the child's culpability, the child's age, the child's prior record, and the child's specific needs.[60] All

48. O.C.G.A. § 15-11-470(2) (2014). The stated aim is to balance holding children accountable for their actions with efforts to mitigate adult consequences of criminal behavior, rehabilitate delinquent children through community-based programs, and successfully reintegrate the children to their homes and communities. O.C.G.A. § 15-11-470(1) (2014).

49. O.C.G.A. §§ 15-11-473 to -474 (2014).

50. O.C.G.A. § 15-11-475 (2014).

51. O.C.G.A. § 15-11-476 (2014). A guardian ad litem must be appointed if the parent cannot protect the child's best interest or if the parent fails to accompany the child to court. *Id.*

52. O.C.G.A. § 15-11-505 (2014).

53. O.C.G.A. § 15-11-510 (2014).

54. O.C.G.A. §§ 15-11-530 to -532, -540 to -546 (2014).

55. O.C.G.A. § 15-11-562 (2014).

56. *Id.*

57. O.C.G.A. § 15-11-564 (2014).

58. O.C.G.A. §§ 15-11-590 to -608 (2014).

59. O.C.G.A. § 15-11-590(a)-(d).

60. O.C.G.A. § 15-11-601(a).

disposition orders must be tailored to the particular child's treatment, rehabilitation, and welfare.[61]

In addition to the new statutory maximum confinement provisions for designated Class A or B felonies, the Act includes new disposition provisions. For example, the court may not order a child adjudicated of a misdemeanor act to be placed in an "institution, camp, or other facility" unless the child has been previously adjudicated for a felony offense and has at least three prior adjudications for specific delinquent acts.[62] Another important change to the disposition rules is that a child may move for early release from restrictive custody at any time and may renew said motion within six months.[63]

Consistent with the adult criminal justice reform during the survey period, the new laws are pro-juvenile.[64] The laws further illustrate a new trend of providing the least restrictive custody possible with an eye towards rehabilitation and treatment, as well as returning the juvenile home and to the community as quickly as possible.[65] It is hoped this trend will not only reduce juvenile recidivism, but will serve to chill juvenile offenders from entering the adult system and becoming recidivists there.[66] Due to the extensiveness of the statutory overhaul, it is recommended that practitioners of juvenile law take the time to carefully analyze Title 15 in its entirety.

III. CASE LAW CHANGES

This survey period was not without activity in the state appellate courts. Some of the important decisions are discussed below.

A. Roadblocks

Every year, Georgia drivers see more roadblocks set by law enforcement to apprehend impaired drivers.[67] In two separate roadblock cases decided on the same day, the Georgia Supreme Court clarified the appropriate analysis used in determining the constitutionality of a

61. *Id.*
62. O.C.G.A. § 15-11-601(a)(10)(B), (11)(B).
63. O.C.G.A. § 15-11-602(f)(2)(A).
64. *See* O.C.G.A. § 15-11-1.
65. *See id.*
66. *See id.*
67. *See Georgia*, GOVERNORS HIGHWAY SAFETY ASS'N, http://www.ghsa.org/html/statein fo/bystate/ga.html (last visited Oct. 28, 2014) (listing the frequency of Georgia sobriety checkpoints as "Weekly").

roadblock.[68] Review of a roadblock is now a clear and distinct two-step analysis.[69] It has long been held that a roadblock will be deemed constitutional if five factors can be shown: (1) the decision to employ the roadblock was made by supervisory personnel (instead of by officers in the field); (2) all vehicles are stopped as opposed to random stops; (3) the delay to motorists is minimal; (4) the roadblock is well identified as a police checkpoint; and (5) the screening officer is trained and qualified to make an initial determination as to which motorists should be given tests for intoxication.[70] The United States Supreme Court has also held that any checkpoint program must have, in addition to the above constitutional safeguards regarding implementation and operation, a primary purpose beyond a "general interest in crime control."[71]

In *Brown v. State,*[72] the Georgia Supreme Court conducted a thorough analysis of roadblock law, finding that over time, the requirement that a particular roadblock be made by "supervisory personnel"—as outlined in *LaFontaine v. State*[73]—became inextricably conflated with the requirement—outlined in *City of Indianapolis v. Edmond*[74]—that a roadblock have a primary purpose other than a general interest in crime control.[75] The court reasoned the two analyses involved "different factual inquiries" and served "different objectives."[76] Thus, the court held that the analyses must be addressed separately because it is possible that one checkpoint could meet the *Edmond* requirements but be declared unconstitutional under the *LaFontaine* factors.[77] In fact, that is exactly what occurred in the two cases heard on October 21, 2013.[78]

In *Brown,* a captain of the Cobb County Sheriff's Department emailed his officers and requested they conduct traffic enforcement on Groover Road in response to a citizen complaint. The next day, a shift supervisor sent a corporal to survey the road. The officer reported back that the

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68. Brown v. State, 293 Ga. 787, 797-98, 750 S.E.2d 148, 158 (2013); Williams v. State, 293 Ga. 883, 887, 750 S.E.2d 355, 359-60 (2013).

69. *Williams*, 293 Ga. at 887, 750 S.E.2d at 360.

70. LaFontaine v. State, 269 Ga. 251, 253, 497 S.E.2d 367, 369 (1998).

71. City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (quoting Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979)).

72. 293 Ga. 787, 750 S.E.2d 148 (2013).

73. 269 Ga. 251, 253, 497 S.E.2d 367, 369 (1998).

74. 531 U.S. 32, 44 (2000).

75. *Brown*, 293 Ga. at 796-97, 750 S.E.2d at 157-58. The focus of the *Edmond* requirement is on why the agency is using the roadblock, while the focus of the *LaFontaine* requirement is how the program is implemented by a supervisor. *Id.*

76. *Id.* at 796, 750 S.E.2d at 157.

77. *Id.* at 797, 750 S.E.2d at 158.

78. *Id.*; *Williams*, 293 Ga. at 888-89, 750 S.E.2d at 360.

road was not conducive to speed control devices because it was too curvy. Two days later, the sergeant decided to set up a virtually spontaneous roadblock.[79] The court went through the distinct two-part analysis and determined that the Cobb County checkpoint policy had a primary purpose other than general crime control. This was evident because the policy actually specified the roadblocks were to "monitor and check driver's licenses, driver condition, vehicle registrations, vehicle equipment, and various other requirements of the Georgia State Motor Vehicle and Traffic Code." However, the court found evidence that the sergeant, as an officer in the field, actually made the decision to set up the roadblock and that he was not acting as a supervisor.[80]

In *Williams v. State*,[81] on the other hand, the court used the same analysis, but found that the roadblock program did not have an appropriate primary purpose other than general crime control.[82] There, the roadblock at issue was held in Bibb County and was instituted by the Bibb County Sheriff's Office and the state-subsidized Highway Enforcement of Aggressive Traffic (HEAT) Unit.[83] The Bibb County policy manual on roadblocks stated that "[v]ehicles may also be stopped at general roadblocks which serve legitimate law enforcement purposes. If evidence of a crime is observed, an officer has the right to take reasonable investigative steps."[84]

The supreme court held that this language authorized general roadblocks without limitation.[85] It reasoned that legitimate law enforcement purposes include vehicle safety and driver sobriety, but could also include general wrongdoing and general interest in crime control.[86] Thus, although the particular checkpoint at issue may have met constitutional muster, the supreme court held that the *Edmond* analysis required a review of the "policy purpose of the checkpoints, viewed 'at the programmatic level,' to ensure that an agency's checkpoints" were established for a proper purpose.[87] The checkpoint was therefore ruled unconstitutional even though the sergeant who authorized it made the decision in advance as a supervisor.[88] Thus, challenged roadblocks are subject to a separate and distinct two-part

79. *Brown*, 293 Ga. at 803-04, 750 S.E.2d at 162.
80. *Id.* at 800, 804, 750 S.E.2d at 160, 162.
81. 293 Ga. 883, 750 S.E.2d 355 (2013).
82. *Id.* at 893, 750 S.E.2d at 363.
83. *Id.* at 884, 750 S.E.2d at 358.
84. *Id.*
85. *Id.* at 892, 750 S.E.2d at 362.
86. *Id.*
87. *Id.* at 891, 750 S.E.2d at 362 (quoting *Brown*, 293 Ga. at 795, 750 S.E.2d at 157).
88. *Id.* at 891, 750 S.E.2d at 361-62.

analysis. The standards were clarified, and the factors outlined in *Edmond* and *LaFontaine* can no longer be conflated.[89]

B. Burglary

Burglary has always consisted of an "unlawful" entry, but can the entry still be unlawful if one gains consent to enter by fraudulent practices? In *State v. Newton*,[90] the Georgia Supreme Court considered that very concept for the first time.[91] Predictably, the court held in the affirmative.[92]

An individual identifying himself as "David Flynn" retained a real estate broker in Douglas County to assist him in relocating to Georgia from New Jersey. Flynn signed a brokerage agreement and produced false identification that allowed him to do so. Flynn then spent two full days in Georgia with the broker looking at houses. While viewing a house owned by another real estate agent (who gave permission to the defendant and his agent to enter), a distraction resulted in the defendant being left alone in an upstairs bedroom. Later, it was discovered that approximately twenty-thousand dollars worth of jewelry was stolen. Although the defendant was convicted of burglary at trial, the Georgia Court of Appeals reversed the conviction, concluding the evidence was insufficient to show the defendant had been without authority to enter the house because he had the owner's consent.[93]

Under O.C.G.A. § 16-7-1,[94] as applicable at the time, "[a] person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another."[95] When reviewing the facts of this case, including the fact that the defendant had obtained consent to enter by fraud, the supreme court held there was no significant difference between gaining entry by force or gaining consent to enter by fraud or artifice.[96] The court of appeals decision was reversed and the case was remanded for sentencing.[97] This case illustrates the point that one cannot gain lawful entry by trickery if one did not have it otherwise.

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89. *Brown*, 293 Ga. at 799, 750 S.E.2d at 159.
90. 294 Ga. 767, 755 S.E.2d 786 (2014).
91. *Id.* at 767, 769, 755 S.E.2d at 787-88.
92. *Id.* at 773, 755 S.E.2d at 790.
93. *Id.* at 767-70, 755 S.E.2d 787-88.
94. O.C.G.A. § 16-7-1 (2007).
95. *Newton*, 294 Ga. at 770-71, 755 S.E.2d at 789 (quoting O.C.G.A. § 16-7-1(a)).
96. *Id.* at 772, 775 S.E.2d at 790.
97. *Id.* at 773, 775 S.E.2d at 790.

C. *Merger*

One case during this survey period reminds practitioners to negotiate pleas with precision while anticipating any merger issues.[98] This is because the limited record at a plea hearing may work to waive any later merger claims.[99] In *Nazario v. State*,[100] the Georgia Supreme Court granted review of the question of whether the entry of a guilty plea automatically waives any claim that the convictions merged as a matter of law or fact.[101]

The defendant was charged with twenty-six crimes arising out of the beating and stabbing death of his girlfriend and the concomitant abuse of her three children. As negotiated with the State, the defendant pleaded guilty to seventeen of the twenty-six charges as follows: one count of felony murder (based on aggravated assault with a knife); two counts of aggravated assault (one for inflicting injuries with a knife and the other for striking the girlfriend with an object); four counts of aggravated battery (two against his girlfriend and two against a child); five counts of concealing a death; and five counts of child cruelty. The trial court sentenced him to life in prison for felony murder with ten years to serve for each concealment conviction. The court also sentenced the defendant to serve twenty years for the aggravated assault, aggravated battery, and child cruelty convictions, with all sentences running concurrently.[102]

The defendant filed a direct appeal asserting the following: (1) the aggravated assault predicate conviction should have merged into the felony murder conviction; (2) that his two child cruelty convictions for injuring the oldest child should have merged because the injuries to that child most likely happened at the same time; (3) the two child cruelty convictions for leaving the two children bound and gagged were based on the same conduct as the concealment charges and should have merged; and (4) the five concealment convictions should have merged as a matter of fact.[103]

The State countered by relying on a list of Georgia cases holding a guilty plea waives all merger claims.[104] The court held that any conviction that merges with another is a nullity and will be vacated as

98. Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).
99. *Id.* at 488-89, 746 S.E.2d at 116.
100. 293 Ga. 480, 746 S.E.2d 109 (2013).
101. *Id.* at 480, 746 S.E.2d at 111.
102. *Id.* at 482-84, 746 S.E.2d at 111-12.
103. *Id.* at 490-91, 746 S.E.2d at 117-18.
104. *Id.* at 483, 746 S.E.2d at 113.

an illegal sentence even without an objection or an enumeration on appeal.[105] This is true provided the issue arises during a proceeding in which void convictions may be challenged, such as a direct appeal.[106] The court cautioned, however, that because the factual record in a guilty plea is so limited, merger claims arising from guilty pleas will "rarely prevail."[107]

In analyzing the case, the court held the only merger claim that had sufficient basis in the limited guilty-plea record was the defendant's fourth allegation—the five concealing-the-death convictions should merge.[108] The court reasoned that the gravamen of that offense was a person preventing a discovery that someone has been unlawfully killed.[109] Since the record showed each separate act of hindering was in fact part of a single course of conduct that hindered a single discovery, the court found all five convictions should have merged.[110]

Although the defendant was successful in having his five concealment convictions merged, the rest of his merger arguments failed due to the limited record established during the guilty plea hearing.[111] Thus, this case serves to illustrate the lesson of which the court cautioned—the importance of extreme precision during plea hearings.[112]

D. Re-sentencing

A system of justice that is based on notions of fundamental due process has no place for the retribution of a vindictive judge. It is for that reason the Georgia Supreme Court revisited the correct approach for determining whether a new sentence triggers the presumption of vindictiveness.[113]

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105. *Id.* at 486, 746 S.E.2d at 115.

106. *Id.* at 488, 746 S.E.2d at 116.

107. *Id.* at 480, 746 S.E.2d at 111.

108. *Id.* at 492, 746 S.E.2d at 118.

109. *Id.* at 491-92, 746 S.E.2d at 118.

110. *Id.* As to the defendant's other claims, the court determined that none were supported by the limited record from the guilty plea. *Id.* at 490, 746 S.E.2d at 117. Specifically, as to claim one, it concluded the felony murder count did not cross-reference the aggravated assault, and the aggravated assault did not necessarily cause a fatal injury; thus, merger was not mandated. *Id.* As to claim two, the court found that the indictment charged the child cruelty counts separately, and neither count alleged what specific injury it referenced, so merger was not mandated. *Id.* at 490-91, 746 S.E.2d at 117-18. As to claim three, the binding and gagging of the child (child cruelty) had different elements than the concealment convictions; thus, those did not merge. *Id.* at 491, 746 S.E.2d at 118.

111. *Id.* at 480, 746 S.E.2d at 111.

112. *See id.*

113. State v. Hudson, 293 Ga. 656, 656-57, 748 S.E.2d 910, 911 (2013).

The United States Supreme Court has long held that due process considerations do not allow a trial court to penalize defendants for making post-trial challenges to their convictions and sentences.[114] Due process requires, the Court has stated, that vindictiveness play "no part" in any new sentence a defendant receives after obtaining a new trial, and also requires that a defendant be permitted to seek post-conviction rights without fear of retaliation.[115] Thus, "vindictiveness will be presumed whenever a more severe sentence is imposed after a retrial or remand."[116] To overcome this presumption of vindictiveness, the judge must affirmatively specify the reasons justifying the increase in sentence severity, and that increase must be based on "objective information [of] . . . identifiable conduct on the part of the defendant."[117]

There have been two approaches to determine whether the vindictiveness doctrine has been triggered. First is the "count-by-count" approach, which has been used in Georgia since 1975.[118] Second is the "aggregate" approach, which the majority of state appellate courts have adopted.[119] The count-by-count approach requires a court to consider each count individually and to compare the initial sentence with the new sentence on a count-by-count basis.[120] If the sentence for any one count is increased for the second (new) sentence, vindictiveness is presumed.[121] Under the aggregate approach, the court must compare the total original sentence with the total new sentence to determine if it has increased.[122]

The Georgia Supreme Court re-examined its approach, determined it was time to follow the majority trend, and adopted the aggregate approach.[123] First, it reasoned that the purpose of the doctrine was to prevent vindictiveness by the sentencing court rather than merely to prevent a harsher sentence.[124] The court determined the vindictiveness presumption could apply in situations where the presence of actual vindictiveness was unlikely.[125] It reasoned that the aggregate ap-

114. North Carolina v. Pearce, 395 U.S. 711, 725 (1969).
115. *Id.*
116. *Hudson*, 293 Ga. at 657, 748 S.E.2d at 911.
117. *Id.* (quoting *Pearce*, 395 U.S. at 726) (internal quotation marks omitted).
118. *Id.* at 656, 748 S.E.2d at 911.
119. *Id.* at 656-57, 748 S.E.2d at 911.
120. *Id.* at 658, 748 S.E.2d at 912.
121. *Id.*
122. *Id.*
123. *Id.* at 657, 748 S.E.2d at 911.
124. *Id.* at 659-60, 748 S.E.2d at 913.
125. *Id.* at 660, 748 S.E.2d at 913.

proach would be more likely to prevent such a result because it was more precise.[126]

Second, the court concluded that "the aggregate approach is more adept at accommodating the discretion trial courts need in fashioning just and proper sentences."[127] Relying on a plurality opinion by the supreme court in *Adams v. State*,[128] the court noted that "judges considering multiple related counts stemming from a single course of conduct typically craft sentences on the various counts as part of an overall sentencing scheme."[129] To that end, if the overall sentencing scheme unravels due to elimination of some of the original sentence, the trial courts must be given a "wide berth" in fixing a new sentence.[130]

Georgia is now in line with the majority of states and employs the aggregate approach to examine sentencing issues by a court after a successful post-trial challenge by a defendant.[131] Although this approach gives more flexibility to the sentencing court, it is designed to flesh out unconstitutional vindictiviness.[132]

IV. CONCLUSION

This was a successful year for criminal justice reform, with affirmative moves by our legislature away from harsh mandatory minimum prison sentences and towards rehabilitation and cooperation between the state and the defendant. Hopefully this movement is indicative of a long-term commitment that will ease prison overcrowding, have an equalizing effect on our racially disproportionate prison population, and reduce juvenile recidivism rates.

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126. *Id.*
127. *Id.*
128. 287 Ga. 513, 696 S.E.2d 676 (2010).
129. *Hudson*, 293 Ga. at 660, 748 S.E.2d at 913 (citing *Adams*, 287 Ga. at 517-18, 696 S.E.2d 676).
130. *Id.*
131. *Id.* at 657, 748 S.E.2d at 911.
132. *Id.* at 658-59, 748 S.E.2d at 912-13.