CASE LAW SUMMARIES

MAY 2017

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- **ADMISSIONS AND CONFESSIONS**
  - **STATE HAS BURDEN OF PROOF**
    - *Welbon v. State*, --- Ga. --- - S17A0359 – GA Supreme Court – (Decided May 01, 2017)
      - Judgment: (Reversed and Remanded)
      - Defendant was found guilty of murder. At trial, defendant moved to suppress his taped statements to the police investigators. A *Jackson-Denno* hearing was held and the trial court allowed the statements at trial. The trial court Ordered after the Motion for New Trial, that the Defendant failed to carry his burden. Specifically, the trial court stated, "In a Jackson-Denno hearing the defendant must prove by a totality of the circumstances that his statements were involuntarily made. At the Jackson-Denno hearing in the instant case, this Court held that [Defendant] had not carried his burden…"
      - Holding: Goes without saying, but the State has the burden of proof of showing an admission or confession was voluntarily made. "Here, the trial court's statements show that it proceeded under the premise that [Defendant] bore the burden of proof on the issue of voluntariness. But this burden rests with the State…Where the trial court has used a wrong standard in reaching its conclusion, a remand may be appropriate where legitimate factual issues are raised."

- **APPELLATE ISSUES**
  - **DELAY IN FILING APPEAL**
    - *Veal v. State*, --- Ga. --- - S17A0255 – GA Supreme Court – (Decided May 15, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged and convicted with a murder and an armed robbery of a bank in 1998. There was a timely notice for new trial filed, but not supplemented until 2014 and 2015. In 2016, new counsel for the Defendant filed a supplemental motion for new trial and requested a continuance. The Court applied constitutional speedy trial factors, when considering if any length of delay harmed the defendant's due process.
      - Holding: "Substantial delays in the appellate process implicate due process rights, and review appellate due process claims under the four-factor analysis used for speedy trial claims set forth in Barker v. Wingo, 407 U.S. 514 (1972)." The factors include: (1) length of delay; (2) reason for the delay; (3) defendant's assertion of his right; and (4) prejudice to the defendant. Even assuming that the first three weigh in favor of the Defendant, the Defendant has failed show how he was harmed based upon delay. In essence, the Defendant has pointed to instances of how

he was harmed regardless of his attorney and the judge have become deceased.

- **TRIAL COURT FAILED TO MAKE EXPRESS FINDINGS OF FACTS**
  - *Williams v. State*, --- Ga. --- - S16G1162 – GA Supreme Court – (Decided May 01, 2017)
    - Judgment: (Remanded)
    - Defendant was stopped by police officer and had a conversation. At some point, Defendant fled and Defendant was arrested for obstruction. Upon being taken to the police station, Defendant ultimately confessed to a burglary. Defendant moved to suppress his statements, claiming he had a right to flee. Trial Court agreed and suppressed the statements. In the trial court's Order, the judge failed to make any particular findings of fact other than Defendant fled a first tier encounter and had a right to flee. State appealed and the Court of Appeals reversed. The Court of Appeals found additional facts that were not referenced by the trial court in its ruling on the motion to suppress. GA Supreme Court states that was error and remands back to the trial court.
    - Holding: "If the trial court has made express findings of fact, but not with sufficient detail to permit meaningful appellate review, an appellate court may remand for further findings. In this case, the trial court made almost no express findings of fact. Given the uncertainty in the trial court's order regarding the basis for its ruling, this Court must vacate the opinion of the Court of Appeals and remand for the Court of Appeals to remand this case to the trial court for further clarification on the specific findings that form the basis for its legal conclusion with regard to [Defendant's] motion to suppress."

COMPETENCY TO STAND TRIAL

- **INVOLUNTARILY MEDICATED**
  - *Johnson v. State*, --- Ga. App. --- - A17A0611 and A17A0783 – GA Court of Appeals – (Decided May 15, 2017)
    - Judgment: (Vacated and Remanded)
    - Defendant was charged with armed robbery. Defense counsel filed a competency evaluation and the doctors determined he was not competent to stand trial. After attempting to have the Defendant go through an in jail restoration program within the Fulton County Jail, the Defendant eventually stopped taking all medication and refused to participate. A Sell hearing was conducted, where two witnesses testified, but neither witness could testify about a treatment plan other than medication would probably help. Trial Court issued an initial Order and then a revised Order requiring the Defendant to be medicated. Defendant appealed.

- Holding: Sell v. United States, 539 U.S. 166 (2003) requires a four-factor test in order to involuntarily medicate an individual. The test includes and the State must prove: (1) an important governmental interests are at stake; (2) involuntary medication will significantly further those government interests; (3) involuntary medication is necessary to further those governmental interests; and (4) the administration of the drugs to be used is medically appropriate for the defendant. The record fails to show, what medication and what dosage would be needed to get the Defendant back to competency; fails to show how long the Defendant would need to take it; and whether there is any other less invasive plans to get Defendant back to competency. As such, the State has failed to carry their burden under Sell and thus the Trial Court's Orders are vacated and the case is remanded back to the trial court to properly consider the four factors.

➢ COURT RECORDS

● OBTAINING THE COURT REPORTER'S AUDIO RECORDING

✪ *The Merchant Law Firm, P.C. v. Emerson, Judge et al.*, --- Ga. --- - S17A0039 – GA Supreme Court – (Decided May 30, 2017)

- Judgment: (Affirmed)
- Plaintiff attempted to obtain a court order requiring the Court's Reporter to turn over her audio recording of the proceedings. Plaintiff claimed the transcripts would not show the context of the Court's interaction with the Plaintiff and wanted to supplement the record with the audio recording. The trial judge denied the request and the Plaintiff filed a complaint seeking mandamus, injunctive relief, and a declaratory judgment in an attempt to copy the recordings. The trial court again dismissed the complaint and the Supreme Court now affirms.
- Holding: Both mandamus and injunctive relief requires that no other relief is available. Because Rule 21 allows appropriate relief, the Plaintiff's request for mandamus and injunctive relief is not available. "Because the common law right of access applied to court records in criminal cases, the right of access to court records preserved by Rule 21 (and thus right of appeal from orders denying that access) applies to court records in criminal cases." The Court explained the Plaintiff had standing to appeal the trial court's decision under Rule 21 and should have exhausted that route.

- **DEMURRER**
  - **GENERAL DEMURRER**
    - *Jackson v. State*, --- Ga. --- - S16G0888 – GA Supreme Court– (Decided May 15, 2017)
      - Judgment: (Reversed)
      - Defendant was placed on the sex offender registry. In 2011 he moved from his address without notifying the sheriff and was charged with failure to register as a sex offender. The indictment merely alleged he failed to register his new address within 72 hours of his change of address as required by OCGA 42-1-12. During the trial, Defendant filed a general demurrer to the indictment, claiming the indictment failed to charge him with a crime. The trial court denied the general demurrer and the Court of Appeals affirmed, relying upon prior holdings in State v. Shabazz, 291 Ga. App. 751 (2008) and State v. Howell, 194 Ga. App. 594 (1990). Supreme Court granted cert and now reverses.
      - Holding: "An indictment that alleges the accused violated a certain statute, without more, would simply state a legal conclusion regarding guilt, and not an allegation of facts from which the grand jury determined probably cause of guilt was shown. A valid indictment '[uses] the language of the statute, including the essential elements of the offense, and [is] sufficiently definite to advise [the Defendant] of what he must be prepared to confront." The Court went on to state, "to withstand a general demurrer, an indictment must: (1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish violation of a criminal statute." In so doing, the Court overrules the holding in Shabazz and Howell in that they hold otherwise. Because the indictment in this case failed to allege specific acts explaining exactly how the Defendant failed to register his address, the indictment is fatally flawed.

- **DOUBLE JEOPARDY**
  - *Millsaps v. State*, --- Ga. App. --- - A17A0592 – GA Court of Appeals – (Decided May 08, 2017)
    - Judgment: (Affirmed)
    - Defendant fled from police traveling through Bartow County. In the process, he also traveled through the city of Emerson, which is in Bartow County. The city of Emerson charged him with misdemeanor city violations of fleeing and reckless conduct. Defendant pled guilty to those charges. Subsequently, Bartow County DA filed an accusation in Superior Court charging Defendant with felony fleeing and reckless conduct. Defendant filed a plea in bar for double jeopardy, but the trial court denied his motion based primarily on the fact that the prosecutor

in the municipal court of the city of Emerson had no knowledge of the other acts. He now appeals.

- Holding: The record only includes the citations issued in Municipal Court which make no reference to any actions occurring outside the city of limits of Emerson and the prosecuting attorney who stated the only information that he is given is what is included on the citations, which again make no reference to any other crimes. The COA determined there was no evidence that the municipal court prosecutor had any knowledge of any criminal conduct occurring outside the city limits of Emerson.
- IMPORTANT NOTE*:* In future cases, it may be more prudent for the Defendant to state in open court while pleading to the misdemeanor charges, that there are other charges pending or further charges likely to be charged, so as to place the prosecutor on notice of the other conduct.

- PRE-TRIAL INTERVENTION PROGRAM – JEOPARDY DOES NOT ATTACH
  - *Palmer et al. v. State*, --- Ga. App. --- - A17A0428 and A17A0429 – GA Court of Appeals (Decided May 18, 2017)
    - Judgment: (Affirmed)
    - Two co-defendants took a pecan trailer in Calhoun County and unloaded the trailer in Irwin County. The two defendants entered a pre-trial intervention program for theft by receiving stolen property in Irwin County, which required them to pay a $1,000 fine and serve 2 years in compliance in the program. They paid the fine and had completed a year of the program, when Calhoun County returned an indictment for theft by taking. Defendants filed a plea in bar claiming double jeopardy in that they have already been punished for the same acts in Irwin County. Trial Court denied the motion.
    - Holding: Defendants were not barred from prosecution in Calhoun County by their decision to enter into a pretrial intervention program in lieu of prosecution in Irwin County. Because the Defendants "were not actually *prosecuted* in Irwin County, jeopardy did not attach.

DRIVING UNDER THE INFLUENCE

- **INDEPENDENT BLOOD TEST**
  - *Hynes v. State*, --- Ga. App. --- - A17A0633 – GA Court of Appeals – (Decided May 31, 2017)
    - Judgment: (Affirmed)
    - Defendant was stopped for suspicion of driving under the influence. Defendant refused a blood test after being read Georgia's Implied Consent but stated he would do an independent test. There is debate about whether he actually refused or requested an independent test.

Nonetheless, the Deputy went ahead and got a search warrant and forced Defendant to set for a State administered blood test. Defendant moved to suppress the blood test, because he was denied the right to have an independent blood test pursuant to OCGA 40-6-392(a)(3).

- Holding: "If the General Assembly had intended OCGA 40-6-392 to grant a DUI suspect the right to an independent test after an officer obtains a search warrant for a chemical test, it could have expressly provided that right. Instead, in the statutory text, our General Assembly used an independent test as an incentive for a DUI suspect to submit to the required State test under implied consent." Thus the right to independent test is only available to the individual who submits to the state-administered test under implied consent.

GUILTY PLEA

WITHDRAWAL

Oubre, Warden v. Woldemichael, --- Ga. --- - S17A0656 – GA Supreme Court – (Decided May 30, 2017)

- Judgment: (Affirmed, but remanded)
- Juvenile Defendant was charged with armed robbery and other crimes. Client pled guilty to a non-negotiated and was sentenced to 45 years with 20 years to serve. Defendant filed a Habeas and moved to withdraw his guilty plea based upon ineffective assistance of counsel. Defendant claimed he would have proceeded to trial had he been given adequate advice that his custodial statement to police would have been suppressed at trial. While the Defendant was in custody, police never contacted his parents and did not originally give Defendant his Miranda Rights. They then encouraged the Defendant to confess and the judge would take that into consideration in deciding how much time he would receive and what charges he would face. At one point, the investigators brought in a co-defendant and allowed them to talk amongst themselves, stating, they needed to get on the same page. Afterwards, the Defendant makes several confessions. The Habeas Court agreed with the Defendant that the custodial statement would have been considered involuntarily obtained and granted his motion to withdraw his guilty plea. The State appealed.
- Holding: Because the Defendant was a juvenile, the Court analyzed the Riley v. State, 237 Ga. 124 (1976) factors and found the statements to police were involuntarily obtained. However, there were additional statements made to the co-defendant when they spoke in the interrogation room. There was no separate analysis made in concluding whether these statements would also be suppressed. The Court remands back to the Habeas Court to determine if these statements would also be

suppressed. If the Habeas Court finds they would be admissible then the Habeas Court would then have to decide if the attorney was ineffective for failing to advise the Defendant his statements could be suppressed.

- **INDEPENDENT CRIMES AND ACTS**
  - **SEXUAL OFFENSES**
    - *State v. McPherson*, --- Ga. App. --- - A17A0364 – GA Court of Appeals– (Decided May 09, 2017)
      - Judgment: (Reversed)
      - Defendant, who was a child psychologist, was charged with several counts of child molestation. Just prior to trial, an individual contacted the DA and explained he had seen the story on the news and he too had been a victim of the Defendant 35 years ago. The State filed a notice to introduce prior bad acts based upon OCGA 24-4-404(b) and OCGA 24-4-413 for the stated purpose of helping to show intent along with several other purposes. The trial court granted the Defendant's motion to exclude these prior bad acts and the State appealed. COA now reverses.
      - Holding: OCGA 24-4-414 states prior acts of child molestation "shall be admissible" in subsequent cases of child molestation and the COA has interpreted this language as "creating a rule of inclusion, with a strong presumption in favor of admissibility." The COA went further and explained exclusion of evidence based upon 403 is an extraordinary remedy. The COA stated, "The prejudicial impact of evidence of similar transactions in child molestation cases is generally considered to be outweighed by its probative value in demonstrating an accused's deposition toward committing a molestation." The fact that the prior acts were committed about 35 years earlier does not automatically require their exclusion and in this case, there was no showing that the potential witness' memory about the alleged incidents is either impaired or patently unreliable.

- **INNEFECTIVE ASSISTANCE OF COUNSEL**
  - **SECOND PRONG OF STRICKLAND (HARM)**
    - *State v. Harris*, --- Ga. --- - S17A0117 – GA Supreme Court – (Decided May 01, 2017)
      - Judgment: (Reversed and Remanded)
      - Defendant was found guilty of murder. At his trial, certain text messages were introduced at trial. The text messages were obtained with a court Order and not via a search warrant. The Defendant's trial attorney never objected and never moved to suppress the text messages based upon unlawfully obtaining the text messages for failure to obtain

a search warrant. At the motion for new trial, the trial attorney stated she was not aware of the requirement that a search warrant was required to obtain electronic communications if the communications are less than 180 days old. Trial Court granted the motion for new trial and the State appealed. Supreme Court now reverses.

- Holding: The Strickland Standard, is a two prong test when determining whether a trial attorney is ineffective. First prong: defendant must prove that his attorney performed her duties at trial in an objectively unreasonable way, considering all the circumstances, and in the light of prevailing professional norms. The second prong: defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." The Supreme Court ultimately determined that the Defendant failed to show the second prong in that the result of the trial could have been decided differently given the overwhelming evidence and the text messages played just a minor part in the prosecution's case.
- IMPORTANT NOTE: The Court did not decide the issue of whether the text messages should be suppressed for failing to comply with federal law. 18 USC 2703 requires a search warrant if the electronic communication is less than 180 days old. The trial court relied upon this federal statute and OCGA 16-11-66.1 (disclosure of stored electronic communications records, search warrants, issuance of subpoena, violation) and Hampton v. State, 295 Ga. 665 (2014). Hampton was a similar case that did not decide this issue and also found the defendant failed to show ineffective assistance of counsel. However, I think the better course of action when confronted with text messages that were obtained without a search warrant, you should move to suppress the records.

JUDGE'S COMMENT ON THE EVIDENCE

"LET THE RECORD REFLECT" – NO VIOLATION

- *Crenshaw v. State*, --- Ga. App. --- - A17A0717 – GA Court of Appeals – (Decided May 16, 2017)
  - Judgment: (Affirmed)
  - Defendant was found guilty of several sexual offenses involving a rape. His only issue for appeal is he claimed the trial judge made an improper comment on the evidence, when after the witness identified him court, the judge stated, "let the record reflect the witness has identified the Defendant."

- Holding: The Supreme Court has previously addressed this issue in Anderson v. State, 249 Ga. 132, 136 (1982) and found a judge's statement about "let the record reflect" is not an improper comment on the evidence. "In context, the trial judge's 'let the record will so reflect' served to clarify the victim's and witness's words, as they would later be transcribed, not to indicate to the jury whether the State had proved that [Defendant] was the man who visited the victim's home." Thus, there was no error.

➢ JURY CHALLENGE

✪ *Ricks v. State*, --- Ga. --- - S17A0465 – GA Supreme Court – (Decided May 15, 2017)

- Judgment: (Reversed)
- Defendant was charged with murder and the State filed notice to seek the death penalty. Defendant filed pre-trial motions seeking a court order declaring Fulton County's method of selecting trial jurors to be in violation of this Court's jury Composition Rule and directing that his trial jury be selected in a manner not violating the Rule. Several evidentiary hearings were held and the Trial Court ruled against the Defendant. Supreme Court granted interim review and asked the parties to address the following question: "Did the trial court err by denying Defendant's claim that the list from which Fulton County jurors are summoned is produced in a manner that violates the Jury Composition Rule?"
- Holding: The Supreme Court of Georgia answers the question in the affirmative based upon four violations of the Jury Composition Rule: (1) Fulton County allowed its vendor to add names from its so-called legacy data to the county master jury lists provided by the Clerks Council; (2) Fulton County's vendor's use of the county's legacy data to remove tens of thousands of names that were locally flagged as ineligible for jury service in prior years; (3) county excluded potential duplicate records; and (4) Fulton County's vendor improperly engages, as the local jury management orders direct it to do, in efforts to inactivate names on the Clerks Council's county master jury list associated with addresses that the vendor concludes are undeliverable based on its submission of all of the addresses to the National Change of Address database. On remand, the Court gives specific instructions on how the Jury Composition Rule must be followed.

- **JURY INSTRUCTIONS**
  - **CREDIBILITY OF THE WITNESS – INTELIGENCE**
    - *Smith v. State*, --- Ga. --- - S17A0183 – GA Supreme Court – (Decided May 01, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of malice murder. During jury instructions, the trial court informed the jury: "In deciding the credibility [of a witness], you may consider all of the facts and circumstances of the case, the manner in which the witnesses testify, their intelligence," etc. The Defendant failed to object to the trial court's inclusion of intelligence in the jury instruction, but the Supreme Court decided the issue regardless.
      - Holding: The Court determined as long as the intelligence factor is not highlighted or singled out, then it is not reversible error for the court to instruct on intelligence. However, the Court stated the better practice is to give that instruction. "Indeed, 'even assuming that the better practice is to omit intelligence as one of the factors in the credibility charge, its inclusion is not reversible error' under the circumstances presented here."
  - **FAILURE TO GIVE ORAL INSTRUCTIOINS BUT SEND OUT WRITTEN INSTRUCTION**
    - *State v. Crist*, --- Ga. App. --- - A17A0052 – GA Court of Appeals – (Decided May 18, 2017)
      - Judgment: (Reversed)
      - Defendant was charged with child molestation and sexual battery. Defendant was found not guilty of child molestation but guilty of sexual battery. In the motion for new trial, Defendant argued it was error for the Trial Court to fail to give an oral instruction on the elements of sexual battery. Even though the trial court sent a written version of the jury instructions out with the jury, the trial court admitted it failed to give a proper instruction and granted the Defendant's motion for new trial. The State appealed claiming the instructions taken as a whole adequately instructed the jury.
      - Holding: First, the Defendant failed to object to the omission of the jury instruction, so the COA decided the issue under a plain error standard. "To be sure, the better practice would have been to include all instructions in the oral charge following closing arguments. Nevertheless, the trial court's written and oral instructions, as a whole adequately informed the jury of the charges." The burden was on the Defendant to show how the improper instructions likely affected the outcome of the trial. There was no evidence provided of any confusion on behalf of the jury.

- **JURY QUESTIONS**
  - **QUESTIONS RAISED BY THE JURY AND ASKED TO THE WITNESSES**
    - *Benton v. State*, --- Ga. --- - S17A0355 – GA Supreme Court – (Decided May 01, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of murder. At trial, the court allowed the jury to give the court questions, reviewed the questions with the attorneys and asked the witnesses questions raised by the jury. Defendant now objects and also objects that the judge did not ask the exact questions posed by the jury in the exact wording.
      - Holding: "It is well established that while jurors in Georgia courts may not ask questions of witnesses directly, a trial court may receive written questions from the jury and ask those questions which the court finds proper, or allow counsel for either party to ask a testifying witness the questions found to be proper." The trial court committed no error. As it relates to the issue of using the exact language of the juror's questions: "a trial court is not required to use the exact language of the jurors imposing their questions, as '[a] trial judge may propound questions to a witness to develop the truth of the case, to clarify testimony, to comment on pertinent evidentiary rules and to exercise its discretion when controlling the conduct of counsel or witnesses in order to enforce its duty to ensure a fair trial to both sides.'"

- **MULTIPLE BASES TO COMMIT AN OFFENSE WITHIN A SINGLE COUNT OF THE INDICTMENT**
  - **FELONY MURDER – TWO DIFFERENT WAYS TO COMMIT FELONY MURDER**
    - *Jones v. State*, --- Ga. --- - S17A0301 – GA Supreme Court – (Decided May 01, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with malice murder and felony murder. The count of felony murder charged defendant with the death of his child in the commission of a felony by committing first and second degree cruelty to children. Defendant was found not guilty of the malice murder, but guilty of the felony murder. Defendant argues there was no evidence presented at trial to show he acted with negligence to commit the crime of cruelty of children in the second degree and therefore he should be acquitted of this charge. Supreme Court disagrees.
      - Holding: "[Defendant] cannot obtain reversal under the Stromberg/Griffin line of cases [Stromberg v. California, 283 U.S. 359 (1931) and Griffin v. United States, 502 U.S. 46 (1991)] on the basis that there was insufficient evidence for the jury to find him guilty of felony

murder based on his commission of the crime of cruelty to children in the second degree, as long as there was sufficient evidence for the jury to find him guilty of felony murder based on his commission of the crime of first degree child cruelty." Defendant had conceded there was evidence relating to cruelty to children in the first degree. (So remember to file demurrers when a single count contains two different ways to commit an offense.)

- **OBJECTION WAIVED**
  - **OBJECTION WAIVED BY DEFENSE FOR INTRODUCING THE EVIDENCE**
    - *Adkins v. State*, --- Ga. --- - S17A0111 – GA Supreme Court – (Decided May 15, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with murder. Just prior to trial, Defense received a statement from a witness that the decedent just prior to dying said, "Fly, Fly, Fly". During State's opening statement, the prosecution stated, this witness will testify that the decedent said "Fly, Fly, Fly" and that the Defendant goes by the street name "Fly". Defense objected and the Court overruled the objected based upon a pre-trial motion and stated the objection is noted. During the witness's testimony, the State never elicited the statements concerning what the decedent said prior to dying. On cross-examination, the Defense Counsel did ask about the dying declaration. Court now states any objection is waived by introducing the testimony themselves.
      - Holding: "A defendant generally cannot complain on appeal about the admission of evidence that he introduced himself, even when he does so after the trial court has overruled his objection to the admissibility of that evidence…Although [Defendant] objected to the admissibility of the evidence, however, his introduction of the evidence after the State failed to introduce it waived his previous objection."
      - IMPORTANT NOTE: Remember that opening statements are not evidence. So the State never introduced the statements into evidence. This did not occur until after the Defendant made mention of the statements in question during cross-examination. Therefore Defendant introduced the statements into evidence and now cannot complain of their introduction.

- **RIGHT TO COUNSEL**
  - **DEFENDANT HIRED AN ATTORNEY PRIOR TO FORMAL CRIMINAL PROCEEDINGS**
    - *Clements v. State*, --- Ga. --- - S17A0088 – Georgia Supreme Court – (Decided May 30, 2017)
      - Judgment: (Affirmed)
      - Prior to any formal charges or arrest, Defendant retained an attorney in expectation of being charged with murder. After Defendant retained an attorney, the lead investigator called the Defendant and had a recorded conversation with him. Defendant moved to suppress the recorded conversation based upon a violation of his Sixth Amendment Right to Counsel. Defendant argued that because he was represented by counsel that it was improper for the State to contact him without his attorney being present. Supreme Court disagrees.
      - Holding: "The United States Supreme Court has emphasized that it would make little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation. Moran v. Burbine, 475 U.S. 412, 430 (1986)." Here no formal criminal proceedings had been initiated against the Defendant at the time that his conversation took place. "He was not under arrest, confronted with any criminal charges, or in custody."

- **RULE OF LENITY**
  - **FALSE STATEMENTS AND FALSE REPORT OF A CRIME**
    - *Knowles v. State*, --- Ga. App. --- - A17A0455 – GA Court of Appeals – (Decided May 31, 2017)
      - Judgment: (Remanded)
      - Defendant was a co-defendant in the case of Marlow et al. v. State, 339 Ga. App. 790 (Decided October 11, 2016). The same exact facts apply to the case at bar. Defendant wrote a statement claiming she was almost run over by a car, but the video of the restaurant shows her statement was false. Defendant was found guilty of making false statements and now appeals claiming the rule of lenity should have applied and she should have been sentenced to false report of a crime.
      - Holding: The COA merely states, "for the same reasons stated in Marlow," the rule of lenity should apply and Defendant could be found guilty of nothing more than false report of a crime.

- **SEARCH AND SEIZURE**
  - **SEARCH WARRANT FAILED TO SPECIFY ITEMS TO BE RECOVERED**
    - *Bryant v. State*, --- Ga. --- - S17A0388 – GA Supreme Court – (Decided May 30, 2017)
      - Judgment: (Reversed)
      - Defendant was found guilty of malice murder and several other charges. Prior to trial, Defendant successfully argued the search warrant exceeded the scope of the search and was able to suppress all items recovered from his house with the exception of an empty bullet box and sneakers. Defense counsel did not seek to rule the entire search warrant was invalid based upon the warrant failed to specify items to be recovered. The search warrant merely stated the house and vehicle was to be searched but failed to state what the officers expected to recover. Supreme Court agrees that it was ineffective assistance of counsel to not move to suppress the evidence based upon an invalid search warrant.
      - Holding: "The Fourth Amendment requires that a warrant particularly describe the place to be searched and the persons or things to be seized….Because the executing officers did not have a warrant particularly describing the items they intended to seize, the search was presumptively unreasonable and unconstitutional under the Fourth Amendment." Additionally, there was minimum other evidence connecting the defendant to the crime and the State referenced the empty box of ammunition as the "smoking gun", the Defendant was able to show harm and that a reasonable jury could potentially render a different verdict.
  - **TRAFFIC STOP – ODOR OF MARIJUANA**
    - *Caffee v. State*, --- Ga. App. --- - A17A0087 – GA Court of Appeals – (Decided May 10, 2017)
      - Judgment: (Affirmed)
      - Defendant was stopped for having an expired tag. When the officer approached he could smell green marijuana and noticed the Defendant's eyes were blood shot. Defendant additionally showed the officer his tongue, which had raised taste buds and was write indicative of recent marijuana use. Officer searched the vehicle but did not find any marijuana. When the officer approached the Defendant again, the smell of marijuana became stronger. He searched the defendant's shirt and recovered less than an ounce of marijuana. Defendant moved to suppress based upon the officer did not have a search warrant or probable cause. Trial court ruled that based upon the totality of circumstances, the search was permissible.
      - Holding: "For probable cause to search a person without a warrant, we must look to the parameters of police knowledge at the time the search

occurred to determine if that knowledge was such as would justify a man of reasonable caution in believing that an offense has been or is being committed, and this requires merely a probability – less than a certainty but more than a mere suspicion or possibility." Based upon the officer's training, the smell of marijuana, blood shot eyes, and white tongue the totality of the circumstances allowed for a warrantless search.

- **SENTENCING**
  - **SPLIT SENTENCES FOR SEX OFFENSES**
    - *State v. Riggs*, --- Ga. --- - S16G1166 – GA Supreme Court– (Decided May 01, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with a couple of counts of child molestation along with other counts. Defendant accepted a non-negotiated plea and was sentenced to 50 years to serve 30 years in prison. Defendant appealed claiming the trial court imposed an invalid sentence because the trial court failed to impose a split sentence, which included at least one year of probation on each count of the child molestation. The Court of Appeals agreed and vacated the sentence, claiming OCGA 17-10-6.2 requires a split sentence to each count. State asked for CERT and the Supreme Court agrees that each count requires a split sentence, but finally decides the issue how to apply the current statute, when charged with multiple counts of sexual offenses.
      - Holding: The Supreme Court of Georgia finally decides the application of sentencing a defendant who is charged with multiple counts of sexual offenses, when the statute OCGA 17-10-6.2 requires a split sentence. The Court agrees that in order for a sentence to be valid, the plain language of the statue requires at minimum a split sentence, which includes one year of probation for each count that is applicable to OCGA 17-10-6.2. HOWEVER, the Court did not stop there. The Court further explained nothing in the statutes prohibits a hybrid sentence, whereby the probation part of the sentence is run concurrent to another sentence, while an in custody part of the sentence of the sentence is run consecutively. The Court held: "we conclude that § 17-10-6.2 (b) requires a split sentence on each sexual offense and that, under § 17-10-1 (a) (2) and § 17-10-10 (a), the trial court may run a split sentence partially consecutive and partially concurrent to another sentence, such that the probationary component of a split sentence may be served concurrently with a period of confinement imposed by the sentence on another count." In essence, in the case at bar, the Defendant could be sentenced to 20 years serve 19 on one count. On the next count, Defendant could be sentenced to 20 years serve 11 with the 11 years to serve to run

consecutively to the first count and the year of probation to run concurrently to the first count. And on a final count, the Defendant is sentenced to 11 years probation to run consecutively to all counts. Thus, the original sentence of 50 years serve 30 years could still be accomplished, with each count of child molestation being split and a hybrid sentence is imposed.

- IMPORTANT NOTE*:* I do not read anything in the opinion limiting the hybrid sentences to only sexual offenses. So perhaps I could imagine a scenario where you ask the DA to run the mandatory minimums concurrently, but the probation consecutively to obtain a plea. For instance, plea to two counts of armed robbery, whereby the defendant is sentenced to 30 years serve 10 years. The serve time would be run concurrently and the probation of 10 years run consecutively. Prior to this opinion the courts would have been required to sentence an additional 10 years to serve in order to give the defendant a lengthier probation sentence.

TERRORISTIC THREATS

RECKLESS STATEMENTS

- *Major v. State*, --- Ga. --- - S17A0086 – GA Supreme Court – (Decided May 15, 2017)
  - Judgment: (Affirmed)
  - Defendant is in high school and made a Facebook post that indicated that based upon all the drama in the high school they are going to make him get his "chopper out and make Columbine look childish." Defendant was charged with terroristic threats. Defendant makes several claims that the comments are protected free speech, that the "reckless" portion of terrorist threats was void for vagueness and that he did not possess the requisite intent to commit the act of terroristic threat.
  - Holding: "the reckless mindset [in the statute] requires a person to consciously act in a manner which they know could cause harm. In other words, 'someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway." The Court went further to state, because the statute requires that a person communicate a threat of violence in purposeful or reckless manner, bot of which are true threats and not protected speech, it does not violate the First Amendment's right to free speech. As for whether the Defendant possesses the requisite intent, that question is reserved for the jury and not the Court.

- **VOIR DIRE**
  - **JUROR IS AN EMPLOYEE OF THE BANK THAT WAS ROBBED**
    - *Veal v. State*, --- Ga. --- - S17A0255 – GA Supreme Court – (Decided May 15, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with murder and armed robbery of a bank. There were several potential jurors, who either banked with the bank or was a former employee of the bank. Defendant did not move to strike the potential jurors for cause based upon their relation with the bank as required under Kirkland v. State, 274 Ga. 778 (2002) and Lowman v. State, 197 Ga. App. 556 (1990). The Supreme Court now considers the issue under the plain error standard.
      - Holding: Kirkland and Lowman do not apply, because in those cases the potential jurors had an ownership interest in the corporation. In this case, none of the potential jurors had an ownership interest, rather the testimony at the trial was that none of the jurors held any shareholder status. "The challenged jurors and panel members all confirmed that they could be fair and impartial, and no other evidence introduced to refute their statements or otherwise cast doubt as to their fitness to serve on the jury." The Court went further and explained, "We have rejected a bright-line rule excluding from jury duty those who have a close, but non-familial, relationship with a party. As an extension of this principle, we have rejected the creation of a per se rule requiring the exclusion of jurors who have an employment relationship with a party to the lawsuit."

INDEX OF CASES SUMMARIZED

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