# Criminal Law

By Joseph J. Drolet*

Criminal law and procedure took some interesting and curious turns during the period of this survey. This article will first cover some of the most novel and notable case decisions of the year. Then a summary will be given of the changes wrought by the 1980 Georgia General Assembly. Finally, some of the recent trends in case law handed down by Georgia's appellate courts will be discussed.

## I. Notable New Decisions

### A. *Compulsory Handwriting Samples*

Prior to *State v. Armstead*,[1] law enforcement agencies could require criminal defendants to write out handwriting samples for comparison with questioned documents. *State v. Armstead* halted this practice and held that even though such practice does not violate the United States Constitution, it violates the Georgia Constitution and Georgia Code Ann. section 38-416.[2] The Court found a distinction between handwriting and other forms of physical testing of the defendant in that handwriting exemplars require the defendant to *do* an act while blood test and other physical tests simply require the defendant to *submit* to an act. Although this is a decision of a single panel of the court of appeals, the effect has been to create instability in an area of law that had been relatively calm since *Schmerber v. California*.[3]

### B. *Right to Counsel Plus Concurrent Self-Representation*

In another case relying on the Georgia Constitution, *Burney v. State*,[4]

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1. 152 Ga. App. 56, 262 S.E.2d 233 (1979).
2. Ga. Code Ann. § 38-416 (1974).
3. 384 U.S. 757 (1966).
4. 244 Ga. 33, 257 S.E.2d 543 (1979).

the Georgia Supreme Court found that even though a defendant already had two court appointed lawyers, he had the additional right to represent himself and act as co-counsel. The Georgia Constitution, unlike the United States Constitution, says that "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state, in person, by attorney, *or both.*"[5] Such language does not appear in the United States Constitution.

This decision places defense lawyers and trial judges in very awkward positions in dealing with indigent defendants. Every recent draft of the Georgia Constitution introduced in the Georgia General Assembly has omitted the words "or both," which appear in the quoted section of the Bill of Rights, and if this language is not eventually removed, there will undoubtedly follow interesting and disruptive situations.

### C. *Charge on Presumption of Intent*

A traditional part of the standard charge given in criminal cases came under attack in *Skrine v. State*,[6] an attack based on the United States Supreme Court case of *Sandstrom v. Montana*.[7] The charge that "a person . . . is presumed to intend the natural and probable consequences of his acts" was upheld in *Skrine* because, unlike the *Sandstrom* situation, the charge in Georgia is followed by language informing the jury that this presumption is rebuttable. Thus, the court found that this language from Georgia Code Ann. section 26-604[8] was not burden-shifting. The ruling in *Skrine* has not yet been challenged in the United States Supreme Court, but undoubtedly it will be.

### D. *Airport Profile Searches*

In *State v. Reid*[9] and *McShan v. State*,[10] the validity of stopping airline passengers who fit a drug courier profile was addressed. In *Reid*, the court found that even though the entire profile was not present, enough grounds existed to give federal drug agents an articulable suspicion and justification to stop the defendant. In *McShan*, the decision to affirm the conviction turned on the defendant's consent to search after he had been stopped.

Both *Reid* and *McShan* have been vacated by the United States Supreme Court and have been remanded to the Georgia courts for a deter-

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5. GA. CONST. art. I, § 1, ¶ 9, GA. CODE ANN. § 2-109 (1977) (emphasis added).
6. 244 Ga. 520, 260 S.E.2d 900 (1979).
7. 442 U.S. 510 (1979).
8. GA. CODE ANN. § 26-604 (1977).
9. 149 Ga. App. 685, 255 S.E.2d 71, *vacated*, 100 S. Ct. 2752 (1980).
10. 150 Ga. App. 232, 257 S.E.2d 202, *vacated mem.*, 100 S. Ct. 2981 (1980).

mination as to whether the defendants were actually seized (arrested or "stopped") or whether they were subjected to some lesser level of contact or encounter. These cases will probably return to the United States Supreme Court on that question and may result in some new law on encounters that do not quite amount to a *Terry v. Ohio*[11] "stop".

*E. Transcript of Voir Dire*

In *Graham v. State*,[12] the court of appeals, in a 6-3 decision, broke with a long line of cases and held that the voir dire must be included in the transcript of all felony trials. The court strictly applied Georgia Code Ann. section 27-2401,[13] to require transcription of everything but the argument of counsel.

*F. Voir Dire—Requiring Use of Peremptory Strike to Excuse A Biased Juror*

In *Bradham v. State*,[14] a prospective juror said he would give more credence to the testimony of a police officer than he would to a lay witness. The trial court declined to excuse the juror for cause and defense counsel was required to use a peremptory challenge, leaving him no strikes when he later needed one. The supreme court found the trial court's ruling to be reversible error. The question remains open, however, whether the same result will prevail in a case in which there is no exhaustion of a defendant's peremptory strikes.

*G. Jackson v. Virginia*

Probably the most earthshaking development in recent years was a decision of the United States Supreme Court in *Jackson v. Virginia*,[15] a case now cited by both Georgia appellate courts in nearly every criminal decision. *Jackson v. Virginia* revolutionized the relationship between state and federal courts by breaking with two centuries of legal precedent and declaring that the sufficiency of the evidence is an issue of constitutional proportions reviewable in federal habeas corpus proceedings. A federal magistrate can now second-guess a jury and the highest court of any state if he disagrees with their determination that the evidence was sufficient to prove the elements of the crime. The effect of the decision is to make *every* existing judgment in a criminal case subject to federal habeas

11. 392 U.S. 1 (1968).
12. 153 Ga. App. 658, 266 S.E.2d 316 (1980).
13. GA. CODE ANN. § 27-2401 (1978).
14. 243 Ga. 638, 256 S.E.2d 311 (1979).
15. 443 U.S. 307 (1979).

corpus review. Every state case is now potentially a federal case.

### *H. Double Jeopardy*

The Georgia Supreme Court reversed the Georgia Court of Appeals in *State v. Burroughs*[16] to hold that disposition of a case in municipal court does not bar later proceedings in state court if the elements of the two offenses were different. The defendant had been convicted of disorderly conduct in municipal court (interfering with a person's occupation) and with simple battery in state court. The supreme court noted that one could interfere with another's occupation without committing a battery.

## II. ACTION BY THE GENERAL ASSEMBLY

Spurred on by a great deal of publicity about rampant crime, the Georgia General Assembly, in its 1980 session, made some notable changes in criminal law and procedure, while following their custom of adding a variety of new categories of crimes to Georgia law.

Among the most significant new-crime bills was Senate Bill 296,[17] which made it a felony for a convicted felon to possess a firearm. This new law, based on a similar federal statute, was able to pass the general assembly with relative ease while proposals for any form of gun registration or licensing, including those proposals sponsored by the Governor, suffered total annihilation.

Four of the Governor's bills creating new crimes fared much better than his "gun" legislation. Probably the most controversial legally is the Loitering and Prowling Bill,[18] which goes to great lengths to explain exactly what type of conduct is proscribed. Whether the bill has succeeded in avoiding vagueness problems remains to be seen. The new statute, Georgia Code Ann. section 26-216,[19] reads as follows:

> (a) A person commits the offense of loitering or prowling when one is in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.
> (b) Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the person takes flight upon the appearance of a law enforcement officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstances make it impracticable, a law

16. 244 Ga. 288, 260 S.E.2d 5 (1979).
17. GA. CODE ANN. § 26-2914 (Supp. 1980).
18. GA. CODE ANN. § 26-2616 (Supp. 1980).
19. *Id.*

> enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer failed to comply with the foregoing procedure, or if it appears at trial that the explanation given by the person was true and, would have dispelled the alarm or immediate concern.

Senate Bill 405[20] creates the new crime of bail-jumping, a bill long sought by many judges and prosecutors. The terms of this legislation are rather simple. Failure to appear in court after one has been notified to appear is punishable as a felony if the original charge is a felony offense. Failure to appear is punishable as a misdemeanor if the original charge is a misdemeanor. Another of the Governor's bills was the Racketeer Influenced and Corrupt Organizations (RICO) Act.[21] The Governor came to the aid of this pending bill, which had been introduced with little fanfare in 1979, and helped secure its passage through both houses of the general assembly in 1980. This law is another clone of a federal statute, and its basic feature is the addition of civil proceedings to condemn property held by criminal enterprises where there exists a pattern of racketeering activity.

Other new crimes in the Governor's package were the "trafficking in drugs" offenses[22] which were piggy-backed on the existing Controlled Substances Act. If a person possesses relatively large quantities of drugs he can be indicted for trafficking and be subjected to mandatory large fines and imprisonment. Since the potential prison terms are actually no longer than those in the existing law, the net effect of the statute may only be its public relations value.

Among the other new categories of crimes created in 1980, the most interesting is found in Georgia Code Ann. section 88-2710.1,[23] "wanton or malicious removal of dead body from grave and disturbance of contents of grave." The bill was apparently inspired by a teenage drinking party in a cemetery where graves were disturbed, but there was no intent by the party goers to sell or dissect the bodies as was required under the existing law.

Another bill closely rivalling House Bill 1592 is Senate Bill 577.[24] Under new code section 26-2802.1, removing a "collar, tag, tatoo or any identification" from an animal is a misdemeanor. This legislation will

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20. GA. CODE ANN. § 26-2511 (Supp. 1980).
21. GA. CODE ANN. ch. 26-34 (Supp. 1980).
22. GA. CODE ANN. § 79A-811 (Supp. 1980).
23. GA. CODE ANN. § 88-2710.1 (Supp. 1980).
24. GA. CODE ANN. § 26-2802.1 (Supp. 1980).

surely help stamp out crime. House Bill 407[25] creates a new regulatory scheme for anyone selling "business opportunities" in Georgia. The bill attempts to fill the gap between securities violations and lawful conduct. Georgia has apparently become a haven for fly-by-night operations promising high profits for investors in such ventures as worm-farming and vending machine maintenance. Any person promoting such investment schemes must now register and disclose various information prior to operating in Georgia. Failure to comply is a felony.

During the 1980 session the general assembly also made changes in a variety of existing criminal offenses and procedures. The burglary statute was amended[26] to re-enact a provision that was dropped when other parts of the law were amended in 1978. The amendment redefines railroad cars and aircraft as "buildings" that may be objects of burglaries.

Senate Bill 386[27] shows what can happen when a group of bankers tries to rework a fairly clear and simple criminal statute. This bill pushed by the banking industry repealed all the laws on credit cards and replaced them with a financial transaction card law. The intent was apparently to insure that every conceivable method of defrauding a bank would be made illegal. The definition of a financial transaction card includes bank cards, credit cards, check-cashing cards or "an instrument or device issued with or without fee by an issurer for the use of the card holder." The law is a maze of self-contradicting provisions and penalties which include a section making it a felony for one to exceed his credit card limits, section 1705.7, and a section eliminating the need to prove venue, section 1705.3. It is reasonable to expect some amendments to this law in 1981.

Another bill passed at the 1980 Session was House Bill 523,[28] the Restitution Act, which attempts to enlarge the authority to use restitution in court, probation, and parole situations. The laudable goals of this bill are more than offset by the requirements of written findings concerning whether or not restitution will be ordered, as well as a cumbersome list of factors which must be considered, apparently as part of the record. The net effect is to add much red tape to what was previously a simple procedure.

The Discovery Bill[29] was one of the significant, though limited, changes in criminal procedure. This bill is also very awkwardly written, partly from having been amended on the House floor. The bill allows the defense to request copies of any written or oral statement made by the defendant. Discovery of laboratory reports is also permitted if such reports

25. 1980 Ga. Laws 1233.
26. GA. CODE ANN. § 26-1601(a) (Supp. 1980).
27. GA. CODE ANN. §§ 26-1705 to 1705.9 (Supp. 1980).
28. GA. CODE ANN. ch. 27-30 (Supp. 1980).
29. GA. CODE ANN. ch. 27-13 (Supp. 1980).

are to be offered in evidence.

Another significant procedural change comes from the Deposition Bill, House Bill 1150.[30] That bill allows either prosecution or defense to depose a witness if the witness is in imminent danger of death or has been threatened because of his status as a witness. However, the deposition may be used in court only if the witness is dead.

Two bills affecting bad checks were also passed. One adds a rather meaningless set of graduated mandatory minimum sentences for writing bad checks.[31] The other bill, Senate Bill 523,[32] attempts to cure the constitutional infirmities of the notice provision of Georgia Code Ann. section 26-1704.[33] In *Hall v. State*,[34] the court had disapproved the provision that "notice . . . by . . . mail . . . shall be . . . equivalent to notice having been received . . . whether such notice shall be returned undelivered or not." The new section makes it prima facie evidence that the accused knew the instrument would not be honored if "notice . . . is returned undelivered . . . when such notice was mailed within a reasonable time of dishonor to the address printed on the instrument or given by the accused at the time of issuance." Although the wording is somewhat different from the former provision, the fate of this provision may be the same as that of its predecessor.

The Unified Appeal Bill,[35] a creature of the Georgia Supreme Court, is meant to allow the court to develop new procedures in death penalty cases. The court wants to insure that all issues are raised and disposed of as soon as possible, rather than dragged out issue by issue in an endless flow of writs and appeals. The new rules issued pursuant to this legislation may achieve this goal, but they may also create even more grounds for extended legislation and further clutter pre-trial and trial procedures.

## III. TRENDS

Over recent years, a number of trends have been noticeable in specific areas of criminal law and procedure. While some of these trends, in the area of pleading for example, show a tendency toward liberalization, others, such as rulings on appellate procedure, seem to require increasingly strict compliance with court rules and statutory law.

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30. GA. CODE ANN. § 38-1301(a) (Supp. 1980).
31. GA. CODE ANN. § 26-1704(b) (Supp. 1980).
32. GA. CODE ANN. § 26-1704(a) (Supp. 1980).
33. GA. CODE ANN. § 26-1704(b) (Supp. 1980).
34. 244 Ga. 86, 259 S.E.2d 41 (1979).
35. GA. CODE ANN. § 27-2538 (Supp. 1980).

### A. *Variance Between "Allegata" and "Probata"*

The trend in recent years has been away from strict compliance with the "fatal variance rule." Where an indictment alleges the crime in such a manner that the defendant is put on notice of the charge and could not be re-tried for the same conduct, the indictment has been deemed sufficient.

In *Jones v. State*,[36] the indictment alleged one date and the victim testified that the crime took place on two possible dates, June 1st *or* 2nd. The court affirmed the conviction. In *Rick v. State*,[37] the drug alleged was "pethidine" and drug proven was "pethidine hydrochloride". However, this variance was not considered fatal. In *Cobb v. State*,[38] the indictment alleged robbery "from the person" of the victim. Although the evidence showed robbery "from the presence" of the victim, no fatal variance was shown. In *Cline v. State*,[39] the indictment alleged that an individual was the victim of armed robbery. Even though the property actually belonged to a corporation, there was no fatal variance. In a similar vein, *Gaston v. State*[40] held that there was no fatal variance when a burglary indictment naming a corporation as the victimized owner was supported by testimony from an individual who was the actual owner. The reverse situation arose in *High v. State*,[41] in which an individual owner was named in the indictment whereas the proof showed a corporate owner.

A loose, commonsense sort of rule has developed in this area of the law to replace the fatal variance rule. The fatal variance rule, when strictly applied, had often led to overly technical reversals. The present trend away from the rule is unlikely to be reversed.

### B. *Appellate Practice*

In the arena of appellate practice, both appellate courts have been enforcing rules more strictly than in previous years. For example, the burden is on counsel to invoke a ruling of the trial court, without which there can be no appellate review.[42] If no ruling is obtained, any error is deemed waived.[43] If the record needs supplementing, the burden is on counsel to

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36. 150 Ga. App. 300, 257 S.E.2d 370 (1979).
37. 152 Ga. App. 519, 263 S.E.2d 213 (1979).
38. 244 Ga. 344, 260 S.E.2d 60 (1979).
39. 153 Ga. App. 576, 266 S.E.2d 266 (1980).
40. 153 Ga. App. 538, 265 S.E.2d 866 (1980).
41. 153 Ga. App. 729, 266 S.E.2d 364 (1980).
42. For this point, *see* Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979); Dowdy v. State, 152 Ga. App. 145, 262 S.E.2d 511 (1979).
43. *See* Hill v. State, 150 Ga. App. 451, 258 S.E.2d 206 (1979).

see that it is supplemented.[44]

As for brief-writing, the trend of strict enforcement continues. The court in *Powers v. State*[45] held that enumerations cannot be enlarged when one writes his brief, and if one does not argue or support enumerations, they are deemed abandoned.[46] As stated in *Wilkie v. State*:[47] "A mere statement of what occurred at trial and the contentions of the appellant does not constitute an argument in support of such contentions."

### C. *Similar Transactions*

There have been a multitude of cases allowing the introduction of separate crimes not alleged in an indictment when these similar transactions show motive, scheme, intent, bent of mind or when they aid in identification.[48] Similar transactions should be "so nearly identical in method as to earmark them as the handiwork of the appellants."[49] The defendant must also be identified as the perpetrator of the similar crime, of course.

While there appears to be a slight liberalization in the use of similar transactions, there also appears to be a point at which the courts are very closely scrutinizing these cases. If the other crime is only technically similar, then its relevance will be weighed against its prejudicial impact. In *Anglin v. State*,[50] for example, Judge Deen, who wrote the decision reversing a drug case, pointed out that a sale of marijuana earlier in the day "cannot possibly tend to prove later possession." The rule as to the admissibility of similar transactions will undoubtedly continue to be the source of much debate with each case being a new battleground.

### D. *Search and Seizure*

The law in regard to search and seizure is not undergoing the revolution of a few years ago but nonetheless continues to be refined by a flow of decisions. One of the best summaries of the law concerning search war-

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44. *See* Zachary v. State, 245 Ga. 2, 262 S.E.2d 779 (1980).

45. 150 Ga. App. 25, 256 S.E.2d 637 (1979).

46. *See* Rick v. State, 152 Ga. App. 519, 263 S.E.2d 213 (1979); Royle v. State, 151 Ga. App. 88, 258 S.E.2d 921 (1979); Blanton v. State, 150 Ga. App. 559, 258 S.E.2d 174 (1979).

47. 153 Ga. App. 609 266 S.E.2d 289 (1980).

48. *See, e.g.*, McClesky v. State, 245 Ga. 108, 263 S.E.2d 146 (1980); Laws v. State, 153 Ga. App. 166, 264 S.E.2d 700 (1980); Buffington v. State, 153 Ga. App. 54, 264 S.E.2d 543 (1980); Rhodes v. State, 153 Ga. App. 306, 266 S.E.2d 801 (1980); Sweeny v. State, 152 Ga. App. 765, 264 S.E.2d 260 (1979); Johnson v. State, 152 Ga. App. 624, 263 S.E.2d 509 (1979); Simmons v. State, 152 Ga. App. 643, 263 S.E.2d 522 (1979); Minis v. State, 150 Ga. App. 671, 258 S.E.2d 308 (1979); Silvers v. State, 151 Ga. App. 216, 259 S.E.2d 203 (1979).

49. *See, e.g.*, Hart v. State, 149 Ga. App. 785, 256 S.E.2d 127 (1979); Williams v. State, 150 Ga. App. 852, 258 S.E.2d 659 (1979).

50. 151 Ga. App. 570, 260 S.E.2d 563 (1979).

rant cases in which there is a confidential informant is *Shaner v. State.*[51] In *Shaner,* Judge Carley carefully and accurately explained the meaning of a number of United States Supreme Court decisions, including *Draper v. United States,*[52] *Aguilar v. Texas,*[53] and *Spinelli v. United States.*[54] The test required under those cases when an informant's tip is relied upon is that the sworn information in the search warrant affidavit must set forth the underlying basis for the informant's knowledge or provide such detail that it is evident that the allegations are not simply based on a casual rumor or accusation. Also, there must be a basis for proving the informant's reliability. *Shaner* is unique in that no underlying basis is given for the informant's knowledge and the informant had no history of previous contacts with the police to establish reliability. In *Shaner,* however, the information given was unusually detailed as to description of the defendants, their auto, their route of travel, and the time that they would be travelling. The informant also described exactly what contraband would be discovered and its location in the vehicle. This information satisfied the first prong of the *Aguilar-Spinelli* text. Although the informant in *Shaner* had no "track record" of previous tips, the independent corroboration by the police of virtually all the information supplied by the informant established the informant's reliability.

In another interesting search case, *Berger v. State,*[55] the defendant attempted to retrieve his lost briefcase at a downtown Atlanta hotel. When asked for identification, the defendant said his wallet was in the briefcase. The security officer then opened the briefcase and observed marijuana as he was removing the wallet. The seizure of the marijuana was upheld on the ground that it is not an unauthorized search for hotel personnel to open unlocked items in an attempt to determine ownership.

In *Buday v. State,*[56] however, the fruits of a search of luggage were found to be inadmissible. The defendant had been lawfully arrested in his automobile and the luggage was in the trunk. The court relied at least partially on *Arkansas v. Sanders,*[57] which held that even though there may be some right to look in the trunk of an auto there must be probable cause to open the luggage found therein. One has an expectation of privacy with regard to his personal luggage.

A number of other expectation of privacy cases included *Riden v.*

51. 153 Ga. App. 694, 266 S.E.2d 338 (1980).
52. 358 U.S. 307 (1959).
53. 378 U.S. 108 (1964).
54. 393 U.S. 410 (1969).
55. 150 Ga. App. 166, 257 S.E.2d 8 (1979).
56. 150 Ga. App. 686, 258 S.E.2d 318 (1979).
57. 442 U.S. 753 (1979).

*State*,[58] in which a prison cell was held to be an area generating no expectation of privacy, and *Dean v. State*,[59] in which a similar rule was applied to a halfway house. In *Reece v. State*,[60] an aerial search by helicopter in a rural area revealed certain evidence not visible from the ground. No expectation of privacy existed. However, in *Bunn v. State*,[61] the partially fenced area behind a rented apartment in an apartment complex was entitled to an expectation of privacy. It is unclear whether there would be a clash between this case and *Reece* if the same items had been openly visible when observed from a helicopter.

In a case involving the scope of a search, *Wyatt v. State*,[62] the court held that a search warrant for a building does not allow an extensive search of the occupants. The appellant was present while a search was being carried out. After a pat-down for weapons, a more extensive search of his person took place. The pat-down was permissible, but since the search warrant did not name the appellant, a search of his person exceeded the limits of the warrant. In a case dealing with peculiarities of search warrant affidavits, *Reed v. State*,[63] the court held that the use of double hearsay in a search warrant is permissible, particularly where the hearsay is from one police officer to another.

In *Cuevas v. State*,[64] an affidavit was attacked for containing knowingly false information. The court held that if the claim affects information vital to establish probable cause, a hearing should be held to determine if the warrant can stand without the false information. If the tainted information is disregarded, the warrant may still be good. The entire warrant is not tainted by the mere existence of some false information.

### *E. Trial Court Charge to the Jury*

Although the charge of the court continues to be the source of many enumerations of error, there has been little major change in this area of law since *State v. Stonaker*.[65] There have, however, been a number of unusual, though not earthshaking, decisions in this arena. A charge concerning good character was requested in *McCollum v. State*,[66] because the defendant testified he had "never been in trouble." The court found this

58. 151 Ga. App. 654, 261 S.E.2d 409 (1979).
59. 151 Ga. App. 874, 261 S.E.2d 759 (1979).
60. 152 Ga. App. 760, 264 S.E.2d 258 (1979).
61. 153 Ga. App. 270, 265 S.E.2d 88 (1980).
62. 151 Ga. App. 207, 259 S.E.2d 199 (1979).
63. 150 Ga. App. 312, 257 S.E.2d 280 (1979).
64. 151 Ga. App. 605, 260 S.E.2d 737 (1979).
65. 236 Ga. 1, 222 S.E.2d 354 (1976).
66. 153 Ga. App. 519, 265 S.E.2d 852 (1980).

statement to be inadequate to require such a charge. In *Powers v. State*,[67] the defendant requested a charge defining rape because the burglary indictment recited that the entry was with the intent to commit theft and rape. The court of appeals agreed.

One of the traditional charges used by judges throughout the state was attacked in *Jenkins v. State*.[68] The charge requires the jury to reconcile conflicts "so as to make all witnesses speak the truth and so as to not impute perjury to any witness." The court approved this charge and found that it does not unconstitutionally impair the jury's decision-making duties.

In three similar but unrelated cases, questions were raised with regard to the requirement of charging on the offense set forth in the indictment. In *Johnson v. State*,[69] the basic rule was restated that if there is any evidence on the offense charged in the indictment the court must charge the jury on that offense. In *Burnett v. State*,[70] the situation arose in which the court charged not only on the language in the shoplifting indictment but also on language from the former shoplifting law. Since the jury might have found the defendant guilty based on conduct that is now legal, the decision was reversed. In *Bennett v. State*,[71] however, the defendant was indicted for robbery, and the judge charged the jury not only on robbery but also on armed robbery. The court found that there was no way the appellant could be harmed by this charge. Since he was only charged with robbery, the jury could not find him guilty of armed robbery. Even if the jury thought he was guilty of armed robbery, robbery is a lesser included offense. The added charge was mere surplusage.

### *F. Guilty Plea*

The entry and later withdrawal of a guilty plea has become a popular subject producing some rather interesting case law. In *Germany v. State*,[72] the court of appeals adopted a new rule requiring the judge to ask all the questions of the defendant when a guilty plea is entered. Traditionally, the prosecutor, sometimes aided by the defense lawyer, would pose various questions to the defendant with the judge listening from the bench. The reasoning of the court of appeals was based on *Purvis v. Connell*,[73] which appeared to adopt Rule 11 of the Federal Rules of Criminal Procedure. There is language in that rule discussing a "personal" inquiry

67. 150 Ga. App. 25, 256 S.E.2d 637 (1979).
68. 152 Ga. App. 637, 263 S.E.2d 520 (1979).
69. 152 Ga. App. 624, 263 S.E.2d 509 (1979).
70. 152 Ga. App. 738, 264 S.E.2d 33 (1979).
71. 153 Ga. App. 210, 264 S.E.2d 688 (1980).
72. 151 Ga. App. 866, 261 S.E.2d 774, *rev'd* 245 Ga. 326, 265 S.E.2d 13 (1979).
73. 227 Ga. 764, 182 S.E.2d 892 (1971).

of the defendant. This case proceeded to the Supreme Court of Georgia by writ of certiorari in *State v. Germany*.[74] The court of appeals was reversed. The supreme court held that literal compliance with Rule 11 is not mandatory since the rule goes well beyond the constitutional requirements of *Boykin v. Alabama*.[75] The net result of these two decisions is that the law in Georgia in this regard is unchanged.

A number of other cases arose recently dealing with the collateral consequences of guilty pleas. *Davis v. State*,[76] held that "adverse unanticipated collateral consequences" of one's guilty plea are not valid grounds for withdrawing a plea. In a refinement of this rule, *Garcia v. State*[77] presented a situation in which a sentence on a guilty plea was to run concurrently with "any federal sentence he may be now serving or required to serve." The federal parole authorities, however, decided to defer revocation of Garcia's parole until he completed his state sentence. Garcia was displeased and wanted to withdraw his plea. The court however found his plea had been freely and voluntarily entered, and found the subsequent action of federal authorities to be a collateral consequence beyond the control of the superior court.

In a similar case, *Jeffares v. DeFrancis*,[78] the defendant and his counsel were optimistic that a seven-year sentence could be served at a restitution center. After the plea was entered, their optimism proved to be unfounded and they wanted to withdraw the guilty plea. The court said: "A defendant's subjective hopes and unfulfilled desires, not induced by the court or state, are not good grounds for attacking the resulting plea and sentence."[79] It thus appears that a defendant and his counsel must anticipate the basic consequences of a guilty plea. Unless the state or the court has misled the defendant, he will have to live with the bargain he has struck.

### *G. Evidence*

Decisions on the admissibility of evidence are almost as frequent in criminal cases as are decisions on the charge of the court. Despite a large number of evidence decisions, however, only slight modifications in the rules of evidence have been made during the survey period. The traditional rule in homicide cases is that specific acts of violence by the victim cannot be used to show the victim's reputation for violence. Only general

74. 245 Ga. 326, 265 S.E.2d 13 (1980).
75. 395 U.S. 238 (1969).
76. 151 Ga. App. 736, 261 S.E.2d 468 (1979).
77. 152 Ga. App. 889, 264 S.E.2d 323 (1980).
78. 244 Ga. 183, 259 S.E.2d 444 (1979).
79. *Id.* at 184, 259 S.E.2d at 445.

reputation evidence on this subject is admissible. *Music v. State*[80] and *Wilson v. State*[81] restated this rule. However, in *Milton v. State*,[82] an exception was developed.

In *Milton*, the victim of the homicide had previously assaulted the defendant, and the defendant claimed that the victim was engaged in such an assault at the time of the killing. The trial court excluded the evidence of specific acts of violence by the victim. The supreme court held that the defendant and his witnesses could testify to the previous assaults since this evidence was vital to the defendant's claim of self-defense. This exception was based not on the value of the evidence to show general reputation but as evidence of the relationship between the parties, which played a major role in explaining the defendant's fear of the victim.

Another continuing trend in evidence decisions has been the liberalization of admissiblity requirements. Evidence of questionable relevance is often allowed in evidence for whatever probative value it may have. Strict chain of evidence requirements have been at least partially abandoned in favor of allowing the jury to have full access to all evidence.

In *Williams v. State*,[83] when the chain of evidence was questioned, the court ruled that it was not necessary to show that the evidence was guarded every minute in order to have an acceptable chain. In *Gunn v. State*[84] and *Rutledge v. State*,[85] weapons were admitted because they were similar to the weapons actually used. In *Ligon v. State*,[86] a coat hanger was admitted into evidence because it was found next to a car the appellant was trying to enter and may have been used by the appellant. Finally, in *McCranie v. State*,[87] there was conflicting testimony about a shotgun, with some witnesses claiming the gun used was of a different gauge. However, the weapon was admitted and the issue of its probative value and weight were left to the jury.

In another significant case, evidence of a defendant's silence was admitted, contrary to the general rule barring such evidence. In *Emmett v. State*,[88] a witness testified that a young boy accused the defendant of a murder. The accusation took place in the presence of friends and relatives at a gathering in a private home. Another witness to the confrontation said the defendant "didn't say nothing . . . He just smiled sort of" after

80. 244 Ga. 832, 262 S.E.2d 128 (1979).
81. 153 Ga. App. 215, 264 S.E.2d 725 (1980).
82. 245 Ga. 20, 262 S.E.2d 789 (1980).
83. 153 Ga. App. 421, 265 S.E.2d 341 (1980).
84. 245 Ga. 359, 264 S.E.2d 862 (1980).
85. 152 Ga. App. 755, 264 S.E.2d 244 (1979).
86. 152 Ga. App. 661, 263 S.E.2d 534 (1979).
87. 151 Ga. App. 871, 261 S.E.2d 779 (1979).
88. 243 Ga. 550, 255 S.E.2d 23 (1979).

the child told him to explain how he killed the victim. This evidence was found to be admissible and not in conflict with *Doyle v. Ohio*[89] or *Howard v. State*.[90] The distinguishing feature was that those cases dealt with in-custody silence while the *Emmett* case was a totally noncustodial situation. Also applicable was Georgia Code Ann. section 38-409,[91] which states that "Acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission."

Another interesting rule of evidence was analyzed in *Emmett*, because the physical evidence had been lost or destroyed. Emmett's counsel claimed that the defendant could not be tried without the physical evidence since he had a right to examine the evidence under *Patterson v. State*.[92] The court rejected this argument and refused to extend *Patterson* to require the production of all evidence to support a valid conviction. The defendant had failed to show any possible harm and had obtained reports on tests conducted on all the available evidence.

In *King v. State*,[93] the court restricted the use of a death certificate to use only as evidence of cause of death. Though Georgia Code Ann. section 88-7715[94] makes such documents admissible, the admissibility relates only to the question of cause of death and not to other matters that may appear on the certificate.

In *O'Quinn v. State*,[95] the law in regard to bloodhound identification was fully explored. An exacting foundation must be laid for such evidence, according to the rules for such admission, which were first set out in *Aiken v. State*.[96] The dog's training and testing must be shown, and a witness with personal knowledge of the dog and its reliability must testify. Since this foundation was absent in *O'Quinn*, the observations by witnesses that the dog sniffed the defendant should not have been admitted. Because the testimony was the only evidence identifying the defendant, the case was reversed.

89. 426 U.S. 610 (1976).
90. 237 Ga. 471, 228 S.E.2d 860 (1976).
91. GA. CODE ANN. § 38-409 (1974).
92. 238 Ga. 204, 232 S.E.2d 233 (1977).
93. 151 Ga. App. 762, 261 S.E.2d 485 (1979).
94. GA. CODE ANN. § 88-1715 (1979).
95. 153 Ga. App. 467, 265 S.E.2d 824 (1980).
96. 16 Ga. App. 848, 86 S.E. 1076 (1915).