Criminal Law

by Franklin J. Hogue*
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I. INTRODUCTION

The appellate courts of Georgia produce a prodigious number of published opinions every year. This year was no exception. We read them with an eye toward cases of interest to lawyers who practice criminal law. It is possible that we missed your favorite case, but we hope we did not miss any important case.

II. PRETRIAL ISSUES

A. *Jurisdiction*

The Georgia Supreme Court reminded the Atlanta City Court Solicitor of the narrow scope of jurisdiction that the city court has over criminal

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cases in *Bush v. State*.[1] In *Bush* defendant Bush was given two uniform traffic citations: one for possession of marijuana and one for carrying a pistol without a license. Bush was not charged with any traffic offenses.[2]

Bush appeared in Atlanta City Court and entered a guilty plea to both offenses and received probated sentences and a fine. However, the city court's jurisdiction over nontraffic offenses is dependent upon the existence of a charged traffic offense.[3] The city court may hear other misdemeanors only when they arise out of the same occurrence as the traffic offense.[4] Because there was no traffic offense in this matter, the city court lacked jurisdiction, the judgment was a nullity, and the court reversed the conviction.[5]

B. Venue

In *Culver v. State*,[6] the Georgia Court of Appeals dealt a huge blow to the Medicaid Fraud Unit of the Attorney General's Office by declaring that the only proper venue for Medicaid fraud cases is DeKalb County, the location where all Medicaid billings are submitted for payment.[7] Defendants Kell and Culver practiced in Fulton County and submitted fraudulent billings from their location to EcoMed, the service provider for Medicaid. Medicaid then submitted the billings to Medicaid's fiscal agent, which is located in DeKalb County. Kell and Culver were convicted of Medicaid fraud in Fulton County, and they appealed, arguing that venue was not properly laid in Fulton County.[8] Defendants alleged that the offense for which they were indicted, pursuant to the Official Code of Georgia Annotated ("O.C.G.A.") section 49-4-146.1(b)-(1),[9] prohibits obtaining or attempting to obtain Medicaid benefits by "(A) [k]nowingly and willfully making a false statement or false representation; (B) [d]eliberate concealment of any material fact; or (C) [a]ny fraudulent scheme or device."[10] Defendants asserted that venue of the criminal act occurs in the location where the fraudulent statements were conveyed, which was DeKalb County.

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1. 273 Ga. 861, 862, 548 S.E.2d 302, 303 (2001).
2. *Id.* at 861, 548 S.E.2d at 302-03.
3. *Id.*, 548 S.E.2d at 303 (citing 1996 Ga. Laws 627, § 3).
4. *Id.*
5. *Id.* at 861-62, 548 S.E.2d at 302-03.
6. 254 Ga. App. 297, 562 S.E.2d 201 (2002).
7. *Id.* at 303, 562 S.E.2d at 207.
8. *Id.* at 302-03, 562 S.E.2d at 207.
9. O.C.G.A. § 49-4-146.1(b)(1) (2002).
10. 254 Ga. App. at 303, 562 S.E.2d at 207 (alterations in original) (quoting O.C.G.A. § 49-4-146.1(b)(1)).

Because Kell and Culver made the false statements in Fulton County, the State argued that Fulton County was the location of the fraudulent scheme underlying the fraudulent billings, even though those statements were conveyed to the fiscal agent in DeKalb County.[11] The court of appeals noted the dicta in *State v. Johnson*[12] as persuasive.[13] In *Johnson* the supreme court stated that venue for obtaining medical assistance benefits under O.C.G.A. section 49-4-146.1(b)(1) would be "'the county where a false report was submitted and processed in an attempt to obtain medical assistance.'"[14] Therefore, the court in *Culver* ruled that the trial court should have directed a verdict of acquittal.[15] The supreme court has accepted certiorari.[16]

C. *Demurrer / Charging Documents / Elements of Offense*

1. Demurrer

In *Perdue v. State*,[17] defendant Perdue was convicted of child molestation, aggravated child molestation, statutory rape, and first-degree cruelty to children, all involving his stepdaughter.[18] The first-degree cruelty charge alleged that he "unlawfully, maliciously caused his stepdaughter cruel and excessive mental pain by telling her not to tell anyone about the sexual activities he was performing on, to, and with her because it would cause her family to break up."[19] Perdue appealed, alleging that there was "no evidence that his stepdaughter experienced excessive mental pain maliciously caused by him."[20] The court of appeals ruled that the jury should determine what is cruel or excessive mental pain, and in this case, the presented facts were sufficient for the jury to find Perdue guilty.[21] The jury convicted Perdue based on (1) the victim's testimony about her struggle between telling the truth to stop the sexual abuse and destroying her family and (2) her mental suffering

11. *Id.* at 302, 562 S.E.2d at 207.
12. 269 Ga. 370, 499 S.E.2d 56 (1998).
13. 254 Ga. App. at 302, 562 S.E.2d at 207.
14. *Id.* (quoting State v. Johnson, 269 Ga. 370, 372, 199 S.E.2d 56, 59 (1998)).
15. *Id.* at 303, 562 S.E.2d at 207.
16. Culver v. State, 2002 Ga. LEXIS 596 (Ga. July 16, 2002).
17. 250 Ga. App. 201, 551 S.E.2d 65 (2001).
18. *Id.* at 201, 551 S.E.2d at 66.
19. *Id.* at 203, 551 S.E.2d at 67.
20. *Id.*
21. *Id.* at 204, 551 S.E.2d at 67.

after the sexual abuse had been reported and after she had been put into a foster home.[22]

In another demurrer case, *Bagby v. State*,[23] defendant Bagby asserted that the offense of contributing to the delinquency of a minor[24] is unconstitutionally vague.[25] O.C.G.A. section 16-12-1(b)(3) provides:

> A person commits the offense of contributing to the delinquency, unruliness, or deprivation of a minor when such person . . . [w]ilfully commits an act or acts or willfully fails to act when such act or omission would cause a minor to be found to be a deprived child as such is defined in Code Section 15-11-2, relating to juvenile proceedings.[26]

Bagby argued that the statute was unconstitutionally vague because the definition of "deprived child" contained in O.C.G.A. section 15-11-2,[27] and incorporated in O.C.G.A. section 16-12-1(b)(3),[28] failed to give adequate notice of the prohibited conduct.[29] The supreme court disagreed, finding the statute "[m]easured by common understanding," was not susceptible to arbitrary and discriminatory enforcement.[30] It was of no consequence to the court that the definition of "deprived child," like other provisions of the Code relating to juvenile proceedings, must be liberally construed. Because criminal statutes must be strictly construed against the State, O.C.G.A. section 16-12-1(b)(3) must also be strictly construed, notwithstanding the interpretation to be given to juvenile proceedings.[31]

In *Dorsey v. State*,[32] this question arose: Does the doctrine of collateral estoppel preclude a suppression determination in a criminal proceeding after there has been a favorable ruling on suppression in a related civil forfeiture proceeding? The court responded in the negative.[33]

The State pursued criminal charges and a civil forfeiture against defendant Dorsey arising out of the same conduct. The forfeiture

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22. *Id.*
23. 274 Ga. 222, 552 S.E.2d 807 (2001).
24. O.C.G.A. § 16-12-1(b)(3) (2001).
25. 274 Ga. at 223, 552 S.E.2d at 808.
26. *Id.* (quoting O.C.G.A. § 16-12-1(b)(3)).
27. O.C.G.A. § 15-11-2 (2001).
28. *Id.* § 16-12-1(b)(3) (1999).
29. 274 Ga. at 223, 552 S.E.2d at 808.
30. *Id.* at 224, 552 S.E.2d at 809.
31. *Id.*
32. 251 Ga. App. 640, 554 S.E.2d 278 (2001).
33. *Id.* at 640, 554 S.E.2d at 279.

proceeding ended when the trial judge granted Dorsey's motion to suppress evidence. Dorsey brought a plea of former jeopardy in the criminal action, arguing that the suppression could not be relitigated.[34]

The court of appeals reiterated that

> [a] civil forfeiture proceeding is a civil action and does not seek to impose the punishment necessary to activate the protection against double jeopardy. . . .[35] [Because] double jeopardy does not arise from a civil forfeiture action in general, then resolution of an issue in the civil forfeiture action should not result in the application of double jeopardy through the collateral estoppel doctrine.[36]

Therefore, "the collateral estoppel doctrine does not apply in a criminal case following a final judgment in a civil forfeiture action . . . ."[37]

2. Charging Documents

When must the indictment state the name of the victim? The court of appeals held that the State does not need to name the victim in a child pornography case because the victim is the "public at large."[38] Similarly, in *Presley v. State*,[39] the court ruled that the State does not need to name the victim in the crime of conspiracy to commit aggravated assault when the conspiracy is not limited to assaulting a particular individual.[40] In this case, defendant Presley hid the weapon for the inmate, intending that the inmate use it to take control of an officer to escape from jail.[41] The court held that under these facts, the intended victim of the aggravated assault was "whoever stood between [the inmate] and freedom . . .," and therefore, "the indictment did not need to specify a particular victim."[42] Accordingly, the trial court's denial of the demurrer was affirmed.[43]

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34. *Id.*
35. *Id.* at 641, 554 S.E.2d at 280 (citing Murphy v. State, 267 Ga. 120, 121, 475 S.E.2d 907 (1996); Rojas v. State, 226 Ga. App. 668, 689, 487 S.E.2d 455 (1997); Cuellar v. State, 230 Ga. App. 203, 496 S.E.2d 282 (1998)).
36. *Id.*
37. *Id.* at 640, 554 S.E.2d at 279.
38. Coalson v. State, 251 Ga. App. 761, 765, 555 S.E.2d 128, 132 (2001).
39. 251 Ga. App. 823, 555 S.E.2d 156 (2001).
40. *Id.* at 825, 555 S.E.2d at 158.
41. *Id.*
42. *Id.*
43. *Id.*

3. Elements of Offense

a. Informing Third Party of Police Presence. In a case of first impression, the court of appeals in *Evans v. State*[44] considered whether a defendant's informing a third party of police presence and warning that third party not to go into a home where officers were conducting a search is sufficient to sustain a conviction for obstruction of a law enforcement officer.[45] The short answer is "yes." Defendant Evans lived across the street from a house in which undercover officers were conducting a reverse sting. "[W]hile standing on the porch of her house . . ., [Evans] warned an individual who approached not to go into the house where the officers were located. After police told her to go back inside her home, she warned another person, 'Hey don't go in there. The police is inside [sic].'"[46] The person she warned followed her suggestion and left quickly.[47]

Evans was convicted of misdemeanor obstruction.[48] The court of appeals affirmed the conviction, finding that her warnings jeopardized the safety of the officers conducting the operation and thereby constituted obstruction.[49]

b. D.U.I./Less Safe Driver. In *Ricks v. State*,[50] the court of appeals reversed a D.U.I. conviction for insufficient evidence because the State failed to prove the elements of driving under the influence of alcohol to the extent that defendant was a less safe driver.[51] Defendant Ricks was stopped for speeding. The officer smelled alcohol, Ricks blew a positive result on the alcosensor, and later registered results of .052 and .05 on the Intoxilyzer 5000. The officer did not administer any field sobriety tests.[52] Even though Ricks was under twenty-one years old, he was charged with driving under the influence of alcohol to the extent that he was a less safe driver.[53] Because he was not charged with the offense of driving with more than 0.02 percent blood alcohol content while under the age of twenty-one,[54] the State had to prove impairment

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44. 250 Ga. App. 70, 550 S.E.2d 118 (2001).
45. *Id.* at 71, 550 S.E.2d at 119.
46. *Id.*
47. *Id.*
48. *Id.* at 70, 550 S.E.2d at 118.
49. *Id.* at 71-72, 550 S.E.2d at 119.
50. 255 Ga. App. 188, 564 S.E.2d 792 (2002).
51. *Id.* at 188, 564 S.E.2d at 794.
52. *Id.* at 189, 564 S.E.2d at 794.
53. *Id.* at 188, 564 S.E.2d at 794.
54. O.C.G.A. § 40-6-391(k)(1) (2001).

to sustain a conviction.[55] The court reversed the conviction because there was no evidence regarding defendant's conduct or appearance that showed he "was a less safe driver due to alcohol consumption."[56]

c. Electronic Transmission of Child Pornography. In *State v. Brown*,[57] defendant Brown was indicted for child molestation and sexual exploitation of children. Brown successfully moved to quash the sexual exploitation count. The State appealed.[58] The court of appeals reversed, holding that electronic transmission of child pornography was an indictable offense.[59]

D. Demand for Trial

Banks v. State[60] is a tough reminder to defense practitioners to file a new demand for trial upon re-indictment. Defendant Banks filed her demand for speedy trial shortly after being indicted. Banks was first indicted (1) for homicide by vehicle for hitting a bicyclist while under the influence of drugs and alcohol; (2) driving under the influence of alcohol and drugs to the extent she was less safe to drive; and (3) failure to stop at or return to the scene of an accident.[61] She was re-indicted months later. This time the indictment charged her with homicide by vehicle while under the influence of alcohol but omitted the allegation that she was under the influence of drugs. The second indictment added a new homicide by vehicle charge which asserted that Banks caused the cyclist's death by failing to stop at or return to the scene of the accident. She did not make a new demand for speedy trial after the second indictment, choosing instead to "adopt" her prior speedy trial motion. Months later, she was indicted a third time, this time the State corrected only a technical error in the pleading. Again, upon Banks's request, the trial court ordered that all prior motions be applied to the new indictment.[62]

The trial court granted Banks's motion to suppress the results of a urine test.[63] The State appealed, the court of appeals affirmed the suppression, and the case was returned to the superior court.[64] After

55. 255 Ga. App. at 189, 564 S.E.2d at 794.
56. *Id.* at 190, 564 S.E.2d at 795.
57. 250 Ga. App. 376, 551 S.E.2d 773 (2001).
58. *Id.* at 376, 551 S.E.2d at 774.
59. *Id.* at 379-80, 551 S.E.2d at 776.
60. 251 Ga. App. 421, 554 S.E.2d 500 (2001).
61. *Id.* at 421, 554 S.E.2d at 501.
62. *Id.*
63. *Id.*
64. *Id.* at 424, 554 S.E.2d at 503.

two terms of court had passed from the time of remittitur to the superior court, Banks moved for acquittal and discharge, asserting that her right to a speedy trial had been violated, necessitating dismissal. The trial court denied Banks's motion, finding that she had waived her speedy trial demand in two ways. First, she filed a suppression motion, which, when granted, entitled the State to a direct appeal and delayed the trial. Second, she petitioned the court for bond stating that she wished to attend a long-term drug treatment facility.[65]

The court of appeals reversed the trial court, holding that (1) the appeal of the suppression motion simply tolled the time for the calculation of the demand, but once the case was returned to the superior court, the clock began to tick and (2) because Banks indicated in every pleading for bond and drug treatment that she was ready and available for trial, there was no way the trial court could infer waiver.[66] Thus, the court concluded that the State could not try her on the offenses alleged in the first indictment.[67]

Nevertheless, Banks's failure to refile a new demand for trial in connection with each re-indictment was a fatal error.[68] The court of appeals noted that a speedy trial demand, which was effective with the first indictment and adopted after re-indictment, was effective with the repeated charges in the second indictment.[69] The original demand, however, did not apply to the new charge that first appeared in the second indictment: homicide by vehicle for leaving the scene of the accident.[70] The court determined that Banks could be tried on this offense only; all other charged crimes were to be discharged.[71]

And again in *Brannen v. State*,[72] the failure to file a speedy trial motion proved fatal for a defendant. The State waited fifty-two months to bring to trial the murder prosecution against defendant Brannen and offered no explanation for the delay. More importantly, one of the defense witnesses died during this time. The trial court found that the facts did not rise to the level of a constitutional speedy trial violation. Because the defense did not file a demand, the trial court ruled that the case could proceed to trial.[73] Although there was a strong dissent, the

65. *Id.* at 424-25, 554 S.E.2d at 503.
66. *Id.* at 425-26, 554 S.E.2d at 504.
67. *Id.* at 426, 554 S.E.2d at 504.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. 274 Ga. 454, 553 S.E.2d 813 (2001).
73. *Id.* at 454-55, 553 S.E.2d at 814.

supreme court affirmed the ruling repeating the fact that the defense had not filed a statutory demand for a speedy trial.[74]

E. Search and Seizure and Related Exclusionary Matters

1. Extended Detention

Once a routine traffic stop has ended, an officer must have either valid consent or reasonable suspicion of criminal conduct before conducting additional questioning.[75] In *Gonzales v. State*,[76] a police officer stopped a car because its tag was partially obscured. When the officer checked the driver's license and registration there were no problems with either, and there were no outstanding warrants on the driver. After the officer issued the driver a citation for a license plate violation, the traffic stop was concluded.[77] Yet, the officer was not through: "Let me ask you a question before you go. I'm certainly not accusing you of anything but a lot of times we run into people that transport contraband in their vehicles."[78] The officer then searched the vehicle, although it was not clear whether the driver consented to the officer's search which uncovered several thousand dollars and a bag of marijuana.[79]

The court of appeals reversed the trial court's denial of defendant's motion to suppress, holding that the officer impermissibly extended the detention of the driver without a reasonable suspicion of criminal conduct that exceeded the partially obstructed license tag.[80] The court determined that there was no basis for the continued questioning; therefore, any possible consent was invalid and the subsequent search was illegal.[81]

In another extended detention case, *Henderson v. State*,[82] defendant Henderson was stopped for his and his passenger's failure to use their seatbelts. While preparing the citation, the officer asked Henderson whether he had any drugs in the car. Henderson said "no." The officer asked whether he could search the car. Henderson replied "yes." Thereafter, police found methamphetamine in the pocket of a pair of pants lying on Henderson's back seat. The trial court denied Henders-

74. *Id.* at 456-58, 553 S.E.2d at 816.
75. Gonzales v. State, 255 Ga. 149, 150, 564 S.E.2d 552, 554 (2002).
76. 255 Ga. 149, 564 S.E.2d 552 (2002).
77. *Id.* at 149-50, 564 S.E.2d at 553-54.
78. *Id.* at 149, 564 S.E.2d at 553.
79. *Id.*
80. *Id.* at 150, 564 S.E.2d at 554.
81. *Id.* at 149-50, 564 S.E.2d at 554.
82. 250 Ga. App. 278, 551 S.E.2d 400 (2001).

on's suppression motion, which asserted that the officer's questions about drugs were impermissibly "unrelated" to the seat belt violation. Because the event was captured on videotape and it was clear that the questions did not prolong Henderson's detention, Henderson could not proceed under the extended detention theory of suppression.[83]

The court of appeals affirmed the denial of the motion to suppress, holding that the feature distinguishing this case from the suppression cases of *State v. Sims*[84] and *State v. Gibbons*[85] was the failure to seize defendant or his property.[86] The court stated that the inquiry for these cases should consider:

> [whether] "the officer *continues to detain* the subject after the conclusion of the traffic stop and interrogates him or seeks consent to search without reasonable suspicion of criminal activity . . . ." Thus, it is not the nature of the questions which offends the Fourth Amendment; it is whether in asking the questions the officer impermissibly *detains* the individual beyond that necessary to investigate the traffic violation precipitating the stop.[87]

In other words, if Henderson had refused to give consent to search his car and the police detained him after that refusal, the evidence would have been suppressed.

In *Cole v. State,*[88] police told defendant Cole that he was free to leave but then asked for consent to search his car. Cole refused. The officer told him he could get a drug dog to sniff Cole's car, so Cole changed his mind and gave consent. The trial court denied the motion to suppress, and Cole was convicted of possession of methamphetamine and marijuana.[89] The court of appeals affirmed the denial of the motion to suppress concluding that Cole's consent was voluntary and that threatening to get the dog out did not constitute coercion.[90] The officer, the court ruled, had reasonable suspicion to detain Cole after the traffic stop.[91]

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83. *Id.* at 279-80, 551 S.E.2d at 402.

84. 248 Ga. App. 277, 546 S.E.2d 47 (2001).

85. 248 Ga. App. 859, 547 S.E.2d 679 (2001).

86. 250 Ga. App. at 279-80, 551 S.E.2d at 402.

87. *Id.* at 280, 551 S.E.2d at 402 (quoting State v. Sims, 248 Ga. App. 277, 279, 546 S.E.2d 47, 50 (2001)).

88. 254 Ga. App. 424, 562 S.E.2d 720 (2002).

89. *Id.* at 424, 562 S.E.2d at 721.

90. *Id.* at 425-26, 562 S.E.2d at 722.

91. *Id.* at 430, 562 S.E.2d at 725. See also *Padron v. State*, 254 Ga. App. 265, 265, 562 S.E.2d 244, 246 (2002), in which the trial court denied defendant's motions to suppress evidence found in luggage during search of trunk of vehicle. The court of appeals, reversed, holding that: (1) after issuing a warning ticket, the officer lacked the reasonable suspicion

2. Protective Sweep

In *State v. Mixon*,[92] the court of appeals upheld suppression of the marijuana evidence found in a "protective sweep" of defendant Mixon's home.[93] Postal inspectors confiscated a package containing marijuana. The address and name on the package was similar to Mixon's name and address.[94] After following the individual who picked up the package at the post office (although she left it in the back of the pickup truck) to Mixon's home, the police entered the home without a search warrant and "conducted a sweep of the home."[95] The police wanted to see what could be found before they went to obtain a search warrant. There was no authority for the "protective sweep."[96] The officers conceded they did not think anyone was at the home nor did they have anyone under arrest at the time they entered the home.[97]

3. Pat-down

In *Edgell v. State*,[98] the court of appeals reversed the trial court's denial of a motion to suppress evidence.[99] Defendant Edgell was the passenger in a car that police stopped for an expired tag. Because of the expired tag, the police called a wrecker to impound the car. Edgell attempted to get out of the car to call someone for a ride, but was stopped by the officer. The officer thought Edgell appeared nervous, so he conducted a protective pat-down. Officers discovered a crack pipe and marijuana, and Edgell was subsequently convicted for possession of marijuana.[100]

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necessary to begin a separate and independent investigation for other criminal activity; (2) the state failed to establish that defendant understood the officer's request to search the vehicle, and thus, failed to establish that consent to search the vehicle was freely and voluntarily given; (3) it could not be said that defendant did not try to revoke or withdraw consent or to limit scope; and (4) prolonged detention of second defendant, who was the spouse of the driver-defendant, was excessive and without legal justification, and thus, she could also challenge evidence. *Id.* at 265-70, 562 S.E.2d at 246-49.

92. 251 Ga. App. 168, 554 S.E.2d 196 (2001).
93. *Id.* at 169, 554 S.E.2d at 197.
94. *Id.*
95. *Id.*
96. *Id.* at 170-71, 554 S.E.2d at 197-98.
97. *Id.*
98. 253 Ga. App. 775, 560 S.E.2d 532 (2002).
99. *Id.* at 775, 560 S.E.2d at 533.
100. *Id.* at 775-77, 560 S.E.2d at 533-34.

At the suppression hearing, the officer admitted that nothing about Edgell made him concerned for his own safety, and that he patted Edgell down only because it was his practice to do so.[101] The court of appeals agreed with Edgell that without any indicia of criminal behavior, the officer was neither authorized to detain Edgell nor to pat him down, and the evidence should have been suppressed.[102]

4. Scope of Warrant

In *Mercer v. State*,[103] the police had a warrant to search a house and everyone in it for drugs. When they arrived, they found defendants Mercer and Champion in the yard getting out of a car. The police handcuffed and searched them but found no drugs. Mercer, in response to interrogation without Miranda warnings, said she used marijuana two days before and Champion had been driving on a suspended license. Both were arrested, and after urine tests, both were convicted of possessing ingested drugs.[104] However, their convictions were reversed on the basis of their illegal arrest and search.[105] Relying on the decision in *State v. Holmes*,[106] that "'it is illegal to search a person not named in the warrant but found on the premises to be searched, without independent justification for a personal search,'"[107] the court determined the police had no reasonable belief or suspicion to initially detain and handcuff the defendants because they were not inside any of the buildings to be searched and were not standing near the person named in the warrant.[108]

5. Drive-Out Tag

In *Berry v. State*,[109] the court of appeals held that "the critical issue to the validity of a traffic stop is whether the officer had 'a particularized and objective basis for suspecting the particular person stopped of

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101. *Id.* at 777, 560 S.E.2d at 534.
102. *Id.* at 778, 560 S.E.2d at 535.
103. 251 Ga. App. 465, 554 S.E.2d 732 (2001).
104. *Id.* at 466, 554 S.E.2d at 733.
105. *Id.*
106. 240 Ga. App. 332, 525 S.E.2d 698 (1999).
107. 251 Ga. App. at 468, 525 S.E.2d at 734 (quoting *Holmes*, 240 Ga. App. at 333, 525 S.E.2d at 700).
108. *Id.*, 525 S.E.2d at 734-35.
109. 248 Ga. App. 874, 547 S.E.2d 664 (2001).

criminal activity.'"[110] The court concluded that stopping vehicles with dealers' drive-out tags because such cars might be stolen was not authorized.[111]

In *Bius v. State*,[112] the court extended that analysis to the situation in which an officer stops a car with a drive-out tag solely to ascertain whether the driver was complying with the vehicle registration laws.[113] This situation also fails to comport with Georgia law.[114] The officer in *Bius* also "had no 'particularized and objective basis for suspecting [Bius] of criminal activity.'"[115] Rather, the officer testified that he had a mere hunch that the driver of a car with a drive-out tag might not be complying with the vehicle registration laws.[116]

6. Burden in Motion to Suppress

In overruling a line of court of appeals cases, the supreme court provided clarity to the question of who bears the burden in a motion to suppress in Georgia. The issue arose in *Watts v. State*,[117] a case in which defendant Watts challenged a search warrant by means of a motion to suppress filed pursuant to O.C.G.A. section 17-5-30.[118] The trial court denied the motion because Watts failed to offer any proof that the affidavit underlying the warrant misled the magistrate court in any way. The trial court stated that the burden was squarely on the defendant to show the existence of false or misleading information in the warrant.[119] The court of appeals agreed.[120]

The supreme court noted that the court of appeals had erroneously applied federal pleading requirements in placing the burden on Watts to show some defect in the warrant.[121] The court held that this burden was contrary to Georgia law, which mandates that the initial burden of evidentiary production is always on the State.[122] The statutory

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110. *Id.* at 880, 547 S.E.2d at 668 (quoting Postell v. State, 264 Ga. 249, 250, 443 S.E.2d 628, 629 (1994) (citation omitted)).
111. *Id.* at 779-80, 547 S.E.2d at 668.
112. 254 Ga. App. 634, 563 S.E.2d 527 (2002).
113. *Id.* at 636, 563 S.E.2d at 530.
114. *Id.*
115. *Id.* (quoting *Berry*, 248 Ga. App. at 880, 547 S.E.2d at 668 (alteration in original)).
116. *Id.*
117. 274 Ga. 373, 552 S.E.2d 823 (2001).
118. O.C.G.A. § 17-5-30 (1997).
119. 274 Ga. at 373-74, 552 S.E.2d at 824.
120. *Id.* at 374, 552 S.E.2d at 824.
121. *Id.*
122. *Id.*

pleading requirements place upon the defendant only that he "state facts showing that the search and seizure were unlawful."[123]

The court of appeals cited *Ferrell v. State*[124] "for the proposition that the defendant must specifically both plead a deliberate or reckless disregard for the truth and produce or proffer evidence in support of such allegation."[125] The supreme court found that this requirement is superseded by O.C.G.A. section 17-5-30.[126] In Georgia, the burden is on the State to prove the validity of a search and seizure, even when a warrant exists.[127] Accordingly, the court overruled any case that "requires the defendant specifically to allege that information was deliberately or recklessly omitted from an affidavit and withheld from the magistrate."[128]

F. Double Jeopardy / Plea in Bar

A retrial will be precluded by a mistrial if the prosecutor purposefully forces the error that goads the defendant into moving for a mistrial.[129] In *State v. Thomas*,[130] the trial court granted defendant Thomas's motion for mistrial in her trial for murder and aggravated assault and barred retrial because the prosecutor purposefully caused the error.[131] During the State's cross-examination of the defense expert in this battered woman syndrome case, the prosecutor asked, "'Isn't it true that [Thomas] told you something regarding her child, that she abused her child?'"[132] Thomas objected, moved for a mistrial, and after conducting an inquiry of the prosecutor, the trial court granted a mistrial. Furthermore, "finding that the prosecutor intended to goad Thomas into moving for a mistrial, the trial court granted Thomas'[s] plea of former jeopardy."[133]

The State appealed.[134] The supreme court upheld the ruling, finding that the trial court sits as the fact finder in this type of matter.[135] The trial court judges the credibility and plausibility of the prosecutor's

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123. *Id.* (quoting O.C.G.A. § 17-5-30(b) (1997)).
124. 198 Ga. App. 270, 401 S.E.2d 301 (1991).
125. *Watts*, 274 Ga. at 374, 552 S.E.2d at 824.
126. *Id.*
127. *Id.*, 552 S.E.2d at 825.
128. *Id.* at 375, 552 S.E.2d at 825.
129. *See* State v. Thomas, 275 Ga. 167, 562 S.E.2d 501 (2002).
130. 275 Ga. 167, 562 S.E.2d 501 (2002).
131. *Id.* at 167, 562 S.E.2d at 502.
132. *Id.* (alteration in original).
133. *Id.*
134. *Id.*
135. *Id.*

explanations. If the trial court concluded that the prosecutor prevaricated, then so be it.[136] Jeopardy attached, and Thomas could not be retried.[137]

In *State v. Jones*,[138] the State successfully reversed the trial court's grant of a plea in bar in a murder case, allowing the case to proceed to trial. The defense argued that the statute of limitations precluded prosecution of a felony murder charge fourteen years after the alleged crime when the statute of limitations barred the prosecution of the underlying felonies predicating the crime of murder (in this case, conspiracy to commit robbery, aggravated battery, and concealing the death of another).[139]

The defense observed the tension between the declaration of the statute of limitations for the underlying felonies and the statute declaring that there is no statute of limitations for the offense of murder.[140] The supreme court noted that other jurisdictions have uniformly held that "'the running of the statute of limitations on the underlying felony is irrelevant to a prosecution for felony murder,'"[141] and it stated that Georgia's statutory scheme for felony murder prosecution does not require that the underlying felony offense be separately charged or that the jury must first declare the defendant guilty of the underlying felony to validate a conviction for felony murder.[142] For these reasons, the court held, "the expiration of the limitations period for the underlying felony does not preclude a prosecution for felony murder."[143]

In *Bair v. State*,[144] defendant Bair was charged in a seven-count indictment stemming from a traffic stop. The jury deadlocked on four counts but reached a verdict on three. Bair asked to receive the verdict on the three counts decided by the jury. The State disagreed, and the court granted a mistrial on all seven counts. On retrial, Bair filed a plea in bar, asserting that jeopardy had attached on the three counts decided by the jury, and the State was prohibited from retrying her on those counts.[145] The trial court denied the plea but was reversed by the court of appeals, which held that jeopardy attached when the jury was

136. *Id.* at 168, 562 S.E.2d at 503.
137. *Id.*
138. 274 Ga. 287, 553 S.E.2d 612 (2001).
139. *Id.* at 287, 553 S.E.2d at 614.
140. *See id.*
141. *Id.* (quoting State v. Dennison, 801 P.2d 193, 202 (Wash. 1990)).
142. *Id.* at 288, 553 S.E.2d at 615.
143. *Id.*
144. 250 Ga. App. 226, 551 S.E.2d 84 (2001).
145. *Id.* at 226, 551 S.E.2d at 86.

seated and sworn and that Bair was entitled to receive any verdict reached by that jury.[146] The court held that "unless manifest necessity existed for granting a mistrial as to the counts decided by the jury, double jeopardy bars any retrial on those counts."[147]

G. *Defendant's Presence*

If jeopardy has not attached, the trial may not proceed without the defendant's presence.[148] In *Riley v. State*,[149] defendant Riley left the court before jury selection. The trial court proceeded with the trial, Riley was convicted, and he appealed.[150] Because the jury had not been sworn (in fact, they had not even been selected), the court determined that defendant's Sixth Amendment right to confrontation was violated by the trial court's proceeding in his absence.[151]

H. *Miscellaneous: Publication of Rules for Granting Test Permits*

In *State v. Bowen*,[152] the supreme court considered, upon writ of certiorari, the question of whether the Forensic Sciences Division of the Georgia Bureau of Investigation ("GBI") must publish its rules for granting permits for the administration of breath, blood, and urine tests under the Boating Under the Influence ("BUI") statutes pursuant to O.C.G.A. section 50-13-3(b)[153] of the Administrative Procedure Act ("APA").[154] The trial court held that the GBI was required to publish these rules and their failure to do so mandated suppression of the results obtained against defendant Bowen. Bowen was charged with operating a boat while under the influence after registering an alcohol concentration of 0.10 or more grams.[155] The supreme court stated, "The trial court granted Bowen's motion to suppress the results of a breath test on the ground that the Department of Natural Resources ranger who administered the test did not possess a valid permit as required under O.C.G.A. [section] 52-7-12(c)(1)."[156] The court of appeals affirmed the suppression.[157]

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146. *Id.*
147. *Id.* (citing Smith v. State, 263 Ga. 782, 783, 439 S.E.2d 483, 485 (1994)).
148. Riley v. State, 252 Ga. App. 781, 782, 556 S.E.2d 917, 918 (2001).
149. 252 Ga. App. 781, 556 S.E.2d 917 (2001).
150. *Id.* at 781-82, 556 S.E.2d at 918.
151. *Id.* at 782, 556 S.E.2d at 918.
152. 274 Ga. 1, 547 S.E.2d 286 (2001).
153. O.C.G.A. § 50-13-3(b) (1998).
154. 274 Ga. at 1, 547 S.E.2d at 286.
155. *Id.*, 547 S.E.2d at 286-87.
156. *Id.*, 547 S.E.2d at 286 (citing O.C.G.A. § 52-7-12(c)(1) (1997)).
157. *Id.*

The Georgia Supreme Court disagreed, noting that "[O.C.G.A. section] 50-13-3(b) of the APA requires that any 'rule, order, or decision' of an agency of the state be 'published or made available for public inspection;' and in the absence of such publication, that rule, order, or decision is rendered invalid and may not be invoked by the agency."[158] This alone would require the Division's rules regarding the certification of the administrators of breath, blood, and urine tests to be published. In 1997, the Forensic Sciences Act[159] exempted the methods of evidence testing adopted by the GBI's Division of Forensic Sciences from the publication requirements of the APA.[160]

O.C.G.A. section 52-7-12(c)(1) provides:

> Chemical analysis of the person's blood, urine, breath, or other bodily substance, to be considered valid under this Code section, shall have been performed according to methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation and by an individual possessing a valid permit issued by the Division of Forensic Sciences for this purpose. The Division of Forensic Sciences . . . is authorized to approve satisfactory techniques or methods to ascertain the qualifications and competence of individuals to conduct analyses and to issue permits, which shall be subject to termination or revocation at the discretion of the Division of Forensic Sciences.[161]

The trial court in *Bowen* determined that, although the first sentence of the Code section does not fall under APA requirements, the second sentence does. The court of appeals agreed, "creating a distinction between 'technical . . . method[s] for collecting, preserving, or testing evidence' in the first sentence, and 'permitting requirements for test operators' in the second sentence."[162]

The supreme court disagreed with that analysis, holding instead that there was no rational basis for distinguishing between the evidence-testing methods that were specifically exempted from the APA publishing requirement and the requirements for issuing operator permits.[163] The dissent was strong, reiterating what the lower courts had held to be a necessary distinction between licensing requirements for administrators

158. *Id.* (quoting O.C.G.A. § 50-13-3(b) (1998)).

159. O.C.G.A. §§ 35-3-150 to -155 (2000).

160. 274 Ga. at 1-2, 547 S.E.2d at 286.

161. *Id.* at 2, 547 S.E.2d at 287 (quoting O.C.G.A. § 52-7-12(c)(1) (2000)).

162. *Id.* (alteration in original) (quoting State v. Bowen, 245 Ga. App. 159, 160, 534 S.E.2d 417, 418 (2000)).

163. *Id.*

and scientific and technical methods and procedures for actually preparing and conducting those tests.[164]

I. Discovery—Gas Chromatograms in DUI Cases

The precise issue in *Birdsall v. State*[165] was one of first impression:

> Does a trial court commit reversible error when it permits an expert to testify, over objection, to the results of a defendant's chemical test, when the [S]tate has failed to furnish the test data underlying those results, and the data [was] properly requested pursuant to [O.C.G.A. section] 40-6-392(a)(4)?[166] The answer is: not always.[167]

The court noted that the penalties set out in O.C.G.A. section 17-16-23(c)[168] for the State's failure to furnish written scientific reports to the defense prior to trial did not apply in this case[169] "because the printout sought by Birdsall does not constitute a scientific report . . . ."[170] The court noted that under the rule enunciated in *Rayburn v. State*,[171] a scientific report is one that includes the examiner's findings.[172] The court held that "'[c]hecklists, expert's notes, work product, *recordation of data*, internal documents, . . . graphs[,] . . . or individual test results that do not include any expression of the expert's conclusions or opinion'" do not constitute a scientific report pursuant to O.C.G.A. section 40-6-392(a)(4).[173] A Division of Forensic Sciences Official Report is a scientific report and must be revealed in discovery, but a gas chromatograph printout, called a chromatogram, is not a report and need not be turned over in discovery pursuant to O.C.G.A. section 17-16-23(c).[174]

Birdsall was instead controlled by O.C.G.A. section 40-6-392(a)(4),[175] the narrow statute dealing with chemical tests for the detection of alcohol or drugs in a driver's blood.[176] This statute provides that a person who has submitted to a chemical test shall be given, upon

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164. *Id.* at 4-5, 547 S.E.2d at 288 (Carley, J., dissenting).
165. 254 Ga. App. 555, 562 S.E.2d 841 (2002).
166. O.C.G.A. § 40-6-392(a)(4) (2001).
167. 254 Ga. App. at 557, 562 S.E.2d at 843.
168. O.C.G.A. § 17-16-23(c) (1995).
169. 254 Ga. App. at 557, 562 S.E.2d at 843.
170. *Id.* at 557, 562 S.E.2d at 843.
171. 234 Ga. App. 482, 506 S.E.2d 876 (1998).
172. 254 Ga. App. at 557, 562 S.E.2d at 843.
173. *Id.* (quoting *Rayburn*, 234 Ga. App. at 484, 506 S.E.2d at 878).
174. *Id.* at 558, 562 S.E.2d at 843.
175. O.C.G.A. § 40-6-392(a)(4) (2000).
176. 254 Ga. App. at 558, 562 S.E.2d at 843.

request, "'full information concerning the test.'"[177] Therefore, "it [was] reversible error for the trial court to quash the subpoena seeking the printout [defendant] Birdsall requested."[178] Birdsall was correct in arguing that

> a subpoena is not required and that a request for discovery directed to the state is adequate to prompt production of the printout, whether it is in the hands of the prosecutor or in the files of the state crime laboratory. Therefore, Birdsall was entitled to the printout pursuant to [O.C.G.A. section] 40-6-392(a)(4).[179]

Moreover, "[u]nlike [O.C.G.A. section] 17-16-23, [O.C.G.A. section] 40-6-392(a)(4) specifies no deadline for requesting 'full information,' no timetable for supplying the information, and no penalty for the [S]tate's failure to produce it."[180] The issue of the penalty for noncompliance is not controlled by the statute, and the court was unwilling to declare an exclusionary penalty unless there was a showing of bad faith.[181] There being no such showing by Birdsall, the trial court did not abuse its discretion in admitting the expert testimony.[182] Birdsall lost after all.

J. Interstate Detainer Agreement Applies to Warrants

In *Carlton v. State*,[183] defendant Carlton, a federal inmate, received notice while in federal prison that Walker County, Georgia had notified his prison that it had issued a warrant for his arrest for violation of Georgia drug laws. The notice asked the Federal Bureau of Prisons to notify the sheriff of Walker County when Carlton was about to be released so that he could come pick him up. Carlton responded by demanding disposition of the charges against him within the 180-day time frame set forth in the Interstate Agreement on Detainer ("IAD").[184] The time passed with no action taken by the State, prompting Carlton to move to dismiss all charges against him. The trial court denied the motion, reasoning that the IAD did not apply to warrants but only to formal charging documents.[185] The court of appeals reversed, holding that the detainer does trigger the IAD.[186] This opinion

177. *Id.* (quoting O.C.G.A. § 40-6-392(a)(4)).
178. *Id.*
179. *Id.*, 562 S.E.2d at 843-44.
180. *Id.*, 562 S.E.2d at 844.
181. *Id.*
182. *Id.* at 558-59, 562 S.E.2d at 844.
183. 254 Ga. App. 653, 563 S.E.2d 521 (2002).
184. *Id.* at 653-54, 563 S.E.2d at 522.
185. *Id.*
186. *Id.*

overruled *Newt v. State*,[187] in which the court previously held that the IAD did not apply to post-conviction arrest warrants for probation violations.[188]

III. GUILTY PLEA

In *Banhi v. State*,[189] the court of appeals held that a trial court must grant a hearing on a properly and timely filed motion when a defendant asks the trial court to withdraw a guilty plea.[190] Defendant Banhi pled guilty to a number of felony offenses and within nine days of sentencing filed a pro se motion to "'vacate and set aside the plea agreement.'"[191] After almost three years had passed with no ruling from the trial court, Banhi filed a "Reminder for Motion," asking the court to rule on his motion. Two days later, the trial court, without holding a hearing, issued a one-line order denying Banhi's motions.[192] Banhi appealed.[193] The State noted nonbinding dicta in *Romano v. State*,[194] in which the court stated that the trial court is not required to hold a hearing on a motion for new trial.[195] The court of appeals distinguished the two motions and remanded, ordering the trial court to hold the necessary hearing on Banhi's motion to withdraw his guilty plea.[196]

IV. JURY ISSUES

A. *Voir Dire*

The State often uses its link to the Georgia Crime Information Center to pull the criminal histories of potential jurors to assist them in jury selection. Is this practice proper? Yes.[197] Is this information discoverable by the defense? No.[198] In *Williams v. State*,[199] defendant "Williams argue[d] that he was entitled to the Georgia Crime Information

187. 190 Ga. App. 301, 379 S.E.2d 11 (1989).
188. 254 Ga. App. at 654, 563 S.E.2d at 522 (citations omitted).
189. 252 Ga. App. 475, 555 S.E.2d 513 (2001).
190. *Id.* at 475, 555 S.E.2d at 514.
191. *Id.*
192. *Id.*
193. *Id.*
194. 220 Ga. App. 322, 469 S.E.2d 726 (1996).
195. 252 Ga. App. at 475-76 n.1, 555 S.E.2d at 514 n.1.
196. *Id.* at 475-76, 555 S.E.2d at 514.
197. Sears v. State, 262 Ga. 805, 808, 426 S.E.2d 553, 557 (1993).
198. Williams v. State, 255 Ga. App. 177, 177, 564 S.E.2d 759, 761 (2002).
199. 255 Ga. App. 177, 564 S.E.2d 759 (2002).

Center's criminal histories ("GCIC reports") of prospective jurors under the discovery statute."[200] Williams argued that if the court would not require the State to comply with his motion, the State should be precluded from using them as well. The trial court refused his request.[201]

The court of appeals conceded that "[d]efense attorneys . . . are not authorized to receive the GCIC reports on potential jurors without the express written consent or fingerprints of the jurors."[202] Yet, the court disagreed that O.C.G.A. section 17-16-4(a)(3)[203] requires disclosure of jurors' criminal histories unless it is "'intended for use by the prosecuting attorney as evidence in the prosecution's case-in-chief or rebuttal at the trial.'"[204] Because the GCIC reports were only intended for use in the selection of the jury, the court determined the information was not discoverable.[205]

Another important case in the area of voir dire is the death penalty case of *Yates v. State*.[206] Defendant Yates properly filed "a pretrial motion requesting that the trial court personally determine all excusals from jury service and that the defense be provided with 'notice and opportunity to be heard on any application by a potential juror to be excused.'"[207] The motion was granted, and the trial court established a procedure for excusals that conformed to the defense request.[208]

However, contrary to the established procedure, the court clerk dismissed 49 of the 160 potential jurors for medical excuses, as well as business and personal reasons. The defense objected to the trial court's failure to comply with its own order. The court overruled the "objection by stating that they had a sufficient number of qualified jurors regardless of the [violation of] procedure."[209] The supreme court reversed, stating that "a blanket, indiscriminate excusal of potential jurors who proffer medical excuses is incompatible with Georgia law and with the need to draw juries from a fair cross-section of the community . . . ."[210]

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200. *Id.* at 177, 564 S.E.2d at 760.
201. *Id.*, 564 S.E.2d at 760-61.
202. *Id.*, 564 S.E.2d at 761 (citation omitted).
203. O.C.G.A. § 17-16-4(a)(3) (2000).
204. 255 Ga. App. at 178, 564 S.E.2d at 761 (quoting O.C.G.A. § 17-16-4(a)(3) (2000)).
205. *Id.*
206. 274 Ga. 312, 553 S.E.2d 563 (2001).
207. *Id.* at 314, 553 S.E.2d at 566.
208. *Id.*
209. *Id.*
210. *Id.* at 315, 553 S.E.2d at 566.

B. Batson

The court of appeals reversed convictions for robbery and aggravated assault on a peace officer in *Ayiteyfio v. State*[211] because the trial court improperly granted the State's *Batson* challenge to defendant's exercise of peremptory strikes.[212] The prosecutor objected to nine of the defendant's ten strikes, all of which were used to strike nonblack members of the venire. Defendant provided race-neutral reasons for striking the jurors, which the State argued were pretextual. The trial court agreed and seated four of the jurors that heard the charges against defendant.[213] The court of appeals addressed the challenge to only one of the four reseated jurors.[214]

Defense counsel offered the following reasons for striking juror no. 11: (1) "her cousin was a police officer and"[215] (2) "she had civil jury experience."[216] Counsel reported that she considered both to be negative attributes. The State attacked these reasons as pretextual "because a black juror with a cousin who was a police officer was seated, and that another black juror with prior jury service was also seated."[217] It was noted that there were no black jurors seated who had both relations to a police officer and prior jury service.[218]

The court of appeals reversed the trial court's ruling and subsequent conviction.[219] First, there is no burden on the proponent of the strike to provide explanations for the strike that rise to the level of justifying the removal of a venireman for cause.[220] The trial court had asked defendant for authority supporting defendant's use of peremptory strikes against those with prior jury service.[221] This request placed an unnecessary burden on defendant.[222] Second, the defense cited multiple race-neutral reasons for striking the juror (e.g., relationship to law enforcement and previous jury service).[223] Showing that a white venireman who responded to one of the criteria was not stricken, the

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211. 254 Ga. App. 1, 561 S.E.2d 157 (2002).
212. *Id.* at 1, 561 S.E.2d at 158.
213. *Id.*
214. *Id.*
215. *Id.* at 2, 561 S.E.2d at 159.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 2-3, 561 S.E.2d at 159.
220. *See id.* at 2, 561 S.E.2d at 159.
221. *Id.*
222. *Id.*
223. *Id.*

court explained, is not a showing of pretext because the seated juror was not similarly situated to the stricken juror for whom more than one reason to strike was cited.[224]

C. *Improper Burden-Shifting in Analyzing a Challenge to a Peremptory Strike*

Every year a handful of convictions are reversed because a trial judge shifts the burden of proving that a peremptory strike was not race-neutral from the opponent of the strike to the proponent. Each year this mistake gives the appellate courts another opportunity to restate the three-step analysis required when one side challenges the other's peremptory strikes as having been made based on race. For the benefit of all, we set forth the analysis once again.

> First, the party challenging a strike has the burden of making a prima facie showing of discrimination. The proponent of the strike must then produce an explanation for the strike [that] is race-neutral and non-discriminatory on its face . . . . The burden of proving that the proffered explanation is merely pretext for discrimination then shifts back to the challenging party.[225]

In many reversed cases, as in this one, the trial judge merges steps two and three. This merger occurs when the proponent gives a race-neutral reason for the strike, and the judge simply disbelieves it, re-seats the juror, but fails to require the opponent of the strike to produce persuasive evidence that the proponent lied to the court when giving reasons for the strike. Trial judges should wait for the opponent of the strike to call the proponent a liar and prove the lie in some way that is inherent in the explanation given for the strike. The Authors have serious reservations about the practice of questioning the integrity of trial lawyers by challenging their use of peremptory strikes. In our view, peremptory strikes should never be questioned by anyone.

D. *Peremptory v. Cause Strikes*

In *Kirkland v. State*,[226] defendant Kirkland was charged in a multi-count indictment and convicted by a jury of various crimes committed at several locations throughout metro Atlanta, including burglaries at Home Depot stores and armed robbery of a Home Depot

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224. *Id.* at 3, 561 S.E.2d at 159.

225. Harris v. State, 251 Ga. App. 475, 475, 554 S.E.2d 606, 607 (2001) (citations omitted). See also Horton v. State, 252 Ga. App. 419, 556 S.E.2d 503 (2001) for a similar result from same error.

226. 274 Ga. 778, 560 S.E.2d 6 (2002).

store manager. Home Depot, Inc. was a named victim in the indictment.[227]

During the general qualifying questions preceding jury selection, the court asked the venire members whether "'any of you now or have ever been officers, directors, shareholders, or employees of Home Depot.'"[228] There were eight affirmative responses. Defense counsel did not seek to strike for cause but, instead, used peremptory strikes to remove five of them. The resulting jury actually included one Home Depot shareholder because defense counsel had exhausted his peremptory strikes.[229]

On appeal, Kirkland alleged ineffective assistance for trial counsel's failure to attempt to remove the unqualified jurors for cause. The court of appeals affirmed the conviction but the Georgia Supreme Court "granted certiorari to decide an issue of first impression: Did trial counsel render ineffective assistance of counsel when he failed to have removed from the venire owners of stock in the corporation which owns the premises allegedly burglarized by the defendant?"[230] The court replied that it did.[231] "Where a corporation is the person injured, it occupies the position of a party at interest, and its stockholders are not competent to serve as jurors in a trial against the alleged wrongdoer."[232] Permitting an incompetent juror to return a verdict, the court determined, rendered trial counsel's representation ineffective.[233]

E. Rehabilitation of Juror by Court

In *Cannon v. State*,[234] the court of appeals finally put an end to judicial rehabilitation of jurors who should be excused for cause.[235] In that case, the court of appeals found that the trial court abused its discretion in denying defendant's motion to excuse a prospective juror for cause and then "rehabilitating" the juror.[236] In reversing the decision, the court implored trial court judges to permit cause strikes when a potential juror's response indicates impartiality.[237] In doing so, the court condemned the practice of trial judges attempting to commit an

227. *Id.* at 778, 560 S.E.2d at 7.
228. *Id.*
229. *Id.*
230. *Id.* at 779, 560 S.E.2d at 7.
231. *Id.*
232. *Id.*
233. *Id.*
234. 250 Ga. App. 777, 552 S.E.2d 922 (2001).
235. *Id.* at 780, 552 S.E.2d at 925.
236. *Id.* at 778-79, 552 S.E.2d at 925.
237. *See id.*

impartial juror to follow the law.[238] The trial court should keep in mind its primary duty of ensuring the selection of an impartial jury.[239]

V. OPENING STATEMENT

After being convicted for possession of cocaine, defendant Billings in *Billings v. State*[240] appealed and argued that the trial court erred in permitting the prosecutor to make an "'improper and inflammatory argument' during opening statements."[241] Specifically, Billings objected to the prosecutor's opening when the prosecutor told the jury, "Welcome to your part in the war on drugs."[242] The court of appeals agreed that the trial court abused its discretion in failing to sustain Billings's objection to the prosecutor's comment because the statement served no legitimate purpose and could serve "'to inflame the minds of the jury against the defendant.'"[243] Nevertheless, finding that there was strong evidence of guilt, the court concluded that the error was not harmful, and, therefore, reversal was not required.[244]

VI. STATE'S CASE-IN-CHIEF

A. *Hearsay*

In *Mason v. State*,[245] defendant Mason appealed because the trial court overruled his objection to a police officer's hearsay testimony. The trial court allowed the testimony, which explained the officer's conduct in calling police in another jurisdiction to inform them of Mason's possible presence there and the danger he posed to authorities.[246] The supreme court held that

> Only "on rare occasions will the need to explain the conduct of an investigating officer justify the admission of hearsay evidence. . . ." "Otherwise, 'it is error to permit an investigating officer to testify, under the guise of explaining the officer's conduct, to what other persons related to the officer during the investigation. . . .'" "'Prosecu-

238. *See id.*
239. *Id.* at 780, 552 S.E.2d at 925.
240. 251 Ga. App. 432, 558 S.E.2d 10 (2001).
241. *Id.* at 433, 558 S.E.2d at 11-12.
242. *Id.*, 558 S.E.2d at 12.
243. *Id.* (quoting Watson v. State, 137 Ga. App. 530, 530, 224 S.E.2d 446 (1976)).
244. *Id.* at 435, 558 S.E.2d at 13.
245. 274 Ga. 79, 548 S.E.2d 298 (2001).
246. *Id.* at 81, 548 S.E.2d at 301.

> tors and trial judges would be well advised to walk wide of error in the proffer and admission of (such) evidence.'"[247]

However, the error was considered harmless in this case because the erroneously admitted hearsay did not contribute to the verdict.[248]

B. State's Expert Witness

In *Schoolfield v. State*,[249] a strange case of sleeping in a car while drunk, the court of appeals affirmed the DUI conviction of defendant Schoolfield who was found passed out in the driver's seat of a car.[250] The motor was running, and Schoolfield was asleep, covered in his own vomit, and had urinated on himself. He registered .18 on the state administered blood alcohol test. His testimony, which was corroborated by his two other witnesses, was that his girlfriend had been driving, they stopped at the gas station, were fighting, the girlfriend left, and Schoolfield simply moved over into the driver's seat.[251]

At trial, the prosecutor asked the arresting officer why he arrested defendant when he had not been driving the car at the time he was stopped.[252] The officer responded, "[i]n the State of Georgia, being in physical control of the vehicle qualifies. The car was running."[253] Defense counsel objected and moved for mistrial, arguing that the officer had been permitted to give expert testimony as to the ultimate issue in the trial. The trial court gave a curative instruction, the motion was renewed, and again denied.[254]

The court of appeals agreed that the officer's testimony was improper but found the testimony to be "cumulative of other evidence of record indicating the defendant had physically been in control of a moving vehicle."[255] There was plenty of evidence from the officer regarding defendant's control over the vehicle. The problem, however, was the officer's stated conclusion that the facts to which he testified constitute physical control as defined by Georgia law. The better ground upon

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247. *Id.* (citations omitted).
248. *Id.*
249. 251 Ga. App. 52, 554 S.E.2d 181 (2001).
250. *Id.* at 53, 554 S.E.2d at 183.
251. *Id.*
252. *Id.*
253. *Id.* at 54, 554 S.E.2d at 183.
254. *Id.*
255. *Id.*, 554 S.E.2d at 184.

which to predicate affirming the conviction, which the opinion mentioned in passing, was the strength of the judge's curative instruction.[256]

C. *Custodial Statements: "Hope of Benefit"*

The court of appeals reversed a trial court's exclusion of defendant Todd's statement in *State v. Todd*.[257] Todd was indicted for rape, two counts of attempted aggravated sodomy, and false imprisonment of his wife. After being Mirandized, handcuffed, and taken from his home to an interview room at the police department, Todd asked if he was under arrest and going to jail no matter what happened. The detective told Todd that he was under arrest and was going to jail. Todd then asked if there was anything he could say or do.[258] The detective replied: "I won't say that. A judge has issued a warrant, but if after we talk to you, we believe that probable cause doesn't exist, we are certainly not going to keep you arrested."[259] Todd then told the detectives what had transpired between him and his wife.[260]

The trial court suppressed the statement, finding that the detective's "replies to Todd's questions offered Todd the hope of benefit that he would be released if he discussed the matter with the police."[261] The court of appeals reversed, holding that the "hope of benefit" in O.C.G.A. section 24-3-50[262] refers only to hope of a lighter sentence, not the hope of release from custody.[263] Judge Ruffin wrote for the dissent, pointing out that the "hope of benefit" is not limited to a reduced sentence (although it is the most common form of benefit offered), but that Georgia courts have found illegally induced statements for the "hope of

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256. *Id.*, 554 S.E.2d at 183. The court, in its curative instruction, stated:

> "Ladies and gentlemen, it is important that you realize that the law apply[ing] to this particular case, as in any case, comes from the Court. It does not come from any witness that you might hear from throughout the trial of this case. And so, any opinions you hear about what the law may or may not be from witnesses should be disregarded by you. You will receive the law of the case from the Court when the Court charges you with the law after you have heard the evidence."

Id. (alteration in original).

257. 250 Ga. App. 265, 266, 549 S.E.2d 821, 823 (2001).

258. *Id.* at 265-66, 549 S.E.2d at 822.

259. *Id.* at 266, 549 S.E.2d at 822.

260. *Id.*

261. *Id.*

262. O.C.G.A. § 24-3-50 (2000).

263. 250 Ga. App. at 266-67, 549 S.E.2d at 823 (citing State v. Ray, 272 Ga. 450, 531 S.E.2d 705 (2000)).

reduced bail,[264] the hope of not being charged with a certain crime,[265] and the hope of being set free."[266] This hope of being set free, the dissent found, is exactly what the trial court relied upon in holding that the detective offered Todd a hope of benefit to induce his statement.[267]

This area becomes even murkier when considering the conclusion by the court of appeals in *McFadden v. State*.[268] Defendant McFadden challenged the voluntariness of her statement, arguing that the interrogating officer held out a hope of benefit to her if she would give a statement. McFadden testified that the officer told her he would dismiss the drug charges if she talked.[269] The police officer testified that "he would let the district attorney know about the defendant's cooperation, and that this *might* result in a reduced sentence."[270] The court affirmed the conviction, holding that the officer's statement did not hold out hope of benefit.[271] Our question: How does the hope of a reduced sentence not mean a "hope of benefit"?

D. Audio/Video Taped Recordings

In 1999 the court of appeals in *Bishop v. State ("Bishop I")*,[272] ruled that audiotaped recordings made by the parents of an underage victim violated the privacy statute and must therefore be suppressed.[273] Soon after, the Legislature amended O.C.G.A. section 16-11-66,[274] effective April 20, 2000, permitting parents as third parties to intercept and tape telephone conversations to which their children are parties upon a "reasonable or good faith belief that such conversation . . . is evidence of criminal conduct involving such child as a victim or an attempt,

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264. *Id.* at 269, 549 S.E.2d at 824 (Ruffin, J., dissenting) (citing Green v. State, 154 Ga. App. 295, 295-96, 267 S.E.2d 898, 900 (1980) ("ruling that officer's promise that he would set 'bond as low as he could' constituted a hope of benefit"); Hickox v. State, 138 Ga. App. 882, 884, 227 S.E.2d 829, 832 (1976) ("officer's statement that he would 'see that [defendant's] bond was lowered so he could get out of jail' constituted hope of benefit").

265. *Id.* (Ruffin, J., dissenting) (citing State v. Ritter, 268 Ga. 108, 110, 485 S.E.2d 492, 495 (1997)).

266. *Id.* (Ruffin, J., dissenting) (citing *In re* R.J.C., 210 Ga. App. 286, 435 S.E.2d 759 (1993)).

267. *Id.* (Ruffin, J., dissenting).

268. 251 Ga. App. 342, 554 S.E.2d 323 (2001).

269. *Id.* at 342-43, 554 S.E.2d at 323-24.

270. *Id.* at 343, 554 S.E.2d at 324.

271. *Id.*

272. 241 Ga. App. 517, 526 S.E.2d 917 (1999).

273. *Id.* at 521-24, 526 S.E.2d at 921-22.

274. O.C.G.A. § 16-11-66(d) (Supp. 2001).

conspiracy, or solicitation to involve such child in criminal activity affecting the welfare or best interest of such child."[275]

The court in *Bishop v. State ("Bishop II")*,[276] relied upon the legislative amendment. Defendant Bishop was tried and convicted, in part, based upon the tape recorded conversations between him and the victim. Bishop appealed his conviction, asserting that the legislative amendment could not be applied retroactively to his offenses. However, the court explained that the amendment did not impose or enhance greater punishment than was previously in force at the time the offenses were committed.[277] Because the sole effect of the amendment was to "make evidence admissible in a criminal case [that] would not have been admissible at the time the offense was committed," the court applied the amendment retroactively to Bishop's conviction.[278]

E. Cross-Examination: Right to Explore Codefendant's Deal

In *Vogleson v. State*,[279] defendant Vogelson was convicted at trial of trafficking cocaine and possessing cocaine with the intent to distribute. Defendant appealed the conviction.[280] The court of appeals held that defendant was denied his constitutional right to cross-examine codefendant as to codefendant's motive, bias, and interest in cooperating with State, and as to codefendant's action of testifying against him.[281]

Similarly, a jury convicted defendant Green for armed robbery in *Green v. State*.[282] The trial denied Green the opportunity to cross-examine his two codefendants about the maximum sentence they faced if they did not agree to testify against him. The court, in keeping with recent decisions in *Hernandez v. State*[283] and *Vogleson v. State*[284] regarding the cross-examination of accomplices, reversed Green's conviction.[285]

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275. Bishop v. State, 252 Ga. App. 211, 212, 555 S.E.2d 504, 505 (2001) ("Bishop II") (quoting O.C.G.A. § 16-11-66(d)).

276. 252 Ga. App. 211, 555 S.E.2d 505 (2001).

277. *Id.* at 211, 555 S.E.2d at 505.

278. *Id.* at 213, 555 S.E.2d at 506 (citing Todd v. State, 228 Ga. 746, 751, 187 S.E.2d 831, 834 (1972)).

279. 250 Ga. App. 555, 552 S.E.2d 513 (2001).

280. *Id.* at 555, 552 S.E.2d at 514.

281. *Id.* at 558-59, 552 S.E.2d at 516.

282. 254 Ga. App. 881, 881, 564 S.E.2d 731, 731 (2002).

283. 244 Ga. App. 874, 537 S.E.2d 149 (2000).

284. 250 Ga. App. 555, 552 S.E.2d 513.

285. 254 Ga. App. at 881, 564 S.E.2d at 732.

VII. DEFENSE CASE-IN-CHIEF

A. *Exclusion of Expert Testimony in D.U.I. Case*

Appealing a D.U.I. conviction in *Evans v. State*,[286] defendant Evans argued that the trial court committed reversible error when it would not permit his expert to testify about the "Widmark formula" as it applied to a hypothetical situation based on evidence from two defense witnesses who were with Evans on the evening of his arrest. The Widmark formula produces an estimate of a person's blood alcohol content based upon the absorption and elimination rates of alcohol in the human body. The formula can help to defend against the statutory inferences that arise under O.C.G.A. section 40-6-392(b)[287] when blood alcohol content exceeds proscribed limits.[288]

Evans, however, had refused all alcohol testing, so there were no blood alcohol figures in the State's case.[289] The court of appeals held that "absent the chemical analysis referenced in [O.C.G.A. section] 40-6-392-(b), an expert's testimony about Evans'[s] blood alcohol content based upon the 'Widmark formula' is irrelevant, and the only issue is whether Evans'[s] driving ability was impaired by alcohol to the point he was 'less safe' to drive."[290] The court concluded that the defense expert was properly excluded.[291]

B. *Cross-Examination of the Defendant*

So you prepared your client to testify. The direct went well, but then you had to sit down and watch the cross-examination. Here is a sound reiteration of fundamental constitutional law: The defendant cannot be questioned about his invocation of his right to remain silent or his right to an attorney. Yet, in *Gordon v. State*,[292] the following colloquy ensued:

> Q. Did you tell them who you were?
> A. They didn't ask me any questions.
> Q. So you're standing there with the police, you know they're investigating this, and you don't tell the police the truth?

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286. 253 Ga. App. 71, 558 S.E.2d 51 (2001).
287. O.C.G.A. § 40-6-392(b) (2001).
288. 253 Ga. App. at 75, 558 S.E.2d at 54.
289. *Id.*, 558 S.E.2d at 55.
290. *Id.* at 76, 558 S.E.2d at 55.
291. *Id.* at 78, 558 S.E.2d at 56.
292. 250 Ga. App. 80, 550 S.E.2d 131 (2001).

A. I don't say nothing at the time.
Q. The police did, in fact, ultimately arrest you, didn't they?
A. Yes, sir.
Q. And they took you in and asked you to give your side of the story, didn't they?
A. Yes, sir, when I told them I had nothing to say without a lawyer present.
Q. And you didn't say anything?
A. Didn't say anything at all.
Q. You're telling us that you are innocent and you didn't tell a soul?[293]

The prosecutor erroneously argued, in the jury's presence, the inference of guilt he wished the jury to derive from his line of questioning. The defense moved for mistrial. The judge sustained the objection, denied the mistrial motion, and instructed the jury that defendant Gordon had the right not to give a statement, but "the prosecutor 'has the right to ask [Gordon] questions about his opportunity to tell the statement and what he said. That is admissible evidence.'"[294] The appellate court reversed Gordon's conviction for aggravated assault.[295]

But the area is murky. In *Morrison v. State*,[296] the prosecutor asked numerous cross-examination questions that touched upon defendant Morrison's exercise of his constitutional right to silence. Morrison testified that he participated in the robbery only out of fear of harm to himself and a codefendant. The prosecutor attempted to weaken that defense by highlighting every conceivable opportunity for seeking help that Morrison had passed up. The State highlighted this cross-examination in its closing argument.[297] The court of appeals held that because all of the questions and comments related to Morrison's failure to act or speak before he was arrested, his right to silence was not violated by this line of questioning.[298]

The court of appeals agreed that the line of questioning arguably "'touch[ed] upon'"[299] Morrison's prearrest silence in the broadest sense, but found that the questions were permissible because Morrison testified that he was actually the victim of an assault and was forced to commit

293. *Id.* at 81, 550 S.E.2d at 132-33.
294. *Id.* at 82, 550 S.E.2d at 133 (alteration in original).
295. *Id.* at 80, 550 S.E.2d at 132.
296. 251 Ga. App. 161, 554 S.E.2d 190 (2001).
297. *Id.* at 164, 554 S.E.2d at 193.
298. *Id.* at 165, 554 S.E.2d at 194.
299. *Id.* at 164, 554 S.E.2d at 193 (quoting Wallace v. State, 272 Ga. 501, 503, 530 S.E.2d 721, 723 (2000)) (alteration in original).

the crime by the actual perpetrators.[300] The court set forth the following guidance for trial courts:

> We conclude the rule prohibiting comments regarding prearrest silence is properly limited to a defendant's silence *in the face of questions by an agent of the State* or his failure to come forward *when he knew that he was the target of a criminal investigation*. . . . We conclude that a prosecutor does not impermissibly comment on prearrest silence merely by showing that the accused's demeanor and conduct during and after the crime (but before an agent of the State questions him and before he knows he is being investigated) were inconsistent with a defense such as coercion or justification.[301]

Similarly, in *Taylor v. State*,[302] defendant Taylor testified at trial that the drugs found in the apartment were not his. On cross-examination the court allowed the prosecutor to ask Taylor if, during the six months between the search of his apartment and his arrest, he ever went to the police to explain that the drugs were not his. The defense argued that this was an improper comment on his right to remain silent.[303] The court of appeals concluded that even if such a line of questioning was an improper comment on defendant's silence, the error was harmless given the strength of the evidence of Taylor's guilt.[304]

C. *Cross-Examination: Juvenile Records*

In balancing the privacy of juvenile records against a defendant's Sixth Amendment right of confrontation, a defendant's right should win. In *Magnum v. State*,[305] the defense moved for production of the juvenile records of the State's witness. The request was limited to the revelation of only pending juvenile adjudications for use as impeachment as to bias or prejudice under the authority of *Davis v. Alaska*[306].[307]

The trial court declined to inspect the records and indicated that the defense could not ask any juvenile witness about any such juvenile court issues. The state produced several juvenile witnesses against defendant.[308] The supreme court justices disagreed over whether the

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300. *Id.*
301. *Id.*, 554 S.E.2d at 193 (citation omitted) (citing *Wallace*, 272 Ga. at 503, 530 S.E.2d at 723).
302. 254 Ga. App. 150, 561 S.E.2d 833 (2002).
303. *Id.* at 152, 561 S.E.2d at 836.
304. *Id.* at 152-53, 561 S.E.2d at 836.
305. 274 Ga. 573, 555 S.E.2d 451 (2001).
306. 415 U.S. 308 (1974).
307. 274 Ga. at 574-75, 555 S.E.2d at 454.
308. *Id.* at 574-75, 555 S.E.2d at 454-55.

defense did, in fact, get to cross-examine these juveniles on their possible bias, but they agreed that the court should have at least viewed the records in camera.[309] For the majority, this violation was grounds for reversal of the murder conviction.[310] For the dissent, it simply meant that the case should have been remanded to enable the court to conduct the in camera inspection to determine if any such records should have been revealed to the defense.[311]

VIII. CLOSING ARGUMENT

The defense in a criminal case loses the final closing argument if the defendant introduces any evidence other than his testimony.[312] In *Harrison v. State*,[313] the defense appealed from the trial court's ruling that he had introduced evidence when he cross-examined the police officer about portions of defendant Harrison's statement that were not related to impeaching the officer's testimony on direct examination.[314] The court of appeals upheld the ruling, holding that because the police officer was asked to read portions of Harrison's statement not related to impeaching the officer's recollection about what Harrison said about his involvement in the crime but instead pertaining to testimony about where the victim's car was driven and instructions given to Harrison about where to drive, the defense introduced evidence and lost final closing.[315]

In a similar case, *Riddles v. State*,[316] after defense counsel cross-examined a State's witness, the State played a portion of a videotape on redirect to show the purchase of the marijuana from defendant Riddles.[317] On recross, defense counsel played the tape "from the time of the alleged sale through the post-buy meeting [to] let the jury see if any other items were purchased or where those items might have gone."[318] The trial court ruled, as a result, that Riddles had introduced evidence; therefore, he lost the final argument.[319] The court of appeals ruled,

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309. *Id.* at 576, 555 S.E.2d at 455.
310. *Id.* at 578, 555 S.E.2d at 457.
311. *Id.* at 581, 555 S.E.2d at 459 (Sears, J., dissenting).
312. Harrison v. State, 251 Ga. App. 302, 553 S.E.2d 343 (2001) (relying on O.C.G.A. § 17-8-71 (1997 & Supp. 2001).
313. 251 Ga. App. 302, 553 S.E.2d 343 (2001).
314. *Id.* at 302-03, 553 S.E.2d at 343-44.
315. *Id.*
316. 251 Ga. App. 525, 554 S.E.2d 737 (2001).
317. *Id.* at 527-28, 554 S.E.2d at 739.
318. *Id.*
319. *Id.* at 528, 554 S.E.2d at 739.

> "If, under the guise of cross-examination, a defendant reads from the portions of a prior written statement of a witness that are not related to impeaching the witness, the defendant has effectively introduced evidence to the jury that should have been formally offered into evidence and the defendant therefore loses the right to open and close final arguments."[320]

Each defendant in a murder case is entitled a maximum of two hours of closing argument because, for purposes of O.C.G.A. section 17-8-73,[321] malice murder and felony murder are capital felonies even if the death penalty is not sought.[322] The supreme court, in *Chapman v. State*,[323] ruled that the trial court had no discretion to impose any further limit on the time for closing argument and failure to afford the parties the full time is, as a matter of law, error.[324]

The prosecutor in *Mason v. State*,[325] a murder case, stated the following in closing argument:

> He must be stopped. It's apparent that he's not going to do it unless you stop him. He did it in '89, spent four years in jail, by his own testimony. Four years later he's doing it again. He will not stop. He's in our community. Stop him before someone else in our community is Mr. Mason's victim. Please, please stop him.[326]

Trial counsel did not object, and appellate counsel raised this failure to object as ineffective assistance of counsel.[327] The court of appeals stated a defendant's future behavior is relevant only in the sentencing phase of a death penalty case.[328] "The prosecutor's statement to the jury raising the specter of appellant's future dangerousness was improper,[329] and trial counsel's failure to object constituted deficient performance."[330] Nevertheless, the conviction was affirmed because "appel-

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320. *Id.* at 527-28, 554 S.E.2d at 739 (quoting Lane v. State, 248 Ga. App. 470, 471-472, 545 S.E.2d 665, 667 (2001)).
321. O.C.G.A. § 17-8-73 (2000).
322. Chapman v. State, 273 Ga. 865, 869, 548 S.E.2d 278, 282 (2001).
323. 273 Ga. 865, 548 S.E.2d 278 (2001).
324. *Id.* at 869, 548 S.E.2d at 282.
325. 274 Ga. 79, 548 S.E.2d 298 (2001).
326. *Id.* at 80 n.2, 548 S.E.2d at 300 n.2.
327. *Id.* at 80, 548 S.E.2d at 300.
328. *Id.*
329. *Id.* (citing Wyatt v. State, 267 Ga. 860, 485 S.E.2d 470 (1997)).
330. *Id.* (citing Nickerson v. State, 248 Ga. App. 829, 545 S.E.2d 587 (2001)).

lant did not establish that the failure to object was so prejudicial to his defense that, but for the deficiency, there was a reasonable probability that the outcome of the trial would have been different."[331]

IX. JURY INSTRUCTIONS

In *Chapman v. State*,[332] defendants Chapman and Murphy were convicted of felony murder for having killed Chapman's mother, Sanders, by asphyxiation. The indictment specified that defendants committed felony murder while in the commission of aggravated assault by suffocating Sanders "with a plastic bag and tape, objects which when used offensively against a person are likely to result in serious bodily injury."[333] In the jury charges, however, the court gave the entire pattern charge on the underlying felony of aggravated assault, including: "A person commits the offense of 'aggravated assault' when that person assaults another person with the intent to murder, rape, or rob."[334] There was evidence at trial that defendants killed the victim because they wanted to take her money and buy drugs. The jury was charged, therefore, with two methods for which the crime of aggravated assault could be committed, when the indictment charged it was committed by one specific method.[335] This was harmful error necessitating reversal.[336]

Similarly, in *Hopkins v. State*,[337] the court reversed the conviction for aggravated battery because the trial court improperly charged the jury on the three ways that the crime of aggravated battery could be committed.[338] However, the indictment listed only one of the ways. Although defendant Hopkins was charged only with aggravated battery by seriously disfiguring the victim's arm, the trial court instructed the jury that aggravated battery may also be committed by depriving a person of a member of her body, by rendering a member of her body useless, or by seriously disfiguring her body or a member of her body. The only testimony of aggravated battery was the victim's description of

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331. *Id.* at 81, 548 S.E.2d at 301 (citing Wallace v. State, 272 Ga. 501, 530 S.E.2d 721 (2000)).

332. 273 Ga. 865, 865, 548 S.E.2d 278, 279-80 (2001).

333. *Id.* at 867, 548 S.E.2d at 281.

334. *Id.*

335. *Id.*, 548 S.E.2d at 280.

336. *Id.* at 867-68, 548 S.E.2d at 281.

337. 255 Ga. App. 202, 564 S.E.2d 805 (2002).

338. *Id.* at 204-05, 564 S.E.2d at 807.

her injuries and the effect of those injuries upon her.[339] As the jury could only convict Hopkins of the crime in the manner in which it was charged, the court determined that the alternative charge was harmful error, necessitating reversal.[340]

Again, in *Talton v. State*,[341] the court reversed a conviction because the trial court improperly charged the jury with an alternative way of committing the offense when only one method was pled in the indictment.[342] Defendant Talton argued that the trial court erred in giving a jury instruction that defined aggravated assault as "an act which places another person in immediate apprehension of receiving a violent injury" when Talton was indicted for aggravated assault by a specific method, "'by shooting' the victim with a pistol."[343] The court of appeals found this error to be especially harmful, given the defense of accident that Talton propounded.[344]

In the context of a murder case, another important decision arose out of an allegation of improper jury instructions in *Pace v. State*.[345] The trial court charged the jury that "[t]o kill by using a deadly weapon in a manner likely to produce death will raise a presumption of intention to kill and this presumption is rebuttable."[346] The supreme court held that the instruction impermissibly shifted the burden of proof to defendant Pace to disprove a presumption of malice and the intent to kill when a deadly weapon is used,[347] thereby violating *Sandstrom v. Montana*[348] and *Francis v. Franklin*.[349]

In *Eckman v. State*,[350] the court refined the pattern jury instruction regarding conspiracy. The relevant portion of the pattern jury charge reads as follows:

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339. *Id.* at 203-04, 564 S.E.2d at 807.

340. *Id.*

341. 254 Ga. App. 111, 561 S.E.2d 139 (2002).

342. *Id.* at 111, 561 S.E.2d at 140.

343. *Id.*

344. *Id.* at 113, 561 S.E.2d at 141-42.

345. 274 Ga. 69, 69, 548 S.E.2d 307, 309 (2001). The benefit to Pace of this reversal, however, was minimal because the erroneous instructions on malice and intent were limited to the charge on malice murder, authorizing the State to forego a reprosecution on the malice murder charge and for the trial court to enter a judgment of conviction and sentence on the jury's verdict of felony murder. *Id.* at 71, 548 S.E.2d at 310.

346. *Id.* at 70 n.4, 548 S.E.2d at 309 n.4.

347. *Id.* at 70, 548 S.E.2d at 309.

348. 442 U.S. 510 (1979).

349. 471 U.S. 307 (1985).

350. 274 Ga. 63, 548 S.E.2d 310 (2001).

> If you find from the evidence in this case that the defendant had no knowledge that a crime was being committed, *and* that the defendant did not knowingly and intentionally commit, participate, or help in the commission of (and was not a conspirator in) the alleged offense, then it would be your duty to acquit the defendant.[351]

Because the pattern charge is stated in the conjunctive, it misleads the jury into thinking that they may only acquit the defendant if the State fails to prove both that the defendant knew a crime was being committed and that he knowingly and intentionally participated in or helped in the commission of the crime.[352] Although the court did not find reversible error in this instance,[353] every pattern instruction book should be modified to reflect the disjunctive presentation of this charge.

The court in *Tolver v. State*[354] scrutinized the efficacy of the jury instruction stating that the jury was "'not bound to believe testimony as to facts incredible, impossible or inherently improbable.'"[355] Following last year's decision in the companion case of *Brandon v. State*,[356] the court of appeals reversed defendant Tolver's convictions for burglary, theft by taking, and entering an automobile because the trial court charged the jury with such an instruction.[357] The court held that the charge was an accurate statement of the law; however, the court stated it "should be used only in extraordinary cases, and only where a witness'[s] statement runs 'contrary to natural law and the universal experience of mankind.'"[358] The error was harmful because the charge "can mislead jurors into believing that there was incredible, impossible, or inherently improbable testimony."[359] In Tolver's case, his statement that he was not at the location of the crime, despite being identified by the victim, was not so incredible as to warrant the prejudicial charge.[360]

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351. *Id.* at 66-67 n.3, 548 S.E.2d at 314 n.3 (emphasis added).
352. *Id.* at 67, 548 S.E.2d at 314.
353. *Id.*
354. 251 Ga. App. 297, 554 S.E.2d 271 (2001).
355. *Id.* at 297, 554 S.E.2d at 272.
356. 241 Ga. App. 887, 528 S.E.2d 809 (2000).
357. 251 Ga. App. at 297, 554 S.E.2d at 272.
358. *Id.* at 298, 554 S.E.2d at 273 (quoting Brandon v. State, 241 Ga. App. 887, 889, 528 S.E.2d 809, 811, 812 (2000) (citations omitted)).
359. *Id.*
360. *Id.* at 298-99, 554 S.E.2d at 273.

X. SENTENCING

A. *Death Penalty*

1. Electrocution Unconstitutional

In *Dawson v. State*,[361] the State sought death by electrocution. Fulton County Superior Court Judge Wendy Shoob found the use of electrocution to be unconstitutional.[362] In a second case, *Moore v. State*,[363] Monroe County Superior Court Judge Arthur Fudger upheld the constitutionality of electrocution.[364] After consolidating the two cases for appeal, the supreme court held that: (1) death by electrocution, as a prescribed method of execution for defendants sentenced to death for capital offenses committed prior to May 1, 2000, violated the State Constitution's prohibition against cruel and unusual punishment; and (2) the uncodified provision of amendments to the death penalty statute, providing for execution of all death sentences by lethal injection in the event that electrocution was declared unconstitutional by the state supreme court, would be given full effect.[365]

2. Aggravating Circumstances

In other death penalty cases, the supreme court had previously held that mutually supporting aggravating circumstances are impermissible where multiple death sentences are imposed.[366] In June 2001 in *Fults v. State*,[367] the court extended that holding where a death sentence and a sentence of life imprisonment without parole have been imposed.[368] Defendant Fults's jury returned a sentence for malice murder of death, finding several statutory aggravating factors to exist, including the fact that the murder was committed during the commission of the kidnapping with bodily injury. The jury fixed the sentence for the kidnapping with bodily injury at life imprisonment without parole, finding several

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361. 274 Ga. 327, 554 S.E.2d 137 (2001).
362. *Id.* at 327, 554 S.E.2d at 139.
363. 274 Ga. 327, 554 S.E.2d 137 (2001).
364. *Id.* at 327, 554 S.E.2d at 137.
365. *Id.* at 336, 554 S.E.2d at 144.
366. Heidler v. State, 273 Ga. 54, 65-66, 537 S.E.2d 44, 57 (2000); Wilson v. State, 250 Ga. 630, 638, 300 S.E.2d 640, 648 (1983).
367. 274 Ga. 82, 548 S.E.2d 315 (2001).
368. *Id.* at 87-88, 548 S.E.2d at 322.

statutory aggravating factors to exist, including the fact that the kidnapping with bodily injury was committed during the commission of the murder.[369] Finding mutually supporting aggravating circumstances, the supreme court set aside the jury's finding that the kidnapping with bodily injury was committed during the commission of the murder.[370] However, Fults's fate was unchanged, because the sentence of life imprisonment without parole for the kidnapping with bodily injury remained adequately supported by the jury's findings that the kidnapping with bodily injury was committed during a burglary and was outrageously and wantonly vile, horrible, or inhumane in that it involved depravity of mind.[371]

B. Evidence in Aggravation of Sentencing

In *Autry v. State*,[372] defendant Autry rejected the sentencing recommendation of "ten-years-serve-one" offered by the prosecutor in exchange for a plea to the offenses of interference with the custody of a minor and statutory rape. The State agreed to dismiss the child molestation charge.[373] Autry entered his plea and, at the sentencing phase,

> the State introduced evidence in aggravation of sentencing, including that Autry (1) had been tried for murder, but the case had been dead docketed following a mistrial; and (2) had a bond forfeiture stemming from a misdemeanor theft by shoplifting charge. . . . [Autrey was] sentenced to serve ten years for statutory rape and five years for interference with custody, to run concurrently.[374]

Autry sought to withdraw his guilty plea, arguing that his trial counsel was ineffective for failing to object to the introduction of evidence in aggravation of sentencing because the State had not provided notice of their intent to do so, pursuant to O.C.G.A. section 17-10-2[375] and the 2000 Georgia Supreme Court opinion of *West v. Waters*.[376] O.C.G.A. section 17-10-2 dictates that the sentencing court can only consider evidence in aggravation of sentencing that the State has provided to the defense prior to trial. The State had not done so in this case.[377] The court of appeals acknowledged defendant's argument that, although the

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369. *Id.* at 82, 82, 548 S.E.2d at 318.
370. *Id.* at 87-88, 548 S.E.2d at 322.
371. *Id.*
372. 250 Ga. App. 107, 549 S.E.2d 769 (2001).
373. *Id.* at 108, 549 S.E.2d at 770.
374. *Id.*
375. O.C.G.A. § 17-10-2 (2000).
376. 272 Ga. 591, 533 S.E.2d 88 (2000).
377. 250 Ga. App. at 108, 549 S.E.2d at 770.

Code section explicitly limited its application to cases in which there was a "jury verdict," it should be extended to sentencing following a guilty plea.[378] Such an extension of the rule, the court noted, would be consistent with the purpose of the Code section, which is "'to give [a] defendant a chance to examine his record to determine if the convictions are in fact his, if he was represented by counsel, and any other defect which would render such [evidence] inadmissible.'"[379] Nevertheless, the court declined to rule that the Code section would apply to guilty plea cases because in Autry's sentencing hearing the trial court stated "that in sentencing Autry, none of its reasons 'included the past record of the defendant whatever it might have been.'"[380]

C. *First Offender*

A defendant may avail himself of first offender treatment for a misdemeanor or a felony.[381] In *Stafford v. State*,[382] defendant Stafford was sentenced under the first offender act for a felony theft by taking. Two weeks after sentencing, the prosecutor moved to vacate the first offender status after discovering that Stafford had received first offender treatment for a misdemeanor simple battery one year earlier.[383] The court of appeals affirmed the resentencing, rescinding the first offender treatment, holding that O.C.G.A. section 42-8-60(a)(1)[384] may be used in disposition of misdemeanors or felonies.[385] Once the status of first offender has been used, whether for misdemeanor or felony plea, it is used up for all time. Stafford had used it up and was no longer eligible for that treatment.[386]

The decision whether to grant first offender status lies within the sole discretion of the trial court. However, this discretion can be abused. In *Cook v. State*,[387] the sentencing judge refused to allow a seventeen-year-old defendant first offender treatment for the conviction of simple battery because defendant proceeded to trial.[388] The court of appeals held that the sentencing court is required to exercise its discretion

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378. *Id.* at 108-09, 549 S.E.2d at 770.

379. *Id.* at 109, 549 S.E.2d at 770 (quoting Howard v. State, 233 Ga. App. 724, 726, 505 S.E.2d 768, 771 (1998)) (alterations in original).

380. *Id.*

381. Stafford v. State, 251 Ga. App. 203, 204, 554 S.E.2d 219, 220 (2001).

382. 251 Ga. App. 203, 554 S.E.2d 219 (2001).

383. *Id.* at 204, 554 S.E.2d at 220.

384. O.C.G.A. § 42-8-60(a)(1) (2000).

385. 251 Ga. App. at 205-06, 554 S.E.2d at 220.

386. *Id.*

387. 256 Ga. App. 353, 568 S.E.2d 482 (2002).

388. *Id.* at 353, 568 S.E.2d at 483.

rather than apply an inflexible rule.[389] Finding that the trial court's ruling was the imposition of an inflexible rule, the court remanded the case for resentencing to allow the trial court to consider first offender status.[390] The court of appeals reminded the sentencing court that a defendant's decision to proceed to trial does not deprive him of his right to be sentenced under the first offender act.[391]

D. Fines or Fees

The Georgia Court of Appeals in *Burns v. State*[392] reiterated that the sentencing court must make a factual finding that the defendant has the ability to pay any fine or fee before imposing such a sentencing condition.[393] This mandate applies to the imposition of repayment of attorney fees.[394] The court appointed the public defender to defendant Burns's defense and then sentenced him to repay the cost of his legal representation. Without a factual finding that the indigent defendant was able to pay back such a cost, the court remanded that portion of the sentence for resentencing.[395]

XI. OTHER APPELLATE ISSUES

A. Ineffective Assistance of Trial Counsel

In *Mann v. State*,[396] defendant Mann was convicted of two counts of aggravated sodomy. The State's first witness, who was the sheriff's investigator, testified that she believed the complaints of the alleged victim. The State's second witness was a counselor who worked with the victim after the charges had been brought against Mann.[397] After relaying to the jury what the child told her, the prosecutor asked the counselor if she found "'any evidence whatsoever that he is not telling the truth when he told you these things?'"[398] The counselor answered, "'The answer to that question is no. I believe he's telling the truth.'"[399] Trial counsel did not object to the testimony of the sheriff's investigator.

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389. *Id.* at 354, 568 S.E.2d at 483.
390. *Id.*
391. *Id.*
392. 251 Ga. App. 889, 555 S.E.2d 209 (2001).
393. *Id.* at 891-92, 555 S.E.2d at 212.
394. *Id.*
395. *Id.*
396. 252 Ga. App. 70, 555 S.E.2d 527 (2001).
397. *Id.* at 70-72, 555 S.E.2d at 528-29.
398. *Id.* at 72, 555 S.E.2d at 529.
399. *Id.*

After the above testimony by the counselor, the court called a bench conference to explain to the prosecutor that her line of questioning was not proper. The defense then objected to the testimony.[400] The prosecutor stated that he would not "'go there again.'"[401] The defense objection was sustained, but there was no curative instruction given to the jury.[402]

The court of appeals held that the failure to object to this line of questioning constituted deficient performance and not trial strategy, noting that defense counsel submitted an affidavit stating that any error would have been the result of inexperience, "'as this was my first jury trial.'"[403] Given the problems with the alleged victim's credibility and the lack of any corroborating evidence, the court of appeals found that the defense lawyer's error undermined any confidence in the outcome of the trial, necessitating reversal.[404]

Another fatal error by trial counsel occurred in *Harris v. State*[405] when the attorney failed to move to bifurcate charges. Defendant Harris was charged with aggravated battery and possession of a firearm by a convicted felon. Trial counsel made no motion to bifurcate the trial. Harris was convicted of both crimes.[406] The court of appeals held that such an error amounted to ineffective assistance of trial counsel and that the error likely contributed to the verdict, warranting reversal of the convictions.[407]

B. Insufficiency of Evidence

In *Epps v. State*,[408] a case of premature arrest, drug officers conducting a reverse sting—when law enforcement officers pose as the seller in order to arrest a buyer—arrested defendant Epps and three of his buddies for trafficking in cocaine before they actually took possession of the drugs. Epps asked to inspect the cocaine. The informant opened the one-kilo brick and let Epps take a piece of it. Epps took it to a codefendant's nearby apartment, tested it, then he and two of his codefendants returned to the informant's car with money to buy it. Epps placed the money on the back seat of the car, where the cocaine had

400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.* at 73, 555 S.E.2d at 529.
404. *Id.* at 74, 555 S.E.2d at 530.
405. 252 Ga. App. 849, 557 S.E.2d 452 (2001).
406. *Id.* at 850, 557 S.E.2d at 452-53.
407. *Id.* at 852, 557 S.E.2d at 455.
408. 251 Ga. App. 645, 555 S.E.2d 25 (2001).

been, then asked for the cocaine. The informant said he had put it in the trunk. As he opened the trunk, police moved in and arrested Epps and his codefendants.[409]

Trafficking in cocaine requires proof of possession of twenty-eight grams or more of cocaine.[410] Epps never had actual possession of the cocaine.[411] The State could only have argued that he had constructive possession of the drugs.[412] Yet there was no evidence that Epps had the power to exercise dominion or control over the cocaine before the sale was consummated.[413] It was a close call, conceded a dissenting judge, who was joined by two of his colleagues.[414] The majority, however, reversed the conviction.[415]

C. *Motion for New Trial and Notice of Appeal*

Timely filing of a notice of appeal is an absolute prerequisite to confer jurisdiction upon the appellate court. O.C.G.A. section 5-6-38(a) states that a notice of appeal "shall be filed within 30 days after entry of the appealable decision or judgment complained of; but when a motion for new trial . . . has been filed, the notice shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion."[416] So what happens when a defendant files a motion for new trial within thirty days of final judgment, then dismisses it after thirty days but immediately files a notice of appeal?

This question was addressed in *Heard v. State*.[417] In April 1996, defendant Heard's conviction became the final judgment of the trial court. He filed a motion for new trial within thirty days. In July 1999, his appellate counsel dismissed the motion for new trial and filed a notice of appeal. The trial court had never ruled on the motion for new trial. Thus, the motion had never been "finally dispos[ed] of" by the court.[418] The court of appeals held that without final disposition on the motion for new trial, the notice of appeal was untimely.[419]

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409. *Id.* at 646, 555 S.E.2d at 26.
410. *Id.*
411. *Id.* at 647, 555 S.E.2d at 27.
412. *See id.*
413. *Id.*
414. *Id.* at 646-47, 555 S.E.2d at 27 (Smith, J., dissenting).
415. *Id.* at 647, 555 S.E.2d at 27.
416. O.C.G.A. § 5-6-38(a) (1995).
417. 274 Ga. 196, 552 S.E.2d 818 (2001).
418. *Id.* at 197, 552 S.E.2d at 820.
419. *Id.* at 198, 552 S.E.2d at 821.

The supreme court granted certiorari to consider whether Heard may have been misled by its opinion in *Johnson v. State*[420] to believe it was not necessary to have a court order to facilitate an extension of the thirty-day time limit.[421] Concluding that appellate counsel may have been misled to the detriment of appellant, the court held that

> O.C.G.A. [section] 5-6-38 requires a *trial court order* granting, denying, or otherwise finally disposing of a party's motion for new trial in order to extend the time for filing a notice of appeal more than 30 days after the entry of judgment. A party's voluntary withdrawal of its motion for new trial, standing alone, is not the statutorily-required court order finally disposing of the motion for new trial.[422]

In so holding, the supreme court overruled Division 1 of *Richards v. State*[423] in which the court of appeals relied on their decision in *Johnson* and *Heard*.[424] Heard was able to have his appeal heard after all.

D. One Paragraph Arguments

In affirming a cocaine possession conviction, in *Brooks v. State*,[425] the court of appeals commented twice, in a disapproving way, on the length of appellant Brooks's arguments, stating, "[i]n a one-paragraph argument, Brooks contends . . . ."[426] and "[i]n another one-paragraph argument, Brooks contends . . . ."[427] Both of Brooks's arguments were in fact weak and were soundly rejected, but the lesson may be that, unless you write like William Faulkner, you should:

> Make sure you indent from time to time;
> just in case you make a strong argument;
> but you don't want it to appear to be weak;
> because it only took one paragraph to write it.

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420. 263 Ga. 395, 435 S.E.2d 195 (1993).
421. 274 Ga. at 197, 552 S.E.2d at 820-21 (citation omitted).
422. *Id.*, 552 S.E.2d at 821.
423. 247 Ga. App. 345, 542 S.E.2d 622 (2000).
424. 274 Ga. at 197, 552 S.E.2d at 820-21 (citations omitted).
425. 252 Ga. App. 389, 556 S.E.2d 484 (2001).
426. *Id.* at 389, 556 S.E.2d at 485.
427. *Id.* at 390, 556 S.E.2d at 485.

E. Making a Record for Appeal

In *Foxx v. State*,[428] defendant Foxx testified on his own behalf.[429] During the State's cross-examination, the following exchange occurred:

> Q: Now, you also say that Johnny Robinson has a reason to lie.
> A: Yes, he do.
> Q: Because he would come over to your house with his girlfriend and get paranoid?
> A: No. I said because he lied because he said he ain't got nothing to live for, he ain't got that long to live, he's going to take as many people down with him as he can . . . .
> The Court: Mr. [Prosecutor], I've just about heard all of this that I want to hear. Finish up.[430]

Foxx argued on appeal that "the trial court's comment was an improper expression of opinion by the trial court as to matters proved or the guilt of the accused."[431] The court of appeals disagreed, surmising from the record that the "trial court's comment [was] directed at the prosecutor and urge[d] him to conclude cross-examination."[432] The trial court, the court went on to observe, "is allowed to prescribe the manner in which the business of the court is conducted. The comment complained of by Foxx, which, at most, indicated displeasure with the prosecutor, did not constitute an improper expression of opinion by the trial court."[433]

What if when saying "I've just about heard all of this that I want to hear" the judge had nodded his head in the direction of the defendant and rolled his eyes, then smiled at the prosecutor and the jury? Would it have then been so clear to the court of appeals that the judge was displeased with the prosecutor and was not making an improper expression of opinion on the guilt of the accused? Given the record on appeal, how would the appellate court know whether that happened or not? If that did happen, or something similar, counsel's error was in failing to make the record clear.

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428. 252 Ga. App. 417, 556 S.E.2d 512 (2001).
429. *Id.* at 418, 556 S.E.2d at 513.
430. *Id.*
431. *Id.*
432. *Id.*, 556 S.E.2d at 513-14.
433. *Id.* at 418-19, 556 S.E.2d at 514.

F. Hijacking a Motor Vehicle

The law prohibiting the hijacking of a motor vehicle states that when a person, "while in possession of a firearm or weapon obtains a motor vehicle from the person or presence of another by force and violence or intimidation . . .," he or she has committed the offense of hijacking.[434] In *Haugland v. State*,[435] defendant Haugland stole one car then ditched it. While running from the police, he flagged down an elderly woman in a Geo Prizm. When she stopped, Haugland grabbed her from the car and flung her to the pavement. Then he drove off in her car. The trial court held that this was sufficient to support hijacking because, as in aggravated assault, his hands could constitute a weapon when used in an offensive manner.[436] The court of appeals disagreed, holding that the legislative intent in promulgating a specific hijacking statute was "to punish more severely those defendants who use a weapon in the forcible theft of a vehicle taken from the person or immediate presence of another. Thus, similar to the armed robbery statute, the focus in the hijacking statute is on the presence of a weapon."[437]

XII. CONCLUSION

The area of criminal law, like any body of lively ideas, is always evolving. It comes as no surprise that the direction of that evolution does not always comport with the views of practicing lawyers, be they prosecutors or defense lawyers. After all, in each specific case, one side lost and the other won. What we all hope, however—a hope that waxes and wanes from year to year—is that the development of criminal law will always reflect the highest standards of justice, mercy, and human decency.

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434. O.C.G.A. § 16-5-44.1(b) (1999).
435. 253 Ga. App. 423, 560 S.E.2d 50 (2002).
436. *Id.* at 425-26, 560 S.E.2d at 52.
437. *Id.* at 426-27, 560 S.E.2d at 52.