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Criminal Law

by Franklin J. Hogue*

I. INTRODUCTION

This Article reviews the most important criminal cases during this reporting period—from June 1, 2012 through May 31, 2013[1]—that will likely have an effect upon the way prosecutors and defense attorneys approach criminal cases in Georgia.

II. INSANITY, DELUSIONAL COMPULSION, AND JUSTIFICATION

In Georgia, pursuant to the Official Code of Georgia Annotated (O.C.G.A.),[2] individuals can admit an act, say, killing another human being, but defend against the intent element of the crime of murder by asserting that they were insane at the time they killed.[3] If a defendant proceeds under the "delusional compulsion" test of O.C.G.A. § 16-3-3,[4] the delusional compulsion must have been caused by a "mental disease, injury, or congenital deficiency,"[5] and the defendant must have acted as he did "because of a delusional compulsion as to such act [that] overmastered his will to resist committing the crime."[6]

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1. For an analysis of Georgia criminal law during the prior survey period, see Franklin J. Hogue & Laura D. Hogue, *Criminal Law, Annual Survey of Georgia Law,* 64 MERCER L. REV. 83 (2012).

2. O.C.G.A. §§ 16-3-2 and 16-3-3 (2011).

3. *Id.*

4. O.C.G.A. § 16-3-3 (2011).

5. *Id.*

6. *Id.*

If defendants make it over these two obstacles, then they still must show that the "delusion [is] one that, if it had been true, would have justified [their] actions."[7] In *Woods v. State*,[8] the defendant requested a jury charge on justification, in addition to insanity, asking that the Superior Court of Berrien County charge the jury on self-defense. Evidence at trial purported to support Woods's claim that he acted under the delusion that the victim, Sauls, intended to kill him. Woods told police that Sauls came to Woods's home to paint a storage container and clean Woods's truck.[9] While there, Sauls said that he would "kill anyone who crossed him."[10] Feeling threatened, Woods retrieved a gun from inside his house and hid it in a potato-chip bag.[11] Sauls was "circling Woods, moving his hands," "looking between Woods and [his] truck," and, according to Woods, looking "bugeyed."[12] Woods shot Sauls in the back, shot him two or three more times, and then hauled the body to some hunting property, where he set the body on fire.[13]

At trial, "Woods presented evidence that he suffered from a mental disease that could have produced a seizure causing a temporary delusion that Sauls posed a threat to Woods's life, even though Sauls may not, in fact, have posed any immediate threat."[14] The superior court refused to give the justification charge, the jury convicted, and the Georgia Supreme Court reversed,[15] reasoning that:

> [T]he jury could not determine whether Woods was suffering from a delusion that satisfied the legal definition without an understanding of what constituted an act that would have been justified, if the circumstances were as Woods contended he believed them to be, without being instructed as to what conduct would constitute justification.[16]

The supreme court concluded that "[a]bsent such an instruction, the jury was not provided 'with the proper guidelines for determining guilt or innocence.'"[17]

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7. Woods v. State, 291 Ga. 804, 810, 733 S.E.2d 730, 736 (2012) (emphasis omitted) (quoting Alvelo v. State, 290 Ga. 609, 612, 724 S.E.2d 377, 382 (2012)).
8. 291 Ga. 804, 733 S.E.2d 730 (2012).
9. *Id.* at 806, 809, 733 S.E.2d at 733, 735.
10. *Id.* at 806, 733 S.E.2d at 733.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 809, 733 S.E.2d at 735.
15. *Id.* at 804, 809, 811, 733 S.E.2d at 731, 735, 736.
16. *Id.* at 811, 733 S.E.2d at 736.
17. *Id.* (quoting Shepherd v. State, 280 Ga. 245, 252, 626 S.E.2d 96, 101 (2006)).

III. DEFENDANT SUBJECT TO IMPEACHMENT BY PRIOR CONVICTIONS

In *Warbington v. State*,[18] the Georgia Court of Appeals faced an evidentiary issue of first impression and foreshadowed the way the court will interpret the new Georgia Evidence Code,[19] which became effective on January 1, 2013.[20] In *Warbington*, the novel issue that arose was "whether, by choosing not to testify at trial, a defendant renders the record inadequate for meaningful review of a preliminary ruling that his prior conviction constitutes impeachment evidence under [O.C.G.A. § 24-9-84.1(b)]."[21] According to section 1 of the Act that established the new evidence code, the Georgia General Assembly adopted the Federal Rules of Evidence "as interpreted by the [United States Supreme Court] and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of [the State of] Georgia."[22] Even though the guiding language for interpreting the new evidence code did not yet exist, O.C.G.A. § 24-9-84.1(b) mirrored Rule 609(b) of the Federal Rules of Evidence[23] and was passed in 2005.[24] Thus, the court in *Warbington* looked to the Supreme Court for guidance.[25]

The leading Supreme Court opinion on this question is *Luce v. United States*.[26] In *Luce*, the United States District Court for the Western District of Tennessee ruled before trial that the government could attempt to impeach Luce with a prior conviction if he testified.[27]

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18. 316 Ga. App. 614, 730 S.E.2d 90 (2012).

19. Ga. H.R. Bill 24, Reg. Sess., 2011 Ga. Laws 99 (codified in scattered sections of O.C.G.A. tits. 24 to 35 (2013 & Supp. 2013)).

20. Ga. H.R. Bill 24 § 1.

21. *Warbington*, 316 Ga. App. at 615, 730 S.E.2d at 91; *see also* O.C.G.A. § 24-9-84.1(b) (Supp. 2009).

22. Ga. H.R. Bill 24 § 1.

23. FED. R. EVID. 609(b).

24. Ga. S. Bill 465, Reg. Sess., 2005 Ga. Laws 72.

25. *Warbington*, 316 Ga. App. at 615, 730 S.E.2d at 91:

> Recognizing that the language of [O.C.G.A. § 24-9-84.1(b)] mirrors that of [Rule 609(b) of the Federal Rules of Evidence] and the statutes based on [Rule 609(b)] that have been enacted by several other states, [the Georgia Supreme Court has] held that it is proper to look for guidance to the judicial decisions of the federal courts construing [Rule 609(b)] and the courts of our sister states construing their statutes modeled on [Rule 609(b)] in interpreting that provision.

Id. (quoting Clay v. State, 290 Ga. 822, 833, 725 S.E.2d 260, 270-71 (2012)).

26. 469 U.S. 38 (1984).

27. *Id.* at 39-40.

Warbington, like Luce, declined to testify, based on that pretrial ruling,[28] and then appealed the decision after the conviction.[29] The Georgia Court of Appeals, following *Luce*, concluded that a defendant "cannot challenge on appeal a ruling allowing his prior conviction to be admitted for impeachment purposes" if the defendant has not testified at trial.[30] This conclusion turned on five reasons taken from *Luce*.[31]

First, the trial court cannot balance the probative value of a prior conviction against its prejudicial effect to a defendant without first hearing the defendant's testimony at trial.[32] A proffer of what a defendant would have said had the ruling not allowed his prior convictions to come in against him is insufficient "because the defendant's trial testimony could, for any number of reasons, differ from his proffer."[33]

Second, any assessment of harm to defendants based on a pre-trial ruling allowing into evidence their prior convictions is speculative if they do not testify.[34] A defendant may offer testimony that differs from any proffer made, and that could cause the trial judge to reverse the decision and prohibit the purported impeachment.[35]

Third, if the prosecutor chose to omit the impeachment by prior conviction, even after a favorable ruling, because a defendant's testimony allowed for other more effective impeachments, it would leave a reviewing court with nothing to review.[36]

Fourth, defendants could assert that they would have testified had the impeachment been prohibited, but who really knows?[37] Because the trial court could not enforce a commitment to testify in exchange for a prohibition of the impeachment, the defendants could always say that they would have testified.[38]

Fifth, any error imputed to a trial court for allowing an impeachment by prior conviction could never be harmless and would always result in

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28. *Warbington*, 316 Ga. App. at 615, 730 S.E.2d at 91. ("Warbington asserts that the ruling contributed to his decision not to testify and effectively deprived him of his constitutional right to testify.").
29. *Id.* at 614, 730 S.E.2d at 91.
30. *Id.* at 617, 730 S.E.2d at 92-93.
31. *Id.* at 616-17, 730 S.E.2d at 92.
32. *Id.* at 616, 730 S.E.2d at 92.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

a reversal of a conviction, a windfall to any defendant.[39] All defendants with prior convictions could simply assert that they would have exercised their constitutional rights to testify had the court not allowed the impeachment, thus ensuring themselves a retrial if the outcome was poor.[40]

IV. LAW ENFORCEMENT ACCESS TO A CITIZEN'S CELL PHONE RECORDS

In *Registe v. State*,[41] a grand jury indicted Michael Jason Registe for two murders.[42] The Superior Court of Muscogee County denied Registe's motion to suppress cell phone records turned over to the Columbus Police Department by Registe's service provider, Cricket Communications (Cricket).[43] The Georgia Supreme Court accepted the interlocutory appeal to decide whether that ruling was erroneous.[44]

In *Registe*, two men borrowed a car from Lawrence Kidd. The next day both men were found dead, each having been shot in the head. Kidd told the police that the two victims had planned to meet "Mike," and he gave the police Mike's cell phone number. The detective then requested from Cricket—by faxed letter, not by subpoena—cell phone records pertaining to that number.[45] The detective told Cricket that the suspect of a double homicide owned the phone connected to the number and that he presented "an immediate danger to any law enforcement officer who may come into contact with [him]."[46]

Cricket voluntarily produced the cell phone records. Police then cold-called numbers found within the records, discovering that Registe used the phone associated with the number (it showed a subscriber name that turned out to be an alias of Registe's) and eventually gathering incriminating evidence supporting an allegation that Registe committed the murders. That investigative work resulted in an indictment, which prompted the motion to suppress the seizure of information from Registe's phone records.[47]

The supreme court first determined that Registe did not have an expectation of privacy in cell phone records that belonged to the cell

39. *Id.*
40. *Id.* at 616-17, 730 S.E.2d at 92.
41. 292 Ga. 154, 734 S.E.2d 19 (2012).
42. *Id.* at 155, 734 S.E.2d at 20.
43. *Id.*
44. *Id.* at 154-55, 734 S.E.2d at 20.
45. *Id.* at 155, 734 S.E.2d at 20.
46. *Id.*
47. *Id.*

phone service provider.[48] Cell phone records constitute business records belonging to Cricket.[49] However, Registe had framed the issue by asserting that the statutes that controlled release of a citizen's cell phone records prohibit the admissibility of those records in any court in Georgia, except to prove violations of statutory prohibitions against wiretapping, eavesdropping, surveillance, and related offenses, all of which concern invasions of privacy.[50]

Registe argued that O.C.G.A. § 16-11-66.1(a)[51] controlled, which mandates that law enforcement may only require the disclosure of stored electronic communications, such as those contained in phone records, "to the extent and under the procedures and conditions provided for by the laws of the United States."[52] The "laws of the United States" at issue include the relevant portion of the Stored Communications Act.[53] Those laws address mandatory or voluntary disclosure of electronic communications records, such as cell phone records, and allow for "voluntary release of non-content records, including subscriber information, 'to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.'"[54] Registe argued that no such emergency existed, and, thus, O.C.G.A. § 16-11-67 should have rendered the information inadmissible.[55]

The supreme court's decision against Registe turned on its deference to "the trial court's findings on disputed facts."[56] The court held that such findings "will be upheld unless clearly erroneous."[57] A disputed fact concerned whether the sort of emergency conditions laid out in the statute existed.[58] The supreme court had no reason to conclude that

48. *Id.* at 156, 734 S.E.2d at 20-21.

49. *Id.* at 156, 734 S.E.2d at 20.

50. *Id.* at 156-57, 734 S.E.2d at 21. O.C.G.A. § 16-11-67 provides the following: "No evidence obtained in a manner [that] violates any of the provisions of this part shall be admissible in any court of this state except to prove violations of this part." O.C.G.A. § 16-11-67 (2011). The "part" at issue is Part 1 of Article 3 of Title 16, which concerns invasions of privacy. *Id.*

51. O.C.G.A. § 16-11-66.1(a) (2011).

52. *Registe*, 292 Ga. at 156, 734 S.E.2d at 21 (quoting O.C.G.A. 16-11-66.1(a)).

53. *Id.*; *see also* 18 U.S.C. §§ 2701-2710 (2012).

54. *Registe*, 292 Ga. at 156, 734 S.E.2d at 21 (quoting 18 U.S.C. § 2702(c)(4)).

55. *Id.* at 156-57, 734 S.E.2d at 21 (quoting O.C.G.A. § 16-11-67).

56. *Id.* at 155, 734 S.E.2d at 20 (quoting Barrett v. State, 289 Ga. 197, 200, 709 S.E.2d 816, 820 (2011)).

57. *Id.* at 155-56, 734 S.E.2d at 20 (quoting *Barrett*, 289 Ga. at 200, 709 S.E.2d at 820).

58. *Id.* at 156, 734 S.E.2d at 21.

the trial court was clearly erroneous in determining that those conditions existed.[59]

What makes this case even more noteworthy (especially in these times when the National Security Administration is in the news almost daily), is the special concurrence by Chief Justice Carol Hunstein.[60] Chief Justice Hunstein warned that there is a

> sizable loophole created by our current legislative scheme in this area, which potentially enables law enforcement to circumvent the strict procedural requirements for accessing protected records by simply "requesting" such records with a tone of sufficient urgency so as to generate a belief on the part of the custodian that an emergency exists.[61]

The "loophole" could work to the detriment of our privacy interests.[62]

Under Georgia privacy law related to cell phone records, O.C.G.A. § 16-11-66.1 "regulates only those situations in which law enforcement is authorized to *require* the disclosure of stored wire or electronic information from a service provider."[63] Because the Georgia statute at issue concerns the "ground rules for the issuance and use of warrants, subpoenas, and other means by which law enforcement can compel the disclosure of information, the statute does not address situations involving voluntary disclosures by service providers."[64] Thus, if a service provider voluntarily discloses a customer's phone records to law enforcement, the Georgia statute provides for no suppression of that evidence in a prosecution of the aggrieved customer.[65]

While the Stored Communications Act addresses circumstances related to voluntary disclosure of a customer's records by service providers to any third party, including law enforcement, the state statute does not.[66] By contrast, the state statute "is directed primarily at the circumstances under which *law enforcement* is authorized to *access* protected information."[67] Under the federal scheme, a service provider may voluntarily provide information to law enforcement "if the provider, in good faith, believes that an emergency involving danger of death or serious physical

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59. *Id.* at 157, 734 S.E.2d at 21.
60. *Id.* at 157-59, 734 S.E.2d at 22-23 (Hunstein, C.J., concurring specially).
61. *Id.* at 158, 734 S.E.2d at 22.
62. *Id.* at 158-59, 734 S.E.2d at 22-23.
63. *Id.* at 158, 734 S.E.2d at 22.
64. *Id.*
65. *Id.*
66. *Compare* 18 U.S.C. § 2702, *with* O.C.G.A. § 16-11-66.1.
67. *Registe*, 292 Ga. at 158, 734 S.E.2d at 22 (Hunstein, C.J., concurring specially).

injury to any person requires disclosure without delay."[68] But the federal law provides no mechanism by which to suppress evidence gathered in violation of its own provisions.[69] For Chief Justice Hunstein, it became irrelevant whether Cricket complied with the good-faith requirement of federal law.[70] "In short," she stated, "because the suppression remedy is applicable only for violations of state law, and because state law does not regulate voluntary disclosures by service providers, there is no statutory basis for suppression of the evidence in this case."[71] Thus, the "loophole" comes into existence.[72]

Because state law fails to regulate voluntary disclosures by service providers, affording no remedy to an aggrieved customer, "current state law affords law enforcement officers virtual free rein to 'encourage' service providers, by making reference to an urgent law enforcement need, to disclose information that the officers could otherwise access without customer consent only by obtaining a warrant, court order, or subpoena."[73] All a law enforcement officer needs to do under current state law, therefore, is "simply send an urgent-sounding fax like that used in [*Registe*] and hope that the service provider is sufficiently impressed by the gravity of the situation to disclose the information without further inquiry."[74] In that way, law enforcement officers can easily acquire the information they want with no judicial oversight and no potential at all for suppression of the evidence acquired, because the disclosure would be considered "voluntary" and would fall outside the purview of state law in this area.[75] Further, the disclosure concerns law enforcement access to the protected information without regard to voluntariness by the service provider.[76] As Chief Justice Hunstein observed, "Law enforcement [officers] ha[ve] nothing to lose by first attempting to effectuate a voluntary disclosure and can always resort to a warrant or court order if [their] initial attempt fails."[77]

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68. *Id.* (quoting 18 U.S.C. § 2702(c)(4)).
69. *Id.*
70. *Id.* at 158-59, 734 S.E.2d at 22.
71. *Id.* at 159, 734 S.E.2d at 22.
72. *Id.* at 158-59, 734 S.E.2d at 22.
73. *Id.* at 159, 734 S.E.2d at 23.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

V. AMORPHOUS HEAT LOSS DETECTED BY THERMAL IMAGING IS NOT TANGIBLE EVIDENCE

The case of *Brundige v. State*[78] highlights a common occurrence in statutory construction: Two appellate courts (here the Georgia Supreme Court and the Georgia Court of Appeals) read a single word or phrase in completely different ways.[79] The issue in *Brundige* was whether O.C.G.A. § 17-5-21(a)(5)[80] authorizes the seizure of "amorphous heat loss" coming from a home where marijuana cultivation is suspected.[81] The statute authorizes a judicial officer to issue a search warrant for seizure of "[a]ny item, substance, object, thing, or matter, other than the private papers of any person, [that] is tangible evidence of the commission of the crime for which probable cause is shown."[82]

A detective in Athens, Georgia, suspected Brundige of growing marijuana inside his house, so he acquired a search warrant to use a "thermal detection device" to see if he could detect an unusual level of heat emanating from various places around the house. The detective found what he was looking for and acquired a search warrant to enter the house, where he found evidence of marijuana cultivation.[83]

The Superior Court of Clarke County denied Brundige's motion to suppress, in which Brundige argued, among other things, that no judicial officer is authorized by statute to issue a search warrant for the detection of heat loss.[84] The court of appeals affirmed the trial court's ruling on interlocutory appeal, and the supreme court granted a writ of certiorari.[85] While upholding the trial court's denial of the motion to suppress and the affirmance of that decision by the court of appeals, the supreme court, nevertheless, ruled that the court of appeals was incorrect in its interpretation of "tangible evidence" in O.C.G.A. § 17-5-21(a)(5).[86] "Tangible evidence," it turns out, does not include amorphous heat loss from a person's house.[87]

Using the familiar rule of statutory construction whereby the supreme court is bound to construe the language of the statute "according to its

78. 291 Ga. 677, 735 S.E.2d 583 (2012).
79. *Id.* at 680-81, 735 S.E.2d at 585-86.
80. O.C.G.A. § 17-5-21(a)(5) (2013).
81. 291 Ga. at 678-80, 735 S.E.2d at 585-86.
82. O.C.G.A. § 17-5-21(a)(5).
83. *Brundige*, 291 Ga. at 677-78, 735 S.E.2d at 584-85.
84. *Id.* at 678, 735 S.E.2d at 585.
85. *Id.* at 677, 678, 735 S.E.2d at 583, 585.
86. *Id.* at 677-78, 735 S.E.2d at 583-85 (interpreting O.C.G.A. § 17-5-21(a)(5)).
87. *Id.* at 680, 735 S.E.2d at 586.

terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage,"[88] and consulting three dictionary definitions of "tangible,"[89] the supreme court concluded that the Georgia General Assembly used the word in accordance with its usual definition to denote any "object with material form that could be touched by a person."[90] One can feel heat, but one cannot touch it.[91]

The court of appeals consulted dictionaries as well,[92] so where did they go wrong? Relying on two United States Supreme Court cases—*Murray v. United States*[93] and *Wong Sun v. United States*[94]—the court of appeals reasoned that because those two cases each noted that the exclusionary rule applies to "both tangible evidence seized during an unlawful search, and testimony regarding knowledge acquired during that search," that "testimony," because contrasted to "tangible evidence," was the exclusive domain and definition of "intangible evidence."[95] However, as the Georgia Supreme Court observed, neither United States Supreme Court case was attempting to "define the terms or parameters of 'tangible evidence' or 'intangible evidence,'" and testimony is merely a "subset of intangible evidence," not the lone member of the set.[96]

A second mistake the court of appeals made, according to the supreme court, was to render the word "tangible" mere surplusage.[97] The court of appeals correctly noted that heat radiating from a building is "real and substantial," but then mistakenly contrasted these terms to something that is merely "imaginary," concluding that since heat is "real and substantial" and not "imaginary," it must be "tangible."[98] The grammatical and logical mistake here, as the supreme court noted, is that the court of appeals contrasted "tangible" evidence to "imaginary"

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88. *Id.* at 680, 735 S.E.2d at 585 (quoting Slakman v. Cont'l Cas. Co., 277 Ga. 189, 191, 587 S.E.2d 24, 26 (2003)).

89. *Id.* at 681, 735 S.E.2d at 586.

90. *Id.*

91. For those with a philosophical bent, it is apparent that the common-sense, everyday use of words such as "material" and "touch" and "feel" are what drives statutory construction, as it should. After all, from the perspective of physics, heat is material in that it consists of matter—particles with extension in space that are capable of motion and susceptible to being "touched," and, hence, "felt" by sentient beings.

92. *Brundige*, 291 Ga. at 680, 735 S.E.2d at 585-86; *see also* Brundige v. State, 310 Ga. App. 900, 903, 714 S.E.2d 681, 683 (2011), *aff'd* 291 Ga. 677, 735 S.E.2d 583 (2012).

93. 487 U.S. 533 (1988).

94. 371 U.S. 471 (1963).

95. *Brundige*, 291 Ga. at 680, 735 S.E.2d at 586.

96. *Id.*

97. *Id.* at 680-81, 735 S.E.2d at 586.

98. *Id.* at 681, 735 S.E.2d at 586.

evidence, which does not exist.[99] Thus, the court of appeals turned the word "tangible" into meaningless surplusage in the statute, because the court's reading contrasts with the imaginary—in other words—with nothing.[100]

While the United States Supreme Court has ruled that the use of thermal detection devices to obtain information about the heat inside and around a house constitutes a search, which is presumptively unreasonable without a warrant,[101] the detective in *Brundige* sought a warrant.[102] However, according to the Georgia Supreme Court's construction, O.C.G.A. § 17-5-21(a)(5) prohibits the issuing of a warrant for heat detection.[103] The warrant-issuing judge in *Brundige* had plenty of other sound evidence on which to base a search warrant, so in the end the search was upheld.[104] In a footnote, however, the supreme court sent this message to the General Assembly: "Of course, should the General Assembly wish to establish a statutory scheme to authorize warrants to capture heat loss from structures, it has the power to do so."[105] The court even gave an example to assist the legislature, citing O.C.G.A. §§ 16-11-64 to -66.1,[106] which authorizes electronic surveillance warrants to capture sounds.[107]

VI. HOW TO BECOME THE LAST DEFENDANT TO BENEFIT FROM A STATUTORY GAP

Because of the last case reported this year, a defendant could have benefitted from the close reading of a statute only to have the General Assembly respond by snapping shut the escape hatch through which that defendant slipped, foreclosing the same relief to any other similarly situated defendant to come later. In *State v. Johnson*,[108] fifteen-year-

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99. *Id.*

100. Again, for the philosophically inclined, a word obtains its meaning from its use in a given context, and its primary use is to draw distinctions, boundaries, contrasts, and the like, to other words. If, for instance, everything in the observable world appeared to us language-using humans to be "green," then the word "green," as well as the corresponding concept of "color," would never have come into play in our language. Those words would simply fail to denote any useful distinction to us. The same idea is at work here in the critique of the court of appeals by the supreme court. "Tangible evidence," if contrasted to something that does not exist, like "imaginary evidence," would cease to mean anything.

101. Kyllo v. United States, 533 U.S. 27, 40 (2001).

102. *Brundige*, 291 Ga. at 678, 735 S.E.2d at 584.

103. *Id.* at 681-82, 735 S.E.2d at 586-87 (interpreting O.C.G.A. § 17-5-21(a)(5)).

104. *Id.* at 677-78, 735 S.E.2d at 584.

105. *Id.* at 681 n.4, 735 S.E.2d at 586 n.4.

106. O.C.G.A. §§ 16-11-64 to -66.1 (2011 & Supp. 2013).

107. *Id.*

108. 292 Ga. 409, 738 S.E.2d 86 (2013).

old Joshua Johnson was accused of murdering his grandmother. He was held in a youth detention center for ten days, then released on bond to home confinement with electronic monitoring. On May 26, 2011, over seven months after his arrest on October 1, 2010, a Whitfield County grand jury indicted Johnson for murder.[109]

In November 2011, Johnson moved the Superior Court of Whitfield County to transfer his case to juvenile court because, contrary to the requirement of O.C.G.A. § 17-7-50.1(b),[110] the grand jury failed to indict him within 180 days of the start of his detention.[111] Holding that home detention counted toward the 180-day period set out in the statute, the superior court granted the motion and transferred Johnson's case to juvenile court, but denied Johnson's simultaneous request to dismiss the indictment.[112]

The State appealed the transfer order, in response to which the supreme court requested that both sides brief the court on whether the State had the authority to appeal such an order in this scenario.[113] The supreme court concluded that the State did not have such authority.[114] However, as happens on a regular basis, the court wrote an opinion showcasing a well-reasoned and close reading of the statute and applying a long-standing rule of statutory construction, and then conveyed to the General Assembly a way to write the statute such that if the will of the legislature was to avoid what happened in this case, it could do so.[115] Instead of a potential sentence of life in prison without parole for allegedly murdering his grandmother, young Joshua Johnson

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109. *Id.* at 409-10, 738 S.E.2d at 86-87.

110. O.C.G.A. § 17-7-50.1(b) (2008) (current version codified at O.C.G.A. § 17-7-50.1(b) (2013)).

111. *Johnson*, 292 Ga. at 410, 738 S.E.2d at 87 ("(a) Any child who is charged with a crime that is within the jurisdiction of the superior court, as provided in [O.C.G.A. § 15-11-28 (2012) (current version codified at O.C.G.A. § 15-11-560 (2013))] or [O.C.G.A. 15-11-30.2 (2008) (current version codified at O.C.G.A. § 15-11-561 (2013))], who is detained shall within 180 days of the date of detention be entitled to have the charge against him or her presented to the grand jury. . . . (b) If the grand jury does not return a true bill against the detained child within the time limitations set forth in subsection (a) of this [c]ode section, the detained child's case shall be transferred to the juvenile court and shall proceed thereafter as provided in Chapter 11 of Title 15." *Id.* (quoting O.C.G.A. § 17-7-50.1 (2008) (current version codified at O.C.G.A. § 17-7.50.1 (2013)).

112. *Id.*

113. *Id.*

114. *Id.* at 410-11, 738 S.E.2d at 86.

115. *Id.* at 412-13, 738 S.E.2d at 88.

now faces detention, if convicted in juvenile court, for no longer than his twenty-first birthday, at which time he must be released.[116]

In analyzing the many statutes at play in this case, "[t]he State does not have the right to appeal decisions in criminal cases unless there is a specific statutory provision granting the right."[117] O.C.G.A. § 5-7-1[118] lists the types of trial court rulings that the State may appeal.[119] When Johnson went before the court, O.C.G.A. § 5-7-1 did not authorize the State to appeal transfer orders made, as Johnson's was, pursuant to O.C.G.A. § 17-7-50.1(b).[120] The General Assembly simply did not amend O.C.G.A. § 5-7-1 to allow the State to appeal this type of transfer order when it enacted O.C.G.A. § 17-7-50.1 in 2006.[121]

The State, grasping the only hold it could reach in this storm, argued that the Title 17 transfer order amounted to "an order . . . setting aside or dismissing [an] indictment," something the State could appeal under O.C.G.A. § 5-7-1(a).[122] But that argument eluded the State when the supreme court noted that O.C.G.A. § 17-7-50.1(b) mentions nothing about "setting aside" or "dismissing" an indictment against a juvenile.[123] Thus, the superior court must transfer the juvenile's "case" to juvenile court when the 180-day indictment rule has been violated but may, as the superior court did in this case, decline to dismiss the pending indictment.[124] Even though the superior court did not dismiss the indictment, it divested itself of jurisdiction by transferring the case, leaving the State no way to prosecute the indictment in superior court.[125]

The supreme court then pointed out that the legislature made changes to the transfer statute on a couple of prior occasions, with respect to discretionary transfers by the superior court.[126] When the legislature enacted O.C.G.A. § 17-7-50.1 as a new juvenile transfer statute in 2006, it did not specify in this statute (which was the statute at issue in

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116. *See* O.C.G.A. § 15-11-63(e)(3) (2012) (current version codified at O.C.G.A. § 15-11-602(g) (Supp. 2013)).

117. *Johnson*, 292 Ga. at 410, 738 S.E.2d at 87 (quoting State v. Caffee, 291 Ga. 31, 33, 728 S.E.2d 171, 173 (2012)).

118. O.C.G.A. § 5-7-1 (1995 & Supp. 2012) (current version codified at O.C.G.A. § 5-1-1 (2013)).

119. *Id.*

120. *Johnson*, 292 Ga. at 411-12, 738 S.E.2d at 87-88 (citing O.C.G.A. §§ 5-7-1 and 17-7-50.1(b)).

121. *Id.*

122. *Id.* at 411, 738 S.E.2d at 87 (quoting O.C.G.A. § 5-7-1(a)(1) (Supp. 2012)).

123. *Id.*

124. *Id.* at 410-11, 738 S.E.2d at 87.

125. *Id.* at 411, 738 S.E.2d at 87.

126. *Id.*

Johnson) that the State could appeal from it, even though it had specified with particularity such appeal rights when amending the discretionary transfer rule.[127] Thus, when applying the rule of statutory construction that holds that the "General Assembly is presumed to enact all statutes with full knowledge of the existing condition of the law and with reference to it,"[128] the supreme court presumed that the legislature knew what it wanted when it did not amend the law to allow the State to appeal a Title 17 transfer like the one in *Johnson*.[129] The court then observed that the General Assembly knows how to make transfer orders appealable—they had done so before in discretionary transfers—and even remarked, "The General Assembly may, if it wishes, amend [O.C.G.A. § 5-7-1] to authorize the State to appeal such transfer orders in the future."[130] Effective July 1, 2013, a subsection was added to the list of the State's appellate rights, and it says that the State may now file a direct appeal "[f]rom an order, decision, or judgment of a superior court transferring a case to the juvenile court pursuant to [O.C.G.A. § 15-11-560]."[131]

VII. CONCLUSION

The Georgia Supreme Court accepts numerous interesting cases on writs of certiorari. This year is no exception; more interesting and far-reaching opinions will become law in the coming year.

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127. *Id.* at 411, 738 S.E.2d at 87-88.

128. *Id.* at 412, 738 S.E.2d at 88 (quoting Fair v. State, 288 Ga. 244, 256, 702 S.E.2d 420, 431 (2010)).

129. *Id.*

130. *Id.*

131. Ga. H.R. Bill 1176 § 1-1, Reg. Sess., 2012 Ga. Laws 899 (currently codified as amended at O.C.G.A. § 5-7-1(a)(7) (2013)).