CASE LAW SUMMARIES

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- **ADMISSIONS AND CONFESSIONS**
  - **CUSTODIAL STATEMENTS**
    - *State v. Rosas*, --- Ga. App. --- - A15A1324 – GA Court of Appeals – (Decided January 09, 2017)
      - Judgment: (Reversed)
      - Police were called out to Defendant's house upon a call claiming Defendant had inappropriately touched a male juvenile. When police arrived, they confronted Defendant at her front door. The officers asked, "Do you know why we are here?" Defendant responded, "I guess I must have touched" him and went on to state she had gotten into bed with the juvenile to console him. Defendant sought to suppress the statements claiming she was never given *Miranda Rights*. Trial Court suppressed the statements claiming they were custodial in nature.
      - Holding: "A person is considered to be in custody and *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associated with a formal arrest." The Court went further to state, "indeed 'a person is not entitled to *Miranda* warnings as a matter of right, even though that person is a suspect, unless that person has been taken into custody or has been deprived of freedom of action in another significant way.' Moses v. State, 264 Ga. 313, 314 (1994)." Because Defendant was not determined to be in custody during the time of the statements, the trial court erred in suppressing the statements.

- **APPELLATE ISSUES**
  - **NOTICE OF APPEAL – 30 DAYS TO FILE**
    - *Southall v. State*, --- Ga. --- - S16A1721 – GA Supreme Court – (Decided January 23, 2017)
      - Judgment: (Reversed prior holdings)
      - Defendant was found guilty of murder and eventually sentenced to life without the possibility of parole on February 04, 2013. That same day (February 04, 2013) Defendant filed his Notice and Motion to Appeal. Even though the judgment was rendered in open court on February 04, 2013, the sentence was not stamped and filed with the clerk until February 05, 2013 (the next day). Thus, Defendant's Notice and Motion for New Trial was considered pre-mature. Based upon prior precedent, Harrison v. Harrison, 229 Ga. 692 (1972), Moore v. Moore, 229 Ga. 600, 601 (1972) and Tremble v. Tremble, 288 Ga. 666, 668 (2011) the premature motion should be considered void and invalid. Based upon these rulings, the COA have "reasonable understood" this to mean they should automatically affirm as to claims of error that are premised on a

trial court's denial of a prematurely filed motion for new trial. Supreme Court re-visits the issue in the case at bar.

- Holding: OCGA §5-5-40(a) states, "All motions for new trial, except in extraordinary cases, shall be made within 30 days of the entry of the judgment on the verdict or entry of the judgment where the case was tried without a jury." Prior cases fixed the starting point to file a motion for new trial based upon the entry of the judgment/sentence and the stopping point, 30 days from that entry. This is now considered error. Going forward there is no starting point, but for a motion to be made timely, it merely must be filed prior to 30 days from said entry of judgment. The Court went in depth concerning the reasoning why voiding a motion merely because it was filed to soon did nothing except infringe upon the rights of the accused. There was no disadvantage to the State by the accused filing a pre-mature motion. If anything, it gives the State more of an advantage by placing them on notice at an earlier point concerning the appeal. "Accordingly, we conclude that a prematurely filed motion for new trial that sufficiently identifies the judgment involved becomes fully effective upon entry of that judgment, enabling the trial court — and ultimately the appellate court pursuant to a properly filed notice of appeal — to review all of the issues raised in the motion on their merits." Thus, Harrison and it its progeny should be considered over-ruled.

- **RAISING INEFFECTIVE ASSISTANCE OF COUNSEL**
  - *Johnson v. State*, --- Ga. --- - S16A1649 – GA Supreme Court – (Decided January 23, 2017)
    - Judgment: (Affirmed)
    - Defendant was convicted of felony murder. During his motion for new trial, he raised ineffectiveness of his trial counsel on certain grounds. That motion was denied. Defendant now appeals the motion for new trial and raises different issues in regards to ineffective assistance of counsel. In particular the State's investigator made statements to Defendant's failure to testify, but trial counsel never objected. This issue was not raised during the motion for new trial.
    - Holding: Because Defendant did not raise the issues he is now appealing during his motion for new trial, he has waived those issues. Citing "Wilson v. State, 286 Ga. 141 (2009) (When issues of ineffectiveness of trial counsel has been raised on motion for new trial, any claims of ineffective assistance of trial counsel not raised at that time are waived)."

- **BRADY MATERIAL**
  - **PLEA AGREEMENTS MADE TO STATE'S WITNESSES**
    - *Southall v. State*, --- Ga. --- - S16A1721 – GA Supreme Court – (Decided January 23, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of murder and eventually sentenced to life without the possibility of parole. At trial, a jailhouse informant testified on behalf of the State. Defendant never received any information concerning deals made to the jailhouse informant. At trial, the informant testified he had not made any deals with the DA. After trial was over, Defendant learned the DA Nolle Prossed the witness's case. In the appeal, Defendant asserts there was a deal in place for the DA to contact the parole board on behalf of the informant and this information was never turned over.
      - Holding: "the fact that [the informant] believed or hoped 'that testifying in [Defendant's] trial would benefit him later does not show an agreement. One sided hope or expectation does not [make a deal]." Accordingly, the evidence on which Defendant relies "does not suggest the existence of even an informal agreement."

- **CHILD HEARSAY**
  - **BOLSTERING**
    - *Laster v. State*, --- Ga. App. --- - A16A1801 – GA Court of Appeals – (Decided January 24, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with child molestation and sexual battery against a person under the age of 16. At trial, the State presented several witnesses who testified prior to the child testifying and explained what the child had told them. Defendant objects on the basis of improper witness bolstering and hearsay.
      - Holding: "Generally speaking, '[u]nless a witness's veracity has affirmatively been placed in issue, the witness's prior consistent statement is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury…[However] the Child Hearsay Statute actually contemplates testimony from both the child and those witnessing the child's later reaction, even if the hearsay may be bolstering." The COA further explained "the order of witnesses is irrelevant to the question of the admissibility of child-hearsay evidence."

- **CLOSING ARGUMENTS**
  - **IMPROPER COMMENTS ON DEFENDANT'S RIGHT TO REMAIN SILENT**
    - *Kilgore v. State*, --- Ga. --- - S16A1430 – GA Supreme Court – (Decided January 23, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of felony murder and other offenses. During closing arguments, Defense Counsel explained that Defendant did not know a robbery was about to occur and his client was merely present during the incident. Prosecutor explained in final closing, that this was a distraction. That since everyone knows they were there, they must come up with another excuse and claim they were merely there. Defense counsel did not object to the statement.
      - Holding: Because defense counsel failed to object, the issue is waived. However, the Court went on to decide the issue. The Court stated, there are two prongs to determine if the prosecutor has improperly commented on the Defendant's right to remain silent: 1) Whether the prosecutor's manifest intention was to do just that or 2) whether the remarks were such that a jury would naturally and necessarily take the remarks to be a comment on the Defendant's right to remain silent. The prosecutor's statements do not satisfy either prong of the test, because "they were in response to the defense argument regarding the State's case and the defense's failure to counter the State's evidence."

- **CONFRONTATION CLAUSE**
  - **WITNESS REFUSED TO ANSWER QUESTIONS ON CROSS-EXAMINATION**
    - *Upshaw v. State*, --- Ga. --- - S16A1524 – GA Supreme Court – (Decided January 23, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of murder and various firearm charges. At trial, the State called a jail house informant to testify. Prior to the witness testifying, the State made references in Opening concerning the informants expected testimony and several other witnesses alluded to the fact that the Defendant made a confession to the informant at jail. Ultimately at trial, the informant backed off his statements during direct and refused to answer any questions during cross-examination. Defendant objected and moved for a mistrial. Trial court instructed the jury they should disregard any statements that any witness made concerning the informant. The trial court also inquired if Defense wanted to instruct the jury on disregarding all the informant's testimony on direct. Defense Counsel declined and so the only instruction

concerned the other witnesses' statements concerning the informant. Defendant now asserts his Sixth Amendment Rights were violated, by not being able to adequately cross-examine the informant.

- Holding: "When a witness declines to answer on cross examination certain pertinent questions relevant to a matter testified about by the witness on direct examination, the trial court may be able to cure this inequity by striking all of the witness' testimony on the same subject matter." Defendant refused the curative instruction, so no error. Whether a trial court grants a defendant's motion for mistrial or uses a curative jury instruction to correct improper evidence that comes before a jury is a matter of judicial discretion.

- **CROSS EXAMINATION**
  - **SENTENCES OF COOPERATING WITNESS**
    - *U.S.A. v. Rushin et. al.*, - No. 14-15622 – 11th Circuit COA – from Middle District of Georgia - (Decided December 21, 2016)
      - Judgment: (Affirmed)
      - Three defendants were correctional officers at Macon State Prison and were assigned to the Emergency Response Team. Several other individuals from the Emergency Response Team accepted plea deals for reduced sentences and testified against defendants. Defendants sought to elicit testimony from the cooperating witnesses concerning what sentence they received and what sentences they could have received had they not pled guilty in order to show motive and bias. Trial Court limited cross-examination and prevented defendants from eliciting testimony about the exact number of years they received or could have received. Defense counsels were able to get into testimony that the cooperating witnesses received favorable plea deals for their testimony.
      - Holding: This was a case of first impression in the 11th Circuit. They outlined what other sister Courts have held and came up with this holding. "While it is imperative that a defendant be able to address the reliability and potential bias of a cooperating witness, in this case the precise number of years the cooperating witnesses may have faced provides little, if any, value above those questions defense counsel were permitted to ask. Here, defendants could inquire as to whether cooperating witnesses otherwise faced a more severe penalty or expected to receive a lesser sentence." The Court went further and explained, to hold contrary to this holding, it invites jury nullification. The Court did explain, "This is not to say that the magnitude of a potential sentence could not ever shift this balance;" however this was not that time. *See* concurring opinion…

- CONCURRING OPINION JUDGE JORDAN: "I concur in the Court's opinion with the understanding that our holding in Part III is a narrow one which does not set out any bright-line rules, and which is limited by the facts of this case, including the proffer made by defense counsel… The human condition strongly suggests that a person may not be willing (or likely) to lie under oath if he expects his benefit to be 8 years in prison rather than 9, but his incentive to dissemble and falsify may increase exponentially if he expects to serve a couple of years in prison instead of a couple of decades. See, e.g., Miriam Hechler Baer, Cooperation's Cost, 88 Wash. U.L. Rev. 903, 936 (2011) (noting the motivation to lie where "a potentially massive reduction in sentence is at stake."). In an appropriate case, therefore, it may be necessary to allow defense counsel to ask a cooperating witness how much of a break he expects to get (or has already received) in exchange for testifying for the government."

- **DISCOVERY VIOLATION**
  - **911 TAPE**
    - *Adams v. State*, --- Ga. App. --- - A16A1583 – GA Court of Appeals – (Decided December 20, 2016)
      - Judgment: (Affirmed)
      - Defendant was charged and ultimately convicted of Aggravated Child Molestation and other various sexual offense concerning a minor. At trial, Defendant testified that she was a good and loving mother. State then reviewed 911 calls at the residence, and discovered a 911 call, where the husband claimed Defendant had struck her daughter. This call was not turned over prior to trial. Defendant objected, but State was allowed to introduce the call. COA affirms
      - Holding: OCGA §17-16-4(a)(3)(A) requires the State to turn over all discovery "no later than ten days prior to trial" that the State intended to use as evidence in the case in chief or as rebuttal evidence. However, failure to comply with discovery does not necessary require exclusion, unless a showing of bad faith has been shown. Defendant failed to show any bad faith occurred.
      - IMPORTANT NOTE: COA went further and explained that the Defendant has waived the issue for appeal because the Defendant did not request a continuance to cure the discovery violation. "Accordingly, [Defendant's] failure to seek a continuance to cure any alleged failure of the State to comply with discovery precludes her from raising the issue on appeal. Spencer v. State, 296 Ga. App. 828, 830 (2009)." So make sure you ask for a continuance, if you plan to preserve the issue.

- **DRIVING UNDER THE INFLUENCE**
  - **HORIZONTAL GAZE NYSTAGMUS TEST (HGN)**
    - *State v. Walsh*, --- Ga. App. --- - A16A1618 – GA Court of Appeals – (Decided December 19, 2016)
      - Judgment: (Reversed)
      - Defendant was stopped for DUI. Officer performed a Horizontal Gaze Nystagmus Test (HGN), while Defendant kept his glasses on. Officer testified at motion to suppress, that better practice would have been to have Defendant take off the glasses, however, it did not obstruct the test. That Defendant met all 6 factors in the HGN, finding he was over the limit. Trial Court suppressed the HGN test, due to Defendant keeping his glasses on. State appealed claiming that goes to weight of evidence, not to admissibility. COA agrees
      - Holding: "In evaluating the admissibility of an HGN test, two findings are necessary: '(1) the general scientific principles and techniques involved are valid and capable of producing reliable results, and (2) the person performing the test substantially performed the scientific procedures in an acceptable manner…With regard to the first determination, we have held that the HGN test is an accepted, common procedure that has reached a state of verifiable certainty in the scientific community…and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol.'" State v. Tousley, 271 Ga. App. 874, 876-78 (2005). With regard to the second determination we have held that HGN tests should be administered under law enforcement guidelines…Absent a fundamental error, such as one affecting the subject's qualification for the HGN test, evidence of the possibility of error goes only to the weight of the test results, not to their admissibility." Parker v. State, 307 Ga. App. 61, 64 (2010).

- **GUILTY PLEA - WITHDRAWAL**
  - **WAIVER OF RIGHT TO APPEAL**
    - *Surry v. State*, --- Ga. App. --- - A16A1726 – GA Court of Appeals – (Decided December 20, 2016)
      - Judgment: (Affirmed)
      - Defendant entered a negotiated plea to various offenses. Prior to Defendant entering a plea, Defendant's attorney went over a plea form, which included a provision that Defendant waives his rights to seek a sentence modification and to appeal his conviction. Defendant signed and initialed each provision and eventually pled guilty. Subsequently Defendant filed a motion to withdraw his guilty plea, and when the trial

court denied the motion, Defendant appealed. COA determined he voluntarily waived his rights to appeal.

- Holding: "It is well established that a defendant can waive his right to seek post conviction relief as part of a negotiated plea agreement, so long as the waiver is voluntary, knowing, and intelligent. The fact that a waiver of the right to appeal is voluntary, knowing, and intelligent may be shown either by (1) a signed waiver form indicating that the defendant understood the rights he was waiving or (2) detailed questioning of the defendant by the trial court revealing that the defendant was informed of and agreed to waive his rights. When the record shows that the defendant understood the rights he was waiving, he will be held to his bargain." Record reveals Defendant voluntarily signed the waiver form, and thus waived his rights to appeal.

HEARSAY

BRUTON STATEMENTS

- *Thomas v. State*, --- Ga. --- - S16A1520 and *Nixon v. State*, --- Ga. --- - S16A1521 – GA Supreme Court – (Decided January 19, 2017)
  - Judgment: (Affirmed)
  - Co-defendants were tried together and each found guilty of multiple offenses, which include Murder, Rape and Armed Robbery. At trial a jailhouse informant gave testimony in regards to statements that co-defendant Nixon had made. The informant was instructed to limit the testimony only to statements that pertain to co-defendant Nixon and not state anything concerning co-defendant Thomas. During his testimony, the informant used the pro-noun "They" on several occasions. Co-defendant Thomas never objected but now claims based on ineffective grounds that it was error for the informant to use the pronoun "They".
  - Holding: "Though [the informant] used the pronoun "they" on a few occasions during his testimony, "they" were never identified by [the informant]. Nor did [the informant] identify [co-defendant] Thomas as a participant in any of the crimes, instead focusing on [co-defendant] Nixon's own inculpatory admissions…Standing alone, the testimony falls outside of Bruton as Jones did not directly implicate [co-defendant] Thomas…"

IMPEACHMENT

PRIOR CONVICTIONS

- *Upshaw v. State*, --- Ga. --- - S16A1524 – GA Supreme Court – (Decided January 23, 2017)
  - Judgment: (Affirmed)

- Defendant was found guilty of murder and various firearm charges. At trial, one of the State's witnesses (driver of the car, when the decedent was forced out and eventually shot) testified against the Defendant about the events that occurred the night of the shooting. On cross-examination, Defendant impeached the witness with a prior aggravated assault conviction and then attempted to get into the details of the prior convictions and the circumstances surrounding it. State objected and the Trial Court sustained the objection.
- Holding: "where, as here, a defendant seeks to impeach a witness with a prior conviction, 'the specific facts underlying the crime are irrelevant unless the witness attempts to rehabilitate himself by explaining the circumstances of his conviction.' Brown v. State, 276 Ga. 192, 193 (2003)." The witness never attempted to rehabilitate himself by explaining the circumstances surrounding the aggravated assault and thus, it was irrelevant.
- IMPORTANT NOTE: In footnote 3, the Court explains this case was tried before January 01, 2013 and thus prior to the new Evidence Code. However, they explain the old portions of the statute relevant to the issue were carried forward and codified in OCGA §24-6-611(b).

JURY INSTRUCTIONS

CORROBORATION OF CONFESSION

- *English v. State*, --- Ga. --- - S16A1754 – GA Supreme Court – (Decided January 23, 2017)
  - Judgment: (Affirmed)
  - Defendant was found guilty of murder and arson. Defendant gave a pre-trial statement in which he stated he got into a physical altercation with the decedent, in which he hit the decedent over the head with an object several times. He further stated he eventually left the house only to return to check on the decedent. At trial, his attorney did not request a jury instruction on corroboration of a confession and now appeals based upon plain error of the trial court not sua sponte giving the instruction.
  - Holding: "As an initial matter, it is clear that most of [Defendant's] statements are admissions, and not confessions." Defendant admitted several acts, but never confessed to killing the decedent or setting the house on fire. Therefore the statements are admissions and not confessions, thus, not requiring the charge on corroboration. The Court went further and explained there was ample evidence of corroboration due to the numerous eye witnesses' testimony, so the Defendant cannot show harm, even if the trial court erroneously failed to give the instruction.

- **MERGER**
  - **ARMED ROBBERY AND AGGRAVATED BATTERY**
    - ✪ *Epperson v. State*, --- Ga. App. --- - A16A1849 – GA Court of Appeals – (Decided December 28, 2016)
      - Judgment: (Affirmed)
      - Defendant was found guilty of armed robbery and aggravated battery for offenses occurring during the same transaction. In essence, Defendant attempted to rob the complaining witness with a firearm, and when the complaining witness fought back, the complaining witness was shot. Defendant was ultimately sentenced to life in prison plus 20 years to run consecutively. Defendant asserts the two convictions should have merged. COA disagrees.
      - Holding: Under the required evidence test, neither offense is included in the other if each statutory provision requires proof of a fact which the other does not. "Based on these charges and the underlying criminal statutes, [Defendant's] aggravated battery conviction did not merge into his armed robbery. Because the taking of the victim's property was not a fact required to establish the aggravated battery offense, and because depriving the victim of a member of his body was not a fact required to establish the armed robbery offense, the two offenses did not merge under the required evidence test."
      - Secondary Holding: Defendant further alleged based upon a recent Georgia Supreme Court holding in Regent v. State, 299 Ga. 172 (2016) that the risk of injury should require merger. Unlike Regent, the charges alleged in the case at bar, differ more than just severity of injury. "Aggravated battery and armed robbery do not simply prohibit different degrees of injury or risk of injury; rather, the two crimes prohibit entirely different categories of injury – depriving a victim of a member of his body versus depriving a victim of property. Thus, the two offense serve different primary purposes and do not merge under OCGA §16-1-6(2), in contrast to the offense in Regent.

- **SEARCH AND SEIZURE**
  - **DUI IMPLIED CONSENT**
    - ✪ *McKibben v. State*, --- Ga. App. --- - A16A1865 – GA Court of Appeals – (Decided January 23, 2017)
      - Judgment: (Affirmed)
      - Defendant was stopped for potentially driving under the influence. The officer observed glazed eyes and slurred speech on behalf of the

Defendant. Officer read Defendant Georgia's Implied Consent and requested a blood draw to determine if the Defendant was impaired. Defendant consented to the blood draw, was taken to the local fire department, and a blood draw was performed indicating Defendant was intoxicated. Defendant filed a motion to suppress based upon lack of consent. Trial Court denied the motion and based upon a bench trial, the defendant was found guilty of DUI per se and less safe.

- Holding: "we have previously cautioned that Williams v. State, 296 Ga. 817 (2015) should not be read as imposing 'a per se rule that the State must always show more than consent under the implied consent statute.' Rather, we take our Supreme Court at its word when it instructed trial courts to 'review the totality of the circumstances in determining consent… Thus, in order to ascertain whether a suspect freely and voluntarily consented to the test, the trial court must consider the totality of the circumstances surrounding his consent, including (but not limited to) whether there was any threat or coercion by the officer; whether the suspect was unable to give valid consent due to (for example) his youth or lack of education; and whether a reasonable person would have felt free to decline the officer's request." In the case at bar, there is no evidence the officers used, threats, coercion, intimidation or lengthy detention to obtain consent. Nor did Defendant present any evidence that he was unable to give consent.

- **SENTENCING**
  - **JUDGE'S PARTICIPATION IN PLEA NEGOTIATIONS**
    - *Winfrey v. State*, --- Ga. App. --- - A16A1609 – GA Court of Appeals – (Decided January 17, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with several offenses including RICO. A status hearing was conducted to place the status of the case on the record including any plea offers which was made. Defense attorney explained Defendant's main objection to the plea offer was which counts he would plead guilty, because he believed it would impact his parole eligibility, especially if was sentenced to the RICO charge. At which point the trial judge explained on the record, that should Defendant go to trial and lose, she would not be concerning herself with parole. Whatever he got found guilty of, she would sentence without regard to if he is parole eligible. She further explained, that she would hold it against him for not taking responsibility for his actions. She further explained everyone in the jail talks about which judges they are assigned. "We all have reputations. My reputation is not that I am an easy judge. I know it, you know it, the whole community knows it. So if that's what you want to

go up against be my guest." Whereupon Defendant eventually pled guilty to 6 of the twenty-seven counts. He then sought to withdraw his plea of guilt due to it was involuntary, because the trial judge interfered in plea negotiations.

- Holding: "Judicial participation in the plea negotiation process is prohibited by Georgia Uniform Superior Court Rule 33.5 (A) and as constitutional matter when the interjection of the plea court is to such a degree as to render a guilty plea involuntary…In particular, '[c]omments by the trial judge that reinforce the unmistakable reality that a defendant who rejects a plea offer and instead opts to go to trial will likely face a greater sentence have been held by this Court to unlawfully insert the judge into the plea process.'" Gibson v. State, 281 Ga. App. 607, 609 (2006). The COA explained this was a close case, however the trial judge did not participate in the plea negotiations, because she never stated "he would" receive a higher sentence if went to trial. She just pointed out that she would not concern herself with parole eligibility and explained her reputation.
- ADDITIONAL NOTE OF CAUTION: the COA cautioned the trial courts in impacting plea negotiations. "We take this opportunity, however, to caution that trial judges should be cognizant of and seek to avoid undue and impermissible involvement in the plea negotiation process so as to avoid involuntary pleas. Although, as we have noted, the trial judge did not explicitly tell [Defendant] that he would face a harsher sentence if he went to trial, she strongly suggested that result by referring to a recent sentence she had imposed for gang related charges and confirming her reputation as a judge who sentences harshly. Under our current precedent, such intimations have been upheld even though they appear to violate the spirit of Rule 33.5 (A) because those general comments did not address how the trial judge would sentence in [Defendant's] particular case. That being said, we do not condone those comments and emphasize that the better practice when allowing the State to put such plea offers on the record would be to undertake that the defendant has been notified of the terms offered, understands the scope of the offer, and is aware of the charges against him and the potential sentence."

- **SECOND OFFENSE OF TRAFFICKING – LIFE SENTENCE**
  - ✪ *Duron v. State*, --- Ga. App. --- - A16A1942 – GA Court of Appeals – (Decided January 19, 2017)
    - Judgment: (Affirmed)
    - Defendant was convicted of a prior trafficking and eventually went to trial and was found guilty in a subsequent trial for trafficking cocaine. Defendant was sentenced to two life sentences. Defendant appealed

asserting the trafficking offenses outlined in OCGA §16-13-31 do not pertain to the sentencing guidelines in OCGA §16-13-30, which deals with possession with intent to distribute. It is the sentencing enhancements in OCGA §16-13-30 which allow for life sentences when dealing with a second or subsequent sentence.

- Holding: COA explained it is illogical to suggest that trafficking charges, which only very in the amount of quantity of the narcotic do not equally apply to sentencing provisions contained in the possession with intent to distribute, OCGA §16-13-30, statute. "Accordingly we conclude that a first conviction for trafficking under OCGA §16-13-31 may be used to enhance a second conviction for trafficking pursuant to OCGA §16-13-30(d)."

YOUTHFUL OFFENDERS – LIFE WITHOUT PAROLE

- *Dennis v. State*, --- Ga. --- - S16A1600 – GA Supreme Court – (Decided January 23, 2017)
  - Judgment: (Affirmed)
  - Defendant was 17 years old in 1997 when he was found guilty of murder. He was eventually sentenced to life in prison "without" the possibility of parole. On October 14, 2015 the State filed a motion pursuant to Miller v. Alabama, 132 SCt. 2455 (2012) which held the Eighth Amendment prohibits cruel and unusual punishment and forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders without a sentencing court first taking into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison. Id. 2469. Based upon recent case law, the trial court amended the sentence and re-sentenced Defendant to life in prison "with" the possibility of parole. Defendant appeals.
  - Holding: This case is weird, because the State filed the petition to amend the sentence and the Defendant is appealing claiming the trial court did not have authority to reduce his sentence to life in prison with the possibility of parole. The facts are not in dispute and the transcript shows the original sentencing court did not take into account the factors outlined in Miller v. Alabama, when Defendant was originally sentenced. "Thus, [Defendant's] 1998 sentence of life without the possibility of parole was void and subject to a challenge on Eighth Amendment grounds at any time." Because the original sentence was void, the trial court had authority to resentence Defendant at any time.

- **SEXUAL BATTERY**
  - **CONSENT IS AN ELEMENT THAT MUST BE PROVED**
    - *Laster v. State*, --- Ga. App. --- - A16A1801 – GA Court of Appeals – (Decided January 24, 2017)
      - Judgment: (Reversed)
      - Defendant was charged with child molestation and sexual battery against a person under the age of 16. At trial, the trial court gave a jury instruction explaining a person under the age of 16 lacks the legal capacity to consent to sexual conduct. This case was heard just prior to the Georgia Supreme Court ruling in Watson v. State, 297 Ga. 718, 720 (2015). Based on Watson, the COA reversed.
      - Holding: "The Watson Court determined that it is erroneous for a trial court to instruct a jury that an underage victim is not capable of consenting to contact constituting sexual battery." The COA went on to explain, "following Watson, the trial court's charge 'effectively relieved the State of its burden to prove [lack of consent,] an essential element of the crime of sexual battery."
      - IMPORTANT NOTE: I helped a colleague recently in drafting jury charges on an aggravated sexual battery case. We were able to effectively get the judge to also instruct the judge to give a consent instruction on an aggravated sexual battery case. So I would continue to request the consent instruction in both sexual battery and aggravated sexual battery cases. I am placing the jury charge we used below:
      - JURY INSTRUCTION: As it pertains to the Count for Aggravated Sexual Battery, the Statute for Aggravated Sexual Battery requires the State to prove lack of consent of the alleged victim. The age of the alleged victim is thus immaterial to the issue of proof of lack of the alleged victim's consent. Regardless of the age of the alleged victim, the State is required to prove beyond a reasonable doubt that the alleged victim did not consent to the physical contact as alleged in the aggravated sexual battery count. --- Citing Watson v. State, 297 Ga. 718 (2015).

- **SPEEDY TRIAL DEMAND**
  - **CONSTITUTIONAL**
    - *Epperson v. State*, --- Ga. App. --- - A16A1849 – GA Court of Appeals – (Decided December 28, 2016)
      - Judgment: (Affirmed)
      - In 2010, Defendant was charged with several offenses relating to an armed robbery and aggravated assault. The case was delayed several times due to the victim, who was shot needed medical attention, change

in District Attorneys, and an over-crowded trial docket. Defendant filed a constitutional speedy trial and to dismiss the case in July 2013. In June 2014, Defendant went to trial and ultimately found guilty of the charges. At the motion for new trial, Defendant presented no testimony about how he was prejudiced in the delay. Defendant maintains, he was not required to present how he was prejudiced, because the length of delay is prima facie prejudice. COA disagrees.

- Holding: "Application of the *Barker-Doggett* test 'to the circumstances of a particular case is a task committed principally to the discretion of the trial courts, and it is settled law that our role as a court of review is a limited one.'…The prejudice factor of the *Barker-Doggett* balancing test 'addresses three interests which the right to a speedy trial was designed to prevent, (1) pre-trial incarceration from being oppressive, (2) to minimize any anxiety and concern on the part of the accused, and (3) to limit possible impairment of the defense.'…Hence, as part of its analysis of the prejudice factor, a trial court should take into account any presumption of prejudice that has arisen as a result of the length of the delay between the defendant's arrest and trial, with the presumption intensifying over time…Where, as in the present case, 'the defendant has made no attempt at all to demonstrate (or even argue) that he has suffered any particular prejudice to his mental or physical condition or to his defense strategy, any prejudice that might be presumed by virtue only of the passage of time will carry very little weight in the *Barker-Doggett* analysis.'"
- IMPORTANT NOTE: Always make a proffer of how your defendant was harmed due to the length of delay in the case. Failure to proffer prejudice or elicit testimony of prejudice will likely allow Defendant little recourse in terms of appeal.

- **STATUTORY DEMAND**
  - ✪ *Rogers v. State*, --- Ga. App. --- - A16A2143 – GA Court of Appeals – (Decided December 20, 2016)
    - Judgment: (Reversed)
    - Defendant filed multiple motions at the same time. They were individually stapled with each having its own certificate of service. These motions included, entry of appearance, waiver of arraignment, not guilty plea, boiler-plate motions, discovery motions, motions to suppress, and demand for speedy trial pursuant to OCGA §17-7-170. Evidently the State nor the Court realized the speedy trial demand had been filed. The day of trial after the two terms of court had expired, Defendant sought to dismiss the charges. Trial Court denied the motion.
    - Holding: "The record shows that [Defendant] filed multiple documents on the same day, including her statutory speedy trial demand. Each

document had separate certificate of service, and each document was clearly and distinctly titled, including [Defendant's] speedy trial demand. Moreover, [Defendant's] speedy trial demand referenced OCGA §17-7-170, it was not stapled or otherwise bound to any other document filed that day, and it specifically identified the accusation number for [Defendant's] case. Consequently, [Defendant's] speedy trial demand complied with the pleading requirements set forth in OCGA §17-7-170, and the trial court erred denying her motion to dismiss"

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