

# Criminal Law and Criminal Procedure

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In reading over 900 cases in criminal law and criminal procedure during the survey period, the fact that courts find the time to carefully analyze the allegations of error in each case is striking. The difference in the quality of the courts' work is especially striking when compared to the courts of twenty years ago.

Several themes emerge after reading these cases. The first theme is the number of specious arguments raised on appeal.<sup>1</sup> This is due, in large part, to the Georgia Supreme Court's opinion in *Huguley v. State*<sup>2</sup> in which the court disapproved *Anders* motions<sup>3</sup> and forced attorneys to raise arguments on appeal no matter how specious.<sup>4</sup> The second theme is the number of cases courts disposed of without deciding the merits because the claims were waived by failure to raise them at the trial level.<sup>5</sup> Waiver of claims is tied to ineffective assistance of counsel claims, which are given all too short a shrift by appellate courts. The third theme is a determination of harmless error, which leaves the

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1. See, e.g., *In re J.M.*, 276 Ga. 88, 88, 575 S.E.2d 441, 442 (2003).

2. 253 Ga. 709, 324 S.E.2d 729 (1985).

3. See *Anders v. California*, 386 U.S. 738 (1967).

4. *Huguley*, 253 Ga. at 710, 324 S.E.2d at 730-31.

5. See, e.g., *Braithwaite v. State*, 275 Ga. 884, 885-87, 572 S.E.2d 612, 615-16 (2002); *Lyons v. State*, 258 Ga. App. 9, 13, 572 S.E.2d 632, 636 (2002).

convicted appellant without a remedy even in cases of clear error in the trial process.<sup>6</sup>

The supreme court reviewed waiver, ineffective assistance, and harmless error claims in *Braithwaite v. State*.<sup>7</sup> Defendant was convicted by a jury of “three counts of malice murder, three counts of felony murder, three counts of aggravated assault, and three counts of illegal firearm possession.”<sup>8</sup> The prosecutor began his closing argument as follows:

Two 18-year-old kids, sleeping in their house, never done anything wrong, not bothering anybody, engaged to be married, recent graduates from high school, both working, promising careers, maybe college.

What must it have been like to be in that bedroom, minding your own business when five men come in there, order you get down face first? Do you scream? Well, they couldn't do that because they'd stuffed socks in their mouth. Do you fight back? These men have guns.

What must it be like laying there next to the man you love, your face covered up so you can't see but you can hear everything? What must it be like when that first shot was fired into Eddie Fleming's [sic] back and she's laying there right next to him? And he can still talk. He can still move his head and she has to sit there and listen. And then they wait.

And what must it be like while the men are deciding who the next shot is going to be fired from? She's laying there waiting. The blood is pouring out of Eddie's back, who's right next to her. The men decide. A second shot is fired—she's inches away from it—into the head of Eddie McMillian.

What must it have been like for Eddie McMillian as he lay paralyzed? And then what was it like when Nekeba Turner as she lay there waiting for her turn to die?

. . .

What was it like for Chauncey Fleming as he lay there all tied up listening to his friends being killed knowing his turn is coming? And one last piece of worthless metal takes Chauncey's life. I mean the last images anybody has of him is laying there tied up at the ankles and the arms and around the head.

And what must it be like to be Eddie McMillian's mother and find those bodies?<sup>9</sup>

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6. See, e.g., *Braithwaite*, 275 Ga. at 886, 572 S.E.2d at 616; *Shirley v. State*, 259 Ga. App. 503, 505, 578 S.E.2d 163, 165 (2003).

7. 275 Ga. 884, 885-89, 572 S.E.2d 612, 615-18 (2002).

8. *Id.* at 884 n.1, 572 S.E.2d at 614 n.1.

9. *Id.* at 893-94, 572 S.E.2d at 621.

Defendant's attorney did not object to this portion of the closing argument, which clearly violates the proscription against a "golden rule" argument—an argument that asks the jurors to place themselves in the victim's shoes. Because no objection was made and because the issue could not be raised on appeal, appellant was forced to rely on an ineffective assistance claim to make his point.<sup>10</sup> Every defense lawyer knows an ineffective assistance claim is easy to allege, but it is nearly impossible to prove in our current legal climate.

The majority rejected appellant's ineffective assistance of counsel argument.<sup>11</sup> Appellant's trial counsel recognized the golden rule violation but *chose* to ignore the violation and hoped that the jury would ignore it also.<sup>12</sup> The majority found that defense counsel's choice was a reasonable strategy and refused to second guess the defense counsel's decision.<sup>13</sup> In addition, the majority held that the error in allowing this golden rule violation was harmless because the evidence of guilt was overwhelming.<sup>14</sup>

Justice Hunstein, dissenting with Justices Benham and Thompson, objected strongly to the majority's all-too-typical brushing aside of an ineffective assistance claim.<sup>15</sup> As Justice Hunstein saw it:

The argument quoted above reveals that the prosecutor repeatedly and deliberately encouraged the jurors to place themselves in the murder victims' place and imagine for themselves what it must have been like as the crimes occurred, as the victims lay there helpless while shots were fired and friends and loved ones were murdered. The prosecutor even called upon the jurors to imagine themselves in the place of the mother of the murder victim who discovered the bodies. This language was not merely "vivid imagery of what a victim experienced" during a crime, as the concurrence would characterize it, but rather constituted an impermissible golden rule argument that "invited [jurors] to place themselves in the victim's place in regard to the crime itself." Under these circumstances there can be no question that the prosecutor's use of a golden rule argument was error.

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I do not agree with the majority that error by trial counsel is unreviewable merely because the error was intentional. A deliberate decision by trial counsel can constitute deficient performance just as easily as an inadvertent lapse. Invoking the words "tactics" and

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10. *Id.* at 885-86, 572 S.E.2d at 615-16.

11. *Id.* at 886-87, 572 S.E.2d at 616.

12. *Id.* at 886, 572 S.E.2d at 615.

13. *Id.*, 572 S.E.2d at 616.

14. *Id.*

15. *Id.* at 895, 572 S.E.2d at 622 (Hunstein, J., dissenting).

“strategy” does not automatically immunize trial counsel against a claim that a tactical decision or strategic maneuver was an unreasonable one no competent attorney would have made under the same circumstances. “Tactics” and “strategy” provide no talismanic protection against an ineffective assistance of counsel claim. Nor can invoking the phrases “hindsight” and “second-guessing” justify an appellate court’s failure to perform its function as a reviewing court to determine whether the “tactical judgment of [trial counsel] was outside the wide range of reasonably effective assistance.”

Applying the appropriate analysis to this case, trial counsel’s decision to remain silent in the face of the prosecutor’s prolonged and egregious golden rule argument was a decision no reasonable defense counsel would have made under the same circumstances . . . .

There was no reasonable tactical advantage to remaining silent in the face of a golden rule argument that inaccurately informed the jury that it was fair and proper for them to review the evidence from the perspective of the crime victims and their families. There was no reasonable tactical advantage to be gained by abetting the State’s deliberate strategy to subvert the jury’s duty to render a fair and impartial verdict based upon an objective application of the law to the facts. No reasonable attorney hearing this prolonged and egregious violation of the rule against golden rule arguments would remain silent because no reasonable attorney under the same circumstances would believe that a jury would “ignore” this persuasive but improper argument. Certainly no reasonable attorney could possibly believe any injury to his client would result from “drawing attention” to a misleading and damagingly erroneous standard of evidentiary review.<sup>16</sup>

Unlike the majority, Justice Hunstein did not find the evidence of guilt overwhelming.<sup>17</sup> The evidence against appellant was based on three witnesses. Witnesses Davis and Ward were involved in the crime and testified in exchange for reduced sentences. The other witness was Davis’s lover and appellant’s adulterous wife.<sup>18</sup> Because there was no other evidence of appellant’s guilt, Justice Hunstein thought the evidence, while sufficient to support a conviction, was far from overwhelming.<sup>19</sup> As the Justice stated:

As the majority’s holding in this case amply demonstrates, “overwhelming evidence” no longer depends upon the amount and quality of evidence of guilt adduced at trial. Instead, “overwhelming evidence”

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16. *Id.* at 894-97, 572 S.E.2d at 621-23 (Hunstein, J., dissenting) (citations omitted).

17. *Id.* at 898-99, 572 S.E.2d at 624-25 (Hunstein, J., dissenting).

18. *Id.*, 572 S.E.2d at 624 (Hunstein, J., dissenting).

19. *Id.* at 899, 572 S.E.2d at 624-25 (Hunstein, J., dissenting).

has become the catch phrase that excuses all error. No matter how excessive the argument or how impassioned the prosecutor's plea, all is forgiven because "overwhelming evidence" was adduced. Despite the perversion this makes of our Court's rulings, the continued abuse it encourages among prosecutors, and the hypocrisy it foments between words and deeds, the bottom line is that when the evidence adduced at trial meets the [minimum sufficiency] standard, this Court will not reverse a criminal conviction over a prosecutor's use of any golden rule argument, no matter how extensive or damaging that argument is.

...  
It is well established in Georgia that use of a golden rule argument is strictly prohibited. Why, then, do prosecutors continue repeatedly to make these forbidden arguments? The answer is simple: this Court does not hold them accountable for their violation of our rulings. We gum the words of prohibition but there are no teeth to nip prosecutors into obedience. I cannot condone this Court's abandonment of its obligation "to ensure that no infringement of the accused's fair trial rights has occurred" through the use of a prohibited golden rule argument . . . in favor of a rubber stamp approach to the State's improper behavior. Nor can I condone the continuing violations of prosecutorial duty, propriety and restraint in regard to the prohibited use of golden rule arguments.<sup>20</sup>

Considering Justice Hunstein's points, the court should revise its cavalier attitude toward both ineffective assistance claims and the harmless error doctrine.

The case is also notable for Justice Sears's excellent analysis of what constitutes a golden rule argument and why such arguments are prohibited.<sup>21</sup>

## I. PRE-TRIAL MATTERS

### A. *Medical Records*

In *King v. State*,<sup>22</sup> the Gwinnett County Solicitor-General's Office charged King with driving under the influence and failure to maintain a single lane. The State obtained a search warrant for all medical records related to King's treatment at the Gwinnett Medical Center at the time of the incident.<sup>23</sup> King argued that the medical records seizure "violated his right to privacy under the due process clause of the

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20. *Id.* at 899-900, 572 S.E.2d at 625 (Hunstein, J., dissenting) (citations omitted).

21. *Id.* at 889-93, 572 S.E.2d at 618-21 (Sears, P.J., concurring).

22. 276 Ga. 126, 577 S.E.2d 764 (2003).

23. *Id.* at 126-27, 577 S.E.2d at 764-65.

Georgia Constitution as held in *King v. State*.<sup>24</sup> In the first *King* case, the court required the State to give defendant notice and an opportunity to object to a subpoena before the records could be produced.<sup>25</sup> In the second *King* case, defendant sought to extend the court's first *King* ruling to encompass a search warrant for medical records in addition to a subpoena for medical records. The trial court disagreed,<sup>26</sup> and the supreme court affirmed.<sup>27</sup>

The court, in the first (unrelated) *King* case, established a fundamental right to privacy for medical records.<sup>28</sup> Thus, the State needs a compelling reason to intrude on this privacy right, and the intrusive means used should be narrowly tailored to that compelling state interest.<sup>29</sup> The statutory authority<sup>30</sup> for the subpoena in the first *King* case had no defined limits, was not narrowly tailored to the compelling interest of detecting crime, and was, thus, invalid.<sup>31</sup> However, in the second *King* case, the court held that a search warrant, because of constitutional and statutory limitations, is a device narrowly tailored to the compelling interest of detecting criminal activity.<sup>32</sup> Therefore, no notice or opportunity to be heard was required even in an area with a strong and fundamental privacy interest in the medical records.<sup>33</sup>

### B. Home Searches

In *Lyons v. State*,<sup>34</sup> police officers sought a search warrant based on the following affidavit:

The confidential and reliable informant has stated that they have seen a quantity of cocaine under the control and possession of Claude Lyons in the recent past. Said informant states that the quantity of cocaine seen at [the apartment] was in excess of several ounces. Informant further states that Claude Lyons uses this residence at 3012 11th Ave Apt C [sic], as a stash house for currency from narcotics sales and narcotics. Said informant is reliable in that they have given information to deponent that Claude Lyons a.k.a. "C" is a wanted fugitive from

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24. *Id.* at 127, 577 S.E.2d at 765 (citing *King v. State*, 272 Ga. 788, 535 S.E.2d 492 (2000)); see GA. CONST. art. 1, § 1, para. 1 (1998).

25. 272 Ga. at 794, 535 S.E.2d at 497.

26. 276 Ga. at 127, 577 S.E.2d at 765.

27. *Id.* at 129, 577 S.E.2d at 767.

28. 272 Ga. at 790, 535 S.E.2d at 495.

29. *Id.*

30. O.C.G.A. § 24-9-40(a) (1995).

31. 272 Ga. at 792, 535 S.E.2d at 496.

32. 276 Ga. at 128, 577 S.E.2d at 766.

33. *Id.* at 129, 577 S.E.2d at 767.

34. 258 Ga. App. 9, 572 S.E.2d 632 (2002).

the State of Florida for narcotics violations for which deponent has confirmed said information to be true. Independent investigation by deponent has confirmed the information given by informant that Claude Lyons does reside at 3012 11th Ave Apt C [sic] and drives a Oldsmobile 98 GA tag 55811 QD. Informant has provided deponent with another informant who has purchased on several occasions crack cocaine from Claude Lyons a.k.a. "C" which has lead [sic] to his arrest.<sup>35</sup>

Charged with multiple counts of selling and trafficking cocaine, Lyons moved to suppress the incriminating evidence found in his apartment. He argued that the affidavit in support of probable cause was inadequate. The trial court denied the motion to suppress, and Lyons was convicted. At trial, the defense did not object to the introduction of the evidence found in the apartment. The defense attorney stated that she had no objection to the introduction of that evidence several times.<sup>36</sup>

Lyons appealed and argued that the motion to suppress should have been granted.<sup>37</sup> The court of appeals agreed and reversed his conviction.<sup>38</sup> The court determined that the informant was not reliable based on the face of his affidavit.<sup>39</sup> The affidavit's details about Lyons were not sufficient to establish that the informant was a reliable and credible source as to Lyons's criminal activity.<sup>40</sup> Also, the affidavit omitted the facts that the informant was paid for the information and that she had never given information before.<sup>41</sup>

An unidentified informant may be used without indicia of reliability if the tip can be corroborated by further investigation.<sup>42</sup> However, the corroboration must consist of details not generally available to the public.<sup>43</sup> In *Lyons* corroboration of information about the apartment and Lyons's vehicle did not contain the kind of detail that would bolster the reliability of the informant.<sup>44</sup> Therefore, the motion to suppress should have been granted.<sup>45</sup>

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35. *Id.* at 10, 572 S.E.2d at 634.

36. *Id.* at 9, 572 S.E.2d at 633-34.

37. *Id.*, 572 S.E.2d at 633.

38. *Id.* at 13, 572 S.E.2d at 636.

39. *Id.* at 11, 572 S.E.2d at 635.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 11-12, 572 S.E.2d at 635 (quoting *Robertson v. State*, 236 Ga. App. 68, 70, 510 S.E.2d 914, 916 (1999)).

44. *Id.* at 12, 572 S.E.2d at 635.

45. *Id.* at 12-13, 572 S.E.2d at 636.

On motion for reconsideration, the State argued that defendant waived any objection to the search warrant because his attorney did not object to its introduction at trial and stated that she had no objection.<sup>46</sup> In *Kilgore v. State*,<sup>47</sup> the supreme court stated that a defendant's objection to the admission of evidence at trial is not necessary when a motion to suppress has been denied.<sup>48</sup> However, in two earlier cases,<sup>49</sup> the court held that a defendant does waive the objections contained in an overruled motion to suppress when defense counsel not only does not object but also affirmatively states that there is no objection to admission of the evidence.<sup>50</sup>

In *Lyons* the court appeared to disapprove the two earlier cases in general terms.<sup>51</sup> First, the court suggested that the State had waived its argument by failing to raise it on the first appeal.<sup>52</sup> Second, and more importantly, the court held that even if the objection was not waived, defense counsel could be charged with ineffective assistance of counsel because the court could think of no reason why competent counsel would waive objections that were raised unsuccessfully in a motion to suppress.<sup>53</sup> So, "[t]he inescapable conclusion is that counsel was simply unfamiliar with the waiver law in this area."<sup>54</sup>

In *State v. Lejeune*,<sup>55</sup> Lejeune was charged with malice murder, felony murder, aggravated assault, concealing the death of another, and possession of a firearm during the commission of a felony. The State sought the death penalty. The trial court granted a motion to suppress evidence seized from Lejeune's house and the State appealed. The trial court also denied a motion to suppress the evidence seized from defendant's car, and defendant appealed.<sup>56</sup>

In *Lejeune* the decedent was shot in the head, dismembered, and burned. The decedent's severed head was kept for several days and then dumped in a lake. A month later, an attorney called the police to tell

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46. *Id.* at 13, 572 S.E.2d at 636.

47. 247 Ga. 70, 274 S.E.2d 332 (1981).

48. *Id.* at 70, 274 S.E.2d at 332.

49. *Abrams v. State*, 144 Ga. App. 874, 242 S.E.2d 756 (1978); *Carter v. State*, 137 Ga. App. 823, 225 S.E.2d 64 (1976).

50. *Lyons*, 258 Ga. App. at 13, 572 S.E.2d at 636.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* See *Shivers v. State*, 258 Ga. App. 253, 255, 573 S.E.2d 494, 497 (2002) (throwing out a warrant when an informant not known to be reliable gave publicly available details).

55. 276 Ga. 179, 576 S.E.2d 888 (2003).

56. *Id.* at 179, 576 S.E.2d at 890.

them that a client had information about the homicide. The client knew Lejeune and was interested in the \$10,000 reward. The informant told the police that Lejeune told him that Lejeune shot the deceased in the head and dismembered the body with a hand saw. The informant stated that the culprits decided to keep the head because the bullet was still in it. Then the culprits purchased a can of gasoline and attempted to burn the body parts. The informant stated that Lejeune had shown him bloodstains on the carpet in the apartment where the crime occurred.<sup>57</sup>

The police sought a search warrant for Lejeune's apartment. They obtained the warrant, searched the apartment, and arrested Lejeune. Lejeune's white Corolla was parked in the apartment complex parking lot. The police impounded the car to avoid anyone tampering with it. About thirty-six hours later, the police asked for and received a search warrant for the car and thoroughly searched it.<sup>58</sup>

The trial court found that the affidavit supporting the apartment search warrant was insufficient to establish probable cause because

[t]he affidavit was composed almost entirely of Vaughn's assertion that Lejeune had confessed to him. Although Vaughn was a known informant, nothing in the affidavit supported his credibility or corroborated his information. The affidavit [did] not detail any of his past performance as an informant or any efforts by the police to verify Vaughn's information independently.<sup>59</sup>

The supreme court agreed.<sup>60</sup> "In determining whether an affidavit sufficiently establishes the probable cause necessary for issuance of a warrant, [the court] employ[ed] the 'totality of the circumstances' analysis . . . , with the admonition that '[p]rudence counsels that [this analysis] be considered as the *outer limit* of probable cause.'<sup>61</sup>

The magistrate's task in determining if probable cause exists to issue a search warrant is "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, *including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information*, there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . ."<sup>62</sup>

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57. *Id.* at 179-80, 576 S.E.2d at 890-91.

58. *Id.* at 180, 576 S.E.2d at 891.

59. *Id.* at 181, 576 S.E.2d at 891.

60. *Id.* at 182, 576 S.E.2d at 891.

61. *Id.* at 181, 576 S.E.2d at 891 (quoting *Gary v. State*, 262 Ga. 573, 577, 422 S.E.2d 426, 429 (1992)) (citations omitted).

62. *Id.* (quoting *DeYong v. State*, 268 Ga. 780, 786-87, 493 S.E.2d at 157, 165 (1997)) (citations omitted).

This Court “has cautioned attesting officers and magistrates to ‘make every effort to see that supporting affidavits reflect the maximum indication of reliability. . . .’”<sup>63</sup> The affidavit supporting the application for a search warrant for Lejeune’s apartment did not contain any information corroborating Vaughn’s veracity and, therefore, did not reflect the minimum required level of reliability. Since the affidavit was composed almost exclusively of the unsupported hearsay of Vaughn, we find that the magistrate did not have a substantial basis for concluding that probable cause existed.<sup>64</sup>

### C. *Auto Search*

The automobile search in *Lejeune* was a different matter. The State conceded that the warrant for the car was invalid because it was issued by a Fulton County magistrate for a search in DeKalb County. However, the trial court validated the search using the automobile exception, which allows an automobile search without a warrant when probable cause to believe the automobile contains evidence of a crime exists.<sup>65</sup> Justice Carley, speaking for a unanimous court, disagreed.<sup>66</sup> In an opinion worth quoting at length for its excellent analysis of the automobile exception to the search warrant requirement, Justice Carley stated:

There is no evidence that this search was valid as an inventory search or as incident to the arrest.

“The Fourth Amendment generally requires police to secure a warrant before conducting a search.” The “automobile exception” to the search warrant requirement is premised upon two characteristics of automobiles. One characteristic is their “ready mobility.” If the police have probable cause, they may search a vehicle without a warrant because “the opportunity to search is fleeting since a car is readily movable.” If the police had to take the time to secure a warrant, the evidence or contraband would probably vanish. The second characteristic upon which the automobile exception is based is the diminished expectation of privacy in a car. Automobiles are subject to pervasive governmental regulation and control, especially with regard to safety and licensing, and the “public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation.” However, the “automobile exception” cases do not hold that a search warrant is *never* needed to search a car. There is an automobile exception to the search warrant requirement, not an

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63. *Id.* (quoting *Gary*, 262 Ga. at 577, 422 S.E.2d at 430) (citations omitted).

64. *Id.* at 181-82, 576 S.E.2d at 892.

65. *Id.* at 182, 576 S.E.2d at 892.

66. *Id.* at 183, 576 S.E.2d at 893.

exemption. Otherwise, the Supreme Court of the United States would have held that the police would not, under any circumstances, need to obtain a search warrant for an automobile, provided they have probable cause for the search. Instead, the Supreme Court explained how ready mobility and the diminished expectation of privacy in an automobile delineate the circumstances of a permissible warrantless search:

When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception come into play.

If the police have probable cause to search a car under the aforementioned circumstances, “the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.” We conclude that the automobile exception does not apply where, as here, the suspect’s car was legally parked in his residential parking space, the suspect and his only alleged cohort were not in the vehicle or near it and did not have access to it, and the police seized the automobile without a warrant, placed it on a wrecker and hauled it away to be searched at a later date.<sup>67</sup>

In addition, the court stated that no probable cause existed to search the car anyway.<sup>68</sup> Thus, the court clarified that seizure of an automobile from a private parking lot cannot be done without a warrant supported by probable cause.<sup>69</sup> The seizure was invalid because the reasons for the automobile exception did not apply to this case.<sup>70</sup>

In *Wright v. State*,<sup>71</sup> the court distinguished its opinion in *Lejeune*.<sup>72</sup> The court determined that police could properly impound a vehicle belonging to the suspect when the vehicle was parked in a private parking lot at a friend’s apartment and could have been tampered with by the friend or others.<sup>73</sup> The court found crucial the fact that officers knew that Wright’s detention would last for some time and knew that the car was wanted for an investigation in another county.<sup>74</sup> Thus, an

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67. *Id.* at 182-83, 576 S.E.2d at 892-93 (citations omitted).

68. *Id.* at 183-84, 576 S.E.2d at 893.

69. *Id.*

70. *Id.* at 183, 576 S.E.2d at 893.

71. 276 Ga. 454, 579 S.E.2d 214 (2003).

72. *Id.* at 461-62, 579 S.E.2d at 221-22 (citing *Lejeune*, 276 Ga. 179, 576 S.E.2d 888 (2003))

73. *Id.*

74. *Id.* at 461, 579 S.E.2d at 221.

impoundment similar to the unreasonable impoundment in *Lejeune* was held to be reasonable in *Wright*.<sup>75</sup>

#### D. Auto Stop

In *State v. Thompson*,<sup>76</sup> Douglasville police stopped a car for swerving into the right lane and then back again two or three times. During the stop, the police smelled a strong odor of either detergent or air freshener and noticed that defendant was extremely nervous. When asked why he was so nervous, defendant answered that police made him nervous. The officer issued a warning citation for the driving and asked defendant if he was transporting any drugs. When the officer mentioned marijuana, defendant became more nervous and defensive. Defendant refused to consent to a search of the car, and the officer called in a drug dog which arrived about twenty minutes later. Marijuana was found in a package that smelled strongly of detergent.<sup>77</sup>

The trial court found that while the initial stop was valid, the officers lacked reasonable suspicion to detain defendant after the officers completed the initial traffic stop.<sup>78</sup> The court of appeals affirmed the granting of the motion to suppress the marijuana, agreeing with the trial court that nervousness alone is not enough to establish reasonable suspicion.<sup>79</sup> Additionally, a strong smell of detergent could indicate an attempt to mask the smell of marijuana but also could be the result of many legal purposes.<sup>80</sup>

In *Faulkner v. State*,<sup>81</sup> Faulkner was stopped by a police officer for “traveling more than 300 feet in a center turn lane.”<sup>82</sup> The police officer asked for Faulkner’s license and proof of insurance and checked the license and insurance by computer. Then, the officer returned to the car and asked Faulkner to step out while the officer wrote a ticket for driving in the center lane too long. The officer returned Faulkner’s license and insurance card and had Faulkner sign the ticket. While the officer held the ticket, he asked Faulkner if he could search the vehicle. Faulkner agreed, and the officer found a small amount of marijuana in the truck.<sup>83</sup>

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75. *Id.* at 461-62, 579 S.E.2d at 221-22.

76. 256 Ga. App. 188, 569 S.E.2d 254 (2002).

77. *Id.* at 188-89, 569 S.E.2d at 255.

78. *Id.* at 189, 569 S.E.2d at 255.

79. *Id.* at 190, 569 S.E.2d at 256.

80. *Id.*

81. 256 Ga. App. 129, 567 S.E.2d 754 (2002).

82. *Id.* at 129, 567 S.E.2d at 755.

83. *Id.* at 129-30, 567 S.E.2d at 75.

The trial court denied Faulkner's motion to suppress,<sup>84</sup> but the court of appeals reversed.<sup>85</sup> Despite the State's argument, the court held that no reasonable person in Faulkner's position would have felt free to leave before receiving a copy of the ticket.<sup>86</sup> Instead, a reasonable person would wait for the ticket, which contains the details of the stop, the officer's identity, and the hearing's date and time.<sup>87</sup>

Therefore, Faulkner's detention after the ticket was written was improper.<sup>88</sup> "An officer who questions and detains a suspect for [reasons unrelated to the initial stop] exceeds the scope of permissible investigation unless [the officer] has reasonable suspicion of other criminal activity."<sup>89</sup>

In *Duke v. State*,<sup>90</sup> the 911 center radioed a deputy that "a Mazda RX-7, license number 342 PKE, was traveling eastbound on Highway 138 [and was suspected of drug activity]."<sup>91</sup> The deputy stopped the Mazda and requested and received appellant's consent to search the car. The deputy found cocaine in the car. The trial court denied appellant's motion to suppress, and appellant appealed.<sup>92</sup> The court of appeals reversed and held that the State failed to meet its burden of showing reasonable suspicion.<sup>93</sup> The deputy was entitled to rely on the 911 information to make the stop.<sup>94</sup> The deputy acted reasonably because he relied on the collective knowledge of law enforcement officers.<sup>95</sup> However, the court held that the State must produce evidence from other officers that someone had a reasonable and articulable suspicion to justify the stop.<sup>96</sup> Here, the State failed to produce evidence other than the arresting officer's testimony.<sup>97</sup>

In *State v. Cooper*,<sup>98</sup> defendant was a passenger in an automobile that was stopped for crossing the center line several times. The driver was given a warning, and the officer returned her license to her. Then,

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84. *Id.* at 129, 567 S.E.2d at 75.

85. *Id.* at 130, 567 S.E.2d at 75.

86. *Id.*

87. *Id.*

88. *Id.* at 130-31, 567 S.E.2d at 755.

89. *Id.* at 131, 567 S.E.2d at 755 (quoting *State v. Sims*, 248 Ga. App. 277, 280, 546 S.E.2d 47, 50 (2001)).

90. 257 Ga. App. 609, 571 S.E.2d 414 (2002).

91. *Id.* at 609, 571 S.E.2d at 415.

92. *Id.*

93. *Id.* at 610, 571 S.E.2d at 415.

94. *Id.*, 571 S.E.2d at 416.

95. *Id.*

96. *Id.* at 610-11, 571 S.E.2d at 416.

97. *Id.* at 610, 571 S.E.2d at 416.

98. 260 Ga. App. 333, 579 S.E.2d 754 (2003).

because the driver appeared nervous, the officer began a new investigation and asked the driver if she had any contraband in the car. The driver gave consent to search the car. Before searching the car, the officer asked Cooper, the passenger/defendant, for his identification. The officer called in Cooper's name and found outstanding warrants against him. The officer arrested Cooper because of the warrants. Finally, the officer searched the car and found marijuana on the floor of the front and rear passenger seats.<sup>99</sup>

Cooper filed a motion to suppress the marijuana, arguing that the marijuana was the tainted fruit of the illegal detention. The "new investigation" that began after the issuing of the warning ticket was clearly illegal because there was no reasonable suspicion or probable cause to further detain the car's occupants once the warning ticket was issued. The State argued that Cooper, a passenger, lacked standing to contest the search. The trial court found that defendant did have standing to contest the stop of the car because of his own interest in not being detained illegally. Thus, the trial court agreed with defendant and granted the motion to suppress.<sup>100</sup>

The court of appeals agreed that defendant had standing to assert the stop's illegality and that the continued detention was illegal.<sup>101</sup> Thus, the arrest, which was based on obtaining defendant's identification during an illegal detention, would seem to be tainted and a search based on that arrest would also seem to be tainted. However, the court of appeals, noting that defendant did not contest the illegality of the arrest, held that the uncontested arrest attenuated the taint between the illegal detention and the subsequent search of the car.<sup>102</sup> The court's analysis was not changed by the officer's decision to search the car before discovering the outstanding warrants.<sup>103</sup>

In *State v. Bell*,<sup>104</sup> Bell walked into a liquor store while holding and drinking from a small glass imprinted with the name of a cognac. An officer working at the store took the glass from Bell and ascertained that it contained alcohol. He asked Bell for identification, and Bell returned to his car. The officer noticed Bell reaching around on the car floor before pulling his identification from an overhead visor. The officer arrested Bell under a municipal ordinance that forbade alcohol consumption near a liquor store. An "inventory" search of the car

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99. *Id.* at 333-34, 579 S.E.2d at 755-56.

100. *Id.* at 334, 579 S.E.2d at 756.

101. *Id.* at 335, 337, 579 S.E.2d at 756, 758.

102. *Id.* at 336-37, 579 S.E.2d at 757-58.

103. *Id.* at 337, 579 S.E.2d at 758.

104. 259 Ga. App. 328, 577 S.E.2d 39 (2003).

revealed a handgun and crack cocaine. The passenger, who had no driver's license, was permitted to leave.<sup>105</sup>

The trial court granted Bell's motion to suppress. The State argued that the search was permissible incident to arrest, but the trial court disagreed.<sup>106</sup> The court of appeals agreed with the trial court, finding

no cases where a search was determined to be reasonable under the facts presented here: where the defendant was not removed from [the] car; where the arrest was for the violation of a municipal ordinance completely unconnected to the car; and where no issue existed as to the officer's safety.<sup>107</sup>

Little discussion was required of the officer's testimony that this was a valid inventory search because impoundment is valid only if it is necessary to take charge of the property.<sup>108</sup> Here, no reason existed to impound the car, so the motion to suppress was correctly granted.<sup>109</sup>

In *Milby v. State*,<sup>110</sup> the police stopped a truck "for failure to maintain lane."<sup>111</sup> Defendant (Milby) was seated on the passenger side of the truck. The driver consented to a truck search. Milby was instructed to exit the vehicle and to place his hands on the truck. The officer frisked Milby. The officer felt a hard object in Milby's shirt pocket that felt like a rock of cocaine. The officer pulled out the hard object and arrested defendant for possession of cocaine. The officer testified at the suppression hearing that the couple in the truck seemed nervous and that they were driving away from a drug area.<sup>112</sup> The officer testified that he searched Milby because he was looking for "weapons that might be used offensive[ly] against [the officer] and anybody else at the scene."<sup>113</sup> The officer stated that he searched vehicle passengers routinely because the passenger likely would "be standing outside the vehicle behind [him] when [he was] searching."<sup>114</sup>

The trial court denied defendant's motion to suppress,<sup>115</sup> but the court of appeals granted an interlocutory appeal and reversed.<sup>116</sup> The

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105. *Id.* at 328-29, 577 S.E.2d at 40.

106. *Id.* at 329-30, 577 S.E.2d at 41.

107. *Id.*

108. *Id.* at 330, 577 S.E.2d at 41.

109. *Id.*

110. 256 Ga. App. 429, 569 S.E.2d 256 (2002).

111. *Id.* at 430, 569 S.E.2d at 257.

112. *Id.*, 569 S.E.2d at 257-58.

113. *Id.*, 569 S.E.2d at 258.

114. *Id.*

115. *Id.* at 429, 569 S.E.2d at 257.

116. *Id.* at 432, 569 S.E.2d at 259.

court held that the officer had no basis to conclude that defendant was armed and dangerous and thus subject to a pat-down frisk.<sup>117</sup>

As the court stated:

A *Terry* pat-down involves a two-step process. “The officer must pat down first and then intrude beneath the surface only if he comes upon something which feels like a weapon.”

But, “[i]mplicit in this rule of law . . . is the prerequisite determination that the officer actually concluded that the suspect was armed or a threat to personal safety and the officer can articulate a basis for his conclusion so that a *Terry* protective pat-down would not be unreasonable in the given set of circumstances.” [The court has] held that such a practice was reasonable when the defendant was a passenger in a car that was reported stolen, when the passenger exhibits aggressive behavior toward the officer, and where drug use is admitted and one of the car’s occupants is known to be involved in the drug trade.

...

An individual’s rights under the Fourth Amendment are not automatically waived, however, simply because he or she is asked to step out of a vehicle. The safety of officers is of extreme importance to this Court. Nonetheless, our constitution requires an officer to provide evidence to show that an act alleged to be performed for his safety was actually performed for that purpose in conformance with the requisite standards of *Terry*. Without appropriate evidence that the “officer . . . had a reasonable basis for concluding that (the suspect subject to the search) was armed or was otherwise a threat to his personal safety,” the intrusive search of the type in this case is unconstitutional.<sup>118</sup>

### *E. Roadblocks*

In *State v. Ayers*,<sup>119</sup> defendant was stopped at a roadblock, and incriminating evidence was found in the car.<sup>120</sup> Defendant filed a motion to suppress, and at the hearing the officer testified as follows:

[A: Officer] The license safety checkpoint allows us to check mass quantities of vehicles at one location so that—and we enforce all of the laws of the state of Georgia and the county ordinances.

[Q: Defense counsel]: What I wanted to focus on is, is what you’re saying is that the means of enforcing the law is setting up the license checkpoint; but the purpose of the roadblock is general law enforcement?

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117. *Id.* at 431, 569 S.E.2d at 258.

118. *Id.* at 430-31, 569 S.E.2d at 258-59 (citations omitted).

119. 257 Ga. App. 117, 570 S.E.2d 603 (2002).

120. *Id.* at 118, 570 S.E.2d at 603-04.

[A:] Absolutely. There's no—there are no specific reasons that we stop and check. We check everything, license, insurance. We walk around behind and check the tag. Of course, we talk to the people . . .

[Q:] General law enforcement?

[A:] Every law. It doesn't matter. . . .

[Q:] And the primary purpose of this checkpoint was not just licenses?

[A:] That's correct.

[Q:] It was general law enforcement?

[A:] It was—yes. Enforce all the laws of the state of Georgia . . . .

[Q:] You did not pick out any particular primary purpose other than general law enforcement?

[A:] Nope.<sup>121</sup>

The trial court granted defendant's motion,<sup>122</sup> and the court of appeals affirmed.<sup>123</sup> The court cogently discussed the law of setting roadblocks in general and sensibly stated, “[The court has] ‘never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, [the] checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion.’”<sup>124</sup>

#### F. Boat Search

The Official Code of Georgia Annotated (“O.C.G.A.”) section 52-7-25<sup>125</sup> provides:

(a) Any person empowered to enforce this article and any rule or regulation adopted pursuant hereto shall have the authority to stop and board any vessel subject to this article or any such regulation for the purpose of inspection or determining compliance with this article. . . .

(b) An officer empowered to enforce this article shall have the power:

. . .

(4) To board vessels in use, for purposes of examining any documents and safety equipment.<sup>126</sup>

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121. *Id.*, 570 S.E.2d at 604.

122. *Id.* at 117, 570 S.E.2d at 603.

123. *Id.* at 119, 570 S.E.2d at 605.

124. *Id.*, 570 S.E.2d at 604 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000)).

125. O.C.G.A. § 52-7-25 (1997).

126. *Id.*

In *Peruzzi v. State*,<sup>127</sup> six rangers from the Georgia Department of Natural Resources (“DNR”) operated under auspices of that statute. The rangers took three boats onto Lake Peachtree in Fayette County to conduct boat safety inspections. The rangers intended to stop all boats on the lake if possible. A ranger stopped defendant for a safety inspection and noticed the odor of alcohol. The ranger removed defendant from his boat and ascertained through testing that defendant was intoxicated. The ranger arrested defendant. At trial defendant argued that O.C.G.A. section 52-7-25 authorizes suspicionless stops in contravention of the Fourth Amendment and therefore, his initial seizure was invalid.<sup>128</sup>

The Georgia Supreme Court affirmed the conviction in *Peruzzi*.<sup>129</sup> The court analogized boat stops to the typical roadblock case.<sup>130</sup> As the court stated:

“A roadblock is satisfactory where [(1)] the decision to implement the roadblock was made by supervisory personnel rather than the officers in the field; [(2)] all vehicles are stopped as opposed to random vehicle stops; [(3)] the delay to motorists is minimal; [(4)] the roadblock operation is well identified as a police checkpoint; and [(5)] the screening officer’s training and experience is sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication.”<sup>131</sup>

The court found that the ranger’s inspections met the five factors.<sup>132</sup>

The decision to conduct safety and registration inspections on Lake Peachtree during the holiday was made by the Fayette County Marshal, not the officers conducting the inspections. The rangers’ goal was to “do safety checks of every boat on the lake,” limiting their individual discretion in the process. The rangers were in uniform and in boats clearly marked as “DNR Law Enforcement.” Unlike cars traveling upon a public road, boats on an open body of water such as Lake Peachtree originate from a large number of docks and launches and need not follow any particular path. A roadblock is clearly infeasible and the emphasis in this case is on the procedural aspects of the stop.<sup>133</sup>

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127. 275 Ga. 333, 567 S.E.2d 15 (2002).

128. *Id.* at 333-34, 567 S.E.2d at 15-16.

129. *Id.* at 336, 567 S.E.2d at 17.

130. *Id.* at 335, 567 S.E.2d at 16-17.

131. *Id.* at 335 n.2, 569 S.E.2d at 16 n.2 (quoting *Brent v. State*, 270 Ga. 160, 161-62, 510 S.E.2d 14, 16 (1998)).

132. *Id.* at 335, 567 S.E.2d at 16.

133. *Id.*, 567 S.E.2d at 16-17.

The court also emphasized that a growing number of states allow boat stops without individualized suspicion.<sup>134</sup>

### G. Plain View

In *State v. Tye*,<sup>135</sup> the decedent was stabbed to death in her home. Defendant, Clarence Tye, was the victim's neighbor. Tye was standing on his porch when police officers approached him. Under questioning, Tye admitted that he had had an intimate relationship with the victim. Tye said that the visible stains on his pants and shoes were blood stains from a finger he had cut. The officers asked him if they could take his shoes, and he consented. Tests showed that the blood was a mixture of defendant's blood and the victim's blood. The trial court initially leaned toward denying defendant's motion to suppress, but, two years later, granted the motion on the ground that Tye's consent to the officers' taking the shoes was not voluntary.<sup>136</sup>

The State appealed arguing that the consent was valid and that consent was not even needed because the blood on Tye's shoes was in plain view and subject to seizure without a warrant.<sup>137</sup> The supreme court concluded that under the clearly erroneous standard, the trial court did not err in finding a lack of valid consent.<sup>138</sup> However, the court reversed the grant of the motion to suppress on the grounds that Tye's shoes were in plain view and could be seized without a warrant.<sup>139</sup> Holding that the officers were in a place that the officers had a right to be, questioning the victim's next-door neighbor on his porch, and that the blood on Tye's shoes was "immediately apparent" as possible evidence of the crime, the court allowed the seizure and blood test.<sup>140</sup> The officer was authorized to be "on the defendant's porch and not in his house."<sup>141</sup>

### H. Fifth and Sixth Amendments

In *Woodard v. State*,<sup>142</sup> defendant was arrested for armed robbery. Counsel was appointed to represent defendant at a first appearance hearing. Two days after the hearing, a detective came to the jail and

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134. *Id.*, 567 S.E.2d at 17.

135. 276 Ga. 559, 580 S.E.2d 528 (2003).

136. *Id.* at 559-60, 580 S.E.2d at 529.

137. *Id.* at 562, 580 S.E.2d at 731.

138. *Id.*

139. *Id.* at 563, 580 S.E.2d at 532.

140. *Id.*

141. *Id.* at 560, 580 S.E.2d at 529.

142. 256 Ga. App. 464, 568 S.E.2d 528 (2002).

interrogated defendant. Defendant was warned and signed a written waiver of his Miranda rights. Defendant made a statement about his involvement in the crime that was used against him at trial after the trial court denied a motion to suppress. At the motion to suppress hearing, the trial court did not believe defendant's testimony that he had asked to speak with his attorney prior to the interrogation.<sup>143</sup> The court of appeals reversed and held that although the record did not indicate clearly that defendant had requested an attorney at his first appearance hearing, the appointment of an attorney made defendant's attorney request a reasonable assumption.<sup>144</sup> Thus, the interrogation initiated by the police was a clear violation of the Fifth and Sixth Amendments and was not considered harmless error by the court of appeals.<sup>145</sup>

### *I. Constitutional Privacy*

In the noteworthy case of *In re J. M.*,<sup>146</sup> the supreme court applied the right to sexual privacy announced in *Powell v. State*.<sup>147</sup> Two sixteen-year-olds were found engaging in sexual intercourse in the young girl's bedroom. The two had attempted to block the bedroom door with a stool. The girl's mother came in and caught them in the act. The young boy jumped out of the window and fled. Although the parents did not pursue charges against the boy, the State initiated delinquency proceedings, and the boy was adjudicated a delinquent.<sup>148</sup> In *Powell* the supreme court "held that the Georgia Constitution prohibits the State from criminalizing 'private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent.'"<sup>149</sup> The court in *In re J. M.* held that *Powell* controlled and reversed the juvenile court's delinquency finding because sixteen-year-olds in Georgia are legally able to consent.<sup>150</sup> The State argued that the boy had no privacy right in someone else's home, but the court held that argument to be specious.<sup>151</sup> While the State might be able to assert a compelling interest, such as restricting commercial sexual activity, no compelling interest was present.<sup>152</sup> The State's asserted interest in protecting

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143. *Id.* at 464-65, 568 S.E.2d at 529.

144. *Id.* at 465-66, 568 S.E.2d at 529-30.

145. *Id.* See U.S. CONST. amend. V; U.S. CONST. amend. VI.

146. 276 Ga. 88, 573 S.E.2d 441 (2003).

147. *Id.* at 89, 573 S.E.2d at 443; see *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (1998).

148. *In re J.M.*, 276 Ga. at 88-89, 573 S.E.2d at 442-43.

149. *Id.* at 89, 573 S.E.2d at 443 (quoting *Powell*, 270 Ga. at 336, 510 S.E.2d at 26).

150. *Id.*

151. *Id.*

152. *Id.* at 90, 573 S.E.2d at 444.

minors could not override the privacy interest involved in this case because the general assembly has established that sixteen-year-olds are capable of consenting to sexual intercourse.<sup>153</sup>

## II. CRIMES

### A. *Voluntary Manslaughter*

In *Shirley v. State*,<sup>154</sup> Perry Shirley appealed his voluntary manslaughter conviction with a single enumeration of error—“that the trial court erred in instructing the jury that it could infer the intent to kill from the use of a deadly weapon.”<sup>155</sup> The charge was given as follows:

Ladies and gentlemen, you may infer that a person of sound mind and discretion intends to accomplish the natural and probable consequences of that person's intentional act. And if a person of sound mind and discretion, intentionally and without justification, uses a deadly weapon or instrumentality in the manner in which the weapon or instrumentality is ordinarily used and thereby causes the death of a human being, you may infer the intent to kill. Whether or not you make any such inference is a matter solely within the discretion of the jury.<sup>156</sup>

Although the charge was a correct statement of the law at the time, the supreme court changed the law in 2001, holding that such a charge is error.<sup>157</sup> The court of appeals noted that the supreme court gave no rationale for this change in Georgia law.<sup>158</sup> “Nonetheless, we are bound by the holdings of the [s]upreme [c]ourt whether or not the rationale for the result is contained in the decision.”<sup>159</sup>

Although the court of appeals acknowledged that it could not “be said that it was highly improbable that the improper charge did not contribute to the jury's verdict,”<sup>160</sup> the court held the error harmless and avoided letting defendant off the hook.<sup>161</sup> The court decided “that the evidence of malice was not weak and that it is highly probable that

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153. *Id.* at 90-91, 573 S.E.2d at 444. See O.C.G.A. § 16-6-3(a) (2003) (stating that a person commits statutory rape by having sexual intercourse with someone less than sixteen years old).

154. 259 Ga. App. 503, 578 S.E.2d 163 (2003).

155. *Id.* at 503, 578 S.E.2d at 163.

156. *Id.* at 504, 578 S.E.2d at 164.

157. *Id.* (citing *Harris v. State*, 273 Ga. 608, 610, 543 S.E.2d 716, 717 (2001)).

158. *Id.* at 504-05, 578 S.E.2d at 164.

159. *Id.* at 505, 578 S.E.2d at 164.

160. *Id.*, 578 S.E.2d at 164-65.

161. *Id.*, 578 S.E.2d at 165.

the error the trial judge committed in charging the jury did not contribute to the judgment."<sup>162</sup>

In *Prather v. State*,<sup>163</sup> a jury convicted defendant of voluntary manslaughter, possession of a weapon during the commission of a crime, and possession of a sawed-off shotgun. Defendant appealed, alleging that a fatal variance existed between his original indictment, which charged him with murder and possession of a firearm during the commission of the murder, and the trial evidence on the charge of possessing a firearm during the commission of a crime. The jury found him guilty of the lesser included offense of voluntary manslaughter and of possession of a firearm. Defendant's position on appeal was that he could not be found guilty of possession of a firearm during the commission of a murder when the jury found him guilty of voluntary manslaughter and not murder.<sup>164</sup>

The appellate court held that under established case law, when the evidence is sufficient to support a conviction, a trier of fact can find the defendant guilty of a crime included in the crime charged in the indictment, even when that crime is not specifically charged.<sup>165</sup> Therefore, the jury was authorized to convict defendant of the lesser included voluntary manslaughter offense.<sup>166</sup> However, the court further held that the voluntary manslaughter conviction was mutually exclusive of a conviction for possession of a firearm during the commission of murder.<sup>167</sup> Therefore, defendant could not be convicted of the crime as alleged in the indictment.<sup>168</sup> The court could not find any specific authority on whether the jury was authorized to convict defendant of firearm possession during the commission of voluntary manslaughter.<sup>169</sup> The court decided that it was not necessary to reach that issue because the court held that the jury charge authorized the jury to convict the defendant of firearm possession only during the commission of murder.<sup>170</sup> The court reversed because no instruction identified voluntary manslaughter as a felony, and, thus, the possession charge could not be based on the voluntary manslaughter offense.<sup>171</sup>

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162. *Id.* (applying the holding from *Harris*, 273 Ga. at 610, 543 S.E.2d at 717).

163. 259 Ga. App. 441, 576 S.E.2d 904 (2003).

164. *Id.* at 441-43, 576 S.E.2d at 905-06.

165. *Id.* at 442, 576 S.E.2d at 906.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 442-43, 576 S.E.2d at 906.

171. *Id.* at 443, 576 S.E.2d at 906.

*B. Attempt*

In *Lopez v. State*,<sup>172</sup> Lopez, a forty-six-year-old janitor at the local mall, was smitten with a fifteen-year-old girl who worked at the mall's McDonald's. Lopez spoke little English but visited the restaurant twice daily to try to talk to the girl. When Lopez gave her money, he placed it in her hand or in her front pants pocket. The girl accepted some money, but later she refused to accept Lopez's money.<sup>173</sup> Lopez came up to her on one occasion and handed her a note with a picture of a couple kissing and the inscriptions: "The La Girlfriend," "I love you-a-lot," and "I want to make love to you."<sup>174</sup> Lopez was convicted of criminal attempt to commit child molestation.<sup>175</sup>

On appeal Lopez argued that his "crude or boorish"<sup>176</sup> behavior was not an attempt because there was no evidence of a "substantial step" toward the commission of child molestation.<sup>177</sup> The court, surprisingly, held Lopez's behavior had gone beyond mere preparation and constituted a substantial step toward the crime.<sup>178</sup> The court cited *Wittschen v. State*<sup>179</sup> as authority for its holding.<sup>180</sup> In *Wittschen* the court held that defendant, who offered two girls money to let him put his hands down their pants had taken a substantial step toward child molestation.<sup>181</sup> The facts in *Lopez* seem a far cry from *Wittschen's* attempt and raise the question of how far back into "flirtatious" and inappropriate behavior the court will go to find an attempt crime.

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172. 258 Ga. App. 92, 572 S.E.2d 736 (2002).

173. *Id.* at 93, 572 S.E.2d at 736-37.

174. *Id.*, 572 S.E.2d at 737.

175. *Id.* at 92, 572 S.E.2d at 736. Pursuant to O.C.G.A. section 16-4-1, "[a] person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime." O.C.G.A. § 16-4-1 (2003). And, "[a] person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of [sixteen] years with the intent to arouse or satisfy the sexual desires of either the child or the person." O.C.G.A. § 16-6-4(a) (2003).

176. *Lopez*, 258 Ga. App. at 94, 572 S.E.2d at 737.

177. *Id.*

178. *Id.* at 95, 572 S.E.2d at 738.

179. 259 Ga. 448, 383 S.E.2d 885 (1989).

180. *Lopez*, 258 Ga. App. at 94, 572 S.E.2d at 737-38.

181. *Wittschen*, 259 Ga. at 449, 383 S.E.2d at 887.

### C. Cocaine Laws

In *Brown v. State*,<sup>182</sup> the supreme court addressed a state law anomaly governing the possession or selling of any “imitation controlled substance.”<sup>183</sup> Brown sold imitation crack cocaine to a police informant and was charged and convicted under O.C.G.A. section 16-13-30.1,<sup>184</sup> which makes it a felony for any “person knowingly to manufacture, deliver, distribute, dispense, possess with intent to distribute, or sell a noncontrolled substance upon . . . the express or implied representation that the substance is a narcotic or nonnarcotic controlled substance.”<sup>185</sup> However, O.C.G.A. section 16-13-30.2<sup>186</sup> states that it is a misdemeanor when any person “knowingly manufactures, distributes, or possesses with intent to distribute an imitation controlled substance.”<sup>187</sup> Previously, the supreme court had held that section 30.2 was not always a lesser included offense of section 30.1.<sup>188</sup> The court recognized, however, that under some circumstances, the same evidence could be used to prove both crimes.<sup>189</sup>

In *Brown* a police detective testified that the overall appearance of the substance Brown sold him was consistent with crack.<sup>190</sup> The supreme court concluded that the jury, using the same evidence, could find beyond a reasonable doubt that appellant’s sale violated both statutory sections.<sup>191</sup>

As the court stated:

“Where any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of the two penalties administered.” This principle is frequently referred to as the rule of lenity, which the United States Supreme Court has described as a “junior version of the vagueness doctrine”—the doctrine that bars enforcement of criminal statutes that are too vague for people of common intelligence to understand. Because the same conduct constituted both a felony and a misdemeanor, the rule of lenity requires that Brown be

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182. 276 Ga. 606, 581 S.E.2d 35 (2003).

183. *Id.* at 607, 581 S.E.2d at 36. See O.C.G.A. § 16-13-30.2 (2003).

184. O.C.G.A. § 16-13-30.1 (2003).

185. *Id.*

186. O.C.G.A. § 16-13-30.2.

187. *Id.*

188. *State v. Burgess*, 263 Ga. 143, 145-46 n.6, 429 S.E.2d 252, 253 n.6 (1993).

189. *Id.*

190. *Brown*, 276 Ga. at 608-09, 581 S.E.2d at 37.

191. *Id.* at 608, 581 S.E.2d at 37.

subjected to the penalties for the misdemeanor, rather than the felony. Accordingly, we reverse Brown's felony conviction.<sup>192</sup>

*D. Driving Under the Influence ("DUI")*

In *Baird v. State*,<sup>193</sup> the court of appeals reversed a DUI conviction that was based on an erroneous charge and rejected the State's argument that the error was harmless.<sup>194</sup> The deputy sheriff pulled over defendant, and defendant admitted that he had consumed three beers earlier that day. After the deputy arrested defendant and read him his implied consent rights,<sup>195</sup> defendant refused to take a breath test.<sup>196</sup>

Defendant was charged with "driving under the influence to the extent that it was less safe for him to drive and with failure to maintain lane."<sup>197</sup> The jury found defendant guilty of DUI but not guilty of failure to maintain a lane. On appeal, defendant contended that the trial court improperly instructed the jury about the inference that could be drawn from his refusal to take the intoxilyzer test.<sup>198</sup> The judge charged the jury as follows:

In any criminal trial the refusal of the defendant to permit chemical analysis to be made of his blood, breath, urine or other bodily substance at the time of his arrest shall be admissible as evidence against him. I further charge you that the refusal itself may be considered as positive evidence creating an inference that the test would show the presence of alcohol or other prohibited substances *which impaired his driving*. However, such an inference may be rebutted.<sup>199</sup>

Although O.C.G.A. section 40-6-392(d)<sup>200</sup> provides that a defendant's refusal to submit to chemical testing of a bodily substance is admissible as evidence against him, the appellate court held that the jury instructions were outside the statute's purview because the charge instructed

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192. *Id.* at 608-09, 581 S.E.2d at 37 (citations omitted).

193. 260 Ga. App. 661, 580 S.E.2d 650 (2003).

194. *Id.* at 664, 580 S.E.2d at 653.

195. In *Cooper v. State*, No. 50301074, 203 Ga. LEXIS 671 (July 14, 2003), the supreme court declared that Georgia's Implied Consent statute, O.C.G.A. § 40-5-55 (2001), violated the Georgia and United States constitutions because probable cause was not required for chemical testing. 203 Ga. LEXIS 671, at \*1. The decision is not final until the rehearing period ends. See GA. RULES OF CT. ANN. 27, 60.

196. *Baird*, 260 Ga. App. at 661-62, 580 S.E.2d at 651-52.

197. *Id.* at 662, 580 S.E.2d at 652.

198. *Id.*

199. *Id.*

200. O.C.G.A. § 40-6-392(d) (2001).

the jurors that they could infer from a refusal of chemical testing that the test would have shown the presence of alcohol or other prohibited substances.<sup>201</sup> The court noted that individual responses to alcohol vary and that the presence of alcohol in the body, by itself, does not support an inference that defendant was an impaired driver.<sup>202</sup> Because the charge could have misled the jury into thinking that the State met its burden of proof simply by showing the refusal,<sup>203</sup> the appellate court rejected the State's argument that any error in the charge was harmless.<sup>204</sup>

Omar Rodriguez, defendant in *Rodriguez v. State*,<sup>205</sup> appealed his drunk driving conviction, claiming that because he was not given his implied consent waivers in Spanish, his constitutional rights, as a non-English-speaking defendant, were violated. He contended that the results of his blood-alcohol tests should have been suppressed because O.C.G.A. section 24-9-103,<sup>206</sup> violated equal protection. Section 24-9-103 requires police officers to attempt to obtain a qualified interpreter to inform a hearing-impaired person of his implied consent warnings, but the section does not require an officer to attempt to obtain an interpreter for non-English speaking persons.<sup>207</sup>

The appellate court held that defendant's equal protection claims were without merit.<sup>208</sup> Defendant was not similarly situated to a hearing-impaired person because a hearing-impaired person physically could not learn to understand an implied consent warning read to them in English, whereas defendant had the potential to understand such a warning.<sup>209</sup> Defendant failed to show that the implied consent laws were enacted or applied with a discriminatory purpose.<sup>210</sup> Although defendant was similarly situated to English-speaking drivers, a language classification was not a suspect classification, so defendant failed to meet his burden of establishing that he was similarly situated to members of the class who were treated differently.<sup>211</sup> Furthermore, the govern-

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201. *Baird*, 260 Ga. App. at 663, 580 S.E.2d at 653.

202. *Id.*

203. *Id.* at 664, 580 S.E.2d at 653. The court noted that "although the evidence of [the defendant's] impairment was sufficient to support the DUI conviction, it was not overwhelming." *Id.*

204. *Id.* at 663-64, 580 S.E.2d at 653.

205. 275 Ga. 283, 565 S.E.2d 458 (2002).

206. O.C.G.A. § 24-9-103 (1995).

207. *Rodriguez*, 275 Ga. at 283-85, 565 S.E.2d at 459-60.

208. *Id.* at 285, 565 S.E.2d at 460.

209. *Id.*

210. *Id.*

211. *Id.* at 284-85, 565 S.E.2d at 460.

mental procedures had a rational basis.<sup>212</sup> Even though the court conceded that defendant correctly pointed out that the statute did not provide accommodation for non-English-speaking persons arrested for DUI, the court concluded “that the disparate treatment does not violate equal protection.”<sup>213</sup>

Defendant also argued

that reading his implied consent rights to him in English and not in Spanish violated his right to equal protection, as an English-speaking defendant would have understood his rights whereas he did not. [H]e contend[ed] that under O.C.G.A. [section] 40-5-67.1<sup>214</sup> and O.C.G.A. [section] 40-6-392(a)(3),<sup>215</sup> as interpreted in *State v. Tosar*,<sup>216</sup> a police officer is required to read a driver his implied consent rights only in English, that the statutes thus effectively classify drivers as English-speaking and non-English-speaking, and that the statutes treat non-English-speaking drivers differently than English-speaking drivers in that non-English-speaking drivers will not understand their implied consent rights.

...  
[The appellate court found that] the language of the relevant statutes [did] not require that the implied consent rights be read only in English, and *Tosar* [did not stand for that proposition.] *Tosar*, instead, simply held that the [c]ourt of [a]ppeals would not require an officer to read the rights to the defendant in his native language. Thus, a police department could require its officers to read the rights in other languages or an individual officer could do so on his own. The statutes thus, on their face, do not create a classification. [The statutes] only require that the implied consent rights be read to defendants. When a statute does not create a classification on its face, it only violates equal protection when the defendant can show the law was enacted or applied with a discriminatory purpose. Here, [the court found,] Rodriguez . . . made no such showing.<sup>217</sup>

Rodriguez also contended “that due process requires that a driver be meaningfully advised of the implied consent rights so that he or she can exercise those rights in a meaningful fashion.”<sup>218</sup> The supreme court, however, held that implied consent warnings are “a matter of legislative

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212. *Id.* at 287, 565 S.E.2d at 462.

213. *Id.* at 284, 565 S.E.2d at 460.

214. O.C.G.A. § 40-5-67.1 (2001).

215. O.C.G.A. § 40-6-392(a)(3) (2001).

216. 180 Ga. App. 885, 350 S.E.2d 811 (1986).

217. 275 Ga. at 285-86, 565 S.E.2d at 460-61 (citing *Tosar*, 180 Ga. App. at 888, 350 S.E.2d at 813).

218. *Id.* at 287, 565 S.E.2d at 462.

grace, and due process does not require that the warnings be given in a language that the driver understands.”<sup>219</sup>

### III. TRIAL MATTERS

#### A. *Right to Counsel*

In *McAdams v. State*,<sup>220</sup> defendant was charged with several crimes after he struck a United States Postal Service truck with his vehicle, drove away, tried to elude an officer, lost control of his vehicle, and hit another car. Alcohol tests performed at the hospital indicated an unlawful blood-alcohol concentration (0.18 grams). Subsequently, defendant signed forms that waived his right to counsel. The waiver forms contained no warnings of any dangers of self-representation. Although the trial court tried to appoint an attorney to represent defendant, he rejected the court’s efforts and insisted on representing himself.<sup>221</sup>

The court of appeals noted that the determination at trial of whether a defendant in a misdemeanor criminal prosecution had a constitutional right to counsel depended on whether the defendant’s sentence was actual imprisonment.<sup>222</sup> Because McAdams was sentenced to eighteen months confinement, he had a constitutional right to counsel.<sup>223</sup> Next, the appellate court examined whether defendant’s constitutional right to counsel had been met.<sup>224</sup> “[W]here a defendant with a constitutional right to counsel proceeds pro se, the State must show that he was made aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver of counsel.”<sup>225</sup> The appellate court noted the State’s “heavy burden”<sup>226</sup> of showing a knowing and intelligent waiver by the defendant through either a trial transcript or other extrinsic evidence.<sup>227</sup> The court held that the trial court did not provide defendant with the information that a criminal defendant needs to make a knowing and intelligent waiver of counsel.<sup>228</sup>

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219. *Id.* at 287-88, 565 S.E.2d at 462.

220. 258 Ga. App. 250, 573 S.E.2d 501 (2002).

221. *Id.* at 250-52, 573 S.E.2d at 502-03.

222. *Id.* at 251, 573 S.E.2d at 503.

223. *Id.*

224. *Id.* at 251-52, 573 S.E.2d at 503.

225. *Id.* at 251, 573 S.E.2d at 503 (quoting *McCants v. State*, 255 Ga. App. 133, 134, 564 S.E.2d 532, 533 (2002)).

226. *Id.* (quoting *McCants*, 255 Ga. App. at 134, 564 S.E.2d at 533).

227. *Id.*

228. *Id.* at 252, 573 S.E.2d at 503.

The court of appeals also held that the waiver form should outline the dangers of self-representation, including the possibility of a jail sentence, should include notice that the rules of evidence will be enforced, should outline strategic decisions with regard to voir dire, and should also inform the defendant that he must strike jurors.<sup>229</sup> The court also stated that the waiver form should outline the strategic decisions as to calling witnesses, should note that the decision of exercising the right to testify must be made by the defendant, and should note that issues must be properly preserved and transcribed in order to be raised on appeal.<sup>230</sup> The court also held that such an error in a waiver form was not subject to a harmless error analysis.<sup>231</sup>

*Kitchens v. State*<sup>232</sup> provides an example of a defendant winning the battle and losing the war. The trial court convicted defendant of driving under the influence of alcohol to the extent that she was a less safe driver, failure to maintain lane, and driving with an expired license.<sup>233</sup> Defendant appealed, “arguing that the trial court erred in admitting the results of the state-administered breath test into evidence, because the implied consent warning read to her by the arresting officer was misleading, inaccurate, and coercive . . . .”<sup>234</sup>

The videotape of the stop and arrest showed that when the officer read the implied consent warning, he overstated the legal limit as ten grams instead of 0.10 grams of alcohol concentration. The officer made this error twice. The officer also incorrectly stated the consequences of refusal to take the test. Defendant explained her lack of understanding and confusion about what the officer told her several times, but defendant took the test. The result of the breath test was 0.199.<sup>235</sup> “The trial court denied [defendant’s] motion to exclude the results . . . and found her guilty of driving under the influence to the extent that she was a less safe driver.”<sup>236</sup>

The appellate court held that the trial court erred in failing to exclude the test results.<sup>237</sup> The court looked to the supreme court’s opinion in *Garrett v. Department of Public Safety*,<sup>238</sup> in which the court held that the purpose of the implied consent law is to notify drivers of their rights

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229. *Id.*

230. *Id.*

231. *Id.* at 252-53, 573 S.E.2d at 504.

232. 258 Ga. App. 411, 574 S.E.2d 451 (2002).

233. *Id.* at 411, 574 S.E.2d at 451.

234. *Id.*

235. *Id.* at 412, 574 S.E.2d at 452.

236. *Id.*

237. *Id.* at 413, 574 S.E.2d at 453.

238. 237 Ga. 413, 228 S.E.2d 812 (1976).

so that an informed decision can be made.<sup>239</sup> In *Garrett* the court also stated that when the driver is misinformed of his rights and that misinformation may affect his decision to consent, the results of chemical tests should be suppressed.<sup>240</sup>

The court in *Kitchens* held that because “the consent was based at least in part on deceptively misleading information concerning a penalty for refusal, which the State was unauthorized to implement, [defendant] was deprived of making an informed choice under the Implied Consent Statute.”<sup>241</sup> The court noted that it “ha[d] previously recognized that overstatement, as opposed to understatement, of the legal limit of blood alcohol concentration is the type of misinformation that might cause someone to submit to testing who . . . otherwise [would not].”<sup>242</sup> The court emphasized that deceptive information about the penalty for refusing the test deprived defendant of making an informed choice.<sup>243</sup>

Finally, the court gave no merit to the State’s argument that admission of the test results did not give rise to harmful error.<sup>244</sup> The court held that the trial court “specifically relied on the test results in reaching its conclusion that Kitchens was a less safe driver.”<sup>245</sup> “The test for harmful error is whether it is “highly probable” that the error contributed to the judgment . . . .”<sup>246</sup> Notwithstanding this holding, the court of appeals concluded that the properly admitted evidence was sufficient to show beyond a reasonable doubt that defendant was guilty of less-safe DUI;<sup>247</sup> therefore, the court of appeals affirmed defendant’s conviction.<sup>248</sup>

### B. Waiver of Counsel

In *Helmer v. State*,<sup>249</sup> the court of appeals reminded all counsel that a record is needed when the issue is waiver of the right to counsel.<sup>250</sup>

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239. *Kitchens*, 258 Ga. App. at 413, 574 S.E.2d at 453 (citing *Garrett*, 237 Ga. at 415, 228 S.E.2d at 813).

240. *Garrett*, 237 Ga. at 415, 228 S.E.2d at 813. See *State v. Terry*, 236 Ga. App. 248, 511 S.E.2d 608 (1999); *State v. Coleman*, 216 Ga. App. 598, 455 S.E.2d 604 (1995).

241. *Kitchens*, 258 Ga. App. at 414-15, 574 S.E.2d at 453 (quoting *Deckard v. State*, 210 Ga. App. 421, 423, 436 S.E.2d 536, 538 (1993)).

242. *Id.* at 413-14, 574 S.E.2d at 453 (citing *Maurer v. State*, 240 Ga. App. 145, 525 S.E.2d 104 (1999)).

243. *Id.* at 415, 574 S.E.2d at 454.

244. *Id.*

245. *Id.*

246. *Id.* (quoting *Head v. State*, 220 Ga. App. 281, 283, 469 S.E.2d 406, 409 (1996)).

247. *Id.* at 416, 574 S.E.2d at 454.

248. *Id.*

249. 256 Ga. App. 717, 569 S.E.2d 606 (2002).

250. *Id.* at 717, 569 S.E.2d at 607.

Rachel Helmer appealed her bench trial speeding conviction. She alleged that the record failed to show a knowing waiver of the right to counsel and the right to a jury trial.<sup>251</sup> The appellate court determined that no trial transcript was prepared.<sup>252</sup> The court noted an exception to the general rule set forth in *Jones v. Wharton*<sup>253</sup> that such an omission usually prevents an appellate court from considering an appellant's allegations of error.<sup>254</sup> In *Wharton* the Georgia Supreme Court held that when a defendant is on trial and faces imprisonment, a constitutionally guaranteed right to counsel attaches.<sup>255</sup> The waiver of this right cannot be presumed from a silent record.<sup>256</sup> The court has applied this rule to misdemeanor cases and also has held that "a valid waiver of right to trial by jury cannot be found on the sole ground that defendant failed to request one."<sup>257</sup> In *Helmer* the court of appeals noted that this rule applies even when the State appends an affidavit from the trial judge swearing that the defendant was fully informed of the dangers of proceeding pro se, as the State did in *Helmer*.<sup>258</sup> The judgment was therefore reversed.<sup>259</sup>

In *Barnes v. State*,<sup>260</sup> defendant appealed a misdemeanor conviction and argued that she did not knowingly and intelligently waive her Sixth Amendment right to counsel. The court of appeals did not decide the issue, relying on the rule that a defendant receiving a suspended or probated sentence rather than actual imprisonment has no right to a court-appointed attorney.<sup>261</sup> The Georgia Supreme Court granted certiorari because of a conflict between the court of appeals rulings in *Deren v. State*<sup>262</sup> and *Barnes v. State*.<sup>263</sup> In *Deren* the court of appeals held that even if a defendant is not entitled to court-appointed counsel, the record must show a knowing and intelligent waiver of the right to private counsel.<sup>264</sup> In *Barnes* the supreme court noted the

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251. *Id.*

252. *Id.*, 569 S.E.2d at 606-07.

253. 253 Ga. 82, 316 S.E.2d 749 (1984).

254. *Helmer*, 256 Ga. App. at 717, 569 S.E.2d at 607.

255. *Wharton*, 253 Ga. at 83, 316 S.E.2d at 751.

256. *Helmer*, 256 Ga. App. at 717, 569 S.E.2d at 607 (citing *Wharton*, 253 Ga. 82, 316 S.E.2d 749).

257. *Helmer*, 256 Ga. App. at 717-18, 569 S.E.2d at 607 (quoting *Copeland v. State*, 224 Ga. App. 402, 402, 480 S.E.2d 623, 624 (1997)).

258. *Id.* at 718, 569 S.E.2d at 607.

259. *Id.*

260. 275 Ga. 499, 570 S.E.2d 277 (2003).

261. *Id.*

262. 237 Ga. App. 387, 515 S.E.2d 191 (1999).

263. 250 Ga. App. 276, 549 S.E.2d 495 (2001).

264. *Deren*, 237 Ga. App. at 388, 515 S.E.2d at 192-93.

United States Supreme Court's decision in *Alabama v. Shelton*<sup>265</sup> that the Sixth Amendment right to appointed counsel is triggered when an indigent defendant is given a probated or suspended prison sentence.<sup>266</sup>

The Georgia Supreme Court first found that the court of appeals ruling was stated in terms of the right to counsel in general terms and that the court of appeals erroneously applied precedent which referred to the right of court-appointed counsel.<sup>267</sup> The supreme court explained that the right to private counsel attaches in all criminal prosecutions, not just to those resulting in imprisonment or a fine, and this right is rooted in the Georgia Constitution.<sup>268</sup> Thus, the issue of waiver of right to counsel does not require the same inquiry as the issue of right to court-appointed counsel.<sup>269</sup> The court held that the court of appeals failed to follow the decision in *Deren* because it did not make a determination of whether defendant waived her right to private counsel.<sup>270</sup> Therefore, the court reversed.<sup>271</sup>

The Georgia Supreme Court also looked to the United States Supreme Court's affirmation of the ruling in *Shelton* that a suspended or probated prison sentence is a "term of imprisonment" that triggers the right to appointed counsel.<sup>272</sup> Absent a knowing and intelligent waiver, no indigent defendant can be imprisoned or sentenced to a probated or suspended prison term unless the defendant was represented by counsel at trial.<sup>273</sup> The Georgia Supreme Court decided that the court of appeals did not follow the United States Supreme Court's ruling in *Shelton*.<sup>274</sup> Therefore, the court of appeals analysis of defendant's allegations concerning his Sixth Amendment right to appointed counsel was improper.<sup>275</sup> The court also overruled *Deren* and other decisions<sup>276</sup> to the extent that these cases have held that a defendant is

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265. 535 U.S. 654 (2002).

266. *Barnes*, 275 Ga. at 499, 501, 570 S.E.2d at 278.

267. *Id.* at 500-01, 570 S.E.2d at 279.

268. *Id.* at 501, 570 S.E.2d at 279.

269. *Id.* at 500-01, 570 S.E.2d at 279.

270. *Id.* at 501, 570 S.E.2d at 279.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 502, 570 S.E.2d at 279-80.

275. *Id.* (citing *Shelton*, 535 U.S. 654).

276. See generally *Parks v. McClung*, 271 Ga. 795, 524 S.E.2d 718 (1999); *State v. Smith*, 264 Ga. 634, 452 S.E.2d 90 (1994); *Brawner v. State*, 250 Ga. 125, 296 S.E.2d 551 (1982); *Johnston v. State*, 236 Ga. 370, 223 S.E.2d 808 (1996); *Romano v. State*, 220 Ga. App. 322, 469 S.E.2d 726 (1996); *Cappelli v. State*, 203 Ga. App. 79, 416 S.E.2d 136 (1992).

entitled to court-appointed counsel only if the defendant is sentenced to actual imprisonment.<sup>277</sup>

In *Manning v. State*,<sup>278</sup> defendant was convicted on four counts of burglary and one count of vandalism; subsequently, defendant appealed his conviction and contended that the trial court “fail[ed] to adequately ascertain that his waiver of the right to counsel was knowing and voluntary.”<sup>279</sup> Defendant also asserted that the trial court erred in denying his request that his court-appointed attorney assist him at trial during his pro se representation.<sup>280</sup> The court of appeals listed the six requirements of a valid waiver as the defendant’s understanding of: (1) the nature of the charges, (2) any lesser included offenses, (3) the range of possible punishments, (4) possible defenses, (5) mitigating circumstances, and (6) “all other facts essential to a broad understanding of the matter.”<sup>281</sup> The State has the burden to prove the six requirements.<sup>282</sup> However, the court also stated that the trial court is not required to go over each of the six factors with the defendant.<sup>283</sup> Thus, whether the waiver was knowing and voluntary depends on the specific facts and circumstances in that particular case.<sup>284</sup> These circumstances include the defendant’s background, experience, and conduct.<sup>285</sup>

Applying the standards in *Manning*, the court held that the State had not proven that defendant made a knowing and voluntary waiver of his right to counsel.<sup>286</sup> The record revealed that defendant was aware that he was facing considerable prison time; however, nothing in the record indicated defendant’s understanding of all six factors.<sup>287</sup> The court noted that the trial court failed to discuss the six factors.<sup>288</sup> Also, the trial court’s warning that the defendant was making an “unwise” and “extremely ill-advised” decision, along with the advice that the defendant would be handicapped in his lack of knowledge of the rules of evidence, legal procedure, and the existence of potential defenses, was not enough.<sup>289</sup> The court instead pointed to the lack of discussion about

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277. *Barnes*, 275 Ga. at 502, 570 S.E.2d at 280.

278. 260 Ga. App. 171, 581 S.E.2d 290 (2003).

279. *Id.* at 171, 581 S.E.2d at 291.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 172, 581 S.E.2d at 291.

284. *Id.*, 581 S.E.2d at 292.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

potential defenses, lesser included offenses, mitigating factors, and the range of possible punishment.<sup>290</sup> The court determined that defendant was unfamiliar with criminal procedure because no evidence showed that his previous jail sentence resulted from a jury trial.<sup>291</sup> Also, despite defendant's time spent in the prison library preparing for his defense, the court did not consider him familiar with criminal procedure.<sup>292</sup>

The court not only found error, but also held that it was impossible to say that the error was harmless beyond a reasonable doubt even though the evidence against defendant was "substantial."<sup>293</sup> Concurring with the majority's decision, Judge Ruffin stated that the majority sent "mixed messages" to the bench and bar.<sup>294</sup> The message was mixed because the majority set forth six factors but did not require the trial court to review each factor.<sup>295</sup> Judge Ruffin advised the bench that requiring the trial court, at a minimum, to address all six factors would be beneficial because it would ensure "careful [court] inquiry."<sup>296</sup>

### C. Venue

The supreme court stated that *Graham v. State*<sup>297</sup> is "yet another criminal case in which venue was not properly proven."<sup>298</sup> Defendant was tried on charges of malice murder, felony murder, aggravated assault, illegal firearm possession, armed robbery, and kidnapping. After the State presented its case, defendant moved for a directed verdict because the State's evidence did not establish venue beyond a reasonable doubt. Defendant conceded that several prosecution witnesses testified that the crimes occurred inside Riverdale city limits, but he argued that this evidence did not prove that the crimes occurred in Clayton County, the proper venue. The State requested to reopen its evidence. The trial court subsequently took judicial notice that Riverdale is located entirely within Clayton County. The trial court then denied defendant's motion for a directed verdict.<sup>299</sup>

The supreme court, stating that "[v]enue is more than a mere procedural nicety,"<sup>300</sup> held that proof of venue is "essential to a crimi-

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290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 173, 581 S.E.2d at 293 (Ruffin, P.J., concurring specially).

295. *Id.* (Ruffin, P.J., concurring specially).

296. *Id.* at 174, 581 S.E.2d at 293 (Ruffin, P.J., concurring specially).

297. 275 Ga. 290, 565 S.E.2d 467 (2002).

298. *Id.* at 290, 565 S.E.2d at 468.

299. *Id.* at 291-93, 565 S.E.2d at 468-69.

300. *Id.* at 292, 565 S.E.2d at 469.

nal prosecution.”<sup>301</sup> Although the court conceded that the trial court was authorized to take judicial notice of the “[local divisions of [its] own state”<sup>302</sup> and that Riverdale is located entirely within Clayton County, it held that judicial notice “is not evidence, but takes the place of evidence.”<sup>303</sup> The court also found that the trial court complied with all procedural prerequisites for taking judicial notice.<sup>304</sup> However, the court further held that because the trial court did not inform the jury of its judicial notice of Riverdale’s Clayton County location, the jury did not have that evidence before it.<sup>305</sup> The supreme court therefore concluded that venue was not proven to the jury.<sup>306</sup>

The court noted that the trial court’s failure to inform the jury of the noticed fact improperly took the issue out of the jury’s hands.<sup>307</sup> The court’s advice to trial judges is that they “would do well to follow Federal Rule of Evidence 201(g),<sup>308</sup> by instructing the jury that it ‘may, but is not required to, accept as conclusive any fact judicially noticed.’<sup>309</sup> The court admonished the trial courts that although venue should rarely be a disputed issue,

[the supreme court] recently considered a number of cases in which venue [was] contested due solely to a lack of direct evidence of venue is cause for great concern. Therefore, [the court] reiterate[d] Chief Justice Fletcher’s exhortation that trial courts would do well to begin giving appropriate jury charges on venue.<sup>310</sup>

The court reversed defendant’s conviction but held that double jeopardy did not bar the State from retrying the case.<sup>311</sup>

In a similar case, *Lynn v. State*,<sup>312</sup> the supreme court reversed defendant’s conviction, holding that placing the crime at a street address does not establish venue with the required specificity if no evidence establishes which county contains that street address.<sup>313</sup> “Venue is a jury question that must be proven beyond a reasonable doubt, and for at

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301. *Id.*

302. *Id.* (quoting O.C.G.A. § 24-1-4 (2000)).

303. *Id.* (quoting D. LAKE RUMSEY, JR., AGNOR’S GEORGIA EVIDENCE § 16-1 (3d ed. 1993)).

304. *Id.*

305. *Id.* at 293, 565 S.E.2d at 469.

306. *Id.*, 565 S.E.2d at 469-70.

307. *Id.*, 565 S.E.2d at 470.

308. FED. R. EVID. 201(g).

309. *Graham*, 275 Ga. at 293, 565 S.E.2d at 470 (quoting FED. R. EVID. 201(g)).

310. *Id.* at 293-94, 565 S.E.2d at 470.

311. *Id.* at 294, 565 S.E.2d at 470.

312. 275 Ga. 288, 565 S.E.2d 800 (2002).

313. *Id.* at 289, 565 S.E.2d at 801.

least the last one hundred years, this [c]ourt has reversed criminal convictions when the State failed to prove venue.<sup>314</sup> The supreme court gave advice to the bench: “One way to encourage prosecutors to make sure they have proven venue and to alert the juries to their role in determining venue is to instruct juries that they must find venue beyond a reasonable doubt.”<sup>315</sup> The court “strongly” urged trial courts to give a venue charge tailored to the particular case’s facts.<sup>316</sup>

*Robinson v. State*<sup>317</sup> is another case in which the court of appeals reversed a trial court conviction on a venue issue.<sup>318</sup> Robinson was charged with driving under the influence of alcohol and was found guilty in the Municipal Court of Jonesboro. The conviction was affirmed by the Superior Court of Clayton County. The state’s only venue evidence was a police officer’s testimony that the officer saw defendant driving within the Jonesboro city limits.<sup>319</sup> Because the State did not establish the county in which the crime was committed, the court of appeals reversed defendant’s conviction.<sup>320</sup>

The supreme court, in *State v. Kell*,<sup>321</sup> and the court of appeals, in *Naylor v. State*,<sup>322</sup> established the proper venue for Medicaid fraud<sup>323</sup> and theft by taking cases,<sup>324</sup> respectively. The supreme court, in *Kell*, held that the proper venue for Medicaid fraud committed by a fraudulent scheme or device pursuant to O.C.G.A. section 49-4-146.1(b)(1)<sup>325</sup> is in any county where an act was committed which furthered the fraudulent transaction.<sup>326</sup> In *Naylor* the court of appeals held that the proper venue for a theft by taking case is any county in which the accused exercised control over the property which is the subject of the theft.<sup>327</sup>

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314. *Id.*

315. *Id.* at 290, 565 S.E.2d at 800.

316. *Id.*

317. 260 Ga. App. 186, 581 S.E.2d 285 (2003).

318. *Id.* at 186, 581 S.E.2d at 285.

319. *Id.*

320. *Id.* at 187, 581 S.E.2d at 286.

321. 276 Ga. 423, 577 S.E.2d 551 (2003).

322. 257 Ga. App. 899, 572 S.E.2d 410 (2002).

323. *Kell*, 276 Ga. at 423, 577 S.E.2d at 552.

324. *Naylor*, 257 Ga. App. at 900, 572 S.E.2d at 411.

325. O.C.G.A. § 49-4-146.1(b)(1) (2003).

326. *Kell*, 276 Ga. at 425, 577 S.E.2d at 553. In *Kell* the supreme court reversed the court of appeals to the extent that the court reached another conclusion in *Culver v. State*, 254 Ga. App. 297, 562 S.E.2d 201 (2002) and *Cash v. State*, 254 Ga. App. 718, 563 S.E.2d 459 (2002). *Id.*

327. *Naylor*, 257 Ga. App. at 900, 572 S.E.2d at 411.

*D. Jury Selection*

The court of appeals, in *Foster v. State*,<sup>328</sup> limited the lengths that judges and prosecutors can go to in rehabilitating a juror.<sup>329</sup> If the questioning is lengthy and repetitious, an appellate court may determine that the questioning is more of an instruction on the desired answer than a neutral attempt to determine the juror's impartiality.<sup>330</sup>

In *Foster* a defense attorney asked a potential juror whether she would have a "difficult time" following the law and being fair and impartial when the evidence would be that defendant had "about one or two" DUI convictions.<sup>331</sup> The potential juror responded: "I don't have a problem following the law. It's just that I don't think DUI laws are strict enough. I think once you're convicted you should not be driving."<sup>332</sup> The potential juror further responded that she would not be able to be a fair and impartial juror and follow the law in "this case."<sup>333</sup> The prosecutor then tried to rehabilitate her, instructing her that she had given different answers and asking her again about the answer that she could follow the law. The potential juror answered again that she did not have a problem following the law, but that she was confused. The potential juror felt "scared" because she had two children that drove. The potential juror interrupted the prosecutor's next statement with her own idea that once one is convicted of drunk driving, that person should never be allowed to drive again. The prosecutor persisted in asking the potential juror whether she could listen to the evidence and the charge. The trial judge interjected and twice asked the juror the "rehabilitation" question.<sup>334</sup>

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328. 258 Ga. App. 601, 574 S.E.2d 843 (2002).

329. *Id.* at 608, 574 S.E.2d at 849.

330. *Id.*

331. *Id.* at 606, 574 S.E.2d at 848.

332. *Id.*

333. *Id.*

334. *Id.* The judge's "rehabilitation" of the juror went as follows:

Let's just put it to you as clear as I can. Okay. The state is entitled to a fair trial just like the defense is. Would the mere fact that the defendant has had a prior DUI or two mean that you would not be able to hear the facts of this particular case and render a fair verdict based on the evidence that I say is okay? You know, you get instructions from the court on what the law is but you determine the facts. Would the fact that the defendant has had prior DUI's be so prejudicial in your mind that you would not be able to render a fair and impartial decision in this case?

*Id.*

The potential juror told the judge that she could listen to his instructions and that she would not be that prejudiced.<sup>335</sup> However, she then restated her position, “[b]ut it would still be there, you know, would still be a thought that might skew what I might would think.”<sup>336</sup> The prosecutor continued to ask the potential juror questions, and the potential juror acknowledged that she *understood* the presumption of innocence, the meaning of allegations, and the theory that the State has the burden of proof beyond a reasonable doubt.<sup>337</sup>

Still, the “rehabilitation” questioning continued. The trial court overruled defense objections.<sup>338</sup> After repeated questioning of this nature, the juror contradicted her previous responses and conceded, though she reiterated, “I just have really strong feelings against DUI.”<sup>339</sup> The prosecutor persisted, “[a]nd that’s ultimately our question. Could you do that even though you have these strong feelings?”<sup>340</sup> The juror yielded.<sup>341</sup>

When the defense attorney asked the juror whether, given her personal feelings and beliefs about DUI, she would be able to be fair and impartial, the juror responded,

I *think* I could be fair. I can listen. I mean, just because I screwed up one time doesn’t mean what I should do tomorrow based on yesterday either. So, you know, I could listen and do it but that is like one of my little things, you know, is DUI.<sup>342</sup>

The defense attorney moved the court to strike the potential juror for cause, but the trial court refused to do so and the defense used a peremptory strike. The potential juror tried to maintain her position and repeatedly explained her position. She was confronted with extensive rehabilitation attempts and questions. After the fifth “go-round” and under the weight of this rehabilitation pressure, the potential juror gave up and responded as the judge and prosecutor wished.<sup>343</sup>

In *Foster* the court of appeals clearly warned trial courts:

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335. *Id.*

336. *Id.* at 606-07, 574 S.E.2d at 848.

337. *Id.* at 607, 574 S.E.2d at 848.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*, 574 S.E.2d at 849.

342. *Id.*

343. *Id.* at 608, 574 S.E.2d at 850.

In too many cases, trial courts confronted with clearly biased and partial jurors use their significant discretion to “rehabilitate” these jurors by asking a version of this loaded question: After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law? Not so remarkably, jurors confronted with this question from the bench almost inevitably say, “yes.” Such biased jurors likely even believe that they can set aside their preconceptions and inclinations—certainly every reasonable person wants to believe he or she is capable of doing so. Once jurors affirmatively answer the “rehabilitation” question, judges usually decide to retain these purportedly rehabilitated jurors.<sup>344</sup>

The court of appeals reversed and reminded the trial court that “[a] trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors because, in reality, the judge is the only person in a courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury.”<sup>345</sup>

In yet another case, the court of appeals reversed the trial court’s denial of new trial when defendant alleged that the trial court erred in refusing to excuse a juror for cause.<sup>346</sup> In *Ivey v. State*,<sup>347</sup> the potential juror told the court that she may be prejudiced because she had been an armed robbery victim. Throughout the rehabilitation process, the potential juror answered at least four times that she could not be fair and partial. Still, the court refused to remove her for cause and invited the prosecutor to ask additional questions. After the prosecutor grilled her, the potential juror relented. She stated that she could wait until she heard all the evidence and that she could vote not guilty if she believed the State had not proved guilt beyond a reasonable doubt. In addition, the court asked the potential juror to explain conflicting answers. She restated that she did not know whether hearing the evidence would make a difference to her because of her past experiences.

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344. *Id.* at 605, 574 S.E.2d at 847-48 (quoting *Walls v. Kim*, 250 Ga. App. 259, 259, 549 S.E.2d 797, 799 (2001)), *aff’d*, 275 Ga. 177, 563 S.E.2d 847 (2002). *Foster* can be useful to attorneys trying civil cases because the court of appeals looked to its decision in *Walls*, in which the court expressly disagreed with “the way that the ‘rehabilitation’ question has become something of a talisman relied upon by trial and appellate judges to justify retaining biased jurors.” 250 Ga. App. at 259, 549 S.E.2d at 797. The court applied *Walls* in *Foster*, 258 Ga. App. at 605, 574 S.E.2d at 848.

345. 258 Ga. App. at 608, 574 S.E.2d at 849 (quoting *Walls*, 250 Ga. at 260, 549 S.E.2d at 799). The dissent discussed the trial courts’ broad discretion in qualifying jurors. *Id.* at 610, 574 S.E.2d at 851 (Mikell, J., dissenting).

346. *Ivey v. State*, 258 Ga. App. 587, 574 S.E.2d 663 (2002).

347. *Id.* at 587, 574 S.E.2d at 664.

The trial court resorted again to rehabilitation questioning, and the juror yielded to it.<sup>348</sup>

As in *Foster*, the appellate court in *Ivey* admonished trial courts that in too many cases, trial courts use their significant discretion to rehabilitate jurors that were clearly biased and partial.<sup>349</sup> The court pointed to the question, “After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?”<sup>350</sup> as an example of a version of the “loaded question.”<sup>351</sup> The court stated, “A trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors. . . .”<sup>352</sup> The court held that after a juror states that he cannot be fair and impartial and explains this position, the court should “limit further questions to clarification of the answer. Neither the court nor the parties should incessantly interrogate the juror in a manner calculated only to elicit a response contrary to the one originally given.”<sup>353</sup>

#### E. Batson Challenges

In *Harrison v. State*,<sup>354</sup> Harrison appealed his aggravated assault conviction. Harrison alleged that the trial court erred by seating three jurors the defense had struck. At trial, the State alleged that the defense used all six peremptory strikes on Caucasian jurors because of their race.<sup>355</sup> The State challenged the strikes, and the defense counsel gave the following explanations for the strikes: the first juror

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348. *Id.* at 589-90, 574 S.E.2d at 665-66.

349. *Id.* at 588, 574 S.E.2d at 665.

350. *Id.*

351. *Id.*

352. *Id.* at 591, 574 S.E.2d at 667 (quoting *Walls*, 250 Ga. at 260, 549 S.E.2d at 799).

353. *Id.* at 592, 574 S.E.2d at 667. Dissenting, Judge Andrews stated that he did not believe that the trial judge manifestly abused his discretion and that the proper standard should be whether the juror’s opinion regarding the guilt or innocence is so fixed and definite that he or she is unable to set that opinion aside based on the evidence and court instructions.

A potential juror’s doubts as to his or her own impartiality or reservations about his or her ability to set aside personal experiences do not require the court to strike the juror, as the judge is uniquely positioned to observe the juror’s demeanor and thereby to evaluate his or her capacity to render an impartial verdict.

*Id.* at 596, 574 S.E.2d at 670 (quoting *Brown v. State*, 243 Ga. App. 632, 633, 534 S.E.2d 98, 100-01 (2000)) (Andrews, P.J., dissenting).

354. 257 Ga. App. 718, 572 S.E.2d 4 (2002).

355. *Id.* at 718, 572 S.E.2d at 4.

was struck because she was “‘a housewife and not a supervisor,’ and had not worked outside the home.”<sup>356</sup> The second juror was struck because he had worked as a supervisor; the third juror was struck because she had medical training and had worked in the emergency room on trauma cases. The trial judge found that the explanations were not race-neutral, disallowed the strikes, and seated the jurors.<sup>357</sup> The court of appeals disagreed and found error, holding that the explanations were race-neutral under the appropriate standard of facial validity.<sup>358</sup>

The court stated that the trial court should have continued with step three of the *Batson* inquiry and analyzed the persuasiveness of the defense’s explanations.<sup>359</sup> The court ruled that step three was the appropriate time for the court to analyze whether the explanations are implausible or fantastic: “[T]o say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious.”<sup>360</sup> Defendant was held to have been tried before an illegally constituted jury.<sup>361</sup>

In *Brown v. State*,<sup>362</sup> defendant, convicted of voluntary manslaughter and aggravated assault, alleged on appeal that the trial court erred in denying his *Batson* objection to the State’s striking an African-American juror.<sup>363</sup> The court of appeals used the three-step process of (1) whether the opponent of the peremptory challenge made a prima facie case showing racial discrimination, (2) whether the striker gave a race-neutral explanation, and (3) whether the striker’s opponent proved discriminatory intent.<sup>364</sup> The court of appeals held that the prosecutor’s statement showed a race-based juror strike.<sup>365</sup>

In *Brown* the State used four of five peremptory strikes to strike African-Americans from a panel made of forty-three percent African-Americans and fifty-seven percent Caucasians. Finding that the defense made a prima facie showing, the trial court examined the State’s reasons for the strike. The State struck the juror because the juror’s family moved from a high crime area, and the juror felt the system was racially

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356. *Id.*, 572 S.E.2d at 5.

357. *Id.* at 718-19, 572 S.E.2d at 5.

358. *Id.*

359. *Id.*

360. *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)).

361. *Id.*, 572 S.E.2d at 6.

362. 256 Ga. App. 209, 568 S.E.2d 62 (2002).

363. *Id.* at 209, 568 S.E.2d at 62-63.

364. *Id.*, 568 S.E.2d at 63.

365. *Id.* at 210, 568 S.E.2d at 63.

prejudiced.<sup>366</sup> The State felt that such a belief by the juror was “particularly relevant when the party who is saying the system is prejudiced based on race is the same race as the defendant.”<sup>367</sup> The court of appeals held that the State’s own explanation demonstrated a discriminatory purpose.<sup>368</sup>

In another case dealing with *Batson* issues,<sup>369</sup> the supreme court held that no error occurred when the trial court denied defendant’s *Batson* challenge.<sup>370</sup> In *Daniels v. State*,<sup>371</sup> the defense made a prima facie case of racial discrimination.<sup>372</sup> The State explained that the struck jurors all had close friends or family that had been either mistreated or falsely accused of crimes by the State.<sup>373</sup> The trial court found this explanation race-neutral and the appellate court agreed.<sup>374</sup> Although the court of appeals held that Daniels had established a prima facie case of racial discrimination, Daniels did not make a counter-showing to the State’s race-neutral reasons for the strikes.<sup>375</sup>

In *White v. State*,<sup>376</sup> the court of appeals examined the “similarly situated” sub-issue of a *Batson* challenge.<sup>377</sup> Defendant alleged that the trial court’s denial of his *Batson* challenge to the State’s peremptory strike of an African-American was error. The panel included two African-Americans jurors. The State did not challenge the male African-American juror, but the State did challenge the female African-American juror. The defense raised a *Batson* issue.<sup>378</sup>

The State explained that it struck the juror because of employment-related reasons and not racial reasons.<sup>379</sup> The prosecutor further explained that “he thought that people in artistic or cosmetic professions have a different slant.”<sup>380</sup> Based on this explanation, the trial court denied defendant’s challenge.<sup>381</sup>

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366. *Id.* at 209-10, 568 S.E.2d at 62-63.

367. *Id.* at 210, 568 S.E.2d at 63 (quoting trial record).

368. *Id.*

369. *Daniels v. State*, 276 Ga. 632, 580 S.E.2d 221 (2003).

370. *Id.* at 633, 580 S.E.2d at 223.

371. 276 Ga. 632, 580 S.E.2d 221 (2003).

372. *Id.* at 634, 580 S.E.2d at 223.

373. *Id.*

374. *Id.* at 633, 580 S.E.2d at 223.

375. *Id.* at 634, 580 S.E.2d at 224.

376. 258 Ga. App. 546, 574 S.E.2d 629 (2002).

377. *Id.* at 546-47, 574 S.E.2d at 630.

378. *Id.* at 549, 574 S.E.2d at 631.

379. *Id.*

380. *Id.*

381. *Id.*

On appeal defendant contended that he had carried his burden of proving that the race-neutral reason given by the State was a pretext. Defendant argued that the State did not strike similarly situated white female jurors. One of these white female jurors was a part-time chorus instructor, and the other was a studio operator.<sup>382</sup>

The appellate court stated, “The opponent of the strike may carry [the] burden . . . by showing that similarly situated jurors of another race were not struck.”<sup>383</sup> The court determined that the two jurors relied on by defendant were not similarly situated with the challenged juror.<sup>384</sup> Thus, a part-time chorus instructor who “primarily” sold carpet and a homemaker who operated a studio in the past are not similarly situated to a full-time dance instructor.<sup>385</sup>

The court of appeals, in *Shelton v. State*,<sup>386</sup> held that the trial court did not abuse its discretion by granting the State’s reverse *Batson* motion.<sup>387</sup> Defendant was convicted of selling cocaine. The State challenged three defense strikes which excluded white males.<sup>388</sup> The court of appeals held that defendant’s strike explanations were facially neutral but held that the explanations were neither reasonably specific nor related to the trial case.<sup>389</sup>

The explanations held by the court to be facially neutral but not reasonably specific or related to the case were the following: (1) working for a county water department, and, thus, having a connection with the case because Cobb County was prosecuting, (2) being in the Army for four years and being married to a corporate executive, and (3) being involved in a collections case and thus actively seeking and pursuing litigation.<sup>390</sup> The court agreed with the trial court that these explanations had no “bearing on a prosecution for selling cocaine.”<sup>391</sup>

In contrast, the same court, in *Ware v. State*,<sup>392</sup> viewed the issue differently.<sup>393</sup> Ware was convicted of armed robbery. On appeal, he alleged that the trial court erred in refusing his *Batson* challenge to the

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382. *Id.* at 549-50, 574 S.E.2d at 631-32.

383. *Id.* at 549, 574 S.E.2d at 632 (quoting *Morris v. State*, 246 Ga. App. 260, 262, 540 S.E.2d 244, 246 (2000)).

384. *Id.* at 550, 574 S.E.2d at 632.

385. *Id.*

386. 257 Ga. App. 890, 572 S.E.2d 401 (2002).

387. *Id.* at 890, 572 S.E.2d at 403.

388. *Id.*

389. *Id.* at 891, 572 S.E.2d at 404.

390. *Id.*

391. *Id.* at 892, 572 S.E.2d at 404.

392. 258 Ga. App. 706, 574 S.E.2d 898 (2002).

393. *Id.* at 707-08, 574 S.E.2d at 899.

State's striking three African-American women. The prosecutor explained that she struck the jurors because they were unemployed.<sup>394</sup> The court of appeals concluded that the State could properly strike an unemployed juror because the reason for the strike was "concrete, tangible and race-neutral."<sup>395</sup>

#### F. Sentencing

In *Rogers v. State*,<sup>396</sup> the court considered a mental retardation issue in a death penalty murder case.<sup>397</sup> In *Rogers* the defendant was convicted of murder. His death sentence was affirmed. Defendant then filed a petition for state habeas corpus and sought a jury trial on the issue of mental retardation.<sup>398</sup>

The habeas court decided that a genuine issue of fact about mental retardation existed. Before the jury trial on petitioner's mental retardation occurred, however, the petitioner wrote a letter to the trial court and asked for dismissal of the proceeding. The trial court held a hearing during which the petitioner stated that he was not mentally retarded. The trial court found that the petitioner knowingly and voluntarily waived his right to a jury trial on the issue. The next month, with new counsel, petitioner sought to set aside the dismissal and withdraw his waiver. Before the court ruled on the motion, however, the petitioner wrote another letter asking for a dismissal of the mental retardation trial. The trial court again found a waiver of the right to a trial on mental retardation.<sup>399</sup>

The appellate court held that because petitioner's trial for a capital crime was before July 1, 1988,<sup>400</sup> once the habeas corpus court found a genuine issue regarding his mental retardation, that issue had to be thoroughly reviewed and passed upon and was no longer subject to waiver.<sup>401</sup> The court held that contrary to the State's contention, the trial court was not authorized to resolve the matter by finding that the

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394. *Id.* at 707, 574 S.E.2d at 900.

395. *Id.* at 708, 574 S.E.2d at 900.

396. 276 Ga. 67, 575 S.E.2d 879 (2003).

397. *Id.* at 67, 575 S.E.2d at 880.

398. *Id.*

399. *Id.* at 68, 575 S.E.2d at 881.

400. Georgia defendants tried after July 1, 1988, pursuant to O.C.G.A. section 17-7-131, are permitted to contend that they were mentally retarded at the time of the crime and to present evidence of this retardation to the trier of fact. In capital cases, the trier is then required to determine during the guilt-innocence phase whether the defendant is guilty but mentally retarded. If the trier of fact so finds, the defendant cannot be executed. O.C.G.A. § 17-7-131 (1997).

401. *Rogers*, 276 Ga. at 69, 575 S.E.2d at 881.

petitioner was not mentally retarded.<sup>402</sup> Using the definition of mental retardation in O.C.G.A. section 17-7-131,<sup>403</sup> a jury would have to decide the issue.<sup>404</sup> The court reversed the judgment and remanded the case to the trial court for further proceedings, including a jury trial on the issue of mental retardation.<sup>405</sup>

Dissenting, Justice Carley concluded that because defendant elected to waive his right, “the only issue before [the supreme court] was whether he was authorized to do so.”<sup>406</sup> Justice Carley believed that defendant could and did waive his right to a jury trial.<sup>407</sup> Also, Justice Carley determined that “the trial court . . . properly addressed and resolved the issue of [defendant’s] alleged mental retardation.”<sup>408</sup>

In *Keller v. State*,<sup>409</sup> the trial court, after the jury’s verdict of guilty, entered a written judgment of conviction and sentence on all but one count of a multi-count indictment.<sup>410</sup> The supreme court held that defendant’s case was not ripe for appeal until a sentence had been entered on each count of the indictment that was the subject of the trial because a criminal case is not final, but is pending, until the court enters a written judgment of conviction and sentence on each count.<sup>411</sup> In *Keller* defendant filed a notice of appeal within thirty days of the trial court’s entry of a written sentence on the last count of the jury’s verdict.<sup>412</sup> The court, therefore, held that his appeal was timely and that the appellate court erred in dismissing it.<sup>413</sup>

*Keller* is noteworthy because the supreme court has clearly extended the rules set forth in *Littlejohn v. State*<sup>414</sup> and *Crolley v. State*.<sup>415</sup> In those cases, a one-count indictment required the court to enter one sentence.<sup>416</sup> The extension of the *Littlejohn* and *Crolley* rules is evidenced in *Keller* in the court’s statement that the “principle of those

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402. *Id.* at 70, 575 S.E.2d at 882.

403. O.C.G.A. § 17-7-131.

404. *Rogers*, 276 Ga. at 70, 575 S.E.2d at 882.

405. *Id.* at 69-70, 575 S.E.2d at 881-82.

406. *Id.* at 70, 575 S.E.2d at 882 (Carley, J., dissenting).

407. *Id.* (Carley, J., dissenting).

408. *Id.* (Carley, J., dissenting).

409. 275 Ga. 680, 571 S.E.2d 806 (2002).

410. *Id.* at 680-81, 571 S.E.2d at 807.

411. *Id.* at 681, 571 S.E.2d 807-08. See O.C.G.A. § 5-6-34(a)(1) (1995 & Supp. 2003).

412. *Keller*, 275 Ga. at 681, 571 S.E.2d at 808.

413. *Id.*

414. 185 Ga. App. 31, 363 S.E.2d 327 (1987).

415. 182 Ga. App. 2, 354 S.E.2d 864 (1987).

416. *Keller*, 275 Ga. at 680-81, 571 S.E.2d at 807.

cases applies with equal force to cases such as Keller's in which multiple counts of an indictment are tried together."<sup>417</sup>

### G. First Offender

In *Cook v. State*,<sup>418</sup> defendant, a seventeen-year-old boy, was convicted by a jury of the simple battery of his father.<sup>419</sup> Defendant asked for first offender treatment, but the trial court refused, stating:

Mr. Cook, you have lost your chance for first offender. Even when it was pointed out to you that the jury was split four to two in favor of conviction, with two jurors indicating they could change their minds, you still maintained your desire to get a jury verdict and you did. So that's of your own making, and you will live with that.<sup>420</sup>

The court of appeals, relying on solid precedent, remanded the case for new sentencing.<sup>421</sup> The trial court is required to exercise discretion in granting first offender status, and an inflexible rule is not approved.<sup>422</sup> Refusing first offender status to one who has demanded a jury trial is not an acceptable exercise of discretion.<sup>423</sup>

Similarly, the court of appeals vacated and remanded a case for a new sentence based on the trial court's adoption of an inflexible rule governing first offender status in *Wilcox v. State*.<sup>424</sup> Defendant pleaded guilty to armed robbery and kidnapping. He requested first offender status, but the trial court was inflexible and refused to consider first offender status for the crime of armed robbery.<sup>425</sup>

Additionally, the court of appeals has held that the request for first offender status must be made at trial, or the argument is waived.<sup>426</sup>

### H. Probation

The court of appeals, in *Dickey v. State*,<sup>427</sup> tackled an issue that neither a Georgia appellate court nor the United States Supreme Court had addressed: whether probation may be revoked for failure to make restitution when the probationer bargained for the restitution require-

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417. *Id.* at 681, 571 S.E.2d at 807.

418. 256 Ga. App. 353, 568 S.E.2d 482 (2002).

419. *Id.* at 353, 568 S.E.2d at 482-83.

420. *Id.* at 353-54, 568 S.E.2d at 483.

421. *Id.* at 355, 568 S.E.2d at 483-84.

422. *Id.* at 354, 568 S.E.2d at 483.

423. *Id.*

424. 257 Ga. App. 519, 521, 571 S.E.2d 512, 514 (2002).

425. *Id.* at 520, 571 S.E.2d at 513.

426. *See* *Gibson v. State*, 257 Ga. App. 134, 570 S.E.2d 437 (2002).

427. 257 Ga. App. 190, 570 S.E.2d 634 (2002).

ment.<sup>428</sup> In *Dickey* the defendant agreed to a negotiated plea of ten years probation plus the payment of restitution to avoid incarceration. Defendant then failed to pay the restitution, and the trial court revoked his probation. Defendant argued that the trial court erred in revoking his probation for failure to pay restitution because no evidence showed that he willfully failed to pay.<sup>429</sup>

The court of appeals, affirming the trial court's revocation of probation, decided that defendant was not without fault.<sup>430</sup> The court stated that when defendant agreed to the plea bargain, he entered into a contract, and any doubts about his ability to make the payment should have been addressed with the other parties before everyone agreed to the terms.<sup>431</sup> Defendant's "silence, when he should have spoken, and his ultimate breach, [made] him culpable."<sup>432</sup>

The court reviewed the plea agreement and decided that defendant had acknowledged that he was aware of his rights and that he was pleading guilty in exchange for a specified sentence.<sup>433</sup> The agreement also stated that defendant had freely and voluntarily executed the document after consulting with his attorney. The trial court sentenced Dickey in accordance with the plea agreement.<sup>434</sup>

After entering into the negotiated plea, defendant failed to make the required and agreed upon restitution payments. Defendant's probation officer petitioned the court to revoke or modify his probation. At the revocation hearing, Dickey stipulated that he had not paid the required restitution. However, Dickey argued that restitution was not paid because he was incarcerated. Dickey also argued that the court was not permitted to revoke probation based on inability to pay.<sup>435</sup> Defendant based his argument on the United States Supreme Court's decision in *Bearden v. Georgia*,<sup>436</sup> in which

[t]he Court recognized that differential treatment of indigent defendants in revoking probation may violate the equal protection clause and that the fundamental unfairness of revoking probation based on an indigent's failure to pay a fine raises due process concerns. Thus, "if the State determines a fine or restitution to be the appropriate and

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428. *Id.* at 190, 570 S.E.2d at 635.

429. *Id.* at 190-91, 570 S.E.2d at 635.

430. *Id.* at 192, 570 S.E.2d at 636.

431. *Id.*

432. *Id.* (citing *Gilbert v. State*, 245 Ga. App. 544, 546, 538 S.E.2d 104, 106 (2000)).

433. *Id.*

434. *Id.* at 190-91, 570 S.E.2d at 635.

435. *Id.* at 191, 570 S.E.2d at 635.

436. 461 U.S. 660 (1983).

adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.<sup>437</sup>

On the other hand, the State can imprison a defendant who willfully refuses to pay a fine or restitution.<sup>438</sup> The trier of fact should examine the reason for the probationer's nonpayment, and if the evidence shows no fault by the probationer, then his probation should not be revoked.<sup>439</sup>

Applying the *Bearden* standard, the court of appeals held that Dickey was not without fault because he agreed to the plea bargain, entered into a contract, knew the schedule and amount of the required payments, and knew his ability to make the payments.<sup>440</sup> The court emphasized that no evidence showed the defendant expressed any doubt about his ability to make the payments before everyone agreed to the plea terms.<sup>441</sup>

The court distinguished *Dickey* from *Bearden*.<sup>442</sup> The trial court in *Bearden* unilaterally imposed the probated sentence, fines, and restitution as an alternative to incarceration.<sup>443</sup> However, the probationer in *Dickey* participated in the negotiations and agreed to the probated sentence and restitution payments to avoid incarceration.<sup>444</sup> The distinction is crucial and results in the rule that a probationer cannot be deprived of his freedom solely because he was unable to pay the restitution, except when a probationer secures his freedom by negotiating and agreeing to an agreement that requires restitution.<sup>445</sup> If the probationer does not follow the negotiated agreement, a court may properly sentence him according to the terms of the agreement.<sup>446</sup>

The court of appeals, in *State v. Huckeba*,<sup>447</sup> reversed the trial court's decision that, under O.C.G.A. section 42-8-38(a),<sup>448</sup> only a probation violation that occurred within the probationary term could be the subject matter of a probation revocation petition.<sup>449</sup> In *Huckeba*

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437. *Wilcox*, 257 Ga. App. at 191-92, 570 S.E.2d at 635-36 (quoting *Bearden*, 461 U.S. at 667).

438. *Id.* at 192, 570 S.E.2d at 636.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 191-92, 570 S.E.2d at 635-36.

443. *Id.* at 192-93, 570 S.E.2d at 636.

444. *Id.*

445. *Id.* at 193, 570 S.E.2d at 636.

446. *Id.*

447. 258 Ga. App. 627, 574 S.E.2d 856 (2002).

448. O.C.G.A. § 42-8-38(a) (1997).

449. *Huckeba*, 258 Ga. App. at 628, 574 S.E.2d at 858.

the defendant pleaded guilty to three felony counts of violating the Georgia Controlled Substances Act<sup>450</sup> in 1996 and was sentenced to five years incarceration followed by five years of probation. The probationary term was set to begin in June 2001. Huckeba was paroled approximately four months before his scheduled probationary period. Almost immediately, in March 2001, he was arrested for another felony violation of the Controlled Substances Act.<sup>451</sup>

The State filed a petition for revocation. The trial court denied the petition, interpreting O.C.G.A. section 42-8-38(a)<sup>452</sup> as pertaining to the probationer's actions within the probation period. Thus, the trial court found it had no authority to consider the State's petition because the violation of probation occurred *before* the probation period began.<sup>453</sup>

The court of appeals reversed, relying on the rule that refraining from violating any criminal laws was a condition for the probationary period's imposition and a condition to remaining on probation.<sup>454</sup> The court held that it did not matter that the condition of probation was violated before the probationary period actually began.<sup>455</sup> The commission of another felony offense violated the court's sentence and a condition under which probation was imposed.<sup>456</sup> The holding encompasses an "implicit condition": when a defendant commits a felony while under a probationary sentence, even if it is committed before the effective date of the sentence's probationary period, the sentencing court is authorized to revoke the defendant's probation for violation of a condition *implicit* in every suspended or probationary sentence.<sup>457</sup> This implicit condition is that the probationer, while under such sentence, will not commit another criminal offense.<sup>458</sup>

### I. Double Jeopardy

The court of appeals, in *Puplampu v. State*,<sup>459</sup> held that a trial was improperly terminated and reversed the judgment of the trial court, which denied defendant's double jeopardy plea.<sup>460</sup> The bench trial record revealed that after the first witness was sworn in in this speeding

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450. See O.C.G.A. § 16-30-20 (2003).

451. *Huckeba*, 258 Ga. App. at 627-28, 574 S.E.2d at 857.

452. O.C.G.A. § 42-8-38(a).

453. *Huckeba*, 258 Ga. App. at 629, 574 S.E.2d at 858.

454. *Id.* at 628, 574 S.E.2d at 858.

455. *Id.*

456. *Id.*

457. *Id.* at 628-29, 574 S.E.2d at 858.

458. *Id.*

459. 257 Ga. App. 5, 570 S.E.2d 83 (2002).

460. *Id.* at 6, 570 S.E.2d at 84.

violation case, but before the solicitor general began his questioning, the solicitor general informed the court that he did not have the documents necessary to lay the foundation for the admission of the State's laser speeding device evidence. Over objection from defense counsel, the trial judge reset the case to give the solicitor general time to obtain the documents.<sup>461</sup>

One day before the second trial, Puplampu filed a motion for plea of double jeopardy. On the date of the second trial, the case was set to begin before a different judge. The case was called, and defendant entered a plea of double jeopardy. Following a hearing on the issue, the court denied the plea because the court was not convinced that jeopardy had attached in the case. Defendant appealed.<sup>462</sup>

The appellate court quoted the Georgia Constitution: "[N]o person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial."<sup>463</sup> The court applied its decision in *Wilson v. State*,<sup>464</sup> in which the court held that "[t]he appellate standard of review of a grant or denial of a double jeopardy plea in bar is whether, after reviewing the trial court's oral and written rulings as a whole, the trial court's findings support its conclusion."<sup>465</sup> The court analyzed

O.C.G.A. [section] 16-1-8(a)(2),<sup>466</sup> which provides that "[a] prosecution is barred if the accused was formerly prosecuted for the same crime based upon the same material facts, if such former prosecution . . . [w]as terminated improperly . . . in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts. . . ."<sup>467</sup>

Further, the court, applying O.C.G.A. section 16-1-8(e),<sup>468</sup> set out the following situations of improper trial termination:

"(1) The accused consents to the termination or waives by motion to dismiss or other affirmative action his right to object to the termination; or (2) [t]he trial court finds that the termination is necessary because: (A) [i]t is physically impossible to proceed with the trial; (B) [p]rejudicial conduct in or out of the courtroom makes it impossible to

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461. *Id.* at 5, 570 S.E.2d at 84.

462. *Id.*

463. *Id.*; GA. CONST. art. I, § 1, para. 18 (1998).

464. 229 Ga. App. 455, 494 S.E.2d 267 (1997).

465. *Puplampu*, 257 Ga. App. at 5-6, 570 S.E.2d at 84 (quoting *Wilson*, 229 Ga. App. at 455, 494 S.E.2d at 268).

466. O.C.G.A. § 16-1-8(a)(2) (2003).

467. *Puplampu*, 257 Ga. App. at 6, 570 S.E.2d at 84 (quoting O.C.G.A. § 16-1-8(a)(2)).

468. O.C.G.A. § 16-1-8(e).

proceed with the trial without injustice to the defendant; (C) [t]he jury is unable to agree upon a verdict; or (D) [f]alse statements of a juror on voir dire prevent a fair trial.”<sup>469</sup>

The court of appeals held that the termination of Puplampu’s first trial after the first witness was sworn in and before findings were rendered was clearly not a proper basis for terminating a criminal bench trial at that stage of the proceedings.<sup>470</sup> The court distinguished this set of facts from “a case of a continuance, where the trial would simply be recessed for a brief time and then continued before the same trier of facts.”<sup>471</sup> The court held that the trial was improperly terminated and reversed the judgment of the trial court.<sup>472</sup>

In *State v. Perkins*,<sup>473</sup> the court split into three camps, producing a concurring opinion and a dissent.<sup>474</sup> The State appealed a Whitfield County Superior Court order which sustained Perkins’s plea of former jeopardy and barred further prosecution.<sup>475</sup>

In *Perkins* the defendant was in an automobile collision that resulted in a death. Perkins was charged in separate citations with vehicular homicide and reckless driving. Although the deputy wrote “Superior Court” on the reckless driving citation, the Whitfield County Probate Court processed the citation instead of binding it over. Deputies took Perkins from the jail to the probate court to answer the reckless driving charge. Without benefit of counsel, the eighteen-year-old defendant pleaded guilty to the charge and was convicted of the offense.<sup>476</sup>

Subsequently, the district attorney indicted Perkins for reckless driving and felony vehicular homicide. At arraignment, Perkins filed a plea in bar on former jeopardy grounds.<sup>477</sup> The district attorney, citing O.C.G.A. section 40-6-376(d),<sup>478</sup> responded with a motion to set aside Perkins’s prior reckless driving conviction.<sup>479</sup> The trial court sustained the plea in bar because it found that defendant’s “reckless driving conviction [was] a lesser included offense of the vehicular homicide offense for which he was indicted.”<sup>480</sup> The State appealed.<sup>481</sup>

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469. *Puplampu*, 257 Ga. App. at 6, 570 S.E.2d at 84 (quoting O.C.G.A. § 16-1-8(e)).

470. *Id.*

471. *Id.*

472. *Id.*, 570 S.E.2d at 85.

473. 256 Ga. App. 855, 569 S.E.2d 910 (2002).

474. *Id.* at 855-59, 569 S.E.2d at 901-14.

475. *Id.* at 866, 569 S.E.2d at 911.

476. *Id.*

477. *Id.*

478. O.C.G.A. § 40-6-376(d) (2001).

479. *Perkins*, 256 Ga. App. at 855, 569 S.E.2d at 911.

480. *Id.*

On appeal, “[t]he State d[id] not contest that, but for the application of [O.C.G.A. section] 40-6-376,<sup>482</sup> the instant prosecution would be barred on former jeopardy grounds.”<sup>483</sup> Instead, the State argued that according to O.C.G.A. section 40-6-376(d), defendant’s “reckless driving conviction [was] ‘null and void’”<sup>484</sup> because the probate court lacked jurisdiction to try defendant on the felony vehicular homicide charge, and the probate court also lacked jurisdiction on the underlying lesser included misdemeanor. The State, therefore, argued that double jeopardy protection was not triggered.<sup>485</sup>

The court of appeals held that the plain language of section 40-6-376(d) did not support the State’s argument.<sup>486</sup> The statute provided:

No court, other than a court having jurisdiction to try a person charged with a violation of [O.C.G.A.] [s]ection 40-6-393,<sup>487</sup> shall have jurisdiction over any offense arising under the laws of this state or the ordinances of any political subdivision thereof, which offense arose out of the same conduct which led to said person’s being charged with a violation of . . . [s]ection 40-6-393 and any judgment rendered by such court shall be null and void.<sup>488</sup>

The court determined that because “the Whitfield County Probate Court [had] jurisdiction to try misdemeanor vehicular homicide cases charged under [O.C.G.A. section] 40-6-393(b),<sup>489</sup> the probate court was, by definition, included among the courts that ‘hav[e] jurisdiction to try a [defendant] charged with [violating O.C.G.A. section] 40-6-393.’”<sup>490</sup> The court of appeals noted that the Georgia legislature made no distinction between misdemeanor and felony grades of vehicular homicide under section 40-6-393 when it drafted section 40-6-376(d).<sup>491</sup> Thus, the court reasoned, by its plain language, section 40-6-376(d) did not divest the Whitfield County Probate Court of jurisdiction to try Perkins on the reckless driving charge.<sup>492</sup> The court, therefore, held that the “conviction was not ‘null and void,’ and the trial court properly

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481. *Id.*

482. O.C.G.A. § 40-6-376(d).

483. *Perkins*, 256 Ga. App. at 855, 569 S.E.2d at 911.

484. *Id.*

485. *Id.* at 855-56, 569 S.E.2d at 911-12.

486. *Id.* at 856, 569 S.E.2d at 912.

487. O.C.G.A. § 40-6-393 (2001).

488. *Id.* (quoting O.C.G.A. § 40-6-376 (d)).

489. *See* O.C.G.A. § 40-6-393(b) (2001).

490. *Perkins*, 256 Ga. App. at 856, 569 S.E.2d at 912 (quoting O.C.G.A. § 40-6-376(d)).

491. *Id.*

492. *Id.*

sustained [defendant's] plea in bar."<sup>493</sup>

In his concurring opinion, joined by Judge Smith, Judge Pope stated that although he was "constrained to agree with . . . the majority, [he did] not believe that the legislature intended the result here."<sup>494</sup> Also, Judge Pope

[could not] agree with the dissent that the statute as written can be construed to effectuate that intent. Certainty of legislative intent cannot compensate for omissions or oversights in statutory drafting—we must abide by the statute as it is plainly written . . . and we cannot rewrite the statute to make such a distinction. This is a job for the General Assembly, not the courts.<sup>495</sup>

In his dissent, joined by Judge Ruffin, Judge Eldridge, relied on O.C.G.A. section 1-3-1(a)<sup>496</sup> and argued that the statute's plain language demands the construction that the legislature obviously intended when the law was enacted twenty years ago.<sup>497</sup> Judge Eldridge opined further that section 40-6-376(d) was enacted to prevent the very scenario presented by *Perkins*.<sup>498</sup> As evidenced from the statute's plain meaning, the legislature intended that only a court with the jurisdiction to try a person on the vehicular homicide with which he is charged should be able to dispose of the offense underlying that charge.<sup>499</sup> Judge Eldridge reasoned that "[t]he plain language of [O.C.G.A. section] 40-6-376(d) goes to a court's ability to try a person who has been charged with a vehicular homicide violation. The language in the statute twice referring to a person charged with a violation cannot simply be ignored as mere surplusage."<sup>500</sup> The dissent discovered incongruity, not in the statute's language, but in the majority's interpretation.<sup>501</sup>

Judge Eldridge further observed that the statute's plain language divests a probate court of jurisdiction over an underlying misdemeanor offense when a person has been charged with a felony violation of section 40-6-393.<sup>502</sup> Judge Eldridge opined that the probate court had no

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493. *Id.*

494. *Id.* (Pope, P.J., concurring).

495. *Id.* (Pope, P.J., concurring).

496. O.C.G.A. § 1-3-1(a) (2000). Section 1-3-1(a) states, "The initial rule of statutory construction is to look to the legislative intent and to construe statutes to effectuate that intent." *Id.*

497. *Perkins*, 256 Ga. App. at 857, 569 S.E.2d at 912 (Eldridge, J., dissenting).

498. *Id.* (Eldridge, J., dissenting).

499. *Id.* (Eldridge, J., dissenting).

500. *Id.*, 569 S.E.2d at 913 (Eldridge, J., dissenting).

501. *Id.* at 857-58, 569 S.E.2d at 913 (Eldridge, J., dissenting).

502. *Id.* at 858, 569 S.E.2d at 913 (Eldridge, J., dissenting).

authority to dispose of the reckless driving offense because it did not have jurisdiction to try defendant on the charge of felony vehicular homicide.<sup>503</sup>

The supreme court granted certiorari<sup>504</sup> and held that the dissenting judges in the appellate court correctly interpreted section 40-6-376(d).<sup>505</sup> The court held that the “determinative factor” was whether the vehicular homicide charge was a felony that would fall under section 40-6-393(a) or a misdemeanor that would fall under subsection (b) of O.C.G.A. section 40-13-21.<sup>506</sup> The distinction between the misdemeanor and felony grades determines whether section 40-6-376(d) applies to a probate court.<sup>507</sup> The court determined that in *Perkins*, defendant was charged with felony vehicular homicide, and the probate court did not have jurisdiction.<sup>508</sup> The court held that the code section’s jurisdiction restrictions over underlying offenses applied.<sup>509</sup> Properly interpreting section 40-6-376(d), the court held that the appellate court would have had to hold that the judgment entered by the probate court of the reckless driving charge was “null and void.”<sup>510</sup> The supreme court held that the trial court erred because it interpreted the statute incorrectly, and the court of appeals erred in affirming the trial court.<sup>511</sup>

In another case with a double jeopardy issue, *Johnson v. State*,<sup>512</sup> the court of appeals held that the trial court abused its discretion when it refused defendant’s request to accept the jury’s unanimous verdict on three of four counts when the jury was deadlocked on the fourth count.<sup>513</sup> The court of appeals found that a retrial on those three counts was barred under the double jeopardy clause.<sup>514</sup>

The record reflects that after the evidence was presented, the jury announced three separate times that it had reached a unanimous verdict on three counts but was deadlocked on the fourth. When the State moved for a mistrial, Johnson’s counsel made a motion that the trial court receive the verdicts on the three counts. The State concurred with defendant’s motion. The trial court entered a mistrial on all four counts,

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503. *Id.* at 858-59, 569 S.E.2d at 914 (Eldridge, J., dissenting).

504. *State v. Perkins*, 176 Ga. 621, 580 S.E.2d 523 (2003).

505. *Id.* at 622-23, 580 S.E.2d at 524-25.

506. *Id.* at 622, 580 S.E.2d at 525 (citing O.C.G.A. § 40-13-21(b) (2001)).

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.* at 623, 580 S.E.2d at 526.

511. *Id.* at 621, 580 S.E.2d at 524.

512. 256 Ga. App. 730, 569 S.E.2d 625 (2002).

513. *Id.* at 730, 569 S.E.2d at 626.

514. *Id.*

noting the lengthy time the jury had taken to deliberate compared to the short time it took the parties to present evidence. Defendant made a motion to dismiss because of a double jeopardy plea. The trial court denied the motion, and defendant appealed.<sup>515</sup>

The court of appeals, citing *Bair v. State*,<sup>516</sup> stated that defendant was entitled to receive any unanimous verdict reached by the jury impaneled and sworn to hear the charges against him.<sup>517</sup> The court also noted that the State concurred in Johnson's request to receive the jury's verdict on the three decided counts.<sup>518</sup> Additionally, the court noted that the trial court "could easily have followed the less drastic alternative of accepting the jury's verdict on the decided counts and declaring a mistrial only on the . . . undecided count."<sup>519</sup> The court held that the trial court abused its discretion in granting a mistrial on the three charges adjudicated by the jury and that any retrial of these three charges would be barred from retrial under the double jeopardy clause.<sup>520</sup>

In another case also named *Johnson v. State*,<sup>521</sup> the court of appeals held that the trial court erred in its denial of defendant's motion to dismiss on double jeopardy grounds after the trial court's *sua sponte* declaration of a mistrial.<sup>522</sup> The record reveals that the defense attorney interrupted the judge on several occasions, even though he received a warning from the judge on each occasion.<sup>523</sup> Also, the record indicates that the defense attorney called the prosecutor "an absolute liar"<sup>524</sup> during an intense argument that took place in front of the jury. The trial judge feared that defendant could no longer receive a fair trial because of the defense counsel's behavior so the trial judge, *sua sponte*, declared a mistrial. The State did not object to the mistrial, but defendant did object and informed the trial court that defendant desired for the trial to continue. The judge overruled defendant's objection, and the defense attorney filed a motion to dismiss on double jeopardy

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515. *Id.* at 731, 569 S.E.2d at 626.

516. 250 Ga. App. 226, 551 S.E.2d 84 (2001).

517. *Johnson*, 256 Ga. App. at 732, 551 S.E.2d at 627 (citing *Bair*, 250 Ga. App. at 226, 551 S.E.2d at 86).

518. *Id.* at 731, 569 S.E.2d at 626.

519. *Id.* at 732, 569 S.E.2d at 627 (citing *Bair*, 250 Ga. App. at 227, 551 S.E.2d at 86).

520. *Id.* (quoting *Bair*, 250 Ga. App. at 227, 551 S.E.2d at 86). The appellate court did find that the State could retry the defendant on the DUI charge. *Id.*

521. 258 Ga. App. 33, 572 S.E.2d 669 (2002).

522. *Id.* at 33, 572 S.E.2d at 670.

523. *Id.*

524. *Id.*

grounds. The trial court denied the motion.<sup>525</sup>

After denying defendant's motion, the trial court interviewed jurors about their reactions to the defense attorney's trial behavior. The interview transcript, filed under seal, did not reveal that the jurors would have been unable to decide the case fairly because of the defense attorney's actions.<sup>526</sup>

On appeal, the defense alleged that the trial court improperly declared a mistrial and erred in denying defendant's motion to dismiss on double jeopardy grounds.<sup>527</sup> Agreeing with defendant, the appellate court quoted the Georgia Constitution's prohibition against being put "in jeopardy of life or liberty more than once for the same offense except in the case of a new trial that is granted after conviction or in the case of mistrial,"<sup>528</sup> and held that double jeopardy "does not bar retrial of a criminal defendant following declaration of a mistrial over his objection where there is 'manifest necessity' for declaration of the mistrial or the 'ends of public justice' would be defeated by allowing the trial to continue."<sup>529</sup>

However, outside of such extreme circumstances, "the defendant has a right to be tried once and for all for the offense, and . . . consequently where a mistrial is granted because of *prejudice caused to the defendant*, the defendant has the right to object to a mistrial (and thus insist on this trial) despite any such prejudice to himself. . . ."<sup>530</sup>

The court noted that although the trial court "declared a mistrial based on a pattern of abrasive, unprofessional and disrespectful conduct by defense counsel, . . . which had alienated and upset the jury to the extent that the *defendant* could not receive a fair trial,"<sup>531</sup> the record did not clearly reveal that the jurors would not have been able to make a fair decision despite defendant's attorney's conduct.<sup>532</sup> The court further noted that the trial court stated that the mistrial was not declared because of prejudice to the State and that the State had failed in its responsibility to raise any objection to the mistrial.<sup>533</sup> Further, the court opined that, "[w]hile the trial court may have believed that

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525. *Id.*

526. *Id.* at 34, 572 S.E.2d at 670.

527. *Id.*

528. *Id.*, 572 S.E.2d at 671 (quoting GA. CONST. art. I, § 1, para. 18 (1998)).

529. *Id.* (quoting *Jackson v. State*, 226 Ga. App. 256, 257, 485 S.E.2d 832, 833 (1997)).

530. *Id.* at 35, 572 S.E.2d at 671 (quoting *State v. Abdi*, 162 Ga. App. 20, 21, 288 S.E.2d 772, 774 (1982)).

531. *Id.* (emphasis supplied).

532. *Id.*

533. *Id.*

[defense counsel's] actions caused prejudice to [defendant], this [belief did] not overshadow [defendant's] right to be tried once for the [charged offense].<sup>534</sup>

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534. *Id.*