Criminal Law

by Bernadette C. Crucilla*

I. INTRODUCTION

As in prior periods, this year's survey of criminal law will include only a few of the most significant cases and statutory amendments. Due to the constant evolution of criminal laws in our society, it is simply not practical to attempt to make note of every legal development.[1] Therefore, the discussion is limited to those changes that will have the widest application and interest to criminal law practitioners for the period from June 1, 2015 through May 31, 2016.

II. STATUTORY CHANGES

As usual, statutory changes in this survey period correlate closely with the times in which we live. These changes include loosening renewal requirements for firearms carry licenses, permitting law enforcement use of concealed surveillance devices inside homes, legalizing medical marijuana oil, and the usual and customary accessions to Georgia's library of crime. Each will be discussed in turn.

A. Firearms, Concealed Surveillance, and Witness Identification

The renewal process for firearms carry permits was expanded this year. For example, a carry permit holder is now allowed to renew his or her license if there are ninety or fewer days remaining before the expiration of a current carry license or if thirty or fewer days have passed since

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1. For an analysis of Georgia criminal law during the prior survey period, *see* Bernadette C. Crucilla, *Criminal Law, Annual Survey of Georgia Law,* 67 MERCER L. REV. 31 (2015).

the expiration of said license.[2] Further, the mere presentation of a carry license set to expire shall be prima facie evidence to any probate judge that the fingerprints of the holder are on file with the judge who issued the license, and the judge shall need merely to request a nonfingerprint based criminal records check within five days.[3] This streamlines the criminal records check process for the applicant so that new fingerprint cards do not need to be obtained every time a renewal license is sought.[4]

Furthermore, in order to ensure court records are kept up to date, the statute now mandates all judges presiding over a case wherein a felony conviction results to inquire at sentencing whether the person holds a weapons carry license.[5] If so, then he or she must notify the judge who issued the license of the change in conviction status such that the individual will not be erroneously issued another permit.[6]

Concealed surveillance laws have been updated such that law enforcement officials (or their agents, such as confidential informants) can now freely record the actions of a person if taken in the presence of the law enforcement officer or agent, even where such activities occur in a private place such as a residence.[7] This will make it a lot easier for law enforcement officials to record controlled drug buys.[8]

The Georgia General Assembly has also required all law enforcement agencies conducting live or photo line ups or show ups[9] to adopt written policies[10] to help standardize such procedures and reduce suggestibility.[11]

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2. *See* Ga. H.R. Bill 492 § 6, Reg. Sess., 2015 Ga. Laws 805 (codified at O.C.G.A. § 16-11-129(a) (2011 & Supp. 2016)).

3. *Id.*

4. *Id.*

5. Ga. H.R. Bill 492 § 6, 2015 Ga. Laws 807-10 (codified at O.C.G.A. § 16-11-129(e)(2) (2011 & Supp. 2016)).

6. *Id.*

7. Ga. S. Bill 94 §§ 1-2, Reg. Sess., 2015 Ga. Laws 1046, 1047 (codified at O.C.G.A. §§ 16-11-60, -62 (2011 & Supp. 2016)).

8. *Id.*

9. An identification procedure in which a witness is presented with a single individual. O.C.G.A. § 17-20-1 (Supp. 2016).

10. Policies shall include having a witness who does not know the suspect, photos placed in folders and shuffled, using a minimum number of fillers, obtaining any identification in a witness' own words, etc. O.C.G.A. § 17-20-2 (Supp. 2016).

11. Ga. S. Bill 94 § 4, Reg. Sess., 2015 Ga. Laws 1048-49 (codified at O.C.G.A. § 17-20-2 (Supp. 2016)).

B. Medical Marijuana Oil

With the enactment of "Haleigh's Hope Act,"[12] medical marijuana oil is now legal in the state of Georgia.[13] More specifically, it is now legal to have up to twenty fluid ounces of marijuana-extract oil containing a relatively low amount of tetrahydrocannabinol (THC) if it has been prescribed by a physician and is in a pharmaceutical container.[14] Low-THC oil is defined as an oil that contains no more than five percent by weight of THC, which is the main psychedelic ingredient in marijuana.[15] Possession of such an amount without a prescription is a misdemeanor.[16]

One can obtain the necessary prescription for low-THC oil for the treatment of any of the following medical conditions: (A) cancer, if end stage or the treatment produces wasting or recalcitrant nausea and vomiting; (B) amyotrophic lateral sclerosis, if severe or end stage; (C) seizure disorders, if related to epilepsy or head injury; (D) multiple sclerosis, if severe or end stage; (E) Crohn's disease; (F) mitochondrial disease; (G) Parkinson's disease, if severe or end stage; and (H) sickle cell disease, if severe or end stage.[17]

A person who possesses more than twenty fluid ounces or one who manufactures, distributes, dispenses, sells or possesses with intent to distribute low-THC oil is guilty of a felony that carries one to ten years in prison.[18] There are also ranges of punishments tied specifically to the amount of THC oil possessed (or distributed) all the way up to a trafficking amount.[19]

C. New Crimes or Sentencing Changes

As in previous years, the legislature has added to Georgia's library of crime this survey period. When it was not outright adding crimes, the General Assembly was making enhancements to the sentencing structure of existing crimes.

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12. Ga. H.R. Bill 1 § 1-2, Reg. Sess., 2015 Ga. Laws 49, 50-54 (codified at O.C.G.A. §§ 16-12-190 to -191 (Supp. 2016)).

13. O.C.G.A. §§ 16-12-190, 191.

14. O.C.G.A. § 16-12-191.

15. O.C.G.A. § 16-12-190 (Supp. 2016).

16. O.C.G.A. § 16-12-191(a)(2).

17. O.C.G.A. § 31-2A-18 (Supp. 2016).

18. O.C.G.A. § 16-12-191(c).

19. O.C.G.A. §§ 16-12-191(c), (d). Possession of 160 or more fluid ounces is considered trafficking, with 160 to 31,000 fluid ounces carrying five to ten years in prison, 31,000 to 154,000 fluid ounces carrying seven to fifteen years in prison, and 154,000 or more fluid ounces carrying ten to twenty years in prison. These sentences also include fines up to $1 million. *Id.*

1. Terroristic Threats and Acts

The commission of a terroristic threat used to be a felony.[20] Now, however, the making of such a threat shall be a misdemeanor unless the threat "suggest[s] the death of the threatened individual," in which case it shall be a felony and shall carry a sentence of one to five years in prison.[21] Interestingly, when the threat is to retaliate for (or intimidate anyone from) attending a judicial proceeding or for providing any official information about a crime, the punishment shall increase to five to twenty years in prison.[22]

2. Criminal Street Gangs

The Criminal Street Gang Statute[23] has been amended to increase penalties from a maximum of fifteen years up to twenty years in prison.[24] In addition, a new section provides that any person who violates the gang statute by giving an inmate a weapon, drugs, cell phone, or any other contraband shall face a prison term of two to twenty years that will run consecutively to any other sentence.[25] Additional portions of the statute increased punishment for holding a leadership position in or for organizing a gang.[26]

Some additional changes of note make the already-liberal evidentiary provisions even more expansive, providing that evidence of a prior conviction of any gang member for any crime under the gang statute shall be admissible against any other member of the gang, and it will not be subject to any of the restrictions of the hearsay statute.[27]

3. Incest

Incest prohibitions have now also been expanded to include relations by half-blood.[28] For example, half and whole-blood grandparent and grandchild are now included, as are half and whole-blood aunts and uncles and their respective nieces or nephews.[29]

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20. *See* O.C.G.A. § 16-11-37(c) (2011 & Supp. 2016).

21. Ga. H.R. Bill 874 § 2, Reg. Sess. (2016) (codified at O.C.G.A. § 16-11-37 (2011 & Supp. 2016)).

22. O.C.G.A. §16-11-37(e) (Supp. 2016).

23. O.C.G.A. §16-15-4(k) (2011 & Supp. 2016).

24. O.C.G.A. § 16-15-4(k)(1).

25. O.C.G.A. § 16-15-4(k)(2). Also, no portion of the minimum shall be suspended, stayed, probated, deferred, or withheld. *Id.*

26. O.C.G.A. §§ 16-15-4(d), (k)(3) (2011 & Supp. 2016).

27. O.C.G.A. § 16-15-9 (2011 & Supp. 2016).

28. O.C.G.A. § 16-6-22 (2011 & Supp. 2016).

29. *Id.*

4. Harassing Phone Calls

The statutory prohibition against harassing phone calls has also been expanded to include all harassing communications, whether by telecommunication, email, text-messaging, or any other form of electronic communication.[30] It is correspondingly now entitled "Harassing Communications" rather than "Harrassing Phone Calls."[31] In addition, the venue requirements have changed. Proper venue shall now be in the county where the communication either originated or was received.[32]

5. Law Enforcement Animals

Last year's expansion of the animal cruelty statutes extended into this year to apply to law enforcement animals including police dogs, police horses, or "any other animal trained to support a peace officer, fire department or state fire marshal in performance of law enforcement duties."[33] Similarly to the animal cruelty statutes, the penalties range in degree from "harming a law enforcement animal in the first degree" (for intentionally causing the death of a law enforcement animal) which is a felony and carries a possible prison sentence of eighteen months to five years, all the way down to "harming a law enforcement animal in the fourth degree" (for intentionally causing injury to the animal), which is a misdemeanor of a high and aggravated nature, and carries possible imprisonment of twelve months and a fine.[34]

All degrees of harming a law enforcement animal require that the animal be in the performance of its official duties.[35] The statute also requires the payment of restitution to the agency harmed by the action.[36]

III. CASE LAW CHANGES

As in previous years, this period was also significant for its activity in the appellate courts. Although there is no particular way to neatly categorize the case law developments, some of the more significant or interesting changes are set forth below.

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30. Ga. S. Bill 72 § 2-1, Reg. Sess., 2015 Ga. Laws 203-04 (codified at O.C.G.A. § 16-11-39.1(a) (2011 & Supp. 2016)).

31. O.C.G.A. § 16-11-39.1 (2011 & Supp. 2016).

32. O.C.G.A. § 16-11-39.1(c).

33. O.C.G.A. § 16-11-107(a)(3.2) (2011 & Supp. 2016).

34. O.C.G.A. §§ 16-11-107(b)-(e) (2011 & Supp. 2016).

35. *Id.*

36. O.C.G.A. § 16-11-107(f) (Supp. 2016).

A. Insanity Defense and Attorney-Client Privilege

In a matter of first impression, the Georgia Supreme Court ruled that merely raising the insanity defense does not waive the attorney-client privilege where the evaluating experts "neither serve as a witness at trial nor provide any basis for the formulation of other experts' trial testimony."[37]

In *Neuman v. State*,[38] the defendant was indicted and tried for shooting to death the husband of the woman with whom he was having an affair while the husband was outside of his son's daycare center. The defense contracted with both a psychologist, Dr. Peter Thomas, and a forensic psychiatrist, Dr. Julia Rand Dorney, to provide an initial evaluation of the defendant's psychological issues and report back to the attorneys. Based upon these reports, the attorneys then hired an expert to conduct his own forensic evaluation and to testify at trial.[39]

At trial, the defendant's trial experts testified that the defendant suffered from long standing "bipolar disorder with psychosis" and delusions making him "incapable of distinguishing right and wrong."[40] Upon learning that the defendant had met with both Drs. Thomas and Rand Dorney, the State subpoenaed the records concerning their evaluations and interviews, over the defendant's objection. The trial court conducted an in-camera inspection and then turned over the records to the State. Although they never intended to have these doctors testify, in light of the courts' rulings on the evidence, the State decided to call the doctors as part of their case-in-chief.[41] After a hotly-contested trial that included expert testimony from both sides, the jury rejected the insanity defense and found the defendant guilty but mentally ill.[42] The defendant appealed, and the supreme court reversed the trial court, ordering a retrial.[43] Again, since the initial experts were not hired to testify at trial nor provide any basis for the formulation of other experts' trial testimony,

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37. Neuman v. State, 297 Ga. 501, 503-04, 773 S.E.2d 716, 719-20 (2015).

38. 297 Ga. 501, 773 S.E.2d 716 (2015).

39. *Id.* at 501-03, 773 S.E.2d at 718-19. Based on this expert's evaluation, the defendant changed his plea to not guilty by reason of insanity. *Id.*

40. *Id.* at 502, 773 S.E.2d at 718.

41. *Id.* at 502-03, 773 S.E.2d at 718-19. The State argued that merely raising the insanity defense waived the attorney-client privilege as to revealing the experts' records. The trial court agreed. *Id.* at 503, 773 S.E.2d at 719.

42. *Id.* at 501-02, 773 S.E.2d at 718. The State used the Thomas and Rand Dorney records in its rebuttal case and put forth its own experts to opine that the defendant was malingering and was "faking" mental illness. *Id.* at 502, 773 S.E.2d at 718.

43. *Id.* at 501, 773 S.E.2d at 718 (holding the trial court erred by admitting evidence protected by the attorney-client privilege).

the attorney-client privilege was not waived as to them, and the records should not have been released to the prosecutor.[44]

B. Minor's Consent Issues

In two cases this survey period, a minor's consent was at issue: first in the context of a sexual battery case, and second, with respect to the recordation of a phone call.

In *Watson v. State*,[45] the supreme court took on the question of whether "the victim's age alone may conclusively establish the lack-of-consent element of sexual battery."[46] The defendant in *Watson* was tried for child molestation against his daughter, K.P., who was under the age of thirteen.[47] The trial court gave the jury instruction on the lesser-included offense of sexual battery, including the fact that "a victim under the age of 16 lacks the legal capacity to consent to sexual conduct."[48] The defendant objected to that instruction and was overruled.[49] After deliberations, the jury convicted Watson of two counts of sexual battery.[50] After the Georgia Court of Appeals affirmed the trial court's ruling,[51] the Georgia Supreme Court granted certiorari to review the propriety of the trial court's jury instruction on sexual battery.[52]

While the supreme court held that it is a correct statement of the law that a victim under sixteen lacks the capacity to consent to sexual conduct, in relation to the offense of sexual battery, it held the instruction given was erroneous.[53] The court thus reversed the judgment of the court of appeals on that issue.[54] In reaching its decision, the court reasoned that Georgia law provides a person under the age of sixteen lacks legal capacity to consent to *sexual* contact, but the offense of sexual battery does not require any *sexual* contact, only non-consensual, intentional physical contact with his or her intimate body parts.[55] Thus, it held the

44. *Id.* at 503, 506, 773 S.E.2d at 719, 721.
45. 297 Ga. 718, 777 S.E. 2d 677 (2015).
46. *Id.* at 719, 777 S.E.2d at 677
47. *Id.* at 718, 777 S.E.2d at 677.
48. *Id.*
49. *Id.* at 718-19, 777 S.E.2d at 677.
50. *Id.* at 718, 777 S.E.2d at 677.
51. *See* Watson v. State, 329 Ga. App. 334, 765 S.E.2d 24 (2014).
52. *Watson*, 297 Ga. at 718, 777 S.E.2d at 677.
53. *Id.*
54. *Id.*
55. *Id.* at 720, 777 S.E.2d at 677-78.

State must prove the contact was without consent regardless of the victim's age.[56]

In *London v. State*,[57] the court of appeals analyzed the admission into evidence of a recorded phone conversation between the defendant, Bartholomew London, and his fifteen-year-old stepdaughter in a prosecution for child molestation and aggravated child molestation.[58] In that case, the court reviewed the Georgia statutes involving the prohibition against recording a telephone call and noted that an exception lies where one party to the call has given prior consent.[59] However, O.C.G.A. § 16-11-66(b)[60] provides that when the conversation is with a minor under the age of eighteen, an order signed by a superior court judge must be obtained before the conversation can be recorded and divulged.[61]

In *London*, law enforcement officers had the victim (a fifteen-year-old child) record a phone conversation with the defendant in which the defendant discussed sexual acts perpetrated on the victim. The court allowed the State to introduce the tape at trial, despite the defendant's motion to suppress. Not surprisingly, the defendant was convicted.[62] On appeal, the court held that because the statute requires a court order, the fact that the child consented was not enough to satisfy this requirement.[63] The verdict was thus reversed with the express holding that the defendant could be retried because the evidence was sufficient to sustain the conviction.[64]

C. Other Crimes or Acts

Two cases this survey period shed some light on what will be admitted into or excluded from evidence as "other crimes or acts" evidence, better known by practitioners as "Rule 404(b) evidence."[65]

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56. *Id.* at 720, 777 S.E.2d at 678.

57. 333 Ga. App. 332, 775 S.E.2d 787 (2015).

58. *Id.* at 332, 775 S.E.2d at 787.

59. *Id.* at 334-35, 775 S.E.2d at 788-89. Thus, it is perfectly legal to record a phone call when the person who records it consents to the same. *See id.*

60. O.C.G.A. § 16-11-66(b) (2011).

61. *London*, 333 Ga. App. at 335, 775 S.E.2d at 789.

62. *Id.* at 332, 333-36, 775 S.E.2d at 787, 788-89.

63. *Id.* at 336-37, 775 S.E.2d at 790.

64. *Id.* at 338, 775 S.E.2d at 791.

65. Beginning January 1, 2013, the new Evidence Code applies to cases tried in Georgia. *See* Humphrey v. Williams, 295 Ga. 536, 540 n.2, 761 S.E.2d 297, 302 n.2 (2014). Prior to that date, Rule 404(b) evidence was known as "similar transaction" evidence.

In *Brooks v. State*,[66] the supreme court analyzed the admission of "other acts" evidence to prove identity, motive, and course of conduct in a murder case.[67] After a thorough analysis of the three permitted uses of other acts evidence, the court found error and reversed the conviction.[68] The defendant and an accomplice were charged with the malice murder of a security guard during the burglary of vending machines at a meat packing plant at which they were employed. When confronted by the security guard, the men tied the guard up inside a locker room, and the defendant shot him in the back. Prior to trial, the State provided notice that it intended to introduce evidence that the defendant and an accomplice murdered a state trooper in Mississippi in 1983 after escaping from prison and being pulled over in a traffic stop. The state indicated it was introducing the evidence to prove identity, motive, and course of conduct.[69]

The court reasoned that, under O.C.G.A. §24-4-404(b),[70] there is a three-part test to determine admissibility:

> (1) the evidence needs to be relevant to an issue other than bad character; (2) the probative value of the other acts evidence cannot be outweighed substantially by its unfair prejudice; and (3) there must be sufficient proof to enable the jury to find that the accused committed the other acts.[71]

The court first analyzed the other acts evidence to prove identity and found that "evidence offered to prove identity must satisfy a particularly stringent analysis."[72] It held that, to prove identity, the similarity of the two offenses is the crucial consideration.[73] Basically, the physical similarity must be such that it marks the crime as the handiwork of the accused, or demonstrates a "modus operandi."[74] The court found that the specific dissimilarities of the two crimes, including the fact that they were seven years and hundreds of miles apart, made the prior crime not admissible to prove identity.[75]

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66. 298 Ga. 722, 783 S.E.2d 895 (2016).
67. *Id.* at 722, 783 S.E.2d at 897.
68. *Id.* at 725-28, 783 S.E.2d at 898-900.
69. *Id.* at 721-24, 783 S.E.2d at 897-98.
70. O.C.G.A. § 24-4-404(b) (2013).
71. *Brooks,* 298 Ga. at 724, 783 S.E.2d at 898.
72. *Id.* at 725, 783 S.E.2d at 898.
73. *Id.*
74. *Id.*
75. *Id.* at 725-26, 783 S.E.2d at 899.

The court next turned to motive, holding that overall similarity is not required when motive is at issue.[76] However, to prove motive, extrinsic evidence must be "logically relevant and necessary to prove something other than the accused's propensity to commit the crime charged."[77] The court held that evidence of the 1983 murder did not meet the logically relevant and necessary test, because the 1983 murder of a state trooper during a prison escape is unrelated and unnecessary to prove why the defendant murdered a security guard in the course of a theft.[78]

Lastly, the court looked at course of conduct and held that "'course of conduct' [was] noticeably absent from the list of purposes" in O.C.G.A. § 24-4-404(b).[79] Although that list is not exhaustive, "our Court of Appeals has correctly observed that the 'course of conduct' and 'bent-of-mind' exceptions, formerly an integral part of our law of evidence, have been eliminated from the new Evidence Code."[80] As a result, the court held it was error for the trial court to admit the extrinsic evidence, and, because the error was prejudicial, the judgment was reversed.[81]

Another case in this period that dealt with other crimes and acts evidence is *Olds v. State*.[82] There, the defendant was convicted for the false imprisonment and battery of a woman with whom he had once been in a relationship. The State offered evidence of two other incidents, during which the defendant assaulted other women to prove "intent" under Rule 404(b), and the court admitted the evidence.[83]

The court then conducted a discussion of Georgia's new Evidence Code and United States Court of Appeals for the Eleventh Circuit decisional law (which interprets the Federal Rules of Evidence) upon which the new evidence code is based.[84] The court then analyzed the three purposes for which evidence may be admitted under Rule 404(b): (1) if it is relevant for a particular purpose or "has any tendency to make the existence of any fact that is of consequence to the determination of the action more

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76. *Id.* at 726, 783 S.E.2d at 899.

77. *Id.* (quoting PAUL S. MILICH, GEORGIA RULES OF EVIDENCE § 11.3, 244 (2014)).

78. *Id.* at 726-27, 783 S.E.2d at 900.

79. *Id.* at 727, 783 S.E.2d at 900.

80. *Id.*

81. *Id.* at 727-28, 783 S.E.2d at 900.

82. 299 Ga. 65, 786 S.E.2d 633 (2016).

83. *Id.* at 65-66, 786 S.E.2d at 634. The court noted that the court of appeals relied on *Bradshaw v. State*, 296 Ga. 650, 769 S.E.2d 892 (2015), in its decision to affirm the trial court's ruling. *Olds*, 299 Ga. at 66, 786 S.E.2d at 634. The Georgia Supreme Court thus granted certiorari to clarify its previous opinion in *Bradshaw*. *Id.*

84. *Olds*, 299 Ga. at 69, 786 S.E.2d at 636.

probable or less probable than it would be without the evidence;" (2) "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice;" and (3) evidence will be admitted if it is "sufficient to permit a jury to conclude by a preponderance of the proof that the person with whom the evidence is concerned actually committed the other acts in question."[85]

The court then observed that its previous holding was based on an analysis of federal conspiracy cases, while the current case was not.[86] Because, the court reasoned, intent is nearly always at issue in a federal conspiracy case, it may or may not have sufficient probative value (that is not substantially outweighed by its prejudicial impact) in a non-conspiracy case to satisfy the three requirements of the Rule 404(b) test.[87] The case was thus remanded to the court of appeals to engage in the proper three-prong analysis under Rule 404(b).[88]

D. Inadequacy of Interpreter

One case in this period, *State v. Tunkura*,[89] underscores the importance of an interpreter translating correctly. After his first trial resulted in a mistrial, Tunkara, who needed a Soninke interpreter, was retried.[90] At the second trial, a different, non-certified interpreter was used. At some point, the defense attorney became aware the interpreter was giving Tunkara misleading information, and he moved for a mistrial, which was denied.[91] The trial judge denied the request because Tunkara "appeared to understand the proceedings."[92]

After being convicted of murder and aggravated assault, Tunkara filed a motion for new trial, which was granted by the trial court on the basis that "there was a complete breakdown of . . . what was transpiring at trial due to the interpreter and this prejudiced" the defendant.[93] In fact, the trial court found that Tunkara did not understand what was going on at trial and "the principles of justice and equity" required he be granted a new trial.[94] The State actually appealed this ruling, and the

85. *Id.* at 69-70, 786 S.E.2d at 636-37.

86. *Id.* at 73, 786 S.E.2d at 639.

87. *Id.* at 73-76, 786 S.E.2d at 639-41.

88. *Id.* at 77-78, 786 S.E.2d at 642.

89. 298 Ga. 488, 782 S.E.2d 278 (2016).

90. Soninke is spoken by a tribe in West Africa.

91. *Tunkara*, 298 Ga. at 489, 782 S.E.2d at 279. The inaccuracies culminated in Tunkara believing the murder weapon had his blood on it, rather than that of the victim. *Id.*

92. *Id.*

93. *Id.* at 489-90, 782 S.E.2d at 279.

94. *Id.* at 490, 782 S.E.2d at 280.

supreme court affirmed.[95] Again, the defendant having "appeared to understand" did not satisfy the supreme court, and the decision from the court of appeals ordering a new trial was affirmed.[96]

E. Sexual Predator Classification Implicates Due Process

On March 21, 2016, the supreme court considered whether due process requirements apply to a person whom the state seeks to have classified as a "sexually dangerous predator" under the Georgia sexual offender laws.[97] Basically, the defendant, Gregory, broadcast images on the internet to a teenage girl and was convicted of obscene internet contact with a child.[98] Under the sex offender laws, obscene internet contact with a child is a "dangerous sex offense," and Gregory's conviction renders him a sexual offender.[99]

The sex offender laws require everyone convicted of a dangerous sex offense after July 1, 1996 to register annually with the sheriff of his county of residence.[100] As fully discussed in *Gregory,* the sex offender registration requirements often prohibit an offender "from residing within 1,000 feet of a child care facility, church, school, or 'area where minors congregate.'"[101] The law requires the Sexual Offender Registration Review Board (the Board) to "assess the likelihood that [an offender] will engage in another crime against a victim who is a minor or a dangerous

95. *Id.* at 490-91, 782 S.E.2d at 279-80.

96. *Id.* at 491, 782 S.E.2d at 280.

97. Gregory v. Sexual Offender Registration Rev. Bd., 298 Ga. 675, 784 S.E.2d 392 (2016); O.C.G.A. § 42-1-12 to -19 (2014 & Supp. 2016).

98. *Gregory*, 298 Ga. at 676, 784 S.E.2d at 393-94. Obscene internet contact with a child is a felony offense, and Gregory received a term of probation under the First Offender Act. *See* O.C.G.A. § 42-8-60 to -66 (2014 & Supp. 2016). He violated his probation two years later and was adjudicated guilty and sentenced to imprisonment and probation. *Gregory*, 298 Ga. at 676 n.6, 784 S.E.2d at 394 n.6.

99. *Gregory*, 298 Ga. at 676-77, 784 S.E.2d 394-95. *See also* O.C.G.A. §§ 41-1-12(a)(10)(B), (a)(20)(A) (Supp. 2016).

100. *Gregory*, 298 Ga. at 678-79, 784 S.E.2d at 395-96. The sheriffs are required to keep the lists and make them available for inspection by the public, and they also must submit the lists to the G.B.I which, in turn, furnishes the same to schools, and daycare and long-term child care facilities. *Id.*

101. *Id.* at 679, 784 S.E.2d at 396. "'Area[s] where minors congregate' includes 'all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, public libraries, and public and community swimming pools.'" *Id.* at 679 n.11, 784 S.E.2d at 396 n.11 (quoting O.C.G.A. § 41-1-12(a)(3) (Supp. 2016)).

sexual offense . . . and to classify sexual offenders according to that assessment."[102]

The opinion goes on to note that there are three classifications: Level I, Level II, and sexually dangerous predator.[103] It further notes that offenders classified as Level II or as sexually dangerous predators can petition for a reevaluation and can submit documentary evidence in support thereof (such as psychological testing, psychotherapy treatment notes, affidavits, etc.), but there is no provision for a hearing in connection with the Board's reevaluation.[104] Alternatively or additionally, offenders classified as Level II or as sexually dangerous predators may seek judicial review of their classifications and likewise may submit documentary evidence in support.[105] Within the rubric of judicial review, there is a provision for the court to hold a full evidentiary hearing upon request of the petitioner, but that provision is permissive rather than mandatory (i.e. the court may hold a hearing to determine the issue of classification).[106]

In the instant case, after the defendant committed another sexual offense sufficient to have his first offender status revoked, the Board classified him as a sexually dangerous predator.[107] The defendant filed a petition for reevaluation, which was denied, and then he sought judicial review. Although he specifically requested a hearing, he was not given one by the court, which subsequently affirmed the decision of the Board.[108]

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102. *Gregory*, 298 Ga. at 680, 784 S.E.2d at 396.

103. *Id.* Level I signifies the offender is a low offense risk for future sexual offenses, Level II (the default classification) means the offender is an intermediate risk for future sexual offenses, and a sexually dangerous predator indicates the offender is a risk for perpetrating future sexual offenses. *Id.*; O.C.G.A. §§ 41-1-12(a)(12), (a)(13), (a)(21)(B) (Supp. 2016).

104. *Gregory*, 298 Ga. at 681-84, 784 S.E.2d at 397-98. A sexually dangerous predator is subject to additional requirements and restrictions, most notably having to submit to electronic monitoring and tracking of his person for the rest of his life and having to pay the costs for the same. O.C.G.A. § 42-1-14(e) (2014 & Supp. 2016). They additionally have to register with the sheriff more frequently and are subject to more stringent employment restrictions. O.C.G.A. § 42-1-14(f) (2014 & Supp. 2016); O.C.G.A. § 42-1-15(c)(2) (2014).

105. *Gregory*, 298 Ga. at 682, 784 S.E.2d at 397.

106. *Id.* at 682, 784 S.E.2d at 397-98.

107. *Id.* at 684, 784 S.E.2d at 399. Gregory was arrested for public indecency for exposing himself at a public swimming pool, his first offender status was revoked, and he was adjudicated guilty and sentenced to imprisonment followed by probation. *Id.* at 676 n.6, 784 S.E.2d at 394 n.6.

108. *Id.* at 684, 784 S.E.2d at 399. Gregory did, however, submit documentary evidence in his favor. *Id.*

The defendant filed an appeal, contending that classifying an offender as a sexually dangerous predator without affording him or her an evidentiary hearing is a denial of due process.[109] After a thorough analysis of the elements of due process, the supreme court agreed, holding that an evidentiary hearing must be provided, upon request, to any person classified by the Board as a sexually dangerous predator.[110] Interestingly, the opinion does not state whether being classified as a Level II offender would also require a hearing upon request. Gregory's case was thus remanded for a hearing consistent with the holding.[111]

IV. CONCLUSION

This year was significant for statutory changes to the renewal of firearms carry licenses, the use concealed surveillance devices, the legalization of medical marijuana oil, and the addition of several new crimes and changes to the sentencing structure of some existing crimes. Additionally, the appellate courts issued a number of decisions providing guidance as to the insanity defense, when the attorney-client privilege has been waived, issues regarding when a minor's consent must and may not be proved, and how to determine when other crimes or acts may be admitted or excluded from evidence. The courts also touched on the importance of an adequate interpreter regardless of whether the defendant "appears" to understand and when an evidentiary hearing will be provided in a case involving sexual predator classification. As in previous periods, the evolving laws in this period truly reflect the times in which we live.

109. *Id.* at 685, 784 S.E.2d at 399.
110. *Id.* at 690-91, 784 S.E.2d at 403.
111. *Id.* at 691, 784 S.E.2d at 403.