

Criminal Law

by **Laura D. Hogue***
and **Franklin J. Hogue****

I. INTRODUCTION

In this survey of Georgia criminal law, we have selected only those cases that we deemed to be of interest to those of us who practice in the area of criminal law. For space reasons, however, we could not include every interesting case, even in footnotes. Other writers of this survey would have selected differently, no doubt. We also were able to omit all death penalty cases and cases involving strictly evidentiary issues, as two other fine articles in this edition of the *Mercer Law Review* cover those cases.

II. PRETRIAL ISSUES

A. *Speedy Trial*

The “capital offense” conundrum was addressed in *Merrow v. State*,¹ as a precursor to determining the applicability of the speedy trial statutes. The conundrum is this: The Official Code of Georgia

* Partner in the law firm of Hogue & Hogue, LLP, Macon, Georgia. Adjunct Faculty, Walter F. George School of Law, Mercer University. Columbus College (B.A., cum laude, 1986); Walter F. George School of Law, Mercer University (J.D., magna cum laude, 1991). Member, State Bar of Georgia; Regional Vice-President, Georgia Association of Criminal Defense Lawyers; Macon Association of Criminal Defense Lawyers.

** Partner in the law firm of Hogue & Hogue, LLP, Macon, Georgia. Faculty, National Criminal Defense College; Adjunct Faculty, Walter F. George School of Law, Mercer University. Atlanta Christian College (B.A., magna cum laude, 1980); Emmanuel School of Religion (M.A., summa cum laude, 1983); Georgia State University (M.A., summa cum laude, 1988); Walter F. George School of Law, Mercer University (J.D., cum laude, 1991). Member, State Bar of Georgia; Past-President, Macon Association of Criminal Defense Lawyers; Regional Vice-President, Georgia Association of Criminal Defense Lawyers; Member, National Association of Criminal Defense Lawyers.

1. 268 Ga. App. 47, 601 S.E.2d 428 (2004).

Annotated (“O.C.G.A.”) sets forth several crimes for which the death penalty may be imposed (e.g., armed robbery, rape, kidnapping with bodily injury), but constitutional law prohibits the death penalty where there was no murder.² The significance of defining a “capital” case became the central issue in *Merrow v. State* because the defendant, charged with the offense of rape, filed a demand for trial pursuant to the code section that applies to capital offenses.³ The general speedy trial code section⁴ sets forth that in noncapital cases, the defendant must be tried during the term the demand for trial is made, or the next succeeding term.⁵ According to O.C.G.A. section 17-7-171,⁶ the defendant must be tried within two terms after the demand for trial is made, or the defendant is completely discharged and acquitted.⁷ If the State is seeking the death penalty, the two-term time limit does not begin to run until after the pretrial proceedings are completed pursuant to the unified appeal.⁸

In *Merrow* the Georgia Court of Appeals made “a definitive ruling that for purposes of the speedy trial statutes, rape is indeed a capital offense.”⁹ The rationale is that the legislature extended the amount of time for the State to prepare for trial in cases that are more serious and complex.¹⁰ Furthermore, the prohibition against seeking the death penalty for the offense of rape “does not diminish the seriousness or complexity of the crime,” nor, therefore, the amount of time the State would need for trial preparation.¹¹ As a result, Merrow’s motion for discharge and acquittal, filed two terms after the demand for trial was filed, was premature.¹²

During this reporting period, the State appealed two discharge and acquittals that were based on violations of the constitutional right to a speedy trial.¹³ In both cases, the appellate court affirmed the trial court’s decision. First, in *State v. Carr*,¹⁴ the defendant’s convictions for

2. *Coker v. Georgia*, 433 U.S. 584 (1977).

3. 268 Ga. App. at 47, 601 S.E.2d at 429.

4. O.C.G.A. § 17-7-170 (2004).

5. *Id.*

6. O.C.G.A. § 17-7-171 (2004).

7. *Id.* § 17-7-171(b); O.C.G.A. § 17-7-170.

8. O.C.G.A. § 17-7-171(c).

9. 268 Ga. App. at 49, 601 S.E.2d at 430.

10. *Id.*

11. *Id.*, 601 S.E.2d at 431.

12. *Id.* at 51, 601 S.E.2d at 432. The court determined that the demand for speedy trial itself was defective because it did not properly cite the applicable statute. *Id.* at 52, 601 S.E.2d at 432.

13. GA. CONST. art. VI, § 8, para. 2.

14. 278 Ga. 124, 598 S.E.2d 468 (2004).

malice murder and first degree arson were overturned, and the case was returned to the superior court in April 1997.¹⁵ In May 2003 the trial court granted Carr's motion for discharge and acquittal, and the State appealed.¹⁶

Second, in *State v. Sutton*,¹⁷ the State waited seven years to try the defendant on the charges of armed robbery and possession of a firearm during the commission of a felony, which were alleged to have occurred when Sutton was thirteen-years-old.¹⁸ In both cases, the *Barker v. Wingo*¹⁹ factors were applied to determine whether the State had violated the defendants' constitutional right to a speedy trial, and in both cases, the appellate court concluded the trial court had not abused its discretion in dismissing the indictments.²⁰

Finally, in *Hester v. State*,²¹ the defendant moved to dismiss her vehicular homicide charges after the State failed to try her case for more than five years after her arrest.²² The trial court denied the motion, but the court of appeals reversed, concluding that Hester's constitutional right to a speedy trial had been violated.²³ Most significant in their decision was the court's disagreement with the trial court's conclusion that "Hester brought some of the delay on herself when she repeatedly complained about the State not having produced all the discovery documents and materials required by court order and by law."²⁴ The appellate court noted that the State's failure to produce the required discovery was the cause for the delay, not Hester's proper assertion of her pretrial right to discovery.²⁵

15. *Id.* at 124, 598 S.E.2d at 469.

16. *Id.* at 124-25, 598 S.E.2d at 469.

17. 273 Ga. App. 84, 614 S.E.2d 206 (2005).

18. *Id.* at 84, 614 S.E.2d at 207.

19. 407 U.S. 514 (1972). The *Barker v. Wingo* factors consider (1) "the length of the delay," (2) the reason for the delay, (3) "[w]hether and how a defendant asserts his right" to a speedy trial, and (4) "prejudice to the defendant." *Id.* at 530-32.

20. *State v. Carr*, 278 Ga. at 128, 598 S.E.2d at 471; *State v. Sutton*, 273 Ga. App. at 85, 87, 614 S.E.2d at 208, 209.

21. 268 Ga. App. 94, 601 S.E.2d 456 (2004).

22. *Id.* at 94, 601 S.E.2d at 457.

23. *Id.* at 94-95, 601 S.E.2d at 457.

24. *Id.* at 98, 601 S.E.2d at 460.

25. *Id.*

B. Demurrers: Sufficiency and Constitutionality of the Charging Documents

The constitutionality of the statute commonly referred to as the indecent telephone call crime²⁶ was challenged in *McKenzie v. State*.²⁷ The appellant's attack was based on the First Amendment to the United States Constitution²⁸ in that the statute impermissibly infringed upon the right to free speech.²⁹ The Georgia Supreme Court agreed, concluding the statute did "not contain the necessary language setting out the least restrictive means to further a compelling state interest."³⁰ Simply put, the statute criminalized indecent speech between consenting adults, even if the speech was "welcomed by the listener and spoken with intent to please or amuse."³¹ The statute was overbroad and infringed on the right to free speech, therefore, it was declared unconstitutional.³²

C. Search and Seizure

1. Automobile Stops. Police work can be dangerous. For that reason, Georgia made it illegal to have automobile windows tinted so dark that a police officer is unable to see the occupants of an automobile.³³ In *Ciak v. State*,³⁴ Ciak challenged the constitutionality of that statute and obtained a partial victory when the Georgia Supreme Court held that the statute violated the principle of equal protection of the law.³⁵ Georgia's window-tint law, it turned out, applied only to those cars being driven by Georgia residents in this State.³⁶ Therefore, nonresidents were exempt.

After failing in the trial court and Georgia Court of Appeals, Ciak, a Georgia resident, successfully argued before the supreme court that applying the statute only to residents failed to meet the minimal requirement that such a distinction bear a rational connection to the statute's goal of enhancing law enforcement safety because nonresidents

26. O.C.G.A. § 46-5-21 (2004).

27. 279 Ga. 265, ___ S.E.2d ___ (2005).

28. U.S. CONST. amend. I.

29. *McKenzie*, 279 Ga. at 265, ___ S.E.2d at ___.

30. *Id.* at 267, ___ S.E.2d at ___.

31. *Id.*, ___ S.E.2d at ___.

32. *Id.* at 267-68, ___ S.E.2d at ___.

33. O.C.G.A. § 40-8-73.1 (2004 & Supp. 2005).

34. 278 Ga. 27, 597 S.E.2d 392 (2004).

35. *Id.* at 28, 597 S.E.2d at 394.

36. O.C.G.A. § 40-8-73.1(b).

can be just as dangerous as residents behind dark-tinted windows.³⁷ The supreme court struck down the statute.³⁸

We say that Ciak obtained a partial victory because, even though the statute that formed the entire basis of the traffic stop in her case was declared unconstitutional, the denial of Ciak's motion to suppress evidence of her driving under the influence of alcohol was affirmed.³⁹ The law does not require police officers to speculate whether the laws they enforce may later be proven to violate provisions of the constitution.⁴⁰ Thus, because the officer thought the windows were too dark on Ciak's car, he possessed the requisite articulable suspicion of wrongdoing to justify the stop, even though the statute would soon be declared unconstitutional, and even though, upon inspection, the windows were not too dark.⁴¹

2. Roadblocks. For the last few years, law enforcement agencies along Interstate 16 ("I-16"), particularly through Twiggs, Laurens, and Treutlen Counties, have arrested hundreds of motorists at roadblocks. In *State v. Morgan*,⁴² one such hapless traveler was Garie Garfield Morgan, who was arrested on April 18, 2002 for trafficking 122 pounds of marijuana. The date, it turns out, was crucial. Here's how the roadblock was set up: Officers from the Interstate Criminal Enforcement Unit, in conjunction with various drug dog units and even several probation officers, gathered at the end of an exit ramp off of I-16 in Laurens County. Before the exit, the officers placed signs warning motorists that they were approaching a "DUI/drug check point." The officers also parked several police cars with flashing lights along the interstate as decoys. Many motorists, thinking the roadblock was on the interstate ahead, took the next exit ramp, only to encounter the roadblock at the end of the ramp. Seventy-five percent of the motorists who took the exit did so to avoid the roadblock they thought was up ahead on the interstate.⁴³

The trial court granted Morgan's motion to suppress because the roadblock that snagged Morgan occurred one day prior to the date set forth in the authorization signed by the supervisor to the field officer who carried out the roadblock.⁴⁴ While the court of appeals agreed

37. *Ciak*, 278 Ga. at 28-29, 597 S.E.2d at 394.

38. *Id.* at 29, 597 S.E.2d at 395.

39. *Id.* at 31, 597 S.E.2d at 396.

40. *Id.* at 29, 597 S.E.2d at 395 (citing *Michigan v. De Fillipo*, 443 U.S. 31, 38 (1979)).

41. *Id.* at 30-31, 597 S.E.2d at 395-96.

42. 267 Ga. App. 728, 600 S.E.2d 767 (2004).

43. *Id.* at 728-29, 600 S.E.2d at 768.

44. *Id.* at 730, 600 S.E.2d at 769.

with the trial court's finding, it noted an additional problem: This roadblock also violated the restrictions set out in *City of Indianapolis v. Edmond*⁴⁵ limiting the grounds under which a roadblock may be authorized to those where there are "special needs, beyond the normal need for law enforcement."⁴⁶ Because the authorization in *Morgan* extended to general law enforcement, and in light of the testimony of the officer in charge that he and his fellow officers were looking for "any criminal activity," the roadblock violated Morgan's Fourth Amendment expectation of privacy.⁴⁷

3. Consensual Search. In previous years, we have reported cases in which the legal question concerned whether various third persons could give consent to search a defendant's home or other place in which one expects privacy. This year is no exception. In *State v. McKinney*,⁴⁸ McKinney was living with his girlfriend in March 2002, and his teenage son had been living with him for about seven months. On March 31, McKinney was in jail and his ex-wife and her fiancé went to McKinney's girlfriend's home to get her son. While there, McKinney's ex-wife decided to wander through the house, ostensibly looking for her son's belongings. While in McKinney's bedroom, she spied a baggie poking out of a black bag on the nightstand. She and her fiancé surmised the baggie might contain drugs, so she called the law.⁴⁹ Apparently, the wounds of divorce had not yet healed. Or maybe she was just being a good citizen.

The reporting officer knew McKinney's ex-wife did not live at the residence, but asked her and her teenage son for permission to search the house. The ex-wife consented, while her son "never indicated [anything] other than sure."⁵⁰ The trial court suppressed the drug evidence seized from the baggie in the black bag, reasoning that the ex-wife had no authority to give consent and the teenager never expressly authorized the search.⁵¹

The court of appeals held that a minor can give consent if he lives at that place, has the right of access, the right to invite others over, and has reached an age to exercise at least minimal discretion.⁵² The

45. 531 U.S. 32 (2000).

46. *Morgan*, 267 Ga. App. at 731, 600 S.E.2d at 769 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000)).

47. *Id.* at 732, 600 S.E.2d at 770 (citing *Edmond*, 531 U.S. at 45).

48. 268 Ga. App. 296, 601 S.E.2d 777 (2004).

49. *Id.* at 296, 601 S.E.2d at 778.

50. *Id.* at 296-97, 601 S.E.2d at 778-79.

51. *Id.* at 297, 601 S.E.2d at 779.

52. *Id.* at 298, 601 S.E.2d at 779.

record in this case failed to establish these factors, thus requiring remand for further inquiry.⁵³ On remand, therefore, if the son says that he could enter his father's bedroom whenever he wanted to, and that he had "common authority" over it, then he had the power "to permit inspection in his own right and . . . others have assumed the risk that one of their number might permit the common area to be searched."⁵⁴ However, the trial judge had already concluded that "McKinney's ex-wife was essentially controlling the teenager, and that his authorization of the search—upon which the officers relied—appeared to be solely the result of her influence."⁵⁵

4. Blood Test Refusal. In an important case this reporting period,⁵⁶ the Georgia Supreme Court granted certiorari to the court of appeals for consideration of its decision that refusal to submit to a blood test after suffering a serious injury in a traffic wreck, but before arrest for DUI, is not admissible against the defendant.⁵⁷ Handschuh wrecked his truck one night in Fayette County, flipping it and seriously injuring himself. While at the hospital, but before he was arrested, an officer read him the implied consent notice. Handschuh refused to allow a technician to draw his blood. At trial, the court allowed his refusal into evidence, and the jury convicted Handschuh.⁵⁸

The court of appeals overruled several cases, holding that refusal of a chemical test for intoxication was admissible even if the defendant was not under arrest when the refusal was made.⁵⁹ It did so because the statute at issue, O.C.G.A. section 40-5-55,⁶⁰ clearly states

any person who operates a motor vehicle upon the highways or elsewhere throughout this state shall be deemed to have given consent, subject to Code Section 40-6-392, to a chemical test or tests of his or her blood, breath, urine, or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been committed in violation of Code Section 40-6-391⁶¹

53. *Id.* at 299, 601 S.E.2d at 780.

54. *Id.* at 298, 601 S.E.2d at 779-80.

55. *Id.* at 297, 601 S.E.2d at 779.

56. *Handschuh v. State*, 270 Ga. App. 676, 607 S.E.2d 899 (2004).

57. *Id.* at 676-77, 607 S.E.2d at 901.

58. *Id.*

59. *Id.* at 680-81, 607 S.E.2d at 904.

60. O.C.G.A. § 40-5-55 (2004).

61. *Id.* § 40-5-55(a).

Because Handschuh was not under arrest, but merely under suspicion while in the hospital when the implied consent notice was given, his refusal should not have been admitted against him.⁶² The supreme court granted certiorari to answer the following question:

Whether in a traffic accident involving serious injury where a law enforcement officer has probable cause to believe the suspect was under the influence of alcohol or drugs, the State may constitutionally require the suspect pursuant to [O.C.G.A. section] 40-5-55 to submit to a chemical test of his blood for the purpose of determining the presence of alcohol or other drugs prior to any formal arrest of the suspect?⁶³

Oral argument occurred in June; we await the court's decision.

D. Recusal

The murder, armed robbery, and aggravated assault convictions in *Johnson v. State*⁶⁴ were reversed for the trial court's denial of the defense motion to recuse.⁶⁵ The Georgia Supreme Court concluded that the trial judge's conduct raised serious questions about his impartiality.⁶⁶ During a pretrial hearing on a defense motion in limine seeking to prohibit the introduction of evidence that would improperly place the defendant's character in evidence, the trial judge commented that "being a party" to a murder "certainly doesn't do anything to uphold [the defendant's] character."⁶⁷ In front of the jury, there were "numerous instances during trial when the judge's behavior appears to have been biased against [the] appellant's counsel and partial . . . [to] the State."⁶⁸ For example, during jury selection, the trial judge yelled at defense counsel to "sit down and shut up."⁶⁹ Furthermore, during repeated objections to questions the prosecutor was asking of a state's witness, the judge told defense counsel that the witness could testify to "whatever subjects the trial judge wanted to hear about," and admonished counsel not to "interrupt the State's cross-examination again."⁷⁰ After many more instances of berating counsel and openly assisting the prosecutor in developing his case, defense counsel moved for the trial judge's recusal

62. *Handschuh*, 270 Ga. App. at 678, 607 S.E.2d at 902.

63. *State v. Handschuh*, 279 Ga. 711, 620 S.E.2d 380 (2005).

64. 278 Ga. 344, 602 S.E.2d 623 (2004).

65. *Id.* at 349, 602 S.E.2d at 627.

66. *Id.* at 348-49, 602 S.E.2d at 627.

67. *Id.* at 346, 602 S.E.2d at 625.

68. *Id.*, 602 S.E.2d at 626.

69. *Id.* at 347, 602 S.E.2d at 626.

70. *Id.*

and for a mistrial.⁷¹ The judge denied the motions and warned counsel that if he sought again “to bring discredit . . . upon the court,’ the court would cite him for contempt.”⁷² With all justices concurring, the court reversed the denial of the motion to recuse as well as the mistrial motion.⁷³

E. Right to Counsel

The sanctity of the attorney-client relationship was upheld in *Grant v. State*,⁷⁴ and *Williams v. State*.⁷⁵ Both cases concerned attorney Matthew Rubenstein, who is imminently qualified in death penalty representation and has consistently maintained an “excellent working relationship” with his clients.⁷⁶ In *Grant* Rubenstein was being assisted, pro bono, by two other “well-qualified” attorneys who, likewise, had developed a strong working relationship with the defendant.⁷⁷ The trial court wished to appoint local counsel as second chair and ordered that the attorneys who had been volunteering their time be removed as second chair.⁷⁸ The trial court ignored the rules concerning the appointment of counsel over the objections of the defendant, which provide that “when a defendant’s choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no countervailing considerations of comparable weight, it is an abuse of discretion to deny the defendant’s request to appoint the counsel of his preference.”⁷⁹ It was improper, therefore, for the trial judge to order that the second chair attorneys be removed.⁸⁰

The Georgia Court of Appeals reaffirmed the importance of the right to counsel of a defendant’s choosing in *Turman v. State*.⁸¹ In *Turman* the defendant had hired an attorney, but when the case was called for trial, the attorney’s office notified the trial court that the lawyer was in the hospital and submitted a medical record showing that he had been

71. *Id.*

72. *Id.*

73. *Id.* at 349, 602 S.E.2d at 627.

74. 278 Ga. 817, 607 S.E.2d 586 (2005).

75. 279 Ga. 154, 611 S.E.2d 51 (2005).

76. *Grant*, 278 Ga. at 817, 607 S.E.2d at 586.

77. *Id.*

78. *Id.*

79. *Id.* at 817-18, 607 S.E.2d at 587 (quoting *Davis v. State*, 261 Ga. 221, 222, 403 S.E.2d 800, 801 (1991)).

80. *Id.* at 818, 607 S.E.2d at 587. Additionally, in *Williams* the supreme court reversed the trial court’s attempt to remove Matthew Rubenstein as lead counsel over Mr. Williams’s objection. 279 Ga. at 154, 611 S.E.2d at 51.

81. 272 Ga. App. 570, 570, 613 S.E.2d 126, 126 (2005).

seen in the emergency room the night before for gastroenteritis. The trial court ordered an appointed attorney to take the case and be ready for trial the next day. Despite counsel's protests concerning the forced representation of a person who was already represented, as well as counsel's grave concerns that he was completely unprepared, the court compelled the attorney to try the case, which quickly resulted in convictions for three major felonies.⁸² In reversing the convictions, the court of appeals reiterated that "[t]here can be no greater safeguard than the presence of that attorney selected by the defendant as leading counsel who is prepared for the trial and upon whom the defendant relies to manage and conduct his trial."⁸³

III. STATE'S CASE IN CHIEF

A. Admissibility of Evidence

In *Grinstead v. State*,⁸⁴ the Georgia Court of Appeals applied the test set forth in *Harper v. State*⁸⁵ to determine the admissibility of the "Roche Diagnostic Corporation's "On Track TesTstik" drug test" at Grinstead's probation revocation hearing.⁸⁶ Under *Harper*, if a scientific procedure or test has reached a stage of verifiable certainty, it may be admitted into evidence without requiring the test proponent to show the reliability of the procedure.⁸⁷ One way a trial court can find "verifiable certainty" is to rely on the findings of other courts by way of case law holding that the test is verifiably certain.⁸⁸ In *Grinstead*, however, the trial court relied only on the holding in *Cheatwood v. State*,⁸⁹ in which expert testimony was presented that the On Track TesTstik "was 100 percent reliable for testing marijuana or cocaine."⁹⁰ In Grinstead's probation revocation hearing, in which it was alleged that Grinstead tested positive for methamphetamine and morphine, the appellate court held that the trial court's reliance on only one previous case fell far short of the requirement that "a substantial number of cases is required that show that other courts recogniz[ed] the scientific

82. *Id.* at 572-76, 613 S.E.2d at 127-30.

83. *Id.* at 577, 613 S.E.2d at 130 (quoting *Long v. State*, 119 Ga. App. 82, 83, 166 S.E.2d 365, 366 (1969)).

84. 269 Ga. App. 820, 605 S.E.2d 417 (2004).

85. 249 Ga. 519, 292 S.E.2d 389 (1982).

86. *Grinstead*, 269 Ga. App. at 821-22, 605 S.E.2d at 419.

87. *Harper*, 249 Ga. at 525-26, 292 S.E.2d at 395-96.

88. *Grinstead*, 269 Ga. App. at 822, 605 S.E.2d at 419.

89. 248 Ga. App. 617, 548 S.E.2d 384 (2001).

90. *Id.* at 619, 548 S.E.2d at 386.

procedure or technique.”⁹¹ “One case is not enough,” the court held, especially when it was unclear whether the test at issue was, indeed, the same test analyzed in *Cheatwood*.⁹²

B. Hearsay

Oscar Senior was convicted of arson on his girlfriend’s car, in large part based on an eyewitness’s statement given to the investigating officer.⁹³ The statement indicated that she saw the defendant around the victim’s car with a white T-shirt over his shoulder “acting very weird,” and that as she later walked by the car, the defendant told her to “get the hell out of the way, the car was going to blow up.”⁹⁴ Most significantly, the witness noted that when he yelled at her, he no longer had the T-shirt on his shoulder. The case agent testified that there was a white, wet rag on the ground next to the car which would have fit into the gas tank where it was burned.⁹⁵ At trial, this eyewitness was not available and the trial court, over objection, permitted the officer to read her statement into evidence.⁹⁶

The court of appeals concluded that this admission of hearsay was erroneous and the error was harmful.⁹⁷ It violated the Sixth Amendment Confrontation Clause,⁹⁸ the United States Supreme Court’s recent decision in *Crawford v. Washington*,⁹⁹ and its progeny rendered by the Georgia Supreme Court, which hold that statements made to police officers during the course of an investigation are testimonial in nature and are, therefore, inadmissible under the *res gestae* exception to the prohibition against the admission of hearsay.¹⁰⁰ The conviction for arson was reversed.¹⁰¹

The O.C.G.A. sets forth another exception to the prohibition against the admissibility of hearsay, known as the co-conspirator’s statement

91. 269 Ga. App. at 822, 605 S.E.2d at 419.

92. *Id.* The probation revocation was affirmed because Grinstead was also adjudicated guilty for possession of ammunition in violation of his probation; however, the case was remanded for sentencing in accordance with the holding that the trial court abused its discretion in admitting evidence of the positive drug tests.

93. *Senior v. State*, 273 Ga. App. 383, 615 S.E.2d 220 (2005).

94. *Id.* at 384, 615 S.E.2d at 221-22.

95. *Id.* at 383, 615 S.E.2d at 221-22.

96. *Id.* at 383-84, 615 S.E.2d at 221.

97. *Id.* at 385, 615 S.E.2d at 221.

98. U.S. CONST. amend. VI.

99. 541 U.S. 36 (2004).

100. *Porter v. State*, 278 Ga. 694, 696, 606 S.E.2d 240, 243 (2004); *Brawner v. State*, 278 Ga. 316, 318, 602 S.E.2d 612, 614 (2004).

101. *Senior*, 273 Ga. App. at 383, 615 S.E.2d at 221.

exception.¹⁰² This exception permits the admission of statements made by co-conspirators “during the course and in furtherance of the criminal project.”¹⁰³ In *Sharber v. State*,¹⁰⁴ Sharber and Freeman were on trial for conspiracy to manufacture methamphetamine. When they were first arrested, Sharber and Freeman were questioned separately. Sharber denied any wrongdoing, but Freeman incriminated Sharber.¹⁰⁵ At trial, relying upon the co-conspirator exception, the court allowed the investigating officer to testify as to Freeman’s incriminating statements.¹⁰⁶

The ruling was a harmful abuse of discretion because a statement made to police by a conspirator that “incriminates the other conspirator as a party to the crime” constitutes termination of the conspiracy.¹⁰⁷ Freeman’s statement to the police could not be admissible under the co-conspirator exception.¹⁰⁸ Moreover, because Freeman did not testify at the trial, the admissibility of his statement violated the holding from *Bruton v. United States*,¹⁰⁹ which prohibits the admission of an “incriminating statement of a non-testifying codefendant” because it violates the defendant’s right to confrontation.¹¹⁰

Another statutory exception to the prohibition against the admissibility of hearsay is the child hearsay exception.¹¹¹ The statute and the case law construing the statute have established a long list of factors the trial court must consider “to facilitate determination of the existence or absence of the requisite degree of trustworthiness” of the child’s statements.¹¹² In *Ferreri v. State*,¹¹³ the Georgia Court of Appeals reversed Ferreri’s convictions for six counts of child molestation against his daughter when she was between the ages of one-and-a-half and three-and-a-half years old by finding that the child’s out-of-court statements were not sufficiently reliable to be admitted under the child hearsay exception.¹¹⁴ There was no medical evidence of molestation,

102. O.C.G.A. § 24-3-5 (1995 & Supp. 2005).

103. *Livingston v. State*, 268 Ga. 205, 210, 486 S.E.2d 845, 849 (1997).

104. 268 Ga. App. 365, 601 S.E.2d 732 (2004).

105. *Id.* at 365-66, 601 S.E.2d at 734.

106. *Id.* at 367, 601 S.E.2d at 734.

107. *Id.* at 368, 601 S.E.2d at 735 (citing *Meadows v. State*, 264 Ga. App. 160, 166, 590 S.E.2d 173, 180 (2003)).

108. *Id.*

109. 391 U.S. 123 (1968).

110. *Sharber*, 268 Ga. App. at 368 n.1, 601 S.E.2d at 735 n.1.

111. O.C.G.A. § 24-3-16 (1995 & Supp. 2005).

112. *Gregg v. State*, 201 Ga. App. 238, 241, 411 S.E.2d 65, 68 (1991); *accord Rolader v. State*, 202 Ga. App. 134, 139-40, 411 S.E.2d 65, 67-68 (1991).

113. 267 Ga. App. 811, 600 S.E.2d 793 (2004).

114. *Id.* at 811-12, 600 S.E.2d at 793.

the victim testified that she either “did not know” or “did not remember” any of the allegations, the charges arose out of an acrimonious divorce, the child had just turned three at the time of her first statement, and she was interviewed repeatedly, and poorly, over a seven-month period.¹¹⁵ In fact, one interview was conducted with so many people in the room that it was deemed “chaotic,” one interviewer promised the child small toys in exchange for answering questions, and yet another interviewer offered snacks and told the child that she was “so proud of you” after the child, reluctantly, made statements incriminating the defendant.¹¹⁶

Once the trial court makes a determination that a child’s statement is admissible under the child hearsay exception, as it was in *Starr v. State*,¹¹⁷ it is error for this finding to be expressed to the jury.¹¹⁸ According to O.C.G.A. section 17-8-57,¹¹⁹ the trial judge in a criminal case may not “express or intimate [an] opinion as to what has or has not been proved.”¹²⁰ The trial judge in *Starr* violated this prohibition when he engaged in an “unrequested, gratuitous recitation of the Child Hearsay Statute” in his jury instructions, which included the statement, “The court finds that the circumstances of the statement provides [sic] sufficient indicia of reliability.”¹²¹

IV. DEFENSE CASE

Imagine a trial in which the defendant may testify and explain her conduct in the case at bar in a way consistent with innocence without opening the door to her bad character; specifically, keeping out of evidence prior convictions and those nasty peccadillos from the past. This was the manner in which trials were conducted in Georgia for decades prior to July 1, 2005.¹²² After that date, if the defendant testifies, his convictions may be admitted without a previous requirement that the door to character evidence be opened.¹²³ The difference is significant, as the following case from this reporting period illustrates.

115. *Id.* at 812-14, 600 S.E.2d at 793-95.

116. *Id.* at 813-14 n.2, 600 S.E.2d at 794-95 n.2.

117. 269 Ga. App. 466, 604 S.E.2d 297 (2004).

118. *Id.* at 466, 604 S.E.2d at 297.

119. O.C.G.A. § 17-8-57 (2004).

120. *Id.*

121. *Starr*, 269 Ga. App. at 466-67, 604 S.E.2d at 298.

122. See O.C.G.A. § 24-9-20, as amended by H.B. 170 (April 5, 2005), known as the Criminal Justice Act of 2005.

123. O.C.G.A. § 24-9-20(b).

In *King v. State*,¹²⁴ King was convicted of possession of methamphetamine with intent to distribute and possession of amphetamine with intent to distribute. At trial, King testified that he went to a drug informant's house, without knowledge he was an informant, because King's buddy Bradley paid him one hundred dollars for a ride there to enable Bradley to pick up some oxycodone pills from the informant.¹²⁵ The evidence showed that Bradley had called the informant from King's cell phone on the way to the informant's house.¹²⁶ Upon entering the informant's house, the officers performed a "take-down."¹²⁷ King threw his cell phone toward a sofa, the officers retrieved it, left the room with it, then returned and claimed that the leather cover contained the offending drugs.¹²⁸

King testified in his defense at trial and never placed his character in issue. The State, however, proceeded to introduce into evidence King's several felony convictions, including a conviction for possession of cocaine, claiming King opened the door to this bad character evidence by testifying he wasn't "taking" illegal drugs.¹²⁹ The context of the answer in which King claimed not to have been taking drugs, however, clearly showed he was saying that he was not taking drugs to the informant's house, not that he was not a drug user. Had he meant the latter, the felonies may have been admissible to impeach him. As it was, King's conviction was reversed.¹³⁰ This would not be the case after July 1, 2005. If King were to be retried today, and if King were to take the stand to offer his story of innocence, then evidence of his convictions, including drug convictions, would probably be admissible against him.

We say "probably" because O.C.G.A. section 24-9-84.1¹³¹ adds a balancing test for determining the admissibility of felony convictions against the defendant or any other witness. For a nondefendant witness, the court must "determine[] that the probative value of admitting the evidence outweighs its prejudicial effect to the witness" before admitting the evidence of a prior conviction.¹³² For the defendant, the court must "determine[] that the probative value of admitting the evidence *substantially* outweighs its prejudicial effect to the defen-

124. 270 Ga. App. 399, 606 S.E.2d 616 (2004).

125. *Id.* at 401, 606 S.E.2d at 617.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 400-01, 606 S.E.2d at 618.

130. *Id.* at 399, 606 S.E.2d at 617.

131. O.C.G.A. § 24-9-84.1 (1995 & Supp. 2005).

132. *Id.* § 24-9-84.1(a)(1).

dant.”¹³³ However, it is likely that King’s drug conviction would be admitted against him in his drug case.

In *Ross v. State*,¹³⁴ a case concerning the defendant’s prior convictions when the defendant did not testify and was not directly affected by the new O.C.G.A. section 24-9-20,¹³⁵ the Georgia Supreme Court adopted the reasoning of the United States Supreme Court in *Old Chief v. United States*¹³⁶ by stating the following limited rule:

[W]hen (1) a defendant’s prior conviction is of the nature likely to inflame the passions of the jury and raise the risk of a conviction based on improper considerations, and (2) the purpose of the evidence is solely to prove the defendant’s status as a convicted felon, then it is an abuse of discretion for the trial court to spurn the defendant’s offer to stipulate to his prior conviction and admit the evidence to the jury.¹³⁷

In an attempt to conceal the nature of his prior felony,¹³⁸ the defendant in *Ross* offered to stipulate that he was a felon in his murder trial, which included a charge that he was a felon in possession of a firearm.¹³⁹ Ross knew, and the Georgia Supreme Court agreed, that once that fact was revealed, there was a great risk that the jury would be unable to separate from its consideration whether Ross committed murder, armed with the knowledge that somewhere in Ross’s recent past he had enticed a child for a sexual purpose.¹⁴⁰ The supreme court held that this conviction had no probative value for determining whether Ross committed murder.¹⁴¹

The question remains, however, what if Ross had testified? Could the State have then told the jury in its cross-examination of Ross what the nature of his felony conviction was? It would seem so under O.C.G.A. section 24-9-20, because (1) the defendant may now be cross-examined “as any other witness,” and (2) any other witness may be impeached with convictions, including the nature of the crime for which the witness was convicted.¹⁴² However, using the balancing test set out in O.C.G.A. section 24-9-84.1, Ross’s conviction for enticing a child for

133. *Id.* § 24-9-84.1(a)(2) (emphasis added).

134. 279 Ga. 365, 614 S.E.2d 31 (2005).

135. O.C.G.A. § 24-9-20 (1995 & Supp. 2005).

136. 519 U.S. 172 (1997).

137. *Ross*, 279 Ga. at 368, 614 S.E.2d at 34.

138. Ross was formerly convicted of a felony for enticing a child for indecent purposes. *Id.* at 366, 614 S.E.2d at 33.

139. *Id.*

140. *Id.* at 368, 614 S.E.2d at 34.

141. *Id.*

142. O.C.G.A. § 24-9-20 (1995 & Supp. 2005).

indecent purposes would be excluded. After all, it seems such a conviction in the context of his murder case, in which he was accused of shooting his former girlfriend's new boyfriend, would have a prejudicial effect on Ross substantially outweighing its probative value in deciding whether he committed the murder.

The change in evidentiary law, however, will likely deter the testimony of future defendants like King and Ross because, once a jury hears that a defendant is already a felon, that defendant's chances of acquittal plummet. Defendants will need to have pre-trial rulings on these matters of admissibility of convictions to make crucial decisions concerning whether or not to testify.

Accompanying House Bill 170 were other sweeping changes in criminal procedure, including equal peremptory jury strikes for State and defense, as well as the State's right to make the final closing argument in every case.¹⁴³ However, because these changes took effect after the reporting period for this survey, we will delay our analysis of the remainder of these until the next reporting period, after we have lived with the new rules for almost a year and have seen how they reshape the terrain of criminal law.

V. JURY INSTRUCTIONS

A jury instruction on entrapment requires that "(1) the idea for the commission of the crime must originate with the state agent; (2) the crime must be induced by the agent's undue persuasion, incitement, or deceit; and (3) the defendant must not be predisposed to commit the

143. See O.C.G.A. § 5-6-34 (1995 & Supp. 2005) (defendant's motion to recuse may be subject to interlocutory appeal); O.C.G.A. § 5-7-1 (1995 & Supp. 2005) (the State may appeal from an order, decision, or judgment by a superior court granting a motion for new trial or denying a motion by the State to recuse or disqualify a judge); O.C.G.A. § 15-12-125 (2005) (equal and fewer peremptory strikes in misdemeanor cases); O.C.G.A. § 15-12-160 (2005) (changing the size of the jury panel); O.C.G.A. § 15-12-164 (2005) (excuses for cause); O.C.G.A. § 15-12-165 (2005) (equal and fewer peremptory strikes in felony cases); O.C.G.A. § 15-12-169 (2005) (number of alternate jurors); O.C.G.A. § 17-8-4 (2004 & Supp. 2005) (additional peremptory challenges in cases of jointly tried defendants); O.C.G.A. § 17-8-71 (2004 & Supp. 2005) (prosecuting attorney shall open and conclude the argument to the jury); O.C.G.A. § 17-10-2 (2004 & Supp. 2005) (procedure in pre-sentencing hearings); O.C.G.A. § 17-16-2 (2004 & Supp. 2005) (discovery provisions apply to sentencing hearings); § 17-16-4 (discovery in sentencing hearings in death penalty cases); O.C.G.A. § 24-2-3 (1995 & Supp. 2005) (relating to evidence of past sexual behavior in certain cases); O.C.G.A. § 24-9-20 (1995 & Supp. 2005) (examination and cross-examination of defendant); O.C.G.A. § 24-9-81 (1995 & Supp. 2005) (impeachment); O.C.G.A. § 24-9-84.1 (1995 & Supp. 2005) (attacking credibility of a witness or the defendant).

crime.”¹⁴⁴ The defendant need not admit to committing the crime to receive a charge on entrapment, as long as he offers no evidence of entrapment that is inconsistent with his defense that he did not commit the crime.¹⁴⁵ In *Ellzey v. State*,¹⁴⁶ the defendant was convicted of criminal attempt to traffic in methamphetamine after a confidential informant initiated a number of telephone calls to set up a methamphetamine deal. Ellzey testified that he only met with the informant because he was being pressured to loan the informant money.¹⁴⁷ When Ellzey requested a charge on entrapment, the trial court denied the request because Ellzey did not admit to committing the crime.¹⁴⁸ As the State’s evidence satisfied the three-part showing required for an entrapment defense, and Ellzey did not present any evidence of entrapment, only evidence that he did not commit the crime, it was reversible error for the trial court to refuse to charge the jury on the entrapment defense.¹⁴⁹

VI. VERDICT

In *Benefield v. State*,¹⁵⁰ the Georgia Supreme Court granted certiorari to determine whether a juror’s negative answer to a poll question required that the deliberation resume.¹⁵¹ Following a guilty verdict on three counts of aggravated child molestation and one count of child molestation, the defense asked that the jury be polled.¹⁵² The trial court asked the jurors “whether the published verdict was their verdict in the jury room and whether it was still their verdict.”¹⁵³ The first eleven jurors answered both questions in the affirmative, but the twelfth juror responded “no” to the first poll question and “yes” to the second.¹⁵⁴

144. *Hill v. State*, 261 Ga. 377, 405 S.E.2d 258 (1991) (citing *Keaton v. State*, 253 Ga. 70, 72, 316 S.E.2d 482 (1984)); O.C.G.A. § 16-3-25 (2003).

145. *Gregoroff v. State*, 248 Ga. 667, 672, 285 S.E.2d 537, 541 (1982).

146. 272 Ga. App. 253, 612 S.E.2d 77 (2005).

147. *Id.* at 253-55, 612 S.E.2d at 79-80.

148. *Id.* at 255, 612 S.E.2d at 80.

149. *Id.* at 257, 612 S.E.2d at 82.

150. 278 Ga. 464, 602 S.E.2d 631 (2004).

151. *Id.* at 464, 602 S.E.2d at 632.

152. *Id.*

153. *Id.* It is ordinarily the custom (though not a necessity) that the court also ask whether the verdict was freely and voluntarily arrived at. The authors encourage this additional question as it can serve to uncover whether any juror felt pressured or coerced to join the majority in their verdict.

154. *Id.*

On direct appeal to the court of appeals, Benefield raised ineffective assistance of counsel for his trial attorney's failure to object to the poll.¹⁵⁵ The court of appeals remanded the case to the trial court for a hearing on this issue, and the trial court ruled that the juror's affirmative answer to the second question removed any ambiguity in the jury verdict.¹⁵⁶

The Georgia Supreme Court granted certiorari to resolve this issue. The supreme court held that "a negative response to a poll question 'is enough to raise the inference that the finding of the jury was not concurred in by each of the jurors,'" and to raise a concern that the verdict "was due to external pressure."¹⁵⁷ If the verdict was not freely and voluntarily assented to by all, it is not a legal verdict, and the jury must be ordered to return to its deliberations.¹⁵⁸

VII. SENTENCING

A. *Constitutionality of Sentencing Statute*

In the companion cases of *Botts v. State* and *Pisciotta v. State*,¹⁵⁹ the Georgia Supreme Court reviewed the constitutionality of the hate crime penalty statute.¹⁶⁰ The hate crime statute "require[d] the enhancement of criminal sentences whenever the fact finder determine[d] beyond a reasonable doubt 'that the defendant intentionally selected any victim or any property of the victim as the object of the offense because of bias or prejudice.'"¹⁶¹ The statute was challenged for violating the due process clauses of the United States¹⁶² and Georgia¹⁶³ Constitutions as being unconstitutionally vague.¹⁶⁴

The supreme court held that the language of the statute was not specific enough to give people of ordinary intelligence warning of what conduct was prohibited.¹⁶⁵ The court noted that the language was so broad it "encompasses every possible partiality or preference," such as "[a] rabid sports fan convicted of uttering terroristic threats to a victim

155. *Id.*

156. *Id.*

157. *Id.* at 466, 602 S.E.2d at 633-34 (quoting *Ponder v. State*, 11 Ga. App. 60, 60-62, 74 S.E. 715, 715-16 (1912)).

158. *Id.*, 602 S.E.2d at 634.

159. 278 Ga. 538, 604 S.E.2d 512 (2004).

160. *Id.* at 538, 604 S.E.2d at 512; O.C.G.A. § 17-10-17 (2004).

161. *Botts*, 278 Ga. at 538, 604 S.E.2d at 513 (quoting O.C.G.A. § 17-10-17(a)).

162. U.S. CONST. amends. V and XIV.

163. GA. CONST. art. I, § 1, para. 13.

164. *Botts*, 278 Ga. at 538, 604 S.E.2d at 513-14.

165. *Id.* at 538-39, 604 S.E.2d at 513-14.

selected for wearing a competing team's baseball cap; [and] a campaign worker convicted of trespassing for defacing a political opponent's yard signs."¹⁶⁶ The conviction was reversed.¹⁶⁷

B. *First Offender Treatment*

Carlotta Andrews pleaded guilty to trafficking in cocaine and, pursuant to the First Offender Act,¹⁶⁸ was initially sentenced to ten years and allowed him to serve the time on probation.¹⁶⁹ The trial court became concerned that it was not authorized to impose a probated sentence for the crime of trafficking in cocaine, and three days later the court vacated the sentence and sentenced Andrews as a first offender to a ten-year prison term.¹⁷⁰ Soon after, the court changed its mind again and, this time, sentenced Andrews to six years in prison and four years of probation. Both the State and the defendant appealed.¹⁷¹

The Georgia Court of Appeals focused on "the interplay between [O.C.G.A. section] 16-13-31, which establishes the penalties for trafficking in cocaine, and [O.C.G.A. section] 42-8-60, the provision that authorizes probated first offender sentences."¹⁷² The penalty for trafficking in cocaine is a mandatory minimum ten-year prison term.¹⁷³ The O.C.G.A. mandates that the minimum sentence cannot be probated or deferred.¹⁷⁴ The conditional discharge language of the first offender provision is, therefore, trumped by the directive that the mandatory minimum sentence cannot be suspended or deferred.¹⁷⁵ Andrews was returned to ten years in prison with no first offender treatment.¹⁷⁶

C. *Recidivist Issues*

In *Allen v. State*,¹⁷⁷ the State introduced a certified copy of Allen's prior conviction for robbery during his trial for possession of a firearm by a convicted felon.¹⁷⁸ The jury found the defendant guilty on all

166. *Id.* at 540, 604 S.E.2d at 514.

167. *Id.* at 541, 604 S.E.2d at 515.

168. O.C.G.A. § 42-8-60 to -66 (1997 & Supp. 2005).

169. *Andrews v. State*, 271 Ga. App. 162, 162, 609 S.E.2d 119, 120 (2004).

170. *Id.*

171. *Id.* at 162, 609 S.E.2d at 120.

172. *Id.* at 163, 609 S.E.2d at 120.

173. O.C.G.A. § 16-13-31(a)(1)(A) (2003 & Supp. 2005).

174. *Id.* § 16-13-31(g)(1).

175. *Andrews*, 271 Ga. App. at 164-65, 609 S.E.2d at 121-22.

176. *Id.* at 165, 609 S.E.2d at 122.

177. 268 Ga. App. 519, 602 S.E.2d 250 (2004).

178. *Id.* at 533-34, 602 S.E.2d at 262.

fourteen counts of possession of a firearm by a convicted felon.¹⁷⁹ Then, at the sentencing hearing, the State retendered the certified copy of Allen's prior conviction for robbery for purposes of seeking recidivist sentencing for Allen.¹⁸⁰ The court sentenced Allen to the maximum on each count.¹⁸¹

The sentence was contrary to the law because when "the State proves a defendant's prior felony convictions for the purpose of convicting him of being a convicted felon in possession of a firearm, it may not also use those prior convictions in aggravation of punishment."¹⁸² The State must elect whether to use the prior conviction as the underlying felony in support of a conviction for possession of a firearm by a convicted felon, or as a prior conviction for recidivist punishment, but not both.¹⁸³ Allen's sentence was not supported by law; therefore, the sentence was reversed, and the case was remanded to the trial court for resentencing.¹⁸⁴

There are both general and specific statutes dealing with recidivist punishment.¹⁸⁵ If the State intends to ask the trial court to impose recidivist punishment, it must first provide proper notice as set forth in either the general or the specific recidivist statute, or both.¹⁸⁶ In *Webb v. State*,¹⁸⁷ the jury found the defendant guilty of child molestation and sexual battery.¹⁸⁸ Months before trial, the State provided the defendant with proper notice seeking recidivist treatment pursuant to O.C.G.A. section 17-10-7(c),¹⁸⁹ the general recidivist statute.¹⁹⁰ The general recidivist statute required that whatever sentence the defendant received, he would have to serve it in its entirety, without parole.¹⁹¹ However, after the jury was selected, and one day before testimony began, the State served the defendant with notice that it would seek life imprisonment, pursuant to the specific child molestation recidivist

179. *Id.* at 534, 602 S.E.2d at 262.

180. *Id.*

181. *Id.*, 602 S.E.2d at 262-63.

182. *Id.*, 602 S.E.2d at 263 (quoting *Caver v. State*, 215 Ga. App. 711, 713, 452 S.E.2d 515, 517 (1994)).

183. *Id.*

184. *Id.* The same error was made in *Morrison v. State*, 272 Ga. App. 34, 43, 611 S.E.2d 720, 728 (2005), and the court of appeals, likewise, reversed the sentence and remanded for resentencing.

185. O.C.G.A. § 17-10-7(c) (2004) (general); O.C.G.A. § 16-6-4(b) (2003) (specific).

186. O.C.G.A. § 17-10-7(c); O.C.G.A. § 16-6-4(b).

187. 270 Ga. App. 817, 608 S.E.2d 241 (2004).

188. *Id.* at 817, 608 S.E.2d at 241.

189. O.C.G.A. § 17-10-7(c) (2004).

190. *Webb*, 270 Ga. App. at 820, 608 S.E.2d at 244.

191. *Id.*

statute,¹⁹² which required such a punishment upon proof of the defendant's second conviction for the offense of child molestation.¹⁹³ Later that day, this notice was followed by a letter faxed from the prosecutor to the defense attorney containing an offer to withhold presentation of proof of the prior molestation conviction at sentencing in exchange for the defendant's entry of a guilty plea.¹⁹⁴

At sentencing, the trial court refused to impose a life sentence because the timing of the specific recidivist notice and the accompanying plea offer left the impression that the State intended to have the defendant punished more harshly for exercising his right to a jury trial.¹⁹⁵ The trial court set aside the notice to seek a life sentence and that decision was upheld.¹⁹⁶

Similarly, prior to trial in *Blevins v. State*,¹⁹⁷ the State filed a notice pursuant to O.C.G.A. section 16-6-4(b), the specific recidivist punishment statute pertaining to child sexual offenses. The State also filed a notice pursuant to O.C.G.A. section 17-10-7(c), which requires that the trial judge impose the maximum sentence set forth by statute, that the sentence cannot be suspended or probated, and that the defendant be ineligible for parole until completion of the maximum sentence.¹⁹⁸ Regarding the defendant's convictions for two counts of child molestation, the State sought a life sentence without parole.¹⁹⁹ The trial judge believed that he had no discretion but to impose the sentence the State requested—a life sentence without parole.²⁰⁰ The judge, however, was wrong because the sentencing range was not less than ten and not more than thirty years, or life imprisonment.²⁰¹ Although the judge could have sentenced the defendant to life, he was not required to do so.²⁰² The judge's mistaken belief that he had no choice essentially stripped him of the discretion he was obligated to exercise; therefore, the case was remanded for resentencing.²⁰³

192. O.C.G.A. § 16-6-4(b) (2003).

193. *See id.*

194. *Webb*, 270 Ga. App. at 820, 608 S.E.2d at 244.

195. *Id.* at 820-21, 608 S.E.2d at 244.

196. *Id.* at 821, 608 S.E.2d at 245.

197. 270 Ga. App. 388, 606 S.E.2d 624 (2004).

198. *Id.* at 394, 606 S.E.2d at 630.

199. *Id.*

200. *Id.* at 394-95, 606 S.E.2d at 630.

201. O.C.G.A. § 16-6-4(b).

202. *Blevins*, 270 Ga. App. at 395, 606 S.E.2d at 630.

203. *Id.*

VIII. APPELLATE ISSUES

A. *Insufficient Evidence to Convict*

A conviction can only withstand appellate scrutiny if every essential element of the crime is proved beyond a reasonable doubt. In *Elrod v. State*,²⁰⁴ the jury found the defendant guilty of trafficking in amphetamines.²⁰⁵ The trafficking statute sets forth two ways the offense can be proven—when a person knowingly brings into this state, delivers, or sells or has possession of twenty-eight grams or more of (1) amphetamine or (2) any mixture containing amphetamine.²⁰⁶ The indictment charged Elrod with possessing more than twenty-eight grams of amphetamine, which required the State to prove the offense of trafficking in that manner. However, the chemist only testified that the substance was positive for amphetamine, and that the total weight of the substance was 58.6 grams.²⁰⁷ Having failed to prove the purity or composition of the substance, the State failed to prove the offense of trafficking as charged in the indictment. As a result, the appellate court vacated the trafficking conviction and remanded the case for sentencing for the offense of possession of amphetamine.²⁰⁸

In *Wilson v. State*,²⁰⁹ the defendant was convicted of sexual assault and aggravated sodomy arising out of acts he allegedly committed against a nursing home patient under his care.²¹⁰ The sexual assault charge was based upon O.C.G.A. section 16-6-5.1(c)(1),²¹¹ which establishes the offense of sexual assault when a “person has supervisory or disciplinary authority over another person and such person engages in sexual contact with that other person who is: . . . [d]etained in or is a patient in a hospital or other institution.”²¹² Wilson argued on appeal that he did not have “supervisory authority” over the nursing home patient, but instead, as a caregiver, he cleaned up after incontinence and looked after the patients’ other general needs.²¹³ The court

204. 269 Ga. App. 112, 603 S.E.2d 512 (2004).

205. *Id.* at 112, 603 S.E.2d at 512.

206. O.C.G.A. § 16-13-31(e) (2003).

207. *Elrod*, 269 Ga. App. at 112-13, 603 S.E.2d at 512-13.

208. *Id.* at 113, 603 S.E.2d at 513.

209. 270 Ga. App. 311, 605 S.E.2d 921 (2004).

210. *Id.* at 311, 605 S.E.2d at 922.

211. O.C.G.A. § 16-6-5.1(c)(1) (2003).

212. *Wilson*, 270 Ga. App. at 312, 605 S.E.2d at 923 (quoting O.C.G.A. § 16-6-5.1(c)(1)).

213. *Id.* at 312-13, 605 S.E.2d at 923.

of appeals agreed, relying on the definition of supervisory authority²¹⁴ previously developed in *Randolph v. State*,²¹⁵ which held that supervisory authority required “the power to enforce laws, exact obedience, [and] command,” and therefore, “the power to direct . . . compliance.”²¹⁶

In the field of D.U.I. law, in *Shaheed v. State*,²¹⁷ the Georgia Court of Appeals reversed a conviction for driving under the influence in violation of O.C.G.A. section 40-6-391(a)(1),²¹⁸ concerning “less safe” drivers.²¹⁹ Shaheed was stopped for driving on an expired tag. When Shaheed could not produce proof of current insurance, the officer asked him to step out of the car. The officer smelled “a strong [odor] of alcohol,” and Shaheed responded affirmatively when asked if he had been drinking.²²⁰ This, however, is the only help Shaheed gave the officer. Shaheed refused to perform the field sobriety tests, and he refused two requests to submit to a chemical breath test. Shaheed was arrested for, and convicted of, the offense of driving under the influence of alcohol to the extent that he was less safe to drive.²²¹

The appellate court reversed the conviction, holding that the State failed to prove Shaheed’s ability to drive was impaired.²²² The officer did not testify about any erratic or unusual behavior or driving.²²³ Therefore, “there was nothing from which the jury could have inferred that [Shaheed] was under the influence of alcohol *to the extent that he was a less safe driver.*”²²⁴

B. Ineffective Assistance of Counsel

In the habeas corpus appeal of *Gerisch v. Meadows*,²²⁵ the Georgia Supreme Court ruled the trial counsel’s failure to recognize and develop a double jeopardy claim was constitutionally ineffective.²²⁶ Gerisch got into a fight with a woman and was charged with the municipal offenses of “public drunk” and disorderly conduct.²²⁷ Less than a month later,

214. *See id.* at 313, 605 S.E.2d at 923.

215. 269 Ga. 147, 496 S.E.2d 258 (1998).

216. *Id.* at 149-50, 496 S.E.2d at 260.

217. 270 Ga. App. 709, 607 S.E.2d 897 (2004).

218. O.C.G.A. § 40-6-391(a)(1) (2004 & Supp. 2005).

219. *Shaheed*, 270 Ga. App. at 709, 607 S.E.2d at 897.

220. *Id.*, 607 S.E.2d at 898.

221. *Id.* at 709-10, 607 S.E.2d at 898.

222. *Id.* at 710-11, 607 S.E.2d at 898-99.

223. *Id.*

224. *Id.* (emphasis omitted).

225. 278 Ga. 641, 604 S.E.2d 462 (2004).

226. *Id.* at 641-42, 604 S.E.2d at 463.

227. *Id.* at 642, 604 S.E.2d at 463.

Gerisch pleaded guilty to these charges in the city court. However, four days after the incident (and several weeks before the guilty plea), Gerisch was indicted for aggravated battery arising out of the same fight.²²⁸

The prosecutor conveyed a plea offer to Gerisch's appointed counsel—ten years in prison followed by ten years on probation.²²⁹ Even though Gerisch told his lawyer that he had already entered a plea in city court for this offense, his lawyer advised him to take the plea offer because if he pursued a double jeopardy claim and failed, "The prosecutor would withdraw his plea recommendation and seek greater punishment."²³⁰ Gerisch subsequently entered the plea.²³¹ Gerisch, who was "functionally illiterate," represented himself *pro se* on his habeas petition and appeal from the denial of that petition.²³²

The habeas court erroneously held that the guilty plea waived consideration of the double jeopardy claim.²³³ The ruling was erroneous because the guilty plea was based upon the advice given by trial counsel after "a cursory inquiry into the city court proceedings," and after "counsel utterly failed to research and evaluate evidence of the elements of the city court offense or the facts underlying it," which resulted in constitutionally ineffective assistance.²³⁴ Because counsel was ineffective, the guilty plea could not form the basis for a knowing and voluntary waiver of the double jeopardy claim.²³⁵

Trial counsel's representation in *Gibbs v. State*²³⁶ fell below the objective standard of reasonableness by failing to comply with reciprocal discovery obligations resulting in harm to the client. The defendant was unable to introduce dental records and photographs that were pertinent to his defense of misidentification because his attorney failed to comply with the reciprocal discovery rules.²³⁷ The question to be asked, the court of appeals held, is not whether any reasonable attorney would have chosen to introduce the documents, but instead, "whether any reasonable trial counsel would have, as trial strategy, failed to protect his *opportunity* to use the records."²³⁸ The obvious answer led to the reversal of

228. *Id.*

229. *Id.*

230. *Id.* at 645, 604 S.E.2d at 465.

231. *Id.*

232. *Id.* at 642, 650, 604 S.E.2d at 463.

233. *Id.* at 642, 604 S.E.2d at 463.

234. *Id.* at 645, 604 S.E.2d at 465.

235. *Id.*

236. 270 Ga. App. 56, 606 S.E.2d 83 (2004).

237. *Id.* at 58, 606 S.E.2d at 86.

238. *Id.* (emphasis added).

Gibbs's convictions for armed robbery and possession of a firearm during the commission of a felony.²³⁹

Ordinarily, an evidentiary hearing with testimony from the trial attorney is the necessary predicate to a successful claim of ineffective assistance of trial counsel. The exception to this rule occurs when the matter "is determinable from the record,"²⁴⁰ as was the case in *Wilson v. State*.²⁴¹ Trial counsel made two significant errors, which resulted in the appellate court's reversal of Wilson's conviction for possession of cocaine. First, even though trial counsel requested a charge on mere presence at the scene of the crime, when the judge denied the requested charge, counsel failed to reserve his objections to the charge, thereby waiving appellate review of the court's charge.²⁴² Second, trial counsel failed to challenge the admissibility of the cocaine based upon the State's failure to establish the required chain of custody.²⁴³ Even though there was no evidentiary hearing to support the claim of ineffective assistance of counsel, the court of appeals concluded that the ineffectiveness was discernible from the record because "we can divine no strategic reasons to support the omissions chargeable to counsel here."²⁴⁴

In *Shorter v. Waters*,²⁴⁵ the Georgia Supreme Court revisited Shorter's conviction for the offense of aggravated assault on a police officer.²⁴⁶ The case was reviewed and affirmed on a claim of ineffective assistance of trial counsel for the failure to raise a suppression issue.²⁴⁷ On habeas review, however, ineffective assistance of appellate counsel was raised for the appellate attorney's failure to raise, on direct appeal, trial counsel's ineffectiveness for failing to request a charge on reckless conduct or join in the codefendant's objection to the court's refusal to give the charge (which the codefendant requested, the trial court refused, and the court of appeals reversed for the court's failure to give the requested charge).²⁴⁸

When reviewing Shorter's habeas petition, the habeas court, based on the authority of *Battles v. Chapman*,²⁴⁹ "weighed the relative strengths and weaknesses of the argument" that appellate counsel did raise (trial

239. *Id.* at 60, 606 S.E.2d at 87.

240. 271 Ga. App. 359, 359, 609 S.E.2d 703, 704 (2005).

241. 271 Ga. App. 359, 609 S.E.2d 703 (2005).

242. *Id.* at 361, 609 S.E.2d at 705.

243. *Id.*

244. *Id.* at 362, 609 S.E.2d at 706.

245. 278 Ga. 558, 604 S.E.2d 472 (2004).

246. *Id.* at 558, 604 S.E.2d at 473.

247. *Shorter v. State*, 239 Ga. App. 625, 521 S.E.2d 685 (1999).

248. *Shaw v. State*, 238 Ga. App. 757, 759, 519 S.E.2d 486, 489 (1999).

249. 269 Ga. 702, 506 S.E.2d 838 (1998).

counsel's failure to file a suppression motion) against the strengths and weaknesses of the argument that appellate counsel did not raise (trial counsel's errors with respect to the reckless conduct charge).²⁵⁰ The Georgia Supreme Court held that this analysis needed to be modified.²⁵¹ The balancing test was one possible way to consider the effectiveness of appellate counsel, but the balancing test was not the *only* way.²⁵² The balancing test should not be applied to the extent that it failed to help determine whether appellate counsel's decision to forego a particular appellate issue was a reasonable tactical move.²⁵³ Based on this modification of precedent, the habeas case was remanded for a ruling in accordance with the decision.²⁵⁴

On remand, the habeas court reaffirmed its ruling, and the petitioner appealed.²⁵⁵ The appellate attorney testified at the habeas hearing that although he recognized the issue of trial counsel's failures with respect to the reckless conduct charge as "viable," he felt that the strength of the issue was diminished by having to raise it in the context of ineffective assistance of counsel.²⁵⁶ The Georgia Supreme Court rejected this rationale, holding "The belief that somehow the reckless conduct charge claim would be less viable or effective because it would be reviewed in the framework of trial counsel's alleged ineffectiveness has no basis in fact or law; therefore, it was patently unreasonable."²⁵⁷ After finding that the appellate counsel was ineffective, the court reversed the denial of the habeas petition.²⁵⁸

IX. CONCLUSION

Criminal law is a rapidly changing and ever-evolving area of law. Our appellate courts produce about one thousand opinions a year in this area alone. Georgia is one of the busiest states in terms of numbers of criminal cases at all levels, trial and appellate. As always, we endeavored in this survey to cover the waterfront sufficiently to provide the reader with at least a sense of where things are in our current state of the law. No doubt it will be different tomorrow.

250. *Shorter v. Waters*, 275 Ga. 581, 583, 571 S.E.2d 373, 375 (2002).

251. *Id.* at 584-85, 571 S.E.2d at 376.

252. *Id.*

253. *Id.* at 585, 571 S.E.2d at 376.

254. *Id.*

255. *Shorter v. Waters*, 278 Ga. 558, 558, 604 S.E.2d 472, 473 (2004).

256. *Id.* at 560, 604 S.E.2d at 474.

257. *Id.*, 604 S.E.2d at 475.

258. *Id.* at 560-61, 604 S.E.2d at 475.