

Criminal Law

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I. INTRODUCTION

As in previous years, we cannot comment on every development in criminal law in Georgia that occurred this past year through appellate opinions and statutory changes. We cannot even footnote all of them. Instead, we have chosen cases that are the most important or the most interesting or those that may have the widest application to the future course of criminal practice and procedure. We hope this Article is useful to our colleagues who practice criminal law.

II. PRETRIAL ISSUES

A. *Demurrers: Constitutionality of the Charging Documents*

In *Briggs v. State*,¹ Briggs was caught trying to sell fifty-two individually wrapped compact discs containing reproductions of recorded material. He raised two challenges to the statute under which he was charged, Official Code of Georgia Annotated (“O.C.G.A.”) section 16-8-

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1. 281 Ga. 329, 638 S.E.2d 292 (2006).

60(b).² That statute prohibits the possession and distribution of sounds or images without a label bearing the name and address of the transferor of the sounds or images.³ Briggs asserted that (1) the statute was unconstitutionally vague or overbroad and (2) it was preempted by federal copyright law.⁴ He lost on both arguments.⁵

With respect to vagueness, Briggs argued that the statute failed to make it clear to whom the phrase “transferor of the sounds or visual images” referred.⁶ Though the opinion does not say it, we can infer that Briggs’s vagueness argument focused on the meaning of transferor—specifically, whether the original conveyor of the sounds or images was the transferor, such as the artist who recorded the songs, or whether Briggs himself was the transferor because he copied those songs to another disc. Vagueness of that sort would render a criminal statute unconstitutional because it would leave uncertain what act was prohibited and who was prohibited from doing it, which would violate the guarantee of due process.⁷ The Georgia Supreme Court, applying the “reasonable definiteness” standard and reading the statute in its context, concluded that the article containing the sounds or images—the compact disc—must contain the name and address of the original conveyor of the sounds or images to the disc.⁸ But what if Briggs had put his own name and address on the discs in his possession and argued that he was the one who conveyed the sounds or images to the disc in question, even while conceding that he copied the sounds or images from another disc that bore the name and address of the original conveyor of those sounds or images to *that* disc? It is safe to conclude that he would still have lost on his vagueness argument.

Briggs’s argument that the statute was overbroad focused on the statute’s chilling effect on protected speech.⁹ Briggs’s argument, as we can infer from the opinion, was that the statute prohibited one from remaining anonymous by omitting one’s name and address from the label of a disc.¹⁰ The supreme court held that the statute did not regulate pure speech, but instead it regulated speech plus commercial conduct.¹¹ Thus, the statute was narrowly tailored to achieve the

2. *Id.* at 329, 638 S.E.2d at 293; O.C.G.A. § 16-8-60(b) (2007).

3. O.C.G.A. § 16-8-60(b).

4. *Briggs*, 281 Ga. at 329, 638 S.E.2d at 293.

5. *Id.* at 332, 638 S.E.2d at 295.

6. *Id.* at 330, 638 S.E.2d at 294 (quoting O.C.G.A. § 16-8-60(b)).

7. *Id.*

8. *Id.*

9. *Id.* at 331, 638 S.E.2d at 294.

10. *See id.*

11. *Id.*

legitimate state interest in protecting the entertainment industry from piracy and bootlegging.¹²

Briggs's federal preemption argument—that the state law was equivalent to the federal copyright law, and thus, preempted by the copyright law—also failed.¹³ The court applied “Nimmer’s ‘extra-element’ test”: If the state law requires any element beyond those elements required under federal copyright law—17 U.S.C. § 106¹⁴—then the federal law does not preempt state law.¹⁵ The supreme court compared the state law and the federal law and concluded that the federal law did not preempt state law because the Georgia statute contains the element that the article being sold contain a label that includes the name and address of the transferor of the sounds or images, an element that federal copyright law does not require.¹⁶

The decision drew a dissent from Justice Melton, in which Chief Justice Sears joined.¹⁷ Both justices concluded that the statute was indeed overbroad because it “prohibits a substantial amount of constitutionally-protected speech, including anonymous political speech.”¹⁸ Justices Hunstein¹⁹ and Carley²⁰ wrote two separate special concurring opinions because they both thought that the majority failed to acknowledge the overbreadth of the statute; however, they each thought the majority appropriately narrowed the statute by limiting “its application to media that has been stolen or ‘pirated.’”²¹ Thus, it remains a crime in Georgia to copy music, for example, from its original labeled disc to an unlabeled disc, then attempt to offer it for sale, sell it, or otherwise distribute it.²²

B. Search and Seizure

1. Police-Citizen Encounters. Each year we review search-and-seizure law by picking a few of the many cases in the reporting period

12. *Id.*

13. *Id.* at 332, 638 S.E.2d at 295.

14. 17 U.S.C. § 106 (2000).

15. *Briggs*, 281 Ga. at 332, 638 S.E.2d at 295 (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1], at 1-13 to -14 (2005)).

16. *Id.*

17. *Id.* at 335, 638 S.E.2d at 297 (Melton, J., dissenting).

18. *Id.*

19. *Id.* at 332, 638 S.E.2d at 295 (Hunstein, J., concurring).

20. *Id.* at 334, 638 S.E.2d at 296 (Carley, J., concurring specially).

21. *Id.* at 333, 638 S.E.2d at 295 (Hunstein, J., concurring).

22. *See generally id.* at 329, 638 S.E.2d at 293.

that highlight search-and-seizure issues and the state of the law in this area. This year is no exception. We start with a “tier-one” case.

“According to *Terry v. Ohio*,²³ Judge Blackburn wrote for the majority in *Black v. State*,²⁴ “police-citizen encounters are generally categorized into three tiers: consensual encounters; brief investigatory stops, which require reasonable suspicion; and arrests that must be supported by probable cause.”²⁵ In this case, a drug agent received an anonymous tip, as well as information from an informant, that drugs could be found at Eddie and Pamela Black’s house. After watching the house for a few hours, the agent saw a truck leave with three males in it. The agent followed the truck and called for backup. The truck pulled into a gas station, as did a couple of the backup patrol cars. Rodney Black, Eddie and Pamela’s grown son, got out of the truck and walked into the gas station’s store. Less than a minute later, Rodney walked out the opposite door of the store and headed for the nearby woods.²⁶

The agent then requested that one of the patrol officers ask Rodney what he was doing. The officer repeatedly attempted to do so, but Rodney told the officer that the officer had no right to speak to him and refused to answer the officer’s questions. Thinking Rodney was about to flee, the officer grabbed Rodney’s arm, and Rodney became belligerent. The officer arrested him for obstruction. In the ensuing search incident to arrest, the officer found methamphetamine in Rodney’s pocket.²⁷

Rodney then talked about having drug paraphernalia back at the house, which led the officers to search the house. At the house, Rodney’s parents talked to the officers, which led to a “consensual” search of the whole house, the discovery of more methamphetamine, more arrests, the convictions of Rodney’s parents, and this appeal.²⁸ The court of appeals agreed with Eddie and Pamela that the search of their home, because it was based on Rodney’s illegal arrest and the search of his pockets, was tainted by “several illegalities, beginning with the unlawful detention of their son and culminating in the agents’ unlawful entry into their home.”²⁹ Because Rodney’s arrest and search was illegal, everything that flowed from it was illegal. The interesting issue here is how close

23. *Black v. State*, 281 Ga. App. 40, 43, 635 S.E.2d 568, 571 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

24. 281 Ga. App. 40, 635 S.E.2d 568 (2006).

25. *Id.* at 43, 635 S.E.2d at 571 (citing *Terry*, 392 U.S. at 21; *State v. Harris*, 261 Ga. App. 119, 581 S.E.2d 736, 739 (2003)).

26. *Id.* at 40, 635 S.E.2d at 570.

27. *Id.* at 41, 635 S.E.2d at 570.

28. *Id.*

29. *Id.* at 42, 635 S.E.2d at 571.

a first-tier encounter is to a second-tier encounter and how the former led to the result in this case, but the latter would not have.

Consider:

In a first-tier encounter, 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.³⁰

The citizen may respond to such an approach by an officer at this level by ignoring the officer and walking away.³¹ This would not constitute obstruction of the officer, and any arrest and search subsequent to this cold reception to the officer would be illegal.³²

But note how close a second-tier encounter is to a first-tier:

During a second-tier encounter, the police officer conducts a brief investigative *Terry* stop of the citizen. In this level, a police officer, even in the absence of probable cause, may stop persons and detain them briefly, when the officer has a particularized and objective basis for suspecting the persons are involved in criminal activity. To stop a citizen, the officer must possess more than a subjective, unparticularized suspicion or hunch. The officer's action must be justified by specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion, and the officer must have some basis from which the court can determine that the detention was neither arbitrary nor harassing.³³

The question for the citizen, and ultimately for the courts, perhaps, is this: Doesn't the mere approach of a law enforcement officer to a citizen, the officer's request for identification, and whatever questions the officer may ask—"What are you doing here?", "Where are you going?", "Where did you just come from?", and many other similar ones—by its nature create the impression in the citizen's mind that he or she may not leave and that he or she must produce identification and explain his or her comings and goings? If the first tier is determined by the citizen's belief that he or she is free to leave and if the second tier is determined by the officer's possession of articulable suspicions about the citizen—suspicions of which the citizen may not be aware—then a citizen with an honest belief that he or she is free to leave will be arrested for obstruction and be searched incident to that arrest if he or she unwittingly begins to

30. *Id.* at 43, 635 S.E.2d at 571.

31. *Id.*, 635 S.E.2d at 571-72.

32. *Id.*

33. *Id.*, 635 S.E.2d at 572.

walk away, not knowing that the officer is able to articulate some suspicion that the citizen is up to no good.

This is what makes *Black* an interesting case. The officer, according to Judge Blackburn, had no articulable suspicion even though the officer saw Rodney leave a house under surveillance for alleged drug activity, walk away from the officer swiftly when approached, and belligerently insist that the officer had no right to question him.³⁴ Two judges dissented, seeing reasonable articulable suspicion to detain Rodney where the majority saw none.³⁵ For the dissenters, the totality of the circumstances amounted to a reasonable articulable suspicion:

(1) an anonymous informant and a confidential informant had indicated that the Black residence might conceal a methamphetamine lab; (2) three young men departed from that house; (3) in direct response to seeing marked police cars pull into the gas station, Rodney stopped what he was doing and entered the gas station, then in less than thirty seconds he exited the opposite side and began walking “very briskly” toward the wood line behind the store; (4) as an officer called to talk to Rodney, Rodney kept moving faster toward the wood line, in what the officer described as a “speedwalk.”³⁶

Both the majority and the dissent noted all of the same facts surrounding Rodney’s arrest and subsequent search, but disagreed over whether those facts added up to a reasonable suspicion. While that alone is common, in this time when the Fourth Amendment³⁷ privacy protections are beset on every side—from national security concerns used to justify widespread snooping to arguments that a modern professionalized police force supports less stringent application of the exclusionary rule—it is refreshing to see a case like *Black*.

But try to accord *Black* with this next case, decided just a couple of months earlier than *Black* by the same court of appeals, although by a different judge. In *State v. Williams*,³⁸ Judge Miller upheld a trial court’s suppression of marijuana (as evidence) on the grounds that Williams’s putative consent for the officer to search his pockets, in which Williams possessed a “blunt,” was not consensual because the officer was holding a stun gun on Williams, which Williams thought was a firearm.³⁹ Police officers had received a tip, the anonymity or reliability of which the opinion does not address except to say that it came from

34. *Id.* at 46, 635 S.E.2d at 573-74.

35. *Id.* at 48-51, 635 S.E.2d at 575-77 (Adams, J., dissenting).

36. *Id.* at 49, 635 S.E.2d at 576.

37. U.S. CONST. amend. IV.

38. 281 Ga. App. 187, 635 S.E.2d 807 (2006).

39. *Id.* at 188, 635 S.E.2d at 808.

a concerned citizen, that people were smoking marijuana in a local park after dark. Over the next several days, officers went to the park but caught no one smoking marijuana. Then, returning to the park one more day, this time in an unmarked truck, they saw Williams and several other young people on and around a swing set.⁴⁰

The officers testified that they identified themselves, then Williams jumped out of the swing, walked away at a brisk pace, but stopped when they ordered him to do so. Williams testified that he began walking away when he saw an unmarked truck pull up, not knowing that it contained police officers, but that he stopped walking as soon as the officers identified themselves.⁴¹ While this factual dispute was left unresolved and does not seem to matter to the analysis of this case, the trial court ruled for Williams because the officers had failed to articulate a reasonable suspicion of illegal activity, and the trial judge noted it was “‘very significant’ that the officers’ initial testimony omitted any reference to one of them pulling out his stun gun.”⁴² The officer only mentioned the gun, clarifying that it was his stun gun and not his firearm, when recalled to the stand after Williams and one of his friends testified that the officer had a gun pointed at Williams when he requested that Williams consent to a search of his person.⁴³

Here is the interesting part, however, in light of what we read in *Black*. Judge Miller, after reviewing the three principles of appellate review of a judge’s findings of facts and conclusions of law when he or she sits as the trier of facts,⁴⁴ said this: “Here, despite the trial court’s claim that the officers had no basis to suspect that Williams was committing a crime at the time they conducted their search, flight is a circumstance sufficient to give an articulable suspicion of illegal activity.”⁴⁵ Judge Miller went on to say: “Assuming that Williams’ act

40. *Id.* at 187-88, 635 S.E.2d at 808.

41. *Id.* at 188, 635 S.E.2d at 808.

42. *Id.*

43. *Id.*

44. *Id.*

“First, the judge sits as the trier of facts. The trial judge hears the evidence, and [the judge’s] findings based upon conflicting evidence are analogous to the verdict of a jury and should not be disturbed by a reviewing court if there is any evidence to support it. Second, the trial court’s decision with regard to questions of fact and credibility must be accepted unless clearly erroneous. Third, the reviewing court must construe the evidence most favorably to the upholding of the trial court’s findings and judgment.”

Id., 635 S.E.2d at 809 (brackets in original) (quoting *State v. Brown*, 278 Ga. App. 457, 459-60, 629 S.E.2d 123, 125 (2006)).

45. *Id.* at 189, 635 S.E.2d at 809 (citing *Tuggle v. State*, 236 Ga. App. 847, 849, 512 S.E.2d 650, 652 (1999)).

of walking away from the officers provided them with such a suspicion,” which Judge Miller did assume, “they were authorized to conduct a brief, *Terry*-type stop in which they could restrain Williams for further brief questioning.”⁴⁶ Remember that *Terry*-stops occur at the second tier in the familiar three-tier police-citizen encounter schematic. In Judge Miller’s analysis, therefore, one wonders how a first-tier encounter could ever occur.

Note that Judge Miller did not say that the officers possessed an articulable suspicion that Williams was engaged in unlawful activity—which would justify the second-tier brief detention—because of any facts in their possession that they could articulate when they came upon Williams on the swing in the park. Indeed, all the officers knew at that point was that some concerned citizen had complained that people were smoking marijuana in the park after dark. So if the officers did not possess any reasonable articulable suspicions about Williams when they emptied out of their unmarked truck to descend upon him and his friends, why is it that Williams’s departure, brisk or not, is not an action that he can legally take as a citizen protected by the Fourth Amendment? Why is it necessarily a suspicious act that then gives police officers the right to detain him for a more intrusive *Terry*-type second-tier encounter, complete with a demand for identification, a pat-down search to determine whether he was armed and dangerous, and questions about what he was doing, where he was going, and what was in his pockets? We fail to see how Williams’s actions are any different from Rodney Black’s actions. The only distinction that helped Williams prevail on his motion to suppress is that the officer pulled a stun gun on Williams before Williams “consented” to a search, which meant that there was no valid consent in the first place.⁴⁷

2. Search Incident to Arrest. In *Lindsey v. State*,⁴⁸ a case of first impression, the court of appeals was called upon to determine whether a search was lawful when the defendant was arrested pursuant to a civil order under O.C.G.A. section 37-7-41(b),⁴⁹ a statute authorizing the court to order that any peace officer could arrest a person named in the order for delivery to involuntary treatment for alcohol or drug dependency.⁵⁰ A probate court had issued an order, pursuant to this statute, to any peace officer to arrest Phillip Lindsey and deliver him to a mental

46. *Id.* (citing *Tuggle*, 236 Ga. App. at 849, 512 S.E.2d at 652).

47. *See generally id.* at 189-90, 635 S.E.2d at 809-10.

48. 282 Ga. App. 644, 639 S.E.2d 584 (2006).

49. O.C.G.A. § 37-7-41(b) (1995).

50. *Id.*

health facility or medical center emergency room because he was a drug addict who needed help. A police officer then found Lindsey in a bar and asked him to step outside. Lindsey complied, the officer explained the court order to him, and then handcuffed him. Then, following department protocol, the officer patted Lindsey down for weapons, did not find any, then emptied Lindsey's pockets and found a small baggie containing methamphetamine. The officer then put Lindsey in his patrol car and, instead of taking him to a mental health facility or a medical center emergency room, took him to jail and charged him with a violation of O.C.G.A. section 16-13-30,⁵¹ part of the Georgia Controlled Substances Act.⁵² The State then argued at the suppression hearing that the search was incident to a lawful arrest, authorized by O.C.G.A. section 17-5-1,⁵³ and thus, the evidence should not be excluded from trial.⁵⁴ The trial court agreed and denied Lindsey's motion.⁵⁵

The court of appeals reversed, citing, first, O.C.G.A. section 17-4-1,⁵⁶ which states that "a person is under arrest whenever his liberty to come and go as he pleases is restrained, no matter how slight such restraint may be."⁵⁷ If a person is under arrest, then law enforcement "may reasonably search the person arrested," including his pockets for possession of drugs.⁵⁸ At this point in the analysis, it would be difficult to conclude that Lindsey was not under arrest and that he could not have been searched.⁵⁹ "But," the court observed, "not every taking of a person into custody by a peace officer constitutes an arrest."⁶⁰ Citing O.C.G.A. sections 17-4-40,⁶¹ 17-4-20,⁶² and 17-4-60,⁶³ the court noted that an arrest is an arrest only when the person is taken into custody upon probable cause to believe that he or she has violated the penal laws, which is to say that he or she is believed to have committed a crime.⁶⁴ In this case, the officer apprehended (not arrested) Lindsey

51. *Lindsey*, 282 Ga. App. at 644-45, 639 S.E.2d at 586-87; O.C.G.A. § 16-13-30 (2007).

52. O.C.G.A. §§ 16-13-1 to -114 (2007).

53. O.C.G.A. § 17-5-1 (2004).

54. *Lindsey*, 282 Ga. App. at 645, 639 S.E.2d at 587.

55. *Id.*

56. O.C.G.A. § 17-4-1 (2004).

57. *Lindsey*, 282 Ga. App. at 646, 639 S.E.2d at 587 (quoting *State v. Nelson*, 261 Ga. 246, 247, 404 S.E.2d 112, 113 (1991)).

58. O.C.G.A. § 17-5-1(a); *see also* *United States v. Robinson*, 414 U.S. 218, 236 (1973).

59. *See generally Lindsey*, 282 Ga. App. 644, 639 S.E.2d 584.

60. *Id.* at 646, 639 S.E.2d at 587.

61. O.C.G.A. § 17-4-40 (2004).

62. O.C.G.A. § 17-4-20 (2004).

63. O.C.G.A. § 17-4-60 (2004).

64. *Lindsey*, 282 Ga. App. at 646-47, 639 S.E.2d at 587-88 (citing O.C.G.A. §§ 17-4-40, -20, -60).

upon the authority of a court order issued pursuant to a civil statute authorizing “protective custody, not a criminal arrest.”⁶⁵ Lindsey was not taken into custody based upon probable cause to believe that he had violated a criminal statute but based upon a finding that he presented a health risk to himself or others because of his drug addiction.⁶⁶ Thus, the court interpreted this civil statute for the first time by holding that “a peace officer executing an order to apprehend pursuant to [O.C.G.A. sections] 37-3-41(a) and 37-7-41(b) does not thereby arrest the person to be examined such that a search incident to arrest is authorized.”⁶⁷

The court noted that an officer apprehending a citizen pursuant to a court order issued under authority of this statute could still conduct a limited search of the person for weapons.⁶⁸ In this case, the officer patted down Lindsey but felt nothing resembling a weapon.⁶⁹ Thus, the search should have ended there.⁷⁰

The court went an additional step by holding that an inventory search of a person’s belongings when apprehended pursuant to a civil protective order is, likewise, not authorized.⁷¹ An inventory search, like a search incident to arrest, is authorized when the citizen has been arrested and is on the way to jail.⁷² A search of an arrestee’s belongings rests upon several governmental interests, and among those are keeping drugs and weapons out of the jail and preventing false claims over lost or stolen property.⁷³ But when the police simply give the apprehended citizen a ride to a mental health facility or medical center emergency room so that he or she can get help for a drug or alcohol problem, no police inventory of his or her pockets, bags, or other belongings is justified.⁷⁴

C. *Voluntariness of Statements*

A fundamental tenet of language, logic, and law is that a word gets its meaning from its context. This is no more apparent than in *Spence v. State*,⁷⁵ where even Webster’s Third New International Dictionary made an appearance in the court’s opinion regarding the definition of

65. *Id.* at 646, 639 S.E.2d at 587.

66. *See id.* at 646-47, 639 S.E.2d at 587-88.

67. *Id.* at 647, 639 S.E.2d at 588 (citing O.C.G.A. §§ 37-3-41(a), -7-41(b)).

68. *Id.* at 647 n.7, 639 S.E.2d at 588 n.7.

69. *Id.* at 645, 639 S.E.2d at 586.

70. *See id.* at 649, 639 S.E.2d at 589.

71. *Id.* at 648, 639 S.E.2d at 588.

72. *See id.*, 639 S.E.2d at 588-89.

73. *Id.*

74. *Id.* at 648-49, 639 S.E.2d at 589.

75. 281 Ga. 697, 642 S.E.2d 856 (2007).

“confidential.”⁷⁶ Lemuel Spence was in custody for the rape of a woman and the stabbing death of another person unrelated to the rape.⁷⁷ During his interrogation by Detective Quinn, after having read and signed the *Miranda* warnings,⁷⁸ the following exchange occurred between Quinn and Spence:

Quinn: Just you and me, just you and me.

Spence: I'm just scared when I go to jail, everybody gonna know I said something.

Quinn: Lem, ain't nobody saying nothing, this is confidential. Nobody knows what you're there for. What are you talking about? I don't understand.

Spence: I mean, not [what I'm] there for. I mean I don't want anybody to think that I (unintelligible).

Quinn: No, that's not going to happen. This is confidential what we're doing right here. Do you understand that? This is confidential

Spence: . . . what happened.

Quinn: Tell me what happened down there, Lem. What happened down there.⁷⁹

Spence then went on to incriminate himself in the murder.⁸⁰

The trial court denied Spence's motion to exclude his incriminating statement because, in the judge's view, “confidential,” as used by Quinn, meant that Spence's statement would be kept from other people in the jail and did not amount to a false promise not to use it against him in court.⁸¹ On appeal, the trial court's denial was reversed, and Justice Carley dissented, agreeing with the trial judge that in its context, Quinn merely promised Spence that he would not tell his jail mates that he confessed to the crimes charged, not that his statement would not be used against him in court.⁸² Further, he castigated the majority for ignoring the standard for determining admissibility of confessions and substituting its reading of the meaning of “confidential” for the trial judge's understanding of it in the totality of the circumstances—all without ever finding that the trial judge was clearly erroneous.⁸³ He also noted that Quinn had not lied to Spence; he did not cross “the line into the sort of lying that deprives a defendant of the knowledge

76. *Id.* at 700 & n.7, 642 S.E.2d at 858 & n.7.

77. *Id.* at 697, 642 S.E.2d at 857.

78. *See generally* *Miranda v. Arizona*, 384 U.S. 436 (1966).

79. *Spence*, 281 Ga. at 698, 642 S.E.2d at 857 (brackets and alterations in original).

80. *Id.*

81. *Id.* at 699, 642 S.E.2d at 858.

82. *Id.* at 702, 642 S.E.2d at 860 (Carley, J., dissenting).

83. *Id.* at 704, 642 S.E.2d at 861.

essential to his ability to understand the nature of his rights and the consequences of abandoning them.”⁸⁴ So how did the majority read confidential differently?

The majority concluded that Quinn did not qualify his statement that his conversation with Spence was confidential to mean that Quinn would not tell Spence’s jail mates but that he would tell the court, thus leading Spence to reasonably understand “that their interview was confidential as an unqualified statement that what Spence told Quinn would be kept confidential between the two of them, and would not be disclosed to anyone else.”⁸⁵ The court was persuaded by the rationale in *Hopkins v. Cockrell*,⁸⁶ where an interrogating officer told the defendant that “their conversation was confidential telling [the defendant], ‘This is for me and you. This is for me. Okay. This ain’t for nobody else.’”⁸⁷ In addition, the court cited *Foster v. State*,⁸⁸ a case in which the court excluded a defendant’s confession “after he was told repeatedly that it was not going to hurt ‘a thing,’ and that it would be ‘as much for your benefit as ours.’”⁸⁹ The court noted that in *Foster* it held that “[a]n accused must be warned that anything he says can and will be used against him in court. Telling him that a confession is not going to hurt and, on the contrary, will benefit him as much as the police, is not consistent with the warnings required by *Miranda*.”⁹⁰

We side with the majority because, having represented hundreds of defendants in our combined thirty-two years of lawyering, it was reasonable for Spence to believe that Quinn’s promise of confidentiality was unqualified, because every incarcerated person knows that whatever happens in court circulates like wildfire through the jail. Nothing that happens in a public courtroom in a criminal case is confidential. Not only will other inmates talk about what they see and hear there, so will jailers who transport prisoners between jail and court, not to mention the publication of courtroom events in newspapers and on the evening news that most inmates are watching each night in jail. The lesson for Quinn and all law enforcement officers is clear: Read the *Miranda* warnings to the suspect, ask if the suspect understands them, and have him or her sign a form containing them and verifying that he or she

84. *Id.* at 703, 642 S.E.2d at 861 (internal quotation marks omitted) (quoting *Hopkins v. Cockrell*, 325 F.3d 579, 584 (5th Cir. 2003)).

85. *Id.* at 699-700, 642 S.E.2d at 858 (majority opinion).

86. 325 F.3d 579 (5th Cir. 2003).

87. *Spence*, 281 Ga. at 699, 642 S.E.2d at 858 (quoting *Hopkins*, 325 F.3d at 584).

88. 258 Ga. 736, 374 S.E.2d 188 (1988).

89. *Id.* at 742, 374 S.E.2d at 194.

90. *Spence*, 281 Ga. at 699, 642 S.E.2d at 858 (quoting *Foster*, 258 Ga. at 742, 374 S.E.2d at 193).

understands them. If the suspect chooses to waive them, then say nothing at all during the interview to convey even the slightest impression that anything the suspect says will not be used to incriminate him or her. It's that simple. Solving crimes, especially heinous ones, is extremely important, but solving them at the expense of venerable constitutional rights that protect all of us exacts a price too great to pay.

D. Right to Waive Jury Trial and Demand Bench Trial

The Sixth Amendment to the United States Constitution⁹¹ guarantees the right to a trial by jury in a criminal case.⁹² Over a century ago, Georgia recognized that an accused could forego that right and put the issue before the judge without a jury.⁹³ Over sixty years ago, Georgia established that while a defendant may waive his or her right to a jury trial, the defendant did not have the right to a bench trial without the acquiescence of the trial court.⁹⁴ In this reporting period, the Georgia Supreme Court went one step further, holding that it is not just the court that has to acquiesce to the defendant's waiver of a jury trial, but the State must acquiesce as well.⁹⁵

In *Zigan v. State*,⁹⁶ the defendant sought to waive his right to a jury trial on the charge of involuntary manslaughter and allow the court to try him. The State objected, and the trial court denied the defendant's request but granted a certificate of immediate review.⁹⁷ The supreme court concluded that "the refusal of the prosecution to consent [to a bench trial] left the trial court with no choice but to deny the demand."⁹⁸ By what rationale did the supreme court reach the surprising decision to extend the veto power over a defendant's waiver of his right to a jury trial from the trial judge to the prosecutor? This is how the majority did it: (1) "[T]he ability to waive the right to a jury trial [is] not the same as the power to demand a bench trial."⁹⁹ That is because waiving a right is different from demanding a privilege.¹⁰⁰ (2) State law already holds that a defendant cannot waive a unanimous verdict unless he or she gives express and intelligent consent and the prosecu-

91. U.S. CONST. amend. VI.

92. *Id.*

93. *See, e.g.*, *Logan v. State*, 86 Ga. 266, 12 S.E. 406 (1890); O.C.G.A. § 1-3-7 (2000).

94. *Palmer v. State*, 195 Ga. 661, 669, 25 S.E.2d 295, 300-01 (1943).

95. *Zigan v. State*, 281 Ga. 415, 417, 638 S.E.2d 322, 324 (2006).

96. 281 Ga. 415, 638 S.E.2d 322 (2006).

97. *Id.* at 415, 638 S.E.2d at 323.

98. *Id.* at 417, 638 S.E.2d at 324.

99. *Id.* at 416, 638 S.E.2d at 323 (citing *Palmer*, 195 Ga. at 661, 25 S.E.2d at 296).

100. *Zigan*, 281 Ga. at 416, 638 S.E.2d at 323.

tion consents.¹⁰¹ The Georgia case in which this rule was established cites a United States Supreme Court case for the rationale employed there, in which the Supreme Court held that no federal right exists to demand a bench trial.¹⁰² (3) Because *Glass v. State*¹⁰³ adopted the principles enunciated in *Patton v. United States*,¹⁰⁴ it follows, the Georgia Supreme Court reasoned, that applying *Glass* to *Zigan* “requires affirmance of the trial court’s denial of appellants’ demand for a bench trial.”¹⁰⁵

Chief Justice Sears dissented, saying that she did not see anything “in Georgia law that requires that the State have a veto power over a defendant’s request for a bench trial.”¹⁰⁶ She agreed with the premise in the majority’s argument—“a defendant does not have the right to unilaterally demand that a trial court conduct a bench trial”¹⁰⁷—but parted ways with the majority’s view that the trial court was insufficient by itself to safeguard the traditional importance of a jury trial and that it needed the prosecution to become the final arbiter.¹⁰⁸ A right that has been promulgated for the benefit of the individual accused citizen now cannot be waived in Georgia without the consent of the State, even when the trial court agrees with the defendant that he or she may waive this right.¹⁰⁹

Not only does this decision rest on shaky historical ground, but it is also weak with logical fallacy as well. Nothing in logic requires the court to draw from *Glass* and apply to *Zigan* the premise that the State must acquiesce in a defendant’s waiver of a unanimous verdict to the defendant’s waiver of a jury trial. The court supported this conclusion by reasoning that because the 1983 Georgia Supreme Court, when *Glass* was decided, supported its decision concerning unanimous verdict waiver by quoting the rationale in *Patton*, the U.S. Supreme Court’s 1930 opinion, the 2006 Georgia Supreme Court must now adopt that same 1930 rationale and extend it to the question of whether the State, too, should be allowed to veto a defendant’s waiver of his or her right to a jury trial.¹¹⁰ But this conclusion does not necessarily follow. The court

101. *Id.* (citing *Glass v. State*, 250 Ga. 736, 737, 300 S.E.2d 812, 813 (1983)).

102. *Glass*, 250 Ga. at 737, 300 S.E.2d at 813 (citing *Patton v. United States*, 281 U.S. 276, 312 (1930)).

103. 250 Ga. 736, 300 S.E.2d 812 (1983).

104. 281 U.S. 276 (1930).

105. *Zigan*, 281 Ga. at 417, 638 S.E.2d at 324.

106. *Id.* at 418, 638 S.E.2d at 324 (Sears, C.J., dissenting).

107. *Id.* (citing *Palmer*, 195 Ga. at 668-69, 25 S.E.2d at 300).

108. *Id.*, 638 S.E.2d at 324-25.

109. *Id.* at 417, 638 S.E.2d at 324 (majority opinion).

110. *See generally id.* at 415-17, 638 S.E.2d at 323-24.

could have just as easily and authoritatively refused to extend the veto power beyond the judge. Nevertheless, the law in Georgia is now that a defendant cannot waive his right to a jury trial and put his fate before a judge unless both the judge and the prosecutor agree to let him do it and, even more, unless the prosecutor agrees to it even if the judge has already approved the waiver.¹¹¹

E. Double Jeopardy

The long-standing law in Georgia was that when a jury proceeds to a verdict without first having been sworn, that verdict is a nullity.¹¹² Until this reporting period, all of the reversals and retrials of such null verdicts occurred in cases in which the defendant was convicted. But what happens if the defendant is acquitted? As Thomas Alan Spencer found out, consider it to be an expensive mock trial; the verdicts are just as null as the cases in which defendants were convicted.¹¹³

Jeopardy attaches in a jury trial when the jury is both impaneled and sworn.¹¹⁴ In *Spencer v. State*,¹¹⁵ the jury was impaneled—twelve jurors were selected to hear the case—but not sworn.¹¹⁶ The jury heard evidence, then acquitted Spencer of malice murder, though it convicted him of felony murder and other charges. Spencer argued that his acquittal of malice murder by his unsworn jury should bar a retrial on that charge based upon double jeopardy.¹¹⁷ Not so, ruled the Georgia Supreme Court.¹¹⁸ The oath to the petit jury is mandatory.¹¹⁹ “When, as in this case,” wrote the supreme court in *Spencer*, “a trial jury proceeds without this mandatory oath, the statutory requirement becomes jurisdictional in character, involving considerations of public policy.”¹²⁰ The public policy at issue is whether a citizen can be tried by an unlawful tribunal. The obvious answer is no—we do not want kangaroo courts determining our liberty—and because an unsworn jury is nothing more than a collection of citizens who can do whatever it wants with the evidence presented to it, such a jury’s verdict is of no account. We cannot help but wonder, though, whether the jurors in Spencer’s case in fact conducted themselves in any way different than

111. *Id.*

112. *Slaughter v. State*, 100 Ga. 323, 324, 28 S.E. 159, 161 (1897).

113. *Spencer v. State*, 281 Ga. 533, 534, 640 S.E.2d 267, 268 (2007).

114. *Alexander v. State*, 279 Ga. 683, 685, 620 S.E.2d 792, 794-95 (2005).

115. 281 Ga. 533, 640 S.E.2d 267 (2007).

116. *Id.* at 533, 640 S.E.2d at 267-68.

117. *Id.* at 533-34, 640 S.E.2d at 268.

118. *Id.* at 534, 640 S.E.2d at 268.

119. *Id.*

120. *Id.* (citing *Slaughter*, 100 Ga. at 326, 28 S.E.2d at 159).

they would have had they been given the statutory oath. But even so, the public policy reasons for this bright-line rule make eminent sense.

F. Conflict of Interest

In *Burns v. State*,¹²¹ the Georgia Supreme Court declined to establish a rule that a conflict of interest should be presumed when attorneys from the same public defender's office represent co-defendants in a joint trial.¹²² The court based this conclusion on the well-established rule that no presumption of a conflict of interest exists when one attorney represents multiple defendants in a single case.¹²³ If a defendant objects to his or her public defender based upon the fact that a co-defendant is being represented by another public defender from the same office, the objecting defendant must show the trial court that the potential conflict imperils his or her right to a fair trial.¹²⁴ Burns attempted to do that by arguing that his co-defendant's defense was antagonistic to his defense because at a previous trial that ended in a mistrial, his co-defendant's public defender expressed indifference about the outcome of Burns's case, as did Burns's lawyer about the co-defendant's fate, emphasizing that the two defendants faced separate verdicts and that the co-defendant's lawyer did not care what happened to Burns.¹²⁵ Burns incorrectly characterized this indifference as antagonistic defenses.¹²⁶ The court concluded that this was not an antagonistic defense, but "nothing more than mutual expressions of indifference by counsel over the outcome of the criminal charges against the other party."¹²⁷ Therefore, the court did not reach the question "whether public defenders should be automatically disqualified or be treated differently from private law firm attorneys when actual or possible conflicts arise in multiple defendant representation cases."¹²⁸ In this time of flux in the indigent defense delivery system—when funding is at a crisis and costs increase even more when conflict counsel must be appointed—expect this unreached question to arise one day soon. Also, expect to see more multiple-defendant representation from the circuit public defenders' offices.

121. 281 Ga. 338, 638 S.E.2d 299 (2006).

122. *Id.* at 340, 638 S.E.2d at 301.

123. *Id.*; see also *Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980).

124. *Burns*, 281 Ga. at 340, 638 S.E.2d at 301.

125. *Id.* at 339 & n.1, 638 S.E.2d at 300 & n.1.

126. *Id.* at 340, 638 S.E.2d at 301.

127. *Id.* at 341, 638 S.E.2d at 301.

128. *Id.*

In *Odum v. State*,¹²⁹ the public defender's office undertook the representation of Johnnie Odum, who had been charged with attempted murder and other related crimes. Odum became dissatisfied with the representation of his assistant public defender, Kathleen Jennings. He said so in open court at a bond hearing, then refused to speak to two other assistant public defenders who attempted to take over the representation from Jennings. Odum then filed a federal lawsuit against Jennings and her entire office.¹³⁰

Jennings moved to withdraw, pursuant to Uniform Superior Court Rule 4.3,¹³¹ asserting a nonwaivable conflict of interest based upon Odum's lawsuit. The trial court denied the motion, but granted an application for interlocutory appeal. On appeal, Odum argued that O.C.G.A. section 17-12-22,¹³² a statute that became effective January 1, 2005, as part of the Indigent Defense Act,¹³³ granted the public defender independent authority to determine when a conflict of interest exists and thereby divests the trial court of its authority to make an evaluation of such putative conflicts and deny motions to withdraw when made by the public defender.¹³⁴ In essence, therefore, Odum's position, as stated by Jennings, was that the statute conflicted with the superior court rule, and because statutes trump rules, the trial court abused its discretion in denying Jennings's motion to withdraw.¹³⁵

The court of appeals, interpreting O.C.G.A. section 17-12-22 for the first time, concluded that no such conflict between the statute and the rule existed.¹³⁶ The statute, the court held, makes it incumbent upon the public defender to identify conflicts at the outset of the representation and gives the public defender the authority to refuse to represent

129. 283 Ga. App. 291, 641 S.E.2d 279 (2007).

130. *Id.* at 291-92, 641 S.E.2d at 280.

131. GA. UNIF. SUPER. CT. R. 4.3.

132. O.C.G.A. § 17-12-22 (2004). In pertinent part, O.C.G.A. section 17-12-22 provides

(a) The council shall establish a procedure for providing legal representation in cases where the circuit public defender office has a conflict of interest. This procedure may be by appointment of individual counsel on a case-by-case basis or by the establishment of a conflict defender office in those circuits where the volume of cases may warrant a separate conflict defender office.

.....

(c) The circuit public defender shall establish a method for identifying conflicts of interest at the earliest possible opportunity.

Id.

133. O.C.G.A. §§ 17-12-1 to -128 (2004 & Supp. 2007).

134. O.C.G.A. § 17-12-22.

135. *Odum*, 283 Ga. App. at 293, 641 S.E.2d at 281.

136. *Id.*

the defendant and to refer him or her to conflict counsel.¹³⁷ But once the representation has begun, the statute does not leave the authority in the hands of the public defender to be the sole arbiter of whether a conflict renders continued representation impossible.¹³⁸ Rather, at that point, the public defender would have to move to withdraw, as Jennings did, and the court, pursuant to its authority, could determine whether the conflict would render the representation ineffective and necessitate the appointment of conflict counsel.¹³⁹ If this were not the rule, the court of appeals reasoned, then defendants could indefinitely delay trials by simply filing lawsuits against their appointed counsel, causing withdrawal after withdrawal with no oversight by the court.¹⁴⁰

In Odum's case, even though the court of appeals disagreed with Odum's interpretation of O.C.G.A. section 17-12-22, it did agree that the trial court abused its discretion by denying Jennings's motion to withdraw.¹⁴¹ Having to defend themselves against Odum's federal lawsuit was sufficient to create a conflict of interest between Odum and the public defender's office and, thus, should have ended the representation.¹⁴²

III. GUILTY PLEAS

A. Defendant's Right to Withdraw

In *Kaiser v. State*,¹⁴³ Alan Kaiser pleaded guilty to more than sixty counts of drug manufacturing, possession, and dispensation of controlled substances. In addition to ten years of prison time, followed by twenty years on probation and fines and fees, the negotiated plea also contained a term prohibiting Kaiser from practicing medicine in Georgia or any contiguous state during his sentence. But at the sentencing hearing, the judge modified this term to prohibit Kaiser from *ever* practicing medicine in Georgia or the contiguous states.¹⁴⁴

137. *Id.*

138. *Id.* at 293-94, 641 S.E.2d at 281.

139. *See* *Holloway v. Arkansas*, 435 U.S. 475, 487 (1978).

140. *Odum*, 283 Ga. App. at 294, 641 S.E.2d at 281.

141. *Id.*, 641 S.E.2d at 282.

142. *Id.* at 295, 641 S.E.2d at 282.

143. 285 Ga. App. 63, 646 S.E.2d 84 (2007). The authors reported the earlier version of this case, *Kaiser v. State*, 275 Ga. App. 684, 621 S.E.2d 802 (2005), in last year's article. *See* Franklin J. Hogue & Laura D. Hogue, *Criminal Law*, 58 MERCER L. REV. 83, 107 (2006).

144. *Kaiser*, 285 Ga. App. at 63, 646 S.E.2d at 85.

Kaiser moved the trial court to modify the prohibition against ever practicing medicine because it was an illegal sentence. It was illegal, Kaiser argued, because it was indeterminate, which violates O.C.G.A. section 17-10-1(a)(1).¹⁴⁵ The trial court denied Kaiser's motion, but the court of appeals reversed, vacating Kaiser's sentence in its entirety.¹⁴⁶

Three days after the case had been sent back to the trial court for re-sentencing, but before re-sentencing had occurred, Kaiser moved to withdraw his plea to several counts in the indictment. The trial court re-sentenced Kaiser according to the terms of the original negotiated plea anyway, then dismissed Kaiser's motion to withdraw his plea on the ground that it was filed after the term of court in which the original sentence was imposed.¹⁴⁷ This then set up the following conundrum for the court to solve.

First, O.C.G.A. section 17-7-93(b)¹⁴⁸ provides that "[a]t any time before judgment is pronounced, the accused person may withdraw the plea of 'guilty' and plead 'not guilty.'"¹⁴⁹ "The phrase 'at any time before judgment is pronounced,'" the court explained, "means at any time before the judge orally pronounces sentencing."¹⁵⁰ Thus, after entering a plea but before being sentenced, a defendant has "an absolute right" to withdraw his or her plea.¹⁵¹

Second, "[A] defendant must file a post-sentencing motion to withdraw a guilty plea in the same term in which he was sentenced."¹⁵² After that, the court lacks jurisdiction to entertain the motion, and the defendant is left only with the option of filing a habeas petition.¹⁵³

Third, "[A] finding of a void sentence, following a guilty plea, does not automatically discharge the defendant from his plea," but rather "the proper procedure is to return the defendant to the trial court for the imposition of a legal sentence."¹⁵⁴

Now we have Kaiser's dilemma: what happens when a defendant wishes to withdraw a guilty plea following a void sentence but before re-sentencing outside the term of court in which the defendant entered the plea and was given the void sentence? The court cited two contradictory

145. *Id.*; O.C.G.A. § 17-10-1(a)(1) (Supp. 2007).

146. *Kaiser*, 285 Ga. App. at 63, 646 S.E.2d at 85.

147. *Id.* at 64, 646 S.E.2d at 85-86.

148. O.C.G.A. § 17-7-93(b) (2004).

149. *Id.*

150. *Kaiser*, 285 Ga. App. at 64-65, 646 S.E.2d at 86 (citing *State v. Germany*, 246 Ga. 455, 456, 271 S.E.2d 851, 852 (1980)).

151. *Id.* at 65, 646 S.E.2d at 86.

152. *Id.*

153. *Id.*

154. *Id.*

lines of authority—the “*Mullins* line,”¹⁵⁵ which supports Kaiser’s position by holding that “[w]here the sentence is void, a valid sentence may be imposed by the court, until which time the defendant stands as though convicted but not sentenced,”¹⁵⁶ and the “*Jarrett* line,”¹⁵⁷ which supports the State’s position by holding that when a defendant moves to withdraw a plea after imposition of a void sentence and when such motion has been made outside the term of court in which the void sentence was imposed, the only action allowed is to re-sentence the defendant by giving him a legal sentence.¹⁵⁸

The court solved this dilemma by siding with the *Mullins* line because the reasoning in *Mullins* “gives effect to each of the three overlapping principles” while the *Jarrett* line “completely ignores a defendant’s statutory right to withdraw his plea prior to sentencing.”¹⁵⁹ As a result, a host of cases in the *Jarrett* line, including *Jarrett*, were overruled.¹⁶⁰

B. State’s Right to Withdraw

The short answer to the question of whether the State can withdraw its plea offer when the trial court accepts a guilty plea but announces its intention to reject the negotiated sentence in favor of the defendant is no.¹⁶¹ In *State v. Harper*,¹⁶² Harper agreed to plead guilty to robbery, reduced from armed robbery, in exchange for a joint recommendation of five years in prison. The trial court accepted the plea but rejected the negotiated sentence, instead the court gave Harper five years, one to be served in confinement, the balance on probation, but that one year in confinement to be suspended upon completion of a boot camp program.¹⁶³ Miffed by the court’s “complete disregard of the

155. *Id.*, 646 S.E.2d at 87 (citing *Mullins v. State*, 134 Ga. App. 243, 214 S.E.2d 1 (1975)).

156. *Id.* at 66, 646 S.E.2d at 87 (quoting *Mullins*, 134 Ga. App. at 243, 214 S.E.2d at 2).

157. *Id.* at 67, 646 S.E.2d at 88 (citing *Jarrett v. State*, 217 Ga. App. 627, 458 S.E.2d 414 (1995)).

158. *Id.*

159. *Id.* at 68, 646 S.E.2d at 88.

160. *Id.* at 68-69, 646 S.E.2d at 89 (overruling *Woodson v. State*, 267 Ga. App. 636, 600 S.E.2d 717 (2004); *Mann v. State*, 264 Ga. App. 631, 591 S.E.2d 495 (2003); *Farist v. State*, 249 Ga. App. 320, 547 S.E.2d 618 (2001); *Brasuell v. State*, 243 Ga. App. 176, 531 S.E.2d 732 (2000); *Baldwin v. State*, 242 Ga. App. 205, 529 S.E.2d 201 (2000); *Lewis v. State*, 229 Ga. App. 827, 494 S.E.2d 678 (1997); *Jarrett*, 217 Ga. App. 627, 458 S.E.2d 414).

161. See *State v. Harper*, 279 Ga. App. 620, 621, 631 S.E.2d 820, 821 (2006).

162. 279 Ga. App. 620, 631 S.E.2d 820 (2006).

163. *Id.* at 620, 631 S.E.2d at 820.

plea agreement,” the State appealed.¹⁶⁴ The court of appeals, noting that the State conceded in its brief that Georgia law gives only the defendant the right to withdraw his guilty plea and does not confer such a right upon the State, was unmoved by the State’s argument that it too should have this right.¹⁶⁵ Imagine if the State had such a right: The State would then wrest exceptional power from the judiciary to fashion sentences. It would mean that almost *any time* that a judge, in his or her wisdom, temperance, and moderation, sought to impose a more lenient sentence than even the defendant agreed to in the negotiations with the State, the court could not do so. The State could simply withdraw the plea offer and revert to a charge, assuming one is available, that requires the judge to give a greater sentence.

IV. THE STATE’S CASE IN CHIEF

A. *Hearsay*

1. Res Gestae Exception. As trial attorneys, we observe more confusion by lawyers and even judges about the hearsay rule and all its many exceptions than any other rule of evidence. An oft-used exception by the State is the “res gestae” exception to the hearsay rule. As most lawyers learned in law school, res gestae is Latin for “things done” or “events.”¹⁶⁶ We also learned that in Georgia’s rules of evidence, it covers a wide array of present sense impressions, excited utterances, and other spontaneous declarations made roughly contemporaneously with an event. Introduced into American law from English common law in the nineteenth century and codified in Georgia’s first book of statutes, the Code of 1860,¹⁶⁷ this exception has grown more obscure over its long history. Indeed, the Federal Rules of Evidence, enacted in 1975 and now adopted by forty-two states, not including Georgia, did away with this vague term, replacing it with specific exceptions identified in Rules 803(1), (2), and (3).¹⁶⁸

164. *Id.*

165. *Id.* at 621, 631 S.E.2d at 821.

166. BLACK’S LAW DICTIONARY 1335 (8th ed. 2004).

167. GA. CODE of 1860 § 3696 (Seals 1861).

168. FED. R. EVID. 803(1)-(3). The Evidence Study Committee of the State Bar of Georgia has proposed new evidence rules for Georgia, which would track the federal rules and, in doing so, would eliminate the term “res gestae” and adopt the more specific rules found in Federal Rules of Evidence 801 (1), (2), and (3), codifying them at O.C.G.A. section 24-8-803(1), (2), and (3). The Board of Governors of the State Bar will vote on the proposed change in the fall of 2007 and, if approved, will present them to the legislature for consideration. See State Bar of Georgia, http://gabar.org/news/proposed_new_georgia_rules

Under the current *res gestae* rule at O.C.G.A. section 24-3-3,¹⁶⁹ the Georgia Supreme Court, in *Orr v. State*,¹⁷⁰ reversed a trial court for admitting into evidence the hearsay statement of an unknown third party on a 911 tape.¹⁷¹ The unknown third party was not the caller and could be heard stating the defendant's name as the caller reported a shooting, which turned out to be a murder.¹⁷² The person named by the unknown third party was ultimately identified in a lineup by another witness and convicted of the murder.¹⁷³ The admission of the tape containing the utterance of Orr's name was reversible error because there was no evidence to show whether the third party spoke Orr's name because he or she was a witness to the shooting and saw Orr do it, or whether the third party simply stated Orr's name as an expression of the declarant's opinion or a conclusion.¹⁷⁴ In other words, there was no way to know whether the declarant was uttering Orr's name from personal knowledge or not.¹⁷⁵ It is safe to say that even under the new proposed rules of evidence, this case should have, and probably would have, come out the same way. In our view, the proposed rules to be considered by the State Bar of Georgia in Fall 2007, modeled as they are on the federal rules, would be a welcome change to Georgia's current rules of evidence.

2. Right to Confrontation. In one of the more important decisions in criminal law in recent years, the United States Supreme Court held, in *Crawford v. Washington*,¹⁷⁶ that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."¹⁷⁷ The Georgia Court of Appeals was called upon to apply this interpretation of the Sixth Amendment guarantee to the right to confront and cross-examine one's accusers in *Dickson v. State*.¹⁷⁸ In that case, Richard Dickson got into a fight with his brother, Barry, which led to Richard's stabbing Barry to death. The father of the two men, Grady Dickson, witnessed the stabbing as he attempted to break

_of_evidence (last visited Aug. 25, 2007).

169. O.C.G.A. § 24-3-3 (1995).

170. 281 Ga. 112, 636 S.E.2d 505 (2006).

171. *Id.* at 113-14, 636 S.E.2d at 507-08.

172. *Id.* at 112, 636 S.E.2d at 507.

173. *Id.*

174. *Id.* at 113, 636 S.E.2d at 507-08.

175. *Id.*, 636 S.E.2d at 507.

176. 541 U.S. 36 (2004).

177. *Id.* at 68.

178. 281 Ga. App. 539, 636 S.E.2d 721 (2006).

up the fight. Grady gave a statement to an investigator, in which he characterized events in a way that undermined Richard's later self-defense theory at trial. Grady did not testify at Richard's trial, however, because Grady had died. But he did testify at Richard's bond hearing prior to the trial. In fact, Richard had called him as a witness to say that if the court were to grant a bond to Richard, Grady and his wife would not have felt threatened by him. On cross-examination, the State asked Grady about the specific details of the stabbing, but on re-direct, Richard asked further questions related to bail and did not question Grady about the stabbing.¹⁷⁹

Richard went to trial, where he presented his self-defense theory. The State, however, was allowed to have the investigator who had interviewed Grady play for the jury the audiotape of that interview. The trial court reasoned that this hearsay was admissible because Grady was obviously unavailable, and Richard had an opportunity to cross-examine Grady at his bond hearing.¹⁸⁰

The court of appeals concluded that this was error and, because it was harmful error, reversed Richard's conviction.¹⁸¹ It did so by holding that Richard did not have a meaningful opportunity to cross-examine Grady on substantially the same issue that arose at trial because the bond hearing involved different issues than those at trial.¹⁸² We find this case to be instructive, as a reminder to lawyers and trial courts, not only for its correct application of *Crawford* and its protection of Richard's Sixth Amendment right under the United States Constitution, but more for the distinction it draws between issues at a bond hearing and issues at trial and their differing standards.

The issues at a bond hearing involve the significant risks identified in O.C.G.A. section 17-6-1(e):¹⁸³ flight, danger to others or property, risk of committing a new felony, and risk of intimidating witnesses.¹⁸⁴ The test at a bond hearing for release on bail is whether the accused shows the court that he or she does not pose one of these risks in significant proportions.¹⁸⁵ The issue at trial, of course, is whether the defendant is guilty of the crime charged beyond a reasonable doubt. It should go without saying that this standard "is significantly more demanding."¹⁸⁶

179. *Id.* at 539 & n.1, 636 S.E.2d at 722-23 & n.1.

180. *Id.* at 539, 636 S.E.2d at 723.

181. *Id.* at 541-42, 636 S.E.2d at 724.

182. *Id.* at 540, 636 S.E.2d at 723.

183. O.C.G.A. § 17-6-1(e) (2004).

184. *Id.*

185. *Dickson*, 281 Ga. App. at 540, 636 S.E.2d at 723.

186. *Id.* at 541, 636 S.E.2d at 723.

The Georgia Supreme Court also faced the question for the first time of whether the requirements of the Sixth Amendment's right to confront and cross-examine one's accusers applies at a preliminary hearing.¹⁸⁷ In *Gresham v. Edwards*,¹⁸⁸ an appeal from the denial of a petition for writ of habeas corpus, the court said no.¹⁸⁹ Gresham's petition for bond was denied, so he filed a habeas petition against the sheriff. It, too, was denied, which brought his appeal to the Georgia Supreme Court. At all stages, he raised the issue that he had been denied his right to confront and cross-examine his accusers at his preliminary hearing when the investigator in his case gave hearsay testimony from a variety of witnesses about a variety of things.¹⁹⁰ The magistrate court, presiding over the preliminary hearing, overruled his hearsay and constitutional objections because "hearsay has long been admissible in determining the existence of probable cause."¹⁹¹

On appeal, Gresham reasoned that because a preliminary hearing is a "critical stage" in the prosecution of a citizen, the Sixth Amendment right to confront and cross-examine applies, just as the Sixth Amendment right to assistance of counsel applies.¹⁹² Gresham further argued that this has become all the more true since the United States Supreme Court decided *Crawford*.¹⁹³ The Georgia Supreme Court disagreed, however, emphasizing throughout its analysis of the issue that *Crawford*, with its historical overview of this Sixth Amendment right, made it clear that this right applies at *trial*.¹⁹⁴ Because a preliminary hearing only determines "probable cause to believe the accused guilty of the crime charged, and if so to bind him over for indictment by the grand jury,"¹⁹⁵ whereas a trial determines guilt or innocence, the right to confront and cross-examine one's accusers does not apply.¹⁹⁶

187. See *Gresham v. Edwards*, 281 Ga. 881, 644 S.E.2d 122 (2007).

188. 281 Ga. 881, 644 S.E.2d 122 (2007).

189. *Id.* at 883, 644 S.E.2d at 124.

190. *Id.* at 881-82, 644 S.E.2d at 123.

191. *Id.* at 882, 644 S.E.2d at 123 (citing *Banks v. State*, 277 Ga. 543, 544, 592 S.E.2d 668, 670 (2004)).

192. *Id.* (citing *Coleman v. Alabama*, 399 U.S. 1, 10 (1970)).

193. *Id.*, 644 S.E.2d at 124.

194. *Id.* at 882-83, 644 S.E.2d at 124.

195. *State v. Middlebrooks*, 236 Ga. 52, 54, 222 S.E.2d 343, 345 (1976).

196. *Gresham*, 281 Ga. at 883, 644 S.E.2d at 124.

V. DEFENSE CASE

A. *Impeachment of the Defendant*

In 2005 the Georgia legislature enacted O.C.G.A. section 24-9-84.1,¹⁹⁷ intending to establish guidelines for the use of criminal convictions to impeach witnesses or defendants who testify.¹⁹⁸ In *Adams v. State*,¹⁹⁹ the trial court allowed the State to impeach the defendant in a burglary case with a misdemeanor conviction for theft by receiving stolen property on the theory that the prior crime involved “dishonesty” within the meaning of O.C.G.A. section 24-9-84.1(a)(3).²⁰⁰ Until *Adams*, the Georgia Court of Appeals and Georgia Supreme Court had not yet identified which crimes involve dishonesty within the meaning of this statute. Therefore, the courts had not identified which crimes could be used to impeach based on this theory. After a thorough analysis of the topic, the court of appeals concluded that misdemeanor theft by receiving stolen property does not involve dishonesty and, thus, does not fit within the permissible prior convictions that may be used to impeach a testifying witness, including a defendant.²⁰¹

The court arrived at this conclusion by noting that the new statute adopted the language of Federal Rule of Evidence 609(a)(2).²⁰² Given that starting point for its statutory analysis, the court looked to federal appellate court interpretation of this federal rule as persuasive authority and observed that the Eleventh Circuit has concluded that theft is not a crime involving dishonesty.²⁰³ The court noted that every other circuit in the federal system, except the Fourth Circuit (which apparently has not ruled on the issue), had reached the same conclusion.²⁰⁴ The various states that have addressed the issue have not come out so uniformly as the federal circuits, but “[m]any of these courts have adopted the reasoning of the federal courts that a crime of dishonesty is one that bears on a witness’s propensity to testify truthfully or that involves some element of deceit or falsification.”²⁰⁵ While the court in *Adams* concluded that the trial court erred in admitting the evidence of

197. O.C.G.A. § 24-9-84.1 (Supp. 2007).

198. *See id.* § 24-9-84.1(a).

199. 284 Ga. App. 534, 644 S.E.2d 426 (2007).

200. *Id.* at 537, 644 S.E.2d at 430.

201. *Id.* at 540, 644 S.E.2d at 432.

202. *Id.* at 537, 644 S.E.2d at 430 (citing FED. R. EVID. 609(a)(2)).

203. *Id.* (citing *United States v. Sellars*, 906 F.2d 597, 603 (11th Cir. 1990)).

204. *See id.* at 538 & n.25, 644 S.E.2d at 431 & n.25.

205. *Id.* at 539, 644 S.E.2d at 431.

the prior theft conviction to impeach the defendant, the error was harmless because it was not “highly probable” that the error contributed to the guilty verdict.²⁰⁶

This case marks an important change in the rules of evidence regarding impeachment. Prior to the enactment of O.C.G.A. section 24-9-84.1, “a witness could be impeached by proof of general bad character or by proof that the witness had been convicted of a crime of moral turpitude.”²⁰⁷ Theft was considered to be a crime of moral turpitude and, thus, could be used to impeach a witness.²⁰⁸ The change in language in the new statute persuaded the court that the legislature no longer intended for such to be the case.²⁰⁹

Judge Smith concurred in the majority’s holding—the conviction was affirmed—but wrote separately to say that in his view, the majority violated Georgia’s rule of statutory construction and that he would have included theft as a crime of dishonesty.²¹⁰ For his part, he would not have looked at how the federal courts interpret their own Rule 609(a)(2), as did the majority, because “Georgia courts must look first to their own direct instructions with regard to statutory interpretation.”²¹¹ Citing O.C.G.A. section 1-3-1(b)²¹² and *Fleming v. State*²¹³ for those instructions, Judge Smith asserted that the court should not resort to federal statutes and cases when the Georgia statute is unambiguous.²¹⁴ To him, the new statute is unambiguous because dishonesty is a common word, the meaning of which everyone knows, and, also for him, theft necessarily involves dishonesty.²¹⁵ In addition, the new statute mentions “making a false statement” or dishonesty, a disjunctive construction, and under the majority’s view, he asserts, dishonesty becomes redundant in the new statute if it means “failing to testify truthfully in court,” because that is essentially what “making a false statement” includes as well.²¹⁶

The majority, however, stated that crimes of dishonesty, like the federal courts interpret the phrase, “are limited to those crimes that bear

206. *Id.* at 541, 644 S.E.2d at 433.

207. *Id.* at 539, 644 S.E.2d at 432; *see also* Sapp v. State, 271 Ga. 446, 448, 520 S.E.2d 462, 464 (1999).

208. *Adams*, 284 Ga. App. at 539, 644 S.E.2d at 432.

209. *Id.*

210. *Id.* at 541, 644 S.E.2d at 433 (Smith, J., concurring).

211. *Id.*

212. O.C.G.A. § 1-3-1(b) (Supp. 2007).

213. 271 Ga. 587, 589, 523 S.E.2d 315, 317 (1999).

214. *Adams*, 284 Ga. App. at 542, 644 S.E.2d at 433 (Smith, J., concurring).

215. *Id.*

216. *Id.*, 644 S.E.2d at 434.

upon a witness's propensity to testify truthfully."²¹⁷ Because one can knowingly receive stolen property and be honest about it—one may receive a stolen four-wheeler, for example, know it to be stolen, and thus be guilty of this crime, but may simultaneously always tell the truth about it when asked—the majority's interpretation of this new impeachment statute seems to comport best with legislative intent and logic. The interesting case will be the one in which theft is involved but it also includes some form of deceit, such as theft by deception.²¹⁸ No doubt this issue will arise at some point.

VI. SENTENCING—STATUTORY CONSTRUCTION

In *Gillespie v. State*,²¹⁹ a question arose for the first time under O.C.G.A. section 16-5-23(f),²²⁰ the family violence provision of the simple battery statute, namely, whether a person could be sentenced for this “high and aggravated” offense when the victim of the defendant's battery is the defendant's girlfriend.²²¹ At trial, the girlfriend mentioned that she had been pregnant by the defendant a few weeks before the attack but was no longer pregnant and, moreover, that she had never told the defendant that he had impregnated her.²²² The statute governing the offense of simple battery provides that *family violence* simple battery should result in a misdemeanor sentence of a high and aggravated nature.²²³ Family violence simple battery occurs between “persons who are parents of the same child.”²²⁴ The court of appeals concluded that the legislature did not intend for the statute to encompass a relationship in which (1) a man and woman had sexual relations, (2) the woman became pregnant but only a few weeks before the battery, (3) the man did not know she was pregnant when he committed the battery, and (4) the two of them had not lived together, as were the facts in this case.²²⁵ Chief Judge Ruffin, the author of the opinion, applied the doctrine of *expressio unius est exclusio alterius*, which means “that when particular things are enumerated in a statute, things not mentioned are excluded from application of the statute,” to conclude that the legislature could have included sexual partners on the list of familial

217. *Id.* at 540, 644 S.E.2d at 432 (majority opinion).

218. *See* O.C.G.A. § 16-8-3 (2003).

219. 280 Ga. App. 243, 633 S.E.2d 632 (2006).

220. O.C.G.A. § 16-5-23(f) (2007).

221. *Gillespie*, 280 Ga. App. at 243-44, 633 S.E.2d at 633.

222. *Id.* at 244, 633 S.E.2d at 633-34.

223. O.C.G.A. § 16-5-23(f).

224. *Id.*

225. *Gillespie*, 280 Ga. App. at 245, 633 S.E.2d at 634.

relationships but chose not to do so.²²⁶ The case was remanded for resentencing as a misdemeanor simple battery, not high and aggravated.²²⁷

Judge Barnes concurred but wrote separately to employ a different rule of statutory construction with the Latin name *noscitur a sociis*, which says that “the meaning of a word is or may be known from accompanying words.”²²⁸ Being a parent is not the key, she observed; “the essential thing here is the relationship.”²²⁹ The victim’s pregnancy without the defendant’s knowledge does not create the sort of relationship, she wrote, intended by the legislature when writing this Code section.²³⁰

Finally, Judge Bernes also concurred specially, likewise parting company with the majority’s statutory construction.²³¹ In her view, the court should have presumed that the legislature’s failure to refer specifically to unborn children or pregnancy in O.C.G.A. section 16-5-23(f) “was ‘a matter of considered choice’”²³² because the General Assembly “has indicated by specific language when it intends to include unborn children within the contemplation of a criminal statute”²³³ and because in another subsection of the simple battery statute—O.C.G.A. section 16-5-23(c)—the legislature proscribes with an elevated punishment simple battery “‘against a female who is pregnant at the time of the offense.’”²³⁴

VII. APPELLATE ISSUES

A. State’s Right to Appeal

1. Oral Order. The legislature gave the right to the State to immediately appeal the granting of a defendant’s motion to suppress by

226. *Id.* at 246, 633 S.E.2d at 635 (citing *Long v. State*, 271 Ga. App. 565, 569, 610 S.E.2d 74, 78 (2004)).

227. *Id.*

228. *Id.* at 247, 633 S.E.2d at 635 (Barnes, J., concurring) (citing *Mott v. Cent. R.R.*, 70 Ga. 680, 683 (1883), *overruled on other grounds by Thompson v. Watson*, 186 Ga. 396, 406-08, 197 S.E. 774, 779-80 (1938)).

229. *Id.*

230. *Id.*

231. *Id.* (Bernes, J., concurring).

232. *Id.* at 248, 633 S.E.2d at 636 (quoting *Inland Paperboard & Packaging, Inc. v. Ga. Dep’t of Revenue*, 247 Ga. App. 101, 104, 616 S.E.2d 873, 876 (2005)).

233. *Id.* at 247-48, 633 S.E.2d at 635-36 (quoting *State v. Luster*, 204 Ga. App. 156, 157, 419 S.E.2d 32, 34 (1992)).

234. *Id.* at 248, 633 S.E.2d at 636 (quoting O.C.G.A. § 16-5-23(c) (2003)).

enacting O.C.G.A. section 5-7-1(a)(4).²³⁵ The right is immediate because the State cannot appeal after an acquittal,²³⁶ and an immediate appeal allows the appellate courts to correct any potential miscarriage of justice if a trial judge has erroneously excluded evidence and has left the State with no case.²³⁷ Add to these basic rules the additional rule that the State may not appeal an order to suppress evidence unless the order is in writing,²³⁸ and we have the unique problem that arose in *State v. Morrell*.²³⁹ In *Morrell* the trial judge, the day before Morrell's murder trial was to begin, granted Morrell's motion to exclude a statement Morrell had given to the police. The judge, however, did not reduce his order to writing. The State filed a notice of appeal from the oral ruling and objected to the judge's decision to begin the trial anyway. The trial proceeded to verdict, in which the jury acquitted Morrell. The State then filed a notice of appeal from the judgment of acquittal.²⁴⁰

The supreme court recognized the position a trial judge can put the State in by refusing to reduce an oral suppression order to writing and acknowledged the injustice of it:

Given that the State cannot appeal after an acquittal and thus can never seek to rectify an incorrect suppression order if a defendant is acquitted, a trial court's refusal to put an order suppressing evidence into writing defeats the heart of the legislature's intent of granting the State a limited right of appeal and has the potential to exact grave injustices.²⁴¹

Thus, the court concluded, the rule that the State may not appeal unless the order has been reduced to writing is not absolute.²⁴² But the court narrowed its holding that the State may appeal oral orders granting suppression to instances "only when the transcript affirmatively shows that the State requested the trial court to put the oral order in written form and that the trial court refused to do so."²⁴³ In *Morrell* the State failed to request a written order, so the State's appeal was dismissed.²⁴⁴

235. O.C.G.A. § 5-7-1(a)(4) (1995 & Supp. 2007).

236. *City of Atlanta v. McCary*, 245 Ga. 582, 582, 266 S.E.2d 193, 193 (1980).

237. *Strickman v. State*, 253 Ga. 287, 288, 319 S.E.2d 864, 865 (1984).

238. *Crowell v. State*, 234 Ga. 313, 313, 215 S.E.2d 685, 685 (1975).

239. 281 Ga. 152, 635 S.E.2d 716 (2006).

240. *Id.* at 152, 635 S.E.2d at 716.

241. *Id.* at 153, 635 S.E.2d at 717.

242. *Id.* at 152, 635 S.E.2d at 717.

243. *Id.* at 153, 635 S.E.2d at 717.

244. *Id.*

What would happen, however, if the State requested a written order when the trial court granted suppression, but the judge refused to do it? Because the trial court has a duty to put its oral orders in writing upon request,²⁴⁵ the transcript would reflect the trial court's refusal to do its duty, which would then save the State's appeal from dismissal.²⁴⁶ The court goes on to note that the State could have also filed a mandamus petition seeking to require the trial court to put its order in writing, but in light of language above in the opinion—"we find that the State has the right to appeal oral orders only when the transcript affirmatively shows that the State requested the trial court to put the oral order in written form and that the trial court refused to do so"²⁴⁷—filing a mandamus does not seem to be necessary to preserve the issue for appeal.

2. Order Granting Defendant's Motion for New Trial. In 2005 the legislature amended O.C.G.A. section 5-7-1(a)²⁴⁸ by adding the words "a motion for new trial or" to the subsection that had previously allowed the State to appeal from a grant of an extraordinary motion for new trial only.²⁴⁹ The first appeal by the State under this amended Code section came before the court of appeals in *State v. McMillon*.²⁵⁰ In that case, McMillon was convicted of involuntary manslaughter and sentenced to serve ten years for pushing his wife into the path of an oncoming car.²⁵¹ On his motion for new trial, McMillon persuaded the trial court that he received ineffective assistance of counsel because trial counsel (1) failed to interview any of the State's witnesses, (2) did not obtain taped interviews of the State's witnesses, (3) stipulated to the admission of toxicology reports showing that McMillon and his wife both tested positive for alcohol and cocaine metabolites but failed to investigate whether either drug affected their ability to function, and (4) failed to investigate or pursue the defense of accident, especially because "evidence adduced at trial raised the possibility that McMillon had thrown his shirt onto the highway and that Sheila was struck by the vehicle when she bent down to retrieve it."²⁵²

245. *Titelman v. Stedman*, 277 Ga. 460, 462, 591 S.E.2d 774, 776 (2003).

246. *Morrell*, 281 Ga. at 152, 635 S.E.2d at 717.

247. *Id.* at 153, 635 S.E.2d at 717.

248. O.C.G.A. § 5-7-1(a) (1995), amended by O.C.G.A. § 5-7-1(a)(7) (Supp. 2007).

249. O.C.G.A. § 5-7-1(a)(7) (Supp. 2007).

250. 283 Ga. App. 671, 642 S.E.2d 343 (2007).

251. *Id.* at 671, 642 S.E.2d at 343.

252. *Id.* at 672, 642 S.E.2d at 344-45 (citing *Cortez v. State*, 253 Ga. App. 699, 704, 561 S.E.2d 142, 148 (2002) (citing *Strickland v. Washington*, 466 U.S. 668 (1984))).

The court applied “the same standard of review used in all cases challenging the first grant of a motion for new trial.”²⁵³ That standard is found at O.C.G.A. section 5-5-50,²⁵⁴ which states that “[t]he first grant of a [motion for] new trial shall not be disturbed by an appellate court unless the appellant shows that the judge abused his discretion in granting it and that the law and facts require the verdict notwithstanding the judgment of the presiding judge.”²⁵⁵ This case marks the first time this standard has been applied to a criminal case.²⁵⁶

The court noted that its authority to reverse is greatly restricted because “the trial judge is vested with the strongest of discretions to review the case and to set the verdict aside if he is not satisfied with it.”²⁵⁷ The rule is that “the first grant of a new trial to either party is not to be reversed by an appellate court unless the verdict set aside by the trial court was absolutely demanded.”²⁵⁸ In other words, unless the guilty verdict against McMillon was absolutely demanded, the trial court’s grant of his motion for new trial should stand.²⁵⁹ Because the court of appeals agreed with the trial court that McMillon was denied his constitutional right to effective assistance of counsel because of trial counsel’s poor representation, the guilty verdict was not absolutely demanded.²⁶⁰ McMillon met the two-prong test for showing ineffective assistance of counsel: trial counsel displayed deficient performance and the deficient performance caused prejudice to McMillon.²⁶¹ Thus, the trial court’s grant of McMillon’s motion for new trial was affirmed.²⁶²

3. Allegedly Void Sentence. For yet another case during this period in which the State exercised its right to appeal a trial court’s favorable decision toward a defendant but lost, we include *State v. Carden*²⁶³ because it points out an interesting difference between the state and federal manner of rewarding a cooperating defendant in a drug case. In federal law, a cooperating defendant must provide substantial assistance in the investigation and prosecution of others before *the government* will file a motion pursuant to United States Sentencing

253. *Id.* at 671, 642 S.E.2d at 344.

254. O.C.G.A. § 5-5-50 (1995).

255. *Id.*

256. *McMillon*, 283 Ga. App. at 671, 642 S.E.2d at 344.

257. *Id.*

258. *Id.* at 671-72, 642 S.E.2d at 344.

259. *See id.*

260. *Id.* at 672, 642 S.E.2d at 344.

261. *Id.*

262. *Id.* at 673, 642 S.E.2d at 345.

263. 281 Ga. App. 886, 637 S.E.2d 493 (2006).

Guidelines section 5K1.1²⁶⁴ for a downward adjustment of that defendant's sentence.²⁶⁵ While the final decision whether to grant the motion and how much to adjust the sentence rests with the judge, the initial decision to submit the defendant's cooperation to the judge for leniency rests with the government and only the government.²⁶⁶ The defendant is prohibited from moving for a sentence reduction based upon substantial assistance.²⁶⁷

Compare that scheme to O.C.G.A. section 16-13-31(g)(2),²⁶⁸ which states:

The district attorney may move the sentencing court to impose a reduced or suspended sentence upon any person who is convicted of a violation of this Code section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, conspirators, or principals. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may impose a reduced or suspended sentence if he finds that the defendant has rendered such substantial assistance.²⁶⁹

While the statute is silent regarding the defendant's right to make such a motion when the district attorney refuses to do so, the Georgia Supreme Court, unlike federal law, has held that the defendant may make such a motion to the court.²⁷⁰

In *Carden* the State enumerated as error on appeal the trial court's reduction of Carden's sentence because the judge gave her a sentence of ten years, with five to serve in prison and five to serve on probation, despite the fact that the drug statute under which she was convicted—O.C.G.A. section 16-13-31(e)(1)—calls for mandatory minimum ten years to serve with no probation available.²⁷¹ The State alleged that the law does not allow a sentence below the mandatory minimum and alleged that the trial judge's true motive in giving the reduced sentence

264. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

265. *Id.*

266. *Id.*

267. *Id.*

268. O.C.G.A. § 16-13-31(g)(2) (2007).

269. *Id.*

270. *Brugman v. State*, 255 Ga. 407, 414, 339 S.E.2d 244, 251 (1986).

[W]e hold that where any person is convicted under [O.C.G.A. section] 16-13-31, and provides "substantial assistance" to the authorities as contemplated by the statute, this information may be brought to the attention of the sentencing court by motion of either the district attorney or the defendant, or the sentencing court may make its own inquiry into the matter.

Id.

271. *Carden*, 281 Ga. App. at 889, 637 S.E.2d at 497.

was not because he believed that Carden had provided substantial assistance—the State argued that she had failed in this regard because all she did was provide the name of her supplier on the day of her arrest, nothing more—but because of the judge’s “personal disdain of mandatory minimum sentencing provisions.”²⁷² The court first held that O.C.G.A. section 16-13-31(g)(2) allows a judge to reduce a sentence for substantial assistance, even if that reduction takes the sentence below the mandatory minimum.²⁷³ The court then held that the trial court stated the judge’s findings of substantial assistance as the reason for the reduction, and because this finding was supported by the evidence at the sentencing hearing, the State’s appeal was dismissed.²⁷⁴

VIII. CONCLUSION

Criminal law, like law generally, evolves with the changing standards of the times. The exclusionary rule, for example, has never been fully appreciated by the general public but has been safeguarded by our courts since its introduction as a remedy for the abrogation of a citizen’s rights to privacy, to silence, and to counsel. We saw those rights preserved in several opinions this year. We all benefit from vigilant lawyers who raise issue after issue in hundreds of cases every year to preserve in a meaningful way the cherished fundamental liberties that make our criminal justice system unique in the history of the world.

272. *Id.* at 890, 637 S.E.2d at 497. Concerning mandatory minimums, the judge stated at sentencing: “I hate them. Every judge hates them to the bottom of [their] shoes.” *Id.* We may state, with Judge Howe, the sentencing judge in this case, that we hate them too, as does every criminal defense lawyer we know. Mandatory minimums are politically popular, but the cost is excessive, and not just the cost in incarcerating more people for longer periods, but the cost to the integrity and independence of the judicial branch of government when judges are stripped of their ability to apply their own wisdom and sense of proportionality to sentencing the individuals who come before them.

273. *Id.*

274. *Id.* at 886, 637 S.E.2d at 495.