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Criminal Law

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I. INTRODUCTION

The dynamic nature of criminal law is a result of the ongoing struggle between those who prosecute individuals charged with crimes and those who defend them. It is, therefore, not practical to try to include every change in criminal law occurring during a particular survey period.[1] I have sifted through the cases and statutory amendments from June 1, 2014 through May 31, 2015 and selected those with the widest application or interest to criminal law practitioners.

II. LEGISLATION

Statutory changes this survey period are illustrative of the times in which we live. These changes include our state's continued dedication to accountability courts, a relaxation of driver's license suspensions, and the creation of a number of new crimes. Each will be discussed in turn.

A. Veterans' Court

Accountability courts have existed in Georgia for several decades.[2] These courts provide alternatives to incarceration by targeting specific populations and addressing those populations' underlying reasons for

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1. For an analysis of Georgia criminal law during the prior survey period, see Bernadette C. Crucilla, *Criminal Law, Annual Survey of Georgia Law*, 66 MERCER L. REV. 37 (2014).

2. *See Georgia,* SUPERIOR COURT OF FULTON COUNTY, ACCOUNTABILITY COURTS-HISTORY, http://www.fultoncourt.org/accountability/acc-history.php (last visited Oct. 14, 2015).

criminal activity.[3] There were more than ninety such courts operating in Georgia by 2011, including felony drug courts, mental health courts, and DUI courts, and now nearly every county in Georgia boasts at least one.[4] While a statute in 2005[5] provided the authority for the creation of drug courts, the legislature did not authorize mental health courts until 2011.[6] Based upon their widespread successes, this survey period is significant for the addition of section 15-1-17 of the Official Code of Georgia Annotated (O.C.G.A.),[7] which added veterans' courts to the family of accountability courts.[8]

The Georgia General Assembly aptly recognizes the unique "physical, emotional, or mental impairments" incurred by our service men or women that contributes to their criminal behaviors and the need to address these specialized treatment issues.[9] To that end, the statute authorizes any criminal court to establish a separate veterans' court to provide alternative dispositions for veterans who meet defined eligibility criteria.[10] The statute mandates the establishment of a planning group consisting of judges, prosecutors, public defenders, law enforcement officials, and others familiar with veterans' services to develop a written work plan for the implementation of the program.[11] It is envisioned that, at a minimum, the veterans' courts combine "judicial supervision, treatment . . ., and drug and mental health testing as incarceration alternatives."[12]

Although the written work plan must include defined eligibility criteria, it has some limitations.[13] For example, one limitation notes, "[d]efendants charged with murder, armed robbery, rape, aggravated sodomy, aggravated sexual battery, aggravated child molestation, or child molestation [or any combination thereof] shall not be eligible for entry" into the program "except in the case of a separate court supervised reentry program designed to more closely monitor veterans

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3. *See* JUDICIAL COUNCIL OF GEORGIA, ADMINISTRATIVE OFFICE OF THE COURTS (2011), http://w2.georgiacourts.org/gac/files/Georgia%20Accountability%20Courts %20Defining%20 Elements.pdf.

4. *Id.*

5. *See* Ga. H.R. Bill 254, Reg. Sess., 2005 Ga. Laws 1505.

6. *See* Ga. S. Bill 39, Reg. Sess., 2011 Ga. Laws 224.

7. O.C.G.A. § 15-1-17 (2015).

8. Ga. S. Bill 320 § 1, Reg. Sess., 2014 Ga. Laws 79 (codified at O.C.G.A. § 15-1-17).

9. *See id.*

10. O.C.G.A. § 15-1-17(b)(1).

11. *Id.* § 15-1-17(b)(3). The statute also mandates the Council of Accountability Court Judges of Georgia to adopt standards and practices, taking into consideration ongoing research and guidelines published by veterans' needs experts. *Id.* § 15-1-17(b)(4).

12. *Id.* § 15-1-17(b)(3).

13. *See id.*

returning to the community after having served a term of incarceration."[14] The statute further mandates successful completion of the program be defined, and after completion, that the case may be dismissed without adjudication or result in a modified sentence.[15] There are provisions for confidentiality of records and expungement opportunities for successful completion of the program.[16] Funding for the veterans' courts shall come from a combination of federal, state, and county funds, as well as private donations.[17]

B. Driver's License Suspensions

There were significant "common sense" changes made relating to driver's license suspensions and limited driving permits.[18] Across the board, these changes relaxed the mandated suspension of driver's licenses as well as when limited driving permits can be obtained.[19] For example, drivers under the age of twenty-one will no longer be subject to license suspension for underage possession or purchase of alcohol.[20] In addition, mandatory suspension of licenses will no longer be required upon conviction for generalized "controlled substance" offenses that do not involve the operation of a motor vehicle.[21] Also, those charged with driving with a suspended registration may now plead nolo contendre once every five years to avoid a license suspension.[22]

Drivers who have had their license suspended in another state may now obtain a Georgia limited driving permit if they can meet Georgia's criteria.[23] Further, those individuals with limited driving permits may now drive for work purposes and not merely to and from work.[24] All drivers (even those with suspensions for second DUI convictions) are now

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14. *Id.*
15. *Id.* § 15-1-17(c)(1)-(4).
16. *Id.* §§ 15-1-17(c)(2)-(4), (f).
17. *Id.* § 15-1-17(b)(9).
18. *See* Ga. S. Bill 100, Reg. Sess. (2015).
19. *See* Ga. S. Bill 100, Reg. Sess. §§ 4-13, 4-17.
20. Ga. S. Bill 100 § 4-15, Reg. Sess. (codified as amended at O.C.G.A. §§ 40-5-57.1, -63(e), (f) (2014 & Supp. 2015)).
21. Ga. S. Bill 100 § 4-18, Reg. Sess. (codified as amended at O.C.G.A. § 40-5-75 (2014 & Supp. 2015)).
22. Ga. S. Bill 100 § 4-24, Reg. Sess. (codified as amended at O.C.G.A. § 40-6-15(a)-(c) (2014 & Supp. 2015)).
23. Ga. S. Bill 100 § 4-8, Reg. Sess. (codified as amended at O.C.G.A. § 40-5-22(d) (2014 & Supp. 2015)).
24. Ga. S. Bill 100 § 4-17, Reg. Sess. (codified as amended at O.C.G.A. § 40-5-64 (2014 & Supp. 2015)).

eligible for limited driving permits if they are participating in a drug, mental health, or veterans' court.[25]

C. New Crimes

This survey period was also significant for several new additions to Georgia's lexicon of crime. These changes exemplify how crimes tend to evolve along with societal norms.

1. Refund Fraud. Effective July 1, 2014, the General Assembly has added the crime of "refund fraud" to the books.[26] This crime makes it unlawful to use a false or unauthorized name or false information to obtain a store refund.[27] The refund can be in any form, such as monetary or any other type of credit.[28] As with many other theft related crimes, the punishment is tied to the value of the stolen property.[29] For example, if the property that is the subject of the refund is worth $500 or less, the punishment is that of a misdemeanor.[30] If the property is worth more than $500, the punishment increases to felony status and the penalty is imprisonment for one to ten years.[31] Punishment is also tied to the timeframe over which the crime occurs and the number of prior convictions.[32]

2. Murder in the Second Degree. The General Assembly established a new degree of murder this period: murder in the second degree.[33] This degree of murder is similar to felony murder in that it requires proof of a predicate act (cruelty to children in the second degree).[34] A person commits second degree murder if "in the commission of cruelty to children in the second degree, he or she causes the death of another human being irrespective of malice."[35] Presumably,

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25. Ga. S. Bill 100 § 4-18, Reg. Sess. (codified as amended at O.C.G.A. § 40-5-75(a)).

26. Ga. S. Bill 382 § 1-1, 2014 Ga. Laws 404 (codified at O.C.G.A. § 16-8-14.1 (Supp. 2015)).

27. O.C.G.A. §§ 16-8-14.1(a)(1)-(2).

28. *Id.* § 16-8-14.1(a)(2).

29. *Id.* § 16-8-14.1(b).

30. *Id.* § 16-8-14.1(b)(1).

31. *Id.* § 16-8-14.1(b)(2).

32. *Id.* §§ 16-8-14.1(b)(3)-(4), (c)(1)-(3). For example, if the property's total value is over $500 and is taken from three separate establishments within one county during a period of seven days, or taken during a period of 180 days, the punishment shall be imprisonment from one to ten years. *Id.* § 16-8-14.1(b)(3)-(4).

33. Ga. H.R. Bill 271 § 1-1, Reg. Sess., 2014 Ga. Laws 444 (codified as amended at O.C.G.A. § 16-5-1(d) (2011 & Supp. 2015)).

34. *See* O.C.G.A. § 16-5-1(d).

35. *Id.*

the death could be either the death of the child *or* of any other person while the defendant is committing cruelty to children in the second degree, intended or not. However, because the statute expressly provides the underlying felony must be "cruelty to children in the second degree," one cannot help but wonder whether a demurrer (or directed verdict) would lie if the underlying act is cruelty to children in the *first* degree.[36] Unlike other forms of murder, which carry a mandatory life sentence, second degree murder carries a sentence of ten to thirty years.[37]

3. Home Invasion in the First and Second Degree. The General Assembly also created the new crime of home invasion (in either the first or second degree).[38] This crime is a hybrid between burglary and aggravated assault with a deadly weapon.[39] The elements of home invasion in the first degree are as follows: a person who, without authority and with an intent to commit a forcible felony therein, and while in possession of a deadly weapon,[40] enters the dwelling house of another while such dwelling house is occupied by any person with authority to be present in the home.[41] As with burglary, it appears that only the intent to commit the forcible felony must be proved, and not the actual commission thereof.[42] Upon conviction, the penalty is ten to twenty years or life imprisonment, and a fine of up to $100,000.[43] Presumably, if a defendant intends to commit another crime (that is not a forcible felony), then he or she would not be guilty of first degree home invasion (although he or she would certainly be facing other issues).[44]

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36. *Id.* Cruelty to children in the second degree requires causing a child cruel or excessive physical or mental pain through criminal negligence, while first degree requires wilfully depriving the child of necessary sustenance or maliciously causing a child excessive physical or mental pain. O.C.G.A. §§ 16-5-70(a)-(c) (2011).

37. *Compare* O.C.G.A. § 16-5-1(e)(1), *with* O.C.G.A. § 16-5-1(e)(2).

38. Ga. H.R. Bill 770 § 3, Reg. Sess., 2014 Ga. Laws 426 (codified at O.C.G.A. § 16-7-5 (2015)).

39. *Compare* O.C.G.A. § 16-7-5 (home invasion), *with* O.C.G.A. § 16-7-1(b) (2011 & Supp. 2015) (burglary), *and* O.C.G.A. § 16-5-21(b)(2) (2011 & Supp. 2015) (aggravated assault with a deadly weapon).

40. As in aggravated assault, a deadly weapon is defined as an "instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury." *Compare* O.C.G.A. § 16-7-5(b) (home invasion), *with* O.C.G.A. § 16-5-21(b)(2) (aggravated assault with a deadly weapon).

41. O.C.G.A. § 16-7-5(b).

42. *Compare* O.C.G.A. § 16-7-5(b) (first degree home invasion), *with* O.C.G.A. § 16-7-1(b) (burglary).

43. O.C.G.A. § 16-7-5(d).

44. *See id.* § 16-7-5(b).

Second degree home invasion has the exact same elements as first degree, with the exception of the intent element.[45] With second degree, the defendant needs to only intend to commit a forcible misdemeanor, although the conviction thereof is a felony.[46] Upon conviction of second degree home invasion, the penalty is five to twenty years imprisonment and a fine of up to $100,000.[47]

The statute further permits the judge to sentence a defendant to all or part probation, but a wholly deferred or suspended sentence is not permitted.[48] Additional statutory provisions related to this new crime make home invasion in the first degree a class A designated felony act in the juvenile code and home invasion in the second degree a class B designated felony.[49] The crimes of home invasion (in any degree) have also been added to the list of crimes for which there are enhanced minimum punishments for multiple convictions if a firearm is used.[50] Also, home invasion has been added to the list of crimes that are bailable only before a superior court judge.[51]

4. Strangulation. Strangulation has been explicitly added as one manner in which to commit an aggravated assault.[52] As of July 1, 2014, one can commit an aggravated assault by using "any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in strangulation."[53] The aggravated assault statute also defines "strangulation."[54] The penalty for aggravated assault by strangulation remains the same as for other means of aggravated assault, one to twenty years in prison with enhanced imprisonment for specific classes of victims.[55]

5. Transmission of Sexually Explicit Images of Adults. It is now a crime to "post" or otherwise electronically transmit images of another

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45. *Compare* O.C.G.A. § 16-7-5(b) (first degree home invasion), *with* O.C.G.A. § 16-7-5(c) (second degree home invasion).

46. O.C.G.A. §§ 16-7-5(c), (d).

47. *Id.* § 16-7-5(d).

48. *Id.* § 16-7-5(e).

49. O.C.G.A. §§ 15-11-2(12), (13) (2015).

50. O.C.G.A. § 16-11-133(b) (2011 & Supp. 2015) (second conviction with gun requires consecutive imprisonment for fifteen years).

51. Ga. H.R. Bill 770 § 9, 2014 Ga. Laws 426 (codified as amended at O.C.G.A. § 17-6-1(a)(5.1) (2013 & Supp. 2015)).

52. Ga. H.R. Bill 911 § 1, 2014 Ga. Laws 441 (codified as amended at O.C.G.A. § 16-5-21(b)(3) (2011 & Supp. 2015)).

53. *Id.*

54. O.C.G.A. § 16-5-21(a) (2011 & Supp. 2015).

55. *See* O.C.G.A. § 16-5-21(c) (2011 & Supp. 2015).

adult that depict nudity[56] for the purposes of harassment or causing financial loss to the depicted person and which serves no legitimate purpose.[57] A violation of the Georgia Code section shall be punishable as a misdemeanor of a high and aggravated nature, but a second or subsequent conviction shall be a felony, carrying one to five years in prison.[58]

6. Cruelty to Animals. The General Assembly ramped up the applicable punishments for cruelty to animals and expanded some definitions, perhaps due to increased incidents of animal hoarding and other like abuses.[59] First, the General Assembly broadened the definition of the crime to include more variety.[60] A person commits the offense of cruelty to animals when they (1) cause physical pain, suffering, or death to an animal by *any* unjustifiable act or omission or (2) having intentionally exercised care, custody, control, ownership, or possession of an animal, fails to provide the animal adequate food, water, sanitary conditions, or ventilation consistent with what a reasonable person would believe is the normal requirement for the animal's size, species, breed, age, and physical condition.[61] The first conviction continues to be a misdemeanor;[62] however, the penalties increase for subsequent convictions.[63] A second conviction will now be considered a misdemeanor of a high and aggravated nature, which increases the fine to $15,000.[64] Also significant is that crimes committed in other states and juvenile convictions are counted as prior convictions.[65]

The General Assembly expanded the definition of aggravated cruelty to animals (a felony), which is punishable by one to five years in prison and a fine of up to $15,000.[66] A second conviction carries one to ten

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56. Nudity shall mean the showing of male or female genital, pubic areas or buttocks, or female breasts, if less than fully covered. O.C.G.A. § 16-11-90(a)(2) (Supp. 2015).

57. Ga. H.R. Bill 838 § 1, 2014 Ga. Laws 220 (codified at O.C.G.A. § 16-11-90 (Supp. 2015)).

58. O.C.G.A. § 16-11-90(c).

59. Ga. H.R. Bill 863, 2014 Ga. Laws 492 (codified as amended at O.C.G.A. § 16-12-4 (2011 & Supp. 2015)).

60. *Id.*

61. O.C.G.A. § 16-12-4(b).

62. Misdemeanors carry up to twelve months in county jail, although most cases result in only twelve months probation. *See* O.C.G.A. § 17-10-3 (2013 & Supp. 2015).

63. O.C.G.A. § 16-12-4(c).

64. *Id.* §§ 16-12-4(c),(e); *see also* Ga. H.R. Bill 863 § 1, 2014 Ga. Laws 492.

65. O.C.G.A. § 16-12-4(c).

66. Ga. H.R. Bill 863, 2014 Ga. Laws 492 (codified as amended at O.C.G.A. § 16-12-4(e)).

years in prison and a fine of up to $100,000.[67] Aggravated cruelty to animals can be committed in any of five different ways: (1) maliciously causing the death of an animal; (2) maliciously causing an animal physical harm by depriving it of a member of its body, rendering a part of its body useless, or seriously disfiguring it; (3) maliciously torturing the animal by inflicting severe or prolonged physical pain; (4) maliciously poisoning an animal or exposing it to any poisonous material; or (5) having intentionally exercised care, custody, control, ownership, or possession of an animal and failing to provide the animal with adequate food, water, sanitary conditions, or ventilation consistent with what a reasonable person believes is the normal requirement for the animal's size, species, breed, age, and physical condition to the extent that the animal dies or a member of its body is rendered useless or seriously disfigured.[68]

III. CASE LAW CHANGES

This period was not without activity in the appellate courts. Case law changes fell into several categories: changes in Fourth Amendment laws, admonitions to lawyers when rendering client advice for guilty pleas, and strict curtailments to criminal trial judges' comments in front of the jury. Each will be discussed in turn.

A. Fourth Amendment

A number of important cases dealing with Fourth Amendment issues were decided during this period. These include warrant requirements for blood testing in DUI cases; smell alone being sufficient probable cause for a search warrant; and the need for actual submission to police authority to constitute a seizure.

1. Blood Testing and DUI. In *Williams v. State*,[69] the Georgia Supreme Court first determined the compelled extraction of blood (to test for intoxication in a DUI case) violated Fourth Amendment protections[70] and constituted an intrusion into the human body.[71] Therefore, to obtain blood without a search warrant, the state would have to show either exigent circumstances existed or that actual voluntary consent was obtained from the defendant.[72] Whether exigent circumstances

67. O.C.G.A. § 16-12-4(e).
68. *Id.* § 16-12-4(d).
69. 296 Ga. 817, 771 S.E.2d 373 (2015).
70. U.S. CONST. amend. IV.
71. *Williams*, 296 Ga. at 819, 771 S.E.2d at 375.
72. *Id.* at 819-20, 821, 771 S.E.2d at 375-76.

existed will no longer be automatically established simply because "alcohol dissipates quickly in the body," and it must now be determined on a case by case basis.[73] In other words, exigency must be determined under the totality of the circumstances.[74] In a regular DUI situation, where nothing other than normal delay existed, a warrant will likely be required.[75] If the officer articulates that a specific delay existed, the dissipation of alcohol in the body will likely constitute a sufficient exigency to preclude the need for a warrant.[76]

The supreme court then turned from the exigency analysis to the other warrant exception, consent.[77] The court held that mere acquiescence to a blood test based upon a reading of the statutory implied consent notice would not necessarily constitute "actual, and therefore voluntary, consent" for Fourth Amendment purposes.[78] The court held that actual consent must be determined based on the totality of the circumstances.[79] Because the trial court failed to address the voluntariness of the consent, the case was remanded for further analysis.[80] It is anticipated that the consent issue will provide fertile ground for pretrial motions in DUI "blood-draw" cases moving forward. These may include whether the defendant was under duress, whether the defendant depended upon the license for his or her livelihood, whether the consent was the product of coercion, whether the defendant was under arrest, and whether the defendant was intoxicated at the time consent was given.[81]

2. Odors Alone Can Justify Search Warrant. In *State v. Kazmierczak*,[82] the Georgia Court of Appeals ruled that the odor of raw marijuana, alone, can be the sole basis for the issuance of a search warrant.[83] In so ruling, the court examined a number of federal cases

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73. *Id.* at 820-21, 771 S.E.2d at 376.

74. *See* Missouri v. McNeely, 133 S. Ct. 1552, 1563, 1567-68 (2013) (finding the officer did not identify any factors showing he faced an unusual delay in securing a warrant, thus, a warrant was needed). *But cf.* Schmerber v. California, 384 U.S. 757, 770-71 (1966) (officer articulated delay was based on the need to investigate accident and to transport defendant to a hospital, thus, exigent circumstances precluded the need for a warrant).

75. *See McNeely*, 133 S. Ct. at 1568.

76. *Schmerber*, 384 U.S. at 770-71.

77. *Williams*, 296 Ga. at 821, 771 S.E.2d at 377.

78. *Id.* at 822, 771 S.E.2d at 377.

79. *Id.*

80. *Id.* at 823, 771 S.E.2d at 377.

81. *See* State v. Aiken, 282 Ga. 132, 135-36, 646 S.E.2d 222, 225-26 (2007); State v. Fulghum, 261 Ga. App. 594, 596, 583 S.E.2d 278, 281 (2003); State v. Durrence, 295 Ga. App. 216, 217, 671 S.E.2d 261, 263 (2008).

82. 331 Ga. App. 817, 771 S.E.2d 473 (2015).

83. *Id.* at 822, 771 S.E.2d at 478.

from numerous jurisdictions and observed this rationale was widely accepted.[84] The court noted there were two different standards for probable cause based on distinctive odors—one for the warrantless search of a vehicle[85] and another for the issuance of search warrants for a residence[86]—and determined the two standards should be brought into line.[87] Thus, the court held if the officer is qualified to recognize the odor of marijuana and these qualifications are apparent in the warrant affidavit, then probable cause for the warrant can be established based on smell alone.[88]

3. No Seizure Without Actual Submission. In *State v. Walker*,[89] the Georgia Supreme Court analyzed the elements of a Fourth Amendment seizure, noting that not only must an officer restrain the liberty of an individual by making an assertion of authority, but there must also be actual submission to that authority.[90] In *Walker*, an officer apprehended a defendant stepping off school premises and instructed him to remove his hands from his pockets. Although the defendant stopped, when asked to remove his hands, he ran away.[91]

The court reversed the court of appeals decision (which held the officer only needed articulable suspicion) determining the court had gone "astray" from applicable law.[92] The court reasoned that although an officer's command can be an assertion of his authority sufficient to form the basis for a seizure, the seizure does not actually occur until the suspect submits to that authority.[93] However, because the defendant fled rather than submitting to the officer's authority, no seizure had occurred and suppression of the contraband was not proper.[94]

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84. *Id.* at 821-22, 771 S.E.2d at 478.

85. State v. Folk, 238 Ga. App. 206, 209, 521 S.E.2d 194, 198 (1999) (holding the smell of burning marijuana alone established probable cause for search of vehicle).

86. Shivers v. State, 258 Ga. App. 253, 257, 573 S.E.2d 494, 497-98 (2002) (holding the odor of marijuana outside house is only one factor when determining probable cause for issuance of a warrant).

87. *Kazmierczak*, 331 Ga. App. at 821, 771 S.E.2d at 477 (noting it is well established that a warrantless search of an automobile must be based on same degree of probable cause sufficient for search warrant).

88. *Id.* at 823, 771 S.E.2d at 478.

89. 295 Ga. 888, 764 S.E.2d 804 (2014).

90. *Id.* at 890, 891, 764 S.E.2d at 806.

91. *Id.* at 888, 764 S.E.2d at 805.

92. *Id.* at 890, 764 S.E.2d at 806.

93. *Id.* at 891, 764 S.E.2d at 806.

94. *Id.* at 894-95, 764 S.E.2d at 809.

B. Ineffective Assistance of Counsel

As every criminal trial lawyer knows, one of the most common claims raised post conviction is that the defense lawyer provided ineffective representation. This year, the Georgia Supreme Court reminds us that such claims do not always come about after a trial, but that they can arise even after a carefully considered guilty plea. Two cases provide defense lawyers with some guidance on considerations when counseling their clients in guilty plea situations.

The Georgia Supreme Court held that where the law is clear that deportation is mandatory upon conviction of a crime, a lawyer has a duty to accurately inform the client of that fact prior to the entry of a guilty plea.[95] In *Encarnacion v. State*,[96] the defendant, a legal permanent resident who had entered a guilty plea to burglary, filed a habeas corpus action seeking to withdraw the plea. He claimed the plea was not knowing and voluntary because his lawyer was ineffective.[97] Apparently, the lawyer advised the defendant the conviction "may" or "could" impact his immigration status, but because he was sentenced under the First Offender Act,[98] he "would not have a conviction for burglary" if he completed his sentence.[99] The habeas court denied the defendant's petition, finding the lawyer provided the defendant "with consistent, accurate advice about the risk" he was facing and the advice was neither "mis-advice" nor "insufficient or inadequate."[100]

On review, the Georgia Supreme Court analyzed the matter with regard to *Padilla v. Kentucky*,[101] a United States Supreme Court case.[102] In that case, the Court held that the Sixth Amendment[103] guarantees effective legal advice about deportation consequences and where immigration consequences of a plea are "truly clear," the duty to give correct advice is "equally clear."[104] The Georgia Supreme Court further noted the felony offense of burglary clearly fell within the definition of an "aggravated felony" in the Immigration and Nationality Act (INA)[105] and the grant of first offender status was of no import

95. Encarnacion v. State, 295 Ga. 660, 663, 763 S.E.2d 463, 466 (2014).
96. 295 Ga. 660, 763 S.E.2d 463 (2014).
97. *Id.* at 660, 763 S.E.2d at 464.
98. O.C.G.A. §§ 42-8-60 to -66 (2014).
99. *Encarnacion*, 295 Ga. at 660, 765 S.E.2d at 464.
100. *Id.* at 661, 765 S.E.2d at 464.
101. 559 U.S. 356 (2009).
102. *Encarnacion*, 295 Ga. at 661, 765 S.E.2d at 465.
103. U.S. CONST. amend. VI.
104. *Padilla*, 559 U.S. at 369, 373.
105. 8 U.S.C. §§ 1101 to 1537 (2012).

because "federal immigration law treats a guilty plea to an aggravated felony as a conviction even if the conviction is ultimately expunged."[106] The supreme court thus held that "where . . . the law is clear that deportation is mandatory . . ., an attorney has a duty to accurately advise his client of that fact."[107]

In yet another case, the court ruled it no longer matters whether a guilty plea gives rise to a direct or collateral consequence; instead, in every case involving the attempted withdrawal of a guilty plea based on ineffective assistance of counsel, the analysis must be made under the familiar *Strickland v. Washington*[108] standard.[109] In *Alexander v. State*,[110] a defendant sought to withdraw his guilty plea based on ineffective assistance of counsel, claiming his counsel failed to advise him he would not be eligible for parole on a fifteen year prison sentence because he was a recidivist.[111] The Georgia Court of Appeals affirmed the denial of the motion to withdraw the guilty plea.[112] The court of appeals determined it was constrained by the supreme court's holding in *Williams v. Duffy*,[113] which regarded parole eligibility as a collateral consequence of a criminal sentence (and a lawyer's failure to inform a client about a collateral consequence could never be the basis for deficient performance).[114]

The supreme court noted there were two analyses at issue.[115] First, those cases where a lawyer completely failed to inform a criminal defendant of the collateral consequences of a plea (which would never constitute deficient performance);[116] second, those cases where a lawyer actually misinformed a defendant about such consequences, which were analyzed under a Sixth Amendment, *Strickland* approach.[117] The supreme court then reviewed a number of recent cases involving claims alleging ineffectiveness in the context of guilty pleas, including the Supreme Court's decision in *Padilla v. Kentucky*, and determined the

106. *Encarnacion*, 295 Ga. at 662, 763 S.E.2d at 465.
107. *Id.* at 663, 763 S.E.2d at 466.
108. 466 U.S. 668 (1984).
109. Alexander v. State, 297 Ga. 59, 64, 772 S.E.2d 655, 659 (2015).
110. 297 Ga. 59, 772 S.E.2d 655 (2015).
111. *Id.* at 59, 772 S.E.2d at 656.
112. *Id.*; *see also* Alexander v. State, 328 Ga. App. 300, 761 S.E.2d 844 (2014).
113. 270 Ga. 580, 513 S.E.2d 212 (1999).
114. *Alexander*, 297 Ga. at 59, 772 S.E.2d at 656; *see also Alexander*, 328 Ga. App. at 307, 761 S.E.2d at 849.
115. *Alexander*, 297 Ga. at 62, 64, 772 S.E.2d at 658, 659.
116. *See id.* at 65, 772 S.E.2d at 660.
117. *See Alexander*, 328 Ga. App. at 303, 761 S.E.2d at 846-47.

better approach is to evaluate all such claims with the familiar *Strickland* two-part analysis.[118]

The court, however, was careful to note an attorney's failure to offer advice on a collateral consequence will not rise to a constitutionally deficient level in every situation, but that courts should weigh deficient performance by looking to the practice and expectations of the legal community, including the prevailing norms of practice in the American Bar Association standards.[119] The court also cited three specific factors to review: (1) "whether the collateral consequence is intimately related to the criminal process and is 'nearly an automatic result,'" (2) "whether the consequence is a 'drastic measure' or a penalty with harsh ramifications," and (3) "whether the law imposing the consequence is 'succinct, clear and explicit.'"[120] Using the above factors, the court concluded an attorney's failure to inform the client about the ineligibility for parole was, in fact, deficient performance and remanded the case to the trial court to determine if the client was prejudiced.[121]

C. Judicial Comments

Several cases this survey period illustrate the Georgia Supreme Court's intolerance towards judicial comments about evidence that violates O.C.G.A. § 17-8-57[122] if made in front of the jury. That statute shall be strictly upheld regardless of whether the comment is intentional, whether there is any actual prejudice to the defendant, and/or whether a defendant objects or even raises it on appeal.[123]

In *Rouse v. State*,[124] during the trial court's preliminary instructions to the entire venire, it stated, "This process this morning is what[] we call voir dire. Voir dire just simply means to speak the truth. This means that you will be hearing about a case, which is a murder case, that happened in Muscogee County, and you'll be asked questions about

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118. *Alexander*, 297 Ga. at 62 n.5, 772 S.E.2d at 658 n.5.

119. *Id.* at 64, 772 S.E.2d at 659.

120. *Id.* at 64-65, 772 S.E.2d at 659-60 (quoting *Padilla*, 559 U.S. at 361, 366, 381).

121. *Id.* at 65, 772 S.E.2d at 660.

122. O.C.G.A. § 17-8-57 (2013 & Supp. 2015).

> It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused. Should any judge violate this Code section, the violation shall be held by the [court] to be error and the decision in the case reversed, and a new trial granted in the court below . . . .

Id.

123. *See* Rouse v. State, 296 Ga. 213, 214-15, 765 S.E.2d 879, 880 (2014).

124. 296 Ga. 213, 765 S.E.2d 879 (2014).

this case."[125] The court concluded that this comment "clearly and unambiguously" suggested that venue had been established (or was not in dispute).[126] This conclusion was true regardless of the fact that the word "venue" was not even mentioned in the comment.[127]

The court reasoned voir dire is part of the "progress" of the case, and it was clear the jurors who decided the case were all members of the venire to which the trial court's comments were directed.[128] Nor could the comment be construed as one regarding what the state expected to prove at trial.[129] Further, the court noted, contrary to the dissent's argument, that the court's later instructions, although they may have touched upon the issue of context, could not cure the prejudice because any violation of the statute is subject to a "super-plain-error" standard of review.[130] Interestingly, in a blistering, three judge dissent authored by Justice Nahmias, a vigorous plea was made to the General Assembly to repeal portions of the statute.[131]

The same thing occurred in a case decided three months later. In *Sales v. State*,[132] while instructing the prospective jurors to consider whether they had heard about the case or knew the parties, the judge told the venire, "This happened in Taylor County. So if anybody knows any of the parties, we would respectfully ask you to let us know now."[133] Based on the identical analysis, the court ordered a new trial.[134]

Yet another case this period was overturned due to a trial court's comment on the evidence. This time, the offending comment occurred in the context of admitting the defendant's recorded statement into evidence. At trial, two recorded statements of the defendant were sought to be introduced. When attempting to introduce the second interview, the defendant objected.[135] The state indicated that "the issue of voluntariness has already been addressed. . . ."[136] The trial judge

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125. *Id.* at 215, 765 S.E.2d at 880 (alterations in original).
126. *Id.* at 215, 765 S.E.2d at 880-81.
127. *Id.* at 215-16, 765 S.E.2d at 881.
128. *Id.* at 217, 765 S.E.2d at 882.
129. *Id.*
130. *Id.* at 218, 765 S.E.2d at 882-83.
131. *Id.* at 238, 765 S.E.2d at 895-96 (Hines, Nahmias & Blackwell, JJ., dissenting). The dissent noted the comment was unintentional and made before voir dire had begun, it must be considered in its context, the defendant did not object at trial or during the motion for new trial, and venue was not disputed at trial. *Id.* at 219, 765 S.E.2d at 883.
132. 296 Ga. 538, 769 S.E.2d 374 (2015).
133. *Id.* at 540, 769 S.E.2d at 376.
134. *Id.* at 541, 769 S.E.2d at 376.
135. Freeman v. State, 295 Ga. 820, 821, 764 S.E.2d 390, 393 (2014).
136. *Id.*

responded, "All right. I find that the statement was freely and voluntarily given as previously ruled. I'll admit it over the objection. . . ."[137]

The court determined the statement to be a violation of O.C.G.A. § 17-8-57 as an improper comment on the evidence.[138] The court explained that determining the admissibility of a defendant's statement in a criminal case is a two-step process.[139] First, the court determines, outside the presence of the jury, whether the statement is voluntary.[140] Second, if the court deems the statement voluntary, the statement is admitted for the jury to make the ultimate determination on its voluntariness, and thus, its probity.[141] The court instructed, "Having made the determination that a statement is voluntary, the trial court should simply admit it into evidence and not inform the jury of its ruling."[142] The court further cautioned that ruling before the jury on the voluntariness of a defendant's statement, "even when coupled with an explanation as to the roles played by the trial court and the jury," amounts to a violation of the statute and demands a new trial.[143]

IV. CONCLUSION

This year was significant for statutory changes that reaffirmed the General Assembly's attempt to stay progressive, via establishing veterans' courts, taking a more common sense approach to the suspension of driver's licenses, and by enacting some new modernized crimes. The appellate courts issued a number of decisions providing guidance to police officers when apprehending suspects and providing cautionary guidance both to attorneys in plea scenarios and to criminal trial judges when speaking before a jury.

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137. *Id.*
138. *Id.*
139. *Id.* at 821-22, 764 S.E.2d at 393.
140. *Id.* at 822, 764 S.E.2d at 393.
141. *Id.*
142. *Id.*
143. *Id.*