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CRIMINAL LAW

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I. INTRODUCTION

This Article reviews some of the most important opinions impacting the practice of criminal law delivered by the Supreme Court of the United States and the Supreme Court of Georgia covering the period from June 1, 2021 to May 31, 2022, as well as legislation adopted by the Georgia General Assembly during the 2021 session.[1] This Article is designed to be a mere overview to both prosecutors and defense attorneys of decisions and new statutes and serves as a broad guideline to how these decisions will affect the practices.

II. SUPREME COURT OF THE UNITED STATES DECISIONS

Although the Supreme Court of the United States has delivered multiple decisions during the term, this Article addresses one decision.[2] Most of the cases decided by the Court dealt primarily with jurisdictional matters,[3] the method of execution in death penalty cases,[4] and either the interpretation of federal criminal offenses[5] or the application of the federal sentencing guidelines.[6]

The case of *Hemphill v. New York*[7] dealt with the overlap between the Confrontation Clause of the United States Constitution and the notion of

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1. For an analysis of criminal law in the prior survey period, *see* J. Scott Key, *Criminal Law*, *Annual Survey of Georgia Law*, 73 MERCER L. REV. 75 (2021), https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss1/8/ [https://perma.cc/HZ8T-VGLD].
2. Hemphill v. New York, 142 S. Ct. 681 (2022).
3. *E.g.*, Denezpi v. United States, 142 S. Ct. 1838 (2022).
4. *E.g.*, Ramirez v. Collier, 142 S. Ct. 1264 (2022).
5. *E.g.*, Ruan v. United States, 142 S. Ct. 1099 (2022).
6. *E.g.*, Borden v. United States, 141 S. Ct. 1817 (2021).
7. 142 S. Ct. 681 (2022).

"opening the door" for relevance purposes.[8] This case began in 2006 when a stray nine-millimeter bullet killed a two-year-old child in the Bronx. The state of New York initially charged Nicholas Morris with murder but later allowed him to plead to a lesser charge. Morris admitted to possessing a .357-magnum revolver and not the nine-millimeter handgun originally charged in the indictment and used in the killing. However, an eyewitness described the shooter as wearing a blue shirt. Several years later, police discovered Darrell Hemphill's DNA on a blue sweater that had been recovered from Morris's house. Hemphill was placed on trial for the child's murder. At trial, Hemphill testified that nine-millimeter ammunition had been found at Morris's apartment.[9]

The prosecution then introduced evidence of Morris's guilty plea, noting he admitted to possessing .357-caliber bullets and not nine-millimeter bullets.[10] Morris's plea testimony was introduced over a Confrontation Clause objection, as Morris was unavailable to testify, and Hemphill did not have the ability to cross-examine Morris at the plea hearing. The question for review was whether Morris's plea hearing transcript was admissible over a Sixth Amendment Confrontation Clause objection. The State of New York argued Hemphill opened the door to the testimony by offering evidence of the nine-millimeter bullets.[11]

In an 8–1 decision, the Court reversed Hemphill's conviction, reasoning that though the mention of the nine-millimeter bullets may have made the plea allocution transcript relevant, in no way did the defense waive the right to Confrontation.[12] "Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense," began Justice Sotomayor.[13] She concluded, reasoning:

> The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court. The trial court's admission of unconfronted testimonial hearsay over Hemphill's objection, on the view that it was reasonably necessary to correct Hemphill's misleading argument, violated that fundamental guarantee.[14]

8. *Hemphill*, 142 S. Ct. at 691.
9. *Id.* at 686–87.
10. *Id.*
11. *Id.* at 688.
12. *Id.* at 692.
13. *Id.* at 686.
14. *Id.* at 694.

III. DECISIONS OF THE SUPREME COURT OF GEORGIA

Cook v. State[15] represents a seismic shift in Georgia criminal procedure.[16] In November 2013, Cadedra Cook entered a negotiated plea to felony murder and armed robbery.[17] She was sentenced to life with the possibility of parole and twenty years to run concurrently with the life sentence. Six years later, Cook moved for an out-of-time appeal, alleging she was deprived of her appeal due to ineffective assistance of counsel. The Polk County Superior Court denied her motion, and she appealed.[18] The Supreme Court of Georgia considered supplemental briefing on the following two questions:

> [1] Should this Court reconsider whether a criminal defendant who alleges that she was deprived of her right to appeal because of her counsel's alleged ineffective assistance . . . be permitted to seek a remedy for that alleged constitutional violation by filing a motion for out-of-time appeal in the trial court, as opposed to filing, as her exclusive remedy, a petition for writ of habeas corpus?
>
> [2] How do considerations of stare decisis apply in this analysis?[19]

Criminal appellate practitioners have long relied on an out-of-time appeal where, because of no fault of the client, the deadline to file a motion for new trial or notice of appeal was missed.[20] In appointed cases, for instance, deadlines are frequently missed during the handoff of the case from trial counsel to appellate counsel.[21]

The problem for the majority was that the line of cases which created the right to an out-of-time appeal lacked a statutory basis.[22] As said by the majority,

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15. 313 Ga. 471, 870 S.E.2d 758 (2022).
16. *Id.* at 471–72, 870 S.E.2d at 760.
17. *Id.* at 474, 870 S.E.2d at 761.
18. *Id.* at 474, 870 S.E.2d at 761–62.
19. *Id.* at 475, 870 S.E.2d at 762.
20. For example, in Burley v. State, the court reaffirmed that:

> [a] defendant seeking an out-of-time appeal "must allege and prove an excuse of constitutional magnitude for failing to file a timely direct appeal," which a defendant may do by showing that counsel's ineffectiveness deprived him of the right to an appeal. In order to obtain an out-of-time appeal, a defendant need not show that he actually would have prevailed in a timely appeal, even if he is seeking to appeal from a judgment entered on a guilty plea.

308 Ga. 650, 651, 842 S.E.2d 851, 852 (2020) (citing Collier v. State, 307 Ga. 363, 364, 834 S.E.2d 769, 773 (2019)).

21. *E.g.*, *Collier*, 307 Ga. at 372, 834 S.E.2d at 778.
22. *Cook*, 313 Ga. at 479, 870 S.E.2d at 765.

> In sum: even though the General Assembly statutorily established habeas corpus as the exclusive procedure for vindicating a convicted defendant's constitutional rights, including the deprivation of the right to appeal, and established the contours of the procedure to seek such relief, this Court allowed and then expressly endorsed a procedure parallel to, but distinct from, habeas corpus for convicted defendants to seek vindication of alleged constitutional violations that frustrated their right to appeal. And allowing convicted defendants to do so in turn allowed them to circumvent the requirements and restrictions imposed by the Habeas Corpus Act.[23]

Why do convicted defendants want to "circumvent the . . . Habeas Corpus Act?"[24] For one, a defendant has the right to a direct appeal and to the assistance of counsel in the process of a direct appeal.[25] No such right exists under Georgia's Habeas Corpus Act.[26] A habeas corpus action takes place in the county of incarceration, sometimes hundreds of miles from the county of conviction.[27] Finally, if a habeas plaintiff is unsuccessful, there is no right to appeal; rather, appeal is only allowed in the discretion of the court.[28] In short, a convicted defendant on direct appeal has the right to appeal and the right to effective assistance of counsel on that appeal. On habeas, the indigent petitioner is left to navigate legal procedures from inside a prison, without the right to counsel or an appeal.[29]

Turning to the questions for review, the court found that the line of cases allowing an out-of-time appeal was erroneous, lacking any statutory basis.[30] However, the line of cases allowing for out-of-time

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23. *Id.* at 479, 870 S.E.2d at 764–65.

24. *Id.* at 479, 870 S.E.2d at 765.

25. For example, in Nesbitt v. State, the Georgia Court of Appeals held that:

> [a] criminal defendant has the absolute right to file a timely direct appeal from a judgment of conviction and sentence entered after a jury or bench trial. . . . [T]he defendant's right to effective assistance of counsel includes the right to be informed of the right to appeal and the right to counsel on appeal, including the right to appointed counsel for indigent defendants. Defendants in criminal cases have both a federal and a state constitutional right to be represented by counsel. This right extends to every indigent accused who indicates his desire to appeal.

295 Ga. App. 394, 394–95, 671 S.E.2d 877, 878–79 (2008).

26. *See* Crosson v. Conway, 291 Ga. 220, 221, 728 S.E.2d 617, 619 (2012) (holding that "there is no federal or state constitutional right to appeal from an adverse order in a habeas corpus proceeding . . . nor is there any constitutional right to counsel in a habeas proceeding or on application to appeal a ruling therein.").

27. O.C.G.A. § 9-14-43 (2022).

28. *See* O.C.G.A. § 9-14-52 (2022).

29. *Cook*, 313 Ga. at 502, 870 S.E.2d at 780.

30. *Id.* at 471, 870 S.E.2d at 760.

appeal in criminal cases runs far back in time and through perhaps hundreds of cases. Notwithstanding: they are all overturned. The court next turned to *stare decisis* issues.[31] According to the majority, "stare decisis is not an inexorable command."[32] In cases, such as *Cook*, where the majority determined that the line of cases is lacking in statutory support, the court decided that "considerations of stare decisis apply with less force."[33] In sum, the court held that "[w]e cannot say, however, that entrenchment of the trial court out-of-time appeal procedure in Georgia weighs so heavily in the stare decisis analysis that we should retain our erroneous precedents."[34] In short, if a criminal defendant, even one represented by counsel, misses a deadline to file a motion for new trial or direct appeal, the right to appeal is forfeited. Then, the defendant's sole remaining remedy is the Habeas Corpus Act, regardless of the client's potential indigence or level of education or intellect.[35]

Cook drew a three-judge dissent, authored by Justice Nels Peterson.[36] The dissenters agreed with much of the majority's analysis. However, the dissent was concerned about principles of *stare decisis* as well as the fallout that criminal appellants would face as a result.[37] Justice Peterson wrote, "[i]n my view, stare decisis exists for cases like this one, and I would retain our incorrect precedent as the lesser of two evils."[38] More particularly, the dissent was concerned that the effect will be chaotic to the system:

> Granting a motion for out-of-time appeal allows the claims to be resolved promptly by the judge who presided over the trial. It avoids the need for an inmate to grapple with the procedural hurdles of filing a habeas petition, avoids the need to transfer records between jurisdictions, and reduces travel costs for lawyers and prisoners.[39]

Cook raises more questions than it answers. Short of a fix from the General Assembly, there is likely much litigation ahead. What, for instance, will happen when a defendant makes a request for appointed

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31. *Id.* at 484, 879 S.E.2d at 768.

32. *Id.* at 485, 870 S.E.2d at 768–69 (citing Pounds v. State, 309 Ga. 376, 382, 846 S.E.2d 48, 55 (2020)).

33. *Cook*, 313 Ga. at 486, 870 S.E.2d at 769.

34. *Id.* at 491, 870 S.E.2d at 773.

35. *Id.* at 471, 870 S.E.2d at 758.

36. *Id.* at 508, 870 S.E.2d at 784 (Peterson, J., dissenting).

37. *Id.* (Peterson, J., dissenting).

38. *Id.* at 509, 870 S.E.2d at 784–85 (Peterson, J., dissenting).

39. *Id.* at 513–14, 870 S.E.2d at 788 (Peterson, J., dissenting).

appellate counsel, the appointment is delayed or the motion is not timely filed, and the statute of limitation for habeas expires?

In *Maxwell v. State*,[40] the court addressed the question of whether a misdemeanor conviction for firearms charges bars a subsequent felony charge related to the same guns.[41] In *Maxwell*, a shooting victim was taken to the hospital for a gunshot wound to the head, where he later died. Police learned that the victim was taken to the hospital by a car occupied by Zonnique Maxwell and his co-defendant Tyquarius Washington, along with two other individuals. Police searched and found a handgun on Maxwell and a revolver and a pistol on Washington.[42]

Maxwell was charged in the State Court of Chatham County for the misdemeanor offense of possession of a handgun by a person under the age of eighteen.[43] Maxwell was also indicted for two counts of felony murder, aggravated assault, one count of carrying a weapon by an underage person without a license, three counts of possession of a firearm during the commission of a felony, and seven counts of street gang activity. All but the state court charges were dismissed; Maxwell plead guilty and was sentenced to serve twelve months. Maxwell argued all charges should have been dismissed in superior court on double jeopardy grounds.[44] The supreme court held that the District Attorney knew about the misdemeanor charges because the District Attorney prosecutes in superior court and state court.[45] The court then turned to address whether all the felony charges were subject to dismissal under principles of double jeopardy; the test for such a determination centers around whether the state and superior court charges arose from the "same conduct."[46] Citing *Johns v. State,*[47] the court applied a set of factors:

> In order to determine whether offenses occurred as a result of the same conduct to constitute procedural double jeopardy, . . . the crimes, inter alia, must arise from the same transaction or continuing course of conduct, occur at the same scene, occur on the same date, and occur without a break in the action; additionally, if it is necessary to present

40. 311 Ga. 673, 859 S.E.2d 58 (2021).
41. *Id.* at 674, 859 S.E.2d at 60.
42. *Id.* at 673, 859 S.E.2d at 59–60.
43. *Id.* at 674, 859 S.E.2d at 60.
44. *Id.*
45. *Id.* at 678, 859 S.E.2d at 63.
46. *Id.* at 678–79, 589 S.E.2d at 63.
47. 319 Ga. App. 718, 738 S.E.2d 304 (2013).

> evidence of the one crime in order to prove the other, then the State must prosecute those charges at the same time.[48]

For the supreme court, the analysis turned on whether all the crimes took place at the same scene and at the same time.[49] Police found Maxwell in possession of the firearm at the hospital, but the shooting scene was over two miles away at an earlier time. It was unclear whether the evidence of possession of the guns at the hospital was necessary to prove the other counts.[50] The court affirmed the trial court's decision to allow the murder and aggravated assault charges to proceed based upon the break in time and the second scenes.[51] The court held the street gang charges related to the possession of weapons and other charges related to the mere possession of weapons should have been vacated.[52]

In *Seals v. State*,[53] the court addressed the issue, regarding appellate review, when a criminal case is final for appellate purposes.[54] In June 2017, a grand jury indicted Demarquis Seals on one count of rape and one count of child molestation. In 2018, the jury found Seal's guilty of child molestation but deadlocked on rape. A mistrial was entered on that count. Seals was sentenced on child molestation, and the state dead-docketed the rape charge. Seals timely appealed the child molestation conviction.[55] The supreme court dismissed the appeal, concluding that the case was not ripe for appellate review because the dead-docketed count was still pending pursuant to O.C.G.A. § 5-6-34(a)(1).[56]

Seals drew a strong dissent.[57] Justice LaGrua, writing for a two-justice minority, began "[t]he majority's conclusion that 'dead' means 'pending' is illogical. Once a count is moved to the dead docket, the count is *dead*."[58] The dissenters were concerned that the holding would cause a delay in appellate review of potentially indefinite length and could potentially frustrate the right to appeal.[59] Also, as the trial counsel would be the

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48. *Maxwell*, 311 Ga. at 679, 589 S.E.2d at 63 (quoting *Johns*, 319 Ga. App. at 719, 738 S.E.2d at 305).

49. *Maxwell*, 311 Ga. at 679, 589 S.E.2d at 63.

50. *Id.* at 680, 589 S.E.2d at 63–64.

51. *Id.* at 681, 589 S.E.2d at 64–65.

52. *Id.*

53. 311 Ga. 739, 860 S.E.2d 419 (2021).

54. *Id.* at 739, 860 S.E.2d at 421.

55. *Id.*

56. *Id.* at 748–49, 860 S.E.2d. at 426–27 (citing O.C.G.A. § 5-6-34(a)(1) (2022)).

57. *Seals*, 311 Ga. at 751, 860 S.E.2d at 428 (LaGrua, J., dissenting).

58. *Id.* (LaGrua, J., dissenting).

59. *Id.* at 754, 860 S.E.2d at 430–31 (LaGrua, J., dissenting).

party responsible for bringing an interlocutory appeal, the ruling would deprive the defendant of conflict-free counsel in the event of an ineffective assistance of counsel claim.[60]

While the court in *Seals* considered when cases are not ripe for appeal, the court in *Jackson v. Crickmar*[61] took up the issue of whether merger arguments can be raised for the first time through habeas corpus.[62] The warden conceded Jackson's convictions for aggravated assault and aggravated battery should have merged into his conviction for attempted murder. The question was whether the issue could be raised for the first time on habeas corpus.[63] The court held it could be because "merger claims . . . are a species of void-conviction claim . . . and challenges to '[v]oid convictions and illegal sentences have never been subject to general waiver rules.'"[64] Thus, *Jackson* stands for the proposition that merger may be raised for the first time through habeas corpus.[65]

Moon v. State[66] dealt with the circumstances in which it is permissible to excuse a holdout juror and substitute an alternate.[67] In *Moon*, a lone juror was holding out not guilty. After much back and forth, the Chatham County Superior Court granted a motion to remove the juror and substitute the alternate.[68] The court noted that "'alternate 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.'"[69]

The court reversed the conviction reasoning the trial court had not conducted a thorough investigation of the issues among the jurors.[70] The foreperson reported the hold out juror was being "stubborn" but not that her views were so fixed she could not consider the views of fellow jurors.[71] Ultimately, the court held that "[b]ecause the judge's limited inquiry into [the juror's] alleged incapacity and misconduct fell short of providing a

60. *Id.* (LaGrua, J., dissenting).

61. 311 Ga. 870, 860 S.E.2d 709 (2021).

62. *Id.* at 870, 860 S.E.2d at 710.

63. *Id.*

64. *Id.* at 873, 860 S.E.2d at 712.

65. *Id.* at 874, 860 S.E.2d at 712.

66. 312 Ga. 31, 860 S.E.2d 519 (2021).

67. *Id.* at 31, 860 S.E.2d at 524.

68. *Id.* at 44, 860 S.E.2d at 532.

69. *Id.* at 45, 860 S.E.2d at 533 (quoting Wallace v. State, 303 Ga. 34, 38, 810 S.E.2d 93, 98 (2018)).

70. *Moon*, 312 Ga. at 50, 860 S.E.2d at 536.

71. *Id.* at 46, 860 S.E.2d at 533–34.

sound basis for the juror's removal, [it] conclude[d] that the judge abused her discretion in removing [the juror]."[72]

In *State v. Gilmore*,[73] the court held that a video recording of a confidential informant purchasing drugs did not constitute a statement for Confrontation Clause purposes.[74] In this case, law enforcement arranged for a controlled buy of drugs from David Lee Gilmore using a confidential informant (C.I.). Law enforcement hid a camera on the C.I. and sent him to Gilmore's home with a $20 bill. The video recording depicted Gilmore handing the C.I. a small bag of methamphetamine and Gilmore holding a $20 bill. The C.I. died by suicide before trial.[75] The Georgia Court of Appeals held that the recording was inadmissible as a violation of the right to confrontation.[76] The supreme court reversed the court of appeals, reasoning that non-verbal conduct does not come within the reach of the Confrontation Clause.[77] The court concluded and held that "[b]ecause the CI's nonverbal conduct depicted in the video recording did not constitute a statement—even by implication—it could not as a matter of law constitute a testimonial statement barred by the Confrontation Clause."[78]

In *Nelson v. State*,[79] a significant Fourth Amendment case, the court sorted through issues of staleness and standing.[80] The court granted an interlocutory appeal to address a suppression issue.[81] The facts are straightforward. On October 15, 2017, police obtained and executed a search warrant on Corey Nelson's home, where they seized an iPhone, a Samsung cell phone, and a laptop computer. Nelson was also arrested for murder on that day. On January 4, 2018, a grand jury indicted Nelson for malice murder, felony murder, aggravated assault, and felon in possession of a firearm. On January 18, 2018, police obtained a separate warrant to search the contents of the electronic devices. However, more than a year passed before law enforcement executed the 2018 warrant and searched the devices.[82]

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72. *Id.* at 50, 860 S.E.2d at 536.
73. 312 Ga. 289, 862 S.E.2d 499 (2021).
74. *Id.* at 290, 862 S.E.2d at 501.
75. *Id.*
76. *Id.* at 291, 862 S.E.2d at 502.
77. *Id.* at 298, 862 S.E.2d at 506–07.
78. *Id.*
79. 312 Ga. 375, 863 S.E.2d 61 (2021).
80. *Id.* at 375, 863 S.E.2d at 62.
81. *Id.*
82. *Id.* at 376, 863 S.E.2d at 63.

The Cobb County Superior Court suppressed the results of those searches, holding that too much time had passed between the issuance of the warrants and the searches.[83] Law enforcement then applied for and obtained a second warrant to search the devices, and timely searched them.[84] The trial court denied the second motion to suppress, and the supreme court granted interlocutory review.[85] The supreme court affirmed, reasoning that Nelson never demanded the devices be returned, and he did not have a possessory interest in them because he could not use them in jail.[86] The court reasoned that the denial of the suppression motion was not clearly erroneous.[87] It appears that two motions to suppress were not sufficient to assert a possessory interest in cell phones versus potentially writing a letter asking for their return.

The court granted certiorari in *State v. Henry*[88] to decide the proper standard in determining if a DUI suspect requested an independent blood test.[89] The court of appeals held that "a request for additional testing has been lawfully asserted when a suspect has made some statement that 'reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test.'"[90] The court of appeals also held that trial counsel was ineffective for failing to move to suppress the blood test based upon the accused not being provided an independent test.[91] The supreme court reversed, holding that the proper standard was whether the suspect had made some statement that "reasonably would" be construed as a desire for an independent test.[92]

In *Henry*, police arrested the suspect and read implied consent.[93] After which, the suspect asked "[s]o, you're gonna let me do the breathalyzer one more time?"[94] The officer read implied consent again, and the suspect asked "so you are saying I can take, my blood, my blood, my doctor can do my blood test and all that?"[95] The officer then said he needed a yes or no on implied consent. The officer interpreted what the suspect said next

83. *Id.* at 376–77, 863 S.E.2d at 63.

84. *Id.*

85. *Id.* at 377, 863 S.E.2d at 63–64.

86. *Id.* at 378, 863 S.E.2d at 64–65.

87. *Id.* at 378–79, 863 S.E.2d at 64–65.

88. 312 Ga. 632, 864 S.E.2d 415 (2021).

89. *Id.* at 632, 864 S.E.2d at 417.

90. *Id.* at 632, 864 S.E.2d at 417 (quoting Ladow v. State, 256 Ga. App. 726, 569 S.E.2d 572 (2002)).

91. *Henry*, 312 Ga. at 632–33, 864 S.E.2d at 417–18.

92. *Id.*

93. *Id.* at 633, 864 S.E.2d at 418.

94. *Id.*

95. *Id.*

as a yes.[96] The court overruled a line of cases, holding that the officer's failure to provide an independent test was "justifiable" if the suspect's statement "reasonably would" be "construed as an expression of a request for such a test."[97]

The court in *George v. State*[98] considered the proper standard to apply to the plain view exception to the Fourth Amendment.[99] The accused was a youth minister at a church in Walton County. He was accused of touching the victim's genitals under the pretext of measuring his body while supervising a physical conditioning program. Police obtained a search warrant for the accused's electronic devices. Police seized notes, papers, and other materials.[100] Police also seized non-electronic items such as "measuring tapes, a bag, notepads, and other papers."[101] The accused filed a Motion to Suppress, asserting these materials were not described in the search warrant.[102] The court of appeals affirmed the denial of the Motion to Suppress, reasoning that the state needed only to show that the items in plain view were "related" to the case.[103] Because the *modus operandi* of the accused was to touch the genitalia of minors while measuring them, the measuring tapes and notebooks could be seized when found in plain view.[104]

The supreme court reversed, reasoning that "the Court of Appeals has erred in considering the relevance of evidence alone as justifying its seizure outside the scope of a search warrant, without considering whether the requirements of the plain view doctrine have been met."[105] The case was remanded to the Walton County Superior Court to consider the requirements of the plain view doctrine, which are that (1) the item must be in plain view and (2) its incriminating nature must be immediately apparent.[106]

In *Awad v. State*,[107] the court held that Article I, Section I, Paragraph XVI of the Georgia Constitution "prohibits the State from admitting into evidence a defendant's refusal to urinate into a collection container as

96. *Id.*

97. *Id.* at 639–40, 864 S.E.2d at 422.

98. 312 Ga. 801, 865 S.E.2d 127 (2021).

99. *Id.* at 802, 865 S.E.2d at 128.

100. *Id.* at 802, 865 S.E.2d at 129.

101. *Id.*

102. *Id.* at 802–03, 865 S.E.2d at 129.

103. *Id.* at 804, 865 S.E.2d at 130.

104. *Id.*

105. *Id.* at 807, 865 S.E.2d at 132.

106. *Id.* at 804–05, 865 S.E.2d at 130 (citing Horton v. California, 496 U.S. 128, 136–37 (1990)).

107. 313 Ga. 99, 868 S.E.2d 219 (2022).

directed by the State for purposes of providing a urine sample for chemical testing."[108] The facts are straightforward. Omar Awad was found asleep in the driver's seat of a vehicle stopped in the middle of an intersection. Law enforcement arrested him and requested Awad provide a urine sample; Awad refused. The Whitfield County Superior Court granted a Motion to Suppress. The court of appeals reversed.[109] The supreme court reversed the court of appeals.[110]

The court extended its ruling in *Olevik v. State*[111] that admission of evidence of a refusal to submit to a breath test violated Paragraph XVI[112] to hold that the same principle applied to the refusal to urinate into a collection container.[113] Specifically, the court held that:

> [U]nder *Olevik*, the right against compelled self-incrimination protected by *Paragraph XVI* affords a defendant the right to refuse to give the State a urine sample in a collection container, as directed by the State, for purposes of chemical testing. We further hold that, under *Elliott*, the State may not admit in a criminal trial evidence that the defendant refused to submit to such a test.[114]

Justice Colvin authored a separate concurring opinion, noting that she has grave concerns about the soundness of *Olevik* and *Elliott* but did not elaborate about the precedent because the state has not asked that it be reconsidered.[115]

The court established a new standard in *Johnson v. State*[116] to determine whether convictions for multiple counts merge into one another for sentencing purposes.[117] Between October 31, 2007, at 10:54 p.m. and 4:30 a.m. on November 1, 2007, the accused was seen on surveillance video in a shop. The videos showed the accused loading up and taking various items before his departure from that business.[118] The court held that "[w]hen a defendant enumerates a merger error after being convicted of multiple counts of the *same* crime, the correct merger analysis requires courts to ask whether those crimes arose from 'a single

108. *Id.* at 99, 868 S.E.2d at 221.
109. *Id.* at 100, 868 S.E.2d at 221.
110. *Id.* at 106, 868 S.E.2d at 225.
111. 302 Ga. 228, 806 S.E.2d 505 (2017).
112. *Id.* at 229, 806 S.E.2d at 509.
113. *Awad*, 313 Ga. at 106, 868 S.E.2d at 225.
114. *Id.* at 106, 868 S.E.2d at 225.
115. *Id.* at 106–07, 868 S.E.2d at 225–26 (Colvin, J., concurring).
116. 313 Ga. 155, 868 S.E.2d 226 (2022).
117. *Id.* at 155, 868 S.E.2d at 227.
118. *Id.* at 155–56, 868 S.E.2d at 227–28.

course of conduct' and, if so, whether the defendant can face multiple convictions and sentences under a unit-of-prosecution analysis."[119] The court remanded the case to the court of appeals to do that analysis.[120]

The supreme court held in *Martinez-Arias v. State*[121] that it was an abuse of discretion for a trial court to admit evidence of the cultural characteristics of an ethnic group.[122] In this child molestation case, the state called Betsy Escamilla, a counselor at the victim's middle school.[123] The state proffered that Escamilla was "of Latino background" and one of her passions was to "work with Latino at-risk students."[124] Escamilla also wrote a "senior research paper" on the "prevalence [of incest] among Latino families."[125] The Superior Court of Hall County accepted her as an expert in "Latino culture."[126] The expert then testified incest was common in "Latino" cultures because Latinos "value collectivism a lot."[127] Escamilla also testified that the culture values "machismo," requiring women in the home to serve the male figure.[128] She ultimately concluded that "Mexican culture, in particular, it's taboo—sexual education is a taboo topic among Latinos and a lot more in the Mexican structure, because it's based on religious foundations, as well."[129]

The court assigned error to admitting Escamilla's expert testimony, though it was deemed harmless error, for several reasons.[130] First, there was not sufficient evidence of how immersed the defendant and his family were in any culture.[131] Also, the expert's knowledge of "Latino" culture was so broad and generalized that it could not be applied to any norms of the defendant or his family.[132] Finally, the court took an opportunity to

> caution that Georgia courts should assess the relevance of cultural or ethnic evidence based on the specific testimony in question and on the

119. *Id.* at 159, 868 S.E.2d at 229 (quoting Edvalson v. State, 310 Ga. 7, 8, 849 S.E.2d 204, 205 (2020)).

120. *Johnson*, 313 Ga. at 161, 868 S.E.2d at 231.

121. 313 Ga. 276, 869 S.E.2d 501 (2022).

122. *Id.* at 276, 869 S.E.2d at 502–03.

123. *Id.* at 280, 869 S.E.2d at 505.

124. *Id.*

125. *Id.*

126. *Id.* at 285, 869 S.E.2d at 508.

127. *Id.* at 280, 869 S.E.2d at 505.

128. *Id.* at 281, 869 S.E.2d at 505–06.

129. *Id.* at 282, 869 S.E.2d at 506.

130. *Id.* at 290, 869 S.E.2d at 511–12.

131. *Id.* at 287, 869 S.E.2d at 509–10.

132. *Id.* at 286–87, 869 S.E.2d at 509–10.

> fact that such evidence is supposed to make more (or less) probable, viewing such evidence in the context of a record before the court in that particular case.[133]

In *Langley v. State*,[134] the court held that a trial court has the discretion to probate a sentence for possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131(b),[135] even though the language regarding punishment under that code section states that a person convicted "shall be imprisoned."[136] The court reasoned that traditionally, "shall be imprisoned" has included terms of imprisonment and probation and that such an interpretation is reinforced by the fact that the legislature has chosen to include language in certain sentencing statutes that offenses cannot be probated.[137]

In *Caldwell v. State*,[138] the supreme court held that a trial court erred in failing to give a curative instruction after a prosecutor argued in a closing argument that the prosecutor decides who is an accomplice.[139] Referencing the indictment: "you'll see Gregory W. Edwards, District Attorney brought this indictment against these individuals . . . . [N]ot even the Judge has that role, to decide who goes forward in terms of charges. That's a decision the District Attorney makes."[140] The defense objected and requested a curative instruction, which the Dougherty County Superior Court refused to give.[141]

Concluding that evidence for a state's witness being an accomplice was strong, the court determined the argument was not only improper but prejudicial.[142] The court reasoned:

> The District Attorney's arguments suggested to the jury that because of the District Attorney's authority, the decision about whether to indict . . . had already been made, so the jury did not have to make

133. *Id.* at 289, 869 S.E.2d at 511 (citing Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 (2008)).

134. 313 Ga. 141, 868 S.E.2d 759 (2022).

135. O.C.G.A. § 16-11-131(b) (2022) (allowing a person previously convicted or on probation for a felony to be imprisoned for possession of a firearm).

136. *Id. See also Langley*, 313 Ga. at 148, 868 S.E.2d at 764.

137. *Langley,* 313 Ga. at 146, 868 S.E.2d at 762–63.

138. 313 Ga. 640, 872 S.E.2d 712 (2022).

139. *Id.* at 640, 872 S.E.2d at 714–15.

140. *Id.* at 646, 872 S.E.2d at 718.

141. *Id.*

142. *Id.* at 649–50, 872 S.E.2d at 720.

> that determination, and the trial court's subsequent charge to the jury can be reasonably construed as reinforcing that argument.[143]

IV. THE GEORGIA LEGISLATURE

House Bill 478[144] went into effect on July 1, 2022.[145] The new law brings Federal Rule of Evidence 702 and the Daubert standard to criminal prosecutions.[146] The new law replaces the old *Harper* standard for criminal cases, which held that expert scientific evidence was admissible if it had reached "a scientific stage of verifiable certainty."[147] The law will provide for more rigorous standards to admit scientific evidence and bring Georgia criminal procedure in line with civil procedure and the Federal Rules.

House Bill 1188[148] provides that in prosecutions for child molestation, aggravated child molestation, and sexual exploitation of children, each act of child molestation should be charged as a separate offense.[149] The law also provides that, for sexual exploitation of children, each separate image or depiction shall be treated as a separate offense, which cannot merge for sentencing purposes.[150] This bill addresses the rule established by the Supreme Court of Georgia in *Edvalson v. State*.[151] In that case, the court held that a person could only be sentenced for one count of possession of child pornography, no matter how many images or acts were depicted in the material in the defendant's possession.[152] Similarly, Senate Bill 479[153] removed merger for a firearm possession count, making each separate gun a "unit of prosecution" for merger purposes.[154]

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143. *Id.* at 649, 872 S.E.2d at 720.

144. Ga. H.R. Bill 478, Reg. Sess. (2022).

145. *Id.*

146. *Id.* Under Federal Rule of Evidence 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise, if: (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) The testimony is based upon sufficient facts or data; (3) The testimony is the product of reliable principles and methods; and (4) The expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

147. Harper v. State, 249 Ga. 519, 525, 292 S.E.2d 389, 395 (1984).

148. Ga. H.R. Bill 1188, Reg. Sess. (2022).

149. *Id.*

150. *Id.*

151. 310 Ga. 7, 849 S.E.2d 204 (2020).

152. *Id.* at 7–8, 849 S.E.2d at 205–06.

153. Ga. S. Bill 479, Reg. Sess. (2022).

154. *Edvalson*, 310 Ga. at 8, 849 S.E.2d at 205; *see* Ga. S. Bill 479, Reg. Sess. (2022).

Finally, House Bill 1216[155] passed and became effective in April.[156] Under the new law, penalties are now enhanced for fleeing or attempting to elude law enforcement.[157] The minimum mandatory sentence for a first conviction is thirty days to serve; for a second offense, ninety days to serve; and 180 days on a third offense.[158] A fourth such offense is now a felony.[159] Under aggravated circumstances, a first DUI and first offense for reckless driving is a felony.[160]

V. CONCLUSION

These decisions and statutory changes 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 lawyers alike to always be aware of 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. So too will the laws passed by the General Assembly affect the way criminal cases are handled by Georgia's courts.

155. Ga. H.R. Bill 1216, Reg. Sess. (2022).
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*