CASE LAW SUMMARIES

JANUARY 2016 TO DECEMBER 2016

Drafted and Summarized by:
Randall Sharp
Assistant Public Defender
Clayton Public Defender's Office
Randall.sharp.esq@gmail.com

Table of Contents

ADMISSIONS AND CONFESSIONS 8
- CELL PHONE TEXT MESSAGES 10
- CUSTODY 12
- HOPE OF BENEFIT AND REQUEST FOR AN ATTORNEY 12
- MIRANDA RIGHTS 14
- RIGHT TO AN ATTORNEY 14
- VOLUNTARINESS – IN CUSTODY STATEMENT 14

AFFIRMATIVE DEFENSES 14
- ACCIDENT 14
- JUSTIFICATION – POSSESION OF FIRARM BY CONVICTED FELON 16
- MISTAKE 16
- SELF-DEFENSE 16
- TRANSFERRED INTENT FOR JUSTIFICATION 18

AGGRAVATED ASSAULT 18
- ATTEMPT 18
- INTENT 18

AGGRAVATED STALKING 20
ALLOCUTION 20
ARRAIGNMENT 22
ATTEMPT – ARMED ROBBERY 22
AUTHENTICATION 22
- SOCIAL MEDIA 22
- VIDEO EVIDENCE 24

BAIL BONDSMAN 24
BANISHMENT 24
BIFURCATED TRIAL 26
BOLSTERING AND HEARSAY 26
BRADY MATERIAL 26
CHARACTER EVIDENCE 28
- ACCUSED 28
- PRIOR CONVICTIONS 28
- REQUEST FOR MISTRIAL 28
- THIRD PERSON 30

CHILD HEARSAY STATUTE - NEW RULES DOES NOT REQUIRE RELIABILITY 30
CHILD MOLESTATION 30
CHILD PORNOGRAPHY – FEDERAL 30
CHILD PORNOGRAPHY AND CHILD EXPLOITATION PREVENTION ACT 32
CLOSING ARGUMENTS 32
- GOLDEN RULE 34
- IMPROPER COMMENT ON DEFENDANT'S RIGHT TO REMAIN SILENT 34
- PROPENSITY OF PRIOR ACTS 36

COLLATERAL ESTOPPEL 36
COLLATERAL ESTOPPEL 38

DOUBLE JEOPARDY 38
COMPETENCY TO STAND TRIAL 38
CONFIDENTIAL INFORMANT 38
CONFRONTATION CLAUSE 40
CO-CONSPIRATOR'S STATEMENT 40
INFORMANT 40
CONSENT – IMPLIED 42
CONSPIRACY 42
CONTINUANCES 42
OBTAIN ANOTHER ATTORNEY 42
CORROBORATION 44
CO-DEFENDANT'S STATEMENT – OCGA 24-14-8 44
CRIMINAL ATTEMPT TO COMMIT FELONY MURDER 46
CRIMINAL DAMAGE TO PROPERTY – VALUE 46
CRIMINAL TRESPASS 46
CRUELTY TO CHILDREN IN FIRST DEGREE 46
DEFENDANT'S RIGHT TO BE PRESENT IN ALL STAGES OF TRIAL 48
BENCH CONFERENCES 48
INTERPRETER TRANSLATED INFORMATION INCORRECTLY 48
JUROR EXCUSED FOR CAUSE WHILE DEFENDANT WAS NOT PRESENT 50
JUDGE DISCUSSED A PROCEDURAL ISSUE WITH ATTORNEYS 50
JUDGE MET PRIVATELY WITH A WITNESS 50
JURY NOTES 52
DEFENDANT'S RIGHT TO REMAIN SILENT OR REQUEST FOR ATTORNEY 52
DEMONSTRATIVE EVIDENCE 54
DIRECTED VERDICT 54
DISCOVERY VIOLATION 54
DFACS RECORDS 56
DISMISSAL OF CASE BY JUDGE 56
DISRUPTING SCHOOL ACTIVITIES – OCGA 20-2-1182 58
FIRST ADMENENT FREEDOM OF SPEECH 58
DOUBLE JEOPARDY 58
ISSUE PRECLUSION 62
PUNITIVE BOND CONDITIONS 62
DRIVING UNDER THE INFLUENCE 62
FIELD SOBRIETY TEST 62
FOUNDATION FOR BREATH TEST 62
INTOXILIZER CERTIFICATES 64
EXPERT TESTIMONY 64
EXTRINSIC EVIDENCE 64
FAMILY VIOLANCE 66
FELONY MURDER 66
FIRST OFFENDER 66
FLEEING 68
GANG PARTICIPATION 68
GRAND JURY PERJURY 68

GUILTY PLEA 70
BOYKIN RIGHTS 70
VOLUNTARINESS 70
WITHDRAWAL 70
HABIT 74
HEARSAY 74
BUSINESS/MEDICAL RECORD EXCEPTION 74
CO-CONSPIRATOR EXCEPTION 76
CONFRONTATION CLAUSE 76
EXCITED UTTERANCE 78
INDEPENDENT CRIMES AND ACTS 78
INDICTMENT 78
PRESENT SENSE IMPRESSION 78
RESIDUAL HEARSAY EXCEPTION (NECESSITY EXCEPTION) 80
RULE OF NECESSITY 80
TRUTH OF THE MATTER ASSERTED 80
HUNG JURY – MISTRIAL 82
IDENTIFICATION 82
PHOTOGRAPHIC LINEUP 82
IMMIGRATION 84
IMMUNITY 84
IMPEACHMENT 84
CONTEMPT OF COURT 84
FIRST OFFENDER 86
INCONSISTENT VERDICT RULE vs. REPUGNANT VERDICT 86
INDEPENDENT CRIMES AND ACTS 88
DUI SIMILAR TRANSACTION 88
INTENT 88
INTENT, MOTIVE, AND COURSE OF CONDUCT 92
KNOWLEDGE 94
MOTIVE 94
PRIOR SEXUAL ACTS 98
SELF-DEFENSE 98
SEXUAL OFFENSES 98
INDIGENT CLIENT 100
INNEFECTIVE ASSISTANCE OF COUNSEL 100
ADVISING CLIENT ABOUT PLEA 100
CHILD HEARSAY AND BOLSTERING 102
CONCEDING A GUILTY CHARGE TO ONE COUNT 102
CROSS-EXAMINATION OF CO-DEFENDANT 102
FAILED TO ASK FOR CONTINUANCE 104
FAILURE TO FILE A DEMURRER 104
FAILURE TO MOVE TO SUPPRESS EVIDENCE AND PROSECUTOR'S COMMENT ON DEFENDANT'S PRE-ARREST SILENCE 104
FAILURE TO PRECURE WITNESSES 106
FAILURE TO PRESENT ALIBI WITNESS 106

FAILURE TO SUBPOENA WITNESS 106
IMPEACH WITNESS ABOUT PLEA DEAL 108
LACK OF EXPERIENCE 108
REQUEST JURY CHARGE ON CORROBORATION 108
WAIVING DEFENDANT'S RIGHTS 108
INSANITY 110
GUILTY BUT MENTALLY ILL 110
INTERPRETERS 110
INVASION OF PRIVACY 110
JAILHOUSE INFORMANT – CROSS EXAMINATION 112
JUDGE'S IMPROPER COMMENT ON THE EVIDENCE 112
JURISDICTION 114
SUBJECT MATTER 114
JUROR MISCONDUCT 116
RESEARCHED THE LAW OUTSIDE THE JURY ROOM 116
JUROR'S OATH – PETIT OATH 116
JURY DELIBERATIONS 116
JURY INSTRUCTIONS 118
DEFENDANT'S CHOICE NOT TO TESTIFY 118
JUSTIFICATION 118
JURY QUESTIONS 120
QUESTIONS RAISED BY THE JURY AND ASKED TO THE WITNESSES 120
JUVENILE CHARGED IN SUPERIOR COURT 120
PRESENTMENT TO GRAND JURY 120
JUVENILE DELINQUENCY PETITION 120
30 DAY TIME PERIOD 120
JUVENILE SENTENCING 122
COURT'S AUTHORITY TO PROBATE A SENTENCE AFTER SENTENCING 122
KIDNAPPING 122
ASPORTATION 122
LEADING QUESTIONS 124
LESSOR INCLUDED OFFENSE 124
CRIMINAL TRESPASS FROM BURGLARY 124
CRUELTY TO CHILDREN AND RECKLESS CONDUCT 124
INVOLUNTARY MANSLAUGHTER AS LESSER INCLUDED OF MAILCE MURDER 126
SIMPLE BATTERY/ASSAULT FROM MALICE MURDER 126
SIMPLE BATTERY OF CHILD MOLESTATION 126
VOLUNTARY MANSLAUGHTER FROM MURDER 128
MERGER 128
AGGRAVATED ASSAULT / AGGRAVATED BATTERY 128
'EDGE' MODIFIED MERGER RULE 128
GUILTY PLEA 128
IDENTICAL COUNTS OF THE INDICTMENT 130
GANG PARTICIPATION 132
MALICE MURDER AND FELONY MURDER 132

POSSESSION OF A FIREARM 132
POSSESSION WITH INTENT AND/OR ATTEMPT TO DISTRIBUTE 134
RAPE AND AGGRAVATED CHILD MOLESTATION 134
MIRANDA 134
MISTRIAL AND DOUBLE JEOPARDY 134
MISTRIAL REQUEST OR CORRECTIVE MEASURE 136
MOTION FOR NEW TRIAL 136
GENERAL GROUNDS – THIRTEENTH JUROR 136
MISSING PART OF THE TRANSCRIPT 136
NOTICE 138
NOTICE OF APPEAL – 30 DAY TIME FRAME 138
OBJECTIONS 138
NON-SPECIFIC OBJECTIONS ARE NOT ALLOWED 138
OBSTRUCTION OF AN OFFICER 140
OPENING AND CLOSING STATEMENTS 140
OUT-OF-TIME APPEAL 140
PARTY TO THE CRIME 142
PHOTOGRAPHIC LINE-UP 144
PHOTOGRAPHS – AUTOPSY 144
PHOTOGRAPHS – IN LIFE PHOTOTGRAPHS OF THE DECEDENT 146
PLEA AGREEMENT – NEGOTIATED 146
PLEA IN BAR 146
POLYGRAPH 148
POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE 148
POSSESSION OF TOOLS FOR COMMISSION OF CRIME 148
PRIOR CONVICTIONS – DEFENDANT 150
PROBATION 150
PRO SE CLIENT 152
PROSECUTOR MISCONDUCT 156
PUBLIC ACCESS TO THE COURTS 156
RAPE 156
INTIMIDATION 156
RAPE SHIELD STATUTE 158
RECORD RESTRICTION 158
RECIDIVIST PUNISHMENT 158
RECUSSAL OF THE JUDGE 160
RECUSAL OF THE PROSECUTION 160
RES GESTAE 162
RIGHT TO COUNSEL 162
RIGHT TO REMAIN SILENT – POST ARREST 162
RULE OF COMPLETENESS 164
RULE OF LENITY 164
AGGRAVATED ASSAULT AND OBSTRUCTION 164
FALSE STATEMENTS AND FALSE REPORT OF A CRIME 166
FELONY AND MISDEMEANOR VERSIONS OF SAME OFFENSE 166
FORGERY IN THE FIRST AND FALSE STATEMENT OR WRITING 166

RULE OF SEQUESTRATION 168
SEARCH AND SEIZURE 168
ARTICULABLE SUSPICION 168
CELL PHONE 168
CREDIBILITY OF THE OFFICER 170
DOG SNIFF SEARCHES 170
DUI IMPLIED CONSENT 172
IMPLIED CONSENT 172
INDEPENDENT SOURCE DOCTRINE 176
OBSTRUCTION 178
PENIAL SWABS 178
PRIVATE CITIZEN SEARCH 178
PROBABLE CAUSE 178
SEARCH INCIDENT TO ARREST 180
SEARCH WARRANT – ANONYMOUS TIP 180
STALENESS – PASSAGE OF TIME 184
TAIL LIGHT 184
TIER 2 POLICE ENCOUNTER 184
VEHICLE SEARCH – DUAL POSSESSION 184
VEHICLE EXCEPTION 186
WARRANT AFFIDAVIT 186
4 TH AMENDMENT WAIVER 188
SENTENCING 188
ABILITY TO PAY RESTITUTION 188
DOWNWARD DEPARTURE ON SEXUAL OFFENSES 190
JUDGES DISCRETION 190
JUDGE'S PARTICIPATION IN PLEA NEGOTIATIONS 190
PAROLE ELIGIBILITY 192
RECIDIVIST PUNISHMENT 192
SPLIT SENTENCES 194
SPLIT SENTENCES FOR SEX OFFENSES 194
SELECTIVE PROSECUTION 196
SERIOUS INJURY BY A MOTOR VEHICLE 196
NO PREDICATE OFFENSE CONVICTION REQUIRED 196
SEVERANCE 198
SEX OFFENDER REGISTRY 200
VIOLATIONS 200
SEXUAL ASSAULT 202
SCHOOL ADMINISTRATOR 202
SEXUAL EXPLOITATION OF CHILDREN 202
REQUIRES KNOWLEDGE THE CHILD IS A MINOR 202
SPECIFIC BAD ACTS BY THE COMPLAINING WITNESS 202
SPEEDY TRIAL DEMAND 204
CONSTITUTIONAL 204
STATUTORY 208
STATUTE OF LIMITATIONS 210

TATTOOS 210
TERRORISTIC THREATS 212
THEFT BY RECEIVING 212
TIMELINESS OF APPEAL (STATE'S NOTICE REQUIREMENT) 212
TIMELINESS OF MOTION TO MODIFY SENTENCE 212
TOLLING MISDEMEANOR PROBATION 212
TRAFFICKING 214
UNANIMOUS JURY 214
VARIANCES IN THE INDICTMENT 214
VENUE 216
    FORGERY - UTTERANCE 220
VICTIM IMPACT STATEMENTS – CAPITAL CASES 220
VOIR DIRE 220
VOLUNTARY MANSLAUGHTER 224
WARRANT AFFIDAVIT – PROBABLE CAUSE 226
WARRANTS BASED ON CONFIDENTIAL INFORMATS 226
WIRE-TAPS 226
WITNESS TAMPERING 228
INDEX OF CASES SUMMARIZED 230

➢ ADMISSIONS AND CONFESSIONS

- ✪ *Norman v. State*, 298 Ga. 344 - S15A1525 – GA Supreme Court - (Decided January 19, 2016)
  - Judgment: (Affirmed)
  - Defendant gave an hour-long interview to the police to whom he confessed to killing the decedent and having sex with her after she died. Defendant now objects, stating there was nothing to corroborate the confession
  - Holding: "When the jury finds that a confession is corroborated, 'it need not find proof of guilt beyond a reasonable doubt from evidence separate from and wholly independent of the confession, and it instead may consider the confession along with other facts and circumstances independent of and separate from it.'" In the current situation the Court determined there was sufficient corroboration based upon Defendant stating where they could find the body and how she died.
- ✪ *State v. Lee*, 298 Ga. 388 - S15A1502 – Georgia Supreme Court – (Decided February 01, 2016)
  - Judgment: (Affirmed)
  - The police questioned juvenile Defendant after being detained for over 10 hours. He was extremely distraught and had minimal capacity to understand his rights. He never once looked at the waiver form or signed it. His mother signed on his behalf. Trial court and Supreme Court acknowledge the juvenile defendant did not waive his rights
  - Holding: A parent of a juvenile defendant has no authority to waive a juvenile defendant's rights
- ✪ *Cheley v. State*, 299 Ga. 88 - S16A0003, GA Supreme Court – (Decided May 23, 2016)
  - Judgment: (Affirmed)
  - Defendant was taken into custody, read his Miranda Rights, and agreed to speak with investigators. After making several statements, Defendant stated, "I'm completely finished." The investigators continued to ask question and Defendant continued to speak. Defendant sought to suppress all statements after the point he stated, "I'm completely finished."
  - Holding: "[Defendant's] statement that he was 'completely finished' was not an unequivocal assertion of his right to remain silent. To the contrary, a reasonable law enforcement officer would have understood

[Defendant] to mean only that he had lost patience with the repeated and continued questions about what he had done before buying gasoline and that he wanted to know what the investigators were investigating…A suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent."

- ✪ *Finley v. State*, 298 Ga. 451 - S15A1595 – Georgia Supreme Court – (Decided February 08, 2016)
  - Judgment: (Affirmed)
  - Defendant requested the custodial statement to the police should be suppressed based upon a hope of benefit. Specifically, the officer stated, "your quickest way to get to see your children or your quickest way to take a large load off your shoulders is just to tell the truth."
  - Holding: "the Court consistently has held that the statutory reference to the 'slightest hope of benefit' means promises of 'reduced criminal punishment – a shorter sentence, lesser charges, or no charges at all.' It does not include promises of 'collateral benefits' that do not relate to charges or sentencing."
- ✪ *Baughns v. State*, 335 Ga. App. 600 - A15A2242 – GA Court of Appeals (Decided February 05, 2016)
  - Judgment: (Affirmed)
  - Defendant sought to suppress his confession based upon involuntariness and hope of benefit, because the officer stated, he would speak to the DA for him and also tell his family that he ultimately did the right thing.
  - Holding: "our courts have held that it is not a promise that relates to the charge or sentence facing the suspect under OCGA §24-8-824 where an interrogator merely promises to tell the prosecutor or the court that the suspect cooperated, accepted responsibility, was justified in connection with the offenses at issue, etc."
- ✪ *Babbitt v. State*, 337 Ga. App. 553 - A16A0338 – GA Court of Appeals – (Decided June 15, 2016)
  - Judgment: (Affirmed for harmless error)
  - During plea negotiations, Defendant agreed to speak to the DA and make a proffer about what occurred on the night of the incident. The Defendant gave a proffer in hopes of receiving a plea offer to something

other than Murder. No plea offer was made prior to the proffer. Defendant was not read his *Miranda Rights*. When the plea negotiations fell through, Defendant sought to suppress the statements at the proffer. The Trial Court ruled they would be inadmissible as to admissions of guilty, so the State could not use the statements during its case-in-chief. However, should the Defendant testify, the state could introduce the statements for impeachment purposes. Defendant chose not testify. COA found it was error to allow the statements for impeachment purposes but it was harmless error.

- Holding: OCGA §24-8-824 renders a defendant's confession inadmissible if it was induced by the slightest hope of benefit…Thus, in order to determine whether Defendant's statement was voluntary in order for impeachment purposes, the trial court was required to determine whether Defendant made it with a hope of benefit…The slightest hope of benefit in former OCGA §24-3-50 means the hope of a lighter sentence. In this case, the evidence shows that the trial court erred by determining that Defendant did not make the statements in the interview without the slightest hope of benefit for a lighter sentence that was brought about by discussions with the State."
- IMPORTANT NOTE: The COA did assert that confessions may be allowed for impeachment purposes under certain circumstances. The COA stated, "If [the confession is] inadmissible for procedural defects [i.e. lack of Miranda], with no indication of traditional involuntariness, the confession may be used for impeachment. If inadmissible because not voluntarily made, a confession may not be used for impeachment."

- **CELL PHONE TEXT MESSAGES**
  - *Glispie v. State*, --- Ga. --- - S16G0583 – GA Supreme Court – (Decided November 07, 2016)
    - Judgment: (Affirmed for harmless error)
    - Officers attempted to pull over Defendant when he fled. Cops eventually located Defendant's house and arrested Defendant. A search of the vehicle resulted in drugs. Police Officer got a search warrant for Defendant's phone and obtained text messages, which implicated drug transactions. Defendant sought to suppress the text messages based upon hearsay arguments. Trial court determined they were party-opponent admissions and admitted them. COA affirmed the trial court's decision. Supreme Court granted cert and also affirmed.

- Holding: "OCGA §24-8-801(d)(2)(A) provides that 'admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is…*[t]he party's own statement.*' (Emphasis supplied.) Therefore the outgoing text messages on the cell phone may be considered [Defendant's] own statements, as the facts of this case indicate that [Defendant] sent the messages. The incoming text messages, however, are not statements by [Defendant]. As such, they do not fall under this hearsay exception."
- IMPORTANT NOTE: Rile v. California, 134 SCt. 2473 (2014) does not apply since the officers obtained a valid search warrant as noted in footnote 1.

- **CUSTODY**
  - *Jacobs v. State*, 338 Ga. App. 743 - A16A1115 – GA Court of Appeals – (Decided September 29, 2016)
    - Judgment: (Affirmed)
    - Police responded to call where someone ran into the apartment gate. Upon searching the apartment complex parking lot, police officer located Defendant's car. Defendant's girlfriend arrived on scene and stated her boyfriend called her because he was injured. Girlfriend called Defendant and allowed the police officer to speak with him. Police officer explained to Defendant that he wished to speak with him outside, and if he did not come out to speak with him, then the officer would get an arrest warrant. Defendant reluctantly came outside and made several admissions concerning drinking alcohol. Defendant sought to suppress the admission.
    - Holding: The COA explained, "we have held that a threat to obtain a search warrant does not amount to such coercion and duress so as to invalidate a suspect's consent to the search. *See* Farley v. State, 195 Ga. App. 721, 721-22 (1990). Here the officer's reference to obtaining a warrant could be seen by [Defendant] as a signal that the officer was not authorized or prepared to arrest him absent the further steps of obtaining a warrant, as least as long as he stayed in the apartment." Given the totality of circumstances, Defendant voluntarily, albeit reluctantly, exited the apartment and spoke with the officer, Defendant was not in custody during the time of his admissions.

- **HOPE OF BENEFIT AND REQUEST FOR AN ATTORNEY**
  - *Huff v. State*, --- Ga. --- - S16A0996 – GA Supreme Court – (Decided October 17, 2016)
    - Judgment: (Affirmed)
    - Defendant sought to suppress his custodial statements prior to trial. Trial Court denied the request and Defendant was found guilty of murder. During the custodial interrogation, Officer explained to Defendant, "The truth will set you free" and statements concerning Defendant being present "for when his children as they grew up". Defendant additionally stated several times in the interview, that he would "rather do this in court" inferring his displeasure with the interview or possibly asserting his right to remain silent.
    - Holding: "For the purposes of OCGA §24-8-824, a hope of benefit refers to 'promises related to reduced criminal punishment – a shorter sentence, lesser charges, or no charges at all.' State v. Chulpayev, 296 Ga. 764, 771 (2015). Encouragement or admonitions to tell the truth will not invalidate a confession." As for Defendant's right to remain silent, Defendant is required to unequivocally assert that right. "[Defendant's] isolated statements expressing some degree of displeasure with the interrogation must be viewed in context and we conclude that the trial court's finding that [Defendant] did not unequivocally assert his right to remain silent."
  - *Shepard v. State*, --- Ga. --- - S16A0884 – GA Supreme Court – (Decided November 21, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of murder. Defendant sought to suppress his custodial statement based upon being offered "hope of benefit". The investigator explained to the Defendant prior to the statement that he would "100 percent stand with him" and further explained could possibly get a deal with the district attorney. The investigator explained when asked if Defendant could get jail time for the offense, the officer responded, "that is something you will have to discuss with the district attorney." Trial Court denied the motion to suppress.
    - Holding: "This Court consistently has held that the statutory reference to the 'slightest hope of benefit' means promises of reduced criminal punishment – a shorter sentence, lesser charges, or no charges at all. Finley v. State, 298 Ga. 451, 454 (2016)." The Court determined that the

detective never promised a reduced criminal punishment or receive a shorter sentence. That any deal would need to be worked out with the district attorney, even though they could help arrange that.

- **MIRANDA RIGHTS**
  - ✪ *Ellis v. State*, 299 Ga. 645 - S16A1251 – GA Supreme Court (Decided September 12, 2016)
    - Judgment: (Affirmed)
    - Defendant gave three prior statements in the span of two weeks to law enforcement prior to being arrested. In the first interview, the officers read the Defendant his Miranda Rights. In the second interview, officers read and had both the Defendant and his guardian sign a waiver form. In the third interview, the officer's asked the Defendant and his guardian if they remembered the signed waiver form and still understood their rights; however, they did not re-read the Miranda Rights. Both prior to trial and after being found guilty of murder, Defendant objects and states he should have been read his Miranda Rights prior to the third interview.
    - Holding: "Neither Federal nor Georgia law mandates 'that an accused be continually reminded of his rights once he has intelligently waived them.'…based on the totality of the circumstances, the trial court did not err in finding Defendant's May 16 statement to be freely, knowingly and voluntarily given and subsequently admitting the statement at trial.
- **RIGHT TO AN ATTORNEY**
  - ✪ *State v. Estrada*, --- Ga. --- S16A1082 – GA Supreme Court – (Decided November 21, 2016)
    - Judgment: (Affirmed)
    - Defendant was in custody on unrelated charges. Investigators placed Defendant in a room and read Defendant his Miranda Rights. Defendant never signed a waiver and never verbally waived his rights. The investigators asked a couple questions concerning a murder. Defendant stated he did not want to speak about anything without an attorney present. Investigators asked a few more questions and Defendant then asked, would speaking to the officers without an attorney make a difference to whether he would be charged with murder. Investigators never answered the question. Defendant then again stated he wanted an attorney. Investigators left the room and said they could not speak to him because he asked for an attorney. About 5

minutes later, officers again entered the room and explained why they wanted to speak him about the murder. Defendant ultimately made an hour long interview with inculpatory statements included. Trial Court granted Defendant's motion to suppress the interview.

- Holding: "When a defendant invokes his right to counsel, all interrogation is to cease until such time as an attorney is made available or until such time as the defendant reinitiates conversation with law enforcement and waives his right to having counsel present…Here [Defendant] twice invoked his right to counsel in a manner that was unequivocal, but the officers did not end the interrogation so an attorney could be made available…Any police-initiated questioning after the invocation of counsel renders any purported waiver by the accused invalid."

- **VOLUNTARINESS – IN CUSTODY STATEMENT**
  - *Blackwell v. State*, 337 Ga. App. 173 - A16A0172 – GA Court of Appeals – (Decided May 20, 2016)
    - Judgment: (Affirmed)
    - Defendant was taken into custody for various drug charges. He was read his Miranda Warning and signed a consent form. During the interview the investigator explained that if he did not take possession of the drugs, that his wife or children could also be charged with drugs and arrested. Defendant made several admissions after the officer explained this. Defendant sought to suppress these statements as being involuntary.
    - Holding: "As we have explained, 'a statement by police that makes the defendant aware of potential legal consequences is in the nature of a mere truism that does not constitute a threat of injury or promise of benefit' with the meaning of former OCGA §24-3-50." (which is now OCGA §24-8-824)

AFFIRMATIVE DEFENSES

- **ACCIDENT**
  - *Kellam v. State*, 298 Ga. 520 - S15A1913 – GA Supreme Court – (Decided February 22, 2016)
    - Judgment: (Affirmed)
    - Defendant claimed the Trial Court should have instructed the jury on the affirmative defense of accident. Defendant never testified at trial, but

a witness claimed she saw the decedent (small child) was playing on the bed. Defendant wanted to argue that he was playing with the child on the bed, but never acknowledged the child fell off the bed.

- Holding: "An affirmative defense is one 'that admits the doing of the act charged but seeks to justify, excuse, or mitigate it. Accordingly, if a defendant does not admit to committing any act which constitutes the offense charged, he is not entitled to a charge on the defense of accident.'" Defendant only admitted to playing with the child on the bed, not to causing any of the blunt force trauma to the child. Trial court did not err by failing to give a jury charge on accident.

- **JUSTIFICATION – POSSESION OF FIRARM BY CONVICTED FELON**
  - *Propst v. State*, 229 Ga. 557 - S16A0275 – GA Supreme Court – (Decided July 05, 2016)
    - Judgment: (Affirmed)
    - Defendant sought to have pre-trial hearing for justification based upon self-defense. However, he was a convicted felon and the State objected claiming the statute precluded self-defense pre-trial immunity in cases where Defendant is a convicted felon. Defendant appealed based upon the Equal Protection Clause, that he is being discriminated against because he is a convicted felon.
    - Holding: The pre-trial immunity statute does not classify convicted felons into its own sub-category, therefore the Equal Protection Clause is not applicable. "Former OCGA §16-3-24.2 did not preclude only convicted felons from asserting pre-trial immunity. Rather, it precluded anyone, convicted felons and non-felons alike, from asserting pre-trial immunity who unlawfully carried or possessed a weapon in violation of either Part 2 or 3 of Chapter 11 Article 4 when an incident occurred."
    - IMPORTANT NOTE: The Supreme Court made clear that the immunity statute, which prohibits Defendant's from claiming justification pre-trial at an immunity hearing, is only applicable to pre-trial immunity hearing. The statute does not prohibit asserting self-defense at trial. "The immunity statute did not prevent Defendant from engaging in acts of alleged self-defense, and it does not prevent him from trying to argue self-defense at trial."

- **MISTAKE**
  - ✪ *Franklin v. State*, 335 Ga. App. 557 - A15A2180 – GA Court of Appeals – (Decided February 02, 2016)
    - Judgment: (Affirmed)
    - Defendant claimed he believed his wife consented to the sexual contact, because she went along with the act without resistance. Defendant requested the Court to charge the jury on "mistake of fact", but the trial court refused
    - Holding: "Supreme Court has previously held that, in cases in which a jury finds a defendant guilty of forcible rape after proper instruction, 'the element of force negates any possible mistake as to consent.'" The facts show, he bound and beat his wife with a bat prior to having sex. Thus, the element of force negates any mistake of fact about consent.
- **SELF-DEFENSE**
  - ✪ *Amos v. State*, 298 Ga. 804 - S15A1580 – GA Supreme Court – (Decided March 07, 2016)
    - Judgment: (Affirmed)
    - Defendant admitted to shooting the decedent, but claimed it was self-defense. Defendant, however was not at his home, and the Defendant did not have a weapons carry permit to allow him to carry a weapon outside of his home. Trial court ruled defendant was not entitled to immunity because he was carrying a weapon without a license in violation of OCGA §16-11-126.
    - Holding: "At the time of the trial court's immunity ruling, immunity was not available if 'in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person." Because Defendant was unlawfully carrying the weapon, he was not entitled to immunity.
    - IMPORTANT NOTE: "In 2014 the immunity statute was amended as part of the Safe Carry Protection Act to delete the 'or 3' from the phrase 'Part 2 or 3' within the exception for unlawful carrying or possession of a weapon." Thus, it appears Immunity may be claimed even if Defendant was carrying the weapon without a license. This law does not change the fact for possession of a weapon by a convicted felon.

- ✪ *Anthony v. State*, 298 Ga. 827 - S16A0059 – GA Supreme Court – (Decided April 04, 2016)
  - Judgment: (Affirmed)
  - Defendant raised the issue of immunity from prosecution pursuant to OCGA §16-3-24.2. At the pre-trial hearing, Defendant presented several character witnesses and then Defense Counsel proffered for the court what the Defendant would state on the stand. Prosecution did not present any evidence and instead made a proffer for the court what evidence will be presented at trial.
  - Holding: "Attorneys are officers of the court and a statement to the court in their place is prima facie true and needs no further verification unless the same is required by the court or the opposite part…[in the case at bar] the statements-in-place by [defendant's attorney] were not a proper substitute for evidence at the hearing on the motion for immunity because the State did not accept those proffers but rather insisted that the [Defendant] prove his immunity with traditional evidence."
  - IMPORTANT NOTE: Even though the Court ruled against Defendant because both Defense Counsel and the State had inconsistent proffers; I believe there may be a scenario where Defense Counsel could make a proffer in place of Defendant taking the stand at a pre-trial immunity hearing. If the Defense and the State present similar facts and are only arguing whether justification is applicable based upon those facts, then Defendant might wish not to take the stand and have his attorney make a proffer of facts to the Court.

- **TRANSFERRED INTENT FOR JUSTIFICATION**
  - ✪ *Springer v. State*, 335 Ga. App. 462 - A14A0598 – Court of Appeals (decided on January 12, 2016)
    - Judgment: (Affirmed)
    - Trial judge did not give jury instruction on transferred intent, based upon a justification defense
    - Holding: Court Appeals stated, "the better practice may have been for the trial court to include a specific charge on transferred justification" but considering the court's instructions as a whole, there is no reversible error.

- **AGGRAVATED ASSAULT**
  - **ATTEMPT**
    - *State v. Harlacher*, 336 Ga. App. 9 - A15A1856 – GA Court of Appeals – (Decided March 02, 2016)
      - Judgment: (Affirmed)
      - Defendant was charged with criminal attempt to commit aggravated assault. Defendant demurred claiming aggravated assault is an attempted battery. Thus he could not be charged with attempt of an attempt. State claimed it should not matter whether the person was aware the gun was pointing at him or not.
      - Holding: OCGA §16-5-20(a)(2) does not include attempt as an element of the offense, it would indeed seem feasible to convict an accused of attempting a reasonable apprehension of harm type of assault. However, the fact that the victim was unaware that Defendant aimed a handgun at him precludes a conviction of a completed aggravated assault under OCGA §16-5-21(b)(2) and §16-5-20(a)(2).
      - IMPORTANT NOTE: Because OCGA §16-5-20(a)(1) does include the word "attempt" it would appear that a defendant could not be found guilty of criminal attempt to commit aggravated assault under this provision.
  - **INTENT**
    - *Patterson v. State*, 299 Ga. 491 - S15G1303 – GA Supreme Court – (Decided July 14, 2016)
      - Judgment: (Affirmed)
      - Defendant was charged with aggravated assault for driving a vehicle toward the complaining witness and ultimately pinning the complaining witness against the wall causing bodily injury. Defendant argued at trial that he drove recklessly, but never intended to cause bodily injury or place the complaining witness in a reasonable apprehension of fear of receiving bodily injury. Defendant requested a lesser included jury instruction of Reckless Driving and Reckless Conduct, but the trial court rejected. Court of Appeals affirmed the trial court's ruling. The Court was presented the issue of whether simple assault and ultimately aggravated assault required a specific intent to cause bodily injury or place the complaining witness in reasonable apprehension of receiving bodily injury, or whether just the general intent of committing the act is sufficient.

- Holding: "All that is required is that the Defendant intend to commit the act which in fact places another in reasonable apprehension of injury, not a specific intent to cause such apprehension." The court concluded, "The State was required to show that Defendant intended to drive his van in the direction of [complaining witness], that [witness] was placed in reasonable apprehension of injury, and that the van was an object that when used offensively against a person, was likely to or actually did result in serious bodily injury. The State was not required to show an intent to injure or that Defendant intended to place [witness] in reasonable apprehension of injury."
- JUSTICE BLACKWELL DISSENT: The majority opinion was 10 pages and mostly focused on the statutory language in OCGA §16-5-20. The Justice Blackwell's dissent is a 39 page treatise that outlines the history of the statute and explained starie decisis might require the Court to affirm the holding, but common sense dictates otherwise. Justice Blackwell explains that almost everyone, preachers, teachers, politicians etc., have committed the offense of aggravated assault with the simple act of driving down the street. If you merely focus on the apprehension of the person perceiving the act and completely discount the intent of the person committing the act, then we have all committed aggravated assault. In essence, say, you were driving down the interstate and a vehicle is in your blind spot. You change lanes and the other driver is in fear of receiving bodily injury; you have committed aggravated assault. You go to pull out your driveway and do not see a fast approaching vehicle. The other driver fears receiving bodily injury; you have committed aggravated assault. Even lawfully holding a gun. You hold a gun, and someone else perceives they are at risk of receiving bodily injury; you have committed aggravated assault. Thus, we are left with the DA choosing which crimes they will prosecute.

➢ AGGRAVATED STALKING

✪ *State v. Davis*, --- Ga. App. --- - A16A1006 – GA Court of Appeals – (Decided October 28, 2016)

- Judgment: (Reversed)
- Defendant was charged with aggravated stalking for violating a "Final Divorce Decree", which prohibited Defendant from having contact with the ex-wife or oldest child except for parental visitation. Defendant was

charged when he contacted the ex-wife at a restaurant for the purposes of harassment and intimidation. Defendant filed a motion to dismiss (Demurrer), claiming the "Final Divorce Decree" was not one of the enumerated articles outlined in the aggravated stalking statute. Trial Court agreed, but COA reversed.

- Holding: Trial Court had rejected aggravated stalking statute applied, claiming since "The Final Divorce Decree" allowed for some contact, it was not a permanent protective order. However, the trial court failed to take into consideration a "permanent injunction". "Injunctions are defined generally as court orders that prohibit someone from doing a specific act or future wrong…In conclusion, we find that the provision in the Divorce Order that [Defendant] is accused of violating constituted a permanent injunction within the meaning of OCGA §16-5-91(a). The trial court thus erred in dismissing the charge of aggravated stalking."

➢ ALLOCUTION

✪ *Seagraves v. State*, --- Ga. App. --- - A16A0951 – GA Court of Appeals – (Decided October 31, 2016)

- Judgment: (Affirmed)
- Defendant entered into a non-negotiated plea to aggravated assault and aggravated battery. The complaining witness requested the court to sentence Defendant to 5 years prison. Defendant's attorney additionally asked the court to sentence Defendant to 5 years prison, but did not allow Defendant to speak or present any other evidence. Trial Court went with the State's recommendation of 30 years serve 15 years in prison. Defendant claims on appeal that he was denied his right to allocution and moved to withdraw his guilty plea.
- Holding: OCGA §17-10-2 provides in pertinent part, "the judge shall…hear argument by the accused or the accused's counsel and the prosecuting attorney, as provided by law, regarding the punishment ot be imposed." COA determined that the trial court allowed defense counsel to speak, and it does not matter that Defendant wished to speak or had other witnesses willing to testify on his behalf.
- IMPORTANT NOTE: COA did not decide the issue whether a person who enters a non-negotiated plea has a right to allocution in the first place. COA did explain and cite to Barksdale v. Ricketts, 233 Ga. 60 (1974), which held that when a Defendant entered a plea of guilty, he

waives his right to allocution. It was not clear in Barksdale, whether it was a non-negotiated plea or not. I would be cautious about entering a non-negotiated plea, unless there is a clear understanding that you would be allowed to speak on behalf your client and if your client chooses, also be allowed to speak and give an allocution. The COA has now at least hinted that it might not be error to accept the non-negotiated guilty plea and proceed directly into sentencing without giving either party an option to speak.

- **ARRAIGNMENT**
  - *Moss v. State*, 298 Ga. 613 - S15A1736 – GA Supreme Court – (Decided March 07, 2016)
    - Judgment: (Affirmed)
    - Defendant was never formally arraigned until after the close of evidence. When the trial judge was preparing the indictment to send back to the jury, the trial judge discovered the Defendant had never been arraigned. The Defendant was subsequently arraigned after the close of evidence.
    - Holding: Because the Defendant never objected prior to trial, during trial or prior to the verdict, Defendant has waived the issue.
  - *Sapp v. State*, 338 Ga. App. 628 - A16A1425 – GA Court of Appeals – (Decided September 15, 2016)
    - Judgment: (Reversed)
    - Defendant was charged with speeding and excess speed. Prior to trial, the judge asked the Defendant to sign the accusation, which included the phrase waiving formal arraignment. Defendant objected and stated she is not waiving anything. She wrote on the accusation that she does not waive. Judge proceeded to trial and she was found guilty of driving in excess speed.
    - Holding: "While OCGA §17-7-91(c) permits waiver upon 'appearance and entering of a plea,' it is reversible error for a trial court to require a defendant to go to trial on an indictment 'when [she] was not formally arraigned and refused specifically to waive such arraignment.'" The State conceded that they cannot prove Defendant was formally arraigned and since Defendant refused to waive a formal arraignment, case must be reversed.

- **ATTEMPT – ARMED ROBBERY**
  - *Rainey v. State*, 338 Ga. App. 413 - A16A0675 – GA Court of Appeals – (Decided July 13, 2016)
    - Judgment: (Reversed)
    - Defendant was spotted wearing a mask and a hoodie pacing outside a CVS. Mechanics from across the street observed this and called the police. When police arrived, the observed Defendant go back to his car. Upon a search of the car, the police discovered a check book that contained notes for preparation of the robbery. No weapon was found in the car or on the Defendant. Defendant was eventually found guilty of criminal attempt to commit armed robbery.
    - Holding: "Defendant's actions in obscuring his license plate and being in possession of notes, surgical mask, and police scanner – in the absence of any evidence that he was in possession of a weapon or device having the appearance of a weapon, and in the absence of evidence that he showed anyone the notes – were mere preparatory acts and do not amount to an attempt to commit the crime of armed robbery." The COA did state it likely would support a conviction to criminal attempt to commit robbery.
    - JUDGE BOGGS DISSENTING: Judge Boggs believes that since armed robbery does not require the actual presence of a weapon, but only evidence from which a weapon's presence may be inferred, he would have affirmed the conviction.

- **AUTHENTICATION**
  - **SOCIAL MEDIA**
    - *Blackledge v. State*, 299 Ga. 385 - S16A0354 – GA Supreme Court – (Decided July 05, 2016)
      - Judgment: (Affirmed)
      - State introduced several documents from Defendant's and co-defendant's Myspace pages. Defendant claims the documents were not properly authenticated in order for the documents to be introduced. The officer testified he obtained the Myspace accounts by searching their names and date of births. The officer further testified they accurately depict the Defendants' Myspace pages.
      - Holding: "We have already held that 'documetns from electronic sources such as the printouts from a website like Myspace are subject to

the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence." Citing Burgess v. State, 292 Ga. 821 (2013) The court went on to state, the officer's testimony that the posts were an accurate presentation of what was posted on those pages "was sufficient to authenticate the photographs and captions, and the trial court did not abuse its discretion when it admitted that evidence."

- **VIDEO EVIDENCE**
  - *State v. Smith*, --- Ga. --- - S16A1069 – GA Supreme Court – (Decided October 31, 2016)
    - Judgment: (Affirmed)
    - Defendant moved to suppress a video containing several admissions and/or confessions. At the suppression hearing, the investigator could not authenticate one disc, so the DA removed that disc from consideration. As to the second disc, the investigator stated he needed an opportunity to view the disc. A short recess was conducted and when the investigator went back on the record, he stated he had an opportunity to review the disc and it reflected everything that occurred during the interview. On cross-examination, when asked how long the video was, he stated he did not know. Because the disc did not have any markings on it, he could not state whether the video was the disc was the disc that he turned over to prosecution.
    - Holding: "With respect to authenticating a video recording of a defendant's custodial statement, the State must show it is a fair representation of the statement, and may authenticate the recording by any witness familiar with the subject depicted on the recording, as is the case with any other video recording presented as evidence at a criminal trial. See Heard v. State, 296 Ga. 681, 686 (2015)." Trial Court did not abuse its discretion in suppressing the video because there was equivocal testimony concerning whether the video was the same video that he viewed earlier.

- **BAIL BONDSMAN**
  - *Harper v. State*, 338 Ga. App. 535 - A16A1008 – GA Court of Appeals – (Decided August 18, 2016)
    - Judgment: (Affirmed in part and reversed in part)
    - Defendant was a professional bondsman. He broke down the door of a third person to gain entry to the house in order to take into custody one his client's. Defendant did in fact arrest the client in the house. State charged Defendant with two counts of criminal trespass pursuant to OCGA §16-7-21(a) (damage to the door) and §16-7-21(b)(2) (trespass when he or she has notice to not come onto the property).
    - Holding: "The bond agreement between [Client] and the [Defendant] carried with it [Client's] implied consent that the bondsman may use reasonable force necessary to arrest [Client] on a forfeited bond, including the use of reasonable force to enter [Client's] residence for that purpose. But nothing in the bond agreement between the bondsman and [Client] can be construed to provide authority for the bondsman or the bondsman's agent, to enter [a third parties] residence (where Client did not reside) without obtaining [the third party's] consent.

- **BANISHMENT**
  - *Mallory v. State*, 335 Ga. App. 852 - A15A2343 – GA Court of Appeals (Decided February 26, 2016)
    - Judgment: (Affirmed)
    - As part of Defendant's sentence, the trial court banished Defendant from Bartow and Gordon Counties. Defendant claims the only place he can parole out is located within those counties. Because he does not have a valid address he can parole out to, the department of pardons and parole is rejecting his parole requests. Defendant appeals the denial of his sentence modification.
    - Holding: It is the Defendant's burden to show his sentence is unreasonable. Defendant failed to establish that being banished from two counties, the same two counties the victim lives and works, is unreasonable. Further the Trial Court has broad discretion when sentencing.

- **BIFURCATED TRIAL**
  - *Cooks v. State*, --- Ga. --- - S16A0719 – GA Supreme Court – (Decided October 17, 2016)
    - Judgment: (Affirmed)
    - Defendant claimed his trial counsel was ineffective for not asking for a bifurcated trial as it relates to his possession of a firearm by a convicted felon. Defendant was ultimately convicted of Felony Murder, Malice Murder, possession of firearm and other related charges.
    - Holding: "[Defendant] correctly argues that 'in cases where a felon-in-possession firearm charge is unrelated to another count for which the defendant is to be tried, the proceedings should be bifurcated so that the jury will hear and decide the more serious charge(s) before learning about the firearm charge and the defendant's prior conviction.' Brown v. State, 295 Ga. 804, 807 (2014). But where, as here, 'the count charging possession of a firearm by a convicted felon might serve as the underlying felony supporting a felony murder conviction,' a motion to bifurcate should be denied."

- **BOLSTERING AND HEARSAY**
  - *Blackmon v. State*, 336 Ga. App 387 - A15A1834 – GA Court of Appeals (Decided March 24, 2016)
    - See Ineffective Assistance Counsel section

  - *Brown v. State*, 336 Ga. App. 428 - A15A1637 – GA Court of Appeals (Decided March 28, 2016)
    - Judgment: (Affirmed)
    - The complaining witness was 16 years of age, so the child-hearsay statute did not apply. The forensic interviewer testified about the statements he was told by the complaining witness. Defense counsel objected on the basis of hearsay.
    - Holding: "Where a party objects to evidence only on grounds of hearsay, an objection on the ground of improper bolstering has been waived."
    - CONCURRING OPINION, Judge McFadden believes the objection was not waived as Defense counsel argued the complaining witness's credibility had not been placed in issue at that moment. However any error in allowing the statements was harmless due to the other evidence.

- ✪ *Gilmer v. State*, --- Ga. App. --- - A16A0919 – GA Court of Appeals – (Decided November 18, 2016)
  - Judgment: (Affirmed for harmless error)
  - Defendant was found guilty of child molestation and aggravated child molestation. State's expert witness, Anique Whitmore, during direct examination was explaining why a child who would use the term "blowtorch" when referring to pain would describe it in that way. Ms. Whitmore stated, "So the spontaneity and the genuineness of that response, for me adds credibility to what [the juvenile] was saying." Another witness stated "she believed the molestation happened because she was molested as a child herself and we would not set up here and lie about something like this." Defendant never objected, and this issue was raised as an ineffective assistance of counsel issue. Ultimately the court found it was error, but harmless.
  - Holding: "We agree that this testimony constitutes improper bolstering. See Buice v. State, 239 Ga. App. 52, 55 (1999)." However the court also considered that the defense counsel may have chosen not to object to the statements based upon trial strategy, thus it was harmless.
  - DISSENT BY JUDGE MCFADDEN: Judge McFadden dissents because he does not believe failing to object to such harmful bolstering statements could be considered reasonable trial strategy. "While trial counsel is afforded tremendous deference over matters of trial strategy, such trial strategy must be reasonable supported and within the wide range of professionally competent assistance… Although a decision not object may be part of a reasonable trial strategy, see Walker v. State, 329 Ga. App. 369, 376 (2014), the record does not show that the trial counsel made any such decision in this case. To the contrary, trial counsel's testimony shows that he made no decision at all concerning the improper bolstering."

- ➢ **BRADY MATERIAL**
  - ✪ *Brannon v. State*, 298 Ga. 601 - S15A1724 – GA Supreme Court – (Decided March 07, 2016)
    - Judgment: (Affirmed)
    - Defendant requested pre-trial for all police officer notes, because he believed they contained exculpatory material. Trial court rejected the Defendant's request.

- Holding: The State has no duty to provide the notes under OCGA §17-16-4 and the Defendant had not made a showing that he was entitled under any other basis.

➢ CHARACTER EVIDENCE

ACCUSED

✪ *Watson v. State*, 337 Ga. App. 16 - A16A0228 - GA Court of Appeals – (Decided May 02, 2016)

- Judgment: (Affirmed as harmless error)
- State introduced evidence that Defendant's DNA profile was previously stored in CODIS, which is a database that collects DNA profiles of convicted felons. Defendant's counsel did not object to this statement as improper character evidence.
- Holding: COA determined that the overwhelming evidence in this case, particularly Defendant's blood located inside the broken display case made any error harmless.
- IMPORTANT NOTE: Even though the court determined the error to be harmless, they indicated this is impermissible character evidence. "Evidence that a defendant's DNA profile is included in a database compiled by a state or a federal government agency would reflect badly on the defendant's character if the DNA profile or references to the database linked the defendant to criminal activity." *Citing* Scales v. State, 310 Ga. App. 48, 51-52 (2011). Therefore make sure to object and preserve the issue in the future.

PRIOR CONVICTIONS

✪ *Williams v. State*, --- Ga. --- - S16A1116 – GA Supreme Court – (Decided October 17, 2016)

- Judgment: (Reversed)
- Defendant was found guilty of murder. He now appeals claiming the State impermissibly introduced two prior convictions of Defendant's. The State sought a preliminary ruling requesting permission to introduce the prior convictions for impeachment purposes, however the Court denied the request. Defendant's defense was justification. During direct examination, Defendant stated, "he surrendered to the authorities after visiting his parole officer." State claimed Defendant's statement about parole opened the door to allow them present the prior

convictions. Trial Court ultimately allowed both convictions and not just the conviction for which he was on parole.

- Holding: As to the theft by taking conviction for which Defendant was on parole it was not improper to introduce that conviction. "A party has a right to a thorough and sifting cross-examination of an adverse witness with respect to matters raised in the witness' testimony." However as to Defendant's other conviction for terroristic threats, the trial court failed to make an on the record finding "that the probative value of admitting that conviction substantially outweighed the prejudicial effect of its admission," pursuant to the old impeachment rules.
- IMPORTANT NOTE: This case was tried before the new evidence code. For impeachment of prior convictions, the old code required an on the record finding by the trial court pursuant to 403. In footnote 2, the Court explains that under OCGA §24-6-609, a finding that probative value of the evidence substantially outweighs it prejudice effect has been removed if the witness is the accused and thus no longer required. The new rules however have codified the old rules in regards to cross-examination of a witness who opens the door by mentioning they were on parole.

- **REQUEST FOR MISTRIAL**
  - *Turner v. State*, --- Ga. --- - S16A1349 – GA Supreme Court – (Decided October 03, 2016)
    - Judgment: (Affirmed)
    - State's witness said during direct examination that she saw Defendant and other people smoking marijuana in a breeze way in the apartment complex. Defendant objected and asked for a mistrial. Trial Court denied the mistrial and instead admonished the witness and told the jury to disregard the statement insofar it constituted a negative comment upon Defendant's character.
    - Holding: "The refusal to grant a mistrial based on a prejudicial comment lies within the discretion of the trial court, and this Court will not interfere with that discretion on appeal in the absence of a manifest abuse…Moreover, a new trial will not be granted unless it is clear that the trial court's curative instruction failed to eliminate the effect of the prejudicial comment." The Court found the Trial Court's instruction

and admonition was sufficient to protect Defendant from the improper comment.

- **THIRD PERSON**
  - ✪ *Gilreath v. State*, 784 S.E. 2d 388 - S15A1512 – GA Supreme Court – (Decided March 21, 2016)
    - Judgment: (Reversed)
    - Defendant attempted to elicit testimony that the decedent's ex-husband had a history of violence directed at the kids and the decedent. The ex-husband testified on behalf of the state. The State moved for a motion in limine to preclude such evidence and was granted exclusion by the Trial Court.
    - Holding: "A reasonable inference of the defendant's innocence is raised by evidence that renders the desired inference more probable than the inference would be without the evidence." Additionally, "certainly a defendant is entitled to introduce relevant and admissible testimony tending to show that another person committed the crime for which the defendant is tried. However, the proffered evidence must raise a reasonable inference of the defendant's innocence, and must directly connect the other person with the corpus delicti, or show that the other person has recently committed a crime of the same or similar nature."
  - ✪ *Hall v. State*, 335 Ga. App. 895 - A15A1639 – GA Court of Appeals – (Decided March 02, 2016)
    - Judgment: (Affirmed)
    - State impeached a defense witness with a First Offender Conviction. Defense objected relying on Matthews v. State, 268 Ga. 798, 802 (1997) (Stating "unless there is an adjudication of guilty, a witness may not be impeached on general credibility grounds by evidence of a first offender record." However, the State sought to introduce the prior first offender plea, not for general credibility impeachment but to show bias.
    - Holding: "When the impeachment is to show bias, we have previously held that the Confrontation Clause of the Sixth Amendment permits a defendant in a criminal case to cross-examine witnesses about their first offender status." The trial court acted well within its discretion in allowing the State to explore whether Hal's previous attempt to accept responsibility for his girlfriend's criminal conduct may have influenced her trial testimony.

- **CHILD HEARSAY STATUTE - NEW RULES DOES NOT REQUIRE RELIABILITY**
  - *McMurtry v. State*, 338 Ga. App. 622 - A16A1142 – GA Court of Appeals (Decided September 15, 2016)
    - Judgment: (Affirmed)
    - Juvenile complaining witness's mother and police officer both testified to statements that the juvenile complaining told them pursuant to child hearsay statute. Defendant objected claiming the statements lacked an indicia of reliability.
    - Holding: For offenses occurring on or after July 01, 2013, a showing of indicia of reliability is no longer a requirement for allowing child hearsay evidence. OCGA §24-8-820 unlike its predecessors contains no requirement of reliability.

- **CHILD MOLESTATION**
  - *Prophitt v. State*, 336 Ga. App. 262 - A15A2400 – GA Court of Appeals – (Decided March 16, 2016)
    - Judgment: (Reversed)
    - Defendant was under the house looking at a juvenile in the bathroom through a small hole in the floor. Defendant was pleasuring himself while looking at the juvenile. Defendant was charged with one count of child molestation for doing an indecent act in the presence of a child.
    - Holding: Court of Appeals defined what is meant by "presence of a child". They determined presence must be where both individuals are capable of observing each other. Since the child was incapable of observing the Defendant through the small crack, they were not in the presence. "For an accused and victim to be together, they must be in the same location - i.e., they must be in close enough physical proximity that they each would at least have the opportunity to observe the other – regardless of whether the child actually does observe the defendant's conduct.

- **CHILD PORNOGRAPHY – FEDERAL**
  - *U.S.A. v. Holmes*, 814 F.3d 1246 – No. 14-11137 – 11th Circuit COA (Decided February 25, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of possessing child pornography in Federal Court and sentenced to minimum 15 years prison. Defendant placed a

hidden camera in his step-daughter's bathroom. The camera was set up to capture normal daily routines such as showering and getting ready for the day. Defendant claimed at trial and on appeal that the images were not child pornography due to the images were not sexually explicit conduct in nature. Defendant claimed the images were normal daily activities and not for sex.

- Holding: Under Federal Rules, sexually explicit conduct includes "lascivious exhibition of the genitals or pubic area of any person" 18 U.S.C. 2256(2)(A). The 11th Circuit now adopts the holdings in the sister Courts (Eighth, Ninth, and Tenth) that define "lasciviousness in not a characteristic of the child photographed, but of the exhibition which the photographer sets up for an audience." In other words, you look toward the conduct of the photographer who captured the images rather than the conduct of the child to determine if the acts are lascivious.

➢ CHILD PORNOGRAPHY AND CHILD EXPLOITATION PREVENTION ACT

✪ *Scott v. State*, 299 Ga. 568 - S16A0323 – GA Supreme Court – (Decided July 05, 2016)

- Judgment: (Affirmed)
- Defendant filed a constitutional claim against OCGA 16-12-100.2 (Computer or Electronic Pornography and Child Exploitation Prevention Act). Defendant claimed the Act was unconstitutionally overbroad in violation of the right to free speech guaranteed under the First Amendment to the U.S. Constitution.
- Holding: This is a lengthy opinion which goes into detail why the Act does not violate the First Amendment. However the jest of the opinion: "We now hold that, when properly construed, subsection (e) does not effect a real and substantial constraint upon constitutionally protect expression. Subsection (e) therefore does not on its face violate the First Amendment, and the trial court properly denied Defendant's demurrer."
- IMPORTANT NOTE: The Court did address that there may be the rare occasion where the Act does implicate the First Amendment, even if the Court mentioned it in jest. "Though creative attorneys may dream up 'fanciful hypothetical's' under which the statute here reaches protected expression, United States v. Williams, 553 U.S. 285, 303 (2008), we are not convinced that these scenarios are sufficiently numerous or likely to

warrant the statute's wholesale invalidation. The mere fact that one can conceive of some impermissible applications of a statue is not sufficient to render it susceptible to an overbreadth challenge." So I say continue to make constitutional challenges in hopes of it falling into this rare category.

- **CLOSING ARGUMENTS**
  - *Cheley v. State*, 299 Ga. 88 - S16A0003, GA Supreme Court – (Decided May 23, 2016)
    - Judgment: (Affirmed)
    - Prosecutor in closing argument when explaining why a jailhouse informant might appear nervous made the statement, "everybody's heard the saying…'snitches get stitches.'" Defendant objected to the statement and the trial court sustained the objection. However, Defendant not ask for any kind of curative actions. Defendant appealed claiming the trial court should have sua sponte rebuked the prosecutor.
    - Holding: OCGA §17-8-75 states, "[w]here counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression." However, "it is well-established that a trial court has not duty to rebuke a prosecutor under that statute unless specifically requested by the defendant.
    - IMPORTANT NOTE: The court did not decide whether the trial court improperly sustained the objection that the prosecution's statement was improper. However, for future cases, I would object and ask to rebuke the prosecution and use this case as persuasive argument that it was improper.
  - *Hopkins v. State*, 337 Ga. App. 143 - A16A0264 – GA Court of Appeals – (Decided May 18, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of DUI and various other traffic offenses. In closing arguments, the DA stated while referring to a traffic stop, "the traffic stop is a dangerous situation. What if he had a gun?" Defense counsel objected and moved for a mistrial as facts not in evidence of a

gun. Trial Court denied the mistrial and instead gave a curative instruction.

- Holding: "The granting or refusal to grant a mistrial has long been held to be largely in the discretion of the trial judge, but a mistrial should be granted when it is essential to preserve the right of fair trial." The trial court did not abuse its discretion.
- IMPORTANT NOTE: The COA did not decide whether the prosecutor made an improper comment and instead mentioned: "Assuming without deciding that the statement at issue was improper, we conclude that the trial court's curative instructions adequately preserved Defendant's right to a fair trial." However, I believe you could you use this case as persuasive authority that the DA should be precluded from making inferences about analogies referring to dangerous situations when there is no evidence to indicate as such.

✪ *Durden v. State*, 299 Ga. 273 - S16A0539 – GA Supreme Court – (Decided June 20, 2016)

- Judgment: (Affirmed)
- Defendant was charged and convicted of malice murder. During closing arguments, defense counsel stated, his client did not have testify, but he did and gave 5 hours worth of testimony, because he said he had nothing to hide. (This was in reference to a recorded statement that was tendered as Defendant did not testify at trial). During the State's rebuttal closing, the ADA stated, "he tells you that his client testified before you, no he didn't. testimony in a courtroom is placed under oath. Each witness that took that stand raised their right hand and promised before God to tell the truth. The defendant didn't do that."
- Holding: "Because Defendant did not, in fact, testify at trial, the prosecutor's rejoinder was a permissible attempt to correct defense counsel's misstatement, rather than in impermissible effort to comment on Defendant's failure to testify."
- IMPORTANT NOTE: Defense counsel failed to object to this issue at trial, thus failed to preserve the issue. The Court explained: "As this Court recently held in Gates v. State, 298 Ga. 324 (2016), Georgia law does not make plain error review available for errors that have not been preserved in the trial court relating to alleged improper remarks made by a prosecutor during closing argument." So remember to object!

- **GOLDEN RULE**
  - *Satterfield v. State*, --- Ga. App. --- - A16A1278 – GA Court of Appeals – (Decided October, 19, 2016)
    - Judgment: (Affirmed)
    - Defendant was charged and ultimately convicted of making terroristic threats against a judge and his family. Part of the evidence presented at trial was a letter from Defendant explaining his intentions to kill the judge and his family. In closing arguments, the State mentioned, "Read the letter. It will make your heart skip a beat. A mother and father read this letter. You can just imagine how they felt." Defendant objected based upon golden rule and asked for a mistrial.
    - Holding: "A golden rule argument is one that, regardless of the nomenclature used, asks the jurors to place themselves in a victim's position…Such an argument is impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." However the statement at issue does not ask the jurors about the juror's feelings or to place themselves in a victim's position, rather it asks the jurors to imagine how the victim's felt when the victims received the letter. Thus not improper.

- **IMPROPER COMMENT ON DEFENDANT'S RIGHT TO REMAIN SILENT**
  - *Gaines v. State*, --- Ga. App. --- - A16A1150 – GA Court of Appeals – (Decided November 01, 2016)
    - Judgment: (Affirmed)
    - During closing arguments, Prosecutor stated, "There was his DNA on her nipple where he bit her on the nipple. Have we heard his explanation for that? No. Because he does not have one." Defendant failed to object, so it was decided for plain error.
    - Holding: "A mere comment on the [Defendant's] failure to rebut the state's evidence is not impermissible. Ultimately, closing arguments must be judged in the context in which they are made." COA determined that the State was rebutting arguments made by defense counsel. Defense had prior stated, that there reasons why DNA might be found on the condom, so the State was able to point out that the Defense had failed to try to explain the DNA on the alleged victim's chest area.
  - *Frazier v. State*, --- Ga. App. --- - A16A1118 – GA Court of Appeals – (Decided November 10, 2016)

- Judgment: (Affirmed for harmless error)
- During cross-examination and closing arguments, the prosecutor stated, the Defendant failed to come forward and tell the police the 'real truth' about the crimes. Defendant failed to object to the comments.
- Holding: "There is no dispute that these comments were impermissible and that the trial counsel was deficient for failing to object to them. Nevertheless, given the direct and circumstantial evidence of [Defendant's] guilt, as set forth above, we find that there is no reasonable probability that the outcome of the trial would have been different but for trial counsel's deficient performance."

- **PROPENSITY OF PRIOR ACTS**
  - *Parker v. State*, --- Ga. App. --- - A16A1252 – GA Court of Appeals – (Decided November 01, 2016)
    - Judgment: (Affirmed for harmless error)
    - State was able to introduce a prior conviction based upon impeachment purposes. During closing argument, State mentioned, "this is not his first rodeo…Do you believe somebody who's been convicted of those crimes is not capable of committing this offense?..." Defendant's attorney failed to object and stated at the motion for new trial that she just missed it.
    - Holding: "Evidence of [Defendant's] previous charge and conviction was admitted to attach his credibility by disproving facts to which he testified…The State therefore could not argue that this evidence showed that [Defendant] had a propensity to commit aggravated assault here, and trial counsel was ineffective in failing to object this portion of the prosecutor's closing statement." However, based upon the overwhelming evidence, COA determined it was harmless error.

- **COLLATERAL ESTOPPEL**
  - *Giddens v. State*, 299 Ga. 109 - S16A0256 – GA Supreme Court – (Decided May 23, 2016)
    - Judgment: (Affirmed)
    - Defendant was found not guilty of Aggravated Assault. He was found guilty of several offenses that used the predicate of aggravated assault, such as felony murder and gang related activity. Defendant filed a motion for new trial and was granted a new trial based upon instructional errors. Defendant then filed a plea in bar to prohibit being retried on the offenses he was found guilty using the predicate offense of aggravated assault.

- Holding: "Inconsistent verdicts 'give little guidance as to the jury's factual findings,' meaning that the defendant cannot rely on the verdict helpful to him and ignore the verdict harmful to him, to meet his burden of showing that his innocence was conclusively decided in the earlier trial…For this reason, collateral estoppel will not apply to prevent retrial of a vacated conviction merely because it is inconsistent with an acquittal."
- IMPORTANT NOTE: The United States Supreme Court has granted certiorari to decide this very issue in United States v. Bravo-Fernandez, 790 F3d 41 (1st Cir. 2015), cert. granted, No. 15-537, 2016 WL 1173125 (U.S. Mar. 28, 2016). The GA Supreme Court stated this decision would not come out prior to the two term session required in the case at bar. Therefore, this issue may be decided differently in the coming months. I would continue to file plea in bars on any case that has this issue in hopes SCOTUS decides differently. The Circuit Courts are currently split on what to do.

✪ *Holt v. State*, --- Ga. App. --- - A16A1360 – GA Court of Appeals – (Decided October 28, 2016)

- Judgment: (Affirmed)
- Defendant was alleged of robbing a victim at gun point and taking her money and purse while she was at an ATM. Afterwards, he took the alleged victim's car. A couple days later, he was stopped and arrested, when it was determined the car he was in was stolen. He eventually plead guilty to the "Theft by Receiving" as it relates to the car. About a year later, he was charged for armed robbery and theft by taking as it relates to the taking of the purse and money. Defendant claimed the State was collaterally estopped because he plead guilty to the theft by receiving and thus could not be charged with the taking. His ultimate claim was the purse and money were in the car already and the courts already determined he received the car.
- Holding: "Collateral estoppel…may completely bar a subsequent prosecution where one of the facts necessarily determined in the former proceeding is an essential element of the conviction sought…The Doctrine of collateral estoppel will not bar a retrial unless the record of the prior proceeding affirmatively demonstrates that an issue involved in the second trial was definitely determined in the former trial; the possibility that it may have been does not prevent the re-litigation of

that issue." The COA determined that the taking of the initial items "may" have been completed prior to him receiving the car and thus collateral estoppel is not appropriate.

- **COLLATERAL ESTOPPEL**
  - **DOUBLE JEOPARDY**
    - *Bonner v. State*, --- Ga. App. --- - A16A1097 – GA Court of Appeals – (Decided November 17, 2016)
      - Judgment: (Reversed)
      - Defendant was charged in Clayton County for theft by receiving a stolen vehicle. At the same time, he was charged in Fulton County for Armed Robbery and Motor Vehicle Hijacking for taking said car. Defendant pled guilty to the Theft by Receiving charge in Clayton County and then filed a plea in bar to the Fulton County offenses. Trial Court denied the plea in bar, and now the COA reverses.
      - Holding: Collateral Estoppel is where, "a defendant's prior conviction necessarily includes a factual finding that would prevent his conviction on other charges, further prosecution of those charges is barred, and the trial court erred to the extent that it found that a subsequent prosecution may proceed as long as the defendant is not convicted on the barred charge." The COA went further and stated, "In Georgia, there is no doubt that one cannot be convicted of both robbery of a vehicle and theft by receiving that vehicle. The offense of theft by receiving is intended to catch the person who buys or receives stolen goods, as distinct from the principal thief." The COA explained, "the charges of armed robbery under OCGA §16-8-41 and hijacking a motor vehicle under OCGA §16-5-44.1 as indicted in this case, each requires proof that [Defendant] actually took the car. Because these charges are mutually exclusive of [Defendant's] prior conviction for theft by retaining the vehicle, the trial court erred in denying his plea in bar and the motion to dismiss the Fulton County indictment."

- **COMPETENCY TO STAND TRIAL**
  - *Tye v. State*, 298 Ga. 474 - S15A1522 – GA Supreme Court (decided January 19, 2016)
    - Judgment: (Affirmed)
    - Defendant filed a motion for continuance and claimed he was incompetent one week prior to trial and the trial court denied his motion stating it was for delay of proceedings. After his conviction, Defendant reasserted he was incompetent to stand trial and a hearing was

conducted to determine his competency. Trial Court determined the defendant was competent

- Holding: Defendant's competency could be determined post-adjudication and it is the Defendant's burden to show by the preponderance of evidence that he was not competent…"A criminal defendant is deemed to be competent for the purposes of standing trial if the defendant is capable of understanding the nature and object of the criminal proceedings against him and of assisting his attorney with his defense."
- IMPORTANT NOTE: "As acknowledged by Dr. Flores, merely having a low IQ may not render an individual incompetent to stand trial. *See* Slaughter v. State, 292 Ga. 573 (2013)."

➢ **CONFIDENTIAL INFORMANT**

✪ *McGhee v. State*, 337 Ga. App. 150 - A16A0388 – GA Court of Appeals – (Decided May 18, 2016)

- Judgment: (Affirmed – however did indicated trial court made error)
- Defendant was charged with various drug offenses based upon a tip from a confidential informant. The CI contacted the police and made a phone call to the Defendant in the police's presence to set up a buy. Police responded to the set up and arrested the Defendant. Defendant sought to reveal the name of the CI. Trial Court determined the CI was a mere tipster and refused to make the State reveal the name of the CI.
- Holding: There are two types of confidential informants. (1) a mere tipster, the State does not have to reveal the name. (2) a participating informant in which a two part analysis must take place to determine if the informant must be revealed. The Trial Court determined this was a mere tipster and did not require the name to be disclosed. However, the COA determined that the CI was not a mere tipster, since he set up the buy and contacted the Defendant using his phone. Thus the CI was determined to be a participating informant. The two part test to determine if a participating CI should be revealed is: (1) First consider the evidence to determine (a) that the CI is an alleged informer, whose testimony appears to be material to the defense on the issue of guilty of punishment; (b) that the testimony for the prosecution and the defense is or will be in conflict; and (c) that the CI was the only available witness who could amplify or contradict the testimony of these witnesses. (2)

The second part is to hold an in-camera hearing of the CI's testimony, after which the court should 'weigh the materiality of the informer's identity to the defense against the State's privilege not to disclose his name under Roviaro v. U.S. 353 U.S. 53 (1957). The COA determined that the Defendant never argued during trial the disputed facts concerning the CI and never raised an entrapment defense, the Defense did not meet the threshold determination to determine if an in-camera inspection was necessary.

- ✪ *Woodruff v. State*, --- Ga. App. --- - A16A0882 – GA Court of Appeals – (Decided November 03, 2016)
  - Judgment: (Affirmed)
  - Defendant was found guilty of various narcotic charges. Defendant requested pre-trial to reveal the identity of the confidential informant. The CI was the basis for the search and played no other role in the investigation. Further the Defendant was not charged with sale of narcotics to the CI.
  - Holding: "Because the confidential informant appears to be a mere tipster who had neither seen nor participated in the events [search of the house], disclosure was not required."

➢ CONFRONTATION CLAUSE

CO-CONSPIRATOR'S STATEMENT

- ✪ *Franklin v. State*, 298 Ga. 636 - S15A1308 – GA Supreme Court (Decided March 21, 2016)
  - Judgment: (Affirmed)
  - This was actually an ineffective assistance of counsel claim, but the Court decided whether any ineffectiveness was conducted by determining whether a non-testifying co-conspirator's could come into trial. Primarily, co-defendant made several jailhouse statements to a fellow inmate that inculpates himself as well as his co-defendant's. Co-Defendant did not testify, yet these statements were introduced at trial. (Trial counsel did not object, which is why there is an ineffective claim.)
  - Holding: Co-defendant made his jailhouse statement at a time when the investigation was ongoing and the other conspirators remained at large, and thus the statement was made during the pendency of the conspiracy. Additionally, there is no confrontation issue because the statements are non-testimonial. "A statement is testimonial if its primary purpose was to establish evidence that could be used in a future

prosecution." In this case, these statements were clearly not meant for future prosecution.

- **INFORMANT**
  - *Hampton v. State*, --- Ga. App. --- - A16A1270 – GA Court of Appeals – (Decided October 13, 2016)
    - Judgment: (Reversed)
    - Defendant's boss was an undercover informant. Defendant's boss asked Defendant if he knew where anyone could get some meth. Defendant stated he knew a person. There is discrepancies on whether the boss claimed Defendant's job depended on him obtaining the meth and exactly who brought up the subject first. Defendant ultimately arranged a deal. Prior to trial, Defendant requested the State reveal the confidential informant and make him available for trial. Defendant's sole defense was entrapment. After an in-camera hearing with the informant, the Trial Court denied Defendant's motion to reveal and/or present the informant.
    - Holding: The informant was known, because he was the Defendant's former boss, so that issue is moot. However, the COA determined the State should have been required to produce the informant for trial and allow Defendant to confront the informant pursuant to Defendant's Sixth Amendment Rights. "Where a defendant charges that a confidential informant has entrapped him outside the presence of any other witnesses, Roviaro v. United States, 353 U.S. 53, 59-60 (1957), would ordinarily require disclosure of the informant's identity, since the defenses of entrapment would rest upon allegations which only the informant could confirm or deny." The COA went further and explained the informant was not a mere tipster…but a 'decoy' – a person used to obtain evidence (the informer-participant) or to establish facts (the informer-witness) upon which to base a prosecution." Defendant had a right to confront the informant and have the State produce him/her at trial.

- **CONSENT – IMPLIED**
  - *State v. Reid*, 337 Ga. App. 77 - A16A1237 – GA Court of Appeals – (Decided April 22, 2016)
    - Judgment: (Reversed)
    - Defendant moved to suppress the blood test results (taken after being arrested for DUI) on the ground she had not given actual consent to the blood draw as required by Williams v. State, 296 Ga. 817 (2015). Trial court subsequently suppressed the evidence, because the court found Defendant consented out of fear she would lose her license if she refused the test. Court of Appeals reverses.
    - Holding: "A consent to search will normally be held voluntary if the totality of the circumstances fails to show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent." Based upon the officers dashboard camera, defendant "clearly understood the situation and articulately pleaded with the officer not to arrest her. The video also fails to show any coercive circumstances that would undercut the voluntariness of the consent.

- **CONSPIRACY**
  - *Myers v. State*, 299 Ga. 409 - S16A0377 – GA Supreme Court – (Decided July 05, 2016)
    - Judgment: (Affirmed)
    - Defendant was not indicted for conspiracy. Trial Court gave the charge to jury on conspiracy. Defendant appealed claiming this was error. Supreme Court disagrees.
    - Holding: First only slight evidence is required to give a charge to the jury. With that, the Court found the multiple burglaries followed a common design where Defendant assisted in breaking into the homes and the get-a-way driver would sell the merchandise. As for the indictment failing to charge conspiracy, the Supreme Court stated, "The fact that Defendant was not indicted for conspiracy did not preclude giving a charge on conspiracy. Holmes v. State, 272 Ga. 517 (2000) ('It is not error to charge on the subject of conspiracy when the evidence tends to show a conspiracy, even if a conspiracy is not alleged in the indictment.')…Also, Defendant need not have participated in every

burglary for which his cohorts were indicted to be a part of the conspiracy."

- **CONTINUANCES**
  - *Foster v. State*, --- Ga. --- - S16A0712 – GA Supreme Court – (Decided October 03, 2016)
    - Judgment: (Affirmed)
    - Five days before trial, Defendant's attorney requested a continuance in order to obtain an expert to review the autopsy report. At the trial calendar call, Defense Counsel announced ready. At trial, Defense Counsel asked for a ruling on his motion, by which the trial court stated, "your change of venue is denied." There were no further discussions concerning the continuance.
    - Holding: Trial Court did not abuse its discretion because the claim was abandoned, when Trial Counsel announced ready and made no further objections. However the COA went further and explained even if the claim was not abandoned, the Trial Court did not abuse discretion, because Trial Counsel never "made [any] showing as to who the expert would be, what his or her testimony would be expected to show, or how that testimony would benefit [Defendant].
    - IMPORTANT NOTE: If you are going to ask for a continuance, make sure you state for the record: (1) the reason why you want the continuance; (2) the names of the witnesses you hope to call; (3) proffer any expected testimony these witnesses are expected to make; and (4) explain exactly how these witnesses will benefit you at trial. Absent all this being contained in the record, the Court of Appeals will likely state Judge's discretion as they did in this case.

- **OBTAIN ANOTHER ATTORNEY**
  - *Lane v. State*, --- Ga. --- - S16A0721 – GA Supreme Court – (Decided October 17, 2016)
    - Judgment: (Affirmed)
    - Defendant had filed a speedy trial. At the original trial date, Defendant asked for a continuance to have a psychological evaluation conducted and withdrew the speedy trial. Case was specially set for trial 6 weeks later and Defendant was informed that no further delays would granted. Eve of trial, Defendant again asked for continuance. Defendant had hired a private attorney, who was present in court, but would not

be ready for trial. Trial Court denied the continuance, and the original appointed counsel represented defendant at trial. Defendant appeals his denial of the continuance.

- Holding: "While every defendant has the right to hire to counsel, a defendant must use reasonable diligence in obtaining retained counsel. A Defendant may not use a request for change of counsel as a dilatory tactic." Citing Davis v. State, 295 Ga. 168, 169 (2014). A refusal to grant a continuance will not be disturbed unless the trial judge clearly abused his discretion and in this case, the trial court did not abuse his discretion.

➢ CORROBORATION

✪ *Stanbury v. State*, 299 Ga. 125 - S16A0321, GA Supreme Court – (Decided May 23, 2016)

- Judgment: (Reversed)
- Defendant found guilty of murder. His co-defendant testified against him. The judge gave the pattern jury instruction for "a single witness if believed is generally sufficient to establish a fact." The court did not instruct the jury on the defendant cannot be found guilty of a crime based solely on the testimony of an accomplice. Supreme Court held failing to give the second instruction on corroboration was error.
- Holding: "The trial court did not provide the jury with the proper guidelines for determining defendant's guilty or innocence by failing to give the required accomplice corroboration charge, and thus the trial court's failure to provide the unrequested accomplice corroboration charge was clear error not subject to dispute."
- IMPORTANT NOTE: Under footnote 5, Defendant's counsel withdrew his request to charge on Defendant's Statement, but never requested or withdrew a request to charge on corroboration. "Counsel's withdrawal of defendant's statements charge waived the right to that particular charge. His counsel's failure to request the corroboration instruction constituted forfeiture, and did not waive defendant's right to the accomplice corroboration charge." So that leaves the question, as a trial strategy, should an attorney ever request corroboration, in hopes that the judge fails to give it in order to prevail on a motion for new trial? Me personally, I like to try cases only once, so I would always request the charge and argue the charge in closing.

- *Heatherly v. State*, 336 Ga. App. 875 - A16A0262 – GA Court of Appeals – (Decided April 20, 2016)
  - Judgment: (Affirmed)
  - Defendant was convicted of Felony theft by taking based upon the statements of a co-defendant. At a restitution hearing, the defendant was then re-sentenced to misdemeanor. Defendant appeals claiming there was no corroboration of the co-defendant's statement.
  - Holding: "where the only witness is an accomplice, the testimony of a single witness shall not be sufficient." However, because the trial court corrected Defendant's conviction to be a misdemeanor, corroboration is not required. "In numerous decisions our courts have held that corroboration of an accomplice is not necessary to sustain a misdemeanor conviction."

CO-DEFENDANT'S STATEMENT – OCGA 24-14-8

- *Cisneros v. State*, --- Ga. --- - S16G0443 – GA Supreme Court – (Decided October 17, 2016)
  - Judgment: (Affirmed)
  - Defendant was indicted and ultimately found guilty to several counts of armed robbery and home invasion. As to a couple of the counts, there was corroborating evidence of that of the co-defendant who testified. As to two of the counts, however, the only evidence that was presented at trial was that of the co-defendant. State argued the modus operandi of the other counts was sufficient in corroborating the co-defendant's testimony. Court of Appeals affirmed the convictions. Supreme Court offered cert and also affirmed.
  - Holding: "Slight evidence of corroboration is all that is needed to support a guilty verdict, and 'the necessary corroboration may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that he participated in the crime.'…We conclude the modus operandi evidence in this case was sufficient to corroborate [co-defendant's] testimony identifying [Defendant] as a participant in the [remaining charges]."

- **CRIMINAL ATTEMPT TO COMMIT FELONY MURDER**
  - *Summerlin v. State*, --- Ga. App. --- - A16A0674 – GA Court of Appeals – (Decided October, 28, 2016)
    - Judgment: (Affirmed for harmless error)
    - Defendant was charged and convicted but mentally ill on two counts of attempted malice murder and two counts of attempted felony murder. COA initially looked to discern whether criminal attempt to commit felony murder was actually a crime in Georgia.
    - Holding: "There does not appear to be any case law in Georgia on whether an *attempt* to commit felony murder is a recognized crime. We note that other jurisdictions have ruled on this issue, and the majority of jurisdictions which have considered the question have concluded that attempted felony murder is not a crime…[T]he offense of attempt requires an intent to commit a specific offense, while…felony murder…does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result." COA stated additionally that this logic seems sounds, but because the two attempted felony murder charges were merged into the attempted malice murder counts, and defendant was not sentenced on the attempted felony murder counts, this issue is moot.

- **CRIMINAL DAMAGE TO PROPERTY – VALUE**
  - *Frey v. State*, 338 Ga. App. 583 - A16A0829 – GA Court of Appeals – (Decided September 08, 2016)
    - Judgment: (Reversed)
    - Defendant was charged with several charges pertaining to arson. In one count, Defendant was charged with criminal damage to property in the second degree for damaging the neighbor's vehicle, because he thought they spoke to the police. Defendant was only charged with damaging the Jeep and the Court refused to allow evidence of the damage to the neighbor's other vehicle to come into trial. When discussing the value of the damage, the neighbor referenced the damage to the windshields (plural) $300 and other damages without giving a value.
    - Holding: "the State failed to show that the $300 was spent only on the Jeep. And even construing the second question as pertaining only to the Jeep, the victim failed to place a monetary value on the cost of replacing the mirrors. Thus, the State failed to prove that [Defendant] caused at

least $500 of damage to the Jeep as charged in the indictment and therefore failed to prove that Frey committed criminal damage to personal property in the second degree with regard to the Jeep."

- **CRIMINAL TRESPASS**
  - *Harper v. State*, 338 Ga. App. 535 - A16A1008 – GA Court of Appeals – (Decided August 18, 2016)
    - Judgment: (Reversed)
    - Bail bondsman entered a house of third party in order to arrest a client who had failed to appear in court. The bail bondsman ("Defendant") broke down the back door of the house in order to make the arrest. Defendant was found guilty of two counts of criminal trespass. One for the damage to the door under OCGA §16-7-21(a) and the other for trespassing on the property pursuant to OCGA §16-7-21(b)(2). Court affirmed the conviction as to the damage to the door, but reversed the conviction as to the entry onto property pursuant to OCGA 16-7-21(b)(2) for lack of notice.
    - Holding: As it pertains to Count 2, OCGA §16-7-21(b)(2) criminal trespass requires "express notice" that entry is forbidden. "The State's allegation and proof that Defendant was given prior 'constructive notice' not to enter the premises when he entered without permission through a locked door was not sufficient to establish the prior express notice required for violation of OCGA §16-7-21(b)(2)." The Court went further to cite to a Supreme Court case Murphey v. State, 115 Ga. 201, 202 (1902) "it ought in every case of this kind to be made to clearly appear, not only that the notice [not to enter] given to the accused was intended to apply to the particular [premises] alleged to have been unlawfully entered upon, but also that such notice was conveyed to him *by language sufficiently explicit* to enable him to so understand."

- **CRUELTY TO CHILDREN IN FIRST DEGREE**
  - *Everhart v. State*, 337 Ga. App. 348 - A16A0652 – GA Court of Appeals – (Decided May 25, 2016)
    - Judgment: (Reversed in part concerning this issue)
    - Defendant was charged with Cruelty to Children in the First Degree (and several other counts which he was found guilty). Specifically Defendant was charged in Count 1 with "cruelty to children in the first

degree in violation of OCGA §16-5-70 when he willfullty deprived the victim of necessary substance to the extent said child's health and well-being were jeopardized by failing to seek medical attention for said child after noticing injury and illness to the child which continued to worsen." Defendant argued timely medical care does not qualify as "necessary sustenance" under the statute. COA agrees.

- Holding: "The denial of necessary and appropriate medical care for a child under 18 years of age can constitute cruelty to a child when it causes the child cruel or excessive physical or mental pain, under OCGA §16-5-70(b), but it does not constitute a denial of sustenance. In order for the State to have charged Defendant sufficiently with cruelty to children in the first degree for the failure to seek timely medical care following the severe beating of the victim, the State needed to allege that the failure maliciously caused the child 'cruel or excessive physical or mental pain.' OCGA §16-5-70(b). The State's indictment omitted these essential elements of the crime and therefore failed to charge Defendant with any crime at all."

➢ DEFENDANT'S RIGHT TO BE PRESENT IN ALL STAGES OF TRIAL

BENCH CONFERENCES

✪ *Murphy v. State*, 299 Ga. 238 - S16A0150 – GA Supreme Court (Decided June 20, 2016)

- Judgment: (Affirmed)
- Defendant was found guilty of Felony Murder. She appealed claiming that her rights to be present at all stages of the trial were violated, because she did not attend any of the bench conferences. Neither the Defendant nor the Defense Counsel objected to her not being able to participate in the bench conferences.
- Holding: "It is well-established that proceedings involving the selection of a jury are considered 'critical stages at which the defendant is entitled to be present'…, and that a defendant who is present in the courtroom but who does not participate in a bench conference at which a juror is discussed and dismissed is not 'present' to the extent required under the federal and state constitutions." This right to be present can be relinquished, if the Defendant waives that right or acquiescence to the right. "Acquiescence may occur when counsel makes no objection and

a defendant remains silent after he or she is made aware of the proceedings occurring in his or her absence."

- *Smith v. State*, --- Ga. --- - S16A0835 – GA Supreme Court – (Decided November 21, 2016)
  - Judgment: (Affirmed)
  - Defendant was found guilty at a joint trial with the co-defendant for murder. Defendant's sole enumeration of error was that she had a right to be present at a bench conference whereby a potential juror requested to be excused based upon hardship. Defendant did not object at trial and the issue was not brought up until the appeal, nearly 4 years later. Court determined the Defendant acquiesced to not being present.
  - Holding: Defendant had a right to be present at the bench conference. *See* Burney v. State, S16A1042 (decided October 17, 2016). However, Defendant is free to waive this right either personally or by counsel or by acquiescence to the waiver. "Acquiescence, which is a tacit consent to acts or conditions, may occur when counsel makes no objection and a defendant remains silent after he or she is made aware of the proceedings occurring in his or her absence. Burney." Defendant observed the bench conference taking place and voiced no objection to her absence. Thus she acquiescenced.

INTERPRETER TRANSLATED INFORMATION INCORRECTLY

- *State v. Tunkara*, 298 Ga. 488 - S15A1715 – Georgia Supreme Court (Decided February 01, 2016)
  - Judgment: (Affirmed)
  - Defendant was provided an interpreter to translate the trial proceedings. Toward the end of the trial, Defense Counsel moved for a mistrial, stating his client has been receiving mis-information by way of the interpreter about crucial facts of the case. In particular, whether it was his blood or the decedent's blood on the murder weapon. After Defendant was found guilty, the trial court granted a new trial based upon the defendant's due process rights and his right to be present and understand all proceedings under the Sixth and Fourteenth Amendments.
  - Holding: "As a general matter, the discretion given to the trial judge when considering a motion for new trial is broad" and we affirm the court's ruling. The Court affirmed the Trial Court's decision based upon the discretion of the judge to grant a new trial. But trial court granted

new trial based upon Defendant, even though present at trial, did not understand the proceedings due to the interpreter.

- **JUROR EXCUSED FOR CAUSE WHILE DEFENDANT WAS NOT PRESENT**
  - ✪ *Smith v. State*, 298 Ga. 406 - S15A1705 – Georgia Supreme Court (Decided February 01, 2016)
    - Judgment: (Affirmed)
    - Defendant was present during the questioning of Juror #33, where it was indicated she could not be fair and impartial due to being associated with a similar offense on her grandmother. Before the any motions to strike, Defendant requested to go to the restroom. While Defendant is in the restroom, his attorney stated he would be making a motion for cause. The judge granted the motion and stated he would go back on the record with once Defendant returned from the restroom. However, juror #33 was never brought back up.
    - Holding: Even though "proceedings at which the jury composition is selected or changed are critical stages at which the defendant is entitled to be present," Defendant waived and acquiesced to the juror's removal by not objecting to her removal at any time during the trial.
  - ✪ *Pack v. State*, 335 Ga. App. 783 - A15A2315 – GA Court of Appeals – (Decided February 23, 2016)
    - Judgment: (Affirmed)
    - Defendant did not go to the bench conference where the Trial Court excused a juror who was on first offender. Trial Court excused the juror for cause because it believed someone on First Offender probation could not sit on the jury. There was no objection by the defendant's counsel.
    - Holding: "A defendant need not participate in a bench conference consisting of 'essentially legal argument about which the defendant presumably has no knowledge." This was a purely legal argument and thus the Defendant was not required to attend.
    - NOTE: The Court of Appeals acknowledged that the trial court was actually incorrect for excusing the juror for cause as someone on first offender probation can sit on a jury. (citing Humphreys v. State, 287 Ga. 63 (2010))

- **JUDGE DISCUSSED A PROCEDURAL ISSUE WITH ATTORNEYS**
  - *Pitt v. State*, 337 Ga. App. 436 - A16A0408 – GA Court of Appeals – (Decided June 15, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of Child Molestation and Aggravated Child Molestation. During the trial, Defendant was excused from the courtroom so one of his attorneys could speak to him in the booth. His other attorney along with the District Attorney discussed the remaining witnesses including a new defense witness. Defense counsel gave a proffer to the court for the necessity of having the witness testify. When the Defendant came back to the courtroom, the DA agreed to allow the new witness to testify. Defendant requested a new trial based upon he was not present when the discussions about his new witness were made to the court.
    - Holding: "The short portion of the trial in which Defendant was absent was not a critical phase of the proceedings. The only issue discussed was a procedural question about a witness that the court never had to resolve because it was resolved by the parties once Defendant was present in the courtroom, and thus the brief discussion was not a portion of the proceeding where Defendant had an unequivocal right to be present."
- **JUDGE MET PRIVATELY WITH A WITNESS**
  - *Scudder v. State*, 298 Ga. 438 - S15A1312 – Georgia Supreme Court – (Decided February 08, 2016)
    - Judgment: Affirmed based upon counsel failing to object during trial
    - A witness stated she did not want to testify based upon she did not want to be considered a snitch and the pressure of testifying has caused her mental anguish. The judge asked the witness to come to his office and speak to him privately about her concerns. After the private conversation, the witness took the stand and testified without objection.
    - Holding: Neither the defense counsel nor the defendant raised an objection at trial, so they have waived the Defendant's right to be present
    - In dicta, the court acknowledges the Defendant has the right to be present and see and hear all critical parts of his trial. The court went further to state, "this is a fundamental right and a foundational aspect of due process of law." However, the defense failed to raise an objection. (I believe, had an objection preserved the issue, that this would have

been grounds for reversal based upon a violation of the Defendant's Due Process Rights)

- ✪ *Weaver v. State*, 336 Ga. App. 206 - A15A2044 – GA Court of Appeals – (Decided March 15, 2016)
  - Judgment: (Affirmed)
  - During jury deliberations, the trial court received a note concerning one of the jurors wished to discuss a matter with the judge. The trial court sent a note back asking what about. The jury sent a subsequent note indicating the juror wished to speak to the judge about juror misconduct. The trial court sent another note back indicating they should continue to deliberate. All these notes were passed during a recess when neither attorneys or the defendant was present in the courtroom.
  - Holding: Defendant waived his right to be present by failing to object upon learning of the notes being passed.
  - IMPORTANT NOTE: the Court of Appeals did indicate however, "upon being told of the occurrence, a motion for mistrial is a proper manner for objecting." Thus, if the judge ever passes a note while the Defendant is not present, defense counsel should immediately request a mistrial to preserve the objection.

- **JURY NOTES**
  - ✪ *Burney v. State*, --- Ga. --- - S16A1042 – GA Supreme Court – (Decided October 17, 2016)
    - Judgment: (Affirmed)
    - After selecting the jury for the trial, but before the jurors left for the day, five jurors wrote notes to the trial judge. Two of the notes dealt with scheduling matters. Three other notes dealt with jurors requesting be released for hardship and a final note dealt with a juror remembering one of the potential witnesses. When the trial court informed trial counsels about the notes, Defendant was not present in the courtroom. Trial was excused for that night, and when the parties, including the Defendant, returned the next morning, the Trial Court again addressed the notes and asked if anyone wanted to review the notes. The only statement made by defense counsel was he wanted them included in the record. Defendant remained silent about the notes.
    - Holding: The right to be present at all stages of the proceedings can be relinquished by the Defendant and waived, "if the defendant personally

waives it in court; if counsel waives it at the defendant's express direction; if counsel waives it in open court while the defendant is present; or if counsel waives it and the defendant subsequently acquiesces in the waiver." Citing Hampton v. State, 282 Ga. 490, 492 (2007). "As our precedents explain, acquiescence…may occur when counsel makes no objection and a defendant remains silent after he or she is made aware of the proceedings occurring in his or her absence." Defendant was made aware of the notes the following morning and never questioned or objected to the notes.

- **DEFENDANT'S RIGHT TO REMAIN SILENT OR REQUEST FOR ATTORNEY**
  - *Ragan v. State*, --- Ga. --- - S16A1107 – GA Supreme Court – (Decided October 17, 2016)
    - Judgment: (Affirmed for harmless error)
    - Defendant presented at trial a psychologist to testify about Defendant's mental culpability. During cross-examination of the psychologist, the State asked, "Additionally, he reportedly requested an attorney before making any statements?" Defense Counsel objected before an answer was given and moved for a mistrial. Trial Court denied the mistrial and informed the jury to disregard the last question.
    - Holding: "In Doyle v. Ohio, 426 U.S. 610 (1976) the U.S. Supreme Court ruled that it is a violation of the defendant's due process rights for the State to comment on the defendant's invocation of his right to remain silent…The Supreme Court in Wainwright v. Greenfield, 474 U.S. 284 (1986) later extended this protection to invocations of the right to counsel." The Supreme Court determined any error was harmless however and further stated, "Our conclusion that this error is harmless is bolstered by the overwhelming evidence of [Defendant's] guilt, the curative instruction provided by the trial court, and the fact that [Defendant's] reported request for an attorney was never again mentioned."

- **DEMONSTRATIVE EVIDENCE**
  - *Smith v. State*, 299 Ga. 424 - S16A0398 – GA Supreme Court – (Decided July 05, 2016)
    - Judgment: (Affirmed)
    - State was allowed to present an expert witness who used a doll to describe how shaking the child could cause the injuries to the child, which ultimately caused the child's death. Defense claims the Trial Court abused its discretion in allowing the demonstration.
    - Holding: "Demonstrative evidence is combination of real and testimonial evidence. It is real evidence in that it 'is adduced directly to the senses of the court or jury' but it is irrelevant and inadmissible unless accompanied by witness testimony that shows that the demonstrative evidence is substantially similar to the actual conditions or events at issue." The Supreme Court cited United States v. Gaskell, 985 F2d 1056, 1060 (11th Cir. 1993) and stated, "'As a general rule, the district court has wide discretion to admit evidence of experiments conducted under substantially similar conditions.' The burden is on the party offering a courtroom demonstration or experiment to lay a proper foundation establishing a similarity of circumstances and conditions. Although the conditions of the demonstration need not be identical to the event at issue, 'they must be so nearly the same in substantial particulars as to afford a fair comparison in respect to the particular issue to which the test is directed.' Further, experimental or demonstrative evidence, like any evidence offered at trial, should be excluded 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" Considering the evidence and testimony as a whole, the Trial Court did not abuse its discretion.
    - IMPORTANT NOTE: The Supreme Court again reiterates that we must cite to the new evidence code. "As the Court has emphasized, 'we are all living in a new evidence world and are required to analyze and apply the new law.'" So cite the new evidence code whenever possible.

- **DIRECTED VERDICT**
  - "UNPUBLISHED OPINION" - *State v. Davis*, --- Ga. --- - S16A1664 – GA Supreme Court – (Decided September 06, 2016)
  - Facts of case from Daily Report: http://www.dailyreportonline.com/home/id=1202768640624/High-Court-Murder-Mistrial-No-Bar-to-Directed-Verdict-for-Defense?mcode=1202617074542&curindex=1
    - Judgment: (Affirmed)
    - This is an unpublished opinion, which was reported in the Daily Report. I thought it was interesting and so I am including it in the case summaries. I have not read the opinion myself and all facts come from the Daily Report. Perhaps it could be used in persuasive argument, should a similar issue arise.
    - Defendant was charged with murder. Trial Counsel argued for a directed verdict, but the trial judge reserved ruling. Jurors came back deadlocked and the trial judge ordered a mistrial. Several weeks later the trial attorney again asked to be heard on the matter of directed verdict. Trial judge ultimately ruled in favor of the Defendant's directed verdict and dismissed the case. State appealed.
    - Holding: from what I understand, the State did not procedurally follow the rules in terms of appealing, so the case was dismissed. However, State was arguing that Trial Judge no longer lacked jurisdiction to rule on the directed verdict once the mistrial was ordered. Defense argued jeopardy was still attached, since the Indictment was still pending. "Supreme Court's two page order said that, since [Defendant's] indictment had been neither dismissed nor nolle prossed at the time of [Trial Judge's] order, she retained jurisdiction over his case." Which signifies the Trial Judge could still rule on the directed verdict. Thus, I would always reassert my motion for directed verdict should a case end with a hung jury mistrial.

- **DISCOVERY VIOLATION**
  - *Moceri v. State*, 338 Ga. App. 329 - A16A0063 – GA Court of Appeals – (Decided July 07, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of vehicular homicide for events that occurred when he was fleeing police, the passenger of his vehicle died

when he struck a light pole. Defendant entered reciprocal discovery with the State. At trial, defendant was going to present expert testimony that a recall from BMW could have contributed to the crash, when the accelerator cable got stuck. Defense counsel gave summaries of the expert testimony and notified the Court the State had no right to inspect the vehicle. The trial court disagreed and ordered full expert reports be turned over and submitted a Court Order that the vehicle remain available for inspection in the current condition. Defense counsel did not turn expert reports and the car was eventually sold and destroyed.

- Holding: "Exclusion of evidence under OCGA §17-16-6 for failure to comply with the Act's discovery requirements applies only on a showing of bad faith and prejudice, and is imposed mutually on the defendant to ensure compliance with the Act. A defendant has no unqualified constitutional right to present evidence that violates a state's rules of evidence and procedure, and 'probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule.'"

✪ *Cushenberry v. State*, --- Ga. --- - S16A1039 – GA Supreme Court – (Decided November 21, 2016)

- Judgment: (Affirmed)
- About 10 days prior to trial, State began turning over evidence of Defendant's gang participation, including adding an expert witness in gang activities on their witness list. About 5 days before trial, State turned over evidence on a CD that contained photographs of tattoos on Defendant. Defense was unable to open the CD. The day of trial, State turned over additional evidence concerning gang participation. Defense moved to exclude the evidence or at a minimum to continue the trial. Trial court denied both requests.
- Holding: OCGA §17-16-4(c) "If prior to or during trial a party discovers additional evidence or material…which is subject to discovery…such party shall promptly notify the other party of the existence of the additional evidence or material and make it available as provided in this article." The Court went further to state, "although the exclusion of evidence is among the potential remedies, that harsh remedy should be imposed only where there is a showing of both bad faith by the State and prejudice to the defense." Defense attorney at the motion for new trial admitted that there was no bad faith and the DA turned over the evidence once it was received, therefore this claim cannot prevail.

Further, since the Trial Court allowed the Defense to interview the expert witness added to the witness list prior to testifying, there was no abuse in discretion in failing to continue the trial.

- **DFACS RECORDS**
  - ✪ *Grier v. State*, --- Ga. App. --- - A16A0236 – GA Court of Appeals – (Decided November 09, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of various counts of child molestation or aggravated child molestation. Defendant sought to subpoena the DFACs records for the complaining witness. Both times DFACs moved to squash the subpoena and Defendant never objected.
    - Holding: OCGA §49-5040(b) provides that DFACs records or other child advocacy center records concerning reports of child abuse are confidential except as provided by other code sections. OCGA §49-5-41 and §49-5-41.1 allows access to DFACs records by court subpoena upon an in-camera inspection that the records are relevant. In this case, Defendant never requested an in-camera inspection and thus, DFACs was not required to turn over the records.

- **DISMISSAL OF CASE BY JUDGE**
  - ✪ *State v. Broughton et. al.*, 335 Ga. App. 700 - A15A1748 – GA Court of Appeals (Decided February 12, 2016)
    - Judgment: (Reversed)
    - Trial court dismissed (was not indicated "with prejudice or not") three defendant's cases at a probation hearing, because the State failed to produce complaining witnesses.
    - Holding: "Even if this trial court would have been justified in denying the State's petitions for probation revocation on the ground that it had failed to produce any witnesses in support of the petitions, there is no legal basis for the dismissal of the indictments at issue in this appeal." In other words, the Judge had authority to dismiss the probation warrants; however, since the actual charges were not at issue during the probation, the judge had no authority to also sua sponte dismiss the underlying charges.

- **DISRUPTING SCHOOL ACTIVITIES – OCGA 20-2-1182**
  - **FIRST ADMENENT FREEDOM OF SPEECH**
    - *West v. State*, --- Ga. --- - S16A1369 – GA Supreme Court – (Decided October, 31, 2016)
      - Judgment: (Reversed)
      - Defendant is charged with violating OCGA 20-2-1182, which criminalizes upbraiding, insulting, or abusing a public school teacher, administrator, or bus driver in the presence of a pupil while on the premises of a public school or school bus. Defendant filed a demurrer complaining the statute is overly broad and against his constitutional First Amendment free speech.
      - Holding: "We agree with [Defendant} that this statute, though perhaps well intentioned, neither regulates unprotected speech nor is appropriately tailored to meet its intended objective and is therefore overbroad." The Court went further and explained, "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." The statute in essence makes it criminal for any parent, employee or concerned citizen while on school premises to speak critically of the school officials or potentially face criminal punishments. Thus the Statute is deemed unconstitutional.

- **DOUBLE JEOPARDY**
  - *Edwards v. State*, 336 Ga. App. 595 - A16A0532 – GA Court of Appeals – (Decided March 30, 2016)
    - Judgment: (Affirmed)
    - The jury was sworn in, but prior to any evidence being presented, Defense counsel informed the trial court that a potential conflict exists. Defense counsel had previously represented the mother of the complaining witness and had personal knowledge that the mother had potentially influenced the complaining witness. The trial court asked the defendant if he wanted to waive any objection and continue with his attorney, who would be instructed not to ask any questions about the privileged information. Defendant agreed. However, the trial court still concerned about the conflict ordered a mistrial sua sponte over defendant's objection. Defendant later filed a plea in bar based upon double jeopardy.

- Holding: "Because a trial under these circumstances would have been inconsistent with the public interest in a fair trial, conducted in accordance with ethical standards, designed to end in a just judgment, the trial court did not abuse its discretion by concluding that 'manifest necessity' existed for the mistrial."

✪ *Hantz v. State*, 337 Ga. App. 675 - A16A0249 – Ga. Court of Appeals – (Decided June 30, 2016)

- Judgment: (Affirmed)
- Defendant was charged with speeding and DUI. Prior to trial, Defendant pled guilty to the speeding offense and the Trial Court orally announced he would accept the plea and sentence her to 12 months probation. The next day Defendant went to trial and was found guilty of the DUI. The Trial Court sentenced Defendant to both counts 12 months probation to run consecutively to each other. Defendant claims her attorney was ineffective due to he did not file a plea in bar once she entered her guilty plea to the speeding. COA disagrees.
- Holding: "Here the trial court did not enter a final judgment of conviction of Defendant's oral guilty plea at the plea hearing. Rather, the judge simply announced that he would accept the plea and would impose 12-month probated sentence recommended by the state. An oral declaration as to what the sentence shall is not the sentence of the court; the sentence signed by the judge is…Thus, the criminal proceedings against Defendant were still pending in the trial court until such time as her sentence was entered in writing and became final."

✪ *State v. Davis*, 338 Ga. App. 580 - A16A1156 – GA Court of Appeals – (Decided September 07, 2016)

- Judgment: (Reversed)
- Police obtained a search warrant, which the police recovered a computer and an IPhone. A search of the computer revealed several photographs of child pornography. Defendant was charged with 25 counts of sexual exploitation of children. The State sent off Defendant's IPhone to Apple and eventually obtained the contents revealing he sent sexually explicit material to a 14 year old child. An interview of the child, revealed Defendant had also fondled the child's butt on one occasion. State took out a second indictment charging Defendant with two counts of child molestation. Defendant pled guilty to the first indictment and then filed

a plea in bar to the second indictment. Trial Court granted the plea in bar based upon double jeopardy. Court of Appeals reverses.

- Holding: "Under OCGA §16-1-7 (b), if several crimes [1] arising from the same conduct are [2] known to the proper prosecuting officer at the time of commencing the prosecution and are [3] within the jurisdiction of a single court, they must be prosecuted in a single prosecution. A second prosecution is barred under OCGA §16-1-8 (b) (1) if it is for crimes which should have been brought in the first prosecution under OCGA §16-1-7 (b). In order for this procedural aspect of double jeopardy to prohibit a prosecution, all three prongs must be satisfied. Crimes arise from the same conduct if they emerge 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…In this case, although the evidence support the charges in both indictments was seized on the same date, the charges are entirely separate and do not involve a continuing course of conduct nor did they occur without a break in the action."

✪ *State v. Garlepp*, 338 Ga. App. 788 - A16A1230 – GA Court of Appeals – (Decided September 21, 2016)

- Judgment: (Reversed)
- Defendant was pulled over for following too close, failing to wear a seat belt and DUI of a person under the age 21. Defendant was allowed to pay his fine pursuant to the seatbelt charge on-line after an amended citation was entered into the database. After Defendant paid his fine, Solicitor's Office brought forth an accusation pursuant to the rest of the charges. Defendant filed a plea in bar pursuant to double-jeopardy. Trial Court ruled in favor of Defendant. COA reverses.
- Holding: OCGA §16-7-1(b) requires the State to "prosecute crimes in a single prosecution if the crimes (1) arise from the same conduct, (2) are known to the proper prosecuting officer at the time of commencing the prosecution, and (3) are within the jurisdiction of a single court." As it pertains to elements (1) and (3) the court agrees with the Trial Court. However, COA disagrees as it pertains to (2) that the proper prosecuting officer at the time of commencing the prosecution was aware of the other charges. In essence, COA determined there was no evidence presented that the solicitor who amended the seat-belt citation and

entered it into the database was aware of the outstanding pending charges.

- IMPORTANT NOTE: COA pointed out, when deciding if the officer was aware of other charges, you do not look at the prosecuting officer who is currently prosecuting the outstanding charges, but you look to see if the prosecuting officer who handled the original charge was aware of the current charges. In this case, the original solicitor was not aware of outstanding charges when he/she posted the fine amount on-line.

✪ *Holt v. State*, --- Ga. App. --- - A16A1360 – GA Court of Appeals – (Decided October 28, 2016)

- Judgment: (Affirmed)
- Defendant was alleged of robbing a victim at gun point and taking her money and purse while she was at an ATM. Afterwards, he took the alleged victim's car. A couple days later, he was stopped and arrested, when it was determined the car he was in was stolen. He eventually plead guilty to the "Theft by Receiving" as it relates to the car. About a year later, he was charged for armed robbery and theft by taking as it relates to the taking of the purse and money. Defendant claimed double jeopardy as he already plead guilty to the theft by receiving and the same district attorney's office is now prosecuting him for the armed robbery.
- Holding: "OCGA §16-1-8(b)(1) provides that a prosecution is barred if the accused was formerly prosecuted for a different crime…, if such former prosecution…[r]esulted in either a conviction or an acquittal and the subsequent prosecution…is for a crime with which the accused should have been charged on the former prosecution (unless the court ordered a separate trial of such charge){.}" COA determined the double jeopardy claims because Defendant failed to present any evidence that the prosecution at the time of the guilty plea for theft by receiving had knowledge of the armed robbery. "The defendant 'bears the burden of affirmatively showing that the prosecuting attorney for the State who handled the first prosecution had actual knowledge of the facts supporting the charge allegedly subject to the plea in bar."
- CONCURRING OPINION Judge Dillard: concurs in judgment only as to the double jeopardy claim, "because I do not agree with all that is said in that division of the majority opinion. As a result, [double jeopardy] of the majority's opinion decides only the issues presented in that

division and may not be cited as binding precedent. See Court of Appeals Rule 33(a)."

- **ISSUE PRECLUSION**
  - *Bravo-Fernandez et. al. v. United States*, --- U.S. --- - No. 15-537 – United States Supreme Court (Decided November 29, 2016)
    - Judgment: (Affirmed)
    - Two Defendants were originally charged with violating the federal program bribery act; conspiracy to violate the act, and traveling interstate commerce to further violate the act. After a jury trial, the jury found defendants guilty of the bribery counts, but acquitted them of the conspiracy and traveling interstate counts. Defendants ultimately appealed the bribery counts and prevailed based upon improper jury instructions. Defendants then filed a motion for dismissal and acquittal claiming double jeopardy, since the jury already addressed the issue when they acquitted them of the conspiracy counts. Defendant's argued issue preclusion, making similar arguments that was decided in Yeager v. United States, 557 U.S. 110 (2009), when the court precluded retrial when the jury acquitted Defendant on some counts and hung on other counts, based upon the same ultimate issues. Supreme Court determined Yeager did not apply.
    - Holding: This is a rather lengthy decision. In essence, the Court determined that with Yeager, the hung jury on specific counts was in effect "no decision" thus no inconsistency, whereas in the case at bar, a guilty conviction is a "decision". Thus, even though inconsistent verdicts, the State can retry Defendants on the counts where the jury returned a guilty verdict and later vacated on appeal, but obviously cannot retry the acquitted counts. "In other words, because we do not know what the jury would have concluded had there been no instructional error, a new trial on the counts of conviction is in order. [Defendants] have succeeded on appeal to that extent, but they are entitled to no more. The split verdict does not impede the Government from renewing the prosecution."

- **PUNITIVE BOND CONDITIONS**
  - *Edvalson v. State*, --- Ga. App. --- - A16A1392 – GA Supreme Court – (Decided November 08, 2016)
    - Judgment: (Affirmed)
    - Defendant was arrested for child pornography. A condition of his bond included that he have no access to the internet, nor have any devices in his house that could access the internet. Defendant claims that these

bond conditions are punitive in nature and thus jeopardy has attached. He therefore requests that his case be dismissed.

- Holding: "'jeopardy does not attach, and the constitutional prohibition [against double jeopardy] can have no application, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge.' Serfass v. U.S., 420 U. S. 377, 388 (1975) (citations and punctuation omitted). Accordingly, jeopardy does not attach at any pretrial proceeding, including a bond revocation hearing… Thus, the appropriate remedy for pretrial punishment (including bond conditions that are punitive, rather than remedial) is to bring a petition for habeas corpus or other proceeding under the Due Process Clause."

➢ DRIVING UNDER THE INFLUENCE

FIELD SOBRIETY TEST

✪ *Spencer v. State*, 337 Ga. App. 360 - A16A0118 – GA Court of Appeals – (Decided June 9, 2016)

- Judgment: (Affirmed)
- Defendant was stopped and eventually arrested for DUI. On the scene the police officer administered a Horizontal Gaze Nystagmus (HGN test). At the trial, the police officer testified that he looked for 6 clues in the Defendant's eyes and observed 4 clues. Based upon the 4 out of 6 clues observed, the officer testified that indicates a blood alcohol level equal to or greater than .08.
- Holding: "The trial court here did not err in allowing the officer's testimony since he did not identify a specific numeric blood alcohol content based on Defendant's HGN results, and instead properly testified that generally an HGN test showing four out of six clues indicates impairment."
- IMPORTANT NOTE: The Court did affirm, "it is true that an arresting officer's testimony identifying a specific numeric blood alcohol content based solely on a defendant's HGN results should be excluded." *Citing* Scott v. State, 332 Ga. App. 559, 567 (2015).

FOUNDATION FOR BREATH TEST

✪ *State v. Warren*, --- Ga. App. --- - A16A0715 – GA Court of Appeals – (Decided October 12, 2016)

- Judgment: (Affirmed)
- Defendant sought suppression of a preliminary breath test that resulted in the presence of alcohol. During the suppression hearing, the State

attempted to lay the foundation for admittance of the breath test. Specifically the State asked, "was the handheld Alco-Sensor authorized by the Division of Forensic Sciences?" Defendant objected as to leading and the Trial Court sustained the objection. The State attempted to rephrase the questions several times and the closest the State got to a correct answer was the officer believed the device was permitted from the GBI. Trial Court granted the motion to suppress in part based upon lack of foundation. The State never laid a proffer of what the Officer's response would have been had the original objection not been sustained. State Appealed.

- Holding: "Without knowing how the deputy might have answered the prosecutor's question, we do not know whether the State was harmed by any erroneous ruling on the defense objection." The COA did not decide whether there was an error in sustaining the objection for leading, because the COA determined the State failed to give a proffer of the testimony so they cannot determine if any harm occurred.

- **INTOXILIZER CERTIFICATES**
  - *Smith v. State*, 338 Ga. App. 635 - A16A0746 – GA Court of Appeals (Decided September 16, 2016)
    - Judgment: (Affirmed)
    - Defendant objected that the State admitted inspection certificates from the Intoxilyser 9000 based upon the State failed to list the name of the inspector who signed the certificates during discovery. COA affirmed the Trial Court's decision to admit the certificates.
    - Holding: "In Brown v. State, 268 Ga. 76, 80 (1997), the Supreme Court of Georgia held that such inspection certificates merely memorialize the fact that all required calibration tests have been made and that the device passed those tests. The inspection certificates are not testimonial in nature. Rackoff v. State, 281 Ga. 306, 309 (2006). Because an inspection certificate is not testimonial in nature, a defendant has no right to confront the inspector who produced it and the State need not produce the inspector as a witness at trial in order to introduce the certificates into evidence."

- **EXPERT TESTIMONY**
  - *Murphy v. State*, 299 Ga. 238 - S16A0150 – GA Supreme Court (Decided June 20, 2016)
    - Judgment: (Affirmed – State committed error, but lack of bad faith)
    - Defendant was found guilty of Felony Murder. At trial, an expert testified about how the fire started and gave an opinion about an accelerant. Expert witness did not give a written statement prior to trial, which was turned over to the Defense. State asserts it did not violate OCGA §17-16-4(a)(4) notice requirement, because the testimony elicited was a permissible hypothetical question.
    - Holding: "OCGA §17-16-4(a)(4) requires the prosecuting attorney, no later than 10 days prior to trial or as otherwise ordered by the court, to disclose to the defense a written report or summary of its expert's findings and conclusions. Thus, although the State may have been permitted to elicit the Expert's hypothetical opinion by asking him to assume facts admitted into evidence at trial, it still was required under OCGA §17-16-4(a)(4) to provide timely notice of Expert's opinion to defense counsel." However, defendant failed to show any bad faith on the part of the State. Absent bad faith, the testimony would not be excluded. Therefore, trial court did not abuse discretion by allowing the Expert to testify to the conclusion.

- **EXTRINSIC EVIDENCE**
  - *Baughns v. State*, 335 Ga. App. 600 - A15A2242 – GA Court of Appeals (Decided February 05, 2016)
    - Judgment: (Affirmed)
    - Defendant made a motion in limine to preclude from his trial, counts in the Indictment where he was not a named defendant, specifically five counts of burglary. Trial Court denied his request stating all the burglaries show a series or pattern of events – "a burglary spree"
    - Holding: "The new Evidence Code under the concept of 'intrinsic facts' evidence, as compared to evidence of 'extrinsic acts' which are generally inadmissible pursuant to OCGA §24-4-404(b)…evidence is intrinsic to the charged offense…if it (1) arose out of the same transaction or series of transactions as the charged offense; (2) is necessary to complete the story of the crime; or (3) is inextricably intertwined with the evidence regarding the charged offense."

- **FAMILY VIOLANCE**
  - *Voisine v. United States*, 136 S.Ct. 2272 - No. 14-10154 – U.S. Supreme Court – (Decided June 27, 2016)
    - Judgment: (Affirmed)
    - This case involved two separate defendants. The first person, Voisine, had previously pled guilty to what amounted battery family violence (misdemeanor). He later shot a bald eagle. Police learned he had a prior family violence charge and then charged him with also violating U.S.C. §922(g)(9) under the Federal Statute for possessing a firearm, which is precluded by someone who has committed an act of family violence. The second person, Armstrong, had previously pled guilty to what amounted battery family violence (misdemeanor) and a search of his residence revealed a cache of guns and ammunition. He was also charged with violating U.S.C. §922(g)(9). Both men argued that they were not subject to U.S.C. §922(g)(9), because their prior convictions could have been based on reckless conduct and not on domestic violence.
    - Holding: "In sum, Congress's definition of a 'misdemeanor crime of violence' contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly 'use[s]' force, no less than one who carries out that same action knowingly or intentionally. The relevant text thus supports prohibiting petitions and others with similar criminal records from possessing firearms." SCOTUS went further to state, "The federal ban on firearms possession applies to any person with a prior misdemeanor conviction for the use of physical force against a domestic relation. §922(a)(33)(A). That language, naturally read, encompasses acts of force undertaken recklessly, with conscious disregard of a substantial risk of harm."
    - JUSTICE THOMAS dissent: in essence, Justice Thomas believes that reckless domestic violence does contain the element of "use of physical force", therefore the statute should not apply. Justice Thomas foresees that you will have individuals charged with reckless conduct, such as dropping a plate on a wife's foot or a parent getting in a car wreck while texting and driving. These somewhat innocuous events would strip these individuals of their right to bear arms.

- **FELONY MURDER**
  - *Williams v. State*, 299 Ga. 632 - S16A0965 – GA Supreme Court (Decided September 12, 2016)
    - Judgment: (Reversed)
    - Defendant was charged with felony murder based upon felony contributing to the deprivation of a minor. In other words, Defendant was charged with felony murder based upon failing to give adequate care to a minor which resulted in death. Defendant demurred claiming OCGA §16-12-1 (contributing to deprivation of a minor) specifically sets out the sentencing guidelines for causing the death of a minor by deprivation and therefore he or she cannot be sentenced under the guidelines for felony murder. Trial Court denied his demurred. Supreme Court reversed.
    - Holding: "Looking at both the plain language of the statutes, as well as the sequence of their adoption, we come to the conclusion that the felony deprivation statute cannot be used as a predicate offense for felony murder. The clear language of OCGA §16-12-1 (d.1) (1) & (e) specifically criminalizes the death of a minor resulting from an accused's contribution to the deprivation or delinquency of that child, whereas felony murder criminalizes general felony conduct resulting in death of another. Because the felony deprivation statute specifically criminalizes the actions or inactions of an accused resulting in the death of a child, the general provisions of the earlier enacted felony murder statute are inapplicable to OCGA §16-12-1 (d.1) (1)…The State cannot circumvent the specific sentencing scheme established by the General Assembly in OCGA §16-12-1(e) by subsuming it into the felony murder statute in order to take advantage of a harsher sentencing provision."

- **FIRST OFFENDER**
  - *Collins v. State*, --- Ga. App. --- - A16A1269 – GA Court of Appeals – (Decided October 14, 2016)
    - Judgment: (Reversed)
    - In 1995, Defendant entered a negotiated plea for three years probation under the act for first offenders. The day prior to the completion of his probation, Defendant's probation officer completed a petition seeking unsatisfactory completion of first offender based upon three traffic violations during the course of the probation. Two days after the

completion of the First Offender sentence, Trial Court entered an Order stating Defendant was not entitled to discharge and exoneration provided under the act. In 2015, Defendant petitioned the Trial Court for discharge of acquittal, but was denied. Defendant appealed.

- Holding: COA determined they had standing to hear the appeal, because this was a void sentence. The trial court only had authority to revoke defendant's bond during the pendency of his probation. The Order denying him acquittal was filed two days after the fact. Since the trial court did not have authority to revoke defendant's sentence, Defendant was entitled to a discharge and exoneration provided under OCGA §42-8-62.

➢ **FLEEING**

✪ *Sapp v. State*, 337 Ga. App. 14 - A16A0682 – GA Court of Appeals – (Decided April 27, 2016)

- Judgment: (Affirmed)
- Defendant was a passenger in a vehicle when the vehicle fled the scene of a prior assault. A police officer attempted to pull over the vehicle but the vehicle continued to flee. Once the vehicle came to a stop, Defendant fled from the passenger side, but was ultimately arrested. Defendant claimed, since he was not driving he should not be found guilty as a party to the crime of fleeing pursuant to Carter v. State, 249 Ga. App. 354, 357 (2001).
- Holding: "a passenger can be convicted as a party to the crime of fleeing or attempting to elude a police officer, if he flees the scene on foot after the police have stopped the fleeing vehicle." Further this case can be distinguishable from Carter, because in Carter, the passenger did not flee on foot once the vehicle was stopped.

➢ **GANG PARTICIPATION**

✪ *Hayes v. State*, 298 Ga. 339 - S15A1511 – GA Supreme Court (decided January 19, 2016)

- Judgment: (Affirmed)
- Defendants claimed there was insufficient evidence to show they were involved in a street gang – MPRC3000
- Holding: the existence of a street gang," organization, association or group of individuals associated in fact may be established by evidence

of a common name or common identifying signs, symbols, tattoos, graffiti, or attire or other distinguishing characteristics, including, but not limited to, common activities, customs, or behaviors."

- ✪ *Finley v. State*, 298 Ga. 451 - S15A1595 – Georgia Supreme Court – (Decided February 08, 2016)
  - Judgment: (Affirmed)
  - Defendant claims it was error for the Court to admit into evidence items that tended to show he was involved in a gang, including photographs of tattoos, rap albums, social media posting and drawings.
  - Holding: "It is well established that involvement with a gang may be admissible to show motive…and the evidence of gang involvement in this case supported the State's theory of how the co-indictees were affiliated and what motivated them to commit the crimes in the way they did."
- ✪ *Nolley v. State*, 335 Ga. App. 539 - A15A1686 – GA Court of Appeals – (Decided February 02, 2016)
  - Judgment: (Affirmed)
  - Holding: "Proof that the commission of the predicate act was intended to further the interests of the gang is essential to prove a violation of OCGA §16-15-4(a)." There must be some nexus between the act and an intent to further street gang activity. However based upon (1) all the codefendants were members of the gang; (2) the gang was involved in drugs and prostitution, and (3) the offense centered around enforcing gang respect and acquiring territory, we find the evidence was sufficient to establish a nexus between the acts.

➢ GRAND JURY PERJURY

- ✪ *Ellis v. State*, --- Ga. --- - S16A1246 – GA Supreme Court – (Decided November 30, 2016)
  - Judgment: (Reversed)
  - Defendant was former Dekalb County Chief Executive Officer. He was found guilty of perjury and attempt to commit theft by extortion. His perjury count comes by way of his testimony at a Special Purpose Grand Jury. At Defendant's trial, one of the Grand Jurors was called to testify in an effort to prove Defendant's false statements to the Special Purpose Grand Jury were material to the Grand Jury's investigation. Court found this to be error.

- Holding: Whether a false statement was material is normally an issue for the jury…Instead of relying on such appropriate evidence to allow the jury to make an independent decision on the issue of materiality, the State offered evidence of an individual Special Purpose Grand Juror's subjective belief about the materiality of [Defendant's] statement. Because the materiality of [Defendant's] alleged false statements was ultimately a question to be resolved by the trial jury based on objective evidence as set forth above, this subjective evidence was not appropriate."

➢ GUILTY PLEA

BOYKIN RIGHTS

✪ *Raheem v. State*, --- Ga. App. --- - A16A1362 and A16A1363 – GA Court of Appeals – (Decided November 16, 2016)

- Judgment: (Reversed)
- Defendant pled guilty to burglary and armed robbery convictions in 1982 and 1985. In 2013, Defendant filed a motion to withdraw his guilty plea based upon they were not knowing and voluntary because he was not informed of his *Boykin Rights*. Specifically, he was not informed he had a right to confront his accusers and a right to not incriminate himself. There was no transcript of the proceedings.
- Holding: "Regardless of the practices in place at that time, [t]he requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized. Rather, the procedural element added in Boykin was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily. Thus, Boykin imposed a constitutional record-keeping requirement on the State if they hoped to insulate guilty pleas from future attacks on federal constitutional grounds." Since there is no record that Defendant was informed of his *Boykin Rights*, the two cases must be reversed.

VOLUNTARINESS

✪ *Hayes v. State*, 337 Ga. App. 280 - A16A0588 – GA Court of Appeals (Decided May 18, 2016)

- Judgment: (Reversed)
- The Trial Court placed Defendant's plea recommendation on the record. During the colloquy, the trial judge states, you will be recidivised if you proceed to trial, which means if you lose and are found guilty, you will be sentenced to 20 years prison without the possibility of parole. Meaning you will serve every day of the 20 years prison. Defendant

ultimately pled guilty and later filed an out of time appeal to withdraw his guilty plea based upon voluntariness. COA determined the trial judge participated with plea negotiations.

- Holding: "Both this Court and the Supreme Court of Georgia have reversed when it appears from the record that the trial court intimated its intentions with regard to sentencing should a defendant proceed to trial rather than accept a guilty plea…Contrary to the State's assertions that the trial court only informed Defendant that he would not be eligible for parole, the court effectively advised Defendant that it had no intention of probating or suspending any portion of his sentence if he proceeded to trial, stating that he would spend 'every day of the 20-year sentence in prison.'"

- **WITHDRAWAL**
  - *Blackwell v. State*, 299 Ga. 122 - S16A0270 – GA Supreme Court – (Decided May 23, 2016)
    - Judgment: (Affirmed)
    - Defendant pled guilty and entered an agreement to testify truthfully against his co-defendants. Sentencing was withheld until after his testimony. At the plea colloquy, Defendant acknowledged, that upon entering this guilty plea, that he would be required to testify truthfully against his co-defendants and he waives any rights to withdraw his guilty plea. On the eve of trial of his co-defendant, Defendant sought to withdraw his guilty plea based upon OCGA §17-7-93(b), because he had not been sentenced yet. Trial court denied his request to withdraw his guilty plea and the Supreme Court affirmed.
    - Holding: "Where no such prohibition against waiver exists, a criminal defendant may make 'a voluntary, knowing, and intelligent waiver' of the right in question.'…We therefore conclude that a criminal defendant's right under OCGA §17-7-93(b) to withdraw his or her guilty plea at any time prior to sentencing is a right that can be waived."
    - IMPORTANT NOTE: While the Court of Appeals has held that an accused's right to withdraw a guilty plea prior to sentencing can never be withdrawn, these holdings are expressly overruled.

- *Humphrey v. State*, 299 Ga. 197 - S16A0197 – GA Supreme Court – (Decided June 06, 2016)
  - Judgment: (Remanded and ordered to dismiss)
  - Defendant entered a guilty plea to Murder and was sentenced to life without the possibility of parole until after he served 25 years. 15 or so years later he appealed his sentence claiming the judge had no authority to deviate from the statute. This first appeal, the Supreme Court agreed and remanded the case back to the Trial Court to be re-sentenced properly. Prior to being resentenced, Defendant filed a motion to withdraw his guilty plea, claiming since he was improperly sentence it places him back to the original situation as never being sentence. The Trial Court denied the Defendant's motion to withdraw. Supreme Court stated since it was out of term, trial court should never have entertained the motion and should have just dismissed it.
  - Holding: Because the original appeal only involved a single provision concerning eligibility parole, and expressly stated, all other provisions of his sentence remain in effect, his plea is therefore ineligible for withdrawal at this late stage. "Accordingly, defendant had no right to withdraw his plea; his out-of-term motion to withdraw was thus untimely; and the trial court therefore lacked jurisdiction to entertain the motion."
  - IMPORTANT NOTE: The Supreme Court did not decide whether if the entire sentence was remanded back to the trial court, could a defendant as a matter of right withdraw his guilty plea, because he was never sentenced. In dicta, they did say, "where a sentence entered on a plea is later adjudged to be void, 'it is as if no sentence has been entered at all, and the defendant stands in the same position sa if he had pled guilty and not yet been sentence.'" Kaiser v. State, 285 Ga. App. 63, 66 (2007).
- *Shepard v. Williams*, 299 Ga. 437 - S16A0405 – GA Supreme Court (Decided July 05, 2016)
  - Judgment: (Reversed)
  - Defendant pled guilty to malice murder and several other offenses and was sentenced to life in prison. Prior to guilty plea, the trial court ruled inadmissible certain testimony including expert testimony. The trial court then placed the plea offer on the record and indicated accept the plea now or proceed to trial now. Client pled guilty. In a Habeas matter, the Habeas Court determined the on-the-spot requirement to accept the

plea was not knowing or voluntarily and ruled in Defendant's favor. Supreme Court reversed

- Holding: "As determined by the habeas court, Defendant's decision to plead guilty was prompted by the trial court's decision to disallow the testimony of Defendant's expert witness and his imminent trial. This circumstance and the unavoidable pressure it produced do not render his plea involuntary…Defendant's situation was, in fact, no different than that of any other criminal defendant who must decide whether to proceed to trial and put the State to its proof or plead guilty. Accordingly, the habeas court erred to the extent it gave weight to this factor in determining that Defendant's plea was involuntary."

✪ *Lejeune v. McLaughlin, Warden*, 299 Ga. 546 - S16A0072 – GA Supreme Court – (Decided July 14, 2016)

- Judgment: (Reversed)
- This is the second appeal concerning this case. The first appeal, the Supreme Court remanded to trial court for an evidentiary hearing to determine if Defendant knowingly and voluntarily entered his plea. Trial court determined Defendant had knowingly and voluntarily entered his guilty plea. Supreme Court reverses
- Holding: "This Court has, for many years now, held that for a plea to be constitutionally valid, a pleading defendant must be informed of his three 'Boykin rights." (Footnote 2 – "These rights include the privilege against compulsory self-incrimination, the right to trial by jury, and the right of confrontation. See Boykin v. Alabama, 395 U.S. 238, 243 (1969)." Defendant was never informed he had the right against self-incrimination. Habeas court determined based upon prior jurisprudence that a defendant who previously has been through the process, would remember certain rights from prior plea of guilty. (Relying on Parke v. Raley, 506 U.S. 20, 37 (1992)). However in Parke, the Defendant had been through the criminal justice process before, and there is no evidence Defendant in the case at bar had prior experience. The Habeas Court relied upon the two year process with numerous court hearings. But the Supreme Court determined that was not enough.
- JUSTICE NAHMIAS DISSENT: "I would hold that the trial court's failure to ensure that Defendant understood his right against self-incrimination at trial before he entered his guilty plea was harmless error because the record as a whole shows that his plea was knowing

and voluntary under the totality of circumstances and therefore constitutionally valid."

- ✪ *Hanh v. State*, 338 Ga. App. 498 - A16A1409 – GA Court of Appeals – (Decided August 08, 2016)
  - Judgment: (Reversed)
  - Defendant entered a guilty plea to child molestation. He was sentenced to 20 years prison. Defendant sought to withdraw his guilty plea, based upon the sentence was void. Child molestation requires at minimum 1 year probation. In his motion to vacate a void sentence, he also included a motion to withdraw his guilty plea. At the hearing, the trial court corrected the void sentence and re-sentenced him to 19 years prison with 1 year probation. Defendant was prevented from asserting his request to withdraw his guilty plea, by the judge.
  - Holding: This issue is controlled by our decision in Kaiser v. State, 285 Ga. App. 63 (2007), in which we approved a line of cases holding that 'where a void sentence has been entered, it is as if no sentence has been entered at all, and the defendant stands in the same position as if he had pled guilty and not yet been sentenced. And pursuant to OCGA §17-7-93(b), the defendant may withdraw his plea as of right prior to sentencing.'"
  - IMPORTANT NOTE: As the defendant did here, you must request to withdraw the guilty prior to sentencing. Had he only requested to vacate a void sentence, he would likely have no recourse.
- ✪ *Kennedy (Warden) v. Primack*, --- Ga. --- - S16A0821 – GA Supreme Court – (Decided October 03, 2016)
  - Judgment: (Affirmed)
  - Defendant pled guilty with a non-negotiated plea to cruelty to children in the second degree. She was subsequently sentenced to the maximum punishment, ten years prison. During the plea colloquy, Defendant asked the judge what criminal negligence meant. The Trial Court explained it is a law school term which means something more than simple or gross negligence. Defendant's attorney agreed with the judge, reciting similar language. Nobody asked if she understood and nobody fully defined the term. Defendant filed a Habeas and prevailed because the Habeas Court decided her plea was not knowingly. Supreme Court agrees

- Holding: "Because a guilty plea is an admission of all the elements of a formal criminal charge, *it cannot be truly voluntary unless the defendant possesses an understanding of law in relation to the facts*. McCarthy v. United States, 394 U.S. 459, 466 (1969)… The definitions offered by the trial court and defense counsel simply did not convey any of the concepts that define "criminal negligence" in any straightforward or readily discernable way to a defendant who specifically asked what the term meant. Indeed, [Defendant] testified at the habeas hearing that she did not, in fact, understand the explanation given by the trial court and her defense counsel." Accordingly, Defendant did not knowingly enter a plea of guilty.

➢ HABIT

✪ *Evans-Glodowski v. State*, 335 Ga. App. 484 - A15A2035 – Court of Appeals (decided January 14, 2016)

- Judgment: (Affirmed)
- Defendant tried to introduce evidence about how she drove around a particular curve in reference to running someone over. The State objected and the Court of Appeals affirmed
- Holding: "The offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature…The federal courts generally have construed 'habit' narrowly, requiring that the conduct be highly particularized and not involve general or complex behaviors such as drunkenness or reckless driving."

➢ HEARSAY

BUSINESS/MEDICAL RECORD EXCEPTION

✪ *Samuels v. State*, 335 Ga. App. 819 - A15A1804 – GA Court of Appeals – (Decided February 25, 2016)

- Judgment: (Affirmed)
- Defendant objected to the Trial Court allowing medical records into evidence that indicated he appeared intoxicated. COA determined the Trial Court correctly admitted the records into evidence.
- Holding: "Courts have held that hospital records, including medical opinions, are admitted under [Federal Rule of Evidence 803(6)], which

expressly permits opinions and diagnoses. Given this construction of Federal Rule of Evidence 803, the fact that OCGA §24-8-803(6) is nearly identically worded, and the fact that these records were made to facilitate Defendant's treatment and not in anticipation or prosecution, the trial court did not err."

- *Chase v. State*, 337 Ga. App. 449 - A16A0436 – GA Court of Appeals – (Decided June 16, 2016)
  - Judgment: (Affirmed)
  - Defendant claimed that OCGA §24-9-902(11) requires the State to provide "written notice", if the State intends to admit hearsay statements through the business records exception. Defendant was provided an affidavit from the records custodian, which complied with OCGA §24-8-803(6); however the State did not provide written notice.
  - Holding: "As we recently explained, the purpose of the notice requirement is to 'give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the self-authentication declaration.' Where written notice is not given, actual notice that a party plans to utilize the self-authentication procedure may suffice. Here, Defendant had actual notice before trial [by way of the custodian's affidavit]."

CO-CONSPIRATOR EXCEPTION

- *Ray v. State*, --- Ga. App. --- - A16A1091; *Randell v. State*, --- Ga. App. --- - A16A1126; *Brown v. State*, --- Ga. App. --- - A16A1178 – GA Court of Appeals – (Decided October 11, 2016)
  - Judgment: (Affirmed)
  - Defendant was tried jointly with other co-defendants. At trial none of the co-defendants testified, but testimony came into trial by way of a State witness in which the co-defendants discussed planning the armed robbery. Defendant objected based upon hearsay.
  - Holding: "As to the Confrontation Clause issue, a defendant's Sixth Amendment right to be confronted by the witnesses against him is violated under Bruton when co-defendants are tried jointly and the testimonial statement of a co-defendant who does not testify at trial is used to implicate the other co-defendant in the crime. Bruton thus applies only to out-of-court statements by non-testifying co-defendants that are 'testimonial' in nature. A statement is testimonial if its 'primary purpose was to establish evidence that could be used in a future

prosecution.' Here, [none] of the statements in question were testimonial in nature, [because] . . . statements by a co-conspirator made during and in furtherance of the conspiracy are not considered 'testimonial' and therefore do not require any constitutional scrutiny under the Confrontation Clause." *Citing* Favors v. State, 296 Ga. 842 (2015). The COA determined the statements were co-conspirator statements and thus not subject to hearsay objections.

- **CONFRONTATION CLAUSE – (statements lack reliability not the standard)**
  - *McClendon v. State*, 299 Ga. 611 – S16A0699 and *Burks v. State*, 299 Ga. 611 S16A0700 – GA Supreme Court – (Decided September 12, 2016)
    - Judgment: (Affirmed)
    - Defendant and co-defendant were both found guilty of murder. There appeals were combined for appellate review. At a joint trial, a jailhouse informant testified about conversations he had with the co-defendant while they shared a cell. Defendant, Burks, objected claiming this testimony was against his right to confrontation and hearsay; because the statements lacked reliability.
    - Holding: "In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court overturned the 'indicia of reliability' test as laid out in Ohio v. Roberts, 448 U.S. 56 (1980), holding that a Confrontation Clause violation occurs when a declarant is unavailable to be called as a witness, was not previously subject to cross-examination, and when the statements to be introduced at trial are 'testimonial' in nature…Thus, the question of whether hearsay evidence violates the Confrontation Clause turns, not on indicia of reliability, but rather on whether the hearsay statement is testimonial. Relying on United States Supreme Court precedent, this Court has held that statements properly admitted pursuant to the co-conspirator hearsay exception do not qualify as 'testimonial' statements which implicate Sixth Amendment protections."
    - FURHTER NOTE: The Court stated, "Further, we agree with the State that the 'indicia of reliability test' established by this Court in Copeland v. State, 266 Ga. 664 (1996) is no longer good law. We therefore disapprove of Copeland and its progeny in this regard."

- **EXCITED UTTERANCE**
  - *Robbins v. State*, --- Ga. --- - S16A1342 – GA Supreme Court – (Decided October 31, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of felony murder. At trial, the State introduced several statements that the decedent gave to her daughter concerning being beat. The alleged beating took place over a period of a night. When the daughter arrived the next morning, the decedent explained she had been beat all night and the Defendant was still in the house. The daughter was allowed to testify concerning the incident.
    - Holding: "we find that such statements could be properly admitted into evidence as excited utterances under OCGA §24-8-803(2). Again 'a statement relating to a starling event or condition made while the declarant was *under the stress of excitement caused by the event or condition*' may be admitted into evidence under the excited utterance exception to the rule against hearsay…we find no abuse of discretion in the trial court's conclusion that, under the totality of the circumstances, [decedent] was still suffering under the stress of the all-night beating such that her statements to [daughter] were admissible under the excited utterance exception to the rule against hearsay."
- **INDEPENDENT CRIMES AND ACTS**
  - *Dawson v. State*, --- Ga. --- - S16A0786 – GA Supreme Court – (Decided November 21, 2016)
    - Judgment: (Affirmed – without deciding the issue)
    - Defendant was found guilty of two counts of Malic Murder. At trial, State introduced a prior similar transaction. The testimony came by way of the police officer who testified about statements he was given by the original alleged victim. Defendant objected based upon hearsay. Trial Court allowed the testimony and the Supreme Court affirmed based upon any error was harmless.
    - Holding: "Assuming without deciding that the trial court erred by admitting the factual basis for the similar transaction in this way, the admission of this evidence, in light of the overwhelming evidence of [Defendant's] guilt was harmless beyond a reasonable doubt."
    - IMPORTANT NOTE: Even though the court did not decide the case, I think it help shows presenting evidence in this manner is improper. Further, Justice Hunstein concurred in judgment only as it pertains to this issue.

- **INDICTMENT**
  - *State v. Brown et al*, 298 Ga. 878 - S16A0122 – GA Supreme Court – Decided April 26, 2016)
    - Judgment: (Affirmed)
    - State attempted to introduce a Federal Indictment charging defendants with violation of street gang terrorism. State sought to introduce the indictment to prove essential elements of the street gang terrorism act, specifically, the existence of a criminal street gang and the commission of criminal gang activity.
    - Holding: A bare indictment is nothing more than a prosecutor's hearsay statements. "In short, the fact that this case involves the prosecution of alleged gang-related crimes does not obviate the State's responsibility to prove its case in accordance with the rules of evidence applicable in all other prosecutions."

- **PRESENT SENSE IMPRESSION**
  - *Yarber v. State*, 337 Ga. App. 40 - A16A0149 – GA Court of Appeals – (Decided May 04, 2016)
    - Judgment: (Affirmed as harmless error)
    - Defendant was found guilty of DUI less safe. At trial, the State introduced a 911 call from the driver of the other vehicle, who described the incident to the 911 operator. The other driver did not testify at trial. Defendant objected as hearsay and confrontation. State argued present sense impression and the trial court agreed.
    - Holding: COA determined the evidence was cumulative to already introduced testimony and any error was harmless, thus affirmed the conviction.
    - IMPORTANT NOTE: Footnotes 5, 6, and 9 indicate that 911 calls can be excluded by hearsay and lack of confrontation and should be considered in a case-by-case basis. Footnote 9: "if 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers." Davis v. Washington, 547 U.S. 813, 823 (2006); "The determination of whether the recording of a 911 recording was non-testimonial where the call was made while the crime was in progress, by a panicked caller whose primary purpose was to seek assistance to prevent the completion of an ongoing crime." Pitts v. State 280 Ga. 288-290 (2006); However, "where the victim's statement

of past events was delivered at some remove in time from the danger she described and was not providing information enabling officers immediately to end a threatening situation, the statement was testimonial in nature." Brown v. State, 288 Ga. 404, 408 (2010).

- **RESIDUAL HEARSAY EXCEPTION (NECESSITY EXCEPTION)**
  - ✪ *Smart v. State*, 299 Ga. 414 - S16A0393 – GA Supreme Court – (Decided July 05, 2016)
    - Judgment: (Affirmed – harmless error)
    - Trial Court admitted several hearsay statements through a friend of the decedent by way of OCGA §24-8-807 the residual hearsay exception. All of these statements were substantive that the Defendant had been making threats toward the decedent prior to the death and the Defendant's alcohol problems. The Supreme Court did not state whether it was error or not, but merely stated any error was harmless.
    - Holding: The residual hearsay exception was designed 'to be used very rarely, and only in exceptional circumstances.' Rivers v. United States, 777 F3d 1306, 1312 (11th Cir. 2015). The rule applies 'only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present.'" The Court went further to cite Rivers, "[S]uch guarantees must be 'equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history." [Cit.] These categories of hearsay "have attributes of trustworthiness not possessed by the general run of hearsay statements that tip the balance in favor of introducing the information if the declarant is unavailable to testify.' [Cit.] And they are all considered sufficiently trustworthy not because of the credibility of the witness reporting them in court, but because of the circumstances under which they were originally made." The Court however stated there was no plain error due to if it was error to admit the statements the error was harmless.
- **RULE OF NECESSITY**
  - ✪ *Sneiderman v. State*, 336 Ga. App. 153 - A15A1774 – GA Court of Appeals (Decided March 11, 2016)
    - Judgment: (Affirmed)
    - The State introduced non-testimonial statements made by defendant's paramour, who eventually killed her husband. These statements

included the relationship status between Defendant and her paramour. Defendant objected, but the trial court allowed the statements to be introduced at trial.

- Holding: "Non-testimonial hearsay evidence may be admitted under the necessity exception set forth in OCGA §24-8-807." "The trial court did not abuse its discretion by determining that there were circumstantial guarantees of trustworthiness; that the statements were evidence of a material fact and more probative than other evidence the State could procure; and that the evidentiary rules and the interests of justice were best served by admission of the statements pursuant to the necessity exception in OCGA 24-8-807."
- IMPORTANT NOTE: under the new rules, pre-trial notice must be given.

- **TRUTH OF THE MATTER ASSERTED**
  - *Gates v. State*, 298 Ga. 324 - S15A1407 – GA Supreme Court (decided January 19, 2016)
    - Judgment: (Affirmed)
    - State introduced text messages from the decedent and defense objected based upon hearsay
    - Holding: the text messages were not for the truth of the matter asserted (i.e. that the person could hear if he felt lonely) but rather to show the effect of the messages upon the defendant and his motive for committing the murder. In the current case, "the statement would not be hearsay as it was not offered for the truth of the matters asserted, but for the effect or lack thereof on the hearer."
  - *Jones v. State*, --- Ga. App. --- - A16A1279 – GA Court of Appeals – (Decided October 13, 2016)
    - Judgment: (Affirmed)
    - State introduced a recorded conversation between the Defendant and an informant. The informant did not testify at trial. In the recorded statement, the informant would ask several questions and the Defendant gave several inculpatory responses. Defendant objected to the recorded statement based upon hearsay.
    - Holding: First, as to the statements made by Defendant, they are admissions by a party and thus not hearsay. As to the questions asked by the informant, the trial court and the COA both agree that they are

not hearsay, as the questions are not offered for the truth of the matter asserted. "Post-*Crawford*, the Eleventh Circuit has continued to hold that statements offered by a non-testifying speaker are not hearsay and do not violate the Confrontation Clause when the statements are 'not offered for their truth, but only to place…[the defendant's] statements in context. United States v. Makarenkov, 401 Fed. Appx. 442, 445 (11th Cir. 2010)" The COA determined the questions were merely placing the Defendant's statements in context and as such not hearsay.

- **HUNG JURY – MISTRIAL**
  - *Honester v. State*, 336 Ga. App. 166 - A15A2235 – GA Court of Appeals – (Decided March 11, 2016)
    - Judgment: (Reversed)
    - Defendant was tried originally for obstruction of an officer. The jury sent a note stating they were deadlocked. The Trial Court asked for a numerical division in their votes. Defense and the State objected and requested an Allen Charge. Trial Court requested their division anyway. It was 11 to 1 to acquit. State then retracted their request for an Allen Charge and requested a mistrial. Defense objected and again requested a Allen Charge. Trial court sua sponte declared a mistrial. Trial Court claimed it would impermissibly put pressure on the lone juror to give an Allen Charge.
    - Holding: "Given the sever consequences of ordering a mistrial without the accused's consent, it is highly important that the trial court undertake a consideration of alternative remedies before declaring a mistrial based on a jury's alleged inability to reach a verdict." The trial court failed to take any remedial actions and further appeared to take into consideration the numerical division in deciding whether a mistrial was appropriate. Therefore a plea in bar was appropriate.
    - IMPORTANT NOTE: "The law is clear that in an effort to determine whether it should order further deliberations, the trial court 'may inquire how the jury stands numerically.' But the law is equally clear that a trial court may not inquire into the 'nature of a jury's numerical division, and in fact should caution the jurors not to state whether the vote favors acquittal or conviction."

- **IDENTIFICATION**
  - *Jackson v. State*, 335 Ga. App. 500 - A15A1883 – Court of Appeals (decided January 25, 2016)
    - Judgment: (Affirmed)
    - Defendant objects to the use of in-court identification based upon the witnesses' inability to pick him out of a line-up prior to trial. The court allowed the in-court identification and stated it goes to weight not to admissibility.
    - Holding: "Challenges to in-court identifications must be made through cross-examination…Defendant's challenges to [the witnesses'] in-court identification, including the inconsistency in [the witness'] in-court and pre-trial identifications, go to the weight and credibility of [the witness], not to its admissibility."
  - *Houston v. State*, 335 Ga. App. 481 - A15A1828, - Court of Appeals (decided January 14, 2016)
    - Judgment: (Affirmed)
    - Defendant challenged the witness's ability to testify about the "certainty" of the identification, which was in violation of Brodes v. State, 279 Ga. 435 (2005).
    - Holding: Court of Appeals stated Brodes only prohibited the trial court from giving an instruction based upon the certainty of the witness. Brodes does not restrict a witness from testifying about the certainty and the Court of Appeals refuses to expand Brodes to also include testimony as the witness can be cross-examined about their level certainty.
- **PHOTOGRAPHIC LINEUP**
  - *Bowen v. State*, --- Ga. --- - S160850 – GA Supreme Court – (Decided October 31, 2016)
    - Judgment: (Affirmed)
    - Defendant objected to the admission of evidence as it pertains to three different pre-trial photographic lineup identifications. Defendant asserted the lineups were unduly suggestive and unreliable. Court determined otherwise.
    - Holding: "Testimony regarding a witness's pre-trial identification of the defendant must be excluded if the identification procedure was unduly suggestive and under the totality of the circumstances, resulted in a substantial likelihood of misidentification. … This Court employs a two-step process in examining a trial court's admission of identification

evidence for error… First, the Court decides whether the identification procedure used was impermissibly suggestive, i.e., "lead[ing] the witness to an 'all but inevitable identification' of the defendant as the perpetrator." … Second, and only upon a finding that the identification procedure was indeed impermissibly suggestive, the Court determines whether there was a substantial likelihood of irreparable misidentification of the defendant in light of the totality of the circumstances." The Court determined all the photographs were of similar individuals and there was no suggestiveness by the officers.

- ✪ *Blackmon v. State*, --- Ga. --- - S16A1306 – GA Supreme Court – (Decided October 31, 2016)
  - Judgment: (Affirmed)
  - Similar facts as with Bowen v. State above.
  - Holding: "Similar holding with Bowen v. State above.

➢ IMMIGRATION

- ✪ *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016)(Decided May 27, 2016) U.S. Department of Justice Executive Office for Immigration Review Board of Immigration Appeals
  - Judgment: (Affirmed in part and Reversed in part)
  - Holding: OCGA §16-5-23(a)(2) makes a lawful permanent resident (green card holder) deportable if the underlying facts establish family violence. Depending on the person's criminal and immigration history, deportation may be mandatory or discretionary. However, if the judge is willing to impose a fully probated sentence, this does not count as a sentence to serve under immigration law. The sentencing paperwork must explicitly state that there is no associated term of imprisonment associated with the probation term.
- ✪ *Herrera v. U.S. Attorney General*, 811 F.3d 1298 - 15-12093 – 11th Circuit COA (Decided February 2, 2016)
  - Judgment: (Affirmed)
  - Defendant was a citizen of Peru and pled guilty to the offense burglary. His plea was 5 years probation with 1 year of that to be under house arrest. The trial judge explicitly stated on the record that no part of this sentence includes a term of imprisonment. ICE still picked him and initiated deportation actions. Defendant appeals stating because he was

not sentenced to a term of imprisonment his crime did not involve a crime of moral turpitude.

- Holding: "The Board reasonable determined that house arrest is a 'term of imprisonment' under section 1101(a)(48)(B). A 'term of imprisonment' is defined in the Act as a 'period of incarceration or confinement.' 8U.S.C. §1101(a)(48)(B)"

➢ IMMUNITY

✪ *Allen v. State*, 336 Ga. App. 80 - A15A2317 – GA Court of Appeals – (Decided March 04, 2016)

- Judgment: (Affirmed)
- Co-defendant entered a plea of guilty. At defendant's trial, the State offered the co-defendant immunity for his testimony. Defendant objected.
- Holding: Defendant lacked standing to challenge co-defendant's immunity. "While the defendant might have preferred that a key witness not be ordered to testify truthfully in his trial, there is nothing in Georgia law that would have permitted him to object to the State's request for immunity order."

➢ IMPEACHMENT

CONTEMPT OF COURT

✪ *Green v. State*, 299 Ga. 337 - S16A0066 – GA Supreme Court – (Decided July 05, 2016)

- Judgment: (Affirmed)
- This case dealt with an ineffective claim for failing to object or ask for a mistrial. A State's witness testified at trial. After the testimony was concluded, the jury was excused from the courtroom. The Trial Court then inquired with the witness about the merits of her testimony. Trial Court determined the witness had committed perjury and held her in contempt for 20 days. Trial Court then determined that neither party could inform the jury that the witness was held in contempt for lying under oath.
- Holding: "OCGA §17-8-57 says that [i]t 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…' One of the purposes of OCGA §17-8-57 'is to

prevent the jury from being influenced by any disclosure of the trial court's opinion regarding the credibility of a witness.' *citing* Smith v. State, 297 Ga. 268, 270 (2015). For the trial court to allow the jury to be informed that it had found [the witness] to have testified falsely would have directly violated this principle."

- *Parker v. State*, --- Ga. App. --- - A16A1252 – GA Court of Appeals – (Decided November 01, 2016)
  - Judgment: (Affirmed)
  - During direct examination, Defendant stated "he had never been in a situation like this", when asked about if he knew anything about this crime? State objected and stated the Defendant opened the door to his prior misdemeanor guilty plea to battery, which was pled down from aggravated assault to come into trial. Defendant attempted to explain what he meant, that he had never been falsely charged with a crime. Judge allowed the prior misdemeanor conviction to come in along with the original charge of aggravated assault.
  - Holding: State argued Defendant "opened the door" but in actuality, this is impeachment evidence, not character evidence. "The State was therefore allowed to disprove the fact [Defendant] testified to by impeaching him with his prior charge for aggravated assault, even though that charge resulted in a conviction on a lesser offense."

FIRST OFFENDER

- *State v. Enich*, 337 Ga. App. 724 - A16A0550 – GA Court of Appeals – (Decided July 05, 2016)
  - Judgment: (Affirmed)
  - Trial Court granted a new trial based upon Defendant was precluded from impeaching a State's witness with her First Offender plea. Witness had previously pled guilty under First Offender to Forgery and Identity Fraud. When Defendant moved in with witness, he started accusing witness of stealing his state benefits. The next day witness accused Defendant of Raping her daughter. Defendant sought to admit the prior plea of guilt to show the witness's motive to divert attention from her or as the Defendant stated, "Rape is a louder word than theft."
  - Holding: "Because first offender status is not considered an adjudication of guilt, a witness also may not be impeached on general credibility grounds with a first offender sentence that is currently being served. When the impeachment is to show bias, however, we have previously held the Confrontation Clause of the Sixth Amendment permits a

defendant in a criminal case to cross-examine witnesses about their first offender status…By means of such cross-examination, the defendant is entitled to attack the credibility of the witness by showing that the pending charges reveal a possible bias, prejudice, or ulterior motive on the part of the witness to give untruthful or shaded testimony in an effort to pleas the State." While the First Offender plea was inadmissible for impeachment purposes, it was admissible to show potential biases or motives.

- ✪ *Clark v. State*, 335 Ga. App. 747 - A15A1885 – GA Court of Appeals – (Decided February 22, 2016)
  - Judgment: (Affirmed)
  - Defendant sought to impeach the complaining witness with his first offender plea of possession with intent. Defendant relied upon Matthews v. State, 268 Ga. 798 (1997) to assert he should have been able to impeach the witness in order to contradict his story.
  - Holding: "Because first offender status is not considered an adjudication of guilt, a first offender plea cannot be used to impeach a witness on general grounds."

- ➢ **INCONSISTENT VERDICT RULE vs. REPUGNANT VERDICT**
  - ✪ *Carter v. State*, 298 Ga. 867 - S15G1047 – GA Supreme Court (Decided April 04, 2016)
    - Judgment: (Affirmed)
    - Defendant was found not guilty of Malice Murder and Felony Murder. Defendant was also found not guilty of lessor included voluntary manslaughter to Malice Murder, but guilty of lessor included voluntary manslaughter to Felony Murder. Defendant appealed stating the verdicts were repugnant to each other, since he was found not guilty and guilty to the same the offense.
    - Holding: Court held the verdicts were not repugnant, but merely inconsistent. For the verdicts to be repugnant they must be both guilty and not guilty to the exact same offense. However voluntary manslaughter as a lessor included charge to malice murder requires intent to murder. Whereas voluntary manslaughter to felony murder does not. Therefore the verdicts were inconsistent. The Court has already acknowledged, "it is not generally within the court's power to

make inquiries into the jury's deliberations, or to speculate about the reasons for any inconsistency between guilty and not guilty verdicts." U.S. v. Powell, 469 U.S. 57, 66 (1984).

- ✪ *Thornton v. State*, 298 Ga. 709 - S15G1108 – GA Supreme Court – (Decided March 21, 2016)
  - Judgment: (Affirmed)
  - Defendant was found guilty of conspiracy to commit murder, but his co-defendant was found not guilty of that count. The co-defendant was only found guilty of making false statements. Defendant appealed to the court of appeals and later granted Cert to the Supreme Court to determine if the same jury acquits one defendant of a conspiracy can the other defendant still be found guilty.
  - Holding: "Allowing a defendant to challenge inconsistent verdicts would be prone to speculation and would require courts to make impermissible inquiries into the jury's deliberation process." Thus, the GA Supreme Court answers in the affirmative that in a mutual trial where one co-defendant was found not guilty of conspiracy, the sole other co-defendant can still be found guilty of the conspiracy.

➢ INDEPENDENT CRIMES AND ACTS

DUI SIMILAR TRANSACTION

- ✪ *State v. Tittle*, 335 Ga. App. 588 - A15A1808 – GA Court of Appeals – (Decided February 05, 2016)
  - Judgment: (Reversed)
  - Trial Court had prohibited the State from introducing prior DUI evidence, based upon Frost v. State, 328 Ga. App. 337 (2014). However, shortly after the trial court's decision to reject the introduction of similar transaction evidence, the Supreme Court reversed Frost, in State v. Frost, 297 Ga. 296 (2015).
  - Holding: Based upon the Supreme Court holding in Frost, the State is allowed to introduce a prior DUI offense, where the Defendant refused a sobriety test, because on "prior occasions on which the accused had driven under the influence that the accused had awareness that his ingestion of an intoxicant impaired his ability to drive safely…and would tend to show that he was in fact under the influence."

- **INTENT**
  - *Wilson v. State*, 336 Ga. App. 60 - A15A1848 – GA Court of Appeals – (Decided March 03, 2016)
    - Judgment: (Affirmed)
    - State introduced a prior aggravated assault against Defendant to show among other things, criminal intent. Both the prior case and current case involved Defendant getting into an argument and pulling out a knife. Defendant claimed aggravated assault involved general intent. Thus the prior independent crime should not have been introduced for that purpose.
    - Holding: "In this case, the state of mind required for the charged offense was the same as the state of mind required for the uncharged act…When the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404(b) test relevance is satisfied."
  - *Olds v. State*, 299 Ga. 65 - S15G1610 – GA Supreme Court (Decided May 23, 2016)
    - Judgment: (Remanded back to Court of Appeals
    - State introduced two other prior incidents of Defendant where he had abused woman in order to show "Intent" in the case at bar. The Court of Appeals affirmed the verdict relying primarily on Bradshaw v. State, 296 Ga. 650 (2015), stating the Defendant placed intent at issue, when he plead not guilty to the charges. Georgia Supreme Court granted certiori in order to clarify their decision in Bradshaw and remanded the case back to the Court of Appeals with further clarification on how Intent should be viewed.
    - Holding: When admitting prior independent crimes or acts, the court should consider three factors: (1) "Such evidence must be relevant to some issue other than character." (2) "The evidence must pass the test of OCGA §24-4-403 ("Rule 403"), which provides that 'relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" (3) Evidence of other acts is admissible under Rule 404(b) only to the extent that the evidence is sufficient to permit a jury to conclude by a preponderance of the proof that the person with whom the evidence is concerned actually committed the other acts in question." As it relates to the first factor,

intent is an essential element of every crime. Thus, if the State is introducing the prior act for to show Intent, the first factor outlined above is met. However, the GA Supreme Court went further to state, that their decision in Bradsahw perhaps expanded the scope of other acts too broadly. "By relying on Edouard in Bradshaw, however, we may have implied that such evidence inevitably has more probative value than it may, in fact, have in a particular case. And an accurate assessment of probative value is an essential part of a proper application of Rule 403, which embodies the second requirement for the admission of evidence of other acts under Rule 404(b)…the second requirement of Rule 404(b) – that other acts evidence passes the Rule 403 test – calls for a careful, case-by-case analysis, not a categorical approach."

- IMPORTANT NOTE: The Court emphasized, "we do not mean to suggest that admitting that evidence for intent – or for any of the other purposes that the Court of Appeals did not reach in its earlier consideration of the case – was in fact, an abuse of discretion. We do not decide that question. Instead, we leave it for the Court of Appeals."

✪ *Hood v. State*, 299 Ga. 95 - S16A0064 – GA Supreme Court – (Decided May 23, 2016)

- Judgment: (Affirmed for harmless error)
- State introduced two prior acts of Defendant selling drugs. Defendant sought to keep out the prior acts by offering to stipulate to possessing the drugs with an intent to distribute the drugs. State refused the Defendant's stipulation and presented the prior acts at trial. In both opening and closing, Defendant's counsel acknowledged that Defendant possessed the drugs with intent to distribute.
- Holding: "A rejected offer to stipulate to an issue does not render evidence on that issue irrelevant, but it must be considered under Rule 403, because the availability of the stipulation diminishes the probative value of the extrinsic evidence." The statements by the 404(b) witnesses did nothing to complete the picture of what happened on the night the decedent died, instead their testimony only expanded the picture to depict Defendant as a frequent and degenerate drug dealer. Doing so was unfairly prejudicial. However, any error was harmless.

- ✪ *U.S.A. v. Barron-Soto*, 820 F.3d 409 – 13-14731 – 11th Circuit COA (Decided April 26, 2016)
  - Judgment: (Affirmed)
  - State sought to introduce a prior 2006 drug trafficking conviction to show intent.
  - Holding: "In a conspiracy case, a defendant's 'not guilty plea renders the defendant's intent a material issue'…Evidence of prior drug dealings is highly probative of intent to distribute a controlled substance, as well as involvement in a conspiracy."
- ✪ *Chase v. State*, 337 Ga. App. 449 - A16A0436 – GA Court of Appeals – (Decided June 16, 2016)
  - Judgment: (Affirmed for harmless error)
  - There were several prior convictions presented at trial against the Defendant for the purpose of Intent. As it pertains to the prior conviction for stealing public documents, the State failed to present any evidence concerning how the crime occurred and relied upon admitting the indictment into evidence.
  - Holding: "We question, therefore, whether evidence of this conviction shed light on Defendant's intent, knowledge, or any other relevant inquiry in this case. But even if the trial court erred in admitting evidence of the stealing public documents conviction, reversal is not required." In essence there was no harm shown due to the other evidence presented at trial.
- ✪ *Graham v. State*, 337 Ga. App. 664 - A16A0473 – GA Court of Appeals – (Decided June 29, 2016)
  - Judgment: (Affirmed)
  - Defendant was charged with theft by taking. State introduced two prior similar acts to show intent, knowledge, and plan.
  - Holding: "Without question, intent was put in issue by Defendant entering a plea of not guilty. Olds v. State, --- Ga. ---, (Case No. S15G1610; decided May 23, 2016)…Evidence of these other acts, which involved the same sort of intent as required to prove the theft here and had a tendency to prove such intent were relevant and satisfied the first requirement for admission."

- ✪ *Jones v. State*, 299 Ga. 377 - S16A0314 – GA Supreme Court – (Decided July 05, 2016)
  - Judgment: (Affirmed)
  - Defendant appealed claiming his two prior armed robbery plea convictions should not have been admitted into trial for the purposes of showing intent and motive. The Court originally held it could be admitted for course of conduct, but changed that Order after the new evidence code was enacted. The trial court did admit the prior convictions to show intent and motive under the new evidence code. Supreme Court agrees.
  - Holding: "Defendant's entry of a not guilty plea in the instant case put the State to its burden of proving every element of the crime charged, including intent. *See* Olds v. State, S15G1610 (May 23, 2016). As Defendant's participation in the earlier crimes required the same intent as the charged attempted robbery, the evidence of these other acts was relevant." As for the 403 issue (probative vs. prejudicial) "Given Defendant's testimony at trial that it was the victim who pulled out the gun in an attempt to rob Defendant and the driver of the car following the drug deal, and that the victim was shot as he tussled with the driver over possession of the gun, intent was a challenged element. Under the circumstances presented, we conclude the trial court did not abuse its discretion…"
- ✪ *State v. Ashley*, 299 Ga. 450 - S15G1207 – GA Supreme Court – (Decided July 08, 2016)
  - Judgment: (Reversed)
  - Defendant was charged and convicted for kidnapping and attempted kidnapping of two girls at public pool. The trial court allowed the State to introduce two prior incidents where the Defendant tried lure or contact other children at the pool. The trial court admitted these prior incidents under the old evidence code to help show Intent. The Court of Appeals reversed. Supreme Court granted Certiori and Reversed the Court of Appeals, thus upholding the trial court's decision
  - Holding: This case was considered under the old evidence code, so it may be no longer applicable. I included it, just because it discusses Intent. "In this analysis, the proper focus was on the similarities, not the differences, between the separate act and the crimes in questions. The independent act did not need to mirror every detail of a charged crime,

but instead might reflect only a portion of the acts that established one or more of the charges being trial…Moreover, a lesser degree of similarity was required to admit evidence of independent acts to show motive or intent than to admit such evidence to prove identity." The Court determined that the two prior pool incidents helped to show intent in the case at bar and under the old rules (I believe the new rules too) the prior incidents did not need to be criminal in nature in order to be admitted.

- *State v. Spriggs*, 338 Ga. App. 655 - A16A0871 – GA Court of Appeals (Decided September 21, 2016)
  - Judgment: (Affirmed)
  - Defendant is charged with armed robbery. During discovery, State presented two videos from Defendant's cell phone which display Defendant holding a gun and stating, "he is thinking of ways to make money…selling dope, or just straight robbing…" State filed 404(b) motion to introduce the videos to help show intent and motive. At the suppression hearing, Trial Court found the videos were only being introduced for bad character and thus excluded the videos. Trial Court also found based upon OCGA §24-4-403 that the prejudicial effect outweighed the probative value. COA agreed with the trial court.
  - Holding: "The State has not shown, however, that [Defendant's] act of making the videos amounted to any criminal act, let alone that it required the same or similar intent as the charged offense of armed robbery. The acts of making the videos and of committing the armed robbery are thus not 'similar acts' for purposes of Rule 403 because they do not share 'the same sort of intent.' Olds v. State, 299 Ga. 65 (2016)…Further, and as the trial court noted, moreover, the State has provided no evidence that the two acts of making the video and committing the armed robbery were 'committed close in time and in similar circumstances.' Olds, 299 Ga. At 72.

INTENT, MOTIVE, AND COURSE OF CONDUCT

- *Brooks v. State*, 298 Ga. 722 - S15A1480 – GA Supreme Court – (Decided March 07, 2016)
  - Judgment: (Reversed) (decided under the new evidence code)
  - Trial Court allowed the State to introduce a prior murder to show identity, motive and course of conduct. The GA Supreme Court went into depth how the trial court improperly allowed the prior

independent crime to come into evidence. The Supreme Court ultimately reversed the conviction stating it was not harmless error.

- Holding: The trial court abused its discretion when weighing the factors set out in Bradshaw v. State, 296 GA 650 (2015): (1) evidence needs to be relevant to an issue other than bad character; (2) probative value of the acts evidence cannot be outweighed substantially by its unfair prejudice; and (3) there must be sufficient proof to enable the jury to find the accused committed the independent acts.
  - Identity: "When extrinsic offense evidence is introduced to prove identity, the likeness of the offenses is crucial consideration. The physical similarity must be such that it marks the offenses as the handiwork of the accused. In other words, the evidence must demonstrate a modus operandi. The extrinsic act must be a 'signature' crime."
  - Motive: "Overall similarity between the charged crime and the extrinsic offense is not required when the offense is introduced to show motive. Even so, to be admitted to prove motive, extrinsic evidence must be 'logically and relevant and necessary to prove something other than the accused's propensity to commit the crime charged…Simply put, evidence of the 1983 murder of a Mississippi state trooper during a prison escape is unrelated and unnecessary to prove why appellant murdered a security guard in the course of a theft.
  - Course of Conduct: Court of Appeals has correctly observed that the 'course of conduct' and 'bent of mind' exceptions, formerly an integral part of our law of evidence, have been eliminated from the new Evidence Code."

- **KNOWLEDGE**
  - *Kim v. State*, 337 Ga. App. 155 - A16A0430 – GA Court of Appeals – (Decided May 18, 2016)
    - Judgment: (Affirmed)
    - At Defendant's trial, State introduced a prior DUI to show that Defendant had knowledge about taking field sobriety tests. The judge allowed the prior DUI to come into evidence and gave a limiting instruction. Defendant objected, claiming a 403 objection that their admission was more prejudicial that probative.

- Holding: "The Georgia Supreme Court has cautioned that 'there is no mechanical solution for this balancing test. Instead, a trial court must undertake in each case a considered evaluation of the proffered justification for the admission of such evidence and make an independent determination' of the prejudicial and probative value." *Citing* State v. Jones, 297 Ga. 156, 163 (2015). "In so concluding, we are reminded that Rule 403 is 'an extraordinary remedy which the courts should invoke sparingly.' Even in close cases, courts should strike the balance in favor of admissibility."

- **MOTIVE**
  - *Anthony v. State*, 298 Ga. 827 - S16A0059 – GA Supreme Court – (Decided April 04, 2016)
    - Judgment: (Affirmed)
    - There were three prior incidents the State sought to introduce at trial to help establish motive. All three relate to surveillance of his ex-wife or slicing her tires. Defendant claimed it showed only that he was upset at the divorce. State argued it showed motive and necessary to counter Defendant's justification defense.
    - Holding: Court held it could also show Defendant's "desire to take revenge and to provoke confrontation in response to his wife's affair with the victim." Motive is "the reason that nudges the will and prods the mind to indulge the criminal intent."
    - IMPORTANT NOTE: Defense counsel did not renew its objection to the 404(b) at trial. The Court appears to acknowledge that this is not necessary, because "once the [trial] court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal." I think however the better practice is to still object at the pre-trial hearing and at trial once the evidence is admitted to ensure the issue is preserved.
  - *Smart v. State*, 299 Ga. 414 - S16A0393 – GA Supreme Court – (Decided July 05, 2016)
    - Judgment: (Affirmed)
    - Trial Court allowed the sister of Defendant's ex-wife testify to the family violence she observed as it relates to her sister in the Defendant's trial for murder against his current wife. In essence, the sister testified she observed numerous bruises and altercations between defendant and her

sister. That the Defendant would ask how many punches, if the sister said one, Defendant would hit her twice. Defendant would drag her out the house. Trial Court allowed this evidence to come into the trial to help establish motive, which is allowed under the new evidence code.

- Holding: "While motive is not an element of any of the charged offenses here, Sister's testimony was relevant to help the jury understand why Defendant might have used violence against [his current wife]…Sister's testimony was relevant to the State addressing motive, namely, that Defendant used violence to control [the decedent]." The court went further to address the third prong of Bradshaw, "The major function of Rule 403 is to 'exclude matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect…[but] while the evidence against Defendant was prejudicial – as almost all evidence presented by the State will be – on balance, we agree with the trial court that the probative nature of Sister's testimony outweighed that prejudice."

✪ *United States v. Dotson*, --- U.S. App. --- - No. 15-13787 – 11th Circuit Court of Appeals – (Decided August 24, 2016)

- Judgment: (Affirmed)
- State sought to introduce a prior acts of writing bad checks to establish that Defendant engaged in a loan scheme. State initially claimed that the legitimate purpose of introducing the bad checks was for identity because the jury could compare the signature on the documents and secondly to help complete the story. 11th Circuit quickly discounted both of these theories but stated they were still properly admitted to help establish motive.
- Holding: "The Government was permitted to put on evidence demonstrating that [Defendant] needed money from the loan scheme to make payments required by the restitution agreement. Applying our three-part test, then, we conclude that the evidence was relevant to [Defendant's] motive, an issue other than her character. The Government provided adequate proof of [Defendant's] involvement in the scheme by providing the documents and a witness who could testify to the process used to create them. Finally, though the evidence was prejudicial, we cannot say that any undue prejudice substantially outweighed its probative value. Therefore, we hold that the district court did not abuse its discretion in admitting the evidence.

- IMPORTANT NOTE: This case in dicta makes 404(b) evidence one of inclusion and states further that excluding this type of evidence should be used sparingly. In particular the Court stated: "Rule 404(b) is characterized as a rule of inclusion, and thus 404(b) evidence should not lightly be excluded when it is central to the prosecution's case. United States v. Jernigan, 341 F.3d 1273, 1280 (11th Cir. 2003)…We consider the evidence in the light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact. Even where the prejudicial effect is close, the abuse of discretion standard is deferential."

✪ *State v. Spriggs*, 338 Ga. App. 655 - A16A0871 – GA Court of Appeals (Decided September 21, 2016)

- Judgment: (Affirmed)
- Defendant is charged with armed robbery. During discovery, State presented two videos from Defendant's cell phone which display Defendant holding a gun and stating, "he is thinking of ways to make money…selling dope, or just straight robbing…" State filed 404(b) motion to introduce the videos to help show intent and motive. At the suppression hearing, Trial Court found the videos were only being introduced for bad character and thus excluded the videos. Trial Court also found based upon OCGA §24-4-403 that the prejudicial effect outweighed the probative value. COA agreed with the trial court.
- Holding: "[Defendant's] act of making videotapes containing vague threats and showing him in possession of a gun does not demonstrate motive, as these acts were not in themselves criminal. Further, the fact that [Defendant] possessed a gun in the armed robbery he allegedly committed 'does nothing to distinguish [Defendant] from most other robbers or to prove a specific motive for this crime. Instead, such facts show only a mere propensity to commit armed robbery, and are thus inadmissible."

✪ *Harris v. State*, --- Ga. App. --- - A16A1047 – GA Court of Appeals – (Decided October 05, 2016)

- Judgment: (Affirmed)
- Defendant was charged with several sexual offenses but only found guilty of battery (family violence). On appeal, he argues it was improper for the State to introduce two prior batteries against his ex-wife. State sought to introduce the convictions to help establish motive. The facts

of the current case: he made several sexual advances against the child, and when she rebuffed his advances, he grabbed her hair and punched her in the mouth, splitting her lip.

- Holding: "Our Supreme Court has defined motive 'as the reason that nudges the will and prods the mind to indulge the criminal intent. Bradshaw v. State, 296 Ga. 650 (2015). To be admitted to prove motive, extrinsic evidence must be 'logically relevant and necessary to prove something other than the accused's propensity to commit the crime charged." In the case at bar, the other acts showed Defendant's willingness to use physical violence against female victims whom he knew in an attempt to intimidate them or bend them to his will when they did not accede to his demands or were otherwise acting against his wishes.

- **PRIOR SEXUAL ACTS**
  - *Marlow v. State*, 337 Ga. App. 1 - A16A0573 – GA Court of Appeals (Decided April 22, 2016)
    - Judgment: (Affirmed)
    - Defendant objected to the State's introduction of a prior sexual offense. The trial court ultimately admitted the offense based upon OCGA 24-4-413, and charged the jury as to the limited use that "such evidence could be used to 'corroborate' the victim's testimony." Defendant's defense at trial was that the complaining witness was not credible and she made this up. State sought to introduce the prior to corroborate the complaining witness testimony.
    - Holding: "The State's extrinsic evidence that defendant had committed a similar sexual assault had the tendency to bolster the credibility of the victim by demonstrating that her circumstances were not unique…Just as evidence corroborating a victim's testimony concerning rape would have a tendency to disprove a defense of consent, it would similarly serve to disprove a defense that the victim had a motive to fabricate allegations of rape."

- **SELF-DEFENSE**
  - *Parks v. State*, --- Ga. --- - S16A1001 – GA Supreme Court – (Decided November 30, 2016)
    - Judgment: (Affirmed for harmless error)
    - Defendant was found guilty of murder. At trial, State was allowed to introduce a prior 1990 aggravated assault (shooting) in order to help show motive, intent, knowledge, identity and the absence of mistake or accident. Defendant's sole defense was justification, that he acted in self-defense.
    - Holding: "Trial court erred when it admitted [Defendant's] 1990 conviction. No argument can be made for introducing the 1990 aggravated assault to show [Defendant's] knowledge and absence of mistake or accident as to the crimes charged; his *knowledge* was not at issue where the defense was justification, and he made no claim that he *accidently or mistakenly* shot the victim. *Identity* and *motive* are equally inapplicable under the federal Rule 404(b) case law that we recently endorsed in Brooks v. State, 298 Ga. 722 (concluding that the 404(b) evidence was not admissible to prove identity where the prior and current crimes were not so similar as to mark the murders as the handiwork of [Defendant] and the modus operandi for each murder was relatively commonplace – these were not signature crimes) and (explain that to be admitted to prove motive, extrinsic evidence must be logically relevant and necessary to prove something other than the [Defendant's] propensity to commit the crime)…Identity and motive are particularly inapposite here, where [Defendant] claimed self-defense." As for *intent*, "Since the defendant admitted the shooting and claimed only that in doing so he acted in self-defense, the only factual issue in the case was whether that was the reason for the admitted act…All that the evidence of the prior conviction of assault could possibly show was the defendant's propensity to commit assaults on other person or his general propensity to commit violent crimes." With all that said, Court determined any error by introducing the similar transaction was harmless due to the overwhelming evidence, including Defendant's own statement that he shot an unarmed man.

- **SEXUAL OFFENSES**
  - *Kritlow v. State*, --- Ga. App. --- - A16A1093 – GA Court of Appeals – (Decided November 09, 2016)
    - Judgment: (Affirmed)
    - Defendant was convicted of aggravated sodomy and other charges. State sought to introduce a prior sexual offense to help show intent and

lustful disposition under OCGA §24-4-413. Trial court granted the State's request.

- Holding: This case was decided after the new evidence code was enacted. "As for lustful disposition, although it is not one of the purposes specifically set out in OCGA §24-4-404 (b) for the admission of other acts, OCGA §24-4-413 provides an exception to the general rule in sexual assault cases and allows the admission of [such] propensity evidence. [Cits.] Thus, the provisions of OCGA §24-4-413 (a) supersede the provisions of OCGA §24-4-404 (b) in sexual assault cases." Thus, it was admissible.

➢ INDIGENT CLIENT

✪ *Roberson v. State*, 335 Ga. App. 606 - A15A1735 – GA Court of Appeals – (Decided February 08, 2016)

- Judgment: (Affirmed)
- Defendant was found guilty of misdemeanor battery (family violence). At trial, she was represented by the public defender's office. At the conclusion of the trial, she filed a notice of appeal and requested the Court to give her the trial transcripts free of charge. The Court held a hearing to determine her indigence and found she was not indigent, because she had just moved into a nice home. Defendant claimed the Public Defender's Office had already determined her indigence and the court should abide by this decision
- Holding: Because the Indigent Defense Act does not enumerate the "determination of indigence for the purpose of providing a transcript free of charge to indigent defendants, it follows that the trial court retains discretion, to determine whether a defendant is indigent for the purpose of holding a county responsible for the cost of a transcript."

➢ INNEFECTIVE ASSISTANCE OF COUNSEL

ADVISING CLIENT ABOUT PLEA

✪ *Wiley v. State*, 782 S.E.2d 850 - A15A2148 – GA Court of Appeals – (Decided February 24, 2016)

- Judgment: (Affirmed)
- Defendant was found guilty of Aggravated Child Molestation and sentenced to 25 years in prison without the possibility of parole. The plea offer prior to trial was 15 to 20 years with 10 years to serve in prison with parole. Counsel advised defendant on the different sentencing

provisions and explained the strengths and weaknesses of her case and the state's case. Defendant alleged ineffective assistance of counsel because counsel never gave his advice on whether she should take the plea or not.

- Holding: "An attorney ordinarily may satisfy the duty to provide informed legal advice regarding a plea offer by discussing with the accused the risks of going to trial, the evidence against him or her, and differences in possible sentences that would be imposed following a guilty plea and following a conviction at trial."
- Concurring Opinion Justice McFadden: Justice McFadden stated he has the same conclusion, but for a different reason because the Defendant never claimed she would have accepted the plea if only her attorney would have told her to do so. Justice McFadden goes further to state, "The Supreme Court of the United States held over sixty years ago that prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Von Moltke v. Gillies, 332 U.S. 708, 721 (1948)

✪ *Ingram v. State*, 338 Ga. App. 552 - A16A1221 – GA Court of Appeals – (Decided August 23, 2016)

- Judgment: (Reversed)
- Defendant was charged with several drug related crimes including street gang terrorism. Defendant was potentially facing 75 years imprisonment as a section (c) recidivist, or at least he thought. State served aggravation of punishment and listed three prior felonies. However one of the prior felony convictions was a successful completion of First Offender. Defendant's attorney entered a quasi-negotiated plea, whereby the State withdrew recidivist punishment. Defendant was sentenced to 35 years with 20 years to serve. Defendant sought to withdraw his guilty plea based upon ineffectiveness of his attorney in notifying him he was not a section (c) recidivist.
- Holding: First, since one of his prior convictions was discharged under the First Offender Act, Defendant was not a section (c) recidivist. State conceded that Defendant's attorney was ineffective for not advising Defendant properly. "When it comes to parole eligibility…an attorney's failure to inform his or her client that he or she would be ineligible for parole as a recidivist for the entirety of a lengthy prison sentence is

constitutionally deficient performance." Since Defendant made it clear both prior to the plea and after the plea that he would not have pled guilty but for fear of the recidivist punishment, the second prong of *Strickland* was met.

- **CHILD HEARSAY AND BOLSTERING**
  - *Blackmon v. State*, 336 Ga. App. 387 - A15A1834 – GA Court of Appeals (Decided March 24, 2016)
    - Judgment: (Reversed)
    - Defendant was charged with various sex offenses concerning a 14 year complaining witness. These events alleged to have occurred prior to the new rules of evidence being enacted. State introduced several statements from the 14 year old child by way of the mother, forensic examiner, doctors, aunt, etc. Defense counsel failed to object to any of these statements on the basis of hearsay and improper witness bolstering. At the motion for new trial, defense counsel acknowledged her mistakes, attributing her failure to object to her being "a bonehead, worn out, and overwhelmed".
    - Holding: The child-hearsay statute did not apply because the complaining witness was 14 years of age at the time. The state claimed the statements would be admissible anyways as a prior consistent statement, because the juvenile witness was impeached. However, to admit a prior consistent statement, the witness must be impeached with recent fabrication, improper influence, or improper motive and the prior statement must predate the alleged fabrication, influence or motive. Therefore it was ineffective for the defense counsel to fail to object to these statements that would have been inadmissible otherwise.
    - CONCURRING OPINION – Judge Rickman takes offense with what he perceives defense attorneys falling on the sword in order to obtain a new trial for their client. "We continue to witness admissions that point to ineffectiveness and the resulting findings, with apparently no response or consequence. A consequence need not even be a punitive consequence; but rather some meaningful attempt to keep ineffective attorneys out of the criminal courtroom."

- **CONCEDING A GUILTY CHARGE TO ONE COUNT**
  - *Payne v. State*, 338 Ga. App. 677 - A16A1049 – GA Court of Appeals – (Decided September 22, 2016)
    - Judgment: (Affirmed)
    - Client was charged with Armed Robbery and several other counts. Count 7 of the Indictment charged Defendant with felony fleeing. During closing arguments, Defendant's counsel explained to the jury that there is no reason to debate Count 7, just go ahead and check mark the guilty box on that count. Defendant claims on appeal that his attorney was ineffective based upon conceding that charge. Trial Counsel testified at the motion for new trial that he made a tactical decision to concede that charge.
    - Holding: Court determined it is not unreasonable to concede guilt to a lesser charge like fleeing from police in hopes to gaining credibility with the jury. Further there are times when you want to concede guilt of the lesser crimes as was the case in this case, in hopes the jury does not find the Defendant guilty of the serious offense (i.e. defendant was a section (c) recidivist and facing life without parole for the armed robbery).
- **CROSS-EXAMINATION OF CO-DEFENDANT**
  - *Ali v. State*, 338 Ga. App. 716 - A16A0864 – GA Court of Appeals (Decided September 28, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of armed robbery. At trial a co-defendant testified for the State. The co-defendant eventually pled guilty to Robbery and was sentenced to 10 serve 5. Defendant's attorney at trial never asked co-defendant about the possible minimum punishment he faced should his charge remain an armed robbery.
    - Holding: "decisions about what questions to ask on cross-examination are quintessential trial strategy and will rarely constitute ineffective assistance of counsel. In particular, whether to impeach prosecution witnesses and how to do so are tactical decisions." Defendant failed to show how he was prejudiced by his attorney's failure to impeach the state's witness, thus he failed both prongs of Strickland v. Washington.

- **FAILED TO ASK FOR CONTINUANCE**
  - *McLaughlin v. State*, 338 Ga. App. 1 - A16A0385 – GA Court of Appeals – (Decided July 12, 2016)
    - Judgment: (Affirmed)
    - Defendant was accused with aggravated assault. Defense counsel filed a statutory speedy trial. Prior to the trial, but on the same day as trial, a justification hearing was conducted. At the justification hearing, Defense Counsel learned Defendant might suffer from Battered Woman Syndrome. Defense Counsel did not request a continuance for the trial or withdraw the speedy trial demand. Defense Counsel testified at the motion for new trial that he was aware of Battered Woman Syndrome, but did not believe he was entitled to a continuance due to trial had begun.
    - Holding: "Despite counsel's belief to the contrary, the law does not specifically limit the time in which a party may move for a continuance. Rather, the law simply provides that 'all applications for continuances are addressed to the sound legal discretion of the court and…shall be granted or refused as the ends of justice may require...Thus, a trial court may entertain a motion for a continuance made in the middle of trial." The court went further to state, "we find that counsel's failure to seek continuance based on his mistaken belief that he was procedurally barred from doing so constituted deficient performance. 'An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland."
    - ADDITIONAL NOTE ON BATTERED WOMAN SYNDROME: The court did briefly analyze Battered Woman Syndrome. "Battered person syndrome "is not a separate defense." Rather, evidence of BPS may be introduced in an appropriate case to support a defendant's claim of justification. "To make a prima facie showing of [justification] based upon [ ] battered person syndrome, a defendant should present the opinion testimony of an expert as well as independent testimony regarding the historical facts upon which the expert relies." Bishop v. State, 271 Ga. 291, 293 (3) (519 SE2d 206) (1999) (citations omitted). Specifically, the defendant should present an expert witness to "describe the syndrome, apply that model to the facts shown by the evidence, and opine that the defendant falls within the profile." Id.

- **FAILURE TO FILE A DEMURRER**
  - ✪ *Lupoe v. State*, --- Ga. --- - S16A1261 -; *Williams v. State*, --- Ga. --- - S16A1262-; *Carter v. State*, --- Ga. --- - S16A1263 – GA Supreme Court – (Decided November 21, 2016)
    - Judgment: (Affirmed)
    - Defendant Lupoe claims his attorney provided ineffective assistance of counsel for failing to file a demurrer to the count of gang participation. Additionally, this case involved three co-defendant who were eventually found guilty of murder. Their appeals were combined. This is a very lengthy decision, but almost all the issues were decided based upon plain error, because the three trial attorney's did not object to the evidence. The Court found no plain error in the 20 plus remaining errors.
    - Holding: Defendant cannot show prejudice, because even had he prevailed on the demurrer, the State could have recharged him on a proper indictment, assuming the original was defected, which the Court did not find. "Because a defendant can be re-indicted after the grant of a special demurrer, a failure to file such a demurrer generally will not support a finding of ineffective assistance of counsel." Citing Washington v. State, 298 Ga. App. 105, 106 (2009).
- **FAILURE TO MOVE TO SUPPRESS EVIDENCE AND PROSECUTOR'S COMMENT ON DEFENDANT'S PRE-ARREST SILENCE**
  - ✪ *Kennebrew v. State*, --- Ga. --- - S16A0844 – GA Supreme Court – (Decided October 31, 2016)
    - Judgment: (Reversed)
    - Defendant was charged and arrested with two other co-defendants for malice murder. Defendant's sole defense was mere presence. The majority of the evidence placing Defendant at the scene of the crime was obtained when Defendant's book-bag was searched without a warrant. The Defendant was arrested at his college dorm. After being taken out of the dorm, the police seized the book-bag. The police then searched the book-bag 8 days later without a warrant. Defense Counsel's only testimony at the motion for new trial concerning why he did not move to suppress the evidence was because he thought it was searched incident to arrest. Further at trial, the prosecutor explained during closing, if the Defendant was merely present at the scene, why did he not call 911. Look at the phone records, there is not one 911 call made. Defense Counsel failed to object.

- Holding: "Although the Supreme Court's decisions have vacillated to some extent on the scope of the exception in the context of persons arrested in vehicles, it has been settled law for decades that in other contexts – like the arrest of person in a residence – the police may search only the arrestee's person, personal property immediately associated with his person…, and the area within his reaching distance." In this case, the Defendant had already been removed from the dorm and the bag searched 8 days later. It is clear the exception for search incident to arrest did not apply. As for the improper comments on Defendant's pre-arrest silence, "[defense counsel's] failure to object was patently unreasonable and thus deficient performance under Strickland.
- IMPORTANT NOTE: Under the old rules of evidence, defense counsel was not required to object to prosecutor's improper comments during closing concerning Defendant's pre-arrest silence. This rule has since been modified. In order to preserve the evidence, you must object to preserve the issue, See footnote 4 and Simmons v. State, 299 Ga. 370, 374 (2016)

FAILURE TO PRECURE WITNESSES

✪ *Robinson v. State*, 299 Ga. 648 - S16A1274 – GA Supreme Court (Decided September 12, 2016)

- Judgment: (Affirmed)
- Trial Counsel was appointed to Defendant's case about a year after the Defendant was arrested due to conflicts with the PD's office. Due to this delay, Trial Counsel was unable to procure or find potential witnesses due to their transient makeup (most were homeless). Defendant alleged he was denied effective assistance of counsel due to this delay and his attorney's inability to find these witnesses.
- Holding: "All of this testimony [of potential transient witnesses], however, is merely speculation, and it does not support a claim of ineffective assistance. [Defendant] ultimately did not proffer any uncalled witness to testify at the hearing or otherwise proffer a legally recognized substitute for such testimony. In the absence of such evidence, [Defendant] cannot prevail on the prejudice prong of his ineffective assistance claim".

- **FAILURE TO PRESENT ALIBI WITNESS**
  - *Newby v. State*, 338 Ga. App. 588 - A16A1000 – GA Court of Appeals – (Decided September 12, 2016)
    - Judgment: (Affirmed)
    - Defendant claimed his attorney was ineffective for failing to call an alibi witness on his behalf. Trial Counsel testified at the motion for new trial that she interviewed the potential alibi witness and after a discussion with the potential alibi witness, the Trial Counsel did not believe the witness's information would be helpful. Thus, the Trial Counsel did not call the potential alibi witness to the stand.
    - Holding: "The tactical decision of whether to present an alibi defense 'after thorough investigation and client consultation is virtually unchallengeable.' Walker v. State, 280 Ga. App. 457 (2006)." COA affirmed the decision based upon the Trial Counsel made a reasonable strategic decision not to call the potential alibi witness.
- **FAILURE TO SUBPOENA WITNESS**
  - *Fisher v. State*, 299 Ga. 478 - S16A0515 – GA Supreme Court – (Decided July 08, 2016)
    - Judgment: (Reversed on this ground and for failing to request a jury charge)
    - Defense counsel placed an alibi witness on Defense's witness list but never served him with a subpoena. At trial the alibi witness failed to appear to give testimony. At the Motion for New Trial hearing, Defense Counsel explained, since the alibi witness was a cooperating witness, he did not see the need to subpoena the witness and believed the witness would just appear voluntarily at trial. The alibi witness testified that he was never notified about the trial date.
    - Holding: "Unlike many cases involving this issue, there is no indication that Defense Counsel had concerns about Defendant's potential testimony or credibility that might have provided a reason not to call him to testify despite listing him on the defense's witness list." Defense Counsel erred in believing the witness would just show up voluntarily. Further in regards to asking for a continuance, OCGA §17-8-25 states, "in all applications for continuances upon the ground of the absence of a witness, it shall be shown to the court that the witness…has been subpoenaed…" "Accordingly, we conclude that Defendant has shown

that Defense Counsel was professionally deficient in failing to subpoena the alibi witness or otherwise secure his attendance at trial."

- **IMPEACH WITNESS ABOUT PLEA DEAL**
  - ✪ *Taylor v. Metoyer*, 299 Ga. 345 - S16A0070 – GA Supreme Court (Decided July 05, 2016)
    - Judgment: (Affirmed)
    - Defendant was originally charged with two co-defendants. Both co-defendants received favorable plea deals, with the requirement that they testify at trial against Defendant. Defendant's trial counsel never cross-examined the witnesses about their plea deals. In addition Defendant's appellate counsel never raised the issue in the motion for new trial. Defendant filed a Habeas claiming his trial counsel was ineffective for failing to cross-examine the witnesses about their plea deals for the purposes of bias and motive.
    - Holding: "Trial counsel's failure prevented the jury from hearing what motive the co-defendants had in testifying against Defendant; it also prevented the jury from learning that the co-defendants and the State had been less than forthcoming about their agreements. Such a claim satisfies both prongs of Strickland. Given that trial counsel's performance was deficient and the deficiency prejudiced Defendant's defense, had appellate counsel raised this issue on appeal Defendant would have been entitled to a reversal of his armed robbery convictions. As the habeas court correctly granted Defendant's habeas petition, the judgment of that court is affirmed."
- **LACK OF EXPERIENCE**
  - ✪ *State v. Banks*, 337 Ga. App. 749 - A16A0602 – GA Court of Appeals – (Decided June 08, 2016)
    - Judgment: (Reversed and Remanded)
    - Defendant was charged with aggravated child molestation and child molestation. Lead counsel for Defendant was a practicing third year law student, who had taken the Bar, but had not received her results yet. She was assisted at trial by the Circuit Public Defender and another assistant public defender. At no point during the trial did anyone object to the lack of experience and in fact the judge explained to the defendant that he had three attorneys at the table to help him with his case.
    - Holding: "An attorney's lack of experience, standing alone, is not grounds for a claim of ineffective assistance of counsel…To the contrary,

'a successful ineffectiveness claim must be based upon specific errors made by counsel, rather than upon trial counsel's experience or lack thereof." COA determined that the lead attorney, even though may have been inexperienced, she performed as a reasonable and professional attorney, making all the key decision, objecting appropriately, filing pre-trial motions, and making arguments to the jury. Because the trial court did not cite to any deficient grounds of the attorney, the case is remanded back to the trial court.

- **REQUEST JURY CHARGE ON CORROBORATION**
  - ✪ *Fisher v. State*, 299 Ga. 478 - S16A0515 – GA Supreme Court – (Decided July 08, 2016)
    - Judgment: (Reversed on this ground and for failure to subpoena a witness)
    - The majority of the State's evidence against defendant came by way of an accomplice to the crime. State requested the pattern jury charge on a single witness if believed is sufficient to find a judgment of guilt. Defense Counsel did not request the additional pattern jury charge based upon OCGA §24-4-8 (old statute) that there must be corroboration of an accomplice. The new statute is OCGA §24-14-8 and in footnote 4, the Court states "we give the new provision the same meaning as the old one."
    - Holding: "Given the importance of [the alibi witness'] testimony to the State's ability to prove its case against Defendant, it would have been entirely unreasonable for [Defense Counsel] to make a 'strategic decision' to approve the trial court's instruction to the jury that 'generally, the testimony of a single witness, if believed, is sufficient to establish a fact,' without insisting that the court also instruct the jury that this general rule did not apply to [the alibi witness's] testimony if the jury found him to be an accomplice."
- **WAIVING DEFENDANT'S RIGHTS**
  - ✪ *State v. Garland*, 298 Ga. 482 - S15A1562 – GA Supreme Court (decided January 19, 2016)
    - Judgment: (Affirmed)
    - Defendant asserts on Habeas that his appellate attorney was ineffective by waving his rights to appellate review in order for Defendant to be released on probation. Defendant asserts he was never notified about any waiver and he would never have agreed to it

- Holding: "Defense counsel should not agree to waiver of right to appeal or to contest conviction in collateral proceedings 'unless after consultation with the client it is agreed that the risk of losing the negotiated disposition outweighs other considerations…The prejudicial effects of appellate counsel's failure to advise and consult with Defendant are heightened because of the un-contradicted evidence of Defendant's lack of competence and diminished mental condition"

➢ **INSANITY**

- **GUILTY BUT MENTALLY ILL**
  - ✪ *Buford v. State*, --- Ga. --- - S16A1353 – GA Supreme Court – (Decided November 07, 2016)
    - Judgment: (Affirmed)
    - Defendant charged with murder for killing the decedent while he was off his medication. Defendant's psychologist testified that Defendant could not state what if any delusions caused him to commit the killing, but stated Defendant did not know right from wrong. State's psychologist testified Defendant did know right from wrong, but conceded that Defendant did have a history of mental illness. After the bench trial, the trial court found Defendant Guilty but mentally ill and sentenced him to life.
    - Holding: "The fact that a person is schizophrenic or suffers from a psychosis does not mean he meets the test of insanity requiring a verdict of not guilty on the basis of insanity. The trial court, sitting as the trier of fact, [is] not compelled to accept the testimony of [the defendant's] psychologist, but [is] authorized to find proof of [the defendant's] criminal intent based upon the testimony of the [experts and evidence presented], as well as the words, conduct, demeanor, motive and other circumstances connected with [the defendant's] acts." Here, the Defendant failed to prove he was legally insane by a preponderance of the evidence as the trial court was not required to accept Defendant's psychologist over the State's psychologist.

➢ **INTERPRETERS**

- ✪ *Cisneros v. State*, --- Ga. --- - S16G0443 – GA Supreme Court – (Decided October 17, 2016)
  - Judgment: (Affirmed for harmless error)
  - Defendant was indicted and ultimately found guilty to several counts of armed robbery and home invasion. At trial a Spanish speaking interpreter was provided for the court and for the Defendant. During

the trial, one of the alternate jurors called into question the court's interpreter claiming it was not correct. Trial Court ultimately dismissed the alternate juror for unrelated issues, (Juror was trying to influence other jurors during the trial and had made her decision known). Defense attorney did not request a hearing to determine the accuracy of the interpretation. Defendant argued on appeal that Counsel was ineffective for not requesting an attorney once the interpretations were called into question.

- Holding: "We agree with [Defendant] that once it became apparent to defense counsel that a Spanish-speaking juror was taking issue with portions of the interpreter's interpretation, the information known to defense counsel was sufficient to call into question the accuracy of the official interpretation. We are also in agreement that, at that point, the better course would have been for defense counsel to request a hearing, thereby allowing the trial court to determine during trial whether the interpreter was able to communicate accurately with the non-English speaking witnesses. See Georgia Supreme Court Rules for the Use of Interpreters for Non-English Speaking and Hearing Impaired Persons, Appendix C, Code of Professional Responsibility for Interpreters, Standard VI." The Supreme Court ultimately ruled however the error was harmless, based upon that there were some inconsistencies in the interpretation, but "none of the alleged errors prevented [Defendant] from effectively presenting his defense, and we find no instance where the meaning of a witness' testimony was altered in a legally significant manner."

➢ INVASION OF PRIVACY

✪ *Gary v. State*, 338 Ga. App. 403 - A16A0666 – GA Court of Appeals – (Decided July 15, 2016)

- Judgment: (Reversed)
- Defendant worked at Publix. While working, he followed a female around the store taking photographs with his phone up her skirt. Defendant was eventually charged and convicted of Invasion of Privacy pursuant to OCGA 16-11-62(2). That statute prohibits recording or photographing a person in a "private place". Defendant filed a demurrer and requested a directed verdict based upon his conduct

occurred in a "public place", namely the grocery store. Trial court refused both requests.

- Holding: both the general definition and the statutory definition of "private place" refers to a location that is not in public view. As a public grocery store does not fit into this category, the State is unable to prove an essential element of the offense charged. The COA closed with this statement: "we note that it is regrettable that no law currently exists which criminalizes Defendant's reprehensible conduct. Unfortunately, there is a gap in Georgia's criminal statutory scheme, in that our law does not reach all of the disturbing conduct that has been made possible by ever-advancing technology. The remedy for this problem, however, lies with the General Assembly, not with this Court."
- JUDGE MERCIER DISSENT: Judge Mercier believes a "private place" can also include a place on the person's body. That up a female's skirt, should be considered a private place and would therefore affirm the trial court's decision.

➢ JAILHOUSE INFORMANT – CROSS EXAMINATION

✪ *Cheley v. State*, 299 Ga. 88 - S16A0003 - GA Supreme Court – (Decided May 23, 2016)

- Judgment: (Affirmed)
- Two jailhouse informants testified for the prosecution. Neither informant was sentenced prior to testifying as one informant's sentence was withheld until after testimony and the second informant's case was placed on dead-docket. Defendant sought to cross-examine the informants concerning the potential sentences they faced. State objected and the trial court sustained the objection.
- Holding: "It was established at trial that neither of the informants had entered into any agreement with the State. And where a witness has not obtained such a 'deal,' the defendant has 'broad scope in exposing the potential bias in the witness's testimony, but he may not bring out the potential penalties faced by the witness." *Citing* Jackson v. State, 294 Ga. 34, 37 (2013).

- **JUDGE'S IMPROPER COMMENT ON THE EVIDENCE**
  - *Alday v. State*, 336 Ga. App. 508 - A15A2236 – GA Court of Appeals – (Decided March 29, 2016)
    - Judgment: (Reversed)
    - Defendant was charged with sexually assaulting his daughter. Outside the presence of the jury, the Judge opined, "you know, counselor, I believe if my father molested my daughter I believe I might be aggressive too." Then during cross-examination (in the jury's presence) of the forensic examiner, Defense counsel was trying to make a distinction between touching and massaging. The judge opined, "But I think that was the distinction they made between touching and a massage, but keep going, defense counsel." Upon further questioning the judge again opined, "are we dealing here with a matter of semantics with…a little child? I mean, it would be like taking one page out of a hundred page book and isolating it. You've got to get the whole thing together basically; is that what you're trying to do?" Defense never objected to these remarks.
    - Holding: As to the comments made outside the presence of the jury, even though in error, OCGA §17-8-57 is confined to matters occurring before the jury. However, the court cautioned, "Even outside the jury's presence, a judge must be alert to avoid comments that may be perceived as prejudicial." As to the comments made in the presence of the jury, "the jury could have interpreted the trial court's comment as expressing his favorable opinion of the credibility and reliability of the forensic interviewer's explanation of the distinction between the 'touch' and 'massage'. Therefore the trial court erred in making statements that could have been interpreted as offering an opinion on the forensic interviewer's credibility."
    - IMPORTANT NOTE: Under the new rules of OCGA §17-8-57(a)(2) "any party who alleges a violation of paragraph (1) of this subsection shall make a timely objection and inform the court of the specific objection and the grounds for such objection, outside of the jury's hearing and presence." The above case was under the old rules. Make sure you object now.
  - *Quiller v. State*, 338 Ga. App. 206 - A16A0114 – GA Court of Appeals (Decided July 15, 2016)
    - Judgment: (Affirmed)

- After jury selection was conducted, prior to opening statements, the trial judge explained to the jury the trial process. In so doing, he explained this is not like Law in Order, where a case is tried in 30 minutes. It is also not like CSI, with all the technology. Sometimes there are no fingerprints as fingerprints are hard to obtain. He went further to state he did not know what would come out at trial. He later gave proper jury instructions. Defendant never objected at trial or asked for a mistrial.
- Holding: COA determined the trial court's statement about fingerprints was a comment on the evidence and was error. Under the prior law, OCGA §17-8-57, a judge's comment on the evidence would automatically require a new trial regardless if anyone objected. However, the new evidence code OCGA §17-8-57 has a subsection that requires an objection to made and a request for a mistrial. Because the Defendant never objected, the court then looks to plain error. Under plain error, the COA determined the trial error did not influence the jury's decision as they were properly given instructions prior to deliberating. Even though the Defendant was tried before the enacting of the new evidence code, it is applied retroactively.
- JUDGE MCFADDEN DISSENT: Judge McFadden stated, "under the version of the statute that governed during the trial in this case, defendant had no duty to object to the trial judge's improper comment on the evidence and was automatically entitled to a new trial based on the judge's violation of the statute." Judge McFadden does not believe the statute should be applied retroactively.
- IMPORTANT NOTE: Make sure you object and ask for a mistrial to any judge's comment on the evidence. Otherwise it likely will be deemed waived.

➢ JURISDICTION

SUBJECT MATTER

✪ *Zilke v. State*, 299 Ga. 232 - S15G1820 – GA Supreme Court – (Decided June 20, 2016)

- Judgment: (Reversed)
- Defendant was stopped by an off duty Kennesaw State University campus police officer, when the defendant was not "at or near" the university campus. Defendant failed field sobriety tests and breath test. Defendant was subsequently arrested and charged with DUI. State

court ruled in favor of Defendant and suppressed all evidence due to the officer did not have jurisdiction to arrest. Court of Appeals reversed based upon Glazner v. State, 170 Ga. App. 810 (1984). GA Supreme Court Reversed COA and stated, "we disapprove of Glazner to the extent that case and its progeny hold OCGA §17-4-23(a) authorizes law enforcement officer, including a campus police officer, to make a custodial arrest outside the jurisdiction of the law enforcement agency by which he is employed."

- Holding: "The trial court did not err when it determined that Officer Mason did not have any authority to arrest appellant beyond 500 yards of the KSU campus. Accordingly, the judgment of the Court of Appeals cannot be sustained."
- IMPORTANT NOTE: Nothing in the statutes or case law would prevent an officer to make an arrest, based upon observing or witnessing a crime. The officer had authority to make the stop, due to witnessing the vehicle unable to maintain a lane. Even a private citizen can make a citizen's arrest. However, all they can do, is make the arrest and then turn the defendant to the proper authorities. They have no authority to investigate or conduct tests. Had Officer Mason turned Defendant over to local authorities and they conducted the field sobriety tests, the outcome of the case would have been different. This case only involved the suppression of evidence and therefore the trial court had discretion to suppress the evidence.
- IMPORTANT NOTE 2 – CONCURRING OPINION JUSTICE NAHMIAS: Both the majority decision and concurring opinion make reference that the exclusionary rule to the suppressed evidence was never at issue so the majority decision does not decide this point. The Concurring opinion, however does explain that the exclusionary rule is an extraordinary measure and should be used with caution. The Court goes on to explain: "there is a substantial question regarding whether it was proper for the trial court to suppress evidence as a remedy for the violation of OCGA §20-3-72 that the court correctly found in this case. Because the State has not challenged the remedial aspect of the trial court's order, the Court appropriately does not decide this question today. But this discussion should highlight the importance of considering the remedial element of motions to suppress evidence in future cases of this sort."

- **JUROR MISCONDUCT**
  - **RESEARCHED THE LAW OUTSIDE THE JURY ROOM**
    - *Lloyd v. State*, --- Ga. App. --- - A16A0727 – GA Court of Appeals – (Decided October 18, 2016)
      - Judgment: (Reversed)
      - Defendant was charged with Murder and several other counts pertaining the incident. Defendant was eventually found guilty of aggravated assault and possession of a firearm. During the jury deliberation, one juror – R.R., researched on the internet the definitions of malice and felony murder. He eventually conveyed his research to the rest of the jurors. Additionally after the Court re-explained self-defense and stand your ground theories, during a lunch recess, Juror R.R. asked a police officer to better explain the terms in layman terms. The jury was 11 to acquit and only Juror R.R. willing to convict at that point. After Juror R.R. explained the terms further and drew a diagram for the other jurors, did the jurors come back with a conviction for the aggravated assault and possession of a firearm. Defendant was immediately sentenced to the max: 25 years prison. After sentencing several jurors remained in the courthouse and explained what Juror R.R. had done. This appeal follows.
      - Holding: "Because the juror's misconduct in the present case affected the key issue of self-defense and the verdict became unanimous only after the introduction of the improper [communication], we conclude that there is a reasonable possibility that the juror's misconduct contributed to [Defendant's] conviction. The State did not overcome the presumption of prejudice beyond a reasonable doubt."
      - IMPOTANT NOTE: Both parties incorrectly cited Armstrong v. Gynecology & Obstetrics of DeKalb, 327 Ga. App. 737 (2014) as for the position that there is no presumed harmed for juror misconduct. Armstrong was a civil case and is not controlling. "*Armstrong* cannot be read to undermine the long line of Supreme Court authority holding that such a presumption does obtain in criminal cases – especially since the analyses in that line of authority do not cite the Evidence Code." The COA affirms, "the rule in this state is that where such an improper communication occurs, there is a presumption of harm and the burden

is on the State to show the lack thereof." Citing, Whitlock v. State, 230 Ga. 700, 700-702 (1973) and several other cases.

- **JUROR'S OATH – PETIT OATH**
  - *State v. Desai*, 337 Ga. App. 873 - A16A0020 – GA Court of Appeals – (Decided July 12, 2016)
    - Judgment: (Affirmed)
    - Defendant was on trial for DUI. After the closing of evidence and the jury had deliberated for almost an hour, the Trial Court realized the jury may not have been sworn with the petit jury oath, which is mandated by OCGA 15-12-139. Trial Court ordered this first trial a nullity and further ordered a new trial. The State appealed, but the COA affirmed the trial court's decision.
    - Holding: "Here, it is undisputed that the jury was not administered the petit oath prior to beginning deliberations and, indeed, was not sworn until it had almost rendered a verdict. We conclude that a belated oath of that nature rendered the jury 'fatally infirm' and the trial a mere nullity."
    - IMPORTANT NOTE: The State relied upon Adams v. State, 286 Ga. 496, 497-498 (2010) for this appeal and the COA explained the difference. In Adams, the petit oath was administered at the close evidence but prior to the jury deliberating. "The Adams Court drew a clear distinction between (1) a jury which is never sworn or not sworn prior to deliberations, and (2) a jury that is belatedly sworn, but the oath is administered before jury deliberations." Thus, the oath can still be given at the close of evidence, but prior to the jury deliberating unless a showing of prejudice is made. Whereas, once the jury begins deliberating the petit oath is determined statutorily late and the trial becomes a nullity.

- **JURY DELIBERATIONS**
  - *Bethea v. State*, 337 Ga. App. 217 - A16A0377 – GA Court of Appeals (Decided May 26, 2016)
    - Judgment: (Affirmed)
    - During jury deliberations about two hours into deliberation, one of the jurors sends out a note stating, "she cannot do this anymore and she wants out." When the court inquired about the note, the juror explained

she is not going to vote a certain way just to get a verdict. She is done deliberating and she wants to go home. She was visibly upset and crying. Trial Court excused the juror and brought in an alternate. Defendant was subsequently found guilty of voluntary manslaughter (lessor included of murder)

- Holding: "The trial court's main concern was the that the juror was visibly upset and had reached a fixed and definite opinion so soon after the deliberation began without fully vetting the evidence with the other jurors…Legal cause for excusing a juror arises when the court determines, in its sound discretion, that the juror holds an opinion so fixed and definite that he or she cannot lay it aside and decide the case on the evidence presented and the court's charge."

✪ *Murphy v. State*, 299 Ga. 238 - S16A0150 – GA Supreme Court (Decided June 20, 2016)

- Judgment: (Affirmed)
- During jury deliberations, one of the jurors, who had prior experience in investigating fires, used a lighter to demonstrate that fire traveled upward. After the guilty verdict was rendered, several jurors wrote affidavits about the account. Under the old evidence code, affidavits were impermissible to impeach a verdict. However, the Supreme Court addressed the issue anyway, as to whether a juror can conduct a demonstration during jury deliberations to help make a point.
- Holding: "It is not error for jurors to bring their past experiences and learning into deliberations to provide context and insight that allow the evidence and arguments presented at trial to be thoroughly examined…Juror…did introduce prohibited extrajudicial information into the deliberations. They, instead, exemplify the use of one juror's experience based knowledge to assist other jurors in their examination of the evidence and their understanding of the theories offered by expert witnesses at trial."

- **JURY INSTRUCTIONS**
  - **DEFENDANT'S CHOICE NOT TO TESTIFY**
    - *Barnes v. State*, 335 Ga. App. 709 - A15A1631 – GA Court of Appeals – (Decided February 15, 2016)
      - Judgment: (Reversed)
      - Defendant made timely request to charge jury on his right to not testify. Trial Court instructed the jury on the majority of the pattern jury charge but failed to instruct the jury on the last sentence, "they man not consider his right to not to testify in any way in making their decision." Defendant's attorney failed to object at trial. Court of Appeals states it was a constitutional error and regardless of the attorney failing to object, the judge was required to give the proper charge.
      - Holding: "The failure to give the instruction subverts the privilege against compulsory self-incrimination and not only undermines the fairness of the proceeding, but public confidence in that process. Accordingly, Defendant must be awarded a new trial.
  - **JUSTIFICATION**
    - *State v. Alvarez*, 299 Ga. 213 - S16A0397 – GA Supreme Court – (Decided June 06, 2016)
      - Judgment: (Affirmed)
      - Defendant claimed an affirmative defense (self-defense) at trial. Evidence was presented at trial to support the self-defense request. Defendant filed with the court a request to charge that the State must prove beyond a reasonable doubt that Defendant's conduct was not justified. The trial court refused to give the charge, however, Defendant's counsel failed to object after the jury was instructed. Supreme Court determined it was plain error not to give the instruction and affirmed the trial court's decision granting a new trial.
      - Holding: "The failure to give the requested instruction on Defendant's affirmative defense of justification was erroneous in this case because evidence was presented to support the defense and the charge requested is a correct statement of the law…Given the longstanding rule regarding the State's burden of disproving a defendant's affirmative defense in these circumstances, the error was obvious."

- **JURY QUESTIONS**
  - **QUESTIONS RAISED BY THE JURY AND ASKED TO THE WITNESSES**
    - *Hernandez v. State*, --- Ga. --- - S16A0936 – GA Supreme Court – (Decided October 17, 2016)
      - Judgment: (Affirmed)
      - At Defendant's trial, the trial judge explained to the jurors prior to presentation of evidence, if they had any questions of the witnesses, they should write the questions down, and after he conferred with trial counsels, he would ask any questions that were deemed proper. Following this procedure, there were about 100 questions to various witnesses that came from the jurors. Defendant never objected, so the Court decides this issue for plain error.
      - Holding: "while jurors in Georgia courts may not ask questions of witnesses directly, a trial court may receive written questions from the jury and ask those questions which the court finds proper, or allow counsel for either party to ask a testifying witness the questions found to be proper." Citing, Allen v. State, 286 Ga. 392 (2010). Further, the Defendant has failed to show any questions that were asked of the witnesses were improper.
      - IMPORTANT NOTE: Court did caution about soliciting large number of questions from the jurors. "Although trial courts must be cautious in soliciting and asking jury questions, particularly in large numbers…"

- **JUVENILE CHARGED IN SUPERIOR COURT**
  - **PRESENTMENT TO GRAND JURY**
    - *State v. Baxter*, --- Ga. --- - S16G0184 – GA Supreme Court – (Decided November 21, 2016)
      - Judgment: (Reversed)
      - Defendant is a 16 year old juvenile arrested for Aggravated Sexual Battery. Defendant was detained in custody and represented by counsel. Prior to the 180 day requirement for the State to present the case to the Grand Jury, Defendant signed a valid waiver, waiving the timeliness required by OCGA §17-7-50.1. After the State failed to present the case to the Grand Jury within 180 days, Defendant moved to have his case transferred to Juvenile Court. Trial Court granted the transfer and the Court of Appeals affirmed. COA stated OCGA §17-7-50.1 "absolutely required" the case be presented to the Grand Jury in a timely manner. Supreme Court disagrees.

- Holding: "If the child waives prompt presentation before the time has expired, the condition that divests the superior court of jurisdiction – the expiration of the time – never comes into being. Put another way, the jurisdiction of the superior court falls away only when the clock runs out, but so long as the clock is running, the child may agree to stop it…Accordingly, we reverse the judgment of the Court of Appeals."

➢ JUVENILE DELINQUENCY PETITION

30 DAY TIME PERIOD

✪ *In the Interest of M.D.H*, --- Ga. --- - S16G0428 – and *In the Interest of D.V.H.*, --- Ga. --- - S16G0428 – GA Supreme Court – (Decided October 31, 2016)

- Judgment: (Affirmed as to M.D.H. and Reversed as to D.V.H.)
- Two separate juvenile cases concerning what remedies are available when the State fails to file a delinquency petition within the required 30 days pursuant to OCGA 15-11-521(b). Both cases were combined for appeal. In both cases the State failed to file a delinquency petition within 30 days of the complaint and the defendant moved to dismiss with prejudice.
- Holding: "We now hold that if the State fails to file a delinquency petition within the required 30 days or to seek and receive an extension of that deadline, the case must be dismissed *without* prejudice." In other words, the State can re-file a new complaint and then within 30 days file a delinquency petition and preserve the issue. The Supreme Court did explain, that the Statute of Limitations is a bar from delay proceedings, for what it is worth.

✪ *In the Interest of J.F., a child*, 338 Ga. App. 15 - A16A0395 – GA Court of Appeals (Decided July 12, 2016)

- Judgment: (Certified to the GA Supreme Court)
- Juvenile was arrested for robbery and aggravated assault. Juvenile was released at a detention hearing shortly afterwards. State failed to file a delinquency petition within 30 days after the juvenile's release. State asserted due to personnel changes and inter-office policies, the State failed to file the delinquency petition. OCGA §15-11-521(b) requires the petition to be filed within 30 days after the juvenile's release from custody.
- Holding: In an unprecedented Order, the Court of Appeals filed for Cert to the Supreme Court to address this issue. The Supreme Court currently has two cases pending before it with similar issues. Due to

time restrictions, the Court of Appeals will not be able to wait for the Supreme Court decision. Therefore they also request Cert for the Supreme Court to address this case.

- IMPORTANT NOTE: Supreme Court decided the issue on October 31, 2016 in the above mentioned case, In the Interest of M.D.H. and In the Interest of D.V.H.

➢ JUVENILE SENTENCING

COURT'S AUTHORITY TO PROBATE A SENTENCE AFTER SENTENCING

✪ *State v. T.M.H.*, --- Ga. App. --- - A16A1357 – GA Court of Appeals – (Decided November 08, 2016)

- Judgment: (Affirmed)
- 16 year old juvenile defendant pled guilty to armed robbery with a firearm, aggravated assault and obstruction in Superior Court. State agreed to a downward departure and Defendant was sentenced to 5 years prison. Just prior to his 17th birthday, a status hearing was conducted to determine if the juvenile should be transferred to the Department of Corrections. Defendant requested the trial judge to release him to probation pursuant to OCGA §49-4A-9(e), which still allows the trial court to modify a juvenile sentence. State objected. Trial Court agreed with the Defendant and Ordered the remainder of Defendant's sentence to be served on probation.
- Holding: "In light of the express authority provided in OCGA § 49-4A-9(e) to review [Defendant's] sentence before he turned 17, the superior court was authorized to place [Defendant] on probation based on the court's finding of [Defendant's] rehabilitation, which finding was supported by the record. Accordingly, we discern no legal error requiring reversal, and we affirm the judgment of the superior court."
- IMPORTANT NOTE: This is a rather lengthy decision, whereby the COA went into the legislature history of several statutes. The crux of the statute grants the Superior Court continued authority to modify a juvenile's sentence until the child reaches 17. I would start requesting status hearings and bringing in witnesses on all juveniles, who have been sentenced in Superior Court.
- ADDITIONAL NOTE: This was a full Court's decision. Chief Judge Doyle wrote the decision, with P.J. Miller, McFadden, McMillian and J.J. Rickman concur. P.J. Barnes concurs in judgment only. And P.J. Andrews, Boggs and J.J. Ray dissent. I would expect the Superior Court to grant cert in this case.

- **KIDNAPPING**
  - **ASPORTATION**
    - *Overstreet v. Warden – A.G.*, 811 F.3d 1283 - No. 13-14995 – 11th Circuit (decided January 27, 2016)
      - Judgment: (Reversed)
      - Defendant was found guilty and sentenced to several counts of Kidnapping that resulted when the Defendant required the store manager to go to the back office to unlock a safe. Defendant's appellate attorney did not raise the issue of asportation even though the kidnappings were a direct result and furtherance of the crime, armed robbery.
      - Holding: Appellate attorney rendered ineffective assistance of counsel, because under Garza v. State, 670 S.E.2d 73 (GA 2008) "movement of a victim that is 'part and parcel' of an independent crime, such as armed robbery, would generally not be considered asportation…Defendant's appellate counsel rendered ineffective assistance in failing to argue that there was insufficient evidence to support Defendant's kidnapping convictions in light of Garza."
    - *Whatley v. State*, 335 Ga. App. 749 - A15A1911 – GA Court of Appeals (Decided February 22, 2016)
      - Judgment: (Affirmed)
      - Defendant claimed based upon Garza that asportation was not independent to the crime charged of armed robber. Defendant locked the store clerk into a back room prior to leaving the store.
      - Holding: The statute outlines four elements to establish asportation: (1) conceals or isolates the victim; (2) makes the commission of the offense substantially easier; (3) lessens the risk of detection; or (4) is for the purpose of avoiding apprehension. Based upon the new statute, concealing the victim in order to expedite their escape met the standards for asportation.

- **LEADING QUESTIONS**
  - *Wiggins v. State*, 338 Ga. App. 273 - A16A0162 – GA Court of Appeals – (Decided June 24, 2016)
    - Judgment: (Affirmed)
    - Defendant claimed it was error for the trial court to allow leading questions; such as, (1) Would she actually hold your hand during this time? And (2) Did he ever get his private part inside of your vagina?
    - Holding: "A question is leading when it is so framed as to suggest to the witness the answer which is desired; on the other hand, a question not suggesting the desired answer is not leading where it inquires only into a single fact. Milner v. State, 258 Ga. App. 425, 429 (2002). Thus a question is not open to the objection that it is leading when it does not suggest the answer desired…because each of these questions inquired into a single fact and did not suggest the answer desired, the questions were not leading."

- **LESSOR INCLUDED OFFENSE**
  - **CRIMINAL TRESPASS FROM BURGLARY**
    - *Daniel v. State*, 338 Ga. App. 389 - A16A0587 – GA Court of Appeals – (Decided June 07, 2016)
      - Judgment: (Affirmed)
      - Defendant gave a written request to charge the lessor included offense of criminal trespass from that of burglary. However, Defendant did not take the stand to testify that he was merely seeking shelter and not for the purposes of theft. Trial Court refused to give the requested charge. Defendant objected in the charge conference, but failed to object after the charge was given.
      - Holding: "We have held that the trial court must give a requested charge on criminal trespass as a lesser included offense of burglary where the testimony of the accused if believed, would negate an element of the crime of burglary (entry with intent to commit a felony or theft). Specifically, where the accused admits the unauthorized entry but denies the intent to commit a felony or theft, the trial court must give a requested charge on the lesser included offense of criminal trespass." However, Defendant did not testify at trial or present any other evidence negating any element of the crime of burglary, so the lesser included offense was required.

- IMPORTANT NOTE: Defense counsel failed to object after the jury charges were given. Thus, he waived appellate review with the exception of plain error. In this case, the court indicated it would not really have mattered, due to the lessor included should not have been given anyway. But remember: "because an objection voiced at the charge conference does not preserve objections to the charge as subsequently given, the failure to object to the charge as given precludes appellate review unless such portion of the jury charge constitutes plain error which affects substantial rights of the parties." So always object before and "AFTER" the charge.

CRUELTY TO CHILDREN AND RECKLESS CONDUCT

✪ *Shah v. State*, --- Ga. --- - S16A1083 – GA Supreme Court – (Decided October 31, 2016)

- Judgment: (Reversed)
- Defendant was found guilty of felony murder and cruelty to children in the first degree in connection to the death of her infant child. At trial, Defendant requested a lesser offense jury charge for reckless conduct, but the trial court denied the request. Prior to the death, Defendant would leave the infant child with her 14 year old daughter to take care of the infant. Additionally, the Defendant's air conditioning went out. The infant died and autopsy determined the infant was dehydrated and malnourished. Trial Court determined the defense was all or nothing and denied the lesser included request.
- Holding: "This Court has explained that 'reckless conduct may be a lesser included offense of cruelty to children,' if the harm to the child resulted from criminal negligence rather than malicious or willful conduct…We have also explained that 'a written request to charge a lesser included offense must always be given if there is any evidence that he defendant is guilty of the lesser included offense." Supreme Court determined it was erroneous for the trial court to fail to charge the jury on the lesser included offense, because there was evidence that negligence of leaving the child with the 14 year old daughter led to the death. Further defense counsel argued in opening about recklessness.

- **INVOLUNTARY MANSLAUGHTER AS LESSER INCLUDED OF MAILCE MURDER**
  - ✪ *Seabolt, Warden v. Norris*, 298 Ga. 583 – S15A1692 – GA Supreme Court (Decided March 07, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of malice murder. During the trial, the trial counsel requested a lesser included charge of involuntary manslaughter, but the trial court refused to give the charge. On appeal, the appellate attorney did not raise the issue on appeal. Defendant filed a Habeas on the appellate attorney, for failing to raise the issue of the lesser included request to charge and numerous other reasons. The Habeas Court granted Defendant relief based upon the appellate attorney ineffective assistance of counsel. The Warden appealed the decision. Supreme Court affirmed the Habeas Court as respect to failing to raise the issue of lesser included offense but reversed the other issues. New trial still granted.
    - Holding: "A written request to charge a lesser included offense must always be given if there is any evidence that the defendant is guilty of the lesser included offense. Despite counsel's proper request, the trial court refused to give a charge on involuntary manslaughter as a lesser included offense of malice murder, and instead charged the jury that involuntary manslaughter was only a lesser included offense of felony murder. However, as explained more fully below, the very same evidence that supported a charge of involuntary manslaughter as a lesser included offense of felony murder supports the conclusion that [Defendant] could have been guilty of involuntary manslaughter as a lesser included offense of malice murder."
- **SIMPLE BATTERY/ASSAULT FROM MALICE MURDER**
  - ✪ *Allaben v. State*, 299 Ga. 253 - S16A0166 – GA Supreme Court – (Decided June 20, 2016)
    - Judgment: (Reversed)
    - Defendant requested a written request to charge the jury for the lessor offenses of simple battery and simple assault from that of malice murder. Evidence presented at trial included that of the medical examiner who testified that the purpose of a sleeper hold is to subdue an individual yet the risk of death associated with it is significant

enough that many police jurisdictions around the nation have prohibited such a maneuver.

- Holding: "We find this evidence (the medical examiner's testimony) to be sufficient to warrant instructions on both simple battery, [simple assault] and reckless conduct as lesser-included offenses of malice murder."
- IMPORTANT NOTE: This is fact specific. The Supreme Court had already reversed the decision based upon "Rule of Completeness" but gave instruction on this issue to ensure it did not happen in the re-trial. As a practical matter, I would always request a lesser offense out of an abundance of caution. Just make sure you do so in writing.

- **SIMPLE BATTERY OF CHILD MOLESTATION**
  - *McMurtry v. State*, 338 Ga. App. 622 - A16A1142 – GA Court of Appeals (Decided September 15, 2016)
    - Judgment: (Affirmed)
    - Defendant filed a written request to charge for the lessor included offense of battery. At the charge conference, Counsel argued for the lessor included offense of simple battery. Trial Court denied the request to charge of simple battery.
    - Holding: "A trial judge never errs in failing to instruct the jury on a lesser included offense where there is no written request to so charge." The COA however went further to state that even if a written request to charge was made, it was still proper to deny the request. In essence, if you believed the complaining witness, he committed the act of child molestation. If you believe the Defendant, no criminal act was committed. Therefore it was not error for the judge to deny the request.
    - IMPORTANT NOTE: The COA cited to Brooks v. State, 197 Ga. App. 194, 194-195 (1990) "questioning whether simple battery can ever be a lesser included offense to child molestation." Regardless of this statement, I would still request the charge of simple battery and battery as the lessor included offenses and let the judge decide if he wants to give it. Just make sure your request is in writing.

- **VOLUNTARY MANSLAUGHTER FROM MURDER**
  - *Wright v. State*, --- Ga. --- - S16A1035 – GA Supreme Court – (Decided November 21, 2016)
    - Judgment: (Affirmed)
    - Defendant was charged with murder. At trial he requested a jury instruction for lessor included offense of voluntary manslaughter and self-defense. During the Defendant's testimony, he testified that he feared for his life, when he shot the decedent. Defendant never testified that he was in raged or shot the decedent out of an irresistible passion.
    - Holding: "Although the jury charges on self-defense and voluntary manslaughter are not mutually exclusive, 'the provocation necessary to support a charge of voluntary manslaughter is different from that which will support a claim of self-defense.' Walker v. State, 281, Ga. 521, 524 (2007). Only where the provocation so influenced and excited the accused that he reacted passionately rather than simply in an attempt to defend himself will a charge on voluntary manslaughter be warranted."

MERGER

- **AGGRAVATED ASSAULT / AGGRAVATED BATTERY**
  - *Regent v. State*, 299 Ga. 172 - S15G1829 - GA Supreme Court – (Decided June 06, 2016)
    - Judgment: (Reversed)
    - Defendant cut the throat of his girlfriend after an argument. The State charged Defendant with both Aggravated Assault and Aggravated Battery for the act of cutting the victim's throat. The Trial Court sentenced Defendant to consecutive sentences claiming the charges did not merge. Court of Appeals affirmed applying the "required evidence test" in Drinkard v. Walker, 281 Ga. 211 (2006) and "concluded that 'aggravated assault and aggravated battery are two separate offenses with different elements of proof' and thus, that the two offenses did not merge." Georgia Supreme Court disagrees and reverses.
    - Holding: "The offenses here, which are based on the single criminal act of Defendant cutting the victim's throat with a knife, only differ with respect to the seriousness of the injury or risk of injury suffered by the victim; while the aggravated assault count requires proof that Defendant cut the victim's throat with a knife, a weapon *likely* to result in serious bodily injury, the aggravated battery count requires proof of *actual* bodily harm by serious disfigurement that resulted from Defendant having slashed the victim's throat with a knife. Accordingly,

as charged here, aggravated assault is included in aggravated battery, and the two offenses should have merged."

- **'EDGE' MODIFIED MERGER RULE**
  - ✪ *DuBose v. State*, 299 Ga. 652 - S16A1299 – GA Supreme Court – (Decided September 12, 2016)
    - Judgment: (Affirmed)
    - Defendant was charged with Malice Murder and Felony Murder. The Felony Murder was premised on the underlying offense of possession of a firearm by a convicted felon. Jury found Defendant guilty of the lesser included voluntary manslaughter as to the Malice Murder, but still found him guilty of the Felony Murder. Court sentenced Defendant to both Felony Murder and Voluntary Manslaughter. Defendant appealed claiming the offenses should have merged and only sentenced to Voluntary Manslaughter.
    - Holding: "In Edge v. State, 261 Ga. 865 (1992), this Court adopted what has come to be known as the 'modified merger rule,' which holds that, when a defendant is found guilty of voluntary manslaughter, he cannot also be convicted of felony murder based on the same underlying acts. But this Court has consistently limited the application of the rule to cases in which the felony murder is predicated on a felony that is itself integral to the killing, typically an aggravated assault. See Wallace v. State, 294 Ga. 257, 258- 259 (2013). Moreover, this Court has consistently refused to extend the Edge rule to cases in which felony murder is predicated on the unlawful possession of a firearm by a convicted felon. See, e.g., Amos v. State, 297 Ga. 892, 894 (2015)…Because the felony murder charge in this case is predicated on the unlawful and independent possession of a firearm by convicted felon, the Edge modified merger rule does not apply."
- **GUILTY PLEA**
  - ✪ *Reid v. State*, --- Ga. App. --- - A16A1380 – GA Court of Appeals – (Decided November 03, 2016)
    - Judgment: (Remanded)
    - Defendant pled guilty to various charges. After his guilty plea, he filed an out-of-time motion to withdraw his plea. The trial court denied the motion. Defendant also requested that some of offenses should have merged. COA agrees that the out-of-time motion to withdraw his plea was properly denied. However, because some of the offense should have merged, the trial court must consider whether this was based upon

ineffective assistance of counsel, which could still grant Defendant an option to withdraw his guilty plea.

- Holding: "to disregard [the merger issue] and allow the defendant to serve a sentence for a criminal conviction that has been identified as illegal and void would not comport with fundamental fairness and due process of law."… Therefore, contrary to the State's argument that [Defendant's] guilty plea waives any error here, merger claims are not waived by the entry of a guilty plea, and appellate courts have an obligation to correct such errors." COA determined looking at the indictment that Defendant's charges for aggravated assault on a police officer and felony obstruction should have merged.

- **IDENTICAL COUNTS OF THE INDICTMENT**
  - *Simpson v. State*, 298 Ga. 315 - S15A1365 – GA Supreme Court (decided January 19, 2016)
    - Judgment: (Vacated in part and Remanded)
    - Defendant was found guilty of both Felony Murder for committing an aggravated assault and found guilty of the underlying aggravated assault.
    - Holding: "When the only murder conviction is for felony murder and a defendant is convicted of both felony murder and the predicate felony of the felony murder charge, the conviction for the predicate felony merges into the felony murder conviction…neither the indictment nor the trial court's charge to the jury specified that Defendant was being tried for two distinct aggravated assaults…as a result, Defendant's conviction and sentence for aggravated assault must be vacated because it merged with the conviction for felony murder."
  - *Tye v. State*, 298 Ga. 474 - S15A1522 – GA Supreme Court (decided January 19, 2016)
    - Judgment: (Reversed)
    - Defendant was found guilty of two counts of felony murder based upon the death of one individual
    - "Defendant may not be sentenced on both felony murder counts when only one person was killed inasmuch as this improperly subjects him to multiple convictions and punishments for one crime."

- *Lidy v. State*, 335 Ga. App. 517 - A15A2398 – Court of Appeals (Decided January 25, 2016)
  - Judgment: (Remanded for resentencing)
  - Defendant was found guilty of two counts of obstruction of an officer, because as the officers were placing him under arrest and escorted him to the patrol car, the Defendant pushed back against both officers causing everyone to fall to the ground.
  - Holding: "Although a defendant may be tried on multiple counts arising out of the same conduct, the rules of merger permit only one conviction and sentence for a single crime and all included offenses…When a suspect flees from the joint hold of more than one officer. Unless the evidence shows that each officer was obstructed in a different way or at a different point in time, multiple obstruction charges against multiple officers should merge for purposes of sentencing."
- *Hunt v. State*, 336 Ga. App. 821 - A15A2064 – GA Court of Appeals – (Decided March 29, 2016)
  - Judgment: (Reversed)
  - Defendant was charged with multiple counts of child molestation with the exact date of the offense being unknown. The only difference between the different counts, is that the second count states the second occurrence of the same crime occurred on an occasion different or on a different date than the first occurrence.
  - Holding: "Where two charges are indistinguishable because all of the averments, including date (which was not made an essential element), victim, and description of the defendant's conduct constituting the offense were identical, only one sentence may be imposed." In essence the Court stated because the same date range was used by both counts and no other averments were distinguishable, Defendant could only be sentenced to one count.
  - DISSENTING OPINION, Judge Miller states, because the second count states it happened on a different date than that of the first count, that the two counts are distinguishable and should be allowed to be sentenced to both counts.

- *Mitchell v. State*, 337 Ga. App. 841 - A16A0041 – GA Court of Appeals – (Decided June16, 2016)
  - Judgment: (Vacated and Remanded)
  - Defendant was found guilty of numerous counts of sexual offenses. Four counts in particular (7 and 12) aggravated sodomy and (8 and 13) rape contained similar language in the indictments. Trial Court did not merge the counts. In particular, each count had the phrase, "the allegations of this count of the indictment being separate and distinct from the allegations of any other count in this indictment." The jury was never instructed or given the option about what averments distinguished the two counts from each other.
  - Holding: "Although the indictments included the phrase, 'the allegations of this count of the indictment being separate and distinct from the allegations contained in any other count in this indictment,' this phrase was not charged to the jury nor stated in the indictment as a material averment distinguishing the two counts. For instance, in Bloodworth v. State, 128 Ga. App. 657 (1973) the State made material the normally immaterial date averred within the indictment by stating that 'the date herein alleged being a material averment as to his count.'"

GANG PARTICIPATION

- *Veal v. State*, 784 S.E.2d 403 - S15A1721 – GA Supreme Court – (Decided March 21, 2016)
  - Judgment: (Affirmed)
  - Defendant was charged and convicted of murder and armed robbery. He was also found guilty to gang participation as to both of those counts. Defendant requested that both of his gang participation counts should merge.
  - Holding: Defendant can be sentenced to each count of gang participation independently. "the statute makes clear that it can be violated 'through the commission of any enumerated offense.'"
- *Zamudio v. State*, 337 Ga. App. 531 - A16A0547 – GA Court of Appeals – (Decided June 09, 2016)
  - Judgment: (Affirmed)
  - Defendant was found guilty of the underlying offense of aggravated battery and of street gang terrorism. Defendant requested the Trial Court to merge the counts. Trial court refused to merge and COA affirms.

- Holding: "This Court decided Nolley v. State, 335 Ga. App. 539 (2016), in which this Court held that by enacting OCGA §16-15-4(m), the Legislature had determined that predicate acts for any offenses listed in the Street Gangs Act do not merge with the separately charged violation of the Street Gangs Act."

- **MALICE MURDER AND FELONY MURDER**
  - *Graves v. State*, 298 Ga. 551 - S15A1357 – GA Supreme Court (Decided March 07, 2016)
    - Judgment: (Remanded)
    - Trial Court merged the Felony Murder counts into the Malice Murder. Each Felony Murder count also had an underlying felony count (armed robbery and possession of a gun). Because the trial court merged the felony murder counts the trial court also merged the underlying counts.
    - Holding: Trial Court improperly merged the felony murder counts. Instead, the trial court should have vacated the felony murder counts. Since the felony murder counts were vacated, there was nothing for the underlying felony charges to merge with. Thus the trial court is instructed to resentence Defendant on the underlying felony charges.
  - *Brannon v. State*, 298 Ga. 601 - S15A1724 – GA Supreme Court – (Decided March 07, 2016)
    - Judgment: (Remanded)
    - Similar to Graves above, the court improperly merged the underlying armed robbery into the felony murder and then merged the felony murder into the malice murder.
    - Holding: Because the felony murder was vacated by operation of law and merged into the malice murder, there is nothing for the underlying predicate felony (armed robbery) to merge into. Thus the case is remanded for resentencing on the armed robbery.
- **POSSESSION OF A FIREARM**
  - *Scudder v. State*, 298 Ga. 438 - S15A1312 – Georgia Supreme Court – (Decided February 08, 2016)
    - Judgment: (Remanded)
    - The Defendant was never sentenced to two counts of possession of a firearm during commission of a crime, because the trial court merged them with another count; however the counts do not merge and Defendant must be resentenced.

- Holding: "The unlawful passion of a firearm during the commission of a crime is a crime distinct from the predicate felony. Where multiple crimes are committed together during the course of one continuous crime spree, a defendant may be convicted once for possession of a firearm during the commission of a crime as to every individual victim of the crime spree."

- **POSSESSION WITH INTENT AND/OR ATTEMPT TO DISTRIBUTE**
  - ✪ *Crankshaw v. State*, 336 Ga. App. 700 - A15A1975 – GA Court of Appeals (Decided March 09, 2016)
    - Judgment: (Affirmed)
    - Defendant was charged and convicted of both offenses: (1) attempt to sell oxycodone and (2) possession with intent to distribute.
    - Holding: No merger. "Each offense required proof of a fact that the other did not – the substantial step element of the attempt charge was not required to prove the possession with intent charge, while the possession element of the possession with intent charge was not required to prove the attempted sale charge.
- **RAPE AND AGGRAVATED CHILD MOLESTATION**
  - ✪ *Jones v. State*, 335 Ga. App. 591 - A15A1825 – GA Court of Appeals – (Decided February 05, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of Rape and Aggravated Child Molestation for having intercourse with an individual under the age of 10 years old. Trial Court did not merge the offenses for sentencing. Defendant claimed since they are both for having sex with an individual under the age of 10 they should merge
    - Holding: if both counts were based upon a single incident, then the required evidence test would not be satisfied and the counts would merge. However, if the counts were based on separate incidents of conduct they do not merge. Court Determined there were at least two separate incidents and thus did not merge.

- **MIRANDA**
  - *Mays v. State*, 336 Ga. App. 398 - A15A2337 – GA Court of Appeals – (Decided March 04, 2016)
    - Judgment: (Remanded)
    - Defendant was in custody for violation of probation. While in custody, a GBI officer questioned her about an unrelated criminal matter based upon making false statements. Defendant was transported from her cell, by a guard, where she was interviewed by the GBI in a well lit room. It is unclear whether she was handcuffed. 15 minutes into the interview, GBI explained to Defendant she is free to leave the interview at any point, but was never given Miranda Warnings. Defendant sought to suppress the interview, but the trial court denied the request claiming she was not in custody for purposes of Miranda.
    - Holding: "there is no bright-line rule that after a defendant has been remanded to jail or prison that she is always in custody for purposes of Miranda. The question is whether the circumstances of the interview are thought generally to present a serious danger of coercion." Because the content of the information that was being asked, defendant had not been sentenced, and she was notified until 15 minutes into the interview that she was free to leave, the Court of Appeals determined she was in custody for purposes of Miranda.

- **MISTRIAL AND DOUBLE JEOPARDY**
  - *Otis v. State*, 298 Ga. 544 - S15A1717 – Supreme Court of Georgia – Decided February 08, 2016)
    - Judgment: (Reversed)
    - Defendant raised for the first time at trial, after the jury had been sworn and opening statements made, that the Defense is going to claim an insanity defense. Defense asserted pre-trial notice is only required if an expert will be utilized to support the insanity defense, and since they are not using an expert, then no notice is required. The trial court ordered a mistrial and set the case for trial at a later date. Two weeks later, Defense filed a plea in bar claiming double jeopardy. Trial court rejected the plea in bar and Supreme Court reversed
    - Holding: "The trial court erred in entering a mistrial over the appellant's objection because appellant did not violate USCR 31.1 when he announced his intent to raise the insanity defense based solely on lay

witness testimony without first giving timely notice to the state. As a result, appellant may not be retried."

- Concurring Opinion by Justice Nahmias states, the rules need to be changed and petitions the legislature to amend the Superior Court Rules to require notice of insanity in any respect, rather an expert is used or not. As Justice Nahmias states, notice should be provided in order to produce a fair trial.

➢ MISTRIAL REQUEST OR CORRECTIVE MEASURE

✪ *Graves v. State*, 298 Ga. 551 - S15A1357 – GA Supreme Court (Decided March 07, 2016)

- Judgment: (Affirmed)
- State referenced a "gun case" that potentially asserted Defendant's bad character into evidence. Defense Counsel initially requested a mistrial, but the trial judge refused and gave a corrective instruction. Defense Counsel did not renew his request for a mistrial after the corrective instruction was given.
- Holding: "As an initial matter, because [defendant] failed to renew his motion for mistrial after the trial court denied that motion and took other corrective action, this argument is waived."
- NOTE: The Supreme Court did acknowledge that a mistrial was not warranted even if properly preserved due to the Defendant permitted the jury to hear the character evidence himself.

➢ MOTION FOR NEW TRIAL

✪ *Smith v. State*, 298 Ga. 487 - S15A1647 – Georgia Supreme Court (Decided January 19, 2016)

- Judgment: (Affirmed)
- Defendant filed an extraordinary motion for new trial after she pled guilty asserting she has discovered new evidence showing her innocence.
- Holding: Court denied her motion stating "an extraordinary motion for new trial is not a remedy available to the defendant because she pled guilty."

- **GENERAL GROUNDS – THIRTEENTH JUROR**
  - *State v. Hamilton*, 299 Ga. 667 - S16A0986 – GA Supreme Court – (Decided September 12, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of felony murder and other charges. Defendant filed a motion for new trial asserting "General Grounds" and several other reasons. Trial Judge granted the Motion for New Trial based upon General Grounds and also found trial counsel ineffective. State appealed, but Supreme Court affirmed.
    - Holding: "Even when the evidence is legally sufficient to sustain a conviction [under the Jackson v. Virginia standard], a trial judge may grant a new trial if the verdict of the jury is 'contrary to . . . the principles of justice and equity,' OCGA §5-5-20, or if the verdict is 'decidedly and strongly against the weight of the evidence.' OCGA §5-5-21. When properly raised in a timely motion, these grounds for a new trial – commonly known as the 'general grounds' – require the trial judge to exercise a 'broad discretion to sit as a 'thirteenth juror.'…Although the discretion of a trial judge to award a new trial on the general grounds is not boundless – it is, after all, a discretion that 'should be exercised with caution [and] invoked only in exceptional cases in which the evidence preponderates heavily against the verdict' – it nevertheless is, generally speaking, a substantial discretion." Court did not decide the other appellate issues, because the Court determined the Trial Judge did not abuse its discretion.

- **MISSING PART OF THE TRANSCRIPT**
  - *Sheard v. State*, --- Ga. --- - S16A1291 – GA Supreme Court – (Decided November 07, 2016)
    - Judgment: (Reversed and motion for new trial granted)
    - Defendant was found guilty of murder in 1998. Defendant timely filed a motion for new trial. He was appointed an appellate attorney, however no amended motion for new trial was filed until 2004. At this point it was realized that parts of the trial transcript were missing. In particular, the closing arguments and the charge to the jury were missing. After attempts to locate the missing transcript and hearings on what occurred, the trial court ultimately denied Defendant's motion for new trial, stating the trial court had sufficient memory to determine that

no errors were committed during the charge to the jury. Supreme Court disagrees.

- Holding: "In all felony cases in this State, 'the transcript of evidence and proceedings shall be reported and prepared by a court reporter,' OCGA §5-6-41(a), and 'it is the duty of the state to file the transcript after a guilty verdict has been returned in a felony case.' Wade v. State, 231 Ga. 131 (1973)…courts in this State 'have held that the failure of the state to file a correct transcript, though no fault of the appellant, effectively deprives the defendant of his right to appeal.' Montford v. State, 164 Ga. App. 627, 628 (1982)." The Supreme Court went further and explained that all omissions do not necessarily require new trial, such as, voir dire, opening statements, bench conferences, and polling the jury, however "where the missing transcript prevents adequate review of the trial below, a new trial is warranted." The omissions of the charge to the jury prevented an adequate review of the trial and thus a new trial is warranted.

➢ **NOTICE**

✪ *Case v. State*, --- Ga. --- - S16A1086 – GA Supreme Court – (Decided November 21, 2016)

- Judgment: (Reversed)
- This case primarily deals with whether the Defendant followed the procedural guidelines for appealing a Habeas Court's final Order dismissing the claim for want of prosecution. However, there is a notice issue that forms the basis. Defendant filed a Habeas claiming his trial attorney was ineffective based upon failure to notify him about being required to register as a sex offender. The Habeas was set for hearing, but neither the Defendant nor the Defendant's new attorney appeared for the hearing. Habeas Court denied the motion for want of prosecution. Defendant filed a motion to set aside judgment and included an affidavit claiming he never received notice of the hearing. Habeas Court determined notice was sent to correct address, never mentioning the affidavit and denied the requests. Defendant appealed.
- Holding: "When a party contends that a judgment dismissing a case for want of prosecution must be set aside due to a trial court's clerical error in failing to provide that party with proper notice of the hearing, an affidavit attesting to that lack of notice must be considered in connection with that motion to set aside…The habeas court was incorrect in its conclusion that an affidavit showing a party's lack of notice of the final hearing 'cannot constitute grounds for setting the [final habeas] order aside.' To the contrary, such an affidavit, if found to be credible, could establish that a judgment may be set aside based on that party's lack of

notice of the very hearing that led to the judgment against them dismissing the case for want of prosecution."

- **NOTICE OF APPEAL – 30 DAY TIME FRAME**
  - *Waller v. State*, 299 Ga. 619 - S16A0788 – GA Supreme Court – (Decided September 12, 2016)
    - Judgment: (Affirmed)
    - Defendant was convicted of Murder. His public defender filed a Motion for New Trial. At the Motion for New Trial hearing, Defendant became unpleased with his attorney and requested he represent himself. Trial Court notified him of his rights and of the fact that if he should lose his motion for new trial, he would be responsible for perfecting the notice of appeal. Defendant proceeded Pro Se. Defendant's Motion for New Trial was denied on November 21, 2013; therefore his Notice of Appeal must be filed by December 23, 2013. Defendant mailed his copy of notice of appeal on December 20, 2013; but it was not filed with the clerk until December 26, 2013. Defendant asserted the "mailbox rule" should apply and the fact that he did not receive the Court's Order until about a week after a filing; thus shortening his timeframe even further. Court found otherwise.
    - Holding: "First, the 30-day time frame provided in OCGA §5-6-38(a) is triggered by the 'entry' of the judgment sought to be appealed, and 'the filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment.' OCGA §5-6-31. Second, the 'mailbox rule' of Massaline v. Williams, 274 Ga. 552 (2001) does not apply outside the attempted appeal of a final order by a pro se inmate in a habeas corpus case. Roberts v. Cooper, 286 Ga. 657, 660 (2010)."

- **OBJECTIONS**
  - **NON-SPECIFIC OBJECTIONS ARE NOT ALLOWED**
    - *Frey v. State*, 338 Ga. App. 583 - A16A0829 – GA Court of Appeals – (Decided September 08, 2016)
      - Judgment: (Affirmed)
      - State sought recidivist punishment on Defendant. At the sentencing hearing, Defendant "objected" to the out of state indictments being presented but did not give any particular reason for the objection.

- Holding: "To be reviewable on appeal, an objection must clearly direct the attention of the trial court to the claimed error and must be stated with sufficient particularity to leave no doubt as to the specific ground upon which the charge is challenged…Because [Defendant] did not object below on the grounds he now attempts to raise on appeal, he has waived appellate review of the issues."
- IMPORTANT NOTE: You must give a specific reason as to why you are objecting. Merely stating "objection" does nothing to preserve the issue.

✪ *Orengo v. State*, --- Ga. App. --- - A16A1171 – GA Court of Appeals – (Decided October 27, 2016)

- Judgment: (Affirmed)
- Defendant was on trial for rape. Facts of the rape case consisted of a delayed outcry by the complaining witness. State did not place an expert witness on their witness list. After Defendant testified, State called their expert witness to testify about reasons people have delayed disclosures. Defendant merely objected at trial but did not give a reason. On appeal, Defendant claims the State knew of the expert and had anticipated on calling her all along. Further that it was improper rebuttal testimony.
- Holding: "It is the rule in Georgia that objections should be made with sufficient specificity for the trial court to identify the precise basis. It is not important in what format the allegation is cast so long as it is clear to the court the specific error alleged that the court may have the opportunity to correct them…On appeal only issues properly raised before the trial court will be considered." Defendant never stated a particular objection and thus he has waived it on appeal.

➢ **OBSTRUCTION OF AN OFFICER**

✪ *Hoglen v. State*, 336 Ga. App. 471 - A15A1755 – GA Court of Appeals – (Decided March 29, 2016)

- Judgment: (Affirmed)
- Defendant was being arrested in the middle of night. As he is being arrested, he is yelling out that the police are hurting him and killing him. His grandfather in response shoots a gun into the air to get the officers to stop. After the grandfather shoots his gun in the air, Defendant yells out over here. The State charged Defendant with felony obstruction and he was ultimately found guilty. Court of Appeals decided whether words alone are enough to support a felony obstruction charge

- Holding: "We have recognized that words, alone, can rise to the level of obstruction if they may reasonably be interpreted as a threat of violence and amount to an obstruction or hindrance…because the jury had some evidence from which it could reasonably infer that Defendant's shouts amounted to an offer of violence on the deputies as they were engaged in their official duties, we affirm defendant's conviction."

➢ **OPENING AND CLOSING STATEMENTS**

✪ *Simmons v. State*, 299 Ga. 370 - S16A0253 – GA Supreme Court – (Decided July 05, 2016)

- Judgment: (Affirmed)
- During the State's opening and closing statements, the State mentioned the Defendant never called anyone after leaving the decedent's body in a vacant lot and the Defendant never came forward during the 3 month investigation to notify the cops that he had sex with the decedent on the night she was killed. Defendant's counsel never objected to these remarks at trial as an improper comment upon his right to remain silent. Supreme Court considers the objection waived.
- Holding: "Inasmuch as there was no contemporaneous objection made, these allegations of error have not been preserved for review on appeal. Also there is no authority for the application of plain error review to comments made by lawyers during opening statements or closing argument…Accordingly, in the absence of an objection, these allegations of error will not be considered by the Court."
- IMPORTANT NOTE: always make the objection contemporaneously during opening and closing arguments. If not they will be waived. Should the Court not record the opening and closing statements, still object contemporaneously and then go back on the record after the opening or closing and restate your objection and the fact that you made a contemporaneously to the statement.

➢ **OUT-OF-TIME APPEAL**

✪ *Mims v. State*, 299 Ga. 578 - S16A0542 – GA Supreme Court – (Decided June 06, 2016)

- Judgment: (Affirmed)
- In 1985, Defendant entered a guilty plea to murder and kidnapping. He was subsequently sentenced to consecutive life sentences. 28 years later,

he filed a motion for out-of-time appeal claiming in essence, his plea was not knowingly or voluntarily due to the ineffectiveness of his attorney.

- Holding: "When a defendant is denied the effective assistance of counsel and loses his right of appeal as a result, this Court has held that the defendant is entitled to take an out-of-time appeal." However, "in deciding a motion for out-of-time appeal, the trial court must hold an evidentiary hearing to determine whether defense counsel's unprofessional conduct was the cause of the untimeliness only where the motion raises an issue that would have been meritorious on the existing record had a timely appeal been taken." The trial court and the Supreme Court determined that all Defendant's claims for ineffectiveness could be resolved by the record, which unequivocally shows Defendant entered his plea knowingly, willingly, and voluntarily. Thus no evidentiary hearing was required. Defendant's only recourse now is to file a Habeas.

✪ *Chism v. State*, 338 Ga. App. 463 - A16A0907 – GA Court of Appeals – (Decided August 03, 2016

- Judgment: (Affirmed)
- Defendant pled guilty with a non-negotiated plea in 2005 to various charges, including armed robbery and kidnapping. Three days after being sentenced, Defendant requested his trial counsel to withdraw his guilty plea. From 2005 to 2016, Defendant repeatedly requested his plea to be withdrawn, asked for trial transcripts, and requested an "out of time motion to appeal", all of which were denied. Trial Court denied his motion for out of time appeal, and the COA affirmed, because the ineffectiveness claim cannot be determined strictly by the record.
- Holding: "A direct appeal from a judgment of conviction and sentence entered on a guilty plea is only available if the issue on appeal can be resolved by reference to facts on the record. The ability to decide the appeal based on the existing record thus becomes the deciding factor in determining the availability of an out-of-time appeal when the defendant has pled guilty." Since the attorney's ineffectiveness as it relates to this case cannot be determined by the record, and requires a post-plea hearing, a direct appeal is not available, and Defendant's only recourse is through an action for habeas corpus.

- ✪ *Morris v. State*, 338 Ga. App. 599 - A16A1222 – GA Court of Appeals – (Decided September 14, 2016)
  - Judgment: (Reversed)
  - Defendant was found guilty of aggravated child molestation. Defendant's trial attorney handled the motion for new trial, which was ultimately denied. After the motion for new trial, Trial Counsel had numerous conversations with Defendant's family about a potential appeal. Trial Counsel explained there was not much to appeal and perhaps the family's money would be better used elsewhere. Trial Counsel further told the family that he did not recommend the public defender's office for an appeal, because in his opinion, "they do a very weak job on appeal." Trial Counsel could not recall if he ever had a specific discussion with Defendant concerning his appellate rights.
  - Holding: "A criminal defendant who has lost his right to appellate review of his conviction due to error of counsel is entitled to an out-of-time appeal…A 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…The right to appeal is also violated when the lawyer deliberately forgoes the direct appeal without first obtaining his client's consent…On this record, there simply was no evidence on which the trial court could rely to find that [Defendant] was adequately advised of his appeal rights, including the deadline to assert those rights, and there was no evidence showing that he voluntarily chose to waive his appeal rights."

- ➢ **PARTY TO THE CRIME**
  - ✪ *Robinson v. State*, 298 Ga. 455 - S15A1912 – Georgia Supreme Court – (Decided February 08, 2016)
    - Judgment: (Affirmed)
    - Defendant drove the co-defendant to the scene, waited for him to return, fled the scene once the co-defendant came back, and led the police on a high speed chase.
    - Holding: "Mere presence at the scene of the crime and mere approval of a criminal act are insufficient to establish that a defendant was a party to the crime. Proof that the defendant shares a common criminal intent with the actual perpetrators is necessary. But such shared criminal

intent 'may be inferred from the defendant's conduct before, during and after the crime.'" Defendant's conduct established he was a party to the crime.

- ✪ *Cisneros v. State*, --- Ga. --- - S16G0443 – GA Supreme Court – (Decided October 17, 2016)
  - Judgment: (Affirmed)
  - Defendant was indicted and ultimately found guilty to several counts of armed robbery and home invasion. In one of the home invasions, as Defendant waited in the car as a get away driver, one of the co-defendants sexually assaulted one of the alleged victims. Defendant was charged as a party to a crime and ultimately found guilty to this count also. Defendant appealed claiming he had knowledge about the co=defendant's actions. Court of Appeals affirmed the convictions. Supreme Court offered cert and also affirmed.
  - Holding: "A person who does not directly commit a crime may nevertheless be convicted as a party to that crime upon proof that he or she intentionally aided or abetted the commission of the crime, or intentionally advised, encouraged, hired, counseled, or procured another to commit the crime. See OCGA §16-2-20(b)(3)(4)." The Defendant argued that Rosemond v. U.S., 134 S Ct. 1240 (2014) requires that to be a party to a crime, one must have advanced knowledge, not just that it was reasonably foreseeable. Georgia Supreme Court rejected that theory in Hicks v. State, 295 Ga. 268 (2014) and again stated that Rosemond was decided under federal law and does not control.

➢ PHOTOGRAPHIC LINE-UP

- ✪ *King v. State*, 336 Ga. App. 531 - A15A1878 – GA Court of Appeals – (Decided March 30, 2016)
  - Judgment: (Affirmed)
  - The complaining witness was shown a six-pack line-up, where he picked out the defendant. All the judges describe the photographic line-up as the defendant's photograph has obvious differences from the other five photographs. Specifically, the defendant's photograph had a sharper image, brighter eyes, and visible background differences. The individuals in the photographs were all of a same description: race, male, facial hair. However, due to the differences, they explain your eye is instantly drawn to the photograph of the Defendant.

- Holding: The mere fact that the defendant's photograph itself is noticeably different from the others does not without more, render the lineup impermissibly suggestive. "Our courts have repeatedly held that slight differences in the size, shading, or clarity of photographs used in an identification line-up will not render the lineup impermissibly suggestive."
- DISSENTING OPINION, Judge Miller dissents as to the photographic line-up. Nevertheless, the witness's subsequent independent voice and in-court identification of the defendant cured any defect in the photographic line-up. Judge Miller agrees with the plurality that slight differences of photographs will not render the line-up impermissibly suggestive unless there is more. However Judge Miller points there is not just a slight difference and there is more. Defendant's photograph is the only one that had a clear background, where the other five had a shady grey hue. "Looking at the array, one's eyes are immediately drawn to Defendant's photo with the 'all but inevitable identification of defendant as the perpetrator.'" However, Judge Miller believes the certainty of the in-court identification based upon independent voice analysis renders any error harmless.
- DISSENTING OPINION, Judge Phipps dissents as to the photographic line-up. Judge Phipps states the Defendant's photograph is the only one that is different and your eye is immediately drawn to Defendant's picture. Further Defendant's photograph is the only one that is sharp enough to show sufficient clarity of facial features to allow identification. Based upon this, Judge Phipps believes the photo-array is impermissibly suggestive and should not have been introduced at trial. Judge Phipps also believes it was not harmless error and would have reversed for a new trial.

➢ PHOTOGRAPHS – AUTOPSY

✪ *Simpson v. State*, 298 Ga. 314 - S15A1365 – GA Supreme Court (decided January 19, 2016)

- Judgment: (Affirmed)
- Defendant objected to admission of autopsy photographs
- Holding: "Photographs that depicts the victim after autopsy incisions is admissible when necessary to show some material fact which becomes apparent only because of the autopsy."

- ✪ *Churchill v. State*, 298 Ga. 471 - S15A1487 – GA Supreme Court (decided January 19, 2016)
  - Judgment: (Affirmed)
  - Defendant objected to admission of autopsy photographs showing the baby's broken ribs from a prior incident
  - Holding: same as above in Simpson: "Photographs depicting baby's prior healing rib fracture were admissible where they 'served as part of the basis of the medical expert's opinion regarding the mechanism of death and were relevant to prior difficulty testimony showing the defendant had improperly squeezed the baby in the past."

➢ **PHOTOGRAPHS – IN LIFE PHOTOTGRAPHS OF THE DECEDENT**

- ✪ *Ragan v. State*, --- Ga. --- - S16A1107 – GA Supreme Court – (Decided October 17, 2016)
  - Judgment: (Affirmed for harmless error)
  - At Defendant's trial, the State introduced 5 "in-life" photographs of the decedent. The in-life photographs also included the decedent together with her children and grandchildren. The Decedent's husband identified the photographs for the court. During the testimony of the husband, several members of the jury started crying and/or was emotional. Defendant failed to object until after the testimony of the husband.
  - Holding: This case was tried after the new rules of evidence went into effect. However even under the old rules, "a photograph of a victim in life may be relevant 'to prove an element of the corpus delicti, that is that the person alleged to have been killed is actually dead.' Sizemore v. State, 251 Ga. 867, 868 (1984). This Court has stressed, however, that certain steps must be taken to ensure that the tenuous probative value of a victim-while-in-life photograph is not subsumed by the substantial prejudicial impact. *See*, e.g. Boyd v. State, 284 Ga. 46 (2008) (emphasizing 'that every effort should be made to proffer a photograph of the victim alone'); Flowers v. State, 275 Ga. 592 (2002) (recognizing that 'the better practice is to not permit a victim's family member to identify the victim where other, nonrelated witnesses are able to do so')). Here, the State failed to heed our caution…Nevertheless, any error here is harmless." As for the juror's emotions to the photographs, Defense Counsel did not

timely object, because other photographs were presented and it is unclear if their emotions were to the in-life-photographs or the other photographs.

- **PLEA AGREEMENT – NEGOTIATED**
  - *Underwood v. State*, 338 Ga. App. 670 - A16A1158 – GA Court of Appeals – (Decided September 21, 2016)
    - Judgment: (Reversed)
    - Defendant intended to accept a negotiated plea offer. During the plea colloquy, the Judge indicated he was not going to accept the plea agreement. Trial Judge explained that if Defendant would like to reconsider, Trial Judge was inclined to accept a 20 serve 10 sentence. Defendant conferred with his attorney and eventually pled guilty. Defendant then filed a motion to withdraw the guilty plea and appealed.
    - Holding: "In State v. Germany, 246 Ga. 455 (1980) our Supreme Court held that where the trial court intends to reject a negotiated plea agreement, 'the trial court shall, on the record, inform the defendant personally that (1) the trial court is not bound by any plea agreement, (2) the trial court intends to reject the plea agreement presently before it, (3) the disposition of the present case may be less favorable to the defendant than that contemplated by the plea agreement, and (4) that the defendant may then withdraw his or her guilty plea as a matter of right.' We have described this rule as a 'bright line test' that requires the trial court to 'expressly' inform the defendant, 'personally and on the record,' of his right to withdraw his guilty plea. Lawrence v. State, 234 Ga. App. 603, 605 (1998)" The Trial Court failed to explicitly advise Defendant of all four of the principles identified in State v. Germany and USCR 33.10.

- **PLEA IN BAR**
  - *Jackson v. State*, 336 Ga. App. 140 - A15A2244 – GA Court of Appeals – (Decided March 10, 2016)
    - Judgment: (Affirmed)
    - Defendant was charged with several misdemeanor counts for criminal trespass and others for trespassing at an apartment complex. Earlier that same night there was a rape, which defendant was also charged with.

The DA requested the State Court to hold off on the misdemeanor charges until they could figure out what would happen with the rape. However, the State Court allowed defendant to plea to the misdemeanor charges. Defendant now filed a plea in bar to the rape charge.

- Holding: "Crimes arise from the same conduct if they emerge 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." Trial Court and COA both determined there was a break between the rape and the criminal trespass, thus defendant's plea in bar is denied.

➢ POLYGRAPH

✪ *Parefenuk v. State*, 338 Ga. App. 95 - A16A0636 – GA Court of Appeals (Decided July 13, 2016)

- Judgment: (Reversed)
- Defendant was charged with child molestation. Leading up to the trial, Defendant performed a polygraph and after he was evaluated, Defendant changed his story about what occurred. At trial, without being prompted by any questions, Defendant stated, he told the officer that he would be willing to take a polygraph. No further questions were asked about the polygraph on direct. State argued that Defendant opened the door to the polygraph and that the State should now be able to introduce the results of the polygraph. Trial Court agreed to allow the results to come in. COA found reversible error.
- Holding: "As explained by the Supreme Court of Georgia, the results of a polygraph examination are inadmissible with two exceptions, by a proper stipulation of the parties, or 'to explain an actor's conduct or motive when such is relevant to the issues on trial.'" The court went on to state, "simply revealing that the defendant took a lie detector test – is not prejudicial to the State if no inference is raised as to the result of the test or if any inference is not prejudicial…Although Defendant may have opened the door to the some evidence regarding taking the test, the trial court allowed the State to introduce the results of the test, far exceeding any necessary rebuttal. But the results of the test, including that they showed the officer that Defendant was being deceptive when he denied the material allegations of the charges against him, invaded the province of the jury."

- **POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE**
  - *McNorrill v. State*, 338 Ga. App. 466 - A16A1016 – GA Court of Appeals – (Decided August 03, 2016)
    - Judgment: (Affirmed)
    - Defendant was stopped and his vehicle was eventually searched. A search of the vehicle revealed nine separately sealed bags of marijuana, a loaded firearm and no other drug paraphernalia. Defendant claimed there was not enough evidence to find him guilty of the charge "With Intent to Distribute". COA disagrees.
    - Holding: "Evidence that the marijuana was packaged in a manner commonly associated with the sale or distribution of such contraband would authorize any rational trier of fact to infer that defendant possessed marijuana, a controlled substance, with intent to distribute…Moreover, in addition to the packaging of the marijuana, the evidence shows that a loaded handgun was found on the driver's seat, bullets were found in defendant's pocket. This evidence further supported Defendant's conviction for possession of marijuana with intent to distribute…Conversely, there was no evidence that Defendant or his co-defendant were drug users or were under the influence of drugs, and no evidence of any smoking devices, rolling papers, or other paraphernalia associated with drug use found in the car.
    - IMPORTANT NOTE: This case distinguished two cases the Defendant relied upon; Hicks v. State, 293 Ga. App. 830 (2008) and Clark v. State, 245 Ga. App. 267 (2000), where the court previously held the evidence only supported a conviction of personal use. In both cases the court emphasized that there was a lack of drug packaging and a lack of a weapons, thus indicating personal use.

- **POSSESSION OF TOOLS FOR COMMISSION OF CRIME**
  - *Sutton v. State*, 338 Ga. App. 724 - A16A1176 – GA Court of Appeals – (Decided September 28, 2016)
    - Judgment: (Affirmed)
    - Defendant was tried and convicted of possession of tools during commission of crime. On the incident date, an officer observed Defendant driving slow, pulling into a couple of private driveways and backing out, and the officer eventually stopped Defendant when he ran

a stop sign. Upon approaching the vehicle, he noticed Defendant had socks pulled over his shoes, along with crow bars, grinders, and sledgehammers in the back seat. When Defendant was asked about the tools, he explained he was going to pick up some items that a relative owed him. Defendant appealed his conviction in part based upon no crime had taken place to this point.

- Holding: COA explained that in all the cases they reviewed, there was actually some evidence that tools were actually used in some specific crime or attempted crime. However COA explained they could find no case that indicates that a particular crime or attempted crime is necessary to support a conviction of possession of tools during commission of crime. "This is because the plain language of the statue [OCGA §16-7-20(a)] itself requires only that the defendant possess the relevant tools *with the intent* to use them in the commission of a crime, not that the tools must have already been used to commit a particular crime." Based upon the suspicious driving, socks over his shoes, tools in the back and could not give an explanation about what he was doing, there was sufficient evidence to find him guilty of possession of tools for the commission of a crime.

➢ PRIOR CONVICTIONS – DEFENDANT

✪ *Franklin v. State*, 336 Ga. App. 140 - S15A1308 – GA Court of Appeals (Decided March 21, 2016)

- Judgment: (Affirmed)
- Trial Court allowed an audio recording of a witness to be played after the defense attempted to impeach this witness a prior conviction.
- Holding: "The prior consistent statement of a witness is admissible at trial 'only where (1) the veracity of a witness's trial testimony has been placed in issue at trial; (2) the witness is present at trial; and (3) the witness is available for cross-examination…A witness's veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross examination to rebut a charge that a witness is motivated or has been influenced to testify falsely."

- ✪ *Robinson v. State*, 336 Ga. App. 627 - A16A0125 – GA Court of Appeals – (Decided April 05, 2016)
  - Judgment: (Affirmed)
  - Defendant's prior conviction for armed robbery was introduced for impeachment purposes. Defendant acknowledged the convictions while cross-examined and objected to the introduction of certified convictions because he stipulated to the convictions.
  - Holding: Under the old evidence the courts were to look at five factors to undertake a balancing test when deciding to admit defendant's prior convictions for impeachment purposes. The new rules do not list the factors but the federal rules are similar to the new Georgia rules and still require the balancing test. Thus, it would appear the courts should still look to these factors: (1) The kind of felony involved and its impeachment value; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue.
  - ADDITIONAL NOTE: Defendant tried to stipulate to the prior conviction to prevent the certified convictions introduction into evidence. Court relied upon State v. Jones, 297 Ga. 156 (2015), which stated when they are entered for impeachment purposes, the defendant cannot stipulate to prevent their introduction

➢ **PROBATION**

- ✪ *Barfield v. State*, 335 Ga. App. 674 - A15A2071 – GA Court of Appeals – (Decided February 10, 2016)
  - Judgment: (Reversed)
  - Defendant pled guilty and received a 20 year serve 6 years sentence. In 2013, Defendant was accused of violating his probation by committing the offense of Armed Robbery. In essence, the only evidence presented at the probation hearing was a sunflower seed that contained the Defendant's DNA and a pack of sunflower seeds in the getaway car that did not have any DNA or fingerprints linking Defendant to the car. Trial court revoked the balance stating the State met its burden by the preponderance of the evidence standard.
  - Holding: "mere presence or association, without any evidence to show further participation in the commission of the crime, is insufficient to

authorize a conviction." Because the State was unable to link the sunflower seed to the bag of sunflower seeds in the getaway car, the State failed to prove even by a preponderance of the evidence standard that Defendant was guilty.

- ✪ *Hayward v. Danforth*, 299 Ga. 261 - S16A0419 – GA Supreme Court – (Decided June 20, 2016)
  - Judgment: (Reversed)
  - In 2007 Defendant pled guilty to 25 years with 8 years to serve in prison. Defendant paroled out on the 8 years in 2009. In 2010, Defendant was arrested again for violating criminal laws and the trial court revoked the balance of his sentence, which 20 years, 3 months and 8 days. Defendant filed a Habeas claiming the trial court violated the separation of powers, because only the executive branch (Board of Pardons of Parole) can revoke part of his prison sentence. Supreme Court agreed
  - Holding: "A trial court cannot, in a criminal sentence, purport to limit the power of the Board of Pardons of Parole to grant parole in a manner not authorized by statute. Defendant had been granted parole by the Board and was in its legal custody until the expiration of his sentence, or until pardoned…OCGA §17-10-1(a)(1) provides that the trial court may revoke probation even before the probationary period has begun. However, pretermitting any constitutional issue, OCGA §17-10-1(a)(4) specifically sets forth that 'no revocation of any part of a probated sentence shall be effective while a defendant is in the legal custody of the State Board of Pardons and Paroles.'"
  - IMPORTANT NOTE: The way I read this case, The trial court has authority to revoke probation while Defendant is on parole, however, the sentence will not go into effect until after the Defendant's prison sentence has ended. Thus, he will be out on parole and will then have to report back to prison after parole ends. That leads to the question, what happens to the defendant should he choose to not report to prison in three years? Is he then charged with felony escape?

- ➢ **PRO SE CLIENT**
  - ✪ *Wiggins v. State*, 298 Ga. 366 - S15A1729 – Georgia Supreme Court (Decided January 19, 2016)
    - Judgment: (Reversed)

- Defendant wrote several letters to the judge requesting that he be allowed to represent himself Pro Se based upon a conflict of interest with his appointed attorney. Judge explained to him the request must be done through the "proper channels" and ignored his request. Defendant proceeded to trial without further inquiry or a *Farretta Hearing*.
- Holding: When a Defendant makes an unequivocal statement to represent himself at trial, the trial court must at minimum conduct a *Faretta Hearing* as the Defendant cannot silently waive his constitutional rights.
- "In summary, the record in this case shows that appellant unequivocally asserted his right to self-representation and that his request to proceed pro se was implicitly denied by the trial court without a *Faretta Hearing*. The trial court's failure to engage in the required Faretta colloquy and failure to rule on appellant's unequivocal request amount to violation of his constitutional right to self-representation."

✪ *Owens v. State*, 335 Ga. App. 537 - A16A0107 – Court of Appeals (decided January 27, 2016)

- Judgment: (Reversed and remanded)
- Defendant requested pro se to withdraw his guilty plea. Defendant was never instructed that he had a right to counsel during the proceedings to withdraw his plea.
- Holding: Based upon Folston v. State, 272 Ga. 457 (2000), case was remanded because defendant "was not appointed counsel and no valid waiver of his right to counsel was obtained."

✪ *Redford v. State*, 335 Ga. App. 682 - A15A1868 – GA Court of Appeals (Decided February 11, 2016)

- Judgment: (Affirmed)
- Defendant filed a pro se motion for speedy trial demand. At the time he filed his motion, defendant hired an attorney to help get him a bond. The attorney requested the bond and then withdrew from representation. Defendant never re-filed his motion for speedy trial.
- Holding: "A demand for a speedy trial has no legal affect whatsoever if filed by a defendant acting pro se at a time he is represented by counsel."

✪ *Page v. State*, 336 Ga. App. 121 - A15A1952 – GA Court of Appeals (Decided March 10, 2016)

- Judgment: (Affirmed)

- Defendant pled as a first offender to one count of burglary. Defendant was allowed to turn himself in three days later after his hospital visit. He was notified failure to turn himself could terminate his first offender. The judge signed the Sentencing Order but it was not recorded with the Clerk until several days after the day he was supposed to turn himself in. Defendant failed to turn himself three days later, and picked up several more felony charges when the officer's tried to arrest him. Defendant claimed since the Order was not signed with the Clerk, he could not be revoked.
- Holding: Because defendant failed to appear three days later, which was mandated by court Order, the Trial Court was authorized to revoke his first offender.
- CONCURRING OPINION: Judge Boggs concurred and explained "the court's sentence becomes effective once it is reduced to writing and signed by the trial judge." In essence, there is no requirement that the Order must be filed with the clerk of court for the Order to become binding.

✪ *Owens v. State*, 298 Ga. 813 - S16A0058 – GA Supreme Court – (decided March 07, 2016)

- Judgment: (Affirmed)
- Defendant requested to fire her attorney and represent herself pre-trial. A Ferreta Hearing was held and her attorney was dismissed. After other pre-trial hearings, Defendant requested her attorney back and was given her attorney back. In the middle of trial, Defendant again asked to dismiss her attorney, but the trial court denied her request.
- Holding: a request to dismiss their attorney made after the testimony of the State's witnesses cannot serve as the basis for reversal since a defendant 'cannot frivolously change his mind in midstream' by asserting his right to self-representation in the middle of his trial.

✪ *Williams v. State*, 336 Ga. App. 442 - A15A1973 – GA Court of Appeals – (Decided March 28, 2016)

- Judgment: (Reversed)
- Defendant had a bench trial where he signed a form waiving his right to counsel, but the form did not have any other information on it other than an attorney might be able to help him with legal issues and explain what he is charged with. He was found guilty by way of a bench trial.

- Holding: "A waiver of counsel is valid only if it is made with an understanding of (1) the nature of the charges, (2) any statutory lesser included offenses, (3) the range of allowable punishments for the charges, (4) possible defenses to the charges, (5) circumstances in mitigation thereof, and (6) all other facts essential to a broad understanding of the matter…If the State [is going] to use a pretrial waiver form to show that a defendant has intelligently elected to represent himself at trial after being advised of his right to counsel and the 'dangers' of waiver, the form should outline those pertinent dangers: such as (1) the possibility of a jail sentence; (2) the rules of evidence will be enforced; (3) strategic decisions with regard to voir dire and the striking of jurors must be made by defendant; (4) strategic decisions as to the calling of witnesses and/or the right to testify must be made by defendant; and (5) issues must be properly preserved and transcribed in order to raise them on appeal." The pre-printed form defendant signed only contained conclusory statements concerning his rights rather than an explanation of the dangers of proceeding to trial pro se.

✪ *U.S.A. v. Jimenez-Antunez*, 820 F.3d 1267 – No. 15-10224 – 11th Circuit COA (Decided April 25, 2016)

- Judgment: (Remanded)
- Defendant entered a plea of guilty to various drug charges. Prior to sentencing, Defendant sought to fire his retained attorney and requested an appointed public defender. Defendant asserted he felt coerced to accept the plea offer based upon conversation with his retained attorney. District court denied the motion to substitute his retained motion with a public defender, because the Defendant did not show cause of how his retained attorney was deficient.
- Holding: "Because a defendant who moves to dismiss his retained counsel maintains the right to counsel of choice, a district court cannot require the defendant to show good cause." Thus, a defendant has the right to fire his retained attorney for any reason as long as the decision is not based upon a delay or manipulation of the courts. Once, his retained attorney is discharged, the defendant then becomes like any other criminal defendant and should qualified to see if he or she is entitled to a public defender.

- **PROSECUTOR MISCONDUCT**
  - *Washington v. Hopson*, 299 Ga. 358 - S16A0148 –GA Supreme Court (Decided July 5, 2016)
    - Judgment: (Reversed)
    - I placed this case in the case summaries merely to point out prosecutor misconduct, which rarely if ever is acknowledged by the Supreme Court. Especially since Nahmias wrote the decision. In essence defendant was found guilty of rape. Some years after the trial and the prosecutor on the case went into private practice, the prosecutor was contacted about getting a new trial. The prosecutor met with the family of the defendant. The family secretly recorded the conversation. The prosecutor stated he knew witnesses were lying and for $15,000 he could get a new trial. That he personally would not place his name on documents, but another attorney would file the documents on his behalf.
    - Holding: Supreme Court determined the prosecutor's belief that a witnessed lied was an opinion and it was up to the jury to determine the credibility of the witnesses. As for the misconduct after the trial was over, even though the Supreme Court acknowledges the misconduct, they state it did nothing to affect the outcome of the trial. Therefore the Supreme Court reversed the granting of a new trial. (At the end of the day, Nahmias stays true to his prosecution background and denies a new trial. However, he did state, "This court and the Court of Appeals have previously indicated our agreement with the habeas court's condemnation of Joshi's [prosecutor] conduct in this respect, and we reiterate that it was unscrupulous."

- **PUBLIC ACCESS TO THE COURTS**
  - *Jackson v. State*, --- Ga. App. --- - A16A0738 – GA Court of Appeals – (Decided November 03, 2016)
    - Judgment: (Reversed)
    - Defendant was charged with child molestation against his step-daughter. The "evidence against him was overwhelming and largely undisputed". However the Trial Court closed off the proceedings to the public when the complaining witness testified, based upon a motion filed by the State. COA determined the trial court did not follow the procedures set out by the United States Supreme Court to safeguard a defendant's right to a public trial.

- Holding: "The Supreme Court of the U.S. has articulated the framework governing courtroom closures. "The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternative to closing the proceeding, and it must make findings adequate to support the closure. Citing Presley v. Georgia, 558 U.S. 209, 213-14 (2010)." COA determined the trial court failed to adequately make findings on the record that supported the closure and that it was not narrowly tailored, because the closure excluded everyone and not just family members. COA went further and explained, "to ensure that courtroom closure remains the rare exception rather than the rule, our Supreme Court has mandated that a movant seeking closure demonstrate by 'clear and convincing proof' that 'no means available other than closure of the hearing will serve to protect the right of the movant.'"
- IMPORTANT NOTE: The COA takes offense with the State appearing to lie to the Court. The trial court asked if the request to close the courtroom included everyone or just the defendant's family, and twice the State responded that they wanted everyone except court-personnel. However, in the State's brief, they claim they merely wanted to exclude the Defendant's family. COA stated, "this is nonsense". The COA went further and explained when the State tried to argue that the press was still allowed to remain: "The State argues that, because the press is part of the courtroom personnel, it was inherent in the court's ruling that the press was not removed from the courtroom. If the State's first argument is nonsense- and it is – then this argument is nonsense on stilts. The record shows a total closure of the courtroom."

RAPE

INTIMIDATION

- *Mack v. State*, --- Ga. App. --- - A16A0966 – GA Court of Appeals – (Decided October 12, 2016)
  - Judgment: (Affirmed)
  - Defendant was charged with Rape, armed robbery, and several other counts pertaining the same incident. During the incident, Defendant and co-defendant held the complaining witness at gun point and went through her purse. At different times, the two co-defendants took turns going into the bedroom and had intercourse with the complaining witness. While inside the bedroom the other co-defendant would remain outside with the gun. In both instances, the complaining witness

begged the men to put on a condom which they did before the intercourse. Defendant now appeals claiming there was insufficient evidence as to show the intercourse was conducted against the complaining witness's consent or by use of intimidation.

- Holding: "'A person commits the offense of rape when he has carnal knowledge of ... [a] female forcibly and against her will[.]' OCGA §16-6-1(a)(1). Carnal knowledge is statutorily defined as 'any penetration of the female sex organ by the male sex organ.' OCGA §16-6-1(a). The term 'forcibly' means the use of 'acts of physical force, threats of death or physical bodily harm, or mental coercion,' and the phrase 'against her will' means without the victim's consent…Lack of resistance, induced by fear, is force within the meaning of OCGA §16-6-1(a)(1)." It is further immaterial that the complaining witness requested Defendant to put on a condom, because the reasonableness of her fear was up to the jury.

➢ **RAPE SHIELD STATUTE**

✪ *Morgan v. State*, 337 Ga. App. 29 - A16A0531 - GA Court of Appeals – (Decided May 02, 2016)

- Judgment: (Affirmed)
- Defendant sought to introduce evidence of complaining witness's prior false accusation of child molestation against her stepfather. Trial court held a hearing outside the presence of the jury and determined the allegations against her stepfather were in fact true and thus precluded defendant from introducing the prior accusation.
- Holding: Evidence of prior sexual behavior by the complaining witness shall not be admissible pursuant to the Rape Shield, OCGA §24-4-412. "But such evidence may be admissible to show the victim's lack of credibility where the victim has made prior false allegations of child molestation. The reason for this exception to the Rape Shield Statute is that the evidence does not involve the victim's past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct. However, before such evidence can be admitted, the trial court must make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists." The court held such a hearing and determined there was a reasonable probability that the information was in fact true.

- **RECORD RESTRICTION**
  - *Mosley v. Lowe*, 298 Ga. 363 - S15A1722 – Georgia Supreme Court (Decided January 19, 2016)
    - Judgment: (Affirmed)
    - Lowe was arrested in 1996 and charged with simple assault. The case was eventually Nolle Prossed based upon lack of prosecution. Based upon OCGA §35-3-37, Lowe requested her arrest be restricted. Sheriff denied her request, claiming her arrest occurred prior to the statute's enacting language.
    - Holding: OCGA §35-3-37 includes language that the statute should be applied retroactively and Lowe should have her record restricted.
  - *Woodhouse v. State*, 336 Ga. App. 880 - A16A0358 – GA Court of Appeals – (Decided April 20, 2016)
    - Judgment: (Reversed)
    - Defendant entered and successfully completed a pre-trial diversion program. At the conclusion of the pre-trial diversion, the case was nolle prossed. Defendant then petitioned the court to restrict the arrest record pursuant to OCGA §35-3-37. A hearing was conducted and the trial court concluded that OCGA 35-3-37 does not apply, because the indictment was pre-statute becoming enacted. Defendant appealed
    - Holding: The Supreme Court of Georgia recently considered the question of whether the amendments to OCGA §35-3-37 apply to pre-July 01, 2013 arrests. In Mosley v. Lowe, 782 SE2d 43 (2016), the Court held: "because the statute itself makes clear that it does apply to information regarding arrests pre-dating the amendments, and because such application presents no constitutional problem, we hold that the amendments to the statute do apply here." Thus, Defendant should be allowed to have her record restricted.

- **RECIDIVIST PUNISHMENT**
  - *Cook v. State*, 338 Ga. App. 489 - A16A1105 – GA Court of Appeals – (Decided August 08, 2016)
    - Judgment: (Remanded)
    - Defendant was on first offender for false imprisonment. Prior to adjudication of guilt on the first offender plea, Defendant was charged and accused of Rape. At his probation revocation hearing, which occurred several days after his recent arrest, Defendant's first offender

was revoked and Defendant was sentenced to 10 years to serve. When Defendant was found guilty of Rape, he was sentenced as a recidivist and sentenced to life in prison. Defendant appealed.

- Holding: "OCGA §17-10-7(a) provided that 'any person convicted of a felony offense in this state…who shall afterwards commit a felony' shall be sentenced to the maximum possible punishment for the subsequent off4ense. 'A first offender's guilty plea does not constitute a conviction as that term is defined in the Criminal Code of Georgia.' Rather, under the first offender statute, 'until an adjudication of guilt is entered, there is no conviction.'" Defendant's offense of Rape occurred prior to the adjudication of guilt for first offender, therefore it was improper to sentence him as recidivist.

➢ RECUSSAL OF THE JUDGE

✪ *Battle v. State*, 298 Ga. 661 - S15A1510 – GA Supreme Court (Decided March 21, 2016)

- Judgment: (Affirmed)
- Defendant made several threats directed toward the judge prior to trial. However, defendant never requested the judge to recuse himself.
- Holding: Defendant failed to preserve the issue by not raising the issue of recusal within five days after becoming aware of the conflict. The Court went further to address whether even if a timely request was made, would the judge be required to recuse himself. In this regard the court held: "absent extraordinary circumstances, threats or plots by a criminal defendant against the judge presiding over his case – even serious ones- do not mandate the judge's recusal."

✪ *Williams v. Pennsylvania*, 136 S.Ct. 1899 - No. 15-5040, - U.S. Supreme Court - (June 09, 2016)

- Judgment: (Affirmed)
- Defendant was charged with a capital case in Philadelphia. The prosecutor on the case requested permission from her superiors to seek the death penalty. Then District Attorney, Ronald Castille, approved the request to seek the death penalty. At some point later, Ronald Castille became Chief Justice for Pennsylvania. Defendant filed an appeal asking for stay of his conviction, of which Ronald Castille participated in the decision to not grant relief. Defendant requested to recuse Ronald

Castille from participating in his appeal due to he participated in his prosecution.

- Holding: "The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case…Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."
- IMPORTANT NOTE: It makes no difference that the Chief Justice Ronald Castille did not give the decisive vote. His influence during the oral arguments or deliberations may have impacted other members, by persuading them to vote according to his view point. Therefore, a new hearing should be conducted with Chief Justice Ronald Castille being recused from participating.

➢ **RECUSAL OF THE PROSECUTION**

✪ *State v. Mantooth*, 337 Ga. App. 698 - A16A0256 – GA Court of Appeals – (Decided July 01, 2016)

- Judgment: (Reversed)
- Defendant was arrested for DUI. The Solicitor was a personal acquaintance of the Defendant. The Solicitor petitioned the Attorney General to appoint another Solicitor and recuse himself. Defendant objected to the recusal and the Trial Court vacated the recusal Order. State appealed claiming Defendant did not have standing to oppose the recusal request.
- Holding: "This Court has specifically held that a defendant 'does not have a substantive right to have his case tried by a specific prosecutor so as to make notice necessary in order to oppose the solicitor-general's disqualification…Under the circumstances presented in this case, we will not second guess the Solicitor-General's voluntary recusal."

- **RES GESTAE**
  - *Wiggins v. State*, 338 Ga. App. 273 - A16A0162 – GA Court of Appeals – (Decided June 24, 2016)
    - Judgment: (Affirmed)
    - Defendant was convicted of several sexual offenses that involved her bringing a child to another man's house to be sexually abused for money. Defendant would explain to the child while they would go to the house, that she herself was sexually abused as a child. Defendant sought to suppress the information as improper character evidence.
    - Holding: "Under longstanding Georgia law, all the acts and circumstances surrounding and constituting the res gestae are admissible, despite the fact that they may reflect poorly on a defendant's character. Baughns v. State, 335 Ga. App. 600, 602 (2016). Therefore, evidence of statements made by the defendant during the commission of the offense is admissible as part of the res gestae of the crime even if it puts the defendant's character in evidence."
  - *Satterfield v. State*, --- Ga. App. --- - A16A1278 – GA Court of Appeals – (Decided October, 19, 2016)
    - Judgment: (Affirmed)
    - Defendant was charged and ultimately convicted of making terroristic threats against a judge and his family. During the trial, the State admitted into evidence a firearm that was located inside Defendant's car. Defendant objected claiming the gun was irrelevant as to offense he was charged with.
    - Holding: This case was tried after the new rules and as such res gestae is no longer appropriate terminology. However, res gestae has been carried over to the new rules as intrinsic evidence, which is admissible; as opposed to extrinsic evidence, which is not admissible unless 404(b) applies. "Evidence is intrinsic 'if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense' Brooks v. State, 298 Ga. 722, 727 (2016)." The gun was inextricably intertwined with the other evidence for the offenses he was charged and thus relevant.

- **RIGHT TO COUNSEL**
  - *State v. Philpot*, 299 Ga. 206 - S16A0334 – GA Supreme Court – (Decided June 06, 2016)
    - Judgment: (Affirmed)
    - Defendant was arrested for his actions concerning a homicide. When defendant was being read his *Miranda Rights*, the officer stated, "you have the right to an attorney". Defendant then responded, "would you like his phone number? You can call my old lady and get his phone number." Officer responded, "so you have a lawyer?" and he responded in the affirmative. The officer then continued reading the *Miranda Rights*, interviewed the defendant and Defendant ultimately made a confession. Trial court suppressed the confession and the State appealed. Supreme Court agreed with the trial court.
    - Holding: "By the time the Defendant reiterated that he needed the officers to call his girlfriend to get his lawyer's number, he had unambiguously invoked his right to counsel. See McDougal v. State, 277 Ga. 493, 499 (2004) ('A suspect's statement that he wants to call his lawyer or, as in this case, that the wants to contact his wife so she may call his lawyer, is a clear request for an attorney.')" The fact that defendant continued to speak to the detectives and even signed a waiver would have no impact on the fact that Defendant requested an attorney. Questioning of Defendant, should have ceased at that moment, until an attorney was provided.

- **RIGHT TO REMAIN SILENT – POST ARREST**
  - *Dumas v. State*, 337 Ga. App. 124 - A16A0053 – GA Court of Appeals – (Decided May 28, 2016)
    - Judgment: (Reversed for ineffective assistance of counsel)
    - Defendant was convicted of Rape and child molestation. During the trial, the DA consistently asked the Defendant while he was on the stand, "why he did not tell this version of events to the police after he was arrested?" Defendant's attorney repeatedly objected. However in closing, the DA again mentioned, "if you are arrested for a crime you did not commit, you would scream that from the mountains and tell everyone you know." Defense counsel did not object and could give an explanation why he did not object.

- Holding: "Georgia law is abundantly clear that arguments commenting on a defendant's silence are impermissible. (citing several cases)…And Defense counsel's failure to object to such comments amounts to deficient performance."
- IMPORTANT NOTE: Defendant's counsel did not ask for a curative instruction, after the State repeatedly commented on the Defendant's silence. The COA did not find him ineffective for failing to request a curative instruction as they determined it was trial strategy. However the better course of action would be to ask for a curative instruction.
- IMPORTANT NOTE 2: Since, the ineffective part was failing to object to the closing argument comment, the State argued Defense opened the door by commenting in closing that the police never asked the defendant for his side of the story. COA rejected this theory based upon the comment from the Defense Counsel was rebuttal statements to the State's already improper evidence. Therefore the Defense did not open the door, and the State cannot open the door and walk through it themselves.

➢ **RULE OF COMPLETENESS**

✪ *Allaben v. State*, 299 Ga. 253 - S16A0166 – GA Supreme Court – (Decided June 20, 2016)

- Judgment: (Reversed)
- This is the second reversed conviction concerning Defendant. He was found guilty of killing his wife. Prior to arrest he went to a friend's house, Jon Kevin Crane, and admitted to killing his wife. Crane testified at trial that Defendant confessed to killing his wife. Trial Court prevented defense counsel from eliciting testimony that Defendant also stated, "that he didn't mean for her death to happen, that he loved her so much and her death was not what he wanted." The court excluded this information based upon inadmissible self-serving statements or hearsay.
- Holding: "When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence." OCGA §24-8-822… "Where a part of a conversation, which amounts to an incriminatory admission, is admitted in evidence, it is the right of the accused to bring out other portions of the same conversation, even

though it is self-serving in its nature, or exculpatory, in that it justifies excuses, or mitigates the act."

- ✪ *Morales v. State*, 337 Ga. App. 614 - A15A2386 – GA Court of Appeals – (Decided June 29, 2016)
  - Judgment: (Affirmed on harmless error)
  - Defendant was tried and convicted for Rape. During the trial, the state played portions of his recorded interview that were inculpatory in nature. The trial court refused to admit other portions of the recorded interview due to their self-serving nature. Defendant claims the rule of completeness required the admission of the entire recorded statement. COA agrees but found the other evidence overwhelming.
  - Holding: "We agree that Defendant's entire statement should have been admitted under the rule of completeness, but conclude that the error was harmless." The COA went further to state, "As the Supreme Court of Georgia has recently noted, the rule of completeness prevents litigants from misleading the jury by presenting portions of prior statements taken out of context and is often essential in order to arrive at the true drift, intent and meaning what was said on the previous occasion."

➢ RULE OF LENITY

AGGRAVATED ASSAULT AND OBSTRUCTION

- ✪ *Gordon v. State*, 337 Ga. App. 64 - A16A0177 – GA Court of Appeals – (Decided May 06, 2016)
  - Judgment: (Affirmed)
  - Defendant was indicted and found guilty of Aggravated Assault and felony Obstruction based upon the same conduct of trying to put a cigarette in the eye of the officer. Defendant argued that the rule of lenity should apply and could only be found guilty of the lesser offense of felony Obstruction.
  - Holding: "The Supreme Court of Georgia has cautioned that simply because a single act may, as a factual matter, violate more than one penal statue does not implicate the rule of lenity…Simply because a single act may, as a factual matter, violate more than one penal statute does not implicate the rule of lenity. What is required is a statutory ambiguity such that identical evidence, not merely a single act, results in different punishments."

- **FALSE STATEMENTS AND FALSE REPORT OF A CRIME**
  - ✪ *Marlow v. State*, --- Ga. App. --- - A16A0877; *Trim v. State*, --- Ga. App. --- - A16A0878 – GA Court of Appeals – (Decided October 11, 2016)
    - Judgment: (Remanded)
    - Both defendants were tried together and the Court of Appeals joined their appeals as they both raise similar arguments. Both defendants wrote two separate statements each and similar to each other. These statements were given to the police officer claiming they were almost run over by a third person. Officer obtained a video from the restaurant showing the road and the video is inconsistent with their statements. In fact no car passed by when they crossed the road. They were charged with felony making a false statement and convicted. Both appeal claiming the Rule of Lenity should apply.
    - Holding: "The fundamental inquiry when making this assessment, then, is *whether the identical conduct would support a conviction under either of two crimes with differing penalties,* i.e., whether the statutes define the same offense such that an ambiguity is created by different punishments being set forth for the same crime… Thus, the rule of lenity applies where there is ambiguity in the two statutes such that 'both crimes could be proved with the same evidence.'" The COA went further and explained, "[u]pon review of the two statutes at issue, although there are many ways that the crime of making a false statement may be committed, [the defendant's] conduct, as charged, subjected [them] to prosecution and sentencing under both OCGA §§ 16-10-20 and 16-10-26. Indeed, [the defendant's] willfully and knowingly made . . . false statements to [a law enforcement officer] by falsely reporting to [that] officer[] a crime that [they] alleged to have occurred in their jurisdiction. Thus, because these two statutes provide different grades of punishment for the same criminal conduct, [the defendants are] entitled to the rule of lenity."
- **FELONY AND MISDEMEANOR VERSIONS OF SAME OFFENSE**
  - ✪ *Bynes v. State*, 336 Ga. App. 223 - A15A1974 – GA Court of Appeals – (Decided March 16, 2016)
    - Judgment: (Reversed and Remanded)
    - Defendant was indicted with the offense of "harming a police dog" with no mention to the subsection or words, "causing debilitating physical injury to the dog." However, the trial court charged the jury on the

felony version for causing debilitating physical injury to the dog. Once defendant was found guilty, the Trial Court sentenced him to the felony version and sentenced him to five years prison to run concurrent.

- Holding: "It is axiomatic that, as the trial court noted, the indictment and the pleas of not guilty from the issue which a jury is trying and will determine by its verdict...Because Defendant was sentenced for a crime not charged in the indictment, and therefore not considered by this jury we vacate that portion of Defendant's sentence."

- **FORGERY IN THE FIRST AND FALSE STATEMENT OR WRITING**
  - *Martinez v. State*, 337 Ga. App. 374 - A16A0323 – GA Court of Appeals – (Decided June 09, 2016)
    - Judgment: (Reversed)
    - Defendant was arrested for Robbery by Snatching. When booked into the jail, he singed several booking reports with a false name. Defendant was indicted with Forgery in the First and several other related charges. Defendant asserted the Rule of Lenity required the Court to sentence him to the lesser offense of making false statements in writing instead of the Forgery in the First. At the time of trial in the case at bar Forgery in the First carried 10 years prison and False Statements carried 5 years prison.
    - Holding: "The fundamental inquiry when assessing whether the rule of lenity applies is whether the identical conduct, meaning the specific conduct with which the defendant was charged, would support a conviction under either of two criminal statutes with differing penalties…Under OCGA §16-9-1(b), Defendant was guilty of intending to defraud the sheriff's department by knowingly making four writings in a factious name. Under OCGA §16-10-20, Martinez was guilty of knowingly and willfully making a false statement of his name, in four writings, with the intent to deceive a government entity…Therefore, because these two statutes provide for different penalties for the same conduct at issue in this case, the rule of lenity applies, and Defendant must be resentenced."

- **RULE OF SEQUESTRATION**
  - *Davis v. State*, 299 Ga. 180 - S16A0103 – GA Supreme Court – (Decided June 06, 2016)
    - Judgment: (Affirmed)
    - The rule of sequestration was never invoked, however both parties adhered to the rule with the exception of the State's rebuttal expert witness. Defendant presented an expert witness via video recording. A transcript of the testimony was prepared and ultimately given to the State's expert witness, who testified in rebuttal. Defendant objected and claimed the State violated the rule of sequestration.
    - Holding: Both OCGA §24-6-615(3) and Federal Rule of Evidence §615(c) preclude trial courts from excluding a witness whose presence a party shows is 'essential' to presenting that party's case. The trial court has broad discretion in deciding whether a witness comes within this exception…Federal courts have explained that the concerns underlying sequestration are generally overcome where an expert witness will give only or primarily opinion rather than factual testimony and may appropriately base that opinion on the testimony of other witnesses…Indeed, having the expert attend the relevant pats of the trial may render unnecessary the lengthy, convoluted, and typically argumentative hypothetical questions that lawyers would otherwise utilize."
    - IMPORTANT NOTE: This case was decided shortly after January 01, 2013, when the new evidence code took effect. Neither the trial attorneys nor the appellate attorneys for the defendant or the state cited to the new evidence code except in passing. The GA Supreme Court admonishes the attorneys in the last paragraph of the opinion for its failure to cite to current case law. "Georgia lawyers do this Court no favors – and risk obtaining reversible evidence rulings from trial courts – when they fail to recognize that we are all living in a new evidence world and are required to analyze and apply the new law…We trust that this shortcoming will not be repeated in future cases coming to this Court."

- **SEARCH AND SEIZURE**
  - **ARTICULABLE SUSPICION**
    - *Gaither v. State*, 338 Ga. App. 763 - A16A0788 – GA Court of Appeals – (Decided October 04, 2016)
      - Judgment: (Reversed)
      - Police officer testified at a suppression hearing that he did not observe Defendant commit any traffic violations. That when he passed Defendant, she turned onto a dead-end road that lead only to one private driveway. When Defendant passed the only driveway and came to the dead-end she proceeded to turn around. Police Officer turned on the blue lights at this point. Officer testified on cross-examination that he activated his blue lights 'solely because it was a suspicious vehicle.' Trial Court denied the motion to suppress. COA reverses
      - Holding: "'In a second-tier encounter, . . . an officer may stop and detain a person briefly when the officer has a particularized and objective basis for suspecting the person is involved in criminal activity. [T]he officer must possess more than a subjective, unparticularized suspicion or hunch[.]' Rather, an investigative stop 'must be justified by specific and articulable facts which, taken together with rational inferences from those facts,' give rise to reasonable suspicion of criminal activity…'[A]bsent some particularized suspicion of wrongdoing, merely acting in a way that fits a known 'pattern' of criminal activity—does not justify an investigatory stop.' Thus, a set of generally suspicious facts may warrant close observation by law enforcement, and yet not justify a second-tier encounter." The COA went further and stated, even if the officer had testified that thefts are common at this time of night, "such a statement would have been no more than an unparticularized suspicion or hunch, which is insufficient to justify an investigative stop."
  - **CELL PHONE**
    - *Campbell v. State*, 337 Ga. App. 7 - A16A0142 – GA Court of Appeals – (Decided April 27, 2016)
      - Judgment: (Affirmed)
      - Upon a search of co-defendant's home, numerous amounts of narcotics were recovered including a cell phone. The cell phone kept getting text messages and phone calls from a name "Head". Officers inquired was the supplier of the drugs, the person who keeps calling and the co-

defendant affirmed it was. When Defendant arrived at the house, cops seized his phone and checked the phone number to see if it matches the number that kept calling the co-defendant's phone. Defendant sought to suppress this evidence from the phone that his number was the number the co-defendant asserted was his supplier.

- Holding: "In Riley v. California, 134 S.Ct. 2473 (2014), the United States Supreme Court held that a search warrant generally is required before police officers may search a suspect's cell phone, even when the phone is seized incident to arrest." However, Defendant's phone number was merely cumulative to other properly introduced evidence. "Accordingly, even if the phone number of defendant's phone was acquired as the result of an unlawful search and seizure, we affirm the trial court's denial of Defendant's motion to suppress because any error in that ruling was harmless beyond a reasonable doubt."

✪ *Marchman v. State*, 299 Ga. 534 - S16A0027 – GA Supreme Court – (Decided June 20, 2016)

- Judgment: (Affirmed)
- Defendant and co-defendant were convicted of two counts of Malice Murder. At trial, the State introduced phone records by way of a business records. Defendant objected based upon Riley v. California, 134 SCt. 2473 (2014) that the State failed to get a search warrant to retrieve the phone records.
- Holding: The case at bar is not applicable to the Riley standard. The police never seized or searched the cell phone. They retrieved the records from the phone company. "Subscriber and call toll records belong to the service provider and, even if Defendant had shown he was the owner of the phone account in question, he had no reasonable expectation of privacy in these records. *See Moss v. State*, 298 Ga. 613, 615-616 (2016).

✪ *State v. Hill*, 338 Ga. App. 57 - A16A0501 – GA Court of Appeals – (Decided July 13, 2016)

- Judgment: (Reversed)
- Defendant jumped out of a cab without paying the fare. Defendant ended up leaving his cell phone in the cab in his haste to leave. When an officer arrived, he discovered the phone, which had a pass-code lock enabled. Officer then placed an emergency call from the phone and spoke to the 911 operator. The 911 operator was able to reveal the

number of the cell phone including to whom it was registered. Defendant moved to suppress this information based upon 4th Amendment violation. Trial Court granted the suppression, but COA reverses.

- Holding: The COA distinguishes Riley v. California, 134 SCt. 2473 (2014). In Riley, the officer accessed files and content on the phone. In the case at bar, all the information was obtained through a third party, 911 dispatch. There is nothing preventing an officer from making a phone call to determine identification information, when the phone is lawfully in his possession. The officer in this case, did not unlock the phone or obtain any files or data stored on the phone. There is no expectation of privacy of information stored on a third party data base, thus the 4th Amendment is not implicated.

- **CREDIBILITY OF THE OFFICER**
  - *State v. Camp*, 335 Ga. App. 730 - A15A2101 – GA Court of Appeals – (Decided February 17, 2016)
    - Judgment: (Affirmed)
    - Trial Court granted Defendant's motion to suppress based upon the court did not believe the officer could smell the small amount of marijuana in Defendant's pants. As such, Defendant was free to walk away from the Tier 1 encounter. However as the Defendant tried to walk away, the officer pulled out his taser and placed him in handcuffs, escalating it to a Tier 3 arrest.
    - Holding: "Once the trial court chose to disbelieve the officer's testimony, there was nothing left in the record to establish the reasonable articulable suspicion which would be necessary to escalate the encounter from the initially lawful first-tier encounter."
- **DOG SNIFF SEARCHES**
  - *Williams v. State*, 336 Ga. App. 64 - A15A1928 – GA Court of Appeals – (Decided March 03, 2016)
    - Judgment: (Affirmed)
    - Defendant and co-defendant were both in a truck when it was stopped for an improper lane change. While the officer was waiting for the identification check to come back, he walked a drug dog around the car. The dog alerted that drugs were probably in the car and a subsequent search of the vehicle revealed several kilos of cocaine. Both defendant's sought to suppress the search.

- Holding: "Like any other investigation unrelated to the traffic stop, a open-air dog sniff can be lawfully done as long as it does not prolong the stop for any amount of time…Tasks related to the mission of the traffic stop include 'checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." Therefore the search was valid.

- **DUI IMPLIED CONSENT**
  - *Smith v. State*, 338 Ga. App. 635 - A16A0746 – GA Court of Appeals (Decided September 16, 2016)
    - Judgment: (Affirmed for Harmless error)
    - Defendant was stopped for stopping in the middle of the street. Officer observed a strong odor of alcohol and other signs that the Defendant was intoxicated. Defendant had a license out of South Carolina, however his license had been previously suspended. Officer read Defendant implied consent and informed Defendant that if he refused, the State "will turn around and suspend your license for a year." State conceded that the officer's statement was substantially misleading because the Georgia Department of Driver Services has no authority to suspend or revoke the driver's license of a non-resident motorist; however they argued it was harmless.
    - Holding: The State has no authority to suspend or revoke the driver's license of a nonresident motorist. "Because this misleading information may have affected [Defendant's] decision to consent to the Intoxilyser test, the Court's decision to admit the test results in evidence was error." However, based upon the other evidence presented at trial, COA determined it was harmless as pertaining to the DUI 'less safe'"
  - *Jacobs v. State*, 338 Ga. App. 743 - A16A1115 – GA Court of Appeals – (Decided September 29, 2016)
    - Judgment: (Affirmed)
    - Police officer was called because a vehicle drove through the apartment gate. Upon locating the driver, Defendant, the officer believed Defendant was intoxicated. After placing Defendant under arrest, Police Officer read Defendant Georgia's Implied Consent as it pertains to requesting Defendant to allow a blood draw. Defendant consented to wit his blood was drawn and revealed an alcohol content of .2.

- Holding: U.S. Supreme Court has held in Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016) that warrantless blood test is not permitted without a person's consent. The Supreme Court went further and explained that where a state's implied consent provides for criminal penalties, then the implied consent statute is also invalidated. "However, the sort of implied consent law at issue in Birchfield is not at issue here. Georgia's implied consent law does not impose criminal penalties for failure to submit to a blood test, but merely provides for license suspension and evidentiary consequences. *See* OCGA §40-5-67.1(b), (d)…Consent given in response to Georgia's implied consent warning thus remains a valid basis for a warrantless search where it is given freely and voluntarily, including in response to the reading of an implied consent warning that does not threaten a criminal penalty."

- **IMPLIED CONSENT**
  - *Birchfield v. North Dakota*, 136 S.Ct. 2160 - No. 14-1468 – U.S. Supreme Court – (Decided June 23, 2016)
    - Judgment: (Reversed)
    - States have enacted laws that make it a crime to refuse to consent to blood or breath test to determine the blood alcohol concentration. This case involves three separate defendants who all were told they were either obligated or required to give a blood sample or a breath test. Two of them refused and criminally charged for refusing. The third consented. Thus the key issue is whether the 4th Amendment precludes criminalizing a refusal to give up your rights or whether the State must obtain a search warrant.
    - Holding: SCOTUS looked at this issue in connection with "search incident to arrest". They first determined that blood tests are different from breath tests. Blood tests are significantly more intrusive than blowing into a tube. "Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving…We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test." Thus a warrant must be obtained to require a blood test. SCOTUS went further and explained that laws making it a criminal violation for refusing to consent are not

constitutional. "We conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."

- JUSTICE SOTOMAYOR concurring opinion: Justice Sotomayor believes each case should be considered on a case-by-case basis. That the Fourth Amendment should not be chipped away under one categorical approach. That even with breath tests, there are situations that would allow an officer to obtain a search warrant to require a breath tests. The majorities holding creates a new exception to the search incident to arrests, when it was not necessary.
- JUSTICE THOMAS concurring opinion: Justice Thomas believes that based upon the exception of "exigent-circumstances" that a search warrant should not be required even to blood draws. He believes both searches would be constitutional.

✪ *State v. Bowman*, 337 Ga. App. 313 - A16A0555 – GA Court of Appeals – (Decided June 07, 2016)

- Judgment: (Affirmed)
- Defendant was 20 years old. Defendant was involved in a car accident. Defendant had blurred speech, bloodshot eyes, and smelled of alcohol. On the way to the jail, officer asked if defendant consented to a blood test to determine his alcohol level. Defendant stated, "He was going to jail anyway". He was refused entrance to the jail and the officer instructed to take him to the hospital. While at the hospital, the officer again read the implied consent warning and asked Defendant to submit to the blood test. Defendant once again stated, "yeah, whatever you got to do." The trial court suppressed the blood test based upon lack of consent.
- Holding: The Supreme Court of Georgia in Williams v. State, 296 Ga. 817, 817 (2015) stated, that "mere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant…the voluntariness of consent to search is measured by evaluating the totality of the circumstances, which includes factors such as prolonged questioning; the use of physical punishment; the accused's age, level of education, intelligence, length of detention, and advisement of constitutional rights; and the psychological impact of the these factors on the accused." Nothing in

the record indicates that the Defendant was read his *Miranda Rights* or inquired into the educational or psychological level of the Defendant. Therefore the discretion of the Trial Court is upheld.

- IMPORTANT NOTE: "The State neglects to mention that nothing in the court's ruling prevents the State from obtaining a warrant to draw a suspect's blood in situations, such as this, in which the voluntariness of a suspect's consent is difficult to determine. And while obtaining a warrant no doubt imposes more of a burden on police officers than simply reading the implied-consent notice, 'in those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.'" (citing Missouri v. McNeely, 133 S.Ct. 1552, 1561 (2013).

✪ *State v. Jung*, 337 Ga. App. 799 - A16A0527 – GA Court of Appeals – (Decided July 07, 2016)

- Judgment: (Affirmed)
- Defendant was involved in an accident. When police arrived the police observed Defendant leaning against the vehicle and appeared to be intoxicated. According to police report, during field sobriety, Defendant appeared intoxicated and confused. Police officer eventually read implied consent and Defendant consented to breath test. Trial court determined based upon the Defendant's intoxication and confusion, he failed to voluntarily consent. State appealed, and COA affirmed.
- Holding: "Under Georgia law, 'voluntariness must reflect an exercise of free will, not merely a submission to or acquiescence in the express or implied assertion of authority.' State v. Bowman, --- Ga. App. --- A16A0555, Decided June 07, 2016. In making this determination, we consider a number of factors, including 'prolonged questioning; the use of physical punishment, the accused's age, level of education, intelligence, length of detention, and advisement of constitutional rights; and the psychological impact of these factors on the accused.' And no single factor is controlling." The court went further to state, "Our Supreme Court has also held that a high level of intoxication may be sufficient to support a trial court's finding that a statement is involuntary. Clay v. State, 290 Ga. 822, 826 (2012).

- ✪ *State v. Williams*, 337 Ga. App. 791 - A16A0509 – GA Court of Appeals – (Decided July 07, 2016)
  - Judgment: (Affirmed)
  - This is the second appeal concerning this case. In the first, the Supreme Court remanded back to the trial court for consideration. Trial Court again ruled the suppression of the blood and alcohol test, because the Defendant failed to consent.
  - Holding: "When relying on the consent exception to the warrant requirement, the State has the burden of proving that the accused acted freely and voluntarily under the totality of the circumstances." The Court went further to state, "A defendant's level of intoxication may be an appropriate factor for consideration among the totality of the circumstances in determining the voluntariness of consent. See State v. Bowman, --- Ga. App. --- - A16A0555, Decided June 07, 2016).
- ✪ *Bailey v. State*, 338 Ga. App. 428 - A16A0200 – GA Court of Appeals – (Decided July 13, 2016)
  - Judgment: (Reversed)
  - Defendant was involved in a single vehicle crash. As a result of the crash, Defendant sustained a broken leg and taken to the hospital. At the hospital while Defendant was unconscious, police officer obtained a blood draw from defendant pursuant to the implied consent statute: OCGA §40-5-67.1 and OCGA §40-5-55. In essence a person who is involved in a traffic accident resulting in serious injuries is considered to have given implied consent. And the mere fact that a person is unconscious does not mean the person has withdrawn consent.
  - Holding: Implied consent is only one prong when deciding if a defendant gave consent to withdraw his blood. The courts must also evaluate whether actual consent was given. The COA relied upon three current cases when making this decision: Williams v. State, 296 Ga. 817 (2015); McNeely v. Missouri, 133 SCt. 1552 (2013); and Birchfield v. North Dakota, No. 14-1468 (Decided June 23, 2016). Based upon these recent cases, "Defendant's implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as he was unconscious." The COA went further to state, that any cases that hold otherwise are now hereby disapproved.

- *State v. Young*, --- Ga. App. --- - A16A1435 – GA Court of Appeals – (Decided November 02, 2016)
  - Judgment: (Reversed)
  - Defendant was pulled over for DUI. Officers read Defendant the implied consent, but did not read defendant her Miranda Rights or that it was voluntary. Defendant sought to suppress the results of her breath test and the trial court granted the motion based upon Defendant's consent was involuntary when the officers failed to provide Defendant with her Miranda Rights.
  - Holding: "We have previously concluded, the implied consent notice read to [Defendant] 'accurately recites Georgia law as contained within OCGA §40-5-67.1(b)(2) and informs the suspect of her choice of either agreeing or refusing to submit to chemical testing, and the possible consequences for each choice…Further, the Supreme Court of the United States and other courts have rejected invitations to create a duty to inform suspects of their constitutional right against unreasonable searches and seizures, and we will not depart from their well-worn path."

INDEPENDENT SOURCE DOCTRINE

- *U.S.A. v. Barron-Soto*, 820 F.3d 409 - No. 13-14731 – 11th Circuit COA (Decided April 26, 2016)
  - Judgment: (Affirmed)
  - Defendant's cell phone was searched incident to arrest. This search occurred prior to the Rile v. California, 134 S.Ct. 2473 (2014) decision. The State agreed based upon Riley, that the search was improper, however, the exclusionary rule should not apply based upon the Independent Source Doctrine, because the State properly obtained a search warrant that was not based upon the information gained from the improper search. 11th Circuit agreed with the state.
  - Holding: "In the event the government violates the Fourth Amendment in conducting an illegal search, "the independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violations." "We conclude that, regardless of any information learned from the warrantless search, the information set forth in Agent Manna's warrant affidavit clearly sets out facts and circumstances that support probable cause to issue a search warrant for the co-defendant's cell phones.

- **OBSTRUCTION**
  - *State v. Williams*, 336 Ga. App. 97 - A15A1858 – GA Court of Appeals (Decided March 09, 2016)
    - Judgment: (Reversed)
    - Defendant was implicated in a burglary by an anonymous tip. Upon questioning Defendant about the robbery, he became fidgety before running away. As he ran away, the police officer ordered him to stop, but he continued to run. He was eventually tazed and charged with obstruction of an officer. Trial Court ruled this was a Tier 1 encounter thus he could leave or walk away. Court of Appeals reversed.
    - Holding: Court of Appeals agrees this was originally a Tier 1 encounter thus Defendant was free to walk away. "Nevertheless, 'flight in connection with other circumstances may be sufficient probable cause to uphold a warrantless arrest or search and also sufficient to give rise to articulable suspicion that the person fleeing has been engaged in criminal act sufficient to perform a brief investigatory stop." Accordingly, the Court of Appeals decided this Tier 1 encounter turned into a Tier 2 encounter when he fled from the officer. And since the officer yelled for him to stop while he was fleeing, he had ultimately committed obstruction.
- **PENIAL SWABS**
  - *Jackson v. State*, 336 Ga. App 140 - A15A2244 – GA Court of Appeals – (Decided March 10, 2016)
    - Judgment: (Affirmed)
    - Defendant was accused of rape. The investigator arrested Defendant for criminal trespass and required him to allow the investigator to conduct a penile swab in order to collect potential evidence of the rape. The investigator explained at a hearing that based upon experience, if they had waited for a search warrant the evidence could be compromised by him wiping it off or it degrading over the passage of time.
    - Holding: The court stated although no Georgia authority addresses this precise issue, several sister jurisdictions have approved similar warrantless searches based upon the exigent circumstances. There was an urgency to collect the evidence prior to the potential evidence degrading or becoming compromised. Therefore the motion to suppress is denied.

- **PRIVATE CITIZEN SEARCH**
  - *DeGeorgis v. State*, --- Ga. App. --- - A16A0927 – GA Court of Appeals – (Decided October 20, 2016)
    - Judgment: (Affirmed)
    - Defendant was charged with sexual exploitation of a child. The officers initially learned of the photographic images on the Defendant's computer, when his ex-wife entered the home that she no longer resided and took the computer and brought it to the police. Based upon the initial images the ex-wife showed the officers, the officers obtained a search warrant and searched the rest of the computer. Defendant moved to suppress the computer data based upon the ex-wife had no authority to take the computer from Defendant's home, where she no longer resided.
    - Holding: "It is well established, however, 'that no illegal search and seizure occurs when a private citizen independently discovers contraband or other evidence of illegal conduct and then brings it the attention of law enforcement…Indeed, 'the protection afforded by the Fourth Amendment proscribes only governmental action and is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation of a government official.'"
- **PROBABLE CAUSE**
  - *State v. Cook*, 337 Ga. App. 205 - A16A0432 – GA Court of Appeals – (Decided May 25, 2016)
    - Judgment: (Affirmed)
    - Defendant was in a car accident and taken to Grady Hospital. Upon arriving to Grady, hospital staff smelled marijuana from Defendant's backpack and searched it. They found a mason jar with marijuana inside the backpack. They called the police. When officer arrived, he retrieved the backpack, searched, and recovered the mason jar of marijuana. Defendant sought to suppress the evidence as the officer did not have probable cause or consent to search the backpack. At the suppression hearing, the officer testified he did not smell marijuana from the backpack nor did anyone tell him what was inside the backpack. Trial court suppressed the evidence and the COA agreed.
    - Holding: The only testimony presented at the hearing was that of the police officer who was called to Grady Hospital. Importantly, the officer

did not testify that he personally smelled marijuana. Notably, the State did not present any testimony from the hospital security officers who allegedly smelled the marijuana, confiscated the bag, and searched it. Therefore, on these facts, we must conclude, as a matter of law that the State failed to meet its burden under OCGA §17-5-30(b).

- **SEARCH INCIDENT TO ARREST**
  - *Utah v. Strieff*, 136 S.Ct. 2056 - No. 14-1373 – U.S. Supreme Court – (Decided June 20, 2016)
    - Judgment: (Reversed)
    - Narcotics agents were surveilling a house they believed the occupants were selling drugs. Upon Defendant leaving the house, he was pulled over and inquired to what he was doing. The officer's ran his name and determined he had an arrest warrant for a traffic violation. They searched his vehicle incident to arrest and located drugs and paraphernalia. Defendant sought to suppress the evidence based upon no articulable suspicion to stop the Defendant in the first place.
    - Holding: "The evidence Officer Fackrell seized incident to [Defendant's] arrest is admissible based on an application of the attenuation factors from Brown v. Illinois, 422 U.S. 590 (1975). In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest." There are three factors outlined in Brown v. Illinois to determine if the attenuation exception would apply: (1) the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search; (2) The presence of intervening circumstances; and (3) the purpose and flagrancy of official misconduct. Based upon these three factors, the court determined the only factor (Factor number 1) weighed in favor of suppressing the evidence; however, this was outweighed by the other two factors. Thus the evidence should not be suppressed.
    - JUSTICE SOTOMAYOR dissenting opinion: Justice Sotomayor comes out strong against the majority's opinion. She explained, "Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants – even if you are doing nothing wrong. If

the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant." She goes further to explain that this will disproportionately affect African Americans due to the number of people who have outstanding warrants for seemingly petty charges. That the court system becomes a party to the officer's unlawful conduct by condoning this type of conduct.

- JUSTICE KAGAN dissenting opinion: Justice Kagen equally opposes the majority's opinion. She states, "The majority's misapplication of Brown's three part inquiry creates unfortunate incentives for the police – indeed, practically invites them to do what Fackrell did here…So long as the target is one of the may millions of people in the country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer's incentive to violate the Constitution thus increases."

- **SEARCH WARRANT – ANONYMOUS TIP**
  - *Nichols v. State*, 336 Ga. App. 287 - A15A2353 – GA Court of Appeals – (Decided March 17, 2016)
    - Judgment: (Reversed)
    - Defendant sought to suppress evidence due to the affidavit for the search warrant was insufficient for the magistrate judge to determine probable cause. In essence, the affidavit was based upon an anonymous tip who called the police several times and described cars coming and going from the property, dead vegetation possibly due to dumping chemicals, and observed camp fuel and batteries being brought into the home. The officer listed all this information in the affidavit for the search warrant. The tipster had never given any information prior to this incident.
    - Holding: Where a confidential informant has not shown to be inherently credible or reliable, the information may be proved trustworthy if portions of the information are sufficiently corroborated by law enforcement. "For the corroboration to be meaningful, however, the information corroborated must include a range of details relating to future actions of third parties not easily predicted. That is the tip must include inside information not available to the general public." The

Court determined all the information given by the tipster was available to the general public thus lacked reliability.

- ✪ *Brannon v. State*, 298 Ga. 601 - S15A1724 – GA Supreme Court – (Decided March 07, 2016)
  - Judgment: (Affirmed)
  - Defendant claimed his attorney was ineffective based upon failure to challenge a search warrant because it was identical to a search warrant for another location.
  - Holding: "Under the circumstances presented, we find the search warrant for [defendant's] house was sufficiently definite and that trial counsel's failure to challenge the warrant on this basis was not unreasonable."
- ✪ *Creamer v. State*, 337 Ga. App. 394 - A16A0614 – GA Court of Appeals – (Decided May 18, 2016)
  - Judgment: (Affirmed)
  - Defendant sought to suppress evidence relating to the search of his home, based upon insufficient probable cause to search the residence. The police received a tip from a confidential informant concerning someone selling drugs from the residence. On two controlled buys, a CI went to the door of the residence and purchased drugs. Each time the Defendant went to the vehicle in the driveway and obtained the drugs and gave them to the CI. Defendant claimed all the probable cause was for the car and not the residence. COA disagrees.
  - Holding: "Defendant is indeed correct that when the State 'fails to show any connection between the items sought and the place to be searched there are no reasonable grounds for the search.'" Citing Macias v. State, 292 Ga. App. 225, 229 (2008). However based upon the facts of this case, the investigator could have made a fair presumption that evidence of drug dealing, such as larger quantities of marijuana along with packaging materials or scales, could be found inside the residence where the drug-dealer appeared to live.
- ✪ *State v. Dotson*, 337 Ga. App. 284 - A16A0266 – GA Court of Appeals – (Decided June 03, 2016)
  - Judgment: (Reversed)
  - Trial Court granted a motion to suppress based upon lack of probable cause included in the search warrant for the residence. The search warrant included the following statements: (1) numerous concerned

citizens called police indicating people were shooting guns at this residence at all times of the night, (2) the concerned citizens indicated they feared for their lives, and (3) a background check of the residents included the defendant, who was a convicted felon. Based upon the prior facts, the judge granted a search warrant for the residence to determine if there was any guns located on the property. A subsequent search revealed guns and marijuana.

- Holding: "These facts – namely, the multiple calls from concerned citizens and Defendant's prior convictions for felony drug and firearms offenses – were sufficient to allow the magistrate to make an independent determination of probable cause that a crime was being or had been committed…Moreover, in determining that probable cause existed to issue the search warrant, the magistrate was entitled to consider the totality of the information before him, including the hearsay statements of the anonymous callers, because there was a substantial basis for crediting that hearsay."

✪ *Torres v. State*, 338 Ga. App. 269 - A16A1074 – GA Court of Appeals – (Decided July 22, 2016)

- Judgment: (Reversed)
- Defendant's house was searched pursuant to a search warrant. The search warrant was obtained when an unidentified third party was arrested for possession of meth and notified the police where he obtained the drugs. The police placed Defendant's house under surveillance, but did not observe any drug activity. The relied upon the unidentified third person's information to obtain the search warrant.
- Holding: "In cases where, as here, a confidential information has not been shown to be credible or reliable, the information he provides may be proven trustworthy if portions of the information are sufficiently corroborated by law enforcement." The State relied upon however that the totality of the circumstances would indicate the reliability of the confidential information, namely that the location of the drugs were against his penal interest. The COA agreed "when a named informant makes a declaration against his interest and based on personal observation, that in itself provides a substantial basis for the magistrate to credit his statement." However the COA went further to state, "we have explicitly held, however, that this principle of law applies to named informants whose identities have been disclosed to the

magistrate." Since the confidential informant was never named, the motion to suppress should have been granted.

- **STALENESS – PASSAGE OF TIME**
  - ✪ *Gerbert v. State*, --- Ga. App. --- - A16A0868 – GA Court of Appeals – (Decided October 28, 2016)
    - Judgment: (Affirmed)
    - Defendant was child with possession of child pornography. The search warrant affidavit sought to search Defendant's computer and other computer devices for the presence of child pornography. In particular, the search warrant sought pictures of a juvenile that were taken 3-4 years earlier, but Defendant stated he would never delete. Pictures were eventually located on Defendant's phone and Defendant moved to suppress based upon the passage of time.
    - Holding: "We have held that media capable of storing sexually explicit material, such as computers or hard drives, are unlikely to be affected by the passage of time…Because the nature of the files sought meant that it was not likely to have disappeared with the passage of time, and there was evidence that [Defendant] intended to retain the files, the warrant was not based on stale information."
- **TAIL LIGHT**
  - ✪ *Loveless v. State*, 337 Ga. App. 894 - A16A0161 – GA Court of Appeals (Decided July 12, 2016)
    - Judgment: (Affirmed)
    - Defendant was stopped, due to his vehicle had a broken tail light. The tail light had a 3 inch crack and a hole in the lens. Upon Defendant giving the officer a false name, he was arrested and the vehicle searched incident to arrest. The officer's found 200+ grams of meth. Defendant actually raised several other issues on appeal, but since the COA found he was lawfully pulled over and searched incident to arrest, they did not need to address the other claims.
    - Holding: "Pursuant to OCGA §40-8-26(d), 'all lenses on brake lights and signal devices shall be maintained in good repair and shall meet manufacturers' specifications.' And it 'is a misdemeanor for any person to drive or move…on any street or highway any vehicle…which does not contain those parts or is not at all times equipped with such lights and other equipment in proper condition and adjustment as required in this chapter…' The officer's observation of even this minor traffic

violation constituted a valid basis for the stop." Upon Defendant given a false name, the vehicle was properly searched incident to arrest.

- **TIER 2 POLICE ENCOUNTER**
  - ✪ *Sims v. State*, 335 Ga. App. 625 - A15A1836 – GA Court of Appeals (Decided February 09, 2016)
    - Judgment: (Affirmed)
    - Police officers observed defendant and another individual coming from behind an apartment. Based upon recent encounters, the off duty police officer knew the defendant did not reside in those apartments and had previous knowledge of him smoking marijuana. The officer asked the Defendant to come to him, by which he refused and tried to walk away. Officer tried to get him to stop and he resisted, claiming he had done nothing wrong. He motioned the judge to suppress the marijuana found on his person and the obstruction.
    - Holding: Based upon the totality of the circumstances that the officers had reasonable suspicion that Defendant was or was about to be engaged in criminal activity, the officers had a right to stop the Defendant and investigate (tier 2 stop). Because Defendant obstructed the officer in his lawful duties, there was probable to cause to arrest (tier 3 stop).
- **VEHICLE SEARCH – DUAL POSSESSION**
  - ✪ *Gomillion v. State*, 298 Ga. 505 - S15A1617 – GA Supreme Court – (Decided February 22, 2016)
    - Judgment: (Affirmed)
    - Defendant borrowed a friend's car and was subsequently arrested. The car was impounded and the owner notified. The owner of the car gave consent to search. Defendant claimed he had an expectation of privacy and he never consented to the search.
    - Holding: "Supreme Court firmly established that police officers may search jointly occupied premises if one of the occupants consents." Fernandez v. California, 134 S. Ct. 1126, 1129 (2014). The court went further to state, "an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason and that Georgia v. Randolph, 547 U.S. 103 (2006) unequivocally requires the presence of the objecting occupant in every situation other than the one mentioned in the dictum.

- NOTE: The Court based its decision on the fact the driver of the vehicle was not present to object to the search. But had he been present and objected, then the Court's decision may have different. However see the case below: Sevilla-Carcamo v. State, 335 Ga. App. 788 (February 23, 2016).

✪ *Sevilla-Carcamo v. State*, 335 Ga. App 788 - A15A2351 – GA Court of Appeals (Decided February 23, 2016)

- Judgment: (Affirmed)
- Defendant was pulled over for an improper turn signal. Police asked for consent to search the vehicle. Defendant denied the consent. Police allowed her to call her priest to come and take possession of the vehicle. When the priest arrived, the police told him that he can take possession of the vehicle but he may be held responsible for any drugs in the car should they discover them. The priest asks the Defendant about this and then goes back to the officers and says he can take the car, but he wants them to search the vehicle first. Police again ask the Defendant for consent and she refuses once again. Police search the vehicle and find drugs.
- Holding: "We decline Defendant's invitation to extend the Supreme Court of the United State's narrow holding in Randolph given the well established differential treatment of residences and automobiles under the Fourth Amendment." The court went on to state, the defendant's agreement to entrust her vehicle to the pastor for safekeeping created a bailment and thus the priest had authority to allow someone else to look inside the vehicle.

VEHICLE EXCEPTION

✪ *State v. Vickers et. al.*, --- Ga. App. --- - A16A0792 – GA Court of Appeals – (Decided November 01, 2016)

- Judgment: (Affirmed)
- Four defendants were sitting in a car parked in one of the Defendant's driveway. An undercover cop approached a neighboring house to serve a warrant, when he observed a car filled with smoke and could smell marijuana. He called for other officers, who arrived. None of the officers observed any narcotics in plain-view or observed any illegal activity. The officers pulled the defendants out of the car and searched the car. The search revealed marijuana. All Defendant's moved to suppress the evidence and the trial court granted the request. State now appeals.

- Holding: "When the officers here searched the interior of the vehicle without a warrant, consent, or exigent circumstances, their discovery of the drugs under the seat was illegal and was correctly suppressed." State relied upon the "automobile exception", however that exception does not apply when the vehicle is in the curtilage of a defendant's residence. "We decline to alter the established Georgia rule that vehicles, like any other item or location within the curtilage of a residence, are not to be searched without a warrant, consent, or exigent circumstances."

- **WARRANT AFFIDAVIT**
  - *Taylor v. State*, 338 Ga. App. 804 - A16A0880 – GA Court of Appeals – (Decided October 11, 2016)
    - Judgment: (Affirmed)
    - Defendant was arrested and ultimately indicted in 2008 for several sexual offenses against 15 minors. Police officer prepared an affidavit in order to get a search warrant to search Defendant's residence. In the affidavit, it never listed the address to search as that of Defendant's or whether Defendant resided at that address. Defendant filed a motion to suppress, based upon the warrant failed to identify Defendant had a connection with the residence to be searched.
    - Holding: The COA stated this was a case of first impression as it relates to Georgia, however, other jurisdictions have already resolved this issue. These "other jurisdictions have applied a common-sense approach to resolving the issue when the affidavit fails to state explicitly that an address to be searched is the residence of the suspect." As the court stated in State v. Trujillo, 150 N.M. 721, 720-728 (2011), "Barring a hypertechnical reading of the affidavit, an inference that the residence described is the same as the residence where evidence can be found, is much more reasonable than its opposite—that the residence described in such painstaking detail actually has no relationship to the events of this case. We think the reviewing judge was well within his rights to draw the rational inference and avoid the irrational."

- **4TH AMENDMENT WAIVER**
  - *Whitfield v. State*, 337 Ga. App. 167 - A16A0420 – GA Court of Appeals – (Decided May 19, 2016)
    - Judgment: (Affirmed)
    - Defendant was on probation with a 4th amendment waiver. Defendant failed a drug screen on a prior month and when asked about drug use, defendant claimed he has been counting the days since the last use. Based upon these incidents, the probation officer asked police to search the residence. Police located a grinder with marijuana inside the grinder. Defendant sought to suppress evidence based upon lack of reasonable suspicion.
    - Holding: When a probationer "has a valid 4th amendment waiver, there must still be 'some conduct reasonably suggestive of criminal activity to trigger the search'. This trigger can be prompted by 'a good-faith suspicion arising from routine police investigative work. In sum, the general rule is that 'the police can search a probationer, who is subject to such a special condition of probation, at any time, day or night, and with or without a warrant, provided there exists a reasonable or good-faith suspicion for the search, that is, the police must not merely be acting in bad faith or in a arbitrary and capricious manner (such as searching to harass probationer.'" *Citing* Reece v. State, 257 Ga. App. 137, 140 (2002).
  - *State v. Rucker*, 337 Ga. App. 875 - A16A0047 – GA Court of Appeals – (Decided July 12, 2016)
    - Judgment: (Reversed)
    - Police officer received an anonymous tip concerning defendant selling drugs out of his trailer. Upon a records check, they determined he had a valid 4th amendment waiver due to a prior drug charge. The officers went to the trailer and a female came to the door. The police officers asked if they could come in, and the female consented. Once inside, the officers observed a hand gun, to wit the female stated it was the Defendant's. Trial court suppressed the evidence due to the anonymous tip did not give rise reliability for the officers to enter the trailer. COA reversed.
    - Holding: "evidence supporting the officers' decision to investigate the anonymous tip included Defendant's status as a probationer on drug charges and his execution of a valid waiver of his Fourth Amendment

rights; the officers undertook an authorized knock-and-talk procedure that did not amount to a search, and there is no evidence in the record to justify a conclusion that they acted in bad faith or with the intent to harass Defendant when they did so."

- IMPORTANT NOTE: The Court did reiterate that a search pursuant to a 4th amendment waiver cannot be conducted when the police are merely "acting in bad faith or in an arbitrary and capricious manner (such as searching to harass a probationer)" citing Hess v. State, 296 Ga. App. 300, 302 (2009).

➢ SENTENCING

ABILITY TO PAY RESTITUTION

✪ *U.S.A. v. Plate*, No. 15-13928 – 11th Circuit Court of Appeals [Florida] – (11th Cir. Decided October 05, 2016)

- Judgment: (Reversed and Remanded)
- Defendant pled guilty to embezzlement. When she was unable to pay the full restitution, the trial court sentenced Defendant to 27 months in prison. In sentencing Defendant, the trial court explained, if she had paid the restitution then the court would have no problem sentencing her to probation. In addition, the Trial Court explained, if at any point her family pays the remainder of restitution, trial court would amend the sentencing order to probation. Defendant appealed claiming the sentence violated her constitutional rights.
- Holding: "The Supreme Court held that it violates equal protection principles to incarcerate a person 'solely because he lacked the resources to pay' a fine or restitution. Bearden v. Georgia, 461 U.S. 660 (1983)…It is apparent that [Defendant] was treated more harshly in her sentence than she would have been if she or her family and friends) had access to more money, and that is unconstitutional, as multiple courts have held." The 11th Circuit went further and explained the trial court is unable to disregard basing its sentencing on an improper factor, such as the ability to pay restitution, and thus, they remand the case to another judge for resentencing.

- **DOWNWARD DEPARTURE ON SEXUAL OFFENSES**
  - *Evans v. State*, --- Ga. --- - S16G0280 – GA Supreme Court – (Decided November 21, 2016)
    - Judgment: (Affirmed)
    - Defendant had a bench trial and found guilty of one count of child molestation and one count of sexual exploitation of a child. Even though both counts were contained in the same indictment, the alleged incident dates were about 8 months apart. After being found guilty, the Court explained it had no option but to sentence Defendant to 5 years prison and could not depart from the mandatory minimum because OCGA §17-10-6.2(c)(1)(C) does not allow downward departure when there is a finding of a "relevant similar transaction". Defendant claims relevant similar transaction, only pertains when there is a showing of similar transaction not included in the indictment. Court of Appeals disagrees and Supreme Court granted cert. Supreme Court affirms.
    - Holding: "the sentencing provision of OCGA §17-10-6.2(c)(1)(C) must be read; when the trial court considers sentencing on any specific count, a similar act not included in that count is independent to it such that, even if it is charged in the same indictment, it can be a 'relevant similar transaction' so as to preclude a downward modification of sentencing."
    - IMPORTANT NOTE: The Supreme Court further explained that when two counts of the indictment pertain to the same incident, then downward departure can be available. However, if the two counts pertain to different incidents, even though contained in the same indictment, then downward departure is not available.
- **JUDGES DISCRETION**
  - *State v. Kelley*, 298 Ga. 527 - S15G1197 – GA Supreme Court – (Decided February 22, 2016)
    - Judgment: (Reversed)
    - State and Defendant presented a negotiated plea to the trial court on the lesser included charge of Voluntary Manslaughter. Trial judge heard testimony from the Defendant and did not accept the State's recommendation and reduced the plea from 20 to serve to 5 years to serve. State objected and asked to withdraw the plea. Trial court rejected and the Court of Appeals affirmed.
    - Holding: "We also hold that, where a trial court intends to reject a sentence recommended as part of a plea agreement to a lesser charge, the Trial Court must, on the record and before sentencing, inform the State of its intention and allow the State to exercise its authority to withdraw its consent to the plea and demand a trial."

- DISSENT OF JUSTICE BENHAM: Believes the Uniform Superior Court Rules §33.5 gives judges the discretion to accept, reject, or set a sentence upon a guilty plea. Believes the Defendant has a right to withdraw a plea upon a change in sentence, but the State has no right.

- **JUDGE'S PARTICIPATION IN PLEA NEGOTIATIONS**
  - *McCranie v. State*, 335 Ga. App. 548 - A15A2008 – GA Court of Appeals – (Decided February 02, 2016)
    - Judgment: (Reversed) Defendant filed a motion for an out of time appeal, which the trial court rejected. Court of appeals reversed, stating because the Defendant has a constitutional claim that his plea was non-voluntary, he has a right for the court to consider his out of time appeal
    - Defendant's original plea offer was 20 serve 10 for child molestation. However the trial judge stated he would not accept that plea and would not accept anything less than thirty serve ten. Defendant asked what he would receive if he went to trial, and the court instructed him, "Why don't you try it and lets see". The court further explained "I will be glad for you to go to trial because I will be your judge," indicating he would give him more time.
    - Holding: The court should have a hearing to determine if the defendant's guilty plea was voluntary. "Judicial participation in the plea negotiation process is prohibited by court rule in this state and is prohibited as a constitutional matter when it is so great as to render a guilty plea involuntary."
    - "Here, the trial court not only rejected the negotiated plea, but repeatedly indicated that it wished to sentence Defendant to a longer sentence. The trial court also stated that it would be happy for Defendant to withdraw his plea so that the trial court could preside over his trial…thus the judicial participation in the plea negotiations in this case was so great as to render defendant's resulting guilty plea involuntary."
  - *State v. Bankston*, 337 Ga. App. 601 - A16A0003 – GA Court of Appeals – (Decided June 28, 2016)
    - Judgment: (Reversed)
    - Defendant was charged with two counts of armed robbery. The negotiated plea was 20 serve 10 as to each count. Judge sentenced Defendant to the lesser included Robbery by Intimidation and sentenced him to 20 serve 7. State appealed.

- Holding: "Based on the recent Supreme Court decision in State v. Kelley, --- Ga. ---, (Case Number S15G1197, decided Feb. 22, 2016), we reverse the trial court's judgment." The court went further to state, "although the trial court has wide discretion in rejecting a plea agreement, 'a trial court may not compel the State to accept a plea to an offense other than that which is charged in the charging instrument.'"

- **PAROLE ELIGIBILITY**
  - ✪ *Ellison v. State*, --- Ga. --- - S16A0602 – GA Supreme Court – (Decided October 17, 2016)
    - Judgment: (Reversed and Remanded)
    - Defendant pled guilty in 1997 to malice murder. His plea agreement included a sentencing condition that Defendant agreed to not file for parole until he has served at minimum 25 years in prison. Defendant now appeals this condition.
    - Holding: The sentencing provisions allowed to a court for Murder is, Death, Life in Prison without the possibility of parole or Life in Prison with the possibility of parole. No other provisions are allowed the trial court. Parole is a function of the executive branch and the trial court has no authority to limit the Board of Pardons and Parole due to separation of powers. The sentence is thus a void sentence. The provision limiting parole must be vacated.
- **RECIDIVIST PUNISHMENT**
  - ✪ *Johnson v. State*, 335 Ga. App. 796 - A15A1665 – GA Court of Appeals (Decided February 24, 2016)
    - Judgment: (Remanded for resentencing)
    - Defendant was found guilty of possession of a firearm by convicted felon and possession of cocaine. The state tendered three prior convictions after sentencing. One of the prior convictions was also for possession of cocaine. Defendant claimed he could not be sentenced to subsection (c) recidivist punishment due to the language in subsection (b.1). Trial Court sentenced him defendant to the max without the possibility of parole, but to run concurrent. (5 years on gun and 3 years on cocaine) Defendant was sentenced under OCGA §17-10-7(c)
    - Holding: Based upon OCGA §17-10-7(b.1) Defendant could not be sentenced under subsection (c) to the possession of cocaine count. However Defendant was properly sentenced to subsection (c) as it relates to the possession of a gun count. The trial court must resentence

and indicate as it relates to the possession of cocaine count, he is only sentenced under OCGA §17-10-7(a).
    - NOTE: The way I read the case, the court can break up the counts and assign recidivist punishment accordingly.

✪ *Becker v. State*, 335 Ga. App. 808 - A15A2265 – GA Court of Appeals (Decided February 24, 2016)
    - Judgment: (Remanded for resentencing)
    - Defendant was sentenced to Fifteen years with the first seven years to serve without the possibility of parole after being found guilty of possession of meth. He was sentenced under OCGA §17-10-7(a) and (c) Trial court did not believe it had any discretion in sentencing.
    - Holding: State conceded and COA agreed that under OCGA §17-10-7(b.1) that the Defendant would not be subject to the recidivist punishment under OCGA §17-10-7(a) and (c). Case was remanded back to the Trial Court for re-sentencing.
    - NOTE: The opinion did not state what prior convictions were tendered in aggravation or whether Defendant still faced recidivist punishment under subsection (a).

✪ *Mathis v. State*, 336 Ga. App. 257 - A15A2292 – GA Court of Appeals – (Decided March 16, 2016)
    - Judgment: (Reversed and Remanded)
    - Defendant pled guilty to two counts of violating OCGA §16-3-30(a) and the trial court imposed a recidivist sentence pursuant to OCGA §17-10-7(c). Defendant appealed claiming OCGA §17-10-7(b.1) prohibits him from being sentenced as a recidivist because one of his prior convictions included sale of marijuana pursuant to OCGA §16-13-30(j)(1). The State claimed recidivist is applicable because it involved two different violations. Defendant claimed the recidivist statute makes no distinction as to whether they must be the same.
    - Holding: "A defendant who has been convicted previously of violating either subsection (a) or subsection (i)(1) or subsection (j) of OCGA §16-13-30 may not be sentenced as a recidivist for a second or subsequent conviction for violating any of those code sections, regardless of whether the defendant has been convicted previously of violating the exact subsection for which he is being sentenced."

- *Anderson v. State*, 337 Ga. App. 739 - A16A1242 – GA Court of Appeals – (Decided July 06, 2016)
  - Judgment: (Affirmed)
  - Defendant pled nolo to an Armed Robbery in Michigan when he was a juvenile. He was sentenced to 6 to 15 years to serve. After being found guilty of Armed Robbery in Georgia, the State introduced the Michigan conviction to sentence him under OCGA §17-10-7(c) to life without parole. Defendant appealed claiming his Michigan plea while he was a juvenile should not be used for recidivist purposes.
  - Holding: "As a general rule, prior offenses committed in other states by a defendant when he was a juvenile cannot be used as predicate convictions for recidivist punishment because in Georgia, a juvenile is not convicted of felonies, but adjudicated delinquent, based on delinquent acts, and the plain terms of the recidivist statute require that the defendant be convicted of prior crimes which if committed in this state would be felonies." However in Georgia, Superior Courts have concurrent jurisdiction over armed robbery. If the armed robbery would have been committed in Georgia, he could have been convicted of the felony rather than delinquent. Thus, it was proper to allow the juvenile conviction from Michigan to be used in determining recidivist purposes.

SPLIT SENTENCES

- *Moon v. State*, 335 Ga. App. 642 - A15A1636 – GA Court of Appeals (Decided February 10, 2016)
  - Judgment: (Remanded)
  - Defendant was sentenced to 20 years prison for three separate counts of child molestation. However, OCGA §17-10-6.2(b) requires anyone convicted a sexual offense shall be sentenced to a split sentence which shall include the minimum term of imprisonment, followed by at least one year of probation.
  - Holding: Since the Defendant was not sentenced to a split sentence that included probation; Defendant must be resentenced.
  - IMPORTANT NOTE: The court still has not gave an opinion on whether the counts could run consecutively, since they require a term of probation, which if run consecutively would require the Defendant to get out of prison for a minimum of a year and then return back to prison for the following count, etc.

- **SPLIT SENTENCES FOR SEX OFFENSES**
  - *Watkins v. State*, 336 Ga. App 145 - A15A2411 – GA Court of Appeals – (Decided March 10, 2016)
    - Judgment: (Remanded)
    - Defendant was sentenced as a recidivist to life in prison for aggravated child molestation, 20 years confinement for child molestation consecutive to the aggravated child molestation, and another 20 years confinement for two additional counts of child molestation to run concurrent. There was no split sentence of at least one year probation.
    - Holding: OCGA §17-10-6.2(b) requires any person convicted of a sexual offense shall be sentenced to a split sentence, which shall include a minimum term of probation. The case was remanded back to the trial court, who is required to sentence defendant to the split sentences.
    - IMPORTANT NOTE: The Court still has not addressed whether to counts of child molestation can be ran consecutive to each other due to the split sentence. My belief is that the trial court cannot run two counts of child molestation consecutive where both counts require prison time. Because the Defendant would have to be let out for a year on probation and required to turn himself back in after the first sentence has run.
  - *Jackson v. State*, 338 Ga. App. 509 - A16A1058 – GA Court of Appeals – (Decided August 10, 2016)
    - Judgment: (Remanded)
    - Defendant pled guilty to three counts of child molestation and ten counts of sexual exploitation of a minor. Defendant was sentenced to 20 years prison for the child molestation counts concurrently, and additional 20 years probation for the sexual exploitation of a minor counts to run consecutive to the child molestation counts. Defendant appealed claiming his sentence was void, because he was not sentenced to a split sentence on the child molestation counts.
    - Holding: OCGA §16-6-4(b); and §17-10-6.2(a)(5) requires a person who is convicted of a first offense of child molestation is subject to a split sentence, which must include a mandatory-minimum five-year prison term, to be followed by at least one year probation. OCGA §16-12-100(f) and §17-10-6.2(a)(10) also requires a person convicted of sexual exploitation of children must be subject to a split sentence, which must include a mandatory-minimum five-year prison term, to be followed by at least one year of probation. A trial court may impose a sentence below

the statutory minimum for either offense if it finds and enumerates the existence of six mitigating factors set forth in OCGA §17-10-6.2(c). Since the trial court did not sentence Defendant on any count to a split sentence and the court failed to enumerate any mitigating factors, the sentence is void and remanded back to the Trial Court for re-sentencing.

- ✪ *Barton v. State*, 338 Ga. App. 524 - A16A0745 – GA Court of Appeals – (Decided August 15, 2016)
  - Judgment: (Remanded)
  - Defendant was sentenced on two counts of sexual battery to consecutive 5 years. Defendant appealed claiming his sentences are void, because the statute requires at minimum a split sentence.
  - Holding: OCGA §16-6-22.1 states, "A person convicted of the offense of sexual battery against any child under the age of 16 years shall be guilty of a felony and upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years." OCGA §17-10-6.2(b) states, "any person convicted of a sexual offense shall be sentenced to a split sentence which shall include the minimum term of imprisonment specified in the Code…and such sentence shall include, in addition to the mandatory imprisonment, an additional probated sentence of at least one year." Since the Defendant was not sentenced to a split-sentence, his sentence is void and he must be resentenced. Case is remanded back to the Trial Court.

➢ SELECTIVE PROSECUTION

- ✪ *Wallace v. State*, --- Ga. --- - S16A0654 – GA Supreme Court – (Decided October 03, 2016)
  - Judgment: (Affirmed)
  - Defendant and one other co-defendant (both males) were charged with murder and armed robbery as it pertains to the death of the decedent. One other co-defendant (female) was only charged with armed robbery. Prior to the shooting, all three co-defendants agreed to rob a drug dealer in hopes of getting enough money to go to New York. During the robbery, the other co-defendant shot and killed the drug dealer. Defendant appealed claiming the prosecution impermissibly selectively prosecuted him, when he was just as cooperative as the female co-defendant.

- Holding: "To make out a claim of unlawful selective prosecution, [Defendant] had 'to show that his prosecution represented an intentional and purposeful discrimination which was deliberately based upon an unjustifiable standard, such as a race, religion, or other arbitrary classification.' Coe v. State, 274 Ga. 265, 267 (2001)". The Court determined that the female co-defendant was positioned differently than the Defendant, in that she was less culpable and more cooperative with the initial investigation. Therefore, her more lenient charges were based upon this and not based upon discrimination merely because of her race or gender.

➢ **SERIOUS INJURY BY A MOTOR VEHICLE**

- **NO PREDICATE OFFENSE CONVICTION REQUIRED**
  - *Fitzpatrick v. State*, --- Ga. App. --- - A16A1336 – GA Court of Appeals – (Decided October 27, 2016)
    - Judgment: (Affirmed)
    - Defendant was charged with both serious injury by a vehicle and driving under the influence. The predicate offense for the serious injury by a vehicle was the driving under the influence. At trial, Defendant was found guilty of the serious injury by a vehicle, but was found not guilty of the driving under the influence. Defendant appeals claiming since he was found not guilty of the driving under the influence, then the State failed to prove an essential element of the serious injury by a vehicle and thus he should be acquitted of that offense also.
    - Holding: "Georgia's [serious injury by vehicle] statute does not require, as an essential element of the offense, that a defendant be *charged with or convicted of* the predicate offense. Rather, the language in the serious injury by vehicle statute, OCGA §40-6-394, stating "through the violation of means that the State bears the burden of establishing a causal connection between the defendant's violation of…[the driving under the influence statute, OCGA] §40-6-391… and the victim's death." Citing Leachman v. State, 286 Ga. App. 708 (2007). Thus, it does not require a conviction of the predicate offense, and only a causal connection, which the State proved.

- **SEVERANCE**
  - *Marquez v. State*, 298 Ga. 448 - S15A1459 – Georgia Supreme Court – (Decided February 08, 2016)
    - Judgment: (Affirmed) based upon OCGA §17-8-4
    - "In ruling on a severance motion, the court should consider: (1) the likelihood of confusion of the evidence and law; (2) the possibility that evidence against one defendant may be considered against the other defendant; and (3) the presence or absence of antagonistic defenses."Nwakanma v. State, 296 Ga. 493, 498 (2015).
    - Holding: The burden is on the defendant and the defendant "must make a clear showing that a joint trial would lead to prejudice and a consequent denial of due process." However, "antagonistic defenses alone is insufficient to require severance."
  - *Blackledge v. State*, 299 Ga. 385 - S16A0354 – GA Supreme Court – (Decided July 05, 2016)
    - Judgment: (Affirmed)
    - This is the third co-defendant to bring the severance claim in form of appeal. His other co-defendants were Miracle Nwakanma and Louis Francis. The Supreme Court denied the severance claims in the first two appeals and likewise denies the appeal again as to this defendant.
    - Holding: "In ruling on a severance motion, the court should consider: (1) the likelihood of confusion of the evidence and law; (2) the possibility that evidence against one defendant may be considered against the other defendant; and (3) the presence or absence of antagonistic defenses." When determining these factors, the court stressed, "they were jointly tried for almost the same offenses, which involved the same witnesses, whose credibility the co-defendants jointly attacked, and the State's evidence indicated that they acted in concert."
  - *McClendon v. State*, 299 Ga. 611 - S16A0699 – and *Burks v. State*, 299 Ga. 611 – S16A0700 - GA Supreme Court – (Decided September 12, 2016)
    - Judgment: (Affirmed)
    - Defendant and co-defendant were both found guilty of murder. There cases were joined for the appeal. Defendant, McClendon, appealed the Trial Court's ruling denying his request to severe the parties.
    - Holding: "The three factors a trial court should consider when determining whether to grant or deny a motion to sever are: '1) whether the number of defendants will confuse the jury as to the evidence and

the law applicable to each defendant; 2) whether, despite cautionary instructions from the court, there is a danger that evidence admissible against one defendant will be improperly considered against another defendant; and 3) whether the defenses of the defendants are antagonistic to each other or to each other's rights of due process.' Citing Green v. State, 274 Ga. 686, 687-688 (2002)" Court determined all three factors weighed in favor that the Trial Court did not abuse its discretion in failing to sever the trial.

- ✪ *Ray v. State*, 338 Ga. App. 822 - A16A1091; *Randell v. State*, 338 Ga. App. 822 - A16A1126; and *Brown v. State*, 338 Ga. App. 822 - A16A1178 – GA Court of Appeals – (Decided October 11, 2016)
  - Judgment: (Affirmed)
  - Defendants were tried together at trial. They were all found guilty of 43 counts, which included armed robbery, kidnapping etc. Their cases were combined during the appeal. All three claim on appeal that their cases should have been severed and each tried separately.
  - Holding: "It is incumbent upon the defendant who seeks a severance to show clearly that the defendant will be prejudiced by a joint trial, and in the absence of such a showing, the trial court's denial of a severance motion will not be disturbed. Factors to be considered by the trial court are: whether a joint trial will create confusion of evidence and law; whether there is a danger that evidence implicating one defendant will be considered against a co-defendant despite limiting instructions; and whether the defendants are asserting antagonistic defenses. The burden is on the defendant requesting the severance to do more than raise the possibility that a separate trial would give him a better chance of acquittal. He must make a clear showing of prejudice and a consequent denial of due process." COA determined that there were no counts independently to one defendant and they all had similar defense, "I didn't do it". Therefore it was not an abuse of discretion for the trial judge to try the defendants jointly.

- **SEX OFFENDER REGISTRY**
  - *State v. Randle*, 298 Ga. 375 - S15G0946, - GA Supreme Court - (decided January 19, 2016)
    - Judgment: (Affirmed)
    - Defendant requested to be removed from the sex offender registry after 10 years from the completion of his sentence. State objected based upon "intentional physical harm" by touching the child's private area.
    - Holding: "intentional physical harm, as it is used in OCGA §17-10-6.2(c)(1)(D), means intentional physical contact that causes actual physical damage, injury, or hurt to the victim."
    - OCGA §17-10-6.2(c)(1) allows for removal if (1) the offender has no prior convictions for sexual offenses; (2) the offense at issue did not involve the use of a deadly weapon; (3) the court finds no evidence of a similar transaction; (4) Victim did not suffer any intentional physical harm; (5) the offense did not involve the transportation of the victim; and (6) the victim was not physically restrained during the commission of the offense.
  - *Gregory v. Sexual Offender Registration Review Board*, 298 Ga. 675 - S15A1718 – GA Supreme Court – (Decided March 21, 2016)
    - Judgment: (Reversed)
    - Defendant was classified as a dangerous sexual predator (level III), which means he will have to wear an ankle monitor for life, plus adhere to additional sex offender restrictions. Defendant requested a hearing to present evidence why he should be reclassified and the trial court refused the hearing and made its decision based upon the record.
    - Holding: Because being labeled a dangerous sexual predator requires additional liberty restrictions including that of an ankle monitor, such classification implicates a liberty interest. Because the liberty interest are substantial in this regards, an evidentiary hearing must be held if one is requested.
    - IMPORTANT NOTE: State asserted that holding an evidentiary hearing in every case would be too great of a burden and cost effective. The Court did not agree, however they did state that an evidentiary is not required unless the Defendant request such a hearing.

- ✪ *Yelverton v. State*, --- Ga. --- - S16A1043 – GA Supreme Court – (Decided November 30, 2016)
  - Judgment: (Reversed and Remanded)
  - Defendant was found guilty of child molestation and aggravated child molestation in 1990 and sentenced to 20 years. During the trial, the judge allowed a similar transaction to come into trial, whereby Defendant was accused of having sex with an adult female, but Defendant claimed it was consensual. Defendant was never charged or found guilty of the similar transaction. Defendant completed his sentence in 2010. In 2015, Defendant filed for removal of sex offender registry. Trial Court agreed with the State that because Defendant was determined to have a prior sexual offense he did not qualify for release pursuant to OCGA §17-10-6.2(c)(1)(C) and OCGA §42-1-19(a)(4). Defendant appealed.
  - Holding: Just because an alleged incident was introduced as a similar transaction at trial does not make a prima facie showing that it is a relevant similar transaction pursuant to OCGA §17-10-6.2(c)(1)(C). The Court hearing the petition must make the determination for itself "whether there is evidence of a relevant similar transaction that would render Defendant ineligible for release. The Court below erred when it failed to make such a determination, and so we must reverse its judgment."
  - JUDGE MELTON DISSENT: Judge Melton states, "a straightforward reading of OCGA §17-10-6.2(c)(1)(C) reveals that, where the removal court finds in the record in the defendant's particular case that evidence of a relevant similar transaction already exists from the defendant's original trial, that defendant may not be considered for removal from the regist4ration requirements." Judge Melton believes that since the original court found evidence of a similar transaction that should be enough to bar removal from the registry.

- **VIOLATIONS**
  - ✪ *Jackson v. State*, 335 Ga. App. 597 - A15A1855 – GA Court of Appeals (Decided February 05, 2016)
    - Judgment: (Affirmed)
    - Defendant made an oral demurrer based upon the Indictment failed to mention he was actually a sex offender who was required to register. The indictment only stated that Defendant failed to register his change of address with the sheriff pursuant to OCGA §42-1-12.
    - Holding: there was no error, because the Defendant could not plead guilty to the Indictment and still be found innocent.

- **SEXUAL ASSAULT**
  - **SCHOOL ADMINISTRATOR**
    - *State v. Morrow*, --- Ga. --- - S16G0584 – GA Supreme Court – (Decided November 21, 2016)
      - Judgment: (Affirmed, but for other reason)
      - Defendant was found guilty of sexual assault under OCGA §16-6-5.1(b)(1) for being a teacher or administrator who supervised the alleged victim. Defendant was classified as a paraprofessional, who helped special needs students get to and from classes. Court of Appeals reversed the conviction because the court found Defendant did not have any supervisory or disciplinary authority over the individual. Supreme Court stated the COA erred, because the defendant had general supervisory and disciplinary authority, which was sufficient. However, Supreme Court affirmed the reversal of the conviction, because the State failed to prove the Defendant was a teacher or administrator.
      - Holding: "to show a violation of OCGA §16-6-5.1(b)(1), the State must prove that the [defendant] was a 'teacher, principal, assistant principal, or other administrator of any school…As used in OCGA §16-6-5.1(b)(1), 'teacher means a teacher, and it does not mean a paraprofessional or other educator." Defendant was merely a paraprofessional, who had no job requirements of teaching or assigning of schoolwork. Further in Georgia public schools, a teacher is required to be certified as such by the Georgia Professional Standards Commission, which Defendant was not.

- **SEXUAL EXPLOITATION OF CHILDREN**
  - **REQUIRES KNOWLEDGE THE CHILD IS A MINOR**
    - *Gerbert v. State*, --- Ga. App. --- - A16A0868 – GA Court of Appeals – (Decided October 28, 2016)
      - Judgment: (Reversed)
      - In the Counts at issue, Defendant was charged with sexual exploitation of children. Several photographs were located on Defendant's computer showing a minor engaged in sexual activity. The only testimony introduced at trial, was the girl stated she was 17, but she did not know the Defendant and was unaware that he possessed the photographs. There was no evidence introduced that Defendant knew the female in the photographs was only 17.
      - Holding: COA acknowledged that they could find no case in Georgia addressing the issue of knowledge of the juvenile's age, but stated they now hold OCGA §16-12-100(b)(8) does in fact require the State to prove

knowledge of the individual's age. "Regardless of whether we answered this question in Abernathy v. State, 278 Ga. App. 574 (2006) or Henderson v. State, 320 Ga. App. 553 (2013), we explicitly answer it here: OCGA §16-12-100(b)(8) requires the State to prove that the defendant knew the person depicted in the image was under the age of 18. Our conclusion is based on the Georgia Supreme Court's decision in Phagan v. State, 268 Ga. 272 (1997) where the Supreme Court held that the State had to prove the defendant had knowledge that the individual was a minor to sustain a conviction under OCGA §16-12-100(b)(1) [enticement of a minor for producing child porn]."

- CONCURRING OPINION: JUDGE DILLARD wrote a lengthy concurring opinion distinguishing Barton v. State, 286 Ga. App. 49 (2007). Defendant had argued that Barton required that Defendant had knowledge the photographs were saved on his computer or device. Judge Dillard explained at length that Barton does not require the State to prove Defendant "saved or downloaded" the items. It only required that at some point, past or present, had knowledge about the photographs. Judge Dillard reasoned it to checking out a hard copy at a library and returning the item. At some point the Defendant possessed the items. It does not matter he was unaware that there was a link or trace leading back to him. All that matters is that he possessed it at some point. Similarly, a hidden link or a hidden file on the computer would equally show Defendant possessed the items at some point. State must still show the images or videos were originally viewed willfully and not an inadvertent act.

➢ SPECIFIC BAD ACTS BY THE COMPLAINING WITNESS

- ✪ *Tarpley v. State*, 298 Ga. 442 - S15A1457 – Georgia Supreme Court – (Decided February 08, 2016)
  - Judgment: (Affirmed) – Defendant failed to make a prima facie showing of justification
  - Defendant attempted to introduce prior specific acts of violence by the complaining witness to help establish justification. Under Chandler v. State, 261 Ga. 40 (1991), to permit such evidence, the Defendant must: (1) follow the procedural requirements for introducing the evidence, (2) establish the existence of prior violent acts by competent evidence, and (3) make a prima facie showing of justification. However, in the case at

bar, Defendant retreated from the altercation, retrieved a weapon and sought out the victim.

- Holding: "Trial court did not abuse its discretion in excluding evidence of prior violent acts by the victim, where the evidence showed that, while the victim was the initial aggressor, the defendant escaped from the altercation", and then became the new initial aggressor.
- IMPORTANT NOTE: This case was tried prior to the new evidence code. OCGA §24-4-405 would most likely limit the evidence under the new evidence code. "where character evidence is admissible, it is generally limited to that regarding reputation or opinion rather than specific instances of conduct. Mohamud v. State, 297 Ga. 532, 536 (2015).

➢ SPEEDY TRIAL DEMAND

CONSTITUTIONAL

✪ *Smith v. State*, 336 Ga. App. 229 - A15A2214 – GA Court of Appeals – (Decided March 16, 2016)

- Judgment: (Affirmed)
- Defendant was arrested for V.G.S.A. He was ultimately sent to Federal prison prior to having his case resolved. Three years go by and he is eventually indicted on the V.G.S.A. He requested a speedy trial and was eventually tried and convicted. Prior to trial, Defendant filed a motion to dismiss based upon failure to try him timely.
- Holding: Trial Court did not abuse its discretion in denying Defendant's motion to dismiss.
- IMPORTANT NOTE: when analyzing speedy trial grounds, "the trial court must determine whether the interval from the defendant's arrest, indictment, or other formal accusation to trial is sufficiently long to be considered presumptively prejudicial. If the delay is presumptively prejudicial the trial court must determine whether the defendant has been deprived of his right to a speedy trial by analyzing a four part balancing test that considers (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) prejudice to the defendant. " Keep in mind a delay of greater than a year is generally considered to be presumptively prejudicial.

- ✪ *State v. Wood*, 338 Ga. App. 181 - A16A0023 – GA Court of Appeals – (Decided June 30, 2016)
  - Judgment: (Vacated and Remanded)
  - Prior to Defendant being charged or arrested for various sexual offenses, Defendant moved to Finland. After Defendant moved to Finland, the State issued an arrest warrant and indicted Defendant on the charges. Defendant did not appear for arraignment and a bench warrant was issued. Four years later, Defendant was re-indicted on the charges. Counsel for Defendant entered an appearance and filed a constitutional right to a speedy trial. The Trial Court granted Defendant's speedy trial motion.
  - Holding: "It is well settled that the constitutional right to a speedy trial attaches either at the time of the defendant's arrest or when formal charges are brought, whichever occurs earlier. Defendant's constitutional right to a speedy trial arose on the date of the first indictment in January 2009." The State argued Defendant could not assert his constitutional rights in absentia. However, a defendant may waive formal arraignment, including through his conduct. "Here, even though Defendant has not been properly arraigned, his filing of a motion to dismiss on speedy trial grounds constituted waiver of the arraignment." The State further argued that Defendant could not assert his speedy trial until he learned of the charges, which was in 2013; and the State could have waited to indict the Defendant until then by way of tolling the Statute of Limitations. "Regardless of whether the State could have waited, it did not. The State cannot rewrite the record now, and nor can it avoid its constitutional duty to give Defendant a speedy trial. Lastly however, the trial court determined there was nothing in the record to show Defendant's own action delayed the proceedings. However, upon COA review there is information about the extradition hearings. Thus the case is Remanded back to the Trial Court for it to consider this evidence.
- ✪ *Smith v. State*, 338 Ga. App. 62 - A16A0519 – GA Court of Appeals – (Decided July 13, 2016)
  - Judgment: (Remanded)
  - Case concerned a DUI. Defendant sought to receive discovery and other evidence concerning the breathalyzer. The delay ended up being 5 years before trial was to begin. The day of trial, Defendant raised for the first

time a constitutional speedy trial claim and further argued that he still did not have all the discovery. Trial Court denied his speedy trial claim and Defendant appealed.

- Holding: The Court of Appeals remanded the case back to the trial court to properly weigh the *Barker* four part balancing test. Barker v. Wingo, 407 U.S. 514 (1972) This test consists: "(1) the length of the delay; (2) reasons for the delay; (3) defendant's assertion of the right to speedy trial; and (4) the prejudice to the defendant. Standing alone, none of these factors are a necessary, or sufficient condition to a finding of deprivation of the right to a speedy trial, but rather should be considered as part of a balancing test." COA determined the Trial Court did not properly weigh the factors and remanded back for a proper analysis.

✪ *Taylor v. State*, 338 Ga. App. 804 - A16A0880 – GA Court of Appeals – (Decided October 11, 2016)

- Judgment: (Affirmed)
- Defendant was arrested and ultimately indicted in 2008 for several sexual offenses against 15 minors. Defendant was not brought to trial until 2012, at which time he filed a plea in bar and constitutional speedy trial. While in custody, Defendant was placed in solitary confinement for an extended period of time. However during the 4 year gap, Defendant consented to several continuances for various reasons and the case was transferred to 7 different judges. Trial Court denied his speedy trial and after a bench trial, he was found guilty.
- Holding: When analyzing constitutional speedy trial, the courts must weigh and balance the four factors outlined in Barker v. Wingo, 407 U.S. 514 (1972). They include: (1) Length of delay; (2) Reason for delay; (3) Assertion of speedy trial rights; and (4) Prejudice to the defendant. The COA explained, "[b]ased upon the complexity of the multi-count indictment involving 15 separate victims, [Defendant's] failure to timely assert his right to a speedy trial, and the lack of any actual prejudice to his defense, we cannot say that the trial court's ultimate conclusion amounts to an abuse of discretion."

- ✪ *McDougler v. State*, --- Ga. App. --- - A16A1347 – GA Court of Appeals – (Decided October 28, 2016)
  - Judgment: (Affirmed)
  - Defendant was arrested for various drug charges. 7 months later when call for trial, State asked for a continuance due to they were not prepared. Case called a week later, and State filed a motion to introduce similar transactions. Due to notice requirement, Trial Court continued the case another 2 months. When called again, State still failed to provide notice requirements and case was continued again. 16 months after arrest, Defendant filed a motion to dismiss for constitutional speedy trial concerns. It was denied and he was ultimately convicted of the charges.
  - Holding: There is a two part test the courts use to determine constitutional speedy trial demands: First, is the delay presumptively prejudicial - - delays over a year are usually determined prejudicial; and secondly, if the court determines the delay is presumptively prejudicial, the court then looks at the four factors outlined in Barker v. Wingo, 407 U.S. 514 (1972): (1) whether delay before trial was uncommonly long, (2) whether the government or the criminal defendant is more to blame for that delay, (3) whether, in due course, the defendant asserted his right to speedy trial, and (4) whether he suffered prejudice as the delay's result. These final four factors are weighed equally balancing all of the factors and based on the discretion of the trial court. COA determined the trial court weighed the first two in favor of the defendant and the second two in favor of the state. There was no abuse of discretion. COA did state they would likely have held it more against the State for continuously failing to adhere notice requirements and discovery rules and likely ruled a different way, they could not state the Trial Court abused its discretion.
- ✪ *Johnson v. State,* --- Ga. --- - S16A1347 – GA Supreme Court – (Decided November 21, 2016)
  - Judgment: (Remanded with instructions)
  - Defendant also filed a statutory speedy trial and see below for that issue. Defendant also asserted constitutional and raised the issue on appeal prior to trial. The Trial Court did not address any factors in denying defendant's constitutional claim.
  - Holding: Constitutional speedy trial claims are evaluated under the two-part framework set out in Barker v. Wingo, 407 U.S. 514 (1972) and

refined in Doggett v. United States, 505 U.S. 647 (1992). The first part is to determine whether the time between the defendant's arrest or indictment and his trial was long enough to be considered presumptively prejudicial to the defendant. If it is determined presumptively prejudicial the courts then focus on the four-factor balancing test, which are: (1) the length of delay, (2) the reasons for delay, (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. The trial court failed to consider these factors and so the Supreme Court remanded the case back with instructions to consider these factors.

- IMPORTANT NOTE: Normally a constitutional speedy trial demand is not appealable prior to trial. However the denial of a motion for acquittal on statutory speedy trial grounds is immediately appealable. Because the defendant appealed the statutory grounds, also, the Court was also able to consider the Defendant's contemporaneous constitutional speedy trial demand.

✪ *State v. Bonawitz*, --- Ga. App. --- - A16A1153 – GA Court of Appeals – (Decided November 02, 2016)

- Judgment: (Affirmed)
- Defendant requested a dismissal and acquittal of his case based upon statutory speedy trial. Defendant was in prison for a couple of years and requested that he be produced and asserted he wanted to go to trial. The Court never produced the Defendant until two years later. During this time, a key witness who pled guilty and exonerated the Defendant died. Trial Court granted Defendant's motion to dismiss.
- Holding: I will not reiterate the Barker –Doggett factors, but the court analyzed each, weighing each factor in favor of Defendant. Of particular reference, the State argued that the second factor: cause of delay, should not be weighed against the State, since it was the trial court and not the prosecution who was required to produce the Defendant, while he was in prison. COA explained: "[t]he responsibility for bringing a defendant promptly to trial rests with the government, which includes all state actors, even trial and appellate court judges. The relevant inquiry for purposes of this factor is not whether the prosecutor or the accused bears more responsibility for the delay, but whether the *government* or the criminal defendant is more to blame for that delay." Thus, this factor is weighted in favor of Defendant. As for the prejudice prong, the fact that a potential witness died, who could exonerate Defendant was purely prejudicial.

- **STATUTORY**
  - *State v. Marshall*, 337 Ga. App. 336 - A16A0744 or *State v. Lucas*, 337 Ga. App. 336 - A16A0748 – GA Court of Appeals – (Decided June 08, 2016)
    - Judgment: (Affirmed)
    - Both defendants filed statutory speedy trials in their respective cases. Both cases were handled by the same judge. The judge sent out a case management order that included when discovery should be presented, motions filed and *set a trial date outside the statutory deadline*. Neither defendant objected to the case management order. After the statutory deadline ran, both defendants filed plea in bars. Trial court granted the plea in bars and the State appealed. COA agrees with the trial court.
    - Holding: "The defendant, it is true, may waive his right to insist upon a demand. If he should absent himself from the court, or should move for a continuance, or should agree upon a continuance, or should do any other act affirmatively showing an intention not to insist upon his demand, a waiver would be implied. However, *no such waiver results from mere inactivity on his part*, provided he does not absent himself from the court, so that he cannot be tried. The State is the pursuer. He is the pursued. Until the State moves toward him, he may remain still. *If he has demanded trial and stands ready for the trial if it comes, he has done all that the law requires of him in the way of insistence upon his demand.*"
  - *Johnson v. State,* --- Ga. --- - S16A1347 – GA Supreme Court – (Decided November 21, 2016)
    - Judgment: (Affirmed)
    - Defendant was originally represented by counsel. Two days prior to his counsel withdrawing, Defendant filed a Motion for Speedy Trial. Trial Court ultimately denied the motion and stated he was represented by counsel at that time. At arraignment, trial court gave Defendant 20 more days to file any motions. Defendant requested 45 days but the trial court said 20. 28 days later, Defendant filed another demand for speedy trial, citing the wrong statute and failed to serve on the prosecutor and the judge. This demand was also outside the last term of court to file a speedy by 5 days. Trial Court again dismissed the demand and the Defendant appealed.
    - Holding: Court agreed the original speedy trial was not effective because he was represented by counsel and the second request was also defective because it was outside the term of court and he failed to serve the DA and the Judge.

- **STATUTE OF LIMITATIONS**
  - *Johnson v. State*, 335 Ga. App. 886 - A15A1813 – GA Court of Appeals (Decided February 10, 2016)
    - Judgment: (Affirmed)
    - Defendant was timely indicted within the statute of limitations. Defendant filed a demurrer claiming the indictment was defective because it failed to assert a person the property was taken from and instead asserted it was the property of a corporation. After the judge granted the Demurrer, the State re-indicted Defendant within 6 months from the indictment being quashed.
    - Holding; OCGA §17-3-3 "if an indictment is found within the time provided for by statue, and is quashed or nolle prosequi entered, the limitation shall be extended six months from the time the first indictment is quashed.
    - Defendant also appealed claiming the second indictment was defective based upon the indictment failed to allege the statute of limitations was extended by OCGA §17-3-3. The Supreme Court has already addressed this issue and stated because OCGA §17-3-3 is an extension and not an exception to the statue of limitations, it is not necessary for the State to include the statute of limitations is extended.
  - *State v. Crowder*, 338 Ga. App. 642 - A16A1184 – GA Court of Appeals – (Decided September 20, 2016)
    - Judgment: (Affirmed)
    - Defendant was owner of a computer hardware business. Defendant's company was being audited and the State alleges he committed several offenses based upon the unlawful conversion of sales tax. The Indictment was filed in October 2014 alleging acts that occurred prior to 2010, but cited the State had no knowledge of the offenses until October 2010. The original audit commenced prior to the summer of 2010, in which ambiguities started to arise. Therefore the Department of Revenue ordered a more detailed audit which did not give a final report until October 2010. Defendant filed a plea in bar and Trial Court granted based upon statute of limitations.
    - Holding: "The burden is on the state to prove that the crime occurred either within the statute of limitation, or, if an exception to the statue is alleged, to prove that the case falls within the exception." The Court went further to state, "The statute of limitation cannot be tolled for the

routine investigation of crimes, or based upon the subjective opinion of the [Department of Revenue] or the prosecutor as to whether there is enough evidence to file charges." In essence, because the Department of Revenue had actual knowledge that something was not right prior to requesting the detailed audit, they had knowledge and the Statute of Limitations does not toll until they finished their investigation to confirm their beliefs.

- IMPORTANT NOTE: The COA dismissed in detail several of the cases that the State used to argue why the statute tolled. In particular, State v. Campbell, 295 Ga. App. 856 (2009); Harper v. State, 292 Ga. 557 (2013); and Royal v. State, 314 Ga. App. 20 (2012). I include this note because the State might try to avail themselves of these same arguments and this case goes into detail why the case at bar is different and the previously mentioned cases do not apply.

➢ TATTOOS

✪ *Smith v. State*, 299 Ga. 424 - S16A0398 – GA Supreme Court – (Decided July 05, 2016)

- Judgment: (Affirmed for harmless error)
- During defendant's testimony on direct, he showed the jury scars on his arm to indicate he was too weak to have committed the crime alleged (murder of infant by shaking the baby). On cross-examination, the State got Defendant to display his arms again, but then started questioning him about the tattoos on his arm and what they meant. Eventually eliciting testimony that some of the tattoos were obtained while he was in custody. Defense Counsel objected based upon relevance.
- Holding: "In the new code, relevant evidence is defined in OCGA §24-4-401 as evidence heaving any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Court then went on to state, that because the tattoos were not being used for identification purposes, "it should have been clear that this line of questioning would not develop relevant evidence, and the remaining handful of questions that turned to why and where Defendant got tattoos was rather obviously irrelevant…Nevertheless, we are confident that any such error was harmless."

- IMPORTANT NOTE: The Supreme Court concedes tattoos are relevant in some cases for identification purposes. "See United States v. Blasingame, 219 Fed. Appx. 934, 944 (11th Cir. 2007) (holding that a photograph of a defendant's torso showing a gunshot scar and tattoos similar to those witnesses had described was relevant to identify the defendant as the masked gunman.)"

➢ **TERRORISTIC THREATS**

✪ *Looney v. State*, 336 Ga. App. 882 - A16A0393 – GA Court of Appeals – (Decided April 20, 2016)

- Judgment: (Affirmed)
- Defendant was evicted from his apartment. He went to the leasing manager and stated if the management did not return his stuff, including an XBOX, that he would kill the leasing manager and other staff employees. Defendant was convicted. Defendant appealed claiming he could not be convicted because his threats were conditioned on future events that may happen or not happen.
- Holding: "A defendant need not have the immediate ability to carry out the threat to violate OCGA §16-11-37(a). A threat can be conditional and non-immediate and still qualify as a terroristic threat."

➢ **THEFT BY RECEIVING**

✪ *Lindsay v. State*, 336 Ga. App. 330 - A15A2104 – GA Court of Appeals – (Decided March 22, 2016)

- Judgment: (Reversed)
- Defendant was found guilty of the theft by receiving stolen property for purchasing merchandise with embezzled funds. The state asserted that property traceable to stolen funds remains the property of the victim of the theft through equity.
- Holding: "After carefully considering this issue, we conclude that a common sense reading of the plain language of the statue requires the State to prove that the tangible goods received by the defendant were the same goods that were taken from the owner."

- **TIMELINESS OF APPEAL (STATE'S NOTICE REQUIREMENT)**
  - *State v. Andrade*, 298 Ga. 464 - S15G0866 – Georgia Supreme Court – (Decided February 08, 2016)
    - Judgment: (Reversed)
    - Court of Appeals originally denied the State's appeal based upon the State failing to give timely notice. The State was appealing a motion to suppress, granted to defense based upon the voluntariness of a confession. The Court of Appeals stated notice must be filed within two days based upon OCGA §5-7-1(a)(5).
    - Holding: When the State appeals a trial court's order excluding evidence, they file that appeal under OCGA §5-7-1(a)(4), which allows 30 days for notice appeal; and not subject to OCGA §5-7-1(a)(5) two days notice.

- **TIMELINESS OF MOTION TO MODIFY SENTENCE**
  - *Pendleton v. State*, 335 Ga. App. 455 - A15A2240 Court of Appeals (decided on January 06, 2016)
    - Judgment: (Reversed and Remanded)
    - Judge denied defendant's motion to modify sentence based upon timeliness, where motion was filed 10 months after the sentence and no longer in the term of court
    - Holding: OCGA §17-10-1(f) vested the trial judge with jurisdiction to consider a motion to modify a sentence within (1) one year from the date sentence was imposed

- **TOLLING MISDEMEANOR PROBATION**
  - *Anderson v. Sentinel Offender Services*, 298 Ga. 854 - S15Q1816 – GA Supreme Court – (Decided March 25, 2016)
    - Judgment: (Answered U.S. District Court's question)
    - U.S. District Court requested the State Supreme Court answer two questions to determine if common law principles allow for misdemeanor probations to be tolled.
    - Holding: The GA Supreme Court answered the District Court's questions indicating that common law principles do allow for misdemeanor probation to be tolled.
    - IMPORTANT NOTE: (Footnote 1) "The private probation statutory scheme, applicable to misdemeanor probation, has since been amended,

defective July 01, 2015, to include a tolling provision for misdemeanor probation…We render no opinion in this case as to the effect of this amendment on the principle of common law tolling."

- **TRAFFICKING**
  - *Crider v. State*, 336 Ga. App. 83 - A15A1922 – GA Court of Appeals – (Decided March 07, 2016)
    - Judgment: (Affirmed)
    - Defendant was a passenger in a vehicle, which was stopped pursuant to reckless driving. A search of the vehicle revealed 7 grams of meth under the passenger's seat. The driver of the vehicle notified the police she picked defendant from a hotel where he sold her some additional meth. A search of the hotel revealed 23 grams of meth. Defendant had on his person a key to the hotel room.
    - Holding: Even though neither incident alone would suffice to convict for trafficking, constructive possession affirms the trafficking conviction. "A person has constructive possession of a thing if he or she 'knowingly has both the power and intention at a given time to exercise dominion or control over it.'"

- **UNANIMOUS JURY**
  - *Jones v. State*, 335 Ga. App. 591 - A15A1825 – GA Court of Appeals – (Decided February 05, 2016)
    - Judgment: (Affirmed)
    - Defendant was charged with four separate sexual offenses. The jury sent a note stating they had a unanimous verdict and it was read in open court as guilty to all counts. Defense asked the jury to be polled, where as one juror stated that was not her verdict. Defense moved for a mistrial and it was denied. After questioning the juror and the foreperson, the court instructed the jury to continue to deliberate. An hour later, the jury returned another verdict of guilty to all counts, which was unanimous.
    - Holding: "Where a poll of the jury discloses other than a unanimous verdict, the proper procedure is for the trial court to return the jury to the jury room for further deliberations in an effort to arrive at a unanimous verdict." Court of Appeals finds no error in what occurred.
    - IMPORTANT NOTE: The court distinguishes this case from Brasfield v. U.S., 272 U.S. 448 (1926), where the courts found it improper to poll the

jury prior to a unanimous verdict. The case at bar the court believed there was a unanimous verdict and the polling was not made to influence the jury in any respect. However, in Brasfield the courts polled the jury prior to a unanimous verdict and the U.S. Supreme Court stated, under that set of circumstances it is clear how the polling of a jury before a verdict is reached may be coercive.

- **VARIANCES IN THE INDICTMENT**
  - *Bolden v. State*, 335 Ga. App. 653 - A15A1927 – GA Court of Appeals (Decided February 10, 2016)
    - Judgment: (Reversed for new trial)
    - The indictment accused the Defendant with the offense of Robbery, by way of "did without authority enter into the residence" to commit rape. However, the Court instructed the jury on the robbery count that the burglary offense is committed if the Defendant enters a "dwelling of another or any room or part of it with the intent to commit a rape." The Jury later came back with a question inquiring whether the intent must be formed prior to entering the house or upon entering the house then forming the intent. The judge re-instructed them and also told them to view the indictment.
    - Holding: "A criminal defendant's right to due process may be endangered when an indictment charges the defendant with committing a crime in a specific manner and the trial court's jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment"
    - IMPORTANT NOTE: the Defendant never objected at trial to the improper jury instruction, and so the Court of Appeals determined the attorney rendered ineffective assistance of counsel. (We must make sure the jury instructions are tailored to the indictment. I am dealing with an appeal on this very same issue. My case is even more egregious because the judge stated the jury could disregard the manner in which the offense occurred because it was mere surplusage.)
  - *Moon v. State*, 335 Ga. App. 642 - A15A1636 – GA Court of Appeals (Decided February 10, 2016)
    - Judgment: (Affirmed)
    - Defendant appealed alleging there was a fatal variance in the indictment from what the evidence proved. Basically, the indictment alleged he

possessed a photograph of a child depicting sexual images; however, the evidence presented at trial was the Defendant possessed a digital image and not a photograph. The Court determined that it was a not a fatal variance.

- Holding: "Not every variance in proof from that alleged in the indictment is fatal. The fundamental test is to determine whether (1) the accused was definitely informed of the charges against him so as to enable him to present his defense and not to be taken by surprise, and (2) the accused was adequately protected against another prosecution for the same offense."

✪ *Whaley v. State*, 337 Ga. App. 50 - A16A0569 – GA Court of Appeals – (Decided May 04, 2016)

- Judgment: (Reversed)
- Defendant was found guilty of reckless driving. The indictment accused Defendant of reckless driving for running several red lights. However, no information about running red lights were presented during the trial.
- Holding: "While an unnecessary description of an unnecessary fact averred in an indictment need not be proved, in criminal law even an unnecessarily minute description of a necessary fact must be proved as charged. If the indictment sets out the offense as done in a particular way, the proof must show it so. No averment in an indictment can be rejected as surplusage, which is descriptive either of the offense or of the manner in which it was committed. All such averments must be proved as laid."

✪ *Wilhite v. State*, 337 Ga. App. 324 - A16A0216 – GA Court of Appeals – (Decided June 08, 2016)

- Judgment: (Affirmed)
- Defendant was charged with Aggravated Sodomy and Burglary, where the indictment alleged the offenses occurred at Velma Court. Velma Court was the complaining witness's new address. At trial, the evidence presented the offenses occurred at Spring Point, the complaining witness's old address. Defendant sought a new trial, claiming there was a fatal variance in the indictment from that of the evidence which was presented at trial.
- Holding: "The true inquiry is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused…(1) The allegations must definitely

inform the accused as to the charges against him as to enable him to present his defense and not be taken by surprise, and (2) the allegations must be adequate to protect the accused against another prosecution for the same offense." Trial counsel explained at the motion for new trial, that he was made aware the offense occurred Spring Point, thus was not caught off by surprise. Accordingly there is no fatal variance and is in effect mere surplusage. (*citing* Day v. State, 254 Ga. App. 286, 287 (2002), there is "no fatal variance where indictment alleged non-existent address, because 'the specific location was not an element of the crime of burglary charged against the defendant, and the precise location charged in the indictment was mere surplusage.")

- **VENUE**
  - *Shelton v. Lee*, 299 Ga. 350 - S16A0106 – Ga. Supreme Court – (Decided July 05, 2016)
    - Judgment: (Affirmed)
    - Defendant was found guilty of malice murder. The facts presented at trial gave conflicting evidence about where the murder occurred. The trial court instructed the jury according to pattern jury charge, "Where it cannot readily be determined in what county the cause of death was inflicted, 'it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered.'" The 11 Circuit had previously ruled in Owens v. McLaughlin, 733 F3d 320, 325 (11th Circuit 2013) that the language "Shall be considered" impermissibly relieves the State of having to prove to venue and thus violates Defendant's constitutional rights. Ga. Supreme Court fails to agree with the 11th Circuit.
    - Holding: "It is our view that the Eleventh Circuit in Owens v. McLaughlin did not properly construe Georgia's constitutional and statutory law on venue, and therefore it mistakenly concluded that jury instructions based directly on Georgia's venue law improperly shift to the defendant the burden of proof with respect to venue." The court went on to state, "We hold, instead, that a jury instruction that follows the "shall be considered" language of OCGA §17-2-2(c) is a proper instruction. Contrary to the Eleventh Circuit's conclusion, we are not persuaded that instructions such as those given in this case, viewed properly as a matter of Georgia venue law, violate the rule in Sadnstrom

by unconstitutionally shifting to the defendant the burden of proof of an element of the crime charged.

- IMPORTANT NOTE: The Supreme Court did state, "if a defendant believes the venue statute violates the Constitution's venue provision, it should be challenged on that ground, which would raise a question of state constitutional law." In this case, the defendant did not raise a constitutional issue. In future cases, where the decedent cannot be determined where he or she was killed; it would be better practice to make a constitutional claim.

✪ *Propst v. State*, 299 Ga. 557 - S16A0275 – GA Supreme Court – (Decided July 05, 2016)

- Judgment: (Affirmed)
- Concerning the initial robbery, several witnesses testified that the robbery occurred in Walton County. However the witnesses only testified that the shooting took place down the road from the initial robbery. Defendant appeals claiming Venue was not established to the shooting, due to no evidence was presented that the intersection of Virginia Way and Shadwell Lane, where the shooting occurred, were located in Walton County. However, the responding officers were all from Walton County.
- Holding: "In light of the well-settled principle that public officials are believed to have performed their duties properly and not to have exceeded their authority unless clearly proven otherwise…the jury was authorized to find the police officer acted within the territorial jurisdiction in which he testified he was employed." In essence, all the responding officers were from Walton County, the crime scene unit was from Walton County, and the evidence forms and evidence stored were in Walton County. Thus, there was enough circumstantial evidence to establish venue.

✪ *State v. Wallace*, 338 Ga. App. 611 - A16A0891 – GA Court of Appeals – (Decided September 15, 2016)

- Judgment: (Reversed and Remanded)
- Defendant filed a motion to suppress evidence based upon an improper traffic stop and subsequent search of the vehicle. At the motions hearing, after State concluded with presenting evidence, Defense moved to dismiss based upon the State failed to establish venue. Trial Court agreed and dismissed. COA reverses based upon Venue is a trial issue.

- Holding: "Venue relates to the *place of the trial* because criminal actions are required to *tried* in the county where the crime occurred, unless otherwise provided by law. Accordingly, venue is a jurisdictional fact and an element of the crime which the State must prove beyond a reasonable doubt at trial…The State did not need to establish venue at the pretrial hearing on [Defendant's] motion to suppress as it was not relevant to the issues raised in his written motion."

✪ *Payne v. State*, 338 Ga. App. 677 - A16A1049 – GA Court of Appeals – (Decided September 22, 2016)

- Judgment: (Affirmed)
- Police were called to a trailer park in Chatham County in response to a fight. Upon arrival by the police, Defendant fled in a white van. The van was observed by a taxi driver, who testified he observed the police chasing the van on Skidaway Road. The taxi driver further testified that he was in Chatham County eating at a restaurant when he observed the white van. Defendant alleged on appeal that Venue was never established.
- Holding: The offense of eluding an officer is complete when a defendant refuses to stop his vehicle despite visual and audible signals to do so. The taxi-driver's testimony indicating he was in Chatham County coupled with the trailer park was in Chatham County is enough evidence to prove venue.
- IMPORTANT NOTE: The COA has cautioned prosecutors about overlooking venue, when issues like the one in this case was unnecessary given the ease of which would be need to establish venue. The COA also noted, "Our Supreme Court has made clear that merely 'slight evidence' of the proper venue is not enough to sustain a verdict. Martin v. McLaughlin, 298 Ga. 44, 46 (2015); Jones v. State, 272 Ga. 900, 902-03 (2000). And "[e]stablishing the venue of a near-by site does not establish the venue of the [crime] site itself." Chapman v. State, 275 Ga. 314, 317 (2002)."

✪ *McMullen v. State*, --- Ga. --- - S16A0937 – GA Supreme Court – (Decided November 21, 2016)

- Judgment: (Affirmed)
- Defendant was found guilty of murder for shooting his ex-girlfriend as they drove down Washington Street. The evidence at trial presented that the decedent first came into contact with the Defendant at a barber shop

in Newton County. After the decedent was shot, her vehicle came to rest at a service station also in Newton County. Coroner explained the decedent would have died within minutes of being shot, which was just prior to the car coming to rest.

- Holding: the Court analyzed the case at bar with that of Jones v. State, 299 Ga. 377, 381 (2016), which also found Venue was proven beyond a reasonable doubt when the decedent was thrown from a moving car. "In light of our decision in Jones, we find that, here too, the evidence as a whole is sufficient to prove venue beyond a reasonable doubt."

- **FORGERY - UTTERANCE**
  - ✪ *Rowan V. State*, --- Ga. App. --- - A16A1004 – GA Court of Appeals – (Decided October 04, 3016)
    - Judgment: (Affirmed)
    - Defendant and complaining witness were in a business partnership. Complaining witness learned that Defendant forged his name on documents to also form a business in Maryland. The documents were signed by a notary in Jackson County, Georgia before being submitted to Maryland. Defendant appealed his conviction claiming proper venue was Maryland, where the documents were ultimately delivered and not Jackson County, Georgia.
    - Holding: "To utter and publish a document is to offer directly or indirectly, by words or actions, such document as good." Here Defendant uttered the document was good when he presented the document to the Notary, located in Jackson County, Georgia and uttered the signature on the document was an authentic signature of the complaining witness's. The COA went further and explained that there was also an utterance to Maryland, but stated, the offense of forgery is complete with any utterance of a document and not just for the "ultimate improper purpose."

- **VICTIM IMPACT STATEMENTS – CAPITAL CASES**
  - ✪ *Bosse v. Oklahoma*, 590 U.S. --- - No. 15-9173 – US Supreme Court – (Decided October 11, 2016)
    - Judgment: (Reversed)
    - This is a short opinion and only concerned victim impact statements that are used in Capital Cases. Defendant was found guilty of Murder and at his sentencing hearing, the State introduced several family member's

impact statements explaining the family requested the jury to sentence the Defendant to death. The jury ultimately agreed with the jury. Defendant appeals.

- Holding: In Booth v. Maryland, 482 U.S. 496 (1987), the Supreme Court held the Eighth Amendment prohibits introduction of victim impact statements that explain opinions about the crimes, opinions about the defendant and what the appropriate sentence should be in capital cases. Later, SCOTUS held in Payne v. Tennessee, 501 U.S. 808 (1991) over-ruled part of Booth, stating victim impact statements can be admitted to show the emotional impact of the crime on the victim's family, but Payne made no mention about the other issues held in Booth. Oklahoma courts were incorrect in finding that Payne completely over-ruled Booth. Thus, victim impact statements in capital cases are still precluded if used to explain opinions about the crimes, opinions about the defendant and what the appropriate sentence should be in capital cases.

➢ VOIR DIRE

✪ *Welch v. State*, 298 Ga. 320 - S15A1393 – GA Supreme Court (decided January 19, 2016)

- Judgment: (Affirmed)
- Defense objected that the trial court did not strike for cause two jurors who originally stated they could not be fair and impartial and later after further questioning stated they could
- Holding: "Trial court does not abuse its discretion when it refuses to strike a juror for cause unless the juror's opinion is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence and the trial court's instructions:"

✪ *Smith v. State*, 335 Ga. App. 497 - A15A1664 – Court of Appeals (decided January 25, 2016)

- Judgment: (Affirmed)
- Judge excused a juror during deliberations, once the D.A. was able to show the juror was listed as a friend on the Defendant's facebook page. The juror explained she did not go on Facebook that much and does not know all the people she is friends with, but the Judge excused the juror out of an abundance of caution.
- Holding: "The trial court did not abuse its discretion in replacing Juror 4. Regardless of Juror 4's reasons for failing to disclose constituted

misconduct, Juror 4 was connected to Defendant in some fashion and her veracity on the issue was in question."

- ✪ *Jackson v. State*, 336 Ga. App. 70 - A15A2137 – GA Court of Appeals – (Decided March 03, 2016)
  - Judgment: (Affirmed)
  - During voir dire one of the witnesses failed to mention that he knew the Defendant's father. During one of the breaks, the juror was spotted in the parking lot having a discussion with the defendant's father. The trial court subsequently dismissed the juror and replaced him with an alternate.
  - Holding: "OCGA §15-12-172 provides a trial court with discretion to discharge a juror and replace him or her with an alternate at any time, and we will not reverse as long as the court's exercise of discretion has a sound legal basis."
- ✪ *Gray v. State*, 298 Ga. 885 - S16A0278 – GA Supreme Court – (Decided April 26, 2016)
  - Judgment: (Affirmed)
  - Defense sought to excuse a potential juror for cause because when initially asked about the state's burden, he "indicated that he would not 'be able to reconcile' with the principle that 'the defense doesn't have to do anything with respect to this case' and that he anticipated that the defense would, in fact, put up evidence in the case. This juror went further to state, it "would be hard for him to reach a verdict of not guilty in such a situation, even if the evidence presented by the State did not prove guilt. The Court then explained the burden of proof and the juror agreed he could apply the law given.
  - Holding: "A trial court does not abuse its discretion when it fails to strike someone who initially expresses confusion about the burden of proof."
- ✪ *Jones v. State*, 338 Ga. App. 505 - A16A1048 – GA Court of Appeals – (Decided August 10, 2016)
  - Judgment: (Affirmed)
  - Defendant sought to excuse a juror for cause in a drug case, because the juror stated drugs have affected his family based upon his brother getting addicted to drugs. The potential juror went further to state, "I'd like to think that I would be fair and impartial but, you know, there's

probably some bias there." The DA then rehabilitated the juror and asked if the juror could listen to the testimony, weigh the evidence and apply the law that the judge gives. The potential juror stated, "I believe I could."

- Holding: "The fact that a potential juror may have some doubt as to his impartiality, or complete freedom from all bias, does not demand as a matter of law that the juror be excused for cause." The Court went further to state, "A prospective juror's doubt as to his or her own impartiality does not demand as a matter of law that he or she be excused for cause. For instance, when a potential juror testifies that he or she will 'try' to decide the case based upon the court's instructions and the evidence, excusing that prospective juror for cause is not mandated."

✪ *Brittian v. State*, --- Ga. --- - S16A0950 – GA Supreme Court – (Decided October 03, 2016

- Judgment: (Affirmed)
- Defendant appealed claiming the Trial Court should have dismissed a juror for cause, because she showed bias in favor of police officers. Defendant further appealed stating trial counsel was ineffective because he did not get two other jurors struck for cause and instead used preemptory strikes. All three jurors indicated there was a possibility they would give greater weight to officers, however when further questioned by the court, stated they could be fair and impartial and could weigh the evidence.
- Holding: "Whether to strike a juror for cause lies within the sound discretion of the trial court. For a juror to be excused for cause, it must be shown that he or she holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the court's charge upon the evidence. A prospective juror's doubt as to his or her own impartiality does not demand as a matter of law that he or she be excused for cause. Nor is excusal required when a potential juror expresses reservations about his or her ability to put aside personal experiences." Holmes v. State, 269 Ga. 124, 126 (1998). All three jurors indicated they could put aside their personal opinions and experiences and weigh the evidence accordingly. Therefore, there was no reason to excuse these jurors for cause.

- *Turner v. State*, --- Ga. --- - S16A1349 – GA Supreme Court – (Decided October 03, 2016)
  - Judgment: (Affirmed)
  - During Voir Dire, the State asked whether anyone believes they could never return a guilty verdict based solely on the word of one person. Defendant objected, claiming the question asked the jury to prejudge the case.
  - Holding: "the question related not to hypothetical facts but to the potential jurors' willingness to adhere to the trial court's instructions concerning the State's burden of proof." Therefore, the jurors were not invited to pre-judge the case and the question was proper.

- **JUROR EXCUSED FOR CAUSE**
  - *Trim v. Shepard*, --- Ga. --- - S16A0960 – GA Supreme Court – (Decided November 21, 2016)
    - Judgment: (Affirmed)
    - During voir dire, a potential juror explained that her daughter was prosecuted by the same prosecutor and that one of the defense attorney's had represented her daughter. DA immediately requested to strike for cause, which was granted. Defendant filed Habeas which was ultimately denied. Defendant never argued that the jury he was eventually sat with was impartial or biased.
    - Holding: "if a trial court were to err in assessing the impartiality of prospective jurors, it would be better that the trial court 'err on the side of caution by dismissing, rather than trying to rehabilitate biased jurors.' Foster v. State, 258 Ga. App. 601, 608 (2002)…even if a trial court abused its discretion in striking a prospective juror for cause, 'the erroneous allowing of a challenge for cause [ordinarily] affords no ground of complaint if a competent and unbiased jury is finally selected.' Bryant v. State, 288 Ga. 876, 881 (2011)." Defendant never established or even argued that the jury who decided his case was impartial or biased, therefore he cannot establish harm.

- **VOLUNTARY MANSLAUGHTER**
  - *Tarpley v. State*, 298 Ga. 442 - S15A1457 – Georgia Supreme Court – (Decided February 08, 2016)
    - Judgment: (Affirmed) Trial Court did not abuse its discretion in refusing to give voluntary manslaughter charge

- Defendant's defense throughout the trial, was that he was justified in the killing of the decedent based upon he was not the initial aggressor. At the conclusion of the trial, Defendant requested the Trial Court to charge on both justification and the lesser included voluntary manslaughter. Trial Court refused to give voluntary manslaughter charge.
- Holding: There was no evidence presented at trial that the Defendant committed the acts because he was angered or impassioned, as the Defendant's own testimony was he committed the acts out of fear.

✪ *Claugh v. State*, 298 Ga. 594 - S15A1708 – GA Supreme Court – (Decided March 07, 2016)

- Judgment: (Reversed)
- Defendant went to his mother-in-law's house and found his ex-wife with another man. He eventually killed the ex-wife. The trial court rejected the Defendant's request for jury instruction on voluntary manslaughter. Trial court reasoned that the defendant would not be able to enter any random house and claim provocation. Defendant had no lawful right to enter the mother-in-law's house. Thus, he is not entitled to voluntary manslaughter.
- Holding: The sufficiency of the provocation is an issue for the jury. The trial court deciding whether someone had the right to lawfully be at a location is a decision about the sufficiency of the provocation. Supreme Court reversed the malice murder and felony murder on aggravated assault.
- IMPORTANT NOTE: Supreme Court did not reverse the felony murder based upon predicate Burglary and stated that conviction is not affected.
- JUSTICE BLACKWELL concurring opinion on the Felony Murder based upon burglary: Justice Blackwell states it is troubling that because the predicate offense of Burglary does not have a provocation element that it too cannot be subject to an instruction on voluntary manslaughter. Justice Blackwell states, the court's jurisprudence requires this holding, however he believes that a voluntary manslaughter instruction should also be given in this scenario to give the jury an option to mitigate the specific offense of felony murder.

- ✪ *Harris v. State*, 299 Ga. 642 - S16A1188 – GA Supreme Court (Decided September 12, 2016)
  - Judgment: (Affirmed)
  - Defendant requested a jury charge on both justification and voluntary manslaughter at trial. Trial Court refused to give the charge on voluntary manslaughter because there was no evidence to support the charge. Defendant testified at trial that the decedent had threatened him with a gun. He then proceeded to go back in the house and put his children to bed. When he came back outside with a gun, the decedent was still outside holding a gun at him. He therefore shot the decedent.
  - Holding: "Although 'jury charges on self-defense and voluntary manslaughter are not mutually exclusive, the provocation necessary to support a charge of voluntary manslaughter is different from that which will support a claim of self-defense.' Dugger v. State, 297 Ga. 120, 124 (2015)…Here, the [Defendant] points to some proof of potential provocation, but this case presents not even a pretense of passion, much less that the [Defendant] acted solely as the result of passion that was 'sudden' and 'irresistible'…This Court previously has held 'that neither fear that someone is going to pull a gun nor fighting' is sufficient alone to require a charge on voluntary manslaughter.' Smith v. State, 296 Ga. 731, 737 (2015).

➢ **WARRANT AFFIDAVIT – PROBABLE CAUSE**

- ✪ *Johnson v. State*, 336 Ga. App. 888 - A16A0678 – GA Court of Appeals – (Decided April 20, 2016)
  - Judgment: (Affirmed)
  - A confidential informant told a narcotics agent where he could get some drugs. A controlled buy with the confidential informant was conducted and narcotics were purchased. The narcotics agent observed the controlled buy, but did not see or hear the actual transaction. In the warrant affidavit, there was no mention about the credibility or reliability of the confidential informant.
  - Holding: Even though the affidavit contains no information concerning the reliability and credibility of the confidential informant, the controlled drug buy observed by the narcotics agent was sufficient to establish probable cause. "Probable cause to issue a search warrant does not require certainty that an offense was committed, but merely a fair

probability that contraband or evidence of a crime will be found at a particular place." It makes no difference that the narcotics officer did not actually see or hear the transaction.

- **WARRANTS BASED ON CONFIDENTIAL INFORMATS**
  - *Whatley v. State*, 335 Ga. App. 749 - A15A1911 – GA Court of Appeals (Decided February 22, 2016)
    - Judgment: (Affirmed)
    - Defendant sought to suppress the search warrants and arrest warrants that were based upon information given by a confidential informant. Defendant claimed there was no indicia of reliability on the information from the confidential informant.
    - Holding: "If an unidentified informant is not shown to be reliable, his tip nevertheless may be considered trustworthy if portions of it are sufficiently corroborated by the police. For corroboration to be meaningful, the tip must 'include a range of details relating to future actions of third parties not easily predicated or similar information not available to the general public.'"
    - NOTE: among the factors to consider in assessing reliability is: (1) the type of information previously supplied by the informant; (2) the use to which the information was put; and (3) the elapsed time since the information was furnished.

- **WIRE-TAPS**
  - *Finney v. State*, 298 Ga. 620 - S15A1739 – GA Supreme Court – (Decided March 07, 2016)
    - Judgment: (Reversed)
    - On February 08 police received a court order to wire-tap Defendant's phone for 30 days. On March 07 another judge issued a wire-tap for an additional 30 days. Thus the wire-tap was to conclude on April 07. Based upon 18 USC 2518(8)(a) the police were required to immediately submit the recordings to the judge to seal the recordings until in-camera inspection. However, the State did not present the recordings until April 23, or sixteen days later.
    - Holding: "If recordings are not presented immediately for sealing, the government may not use or disclose the content of any intercepted communication or any evidence derived therefrom in a judicial

proceeding, unless there appears a 'satisfactory explanation' for the failure to make an immediate presentation of the recordings." The State's excuse that they were pre-occupied with another case is not a sufficient enough reason for the lengthy delay.

- **WITNESS TAMPERING**
  - *Wiggins v. State*, 338 Ga. App. 273 - A16A0162 – GA Court of Appeals – (Decided June 24, 2016)
    - Judgment: (Affirmed based upon lack of harm)
    - Defendant claimed his defense counsel became ineffective when she became the focus of a criminal prosecution. Defense Counsel included on her witness list a potential witness. Prior to trial, upon learning what the witness would testify, Defense Counsel instructed the witness, his testimony would not be needed and he should go back to Texas. During the State's opening statement, the DA promised the jury that they would hear testimony from this potential witness only later to find out he was told to go back to Texas. The DA did not subpoena the witness. Upon learning the witness went back to Texas, the DA stated he was going to bring charges against the Defense Counsel for witness tampering. Defense Counsel stated because she now had to focus on her own legal issues she was unable to focus completely on the trial.
    - Holding: Defendant is unable to point to any instance where her defense counsel rendered inadequate presentation, thus the Defendant is unable to show any harm she received as a result.
    - CONCURRING OPINION JUDGE MCFADDEN: Judge McFadden goes into detail that Defense Counsel never committed any criminal act by releasing her witness. "It is not the responsibility of defense counsel to help the state present its case. The State had no right to rely on defense counsel's list of possible witnesses…obviously – even if defense counsel instructed witness to leave the state, which she denied – her conduct did not involve any threat of injury or damage; benefit, reward, or consideration; intimidation, physical force, or threats; means of corruption; or misleading conduct." Judge McFadden went further to state that even though they find no harm to the Defendant occurred, it does not "justify use of the power of the office of the district attorney to try to intimidate defense counsel. Nor does it justify subjecting defense

counsel to the anxiety and expense of dealing with the prospect of a specious prosecution."

INDEX OF CASES SUMMARIZED

"UNPUBLISHED OPINION" - *State v. Davis*, --- Ga. --- - S16A1664 – GA Supreme Court – (Decided September 06, 2016) 55
Alday v. State, 336 Ga. App. 508 - A15A2236 – GA Court of Appeals – (Decided March 29, 2016) 113
Ali v. State, 338 Ga. App. 716 - A16A0864 – GA Court of Appeals (Decided September 28, 2016) 103
Allaben v. State, 299 Ga. 253 - S16A0166 – GA Supreme Court – (Decided June 20, 2016) 126, 164
Allen v. State, 336 Ga. App. 80 - A15A2317 – GA Court of Appeals – (Decided March 04, 2016) 85
Amos v. State, 298 Ga. 804 - S15A1580 – GA Supreme Court – (Decided March 07, 2016) 17
Anderson v. Sentinel Offender Services, 298 Ga. 854 - S15Q1816 – GA Supreme Court – (Decided March 25, 2016) 213
Anderson v. State, 337 Ga. App. 739 - A16A1242 – GA Court of Appeals – (Decided July 06, 2016) 194
Anthony v. State, 298 Ga. 827 - S16A0059 – GA Supreme Court – (Decided April 04, 2016) 18, 95
Babbitt v. State, 337 Ga. App. 553 - A16A0338 – GA Court of Appeals – (Decided June 15, 2016) 10
Bailey v. State, 338 Ga. App. 428 - A16A0200 – GA Court of Appeals – (Decided July 13, 2016) 176
Barfield v. State, 335 Ga. App. 674 - A15A2071 – GA Court of Appeals – (Decided February 10, 2016) 151
Barnes v. State, 335 Ga. App. 709 - A15A1631 – GA Court of Appeals – (Decided February 15, 2016) 119
Barton v. State, 338 Ga. App. 524 - A16A0745 – GA Court of Appeals – (Decided August 15, 2016) 196
Battle v. State, 298 Ga. 661 - S15A1510 – GA Supreme Court (Decided March 21, 2016) 160
Baughns v. State, 335 Ga. App. 600 - A15A2242 – GA Court of Appeals (Decided February 05, 2016) 10, 65
Becker v. State, 335 Ga. App. 808 - A15A2265 – GA Court of Appeals (Decided February 24, 2016) 193
Bethea v. State, 337 Ga. App. 217 - A16A0377 – GA Court of Appeals (Decided May 26, 2016) 117
Birchfield v. North Dakota, 136 S.Ct. 2160 - No. 14-1468 – U.S. Supreme Court – (Decided June 23, 2016) 173
Blackledge v. State, 299 Ga. 385 - S16A0354 – GA Supreme Court – (Decided July 05, 2016) 23, 198

Blackmon v. State, --- Ga. --- - S16A1306 – GA Supreme Court – (Decided October 31, 2016) 84
Blackmon v. State, 336 Ga. App 387 - A15A1834 – GA Court of Appeals (Decided March 24, 2016) 26
Blackmon v. State, 336 Ga. App. 387 - A15A1834 – GA Court of Appeals (Decided March 24, 2016) 102
Blackwell v. State, 299 Ga. 122 - S16A0270 – GA Supreme Court – (Decided May 23, 2016) 71
Blackwell v. State, 337 Ga. App. 173 - A16A0172 – GA Court of Appeals – (Decided May 20, 2016) 15
Bolden v. State, 335 Ga. App. 653 - A15A1927 – GA Court of Appeals (Decided February 10, 2016) 215
Bonner v. State, --- Ga. App. --- - A16A1097 – GA Court of Appeals – (Decided November 17, 2016) 38
Bosse v. Oklahoma, 590 U.S. --- - No. 15-9173 – US Supreme Court – (Decided October 11, 2016) 220
Bowen v. State, --- Ga. --- - S160850 – GA Supreme Court – (Decided October 31, 2016) 83
Brannon v. State, 298 Ga. 601 - S15A1724 – GA Supreme Court – (Decided March 07, 2016) 27, 133, 182
Bravo-Fernandez et. al. v. United States, --- U.S. --- - No. 15-537 – United States Supreme Court (Decided November 29, 2016) 62
Brittian v. State, --- Ga. --- - S16A0950 – GA Supreme Court – (Decided October 03, 2016 223
Brooks v. State, 298 Ga. 722 - S15A1480 – GA Supreme Court – (Decided March 07, 2016) 93
Brown v. State, 336 Ga. App. 428 - A15A1637 – GA Court of Appeals (Decided March 28, 2016) 26
Buford v. State, --- Ga. --- - S16A1353 – GA Supreme Court – (Decided November 07, 2016) 110
Burney v. State, --- Ga. --- - S16A1042 – GA Supreme Court – (Decided October 17, 2016) 52
Bynes v. State, 336 Ga. App. 223 - A15A1974 – GA Court of Appeals – (Decided March 16, 2016) 166
Campbell v. State, 337 Ga. App. 7 - A16A0142 – GA Court of Appeals – (Decided April 27, 2016) 169
Carter v. State, 298 Ga. 867 - S15G1047 – GA Supreme Court (Decided April 04, 2016) 87
Case v. State, --- Ga. --- - S16A1086 – GA Supreme Court – (Decided November 21, 2016) 138
Cheley v. State, 299 Ga. 88 - S16A0003 - GA Supreme Court – (Decided May 23, 2016) 112

Cheley v. State, 299 Ga. 88 - S16A0003, GA Supreme Court – (Decided May 23, 2016) 33
Chism v. State, 338 Ga. App. 463 - A16A0907 – GA Court of Appeals – (Decided August 03, 2016 142
Churchill v. State, 298 Ga. 471 - S15A1487 – GA Supreme Court (decided January 19, 2016) 146
Cisneros v. State, --- Ga. --- - S16G0443 – GA Supreme Court – (Decided October 17, 2016) 144
Clark v. State, 335 Ga. App. 747 - A15A1885 – GA Court of Appeals – (Decided February 22, 2016) 87
Claugh v. State, 298 Ga. 594 - S15A1708 – GA Supreme Court – (Decided March 07, 2016) 225
Collins v. State, --- Ga. App. --- - A16A1269 – GA Court of Appeals – (Decided October 14, 2016) 67
Cook v. State, 338 Ga. App. 489 - A16A1105 – GA Court of Appeals – (Decided August 08, 2016) 159
Cooks v. State, --- Ga. --- - S16A0719 – GA Supreme Court – (Decided October 17, 2016) 26
Crankshaw v. State, 336 Ga. App. 700 - A15A1975 – GA Court of Appeals (Decided March 09, 2016) 134
Creamer v. State, 337 Ga. App. 394 - A16A0614 – GA Court of Appeals – (Decided May 18, 2016) 182
Crider v. State, 336 Ga. App. 83 - A15A1922 – GA Court of Appeals – (Decided March 07, 2016) 214
Cushenberry v. State, --- Ga. --- - S16A1039 – GA Supreme Court – (Decided November 21, 2016) 56
Daniel v. State, 338 Ga. App. 389 - A16A0587 – GA Court of Appeals – (Decided June 07, 2016) 124
Davis v. State, 299 Ga. 180 - S16A0103 – GA Supreme Court – (Decided June 06, 2016) 168
Dawson v. State, --- Ga. --- - S16A0786 – GA Supreme Court – (Decided November 21, 2016) 78
DeGeorgis v. State, --- Ga. App. --- - A16A0927 – GA Court of Appeals – (Decided October 20, 2016) 179
DuBose v. State, 299 Ga. 652 - S16A1299 – GA Supreme Court – (Decided September 12, 2016) 129
Dumas v. State, 337 Ga. App. 124 - A16A0053 – GA Court of Appeals – (Decided May 28, 2016) 163
Durden v. State, 299 Ga. 273 - S16A0539 – GA Supreme Court – (Decided June 20, 2016) 34
Edvalson v. State, --- Ga. App. --- - A16A1392 – GA Supreme Court – (Decided November 08, 2016) 62

Edwards v. State, 336 Ga. App. 595 - A16A0532 – GA Court of Appeals – (Decided March 30, 2016) 58
Ellis v. State, --- Ga. --- - S16A1246 – GA Supreme Court – (Decided November 30, 2016) 69
Ellis v. State, 299 Ga. 645 - S16A1251 – GA Supreme Court (Decided September 12, 2016) 14
Ellison v. State, --- Ga. --- - S16A0602 – GA Supreme Court – (Decided October 17, 2016) 192
Evans v. State, --- Ga. --- - S16G0280 – GA Supreme Court – (Decided November 21, 2016) 190
Evans-Glodowski v. State, 335 Ga. App. 484 - A15A2035 – Court of Appeals (decided January 14, 2016) 75
Everhart v. State, 337 Ga. App. 348 - A16A0652 – GA Court of Appeals – (Decided May 25, 2016) 47
Finley v. State, 298 Ga. 451 - S15A1595 – Georgia Supreme Court – (Decided February 08, 2016) 10, 69
Finney v. State, 298 Ga. 620 - S15A1739 – GA Supreme Court – (Decided March 07, 2016) 227
Fisher v. State, 299 Ga. 478 - S16A0515 – GA Supreme Court – (Decided July 08, 2016) 107, 109
Fitzpatrick v. State, --- Ga. App. --- - A16A1336 – GA Court of Appeals – (Decided October 27, 2016) 197
Foster v. State, --- Ga. --- - S16A0712 – GA Supreme Court – (Decided October 03, 2016) 43
Franklin v. State, 298 Ga. 636 - S15A1308 – GA Supreme Court (Decided March 21, 2016) 40
Franklin v. State, 335 Ga. App. 557 - A15A2180 – GA Court of Appeals – (Decided February 02, 2016) 17
Franklin v. State, 336 Ga. App. 140 - S15A1308 – GA Court of Appeals (Decided March 21, 2016) 150
Frazier v. State, --- Ga. App. --- - A16A1118 – GA Court of Appeals – (Decided November 10, 2016) 35
Frey v. State, 338 Ga. App. 583 - A16A0829 – GA Court of Appeals – (Decided September 08, 2016) 139
Gaines v. State, --- Ga. App. --- - A16A1150 – GA Court of Appeals – (Decided November 01, 2016) 35
Gaither v. State, 338 Ga. App. 763 - A16A0788 – GA Court of Appeals – (Decided October 04, 2016) 169
Gary v. State, 338 Ga. App. 403 - A16A0666 – GA Court of Appeals – (Decided July 15, 2016) 111
Gates v. State, 298 Ga. 324 - S15A1407 – GA Supreme Court (decided January 19, 2016) 81

Gerbert v. State, --- Ga. App. --- - A16A0868 – GA Court of Appeals – (Decided October 28, 2016) 202
Giddens v. State, 299 Ga. 109 - S16A0256 – GA Supreme Court – (Decided May 23, 2016) 36
Gilmer v. State, --- Ga. App. --- - A16A0919 – GA Court of Appeals – (Decided November 18, 2016) 27
Gilreath v. State, 784 S.E. 2d 388 - S15A1512 – GA Supreme Court – (Decided March 21, 2016) 30
Glispie v. State, --- Ga. --- - S16G0583 – GA Supreme Court – (Decided November 07, 2016) 11
Gomillion v. State, 298 Ga. 505 - S15A1617 – GA Supreme Court – (Decided February 22, 2016) 185
Gordon v. State, 337 Ga. App. 64 - A16A0177 – GA Court of Appeals – (Decided May 06, 2016) 165
Graham v. State, 337 Ga. App. 664 - A16A0473 – GA Court of Appeals – (Decided June 29, 2016) 91
Graves v. State, 298 Ga. 551 - S15A1357 – GA Supreme Court (Decided March 07, 2016) 133, 136
Gray v. State, 298 Ga. 885 - S16A0278 – GA Supreme Court – (Decided April 26, 2016) 222
Green v. State, 299 Ga. 337 - S16A0066 – GA Supreme Court – (Decided July 05, 2016) 85
Gregory v. Sexual Offender Registration Review Board, 298 Ga. 675 - S15A1718 – GA Supreme Court – (Decided March 21, 2016) 200
Grier v. State, --- Ga. App. --- - A16A0236 – GA Court of Appeals – (Decided November 09, 2016) 57
Hall v. State, 335 Ga. App. 895 - A15A1639 – GA Court of Appeals – (Decided March 02, 2016) 30
Hampton v. State, --- Ga. App. --- - A16A1270 – GA Court of Appeals – (Decided October 13, 2016) 41
Hanh v. State, 338 Ga. App. 498 - A16A1409 – GA Court of Appeals – (Decided August 08, 2016) 74
Hantz v. State, 337 Ga. App. 675 - A16A0249 – Ga. Court of Appeals – (Decided June 30, 2016) 59
Harris v. State, --- Ga. App. --- - A16A1047 – GA Court of Appeals – (Decided October 05, 2016) 97
Harris v. State, 299 Ga. 642 - S16A1188 – GA Supreme Court (Decided September 12, 2016) 226
Hayes v. State, 298 Ga. 339 - S15A1511 – GA Supreme Court (decided January 19, 2016) 68
Hayes v. State, 337 Ga. App. 280 - A16A0588 – GA Court of Appeals (Decided May 18, 2016) 70

Hayward v. Danforth, 299 Ga. 261 - S16A0419 – GA Supreme Court – (Decided June 20, 2016) 152
Heatherly v. State, 336 Ga. App. 875 - A16A0262 – GA Court of Appeals – (Decided April 20, 2016) 45
Hernandez v. State, --- Ga. --- - S16A0936 – GA Supreme Court – (Decided October 17, 2016) 120
Herrera v. U.S. Attorney General, 811 F.3d 1298 - 15-12093 – 11th Circuit COA (Decided February 2, 2016) 84
Hoglen v. State, 336 Ga. App. 471 - A15A1755 – GA Court of Appeals – (Decided March 29, 2016) 140
Honester v. State, 336 Ga. App. 166 - A15A2235 – GA Court of Appeals – (Decided March 11, 2016) 82
Hood v. State, 299 Ga. 95 - S16A0064 – GA Supreme Court – (Decided May 23, 2016) 90
Hopkins v. State, 337 Ga. App. 143 - A16A0264 – GA Court of Appeals – (Decided May 18, 2016) 33
Houston v. State, 335 Ga. App. 481 - A15A1828, - Court of Appeals (decided January 14, 2016) 83
Huff v. State, --- Ga. --- - S16A0996 – GA Supreme Court – (Decided October 17, 2016) 13
Humphrey v. State, 299 Ga. 197 - S16A0197 – GA Supreme Court – (Decided June 06, 2016) 72
Hunt v. State, 336 Ga. App. 821 - A15A2064 – GA Court of Appeals – (Decided March 29, 2016) 131
In the Interest of J.F., a child, 338 Ga. App. 15 - A16A0395 – GA Court of Appeals (Decided July 12, 2016) 121
In the Interest of M.D.H, --- Ga. --- - S16G0428 – and *In the Interest of D.V.H.*, --- Ga. --- - S16G0428 – GA Supreme Court – (Decided October 31, 2016) 121
Ingram v. State, 338 Ga. App. 552 - A16A1221 – GA Court of Appeals – (Decided August 23, 2016) 101
Jackson v. State, --- Ga. App. --- - A16A0738 – GA Court of Appeals – (Decided November 03, 2016) 156
Jackson v. State, 335 Ga. App. 500 - A15A1883 – Court of Appeals (decided January 25, 2016) 83
Jackson v. State, 335 Ga. App. 597 - A15A1855 – GA Court of Appeals (Decided February 05, 2016) 201
Jackson v. State, 336 Ga. App 140 - A15A2244 – GA Court of Appeals – (Decided March 10, 2016) 178
Jackson v. State, 336 Ga. App. 140 - A15A2244 – GA Court of Appeals – (Decided March 10, 2016) 147
Jackson v. State, 336 Ga. App. 70 - A15A2137 – GA Court of Appeals – (Decided March 03, 2016) 222

Jackson v. State, 338 Ga. App. 509 - A16A1058 – GA Court of Appeals – (Decided August 10, 2016) 195
Jacobs v. State, 338 Ga. App. 743 - A16A1115 – GA Court of Appeals – (Decided September 29, 2016) 12, 172
Johnson v. State, --- Ga. --- - S16A1347 – GA Supreme Court – (Decided November 21, 2016) 207, 209
Johnson v. State, 335 Ga. App. 796 - A15A1665 – GA Court of Appeals (Decided February 24, 2016) 192
Johnson v. State, 335 Ga. App. 886 - A15A1813 – GA Court of Appeals (Decided February 10, 2016) 210
Johnson v. State, 336 Ga. App. 888 - A16A0678 – GA Court of Appeals – (Decided April 20, 2016) 226
Jones v. State, --- Ga. App. --- - A16A1279 – GA Court of Appeals – (Decided October 13, 2016) 81
Jones v. State, 299 Ga. 377 - S16A0314 – GA Supreme Court – (Decided July 05, 2016) 92
Jones v. State, 335 Ga. App. 591 - A15A1825 – GA Court of Appeals – (Decided February 05, 2016) 134, 214
Jones v. State, 338 Ga. App. 505 - A16A1048 – GA Court of Appeals – (Decided August 10, 2016) 222
Kellam v. State, 298 Ga. 520 - S15A1913 – GA Supreme Court – (Decided February 22, 2016) 15
Kennebrew v. State, --- Ga. --- - S16A0844 – GA Supreme Court – (Decided October 31, 2016) 105
Kennedy (Warden) v. Primack, --- Ga. --- - S16A0821 – GA Supreme Court – (Decided October 03, 2016) 74
Kim v. State, 337 Ga. App. 155 - A16A0430 – GA Court of Appeals – (Decided May 18, 2016) 94
King v. State, 336 Ga. App. 531 - A15A1878 – GA Court of Appeals – (Decided March 30, 2016) 144
Kritlow v. State, --- Ga. App. --- - A16A1093 – GA Court of Appeals – (Decided November 09, 2016) 99
Lane v. State, --- Ga. --- - S16A0721 – GA Supreme Court – (Decided October 17, 2016) 43
Lejeune v. McLaughlin, Warden, 299 Ga. 546 - S16A0072 – GA Supreme Court – (Decided July 14, 2016) 73
Lidy v. State, 335 Ga. App. 517 - A15A2398 – Court of Appeals (Decided January 25, 2016) 131
Lindsay v. State, 336 Ga. App. 330 - A15A2104 – GA Court of Appeals – (Decided March 22, 2016) 212
Lloyd v. State, --- Ga. App. --- - A16A0727 – GA Court of Appeals – (Decided October 18, 2016) 116

Looney v. State, 336 Ga. App. 882 - A16A0393 – GA Court of Appeals – (Decided April 20, 2016) 212
Loveless v. State, 337 Ga. App. 894 - A16A0161 – GA Court of Appeals (Decided July 12, 2016) 184
Lupoe v. State, --- Ga. --- - S16A1261 -; *Williams v. State*, --- Ga. --- - S16A1262-; *Carter v. State*, --- Ga. --- - S16A1263 – GA Supreme Court – (Decided November 21, 2016) 105
Mack v. State, --- Ga. App. --- - A16A0966 – GA Court of Appeals – (Decided October 12, 2016) 157
Mallory v. State, 335 Ga. App. 852 - A15A2343 – GA Court of Appeals (Decided February 26, 2016) 25
Marchman v. State, 299 Ga. 534 - S16A0027 – GA Supreme Court – (Decided June 20, 2016) 170
Marlow v. State, --- Ga. App. --- - A16A0877; *Trim v. State*, --- Ga. App. --- - A16A0878 – GA Court of Appeals – (Decided October 11, 2016) 166
Marlow v. State, 337 Ga. App. 1 - A16A0573 – GA Court of Appeals (Decided April 22, 2016) 98
Marquez v. State, 298 Ga. 448 - S15A1459 – Georgia Supreme Court – (Decided February 08, 2016) 198
Martinez v. State, 337 Ga. App. 374 - A16A0323 – GA Court of Appeals – (Decided June 09, 2016) 167
Mathis v. State, 336 Ga. App. 257 - A15A2292 – GA Court of Appeals – (Decided March 16, 2016) 193
Matter of H. Estrada, 26 I&N Dec. 749 (BIA 2016)(Decided May 27, 2016) U.S. Department of Justice Executive Office for Immigration Review Board of Immigration Appeals 84
Mays v. State, 336 Ga. App. 398 - A15A2337 – GA Court of Appeals – (Decided March 04, 2016) 135
McClendon v. State, 299 Ga. 611 - S16A0699 – and *Burks v. State*, 299 Ga. 611 – S16A0700 - GA Supreme Court – (Decided September 12, 2016) 198
McClendon v. State, 299 Ga. 611 – S16A0699 and *Burks v. State*, 299 Ga. 611 S16A0700 – GA Supreme Court – (Decided September 12, 2016) 77
McCranie v. State, 335 Ga. App. 548 - A15A2008 – GA Court of Appeals – (Decided February 02, 2016) 191
McDougler v. State, --- Ga. App. --- - A16A1347 – GA Court of Appeals – (Decided October 28, 2016) 207
McGhee v. State, 337 Ga. App. 150 - A16A0388 – GA Court of Appeals – (Decided May 18, 2016) 39
McLaughlin v. State, 338 Ga. App. 1 - A16A0385 – GA Court of Appeals – (Decided July 12, 2016) 104
McMullen v. State, --- Ga. --- - S16A0937 – GA Supreme Court – (Decided November 21, 2016) 219

McMurtry v. State, 338 Ga. App. 622 - A16A1142 – GA Court of Appeals (Decided September 15, 2016) 31, 127
McNorrill v. State, 338 Ga. App. 466 - A16A1016 – GA Court of Appeals – (Decided August 03, 2016) 149
Mims v. State, 299 Ga. 578 - S16A0542 – GA Supreme Court – (Decided June 06, 2016) 141
Mitchell v. State, 337 Ga. App. 841 - A16A0041 – GA Court of Appeals – (Decided June16, 2016) 132
Moceri v. State, 338 Ga. App. 329 - A16A0063 – GA Court of Appeals – (Decided July 07, 2016) 55
Moon v. State, 335 Ga. App. 642 - A15A1636 – GA Court of Appeals (Decided February 10, 2016) 194, 215
Morales v. State, 337 Ga. App. 614 - A15A2386 – GA Court of Appeals – (Decided June 29, 2016) 165
Morgan v. State, 337 Ga. App. 29 - A16A0531 - GA Court of Appeals – (Decided May 02, 2016) 158
Morris v. State, 338 Ga. App. 599 - A16A1222 – GA Court of Appeals – (Decided September 14, 2016) 143
Mosley v. Lowe, 298 Ga. 363 - S15A1722 – Georgia Supreme Court (Decided January 19, 2016) 159
Moss v. State, 298 Ga. 613 - S15A1736 – GA Supreme Court – (Decided March 07, 2016) 22
Murphy v. State, 299 Ga. 238 - S16A0150 – GA Supreme Court (Decided June 20, 2016) 48, 65, 118
Myers v. State, 299 Ga. 409 - S16A0377 – GA Supreme Court – (Decided July 05, 2016) 42
Newby v. State, 338 Ga. App. 588 - A16A1000 – GA Court of Appeals – (Decided September 12, 2016) 107
Nichols v. State, 336 Ga. App. 287 - A15A2353 – GA Court of Appeals – (Decided March 17, 2016) 181
Nolley v. State, 335 Ga. App. 539 - A15A1686 – GA Court of Appeals – (Decided February 02, 2016) 69
Norman v. State, 298 Ga. 344 - S15A1525 – GA Supreme Court - (Decided January 19, 2016) 9
Olds v. State, 299 Ga. 65 - S15G1610 – GA Supreme Court (Decided May 23, 2016) 89
Orengo v. State, --- Ga. App. --- - A16A1171 – GA Court of Appeals – (Decided October 27, 2016) 140
Otis v. State, 298 Ga. 544 - S15A1717 – Supreme Court of Georgia – Decided February 08, 2016) 135
Overstreet v. Warden – A.G., 811 F.3d 1283 - No. 13-14995 – 11th Circuit (decided January 27, 2016) 123

Owens v. State, 298 Ga. 813 - S16A0058 – GA Supreme Court – (decided March 07, 2016) 154
Owens v. State, 335 Ga. App. 537 - A16A0107 – Court of Appeals (decided January 27, 2016) 153
Pack v. State, 335 Ga. App. 783 - A15A2315 – GA Court of Appeals – (Decided February 23, 2016) 50
Page v. State, 336 Ga. App. 121 - A15A1952 – GA Court of Appeals (Decided March 10, 2016) 153
Parefenuk v. State, 338 Ga. App. 95 - A16A0636 – GA Court of Appeals (Decided July 13, 2016) 148
Parker v. State, --- Ga. App. --- - A16A1252 – GA Court of Appeals – (Decided November 01, 2016) 36, 86
Parks v. State, --- Ga. --- - S16A1001 – GA Supreme Court – (Decided November 30, 2016) 99
Patterson v. State, 299 Ga. 491 - S15G1303 – GA Supreme Court – (Decided July 14, 2016) 19
Pendleton v. State, 335 Ga. App. 455 - A15A2240 Court of Appeals (decided on January 06, 2016) 213
Pitt v. State, 337 Ga. App. 436 - A16A0408 – GA Court of Appeals – (Decided June 15, 2016) 51
Prophitt v. State, 336 Ga. App. 262 - A15A2400 – GA Court of Appeals – (Decided March 16, 2016) 31
Propst v. State, 229 Ga. 557 - S16A0275 – GA Supreme Court – (Decided July 05, 2016) 16
Propst v. State, 299 Ga. 557 - S16A0275 – GA Supreme Court – (Decided July 05, 2016) 218
Quiller v. State, 338 Ga. App. 206 - A16A0114 – GA Court of Appeals (Decided July 15, 2016) 113
Ragan v. State, --- Ga. --- - S16A1107 – GA Supreme Court – (Decided October 17, 2016) 146
Raheem v. State, --- Ga. App. --- - A16A1362 and A16A1363 – GA Court of Appeals – (Decided November 16, 2016) 70
Rainey v. State, 338 Ga. App. 413 - A16A0675 – GA Court of Appeals – (Decided July 13, 2016) 23
Ray v. State, 338 Ga. App. 822 - A16A1091; *Randell v. State*, 338 Ga. App. 822 - A16A1126; and *Brown v. State*, 338 Ga. App. 822 - A16A1178 – GA Court of Appeals – (Decided October 11, 2016) 199
Redford v. State, 335 Ga. App. 682 - A15A1868 – GA Court of Appeals (Decided February 11, 2016) 153
Regent v. State, 299 Ga. 172 - S15G1829 - GA Supreme Court – (Decided June 06, 2016) 128

Reid v. State, --- Ga. App. --- - A16A1380 – GA Court of Appeals – (Decided November 03, 2016) 129
Robbins v. State, --- Ga. --- - S16A1342 – GA Supreme Court – (Decided October 31, 2016) 78
Roberson v. State, 335 Ga. App. 606 - A15A1735 – GA Court of Appeals – (Decided February 08, 2016) 100
Robinson v. State, 298 Ga. 455 - S15A1912 – Georgia Supreme Court – (Decided February 08, 2016) 143
Robinson v. State, 299 Ga. 648 - S16A1274 – GA Supreme Court (Decided September 12, 2016) 106
Robinson v. State, 336 Ga. App. 627 - A16A0125 – GA Court of Appeals – (Decided April 05, 2016) 151
Rowan V. State, --- Ga. App. --- - A16A1004 – GA Court of Appeals – (Decided October 04, 3016) 220
Samuels v. State, 335 Ga. App. 819 - A15A1804 – GA Court of Appeals – (Decided February 25, 2016) 75
Sapp v. State, 337 Ga. App. 14 - A16A0682 – GA Court of Appeals – (Decided April 27, 2016) 68
Sapp v. State, 338 Ga. App. 628 - A16A1425 – GA Court of Appeals – (Decided September 15, 2016) 22
Scott v. State, 299 Ga. 568 - S16A0323 – GA Supreme Court – (Decided July 05, 2016) 32
Scudder v. State, 298 Ga. 438 - S15A1312 – Georgia Supreme Court – (Decided February 08, 2016) 51, 133
Seabolt, Warden v. Norris, 298 Ga. 583 – S15A1692 – GA Supreme Court (Decided March 07, 2016) 126
Seagraves v. State, --- Ga. App. --- - A16A0951 – GA Court of Appeals – (Decided October 31, 2016) 21
Sevilla-Carcamo v. State, 335 Ga. App 788 - A15A2351 – GA Court of Appeals (Decided February 23, 2016) 186
Shah v. State, --- Ga. --- - S16A1083 – GA Supreme Court – (Decided October 31, 2016) 125
Sheard v. State, --- Ga. --- - S16A1291 – GA Supreme Court – (Decided November 07, 2016) 137
Shelton v. Lee, 299 Ga. 350 - S16A0106 – Ga. Supreme Court – (Decided July 05, 2016) 217
Shepard v. State, --- Ga. --- - S16A0884 – GA Supreme Court – (Decided November 21, 2016) 13
Shepard v. Williams, 299 Ga. 437 - S16A0405 – GA Supreme Court (Decided July 05, 2016) 72
Simmons v. State, 299 Ga. 370 - S16A0253 – GA Supreme Court – (Decided July 05, 2016) 141

Simpson v. State, 298 Ga. 314 - S15A1365 – GA Supreme Court (decided January 19, 2016) 145
Simpson v. State, 298 Ga. 315 - S15A1365 – GA Supreme Court (decided January 19, 2016) 130
Sims v. State, 335 Ga. App. 625 - A15A1836 – GA Court of Appeals (Decided February 09, 2016) 185
Smart v. State, 299 Ga. 414 - S16A0393 – GA Supreme Court – (Decided July 05, 2016) 80, 95
Smith v. State, --- Ga. --- - S16A0835 – GA Supreme Court – (Decided November 21, 2016) 49
Smith v. State, 298 Ga. 406 - S15A1705 – Georgia Supreme Court (Decided February 01, 2016) 50
Smith v. State, 298 Ga. 487 - S15A1647 – Georgia Supreme Court (Decided January 19, 2016) 136
Smith v. State, 299 Ga. 424 - S16A0398 – GA Supreme Court – (Decided July 05, 2016) 54, 211
Smith v. State, 335 Ga. App. 497 - A15A1664 – Court of Appeals (decided January 25, 2016) 221
Smith v. State, 336 Ga. App. 229 - A15A2214 – GA Court of Appeals – (Decided March 16, 2016) 204
Smith v. State, 338 Ga. App. 62 - A16A0519 – GA Court of Appeals – (Decided July 13, 2016) 205
Sneiderman v. State, 336 Ga. App. 153 - A15A1774 – GA Court of Appeals (Decided March 11, 2016) 80
Spencer v. State, 337 Ga. App. 360 - A16A0118 – GA Court of Appeals – (Decided June 9, 2016) 63
Springer v. State, 335 Ga. App. 462 - A14A0598 – Court of Appeals (decided on January 12, 2016) 18
Stanbury v. State, 299 Ga. 125 - S16A0321, GA Supreme Court – (Decided May 23, 2016) 44
State v. Alvarez, 299 Ga. 213 - S16A0397 – GA Supreme Court – (Decided June 06, 2016) 119
State v. Andrade, 298 Ga. 464 - S15G0866 – Georgia Supreme Court – (Decided February 08, 2016) 213
State v. Ashley, 299 Ga. 450 - S15G1207 – GA Supreme Court – (Decided July 08, 2016) 92
State v. Banks, 337 Ga. App. 749 - A16A0602 – GA Court of Appeals – (Decided June 08, 2016) 108
State v. Bankston, 337 Ga. App. 601 - A16A0003 – GA Court of Appeals – (Decided June 28, 2016) 191
State v. Baxter, --- Ga. --- - S16G0184 – GA Supreme Court – (Decided November 21, 2016) 120

State v. Bonawitz, --- Ga. App. --- - A16A1153 – GA Court of Appeals – (Decided November 02, 2016) 208
State v. Bowman, 337 Ga. App. 313 - A16A0555 – GA Court of Appeals – (Decided June 07, 2016) 174
State v. Broughton et. al., 335 Ga. App. 700 - A15A1748 – GA Court of Appeals (Decided February 12, 2016) 57
State v. Brown et al, 298 Ga. 878 - S16A0122 – GA Supreme Court – Decided April 26, 2016) 79
State v. Camp, 335 Ga. App. 730 - A15A2101 – GA Court of Appeals – (Decided February 17, 2016) 171
State v. Cook, 337 Ga. App. 205 - A16A0432 – GA Court of Appeals – (Decided May 25, 2016) 179
State v. Crowder, 338 Ga. App. 642 - A16A1184 – GA Court of Appeals – (Decided September 20, 2016) 210
State v. Davis, --- Ga. App. --- - A16A1006 – GA Court of Appeals – (Decided October 28, 2016) 20
State v. Davis, 338 Ga. App. 580 - A16A1156 – GA Court of Appeals – (Decided September 07, 2016) 59
State v. Desai, 337 Ga. App. 873 - A16A0020 – GA Court of Appeals – (Decided July 12, 2016) 117
State v. Dotson, 337 Ga. App. 284 - A16A0266 – GA Court of Appeals – (Decided June 03, 2016) 182
State v. Enich, 337 Ga. App. 724 - A16A0550 – GA Court of Appeals – (Decided July 05, 2016) 86
State v. Estrada, --- Ga. --- S16A1082 – GA Supreme Court – (Decided November 21, 2016) 14
State v. Garland, 298 Ga. 482 - S15A1562 – GA Supreme Court (decided January 19, 2016) 109
State v. Garlepp, 338 Ga. App. 788 - A16A1230 – GA Court of Appeals – (Decided September 21, 2016) 60
State v. Hamilton, 299 Ga. 667 - S16A0986 – GA Supreme Court – (Decided September 12, 2016) 137
State v. Harlacher, 336 Ga. App. 9 - A15A1856 – GA Court of Appeals – (Decided March 02, 2016) 19
State v. Hill, 338 Ga. App. 57 - A16A0501 – GA Court of Appeals – (Decided July 13, 2016) 170
State v. Jung, 337 Ga. App. 799 - A16A0527 – GA Court of Appeals – (Decided July 07, 2016) 175
State v. Kelley, 298 Ga. 527 - S15G1197 – GA Supreme Court – (Decided February 22, 2016) 190
State v. Lee, 298 Ga. 388 - S15A1502 – Georgia Supreme Court – (Decided February 01, 2016) 9

State v. Mantooth, 337 Ga. App. 698 - A16A0256 – GA Court of Appeals – (Decided July 01, 2016) 161
State v. Marshall, 337 Ga. App. 336 - A16A0744 or *State v. Lucas*, 337 Ga. App. 336 - A16A0748 – GA Court of Appeals – (Decided June 08, 2016) 209
State v. Morrow, --- Ga. --- - S16G0584 – GA Supreme Court – (Decided November 21, 2016) 202
State v. Philpot, 299 Ga. 206 - S16A0334 – GA Supreme Court – (Decided June 06, 2016) 163
State v. Randle, 298 Ga. 375 - S15G0946, - GA Supreme Court - (decided January 19, 2016) 200
State v. Reid, 337 Ga. App. 77 - A16A1237 – GA Court of Appeals – (Decided April 22, 2016) 42
State v. Rucker, 337 Ga. App. 875 - A16A0047 – GA Court of Appeals – (Decided July 12, 2016) 188
State v. Smith, --- Ga. --- - S16A1069 – GA Supreme Court – (Decided October 31, 2016) 24
State v. T.M.H., --- Ga. App. --- - A16A1357 – GA Court of Appeals – (Decided November 08, 2016) 122
State v. Tittle, 335 Ga. App. 588 - A15A1808 – GA Court of Appeals – (Decided February 05, 2016) 88
State v. Tunkara, 298 Ga. 488 - S15A1715 – Georgia Supreme Court (Decided February 01, 2016) 49
State v. Vickers et. al., --- Ga. App. --- - A16A0792 – GA Court of Appeals – (Decided November 01, 2016) 186
State v. Wallace, 338 Ga. App. 611 - A16A0891 – GA Court of Appeals – (Decided September 15, 2016) 218
State v. Warren, --- Ga. App. --- - A16A0715 – GA Court of Appeals – (Decided October 12, 2016) 63
State v. Williams, 336 Ga. App. 97 - A15A1858 – GA Court of Appeals (Decided March 09, 2016) 178
State v. Williams, 337 Ga. App. 791 - A16A0509 – GA Court of Appeals – (Decided July 07, 2016) 176
State v. Wood, 338 Ga. App. 181 - A16A0023 – GA Court of Appeals – (Decided June 30, 2016) 205
State v. Young, --- Ga. App. --- - A16A1435 – GA Court of Appeals – (Decided November 02, 2016) 177
Summerlin v. State, --- Ga. App. --- - A16A0674 – GA Court of Appeals – (Decided October, 28, 2016) 46
Sutton v. State, 338 Ga. App. 724 - A16A1176 – GA Court of Appeals – (Decided September 28, 2016) 149
Tarpley v. State, 298 Ga. 442 - S15A1457 – Georgia Supreme Court – (Decided February 08, 2016) 203, 224

Taylor v. Metoyer, 299 Ga. 345 - S16A0070 – GA Supreme Court (Decided July 05, 2016) 108
Taylor v. State, 338 Ga. App. 804 - A16A0880 – GA Court of Appeals – (Decided October 11, 2016) 187, 206
Thornton v. State, 298 Ga. 709 - S15G1108 – GA Supreme Court – (Decided March 21, 2016) 88
Torres v. State, 338 Ga. App. 269 - A16A1074 – GA Court of Appeals – (Decided July 22, 2016) 183
Trim v. Shepard, --- Ga. --- - S16A0960 – GA Supreme Court – (Decided November 21, 2016) 224
Tye v. State, 298 Ga. 474 - S15A1522 – GA Supreme Court (decided January 19, 2016) 38, 130
U.S.A. v. Barron-Soto, 820 F.3d 409 – 13-14731 – 11th Circuit COA (Decided April 26, 2016) 91
U.S.A. v. Barron-Soto, 820 F.3d 409 - No. 13-14731 – 11th Circuit COA (Decided April 26, 2016) 177
U.S.A. v. Holmes, 814 F.3d 1246 – No. 14-11137 – 11th Circuit COA (Decided February 25, 2016) 31
U.S.A. v. Jimenez-Antunez, 820 F.3d 1267 – No. 15-10224 – 11th Circuit COA (Decided April 25, 2016) 155
U.S.A. v. Plate, No. 15-13928 – 11th Circuit Court of Appeals [Florida] – (11th Cir. Decided October 05, 2016) 189
Underwood v. State, 338 Ga. App. 670 - A16A1158 – GA Court of Appeals – (Decided September 21, 2016) 147
United States v. Dotson, --- U.S. App. --- - No. 15-13787 – 11th Circuit Court of Appeals – (Decided August 24, 2016) 96
Utah v. Strieff, 136 S.Ct. 2056 - No. 14-1373 – U.S. Supreme Court – (Decided June 20, 2016) 180
v. State, 299 Ga. 88 - S16A0003, GA Supreme Court – (Decided May 23, 2016) 9
Veal v. State, 784 S.E.2d 403 - S15A1721 – GA Supreme Court – (Decided March 21, 2016) 132
Voisine v. United States, 136 S.Ct. 2272 - No. 14-10154 – U.S. Supreme Court – (Decided June 27, 2016) 66
Wallace v. State, --- Ga. --- - S16A0654 – GA Supreme Court – (Decided October 03, 2016) 196
Waller v. State, 299 Ga. 619 - S16A0788 – GA Supreme Court – (Decided September 12, 2016) 139
Washington v. Hopson, 299 Ga. 358 - S16A0148 –GA Supreme Court (Decided July 5, 2016) 156
Watkins v. State, 336 Ga. App 145 - A15A2411 – GA Court of Appeals – (Decided March 10, 2016) 195

Watson v. State, 337 Ga. App. 16 - A16A0228 - GA Court of Appeals – (Decided May 02, 2016) 28
Weaver v. State, 336 Ga. App. 206 - A15A2044 – GA Court of Appeals – (Decided March 15, 2016) 52
Welch v. State, 298 Ga. 320 - S15A1393 – GA Supreme Court (decided January 19, 2016) 221
West v. State, --- Ga. --- - S16A1369 – GA Supreme Court – (Decided October, 31, 2016) 58
Whaley v. State, 337 Ga. App. 50 - A16A0569 – GA Court of Appeals – (Decided May 04, 2016) 216
Whatley v. State, 335 Ga. App. 749 - A15A1911 – GA Court of Appeals (Decided February 22, 2016) 123, 227
Whitfield v. State, 337 Ga. App. 167 - A16A0420 – GA Court of Appeals – (Decided May 19, 2016) 188
Wiggins v. State, 298 Ga. 366 - S15A1729 – Georgia Supreme Court (Decided January 19, 2016) 152
Wiley v. State, 782 S.E.2d 850 - A15A2148 – GA Court of Appeals – (Decided February 24, 2016) 100
Wilhite v. State, 337 Ga. App. 324 - A16A0216 – GA Court of Appeals – (Decided June 08, 2016) 216
Williams v. Pennsylvania, 136 S.Ct. 1899 - No. 15-5040, - U.S. Supreme Court - (June 09, 2016) 160
Williams v. State, --- Ga. --- - S16A1116 – GA Supreme Court – (Decided October 17, 2016) 28
Williams v. State, 299 Ga. 632 - S16A0965 – GA Supreme Court (Decided September 12, 2016) 67
Williams v. State, 336 Ga. App. 442 - A15A1973 – GA Court of Appeals – (Decided March 28, 2016) 154
Williams v. State, 336 Ga. App. 64 - A15A1928 – GA Court of Appeals – (Decided March 03, 2016) 171
Wilson v. State, 336 Ga. App. 60 - A15A1848 – GA Court of Appeals – (Decided March 03, 2016) 89
Woodhouse v. State, 336 Ga. App. 880 - A16A0358 – GA Court of Appeals – (Decided April 20, 2016) 159
Woodruff v. State, --- Ga. App. --- - A16A0882 – GA Court of Appeals – (Decided November 03, 2016) 40
Wright v. State, --- Ga. --- - S16A1035 – GA Supreme Court – (Decided November 21, 2016) 128
Yarber v. State, 337 Ga. App. 40 - A16A0149 – GA Court of Appeals – (Decided May 04, 2016) 79
Yelverton v. State, --- Ga. --- - S16A1043 – GA Supreme Court – (Decided November 30, 2016) 201

Zamudio v. State, 337 Ga. App. 531 - A16A0547 – GA Court of Appeals – (Decided June 09, 2016) 132
Zilke v. State, 299 Ga. 232 - S15G1820 – GA Supreme Court – (Decided June 20, 2016) 114