CASE LAW SUMMARIES

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- **DISCOVERY VIOLATION**
  - **TRIAL COURT CANNOT DISMISS CASE WITH PREJUDICE FOR WANT OF PROSECUTION**
    - *State v. Banks, et al.*, --- Ga. App. ---, A18A1727 through A18A1753, GA Court of Appeals (February 28, 2019)
      - Judgment: (some Affirmed and some Remanded)
      - This case involved 26 different accusations, where the State failed to provide witness lists prior to the case called for trial. The trial judge asked the prosecution had they provided the witness lists and upon the answer of no, the trial judge dismissed all 26 cases for want of prosecution. State appealed indicating that the penalty for violating the discovery statute is not dismissal of the case for want of prosecution. The trial court's Order does not indicate whether the dismissal was with prejudice or without prejudice. But on some of the cases, the statute of limitations has now run, thus making them with prejudice.
      - Holding: "This Court has held that a trial court is without authority to dismiss criminal charges for want of prosecution if such dismissal amounts to a dismissal *with prejudice*…in order to determine whether the dismissals in the cases at hand amounted to impermissible dismissals with prejudice, the relevant question is whether, at the time of the dismissal, the State could have re-accused the defendants prior to the expiration of the period of limitation." In the cases where the State can re-accuse the cases, the COA affirms the trial court's dismissals. However, in those cases where the statute of limitations has now run, making the dismissals with prejudice, the COA vacates the trial court's Order.

- **CIVIL FORFEITURE**
  - **EIGTHTH AMENDMENT AGAINST EXCESSIVE FINES APPLIES TO STATE'S CIVIL FORFEITURE CLAIMS**
    - *Timbs v. Indiana*, --- U.S. ---, No. 17-1091, US Supreme Court (February 20, 2019)
      - Judgment: (Reversed)
      - Defendant pled guilty to various drug charges. At the time of one of the drug transaction, it occurred while defendant was in his $42,000 vehicle. Defendant obtained the vehicle through insurance payments from when his father died. The maximum fine for the offense he pled guilty to was $10,000. Nonetheless, the State of Indiana sought to possess the defendant's $42,000 vehicle through a civil forfeiture. The trial court denied the State's motion to capture the vehicle, but ultimately the Supreme Court of Indiana reversed the trial court's

order and required Defendant to turn over the vehicle. The U.S. Supreme Court now reverses.

- Holding: The Eighth Amendment made applicable to the States by way of the Fourteenth Amendment precludes cruel and unusual punishment; excessive bail; the protection against excessive fines, which guards against abuses of government's punitive or criminal law enforcement authority. "This safeguard, we hold, is fundamental to our scheme of ordered liberty, with deep roots in our history and tradition."

➢ DRIVING UNDER THE INFLUENCE (D.U.I.)

IMPLIED CONSENT MUST ACCURATELY NOTIFY THE DEFENDANT THAT "GEORGIA LICENSE" CAN BE SUSPENDED FOR A YEAR

✪ *Hernandez v. State*, --- Ga. App. ---, A18A1638, GA Court of Appeals (February 11, 2019)

- Judgment: (Reversed)
- Defendant was pulled over and a DUI investigation was conducted. Defendant had a Washington State driver's license. Defendant moved to suppress the blood draw that she eventually consented. At the suppression hearing there was an audio recording admitted where there was a lot of discussion concerning implied consent and whether the defendant's license would be suspended. On more than one time, defendant stated she did not want to do a blood test. The officer would respond: then I will suspend your license for a period of 1 year. Whereby Defendant would change her answer and consent to the blood draw. Trial Court denied her motion to suppress, and the COA reverses.
- Holding: DDS has no authority to suspend or revoke the driver's license of a non-resident motorist. "An implied consent notice that misinforms the holder of an out-of-state driver's license that refusal to submit to state testing will result in revocation of the out-of-state license is 'the type of misleading information' that impedes a suspect's ability to make an informed choice under the implied consent statute and thereby renders ensuing test results inadmissible."

REFUSAL OF BREATH TEST IS BARRED AT TRIAL ON GEORGIA CONSTITUIONAL GROUNDS

✪ *Elliot v. State*, --- Ga. ---, S18A1204, GA Supreme Court (February 18, 2019)

- Judgment: (Reversed)
- Defendant was pulled over for driving under the influence. On the scene, defendant refused to give a breath test and at trial sought to

suppress his refusal on Georgia constitutional grounds. The trial court disagreed with the defendant.

- Holding: "Based on the well-established meaning given to the constitutional right against compelled self-incrimination and carried forward into subsequent state constitutions, we concluded that a breath test is an act incriminating in nature and, therefore, Paragraph XVI prohibits the State from compelling such a test." Citing Olevik v. State, 302 Ga. 228 (2017). The Court explained, "The United States Supreme Court has held that the Fifth Amendment to the United States Constitution does not bar the State from using such a refusal, in part because the Fifth Amendment gives [a defendant] no right to refuse to act in the first place. But we have held – and hold again today – that the protection against compelled self-incrimination provided by Article I, Section I, Paragraph XVI of the Georgia Constitution does afford the right to refuse such a test." At the end of the decision the Court stated, "Consequently, we conclude that OCGA § 40-5-67.1(b) and 40-6-392(d) are unconstitutional to the extent that they allow a defendant's refusal to submit to a breath test to be admitted into evidence at a criminal trial."
- Important Note: This issue hinges on Georgia Constituional grounds and not the Fifth Amendment of the U.S. Constitution. To preserve such an objection, make sure you object based upon violation of Section I, Paragraph XVI of the Georgia Constitution. If you merely object based upon the Fifth Amendment, you will not preserve the issue, because as the Court explains, the US Supreme Court has already determined the Fifth Amendment does not apply. Additionally, this is a very long decision (91 pages). Feel free to read it if you want to understand the historical back ground of this case.
- Second Note: There are rumors that the Georgia Legislature is currently attempting to resolve this issue as they are currently in session. The Court explained that it is up to the Georgia Legislature to amend the constitution or rewrite the laws. So I expect this will be done in short order.
- Justice Boggs concurring opinion: He explains the implied consent law are not affected by this decision and blood tests done by warrant are still viable options. Additionally, Justice Boggs explains that an individuals' license suspension will still be appropriate should someone refuse a breath test pursuant to OCGA §40-5-67.1(c) and (d). Justice Boggs also encourages the General Assembly to look at modifying Paragraph XVI of the Georgia Constitution.

- **HYPNOSIS**
  - **STATEMENTS MUST BE SUBSTANTIALLY THE SAME AS BEFORE HYPNOSIS**
    - *Winters v. State*, --- Ga. ---, S18A1234, GA Supreme Court (February 18, 2019)
      - Judgment: (Affirmed)
      - Defendant was charged with an old murder case. A witness at the time of the incident testified that defendant reached across the seat before shooting the decedent. This witness later underwent hypnosis and at trial testified that a hand was placed her face. Defendant objected because the two statements (pre and post hypnosis) were not identical.
      - Holding: "The rule regarding the admissibility of statements by a witness who has undergone hypnosis is clear: the witness's post-hypnotic testimony cannot differ from her pre-hypnotic statements….This rule, however, is not about semantics but substance; it does not compel the witness to parrot her previous statements as if reading from a script."

- **IDENTIFICATION OF ACCUSED**
  - **TOTALITY OF THE CIRCUMSTANCES**
    - *Curry v. State*, --- Ga. ---, S18A1302, GA Supreme Court (February 04, 2019)
      - Judgment: (Affirmed)
      - Defendant was charged and convicted of murder and armed robbery. In the initial report, the witness did not give details about facial features. During the trial, the witness testified that she was with the prosecutor on a prior date and observed a newspaper clipping in the prosecutor's file. Upon seeing the clipping, she recognized the defendant as the perpetrator. Defendant objected and moved for a mistrial based upon the impermissibly suggestive pretrial identification procedure. The trial court initially ruled the identification was impermissibly suggestive.
      - Holding: "When, as in this case, a trial court concludes that the State employed an impermissibly suggestive pretrial identification procedure, the issue becomes whether, considering the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. If not, then both the pre-trial and in-court identifications are admissible…The ultimate question is, whether under the totality of circumstances, the identification is reliable." The Court held the trial court properly admitted the identification based upon the totality of circumstances.

- Important Note**:** Footnote 3: Explains the General Assembly adopted OCGA §§17-20-1 through 17-20-3 and went into effect July 01, 2016 and sets out the proper procedures for pre-trial identifications in order to improve the accuracy of eyewitness identifications.

➢ INCONSISTENT VERDICTS

NOT VIABLE DEFENSE

✪ *Smith v. State*, --- Ga. App. ---, A18A1858, GA Court of Appeals (February 19, 2019)

- Judgment: (Affirmed)
- Defendant was found guilty of criminal attempt to commit rape but found not guilty of aggravated assault based upon the same facts. Defendant argues the two verdicts were repugnant (inconsistent) citing Wiley v. State, 124 Ga. App. 654, 655 (1971). Court disagrees.
- Holding: In Blevins v. State, 343 Ga. App. 539, 550 (2017) the COA overruled Wiley and its progeny and "determined that…abolishing the inconsistent verdict rule in criminal cases also applied to repugnant verdicts as defined in Wiley.

➢ INDEPENDENT CRIMES AND ACTS

ACTS OF A THIRD PERSON MUST BE RELEVANT

✪ *Roberts v. State*, --- Ga. ---, S18A1440 – GA Supreme Court (February 18, 2019)

- Judgment: (Affirmed)
- Defendant was found guilty of murder. At trial, Defendant attempted to introduce acts of a third individual, who had pulled a gun on the decedent at a dice game a week prior. Defendant attempted to introduce this information pursuant to OCGA §24-4-404(b) to show that another person had motive. Trial court denied the defendant's request.
- Holding: 404(b) evidence can be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The general rule concerning whether another person committed the crime, "the proffered evidence must raise a reasonable inference of the defendant's innocence and, in the absence of a showing that the other person recently committed a crime of the same or similar nature, 'must directly connect the other person with the corpus delicti.'" In essence rumor, speculation and conjecture will not be enough to meet the relevance standard. In this case, the defendant could not even name the third person, as such it was pure speculation.

- Important Note: The Court acknowledged that OCGA §24-4-404(b) is usually a tool used by the prosecution. In this case, the Defendant was attempting to introduce other crimes of a third person to show motive of a third person. The Court did not decide the issue of whether 404(b) can be used in this context, because the defendant did not meet the threshold standard for admissibility. There is at least an argument to be made that had the defendant properly connected and identified the third person to the death of the decedent, then 404(b) could be used to introduce these acts of a third person.

- **INTENT – DEFENDANT DOES NOT RELIEVE THE STATE FROM PROVING INTENT MERELY BY PRESENTING A DEFENSE THAT DOES NOT DISPUTE INTENT**
  - *Burgess v. State*, --- Ga. App. ---, A18A1596, GA Court of Appeals (February 19, 2019)
    - Judgment: (Affirmed)
    - Defendant was charged with various drug offenses with intent to distribute. The drugs were located in a storage room at a hotel. Defendant had a prior conviction for drugs with intent to distribute. Defendant presented the sole defense that he never had possession of the drugs and never contested that the drugs found were likely for the purposes of distributing. The State sought and the trial court granted the prior conviction for the purpose to show the Defendant's intent. Defendant objected based upon he was not contesting the "with intent to distribute" element of the offense.
    - Holding: Defendant places his intent into issue when he pleads not guilty, unless he takes affirmative steps to withdraw intent as an element to be proved by the State. Jones v. State, 301 Ga. 544, 545 (2017). The defendant however "did not relieve the State of the burden of proving intent merely by focusing his defense on the possession aspect of the crime, and the State was still required to prove that [the Defendant} had actual or constructive possession of the contraband in the storage closet and that he had the requisite intent to distribute it.
    - 403 Balancing Test: "When as here, the prior and current crimes are identical and the State introduces defendant's prior conviction demonstrating that he was previously convicted of an identical crime requiring the State to prove he acted with an identical specific criminal intent, the similarity in the manner of commission of the crimes may be of lesser importance." I take this to mean, since both crimes required "with intent to distribute" (specific intent offenses) then the trial courts do not have to weigh the similarity between the offenses. In this case,

there were no factual evidence of the prior offense for the Courts to even weigh the similarity.

- **INVOLUNTARY INTOXICATION**
  - **REQUIRES PRE-TRIAL NOTICE**
    - *McKelvin v. State*, --- Ga. --- S18A1031 – GA Supreme Court (February 04, 2019)
      - Judgment: (Affirmed – Harmless Error)
      - Defendant was convicted of murder. Prior to trial, the Defendant had a competency evaluation conducted. This was originally filed under seal. After the State received a witness list and noticed a doctor's name on the list, the State requested the Court conduct an in-camera inspection with the defense to determine if they plan to present an insanity defense in which they are required to give notice. During the in-camera review, defense counsel acknowledged they would be presenting an involuntary intoxication defense, not an insanity defense and as such, they did not need to give notice. The Court disagrees.
      - Holding: "Rule 31.5 [of Superior Court Rules] requires written, pre-trial notice to the State where an accused intends 'to raise the issue that [he] was insane, mentally ill or mentally retarded at the time of the act or acts charged against the accused.' Though involuntary intoxication is not specifically referenced in the rule, that defense 'is one involving issues of mental competence, in effect, temporary insanity.'"
      - Important Note**:** There was an argument also made concerning, because defendant intended to only use lay witnesses concerning his intoxication, that he did not need to give notice. The Court likewise disagreed because there was a doctor on his witness list, who he intended to call to discuss the effects of intoxication.

- **JURY INSTRUCTION**
  - **ACCOMPLICE TESTIMONY MUST HAVE CORROBORATION AND IT IS PLAIN ERROR FOR THE TRIAL COURT TO NOT SUA SPONTE GIVE THE INSTRUCTION**
    - *State v. Johnson*, --- Ga. ---, S18A1275, GA Supreme Court (February 18, 2019)
      - Judgment: (Affirmed granting of motion for new trial)
      - Defendant was found guilty of murder. At trial, all the evidence inferring guilt of the defendant was presented from an accomplice. During the charge of the jury, the Court did not give a jury instruction that an accomplice's testimony must be corroborated and instead gave a jury charge that a single witness if believed is enough to convict. The trial court granted the Defendant's request for new trial and the State

appealed. Supreme Court affirmed the trial court's decision based upon plain error.

- Holding: "OCGA §24-14-8 provides that in 'felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient to establish a fact." By failing to give the required accomplice corroboration charge, the trial court did not provide the jury with proper guidelines for determining guilt or innocence. "This was clearly erroneous."

➢ PRO SE DEFENDANT

DEFENDANT'S STATEMENT TO REPRESENT HIMSELF/HERSELF MUST BE UNEQUIVOCAL

✪ *Allen v. State*, --- Ga. App. ---, A18A1892, GA Court of Appeals (February 11, 2019)

- Judgment: (Affirmed)
- Defendant was convicted of several drug offenses. Prior to trial, the State brought up to the judge that he believed the defendant wanted to fire his public defender and represent himself. The Court asked the defendant and the he responded with a long colloquy about how he is dissatisfied with his current attorney, that he would prefer his prior attorneys, that he felt he could represent himself better. Defendant ultimately asked the Court "am I able to proceed by myself, your honor? I don't mind doing that by myself?" The trial court responded, Thank you and lets start trial. There was no further discussions concerning the defendant representing himself.
- Holding: "If the request to represent oneself is equivocal, there is no reversible error in requiring the defendant to proceed with counsel…Thus, statements that amount to nothing more than expressions of dissatisfaction with current counsel do not trigger any requirement that the court hold a hearing under *Faretta* or that the defendant be allowed to proceed pro se." The Court ultimately determined that the defendant never made an unequivocal request to proceed pro se.

➢ RAPE SHIELD

DEFENDANT CAN INVOKE THE RAPE SHIELD STATUTE

✪ *White v. State*, --- Ga. ---, S18G0365, GA Supreme Court (February 04, 2019)

- Judgment: (Affirmed – error did not result in plain error)
- Defendant was found guilty of several counts of rape and child molestation. At trial, the State attempted to introduce acts of witness, who was also abused by the defendant, that she engaged in other

sexual acts against juveniles while she was juvenile. The State elicited testimony that juveniles who prematurely engage in sexual acts, were most likely victimized themselves. The defendant only objected on relevance grounds and not for in violation of OCGA 24-4-412 (rape shield). Because of this, the Court determined the issue under Plain Error and found the trial court improperly admitted the statements, but the error did not rise to Plain Error.

- Holding: The Court addressed the following questions:
  1. Can a defendant invoke OCGA § 24-4-412 in order to prohibit the admission of evidence of a witness's past sexual behavior offered by the State? "Yes, a defendant can invoke the Rape Shield Statute to prohibit the admission of evidence of a witness's past sexual behavior offered by the State where such offered evidence is inadmissible pursuant to the terms of the Rape Shield Statute;"
  2. Is evidence of a complaining witness's past sexual behavior admissible if that evidence is relevant to an issue other than consent? "No, because evidence of a complaining witness's past sexual behavior is only admissible under the Rape Shield Statute if that evidence is relevant to the issue of consent;"
  3. Did the trial court improperly admit evidence of the complaining witness's past sexual behavior, and, if so, was any such error harmless? "The trial court did improperly admit evidence of the complaining witness's past sexual behavior in this case, but the admission of the evidence did not amount to plain error requiring reversal of [defendant's] convictions."

➢ RULE OF LENITY

DOES NOT APPLY TO PLEA OF GUILT

✪ *State v. Hanna*, --- Ga. ---, S18A1559, GA Supreme Court (February 04, 2019)

- Judgment: (Reversed)
- Defendant was charged with Felony Murder and Cruelty to Children in the First. At the plea hearing, the defendant requested that she be sentenced to "deprivation of a minor leading to death" instead of the felony murder count she pled guilty to. Trial court agreed with the defendant and sentenced her based upon the Rule of Lenity to the lesser charge to a term of 10 years with the first 4 years to serve. State objected and appealed.
- Holding: The defendant pled guilty to murder, which requires a sentence of life or death. The trial court does not have authority to accept a plea of guilt to one charge and sentence the defendant to another charge. In essence, the defendant could have went to trial or

filed pre-trial motions and argued that the Rule of Lenity applies. However, she cannot plead guilty to murder and be sentenced to a lesser statute.

- Note: because the trial court entered a void sentence to the murder count, the defendant can withdraw her guilty plea to that count, but not to the other counts that she was properly sentenced.

SEARCH AND SEIZURE

TRAFFIC STOP ELEVATED FROM TEIR 2 TO TEIR 3 BASED UPON FALSE NAME GIVEN TO OFFICER

- *Cromartie v. State*, --- Ga. App. ---, A18A2041, Court of Appeals (February 08, 2019)
  - Judgment: (Affirmed)
  - Defendant was pulled over in a traffic stop for erratic driving. Defendant ultimately gave the officer a false name when approached. A period of about 50 minutes elapsed until the drug dog came to the scene and alerted on drugs. Defendant sought to suppress the drugs, because the cops unlawfully prolonged the traffic stop until the drug dog came to the scene.
  - Holding: When the defendant was originally pulled over, it was a tier 2 stop and the defendant was correct that the police cannot improperly prolong a traffic stop. However, when the defendant gave the officers a false name, the tier 2 stop was elevated to a tier 3 stop, which the defendant was in lawful arrest. And based upon the automobile exception, once the dog alerted on the drugs, the officers had probable cause to search the vehicle.

OFFICER MUST HAVE REASONABLE SUSPICION TO PAT DOWN A PASSENGER IN A VEHICLE

- *State v. Robusto*, --- Ga. App. ---, A18A1802, GA Court of Appeals (February 11, 2019)
  - Judgment: (Affirmed)
  - Defendant was a passenger of in vehicle during a traffic stop. The officer observed a spoon in the center console that had write residue on it. Upon observing this, the officer testified this elevated to a drug investigation and took the passenger out of the vehicle and patted him down. Upon the pat-down, the officer found 2 syringes. The Defendant moved to suppress the syringes and the trial court granted the motion. State now appeals. Of important note, during the suppression hearing, the officer testified that it is APD policy to pat-down all occupants of a vehicle upon conducting a drug investigation.

- Holding: "To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." "The officer testified that such pat-downs were standard operating procedure for the APD and that he performs pat-downs on everyone he suspects of using intravenous drugs." The officer went on to testify that there was no reason to believe defendant was armed or dangerous.

STATUTE OF LIMITATIONS

UNKNOWN PERSON EXCEPTION – REQUIRES LACK OF PROBABLE CAUSE

Riley v. State, --- Ga. --- , S18A1048, GA Supreme Court (February 18, 2019)

- Judgment: (Remanded for Probable Cause Hearing)
- Defendant was found guilty of murder and several other non-murder charges. The case was indicted 26 years after the date of murder occurred. Defendant argued the non-murder counts should have been vacated by operation of law because the statute of limitations had run (4 years for the felony non -murder counts). State argued the exception enumerated in OCGA §17-3-2(2) was applicable because they did not know who the perpetrator of the crime was. The trial court did not conduct a probable cause to determine if the prosecution knew who the person was by a probable cause standard and the case was remanded.
- Holding: "We have held that the tolling period ends when the State has actual, as opposed to constructive, knowledge of both the defendant's identity and the crime…In doing so, we arrive at the following interpretation, and read OCGA § 17-3-2(2) to mean that a statute of limitation is tolled with respect to an 'unknown' person until the State possesses sufficient evidence to authorize the lawful arrest of that person for the crime charged…The amount of actual knowledge required to lawfully arrest an individual is the familiar 'probable cause' standard." In this case, since the Trial Court did not conduct a probable cause, the case is remanded back with instruction.
- Important Note: This was a case of first impression and gives great explanation of why probable cause standard is the appropriate standard. When a defendant makes a prima facie case (shows the court the accusation or indictment is outside the statute of limitations range) the State has the burden of proof of showing that it lacked probable cause to arrest the defendant in a timely manner. Thus, you should

request a preliminary hearing and have the State put up evidence of why it could not charge the defendant in a timely manner.

- **STREET GANG ACTIVITY**
  - **NEXUS REQUIRED**
    - *Barge v. State*, --- Ga. App. ---, A18A2030, GA Court of Appeals (February 12, 2019)
      - Judgment: (Reversed)
      - Defendant was charged with his co-defendant "Kelly", whose cases were combined for appeal. Kelly's convictions for drug sales were affirmed. Barge's conviction for criminal street gang terrorism was reversed.
      - Holding: "The State was required to prove something more than the mere commission of a crime by gang members…It is essential that the State demonstrate that the commission of the predicate was intended to further the interests of the gang." There was no evidence that defendant "possessed or distributed the marijuana in a highly visible manner or that they referenced this particular crime on social media to enhance the gang's reputation. The expert's testimony about the East Coast Bloods' general reputation for drug sales and distribution also provides insufficient evidence that this particular furthered the interests of the gang."

- **VOIR DIRE**
  - **PANELS OF 12 REQUIRED UPON REQUEST**
    - *Wainwright v. State*, --- Ga. ---, S18A1221, GA Supreme Court (February 04, 2019)
      - Judgment: (Affirmed – harmless error)
      - Defendant requested pre-trial that he be able to voir dire the jury in panels of 12. The Court ultimately placed the jurors in panels of 14. Defendant appealed his conviction based upon violation of OCGA §15-12-131.
      - Holding: OCGA §15-12-131 states, "in the examination of individual jurors…it shall be the duty of the court, upon a request of either party, to place the jurors in the jury box in panels of 12 at a time, so as to facilitate their examination by counsel." The Court explained, "upon a party's request, the trial court is required to put the jurors in the jury box in groups of 12 for examination of individual jurors because the statute does not provide for the exercise of judicial discretion in this matter." However, the defendant failed to show how the addition of two other jurors in the panels has harmed him, especially in light of the overwhelming evidence against the defendant.

LIST OF CASES SUMMARIZED