# CASE LAW SUMMARIES

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- **ADMISSIONS AND CONFESSIONS**
  - **REQUEST TO KEEP THIS "OFF THE RECORD"**
    - *State v. Clark*, --- Ga. --- - S17A0350 – GA Supreme Court – (Decided April 17, 2017)
      - Judgment: (Affirmed)
      - Defendant called the police and reported his girlfriend was dead. When the officers arrived, Defendant was arrested at the scene and read his *Miranda* rights. Defendant was also taken to the hospital and eventually taken to the police station where the interrogation continued. Defendant was reminded of his *Miranda* warnings at the police station and Defendant continued to speak to the officers. Thirty seconds into the interrogation, Defendant stated, "This is off the record." The investigator responded "Yeah". Defendant is reminded several more times that he has waived his *Miranda* rights throughout the interrogation and each time, the Defendant just continues to talk to the police. Defendant filed a motion to suppress the confession/admissions and the trial court granted the motion, based upon the Defendant did not understand his rights. Supreme Court agrees.
      - Holding: "This Court has held that when an accused has received Miranda warnings, but subsequently the police officer affirmatively states that an accused's custodial statements will be kept confidential, then the resulting statements are inadmissible at trial. *See* Spence v. State, 281 Ga. 697 (2007)." The Court makes no difference between the opinion in Spence, where the term was "confidential" and the case at bar where the Defendant used the terms "off the record". The Court went further to explain when the Defendant asked to keep this off the record that the investigator should have corrected him and explained "anything he said to police was on the record."

- **BRADY EVIDENCE**
  - **PROSECUTOR FAILED TO DISCLOSE**
    - *In the Matter of Demone Wyatt Lee*, --- Ga. --- - S16Y0832 – GA Supreme Court – (Decided May 01, 2017)
      - Judgment: (Affirmed)
      - Lee was an assistant district attorney and prosecuted a case involving allegations of sodomy. The child originally stated in a recorded statement that the defendant had committed both oral and anal sodomy. Just prior to trial, the district attorney interviewed the child and the child recanted the part about the defendant touching his butt. This information was never disclosed to the defense. At trial, Lee did not pursue the count of sodomy concerning the touching of the child's butt, got the child to recant on the stand, and conceded in closing that no

evidence was presented concerning that count. After the jury returned a verdict of guilty to the other count of sodomy Lee spoke with the jury who asked why he conceded the one count. Lee explained about the interview with the child prior to trial. Defense counsel overheard the statements and filed for a new trial, which the State consented. The State BAR filed a formal complaint.

- Holding: In sum, the Court held that Brady does not always require pretrial disclosure of exculpatory evidence, if the prosecuting attorney discloses the Brady evidence at trial. "Whether a disclosure at trial is timely enough to satisfy Brady depends on the extent to which the delay in disclosing the exculpatory evidence deprived the defense of a meaningful opportunity to cross-examine the pertinent witness at trial, whether earlier disclosure would have benefitted the defense, and whether the delay deprived the accused of a fair trial or materially prejudiced his defense." Because the prosecutor disclosed the recantation at trial and nothing in the record shows how the defense was harmed the Court concluded "we cannot say on the record now before us that the State BAR has shown a clear-cut Brady violation. We conclude that no discipline is warranted…"
- IMPORTANT NOTE**:** This case is important for two reasons: First, it stands that prosecutors still have an obligation to disclose inconsistent statements, even if they were orally made prior to trial. The Supreme Court did not hold the recantation was not Brady evidence, but merely because the prosecutor disclosed it trial, it did not require pre-trial disclosure. Secondly, be cautious of failing to comply with the rules of discovery, as the State BAR is now asking for public reprimands for failing to comply.

## ➢ CORROBORATION

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

✪ *Pittman v. State*, --- Ga. --- - S17A0290 – GA Supreme Court – (Decided April 17, 2017)

- Judgment: (Affirmed)
- Defendant was found guilty of murder. At trial he moved for a directed verdict based upon there was no corroboration of the co-defendant's statement. Trial court denied the directed verdict request and the Supreme Court agrees with the trial court.
- Holding: "While slight evidence is required, 'it is not necessary that the corroborating evidence correspond to the accomplice's testimony in every particular. Benbow v. State, 288 Ga. 192, 194 (2010). Further, the corroborating evidence may be testimony from another accomplice. Clark v. State, 296 Ga. 543, 547 (2015)" The Court found that there was

sufficient evidence to corroborate the accomplice's testimony including another accomplice's testimony.

- IMPORTANT NOTE: In footnote 2, the Court explains this case was tried before the new evidence code, however the provisions of the prior code: 24-4-8 was carried over to the new evidence code in OCGA 24-14-8.

## ➢ CLOSING ARGUMENTS

### IMPROPER VICTIM IMPACT STATEMENTS

✪ *McCray v. State*, --- Ga. --- - S17A0315 – GA Supreme Court – (Decided April 17, 2017)

- Judgment: (Affirmed because it was not preserved)
- Defendant was found guilty of murder. During the State's closing argument, the prosecutor pretended to call herself to the stand, swore herself in, and began to give statements as if she was the victim. The prosecutor pretended to explain how she would miss all these important events and how she was only trying to protect her family. Defendant never objected to the prosecutor's statements.
- Holding: "This Court, however, has ruled that in a non-capital case, 'the defendant's failure to object to the State's closing argument waives his right to rely on the alleged impropriety of that argument as a basis for reversal.' Scott v. State, 290 Ga. 883, 885 (2012)." Thus, the issue was not preserved.
- IMPORTANT NOTE: The Court did explain, "we strongly disapprove of the prosecutor's attempt in her closing argument to 'speak' for the victim, and caution against such a practice."

## ➢ DEMURRER

### SPECIAL DEMURRER – RICO STATUTE MUST SHOW NEXUS

✪ *Kimbrough et al v. State*, --- Ga. --- - S16G1313 – GA Supreme Court – (Decided April 17, 2017)

- Judgment: (Reversed)
- Two Defendants were charged with violation of Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act. Both defendants filed special demurrers prior to trial claiming the indictment fails to place them on notice of what they need to defend against, because the indictment fails to include enough facts to show a nexus between being associated with a criminal enterprise and how they participated in it. Trial Court denied the demurrers and the Court of Appeals affirmed. The Supreme Court now reverses both lower courts.
- Holding: "We have held that an indictment not only must state the essential elements of the offense charged…but it also must allege the

underlying facts with enough detail to sufficiently apprise the defendant of what he must be prepared to meet." The Court also explained, "It is useful to remember that a purpose of the indictment is to all a defendant to prepare [his/her] defense intelligently." Looking now toward the indictment, the court explains that an essential element of the RICO Act is a connection or nexus between the enterprise and the racketeering activity." Because the indictment sets out the enterprise and the racketeering activity, but fails to explain a nexus between the two, the Indictment is not perfect in form. Thus, the defendants can properly defend against the indictment.

- **INDEPENDENT CRIMES AND ACTS**
  - **INTRINSIC ACTS**
    - *Sanches-Villa v. State*, --- Ga. App. – A17A0459 – Georgia Court of Appeals – (Decided April 19, 2017)
      - Judgment: (Reversed)
      - Dekalb task force received a tip from a CI that Defendant would be engaged in a drug transaction at a gas station. Upon staking out the gas station, the task force observed the drug transaction and eventually arrested the Defendant for trafficking cocaine. After arrest, the task force learned that the DEA had placed Defendant under surveillance and recorded several phone calls concerning prior drug transactions. The State initially sought to introduce this DEA testimony and evidence pursuant to 404(b), but when learned the State failed to produce proper notice, the State withdrew request and instead introduced the evidence as intrinsic evidence. The trial court allowed the testimony as intrinsic evidence. At trial, the DEA officer testified concerning the prior recordings, but no evidence was presented of how those prior recordings related to the current offense. COA now reverses.
      - Holding: "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, 726 (2016)." The COA addressed several prior cases that the State raised and differentiated each in footnotes. In essence, the COA explains there was no modus operendi or acts tending show Defendant's similar role in the illegal enterprise. The prior acts ended with the recorded conversations and the case at bar began with a Confidential Informant's tip and ended with an arrest. There was no evidence presented at trial that connects the two offense to label them as intrinsic acts.

- IMPORTANT NOTE*:* COA explained that during a retrial, the evidence may possibly be admitted as 404(b) evidence, but cautioned the trial court that it should consider the factors set forth in Bradshaw v. State, 296 Ga. 650, 656 (2015) "and apply the other procedural safeguards in Rule 404(b), including granting the defendant an opportunity to request that the jury be instructed as to the limited purposes for which it may consider the evidence."

- **SEXUAL OFFENSES**
  - *Dixon v. State*, --- Ga. App. --- - A17A0233 – GA Court of Appeals– (Decided April 19, 2017)
    - Judgment: (Affirmed)
    - Defendant was found guilty of aggravated child molestation and various child molestation counts in relation to acts occurred against a child, whose mother he was dating. At trial, the State presented a prior incident between Defendant and a prior step-son. Both events contained allegations of sodomy. The State introduced the prior acts under O.C.G.A. §§24-4-404(b), 413, and 414. Defendant argues that these prior acts should not have been admitted because the prior acts were not corroborated and they were investigated or charged.
    - Holding: The COA first explains that OCGA 24-4-413 and 414 supersede the provisions of 24-4-404. Thus, the State can seek to admit evidence these provisions for any relevant purpose, including propensity. Next, looking toward the Eleventh Circuit's guidance, corroboration, criminal charges, or a conviction are not required for the admission of other acts evidence. What is required is the trial court must make a finding that the "jury could find by a preponderance of the evidence that the defendant committed the act."
    - IMPORTANT NOTE*:* The COA states that neither Georgia Courts or the Eleventh Circuit have determined if a different type of Rule 403 balancing test should be used when deciding prior acts of sexual offenses. The COA cites to several law review articles that appear to argue that a different balancing test should be used. However the COA determined that under the normal 403 test that there was no error committed in allowing the prior acts.

- **JURY INSTRUCTIONS**
  - **EQUAL ACCESS**
    - *Sanches-Villa v. State*, --- Ga. App. – A17A0459 – Georgia Court of Appeals – (Decided April 19, 2017)
      - Judgment: (Affirmed, but reversed on another issue)
      - Dekalb task force received a tip from a CI that Defendant would be engaged in a drug transaction at a gas station. Upon staking out the gas station the task force observed a drug transaction take place, whereby a duffle bag was placed in the Defendant's car. There was another passenger in the car, when it was eventually stopped and Defendant was arrested. Defendant was eventually charged and convicted for trafficking cocaine. At trial, the State did not request and the trial court did not include an instruction to the jury regarding the presumption of possession. The State did argue during closing that Defendant was the driver of the car and had control of the vehicle.
      - Holding: "As the Supreme Court held in Johnson v. State, 280 Ga. 511, 513 (2006), even if evidence presented by the State gives rise to the presumption, the trial court must instruct the jury as to the presumption of possession arising from the defendant's control of the vehicle before it can properly instruct the jury as to the equal access defense."

  - **POSSESSION OF A FIREARM BY A CONVICTED FELON – SUDDEN EMERGENCY EXCEPTION**
    - *Austin v. State*, --- Ga. --- - S17A0284 – GA Supreme Court– (Decided April 17, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged and ultimately found guilty of murder and possession of a firearm by a convicted felon. Prior to the incident Defendant was a convicted felon and there was no dispute he possessed the gun at some point. At trial Defendant claimed self-defense and asked the trial court to give the following jury charge as it pertains to recent possession of a firearm by a convicted felon for use of self-defense: "Where, upon a sudden emergency, one suddenly acquires actual possession of a pistol for the purpose of defending himself, if you find that to have been the purpose, [Defendant] would not be in violation of any law prohibiting a felon from being in possession of a firearm." Trial Court refused the jury instruction request and Defendant was found guilty.
      - Holding: The Court explained the requested charge "is an appropriate charge to be given regarding a defendant's use of force to defend himself where that defendant otherwise would be prohibited form asserting self-defense due to having been engaged in the felony of possessing a

firearm at the time he was defending himself." However, because the trial testimony was that Defendant possessed the firearm prior to any sudden emergency the jury charge was not required.

- **JURY QUESTIONS DURING DELIBERATIONS**
  - **FAILURE TO CONSULT WITH COUNSEL**
    - *Dowda v. State*, --- Ga. App. --- - A17A0531 – GA Court of Appeals – (Decided April 21, 2017)
      - Judgment: (Reversed)
      - Defendant was charged and convicted of criminal trespass. During jury deliberations the jury sent out a note stating they cannot reach a unanimous decision and explained the split in the jury in that 4 were voting "not guilty" based on evidence and 2 were voting "innocent" based on evidence. The trial court merely explained the jury had not reached a unanimous decision, never requested advice from either counsel, and told the jury to continue to deliberate
      - Holding: "The Supreme Court requires trial courts to have jurors' communications submitted to the court in writing; to mark the written communication as a court exhibit in the presence of counsel; to afford counsel a full opportunity to suggest an appropriate response; and to make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications counsel deems appropriate before jury is exposed to the instruction." Since the defense counsel was not made fully aware of the communication and could not have given advice, thus Defendant was deprived of his right to counsel and the conviction must be reversed.

- **OPEN RECORDS ACT**
  - **REMEDIES FOR FAILURE TO COMPLY**
    - *Blalock v. Cartwright, Mayor*, --- Ga. --- - S17A0065 – GA Supreme Court – (Decided April 17, 2017)
      - Judgment: (Affirmed but for other reason)
      - Plaintiff sought access to records from the City of Lovejoy under Georgia Open Records Act, OCGA 50-18-70 et seq. The city of Lovejoy failed to comply with the request in a timely manner. Plaintiff filed a mandamus to force compliance with the records requests and requested his attorney fees be paid. The trial court dismissed the mandamus, because the Acts provision affords a proper remedy that is equally applicable to that of a mandamus. Georgia Supreme Court affirms the trial court's decision but for a different reason.
      - Holding: First it must be pointed out that a mandamus is only applicable, "if there is no other specific legal remedy to vindicate the petitioner's

rights." The Court concluded the Act's enforcement provisions do afford the Plaintiff an adequate alternative remedy to mandamus. As noted…the Act authorizes 'any person, firm, corporation, or other entity' to bring an action…to enforce compliance with the provisions of the [Act]." To the extent that cases like *Evans v. Georgia Bureau of Investigation*, 297 Ga. 318 (2015) suggest otherwise, they are disapproved.

- IMPORTANT NOTE*:* The Court questions whether Civil Penalties are available to private individuals, such as the Plaintiff. The Act provides, "the Attorney General shall have authority to bring such actions in his or her discretion as may be appropriate to enforce compliance with [the Act] and to seek either civil or criminal penalties or both." The plain language of the Act states the Attorney General has the authority to bring forth civil penalties and makes no mention about whether anyone else is capable. The Court further explained, "a monetary award is simply no substitute for access to the information found in government records." Because the Plaintiff did not appeal the denial of attorney fees, the Court refused to answer the question.

## ➢ PLEA IN BAR – DOUBLE JEOPARDY

### MISTRIAL

✪ *Ledford v. State*, --- Ga. App. --- - A17A0594 – GA Court of Appeals – (Decided April 12, 2017)

- Judgment: (Affirmed)
- Defendant was charged with DUI. Prior to trial, Defendant successfully argued to suppress the HGN test. At trial, prior to admitting the video of the traffic stop, outside the presence of the jury, Defendant again reminded the Court and the witness that the HGN test had been suppressed and there should be no mention of the HGN test, because he did not want a mistrial. Judge agreed. Immediately following the discussion, the prosecutor attempted to lay the foundation for the video and asked whether there had been any modifications to the video. The Officer responded "Yes, ma'am, for the HGN." Defendant immediately moved for a mistrial and subsequently filed a plea in bar. Trial Court granted the mistrial but denied the plea in bar, because there was nothing done intentionally by the prosecutor to goad a mistrial.
- Holding: "The general rule is that where a mistrial is granted at the behest of the defendant, a retrial is not barred by principles of double jeopardy unless the governmental conduct in question is intended to goad the defendant into moving for a mistrial. Even where a prosecutor's conduct is sufficient to justify a grant of mistrial, the conduct nevertheless does not bar retrial absent intent on the part of the

prosecutor to subvert the protections afforded by the double jeopardy clause.

- **PROBATION REVOCATION HEARING**
  - **VIOLATION OF AN OFFENSE NOT ALLEGED IN THE PETITION**
    - *Ponder v. State*, --- Ga. App. --- - A17A0495 – GA Court of Appeals – (Decided April 19, 2017)
      - Judgment: (Reversed and Remanded)
      - Defendant pled guilty to terroristic threats and sentenced to 5 years probation. Later, he was arrested for misdemeanor stalking and brought to a probation hearing. At the probation hearing Defendant stipulated to the misdemeanor charges, however the State presented evidence that they indicted the case and charged Defendant with felony aggravated stalking. Trial Court acknowledged felony aggravated was not alleged in the petition, but nonetheless revokes Defendant's probation on felony aggravated stalking and sentences him to 2 years prison. Defendant appealed.
      - Holding: "in order to revoke the probationary features of a sentence the defendant must have notice and opportunity to be heard, the notice being sufficient to inform him not only of the time and place of the hearing and the fact that revocation is sought, but the grounds upon which it is based. In addition, a defendant's probation may not be revoked when there is no evidence that the defendant violated its terms in the manner charged in the notice, even though there be evidence at the hearing that the defendant violated the terms of probation in some other manner as to which there was no notice given. Thus, if a judgment is based upon an offense not charged in the petition for revocation, it must be reversed." Because the sentence the Defendant received based upon an offense not alleged in the petition, the sentence is also reversed. The case was remanded back to the trial court for resentencing.

- **PROPERTY**
  - **OBTAINING SEIZED PROPERTY**
    - *In the Interest of T.F.N., jr., a Child*, --- Ga. App. --- - A17A0530 – GA Court of Appeals– (Decided April 14, 2017)
      - Judgment: (Affirmed)
      - Defendant, a juvenile, was charged with several counts of theft related charges. Defendant was eventually found delinquent to committing theft of a vehicle. Defendant returned a pair of boots belonging to the complaining witness. Defendant was sentenced to 10 months custody. When Defendant was arrested, he had three cell phones located on his person. After Defendant's sentenced, he requested the return of his three cell phones. Trial Court found Defendant failed to comply with

the requirements found in OCGA §17-5-54(c)(3). Defendant argued that requirement pertains to third party individuals and not to the Defendant whose property was taken off his person. COA disagrees.

- Holding: OCGA §17-5-54(c)(3) provides in part that "[a]ny person claiming to be a rightful owner of property shall make an application to the entity holding his or her property and shall furnish satisfactory proof of ownership of such property and present personal identification." COA states the plain language of the statute indicates "any person" which includes the Defendant. "Accordingly, any party claiming to be the rightful owner of the property must make an application to the law enforcement entity holding the property, furnish satisfactory proof of ownership, and present evidence of his or her identity in compliance with subsection (c)(3) before the party can claim that the entity has improperly refused to return the property to him or her in violation of OCGA §17-5-54(c)(2). In this case, the Defendant never submitted an application and simply asked the Court to return it. Therefore he did not comply with the statute.
- Important Note: This case was not limited to juvenile defendants, even though the Defendant in this case was a juvenile.

## SEARCHES AND SEIZURES

### ROADBLOCKS

*McCoy v. State*, --- Ga. App. --- - A17A0534 – GA Court of Appeals – (Decided April 11, 2017)

- Judgment: (Affirmed)
- Defendant was stopped at a roadblock and ultimately charged with DUI. Defendant moved to suppress the evidence obtained at the road block based upon the legality of the roadblock. There are five factors when determining the legality of a roadblock, which are enumerated in LaFontaine v. State, 269 Ga. 251 (1998). These factors are: "(1) the decision to implement the roadblock was made by supervisory personnel rather than the officers in the field; (2) all vehicles were stopped as opposed to random vehicle stops; (3)the delay to motorists was minimal; (4) the roadblock operation was well identified as a police checkpoint; and (5) the 'screening' officer's training and experience was sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication." Defendant challenged only the last factor, the officer's training and experience, because at the suppression hearing a supervising officer testified that all officers were POST certified, thus all the officers had requisite training. Trial Judge took judicial notice that all officers who are POST certified have the requisite training. Defendant appealed.

- Holding: "We conclude that it is commonly known and cannot reasonably be questioned that any police officer, to obtain certification in Georgia, has received training in law enforcement activities that concern impaired drivers…and given that any POST-certified officer will have had some training in law enforcement activities that concern impaired drivers, we conclude based on the foregoing authorities that the trial court in this case did no err in denying [defendant's] motion to suppress based on its finding that the POST-certified screening officer had training and experience sufficient to enable him to make the initial determination as to which motorists should be given the field test for intoxication."

# INDEX OF CASES SUMMARIZED

**Cases**