CASE LAW SUMMARIES

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  - **DISCOVERY – WHETHER DEFENSE CAN OBTAIN A COPY**
    - *Bello v. State*, --- Ga. --- - S16A1602 – GA Supreme Court – (Decided March 06, 2017)
      - Judgment: (Affirmed)
      - Defendant was indicted on sexual exploitation of children, where his computer was searched and photographs/videos on the computer contained children involved in sexual acts. Defense counsel attempted to obtain a copy of the videos and a written report that was prepared by law enforcement. The State allowed Defense Counsel and any expert to come to the police station and review the material in a secure room, but refused to turn over the materials. Defendant sought to compel the State to turn of the materials, the trial court denied the request and now the Supreme Court agrees that it should not be turned over.
      - Holding: The State cited OCGA 17-16-4(a)(3)(B) that "such evidence shall, no later than ten days prior to trial, or as otherwise ordered by the court, be allowed to be inspected by the defendant but shall not be allowed to be copied" Defense claimed it was unconstitutional. The Court held, "even when due process demands that the accused be afforded an opportunity before trial to have critical evidence tested by an expert of his choosing, id does not always require that the prosecution simply surrender the evidence to the custody and control of the accused and his defense time." They likened this to the State retaining control of narcotics. You can have it independently tested, but the State does not have to give up control. And the State has a legitimate and compelling reason in ensuring the sexual explicit material of children is not duplicated and released.
      - IMPORTANT NOTE: The Court also addressed in paragraph 3 on whether it is a crime for Defense attorneys to possess this type of material, pursuant to OCGA 16-12-100(b)(8). That statute makes it a crime for anyone to possess sexually explicit material of minors, but carves out an exception for prosecuting attorneys and police officers. *See* OCGA 16-12-100(d)(1). There is no exception in that statute for defense attorneys. The Court explained, "if the Constitution allows the government to insist that materials containing child pornography remain in the custody of control of government agents, forbidding non-government lawyers from taking custody and control of child pornography is equally permissible."
      - MY READ: I take this to mean, regardless if the State turned this material over in Discovery, if you (defense attorney) or your firm has possession of child pornography in relation to a client's case, you are still in violation of OCGA 16-12-100(b)(8) and subject to prosecution,

which comes with potential prison, registering as a sex offender and loss of BAR license. I would personally return it back to the DA as quickly as possible. Which then leads the question, by returning it, have you now admitted to possessing the material? Use your own discretion on whether you should return or destroy it.

- **COMPETENCY TO STAND TRIAL**
  - **JUVENILE**
    - *In the Interest of L.L., a Child*, --- Ga. App. --- - A16A1953 – GA Court of Appeals – (Decided March 01, 2017)
      - Judgment: (Affirmed)
      - Defendant is a thirteen-year-old child, who was charged with aggravated assault with a deadly weapon after he threw a knife at his neighbor and cut her. Prior to a delinquency hearing, Defense Counsel filed a competency evaluation to determine if the Defendant is competent. Defendant was evaluated by Dr. Sloan, who determined he had a below average IQ and would be unable to assist his attorneys with his defense. Thus, Dr. Sloan testified that would be incompetent to stand to trial. Trial judge, disregarded Dr. Sloan's testimony and found Defendant competent to stand trial. Defendant was ultimately found delinquent and sentenced to 12 months probation and complete CAP program. Defendant appealed his competency determination.
      - Holding: "Pursuant to OCGA 15-11-651, a child may be found incompetent to proceed when the child is lacking sufficient present ability to understand the nature and object of the proceedings, to comprehend his or her own situation in relation to the proceedings, and to assist his or her case in all adjudication, disposition, or transfer hearings." However, the fact-finder need not adhere to an expert opinion on incompetency if there is a reason to discount it. There are four factors the court should look toward to discount the expert: "(1) the correctness or adequacy of the factual assumptions on which the expert opinion is based; (2) possible bias in the experts' appraisal of the defendant's condition; (3) inconsistencies in the expert's testimony, or material variations between experts; and (4) the relevance and strength of the contrary lay testimony." Based upon the first factor, the judge was within his discretion to disregard the expert's opinion. "The factual assumptions upon which Dr. Slone relied in reaching her opinion were inadequate to support a conclusion of incompetency."

- **CONSPIRACY**
  - **WITHDRAWAL – REQUIRES AN AFFIRMATIVE STEP**
    - *Bergman v. State*, No. 14-14990 – Eleventh Circuit Court of Appeals – Florida (Decided 11th Cir. March 24, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of conspiracy to commit wire fraud and accepting kickbacks connected to federal health care benefits. Defendant claimed he withdrew from conspiracy, if there ever was a conspiracy when he quit his employment with the medical office. And since he quit his job outside of the statute of limitations (5 years in this case) from the time of indictment that he should be barred from prosecution. The State presented evidence that Defendant did not quit, but was fired. Thus, it was presented to the jury to determine if the defendant committed any overt acts to affirmatively withdraw from the conspiracy.
      - Holding: "Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws. A defendant who withdraws outside the relevant statute of limitations period has a complete defense to prosecution…This Circuit has a well-established, two-prong test for withdrawal: 'the defendant must prove that he undertook affirmative steps, inconsistent with the objects of the conspiracy, to disavow or to defeat the conspiratorial objectives, and either communicated those acts in a manner reasonably calculated to reach his conspirators or disclosed the illegal scheme to law enforcement authorities." The Court explained merely ending one's activities does not constitute a withdrawal. The Court reasoned because the jury could have determined that the Defendant did not make any affirmative actions, since he may have been fired, his part in the conspiracy continued
      - DISSENTING OPINION: Judge Martin. Relying on Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823 (11th Cir. 1999); the dissent explained, "so long as the conspirator's break with the other conspirators was both clean and permanent, and the conspirators are notified of it, withdrawal is effective in this circuit." That in essence, it should not matter whether the Defendant was fired or quit, that there was no evidence presented that he intended to continue the conspiracy or that there was any chance that he could rejoin the conspiracy upon him leavening his employment. The dissent concludes with: "nothing herein should be read as holding that an employee's resignation cannot be an effective withdrawal." Thus, this holding is limited and fact specific.

- **CONTINUING WITNESS**
  - **PHOTOGRAPHIC LINEUP WITH ADDITIONAL STATEMENTS WRITTEN**
    - *Rainwater v. State*, --- Ga. --- - S16A1532 – GA Supreme Court – (Decided March 06, 2017)
      - Judgment: (Affirmed on harmless error)
      - Three separate witnesses were shown photographic lineups and on the admonition form, they all wrote a brief statement that went further than identification of the Defendant. For instance, one form, the witness wrote, "he was standing outside my door". All of these admonition forms that were connected to the photographic lineups went out with the jury. Defendant failed to object at trial for violating continuing witness rule and the Court reviewed for plain error.
      - Holding: "To the extent the photographic lineup admonition forms contained statements beyond the identification of [Defendant], allowing them to go back with the jury violated the continuing witness rule…But [Defendant] has not made an affirmative showing that the 'error probably did affect the outcome below.'" In essence, the evidence was cumulative and there was overwhelming evidence of Defendant's guilt. Thus, harmless error. The Court did compare Dockery v. State, 287 Ga. 275, 277 (2010) which held "no continuing witness rule violation where lineup forms went out with the jury containing only witness's name and signature, number of photograph selected, date and time, and name of detective who conducted lineup."

- **DEATH PENALTY**
  - **INTELLECTUALLY DISABLED TO BE EXEMPT FROM DEATH**
    - *Moore v. Texas*, 581 U.S. --- - No. 15-797 – United States Supreme Court – (Decided March 28, 2017)
      - Judgment: (Vacated and Remanded)
      - Defendant was found guilty of murder and sentenced to death. Prior to trial, Defendant raised the issue that he had mental health issues and he should not be subject to the death penalty. Several IQ test were performed that placed Defendant's IQ at a combined 74. Based upon this IQ and factors outlined in a prior Texas court case in Ex Parte Briseno, state court determined Defendant was competent to be put to death. On Habeas, the Habeas Court determined the factors outlined in Briseno were not the proper factors and based upon current medical opinions that Defendant was incompetent to be put to death and remanded the case back to the Texas Court of Appeals. Texas Court of Appeals refused to accept the Habeas ruling and Supreme Court granted Cert.

- Holding: "States have some flexibility, but not 'unfettered discretion,' in enforcing *Atkins'* holding (Atkins v. Virginia, 536 U.S. 304 (2002)), Hall v. Florida, 572 U.S. ___ (2014), and the medical community's current standards, reflecting improved understanding over time, constrain States' leeway in this area. Here, the habeas court applied current medical standards in reaching its conclusion, but the [Texas Court of Appeals] adhered to the standard it laid out in Briseno, including the nonclinical *Briseno* factors. The [Texas Court of Appeals] therefore failed adequately to inform itself of the 'medical community's diagnostic framework,' Hall, 572 U.S., at ___ - ___." The Supreme Court explained there are three core elements that are "generally accepted, uncontroversial intellectual-disability diagnostics": (1) intellectual-functioning deficits (score of roughly 70 adjusted for the standard error of measurement); (2) adaptive deficits (inability to learn basic skills and adjust behavior to changing circumstances) and (3) the onset of these deficits while still a minor. Based upon these three factors, the Texas Court of Appeals failed to apply the correct standard to determine Defendant's intellectual disability and the case must be remanded.
- DISSENTING OPINION, Justice Roberts: The dissent agrees that the factors outlined in Briseno were not the proper factors to determine intellectual disability, but stated it would affirm the Texas Court of Appeals' decision because it had an independent analysis to determine intellectual disabilities. Justice Roberts explains it is the Courts that determine intellectual disabilities and not the medical community in regards to how they apply with the Eighth Amendment.

➢ DEFENDANT'S PRE-TRIAL SILENCE

✪ *Lawton v. State*, --- Ga. App. --- - A16A2089 – GA Court of Appeals– (Decided March 09, 2017)

- Judgment: (Affirmed)
- Defendant was charged with various sexual offenses, including rape and aggravated sodomy. Police officer testified that he contacted the Defendant and the Defendant agreed to meet with the officer. The Defendant did not show for the meeting and claimed he was working. They agreed to meet again, and again he failed to show. Officer testified that Defendant was going out of his way to avoid meeting with the officer. Defendant now claims that this testimony was in violation of right against speaking upon his pre-trial silence or failure to come forward based upon the holding in Mallory v. State, 261 Ga. 625 (1991).
- Holding: COA determined the officer's testimony did not comment on Defendant's pre-trial silence or failure to come forward. "The officer's testimony was limited to noting the inconsistencies between

[Defendant's] statements and his behavior. This does not violate Mallory."

- IMPORTANT NOTE: The COA further explained Mallory is probably no longer valid, since the new rules of evidence did not carry forward old rule OCGA 24-3-36. In footnote 3 of Hernandez v. State, 299 Ga. 796 (2016), the Georgia Supreme Court explained: "the holding in Mallory was based not on the Constitution, but on a provision of Georgia's old Evidence Code, OCGA 24-3-36…The new Evidence Code repealed OCGA 24-3-36, and we have repeatedly reserved decision on the continuing validity of Mallory.

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

DEFENDANT'S OUTBURST CAUSES HIS REMOVAL

Green v. State, --- Ga. --- - S16A1842 – GA Supreme Court – (Decided March 06, 2017)

- Judgment: (Affirmed)
- Defendant was initially found incompetent to stand trial for murder, but eventually a competency trial occurred and the jury found Defendant competent to stand trial. After this determination, Defendant was brought to trial for murder, where he asserted an insanity defense. During voir dire, Defendant made several outbursts. At one point, he stated he was committed to a hospital for the rest of his life, and that he was too dangerous to live in society. Another point he stated that he did not mind if they sent him to prison for the rest of his life. Each of these times, the Defendant was removed from the courtroom until he calmed down and voir dire continued in his absence. Defense counsel asked for a mistrial, but it was denied and the trial court instructed the jury to disregard the Defendant's outbursts.
- Holding: "Measures to be taken as a result of demonstrations and outbursts which occur during the course of trial are matters within the trial court's discretion unless a new trial is necessary to insure a fair trial." Faced with the Defendant's disruptive conduct, the trial judge admonished the Defendant several times to stop, warned him he would be removed if he did not, and was finally compelled to remove him when he began pronouncing that he was a danger to society. The court did not abuse its discretion and it was reasonable to have him removed due to the outburst.

- **ENTICING A CHILD FOR INDECENT PURPOSES**
  - **ATTEMPT**
    - *Smith v. State*, --- Ga. App. --- - A16A2120 – GA Court of Appeals– (Decided March 01, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with performing "an act constituting a substantial step toward the commission of said crime, [enticing a child for indecent purposes]…believed by said accused to be a child under 16 years of age…in violation of OCGA 16-6-5…"Defendant filed general and special demurrers claiming in part that the language "believed by said accused to be a child under 16 years of age" does not charge him with a crime, because the actual alleged victim was not a child and OCGA 16-6-5 requires the victim to be actually under the age of 16.
      - Holding: The COA agrees that a completed offense of OCGA 16-6-5 requires the victim to be actually under the age of 16. However, regardless that the Count in the indictment does not list the code section for criminal attempt, the language in the count actually charges *criminal attempt* under OCGA 16-4-1. "Thus, although Count 3 was entitled 'enticing a child for indecent purposes, OCGA 16-6-5,' the pertinent question before this Court is whether the indictment was sufficient to allege *an attempted* violation of OCGA 16-6-5. This Court has "repeatedly upheld convictions for attempted child sex crimes when the alleged victim was actually a law enforcement officer posing as a minor. Thus, the trial court did not err in denying [Defendant's] general demurrer to Count 3 of the indictment."

- **EXPERT WITNESS**
  - **OPINION TESTIMONY BASED UPON ANOTHER'S WORK-PRODUCT**
    - *Naji et al v. State*, --- Ga. --- - S16A1489 and S17A0503 – GA Supreme Court – (Decided March 06, 2017)
      - Judgment: (Affirmed)
      - Two Defendants are brothers and were convicted of murder. The medical examiner that performed the autopsy was out of the country when the trial took place. The State had another medical examiner review the original medical examiner's documents and reports. The new medical examiner was then presented at trial to give his own expert testimony concerning findings in the original medical examiner's report. The autopsy report was not tendered at trial. The new medical examiner explained that the reports were kept in the course of normal business and he had access to them and formed his own opinion.
      - Holding: Under former statute OCGA 24-9-67 (see important note below), in criminal cases, the opinion of experts on any question of

science shall always be admissible. Further, when forming his expert opinion, the expert may rely upon the data collected by another and personally observed or reviewed by the expert. The Court differentiated this case from Bullcoming v. New Mexico, 564 U.S. 647 (2011). In Bullcoming, the expert witness gave no independent expert opinion and merely attempted to recite that the blood alcohol test was done properly and was certified as accurate. The United States Supreme Court held that violated the confrontation clause. Here, the expert formed his own opinion and the original report was not admitted.

- IMPORTANT NOTE: This case was decided before the new rules of evidence, but in footnote 3, the Court explained the provisions of the former code OCGA 24-9-67 were carried forward in the new Evidence as OCGA 24-7-707 and 24-7-703.

HABITUTAL VIOLATOR

NOTICE

Clinton v. State, --- Ga. App. --- - A16A1606 – GA Court of Appeals– (Decided March 09, 2017)

- Judgment: (Reversed)
- Defendant was stopped for window tint violation and upon the officer checking Defendant's license and discovered three prior DUIs, Defendant was charged as a Habitual Violator. At a bench trial, Defendant stipulated to all the facts with the exception of receiving notice as a Habitual Violator. State presented at trial a signed document that presented "official notice of revocation/suspension" of defendant's license. The notice made no mention of Defendant as a Habitual Violator.
- Holding: The plain language of OCGA 40-5-58 requires the Defendant to have received notice of Habitual Violator status. Because the Defendant never received notice, he cannot be found guilty as Habitual Violator. "In sum, when a driver qualifies as a "habitual violator" under OCGA 40-5-58(a), the State must show that it provided notice to the driver of his status as such before it can obtain a conviction for either the misdemeanor of driving while a habitual violator or the felony of "habitual impaired driving."

HEARSAY

UNAVAILABLE WITNESS – PRIOR CROSS EXAMINATION

Bolling v. State, --- Ga. --- - S16A1674 – GA Supreme Court – (Decided March 06, 2017)

- Judgment: (Affirmed, no abuse of discretion)
- Defendant was charged with murder and various other crimes. At Defendant's first trial, his co-defendant testified against him as part of a

plea deal. During this first trial, Defendant claimed co-defendant had a motive to lie, because he was facing 20 years prison and received probation. After this testimony, the State introduced the initial police interview of the co-defendant as a prior consistent statement. This first trial, the jury was hung and the Court declared a mistrial. After the trial, the co-defendant moved out of state and could not be located. State's investigator gave a proffer about attempting to locating the co-defendant including reaching out to his probation officer, his girlfriend, his mother and various other addresses. He could not be located, and the State sought to introduce the co-defendant's statements based upon OCGA 24-8-804(b)(1) as an unavailable witness. Defendant claimed the State did not exhaust all reasonable means in locating the witness.

- Holding: "To establish that a witness is unavailable under Rule 804…, the proponent must show that reasonable, good-faith efforts to locate the witness were made. See United States v. Siddiqui, 235 F.3d 1318, 1324 (11th Cir. 2000)." The State's investigator made reasonable efforts to locate the witness, by explaining the various attempts to locate the witness. "Under these circumstances, the trial court did not abuse its discretion in admitting [the co-defendant's] prior trial testimony after concluding that the State made a reasonable effort to locate him."

INDEPENDENT CRIMES AND ACTS

INTENT

- *Johnson v. State*, --- Ga. App. --- - A16A1844 – GA Court of Appeals – (Decided March 01, 2017)
  - Judgment: (Affirmed)
  - Defendant was found guilty of armed robbery and various other charges for robbing a bank. The trial court allowed testimony concerning two prior incidents: the first, involved a road rage incident where witnesses testified the Defendant pulled a gun on them in traffic; the second involved Defendant pulling a gun and demanding money. The trial court allowed the State to present this evidence pursuant to OCGA 24-4-404(b). Defendant objected
  - Holding: When determining if prior acts should be admitted, the courts look toward a three prong test, which was outlined in Bradshaw v. State, 296 Ga. 650, 656 (2015). This test includes: (1) the evidence must be relevant to an issue other than defendant's character; (2) the probative value must not be substantially outweighed by undue prejudice; and (3) the government must offer sufficient proof so that the jury could find that defendant committed the act. The COA determined that under prong one, the other acts both involved the same intent as required to prove intent in the current case. As to the second prong, "the other acts

evidence was probative of the issue of [Defendant's] intent and given the circumstances of this case, the trial court did not abuse his discretion in balancing the other acts probative value against its prejudicial effect." The third prong, there were eyewitnesses and photographic lineups which the court could find by the preponderance of the evidence that Defendant committed the acts. Thus, the trial court did not abuse its discretion.

- **REMOTE IN TIME**
  - *Harris v. State*, --- Ga. App. --- - A16A2041 – GA Court of Appeals – (Decided March 16, 2017)
    - Judgment: (Affirmed)
    - Defendant was charged with several counts of child molestation concerning acts against his grandchildren. The trial court allowed his sister to testify concerning acts committed against her 44 years prior when they were children, where Defendant was alleged to have pulled down her pants and tried to have sex with her when they were kids. Defendant objected based upon relevance and remoteness in time.
    - Holding: "Exclusion of proof of other acts that are too remote in time caters principally to the dual concerns for relevance and reliability. The evaluation of the proffered evidence in light of these concerns must be made on a case-by-case basis to determine whether the significance of the prior acts has become too attenuated and whether the memories of the witness has likely become too frail. Neither Rule 403 nor any analogous Rule provides any bright-line rule as to how old is too old." The COA explained that even though the sister's testimony was remote in time, the trial court did not abuse its discretion. Thus affirmed the decision.

INEFFECTIVE ASSISTANCE OF COUNSEL

- **INSANITY OR DELUSIONAL COMPLUSION DEFENSE – FAILURE TO INVESTIGATE OR RAISE A DEFENSE**
  - *Shaw v. State*, --- Ga. App. --- - A16A2019 – GA Court of Appeals – (Decided March 15, 2017)
    - Judgment: (Reversed)
    - Defendant was charged with aggravated battery. Prior to trial, there was evidence presented to Defense Counsel that Defendant suffered from mental issues including PTSD and turrets. Defense counsel explained at the motion for new trial that he was aware of these issues, but in his speaking with the Defendant, he believed the Defendant could understand "right from wrong". Defendant did not consult with psychologist to determine Defendant's mental health and how it might affect his trial. State raised concerns prior to trial that Defendant might

not be sane and stated the Defense has presented no notice that they might rely upon a defense of mental deficiencies. Defense counsel explained they were not raising that as a defense. At the motion for new trial, a psychologist testified that Defendant's mental issues could have affected his thinking and primarily he should have raided delusional compulsion as a defense. Trial counsel again gave no reasoning for failing to raise this defense other than in his mind, Defendant knew right from wrong.

- Holding: "Here, we conclude that [Defendant's] trial counsel's performance was deficient in that he either seriously mishandled an attempt to assert a defense of delusional compulsion or made an unreasonable decision not to investigate the possibility of asserting that defense." The COA further explained that trial counsel did not understand the defense of delusional compulsion and made no attempts to research the possibilities of raising such a defense. As to whether there could be any trial strategy employed for not raising such a defense, the COA stated there could not be. In particular, trial counsel was not aware of the defense of delusional compulsion and the as the Georgia Supreme Court pointed out, "Where a condition may not be visible to a layman, counsel cannot depend on his or her own evaluation of someone's sanity once he has reason to believe an investigation is warranted."

- **VARIOUS ISSUES**
  - *Tran v. State*, --- Ga. App. --- - A16A1654 – GA Court of Appeals– (Decided March 08, 2017)
    - Judgment: (Reversed)
    - Defendant was charged and found guilty of various charges of armed robbery. In his appeal, Defendant claims his attorney was ineffective in several various ways. (1) Defendant did not request a jury charge on his sole defense, because the attorney believed "the judge would give pattern charges and he no longer requests jury charges because his requests are never granted." (2) Defense counsel failed to object to the prosecution's statements during cross-examination concerning Defendant's pre-trial silence. (3) Defense counsel failed to object to hearsay statements concerning police records in an agency that the witness officer did not work. (4) Defense counsel failed to object to the State's impeachment of Defendant with evidence that the Defendant had no knowledge. (5) Defense counsel opened the door to damaging testimony.
    - Holding: First, it must be pointed out that the COA did not find trial counsel ineffective in regards to all these issues, primarily not because of deficient performance but because the issue was not proper for other

reasons. However, I believe the COA still took all these issues into consideration when reversing the convictions; primarily because the trial attorney continued to state the trial just went very fast and gave no reasonable explanation for not objecting. "We now determine if trial counsel's deficiencies prejudiced the defense, and in doing so, we must consider the combined effect of all of counsel's errors…In making this determination, we must consider the totality of the evidence before the judge or jury." Thus, the combined errors led to the conclusion that Defendant was able to show prejudice in order to prevail on his ineffective claim.

- **JURY DELIBERATIONS**
  - **NO IMPEACHMENT EXCEPTION - RACE**
    - *Pena-Rodriguez v. Colorado*, --- U.S. --- - No. 15-606 – United States Supreme Court – (Decided March 06, 2017)
      - Judgment: (Reversed)
      - Defendant was Mexican descent. He was charged with an attempted sexual assault, harassment and unlawful sexual contact. Defendant was found guilty of the two lesser counts of harassment and unlawful contact. At the conclusion of the trial, two jurors stayed behind and spoke with defense counsel. The two jurors explained that one of the jurors made inappropriate comments during deliberations. Specifically they stated the juror said Mexican men are more proned to commit acts of violence against females. That Mexican men feel they are entitled and feel they can do what they want to woman. He further stated, "I think he did it because he's Mexican and Mexican men take whatever they want." Defense counsel had the jurors write affidavits and requested the Trial Court set aside the verdict. Colorado has a rule 606(b), which is similar to our OCGA 24-6-606(b) that forbids disturbing the verdict. It is called the "no impeachment rule".
      - Holding: OCGA 24-6-606(b) is the Georgia version of the no impeachment rule. Under this rule, the juror cannot be impeached with statements made during deliberations. The SCOTUS carved out an exception to the no impeachment rule in this decision based upon a showing that a juror's overt racism led to a verdict. SCOTUS stated, "it must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." SCOTUS further stated, "For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to

consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."

- DISSENTING OPINION OF JUSTICE THOMAS AND JUSTICE ALITO: Both Justices wrote separate dissents and both explaining basically that the constitution does not allow the judicial branch to create laws. Several states have had their legislatures carve out a similar exception to the one announced in the majority opinion, but it was left to the states to decide that for themselves. The constitution does not allow the judicial branch to create a single law that covers all the states.
- IMPORTANT NOTE: Always try to speak with your jurors after the trial and see if any improper comments were made. However, keep in mind that you cannot harass the jurors. Additionally, as with this case, the improper statements must go beyond just mere racially motivated comments. They must show a clear showing that the racial bias led to the juror's verdict.

JURY INSTRUCTIONS

PLAIN ERROR – FAILURE TO CHARGE AN ESSENTIAL ELEMENT OF THE OFFENSE

✪ *Shaw v. State*, --- Ga. App. --- - A16A2019 – GA Court of Appeals – (Decided March 15, 2017)

- Judgment: (Reversed)
- Defendant was charged with aggravated battery. Trial court charged the jury on battery and aggravated battery. When charging battery, the trial court failed to state "substantial" when describing the physical harm required to sustain a conviction. When the jury sent a note asking the judge to further explain the difference between battery and aggravated batter, the trial court defined simple battery and aggravated batter and again failed to correct the prior error of defining "substantial" physical harm.
- Holding: "Failure to inform the jury of an essential element of the crime charged is reversible error because the jury is left without appropriate guidelines for reaching its verdict. The court again erred in the recharge by failing to recognize that the jury was confused about the various forms of battery, by failing to correct the original error in the definition of battery, and by charging on simple battery, which was not an issue in the case.

SPOILATION OF EVIDENCE

✪ *Sachtjen v. State*, --- Ga. App. --- - A16A1863 – GA Court of Appeals – (Decided March 09, 2017)

- Judgment: (Affirmed)

- Defendant was stopped and eventually charged with DUI. After the stop, the police officer started his body camera and audio recording device. Once the Defendant was placed in the police car, the audio portion of the video stopped working. At trial, Defendant requested a jury charge on spoliation similar to what is used in civil matters. In particular, Defendant requested, "If you find from the evidence that a videotape recording was made of the traffic stop and roadside investigation in this case, and that the police failed to preserve all or a part of the tape recording, I instruct you to presume that the tape, had you been able to view it, would have been favorable to the defendant." Jury trial refused to give the charge and Defendant appealed.
- Holding: COA stated that there was no evidence that ever existed that the State failed to preserve. This case is different from a case where the State actually obtained evidence and failed to preserve it. Here the audio recording never existed. "Because the record does not support the giving of any charge as to the failure to preserve evidence that never came into existence, the trial court did not abuse its discretion in failing to give [Defendant's] requested charge."
- IMPORTANT NOTE: The Court determined the State actually never possessed the audio recording so there is nothing for them to have lost. However, in cases where the State actually possesses the evidence and loses it, I would start requesting this jury charge. Just know, the COA stated, "[Defendant] concedes, moreover, we have not seen any Georgia law suggesting that a spoliation presumption could apply to criminal proceedings." Thus Defendant has failed to show trial counsel has abused its discretion. I take this to mean that it is in the trial court's discretion and there are no rulings to suggest it is improper.

JUVENILE DELINQUENCY PETITION

30 DAY TIME PERIOD

In the Interest of J.F. a child, --- Ga. --- - S16Q1826 – GA Supreme Court – (Decided March 06, 2017)

- Judgment: (Refused to give an opinion)
- This issue was recently decided in In the Interest of M.D.H. et al., --- Ga. --- S16G0428 – (Decided October 31, 2016) So the Court refused to readdress the issue. However this case came to the Georgia Supreme Court by way of the Court of Appeals issuing an unprecedented Order, whereby they requested the Supreme Court to decide the case for them. The Supreme Court had already granted cert in the prior case, and the two-term time limit was running out on this case. So the COA asked the Supreme Court to decide this case when they decided the other case, which all the cases were concerning the same issue, what happens if the

State fails to file a delinquency within 30 days of the juvenile's release. Court decided the case was dismissed *without prejudice*.

- Holding: I summarized this case merely because I had previously summarized the Court of Appeals decision whereby they asked for the extraordinary Order for the Supreme Court to make their decision for them. The Court refuses to carve out an exception to make a ruling for the Court of Appeals. "When the Court of Appeals is faced with a question that also may be decided by this Court, if that court cannot certify the question in accordance with our precedents and cannot delay its decision because of its obligations to decide appeals within two terms of court…the court should simply decide its case as best it can."

MERGER

FLEEIING – FELONY WITH OTHER FLEEING DURING SAME COURSE OF CONDUCT

Gibbs v. State, --- Ga. App. --- - A16A2229 – GA Court of Appeals – (Decided March 14, 2017)

- Judgment: (Reversed)
- Defendant was charged and eventually convicted for two different counts of felony fleeing in relation to fleeing from police officers. The two counts very only in one count charged Defendant with colliding with a police officer's car and the other count charged Defendant for placing the general public at risk of receiving serious injuries. Based upon the language in OCGA 40-6-395 and prior case law, the trial court did not merge the offenses. COA now reversed based upon recent Supreme Court decision in Smith v. State, 290 Ga. 768 (2012).
- Holding: The State and trial court relied upon Michael v. State, 281 Ga. App. 289 (2006) to decide that the merger is not appropriate. COA now disapproves the holding in Michael based upon Georgia Supreme Court holding in Smith v. State, 290 Ga. 768 (2012). The COA explained, "whether a course of conduct can result in multiple violations of a single statute, the proper focus is the unit of prosecution and that the unit of prosecution under OCGA 40-6-395 is the act of fleeing from an individual police vehicle or police officer after being given proper visual or audible signal to stop form the individual police vehicle or officer." Michael has thus been overruled as it pertains to this issue.

MURDER AND AGGRAVATED ASSAULT

Johnson v. State, --- Ga. --- - S16A1514 – GA Supreme Court – (Decided March 06, 2017)

- Judgment: (Reversed)
- Defendant was found guilty of murder and aggravated assault. Both offenses occurred on the same victim and the medical examiner testified

that the decedent was stabbed several times around the head and he could not give an opinion as to which blow came first. Defendant was sentenced as to both counts and they were not merged.

- Holding: "OCGA 16-1-7(a)(1) prohibits a defendant from being convicted of more than one crime if one crime is included in another, and aggravated assault is included in the crime of malice murder when the former is established by proof of the same or less than all the facts." The Court did explain that separate convictions for malice murder and aggravated assault of a single victim might be permitted if there is evidence of a "deliberate interval" separating the infliction of an initial non-fatal injury from the infliction of a subsequent fatal injury. However there is no evidence of any deliberate interval in the facts.

➢ MONEY LAUNDERING

✪ *Akintoye v. State*, --- Ga. App. --- - A16A1625 – GA Court of Appeals– (Decided February 06, 2017)

- Judgment: (Affirmed)
- Defendant was charged with several offenses including money laundering, where he and another individual would scam elderly individuals to wire him money for various reasons. Defendant was eventually convicted of the offenses including the money laundering count. Defendant appeals claiming the evidence was insufficient to support the conviction.
- Holding: This was a case of first impression. Neither the COA nor the Georgia Supreme Court has addressed the sufficiency of evidence in terms of money laundering. There are four elements that the State must prove: (1) knowledge that the funds involved in a currency transaction represented the proceeds of unlawful activity; (2) Conducting or attempting to conduct a transaction which involves the proceeds of the specified unlawful activity; (3) Using the funds or proceeds from the specified unlawful activity; and (4) Acting with the intent to promote the carrying on of the specified unlawful activity. COA determined that the evidence presented at trial met all four elements.
- CONCURRING OPINION, Judge McMillian: "While I concur with the result reached by the majority in this case, I do not agree with all that is said. Accordingly, I concur in the judgment only and as a result, the majority's opinion is not binding precedent."

- **PRIOR CONSISTENT STATEMENT**
  - **RECENT FABRICATION TO LIE**
    - *Bolling v. State*, --- Ga. --- - S16A1674 – GA Supreme Court – (Decided March 06, 2017)
      - Judgment: (Affirmed, no abuse of discretion)
      - Defendant was charged with murder and various other crimes. At Defendant's first trial, his co-defendant testified against him as part of a plea deal. During this first trial, Defendant elicited testimony that the co-defendant was facing 20 years prison, yet he received probation. The State then played the co-defendant initial interview with the officers where he gave consistent testimony. Defendant argued that merely asking the co-defendant about his plea deal was a general attack on his credibility and not to show recent fabrication. The trial court allowed the State to play the initial interview. This first trial ended with a hung jury, mistrial. At the second trial, the trial court again allowed the State to present this prior consistent statement based upon OCGA 24-8-804(b)(1).
      - Holding: "By asking [the co-defendant] about agreeing to testify as part of his plea deal in order to avoid facing 20 years in prison, [Defendant] was clearly suggesting that [co-defendant's] motivation for testifying was to receive the benefit of the State's plea offer…[His] videotaped statements predated the alleged improper motive, as he gave the statements before the State made the plea offer." Therefore the trial court did not abuse its discretion.

- **RECUSAL OF THE JUDGE**
  - **JUDGE UNDER INVESTIGATION FOR TAKING BRIBES**
    - *Rippo v. Baker*, --- U.S. --- - No. 16-6316 – United States Supreme Court – (Decided March 06, 2017)
      - Judgment: (Granted Certiorari and Remanded)
      - Defendant filed a petition for writ of certiorari to the Supreme Court of Nevada. Defendant was found guilty of murder and sentenced to death. During the trial, Defendant learned that the trial judge was under federal investigation for taking bribes. Defendant sought to have the judge recused, but the judge denied the request without a hearing. The Nevada Supreme Court affirmed the decision because the Defendant had failed to show the judge was actually biased in this case.
      - Holding: "Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." The Court does not require a showing of actual bias on the part of the judge. The question that must be asked: "whether, considering all the circumstances alleged, the risk

of bias was too high to be constitutionally tolerable." Because the Nevada Supreme Court did not inquire into that question, the case is remanded with direction.

- **SEARCH AND SEIZURE**
  - **OFFICER'S GOOD FAITH BELIEF**
    - *Toole v. State*, --- Ga. App. --- - A16A1491 – GA Court of Appeals – (Decided March 10, 2017)
      - Judgment: (Affirmed)
      - Officer observed Defendant driving a vehicle in the left most lane of a three-lane highway in a manner that appeared to be holding up traffic. Officer slowed his car and when the Defendant eventually passed him, the officer testified that the Defendant appeared to be traveling about 68 mph in a 70 mph zone. Officer eventually pulled Defendant over and wrote a ticket for violation of OCGA 40-6-40(b) for failing to move to the right of the roadway and driving without a license. A search of the vehicle revealed drug related object and small amount of marijuana. Defendant sought to suppress this evidence due to improper stop. Trial Court determined even though the Defendant committed no criminal violation prior to being pulled over, the officer had a good faith basis that a traffic violation had occurred, when denying the motion to suppress.
      - Holding: "For a traffic stop to be valid, an officer must identify specific and articulable facts that provide a reasonable suspicion that the individual being stopped is engaged in criminal activity…A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing." The COA further explained an officer's good faith belief that a traffic offense has occurred would not be deemed improper by a later determination that the defendant's actions were not technically illegal in the face of the law. The COA did not decide the issue on whether it was actually a violation of the law to where someone can be detained for traveling in the left most lane at a slower rate of speed and impeding traffic.

- **SEXUAL BATTERY**
  - **CONSENT IS AN ESSENTIAL ELEMENT**
    - *Aguilar v. State*, --- Ga. App. --- - A16A1893 – GA Court of Appeals – (Decided March 07, 2017)
      - Judgment: (Reversed)
      - Defendant was found guilty of cruelty to children in the first degree and two counts of sexual battery, which were lesser-included offenses of aggravated child molestation. Defendant asked for the lesser-included

offenses and was granted. The trial court prior to giving the jury charge asked Defendant if consent was an issue and the Defense attorney stated "no". The Trial Court gave the following instruction: "a person commits sexual battery when that person intentionally makes physical contact with the anus or buttocks of a child under the age of 16."

- Holding: "This jury instruction wholly failed to charge the essential element of the crime of sexual battery – lack of consent to the touching. Moreover, because this crime was a lesser-included charge to the indicted crimes of aggravated child molestation, the trial court's earlier reading of the indictment could not save this instruction as to this essential element." Because the court's instruction constituted plain error, the judgment is reversed as to the two counts of sexual battery.

SEX OFFENDER REGISTRY

PARDON RELINQUISHES REGISTRY REQUIREMENT

- *Davis v. State*, --- Ga. App. --- - A16A1650 – GA Court of Appeals – (Decided March 10, 2017)
  - Judgment: (Reversed)
  - Defendant was convicted of aggravated sodomy in 1995 and required to register as a sex offender. At the conclusion of Defendant's sentence and after he completed his probation, Defendant applied for a pardon and eventually granted. The pardon stated all disabilities under Georgia law are removed and further ordered that all his rights were restored with the exception of possessing a firearm. After receiving the pardon, Defendant moved out of state without letting the sheriff know. Defendant was eventually charged with failing to register as a sex offender. Defendant filed a demurrer, at which the trial court denied. COA now reverses.
  - Holding: The COA was faced with the question as to whether registering as a sex offender is a legal disability that the Board of Pardons and Parole has the ability to remove. The COA determined it was, when it stated, "the requirement that [Defendant] register as sex offender constitutes a legal disability that the Board's pardon obviated, and we are constrained to conclude that it is a disability and that the trial court erred in holding otherwise." They likened this to similarly the Board's ability to restore gun ownership rights. Because the Board knows how to continue to require a defendant from possessing a gun, if they had desired, they could also continue a defendant to register as a sex offender. They chose not to do so, and the COA will not disturb their ruling.

- **SPECIAL DEMURRER**
  - **CHILD PORNOGRAPHY**
    - *Smith v. State*, --- Ga. App. --- - A16A2120 – GA Court of Appeals– (Decided March 01, 2017)
      - Judgment: (Reversed)
      - Defendant was charged with the offense of computer child pornography in violation of OCGA 16-12-100.2. The Count in the indictment tract the language in the statute in that it charged Defendant with utilizing a computer to attempt to seduce, lure and entice another person…under the age of 16…to engage in *conduct that by its nature is an unlawful sexual offense against a child* in violation of Code Section of 16-12-100.2. Defendant filed a special demurrer claiming the indictment was not definitive enough, because it failed to explain what the "conduct that by its nature is an unlawful sexual offense" was. COA agrees with the Defendant.
      - Holding: "An indictment is sufficient to withstand a special demurrer if it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense." The COA further explained, "while the indictment tracked the relevant statutory language, it might also operate to bestow upon the jury the power to create and then retroactively enforce an 'unlawful sexual offense' based solely on its feelings, or its beliefs regarding how the community would feel, about [Defendant's] conduct." In essence, because the indictment did not state what the "unlawful sexual offense" was, the indictment was flawed and Defendant's special demurrer should have been granted.

- **STATUTE OF LIMITATIONS**
  - **TOLLING**
    - *State v. Watson*, --- Ga. App. --- - A16A2073 – GA Court of Appeals – (Decided March 10, 2017)
      - Judgment: (Affirmed)
      - In 1996, the complaining witness claimed she met a guy, who gave her his name and phone number, but she could not remember them. After car trouble, she eventually went to his apartment, where she was raped at gun point. Once she was eventually released and notified the police, she described his apartment but could not relocate the apartment where it occurred. In 2013, a cold-hit on DNA came back a match to Defendant and he was subsequently charged. Defendant filed a plea in bar, claiming the Statute of Limitations has run. Trial Court agreed and stated the tolling provisions did not apply because the complaining

witness knew the Defendant's identity because she had his phone number, name, and place where he lived.

- Holding: "Our Supreme Court has explained that the General Assembly intended for the 'person unknown' tolling exception to apply to a situation…where there is no identified suspect among the universe of all potential suspects…Although the knowledge of a victim is imputed to the State, that knowledge must be *actual* knowledge." In the case at bar, the trial court did not abuse its discretion in ruling the complaining witness had actual knowledge, because she had his name, phone number, and address. The complaining witness' credibility was also taken into consideration, when she claimed she could not remember those things.

VOIR DIRE

EXCUSING THE JURY PANEL

Johnson v. State, --- Ga. App. --- - A16A1844 – GA Court of Appeals – (Decided March 01, 2017)

- Judgment: (Affirmed)
- Defendant was found guilty of armed robbery and various other charges for robbing a bank. During voir dire, a potential juror stated after hearing the indictment that he had heard enough and he had made up his mind. The State attempted to rehabilitate the potential juror, and the juror explained, if there was an eyewitness, he could not be impartial. Throughout this rehabilitation process, the juror continued to speculate about what the evidence would be and stated he believed he was guilty. Trial court eventually excused the potential juror for cause. Defense sought to excuse the entire panel, but the trial court denied this request.
- Holding: "In determining whether a trial court is required to excuse a jury panel for remarks made during voir dire, the inquiry is whether the remarks were inherently prejudicial and deprived [Defendant] of his right to begin his trial with a jury free from even a suspicion of prejudgment or fixed opinion. If so, then the trial court's failure to excuse the panel constitutes an abuse of discretion." However, dismissal of the panel is not required when the statements establish only possibilities of prejudice. In the case at bar, the potential juror only speculated as to what the evidence might show based upon the indictment while being reminded repeatedly by the trial court that there was no evidence presented. Accordingly, the potential juror's statements provided no ground for disqualifying the entire panel of potential jurors.

INDEX OF CASES SUMMARIZED