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John A. Regan

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by John A. Regan*

I. INTRODUCTION

This Article reviews opinions impacting the practice of criminal law delivered by the Supreme Court of the United States and the Georgia Supreme Court covering the period of June 1, 2019, up until May 21, 2020.[1] This Article is designed to be a mere overview to both prosecutors and defense attorneys of decisions and new statutes, and it serves as a broad guideline to how these decisions will affect their practices.

II. UNITED STATES SUPREME COURT DECISIONS

Three Supreme Court decisions are covered in this Article. The first, *Kahler v. Kansas*,[2] deals with the insanity defense, whereas *Kansas v. Glover*[3] and *Mitchell v. Wisconsin*[4] deal with traffic stops and blood draws of drivers who are not responsive, respectively.

The issue in *Kahler* was a Kansas statute that would not wholly exonerate a defendant on the ground that his illness prevented him from recognizing his criminal act as morally wrong.[5] That is to say that Kansas does not recognize the second prong of the so-called "M'Naghten Rule,"[6] the landmark nineteenth century English case from which many states have adapted their insanity defenses. Kansas had adopted the first prong of M'Naghten, but did not recognize the second.[7] The appellant in

* State Gang Resource Prosecutor, Prosecuting Attorneys Council of Georgia, 2019–Present, Assistant District Attorney, Macon Judicial Circuit 2001–2019. Wake Forest University (B.A., cum laude, 1998); Mercer University School of Law (J.D., 2001). Member, State Bar of Georgia.

[1] For an analysis of criminal law during the prior survey period, see John Allen Regan, *Criminal Law*, *Annual Survey of Georgia Law*, 71 MERCER L. REV. 69 (2019).

[2] 140 S. Ct. 1021 (2020).

[3] 140 S. Ct. 1183 (2020).

[4] 139 S. Ct. 2525 (2019).

[5] *Kahler*, 140 S. Ct. at 1024.

[6] *Daniel M'Naghten Opinion* (1843) 10 Cl. & Fin. 200, *reprinted in* 8 ENG. REP. 718.

[7] *Kahler*, 140 S. Ct. at 1026.

Kahler had been convicted of a brutal murder of his estranged wife, his two daughters, and his wife's grandmother on Thanksgiving Day. He was sentenced to death by a jury, but at trial argued Kansas' insanity law denied him the defense of showing a defendant did not know the difference between right and wrong, leaving him only the defense of showing he did not intend to kill.[8] The Kansas Supreme Court also denied his appeal based on Kansas law so he appealed to the United States Supreme Court using a Fourteenth Amendment[9] due process argument.[10]

The Supreme Court opinion, authored by Justice Kagan, was a 6-3 decision against the Appellant wherein the court held that it is up to the individual states and not the Court to determine when a criminal defendant can be held liable for his actions, unless there is a violation of the fundamental principles of justice.[11] As Justice Kagan wrote in her opinion:

> Kansas has an insanity defense negating criminal liability—even though not the type Kahler demands. As noted earlier, Kansas law provides that it is "a defense to a prosecution" that "the defendant, as a result of mental disease or defect, lacked the culpable mental state required" for a crime. [. . . .] That provision enables a defendant to present psychiatric and other evidence of mental illness to defend himself against a criminal charge. More specifically, the defendant can use that evidence to show that his illness left him without the cognitive capacity to form the requisite intent.
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> . . . .
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> Second, and significantly, Kansas permits a defendant to offer whatever mental health evidence he deems relevant at sentencing. [. . . .] A mentally ill defendant may argue there that he is not blameworthy because he could not tell the difference between right and wrong. Or, because he did not know his conduct broke the law. Or, because he could not control his behavior. Or, because of anything else. In other words, any manifestation of mental illness that Kansas's guilt-phase insanity defense disregards—including the moral incapacity Kahler highlights—can come in later to mitigate culpability and lessen punishment. And that same kind of evidence can persuade a judge to replace any prison term with commitment to a mental health facility . . . . In sum, Kansas does not bar, but only channels to sentencing, the mental health evidence that falls outside its intent-

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[8] *Id.* at 1027.

[9] U.S. CONST. amend. XIV, § 1.

[10] *Kahler*, 140 S. Ct. at 1023.

[11] *Id.* at 1024.

> based insanity defense. When combined with Kansas's allowance of mental health evidence to show a defendant's inability to form criminal intent, that sentencing regime defeats Kahler's charge that the State has "abolish[ed] the insanity defense entirely."[12]

Although Georgia law foundation is in M'Naghten, and Georgia does allow for a guilty but mentally ill verdict, the decision in *Kahler* is worth noting to see if the Georgia General Assembly so chooses to modify existing statutes to adopt this more streamlined approach to the insanity defense in criminal cases.

Another critical decision is *Kansas v. Glover*[13] in which the Court addressed the "investigative traffic stop" issue by determining whether evidence from a traffic stop initiated by a deputy running a license plate and finding the registered owner's license to have been suspended should be suppressed.[14] The appellant filed a motion to suppress the evidence seized in the stop because the stop was unreasonable. The trial court granted the motion, but the Kansas Court of Appeals reversed that decision; however, the Kansas Supreme Court reversed the court of appeals and the case ended up on the Supreme Court Docket.[15]

In reversing the Kansas Supreme Court decision, Justice Thomas, writing for an 8-1 majority, denied that the deputy had committed a Fourth Amendment violation:

> Before initiating the stop, Deputy Mehrer observed an individual operating a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. He also knew that the registered owner of the truck had a revoked license and that the model of the truck matched the observed vehicle. From these three facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop. The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences.[16]

However, the Court did hold this case to be narrow in scope, and that, as with most cases of reasonable suspicion, the ruling was quite fact specific.[17] As Justice Thomas points out further in his opinion:

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[12] *Id.* at 1030–31.

[13] *Kansas*, 140 S. Ct. 1183 (2020).

[14] *Id.* at 1187.

[15] *Id.*

[16] *Id.* at 1188.

[17] Id. at 1191.

> For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not "raise a suspicion that the particular individual being stopped is engaged in wrongdoing."[18]

With the growing use of tag readers in Georgia, this case will be used as a guideline for law enforcement agencies across the State, as well as prosecutors and defense counsel, to make sure and focus not just on the initial reading that comes back from a machine, but to look at the total picture of the stop before proceeding with an investigation or prosecution.

The question of when police may execute a warrantless blood draw on an unconscious person suspected of drunk driving was decided in *Mitchell v. Wisconsin*.[19] The petitioner in *Mitchell* had been arrested for drunk driving and, while at the police station, passed out before the second required test could be performed. He was then transported to the hospital where a warrantless blood draw was performed. The results of the blood draw showed his blood alcohol concentration to be almost three times the legal limit. Petitioner appealed following his denial of his motion to suppress by both the trial court and the Wisconsin Supreme Court.[20]

The Supreme Court, in an unusual 5-4 split, affirmed the warrantless blood draw.[21] Justice Alito's opinion allowed the blood draw under exigent circumstances, noting that:

> The importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives. The specifics, in short, are these: Highway safety is critical; it is served by laws that criminalize driving with a certain BAC level; and enforcing these legal BAC limits requires efficient testing to obtain BAC evidence, which naturally dissipates. So BAC tests are crucial links in a chain on which vital interests hang. And when a breath test is unavailable to advance those aims, a blood test becomes essential.[22]

Justice Alito also noted that proper blood alcohol concentration testing is needed as soon as possible noting: "Enforcement of BAC limits also requires prompt testing because it is 'a biological certainty' that '[a]lcohol

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[18] *Id.*

[19] 139 S. Ct. at 2530–31.

[20] *Id.* at 2528–29.

[21] *Id.* at 2530.

[22] *Id.* at 2535.

dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour . . . . Evidence is literally disappearing by the minute.'"[23]

However, Justice Alito's decision did not create a bright-line rule to authorize warrantless blood draws in all situations, as he closed his opinion with the following caveat:

> We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.[24]

Although the decision was 5-4, it is interesting to note the break-down of the Justices in the opinions. The normally liberal-leaning Justice Breyer joined Justice Alito, Justice Thomas, Justice Roberts, and Justice Kavanaugh, while Justice Gorsuch, normally seen as a conservative, joined the minority made up of Justice Ginsburg, Justice Sotomayor, and Justice Kagan.

III. GEORGIA SUPREME COURT DECISIONS

Casting off over one hundred precedents of both the court itself and the Georgia Court of Appeals, the Georgia Supreme Court established the so-called "Cumulative Error Rule" in *State v. Lane*.[25] The case stems from a defendant who was convicted in a murder-for-hire gone wrong.[26] "The trial court found that trial counsel was ineffective for, among other reasons, (1) failing to cross-examine [the lead detective] with evidence that he testified falsely about [a witness's] statements to him, and (2) failing to object to hearsay and bolstering testimony by [the lead detective.]"[27] "In addition, the trial court found that it had erred in various respects, including in admitting . . . ." hearsay evidence.[28] In establishing the new precedent, Justice Peterson argued:

> It would make no sense to say that one trial court error in admitting certain evidence was harmless given the strength of other evidence that was improperly admitted, then say that the error in admitting the second piece of evidence was harmless given the strength of the first

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[23] *Id.* at 2536.

[24] *Id.* at 2539.

[25] 308 Ga. 10, 838 S.E.2d 808 (2020).

[26] *Id.,* 838 S.E.2d at 810–11.

[27] *Id.* at 13, 838 S.E.2d at 812.

[28] *Id.*

> improper evidence. Indeed, weighing prejudice cumulatively is simply a natural implication of the harmless error doctrine: The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. The purpose of a cumulative-error analysis is to address that possibility. Such an analysis is an extension of the harmless-error rule, which is used to determine whether an individual error requires reversal.[29]

However, in adopting this new rule, the court did note that the cumulative errors in this case were of an evidentiary nature and the court was not focusing on other types of error that may or may not occur at trial.[30] The ruling puts a defendant on notice that an appeal under this new standard not based on an evidentiary standard must show why the new rule should be enlarged to encompass the new allegation.[31]

The court addressed the issue of a defendant's right to an "out-of-time" appeal in *Collier v. State.*[32] The case arises from a defendant who entered a guilty plea in 2009 to a 2008 murder case in Macon County. In 2018, the defendant filed a motion for an out-of-time appeal based on the argument that his trial counsel failed to inform him of his right to appeal and, immediately after he was sentenced, he informed his counsel that he wished to withdraw his plea and file an appeal for his conviction. The trial court summarily denied his motion.[33]

As in *Lane*, mentioned above, the Supreme Court again overturned years of precedent cases and held a defendant is no longer required to show both elements of the *Strickland v. Washington*[34] standard, namely the prejudice standard of the second-prong of the test to receive an out-of-time appeal, citing to two Supreme Court decisions[35], namely *Roe v. Flores-Ortega*[36] and *Garza v. Idaho.*[37] In writing for the court, Justice Ellington stated:

> Unfortunately, we have long erroneously held that a defendant seeking an out-of-time appeal directly from a judgment entered on a guilty plea must satisfy the prejudice component of the *Strickland* standard by showing that his appeal would have had merit. See *Ringold,* 304 Ga. at 881 n.3. We have also held that, if the defendant

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[29] *Id.* at 15, 838 S.E.2d at 813–14.

[30] *Id.* at 17, 838 S.E.2d at 815.

[31] *Id.* at 17–18, 838 S.E.2d at 815.

[32] 307 Ga. 363, 834 S.E.2d 769 (2019).

[33] *Id.*, 834 S.E.2d at 772.

[34] *Strickland v. Washington*, 466 U.S. 668 (1984).

[35] *Collier,* 307 Ga. at 366, 834 S.E.2d at 774.

[36] 528 U.S. 470 (2000).

[37] 139 S. Ct. 738 (2019).

> cannot show that his appeal would have had merit, the trial court may forgo an inquiry into whether counsel's performance with respect to the appeal was constitutionally deficient. For example, in *Stephens v. State*, this Court held that,
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> > "in deciding a motion for out-of-time appeal, the trial court must hold an evidentiary hearing to determine whether defense counsel's unprofessional conduct was the cause of the untimeliness only where the motion raises an issue that would have been meritorious on the existing record had a timely appeal been taken."
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> Because the holding in *Stephens* conflicts with controlling United States Supreme Court precedent, it and other opinions with similar holdings from this Court and the Court of Appeals are overruled.[38]

Although the court's decision did open up the door for more defendants to file out-of-time appeals, the court did require the State to present the argument that a defendant's delay in filing has unduly prejudiced the State's ability to respond as a result of the delay[39] and further called on the Georgia Assembly as the proper avenue to remedy and streamline the appeals process, specifically the relationship between the right to file a Habeas petition and the out-of-time appeals process.[40]

The court addressed a defendant's right to an affirmative defense in *McClure v. State*[41] and *Pennington v. State.*[42] In *McClure*, a defendant was convicted of two counts of aggravated assault in Spalding County for pointing a BB rifle at two people. Defendant asked for the defense of self and defense of habitation jury charges, but neither were given because when the defendant testified at trial he refused to admit he had in fact pointed the rifle even though he admitted he did carry the weapon.[43] The court of appeals affirmed his conviction and he appealed it to the supreme court.[44] The supreme court reversed the trial court and the court of appeals with Justice Ellington writing:

> [I]n order to raise an affirmative defense, a criminal defendant need not "admit" anything, in the sense of acknowledging that any facts alleged in the indictment or accusation are true. Rather, in asserting an affirmative defense, a defendant may accept certain facts as true

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[38] *Collier*, 307 Ga. at 366–67, 834 S.E.2d at 774.

[39] *Id.* at 376, 834 S.E.2d at 781.

[40] *Id.* at 380–82, 834 S.E.2d at 784 (Peterson, J. concurring).

[41] 306 Ga. 856, 834 S.E.2d 96 (2019).

[42] 306 Ga. 854, 834 S.E.2d 63 (2019).

[43] *McClure,* 306 Ga. at 856–57, 834 S.E.2d at 98.

[44] *Id.*

> for the sake of argument, and the defendant may do so for the limited purpose of raising the specific affirmative defense at issue. A defendant is entitled to a requested jury instruction regarding an affirmative defense when at least slight evidence supports the theory of the charge, whether in the State's evidence or evidence presented by the defendant, and regardless of whether the theory of the affirmative defense conflicts with any other theory being advanced by the defendant. It follows that a trial court errs in denying a defendant's request for a jury instruction on an affirmative defense solely on the basis that the defendant did not admit for all purposes the truth of the allegations in the indictment or accusation regarding the allegedly unlawful act.[45]

The Court also addressed the pattern jury charge for affirmative defense given across the state and held it to be good law, but warned that in light of this decision the phrase "admits the doing of the act charged" would needed to be changed.[46]

Unlike in *McClure* where the defendant did testify, the defendants in *Pennington* did not testify and were convicted of possession of methamphetamine with intent to distribute within 1000 feet of a school. Both defendants requested the trial court give the affirmative defense that the actions occurred completely within a private residence, that no children under seventeen were present at the time, and the act was done not for financial gain.[47] Their request was denied.[48] As in *McClure*, the court of appeals affirmed and defendants appealed to the supreme court.[49] Based on their holding in *McClure*, the supreme court vacated the judgment and sent the case back to the court of appeals because neither the defense nor the State presented evidence at trial that the active meth lab discovered at Pennington's residence was not being used for financial gain.[50]

Georgia's Rape Shield Law[51] was the focus of *State v. Burns*.[52] At issue was the defendant who was on trial for aggravated sexual battery, aggravated sodomy, and incest, which was the result of a social media post written by his step-daughter detailing their encounter. The post also contained a reference to an attempted rape by the victim's brother's best friend, an allegation later proven to be false.[53] The trial court granted the

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[45] *Id.* at 863–64, 834 S.E.2d at 102–03.

[46] *Id.* at 865, 834 S.E.2d at 104.

[47] *Pennington v. State*, 306 Ga. at 854, 834 S.E.2d at 63–64.

[48] *Id.*, 834 S.E.2d at 64.

[49] *Id.* at 855, 834 S.E.2d at 64.

[50] *Id.* at 856, 834 S.E.2d at 64–65.

[51] O.C.G.A. § 24-4-412 (2019).

[52] 306 Ga. 117, 829 S.E.2d 367 (2019).

[53] *Id.* at 117–18, 829 S.E.2d at 370.

State's motion to exclude concluding "that the probative value of the statement in question is substantially outweighed by the danger of unfair prejudice and confusion of the issues and is inadmissible."[54] The trial court granted the defendant's motion for immediate review to the court of appeals who decided the trial court's Rule 403 analysis was wrong as defined under *Smith v. State*[55] and reversed the lower court.[56]

The supreme court first examined if Georgia's Rape Shield Law, originally codified in 1976 prior to the adoption of Georgia's new rules of evidence in 2013, was in fact still good law.[57] The court did under a plain language analysis.[58] However, the supreme court reversed the court of appeals analysis applying *Smith*, ruling the opinion seemingly relied on the Sixth and Fourteenth Amendments to create a *per se* rule of admissibility for evidence of prior false allegations where falsity has been established, notwithstanding other rules of evidence.[59] These constitutional provisions demand no such rule, thereby overruling *Smith* and nine other cases relying on *Smith* and forty-six cases that cite and rely on the constitutional holding.[60] Despite overruling *Smith*, the court found the court of appeals was correct in overruling the trial court, holding that the lower court had misapplied and incorrectly determined the evidence of the false allegation was inadmissible under 403.[61]

Composition of a Grand Jury and actions by the County Clerk of Court were addressed in *State v. Towns*.[62] The defendant in this case was charged with two counts of murder and armed robbery in the murder of a couple who went to Telfair County to purchase a 1966 Ford Mustang advertised on Craigslist in 2015. When the State went to indict the defendant in March of 2016, less than sixteen of the fifty summoned jurors for Grand Jury appeared, either due to deferrals or failure to respond. The Chief Judge of the Circuit ordered the Sheriff to locate those perspective jurors who failed to appear without being dismissed and

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[54] *Id.* at 118, 829 S.E.2d at 370 (citing O.C.G.A § 24-4-403) (internal quotations omitted).

[55] 259 Ga. 135, 377 S.E.2d 158 (1989). The court held that once certain procedural requirements are satisfied, a defendant in a sexual offense prosecution may adduce evidence at trial that the complaining witness has made prior false accusations of sexual misconduct and, further, that such evidence is admissible both to attack the credibility of the victim and as substantive evidence tending to prove that the conduct underlying the charges did not occur.

[56] *Burns,* 306 Ga. at 117, 829 S.E.2d at 370.

[57] *Id.* at 121, 829 S.E.2d at 372.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 123–24, 829 S.E.2d at 373–74.

[62] 307 Ga. 351, 834 S.E.2d 839 (2019).

bring them to court. The court also ordered the Clerk of the Court to supplement the Grand Jurors with perspective jurors from the following day's jury list. The Clerk complied with the court's demand, locating two potential jurors who she knew were available from personal knowledge and would be available that day. These two jurors selected by the clerk along with the ones located by the Sheriff composed the Grand Jury and indicted defendant on murder and armed robbery charges.[63] The defendant challenged the composition of the Grand Jury, arguing the actions of the Clerk were not selected at random[64] as required under Georgia law.[65] The trial court agreed with the defendant and dismissed the indictment.[66]

The State appealed to the supreme court who agreed with the trial court.[67] In a 7-2 opinion, Justice Blackwell wrote:

> In this case, it is true that the persons summoned for service as petit jurors were selected at random from the master jury list. But [(1)] in selecting [the two potential jurors] from that random list to serve on the grand jury, the clerk relied on her personal knowledge of the prospective petit jurors, her own assessment of the extent to which she had the information necessary to contact them, and her estimate of the likelihood that they would be available to report immediately. Those selections were not "random" in any sense of the word. The trial court was right to conclude that [the two potential jurors] were not "cho[sen] at random" for service on the grand jury and were not, therefore, selected as required by O.C.G.A. § 15-12-66.1.[68]

In his dissent, Justice Ellington goes on to say that although the actions of the Clerk were not in any way deemed to be done with any malice, the only result available was dismissal due to a violation of the statute:

> A grand jury is randomly selected only to the extent that all of its members were randomly selected. Even an occasional, limited, and well-intentioned violation of the randomness requirement in the statute governing the summoning of additional grand jurors undercuts

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[63] *Id.* at 352, 834 S.E.2d at 840–41.

[64] *Id.*

[65] O.C.G.A. § 15-12-66.1 requires that the petit jurors selected to serve on the grand jury be chosen *randomly*: "When from challenge or from any other cause there are not a sufficient number of persons in attendance to complete the empaneling of grand jurors, the presiding judge shall order the clerk to choose at random from the names of persons summoned as trial jurors a sufficient number of prospective grand jurors necessary to complete the grand jury."

[66] *Towns,* 307 Ga. at 351, 834 S.E.2d at 840.

[67] *Id.* at 353, 834 S.E.2d at 841.

[68] *Id.* at 354, 834 S.E.2d at 842.

> a key feature of the modern scheme for selecting juries. Especially in light of our prior decisions on this subject, we cannot say that such a violation is anything less than the violation of an "essential and substantial" provision of the jury selection statutes. Accordingly, on the facts before us, the trial court did not err when it dismissed the indictment as a remedy for the violation of the randomness requirement that occurred in this case. [69]

The supreme court addressed the issue of juror removal during deliberations in *Mills v. State.*[70] The defendant in this case was convicted of felony murder and aggravated assault, and had been sentenced to life without parole plus twenty years, although the court did not address the merger issue.[71] The question of the juror removal occurred when, after approximately four hours of deliberations, the jury sent out a note saying, "[w]e have a juror that believes the defendants are not guilty, based on the evidence presented."[72] The trial court sent the jury home for the day and told them to report the next day.[73]

Approximately two hours after deliberations resumed, the jurors sent out a second note stating:

> Your Honor[,] we have a juror that does not believe any of the witness testimony, does not believe any of the evidence that was submitted by the D.A. for this case, and says that there is no proof that Roger or Moses were in the house on Dec. 23, 2017. And the only thing that would change their mind, would be to see a clear resolution video from within the house showing both Roger and Moses firing the guns. Is this a hung jury?[74]

The trial judge then brought the jury in and identified the foreperson and asked if in fact the note was accurate. The foreperson and other jurors confirmed the note, and the trial judge then asked for the identification of the juror in question.[75] The juror, identified as Juror 23, raised her hand at which time the judge stated the following:

> I'm going to exercise the authority that I have under O.C.G.A [§] 15-12-172 to remove you from further decision-making in this case. I'm going to make a finding that based upon your position, you are not

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[69] *Id.* at 357–58, 834 S.E.2d at 844. As a note, after being dismissed by the Supreme Court, the defendant was reindicted by a new Grand Jury in Telfair County in January of 2020.

[70] 308 Ga. 558, 842 S.E.2d 284 (2020).

[71] *Id.* at 558, 842 S.E.2d at 286 n.1.

[72] *Id.* at 560, 842 S.E.2d at 287.

[73] *Id.* at 561, 842 S.E.2d at 287.

[74] *Id.*

[75] *Id.*

> able to perform your duty, that you are not following instructions of the Court. There's no burden of proof in a criminal case about having a clear resolution video. So I'm going to remove you from the case and replace you with the alternate juror.[76]

The court removed the juror despite the defendant's objections. Juror 23 was replaced with an alternate and the court the told the jury to restart the deliberations from the beginning with the alternate, after which the defendant was found guilty of felony murder and aggravated assault.[77]

The supreme court reversed the conviction, stating that although the decision to remove a juror rests with the trial court's discretion, even after deliberations have begun, in order to remove a juror:

> [t]here must be some sound basis upon which the trial judge exercises his discretion to remove the juror. A sound basis may be one which serves the legally relevant purpose of preserving public respect for the integrity of the judicial process. Where the basis for the juror's incapacity is not certain or obvious, some hearing or inquiry into the situation is appropriate to the proper exercise of judicial discretion. Dismissal of a juror without any factual support or for a legally irrelevant reason is prejudicial.[78]

The supreme court held the trial court had abused its discretion, finding nothing in the notes sent by the jury before the removal of Juror 23 nor in the trial court's finding had satisfied the O.C.G.A. § 15-12-172[79] standard of removal.[80] Justice Ellington writing for a unanimous Court ruled:

> The trial court's very limited inquiry into Juror 23's possible incapacity fell short of providing a sound basis for her excusal. That Juror 23 had reached a conclusion different from that of the other jurors did not show that she was incapacitated or legally unfit to serve. See *Wallace v. State*, 303 Ga. 34, 38 (2) (810 SE2d 93) (2018) ("[A]lternate jurors generally should not serve to substitute for minority jurors who cannot agree with the majority, as taking such a minority position does not by itself render a juror incapacitated or legally unfit to serve, and making such a substitution may constitute an abuse of discretion."). We conclude that the trial court abused its discretion in removing Juror 23. Because such an error was harmful, Mills's convictions must be reversed. See *Arnold*, 280 Ga. at 489 ("Dismissal of a juror without any

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[76] *Id.*, 842 S.E.2d at 287–88.

[77] *Id.*, 842 S.E.2d at 288.

[78] *Id.* at 560, 842 S.E.2d at 287.

[79] O.C.G.A. § 15-12-172 (2019).

[80] *Mills*, 308 Ga. at 562, 842 S.E.2d at 288.

> factual support or for a legally irrelevant reason is prejudicial." (citation omitted)).[81]

The final case reviewed in this note deals with extraordinary motions for new trial and DNA evidence. In *State v. Gates*,[82] the court dealt with the appeal of a conviction for murder and rape that occurred in 1977 in Columbus, Georgia, where the victim was found shot to death, bound with neckties and a belt from a bathroom robe.[83] The defendant, nineteen years old at the time of the crime, was identified out of a line-up two months later, was read his *Miranda*[84] rights, wrote a confession, and agreed to go with police back to the crime scene.[85] Once the defendant left the crime scene, police dusted for prints and found two prints that matched the defendant, even though no prints had been found at the initial search of the crime scene.[86] Defendant did not testify at trial and was convicted and sentenced to death.[87]

Defendant unsuccessfully challenged his conviction and also was unsuccessful in his state or federal habeas petitions, during the latter of which he attempted to expand the record to include a GBI report from 1976 mentioning the neckties and bathroom robe; however, the record was not clear on whether the defendant had attempted to obtain these items as part of his federal habeas petition. Defendant then filed a second state habeas in 1989 seeking a psychological evaluation, alleging he was ineligible for the death penalty due to intellectual disability. In 1992, the defendant was ordered to have a jury trial on whether he was eligible for the death penalty as a result of psychological testing. The second habeas proceeding dragged on until 2002, during which time the defendant and the State argued over several issues including turning over any and all evidence. In November 2002, an evidentiary hearing was held at which time the State produced a document from GBI stating the neckties and bathrobe belt had been destroyed in 1979. The hearing on defendant's intellectual disability was held in 2003 which resulted in a mistrial, after which the defendant and the State agreed to resentence the defendant to life without parole.[88]

In 2015, defendant again contacted his original attorneys and asked to look into the State's files for documentation of the physical evidence from the 1977 crime scene and documentation of the destroyed evidence.

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[81] *Id.*

[82] 308 Ga. 238, 840 S.E.2d 437 (2020).

[83] *Id.* at 239, 840 S.E2d at 439–40.

[84] Miranda v. Ariz., 384 U.S. 436 (1966).

[85] *Gates,* 308 Ga. at 242, 840 S.E.2d at 442.

[86] *Id.* at 242–43, 840 S.E.2d at 442.

[87] *Id.* at 243, 840 S.E.2d at 442.

[88] *Id.* at 243–46, 840 S.E.2d at 442–45.

Later that year, interns from defendant's attorneys went to the District Attorney's office in Columbus and actually located the missing neckties and bathrobe belt in a manila envelope. An extraordinary motion for DNA testing was ordered and the GBI found three different DNA profiles on the evidence but could not test further due to testing policies in place at the time at the GBI.[89]

Defendant sought further testing by a defense DNA expert and on February 1, 2017, the trial court ordered further testing of the DNA found on the belt and tie by the GBI and comparison of the results of that testing with a DNA reference sample taken from Gates.

> The trial court also permitted Gates to analyze the results and comparison through probabilistic genotyping software known as TrueAllele. That analysis was conducted by a company known as Cybergenetics. The GBI's initial analysis of the DNA samples was inconclusive, but the TrueAllele analysis excluded Gates as a contributor to the DNA mixture found on the belt and tie.[90]

Based on this new evidence, a new trial was ordered for the defendant in 2017 and the State appealed, arguing the trial court had not followed the standard for ordering a new trial on newly discovered evidence[91] under *Timberlake v. State*[92] which states:

> It is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.[93]

The supreme court disagreed and ruled that, although the State's evidence of the defendant's guilt was strong, the State was incorrect in arguing that the defendant had known about the evidence since 1977 and in fact had been led to believe since 2002 that it had been destroyed and was not aware of the existence of the evidence until the rediscovery of

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[89] *Id.* at 247, 840 S.E.2d at 445.

[90] *Id.* at 248, 840 S.E.2d at 445–46.

[91] *Id.* at 250, 840 S.E.2d at 447.

[92] 246 Ga. 488, 271 S.E.2d 792 (1980).

[93] *Id.* at 491, 271 S.E.2d at 795–96.

said evidence in 2015.[94] Further, the court held that science of "Touch DNA" and TrueAllele technology was not in existence in 1977, and the results of these tests and the accompanying testimony are in fact material and exculpatory to the defendant.[95] As such, defendant was granted a new trial.[96]

IV. CONCLUSION

These decisions are just a handful of the cases that will impact criminal law in Georgia. The law is always in a state of flux, which requires prosecutors and criminal defense attorneys alike to always be aware of the cases granted certiorari by the courts and be aware of the impact their decisions will have on the cases argued across this state and country for years to come. In an era of Covid-19, with the courts turning to technology to streamline cases and the inevitable issues that will arise as a result, I expect more decisions and laws to affect a defendant's right to confrontation and the way evidence is admitted in courts across the United States and specifically Georgia.

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[94] *Gates*, 308 Ga. at 254, 840 S.E.2d at 450.

[95] *Id.* at 254, 259–60, 840 S.E.2d at 450, 453.

[96] *Id.* at 265, 840 S.E.2d at 456.