Criminal Law

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The Georgia Supreme Court and the Georgia Court of Appeals decided over 800 cases in the area of criminal law during the period of this survey. The first section of this article will examine individual cases of note. The second section will deal with some of the more heavily litigated categories of criminal law in this survey period.

I. Individual Cases of Note

A. *Voir Dire*

The question of whether *voir dire* must be reported and transcribed in noncapital felony cases was answered in the negative by the supreme court in *State v. Graham.*[1] The court stated that the transcription requirement, as announced in *Owens v. State,*[2] applies only to cases in which the death penalty is sought. The court in *Owens* based its holding on the unique character of the death penalty, rather than on the critical nature of *voir dire.* The court also rejected an argument that the "testimony and proceedings,"[3] which the state had a statutory duty to have transcribed,[4] included *voir dire.*[5]

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1. 246 Ga. 341, 271 S.E.2d 627 (1980).
2. 233 Ga. 869, 214 S.E.2d 173 (1975).
3. 246 Ga. at 343, 271 S.E.2d at 628.
4. *See* Ga. Code Ann. § 27-2401 (1978).
5. 246 Ga. at 342, 271 S.E.2d at 628.

B. Venue

In *Bundren v. State*,[6] defendant had fired shots from a speeding vehicle at a pursuing police car just as both cars were crossing a county line. The state constitution requires that criminal trials be held in the county where the crime was committed.[7] When the place where the crime occurred cannot be determined, however, Georgia Code Ann. section 26-302 provides that a trial can be held in any county in which the evidence shows beyond a reasonable doubt that the crime might have been committed.[8] The supreme court found this code provision to be in harmony with the constitutional mandate, and rejected defendant's challenge.

C. Right to a Speedy Trial

A motion to dismiss or quash an indictment for denial of a speedy trial that does not request an immediate trial is *not* a demand for trial, and also is not an assertion of the right to a speedy trial, according to the decision in *State v. Lively*.[9] Although the State had failed to bring defendant to trial in the five and one-half years after his indictment, the court of appeals pointed out that both prejudice to the defendant and inexcusable delay by the State must be shown. The delay in *Lively* was apparently to defendant's benefit; thus he failed to show a violation of his right to a speedy trial.

D. Right to Confrontation

A criminal defendant accused of a felony who is in custody may waive the right to be personally present during his trial under the court's holding in *State v. Phillips*.[10] This waiver may be made by counsel for the defendant *if* the defendant authorizes or subsequently acquiesces in the waiver, or is present when it occurs. In adopting this rule, the supreme court announced that it was following several recent federal cases.[11]

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6. 247 Ga. 180, 274 S.E.2d 455 (1981).

7. GA. CONST. art. VI, § 14, ¶ 6; GA. CODE ANN. § 2-4306 (1977).

8. GA. CODE ANN. § 26-302(h) (1977).

9. 155 Ga. App. 402, 270 S.E.2d 812 (1980). *See also* Barker v. Wingo, 407 U.S. 514 (1972).

10. 247 Ga. 246, 275 S.E.2d 323 (1981).

11. *See, e.g.*, Wilson v. Harris, 595 F.2d 101 (2d Cir. 1979); United States v. Alper, 449 F.2d 1223 (3d Cir. 1971), *cert. denied*, 405 U.S. 988 (1972); Arizona v. Hunt, 408 F.2d 1086 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969).

E. The Overt Act Requirement in Criminal Attempt

In *Howell v. State*,[12] defendant wanted to have his wife killed, but he hired an undercover policeman rather than a true assassin to do the job. He later contended that this was merely an act of preparation, since neither he nor his "agent" intended to commit the actual offense. Finding no Georgia cases on point, the court of appeals decided to follow the reasoning of cases from other jurisdictions[13] that authorized a finding of guilt if the accused believed his accomplice was involved, regardless of the actual intent of the accomplice.

F. Multiple Convictions for Conspiracy

In *Price v. State*,[14] appellant and codefendant had been convicted on 150 of 168 counts of conspiracy to unlawfully prescribe controlled substances.[15] After noting that the case specifically dealt with a prosecution for multiple violations of a single conspiracy statute, the supreme court reversed the multiple convictions. Relying on principles enunciated by the United States Supreme Court in *Braverman v. United States*,[16] the court held that, regardless of whether the object of a single agreement is to commit one or many crimes, it is, in either case, the agreement that constitutes the conspiracy. If there is only one agreement, as was found to be the case in *Price*, there can be only one conspiracy, and thus, only one conviction.

G. Penalty for Violation of the Rule of Sequestration

Should a witness who violates the rule of sequestration[17] in a criminal case be permitted to testify? In May 1980, the court of appeals held in *McElroy v. State* that, absent an abuse of discretion by the trial judge, a witness who violated the rule could be barred from testifying.[18] This decision was based on two fairly recent supreme court cases.[19]

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12. 157 Ga. App. 451, 278 S.E.2d 43 (1981).

13. *See, e.g.*, Braham v. State, 571 P.2d 631 (Alaska 1977), *cert. denied*, 436 U.S. 910 (1978); State v. Gay, 4 Wash. App. 834, 486 P.2d 341 (1971); State v. Mandel, 78 Ariz. 226, 278 P.2d 413 (1954).

14. 247 Ga. 58, 273 S.E.2d 854 (1981).

15. GA. CODE ANN. § 79A-812 (1973). This is a special conspiracy statute, applicable to conspiracies to violate the Controlled Substances Act. *See* GA. CODE ANN. §§ 79A-801 to -834 (1973).

16. 317 U.S. 49 (1942).

17. *See* GA. CODE ANN. § 38-1703 (1981).

18. 154 Ga. App. 638, 269 S.E.2d 497 (1980).

19. Thomas v. State, 240 Ga. 441, 241 S.E.2d 194 (1978); Wessner v. State, 236 Ga. 162, 223 S.E.2d 141 (1976).

Soon after *McElroy,* however, the supreme court held in *Wright v. State*[20] that it was error to exclude defendant's sole supporting witness. The court found that the State's correct remedy in such a case is an instruction to the jury that the witness' violation of the rule can be considered in determining his credibility. The issue arose again in March 1981. Noting the conflict in the case law and a trend in Georgia to make more witnesses competent to testify, the supreme court overruled an earlier case[21] and held that a defense witness who violates the rule of sequestration shall not be precluded from testifying in a criminal case.[22] This new rule was quickly expanded to cover witnesses for the prosecution.[23] In either case, a violation of the rule would go to the credibility rather than the admissibility of the witness' testimony.[24]

H. Entrapment

The court of appeals has, on several occasions, found that a directed verdict of acquittal is required in cases in which: (1) the defendant alleged entrapment or undue influence by a confidential informant and (2) the State failed to produce the informant.[25] This position was reaffirmed in *Royal v. State.*[26] On appeal, however, the supreme court overruled the court of appeals decision in *Royal.*[27] Carefully distinguishing earlier cases cited by the court of appeals, the supreme court held that there was no per se rule that entitled a defendant to a directed verdict when his testimony of entrapment is not rebutted by the informant.[28] The court made a distinction between evidence that *raises* a defense of entrapment and evidence that *demands* a finding of entrapment. A defendant is not entitled to a directed verdict of acquittal unless his unrebutted testimony, together with all its reasonable deductions and inferences, demands a finding of entrapment.[29] In *Royal,* the court reasoned that while defendant's testimony gave some indications of entrapment, there was sufficient evidence to authorize the jury's verdict of guilty.[30]

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20. 246 Ga. 53, 268 S.E.2d 645 (1980).
21. Wessner v. State, 236 Ga. 162, 223 S.E.2d 141 (1976).
22. Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981).
23. Blanchard v. State, 247 Ga. 415, 276 S.E.2d 593 (1981).
24. 247 Ga. at 417, 276 S.E.2d at 595.
25. *See, e.g.,* Perry v. State, 143 Ga. App. 675, 237 S.E.2d 705 (1977); Coleman v. State, 141 Ga. App. 193, 233 S.E.2d 42 (1977); Harris v. State, 139 Ga. App. 675, 229 S.E.2d 148 (1976).
26. 155 Ga. App. 691, 272 S.E.2d 556 (1980).
27. State v. Royal, 247 Ga. 309, 275 S.E.2d 646 (1981).
28. 247 Ga. at 310, 275 S.E.2d at 648.
29. *Id.*
30. The factors indicating nonentrapment were as follows: Royal admitted that he was not coerced to buy marijuana; he was only alone with the informant for a few minutes; and

I. Guilty Pleas

In *State v. Germany*,[31] the supreme court was called upon to interpret Georgia Code Ann. section 27-1404,[32] which provides for withdrawal of a guilty plea as a matter of right. The section allows the plea to be withdrawn at "any time before the judgment is *pronounced.*"[33] The question presented in *Germany* was: "When is a sentence pronounced?" The court found it to be pronounced when the sentence is orally announced, rather than when it is entered. This holding will only be applied prospectively.[34]

In another case, *Thompson v. State*,[35] the court of appeals found no constitutional bar to the imposition of a stricter sentence for a guilty verdict than would have been imposed had defendant not withdrawn his guilty plea. Under the United States Supreme Court decision in *North Carolina v. Pearce*,[36] due process requires the sentencing court to include in the record an affirmative statement of the reasons for an increased sentence. If the reasons support the increase, due process is satisfied, according to the ruling in *Thompson*.[37]

II. Topics of Heavy Litigation

A. Sufficiency of the Indictment

The court of appeals in *Bryant v. State*[38] pointed out that Georgia no longer strictly follows the "fatal variance" rule. When allegations and proof substantially correspond, the indictment will be sufficient. This guarantees that a defendant will have notice of the charges against him, and that he will be protected from multiple prosecutions for the same crime.[39]

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he admitted that he had smoked marijuana before and after the sale, which indicated a predisposition for use of the drug. 247 Ga. at 311, 275 S.E.2d at 649.

31. 246 Ga. 455, 271 S.E.2d 851 (1980).

32. Ga. Code Ann. § 27-1404 (1978).

33. *Id.* (emphasis added). The court in *Germany* also held that at the time a plea is offered there must be a disclosure of any plea agreement that has been reached between the prosecution and the defendant. The court further held that the trial judge must inform the defendant personally if the court intends to reject the plea agreement. 246 Ga. at 456, 271 S.E.2d at 852.

34. 246 Ga. at 456, 271 S.E.2d at 852.

35. 154 Ga. App. 704, 269 S.E.2d 474 (1980).

36. 395 U.S. 711 (1969).

37. 154 Ga. App. at 708, 269 S.E.2d at 476.

38. 155 Ga. App. 621, 271 S.E.2d 875 (1980).

39. *Id.* at 621, 271 S.E.2d at 876.

In *State v. Williams*,[40] the indictment charged defendant with defacing government property belonging to the "State of Georgia, State Highway Department."[41] The problem was that the agency formerly known by that name had become the Department of Transportation. Since the important element was held to be ownership by the state, rather than by a particular agency, the variance was not fatal. In *Jones v. State*,[42] the company named as the victim in an indictment for theft by taking was shown to be in lawful possession of the property in issue, but not its true owner. The court of appeals found no fatal variance. The variance between a trailer park lot number alleged in a burglary indictment and the lot number proved at trial was held not fatal in *McCarty v. State*.[43] Nor was a fatal variance found in *Whitt v. State*,[44] in which the day of the offense alleged in the indictment was one day earlier than the date that was actually proved at trial.

Despite the apparent relaxation in application of the fatal variance rule, the courts have by no means abandoned it. In *Hunter v. State*,[45] the indictment alleged a burglary on August 18, 1978, of West's Grocery, on Georgia Highway 373, approximately ten miles east of the City of Calhoun. At trial, a police officer testified that he answered a call on August 27, 1978, at West's Grocery on Dews Pond Road, about seven miles east of Calhoun; Harry West testified that he operated Dews Pond Grocery on Dews Pond Road, about seven miles east of Calhoun. There was no evidence that showed West's Grocery and Dews Pond Grocery were the same place, or that Georgia Highway 373 and Dews Pond Road were the same highway. Consequently, the court of appeals found this variance to be fatal.

B. Search and Seizure

It was determined by the court of appeals in *Jones v. State*[46] that police can make an investigatory stop of a vehicle on the only outlet street in an area when there have been problems of vandalism in the past. The dissent argued, to no avail, that *Terry v. Ohio*[47] could not justify such a stop when the officer had observed no indication of illegal activity and the record did not indicate when the most recent acts of vandalism had

40. 246 Ga. 788, 272 S.E.2d 725 (1980).
41. *Id.* at 788, 272 S.E.2d at 726.
42. 156 Ga. App. 646, 276 S.E.2d 50 (1980).
43. 157 Ga. App. 336, 277 S.E.2d 259 (1981).
44. 157 Ga. App. 10, 276 S.E.2d 64 (1981).
45. 155 Ga. App. 561, 271 S.E.2d 694 (1980).
46. 156 Ga. App. 730, 275 S.E.2d 778 (1980).
47. 392 U.S. 1 (1968).

occurred.[48]

In *Dunivant v. State*,[49] the court of appeals found that the insertion of a "beeper" device by drug agents into a package of chemicals the agents suspected were to be used in the manufacture of illegal drugs did not violate defendant's reasonable expectations of privacy. In *Dunivant*, the existence of probable cause that a crime was intended and the absence of a trespass were found to satisfy the requirements of the fourth amendment. The court in *Giddens v. State*[50] held that defendant had no reasonable expectation of privacy in a field surrounded by a barbed wire fence that did not contain any facilities that could qualify as a dwelling. Surveillance from an airplane was not an invasion of a reasonable expectation of privacy in *Williams v. State*.[51] The court of appeals analogized the sky to a highway, reasoning that those licensed to do so may pass as long as they keep a proper vertical distance from the property of others.

In *State v. Sanders*,[52] the court approved a police officer's correction of a single digit error in a room number on a search warrant. The suspect was named in the warrant; when the officer found that the suspect was in room 337, not 327, it was reasonable and proper for him to call the magistrate and have the correction approved. The court in *Miller v. State*[53] held that a hearsay declarant whose information is the basis for issuance of a search warrant need not meet the credibility standards of *Aguilar v. Texas*[54] if the affiant can state as a result of personal knowledge or investigation that the declarant is a law abiding citizen.

A landlord who in good faith believes that his lessee's rental contract has terminated has a sufficient relationship to the premises to consent to a search of those premises, according to the court in *Witt v. State*.[55] Another case that raised the question of authority to consent to a search of premises was *Valenzuela v. State*.[56] The defendant in that case was a guest on the premises; however, he was also the "target" of the search. While he might not have had the authority to consent to a search if the *owner* of the premises were the target, the court of appeals held that defendant certainly could, and did, consent to a search of his area of the house.[57]

The court of appeals overturned an "inventory" search of a bag in the

48. 156 Ga. App. 730, 731, 275 S.E.2d 778, 779 (1980) (Smith, J., dissenting).
49. 155 Ga. App. 884, 273 S.E.2d 621 (1980).
50. 156 Ga. App. 258, 274 S.E.2d 595 (1980).
51. 157 Ga. App. 476, 277 S.E.2d 923 (1981).
52. 155 Ga. App. 274, 270 S.E.2d 850 (1980).
53. 155 Ga. App. 399, 270 S.E.2d 822 (1980).
54. 378 U.S. 108 (1964).
55. 157 Ga. App. 564, 278 S.E.2d 145 (1981).
56. 157 Ga. App. 247, 277 S.E.2d 56 (1981).
57. *Id.* at 249, 277 S.E.2d at 58.

possession of defendant at the scene of her one-car accident in *Gaston v. State*.[58] Defendant had attempted to leave the bag with a friend, but police forced her to keep it when they arrested her for traffic violations. The court analogized the case in *Dunkum v. State*,[59] in which the court found that unnecessary impoundment of a car not involved in defendant's crime was merely a subterfuge to avoid the warrant requirement. The perceived use of a "subterfuge" rendered the search in *Gaston* unreasonable.

C. *Brady v. Maryland Problems*

A *Brady v. Maryland*[60] motion was combined with a motion to suppress in *State v. Ross*.[61] The trial court had determined that the exculpatory evidence would exonerate defendant, and granted the motion to suppress without hearing evidence. The court of appeals reversed; *Brady* demands only that the trial court make certain that the State produce whatever exculpatory material it has, and Georgia Code Ann. section 27-313[62] requires that the State be given an opportunity to present evidence on a motion to suppress. In *State v. Martin*,[63] the court held that the *Brady* decision does not require disclosure of an informer's identity or the contents of the informer's communications unless the defendant can show that such information would be relevant and helpful to his defense, or essential to a fair determination of a cause relating to his guilt or sentence.

The court of appeals, in *Plemons v. State*,[64] attempted to outline the proper procedure for appellate review of *in camera* inspections of the State's files by the trial court pursuant to a *Brady* motion. The court directed that photocopies of the files should be made and sealed; this would preserve a record for appellate review. A recent supreme court case, *Wilson v. State*,[65] had approved such a procedure: "Once the material is sealed or inventoried by the trial court, the appellate court can, upon the defendant's showing cause, exercise its discretion and call for the examined material."[66] This language was noted in *Plemons*, and was interpreted to mean that filing an enumeration of error would constitute sufficient cause for review by the court of appeals.[67] A previous

58. 155 Ga. App. 337, 270 S.E.2d 877 (1980).
59. 138 Ga. App. 321, 226 S.E.2d 133 (1976).
60. 373 U.S. 83 (1962).
61. 155 Ga. App. 659, 272 S.E.2d 524 (1980).
62. GA. CODE ANN. § 27-313 (1978).
63. 156 Ga. App. 554, 275 S.E.2d 129 (1981).
64. 155 Ga. App. 447, 270 S.E.2d 836 (1980).
65. 256 Ga. 62, 268 S.E.2d 895 (1980).
66. *Id.* at 65, 268 S.E.2d at 898.
67. 155 Ga. App. at 452, 270 S.E.2d at 841.

case,[68] which implied that the trial court had no duty to include a copy of the State's file in the record after an *in camera* examination, was overruled.[69]

This new procedure was short-lived, however. In *Barnes v. State*,[70] the court of appeals decided to overrule that portion of the *Plemons* decision which held that the filing of an enumeration of error to review the *in camera* inspection would constitute sufficient cause for the appellate court to request copies of the State's files. The court in *Barnes* held that before it would review the State's file, appellant had to show that he was prejudiced by suppression of evidence.[71] The dissent strongly questioned the fairness of a requirement that, as a prerequisite for appellate review, forced a defendant to demonstrate constitutional error without access to the record on which the alleged erroneous decision was based.[72] Fair or not, this is the current state of the law.

D. Right to Counsel

In *Moody v. State*,[73] the court of appeals ruled that the Georgia Constitution[74] requires that a defendant who wishes to act as his own counsel be allowed to do so, even if he is represented by counsel. In a later supreme court case, *Johnson v. State*,[75] the court decided that when a defendant is represented by counsel, and the defendant wishes to examine and cross examine witnesses, the trial court may require that either the defendant *or* his counsel conduct the examination and cross examination of each witness, not both.

The supreme court decided in *Wooten v. State*[76] that the appointed counsel in a criminal case has no duty to apply for certiorari after the court of appeals affirms a conviction of his indigent client. The court specifically noted that it did not reach the question of whether a superior court can order appointed counsel to pursue discretionary appeals.[77]

There is no violation of the sixth amendment right to counsel when incriminatory statements are elicited from a suspect prior to indictment, if he is represented by counsel in a different criminal case. In *Drake v.*

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68. Collins v. State, 143 Ga. App. 583, 239 S.E.2d 232 (1977).
69. 155 Ga. App. at 452, 270 S.E.2d at 841.
70. 157 Ga. App. 582, 278 S.E.2d 916 (1981).
71. *Id.* at 588, 278 S.E.2d at 921.
72. *Id.* at 591, 278 S.E.2d at 925 (Shulman, J., dissenting).
73. 153 Ga. App. 866, 267 S.E.2d 291 (1980).
74. GA. CONST. art. I, § 1, ¶ 9; GA. CODE ANN. § 2-109 (1977).
75. 246 Ga. 126, 269 S.E.2d 18 (1980).
76. 245 Ga. 724, 266 S.E.2d 927 (1980).
77. In this regard, *see* Ross v. Moffitt, 417 U.S. 600 (1974).

State,[78] the court held that the decision in *Massiah v. United States*[79] addressed situations in which statements concerning a case for which defendant stands indicted are elicited from defendant without permission of counsel. *Massiah* does not prohibit interrogation in one case of a witness who is known to be represented by counsel in another case.[80]

Codefendants in cases in which the death penalty is sought must be represented by separate and independent counsel as a result of the decision in *Fleming v. State*.[81] The supreme court based this requirement on its inherent power to govern the practice of law in Georgia. The court felt that such a rule was especially necessary in death penalty cases; in those cases, a slight conflict, irrelevant to guilt or innocence, could be important in the sentencing phase.

E. Double Jeopardy

The supreme court found a violation of the double jeopardy clause of the United States Constitution[82] in *Cobb v. State*.[83] The trial judge declared a mistrial, only thirteen minutes after jury deliberation had begun, when the foreman relayed the jury's opinion that neither side had presented enough evidence. The supreme court felt it was obvious that the prosecution had not met its burden of proof; thus, denial of defendant's habeas corpus petition claiming double jeopardy was reversed.

Several cases were decided under the Georgia statute on double jeopardy,[84] which is broader in scope than the constitutional standard.[85] In *Singer v. State*,[86] the court held that the district attorney and his assistants, rather than the arresting police officer, were the "proper prosecuting officers"[87] whose knowledge of multiple prosecutions would give rise to the protections of the statute.[88] The court in *Bowens v. State*[89] ruled that

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78. 245 Ga. 798, 267 S.E.2d 823 (1980).

79. 377 U.S. 201 (1964).

80. 245 Ga. at 800, 267 S.E.2d at 240. *See also* Hoffa v. United States, 385 U.S. 293 (1966).

81. 246 Ga. 90, 270 S.E.2d 185; *cert. denied*, ___ U.S. ___, 101 S. Ct. 278 (1980).

82. U.S. CONST. amend. V.

83. 246 Ga. 619, 272 S.E.2d 296 (1980).

84. GA. CODE ANN. § 26-506 (1977).

85. *See, e.g.*, Trimble v. State, 156 Ga. App. 9, 274 S.E.2d 10 (1980); State v. Estevez, 232 Ga. 316, 206 S.E.2d 475 (1974).

86. 156 Ga. App. 416, 274 S.E.2d 612 (1980).

87. *Id.* at 417, 274 S.E.2d at 614.

88. GA. CODE ANN. § 26-506(b) (1977) provides: "If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided for in subsection (c)."

entry of a nolle prosequi to an indictment before its submission to the jury will not violate the state double jeopardy statute.

F. Possible Bias or Prejudice Against the Defendant

Police officers, while normally not included on jury lists, are eligible for jury duty upon written request to the Board of Jury Commissioners or its clerk.[90] However, if an eligible police officer is challenged for cause in a criminal case, the decision in *Hutcheson v. State*[91] requires that the challenge be sustained. In *Hart v. State*,[92] a juror complained to defense counsel during a recess that his closing argument had upset her. The defense counsel had spoken of a person who had died of cancer, and the juror's husband had recently died of cancer. The court of appeals found that although the juror's conduct was improper, it was not harmful to defendant; therefore, the trial court's refusal to remove the juror was proper.[93]

A district attorney may not administer the oath to the jury panel for the purpose of *voir dire*. In *Ates v. State*,[94] the court of appeals held that Georgia Code Ann. section 59-704.1[95] requires that the oath be administered to each panel by the trial judge. Violation of this mandatory provision was presumed to be prejudicial; this presumption was not overcome by the fact that the court was unable to discern if an actual prejudice formed in the jurors' minds as a result of the oath being administered by the prosecutor.[96]

The following questions were posed in *DeNamur v. State*[97] by the district attorney in his closing argument: "Who wants to prosecute innocent people? What pleasure does the Grand Jury get out of indicting these people?"[98] In response to defendant's motion for mistrial, the trial court instructed the jury to disregard the inquiry. The court of appeals determined that the prosecution's comment was tantamount to an argument that defendant would not have been indicted unless he was guilty. Since a defendant is presumed innocent until proven guilty, the court of

89. 157 Ga. App. 334, 277 S.E.2d 329 (1981).
90. GA. CODE ANN. § 59-112(a)(1) (1965).
91. 246 Ga. 13, 268 S.E.2d 643 (1980).
92. 157 Ga. App. 716, 278 S.E.2d 419 (1981).
93. *Id.* at 717, 278 S.E.2d at 421.
94. 155 Ga. App. 97, 270 S.E.2d 455 (1980); *accord*, Tyson v. State, 157 Ga. App. 569, 278 S.E.2d 150 (1981).
95. GA. CODE ANN. § 59-704.1 (Supp. 1980). The section provides in part, "This oath shall be administered by the trial judge." *Id.*
96. 155 Ga. App. at 98, 270 S.E.2d at 457.
97. 156 Ga. App. 270, 274 S.E.2d 673 (1980).
98. *Id.*

appeals ordered a new trial on the ground that the trial court's instruction was inadequate to eliminate prejudice to DeNamur.

Davenport v. State[99] provided an interesting example of how a defendant can be denied fundamental fairness in a criminal case. The district attorney who tried the case had previously represented the victim in a divorce proceeding against defendant. Under those circumstances, the court found, at the very least, an appearance of impropriety and added, "The administration of the law, and especially that of the criminal law, should, like Caesar's wife, be above suspicion, and should be free from all temptation, bias, or prejudice, so far as it is possible for our courts to accomplish it."[100] In a similar vein, the court in *King v. State*[101] held that a judge must disqualify himself from criminal cases that were even in the investigatory stage while he remained a district attorney in the same circuit. This is the same approach as that adopted in the federal courts.[102]

The federal rule regarding when a trial judge, faced with a motion to recuse, may preside over the recusal hearing was adopted by Georgia in *State v. Fleming*.[103] When a motion to recuse is accompanied by an affidavit, the judge's role will be limited to passing upon the legal sufficiency of the affidavit. If, assuming that all facts in the affidavit are true, recusal would be warranted, another judge must be assigned to hear the motion to recuse.[104]

A question about the legal sufficiency of an affidavit in support of a motion to disqualify a trial judge was addressed in *Mann v. State*.[105] The court decided that allegations of bias or prejudice by the judge against defendant's counsel, in matters unrelated to the pending action, were insufficient grounds for disqualification. The court reasoned that a different rule could possibly lead to situations in which an attorney could choose the judges he would appear before.[106]

G. *Evidence*

The decision in *Johnson v. State*[107] examined the recurring problem

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99. 157 Ga. App. 704, 278 S.E.2d 440 (1981).

100. *Id.* at 705-06, 278 S.E.2d at 441.

101. 246 Ga. 386, 271 S.E.2d 630 (1980).

102. *See* 28 U.S.C. § 455 (1976); Barry v. United States, 528 F.2d 1094 (7th Cir.), *cert. denied*, 429 U.S. 826 (1976).

103. 245 Ga. 700, 267 S.E.2d 207 (1980); *see* 28 U.S.C. § 144 (1976); Bell v. Chandler, 56 F.2d 556 (10th Cir. 1978).

104. 245 Ga. at 702, 267 S.E.2d at 209.

105. 154 Ga. App. 677, 269 S.E.2d 863 (1980); *accord*, Penney v. State, 157 Ga. App. 737, 278 S.E.2d 460 (1981).

106. 154 Ga. App. at 679, 269 S.E.2d at 865.

107. 154 Ga. App. 793, 270 S.E.2d 214 (1980).

caused by the State offering evidence involving similar transactions by a defendant. Such evidence is admissible only when knowledge, motive, intent, good or bad faith, or identity, or any other matter dependent upon a person's state of mind are involved as material elements in the offense for which the defendant is on trial.[108] The admission of a similar transaction or transactions is generally regarded as an exception to the rule against placing a defendant's character in evidence.[109] After careful analysis of the history and original purpose for admitting evidence of similar transactions, the court of appeals, in a rather lengthy opinion, found that the practice is increasingly misused. The court ruled that evidence of subsequent drug sales by defendant lacked any tendency to prove the drug sale with which defendant was charged and, thus, the evidence should have been excluded by the trial court.[110]

On certiorari, the Supreme Court of Georgia reversed the court of appeals[111] and held that any other offense involving a similar transaction would be relevant if there was a logical connection between the other offense and the offense charged. Historically, evidence of similar transactions has been offered and submitted in drug and sex cases, but the ruling of the supreme court broadened the evidentiary consideration respecting similar transactions. Basically, the opinion of the supreme court reflects the rule that had been followed by the trial court prior to the court of appeals ruling in *Johnson*.

In *Williams v. State*,[112] the court of appeals held that expert testimony was unnecessary to establish the obscenity of sexual devices. As long as a nonexpert witness testifies to the facts upon which he bases his opinion, it is not error for him to give his opinion on whether certain items are primarily designed and marketed for sexual gratification.

In *Smith v. State*,[113] the question was whether expert testimony was admissible on the ultimate issue in the case. The trial court refused to allow defendant in a murder case to present testimony by a clinical psychologist on the "Battered Woman Syndrome", and the court of appeals affirmed.[114] After finding that "Battered Woman Syndrome" was an appropriate subject for expert testimony, the supreme court held the correct rule to be that expert testimony, even on the ultimate issue, is admissible when the conclusion of the expert is one that jurors would not be able to

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108. *See* GA. CODE ANN. § 38-202 (1981); Bloodworth v. State, 233 Ga. 589, 212 S.E.2d 774 (1975).

109. 154 Ga. App. at 795, 270 S.E.2d at 215.

110. *Id.* at 798, 270 S.E.2d at 218.

111. State v. Johnson, 246 Ga. 654, 272 S.E.2d 321 (1980).

112. 157 Ga. App. 494, 277 S.E.2d 781 (1981).

113. 247 Ga. 612, ___ S.E.2d ___ (1981).

114. Smith v. State, 156 Ga. App. 419, 274 S.E.2d 703 (1980).

draw themselves.

The question before the court in *State v. Roberts*[115] was whether a trial judge may, at the request of the jury, reopen the evidence and allow the introduction of new evidence after jury deliberations have begun. Although it was noted that some dangers were inherent in such a procedure, the court decided that the best rule is one that allows the evidence to be reopened in the discretion of the trial court.

115. 247 Ga. 456, 277 S.E.2d 644 (1980).