

# Evidence

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## I. INTRODUCTION

One of the more interesting things about writing evidence surveys for the *Mercer Law Review* for almost twenty years has been watching evidentiary rules rise and, sometimes, fall. No rise has been more dramatic than Georgia's necessity exception to the hearsay rule. Its fall, or partial fall, should be equally dramatic as a result of the United States Supreme Court's decision in *Crawford v. Washington*,<sup>1</sup> which knocked the constitutional underpinnings from underneath the necessity exception. As discussed in many prior surveys, sometimes with tentative and respectful criticism, the necessity exception, despite a few minor setbacks, has become a vehicle for the admission of hearsay of a nature that likely has Professors Wigmore and McCormick spinning in their graves. One could argue that if its expansion were to continue at the same rate, there would soon be little need for witnesses at all; law enforcement officers could simply bring their recorded statements to court and read them to the jury. That is, of course, an exaggeration, but no one can deny that the scope of admissible hearsay bears little resemblance to the hearsay rule of only twenty years ago.

In *Crawford* defendant contended the trial court improperly allowed the jury to hear his wife's tape recorded statement to police officers, which the prosecution tendered after his wife invoked her spousal privilege, and thus, was unavailable to testify at trial.<sup>2</sup> The trial court and the Washington Supreme Court, held that the circumstances of the statement made it sufficiently reliable to overcome defendant's argument that the admission of the out-of-court statement violated his Sixth

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1. 124 S. Ct. 1354 (2004).

2. *Id.* at 1356-57.

Amendment<sup>3</sup> right of confrontation.<sup>4</sup> In fact, under *Ohio v. Roberts*,<sup>5</sup> courts have long allowed the admission of hearsay statements if the statements fell within a "firmly rooted hearsay exception" or if they bore "particularized guarantees of trustworthiness."<sup>6</sup> It was this latter language—"particularized guarantees of trustworthiness"—that courts across the country interpreted as a green light to admit hearsay testimony. In Georgia this bypass around the Sixth Amendment came to be known as the necessity exception to the hearsay rule.

The Supreme Court granted certiorari in *Crawford* and took aim at *Roberts*.<sup>7</sup> The Court, going back to early English common law, concluded that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."<sup>8</sup> In other words the drafters of the Sixth Amendment did not intend that it would be limited to in-court testimony.<sup>9</sup> However, neither did they intend the right of confrontation to apply to all out-of-court statements; the Sixth Amendment expressly encompasses only "witnesses" against the accused.<sup>10</sup> Thus, the Court concluded the Sixth Amendment was intended to apply to "testimonial" statements.<sup>11</sup> Testimonial statements include affidavits, custodial examinations, prior testimony, and "similar pretrial statements that declarants would reasonably expect to be used 'prosecutorially.'"<sup>12</sup> While the Court did not define with any great precision what is and is not a testimonial statement, it made clear that interrogations by law enforcement officers are, without a doubt, testimonial in nature.<sup>13</sup>

Having decided that the Sixth Amendment applied to defendant's wife's statement, the Court then concluded, again based on its historical analysis, that the framers "would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."<sup>14</sup> The Court decided these two

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3. U.S. CONST. amend. VI.

4. *Crawford*, 124 S. Ct. at 1357.

5. 448 U.S. 56 (1980).

6. *Crawford*, 124 S. Ct. at 1358.

7. *Id.*

8. *Id.* at 1363.

9. *Id.* at 1364.

10. *Id.*

11. *Id.*

12. *Id.* (quoting Brief for Petitioner at 23).

13. *Id.*

14. *Id.* at 1365.

conclusions were clearly inconsistent with *Roberts* because “[t]he unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”<sup>15</sup> Accordingly, the Supreme Court overruled *Roberts*.<sup>16</sup>

In a concurring opinion, Justice Rehnquist, joined by Justice O’Connor, argued that it was unnecessary to overrule *Roberts* and claimed that the “Court’s distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.”<sup>17</sup> However, perhaps the most notable point of the concurring opinion was its assertion that the majority had implicitly recognized “that the mistaken application of its new rule by courts which guess wrong as to the scope of the rule is subject to harmless error analysis,”<sup>18</sup> a clear escape valve for state courts that had long admitted constitutionally infirm hearsay statements. As discussed below, Georgia courts have already begun their struggle to reconcile *Crawford* with their fondness and affection for the necessity exception.

## II. OBJECTIONS

It is a basic, but often overlooked, fact that a party seeking to appeal a trial court’s evidentiary ruling excluding evidence must not only make a contemporaneous objection, but must also make an appropriate proffer. In *Sharpe v. Department of Transportation*,<sup>19</sup> a case discussed in previous surveys,<sup>20</sup> the supreme court expanded the contemporaneous objection rule by abolishing the use of an after-the-fact motion to strike illegal evidence.<sup>21</sup> *Sharpe* left one exception to the contemporaneous objection rule—hearsay evidence, even if not objected to, that is wholly without probative value and cannot support a verdict.<sup>22</sup>

In a previous survey,<sup>23</sup> the author predicted that this exception to the contemporaneous objection rule—like the motion to strike illegal evidence—might soon meet its demise.<sup>24</sup> However, based upon an

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15. *Id.* at 1371. Without a doubt, the same thing can be said of Georgia’s necessity exception.

16. *Id.* at 1374.

17. *Id.* at 1374 (Rehnquist, C.J., concurring).

18. *Id.* at 1378 (Rehnquist, C.J., concurring).

19. 267 Ga. 267, 476 S.E.2d 722 (1996).

20. Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 309-10 (2002); Marc T. Treadwell, *Evidence*, 49 MERCER L. REV. 149, 149-51 (1997).

21. *Sharpe*, 267 Ga. at 271, 476 S.E.2d at 725.

22. *Id.* at 268, 476 S.E.2d at 723.

23. Marc T. Treadwell, *Evidence*, 51 MERCER L. REV. 279 (1999).

24. *Id.* at 279-80.

interesting, if only for historical reasons, Georgia Supreme Court decision decided during the current survey period, it appears the author's prediction will not soon be realized.

In *Roebuck v. State*,<sup>25</sup> the trial court convicted defendant, in 1999, of a 1985 murder. Because defendant's indictment, fourteen years after the murder, was based on the testimony of an accomplice, it was incumbent upon the prosecution to produce some corroborating evidence of the accomplice's testimony. To meet this burden, the State offered the testimony of a fingerprint expert who testified that defendant's fingerprints matched those on a fingerprint card labeled "Gregory Roebuck." On appeal defendant contended that the fingerprint card, which was admitted without objection, was hearsay and thus, could not be used to support his conviction. Because the fingerprint expert's testimony was based upon the fingerprint card, defendant argued there was no admissible evidence corroborating the accomplice's testimony.<sup>26</sup> A majority of the supreme court resolved this issue by holding that an expert can base his opinion on hearsay.<sup>27</sup> In view of this resolution of the issue, the supreme court concluded that "there is no reason to reconsider Georgia's long-standing rule that inadmissible hearsay lacks probative value even though the opposing party does not object to its introduction."<sup>28</sup>

Justice Fletcher disagreed and, in a concurring opinion, argued that the court should overrule prior cases holding that hearsay has no probative value.<sup>29</sup> Justice Fletcher noted that the corroborating evidence relied on by the State included the fingerprint card, which was clearly hearsay because "it rested 'mainly on the veracity and competency of other persons'; namely, the officer who took Roebuck's print and labeled the print card."<sup>30</sup> Justice Fletcher believed the majority ruling "effectively allowed an expert to serve as a conduit for introducing inadmissible evidence."<sup>31</sup>

This brought Justice Fletcher to the rule that hearsay has no probative value.<sup>32</sup> If the fingerprint card had no probative value, even though defendant did not object to its admission, then there was no

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25. 277 Ga. 200, 586 S.E.2d 651 (2003).

26. *Id.* at 200-02, 586 S.E.2d at 651-55.

27. *Id.* This issue—whether an expert may base his opinion on hearsay—has also taken some interesting historical twists and turns in Georgia. See, e.g., Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 327-28 (2002).

28. *Roebuck*, 277 Ga. at 204, 586 S.E.2d at 656.

29. *Id.* at 208, 586 S.E.2d at 659 (Fletcher, C.J., concurring).

30. *Id.* (quoting O.C.G.A. § 24-3-1(a) (1995)) (Fletcher, C.J., concurring).

31. *Id.* (Fletcher, C.J., concurring).

32. *Id.* at 209, 586 S.E.2d at 660 (Fletcher, C.J., concurring).

corroborating evidence to support defendant's conviction.<sup>33</sup> To Justice Fletcher the rule was simply an archaic legal fiction.<sup>34</sup> According to Justice Fletcher, Georgia was the only jurisdiction in the country still following the rule.<sup>35</sup> Justice Fletcher argued that continued adherence to this archaic rule would invariably lead to unfortunate consequences, such as the majority's scramble to find some basis for upholding defendant's conviction.<sup>36</sup> Further, Justice Fletcher concluded that "[b]ecause the majority cannot rely on the print card to corroborate, it improperly uses expert testimony for this purpose. I would overrule our longstanding rule and rely on the print card to corroborate."<sup>37</sup>

It is difficult to fault Justice Fletcher's analysis. Why should hearsay evidence admitted without objection be treated differently than any other evidence admitted without objection? The majority's task would have been a simple one if it had simply ruled that because defendant failed to object to the print card, he could not on appeal contend that the print card could not be used to corroborate his accomplice's testimony. Yet the majority chose to rely on the principle that an expert can base his opinion on hearsay.<sup>38</sup> It is doubtful that this principle was intended to apply to a necessary factual predicate for the application of an expert's opinion to a particular case as opposed to information that experts typically rely on, such as market data, scientific principles, and similar general bodies of fact and information.

This is what led Justice Fletcher to question why the majority would unnecessarily expand one hearsay exception onto treacherous ground to preserve an "archaic" principle. The majority, however, did just that, and as a result, it seems that archaic principle will likely be with us for some time.

### III. RELEVANCY

#### A. *Relevancy of Prior Sexual Behavior*

Georgia's Rape Shield Statute<sup>39</sup> prohibits the admission of evidence relating to the prior sexual behavior of a rape victim, unless the behavior directly involves the accused and the evidence supports an inference that the accused could have reasonably believed the victim

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33. *Id.* (Fletcher, C.J., concurring).

34. *Id.* (Fletcher, C.J., concurring).

35. *Id.* (Fletcher, C.J., concurring).

36. *Id.* at 209-10, 586 S.E.2d at 660 (Fletcher, C.J., concurring).

37. *Id.* at 210, 586 S.E.2d at 660 (Fletcher, C.J., concurring).

38. *Id.* at 202, 586 S.E.2d at 655.

39. O.C.G.A. § 24-2-3 (1995).

consented to the sexual activity.<sup>40</sup> Although the statute purports, or at least apparently purports, to place an absolute ban on the admission of such evidence, there has been some erosion of this total ban.<sup>41</sup> Arguably, the effect of these inroads, including inroads made during the current survey period, is to blur the distinction between admissible and inadmissible evidence of prior sexual behavior.

In *Ivey v. State*,<sup>42</sup> defendant, who was charged with aggravated sodomy, argued that the trial court improperly barred him from adducing evidence that he had paid the victim to have sex with him on several occasions during the previous five years. Defendant claimed that his visit to the victim on the night of the alleged crime was for the purpose of again having consensual sex. The trial court ruled that defendant could introduce no evidence about this relationship, including the alleged reason for his visit.<sup>43</sup> The court of appeals held that this was reversible error.<sup>44</sup> The fact that defendant had a prior "customer-prostitute relationship" with the victim "would certainly support a reasonable inference that he believed that his sexual relationship with her on the night in question was consensual."<sup>45</sup> Moreover, the court held the evidence was admissible because it tended to prove the victim had a motive to fabricate the allegation of rape.<sup>46</sup> To avoid being charged with prostitution, the victim may have lied to the arresting officer about the consensual nature of her relationship with defendant.<sup>47</sup>

Judges Miller, Ellington, and Phipps dissented from this holding.<sup>48</sup> With regard to the majority's conclusion that the evidence was admissible to prove a motive to fabricate, i.e., that the victim falsely accused defendant to avoid a prostitution charge, the dissent noted that the arresting officer never observed defendant and victim engaging in sex and, thus, "it is difficult to envision how she could have had a motive to make a false claim of rape to avoid prosecution for prostitution."<sup>49</sup> With regard to the argument that the evidence was relevant to the issue of consent, the dissent acknowledged that evidence of prior consensual

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40. *Id.*

41. *See Williams v. State*, 251 Ga. App. 137, 553 S.E.2d 823 (2001).

42. 264 Ga. App. 377, 590 S.E.2d 781 (2003).

43. *Id.* at 378, 590 S.E.2d at 781-84.

44. *Id.*

45. *Id.* at 379, 590 S.E.2d at 783.

46. *Id.* at 382, 590 S.E.2d at 784-85.

47. *Id.* at 384, 590 S.E.2d at 786.

48. *Id.* at 389, 590 S.E.2d at 786-87 (Phipps, J., concurring in part and dissenting in part).

49. *Id.* at 386, 590 S.E.2d at 787 (Phipps, J., concurring in part and dissenting in part).

sexual relations was logically relevant.<sup>50</sup> Nevertheless, the Rape Shield Statute barred such evidence except in the narrowest of circumstances.<sup>51</sup> Given the fact that the physical evidence was consistent with the victim's claims of a violent assault, the dissent argued that the trial court was authorized, in its discretion, to conclude that the fact that defendant may have had a prior consensual sexual relationship with the victim could not support an inference that the victim consented to the violent behavior at issue.<sup>52</sup>

The court of appeals decision in *Payne v. State*<sup>53</sup> also illustrates the deterioration of the bright line ostensibly created by the Rape Shield Statute.<sup>54</sup> In *Payne* defendant, who was charged with child molestation, contended that the trial court erroneously excluded evidence that the victim had watched pornographic movies. Defendant argued that this evidence was relevant to establish how the victim came to have knowledge of various sexual acts. This was particularly important because there was evidence that the victim had recanted her allegations, and to explain how she knew about certain sexual acts, the victim said she had watched a pornographic movie.<sup>55</sup>

The court of appeals agreed that this evidence, although inadmissible under the Rape Shield Statute, was relevant for another purpose—to explain how the victim came to have knowledge of sexual acts.<sup>56</sup> The court held, however, that the trial court did not err in precluding defendant from introducing evidence about the pornographic movie because “the defense could have shown that the victim had acquired knowledge of the sexual acts from someone other than [defendant] without specifying that her viewing of pornography was the mechanism through which she had gained the knowledge.”<sup>57</sup> The court did not explain how this could be done, and it is questionable whether either side would be happy with testimony establishing that the victim had detailed knowledge of sexual acts without explaining how she came to have that knowledge. Indeed, it would seem the prosecution would be more concerned if jurors were simply informed that the defendant had such knowledge; they might conclude that the source of her knowledge was actual sexual contact with someone else.

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50. *Id.* (Phipps, J., concurring in part and dissenting in part).

51. *Id.* at 385, 590 S.E.2d at 786-87 (Phipps, J., concurring in part and dissenting in part).

52. *Id.* at 388, 590 S.E.2d at 789 (Phipps, J., concurring in part and dissenting in part).

53. 267 Ga. App. 498, 600 S.E.2d 422 (2004).

54. *Id.* at 502, 600 S.E.2d at 425.

55. *Id.* at 499, 600 S.E.2d at 423.

56. *Id.* at 501, 600 S.E.2d at 424.

57. *Id.*

Finally, in *Abdulkadir v. State*,<sup>58</sup> the court of appeals acknowledged that the trial courts must “compromise between the requirements of the [R]ape [S]hield [S]tatute and [a defendant’s] rights to a thorough and sifting cross examination and to present evidence.”<sup>59</sup> Defendant, the victim’s stepfather, contended that the victim fabricated her claim that he had molested her because she was upset that defendant had told the victim’s mother that the victim was leaving their apartment when she thought her mother was at work. After defendant told the mother this, the mother returned to the apartment complex and found her daughter in a neighboring apartment with a young man who was partially disrobed. Defendant contended that the victim raised her accusations only after she learned that defendant had told on her.<sup>60</sup> The court of appeals held that the trial court properly ruled that defendant could adduce evidence that the victim lied, but defendant could not “go into details and indicate that she was allegedly found in the bedroom of some other boy with his pants down. . . .”<sup>61</sup>

It seems that the challenge for trial courts is where to draw the line between allowing a defendant to show that a victim has a motive to fabricate, and allowing defendants to prove why the victim has a motive to fabricate when that motive is based on prior sexual activity.

### B. Miscellaneous

In *Blackwell v. Potts*,<sup>62</sup> the court of appeals addressed a relevancy issue that will be of importance to attorneys unfortunate enough to find themselves defendants in a legal malpractice action.<sup>63</sup> In *Blackwell* plaintiff’s first attorney withdrew from representing plaintiff in a medical malpractice action after the case had been pending for over four years. Plaintiff then retained defendants, and shortly thereafter, the case was placed on a trial calendar. Defendants sought a continuance, claiming they needed more time to secure the attendance of their expert witnesses. The trial court refused and suggested that if defendants needed more time, because of their recent entry into the case, they should dismiss and refile. Defendants promptly did that, but they overlooked the fact that more than five years had elapsed since the alleged malpractice. Therefore, the statute of repose<sup>64</sup> barred the

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58. 264 Ga. App. 805, 592 S.E.2d 433 (2003).

59. *Id.* at 808, 592 S.E.2d at 436.

60. *Id.* at 807, 592 S.E.2d at 436.

61. *Id.* at 807-08, 592 S.E.2d at 436.

62. 266 Ga. App. 702, 598 S.E.2d 1 (2004).

63. *Id.* at 705, 598 S.E.2d at 4.

64. See O.C.G.A. § 9-3-71 (1982 & Supp. 2004).



refiled complaint. Having lost the claim against the doctor, plaintiff then brought a malpractice claim against the lawyers, claiming they breached the standard of care.<sup>65</sup>

In a legal malpractice case, a plaintiff must demonstrate that but for his lawyer's negligence, he would have prevailed in the underlying case.<sup>66</sup> To meet this burden, plaintiff attempted to rely upon testimony from medical experts who were not identified in the underlying case.<sup>67</sup> Defendants moved, in limine, to prevent plaintiff from relying on these new experts, and the trial court granted the motion, ruling that the testimony of the new experts was not relevant because the "case must be judged on the circumstances of the case as it existed at the time the defendants represented the plaintiffs."<sup>68</sup>

The court of appeals granted plaintiff's application for interlocutory review and reversed.<sup>69</sup> The court acknowledged the difficulty of the issue raised by the appeal.<sup>70</sup> On the one hand, allowing plaintiffs to introduce evidence that was not available to their attorneys in the underlying case may give legal malpractice plaintiffs a "windfall."<sup>71</sup> On the other hand, limiting the scope of relevant evidence to information or evidence actually possessed by the allegedly negligent attorney would allow that attorney to "avoid liability by intentionally or negligently failing to develop a record."<sup>72</sup> The court held that it would simply be unfair to restrict legal malpractice plaintiffs to the record developed by their allegedly negligent attorneys, and thus, reversed the trial court's ruling that the testimony of the newly retained experts was not relevant.<sup>73</sup>

#### IV. PRIVILEGE

Georgia law recognizes an accountant-client privilege.<sup>74</sup> Thus, communications between an accountant and his client are typically privileged in the same manner as communications between an attorney and a client.<sup>75</sup> However, like the attorney-client privilege, the accoun-

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65. *Blackwell*, 266 Ga. App at 704, 598 S.E.2d at 3.

66. *Id.* at 705, 598 S.E.2d at 4.

67. *Id.*

68. *Id.*, 598 S.E.2d at 3.

69. *Id.* at 708, 598 S.E.2d at 6.

70. *Id.*, 598 S.E.2d at 5.

71. *Id.* at 707-08, 598 S.E.2d at 5.

72. *Id.* at 706, 598 S.E.2d at 4.

73. *Id.* at 708, 598 S.E.2d at 5.

74. O.C.G.A. § 43-3-32(b) (2002).

75. *Id.*

tant-client privilege is subject to the crime-fraud exception,<sup>76</sup> a point reaffirmed during the survey period in *Rose v. Commercial Factors of Atlanta, Inc.*<sup>77</sup>

In *Rose*, plaintiff, a factoring firm, purchased a company's accounts with its customers, one of which was defendant. When defendant failed to pay its account, plaintiff sued claiming, inter alia, that defendant had submitted false invoices to obtain funds from plaintiff. To prove its claim, plaintiff noticed the deposition of defendant's accountant, Rose. Relying on the accountant-client privilege, Rose refused to answer questions even after the court compelled him to appear for a second deposition. When Rose continued to refuse to answer questions, the court ordered him not to raise the accountant-client privilege. The court certified its order for immediate review.<sup>78</sup>

The court of appeals held that plaintiff had adduced sufficient evidence to invoke the crime-fraud exception to the accountant-client privilege.<sup>79</sup> The president of the company, from which plaintiff had purchased defendant's account, testified that false information concerning defendant's orders had been provided to plaintiff. Plaintiff argued that Rose, as defendant's accountant, had to have known defendant had submitted that false information.<sup>80</sup> The court noted that the crime-fraud exception does not require proof that a crime or fraud was committed.<sup>81</sup> It is sufficient if the movant makes a prima facie case that the privileged communication was made in furtherance of illegal or fraudulent activity.<sup>82</sup> Thus, evidence that, standing alone, is not sufficient to prove improper activity, is sufficient to invoke the crime-fraud exception, even though that evidence could be rebutted.<sup>83</sup> Therefore, proof that defendant submitted false information to plaintiff and that Rose, as defendant's accountant, knew or should have known of this fact, was sufficient proof to pierce the accountant-client privilege.<sup>84</sup>

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76. *Rose v. Commercial Factors of Atlanta, Inc.*, 262 Ga. App. 528, 529, 586 S.E.2d 41, 43 (2003) (quoting *In re Fulton County Grand Jury Proceedings*, 244 Ga. App. 380, 382, 535 S.E.2d 340, 343 (2000)).

77. 262 Ga. App. 528, 586 S.E.2d 41 (2003).

78. *Id.* at 528-29, 586 S.E.2d at 41-42.

79. *Id.* at 530, 586 S.E.2d at 43.

80. *Id.*

81. *Id.* at 529, 586 S.E.2d at 43.

82. *Id.*

83. *Id.* at 529-30, 586 S.E.2d at 43.

84. *Id.* at 531, 586 S.E.2d at 44.

## V. WITNESSES

In 1986 the court of appeals, in *Tilley v. Page*,<sup>85</sup> held that a plea of nolo contendere could be used to impeach a witness in a civil case.<sup>86</sup> However, O.C.G.A. section 17-7-95(c)<sup>87</sup> provides that nolo pleas "shall not be used against the defendant in any other court or proceedings as an admission of guilt or otherwise or for any purpose . . . ."<sup>88</sup> In 1989 the Georgia Supreme Court, in *State v. Rocco*,<sup>89</sup> appeared to question the validity of *Tilley*. In *Rocco* the supreme court reaffirmed that nolo contendere pleas could not be used to impeach a criminal defendant.<sup>90</sup> In what the author described as "a potentially portentous conclusion" in the 1990 survey of Georgia evidence law,<sup>91</sup> the supreme court in *Rocco* pointedly noted that the correctness of the court of appeals decision in *Tilley* was "not presented for decision in this case."<sup>92</sup>

Only fourteen years later, the author's suggestion that the holding in *Tilley* would be short lived proved to be accurate. In *Pittmon v. State*,<sup>93</sup> the court of appeals acknowledged that the holding in *Tilley* simply could not be reconciled with the flat prohibition of O.C.G.A. section 17-7-95 against the use of nolo contendere pleas "for any purpose" against a defendant.<sup>94</sup> With all judges concurring, the court overruled *Tilley*.<sup>95</sup>

## VI. OPINION TESTIMONY

A. *Expert Testimony*

Since *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,<sup>96</sup> federal courts have struggled with their gatekeeper role in scrutinizing expert evidence. Perhaps mindful of *Daubert's* travails in federal court and the relatively limited resources of Georgia courts, the Georgia Supreme Court and court of appeals have stubbornly resisted pleas for the judicial

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85. 181 Ga. App. 98, 351 S.E.2d 464 (1986).

86. *Id.* at 100, 351 S.E.2d at 466.

87. O.C.G.A. § 17-7-95(c) (2004).

88. *Id.*

89. 259 Ga. 463, 384 S.E.2d 183 (1989).

90. *Id.* at 467, 384 S.E.2d at 185.

91. Marc T. Treadwell, *Evidence*, 42 MERCER L. REV. 223, 244 (1990).

92. 259 Ga. at 467, 384 S.E.2d at 186.

93. 265 Ga. App. 655, 595 S.E.2d 360 (2004).

94. *Id.* at 660, 595 S.E.2d at 364.

95. *Id.*

96. 509 U.S. 579 (1993).

adoption of *Daubert*.<sup>97</sup> During the current survey period, the court of appeals reaffirmed that it was not willing to adopt *Daubert*.<sup>98</sup>

In *Bennett v. Mullally*,<sup>99</sup> the court of appeals also reaffirmed that a qualified investigating police officer can express expert opinions with regard to the cause of an accident he or she investigated.<sup>100</sup> Specifically, the court in *Bennett* held that it was permissible for the investigating officer to testify that one of the parties ran a red light.<sup>101</sup> This, however, did not constitute an improper opinion on the ultimate issue of whether defendant was negligent. Rather, it was permissible expert testimony based on factual information about the sequence of events, including whether the traffic signal was red when defendant entered the intersection.<sup>102</sup>

### B. Lay Opinion

The court of appeals decision in *Jackson v. State*<sup>103</sup> was both issued and overruled during the survey period.<sup>104</sup> In *Jackson* a court of appeals panel held that the trial court properly allowed a witness to testify that defendant was depicted in a store surveillance video.<sup>105</sup> The court rejected the argument that this was improper opinion testimony invading the province of the jury.<sup>106</sup>

In *Carter v. State*,<sup>107</sup> the full court of appeals disagreed.<sup>108</sup> In *Carter* the court rejected defendant's contention that the trial court improperly prevented testimony from his mother and aunt that he was not one of the perpetrators depicted in a surveillance video.<sup>109</sup> The court decided that the question of a person's identity shown on a videotape was not beyond the knowledge of the ordinary juror, and because that question of identity was the ultimate issue, it would be improper to allow a lay person to offer such testimony.<sup>110</sup> The court

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97. See, e.g., Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 259 (2003).

98. *Bryant v. Hoffmann-Laroche, Inc.*, 262 Ga. App. 401, 585 S.E.2d 723 (2003).

99. 263 Ga. App. 215, 263 S.E.2d 385 (2003).

100. *Id.* at 218, 587 S.E.2d at 388.

101. *Id.* at 219, 263 S.E.2d at 389.

102. *Id.*

103. 262 Ga. App. 451, 585 S.E.2d 745 (2003).

104. *Id.* at 451, 585 S.E.2d at 751, *overruled by* *Carter v. State*, 266 Ga. App. 691, 693, 598 S.E.2d 76, 79 (2004).

105. *Jackson*, 262 Ga. App. at 455, 585 S.E.2d at 750.

106. *Id.*

107. 266 Ga. App. 691, 598 S.E.2d 76 (2004).

108. *Id.* at 693, 598 S.E.2d at 79.

109. *Id.* at 691, 598 S.E.2d at 78.

110. *Id.* at 693, 598 S.E.2d at 78.

held its decision in *Jackson* was wrong to the extent that it held "that a witness's opinion testimony as to the identity of a person depicted in a video was admissible as a question of fact, alone, rather than as one which the average juror could decide without assistance as well, . . . [and] it is overruled."<sup>111</sup> Thus, under *Carter*, it is improper for a witness to testify with regard to the identity of a person shown on a videotape.<sup>112</sup>

## VII. HEARSAY

### A. *The Necessity Exception*

The precise birth date of Georgia's necessity exception can be debated, but the Georgia Supreme Court's decision in *McKissick v. State*<sup>113</sup> must shoulder much of the responsibility for this exception that has nearly swallowed the rule. In *McKissick*, which was discussed in the 1994 survey,<sup>114</sup> the trial court permitted the boyfriend of defendant's wife to testify concerning what the wife told him about her prior difficulties with her husband. Defendant, who had been charged with the murder of his wife, claimed that this testimony was hearsay.<sup>115</sup> The supreme court, noting that O.C.G.A. section 24-3-1<sup>116</sup> permits the use of hearsay evidence "in specified cases from necessity," concluded that the testimony was necessary because the victim was dead.<sup>117</sup> The court concluded that the circumstances surrounding the out-of-court statement established that the victim's accounts were trustworthy.<sup>118</sup>

Although the author, over the years, ventured to criticize the ever-expanding necessity exception, he acknowledged that the necessity exception had become much too convenient a tool for prosecutors and courts and that it was likely here to stay.<sup>119</sup> *Crawford v. Washington*,<sup>120</sup> however, placed the necessity exception in jeopardy. *Crawford* was decided March 8, 2004.<sup>121</sup> Until the decision in *Crawford*, it was

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111. *Id.*, 598 S.E.2d at 79.

112. *Id.*

113. 263 Ga. 188, 429 S.E.2d 655 (1993).

114. Marc T. Treadwell, *Evidence*, 46 MERCER L. REV. 233, 255 (1994).

115. *McKissick*, 263 Ga. at 189, 429 S.E.2d at 656.

116. O.C.G.A. § 34-3-1 (2003).

117. *McKissick*, 263 Ga. at 189, 429 S.E.2d at 656.

118. *Id.*

119. Marc T. Treadwell, *Evidence*, 55 MERCER L. REV. 249, 263 (2003).

120. 124 S. Ct. 1354 (2004).

121. *Id.* at 1354.

business as usual in Georgia with regard to the necessity exception.<sup>122</sup> Two pre-*Crawford* cases, however, merit note.

In *In re L.J.P.*,<sup>123</sup> the Georgia Supreme Court reaffirmed that a witness's out of court identification of a defendant, although hearsay, is admissible when the declarant is available for cross-examination.<sup>124</sup> In *L.J.P.* when the victim could not identify defendant at trial, the court allowed a police officer to testify that the victim identified defendant before trial.<sup>125</sup> While it would seem that the victim's statement to the police officer was "testimonial" as contemplated by *Crawford*, the fact that the victim testified at trial likely removed any constitutional infirmity.

Although there will likely be much judicial pondering over what is, and is not, testimonial hearsay, the supreme court's decision in *Wilson v. State*<sup>126</sup> illustrates that there may also be some uncertainty on whether the cross-examination requirement of *Crawford* is satisfied. In *Wilson*, which again was decided prior to *Crawford*, the court wrestled with an anomaly of Georgia law regarding prior inconsistent statements.<sup>127</sup> Pursuant to *Gibbons v. State*,<sup>128</sup> a decision discussed in many prior surveys,<sup>129</sup> prior inconsistent statements of a witness are admissible as substantive evidence if the witness is subject to cross-examination.<sup>130</sup> In *Wilson* the declarant took the witness stand but refused to answer any substantive questions about a prior statement he gave to the police. On cross-examination defendant's attorney simply established that the declarant would not answer any of his questions either. The prosecution then played the declarant's videotaped statement implicating defendant. Defendant contended that *Gibbons* did not allow the introduction of the videotaped statement because nothing the declarant said was inconsistent with his statement.<sup>131</sup> The supreme court disagreed, noting that the declarant denied making a statement to the police and his general denial was "wholly inconsistent with his entire videotaped statement."<sup>132</sup>

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122. See, e.g., *Armstrong v. State*, 277 Ga. 122, 587 S.E.2d 5 (2003).

123. 277 Ga. 135, 587 S.E.2d 15 (2003).

124. *Id.* at 135-36, 587 S.E.2d at 16-17.

125. *Id.* at 135, 587 S.E.2d at 16.

126. 277 Ga. 114, 587 S.E.2d 9 (2003).

127. *Id.* at 116, 587 S.E.2d at 12.

128. 248 Ga. 858, 286 S.E.2d 717 (1982).

129. See, e.g., Marc T. Treadwell, *Evidence*, 54 MERCER L. REV. 309, 332 (2002).

130. *Gibbons*, 248 Ga. at 862-63, 286 S.E.2d at 721.

131. *Wilson*, 277 Ga. at 114-17, 286 S.E.2d at 11-13.

132. *Id.* at 116, 587 S.E.2d at 12.

Justice Fletcher, in dissent, disagreed, noting that nothing in the defendant's trial testimony conflicted with the substance of the videotaped statement.<sup>133</sup> Had *Crawford* been decided, the court may well have addressed, and likely will have to address at some point, whether *Crawford's* requirement that the declarant be subject to cross-examination is satisfied if the declarant takes the stand but refuses to answer questions.

Although there were several necessity exception decisions rendered after *Crawford*, only two specifically addressed *Crawford*. First, in *Demons v. State*,<sup>134</sup> defendant contended that the trial court improperly admitted testimony from the victim's co-worker that the victim told her, two days before his murder, that defendant was going to kill him. The witness also testified that the victim was distressed, crying, and had bruises on his arms and chest.<sup>135</sup> The supreme court ruled that this testimony satisfied the elements of the necessity exception but acknowledged that *Crawford* precluded the admission of testimonial hearsay.<sup>136</sup> Noting the United States Supreme Court's examples of testimonial hearsay, the court distinguished *Crawford*, reasoning that "the victim's hearsay statements were not remotely similar to such prior testimony or police interrogation, as they were made in a conversation with a friend, before the commission of any crime, and without any reasonable expectation that they would be used at a later trial."<sup>137</sup>

In *Bell v. State*,<sup>138</sup> the other case citing *Crawford*, the supreme court held that, pursuant to *Crawford*, the trial court erred when it admitted out-of-court statements made by the victim to police officers.<sup>139</sup> The appellate court held, however, that this was harmless error given the strength of the evidence against defendant and the fact that other evidence corroborated the substance of the out-of-court statement. This corroborating evidence, however, consisted of other hearsay statements regarding prior difficulties between defendant and his victim, which were made to two relatives and the victim's best friend.<sup>140</sup> The court concluded that these statements were admissible under the necessity exception.<sup>141</sup> Although the court did not mention *Crawford*, the court

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133. *Id.* at 118, 587 S.E.2d at 14 (Fletcher, C.J., dissenting).

134. 277 Ga. 724, 595 S.E.2d 76 (2004).

135. *Id.* at 726, 595 S.E.2d at 79.

136. *Id.* at 728, 595 S.E.2d at 80.

137. *Id.* at 727-28, 595 S.E.2d at 80.

138. 278 Ga. 69, 597 S.E.2d 350 (2004).

139. *Id.* at 72, 597 S.E.2d at 353.

140. *Id.* at 71-72, 597 S.E.2d at 353.

141. *Id.* at 72, 597 S.E.2d at 353.

likely concluded, without expressly stating, that these statements were not testimonial hearsay.

In *Williams v. State*,<sup>142</sup> which was decided the same day as *Bell*, the supreme court did not mention *Crawford* at all. Instead, the court held that the statements failed to satisfy the third prong of the necessity exception test—the hearsay evidence must be more probative of the fact for which it is offered than other evidence that may be procured by the prosecution.<sup>143</sup> The subject matter of the hearsay statements was prior difficulties between defendant and his victim, but because the prosecution had admissible evidence from other witnesses of such prior difficulties, the court concluded that the trial court erroneously found that the third prong of the hearsay necessity exception was established.<sup>144</sup> Nevertheless, the court concluded this was harmless error because of the overwhelming evidence of the defendant's guilt.<sup>145</sup>

Again, in *Tuff v. State*,<sup>146</sup> the supreme court failed to mention *Crawford*. In *Tuff* the challenged testimony consisted of hearsay statements made by a victim to friends and relatives shortly before her murder.<sup>147</sup> Had the court addressed *Crawford*, however, it would have likely held that these statements did not constitute testimonial hearsay.

### B. *Res Gestae*

The holding in *Crawford* also raises issues concerning the *res gestae* doctrine. In the interest of full disclosure, the author should acknowledge that long ago he joined those who criticize “that near-insoluble enigma of our law, which we call *res gestae*.”<sup>148</sup> As Judge Ruffin stated during the current survey period, the *res gestae* doctrine is the “grand octopus of the law, which stretches its clinging tentacles to anything and everything a party says during the commission of an act, or so near thereto [and] has been both a reliable and unreliable exception to the hearsay rule.”<sup>149</sup> Justice Weltner stated a little more colorfully that:

*Res gestae* is a Gordian Knot, which no one has succeeded in untying. Lacking an Alexander, it remains as yet unsevered. This brief survey

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142. 277 Ga. 853, 596 S.E.2d 597 (2004).

143. *Id.* at 853, 596 S.E.2d at 601.

144. *Id.*

145. *Id.*

146. 278 Ga. 91, 597 S.E.2d 328 (2004).

147. *Id.* at 91, 597 S.E.2d at 330.

148. *Andrews v. State*, 249 Ga. 223, 225, 290 S.E.2d 71, 73 (1982); *see, e.g.*, Marc T. Treadwell, *Evidence*, 53 MERCER L. REV. 295, 310 (2001).

149. *White v. State*, 265 Ga. App. 117, 592 S.E.2d 905, 906 (2004).



should be sufficient to demonstrate the futility of attempting now still another definition, for like Joel Chandler Harris' tar baby, striking another blow means getting stuck another time!<sup>150</sup>

The question now is whether the United States Supreme Court's decision in *Crawford* bars the admission of testimonial hearsay that may fall within the vague boundaries of the res gestae exception. Or put another way, does Georgia's res gestae doctrine somehow trump the United States Constitution? It is, of course, too soon to know what will happen, but, almost as if Georgia's appellate courts had some premonition of *Crawford*, they turned to the res gestae exception rather than the necessity exception much more frequently during this survey period.

Many of these decisions concerned the routine application of the res gestae exception to non-testimonial hearsay, for example, the admission of an emergency call to a 911 dispatcher.<sup>151</sup> In other cases, however, the res gestae doctrine was used to justify the admission of, arguably, testimonial hearsay. For example, in *White v. State*,<sup>152</sup> the court of appeals held that a trial court properly admitted, pursuant to the res gestae doctrine, a written statement given by an alleged victim to police approximately thirty minutes after the police were dispatched to the scene.<sup>153</sup> It seems clear that this statement meets the United States Supreme Court's definition of testimonial hearsay.

The question of whether the res gestae exception can trump the United States Constitution was posed with tongue firmly in cheek. The answer is clearly "no." It will be interesting, however, to see whether Georgia courts will narrow the res gestae exception as a result of *Crawford*.

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150. *Andrews*, 249 Ga. at 227, 290 S.E.2d at 74.

151. *Lowenthal v. State*, 265 Ga. App. 266, 593 S.E.2d 726 (2004); *Sweney v. State*, 265 Ga. App. 21, 593 S.E.2d 12 (2004).

152. 265 Ga. App. 117, 592 S.E.2d 905 (2004).

153. *Id.* at 118, 592 S.E.2d at 906.

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