

Criminal Law

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I. INTRODUCTION

In this year's survey of criminal law in Georgia, we selected only cases in which a new rule of law was announced, a case of first impression was presented, a case with unusual or interesting facts was presented, or the case, while saying nothing new, set forth well-established law about topics that we could all use a reminder of from time to time.

II. PRETRIAL ISSUES

A. *Speedy Trial*

When a motion for speedy trial is filed pursuant to the Sixth Amendment of the United States Constitution,¹ and a motion to dismiss alleging a speedy trial violation is subsequently filed, the trial court must enter findings of fact and conclusions of law setting forth its analysis pursuant to *Barker v. Wingo*.² The court must conduct the

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1. U.S. CONST. amend. VI.

2. 407 U.S. 514, 530 (1972).

four-step *Barker v. Wingo* analysis³ and must enter findings of fact and conclusions of law consistent with that opinion. If the court does not do so, the Georgia Court of Appeals held in *Bryant v. State*⁴ and *Smith v. State*,⁵ and the Georgia Supreme Court held in *Williams v. State*,⁶ that the denial of the motions to dismiss will be remanded to the trial court to conduct this essential analysis.

In two instances, the State of Georgia appealed trial court orders granting statutory speedy trial discharges,⁷ and in both *State v. Shields*⁸ and *State v. Edminson*,⁹ defendants prevailed, having sufficiently shown that discharge and acquittal were required for failure to try defendants during the time required by the statutory speedy trial demand.¹⁰

B. Double Jeopardy

If a mistrial is declared over the defendant's objection, the defendant cannot be retried unless it can be shown that the mistrial was manifestly necessary. In *Payne v. State*,¹¹ defendant was charged with various sexual offenses against his stepdaughter, who, after accusing him, recanted to a Department of Family and Children Services ("DFCS") caseworker. The stepdaughter explained she had accused Payne because she was angry at him for disciplining her, and she acquired knowledge of the sex acts she accused Payne of having committed upon her by viewing pornography at her father's home. The State moved to prohibit any evidence that the child had viewed pornography as violative of the Rape Shield Statute.¹² The motion was granted.¹³

At trial defense counsel cross-examined the State's DFCS worker and elicited testimony that the child had recanted.¹⁴ When defense counsel examined her further to elicit the child's explanation for having lied about Payne, the DFCS worker explained that the child "stated that she

3. *Id.* at 530.

4. 265 Ga. App. 234, 593 S.E.2d 705 (2004).

5. 266 Ga. App. 529, 597 S.E.2d 414 (2004).

6. 277 Ga. 598, 592 S.E.2d 848 (2004).

7. O.C.G.A. § 17-7-170 (2003).

8. 265 Ga. App. 473, 594 S.E.2d 692 (2004).

9. 265 Ga. App. 91, 593 S.E.2d 18 (2004).

10. *Shields*, 265 Ga. App. at 473-74, 594 S.E.2d at 692-93; *Edminson*, 265 Ga. App. at 91-92, 593 S.E.2d at 18-19.

11. 267 Ga. App. 498, 600 S.E.2d 422 (2004).

12. O.C.G.A. § 24-2-3 (2003).

13. *Payne*, 267 Ga. App. at 499, 600 S.E.2d at 423.

14. *Id.*

had seen a pornographic movie.”¹⁵ Defense counsel tried to stay within the parameters of the pretrial ruling by questioning the witness about the child’s anger at having been disciplined by Payne; however, on re-cross, defense counsel became concerned that the unresponsive answer concerning pornography could lead the jury to conclude that Payne had been the one to show the child the pornography. Because of this concern, defense counsel returned to the subject and was immediately silenced by the prosecutor, who objected and moved for a mistrial. The motion was granted over defense’s objection, which was raised in a motion to bar a retrial.¹⁶

The Georgia Court of Appeals held that defense counsel did not ask any question that would reasonably have led the DFCS worker to testify about the pornography.¹⁷ Moreover, the court concluded that once the witness testified, it was important for defense counsel to make certain that the jury did not impute to his client the alleged victim’s viewing of the pornographic images.¹⁸ That being the case, there was no “manifest necessity for the declaration of a mistrial without Payne’s consent.”¹⁹ Thus, the trial court erred in denying defendant’s plea of former jeopardy.²⁰

C. Statute of Limitations

The court of appeals, in *Tompkins v. State*,²¹ addressed the complexities of assessing the proper statute of limitations for cases concerning crimes against minors.²² First, in *Tompkins* the court established the rule that the seven-year limitation period for noncapital felonies committed against children under the age of fourteen is a general statute of limitations, not an exception to the four-year statute of limitations that applies to noncapital felonies committed against children between the ages of fourteen and sixteen.²³ The importance of this ruling is that any exception to the statute of limitations must be pleaded in the indictment in order for the State to rely upon it. If the seven-year statute of limitations is an exception to the four-year statute of limitations, the State would be required to plead in the indictment that

15. *Id.*

16. *Id.* at 499-500, 600 S.E.2d at 423-24.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. 265 Ga. App. 760, 595 S.E.2d 599 (2004).

22. *Id.* at 760, 595 S.E.2d at 599.

23. O.C.G.A. § 17-3-1(c) (2003).

the child was under fourteen in order to proceed with the seven-year, versus the four-year, limitations period.²⁴ In *Grizzard v. State*,²⁵ the Georgia Court of Appeals held that in order for the State to rely upon the seven-year limitations period, it must allege in the indictment, and prove, that the victim was under the age of fourteen.²⁶ The holding assumes that the seven-year period is an exception to the four-year limitations period.

The opinion in *Tompkins* disapproves of the holding in *Grizzard*. The court in *Tompkins* held that the seven-year limitations period is a general limitations period, not an exception to the four-year statute of limitations; therefore, it is not necessary for the State to plead age in the indictment to try and utilize the lengthier limitations period.²⁷ Of course either period of limitations is tolled when the indictment alleges that the victim is under the age of sixteen until the time that the child reaches the age of sixteen.²⁸

D. Demurrers: Sufficiency and Constitutionality of the Charging Documents

Two Georgia statutes²⁹ were declared unconstitutional by the Georgia Supreme Court during this reporting period. First, in *Cooper v. State*,³⁰ the constitutionality of the implied consent statute³¹ was challenged. The implied consent statute authorized the seizure of blood from any driver of a vehicle involved in an accident that resulted in serious bodily injury or death.³² Because the statute did not require any determination of whether probable cause existed to suspect the driver committed any crime, the statute violated state³³ and federal³⁴ constitutions and was declared unconstitutional.³⁵

Second, in *Mohamed v. State*,³⁶ the Georgia Supreme Court declared a section of the financial transaction card fraud statute³⁷ unconstitu-

24. *Moss v. State*, 220 Ga. App. 150, 469 S.E.2d 325 (1996).

25. 258 Ga. App. 124, 572 S.E.2d 760 (2002).

26. *Id.* at 127, 572 S.E.2d at 763.

27. 265 Ga. App. at 765, 595 S.E.2d at 603.

28. O.C.G.A. § 17-3-2.1 (2003).

29. *Id.*; O.C.G.A. § 16-9-31(d) (2003).

30. 277 Ga. 282, 587 S.E.2d 605 (2003).

31. O.C.G.A. § 17-3-2.1.

32. *Cooper*, 277 Ga. at 282, 587 S.E.2d at 606-07 (citing O.C.G.A. § 17-3-2.1).

33. GA. CONST. art. I, § 1, para. 13.

34. U.S. CONST. amends. IV & XIV.

35. *Cooper*, 277 Ga. at 283, 587 S.E.2d at 607.

36. 276 Ga. 706, 583 S.E.2d 9 (2003).

37. O.C.G.A. § 16-9-31(d) (2003).

tional.³⁸ The financial transaction card fraud statute provided that possession of two or more financial transaction cards, in the names of persons other than the suspect or his immediate family, would “be prima-facie evidence that the financial transaction cards” had been criminally obtained.³⁹ The court held that this mandatory presumption impermissibly shifted the burden of proof to the defendant to prove that he did not criminally obtain the cards.⁴⁰ Mohamed’s defense was that he found the cards on the ground; yet, the burden-shifting permitted by the statute undermined that defense and effectively eliminated the other sections of the financial transaction card fraud statute that established other elements of proof necessary for the crime. Therefore, the burden-shifting language of that statute was unconstitutional.⁴¹

In *State v. Langlands*,⁴² the State waged an unsuccessful challenge to a trial court’s decision to grant a demurrer on two counts of the indictment against Langlands. Defendant was charged with possession of a firearm by a convicted felon and felony murder. The predicate felony for the firearm offense was a 1985 conviction in Pennsylvania for involuntary manslaughter, and the predicate felony for the felony murder offense was the possession of a firearm. Under Pennsylvania law⁴³ involuntary manslaughter was categorized as a misdemeanor, but it carried a maximum sentence of five years.⁴⁴ The Georgia Supreme Court determined that the trial court was correct in finding that Georgia’s felon-in-possession-of-a-firearm statute⁴⁵ failed to provide “sufficient notice to persons with out-of-state misdemeanor convictions that their convictions may serve as predicate felony offenses” for the crime of possession of a firearm by a convicted felon.⁴⁶

There were several other instances where the appellate courts identified fatal errors in indictments that were sufficient to support the granting of general and special demurrers. Through its rulings the appellate court reminds prosecutors that it is imperative to plead every essential element of the crime in the indictment because “there can be no conviction for the commission of a crime[,] an essential element of

38. 276 Ga. at 709, 583 S.E.2d at 12.

39. O.C.G.A. § 16-9-31(d).

40. *Mohamed*, 276 Ga. at 708, 583 S.E.2d at 12.

41. *Id.* at 707-08, 583 S.E.2d at 11.

42. 276 Ga. 721, 583 S.E.2d 18 (2003).

43. 18 PA. C.S.A. § 2504 (2004).

44. *Langlands*, 276 Ga. at 722, 583 S.E.2d at 20.

45. O.C.G.A. § 16-11-131 (2003).

46. *Langlands*, 276 Ga. at 724, 583 S.E.2d at 21.

which is not charged in the indictment.”⁴⁷ In *Spence v. State*,⁴⁸ the court of appeals held that the indictment, which charged Spence with the crime of fleeing and attempting to elude a police officer, merely recited a description of the statute along with some, but not all, of the elements of the offense, which rendered the indictment fatally deficient.⁴⁹ The fleeing and eluding statute⁵⁰ provides that it is

unlawful for any driver of a vehicle willfully to fail or refuse to bring his or her vehicle to a stop or otherwise to flee or attempt to elude a pursuing police vehicle or police officer when given a visual or an audible signal to bring the vehicle to a stop.⁵¹

The court of appeals held that the indictment was fatally defective because it failed to allege: (1) that Spence intended to elude the police when he failed to stop his car; (2) which signals Spence ignored (visual or audible); and (3) which signals were given by the police.⁵²

In *State v. Burrell*,⁵³ the court of appeals both affirmed and reversed a trial court determination concerning multiple charges of aggressive driving and reckless driving, all arising out of the same incident.⁵⁴ After being cut off in traffic by the driver of an Acura, Burrell chased the car at a high rate of speed and in a reckless manner. The incident ended in a collision. Burrell was charged with four counts of aggressive driving⁵⁵ and four counts of reckless driving;⁵⁶ each of the four counts differed only by naming the four occupants of the Acura.⁵⁷ The trial court sustained the demurrer, finding that both offenses related to the conduct of defendant driver and not to his intent toward the driver or occupant of the other car; therefore, there could be only one charge of each offense arising out of Burrell’s conduct.⁵⁸ The appellate court agreed with that rationale as it applied to the charge of reckless driving but disagreed that the argument applied to the aggressive driving

47. *Spence v. State*, 263 Ga. App. 25, 27, 587 S.E.2d 183, 185 (2003) (quoting *Smith v. Hardrick*, 266 Ga. 54, 55, 464 S.E.2d 198, 200 (1995)).

48. 263 Ga. App. 25, 587 S.E.2d 183 (2003).

49. *Id.* at 28, 587 S.E.2d at 186.

50. O.C.G.A. § 40-6-395(a) (2003).

51. *Id.*

52. *Spence*, 263 Ga. App. at 27-28, 587 S.E.2d at 186.

53. 263 Ga. App. 207, 587 S.E.2d 298 (2003).

54. *Id.* at 209, 587 S.E.2d at 300.

55. O.C.G.A. § 40-6-397 (2003) (a relatively new statute aimed at the problem of “road rage”); *Burrell*, 263 Ga. App. at 207, 587 S.E.2d at 299.

56. O.C.G.A. § 40-6-390 (2002); *Burrell*, 263 Ga. App. at 207, 587 S.E.2d at 299.

57. *Burrell*, 263 Ga. App. at 207-08, 587 S.E.2d at 298-99.

58. *Id.* at 207, 587 S.E.2d at 299.

statute.⁵⁹ As the road rage statute⁶⁰ states, “A person commits the offense of aggressive driving when he or she operates any motor vehicle with the intent to annoy, harass, molest, intimidate, injure, or obstruct another person.”⁶¹ The legislature chose not to limit the potential victim to just the car or the driver but to any or all of the occupants of the car being pursued, if the State can show the requisite intent as it relates to any specific person named in the indictment.⁶² Therefore, Burrell’s indictment, which charged four counts of aggressive driving that arose out of the same car chase, could stand.⁶³

Causation is always a necessary element of the offense and must be pleaded in the indictment. In *Scraders v. State*,⁶⁴ the State indicted defendant for involuntary manslaughter with a misdemeanor offense of possession of a firearm by a person under the age of eighteen. However, the indictment failed to allege the causation between Scraders’s illegal possession of the gun and the death of the victim. Because defendant could have admitted to being a minor in possession of a gun, along with an admission that he unintentionally caused the victim’s death, defendant could not be convicted of the offense of involuntary manslaughter because no act—such as pointing the gun at the victim or acting recklessly with the firearm—was alleged in the indictment.⁶⁵

Likewise, the charging document must also set forth every essential element of the offense, including the predicate acts that form the basis for the offense charged. Failure to do so deprives the accused of due process because it fails to inform him of the nature of the offense to sufficiently enable him to prepare his defense. This is the case for all charging documents, including the insufficient juvenile delinquency petition used in *In the Interest of E.S., A Child*.⁶⁶ The juvenile petition charging E.S. with violation of the Street Gang Act⁶⁷ simply recited that the juvenile violated the statute “by engaging in a pattern of criminal gang activity”⁶⁸ without describing any of the acts he allegedly performed.⁶⁹

59. *Id.* at 208, 587 S.E.2d at 300.

60. See O.C.G.A. § 40-6-397 (2003).

61. *Id.*

62. *Burrell*, 263 Ga. App. at 208-09, 587 S.E.2d at 300.

63. *Id.* at 209, 587 S.E.2d at 300.

64. 263 Ga. App. 754, 589 S.E.2d 315 (2003).

65. *Id.* at 754-55, 589 S.E.2d at 315-16.

66. 262 Ga. App. 768, 586 S.E.2d 691 (2003).

67. O.C.G.A. § 16-15-4 (2003).

68. *In the Interest of E.S.*, 262 Ga. App. at 769, 586 S.E.2d at 693 (quoting O.C.G.A. § 16-15-4).

69. *Id.* at 769-70, 586 S.E.2d at 692-93.

The indictment must also name the victim so that the defendant is given notice of the person whom he is alleged to have injured. The practice of referring to child victims in charging documents by initials only came under scrutiny this reporting period. In *Sellers v. State*,⁷⁰ defendant was indicted for child molestation, but the indictment listed the name of the victim by initials only.⁷¹ The court of appeals recognized that the longstanding practice of naming child victims by initials only was to protect the child's privacy and noted that it is the practice of the appellate courts to refer to children by initials in the court opinions.⁷² Yet the court held that the impulse to protect the minor's identity must give way to the more important constitutional considerations that require the defendant be properly notified in the charging document of the name of his accuser.⁷³

E. Search and Seizure

A legitimate need exists for law enforcement, on occasion, to stop or "seize" a person. Such a seizure should be brief. A person stopped may be frisked, which means patting down the outer clothing for the presence of weapons. Both the stop and the frisk must be based upon specific facts that the officer can articulate, along with reasonable inferences drawn from those facts, which when judged against an objective standard—what a reasonable person would think—would justify the stop and the frisk.⁷⁴ The stop must be based upon a reasonable suspicion of criminal activity, but the frisk must be based upon a reasonable suspicion that the person stopped may be armed.⁷⁵

The legal issues that surround such a police-citizen encounter involve the circumstances that justify the initial stop, the scope of the officer's contact with the citizen after making the stop, and the lawful response a citizen may give to this restraint upon his movement. With respect to the latter issue, a Georgia citizen may refuse to identify himself to police and simply walk away, unless the police officer makes the request in the "lawful discharge of his official duties."⁷⁶ "Lawful discharge" means

70. 263 Ga. App. 144, 587 S.E.2d 276 (2003).

71. *Id.* at 144, 587 S.E.2d at 277.

72. *Id.* at 145, 587 S.E.2d at 277.

73. *Id.*, 587 S.E.2d at 278. The holding is specifically limited to pretrial demurrers. In the event that this issue is raised after a trial, it would be necessary to prove that the defendant did not, in fact, know the identity of the victim identified only by initials. *Id.* at 146, 587 S.E.2d at 278.

74. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Slocum v. State*, 267 Ga. App. 337, 337, 599 S.E.2d 299, 300 (2004).

75. *Terry*, 392 U.S. at 10.

76. O.C.G.A. § 16-10-24 (2003).

that, while on duty, a “police officer may make a momentary detention and investigation based upon specific and articulable facts, which must exceed mere inclination, caprice, or harassment.”⁷⁷ However, the citizen’s decision that the officer does not possess any specific, articulable fact that would support a suspicion of criminal activity, thereby justifying the citizen’s refusal to stop or provide identification, is fraught with peril.⁷⁸ Instances in which a citizen refuses to comply with an officer and the officer fails to charge the citizen with a crime are those cases that never reach a courtroom. Only when a stop, search, arrest, and prosecution occur do we actually find a reported case.

Georgia recognizes three tiers of police-citizen encounters: (1) “communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment”; (2) “brief ‘seizures’ that must be supported by reasonable suspicion”; and (3) “full-scale arrests that must be supported by probable cause.”⁷⁹

In the first level, police officers may approach citizens, ask for identification, and freely question the citizen without any basis or belief that the citizen is involved in criminal activity, as long as the officers do not detain the citizen or create the impression that the citizen may not leave.⁸⁰

In *White v. State*,⁸¹ two police officers, Branham and Moye, drove onto “residential property where individuals performed automotive work for the general public.”⁸² White was in the yard of this house, which was in a known drug area, and he offered to wash and wax the officers’ car.⁸³ The court recounts what then ensued:

Moye declined the offer and walked away. White, however, repeated his offer to Branham. While White was speaking, Branham noticed

77. *Smith v. State*, 262 Ga. App. 614, 617, 585 S.E.2d 888, 892 (2003).

78. *See Hiibel v. Sixth Judicial Dist. Court of Nev.*, 124 S. Ct. 2451, 2461 (2004) (holding that neither Mr. Hiibel’s Fourth nor Fifth Amendment rights were violated upon his conviction under Nevada’s “stop and identify” statute when he refused to identify himself to police officers). *See Clark v. State*, 243 Ga. App. 362, 365, 532 S.E.2d 481, 484 (2000) (“merely refusing to identify oneself to a police officer is not a crime, [but] one may commit obstruction when knowingly and willfully hindering an officer in investigating an offense committed by another.”).

79. *Alexander v. State*, 166 Ga. App. 233, 234, 303 S.E.2d 773, 774 (1983). *See White v. State*, 267 Ga. App. 200, 598 S.E.2d 904 (2004); *Peters v. State*, 242 Ga. App. 816, 817, 531 S.E.2d 386, 387-88 (2000); *McAdoo v. State*, 164 Ga. App. 23, 295 S.E. 114 (1982).

80. *White*, 267 Ga. App. at 201, 598 S.E.2d at 906-07.

81. *Id.*

82. *Id.* at 200, 598 S.E.2d at 906.

83. *Id.*

that White's left thumb and index finger were pinched together as if he were hiding something. White's behavior prompted Branham to inquire whether White had any drugs. White responded that he had "a nick weed," which is street language for a small amount of marijuana.⁸⁴

Until White claimed he was holding marijuana, he was, according to Branham, free to walk away and not answer any of Branham's questions. White, up to the point of his admission, was engaged in a tier one encounter with Officer Branham.⁸⁵ The encounter escalated to a tier two when, "[f]earing that White would try to get rid of the drugs, Branham grabbed White's hand, and White dropped a piece of crack cocaine onto the ground."⁸⁶ White's statement gave Branham reasonable suspicion to suspect that White was involved in criminal activity. The encounter then quickly moved to tier three when Branham arrested White for possession of illegal drugs. The court of appeals affirmed the trial court's denial of White's motion to suppress the evidence seized from him.⁸⁷

In some cases the police-citizen encounter begins at tier two, descends to tier one, then jumps back to tier two, and then ends with a tier three arrest. Consider *Daniel v. State*⁸⁸ where Officer Ryals stopped Daniel for weaving out of his lane of traffic. Two other people were in the car with Daniel. Daniel gave a false name to the officer and claimed not to have any identification on him. Dawson, a front seat passenger, gave the officer his driver's license. Ryals left Daniel and Dawson in their car, returned to his patrol car, and ran a license check on the fake name Daniels had given him and on Dawson's license; he found both names to belong to licensed drivers. Ryals then issued Daniel a warning citation. Because Daniel did not have a driver's license on him, Ryals told him that he would have to let Dawson drive, but that they were free to leave. At this point, the tier two encounter—a brief seizure based upon the officer's observation of weaving—ended.⁸⁹ When Daniel was about to get into the passenger side of his car to let Dawson drive away, Ryals asked: "Do you mind if I ask a question?" This was a tier one encounter to which Daniel could have responded by answering the question, or saying nothing at all, getting in his car, and leaving. But Daniel answered "sure." Ryals then told Daniel he was free to leave, but that

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 202, 598 S.E.2d at 907.

88. 277 Ga. 840, 597 S.E.2d 116 (2004).

89. *Id.* at 847-48, 597 S.E.2d at 123-24.

he would like to talk to him. Daniel said nothing in response but continued to stand next to his car. In a manner now familiar to all who prosecute or defend traffic stop cases, Ryals proceeded to tell Daniel about the problems with narcotics coming into the area and then asked Daniel whether it would be alright for him to search his car. Daniel consented. Drugs were found on Daniel and in his car. Ryals then moved to tier three and arrested Daniel.⁹⁰

Frisking a citizen for weapons often turns into a search for other evidence of a crime. In *Cartwright v. State*,⁹¹ police officers responded to a complaint that Cartwright and her husband, Grant, were arguing with their neighbors over how fast the neighbors' son was driving his car through the neighborhood. The neighbors told the officers that either Cartwright or Grant had threatened to shoot out the tires on the kid's car. The officers then walked across the street to talk to Cartwright and Grant. Grant said he had a gun but would not use it, while Cartwright warned that if the kid came back she would shoot out his tires. The officers then patted the couple down for weapons.⁹²

While patting down Cartwright, the officer felt something hard in Cartwright's front pocket. The officer removed it; it was a magazine clip containing bullets. The officer returned to the pat-down and felt another hard object, this time in Cartwright's back pocket. When the officer removed the object, she saw it was a small wooden box. She opened it, only to find that it contained marijuana. The officer arrested Cartwright.⁹³

On appeal from the trial court's denial of Cartwright's motion to suppress, the court of appeals reversed, holding that opening the box exceeded the scope of the officer's lawful pat-down for weapons.⁹⁴ A pat-down is a search limited to weapons and is authorized only when the officer has a reasonable belief that the person is armed and dangerous.⁹⁵ In this instance the officer did possess such a reasonable belief because Cartwright was agitated and threatened to shoot out someone's tires. The search went wrong, however, when the officer opened the box, not because she thought it contained a weapon, which she did not, but because, as she testified, she thought it contained marijuana. Even if the officer had thought the box contained a weapon, she still could not

90. *Id.* at 848, 597 S.E.2d at 124.

91. 265 Ga. App. 520, 594 S.E.2d 723 (2004).

92. *Id.* at 520, 594 S.E.2d at 723.

93. *Id.*

94. *Id.* at 522, 594 S.E.2d at 725.

95. *Id.* at 521, 594 S.E.2d at 724.

have opened the box because the purpose of the pat-down had been accomplished when she removed the box from Cartwright.⁹⁶

To illustrate how thinly the courts slice these pat-down cases, note the distinction between *Cartwright* and *Davis v. State*.⁹⁷ In *Davis* the “officer was justified in opening a cigarette box found in the [defendant’s] pocket because the officer testified that he believed the box might contain ‘a razor blade, needle, or other small weapon.’”⁹⁸ In fact it contained marijuana, but that search was upheld, even though, as in *Cartwright*, the officer had removed the possible weapon from Davis and, therefore, had accomplished the purpose of the pat-down.⁹⁹ Note that the entire difference between the two cases appears to be the testimony of the respective police officers about what they believed to be in the boxes when they opened them.

In yet another cigarette box pat-down case, the State unsuccessfully sought to reverse the trial court’s suppression of methamphetamine that a Department of Natural Resources ranger found on a hunter.¹⁰⁰ In *State v. Jourdan*,¹⁰¹ the ranger testified that he knew the box could contain a small weapon, but he did not think that it did.¹⁰² That makes the case, and the outcome, much like *Cartwright*¹⁰³ and unlike *Davis*.¹⁰⁴ But *Jourdan* raises the additional issue of consent. The ranger asked Jourdan to climb down from a deer stand, after which the ranger asked Jourdan whether he had any weapons and if he would consent to a search, which Jourdan did. The ranger checked Jourdan’s pockets, found no weapons, then asked Jourdan to remove his coveralls, which he did. The ranger felt a cigarette box in Jourdan’s shirt pocket and requested that Jourdan hand it to him, which he did. The ranger opened the box and found the methamphetamine.¹⁰⁵

In addition to its argument that the seizure was lawful because the pat-down was lawful, the State argued that the search of the cigarette box was lawful because Jourdan had given consent.¹⁰⁶ However, both

96. *Id.*

97. 232 Ga. App. 450, 501 S.E.2d 241 (1998).

98. *Cartwright*, 265 Ga. App. at 520, 594 S.E.2d at 724-25 (quoting *Davis*, 232 Ga. App. at 451, 501 S.E.2d at 244).

99. *Davis*, 232 Ga. App. at 451, 501 S.E.2d at 243-44.

100. *State v. Jourdan*, 264 Ga. App. 118, 589 S.E.2d 682 (2003).

101. 264 Ga. App. 118, 589 S.E.2d 682 (2003).

102. *Id.* at 120, 589 S.E.2d at 685.

103. *Cartwright*, 265 Ga. App. at 520, 594 S.E.2d at 723.

104. *Davis*, 232 Ga. App. at 450, 501 S.E.2d at 241.

105. *Jourdan*, 264 Ga. App. at 119, 589 S.E.2d at 684.

106. *Id.*, 589 S.E.2d at 684-85.

the trial court and appellate court disagreed.¹⁰⁷ The court of appeals held: “While Jourdan apparently acquiesced to the officer’s directive to give him the cigarette box, we cannot say that single factor demonstrated free consent or showed that Jourdan felt free to refuse to do so.”¹⁰⁸ Again, to illustrate how thin the factual differences can be between cases that produce diametrically opposite results, the court distinguished *Morris v. State*¹⁰⁹ from *Jourdan* by noting that in *Morris* the officer asked Morris if he would mind if the officer examined a box of matches he had seized from him, to which Morris responded by saying, “no, go ahead.”¹¹⁰ Those three little words from Morris gave the consent that Jourdan failed to give by merely handing over the cigarette pack when directed to do so by the ranger.

If, during a pat-down for weapons, an officer feels something that he or she knows is not a weapon, but feels like “an object whose contours and mass makes [sic] it immediately identifiable as contraband, that officer can seize the item.”¹¹¹ Such a tactile experience by the officer increases the officer’s belief from a reasonable suspicion that the person being searched may be armed to probable cause that the person is committing a crime. This standard was initially set forth by the United States Supreme Court in 1993, when the Court established what has come to be known as the “plain feel doctrine.”¹¹² In *Henderson v. State*,¹¹³ the court affirmed the suppression of the officer’s seizure of a plastic bag containing drugs found in Henderson’s coin pocket, felt during a lawful pat-down, because there was nothing about the baggie that would immediately distinguish it from a legal substance, such as “sweetener or headache powder,” and the officer failed to articulate any distinction.¹¹⁴

Like all search and seizure cases, the slight factual differences between pat-down cases make all the difference in their outcomes. Now compare the result in *Henderson* to *Bianco v. State*,¹¹⁵ in which the court affirmed the denial of a motion to suppress when a sixteen-year police veteran testified that the object he felt in defendant’s pocket felt

107. *Id.* at 123, 589 S.E.2d at 687.

108. *Id.* at 121, 589 S.E.2d at 685-86.

109. 239 Ga. App. 100, 520 S.E.2d 485 (1999).

110. *Jourdan*, 264 Ga. App. at 121, 589 S.E.2d at 686 (quoting *Morris*, 239 Ga. App. at 101, 520 S.E.2d at 488).

111. *State v. Henderson*, 263 Ga. App. 880, 883, 589 S.E.2d 647, 649 (2003) (quoting *Patman v. State*, 244 Ga. App. 833, 834, 537 S.E. 118, 120 (2000)).

112. *Minnesota v. Dickerson*, 508 U.S. 365, 377 (1993).

113. 263 Ga. App. 880, 589 S.E.2d 647 (2003).

114. *Id.* at 882, 589 S.E.2d at 648.

115. 257 Ga. App. 289, 570 S.E.2d 605 (2002).

to him like a “corner baggie,” commonly used in street drug sales.¹¹⁶ The officer in *Henderson*, it should be noted, testified that he had no doubt that what he felt in Henderson’s pocket was contraband. He could tell it was a plastic bag, he knew that drugs were frequently stored in plastic bags, and he knew that the coin pocket was a favorite place for people to hide drugs. But the officer in *Henderson* only had two-and-a-half years experience in drug interdiction as opposed to the sixteen years experience of the officer in *Bianco*.¹¹⁷ More importantly, however, in *Bianco*,¹¹⁸ as well as in *Seaman v. State*,¹¹⁹ a case in which the officer felt a plastic bag in defendant’s pocket, believed it contained contraband, and could see a portion of the bag protruding from the defendant’s pocket, the trial courts denied the motions to suppress; however, in *Henderson* the trial court granted the motion.¹²⁰ The trial courts’ decisions mattered to the appellate court because “[i]n these cases, which are very ‘fact specific,’ the decision of the trial judge, sitting as the trier of fact, should be accorded considerable deference when his or her decision falls within the broad outlines of the guidance provided by the United States Supreme Court in *Dickerson*.”¹²¹

In *Burrell v. State*,¹²² Officer Pickens stopped a car one December night because it did not have a “properly affixed license plate.”¹²³ The driver was arrested after a driver’s license check because he had outstanding warrants. Two additional officers, Reddy and Brewer, arrived as backup. The driver asked Pickens if his buddy, front seat passenger Samuel Burrell, could drive his car to avoid having it impounded. Reddy approached Burrell to verify that he had a valid license. Reddy ran a license check on Burrell, which resulted in a problem with Burrell’s license; the name Burrell gave did not match the license number. Pickens took the license from Reddy to run a second check. While running the check from inside his police car, Pickens noticed that Reddy was conducting a pat-down of Burrell. Reddy found a knife and a martial arts weapon. Pickens and Brewer then confronted Burrell with the fake name problem, and Burrell admitted to using a false name because he had outstanding warrants as well. The officers arrested Burrell, but when Pickens detected a gun on Burrell, Burrell

116. *Id.* at 291, 570 S.E.2d at 607.

117. *Henderson*, 263 Ga. App. at 884-85, 589 S.E.2d at 650.

118. *Bianco*, 257 Ga. App. at 289, 570 S.E.2d at 605.

119. 214 Ga. App. 878, 449 S.E.2d 526 (1994).

120. *Henderson*, 263 Ga. App. at 885, 589 S.E.2d at 650.

121. *Id.*

122. 261 Ga. App. 677, 583 S.E.2d 521 (2003).

123. *Id.* at 677, 583 S.E.2d at 521.

attempted to flee. He did not get very far, however, because the officers tackled him and secured the gun in his possession.¹²⁴

At the suppression hearing, Reddy never testified. At the hearing, Pickens admitted he had never had a conversation with Burrell until after he conducted the second license check. Thus, Pickens did not know what transpired between Reddy and Burrell regarding the driver's request to allow Burrell to take the car. Therefore, Pickens did not know whether the encounter between Reddy and Burrell was in fact a tier one encounter. Because the State failed to provide evidence to show why Burrell's license was being checked, the State failed to meet its burden of proving that the encounter between the officers and Burrell was lawful; thus, the evidence had to be suppressed.¹²⁵

In reviewing a motion to suppress, the appellate court will affirm the trial court's findings of disputed facts, unless clearly erroneous, and will review its application of law to undisputed facts de novo.¹²⁶ In *Moore v. State*,¹²⁷ two deputies stopped at a travel center around 3:00 a.m. to get something to eat, and a clerk asked them to check out a suspicious car in the rear lot where the large trucks refueled. When the deputies saw the car pull away, one of them pursued the driver, Moore, and stopped him. This deputy, Mobley, smelled alcohol, saw that Moore's eyes were bloodshot, and noticed he was unsteady on his feet. Moore admitted that he had been drinking; his breath test results read 0.180.¹²⁸

If the officer made the traffic stop based upon some particular suspicion of criminal activity, rather than a stop based upon a citizen's suspicion of Moore being parked in the wrong place, the stop would have been legal and the further evidence acquired admissible against Moore. As it was, however, the evidence had to be suppressed. Parking in an unusual place is insufficient to raise suspicion of criminal behavior.¹²⁹

Credibility findings by a trial court will be upheld unless they are clearly erroneous.¹³⁰ In *State v. Keddington*,¹³¹ Officer Bates stopped Keddington because her Mitsubishi had "Euro" style taillights—white lenses with red circles in the middle. The problem with these taillights, according to Bates, is that they violate section 40-8-23(e) of the Official

124. *Id.*, 583 S.E.2d at 522.

125. *Id.*, 583 S.E.2d at 523.

126. *Moore v. State*, 265 Ga. App. 108, 108, 592 S.E.2d 892, 893 (2004).

127. 265 Ga. App. 108, 592 S.E.2d 892 (2004).

128. *Id.* at 108, 592 S.E.2d at 893.

129. *Id.* at 109, 592 S.E.2d at 894.

130. *State v. Keddington*, 264 Ga. App. 912, 913, 592 S.E.2d 532, 533 (2003).

131. 264 Ga. App. 912, 592 S.E.2d 532 (2003).

Code of Georgia Annotated (“O.C.G.A.”),¹³² which requires that “[a]ll lenses on taillights shall be maintained in good repair and shall meet manufacturers’ specifications.”¹³³ Bates claimed to have conducted personal research to determine that these “Euro” style lights did not meet Mitsubishi’s specifications. However, Bates could not produce any documents to support his research, he could not identify what Mitsubishi’s taillight specifications were, and he did not know who made Mitsubishi taillights. The State, in arguing its case, told the trial court that the court’s decision would come down to whether the court believed that Bates thought the taillights violated the law, giving him reasonable suspicion to pull over the car to investigate, even if he could not support his belief in court. The trial court, however, apparently did not believe Bates.¹³⁴ The court of appeals held Bates’s justification for the stop to have been unreasonable and not in good faith.¹³⁵

“[W]here police acquire information from an anonymous informant or one of unknown reliability, this is ordinarily not a sufficient basis to provide reasonable suspicion [to make a traffic stop, a tier two encounter], unless the information exhibits sufficient indicia of reliability.”¹³⁶ In *Slocum v. State*,¹³⁷ a “female called 911 at night from a payphone near an intersection on a major thoroughfare in Hall County reporting that she had been assaulted by a white male and that a dark colored sport utility vehicle (“SUV”) was involved.”¹³⁸ The officers pulled over a dark Ford Explorer SUV about a block away from the intersection where the call had been made. That was all the information the officers received. They had no identity of the 911 caller, when or where the alleged assault had occurred, how the SUV or anyone in it was involved, or any further description of the SUV. *Slocum*, the driver of the SUV, had been drinking and driving. His subsequent conviction for DUI was reversed, however, because the officers lacked a sufficient indicia of reliability to have a reasonable suspicion that this particular SUV was the SUV the 911 caller described.¹³⁹

Appellate courts have clearly defined the factors of a roadblock warrant so that evidence seized will be admissible against the driver

132. O.C.G.A. § 40-8-23(c) (2003).

133. *Keddington*, 264 Ga. App. at 912, 592 S.E.2d at 533.

134. *Id.* at 913, 592 S.E.2d at 533.

135. *Id.* at 914, 592 S.E.2d at 534.

136. *Slocum v. State*, 267 Ga. App. 337, 338, 599 S.E.2d 299, 300 (2004). *See also* *Alabama v. White*, 496 U.S. 325 (1990).

137. 267 Ga. App. 337, 599 S.E.2d 299 (2004).

138. *Id.* at 337, 599 S.E.2d at 300.

139. *Id.*, 599 S.E.2d at 301.

who encounters one.¹⁴⁰ The factors are as follows: (1) The decision to set up a roadblock must be made by a supervisory police officer, not an officer in the field, and (2) the supervisory officer must have a valid primary purpose for the roadblock, other than a general search for any sort of criminal behavior.¹⁴¹ Two roadblock cases were reversed this reporting period because the State failed to call the supervisor as a witness to establish these two simple conditions.¹⁴² Hearsay from field officers that a supervisor ordered the roadblock for a valid purpose is not sufficient evidence.¹⁴³

In *State v. Charles*,¹⁴⁴ Charles and Jackson got a room at the Suburban Lodge motel. Someone called the police to complain of “heavy foot traffic going in and out of” the boys’ room.¹⁴⁵ No doubt with thoughts of drug-dealing on their mind, three officers arrived to investigate. When Jackson opened the door, two of the officers smelled marijuana. Jackson told them the room belonged to his uncle, and he was there with a friend. Soon after, Charles came out of the room, and in response to a question from one of the officers, admitted he had smoked pot earlier that day.¹⁴⁶

The officers then asked if they might enter the room. The boys said “no.” One officer entered anyway to make a “protective sweep.” During the protective sweep, the officer noticed a bag of pot on the toilet tank. The officer testified he had intended to apply for a search warrant before he swept; however, the officer who actually obtained the search warrant testified that no one said anything about a search warrant until the sweeper found the pot on the commode. When the officer returned with the search warrant, more marijuana, some scales, and about twenty-five rocks of cocaine were found.¹⁴⁷

The decision by the trial court to suppress the evidence, and the appellate court’s affirmation of that decision, turned, in large part, on the nature of a protective sweep.¹⁴⁸ “A “protective sweep” is a limited search of the [premises] primarily to ensure officer safety by detecting the presence of other occupants.”¹⁴⁹ The court determined that

140. *Cook v. State*, 265 Ga. App. 491, 492, 594 S.E.2d 708, 709 (2004).

141. *Id.* at 492-93, 594 S.E.2d at 709.

142. *Id.* at 491, 594 S.E.2d at 709; *Morris v. State*, 265 Ga. App. 186, 593 S.E.2d 360 (2004).

143. *Morris*, 265 Ga. App. at 187-88, 593 S.E.2d at 362.

144. 264 Ga. App. 874, 592 S.E.2d 518 (2003).

145. *Id.* at 874, 592 S.E.2d at 519.

146. *Id.* at 875, 592 S.E.2d at 519.

147. *Id.*

148. *Id.*

149. *Id.*

neither of the boys posed a threat to the officers; therefore, there was no reason to perform a protective sweep.¹⁵⁰

But what about the marijuana smell? Surely that establishes probable cause to believe a crime is being committed. After all, the State argued, the appellate court has held that an officer may search a car based only upon the smell of marijuana wafting through the window during a traffic stop.¹⁵¹ But this case involved a motel room, not a car. Additionally, the search warrant said "slight odor of burned marijuana," not "burning marijuana."¹⁵² This led the court to hold that a weak odor of stale marijuana in a motel room is not enough information to support a search warrant.¹⁵³

Is it enough that one of the occupants of the room admitted to having smoked pot earlier that day? "Because marijuana is a consumable product, this Court has previously recognized that an admission that marijuana had been used in the past may be insufficient to show that marijuana may be currently on the premises."¹⁵⁴ Neither Jackson nor Charles smelled like marijuana, they did not appear to be intoxicated, and the odor from the room was not fresh marijuana. Furthermore, neither defendant admitted there was any marijuana in the room. Armed with this weak evidence, the officers did not have enough information to obtain a search warrant.¹⁵⁵

The supreme court granted *certiorari* to consider whether a statement against one's penal interest is sufficient to authorize issuance of a search warrant in *Graddy v. State*.¹⁵⁶ This issue first arose when police arrested Mills near Graddy's property and charged him with possession of a concealed weapon.¹⁵⁷ "After his arrest, Mills provided information" that he observed Graddy's son manufacturing methamphetamine on the property.¹⁵⁸ The magistrate concluded that this inside information was sufficient to issue the search warrant for Graddy's premises. Graddy was arrested and charged with manufacturing methamphetamine, manufacturing methamphetamine within one thousand feet of a school, and possession of a firearm by a convicted felon.¹⁵⁹

150. *Id.* at 876, 592 S.E.2d at 520.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. 277 Ga. 765, 596 S.E.2d 109 (2004).

157. *Id.* at 765, 596 S.E.2d at 109.

158. *Id.*

159. *Id.*

The trial court granted the motion to suppress. The court of appeals reversed, and the supreme court affirmed the court of appeals.¹⁶⁰ There is a general rule of evidence in criminal cases that “hearsay statements that are against the criminal interest of a third party declarant and exculpatory of the accused are inadmissible.”¹⁶¹

But what about using a third party declarant’s hearsay to obtain a search warrant? The supreme court has determined this is acceptable because, “[T]hat rationale for discounting exculpatory statements against penal interest does not apply in the pre-trial warrant context, where the issue ‘is not guilt beyond reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises.’”¹⁶²

The court of appeals faced a novel issue in a search case upon which the Georgia Supreme Court has granted certiorari in *Randolph v. State*.¹⁶³ Do the police have the authority to conduct a warrantless search of a house when one spouse says “go ahead and search” and the other spouse says “get lost”? Scott Randolph and his wife separated. Ms. Randolph loaded her clothes and left for Canada with the couples’ child. About two months later, Ms. Randolph returned to Georgia with the child. After a couple of days back at home with her husband, Ms. Randolph called the police. Mr. Randolph had taken the child from the house, she reported, and she was “very upset.” When the police arrived, Ms. Randolph accused her husband of using cocaine, thereby causing money problems for the family. Not long after, Mr. Randolph arrived home and explained to the police that he had taken the child to a neighbor’s house because he feared that his wife was about to run again. He also told the police that his wife was drunk and was an alcoholic.¹⁶⁴

The reporting officer asked Mr. Randolph for consent to search the house for evidence of cocaine use.¹⁶⁵ “When Mr. Randolph responded with an unequivocal ‘no,’ [the officer] turned to Ms. Randolph and asked for her consent.”¹⁶⁶ She “readily” agreed to the search. She took the officer to an upstairs bedroom, where he found evidence Ms. Randolph knew would be there. The officer collected a straw and cocaine residue and called the district attorney’s office. The officer was informed to stop searching and to obtain a search warrant. At that point Ms. Randolph

160. *Id.* at 768, 596 S.E.2d at 110.

161. *Id.*

162. *Id.* (quoting *Harris v. United States*, 403 U.S. 573, 584 (1971)).

163. 264 Ga. App. 396, 590 S.E.2d 834 (2004).

164. *Id.* at 396, 590 S.E.2d at 836.

165. *Id.*

166. *Id.*

withdrew her consent to the search. The officer took the couple to the police station, obtained a warrant, and returned to the house to complete the search. The officer found more evidence of drug use. After Mr. Randolph was indicted, he filed a motion to suppress, which the trial court denied.¹⁶⁷ The court of appeals accepted an interlocutory appeal from that denial.¹⁶⁸

Even though “it is well established that ‘the consent of one who possesses common authority over premises or effects is valid as against the absent nonconsenting person with whom authority is shared[,] [t]his is so . . . because it is reasonable”¹⁶⁹ to assume that one co-habitant could exercise authority for both if “one person with equal rights in a place refuses to honor a co-occupant’s objection, such refusal hints of underlying trouble in the relationship and should raise a question as to why consent was given.”¹⁷⁰ The court of appeals reached this conclusion with, notably, no Georgia Supreme Court or United States Supreme Court case precisely on point.¹⁷¹ But its reasoning is unassailable and, so the Authors hope, will be upheld by the Georgia Supreme Court: “If ‘common authority’ is the basis for allowing one co-occupant to consent to a search on behalf of all occupants, it seems reasonable that ‘common authority’ should permit a co-occupant to exercise privacy rights on behalf of all occupants.”¹⁷²

F. Discovery

The appellate courts were presented with very few issues concerning discovery during this reporting period. The two decisions by the Georgia Supreme Court in which discovery violations were the basis for a reversal—both decided within the same week in October—involved *Brady*¹⁷³ violations.

In *Stripling v. State*,¹⁷⁴ the Georgia Supreme Court affirmed defendant’s conviction for murder and his death sentence.¹⁷⁵ Stripling filed a petition for a writ of habeas corpus. The habeas court vacated the death sentence after finding that the State had impermissibly sup-

167. *Id.* at 397, 590 S.E.2d at 836.

168. *Id.* at 396-97, 590 S.E.2d at 836.

169. *Id.* at 397, 590 S.E.2d at 836 (quoting *United States v. Matlock*, 415 U.S. 164, 170 (1974)).

170. *Id.*, 590 S.E.2d at 837.

171. *Id.*, 590 S.E.2d at 836.

172. *Id.*, 590 S.E.2d at 837.

173. *Brady v. Maryland*, 373 U.S. 83 (1963).

174. 261 Ga. 1, 401 S.E.2d 500 (1991).

175. *Id.* at 1, 401 S.E.2d at 502.

pressed evidence in support of Stripling's mental retardation.¹⁷⁶ Trial counsel sought to obtain defendant's parole file, hoping there would be additional information in defendant's lengthy file to support his claim of mental retardation. The trial court received the parole file, inspected it *in camera* and reported to the parties that the evidence in the file that was relevant was cumulative to the testimony of the defense psychiatrist who had testified previously at a competency hearing for the defense.¹⁷⁷

At the sentencing phase, the defense presented evidence of low I.Q. scores and testimony from a psychiatrist and psychologist to support its claim that Stripling was mentally retarded. The State responded by presenting: evidence of one intelligence test with a higher score; the testimony of a state psychologist that Stripling had average intelligence; evidence that Stripling's prior bank robberies showed some degree of planning; testimony from coworkers that Stripling could hold a job, drive, and operate machinery; and records from prison showing satisfactory performance in the vocational classes he had taken.¹⁷⁸ The crux of the State's response to the defense claim of mental retardation was that "the defense had recently concocted [Stripling's] alleged mental retardation."¹⁷⁹

Yet more than a decade after Stripling's trial, when the habeas court reviewed the same parole file that the trial court inspected *in camera*, it was evident that the parole file contained information supporting Stripling's claim of mental retardation that was not cumulative, and, moreover, would have undermined the prosecution's claim that Stripling's mental retardation was created by the defense.¹⁸⁰ The file showed that state officials and Stripling's mother characterized him as mentally retarded as early as the 1970s, and that the intelligence test score relied upon by the State at trial was "questionable."¹⁸¹

The parole file is controlled by the attorney general. The Georgia Supreme Court agreed that the attorney general's office was part of the "prosecution team," for purposes of the *Brady* analysis because it was the entity that transmitted the parole file to the trial court for *in camera* review.¹⁸² The suppression of this evidence, therefore, was a violation

176. *Head v. Stripling*, 277 Ga. 403, 403, 590 S.E.2d 122, 123-24 (2003).

177. *Id.* at 406, 590 S.E.2d at 125.

178. *Id.* at 404-05, 590 S.E.2d at 124.

179. *Id.* at 406, 590 S.E.2d at 125.

180. *Id.*

181. *Id.* at 405-06, 590 S.E.2d at 125.

182. *Id.* at 408, 590 S.E.2d at 126.

of *Brady v. Maryland*.¹⁸³ Because there was a reasonable probability that the evidence would have affected the outcome of Stripling's trial, the habeas court determination that defendant had to be retried on mental retardation and sentencing was affirmed.¹⁸⁴

In *Brownlow v. Schofield*,¹⁸⁵ the Georgia Supreme Court reversed the habeas court's denial of Brownlow's petition challenging his conviction for aggravated sodomy, holding that the prosecutor's suppression of exculpatory evidence violated defendant's due process rights and required reversal.¹⁸⁶ In a videotaped interview, Brownlow's grandson denied that his grandfather had inappropriately touched him. This videotape was revealed to the defense.¹⁸⁷ Ten days before trial, the prosecutor interviewed the child and asked him whether his grandfather had ever put his mouth on the child's penis; the child "responded by shaking his head negatively."¹⁸⁸ The prosecutor revealed this conversation to the defense only after Brownlow's conviction was affirmed on appeal.¹⁸⁹

The Georgia Supreme Court considered the following question in agreeing to grant the certificate of probable cause: "[I]s the habeas court authorized to deny relief where the prosecutor failed to disclose evidence which is favorable to the defense, but which is weaker than similar exculpatory evidence which was admitted at trial?"¹⁹⁰ The question was a response to the applicability of the United States Supreme Court opinion in the case of *Kyles v. Whitley*.¹⁹¹ The United States Supreme Court held that suppressed evidence was to be considered "collectively, not item by item."¹⁹² This holding was relied upon by the habeas court in *Brownlow* to conclude that because the defense and the jury were already aware of the child's initial recantation, the weaker head-shaking recantation did not support a finding that there was a reasonable probability that the outcome would have been different if this information had not been suppressed.¹⁹³

The Georgia Supreme Court held that the habeas court had improperly applied the holding in *Kyles*, ruling that a finding that a suppressed

183. 373 U.S. 83 (1963); *Head*, 277 Ga. at 403, 590 S.E.2d at 123.

184. *Head*, 277 Ga. at 409, 590 S.E.2d at 127-28.

185. 277 Ga. 237, 587 S.E.2d 647 (2003).

186. *Id.* at 240, 587 S.E.2d at 650.

187. *Id.* at 237, 587 S.E.2d at 648-49.

188. *Id.*, 587 S.E.2d at 648.

189. *Id.*

190. *Id.* at 238, 587 S.E.2d at 649.

191. 514 U.S. 419 (1995).

192. *Id.* at 436.

193. *Brownlow*, 277 Ga. at 238, 587 S.E.2d at 649.

piece of exculpatory evidence was “weaker” than a piece of disclosed exculpatory evidence, did not demand a denial of relief, but instead, was a factual finding that should then be applied to the essential question¹⁹⁴—“whether a reasonable probability exists that the outcome of the proceeding would have been different had the suppressed evidence, considered collectively, been disclosed to the defense.”¹⁹⁵

III. GUILTY PLEAS

In order for the court to accept a guilty plea, the defendant must be advised of all of the rights he is waiving upon entry of a plea, and he must explicitly acknowledge an understanding of those rights and his desire to waive them.¹⁹⁶ In *Foskey v. Battle*,¹⁹⁷ the Georgia Supreme Court held that the method utilized in Coffee County Superior Court was insufficient to establish that defendant’s plea was intelligent and voluntary.¹⁹⁸ The trial court utilized a pre-printed, typewritten form with nineteen questions and typewritten answers entitled, “transcript of proceedings.”¹⁹⁹ During the accompanying plea colloquy, defendant was not orally advised of any of those rights, nor was he asked to state whether he understood those rights or had agreed to waive them.²⁰⁰ The Georgia Supreme Court held the plea was invalid.²⁰¹

If the trial court is not willing to accept the negotiated plea recommendation between the defense and the State, the court is bound to notify the parties of this fact before accepting the defendant’s guilty plea.²⁰² If the court intends to reject a plea agreement, the court must explicitly advise the defendant that: (1) the court is not bound by the plea agreement; (2) the court intends to reject the plea agreement; (3) the disposition of the case may be less favorable to the defendant than the deal contemplated by the plea agreement; and (4) the defendant has the right to withdraw the plea.²⁰³

In *Mulkey v. State*,²⁰⁴ the trial judge told defendant that he did not intend to follow a part of the plea recommendation, but the judge did not inform defendant which portion he rejected nor that the disposition of

194. *Id.* at 240, 587 S.E.2d at 650.

195. *Id.* at 238, 587 S.E.2d at 649.

196. *Boykin v. Alabama*, 395 U.S. 238 (1969).

197. 277 Ga. 480, 591 S.E.2d 802 (2004).

198. *Id.* at 482, 591 S.E.2d at 803.

199. *Id.* at 481, 591 S.E.2d at 803.

200. *Id.*

201. *Id.* at 482, 591 S.E.2d at 804.

202. UNIF. SUPERIOR CT. RULE 33.10.

203. *State v. Germany*, 246 Ga. 455, 456, 271 S.E.2d 851, 852 (1980).

204. 265 Ga. App. 631, 595 S.E.2d 330 (2004).

her case could be less favorable than the plea recommendation.²⁰⁵ The appellate court held that the trial court could not presume that defendant's "highly experienced" attorney would have explained to her that rejection of the plea recommendation meant defendant would likely be sentenced more harshly; what mattered were the statements the court made directly to defendant.²⁰⁶ Because the court failed to explicitly state the four factors set forth in *State v. Germany*,²⁰⁷ Mulkey's plea was not valid, and her plea and sentence had to be reversed.²⁰⁸

In a case of first impression, *Carlisle v. State*,²⁰⁹ the Georgia Supreme Court considered "whether certain criminal charges which had been the subject of a previous order of nolle prosequi [could] be revived" after the statute of limitations had expired and when the dismissal was entered pursuant to a plea agreement, which defendant later rescinded by withdrawing her guilty pleas.²¹⁰ In 1997 Carlisle entered a negotiated plea to four counts of an indictment. In exchange, the State tendered a *nolle prosequi* on the remaining seven counts. In 1999 Carlisle filed a habeas corpus petition, asserting that her mental disorder and lack of medication prevented her from entering a knowing and voluntary plea. The habeas court granted the petition, the State appealed, and the Georgia Supreme Court affirmed.²¹¹

Carlisle returned to court for her retrial and filed a motion to limit her trial to only those four counts that were the subject of her plea, arguing that the statute of limitations had run on the additional seven counts that the State had nol-prossed. The trial court and the court of appeals disagreed, the latter holding that the plea agreement was like a contract, binding both parties, and when one party breaks the agreement (as Carlisle did when she was successful in withdrawing her guilty pleas) the parties needed to be returned to their pre-contract state.²¹²

Disagreeing with the court of appeals, the supreme court held that the issue was not a question invoking contract law, but instead, was a jurisdictional question.²¹³ Because the prosecutor failed to re-indict Carlisle for the previously nol prossed offenses during the limitations period, which the Georgia Code permits,²¹⁴ the trial court was without

205. *Id.* at 631, 595 S.E.2d at 331.

206. *Id.*

207. *Germany*, 246 Ga. at 455, 271 S.E.2d at 851.

208. *Mulkey*, 265 Ga. App. at 632, 595 S.E.2d at 331.

209. 277 Ga. 99, 586 S.E.2d 240 (2003).

210. *Id.* at 99, 586 S.E.2d at 241.

211. *Id.* at 99-100, 586 S.E.2d at 241.

212. *Id.* at 101, 586 S.E.2d at 242.

213. *Id.*

214. O.C.G.A. § 17-3-3 (2003).

jurisdiction to try Carlisle on those offenses for which the statute of limitations had run.²¹⁵

IV. JURY SELECTION

The trial court has the discretion to permit or deny questions on voir dire. Sometimes, this discretion can be abused, as in the case of *Laster v. State*.²¹⁶ In *Laster* defense counsel wanted to ask the potential jurors whether the extended period of time between the alleged murder and the trial would affect their deliberations. The trial court disallowed this question on the basis that this inquiry asked the jury to prejudge the case. The Georgia Supreme Court, however, disagreed and reversed Laster's conviction for malice murder, holding that the trial court abused its discretion in prohibiting that question because it was a legitimate question, properly aimed at determining any bias or prejudice on the part of prospective jurors.²¹⁷

In *Valentine v. State*,²¹⁸ the appellate court concluded the trial court had also abused its discretion by improperly attempting to rehabilitate a juror who explicitly stated she could not be fair.²¹⁹ After being sworn in, but before opening statements had begun, the juror reported to the bailiff that she recognized the victim's mother as a fellow church member. The court conducted a brief colloquy with the juror, inquiring whether her relationship with the victim's mother would have "any effect on [her] ability to fairly and impartially judge the guilt or innocence of the defendant?"²²⁰ The juror responded, "Honestly, yes."²²¹ The court then asked questions of the juror, inquiring whether she could listen fairly to the testimony and give defendant a fair trial, to which the juror responded affirmatively. Asking only two "talismanic" questions, the court violated the prohibition in *Kim v. Walls*²²² against the use of inadequate rehabilitative questioning by the court, which necessitated reversal of Valentine's conviction.²²³

The opinion in *Valentine* is difficult to square, however, with the court of appeals decision affirming the conviction for aggravated child

215. *Carlisle*, 277 Ga. App. at 101, 586 S.E.2d at 242.

216. 276 Ga. 645, 581 S.E.2d 522 (2003).

217. *Id.* at 647-48, 581 S.E.2d at 525-26. The court also concluded there was error in the trial court's limitation on closing argument and its failure to properly instruct the jury. *Id.*

218. 265 Ga. App. 139, 592 S.E.2d 918 (2004).

219. *Id.* at 141, 592 S.E.2d at 920.

220. *Id.* at 140, 592 S.E.2d at 919.

221. *Id.*

222. 275 Ga. 177, 180, 563 S.E.2d 847, 850 (2002).

223. *Valentine*, 265 Ga. App. at 141, 592 S.E.2d at 920.

molestation and cruelty to children in *Doss v. State*,²²⁴ entered less than two months later.²²⁵ The potential juror in *Doss* reported that she had been sexually molested as a child on two separate occasions, involving two different perpetrators.²²⁶ She was questioned by the court and both attorneys and responded that she was not sure whether she could be fair, stating that she had “prejudices towards men who would do that kind of thing.”²²⁷

After the defense moved to strike the juror for cause, the court asked a lengthy question, explaining to the juror her need to listen to the evidence and the court’s charge and render a verdict based solely on the evidence. The court ended the question by telling the juror that if her past experiences made it impossible for her to judge the case solely on the evidence, she would not be qualified to serve.²²⁸ The juror responded, “I think I could do it.”²²⁹ The motion to strike for cause was denied.²³⁰

The court of appeals affirmed the trial court’s decision, concluding that the lengthy question by the court was “as close to being nonleading as most lawyers can come.”²³¹ Although the appellate court held that the trial court did not abuse its discretion in refusing to remove the juror for cause, it noted that the better decision would have been to grant the motion, “especially when the potential juror [was] a victim of the same crime for which the accused [was] on trial.”²³²

The language in *Kim* was invoked again, this time by the Georgia Court of Appeals, in reversing the conviction for child molestation in *Kier v. State*.²³³ Invoking the *Kim* opinion, trial courts were reminded that in jury selection, “[i]f error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors.”²³⁴ In *Kier* defense counsel sought to strike for cause a potential juror who was employed at the jail where Kier was being housed awaiting trial. The juror, questioned extensively and repeatedly, stated that he could be fair and agreed not to reveal to the other jurors the fact that Kier was being held at the jail. Kier moved to strike for cause, the trial court denied the

224. 264 Ga. App. 205, 590 S.E.2d 208 (2003).

225. *Id.* at 205, 590 S.E.2d at 210.

226. *Id.* at 208, 590 S.E.2d at 210.

227. *Id.*, 590 S.E.2d at 212.

228. *Id.* at 209-10, 590 S.E.2d at 212-13.

229. *Id.* at 210, 590 S.E.2d at 213.

230. *Id.*

231. *Id.* at 212, 590 S.E.2d at 214.

232. *Id.* at 213, 590 S.E.2d at 215.

233. 263 Ga. App. 347, 347, 587 S.E.2d 841, 841 (2003).

234. *Id.* at 348, 587 S.E.2d at 842 (quoting *Kim*, 275 Ga. at 178, 563 S.E.2d at 849).

request, and Kier was forced to use one of his peremptory strikes to remove this juror.²³⁵

The appellate court held that the fact that this corrections officer was working at the very jail in which Kier was incarcerated, awaiting trial on the very charges that the juror would be asked to hear, created a “substantial appearance of impropriety” necessitating reversal.²³⁶

V. STATE’S CASE IN CHIEF

A. Severance

The American Bar Association (“ABA”) Standards on Joinder of Offenses direct that offenses that are joined for trial solely on the ground that they are of the same or similar character must be severed upon the defendant’s request.²³⁷ The standard, however, is undermined by the nature of similar transaction evidence in that the offenses that would automatically be severed pursuant to the ABA Standard end up being admissible in the trial anyway as evidence of a “similar transaction.”²³⁸ In *Stewart v. State*,²³⁹ Stewart was tried and convicted for various offenses arising out of separate attacks on three different women. The Georgia Supreme Court reviewed what had become the norm in analyzing a motion to sever offenses when evidence of the severed offenses would have been admitted as similar transactions.²⁴⁰ Severance was not required because the offenses “were sufficiently similar so that evidence from each victim would have been admissible in the other trials had the cases been tried separately.”²⁴¹

The Georgia Supreme Court held that the finding that evidence of one offense would be admissible in a trial for another offense as a similar transaction “is a relevant consideration in determining whether to sever,”²⁴² but does not end the inquiry; the court would still need to determine if part (b) of the ABA Standards on Joinder of Offenses²⁴³

235. *Id.* at 347-48, 587 S.E.2d at 842.

236. *Id.* at 350, 587 S.E.2d at 843.

237. ABA STANDARDS FOR CRIMINAL JUSTICE § 13-3.1 (2004).

238. UNIF. SUPERIOR CT. RULE 31-2.

239. 277 Ga. 138, 587 S.E.2d 602 (2003).

240. *Id.* at 138, 587 S.E.2d at 603.

241. *Stewart v. State*, 259 Ga. App. 117, 122, 576 S.E.2d 93, 97 (2003).

242. *Stewart*, 277 Ga. at 140, 587 S.E.2d at 604.

243. ABA STANDARDS FOR CRIMINAL JUSTICE § 13-3.1 (2004). Section (b) determines whether the trier of fact would be able to fairly and intelligently assess guilt or innocence as to each charge. *Id.*

necessitated severance of offenses.²⁴⁴ The case was remanded to the trial court for it to conduct this further inquiry into whether the trier of fact could fairly assess guilt or innocence as to each charge.²⁴⁵

B. *Statements of the Defendant*

When the accused invokes his right to counsel, all interrogation must cease and it can only begin again if the accused voluntarily initiates further conversation.²⁴⁶ In *State v. Langlands*,²⁴⁷ defendant was advised of his *Miranda*²⁴⁸ rights, and Langlands responded that he wished to invoke his right to counsel.²⁴⁹ The officer no longer interrogated Langlands about the offense he was suspected of having committed, but “repeatedly questioned Langlands about his attorney and stressed that once Langlands obtained counsel, Jarrell [the investigator] ‘really needed’ to talk to Langlands because he ‘really needed to know his side of the story.’”²⁵⁰ Langlands eventually said that he would talk with the investigator without an attorney. The trial court suppressed defendant’s custodial statement to the police, finding that the investigator’s attempts to encourage Langlands to speak rendered defendant’s decision to talk to the investigator, without his attorney, involuntary.²⁵¹ The court of appeals agreed and affirmed the decision.²⁵²

In *State v. Pinkerton*,²⁵³ the court of appeals again agreed with the trial court’s ruling that the accused had not validly waived his right to counsel.²⁵⁴ In *Pinkerton* the appellate court concluded that although Pinkerton’s waiver was voluntary, it was not intelligently or knowingly made.²⁵⁵ Pinkerton appeared for his arraignment, was advised by the court of his right to counsel, and waived his right to counsel so that he could engage in plea negotiations with the prosecutor. During this conversation with the prosecutor, Pinkerton made some incriminating statements. The negotiations broke down, and when later notified that

244. *Stewart*, 277 Ga. at 140, 587 S.E.2d at 604.

245. *Id.*

246. U.S. CONST. amend. VI.

247. 276 Ga. 721, 583 S.E.2d 18 (2003).

248. *Miranda v. Arizona*, 348 U.S. 436 (1966).

249. *Langlands*, 276 Ga. at 721, 583 S.E.2d at 18-19.

250. *Id.*, 583 S.E.2d at 19.

251. *Id.* at 721-22, 583 S.E.2d at 19.

252. *Id.*

253. 262 Ga. App. 858, 586 S.E.2d 743 (2003).

254. *Id.* at 859, 586 S.E.2d at 745.

255. *Id.*, 586 S.E.2d at 743.

the State intended to introduce his inculpatory statements into evidence, defendant, now represented, moved to have the statements excluded.²⁵⁶

The trial court held, and the court of appeals affirmed, that although Pinkerton freely and voluntarily waived his right to counsel, “he did not do so knowingly since the court had failed to give him sufficient warnings.”²⁵⁷ Before permitting a waiver of counsel at a critical stage of a criminal prosecution, the accused must be informed of more than simply his right to counsel; he must be informed of, and understand, the nature of the charges against him, the range of punishment, possible defenses, mitigating circumstances, and “any other facts necessary for a broad understanding of the matter.”²⁵⁸

C. *Similar Transactions*

In *Perry v. State*,²⁵⁹ the Georgia Court of Appeals reversed defendant’s conviction for the lesser included offenses of aggravated assault and sexual battery, holding that the trial court improperly admitted evidence that when Perry was eighteen years old, he pleaded guilty to the offense of child molestation, which arose out of his having engaged in nonforcible sexual intercourse with a thirteen-year-old girl.²⁶⁰ Acknowledging the appellate court’s policy of liberally upholding the admissibility of independent crimes in sexual offense cases, the court of appeals nevertheless concluded that “we do not believe that a nonviolent sexual encounter with a minor shows a predilection to commit forcible rape against an adult.”²⁶¹

D. *Cross-Examination*

The Rape Shield Statute²⁶² mandates that evidence relating to the past sexual behavior of an alleged victim of a sexual crime is not admissible in the trial of the accused.²⁶³ In *Richardson v. State*,²⁶⁴ the Georgia Supreme Court considered a trial court’s prohibition of the defense’s attempt to cross-examine the alleged victim to show that she engaged in consensual intercourse with defendant, but after becoming concerned that this act would hinder her attempts to reconcile with a

256. *Id.* at 858-59, 586 S.E.2d at 743-44.

257. *Id.* at 859, 586 S.E.2d at 745.

258. *Id.* at 859-60, 586 S.E.2d at 745.

259. 263 Ga. App. 670, 588 S.E.2d 838 (2003).

260. *Id.* at 670-71, 588 S.E.2d at 839.

261. *Id.* at 671, 588 S.E.2d at 840.

262. O.C.G.A. § 24-9-64 (2003).

263. *Id.*

264. 276 Ga. 639, 581 S.E.2d 528 (2003).

former boyfriend, she fabricated the rape story.²⁶⁵ The court of appeals upheld the trial court's prohibition of this evidence pursuant to the Rape Shield Statute.²⁶⁶ The Georgia Supreme Court granted certiorari and reversed the conviction, holding that the prohibition of the Rape Shield Statute is limited only to those sexual aspects of relationships of the victim, not the facts that she was involved, had been involved, or hoped to be involved again in a relationship when it is relevant to the theory of the defense.²⁶⁷

E. Admissibility of Hearsay

The United States Supreme Court's decision of *Crawford v. Washington*²⁶⁸ forced the trial and appellate courts in Georgia to modify the manner in which the admissibility of hearsay testimony is considered.²⁶⁹ In *Crawford* the United States Supreme Court barred out-of-court testimonial statements of witnesses unless the witness was unavailable and the defense had the opportunity to cross-examine the witness.²⁷⁰ These requirements are essential to the admissibility of the statement, regardless of whether the trial court determines that the out-of-court statement was reliable. The requirements overruled the long-standing rules and practice concerning the admissibility of hearsay.²⁷¹

Two weeks after the decision in *Crawford*, the Georgia Supreme Court decided *Moody v. State*,²⁷² in which Moody had been convicted of the malice murder of his girlfriend, Rebecca Norman. Under the cloak of the necessity exception to the hearsay rule, the trial court permitted a police officer to testify about what Norman told him after Moody had previously fired a gun into her bedroom while she was sleeping.²⁷³ Relying upon *Crawford*, the appellate court concluded the testimony was inadmissible, but, as it was cumulative of other testimony, the error was harmless.²⁷⁴

265. *Id.* at 640-41, 581 S.E.2d at 529.

266. *Id.*

267. *Id.*, 581 S.E.2d at 530.

268. 124 S. Ct. 1354 (2004).

269. *Id.* at 1364.

270. *Id.*

271. *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled by Crawford v. Washington*, 124 S. Ct. 1354, 1366 (2004).

272. 277 Ga. 676, 594 S.E.2d 350 (2004).

273. *Id.* at 679-80, 594 S.E.2d at 353-54.

274. *Id.*, 594 S.E.2d at 354.

One week later, the Georgia Supreme Court considered the impact of *Crawford* on the admission of hearsay testimony in the murder trial of *Demons v. State*.²⁷⁵ At trial, the

victim's co-worker, Jackie Bohr, testified that, two days before the murder, the victim was distressed and had bruises on his upper arms and chest, that he began crying and told her where the bruises came from, that she had never seen anybody so afraid of anyone else, and that he said that Demons was going to kill him.²⁷⁶

The Georgia Supreme Court determined that *Crawford's* limitation on the admissibility of hearsay under the necessity exception applied only to testimonial, out-of-court statements, which, they concluded, were distinguishable from the hearsay statements admitted because "they were made in a conversation with a friend, before the commission of any crime, and without any reasonable expectation that they would be used at a later trial."²⁷⁷ Finding that the hearsay statements were not testimonial, the trial court was permitted to consider indicia of reliability other than the opportunity for cross-examination.²⁷⁸ The Georgia Supreme Court concluded that the trial court was correct in concluding that the hearsay statements were reliable and properly admitted.²⁷⁹

Surprisingly, less than two months later, two opinions²⁸⁰ were returned by the Georgia Supreme Court concerning the admissibility of hearsay under the necessity exception. *Crawford* was applied in one case but not even mentioned in the other case. In *Bell v. State*,²⁸¹ the trial court admitted evidence of prior difficulties between the deceased wife and defendant husband through testimony of the wife's best friend, who claimed that Ms. Bell had told her that Mr. Bell had threatened to kill her.²⁸² The Georgia Supreme Court agreed with the trial court's analysis of the admissibility of the hearsay under the Georgia test at the time of the trial, but the court noted that because of *Crawford*, the statements of the friend would be deemed inadmissible because they were "testimonial in nature, and were inadmissible since Ms. Bell was unavailable to testify at trial and Mr. Bell did not have a prior

275. 277 Ga. 724, 595 S.E.2d 76 (2004).

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

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

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

279. *Id.* at 729, 595 S.E.2d at 81.

280. *Bell v. State*, 278 Ga. 69, 597 S.E.2d 350 (2004); *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

281. 278 Ga. 69, 597 S.E.2d 350 (2004).

282. *Id.* at 71, 597 S.E.2d at 353.

opportunity to cross-examine the victim about the statements.”²⁸³ Given the strength of the evidence against Bell and the cumulative nature of the hearsay testimony concerning the threats he had previously made towards his wife, the error was deemed harmless.²⁸⁴

Yet on the same day, the Georgia Supreme Court decided the case of *Williams v. State*,²⁸⁵ which also evaluated the admissibility of hearsay under the necessity exception. Notably, the *Crawford* case was not mentioned. At defendant’s trial the State introduced evidence of prior difficulties between defendant and the deceased by calling two State’s witnesses who were permitted to testify about statements that the deceased had made to them concerning defendant’s abuse of her.²⁸⁶ Without considering the impact of *Crawford* on their analysis, the court, nevertheless, held that the hearsay should not have been admitted because it was not any more probative than other nonhearsay evidence that could have been presented.²⁸⁷ But, again, the error was deemed harmless, given the “overwhelming evidence of Williams’[s] commission of the murder.”²⁸⁸

VI. CLOSING ARGUMENT

O.C.G.A. section 17-8-71²⁸⁹ states that defense counsel has the right to open and conclude closing arguments if the defendant does not produce any evidence other than the defendant’s testimony.²⁹⁰ There is often some debate over whether the defense introduces evidence through impeachment of State’s witnesses. The standard for determining whether the defense has introduced evidence for the purpose of determining whether the defense has forfeited final closing argument was established in 2000 in the case of *Smith v. State*.²⁹¹ If the defendant merely impeaches the State’s witness by reading only portions of a prior statement, directly related to the impeachment, the defendant has not introduced evidence.²⁹² If, however, the defendant’s counsel reads portions of the prior statement that are unrelated to impeachment, the defense has introduced evidence and forfeits the final closing.²⁹³

283. *Id.*

284. *Id.*

285. 277 Ga. 853, 596 S.E.2d 597 (2004).

286. *Id.* at 854, 596 S.E.2d at 600.

287. *Id.* at 855, 596 S.E.2d at 601.

288. *Id.*

289. O.C.G.A. § 17-8-71 (2003).

290. *Id.*

291. 272 Ga. 874, 536 S.E.2d 514 (2000).

292. *Id.* at 877, 536 S.E.2d at 517.

293. *Id.*

In two instances during this reporting period, the trial court erroneously concluded that the defense had introduced evidence during impeachment and forfeited their final closing arguments.²⁹⁴ In *Thomas v. State*,²⁹⁵ defense counsel attempted to impeach the officer who had interviewed defendant by using the officer's report to highlight inconsistencies and omissions between the officer's direct testimony and incident report. Additionally, defense counsel referred to and displayed other police reports and reports from the Department of Family and Children Services ("DFCS") although he did not read from these reports.²⁹⁶ The supreme court concluded that this impeachment and reference to other reports did not constitute the introduction of evidence; therefore, the trial court erred in ordering that the defense had forfeited the final closing argument.²⁹⁷

In *West v. State*,²⁹⁸ the trial court, likewise, erroneously concluded that the defense had introduced evidence and forfeited the closing argument. During the State's case, the prosecutor introduced into evidence a videotape of the execution of the search warrant, and the tape was admitted into evidence and played without audio to the jury. On cross-examination defense counsel played the tape again, this time with the sound on.²⁹⁹ Because the tape was already a piece of evidence, the court of appeals ruled that it was error to consider the playing of the audio as the introduction of new evidence.³⁰⁰ As the evidence of guilt was not so overwhelming to consider this error harmless, the conviction was reversed.³⁰¹

The Georgia Supreme Court granted certiorari to consider the meaning of the words, "in conclusion," found in the statute³⁰² governing the number of attorneys who can participate in the closing argument for each side.³⁰³ The relevant portion of this statute states that "[n]ot more than two counsel shall be permitted to argue any cause for each side, except by express leave of the court; and in no case shall more than one counsel be heard in conclusion."³⁰⁴

294. *Thomas v. State*, 262 Ga. App. 492, 589 S.E.2d 243 (2003); *West v. State*, 265 Ga. App. 339, 593 S.E.2d 874 (2004).

295. 262 Ga. App. 492, 589 S.E.2d 243 (2003).

296. *Id.* at 495, 589 S.E.2d at 247.

297. *Id.* at 497-98, 589 S.E.2d at 249.

298. 265 Ga. App. 339, 593 S.E.2d 874 (2004).

299. *Id.* at 339, 593 S.E.2d at 874.

300. *Id.*, 593 S.E.2d at 876-77.

301. *Id.* at 342, 593 S.E.2d at 877.

302. O.C.G.A. § 17-8-70 (2003).

303. *Sheriff v. State*, 277 Ga. 182, 182, 587 S.E.2d 27, 28 (2003).

304. O.C.G.A. § 17-8-70.

The defense in *Sheriff v. State*³⁰⁵ introduced evidence; therefore, “the State was entitled to make the opening and concluding closing arguments.”³⁰⁶ The defense wanted to divide their closing argument between both defense attorneys. The State objected and the trial court sustained the objection, relying upon the second clause of O.C.G.A. section 17-8-70, as stated above.³⁰⁷

The Georgia Supreme Court noted the split of decisions between those cases that held the one-lawyer limitation applied only to the final concluding argument, not the middle argument,³⁰⁸ and the cases that extended the one-lawyer limitation to the middle argument.³⁰⁹ The Georgia Supreme Court, “faced with conflicting constructions of [O.C.G.A. section] 17-8-70,” concluded that the statutory limitation of one-lawyer “heard in conclusion” applies only to the party arguing the final conclusion, not the middle closing argument, thereby overruling the line of cases that held otherwise and ordering that the Uniform Court Rules be construed in conformity with this holding.³¹⁰

O.C.G.A. section 17-8-73³¹¹ provides that closing arguments in a case involving a capital felony are limited to two hours for each side.³¹² In two instances during this reporting period, trial courts attempted to abridge this right and limit defense counsel’s closing arguments to one hour.³¹³ In both instances the Georgia Supreme Court presumed harm from this error and held that the evidence was not so overwhelming that the limitation on counsel’s right to continue his closing argument could be said to be harmless, necessitating the reversal of both murder convictions.³¹⁴

The prosecuting attorney, while presenting a closing argument, “may strike hard blows, [but] he is not at liberty to strike foul ones.”³¹⁵

305. 277 Ga. 182, 587 S.E.2d 27 (2003).

306. *Id.* at 183, 587 S.E.2d at 28.

307. *Id.*

308. *Steverson v. Eason*, 194 Ga. App. 273, 390 S.E.2d 424 (1990); *Goforth v. Wigley*, 178 Ga. App. 558, 343 S.E.2d 788 (1986); *Taylor v. Powell*, 158 Ga. App. 339, 280 S.E.2d 386 (1981); *Limbrick v. State*, 152 Ga. App. 615, 263 S.E.2d 502 (1979).

309. *Bentley v. B.M.W., Inc.*, 209 Ga. App. 526, 433 S.E.2d 719 (1993); *City of Monroe v. Jordan*, 201 Ga. App. 332, 411 S.E.2d 511 (1991); *Bridges v. Schier*, 195 Ga. App. 583, 394 S.E.2d 408 (1990); *White v. Cline*, 174 Ga. App. 448, 330 S.E.2d 386 (1985).

310. *Sheriff*, 277 Ga. at 187, 587 S.E.2d at 31.

311. O.C.G.A. § 17-8-73 (2003).

312. *Id.*

313. *Hendricks v. State*, 277 Ga. 61, 586 S.E.2d 317 (2003); *Laster v. State*, 276 Ga. 645, 581 S.E.2d 522 (2003).

314. *Hendricks*, 277 Ga. at 63, 586 S.E.2d at 317; *Laster*, 276 Ga. at 650, 581 S.E.2d at 526.

315. *Berger v. United States*, 295 U.S. 78, 88 (1935).

Arguing that the jury consider similar transaction evidence for an impermissible purpose is such a foul. In *Collier v. State*,³¹⁶ the trial court admitted extrinsic evidence of two prior bar fights during Collier's trial for aggravated assault, which also occurred in a bar.³¹⁷ The similar transactions were introduced to defeat Collier's defense of justification by "showing Collier's modus operandi, scheme, course of conduct, and bent of mind under particular circumstances."³¹⁸ Yet in his closing argument, the prosecutor pointed out the leniency afforded to Collier in the prior assault cases by stating that Collier received probationary sentences. Relying upon that fact, the prosecutor asked the jury to punish Collier because he had not been imprisoned before and implored the jury to protect the community from the future dangerousness of defendant.³¹⁹ The Georgia Court of Appeals held that the prosecutor "blatantly misused" the similar transaction evidence, exacerbated the error by arguing the future dangerousness of defendant, and concluded those errors necessitated reversal.³²⁰

VII. JURY INSTRUCTIONS

The Georgia Supreme Court took another opportunity to reflect on the propriety of the *Allen v. United States*³²¹ charge and determined that a portion of the charge was inaccurate and should no longer be used by trial courts.³²² In *Burchette v. State*,³²³ defendant challenged the following clause of the *Allen* charge: "this case must be decided by some jury selected in the same manner this jury was selected and there is no reason to think a jury better qualified than you would ever be chosen."³²⁴ The court of appeals affirmed Burchette's conviction, relying on several previous cases in which this language was upheld.³²⁵ The supreme court, however, concluded that it would follow the trend of California, Massachusetts, and Iowa, which had reviewed and rejected this type of language.³²⁶ The *Allen* charge language was simply not accurate because a hung jury does not necessarily mean that the case must be retried; the prosecution always retains the authority, in the face

316. 266 Ga. App. 345, 596 S.E.2d 795 (2004).

317. *Id.* at 347, 596 S.E.2d at 800.

318. *Id.* at 348, 596 S.E.2d at 799.

319. *Id.* at 353, 596 S.E.2d at 802.

320. *Id.*

321. 164 U.S. 492, 501 (1986).

322. *Burchette v. State*, 278 Ga. 1, 596 S.E.2d 162 (2004).

323. 278 Ga. 1, 596 S.E.2d 162 (2004).

324. *Id.* at 1, 596 S.E.2d at 163.

325. *Burchette v. State*, 260 Ga. App. 739, 739, 580 S.E.2d 609, 613 (2003).

326. *Burchette*, 278 Ga. at 3 n.5, 596 S.E.2d at 163 n.5.

of a mistrial, to dismiss the case.³²⁷ Burchette's conviction, however, was affirmed because, under the facts of this case, the *Allen* charge was not so coercive as to demand a reversal.³²⁸ Trial courts in the future are forewarned "that the 'must be decided' charge should no longer be included in *Allen* charges in this State."³²⁹

In a case of first impression, the Georgia Supreme Court considered whether the defense of habitation charge³³⁰ can be invoked when the victim and the defendant occupy separate rooms in the same house.³³¹ In *Hammock v. State*,³³² defendant shot and killed her husband after he broke down the bedroom door behind which she was locked and barricaded. The couple had been living in separate bedrooms for several weeks leading up to the shooting because they were considering a divorce. On the night of the shooting, after several hours of beating on the door and hollering at defendant, the alleged victim busted in the door, entered the bedroom, and had a conversation with defendant. Defendant told him to leave and informed him that she had already been to the magistrate judge for a warrant. The alleged victim responded that he was going to "teach her a lesson."³³³ As he came towards defendant, she shot him.³³⁴

The defense of habitation charge authorizes a person to use deadly force to terminate an unlawful entry into a person's habitation, if: (1) the entry is violent and tumultuous and (2) the person reasonably believes the entry was made for the purpose of assaulting their person.³³⁵ In such a case, use of deadly force would be necessary to prevent that violence.³³⁶ The supreme court held that those subsections of O.C.G.A. section 16-3-23,³³⁷ which do not expressly prohibit applicability to members of the same family or household, could be extended to separate spaces in a jointly occupied dwelling, "provided that such person has obtained the right to occupy that space and exclude his co-inhabitants therefrom."³³⁸ In *Hammock* the court held that there had not been sufficient evidence, such as a court order dividing the

327. *Id.* at 2-3, 596 S.E.2d at 163.

328. *Id.* at 3, 596 S.E.2d at 164.

329. *Id.*

330. O.C.G.A. § 16-3-23 (2003).

331. *Hammock v. State*, 277 Ga. 612, 592 S.E.2d 415 (2004).

332. 277 Ga. 612, 592 S.E.2d 415 (2004).

333. *Id.* at 613, 615, 592 S.E.2d at 417, 419.

334. *Id.* at 613, 592 S.E.2d at 417.

335. O.C.G.A. § 16-3-23(1), (3).

336. *Id.*

337. *Id.* § 16-3-23.

338. *Hammock*, 277 Ga. at 616, 592 S.E.2d at 419.

house, or a written agreement between the spouses, or even clear evidence of the separate right to a section of the household established by a course of conduct between the spouses; therefore, the trial court did not err in denying defendant's request to charge defense of habitation.³³⁹

VIII. SENTENCING

A divided supreme court decided the case of *Dixon v. State*,³⁴⁰ reversing the eighteen-year-old defendant's conviction for aggravated child molestation.³⁴¹ Dixon, a twelfth-grader, was indicted for rape, statutory rape, false imprisonment, aggravated assault, aggravated child molestation, and sexual battery arising out of a sexual encounter with a fifteen-year-old, who was in the tenth grade at Dixon's high school. The girl testified that she was forcibly raped, and there was medical evidence of bruising on her arms and slight vaginal injuries. The defense admitted sexual intercourse, but alleged that it was consensual and that the girl said she was raped because she feared her father's reaction to her sexual activity.³⁴²

The jury returned a verdict of not guilty on the counts of rape, false imprisonment, aggravated assault, and sexual battery, but guilty on the counts of statutory rape and aggravated child molestation.³⁴³ The defense appealed the aggravated child molestation conviction, arguing that the conduct for which the jury found Dixon guilty (engaging in nonforcible sexual intercourse with a fifteen-year-old) was encompassed in the misdemeanor statutory rape statute and could not be doubly punished as aggravated child molestation.³⁴⁴

The majority agreed, holding that a reading of both the misdemeanor statutory rape and aggravated child molestation statutes showed "a clear legislative intent to prosecute the conduct that the jury determined to have occurred in this case as misdemeanor statutory rape."³⁴⁵ The majority noted that the most compelling indication of the General Assembly's intent was that the most recent amendment to the statutory rape statute removed the discretion from the trial court to punish consensual sexual activity between victims who are fourteen or fifteen

339. *Id.*

340. 278 Ga. 4, 596 S.E.2d 147 (2004).

341. *Id.* at 4, 596 S.E.2d at 148.

342. *Id.*

343. *Id.*

344. *Id.* at 5-6, 596 S.E.2d at 149. See O.C.G.A. § 16-6-3(b) (2003); O.C.G.A. § 16-6-4(c) (2003).

345. *Dixon*, 278 Ga. at 5, 596 S.E.2d at 148-49.

and perpetrators who are no more than three years older than the victim, as misdemeanor, not felony, statutory rape and made such reduced punishment mandatory.³⁴⁶ The majority argued that removing that discretion from the courts, while still allowing the state to retain the discretion to “prosecute the [exact] same conduct as either misdemeanor statutory rape or felony child molestation,” was “entirely incongruous with the intent of the legislature.”³⁴⁷ Because the rule of lenity applied, the majority concluded that when two statutes conflict, defendant must be afforded the lesser punishment.³⁴⁸ The crime of aggravated child molestation carries a minimum, mandatory sentence of ten years to serve without parole and up to a maximum sentence of thirty years in prison.³⁴⁹ The crime of misdemeanor statutory rape carries a maximum sentence of twelve months at the county jail.³⁵⁰

How many times can a person be charged and convicted for possessing a weapon during the commission of a felony, when that felony is a continuous crime spree? The Georgia Supreme Court addressed this issue in *State v. Marlowe*.³⁵¹ Because the court of appeals had previously rendered conflicting opinions, the Georgia Supreme Court established the definitive answer: Multiple convictions for possession of a weapon when multiple felonies are committed are permitted only when the felonies are committed against multiple victims.³⁵² In order to determine whether multiple violations under the same statute violated the prohibition against double jeopardy, the court had to determine the appropriate “unit of prosecution” that defined the “precise act or conduct” that the statute criminalized.³⁵³ The court determined that “a defendant may be convicted once for possession of a firearm during the commission of a crime as to every individual victim of a crime spree,” but only once for each crime that is not perpetrated upon an individual.³⁵⁴ For example, in *Pearson* defendant was charged with and convicted for ten felonies arising out of an attack on three people. He was also charged with and convicted for ten counts of possession of a firearm during the commission of each of the predicate felonies. Applying the new analysis, *Pearson* could be punished for three weapon possession offenses arising out of the crimes committed against the three

346. *Id.* at 5-6, 596 S.E.2d at 149.

347. *Id.* at 5, 596 S.E.2d at 149.

348. *Id.* at 7, 596 S.E.2d at 150.

349. O.C.G.A. § 16-6-4 (2003).

350. O.C.G.A. § 16-6-3 (2003).

351. 277 Ga. 383, 589 S.E.2d 69 (2003).

352. *Id.* at 383, 589 S.E.2d at 70.

353. *Id.* at 383-84, 589 S.E.2d at 71.

354. *Id.* at 386, 589 S.E.2d at 73.

separate victims, and two additional weapon possession charges arising out of the crimes of burglary and hijacking of a motor vehicle. The additional weapon possession charges, which were based upon all of the multiple crimes against the three victims, would violate double jeopardy and would have to be merged with the possession crimes.³⁵⁵ Relying upon what has come to be known as the *Marlowe* decision, the supreme court ordered merger in two more cases during this reporting period.³⁵⁶

IX. APPELLATE ISSUES

A. *Ineffective Assistance of Counsel*

Ordinarily, the failure to advise a client concerning the collateral consequences of his guilty plea does not rise to the level of ineffective assistance of counsel and serve to invalidate the plea. But when the attorney responds to questions from his client concerning the collateral consequences of his plea and the attorney *misadvises* the client, counsel has been ineffective and the plea cannot stand. This was the case in *Rollins v. State*,³⁵⁷ in which Rollins inquired about the effect of a first offender plea to a drug charge, especially as it related to her desire to become a lawyer and her immigration status. Her attorney failed to do the simple research it would have taken to discover that the plea would affect Rollins's fitness as a candidate for a bar license and would expose her to deportation proceedings. Instead, her lawyer told her that there would be "no negative repercussions" from the plea.³⁵⁸ Because the evidence presented at the habeas hearing revealed that Rollins would not have pleaded guilty had she been given the correct information concerning the collateral consequences of her plea and because the State's drug case against her was weak, the denial of the habeas was reversed and Rollins was able to withdraw her guilty plea.³⁵⁹

Similarly, in *Smith v. Williams*,³⁶⁰ defendant asked his attorney, prior to deciding whether to enter his guilty plea, how much time he could expect to serve before being eligible for parole. The plea offer was fifteen years to serve on a vehicular homicide, concurrent with a fifteen year sentence for possession of methamphetamine. Counsel told Smith he would be eligible for parole after serving one-third of his sentence.

355. *Id.* at 387, 589 S.E.2d at 73.

356. *Bell v. State*, 278 Ga. 69, 597 S.E.2d 350 (2004); *Carero v. State*, 277 Ga. 867, 596 S.E.2d 619 (2004).

357. 277 Ga. 488, 591 S.E.2d 796 (2004).

358. *Id.* at 489-90, 591 S.E.2d at 797-98.

359. *Id.* at 491-92, 591 S.E.2d at 799-800.

360. 277 Ga. 778, 596 S.E.2d 112 (2004).

However, defense counsel was unaware that three months earlier, on January 1, 1998, the parole board instituted a ninety percent policy, which mandated that ninety percent of the sentence for a number of enumerated crimes, one of which was vehicular homicide, would have to be served before a defendant would be eligible for parole. This meant that instead of serving five years before parole eligibility, Smith would have to serve over thirteen-and-one-half years before his first parole consideration.³⁶¹ This error rose to the level of satisfying the first tier of ineffective assistance of counsel, which is a finding that counsel's representation falls outside the permitted range of competence.³⁶² The case was remanded for a determination of the second tier, whether the client was harmed by the error.³⁶³

Other instances of conduct that were deemed ineffective included: (1) badgering a client, on the record, to take a plea and then cussing when the client told the court that he was not guilty;³⁶⁴ (2) an attorney's use of a peremptory strike on a juror that he failed to realize had already been stricken for cause by the court, but that the court had erroneously failed to remove from the remaining panel;³⁶⁵ (3) trial counsel's failure to move to suppress blood and urine samples when defendant's consent was clearly not valid;³⁶⁶ (4) counsel's failure to object and move for mistrial when eyewitnesses testified at trial that the prosecutor showed them a photograph of defendant before trial, tainting their in-court identification;³⁶⁷ (5) counsel's failure to object and move for a mistrial when the investigating officer in a statutory rape case testified that "she believed the victim was being *untruthful* when she denied penetration," and when the victim later admitted partial penetration, the officer vouched for the victim's truthfulness;³⁶⁸ (6) counsel's failure to raise a chain of custody issue when the State presented no evidence to establish that the drugs tested at the crime lab were the drugs seized from the defendant;³⁶⁹ (7) counsel's failure to investigate and locate corroborating alibi witnesses;³⁷⁰ (8) counsel's failure to request a charge on defense of habitation when defendant was sitting in her car at the time

361. *Id.* at 778-79, 596 S.E.2d at 113.

362. *Id.*

363. *Id.*

364. *Heyward v. Humphrey*, 277 Ga. 565, 570, 592 S.E.2d 660, 664 (2004).

365. *Fortson v. State*, 277 Ga. 164, 166, 587 S.E.2d 39, 42 (2003).

366. *Collier v. State*, 266 Ga. App. 762, 764, 598 S.E.2d 373, 375 (2004).

367. *Joncamlae v. State*, 267 Ga. App. 214, 215, 598 S.E.2d 923, 923-24 (2004).

368. *Orr v. State*, 262 Ga. App. 125, 584 S.E.2d 720, 724 (2003) (emphasis in original).

369. *Phillips v. Williams*, 276 Ga. 691, 692, 583 S.E.2d 4, 5 (2003).

370. *Tenorio v. State*, 261 Ga. App. 609, 613, 583 S.E.2d 269, 273 (2003).

the alleged victim assaulted her;³⁷¹ and (9) counsel's failure to except to the trial court's refusal to charge the jury properly on impeachment by a prior felony.³⁷²

B. Insufficient Evidence to Convict

The Georgia Supreme Court considered *Thompson v. State*,³⁷³ a case of first impression this reporting period. The question was: Because venue is an essential element of the State's case that must be decided by a jury, may the appellate courts consider venue to have been established in a pre-trial hearing? Short answer: No.³⁷⁴ So why, you ask, is this case in this section of the Article rather than under a section entitled "Venue"? Because venue is an essential element of the State's case, when the State fails to offer any evidence of venue at a jury trial, the State has failed to prove venue. Therefore, the State's evidence was insufficient to convict.

The State argued on appeal that venue was established when defendant filed a motion for reconsideration of his denial of bond. In that motion defendant asserted that he had been a resident of Houston County all his life, and that his business, where one of the crimes was alleged to have occurred, was in Houston County. The court of appeals accepted the State's argument,³⁷⁵ but the supreme court reversed, concluding that the court of appeals "failed to conduct a proper sufficiency review" by considering facts not found by a jury.³⁷⁶

In another insufficient evidence case, *Everitt v. State*,³⁷⁷ the Georgia Supreme Court considered this question: "Can one who enters a successful conspiracy to commit arson be held criminally responsible for the murder of one co-conspirator by another, when the murder was committed months after the arson in order to keep the conspiracy secret?"³⁷⁸ A conspiracy exists when two or more people join together to pursue a common criminal plan.³⁷⁹ The criminal culpability of each conspirator "extends not only to what is done by any of the conspirators

371. *Benham v. State*, 277 Ga. 516, 518-19, 591 S.E.2d 824, 826 (2004).

372. *Wakefield v. State*, 261 Ga. App. 474, 477, 583 S.E.2d 155, 157 (2003).

373. 277 Ga. 102, 586 S.E.2d 231 (2003).

374. *Id.* at 103, 586 S.E.2d at 232-33.

375. *Id.* at 102-03, 586 S.E.2d at 232.

376. *Id.* at 104, 586 S.E.2d at 233.

377. 277 Ga. 457, 588 S.E.2d 691 (2003).

378. *Id.* at 457, 588 S.E.2d at 691-92.

379. *Id.* at 459, 588 S.E.2d at 693 (citing *Burke v. State*, 234 Ga. 512, 514, 216 S.E.2d 812 (1975)).

pursuant to the original agreement but also to *collateral acts* incident to and growing out of the original purpose.”³⁸⁰

In *Everitt* Ray Everitt hired John McDuffie to burn down Everitt’s gas station for the insurance money. Everitt promised to pay McDuffie out of the insurance proceeds when he received them. McDuffie, after one failed attempt, offered Cox \$1500 to do the job, and Cox burned the station down. When Everitt was not paid right away from the insurance proceeds, Everitt was unable to pay McDuffie, who in turn could not pay Cox. Cox began complaining to friends that McDuffie owed him money for burning down Everitt’s gas station. McDuffie, who was not happy about this, lured Cox into his shop and killed him with an ax. McDuffie and his grandson then dumped Cox’s body in the woods. Everitt gave McDuffie a new set of tires so that tire tracks could not be traced to his truck, which he had used to dump the body. The jury convicted Everitt for conspiracy to commit murder, and the court gave him a life sentence.³⁸¹

The supreme court reversed, holding that “a conspiracy to commit arson, without more, does not naturally, necessarily, and probably result in the murder of one co-conspirator by another.”³⁸² There was no evidence at all that Everitt conspired to kill Cox. The tire incident occurred after the murder and could only prove that Everitt was a party to murder after the fact, but to be a conspirator, Everitt had to have been involved before the fact.³⁸³ The court rejected the State’s argument that the murder was done in furtherance of the conspiracy by helping to conceal it because there was no evidence that this was reasonably foreseen by Everitt when he agreed to commit arson with McDuffie.³⁸⁴ Because the court reversed for insufficient evidence, Everitt cannot ever be retried.³⁸⁵

X. CONCLUSION

We are criminal defense lawyers. We understand and respect the role prosecuting attorneys play in the administration of criminal justice. We hope that all lawyers, whether or not they practice criminal law, whether they prosecute or defend, appreciate the precious liberties guaranteed to us all by the federal and state constitutions. The courts, as each of these cases above illustrate in some measure, strive to achieve

380. *Id.* (quoting *Burke*, 234 Ga. at 514, 216 S.E.2d at 814).

381. *Id.* at 457 n.1, 588 S.E.2d at 692 n.1.

382. *Id.* at 459-60, 588 S.E.2d at 693.

383. *Id.* at 458, 588 S.E.2d at 692.

384. *Id.*

385. *Id.* at 460, 588 S.E.2d at 693.

that delicate balance whereby the state, on the one side, can maintain the peace, good order, and dignity of our communities, while the accused citizen, on the other, can be assured that no one, not even the state with all its power, can take away his freedom without first providing what we have come to call "due process," a phrase imbued with the lessons of hundreds of years of struggle.