

Trial Handbook for Georgia Lawyers

2024-2025 Edition

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PREFACE TO 2024-2025 EDITION

The 2024-2025 Edition of the *Trial Handbook for Georgia Lawyers* contains a broad array of civil and criminal case law and statutes, including both historical as well as late-breaking developments. Among the recent authorities, decisions, and other developments contained herein are:

- Application of the rules of relevance and unfair prejudice in a civil case where fraud and breach of fiduciary duty are alleged. *See* § 15:3.
- Revamped, reconfigured, and expanded Chapter 28, dealing with illegally obtained evidence, searches, seizures, and motions to suppress.
- Requirements for jury instructions on preponderance of the evidence in civil case as explained in *White v. Stanley*. *See* § 35:2.
- 2024 Georgia Supreme Court decision on the admissibility of an alleged victim's prior false allegations in sex crimes prosecutions. *See* § 12:3.
- New section delineating Georgia and federal authority on the defense of third-party criminal culpability. *See* § 29:30.
- *Kirkland v. State*, where the Supreme Court of Georgia considered whether a second photographic lineup was unduly suggestive in a criminal case. *See* § 29:28.
- Expert witness requirements in DUI prosecutions as addressed in *Garrison v. State*. *See* § 24:33.
- A 2024 opinion from the Supreme Court of Georgia applying the “offer of compromise” rule. *See* § 26:13.
- Newly added Georgia authority addressing damages in civil cases. *See* Chapter 33.
- Admissibility of lay witness identification testimony based on photographic evidence as advanced in *Cross v. State*. *See* § 24:9.

This 2024-2025 Edition replaces the 2023-2024 Edition, which may now be recycled or discarded.

INTRODUCTION

Few works are undertaken with the goal of covering both civil and criminal evidence as well as trial practice issues in litigation fields extending from will contests to automobile negligence or murder cases. This unique breadth of coverage is incorporated in this edition of the *Trial Handbook for Georgia Lawyers*. In other words, the law of closing arguments and jury voir dire appears here, along with subjects like the exceptions to the hearsay rule.

With more and more law school graduates learning evidence through the mechanism of the Federal Rules of Evidence, it is important to include a table to locate Georgia law from knowledge of a federal rule. By applying the Fast Finder service contained in Appendix A, the reader can trace a federal evidence rule directly into Georgia cases and statutes.

This point is doubly important in today's world. Effective January 1, 2013, Georgia embraced the federal rules in the new Georgia Evidence Code. At appropriate points in this text, the new rules are highlighted. Appendix D sets out the full text of the 2013 Rules of Evidence, including the new rules and amendments which have been added in the years since.

An Appendix of Forms provides a valuable adjunct to the Georgia law incorporated in detail in the main text. For example, the text addresses exclusion from evidence in civil cases of any statements made in compromise negotiations. Compromise offers are excluded. They do not stand as admissions made by a party. In addition to text material on this topic, a form provides guidance on how to draft a motion in limine to secure exclusion of such potentially damaging evidence.

There are criminal case forms as well. Chapter 28 details Georgia cases and statutes on illegal search and seizure. For the 2024-2025 Edition of this work, Chapter 28 has been significantly upgraded and modernized. A form of a motion to suppress supplies direction for criminal lawyers seeking to exclude illegally seized evidence. There are prosecution forms also, including a prosecutor's notice of intent to introduce prior similar bad acts committed by a defendant.

Another feature of the Appendix is the checklist of commonly used Georgia trial objections. Each is annotated with a Georgia case or statute, or both. Organized alphabetically, this service affords a lightning fast reference to Georgia objections. Often viewed as one of the hardest skills for the trial lawyer to master, the task of objecting is eased with this unique fast-finder objec-

tion guide.

Perhaps one other publication merits special identification here: the undersigned author's book, *Successful Techniques for Civil Trials 2d*, also published by Thomson Reuters. At appropriate points herein, some targeted references to that work are made. As an example, when this text refers to motions in limine in Chapter 30, the forms for preparing a motion in limine are referenced in the *Successful Techniques* text.

Throughout this book, we have endeavored to be gender neutral. However, sometimes the use of a pronoun was necessary. We have, therefore, alternated the masculine and feminine pronoun to avoid the awkward "he or she" and "his or her." We intend that either pronoun embrace both genders.

Again, much of this book pertains to the law of evidence. Currently, Georgia continues its transition from its former evidence rules into Georgia's new Evidence Code, which is largely based upon the federal rules of evidence. While federal case law and authority under Georgia's new evidence statutes form the touchstones for the interpretation of the vast majority of Georgia's current Evidence Code, there remain some areas where former Georgia evidence law remains viable. In addition, earlier Georgia evidence precedent often provides context for current applications and changes. Accordingly, concepts from both bodies of law appear herein. Where questions arise over which body of law to apply, readers should be attentive to the principles and guideposts detailed in § 2:18.

This most recent edition of *Trial Handbook for Georgia Lawyers* marks a point of significant transition. The Authors are pleased to announce the significant contributions of Georgia State Bar members Alan A. Cook, Rhani Lott Choi, and Hannah M. Palmquist, each of whom brings an impressive array of both legal experience and expertise—as well as tremendous enthusiasm—to the *Trial Handbook for Georgia Lawyers*. Their involvement coincides with the departure from this publication of our longtime co-author and friend Julian A. Cook III. We are certain that Professor Cook's impact on *Trial Handbook for Georgia Lawyers* will be felt for years to come, as will those of our new contributors.

The views in this work are those of the Authors and do not represent those of any institution or association.

The Authors
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Author Mike Carlson expresses his deep appreciation to his father, Prof. Ron Carlson, and to Thomson Reuters for their willingness to include him as a contributor to this important work.

Wilson (Willy) Howe continues to supply first-rate support and guidance as our editor.



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§ 1:1 Attorney and trial of case

The role of the attorney in the trial of the case is extremely complicated and becomes even more so when the case involves controversial or complex issues. On the one hand, she is charged with a duty to represent her client with vigor and determination. Failure to do so not only results in loss of income and prestige, but also may result in civil liability for malpractice. On the other hand, if she is overly enthusiastic, she runs the danger of causing a mistrial, committing reversible error, being guilty of contempt of court and even being subjected to disciplinary action.

The lawyer who enters the courtroom is obligated to do so with a thorough knowledge of the rules of evidence and procedure that will guide his conduct while he is there. These rules are constantly changing, as a result of the activities of appellate courts, state and federal legislation and changes in practice and procedure adopted by the local trial courts.

The objective of this Trial Handbook is to give to the lawyer, in one compact source, those rules as they now exist in Georgia.

§ 1:2 Right to counsel

There is no recognized right to be represented by appointed counsel in a civil case. The extension of legal aid bureaus and other assistance to the indigent in civil cases indicates that such representation might be given limited recognition, as a matter of

right, in the future.¹

An indigent defendant has the right to counsel in capital cases, or in a non-capital case where the punishment may be imprisonment in the penitentiary.² It has also been held that a defendant is entitled to counsel whenever he may be sentenced to imprisonment regardless of the classification of the offense.³ It appears clear that the general provision regarding benefit of counsel includes the right to communicate with one's counsel while in custody.⁴ Every person charged with an offense has the privilege and benefit of counsel.⁵ However, a person is not entitled to be advised of his right to counsel during questioning before he is a suspect in a case.⁶

2003 legislation created a Georgia Public Defender Standards Council to set guidelines for public defenders across the state. Under the Georgia Indigent Defense Act, public defender offices are established in each of the state's 49 judicial districts.⁷

A 2007 enactment transferred the Georgia Public Defender Standards Council from the judicial branch to the executive branch of government.⁸

Added changes came in 2008. Act 729, HB 1245 (2008) changed the poverty guidelines for indigent defense and restricted the use of senior judges in death penalty cases. It also established a procedure for verifying an applicant's income.⁹

In 2011, an Act¹⁰ reconstituted the membership of the Public Defenders Standards Council, reduced the membership of each circuit public defender supervisory panel and required each panel to nominate persons to be their circuit public defender, who is

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¹O.C.G.A. § 15-11-103 provides that "[a] child, any custodian or guardian subject to a sworn complaint or affidavit, and any other respondent to a proceeding under this article [Dependency Proceedings] shall have the right to an attorney at all stages of the proceedings under this article."

²*Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963).

³*Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

⁴*See Walker v. State*, 194 Ga. 727, 22 S.E.2d 462 (1942).

⁵Ga. Const. Art. I § 1 par. XIV. Petitioner had right to counsel in municipal court proceedings for violations

of city ordinances for which she faced imposition of fines. *Nguyen v. State*, 282 Ga. 483, 651 S.E.2d 681 (2007); O.C.G.A. § 36-32-1(f).

⁶*O'Donnell v. State*, 258 Ga. 782, 374 S.E.2d 729 (1989).

⁷*See* O.C.G.A. §§ 17-12-1 through 17-12-128.

⁸O.C.G.A. §§ 17-21-1, 17-12-10.1, 17-12-26, and 17-12-30. For legislative changes relating to indigent defense costs as well as appointment of counsel and attorney's fees in capital cases, see 2007 amendments to O.C.G.A. § 15-6-24 and O.C.G.A. § 17-12-127.

⁹Article 6 of O.C.G.A. Title 17, Chapter 12 was repealed.

¹⁰Ga. Laws 2011, Act 51, repealing former O.C.G.A. § 17-12-3, and enacting new O.C.G.A. § 17-12-3.

ultimately appointed by the director of the Standards Council.

The defendant has no right to have his counsel present during the prosecution's pretrial preparatory steps such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair and the like, since these are not critical stages of the trial. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the expert witnesses and the presentation of the evidence of his own experts.¹¹

The defendant's rights were not violated because he did not have an attorney present at a preindictment lineup even though he had requested one, since there is no constitutional right to an attorney at such stage and the procedures used were neither unnecessarily suggestive nor conducive to mistaken identification.¹²

Failure to appoint counsel to represent a prisoner prior to a preindictment line-up which took place prior to the prisoner's commitment hearing did not invalidate the prisoner's conviction.¹³ Lineups after indictment are different, however.¹⁴

A review of cases involving right to counsel may be helpful.

With respect to attorneys who regularly accepted court appointments to represent indigent criminal defendants, a concerted refusal by such attorneys to represent such defendants without an increase in compensation constituted a restraint of trade within the meaning of the Sherman Act, violated the prohibition against unfair methods of competition of the Federal Trade Commission Act, and was not protected by the First Amendment.¹⁵

Trial court did not err in failing to appoint counsel for defendant at habeas corpus hearing since application for writ of habeas corpus is not a criminal proceeding, and neither the Sixth Amendment of the United States Constitution nor the Georgia Constitution requires appointment of counsel for the petitioner in such proceeding.¹⁶ Neither the Sixth Amendment of United States Constitution nor the Georgia Constitution requires appointment of counsel for a habeas corpus petitioner.¹⁷

Where the state seeks the death penalty against any one

¹¹U.S. v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

¹²Johnson v. State, 198 Ga. App. 316, 401 S.E.2d 331 (1991).

¹³Hunt v. Hopper, 232 Ga. 53, 205 S.E.2d 303 (1974).

¹⁴U.S. v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

¹⁵F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990).

¹⁶Moye v. Hopper, 234 Ga. 230, 214 S.E.2d 920 (1975). See Woodson v. Jarvis, 261 Ga. 557, 408 S.E.2d 414 (1991).

¹⁷Spencer v. Hopper, 243 Ga. 532,

defendant, he and all his codefendants must be provided with separate and independent counsel.¹⁸

Defense counsel jointly defending a defendant and a co-defendant in a kidnapping prosecution had a conflict of interest that adversely affected counsel's performance in advising the defendant to plead guilty to the false imprisonment, and thus the pleas could be vacated based on ineffective assistance of counsel. Counsel was paid solely by the co-defendant, counsel pursued a unified defense even though the defendant was much less culpable in the incident leading to charges, counsel failed to pursue an alternative defense theory on behalf of the defendant and failed even to recognize the possibility that one might exist. The defendant's guilty plea was vacated.¹⁹

In *Georgia Trails & Rentals, Inc. v. Rogers*,²⁰ the Georgia Court of Appeals found that an attorney who represented an injured biker and his parents in a negligence personal injury action did not warrant disqualification. The court found that the trial court did not abuse its discretion given that no evidence of an actual conflict was presented.

After being afforded a continuance to obtain counsel, a defendant cannot reject appointed counsel and insist on further delay while he tries to obtain the services of a specific counsel who has not agreed to take the case.²¹

No violation of right to counsel where the court refused to exclude a witness' identification testimony because she saw the defendant at his preliminary hearing where he was not represented by counsel.²²

An indigent defendant does not have an absolute right to assignment of counsel of his own choice; rather, appointment is left to the sound discretion of the court.²³

The right to appointed counsel does not include the right to counsel of choice.²⁴ Although an indigent defendant has no right to compel the trial court to appoint an attorney of his or her own choosing, if an indigent defendant can make his or her own arrangements for attorney representation, whether with the financial assistance of family or friends, or by persuading an attorney to represent him or her pro bono, the defendant ordinarily

255 S.E.2d 1 (1979).

¹⁸*Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185 (1980).

¹⁹*The State v. Mamedov*, 288 Ga. 858 708 S.E.2d 279 (2011).

²⁰*Georgia Trails & Rentals, Inc. v. Rogers*, 359 Ga. App. 207, 855 S.E.2d 103 (2021).

²¹*Eiland v. State*, 246 Ga. 112, 268 S.E.2d 922 (1980).

²²*Eiland v. State*, 246 Ga. 112, 268 S.E.2d 922 (1980).

²³*Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185 (1980).

²⁴*Preston v. State*, 257 Ga. 42, 354 S.E.2d 135 (1987).

may do so.²⁵

When a defendant's statement of preference for appointment of counsel who has already represented him is timely made and supported by objective considerations of the consequences involved, and where there are no countervailing considerations of comparable weight, it is an abuse of judicial discretion to deny the defendant's request to appoint the counsel of his preference.²⁶

The trial court erred in refusing an indigent, capital defendant's request that his present counsel be appointed to represent him at his third sentencing hearing, since defendant's choice of counsel was supported by objective considerations favoring the appointment and there were no countervailing considerations of comparable weight.²⁷

A trial court's refusal to allow a nonmember of the state bar at the defense table during trial was not a denial of the defendant's constitutional right to counsel since an accused has no right to be represented by a nonlawyer third party.²⁸

In the absence of evidence that a criminal defendant's request for counsel was limited by its terms, it is presumed that the defendant requested an attorney's services at all critical stages of the prosecution.²⁹

A state legislator may be disqualified from representing a client in a civil transaction or matter wherein the State of Georgia is an opposing party, under an ad hoc conflict of interest standard.³⁰

Whether or not actual paternity has been proven, a putative father is a party to an action to terminate parental rights and, if indigent, is entitled to have court-appointed counsel under O.C.G.A. § 15-11-30(b).³¹

The trial court's failure to advise the defendant that there was a possibility he could obtain appointed counsel, even if he did not meet the financial baseline, was a failure to comply with former O.C.G.A. § 17-12-4 and implementing rules and effectively denied defendant counsel.³² The form for an indigent in criminal cases to make application for an appointed attorney appears in Uniform Superior Court Rule 29.3. A responsibility is imposed on courts

²⁵Lipham v. State, 257 Ga. 808, 364 S.E.2d 840 (1988).

²⁶Amadeo v. State, 259 Ga. 469, 384 S.E.2d 181 (1989).

²⁷Davis v. State, 261 Ga. 221, 403 S.E.2d 800 (1991).

²⁸Cruickshank v. State, 258 Ga. 544, 372 S.E.2d 223 (1988).

²⁹Roper v. State, 258 Ga. 847, 375 S.E.2d 600 (1989).

³⁰Georgia Ports Authority v. Harris, 274 Ga. 146, 549 S.E.2d 95 (2001).

³¹Wilkins v. Georgia Dept. of Human Resources, 255 Ga. 230, 337 S.E.2d 20 (1985).

³²Butler v. State, 198 Ga. App. 217, 401 S.E.2d 43 (1990).

in Rule 29.4 to determine when an accused person, claiming to be financially unable to employ an attorney, is eligible for publicly provided counsel.

Sixth Amendment of United States Constitution does not require that assistance of counsel be allowed for defendant at psychiatric examination, when defendant's incriminating statements to examiners, if any, are used only in formulation of their opinion as to his mental capacity at time offense was alleged to have occurred.³³

A trial court's failure to advise defendant of his right to counsel on appeal requires dismissal of appeal without prejudice and remand for such advisement.³⁴

For a discussion of the duty of police officers to advise an accused of his right to counsel before obtaining an admission or confession, see § 27:4, *infra*; for the right to have counsel present at the trial, see § 2:3, *infra*.

§ 1:3 Party's right to act as co-counsel

Under the Georgia Constitution, a layperson does not have the right to represent himself and also be represented by an attorney, but a lawyer does have such a right, subject to the authority of the trial court to limit the exercise of that right in order to insure the orderly disposition of matters before it.¹ A defendant who is represented by counsel does not have the right to independently conduct his own defense.²

This is sometimes called hybrid representation, and the Sixth Amendment right to counsel does not afford the defendant the hybrid right to simultaneously represent himself and be represented by counsel.³ However, in 2023 the Georgia Supreme Court ruled that a court has the discretion to recognize a timely and otherwise procedurally proper *pro se* filing made by a defendant who is still formally represented by counsel; although the Supreme Court "expect[s] that courts will exercise this discretion only rarely, as when trial counsel has failed to act within the prescribed time period to preserve the defendant's right to appeal and a *pro se* filing would preserve that right. And when a court chooses to recognize such a filing, it should make that exercise of

³³*Presnell v. State*, 241 Ga. 49, 243 S.E.2d 496 (1978), judgment rev'd in part on other grounds, 439 U.S. 14, 99 S. Ct. 235, 58 L. Ed. 2d 207.

³⁴*Goodwin v. Jacobs*, 258 Ga. 789, 375 S.E.2d 33 (1989).

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¹*Seagraves v. State*, 259 Ga. 36,

376 S.E.2d 670 (1989).

²*Ware v. State*, 267 Ga. 510, 480 S.E.2d 599 (1997) (overruled on other grounds by, *Johnson v. State*, 315 Ga. 876, 885 S.E.2d 725 (2023)).

³*Ditman v. State*, 301 Ga. App. 187, 687 S.E.2d 155 (2009).

discretion clear on the record.”⁴

One law review article studied the right to counsel and the right to defend pro se in criminal cases.⁵ In the view of the courts, hybrid representation mixing these concepts is not much accepted by the bench. Concurrent self-representation and representation by counsel appears to be disfavored under Georgia law. However, courts regularly employ the separate model of standby or advisory counsel. The article explains:

In America, a defendant in a criminal case has a different set of rights, which omits hybrid representation. To begin with, whether in state or federal court, a criminal defendant has a constitutional right to counsel in America. Alternatively, an accused—if competent to waive counsel—has a qualified right to proceed without the assistance of an attorney. Although a court cannot force a criminal defendant to accept representation by counsel, if the accused elects to proceed pro se, the trial court has the discretion to authorize either advisory or standby counsel to assist the defendant. Moreover, if the accused is indigent, the court may appoint advisory or standby counsel in those cases in which the defendant elects to proceed without counsel.⁶

A defendant is entitled to represent himself if he knowingly and intelligently chooses that form of representation.⁷

§ 1:4 Right to competent counsel

Chaidez v. United States,¹ a 2013 decision by the United States Supreme Court addresses the duties of competent counsel when handling the resolution of a criminal case by way of a guilty plea. The Sixth Amendment requires a lawyer for an immigrant criminal defendant to advise a client of the risk of deportation which arises when such a defendant pleads guilty. “[In *Padilla*] [w]e held that criminal defense attorneys must inform non-citizen clients of the risk of deportation arising from guilty pleas.”² The *Chaidez* case then proceeds to find that a lawyer’s failure to provide *Padilla* advice in past cases is not a retroactive rule. The case also analyzes the *Strickland* decision, which appears in this text a few paragraphs ahead. A lawyer’s nonadvice about a plea’s deportation risk is not exempt from Sixth Amendment scrutiny. A list of competency-of-counsel rulings appears in Note 1 to the

⁴Johnson v. State, 315 Ga. 876, 885 S.E.2d 725 (2023).

⁵Colquitt, Hybrid Representation, 38 Wake Forest L. Rev. 55 (2003).

⁶38 Wake Forest L. Rev. 55, 57.

⁷Colwell v. State, 273 Ga. 634, 544 S.E.2d 120 (2001).

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¹Chaidez v. U.S., 133 S. Ct. 1103, 1106, 185 L. Ed. 2d 149 (2013).

²Chaidez v. U.S., 133 S. Ct. 1103, 1106, 185 L. Ed. 2d 149 (2013), construing *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Justice Sotomayor dissenting opinion in *Chaidez*.

Appellate courts tend to closely scrutinize claims that a party was not represented by competent counsel.

In *Ucak v. State*,³ the accused failed to establish deficient performance under the standard that the defendant must show that the attorney's performance was deficient and the deficiency prejudiced his defense. Ineffective assistance was also not found in *Blake v. State*.⁴

Speculation is insufficient to establish the prejudice prong of a claim as ineffective assistance of counsel.⁵

The benchmarks for determining whether trial counsel's representation of a defendant in a criminal case was so deficient as to result in the denial of defendant's right to assistance of counsel under the Sixth Amendment are set out in *Strickland v. Washington*.⁶ The trial court should keep in mind that "counsel's function . . . is to make the adversarial testing process work in the particular case . . . [C]ounsel has a duty to make reasonable investigations." The defendant must "overcome the presumption that under the circumstances the challenged action 'might be considered sound trial strategy.'" The second component of *Strickland* requires the litigant to show prejudice.⁷

In *Bobby v. Van Hook*,⁸ the U.S. Supreme Court relied upon *Strickland* to find that defense counsel's performance was satisfactory. Van Hook engaged in violent conduct luring homosexual men into secluded settings and robbing or killing them.

Georgia law provides that an ineffective assistance of counsel claim need not be raised until such time as trial counsel no longer represents the accused.⁹ The Georgia Supreme Court has adopted the *Strickland* test for effectiveness of counsel.¹⁰

In *Hughs v. State*,¹¹ the Georgia Supreme Court relied on *Strickland* to find that defense counsel's decision not to retain and hire a competing medical expert to challenge medical

³*Ucak v. State*, 273 Ga. 536, 544 S.E.2d 133 (2001).

⁴*Blake v. State*, 273 Ga. 447, 542 S.E.2d 492 (2001).

⁵*Johnson v. State*, 290 Ga. 382, 721 S.E.2d 851 (2012). Standards for competent counsel, see *Allen v. State*, 290 Ga. 743, 723 S.E.2d 684 (2012).

⁶*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

⁷*Cochran v. State*, 262 Ga. 106,

414 S.E.2d 211 (1992) (lack of trial preparation resulted in reversal of conviction). See *Perkins v. State*, 260 Ga. 292, 392 S.E.2d 872 (1990).

⁸*Bobby v. Van Hook*, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009).

⁹*Turpin v. Christenson*, 269 Ga. 226, 497 S.E.2d 216 (1998).

¹⁰See *Brown v. State*, 288 Ga. 902, 708 S.E.2d 294 (2011).

¹¹*Hughs v. State*, 312 Ga. 606, 610, 864 S.E.2d 59, 64 (2021).

testimony from the state was a tactical decision and not ineffective of counsel stating: “[i]n order to establish constitutionally ineffective assistance, a defendant must show that his counsel’s performance was professionally deficient and that, but for such deficient performance, there is a reasonable probability that the result of the trial would have been different.”

In *Blackshear v. State*,¹² if a court-appointed counsel were to solicit a fee to achieve a better result in a criminal case, such action would violate the Rules of Professional Conduct and would warrant disciplinary sanctions.¹³ However, an ethics violation does not necessarily establish a claim of ineffectiveness of counsel; the defendant must still meet *Strickland*’s two-prong test for deficient performance and prejudice.

Defense counsel was not ineffective for failing to seek funds in order to secure an expert to determine the integrity of the videotape of a murder suspect’s in-custody interview.¹⁴

Notwithstanding specific objections of a convicted defendant, there is a strong presumption that a trial counsel’s performance falls within the broad range of reasonably professional conduct.¹⁵

The standard for determining counsel’s effectiveness is whether the conduct of counsel thwarted the adversary process to the point that the results cannot be relied upon as being just.¹⁶

A failure to object to the admissibility of a defendant’s out-of-court statements was not ineffective assistance.¹⁷

“Tactical decisions” by counsel in regard to cross-examination “will not constitute ineffective assistance unless they are so patently unreasonable that no competent attorney would have chosen that approach.”¹⁸

Other cases have involved a defendant’s complaint that his or her lawyer failed to object upon trial. Where an attorney’s decision not to object is part of a legitimate trial strategy, it falls within the range of reasonable professional assistance.¹⁹

Counsel for a murder defendant was deemed to be not ineffective in making a tactical decision to refrain from objecting to hearsay testimony because he believed that the objection would draw undue attention to statements, that the portion of hearsay

¹²*Blackshear v. State*, 274 Ga. 842, 560 S.E.2d 688 (2002).

¹³State Bar Rules and Regulations, Georgia Rule of Professional Conduct 1.7(a).

¹⁴*Flanigan v. State*, 269 Ga. 160, 496 S.E.2d 255 (1998).

¹⁵*Brogdon v. State*, 255 Ga. 64, 335 S.E.2d 383 (1985).

¹⁶*Reese v. State*, 257 Ga. 624, 361 S.E.2d 796 (1987).

¹⁷*Reese v. State*, 257 Ga. 624, 361 S.E.2d 796 (1987).

¹⁸*Anthony v. State*, 302 Ga. 546, 807 S.E.2d 891 (2017).

¹⁹*Fargason v. State*, 266 Ga. 463, 467 S.E.2d 551 (1996).

testimony was not relevant to the case and did not harm the defendant, and that the hearsay was merely cumulative of other admissible evidence. Counsel was also not ineffective in making a tactical decision not to challenge the validity of a search warrant executed at an apartment alleged to be the defendant's residence, and failing to move to suppress certain evidence seized pursuant to that warrant, on the basis that counsel would raise the validity of warrant during the defense case, during which it was intended that defendant would testify, even though the defendant ultimately chose not to testify.²⁰

Counsel's failure to object in murder trial did not constitute ineffective assistance when counsel failed to object when witness on redirect testified to prior instances of the defendant's conduct beyond what the trial court had ruled were admissible. Supreme Court of Georgia found that defense counsel questioning of witness on cross-examination opened the door for such testimony on redirect.²¹

Counsel was not ineffective when counsel failed to object to a juror as well as a prospective juror. "When defense counsel fails to strike a potential juror for cause, but uses a peremptory challenge to strike the same juror, and the defendant has not shown that any challenged juror who served was unqualified, the defendant has failed to show any reasonable probability that the outcome of the case would have been different but for counsel's alleged deficiency."²²

Counsel's failure to file a motion to suppress evidence did not amount to ineffective assistance. The Georgia Supreme Court noted that the defendant bears the burden of making a "strong showing that the damaging evidence would have been suppressed" in the event a motion had been filed.²³

Counsel's failure to file a motion to sever was found not to be ineffective assistance by the Georgia Supreme Court in *Styles v. State*.²⁴ The Court reasoned "[w]here trial counsel does not file a motion to sever because counsel reasonably believes the jury will find the co-defendant or co-defendants more culpable, that is a matter of reasonable trial strategy, and it does not constitute deficient performance."

Counsel also does not render ineffective assistance of counsel

²⁰Slade v. State, 270 Ga. 305, 509 S.E.2d 618 (1998). 26, 880 S.E.2d 599 (2022).

²¹Moore v. State, 307 Ga. 290, 835 S.E.2d 610 (2015). ²³Smith v. State, 296 Ga. 731, 770 S.E.2d 610 (2015).

²²Massingill v. State, 366 Ga. App. S.E.2d 325 (2020). ²⁴Styles v. State, 309 Ga. 463, 847 S.E.2d 325 (2020).

when he fails to lodge a meritless objection.²⁵ In *Johnson v. State*,²⁶ the defendant argued that his attorney was ineffective given his failure “to make all of the proper arguments” or to remind the court thereof in support of his motion for a mistrial following the admission of a letter he had written. Since the trial court did not err in its denial of the mistrial motion, the appellate court held that counsel did not render ineffective assistance. Similarly, in *Slaton v. State*²⁷ the Supreme Court of Georgia found that defense counsel was not ineffective when counsel failed to object to testimony by a witness that she had sex with appellant on account of threats, to evidence that appellant was using a painkiller, and to a leading questions posed by the prosecution.

Overruling prior precedent, the Georgia Supreme Court held in *Williams v. Harvey* “that a contemporaneous objection must be made at the time an alleged violation of a ruled-upon motion in limine occurs at trial—whether during the presentation of evidence or in opening statements or arguments made by counsel before the factfinder—in order to preserve the error for appeal.”²⁸

Defense attorney who failed to object to comment by prosecutor regarding causation in a vehicular homicide action was not ineffective. Court reasoned that prosecutor’s comment was not directed to the jury and was not in the form of testimony, the jury had been given preliminary instructions that attorney objections did not constitute evidence, the jury was again instructed before they deliberated regarding what constituted evidence, and there was no demonstration of prejudice.²⁹

The Georgia Court of Appeals found that defendant’s claim of ineffective assistance of counsel was meritless when counsel failed to object to the prosecutor’s statement during closing argument that given the defendant’s felony convictions the jury could “completely disregard everything he has to say.” The court found that juries are tasked with the responsibility of assessing witness credibility and determining what weight, if any, such testimony should be afforded. Thus, the jury could, but was not required to, find that the defendant’s testimony was not credible and should be afforded no weight.³⁰

The Georgia Supreme Court found that counsel’s failure to object to prosecutorial remarks during closing arguments did not

²⁵*Lopez v. State*, 310 Ga. 529, 852 S.E.2d 547 (2020) (overruled on other grounds by, *Johnson v. State*, 315 Ga. 876, 885 S.E.2d 725 (2023)).

²⁶*Johnson v. State*, 328 Ga. App. 702, 760 S.E.2d 682 (2014).

²⁷*Slaton v. State*, 303 Ga. 651,

652, 814 S.E.2d 344, 347 (2018).

²⁸*Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021).

²⁹*Davis v. State*, 358 Ga. App. 832, 856 S.E.2d 411 (2021).

³⁰*McAllister v. State*, 351 Ga. App. 76, 830 S.E.2d 443 (2019).

constitute ineffective assistance. The prosecutor commented that “[c]rime is a cancer that eats away at society,” and that the jury should “stand in the way of injustice.” The Court reasoned that “general appeals to enforce the criminal law for the safety of the community have long been held by this Court to be within the bounds of permissible argument,” and given “the context in which they were made . . . the alleged offending remarks merely reflected the State’s theory that the motive for the crime was vigilante justice and generally and properly appealed to the jury to enforce the law for the safety of the community.”³¹

In *Peoples v. State*,³² the court found that defense counsel was not ineffective when he failed to object to certain comments made by the prosecutor during closing arguments. On appeal, the defendant had asserted that his counsel was ineffective when he failed to object to the prosecutor’s reference to individual jurors by name, and when he “allegedly suggested that the jury should reach a verdict based on how the community feels rather than on the law and the evidence.”

Failure on the part of defense counsel to object to prosecutor’s inappropriate comment during his opening statement, that the defendant and his co-defendant “did their best to cover up [their crime] in more than one way. One way was very sophisticated. And they hired lawyers, which they’re entitled to do under our Constitution,” did not constitute ineffective assistance of counsel. The court found that the comments, though disparaging of defense counsel, did not prejudice the defendant because it did not impugn counsel’s role in the trial.³³

Ineffective assistance of counsel claims are sometimes raised in motions for a new trial. A defendant waives his right to raise such a claim unless raised at “the earliest practicable moment.”³⁴ “In order to succeed on an ineffective assistance of counsel claim, a defendant must show that his counsel’s performance was deficient and that counsel’s deficient performance prejudiced his defense. *Smith v. Francis*, 253 Ga. 782, 783, 325 S.E.2d 362 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To meet the first part of this test, a defendant must overcome the ‘strong presumption that his counsel’s performance fell within a wide range of reasonable professional conduct’ and that his counsel’s decisions were ‘made

³¹*Smith v. State*, 296 Ga. 731, 770 S.E.2d 610 (2015).

³²*Peoples v. State*, 295 Ga. 44, 757 S.E.2d 646 (2014).

³³*Moses v. State*, 328 Ga. App. 625, 760 S.E.2d 217 (2014).

³⁴*Williams v. State*, 298 Ga. 538, 783 S.E.2d 594 (2016). See also *Lopez v. State*, 310 Ga. 529, 852 S.E.2d 547 (2020) (overruled on other grounds by *Johnson v. State*, 315 Ga. 876, 885 S.E.2d 725 (2023)).

in the exercise of reasonable professional judgment.’ *Id.*”³⁵

For the purpose of a claim of ineffective assistance of counsel a defendant must show that her attorney’s performance was deficient and that the deficiency prejudiced her such that a reasonable probability exists that, but for counsel’s errors, the outcome at trial would have been different. Whether counsel’s performance was reasonable is judged by the circumstances counsel confronted at trial, without resorting to hindsight. Defendant failed to establish her trial counsel was ineffective due to counsel’s failure to interview the police witnesses before trial for malice murder, where defendant pursued a justification defense at trial, and defendant failed to show that she was prejudiced by counsel’s failure to interview the witnesses.³⁶

In *Johnson v. State*,³⁷ the Court found that defense counsel was not ineffective when he failed to interview the victim’s aunt. The Court reasoned that the defendant failed to demonstrate that the victim’s aunt was willing to be interviewed by defense counsel or show the failure to interview the witness led to the introduction of testimony harmful to the defendant.

Counsel did not render ineffective assistance when he failed to seek a continuance so that an investigator could appear at trial and testify on behalf of the defendant. The court noted that the investigator did not testify at the motions hearing, and the defendant’s testimony regarding the investigator’s possible testimony was speculative. Accordingly, the defendant was unable to establish a reasonable probability that the outcome of the trial would have been different.³⁸

As indicated in § 1:4, *infra*, a claim by defendant of ineffective assistance of counsel need not be raised until trial counsel no longer represents the accused. In *Head v. Carr*,³⁹ Carr’s trial counsel represented him through his direct appeals, so his claim remained a viable one in habeas corpus.

In *Cooper v. State*,⁴⁰ the Supreme Court of Georgia found that counsel’s performance was not deficient when she decided to focus on a defense that her client’s actions were justifiable rather than focusing on a defense that relied largely upon circumstantial evidence. The Court deemed such a decision to be strategic, commenting that “ample evidence [was] presented at trial that appellant fought with and stabbed the victim.”

³⁵*Roland v. State*, 266 Ga. 545, 546, 468 S.E.2d 378 (1996).

³⁶*Wigfall v. State*, 274 Ga. 672, 558 S.E.2d 389 (2002).

³⁷*Johnson v. State*, 293 Ga. 641, 748 S.E.2d 896 (2013).

³⁸*Marshall v. State*, 324 Ga. App. 348, 750 S.E.2d 418 (2013).

³⁹*Head v. Carr*, 273 Ga. 613, 544 S.E.2d 409 (2001).

⁴⁰*Cooper v. State*, 296 Ga. 728, 770 S.E.2d 597 (2015).

The Supreme Court of Georgia in *Horton v. State*⁴¹ found that trial counsel was not ineffective in a homicide prosecution when counsel failed to introduce evidence that indicated that some of the hairs found on clothing worn by the victim were inconsistent with hairs of the defendant or the victim. The Court reasoned, in part, that:

A competent attorney could reasonably have concluded that, given the number of people on the scene and the manner in which Hagan's body was handled, all that the hair analysis could show was that an unidentified third person was in contact with Hagan at some point, possibly after his death.

In addition, the Court noted that no prejudice was demonstrated.

The issue of whether an ineffective assistance claim is justified because trial counsel failed to have the defendant testify at the *Jackson-Denno* hearing challenging the defendant's confession was adjudicated in *Blackwell v. State*.⁴² The Supreme Court applied the "reasonable attorney performance" test in concluding the actions of trial counsel were reasonable.

Counsel was not ineffective when counsel failed to object to the state's for-cause strike of a potential juror who had informed the prosecution and the defense that she had some familiarity with the case since she knew the girlfriend of the defendant's accomplice. The Georgia Supreme Court found that the record was devoid of evidence that the jury that was sworn to hear the case was not impartial. Thus, the Court found that, even if counsel was deficient, there was no prejudice.⁴³

The Supreme Court of Georgia found that counsel was not ineffective when he failed to call a witness and the defendant during a *Jackson-Denno* hearing, and when he allegedly failed to advise the defendant of his right to testify at such hearing. The Court concluded that there was no showing that counsel's performance was deficient or that he was prejudiced.⁴⁴

In *Johnson v. State*,⁴⁵ the Supreme Court of Georgia observed that allegations that trial counsel has been ineffective given his or her failure to poll the jury has been consistently rejected.

A defense attorney in a criminal case should avoid testifying on behalf of his or her client.⁴⁶

⁴¹*Horton v. State*, 310 Ga. 310, 849 S.E.2d 382 (2020).

⁴²*Blackwell v. State*, 270 Ga. 509, 512 S.E.2d 233 (1999).

⁴³*Williams v. State*, 305 Ga. 776, 827 S.E.2d 849 (2019).

⁴⁴*Teasley v. State*, 293 Ga. 758, 749 S.E.2d 710 (2013).

⁴⁵*Johnson v. State*, 293 Ga. 641, 748 S.E.2d 896 (2013).

⁴⁶*Owens v. State*, 269 Ga. 887, 506 S.E.2d 860 (1998). See also Wright

Attorney conflicts of interest were discussed in *Sallie v. State*.⁴⁷ A conflict arises from a lawyer's simultaneous role as attorney representing a capital defendant in the same court in which the lawyer is also a full-time law clerk. When counsel representing multiple defendants negotiates a plea bargain conditioned upon more than one pleading guilty, that attorney has suffered a conflict of interest which per se adversely affects his representation of each defendant affected. A showing that a defendant was allowed to plead guilty upon the condition that another defendant represented by the same attorney also pled guilty is a per se showing of ineffective assistance of counsel which rises to the level of an unconstitutional deprivation of the right to counsel.⁴⁸

The fact that an attorney would receive more compensation if the case against defendant went to trial than if charges against defendant were dismissed did not alone compel the conclusion that defendant's attorney had an actual conflict of interest with defendant and, thus, did not warrant relief from convictions based on presumption of prejudice to defense, in a claim for ineffective assistance of counsel. Defendant's attorney, who stood to recover a greater fee under the representation contract if defendant's case went to trial than if charges against the defendant were dismissed, was entitled to a presumption that he faithfully represented defendant in a criminal proceeding, and that he did not intentionally overlook avenues of defense simply because it may have been to his financial benefit to do so, in a claim for ineffective assistance of counsel.⁴⁹

When a lawyer represented the victim of a murder during the time that the victim was alive, and thereafter was appointed to represent the alleged killer, this conflict of interest was not demonstrated to adversely affect counsel's performance.⁵⁰

In *Norton v. State*,⁵¹ the Supreme Court of Georgia held that counsel was not ineffective during his representation of the defendant who was convicted of murder. Defendant claimed that counsel's representation of the murder victim a years earlier in a civil matter constituted a conflict of interest. Rejecting this argu-

v. State, 267 Ga. 496, 480 S.E.2d 13 (1997) (attorney taking witness stand in case he is trying).

⁴⁷*Sallie v. State*, 269 Ga. 446, 499 S.E.2d 897 (1998).

Concerns over the rise of ineffective assistance of counsel claims (and accompanying ethical considerations) are discussed in Geary, Build It and They Will Come: The Realized Prophecy of Strickland v. Washington,

7 J. Marshall L.J. (Aug. 2014).

⁴⁸*Tarwater v. State*, 259 Ga. 516, 383 S.E.2d 883 (1989), judgment aff'd, 261 Ga. 655, 409 S.E.2d 660 (1991).

⁴⁹*Fogarty v. State*, 270 Ga. 609, 513 S.E.2d 493 (1999).

⁵⁰*Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

⁵¹*Norton v. State*, 293 Ga. 332, 745 S.E.2d 630 (2013).

ment, the Court found that defendant failed to demonstrate how such a conflict adversely effected his attorney's performance. Specifically, the Court reasoned that there "was clearly no simultaneous representation of Amy [the victim] and Norton. [Cit.] Nor was there any connection between the representation of Norton and the prior representation of Amy."

Inadequate investigation for mitigating evidence can constitute ineffective assistance of counsel.⁵²

When a defense attorney receives information from a reliable source that his client has had a history of psychiatric problems, but fails to adequately investigate this history, counsel's performance is ineffective. However, if counsel does not have notice of a defendant's prior psychiatric problems, counsel's failure to investigate a defendant's mental health is not necessarily deficient performance. In *Williams v. State*,⁵³ counsel was not ineffective for failing to obtain a mental evaluation and present evidence of the defendant's mental health history at sentencing. Counsel had met with the defendant more than 14 times in preparation for trial, counsel did not have trouble communicating with the defendant, and there were no apparent signs of mental health problems as the defendant actively participated in his defense and understood the charges against him.

Ineffective assistance was not shown by counsel's failure to call three witnesses whom he had interviewed prior to trial.⁵⁴ Defense counsel was not ineffective despite facts that he failed to object to the government's failure to provide him with 10 days notice of its intent to call the witness to testify, failed to investigate defendant's claim that he and the government witness were not housed at the same facility or "would not have had access to each other at the time of" defendant's purported confession to the witness, and failed to call certain alibi witnesses.⁵⁵ Dismissal of an attorney's motion for new trial based on the attorney's failure to pursue did not demonstrate ineffective assistance where the motion was considered at a later time.⁵⁶ Ineffective assistance of counsel cannot be based on lack of preparation if no prejudice is shown.⁵⁷ Counsel was not ineffective for purportedly failing to meet with the defendant and preparing him for his trial testimony. The record reflected that he and his defense team spent several hundred hours preparing the case for trial, and

⁵²*Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

⁵³*Williams v. State*, 326 Ga. App. 418, 756 S.E.2d 650 (2014).

⁵⁴*Nichols v. State*, 257 Ga. 558, 361 S.E.2d 486 (1987).

⁵⁵*Mathis v. State*, 328 Ga. App. 292, 761 S.E.2d 836 (2014).

⁵⁶*Brown v. State*, 257 Ga. 277, 357 S.E.2d 590 (1987).

⁵⁷*Williams v. State*, 257 Ga. 311, 357 S.E.2d 578 (1987).

that case had discussed the case at length with the defendant. In addition, defendant failed to show how additional preparation would have changed the outcome of the trial.⁵⁸ A trial court did not render a white attorney's representation ineffective by denying him funds to hire a black investigator to interview black witnesses.⁵⁹

Defendant received ineffective assistance of counsel which prejudiced his rights where the record showed that counsel was appointed to the case two weeks before defendant's trial was to begin, filed no written motion for continuance or other pretrial motions, spent a total of 45 minutes with the defendant before the trial began, interviewed no witnesses listed in the indictment face-to-face and filed no written requests for jury charges.⁶⁰

Reversal of a conviction occurred in *Goldstein v. State*.⁶¹

In *Cheeks v. State*,⁶² the defendant's conviction was reversed for ineffectiveness when defendant's counsel failed to object to prosecutor comments regarding the defendant's silence and his failure to come forward. Defense counsel admitted that the failure to object was not based upon a strategic decision.

Counsel's performance was ineffective when he failed to object, ask for a curative instruction, or move for a mistrial when the prosecutor during closing arguments commented upon the defendant's silence in the presence of the police and defense counsel proffered no strategic reason for this failure.⁶³

In *Lofton v. State*,⁶⁴ the Georgia Supreme Court held that defense counsel was "was professionally deficient for not objecting to the State's improper victim impact arguments."

In *Weldon v. State*,⁶⁵ the Georgia court of appeals found that a defense attorney's failure to object in a robbery and assault trial to the interpreters in his case did not constitute ineffective assistance of counsel. Defendant argued that segments of the trial testimony were misinterpreted, and criticized the professionalism of one of the interpreters. The court noted that the defendant did not offer a correct interpretation of the testimony that was allegedly misinterpreted, and that there was also evidence introduced by the government that did not require interpreters. The court

⁵⁸*Inman v. State*, 294 Ga. 650, 755 S.E.2d 752 (2014), reviewing court).

⁵⁹*Williams v. State*, 257 Ga. 311, 357 S.E.2d 578 (1987).

⁶⁰*Cochran v. State*, 262 Ga. 106, 414 S.E.2d 211 (1992).

⁶¹*Goldstein v. State*, 283 Ga. App. 1, 640 S.E.2d 599, 33 A.L.R.6th 609 (2006) (ineffective assistance found by

⁶²*Cheeks v. State*, 325 Ga. App. 367, 750 S.E.2d 753 (2013).

⁶³*Dumas v. State*, 337 Ga. App. 124, 786 S.E.2d 508 (2016).

⁶⁴*Lofton v. State*, 309 Ga. 349, 365, 846 S.E.2d 57, 72 (2020).

⁶⁵*Weldon v. State*, 328 Ga. App. 163, 761 S.E.2d 566 (2014).

stated that the government “also presented testimony from victims and similar transaction witnesses who did not require interpreters, and it presented testimony from police officers and [the defendant’s] accomplice tying him to the crimes.”

When appellate counsel raises the issue of ineffective assistance of counsel in an amended motion for new trial, appellate counsel must request a hearing on the issue. If no such request is made, the right to a hearing is waived.⁶⁶ The requirement that an evidentiary hearing on an ineffective assistance of counsel claim must be requested at the time of an amended motion for a new trial does not apply to a case where the appellate counsel does not participate in the motion for a new trial and where the issue of ineffectiveness of counsel is raised for the first time on appeal.⁶⁷

Where a properly informed, competent defendant insists that he prefers a death sentence to life imprisonment, his attorney does not violate any right of the defendant by attempting to comply with his client’s wishes and arguing to the sentencer in favor of a death sentence.⁶⁸

The ABA and Georgia Supreme Court have stated that an attorney has a requirement to inform a defendant of an offer to plead guilty. This type of decision is one to be made by the defendant with the advice of his counsel. The failure to communicate the offer of the prosecutor for the defendant’s consideration falls below the standard of care expected in the legal profession.⁶⁹

A defense counsel’s rejection of a guilty plea offer without the knowledge and consent of the defendant will, in most instances, support a claim of ineffective assistance of counsel. In determining whether an attorney’s failure to advise the defendant of a guilty plea offer prejudiced the result of the proceeding, there must be at least an inference from the evidence that the defendant would have accepted the offer as made or something similar. Such an inference could be drawn, even if the evidence is disputed or unclear on this question.⁷⁰

Counsel was not ineffective in failing to show video surveillance to defendant, when record revealed, among other things, that counsel had discussed with the defendant the contents of the video, how it linked the defendant to the crime alleged, the

⁶⁶Dawson v. State, 258 Ga. 380, 373 S.E.2d 506 (1988).
369 S.E.2d 897 (1988).

⁶⁷Johnson v. State, 259 Ga. 428, 383 S.E.2d 115 (1989) (overruled on other grounds by, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003)).

⁶⁸Morrison v. State, 258 Ga. 683,

⁶⁹Lloyd v. State, 258 Ga. 645, 373 S.E.2d 1 (1988); ABA Standards, The Defense Function § 6.2(a)(A).

⁷⁰Lloyd v. State, 258 Ga. 645, 373 S.E.2d 1 (1988).

government's plea offer, as well as the evidence, discovery, and sentencing consequences.⁷¹

Parties in civil litigation have no constitutional right to effective assistance of counsel.⁷²

An attorney challenged the authority of circuit judges to appoint her to serve as counsel, or as uncompensated co-counsel, for indigent defendants. The Supreme Court agreed that local indigent defense programs are unenforceable insofar as they authorize the appointment of counsel without any sort of compensation, even under limited circumstances such as the co-counsel program for those unprepared to handle criminal defense matters. The Supreme Court held, however, that an attorney's lack of interest in criminal matters does not equate to incompetence or otherwise exclude the attorney from participation in the program. The Court said that extended experience in criminal matters is not a prerequisite for competence in all criminal cases; lawyers may take steps to become more competent, such as through local bars' mentoring programs.⁷³

Deficient performance of counsel was found in *Bass v. State*.⁷⁴ Counsel failed to object when the sheriff testified against the defendant, then assumed the role of bailiff in charge of the jury.

Trial counsel was not ineffective when he failed to object during government's closing argument. In felony murder case, government counsel stated, "It's shocking to think about. Shocking to think about somebody getting out of jail and four hours later killing a man. That's what we've got here. *That's the truth.*" Defense counsel's failure to object was not ineffective since the prosecutor's comments were not inappropriate. Government counsel's remarks were based upon the evidence presented and were not a statements of his personal belief.⁷⁵

Similarly, in *Atkinson v. State*,⁷⁶ defense counsel in a malice murder trial was not ineffective when he failed to object to statements made by government counsel during closing arguments, where the prosecutor made reference to a statement allegedly uttered by defendant. The appellate court held that the failure to object was reasonable, accepting defense counsel's reasoning that the statement "was not a material element of the indictment that needed to be proven beyond a reasonable doubt."

Counsel did not render ineffective assistance of counsel in

⁷¹Brooks v. State, 324 Ga. App. 352, 750 S.E.2d 423 (2013).

⁷²Calhoun v. Maynard, 196 Ga. App. 219, 395 S.E.2d 645 (1990).

⁷³Sacandy v. Walther, 262 Ga. 11, 413 S.E.2d 727 (1992).

⁷⁴Bass v. State, 285 Ga. 89, 674 S.E.2d 255 (2009).

⁷⁵Jackson v. State, 301 Ga. 774, 804 S.E.2d 73 (2017).

⁷⁶Atkinson v. State, 301 Ga. 518, 801 S.E.2d 833 (2017).

initially stating during opening arguments that defendant would testify and then later advising defendant not to testify.⁷⁷

Defense counsel's decision not to seek severance of drug and theft charges from murder and robbery charges on the basis that they were unrelated to murder and robbery charges was a reasonable tactical decision, and, thus, was not ineffective assistance. Counsel testified that he did not seek severance of the charges in the hope that the jury would opt to convict on drug and theft offenses and refuse to convict on the more serious charges.⁷⁸

In *Jackson v. State*,⁷⁹ trial counsel's failure to object to the prosecutor's closing argument did not constitute ineffective assistance of counsel, in a prosecution for malice murder. The prosecutor's use of phrases such as "I think" was held to not render the prosecutor's argument an impermissible statement of personal opinion.

In *Johnson v. State*,⁸⁰ the case was reversed for ineffective assistance of counsel where the trial court denied a continuance request and consented to a request for mental evaluation of the defendant and the defense attorney had inadequate time to prepare.

When trial counsel testified at a motion for new trial that trial counsel had ordered defendant not to testify in the main case, a new trial was granted.⁸¹ Concurring Judge Smith worried about an "increasing concern." He wrote:

I concur fully in the majority opinion, but write separately to point out an area of increasing concern in claims of ineffective assistance of counsel. Trial counsel's testimony in this case demonstrates a worrisome trend with serious implications for the bar and the administration of justice. . . . The developing trend of emphatically and even eagerly testifying to one's own incompetence or misconduct is dangerous to the administration of justice, particularly if it is allowed to continue without any consequences for the testifying trial counsel.⁸²

See *Rolland v. State*⁸³ where trial counsel conducted the trial with the goal of preserving the right to make the final closing

⁷⁷*Watkins v. State*, 285 Ga. 107, 690 S.E.2d 846 (2010).
674 S.E.2d 275 (2009).

⁷⁸*Horne v. State*, 281 Ga. 799, 642 S.E.2d 659 (2007).

⁷⁹*Jackson v. State*, 281 Ga. 705, 642 S.E.2d 656 (2007).

⁸⁰*Johnson v. State*, 284 Ga. App. 147, 643 S.E.2d 556 (2007).

⁸¹*Nejad v. State*, 296 Ga. App. 163, 674 S.E.2d 60 (2009), judgment rev'd on other grounds, 286 Ga. 695,

⁸²*Nejad v. State*, 296 Ga. App. 163, 169, 674 S.E.2d 60 (2009), judgment rev'd on other grounds, 286 Ga. 695, 690 S.E.2d 846 (2010).

The concern expressed above was reiterated in *McMichael v. State*, 305 Ga. App. 876, 700 S.E.2d 879 (2010).

⁸³*Rolland v. State*, 280 Ga. 517, 630 S.E.2d 386 (2006).

argument, as permitted under former law.

Standards for competency of counsel appear in *Thomas v. State*,⁸⁴ *Rivers v. State*,⁸⁵ and *Felton v. State*.⁸⁶

In order to prevail on his ineffective assistance of counsel claim, a defendant must show both that his counsel's performance was deficient and that but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different.⁸⁷ Hindsight, whether by a court, the defendant, or defendant's counsel, is a legally insufficient basis for concluding that counsel's performance at trial was deficient.

In *Morris v. State*,⁸⁸ it was held that an attorney's misunderstanding of the law can result in ineffective assistance of counsel when it leads to advice on a plea bargain which incorrectly assesses the legal consequences of the plea. However, a claim of ineffective assistance of counsel is judged by whether counsel rendered reasonably effective assistance, not by a standard of errorless counsel or by hindsight.⁸⁹

Counsel prosecuting an ineffective assistance of counsel claim must be free to operate independently of the attorney whose performance is in question.⁹⁰ In the absence of testimony to the contrary, counsel's actions are presumed to be strategic, and strongly presumed to fall within the wide range of reasonable, professional assistance.

The test to determine whether an attorney rendered reasonable professional assistance for purposes of ineffective assistance claim is whether a reasonable lawyer could have acted in the same manner as defense counsel acted at trial.⁹¹

Habeas relief on grounds of ineffective assistance of counsel was granted in *Rompilla v. Beard*.⁹² In a case heard by the United States Supreme Court, the defendant's conviction was reversed. "Ineffective assistance" under *Strickland* is deficient performance by counsel resulting in prejudice, with performance being measured against an objective standard of reasonableness, under prevailing professional norms.

⁸⁴*Thomas v. State*, 282 Ga. 894, 655 S.E.2d 599 (2008).

⁸⁵*Rivers v. State*, 283 Ga. 1, 655 S.E.2d 594 (2008).

⁸⁶*Felton v. State*, 283 Ga. 242, 657 S.E.2d 850 (2008).

⁸⁷U.S.C.A. Const. Amend. 6; *Sturgis v. State*, 282 Ga. 88, 646 S.E.2d 233 (2007).

⁸⁸*Morris v. State*, 280 Ga. 179, 626 S.E.2d 123 (2006).

⁸⁹*Hooks v. State*, 280 Ga. 164, 626 S.E.2d 114 (2006).

⁹⁰*Chatman v. Mancill*, 280 Ga. 253, 626 S.E.2d 102 (2006).

⁹¹*Stinchcomb v. State*, 280 Ga. 170, 626 S.E.2d 88 (2006).

⁹²*Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360, 31 A.L.R. Fed. 2d 595 (2005).

Since a defendant claiming ineffective assistance of counsel must show both deficient performance and actual prejudice stemming from that deficiency, an insufficient showing on either of these prongs relieves the reviewing court of the need to address the other prong. In order to establish the prejudice prong of a claim of ineffective assistance of counsel, the defendant bears the burden of showing that but for the deficient performance, there was a reasonable likelihood that the outcome of the trial would have been different.⁹³

In attacks on competency of trial counsel, a presumption operates to support the conduct of a criminal defendant's lawyer. The Georgia Supreme Court explains in *Jackson v. State*:

Jackson contends that trial counsel was ineffective in that he failed to investigate and take photographs of the crime scene, failed to consult with Jackson regarding trial strategy, and failed to impeach the State's witnesses. In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that there is a reasonable probability, i.e., a probability sufficient to undermine confidence in the outcome, that but for counsel's unprofessional errors the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. Francis*, 253 Ga. 782, 783, 325 S.E.2d 362 (1985). "The criminal defendant must overcome the strong presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct. [Cit.]" *Chapman v. State*, 273 Ga. 348, 350(2), 541 S.E.2d 634 (2001).⁹⁴

After reviewing the evidence, the Supreme Court viewed it as sufficient to uphold a verdict of guilty of malice murder. The record of the evidentiary hearing on Jackson's claim of ineffective counsel revealed no merit in those allegations, in the Court's view. "Applying the *Strickland* standard, we conclude that the trial court's determination that Jackson received effective assistance of counsel was not clearly erroneous. See, generally, *Willingham v. State*, 268 Ga. 64(6), 485 S.E.2d 735 (1997)."⁹⁵

Invoking words like "tactics" and "strategy" does not automatically immunize trial counsel against a claim that a tactical decision or strategic maneuver was an unreasonable one no competent attorney would have made under the same circumstances; "tactics" and "strategy" provide no talismanic protection against an ineffective assistance of counsel claim.⁹⁶

Deficiencies in counsel performance resulted in relief for the

⁹³*Riggins v. State*, 279 Ga. 407, 614 S.E.2d 70 (2005).

⁹⁴*Jackson v. State*, 277 Ga. 592, 593, 592 S.E.2d 834 (2004).

⁹⁵*Jackson v. State*, 277 Ga. 592, 593, 592 S.E.2d 834 (2004).

⁹⁶*Benham v. State*, 277 Ga. 516, 591 S.E.2d 824 (2004).

defendant in *Rollins v. State*.⁹⁷ The defendant succeeded in carrying the burden of showing a constitutional violation of the Sixth Amendment right to counsel. As a general rule, in order to prevail on such a claim a defendant must (1) establish that her counsel's performance fell outside the range of competence for attorneys in criminal cases and (2) establish the reasonable probability that, but for counsel's errors, she would not have pleaded guilty and would have insisted on going to trial.

§ 1:5 Need for counsel to be admitted to practice law

An out-of-state lawyer may be permitted by the courts to participate in the trial of a case in which he represents one of the parties.¹

Permission to practice in a particular case is sometimes the object of special approval by the trial court. For example, in federal courts in Georgia's southern district, any member in good standing of the bar of any other U.S. District Court who is a non-resident of the southern district may be permitted to appear upon filing a certificate of good standing from another federal court.²

For purposes of trials in Georgia's Superior and State courts, rules were liberalized in December, 2002 to allow admission to the Georgia Bar for attorneys licensed elsewhere. As noted in one law review article,³ several factors militated in the direction of a new rule, including this one: "Attorneys from other jurisdictions active in Georgia (as, for instance, corporate counsel admitted in other states and military judge advocates admitted in states other than Georgia but practicing here) could, through admission to the Georgia Bar on motion, be brought within the disciplinary and regulatory framework of the State Bar of Georgia."

Imposition of permanent injunction enjoining a person from engaging in practice of law in Georgia until such time as he is licensed to practice law in Georgia was properly entered.⁴

In *R.R.R. Ltd. Partnership v. Recreational Services, Inc.*,⁵ a contempt attachment was before the Georgia Supreme Court for review. The rule respecting nonlawyer representation in corporate

⁹⁷*Rollins v. State*, 277 Ga. 488, 591 S.E.2d 796 (2004).

[Section 1:5]

¹O.C.G.A. § 15-19-50; *Williams v. State*, 157 Ga. App. 494, 277 S.E.2d 781 (1981).

²For additional details, see LR 83.4, Rules for the U.S. District Court for the Southern District of Georgia,

effective September 1, 1994.

³Dalianas and Askew, Three States Add to or Revise Motion Admission Rules, 72 The Bar Examiner 16, 20 (Feb. 2003).

⁴*Huber v. State Bar*, 237 Ga. 825, 229 S.E.2d 647 (1976).

⁵*R.R.R. Ltd. Partnership v. Recreational Services, Inc.*, 267 Ga. 757, 481 S.E.2d 225 (1997).

proceedings was explained:

This Court in *Eckles v. Atlanta Tech. Group, Inc.*, — Ga. —(s), 483 S.E.2d 99 (1997), invalidated OCGA § 15-19-52 when we held that a corporation may not be represented in court by any person who is not a lawyer. That holding necessarily applies to persons representing corporations in contempt proceedings. However, *Eckles* does not control here because this case was initiated prior to the publication of *Eckles* in the Advance Sheets.⁶

As indicated in the foregoing passage, the *Eckles* case requires that a corporation may not be represented in court by a person not licensed to practice law in the state.

A defendant may not be represented by a nonattorney or by an attorney who has not yet been admitted to the bar; defendant may represent himself.⁷ A criminal defendant's motion that he be allowed to be represented by a nonattorney was properly denied.⁸

The closing of a real estate transaction in Georgia constitutes the practice of law, and, if performed by someone other than a duly-licensed Georgia attorney, results in the prohibited unlicensed practice of law.⁹

Admission to the bar of Georgia without examination is provided for in § 2 of the Rules Governing Admission to the Practice of Law.¹⁰ A JD or LLB graduate of an ABA accredited law school who is a member in good standing of another state's bar, which state "has comity for bar admissions purposes with the State of Georgia," can apply for a Georgia license. The candidate must have never taken and failed the Georgia bar exam, and should have actively practiced law for five of the seven years preceding the date of seeking Georgia bar status.

§ 1:6 Waiver of right to counsel

Where a defendant refuses representation by appointed counsel and announces his desire to represent himself, the defendant will be permitted to exercise this right if the record reflects a finding that the defendant has validly chosen to proceed pro se, and that the choice was made after the defendant was made aware of his

⁶The quoted material was withdrawn from the bound volume because a new opinion was issued. The final citation to *Eckles* is 267 Ga. 801, 485 SE2d 22 (corporation must be represented by licensed attorney in courts of law).

⁷*Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185 (1980).

⁸*Lebrun v. State*, 255 Ga. 406, 339 S.E.2d 227 (1986).

⁹Formal Advisory Opinion No. 04-1, 280 Ga. 227, 626 S.E.2d 480 (2006).

¹⁰See <http://www.gabaradmission.org> (follow "Rules Governing Admission to the Practice of Law in Georgia" hyperlink).

right to counsel and the dangers of proceeding without counsel.¹

An unequivocal assertion of right to represent oneself, made prior to trial, should be followed by a hearing to ensure that the defendant knowingly and intelligently waives the right to counsel and understands the disadvantages of self-representation.²

Accused does not have right to be represented by a lawyer and also to represent himself.³ This proposition applies on appeal as well as upon trial.⁴ The former Georgia Constitution clause granting a right for a person to be represented by both an attorney and himself has been repealed; a criminal defendant represented by counsel no longer has a right to personally cross examine witnesses.⁵

Can a trial judge insist that a lawyer help a defendant who suffers from mental problems, when the accused who wants to represent himself is competent to stand trial? Yes, says the United States Supreme Court in *Indiana v. Edwards*.⁶ Justice Breyer summarized:

The case focuses upon a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. We must decide whether in these circumstances the Constitution forbids a State from insisting the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself. See U.S. Const., Amd. 6; *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.E.2d 562 (1975). We conclude that the Constitution does not forbid a State so to insist.

In a 2013 ruling, the United States Supreme Court approved a state appellate court's determination that petitioner's Sixth Amendment right to counsel was not violated by trial court's denial of his request for counsel to help file a motion for a new trial. The defendant's request was made after he had waived his right to counsel on three occasions. The decision not to appoint counsel was neither contrary to, nor an unreasonable application of, clearly established federal law.⁷

[Section 1:6]

¹Cochran v. State, 253 Ga. 10, 315 S.E.2d 653 (1984). See also Annaswamy v. State, 284 Ga. App. 6, 642 S.E.2d 917 (2007) (defendant's decision to proceed pro se affirmed).

²Thaxton v. State, 260 Ga. 141, 390 S.E.2d 841 (1990).

³Garland v. State, 283 Ga. 201, 657 S.E.2d 842 (2008).

⁴Vadde v. State, 296 Ga. App. 405, 674 S.E.2d 323 (2009).

⁵Cargill v. State, 255 Ga. 616, 340 S.E.2d 891 (1986) (overruled on other grounds by, Manzano v. State, 282 Ga. 557, 651 S.E.2d 661 (2007)).

⁶Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008).

⁷Marshall v. Rodgers, 133 S. Ct. 1446, 185 L. Ed. 2d 540 (2013).

§ 1:7 Right to consult with attorney and others

In civil cases, there is no problem about the right of a party to consult with his attorney, both prior to and during trial. In criminal cases, there may be a denial of constitutional rights if the defendant's request to consult with counsel is not honored.¹

In criminal matters, not every restriction imposed upon counsel's time or opportunity to consult with his client violates a defendant's Sixth Amendment right to counsel. However, the Supreme Court of Georgia has recognized the basic proposition that detained defendants are denied meaningful access to their counsel in violation of the Sixth Amendment if, in the facilities provided for attorney-client conferences, conversation is difficult and privacy is impossible.²

§ 1:8 General conduct of attorney

In addition to the case and statutory law that governs the conduct of the lawyer, he is subject to the limitations imposed by the Codes of Ethics of the American and Georgia Bar Associations. Such limitations have an impact on all phases of the practice of law, including the trial of cases.

The oath of admission to the bar emphasizes the honesty required from counsel. Amended in 2002, the oath reads as follows: "I do solemnly swear (or affirm) that I will conduct myself as an attorney or counselor of this Court truly and honestly, justly and uprightly, and according to law; and that I will support the Constitution of the State of Georgia and the Constitution of the United States. So help me God."

In 1990, the Georgia Chief Justice's Commission on Professionalism also adopted *A Lawyer's Creed and Aspirational Statement on Professionalism*, which are meant to serve "encouragement, guidance and assistance to individual lawyers, law firms, and bar associations as they recognize the special obligations that attach to their calling and their responsibility to serve others."¹

A lawyer is required to maintain a respectful attitude toward the court. He should not attempt to communicate or argue privately with the judge as to the merits of a pending case.

The lawyer has the right to defend any person, regardless of his personal opinion of the client's guilt, and to present every

[Section 1:7]

¹Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

²Brown v. State, 288 Ga. App.

671, 655 S.E.2d 287 (2007).

[Section 1:8]

¹<https://cjcpga.org/lawyers-creed/> (last visited August 15, 2024).

available defense by all fair and honorable means. The duty of the prosecutor is not to convict, but to see that justice is done. The lawyer owes his client entire devotion and warm zeal, as well as the exertion of his utmost learning and ability.

An attorney also has a duty of candor to the tribunal. As stated in a concurring opinion in *In re Manning-Wallace*:²

Among the most important ethical requirements for Georgia lawyers is the duty of candor to the courts in which they appear, as set forth in Rule 3.3 of the Georgia Rules of Professional Conduct, see Bar Rule 4-102(d). That rule provides specifically that “[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.” Rule 3.3(a)(4). As the comments to Rule 3.3 clearly explain, the lawyers’ obligation not to pollute our tribunals with false evidence is so strong that it may trump the wishes and interests of their clients and even the attorney-client privilege. Lawyers owe a similar duty of fairness to opposing parties and their counsel, which specifically includes the obligation not to “falsify evidence.” Rule 3.4(b)(1). This is one of the prohibitions that secures “[f]air competition in the adversary system.” Rule 3.4, Comment [1]. The maximum penalty for violation of both Rule 3.3 and Rule 3.4 is disbarment.³

The lawyer must restrain his client from all forms of impropriety and withdraw if a client persists in such conduct.

In the trial, the lawyer must avoid personalities between counsel and should treat adverse parties and witnesses fairly and considerately. He should be punctual in attendance and conform to local customs and practice in dealing with opposing counsel. He should treat adverse witnesses and suitors with fairness and due consideration and should never minister to the malevolence or prejudices of a client. Nor should he misquote the contents of a paper, offer evidence which he knows the court will reject, or assert in argument his personal belief in his client’s innocence or the justice of his case.

When a prosecution witness was cross-examined, he was asked what kind of deal he arranged. He did not disclose his immunity agreement, nor did the prosecuting attorney elicit a response about it during redirect examination. Because suppression of evidence by the prosecution violates due process, the defendant’s conviction was overturned.⁴

Can a prosecutor be disciplined when exculpatory evidence is withheld and suppressed by his actions or by his office? Generally a prosecutor’s immunity to suit for discretionary actions

²*In re Manning-Wallace*, 287 Ga. (2010).
223, 695 S.E.2d 237 (2010).

³*In re Manning-Wallace*, 287 Ga. 223, 224-25, 695 S.E.2d 237, 238-39.
⁴*Byrd v. Owen*, 272 Ga. 807, 536 S.E.2d 736 (2000).

protects the individual. As for the office, a single *Brady* violation will not result in liability; there must be a pattern of similar violations.⁵

The United States Supreme Court adjudicated the issue of prosecutorial immunity in a situation where a witness was arrested and locked up, and later the witness sued over his wrongful seizure and incarceration. Will alleged abuse by prosecutors of material witness laws give rise to a successful civil rights suit? When seeking to arrest and interrogate a suspect, but lacking probable cause, can the prosecutor simply have the person arrested as a material witness? One of the issues in the Supreme Court case which addressed this question was whether the arrest and seizure of the person violated clearly established rights. The Court decided that material witness law was not so established that a prosecutor's alleged misapplication of it amounted to a civil rights violation.⁶

All attorneys have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of the trial.⁷ Attorneys representing multiple defendants in criminal cases have an obligation to promptly advise the court of any conflict of interest between their clients.⁸

A conflict of interest was found in *State v. Mamedov*.⁹ The defendant's guilty plea was vacated.

Rule 3.7 of the Rules of Professional Conduct of the State Bar of Georgia provides that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness, subject to a narrow set of exceptions.¹⁰

Bombastic argument is not unconstitutional.¹¹ Counsel enjoys wide latitude in argument. Her illustrations may be as various as are the resources of her genius. She may give play to her wit and wing to her imagination.¹² An attorney in a criminal case cannot

⁵Connick v. Thompson, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011).

⁶See Ashcroft v. al-Kidd, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

⁷Hudson v. State, 250 Ga. 479, 299 S.E.2d 531 (1983).

⁸Wilson v. State, 257 Ga. 352, 359 S.E.2d 661 (1987).

⁹State v. Mamedov, 288 Ga. 858, 708 S.E.2d 279 (2011).

¹⁰The "advocate-witness rule," under which lawyers generally are believed to be disqualified from representing clients in cases where lawyers may be called to testify as fact witnesses, is analyzed in Richmond, Lawyers as Witnesses, 36 N.M. L. Rev. 51 (2006).

¹¹Patillo v. State, 258 Ga. 255, 368 S.E.2d 493 (1988).

¹²Head v. State, 276 Ga. 131, 575 S.E.2d 883 (2003).

argue that an accused may receive clemency or parole.¹³

Can a lawyer assert a position in a judicial proceeding which is at odds with her position in another, related legal proceeding? See the discussion of judicial estoppel in *Stinson v. State*.¹⁴ The purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.¹⁵ Judicial estoppel was imposed to bar an insurer from retrying a damages claim in *Cincinnati Ins. Co. v. MacLeod*.¹⁶ Under the doctrine of judicial estoppel, a party is precluded from asserting a position in a judicial proceeding that is inconsistent with a position that party previously asserted in a prior proceeding.¹⁷ Judicial estoppel was invoked in *Bishop's Property & Investments, LLC v. Protective Life Ins. Co.*¹⁸

Attorneys are officers of the court, and their statements in their place, if not objected to, serve the same function as evidence.¹⁹

§ 1:9 Contempt by attorney

All who appear in and about the courtroom are subject to the power of the court to punish for contempt. Most of the acts that can result in such punishment can be committed by an attorney, as well as by any other person. Such acts are discussed in detail in §§ 5:1 et seq., *infra*.

An attorney may be held in contempt for use of violent language in court, wrongful removal of court papers and other conduct identified in O.C.G.A. § 15-1-4.

However, an attorney may be held in contempt for statements made during courtroom proceedings only after the court has found that (1) the attorney's statements and attendant conduct either actually interfered with or posed an imminent threat of interfering with the administration of justice and (2) the attorney knew or should have known that the statements and attendant conduct

¹³*Curles v. State*, 276 Ga. 237, 575 S.E.2d 891 (2003) (O.C.G.A. § 17-8-76 not violated in this case).

¹⁴*Stinson v. State*, 256 Ga. App. 902, 569 S.E.2d 858 (2002).

¹⁵*Klardie v. Klardie*, 287 Ga. 499, 697 S.E.2d 207 (2010).

¹⁶*Cincinnati Ins. Co. v. MacLeod*, 259 Ga. App. 761, 577 S.E.2d 799 (2003) (doctrine prevents party from adopting an inconsistent position from that

which was taken to its advantage in earlier litigation).

¹⁷*Gantt v. State*, 263 Ga. App. 102, 587 S.E.2d 255 (2003).

¹⁸*Bishop's Property & Investments, LLC v. Protective Life Ins. Co.*, 597 F. Supp. 2d 1354 (M.D. Ga. 2009). Other cases, see § 2:1, *infra*.

¹⁹*Rank v. Rank*, 287 Ga. 147, 695 S.E.2d 13 (2010).

exceeded the outermost bounds of permissible advocacy.¹

The intent element of contempt by an attorney may be found only where the attorney knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role, and that he is hindering rather than facilitating the search for truth.²

The distinction between criminal and civil contempt is that “criminal contempt” imposes unconditional punishment for prior acts of contumacy, whereas “civil contempt” imposes conditional punishment as a means of coercing future compliance with a prior court order.³ “Direct, criminal contempt of court occurs where the contemptuous conduct takes place in the court’s presence,” and “[w]hen such contemptuous conduct occurs during trial, a trial judge has the authority after affording the contemnor an opportunity to speak in his or her own behalf, to announce punishment summarily and without further notice or hearing.”⁴

An attorney may be held in direct criminal contempt for willfully failing to respond to the calendar call or to the call of a case for trial.⁵ Attorney and client were held in civil contempt (and ordered to pay attorneys fees) for failing to abide by court’s order regarding child visitation.⁶

§ 1:10 Discipline of attorney for improper conduct

Discipline can consist of disbarment, suspension of license to practice for a period of time, a request for the lawyer to voluntarily surrender her lawyer’s license, making restitution, or other disposition.

In *In re Blitch*,¹ a special master recommended a three-year suspension while the State Bar favored disbarment. The Supreme Court held that disbarment was warranted. In *In re Camp*,² the court approved voluntary surrender of a license.

Surrender of the attorney’s law license was the resolution in *In re Gardner*.³

An attorney who agreed to represent a client while the lawyer

[Section 1:9]

¹*Morris v. State*, 295 Ga. App. 579, 672 S.E.2d 531 (2009).

²*In re Hughes*, 299 Ga. App. 66, 681 S.E.2d 745 (2009).

³*In re Hughes*, 299 Ga. App. 66, 681 S.E.2d 745 (2009).

⁴*Hillman v. ALDI, Inc.*, 349 Ga. App. 432, 825 S.E.2d 870 (2019) (internal quote marks omitted).

⁵*In re Beckstrom*, 295 Ga. App.

179, 671 S.E.2d 215 (2008).

⁶*In re Singleton*, 323 Ga. App. 396, 744 S.E.2d 912 (2013).

[Section 1:10]

¹*In re Blitch*, 288 Ga. 690, 706 S.E.2d 461 (2011).

²*In re Camp*, 288 Ga. 694, 706 S.E.2d 464 (2011).

³*In re Gardner*, 286 Ga. 623, 690 S.E.2d 611 (2010) (obstruction of a police officer by attorney and sentence of

was suspended from practice, along with an apparent history of violations of ethics rules, warranted disbarment in *In re Beall*.⁴ Other factors included failing to return client telephone calls or letters.

Disbarment was held to be warranted based upon lawyer commingling settlement funds with his own, vacating his law office without a forwarding address, failing to respond to telephone calls, and other errors in conduct.⁵

For disbarment for abandonment of a legal matter, see *In re Bradley*.⁶

An attorney's admitted compensation of non-lawyers to recommend or secure employment by clients and sharing of legal fees with non-lawyers warranted disbarment.⁷

The danger in ignoring disciplinary process and failure to respond to bar allegations was underlined in *In re McFall*.⁸

For conviction of a felony followed by voluntary surrender of license, see *In re Bates*.⁹

The entrapment defense generally is not available in attorney disciplinary proceedings.¹⁰

Extramarital relationships with clients are inappropriate.¹¹

For disbarment in Georgia because of disbarment in another state, see the discussion in *Matter of Bankhead*.¹²

Out-of-state convictions of grand theft and carrying a concealed weapon led to disbarment in *In re Barrett*.¹³ Disbarment in another state for multiple offenses warranted reciprocal disbarment in Georgia in *In re Craig*.¹⁴

Although bar standards authorize disbarment upon conviction of any felony or misdemeanor involving moral turpitude, that may not be the appropriate level of discipline in all cases. Where an attorney pled guilty to the misdemeanor of bank larceny, a two-year suspension from the practice of law was ordered in *Mat-*

12 months probation led to voluntary surrender of license).

⁴*In re Beall*, 276 Ga. 214, 576 S.E.2d 882 (2003).

⁵See *In re McDaniel*, 276 Ga. 226, 577 S.E.2d 275 (2003).

⁶*In re Bradley*, 274 Ga. 244, 552 S.E.2d 844 (2001).

⁷*In re Sinowski*, 290 Ga. 303, 720 S.E.2d 597 (2011).

⁸*In re McFall*, 289 Ga. 829, 716 S.E.2d 221 (2011) (suspension from practice).

⁹*In re Bates*, 274 Ga. 243, 552 S.E.2d 845 (2001).

¹⁰*Matter of Kennedy*, 266 Ga. 249, 466 S.E.2d 1 (1996) (disapproved of by *In re Henley*, 271 Ga. 21, 518 S.E.2d 418 (1999)).

¹¹*In re Stewart*, 275 Ga. 199, 563 S.E.2d 859 (2002).

¹²*Matter of Bankhead*, 266 Ga. 525, 468 S.E.2d 29 (1996).

¹³*In re Barrett*, 276 Ga. 279, 577 S.E.2d 771 (2003).

¹⁴*In re Craig*, 276 Ga. 225, 576 S.E.2d 862 (2003).

ter of Acree.¹⁵

When an attorney petitioned for voluntary discipline, the Georgia Supreme Court held that a six-month suspension from practice was an appropriate sanction for depositing funds from divorce proceedings in the attorney's trust account, sending a check for less than the amount received and submitting no accounting to the client. The attorney cooperated fully with disciplinary authorities, and made restitution.¹⁶

Disbarment was held to be warranted in a case where the bar filed a complaint alleging that an attorney told a client a case had been settled and advised her to pick up her check. The special master found that the attorney had not settled the case, but that the statute of limitations had run and the lawyer paid the client out of his own funds.¹⁷

A bar applicant appealed from a decision denying his application for certification of fitness to practice law. The Supreme Court held that the evidence supported the decision that the applicant failed to demonstrate candor on his bar application. "False, misleading, or evasive answers to Bar application questions are grounds for finding a lack of character, fitness and integrity required to be a member of the Bar of this State."¹⁸

However, in another case, a different result occurred. A decision by the Board to determine fitness of bar applicants was adverse to the person seeking bar admission. The decision was reversed by the Georgia Supreme Court. Ultimately the decision whether an applicant for admission to the bar is fit to practice law rests with the Supreme Court.¹⁹

Attorney's repeated filing of frivolous actions on his own behalf to the point at which multiple districts enjoined him from asserting further claims and Supreme Court imposed frivolous appeal penalties, in combination with attorney's refusal to cooperate with disciplinary proceeding investigations, violated professional rules prohibiting lawyers from advancing frivolous actions and requiring lawyers to cooperate with disciplinary authorities. Disbarment was ordered in *In re Rolleston*.²⁰

Attorney's abandonment of three clients whom he was supposed to represent in civil matters, doing little or no work on their cases and generally failing to communicate with any of them, violated professional rule governing diligence and com-

¹⁵Matter of Acree, 269 Ga. 57, 495 S.E.2d 293 (1998).

¹⁶Matter of Garland, 269 Ga. 395, 497 S.E.2d 559 (1998).

¹⁷Matter of Mays, 269 Ga. 100, 495 S.E.2d 30 (1998).

¹⁸In re E.L.D., 268 Ga. 883, 494 S.E.2d 317 (1998).

¹⁹In re Ringstaff, 288 Ga. 583, 706 S.E.2d 394 (2011).

²⁰In re Rolleston, 282 Ga. 513, 651 S.E.2d 739 (2007).

munication with clients. Disbarment was ordered in *In re David*.²¹

Disbarment was held to be an appropriate disciplinary sanction for attorney who failed to return \$3,500 retainer to client and \$50,000 that client had entrusted to attorney to hold in attorney trust account, the return of which funds client had requested about seven days after client gave the funds to attorney. Aggravating circumstances found by the court included the following: the attorney refused to acknowledge the wrongful nature of his conduct, attorney had dishonest or selfish motive, attorney was apparently indifferent to making restitution, attorney obstructed the disciplinary process, and attorney submitted false statements of material fact in his response to the disciplinary grievance.²²

Disbarments were ordered in *In re Turner*²³ and *In re Shoemaker*.²⁴ Also disbarred was Harold Michael Harvey in *In re Harvey*.²⁵ Similar discipline was handed out in *In re Eaton*.²⁶

Former Atlanta Mayor William Campbell was sentenced to federal prison for tax evasion. The Georgia Supreme Court accepted Campbell's voluntary surrender of his law license.²⁷

Disbarment, rather than a four-year suspension from practice of law, was deemed an appropriate sanction for an attorney's violation of the Rules of Professional Conduct due to conviction for unlawful conversion of government property. This was based on an attorney's admissions that she, as a named representative payee for an individual receiving disability benefits, failed to notify the Social Security Administration of the individual's incarceration, that she continued to receive and deposit checks, and that she deposited at least one check into a personal bank account. In view of the attorney's prior disciplinary history including one-year suspension for mishandling of an escrow account, Review Panel reprimand, three Investigative Panel reprimands, and a letter of formal admonition for mishandling of client funds, disbarment was deemed to be appropriate.²⁸

An attorney's conduct in forging an endorsement on a clients' settlement checks, converting the funds to his own use, failing to

²¹*In re David*, 282 Ga. 517, 651 S.E.2d 743 (2007) (apparently felony tax evasion also part of history).

²²*In re Butler*, 283 Ga. 250, 657 S.E.2d 245 (2008).

²³*In re Turner*, 282 Ga. 475, 651 S.E.2d 81 (2007).

²⁴*In re Shoemaker*, 282 Ga. 470, 651 S.E.2d 82 (2007) (Georgia Supreme Court cites prior disciplinary record, including former suspension as

well as prior reprimand).

²⁵*In re Harvey*, 279 Ga. 876, 621 S.E.2d 409 (2005) (tracing history of prior disciplinary proceedings).

²⁶*In re Eaton*, 286 Ga. 28, 685 S.E.2d 279 (2009).

²⁷*In re Campbell*, 282 Ga. 688, 653 S.E.2d 51 (2007).

²⁸*In re Porges–Dodson*, 280 Ga. 433, 627 S.E.2d 545 (2006).

give an accounting to clients regarding the funds, and informing clients that he had not received the funds violated the rules of professional conduct. The rules prohibit a lawyer from engaging in misconduct, require a lawyer to promptly notify a client when he receives funds or property that the client has an interest in, and requires a lawyer to deposit client funds in a trust account.²⁹

Failure of an attorney, when his client terminated his representation in a personal injury case, to provide her with either a notice of withdrawal or a copy of her file which contained invoices and other documents she needed to prosecute her claims, violated the professional conduct rule regarding termination of representation.³⁰ The Supreme Court reviewed the evidence:

Although the testimony in this matter is conflicting, the record contains evidence sufficient to support the review panel's findings that after a client hired Respondent, a member of the Bar since 1988, to represent her regarding claims (personal and property) arising from an automobile accident, he did little work on her case, failed to return her phone calls, and failed to make himself available to advise her on the status of her claims; that these failures caused the client to suffer needless worry and concern over her case; and that once the client terminated Respondent's employment, his office failed to provide her with either a notice of withdrawal or a copy of her file which contained invoices and other documents she needed to prosecute her claims.

Disbarment is the typical discipline imposed in cases where a lawyer engages in criminal conduct involving interference with the administration of justice, false swearing, misrepresentation, or fraud.³¹ Disbarment was warranted as a disciplinary sanction for an attorney's felony conviction pursuant to his guilty plea to a federal felony charge of making a false statement, relating to attorney's alleged statement to an FBI agent investigating corruption in county government, asserting that attorney "did not know" whether, while he was serving as county commissioner, he had participated in the commission's vote to approve a contract between county and a proposed vendor. This was at a time when the vendor was confidentially paying the attorney/commissioner to be a "consultant."

Attorney's agreement to taking of her client's deposition by defendant's counsel, failure to appear for deposition, failure to inform client of imposition of sanctions and assessment of costs against attorney personally, as well as other conduct amounted to willful abandonment or disregard of entrusted legal matter,

²⁹In re Peebles, 280 Ga. 229, 626 S.E.2d 25 (2006) (attorney suspended).
S.E.2d 488 (2006).

³¹In re Skandalakis, 279 Ga. 865, 621 S.E.2d 750 (2005).

and concealment of matters required by law to be revealed.³²

Attorney's misconduct in failing to appear for scheduled trial, failing to return client's retainer after client had to represent himself and was found guilty, and making false representations that he had obtained continuance of client's trial and that he had so notified client warranted disbarment from practice of law.³³

*In re Friedberg*³⁴ involved a disciplinary proceeding regarding three attorneys from same firm. A Review Panel of the State Disciplinary Board recommended disbarment. The Supreme Court held that attorneys' convictions on plea of guilty in federal court for conspiracy to defraud the United States and false statement on a tax return, based on their failure to report their total income by distributing cash payments to themselves without reporting the payments as income, by not reporting as income amounts of "fee splitting" to non-lawyer individuals, i.e., runners, and by paying referral fees to runners for the referral of clients to the law firm, justified disbarment, rather than suspension.

Where the Supreme Court found that an attorney abandoned her clients' cases by not timely filing complaints, motions, or briefs, by not responding to motions, and by not responding to court orders requiring her action to preserve her clients' claims and as a result, her clients' cases were dismissed, disbarment was ordered.³⁵

Disbarment of attorney was deemed to be warranted, in attorney disciplinary case, where attorney failed to communicate with clients, he failed to file complaints for clients, he failed to notify clients regarding the results of their appeals, he refused to enter a guilty plea on behalf of a client, and attorney had previously been subject to disciplinary action. The Supreme Court found a pattern of neglect and abandonment.³⁶

Felony convictions prompted voluntary surrenders of bar licenses in two cases.³⁷ Felony convictions also led to voluntary surrender of licenses.³⁸ Reciprocal discipline was imposed for rule

³²*In re Goff*, 277 Ga. 528, 591 S.E.2d 819 (2004).

³³*In re Thompson*, 277 Ga. 526, 591 S.E.2d 804 (2004).

³⁴*In re Friedberg*, 277 Ga. 141, 586 S.E.2d 305 (2003).

³⁵*In re Griggs*, 277 Ga. 663, 593 S.E.2d 328 (2004) (overruled on other grounds by, *In re Stubbs*, 285 Ga. 702, 681 S.E.2d 113 (2009)).

³⁶*In re Garnett*, 278 Ga. 527, 603

S.E.2d 281 (2004).

³⁷See *In re Calugar*, 281 Ga. 509, 640 S.E.2d 32 (2007) (offense involved violation of section of General Business Laws of New York); *In re Pronk*, 281 Ga. 511, 640 S.E.2d 32 (2007) (aggravated assault).

³⁸*In re Manown*, 283 Ga. 385, 659 S.E.2d 382 (2008) (bank fraud conviction), and *In re Constanzo*, 283 Ga. 385, 659 S.E.2d 382 (2008) (theft conviction).

violations in Florida in *In re Cronin*³⁹ and *In re Owens*.⁴⁰ Reciprocal discipline of 30-day suspension of attorney's license to practice law was appropriate sanction for attorney who was disciplined in Tennessee for converting over \$92,000 in funds from his law partnership over a three-year period, arising out of a partnership dispute.⁴¹

A petition for voluntary discipline, agreed upon by the attorney at issue and the State Bar of Georgia, was rejected by the Georgia Supreme Court in *In re Woodham*.⁴² There the attorney sought reprimand based on his admission of violation of Rules 3.5(c) and 4.2(a). The court felt that the proposed punishment was shaped too narrowly because it failed to consider underlying facts showing that counsel also potentially violated Rules 3.1 and 8.4(a)(4) by offering to drop a complaint in exchange for a percentage of the revenue stream he was challenging in the lawsuit itself.⁴³

One-year suspension and public reprimand was warranted sanction for attorney who had entered guilty plea to two felony counts of filing a false tax return; disbarment was not mandatory when mitigating factors warranted lesser penalty, attorney had already been punished through criminal justice system, attorney had accepted responsibility for his mistakes, which did not involve the practice of law, and mitigating factors included attorney's remorse, his past and present service to his community, fact that attorney had no prior disciplinary record, and attorney's willingness to take full responsibility for his actions.⁴⁴

§ 1:11 Withdrawal of counsel

Appointed counsel is given permission to withdraw from a case on appeal after he has accomplished the following:

- (1) submitted to the Georgia Supreme Court a request for permission to withdraw based upon counsel's opinion that, after conscientious examination of the transcript and record, he finds the appeal to be "wholly frivolous";
- (2) accompanied the request with a brief setting forth anything of record which "might arguably support the appeal"; and

³⁹*In re Cronin*, 283 Ga. 383, 659 S.E.2d 383 (2008).

⁴⁰*In re Owens*, 283 Ga. 384, 659 S.E.2d 383 (2008).

⁴¹*In re Maddux*, 281 Ga. 607, 642 S.E.2d 317 (2007).

⁴²*In re Woodham*, 291 Ga. 255, 728 S.E.2d 659 (2012).

⁴³*In re Woodham*, 291 Ga. 255, 256-57, 728 S.E.2d 659 (2012). Other disciplinary cases include *In re Jones*, 292 Ga. 310, 736 S.E.2d 432 (2013) (conduct warranted added suspension); *In re Hutt*, 291 Ga. 171, 728 S.E.2d 552 (2012) (reciprocal discipline).

⁴⁴*In re Haugabrook*, 278 Ga. 721, 606 S.E.2d 257 (2004).

- (3) furnished the indigent client a copy of the brief in order to allow defendant to raise any points he chooses to raise.¹

The Supreme Court no longer will entertain “Anders” motion to withdraw as counsel.²

An attorney representing multiple defendants must be allowed to withdraw if a conflict of interest develops between his clients.³

Without a trial transcript, Court of Appeals will presume that the trial court acted properly in denying a defense counsel’s oral motion to withdraw. The mandates of superior court rules concerning withdrawal of counsel require, among other things, that the motion be submitted in writing.⁴

A trial court is entitled to decline an attorney’s request to withdraw if to do so would delay the trial of the action. The decision whether to grant a motion to withdraw representation falls within the sound discretion of the trial court.⁵

Trial counsel’s failure to withdraw as counsel after learning that defendant had filed a bar complaint against him based on his dissatisfaction with his representation did not constitute ineffective assistance of counsel. At least when counsel’s representation is not undermined, withdrawal is not required.⁶

Trial counsel is not required to file notice of withdrawal upon opposing counsel; rather, the change of representation requires notice to the calendar clerk from the new attorney.⁷

For rules relating to conflicts of interest, see State Bar Rules and Regulations, Georgia Rules of Professional Conduct 1.7 to 1.9.

§ 1:12 Disqualification of counsel

Rule 3.7 of the State Bar Rules and Regulations, Georgia Rules of Professional Conduct provides a lawyer shall not act as a witness on behalf of his client.¹ There is a difference between testifying on direct during the client’s case versus being forced to the stand by one’s adversary, however. In the latter situation, courts

[Section 1:11]

¹Bethay v. State, 237 Ga. 625, 229 S.E.2d 406 (1976).

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

³Wilson v. State, 257 Ga. 352, 359 S.E.2d 661 (1987).

⁴Neely v. Strength, 291 Ga. App. 304, 661 S.E.2d 677 (2008).

⁵Johnson v. State, 283 Ga. App.

524, 642 S.E.2d 170 (2007) (overruled on other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

⁶Holsey v. State, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

⁷Nodvin v. Investguard, Ltd., 261 Ga. 805, 411 S.E.2d 708 (1992).

[Section 1:12]

¹See Clough v. Richelo, 274 Ga. App. 129, 616 S.E.2d 888 (2005).

are loath to disqualify the lawyer.²

A special prosecutor, who is subject to direction and control of the district attorney, may be employed by the family of the deceased to assist the district attorney in prosecuting case; the fact that the special prosecutor represents the deceased's family in civil litigation arising from his death is no ground for disqualification.³

An attorney who continued to represent a criminal defendant after being elected to the office of public prosecutor had a conflict of interest and should have been disqualified.⁴

Disqualification was required where the attorney for a party was also a party in his own right, and it was certain that he would be called as a witness.⁵

Entire office of district attorney was not disqualified due to prior representation of defendant by an assistant district attorney in an unrelated matter.⁶

²Richmond, Lawyers as Witnesses, 36 N.M.L. Rev. 47, 52 (2006).

³Brown v. State, 242 Ga. 536, 250 S.E.2d 438 (1978).

⁴O'Melia v. State, 255 Ga. 476,

339 S.E.2d 586 (1986).

⁵Cherry v. Coast House, Ltd., 257 Ga. 403, 359 S.E.2d 904 (1987).

⁶Sealey v. State, 277 Ga. 617, 593 S.E.2d 335 (2004).

Chapter 2

Conduct of Trial

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§ 2:1 Conduct of trial; generally

Violation of the rules of evidence and procedure may, if sufficiently serious, give rise to various forms of remedial action. Improper evidence may be excluded when it is offered. If the impropriety is sufficiently serious, there may be a mistrial. Under some circumstances, there may be a directed verdict for one party or the other. Or, the trial court may grant a new trial or enter a judgment notwithstanding the verdict.

If the error that has been committed at the trial is sufficiently serious and is not corrected by the trial court judge, the judgment may be reversed on appeal. The Georgia Supreme Court has found situations where undue limitations—including forbidding the filing of further motions, limiting the time in which parties could present their cases at trial and limiting cross-examination—were improper to the extent that they prejudiced the parties, prevented a full and meaningful presentation of the merits of the case and were reversible error.¹

Keeping a jury confined for a reasonable time, sending a jury back for more deliberations, and advising them on the desirability of reaching a verdict with well guarded language will not amount to reversible abuse and coercion since the trial judge is given considerable latitude as to such matters.²

There was no error in conducting trial on a Sunday where all the parties were present and consented to trying the case on Sunday.³

Trial court's decision to "open early and stay late" did not unreasonably burden the defense.⁴

A decision by Judge Dillard of the Georgia Court of Appeals observed that Georgia's rules for reopening of evidence are "forgiving," allowing trial judges broad discretion to permit the introduction of additional evidence, even after the start of jury deliberations.⁵

Trial court impermissibly abridged the right of the government to prosecute a case when it dismissed the case after a plea agreement had been entered.⁶

Judicial estoppel was invoked in *Bishop's Property & Investments, LLC v. Protective Life Ins. Co.*⁷

The purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.⁸ Because it is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion. Judicial estoppel is a common-law doc-

[Section 2:1]

¹*Newton Commonwealth Property, N.V. v. G + H Montage GmbH*, 261 Ga. 269, 404 S.E.2d 551 (1991).

²*Morse v. Holland*, 233 Ga. 233, 210 S.E.2d 734 (1974).

³*Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (1988).

⁴*Conway v. State*, 281 Ga. 685,

642 S.E.2d 673 (2007).

⁵*Alvarez-Maldonado v. State*, 359 Ga. App. 500, 859 S.E.2d 481 (2021).

⁶*State v. Santiago*, 333 Ga. App. 742, 776 S.E.2d 824 (2015).

⁷*Bishop's Property & Investments, LLC v. Protective Life Ins. Co.*, 597 F. Supp. 2d 1354 (M.D. Ga. 2009).

⁸*Roberts v. State*, 278 Ga. 610, 604 S.E.2d 781 (2004).

trine, and there is no indication it is constitutionally mandated.

Under the doctrine of judicial estoppel, a party is precluded from asserting a position in a judicial proceeding that is inconsistent with a position that party previously asserted in a prior proceeding.⁹

The interface between the doctrine of judicial estoppel and bankruptcy proceedings was the focus of a 2006 decision. Under the doctrine of “judicial estoppel,” a party will not be permitted to take a position in a state court proceeding that is inconsistent with a position taken in a bankruptcy proceeding.¹⁰ The judicial estoppel doctrine is not mechanically applied, but its application in any given case depends on three factors: (1) the party’s later position must be clearly inconsistent with its earlier position, (2) the party must have succeeded in persuading a court to accept the party’s earlier position, because absent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determination, and (3) a court must consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

§ 2:2 Right to speedy trial

There are four factors by which to evaluate claims that the right to a speedy trial guaranteed by the Sixth Amendment has been violated:

- (1) the length of the delay;
- (2) the reason for the delay;
- (3) the defendant’s assertion of his right; and
- (4) the prejudice to the defendant. The fourth factor protects three of the defendant’s interests:
 - (a) to prevent oppressive pretrial incarceration;
 - (b) to minimize anxiety and concern of the accused; and
 - (c) to limit the possibility that the defense will be impaired.¹

⁹*Gantt v. State*, 263 Ga. App. 102, 587 S.E.2d 255 (2003).

¹⁰*Collections of Life & Heritage, Inc. v. Gaston-Thacker, General Partners*, 277 Ga. App. 402, 626 S.E.2d 827 (2006).

[Section 2:2]

¹*Perry v. Mitchell*, 253 Ga. 593, 322 S.E.2d 273 (1984) (defendant’s

right to speedy trial held not violated by delay between arrest and trial of two years, three months, and 10 days, where court found delay was not caused by desire to hamper defense, but was primarily attributable to defendant’s conduct during detention). See also *Ward v. State*, 325 Ga. App. 890, 756 S.E.2d 21 (2014).

Factors are also listed in *Smereczynsky v. State*.² Such factors are generally not an exhaustive list, and should be considered with other relevant circumstances on an ad hoc basis.³

The constitutional right to a speedy trial attaches either at the time of the defendant's arrest or at the time of his indictment, whichever occurs earlier.⁴

Delay in asserting constitutional speedy trial rights can weigh heavily against a defendant in a *Barker* analysis.⁵ A defendant waives his statutory speedy trial demand when he takes any affirmative action that moves the case into a later term of court.⁶

In addition to the constitution speedy trial rights, Georgia law contains specialized statutes providing additional protections. To avail themselves of statutory protections, however, defendants must formally file a pleading. Accordingly, while the Sixth Amendment right to a speedy trial accrues after arrest, a defendant must wait for an accusation or indictment to be filed before his statutory right to a speedy trial can be asserted.⁷ For noncapital offenses, the demand must be filed in the same term as the accusation or the next succeeding regular term.⁸

Under Georgia law, a statutory speedy trial demand is a device that requires criminal defendants to be tried within a specific period of time.⁹ Failure of the state to try the defendant during that period results in discharge.¹⁰

Due to the severity of the remedy, strict compliance with the statutory guidelines is imperative for a defendant to be successful in a statutory speedy trial demand.¹¹

The clock for a statutory speedy trial starts running on the date of accusation or indictment, and any time before that is "premature and a nullity."¹²

Filing a speedy trial demand may lead to discovery conse-

²*Smereczynsky v. State*, 314 Ga. App. 73, 722 S.E.2d 892 (2012).

³*Teasley v. State*, 307 Ga. App. 153, 704 S.E.2d 248 (2010).

⁴*Whatley v. State*, 326 Ga. App. 81, 755 S.E.2d 885 (2014).

⁵*State v. Pickett*, 288 Ga. 674, 706 S.E.2d 561 (2011) (defendant was arrested three years before indictment and did not assert his constitutional right until two years after being indicted). See also *State v. Gay*, 321 Ga. App. 92, 741 S.E.2d 217 (2013).

⁶*Jones v. State*, 276 Ga. 171, 575 S.E.2d 456 (2003).

⁷*Nusser v. State*, 275 Ga. App. 896, 622 S.E.2d 105 (2005).

⁸*Williamson v. State*, 321 Ga. App. 25, 740 S.E.2d 841 (2013).

⁹*Walker v. State*, 290 Ga. 696, 723 S.E.2d 894 (2012).

¹⁰*State v. Varner*, 277 Ga. 433, 589 S.E.2d 111 (2003). Capital cases, see *Walker v. State*, 290 Ga. 696, 723 S.E.2d 894 (2012).

¹¹*State v. Varner*, 277 Ga. 433, 589 S.E.2d 111 (2003).

¹²*State v. Bloodsworth*, 241 Ga. App. 840, 528 S.E.2d 285 (2000).

quences for the defendant.¹³

The time for trial of capital offenses charged in a multi-count indictment is governed by O.C.G.A. § 17-7-171, which requires that a defendant accused of a capital offense who makes a proper demand for trial must be tried within the term of the demand or by the end of the next two terms.¹⁴ However, the Georgia Supreme Court interpreted O.C.G.A. § 17-7-171 in a 2012 opinion to mean that a defendant accused of a capital offense may be discharged and acquitted only if she is not given a trial after at least *three* full terms of court have expired after the term in which her demand was filed.¹⁵

A 1988 amendment to O.C.G.A. § 17-7-171 added a subsection (c) which provides that in capital cases the counting of terms shall not begin until the convening of the first term following the completion of pretrial review proceedings in the Supreme Court. Other cases, see O.C.G.A. § 17-7-170.¹⁶

If a defendant is represented by counsel when he files a pro se statutory demand for trial, that demand is of no legal effect whatsoever.¹⁷

In *State v. Pickett*,¹⁸ the Georgia Supreme Court analyzed a delay of five years between the defendant's arrest and his motion to dismiss on speedy trial grounds. While the delay was presumptively prejudicial, the defendant's claim failed because the evidence was insufficient to support his claim that he was prejudiced by the delay. On the other hand, a lack of speedy trial was fatal to the state's case in *State v. Gleaton*.¹⁹ In a 4-3 decision, Justice Hines found the defendants could not be penalized in a case that took almost four years to indict.

A 10-month delay between the defendant's arrest and the dismissal of charges was not a violation of the defendant's speedy

¹³See *Higuera-Hernandez v. State*, 289 Ga. 553, 714 S.E.2d 236 (2011) (statutory trial demand adversely impacts defense objections to untimely notice of trial and service of discovery responses).

¹⁴*Cleary v. State*, 258 Ga. 203, 366 S.E.2d 677 (1988) (disapproved on other grounds by *Mize v. State*, 262 Ga. 489, 422 S.E.2d 180 (1992)).

¹⁵*Walker v. State*, 290 Ga. 696, 698, 723 S.E.2d 894, 896 (2012).

¹⁶See, e.g., *Williamson v. State*, 295 Ga. 185, 758 S.E.2d 790 (2014) ("Pursuant to the plain meaning of the

language of OCGA § 17-7-17 (b), when the defendant files a speedy trial demand, the State then has two terms—the current term or the following term—during which to try the defendant. The one condition precedent to the two terms counting is that there are juries impaneled and qualified to try the defendant during each term.").

¹⁷*Daniels v. State*, 235 Ga. App. 296, 298, 509 S.E.2d 368, 370 (1998).

¹⁸*State v. Pickett*, 288 Ga. 674, 706 S.E.2d 561 (2011).

¹⁹*State v. Gleaton*, 288 Ga. 373, 703 S.E.2d 642 (2010).

trial rights.²⁰

In a rape and child molestation case, the defendant was not denied his constitutional right to a speedy trial despite the court's finding of a "substantial delay." The court reasoned that the lengthy delay was "not exceedingly slow for its particular jurisdiction," that "the reasons for the delay were benign," that the defendant failed to assert his rights in a timely manner, and that the defendant failed to demonstrate prejudice.²¹

The Georgia Court of Appeals vacated a trial court's order dismissing the State's case based on denial of the defendant's constitutional right to a speedy trial in *State v. Takyi*.²² Though the Court of Appeals accepted the determinations as to all factors but actual harm to the defendant. The Court of Appeals found that the trial court inappropriately considered hearsay evidence in determining harm to defendant's interest, and therefore could not have appropriately balanced the four Sixth Amendment factors.

Trial court abused its discretion in assessing defendant's speedy trial violation motion when it failed to adequately examine "the reasons and responsibilities for the delay." The Georgia Court of Appeals found that the trial court failed to "break down the overall pretrial delay into relevant time periods and assign responsibility for delay to each time period." It further found that the trial court's determination that the defendant "caused [the] delay because he was unable to work with counsel and because he filed in excess of 90 motions requiring attention from the Court" failed to explain how these facts contributed to the delay and why any such delay should be attributable entirely to the defendant.²³

Speedy trial violation was not found for a 48-month delay in *Williams v. State*.²⁴

A 27-month delay from the time of the defendant's arrest to his motion to dismiss, during which time the defendant was incarcerated, did not violate his right to a speedy trial where the State made no deliberate attempt to delay the trial and the defendant was held to have delayed in asserting his right to a speedy trial.²⁵

²⁰*State v. Auerswald*, 198 Ga. App. 183, 401 S.E.2d 27 (1990). quotes omitted).

²¹*Durham v. State*, 355 Ga. App. 426, 844 S.E.2d 499 (2020).

²²*State v. Takyi*, 314 Ga. App. 444, 724 S.E.2d 459 (2012).

²³*Thomas v. State*, 331 Ga. App. 641, 771 S.E.2d 255 (2015) (internal

²⁴*Williams v. State*, 290 Ga. 24, 717 S.E.2d 640 (2011).

Delay of more than four years, see *Phan v. State*, 290 Ga. 588, 723 S.E.2d 876 (2012).

²⁵*Boseman v. State*, 263 Ga. 730, 438 S.E.2d 626 (1994).

In *Levester v. State*,²⁶ the defendant did not make an effective demand for speedy trial. In a capital case, the accused must actually be present in court and announce his readiness to proceed to trial, either through his own actions or those of his attorney.

The statutory right to demand speedy trial of a traffic offense in state court attaches when the uniform traffic citation is filed in court.²⁷

Dismissal for want of a speedy trial is an extreme sanction which can be waived by defendant's actions.²⁸

In another case, a defendant was not denied his constitutional right to speedy trial by a 33-month delay between arrest and date of trial; although the delay was presumptively prejudicial, there was no evidence that the delay was due to bad faith or dilatory purpose by the State. The defendant's notification of speedy trial demands related mostly to state statutory grounds and not constitutional grounds, and the defendant failed to show that he was prejudiced by the delay.²⁹

Legislative attention to the subject of continuances was provided in 2003. In cases in which a material witness is absent because of military service elsewhere, the trial judge shall continue the case. O.C.G.A. § 17-8-31. Regarding cases where a demand for trial has been filed under O.C.G.A. § 17-1-170 or 17-7-171, the court shall grant a continuance when a material witness is unavailable, the continuance to run until the witness "is released from active duty or the military makes the witness available to testify."

While the trial court can grant a defendant special permission to file an out of time demand for speedy trial, the trial court cannot actually make that demand for the defendant. A defendant who had moved for permission to file an out of time demand was required to actually make the demand for speedy trial.³⁰

The failure by a murder defendant to enter a demand for trial at the term of court at which his indictment was found or the next succeeding regular term or to request special permission of the court to file his motion for speedy trial during a subsequent term was fatal to his statutory speedy trial claim.³¹

Does time allotted by the trial court for defense preparation affect timing for speedy trial considerations? The United States

²⁶*Levester v. State*, 270 Ga. 485, 512 S.E.2d 258 (1999).

²⁷*State v. Gerbert*, 267 Ga. 169, 475 S.E.2d 621 (1996).

²⁸*Spencer v. State*, 259 Ga. App. 664, 577 S.E.2d 817 (2003).

²⁹*Redd v. State*, 261 Ga. 300, 404 S.E.2d 264 (1991).

³⁰*Smith v. State*, 261 Ga. 298, 404 S.E.2d 115 (1991).

³¹O.C.G.A. § 17-7-171(a); *Abiff v. State*, 260 Ga. 434, 396 S.E.2d 483 (1990).

Supreme Court granted certiorari from a decision in which the Eighth Circuit Court of Appeals held, as a matter of apparent first impression for the court, that a district court's express 28-day extension, at a defendant's request, of the deadline for filing pretrial motions was excludable under the Speedy Trial Act, even though the defendant did not actually file any pretrial motions.³² In *Bloate v. U.S.*,³³ the U.S. Supreme Court ruled that time granted to a party to prepare pretrial motions was not automatically excludable from the time limits set for bringing an accused to trial. The time may be excluded if the court makes specific findings that the ends of justice are served by granting a continuance. The decision of the Eighth Circuit was reversed.

If a case does not go to trial due to lack of state funding of appointed counsel, does that count as a factor weighing against the prosecution when the defendant makes a constitutional speedy trial claim? The United States Supreme Court looked at that claim in a case from Louisiana, then dismissed the grant of certiorari as improvidently granted.³⁴

A 13-month delay between arrest and trial in a murder case was not prejudicial. Neither was defense counsel's motion for a continuance, which waived the statutory demand for speedy trial.³⁵

Speedy trial claim in a case involving delay of more than two years from filing of charges until trial, and 5½ years from initial arrest to trial resulted in dismissal of charges.³⁶ While at one time it was said that a delay of eight months or longer was presumptively prejudicial,³⁷ later decisions seem to have changed this time frame. The first prong of the speedy trial inquiry is whether the interval from the accused's arrest, indictment, or other formal accusation to the trial is sufficiently long to be considered presumptively prejudicial; if not, the speedy trial claim fails at the threshold.³⁸ A delay of one year between an arrest or formal accusation and trial generally marks the point at which delay becomes presumptively prejudicial, thus triggering the requirement for further speedy trial analysis.

³²U.S. v. Bloate, 534 F.3d 893 (8th Cir. 2008), decision below 534 F.3d 893 (8th Cir. 2008).

³³Bloate v. U.S., 130 S. Ct. 1345, 176 L. Ed. 2d 54 (2010).

³⁴Boyer v. Louisiana, 133 S. Ct. 1702, 185 L. Ed. 2d 774 (2013).

³⁵Williams v. State, 282 Ga. 561, 651 S.E.2d 674 (2007).

³⁶State v. White, 282 Ga. 859, 655 S.E.2d 575 (2008) (Carley, J.).

³⁷Scandrett v. State, 279 Ga. 632, 619 S.E.2d 603 (2005).

³⁸State v. Porter, 288 Ga. 524, 705 S.E.2d 636 (2011) (overruled on other grounds by, Johnson v. State, 315 Ga. 876, 885 S.E.2d 725 (2023)) (period of delay between arrest or accusation and trial became presumptively prejudicial at one year, for purposes of alleged speedy trial violation, and not at eight months).

In *Burney v. State*,³⁹ the Supreme Court of Georgia found in a malice murder prosecution that a six and one-half year delay was presumptively prejudicial. Nevertheless, the court found no speedy trial violation given that the delays were attributable primarily to the defendant, the defendant did not assert his rights, and there was no demonstrated prejudice.

In *Franklin v. State*,⁴⁰ the court dismissed the speedy trial complaint of a prisoner who had been charged with armed robbery 32 years earlier. After the armed robbery, the prisoner escaped from jail and killed someone, for which he was convicted of murder. At the end of his murder sentence, the prosecutor removed the old robbery case from the dead docket and proceeded to advance the case. The defendant objected. Noting that the possibility of harm to the accused's defense is the most serious of the factors to be weighed when assessing the prejudice of any delay, the Court of Appeals ruled no actual prejudice occurred. The decision cited and distinguished the Georgia Supreme Court decision in *State v. Lattimore*.⁴¹ In *State v. Gleaton*,⁴² the Georgia Supreme Court found a speedy trial violation when approximately four years elapsed between arrest and indictment. *Lattimore* was again cited.

Sixty-one-month delay between a murder defendant's arrest and her trial did not prejudice the defendant, and, thus, she was not denied her right to a speedy trial, as defendant suffered little actual prejudice to her defense, she suffered no unduly oppressive pretrial incarceration, and she waited a significant amount of time before asserting her right to a speedy trial.⁴³

Speedy trial rights were not violated in *Vermont v. Brillon*.⁴⁴

In sum, delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned. "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case," *Barker*, 407 U.S., at 522, 92 S. Ct. 2182, and the record in this case does not show that Brillon was denied his constitutional right to a speedy trial.

³⁹*Burney v. State*, 309 Ga. 273, 845 S.E.2d 625 (2020).

⁴⁰*Franklin v. State*, 305 Ga. App. 354, 699 S.E.2d 575 (2010).

⁴¹*State v. Lattimore*, 287 Ga. 505, 696 S.E.2d 613 (2010).

⁴²*State v. Gleaton*, 288 Ga. 373, 703 S.E.2d 642 (2010).

⁴³*Christian v. State*, 281 Ga. 474,

640 S.E.2d 21 (2007). See also *Walker v. State*, 285 Ga. App. 529, 646 S.E.2d 734 (2007) (speedy trial demand filed in advance of accusation constitutes "a nullity"; defendant's constitutional speedy trial demand argument was undercut by delays created by defendant and defense counsel).

⁴⁴*Vermont v. Brillon*, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009).

For procedural developments, see *Webb v. State*⁴⁵ and O.C.G.A. § 17-7-170 (revised statute requiring that demand must be a “stand alone” document).

The murder conviction of Weldon Wayne Carr was overturned by the Georgia Supreme Court in 1997 after finding “inexcusable” misconduct on the part of the prosecutor. Originally, Carr was subject to retrial. Delay occurred. When Carr still had not been retried by 2003, the trial court dismissed the case on speedy trial grounds. In 2004 the Georgia Supreme Court approved the decision of Fulton Superior Court Judge Roland Barnes to dismiss the case. After the 1997 reversal, “[f]our years passed before the State announced it was ready for trial. . . . A delay of 27 months raises a threshold presumption of prejudice. Here, the delay was over 50 months.”⁴⁶

Speedy trial rights have been litigated in a number of cases. In *Williams v. State*,⁴⁷ the Supreme Court found reasons that more than 61 months delay between murder defendant’s indictment and his trial did not support a lack of speedy trial complaint. Defendant’s frequent and lengthy medical examinations and treatment for an abnormal mass in his brain were primary reasons for the lengthy delay, and after his medical condition ceased to be an issue, case was attended to conscientiously by all, save for a defense investigator and possibly defense counsel, held the court.

Georgia’s speedy trial law is adjusted to the timing of terms of court. Terms of court are the subject of O.C.G.A. § 15-6-3.

In *Hudson v. State*,⁴⁸ the Supreme Court held that for purposes of a constitutional speedy trial analysis, length of delay in bringing a murder defendant to trial consisted of a six-month period between defendant’s arrest and his attorney’s filing of motion for a continuance, and a nine-month period between expiration of the last defense motion for continuance and beginning of trial. Constitutional speedy trial rights were not violated by these delays nor were they reversible error in *Ruffin v. State*.⁴⁹

In addition to speedy trial concerns, substantial delays experienced during the criminal appellate process implicate due process rights.⁵⁰ Due process claims of inordinate delay that impairs a defendant’s right of access to courts in post-conviction

⁴⁵*Webb v. State*, 278 Ga. App. 9, 592 S.E.2d 848 (2004).

627 S.E.2d 925 (2006) (demand must be served on both the state and the court).

⁴⁶*State v. Carr*, 278 Ga. 124, 598 S.E.2d 468 (2004).

⁴⁷*Williams v. State*, 277 Ga. 598,

⁴⁸*Hudson v. State*, 277 Ga. 581, 591 S.E.2d 807 (2004).

⁴⁹*Ruffin v. State*, 284 Ga. 52, 663 S.E.2d 189 (2008).

⁵⁰*Chatman v. Mancill*, 280 Ga. 253, 626 S.E.2d 102 (2006).

proceedings arising out of direct appeal of non-capital cases are analyzed based on the four speedy trial factors set forth in *Barker v. Wingo*:⁵¹ (1) length of delay, (2) reason for delay, (3) defendant's assertion of due process rights, and (4) prejudice to the defense. Not every delay in the appeal of a case, even an inordinate one, implicates a criminal defendant's due process rights. Prejudice must also be evident.⁵² An eight-year delay between defendant's non-capital murder convictions and appellate affirmance of the convictions was excessive. This sort of delay is a factor for determining whether inordinate delay impaired defendant's due process right of access to courts in post-conviction proceedings arising out of direct appeal in non-capital case. The appropriate test for prejudice, as an element for establishing a due process violation based on post-conviction direct appeal delay, is akin to the second prong of the *Strickland*⁵³ test for ineffective assistance of counsel: appellate delay is prejudicial when there is a "reasonable probability" that, but for the delay, the result of the appeal would have been different, which is a probability sufficient to undermine confidence in the outcome.

Defendant who experienced a "15-year delay between the filing of his motion for new trial and its resolution" did not have his speedy trial rights violated. The court found that the delay was neither intentional nor the product of strategic delay. Trial counsel timely filed motion for new trial, and then left the case under the belief that new counsel would be appointed. But the judge died before new counsel was appointed. This factor, the court found, favored the defendant. However, the court found that the "reasons for the delay are neutral" and are not weighed as heavily. In addition, the court found that the defendant did not clearly assert his rights during the 15-year period and did not demonstrate prejudice.⁵⁴

Even where delays might be attributable to the activity of a criminal defendant, however, the record on appeal must be clear, distinct, and sufficient when dismissing a constitutional speedy trial motion. In a 2015 case, the Georgia Court of Appeals reversed and remanded for further inquiry the dismissal of a criminal defendant's Sixth Amendment motion, notwithstanding the fact that the trial court found that the defendant had "contributed to the delay" due to his "inability to work with counsel," *pro se* filing of 90 motions, and pre-trial mental health evaluations. The

⁵¹*Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

⁵²See, generally, *Singleton v. State*, 326 Ga. App. 609, 757 S.E.2d 211 (2014) (10-year delay in hearing defendant's motion for new trial did

not violate due process rights where no proof of prejudice).

⁵³See § 1:4, *supra*.

⁵⁴*Hyden v. State*, 308 Ga. 218, 839 S.E.2d 506 (2020).

reason for the reversal? The trial court’s failure to “break down the overall pretrial delay into relevant time periods and assign responsibility for delay to each time period.”⁵⁵

§ 2:3 Presence of parties and counsel

In civil actions, each party has a right to be present at the trial thereof, either in person or by his counsel, but may waive that right at any particular stage of the trial. Thus, a party to a civil action who is not in default is entitled to be present in the courtroom and to be represented by counsel at all stages during the actual trial of the action.¹ The right of the defendant to be present at the trial can be waived by the defendant, or by his attorney, either with the consent of the defendant or in his presence.²

A defendant and his counsel have a constitutional right to be present at every stage of the defendant’s trial, including voir dire. This right, however, may be waived.³ Thus, the view has been taken that the defendant waives his right to be present if he voluntarily absents himself from the proceedings.⁴ A defendant can also waive this right if he “personally waives it in court,” or if he directs his attorney to waive his presence, or if counsel waives it and the defendant subsequently acquiesces in the waiver.⁵

Defendant’s right to be present in the courtroom was not violated when trial court met with a witness who expressed fear of testifying in a felony murder case due to threats. The court found that defendant acquiesced to his absence from this meeting, and that the defendant was present at a series of other matters involving the court and this particular witness.⁶

Defendant waived his right to be present in the courtroom when his counsel requested that defendant be excused for the remainder of the court proceedings on a certain day (when the prosecution intended to introduce similar transaction evidence against him) and the defendant expressed no objection.⁷ In

⁵⁵Thomas v. State, 331 Ga. App. 641, 771, 771 S.E.2d 255 (2015).

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¹Willingham v. Willingham, 192 Ga. 405, 15 S.E.2d 514 (1941).

²Thomas v. State, 359 Ga. App. 861, 860 S.E.2d 150 (2021); Dutton v. Morris, 222 Ga. 595, 151 S.E.2d 125 (1966).

³Speed v. State, 270 Ga. 688, 512 S.E.2d 896 (1999).

⁴Miller v. State, 122 Ga. App. 869, 179 S.E.2d 265 (1970).

⁵Ramirez v. State, 345 Ga. App. 611, 814 S.E.2d 751 (2018), quoting Murphy v. State, 299 Ga. 238, 787 S.E.2d 721 (2016).

⁶Hurston v. State, 310 Ga. 818, 854 S.E.2d 745 (2021).

⁷Davis v. State, 331 Ga. App. 585, 771 S.E.2d 232 (2015).

Ramirez v. State,⁸ the Georgia Court of Appeals found that the defendant waived his right to be present during bench conference regarding the striking of potential jurors. As noted in *Johnson v. State*,⁹ issues regarding hardship excuses or a juror's impartiality require a "factual showing of cause," thus prevented the court from concluding that the defendant could not have meaningfully contributed to such bench conference discussions.

For other cases on the presence of the defendant at all stages of a criminal prosecution, see § 4:1, *infra*.

Defendant's constitutional right to be present during critical stages of the prosecution was not violated when he was not present during plea negotiations. The Georgia Court of Appeals found that the defendant's "rights could not have been lost, his defenses waived, any privileges claimed or waived, or the outcome of the case substantially affected because of the plea negotiation from which he was absent—particularly when [the defendant] himself had the absolute authority either to accept or reject the proposed plea deal."¹⁰

The 11th Circuit found that a district court committed plain error when the defendant was not present when an impaneled but not yet sworn jury was discharged. The 11th Circuit found that "jury discharge is a 'trial stage' within the meaning of Rule 43(a)(2)." However, the appeals court concluded that the defendant failed to show that his substantial rights were affected.¹¹

Defendant's right to be present during critical stages was not violated when he was not present during the entirety of the guilty plea hearings of his two accomplices in a murder prosecution.¹²

Defendant's right to be present was violated when trial court amended the defendant's sentence by email as opposed to modifying the sentence in open court.¹³

In *Sarat-Vasquez v. State*,¹⁴ the Georgia Court of Appeals found that the trial court properly denied the defendant's motion for new trial based on his claim that his right to an interpreter was violated. The court noted that it is well-settled that a defendant has a right to be present during the critical stages of a trial, and that the failure to provide an interpreter implicates this right.

⁸*Ramirez v. State*, 345 Ga. App. 611, 814 S.E.2d 751 (2018).

⁹*Johnson v. State*, 347 Ga. App. 831, 821 S.E.2d 76 (2018).

¹⁰*Hower v. State*, 331 Ga. App. 567, 769 S.E.2d 402 (2015).

¹¹*United States v. Downs*, 61 F.4th 1306 (11th Cir. 2023).

¹²*Tookes v. State*, 306 Ga. 166, 829 S.E.2d 363 (2019).

¹³*Pittman v. State*, 366 Ga. App. 372, 883 S.E.2d 56 (2023).

¹⁴*Sarat-Vasquez v. State*, 350 Ga. App. 322, 829 S.E.2d 394 (2019).

However, here the court determined, among other things, “that Vasquez agreed with his trial counsel’s advice to forego an interpreter in order to increase his chances of an acquittal at trial.”

In *Ward v. State*,¹⁵ the defendant’s right to be present is cast as a fundamental right, and not subject to harmless error review on direct appeal.

A criminal defendant who absents himself from trial can have that absence used against him and waives his right to be present at the remainder of the trial.¹⁶ In a 2012 opinion, the Georgia Supreme Court held that appeals on behalf of fugitives from justice are properly dismissed.¹⁷

On the right of a trial judge to exclude a severely injured party from civil proceedings, see *Kesterson v. Jarrett*.¹⁸ *Kesterson* affirms the principle that the right to be present extends to those parties whose physical or mental condition may generate sympathy from the jury.

Kesterson presents challenges for personal injury defendants. Following the Georgia Supreme Court’s ruling in *Kesterson*, the Georgia Court of Appeals in *Morris v. Turnkey Medical Engineering, Inc.*,¹⁹ retroactively applied *Kesterson* to the case. Finding that the defendant failed to seek the alternative remedies enunciated in *Kesterson*, the court remanded the case for a new trial.

Consistent with *Kesterson*, Georgia’s victim-rights provisions, located at O.C.G.A. § 17-17-9, guaranteed the right of a four-year-old, severely disabled victim in a child cruelty prosecution who was not able to “talk, walk, feed, or toilet himself,” and “groaned several times out loud” after being brought into the courtroom in a wheelchair to be present at trial.²⁰

Criminal cases decided in 2013 underlined the requirement of a party’s presence at trial. In *Heywood v. State*,²¹ the Supreme Court explained that bench conferences held during trial do not invoke defendant’s right to be present. “Bench conferences, or sidebars, are a common occurrence during jury trials . . . [A] defendant’s right to be present is not violated by his absence

¹⁵*Ward v. State*, 288 Ga. 641, 706 S.E.2d 430 (2011). See also *Wedel v. State*, 320 Ga.App. 28, 761 S.E.2d 454 (2014).

¹⁶*Stell v. State*, 210 Ga. App. 662, 663, 436 S.E.2d 806, 808 (1993).

¹⁷*Tompkins v. Hall*, 291 Ga. 224, 728 S.E.2d 621 (2012).

¹⁸*Kesterson v. Jarrett*, 291 Ga. 380, 728 S.E.2d 557 (2012) (when

defendant seeks to exclude a handicapped plaintiff he must establish that presence would prejudice jury).

¹⁹*Morris v. Turnkey Medical Engineering, Inc.*, 317 Ga. App. 295, 729 S.E.2d 665 (2012).

²⁰*Freeman v. State*, 333 Ga. App. 6, 775 S.E.2d 258 (2015).

²¹*Heywood v. State*, 292 Ga. 771, 743 S.E.2d 12 (2013).

from such bench conferences.” In *Campbell v. State*,²² the trial court took up a motion in limine prior to the selection of the jury. Campbell’s absence during discussion of legal matters did not abridge his right to be present.

Citing *Heywood*, the court in *Tucker v. State*²³ found in a statutory rape case that the defendant’s absence from four bench conferences did not violate his right to be present at trial. The court concluded that “Tucker was not entitled to be present at the bench conferences where the lawyers and the judge discussed the logistical issue of getting the victim to actually provide testimony.”

Similarly, where a jury note was discussed with a criminal defendant in the courtroom, but not at the bench where the conference transpired, and where the judge answered the jury’s question in the presence and with the acquiesce of all counsel, and the judge merely referred the jury to the charges already provided, there was no violation of the defendant’s right of presence.²⁴

Where presence is completely denied in connection with substantive juror communications, however, the rights of both criminal and civil parties are violated. In a civil case where the trial judge allegedly responded to a note from the jury without revealing to the parties or their counsel the contents of the note or the judge’s response, the Georgia Supreme Court remarked:

But, as a general matter, parties to civil actions in Georgia have the right to be present at all stages of the trial of the action [and] in a civil proceeding this is so in order, inter alia, that the party be able to render assistance to his counsel as developments unfold This Court cannot sanction communications of a substantive nature between a trial judge and a jury outside the presence of the defendant and counsel in a criminal trial, and it should not do so in a civil trial as such actions are no less a violation of a party’s right to be present during trial.²⁵

Defendant’s right to be present was not violated when questions submitted by the jury were answered outside the presence of the defendant. After the questions were answered a summary of the communication [which had been agreed to by the defense and government attorneys] was provided in the presence of the defendant and neither defendant nor his counsel objected to the

²²*Campbell v. State*, 292 Ga. 766, 740 S.E.2d 115 (2013).

²³*Tucker v. State*, 355 Ga. App. 796, 845 S.E.2d 759 (2020).

²⁴*Leeks v. State*, 296 Ga. 515, 769 S.E.2d 296 (2015).

²⁵*Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015).

responses provided by the court.²⁶

In a homicide case, the Supreme Court of Georgia found that defendant's right to be present was not violated when trial judge discussed a jury note regarding a "purely legal issue regarding how the trial court should respond to the jury's substantive inquiry about why certain evidence was not presented." The trial judge discussed the matter with the prosecution and defense counsel and both parties agreed regarding how the court should respond to the jury note.²⁷

The Georgia Supreme Court held in *Phillips v. Harmon*²⁸ that a civil plaintiff in a medical malpractice action had a right to be present during a trial court's communications with a jury, even though the court's communication with the jury was "brief." "This Court cannot sanction communications of a substantive nature between a trial judge and a jury outside the presence of the defendant and counsel in a criminal trial, and it should not do so in a civil trial as such actions are no less a violation of a party's right to be present during trial."

In *Huff v. State*,²⁹ the court noted that a charge conference is not one of those proceedings at which an accused has a right to be present, then rejected any right of an accused person to attend a discussion in chambers about the issue of whether confessions and statements would go out with the jury:

Embodied in the constitutional right to the courts under Art. I, Sec. I, Par. XII of the Georgia Constitution of 1983 is the right of the criminal defendant to be present at all proceedings had against him at the trial of his case. *Pennie v. State*, 271 Ga. 419(2), 520 S.E.2d 448 (1999). The right to be present attaches "at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). This Court has determined that "[a] critical stage in a criminal prosecution is one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way." *Ballard v. Smith*, 225 Ga. 416, 418(2), 169 S.E.2d 329 (1969).

Defendant's right to be present was not violated when a hearing was held where the sole issue was the "proper procedural mechanism for release of" information in the file of a guardian ad

²⁶*Estrada v. State*, 332 Ga. App. 359, 772 S.E.2d 810 (2015).

²⁷*Carter v. State*, 308 Ga. 589, 842 S.E.2d 831 (2020).

²⁸*Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015).

²⁹*Huff v. State*, 274 Ga. 110, 549 S.E.2d 370 (2001).

litem.³⁰

Trial court that, outside the presence of the defendant, ruled on a motion to admit evidence and excused a prospective juror did not violate defendant's constitutional right to be present.³¹

General right of accused felon to be present during the course of trial does not extend to postverdict procedures.³² The right to be present also does not automatically extend to co-defendants. The Eleventh Circuit held in *United States v. Mosquera*³³ that it was not plain error when a trial court failed to notify three co-defendants of a evidentiary hearing on behalf of a different defendant. A defendant does not have the right to be present at a hearing on extraordinary motion for new trial.³⁴

In an armed robbery case, a trial court did not err when it removed a defendant from the courtroom on account of repeated disruptive behavior.³⁵

Although the defendant in a criminal trial may waive his constitutional right to be present at all stages of his trial, such right of waiver does not include a concomitant right of absence; where identification of the defendant by a witness is contemplated by the prosecution, the State is entitled to demand the defendant's presence.³⁶

An authorization for arraignments to be conducted by closed circuit television did not permit entry of guilty pleas by such means.³⁷

Uniform Superior Court Rule 10.4 does not require a party's presence at a civil trial, nor does it authorize a trial judge to impose sanctions for a party's failure to appear.³⁸

The right to a fair and impartial criminal trial depends on the right of the accused and his or her counsel to be present when there are communications between the jurors and the trial judge which may materially affect the case.³⁹

A defendant has a right to be present at his or her trial, but

³⁰Duncan v. State, 342 Ga. App. 530, 804 S.E.2d 156 (2017).

³¹Brewner v. State, 302 Ga. 6, 804 S.E.2d 94 (2017).

³²Dobbs v. State, 245 Ga. 208, 264 S.E.2d 18 (1980).

³³United States v. Mosquera, 886 F.3d 1032, 105 Fed. R. Evid. Serv. 1469 (11th Cir. 2018).

³⁴Dobbs v. State, 245 Ga. 208, 264 S.E.2d 18 (1980).

³⁵Haynes v. State, 356 Ga. App. 631, 848 S.E.2d 644 (2020).

³⁶Lewis v. State, 164 Ga. App. 549, 297 S.E.2d 303 (1982).

³⁷Zenlenski v. State, 257 Ga. 381, 359 S.E.2d 676 (1987).

³⁸Masonry Standards, Inc. v. UPS Truck Leasing, Inc., 257 Ga. 743, 363 S.E.2d 553 (1988).

³⁹Morris v. State, 257 Ga. 781, 364 S.E.2d 571 (1988).

may waive that right, even in a death penalty case.⁴⁰ Although defendant's counsel may waive a defendant's right to be present during all trial proceedings, in order for the counsel's waiver to be binding on the defendant, it must be made in his presence or by his express authority, or be subsequently acquiesced in by him.⁴¹

In addition to a defendant's right to be present during his trial, special rights are afforded police officers when it is a law enforcement officer who may become a defendant in a criminal case. The special rights apply when those officers are being investigated by a grand jury.⁴² The rights afforded an officer indicted for malfeasance in office include the right to be present with counsel during the state's presentation of evidence to the grand jury and, at the conclusion of the state's evidence, the right to make a statement without being subject to direct or cross-examination.⁴³ Defendant police officer was acting in the course of his official duties when he committed the offense of false writings and statements by falsifying records on his daily activity sheet to cover up his crime of threatening a minor with arrest if she did not have sex with him, and thus the officer was entitled to notice and the opportunity to appear before grand jury under the statutes affording special rights to officers.

General rights to be present at trial in the future will fall under the authority of O.C.G.A. § 24-6-615, which is patterned after Fed. R. Evid. 615. Significantly, the 2013 Georgia provision, like its federal counterpart, makes allowances for certain parties to be present in court like lead investigators in criminal cases.⁴⁴ This will mark a departure from prior Georgia law that made lead investigator representatives discretionary.⁴⁵

§ 2:4 Conduct of parties

The parties to a lawsuit, including the complaining witness in a criminal case, are subject to the same restrictions on their behavior during a trial as any other person in the courtroom. They are subject to the discipline imposed by the court and may be guilty of contempt for failure to observe a proper standard of conduct, see §§ 5:1 to 5:7, *infra*. In addition, they are as inhibited

⁴⁰*Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988).

⁴¹*Sammons v. State*, 279 Ga. 386, 612 S.E.2d 785 (2005).

⁴²O.C.G.A. § 17-7-52.

⁴³O.C.G.A. § 45-11-4; *Wiggins v. State*, 280 Ga. 268, 626 S.E.2d 118 (2006).

⁴⁴See *U.S. v. Butera*, 677 F.2d 1376, 10 Fed. R. Evid. Serv. 1469 (11th Cir. 1982).

⁴⁵See, e.g., *Kegler v. State*, 317 Ga. App. 427, 432, 731 S.E.2d 111, 116 (2012) (overruled on other grounds by, *Hamm v. State*, 294 Ga. 791, 756 S.E.2d 507 (2014)).

by the rules as are their attorneys from doing anything that might transfer to the jury any fact, information or testimony other than through the regular channels for the production of evidence.

Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates. The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.¹

There are at least three constitutionally permissible ways for a trial judge to handle an unruly defendant: (1) bind and gag him, thereby keeping him present, (2) cite him for contempt, or (3) take him out of the courtroom until he promises to conduct himself properly.²

Methods for addressing demonstrations and outbursts which occur during the course of a trial are matters within the trial court's discretion and disruptions can be dealt with during the proceedings unless a new trial is necessary to insure a fair trial.³

Under Georgia's 2013 Evidence Code, the related power to control the mode of examination of witnesses is addressed at O.C.G.A. § 24-6-611.

§ 2:5 Joinder of parties

For severance of offenses, see § 2:29, *infra*.

Before trial, the trial judge may order severance on his own motion. During trial, severance should only be granted upon consent of the defendant to be severed. Where the only hint of potential conflict among defendants is testimony of the investigating officer that the defendant denied knowledge of the robbery, there is not sufficient showing to require trial court to order severance.¹

Trial court did not abuse its discretion in denying defendant's motion to sever when the defendant never filed a motion to sever.²

Two or more defendants charged with different offenses may be

[Section 2:4]

561 S.E.2d 414 (2002).

¹In re Scheib, 283 Ga. App. 328, 641 S.E.2d 570 (2007).

[Section 2:5]

¹Hill v. State, 239 Ga. 278, 236 S.E.2d 626 (1977).

²Holmes v. State, 301 Ga. 143, 800 S.E.2d 353 (2017).

²Davis v. State, 331 Ga. App. 585, 771 S.E.2d 232 (2015).

³Brannan v. State, 275 Ga. 70,

tried jointly where offenses were part of common scheme or plan.³

If a motion for severance is made in a noncapital case, it is within the discretion of the trial court to grant or deny; that decision will be reversed on appeal only upon showing of abuse of discretion.⁴

Generally speaking, the burden is on the defendant when making a motion to sever defendants in a criminal case.⁵ In capital cases where the death penalty is sought, however, severance of the parties is mandated by statute.⁶ When separate trials are ordered in a case, the defendants may be tried in the order determined by the prosecution.⁷

The Eleventh Circuit Court of Appeals has remarked that, in federal courts, “[t]here are only two circumstances in which severance is the only permissible remedy[;]” (1) when ‘there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants,’ or (2) to ‘prevent the jury from making a reliable judgment about guilt or innocence.’⁸

All parties interested in subject matter of litigation seeking equitable relief should be joined as parties.⁹

Where the state waived death penalty and elected to try murder defendants jointly, motion for severance was addressed to sound discretion of trial court. To make showing of abuse of discretion, the defendant seeking severance must make a clear showing of harm or prejudice to him and consequent denial of due process that would result from denial of motion for severance.¹⁰

In *Brown v. State*,¹¹ the Court of Appeals found that the trial court did not err in denying a severance motion submitted by the defendant who claimed prejudice given that she, while dressed in civilian attire, was seated next to a co-defendant who was dressed in prison attire. The court found that “it is more likely that [Brown’s] appearance in civilian clothes, alongside Greene dressed in prison garb, reinforced a presumption of [Brown’s] individual innocence.”

Trial court may not grant summary judgment against a plaintiff for failure to have joined an indispensable party where

³Padgett v. State, 239 Ga. 556, 238 S.E.2d 92 (1977).

⁴Barge v. State, 294 Ga. 567, 755 S.E.2d 166 (2014); Lenear v. State, 239 Ga. 617, 238 S.E.2d 407 (1977).

⁵Glass v. State, 289 Ga. 706, 715 S.E.2d 85 (2011).

⁶O.C.G.A. § 17-8-4.

⁷O.C.G.A. § 17-8-4.

⁸United States v. Roberson, 998 F.3d 1237 (11th Cir. 2021).

⁹Cherokee Nat. Life Ins. Co. v. Coastal Bank of Georgia, 239 Ga. 800, 238 S.E.2d 866 (1977).

¹⁰Jones v. State, 243 Ga. 584, 255 S.E.2d 702 (1979).

¹¹Brown v. State, 350 Ga. App. 104, 828 S.E.2d 110 (2019).

proper procedure is to give the plaintiff an opportunity to join and to dismiss upon failure to do so.¹²

§ 2:6 Substitution of parties

When a party wishes to add or drop a party by amendment, the statute allowing a party to amend his pleading as a matter of right at any time before the entry of a pretrial order must be read in pari materia with the statute allowing the dropping and adding of parties only by order of the court on motion of any party.¹

In determining whether to allow an amendment to add a party, the trial court may consider whether the new parties will be prejudiced thereby and whether the movant has some excuse or justification for having failed to name and serve the new parties previously.²

A misnomer contained in a complaint may be corrected to allow amendment to substitute the legal representative of the estate as the proper party plaintiff in place of the estate without leave of court before entry of a pretrial order, pursuant to the liberal amendment provisions of statute governing amended and supplemental pleadings.³

§ 2:7 Presence of judge

The practice of a trial judge leaving the bench during a critical stage of a trial, rather than calling a recess, is not to be condoned, and the Supreme Court will not hesitate to reverse convictions where the record shows that the absence resulted in structural error.¹ In a felony murder case where a judge left very briefly during voir dire, there was no objection by nor harm shown to the defendant and nothing of significance occurred; the event was not reversible error.

In a misdemeanor case, a reversal is not required where no motion for mistrial was made on the ground that the judge was absent.² In a capital case, however, the rule is much more strict and it has been held that even a brief absence, without suspend-

¹²Frady v. Irvin, 245 Ga. 307, 264 S.E.2d 866 (1980).

[Section 2:6]

¹Riding v. Ellis, 297 Ga. App. 740, 678 S.E.2d 178, 245 Ed. Law Rep. 1003 (2009).

²Riding v. Ellis, 297 Ga. App. 740, 678 S.E.2d 178, 245 Ed. Law Rep.

1003 (2009).

³Memar v. Styblo, 293 Ga. App. 528, 667 S.E.2d 388 (2008).

[Section 2:7]

¹Berry v. State, 282 Ga. 376, 651 S.E.2d 1 (2007).

²Ward v. State, 14 Ga. App. 424, 81 S.E. 130 (1914).

ing the proceedings, is error.³

§ 2:8 Substitution of judge

As a general rule, there may properly be a substitution of judge in the preliminary stages of a criminal trial before any evidence has been received, the theory apparently being that the rule against substitution is designed to insure that the judge that hears the testimony as to the facts also applies the law thereto. Generally, a substitution of judge over the objection of the accused is held to be error, although it may be proper if the accused consents.

Grounds for substituting judges include disability, illness, or absence of the presiding judge.¹

Undoubtedly, parties to a civil suit may stipulate to the substitution of judges at any point in the trial. This would seem to be to the advantage of all concerned where a judge dies or becomes incapacitated in some manner during the trial. If there is a complete transcript of the proceedings to that point, the delay and additional time and expense of starting over can be avoided. The circumstances under which a special or substitute judge may act in place of the regular judge, and the manner in which he may be chosen are matters of purely local regulation.²

In federal criminal practice, if by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed, any other judge regularly assigned to the court may familiarize himself with the record and complete the trial.³

Substitution was flawed where a judge who substituted mid-trial and was required to rule on several substantive issues apparently did not review the record. Questions are raised when a successor judge denies post-trial motions on the basis that, having not presided at trial, he could not independently evaluate the evidence and had to accept the jury's evaluations of the evidence.⁴

Party to custody matter who requested that state court judge replace senior superior court judge who was taken ill cannot complain of state court judge's designation.⁵

³Moore v. State, 29 Ga. App. 274, 115 S.E. 25 (1922).

[Section 2:8]

¹O.C.G.A. § 15-1-9.1; Collins v. State, 326 Ga. App. 181, 183, 756 S.E.2d 269, 272 (2014).

²Am. Jur. 2d, Judges § 248.

³Rule 25, Federal Rules of Criminal Procedure.

⁴When substitution may be made, Am. Jur. 2d, Judges § 242.

⁵Fielding v. Fielding, 236 Ga. 114, 223 S.E.2d 85 (1976).

§ 2:9 Disqualification of judge

For procedural factors, see Uniform Superior Court Rule 25.

Under Canon 3E of Code of Judicial Conduct, a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. While not deciding that the judge in instant case should have been disqualified, the defendant should have been permitted to ascertain extent of judge's financial dealing with plaintiff's counsel.¹

For a claim of personal bias or prejudice concerning party, see *Dein v. Mossman*.² Recusal motions as well as the judge's duty to recuse herself sua sponte were topics discussed in *Gude v. State*.³

Trial court properly denied a motion to recuse filed by a homeowner who claimed that the judge was biased based upon family relationship with counsel for the opposing party. The Georgia Court of Appeals concluded it could "not find that 'a fair-minded and impartial person would have a reasonable perception of a judge's lack of impartiality based upon objective facts set forth in the affidavit or reasonable inferences therefrom.'" (citation omitted). Nor does 'the affidavit supporting [Graybill's] recusal motion . . . give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.'"⁴

If a party files a motion to recuse a trial judge and the motion is denied, but it is later determined that the judge should have been disqualified to act in the case, all proceedings after the filing of the motion to recuse are invalid and of no effect.⁵

Trial judge may not preside and make rulings in a case where the judge's son-in-law represents one of the parties without written waiver of such disqualification.⁶

When a motion to recuse is filed, the judge must cease acting on the merits of the case and determine the motion. To disqualify the judge, alleged bias must stem from extrajudicial sources and not from what the judge learned from participating in the case.⁷

In a will contest case, the motion to recuse and supporting affidavit must be filed within five days after the affiant first learns

[Section 2:9]

¹United Banking Co. v. Hendley, 244 Ga. 586, 261 S.E.2d 702 (1979).

²Dein v. Mossman, 244 Ga. 866, 262 S.E.2d 83 (1979).

³Gude v. State, 289 Ga. 46, 709 S.E.2d 206 (2011).

⁴Graybill v. Attaway Construction & Associates, LLC, 341 Ga. App. 805, 802 S.E.2d 91 (2017) (overruled

on other grounds by, SRM Group, Inc. v. Travelers Property Casualty Company of America, 308 Ga. 404, 841 S.E.2d 729 (2020)).

⁵Propst v. Morgan, 288 Ga. 862, 708 S.E.2d 291 (2011).

⁶In re Broome, 245 Ga. 227, 264 S.E.2d 656 (1980).

⁷Henderson v. McVay, 269 Ga. 7, 494 S.E.2d 653 (1998).

of the grounds for disqualification.⁸

A motion to recuse should not be withheld as a fallback position to be asserted only after an adverse ruling.⁹

Recusal motions were comprehensively discussed in *Mayor & Alderman of City of Savannah v. Batson-Cook Co.*¹⁰ The dispute addressed the trial judge's denial of the city's motion to recuse him on the basis that he improperly assigned himself the case when his nephew's law firm was general counsel for Batson-Cook. In adjudicating the issue, the Supreme Court noted that Sup. Ct. R. 25 provides the procedural framework for motions to recuse and Rule 25.3 provides the threshold requirements, i.e., the timeliness of the motion, the legal sufficiency of the affidavits and, assuming any of the facts of the affidavits to be true, whether recusal would be warranted.

Facts alleged in affidavits accompanying motions to recuse raised the appearance of impropriety such that the trial judge's impartiality might reasonably be questioned, supporting recusal or at least assignment of motions to a different judge, in action by city residents challenging rezoning of city property for development. Affidavits alleged that the judge was chairman of a sister organization of one defendant, and charged him with having been appointed by another defendant, that both organizations had similar interests fairly opposed to that of the residents, and urged that the judge himself may have attended a meeting on the topic of the proposed transaction at issue.¹¹

When a motion to recuse a judge has been referred to a second judge, the first judge is no longer qualified to hear any phase of the recusal hearing.¹²

After a legally sufficient motion to recuse has been assigned for hearing, the judge against whom the motion is directed may not oppose the motion.¹³

Bias necessitating recusal at a defendant's retrial was not demonstrated by the fact that the judge had also presided at the first trial and had given the defendant the maximum allowable

⁸*Quarterman v. Quarterman*, 268 Ga. 807, 493 S.E.2d 146 (1997). See also *Henderson v. State*, 295 Ga. 333, 759 S.E.2d 827 (2014) (motion to recuse and supporting affidavit must be filed within five days after the affiant first learns of the grounds for disqualification or must show good cause where the motion was not made within the five days in a criminal prosecution).

⁹*State v. Hargis*, 294 Ga. 818, 756 S.E.2d 529 (2014).

¹⁰*Mayor & Aldermen of City of Savannah v. Batson-Cook Co.*, 291 Ga. 114, 728 S.E.2d 189 (2012).

¹¹O.C.G.A. § 15-1-8; Code of Jud. Conduct, Canon 3, subd. E. *Gillis v. City of Waycross*, 247 Ga. App. 119, 543 S.E.2d 423 (2000).

¹²*Birt v. State*, 255 Ga. 693, 342 S.E.2d 303 (1986).

¹³*Isaacs v. State*, 257 Ga. 126, 355 S.E.2d 644 (1987).

sentence.¹⁴

A motion for recusal must be verified and accompanied by a supporting affidavit.¹⁵

A waiver of disqualification of the judge may occur by implication by proceeding with the trial of the case without objection.¹⁶

A judge is not prohibited from presiding over a criminal case in which the alleged victim is one with whom the judge has worked. The existence of a working relationship in and of itself does not demonstrate or presume personal bias or prejudice on the part of the judge.¹⁷ Nor did the fact that the judge had been a prosecutor in a large district attorney's office require recusal, where there was no showing she worked on defendant's case.¹⁸

In an attorney's fee proceeding arising out of a legal malpractice case, an unrecorded hearing held in the judge's chambers, regarding entry of a confession of judgment on a pending counterclaim and attended by all parties to the counterclaim, was not an ex parte communication with the judge from which the appellant was improperly excluded, since the appellant was not a party to the counterclaim and had already withdrawn as counsel for the malpractice plaintiff.¹⁹

The judge who found the attorney in contempt in the underlying case should have recused himself from hearing the claim for attorney's fees and costs under O.C.G.A. § 9-15-14 against the same attorney.²⁰

It is the duty of trial judge to prevent physical attacks upon defendant in criminal case; this duty extends to protecting counsel for defendant. Where trial judge is notified that defense counsel has been threatened and fails to perform this fundamental duty and shows that his sympathies are with the attackers, he is disqualified from presiding in the case.²¹

A writ of prohibition was filed to bar a particular judge from presiding over a case in *Rice v. Grubbs*.²² The Georgia Supreme Court held that the trial court did not err in denying the writ of prohibition.

Appearance of impropriety resulted when juvenile court judge,

¹⁴Welch v. State, 257 Ga. 197, 357 S.E.2d 70 (1987).

¹⁵Cherry v. Coast House, Ltd., 257 Ga. 403, 359 S.E.2d 904 (1987).

¹⁶In Interest of C.C.C., 188 Ga. App. 849, 374 S.E.2d 754 (1988).

¹⁷Smith v. State, 189 Ga. App. 27, 375 S.E.2d 69 (1988).

¹⁸Gude v. State, 289 Ga. 46, 709 S.E.2d 206 (2011).

¹⁹Bedford, Kirschner & Venker, P.C. v. Goodman, 197 Ga. App. 858, 399 S.E.2d 723 (1990).

²⁰Houston v. Cavanagh, 199 Ga. App. 387, 405 S.E.2d 105 (1991).

²¹Smith v. State, 239 Ga. 477, 238 S.E.2d 116 (1977).

²²Rice v. Grubbs, 281 Ga. 614, 641 S.E.2d 514 (2007).

who was sitting on superior court bench by designation, presided over matter in which the only other juvenile court judge for the circuit represented one of the parties, given that, as the only two juvenile judges in their circuit, judge and counsel for party had to confer regularly about issues pertaining to their court, their respective caseloads, and numerous other confidential matters, and either man's designation to sit as superior court judge had to be ratified by other man.²³

The Georgia Supreme Court reversed a murder conviction because the conduct of the trial judge "raised serious questions concerning his impartiality and gave rise to the appearance of impropriety."²⁴

In another case, the court held that the appearance of impropriety required trial judge to recuse himself from consolidated eminent domain cases, where one condemnee was a judge of the same circuit, and counsel for another condemnee was part-time judge of superior court on designation by trial judge, the chief judge of the circuit.²⁵

To disqualify a trial judge, the alleged bias of the judge must be of such a nature and intensity to prevent the defendant from obtaining a trial uninfluenced by the court's prejudgment.²⁶ To be disqualifying, the alleged bias of a trial judge must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Recusal of the trial judge was not required in a murder prosecution based on the claim that the trial judge had obtained extra-judicial knowledge about another prosecution of defendant during the judge's conversations with defendant's mother. The judge stated that any comments made by defendant's mother were in passing and there was no allegation or evidence in the record that such comments caused the judge to have any bias or prejudice against or in favor of the defendant or the State. Nor did it appear to cause him to form an opinion about defendant's guilt or innocence.

²³Smith v. Guest Pond Club, Inc., 277 Ga. 143, 586 S.E.2d 623 (2003).

²⁴Johnson v. State, 278 Ga. 344, 602 S.E.2d 623 (2004) (when record revealed judge told attorney to "sit down and shut up," Georgia Supreme Court was concerned that this and other incidents created impression of bias

sufficient to warrant judge's recusal).

²⁵Georgia Transmission Corp. v. Dixon, 267 Ga. App. 575, 600 S.E.2d 381 (2004).

²⁶Code of Jud. Conduct, Canon 3(E)(1)(a); Turner v. State, 280 Ga. 174, 626 S.E.2d 86 (2006).

§ 2:10 General conduct of judge

Guidelines for judicial conduct appear in *Johnson v. State*.¹

Remarks of a judge concerning the reason for his ruling are neither an expression of opinion nor a comment on the evidence.² However, during trial it is error for the judge to comment on or express an opinion as to what has or has not been proven.

A magistrate who is also an active member of the State Bar of Georgia must comply with provisions for annual training as required by O.C.G.A. § 15-10-137. Municipal judges must be lawyers under a 2011 legislative enactment. Judges serving prior to June 30, 2011, who are not lawyers may continue to serve under a grandfathering provision, subject to training requirements.³

In federal practice, if a judge presumes to testify in a case he is trying, an automatic objection to the practice is registered on behalf of the party against whom the testimony operates.⁴

The U.S. Supreme Court ruled against a state court judge sitting on a case, in a dispute involving the propriety of state supreme court justice's failure to recuse himself from participation in principal financial supporter's case.⁵

A trial judge did not breach Georgia's statute barring judges from expressing or intimating their opinions on what had or had not been proved when, during the charge conference in an action brought by lessor against lessee alleging lessee breached a provision in the lease requiring lessee to obtain casualty insurance on leased building's structure, the judge purportedly expressed the opinion that evidence did not support an estoppel charge requested by lessee. This remark was not made in the presence of the jury, and the judge submitted the estoppel charge.⁶

The trial court in *Ingram v. State*⁷ did not improperly opine as to the appropriate verdict after a conversation with the jury foreman. The jury returned a finding of guilty on both manslaughter and felony murder and the judge admonished the jury that a finding of the lesser or greater offense would be appropriate. The judge also explicitly told the jury that they could find whatever they wanted based on the evidence presented. The Georgia Supreme Court focused on the trial judge's preservation of issues

[Section 2:10]

¹Johnson v. State, 278 Ga. 344, 602 S.E.2d 623 (2004).

²Johnson v. State, 246 Ga. 126, 269 S.E.2d 18 (1980).

³O.C.G.A. § 36-32-1.1.

⁴Fed. R. Evid. 605.

⁵Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

⁶O.C.G.A. § 9-10-7; Mahsa, Inc. v. Al-Madinah Petroleum, Inc., 276 Ga. App. 890, 625 S.E.2d 37 (2005).

⁷Ingram v. State, 290 Ga. 500, 722 S.E.2d 714 (2012).

of fact from his conversation with the jury, as well as the judge's emphasis on the jury's freedom to rule as it pleased.

It is error for a trial judge in a criminal case to express or intimate his opinion as to what has or has not been proved or as to the guilt of the accused.⁸ However, the statutory provision that is error for a trial judge in a criminal case to express or intimate his opinion as to what has or has not been proved as to the guilt of the accused does not generally extend to colloquies between the judge and counsel regarding the admissibility of evidence. "Thus, where, as here, the trial court interrupts defense counsel to make inquiry concerning the admissibility of testimony or the direction which counsel was going with a particular line of questioning, the court's comments do not constitute an opinion as to the proof or guilt of the accused."⁹

In rape case, trial court was reversed when trial judge expressed his opinion regarding the defendant's guilt during the course of the trial. During defendant's pro se cross-examination of the government principal witness, the judge expressed his belief that the defendant was guilty.¹⁰

Similarly, a judge's "brief musing about defense counsel's strategy," while "unnecessary" and which "should be avoided," was not grounds for reversal.¹¹

Trial court did not impermissibly comment on the evidence when he said during defense counsel's cross-examination, "Well, I mean at some point Sergeant Leisey indicated that he was ultimately responsible for the investigation. However, I think he has made it clear what he did and did not do. So if [trial counsel] wants to meander through this I think [he] has the right to. How effective it is[,] is another question. So I'll overrule the objection." The Supreme Court of Georgia found that such comments "in no way constituted the type of direct comment on the substance or weight of the evidence."¹²

Trial judge who stated during trial that the record should reflect that defendant had been identified by the victim and the witness did not impermissibly comment on the evidence. The Georgia Court of Appeals reasoned that such commentary "is customary language which allows the record, that is, the trial transcript, to accurately reflect aspects of the evidence that are available to the jurors' sensory perception, such as a witness's gestures, but will not be available to future readers of the

⁸O.C.G.A. § 17-8-57.

⁹Butler v. State, 290 Ga. 412, 721 S.E.2d 876 (2012).

¹⁰Jones v. State, 352 Ga. App. 380, 834 S.E.2d 881 (2019).

¹¹Dailey v. State, 297 Ga. 442, 774 S.E.2d 672 (2015).

¹²Dailey v. State, 297 Ga. 442, 774 S.E.2d 672 (2015).

transcript. . . . In context, the trial judge’s ‘the record will so reflect’ served to clarify the victim’s and witness’s words, as they would later be transcribed, not to indicate to the jury whether the State had proved that Crenshaw was the man who visited the victim’s home and, months later, broke in and attacked her.”¹³

Trial court did not improperly comment on evidence when the judge made the following remarks:

And my expectation is that, if you’ll recall, [the prosecutor] made an opening statement about things going on in the swimming pool, and Mr. Ashley allegedly staring at little girls in the pool, and that sort of thing; and I’m assuming that this evidence relates to what [the prosecutor] described in his opening statement that he would prove. And so the law requires me to tell you that you have to limit your consideration of that solely to the issue of, what was Mr. Ashley’s intent at the time the alleged incident at the van occurred. Is everyone clear on that?

The appeals court reasoned that the trial judge simply informed the jury “that the prosecutor was about to present certain evidence mentioned in his opening statement” and “it did not express or intimate the trial court’s opinion as to whether any fact had been or had not been proved.”¹⁴

In *Thompson v. State*,¹⁵ the Georgia Court of Appeals rejected appellant’s claim that the trial court judge improperly commented on the evidence on three different occasions. One such claim concerned comments made when the trial court stated the following, just prior to dismissing the jury so that the state could prepare its witness for examination:

I am tired of us wasting our time because these witnesses have not been talked to and prepared and spend all this time out here with me having to send you back to let the witness read whatever they have to read or talk with whoever they are going to talk to, so don’t discuss this case with each other or anybody else or allow anybody to discuss it with you.

Both Georgia’s appellate courts and its General Assembly addressed restrictions on judicial comment from the bench at trial in 2014 and 2015. Finding the language of O.C.G.A. § 17-8-57 “mandatory,” with any violation requiring “a new trial regardless of whether there has been any showing of actual prejudice to the defendant,” a divided Georgia Supreme Court reversed a murder conviction in *Rouse v. State*.¹⁶ *Rouse* involved a preliminary remark to the venire that the offenses occurred in the forum

¹³Crenshaw v. State, 341 Ga. App. 406, 801 S.E.2d 92 (2017).

¹⁴Ashley v. State, 340 Ga. App. 539, 798 S.E.2d 235 (2017).

¹⁵Thompson v. State, 349 Ga. App. 1, 825 S.E.2d 413 (2019).

¹⁶Rouse v. State, 296 Ga. 213, 765 S.E.2d 879 (2014).

county. That case served as the basis to reverse another murder conviction in a 2015 case where the trial court, again prior to the introduction of evidence, mentioned the venue of the offense.¹⁷ Clearly in the wake of *Rouse*, the Georgia General Assembly amended O.C.G.A. § 17-8-57, effective July 1, 2015, imposing objection requirements and allowing for curative instructions.¹⁸

In *Jones v. State*,¹⁹ the Supreme Court of Georgia found that the trial court did not commit plain error in violation of O.C.G.A. § 17-8-57 when the judge stated after the conclusion of a witness's testimony: "Let's take a quick break. I think that was weighty testimony, we deserve a stretch break; do we not? Let's do that."

In a civil case, comment in front of a jury is discouraged. However, the prohibition against judges commenting on witness testimony is meant to apply to comments made by a judge in front of a jury, not to comments made by a judge in a bench trial, since the purpose behind the prohibition is to prevent the jury from being influenced.²⁰

Violation of the "judicial no comment" rule occurred in *Murphy v. State*.²¹ The violation was deemed to be plain error, and the conviction reversed.

In contrast, there was no violation of the no comment rule in *Burney v. State*, where the judge said before the jury, "I think we've heard from the witnesses, the eyewitnesses themselves where people were. I haven't heard any conflicting testimony about that." Concluding that there was no violation, the court reasoned:

The trial court made the comment in the course of sustaining co-defendant Stillwell's objection to the prosecutor's questioning of a police detective who investigated the case about diagrams and photographs purporting to show the locations of individuals at the time of the shooting. . . . [F]ormer OCGA § 17-8-57 "does not generally extend to colloquies between the judge and counsel regarding the admissibility of evidence," because "remarks of a judge assigning a reason for his ruling are neither an expression of opinion nor a comment on the evidence." Moreover, in context, it is clear that the trial court was not suggesting its opinion as to Appellant's presence at the crime scene or indeed as to where any particular person was, or even who the "people" were. Instead, the court was explaining that the detective need not repeat what he learned from eyewitnesses to the crimes.²²

Judges carrying firearms, see O.C.G.A. § 16-11-130.

¹⁷*Sales v. State*, 296 Ga. 538, 769 S.E.2d 374 (2015).

¹⁸Ga. Laws 2015 Act 174.

¹⁹*Jones v. State*, 304 Ga. 594, 820 S.E.2d 696 (2018).

²⁰*Shaw v. Shaw*, 290 Ga. 354, 720 S.E.2d 614 (2012).

²¹*Murphy v. State*, 290 Ga. 459, 722 S.E.2d 51 (2012).

²²*Burney v. State*, 299 Ga. 813,

Judges have a responsibility to see that court processes are not abused by attorneys or parties. Sometimes this responsibility is discharged by enforcing the doctrine of judicial estoppel. The purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.²³ Because it is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion. Judicial estoppel is a common-law doctrine, and there is no indication it is constitutionally mandated.²⁴

§ 2:11 Demeanor of judge

The Georgia Supreme Court reversed a murder conviction because the conduct of the trial judge “raised serious questions concerning his impartiality and gave rise to the appearance of impropriety.”¹

The judge should refrain from remarks that will injure a litigant,² and she should refrain from conveying to the jurors by word and deed, her opinions on ultimate factual matters, the credibility of witnesses and the weight to be given to their testimony.³ The judge should never express an opinion on any controverted question of fact.⁴ Any personal expression of opinion by the trial court as to what has or has not been proved during the course of a trial is reversible error.⁵

To constitute an improper comment, under O.C.G.A. § 17-8-57, the trial court’s statement must express an opinion about whether the evidence has proven a material issue in the case, whether a witness was credible, or whether the defendant was guilty.⁶ This rule does not generally extend to colloquies between the judge and counsel regarding the admissibility of evidence. Furthermore, remarks of a judge assigning a reason for his ruling are neither an expression of opinion nor a comment on the evidence.⁷

792 S.E.2d 354 (2016) (citations omitted).

²³Roberts v. State, 278 Ga. 610, 604 S.E.2d 781 (2004).

²⁴See also § 2:1, supra.

[Section 2:11]

¹Johnson v. State, 278 Ga. 344, 602 S.E.2d 623 (2004) (when record revealed judge told attorney to “sit down and shut up,” Georgia Supreme Court was concerned that this and other incidents created impression of bias

sufficient to warrant judge’s recusal).

²Am. Jur. 2d, Trial §§ 180, 272, 273.

³O.C.G.A. § 9-10-7.

⁴O.C.G.A. § 17-8-57.

⁵McMillan v. State, 253 Ga. 520, 322 S.E.2d 278 (1984).

⁶Spearman v. State, 294 Ga. 402, 754 S.E.2d 37 (2014).

⁷McNeal v. State, 326 Ga. App. 429, 756 S.E.2d 660 (2014).

In *Gibson v. State*,⁸ Gibson contended on appeal that the trial court erred by referring to the appellate review of his case when responding to a jury question about trial exhibits that were not sent out with the jury. The Supreme Court agreed, finding that the judge's statements improperly referenced appellate review when the judge said if he gave the jury certain exhibits "we would have to try the case all over again [I]t would be reversible error for me to give you all the exhibits." Since violations of O.C.G.A. § 17-8-57 are subject to plain error review, the absence of an objection did not prevent reversal of Gibson's conviction of murder.

Although, a trial judge's vocal emphasis is not reviewable on appeal, nevertheless, an appellant's contentions regarding derogatory and prejudicial vocal emphasis, facial expressions, or other bodily demeanor on the part of a trial judge will be reviewable on appeal if the appellant has completed a record which will enable the appellate court to review his contentions. A reviewable record at a minimum must demonstrate the demeanor or conduct of the trial judge that is in question, a timely objection thereto, and how the rights of the complaining party were prejudiced. An attorney could attempt to make such a record, for instance, by calling as witnesses people who were in the courtroom at the time of the incident in question and questioning them as to the trial judge's demeanor.⁹

A comment by the judge indicating his irritation with a party's refusal to mediate the dispute does not indicate the type of personal bias necessitating recusal.¹⁰

In *Hightower v. State*,¹¹ the Georgia Supreme Court found that the trial judge did not commit plain error when the court made the following comments to the jury after the prosecution requested that the court find that a forensic pathologist was qualified to render an expert opinion: "She is an expert. Remember, I told you that experts, in weighing their testimony, you're not required to accept any testimony, expert or otherwise, but the doctor is a frequent witness in Fulton Court."

The Georgia Supreme Court held in a judicial disciplinary proceeding that a judge who makes and engages in intemperate, discourteous and injudicious language, comments, and conduct, who fails and refuses to hear material evidence and/or witnesses, and demonstrates manifest bias, commits judicial misconduct

⁸*Gibson v. State*, 288 Ga. 617, Atlanta, 260 Ga. 699, 398 S.E.2d 567 706 S.E.2d 412 (2011). (1990).

⁹*Milhouse v. State*, 254 Ga. 357, 329 S.E.2d 490 (1985).

¹¹*Hightower v. State*, 304 Ga. 755, 822 S.E.2d 273 (2018).

¹⁰*Department of Transp. v. City of*

warranting permanent bar from active service as senior judge, in light of prior misconduct and discipline.¹²

A trial judge should have disqualified himself in a prosecution of the defendant for bribery where, during his former tenure as district attorney, he had authorized an investigation of the criminal activities of the defendant.¹³

The judge in a murder case did not err when, in the presence of the jury, he asked the prosecutor if the state was seeking the death penalty.¹⁴

However, judges are not allowed to communicate with the jury when the lawyers are not present during deliberations.¹⁵ Accordingly, trial courts are required to (1) have jurors' communications submitted to the court in writing; (2) mark the written communication as a court exhibit in the presence of counsel; (3) afford counsel a full opportunity to suggest an appropriate response; and (4) make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications counsel deems appropriate before the jury is exposed to the instruction.¹⁶

In an equity case a judge may seek a jury's aid as a fact finding body, but this does not abrogate his responsibility to make factual findings and apply them to the law.¹⁷

A trial judge erred in not referring to another judge the matter of his possible disqualification for alleged personal bias.¹⁸

Responding to defense counsel's inquiry whether the trial judge could produce a case in support of his ruling on a voir dire question, the trial court judge stated that he would give counsel a case on that point and would be delighted to orient counsel on any of the law as soon as counsel completed the case. The court's statement was made in response to counsel's objection to the court's ruling denying a voir dire question and was neither an expression of opinion nor a comment on the evidence.¹⁹

A 45-day suspension was warranted for a judge's informal discussions with the attorney for a party before a rule nisi hearing, as well as for his prior violation of the same Canon for which

¹²Matter of Inquiry Concerning a Judge No. 1496, 261 Ga. 537, 407 S.E.2d 743 (1991).

¹³King v. State, 246 Ga. 386, 271 S.E.2d 630, 16 A.L.R.4th 545 (1980).

¹⁴Walker v. State, 255 Ga. 251, 336 S.E.2d 752 (1985).

¹⁵See Phillips ex rel. Hector v. Harmon, 328 Ga. App. 686, 760 S.E.2d 235 (2014).

¹⁶Grant v. State, 295 Ga. 126, 757 S.E.2d 831 (2014).

¹⁷Sanders v. Stone, 255 Ga. 704, 342 S.E.2d 318 (1986).

¹⁸Central of Georgia R.R. v. Lightsey, 189 Ga. App. 44, 374 S.E.2d 787 (1988).

¹⁹Wilson v. State, 259 Ga. 55, 376 S.E.2d 676 (1989).

he had been suspended for 15 days.²⁰

It is proper for the judge to encourage settlement, but not to force a settlement, and his efforts in this regard should not be in the presence of the jury.²¹

A trial court erred in failing to charge the jury, upon written request of defendant to do so, that defendant's failure to testify in her own favor shall not create presumption against her.²²

§ 2:12 Duty to preserve order

The judge has the power and the duty to preserve order, enforce obedience to lawful orders and process, and to control witnesses and the conduct of counsel.¹ He is not a mere moderator but is the governor of the trial for the purpose of assuring its proper conduct and the fair and impartial administration of justice between the parties.²

In conducting the trial he should take all steps reasonably necessary to assure an orderly trial and to keep it within bounds prescribed by decency and the ordinary rules of good conduct.³

In *Csehy v. State*,⁴ the Georgia Court of Appeals noted that "a court's inherent 'power to control the proceeding of the court is subject to the proviso that in so doing a judge does not take away or abridge any right of a party under the law.'" Accordingly, this includes a court-ordered urine test which violates a defendant's Fourth Amendment rights.

Mistrial was not warranted after the defendant had an outburst in front of the jury. The Supreme Court of Georgia reasoned: "Faced with Green's disruptive conduct, the trial judge admonished Green several times to stop, warned him he would be removed if he did not, and was finally compelled to remove Green when he began pronouncing that he was a danger to society. The judge then offered the jury a brief explanation for what had occurred. The court's response to Green's outburst was reasonable and within its discretion."⁵

The trial judge is charged with ensuring that the rules of evidence and procedure are followed, and that the proceedings are both orderly and fair. There is a duty of fairness. When a judge

²⁰Matter of Inquiry Concerning a Judge No. 1228, 259 Ga. 146, 378 S.E.2d 115 (1989).

²¹Am. Jur. 2d, Trial § 287.

²²Lay v. State, 242 Ga. 225, 248 S.E.2d 611 (1978).

[Section 2:12]

¹Am. Jur. 2d, Trial § 180.

²Am. Jur. 2d, Trial §§ 180, 272, 273.

³Atlanta Newspapers, Inc. v. Grimes, 216 Ga. 74, 114 S.E.2d 421 (1960).

⁴Csehy v. State, 346 Ga. App. 747, 816 S.E.2d 833 (2018).

⁵Green v. State, 300 Ga. 707, 797 S.E.2d 863 (2017).

shows a lack of impartiality and bias, this can result in reversal.⁶

The judge has a duty to maintain the proper decorum within the bar. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and jury. The court should take any necessary steps to avoid commotion within the bar.⁷

See § 2:15, *infra*, for the regulation of publicity and the action of news gatherers during the trial.

It is the duty of trial judge to prevent physical attacks upon the defendant in a criminal case; this duty extends to protecting counsel for the defendant. Where trial judge is notified that the defense counsel has been threatened and fails to perform this fundamental duty and shows that his sympathies are with the attackers, he is disqualified from presiding in the case.⁸

Management of difficult defendants was the subject of *Weldon v. State*,⁹ where the Court of Appeals ruled the trial court did not properly exercise discretion in the manner in which he controlled the defendant. Although binding and gagging a defendant may be constitutionally acceptable in certain circumstances, it is likely to have a significant prejudicial impact upon the jury. This remedy is less preferable than removing the accused from the courtroom. The appellate court expressed concern about much of the disruption occurring in the presence of the jury, including the judge's order to courtroom personnel: "Go get the chain and the gags."

Courts have wide latitude to deal with security threats at trial. The Supreme Court of Georgia found that a trial court did not abuse its discretion when it required a defendant to wear a "shock sleeve" during trial. The Court reasoned that there was no indication that the jury was aware of the sleeve, it did not infringe upon the defendant's ability to confer with his attorney, and it did not compromise his ability to focus upon the trial.¹⁰

Trial court did not abuse its discretion when it ordered that a defendant be shackled during trial. Shackling a defendant should

⁶*Johnson v. State*, 278 Ga. 344, 53 S.E.2d 116 (1977).
602 S.E.2d 623 (2004).

⁷*Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

⁸*Smith v. State*, 239 Ga. 477, 238 S.E.2d 522 (2015).

⁹*Weldon v. State*, 247 Ga. App. 17, 543 S.E.2d 56 (2000).

¹⁰*Weldon v. State*, 297 Ga. 537, 775 S.E.2d 522 (2015).

be imposed “as a last resort.”¹¹ “But the court has the discretion to resort to shackling, under some circumstances, where ‘an essential state interest [is] furthered. . . [and where] less restrictive, less prejudicial methods of restraint were considered.’ ”¹²

In *Allen v. State*,¹³ the court found that a “deputy’s instruction [to the defendant during trial] was [not] so inherently prejudicial as to pose an unacceptable threat to [the defendant’s] right to a fair trial.” There, the deputy instructed the defendant to face forward (as opposed to facing the jury and prosecutors). The deputy explained that this request was made for security reasons.

Control of defendants during criminal trial, see § 4:2, *infra*.

Judge did not abuse discretion in failing to restrict the number of police officers in the courtroom, their presence not constituting intimidation of jurors.¹⁴

Under Georgia’s 2013 Evidence Code, the related authority to control the mode and order of examination of witnesses is addressed at O.C.G.A. § 24-6-611.

§ 2:13 Exclusion of public

A criminal defendant’s Sixth Amendment right to a public trial can be violated if the trial court excludes the public from the voir dire of prospective jurors, even if that the trial court had an overriding interest in closing voir dire, if it failed to consider all reasonable alternatives to closure. In order to close a criminal trial to the public, the moving party must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.¹

Although it permitted the news media to remain, a trial court erred in excluding the general public from a trial where the court did not make written findings of fact and conclusions of law concerning the necessity for such closure.²

¹¹*Illinois v. Allen*, 397 U.S. 337(I), 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

¹²*Munn v. State*, 313 Ga. 716, 873 S.E.2d 166 (2022).

¹³*Allen v. State*, 345 Ga. App. 599, 814 S.E.2d 740 (2018).

¹⁴*Lemley v. State*, 245 Ga. 350, 264 S.E.2d 881 (1980).

721 (2010).

The *Presley* case was followed in *Purvis v. State*, 288 Ga. 865, 708 S.E.2d 283 (2011) (exclusion of family members), and *Martinez v. State*, 318 Ga. App. 254, 735 S.E.2d 785 (2012) (objection by defense required).

²*Stephens v. State*, 261 Ga. 467, 405 S.E.2d 483 (1991).

[Section 2:13]

¹*Presley v. Georgia*, 130 S. Ct.

It is the duty of a trial judge, upon request, to enter a written closure order with findings of fact.³

The Georgia Constitution provides that criminal proceedings “shall” be open to the public.⁴ The Supreme Court of Georgia qualified this provision when it held that a criminal proceeding in a Georgia court shall be open to the public and the press, unless the defendant in the proceeding is able to demonstrate on the record by clear and convincing proof that closing the proceeding is the only means by which a clear and present danger to his right to a fair trial or other right can be avoided.⁵

Suppose a judge is considering closure, but the defendant is uneasy with this approach. Duties inure to a defendant when the accused opposes closing a courtroom. The improper closing of a courtroom is a structural error requiring reversal only if the defendant properly objected at trial and raised the issue on direct appeal.⁶

Civil defendants in Georgia do not appear to possess a constitutional right to a public trial. Presiding judges in state court may, at their own motion or at the motion of one or both of the parties, clear the courtroom of all or any portion of the audience in cases in which the evidence is vulgar and obscene or relates to improper sexual acts and tends to debauch the morals of the young.⁷ It appears that by negative implication all other civil proceedings are presumptively open.

In a juvenile delinquency proceeding, an attorney who requested and was granted a continuance was no longer a party to the case and was properly excluded under the Uniform Rules for the Juvenile Courts, which provides that the general public shall be excluded from juvenile court hearings.⁸

Federal courts have distinguished between total and partial closures of proceedings. In a partial closure, where access to the courtroom is retained by some spectators (such as representatives of the press or the defendant’s family members), a court need merely find a “substantial” reason for the partial closure, rather than the “compelling” reason that is required to justify a

³Grier v. State, 257 Ga. 539, 361 S.E.2d 379 (1987).

⁴Ga. Const. 1983 Art. 1, Sec. 1 Para. XI.

⁵Georgia Television Co. v. State, 257 Ga. 764, 363 S.E.2d 528 (1988) (citing R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (1982)).

⁶Reid v. State, 286 Ga. 484, 690 S.E.2d 177 (2010).

⁷O.C.G.A. § 9-10-3.

⁸In Interest of C.C.C., 188 Ga. App. 849, 374 S.E.2d 754 (1988). Access to juvenile court proceedings, see Juvenile Court Rule 26.1.

complete closure.⁹

Though a defendant has a right to a public trial that is protected by the Sixth Amendment and the Georgia Constitution, the right is not absolute. An exception is found in O.C.G.A. § 17-8-54, which provides:

when any person under the age of 16 is testifying concerning any sexual offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, victim assistance coordinators, victims' advocates, and such other victim assistance personnel as provided for by Code Section 15-18-14.2, jurors, newspaper reporters or broadcasters, and court reporters.¹⁰

In *Spikes v. State*,¹¹ the Georgia Court of Appeals found that the trial court erred in closing the courtroom in a rape and child molestation case, entitling defendant to a new trial. When the victim was announced as a government witness, the court, over the defendant's objection, ordered that the courtroom be cleared, with the exception of the defendant's mother and a few additional court personnel. The Court of Appeals found that the trial court effectuated not a partial closure, but one akin to a total closure. It noted that the trial court failed to make case-specific findings, stating "a trial court's findings must be specific enough that a reviewing court can determine whether the closure order was properly entered."

§ 2:14 Exclusion of news media

A newspaper filed a request for permission to use a still camera in coverage of a trial in a prosecution for murder. The trial judge denied the request. The newspaper appealed, and the Supreme Court, Sears, C.J., held that allowing the newspaper to use still cameras was warranted at trial. Since the trial court had barred photographs, that decision of the trial court was reversed. The Supreme Court held that in ruling on a request for electronic and photographic coverage of judicial proceedings, a trial court should bear in mind the state's policy favoring open judicial proceedings.¹ Although the decision whether to allow electronic and photographic coverage of a trial is within the discretion of the trial court, if a trial court denies such coverage, there must be a factual

⁹Jackson v. State, 339 Ga. App. 313, 793 S.E.2d 201 (2016); U.S. v. Flanders, 752 F.3d 1317, 1337 (11th Cir. 2014).

¹⁰Hicks v. State, 366 Ga. App. 599, 884 S.E.2d 16 (2023).

¹¹Spikes v. State, 353 Ga. App.

454, 838 S.E.2d 121 (2020).

[Section 2:14]

¹O.C.G.A. § 15-1-10.1; Uniform Superior Court Rule 22(P); Morris Communications, LLC v. Griffin, 279 Ga. 735, 620 S.E.2d 800 (2005).

basis in the record that supports the denial.

A written motion for closure must be supported at the hearing by the movant by evidence constituting clear and convincing proof that no available means other than closure of the hearing will serve to protect the right of the movant. The hearing on the motion must be open, reported, and transcribed. The movant need not be a formal party to the criminal proceeding.²

Is clear and convincing proof required? See *WALB-TV, Inc. v. Gibson*,³ where the allowance of electronic media coverage of a murder trial was deemed to be a matter for the trial court's discretion, and under O.C.G.A. § 15-1-10.1 there is not a requirement that closure be shown to be necessary by clear and convincing evidence.⁴

O.C.G.A. § 15-1-10.1 provides standards to be considered before a request for televising, videotaping or motion picture filming of judicial proceedings is granted. Factors such as the consent or objection of the parties or witnesses who will provide testimony, the impact upon the administration of the courts, any special circumstances such as the need to protect children, and other considerations are listed. The provision concludes: "The court in its discretion may grant requests [for televising or filming] made under this Code section for all or portions of judicial proceedings."

Rule 22 of the Uniform Superior Court Rules also governs electronic and photographic news coverage of judicial proceedings. A 2014 decision concerns the application of both Uniform Superior Court Rule 22 and O.C.G.A. § 15-1-10.1. In *McLaurin v. Ott*,⁵ the Georgia Court of Appeals admonishes strongly against courts attempting to divine what individuals or entities might constitute "legitimate" news media for access purposes.

While the objection of a party or a witness is a factor for the trial court to consider in making its discretionary determination under the statute, it does not control the determination. Consent is not a prerequisite to the trial court's decision to allow televising of proceedings.⁶

In *WALB-TV, Inc. v. Gibson*,⁷ the allowance of electronic media coverage of a murder trial was deemed to be a matter for the trial court's discretion, and under O.C.G.A. § 15-1-10.1 there is not a requirement that closure be shown to be necessary by clear and convincing evidence.

²R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (1982).

³WALB-TV, Inc. v. Gibson, 269 Ga. 564, 501 S.E.2d 821 (1998).

⁴Compare Stinski v. State, 286 Ga. 839, 691 S.E.2d 854 (2010).

⁵McLaurin v. Ott, 327 Ga. App. 488, 759 S.E.2d 567 (2014).

⁶Smith v. Gwinnett County, 270 Ga. 424, 510 S.E.2d 525 (1999).

⁷WALB-TV, Inc. v. Gibson, 269 Ga. 564, 501 S.E.2d 821 (1998).

A closure order must provide that the portion of the hearing closed shall be reported and transcribed and made available to the media and public as soon as the prejudicial effect which caused the closure no longer exists.⁸

Trial court did not err in capital murder case by denying defendant's motions seeking to limit media publicity of his case, since the defendant presented no clear and convincing proof that closure of his trial proceedings was necessary in addition to the change of venue actually granted by the trial court.⁹

Closure orders must be narrowly drawn and strictly construed in favor of open hearings. It must only be entered pursuant to written findings of fact fully articulating the alternatives to closure considered by the trial court and the reasons why such alternative would not afford the movant an adequate remedy. These requirements cannot be avoided by agreement between the State and the defendant.¹⁰

§ 2:15 Publicity before and during trial

Where undue publicity has affected the prospective members of the trial jury, there are a number of remedies including change of venue upon proper application, granting a continuance to the defendant to allow emotions to cool off, and other resolutions.

The defendant in *Heidt v. State*¹ alleged that significant “gossip, rumor, and innuendo” about the defendant’s alleged affair infringed upon his right to an impartial jury. However, the defendant failed to show that the affair became an issue at trial. The defendant argued that a large number of excused jurors for cause showed inherent prejudice from pretrial publicity. But the court noted that 10% of an eligible jury pool excused for such reasons is “well below the rate that would indicate actual prejudice rendering a fair trial impossible.”

Where only newspaper clippings were presented with a motion for change of venue and voir dire examination included questions on any possible prejudice from those articles, trial court did not err in denying the motion.²

The Supreme Court of Georgia found that trial court did not err in denying a mistrial motion based upon allegations that the prosecutor had violated a gag order. The prosecutor had allegedly

⁸R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (1982). [Section 2:15]

⁹Stinski v. State, 286 Ga. 839, 691 S.E.2d 854 (2010).

¹⁰R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (1982).

¹Heidt v. State, 292 Ga. 343, 736 S.E.2d 384 (2013).

²Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975).

commented to the media regarding the defendant's motive.³

In *WXIA-TV v. State*,⁴ the Georgia Supreme Court found that a gag order imposed on the prosecutors and defense attorneys (among others) was an unconstitutional restraint upon speech. The court reasoned, in part, that “the record . . . [did] not demonstrate any likelihood that the persons to whom the modified gag order [was] directed would make prejudicial statements.”

Although jurors read pretrial publicity, no error in denying motion for change of venue where jurors indicated they could render verdict based on evidence produced in court.⁵

Although several jurors read pretrial publicity and discussed the case, the judge did not err in denying a motion for change of venue, a motion which addressed itself to the sound discretion of the court where the record of voir dire examination showed that jurors had not formed opinions or become prejudiced by the pretrial publicity.⁶

The test as to whether pretrial publicity has so prejudiced a case that an accused cannot receive a fair trial is whether the jurors summoned to try the case have formed a fixed opinion as to the guilt or innocence of the accused from reading such publicity.⁷ Where out of 62 jurors only one stated that he would be unable to put aside any prejudice arising out of pretrial publicity (1.6 per cent dismissal rate), there was no such prejudicial publicity as would require a change of venue.

Georgia had followed the *Berryhill* standard,⁸ which stated the proper test as to whether the prospective juror “can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” A new standard was announced in 1991. Trial courts are to order change of venue for death penalty trials in those cases in which the defendant can make a substantive showing of likelihood of prejudice by reason of extensive publicity.⁹

The possibility that television coverage of judicial proceedings may “stifle, inhibit, frustrate or prevent” the Socratic dialogue beneficial to the free exchange of ideas between court and counsel is not an adequate basis for denial of electronic media coverage unless it results in the denial of due process of law or detracts from the dignity and decorum of the court. Additionally, the lack

³Allen v. State, 296 Ga. 785, 770 S.E.2d 824 (2015).

⁴WXIA-TV v. State, 303 Ga. 428, 811 S.E.2d 378 (2018).

⁵Smith v. State, 245 Ga. 205, 264 S.E.2d 15 (1980).

⁶Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980).

⁷Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982).

⁸Berryhill v. State, 249 Ga. 442, 291 S.E.2d 685 (1982) (overruled on other grounds by, O'Kelley v. State, 284 Ga. 758, 670 S.E.2d 388 (2008)).

⁹Jones v. State, 261 Ga. 665, 409 S.E.2d 642 (1991).

of newsworthiness of a court proceeding cannot constitute a basis for denial of electronic media coverage.¹⁰

For a discussion of the control by the court of the proceedings, through the use of a pretrial order, see § 2:24, *infra*. For the effect of newspaper reading by jurors, see § 36:4, *infra*.

§ 2:16 Judge's control of examination of witnesses

*Williams v. U.S.*¹ held that a trial judge's repeated admonitions to prosecutors that their witness examinations were unduly time-consuming was both authorized and did not deprive the defendants of a fair trial.

The judge may give the witness an opportunity to explain his testimony.²

As a general rule, no more than one attorney for each party may examine or cross-examine a witness.

In *United States v. Khan*,³ the 11th Circuit delineated four factors that should be considered when ascertaining whether a district court abused its discretion in denying a continuance to obtain testimony: "(1) the diligence of the moving party in obtaining the testimony; (2) the probability of obtaining the testimony within a reasonable time; (3) the specificity with which the defense was able to describe the witness's expected knowledge or testimony; and (4) the nature of the proffered testimony, that is, the degree to which such testimony was expected to be favorable to the accused, and the unique or cumulative nature of testimony." On appeal it was alleged that the trial judge abused its discretion when it denied a continuance request to obtain testimony from Pakistan after a live video conferencing feed had failed. The 11th Circuit found that the circumstances, viewed in their totality, indicated that the district court did not abuse its discretion when it denied defendant's motion to continue.

The court has discretion whether to permit a witness to be recalled for further examination.⁴ The trial court has a wide discretionary latitude in controlling the examination of witnesses, and unless there is a manifest abuse of this discretion, an objection will not work a reversal of the case.⁵

Under Georgia's 2013 Evidence Code, the related authority to

¹⁰*Georgia Television Co. v. Napper*, 258 Ga. 68, 365 S.E.2d 275 (1988).

[Section 2:16]

¹*Williams v. U.S.*, 314 A.3d 1158 (D.C. 2024).

²*Kellar v. State*, 226 Ga. 432, 175 S.E.2d 654 (1970).

³*U.S. v. Khan*, 794 F.3d 1288 (11th Cir. 2015) (internal quotes omitted).

⁴*Morris v. State*, 228 Ga. 39, 184 S.E.2d 82 (1971).

⁵*Sillah v. State*, 291 Ga. App. 848, 663 S.E.2d 274 (2008).

control the mode and order of examination of witnesses is addressed at O.C.G.A. § 24-6-611.

§ 2:17 Limiting number of witnesses

Generally, the judge cannot limit the number of witnesses to a main, controlling, and controverted fact or issue.¹ However, the trial court did not err, in a prosecution for two counts of child molestation, by limiting the number of character witnesses defendant could call, where court allowed defendant to call 12 witnesses, and when defendant indicated he had 12 more witnesses, the state offered to stipulate that additional witnesses would also say that defendant's character and reputation were good and defendant voiced no objection.²

Georgia Rule of Evidence 611(a) is patterned after its federal counterpart and vests in trial courts the power to reasonably control "the mode and order of interrogating witnesses and presenting evidence[.]"³ Federal decisions recognize, however, that Rule 611(a) does not, in-and-of-itself, authorize exclusion of evidence.⁴

In a battery proceeding, the trial judge erroneously excluded evidence relevant to defendant's exculpatory theory.⁵

The Georgia rule favors the admissibility of any relevant evidence, even though it is of slight probative value.⁶

In federal practice, limitation of redundant, cumulative evidence is accomplished under Fed. R. Evid. 403.⁷ In the 2013 Georgia Evidence Code, a similar provision is located in O.C.G.A. § 24-4-403. In the 2013 Georgia Evidence Code, see O.C.G.A. § 24-1-105.

§ 2:18 Ruling on admissibility of evidence

The admissibility of evidence is a question of law for the court.¹

[Section 2:17]

¹Williams v. Colonial Pipeline Co., 220 Ga. 381, 139 S.E.2d 308 (1964).

²Mayo v. State, 261 Ga. App. 314, 582 S.E.2d 482 (2003).

³O.C.G.A. § 24-6-611(a). See also Fed. R. Evid. 611(a).

⁴See U.S. v. Colomb, 419 F.3d 292 (5th Cir. 2005).

⁵Baker v. State, 246 Ga. 317, 271 S.E.2d 360 (1980).

⁶Baker v. State, 246 Ga. 317, 271

S.E.2d 360 (1980).

⁷Lutz v. Glendale Union High School, 403 F.3d 1061, 1071, 61 Fed. R. Serv. 3d 629 (9th Cir. 2005) (district courts have broad authority to limit the number of witnesses on a particular point to avoid cumulative evidence).

[Section 2:18]

¹Brock v. State, 206 Ga. 397, 57 S.E.2d 279 (1950). See also U.S. v. Yida, 498 F.3d 945, 74 Fed. R. Evid. Serv. 234 (9th Cir. 2007).

Pursuant to O.C.G.A. § 24-1-103, a trial court's evidentiary rulings are reviewed under an abuse of discretion standard of review, and "even where an abuse of discretion is shown, there are no grounds for reversal if the error did not affect a 'substantial right,' and thus harm," the opposing party.² In a 2023 opinion reversing a trial court's exclusion of flight-related evidence and statements in a homicide prosecution, the Supreme Court of Georgia explained that applying an incorrect legal standard creates an abuse of discretion.³

Decisions construing Georgia's former Evidence Code held that an abuse of discretion is generally the only basis for overruling a trial court's judgment as to evidence's relevancy; the existence of such an abuse may be measured by weighing the challenged evidence's probative value against the risk that its admission misled the jury or created a substantial danger of unfair prejudice or confusion.⁴

What about where counsel fails to make an objection on an item of evidence? If a party fails to raise the specific objection at trial that it raises on appeal, those claims of error may only be reviewed for plain error under O.C.G.A. § 24-1-103.⁵ To demonstrate plain error, litigants must satisfy a demanding standard:

To establish plain error, Appellant must show (1) an error that was not affirmatively waived, (2) that the error was "clear and obvious," and (3) that the error affected his "substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings." If Appellant made such a showing, we would have discretion to remedy the error, but "only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."⁶

The court also has the right and duty to pass on questions of fact that are incidental to a determination of the admissibility of evidence. Examples of situations where the court must pass on the facts necessary to determine the competency of a witness to testify, and the admissibility of various kinds of evidence, abound throughout this Handbook.

In federal practice, questions concerning the qualifications of a

²*Venturino v. State*, 306 Ga. 391, 830 S.E.2d 110 (2019). See also *U.S. v. Jackson-Randolph*, 282 F.3d 369, 58 Fed. R. Evid. Serv. 417, 2002 FED App. 0066P (6th Cir. 2002) ("Broad discretion is given to district courts in determinations of admissibility based on considerations of relevance and prejudice, and those decisions will not be lightly overruled.").

³*State v. Brinkley*, 316 Ga. 689, 889 S.E.2d 787 (2023).

⁴*Tucker Nursing Center, Inc. v. Mosby*, 303 Ga. App. 80, 692 S.E.2d 727 (2010).

⁵*Morton v. State*, 306 Ga. 492, 831 S.E.2d 740 (2019).

⁶*Moore v. State*, 306 Ga. 500, 831 S.E.2d 736 (2019).

person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the judge under Fed. R. Evid. 104(a).⁷

O.C.G.A. § 24-1-104, establishes the basics for preliminary trial court rulings on evidentiary matters.⁸ Georgia Rule of Evidence 104, which closely adheres to its federal counterpart, Fed. R. Evid. 104, allows for the introduction of otherwise inadmissible evidence in hearings aimed at determining the admissibility of evidence.⁹ Privilege rules, however, continue to apply to such proceedings.

What about the common practice of lawyers providing proposed orders? The Supreme Court of Georgia has addressed the responsibility of trial judges delivering evidentiary rulings in an opinion reversing the pretrial exclusion of incriminating evidence in a homicide prosecution where “the trial court failed to fulfill its duty to memorialize in writing its oral rulings”:

A trial court may—and routinely does—request, or even mandate, that a party submit a proposed order memorializing the court’s oral rulings. But such requests will not absolve the trial court of its duty to issue written orders; the ultimate responsibility for entering a written order rests with the trial court.¹⁰

Given the fact that in 2013 Georgia adopted a new Evidence Code with many new rules enacted and old provisions eliminated, the question of whether prior evidence law will apply will face Georgia’s bench and bar for the coming years.¹¹ *Stratacos v. State*¹² admonishes that counsel should be attuned to where statutes have changed, prior to applying prior Georgia evidence precedent. Underscoring *Stratacos* is the preamble of the 2013 Evidence Code that encourages deference to federal holdings on corresponding Evidence Code provisions, with particular attention to the decisions of the Eleventh Circuit Court of Appeals.¹³

2015 cases of the Georgia Supreme Court embraced that preamble and moved Georgia evidence jurisprudence in the direction of *Stratacos*. In *Parker v. State*,¹⁴ Justice Nahmias adeptly observed:

⁷In *re Intern. Management Associates*, 781 F.3d 1262 (11th Cir. 2015).

⁸See *Kirkland v. State*, 318 Ga. 639, 898 S.E.2d 536 (2024).

⁹*Wilson v. State*, 312 Ga. 174, 860 S.E.2d 485 (2021).

¹⁰*State v. Harris*, 316 Ga. 272, 888 S.E.2d 50 (2023).

¹¹Members of Georgia’s bench and

bar should also remain vigilant to changes to the Federal Rules of Evidence that have been implemented since 2013. A non-exhaustive list of such amended rules includes Fed. R. Evid. 106, 404(b), 702, and 807.

¹²*Stratacos v. State*, 293 Ga. 401, 748 S.E.2d 828 (2013).

¹³2011 Ga. H.B. 24.

¹⁴*Parker v. State*, 296 Ga. 586, 769 S.E.2d 329 (2015).

And where the new Georgia rules mirror their federal counterparts, it is clear that the General Assembly intended for Georgia courts to look to the federal rules and how federal appellate courts have interpreted those rules for guidance.

Consistent with *Parker*, in reversing the Georgia Court of Appeals, the Georgia Supreme Court in *State v. Jones*¹⁵ not only embraced federal authority when it came to key evidentiary concepts of relevance, unfair prejudice and the admissibility of other acts evidence, it also characterized reliance on former Georgia case law to interpret new Georgia Evidence Code provisions as done “mistakenly.”

Providing comprehensive guidance, an opinion from Justice Blackwell¹⁶ dictates that:

(1) Where new Georgia Evidence Code provisions were borrowed from the Federal Rules of Evidence, Georgia courts should look to decisions of the federal appeals courts construing and applying the Federal Rules, especially the decisions of the Eleventh Circuit.

(2) Where provisions of the Georgia’s new Evidence Code were carried over from our old Evidence Code, courts may rely on Georgia decisions under the old Code.

(3) Where a new Georgia Evidence Code provision is “an original creation” of the new Evidence Code, courts must “fall back” upon the usual principles that inform consideration of statutory meaning.

Where “carried forward” former Georgia Evidence Code provisions resemble the corresponding federal rule, their current interpretation must be consistent with federal—*not prior Georgia*—case law. In an opinion reversing the Court of Appeals, Justice Peterson explains this dynamic for a unanimous Georgia Supreme Court in a decision applying the medical diagnosis and treatment exception to the hearsay rule:

In this case, Rule 803 (4) materially mirrors Federal Rule 803 (4). Having found a Federal Rule of Evidence using materially identical language that addresses the evidentiary issue covered by Rule 803 (4), the question of whether to apply state or federal precedent ends: we look to federal appellate precedent until a Georgia appellate court decides the issue under the new Code. The fact that the words of the medical treatment and diagnosis hearsay exception remain substantively unchanged between the old and new Evidence Code is inconsequential; because the state rule mirrors Federal Rule 803 (4), it is now read as interpreted by the federal appellate

¹⁵State v. Jones, 297 Ga. 156, 773 S.E.2d 170 (2015).

¹⁶State v. Frost, 297 Ga. 296, 773 S.E.2d 700 (2015).

courts as of the effective date of the new Code.¹⁷

Respected Georgia legal observers, however, have noted that since the implementation of Georgia's new Evidence Code, fragmentary segments of the Bar have adhered to outmoded case law and concepts from former Georgia evidence jurisprudence.¹⁸ Scholarship makes related observations.¹⁹ The failure to consider federal authority in connection with provisions of Georgia's new Evidence Code that are patterned after the corresponding federal rules violates a host of principles of Georgia law.²⁰

In the 2016 decision of *Davis v. State*,²¹ the Georgia Supreme Court again admonished against the use of former Georgia evidence authority in connection with federalized provisions of Georgia's new Evidence Code statutes and delivered a similar and unequivocal reproach:

Georgia lawyers do this Court no favors—and risk obtaining reversible evidence rulings from trial courts—when they fail to recognize that we are all living in a new evidence world and are required to analyze and apply the new law. It may be hard to comprehend that, when it comes to trials and hearings held after January 1, 2013, the most pertinent precedent to cite on an evidentiary issue may be a decades-old decision of the Eleventh Circuit (or even the old Fifth Circuit), instead of a week-old unanimous decision of this Court (if we were deciding the appeal of a case tried before 2013 and governed by the old rules, as still frequently occurs).²²

Failures to advance federal precedent in connection with federalized provisions of Georgia's new Evidence Code have accordingly

¹⁷*State v. Almanza*, 304 Ga. 553, 820 S.E.2d 1 (2018) (“The General Assembly was crystal clear in conveying its intent that Georgia’s new Evidence Code was primarily enacted to adopt the Federal Rules of Evidence. And to the extent the General Assembly adopted the Federal Rules of Evidence, it did so ‘as interpreted’ by the federal appellate courts as of the effective date of the new Code. Ga. L. 2011, p. 100, § 1. As such, they not only plainly adopted the language of the Federal Rules of Evidence, but they also did so in the light of federal precedent addressing each issue of evidence covered by those same rules.”).

¹⁸See D. Victor Reynolds, “Georgia Indebted to Its Supreme Court for Recent Evidence Decision,” *Daily Report* (July 15, 2015) (“Despite the clear language, mass abrogation of former evidentiary provisions and stated

legislative intent, a rift immediately formed and intensified. A sizeable number of commentators and practitioners clutched to former Georgia evidence precedent, demanding that it, as opposed to federal authority, receive primacy. The fact that the rules had changed did not seem to dissuade these adherents of retired case law.”).

¹⁹Melvin, What are the Chances? A Response to Professor Milich’s View of 404(b), 9 J. Marshall L.J. 40 (2015-16).

²⁰Carlson & Carlson, *Carlson on Evidence: Comparing Georgia Rules & Federal Rules*, pp. xxvi to xxxiv (6th Ed. 2017).

²¹*Davis v. State*, 299 Ga. 180, 787 S.E.2d 221 (2016).

²²*Davis v. State*, 299 Ga. 180, 787 S.E.2d 221 (2016) (footnotes and internal citations omitted).

been referred to as “*Davis* Violations.”²³ The Supreme Court of Georgia has repeatedly expressed concerns over *Davis*-violating counsel.²⁴ A host of mandates require attorneys to advance objections and arguments based solely on valid precedential authority.²⁵ Continued *Davis* violations, years after the adoption of Georgia’s new Evidence Code, then, raise both professional and ethical considerations.

Subsequent Georgia Supreme Court authority indicates that former Georgia evidence case law only applies where two factors both exist: (1) the new Georgia evidence statute in question has been carried forward from the old Code and (2) the new Georgia evidence statute in question does not appear in the Federal Rules of Evidence.²⁶

Of course, regardless of whether a provision of Georgia’s new Evidence Code is federal, former Georgia, or unique to Georgia’s new Evidence Code in form, it will still be impacted by Georgia’s adoption of the rules of relevance, presumptive admissibility, and under Georgia Rules of Evidence 401, 402, and 403, which are patterned after Federal Rules of Evidence 401, 402, and 403.²⁷ These rules reflect a rules-wide “pervasive bias in favor of admitting logically relevant evidence.”²⁸

The 11th Circuit found in *U.S. v. Pate*²⁹ that the district court in a health care fraud case did not abuse its discretion when it

²³Carlson & Carlson, *Davis Violations Dissected: “New” Georgia Law and the Crisis in Evidence*, 9 J. Marshall L.J. 1 (2015–16).

²⁴See, e.g., *Bullard v. State*, 307 Ga. 482, 837 S.E.2d 348 (2019); *McKinney v. State*, 307 Ga. 129, 834 S.E.2d 741 (2019); *Thornton v. State*, 307 Ga. 121, 834 S.E.2d 814 (2019).

²⁵See, e.g., O.C.G.A. § 15-19-4; Ga. State Bar Rules 3.1, 3.3.

²⁶*Watson v. State*, 303 Ga. 758, 814 S.E.2d 396 (2018) (“This provision was carried forward from former OCGA § 24-9-67 of the old Evidence Code and does not have any equivalent provision in the federal rules, and thus it is appropriate to rely on decisions under the old Code.”). See also *Revere v. State*, 302 Ga. 44, 805 S.E.2d 69 (2017) (“Only ‘[w]here a provision of the new Evidence Code differs in substance from the counterpart federal rule, as interpreted by federal courts, . . . must [we] correspondingly pre-

sume that the General Assembly meant the Georgia provision to be different.’”) (emphasis, omission, and substitution original).

²⁷See *Smith v. State*, 342 Ga. App. 656, 805 S.E.2d 251 (2017).

²⁸Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 Mercer L. Rev. 447 (Winter, 1996). See also *Dodson v. Beijing Capital Tire Company, Ltd.*, 104 Fed. R. Evid. Serv. 710 (M.D. Pa. 2017) (“In general, the Federal Rules of Evidence embody a strong preference for admitting any evidence that may assist the trier of fact.”); *Ely v. Cabot Oil & Gas Corp.*, 99 Fed. R. Evid. Serv. 752 (M.D. Pa. 2016) (“The Federal Rules of Evidence can aptly be characterized as evidentiary rules of inclusion, which are designed to broadly permit fact-finders to consider pertinent factual information while searching for the truth.”).

²⁹*United States v. Pate*, 853 Fed.

admitted “wealth evidence.” The court reasoned that the evidence “was relevant to show Pate’s motive for committing the fraud, which was making money to finance extravagant purchases for herself and her family members. And there was little risk of unfair prejudice, because other trial evidence elicited by Pate’s counsel gave the jury a picture of Pate’s relative wealth even apart from the fraudulently acquired portion of it.”

Both the importance of resort to federal law and the impact and ubiquity of Rules 401, 402, and 403 came to light in the Georgia Supreme Court’s decision in *Chrysler Group, LLC v. Walden*.³⁰ *Chrysler* arose from a catastrophic automobile collision where a four-year-old child was trapped and burned to death in an SUV that was that was struck from behind. The family sued both the other driver and Chrysler for wrongful death. The jury returned a multi-million dollar verdict, holding *Chrysler* 99 percent at fault. The Georgia Court of Appeals affirmed.³¹

In the Supreme Court, the central issue in *Chrysler* was whether case law authority from Georgia’s former Evidence Code which precluded the admission of “wealth of the party evidence” would continue to hold sway under Georgia’s new Evidence Code. Because this common law rule of exclusion was not reduced to statutory form in Georgia’s new Evidence Code, the Georgia Supreme Court held in the negative and affirmed:

Because the common law party-wealth rule was itself a rule of relevance, and because there is no specific exclusionary rule in the new Evidence Code carrying forward the common law’s general exclusionary rule for that type of evidence, Georgia courts must consider party-wealth evidence under the parameters of the new Evidence Code.³²

Chrysler also reminds practitioners that O.C.G.A. §§ 24-4-401, 24-4-402, and 24-4-403 have universal application in Georgia’s new Evidence Code:

By standardizing rules concerning both the presumptive admissibility of relevant evidence and the judicial exclusion of certain otherwise admissible evidence, Rules 401, 402, and 403 overlay the entire Evidence Code, and are generally applicable to all evidence that a party seeks to present.³³

The Georgia Court of Appeals has also stressed the need to re-

Appx. 430 (11th Cir. 2021).

³⁰*Chrysler Group, LLC v. Walden*, 303 Ga. 358, 812 S.E.2d 244 (2018).

³¹*Chrysler Group, LLC v. Walden*, 339 Ga. App. 733, 792 S.E.2d 754 (2016).

³²*Chrysler Group, LLC v. Walden*,

303 Ga. 358, 366, 812 S.E.2d 244 (2018) (“But the new Evidence Code does not work in conjunction with the old evidence rules when the two cover the same territory—it replaces them.”).

³³*Chrysler Group, LLC v. Walden*, 303 Ga. 358, 362, 812 S.E.2d 244 (2018) (“Three rules [401, 402, 403] provide a

fer to federal case law when considering Georgia new Evidence Code statutes that take federal form. Decisions from Chief Judge Dillard are exemplary.³⁴ To this point, in *Hines v. State*,³⁵ Chief Judge Dillard adroitly observed:

As recently recognized by the Supreme Court of Georgia, the current Evidence Code “created a ‘new evidence world’ in this State.” Indeed, this relatively new code—which was modeled in large part on the Federal Rules of Evidence—is “far more extensive and comprehensive than the statutes it replaced. . . .” And in adopting the new Evidence Code, the General Assembly directed courts to “look to the ‘substantive law of evidence in Georgia as it existed on December 31, 2012,’ only when not displaced by the new code that took effect on January 1, 2013.” Suffice it to say, the current Evidence Code radically changed the jurisprudential landscape in Georgia.

In a unanimous 2020 decision from the Supreme Court of Georgia, Justice Blackwell observed that earlier evidence precedent interpreting “carried over” statutes that do not appear in the Federal Rules of Evidence remain of limited viability due the Code-wide application of O.C.G.A. §§ 24-4-401, 24-4-402, and 24-4-403.³⁶

Modern Georgia and federal authority, with an emphasis on the jurisprudence of the Eleventh Circuit Court of Appeals, should be used in connection with federalized statutes contained in Georgia’s new Evidence Code. That said, this work will periodically include precedent from related areas of former Georgia evidence law. While, for the most part, this earlier case law is no longer binding authority, it can serve to provide context and fundamental guideposts for many of the principles authoritatively addressed in Georgia’s “new Code” and federal evidence precedent.

§ 2:19 Restricting use of admitted evidence

Evidence that is admissible against only one of several defendants may be admitted, but its application must be limited by a proper instruction.¹ Also, when testimony is admissible only for a limited purpose, the court has the right and duty to admit it

backdrop for Georgia’s new Evidence Code.”). 752, 830 S.E.2d 380 (2019).

³⁴See, e.g., *Douglas v. State*, 340 Ga. App. 168, 796 S.E.2d 893 (2017); *Patch v. State*, 337 Ga. App. 233, 786 S.E.2d 882 (2016).

³⁵*Hines v. State*, 350 Ga. App.

³⁶*Corley v. State*, 308 Ga. 321, 840 S.E.2d 391 (2020).

[Section 2:19]

¹*Miller v. State*, 176 Ga. 825, 169 S.E. 33 (1933).

in evidence for that limited purpose only.² It should then admonish the jury as to the limited purpose for which it is received.³

Limiting instructions given by trial court to the jury regarding evidence of similar transactions committed by co-defendant did not confuse jury; there were only two co-defendants being tried, the limiting instruction directly preceded the evidence of co-defendant's prior crime, and the jury was clearly instructed that evidence could not be used against "the other defendant," which could have only been referring to defendant.⁴

Limited admissibility of evidence in federal practice is controlled by Fed. R. Evid. 105. O.C.G.A. § 24-1-105, drawn with adherence to Fed. R. Evid. 105, authorizes a trial court to restrict the scope of admitted evidence and to instruct the jury accordingly, upon the request of a party.⁵

Federal courts have long held that, under Rule 105, while trial court may propose them, the burden to request limiting instructions falls upon the party opposing the evidence.⁶ Criminal defendants are not exempted from this requirement.⁷ It is generally accepted that federal courts prefer the admission of evidence with proper limiting instructions to the wholesale exclusion of otherwise relevant proof.⁸

§ 2:20 Exclusion of improper evidence on court's own motion

The court may exclude evidence that is not relevant, material, or competent, on its own motion even though objection is not made to the evidence by either party.¹

Defendant was not entitled to have the trial court provide his requested jury instruction, which referred to the trial court's duty to exclude irrelevant evidence, where defendant failed to cite any instance during trial in which the trial court failed to

²Griffie v. State, 107 Ga. App. 356, 130 S.E.2d 149 (1963).

³Griffie v. State, 107 Ga. App. 356, 130 S.E.2d 149 (1963).

⁴Butler v. State, 284 Ga. 620, 669 S.E.2d 118 (2008).

⁵McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

⁶Crane v. Crest Tankers, Inc., 47 F.3d 292, 41 Fed. R. Evid. Serv. 351 (8th Cir. 1995); Fruge v. Penrod Drilling Co., 918 F.2d 1163 (5th Cir. 1990).

⁷U.S. v. Aranda, 963 F.2d 211, 35 Fed. R. Evid. Serv. 1002 (8th Cir. 1992) ("Rule 105 of the Federal Rules of Evi-

dence, however, places the burden of requesting a limiting instruction, in this instance, on the defendant.").

⁸Shanklin v. Norfolk Southern Ry. Co., 369 F.3d 978, 64 Fed. R. Evid. Serv. 396, 2004 FED App. 0156P (6th Cir. 2004).

[Section 2:20]

¹Goodrum v. State, 60 Ga. 509, 1878 WL 2700 (1878). See also Pickett v. Lindsay, 56 Fed. Appx. 718 (7th Cir. 2002). But as to the necessity for objection, where the court does not act on its own motion, see §§ 30:1 to 30:8, *infra*.

exclude irrelevant evidence.²

§ 2:21 Questioning witnesses by judge

The trial judge has the right to question any witness for the purpose of fully developing the truth of the case. The extent of such an examination is within the judge's sound discretion. Such an examination, though lengthy and including leading questions, is not cause for a new trial unless the court expresses or intimates an opinion on the facts of the case, or as to what has or has not been proved, or the examination takes such course as to become argumentative in character.¹

The failure of the appellant to object to questions by the court or to move for a mistrial at the trial estops him from raising the issue on appeal.² However, exceptions do occur.

Judicial questioning of witnesses, see *Johnson v. State*.³ The trial court has the right to question a witness, but must be careful to not express an opinion as to what had been proven.

While a judge is prohibited from expressing or intimating his opinion as to what has or has not been proved, the trial judge does have the right to propound a question or a series of questions to any witness for the purpose of developing fully the truth of the case.⁴ In propounding questions to a witness to develop the truth or clarify an issue, the trial judge is permitted to ask leading questions.

Trial judge did not violate the prohibition on expressing or intimating an opinion when the court asked questions of a witness who had been asked previously whether the witness liked one of the defendants. The Supreme Court of Georgia held that the questions were designed to clarify the witness's earlier testimony.⁵

Trial court did not violate the improper comment rule when it interjected questions to an expert witness during direct

²McGhee v. State, 303 Ga. App. 297, 692 S.E.2d 864 (2010).

[Section 2:21]

¹Beavers v. State, 132 Ga. App. 94, 207 S.E.2d 550 (1974).

²Evans v. State, 360 Ga. App. 596, 859 S.E.2d 593, 392 Ed. Law Rep. 402 (2021) (“[A] motion for mistrial must be promptly made as soon as the party is aware of the matter giving rise to the motion. If the defendant did not make a contemporaneous motion for a mistrial at the time the defendant

became aware of the matter giving rise to the motion, then the defendant has waived review of this issue on appeal.”); Beavers v. State, 132 Ga. App. 94, 207 S.E.2d 550 (1974).

³Johnson v. State, 270 Ga. 234, 507 S.E.2d 737 (1998).

⁴Sims v. State, 306 Ga. App. 68, 701 S.E.2d 534 (2010).

⁵Daniels v. State, 302 Ga. 90, 805 S.E.2d 80 (2017) (overruled on other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

examination. The Supreme Court of Georgia noted that the trial judge gave the jury two curative instructions and informed the jury that the court had no opinion regarding the evidence or the defendant's guilt or innocence.⁶

The comment rule was violated in *Byrd v. State*,⁷ when the trial judge interrupted a prosecutor who was asking a witness where Carrington Road was and the judge interposed: "It's in Taylor County. We've had two folks tell us that already." Because the judge "clearly expressed its opinion that venue had been proven," the defendant's conviction was reversed.

Judicial comment in violation of O.C.G.A. § 17-8-57 was not found to be present in *Rawls v. State*.⁸ On the way to its decision, the court reviewed the history of when, and when not, a judge's questions about whether venue had been established violated the rule against judicial comment.⁹

In his questioning, the trial judge violated O.C.G.A. § 17-8-57, effectively disparaging the defendant's psychiatric defense. Although there was no objection by counsel, the Georgia Supreme Court applied the plain error rule to reverse.¹⁰

The trial judge may question witnesses, even in the presence of the jury.¹¹ A trial judge may propound questions to a witness to develop the truth of the case, to clarify testimony, to comment on pertinent evidentiary rules, and to exercise its discretion when controlling the conduct of counsel or witnesses in order to enforce its duty to ensure a fair trial to both sides. (Per Hunstein, P.J., with two justices concurring, three justices concurring specially, and one justice concurring in judgment only.)¹² Judicial questioning was discussed in *Grooms v. State*.¹³

In *White v. State*,¹⁴ the Georgia Court of Appeals found that a trial judge did not err when it asked two questions of the victim of the defendant's criminal activity. The appellate court found that the trial court did not improperly express or intimate an opinion in violation of O.C.G.A. § 17-8-57.

Federal decisions also address the issue of judicial inquiries of

⁶Holmes v. State, 301 Ga. 143, 800 S.E.2d 353 (2017).

⁷Byrd v. State, 307 Ga. App. 589, 705 S.E.2d 690 (2011).

⁸Rawls v. State, 315 Ga. App. 891, 730 S.E.2d 1 (2012).

⁹See Harper, When a Judge's Comments to the Jury Can Lead to a New Trial, Fulton Daily Report 5 (Apr. 10, 2012).

¹⁰Paul v. State, 272 Ga. 845, 537 S.E.2d 58 (2000).

¹¹Carter v. State, 246 Ga. 328, 271 S.E.2d 475 (1980).

¹²Dickens v. State, 280 Ga. 320, 627 S.E.2d 587 (2006).

¹³Grooms v. State, 261 Ga. App. 549, 583 S.E.2d 216 (2003) (allowing trial court discretion in examining witnesses).

¹⁴White v. State, 332 Ga. App. 495, 773 S.E.2d 448 (2015).

witnesses at trial.¹⁵

Trial court abused its discretion by allowing jury to discuss evidence during trial breaks in medical malpractice action and by allowing jury to submit to the court questions for witnesses; procedures implemented by the trial court modified the traditional roles of the jury and the lawyers, and encouraged the jury to take an active, inquisitorial role, made the trial judge to some extent the jury's mouthpiece in pursuing its own version of facts, and correspondingly reduced counsel's control over presentation of evidence. A trial court may receive written questions from the jury and ask those questions the court finds proper, but as when propounding its own questions to witnesses, must exercise great caution to avoid the appearance of commenting on the evidence. While Georgia law permits a trial judge to propound questions to any witness for the purpose of developing the truth, a trial judge as a neutral administrator of justice must scrupulously avoid the appearance of taking the side of one litigant over another and thus influencing the jury's verdict.¹⁶

However, it is a trial court's right, and often times its duty, to question a witness in order to develop fully the truth of a case.¹⁷

§ 2:22 Court's witnesses

A trial court was under no statutory nor constitutional duty to appoint a state-paid psychiatrist to examine a criminal defendant, even though a special plea of insanity had been filed.¹

Both statute and common law grant the trial judge inherent authority to satisfy himself that the accused has sufficient mental capacity to go to trial; common law, statute, and rule have recognized the authority of the trial judge in civil and criminal cases to summon expert witnesses of his own choosing. The trial court did not err, therefore, in appointing experts to testify as to the defendant's mental capacity at the time of the alleged crimes.²

In federal practice the trial judge has the authority to appoint

¹⁵See *U.S. v. Barnhart*, 599 F.3d 737, 81 Fed. R. Evid. Serv. 982 (7th Cir. 2010) (judge's questioning improperly shod disbelief in defense); *U.S. v. White*, 589 F.2d 1283, 1289 (5th Cir. 1979) (judge's questions constituted attempts to clarify and did not suggest bias).

¹⁶*Steele v. Atlanta Maternal Fetal Medicine, P.C.*, 271 Ga. App. 622, 610 S.E.2d 546 (2005) (overruled on other grounds by *Smith v. Finch*, 285 Ga. 709, 681 S.E.2d 147 (2009)).

¹⁷*Owens v. State*, 271 Ga. App. 365, 609 S.E.2d 670 (2005). See *Zepp v. State*, 276 Ga. App. 466, 623 S.E.2d 569 (2005) (trial judge may question witness).

[Section 2:22]

¹*Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977).

²*Presnell v. State*, 241 Ga. 49, 243 S.E.2d 496 (1978), judgment rev'd in part on other grounds, 439 U.S. 14, 99 S. Ct. 235, 58 L. Ed. 2d 207 (1978).

an expert who, after making his findings may be deposed, called to testify, and cross-examined.³

When the prosecution wants to introduce hearsay of a child victim, it must do so in compliance with the standards of O.C.G.A. § 24-8-820.

§ 2:23 Impartial medical experts

A criminal defendant's right to psychiatric examination may rise to a constitutional level; however, the appointment of a psychiatrist to examine an indigent defendant is a matter within the discretion of the trial court and is reversible only for abuse of discretion.¹

An indigent defendant in a murder trial was improperly denied funds with which to employ an expert where the only evidence linking him to the crime was unusual scientific evidence subject to varying expert opinion.²

A court does not abuse its discretion in ordering the defendant to submit to psychiatric examination by a psychiatrist of its choosing after he filed notice of intent to raise the defense of insanity, even though the court had previously ordered mental evaluation of the defendant.³

The trial court's order to compel a psychiatric examination of a murder defendant did not violate his privilege against self-incrimination under the Fifth and 14th Amendments of the U.S. Constitution. This claim was reviewed in federal habeas corpus after the accused was convicted in Cobb County Superior Court of rape and murder. During the trial, the psychiatrist at no time referred to any remarks made to him by the accused. The psychiatrist merely testified that he had interviewed the prisoner.⁴ However, on another point (error in closing argument) the habeas petitioner presented a successful claim for relief regarding his sentence.

The appointment of impartial experts to assist the trier of fact in civil or criminal cases in federal court, see Fed. R. Evid. 706. O.C.G.A. § 24-7-706 is substantially similar to Fed. R. Evid. 706. Under the federal rule, a judge's determination is reviewable

³Fed. R. Evid. 706. See, generally, *Robinson v. U.S.*, 462 Fed. Appx. 885, 887 (11th Cir. 2012).

[Section 2:23]

¹*Williams v. Newsome*, 254 Ga. 714, 334 S.E.2d 171 (1985).

²*Thornton v. State*, 255 Ga. 434, 339 S.E.2d 240 (1986).

³*Tolbert v. State*, 260 Ga. 527, 397 S.E.2d 439 (1990).

⁴*Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992).

only for an abuse of discretion.⁵

The superior court of the county in which the defendant was convicted had authority, on the defendant's motion for new trial, to order the warden of a correctional institution in another county to permit the expert evaluation of the defendant. By virtue of the warden's custody of the defendant, the warden was a person "connected with" a pending motion for new trial and was thus subject to the trial court's control of his conduct in the furtherance of justice.⁶

§ 2:24 Control of proceedings by pretrial order

A pretrial conference shall be held upon motion of any party or upon the court's own motion.¹ In such a conference the court may consider any matter which will facilitate the trial of the case. When a conference is held, an order shall be made reciting the action taken at the conference.

A 2002 amendment of O.C.G.A. § 9-11-16 makes provision for new experts not named in the pretrial order to be later called to testify. It is within the court's discretion to allow such experts, but opposing parties must be afforded "reasonable time" to take the deposition of the new expert.

The pretrial order's identification of trial witnesses was deemed to be exclusive in *Cook v. Huff*.² The pretrial order controls, unless modified at trial to prevent manifest injustice. In this case, the attorney for the propounder said the witness would not be called if the caveator's counsel was going to object, and thereafter such an objection was made. Generally, a trial court has discretion to allow or disallow a rebuttal witness, and a court's decision will be affirmed unless that discretion is abused.

For the form of a proposed pretrial order, which must be completed by the parties in a civil case, see Rule 7.2, Uniform Superior Court Rules. This official form is reproduced in Form 21 of Appendix C, *infra*.

Pretrial orders often control the conduct of trial proceedings. Trial judge properly precluded Ford Motor Company from contesting certain issues at trial based upon a manufacturer's failure to produce results of the company's crash tests on the vehicle in question. The car builder's refusal to produce the material could

⁵*Sanders v. York*, 446 Fed. Appx. 40, 43 (9th Cir. 2011). [Section 2:24]

⁶O.C.G.A. § 15-1-3(4); *Zant v. Brantley*, 261 Ga. 817, 411 S.E.2d 869 (1992).

¹O.C.G.A. § 9-11-16.

²*Cook v. Huff*, 274 Ga. 186, 552 S.E.2d 83 (2001).

have resulted in even greater sanctions.³

In *Singleton v. Terry*,⁴ the Supreme Court observed that a pretrial order limits the issues for trial to those not disposed of by admissions or agreements of counsel. The pretrial order, when entered, controls the subsequent course of the action unless modified at the trial to prevent manifest injustice. If a claim or issue is omitted from the pretrial order, it is waived.

Failure of a party to raise an issue in the pretrial order will prevent subsequent use of that issue or amendment to the pretrial order to include the issue, if the opposing party, to its detriment, had no opportunity to prepare a defense to the new issue.⁵

A pretrial order is to be construed liberally to allow the consideration of all questions fairly within the ambit of contested issues.⁶

The general rule is that any issue omitted from the pretrial order is waived; but omission of an issue from a pretrial order is not controlling if evidence pertaining to the issue is introduced without objection, the opposing party is not unfairly surprised, and the issue is actually litigated, in which case the pretrial order is treated as impliedly amended to include the issue.⁷

§ 2:25 Control of proceedings by stipulation

A party may enter stipulations controlling various aspects of the trial of the case, just as she can stipulate evidence.¹ Georgia courts have defined stipulations as voluntary agreements by parties that they will not contest certain facts.² Federal courts are in accord.³

An attorney may stipulate virtually any procedural or remedial matter, but such authority does not extend to the substantial rights of his client, so that he may not settle or dismiss his cause without approval of the client.⁴

For the use of stipulations to excuse the introduction of evidence, see § 10:4, *infra*.

When the parties have stipulated that the trial court would

³*Ford Motor Co. v. Gibson*, 283 Ga. 398, 659 S.E.2d 346 (2008).

⁴*Singleton v. Terry*, 262 Ga. App. 151, 584 S.E.2d 613 (2003).

⁵*Williams v. Martin*, 273 Ga. App. 562, 615 S.E.2d 774 (2005).

⁶*Fields Bros. General Contractors v. Ruecksties*, 288 Ga. App. 674, 655 S.E.2d 282 (2007).

⁷*Long v. Bellamy*, 296 Ga. App.

263, 674 S.E.2d 120 (2009).

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¹See § 10:4, *infra*.

²*Fulton County Bd. of Assessors v. Calliope Properties, LLC*, 315 Ga. App. 405, 408, 727 S.E.2d 198, 201 (2012).

³See, e.g., *Guerrero v. Deane*, 2012 WL 3834907 (E.D. Va. 2012).

⁴O.C.G.A. §§ 15-19-5, 15-19-6.

decide and determine the question of interest due on a commercial account, it is not error for the court to do so.⁵

§ 2:26 Law applicable to cases arising outside Georgia

Parties to the action may reside outside Georgia. Jurisdiction over such individuals has been the object of legislative attention. 2002 amendments of O.C.G.A. § 9-11-4 allowed service of process in a civil action upon persons in foreign countries, in conformity with Fed. R. Civ. Proc. 4(f).

For legislation affecting service of process, see revision of O.C.G.A. § 9-11-4 and enactment of O.C.G.A. § 9-11-4.1.¹ Georgia's long-arm statute allows the state of Georgia to exercise personal jurisdiction over nonresidents as if they meet any of the conditions listed in the statute.²

The Georgia workers' compensation rule of law applies when the injury occurred in Georgia, and the plaintiff was eligible to receive workers' compensation benefits in Georgia, even though the employment relationship may have been localized in another state and the plaintiff may have been eligible for such benefits in another state.³

§ 2:27 Transcribing testimony

The official court reporter appointed and directed by the judge is required to take full stenographic notes of the evidence in trials before the court for which the court reporter is appointed.¹ Either party to the suit shall be furnished with a transcript, at a cost.² On what the reporter is required to record, see O.C.G.A. §§ 5-6-41, 15-14-5, 17-8-5.

When the jurors disagree as to testimony, the reporter may be required to read it to them.³

In the absence of a transcript, the appellate court must assume that the evidence supports the judgment of the trial court.⁴

The failure to record a bench conference does not constitute re-

⁵Kroger Co. v. U.S. Foodservice of Atlanta, Inc., 270 Ga. App. 525, 607 S.E.2d 177 (2004).

(2009).
[Section 2:27]

[Section 2:26]

¹Ga. Laws 2010, Act 611 (S.B. 491).

²O.C.G.A. § 9-10-91.

³Liberty Mut. Ins. Co. v. Roark, 297 Ga. App. 612, 677 S.E.2d 786

¹O.C.G.A. § 15-14-1.

²O.C.G.A. § 15-14-5.

³Green v. State, 122 Ga. 169, 50 S.E. 53 (1905).

⁴Blum v. Blum, 242 Ga. 718, 251 S.E.2d 246 (1978).

versible error absent a showing of prejudice to the defendant.⁵

O.C.G.A. § 17-8-5 mandates transcription of proceedings in all felonies except argument of counsel.⁶ Under O.C.G.A. § 5-6-41, Georgia law authorizes a trial court to conduct a hearing when a party contends the transcript does not fully disclose what took place and to “resolve the difference so as to make the record conform to the truth.”⁷

If lacking a transcript of evidence considered by the trial court, the appellate court must assume that the trial court’s findings of fact were supported by the evidence.⁸

Defendant did not establish a violation of his due process rights when he alleged that the absence of a transcript of voir dire and the opening and closing statements impaired his ability to pursue ineffective assistance of counsel claims.⁹

Death penalty cases impose expanded duties. A court reporter’s failure to transcribe closing arguments of counsel does not automatically require the death penalty to be set aside unless the defendant demonstrates harm or prejudice resulting from the court reporter’s failure to transcribe closing arguments.¹⁰

Transcription of entire voir dire is not necessary in all felony cases, but is required where the death penalty may be imposed.¹¹

The Eleventh Circuit stated that the Court Reporter Act does not require that “audio or video recordings, which ‘are not testimony but are themselves admitted into evidence as exhibits,’ also be transcribed by the court reporter.”¹²

No error will lie in denial of a prisoner’s motion for production of trial transcript and records where he does not make sufficient showing of necessity or justification for production.¹³

A person convicted of a crime has a right to a transcript of the trial for use on appeal.¹⁴

A defendant was entitled to a new trial where the trial transcript was lost due to the fact that the court reporter’s hearing was so poor that the transcript contained multiple errors, necessitating that the defendant borrow tapes to make correc-

⁵Bradford v. State, 299 Ga. 880, 792 S.E.2d 684 (2016).

⁶Curtis v. State, 330 Ga. App. 839, 769 S.E.2d 580 (2015).

⁷Leeks v. State, 296 Ga. 515, 769 S.E.2d 296 (2015).

⁸Glass v. Glass, 242 Ga. 736, 251 S.E.2d 298 (1978).

⁹Pearson v. State, 311 Ga. 26, 855 S.E.2d 606 (2021).

¹⁰Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979), judgment vacated on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

¹¹State v. Graham, 246 Ga. 341, 271 S.E.2d 627 (1980).

¹²United States v. Cannon, 987 F.3d 924 (11th Cir. 2021).

¹³McDowell v. Balkcom, 246 Ga. 611, 272 S.E.2d 280 (1980).

¹⁴Wilson v. State, 246 Ga. 672, 273 S.E.2d 9 (1980).

tions and the tapes were lost through the action of a person other than the defendant.¹⁵

A defendant's conviction need not be overturned where the court reporter failed to report the defendant's motion for a directed verdict, the defendant having failed to show how he was harmed by error.¹⁶

A 1993 amendment of the O.C.G.A. provisions on transcribing testimony related to the preparation of transcripts and also authorized depositions to be taken by court reporters.¹⁷

There is no law requiring the testimony adduced at a civil trial to be reported.¹⁸

§ 2:28 Judge as trier of facts

Generally, the rules applying to a non-jury trial are the same as those applying to jury trials, with the exception that the judge assumes the additional role of trier of the facts.

In a bench trial in a criminal case, it is for the trial court to weigh the testimony and determine the credibility of the several witnesses.¹

When a case is tried before a judge without a jury, the rules as to the admission of evidence are less strict.² In a non-jury case, the judge determines the credibility of the witnesses and the weight to be given of their testimony, and where evidence is merely conflicting, a reviewing court will not substitute its own judgment. The judgment of the court will not be reversed if there is any legal evidence to support the finding.³

Is evidence easier to introduce in a non-jury trial? The Georgia Supreme Court has given official recognition to that point, remarking that in a nonjury setting the trial court has broader discretion in admitting evidence than when a jury is involved.⁴

Where evidence is heard by the judge alone, and without the intervention of a jury, it will be presumed that the judge considered only legal and admissible evidence, unless the record

¹⁵Wilson v. State, 246 Ga. 672, 273 S.E.2d 9 (1980).

¹⁶Zachary v. State, 245 Ga. 2, 262 S.E.2d 779 (1980).

¹⁷See O.C.G.A. § 9-11-28.

¹⁸Moore v. Center Court Sports & Fitness, LLC, 289 Ga. App. 596, 657 S.E.2d 548 (2008).

[Section 2:28]

¹Baker v. State, 123 Ga. App.

394, 181 S.E.2d 288 (1971).

²King Sales Co. v. McKey, 105 Ga. App. 787, 125 S.E.2d 684 (1962).

³Dowling v. Jones-Logan Co., 123 Ga. App. 380, 181 S.E.2d 75 (1971).

⁴Superior Farm Management, L.L.C. v. Montgomery, 270 Ga. 615, 513 S.E.2d 215, 93 A.L.R.5th 789 (1999).

clearly indicates that the contrary is true.⁵

Federal courts have noted a “well established presumption” that judges *adhere to basic rules of procedure*, when acting as factfinders.⁶

Factual findings and credibility determinations by the trial court will be upheld on appeal if there appears in the record any evidence to support them.⁷

In nonjudicial foreclosure confirmation proceedings, the judge sits as a trier of fact, and his findings and conclusions have the effect of a jury verdict; he hears the evidence, and his findings based upon conflicting evidence should not be disturbed by a reviewing court if there is any evidence to support them.⁸

Under *Pine Pointe Housing, L.P., v. Lowndes County Bd. of Tax Assessors*,⁹ the standard of review of a non-jury trial of disputed material facts is the clearly erroneous test under a statute concerning findings by the trial court.¹⁰ The plain legal error standard of review of a nonjury trial of disputed material facts applies only where the appellate court determines that the issue was of law, not fact.

Application of the *Bruton* rule in a nonjury trial, see § 27:8, *infra* (*Bruton* probably has little application in bench trials).

In a non-jury trial, and unless waived in writing, the judge is required to make findings of fact and conclusions of law.¹¹ On the other hand, the Georgia Supreme Court has ruled that a judge in a bench trial is not required to make findings a fact unless requested to do so by one of the parties.¹²

Criminal defendants have no right to a bench trial and if the prosecution will not consent to waiving a trial by jury the defendant has no recourse.¹³ Similar rule federally.¹⁴

§ 2:29 Joinder and severance

The right to a severance of offenses for trial arises only upon

⁵*Barger v. Barger*, 238 Ga. 334, 232 S.E.2d 567 (1977).

⁶*In re Fortner*, 2012 WL 3613879 (S.D. Fla. 2012).

⁷*Dudley v. Snead*, 250 Ga. 804, 301 S.E.2d 480 (1983).

⁸*Blue Marlin Development, LLC v. Branch Banking & Trust Co.*, 302 Ga. App. 120, 690 S.E.2d 252 (2010).

⁹*Pine Pointe Housing, L.P. v. Lowndes County Bd. of Tax Assessors*, 254 Ga. App. 197, 561 S.E.2d 860 (2002).

¹⁰O.C.G.A. § 9-11-52.

¹¹*Avery Mechanical Contractors, Inc. v. Quality Mechanical Contractors, Inc.*, 182 Ga. App. 168, 355 S.E.2d 102 (1987).

¹²*Pennington v. Pennington*, 291 Ga. 165, 728 S.E.2d 230 (2012).

¹³*Smith v. State*, 295 Ga. 120, 757 S.E.2d 865 (2014).

¹⁴*U.S. ex rel. Williams v. DeRobertis*, 715 F.2d 1174, 1178 (7th Cir. 1983) (either the court or the prosecutor may veto defendant's request for a bench trial).

appropriate motion.¹

A pattern justifying the joinder of offenses for trial exists where several similar offenses are closely connected by geography, time, and manner so as to constitute a scheme or plan of criminal conduct.² The Supreme Court of Georgia has generally upheld joinder of two crimes when one offense is a circumstance of the arrest on the other infraction.³

Three factors should be considered when a severance motion is presented: “(1) the likelihood of confusion of the evidence and law; (2) the possibility that evidence against one defendant may be considered against the other defendant; and (3) the presence or absence of antagonistic defenses.”⁴

Trial court failed to perform the requisite legal analysis for joinder of separate drug indictments for trial, thus requiring vacation of convictions and remand for hearing on the joinder question, where court’s first rationale for joining offenses was “Because I said it,” court merely cited and noted the outcome of one distinguishable case when defendant reiterated his objection. The court did not consider the similarity, commonality, and character of offenses and State’s purpose in joining offenses but rather focused on the relatively low number of separate indictments.⁵

Defendants are not entitled to severance where a single cause of action is based on a single promissory note contended to be the joint obligation of the multiple defendants, for even though defendants may have different defenses, the principal issue is liability on the note.⁶

The trial court has wide discretion in the joining or separating of issues of the various parties which will not be set aside unless it can be illustrated how the complaining parties’ rights have been affected by the court’s action.⁷

A claim for malicious abuse of process should be tried subsequent to the trial on the underlying action, but by the same jury.⁸

Grant or denial of severance is within the sound discretion of

[Section 2:29]

¹Robins v. State, 298 Ga. App. 70, 679 S.E.2d 92 (2009).

²Grant v. State, 289 Ga. App. 230, 656 S.E.2d 873 (2008).

³Daughtry v. State, 296 Ga. 849, 770 S.E.2d 862 (2015) (“evidence of circumstances of arrest are subject to same standards of materiality and relevancy as other evidence”).

⁴Daniels v. State, 302 Ga. 90, 805 S.E.2d 80 (2017) (overruled on other

grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

⁵Sampler v. State, 294 Ga. App. 174, 669 S.E.2d 195 (2008).

⁶Sheffield v. Lewis, 246 Ga. 19, 268 S.E.2d 615 (1980).

⁷McGowan v. North Georgia Production Credit Ass’n, 246 Ga. 135, 269 S.E.2d 25 (1980).

⁸Yost v. Torok, 256 Ga. 92, 344 S.E.2d 414 (1986).

the court, and absent an abuse of discretion, the ruling will not be set aside. A defendant seeking severance must do more than raise the possibility that a separate trial would give him a better chance of acquittal; he must make a clear showing of prejudice and a consequent denial of due process.⁹

There was no error in refusing to sever codefendants' trials because the pretrial statements of one defendant would incriminate the other; the fact that the defendant who made the complained-of statement took the stand and was subject to cross examination cured any possible error.¹⁰

Murder and aggravated assault charges against the same defendant arising from two shooting incidents were properly tried jointly because they were of a similar character and were based on the same conduct or connected series of acts even though the charges involved different victims, occurred in different places, and had different results.¹¹ Severance was also properly denied in a case involving murder, narcotics, and Georgia Street Gang Terrorism and Prevention Act violations in *Rodriguez v. State*.¹²

A defendant is entitled to severance of offenses when the offenses have been joined solely because they are of the same or similar character. However, offenses are not joined solely because they are of the same or similar character where the similarity reaches the level of a pattern evincing a common motive, plan, scheme, or bent of mind. In such a situation, severance lies within the sound discretion of the trial judge.¹³

Georgia's wide-open cross examination rule has drawn criticism in connection with potential Fifth Amendment violations in criminal cases. Severance rights and priorities are implicated.¹⁴

⁹Murphy v. State, 246 Ga. 626, 273 S.E.2d 2 (1980).

¹⁰Allen v. State, 255 Ga. 513, 340 S.E.2d 187 (1986) (disapproved on other grounds by, Hanifa v. State, 269 Ga. 797, 505 S.E.2d 731 (1998)).

¹¹Reeves v. State, 258 Ga. 619, 373 S.E.2d 16 (1988).

¹²Rodriguez v. State, 309 Ga. 542, 847 S.E.2d 303 (2020).

¹³Wilson v. State, 188 Ga. App. 779, 374 S.E.2d 325 (1988).

¹⁴For a 2014 article detailing these concerns, see Carlson & Carlson, Unconstitutionality And the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining The Accused, 7 J. Marshall L.J. (Aug. 2014).

Chapter 3

Motions During Trial, Default, Dismissal

- § 3:1 Motions during trial; generally
- § 3:2 Continuances
- § 3:3 Voluntary dismissal
- § 3:4 Nolle prosequi
- § 3:5 Involuntary dismissal
- § 3:6 Default judgment
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- § 3:8 Stay of proceedings
- § 3:9 Change of venue
- § 3:10 Request for severance

§ 3:1 Motions during trial; generally

This Trial Handbook is primarily concerned with matters that arise at some point between the moment when a trial begins and the judgment is entered, as opposed to discovery motions filed before trial. Many of the motions made after the entry of the judgment are also excluded.

Several kinds of motions can arise during the trial and include the following: to exclude the public, see § 2:13, *supra*; news media, see § 2:14, *supra*; to prohibit photographing, etc. of the trial, see §§ 2:15, *supra*, 11:12, *infra*; to limit the number of witnesses, see § 2:17, *supra*; to restrict the use of admitted evidence, see § 2:22, *supra*; to have the court call a witness, see § 2:22, *supra*; to call an impartial medical witness, see § 2:23, *supra*; for voluntary dismissal, see § 3:6, *infra*; of nolle prosequi, see § 3:4, *infra*; for default judgment, see § 3:6, *infra*; to quash the jury panel, see § 6:4, *infra*; to excuse for cause, see § 6:15, *infra*; to quash a subpoena, see § 11:1, *infra*; for writ of habeas corpus ad testificandum, see § 11:2, *infra*; for attendance of nonresident witness, see § 11:3, *infra*; for subpoena duces tecum, see § 11:4, *infra*; to exclude witnesses, see § 11:9, *infra*; for appointment of interpreter, see § 11:11, *infra*; to grant immunity to witness in criminal case, see § 15:19, *infra*; to call an adverse witness, see § 15:21, *infra*; to recall witness for further cross-examination, see § 16:13, *infra*; to claim privileged communication, see § 18:5, *infra*; to take judicial notice, see § 19:2, *infra*; for a view, see § 22:2, *infra*; to use secondary evidence, see § 23:16, *infra*; to supply a copy of a

confession, see § 27:6, *infra*; to suppress a confession, see § 27:6, *infra*; to exclude inadmissible evidence, see § 30:6, *infra*; offer of proof, see § 30:8, *infra*; to grant a mistrial, see § 31:1, *infra*; for a directed verdict, see § 32:2, *infra*; to amend pleadings to conform to proof, see § 32:5, *infra*; to keep the jury together, see § 36:5, *infra*; to send items to the jury room, see § 36:6, *infra*; to poll jurors, see § 37:11, *infra*.

For oral motions in limine during trial, as well as written pre-trial motions in limine, see §§ 30:1 *et seq.* on objections. Motions for mistrial, see §§ 31:1 *et seq.*

Trial motions have been litigated in a number of appeals. In one, the reviewing court held that the trial court should not decide disputed questions of fact on cross motions for directed verdict; the fact that both parties moved for a directed verdict does not constitute waiver by each party of right to have fact issues decided by jury if such fact issues remain.¹

A trial court cannot convert a speedy trial motion into a motion for a directed verdict. A directed verdict cannot be entered in the absence of a trial.²

Plaintiffs were entitled to notice of conversion of a motion to dismiss into a motion for summary judgment and to 30 days to respond to such motion.³

Motion made during trial may be made orally.⁴ However, it has been held that an affirmative defense cannot be properly raised by oral motion at trial.⁵ Motions for closure of hearings have been required to be in writing.⁶

When a court considers evidence beyond the pleadings (e.g., exhibits attached to a motion to dismiss), a motion to dismiss is converted to a summary judgment motion.⁷

Pleadings, motions, and orders are construed according to their substance and function and not merely by nomenclature; a motion for summary judgment is designed to test the merits of a claim. Despite a defendant's motion title of "Defendant's Motion for Summary Judgment," it did not challenge the merits of plaintiff's claim in personal injury action, and thus did not entitle plaintiff to a hearing based on rule that provided oral argument

[Section 3:1]

¹Walker v. Bush, 234 Ga. 366, 216 S.E.2d 285 (1975).

²State v. Lewis, 350 Ga. App. 506, 829 S.E.2d 785 (2019).

³Riverhill Community Ass'n v. Cobb County Bd. of Com'rs, 236 Ga. 856, 226 S.E.2d 54 (1976). Summary judgments, see O.C.G.A. § 9-11-56.

⁴Royston v. Royston, 236 Ga. 648, 225 S.E.2d 41 (1976). See O.C.G.A. § 9-11-7.

⁵Hansford v. Robinson, 255 Ga. 530, 340 S.E.2d 614 (1986).

⁶R. W. Page Corp. v. Lumpkin, 249 Ga. 576, 292 S.E.2d 815 (1982).

⁷Schwab v. Jackson, 348 Ga. App. 457, 823 S.E.2d 546 (2019).

on a motion would be permitted upon request. Court's ruling thereupon was not a summary judgment.⁸

Nothing in the summary judgment statute limits the number of times a party may make a motion for summary judgment.⁹

*Space Coast Credit Union v. Groce*¹⁰ involved an appeal of a denial of a summary judgment motion on the basis that the service of a complaint upon an “an elderly, dozing defendant unaware of the process server’s efforts” (papers were left on a table next to the bed where the defendant was sleeping) did not constitute proper service. In affirming the trial court, the Georgia Court of Appeals held:

Groce might not have noticed the papers for some period of time, if ever. A nurse or housekeeper might have thrown the papers away. . . . Although Space Coast may be correct that there is no requirement that a process server always must engage in dialogue about service with a defendant and ensure that the defendant understands and acknowledges service, it was not an abuse of discretion for the trial court to find, under the facts of this case, that some communication was required to ensure that the (at best) semi-conscious defendant had fair notice of the lawsuit.¹¹

§ 3:2 Continuances

Problems relating to the right to a continuance often arise on the day a case is set for trial or during the trial and, therefore, are within the scope of this Handbook.

A motion for continuance is addressed to the sound judicial discretion of the court, and the court’s ruling will not be disturbed on review unless it is shown that the discretion has been abused.¹

In *In Interest of I.L.M.*,² the trial court erred in ordering a continuance of a dependency hearing beyond that authorized by statute when it failed to comply with O.C.G.A. § 15-11-110 which requires that continuances be granted only when it is necessary.

Trial court acted within its discretion when it denied a continuance motion on morning of trial. Defendant had sought to hire a

⁸*McCullers v. Harrell*, 298 Ga. App. 798, 681 S.E.2d 237 (2009). (2016).

⁹*Gold Creek SL, LLC v. City of Dawsonville*, 290 Ga. App. 807, 660 S.E.2d 858 (2008).

¹⁰*Space Coast Credit Union v. Groce*, 337 Ga. App. 24, 785 S.E.2d 663 (2016).

¹¹*Space Coast Credit Union v. Groce*, 337 Ga. App. 24, 785 S.E.2d 663

[Section 3:2]

¹*Colonial Pipeline Co. v. Westlake Club, Inc.*, 112 Ga. App. 412, 145 S.E.2d 669 (1965). See *Peebles v. State*, 260 Ga. 165, 391 S.E.2d 639 (1990); *Eason v. State*, 331 Ga. App. 59, 769 S.E.2d 772 (2015).

²*In Interest of I.L.M.*, 304 Ga. 114, 816 S.E.2d 620 (2018).

new attorney.³

Trial court did not err in denying continuance motion in murder case where the “court considered several factors,” including that the court had granted an earlier request for continuance, and defendant’s counsel “had not previously apprised the trial court of any difficulties he encountered while preparing for trial.”⁴

The trial court did not err in denying a capital murder defendant’s motions for continuance of his bench trial to fix his sentence for malice murder, as defendant did not identify any additional witnesses or evidence in mitigation that he might have presented had he been granted a continuance.⁵

Trial court was found not to have abused its discretion in denying a continuance motion when the government failed to comply with the 10-day witness notice requirement. The Court of Appeals found that the trial court offered the defendant the opportunity to interview the witness, that defendant “acquiesced in the lack of an interview prior to the witness’ testimony by failing to object or request additional relief,” and that the defendant failed to show harm that would have resulted from the failure to grant the continuance.⁶

A similar result occurred in *Hughes v. State*.⁷ Hughes contended the trial court erred by denying a continuance after the existence of DNA evidence became known. The record demonstrated that the state informed Hughes of its DNA expert more than 10 days prior to trial, so there was no abuse of discretion in denying a continuance.

Trial court did not abuse its discretion in denying continuance motion filed in a felony murder case on the first day of trial. Defendant, in essence, argued that he wanted new counsel to represent him. The Supreme Court of Georgia reasoned that given the unlikelihood of plea negotiations, “both sides are ready to go to trial . . . [and] have their witnesses., . . . [a]nd the evidence showed that Harvey had given Davis’ family only a conditional agreement to take the case,” the continuance motion was properly denied.⁸

The trial judge did not abuse his discretion in dismissing the case for want of prosecution where attorney did not present a doctor’s affidavit supporting the attorney’s claim that he was ill and unable to appear in court. Continuances due to the absence

³Percell v. State, 346 Ga. App. 219, 816 S.E.2d 344 (2018).

⁴Mann v. State, 307 Ga. 696, 838 S.E.2d 305 (2020).

⁵Loyd v. State, 288 Ga. 481, 705 S.E.2d 616 (2011).

⁶Murray v. State, 328 Ga. App. 192, 761 S.E.2d 590 (2014).

⁷Hughes v. State, 289 Ga. 98, 709 S.E.2d 764 (2011).

⁸Davis v. State, 301 Ga. 397, 801 S.E.2d 897 (2017).

of counsel are not favored and strict compliance with the law is required.⁹

Defendant in child cruelty and child molestation case was not entitled to continuance after court granted request by government to introduce similar transaction evidence where record showed that defendant had notice of the government's intent to admit such evidence.¹⁰

In circumstances involving uncomplicated domestic relations case which had been set for trial two weeks previously, trial judge did not abuse his discretion in denying continuance on ground that it was inconvenient or impossible for either attorney of record or any of his associates to attend.¹¹

Except where a statute requires the application for a continuance to be made by one of the parties, either a party of record or his attorney may properly apply for a continuance, the general requirement being that the verification be made by one in a position to know the facts upon which the motion is based.¹²

A party making application for continuance must show that he has used due diligence.¹³ A request for a continuance was denied in *LN West Paces Ferry Associates, LLC v. McDonald*.¹⁴

Similarly, in *Hooper v. Townsend*,¹⁵ it was concluded that the trial court did not err in denying a mother's request for continuance in a child custody case. The court noted that the mother filed the continuance request only a few days prior to the trial and she had been aware for some time of the need for a late case evaluation.

Continuance requested by defendant in order to obtain presence at trial of material witness is properly denied if defendant has not been diligent in attempting to procure attendance of absent witness.¹⁶

In *Hampton v. State*,¹⁷ the Georgia Supreme Court held that defendant's motion for continuance was properly denied when defense counsel indicated on first day of trial that he was not ready to proceed on account of defendant's lack of cooperation. The Supreme Court reasoned, in part:

⁹Chappelaer v. General G. M. C. Trucks, Inc., 130 Ga. App. 664, 204 S.E.2d 326 (1974).

¹⁰Aguilar v. State, 340 Ga. App. 522, 798 S.E.2d 60 (2017).

¹¹Harris v. Harris, 242 Ga. 201, 249 S.E.2d 536 (1978).

¹²Mosley v. Bridges, 71 Ga. App. 156, 30 S.E.2d 355 (1944).

¹³Anderson v. State, 258 Ga. 70,

365 S.E.2d 421 (1988).

¹⁴LN West Paces Ferry Associates, LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

¹⁵Hooper v. Townsend, 362 Ga. App. 532, 868 S.E.2d 286 (2022).

¹⁶Burney v. State, 244 Ga. 33, 257 S.E.2d 543 (1979).

¹⁷Hampton v. State, 302 Ga. 166, 805 S.E.2d 902 (2017).

Here, when trial counsel said that he was not ready to proceed with the trial, he had been representing appellant for five months. He did not, however, offer any explanation as to the state of his preparation, simply stating the conclusion that he was not ready to proceed because appellant would not cooperate. Moreover, when trial counsel later moved for a continuance as a result of appellant informing him of the potential witness, he did not say what evidence this witness might offer, and the prosecutor stated to the court that trial counsel had told him that appellant would not share with trial counsel what knowledge the witness had about the case. Additionally, with regard to the potential new witness, the trial court told trial counsel that the court would “work with [him] in any way” it could during the trial “to help [him] secure that witness.”¹⁸

In *Davis v. State*,¹⁹ the Supreme Court of Georgia held that the trial court did not abuse its discretion when it denied defendant’s request to continue his trial. In *Davis*, the defendant substituted counsel on the third day of trial, and then moved for a continuance. The Court reasoned, in part, that “While every defendant has the right to hire counsel, the defendant must use reasonable diligence in obtaining retained counsel [Cit.],” and that requests for a new attorney cannot be used as a delay tactic. The Court further noted that the trial court warned the defendant that a change of counsel during the course of the trial would not warrant a continuance.

In a felon in possession of a firearm case, the Eleventh Circuit held in *U.S. v. Brinson*²⁰ that the district court properly denied defendant’s motion for continuance. Defendant had alleged that a continuance was necessary in order for him to review recordings of prison phone calls that the government had given him on the first day of trial. The circuit court reasoned in part that the trial judge informed the parties that none of the calls would be introduced at trial, and there was nothing exculpatory in the calls.

Motion for continuance to allow saliva and serum tests in paternity suit was too late where defendant had obtained blood test and gave no reason why requested tests had not been performed at the same time.²¹

Trial court did not err in refusing to grant a continuance to obtain the testimony of a witness who had not been subpoenaed.²²

The defense was not entitled to a continuance in order to secure

¹⁸*Hampton v. State*, 302 Ga. 166, Fed. Appx. 855 (11th Cir. 2017).
805 S.E.2d 902 (2017).

¹⁹*Davis v. State*, 295 Ga. 168, 758 S.E.2d 172 (1980).

²⁰*United States v. Brinson*, 679

²¹*Perini v. State*, 245 Ga. 160, 264 S.E.2d 172 (1980).
²²*Apgar v. State*, 159 Ga. App. 752, 285 S.E.2d 89 (1981).

the witness' testimony through other means where the defense attorney declined the judge's offer to have an aged witness brought to the court room by the sheriff.²³

A motion for continuance was properly denied notwithstanding that the day before, the defendant passed out after taking an overdose of his medication, and that he testified he still felt the effects of the overdose.²⁴

In a murder trial, trial court did not abuse its discretion in denying defendant's request for continuance. Defendant argued that he was stressed and sought to testify the following day. The Georgia Supreme Court found that the defendant was not deprived of his right to testify.²⁵

The trial court erred in refusing to grant a continuance to allow newly appointed defense counsel to prepare for trial on the grounds that defendant had previously announced he was ready for trial since nothing in the record indicated that defendant was advised of his right to counsel before announcing ready for trial or that an attorney would be appointed by the court to represent defendant if he could not afford one.²⁶

In *Hughes v. State*,²⁷ the trial court did not abuse its discretion in denying defendant's request for a continuance of the hearing on his motion for new trial. At the beginning of his new trial hearing, the defendant requested that the court allow him to proceed pro se. The court granted his request and allowed the defendant 10 days to file any paperwork he wished to submit. No paperwork was filed by the defendant, and his new trial motion was eventually denied by the court. The appeals court found that the defendant failed to show how he was harmed by the court's failure to grant his continuance.

A similar result was reached in *Anglin v. State*,²⁸ where the Supreme Court of Georgia found that defendant did not demonstrate how he was harmed when the court denied his request for a one-day continuance of the trial.

Trial court was found not to have abused its discretion in denying a second request for continuance in a case involving a murder and other related charges. The defendant had obtained a continuance to have a shell casing tested, but he did not perform the test prior to the rescheduled court date, and he could not demonstrate how he was harmed by the denial of the second motion for

²³Hullender v. State, 256 Ga. 86, 344 S.E.2d 207 (1986).

²⁴Frazier v. State, 257 Ga. 690, 362 S.E.2d 351 (1987).

²⁵Terrell v. State, 304 Ga. 183, 815 S.E.2d 66 (2018).

²⁶Cain v. State, 201 Ga. App. 317, 411 S.E.2d 92 (1991).

²⁷Hughes v. State, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

²⁸Anglin v. State, 312 Ga. 503, 863 S.E.2d 148 (2021).

continuance.²⁹

In criminal cases, continuances shall be allowed in the absence of a material witness or whenever the principles of justice so require.³⁰ O.C.G.A. § 17-8-25 details the requirements for obtaining a continuance based upon the absence of a witness. The statute provides that a moving party must show:

that the witness is absent; that he has been subpoenaed; that he does not reside more than 100 miles from the place of trial by the nearest practical route; that his testimony is material; that the witness is not absent by the permission, directly or indirectly, of the applicant; that the applicant expects he will be able to procure the testimony of the witness at the next term of the court; that the application is not made for the purpose of delay but to enable the applicant to procure the testimony of the absent witness; and the application must state the facts expected to be proved by the absent witness.³¹

It is not error to refuse to grant defendant's motion for a continuance made at the beginning of a trial for murder where the defendant does not explain how the pendency of an appeal from a juvenile matter in which defendant is concerned could affect the murder trial.³²

In *Jackson v. State*,³³ the Georgia Supreme Court held that the trial court did not abuse its discretion in refusing to grant a continuance to evaluate the defendant's competency. The court reasoned, in part, that "up until the day before trial, defense counsel had" no reason to seek a psychiatric evaluation, the jail's medical director determined the defendant to be in sound mental health, the trial court determined that the defendant understood the impropriety of eating his feces, and "the trial court determined that, based on Jackson's familiarity with the justice system, he might be attempting to delay trial."

Defendant who on the day of trial discharged his fourth attorney was not improperly denied a continuance by the trial court. Defendant complained that he needed a continuance in order to review medical records that were provided him the day of trial and in order to obtain witnesses. In rejecting his arguments, the appellate court reasoned that the defendant was afforded time to review the records but did not demonstrate how he would benefit from additional time, and that he failed to identify the additional

²⁹*Geiger v. State*, 295 Ga. 648, 208 (2013).
763 S.E.2d 453 (2014).

³⁰O.C.G.A. § 17-8-33. Application for, see O.C.G.A. § 17-8-25.

³¹O.C.G.A. § 17-8-25; *Janasik v. State*, 323 Ga. App. 545, 746 S.E.2d

³²*Cox v. State*, 259 Ga. 152, 377 S.E.2d 861 (1989).

³³*Jackson v. State*, 294 Ga. 431, 754 S.E.2d 322 (2014).

witnesses and relate what their testimony would be.³⁴

In *Wainwright v. State*,³⁵ the Georgia Supreme Court held a trial court acted within its discretion when it denied a request by one of the defendant's attorneys to continue the action long enough in order to allow lead counsel to be present in the courtroom during the examination of the prosecution's first witness.

There are a number of statutory provisions relating to continuances and the grounds and procedure thereof. Various provisions relating to civil cases are found in O.C.G.A. §§ 9-10-150 et seq. Continuances in criminal cases are provided for in O.C.G.A. §§ 17-8-20 et seq.

2002 amendments to O.C.G.A. §§ 9-10-150 and 17-8-26 clarify the continuance granted for an attorney who is a member of the General Assembly or on staff, or who is a party represented by an attorney in these circumstances. Continuances for legislators and legislative staff expanded by a 2006 enactment which allowed continuances when such persons certify to the court that their presence is required elsewhere because of duties with the General Assembly.³⁶

Trial court erred in refusing to grant a continuance for a summary judgment hearing for an attorney who could not attend the hearing on account of his service in the General Assembly.³⁷

There was no abuse of discretion in denying motion for continuance where defense counsel had "at least three days" to review audio tapes but had failed to do so.³⁸

In *Reinhard v. State*,³⁹ trial court did not abuse its discretion when it granted a short continuance after the state violated a discovery order by turning over 10 pages of therapist notes to the defense just prior to the commencement of trial.

In *Johnson v. State*,⁴⁰ the case was reversed for ineffective assistance of counsel where trial court denied continuance request and consented to request for mental evaluation of defendant and defense attorney had inadequate time to prepare.

§ 3:3 Voluntary dismissal

O.C.G.A. § 9-11-41 was amended in 1986 to provide that a no-

³⁴Lewis v. State, 330 Ga. App. 650, 768 S.E.2d 821 (2015).

³⁵Wainwright v. State, 305 Ga. 63, 823 S.E.2d 749 (2019).

³⁶O.C.G.A. §§ 9-10-150, 9-11-34.

³⁷Hill v. First Atlantic Bank, 323 Ga. App. 731, 747 S.E.2d 892 (2013).

³⁸Hartley v. State, 283 Ga. App. 388, 641 S.E.2d 607 (2007).

³⁹Reinhard v. State, 331 Ga. App. 235, 770 S.E.2d 314 (2015).

⁴⁰Johnson v. State, 284 Ga. App. 147, 643 S.E.2d 556 (2007).

tice of dismissal may be filed any time before the plaintiff calls her first witness. 2003 legislation limited the number of times a plaintiff can dismiss a lawsuit and refile it, from two times to once.

A major purpose of voluntary dismissal is to allow the plaintiff a chance to relitigate his case in the event he finds himself in an untenable position.¹

The dismissal of an action against a defendant with prejudice, even though a consideration is paid by such defendant to the dismissing party, does not, as a matter of law, adjudicate all issues in the case. Thus, a judgment of dismissal with prejudice against one defendant is not repugnant to and inconsistent with another judgment rendered in favor of the same complaining party against another defendant on the same cause of action.²

The plaintiff's right to dismiss cannot be exercised after a verdict or a finding by the judge which is equivalent thereto has been reached; the principle at the foundation of this ruling is that after a party has taken the chances of litigation and knows the actual result reached in the suit by the tribunal which is to pass upon it, he cannot, by exercising his right of voluntary dismissal, deprive the opposite party of the victory thus gained.³

Georgia recognizes the two-dismissal rule. The Georgia Supreme Court discussed the rule in the context of voluntary dismissals:

Although the text of the two-dismissal rule plainly provides that the filing of a second notice of dismissal operates as an adjudication upon the merits, it does not expressly provide that a second voluntary dismissal of an action shall be conclusive as to matters in a third action or that a second dismissal of the same action has res judicata effect. See OCGA § 9-11-41(a)(3).⁴

The Court continued:

[T]o obtain a dismissal of the third action, the defendant must do more than simply assert that the plaintiff has twice voluntarily dismissed a prior action. The defendant must demonstrate that the third action is barred by the doctrine of res judicata by showing that the other two prerequisites of the res judicata defense have been satisfied.⁵

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¹Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165 (2010).

²Rowland v. Vickers, 233 Ga. 67, 209 S.E.2d 592 (1974).

³Cooper v. Rosser, 233 Ga. 388, 211 S.E.2d 303 (1974).

⁴Joyner v. Leaphart, 314 Ga. 1, 875 S.E.2d 729 (2022).

⁵Joyner v. Leaphart, 314 Ga. 1, 875 S.E.2d 729 (2022).

In *Target Nat. Bank v. Luffman*,⁶ the appeals court held that the trial court improperly applied res judicata to the voluntary dismissal of the magistrate court action after the defendant had given sworn testimony in the magistrate court. Though the record was unclear, it did not appear that a trial had taken place. The court “conclude[d] that the swearing of a witness contemplated in OCGA § 9-11-41(a) refers to a trial of the merits of the case resulting in a judgment, not testimony in pretrial proceedings or in a trial which begins but is later terminated by mistrial or continuance.”

In a bifurcated trial, the trial court erred in refusing to allow the plaintiff to voluntarily dismiss his case without prejudice after the liability phase; “case” as used in the statute concerning voluntary dismissals refers to the entire case.⁷

A voluntary dismissal with prejudice, without order or approval of the trial court, constitutes a judgment on the merits for purposes of res judicata. Such a dismissal accompanied by a court order has a res judicata effect, and there is no reason to distinguish cases in which a court order effected the dismissal. The court also noted that pursuant to statute a third voluntary dismissal without order of court has a res judicata effect, and that commentators have concluded that a voluntary dismissal with prejudice, unaccompanied by a court order or approval, is a judgment on the merits for res judicata purposes.⁸

The voluntary dismissal of a plaintiff’s claim does not prevent an award of attorneys fees pursuant to O.C.G.A. § 9-15-14.⁹

An appeal from a directed verdict as to punitive damages and attorney’s fees was not rendered moot when appellant filed voluntary dismissal of claims regarding remaining elements of damages and then refiled those claims.¹⁰

Since plaintiff’s voluntary dismissal of her civil action fell outside the applicable statute of limitations period, and the instant action constituted her second attempt to renew the action, the trial court did not err in granting defendant’s motion for summary judgment. The court reasoned that O.C.G.A. § 9-2-61(a) plainly allows only one renewal “if the dismissal occurs after the

⁶*Target Nat. Bank v. Luffman*, 405 S.E.2d 678 (1991).
324 Ga. App. 442, 750 S.E.2d 750 (2013).

⁷*Pounds v. Hospital Authority of Gwinnett County*, 197 Ga. App. 598, 399 S.E.2d 92 (1990).

⁸*Fowler v. Vineyard*, 261 Ga. 454,

⁹*Omni Builders Risk v. Bennett*, 325 Ga. App. 293, 750 S.E.2d 499 (2013).

¹⁰*Broadfoot v. Aaron Rents, Inc.*, 260 Ga. 836, 401 S.E.2d 257 (1991).

expiration of the applicable period of limitation.”¹¹

Effect of plaintiff’s dismissal under voluntary dismissal statute of her superior court case, which was de novo appeal of magistrate court’s judgment against her, was to dismiss case pending in superior court; plaintiff was entitled to file renewal action, as the voluntary dismissal eliminated both the magistrate court judgment and the case pending in superior court.¹²

A party’s mistake as to the legal effect of a voluntarily dismissal of its action with prejudice does not provide a ground for defensive or affirmative relief.¹³

Voluntary dismissal of action was ineffective to deprive trial court of authority to enter subsequent orders dismissing action and making plaintiff’s counsel liable for defendant’s attorney fees, where trial court prior to the filing of voluntary dismissal communicated its decision to the parties to dismiss action in its entirety and to award attorney fees.¹⁴

The “privilege” of dismissal of a cause of action and renewal pursuant to statute providing for renewal of actions within six months of their dismissal does not apply to cases decided on their merits or void cases, but does allow renewal if the previous action was merely voidable.¹⁵ Renewal opportunities have been litigated.¹⁶

Plaintiff civic association was entitled to renew its petition which challenged a decision by a planning commission given that the original petition was voluntarily removed (and was not “the subject of a judicial dismissal based on a nonamendable defect”), and the action was renewed within six months of the voluntary dismissal.¹⁷

The Georgia Court of Appeals held that a plaintiff’s own dismissal of an action in federal court for lack of federal subject matter jurisdiction does not amount to a voluntary dismissal under O.C.G.A. § 9-11-41(a)(3).¹⁸ In *Crawford v. Kingston*,¹⁹ the plaintiff originally filed a personal injury action in Georgia. When the plaintiff developed a good faith belief that the defendant resided in Florida, the plaintiff voluntarily dismissed the Georgia

¹¹Stokes v. Hill, 324 Ga. App. 256, 737 (1989).
749 S.E.2d 819 (2013).

¹²Long v. Greenwood Homes, Inc., 285 Ga. 560, 679 S.E.2d 712 (2009).

¹³Department of Transp. v. Revco Discount Drug Centers, Inc., 322 Ga. App. 873, 746 S.E.2d 631 (2013).

¹⁴Wall v. Thurman, 283 Ga. 533, 661 S.E.2d 549 (2008).

¹⁵Patterson v. Douglas Women’s Center, P.C., 258 Ga. 803, 374 S.E.2d

¹⁶See Ehrhardt v. Manuel, 306 Ga. App. 6, 700 S.E.2d 910 (2010).

¹⁷Druid Hills Civic Ass’n, Inc. v. Buckler, 328 Ga. App. 485, 760 S.E.2d 194 (2014).

¹⁸Crawford v. Kingston, 316 Ga. App. 313, 315, 728 S.E.2d 904 (2012).

¹⁹Crawford v. Kingston, 316 Ga. App. 313, 728 S.E.2d 904 (2012).

suit after the statute of limitations ran in order to file a federal diversity suit. However, the defendant had moved to Georgia, so the plaintiff dismissed the federal action for want of diversity jurisdiction. The plaintiff re-filed in state court, an action the defendant argued was barred under O.C.G.A. § 9-11-41(a)(3). The Court of Appeals agreed with the plaintiff that a dismissal in federal court for lack of diversity jurisdiction, even if initiated by the plaintiff, could not amount to a voluntary dismissal under that statute.

In *Aaron v. Jekyll Island-State Park Auth.*,²⁰ the Georgia Court of Appeals held that plaintiff who voluntarily dismissed her complaint against “Georgia Department of Natural Resources d/b/a Summer Waves Water Park,” and later filed an action against “Jekyll Island—State Park Authority, a/k/a Jekyll Island Authority, d/b/a Summer Waves Water Park,” was barred by the statute of limitations. The court reasoned that there was a substantial difference between the two defendants named in the respective actions, “and the second lawsuit is not a valid renewal of the first lawsuit.”

§ 3:4 Nolle prosequi

Nolle prosequi is a Latin phrase which means to be unwilling to prosecute and which is a voluntary withdrawal by the prosecutor of the present indictment or information or some count or counts thereof.¹

Under the criminal code, a prosecution is barred if the defendant was formerly prosecuted for the same crime based upon the same material facts if the former prosecution was terminated in one of the ways enumerated by the statute.²

A criminal defendant has no standing to object at trial to the entry of a nolle prosequi as to a codefendant.³ Only the State may initiate a nolle prosequi order.⁴

A nolle prosequi is a cessation of prosecution for the nonce, but it may spring into life again and be continued again with all of the fervor and energy at the command of the prosecuting officers. A new indictment may be returned or a new accusation may be filed, but the earlier nolle prosequi can in no sense be pleaded as *autrefois acquit*, former jeopardy or *res judicata*.⁵

Trial court did not abuse its discretion in granting prosecu-

²⁰*Aaron v. Jekyll Island-State Park Authority*, 348 Ga. App. 332, 822 S.E.2d 829 (2019).

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¹Am. Jur. 2d, Criminal Law § 512.

²O.C.G.A. § 16-1-8.

³*Broomfield v. State*, 264 Ga. 145, 442 S.E.2d 242 (1994).

⁴*State v. LeJeune*, 276 Ga. 179, 576 S.E.2d 888 (2003).

⁵*McGahee v. State*, 133 Ga. App.

tion's motion to enter an order of nolle prosequi, despite fact that defendant had filed motion to quash the indictment. Had the motion to quash been granted the state would have been barred from continuing to prosecute the defendant.⁶

The mere entry of nolle prosequi does not indicate an absence of the commission of a criminal act or forever clear one of the charges brought against him.⁷

Trial court's grant of motion to suppress evidence, resulting in state's entry of nolle prosequi on criminal charges, was a final judgment for purposes of collateral estoppel; parties were fully heard on the motion, trial court expressed its reasons for decision and did not consider its decision provisional or tentative, and grant of motion to suppress was directly appealable by the state.⁸

Approval by trial court of the state's motion to enter nolle prosequi on the charges against defendant on the ground that the state could not prevail on a motion to suppress did not preclude the state, after defendant was reindicted and moved to suppress evidence, from contesting the motion to suppress; trial court made no decision on the merits by granting the state's motion to enter nolle prosequi.⁹

§ 3:5 Involuntary dismissal

In cases where plaintiff is unprepared to go ahead with trial at the time the case is set for trial and still wishes to proceed with the litigation, there are at least two alternatives. He may seek a continuance, as discussed in § 3:2, *supra*. Failing that, and assuming the Statute of Limitations has not run, he may seek a voluntary dismissal without prejudice, as discussed in § 3:3, *supra*. If both measures fail, he may suffer an involuntary dismissal.

For failure of the plaintiff to prosecute or to comply with the statute or any order of court, a defendant may move for dismissal of action or of any claim against him. Trial court did not abuse its discretion in dismissing plaintiff's action when plaintiff failed to appear at the court's scheduled calendar call.¹

A discrimination claim brought under the Americans with Disabilities Act was erroneously dismissed with prejudice given the claimant's failure to follow a court order. The Eleventh Circuit

964, 213 S.E.2d 91 (1975).

⁶Blanton v. State, 324 Ga. App. 610, 751 S.E.2d 431 (2013).

⁷Drake v. State, 170 Ga. App. 846, 318 S.E.2d 721 (1984).

⁸Thackston v. State, 303 Ga. App. 718, 694 S.E.2d 136 (2010).

⁹Bell v. State, 295 Ga. App. 607, 672 S.E.2d 675 (2009).

[Section 3:5]

¹Atlanta Business Video, LLC v. FanTrace, LLC, 324 Ga. App. 559, 751 S.E.2d 169 (2013).

observed that “dismissals with prejudice are warranted only under narrow circumstances, and that a litigant should be apprised of the consequences of failing to heed the district court’s directives.” The circuit court also noted that the record did not indicate that plaintiff’s conduct “evinced intentional delay or willful misconduct.”²

Where trial court dismissed negligence action against the Georgia Department of Corrections given the claimant’s failure to comply with the notice requirements in the Georgia Tort Claims Act, the court did not abuse its discretion. Claimant failed to provide notice of the amount of the loss claimed.³

A similar result was reached in *Tanks v. Nesmith*.⁴ There, the court dismissed a lawsuit against the city of South Fulton given plaintiff’s failure to state the specific amount of monetary damages that were sought.

A federal district court did not err in dismissing complaint filed against the AIDS Healthcare Foundation where the complaint failed to provide the requisite particularity under the False Claims Act. The Eleventh Circuit held:

the general allegations that the Foundation sometimes claimed public reimbursement for services, sometimes offered incentives to employees and patients, and sometimes served patients eligible for government programs is not a specific allegation of the “*presentment* of [a false] claim.” Absent more exact allegations that these factors converged into actual false claims, even accusations that “the practices of [the Foundation were] unwise or improper . . . [do not establish] actionable damage to the public fisc as required under the False Claims Act.” The relators cannot rely on their sweeping accusations that lack the “who,” “what,” “where,” “when,” and “how” of the supposedly fraudulent submissions.⁵

The 11th Circuit held that the district court properly dismissed a claim under 42 U.S.C.A. § 1985. Plaintiff, a cheerleader at a public Georgia university, sought to kneel during the national anthem to protest racial injustice. According to the plaintiff, what followed was a “public and private conspiracy—orchestrated by the university’s leadership, the county sheriff, and a Georgia legislator—to deprive Dean and her teammates of their First Amendment rights.” The decision by the district court to dismiss plaintiff’s complaint was upheld because the plaintiff failed to state a claim to support her claim that the actions against her

²*Lowe v. Delta Air Lines Inc.*, 730 Fed. Appx. 724 (11th Cir. 2018).

³*Farmer v. Department of Corrections*, 346 Ga. App. 387, 816 S.E.2d 376 (2018).

⁴*Tanks v. Nesmith*, 359 Ga. App. 596, 859 S.E.2d 559 (2021).

⁵*Carrel v. AIDS Healthcare Foundation, Inc.*, 898 F.3d 1267 (11th Cir. 2018).

were motivated by race.⁶

Trial court erroneously dismissed complaint on the basis that there was no evidence that the complaint had been personally served. The Georgia Court of Appeals found that the record indicated that an affidavit stated that a summons and complaint had been personally served. The court explained that the document that was served “[p]resumably . . . was the application and not a ‘complaint.’ Even if this somehow constituted insufficiency of process or insufficiency of service of process, [appellee] waived those defenses by failing to include them in its answer.”⁷

After the plaintiff has completed the presentation of his evidence in an action tried by the court without a jury, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal based upon the facts and the law if the plaintiff has shown no right to relief. The court, as trier of the facts, may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. Unless the court in its order for dismissal otherwise specifies, under the original approach of the Georgia law a dismissal other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operated as an adjudication upon the merits.

O.C.G.A. § 9-11-41 was amended in the 1980s to provide that a dismissal for failure to prosecute does not operate as an adjudication upon the merits.⁸ In 1984, the statute was amended to provide that the recommencement within six months of an action dismissed for want of prosecution shall stand upon the same footing as to limitation as the original action.

Dismissal of certain counts of a civil complaint, and release of certain codefendants, is no bar to the case proceeding on other counts in which the remaining defendant is sued individually.⁹

Trial court did not err in dismissing plaintiff’s petition given plaintiff’s failure to perfect service upon the defendants pursuant to O.C.G.A. 9-11-4 and the defendants’ timely presentment of the issue of insufficiency of service.¹⁰ However, in *Babalola v. HSBC*

⁶Dean v. Warren, 12 F.4th 1248, 395 Ed. Law Rep. 51 (11th Cir. 2021).

⁷9766, LLC v. Dwarf House, Inc., 331 Ga. App. 287, 771 S.E.2d 1 (2015).

⁸Chrysler Financial Services Americas, LLC v. Benjamin, 325 Ga. App. 579, 754 S.E.2d 157 (2014) (trial court did not abuse its discretion in dismissing case for failure to prosecute

when plaintiff failed to appear for several calendar calls, but did abuse its discretion in dismissing case with prejudice).

⁹West v. Clarke, 257 Ga. 524, 361 S.E.2d 181 (1987).

¹⁰Rehman v. Belisle, 294 Ga. 71, 751 S.E.2d 97 (2013).

Bank, USA,¹¹ the trial court was found to have abused its discretion when it dismissed plaintiff's action for failure to perfect service. The record revealed that the plaintiff filed two entry of services one month after the defendant's filed their motions to dismiss, and two months before the trial court entered its order.

In an action against the Georgia Department of Juvenile Justice alleging a violation of the Open Records Act, the trial court abused its discretion when it granted a dismissal motion on insufficiency of process grounds. The defendant argued that the service complaint had missing pages. In reaching its decision, the appellate court reasoned:

To begin with, we note the distinction between OCGA § 9-11-12(b)(4) and OCGA § 9-11-12(b)(5), the former permitting dismissal for insufficient process and the latter for insufficient *service of process* [I]nsufficiency of process challenges irregularities in the contents of the summons alone, whereas "insufficient service of process deals with the manner of delivery of summons *and* complaint." At least insofar as federal courts are concerned, "[f]or sufficiency of process, a summons satisfies due process when it complies with the provisions of [Federal Rule of Civil Procedure Rule 4(b)] or any other applicable provision that deals specifically with the content of the summons." Accordingly, the trial court erred in granting the motion to dismiss on the ground of insufficient process when the DJJ made no allegation as to any insufficiency in the summons.¹²

The Eleventh Circuit found that a district court erroneously dismissed with prejudice a complaint alleging inadequate medical care in violation of 42 U.S.C.A. § 1983. The Eleventh Circuit concluded that the district court improperly determined that the three-strikes provision in the Prison Litigation Reform Act ("PLRA"), 28 U.S.C.A. § 1915, barred the filing of the prisoner's in forma pauperis action. The circuit court reasoned that the prisoner demonstrated that he was in imminent danger of serious physical injury. The court noted that the prisoner alleged that he had been denied medication, and that he had not been treated for open wounds, a broken hand, and an infection in his gums.

The failure to attach a supporting affidavit to the complaint in a professional malpractice case was an amendable defect where the plaintiffs had the affidavit before filing suit and sought to amend their complaint by attaching it in opposition to defendant's dismissal motion.¹³ Plaintiffs who filed medical malpractice suit properly amended their complaint in response to a dismissal mo-

¹¹*Babalola v. HSBC Bank, USA, Juvenile Justice*, 328 Ga. App. 733, N.A., 324 Ga. App. 750, 751 S.E.2d 545 (2013). 760 S.E.2d 203 (2014).

¹²*Sampson v. Georgia Dept. of* 259 Ga. 153, 377 S.E.2d 847 (1989).

¹³*St. Joseph's Hosp., Inc. v. Nease*,

tion by attaching to it the required expert affidavits which they had obtained in their previously voluntarily dismissed case.¹⁴

The Eleventh Circuit found that the district court abused its discretion when it failed to allow a federal prisoner leave to amend his shotgun pleading. The court noted that shotgun pleadings do not comply with the F.R.Civ.P. 8(a)(2) requirement of a “short and plain statement of the claim.” However, the court held that a district court ought to allow a plaintiff the opportunity to replead. After an opportunity is provided, dismissal with prejudice may be appropriate if a complaint has not been filed or a request for leave to amend has not been sought.

In *Siska v. McNeil*,¹⁵ it was held that a trial court erred in dismissing a pro se plaintiff’s medical malpractice complaint on account of her failure to file an accompanying expert affidavit. The court noted that “within 45 days of the filing of the complaint and expiration of the statute of limitation, Siska’s attorney filed a first amended complaint with the required expert affidavit,” as permitted pursuant to O.C.G.A. § 9-11-9.1(b).

Federal district courts should consider documents attached to complaints when considering motions to dismiss.¹⁶

O.C.G.A. § 9-11-41(e) and § 9-2-60(b) provide that a case shall be automatically dismissed in instances where there are no written orders within a five-year period.¹⁷

The trial court did not err in dismissing a medical malpractice action where the affidavit of an expert required by O.C.G.A. § 9-11-9.1 was not filed with the complaint and where the plaintiffs never attempted to amend their complaint. Although the cause of action arose prior to the statute’s effective date of July 1, 1987, the statute applied since its requirement does not affect the substantive right of action for professional malpractice, but merely prescribes a procedure for enforcing that right.¹⁸

An osteopathic physician was not competent to testify as an expert witness against an allopathic physician in the absence of competent evidence that the methods of treatment of the injury in question are the same despite the difference in the nomenclature of the schools involved; therefore, the medical malpractice plaintiff’s expert affidavit was insufficient.¹⁹

A hospital patient’s personal injury suit did not involve medi-

¹⁴*Bell v. Figueredo*, 259 Ga. 321, 381 S.E.2d 29 (1989). Cir. 2022).

¹⁵*Siska v. McNeil*, 346 Ga. App. 402, 773 S.E.2d 475 (2015).

¹⁶*MSP Recovery Claims, Series LLC v. Metropolitan General Insurance Company*, 40 F.4th 1295 (11th App. 589, 394 S.E.2d 795 (1990)).

¹⁷*Miller v. Lomax*, 333 Ga. App. 402, 773 S.E.2d 475 (2015).

¹⁸*Blackmon v. Thompson*, 195 Ga. App. 589, 394 S.E.2d 795 (1990).

¹⁹*Milligan v. Manno*, 197 Ga. App. 171, 397 S.E.2d 713 (1990).

cal malpractice and was thus not subject to dismissal for failure to attach the expert affidavit required by O.C.G.A. § 9-11-9.1. The complaint alleged that hospital personnel negligently used the wrong replacement parts in an instrument used to dissolve cataracts, despite the manufacturer's warnings. The court explained that the case involved an issue of simple negligence by hospital employees, not of professional skill and judgment.²⁰

The Georgia Court of Appeals, considering an issue of first impression involving a case alleging negligent credentialing of a physician by Houston Hospitals, held that the trial court properly denied the hospital's motion to dismiss. Houston Hospitals argued that a negligent credentialing action requires the filing of an expert affidavit and that dismissal was warranted given the failure to submit such a document. The appeals court concluded such a filing is unnecessary in every instance involving alleged negligent credentialing. Here, the court found that the claim that a particular doctor had not performed the requisite number of surgeries could have been an administrative decision as opposed to a judgment made by a medical professional.

Trial court erred in dismissing plaintiff's complaint for failure to comply with O.C.G.A. § 9-11-9.1, which requires that a plaintiff attach an expert's affidavit to a complaint alleging malpractice. The plaintiff alleged that "the hospital breached its duty of ordinary care by providing unsafe equipment for use in treating him, that the hospital failed to update the software on the Pentero [a surgical microscope], and that the hospital failed to warn the surgeon of the risk of using the Pentero." The appeals court concluded that the dismissal of the plaintiff's complaint was in error because his petition alleged only simple negligence.²¹

Reversing the Court of Appeals, the Georgia Supreme Court held that the affidavit requirements of O.C.G.A. § 9-11-9.1 do not apply to radiological physicists. The court reasoned that because there is a presumption that the General Assembly enacted the statute, part of the Medical Malpractice Act, with full knowledge of the existing condition of the law, it would conclude that the legislature intended the term "professional" to apply only to those recognized under Georgia law in O.C.G.A. §§ 14-7-2(2), 14-10-2(2) and 43-1-24.²²

The Eleventh Circuit affirmed a district court's dismissal of plaintiff's lawsuit with prejudice under the fugitive disentitle-

²⁰Lamb v. Candler General Hosp., Inc., 262 Ga. 70, 413 S.E.2d 720 (1992).

²¹Ambrose v. Saint Joseph's Hosp. of Atlanta, Inc., 325 Ga. App. 557, 754 S.E.2d 135 (2014).

²²Gillis v. Goodgame, 262 Ga. 117, 414 S.E.2d 197 (1992) (holding modified by Harrell v. Lusk, 263 Ga. 895, 439 S.E.2d 896 (1994) (expanding definition of "professional")).

ment doctrine. That doctrine authorizes courts to dismiss lawsuits or appeals from individuals who are fugitives. It explained that the doctrine “reflects the principle that a fugitive ‘demonstrate[s] such disrespect for the legal process[] that he has no right to call upon the court to adjudicate his claim.’” Here, the plaintiff filed a civil claim in Florida, but was a fugitive from justice (she was in Europe) and was subject to arrest had she returned.²³

Trial court abused its discretion by not allowing automobile insureds to rescind their dismissal of defendant with prejudice, file a dismissal without prejudice, and refile their complaint against defendant and insureds underinsured motorist (UIM) insurer; UIM carrier was not prejudiced by insureds’ mistake in dismissing defendant with prejudice instead of without prejudice, and would gain a substantial unearned windfall if insureds were not allowed to correct error.²⁴

When the outcome of a motion to dismiss for lack of personal jurisdiction depends on unstipulated facts, it must be accompanied by supporting affidavits or citations to evidentiary material in the record; further, to the extent that defendant’s evidence controverts the allegations of the complaint, plaintiff may not rely on mere allegations, but must also submit supporting affidavits or documentary evidence supporting jurisdiction.²⁵

§ 3:6 Default judgment

We are concerned here only with the problems relating to default judgments that arise against parties from the time the case is set for trial until judgment is entered. Problems relating to defaults in other situations are beyond the scope of this Handbook.

Where the defendant fails to file any pleadings, he is in default.¹ In the event of a default, the plaintiff must introduce evidence only when the damages are unliquidated.²

Trial court abused its discretion in entering a default judgment against defendant. The record revealed that defendant’s failure to respond to discovery requests was due to negligence, rather than wilfulness. Record further disclosed that the defendant did

²³Ener v. Martin, 987 F.3d 1328 (11th Cir. 2021). App. 760, 688 S.E.2d 675 (2009).

[Section 3:6]

²⁴Mullinax v. State Farm Mut. Auto. Ins. Co., 303 Ga. App. 76, 692 S.E.2d 734 (2010).

¹O.C.G.A. § 9-11-55.

²⁵Sol Melia, SA v. Brown, 301 Ga.

²House v. Hewett Studios, Inc., 125 Ga. App. 127, 186 S.E.2d 584 (1971).

eventually engage in some discovery.³

Default judgment entered against Wells Fargo (given its failure to timely answer the allegations in the complaint) established its liability with respect to the complaint filed against it. However, there remained a genuine issue of material fact regarding the amount of damages.⁴

In a default situation, the requirement that discovery commence within six months after the filing of the answer does not apply. The matter is left to the discretion of the trial judge.⁵

Where defendant answers original complaint but fails to comply with order requiring answer to amended complaint, trial court properly exercised its discretion to open default judgment.⁶

Refusal to open default judgment ordering partition and sale of property was not an abuse of discretion, where trial court heard all of the evidence and determined that none of the statutory grounds were met, including that of a “proper case” being made for opening the default, and there was no showing that the trial court was substantively in error in rejecting movant’s attempt to open the default under the “providential cause” or “excusable neglect” provisions of the statute.⁷

Trial court erred in entering default judgment against Scott (purchaser of an automobile). There was a written installment agreement for a vehicle purchase. The court held that because “this type of contract is not the appropriate subject matter for a suit on account, the requirement in OCGA § 9-10-112 that Scott verify his responsive pleadings does not apply to this action.”⁸

Opening a default judgment is a remedial measure and is meant to be used in a liberal manner.⁹ Default judgments are considered so severe a resolution of a case that some areas of the law are protected from the procedure. In Georgia, actions for divorce, child custody and alimony are outside the range of default judgments.¹⁰ The Georgia statute contains a grace period

³American Radiosurgery, Inc. v. Rakes, 325 Ga. App. 161, 751 S.E.2d 898 (2013).

⁴Zhong v. PNC Bank, N.A., 345 Ga. App. 135, 812 S.E.2d 514 (2018).

⁵Gray v. Whisenaut, 258 Ga. 242, 368 S.E.2d 115 (1988).

⁶Haire v. Cook, 237 Ga. 639, 229 S.E.2d 436 (1976).

⁷Cardinal Robotics, Inc. v. Moody, 287 Ga. 18, 694 S.E.2d 346 (2010).

⁸Scott v. Prestige Financial

Services, Inc., 345 Ga. App. 530, 813 S.E.2d 610 (2018).

⁹NorthPoint Group Holdings, LLC v. Morris, 300 Ga. App. 491, 685 S.E.2d 436, 438 (2009).

See Nelson v. Board of Regents of University System of Georgia, 307 Ga. App. 220, 704 S.E.2d 868, 872 (2010) (opening default was correct when defaulting party acted promptly to rectify situation).

¹⁰Harold v. Harold, 286 Ga. 175, 686 S.E.2d 123 (2009).

during which a default can be opened as a matter of right.¹¹ Thereafter, most courts expect to see a reasonable explanation for why an answer was not filed in a timely manner.

City waived right to challenge sufficiency of findings of fact and conclusions of law in default judgment against it for \$16 million relating to death of jail detainee; trial court was not required to include findings of fact and conclusions of law unless a party requested it, and city in its motions to set aside judgment and open default did not allege any error in sufficiency of trial court's findings of fact or conclusions of law or request that it amend its judgment to separately make such findings or conclusions.¹²

Where, before entry of default judgment, trial or hearing on merits for final relief is held in suit for declaratory judgment or injunction or both, and defendant appears and opposes relief sought, trial court may treat evidence adduced as constituting answer of defendant and may refuse to enter declaratory or injunctive relief by default if any evidence adduced would authorize judgment in favor of defendant.¹³

The nonappearance of plaintiff or her attorney at trial amounted to a failure to prosecute the case; therefore, the trial court had authority to dismiss the case, or, after trial, to enter judgment for defendant.¹⁴

§ 3:7 New trial

An extraordinary motion for new trial upon the ground of newly discovered evidence is addressed to the sound discretion of the trial judge, and a refusal to grant the motion will not be reversed unless his discretion is abused. Such motions are not favored by the law, and the trial judge, in passing on the motion, must determine whether the evidence would likely produce a different result upon another trial. He must also determine whether the facts could have been obtained before verdict by the exercise of ordinary diligence.¹

To establish a basis for new trial on ground of newly discovered evidence, a defendant is required to show that it was not owing to the want of his own due diligence that he did not acquire the evidence before trial.² The defendant was not entitled to new trial on basis of newly discovered evidence in form of eyewitness

¹¹O.C.G.A. § 9-11-55.

¹²City of East Point v. Jordan, 300 Ga. App. 891, 686 S.E.2d 471 (2009).

¹³Nelson v. Bloodworth, 238 Ga. 264, 232 S.E.2d 547 (1977).

¹⁴Kraft, Inc. v. Abad, 262 Ga. 336, 417 S.E.2d 317 (1992).

[Section 3:7]

¹Lockridge v. State, 335 Ga. App. 611, 614, 782 S.E.2d 674, 677 (2016); Bradley v. Bradley, 232 Ga. 717, 208 S.E.2d 817 (1974).

²Smith v. State, 309 Ga. App. 241, 709 S.E.2d 823 (2011).

testimony to shooting, in prosecution for aggravated assault, as the defendant failed to exercise due diligence in obtaining eyewitness testimony.

To obtain a new trial based on new evidence, new evidence offered must satisfy each of the following criteria; it must have come to the knowledge of the movant since the trial, it is not owing to the lack of due diligence that the movant did not acquire it sooner, it is so material that it would probably produce a different verdict, it is not cumulative only, the affidavit of the witness with new information is procured or its absence accounted for, and the effect of the evidence is not only to impeach the credibility of a witness.³ Trial court did not err in denying extraordinary motion for a new trial because defendant failed to satisfy one of the six requirements governing such motions. Specifically, the defendant failed to show that the delay in obtaining DNA evidence was not caused by a lack of due diligence.⁴

In *White v. State*,⁵ White was serving a life sentence and “sought to re-open his case pursuant to OCGA § 5-5-41(c), which provides those convicted of felony offenses with the ability to request DNA testing of evidence if, among a number of other factors, the identity of the perpetrator of the offense was at issue at trial.” In a matter of first impression, the Georgia Court of Appeals held that a “trial judge reviewing a motion for DNA testing sits as the trier of fact and based on the evidence presented must determine whether the criteria set forth in O.C.G.A. § 5-5-41(c)(7) have been met and whether there is a reasonable probability that the DNA evidence sought by the petitioner, had it been available at his or her trial, would have resulted in a different outcome.”

A defendant who enters a guilty plea cannot prevail on a motion for a new trial since there was not a trial.⁶

An error in the court’s charge to the jury is presumed to be harmful. Instructions not warranted by the evidence are a cause for a new trial unless it is apparent that the jury could not have been misled thereby.⁷

A court order setting aside a judgment because of the excessiveness of the verdict is in the nature of a grant of a new trial on

³*Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980); *Deen v. Altman*, 267 Ga. 111, 475 S.E.2d 611 (1996).

⁴*Bharadia v. State*, 326 Ga. App. 827, 755 S.E.2d 273 (2014).

⁵*White v. State*, 346 Ga. App. 448, 814 S.E.2d 447 (2018).

⁶*Garza v. State*, 325 Ga. App. 505, 753 S.E.2d 651 (2014).

⁷*Department of Transp. v. Davison Inv. Co.*, 267 Ga. 568, 481 S.E.2d 522 (1997) (since jury could have been misled by erroneous instruction, judgment reversed).

general grounds.⁸

In a narcotics distribution case, trial court did not err in denying defendant's new trial motion. It was argued that a new trial was warranted given that the jury foreman observed the defendant in custody during a break in the trial. Rejecting the defendant's claim, the appellate court reasoned that the foreman did not discuss the incident with his fellow jurors, and that the foreman testified that his decision-making was not impacted by the sighting. In addition, defendant did not raise the issue during trial, but instead waited approximately one month later at the defendant's sentencing hearing.⁹

In a conspiracy to distribute illegal narcotics case, the Eleventh Circuit held that the district court did not abuse its discretion in denying defendant's motion for new trial. Defendant claimed that the government committed a *Bruton* error during its summation. The circuit court disagreed, stating:

The Government's closing argument did not compel an inference of Defendant's guilt based on Blanc's statements. (citation omitted). At most, the Government suggested that the jury should weigh the credibility of the testifying witnesses by comparing their testimony with the statements of Blanc and Defendant. The Government did not invite the jury to consider the statements of Blanc as evidence of Defendant's guilt, nor did the Government link Blanc's agreement with the allegation that Justice delivered a package to "you guys" to Defendant. Instead, the Government appears to have been inviting the jury to view each co-defendant's statements as self-inculpatory, especially in light of the district court's limiting instruction.¹⁰

In another Eleventh Circuit case involving conspiracy to distribute illegal narcotics, the court held that the district court properly denied defendant's motion for new trial. After announcing the jury's verdict, the trial judge polled the jury. During this process, the foreman informed the court of a possible discrepancy between the verdict form and what the jury found. The court then ordered the jurors to return to their deliberations. After the jury completed their deliberations, an error in the original verdict form was confirmed. The trial judge then announced the corrected verdict. Defendant sought a new trial arguing that "the confusion over the jury's verdict rendered the corrected verdict unreliable." The Eleventh Circuit reasoned that the only mistake in the original verdict concerned the quantity of the narcotics involved, and that the record was devoid of any "indication . . .

⁸Baxter v. Weiner, 246 Ga. 28, 111, 761 S.E.2d 524 (2014).
268 S.E.2d 619 (1980).

¹⁰United States v. Vernet, 681

⁹Patterson v. State, 328 Ga. App. Fed. Appx. 765 (11th Cir. 2017).

that the jury twice failed to indicate its true verdict.”¹¹

Trial court did not abuse its discretion in denying motion for new trial in case involving an allegation that the verdict was against the weight of the evidence. “Indeed, [w]hen faced with a motion for new trial based on these general grounds, the trial court has the duty to exercise its discretion and weigh the evidence.”¹²

In *Whitmire v. State*,¹³ the Georgia Court of Appeals held in a robbery case that the trial judge evaluated defendant’s motion for new trial on general grounds pursuant to incorrect standards. The court noted that the trial court’s order was devoid of any indication that it exercised its discretion and weighed the evidence.

In *U.S. v. Cortes-Meza*,¹⁴ a case involving human trafficking and prostitution, the 11th Circuit held that defendant’s motion for new trial based upon newly discovered evidence was properly denied. Court reasoned that the purported new evidence from a prostitute who did not testify at trial pertained to counts for which there was overwhelming evidence of the defendant’s guilt.

In *Southall v. State*,¹⁵ the Georgia Supreme Court held that “a prematurely filed motion for new trial that sufficiently identifies the judgment involved becomes fully effective upon entry of that judgment, enabling the trial court—and ultimately the appellate court pursuant to a properly filed notice of appeal—to review all of the issues raised in the motion on their merits.”

A court that grants a new trial sua sponte must do so within 30 days of the judgment. “[O]utside of that statutorily defined 30-day window, a trial court considering a timely motion for new trial is confined to the grounds raised in the motion itself.” In *State v. Reed*,¹⁶ the Georgia Court of Appeals found that the trial court in a RICO case abused its discretion when it granted a new trial on its own motion. It found that the court “failed to properly fulfill its affirmative statutory duty to independently weigh the trial evidence as required by OCGA section 5-5-20 and 5-5-21.”

A constitutional issue may not be raised for the first time on motion for a new trial, a civil case holds.¹⁷

In Georgia’s federal courts, a new trial will not be ordered pur-

¹¹United States v. Barona-Bravo, 685 Fed. Appx. 731, 103 Fed. R. Evid. 685 Fed. Appx. 761 (11th Cir. 2017). Serv. 147 (11th Cir. 2017).

¹²Leggett v. State, 331 Ga. App. 343, 771 S.E.2d 50 (2015) (internal quotes omitted).

¹³Whitmire v. State, 343 Ga. App. 282, 807 S.E.2d 46 (2017).

¹⁴United States v. Cortes-Meza,

¹⁵Southall v. State, 300 Ga. 462, 796 S.E.2d 261 (2017).

¹⁶State v. Reid, 331 Ga. App. 275, 770 S.E.2d 665 (2015).

¹⁷See Cambron v. Canal Ins. Co., 246 Ga. 147, 269 S.E.2d 426 (1980).

suant to a losing litigant's claim that issues were improperly submitted to the jury unless that party moved for a directed verdict.¹⁸ The decision of whether to grant a new trial is reviewed under an abuse of discretion standard. To be entitled to a new trial on the basis of evidentiary rulings, the errors must have affected substantial rights.

In *Durham v. Dollar Tree Stores Inc.*,¹⁹ the Georgia Court of Appeals found that the trial court erred in failing to grant plaintiff's motion for a new trial. The court reasoned that the jury instruction provided regarding contributory negligence was improper.

An attorney may assert the general ground of insufficient evidence as the basis for her motion, or may assert specific complaints about things like the opposing attorney's misconduct, or may combine both general and specific points. When specific grounds are urged, some of the points which may be raised will illustrate the nature of a movant's potential claims:

- Misconduct by the jury when they considered the case.
- Judicial errors in jury instructions or the admission and exclusion of evidence.
- Inflammatory closing argument which prejudiced the jury and emotionalized the case.

This is a nonexhaustive list, but supplies an idea of the range of claims which may be made in the motion. After preparation of the motion, counsel will need to consider the burden of proof she will be required to carry in order to prevail. When counsel's claim is that the jury acted improperly in its deliberations, counsel is required under many cases to show: (1) that jury misconduct occurred and (2) by a reasonable probability, that improper conduct prejudiced the result. Other complaints may be controlled by a slightly different formulation. "The standard for granting a new trial based on improper conduct by counsel, including improper closing argument, 'is whether the conduct was such as to impair gravely the calm and dispassionate consideration of the case by the jury.'"²⁰

Trial court properly granted defendant's motion for new trial based upon improper comments by the prosecutor during closing arguments. The state commented that the defendant in a DUI case could have proven his innocence had he elected to take a breath test. The trial court overruled the defendant's objections

¹⁸Haygood v. Auto-Owners Ins. Inc., 360 Ga. App. 548, 859 S.E.2d 620 Co., 995 F.2d 1512, 38, 38 Fed. R. Evid. (2021).
Serv. 1471 (11th Cir. 1993).

²⁰Neal v. Toyota Motor Corp., 823 F. Supp. 939 (N.D. Ga. 1993).

¹⁹Durham v. Dollar Tree Stores,

and failed to provide curative instructions.²¹

In *State v. Denson*,²² the Supreme Court of Georgia found that the trial court acted within its discretion in a murder case when it granted defendant's new trial motion on general grounds. The Court found that the record was clear that "the trial court understood the legal standard required to grant a motion for new trial on the general grounds and exercised its discretion in applying that standard."

In *Douglas v. State*,²³ the defendant had been convicted of burglary and filed a motion for a new trial. In its order denying the motion the trial judge simply wrote "The Motion for New Trial is hereby DENIED." The Georgia Court of Appeals affirmed, reasoning that there is a presumption that trial judges are aware of the rules requiring that they exercise their discretion and in the absence of contrary evidence the appeals court was unwilling to assume that the trial judge failed to properly exercise its discretion.

Motion for new trial was properly denied when it was filed 37 days after defendant's conviction for armed robbery. The trial court did not deny the new trial motion until over six years had passed.²⁴

"When a defendant challenges a conviction on the general grounds under OCGA § 5-5-20 (that the verdict is contrary to the evidence) or § 5-5-21 (that the verdict is strongly against the evidence), a trial court has broad discretion to sit as the 'thirteenth juror' and consider certain matters beyond the sufficiency of the evidence."²⁵

A trial court erred when it granted a defendant's request for a new trial but later entered an order denying the new trial request. The court was without jurisdiction to change course given that the new order was issued after the original term of the court had expired.²⁶

In an armed robbery case, trial court applied an incorrect standard in evaluating defendant's motion for new trial which asserted that the verdict was against the weight of the evidence. The trial court failed to evaluate defendant's motion pursuant to O.C.G.A. § 5-5-21, which provides that "[t]he presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against

²¹*State v. Mitchell*, 326 Ga. App. 370, 756 S.E.2d 609 (2014).

²²*State v. Denson*, 306 Ga. 795, 833 S.E.2d 510 (2019).

²³*Dunlap v. State*, 351 Ga. App. 685, 832 S.E.2d 667 (2019).

²⁴*Hill-Blount v. State*, 336 Ga. App. 633, 785 S.E.2d 309 (2016).

²⁵*Bridges v. State*, 314 Ga. 395, 877 S.E.2d 261 (2022).

²⁶*Kelly v. State*, 315 Ga. 444, 883 S.E.2d 363 (2023).

the weight of the evidence even though there may appear to be some slight evidence in favor of the finding.” Instead, the trial court erroneously applied the sufficiency standard of *Jackson v. Virginia*.²⁷

In a case where trial counsel sought new trial on the basis that the verdict was against the weight and sufficiency of the evidence, where new counsel filed an “Amended Motion for New Trial” which stated that the verdict as well as the sentence was against the weight of the evidence and that “the verdict and sentence are contrary to law and the principles of justice and equity,” and a third attorney filed a “Second Amended Motion for New Trial which did not amend the first motion or incorporate it by reference, and asserted only the sufficiency of the evidence and ineffective assistance of counsel,” the Supreme Court of Georgia found that the defendant had abandoned the general grounds in her original motion for new trial.²⁸

Trial court properly denied defendant’s motion for new trial in a malice murder prosecution. The Supreme Court of Georgia found that the trial court had properly exercised its discretion when “[i]n its order denying Smith’s motion for new trial, the trial court recited it had weighed the evidence, including the credibility of witnesses, and found Smith was not entitled to a new trial on the general grounds.”²⁹

To obtain a new trial on the ground of newly discovered evidence in wrongful death action against company that mined a form of asbestos to which worker allegedly had been exposed, worker’s heirs had burden of showing that (1) evidence came to their knowledge since trial, (2) its failure to come to light sooner was not result of lack of diligence on their part, (3) it was so material as to make different verdict likely, (4) it is not merely cumulative, (5) witness’s affidavit was procured or its absence was accounted for, and (6) it served some other effect than mere impeachment.³⁰

In a case of first impression, the Supreme Court of Georgia found that a motion for new trial can be granted on the basis of an affidavit submitted by an expert witness. At issue was a doctor’s affidavit that addressed infant head injuries. The Court found that “[t]hese pleadings at the very least allege facts that, if proved at the hearing, would be sufficient to warrant a conclusion that the opinion offered in support of the motion relates to

²⁷*Gordon v. State*, 329 Ga. App. 2, 763, 763 S.E.2d 357 (2014).

²⁸*Hornbuckle v. State*, 300 Ga. 750, 797 S.E.2d 113 (2017).

²⁹*Smith v. State*, 300 Ga. 532, 796 S.E. 2d 671 (2017).

³⁰*United States v. Caldwell*, 963 F.3d 1067 (11th Cir. 2020); *Flowers v. Union Carbide Corp.*, 271 Ga. App. 438, 610 S.E.2d 109 (2005), citing O.C.G.A. § 5-5-23.

new and material facts.”³¹

Under statute governing extraordinary motions for new trial, late filing of a motion for new trial may be predicated on circumstances other than newly discovered evidence.³²

Newly discovered evidence entitles a defendant to a new trial where the case against him is circumstantial and there is so much new evidence that real doubt is created as to whether defendant got a fair trial.³³

In a case involving an improper denial of a new trial claim based, in part, upon ineffective assistance of counsel, where there was “a discrepancy in the testimony between [defendant] and his counsel, it is the function of the trial court at the hearing on the motion for new trial to determine witness credibility and to resolve any conflicts in the testimony.”³⁴

A juror’s silence during voir dire and the subsequent denial of a litigant’s opportunity to exercise a peremptory strike is not, without more, sufficient to grant a new trial. The Supreme Court of Georgia held that a juror’s silence during voir dire does not justify a new trial unless the movant can show: (1) a juror failed to answer, or honestly answer, a material question and (2) a correct response would have provided a valid basis for a challenge for cause. The court concluded that the trial court is in the best position to determine matters relating to juror conduct and thus properly denied a new trial.³⁵

There was no error in denying a new trial where witness executed an affidavit stating that he lied when he testified that the defendant admitted killing the victim. This affidavit did not meet the requirements for granting a new trial based on newly-discovered evidence. Defendant could not show that affiant was convicted of perjury or that the defendant’s conviction could not have been obtained without affiant’s testimony.³⁶

A defendant who is paroled after serving eight years of a sentence may not rely on a statement by a codefendant’s wife that she was solely responsible for a murder as newly discovered evidence in an extraordinary motion for a new trial where evidence shows that a similar statement was in defendant’s hands

³¹Smith v. State, 315 Ga. 287, 882 S.E.2d 300 (2022).

³²O.C.G.A. §§ 5-5-40, 5-5-41(a); Fowler Properties, Inc. v. Dowland, 282 Ga. 76, 646 S.E.2d 197 (2007).

³³Banks v. State, 246 Ga. 1, 268 S.E.2d 630 (1980).

³⁴Perez v. State, 331 Ga. App. 164, 770 S.E.2d 260 (2015).

³⁵Gainesville Radiology Group v. Hummel, 263 Ga. 91, 428 S.E.2d 786 (1993).

³⁶Ashley v. State, 263 Ga. 820, 439 S.E.2d 914 (1994).

shortly before his trial.³⁷

A defendant does not have a right to be present at a hearing on his extraordinary motion for a new trial.³⁸

It was not error to deny the defendant's request to delay the hearing on his motion for new trial until the trial transcript had been prepared.³⁹

Failure by the trial court to honor the attorney's right to argue in a civil or criminal case can result in the grant of a new trial.⁴⁰ Abridgement of the right to argue can be total, or partial. Even the latter is deemed to be a serious error. In one case the trial court's abridgement of defendant's right to closing argument during a malice murder trial, which occurred when the court prohibited defense counsel from making specific references to the possible punishment State's witnesses would have received if they had not made a plea-bargain deal to testify, was harmful and entitled defendant to the new trial. The two witnesses at issue were the source of evidence connecting the defendant to the weapons used in committing the crimes, and trial court's ruling prevented defense counsel from attacking the credibility of those witnesses.⁴¹

When the basis for a new trial rests primarily upon a claim of missing documents, the Georgia Supreme Court has stated the following regarding the governing standards:

Where all or an important portion of the original verbatim transcript of a trial is lost and the transcript reconstructed pursuant to OCGA § 5-6-41(f) and (g) is manifestly inadequate, an appellant is not required to specify how he has been harmed by a particular error that may have occurred at trial but is now buried in unrecorded history. But where, as here, an otherwise verbatim transcript is missing only one or a few parts of the trial, the appellant is not entitled to a new trial unless he alleges that he has been harmed by some specified error involving the omitted part and shows that the omission prevents proper appellate review of that error.⁴²

*Edge v. State*⁴³ was a case involving jury misconduct where certain jurors allegedly used their cell phones improperly and considered extraneous information during their deliberations. There it was held that the trial court erred in denying defendant's

³⁷Carter v. State, 246 Ga. 328, 271 S.E.2d 475 (1980).

³⁸Pitt v. State, 337 Ga. App. 436, 787 S.E.2d 782 (2016); Dobbs v. State, 245 Ga. 208, 264 S.E.2d 18 (1980).

³⁹Appling v. State, 256 Ga. 36, 343 S.E.2d 684 (1986).

⁴⁰See § 34:1, *infra*.

⁴¹Palma v. State, 280 Ga. 108, 624 S.E.2d 137 (2005).

⁴²Gadson v. State, 303 Ga. 871, 815 S.E.2d 828 (2018).

⁴³Edge v. State, 345 Ga. App. 794, 815 S.E.2d 146 (2018).

new trial request. When juror misconduct is demonstrated, there is a presumption of prejudice. It is the state's burden to overcome this presumption. In *Edge*, the state did not satisfy its burden.

In *State v. Melly*,⁴⁴ the Georgia Court of Appeals found that the trial court abused its discretion when it granted a motion for a new trial based upon alleged juror misconduct. At issue was extraneous research performed by one of the 12 jurors in a criminal case involving sexual misconduct. That juror brought a screenshot of this information with her into the jury deliberation room and attempted to show it to the other jurors. The appeals court found that the juror's conduct was harmless, reasoning that the other jurors neither saw the screenshot nor learned of its contents.

Mistaken destruction of evidence, no new trial, see *Blackwood v. State*.⁴⁵

§ 3:8 Stay of proceedings

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants; how this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.¹

Earlier Georgia law held that upon timely objection by defendant that costs in previous action have not been paid, trial court may stay proceedings in pending action for reasonable time to allow plaintiff to pay costs of previous action; upon payment of such costs, there is no reason why pending action should not then be allowed to proceed to determination of case.² Under Little, payment of costs in a prior action was deemed to be a condition precedent to filing a second suit.

Filing for bankruptcy results in automatic stay of all pending actions based on dischargeable debts.³

O.C.G.A. § 9-10-160 sets out items which need to be shown by

⁴⁴*State v. Melly*, 358 Ga. App. 249, 855 S.E.2d 25 (2021).

⁴⁵*Blackwood v. State*, 277 Ga. App. 870, 627 S.E.2d 907, 24 A.L.R. 6th 819 (2006).

[Section 3:8]

¹*In re Estate of Gore*, 292 Ga. App. 285, 664 S.E.2d 290 (2008).

²*McLanahan v. Keith*, 239 Ga. 94, 236 S.E.2d 52 (1977). Later, there was a modification of the rule of

McLanahan (overruled by *Little v. Walker*, 250 Ga. 854, 301 S.E.2d 639 (1983)).

³*Graves v. Graves*, 239 Ga. 869, 239 S.E.2d 35 (1977).

See *Akridge v. Silva*, 298 Ga. App. 862, 681 S.E.2d 667 (2009).

An application for a stay because a party is in military service must be supported by a detailed statement. *City of Pendergrass v. Skelton*, 278 Ga. App. 37, 628 S.E.2d 136, 140

party before continuance will be granted because of absence of witness; it was proper exercise of trial court's discretion to deny motion for continuance when these items were not shown.

Motions for continuance predicated on basis that counsel had not had sufficient time to prepare for trial address themselves to sound discretion of trial court, and the ruling of the trial judge in denying motion for continuance will not be interfered with unless the court has abused its discretion in denying the motion.⁴

§ 3:9 Change of venue

The trial court has the discretion to grant a change of venue and its discretion will not be disturbed absent an abuse of that discretion.¹

The trial court did not err in denying a motion for change of venue in an armed robbery prosecution where 10 of a jury pool of 104 were excused for strong feelings about the case, and the defendant suggested that another six should have been dismissed for the same reason.² The court noted that only 15% of jurors were excused during voir dire, and that voir dire is the best way to explore pretrial publicity in a case.

Change of venue was not required because 24% of all panel members and 48% of all black panel members were excused due to their prior knowledge of a case.³

A change of venue was not required because 34 of 60 veniremen had read or heard about the case.⁴

Even in cases of widespread publicity, change of venue is rare.⁵

The inquiry into a request for a change of venue is two-pronged. First, the court must consider whether the atmosphere in the community is so inherently prejudicial due to pretrial publicity that the defendant cannot receive a fair trial in the community. Second, the court must consider whether the defendant can receive a fair trial despite the prejudice of individual jurors.⁶

It was not error for a trial court to deny a motion for change of venue in a murder prosecution where less than 12% of the venire

(2006).

See *Cornelius v. Morris Brown College*, 299 Ga. App. 83, 681 S.E.2d 730, 733, 248 Ed. Law Rep. 499 (2009).

⁴*Burnett v. State*, 240 Ga. 681, 242 S.E.2d 79 (1978).

[Section 3:9]

¹*Gear v. State*, 288 Ga. 500, 705 S.E.2d 632 (2011) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

²*Thomas v. State*, 290 Ga. 653, 723 S.E.2d 885 (2012).

³*Hughes v. State*, 257 Ga. 200, 357 S.E.2d 80 (1987).

⁴*Ford v. State*, 257 Ga. 461, 360 S.E.2d 258 (1987).

⁵*Rawls v. State*, 315 Ga. App. 891, 730 S.E.2d 1 (2012).

⁶*Lemley v. State*, 258 Ga. 554, 372 S.E.2d 421 (1988).

was excused because of the effect of pretrial publicity and where there was no showing of actual prejudice.⁷ By comparison, a trial court should have granted a defendant's motion for change of venue in a prosecution for murder, false imprisonment, and aggravated child molestation given the prejudicial pretrial publicity, pervasive prior knowledge of the case on the part of the jury venire, and excusal of approximately one third of the prospective jurors for bias or fixed opinion.⁸

In another case, a prospective juror's knowledge of a guilty verdict entered in a prior trial of the case did not entitle the defendant to a change of venue, where the murder case received relatively little publicity on retrial and where the vast majority of prospective jurors indicated that they had no fixed opinions on the case and could render an impartial verdict.⁹

A trial judge is authorized to change venue on his own motion only when there is a danger of violence being committed on the defendant.¹⁰

To justify a change of venue on motion of the accused, a defendant must show pretrial publicity created an inherently prejudicial atmosphere, or actual bias on the part of individual jurors.¹¹

In motions for change of venue based on prejudicial pretrial publicity, the accused has the burden of showing either that present venue is an inherently prejudicial venue or that the jury selection process has revealed the existence of actual prejudice which prevents him from receiving a fair trial. The Supreme Court has held that a finding that pretrial publicity has so infected a community as to render it an inherently prejudiced venue is authorized only in extremely rare situations.¹²

Venue in civil cases has been the object of legislative enactment. In 1999, a revision of O.C.G.A. § 9-10-31 attempted to address the problem of "vanishing venue." Historically, an action may be brought in any county where one or more defendants reside. However, according to this statute, if the court determines prior to trial that:

- (1) That plaintiff brought the action in bad faith against all defendants residing in the county in which the action was brought, or

⁷Tharpe v. State, 262 Ga. 110, 440 S.E.2d 181 (1994).
416 S.E.2d 78 (1992).

⁸Tyree v. State, 262 Ga. 395, 418 S.E.2d 16 (1992). ¹¹Jones v. State, 267 Ga. 592, 481 S.E.2d 821 (1997). See Eckman v. State, 274 Ga. 63, 548 S.E.2d 310 (2001).

⁹Crawford v. State, 257 Ga. 681, 362 S.E.2d 201 (1987).

¹⁰Freeman v. State, 264 Ga. 27, 511 S.E.2d 190 (1999). ¹²Roundtree v. State, 270 Ga. 504,

- (2) As a matter of law, no defendant residing in the county which the action was brought is a proper party; then “the action shall be transferred to the county and court which the plaintiff elects in which venue is proper.” Further, “the burden of proof on the issue of venue shall be on the party claiming improper venue by a preponderance of evidence.”

In 2000, venue for civil suits against corporations received attention. The “Civil Litigation Improvement Act of 2000” provided an alternative venue for tort actions, the act providing authority for removal of such actions from the county where the cause of action originated to the county where the defendant maintains its principal place of business if there is no other basis for venue. Provisions are included relating to motions of removal, notice, and remand to the original court if removal is found to be improper.¹³

In a 2006 decision, one venue provision which was enacted as part of the Tort Reform Act of 2005 was upheld as constitutional, while another part was struck down. The statute providing that a trial court may decline to exercise jurisdiction over a case and may transfer it to a different county of proper venue based on “the interest of justice” and “the convenience of the parties” was constitutional and was deemed to be procedural and thus would apply retroactively.¹⁴ On the other hand, the 2005 statute provided that a nonresident defendant in a medical malpractice action could require transfer of the action to county of defendant’s residence if the tortious act supporting the malpractice claim occurred in the defendant’s county of residence. This was held to be unconstitutional as violative of the Georgia constitutional provision providing that suits against joint-tortfeasors residing in different counties could be tried in either county.¹⁵

Juvenile court did not err in denying parent’s change of venue motion in a deprivation proceeding. The record revealed evidence an exigency to support the venue being in the county where the children were present. Specifically, the “testimony before the juvenile court was that when B.T.H. told his mother he did not want to come home, she threatened to come to Tennessee and that the children would be ‘drug out and tortured.’ In response, the grandmother removed them to her home in Chattooga County and immediately filed a deprivation petition.”¹⁶

Venue in civil cases was an object of attention in the 2005

¹³Civil Litigation Improvement Act, see O.C.G.A. §§ 5-6-46, 14-2-510. Par. 4; O.C.G.A. § 9-10-31(c). EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 626 S.E.2d 482 (2006).

¹⁴O.C.G.A. § 9-10-31.1(a).

¹⁵Georgia Constitution, Art. 6, § 2,

¹⁶In re B.T.H., 326 Ga. App. 531,

Georgia Tort Reform Act. In 1999, a legislative act ended the possibility that venue would vanish as to nonresident defendants who were jointly sued with a resident defendant, in cases where the suit against the resident defendant is dismissed. “Plainly, the 2005 Tort Reform Act undoes the 1999 statute and restores vanishing venue in O.C.G.A. 9-10-31(d).”¹⁷

For civil case venue, see C. Cork, *Change of Venue Under O.C.G.A. § 9-10-31(c) and 9-10-31.1(a)*, 29 Verdict 18 (Summer/Fall 2005).

Regarding medical malpractice case venue, see *EHCA Cartersville, LLC v. Turner*.¹⁸

In criminal fraud cases, venue resides in the county where the fraudulent scheme was hatched, where overt acts to further the plan were performed, or location where fraudulent billings were sent. Generally, all criminal cases are to be tried in the county where the crime was committed.¹⁹

Venue in all criminal cases must be laid in the county in which the crime was allegedly committed. Venue is a jurisdictional fact and is an essential element in proving that one is guilty of the crime charged. Venue is a question for the jury, and must be proved by the prosecution beyond a reasonable doubt. The state may establish venue by whatever means of proof are available to it and it may use both direct and circumstantial evidence.²⁰

For change of venue in criminal cases, see *Maddox v. State*.²¹

Sometimes there is a failure by the state to prove venue, and dismissal of the case can result.²² Venue is a jurisdictional element of every crime.²³

“[W]here a crime is committed upon a vehicle traveling within this state and it cannot readily be determined in which county the crime was committed, the crime shall be considered as having been committed in any county in which the crime could have

757 S.E.2d 167 (2014).

¹⁷R. Ellington, *Georgia’s New Battleground*, 39 Ga. Law Advocate 17 (Spring/Summer 2005).

¹⁸*EHCA Cartersville, LLC v. Turner*, 280 Ga. 333, 626 S.E.2d 482 (2006) (O.C.G.A. § 9-10-31(c) violated a provision of the Georgia constitution; O.C.G.A. § 9-10-31.1(a) was approved).

¹⁹*State v. Kell*, 276 Ga. 423, 577 S.E.2d 551 (2003).

²⁰*King v. State*, 271 Ga. App. 384, 609 S.E.2d 725 (2005).

²¹*Maddox v. State*, 278 Ga. 823,

607 S.E.2d 587 (2005) (trial court held hearing prior to voir dire, and extensive voir dire was conducted; no abuse of discretion to deny motion for change).

²²See *Maldonado v. State*, 284 Ga. App. 26, 643 S.E.2d 316 (2007) (conviction reversed where no evidence that offenses occurred within the county specified in the indictment).

²³*State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010) (reasonable doubt standard controls venue proof; state not required to stipulate to venue).

been committed through which the vehicle traveled.”²⁴ Venue for crimes involving a vehicle may lie in any county through which the vehicle traveled.²⁵

In a 2011 decision, the state carried its burden of proving the crime occurred in Clayton County.²⁶

Additional cases on venue appear in § 9:9, *infra*.

Change of venue not required where jurors stated that they could put past associations aside.²⁷

§ 3:10 Request for severance

It is not enough for defendant seeking severance from other defendants and a separate trial for himself to show that he or she would have a better chance of acquittal at a separate trial or that the evidence against a co-defendant is strong; rather, the defendant must show clearly that a joint trial will prejudice his or her defense, resulting in a denial of due process.¹

Except where the death penalty is sought, the issue of whether to sever the trial of multiple criminal defendants is left to the discretion of the trial court.²

Where severance is discretionary with the trial judge, the factors to be considered by a trial court in exercising its discretion concerning a request for severance in criminal cases are: whether a joint trial will create confusion of evidence and law; whether there is a danger that evidence implicating one defendant will be considered against another defendant despite cautionary instructions to the contrary; and whether the codefendants will press antagonistic defenses.³

In *Evans v. State*,⁴ the Georgia Court of Appeals found in a RICO case that the trial court properly denied defendant’s motion for severance. The court reasoned that while:

Evans has pointed to the length of the trial and the number of

²⁴*Prudhomme v. State*, 285 Ga. App. 662, 647 S.E.2d 343 (2007).

²⁵O.C.G.A. § 17-2-2(e); *Short v. State*, 276 Ga. App. 340, 623 S.E.2d 195 (2005) (convictions for kidnapping, robbery, hijacking, aggravated sodomy and rape; jury authorized to conclude beyond a reasonable doubt that crimes occurred in either Douglas or Fulton County); *Faulkner v. State*, 295 Ga. 321, 758 S.E.2d 817 (2014).

²⁶*Graham v. State*, 275 Ga. 290, 565 S.E.2d 467 (2002).

²⁷*Stokes v. State*, 281 Ga. 825, 642 S.E.2d 82 (2007) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

[Section 3:10]

¹*Krause v. State*, 286 Ga. 745, 691 S.E.2d 211 (2010).

²*Walker v. State*, 282 Ga. 703, 653 S.E.2d 468 (2007).

³*Brown v. State*, 262 Ga. 223, 416 S.E.2d 508 (1992).

⁴*Evans v. State*, 360 Ga. App. 596, 859 S.E.2d 593, 392 Ed. Law Rep. 402 (2021).

defendants, she has not identified evidence against another defendant that possibly was considered against her. And while she has cited an evidentiary dispute with her co-defendants, she has not articulated specific defenses antagonistic to hers at trial.

“A defendant lacks standing to complain of the trial court’s decision to sever his trial from that of the co-indictee[] at the request of the state.”⁵

The refusal to sever felony-murder and kidnapping charges from a charge of robbery of another victim was not held to be an abuse of discretion, where all three crimes were part of a single plan to leave the state in which a car was taken from the murder victim and a purse was snatched from the robbery victim to provide funding for the trip.⁶

A court did not abuse its discretion in denying a severance motion when jurors were not likely to be confused by the fact that the defendants were charged with some separate offenses, jurors were given appropriate limiting instructions regarding the consideration of similar transaction evidence, and the respective defenses of the defendants were not antagonistic.⁷

Where a defendant does not show a significant degree of prejudice from a joint trial, there is no requirement for reversing the judgment because of the court’s denial of his motion to sever his trial from that of his codefendant.⁸

*Ahmed v. Kifle*⁹ involved a defamation action alleging that defendants Kifle and Ethiopian Review published defamatory material stating that plaintiff operated a large human trafficking enterprise involving underage girls. After a bench trial for damages, the court awarded the plaintiff in excess of \$428,000 in compensatory and punitive damages, as well as costs and attorney’s fees. Subsequently, defendants filed a motion to dismiss claiming that there was a lack of complete diversity. Plaintiff, in turn, filed a motion seeking the severance of Kifle from the action in order to preserve diversity. The Eleventh Circuit found that severance was appropriate since Ethiopian Review “was the corporate vehicle through which the website was funded and operated.” Accordingly, Kifle was neither a required nor indispensable party and could properly be severed pursuant to Rule 21 of the Federal Rules of Civil Procedure.

See § 2:29, *supra*, for additional consolidation and severance issues.

⁵*Parker v. State*, 353 Ga. App. 396, 772 S.E.2d 838 (2015).
493, 838 S.E.2d 150 (2020).

⁶*Burrell v. State*, 258 Ga. 841, S.E.2d 724 (1991).

⁷376 S.E.2d 184 (1989).

⁸*Ahmed v. Kifle*, 728 Fed. Appx. 934 (11th Cir. 2018).

⁹*Brooks v. State*, 332 Ga. App.

Chapter 4

Criminal Trials

- § 4:1 Criminal procedure; generally
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§ 4:1 Criminal procedure; generally

O.C.G.A. Title 17 contains the basic provisions relating to criminal procedure.

Every person charged with a crime has an absolute and fundamental right to a fair and impartial trial, and the duty rests upon the courts and the prosecuting attorney to see that this right is upheld and sustained.¹ As stated in *Berger v. U.S.*,² the prosecutor's interest in a criminal prosecution is not that the prosecutor "shall win a case, but that justice shall be done." Moreover, a fair trial for a criminal defendant consists not only in the naked forms of law, but in the recognition and just application of its principles. Thus, the highest duty in a criminal case is to insure a fair and impartial trial to all parties, and it is not allowed to be injected into the proceedings any illegal element to the prejudice of the defendant's rights.³

This right requires that the offense be charged with clearness and all necessary certainty to inform the accused of the crime with which he stands charged in sufficient detail to enable him to prepare his defense and to be protected in the event of double

[Section 4:1]

¹Hudson v. State, 108 Ga. App. 192, 132 S.E.2d 508, 100 A.L.R.2d 1395 (1963).

²Berger v. U.S., 295 U.S. 78, 55

S. Ct. 629, 79 L. Ed. 1314 (1935).

³Hudson v. State, 108 Ga. App. 192, 132 S.E.2d 508, 100 A.L.R.2d 1395 (1963).

jeopardy.⁴ In Georgia, it is required that an indictment be returned in “open court,” which “means that the indictment is returned in a ‘place where court [is] being held open to the public with the judge and the clerk present.’ ”⁵

An indictment should specify the date of the crime. However, an indictment that fails to make this specification “is not perfect in form and is subject to a timely special demurrer.” If the government can demonstrate that a specific date cannot be shown from the evidence, the state can set forth in the indictment that the crime occurred between two dates.⁶

The Eleventh Circuit delineated the requirements for a valid indictment. It stated that “[a]n indictment is sufficient if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.”⁷

Indictments should be rarely dismissed. Dismissal of indictments, according to the Georgia Supreme Court, “is an extreme sanction.”⁸

Indictments must, of course, be returned within the relevant statute of limitations, which “runs ‘from the time of the criminal act to the time of indictment.’ ” There is a “person-unknown” exception however. As explained in *State v. McClendon*,⁹ “[t]his exception applies when the identity of the person who committed the crime is unknown, and it tolls the limitation period from the time the crime was committed until that person’s identity becomes known to the State.”

In *Jackson v. State*,¹⁰ the Supreme Court of Georgia reversed a conviction for failure to register as a sex offender given the insufficiency of the indictment. The Court observed that to survive a challenge to its sufficiency an indictment should “(1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish violation of a criminal statute.” In finding the indictment to be insufficient, the Court reasoned, in part:

The indictment in this case is based upon several assumptions of

⁴*State v. Leatherwood*, 326 Ga. App. 730, 757 S.E.2d 434 (2014); *Griffin v. State*, 294 Ga. 325, 751 S.E.2d 773 (2013).

⁵*State v. Brown*, 293 Ga. 493, 748 S.E.2d 376 (2013).

⁶*Herring v. State*, 334 Ga. App. 50, 778 S.E.2d 57 (2015).

⁷*United States v. Masino*, 869 F.3d 1301 (11th Cir. 2017).

⁸*Olsen v. State*, 302 Ga. 288, 806 S.E.2d 556 (2017).

⁹*State v. McClendon*, 362 Ga. App. 322, 868 S.E.2d 459 (2022).

¹⁰*Jackson v. State*, 301 Ga. 137, 800 S.E.2d 356 (2017).

fact not set forth in the indictment. The caption of the indictment seems to imply that appellant is a convicted sexual offender who was required to register his address. Nevertheless, while the indictment does reference a change of address and that defendant was required to register it with the Houston County sheriff's office, it does not assert that appellant previously was registered there as a sexual offender and has now established a new address within Houston County, or that appellant has moved from Houston County to an address in another county, or that he has moved to Houston County from an address in another county where he was previously registered. In other words, the indictment does not inform the accused of what alleged action or inaction would constitute a violation. . . .

Moreover, the offense denominated in the indictment is "failure to register as a sex offender". . . . But this simply illustrates the problem with the indictment in this case, since failure to register is not the offense for which appellant was tried. The record reflects that appellant properly registered his original address after his guilty plea conviction; he did not fail to register as required by OCGA § 42-1-12. The evidence presented at trial related to appellant's *failure to update* his required registration information with a change of address, not an initial failure to register as a sexual offender.

Although the indictment in this case cited the statute appellant was accused of violating (OCGA § 42-1-12), and it referenced some of the language of that statute, it did not recite a sufficient portion of the statute to set out all the elements of the offense for which he was tried and convicted. Likewise, the indictment did not allege all the facts necessary to establish a violation of OCGA § 42-1-12 (f)(5).

The Supreme Court of Georgia noted the two ways that an indictment can be challenged—a general demurrer and a special demurrer. The Court elaborated upon these approaches in *Daniels v. State*,¹¹ explaining that the former challenges the underlying sufficiency of the charges, while the latter's focus is upon the sufficiency of the form (as opposed to the substance) of the indictment.

The Georgia Supreme Court elaborated further upon these differences in *Bullard v. State*. The Court noted that a general demurrer:

"challenge to the sufficiency of an indictment because it fails to set forth all of the essential elements of the charged crime is properly considered a general demurrer." (citation and punctuation omitted). "An indictment that is not subject to a general demurrer may, however, be subject to a special demurrer, which challenges the specificity of the indictment." *State v. Wyatt*, 295 Ga. 257, 260, 759 S.E.2d 500 (2014). By filing a special demurrer, a defendant "claims

¹¹*Daniels v. State*, 302 Ga. 90, 805 S.E.2d 80 (2017) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

not that the charge in an indictment is fatally defective and incapable of supporting a conviction (as would be asserted by general demurrer), but rather that the charge is imperfect as to form or that the accused is entitled to more information.” *Kimbrough v. State*, 300 Ga. 878, 880-881, 799 S.E.2d 229 (2017) (citation and punctuation omitted). “The true test of the sufficiency of an indictment to withstand a special demurrer is not whether it could have been made more definite and certain.” *Wyatt*, 295 Ga. at 260, 759 S.E.2d 500 (citation and punctuation omitted); see also *Kimbrough*, 300 Ga. at 881, 799 S.E.2d 229 (“an indictment does not have to contain ‘every detail of the crime’ to withstand a special demurrer” (citation omitted)). Even so, the indictment “must allege the underlying facts with enough detail to sufficiently apprise the defendant of what he must be prepared to meet.” *Kimbrough*, 300 Ga. at 881, 799 S.E.2d 229 (citations and punctuation omitted). And “when a court considers whether an indictment is sufficient to withstand a special demurrer, it is useful to remember that a purpose of the indictment is to allow a defendant to prepare [his] defense intelligently.” *Id.* (citation and punctuation omitted).¹²

In *State v. Mondor*,¹³ the Georgia Supreme Court reversed a decision by the trial court dismissing an indictment in a hit and run case. The Court rejected defendant’s challenge to the indictment that it failed to allege mens rea and other critical elements of a hit and run offense.

In *Varnar v. State*,¹⁴ the Georgia Supreme Court also found that it is unnecessary to specify the precise prior felony conviction in an indictment charging a defendant with possession of a firearm by a convicted felon. The Court found that counsel was not ineffective for failing to specially demur as to those counts. The Georgia Supreme Court affirmed the dismissal of an indictment charging a defendant with murder given its finding that two of the grand jurors were not randomly selected. The trial judge selected two individuals who were in court as prospective petit jurors. The Court stated that using prospective petit jurors to serve as grand jurors, provided the selection is random:

OCGA § 15-12-66.1 authorizes a court to select persons who have been summoned for service as petit jurors to supplement the number of persons summoned to appear for service on the grand jury when necessary to secure the attendance of enough jurors to empanel a grand jury. Section 15-12-66.1 requires, however, that the petit jurors selected to serve on the grand jury be chosen *randomly*.¹⁵

¹²*Bullard v. State*, 307 Ga. 482, 837 S.E.2d 348 (2019).

¹³*State v. Mondor*, 306 Ga. 338, 830 S.E.2d 206 (2019).

¹⁴*Varnar v. State*, 306 Ga. 726, 832 S.E.2d 792 (2019).

¹⁵*State v. Towns*, 307 Ga. 351, 834 S.E.2d 839 (2019).

In *State v. Heath*,¹⁶ the Georgia Supreme Court held that trial counsel is ineffective when counsel is deficient in failing to file a general demurrer challenging felony counts in an indictment. Such conduct prejudices a defendant.

The 11th Circuit found that a state could preclude a grand jury witness from disclosing information that the witness learned by virtue of the witness's grand jury appearance. However, such a witness was free to publicly comment on information that the witness learned prior to that witness's grand jury appearance.¹⁷

Discovery can help to inform a defendant. Criminal discovery provisions are located at O.C.G.A. §§ 17-16-1 et seq. and are designed to promote disclosure and avoid trial by ambush.¹⁸ However, to obtain these benefits, criminal defendants must formally opt-in and, as such, face discovery requirements of their own.¹⁹

What about alleged discovery violations by the state? Is the evidence automatically excluded at trial? Disallowing evidence is a harsh sanction, which courts only grant if a defendant requests a continuance and shows the defense suffered prejudice due to bad faith on behalf of the state.²⁰ The state's delayed delivery of discovery materials in violation of a trial judge's scheduling order, standing alone, was insufficient to establish bad faith in *State v. Martin*.²¹

O.C.G.A. § 17-16-1 authorizes a trial court to order a mistrial when the defendant demonstrates prosecutorial bad faith and prejudice from the state's discovery violation, or when a mistrial would be just given the circumstances.²²

The government's failure to oblige with a reciprocal discovery can result in an order requiring the state to comply with the discovery or inspection order, a continuance of the proceedings, or, upon a demonstration of bad faith and prejudice, a disallow-

¹⁶*State v. Heath*, 308 Ga. 836, 843 S.E.2d 801 (2020).

¹⁷*Henry v. Attorney General, Alabama*, 45 F.4th 1272 (11th Cir. 2022).

¹⁸*Nazario v. State*, 293 Ga. 480, 746 S.E.2d 109 (2013).

¹⁹*Grell v. State*, 291 Ga. 615, 732 S.E.2d 741 (2012).

²⁰*Leger v. State*, 291 Ga. 584, 732 S.E.2d 53 (2012); see *Castillo v. State*, 281 Ga. 579, 642 S.E.2d 8 (2007) (holding no discovery violation when the

ballistics report was not used by the State in its case in chief or on cross-examination). See also *Chance v. State*, 291 Ga. 241, 728 S.E.2d 635 (2012) (bad faith not found). See also *Phillips v. State*, 347 Ga. App. 147, 817 S.E.2d 711 (2018) (failure to provide medical records on a timely basis did not warrant exclusion of such records at trial given absence of bad faith).

²¹*State v. Martin*, 372 Ga. App. 746, 906 S.E.2d 446 (2024).

²²*Burton v. State*, 330 Ga. App. 503, 767 S.E.2d 510 (2014).

ance of the introduction of the evidence by the prosecution.²³

“While both the United States and Georgia Constitutions secure the right of criminal defendants to be present at all critical stages of the proceedings against them, unlike the federal constitutional right, the violation of the State constitutional right to be present is presumed prejudicial, and absent waiver, triggers reversal and remand for a new trial whenever the issue is properly raised on direct appeal.” When procedural and scheduling conferences were held outside the defendant’s presence, the defendant’s right to be present was not violated since such conferences were not critical proceedings.²⁴

The defendant has a duty as well as a right to be present at his trial.²⁵ The right of a prisoner to be present at his trial derives from the common law, although it is frequently guaranteed by constitution or statute.²⁶ Pursuant to the above principles, many courts have held or recognized (although there is contrary authority) that the record in a felony case must show that the defendant was present at the rendition of the verdict. The presence of the accused at the time sentence is pronounced must also appear by the record.²⁷

A defendant and his counsel have a constitutional right to be present at every stage of defendant’s trial, including voir dire. This right, however, may be waived.²⁸

In both federal and state courts there is a right of the accused to be present throughout the steps of the prosecution process, as well as provisions which explain conditions under which the defendant waives his right to be present. Federal practice is controlled by Rule 43, Fed. R. Crim. P. The federal rule provides that the defendant shall be considered to have waived his right to be present when, after initially being present for the start of the trial, he voluntarily absents himself from the proceedings.

Some courts hold that, although waiver by counsel is not absolutely precluded, it is not binding on defendant unless made in his presence or by his express authority or unless subsequently acquiesced in by him.²⁹

Although at least one case has held that defendant’s involun-

²³Wyatt v. State, 300 Ga. 509, 796 S.E.2d 701 (2017).

²⁴Heard v. State, 334 Ga. App. 399, 779 S.E.2d 415 (2015) (internal quotes omitted).

²⁵Kivette v. U.S., 230 F.2d 749 (5th Cir. 1956).

²⁶Frank v. State, 142 Ga. 741, 83 S.E. 645 (1914).

²⁷Frank v. State, 142 Ga. 741, 83 S.E. 645 (1914).

²⁸Champ v. State, 310 Ga. 832, 854 S.E.2d 706 (2021); Gobert v. State, 311 Ga. 305, 857 S.E.2d 647 (2021); Speed v. State, 270 Ga. 688, 512 S.E.2d 896 (1999).

²⁹Wilson v. State, 212 Ga. 73, 90 S.E.2d 557 (1955).

tary absence during a portion of the prosecutor's closing argument violates his right to be present at all stages of his trial, other authorities have taken the view that such absence does not require reversal unless it is shown that defendant was prejudiced thereby, at least where the offense is not capital.³⁰ Similarly, it has been held that defendant is not prejudiced by involuntary absence from a portion of his own counsel's argument.³¹

A defendant's right to be present is not violated when his presence "would be useless, or the benefit but a shadow." Thus, the defendant's absence from a bench conference regarding jury selection that ultimately dealt with a legal issue did not violate his right to be present.³² The right to be present generally does not extend to post-trial proceedings.³³

Modern cases continue to deal with the issue of a defendant's presence during his own case. A defendant charged with capital murder can waive his right to be present for the remainder of the trial where he was present at the commencement of the trial. The defendant may waive his right to be present, even in a death penalty case.³⁴ A defendant's waiver of his right to be present at a murder trial was held to be voluntary, even when the trial court did not inform the defendant of his right to confront witnesses and when an in-chambers colloquy indicated that the defendant understood his rights.

The trial court refused to allow defendant charged with robbery by intimidation to absent himself from the courtroom during the trial. A criminal defendant's constitutional right to be present at trial does not include a concomitant right of absence, and the trial court is empowered to order a criminal defendant's personal appearance when it is necessary, especially where identification of the defendant by a witness is contemplated.³⁵

Other rights, like those in a jury trial or in an appeal, can also be waived. For example, once the right to a jury trial was waived by failing to make a timely demand in the probate court, the right could not be raised for the first time on appeal to a superior court or appellate court.³⁶

In a criminal case, the defendant frequently elects to be tried by the judge alone. The ground rules for waiving the right to trial

³⁰*Wilson v. State*, 212 Ga. 73, 90 S.E.2d 557 (1955).

³¹*Williams v. State*, 150 Ga. 641, 104 S.E. 776 (1920).

³²*Pack v. State*, 335 Ga. App. 783, 783 S.E.2d 146 (2016).

³³*Moody v. State*, 361 Ga. App. 737, 865 S.E.2d 544 (2021).

³⁴*Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988).

³⁵*Tilley v. State*, 201 Ga. App. 360, 411 S.E.2d 100 (1991).

³⁶*Walton v. State*, 261 Ga. 392, 405 S.E.2d 29 (1991).

by jury were explained in *Brown v. State*.³⁷ The Supreme Court pointed out that the purpose of a criminal trial, with or without a jury, is not to create issues for appeal. Rather, it is a proceeding to determine whether the defendant is guilty beyond a reasonable doubt of the offense he is charged with committing, and thus, there is not any requirement that the trial court expressly inform the accused of those particular appellate issues which waiver of a jury trial will obviate. A defendant's consent to waive the right to a jury trial need not be in a particular, ritualistic form. The only real issue is whether appellant intelligently agreed to a trial without jury.

A defendant may waive his right to a jury trial only if he does so knowingly, voluntarily and intelligently, and he must do so beyond a reasonable doubt.³⁸ Moreover, a defendant has a right to a public trial. As explained by the Georgia Supreme Court:

Before excluding the public from any stage of a criminal trial, the party seeking to close the courtroom “must advance an overriding interest that is likely to be prejudiced” if the courtroom remains open. In addition, “the closure must be no broader than necessary to protect that interest,” and “the trial court must consider reasonable alternatives” to the closure, even “when they are not offered by the parties.”³⁹

A criminal defendant may waive his right to appeal.⁴⁰

Defendant in a death penalty eligible case validly waived his right to appeal. In exchange for the government's promise to forgo the death penalty, the government and the defendant entered into a plea agreement that provided, in part, that the defendant “waives any and all rights to appeal and will not file, or caused to be filed, any appeal” and “waives and agrees not to seek any post-conviction relief from the sentence imposed pursuant to this contract.” The Court found that this language did not render his plea agreement involuntary simply “because he agreed to the plea contract to avoid the possibility of receiving the death penalty, a sentence for which he was eligible in 1999, but for which he was determined to be ineligible after the Supreme Court's 2005 opinion in *Roper [v. Simmons]*.”⁴¹

Other cases on presence of the defendant at all stages of a

³⁷*Brown v. State*, 277 Ga. 573, 592 S.E.2d 666 (2004).

³⁸*Agee v. State*, 311 Ga. 340, 857 S.E.2d 642 (2021).

³⁹*Alexander v. State*, 313 Ga. 521, 870 S.E.2d 729 (2022).

⁴⁰*Thomas v. State*, 260 Ga. 262, 392 S.E.2d 520 (1990) (a murder defen-

dant's voluntary, knowing and intelligent waiver of his right to appeal in return for the State's waiver of its right to seek the death penalty against both the defendant and his codefendant brother, precluded the defendant from appealing the guilty verdict).

⁴¹*Brant v. State*, 306 Ga. 235, 830 S.E.2d 140 (2019).

criminal prosecution, see § 2:3, *supra*.

The federal constitution and most state constitutions generally provide that no person shall for the same offense be twice put in jeopardy.⁴² The Georgia Constitution “provides that ‘no person shall be put in jeopardy of life or liberty more than once for the same offense.’”⁴³ The common-law rule against a second jeopardy applied only to a second prosecution for the same act and crime, both in law or fact, on which the first prosecution was based.⁴⁴

Jeopardy does not attach until such time as a defendant, “in a court of competent jurisdiction with a sufficient indictment,” has been arraigned, has entered a plea, and has had a jury empaneled and sworn.⁴⁵

Many jurisdictions hold that a conviction of a minor included offense will bar a subsequent prosecution for a higher crime embracing the minor offense, unless the first conviction was procured by the fraud, connivance, or collusion of the defendant.⁴⁶

Acquittal of noncapital offenses, which were lesser included offenses of capital offenses, would be a double jeopardy bar to trial for capital offenses.⁴⁷

Although a lengthy continuance in the middle of a trial before the same jury is not favored, such continuances do not always constitute termination of the case which bars later proceedings under the double jeopardy clause.⁴⁸

A sentencing court may not increase sentence once defendant begins serving it without violating prohibitions against double jeopardy.⁴⁹ But, the State was not barred on the ground of double jeopardy from introducing evidence at the resentencing phase of a trial pertaining to crimes for which the defendant stood acquitted under the speedy trial statute because the defendant was not

⁴²U.S. v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

⁴³Ga. Const. 1983 Art. I, § I, ¶ XVIII. Georgia also has some statutory protections, which can be found in O.C.G.A. §§ 16-1-6, 16-1-7, and 16-1-8. See *State v. Pruiett*, 324 Ga. App. 789, 751 S.E.2d 579 (2013).

⁴⁴*Pryor v. State*, 238 Ga. 698, 234 S.E.2d 918 (1977) (disapproved of by, *Montes v. State*, 262 Ga. 473, 421 S.E.2d 710 (1992)), citing Code §§ 26-505, 506, now O.C.G.A. §§ 16-1-6, 16-1-7. See *Teal v. State*, 203 Ga. App. 440, 417 S.E.2d 666 (1992).

⁴⁵*State v. Fiorenzo*, 325 Ga. App. 666, 754 S.E.2d 634 (2014).

⁴⁶*Pryor v. State*, 238 Ga. 698, 234 S.E.2d 918 (1977) (disapproved on other grounds by, *Montes v. State*, 262 Ga. 473, 421 S.E.2d 710 (1992)).

⁴⁷*Cleary v. State*, 258 Ga. 203, 366 S.E.2d 677 (1988) (disapproved on other grounds by *Mize v. State*, 262 Ga. 489, 422 S.E.2d 180 (1992)).

⁴⁸*Morris v. State*, 264 Ga. 823, 452 S.E.2d 100 (1995).

⁴⁹*Harrison v. State*, 330 Ga. App. 570, 768 S.E.2d 762 (2015); *Strickland v. State*, 258 Ga. 764, 373 S.E.2d 736 (1988).

being tried for such crimes.⁵⁰

A trial court's oral and written rulings, considered as whole, supported a determination that double jeopardy barred reprosecution of a defendant on charges of child molestation after a mistrial was granted due to the prosecutor's violation of an order excluding evidence of similar transactions; the trial court ruled that the prosecutor had deliberately intended to goad the defense counsel into mistrial.⁵¹

A double jeopardy violation was found in *Ward v. State*.⁵² After having been acquitted of stalking, the defendant was later convicted of aggravated stalking. The victim was the same in both cases. The Court reasoned:

[U]nder Georgia's stalking statutes, in order to prove aggravated stalking, the State must also prove the lesser included offense of misdemeanor stalking. And for purposes of double jeopardy, a lesser included offense and a greater offense are the same offense under the Fifth Amendment and the *Blockburger* test because the lesser crime requires no proof beyond that which is required for the conviction of the greater offense.

Double jeopardy applies to the sentencing phase of a capital trial if there was insufficient evidence at the original trial to support the aggravating circumstances or if the jury recommended life imprisonment at the first trial.⁵³

Defendant's prosecution on a charge of an aggravated assault on an officer was barred by the statutory double jeopardy provisions⁵⁴ because of the defendant's prior conviction on a charge of possession of marijuana, because both crimes were known to the prosecutor at the time of the first prosecution, because they were within the jurisdiction of a single court, and because they arose out of the same conduct or transaction.⁵⁵

However, an attempt to indict a suspect before a grand jury does not invoke jeopardy even where a "no bill" is returned for lack of sufficient evidence. The district attorney may attempt to indict the same suspect again without being subject to an objection on the ground of double jeopardy.⁵⁶

A malice murder charge was not barred on double jeopardy grounds, even though the jury in the previous trial had acquitted defendant of felony-murder but found him guilty of malice mur-

⁵⁰*Morgan v. State*, 257 Ga. 596, 361 S.E.2d 793 (1987).

⁵¹*Beck v. State*, 261 Ga. 826, 412 S.E.2d 530 (1992).

⁵²*Ward v. State*, 351 Ga. App. 490, 831 S.E.2d 199 (2019).

⁵³*Brooks v. State*, 259 Ga. 562, 385 S.E.2d 81 (1989).

⁵⁴O.C.G.A. §§ 16-1-7(b), 16-1-8(b).

⁵⁵*McCannon v. State*, 252 Ga. 515, 315 S.E.2d 413 (1984).

⁵⁶*Smith v. State*, 171 Ga. App. 279, 319 S.E.2d 113 (1984).

der, where that conviction was set aside due to a violation of the defendant's right to counsel; the prohibition against double jeopardy does not prevent retrial of a defendant who succeeds in getting his first conviction set aside due to an error in the proceedings leading to a conviction.⁵⁷

Defendant's double jeopardy rights were not violated when he was indicted on 10 counts of mail fraud under 18 U.S.C.A. § 1341 and 10 counts of false claims under 18 U.S.C.A. § 287. Each claim, the 11th Circuit found, requires proof of a distinct element.⁵⁸

Double jeopardy is not violated when a defendant successfully opposes a joinder of two indictments so as to require separate trials. In *Cotman v. State*,⁵⁹ the Georgia Court of Appeals observed that "the United States Supreme Court found that even where a defendant is normally entitled to have charges resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election."

The Fifth Amendment's double jeopardy prohibition is not violated when a defendant is retried after his convictions were reversed on appeal on account of a Confrontation Clause violation where the evidence was otherwise sufficient to support the convictions.⁶⁰

The granting of a new trial solely on the ground of failure to give a requested charge did not expose the defendant to multiple prosecutions or double jeopardy.⁶¹

The granting of a new trial in the absence of a finding of not guilty or a finding of insufficiency of evidence does not ordinarily expose a defendant to double jeopardy or multiple prosecutions.⁶²

A new trial is not barred by the Double Jeopardy Clause where the prosecution fails to present to the jury sufficient evidence to support a conviction as a result of an erroneous ruling by the trial court invoked by the defense counsel.⁶³

If either of two criminal statutes under which a defendant is prosecuted requires proof of a fact which the other does not, the two offenses are not the same for double jeopardy purposes, even though both prosecutions are out of the same criminal act or

⁵⁷Allen v. State, 262 Ga. 240, 416 S.E.2d 290 (1992).

⁵⁸U.S. v. Ford, 784 F.3d 1386, 97 Fed. R. Evid. Serv. 406 (11th Cir. 2015).

⁵⁹Cotman v. State, 328 Ga. App. 822, 762 S.E.2d 824 (2014) (internal quotations omitted).

⁶⁰Freeman v. State, 329 Ga. App. 429, 765 S.E.2d 631 (2014).

⁶¹Ramsey v. State, 258 Ga. 151, 366 S.E.2d 286 (1988).

⁶²Ramsey v. State, 258 Ga. 151, 366 S.E.2d 286 (1988).

⁶³Hunter v. State, 257 Ga. 571, 361 S.E.2d 787 (1987).

episode.⁶⁴

Convictions on two counts of child molestation which are supported by different facts constitute separate offenses and do not merge as a matter of fact or law.⁶⁵

Double jeopardy considerations when the trial judge grants a mistrial are ably discussed in *Tubbs v. State*.⁶⁶

When a nolle prosequi is entered over the objection of a defendant after jeopardy has attached, a retrial on those charges is barred.⁶⁷

Prosecutorial misconduct will bar retrial of a case if the defendant can show that the state was purposefully attempting through its prosecutorial misconduct to secure an opportunity to retry the case, to avoid reversal of the conviction because of the occurrence earlier in the trial of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial.⁶⁸

Double jeopardy does not allow a defendant to be punished on multiple felony murder counts for a single homicide. When a defendant is found guilty on multiple felony murder counts for a single homicide, the additional counts are surplusage and must be vacated.⁶⁹

The Georgia Court of Appeals stated that a merger of crimes takes place when “a defendant is prosecuted for and determined by trial or plea to be guilty of multiple criminal charges but then, as a matter of substantive double jeopardy law, can be punished—convicted and sentenced—for only one of those crimes.”⁷⁰ In *Scott v. State*,⁷¹ the court found that a defendant who was convicted of multiple child molestation offenses arising out of a single instance “constitute[d] a single unit of prosecution for which he is subject to only one conviction and sentence.”⁷²

As stated in *Torres-Toledo v. State*, “[t]he merger doctrine precludes the imposition of multiple punishments when the same conduct constitutes more than one crime. [cit.] ‘The key question in determining whether a merger has occurred is whether the different offenses are proven with the same facts. . . . [I]f the

⁶⁴Potts v. State, 261 Ga. 716, 410 S.E.2d 89 (1991).

⁶⁵Hart v. Wharton, 262 Ga. 374, 419 S.E.2d 22 (1992).

⁶⁶Tubbs v. State, 276 Ga. 751, 583 S.E.2d 853 (2003).

⁶⁷Smith v. State, 279 Ga. 396, 614 S.E.2d 79 (2005).

⁶⁸Byrd v. State, 277 Ga. App. 397, 626 S.E.2d 598 (2006) (such conduct

not found to be present here).

⁶⁹Brady v. State, 283 Ga. 359, 659 S.E.2d 368 (2008).

⁷⁰Scott v. State, 356 Ga. App. 152, 846 S.E.2d 241 (2020).

⁷¹Scott v. State, 356 Ga. App. 152, 846 S.E.2d 241 (2020).

⁷²Scott v. State, 356 Ga. App. 152, 846 S.E.2d 241 (2020).

same facts are used to prove the different offenses, the different crimes merge.’ [cit.]”⁷³

Merger does not occur when there is “a deliberate interval . . . between the completion of one criminal act and the start of a separate criminal act.”⁷⁴

The modified merger rule precludes the conviction of an individual for both felony murder and voluntary manslaughter when there is only a single victim. In *Kipp v. State*,⁷⁵ the Supreme Court of Georgia noted that in *Edge v. State*:⁷⁶

the jury found the defendant guilty of both felony murder and voluntary manslaughter for the death of a single victim, and the trial court entered judgment on both verdicts. (citation omitted). This Court reversed the felony murder conviction, holding that “if there is but one assault and that assault could form the basis of either felony murder or voluntary manslaughter, a verdict of felony murder may *not* be returned if the jury finds that the assault is mitigated by provocation and passion.” (citation omitted). The Court reasoned that “[t]o hold otherwise would eliminate voluntary manslaughter as a separate form of homicide since, in that event, every voluntary manslaughter would also be a felony murder.” (citation omitted). To prevent this outcome, the Court adopted a modified merger rule that “precludes a felony murder conviction only where it would prevent an otherwise warranted verdict of voluntary manslaughter.”

In *Kipp*, the court refused to extend the modified merger rule to single victim cases involving convictions for felony murder and involuntary manslaughter.

In *Stephens v. State*,⁷⁷ the trial court erred when it failed to merge an armed robbery for a victim’s cell phone and the robbery of the victim’s vehicle.

Defendant could be re-tried for theft by conversion of leased property following reversal or her conviction based on the application of an unconstitutional mandatory statutory presumption, as the state presented evidence that defendant was aware of requirements of her lease agreement, that she was placed on notice that she had not met those requirements and must return a stereo, and that she nonetheless left the stereo in the care of her former boyfriend who had previously pawned her property after a

⁷³Torres-Toledo v. State, 366 Ga. App. 526, 883 S.E.2d 545 (2023), citing McKenzie v. State, 302 Ga. App. 538, 539(1)(a), 691 S.E.2d 352 (2010), Bonner v. State, 308 Ga. App. 827, 830(2), 709 S.E.2d 358 (2011), and O.C.G.A. § 16-1-7(a).

⁷⁴Crider v. State, 356 Ga. App. 36,

846 S.E.2d 205 (2020).

⁷⁵Kipp v. State, 296 Ga. 250, 765 S.E.2d 924 (2014).

⁷⁶Edge v. State, 261 Ga. 865, 414 S.E.2d 463 (1992).

⁷⁷Stephens v. State, 346 Ga. App. 686, 816 S.E.2d 748 (2018).

different romantic dispute. From these facts it could be inferred that she had knowingly converted the stereo to some use of her own, in violation of her lease agreement.⁷⁸

Once state trial judge had entered midtrial judgment of acquittal on firearm count, with no reservation of right to reconsider this ruling or indication that ruling was not final, and once trial had proceeded to introduction of evidence by defendant, Double Jeopardy Clause barred trial judge from reconsidering that acquittal after defendant and his co-defendant had rested where there was no state rule or procedure in effect at time of defendant's trial indicating that this ruling was nonfinal.⁷⁹

In *Beasley v. State*,⁸⁰ the Georgia Court of Appeals found that defendant's complaint of a conflict of interest on the part of the trial judge did not implicate the defendant's double jeopardy interests. The error complained of "did not implicate his guilt or innocence or the sufficiency of the evidence introduced by the State at trial."

Generally, when a defendant makes a motion for mistrial, he waives any claim of double jeopardy but, where the prosecutor has goaded the defense into making the mistrial motion in order for the prosecution to avoid reversal of a conviction because of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial, the Double Jeopardy Clause will stand as bar to retrial.⁸¹

In *Jenkins v. State*,⁸² the court found that retrial of the defendant was not prohibited, given the absence of evidence that the prosecutor attempted to induce a mistrial. Specifically, the court determined that there was "no showing" that the state sought to "abort . . . the trial and secur[e] an opportunity to retry the case."

In *Yarbrough v. State*,⁸³ the Georgia Supreme Court found that the prosecution did not attempt to goad the defendant to move for a mistrial. There, the trial court determined that the prosecutor's pointing in the direction of the defendant during direct examination was the product of the prosecutor's frustration to obtain a positive identification, and the Supreme Court found that the court did not clearly err in making reaching this conclusion.

⁷⁸*Sherrod v. State*, 280 Ga. 275, 627 S.E.2d 36 (2006).

⁷⁹*Smith v. Massachusetts*, 543 U.S. 462, 125 S. Ct. 1129, 160 L. Ed. 2d 914 (2005).

⁸⁰*Beasley v. State*, 335 Ga. App. 530, 782 S.E.2d 315 (2016).

⁸¹*Mathis v. State*, 276 Ga. App. 587, 623 S.E.2d 674 (2005).

⁸²*Jenkins v. State*, 294 Ga. 506, 755 S.E.2d 138 (2014).

⁸³*Yarbrough v. State*, 303 Ga. 594, 814 S.E.2d 286 (2018).

In *Ledford v. State*,⁸⁴ the trial court properly found that the prosecution did not goad the defendant into submitting a motion for mistrial. The court of appeals found “that the prosecutor negligently asked a routine foundation question for the admission of a video that resulted in the police officer’s response about the HGN test.”

In *State v. Jackson*,⁸⁵ the Georgia Supreme Court found that the state attempted to goad the defendant into seeking a mistrial in his murder trial. During closing arguments, the prosecutor uttered comments about matters that were not in evidence and the Court found that the trial court did not abuse its discretion when it declared a mistrial.

A prosecution for theft and criminal trespass in Calhoun County was not barred by double jeopardy given an earlier decision by defendants to enter into a “pretrial intervention program . . . in lieu of prosecution in Irwin County.”⁸⁶

Defendant’s double jeopardy rights were not implicated when he was resentenced on an aggravated battery conviction. Because the defendant was resentenced, was not reprosecuted, and the evidence was sufficient to support his conviction, his double jeopardy rights were not infringed.⁸⁷

The Georgia Court of Appeals in *State v. Adams*⁸⁸ held that a prosecutor’s dismissal of a charge in exchange for a plea of guilty to a different charge does not constitute “a legal determination of the defendant’s guilt or innocence on the dismissed charge and, thus, does not amount to an ‘acquittal’ for the purposes of OCGA § 16-1-8.”

The Georgia Supreme Court in *Priester v. State*⁸⁹ held that the trial court erred when it merged an attempted murder charge with an aggravated battery charge. Rather, the Court found that the aggravated battery merges into the attempted murder charge. It explained, “If it were otherwise, an attempted murder that caused no actual injury would be punishable by up to 30 years in prison, but an attempted murder that caused an injury serious enough to amount to aggravated battery would be punishable only by up to 20 years in prison.”⁹⁰

For more cases on double jeopardy, see § 4:4, *infra*.

One aspect of due process is whether the punishment fits the

⁸⁴*Ledford v. State*, 341 Ga. App. 222, 799 S.E.2d 359 (2017).

⁸⁵*State v. Jackson*, 306 Ga. 626, 831 S.E.2d 798 (2019).

⁸⁶*Palmer v. State*, 341 Ga. App. 433, 801 S.E.2d 300 (2017).

⁸⁷*Levin v. State*, 334 Ga. App. 71, 778 S.E.2d 238 (2015).

⁸⁸*State v. Adams*, 355 Ga. App. 875, 846 S.E.2d 148 (2020).

⁸⁹*Priester v. State*, 309 Ga. 330, 845 S.E.2d 683 (2020).

⁹⁰*Priester v. State*, 309 Ga. 330, 845 S.E.2d 683 (2020).

crime or is unduly harsh. The United States Supreme Court has held that in cases involving recidivist statutes the point at which the recidivist is deemed to have demonstrated the necessary propensities and the amount of time the recidivist will be imprisoned are matters largely within the discretion of the punishing jurisdiction. The punishment and its duration are based not merely on that person's most recent offense but also on the propensities demonstrated over time by convictions for other crimes.⁹¹ The Georgia Supreme Court followed this reasoning in holding that a mandatory life sentence imposed upon a petitioner upon a second conviction for selling cocaine did not constitute a violation of the 8th and 14th Amendments to the United States Constitution.⁹²

Cruel and unusual punishments are prohibited by the Eighth Amendment of the United States Constitution. Punishments that are "grossly disproportionate to the crime committed" are included in this prohibition. When making this assessment, court should initially compare "the gravity of the offense and the severity of the sentence." [cit.] When evaluating the 'gravity of the offense' as part of the threshold comparison, courts look not only at the statutory elements of the offense, but also the particular circumstances of the crime committed as shown by the record."⁹³

In *Henry v. State*,⁹⁴ imposition of consecutive life sentences without parole based on aggravated sodomy convictions was proper under the Georgia recidivist statute. However, a 20-year sentence imposed for a child molestation conviction was vacated given the trial court's failure to impose a split sentence with a minimum of one year of probation for each sentence.

Regarding split sentences, such sentences must be imposed in sexual offense cases. However, the prosecution and the defense can negotiate a resolution that deviates from the mandatory minimum requirement and a trial court has the discretion to impose the negotiated result.⁹⁵

O.C.G.A. § 17-9-3 operates as a general prohibition in capital cases against the execution of persons who had not reached their 17th birthday at the time of the commission of the offense and applies to all capital offenses, including homicide.⁹⁶

Execution of the mentally retarded constitutes cruel and

⁹¹*Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980).

⁹²*Grant v. State*, 258 Ga. 299, 368 S.E.2d 737 (1988).

⁹³*Sillah v. State*, 315 Ga. 741, 883 S.E.2d 756 (2023), citing *Adams v. State*, 288 Ga. 695, 701(4), 707 S.E.2d

359 (2011) (citation and punctuation omitted).

⁹⁴*Henry v. State*, 343 Ga. App. 157, 806 S.E.2d 620 (2017).

⁹⁵*Mejia v. State*, 366 Ga. App. 837, 884 S.E.2d 423 (2023).

⁹⁶*Bankston v. State*, 258 Ga. 188, 367 S.E.2d 36 (1988).

unusual punishment under the Georgia Constitution and statutes. As explained in *Turpin v. Hill*,⁹⁷ under O.C.G.A. § 17-7-131 a defendant is required to carry the burden of proving mental retardation beyond a reasonable doubt, as opposed to a preponderance of the evidence.

A habeas corpus court's finding that a defendant who had been sentenced to death was mentally retarded at time of trial required remand to the trial court for a jury trial on the issue of whether defendant's retardation precluded his execution.⁹⁸

A mandatory fine of \$100,000 imposed upon conviction of cocaine trafficking is not out of proportion to the severity of the crime and is not constitutionally infirm either because of its mandatory nature or its amount.⁹⁹

Defendant who was convicted of aggravated child molestation, sentenced to 20 years imprisonment, and argued that his sentence violated the Eighth Amendment's cruel and unusual clause because he committed the offense while he was a minor did not have his constitutional rights violated. The court reasoned:

The sentence imposed upon Richardson on remand is distinguishable from the sentences imposed in *Roper*, *Graham*, and *Miller*. In those cases, the Supreme Court was concerned with the imposition upon juvenile offenders of the "most severe punishments" available under the law, namely, the death penalty and life imprisonment without the possibility of parole. Richardson, however, was not subject to one of the "most severe punishments" allowed by law, but rather to a sentence of a definite term of years. Richardson's constitutional challenge to his sentence predicated on *Roper*, *Graham*, and *Miller* thus is misplaced.¹⁰⁰

A sentence of life with parole for an armed robbery conviction was upheld by the Georgia Court of Appeals in *Walker v. State*.¹⁰¹ Defendant argued that O.C.G.A. § 17-10-1(a)(1) required that the court impose a determinate sentence (specific months and years). The appeals court rejected this, reasoning that O.C.G.A. § 16-8-41(b), which was in effect at the same time, authorized the sentence imposed in this case. The court added that even if the respective statutes create an ambiguity, "in resolving any ambiguity we look to the more specific Code section and agree with the trial court that Walker's sentence is legitimate."

While motive is not an essential element in the proof of the

⁹⁷*Turpin v. Hill*, 269 Ga. 302, 498 S.E.2d 690 (1989).
S.E.2d 52 (1998).

⁹⁸*Zant v. Beck*, 259 Ga. 756, 386 S.E.2d 349 (1989).
¹⁰⁰*Richardson v. State*, 334 Ga. App. 344, 779 S.E.2d 406 (2015).

⁹⁹*Wyatt v. State*, 259 Ga. 208, 378 S.E.2d 1 (2017).
¹⁰¹*Walker v. State*, 341 Ga. App. 515, 802 S.E.2d 1 (2017).

crime of murder, the state is entitled to present evidence to establish that there was a motive. Evidence which is relevant to an issue in a case is not rendered inadmissible by the fact that it incidentally puts defendant's character at issue.¹⁰²

§ 4:2 Physical control of defendant during trial

The manner in which a defendant is controlled during trial may unduly restrict his freedom of movement and may prejudice him in the eyes of the jury. A defendant has the right to appear before the jury without handcuffs or shackles of any kind, but if his conduct is such as to require it, he may lose that right and the court may permit his restraint during trial, if it appears that such precaution is necessary to prevent violence or escape.¹

The same right extends to defendant's witnesses.²

To succeed on appeal, a "defendant must show that the security measure utilized was so inherently prejudicial as to pose an unacceptable threat to his right to a fair trial."³

Although it is well settled that a defendant is entitled to a trial free of partiality which the presence of excessive security measures may create, it is also as well established that the use of extraordinary security measures to prevent dangerous or disruptive behavior which threatens the conduct of a fair and safe trial is within the discretion of the trial court.⁴

Management of difficult defendants was the subject of *Weldon v. State*,⁵ where the Court of Appeals ruled the trial court did not properly exercise discretion in the manner in which he controlled the defendant. Although binding and gagging a defendant may be constitutionally acceptable in certain circumstances, it is likely to have a significant prejudicial impact upon the jury. This remedy is less preferable than removing the accused from the courtroom. The appellate court expressed concern about much of the disruption occurring in the presence of the jury, including the judge's order to courtroom personnel: "Go get the chain and the gags."

Duty of court to preserve order, see § 2:12, *supra*.

The failure, through an oversight, to remove shackles from a prisoner for a short time after proceedings have commenced or any technical violation of the rule prohibiting shackling not prej-

¹⁰²Jones v. State, 280 Ga. 205, 625 S.E.2d 1 (2005).

[Section 4:2]

¹Am. Jur. 2d, Criminal Law §§ 651, 844 to 846.

²Am. Jur. 2d, Criminal Law §§ 651, 844 to 846.

³Weldon v. State, 327 Ga. App. 862, 761 S.E.2d 421 (2014), judgment aff'd, 297 Ga. 537, 775 S.E.2d 522 (2015).

⁴Council v. State, 297 Ga. App. 96, 676 S.E.2d 411 (2009).

⁵Weldon v. State, 247 Ga. App. 17, 543 S.E.2d 56 (2000).

udicial to him is not ground for a new trial; but where there is a substantial violation of the right, a new trial will be granted.⁶

The shackling of a defendant during trial on murder charges has been found to be justifiable where the defendant had threatened to disrupt the proceeding, to throw things at the judge, to assault the district attorney and to take his own attorney hostage to escape. Further, both counsel tables were draped so that the legs and feet of those seated at the tables were not visible to the jurors.⁷

In *Mormon v. State*,⁸ the Georgia Court of Appeals found that a defendant who was shackled but not visible to the jurors was not denied a fair trial.

The Supreme Court of Georgia found that a trial court abused its discretion when it visibly shackled a defendant who was representing himself at trial. The Court explained, “While visible shackling may be appropriate in some cases, even with a pro se defendant, the record must reflect that the trial court considered the impact of visible restraints upon the defendant’s constitutional rights, and whether less visible alternatives could achieve the required level of security.”⁹

Armed guards are permissible during trial if the conduct of defendant is sufficiently threatening to indicate that their presence is necessary.¹⁰

“A defendant is entitled to a requested jury charge on an affirmative defense as long as there is at least some evidence, including the defendant’s own testimony, to support it.”¹¹

Defendant’s history of escape was a circumstance justifying use of five armed guards in courtroom.¹²

§ 4:3 Dress of defendant

There is no error in trying defendant in prison garb if he makes no objection.¹

Fact that defendant is dressed in “identifiable prison clothes” at trial is a harmless error where defendant is being tried for

⁶*Geiger v. State*, 295 Ga. 648, 763 S.E.2d 453 (2014); *Funck v. State*, 296 Ga. 371, 768 S.E.2d 468 (2015); *Starr v. State*, 209 Ga. 258, 71 S.E.2d 654 (1952).

⁷*Potts v. State*, 259 Ga. 96, 376 S.E.2d 851 (1989).

⁸*Morman v. State*, 356 Ga. App. 685, 848 S.E.2d 165 (2020).

⁹*Hill v. State*, 308 Ga. 638, 842 S.E.2d 853 (2020).

¹⁰Am. Jur. 2d, Criminal Law §§ 651, 844 to 846.

¹¹*Jackson v. State*, 329 Ga. App. 240, 764 S.E.2d 569 (2014).

¹²*Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980).

[Section 4:3]

¹*Jackson v. State*, 237 Ga. 717, 229 S.E.2d 471 (1976).

escape from prison and other crimes in connection with escape.²

Head coverings are generally prohibited in the courtroom, but an exception is made where covering is worn for religious reasons.³

Ample evidence that the defendant was aware of the right to appear at trial in civilian clothes instead of prison clothing but, nonetheless, chose to appear in his prison uniform before invoking any ruling asserting this right, amounted to a waiver of this procedural rule.⁴ The same result can be found in *United States v. Shabazz*,⁵ where the Eleventh Circuit concluded that “Shabazz waived his Fifth Amendment right when he rejected the ‘strong suggestion’ of the district court to change into street clothes. . . . Shabazz voluntarily sought to use his attire for strategic advantage so that the jury would not get ‘the wrong impression’ and forget that he was a prisoner.”

In *Choi v. State*,⁶ Choi appeared for trial dressed in prison clothes. The state objected and the trial court ordered Choi to dress in civilian clothes. While a defendant may waive the procedural right to wear civilian clothing, the ability to do so does not create an absolute right to appear in prison clothing.

Although a criminal defendant has a right to appear at trial in civilian clothes rather than prison clothing, a defendant does not always have the right to dictate to the court which civilian clothing he will wear; this is true even when the defendant contends that he had other civilian clothing available to wear, clothing different from that which was used in court.⁷

In an action brought pursuant to 28 U.S.C.A. § 2254, the Eleventh Circuit held in *Nance v. Warden, Georgia Diagnostic Prison*,⁸ that the trial court did not violate the defendant’s due process rights when it required the defendant wear a stun belt during his resentencing trial. The Eleventh Circuit noted that the belt was not visible since it was worn beneath the defendant’s clothes. The court reasoned:

The Supreme Court—the only Court that can clearly establish federal law for purposes of habeas review—has not yet decided whether the use of stun belts (or materially similar restraints) is constrained by the Constitution, nor has it established a standard

²Ingram v. State, 237 Ga. 613, 229 S.E.2d 416 (1976).

³See Uniform Municipal Court Rule 28.

⁴Powell v. State, 199 Ga. App. 544, 405 S.E.2d 540 (1991).

⁵United States v. Shabazz, 887 F.3d 1204 (11th Cir. 2018).

⁶Choi v. State, 269 Ga. 376, 497 S.E.2d 563 (1998).

⁷Palmer v. State, 294 Ga. App. 85, 668 S.E.2d 523 (2008).

⁸Nance v. Warden, Georgia Diagnostic Prison, 922 F.3d 1298 (11th Cir. 2019).

for evaluating such claims. For that reason, the Georgia Supreme Court's decision on this issue is not "contrary to" and does not involve "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1).

A defendant who was convicted of kidnapping with bodily injury and sentenced to death was not prejudiced by his appearance before the jury in handcuffs and leg shackles. The appearance was a brief one before a small minority of prospective jurors, and those who were selected testified that they had not noticed the restraining devices or had not been affected by them.⁹

In *Harp v. State*,¹⁰ the trial court acted within its discretion when it refused to allow the defendant to dress in his National Guard uniform.

The constitution forbids the use of visible shackles when a jury is the trier of fact or punishment.¹¹ In *Tripp v. State*,¹² it was found that the defendant did not receive ineffective assistance of counsel when his attorney failed to object to the employment of leg shackles on the defendant during his trial.

§ 4:4 Defenses in criminal cases

Upon arraignment, accused may enter his plea of not guilty which constitutes the issue between the accused and the state.¹

Good character or reputation of the accused is not a defense as a matter of law, but is a fact for consideration of the jury in connection with other facts.²

A plea of guilty, intelligently and voluntarily given, amounts to a waiver of defenses known and unknown.³ A plea of not guilty may trigger consideration of various defenses available to the accused.

"However, a guilty plea does not waive all challenges to the plea itself, and a defendant can still attack 'the voluntary and knowing nature of the plea.'"⁴

A plea agreement is a contract between the government and the defendant. A contract that contains a collateral attack waiver is enforceable even in circumstances when the law has changed

⁹Potts v. State, 261 Ga. 716, 410 S.E.2d 89 (1991). [Section 4:4]

¹O.C.G.A. § 17-7-94.

¹⁰Harp v. State, 347 Ga. App. 610, 820 S.E.2d 449 (2018).

²Greer v. State, 159 Ga. 85, 125 S.E. 52 (1924).

¹¹Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

³Carroll v. Holt, 251 Ga. 144, 304 S.E.2d 60 (1983).

¹²Tripp v. State, 349 Ga. App. 164, 825 S.E.2d 560 (2019).

⁴United States v. Bates, 960 F.3d 1278 (11th Cir. 2020).

and arguably is of benefit to the defendant. As explained by the 11th Circuit, “[w]e are not the only circuit court to recognize the value of enforcing appeal waivers against claims based on new constitutional rules. To the contrary, the ‘principle that future changes in law do not vitiate collateral-challenge waivers is mainstream.’”⁵

The two-pronged test in *Strickland v. Washington* applies to situations where a defendant seeks to withdraw his guilty plea based upon an ineffective assistance of counsel claim.⁶ Regarding parole eligibility, the Supreme Court of Georgia found that “an attorney’s failure to inform his or her client that he or she would be ineligible for parole as a recidivist for the entirety of a lengthy prison sentence is constitutionally deficient performance.”⁷

Trial court erred in finding that defendant was not prejudiced by his attorney who, during plea negotiations, failed to correctly advise him regarding the mandatory nature of Georgia’s recidivist sentencing laws. The appeals court explained that “to establish prejudice a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the [trial] court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.”⁸

Counsel was found to be ineffective when counsel failed to inform defendant of his right to withdraw his guilty plea for any reason prior to sentencing.⁹

The 11th Circuit held in *Rosin v. U.S.*¹⁰ that defendant’s attorney who allegedly miscalculated his potential time in prison in the event of a conviction after trial and who failed to pursue plea negotiations did not render ineffective assistance. The court found that the defendant “was required to allege that he would have accepted a guilty plea and would not have insisted on going to trial but for his trial counsels’ alleged miscalculation of his potential prison sentence and failure to pursue plea negotiations.”

⁵King v. United States, 41 F.4th 1363 (11th Cir. 2022).

⁶Diaz v. State, 343 Ga. App. 19, 806 S.E.2d 1 (2017).

⁷Alexander v. State, 297 Ga. 59, 772 S.E.2d 655 (2015).

⁸Daniel v. State, 342 Ga. App. 448, 803 S.E.2d 603 (2017).

⁹Nelson v. Wilkey, 309 Ga. 203, 845 S.E.2d 566 (2020).

¹⁰Rosin v. U.S., 786 F.3d 873 (11th Cir. 2015).

In *Walker v. State*,¹¹ it was found that the defendant did not receive ineffective assistance of counsel during plea negotiations. Defendant was convicted by a jury of rape and false imprisonment. He received a life sentence. During plea negotiations, defendant's attorney advised him that he faced a maximum sentence of 20 years. Defendant rejected a proposed plea deal offering 20 years in prison and proceeded to trial. Based upon a review of the record, the Georgia appeals court concluded that "Walker . . . failed to carry his burden of showing that the initial 20-year offer would have ultimately been presented to the trial court and not withdrawn by the State due to the intervening circumstances involved in this case, namely the State's late realization that the maximum sentence available in this case was life imprisonment."

The Criminal Code of Georgia provides for a number of affirmative defenses. O.C.G.A. §§ 16-3-20 et seq. provides for the defenses of justification, use of force in defense of self or others, use of force in defense of habitation and use of force in defense of property, entrapment, and coercion. Several other sections provide for affirmative defenses to specific offenses. A person shall not be considered or found guilty of a crime unless he has attained the age of 13 years at the time of the act, omission, or negligence constituting the crime.¹² The Georgia Code also provides immunity from suit for tort to a minor under the age of 13.¹³ A person convicted of a capital offense without recommendation for mercy who has not reached age 17 at the time of the offense will not receive punishment of death, but rather imprisonment for life applied to the crime of homicide.¹⁴ In 2005 the U.S. Supreme Court changed the law for many states which had allowed 16- or 17-year-olds to receive the death penalty. Under *Roper v. Simmons*,¹⁵ the defendant must have attained the age of 18 when the defendant commits a homicide in order to reach the minimum age for capital punishment.

Defendant may present as many different defenses as he believes he has, even though they are conflicting and may confuse the jury.¹⁶ To obtain a jury instruction on a defense, the defendant need present "only . . . slight evidence supporting the theory of the charge."¹⁷

The fact that a civil settlement has been had with the injured

¹¹*Walker v. State*, 347 Ga. App. 9-3. 163, 816 S.E.2d 849 (2018).

¹²See O.C.G.A. § 16-3-1.

¹³*Barrett v. Carter*, 248 Ga. 389, 283 S.E.2d 609 (1981).

¹⁴*Bankston v. State*, 258 Ga. 188, 367 S.E.2d 36 (1988); O.C.G.A. § 17-

¹⁵*Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

¹⁶*McKibben v. State*, 115 Ga. App. 598, 155 S.E.2d 449 (1967).

¹⁷*Garner v. State*, 303 Ga. 788, 815 S.E.2d 36 (2018).

person or that the injured person has condoned the wrong is not a defense to a criminal charge based thereon,¹⁸ nor may custom or usage be a defense to a crime.¹⁹

A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence.²⁰ However, a claim that a shooting was accidental was no defense to a felony-murder conviction.²¹ The defendant in a murder trial testified that she deliberately fired a gun through a window at a large figure and, therefore, was not entitled to an instruction on the defense of accident and misfortune.²² Both the defenses of accident and self defense can properly be instructed in the same case, depending on the facts. There is no hard and fast rule that they are mutually exclusive.²³

As elaborated upon in *Jackson v. State*:²⁴

Given that a defendant claiming justification admits intentionally engaging in the charged conduct while a defendant claiming accident does not, the two defenses are usually considered mutually exclusive and as a general rule will not be charged in the same case. (citations omitted). The cases in which Georgia's appellate courts have found that a defendant is entitled to a jury instruction on both justification and accident are those in which some evidence shows that the defendant was armed with a weapon while defending himself from another party and the other party was wounded or killed accidentally by that weapon.

The accused was charged with killing his wife. Defense of accident may be rebutted by evidence that the defendant fit the profile of a spousal abuser.²⁵

In *Hughes v. State*,²⁶ the court found that a defendant, who was convicted of hijacking a motor vehicle, armed robbery, attempted kidnapping, obstruction, and marijuana possession, was not entitled to a jury instruction on defense of accident. The evidence indicated, among other things, that the defendant purposefully entered a passing motor vehicle after a bad drug deal, "frightened her, knowingly placed her life in danger of his pursuing attackers; threatened her that she would be harmed if she did not comply with his demands; and repeatedly ordered her to drive

¹⁸*Childs v. State*, 118 Ga. App. 706, 165 S.E.2d 577 (1968).

¹⁹*Burkett v. State*, 198 Ga. 747, 32 S.E.2d 797 (1945).

²⁰O.C.G.A. § 16-2-2.

²¹*Brand v. State*, 258 Ga. 378, 369 S.E.2d 896 (1988).

²²*Duke v. State*, 256 Ga. 671, 352 S.E.2d 561 (1987).

²³*Turner v. State*, 262 Ga. 359, 418 S.E.2d 52 (1992).

²⁴*Jackson v. State*, 329 Ga. App. 240, 764 S.E.2d 569 (2014).

²⁵*Jones v. State*, 276 Ga. 253, 577 S.E.2d 560 (2003).

²⁶*Hughes v. State*, 323 Ga. App. 4, 746 S.E.2d 648 (2013).

him away, irrespective of her pleas and protest.”

Although evidence of the “battered woman syndrome” is admissible for purposes of establishing a wife’s reasonable fear in connection with a claim of self-defense and a husband’s general character for violence, it may not be used to raise the issues of insanity, mental illness or mental incompetency without prior compliance with Rule 31.4, regarding notice of intention to raise the latter defenses.²⁷

For the right to use force in defense of one’s own person or property, or force in making arrests and preventing escapes, see § 4:9, *infra*. For the defense of alibi, see § 9:12, *infra*.

O.C.G.A. § 17-16-5(a) requires the accused to disclose in writing an intention to rely upon the defense of alibi. *Tubbs v. State*²⁸ requires the defendant to list all witnesses upon whom the defendant relies to support the defense.

The double jeopardy clause does not preclude the prosecution from retrying a defendant whose conviction is set aside due to a trial error, such as the incorrect admission of evidence or improper instructions.²⁹

Double jeopardy is an established defense. It is based on the principle that the prosecution, with all its resources, should not be permitted to repeatedly try to convict an individual for an alleged offense.³⁰ The United States Supreme Court has even held that a retrial after a court-decreed acquittal is barred, even if the acquittal is based on a mistake by the trial judge.³¹

The U.S. Supreme Court seems to have indicated that the “same elements” test will be the controlling one in assessing double jeopardy claims.³²

The double jeopardy doctrine forbids a second trial where its purpose is to allow the State to supply evidence it failed to muster in the first proceeding.³³

There is no double jeopardy violation an individual is successively prosecuted by federal and state entities since they are separate sovereigns.³⁴

As stated by the U.S. Supreme Court, “The Double Jeopardy Clause protects a person from being prosecuted twice ‘for the

²⁷*Pugh v. State*, 191 Ga. App. 394, 382 S.E.2d 143 (1989).

²⁸*Tubbs v. State*, 276 Ga. 751, 583 S.E.2d 853 (2003).

²⁹*State v. Caffee*, 291 Ga. 31, 728 S.E.2d 171 (2012).

³⁰*Yeager v. U.S.*, 557 U.S. 110, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009).

³¹*Evans v. Michigan*, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013).

³²*U.S. v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

³³*Jenkins v. State*, 259 Ga. App. 47, 576 S.E.2d 300 (2002).

³⁴*James v. United States*, 141 S. Ct. 1520, 209 L. Ed. 2d 256 (2021).

same offense.’ An offense defined by one sovereign is necessarily different from an offense defined by another, even when the offenses have identical elements. Thus, a person can be successively prosecuted for the two offenses without offending the Clause. We have dubbed this the ‘dual-sovereignty’ doctrine.” The Court added, “the Clause prohibits separate prosecutions for the same offense; it does not bar successive prosecutions by the same sovereign. So even assuming that petitioner’s first prosecutor exercised federal rather than tribal power, the second prosecution did not violate the Constitution’s guarantee against double jeopardy.”³⁵

Double jeopardy has a procedural component, “which places limitations on ‘multiple prosecutions for crimes arising from the same conduct,’ ” and a substantive component, “which protects against ‘multiple convictions or punishments’ for such crimes.”³⁶

A conviction on a lesser-included offense bars subsequent trial on the greater offense. The federal Constitution prohibits successive prosecutions as well as cumulative punishment.³⁷

“A multiplicitous indictment, which ‘charges a single offense in more than one count,’ violates double jeopardy principles ‘because it gives the jury numerous opportunities to convict the defendant for the same offense.’ ”³⁸

The double jeopardy clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. In determining whether a civil sanction is punitive, and this constitutes punishment for purposes of the double jeopardy clause, a court must make a particularized assessment of the sanction and the purposes that the sanction may fairly be said to serve. Civil commitment ordered after the defendant was found not guilty of malice murder by reason of insanity was not punitive, and thus sentence of life imprisonment for the same killing, which was imposed after jury found defendant guilty but mentally ill as to a felony murder charge, was not barred by double jeopardy. By means of its statutory pattern, the legislature had advanced remedial goals with respect to the treatment of an insanity acquittee.³⁹

A defendant can waive his double jeopardy rights. As a general

³⁵*Denezpi v. United States*, 142 S. Ct. 1838, 213 L. Ed. 2d 141 (2022).

³⁶*Neuman v. State*, 311 Ga. 83, 856 S.E.2d 289 (2021).

³⁷*Gerisch v. Meadows*, 278 Ga. 641, 604 S.E.2d 462 (2004).

³⁸*United States v. Cannon*, 987 F.3d 924 (11th Cir. 2021).

³⁹*Shepherd v. State*, 280 Ga. 245, 626 S.E.2d 96 (2006); *Ali v. State*, 328 Ga. App. 203, 761 S.E.2d 601 (2014) (an in rem forfeiture proceeding does

rule, a defendant's failure to file a written plea in her prior to a second trial waives the right to subsequently raise a challenge on statutory procedural double jeopardy grounds.⁴⁰

Double jeopardy will bar a retrial after a mistrial is granted on a defendant's motion when the defendant can establish that the state intended to goad the defendant into moving for a mistrial to avoid a reversal or to obtain a more favorable chance of a guilty verdict on a retrial.⁴¹

However, the standard for the defendant to meet in making this claim is very high. The Georgia Supreme Court held that the bar of double jeopardy is not raised by even intentional prosecutorial misconduct, notwithstanding the fact that the defendant was thereby deprived of due process of law, unless the prosecutor's actions were intended to subvert the protections afforded by the Double Jeopardy Clause.⁴²

Jeopardy attached upon the swearing in of witness in a non-jury trial; *nolle prosequi* counts over defendant's objection bars retrial.⁴³

Subsequent prosecution not barred where case reversed due to ineffective assistance of counsel: "Where there is a timely special demurrer, but quashing of the indictment is neither accomplished nor absolutely required, prosecution under a corrected, non-defective indictment is permissible, and O.C.G.A. § 17-7-53.1 does not require that a plea in bar be sustained."⁴⁴ Subject to limited exceptions, double jeopardy prohibits a retrial when a defendant's conviction has been reversed on account of insufficiency.⁴⁵

Acquittal by unsworn jury is a nullity, and jeopardy does not attach to its verdict.⁴⁶

Order denying defendant's plea in bar challenging second re-indictment for possession of firearm by convicted felon was

not constitute a criminal in persona action for purposes of double jeopardy; in rem actions are directed against the property).

⁴⁰Alexander v. State, 279 Ga. 683, 620 S.E.2d 792 (2005).

⁴¹Wright v. State, 284 Ga. App. 169, 643 S.E.2d 538 (2007) (such goading not shown in this case).

⁴²State v. Traylor, 281 Ga. 730, 642 S.E.2d 700 (2007) ("Where, as here, the trial court does not find that the person in control of the prosecu-

tion instigated the misconduct either directly or through collusion in order to goad the defendant into moving for a mistrial, double jeopardy does not bar retrial . . .").

⁴³State v. Aycock, 283 Ga. App. 876, 643 S.E.2d 249 (2007).

⁴⁴Langlands v. State, 282 Ga. 103, 646 S.E.2d 253 (2007).

⁴⁵Jefferson v. State, 310 Ga. 725, 854 S.E.2d 528 (2021).

⁴⁶Spencer v. State, 281 Ga. 533, 640 S.E.2d 267 (2007).

directly appealable.⁴⁷ The denial of a plea in bar on double jeopardy grounds is directly appealable. Where the plea in bar is based on a second re-indictment for the same offense, judicial economy is best served by holding that the order complained of is subject to direct appeal as a final order. An order overruling a plea in bar based on either double jeopardy or the statutory prohibition against a re-indictment for the same offense is directly appealable.

Relitigation of issues which jury left undecided in multicount indictment, see *Yeager v. U.S.*⁴⁸

Other cases on double jeopardy, see § 4:1, *supra*.

§ 4:5 Entrapment as defense

A person is not guilty of a crime if by entrapment his conduct is induced or solicited by a government officer or employee or agent of either for the purpose of obtaining evidence to be used in prosecuting the person for commission of the crime. Entrapment exists where the idea and intention of the commission of the crime originated with a government officer or employee or with an agent of either and he, by undue persuasion, incitement or deceitful means, induced the accused to commit the act which the accused would not have committed except for the conduct of such officer.¹

Entrapment has been defined as the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. But, a distinction must be drawn between inducing an innocent person to do an unlawful act and catching one in the execution of a criminal act of his own conception and design by the use of decoys and deceit. The defense of entrapment is not available to one who has the intent and design to commit a criminal offense and who does commit the essential act constituting it merely because an officer of the law, for the purpose of securing evidence, affords such a person the opportunity to commit the criminal act or purposely aids and encourages him in its perpetration.²

There is no entrapment where a defendant who is ready to commit the offense is merely furnished an opportunity; even

⁴⁷*Langlands v. State*, 282 Ga. 103, 646 S.E.2d 253 (2007).

²*Sorrells v. U.S.*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A.L.R.

⁴⁸*Yeager v. U.S.*, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009), 249 (1932).

[Section 4:5]

¹O.C.G.A. § 16-3-25.

repeated requests and offers of money do not indicate an entrapment situation as a matter of law.³

The entrapment defense consists of three distinct elements:

- (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 crime. The third element is the key element of the defense.⁴

Keaton v. State,⁵ provides that under the majority view which is followed in Georgia, the predisposition of the defendant toward the crime is a key element. The officer's state of mind does not have the same relevance as that of the accused.

If all of the elements of an affirmative defense are raised by the evidence, the trial court is required to charge the jury on the defense. However, a jury instruction on entrapment was not warranted here. Attractiveness of female informant, who was engaged by police to make controlled drug buy, did not induce defendant to sell cocaine to her as a result of undue persuasion, incitement or deceit, as required to establish an element of entrapment defense in prosecution for sale of cocaine.⁶

In *McClure v. State*,⁷ the Supreme Court of Georgia held that a defendant is entitled to raise an entrapment defense even if he does not admit to the underlying criminal conduct. As the Court explained:

In summary, in order to raise an affirmative defense, a criminal defendant need not "admit" anything, in the sense of acknowledging that any facts alleged in the indictment or accusation are true. Rather, in asserting an affirmative defense, a defendant may accept certain facts as true for the sake of argument, and the defendant may do so for the limited purpose of raising the specific affirmative defense at issue. A defendant is entitled to a requested jury instruction regarding an affirmative defense when at least slight evidence supports the theory of the charge, whether in the State's evidence or evidence presented by the defendant, and regardless of whether the theory of the affirmative defense conflicts with any other theory being advanced by the defendant. It follows that a trial court errs in denying a defendant's request for a jury instruction on an affirmative defense solely on the basis that the defendant did not admit for all purposes the truth of the allegations in the indictment or ac-

³U.S. v. Paulsen, 591 Fed. Appx. 910 (11th Cir. 2015); Paras v. State, 247 Ga. 75, 274 S.E.2d 451 (1981).

⁴Keaton v. State, 253 Ga. 70, 316 S.E.2d 452 (1984).

⁵Keaton v. State, 253 Ga. 70, 316

S.E.2d 452 (1984).

⁶Lightsey v. State, 289 Ga. App. 181, 656 S.E.2d 852 (2008).

⁷McClure v. State, 306 Ga. 856, 834 S.E.2d 96 (2019).

cusation regarding the allegedly unlawful act. Appellate decisions affirming such rulings, where the affirmative defense was supported by at least slight evidence, are hereby overruled to that extent.

An entrapment defense could not be predicated on the conduct of a police informant who was not working with the authorities at the time of such conduct.⁸

Evidence was sufficient to establish a prima facie case of entrapment where defendants sold drugs to undercover narcotics agent after they were told by a friend who was a police informant that he needed help setting up a drug purchaser because he was in trouble with the police.⁹ After a defendant presents a prima facie case of entrapment, the burden is on the State to disprove entrapment beyond a reasonable doubt. The determination of whether the State disproved the entrapment defense beyond a reasonable doubt generally rests with the jury; however, where there is no conflict of evidence and all evidence prior to entrapment that is introduced, with all reasonable deductions and inferences, demands a verdict of acquittal, the trial judge must direct the verdict of acquittal.¹⁰

The Eleventh Circuit found that the defendant was not entitled to present an entrapment defense in an attempted child enticement case. The circuit court found that the government's placement of an advertisement merely created an opportunity for the defendant to commit the crime. The court added that defendant responded affirmatively to the ad and expressed interest in engaging in certain acts that amounted to a crime.¹¹

§ 4:6 Insanity as defense

A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, such person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence.¹

A person shall not be found guilty of a crime when at the time of the act, omission, or negligence constituting the crime, such person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the

⁸Strobhart v. State, 184 Ga. App. S.E.2d 258 (1991).
615, 362 S.E.2d 99 (1987).

⁹Emanuel v. State, 260 Ga. 425,
396 S.E.2d 225 (1990).

¹⁰Hill v. State, 261 Ga. 377, 405

¹¹United States v. Unrein, 688
Fed. Appx. 602 (11th Cir. 2017).

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¹O.C.G.A. § 16-3-2.

crime.²

In instances where an individual who is able to distinguish right from wrong commits a criminal act while suffering under a delusional compulsion which leads him to believe his action is right, i.e., justified, Georgia law accepts this form of insanity as a defense. However, if a delusion is as to a fact which would not excuse the act with which the prisoner is charged, the delusion does not authorize acquittal of the defendant.³

The test of insanity as a defense differs from the test which is applied in determining whether the accused is fit to stand trial.⁴

A trial court must “conduct a sua sponte investigation into” a defendant’s competency to stand trial when evidence of incompetency comes to the attention of the court. However, when a defendant is competent to stand trial, a trial is not obligated to “sua sponte investigate or raise the defense of insanity (or other mental incompetency) at the time of the charged offense.”⁵

In *Carr v. State*,⁶ the Georgia Supreme Court sided with the defendant who challenged on due process grounds “the automatic nature of [his] detention under OCGA § 17-7-130(c) for all defendants who are charged with violent offenses.” The Court reasoned, in part:

Because the nature of *automatic* commitment for all those defendants does bear a reasonable relation to the State’s purpose of accurately determining the restorability of individual defendants’ competence to stand trial, that aspect of OCGA § 17-7-130(c) violates due process when applied to defendants who have been deprived of their liberty based solely on that statutory provision. . . . To ensure that the nature of commitment to the department is appropriate for the particular defendant, the court should consider all relevant evidence and make a finding as to whether the evaluation required by OCGA § 17-7-130(c) should be conducted on an inpatient or outpatient basis.

Similarly, in *McGouirk v. State*,⁷ the Georgia Supreme Court held:

As we determined in *Carr*, where, as here, McGouirk was released on bond and was found to be mentally incompetent to stand trial, and where he was subjected to automatic commitment to the physical custody of the department pursuant to OCGA § 17-7-130(c) solely based on the fact that he was a mentally incompetent indi-

²O.C.G.A. § 16-3-3. See also O.C.G.A. § 17-7-131(a).

³O.C.G.A. § 16-3-3. *Lawrence v. State*, 265 Ga. 310, 454 S.E.2d 446 (1995).

⁴See § 9:11, *infra*.

⁵*Perkins v. State*, 328 Ga. App. 508, 759 S.E.2d 626 (2014).

⁶*Carr v. State*, 303 Ga. 853, 815 S.E.2d 903 (2018).

⁷*McGouirk v. State*, 303 Ga. 881, 815 S.E.2d 825 (2018).

vidual who had been accused of committing violent crimes, OCGA § 17-7-130(c) was not “applied constitutionally to [McGouirk].” In order for the trial court to apply OCGA § 17-7-130(c) in a constitutional manner to McGouirk, the court must exercise its discretion to make “an individualized determination of whether [McGouirk’s] confinement reasonably advances the government’s purpose” of accurately determining whether “there is a substantial probability that [McGouirk] will attain mental competency to stand trial in the foreseeable future.”

Insanity is an affirmative defense. Unless the State’s evidence raises the issue of insanity, the defendant, if he wants to raise it, must present some evidence thereon.⁸ A notice requirement also operates. Prior to presenting proof, an accused must file a notice of his mental defense.⁹ Where a defendant raises insanity as a defense, it must be proved by a preponderance of the evidence.¹⁰ The normal presumption of sanity¹¹ may be overcome by a preponderance of evidence.¹²

The presumption of sanity does not disappear upon the presentation of evidence to the contrary and may be relied upon by the jury (or trial court, as the trier of fact) after the introduction of uncontradicted expert testimony of insanity.¹³

A defendant may assert a defense of insanity even though he has refused to submit to examination by a court-appointed psychiatrist.¹⁴

In *Putnal v. State*,¹⁵ the Georgia Supreme Court observed that “the Fourteenth Amendment’s due process guarantee of fundamental fairness requires that an indigent defendant be given access to a competent mental health expert upon a showing that his sanity at the time of the offense will be a significant factor at trial.” The Court agreed with Putnal that “the trial court erred by refusing to allow Putnal to proceed ex parte and under seal regarding his requests for access for his mental health experts to examine him, thereby unfairly placing him in the position of revealing his trial strategy and theory of the case to the State.”

A plea of not guilty by reason of insanity is a plea of confession and avoidance—it admits the facts pleaded in the indictment, but avoids conviction because of the condition of insanity of the

⁸Keener v. State, 97 Ga. 388, 24 S.E. 28 (1895).

⁹Uniform Superior Court Rule 31.5.

¹⁰Harris v. State, 259 Ga. 511, 384 S.E.2d 647 (1989).

¹¹See § 20:13, *infra*.

¹²McLendon v. State, 205 Ga. 55, 52 S.E.2d 294 (1949).

¹³Phillips v. State, 250 Ga. 336, 297 S.E.2d 217 (1982).

¹⁴Motes v. State, 256 Ga. 831, 353 S.E.2d 348 (1987).

¹⁵Putnal v. State, 303 Ga. 569, 814 S.E.2d 307 (2018).

defendant at the time of the offense.¹⁶

Mental abnormality is not a defense to a crime unless it amounts to insanity.¹⁷

The only two situations which authorize a verdict of not guilty by reason of insanity are those set out in O.C.G.A. §§ 16-3-2 and 16-3-3.¹⁸ Although a defendant may suffer from a mild mental retardation, mental abnormality, unless it amounts to insanity, is not a defense to a crime.¹⁹ However, other verdicts involving defendant's mental state are available. An amendment to O.C.G.A. § 17-7-131 in 1988 added to the permissible instructions on insanity or mental incompetence defenses the permissible verdict "guilty but mentally retarded."

Requirement of O.C.G.A. § 17-7-131(c) that the jury be charged as to guilty but mentally ill where an insanity plea has been entered, is not unconstitutional as violative of equal protection, as vague or as constituting cruel and inhuman behavior.²⁰

There was a defect in the manner in which the jury was instructed in a case where the defendant pursued a delusional compulsion defense in a malice murder trial.²¹ The Georgia Supreme Court found that the omission harmed the defendant's rights enough to require a new trial, even though defense counsel did not request such instructions in writing, and waited until after the jury instructions conference passed to make the request.

The fact that a defendant was entitled to a separate hearing on his competence to stand trial did not mean that he was entitled to a separate hearing on his sanity at the time of the offense.²²

A previous commitment as "a mentally ill person and in need of hospitalization in a psychiatric hospital" may raise a counter presumption to the rebuttable presumption of "sound mind and discretion." An administrative release from hospitalization cancels any previously existing presumption of insanity, leaving

¹⁶Moses v. State, 167 Ga. App. 556, 307 S.E.2d 35 (1983) (overruled on other grounds by Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993)).

¹⁷Dennis v. State, 170 Ga. App. 630, 317 S.E.2d 874 (1984).

¹⁸Caldwell v. State, 257 Ga. 10, 354 S.E.2d 124 (1987).

¹⁹Hudson v. State, 171 Ga. App. 181, 319 S.E.2d 28 (1984).

²⁰Cooper v. State, 253 Ga. 736, 325 S.E.2d 137 (1985). Amendment of statute in 2006 relating to language of the charge to the jury in cases where

insanity defense is used, see O.C.G.A. § 17-7-131.

²¹Woods v. State, 291 Ga. 804, 733 S.E.2d 730 (2012). But see Choynet v. State, 295 Ga. 568, 761 S.E.2d 322 (2014) (trial court did not commit plain error when it failed to instruct the jury on the concept of delusional compulsion, given that the evidence was unclear that the defendant acted as a result of delusional compulsion, and it was unlikely that the jury's outcome was affected by the alleged error).

²²Edison v. State, 256 Ga. 67, 344 S.E.2d 231 (1986).

the rebuttable presumption of sanity.²³

A murder defendant's testimony that he could not remember what happened and could not say whether, at the time of the crime, he could tell the difference between right and wrong was not sufficient to warrant charge on the issue of insanity.²⁴

Additional provisions affecting the procedure for defendants raising the insanity defense were enacted in 2007.²⁵

§ 4:7 Coercion as defense

A person is not guilty of a crime, except murder, if the act upon which the supposed criminal liability is based is performed under such coercion that the person reasonably believes that performing the act is the only way to prevent his imminent death or great bodily injury.¹ Under the statute governing coercion as a defense to a crime, the danger must not be one of future violence but of present and immediate violence at the time of the commission of the forbidden act.²

A defense of coercion requires that the person asserting it have "no reasonable way, other than committing the crimes, to escape the threat of harm."³

Though intimidation by the judiciary or prosecution "that dissuades a potential defense witness from testifying for the defense can, under certain circumstances, violate the defendant's right to present a defense," when the witness has consulted with an independent attorney, "the potential for unconstitutional coercion by a government actor diminishes."⁴

A person cannot successfully defend a murder charge on the ground that he or she was coerced into committing the murder.⁵ Neither the actual perpetrator of a murder or any party thereto may raise the defense of coercion.⁶ Criminal responsibility is to be determined by the condition of the defendant's mind at the time he committed the act.⁷

Defendant was entitled in armed robbery prosecution to jury instruction on statutory affirmative defense of coercion; defendant

²³Hodges v. State, 257 Ga. 818, 364 S.E.2d 275 (1988).

²⁴Gooch v. State, 259 Ga. 301, 379 S.E.2d 522 (1989).

²⁵See the 2007 amendment of O.C.G.A. § 17-7-130.

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¹O.C.G.A. § 16-3-26.

²Engrich v. State, 293 Ga. App. 810, 668 S.E.2d 319 (2008).

³Haney v. State, 365 Ga. App. 22, 877 S.E.2d 276 (2022).

⁴McGlynn v. State, 342 Ga. App. 170, 803 S.E.2d 97 (2017).

⁵Milton v. State, 248 Ga. 192, 282 S.E.2d 90 (1981).

⁶Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980).

⁷Murphy v. State, 70 Ga. App. 387, 28 S.E.2d 198 (1943).

admitted at trial to the elements of armed robbery as a party to the crime, and defendant testified that he participated in the armed robbery because codefendant pointed a gun at him and threatened to shoot him or his family.⁸ However, as noted in § 4:5, *supra*, the Georgia Supreme Court in *McClure v. State*⁹ held that a defendant need not admit to the underlying offense in order to get an instruction on an affirmative defense.

§ 4:8 Intoxication or drugged condition as defense

A person shall not be found guilty of a crime when at the time of the act, omission, or negligence constituting the crime, such person, because of involuntary intoxication, did not have sufficient mental capacity to distinguish between right and wrong in relation to such act. Involuntary intoxication means intoxication caused: (a) by consumption of a substance through excusable ignorance, and (b) by the coercion, fraud, artifice, or contrivance of another person. Voluntary intoxication shall not be an excuse for any criminal act or omission.¹

Contrary to the rule in some other states, older authority has held in Georgia that voluntary drunkenness, so extreme as to cause temporary insanity, is no defense if the accused knew right from wrong when sober.² Alteration of brain function can change the result, however. Voluntary intoxication is not a defense to a crime unless the intoxication has resulted in the alteration of brain function so as to negate intent and, even then, the brain function alteration must be more than temporary.³ An alcoholic's intoxication was not deemed involuntary and was not a defense to the crime of felony-murder.⁴

Given that the defense of involuntary intoxication “is a subset of an insanity defense,” a defendant is required to provide the prosecution with pretrial notice of his intention to raise this issue at trial.⁵ A defendant asserting involuntary intoxication bears the burden of showing, by a preponderance of the evidence, that he was not mentally responsible at the time of the alleged crime. If a defendant asserting involuntary intoxication meets the burden of showing, by a preponderance of the evidence, that he was not mentally responsible at the time of the alleged crime, the state must present sufficient evidence to show beyond a reasonable

⁸*Mathis v. State*, 299 Ga. App. WL 1323 (1886).
831, 684 S.E.2d 6 (2009).

⁹*McClure v. State*, 306 Ga. 856,
834 S.E.2d 96 (2019).

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¹O.C.G.A. § 16-3-4.

²*Beck v. State*, 76 Ga. 452, 1886

³*Horton v. State*, 258 Ga. 489,
371 S.E.2d 384 (1988).

⁴*McEver v. State*, 258 Ga. 768,
373 S.E.2d 624 (1988).

⁵*McKelvin v. State*, 305 Ga. 39,
823 S.E.2d 729 (2019).

doubt that the defendant was not involuntarily intoxicated.⁶

In specific intent crimes, the defense sometimes raises the issue of whether the accused was so intoxicated as to be incapable of forming the specific intent required to commit the crime.

Where the defendant was drunk and, as a result, got into the wrong car by mistake, there was a good defense to a prosecution for larceny of an automobile.⁷

However, it was not error for a trial court to refuse the defendant a jury instruction that a person is not criminally responsible for an act committed while in a state of intoxication so great that the person is not able to form the intent to do the act alleged.⁸ Rather, the trial court instructed the jury that a person *is* responsible for a criminal act when voluntarily intoxicated but still able to tell the difference between right and wrong. The Georgia Court of Appeals upheld the instruction, citing evidence that the defendant apologized to the damaged property owner two days later to show that the intoxicating effect on the defendant's mind was merely temporary.

It was not error for a trial court to refuse to charge that intoxication caused by drugs taken as directed under doctor's prescription would be involuntary and that, if use of drugs destroyed one's knowledge of right and wrong, defendant could not be held responsible for crime, and that withdrawal of certain drug as well as overdose might cause psychosis. The defendant was a physician who was experimenting with use of certain drug to alleviate physical affliction and defendant made his own determination of type and quantity of drug to take. Court did charge with respect to involuntary intoxication by drugs through excusable ignorance. It was also not error for court to refuse to charge that where drug destroys one's knowledge of right and wrong, defendant cannot be held responsible for crime where trial court charged that, if because of alcohol, drugs, or narcotics, one's mind becomes so emptied as to render him incapable of forming the intent to do the act charged or to understand that certain consequences will likely result from it, he would not be criminally liable for his act.⁹

§ 4:9 Use of justifiable force

The defense that is customarily known as self-defense is embodied in the Criminal Code as the use of force in defense of

⁶Citing O.C.G.A. § 16-3-4, see *Stewart v. State*, 291 Ga. App. 846, 663 S.E.2d 278 (2008).

⁷*Hayes v. State*, 57 Ga. App. 801, 196 S.E. 926 (1938); *Smith v. State*, 57

Ga. App. 801, 196 S.E. 927 (1938).

⁸*Anderson v. State*, 319 Ga. App. 701, 738 S.E.2d 285 (2013).

⁹*Johnson v. State*, 235 Ga. 486, 220 S.E.2d 448 (1975).

self or others.

A person is not justified in using force if he initially provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant; is attempting to commit, committing or fleeing after the commission or attempted commission of a felony; or was the aggressor or was engaged in a combat by agreement, unless he withdraws from the encounter and effectively communicates to such other person his intent to do so and the other notwithstanding continues or threatens to continue the use of unlawful force.¹

A person is justified in threatening or using force against another when he reasonably believes that such threat or force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person or the commission of a forcible felony.²

A person is justified in threatening or using force against another when he reasonably believes that such threat or force is necessary to prevent or terminate such other's unlawful entry into or attack upon a habitation; however, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if the entry is made or attempted in a violent and tumultuous manner and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person dwelling or being therein and that such force is necessary to prevent the assault or offer of personal violence or he reasonably believes that the entry is made or attempted for the purpose of committing a felony therein and that such force is necessary to prevent the commission of the felony.³

Accused, who was attempting to commit robbery, was not justified in firing pistol by fact that victim's companion pulled out knife.⁴

In trial for manslaughter, evidence that the defendant had been previously attacked with a knife and received scars to his chest is relevant as to whether he reasonably and honestly believed that deadly force was necessary to prevent death or great bodily injury to himself. Trial court committed reversible error in refusing to allow defendant to physically exhibit the

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¹O.C.G.A. § 16-3-21.

²O.C.G.A. § 16-3-21.

³O.C.G.A. § 16-3-23.

⁴Smith v. State, 235 Ga. 327, 219 S.E.2d 440 (1975).

scars.⁵

The difference between provocation in the self-defense and voluntary manslaughter contexts was discussed in *Ngumezi v. State*.⁶

the provocation necessary to support a charge of voluntary manslaughter is different from that which will support a claim of self-defense. The distinguishing characteristic between the two claims is whether the accused was so influenced and excited that he reacted passionately rather than simply in an attempt to defend himself. Only where this is shown will a charge on voluntary manslaughter be warranted.

A 1993 amendment to O.C.G.A. § 16-3-21 permits, within the court's discretion, a defendant in a criminal prosecution for murder or manslaughter to offer evidence to show that the deceased victimized the defendant through acts of family violence or child abuse, which are defined by O.C.G.A. §§ 19-13-1 and 19-15-1. In addition, the court may allow the defendant to offer expert testimony regarding the defendant's state of mind at the time of the offense, given the facts and circumstances surrounding the acts of family violence or child abuse.⁷

The Georgia Supreme Court has described justification as an affirmative defense.⁸

As noted in § 4:5, *supra*, the Georgia Supreme Court in *McClure v. State*⁹ held that a defendant does not have to admit to the underlying offense in order to get an instruction on an affirmative defense.

However, when defendant produces evidence of self defense, the burden is on the State to establish beyond a reasonable doubt that defendant did not act in self defense.¹⁰ Reversible error occurred in a murder case involving the defense of justification since nowhere in the charge was the jury informed that when the affirmative defense of justification is raised the State has the burden of proving the absence of the elements of that affirmative defense.¹¹ *Coleman v. State* holds that reversible error does not occur in a murder case when a judge refuses to tell the jury that if they believed the defendant to have been justified, it would

⁵*Daniels v. State*, 248 Ga. 591, 285 S.E.2d 516 (1981) (the lapse of time between prior occurrence and the homicide goes to the weight and credit to be accorded to the testimony).

⁶*Ngumezi v. State*, 300 Ga. 764, 798 S.E.2d 229 (2017).

⁷O.C.G.A. § 16-3-21(d)(2).

⁸*Broussard v. State*, 276 Ga. 216, 576 S.E.2d 883 (2003).

⁹*McClure v. State*, 306 Ga. 856, 834 S.E.2d 96 (2019).

¹⁰*Malone v. State*, 160 Ga. App. 883, 288 S.E.2d 595 (1982).

¹¹*Anderson v. State*, 262 Ga. 7, 413 S.E.2d 722 (1992) (overruled on other grounds by, *Coleman v. State*, 264 Ga. 253, 443 S.E.2d 626 (1994)).

have been their duty to acquit the defendant.¹²

When a defendant raises self-defense as a justification for the use of deadly force, the State must disprove that defense beyond a reasonable doubt.¹³

The defense of justification is lodged in O.C.G.A. § 16-3-20. Justification permits the use of force when a governmental officer needs to do so to fulfill official duties or when a person is required to do so to protect others, and the like.

Where a court charges both the statutory defense of justification, including justification in mutual combat, and a pattern jury instruction based upon the statute, the pattern instruction should reflect the correct statutory language.¹⁴

A defendant who shoots victim during fist fight is not entitled to instruction on law of mutual combat where there was no evidence that the defendant and victim mutually agreed or intended to fight with deadly weapons.¹⁵

Trial court properly excluded evidence that the victim was the first person to demonstrate to the defendant how to use a gun. Because this evidence “did not demonstrate any difficulty between the two,” the court did not err in excluding this evidence.¹⁶

Overruling earlier cases to the contrary, the Supreme Court held that, regardless of the felony specified by the State as the underlying felony to a felony murder charge, where there is sufficient evidence of a confrontation between the defendant and the victim or other circumstances which ordinarily would support a charge on justification, the defendant is not precluded from raising justification as a defense.¹⁷

The fact that a victim who was fatally shot had hit the defendant in the head with a beer bottle during an altercation three and one-half days before the defendant shot the victim, was not sufficient evidence of provocation to entitle the defendant to the requested charge on voluntary manslaughter in a prosecution for malice murder; the court could conclude as a matter of law that the prior altercation did not constitute even slight evidence of provocation because of the cooling off period between the altercation and the killing.¹⁸

Character of, and past misconduct by, the victim can play a

¹²Coleman v. State, 264 Ga. 253, 443 S.E.2d 626 (1994).

¹³Linzy v. State, 277 Ga. App. 673, 627 S.E.2d 411 (2006).

¹⁴Gerald v. State, 189 Ga. App. 155, 375 S.E.2d 134 (1988).

¹⁵Martin v. State, 258 Ga. 300, 368 S.E.2d 515 (1988).

¹⁶Williams v. State, 301 Ga. 712, 804 S.E.2d 31 (2017).

¹⁷Heard v. State, 261 Ga. 262, 403 S.E.2d 438 (1991), overruled on other grounds by, Woodard v. State, 296 Ga. 803, 771 S.E.2d 362 (2015)).

¹⁸Aldridge v. State, 258 Ga. 75, 365 S.E.2d 111 (1988).

role in self defense cases. However, evidence of a homicide victim's prior violent acts must be excluded unless a defendant first makes a prima facie showing of justification for his actions; to make this showing, the defendant must produce sufficient evidence to prove that (1) the victim was the aggressor, (2) the victim assaulted the defendant, and (3) the defendant was honestly trying to defend himself.¹⁹

Prior aggravated assault properly admitted to rebut justification defense in murder case.²⁰

A 2006 statute eliminates any duty to retreat in public and private settings when a victim is threatened by unlawful force, and also grants him or her immunity from civil suit for appropriate self-defense actions taken to thwart unlawful attacks.²¹

In self-defense cases, under O.C.G.A. § 16-3-24.2, Georgia provides an opportunity for immunity from prosecution. This can be accomplished if the court is presented with sufficient evidence that the defendant's actions were taken on the basis of self-defense.²² The court is to use a preponderance of the evidence standard in the pre-trial hearing on self-defense immunity.²³

If pre-trial immunity is not granted, a defendant is not barred from pursuing a self-defense claim at trial.²⁴

A trial court has the authority to review its earlier denial of a motion for immunity at any time prior to the entry of a final judgment. In *Hipp v. State*,²⁵ a trial court denied a pretrial motion for immunity. After a jury trial, where the jury convicted the defendant and rejected his self-defense argument, the trial court granted the defendant's new trial motion on the grounds that the defendant was entitled to immunity. The Supreme Court of Georgia held "that after a trial and prior to the entry of the final judgment a trial court retains the inherent authority to reconsider its pretrial ruling on the defendant's motion for immunity from criminal prosecution under O.C.G.A. § 16-3-24.2."

§ 4:10 Improper conduct of prosecution

The suppression by the prosecution of evidence favorable to an

¹⁹*Milner v. State*, 281 Ga. 612, 641 S.E.2d 517 (2007).

²⁰*Cockrell v. State*, 281 Ga. 536, 640 S.E.2d 262 (2007).

²¹O.C.G.A. §§ 16-3-23.1, 16-3-24.2.

²²*Hipp v. State*, 293 Ga. 415, 746 S.E.2d 95 (2013).

²³*Bunn v. State*, 284 Ga. 410, 667 S.E.2d 605 (2008).

²⁴*Sifuentes v. State*, 293 Ga. 441, 746 S.E.2d 127 (2013) ("While a trial

court's pretrial immunity ruling and the jury's verdict on a claim of self-defense may apply the same statutory justification standard, the court's ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different").

²⁵*Hipp v. State*, 293 Ga. 415, 746 S.E.2d 95 (2013).

accused upon request violates due process where the evidence is material either to guilt or punishment.¹

Materiality is established when the defendant demonstrates “that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”²

O.C.G.A. § 17-5-56(a) requires the government, when in possession of physical evidence in a criminal case, to “maintain any physical evidence collected at the time of the crime that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime.” In *Davis v. State*,³ the Georgia Court of Appeals held that this provision did not apply to biological matter from the victim’s abortion recovered more than two months after the crime was committed.

To prevail on a claim that the government failed to produce material favorable evidence in violation of *Brady v. Maryland*, a claimant must show “that he did not possess the evidence and could not obtain it himself with reasonable diligence, that the State suppressed the favorable evidence, and that, if the evidence had been disclosed to him, a reasonable probability exists that the outcome of the proceeding would have been different.”⁴

A prosecutor’s good faith or bad faith is irrelevant to whether or not there was a *Brady* violation.⁵

The defendant’s neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.⁶

It is improper for a prosecutor “to make improper suggestions, insinuations and assertions calculated to mislead the jury and may not appeal to the jury’s passion or prejudice.”⁷

The Eleventh Circuit in *U.S. v. Osmakac*,⁸ detailed the standards that must be satisfied to demonstrate prosecutorial misconduct:

“(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant.” *United States v. Gonzalez*, 122 F.3d 1383, 1389 (11th Cir. 1997) (quoting

[Section 4:10]

S.E.2d 831 (2014).

¹*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

⁵*Matter of Lee*, 301 Ga. 74, 799 S.E.2d 766 (2017).

²*Hittson v. GDCP Warden*, 759 F.3d 1210 (11th Cir. 2014).

⁶O.C.G.A. § 24-5-506.

³*Davis v. State*, 329 Ga. App. 797, 764 S.E.2d 588 (2014).

⁷*U.S. v. Sosa*, 777 F.3d 1279 (11th Cir. 2015).

⁴*Grant v. State*, 295 Ga. 126, 757

⁸*United States v. Osmakac*, 868 F.3d 937 (11th cir. 2017).

United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991)). “A defendant’s substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome [of the trial] would be different.” *United States v. Hall*, 47 F.3d 1091, 1098 (11th Cir. 1995) (citing *Kennedy v. Dugger*, 933 F.2d 905, 914 (11th Cir. 1991)).

“This Court looks to four factors in deciding whether prosecutorial misconduct has occurred: (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused.” *United States v. Feliciano*, 761 F.3d 1202, 1211 (11th Cir. 2014) (internal quotation marks omitted).

Such improper comment should not be made by the judge⁹ or by the prosecutor,¹⁰ nor should the fact be alluded to in any instruction.¹¹ For the right of the prosecution to comment upon the failure of the defendant to produce certain evidence, see §§ 15:15, 34:9, *infra*.

In *Shaburov v. State*,¹² the court found that the state, during its opening statements and during direct examination, did not impermissibly comment on the defendant’s right to remain silent. The court reasoned that the defendant never exercised his right to remain silent. It noted, for example, that after the defendant’s arrest he provided a statement to government investigators.

Prosecutors enjoy wide latitude when engaging in closing arguments, and they may argue reasonable inferences that stem from the evidence presented at trial.¹³

A prosecutor may not comment during closing argument on matters outside the record that pertained to the government’s charging decisions regarding possible accomplices.¹⁴

In *United States v. Valois*,¹⁵ the Eleventh Circuit held in a trafficking cocaine in international waters case that the government prosecutor did not improperly comment during closing arguments on an earlier uncharged seizure of narcotics. The court reasoned that the defendants had originally introduced evidence about the prior seizure and the prosecutor’s comments were intended to rebut an inference that arose from such introduction. In addition, any prosecutorial impropriety was cured by virtue of an instruction provided by the court.

⁹See § 2:11, *infra*.

¹⁰See §§ 1:8 and 34:9, *infra*.

¹¹See § 35:15, *infra*.

¹²*Shaburov v. State*, 324 Ga. App. 743, 751 S.E.2d 540 (2013).

¹³*Thompson v. State*, 343 Ga. App. 60, 806 S.E.2d 202 (2017).

¹⁴*Bronner v. State*, 364 Ga. App. 280, 874 S.E.2d 474 (2022).

¹⁵*United States v. Valois*, 915 F.3d 717 (11th Cir. 2019).

Though the prosecutor may not comment on a defendant's failure to testify, it is not improper for the prosecutor to reflect on failure of the defense to produce any witnesses.¹⁶ But, when the State commented on the defendant's failure to testify by asking the defense's private investigator whether he had the opportunity to question the defendant and whether questioning the defendant would have been helpful to his investigation, no reversible error occurred although the line of inquiry approached a forbidden comment upon the defendant's right to remain silent.¹⁷ Case discussing the conduct of the prosecutor as a potential ground for mistrial, see *Gordon v. State*.¹⁸

A prosecutor's comments following defendant's third trial which ended in a mistrial due to the jury's inability to reach a unanimous verdict which indicated in response to media questions that the vote of the three juries was 35 to 1 for conviction and that there was substantial reason to believe the defendant was guilty of the charged murder were not so egregious as to require the prosecutor's disqualification in the fourth trial.¹⁹

Admission of testimony of a witness whose name did not appear on the list of witnesses furnished by the prosecution to the defense did not warrant a reversal of a conviction where the name of the witness appeared in the allegation in the indictment and the defendant did not file a demand for a list of witnesses prior to arraignment. The prosecutor provided the name of the witness to the defense in a notice of intent to present evidence of similar transactions.²⁰

After providing the defendant with a witness' address, the district attorney did not have to inform the defendant that the witness had been arrested and was in confinement.²¹

The government is under no obligation pursuant to *Brady* to provide the defense with the criminal histories of its witnesses.²²

The 11th Circuit held in *U.S. v. Brester*²³ that the government does not violate *Brady* when it fails to turn over to the defense information in co-conspirator plea agreements that would amount to "merely cumulative" impeachment evidence. The court reasoned:

¹⁶*Smith v. State*, 245 Ga. 205, 264 S.E.2d 15 (1980).

¹⁷*Turner v. State*, 258 Ga. 97, 365 S.E.2d 822 (1988).

¹⁸*Gordon v. State*, 250 Ga. App. 80, 550 S.E.2d 131 (2001) (prosecutor's statements and questioning relating to defendant's pre-arrest and post-arrest silence warranted mistrial).

¹⁹*Williams v. State*, 258 Ga. 305, 369 S.E.2d 232 (1988).

²⁰*State v. McBride*, 258 Ga. 321, 368 S.E.2d 758 (1988).

²¹*Sibert v. State*, 259 Ga. 323, 380 S.E.2d 698 (1989).

²²*Davis v. State*, 327 Ga. App. 729, 761 S.E.2d 139 (2014).

²³*U.S. v. Brester*, 786 F.3d 1335 (11th Cir. 2015).

The undisclosed information about the co-conspirators' loss amount was cumulative of other impeachment evidence. Landsman, Unger, and Chadwick admitted that they had been convicted of conspiring to commit wire fraud and had agreed to cooperate with the government in exchange for plea agreements. Chadwick and Unger testified that they were ordered to pay restitution jointly and severally with the other co-conspirators. Unger acknowledged on cross-examination that his plea agreement provided "a huge incentive" for him to testify against Brester. And Chadwick admitted that he would benefit if Brester was required to pay part of the restitution he owed jointly and severally with Unger and Landsman. The jury learned of the motivations for the co-conspirators' testimony, and we have repeatedly held that the failure to disclose "merely cumulative" impeachment evidence does not establish prejudice.

If evidence suppressed by the State creates a reasonable doubt that did not otherwise exist, constitutional error has been committed; but, if there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.²⁴

Sanctions for nonproduction of written scientific reports are referenced in *Brady v. State*.²⁵ A prosecutor's failure to comply with the 10-day rule of O.C.G.A. § 17-16-4(a)(4) will merit exclusion of the report, or perhaps a continuance on behalf of the defense.

It is generally improper for a government prosecutor to vouch for the credibility of one of its witnesses. Such improper bolstering occurs when "the jury could reasonably believe that the prosecutor was expressing a personal belief in the witness's credibility."²⁶

The State is under a duty to reveal any agreement with a witness, even an informal one; failure to do so constitutes a violation of due process.²⁷

Prosecutor may not suppress material evidence favorable to the accused, whether or not a request for such information is made or an in camera inspection conducted.²⁸

The use of post-arrest pre-Miranda silence is permissible for impeachment purposes, and the 11th Circuit has held that such evidence can also be used as substantive evidence of the defendant's guilt.²⁹

A state's failure to disclose an FBI report stating that prosecu-

²⁴*Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982).

²⁵*Brady v. State*, 233 Ga. App. 287, 503 S.E.2d 906 (1998).

²⁶*U.S. v. Sosa*, 777 F.3d 1279 (11th Cir. 2015).

²⁷*Owens v. State*, 251 Ga. 313, 305 S.E.2d 102 (1983).

²⁸*Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983).

²⁹*United States v. Wilchcombe*, 838 F.3d 1179 (11th Cir. 2016).

tion's hair sample was not suitable for significant comparison purposes denied petitioner a fair trial where there was a reasonable probability that jury would not have arrived at the same verdict.³⁰

Failure to produce evidence which is not exculpatory in any way does not violate *Brady*.³¹

A prosecutor's failure to disclose to the defense an officer's prior inconsistent statements regarding an incident in which shooting victim allegedly had previously attempted to shoot the defendant was not intentional prosecutorial misconduct barring retrial on double jeopardy grounds after a reversal of conviction.³²

The State's withholding of exculpatory evidence of an alleged \$1,000 payment by police officer to two State witnesses who gave testimony crucial to the State's case did not require a new trial where the exculpatory evidence was presented to the jury at trial and the defendant had the opportunity to cross-examine the witness.³³ The prosecution's failure to disclose a dentist's opinion that marks on the victim's leg were probably not made by a human bite and were not consistent with dental models of the murder defendant's teeth was harmless as the dentist testified as a witness for the defendant.³⁴

Evidence that a pocket knife was found in a closed position in the pants pocket of shooting victim was not exculpatory evidence that was required to be furnished to the defendant in a murder prosecution pursuant to the defendant's *Brady* motion.³⁵

Failure of the prosecution to turn over a videotape, where an individual stated that someone other than the defendant confessed to the killing, did not violate *Brady*. Court found that defendant failed "to show a reasonable probability that earlier disclosure of the evidence would have produced a different outcome at trial." More specifically, the court stated that defense counsel "present[ed] no evidence demonstrating how his strategy would have changed [had the videotape been turned over] or that this information would have led to other evidence favorable to his defense."³⁶

In *Smith v. State*,³⁷ the defendant was administered a breath test after he had been encountered by the police after an

³⁰Nelson v. Zant, 261 Ga. 358, 405 S.E.2d 250 (1991).

³¹Alexander v. State, 260 Ga. 870, 401 S.E.2d 7 (1991).

³²Williams v. State, 258 Ga. 305, 369 S.E.2d 232 (1988).

³³Davis v. State, 261 Ga. 382, 405 S.E.2d 648 (1991).

³⁴Bromley v. State, 259 Ga. 377, 380 S.E.2d 694 (1989).

³⁵Bailey v. State, 258 Ga. 779, 374 S.E.2d 724 (1989).

³⁶Grant v. State, 295 Ga. 126, 757 S.E.2d 831 (2014).

³⁷Smith v. State, 325 Ga. App. 405, 750 S.E.2d 758 (2013).

automobile accident. At issue was whether the state's failure to turn over to the defense the computer source code for the breath test machine constituted a *Brady* violation. The court held that it did not given that the state did not have access to the code.

When the district attorney is disqualified from a case, the assistant district attorneys are also disqualified.³⁸

§ 4:11 Death penalty cases

The death penalty generally is covered in O.C.G.A. §§ 17-10-30 et seq. A unified appeal procedure controlling trial during the guilt-innocence phase in cases in which the death penalty is sought is contained in the Rules of Unified Appeal, effective 1989.

To obtain a temporary restraining order or stay of execution the following elements must be proven by the party seeking the request:

- (1) a substantial likelihood of success on the merits;
- (2) that the preliminary injunction is necessary to prevent irreparable injury;
- (3) that the threatened injury outweighs the harm the preliminary injunction would cause the other litigant; and
- (4) that the preliminary injunction would not be averse to the public interest.¹

To successfully challenge a lethal injection protocol on Eighth Amendment grounds the moving party must establish “an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment.” To this end, a showing must be made as to the following two elements: “(1) the lethal injection protocol in question creates a substantial risk of serious harm, and (2) there are known and available alternatives that are feasible, readily implemented, and that will in fact significantly reduce [the] substantial risk of severe pain.”²

§ 4:12 Oaths of witnesses in criminal cases

O.C.G.A. § 17-8-52 suggests the following oath be administered to witnesses in criminal cases: “Do you solemnly swear or affirm that the evidence you shall give to the court and jury in the matter now pending before the court shall be the truth, the whole

³⁸McLaughlin v. Payne, 295 Ga. 609, 761 S.E.2d 289 (2014).

[Section 4:11]

¹Gissendaner v. Commissioner, Georgia Dept. of Corrections, 779 F.3d

1275 (11th Cir. 2015) (internal quotes omitted).

²Gissendaner v. Commissioner, Georgia Dept. of Corrections, 779 F.3d 1275 (11th Cir. 2015) (internal quotes omitted).

truth, and nothing but the truth? So help you God.” Any oath that “substantially complies” with this language is sufficient to subject the witness to contempt if he commits perjury.

Unsworn statements are not treated as amounting to any evidence, except in specified cases from necessity.¹

A party who fails to object to unsworn testimony waives the right to raise this issue on appeal.²

[Section 4:12]

¹*Bell v. Austin*, 278 Ga. 844, 607 S.E.2d 569 (2005). ²*Bennett v. State*, 334 Ga. App. 381, 779 S.E.2d 420 (2015).

Chapter 5

Contempt of Court

- § 5:1 Power of court to punish for contempt
- § 5:2 Standing to bring contempt citation
- § 5:3 Civil and criminal contempt
- § 5:4 Direct and indirect contempt
- § 5:5 Acts constituting direct, criminal contempt
- § 5:6 Procedure in direct, criminal contempt
- § 5:7 Punishment for contempt

§ 5:1 Power of court to punish for contempt

To enable the judge to enforce his orders and regulate the conduct of the trial, he has been given the inherent power to punish for contempt for conduct which tends to impede, embarrass or obstruct the court in the administration of justice or which tends to bring the administration of the law into disrespect or disregard.¹

O.C.G.A. § 15-1-4 authorizes summary punishment for misbehavior of persons in the presence of or near courts when the administration of justice is obstructed. Contempt powers may be exercised for violation of a court order relating to the televising, videotaping, or motion picture filming of proceedings. Other grounds are also listed.

The discretion of superior court judges in contempt matters will not be controlled unless grossly abused. In a contempt attachment, the trial court allowed a corporate party to be represented in court by a member of the board of directors.² When the contempt attachment came before the Georgia Supreme Court for review, the rule respecting nonlawyer representation in corporate proceedings was explained:

This Court in *Eckles v. Atlanta Technology Group, Inc.*, 483 S.E.2d 99 (Ga. 1997), opinion superseded, 267 Ga. 801, 485 S.E.2d 22 (1997), invalidated OCGA § 15-19-52 when we held that a corporation may not be represented in court by any person who is not a lawyer. That holding necessarily applies to persons representing

[Section 5:1]

¹O.C.G.A. § 15-1-3, 15-1-4; *Jackson v. State*, 225 Ga. 553, 170 S.E.2d 281 (1969).

²*R.R.R. Ltd. Partnership v. Recreational Services, Inc.*, 267 Ga. 757, 481 S.E.2d 225 (1997).

corporations in contempt proceedings. However, *Eckles* does not control here because this case was initiated prior to the publication of *Eckles* in the Advance Sheets.³

Under O.C.G.A. § 15-6-8, attorney's fees are not awardable in conjunction with a citation for contempt.⁴

The United States Supreme Court held that a trial court's finding that an attorney's questions prejudiced the jury, together with its assessment of the flagrancy of the attorney's defiance, supported the need for summary contempt to vindicate the court's authority.⁵ The U.S. Supreme Court has stressed the importance of confirming summary contempt orders relating to misconduct occurring in the presence of the court, where the affront to the court's dignity is more widely observed.

The nature of the proceeding in either civil or criminal contempt for alleged disobedience of a court order requires that the language and commands be clear and certain.⁶

Trial court did not err in holding in contempt a religious leader who continued to enter church in violation of interlocutory injunction imposed in a property dispute.⁷ The court found that the injunction did not limit the exercise of anyone's constitutional freedom of religion; rather, it merely protected the property rights of the other parties, and such protection was within the jurisdiction of the trial court.

Attorney's failure to appear for calendar calls was sufficient to support the judgment of contempt since he was held to have disregarded the court's command, disrupted court proceedings

³The quoted material was withdrawn from the bound volume because a new opinion was issued. The final citation to *Eckles* is *Eckles v. Atlanta Technology Group, Inc.*, 267 Ga. 801, 485 S.E.2d 22 (1997) (corporation must be represented by licensed attorney in courts of law).

⁴*Johnson v. Kaplan*, 225 Ga. App. 53, 483 S.E.2d 292 (1997).

⁵*Pounders v. Watson*, 521 U.S. 982, 117 S. Ct. 2359, 138 L. Ed. 2d 976 (1997).

⁶*Hughes v. Browne*, 217 Ga. App. 567, 459 S.E.2d 170 (1995); see also *In re Shafer*, 216 Ga. App. 725, 455 S.E.2d 421 (1995) (stating that if procedural steps are taken verbally, judge must create written record that preserves:

(1) notice to perpetrator of of-

fensive contemptuous conduct;

- (2) detailed description of perpetrator's bad acts despite warning by court to refrain;
- (3) explanation of deleterious impact on court's operations or integrity;
- (4) recitations of perpetrator's reasons for questionable conduct;
- (5) finding of fact of direct conduct interfering with court's administration of justice; and
- (6) order declaring respondent in contempt of court in imposing statutorily authorized sanction).

⁷*Anderson v. Dowd*, 268 Ga. 146, 485 S.E.2d 764 (1997).

and interfered with the orderly administration of justice.⁸

An attorney must be given reasonable notice that his or her case has been called for trial.⁹

A court enjoys “broad authority . . . to preserve good order in the courtroom by the use of contempt power” and this authority is necessary “if the courts are to perform their public duty.”¹⁰

The court’s contempt power should be used sparingly, but a court must be given room to act when faced with conduct which “evinces resistance to authority and interferes with the ability of the court, in its broad institutional sense, to administer justice.”¹¹ An attorney should not accept a case with a court date he will be unable to make prior to leaving for a place where he will be totally unreachable without making sure a leave of absence/continuance will be granted and making alternative arrangements.

A trial court is empowered to inflict punishment for contempt of court upon a witness who disobeys its lawful order.¹²

Juvenile courts are authorized to punish for contempt for disobedience of an order of the court or for obstructing or interfering with its proceedings.¹³ Juvenile court properly found mother to be in criminal contempt when she appeared in court under the influence of narcotics and inhibited the ability of the court to proceed with its judicial function.¹⁴

Trial court has the power to enforce compliance with a subpoena.¹⁵

Out-of-court publications regarding judicial proceedings are protected by the constitutional guaranty of freedom of speech and press unless a clear and present danger of substantive evils resulting from the publication justifies an impairment of the constitutional right; however, the substantive evil must be extremely serious and the degree of imminence extremely high before such utterances can be punished.¹⁶

Appellate court cannot rule that trial court abused its discretion in finding contempt of trial court’s order, in absence of any

⁸In re Brant, 230 Ga. App. 283, 496 S.E.2d 321 (1998).

⁹Thornton v. National American Ins. Co., 269 Ga. 518, 499 S.E.2d 894 (1998).

¹⁰In Interest of K. J., 340 Ga. App. 468, 469, 798 S.E.2d 9, 11 (2017).

¹¹In re Spruell, 227 Ga. App. 324, 489 S.E.2d 48 (1997).

¹²In re Victorine, 230 Ga. App.

209, 495 S.E.2d 864 (1998).

¹³In re Hughes, 299 Ga. App. 66, 681 S.E.2d 745 (2009).

¹⁴In Interest of K. J., 340 Ga. App. 468, 798 S.E.2d 9 (2017).

¹⁵Raszeja v. State, 298 Ga. App. 713, 680 S.E.2d 690 (2009).

¹⁶Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

transcript of evidence on contempt hearing.¹⁷

Former husband's inability to pay required alimony and child support under divorce decree is valid defense to contempt action.¹⁸

Domestic relations cases have given rise to other decisions with implications for contempt of court law. For example, the Georgia Supreme Court reversed the trial court finding of civil and criminal contempt.¹⁹ A trial judge enforced a divorce decree, but impermissibly altered the agreement reached by the parties. The ex-wife closed a business account involved in her and her former husbands' business. This was six months after the deadline contained in the divorce decree which prohibited her from acting as representative of business. However, the decree also obligated the ex-wife to act as a representative of the business in order to extricate herself from it. Thus, the trial court could not hold the ex-wife in contempt for complying with the order.

Because divorce decrees fall under a court's jurisdiction, parties often bring contempt proceedings when challenging an action that allegedly falls under the decree. This may lead the trial court to clarify the agreement in a manner that the challenging party did not intend. For example, the ex-husband in *Hamilton v. Hamilton*²⁰ moved to hold the ex-wife in contempt for failing to notify him that their son fell out of good standing at his university. The decree contemplated a lower alimony payment if the son fell out of good standing. The trial court refused to hold the ex-wife in contempt, though the court did find that the ex-wife had been overpaid. The trial court noted that the higher amount again applied when the son later returned to good standing. The husband challenged this order as an impermissible modification of the decree during a contempt proceeding, but the Georgia Supreme Court upheld the ruling as a matter of the trial court's equitable powers to determine whether parties have complied with court orders.

In *Coppedge v. Coppedge*,²¹ husband and wife were divorced and had two daughters in private, summer and after-school care. Husband was required to pay child support and certain educational expenses. When wife removed the children from an after-care program and hired a babysitter to care for the children, husband reduced his educational expenses. Trial court found husband in contempt. The Supreme Court of Georgia concluded that language in the decree was ambiguous, and that the trial

¹⁷McLendon v. McLendon, 237 727 S.E.2d 490 (2012).
Ga. 870, 230 S.E.2d 305 (1976).

¹⁸Mahaffey v. Mahaffey, 238 Ga. 81, 734 S.E.2d 355 (2012).
64, 230 S.E.2d 872 (1976).

¹⁹Scherer v. Testino, 291 Ga. 75, 494, 783 S.E.2d 94 (2016).
²¹Coppedge v. Coppedge, 298 Ga.

court abused its discretion in holding the husband in contempt.

Trial judge has no authority in contempt proceeding to modify terms of divorce and alimony judgment.²²

Trial court properly refused to hold husband in contempt when he made alimony payments to a jointly held account rather than to his wife directly. The divorce decree and separation agreements were silent as to the method of deposit and the wife had access to the account.²³

The dismissal of a divorce action does not prohibit a party from seeking, and obtaining, contempt relief based upon the failure of one of the parties to comply with the terms of a temporary order that had been issued prior to the dismissal of the case.²⁴

Contempt for discovery violations was adjudicated in *Mableton Parkway CVS, Inc. v. Salter*.²⁵ When reviewing a trial court's findings on a motion for contempt for failure to obey a discovery order, an appellate court will construe the evidence in favor of those findings and will not disturb them if there is any evidence to support them.

In absence of statutory authority or other unusual circumstances, contempt is not an available remedy to enforce a money judgment.²⁶

Unless it is made to appear from record that husband did not pay alimony for some justifiable reason, trial judge could hold husband in contempt.²⁷

When a gainfully employed person violates an order of the court granting temporary or permanent alimony or child support and the judge finds the person in contempt of court, the sentencing judge may sentence the respondent to a term of confinement in a diversion center and participation in a diversion program if such program has been established by the county.²⁸

Once a court dismisses a case, it is deprived of jurisdiction to enter contempt orders, unless the dismissal order has been vacated.²⁹

In action brought by hedge funds alleging RICO violations, the hedge funds voluntarily dismissed action against defendant.

²²*Doritis v. Doritis*, 294 Ga. 421, 754 S.E.2d 53 (2014); *Kiplinger v. Kiplinger*, 242 Ga. 465, 249 S.E.2d 254 (1978).

²³*Brown v. Brown*, 300 Ga. 559, 796 S.E.2d 269 (2017).

²⁴*In Le v. Sherbondy*, 301 Ga. 28, 30, 799 S.E.2d 178 (2017).

²⁵*Mableton Parkway CVS, Inc. v.*

Salter, 254 Ga. App. 162, 561 S.E.2d 478 (2002).

²⁶*McKenna v. Gray*, 263 Ga. 753, 438 S.E.2d 901 (1994).

²⁷*Bennett v. Bennett*, 236 Ga. 764, 225 S.E.2d 264 (1976).

²⁸O.C.G.A. § 15-1-4.

²⁹*Montgomery v. Morris*, 322 Ga. App. 558, 745 S.E.2d 778 (2013).

Defendant subsequently filed motion seeking to modify an earlier protective order. The Eleventh Circuit held that a dismissal under Fed. R. Civ. P. 41(a)(1) disposes of the entire case. However, a court does retain jurisdiction to consider some collateral claims, such as “(1) the imposition of costs, (2) the imposition of attorney’s fees, (3) the imposition of contempt sanctions, and (4) the imposition of Rule 11 sanctions.” In addition, a court has jurisdiction to consider “motions to confirm arbitral awards.” Motions to modify protective orders do not fall within these preserved categories.³⁰

“[A]n application for contempt must be filed in the court which rendered the order or judgment in question. In divorce cases, this means that, generally speaking, a contempt application must be filed in the superior court which entered the divorce decree.” However, which superior court hears the contempt application is a venue consideration, as opposed to subject matter jurisdiction.³¹

§ 5:2 Standing to bring contempt citation

Party acting in capacity as guardian-recipient of fund does not have standing to bring a contempt citation to recover any amount that would be due after death of the fund beneficiary.¹

In *Hall v. Hall*,² a former sister-in-law had standing to seek contempt against a father whose two children had been placed in the custody of the former sister-in-law. The Georgia Court of Appeals found that though the former sister-in-law was not an original party, she had standing to bring a contempt action against the father. The court determined that pursuant to O.C.G.A. § 29-2-22(a)(3) she could “[b]ring, defend, or participate in legal, equitable, or administrative proceedings, . . . as are appropriate for the support, care, education, health, or welfare of the minor in the name of or on behalf of the minor.” The court also found that O.C.G.A. § 19-6-15(e) empowers a nonparent custodian to enforce child support provisions. Finally, the court concluded that O.C.G.A. § 19-6-35(a) authorizes a “child support obligee” to “pursue available remedies for enforcing the judgment, singly or concurrently with Child Support Services, until the judgment is satisfied.”

A party may not file a counterclaim in response to an opposing

³⁰Absolute Activist Value Master Fund Limited v. Devine, 998 F.3d 1258, 109 Fed. R. Serv. 3d 1235 (11th Cir. 2021).

³¹Crutchfield v. Lawson, 294 Ga. 407, 754 S.E.2d 50 (2014).

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¹Farmer v. Farmer, 236 Ga. 603, 225 S.E.2d 24 (1976).

²Hall v. Hall, 335 Ga. App. 208, 780 S.E.2d 787 (2015).

party's application for contempt.³

Where a contempt order is not void for lack of personal jurisdiction, a party has no standing to collaterally attack the contempt order under O.C.G.A. § 9-11-60(a).⁴

There is no action for contempt when the claim is merely anticipatory. Thus, when a mother allegedly intended to move her child to another school in violation of a court decree, a contempt action cannot proceed given that there was not an actual violation.⁵

§ 5:3 Civil and criminal contempt

A contempt may be either civil or criminal. Whether a contempt is classified as “civil” or “criminal” depends on the particular facts of each case.¹ Civil contempts are tried as separate actions, unlike criminal contempts which, if direct, are tried as an intrinsic part of the case on trial.

Where the primary purpose of a contempt order is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal; where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil.² In *Thedieck*, the purpose of the contempt order was to obtain the wife's compliance with the divorce decree, so the contempt was civil. The court said that civil contempt orders imposing a sentence to jail for violation of visitation rights should be conditioned on compliance, and the court found that to the extent that the trial court's order conditioned the wife's avoidance of, or release from incarceration upon payment of the attorney's fees award, it was erroneous.

The failure to pay child support when an individual is capable of making payments can be punishable as either civil or criminal contempt.³

In *Shooter Alley, Inc. v. City of Doraville*,⁴ the trial court properly imposed a \$10,000 civil contempt sanction against a strip club. The order was imposed to encourage compliance with its injunction and deter future violations.

In order for criminal contempt to be upheld, there must be rea-

³Mullins-Leholm v. Evans, 322 Ga. App. 869, 746 S.E.2d 628 (2013).

⁴Sun v. Girardot, 302 Ga. App. 395, 691 S.E.2d 278 (2010).

⁵Hardman v. Hardman, 295 Ga. 732, 763 S.E.2d 861 (2014).

[Section 5:3]

¹City of Macon v. Massey, 214

Ga. 589, 106 S.E.2d 23 (1958).

²Thedieck v. Thedieck, 220 Ga. App. 764, 470 S.E.2d 265 (1996).

³Wright v. Wright, 367 Ga. App. 15, 884 S.E.2d 610 (2023).

⁴Shooter Alley, Inc. v. City of Doraville, 341 Ga. App. 626, 800 S.E.2d 588 (2017).

sonable notice of the contempt hearing. In *Ford v. Ford*,⁵ the court defines reasonable notice, and then distinguishes civil from criminal contempt:

It is well established that a party who has failed to pay support under a court order when he has the ability to pay may be found guilty of civil or criminal contempt and incarcerated under either. *Hughes v. Georgia Dept. of Human Resources*, 269 Ga. 587, 502 S.E.2d 233 (1998). “The distinction between criminal and civil contempt is that criminal contempt imposes unconditional punishment for prior acts of contumacy, whereas civil contempt imposes conditional punishment as a means of coercing future compliance with a prior court order.”

In *In re Williams*,⁶ it was held that the trial court denied an attorney due process by holding her in contempt. The court found that the attorney was not afforded an opportunity to address her actions (why her cell phone went off in court) prior to being held in contempt.

A sanction entirely remedial in nature, as opposed to an unconditional punishment, relates to civil contempt.⁷

“The appropriate standard of proof in a civil contempt case is preponderance of the evidence.”⁸

To establish criminal contempt, there must be proof beyond a reasonable doubt that the alleged contemnor violated a court order and did so willfully; to show willfulness, there must be proof beyond a reasonable doubt that the alleged contemnor had the ability to comply with the court order.⁹ In *Thomas*, the court held that the trial court erred in holding former personal care administrator in contempt when there was no evidence that reducing the number of residents in the home as the order directed was within the power of the administrator.

The filing of a bankruptcy petition by a person who had been ordered to make a property settlement payment to a former spouse prevented a finding of civil contempt, but did not prevent a finding of criminal contempt.¹⁰

In an inheritance dispute, trial court found that a party breached the settlement agreement and that party was ordered to, inter alia, pay the movant slightly less than \$5,000. After the money was not paid, the trial court held the offending party in contempt. The Georgia Court of Appeals held that the trial court

⁵*Ford v. Ford*, 270 Ga. 314, 509 S.E.2d 612 (1998).

⁶*In re Williams*, 347 Ga. App. 189, 818 S.E.2d 260 (2018).

⁷*In re Harvey*, 219 Ga. App. 76, 464 S.E.2d 34 (1995).

⁸*In re Singleton*, 323 Ga. App. 396, 744 S.E.2d 912 (2013).

⁹*Thomas v. Department of Human Resources*, 228 Ga. App. 518, 492 S.E.2d 288 (1997).

¹⁰*Banks v. Wells*, 256 Ga. 164, 344 S.E.2d 652 (1986).

erred, since the lower court's order was a monetary judgment which cannot be enforced through a contempt action.¹¹

Trial court did not abuse its discretion in failing to hold an evidentiary hearing in regards to the civil contempt of a president of a corporate debtor company who violated a bankruptcy court order when he, inter alia, moved a boat and failed to maintain insurance on it.¹²

In a dispute between a doctor's widow and the deceased's limited liability companies, criminal and civil contempt orders against the widow for failing to reactivate the business' Facebook page, as directed by the trial judge, were upheld.¹³

The defense to civil and criminal contempt are that the order was not sufficiently definite and certain, was not violated, or that the violation was not willful.¹⁴ Another recognized defense to civil contempt is that the underlying order is invalid.¹⁵ In *G.I.R. Systems*, the court found that the trial court erred in finding G.I.R. Systems in contempt of its prior order for refusing to allow inspection of equipment; the court had not mentioned inspection of equipment in the order, and therefore the order was not sufficiently definite and certain.¹⁶

Evidence was insufficient to support a conviction of criminal contempt when a court order subjected former wife to contempt by hindering or frustrating the progress of former husband's visitation sessions with their sons since there was no proof that the former husband's visitation was in fact hindered or obstructed even if evidence supported a claim that the former wife desired to accomplish such a purpose.¹⁷

At their inception, acts of contempt are neither criminal nor civil; rather, once an act has been determined to constitute contempt of court, the action the court takes to deal with contempt determines whether the contempt is deemed "civil" or "criminal" contempt.¹⁸

When an incarceration imposed cannot be purged by compliance with the trial court's payment schedule, the purpose of the imprisonment is punishment and therefore the contempt is

¹¹Daniel v. Daniel, 362 Ga. App. 893, 870 S.E.2d 481 (2022).

¹²In re Ocean Warrior, Inc., 835 F.3d 1310 (11th Cir. 2016).

¹³Davis v. VCP South, LLC, 297 Ga. 616, 774 S.E.2d 606 (2015).

¹⁴G.I.R. Systems, Inc. v. Lance, 228 Ga. App. 329, 491 S.E.2d 530 (1997).

¹⁵In re Managed Care, 756 F.3d 1222 (11th Cir. 2014).

¹⁶G.I.R. Systems, Inc. v. Lance, 228 Ga. App. 329, 491 S.E.2d 530 (1997).

¹⁷Bell v. Aprea, 228 Ga. App. 569, 492 S.E.2d 247 (1997).

¹⁸Grantham v. Universal Tax Systems, Inc., 217 Ga. App. 676, 458 S.E.2d 870 (1995).

criminal.¹⁹

Criminal contempt is that which involves some disrespectful or contumacious conduct toward the court.²⁰

Civil contempt was deemed appropriate when the Court of Appeals found evidence that an assistant district attorney was not prepared to go to trial despite announcing he was ready to do so.²¹

Essence of civil contempt involved in proceeding to enforce payment of alimony or child support award is willful disobedience of court's order.²²

In *Johnson v. Johnson*,²³ it was held that a husband could not be held in contempt since his divorce decree granted him the right to visit his son but did not mandate such visitation.

If contemnor is imprisoned for specified unconditional period, purpose is punishment and thus contempt is criminal; if contemnor is imprisoned only until he performs specified act, purpose is remedial and hence contempt is civil.²⁴

Contempt for failure to pay child support is a civil proceeding.²⁵

In *Miller v. Deal*,²⁶ the Georgia Supreme Court held "there is no absolute, inflexible, and categorical right" to appointed counsel in civil contempt proceedings "as a matter of due process, even when the Department [of Human Services], represented by its own lawyers, pursues the incarceration of an indigent parent."

In a civil proceeding, payment of money before final judgment of contempt removes the contempt.²⁷

A contempt order was proper when an American company refused to produce documents sought in a domestic litigation action outside the United States.²⁸

Where a person is on notice that he is being tried for contempt and the movant seeks "such other sanctions as are appropriate to ensure the enforcement and the observance" of the court's order or seeks "such other relief as may be appropriate," the contemnor is on notice that the proceeding is both civil and criminal in

¹⁹Duke v. Duke, 268 Ga. 851, 495 S.E.2d 3 (1998).

²⁰Carter v. State, 231 Ga. App. 42, 497 S.E.2d 812 (1998).

²¹In re Earle, 248 Ga. App. 355, 545 S.E.2d 405 (2001).

²²Ansell v. Ansell, 328 Ga. App. 586, 759 S.E.2d 916 (2014).

²³Johnson v. Johnson, 349 Ga. App. 99, 825 S.E.2d 487 (2019).

²⁴Ensley v. Ensley, 239 Ga. 860, 238 S.E.2d 920 (1977).

²⁵Adkins v. Adkins, 242 Ga. 248, 248 S.E.2d 646 (1978).

²⁶Miller v. Deal, 295 Ga. 504, 761 S.E.2d 274 (2014).

²⁷Kaufmann v. Kaufmann, 246 Ga. 266, 271 S.E.2d 175 (1980).

²⁸Sergeeva v. Tripleton International Limited, 834 F.3d 1194, 95 Fed. R. Serv. 3d 985 (11th Cir. 2016).

nature, and criminal sanctions may be imposed in an appropriate case. Criminal contempt based on an overt act is not vitiated by a mere disavowal under oath.²⁹

Two attorneys representing a capital murder defendant were held in contempt for refusing to proceed with a motions hearing due to lack of indigent funding.³⁰

Civil contempt, see *Kace Investments, L.P. v. Hull*.³¹ Criminal contempt cases, see *In re K.D.*³² Contempt guidelines for criminal contempt, see *In re Jefferson*.³³

Trial court may hold a party in direct contempt during trial without a hearing where conduct interferes with the ability of the court, in its broad institutional sense, to administer justice.³⁴ Where a court defers making a judgment of contempt until after the trial has ended, it can no longer justify finding someone summarily in contempt without providing an opportunity for a hearing, even where the conduct directly before the judge.

Though a court clearly has the authority to hold a party summarily in contempt when necessary to preserve order in the courtroom, even such summary contempt power requires that the contemnor be afforded the opportunity to speak in his or her own behalf. Criminal contempt is a crime in the ordinary sense, requiring proof of the elements of the alleged contempt beyond a reasonable doubt.³⁵

In *U.S. v. Moore*,³⁶ defendant's supervised release was revoked and he was sentenced to 18 months imprisonment as well as an additional 6 months for criminal contempt. The Eleventh Circuit rejected defendant's claim that his criminal contempt conviction was improper given the district court's failure to allow him to allocute. The circuit reasoned that courts are empowered to punish an individual for criminal contempt summarily and that "no precedent from the Supreme Court or this Court directly establishes that Moore had the right to allocute before being held in summary contempt."

If there is any evidence in the record to support the trial judge's

²⁹*Schiselman v. Trust Co. Bank*, 246 Ga. 274, 271 S.E.2d 183 (1980).

³⁰*Britt v. State*, 282 Ga. 746, 653 S.E.2d 713 (2007).

³¹*Kace Investments, L.P. v. Hull*, 278 Ga. App. 477, 629 S.E.2d 26 (2006).

³²*In re K.D.*, 272 Ga. App. 803, 613 S.E.2d 239 (2005); *Ramirez v. State*, 279 Ga. 13, 608 S.E.2d 645 (2005); *In re Schoolcraft*, 274 Ga. App. 271, 617 S.E.2d 241 (2005).

³³*In re Jefferson*, 283 Ga. 216, 657 S.E.2d 830 (2008) (contempt may be found only where attorney knows he is exceeding limits of propriety).

³⁴*In re Scheib*, 283 Ga. App. 328, 641 S.E.2d 570 (2007).

³⁵*Cousins v. Macedonia Baptist Church of Atlanta*, 283 Ga. 570, 662 S.E.2d 533 (2008).

³⁶*United States v. Moore*, 22 F.4th 1258 (11th Cir. 2022).

determination that a party has willfully disobeyed a trial court's order, the decision of the trial court holding party in civil contempt will be affirmed on appeal.³⁷

The Georgia Court of Appeals has stated that when construing “a settlement agreement to determine if a party acted in willful contempt,” a judge enjoys “‘broad discretion to enforce the letter and spirit of the decree, but the court must do so without modifying the original judgment that is being enforced.’ [cit.] ‘The test for distinguishing whether a trial court’s ruling clarifies, rather than impermissibly modifies, a divorce decree, is whether the clarification is reasonable or whether it is so contrary to the apparent intention of the original order as to amount to a modification.’”³⁸

In a contempt proceeding, a trial court improperly modified the original divorce decree. The Georgia Court of Appeals stated that “[i]n considering a modification or clarification of a divorce decree, we look to ‘the nature of the asset the trial court awarded to [the spouse at issue] to determine whether it is equivalent to the asset the parties bargained for in their divorce proceedings.’ In other words, if it was ‘in essence the same asset, the court did not improperly modify the terms of the agreement, but merely construed the relevant provision to determine the intent of the parties when they entered into the original [decree].’ But conversely, if the court used the proceeding to ‘substantially alter the final decree, it amounted to an unauthorized modification.’”³⁹

In *Valley v. South Atl. Conference of Seventh-Day Adventist*,⁴⁰ it was found that the trial court, in denying a contempt motion, wrongfully modified a default judgment. The default judgment obligated the employer to credit Valley’s prior years of service towards its retirement plan as well as provide retirement benefits. However, the denial of the contempt motion modified the terms of that judgment.

§ 5:4 Direct and indirect contempt

Generally, an indirect contempt is one that is committed outside the presence of the court, while a direct contempt is one

³⁷James v. Bank of America, N.A., 332 Ga. App. 365, 772 S.E.2d 812 (2015); Webb v. Watkins, 283 Ga. App. 385, 641 S.E.2d 611 (2007).

³⁸Chatel v. Carroll, 366 Ga. App. 643, 883 S.E.2d 860 (2023), citing Darroch v. Willis, 286 Ga. 566, 570(3), 690 S.E.2d 410 (2010), Mims v. Mims,

297 Ga. 70, 73, 772 S.E.2d 674 (2015), and Cason v. Cason, 281 Ga. 296, 297(1), 637 S.E.2d 716 (2006).

³⁹Smith v. Smith, 366 Ga. App. 418, 883 S.E.2d 167 (2023).

⁴⁰Valley v. South Atlantic Conference of Seventh-Day Adventist, 347 Ga. App. 131, 817 S.E.2d 704 (2018).

committed in the presence of the court while it is in session.¹

The classification of contempt proceedings as civil or criminal is one depending on the facts of each case; this is also true of direct and indirect contempts.²

Courts have inherent power to punish direct criminal contempts committed in their presence summarily and without a hearing, the judge being aware by use of his own senses of what has transpired.³

Summary adjudication is not appropriate in cases of indirect contempt; in such a case, due process requires that a person who is tried for indirect criminal contempt is entitled to more normal adversary procedures, such as, among other things, being advised of charges, having a reasonable opportunity to respond to them, and being permitted the assistance of counsel and the right to call witnesses.⁴

In considering the question of contempt, it is irrelevant whether the trial court's ruling on an evidence question was correct. In *In re Harvey*,⁵ the accused was orally directed to provide certain photographs to the prosecuting attorney, and the willful refusal of the accused to comply with the trial court's order was held to be direct contempt.

Where an indirect contempt is alleged, a separate proceeding is instituted: a petition or similar pleading is filed setting forth the charge, notice is given and a hearing is held to determine whether the alleged contempt has been committed.⁶

A direct contempt may be committed during an intermission in a trial.⁷ An act committed outside the presence of the court, but so near thereto as to constitute an obstruction of the administration of justice, may be a direct contempt.⁸

Since this Handbook is concerned with those problems that arise during the course of a regular trial, it is primarily concerned with direct rather than indirect contempts.

§ 5:5 Acts constituting direct, criminal contempt

In its broad sense, "criminal contempt" means disregard for or

[Section 5:4]

¹Clark v. State, 90 Ga. App. 330, 83 S.E.2d 45 (1954).

²In re Harris, 289 Ga. App. 334, 657 S.E.2d 259 (2008).

³In re Harris, 289 Ga. App. 334, 657 S.E.2d 259 (2008).

⁴Lewis v. State, 330 Ga. App. 412, 767 S.E.2d 771 (2014); Hayes v. State, 298 Ga. App. 419, 680 S.E.2d 508 (2009).

⁵In re Harvey, 219 Ga. App. 76, 464 S.E.2d 34 (1995).

⁶White v. George, 195 Ga. 465, 24 S.E.2d 787 (1943).

⁷Baker v. State, 82 Ga. 776, 9 S.E. 743 (1889) (holding acts committed in the presence of the court when done during recess in courtroom, while judge sitting on bench).

⁸O.C.G.A. § 15-1-4.

disobedience of the order or command of the court; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. It involves some disrespectful or contumacious conduct toward the court.¹

A wide variety of acts may constitute a direct, criminal contempt. An act may be dealt with as contempt even though such act is also an indictable crime.²

Trial court did not err in finding contempt and assessing \$500 fine when defense attorney was held to have expressed general disrespect for the court and directly violated the court's order not to inject negative character evidence of the victim before obtaining permission from the court.³

In *In re Sprayberry*,⁴ the trial court erred in holding an attorney in contempt when the attorney's cell phone vibrated during court proceeding and court failed to afford the attorney a "meaningful opportunity to be heard."

Among those who may be adjudged in contempt for disobedience of mandamus are judges and clerks of court, state boards and officials, taxing boards and officials, county and municipal officials, corporations and officers, directors and trustees and private individuals.⁵

Misconduct of an officer of the court is punishable as contempt.⁶ A solicitor is an officer of the court, and whenever he impedes or obstructs the administration of justice by the use of contemptuous words, he may be properly punished.⁷

It has been held to be a direct contempt to insult or abuse a witness as he was leaving the courthouse while the court was still in session.⁸ Attempts to bribe or coerce witnesses to testify falsely or not to testify at all are contempts,⁹ but would normally be indirect contempts.¹⁰

A person's unjustifiable refusal to testify at all or his unjustifiable refusal as a witness to answer particular questions consti-

[Section 5:5]

¹*In re Hadaway*, 290 Ga. App. 453, 659 S.E.2d 863 (2008).

²*Bradley v. State*, 111 Ga. 168, 36 S.E. 630 (1900).

³*Pleas v. State*, 268 Ga. 889, 495 S.E.2d 4 (1998).

⁴*In re Sprayberry*, 334 Ga. App. 571, 779 S.E.2d 732 (2015).

⁵*Smith v. Lott*, 156 Ga. 590, 119 S.E. 400, 30 A.L.R. 145 (1923) (county commissioners).

⁶*Crudup v. State*, 106 Ga. App. 833, 129 S.E.2d 183 (1962), *aff'd*, 218 Ga. 819, 130 S.E.2d 733 (1963).

⁷*Smith v. Adams*, 161 Ga. App. 820, 288 S.E.2d 775 (1982).

⁸*Morgan v. State*, 26 Ga. App. 83, 105 S.E. 449 (1920).

⁹*Powell v. State*, 152 Ga. 81, 108 S.E. 464 (1921); *Herring v. State*, 165 Ga. 254, 140 S.E. 491 (1927).

¹⁰For contempt of a witness for violating the rule of exclusion, see § 11:9, *infra*.

tutes contempt.¹¹ Misconduct of a juror may be a contempt if the act constitutes an obstruction of the administration of justice.¹² Where a witness fails to appear in court, after being served with a subpoena, he is guilty of contempt¹³ as is a witness who fails to comply with a subpoena duces tecum.¹⁴

There is nothing inherent in divorce decree or alimony award which prevents willful disobedience of its commands from being punished by criminal contempt proceedings.¹⁵

Incarceration for criminal contempt does not involve imprisonment for underlying debt, but imprisonment for failure to obey order of court.¹⁶

Plaintiff's attorney's actions—in talking about the case and the settlement in the presence of jurors while the trial was underway but the judge and defense attorneys were discussing the settlement in the judge's chambers and the attorney's subsequent untruthfulness with the court about this conversation—constituted a clear and present danger to the orderly administration of justice, thus constituting direct criminal contempt.¹⁷

It is contempt to attempt to influence or bribe a juror.¹⁸ A willful attempt to improperly influence a person who has been drawn as a juror, but who has not yet been seated as a full-fledged juror, is a contempt.¹⁹ Even though a willful attempt to influence a juror is a complete failure, it is a contempt nevertheless.²⁰

§ 5:6 Procedure in direct, criminal contempt

In *In re Kendall*,¹ the court reversed the judgment of the trial court relating to contempt since the trial court did not hold a hearing, announced the punishment summarily, and did not afford the accused an opportunity to speak in his own behalf.

The trial court is not required to hold a hearing on the issue of willfulness in every case.² When the defendant had more than two years to comply with the court order, yet failed to do so and failed to show justification or circumstances making the award

¹¹*Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911).

¹²O.C.G.A. § 15-1-4.

¹³*Pullen v. Cleckler*, 162 Ga. 111, 132 S.E. 761 (1926).

¹⁴O.C.G.A. § 24-13-26.

¹⁵*Ensley v. Ensley*, 239 Ga. 860, 238 S.E.2d 920 (1977).

¹⁶*Hopkins v. Hopkins*, 244 Ga. 66, 257 S.E.2d 900 (1979).

¹⁷*In re Jones*, 198 Ga. App. 228, 401 S.E.2d 278 (1990).

¹⁸*Richardson v. State*, 43 Ga. App. 229, 158 S.E. 369 (1931).

¹⁹*Richardson v. State*, 43 Ga. App. 229, 158 S.E. 369 (1931).

²⁰*Summers v. State ex rel. Boykin*, 66 Ga. App. 648, 19 S.E.2d 28 (1942).

[Section 5:6]

¹*In re Kendall*, 220 Ga. App. 591, 469 S.E.2d 836 (1996).

²*Toles v. G & K Services, Inc.*, 230 Ga. App. 452, 496 S.E.2d 550 (1998).

unjust, and when the trial court did hold a hearing on the first motion for contempt, the trial court did not err in granting plaintiff's motion for contempt.

In *Singleton v. State*,³ the Georgia appeals court held that a trial court did not commit reversible error when it held a witness in contempt while in the presence of the jury. The court noted, however, that the better practice would have been to remove the jury.

A trial court during a contempt hearing is under no duty to inform an individual of his rights pursuant to the Fifth Amendment. Ordinarily, unless a statute specifies otherwise, the decision whether to testify is a tactical decision made between the defendant and her counsel.⁴

When attorney failed to voice an objection to the manner in which the trial court decided the issue of contempt, trial court did not fail to afford him due process of law.⁵

The practice and procedure followed in contempt cases has been established by court decision rather than legislation. A judgment of contempt cannot be rendered without notice to the contemnor except in cases of conduct in the presence of the court.⁶

A court is without authority “to hold a person in contempt of a verbal ruling that has not been reduced to writing, signed by the judge, and filed with the court clerk.” In *Tate v. Tate*,⁷ a court was not empowered to hold a party in contempt for failure to comply with a child support order that had not been formalized in writing.

In criminal contempt cases, a defendant must be advised, among other things, “of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses.”⁸

Contempt orders can extend to non-parties to an action as well, provided that the non-party has “actual notice of the order and is in privity with, aided and abetted, or acted in concert with the named party in acts constituting a violation of the order.”⁹

Trial court's finding of contempt was reversed when contemnor was not given notice or an opportunity to defend against the

³*Singleton v. State*, 326 Ga. App. 609, 757 S.E.2d 211 (2014). v. Mann, 188 Ga. 212, 3 S.E.2d 557 (1939).

⁴*Carlson v. Carlson*, 324 Ga. App. 214, 748 S.E.2d 304 (2013). ⁷*Tate v. Tate*, 340 Ga. App. 361, 797 S.E.2d 227 (2017).

⁵*In re Brant*, 230 Ga. App. 283, 496 S.E.2d 321 (1998). ⁸*Moton v. State*, 332 Ga. App. 300, 772 S.E.2d 393 (2015).

⁶*Murphy v. Murphy*, 330 Ga. App. 169, 767 S.E.2d 789 (2014); *Williams* ⁹*Murphy v. Murphy*, 330 Ga. App. 169, 767 S.E.2d 789 (2014).

charge.¹⁰

O.C.G.A. § 5-6-34 authorizes “the direct appeal of judgments or orders that may have an irreparable effect on the rights of parties, such as rulings in contempt, injunction, and mandamus actions.”¹¹

On appeal from a conviction of criminal contempt, the court reviews the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.¹²

In a direct, criminal contempt proceeding in which there is no petition, evidence or rule nisi, the order holding the defendant in contempt must contain facts specifying the misconduct in order to be a valid judgment.¹³

The party on whom duty is imposed by court decree need not be again forewarned before he or she can be guilty of criminal contempt, as the original decree has done so.¹⁴

§ 5:7 Punishment for contempt

O.C.G.A. § 15-6-8 sets out the limits of punishment which may be imposed by the superior courts for contempt.¹

A court enjoys broad discretion in establishing a sanction for civil contempt.²

In *Gooch v. Gooch*,³ a trial court erred in failing to impose a remedy for a husband’s failure to designate his former wife as a beneficiary of a retirement plan. The Supreme Court of Georgia found that the trial court abused its discretion “in failing to devise a remedy for [the former husband’s] willful contempt.”

A direct contempt must be punished by the court against which it was committed.⁴ When inflicting punishment for contempt, the punishment can involve both fines and imprisonment for the

¹⁰*Salter v. Greene*, 226 Ga. App. 384, 486 S.E.2d 650 (1997).

¹¹*Fein v. Chenault*, 330 Ga. App. 222, 767 S.E.2d 766 (2014).

¹²*In re Hadaway*, 290 Ga. App. 453, 659 S.E.2d 863 (2008).

¹³*Salem v. State*, 101 Ga. App. 905, 115 S.E.2d 447 (1960).

¹⁴*Fields v. Fields*, 240 Ga. 173, 240 S.E.2d 58 (1977).

[Section 5:7]

¹For contempts in probate court, see O.C.G.A. § 15-9-34; Supreme Court authority to punish by fine and imprisonment, see O.C.G.A. § 15-2-8.

²*In re Managed Care*, 756 F.3d 1222 (11th Cir. 2014).

³*Gooch v. Gooch*, 297 Ga. 189, 773 S.E.2d 247 (2015).

⁴*Gore v. Gore*, 217 Ga. 478, 123 S.E.2d 254 (1961).

same act.⁵ The Kenimer Case also held that not only must the punishment be within the statutory limits, it must also be just and reasonable.

In contempt proceedings, the court is without authority to reduce alimony due to a wife under a prior divorce decree; this does not mean that trial court is without discretion to set off amounts which the divorce decree requires a wife to expend in a husband's behalf against a wife's claim for alimony and child support arrearage.⁶

A trial court was directed to modify its contempt order so as to make wife's confinement in jail conditional upon her noncompliance with the order of court.⁷ Refusal to produce child in court as ordered was continuing contempt, and confinement in jail until the court's order is complied with is appropriate punishment.⁸

Order that imposed sanction of striking defendants' answer and entering a default judgment as to liability, based on their willful failure to produce discovery documents was not directly appealable as a contempt judgment, but was an interlocutory discovery order; order did not impose a sanction that was available for criminal or civil contempt.⁹

The subject of fines has received attention. The Supreme Court has found that the fact that contemnors had an option to pay fines to avoid jail time did not vitiate the criminal nature of contempt finding which was reflected by the unconditional nature of the punishment imposed. The Court was required to find the contemnors guilty beyond a reasonable doubt.¹⁰

Attorney's fees in the contempt process are objects of court attention. A judgment for attorney's fees in a contempt case is proper where the finding of contempt is authorized under some provisions of the Code, see *Parr v. Parr*,¹¹ but attorney's fees have been held not recoverable in contempt proceedings concerning only child custody or visitation rights.¹²

While an award of attorney's fees is generally not a proper sanction in a civil contempt action, attorney's fees can be awarded

⁵*Kenimer v. State ex rel. Webb*, 83 Ga. App. 264, 63 S.E.2d 280 (1951).

⁶*Walters v. Walters*, 238 Ga. 237, 232 S.E.2d 240 (1977).

⁷*Easley v. Easley*, 238 Ga. 180, 231 S.E.2d 763 (1977).

⁸*Price v. Gibson*, 246 Ga. 815, 272 S.E.2d 716 (1980).

⁹*American Medical Security Group, Inc. v. Parker*, 284 Ga. 102, 663 S.E.2d 697 (2008).

¹⁰*Smith v. Orkin Exterminating Co., Inc.*, 258 Ga. 705, 373 S.E.2d 740 (1988). Sanctions for contempt, see discussion in *Ensley v. Ensley*, 239 Ga. 860, 238 S.E.2d 920 (1977) (willful disobedience of divorce decree or alimony award may result in punishment by criminal contempt proceedings).

¹¹*Parr v. Parr*, 244 Ga. 168, 259 S.E.2d 432 (1979).

¹²*Smith v. Smith*, 244 Ga. 230, 259 S.E.2d 480 (1979).

in a civil contempt action if there is a separate authorization for them.¹³ In *Realty Development*, the appellee argued such an award was authorized by O.C.G.A. § 9-15-14, but the court found nothing in the record to indicate the award was based on that statute and vacated the award of attorney's fees.¹⁴

A trial court may not make payment of attorney's fees a condition of purging contempt without first allowing the contemnor a reasonable time to pay the fees if the award of attorney's fees is not part of any prior order.¹⁵

¹³See *City of Cumming v. Realty Development Corp.*, 268 Ga. 461, 491 S.E.2d 60 (1997).

¹⁴*City of Cumming v. Realty Development Corp.*, 268 Ga. 461, 491 S.E.2d 60 (1997).

¹⁵*Duke v. Duke*, 268 Ga. 851, 495 S.E.2d 3 (1998); *Gay v. Gay*, 268 Ga. 106, 485 S.E.2d 187 (1997).

Chapter 6

Selection of Jury

- § 6:1 Right to fair and impartial jury
- § 6:2 Method of summoning jurors
- § 6:3 Summoning tales jurors
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- § 6:15 Grounds for challenge for cause—Statutes
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- § 6:17 Conditional grounds for challenge
- § 6:18 Facts that normally are not grounds for challenge
- § 6:19 Passing upon challenges for cause
- § 6:20 Swearing the jury

§ 6:1 Right to fair and impartial jury

The right to a jury trial is referenced in both civil and criminal statutes.¹

When the record fails to show whether a defendant's waiver of jury trial in a criminal case is knowingly made, a conviction may be vacated.²

Jury trials are available in divorce cases.³

In order to have a jury of 12 in a civil trial in state court, a minimum claim for damages of \$25,000 must be made.⁴

Phrase in descriptive videotape as to jury service, shown to jury venire, by which venire members were instructed that

[Section 6:1]

47, 576 S.E.2d 300 (2002).

¹O.C.G.A. §§ 9-11-38, 17-9-2. See Uniform Superior Court Rule 26.1(F).

³See *Matthews v. Matthews*, 268 Ga. 863, 494 S.E.2d 325 (1998).

²*Jenkins v. State*, 259 Ga. App.

⁴O.C.G.A. § 15-12-122.

without jurors “no criminals would be brought to justice” did not impermissibly taint jury venire; phrase was part of one sentence in 14-minute video, phrase did not suggest that jurors were supposed to convict defendants without regard to presumptively innocent status, trial court instructed jury that video was not to take the place of any instruction given by court, trial court gave preliminary instructions that defendant was presumed innocent, state bore burden of proving guilt beyond reasonable doubt, and jury was to base decision only upon evidence, and the same principles were included in charge at the close of case.⁵

An amendment of O.C.G.A. § 15-12-1 provides for excusing or deferring from jury duty full-time students at a post-secondary school. A 2006 enactment provides for an exemption from jury service for a primary caregiver of a child who is six years of age or younger and for a primary teacher of children in a home study program.

Civil actions in federal courts in Georgia’s southern district shall be tried to a jury of six members, unless all parties join in a written demand that the case be tried to a jury of 12 members. All criminal cases shall be tried before 12 members, unless waived.⁶

Can the voir dire process be closed to the public, over the objection of the defense? The right to a public trial belongs to a defendant, and even extends beyond the accused and can be invoked under the First Amendment. In a 2010 case, the Georgia accused invoked his right to a public trial, and urged that open court protections extended to the jury selection phase of the case. The United States Supreme Court agreed in *Presley v. Georgia*.⁷

For a discussion of publicity before and during the trial, see § 2:15, *supra*.

In a criminal case, the defendant frequently elects to be tried by the judge alone. The ground rules for waiving the right to trial by jury were explained in *Brown v. State*.⁸ The Supreme Court pointed out that the purpose of a criminal trial, with or without a jury, is not to create issues for appeal. Rather, it is a proceeding to determine whether the defendant is guilty beyond a reasonable doubt of the offense he is charged with committing, and thus, there is not any requirement that the trial court expressly inform the accused of those particular appellate issues which

⁵Roseberry v. State, 274 Ga. 301, 553 S.E.2d 589 (2001).

⁶LR 48.1, Rules for the U.S. District Court for the Southern District of Georgia, effective June 3, 1996.

⁷Presley v. Georgia, 130 S. Ct.

721 (2010) (conviction of accused reversed; party seeking to close a criminal trial must advance an “overriding interest”).

⁸Brown v. State, 277 Ga. 573, 592 S.E.2d 666 (2004).

waiver of a jury trial will obviate. A defendant's consent to waive the right to a jury trial need not be in a particular, ritualistic form. The only real issue is whether appellant intelligently agreed to a trial without jury.

§ 6:2 Method of summoning jurors

The statute which provides the method of preparing the jury list must be complied with, and failure to do so may give rise to a challenge to the array.¹

For grounds for challenge to the array, see § 6:4, *infra*.

In criminal cases any objection to the manner in which a jury panel has been selected or drawn must be in writing before trial at the time the panel is put upon the accused.²

Challenges to the array in civil cases are controlled by O.C.G.A. § 15-12-123.

The procedure for drawing and summoning traverse jurors is found in O.C.G.A. §§ 15-12-40 and 15-12-41. In 2011, the Jury Composition Reform Act of 2011³ provided for a modern and uniform system of compiling, maintaining, and updating jury lists which will be administered by the Council of Superior Court Clerks of Georgia.

There is no reversible error arising out of the jury commission's reliance on the most recently available census in creating its source lists.⁴

§ 6:3 Summoning tales jurors

Whenever the panel is not full for any reason, the judge shall draw tales jurors from the jury boxes and order the sheriff to summon the jurors so drawn.¹

§ 6:4 Grounds for challenging array

A party is entitled to an array of properly drawn, impartial jurors to which he may direct his peremptory challenges as a matter of right; but, conversely, he is entitled to no more.¹

Any defect which goes to the legality of the selection of the

[Section 6:2]

S.E.2d 335 (2004).

¹See *Derryberry v. Higdon*, 116 Ga. App. 381, 157 S.E.2d 559 (1967).

[Section 6:3]

²O.C.G.A. § 15-12-162.

¹O.C.G.A. §§ 15-12-124, 15-12-160.

³Ga. Laws 2011, Act 50, amending O.C.G.A. § 15-6-61.

[Section 6:4]

⁴*Sealey v. State*, 277 Ga. 617, 593

¹*Jackson v. State*, 288 Ga. App. 339, 654 S.E.2d 137 (2007).

panel is grounds for a challenge to the array.²

Defendant waived his right to challenge selection of jurors in his criminal case when he failed to object at any point during the selection process or at trial.³

The mere fact that a juror has served on a prior jury is no cause to challenge the array.⁴

Voter registration lists are a valid source for potential jurors.⁵ As long as a jury list meets equal protection and fair cross-section standards respecting the inclusion of cognizable groups, “the statutory procedures for creating the jury list are merely directory” and, thus, do not create a basis for sustaining challenges to the array.⁶

A trial court did not err in overruling a defendant’s challenge to the array of the grand and traverse juries on the ground that persons aged 18 through 29 were significantly underrepresented on the jury lists in that particular County where the defendant presented no evidence from which the trial court could have found as a fact that young persons were a cognizable group in that County.⁷

The trial court did not err in concluding that persons aged 18 to 24 are not a cognizable group which must be represented on defendant’s jury where the defendant merely argued that because persons in this age group were underrepresented, they formed a cognizable group and that the solidarity and bonding of persons in that age group prove that they constitute a cognizable group.⁸

The Georgia Supreme Court found that Fulton County violated the Supreme Court’s Jury Composition Rule. As explained by the Court in *Ricks v. State*,⁹ the Jury Composition Rule is designed “to set reasonable standards for the preparation, dissemination and improvement of inclusive statewide and county master jury lists.” The Court found that the county violated this rule in several ways, including by “allowing its vendor to add names from its so-called ‘legacy data’ to the county master jury lists provided by the Clerks Council,” by allowing “its vendor’s use of the county’s ‘legacy data’ to remove tens of thousands of names that were locally flagged as ineligible for jury service in prior years,” and by its “vendor improperly engag[ing] in efforts to inactivate

²*Derryberry v. Higdon*, 116 Ga. App. 381, 157 S.E.2d 559 (1967).

³*Oduok v. State*, 347 Ga. App. 178, 817 S.E.2d 145 (2018).

⁴*Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980).

⁵*Eberhart v. State*, 257 Ga. 600, 361 S.E.2d 821 (1987).

⁶*Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987).

⁷*Lee v. State*, 258 Ga. 82, 365 S.E.2d 99 (1988).

⁸*Potts v. State*, 259 Ga. 812, 388 S.E.2d 678 (1990).

⁹*Ricks v. State*, 301 Ga. 171, 800 S.E.2d 307 (2017).

names on the Clerks Council's county master jury list associated with addresses that the vendor concludes are undeliverable."

§ 6:5 Discrimination because of sex, race, etc.

An intentional, planned and deliberate exclusion of or discrimination against members of a particular political or economic group, religious faith, race, ancestry or sex by officers in charge of the selection and summoning of a jury, violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.¹ Such discrimination or exclusion is ground for a motion to quash the array or panel.²

Evidence that no members of the defendant's class or race have been drawn for jury service for several years has been held to make out a prima facie case of discrimination against such class or race by the selecting officials.

The burden of proof of an alleged class or racial discrimination in the selection of persons for jury service is on him who asserts such discrimination.³ As stated by the Georgia Supreme Court:

The ultimate burden of persuasion regarding racial motivation of peremptory strikes rests with and never shifts from the opponent of the strike. Therefore, in order to prevail on his *Batson* challenge, [the defendant] had the burden of proving that the State engaged in purposeful discrimination in the exercise of its peremptory strikes."⁴

Scrutiny of discrimination in peremptory challenges should follow *Batson v. Kentucky*.⁵

An inference of prejudice was raised where the prosecution used nine of its 10 peremptory challenges to excuse black jurors.⁶ Purposeful discrimination was not found when prosecutor used six of nine peremptory challenges to exclude African-Americans.⁷

In *Brown v. State*,⁸ the question of whether striking a minority juror because of the juror's belief that the system was unfair to blacks was litigated. The Court of Appeals reversed a Fulton County manslaughter verdict because the prosecutor's striking of

[Section 6:5]

¹*Whitus v. State of Ga.*, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967).

²*Am. Jur.* 2d, Jury § 163.

³*Jones v. Georgia*, 389 U.S. 24, 88 S. Ct. 4, 19 L. Ed. 2d 25 (1967).

⁴*Partlow v. State*, 346 Ga. App. 473, 816 S.E.2d 474 (2018), quoting *Williams v. State*, 271 Ga. 323, 519 S.E.2d 232 (1999).

⁵*Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (challenges must be on nonracial grounds).

⁶*Powell v. State*, 182 Ga. App. 123, 355 S.E.2d 72 (1987).

⁷*Bester v. State*, 294 Ga. 195, 751 S.E.2d 360 (2013).

⁸*Brown v. State*, 257 Ga. App. 29, 570 S.E.2d 349 (2002).

the juror exhibited “a discriminatory purpose” in removing the juror.

Defense counsel was improperly refused permission to ask prospective jurors: “The accused is a black man, the alleged victim in this case is a white female. With that on your mind is there any one that would have any prejudice, bias or leaning against the defendant simply because he is black?” The right which O.C.G.A. § 15-12-133 gives has wider girth than the trial court allowed.⁹

The Georgia Supreme Court stated that the State’s explanations as to the striking of black jurors—who allegedly made minor mistakes on the jury questionnaire, showed signs of immaturity, or were alleged to demonstrate certain aspects of eye contact—reflected certain stereotypical attitudes as to particular groups. Any such explanations should be given additional scrutiny before they are found acceptable.¹⁰ In another case, remand was required so that a trial court could apply the “additional scrutiny” aspect of the Tharpe decision to the prosecutor’s peremptory strikes of black jurors prior to making a finding as to whether the strikes were racially neutral under *Batson*; the fact that the percentage of blacks on the jury was still greater than the percentage of blacks in the array after peremptory strikes was inadequate to preclude a *Batson* violation.¹¹

The United States Supreme Court held that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race. This holding invoked the Equal Protection clause and federal statutory law and relied upon well established principles of standing.¹²

Statistical methods of showing discrimination are discussed in *Davis v. State*.¹³ In *Berghuis v. Smith*,¹⁴ the defendant was African-American. The venire panel included between 60 and 100 individuals. At most, three of these venire members were African-American. Smith’s claim of violation of fair cross-section rules was rejected by the U.S. Supreme Court.

The U.S. Supreme Court’s oversight of peremptory challenges took a fresh turn in 1994. The Court decided whether peremptory challenges may be aimed at men or women simply because of

⁹*Roberts v. State*, 195 Ga. App. 808, 395 S.E.2d 54 (1990). (1991). The *Powers* ruling is followed in *Congdon v. State*, 261 Ga. 398, 405 S.E.2d 677 (1991).

¹⁰*Tharpe v. State*, 262 Ga. 110, 416 S.E.2d 78 (1992).

¹¹*Weems v. State*, 262 Ga. 101, 416 S.E.2d 84 (1992). ¹³*Davis v. State*, 263 Ga. 5, 426 S.E.2d 844 (1993).

¹²*Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). ¹⁴*Berghuis v. Smith*, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010).

their sex. Reviewing the history of the rules, in 1986 the Supreme Court held that prosecutors could not use peremptory challenges to strike jurors because of their race. In the 1990s, the Court ruled that civil litigants and criminal defendants were barred from using race-based strikes. On the last point, see *Georgia v. McCollum*.¹⁵

The U.S. Supreme Court, in a case from Alabama, decided that the 1986 decision barring race-based peremptory challenges also applies to gender-based strikes. The decision below was *J.E.B. v. State ex rel. T.B.*¹⁶ The Court heard the appeal of James Bowman, an Alabama man who denied paternity in a dispute over who was the father of a boy born in May 1989. Bowman claimed that his Fourteenth Amendment rights were violated because the mother's lawyer struck nine of 10 men in the jury pool. Bowman's lawyer struck the remaining man. In 1991, the 12-woman jury decided that Bowman was the boy's father, and the court required him to pay child support.

In Bowman's petition to the Supreme Court, he urged that "a paternity action particularly pits the female against the male, thereby establishing the man as the defendant. Therefore . . . [Bowman's] right to have males not to be excluded from the jury is particularly sensitive." Bowman's attorney contended that gender-based strikes discriminate against the excused jurors as well as against the litigant.

The Alabama Court of Civil Appeals rejected Bowman's argument that the principles of *Batson* should be extended to gender-based peremptory challenges, but the Supreme Court granted certiorari. In 1994, the U.S. Supreme Court outlawed strikes based solely on gender considerations.¹⁷

Fact that female prospective juror had a relative who had been recently convicted of aggravated assault and that the juror was believed to be potentially sympathetic to the defendant was a gender-neutral reason for one of 10 peremptory challenges striking women from the petit jury; thus, the strike did not violate the equal protection clause.¹⁸

A defendant claimed gender discrimination because the prosecution used seven of its eight peremptory strikes against women. The Georgia Supreme Court pointed out that the percentage of women chosen for the jury was higher than the percentage of possible female jurors in the pool from which the jury was chosen.

¹⁵*Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

¹⁶*J.E.B. v. State ex rel. T.B.*, 606 So. 2d 156 (Ala. Civ. App. 1992).

¹⁷*J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

¹⁸*Pickren v. State*, 272 Ga. 421, 530 S.E.2d 464 (2000).

The Supreme Court rejected this challenge to the defendant's conviction as well as the challenge based on race discrimination. The prosecutor had used three of eight strikes against African-Americans, but the prosecutor presented race-neutral reasons for striking these jurors.¹⁹

In criminal cases, a *Batson* challenge should be brought before the selected jurors are sworn. Timeliness of *Batson* challenges in civil cases is controlled by the rule that civil litigants are required to bring the motion before trial begins.²⁰

Several decisions have found no discrimination in jury selection.

There is a presumption that potential jurors are impartial. In *Veal v. State*,²¹ the Supreme Court of Georgia stated that it has “rejected a bright-line rule excluding from jury duty those who have a close, but non-familial, relationship with a party. As an extension of this principle, we have rejected the creation of a per se rule requiring the exclusion of jurors who have an employment relationship with a party to the lawsuit, and have expressly disapproved statements that could be read as advocating such a per se rule.”

Prior convictions or arrest histories of family members are sufficient race-neutral reasons under *Batson* to justify a prosecutor's peremptory strike.²² Similarly, in *Alexander v. State*,²³ the fact that five black prospective jurors had family members with criminal records constituted sufficient race-neutral reasons for peremptory strikes of those jurors.

Expression by five African-American prospective jurors of reservations about imposing the death penalty, and their having being previously charged with a criminal offense or their having a relative currently facing criminal prosecution, and their claims of hardship due to bankruptcy or physical disability, provided race-neutral reasons for State's use of peremptory strikes against them, in prosecution for capital murder. Information that an African-American prospective juror had learned in nursing school about post-traumatic stress disorder (PTSD), which was to figure prominently in the defense, and that district attorney's office had previously prosecuted her for fraud, provided race-neutral reason for state's use of peremptory strike against her, in prosecution for capital murder.²⁴

Upon whom does the ultimate burden of proof fall when a *Batson*

¹⁹*Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

²⁰*Brantley v. State*, 262 Ga. 786, 427 S.E.2d 758 (1993).

²¹*Veal v. State*, 301 Ga. 161, 800 S.E.2d 325 (2017).

²²*Slade v. State*, 270 Ga. 305, 509 S.E.2d 618 (1998).

²³*Alexander v. State*, 273 Ga. 311, 540 S.E.2d 196 (2001).

²⁴*Brannan v. State*, 275 Ga. 70, 561 S.E.2d 414 (2002).

objection is made? The objecting party, rules the Georgia Supreme Court in *Chandler v. State*.²⁵ The prosecutor opposed defense counsel's jury strikes under *Georgia v. McCollum* and *J.E.B. v. Alabama*. While an objection may force the proponent of the strike to make a race-neutral explanation, the ultimate burden of persuasion rests with the opponent of the strike.

A trial court's finding that a party who made a contested juror strike satisfied the second step of the *Batson* process (neutral explanation) can be implicit. As observed by the Georgia Court of Appeals, "the trial court asked the prosecutor if he wanted 'to argue that—the issues?' By doing so, the trial court 'implicitly indicat[ed] that [he] was moving to step three [of the analysis].'"²⁶

In *Purkett v. Elem*,²⁷ minority jurors were stricken by the prosecutor. The prosecutor was challenged on *Batson* grounds and stated that the two stricken jurors' "mustaches and . . . beards look suspicious to me." The Supreme Court explained that once a race-neutral explanation is made, the opponent must prove purposeful racial discrimination. This last step was not satisfied in *Purkett*.

The state provided a race-neutral reason for striking three African-American jurors.²⁸ This was accomplished by describing to the court the jurors' body language that allegedly indicated disinterest and sympathy. The prosecutor stated that he based his evaluations heavily on what he "felt." The appellant pointed towards language in *Batson*, as well as Georgia cases, arguing that the state's reasons must concrete and tangible. However, the Georgia Supreme Court held that the appellant failed to show discriminatory intent.

On the other hand, a case finding that the proffered reason for preemptory challenge was a pretext for discrimination is *Blair v. State*.²⁹ Race-neutral reasons were not found in *Walton v. State*.³⁰ A race-neutral explanation can be so implausible or fantastic that it renders the explanation pretextual.³¹

In a malice murder case, the Georgia Supreme Court found that the government did not violate *Batson* when it struck two prospective black jurors. Government's proffered reasons for the

²⁵*Chandler v. State*, 266 Ga. 509, 467 S.E.2d 562 (1996).

²⁶*Johnson v. State*, 363 Ga. App. 809, 872 S.E.2d 787 (2022).

²⁷*Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed. 2d 834 (1995) and (criticized in *People v. Jamison*, 50 Cal. Rptr. 2d 679 (App. 2d Dist. 1996).

²⁸*Toomer v. State*, 292 Ga. 49, 734 S.E.2d 333 (2012).

²⁹*Blair v. State*, 267 Ga. 166, 476 S.E.2d 263 (1996) (strikes challenged on ground they were racially and gender motivated).

³⁰*Walton v. State*, 267 Ga. 713, 482 S.E.2d 330 (1997).

³¹*Turner v. State*, 267 Ga. 149, 476 S.E.2d 252 (1996).

strikes—that one of the jurors did not raise her hand to any of general voir dire questions, that the juror responded flippantly to one of the government’s inquiries, and that the other potential juror was talking with one of the prospective jurors about police officers during the break—were race-neutral.³²

In *Snyder v. Louisiana*,³³ *Batson* was violated by a prosecutor’s jury strike which was sought to be justified on the basis that the juror looked “nervous.”

The inferences of discrimination were sufficient to establish a prima facie case of discrimination under *Batson*, shifting the burden to the state to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes, in *Johnson v. California*.³⁴

Improperly stricken jurors may be reinstated under *Batson*, as stated in *Holmes v. State*.³⁵

The state provided a race-neutral explanation for using a peremptory strike against an African-American prospective juror in a malice-murder prosecution, where the state explained that juror did not timely return a juror-information form, which indicated a lack of interest in proceedings, that his courtroom demeanor indicated the same attitude, that he had been engaged in an altercation in a restaurant parking lot, and that he was not the type of conservative juror that the state was seeking, given that his finally completed juror-information form indicated his children were born out of wedlock.³⁶

In a malice murder prosecution, the trial court did not commit clear error when it denied defendant’s *Batson* claim. The state claimed with respect to one of the six potential African-American jurors who was peremptorily struck, that it did so because he was a bondsman on a large drug case in Atkinson county. The court explained that the “stated reason for striking the juror is not one that would lead to the disproportionate exclusion of African-Americans,” and was neither an implausible nor pretextual explanation for purposeful discrimination.³⁷

Not all explanations will be deemed satisfactory, however, and sometimes it is the defense which is accused of discriminatory

³²Heard v. State, 295 Ga. 559, 761 S.E.2d 314 (2014). 129, 8 A.L.R. Fed. 2d 849 (2005).

³³Snyder v. Louisiana, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). ³⁵Holmes v. State, 273 Ga. 644, 543 S.E.2d 688 (2001).

³⁴Johnson v. California, 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d ³⁶Chandler v. State, 281 Ga. 712, 642 S.E.2d 646 (2007).

³⁷Bester v. State, 294 Ga. 195, 751 S.E.2d 360 (2013).

strikes. In *McKee v. State*,³⁸ defendant's reason for striking a prospective juror who had been the victim of crime was pretextual for discrimination, in trial for felony murder. Other jurors were also victims of crime and were not stricken.

Inattentiveness to jury selection process allegedly exhibited by juror was a race neutral reason for jury strike in *Johnson v. State*.³⁹ Explaining a prosecutor's peremptory challenge based upon the demeanor of a juror, see *Thaler v. Hayes*.⁴⁰

Prosecutor provided race-neutral reason for striking five African-American prospective jurors, where prosecutor stated that he struck first prospective juror because she was a psychology student and was therefore more likely to require more than proof beyond a reasonable doubt, that he struck second prospective juror because she was cousin of another member of jury panel, that he struck third prospective juror because she was an acquaintance of fellow juror, that he struck fourth prospective juror because he recognized defendant from going to school with him, and that he struck fifth prospective juror because of her relationship with a potential witness.⁴¹ The evaluation of a *Batson* challenge involves a three-step process: (1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the strike must then provide a race-neutral explanation for the strike; and (3) the court must decide whether the opponent of the strike has proven discriminatory intent. Question of whether prima facie case of discrimination was shown in State's use of peremptory strikes in murder prosecution was rendered moot when the trial court proceeded promptly and directly to an evaluation of State's explanations for its strikes.

African-American prospective juror's acquaintance with witness was adequate race-neutral reason for striking juror, in trial for a felony murder.⁴² Prosecutor's reason for striking single, unemployed African-American prospective juror, that she may lack sufficient ties to community to be concerned about law enforcement, was sufficiently race-neutral to survive *Batson* challenge in trial for felony murder.⁴³ The *Roberts* case further held that an African-American prospective jurors' claims that family members had been badly treated by law enforcement were adequate race-neutral reasons for striking jurors, in trial for felony

³⁸*McKee v. State*, 277 Ga. 577, 1171 (2010).
591 S.E.2d 814 (2004).

³⁹*Johnson v. State*, 283 Ga. App. 524, 642 S.E.2d 170 (2007) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

⁴⁰*Thaler v. Haynes*, 130 S. Ct.

1171 (2010).
⁴¹*Brown v. State*, 278 Ga. 724, 609 S.E.2d 312 (2004).

⁴²*Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

⁴³*Roberts v. State*, 282 Ga. 548, 651 S.E.2d 689 (2007).

murder.

A trial court's decision on a *Batson* motion rests largely upon assessment of the prosecutor's state of mind and credibility; it therefore lies peculiarly within a trial judge's province.⁴⁴ Prosecutor's reason for striking African-American prospective juror was race-neutral, in trial for a theft by receiving stolen auto; juror had expressed doubts and concerns about fairness of a legal system that would allow defendant to represent himself. Another juror who was stricken was extremely nervous, confused, and had problems following voir dire questions. Finally, the Court of Appeals held that the prosecutor's reason for striking another African-American prospective juror was race-neutral, in this trial for receiving a stolen auto, where the juror had a prior DWI conviction and expressed negative feelings about law enforcement.

State provided race-neutral reason for exercising peremptory strike of African-American prospective juror by stating that juror was struck due to his unstable employment history in *Flanagan v. State*.⁴⁵ Another juror was stricken when the prosecutor had information from three deputies that juror's sons and daughters were involved in criminal activity. In exercising peremptory strikes, the state may rely on information and advice provided by others so long as this input is not predicated upon the race of the prospective juror. For purposes of responding to a *Batson* challenge, a "neutral explanation" means an explanation based on something other than the race of the juror; unless a discriminatory intent is inherent in the proponent's explanation, the reason will be deemed race neutral.

Trial court did not commit clear error when government's proffered explanation for striking of African-American juror—that it did so because juror stated that "‘all life is precious,’ and because she rated herself a 3 on a scale of 1 to 10 where 1 was defined as being against the death penalty and 10 was defined as being in favor of the death penalty ‘for every murder’"—was sufficiently race neutral.⁴⁶

§ 6:6 Conduct of voir dire examination

Any juror may be examined or put upon his voir dire by either side in both civil and criminal cases.¹

Voir dire is the engine of selecting a jury that is fair, and Georgia law provides for voir dire examination that "may be relatively

⁴⁴Reedman v. State, 265 Ga. App. 755 S.E.2d 790 (2014).
162, 593 S.E.2d 46 (2003).

[Section 6:6]

⁴⁵Flanagan v. State, 265 Ga. App. 122, 592 S.E.2d 894 (2004).

¹O.C.G.A. §§ 15-12-133 and 15-12-164. See Uniform Superior Court Rule 10.1.

⁴⁶Walker v. State, 294 Ga. 752,

broad in scope.”² However, the scope of voir dire is not unlimited, and the propriety of particular questions is left to the sound discretion of the trial court. In addition to the lawyers, what about judicial questioning? “[I]t is well settled that a trial court is permitted to objectively question prospective jurors in a manner calculated to determine if they are unalterably prejudiced against the defendant.”³

In a case that emanated from the Boston Marathon bombings, the U.S. Supreme Court reviewed a district court’s refusal to submit certain proposed questions to prospective jurors regarding pretrial publicity and resulting possible bias. The Supreme Court found that the district court did not abuse its discretion. It reasoned that courts enjoy broad discretion, including the questions that will be posed to prospective jurors. It added:

The court recognized the significant pretrial publicity concerning the bombings, and reasonably concluded that the proposed media-content question was “unfocused,” risked producing “unmanageable data,” and would at best shed light on “preconceptions” that other questions already probed. At *voir dire*, the court further explained that it did not want to be “too tied to a script” because “[e]very juror is different” and had to be “questioned in a way that [was] appropriate” to the juror’s earlier answers. The court was concerned that a media-content question had “the wrong emphasis,” focusing on what a juror knew before coming to court, rather than on potential bias. Based on “years” of trial experience, the court concluded that jurors who came in with some prior knowledge would still be able to act impartially and “hold the government to its proof.” The District Court’s decision was reasonable and well within its discretion, as our precedents make clear.⁴

The 2005 Georgia Legislature apparently believed the system of unequal strikes rewarded the defendant at the expense of the victim. The Criminal Justice Act of 2005 adjusted the defendant’s number of juror strikes in misdemeanor, felony, and death penalty cases to be equal with the State’s number of peremptory challenges. Specifically:

- Section 4 of the Act amended O.C.G.A. § 15-12-125 to reduce the number of defendant peremptory strikes in misdemeanor cases from four to three. “The defendant and the State shall each have the right to challenge three jurors peremptorily.”
- Section 7 of the Act amended O.C.G.A. § 15-12-165 to reduce

²Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013).

³Heidt v. State, 292 Ga. 343, 736 S.E.2d 384 (2013). In Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013), the judge questioned a prospective juror who initially expressed an opinion that

defendants are generally guilty, but “did not engage in improper rehabilitation.” The juror was ultimately held to be qualified.

⁴United States v. Tsarnaev, 142 S. Ct. 1024, 212 L. Ed. 2d 140 (2022).

the number of defendant peremptory strikes in felony cases from twelve to nine and in death penalty cases from twenty to fifteen. “Every person accused of a felony may peremptorily challenge nine of the jurors impaneled to try him or her. The State shall be allowed the same number of peremptory challenges allowed to the defendant; provided however, that in any case in which the State announces its intention to seek the death penalty, the defendant may peremptorily challenge fifteen jurors and the State shall be allowed the same number.”

The order by which each side exercises its strikes and the total number of jurors impaneled remains the same. In cases where two or more defendants are tried jointly, the court may allow the State additional strikes not to exceed the number of additional strikes as are allowed to the defendants. In addition to these provisions, Section 6 of the Act adds a new subparagraph (d) to O.C.G.A. § 15-12-164 which states that the Court shall excuse for cause any juror who from the totality of the juror’s answers on voir dire is determined by the Court to be substantially impaired in the juror’s ability to be fair and impartial. The juror’s own representation that the juror would be fair and impartial is to be considered by the Court but is not determinative.

Changes to rules regarding jury selection, final argument and impeachment all pertain to procedural matters and, thus, do not offend *ex post facto* restrictions.⁵

Retroactive application of jury strikes statute, see *Madison v. State*.⁶

A juror did not intentionally answer the questionnaire untruthfully, even though the juror failed to disclose his felony habitual-violator conviction, in light of his incorrect belief that the conviction had been dismissed after he fulfilled the probation obligations.⁷

The entire panel of jurors did not have to be dismissed because of one juror’s improper remark during voir dire that he had heard that a prior jury had convicted the defendant.⁸ It was not necessary to allow additional voir dire of already qualified jurors following a prejudicial remark made in the jury assembly room where the court excused the only panel member it determined could have heard the remark.⁹

Potential juror’s statement during voir dire that he had “heard enough to convince [him]” did not warrant the dismissal of the

⁵*Chandler v. State*, 281 Ga. 712, 414 S.E.2d 218 (1992).
642 S.E.2d 646 (2007).

⁶*Madison v. State*, 281 Ga. 640, 344 S.E.2d 644 (1986).
641 S.E.2d 789 (2007).

⁷*Bennett v. State*, 262 Ga. 149, 362 S.E.2d 201 (1987).
⁸*Rogers v. State*, 256 Ga. 139,
⁹*Crawford v. State*, 257 Ga. 681,

entire panel of prospective jurors. Court found that “the statements made by the potential juror were not inherently prejudicial. The potential juror did not relay any harmful information about Johnson, he only speculated as to what the evidence might show based upon the indictment while being reminded repeatedly by both the trial court and the State that he did not, in fact, actually know what the evidence would show.”¹⁰

A trial court does not have to excuse an entire jury panel when that panel learns information from “a prospective juror’s comments [that] do not link a defendant with criminal activity, or characterize the defendant as a criminal.”¹¹

Though a jury should not normally see a defendant in shackles, the failure to remove them for a short time, through an oversight or a technical violation, is not grounds for a new trial. In *Geiger v. State*,¹² the defendant entered the courtroom prior to jury selection in civilian clothes, which obscured the fact that he was shackled at his feet. There was no indication in the record that any of the jurors were aware that the defendant had been shackled, and he rejected the trial court’s offer of a curative instruction.

A trial court did not err when it delegated to the assistant district attorney the responsibility for propounding to the jury the statutory voir dire questions provided in O.C.G.A. § 16-5-21(a)(2).¹³

Requesting parties to not repeat questions already answered on jury questionnaire did not improperly restrict a capital defendant’s voir dire examination.¹⁴

A trial court’s decision to have counsel pose their general voir dire questions to the panel of prospective jurors as a whole was not an abuse of discretion, especially since these general questions were followed by individual inquiries.¹⁵

The trial court did not abuse its discretion when it limited the parties to 10 voir dire questions.¹⁶

Voir dire oath, garbled version of O.C.G.A. § 15-14-15 was given, effect upon request for new trial, see *Hargett v. State*.¹⁷

There is no requirement that voir dire be conducted outside the

¹⁰Johnson v. State, 340 Ga. App. 429, 797 S.E.2d 666 (2017). Ga. 686, 820 S.E.2d 640 (2018)).

¹¹Lockhart v. State, 298 Ga. 384, 782 S.E.2d 245 (2016).

¹²Geiger v. State, 295 Ga. 648, 763 S.E.2d 453 (2014).

¹³Day v. State, 188 Ga. App. 374 S.E.2d 87 (1988) (overruled on other grounds by, Willis v. State, 304

¹⁴Bennett v. State, 262 Ga. 149, 414 S.E.2d 218 (1992).

¹⁵Hammond v. State, 273 Ga. 442, 542 S.E.2d 498 (2001).

¹⁶Reynolds v. State, 334 Ga. App. 496, 779 S.E.2d 712 (2015).

¹⁷Hargett v. State, 285 Ga. 82, 674 S.E.2d 261 (2009) (overruled on

presence of the other jurors, rather the granting of sequestered voir dire is within the discretion of the court.¹⁸

For sequestration of jurors and right to individually question them in civil cases, see *Claxton Poultry Co., Inc. v. City of Claxton*.¹⁹

It is strongly recommended that motions for sequestered voir dire be granted in all death penalty cases.²⁰

During jury selection, are crime histories on prospective jurors, available to the state through the Georgia Crime Information Center, available to the defense? Must the state turn over copies of such GCIC reports before or during trial? No, says *Williams v. State*.²¹

§ 6:7 Hypothetical questions

While the extent to which counsel in examining jurors on their voir dire may go in asking hypothetical questions lies generally in the discretion of the court, the view has been taken that hypothetical questions are not competent when their evident purpose is to have the jurors indicate in advance what their decisions will be under a certain state of the evidence or upon a certain state of facts, and thus possibly commit them to certain ideas or views when the case is finally submitted to them for their decision.¹

In the examination of prospective jurors, hypothetical questions embodying a substantial outline of the case proposed to be made are not proper because such questions tend to cause a juror to pledge himself to a future action and thus to prejudice the case. On the other hand, questions which only seek to ascertain that the juror's mind is free of preconvictions are proper.²

Defendant failed to preserve for review issue of whether trial court erred during voir dire when it allowed the State to ask a potential juror how he felt about the city being ranked as one of the top five cities for “gay people,” where defendant failed to

other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹⁸*Rhodes v. State*, 264 Ga. 123, 441 S.E.2d 748 (1994).

¹⁹*Claxton Poultry Co., Inc. v. City of Claxton*, 155 Ga. App. 308, 271 S.E.2d 227 (1980) (trial court did not abuse its discretion in denying plaintiffs' motion for individual voir dire where sequestered examination would be unduly time consuming).

²⁰*Rogers v. State*, 256 Ga. 139, 344 S.E.2d 644 (1986).

²¹*Williams v. State*, 255 Ga. App. 177, 564 S.E.2d 759 (2002) (convicted felons are disqualified from jury service).

[Section 6:7]

¹Am. Jur. 2d, Jury § 203.

²*Atlanta Joint Terminals v. Knight*, 98 Ga. App. 482, 106 S.E.2d 417, 79 A.L.R.2d 539 (1958).

object.³

In at least some circumstances, hypothetical questions during voir dire are proper. In a felony murder prosecution, the state's hypothetical question did not require response amounting to prejudgment of the state's prosecution of the defendant, when, in response to a juror question, the state responded with the following hypothetical scenario: "Consider there's a very poor young girl who steals some bread out of desperation to feed her hungry child. Can you make a distinction and make a decision only as to whether or not she stole the bread without considering the possible punishment? That means you only look at strictly what the law and the facts say that person did, not what the punishment will be or could be."⁴ In *Ellington v. State*,⁵ the Supreme Court reversed the death penalty imposed against a defendant accused of domestic violence and child homicides on the basis that the trial judge disallowed hypothetical questions, specifically questions of whether the jury could consider all sentencing options. The *Ellington* Court held that in determining the constitutionally allowable facts that can be utilized in questioning the jury, the "subject matter of the action" is critical.

It is not error to ask a juror who said she had strong feelings towards those who sold illegal drugs, whether based on the law and evidence she could make a fair decision no matter what her feelings.⁶ It is error to ask a juror to enumerate hypothetical circumstances in which she might or might not vote to impose the death penalty.⁷

Though defendant is entitled to examine prospective jurors regarding matters pertaining to possible bias, hypothetical inquiries "that would require a response from a juror that might amount to a prejudgment of the case are improper and should be excluded from voir dire."⁸

Some older Georgia civil cases appear to have been consistent with the spirit of *Ellington*.⁹

§ 6:8 Questioning of jurors; generally

It is proper on voir dire to ask questions relating to racial prej-

³Hall v. State, 286 Ga. 358, 687 S.E.2d 819 (2010).

⁴Walker v. State, 294 Ga. 752, 755 S.E.2d 790 (2014).

⁵Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012).

⁶See Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013).

⁷Carr v. State, 267 Ga. 547, 480 S.E.2d 583 (1997).

⁸Polanco v. State, 328 Ga. App. 513, 759 S.E.2d 640 (2014).

⁹See Atlantic Zayre, Inc. v. Meeks, 194 Ga. App. 267, 390 S.E.2d 398 (1990). See also Bransome v. Barton, 154 Ga. App. 799, 270 S.E.2d 55 (1980).

udice of the jurors in order to test their impartiality.¹

A judge may exercise her discretion to allow a defendant to ask prospective jurors on voir dire whether they could follow the presumption of innocence and the requirement of proof beyond a reasonable doubt. Where such questions are not allowed, however, there is some authority that there is no error.²

In most cases, the view has been taken that possible prejudice against large verdicts is a matter as to which the trial court can properly permit inquiry, so long as the question is not so phrased as to amount to an attempt to pledge the juror to a particular award, *Atlanta Joint Terminals v. Knight*.³ In the examination of prospective jurors, hypothetical questions embodying a substantial outline of the case proposed to be made are not proper because such questions tend to cause a juror to pledge himself to a future action and thus to prejudice the case; but, questions which only seek to ascertain that the juror's mind is free of preconceptions are proper.

A party is not entitled to ask a prospective juror whether she felt that the defendant's testimony was worth less than the testimony of the person accusing him. This questioning improperly requires the venire member to prejudge the credibility of the witnesses.⁴

Trial court did not abuse its discretion when it denied defendant's request to ask the venire, "whether the prospective jurors had 'made a decision' about Gonzales 'as you sit here today.'" Court reasoned that trial court had earlier covered the same ground when it asked the venire questions regarding their impartiality.⁵

Trial court did not abuse its discretion in denying mistrial motion when prosecutor asked prospective jurors "whether they believed that it was fair to hold a person who was a party to a crime equally responsible for the crime," and the trial court directed the prosecutor to "move on" before any of the prospective jurors answered the question.⁶

In a child molestation case, trial court did not abuse its discretion in denying defendant's question during voir dire regarding bias based upon a child testifying. The court found that in light of the reading of the indictment, along with the general voir dire

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¹Deering v. State, 168 Ga. App. 835, 310 S.E.2d 720 (1983).

²See Frazier v. State, 195 Ga. App. 109, 393 S.E.2d 262 (1990).

³Atlanta Joint Terminals v. Knight, 98 Ga. App. 482, 106 S.E.2d

417, 79 A.L.R.2d 539 (1958).

⁴Bramble v. State, 263 Ga. 745, 438 S.E.2d 619 (1994).

⁵Gonzales v. State, 345 Ga. App. 334, 812 S.E.2d 638 (2018).

⁶Herrington v. State, 300 Ga. 149, 794 S.E.2d 145 (2016).

questioning by the court and the government, denying the defendant's request "did not create a real risk that juror partiality driven by the fact at issue will not otherwise be identified in voir dire."⁷

In another child molestation case, a trial court was held not to have abused its discretion when it disallowed the defendant from inquiring of the prospective jurors during voir dire whether they "think children lack the worldly knowledge to bring this kind of allegation?" The appeals court found that the proposed question went directly to whether they believed that the child/victim was believable.⁸

In a possession of child pornography case, the Eleventh Circuit held that district court properly refused defendant's request that prospective jurors be asked they could be fair and impartial despite the defendant's prior conviction for a sex offense involving a minor. The circuit court reasoned the district court did not abuse its "wide discretion" because "the court sufficiently alleviated the potential for prejudice . . . by charging the jury that evidence of a prior conviction was not sufficient, by itself, to prove that Bishop was guilty of the crimes charged in the indictment. Overall, the court's questioning, coupled with its charge to the jury, afforded Bishop the protection sought."⁹

A person accused of an interracial capital crime is entitled to have prospective jurors informed of the victim's race and to question them on the issue of racial bias.¹⁰

The Eleventh Circuit held that district court erred in not asking questions of prospective jurors regarding possible sexual orientation bias in case that "involved an alleged domestic battery between former partners of the same sex, and that the sexual orientation of Berthiaume and his witnesses would be central facts at trial and were 'inextricably bound up' with the issues to be resolved at trial." The court declined to mandate such inquiries in every case, but stated that a district court "abuses its discretion by failing to ask a proposed voir dire question about sexual orientation bias in cases where sexual orientation will potentially be a central part of the evidence at trial."¹¹

In *Jones v. State*,¹² on voir dire, the trial court did not abuse its discretion in refusing to allow the appellant to ask whether the prospective jurors had previous personal experience in "collecting

⁷*Davis v. State*, 327 Ga. App. 729, 761 S.E.2d 139 (2014) (internal quotations omitted).

⁸*Carver v. State*, 331 Ga. App. 120, 769 S.E.2d 722 (2015).

⁹*United States v. Bishop*, 683 Fed. Appx. 899 (11th Cir. 2017).

¹⁰*Hammond v. State*, 264 Ga. 879, 452 S.E.2d 745 (1995).

¹¹*Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017).

¹²*Jones v. State*, 265 Ga. 138, 454 S.E.2d 482 (1995).

debts” which involved “hounding” and “threaten[ing] to kill” the debtor.

A juror may not be asked how he would vote under certain contingencies, *Pinion v. State*,¹³ or how he would vote in case certain evidence should be developed on trial, *Gunnin v. State*.¹⁴ Nor may a prospective juror be asked how he would vote if the evidence were evenly balanced.¹⁵

A trial court does not abuse its discretion during voir dire by denying the use of the question of the effect that a defendant’s decision not to testify would have on a potential juror.¹⁶ It is not error to refuse to allow defense counsel to ask whether a prospective juror would tend to believe or prefer the testimony of a police officer over other testimony.

§ 6:9 Voir dire in capital cases

Upon a proper motion, a juror should be excused based on his or her views on the death penalty, life imprisonment without parole, or life imprisonment with the possibility of parole if the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.¹

Death-qualification of jurors does not lead to the selection of juries that are slanted in favor of conviction at the guilt-innocence phase of a death penalty trial.²

The trial court did not err in not disqualifying the entire jury panel because of one prospective juror’s comment that “anyone who kills someone should go to the chair” where the juror was excused from the panel; the comment did not link the defendant to other criminal violations on his part which were complete and separate from the offense for which he was being tried, and the defendant did not move to disqualify the entire panel, request a continuance to obtain another jury panel, or request curative instructions, and did not challenge the array in writing.³

A trial court’s limitation of voir dire questions regarding the jurors’ attitudes toward the death penalty was error in that it deprived the defendant of an opportunity to determine whether prospective jurors were impartial on the question of sentence

¹³*Pinion v. State*, 225 Ga. 36, 165 S.E.2d 708 (1969).

¹⁴*Gunnin v. State*, 112 Ga. App. 720, 146 S.E.2d 131 (1965).

¹⁵See *Gunnin v. State*, 112 Ga. App. 720, 146 S.E.2d 131 (1965).

¹⁶*Simmons v. State*, 282 Ga. 183, 646 S.E.2d 55 (2007).

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¹*Tollette v. State*, 280 Ga. 100, 621 S.E.2d 742 (2005).

²*Leach v. State*, 259 Ga. 33, 376 S.E.2d 667 (1989).

³*Roberts v. State*, 259 Ga. 441, 383 S.E.2d 872 (1989).

where the court ruled that a juror who answered that he or she was not conscientiously opposed to capital punishment could not be asked any other questions concerning the death penalty.⁴

In a death penalty case, neither the defendant nor the State has the right simply to outline the evidence and then ask a prospective juror his or her opinion of that evidence. Nor is it permissible to ask a juror to describe the kind of case that, in the juror's opinion, would warrant a death sentence.⁵

Voir dire testimony that established no more than that the juror had qualms about imposing a sentence she supported in principle and, before hearing any evidence, leaned toward a life sentence, did not support a finding that she was disqualified and her excusal was reversible error.⁶

There is no error in excluding jurors who stated that they would not impose death penalty under any circumstances.⁷

The proper standard for determining the disqualification of a prospective juror based upon his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.⁸ As a general proposition, a prospective juror is not disqualified because he or she is leaning for or against a death sentence or another possible sentence, but he or she is disqualified if possessed with an unwavering bias in favor of or against one of the possible sentences authorized by law, such that they could not meaningfully consider one of the three possible sentences as a verdict. The trial court's refusal to excuse prospective jurors for cause after a juror admitted that he overheard a brief conversation about the case between prospective jurors on the panel in the jury room was not an abuse of discretion; the trial court permitted the parties to individually question the jurors about the jury room conversation, and none of the jurors indicated that anything they heard during voir dire would affect their ability to impartially decide the case.

§ 6:10 Questioning jurors regarding insurance

In a negligence action, it is proper to qualify the jury as to possible interests any member may have in or a relationship with all insurance companies having potential financial interest in the

⁴*Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988).

⁵*Blankenship v. State*, 258 Ga. 43, 365 S.E.2d 265 (1988). See *Hall v. State*, 261 Ga. 778, 415 S.E.2d 158 (1991).

⁶*Jarrell v. State*, 261 Ga. 880, 413 S.E.2d 710 (1992).

⁷*Willis v. State*, 243 Ga. 185, 253 S.E.2d 70 (1979).

⁸*Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005).

outcome of the case.¹ One qualification of the jury by the court concerning their possible relationships with the insurance carrier should suffice.

Referring to the rule that officers, employees, stockholders and relatives of stockholders of a nonparty insurance company which may be liable for a judgment rendered in the case are disqualified as a matter of law from serving as jurors, the court pointed out that refusing to allow plaintiff's counsel to so qualify the jury creates a presumption of injury. Both mutual and stock companies fall within the rule (in the case of mutual companies, an expansion is made in the rule), and the court discusses application of the rule to excess insurance carriers as well.² In *Sibley v. Dial*,³ jurors were pre-qualified regarding any connection to the insurance company involved before taking the statutory oath and only those with no connection were qualified. The court held the plaintiff waived his right to appeal on the issue by waiting until after losing the case to raise concerns. Questions to jurors about whether they had ever filed an injury claim or whether they had any connection to the insurance company involved in the litigation were observed to be proper in *Harper v. Barge Air Conditioning, Inc.*⁴

Where counsel for plaintiff improperly indicates during voir dire that defendant is insured when he is not, it may be ground for mistrial.⁵

Where a party's awareness of the opposing party's insurers was precluded by the latter party's insufficient discovery responses, the former party's inability to qualify the jury as to the opposing party's insurers raised an un rebutted presumption that the former party was materially harmed.⁶

§ 6:11 Selection of alternate jurors

Whenever, in the opinion of a judge of a superior court, any felony trial is likely to be a protracted one, and the counsel for the State and the defendant request the selection of additional jurors or alternates, the court immediately after the jury has been impaneled and sworn shall have, within its discretion, the power to direct the calling of one or more additional jurors to be

[Section 6:10]

¹Weatherbee v. Hutcheson, 114 Ga. App. 761, 152 S.E.2d 715 (1966).

²Lewis v. Emory University, 235 Ga. App. 811, 509 S.E.2d 635 (1998).

³Sibley v. Dial, 315 Ga. App. 457, 723 S.E.2d 689 (2012).

⁴Harper v. Barge Air Conditioning, Inc., 313 Ga. App. 474, 722 S.E.2d 84 (2011).

⁵See § 31:5, *infra*.

⁶Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014).

known as “alternate jurors.”¹

In 1989, O.C.G.A. § 9-11-47 was amended to provide that the additional peremptory challenge allowed if one or two alternate jurors are called may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

Alternate jurors have same qualifications as regular jurors, take same oath as regular jurors, obey all court orders and admonitions, hear and see proceedings, and otherwise conduct themselves as regular jurors, except that they do not retire with regular jurors to deliberate case; when an alternate later is admitted to panel of 12 in substitution for original, he has full access to previous deliberations and may apprise himself of what has transpired in his absence by asking appropriate questions or by listening to deliberations.²

The court did not err in recalling an alternate juror to replace one of the originals who was disqualified for reasons that did not become known until after the jury had retired to begin deliberations, even though the alternate had already been “discharged” and sent home.³

Trial court did not abuse its discretion in replacing juror with an alternate on account of the juror’s previously scheduled medical appointment.⁴

There is no requirement that alternate jurors in a death penalty case be excused once the jury has rendered a verdict as to guilt, and there is no need to keep them separate when the jury is not deliberating.⁵

When there is disagreement in the jury room, can the judge substitute in alternates to simply break a tieup? No, say court decisions. Alternate jurors do not serve to substitute for minority jurors who cannot agree with the majority.⁶

In *Mills v. State*,⁷ the Georgia Supreme Court found that a trial court committed reversible error when it removed a holdout juror during deliberations in a homicide case. Though a trial court enjoys discretion when it comes to the removal of a juror, there must be a “sound basis” when such discretion is exercised. The notes provided to the trial judge during its deliberations

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¹O.C.G.A. § 15-12-168.

²*Tanner v. State*, 242 Ga. 437, 249 S.E.2d 238 (1978).

³*Perry v. State*, 255 Ga. 490, 339 S.E.2d 922 (1986) (overruled on other grounds by, *Character v. State*, 285 Ga. 112, 674 S.E.2d 280 (2009)).

⁴*Lamb v. State*, 337 Ga. App. 62, 785 S.E.2d 898 (2016).

⁵*Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988).

⁶*Semega v. State*, 302 Ga. App. 879, 691 S.E.2d 923 (2010).

⁷*Mills v. State*, 308 Ga. 558, 842 S.E.2d 284 (2020).

reveal that the holdout juror “had concluded that neither defendant was guilty *based on the evidence presented*.” The Court further found that the notes failed to demonstrate that the juror “refused or ceased to participate in the jury’s deliberations.”⁸

In *Delgado v. State*,⁹ the Georgia Court of Appeals found that a trial court erred in removing a trial juror. In this narcotics case, jury notes submitted to the trial judge during its deliberations indicated that the jurors were deadlocked; specifically, that there was one juror who was unwilling to convict. The foreman acknowledged that the holdout juror had deliberated with the other jurors, but eventually refused to further deliberate. The appeals court found that the holdout juror “did not fail to fulfill his obligations as a juror, but rather had reached a decision, which was based on his review of the testimony and the witnesses’ credibility, after meaningfully deliberating and trying to reach a verdict. The holdout juror testified that he had attempted to deliberate with the other jurors, but believed that they were unwilling to accept his differing opinion and the deliberations were no longer productive. This testimony was supported by several other jurors.”¹⁰

§ 6:12 Number of peremptory challenges—Civil cases

In civil cases, the parties strike alternately, with the plaintiff having the first strike.¹ Twelve-person jury in state court civil cases, see § 6:1, *supra*.

Where there is more than one party on either side, they must join in exercising the six available strikes.² Some courts hold that the opposing side is restricted to the prescribed number of peremptory challenges, while others permit to the opposing side an increased number of challenges where the interests of the multiple parties are diverse or antagonistic.³ It has been held that where several litigants are united as one party by an order of court consolidating the actions, they are not each entitled to the full number of peremptory challenges allowed by statute, but rather are only collectively entitled to the number allowed to one party.⁴ Although multiple defendants may have different defenses where the principal issue is the same for all defendants,

⁸*Mills v. State*, 308 Ga. 558, 842 S.E.2d 284 (2020).

⁹*Delgado v. State*, 356 Ga. App. 625, 848 S.E.2d 665 (2020).

¹⁰*Delgado v. State*, 356 Ga. App. 625, 848 S.E.2d 665 (2020).

[Section 6:12]

¹O.C.G.A. § 15-12-122 (number

of strikes).

²See *National Upholstery Co. v. Padgett*, 111 Ga. App. 842, 143 S.E.2d 494 (1965).

³*National Upholstery Co. v. Padgett*, 111 Ga. App. 842, 143 S.E.2d 494 (1965).

⁴*Ellis v. Geer*, 36 Ga. App. 519, 137 S.E. 290 (1927).

defendants may not be given additional peremptory challenges.⁵

What if a faulty decision by a judge causes a party to use up his peremptories? Trial court abused its discretion by failing to dismiss juror for cause in medical malpractice case, and widower exhausted his peremptory strikes, and thus, widower was entitled to a new trial.⁶ The Georgia Supreme Court has ruled that civil litigants do not have to use all of their peremptory challenges in order to raise on appeal the issue of a judge's refusal to excuse a prospective juror for cause. This aligns civil with criminal procedure on the point.⁷

Alternate jurors may be called for service on the petit jury in the event of a juror's death or illness, "[or] upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause."⁸

Juror was properly removed when she "(1) stated several times that she did not want to form an opinion about the case, and (2) further stated that she was actually incapable of making the decision in the case because she could not 'play God' and because her moral beliefs precluded her from making a decision in the case."⁹

§ 6:13 Number of peremptory challenges—Criminal cases

Strikes in criminal cases are controlled by the provisions of O.C.G.A. §§ 15-12-165 and 15-12-125 (misdemeanors). Under the 2005 act, equal strikes to each side resulted in the following numbers: felony cases, nine strikes per side; death penalty, fifteen per side; and misdemeanors, three per side. Where there are joint defendants, the court can allow the state as many additional strikes as allowed to the defense. When there are joint parties, some judges are not inclined to expand the number of allowed challenges. More on peremptory challenges and strikes, see § 6:6, *supra*.

Trial court's application of the amended version of statute allowing state a quantity of peremptory challenges equal to those allowed the defendants did not violate any constitutional prohibition against *ex post facto* laws, as the exercise of peremptory challenges is procedural, and not an independent substantive

⁵Sheffield v. Lewis, 246 Ga. 19, 268 S.E.2d 615 (1980).

⁶Sellers v. Burrowes, 283 Ga. App. 505, 642 S.E.2d 145 (2007).

⁷Stolte v. Fagan, 291 Ga. 477, 731 S.E.2d 653 (2012) (overruled on

other grounds by, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479 (2021)).

⁸Allen v. State, 297 Ga. 702, 777 S.E.2d 680 (2015).

⁹Allen v. State, 297 Ga. 702, 777 S.E.2d 680 (2015).

right.¹

Defendant was not entitled to peremptory strikes in addition to those allowed by statute in his trial for murder, aggravated battery, and possession of a firearm during the commission of a crime, with regard to the shooting death of defendant's wife.² Trial court did not err in capital murder prosecution by denying defendant's request for more peremptory strikes than were provided for by Georgia law at the time of his trial.³

Where two defendants were jointly tried for armed robbery and kidnapping, the trial court did not err in limiting peremptory challenges to the number provided by statute, since where two or more defendants are tried jointly for a crime or offense, they are under Georgia law entitled to same number of peremptory challenges as single defendant if tried separately.⁴ A defendant is not entitled to an increase in the number of peremptory challenges by reason of the fact that the indictment against him contains more than one charge.⁵

In a joint trial, it was a reversible error to require each defendant to alternate in exercising peremptory challenges so that neither defendant was allowed to challenge all jurors.⁶

Requiring a criminal defendant to use one of his peremptory challenges to excuse a juror who should have been excused for cause is a harmful error.⁷

It was proper for a court to refuse a murder defendant's request for more peremptory challenges than were granted by statute.⁸

A defendant's use of his peremptory challenges was not impermissibly interfered with by a juror being excused based upon family illness after the jury had been selected.⁹

The maximum time of imprisonment in the penitentiary for a particular charge determines the number of peremptory challenges allowed.¹⁰

[Section 6:13]

¹O.C.G.A. § 15-12-165; *Newman v. State*, 286 Ga. App. 353, 649 S.E.2d 349 (2007).

²*Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

³O.C.G.A. § 15-12-165; *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854 (2010).

⁴*Allen v. State*, 235 Ga. 709, 221 S.E.2d 405 (1975).

⁵*Reynolds v. State*, 101 Ga. App.

715, 115 S.E.2d 214 (1960).

⁶*Henry v. State*, 256 Ga. 313, 348 S.E.2d 640 (1986).

⁷*McKee v. State*, 168 Ga. App. 214, 308 S.E.2d 574 (1983).

⁸*Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987).

⁹*Childs v. State*, 257 Ga. 243, 357 S.E.2d 48 (1987).

¹⁰*Bailey v. State*, 233 Ga. 452, 212 S.E.2d 1 (1975).

§ 6:14 Exemptions from jury service

The statute providing for exemptions for jury duty (O.C.G.A. § 15-12-1) now reads in general, rather than specific terms, in providing that any person who shows that he will be engaged during his term of jury duty in work necessary to the public health, safety or good order or who shows other good cause why he should be exempt may be excused. Except for permanently mentally or physically disabled persons, all excuses shall be deferred to a date and time certain within that term or the next succeeding term or shall be deferred as set forth in the court order. The statute further provides that any person aged 70 or older may request that his name be removed from the jury list.

Although there is no blanket statutory exemption from jury duty for persons with medical problems, the trial court or someone appointed in writing by the chief judge of the circuit may excuse a potential juror from jury duty if the juror shows good cause why he or she should be exempt from jury duty, and thus, while a blanket, indiscriminate excusal of potential jurors who proffer medical excuses is incompatible with Georgia law and with the community, a trial court has the discretion to excuse a person based upon a determination that jury service would impose a “special and undue hardship” on that particular person due to a medical condition.¹

Title 28 U.S.C.A. § 1863 provides that “members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession” are “barred from jury service on the ground that they are exempt.” In a case of first impression, the Eleventh Circuit in *U.S. v. Pendergrass*² concluded that the statute’s plain language exempts from jury service individuals who “in function” are police officers, and does not extend to individuals who are simply members of a police organization. The court concluded that the district court did not abuse its discretion when it refused to reject a prospective juror (a probation officer) for cause.

A trial court did not abuse its discretion by granting a request for excusal to a 72-year-old juror with a heart condition who had a doctor’s appointment the next day in another town.³

A trial court’s discretion to excuse potential jurors for hardship exists independent of and in addition to its statutory duty to

[Section 6:14]

¹O.C.G.A. § 15-12-1(a); *Yates v. State*, 274 Ga. 312, 553 S.E.2d 563 (2001).

²*United States v. Pendergrass*, 995 F.3d 858 (11th Cir. 2021).

³*Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988).

excuse jurors.⁴

Trial court did not abuse its discretion in excusing a juror given her distraught over being unable to care for her 14-month-old child on account of her jury service (which was anticipated to last approximately four and one-half weeks). The court reasoned that her distraught mindset would likely affect her attentiveness during trial and the defendant failed to demonstrate how her removal resulted in prejudice.⁵

Trial court did not abuse its discretion in refusing to excuse a juror on account of a sick child. The record revealed that an emergency did not exist and that the juror's ability to perform her duties would not be impaired.⁶

A trial court did not abuse its discretion in excusing a prospective juror at her request on the ground that she was scheduled to attend a legal assistance workshop offered "this one and only time" for a nonprofit organization of which she was the president.⁷

A trial court did not abuse its discretion in excusing a juror who stated that he could not render a decision based on the evidence in the case because of his religious beliefs.⁸

In a death penalty case, a prospective juror was properly disqualified where she stated that she was opposed to the death penalty and that she would automatically vote for a life sentence in a murder case, although she also stated that she "maybe" could change her mind.⁹

A trial court did not err by refusing to excuse prospective jurors because they either knew the victims of the crimes at issue or had some knowledge of the case from the pretrial publicity where the jurors testified that they could be fair and impartial and could decide the case based on the evidence presented in court.¹⁰

Does limited hearing ability disqualify a juror? Amplified headphones were used by a juror whose hearing was impaired.¹¹

§ 6:15 Grounds for challenge for cause—Statutes

Statutes providing for challenges for cause include O.C.G.A. §§ 15-12-133, 15-12-134 (general) and O.C.G.A. § 15-12-163

⁴Young v. State, 290 Ga. 392, 721 S.E.2d 855 (2012) (overruled on other grounds by, Nalls v. State, 304 Ga. 168, 815 S.E.2d 38 (2018)).

⁵U.S. v. Godwin, 765 F.3d 1306 (11th Cir. 2014).

⁶Murphy v. State, 299 Ga. 238, 787 S.E.2d 721 (2016).

⁷Blankenship v. State, 258 Ga.

43, 365 S.E.2d 265 (1988).

⁸Robinson v. State, 258 Ga. 279, 368 S.E.2d 513 (1988).

⁹Foster v. State, 258 Ga. 736, 374 S.E.2d 188 (1988).

¹⁰Lee v. State, 258 Ga. 762, 374 S.E.2d 199 (1988).

¹¹Ford v. State, 289 Ga. App. 865, 658 S.E.2d 428 (2008).

(criminal).

Interpreting O.C.G.A. § 15-12-163 in a case of first impression was the 2010 decision in *Humphreys v. State*.¹ At issue was the question of whether a first offender sentence constituted a conviction for purposes of the statutory provision allowing excusal of persons convicted of a felony. The Georgia Supreme Court held it did not:

[W]e conclude that a person who has been placed on probation or sentenced to a term of confinement pursuant to the First Offender Act is not incompetent to serve as a petit juror under O.C.G.A. § 15-12-163(b)(5) either before or after being discharged without an adjudication of guilt. The trial court therefore erred in disqualifying for cause the prospective juror solely on the ground that she was a first offender on probation.

However, the Court ruled that any error by the trial court in the above regard was not a basis for reversal.

Where a juror has talked to a crime victim after an assault and later is called as a prospective juror, this frequently leads to a challenge for cause. So does the fact, in a civil case, that a prospective juror works with one of the parties. Yet trial judges often endeavor to “rehabilitate” such jurors after the juror allows, at trial, that her situation might bring the juror into the case with a preordained bent of mind. Often the trial court’s question urges the juror to lay aside any prior knowledge, and a challenge for cause is thereby avoided.² These appellate cases ruled that such jurors should be excused for cause, notwithstanding “rehabilitation effected by trial judges,” thereby policing trial court use of such techniques. A broad voir dire of such jurors is called for.

The Georgia Supreme Court granted certiorari in *Walls v. Kim* and ruled there is no specific test for disqualification of jurors for favor in a civil case similar to that imposed by O.C.G.A. § 15-12-164(a) in criminal cases. At note 1 of the opinion, the Court sets forth the specific voir dire questions required in a criminal case.³ Then the Court turned its attention to civil cases. Although a per se rule of exclusion of jurors who have an employment relationship with a party is rejected, a sweeping voir dire is needed in these situations. The Court found that the trial judge failed to allow the sort of broad latitude in questioning jurors which is legally required.

[Section 6:15]

¹*Humphreys v. State*, 287 Ga. 63, 694 S.E.2d 316 (2010).

²See *Cannon v. State*, 250 Ga. App. 777, 552 S.E.2d 922 (2001)

(overruled on other grounds by *Jackson v. State*, 254 Ga. App. 562, 562 S.E.2d 847 (2002)), and *Walls v. Kim*, 250 Ga. App. 259, 549 S.E.2d 797 (2001).

³*Kim v. Walls*, 275 Ga. 177, 563 S.E.2d 847, 849 n. 1 (2002).

For a critical view of judicial overreaching in order to save jurors from challenges for cause, see J Cook, *Court Rehabilitation of Prospective Jurors: A Subversion of the Process*, 26 *Verdict* 23, No 1 (Spring 2001).

The rule of *Kim v. Walls* was applied in *Foster v. State*,⁴ which also cites *Cannon v. State*.⁵ When juror answers “no” to the question of whether she can be impartial, “neither the court nor the parties should incessantly interrogate the juror” to get her to change her mind. Foster’s conviction was reversed. However, in another case the rule of *Kim v. Walls* was held to be not violated.⁶ The doctrine of *Kim v. Walls* is ably analyzed in Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 *Ga. L. Rev.* No 4 (2003).

When there is an indication that a juror might not be fair and impartial, a court abuses its discretion if it limits further inquiry into that juror’s potential bias. In *Clarke v. State*,⁷ the court held that the trial court did not abuse its discretion when it allowed the prosecutor to ask additional questions of a juror who had earlier provided a response that suggested that he could not be an impartial juror.

Rehabilitation of jurors was the subject of *Brown v. Columbus Doctors Hosp., Inc.*⁸ and *Pitts v. State*.⁹ In *Brown*, fault was found where the court retained a juror. Other cases have gone different directions, however. Trial court could validly rehabilitate three jurors who expressed initial distrust of corporations in general, in a products liability action against automobile and trailer hitch manufacturers arising from a fatal post-collision fire. All three jurors unequivocally stated that they did not have a particular bias against either manufacturer and that they could decide the issues in the case based solely on the evidence presented and the charge given by the court, and the trial court did not ask pressing questions to inappropriately rehabilitate otherwise biased jurors.¹⁰

⁴*Foster v. State*, 258 Ga. App. 601, 574 S.E.2d 843 (2002) (overruled on other grounds by *Willis v. State*, 304 Ga. 686, 820 S.E.2d 640 (2018)).

⁵*Cannon v. State*, 250 Ga. App. 777, 552 S.E.2d 922 (2001) (overruled on other grounds by *Jackson v. State*, 254 Ga. App. 562, 562 S.E.2d 847 (2002)).

⁶*Pitts v. State*, 260 Ga. App. 553, 580 S.E.2d 618 (2003).

⁷*Clarke v. State*, 325 Ga. App.

472, 753 S.E.2d 134 (2013).

⁸*Brown v. Columbus Doctors Hosp., Inc.*, 277 Ga. App. 891, 627 S.E.2d 805 (2006) (reversible error when juror whose company had economic relationship with defendant hospital not stricken).

⁹*Pitts v. State*, 287 Ga. App. 540, 652 S.E.2d 181 (2007).

¹⁰*Ford Motor Co. v. Gibson*, 283 Ga. 398, 659 S.E.2d 346 (2008); O.C.G.A. § 15-12-134.

The case of *Hargett v. State*¹¹ ably illustrates the back-and-forth which frequently characterizes the interrogation of a juror. After revealing potential information to support a challenge for cause, the juror backed off. The court describes the scenario:

[C]ounsel for appellant Cox moved to strike potential juror Burgess for cause because the juror's father had been a police officer and assistant district attorney in California, she indicated she would believe a police officer over other witnesses at trial and she stated at one point that she had formed an impression about the guilt of appellants. The transcript of voir dire also showed that the juror was rehabilitated by questions posed by the State in which Burgess stated, *inter alia*, that she would not come in favoring the prosecution and that she both could and would judge the case based on the facts as established by the evidence and the law as given by the trial court. Because Burgess never stated a fixed and definite opinion of appellants' guilt, we conclude that the trial court did not abuse its discretion in failing to strike Burgess for cause.¹²

For a trial juror to be excused for cause, it must be shown that he or she holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence and the court's charge upon the evidence.¹³ A prospective juror's doubt as to his or her own impartiality does not demand as a matter of law that he or she be excused for cause.

Other cases have involved a juror's self-hesitation. In *Morrell v. State*,¹⁴ the Georgia Supreme Court found that a trial court did not err when it refused to strike for cause a juror who "expressed doubts about her ability to be impartial." The court reasoned that "she did not express a fixed opinion about Morrell's guilt or innocence. Nor did she unequivocally indicate that she would be unable to decide the case based upon the evidence presented at trial and the trial court's instructions."

Similarly, the Georgia Supreme Court in 2013 found that a juror's expression of doubt that she could be impartial was insufficient to show a manifest abuse of the trial court's discretion in refusing to strike her for cause.¹⁵ The Georgia Supreme Court noted that the juror's stated desire to prevent her emotions from affecting her judgment could not meet the "fixed and definite" standard for opinions disqualify a juror, indicating that a juror is not impartial. A similar approach was used when a juror admit-

¹¹*Hargett v. State*, 285 Ga. 82, 674 S.E.2d 261 (2009) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹²See *Lampley v. State*, 284 Ga. 37, 663 S.E.2d 184 (2008).

¹³*Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

¹⁴*Morrell v. State*, 313 Ga. 247, 869 S.E.2d 447 (2022).

¹⁵*Clarke v. State*, 292 Ga. 305, 737 S.E.2d 575 (2013).

ted his opinion that defendants are generally guilty.¹⁶

In an aggravated cruelty to animals case, trial court did not abuse its discretion in refusing to dismiss prospective juror for cause when juror initially expressed doubts as to his ability to be impartial, and stated that he had a “bad feeling” about the nature of the case. The juror subsequently stated that he had not formed an opinion regarding guilt or innocence and that his ultimate decision would be based on the evidence and the court’s instructions.¹⁷

In *Maldonado v. State*,¹⁸ the court held that the trial court did not abuse its discretion in failing to strike a juror for cause. There, the juror stated, among other things, during the jury selection process that she “hoped [she] could judge these individuals fairly,” that she “believe[d]” that she “could treat it fairly. It’s more of an emotional connection than a reasoning,” and that “that there was ‘some’ question or ‘some reluctance’ whether she could ‘remain completely neutral and impartial because of the nature of the crime.’”

In *Carter v. State*,¹⁹ the court held that the trial court improperly refused to strike a juror for cause, who suggested during voir dire that she might “hold it against the defendant” in the event he elected not to testify. The court noted that the juror never indicated that she would be able to follow the instructions given by the court.

A 2009 Act provides that under certain circumstances, members of an electric membership corporation may be competent to serve as a trial juror in cases involving an electric membership corporation as a party.²⁰

§ 6:16 Grounds for challenge for cause—Cases

One who has stated a belief or desire that one party should prevail,¹ or who was a member of the grand jury that returned the indictment that is presently being tried² or was a juror in an earlier trial of the same case or a case involving the same subject

¹⁶*Ellis v. State*, 292 Ga. 276, 736 S.E.2d 412 (2013) (juror was retained for trial).

¹⁷*Favors v. State*, 326 Ga. App. 373, 756 S.E.2d 612 (2014).

¹⁸*Maldonado v. State*, 325 Ga. App. 41, 752 S.E.2d 112 (2013).

¹⁹*Carter v. State*, 326 Ga. App. 144, 756 S.E.2d 232 (2014) (overruled

on other grounds by, *Willis v. State*, 304 Ga. 686, 820 S.E.2d 640 (2018)).

²⁰The Act enacts O.C.G.A. § 15-12-137.1.

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¹*Kenyon v. Brightwell*, 120 Ga. 606, 48 S.E. 124 (1904).

²*Cason v. State*, 23 Ga. App. 540, 99 S.E. 61 (1919).

matter,³ may be challenged for cause. In a criminal case, a juror was properly excused by the court, even though the juror had not been challenged by either side, where that juror had been a grand juror on the jury which had indicted a codefendant.⁴

Whether to strike a juror for cause is within the sound discretion of the trial court, and the court is not required to strike for cause a potential juror who does not hold a fixed and definite opinion of defendant's guilt or innocence that would prevent the juror from adjudicating the case based solely on the evidence presented and the court's jury instructions.⁵

A trial court must excuse a potential juror for cause based on the juror's partiality if an opinion held by the juror is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the trial court's charge upon the evidence.⁶ In order to disqualify a juror for cause, it must be established that the juror's opinion is so fixed and definite that it would not be changed by the evidence or charge of the court upon the trial of the case.⁷

In *Jackson v. State*,⁸ the Georgia Supreme Court found that a trial court did not err when it initially failed to excuse a juror for cause when that juror had indicated that the juror knew the victim of the crime. The juror was excused for cause later during the selection process.

Prospective juror who had a close relationship with defendant's son and expressed his belief that he could not render an impartial verdict was properly stricken for cause.⁹

Counsel waives a claim that a trial court erred in not questioning a prospective juror when counsel indicated that counsel did not wish to have questions posed to that prospective juror.¹⁰

In a child molestation case, the Georgia Court of Appeals found that the trial court did not abuse its discretion when it struck a prospective juror for cause. The juror had indicated that he suffered from depression, that he was on medication and that he tried to avoid stressful situations. The court deferred to the trial court's exercise of discretion, noting that the lower court

³Hawkins v. Andrews, 39 Ga. 118, 1869 WL 1644 (1869).

⁴Satterfield v. State, 256 Ga. 593, 351 S.E.2d 625 (1987).

⁵Morris v. State, 280 Ga. 184, 625 S.E.2d 391 (2006).

⁶Chatman v. State, 283 Ga. App. 673, 642 S.E.2d 361 (2007).

⁷Underwood v. State, 283 Ga. App. 638, 642 S.E.2d 324 (2007)

(overruled on other grounds by, Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018)); Bethea v. State, 337 Ga. App. 217, 786 S.E.2d 891 (2016).

⁸Jackson v. State, 314 Ga. 751, 879 S.E.2d 410 (2022).

⁹Carter v. State, 302 Ga. 685, 808 S.E.2d 704 (2017).

¹⁰Jones v. State, 314 Ga. 605, 878 S.E.2d 505 (2022).

determined that the juror would have likely ignored evidence in order to safeguard his health and that the juror's service would be unfair to both parties.¹¹

Trial court did not abuse its discretion in striking a juror for cause in an armed robbery case where the prospective juror informed the court that he had been previously arrested, that the officer had "lied about the facts in court," and had planted evidence on him.¹²

The trial court reversibly erred in failing to strike for cause a juror who expressed a fixed bias for the prosecution; juror influenced by media coverage.¹³

Failure to strike for cause two jurors amounted to an abuse of discretion in *Harper v. Barge Air Conditioning, Inc.*¹⁴ The Georgia Supreme Court has ruled that civil litigants do not have to use all of their peremptory challenges in order to raise on appeal the issue of a judge's refusal to excuse a prospective juror for cause. This aligns civil with criminal procedure on the point.¹⁵

Striking juror who believed in nullification and could not lay aside the issue of punishment was proper.¹⁶

Challenges to individual jurors for cause may be based on the ground that there is a leaning or bias on the part of the juror for or against one of the parties.¹⁷ What about a prospective juror who thinks the accused is guilty, but agrees to try to set aside an opinion about guilt?¹⁸

Trial court properly allowed a prospective juror to be stricken for cause when the potential juror stated "that he would not be a good juror, that he resented the police, that he had 'bias' about the court system, that he would not decide the case 'strictly by the book,' but would 'go[] with [his] heart instead of what's the concrete evidence,' and that he would only vote to convict the defendants 'if it's 100 percent' clear that they were guilty."¹⁹

It may not be an abuse of discretion when a trial court finds that juror confusion about burdens of proof does not warrant the

¹¹*Buwee v. State*, 359 Ga. App. 321, 857 S.E.2d 498 (2021). 311 Ga. 439, 858 S.E.2d 479 (2021)).

¹²*Harris v. State*, 345 Ga. App. 80, 812 S.E.2d 342 (2018). ¹⁶*McCoy v. State*, 285 Ga. App. 246, 645 S.E.2d 728 (2007).

¹³*Maxwell v. State*, 282 Ga. 22, 644 S.E.2d 822 (2007). ¹⁷*Perry v. State*, 264 Ga. 524, 448 S.E.2d 444 (1994).

¹⁴*Harper v. Barge Air Conditioning, Inc.*, 313 Ga. App. 474, 722 S.E.2d 84 (2011). ¹⁸See *Fults v. State*, 274 Ga. 82, 548 S.E.2d 315 (2001) (prospective juror need only be excused for cause when it is shown that opinion is fixed and definite).

¹⁵*Stolte v. Fagan*, 291 Ga. 477, 731 S.E.2d 653 (2012) (overruled on other grounds by *Williams v. Harvey*, 303 Ga. 399, 811 S.E.2d 399 (2018)). ¹⁹*Anthony v. State*, 303 Ga. 399, 811 S.E.2d 399 (2018).

juror's removal.²⁰

Challenges for cause have been litigated in a number of cases. The decision to excuse a potential juror for cause lies within the sound discretion of the trial court, and a prospective juror may be excused for cause when the juror holds an opinion about the case which is so fixed that the juror will be unable to set it aside.²¹ In a case where a juror expressed a distinct racial bias against the accused, it was error to refuse to strike the juror for cause. The defendant's conviction was reversed in *Menefee v. State*.²²

Failure to declare a mistrial when a juror volunteered during voir dire an opinion that the defendant was guilty was not erroneous since a motion for mistrial is not ripe before the jury is sworn. The judge promptly instructed the prospective jurors to respond only to the questions and not make extraneous remarks, and the juror in question was stricken for cause.²³

Venirewoman who purportedly stated that she was biased against use of illegal drugs, having seen their effect on a relative, was not subject to discharge for cause in murder and assault prosecution involving shootings occurring during transaction for purchase of cocaine, where venirewoman told trial court she would try to put her emotions aside and decide the case on the evidence presented.²⁴

A prospective juror's initial statement that he would automatically impose a death sentence if the defendant were convicted of malice murder and that he had formed an opinion that police had "probably got the right man" when they arrested the defendant, did not show disqualification of the juror. The juror was confused by the first question about the death penalty, and his previously formed opinion of guilt was not so "fixed and definite" as to necessitate excusal for cause.²⁵

The refusal to excuse the victim of a recent crime and an accountant laboring under pressing responsibilities for cause as prospective jurors was not error, even though it appeared obvious from the record that neither was anxious to serve.²⁶

²⁰Gray v. State, 298 Ga. 885, 785 S.E.2d 517 (2016); Anthony v. State, 298 Ga. 827, 785 S.E.2d 277 (2016).

²¹Rucker v. State, 270 Ga. 431, 510 S.E.2d 816 (1999). See Whatley v. State, 270 Ga. 296, 509 S.E.2d 45 (1998).

²²Menefee v. State, 270 Ga. 540, 512 S.E.2d 275 (1999).

²³Graves v. State, 260 Ga. 779, 399 S.E.2d 922 (1991).

²⁴Heard v. State, 274 Ga. 196, 552 S.E.2d 818 (2001).

²⁵Foster v. State, 258 Ga. 736, 374 S.E.2d 188 (1988).

²⁶Benham v. State, 259 Ga. 249, 379 S.E.2d 506 (1989).

In *Clarke v. State*,²⁷ the court held that the trial court did not abuse its discretion in refusing to strike a juror for cause. In *Clarke*, the defendant was convicted of two counts of financial transaction card fraud. The defendant sought to have a juror stricken for cause, after the juror had indicated that his businesses and his family had been previously victimized by credit card fraud. The appeals court noted that “there is no per se rule excluding the victims of crime, even if the crime charged in the indictment is similar to the crime of which the potential juror was a victim.” The court further stated that the record demonstrated that the juror’s responses did not reveal that his mind was so fixed so as to prevent him from rendering an impartial verdict.

In a rape case, the appeals court in *Haynes v. State*²⁸ held that the trial court did not abuse its discretion in refusing to excuse a juror for cause who indicated that she had been a victim of child abuse, that she was not impartial, that she had already formed an opinion about the defendant’s guilt, and that she would have to be convinced of his innocence. However, upon further questioning, the juror declared that she could not want to, but that she could be fair and impartial. In reaching its decision, the appeals court reasoned that the juror never indicated any bias against the defendant personally, and said that she could put her life experiences aside and try to be fair and impartial.

The fact that a potential juror would credit police officer testimony over that of an ordinary citizen does not give rise to a challenge for cause. However, a prospective juror was properly excused when the juror stated it would be hard for him to convict a young black man. A juror’s belief that the judicial system is unfair may be ground for excusal.²⁹ A trial court properly struck a juror for cause after the juror stated that she would not base her decision on the evidence and on the law if to do so would result in the defendant’s imprisonment.³⁰

One who has been active in the prosecution of the defendant may be challenged for cause.³¹

It has been held that one who has been convicted of a crime involving moral turpitude is incompetent to act as a juror.³² Even if a juror who had no felony convictions aside from his traffic-offense habitual-violator conviction several years before trial would have been excusable for cause if he had been timely chal-

²⁷*Clarke v. State*, 325 Ga. App. 472, 753 S.E.2d 134 (2013).

²⁸*Haynes v. State*, 326 Ga. App. 336, 756 S.E.2d 599 (2014).

²⁹*Roberts v. State*, 276 Ga. 258, 577 S.E.2d 580 (2003).

³⁰*Brown v. State*, 261 Ga. 184, 402 S.E.2d 725 (1991).

³¹Am. Jur. 2d, Jury § 274.

³²*Dodys v. State*, 73 Ga. App. 483, 37 S.E.2d 173 (1946).

lenged, his crime was not so infamous or recent that he was subject to challenge for the first time after trial, particularly where defense counsel learned of the possible disqualification during trial and did not immediately raise the issue.³³

Death qualification of jurors selected to hear a murder case does not lead to selection of jurors that are slanted in favor of conviction at the guilt-innocence phase of a death penalty trial.³⁴ This point was also made in *Potts v. State*.³⁵

The excusal of a juror whose voir dire statements indicated that she was leaning towards imposition of a life sentence in a sentencing trial was a reversible error, where the voir dire testimony established no more than that the juror had some qualms about imposing a death sentence and did not establish reluctance to impose a death sentence so strong it would prevent or substantially impair the performance of her duties as a juror.³⁶ However, a trial court's finding that a juror was disqualified was not clearly erroneous where the prospective juror's answers to questions about the death penalty indicated that she was opposed to the death penalty and would automatically vote for a life sentence in a murder case.³⁷

Prospective jurors in capital cases are properly excluded where: (1) they make it unmistakably clear that they would automatically vote against the death penalty without regard to the evidence in the case before them; and (2) where they make it unmistakably clear that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.³⁸

In order for a juror to be stricken for cause due to prejudice in favor of the death penalty, he or she must be irrevocably committed to impose the sentence of death regardless of the court's charge, despite the facts and circumstances of the case.³⁹

Even though the potential juror was not actually selected and the defense did not use all of its strikes, the death penalty would be reversed where the court failed to exclude for cause a panel member who indicated that, regardless of anything presented in the nature of mitigation, he would vote for the death penalty if

³³*Bennett v. State*, 262 Ga. 149, 414 S.E.2d 218 (1992).

³⁴*Leach v. State*, 259 Ga. 33, 376 S.E.2d 667 (1989).

³⁵*Potts v. State*, 259 Ga. 96, 376 S.E.2d 851 (1989).

³⁶*Jarrell v. State*, 261 Ga. 880, 413 S.E.2d 710 (1992).

³⁷*Foster v. State*, 258 Ga. 736, 374 S.E.2d 188 (1988).

³⁸*Allen v. State*, 248 Ga. 676, 286 S.E.2d 3 (1982).

³⁹*Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982) (abrogated on other grounds by, *Jones v. State*, 261 Ga. 665, 409 S.E.2d 642 (1991)).

the defendant were convicted of murder.⁴⁰

A juror properly was not dismissed for cause where he indicated he would be governed by the judge's instructions notwithstanding his personal feelings that the death penalty was the only proper punishment for murder.⁴¹

Disqualification, for cause, of three prospective jurors was not required in capital murder case, though they expressed a preference for the death penalty for a convicted murderer, one of them also expressed a reluctance to impose life imprisonment with possibility of parole, two of them expressed skepticism about insanity defense, and one of them, whose daughter worked as agent for Department of Justice, responded in the negative when asked awkwardly-phrased question about whether it was fair to a person charged with murder of a police officer to have her on the jury, where the three prospective jurors indicated that they could vote for all three possible sentences and consider mitigating evidence, and jurors who were skeptical of insanity defense indicated they could consider such a defense. Trial court may ask questions designed to clarify the prospective juror's views on the death penalty, before ruling on qualification to serve as juror.⁴²

Jury selection procedures were studied in *Chambers v. State*,⁴³ which held that whether to grant a challenge for cause on account of bias or prejudice rests in the sound discretion of the court. Trial court was not required to strike venireperson for cause after venireperson expressed an unawareness that the State had the burden of proof in a criminal case, in a prosecution for obstruction of a police officer; venireperson did not express a partiality for the State or the defense, and the venireperson stated that he could follow the court's instructions regarding the burden of proof. Trial court additionally was not required to strike venireperson who worked for the county sheriff's office for cause based on venireperson's alleged status as a certified law enforcement officer with arrest powers, where the defendant specifically stated at trial that the venireperson's profession would not provide a reason to strike for cause, and the record did not establish that venireperson was employed with the county sheriff's office as a certified law enforcement officer with arrest powers. When challenging the trial court's failure to strike a venireperson for cause, the burden is on the party alleging error to show it affirmatively by the record, and when he does not do so, the judg-

⁴⁰Pope v. State, 256 Ga. 195, 345 S.E.2d 831 (1986) (overruled on other grounds by, Nash v. State, 271 Ga. 281, 519 S.E.2d 893 (1999)).

⁴¹Rogers v. State, 256 Ga. 139, 344 S.E.2d 644 (1986).

⁴²Brannan v. State, 275 Ga. 70, 561 S.E.2d 414 (2002).

⁴³Chambers v. State, 252 Ga. App. 190, 556 S.E.2d 444 (2001).

ment is assumed to be correct and must be affirmed.

In criminal cases, full time police officers must, upon request, be stricken from a jury panel for cause, and failure to do so is a reversible error whether or not the defendant uses all of his peremptory challenges.⁴⁴

A uniformed employee of the State Patrol did not have to be stricken for cause where he was employed as a civilian and had no arresting authority or police powers.⁴⁵

The dimensions of challenges for cause when a prospective juror is a law enforcement officer were explored in *Terrell v. State*.⁴⁶ During voir dire, prospective juror Smith stated that he was a full-time military policeman with the Georgia National Guard, with arrest power. Terrell moved to excuse juror Smith for cause, but the trial court denied the motion. The Georgia Supreme Court ruled that it is well settled law that full-time police officers with arrest powers must be excused if challenged for cause. Reversal of the conviction was required.

Although a full-time police officer may be challenged for cause, Georgia has declined to extend the rule of exclusion to corrections officers, security guards, or those with prior law enforcement experience.⁴⁷

Trial court did not abuse its discretion when it failed to excuse a certain prospective juror for cause because of his law enforcement background, his friendship with two potential witnesses for the state, his acknowledged bias in favor of the prosecution, and his admission that, for him, the appellant would have the burden of proving self-defense.⁴⁸

Corrections officers in general are not subject to strict rule of automatic removal for cause upon request by defendants during jury selection.⁴⁹

In another case, the trial court did not abuse its discretion in refusing to excuse for cause juror who had been police officer for three years, as juror knew nothing about the case, did not know any of the witnesses, said he would follow court's instructions, said he was not predisposed to any verdict, and said he would consider only evidence presented in the courtroom. Trial court did not abuse its discretion in refusing to excuse for cause juror who was a friend of the manager of the restaurant at which both

⁴⁴Harris v. State, 255 Ga. 464, 339 523 S.E.2d 294 (1999).

S.E.2d 712 (1986) (overruled on other grounds by, Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018)).

⁴⁷See § 36:12, *infra*.

⁴⁵Stocks v. State, 182 Ga. App. 162, 355 S.E.2d 103 (1987).

⁴⁸Anthony v. State, 298 Ga. 827, 785 S.E.2d 277 (2016).

⁴⁶Terrell v. State, 271 Ga. 783, 674 S.E.2d 130 (2009).

⁴⁹Jones v. State, 296 Ga. App. 288,

defendant and murder victim worked and admitted talking to friend around time of murder, as juror did not know specifics of case, said she had not formed an opinion regarding defendant's guilt or innocence, and said she could decide the case only on its merits. Another prospective juror in murder trial was not subject to excusal for cause due to his employment as a corrections officer, as he was not a law enforcement officer and had no general arrest power.⁵⁰

The trial court did not err in refusing to excuse a prospective juror for cause on the ground that he was a certified police officer where the juror stated that he was retired, no longer connected with any law enforcement agency in any official capacity, and no longer exercising any "rights" under his certification.⁵¹

Although potential jurors who are full time police officers must be excused if challenged for cause in a criminal case, the trial court is not required to automatically disqualify part time police officers who are challenged for cause.⁵² However, refusal to dismiss two police officers from jury panel for cause was error, where officers were on full-time duty and wore uniforms in court.⁵³

Any direct financial interest in the case disqualifies a juror.⁵⁴ Certain other relationships to a party are grounds for challenge.

Disqualification as a juror has been held to arise from a relationship to one who, though not a party to the litigation, is financially interested in or may be financially affected by the outcome of the controversy. For example, the rule covers a juror who is related to one entitled to a percentage of the recovery or to one who has some interest in land in controversy.⁵⁵

Where sole stockholder and chief administrative officer of corporation was party to action, prospective juror who was employee of corporation should have been disqualified.⁵⁶ It is not error to excuse juror for cause because he was employee at plant where defendant was manager with the power to discharge.⁵⁷

Two prospective jurors' possible bias against the offense of drunk driving because of having contributed to Mothers Against Drunk Driving and one's having a friend who had been killed by a drunk driver 10 years previously did not demonstrate that they could not be fair and impartial toward the defendant so as to

⁵⁰McPherson v. State, 274 Ga. 444, 553 S.E.2d 569 (2001).

⁵¹Smith v. State, 201 Ga. App. 82, 410 S.E.2d 202 (1991).

⁵²Denison v. State, 258 Ga. 690, 373 S.E.2d 503 (1988).

⁵³Hutcheson v. State, 246 Ga. 13, 268 S.E.2d 643 (1980).

⁵⁴Am. Jur. 2d, Jury §§ 272 to 274.

⁵⁵Snead v. State, 167 Ga. 271, 145 S.E. 510, 63 A.L.R. 179 (1928).

⁵⁶Carr v. Carr, 240 Ga. 161, 240 S.E.2d 50 (1977).

⁵⁷Kesler v. State, 249 Ga. 462, 291 S.E.2d 497 (1982).

sustain challenges for cause where neither juror had any knowledge or connection with this particular incident or the defendant nor displayed a fixed opinion that could not be changed by the evidence or instructions.⁵⁸

Members of electric membership corporations should be disqualified from serving as jurors in criminal trials in which the corporation is the victim of the crime charged.⁵⁹ For civil cases, see § 6:15, *supra*.

A juror who was a full-time employee of the district attorney's office should have been stricken for cause, even if she was actually unbiased, since her service as a juror while an employee of the same district attorney who prosecuted the defendant created a substantial appearance of impropriety.⁶⁰

In the context of an ineffectiveness of counsel claim, the appeals court concluded that defense counsel was not deficient in failing to strike a juror for cause. *Barmore v. State*⁶¹ involved a claim of child molestation and sexual battery case. The defendant argued that because the juror at issue "was the president of the board of the GreenHouse, which interviewed the victim in this case, [the juror] should be considered in essence an employee of the district attorney's office and stricken for cause." In rejecting the defendant's contention, the appeals court reasoned that the entity of which the juror was associated was "a separate, duly formed corporation, operating under the district attorney's Victim Assistance Program," that neither the corporate entity nor the juror was compensated by the district attorneys office, that there was no evidence that the juror "had any day-to-day operational role within" the corporate entity "or worked with victims in any way," that the juror's acquaintance with the "members of the district attorney's office and law enforcement [was] not sufficient to strike him for cause," and that the juror stated that he could be impartial.

A trial court was not required to excuse for cause in a malice-murder prosecution a prospective juror whose father was sheriff of the prosecuting county and who was a friend of the victim's widow, even though defendant argued that, in addition, the juror repeatedly demonstrated bias and lack of credibility. The defendant did not show any direct involvement by the sheriff in prosecution of the case, and the juror firmly concluded, and so

⁵⁸Lord v. State, 194 Ga. App. 749, 392 S.E.2d 17 (1990).

⁵⁹Lowman v. State, 197 Ga. App. 556, 398 S.E.2d 832 (1990) (overruled on other grounds by, Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018)).

⁶⁰Beam v. State, 260 Ga. 784, 400 S.E.2d 327 (1991) (overruled on other grounds by, Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018)).

⁶¹Barmore v. State, 323 Ga. App. 377, 746 S.E.2d 289 (2013).

stated, that she could decide the case solely on evidence presented.⁶²

The trial court properly struck for cause a potential juror who was an attorney for a defense firm. She was apparently handling the civil aspect of a criminal case involving the prosecutor.⁶³

The defendant's wife's uncle's wife was not disqualified from serving as a juror; a criminal defendant is considered related by marriage to blood relatives of his wife, but not to people that his wife is related to only by marriage.⁶⁴

Challenges for cause to prospective jurors who were employees of the university, but not otherwise assigned to the university library, were not erroneously denied in a criminal case in which only the defendant and the State were the parties; mere employment by the university when the actual victim was in the university library was not a per se disqualification.⁶⁵

The trial court properly excused for cause a juror who was related to the defendant, even though the extent of that relationship was not known.⁶⁶

The trial court did not err in refusing to excuse for cause a potential juror who was a clerk in the office of the magistrate who had issued the warrant for the defendant's arrest. The court noted that the potential juror stated that she was unaware of any of the circumstances of the case and that her mind was free of bias. In distinguishing *Beam v. State*,⁶⁷ which involved an employee of the district attorney's office, the court reasoned that a magistrate's function is judicial, not prosecutorial and must be discharged impartially.⁶⁸

Fact that juror is related to one of witnesses for state in criminal prosecution does not render juror incompetent and subject to dismissal for cause.⁶⁹

While it is held that a party cannot complain because a juror is related to him, it is a general rule that one related within a prohibited degree to a party in a case is disqualified to serve as a

⁶²*Stokes v. State*, 281 Ga. 825, 642 S.E.2d 82 (2007) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

⁶³*Wolfe v. State*, 273 Ga. 670, 544 S.E.2d 148 (2001).

⁶⁴*Alexander v. State*, 260 Ga. 870, 401 S.E.2d 7 (1991).

⁶⁵*Willingham v. State*, 198 Ga. App. 178, 401 S.E.2d 63 (1990).

⁶⁶*Wells v. State*, 261 Ga. 282, 404 S.E.2d 106 (1991).

⁶⁷*Beam v. State*, 260 Ga. 784, 400 S.E.2d 327 (1991) (overruled on other grounds by, *Willis v. State*, 304 Ga. 686, 820 S.E.2d 640 (2018)).

⁶⁸*Roberts v. State*, 261 Ga. 813, 411 S.E.2d 496 (1992).

⁶⁹*Taylor v. State*, 243 Ga. 222, 253 S.E.2d 191 (1979).

juror on the case and is subject to challenge by the adverse party.⁷⁰ This applies to relationship by affinity as well as by consanguinity.⁷¹

A juror was not excused for cause even though he knew the murder victim's family and had learned things from the victim's brother, because to disqualify a juror on the basis that he had formed an opinion based on hearsay, the opinion must be so fixed that it would not be changed by the evidence.⁷²

Nor was disqualification required by the fact that a prospective juror's son was the sheriff.⁷³

In *Cohen v. Baxter*, a patient of a doctor accused in a medical malpractice action was not excused for cause. Citing O.C.G.A. § 15-12-134, the Georgia Supreme Court supported the trial judge.⁷⁴

In a medical malpractice action, trial court did not abuse its discretion in failing to dismiss a juror who indicated that she was a patient of a doctor employed by one of the defendants. The record did not support the asserted claim that juror would be biased in favor of the defendants on that basis. However, the trial court did abuse its discretion in failing to dismiss that same juror given that she indicated during voir dire that she would be biased in favor of the defendants given her employment status as a health professional.⁷⁵

Kinship between jurors was not a ground to excuse for cause a juror who was the father and employer of a second juror.⁷⁶

There was no manifest abuse of trial court's discretion in striking prospective juror for cause in prosecution for malice murder, aggravated assault, and possession of a firearm during the commission of a crime; prospective juror testified that he was "close friends" with each of the three defendants, and although the juror later said that he could properly act as a juror, prospective juror, when first asked if he could put aside his feelings of friendship and decide the case upon proper basis, said he would have

⁷⁰*Crawley v. State*, 151 Ga. 818, 108 S.E. 238, 18 A.L.R. 368 (1921) (overruled in part on other grounds by, *Garrett v. State*, 203 Ga. 756, 48 S.E.2d 377 (1948)).

⁷¹*Garrett v. State*, 203 Ga. 756, 48 S.E.2d 377 (1948).

⁷²*Berry v. State*, 267 Ga. 605, 481 S.E.2d 203 (1997).

⁷³*Carr v. State*, 267 Ga. 547, 480 S.E.2d 583 (1997).

⁷⁴*Cohen v. Baxter*, 267 Ga. 422, 479 S.E.2d 746 (1997).

⁷⁵*Scarpaci v. Kaufman*, 328 Ga. App. 446, 762 S.E.2d 172 (2014) (overruled on other grounds by, *Willis v. State*, 304 Ga. 686, 820 S.E.2d 640 (2018)).

⁷⁶*Bryant v. State*, 268 Ga. 664, 492 S.E.2d 868 (1997), citing O.C.G.A. § 15-12-163(b)(4) (however, near kin of prosecutor, defendant or victim are disqualified).

trouble doing so.⁷⁷ On the other hand, in the same case, the trial court was not required to strike a prospective juror for cause when the prospective juror indicated she knew the victim and said she had a “great deal of compassion” for the family. The prospective juror responded affirmatively when asked if, considering that compassion, she could be a fair, impartial juror and render a verdict based on the evidence and the law, without regard to her relationship to the victim’s family.

The trial court’s refusal to excuse prospective jurors for cause after a juror admitted that he overheard a brief conversation about the case between prospective jurors on the panel in the jury room was not an abuse of discretion. The trial court permitted the parties to individually question the jurors about the jury room conversation, and none of the jurors indicated that anything they heard during voir dire would affect their ability to impartially decide the case.⁷⁸

Defense counsel was not ineffective when he failed to move for a mistrial or request that the jury be removed after five jurors indicated that they had been exposed to the case via the media. The Georgia Supreme Court reasoned that all of the jurors indicated that, despite their media exposure, they could be impartial.⁷⁹

§ 6:17 Conditional grounds for challenge

In certain cases a juror may be challenged for cause unless he states that he can set aside the fact, opinion or feeling and render a fair and impartial verdict. The object of a statute using such words is to exclude any person who has made up his mind or formed a judgment in advance. The fact that a juror is prejudiced for or against certain types of action or defense involved in the case on trial is a conditional ground.¹

It is not required that jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the

⁷⁷Adams v. State, 283 Ga. 298, 766 S.E.2d 45 (2014).
658 S.E.2d 627 (2008).

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⁷⁸Lewis v. State, 279 Ga. 756, 620 S.E.2d 778 (2005).

¹Am. Jur. 2d, Jury § 291.

⁷⁹McNair v. State, 296 Ga. 181,

presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.²

The trial court was not required to strike for cause a computer consultant who had an ongoing business relationship with district attorney's office and who also was a friend of the district attorney.³ The court in *Berry* examined the rule previously laid down in *Beam v. State*,⁴ where a juror should have been struck for being a full time employee of the district attorney's office prosecuting the case, but chose not to extend the rule of *Beam* beyond the full time employees of the district attorney's office.

Prospective jurors who either knew murder victims or had some knowledge of the case from pretrial publicity were not required to be excused for cause, as all such prospective jurors testified they could be fair and impartial and could decide case based on the evidence in court.⁵

For more on pretrial publicity and jurors, see § 3:9, *supra*.

§ 6:18 Facts that normally are not grounds for challenge

Being an inhabitant of a municipality or county that is party to the suit does not render one incompetent to serve as juror.¹

A juror who stated he had an opinion on a defendant's guilt was not excused where he also stated that he could set aside that opinion.²

Automatic exclusion of a juror is not required because the juror gives a "yes" answer to the O.C.G.A. § 15-12-164 question concerning the juror's having already formed an opinion based on hearsay.³

The deceased was killed violently by blows to the head in *Chandler v. State*.⁴ At the murder trial, a prospective juror stated that his sister had been killed by a weapon and that his estranged wife had been killed in a confrontation. The Georgia Supreme Court saw nothing in the juror's statements which indicated that

²*Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

³*Berry v. State*, 302 Ga. App. 31, 690 S.E.2d 428 (2010) (overruled on other grounds by, *Willis v. State*, 304 Ga. 686, 820 S.E.2d 640 (2018)).

⁴*Beam v. State*, 260 Ga. 784, 400 S.E.2d 327 (1991) (overruled on other grounds by, *Willis v. State*, 304 Ga. 686, 820 S.E.2d 640 (2018)). See § 6:16, *supra*.

⁵*Lee v. State*, 258 Ga. 762, 374 S.E.2d 199 (1988).

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¹O.C.G.A. §§ 15-12-136 and 15-12-137.

²*Henderson v. State*, 257 Ga. 434, 360 S.E.2d 263 (1987).

³*Childs v. State*, 257 Ga. 243, 357 S.E.2d 48 (1987).

⁴*Chandler v. State*, 281 Ga. 712, 642 S.E.2d 646 (2007).

he held an opinion regarding defendant's guilt or innocence, and the juror's answers to questions required by the voir-dire statute did not indicate any basis to strike him for cause.⁵

In *Simmons v. State*,⁶ the Georgia Supreme Court held that a juror's pretrial exposure to media coverage of a crime does not mandate that the juror be excused for cause when the juror expresses the ability to set aside anything he or she had heard or seen and base his or her personal verdict only on the evidence presented in the courtroom.⁷

Defendant was not entitled to excuse prospective juror for cause based on his employment as a county probation officer and night intake officer, where prospective juror did not have arrest powers and, when prosecuting attorney asked him whether he could be a fair and impartial juror, he responded. "I believe I could be fair."⁸ Defendant also was not entitled to excuse another prospective juror for cause based on his employment as a police officer for corporation and his prior employment as a deputy sheriff, where prospective juror was not a sworn police officer with arrest power at time of trial, and further, he stated he believed he could set aside any preconceived beliefs and decide case solely on basis of evidence admitted at trial and law given in instructions by court. Trial court is not required to strike for cause a potential juror who simply questions his or her impartiality or expresses reservations about his or her ability to set aside personal experiences.

Juror's comment during voir dire that he was neighbor of defendant and that defendant had been "a problem" did not require court to strike entire panel of 60 jurors, in prosecution for aggravated assault on a police officer. The prospective juror's comment did not imply that defendant was guilty of crime with which he was charged, only three jurors were sitting in audience at time of statement, trial court excused juror who made the statement, and when trial court questioned three jurors who were present, they indicated that they would still be able to honor their oath to render fair and impartial verdict based on evidence and law in the case.⁹ Generally, dismissal of a jury panel is required when, during voir dire, a prospective juror relays information that is specific to the defendant and germane to the case for which the defendant is on trial. Dismissal is not required, however, when the statements establish only gossamer possibilities of prejudice. Also, a juror's statement of belief in defendant's guilt based upon media reports did not require striking of the

⁵O.C.G.A. § 15-12-164(a).

⁸Clark v. State, 265 Ga. App. 112, 593 S.E.2d 28 (2003).

⁶Simmons v. State, 282 Ga. 183, 646 S.E.2d 55 (2007).

⁷Simmons v. State, 282 Ga. 183, 646 S.E.2d 55 (2007).

⁹Logan v. State, 265 Ga. App. 134, 593 S.E.2d 14 (2003).

panel.¹⁰

In *Byrd v. State*,¹¹ a prospective juror's expressed doubts about ability to set aside personal experiences in deciding defendant's guilt, without more, did not necessarily warrant removal of juror for cause, in a trial for felony murder, aggravated assault, and possession of firearm during commission of crime. The juror never stated fixed and definite opinion about defendant's guilt.

When resisting a challenge for cause, the court is aided by a presumption. The law presumes that potential jurors are impartial, and the burden of proving partiality lies with the party seeking to have a juror disqualified.¹²

Generally, "[a] juror's knowledge of, or non-familial relationship with, a witness, attorney, or party provides a basis for disqualification only if it is shown that it has resulted in the juror having a *fixed opinion* of the accused's guilt or innocence or a bias for or against the accused." In *Anthony v. State*,¹³ it was held that the trial court did not err when it denied defendant's request to have a juror removed during the trial. It was learned during the trial that the juror knew an officer who testified for the prosecution.

In *McKelvin v. State*,¹⁴ the trial court acted within its discretion when it denied defendant's request to remove a juror who had allegedly had been sleeping during portions of the trial. The Georgia Supreme Court noted that "the accounts of Juror H's attentiveness were neither unanimous nor conclusive."

In *Leslie v. State*,¹⁵ the Georgia Court of Appeals held that the trial court did not abuse its discretion when it refused to strike a juror for cause. The juror had expressed some concerns regarding the juror's "English skills," but there was not any indication that the juror was unable to follow the proceedings.

When appealing his murder conviction, a defendant contended the trial judge erred by refusing to strike for cause a potential juror. Holding that a potential juror's opinion of her own qualifications are not controlling, the Georgia Supreme Court approved the retention of a juror who initially had expressed misgivings about her ability to be fair. Ultimately, the juror said in response to a question about whether she could give a fair judgment that "Yes, I think I'm a fair person." The Supreme Court applied the presumption that potential jurors are impartial, and the

¹⁰*Edwards v. State*, 282 Ga. 259, 646 S.E.2d 663 (2007).

¹¹*Byrd v. State*, 277 Ga. 554, 592 S.E.2d 421 (2004).

¹²*Chatman v. State*, 283 Ga. App. 673, 642 S.E.2d 361 (2007).

¹³*Anthony v. State*, 348 Ga. App. 417, 823 S.E.2d 92 (2019).

¹⁴*McKelvin v. State*, 305 Ga. 39, 823 S.E.2d 729 (2019).

¹⁵*Leslie v. State*, 355 Ga. App. 244, 842 S.E.2d 550 (2020).

defendant was unable to carry the burden of defeating the presumption.¹⁶

Having family members and friend in law enforcement does not constitute ground to strike for cause; inattentiveness to jury selection, strike based on this ground constitutes a race neutral reason.¹⁷

Former in-law of victim, sheriff's daughter, son of victim advocate, and boyfriend of an assistant district attorney all properly allowed to remain in jury panel; defense merely stating that it believed a potential juror was dishonest, without more, is insufficient to overcome a *McCollum* challenge.¹⁸

A victim was shot twice in the leg, and the massive blood loss caused by these wounds resulted in his death. The defendant was convicted as a party to felony murder. During the trial a juror was called who had been an FBI agent many years prior. A juror must be excused for cause if the person is employed as a full-time police officer with arrest powers. However, that rule does not require a trial court to strike a former law enforcement officer "who had left the employ of the FBI about 30 years before the trial of this case."¹⁹

Trial court refusal to allow defense to inquire of jury panel members about how the defendant's decision not to testify might affect them and whether they would prefer a police officer's testimony upheld; exposure to pretrial publicity, alone, does not form grounds to disqualify.²⁰ Another case applied the rule of *Simmons* and barred the defense from asking whether a juror would believe or prefer police officer testimony over that of an ordinary witness.²¹

Denial of motion to strike retired police officer for cause affirmed.²²

Panel member with murdered family member was not required to be removed for cause; trial court's rehabilitation of juror was not improper; ground for strike that panel member failed to timely return juror information form or that panel member had

¹⁶Clarke v. State, 292 Ga. 305, 737 S.E.2d 575 (2013).

¹⁷Johnson v. State, 283 Ga. App. 524, 642 S.E.2d 170 (2007) (overruled on other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹⁸Stokes v. State, 281 Ga. 825, 642 S.E.2d 82 (2007) (overruled on other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹⁹Ellis v. State, 292 Ga. 276, 736 S.E.2d 412 (2013).

²⁰Simmons v. State, 282 Ga. 183, 646 S.E.2d 55 (2007).

²¹Leonard v. State, 292 Ga. 214, 735 S.E.2d 767 (2012).

²²Underwood v. State, 283 Ga. App. 638, 642 S.E.2d 324 (2007) (overruled on other grounds by, Willis v. State, 304 Ga. 686, 820 S.E.2d 640 (2018)).

eyebrow ring did not offend *Batson*.²³

§ 6:19 Passing upon challenges for cause

If a juror meets the statutory qualifications, the determination of whether a challenge for cause should be allowed rests within the sound discretion of the trial court. The court's ruling will not be disturbed unless it has clearly abused its discretion.¹

The parties must use diligence and exercise their right to challenge; if they fail to do so, they waive any alleged incompetency of the juror.² For example, in *Rice v. State*, 292 Ga. 191, 733 S.E.2d 755 (2012) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)), the defendant waived a “for cause” challenge concerning a juror's previous exposure to the case in the media. The defendant moved to excuse the juror on other grounds at trial.

Trial court abused its discretion, requiring reversal of defendant's convictions, in failing to remove for cause a prospective juror who stated that a person charged with a crime must be guilty of something, stated that he was not presuming innocence, and gave no indication that he intended to be impartial during trial.³

Defendant's failure to exhaust peremptory strikes before the twelfth juror was impaneled does not render the error harmless.⁴ However, older cases held that the denial of a challenge for cause is not error, unless the party so challenging has exhausted his peremptory challenges.⁵ The Georgia Supreme Court has ruled that civil litigants do not have to use all of their peremptory challenges in order to raise on appeal the issue of a judge's refusal to excuse a prospective juror for cause. This aligns civil with criminal procedure on the point.⁶

A trial juror was properly removed for cause after jury selection when he discovered he was previously related to defendant

²³*Chandler v. State*, 281 Ga. 712, 642 S.E.2d 646 (2007).

[Section 6:19]

¹*Cox v. State*, 17 Ga. App. 727, 88 S.E. 214 (1916). See also *Adams v. State*, 283 Ga. 298, 658 S.E.2d 627 (2008).

²*Millers Nat. Ins. Co. v. Waters*, 97 Ga. App. 103, 102 S.E.2d 193 (1958).

³*Ham v. State*, 303 Ga. App. 232, 692 S.E.2d 828 (2010) (overruled on other grounds by, *Willis v. State*, 304

Ga. 686, 820 S.E.2d 640 (2018)).

⁴*Berry v. State*, 302 Ga. App. 31, 690 S.E.2d 428 (2010) (overruled on other grounds by, *Willis v. State*, 304 Ga. 686, 820 S.E.2d 640 (2018)).

⁵*Pickering v. Wagnon*, 91 Ga. App. 610, 86 S.E.2d 621 (1955); *Foster v. State*, 240 Ga. 858, 242 S.E.2d 600 (1978). See § 6:12, *supra*.

⁶*Stolte v. Fagan*, 291 Ga. 477, 731 S.E.2d 653 (2012) (overruled on other grounds by, *Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021)).

by marriage.⁷

A trial juror was also properly removed after the close of evidence when the juror violated his oath not to conduct independent research, and the juror had a business relationship with the defendant's attorney.⁸

§ 6:20 Swearing the jury

Once the Jury has been determined, the oath is administered. The oath to be administered in civil cases is contained in O.C.G.A. § 15-12-138. The oath for criminal cases is found in O.C.G.A. § 15-12-139.

The record must show that the jury was sworn, but in the absence of recitals to the contrary, it will be presumed that it was duly sworn to try the issues.¹ Objection to the form of the oath must be made at the time the oath is administered, otherwise it is waived.² It was not necessary to reswear the jury before it heard the second charge in a bifurcated case.³

Petit jury oath provided in statute governing oath in criminal cases is mandatory, and a trial court's total failure to give the oath to the jury is reversible error.⁴

A conviction by an unsworn jury is a nullity, and where it appears affirmatively that the jury was not sworn, a subsequent conviction must be set aside and the case must be remanded for retrial.⁵

Trial court properly granted a new trial where the jury was not administered the petit oath prior to beginning deliberations and was not sworn until it had almost rendered a verdict. This rendered the jury "fatally infirm" and the trial a mere nullity.⁶

⁷Krause v. State, 286 Ga. 745, 691 S.E.2d 211 (2010).

⁸Smith v. State, 298 Ga. 357, 782 S.E.2d 26 (2016).

[Section 6:20]

¹Am. Jur. 2d, Jury § 345; Long v. England, 28 Ga. App. 818, 113 S.E. 50 (1922).

²Smith v. State, 63 Ga. 168, 1879 WL 2473 (1879).

³Booker v. State, 257 Ga. 37, 354 S.E.2d 425 (1987).

⁴Adams v. State, 286 Ga. 496, 690 S.E.2d 171 (2010).

⁵Benton v. State, 286 Ga. App. 736, 649 S.E.2d 793 (2007).

⁶State v. Desai, 337 Ga. App. 873, 789 S.E.2d 222 (2016).

Chapter 7

Opening Statements

- § 7:1 Right to make opening statements
- § 7:2 Order of opening statements
- § 7:3 Content of opening statements
- § 7:4 Limitations on opening statement

§ 7:1 Right to make opening statements

Opening statements are made by the attorneys to acquaint the jury with the facts they expect to prove. Such statements are not evidence, and any statement made by an attorney which is not based on the evidence should be disregarded by the jury.¹

The defendant may reserve her opening statement and delay delivery until the completion of the prosecutor's or plaintiff's evidence. Earlier case law suggested there may be some judicial discretion involved in permitting or not permitting reservation of the opening. One case held that it was not reversible error to deny a defendant's attorney's request to make his opening statement at the conclusion of the State's case.² In criminal cases, the point now seems to be settled by Georgia Uniform Superior Court Rule 10.2, instituted after the *Berryhill* Case. The rule provides that the defense may make an opening "following the conclusion of the State's presentation of evidence."

Failing to give an opening statement will not necessarily result in a finding of ineffective assistance of counsel: "It was not unreasonable for counsel to waive his opening statement to allow him to tailor his defense and arguments to the evidence presented."³

In one case, a trial counsel's failure to give an opening statement in malice murder prosecution was deemed a reasonable trial strategy and did not constitute deficient assistance for purposes of ineffective assistance of counsel claim. It was considered reasonable for the counsel to seek to "leave the door

[Section 7:1]

¹Seaboard Coast Line R. Co. v. Zeigler, 120 Ga. App. 276, 170 S.E.2d 60 (1969).

²*Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982) (abrogated on other grounds by, *Jones v. State*, 261

Ga. 665, 409 S.E.2d 642 (1991)).

³*Washington v. State*, 313 Ga. 771, 873 S.E.2d 132 (2022) ("trial counsel explained at the motion-for-new-trial hearing that he had difficulty formulating a defense theory due to the State's strong evidence and Appellant's changing story").

open” for him to pursue whatever strategy would turn out to be the most advantageous for defendant.⁴

Sentencing phase of a trial in which the state is seeking the death penalty is a “criminal matter” within the scope of rule relating to opening statements in criminal matters and, therefore, a death penalty defendant is entitled to make an opening statement in the sentencing phase.⁵

§ 7:2 Order of opening statements

In addition to the *Berryhill*¹ ruling cited in the preceding section, another case held that it was neither prejudicial nor erroneous for the trial court to require defendant’s counsel to make his opening statement before the beginning of evidence on the issues the jury would have to resolve.² However, Uniform Superior Court Rule 10.2 now conveys a right to the defense in criminal cases to reserve the opening until just before the defendant’s case. So does current case law. It is error for a trial court to refuse to honor defense counsel’s choice of when to make an opening statement as provided in the court rule.³

§ 7:3 Content of opening statements

The opening statement is limited to an outline of the issues involved¹ and of the facts counsel expects to prove.² When elaborating on anticipated proof during opening statement, counsel is well-advised to employ terms like “the evidence is going to show,” and “what the evidence will be” either before or after counsel’s description.³

The primary rationale for the opening statement is to inform the jury in a general way of the nature of the action and defense

⁴Lawrence v. State, 286 Ga. 533, 690 S.E.2d 801 (2010).

⁵See O’Kelley v. State, 284 Ga. 758, 670 S.E.2d 388 (2008); Smith v. State, 270 Ga. 240, 510 S.E.2d 1 (1998). See also Georgia Uniform Superior Court Rule 10.2.

[Section 7:2]

¹Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), overruled by Jones v. State, 261 Ga. 665, 409 S.E.2d 642 (1991).

²Mims v. State, 159 Ga. App. 712, 285 S.E.2d 67 (1981).

³This overrules *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975). See *McKenzie v. State*, 248 Ga. 294, 282 S.E.2d 95 (1981); *McArthur v. State*, 169 Ga. App. 263, 312 S.E.2d 358 (1983); *Mims v. State*, 159 Ga. App. 712, 285 S.E.2d 67 (1981); *O’Kelley v. State*, 284 Ga. 758, 670 S.E.2d 388 (2008).

[Section 7:3]

¹Waits v. Hardy, 214 Ga. 41, 102 S.E.2d 590, 68 A.L.R.2d 995 (1958).

²Beecher v. Farley, 104 Ga. App. 785, 123 S.E.2d 184 (1961).

³See *Newman v. State*, 309 Ga. 171, 844 S.E.2d 775 (2020).

so that they may better be prepared to understand the evidence.⁴

A party has no right to refer in his opening statement to issues or facts which will not be supported by legally admissible evidence.⁵ When a prosecutor fails to offer proof to support claims made in the opening statement, the prosecutor has the burden to show that the failure to do so was in good faith.⁶ The rule was followed in *Hartry v. State*.⁷ However, departures from the principle that an opening statement is simply an outline of what the State expects to prove, as where a prosecutor makes an offhand remark, will not always result in reversal if state acted in good faith.⁸

In another case where there was an absence of proof on a matter mentioned by a prosecutor in opening, mistrial was not required. Although a prosecutor should confine her opening statement to an outline of what she expects to prove, it occurred that a witness with personal knowledge of the very point made by the prosecutor failed to appear at trial. However, other evidence on the point had come out at trial, rendering the trial court's denial of a motion for mistrial to be not reversible error.⁹

Whether an unsupported assertion or misrepresentation during opening statement is made in good faith is a critical consideration. In a murder prosecution pretrial hearing, the trial court indicated that the defendant's statement was inadmissible but issued no written order. Months later, only a few days before trial, a different prosecutor, who was not present at the earlier proceeding and was unaware of the trial court's "ambiguous" ruling, tried the case. During the opening statement, the new prosecutor described the defendant's statement. The defendant's mistrial motion was denied, although the trial court did provide a curative instruction. The Georgia Supreme Court upheld the defendant's conviction and the trial court's "finding that the trial prosecutors acted in good faith and did not knowingly violate any trial court ruling."¹⁰

Where bad faith is at issue, making a mistrial motion is key to preserving appellate rights. A timely motion for mistrial places the burden on the state to prove that the remarks were made in good faith.¹¹

⁴O'Kelley v. State, 284 Ga. 758, 670 S.E.2d 388 (2008).

⁵Walden v. State, 267 Ga. 162, 476 S.E.2d 259 (1996).

⁶Alexander v. State, 270 Ga. 346, 509 S.E.2d 56 (1998) (reversible error).

⁷Hartry v. State, 270 Ga. 596, 512 S.E.2d 251 (1999).

⁸Frazier v. State, 249 Ga. App. 463, 549 S.E.2d 133 (2001).

⁹Ramirez v. State, 276 Ga. 249, 577 S.E.2d 558 (2003).

¹⁰Harper v. State, 318 Ga. 185, 897 S.E.2d 818 (2024).

¹¹Maynor v. State, 317 Ga. 492, 893 S.E.2d 724 (2023).

In *Simmons v. State*,¹² it was not reversible error for the trial court to refuse the defense's motion for a mistrial where the state mentioned evidence in opening that was determined inadmissible by a later motion in limine.

The scope and latitude of the opening statement is largely in the sound discretion of the court.¹³ That said, legal parameters, pre-trial orders, and limiting instructions are matters to which counsel should adhere during opening.

In a three-defendant murder trial, the prosecutor stated during opening statement that the state would only be allowed to ask the lead detective about what each defendant said about himself, implying that he would not be able to ask the detective what each co-defendant may have said about the other co-defendants. This paralleled the trial court's limiting instruction issued pursuant to *Bruton v. United States*.¹⁴ The Supreme Court of Georgia affirmed, over defense arguments that the prosecutor's comments were supposedly of an "inappropriate legal nature," and "introduced legal principles to the jury about *Bruton*" that were "were inappropriate to mention to the jury."¹⁵

One case holds that definite, unqualified admissions in an opening statement bind the client and obviate the need for proof of such fact.¹⁶

Since it is improper for counsel to argue his case in opening statements, improper comments are much less likely than in closing statements. However, any statement that would be improper in closing arguments may also be improper in opening statements. For a discussion of such improprieties, see §§ 34:4 et seq., supra. Some Georgia authority suggests that it is even more reprehensible for a lawyer in his opening statement to misstate evidence to be introduced during opening than it is to misrepresent the evidence during closing argument, because at the former

¹²*Simmons v. State*, 291 Ga. 705, 733 S.E.2d 280 (2012).

¹³See *Cotton States Mut. Ins. Co. v. Stephens*, 106 Ga. App. 145, 126 S.E.2d 645 (1962). See also *U.S. v. Concepcion*, 983 F.2d 369 (2d Cir. 1992) ("A party's statements of fact in its opening statement may indeed be used against it as admissions."); *Hall v. Wal-Mart Stores East, LP*, 447 F. Supp. 2d 604 (W.D. Va. 2006) ("when counsel clearly and unambiguously tells a jury in its opening statement that there is an element in the plaintiff's case which they need not decide because neither party disputes its existence, the in-

struction [that opening statements do not constitute evidence] is inapplicable because the facts have been admitted").

¹⁴*Bruton v. U.S.*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

¹⁵*Collins v. State*, 312 Ga. 727, 864 S.E.2d 85 (2021).

¹⁶*Tanner v. Wilson*, 180 Ga. 694, 180 S.E. 614 (1935). Compare *Everett v. State*, 216 Ga. App. 444, 454 S.E.2d 620 (1995) (reference in opening statement held not to be binding admission against party who made the statement).

point the jury can more easily be misled.¹⁷ This rule was not violated, however, when a prosecutor's opening statement that certain facts would be established by certain witnesses was not completely borne out because those facts were established by other witnesses.¹⁸ As noted, argument is not allowed in opening, and for that reason the presumption of innocence, not being a matter of evidence which the defendant intends to prove, cannot be intensively argued during opening statement.¹⁹

Referencing case law that "victim impact" mentions are improper during opening statement, a 2020 decision from the Georgia Supreme Court opined that "background information about the victim . . . is not relevant to the issues in the guilt/innocence phase" of a criminal trial. *Lofton v. State*,²⁰ however, made this relevancy determination based on case law interpreting former Georgia law, as opposed to Georgia's new Evidence Code. Future Georgia appellate decisions may reexamine this line of authority considering O.C.G.A. §§ 24-4-401, 24-4-402, and 24-4-403.²¹

What about visual aids? A 2022 Supreme Court of Georgia decision upheld the defendant's conviction for the malice murder of his infant daughter where, during opening statement, the prosecution utilized a diagram to show how several witnesses were related with each other, the defendant, and the infant's mother.²²

Likewise, no error was detected when the prosecution wrote names of participants in crimes and witnesses to be called on a chalkboard during opening statement; the prosecution, in its opening statement, is permitted to state what it intends to prove.²³ In civil cases, a statute allowing visual aids has caused appellate courts to endorse their use.²⁴ The State's displaying of an exhibit during opening, "is a permissible part of the opening statement, as its purpose is to help the jury understand and to remember the evidence."²⁵

¹⁷*Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

¹⁸*McMillan v. State*, 257 Ga. 173, 356 S.E.2d 866 (1987) (not improper).

¹⁹*Johnson v. State*, 194 Ga. App. 743, 391 S.E.2d 716 (1990).

²⁰*Lofton v. State*, 309 Ga. 349, 846 S.E.2d 57 (2020).

²¹See generally *Corley v. State*, 308 Ga. 321, 840 S.E.2d 391 (2020) ("OCGA §§ 24-4-401, 24-4-402, and 24-4-403 'overlay the entire Evidence Code, and are generally applicable to

all evidence that a party seeks to present.'").

²²*McNabb v. State*, 313 Ga. 701, 872 S.E.2d 251 (2020).

²³See *Highfield v. State*, 246 Ga. 478, 272 S.E.2d 62 (1980).

²⁴O.C.G.A. § 9-10-183; *Tench v. Galaxy Appliance & Furniture Sales, Inc.*, 255 Ga. App. 829, 567 S.E.2d 53 (2002); *Lewyn v. Morris*, 135 Ga. App. 289, 217 S.E.2d 642 (1975).

²⁵*McGee v. State*, 272 Ga. 363, 364, 529 S.E.2d 366 (2000).

In *Newman v. State*,²⁶ the Supreme Court of Georgia upheld a conviction where, during opening statement, the prosecution played excerpts from audio and video recordings that were later admitted into evidence.

The defendant objected to the state using a PowerPoint presentation that included a photograph during opening. The use of a visual aid is a permissible part of opening statements, often accompanied by an instruction that it is not to be considered as evidence.²⁷

In a 2017 civil case, a litigant's opening statement utilized demonstrative exhibits that contained quotations from witness depositions. Responding to objection, trial counsel explained that these "trial boards" were employed in order to clarify the expected evidence by allowing the jury "to read along so that it doesn't all stream together and get lost." The Georgia Court of Appeals determined that the trial court did not abuse its discretion by permitting the use of these visual aids during opening statement.²⁸

For forms of opening statement, illustrative openings, and objections to an opponent's opening, see Carlson, *Successful Techniques for Civil Trials* §§ 6:17 to 6:20 (2d ed.). For motions for directed verdict following adversary's opening, see Carlson, *supra*, at § 6:21.

§ 7:4 Limitations on opening statement

In criminal cases, defense counsel is given wide latitude in making opening statements and closing arguments.¹

In medical negligence trial against hospital, which was limited to issues of causation and damages, remark in opening statement that twice-removed parent of hospital was largest healthcare corporation in world and that hospital and parents were for-profit corporations, and statement in closing argument that hospital could have paid \$1,000 per hour for medical expert to examine patient in futile attempt to find evidence of no damages, were not impermissible references to size and profitability, where no evidence of size or financial condition, such as net revenues, net worth, and profitability of hospital or parent, was admitted, and argument regarding expert was not comment on hospital's

²⁶*Newman v. State*, 309 Ga. 171, 844 S.E.2d 775 (2020). Bailey, 343 Ga. App. 517, 806 S.E.2d 898 (2017).

²⁷*Phillips v. State*, 287 Ga. 560, 697 S.E.2d 818 (2010). [Section 7:4]

¹*Muller v. State*, 284 Ga. 70, 663 S.E.2d 206 (2008).

²⁸*Vineyard Industries, Inc. v.*

financial condition, but rather focused on futility of such ploy.²

Comment in defendant's opening statement, that "[u]nfortunately, we've come to that point in society where whenever an accident happens and somebody gets hurt, we immediately say . . . It must be somebody's fault," was not so egregious as to be outside permitted bounds of trial court's discretion in premises liability action.³

In criminal cases, O.C.G.A. § 17-8-75 requires:

Where counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender.

*Caldwell v. State*⁴ determined that the trial court erred in refusing to give a requested curative instruction pursuant to O.C.G.A. § 17-8-75 where "[t]he District Attorney referred to a number of matters not in evidence concerning his role and authority in choosing whom to indict, his sworn duty not to indict those who have not committed a crime, and his sole authority to determine whom to indict."

Failure of a defense attorney to object to a prosecutor's statement in a timely fashion waives the appellant's right to challenge the statement on appeal.⁵ In *Huff v. State*,⁶ the Supreme Court of Georgia determined that "because defense counsel failed to timely object to the prosecutor's use of the phrase 'gangster style' during opening statements, [defendant's] challenge to the State's opening statement was not preserved for review[.]"

As a general proposition with any infraction of opening statement rules, a timely objection is needed in order to complain about opponent's opening.⁷ Timeliness of opening statement objections was referenced in a 2011 case. Although it resolved a closing argument dispute, the case referred to the rules on openings

²*Hospital Corp. of Lanier, Inc. v. Doster*, 254 Ga. App. 169, 561 S.E.2d 846 (2002).

³*Kilday v. Kennestone Physicians Center, L.P.*, 296 Ga. App. 818, 676 S.E.2d 271 (2009).

⁴*Caldwell v. State*, 313 Ga. 640, 872 S.E.2d 712 (2022).

⁵*Slaton v. State*, 303 Ga. 651, 814 S.E.2d 344 (2018); *Johnson v. State*, 293 Ga. 641, 748 S.E.2d 896 (2013);

Bailey v. State, 273 Ga. 303, 540 S.E.2d 202 (2001).

⁶*Huff v. State*, 315 Ga. 558, 883 S.E.2d 773 (2023) ("plain error review does not apply to comments made by lawyers during opening statements").

⁷See *Polite v. State*, 273 Ga. App. 235, 614 S.E.2d 849 (2005); *Burgess v. State*, 276 Ga. 185, 188, 576 S.E.2d 863 (2003); *Harris v. State*, 279 Ga. 522, 615 S.E.2d 532 (2005).

as well. Objections to flawed openings or closings need to be timely. In *Stolte v. Fagan*,⁸ 15 minutes after argument was too late:

Stolte did not contemporaneously object to defense counsel's comment that the jury could trust Fagan. Rather, she waited until counsel finished the closing argument and the court had taken a 15 minute break to raise the issue again. "[B]oth the Supreme Court and this court have consistently held that . . . objections based upon improper closing argument are untimely when first made after the closing argument has concluded." *Hamilton v. Shumpert*, 299 Ga. App. 137, 143–144 (3) (682 S.E.2d 159) (2009). See also *Whitley v. Gwinnett County*, 221 Ga. App. 18, 24 (10) (470 S.E.2d 724) (1996) ("Pretermittting the propriety of [references in opening and closing arguments to defendant's unblemished record and fine reputation], because the record shows that [appellant] failed to contemporaneously object to them, her argument is waived on appeal."); *Vega v. La Movida, Inc.*, Ga. App. 311, 316 (3) (670 S.E.2d 116) (2008) (holding that the time to object is when the impropriety occurs at trial). Therefore, Stolte has waived any objection to the comment that the jury could trust Fagan.

Under Georgia law, the contemporaneous objection rule is a strong one. The Supreme Court of Georgia has held that contemporaneous objections are even required where counsel violates a previously ruled-upon motion in limine during opening statement.⁹

Prosecutor's comment "welcome to your part in the war on drugs," made during opening statement in prosecution for cocaine possession was improper and inflammatory; statement served no legitimate purpose and could serve to inflame the minds of the jury against the defendant. The purpose of the opening statement is to give the jury and the court an outline of the evidence that the party anticipates presenting; it is not time for an attorney to argue the case.¹⁰ On certiorari, the Georgia Supreme Court decided that the court of appeals erred in dismissing one of Keller's appeals, and reversed its judgment.¹¹

There are a number of cases which go into what the State can and cannot do during opening. This has included mention of expected, admissible extrinsic or "other acts" evidence against a criminal defendant prior to the evidentiary foundation being established at trial.¹²

Similarly, where evidence is intrinsic and provides background

⁸*Stolte v. Fagan*, 311 Ga. App. 123, 714 S.E.2d 339 (2012), rev'd on other grounds, 291 Ga. 477, 731 S.E.2d 653 (2012).

⁹*Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021).

¹⁰*Keller v. State*, 252 Ga. App. 813, 558 S.E.2d 5 (2001).

¹¹275 Ga. 680, 571 SE2d 806.

¹²*Slaton v. State*, 303 Ga. 651, 814 S.E.2d 344 (2018) ("In a pre-trial motions hearing, the trial court ruled

information on the offense, an opening statement reference to uncharged misconduct or otherwise objectionable matters is often allowed. In a murder prosecution, a former girlfriend of the defendant (Williams) resisted his sexual advances after he was released from prison. In addition, she wanted her brother, who was ultimately the victim of the homicide, with her when she encountered the defendant. The Georgia Supreme Court held that defense objection to the prosecutor's reference in opening statement to the defendant's HIV status and prior sexual assault on the girlfriend was properly overruled:

The challenged evidence plainly pertained to the chain of events in the case and was linked by time and circumstance with the charged crimes, making the information necessary to complete the story for the jury. Williams's HIV status and sexual assault of the victim's sister helped explain to the jury why she refused his advances, the impetus for her declaration to him that it was over and they would never be alone again, and the increasing friction and conflict between the two that culminated in the crimes—including why she so feared him that she insisted that Shawn accompany her to Williams's home on the night of the murder.¹³

"A prosecuting attorney in an opening statement may state what he expects in good faith the evidence will show during [the] trial of the case."¹⁴

Counsel for the State may refer to "the applicable law" during opening statement.¹⁵ Prosecutors can describe the trial process, including the fact that the defense may or may not introduce evidence, as long as there is no comment on the defendant's failure to testify.¹⁶

Use of colloquial, colorful language and visual aids is permitted in the State's opening statement.¹⁷ Prosecutor's remark during opening statement, "A meal ticket and a slave, that's . . . exactly how [defendant] felt about the victim in this case," was fairly based upon witness testimony and not improper.¹⁸

It was not objectionable for the prosecutor to assert that the defendant was "solely to blame for the situation that led to the death of [victim]" and describing the victim as "an innocent, unwilling passenger who was trapped in [defendant's] vehicle,"

that evidence of the armed robbery would be admissible at trial. The prosecutor therefore properly referred to that expected evidence in his opening statement.").

¹³Williams v. State, 302 Ga. 474, 807 S.E.2d 350 (2017).

¹⁴Ross v. State, 233 Ga. App. 26, 27, 503 S.E.2d 308 (1998).

¹⁵Kinsman v. State, 259 Ga. 89, 92, 376 S.E.2d 845 (1989).

¹⁶Worthy v. State, 237 Ga. App. 565, 565–567, 515 S.E.2d 869 (1999).

¹⁷Teems v. State, 256 Ga. 675, 676, 352 S.E.2d 779 (1987).

¹⁸Austin v. State, 286 Ga. App. 149, 648 S.E.2d 414 (2007).

during opening statement in a murder trial.¹⁹

The following prosecutor's remark did not improperly comment on the defendant's Fifth Amendment rights: "And in America one of the things you can do is invoke your rights and just not bother talking to the police, and another thing you can do is choose to speak to them. He went with option two, and he did give a statement."²⁰

In a child molestation prosecution, it was not improper for the prosecution during its opening statement to call "attention to the fact that [defendant] was silent when his girlfriend's daughter accused him of having sexual intercourse with her and when his girlfriend reiterated those accusations," given that adoptive admissions are admissible under O.C.G.A. § 24-8-801(d)(2)(B).²¹

During its opening statement in a murder and rape prosecution, the state commented on defendant's failure to come forward to authorities by stating that, after defendant left victim's body in a vacant lot, he "called no one." This did not constitute plain error.²²

Defense counsel did not render assistance which was ineffective when he failed to object to prosecutor's opening remarks, in which the government attorney stated that the defendant and his co-defendant "did their best to cover up [their crime] in more than one way. One way was very sophisticated. And they hired lawyers, which they're entitled to do under our Constitution[.]"²³

In terms of prohibitions on the State, the prosecutor cannot point to his expectation that the accused will not testify. To grant a mistrial for improper comment related to the defendant's failure to testify, the court must determine that this was the prosecutor's manifest intention or that such remark would naturally and necessarily be so taken by the jury.²⁴

It is improper, after voir dire, to address a juror by name during trial of the case.²⁵

LR 83.14 of the civil case rules for the U.S. District Court for the Southern District of Georgia indicates that when addressing the jury panel after voir dire and during of trial of the case, as

¹⁹Calhoun v. State, 308 Ga. 146, 839 S.E.2d 612 (2020).

²⁰Glover v. State, 309 Ga. 102, 844 S.E.2d 743 (2020).

²¹Neal v. State, 355 Ga. App. 125, 843 S.E.2d 11 (2020).

²²Simmons v. State, 299 Ga. 370, 788 S.E.2d 494 (2016).

²³Moses v. State, 328 Ga. App. 625, 760 S.E.2d 217 (2014).

²⁴Ranger v. State, 249 Ga. 315, 319, 290 S.E.2d 63 (1982).

²⁵Atlanta Stove Works, Inc. v. Hollon, 112 Ga. App. 862, 873, 146 S.E.2d 358, 366 (1965) ("It has been held in other jurisdictions that it is improper to single out a particular juror, address him by name, and personally appeal to him," and Georgia disapproves of such a practice).

when counsel delivers her closing argument, “no juror should be addressed individually or by name.”

There is a prohibition upon golden rule arguments which urge jurors to stand in the shoes of a victim or a party. The proscription applies to closing arguments (see § 34:8 *infra*), and also to opening statements.²⁶ However, in *Sanders v. State*,²⁷ the Georgia Supreme Court held that a prosecutor’s statement did not violate the Golden Rule just because it implied that the alleged crime’s harm could have happened to the prosecutor, and by further implication to the jury.

In *Parker v. State*,²⁸ the Supreme Court announced important limitations on opening statements. Until *Parker* there was uncertainty over whether party A could anticipate the evidence thought to be forthcoming from party B, and comment upon it. Clearly party A could preview her own expected evidence, but could she cross over and discuss B’s evidence? *Parker* involved exactly such a situation. While not reversible error, it was deemed improper for the prosecutor to analyze expected defense evidence. A prosecuting attorney’s opening statement is limited to the statement of what the State expects to prove.

Good faith is the general test in passing upon the preliminary statement of the prosecutor to the jury as to what she expects to prove in a criminal case. Under *Parker* it is inappropriate for a prosecutor in a criminal case to discuss in opening statement the evidence she anticipates the defense will present at trial. Comments by a prosecutor in opening statement regarding the defendant’s anticipated evidence may constitute grounds for reversal should the defense rest without presenting such evidence. The proper standard for determining whether the uncorrected argument of counsel caused a miscarriage of justice is the “highly probable” test, i.e., a conviction will be upheld only if it is highly probable that the error did not contribute to the judgment.

Following *Parker*, see *Cook v. State*.²⁹ However, to enjoy the protection of *Parker*, a prompt objection must be made.³⁰ The *Parker* approach was comprehensively revisited in *Hargett v. State*,³¹ where the Georgia Supreme Court found defects in counsel’s performance but did not reverse the conviction. Here is

²⁶*Parham v. State*, 355 Ga.App. 720, 845 S.E.2d 689 (2020).

²⁷*Sanders v. State*, 290 Ga. 637, 723 S.E.2d 436 (2012).

²⁸*Parker v. State*, 277 Ga. 439, 588 S.E.2d 683 (2003).

²⁹*Cook v. State*, 276 Ga. App. 803, 625 S.E.2d 83 (2005).

³⁰*Shaw v. State*, 265 Ga. App. 451, 594 S.E.2d 393 (2004).

³¹*Hargett v. State*, 285 Ga. 82, 674 S.E.2d 261 (2009) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

what the court said:

Although defense counsel did not object to comments made by the prosecutor in opening statement that the State was “prepared to expose and refute the alibi defense we anticipate from” appellants and was “confident that we have the evidence to prove our case and to disprove the proffered defense,” the record reflects that all appellants gave notice pursuant to O.C.G.A. § 17-16-5(a) to the State of their intent to present an alibi defense, compare *Parker v. State*, 277 439(2), 588 S.E.2d 683 (2003) (no notice given); counsel for appellants set forth misidentification and alibi defenses in their opening statements; and all appellants presented alibi witnesses at trial. Accordingly, while it is inappropriate for a prosecutor in a criminal case to discuss in opening statement the evidence the State anticipates the defense will present at trial, *Parker v. State*, supra at 441(2), 588 S.E.2d 683, appellants cannot carry their burden of showing that, had trial counsel objected to the prosecutor’s improper comments, there is a reasonable probability the outcome of the trial would have been different. See *Jackson v. State*, 282 Ga. 494(3), 651 S.E.2d 702 (2007). See also *Parker* supra at 442(2), 588 S.E.2d 683 (even where counsel objects, uncorrected argument of prosecutor does not require reversal where it is highly probable the improper argument did not contribute to judgment).

Subsequent cases, however, have refined *Parker*. Significantly, in 2019, a unanimous Georgia Supreme Court decision authored by Chief Justice Melton drew a critical distinction between referencing an expected defense *theory* (allowed) as opposed to detailing anticipated *evidence* that will support a particular defense (not allowed). Accordingly, a prosecutor’s expressing, “I anticipate that the defense will be raising many defenses. You all probably have that idea during voir dire. First one would be accident,” during opening statement was not grounds for reversal.³²

Judicial interruptions of a party’s opening sometimes raise the issue of the right to request a mistrial.³³ However, in a murder case, a prosecuting attorney stated during opening statement that police reports would be used only to refresh the memory of testifying officers and would not be available for jurors to review in the jury room. Overruling a defense objection “to the State explaining the law,” the trial judge announced that “[the prosecutor]’s talking about what’s evidence and what’s not evidence.” The Georgia Supreme Court held that this comment

³²Kidd v. State, 304 Ga. 543, 820 S.E.2d 46 (2018) (“Although we have said that a comment during opening statement which forecasts evidence to be presented at trial by the defendant is improper. . . the State here referenced an anticipated defense theory

without predicting what evidence might be presented.”).

³³See Brown v. State, 278 Ga. 724, 609 S.E.2d 312 (2004); Mathis v. State, 276 Ga. App. 205, 622 S.E.2d 857 (2005).

did not intimate judicial opinion on the strength of either side's case, but merely explained her ruling.³⁴

How important is opening statement? In *Lindsey v. State*,³⁵ note 5 of the opinion states: "[I]t is axiomatic that opening statement is not evidence and *has no probative value*." (emphasis added). This reasoning seems at odds with an earlier line of cases which give important effect to openings, and reversed convictions when rules of opening were violated. Conviction was reversed where the prosecutor described prejudicial, yet conditionally admissible matter in opening statement, and then failed to produce evidence of same at trial.³⁶ Other cases have applied the view of *Lindsey*. In *Dolphy v. State*,³⁷ the trial court twice instructed the jury that opening statements are not evidence.

With the adoption of Georgia's current Evidence Code, based largely upon the Federal Rules of Evidence, the rule from *Lindsey* may well have run its course. Federal courts in both criminal and civil cases recognize that the doctrine of curative admissibility applies to comments made during opening statement:

"The rule of 'opening the door,' or 'curative admissibility,' gives the trial court discretion to permit a party to introduce otherwise inadmissible evidence on an issue (a) when the opposing party has introduced inadmissible evidence on the same issue, and (b) when it is needed to rebut a false impression that may have resulted from the opposing party's evidence." *United States v. Rosa*, 11 F.3d 315, 335 (2d Cir. 1993), *cert. denied*, 511 U.S. 1042, 128 L. Ed. 2d 211, 114 S. Ct. 1565 (1994); see *United States v. Rea*, 958 F.2d 1206, 1225 (2d Cir. 1992). Thus, that doctrine focuses generally on a party's interjection of improper evidence. The unrelated principle that statements by counsel are not evidence, see, e.g., *United States v. Peterson*, 808 F.2d 969, 975 (2d Cir. 1987), does not give counsel license to make improper arguments in his opening statement.³⁸

Consistent with the foregoing, the Tenth Circuit Court of Appeals has observed: "It is widely recognized that a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party."³⁹ A civil case explains:

The plaintiff did not need to wait until the witnesses were cross-examined about their alleged bias because this purported bias was raised both pretrial and during the defendants' opening statement.

³⁴Anthony v. State, 303 Ga. 399, 811 S.E.2d 399 (2018).

³⁵Lindsey v. State, 282 Ga. 447, 651 S.E.2d 66 (2007).

³⁶Alexander v. State, 270 Ga. 346, 350-1, 509 S.E.2d 56 (1998).

³⁷Dolphy v. State, 288 Ga. 705, 707 S.E.2d 56 (2011).

³⁸Weyant v. Okst, No. 98-9546 (2d Cir. 1999).

³⁹U.S. v. Magallanez, 408 F.3d 672, 67 Fed. R. Evid. Serv. 281 (10th Cir. 2005).

The doctrine of “curative admissibility” allows a party to elicit “testimony not admissible on direct, on the ground that the other party has opened the doors” to such testimony.⁴⁰

Failure to support contentions which would permissibly place the defendant’s character at issue is error, unless the State’s failure to produce such evidence was in good faith.⁴¹

With *Parker*⁴² and *Alexander*, compare the 2010 development wherein the Georgia Supreme Court relied upon the fact that the trial judge instructed the jury that “evidence did not include opening statements by the attorneys” when it affirmed defendant’s conviction in *Zackery v. State*.⁴³

⁴⁰*Hardin v. Dadlani*, 221 F. Supp. 3d 87 (D.D.C. 2016).

⁴¹*Hartry v. State*, 270 Ga. 596, 598–599, 512 S.E.2d 251 (1999).

⁴²*Parker v. State*, 277 Ga. 439, 588 S.E.2d 683 (2003) (improper for

prosecutor to speculate about defense evidence in opening) (supra this section).

⁴³*Zackery v. State*, 286 Ga. 399, 688 S.E.2d 354 (2010).

Chapter 8

Order of Proof

- § 8:1 Right to open and close
- § 8:2 Order of producing testimony
- § 8:3 Rebuttal testimony
- § 8:4 Surrebuttal
- § 8:5 Right to introduce testimony at later stage

§ 8:1 Right to open and close

The party holding the affirmative of the issues joined in the pleadings, who is normally (but not always) the plaintiff and who would be defeated if no evidence were given on either side, has the right to open and close the evidence and the argument.¹

O.C.G.A. § 9-10-186 also codifies the right to make opening and closing arguments. Thus, “in civil actions, where the burden of proof rests with the plaintiff, the plaintiff is entitled to the opening and concluding arguments except that if the defendant introduces no evidence or admits a prima facie case, the defendant shall be entitled to open and conclude. In civil actions for personal injuries, the defendant shall be deemed not to have admitted a prima facie case if such defendant introduces any evidence as to the extent of damages, other than cross-examination of the plaintiff and witnesses called by the plaintiff.”

Apparently, the rule is that where a party’s right to open and close has been improperly denied, such denial is error.² If both parties have a burden of proof, as where defendant has interposed an affirmative defense, plaintiff has the right to open and close, but if defendant admits the entire cause of action and pleads an affirmative defense, he has the right to open and close.³

In *Hussey v. Hussey*,⁴ when the husband filed for divorce and the wife counterclaimed for divorce and alimony, the wife bore the burden of proof on all issues that were submitted to the jury and was entitled to open and close the closing arguments.

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¹O.C.G.A. §§ 24-4-1, 17-8-71.

²Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970); Gordon v. Abrahams, 330 Ga. App. 795, 769 S.E.2d 544 (2015).

³Canada Dry Bottling Co. v. Campbell, 112 Ga. App. 56, 143 S.E.2d 785 (1965).

⁴Hussey v. Hussey, 273 Ga. 735, 545 S.E.2d 880 (2001).

An intervenor takes the case the way he finds it and cannot deprive the plaintiff of his right to open and close.⁵

The contemnor has the right to open and close in a condemnation case.⁶ For the burden of proof in condemnation cases, see § 9:3, *infra*.

The right to open and close is one that may be waived.⁷

In a civil trial, a defendant is not obliged to announce his or her intention not to introduce evidence before the plaintiff closes his evidence in order to retain his or her right to open and conclude final arguments.⁸

If a plaintiff in a civil action introduces part of a deposition in evidence, the defense does not waive its right to opening and closing argument by reading other relevant parts.⁹ However, where the defense reads parts unrelated to the original passages, this may be held to be introduction of new matter.

The rule determining who has the right to open and close in criminal trials can be found at O.C.G.A. § 17-8-71. Prior to July 1, 2005, the statute allowed for defense counsel to open and conclude the arguments to the jury after the close of the evidence if the defendant had not introduced any evidence at trial. However, as of July 1, 2005, the prosecuting attorney always has the right to open and conclude the arguments to the jury. Defense counsel is entitled to make a closing argument prior to the concluding argument of the prosecuting attorney.

§ 8:2 Order of producing testimony

The party having the right to open and close initially introduces her evidence in chief. Then, the adversary introduces evidence in support of his defense to his opponent's testimony, together with evidence of affirmative matters he has raised.

In *Curtis v. State*,¹ the court held that even if the defendant had not waived his objection to evidence, the trial court could allow the State to introduce evidence of similar transactions prior to introducing evidence of the offense charged.

If the admissibility of evidence depends on evidence not in the record but which counsel vows will be forthcoming, the court may permit its admission subject to producing the evidence upon

⁵Am. Jur. 2d, Trial §§ 535, 536.

⁶State Highway Dept. v. Smith, 111 Ga. App. 292, 141 S.E.2d 590 (1965).

⁷Am. Jur. 2d, Trial § 538.

⁸Kia Motors America, Inc. v.

Range, 276 Ga. App. 360, 623 S.E.2d 514 (2005).

⁹O.C.G.A. § 9-11-32(a)(5).

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¹Curtis v. State, 212 Ga. App. 237, 441 S.E.2d 776 (1994).

which it depends,² but it should be stricken if such promised evidence is not forthcoming.³ For example, a trial court may admit testimony by coconspirators before the conspiracy has been proved, provided its existence is ultimately shown at trial.⁴

In the 2013 Georgia Evidence Code, O.C.G.A. § 24-1-104(b) governs this procedure.

Most modern commentators take the position that a party's exhibit may be offered when the foundation therefore is complete, even if that means offering the document during cross-examination of an opposing witness. In special situations it may take a cross-examination to provide the foundational elements. Such factors support the modern view. However, there is vintage Georgia law holding that neither party has the right to introduce evidence when cross-examining an opposing witness.⁵ It has also been held that a trial court did not err in disallowing testimony concerning previous difficulties which a murder defendant had with a victim, testimony which the defendant intended to use to lay a foundation for the testimony of an expert witness on battered woman syndrome, where there was no proffer of the proposed evidence.⁶

§ 8:3 Rebuttal testimony

Rebuttal proof typically responds and endeavors to answer claims made during an opponent's case. In most trials, the plaintiff will start the proof; then defense presents its case and rests. At this point the plaintiff may supply a rebuttal.

As noted, rebuttal is a place to respond to an opponent's proof. In responding to an opponent's claims, rebuttal may sometimes properly include evidence which would have been incompetent as an initial matter. For example, the statements of a defendant which would not have been admissible as direct evidence due to *Miranda* violations were admissible on rebuttal as prior inconsistent statements.¹ There are decisional indications that a prosecuting attorney will be permitted to testify as a rebuttal witness for the State for impeachment purposes as to what a defense witness has said to the prosecutor.² Further, it was held that a trial court did not abuse its discretion in a felony-murder prosecution

²McCurdy v. Terry, 33 Ga. 49, 1861 WL 1454 (1861).

³Lanier v. Hebard, 123 Ga. 626, 51 S.E. 632 (1905).

⁴Dickerson v. State, 280 Ga. App. 29, 633 S.E.2d 367 (2006).

⁵Brown v. State, 28 Ga. 199, 1859 WL 2536 (1859).

⁶Nunnelley v. State, 258 Ga. 726, 373 S.E.2d 755 (1988).

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¹Hicks v. State, 256 Ga. 266, 347 S.E.2d 589 (1986).

²Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980).

in controlling the scope of rebuttal testimony when, after defendant testified that he took a polygraph examination, the trial court allowed the State to call the polygraph examiner to challenge the inference that the defendant had passed the polygraph examination.³

Cases on rebuttal testimony include *Blackburn v. State*⁴ and *Hestley v. State*.⁵

Evidence may be used on rebuttal to disprove facts testified to by the defendant. In *Francis v. State*,⁶ the court held that the defendant's testimony on direct examination, implying that this was his only conviction for a weapons offense, was subject to rebuttal by proof of other weapons offenses he had committed.

The purpose of rebuttal proof is to refute or explain any part of the opposing party's evidence.⁷

The court in its discretion, may permit evidence to be admitted during rebuttal that should have been offered as part of the case in chief and may permit the introduction of evidence that should have been offered earlier but was inadvertently omitted or discovered subsequently.⁸

When reviewing an appeal of a ruling on a motion for directed verdict, the reviewing court may review all evidence presented at trial, including that evidence presented during rebuttal testimony.⁹

Rebuttal testimony should not be excluded merely because a party could have introduced it during its main case, but it may not be delayed simply to gain strategic advantage. The trial court did not clearly err when it found that the state had not deliberately withheld the identity of a witness until rebuttal for strategic advantage, but rather that the need for the witness arose only after the victim revealed unanticipated inconsistent recollections.¹⁰

³Smith v. State, 260 Ga. 746, 399 S.E.2d 66 (1991).

⁴Blackburn v. State, 266 Ga. 541, 468 S.E.2d 381 (1996) (lower court did not abuse discretion in allowing prosecution to use prior statement to impeach its own witness).

⁵Hestley v. State, 216 Ga. App. 573, 455 S.E.2d 333 (1995) (even if admitted testimony constituted new evidence, reopening evidence is in discretion of trial court).

⁶Francis v. State, 266 Ga. 69, 463

S.E.2d 859 (1995).

⁷Mitchell v. State, 223 Ga. App. 319, 477 S.E.2d 612 (1996).

⁸Dennis v. Weekes, 46 Ga. 514, 1872 WL 2754 (1872).

⁹Reynolds v. State, 265 Ga. App. 776, 595 S.E.2d 606 (2004) (proving venue beyond a reasonable doubt during rebuttal testimony is sufficient to uphold a denial of a motion for directed verdict).

¹⁰Hodges v. State, 260 Ga. App. 483, 580 S.E.2d 614 (2003).

§ 8:4 Surrebuttal

As a general proposition and particularly in civil cases, the decision as to whether to allow surrebuttal testimony is within the trial court's discretion. In *Krause v. Vance*,¹ the court found no abuse of discretion in the trial court's refusal to allow defendant's surrebuttal when such testimony could merely approximate some facts and actually corroborated the plaintiff's claim.

In *Manning v. State*,² the trial court offered the defendant the opportunity to offer surrebuttal evidence by reopening the evidence and allowing him to testify. The defendant and his counsel both stated on the record that the defendant did not wish to testify. The evidence was closed. The next day, the defendant had changed his mind, but the court refused to allow him to testify at that stage. On appeal, the trial court's decision was determined to be within its discretion, and the judgment was affirmed.

§ 8:5 Right to introduce testimony at later stage

In an opinion authored by Presiding Judge Dillard, the Georgia Court of Appeals remarked that Georgia's rules for reopening of evidence are "forgiving," with a trial judge's broad discretion including allowing the introduction of additional evidence after the start of jury deliberations.¹ Whether either party may introduce evidence that he should have introduced at an earlier stage of the trial rests largely in the discretion of the court.² The decision will not be disturbed unless there has been an abuse of discretion.³ The discretion to permit either side to reopen his case to introduce new evidence may be exercised, even though arguments have been completed and the jury has been instructed.⁴

While the trial court may exercise discretion in ruling on a motion to reopen to admit additional evidence during trial, generally the motion should be granted if the evidence would be sufficient to create an issue of fact where none existed otherwise.⁵

It is not an abuse of discretion to reopen the case after plaintiff

[Section 8:4]

¹*Krause v. Vance*, 207 Ga. App. 615, 428 S.E.2d 595 (1993).

²*Manning v. State*, 259 Ga. App. 794, 578 S.E.2d 494 (2003).

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¹*Alvarez-Maldonado v. State*, 359 Ga. App. 500, 859 S.E.2d 481 (2021).

²*Dimmick v. Pullen*, 120 Ga. App. 743, 172 S.E.2d 196 (1969).

³See *In re R.B.*, 264 Ga. 602, 448 S.E.2d 690 (1994) (juvenile court did not abuse its discretion in allowing State to reopen its case).

⁴*Davis-Pickett Chevrolet, Inc. v. Collier*, 106 Ga. App. 660, 127 S.E.2d 923 (1962).

⁵*Hall v. Christian Church of Georgia, Inc.*, 280 Ga. App. 721, 634 S.E.2d 793 (2006).

rests and defendant moves for a directed verdict,⁶ and after verdict (for a show of good cause).⁷

Trial court did not abuse its discretion by allowing the State to reopen its case because the defendant had notice of the witness (investigating officer in trial for DUI), so defendant could anticipate that the individual would have been called to testify.⁸

In breach of contract action, trial court did not abuse its discretion when it recommenced the bench trial to permit the plaintiff to present additional evidence on the issue of damages.⁹

In a case regarding a dog bite, appellate court found reversible error where the trial court refused to reopen the evidence so that a certified copy of the leash law could be admitted, after defendants had moved for a directed verdict for failure to state a prima facie dog bite case.¹⁰ Because it was determined that plaintiffs were not trifling with the court and also that the defendants would not be unduly prejudiced by the addition of the evidence, the trial court was found to have abused its discretion.

⁶Northern Assur. Co. of America v. Roll, 176 Ga. App. 893, 338 S.E.2d 870 (1985), after the close of evidence, A.P.S.S., Inc. v. Clary & Associates, Inc., 178 Ga. App. 131, 342 S.E.2d 375 (1986), after the close of arguments, Davis-Pickett Chevrolet, Inc. v. Collier, 106 Ga. App. 660, 127 S.E.2d 923 (1962), after submission of case to jury, Anderson v. Universal C. I. T. Credit Corp., 134 Ga. App. 931, 216 S.E.2d 719 (1975).

⁷Carolina Tree Service, Inc. v. Cartledge, 96 Ga. App. 240, 99 S.E.2d 705 (1957).

⁸Painter v. State, 263 Ga. App. 407, 587 S.E.2d 867 (2003). See also

Pierce v. State, 274 Ga. App. 670, 618 S.E.2d 700 (2005) (trial court did not abuse its discretion by reopening the evidence after the close of the state's case-in-chief and before the defense's case because the new witness was a co-defendant in the case and also the appellant's housemate, and the appellant could have anticipated that she would testify).

⁹Best v. CB Decatur Court, LLC, 324 Ga. App. 403, 750 S.E.2d 716 (2013).

¹⁰Phiel v. Boston, 262 Ga. App. 814, 586 S.E.2d 718 (2003).

Chapter 9

Burden of Proof

- § 9:1 Burden of proof and burden of going forward
- § 9:2 Prima facie case
- § 9:3 Civil cases; generally
- § 9:4 Claims against estates
- § 9:5 Shifting of burden of proof
- § 9:6 Constructive and resulting trust cases
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- § 9:8 Bailment cases
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- § 9:10 Corpus delicti
- § 9:11 Accused's competency
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- § 9:13 Identity of accused
- § 9:14 Burden on defendant in criminal cases
- § 9:15 Party having burden of proof in civil cases
- § 9:16 Burden on defendant in civil cases
- § 9:17 Burden of proving negative averments

§ 9:1 Burden of proof and burden of going forward

The burden of proof generally lies upon the party asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. If a negation or negative affirmation be so essential, the proof of such negative lies on the party so affirming it.¹

There may be a few narrow situations in which the burden of proof shifts. For instance, in a constructive trust case the burden is on plaintiff to prove the existence of the confidential or fiduciary relationship, and then the burden falls on the defendant to establish the fairness of his dealings.² Another example lies in the fact that, although evidence of an indictment is not conclusive, it is prima facie evidence of probable cause which shifts the burden to the plaintiff in malicious prosecution action to come forward with specific facts tending to show that probable cause did not exist for his arrest and that the charges against him were

[Section 9:1]

¹O.C.G.A. § 24-14-1.

²See § 9:6, *infra*.

instead motivated by malice.³

Courts sometimes speak of the burden of proof as shifting. It would probably add more to a logical application of the principles involved if the courts would recognize the fact that the burden is on plaintiff to prove one fact, or set of facts, and that having done so, there is an entirely separate burden on the other party to prove another fact or set of facts. The party opposing a summary judgment motion need not prove facts sufficient to raise an issue of material fact. The party does not carry the burden of presenting evidence sufficient to warrant judgment.⁴

A similar problem arises in condemnation cases wherein the contemnor has the burden of establishing a value, in the first instance.⁵

Summary judgment issues sometimes pose allocation of proof problems. On a motion for summary judgment, the burden of establishing the nonexistence of any genuine issue of fact is upon moving party and all doubts are to be resolved against movant.⁶ To prevail at summary judgment, a defendant, who will not bear the burden at trial, may point out that there is an absence of evidence to support an element of the plaintiff's case; once the defendant has done so, the plaintiff cannot rest upon her pleadings and has a duty to come forward with specific evidence demonstrating a question of fact.⁷

"On cross-motions for summary judgment, each party must show there is no genuine issue of material fact . . . and that each, respectively, is entitled to summary judgment [as a matter of law]; either party, to prevail by summary judgment, must bear its burden of proof."⁸

What is the effect of a presumption? While a presumption operating in favor of the party having the ultimate burden of persuasion requires the opposing party to go forward with evidence rebutting the presumption, it does not shift the original burden of persuasion; that burden remains with the party upon whom it was originally cast.⁹ Georgia courts generally reject the "bursting bubble" approach to presumptions which provides that

³Thompson v. Howard Bros., Inc., 289 Ga. App. 273, 657 S.E.2d 4 (2008).

⁴Medical Center of Central Georgia, Inc. v. Macon Health Center, Inc., 345 Ga. App. 879, 815 S.E.2d 199 (2018).

⁵See § 9:3, *infra*.

⁶Woods v. A.R.E. Accessories, LLC, 345 Ga. App. 887, 815 S.E.2d 205 (2018); Stephens v. Stephens, 239 Ga. 528, 238 S.E.2d 71 (1977).

⁷In re Carter, 288 Ga. App. 276, 653 S.E.2d 860 (2007). See also Dyess v. Brewton, 284 Ga. 583, 669 S.E.2d 145 (2008).

⁸Heiskell v. Roberts, 342 Ga. App. 109, 802 S.E.2d 385 (2017).

⁹Gordon v. Dennis, 347 Ga. App. 110, 817 S.E.2d 561 (2018); Miller v. Miller, 258 Ga. 168, 366 S.E.2d 682 (1988).

if a presumption is rebutted it disappears from the case and the jury is never told about it. Instead, Georgia courts will instruct the jury in a civil case that the law presumes certain facts from proof of other facts but that the presumption is rebuttable and it is ultimately up to the jury to decide whether the presumption in this case has been rebutted.¹⁰ The presumption remains in the jury instructions and only the jury can ultimately discount it.

§ 9:2 Prima facie case

When a party has the burden of proof and, either through a presumption in his favor or through evidence, establishes the propositions by that quantum of evidence the law requires, she has made a prima facie case and the burden of going forward with the evidence shifts to the other party.¹ For instance, a supplier seeking recovery on an open account establishes a prima facie case by tendering an authenticated invoice and demonstrating that goods were delivered, but that the invoice remains unpaid; at that point, the buyer has the burden of presenting evidence of specific facts to refute the supplier's proof. Moreover, a general denial of a supplier's claim in an action on open account is not sufficient to avoid summary judgment in favor of the supplier if the supplier establishes a prima facie case; the buyer must offer specific factual evidence creating a genuine issue for the jury.²

A presumption may excuse the introduction of evidence on a proposition, but it does not shift the burden of proof to the opposing party.³

Statutes of the various states contain numerous enactments creating or declaring presumptions or specifying that certain facts shall constitute prima facie evidence of other facts, the effect of which is to relieve the party in whose favor they operate of the necessity of producing evidence upon an issue and cast upon the other party the burden of going forward with the evidence.⁴

Defendant did not make a prima facie self-defense case in *Leslie*

¹⁰Baker v. Baker, 280 Ga. 299, 627 S.E.2d 26, 28 (2006) (“[A] rebuttable presumption, once established, does not vanish in the face of evidence contrary to the presumed fact”).

[Section 9:2]

¹Am. Jur. 2d, Evidence § 126.

²Traditional Properties, Inc. v. Performance Food Group of Georgia, LLC, 291 Ga. App. 442, 662 S.E.2d 250 (2008).

³Am. Jur. 2d, Evidence § 126.

⁴Manley v. State of Georgia, 279 U.S. 1, 49 S. Ct. 215, 73 L. Ed. 575 (1929).

See Mahone v. State, 296 Ga. App. 373, 674 S.E.2d 411 (2009) (citing O.C.G.A. § 16-13-32.5(e)); Vadde v. State, 296 Ga. App. 405, 674 S.E.2d 323 (2009) (citing O.C.G.A. § 16-9-20(a)(2)). See also Selph v. Williams, 284 Ga. 349, 667 S.E.2d 40 (2008) (citing O.C.G.A. § 48-4-44).

v. State.⁵ There, defendant sought to present evidence that the victim had committed certain acts of aggression towards third parties. In rejecting defendant's request, the Georgia Court of Appeals reasoned that defendant failed to present any evidence that the victim was the initial aggressor or that the victim presented an imminent threat.

"When a promissory note, on its face, shows that it is past due and in *default*, the plaintiff establishes a *prima facie* right to judgment, and the burden shifts to the [defendant] to establish an affirmative defense."⁶

In the Fifth Amendment Equal Protection context, a defendant makes a *prima facie* case that the jury venire did not adequately reflect a fair cross-section of the community when he shows: "(1) that the group alleged to be excluded is a distinctive group in the community, (2) that representation of the group in venires is not fair and reasonable in relation to the number of such persons in the community, and (3) that the underrepresentation is due to systemic exclusion of the group in the jury-selection process."⁷

Under the co-conspirator exception (O.C.G.A. § 24-8-801(d)(2)(E)), when the government establishes a *prima facie* case of a conspiracy separate and apart from the co-conspirator's statement, then the co-conspirator's statement is admissible.⁸

§ 9:3 Civil cases; generally

Normally, in civil cases the party having the burden of proof is required to prove his case by a preponderance of the evidence.¹

Preponderance of evidence means that superior weight of evidence upon the issues involved, which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue, rather than to the other.²

"Pursuant to OCGA § 15-11-311(a)(5), a juvenile court may only terminate parental rights based on dependency upon finding by clear and convincing evidence that the 'continued dependency was likely to cause serious physical, mental, emotional, or moral harm' to the child."³

A party is entitled to an instruction that the jury, in deciding

⁵*Leslie v. State*, 341 Ga. App. 583–84, 805 S.E.2d 859, 866 (2017).
731, 802 S.E.2d 674 (2017).

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⁶*Tselios v. Sarsour*, 341 Ga. App. 471, 800 S.E.2d 636 (2017).

¹*Whitley Const. Co. v. O'Dell*, 94 Ga. App. 426, 94 S.E.2d 784 (1956).

⁷*United States v. Davis*, 854 F.3d 1276 (11th Cir. 2017).

²O.C.G.A. § 24-1-1(5).

³*In Interest of R. S. T.*, 345 Ga. App. 300, 812 S.E.2d 614 (2018).

whether any fact has been proved, may properly consider the number of witnesses testifying on one side or the other as to that fact, but the number of witnesses alone is not conclusive if the testimony of the lesser number is more convincing.⁴

Insurance companies sometimes defend fire claims and deny coverage on grounds that the insured deliberately burned his home or property. Arson cases under Georgia law are controlled by the proposition that an insurance company can prevail in an arson defense based solely on circumstantial evidence if it shows that the fire was of incendiary origin and that the insured had both the opportunity and motive to have the fire set.⁵

When an insurance company argues that a claim falls within an exclusion contained in a policy, the insurance company bears the burden of proof to show that the facts fall within the exclusion.⁶

The burden of proving that an employee was acting as the agent of his employer is upon the party who asserts the agency,⁷ but that burden is eased by the presumption that an agency exists under various circumstances.⁸

The presumption against reunification delineated in O.C.G.A. § 15-11-204(d)(1) did not apply in situation where the child's aunt and uncle are not the child's parents but are the child's legal guardians.⁹

In a negligent entrustment action where the driver of a company vehicle was involved in traffic incident resulting in a death and injuries, the Georgia Court of Appeals stated, “[a]lthough a presumption arises that the employee was acting in the course and scope of employment when the employee was driving his employer’s vehicle at the time of the collision, the employer may overcome this presumption ‘by presenting uncontradicted evidence showing that the employee was not acting in the course and scope of his employment.’”¹⁰

A party giving contradictory testimony has the burden of offering a reasonable explanation for the contradiction.¹¹

When a party seeks damages, it bears the burden of proving

⁴O.C.G.A. § 24-4-4.

⁵*Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 38, 38 Fed. R. Evid. Serv. 1471 (11th Cir. 1993).

⁶*Auto-Owners Insurance Company v. Smith*, 340 Ga. App. 574, 798 S.E.2d 93 (2017).

⁷*Clark v. Atlanta Veterans Transp., Inc.*, 113 Ga. App. 531, 148 S.E.2d 921 (1966).

⁸See § 20:18, *infra*.

⁹*In Interest of B.G.*, 345 Ga. App. 167, 812 S.E.2d 552 (2018).

¹⁰*Corrugated Replacements, Inc. v. Johnson*, 340 Ga. App. 364, 797 S.E.2d 238 (2017).

¹¹*Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 343 S.E.2d 680 (1986).

the loss suffered so as to enable the judge to determine the loss with a reasonable degree of certainty.¹²

When a party seeks to dismiss an action on the grounds of absence of personal jurisdiction the movant bears the burden to proving that jurisdiction is lacking.¹³

Similarly, when a defendant seeks to dismiss an action on the grounds that subject jurisdiction is lacking, the burden rests with the plaintiff to show that jurisdiction exists.¹⁴

A trial court erred in instructing the jury that circumstantial evidence must be contrary to any other reasonable hypothesis in order for the burden of proof on such issue to be carried.¹⁵

Where statutory text is silent on allocation of burden of persuasion, ordinary default rule is that plaintiffs bear risk of failing to prove their claims.¹⁶

Forum selection clauses will be upheld absent a “strong” showing “free from substantial doubt” that the public interest will be prejudiced by its enforcement.¹⁷

There is a presumption that statutes are constitutional, and the burden to show otherwise rests with the party asserting that it is unconstitutional.¹⁸

A party that asserts a statute of limitations defense bears the burden of showing that the statute bars the action.¹⁹

The Georgia Court of Appeals in *Pascarelli v. Koehler*²⁰ found that plaintiff, who brought action in Georgia against various entities for injuries he sustained during a hotel stay at a Marriott hotel, did not satisfy his burden of proof regarding personal jurisdiction with respect to certain parties to the lawsuit, including a Marriott hotel franchisor.

§ 9:4 Claims against estates

Claims against estates present a number of unusual problems, both from the point of view of obtaining the allowance of rightful

¹²*Mashburn Construction, L.P. v. CharterBank*, 340 Ga. App. 580, 798 S.E.2d 251 (2017). *Inc.*, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009).

¹³*Intercontinental Services of Delaware, LLC v. Kent*, 343 Ga. App. 567, 807 S.E.2d 485 (2017). ¹⁷*Tetra Tech Tesoro, Inc. v. JAAAT Technical Services, LLC*, 338 Ga. App. 77, 789 S.E.2d 310 (2016).

¹⁴*Douglas County v. Hamilton State Bank*, 340 Ga. App. 801, 798 S.E.2d 509 (2017). ¹⁸*Women’s Surgical Center, LLC v. Berry*, 302 Ga. 349, 806 S.E.2d 606 (2017).

¹⁵*Southern Ry. Co. v. Georgia Kraft Co.*, 258 Ga. 232, 367 S.E.2d 539 (1988). ¹⁹*Malak v. Unifund CCR, LLC*, 343 Ga. App. 314, 317–18, 807 S.E.2d 80, 83 (2017).

¹⁶*Gross v. FBL Financial Services, Inc.*, 591, 816 S.E.2d 723 (2018). ²⁰*Pascarelli v. Koehler*, 346 Ga. App. 591, 816 S.E.2d 723 (2018).

claims and from the problems of preventing against false or exaggerated claims after the person who knows the most about their merits is dead.

In *Heard v. Lovett*,¹ when a caveator's claim of forgery as to testator's signature is supported by prima facie evidence, the propounder has the burden of proof on the issue by a preponderance of evidence. Helping the propounder to carry the burden may be the testimony of beneficiaries, who testified in this case to statements attributed to decedent concerning disposition of his property. When the probate court refused to consider the statements on the ground of hearsay, this was error.

In certain cases, a greater degree of proof than the usual preponderance has been required. In an action against an executor for specific performance of a parol contract for sale of land, the plaintiff had to prove her case clearly and strongly and so satisfactorily as to leave no reasonable doubt.²

Upon the trial of the issue arising from propounding of a will and caveat thereto, the burden, in the first instance, is upon the propounder of the alleged will to make out a prima facie case by showing the factum of will, and that at time of its execution the testator apparently had sufficient mental capacity to make it, and acted freely and voluntarily; when this is done, the burden of proof shifts to caveator.³

As noted, when the propounder of a will meets the burden of initially demonstrating the testator's sanity, the burden shifts to the caveator. A person may be unable to transact business, or even lack capacity to contract, and may still have sufficient capacity to make a will.⁴

In the event the original will cannot be found, the propounder of a copy of the will must rebut the presumption that the will was revoked.⁵

The Supreme Court of Georgia stated in *Milbourne v. Milbourne*⁶ the following regarding undue influence in the will context: "[W]hen a beneficiary under a will occupies a confidential relationship with the testator, is not the natural object of the testator's bounty, and takes an active part in the planning, preparation, or execution of the will, a rebuttable presumption of

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¹*Heard v. Lovett*, 273 Ga. 111, 538 S.E.2d 434 (2000).

²*Gordon v. Spellman*, 148 Ga. 394, 96 S.E. 1006 (1918).

³*Cornelius v. Crosby*, 243 Ga. 26, 252 S.E.2d 455 (1979); *Johnson v. Dodgen*, 244 Ga. 422, 260 S.E.2d 332

(1979). In accord, *Holland v. Holland*, 277 Ga. 792, 596 S.E.2d 123 (2004).

⁴*Singelman v. Singelmann*, 273 Ga. 894, 548 S.E.2d 343 (2001).

⁵*Britt v. Sands*, 294 Ga. 426, 754 S.E.2d 58 (2014); O.C.G.A. § 53-4-46.

⁶*Milbourne v. Milbourne*, 301 Ga. 111, 799 S.E.2d 785 (2017).

undue influence arises.”

The “Dead Man’s Act” which formerly governed the admission of testimony in estate claims has been abrogated.⁷

§ 9:5 Shifting of burden of proof

The burden of proof, in the sense of the burden which rests upon a party to establish the truth of a given proposition or issue by the quantum of proof demanded by the law in the case in which the issue arises, never shifts during the course of the trial, but remains from the first to the last upon the party on whom the law cast it at the beginning of the trial, and the party upon whom that burden rests must sustain his position by the degree of truth which the law requires. The duty of going forward with the evidence, however—that is, the burden of proof, in the sense of the duty of producing evidence to meet the evidence produced or the *prima facie* case made by one’s adversary—shifts or passes from side to side as the trial of the case progresses and evidence is introduced by the respective parties. In other words, the burden of proof in the sense of the ultimate risk of nonpersuasion, never shifts from the party who has the affirmative of an issue, although the burden of going forward with the evidence may shift at various times during the trial from one side to the other as evidence is introduced by the respective parties.¹ For instance, if one party introduces evidence of circumstances which under the law causes a presumption of undue influence in the execution of a trust to arise, the burden of going forward with the evidence shifts to the other party; that burden is to produce evidence rebutting the presumption, but is not the ultimate burden of persuasion, which never shifts from the party asserting the claim of undue influence.²

In a wrongful death action stemming from a fatal injury sustained at a music concert (attendee fell from stairs and sustained injuries which resulted in her death), plaintiff was required to put forth evidence showing defendant’s constructive knowledge of the hazard. Once this burden is demonstrated, the burden shifts to the defendant “to show that the plaintiff’s injury resulted from her own intentional disregard of a known risk or a failure to exercise ordinary care for her own safety.” Once this showing is made, “the burden then shifts back to the plaintiff, who must produce evidence creating a genuine issue of material fact on the question of intentional disregard or failure to exercise

⁷See § 14:1, *infra*.

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¹Am. Jur. 2d, Evidence § 124.

²Horton v. Hendrix, 291 Ga. App. 416, 662 S.E.2d 227 (2008).

ordinary care, or evidence tending to show ‘that any such negligence resulted from the defendant’s own actions or conditions under the defendant’s control.’ ”³

A trial court’s charge in a malice murder prosecution that “malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart” did not impermissibly shift the State’s burden of proof to the defendant.⁴

However, in *Bailey v. State*,⁵ the appeals court held that the trial court impermissibly shifted the burden of proof when it gave a jury instruction that implied that the jurors should consider the breath tests that were administered in that case to be valid.

In an action to establish a private access way across the defendant’s land, the burden of going forward shifted to the defendant to prove the plaintiff had reasonable access to his property after the plaintiff showed that there was no other access to his property except over water.⁶

In a school disciplinary action, the Supreme Court of Georgia compared the burden of proof in that case with the burden of proof in a criminal case. The Court stated, “In accordance with the general rule for the burden of proof in civil cases, when a student raises an affirmative defense in a school disciplinary proceeding, the student bears the burden of proving that defense. Unlike the burden of proof in a criminal case, the burden does not shift to the local board of education to refute the student’s defense.”⁷

The presumption of the legitimacy of a child born in wedlock does not shift the ultimate burden of proof regarding paternity to a defendant-husband who denies paternity in a divorce action. Thus, a plaintiff-wife seeking custody and child support in a divorce action had the burden of proving her entitlement to these benefits by demonstrating a preponderance of the evidence to rebut her husband’s denial of paternity.⁸

Venue must be established by the state in criminal prosecutions. The judge in *Napier v. State*⁹ instructed the jury regarding a presumption to be used to determine venue in a murder case. In the view of the Supreme Court, this jury charge did

³*Mercer University v. Stofer*, 345 Ga. App. 116 (2018), vacated on other grounds, 306 Ga. 191 (2019).

⁴*Gooden v. State*, 261 Ga. 691, 410 S.E.2d 113 (1991).

⁵*Bailey v. State*, 323 Ga. App. 424, 747 S.E.2d 210 (2013).

⁶*International Paper Realty Corp. v. Miller*, 255 Ga. 676, 341 S.E.2d

445 (1986).

⁷*Henry County Board of Education v. S.G.*, 301 Ga. 794, 804 S.E.2d 427, 347 Ed. Law Rep. 1232 (2017).

⁸*Miller v. Miller*, 258 Ga. 168, 366 S.E.2d 682 (1988).

⁹*Napier v. State*, 276 Ga. 769, 583 S.E.2d 825 (2003).

not shift the burden of proof as to venue.

In *Carollo v. Boria*,¹⁰ the 11th Circuit stated that after city officials established that they acted within their discretionary authority when they terminated a city manager from his position, the burden shifted to the plaintiff to establish that qualified immunity should not be granted.

In a Fifth Amendment Equal Protection jury selection case, the Eleventh Circuit stated that once a claimant establishes a prima facie case that a distinctive group has been denied the right to serve on a jury the burden shifts to the government “to dispel the inference of intentional discrimination.”¹¹

§ 9:6 Constructive and resulting trust cases

The Georgia trust statute has been revised. A constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to the property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity.¹

A resulting trust is a trust implied when it is determined that the settlor of the trust did not intend for the holder of legal title to the trust property to also hold the beneficial interest.² A resulting trust is implied when a created trust fails, the trust ends and trust property remains, or a purchase money resulting trust was established.

The Georgia Supreme Court explained the provisions of the Revised Georgia Trust Code of 2010 in a 2013 decision, *Ansley v. Racza-Long*.³

An implied trust is defined as either a resulting trust or a constructive trust. See O.C.G.A. § 53-12-2(5); *Hancock v. Hancock*, 205 Ga. 684(1) (54 S.E.2d 285) (1949). Under the Revised Georgia Trust Code of 2010, a resulting trust “is a trust implied for the benefit of the settlor or the settlor’s successors in interest when it is determined that the settlor did not intend that the holder of the legal title to the trust property also should have the beneficial interest in the property.” O.C.G.A. § 53-12-130. “An implied resulting trust can arise under three circumstances: (1) an express [or implied] trust is created but fails for any reason; (2) a trust is fully performed without exhausting all the trust property; or (3) a purchase money resulting trust is established.” *Edwards v. Ed-*

¹⁰*Carollo v. Boria*, 833 F.3d 1322 (11th Cir. 2016). Supply, Inc. v. Pridgen, 267 Ga. App. 125, 598 S.E.2d 805 (2004).

¹¹*United States v. Davis*, 854 F.3d 1276 (11th Cir. 2017).

²O.C.G.A. § 53-12-130.

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³*Ansley v. Racza-Long*, 293 Ga. 138, 744 S.E.2d 55 (2013).

¹O.C.G.A. § 53-12-132; Total

wards, 267 Ga. 780, 781(1) (482 S.E.2d 701) (1997) (applying 1991 Trust Act); see O.C.G.A. § 53-12-131 (defining a purchase money resulting trust). Construing the facts in the light most favorable to Ansley as the party opposing summary judgment, we conclude that the trial court correctly determined that she has failed to allege disputed issues of material facts showing an intention to create an implied resulting trust in her favor under the statute.

A constructive trust “is a trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity.” O.C.G.A. § 53-12-132. “Equity will not allow one with a legal interest in a piece of property a windfall recovery when the beneficial interest should flow to another.” *Weekes v. Gay*, 243 Ga. 784, 787(3) (256 S.E.2d 901) (1979). A “constructive trust is a remedy created by a court in equity to prevent unjust enrichment.” *St. Paul Mercury Ins. Co. v. Meeks*, 270 Ga. 136, 138(2) (508 S.E.2d 646) (1998).

In *Kephart v. Kephart*,⁴ a father brought suit alleging that his son held certain property in constructive trust for the father. The father did not carry his burden of proof. According to Son, the conveyance of the property was an unconditional gift. The father was not allowed to bolster his case by presenting his own out-of-court declarations which were consistent with father’s trial testimony. *Dodd v. Scott*⁵ reviews the rules for determining whether an implied trust was formed. The case also addresses the general inadmissibility of self serving out-of-court declarations sought to be introduced to prove facts asserted by the declarant.

A resulting trust is an implied trust which arises whenever legal title is in one person, but the beneficial interest either from payment of the purchase money or from other circumstances is either wholly or partially in another person, or where from the nature of the transaction it is manifest that it was the intent of the parties that the person taking legal title should have no beneficial interest.⁶

A party seeking to establish such a trust has the burden to show it by clear and convincing evidence.⁷

Disputes over church property sometimes involved principles of implied trust.⁸

Promise from a father-in-law, who was the security deed holder

⁴*Kephart v. Kephart*, 273 Ga. 9, 536 S.E.2d 504 (2000).

⁵*Dodd v. Scott*, 250 Ga. App. 32, 550 S.E.2d 444 (2001).

⁶*Hancock v. Hancock*, 205 Ga. 684, 54 S.E.2d 385 (1949).

⁷See *Brown v. Leggitt*, 226 Ga. 366, 174 S.E.2d 889 (1970); *Weekes v. Gay*, 243 Ga. 784, 256 S.E.2d 901 (1979).

⁸See *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyte-*

of property, to his former daughter-in-law that she would be allowed to continue to inhabit such property following her divorce from his son, did not entitle daughter-in-law to a constructive trust on the property. The father-in-law foreclosed on the property. There was no proof that the father-in-law made the promise with the intention of later breaking it so that he could take daughter-in-law's interest in the property, and the record demonstrated that the daughter-in-law voluntarily left the property prior to the foreclosure.⁹ With regard to interests in real property, a constructive trust generally may not be imposed based solely on a broken verbal promise to hold or transfer the land for the benefit of another. On the other hand, a broken verbal promise may be the basis of a constructive trust with regard to interests in real property if the promise was fraudulently made with the intention of being broken and for the purpose of thereby obtaining title (however, such fraud was not found to be present here).

Husband failed to prove necessary elements required to establish implied resulting trust on deceased wife's undivided one-half interest in land he conveyed to her during marriage, in action to quiet title to land brought against estate and beneficiaries; there was no evidence of creation of express trust, that trust was fully performed without exhausting trust property, or that husband paid consideration for legal title of undivided one-half interest to be transferred from him to his wife.¹⁰

In a divorce action, to prove that his conveyance of the marital home to wife gave rise to a resulting trust, husband must overcome the presumption under Georgia law that the conveyance was a gift. To rebut that presumption, husband must prove by clear and convincing evidence, inter alia, that a resulting trust was contemplated by both parties by way of an understanding or an agreement.¹¹ A resulting trust was not impressed upon real property in *Rosado v. Rosado*.¹² An implied trust is either a resulting trust or a constructive trust.

A jury's finding that a decedent's purported second spouse was entitled to an equitable interest in a home that the spouse shared with the decedent was supported by the evidence, albeit slight, where the spouse and the decedent paid the mortgage from a joint account and the spouse continued to make payments on the house following the decedent's death; the facts established a

rian Church, Inc., 290 Ga. 272, 719 S.E.2d 446 (2011). 604 S.E.2d 137 (2004).

⁹Parris v. Leifels, 280 Ga. 135, 625 S.E.2d 390 (2006). ¹¹Brock v. Brock, 279 Ga. 119, 610 S.E.2d 29 (2005).

¹⁰Burnett v. Holroyd, 278 Ga. 470, 670, 662 S.E.2d 761 (2008). ¹²Rosado v. Rosado, 291 Ga. App.

constructive trust.¹³

Assuming that building owner had possession of heat pumps supplied by subcontractor, allowing building owner to retain them would not violate principles of equity, and thus, a constructive trust in favor of subcontractor would not be implied; building owner or real property owner had paid general contractor for the heat pumps, there was no evidence building owner knew or should have known general contractor did not intend to pay subcontractor, and subcontractor was alleging that general contractor, rather than building owner, was unjustly enriched.¹⁴

The case of *Pearlman v. Security Bank and Trust Co. of Albany*¹⁵ involved a claim by the plaintiff that she was entitled to insurance proceeds due to the doctrine of implied trust. The Court of Appeals analyzed the claim by denying the claim to a constructive trust on the insurance proceeds:

The trial court did not err in failing to find such a trust. “An implied trust is either a resulting trust or a constructive trust.” O.C.G.A. § 53-12-90.

A constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interests in the property without violating some established principle of equity. O.C.G.A. § 53-12-93(a).

Ellen Pearlman failed to demonstrate any fraud or show any other equitable principle which would entitle her to a constructive trust on the insurance proceeds.

§ 9:7 Burden of proving fraud

It is essential to the establishment of fraud that the person charged must either have knowledge of the falsity of his statement and, hence, an intent to deceive the other party, or he must make the false representations, without knowing their falsity, in a fraudulent or reckless manner which would be equivalent to knowledge of the falsehood.¹ Essential elements of action for fraud are: (1) that the defendant made the representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the plaintiff; (4) that the plaintiff reasonably relied upon such representations; and (5) that the plaintiff sustained the alleged loss and damage as the

¹³Singleton v. Wilburn, 262 Ga. App. 52, 584 S.E.2d 659 (2003).

¹⁴Tabar, Inc. v. D & D Services, Inc., 267 Ga. App. 659, 601 S.E.2d 143 (2004).

¹⁵Pearlman v. Security Bank and

Trust Co. of Albany, 261 Ga. App. 270, 582 S.E.2d 219 (2003).

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¹O.C.G.A. § 51-6-2.

proximate result of their having been made.²

“Fraudulent intent at the time of contracting can [also] be inferred based on subsequent conduct of the defendant that is unusual, suspicious, or inconsistent with what would be expected from a contracting party who had been acting in good faith.”³

Promises contained in contracts generally do not form the basis for a fraud claim. But an exception to this general rule exists when the promisor makes the promise with the intent not to perform or is aware that the future event will not take place.⁴ In *Sure, Inc. v. Premier Petroleum, Inc.*,⁵ the Georgia Court of Appeals found that in a fraud action, a genuine issue of material fact existed as to whether a petroleum company intended to loan \$56,000 to a gas station owner. The gas station owner alleged that petroleum company had signed loan documents without any intention of providing the monies as part of a scheme to induce the gas station owner to put up certain property as collateral.

§ 9:8 Bailment cases

Where the bailor has shown that the goods were received in good condition by the bailee and were not returned to the bailor on demand, the bailor has made out a case of prima facie negligence against the bailee, and thus, the bailee must show that the loss or damage was caused without his fault.¹

The effect of this rule is not to shift the burden of proof from plaintiff to the defendant, but simply to shift the burden of the proceeding.²

Where a bailor makes out a prima facie case of negligence against the bailee by showing damage or loss of the goods, the resultant presumption of negligence on the part of the bailee disappears upon the presentation by defendant of evidence showing proper diligence.³

See § 20:18, *infra*, for a discussion of the presumptions relating to bailed goods.

²O.C.G.A. § 51-6-2 (2008).

³*Sims v. Natural Products of Georgia, LLC*, 337 Ga. App. 20, 785 S.E.2d 659 (2016).

⁴*Sure, Inc. v. Premier Petroleum, Inc.*, 343 Ga. App. 219, 228–30, 807 S.E.2d 19 (2017).

⁵*Sure, Inc. v. Premier Petroleum, Inc.*, 343 Ga. App. 219, 807 S.E.2d 19 (2017).

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¹*Deloach v. Automatic Transmission & Brake Shop, Inc.*, 106 Ga. App. 797, 128 S.E.2d 512 (1962).

²See O.C.G.A. § 44-12-44.

³*Buena Vista Loan and Sav. Bank v. Bickerstaff*, 121 Ga. App. 470, 174 S.E.2d 219 (1970). See *Johnson v. Hardwick*, 212 Ga. App. 44, 441 S.E.2d 450 (1994).

§ 9:9 Criminal cases; generally

The prosecution has the burden of proving beyond a reasonable doubt each element of the crime.¹ This burden of proof does not shift from the prosecution to the defense; it rests upon the prosecution throughout the case.²

In criminal prosecutions the burden of proving affirmative defenses rests on the defendant—that is, where the defendant relies on a distinct substantive matter to exempt him from punishment and absolve him from liability, he has the burden of proving that matter, usually by a preponderance of the evidence.³

The responsibility of producing evidence of an affirmative defense and the burden of persuasion by proof beyond a reasonable doubt are two distinct and separate concepts; the first is placed squarely on the defendant unless the state's evidence raised the issue.⁴ In *Reid v. State*,⁵ it was found that the record supported the trial court's determination that the state satisfied its burden of disproving the defendant's affirmative defense of abandonment in a case alleging attempt to commit child molestation.⁶

The defendant has the burden to show that his or her voluntary intoxication rose to a level that negated intent.⁷

The procedural requirement of pretrial notice to the State of a defense, such as insanity, which would generally require expert opinion to rebut has no effect on the burden of proof. The State must still prove criminal intent, but the notice does not add a new burden—that the State must prove sanity without the aid of the “presumption” of sanity—in its case-in-chief. It is merely entitled to prior notice that it will have to present evidence in rebuttal to overcome the defendant's evidence of insanity.⁸ *Johncox* was reversed on other grounds (merger of included offenses) in *Curtis v. State*.⁹

In addition to the elements of the crime charged, the prosecu-

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¹O.C.G.A. § 16-1-5.

²*McRae v. State*, 163 Ga. 336, 136 S.E. 268 (1926).

³*Harris v. State*, 193 Ga. 109, 17 S.E.2d 573, 147 A.L.R. 980 (1941).

⁴*Adams v. State*, 288 Ga. 695, 707 S.E.2d 359 (2011).

⁵*Reid v. State*, 349 Ga. App. 196, 825 S.E.2d 555 (2019).

⁶*Reid v. State*, 349 Ga. App. 196, 825 S.E.2d 555 (2019).

⁷*Horton v. State*, 258 Ga. 489, 371 S.E.2d 384 (1988).

⁸*Johncox v. State*, 189 Ga. App. 188, 375 S.E.2d 139 (1988).

⁹*Curtis v. State*, 275 Ga. 576, 571 S.E.2d 376 (2002) (overruled on other grounds by, *Williams v. State*, 287 Ga. 192, 695 S.E.2d 244 (2010)).

tion has the burden of proving venue beyond a reasonable doubt.¹⁰ In *Harris v. State*,¹¹ the prosecution satisfied its burden of demonstrating venue in a child molestation case where the “uncontradicted evidence” indicated that the charged offenses took place between September 2011 and April 2012 in Clayton County.

However, insufficient evidence of venue is a trial error that does not bar retrial.¹² Circumstantial evidence sometimes plays a role. Circumstantial evidence that a murder took place in a county can be sufficient to establish venue.¹³ In non-homicide cases, if “it cannot be determined in what county a crime was committed, it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed.”¹⁴ In *Awtrey v. State*,¹⁵ it was held that the state properly established venue in Douglas county in an illegal narcotics action. The court noted that numerous officers who made purchases “were affiliated with Douglas County, and in the absence of contrary evidence it is presumed that they performed their duties properly and acted within their jurisdiction.” In addition, the court observed that the officers who performed the search were Douglas County law enforcement personnel.

The presence or absence of conflicting evidence is also a factor. Where there is no conflicting evidence, there are judicial indications that the burden of proof on the prosecution is not as exacting; evidence sufficient to establish venue can be modest.¹⁶

In *Shelton v. Lee*,¹⁷ the Georgia Supreme Court held the following in regard to instructions to be given to a jury regarding venue in homicide cases:

The Eleventh Circuit focused on this Court’s advice in *Napier* to trial courts in future cases that the better practice would be to instruct the jury that it “may consider whether” the cause of death was inflicted in the county in which the death occurred or in which the body was discovered. See *Napier v. State*, supra, 276 Ga. at 772 (2), 583 S.E.2d 825. But as set forth above, we now disapprove of that distinction and that advice to trial courts. We hold, instead, that a jury instruction that follows the “shall be considered” language of OCGA § 17–2–2 (c) is a proper instruction. Contrary to

¹⁰Worthen v. State, 304 Ga. 862, 823 S.E.2d 291 (2019); Turner v. State, 273 Ga. 340, 541 S.E.2d 641 (2001) (venue is an essential element of guilt).

¹¹Harris v. State, 333 Ga. App. 118, 775 S.E.2d 602 (2015).

¹²Bradley v. State, 272 Ga. 740, 533 S.E.2d 727 (2000).

¹³See Jones v. State, 245 Ga. 592, 266 S.E.2d 201 (1980).

¹⁴Propst v. State, 299 Ga. 557, 788 S.E.2d 484 (2016).

¹⁵Awtrey v. State, 346 Ga. App. 892, 815 S.E.2d 655 (2018).

¹⁶Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980).

¹⁷Shelton v. Lee, 299 Ga. 350, 788 S.E.2d 369 (2016).

the Eleventh Circuit's conclusion, we are not persuaded that instructions such as those given in this case, viewed properly as a matter of Georgia venue law, violate the rule in *Sandstrom* [v. Montana, 99 S.Ct. 2450 (1979)] by unconstitutionally shifting to the defendant the burden of proof of an element of the crime charged.

To determine venue in a homicide case, use of the venue statute's subsection on a crime possibly committed in more than one county is not precluded.¹⁸

The statute governing venue of prosecutions for crimes committed while in transit, providing that a crime shall be considered as having been committed in any county through which a defendant traveled while committing the crime, applied only when it could not readily be determined in which county the crime had been committed. It did not apply to a defendant who sold cocaine to a police informant while traveling in an automobile within a city that was in two different counties since the location of the crime could be ascertained. The informant would have known the general locations where sales occurred, and police officers knew the exact route that the informant and defendant traveled. Accordingly, the state's proof of venue was defective.¹⁹

In a "no-knock" case which resulted in death of an elderly householder, the court reversed the conviction of Atlanta police officer Arthur Tesler, holding there was no adequate proof of venue.²⁰

Venue for the offenses of kidnapping as well as child molestation received legislative attention in 2009. An Act changed the definition of the offense of kidnapping, made it nonmergable, and provided the venue for the offense. The Act amends O.C.G.A. § 16-5-40. Another Act changed the definition of the offense of child molestation and provided for venue. That Act amends O.C.G.A. § 16-6-4.

Courts have looked to the likelihood that a reasonable fact finder could draw an inference of venue from the circumstances. In *State v. Prescott*,²¹ there was no stipulation to venue and the State failed to present any specific evidence at trial to demonstrate venue. The Georgia Supreme Court, however, found that a reasonable fact finder could infer the crime did occur in Screven County because the crime occurred at Screven County High School, the resource officer who investigated was an employee of the Screven County Sheriff's Office and Screven County Sheriff Office forms were used for *Miranda* waiver purposes.

¹⁸O.C.G.A. 17-2-2(h); *Rogers v. State*, 290 Ga. 401, 721 S.E.2d 864 (2012).

¹⁹*Thompson v. Brown*, 288 Ga. 855, 708 S.E.2d 270 (2011).

²⁰*Tesler v. State*, 295 Ga. App. 569, 672 S.E.2d 522 (2009).

²¹*State v. Prescott*, 290 Ga. 528, 722 S.E.2d 738 (2012).

The prosecution must sustain the burden as to the corpus delicti,²² the identity of the accused,²³ and the commission of the crime within the period limited by statute.²⁴

It has been held that the testimony of one witness may be sufficient to authorize a conviction.²⁵ As stated by statute, the testimony of a single witness is generally sufficient to establish a fact, O.C.G.A. § 24-14-8, although under certain circumstances corroboration may be required.

Accomplice testimony sometimes raises corroboration issues. Evidence corroborating accomplice's testimony does not have to be sufficient in and of itself to support a verdict of guilty; circumstantial evidence tying the defendant to crime and justifying an inference of guilt is satisfactory.²⁶ The Georgia Supreme Court added that "corroborating evidence must be 'independent of the accomplice testimony and must directly connect the defendant with the crime, or lead to the inference that he is guilty.'"²⁷ For more on the sufficiency of proof based solely upon the testimony of an accomplice, see § 13:8, *infra*. In Georgia, there is no requirement that a child molestation victim must be corroborated, in order to convict.²⁸

Corroboration of an alleged accomplice's testimony is insufficient to satisfy criminal law requirements where corroborating evidence does no more than merely cast on the defendant a grave suspicion of guilt.²⁹

Proof of the existence of a conspiracy is often achieved through inferences from the actions of those allegedly involved in the criminal conduct as well as from circumstantial evidence.³⁰

In malice murder prosecution, the Supreme Court of Georgia found that the evidence present at trial was sufficient to show a conspiracy between the defendant and three other individuals named in the indictment. The Court observed that prior to the shootings the men had discussed committing a robbery as well as their respective roles, that the men left the scene of the incident together, and the defendant had discussed the incident with one of the other men after its occurrence.³¹

²²See § 9:10, *infra*.

²³See § 9:13, *infra*.

²⁴*Pennington v. State*, 323 Ga. App. 92, 746 S.E.2d 768 (2013).

²⁵*Preston v. State*, 42 Ga. App. 280, 155 S.E. 774 (1930).

²⁶*Crawford v. State*, 294 Ga. 898, 757 S.E.2d 102 (2014).

²⁷*Yarn v. State*, 305 Ga. 421, 826 S.E.2d 1 (2019).

²⁸*Goldey v. State*, 289 Ga. App. 198, 656 S.E.2d 549 (2008).

²⁹*Hill v. State*, 236 Ga. 831, 225 S.E.2d 281 (1976).

³⁰*United States v. Gonzalez*, 834 F.3d 1206 (11th Cir. 2016).

³¹*Davis v. State*, 302 Ga. 576, 583–84, 805 S.E.2d 859, 866 (2017).

Conviction for incest may be based on the uncorroborated testimony of a prosecuting witness if the victim's testimony is sufficient to convince the trier of fact of defendant's guilt beyond a reasonable doubt.³²

The question in a rape prosecution is not whether the victim's testimony as to her lack of consent is reasonable, nor is it whether victim's apprehension of great bodily harm, violence or other dangerous consequences of resistance was reasonable, but rather, question is whether the State has proved beyond reasonable doubt that the acts of the accused were not freely consented to by the alleged victim, which is a question of fact for the jury.³³

Where a criminal charge is grounded on a negative proposition or where a negative proposition is an essential element of the crime, the burden is on the prosecution to prove the charge.³⁴ For instance, where the charge is abortion, the fact that the operation was not necessary to preserve the life of the mother must be proved by the prosecution.³⁵

To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.³⁶ The statute is illustrated in *Winders v. State*.³⁷

In *Rodriguez v. State*,³⁸ the Georgia Court of Appeals reversed defendant's conviction for reckless conduct by an HIV-infected person. The court found that the government did not meet its burden of showing that Rodriguez was an infected person. Specifically, the Court determined:

The only evidence of Rodriguez's HIV status was (a) his admission to S.F. and to police that he was "HIV positive," and (b) a one-page Quest Diagnostics testing report that Rodriguez handed to S.F. as they spoke in the parking lot outside of the local health department office. With respect to Rodriguez's admission, it could not satisfy the State's burden to prove his HIV status as defined under OCGA § 31-22-9.1. . . .

Likewise, the Quest Diagnostics document does not purport to satisfy the regulations of the DCH, nor did any witness testify as to the nature of the Quest Diagnostics report or its compliance with DCH regulations or licensing requirements. It was simply a docu-

³²Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980).

³³Clark v. State, 261 Ga. 311, 404 S.E.2d 787 (1991).

³⁴Am. Jur. 2d, Evidence § 153.

³⁵Am. Jur. 2d, Abortion § 20.

³⁶O.C.G.A. § 24-14-6.

³⁷Winders v. State, 258 Ga. 879, 375 S.E.2d 862 (1989); see also Taylor v. State, 337 Ga. App. 486, 788 S.E.2d 97 (2016); Adams v. State, 318 Ga. 105, 897 S.E.2d 396 (2024).

³⁸Rodriguez v. State, 343 Ga. App. 526, 806 S.E.2d 916 (2017).

ment that Rodriguez handed to S.F. in a parking lot, authenticated at trial by S.F. as such a document but nothing more. The report itself, as it appears in the record, presents raw blood data and medical jargon. . . . The State did not call any physician or other competent witness to explain the test report; testify as to its origin, methodology, or meaning; or describe how it satisfies the statutory criteria for demonstrating that a person is an “HIV infected person” under the definitions in OCGA § 31-22-9.1.³⁹

The U.S. Supreme Court held that an instruction in a state homicide trial, defining “reasonable doubt” in terms of “grave” or “substantial” uncertainty and of the need for “moral certainty,” violated the due process clause.⁴⁰

A burden rests on the State to demonstrate clearly that a defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel; at a separate *Jackson v. Denno* hearing re the admissibility of a purported confession, the State is required to show voluntariness only by a preponderance of evidence.⁴¹ In *Saunders v. State*,⁴² it was found that a pro se defendant did not voluntarily waive his right to have an attorney represent him. The court declared that “given the presumption against waiver, the facts cited by the trial court—which amount to no more than Saunders’s failure to request or obtain counsel despite knowing of her right to counsel and the perils of self-representation—do not show that Saunders intentionally relinquished her constitutional right to counsel.”

The government has the burden to prove that a defendant waived his right to a speedy trial.⁴³

The government bears the burden of demonstrating that the acts complained of in the indictment occurred within the applicable statute of limitations.⁴⁴

Absence of a written waiver form is not conclusive on the question of whether *Miranda* warnings have been properly administered; there is no constitutional requirement that waiver of constitutional rights be in writing; in the absence of a writing, the trial court is still authorized to find, from a totality of the evidence, that the State has carried its burden of showing a waiver

³⁹Rodriguez v. State, 343 Ga. App. 526 (2017).

⁴⁰Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990) (disapproved of on other grounds by, *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385, 33 Fed. R. Ev. Serv. 305 (1991)).

⁴¹Hurt v. State, 239 Ga. 665, 238 S.E.2d 542 (1977).

⁴²Saunders v. State, 347 Ga. App. 84, 815 S.E.2d 622 (2018).

⁴³State v. Marshall, 337 Ga. App. 336, 787 S.E.2d 290 (2016).

⁴⁴Beavers v. State, 345 Ga. App. 870, 815 S.E.2d 223 (2018).

of constitutional rights.⁴⁵

Voluntary, intelligent entry of guilty pleas cannot be presumed from a silent record, but must be affirmatively shown by record or by allegations and evidence.⁴⁶

On the other hand, pleas may be assumed to be voluntary and intelligent when the state seeks recidivist punishment in a nondeath penalty case. The state bears the burden of proving two things: (1) the existence of prior guilty pleas and (2) that the defendant was represented by counsel when he entered those pleas. If the government satisfies these prongs, the presumption of regularity attaches and the defendant then bears the burden of producing some affirmative evidence indicating that his rights were infringed or that a procedural irregularity occurred in the taking of the plea.⁴⁷ If the defendant satisfies his burden, the burden shifts back to the prosecution to prove the constitutionality of the plea.⁴⁸

The Georgia Supreme Court made pronouncements applicable to the prosecutor's overall burden of proof in *Parker v. State*.⁴⁹ The observations came up in the context of analyzing what a prosecutor said in opening statement. The Court noted:

[I]t is inappropriate for a prosecutor in a criminal case to discuss in opening state the evidence she anticipates the defense will present at trial. A criminal defendant is under no obligation to prove or disprove anything: "the law is absolutely clear that a criminal defendant carries no burden of proof or persuasion whatsoever." (Footnote omitted.)

Burden of proof on prosecution respecting chain of custody of exhibits, see *Dempsey v. State*.⁵⁰

§ 9:10 Corpus delicti

The burden is on the prosecution to prove the corpus delicti beyond a reasonable doubt.¹ The term corpus delicti means the fact that the crime charged has been committed by someone.²

The corpus delicti or essential elements of the crime may be proved by any competent fact in the case, whether it is direct or

⁴⁵*Spain v. State*, 243 Ga. 15, 252 S.E.2d 436 (1979).

⁴⁶*Warner v. Jones*, 241 Ga. 467, 246 S.E.2d 320 (1978).

⁴⁷*Williams v. State*, 323 Ga. App. 88, 746 S.E.2d 913 (2013).

⁴⁸*Grant v. State*, 326 Ga. App. 121, 756 S.E.2d 255 (2014).

⁴⁹*Parker v. State*, 277 Ga. 439,

588 S.E.2d 683 (2003).

⁵⁰*Dempsey v. State*, 265 Ga. App. 175, 593 S.E.2d 362 (2004) (fungible material, burden on prosecution to show absence of tampering).

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¹*Edwards v. State*, 213 Ga. 552, 100 S.E.2d 172 (1957).

²Am. Jur. 2d, Evidence § 149.

circumstantial evidence.³ Where the circumstances can be explained upon a reasonable hypothesis consistent with innocence and leave a serious and grave doubt of guilt, a conviction is improper.⁴

It should be noted that crimes may be committed in different degrees and are, therefore, legally distinct and separate crimes with different elements and penalties, although the corpus delicti may be the same. For instance, under Georgia's statutory scheme, arson in the first, second, and third degrees are legally distinct crimes with different elements and penalties, although the corpus delicti may be identical.⁵

A confession alone will not prove the corpus delicti, see § 27:7, *infra*, but a confession may be considered as part of the proof of the corpus delicti.⁶ Thus, while a confession, standing alone, is not sufficient to justify a conviction, a free and voluntary confession of guilt by the accused is direct evidence of the highest character and is sufficient to authorize a conviction when corroborated by proof of the corpus delicti.⁷

In a homicide case, the statements or acts of the accused or any other competent evidence, is admissible to show that death resulted from some criminal agency.⁸

§ 9:11 Accused's competency

The competency of the accused may be brought into issue in different ways. On the one hand, if he is insane at the time of the commission of the crime, such insanity may be a defense to the charge.¹ On the other hand, the accused must be sane to stand trial so that he can cooperate with counsel in the preparation and presentation of his defense. Finally, the defendant may have been sane at the time of the commission of the crime and throughout the trial, but insane at the time he is sentenced to death, so that a death sentence cannot be executed. These situations should be kept distinctly separate, even though some of the same problems are involved in all these situations.

A trial court has a duty to conduct, *sua sponte*, a competency hearing when there is information which becomes known to it,

³*Ricks v. State*, 206 Ga. 20, 55 S.E.2d 576 (1949).

⁴*Burge v. State*, 103 Ga. App. 682, 120 S.E.2d 200 (1961).

⁵O.C.G.A. §§ 16-7-60, 16-7-61(a); *Shelnutt v. State*, 289 Ga. App. 528, 657 S.E.2d 611 (2008).

⁶*Beckham v. State*, 103 Ga. App. 719, 120 S.E.2d 341 (1961); *Williams*

v. State, 170 Ga. App. 20, 316 S.E.2d 28 (1984).

⁷*Hargrove v. State*, 289 Ga. App. 363, 657 S.E.2d 282 (2008).

⁸*Wright v. State*, 199 Ga. 576, 34 S.E.2d 879 (1945).

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¹See § 4:6, *supra*.

prior to or at the time of the trial, sufficient to raise a bona fide doubt regarding the defendant's competence.²

For purposes of the Georgia Criminal Code, "incompetent" means a person charged with an offense who is unable because of physical or mental condition to understand the nature and purpose of the proceedings against him or to assist in his defense.³

The Georgia Supreme Court discussed standards relating to claims of incompetency to stand trial in 2005 and 2006 decisions.⁴ In *Traylor v. State*,⁵ the court reviewed applicable principles: "A defendant bears the burden of establishing incompetency to stand trial by a preponderance of the evidence, and this burden is consistent with principles of due process. The threshold for competency is easily met in most cases; it exists so long as a defendant is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands." The court cited *Lewis v. State*.⁶

Procedure for defendant to raise the issue of competency to stand trial, revision of definitions, see 2007 amendment of O.C.G.A. § 17-7-130. The issue of incompetency of the accused is frequently raised by a defendant's special plea of incompetence.⁷ Incompetency of an accused to stand trial must be proved by the defendant at a competency trial by a preponderance of evidence.⁸ Additional changes to the competency statutes came in 2011. Revisions clarified procedures, confirmed the right of the court to request a competency evaluation, provided an option for bench trials when the accused claims incompetency to stand trial, and adjusted procedures for demanding speedy trial when a special plea of mental incompetency is lodged by the accused.⁹

Experts frequently weigh in on the competency issue. The basis for their opinions may be scrutinized by the courts. Expert basis for opinion testimony relating to competency was the subject of

²Pope v. State, 286 Ga. 1, 685 S.E.2d 272 (2009).

³Brown v. State, 215 Ga. 784, 113 S.E.2d 618 (1960). See O.C.G.A. § 17-7-130.

⁴See Sims v. State, 279 Ga. 389, 614 S.E.2d 73 (2005).

⁵Traylor v. State, 280 Ga. 400, 627 S.E.2d 594 (2006).

⁶Lewis v. State, 279 Ga. 69, 70, 608 S.E.2d 602 (2005).

⁷Weaver v. State, 288 Ga. 540, 705 S.E.2d 627 (2011) (during trial defendant yelled and screamed after he had announced, shortly prior to trial, "It's showtime").

⁸Velazquez v. State, 282 Ga. 871, 655 S.E.2d 806 (2008).

⁹See Ga. Laws 2011, Act 91, revising O.C.G.A. § 17-7-130.

analysis in *Velazquez v. State*.¹⁰ Dr. Salinas performed a mental examination on the defendant, then provided an opinion that the accused was capable of assisting the defense. The trial judge allowed Dr. Salinas to refer to an evaluative report by another expert, Dr. Walker, who was not called to testify. Dr. Salinas testified merely that Dr. Walker had performed an examination on defendant, and the opinion of Dr. Salinas relied on the evaluations of Dr. Walker. There was no problem with the trial expert relying upon reports of others, said the Georgia Supreme Court:

There is likewise no merit to Velazquez's claim that the trial court erred by not granting a new trial in that it allowed Dr. Salinas to offer an opinion about his competency based on hearsay, including Dr. Walker's report and conversations with others. As noted, Dr. Salina's opinion was based on her own interview of Velazquez as well as her review of his medical records and conversations with other experts who had evaluated him for competency. In the situation in which an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, on the other's findings, *Roebuck v. State*, 277 Ga. 200, 202, 586 S.E.2d 651, 655 (2003). Even when an expert's testimony is based on hearsay, the expert's lack of personal knowledge does not mandate the exclusion of the opinion but merely presents a jury question as to the weight which should be accorded the opinion.

In a murder trial of a defendant who allegedly had an IQ of 49 and where the trial court had refused to accept the defendant's guilty plea after determining that the defendant did not understand the rights he was giving up by pleading guilty, the defendant was entitled to hearing the issue of competency to stand trial.¹¹

The trial of a special plea of insanity, that is, insanity at the time of trial, is civil in nature, and the burden of producing evidence of insanity is upon the defendant.¹²

The issue of accused's insanity at the time of the alleged crime is a question for the trial jury; issue of accused's competency to stand trial is a question for special jury upon plea of insanity. In either case, the question ultimately is whether the evidence supports the verdict.¹³

On a plea of mental incompetence to stand trial, the issue to be tried is not whether defendant can distinguish between right and wrong, but whether he is capable at the time of the trial of understanding the nature and object of the proceedings going on

¹⁰*Velazquez v. State*, 282 Ga. 871, 655 S.E.2d 806 (2008).

¹¹*Holloway v. State*, 257 Ga. 620, 361 S.E.2d 794 (1987).

¹²*Williams v. State*, 238 Ga. 298, 232 S.E.2d 535 (1977).

¹³*Ricks v. State*, 240 Ga. 853, 242 S.E.2d 604 (1978).

against him and rightly comprehends his own condition in reference to such proceedings and is capable of rendering his attorneys such assistance as a proper defense to the indictment against him demands.¹⁴

If the evidence indicates that there is an issue of competency, the court must inquire into it, even if the defendant makes no motion for a hearing on the issue of competency.¹⁵

The trial judge is aided in making decisions regarding mental claims by the provision of law which mandates a mental exam by the state when the defense plans to produce mental health testimony.¹⁶

Sometimes the issue surfaces in the middle of a trial.¹⁷ The court held that Traylor failed to show, prior to or at trial, evidence of irrational behavior that was significant enough to cause a trial court to make an expanded inquiry regarding competence. Collins raised the issue after jury selection, and was also unsuccessful in his claims.

The evidence of a defendant's prior adjudications of incompetency by the probate and superior courts was admissible in a trial on the defendant's plea of mental incompetency to stand trial for murder.¹⁸

A policy question relates to the manner of the hearing or trial to decide the incompetency question. Should a judge alone do it? That is the way the issue is handled in New York, Florida, federal courts, and most states.¹⁹ In a state like Georgia, juries sometimes have difficulty resolving whether a person is competent. Hung juries can occur, raising this question: do multiple competency trials and successive hung juries serve the cause of effective and efficient justice? Is the cost of a special jury justified? For practical reasons, the enhanced reliability of a judge-only procedure for resolving competency to stand trial makes sense to many. Some commentators have urged that Georgia law be revised in this direction, in order to modernize the procedure.

Movement in this direction was supplied by the Georgia

¹⁴*Baker v. State*, 250 Ga. 187, 297 S.E.2d 9 (1982). *State*, 259 Ga. App. 587, 578 S.E.2d 201 (2003).

¹⁵*Lightsey v. State*, 188 Ga. App. 801, 374 S.E.2d 335 (1988).

¹⁶*See Pope v. State*, 286 Ga. 1, 685 S.E.2d 272 (2009) (defendant must submit to mental health examination by state's expert if he or she intends to present expert mental health testimony at trial).

¹⁷*See Traylor v. State*, 280 Ga. 400, 627 S.E.2d 594 (2006); *Collins v.*

¹⁸*Newman v. State*, 258 Ga. 428, 369 S.E.2d 902 (1988).

¹⁹*See People v. Troy*, 28 A.D.3d 689, 690, 817 N.Y.S.2d 289 (2d Dep't 2006) (no constitutional right to try issue of incompetence before a jury); *U.S. v. Saingerard*, 621 F.3d 1341 (11th Cir. 2010).

legislature in 2011. In the legislation noted earlier in this section, Georgia enacted a procedure to allow bench trial of competency claims.²⁰ Unlike the earlier pattern wherein incompetency claims automatically went to a jury, the 2011 law requires defendants to submit to a bench trial. However, if the defense or prosecutors object, a jury trial can be requested.

§ 9:12 Alibi

It was error to charge jury in such way that defendant had burden of proving alibi to reasonable satisfaction of jury.¹

Although alibi often has been treated as an affirmative defense, it truly is not an independent affirmative defense. It is simply evidence in support of a defendant's plea of not guilty, and should be treated merely as evidence tending to disprove one of the essential factors in the case of the prosecution, that is, presence of the defendant at the time and place of the alleged crime.²

The correct approach to an alibi instruction was supplied in *Swindle v. State*.³ The Georgia Supreme Court looked at the instruction, then offered a suggestion. The trial court's charge on alibi included the following:

The evidence presented with respect to time and place must be such as reasonably excludes a possibility of the presence of the defendant at the scene of the alleged offense. Presence of the defendant at the scene of the crime alleged is an essential element in the crime set forth in the indictment, and the burden of proof is upon the [S]tate to prove such beyond a reasonable doubt.

Appellant urges that the first sentence [of the foregoing instruction] erroneously suggested that he had the burden of proof as to the alibi defense. However, he requested the instruction and is, therefore, precluded from attacking it on appeal. *Whatley v. State*, 270 Ga. 296, 300, 509 S.E.2d 45 (1998). Moreover, in *Chapel v. State*, 270 Ga. 151, 157, 510 S.E.2d 802 (1998), we recognized that a charge on alibi "would be correct and better without" the first sentence, but concluded there was no reversible error because "the final sentence is clear in instructing that the burden of proof rests completely with the [S]tate." Judgement affirmed.

There was no error when the court did not charge to the jury

²⁰See Ga. Laws 2011, Act 91, revising O.C.G.A. § 17-7-130 by providing that it shall be the duty of the court to have a bench trial "unless the state or the accused demands a special jury trial."

[Section 9:12]

¹Ward v. State, 234 Ga. 882, 218 S.E.2d 591 (1975).

²Wright v. State, 169 Ga. App. 693, 314 S.E.2d 709 (1984).

³Swindle v. State, 274 Ga. 668, 558 S.E.2d 385 (2002).

that the State bore the burden of disproving an alibi defense beyond a reasonable doubt when, looking at the charges as a whole, the court instructed the jury on the defendant's presumption of innocence, on the State's burden of proof beyond a reasonable doubt that the defendant committed the crime, and on assessing the credibility of the witnesses.⁴

O.C.G.A. § 17-16-5(a) requires the accused to disclose in writing an intention to rely upon the defense of alibi.⁵ When the defendant gave notice of alibi just three days prior to trial, exclusion of defense alibi evidence was warranted.⁶

See § 35:15, *infra*, for giving of instructions on alibi.

§ 9:13 Identity of accused

The burden is on the prosecution to prove beyond a reasonable doubt that the accused is the person who committed the crime charged, and a conviction cannot be sustained if the identification of the accused was vague, doubtful and uncertain.¹ However, identity may be proved by circumstantial evidence.²

The test of admissibility of a courtroom identification is whether the in-court identification evidence rests upon an independent basis. Application of the test requires considering prior opportunity to observe the alleged criminal act, existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification of another person prior to a lineup, identification by picture of the defendant prior to a lineup, failure to identify the defendant on a prior occasion and lapse of time between the alleged act and a lineup identification.³

In a robbery prosecution, the testimony of the victim as to the robber's appearance was admissible, even though the witness stated that he could not positively identify the robber because he

⁴Scott v. State, 290 Ga. 883, 725 S.E.2d 305 (2012).

⁵Tubbs v. State, 276 Ga. 751, 583 S.E.2d 853 (2003) requires the defendant to list all witnesses upon whom the defendant relies to support the defense.

⁶Huckabee v. State, 287 Ga. 728, 699 S.E.2d 531 (2010) (10 days are required).

[Section 9:13]

¹Patton v. State, 117 Ga. 230, 43

S.E. 533 (1903).

²See Cherry v. State, 299 Ga. App. 194, 682 S.E.2d 150 (2009) noting that "[i]t is not often possible to make out a case of arson by direct proof" because there is only a small chance the arsonist will ever be seen setting a fire.

³Butler v. State, 226 Ga. 56, 172 S.E.2d 399 (1970). For an illustration see Rabie v. State, 294 Ga. App. 187, 668 S.E.2d 833 (2008).

was scared at the time and the robber wore a hat and glasses.⁴

As to the hearsay nature of an identification of the accused made prior to the trial, see § 25:2, *infra*.

Even though the *Miranda* rules are not applicable, a defendant is free to attempt to show that the identification proceedings were so wanting in fairness as to deprive him of due process of law.⁵ Courts are required to scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve his basic right to a fair trial, as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.⁶ A postindictment lineup is a critical stage of the prosecution at which the accused is as much entitled to the aid of counsel as at the trial itself. Where there has been an improper postindictment identification because of the absence of counsel, it is improper to make an in-court identification at the trial by the same witness, unless there is clear and convincing evidence that the in-court identification was based upon observations of the suspect other than the line-up identification. Such evidence must show that the in-court identification was accomplished by means sufficiently distinguishable to be purged of the primary taint, rather than by exploitation of the original illegal procedure. Applying this test requires consideration of certain factors, including the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between the pre-lineup description and the defendant's actual description, any identification prior to line-up of another person, the identification by picture of the defendant prior to the line-up, failure to identify the defendant on a prior occasion and the lapse of time between the alleged act and the line-up identification.

Although one-on-one showups and confrontations, as opposed to conventional lineups, have been generally condemned, occurrence of a one-on-one showup, without more, does not necessarily violate due process. The primary evil to be avoided is the substantial likelihood of irreparable misidentification.⁷ The Georgia Court of Appeals noted that the “[m]ere fact that [a] defendant was in a police car when he was identified in [a] show-up does not taint the identification.”⁸

Defendant is not entitled to the presence of counsel at his

⁴*Carr v. State*, 95 Ga. App. 513, 298 S.E.2d 231 (1957). S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

⁵*Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). ⁷*Williams v. State*, 165 Ga. App. 72, 299 S.E.2d 405 (1983).

⁶*U.S. v. Wade*, 388 U.S. 218, 87 S. Ct. 690, 690 S.E.2d 683 (2010). ⁸*Johnson v. State*, 302 Ga. App. 318, 690 S.E.2d 683 (2010).

lineup prior to indictment, and victim's identification of defendant at lineup is not suppressed.⁹

The evil to be avoided in pretrial identification procedures is the likelihood of misidentification.¹⁰

Pretrial identification procedures are subject to the due process guarantee of fair trial.¹¹

A two-step analogy is to be used in a pretrial identification to avoid misidentification. First, an impermissible suggestive identification is to be avoided. Only if it was suggestive need the court consider whether there was a substantial likelihood of irreparable misidentification.¹² An impermissibly suggestive identification procedure results if it leads the witness to an all but inevitable identification of the defendant as the perpetrator, or is the equivalent of the authorities telling the witness, "This is our suspect."¹³

§ 9:14 Burden on defendant in criminal cases

The burden of proof never shifts to defendant but rests on the prosecution throughout the trial.¹

In a criminal case, the burden is on the prosecution to prove beyond a reasonable doubt the essential elements of the offense with which the accused is charged, and if the proof fails to establish any of the essential elements necessary to constitute a crime, the defendant is entitled to an acquittal.²

A jury does not have to find beyond a reasonable doubt that the defendant is not guilty in order to acquit.³

⁹Harris v. State, 168 Ga. App. 159, 308 S.E.2d 406 (1983).

¹⁰Anderson v. State, 168 Ga. App. 243, 308 S.E.2d 623 (1983).

¹¹Anderson v. State, 168 Ga. App. 243, 308 S.E.2d 623 (1983). See also Davis v. State, 286 Ga. 74, 686 S.E.2d 249 (2009).

¹²Anderson v. State, 168 Ga. App. 243, 308 S.E.2d 623 (1983).

¹³Moore v. State, 301 Ga. App. 220, 687 S.E.2d 259 (2009) (overruled on other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)); Shabazz v. State, 293 Ga. App. 560, 667 S.E.2d 414 (2008) (police officer's statement to witness after witness identified defendant from photo lineup that defendant was in custody on other charges occurred after the identifica-

tion, and thus, the statement did not make the lineup impermissibly suggestive).

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¹Smith v. Smith, 321 F. Supp. 482 (N.D. Ga. 1970), aff'd, 454 F.2d 572 (5th Cir. 1971).

²Bennett v. State, 103 Ga. 66, 29 S.E. 919 (1897).

³Cheddersingh v. State, 290 Ga. 680, 724 S.E.2d 366 (2012) ("Nothing is more fundamental to the jury's consideration of a criminal case than its understanding and application of the State's burden of proof beyond a reasonable doubt . . . the defendant comes to trial presumed to be innocent, it is the State's burden to prove the defendant's guilt beyond a reasonable doubt, and the jury is to acquit the

“[I]t is well settled that ‘the state must prove the element of force to obtain a conviction for forcible rape of a victim under the age of consent,’ [Cit.] but who are ten years of age or older. Nevertheless, ‘the quantum of evidence to prove force against a child is minimal.’”⁴ The rule was applied in the alleged rape of a 14-year-old victim in *Minter v. State*.⁵

An instruction allowing the jury to infer that a person intends the consequences of his acts did not shift the burden on the element of intent. The charge was not worded as a presumption but as a permissive inference.⁶

In a driving under the influence case, a prosecutor’s statement during closing argument that the defendant had a chance to “prove his innocence” impermissibly shifted the burden of proof to the defendant.⁷

Charge to the jury in a homicide prosecution that the “test is whether in your judgment and whether you think beyond a reasonable doubt that this defendant was acting under a reasonable fear that his life was in danger at the time he committed the act that he did commit” was error since it had the effect of shifting burden of proof from state to defendant, and defendant was not required to prove self-defense beyond reasonable doubt.⁸

Burden is on the defendant in a criminal case to show that he was denied beneficial evidence which was so important that its absence prevented his receiving fair trial.⁹ The defendant bears the burden of demonstrating all the essential elements of a *Brady* or *Giglio* violation.¹⁰

The defendant bears the burden of demonstrating the need for severance. The defendant must “do more than raise the possibility that a separate trial would give him a better chance of acquittal. He must make a clear showing of prejudice and a consequent denial of due process.”¹¹

Once criminal intent has been shown, the defendant has the burden of illustrating his insanity before the State is required to

defendant if the State does not do so”).

⁴Haynes v. State, 326 Ga. App. 336, 756 S.E.2d 599 (2014); O.C.G.A. § 16-6-1.

⁵Minter v. State, 245 Ga. App. 327, 537 S.E.2d 769 (2000).

⁶Alexis v. State, 273 Ga. 423, 541 S.E.2d 636 (2001).

⁷State v. Mitchell, 326 Ga. App. 370, 756 S.E.2d 609 (2014).

⁸Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975).

⁹Pryor v. State, 238 Ga. 698, 234 S.E.2d 918 (1977) (disapproved on other grounds by, Montes v. State, 262 Ga. 473, 421 S.E.2d 710 (1992)).

¹⁰Colbert v. State, 345 Ga. App. 554, 813 S.E.2d 777 (2018).

¹¹Carcamo v. State, 348 Ga. App. 383, 823 S.E.2d 68 (2019).

rebut.¹²

The presumption of sanity does not disappear upon the introduction of evidence to the contrary.¹³

The Criminal Code defines which defenses are to be treated as affirmative defenses, how they are to be raised by defendant and the extent of the burden on the State to such defenses.¹⁴

Defense courtroom attacks on alleged victims sometimes impose a burden on the accused. Rape victim cross-examinations present one example.¹⁵

A burden is cast upon a defendant in a criminal case to demonstrate mental retardation in order to avoid capital punishment, where he has been convicted of murder and is subject to the death penalty. The execution of retarded persons is unconstitutional. For Georgia defendants facing death and wishing to raise mental retardation to bar capital punishment, they are required to prove their mental retardation beyond a reasonable doubt.¹⁶

A defendant bears a “heavy” burden when attempting to demonstrate that his counsel’s assistance was ineffective.¹⁷ Moreover, a defendant “must overcome the strong presumption that counsel’s performance fell within the wide range of reasonable professional conduct.”¹⁸ “To prevail on a claim that a conflict of interest worked a denial of the effective assistance of counsel, a defendant . . . must show that an actual conflict of interest adversely affected his lawyer’s performance.”¹⁹ In *Henderson v. State*,²⁰ the Georgia Supreme Court added that, in criminal matters the defendant, “bears the heavy burden of showing ‘both that his counsel performed deficiently and that, but for the deficiency,

¹²Moses v. State, 245 Ga. 180, 263 S.E.2d 916 (1980) (overruled on other grounds by, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993)).

¹³Wilson v. State, 257 Ga. 444, 359 S.E.2d 891 (1987).

¹⁴See § 4:4, *supra*.

¹⁵See Mann v. State, 244 Ga. App. 756, 536 S.E.2d 608 (2000) stating two-part rule that (1) before evidence that victim in sex offense case made previous false allegations of molestation can be admitted, the trial court must make a threshold determination, outside the presence of the jury, that a reasonable probability of falsity exists and (2) defendant has the burden of coming forward with evidence establishing a reasonable probability that the victim made a prior false allegation

of molestation before evidence of such prior allegation can be admitted.

¹⁶Stripling v. State, 289 Ga. 370, 711 S.E.2d 665 (2011), citing O.C.G.A. § 17-7-131(c)(3) (in all criminal trials where the accused seeks a verdict of guilty but mentally retarded, code requires that the trier of fact must find “beyond a reasonable doubt” that the defendant is mentally retarded).

¹⁷Davis v. State, 299 Ga. 180, 787 S.E.2d 221 (2016).

¹⁸Cook v. State, 338 Ga. App. 489, 790 S.E.2d 283 (2016).

¹⁹Tolbert v. State, 298 Ga. 147, 780 S.E.2d 298 (2015) (internal quotes omitted).

²⁰Henderson v. State, 304 Ga. 733, 822 S.E.2d 228 (2018).

there is a reasonable probability that the outcome of his trial would have been more favorable.’”

In order to obtain a sentence reduction for minor participation, a defendant bears the burden of demonstrating this fact by a preponderance of the evidence.²¹

§ 9:15 Party having burden of proof in civil cases

In civil cases, the burden of proof rests upon the party who asserts the affirmative of an issue.¹ This question is determined by reference to the pleadings.² Who has the burden of proof is determined by ascertaining which party, without evidence, would be compelled to submit to an adverse judgment on the pleadings.³ Normally, of course, the burden is on the party who initiated the action.⁴ For example, if one party in a will contest action introduces evidence of circumstances which under the law causes a presumption of undue influence to arise, the burden of going forward with the evidence shifts to the other party. Thus, the burden being shifted to the other party is the burden to produce evidence rebutting the presumption; it is not the ultimate burden of persuasion, which never shifts from the party asserting the claim of undue influence. Concerning the effect of a presumption on the burden of proof, the rule generally is that while a presumption operating in favor of the party having the ultimate burden of persuasion requires the opposing party to go forward with evidence rebutting the presumption, it does not shift the original burden of persuasion. That burden remains with the party upon whom it was originally cast.⁵

Where the existence of an agency relationship is relied upon, the burden of proof rests with the party asserting the existence of such relationship.

The party claiming a right, including property division, has the burden of proof to establish that right.⁶

The burden rests with the party claiming the existence of a contract to prove its existence and terms.⁷ The burden of demonstrating a valid agreement to arbitrate rests with the party seek-

²¹United States v. Cruickshank, 837 F.3d 1182 (11th Cir. 2016).

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¹Am. Jur. 2d, Evidence § 158.

²Am. Jur. 2d, Evidence § 158.

³Am. Jur. 2d, Evidence § 158.

⁴Am. Jur. 2d, Evidence § 158.

⁵Horton v. Hendrix, 291 Ga. App. 416, 662 S.E.2d 227 (2008). Harvey v. Bank One, N.A., 290 Ga. App. 55, 658 S.E.2d 824 (2008).

⁶Southerland v. Southerland, 278 Ga. 188, 598 S.E.2d 442 (2004).

⁷Bazemore v. Jefferson Capital Systems, LLC, 827 F.3d 1325 (11th Cir. 2016).

ing arbitration.⁸ A party alleging incapacity to enter into a contract bears the burden of demonstrating this fact.⁹

In answer to a contempt citation, burden is on one who fails and refuses to pay award for alimony to show that he has in good faith exhausted all resources at his command and has made diligent and bona fide effort to comply with decree.¹⁰

The burden is upon the taxpayer to demonstrate that tax rules were not negligently or intentionally disregarded.¹¹ In regard to penalties imposed for the substantial underrepresentation of income, the taxpayer carries the burden of demonstrating good faith and reasonable cause.¹²

Condemnor has burden of proof in condemnation case, and with that burden goes right to open and conclude argument to jury.¹³

Burden is on person seeking to change zoning to show invalidity of zoning ordinance; it is not sufficient to show that more profitable use could be made of property.¹⁴

Burden of proving existence of resulting trust is on party claiming to be beneficiary of such trust.¹⁵

In products liability actions, the defendant has a “burden ‘to show plainly and indisputably an absence of *any* evidence that a product as designed is defective.’ ”¹⁶

Given the presumption that laws are constitutional, the party arguing that the law is unconstitutional bears the burden of proving it.¹⁷

Plaintiff who failed to comply with the notice provisions contained in O.C.G.A. § 50-21-26 failed to carry his burden of

⁸Kindred Nursing Centers Limited Partnership v. Chrzanowski, 338 Ga. App. 708, 791 S.E.2d 601 (2016).

⁹Kindred Nursing Centers Limited Partnership v. Chrzanowski, 338 Ga. App. 708, 791 S.E.2d 601 (2016).

¹⁰Roberts v. Roberts, 238 Ga. 256, 232 S.E.2d 534 (1977).

¹¹Peterson v. Commissioner of IRS, 827 F.3d 968 (11th Cir. 2016).

¹²Boree v. Commissioner of Internal Revenue Service, 837 F.3d 1093 (11th Cir. 2016).

¹³White v. Georgia Power Co., 237 Ga. 341, 227 S.E.2d 385 (1976)

(overruled on other grounds by, DeKalb County v. Trustees, Decatur Lodge No. 1602, B. P. O. Elks, 242 Ga. 707, 251 S.E.2d 243 (1978)), as stated in Jotin Realty Co., Inc. v. Department of Transp., 174 Ga. App. 809, 331 S.E.2d 605 (1985).

¹⁴Avera v. City of Brunswick, 242 Ga. 73, 247 S.E.2d 868 (1978).

¹⁵Freeman v. Saxton, 243 Ga. 571, 255 S.E.2d 28 (1979).

¹⁶Woods v. A.R.E. Accessories, LLC, 345 Ga. App. 887, 815 S.E.2d 205 (2018).

¹⁷Georgia Department of Human Services v. Steiner, 303 Ga. 890, 815 S.E.2d 883 (2018).

proof regarding the waiver of sovereign immunity.¹⁸

To prove bad faith penalties pursuant to O.C.G.A. § 33-4-6, an insured carries the burden of demonstrating that bad faith underlied the refusal to pay the claim.¹⁹

An insurer seeking to invoke a policy exclusion carries the burden of proving its applicability in a given case.²⁰

Once it was shown that a judgment order was signed by a judge and there was some evidence of delivery to the court clerk, burden of producing evidence of nondelivery of the judgment order was upon party asserting that the judgment order had not been filed.²¹

The party seeking enforcement of an antenuptial agreement bears the burden of proof to demonstrate that: (1) the antenuptial agreement was not the result of fraud, duress, mistake, misrepresentation, or nondisclosure of material facts; (2) the agreement is not unconscionable; and (3) taking into account all relevant facts and circumstances, including changes beyond the parties' contemplation when the agreement was executed, enforcement of the antenuptial agreement would be neither unfair nor unreasonable.²²

The burden is upon the government to demonstrate the constitutionality of its actions when it attempts to restrict speech.²³

Burden of proof on the issue of mitigation of damages has come up in court decisions. The burden is upon the party asserting that the opposite party could have lessened his damages, and such proof must include sufficient data to allow the jury to reasonably estimate how much damages could have been mitigated.²⁴ Burden is on the party who defaults on a contract to prove that a liquidated damages clause is unenforceable.²⁵

In a workers' compensation case, the employer has the burden of proving that an employee has undergone a change for the bet-

¹⁸Department of Transportation v. Jones, 346 Ga. App. 886, 816 S.E.2d 679 (2018).

¹⁹R&G Investments & Holdings, LLC v. American Family Insurance Company, 337 Ga. App. 588, 787 S.E.2d 765 (2016).

²⁰State Farm Fire and Casualty Company v. Moss, 338 Ga. App. 684, 790 S.E.2d 831 (2016).

²¹Bank of Clearwater, Fla., GDN v. Kimbrel, 240 Ga. 570, 242 S.E.2d 16 (1978).

²²Blige v. Blige, 283 Ga. 65, 656 S.E.2d 822 (2008).

²³U.S. Const. Amend. 1; Alabama Democratic Conference v. Attorney General of Alabama, 838 F.3d 1057 (11th Cir. 2016).

²⁴Georgia Farm Bureau Mut. Ins. Co. v. Turpin, 294 Ga. App. 63, 668 S.E.2d 518 (2008).

²⁵Antonios v. Gwinnett Clinic, Ltd., 294 Ga. App. 101, 668 S.E.2d 531 (2008).

ter and is able to return to work.²⁶

§ 9:16 Burden on defendant in civil cases

The burden of proof is on defendant in a civil case to prove all affirmative defenses.¹

When the defendant comes in and admits facts stated by the plaintiff to be true and sets up matter in avoidance, he is the party who asserts the truth of the matter thus set up, and the burden is upon him to establish the facts on which that matter is predicated; if he fails to do so, the plaintiff is entitled to a verdict or decision in his favor.²

The defenses which defendant must plead affirmatively and prove include such defenses as payment, release, satisfaction, license, fraud, duress, estoppel, laches, statute of frauds, illegality, injury by fellow servant, res judicata, statute of limitations, waiver, arbitration and award.³

Waiver and estoppel are affirmative defenses, and as such the burden of proof rests with the party asserting the defense.⁴

When a defendant asserts a claim of insufficient service, that party bears the burden of demonstrating improper service.⁵

§ 9:17 Burden of proving negative averments

The burden of proof of a negation or negative affirmation lies upon the party who asserts it.¹ Thus, for example, a trial court could impose on an onion supplier, against which the seller brought a lost profits claim after allegedly being unable to complete an order because the majority of the supplier's onions at the seller's storage facility were rotten, the burden of producing records to prove the supplier's assertion that it had never owned the rotten onions. Negation of ownership was essential to the

²⁶*McDuffie v. Ocmulgee EMC*, 338 Ga. App. 200, 789 S.E.2d 415 (2016), judgment rev'd in part on other grounds, 302 Ga. 640, 806 S.E.2d 546 (2017).

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¹*Rinzler v. Westinghouse Elec. Corp.*, 103 Ga. App. 201, 119 S.E.2d 31 (1961). See O.C.G.A. § 24-14-1; *Beasley v. Wachovia Bank*, 277 Ga. App. 698, 627 S.E.2d 417 (2006).

²*Thomas v. Clarkson*, 125 Ga. 72, 54 S.E. 77 (1906), as stated in *Preston Carroll Co., Inc. v. Morrison Assur. Co.*, 173 Ga. App. 412, 326 S.E.2d 486

(1985), judgment rev'd on other grounds, 254 Ga. 608, 331 S.E.2d 520 (1985); *Brunswick & W.R. Co. v. Wiggins*, 113 Ga. 842, 39 S.E. 551 (1901).

³O.C.G.A. § 9-11-8.

⁴*Mahsa, Inc. v. Al-Madinah Petroleum, Inc.*, 276 Ga. App. 890, 625 S.E.2d 37 (2005).

⁵*Anglin v. State Farm Fire & Casualty Insurance Company*, 348 Ga. App. 362, 823 S.E.2d 51 (2019).

[Section 9:17]

¹O.C.G.A. § 24-14-1.

supplier's defense.²

"When a promissory note, on its face, shows that it is past due and in default, the plaintiff establishes a prima facie right to judgment, and the burden shifts to the borrower to establish an affirmative defense."³

Where the opposite party possesses full proof to disprove the negative, only slight evidence need be produced by the party asserting the negative to shift the burden of producing evidence.⁴

²Williamson v. Strickland & Bank, Nat. Ass'n, 326 Ga. App. 367, Smith, Inc., 296 Ga. App. 1, 673 S.E.2d 756 S.E.2d 606 (2014). 858 (2009).

³ABI Investments, LLC v. FSG S.E.2d 709 (1951). ⁴Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709 (1951).

Chapter 10

Proof of Facts

- § 10:1 Situations where proof is excused before trial
- § 10:2 Situations where proof is excused during trial
- § 10:3 Methods of proving facts
- § 10:4 Use of stipulations to excuse proof of facts
- § 10:5 Construction and enforcement of stipulations
- § 10:6 Offers to stipulate

§ 10:1 Situations where proof is excused before trial

There are many situations in which a fact necessary to establish a case or a defense need not be proved. A fact may be admitted in the pleadings.¹ Allegations in pleadings are also admissions in *judicio*. Such admissions, if not withdrawn, may be relied upon only by the opposing party.²

If a fact is admitted in the pleadings, evidence contrary thereto generally is not admissible.³ A party may withdraw or strike an admission in *judicio* by amendment and tender evidence to the contrary. However, the opposing party can still avail itself of the original admission in *judicio* and use it as an admission against interest.⁴

As stated in *Wagner v. Robinson*,⁵ a party is generally bound by its admissions set forth in her or his pleadings. Nevertheless, in the event a trial court admits evidence to the contrary:

and either the court (e.g., when ruling on a motion for summary judgment, as here) or the jury (when reaching its verdict) considers the conflicting evidence on the merits, the pleadings at that point become amended to conform to such evidence. This is because, by admitting the evidence and allowing the factfinder to consider it, the trial court has in effect, either *sua sponte* or by overruling an opposing motion, tacitly permitted the pleading party to withdraw

[Section 10:1]

¹O.C.G.A. § 24-8-801, by express admission, see §§ 26:1 et seq., by a confession, see §§ 27:1 et seq., or by failure to deny an allegation. O.C.G.A. § 9-11-8(d).

²*Georgia-Pacific, LLC v. Fields*, 293 Ga. 499, 748 S.E.2d 407 (2013). See O.C.G.A. § 24-8-821.

³*Willis v. Hill*, 116 Ga. App. 848, 159 S.E.2d 145 (1967), judgment rev'd on other grounds, 224 Ga. 263, 161 S.E.2d 281 (1968).

⁴*Georgia-Pacific, LLC v. Fields*, 293 Ga. 499, 748 S.E.2d 407 (2013).

⁵*Wagner v. Robinson*, 329 Ga. App. 169, 764 S.E.2d 189 (2014).

the admission contained in the pleadings.⁶

Walker v. Jack Eckerd Corp.,⁷ dealt with facts admitted in the pleadings. The appellant contended that his complaint which averred that the defendant doctor had telephoned a refillable prescription to defendant Eckerd's drug store did not constitute an admission in judicio because it was merely an expression of opinion. The court rejected this contention, noting that the trial court expressly held that the plaintiff was bound by the allegation contained in his complaint, which was admitted in the answer. Because the trial court did not dispose of the issue of the prescription on the merits, it did not abuse its discretion by treating the admission as conclusive.

An instrument may be admitted to be genuine pursuant to a request to admit its genuineness, and the truth of any relevant matter may be admitted pursuant to such a request.⁸

Cases on admissions of facts pursuant to requests for admissions include *Saleem v. Snow*.⁹

A fact may be admitted in an interrogatory, O.C.G.A. § 9-11-33 or in a deposition.¹⁰

The scope of proof required may be limited in a pretrial order growing out of the pretrial conference, see § 2:24, supra, or by a stipulation. See § 2:25, supra.

The doctrine of estoppel may bar a party from denying the truth of certain facts or from making certain claims or from taking certain positions in litigation, but estoppel must be specially pleaded.¹¹

In *Ledford v. Darter*,¹² the buyer instituted a suit for wrongful

⁶Wagner v. Robinson, 329 Ga. App. 169, 764 S.E.2d 189 (2014), quoting Knutsen v. Atlanta Women's Specialists Obstetrics & Gynecology, 264 Ga. App. 87, 589 S.E.2d 588 (2003).

⁷Walker v. Jack Eckerd Corp., 209 Ga. App. 517, 434 S.E.2d 63 (1993).

⁸O.C.G.A. § 9-11-36.

⁹Saleem v. Snow, 217 Ga. App. 883, 460 S.E.2d 104 (1995) (court allowed withdrawal of admissions pursuant to O.C.G.A. § 9-11-36(b) because although no parties presented evidence, the admissions could be refuted by admissible evidence and motion was not offered solely for delay); F.P.I. Atlanta, Ltd. v. Price, 211 Ga. App.

634, 440 S.E.2d 63 (1994) (matters set forth in request were admitted by operation of law since no response was filed within 30 days and made no showing that § 9-11-36(b) was applicable); Wurlitzer Co. v. Watson, 207 Ga. App. 161, 427 S.E.2d 555 (1993) (where defendant admitted, in response to request for admissions, that she was indebted to plaintiff in the amount of \$35,829.23, plus interest, admission was binding and no evidence could be admitted or considered to contradict it).

¹⁰O.C.G.A. § 9-11-30.

¹¹O.C.G.A. § 9-11-8(c) (affirmative defenses).

¹²Ledford v. Darter, 260 Ga. App. 585, 580 S.E.2d 317 (2003).

disclosure but failed to respond to the seller's requests for admission. The matters set forth in the request were held admitted as a matter of law, because the buyer did not provide even a slight showing that the denials were supported by admissible evidence.

§ 10:2 Situations where proof is excused during trial

Proof of a fact may be excused because the fact is judicially noticed.¹ Also, proof need not be introduced if there is a presumption that such fact exists, but not all presumptions excuse proof of the fact.² In *O'Neil v. Hairston*,³ the Georgia Court of Appeals stated in a case involving a boundary dispute that "surveys or plats made by a county surveyor pursuant to OCGA § 36-7-12 are presumptive evidence of the facts set out therein." Nevertheless, for the presumption to become operative, it is necessary for that the litigant introducing the survey to assert that the survey was performed in compliance with the statute. Nor need a party prove a fact if the burden of proving such fact is on the opponent.⁴

Stipulations, treated in this chapter, are a common methodology for excusing formal proof.

§ 10:3 Methods of proving facts

There are a great variety of ways to prove the facts necessary to establish a case or defense in those cases where proof thereof is not excused.

It is well settled that "the testimony of a single witness is generally sufficient to establish a fact."¹

Normally, of course, the case is proven by one's own witnesses, but it can also be proven through adverse parties and persons.² It may be established through the use of real and demonstrative evidence, such as tangible articles, photographs, models, maps and drawings.³

The 11th Circuit held that a district court did not violate defendant's jury trial and due process rights when it erroneously

[Section 10:2]

¹See §§ 19:1 et seq.; *Woodstone Townhouses, LLC v. Southern Fiber Worx, LLC*, 358 Ga. App. 516, 855 S.E.2d 719 (2021) (court may not take judicial notice "of a city ordinance, or adjudicate a claim or defense based on a city ordinance, unless the ordinance has been properly presented, which includes either production of the original ordinance or a certified copy

thereof").

²See §§ 20:1 et seq.

³*O'Neill v. Hairston*, 364 Ga. App. 876, 876 S.E.2d 730 (2022).

⁴See §§ 9:1 et seq.

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¹*Prescott v. State*, 357 Ga. App. 375, 850 S.E.2d 812 (2020).

²See §§ 15:21 et seq.

³See §§ 21:1 et seq.

instructed the jury that the parties had stipulated to a certain fact. The court reasoned, in part:

Here, the district court was unquestionably wrong to instruct the jury that the parties stipulated to something that they did not stipulate to. While we easily conclude that the instruction was erroneous, we are not convinced that the error rises to the level of a constitutional violation. Importantly, Ms. Akwuba was not prevented from presenting her theory of defense to the jury. Both Ms. Akwuba and her trial counsel had ample opportunity to present the defense both before and after the contested instruction was given, choosing to speak to the defense at certain points—during direct and cross-examination of expert witnesses and Ms. Akwuba—and choosing to not address it at others—during the defense’s opening statement.⁴

Though the government in a criminal case is required to prove its case with competent evidence, there is no requirement as to form.⁵

Attorneys are afforded “wide latitude in the use of demonstratives to assist in the jury’s understanding of the issues to be decided at trial.”⁶

Facts may also be established by a view of the premises, although it is held that a view is not in itself evidence.⁷ They may be established through the use of documentary evidence of a wide variety of kinds.⁸

In proper cases, positions and allegations may be established through the opinions of both experts and nonexperts.⁹

Under some circumstances, facts may be proven by out-of-court statements (hearsay evidence) as exceptions to the hearsay rule.¹⁰

For use of a conviction based on a plea of guilty, see § 26:7, *infra*.

Facts may be proven by circumstantial evidence, see § 29:1, *infra*.¹¹ A defendant may be convicted on the basis of circumstantial evidence, so long as “the proven facts [are] consistent with the hypothesis of guilt and exclude every reasonable hypothesis

⁴United States v. Akwuba, 7 F.4th 1299, 116 Fed. R. Evid. Serv. 241 (11th Cir. 2021).

⁵Brown v. State, 301 Ga. 728, 804 S.E.2d 16 (2017).

⁶Vineyard Industries, Inc. v. Bailey, 343 Ga. App. 517, 806 S.E.2d 898 (2017).

⁷See §§ 22:1 et seq.

⁸See §§ 23:1 et seq.

⁹See §§ 24:1 et seq.

¹⁰See §§ 25:1 et seq.

¹¹Sambou v. State, 358 Ga. App. 645, 854 S.E.2d 392 (2021) (criminal conviction may be based upon circumstantial evidence if “the proved facts are not only consistent with the hypothesis of guilt, but exclude every other reasonable hypothesis but the guilt of the accused”; when the evidence meets this test, circumstantial evidence is “as probative as direct evidence, and whether this burden has been met is a question for the jury”).

save that of guilt.”¹²

Facts may also be proven by judicial notice. Before a trial court may take judicial notice of any fact, it must first announce its intention to do so on the record, and afford the parties an opportunity to be heard regarding whether judicial notice should be taken.¹³

In support of a summary judgment motion, a court may rely upon an affidavit provided that the information contained therein is based upon personal knowledge and observation.¹⁴

The 11th Circuit held in a civil rights action that a district court’s reliance on a suppression-hearing transcript when considering a summary judgment motion was proper. The Court reasoned:

The question is whether sworn testimony from a related judicial proceeding is the type of evidence that courts can consider on a motion for summary judgment. Federal Rule of Civil Procedure 56(c) governs this question. It provides that parties can support or oppose summary judgment motions by citing to materials in the record, including: “depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.] Fed. R. Civ. P. 56(c)(1)(A).” We regard testimony in a judicial proceeding as functionally equivalent to deposition testimony since it is given under oath and with the opportunity for cross-examination.¹⁵

In criminal cases, if there are several methods provided in the statute for committing a particular crime, the state may, of course, indict more than one method of committing the crime and prove any one of the methods alleged. However, if the state chooses a specific method, the state is required to prove that method.¹⁶

In terms of fundamental rules governing the presentation of proof, Georgia has adopted O.C.G.A. §§ 24-4-401, 24-4-402, and 24-4-403, which adhere to their federal counterparts and “overlay the entire Evidence Code, and are generally applicable to all evidence that a party seeks to present.”¹⁷ In order to be admissible, evidence must be both logically and legally relevant. Logical relevance is most commonly associated with Rule 401, whereas

¹²*Houkpatin v. State*, 313 Ga. 789, 873 S.E.2d 201 (2022).

¹³O.C.G.A. § 24-2-201. See *Fitzpatrick v. Harrison*, 300 Ga. App. 672, 686 S.E.2d 322 (2009).

¹⁴*Cross v. Wilmington Trust, National Association*, 360 Ga. App. 747, 860 S.E.2d 212 (2021).

¹⁵*Fuqua v. Turner*, 996 F.3d 1140, 109 Fed. R. Serv. 3d 925 (11th Cir. 2021).

¹⁶*Selfe v. State*, 290 Ga. App. 857, 660 S.E.2d 727 (2008).

¹⁷*Corley v. State*, 308 Ga. 321, 840 S.E.2d 391 (2020).

legal relevance is connected with Rule 403.¹⁸ A federal decision explains:

Under the FRE, admissibility is predicated on more than just logical relevance; rather, legal relevance is paramount: “Although relevant, evidence may be excluded if it[s] probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . or needless presentation of cumulative evidence.” Fed. R. Evid. 403. In determining legal relevance under Rule 403, the trial judge has broad discretion and is authorized to balance the probative value of the evidence against its prejudicial effect. See *United States v. Johnson*, 558 F.2d 744 (5th Cir.); see also *United States v. Maceo*, 947 F.2d 1191 (5th Cir. 1991).¹⁹

The Court of Appeals of Georgia has observed that “The prejudice referenced in Rule 403 addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness.”²⁰

§ 10:4 Use of stipulations to excuse proof of facts

A stipulation is an agreement between parties to a proceeding, or their counsel, relating to some business before the court.

A stipulation may be oral or written, may relate to matters of evidence or may relate to some matter incidental to the trial. This section is confined to stipulations relating to the facts that are the subject of the suit. Such stipulations do away with the necessity for introducing evidence of the fact stipulated.¹

While the parties may stipulate as to facts, they cannot by stipulation change the law.² For the use of stipulations to control the proceedings, see § 2:25, *supra*.

The court does not have to articulate the specifics of stipulations in jury instructions when the court has informed the jury of the existence of the stipulations and provided the jury with them in writing.³

Where the parties have agreed to stipulate facts in criminal

¹⁸See *People v. Rath*, 44 P.3d 1033 439 (1947). (Colo. 2002).

¹⁹*Verzwyvelt v. St. Paul Fire & Marine Ins. Co.*, 175 F. Supp. 2d 881, 58 Fed. R. Evid. Serv. 308 (W.D. La. 2001).

²⁰*Chambers v. State*, 351 Ga. App. 771, 833 S.E.2d 155 (2019).

[Section 10:4]

¹*Commercial Bank of Crawford v. Pharr*, 75 Ga. App. 364, 43 S.E.2d

²*Erskine v. Klein*, 218 Ga. 112, 126 S.E.2d 755 (1962).

³*Martin v. State*, 290 Ga. 901, 725 S.E.2d 313 (2012) (holding not reading the stipulations to the jury did not result in error when the court gave the written stipulations to the jury after stating their significance and the defendant previously argued the stipulations to the jury).

cases, the trier of fact must be informed of the stipulated facts.⁴ In *State v. Dixon*,⁵ the Supreme Court of Georgia reiterated the following:

A criminal defendant may . . . expressly authorize factual stipulations that will obviate the need for proof, see *Thompson v. State*, 277 Ga. 102, 103–104, 586 S.E.2d 231, 233 (2003). But the defendant cannot generally do so over the State’s objection. See *Ross v. State*, 276 Ga. 365, 367, 614 S.E.2d 31, 33–34 (2005). As the United States Supreme Court has explained, “the familiar, standard rule [is] that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.” *Old Chief v. United States*, 519 U.S. 172, 186–87, 117 S.Ct 644, 653 (1997). In other words, “[a] defendant cannot undermine the credibility of the State’s story by selectively admitting certain incriminating evidence to prevent the jury from receiving that evidence.” *Ross*, 279 Ga. at 367.

A stipulation by counsel that the jury has been sworn will support a finding that the oath was administered.⁶

A defendant need not have counsel present or act only on advice of counsel in order to render stipulation to admissibility of results of a polygraph examination valid and binding upon accused.⁷

Where an attorney stipulated that written answers to interrogatories were presented “for the reliance of all concerned, including the court and parties,” answers to interrogatories could be used in evidence without the formality of the deponent’s signature under oath.⁸

§ 10:5 Construction and enforcement of stipulations

No litigant can complain about a stipulation entered into in the course of judicial proceedings unless his consent to the stipulation was obtained by fraud or mistake.¹

The generally binding effect of a voluntary stipulation has been confirmed in a number of cases.² Stipulations can be written or oral; however, to be binding on the client, the stipulation must be

⁴*Tiller v. State*, 286 Ga. App. 230, 648 S.E.2d 738 (2007).

⁵*State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010).

⁶*Bevil v. State*, 220 Ga. App. 1, 467 S.E.2d 586 (1996) (overruled on other grounds by, *Gillis v. City of Waycross*, 247 Ga. App. 119, 543 S.E.2d 423 (2000)).

⁷*Patterson v. State*, 212 Ga. App.

257, 441 S.E.2d 414 (1994).

⁸*Woodson v. Burton*, 241 Ga. 130, 243 S.E.2d 885 (1978).

[Section 10:5]

¹*McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967).

²See *McDaniel v. Oliver*, 172 Ga. App. 109, 322 S.E.2d 1 (1984); *Macuch v. Pettey*, 170 Ga. App. 467, 317 S.E.2d 262 (1984).

in writing or made in open court.³ It is therefore good practice to put out-of-court agreements in writing so that they will be honored by the court.⁴

To constitute a binding stipulation of fact, a statement made by counsel during trial must be a distinct admission made for the purposes of dispensing with formal proof. In *Everett v. State*,⁵ the court found that the defense counsel's reference in his opening statement to an accident as the cause of the victim's death was not a formal admission that the defendant caused the victim's death, as it was not made for the express purpose of dispensing with formal proof on that issue.

A sworn stipulation is binding as an admission in *judicio* as to the party who makes it, even if not stipulated by both parties.⁶

However, a "court may set aside an erroneous stipulation where justice requires."⁷

Parties may properly stipulate to facts that bear on the jurisdiction of a court.⁸

The purpose of stipulations is to expedite the proceedings by foreclosing the need for foundation or proof, as their use does away with the necessity of introducing evidence of the fact stipulated to. Therefore, the facts stipulated or admitted by parties to the action will be taken as true, and the trial court is entitled to rely on the stipulations of the parties without expressly approving them.⁹ However, the parties may not by stipulation fix or change the law.¹⁰

The courts have construed stipulations strictly.¹¹ Once a stipulation is made, it is error for the court to allow the attorneys to withdraw this agreement or to ask questions in an area the par-

³O.C.G.A. § 15-19-5; *Flading v. State*, 327 Ga. App. 346, 759 S.E.2d 67 (2014); *White v. Owens*, 172 Ga. App. 373, 323 S.E.2d 167 (1984).

⁴See *Dein v. Mossman*, 244 Ga. 866, 262 S.E.2d 83 (1979) (court admitted lie detector test, but stated that stipulation to the admission of the test should have been in writing); *Davis v. State*, 172 Ga. App. 701, 324 S.E.2d 551 (1984) (admitted polygraph test even though attorneys only made oral stipulation that it would be admissible and reiterated the need to have these stipulations in writing).

⁵*Everett v. State*, 216 Ga. App. 444, 454 S.E.2d 620 (1995).

⁶*Plunkett v. Ginsburg*, 217 Ga. App. 20, 456 S.E.2d 595 (1995).

⁷*CSX Transportation, Inc. v. Alabama Department of Revenue*, 888 F.3d 1163 (11th Cir. 2018), opinion modified on other grounds on denial of reh'g, *CSX Transportation, Inc. v. Alabama Department of Revenue*, 891 F.3d 927 (11th Cir. 2018).

⁸*United States v. Obando*, 891 F.3d 929 (11th Cir. 2018).

⁹See *Hodges v. Hodges*, 235 Ga. 848, 221 S.E.2d 597 (1976); *Lundin v. Hill*, 105 Ga. App. 449, 125 S.E.2d 105 (1962).

¹⁰See *P. C. Gailey Contractors, Inc. v. Exxon Co., U.S.A.*, 143 Ga. App. 827, 240 S.E.2d 208 (1977).

¹¹See *Gribble v. State*, 248 Ga. 567, 284 S.E.2d 277 (1981).

ties agreed to forego questioning in, absent a showing of fraud or mistake.¹²

The Supreme Court of Georgia held in felon in possession of a firearm case that a jury was entitled to rely upon a stipulated fact—namely, that the defendant was a convicted felon—despite the fact that it was worded in the present tense. The Court reasoned that the jury could properly infer that the stipulation pertained to the defendant’s status at the time of the criminal offense.¹³

It is prudent in pretrial stipulations to include the fact that no evidence is to be presented during the course of the trial to support or contradict the stipulation. Generally, parties are barred from putting on controverting evidence against a point which is stipulated to be admissible.¹⁴ However, the courts have allowed parties the right to contest the accuracy or validity of testimony or evidence when the stipulation was only to the admissibility of the evidence.¹⁵

In *Florida International Board of Trustees v. Florida National University, Inc.*,¹⁶ the 11th Circuit concluded that a district court judgment, based entirely upon a stipulated record, was a “final judgment entered after a bench trial” as opposed to a “summary judgment order” for purposes of determining the appropriate standard for appellate review. The court noted:

the parties “expressly stipulated to an agreed set of facts” and “in effect submitted the case to the court for trial on an agreed statement of facts embodied in a limited written record, which would have enabled the [district] court to decide all issues and resolve all factual disputes.” (citation omitted). At the November 4th and December 3, 2014 hearings, the parties agreed that the summary judgment submissions, pretrial stipulations, and proposed factual findings constituted the full record before the court and that the presentation of additional evidence or live witness testimony would be unnecessary . . . The parties clearly agreed that the district court could treat the stipulated record as a record after a bench trial and resolve factual disputes where necessary.

For refusal to allow defense to argue inferences in conflict with

¹²See § 10:4, *supra*; *Worth v. Douglas Production Credit Ass’n*, 173 Ga. App. 808, 328 S.E.2d 421 (1985); *White v. Owens*, 172 Ga. App. 373, 323 S.E.2d 167 (1984); *White v. State*, 153 Ga. App. 808, 266 S.E.2d 528 (1980).

¹³*Jenkins v. State*, 313 Ga. 81, 868 S.E.2d 205 (2022).

¹⁴See *Goolsby v. Allstate Ins. Co.*, 130 Ga. App. 881, 204 S.E.2d 789 (1974).

¹⁵See *Sisson v. State*, 181 Ga. App. 784, 353 S.E.2d 836 (1987) (admission of polygraph); *State v. Chambers*, 240 Ga. 76, 239 S.E.2d 324 (1977) (inconclusive polygraph test results allowed into evidence due to parties stipulation).

¹⁶*Florida International University Board of Trustees v. Florida National University, Inc.*, 830 F.3d 1242, 334 Ed. Law Rep. 794 (11th Cir. 2016).

its own stipulations, see *Williams v. State*.¹⁷

The preceding paragraphs advert to evidence contradicting a stipulation. The next issue addresses the opponent who wishes to “pile it on.” Can an adversary put in evidence supporting a stipulated point? To avoid introduction of inflammatory or damaging, cumulative proof by the beneficiary of the stipulation, it is wise to include in the agreement the fact that no evidence to support the stipulation shall be entered into evidence during the trial.

§ 10:6 Offers to stipulate

Can a party take away an opponent’s opportunity to present inflammatory proof by offering to stipulate to the point made by the proof? Some cases say “yes,” but there is contrary authority.¹ In the *Woodring* case, the prosecutor was allowed to introduce into evidence and display the human skull of the victim to the jury, and the judge allowed the skull to be taken into the jury room, even though the defendant offered to stipulate to facts sufficient to relieve the State of the necessity of introducing this type of evidence. The Court of Appeals upheld the introduction of this evidence even though the evidence “was indeed inflammatory.”² The Georgia court is not the only court to hold that a stipulation will not prohibit the opposing party from introducing proper evidence. The states are split on this issue.³ Perhaps the real issue is what relevancy the evidence retains once a stipulation has been offered.

The United States Supreme Court has weighed in on the issue of whether one party can offer to stipulate to facts the other party could otherwise prove, and by making a full stipulation thereby take away from the second party the right to prove up the now-undisputed fact. That a stipulating party can sometimes effect this result is affirmed for federal cases in *Old Chief v. U.S.*,⁴ where the United States Supreme Court hold the trial judge must help to enforce such an offer to admit.

In an important decision, the Georgia Supreme Court relied upon the *Old Chief* case to modify Georgia law. While recognizing

¹⁷*Williams v. State*, 279 Ga. 600, 619 S.E.2d 649 (2005).

[Section 10:6]

¹*Woodring v. State*, 130 Ga. App. 247, 202 S.E.2d 696 (1973).

²*Woodring v. State*, 130 Ga. App. 247, 248, 202 S.E.2d 696 (1973).

³See *State v. Nowlin*, 244 N.W.2d 596 (Iowa 1976) (defendant’s offer to stipulate to any facts which might be

proven by graphic proof insufficient to keep prosecutor from presenting evidence); but compare *People v. Washington*, 95 Cal. App. 3d 488, 157 Cal. Rptr. 58 (1st Dist. 1979) (defendant’s stipulation to highly prejudicial evidence precluded prosecutor from presenting evidence).

⁴*Old Chief v. U.S.*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574, 45, 45 Fed. R. Evid. Serv. 835 (1997).

that a defendant may not stipulate or admit his way out of the full evidentiary force of the case as the State chooses to present it, the Court nonetheless recognizes that an offer to stipulate can have important consequences. When 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 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. Evidence of the name and nature of defendant's prior conviction for enticing a child for indecent purposes was not admissible to show the prior felony conviction element of the offense of possession of a weapon by a convicted felon, after defendant offered to stipulate to the prior conviction element of the offenses. The prejudicial nature of defendant's prior conviction raised the risk of a verdict tainted by improper considerations, and the evidence was unnecessary to prove anything other than defendant's status as a convicted felon.⁵

The *Ross* Court recognized that giving this effect to offers to stipulate marked a change in direction, and the decision forthrightly overruled a line of cases to the contrary:

We hereby overrule any prior opinions to the extent they are inconsistent with the current opinion, including the following: *Roberts v. State*, 255 Ga. 170, 171–172, 336 S.E.2d 246 (1985) (no error to refuse to accept proffered stipulation to prior guilty plea); *Head v. State*, 253 Ga. 429, 432(3)(b), 322 S.E.2d 228 (1984) (stating in dicta that a curative instruction would be sufficient to avoid harm from admission of prior conviction); *Quinn v. State*, 255 Ga. App. 744(2), 566 S.E.2d 450 (2002) (state not required to accept similar stipulation); *Banks v. State*, 184 Ga. App. 504(6), 362 S.E.2d 227 (1987) (not error to spurn defendant's offer to stipulate as to his status as a convicted felon).

In *Curry v. State*,⁶ the Georgia Supreme Court held it error to spurn a defendant's offer to stipulate. However, the error was not fatal to the verdict of guilty for a felon in possession of a firearm.

On the other hand, in *Morris v. State*,⁷ the Georgia Supreme Court concluded that the trial court did not abuse its discretion in refusing to accept a criminal defendant's offer to stipulate to his status as a convicted felon, where the prior offenses were “not of a nature likely to inflame the passions of the jury.”

In *Bowman v. State*,⁸ the Georgia Supreme Court upheld the trial court's refusal to allow the defendant to stipulate to his

⁵*Ross v. State*, 279 Ga. 365, 614 S.E.2d 31 (2005).

⁶*Curry v. State*, 283 Ga. 99, 657 S.E.2d 218 (2008).

⁷*Morris v. State*, 297 Ga. 426, 774 S.E.2d 665 (2015); *Ballard v. State*, 297 Ga. 248 773 S.E.2d 254 (2015).

⁸*Bowman v. State*, 317 Ga. 457,

status as a convicted felon without also stipulating to the fact that the prior felony involved the possession or use of a firearm. In that case, the state was required to prove, per the indictment, that the prior felony was “any felony involving the use of possession of a firearm.”

For additional cases balancing prejudice against probative worth in the matter of potentially prejudicial evidence, see §§ 21:5, 29:3, *infra*. Defense forcing stipulations in criminal cases, see discussion in *State v. Dixon*.⁹

In *U.S. v. Coades*,¹⁰ the prosecution introduced evidence of the defendant’s prior conviction for bank robbery on the grounds that the prior conviction showed the existence of an intent to rob the bank. This evidence was introduced despite the fact that the defendant offered to stipulate that whoever entered the bank intended to rob it. The Ninth Circuit held that the government’s contention that the evidence of the conviction was relevant was “frivolous.”¹¹ After the offer to stipulate, what point could be made by the conviction? Two well settled principles are that evidence must logically, naturally and by reasonable inference tend to prove an issue in dispute, see Federal Rule 403, and that if a party stipulates to an issue or fact, that issue or fact it is no longer in dispute. Thus, evidence put on to prove facts to which the opposing party has stipulated is no longer relevant.

The Georgia Supreme Court has dealt with the relevancy issue regarding the admission of gruesome photographs. In *Brown v. State*,¹² the Supreme Court stated that such photographs “should be carefully screened for relevancy.”¹³ In holding the admission of the photographs was reversible error, the court stated that a photograph, no matter how gruesome, would be admissible if it were relevant to the trial. *Brown* was followed in *McKibbins v. State*.¹⁴

An issue sometimes arises when counsel has secured and calls a highly qualified expert to the stand. Suddenly one’s opponent offers to stipulate that the witness “is a qualified and licensed expert,” and asks the court to move on without fulsome elicitat-

893 S.E.2d 735, 464-65 (2023).

⁹*State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010) (citing *Ross* and noting that exception to rule that state need not stipulate lies in the area of prior convictions “likely to inflame the passions of the jury”).

¹⁰*U.S. v. Coades*, 549 F.2d 1303, 1, 1 Fed. R. Evid. Serv. 684 (9th Cir.

1977) (appeal from conviction for attempted bank robbery).

¹¹*Id.* at 1306.

¹²*Brown v. State*, 250 Ga. 862, 302 S.E.2d 347 (1983).

¹³*Brown*, 250 S.E.2d at 351.

¹⁴*McKibbins v. State*, 293 Ga. 843, 750 S.E.2d 314 (2013).

tion of the expert's background.¹⁵ In Georgia, the case of *Watson v. State*¹⁶ allows that the jury is entitled to know all the qualifications of an expert witness.¹⁷

¹⁵Responding to an opponent's offers to stipulate to credentials or qualifications of your expert witness, see *Murphy v. National R. R. Passenger Corp.*, 547 F.2d 816, 1 Fed. R. Evid. Serv. 598 (4th Cir. 1977); Carlson, *Successful Techniques for Civil Trials*

§ 4:23.

¹⁶*Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹⁷Qualifying an expert, see § 24:18, *infra*.

Chapter 11

Witnesses

- § 11:1 Compelling attendance of witnesses
- § 11:2 Habeas corpus ad testificandum
- § 11:3 Witnesses from out-of-state
- § 11:4 Subpoena for production of documentary evidence
- § 11:5 Influencing or harassing witnesses
- § 11:6 Right to interview witnesses
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- § 11:8 Compensation of witnesses
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- § 11:10 Swearing the witnesses
- § 11:11 Use of interpreter
- § 11:12 Giving testimony on television, radio or motion
 picture
- § 11:13 Witnesses not on list
- § 11:14 Death of witnesses

§ 11:1 Compelling attendance of witnesses

A witness can be compelled to attend a trial or hearing by use of a subpoena.¹ The subpoena is issued by the clerk of the court in which the cause is to be heard. The statute requires that a subpoena show the seal of the court, the name of the court, the title of the action and a command to the witness to appear and testify at a specified time and place.

Subpoenas can be served by any sheriff, deputy sheriff or any other person not less than 18 years old. Proof of service may be shown by return or indorsement on a copy of the subpoena. A subpoena may be served by registered or certified mail, and the return receipt constitutes prima facie proof that the subpoena was served. Service upon a party may be made by serving his counsel of record.² If a witness who has been properly served fails to appear, the court can enforce the subpoena by an attachment for contempt and fine and by imprisonment.³

For a specific provision relating to subpoenas for the production of documentary evidence, see § 11:4, *infra*.

[Section 11:1]

¹O.C.G.A. § 24-13-21.

²O.C.G.A. § 24-13-24.

³O.C.G.A. § 24-13-26.

The defendant in a criminal case has a constitutional right to compulsory process. However, if a defendant elects to represent himself, it is his responsibility (and not the trial court) to ensure presence of his witnesses by issuance of subpoenas; Constitution does not require that the trial court take over chores for pro se defendant that would normally have been attended to by trained counsel as matter of course.⁴

It was reversible error to quash the defendant's subpoena duces tecum for a witness's financial records where the defense intended to prove that the witness had killed the victim over a drug problem and sought the records to establish that the witness was a drug dealer by showing an inordinate cash flow.⁵

In *Keller v. State*,⁶ the Supreme Court of Georgia held that the trial court did not err in allowing the jury to possess "redacted copies of [the defendant's] text messages and internet searches" during their deliberations. In reaching this result, the Court commented upon Georgia's "continuing witness rule." The Court stated:

In Georgia, the continuing witness objection is based on the notion that written testimony is heard by the jury when read from the witness stand just as oral testimony is heard when given from the witness stand. But, it is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once. The types of documents that have been held subject to the rule include affidavits, depositions, written confessions, statements, and dying declarations.⁷

§ 11:2 Habeas corpus ad testificandum

The superior court may issue a writ of habeas corpus when necessary to bring before it any prisoner to testify.¹ O.C.G.A. § 24-13-60 sets out the specific methods for securing presence of a prisoner.

The process is available in both criminal and civil cases. In civil cases, costs of bringing a prisoner to court are borne by the party desiring his attendance. However, if the court determines that the prisoner's presence is required by the ends of justice and if there is an inability to pay, then the expenses shall be taxed as costs of the court. The affidavit in support of a motion for such a

⁴U.S.C.A. Const. Amend. 6; *Kegler v. State*, 267 Ga. 147, 475 S.E.2d 593 (1996); *Sheppard v. State*, 297 Ga. App. 806, 678 S.E.2d 509 (2009).

⁵*Henderson v. State*, 255 Ga. 687, 341 S.E.2d 439 (1986).

⁶*Keller v. State*, 308 Ga. 492, 842 S.E.2d 22 (2020).

⁷*Keller v. State*, 308 Ga. 492, 842 S.E.2d 22 (2020).

[Section 11:2]

¹O.C.G.A. § 24-13-62.

writ must show that the testimony of the prisoner is necessary and material.²

Issuance of a writ of habeas corpus ad testificandum is predicated upon a prisoner's showing that the ends of justice require the court's assistance. Whether there is a need for a prisoner's presence is a discretionary determination, and the trial court's decision in that regard will not be reversed in the absence of a clear abuse of its discretion. To demonstrate need, the prisoner must show what he expects to prove and how that proof bears on the case.³

In *Zeigler v. Zeigler*,⁴ the Georgia Court of Appeals considered a prisoner's claim that the Bureau of Prisons should be compelled to transport him to court for a civil matter in which he is a litigant. The appeals court vacated the trial court's order denying the prisoner's request and remanded the case to the lower court. The appeals court reasoned that O.C.G.A. § 24-13-60(c) provides a trial court with discretion "to determine if the prisoner's presence is required by the interests of justice and whether the party desiring the prisoner's presence is financially unable to cover the cost of having him appear." Since the trial court incorrectly concluded that it did not have authority to grant the prisoner's request, the appeals court remanded the case for the court to assess the prisoner's ability to fund his transportation to court, "and if he was unable, whether his presence was required by the ends of justice."⁵

§ 11:3 Witnesses from out-of-state

Upon notice or agreement, an out-of-state witness may be compelled to appear and testify.¹ In such cases, the form of process is similar to that used for in-state witnesses.

The Uniform Act to Secure Attendance of Witnesses from Without the State, a reciprocal act adopted by Georgia, sets forth a procedure by which a defendant in a criminal prosecution in this state may seek to compel an out-of-state witness to appear and testify in this state.² The judge in this state must make certain findings under the Uniform Act, including a finding that

²O.C.G.A. § 24-13-60(c); *Reid v. State*, 119 Ga. App. 368, 166 S.E.2d 900 (1969).

³*Rozar v. Donald*, 280 Ga. 111, 622 S.E.2d 850 (2005).

⁴*Zeigler v. Zeigler*, 355 Ga. App. 316, 844 S.E.2d 190 (2020).

⁵*Zeigler v. Zeigler*, 355 Ga. App. 316, 844 S.E.2d 190 (2020).

[Section 11:3]

¹O.C.G.A. §§ 24-3-90 et seq.

²*Yeary v. State*, 302 Ga. App. 535, 690 S.E.2d 901 (2010); O.C.G.A. § 24-10-94.

The Georgia Supreme Court vacated and remanded the *Yeary* decision on other points. See the next paragraph of this section for the Su-

the out-of-state witness is a material witness in the prosecution pending in this state.³ The judge's certification of the required findings is then presented to a judge of a court of record where the witness lives in the other state for consideration by that judge under the reciprocal provisions of the Act.

When assessing materiality, the judge from the other state is allowed to consider hearsay evidence.⁴

The defendant has a constitutional right to compulsory process. This controls the summoning of witnesses, as well as documents.⁵ The case of *Yeary v. State*⁶ addressed the issue, and Justice Hines concurred in the result reached by the court: "I concur with the determination that The Uniform Act to Secure the Attendance of Witnesses from Without the State, (former) O.C.G.A. §§ 24-10-90 et seq., authorizes a party in a criminal proceeding to seek the desired evidence from an out-of-state corporate entity without naming a person within the corporation as the witness to be summoned to Georgia."

Regarding depositions from out-of-state witnesses, in 2012 the legislature enacted the Uniform Interstate Depositions and Discovery Act as part of Chapter 13 of O.C.G.A. Title 24.

§ 11:4 Subpoena for production of documentary evidence

The Uniform Act to Secure the Attendance of Witnesses from Without the State may provide access to not only testimonial evidence from an out-of-state material witness, but may also provide access to relevant, material documentary or like evidence in the possession of the witness.¹ The Uniform Act does not, however, support a stand-alone request for production (or subpoena duces tecum) for out-of-state documents; rather, a request for documents and like things under the Act must be made ancillary to a request for testimony from an out-of-state witness.²

When documents are sought from an out-of-state corporation, the decision by the Georgia Supreme Court in *Yeary v. State*³ is instructive. It authorizes a party in a criminal case to seek documents from an out-of-state company.

preme Court decision in *Yeary*.

³O.C.G.A. § 24-13-94.

⁴*Bowman v. State*, 363 Ga. App. 711, 872 S.E.2d 485 (2022).

⁵See O.C.G.A. § 24-13-95.

⁶*Yeary v. State*, 289 Ga. 394, 711 S.E.2d 694 (2011).

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¹*Davenport v. State*, 303 Ga. App.

401, 693 S.E.2d 510 (2010), judgment vacated on other grounds, 289 Ga. 399, 711 S.E.2d 699 (2011).

²*French v. State*, 288 Ga. App. 775, 776, 655 S.E.2d 224, 226–27 (2007).

³*Yeary v. State*, 289 Ga. 394, 711 S.E.2d 694 (2011).

A subpoena for production of documentary evidence commands the person to whom it is directed to produce the books, papers, documents or tangible things designated in the subpoena. O.C.G.A. §§ 24-13-21, 24-13-23. Such a subpoena is issued and served in the same manner as a regular subpoena, except that it is issued in blank, and the requesting party fills in the desired items prior to service.⁴

Upon written motion promptly made, the court may quash a subpoena for the production of documentary evidence if the subpoena is unreasonable or oppressive. O.C.G.A. § 24-13-23. The court may also condition its denial of such a motion upon advancement of reproduction costs by the party in whose behalf the subpoena was issued. Such a subpoena apparently cannot force the production of privileged information.⁵

If a subpoena request is overly broad a trial court enjoys the discretion to modify it.⁶

Where the subpoena duces tecum was too broad, too extensive and too indefinite, it is subject to a motion to quash.⁷

Where a party desires to compel production of evidence in the possession of another, in lieu of serving a subpoena, the party desiring production may serve a notice to produce upon counsel for the other party.⁸

§ 11:5 Influencing or harassing witnesses

A person who attempts to influence or harass or threaten a witness can be held in contempt.¹ In the *Burge* Case, such conduct was held to be criminal contempt. For additional criminal violations and punishment, see O.C.G.A. §§ 16-10-32 (attempted killing or threats to prevent information on criminal activity from being communicated to law enforcement or to the courts), 16-10-93 (influencing witnesses).

Relatedly, individuals who harass witnesses can be prosecuted federally for witness tampering² and for obstruction of justice.³ Individuals can be prosecuted under both statutes without violation the Double Jeopardy prohibition under the Fifth Amendment.⁴

⁴O.C.G.A. § 24-13-21.

⁵*Cranford v. Cranford*, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

⁶*Harris v. State*, 341 Ga. App. 831, 802 S.E.2d 708 (2017).

⁷*Hill v. Willis*, 224 Ga. 263, 161 S.E.2d 281 (1968).

⁸O.C.G.A. § 24-13-27.

[Section 11:5]

¹*Burge v. State*, 38 Ga. App. 690, 145 S.E. 463 (1928).

²18 U.S.C.A. § 1512(b)(1).

³18 U.S.C.A. § 1503.

⁴*United States v. Davis*, 854 F.3d 1276 (11th Cir. 2017).

In *Redding v. State*,⁵ the Supreme Court of Georgia noted the “well established” principle, that:

an attempt by a third person to influence a witness not to testify or to testify falsely is relevant and may be introduced into evidence in a criminal prosecution on the issue of the defendant’s guilt where it is established that the attempt was made with the authorization of the accused.

The court held that the evidence was sufficient to reasonably infer that the defendant was responsible for an attack upon a witness, thus justifying the admission of such evidence in his murder trial. It is within the discretion of the trial court to admit evidence of such threats, and in *Marchman v. State*,⁶ the Georgia Supreme Court affirmed the trial court’s admission of such a threat, rejecting the defendant’s claim of unfair prejudice.

In *Dimauro v. State*,⁷ the Georgia Court of Appeals held that evidence that a witness who videotaped a police encounter was harassed by the defendant (a police officer) as well as other officers was relevant. The court stated that “it is well settled ‘in Georgia that evidence of a defendant’s attempt to influence or intimidate a witness can serve as circumstantial evidence of guilt.’ Thus, while the evidence here went to the commission of other acts, rather than the charged offenses, it was nonetheless relevant.”

In *Goodman v. State*,⁸ the Georgia Supreme Court held that a note written by a defendant that encourage a witness to provide favorable testimony and that threatened repercussions against another individual could be used by the jury as evidence of the defendant’s consciousness of guilt.

In *Broadwater v. State*,⁹ the Georgia Court of Appeals held that the trial court erred in admitting testimony at defendant’s armed robbery and kidnapping trial that the defendant’s uncle directed threats to a prosecution witness not to testify via Facebook and text messages. The appeals court reasoned that no evidence was presented that the defendant made such threats or that any threats made to the witnesses were encouraged by the defendant.

In *Flannigan v. State*,¹⁰ the Georgia Supreme Court found that a trial court did not abuse its discretion in admitting evidence that the defendant (in a homicide prosecution) attacked a witness

⁵*Redding v. State*, 297 Ga. 845, 778 S.E.2d 774 (2015).

Ga. 10, 838 S.E.2d 808 (2020)).

⁶*Marchman v. State*, 299 Ga. 534, 787 S.E.2d 734 (2016).

⁸*Goodman v. State*, 313 Ga. 762, 873 S.E.2d 150 (2022).

⁷*Dimauro v. State*, 341 Ga. App. 710, 801 S.E.2d 558 (2017) (overruled on other grounds by, *State v. Lane*, 308

⁹*Broadwater v. State*, 359 Ga. App. 87, 854 S.E.2d 767 (2021).

¹⁰*Flannigan v. State*, 305 Ga. 57, 823 S.E.2d 743 (2019).

given his belief that she was talking with law enforcement. The court further noted that such evidence is not rendered inadmissible simply because it incidentally introduces evidence of the defendant's character.

In *Wade v. State*,¹¹ the Georgia Supreme Court added that “[e]vidence of an attempt made ‘by a third person to influence a witness not to testify or to testify falsely is relevant and may be introduced into evidence in a criminal prosecution on the issue of the defendant’s guilt where it is established that the attempt was made with the authorization of the accused.’ However, ‘evidence of a threat or attempt to influence a witness made by a third party must be linked to the defendant in order to be relevant to any material issues.’” In *Wade*, the court found that there was sufficient evidence linking the defendant to a threat made by a third person to a witness.

In *Palmer v. State*,¹² the court added that threats made to a witness can still be admissible even in instances when the threat is not linked to the defendant. In *Palmer*, the court found that evidence of threats made by the defendant’s uncle to a witness were properly admissible.

The 11th Circuit held that a district court did not err when it imposed a sentencing enhancement for obstruction of justice when a defendant instructed co-employees to lie about events that occurred at their company.¹³

§ 11:6 Right to interview witnesses

It has been held that the defendant in a criminal case has the right to interview any and all witnesses in the case.¹ Accused and his counsel have right to interview witnesses before trial and state may not deny access of a state witness to defense, but the witness cannot be compelled to submit to an interview.²

However, child witnesses may represent a modest exception to the foregoing rule. In *Abernathy v. State*,³ the court held that the Department of Family and Children Services (DFACS), as the child molestation victim’s legal custodian, was not required to allow the defendant to interview the victim before she testified at

¹¹*Wade v. State*, 304 Ga. 5, 815 S.E.2d 875 (2018).

¹²*Palmer v. State*, 303 Ga. 810, 814 S.E.2d 718 (2018).

¹³*United States v. Pate*, 853 Fed. Appx. 430 (11th Cir. 2021).

²*Rutledge v. State*, 245 Ga. 768, 267 S.E.2d 199 (1980).

³*Abernathy v. State*, 244 Ga. App. 610, 536 S.E.2d 289 (2000).

[Section 11:6]

¹*Wilson v. State*, 93 Ga. App. 229, 91 S.E.2d 201 (1956).

trial, and was not required to appoint guardian ad litem to decide whether defense should have been given access to child.

The Georgia Supreme Court held that allowing a witness who was not on the prosecution's witness list to testify was not harmless, where the trial judge directed testimony to proceed without allowing time for an interview by the defendant, and it could not be said that the testimony of the unlisted witness did not contribute to the guilty verdict.⁴

When the state has a witness in its custody, the court has discretion whether to permit defendant's counsel to interview him, but if the request is made in good faith, it should not be denied.⁵

A trial court did not err by refusing to order the state's witnesses to submit to pretrial interviews with defense attorneys.⁶

§ 11:7 Right to confer with witnesses on stand

Once a witness has taken the stand, the trial judge is vested with broad discretion in controlling the course of examination.¹

Unless this discretion is abused, it will not be controlled.² Thus, it would appear to be within the court's discretion to permit counsel to interrupt his examination in order to hold a conference with the witness. It would seem reasonable to permit such a conference only in extreme circumstances.

On the other hand, the defendant has no constitutional right to confer with his attorney during brief break in his testimony. Accordingly, defendant's right to counsel was not violated by denial of counsel's request to approach defendant during break in prosecution's cross-examination of defendant.³

Defendant's Sixth Amendment right to assistance of counsel was not violated where, after he completed his direct testimony, trial court ordered defense counsel not to consult with him about his ongoing testimony during weekend recess, in the absence of any indication in record that defendant and counsel had a desire to confer over the weekend recess but were prevented from doing so by the order; defense counsel made no objection and told the trial court there were no plans for any consultation over the

⁴Rogers v. State, 261 Ga. 649, 409 S.E.2d 655 (1991).

⁵Wilson v. State, 93 Ga. App. 229, 91 S.E.2d 201 (1956).

⁶Jarrells v. State, 258 Ga. 833, 375 S.E.2d 842 (1989) (overruled on other grounds, Woodard v. State, 269 Ga. 317, 496 S.E.2d 896, 71 A.L.R.5th 787).

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¹Dorsey v. State, 73 Ga. App. 271, 36 S.E.2d 178 (1945).

²Greer v. State, 159 Ga. 85, 125 S.E. 52 (1924).

³Ramsay v. State, 220 Ga. App. 618, 469 S.E.2d 814 (1996).

weekend recess.⁴ Accordingly, defendant or defendant's counsel must indicate, on the record, a desire to confer in order to preserve a deprivation of assistance of counsel claim based on trial court order not to communicate during recess during defendant's testimony.

§ 11:8 Compensation of witnesses

All witnesses in all cases in all courts are entitled to payment for each day's attendance and mileage each way for necessary travel. To be entitled to his fee, he must make an affidavit of the number of days actually attended and must state that the attendance was at the instance of one or both the parties or of his attorney.

The question of whether to provide funds for a defendant to obtain expert testimony is a matter of the trial court's discretion.¹ What must be shown on a motion for funds to hire an expert, see § 24:18, *infra*. Access to experts for indigent defendants, see *Ake v. Oklahoma*.² Similarly, a postconviction request for funds to hire an expert or an investigator is a matter within the court's discretion.³

The Georgia Court of Appeals turned down a defendant's argument that he should have received a psychiatric evaluation independent of that provided by the state in *Page v. State*.⁴ There, the defendant presented this argument both from a due process and from a right to competent counsel standpoint. As to the competent counsel argument, the defendant failed to establish the prejudice prong of *Strickland* because the defendant's trial attorneys testified that they never questioned the defendant's competency to stand trial, but rather got the impression that the defendant was an "excellent client."

No witness may condition his appearance upon payment of fees. However, when a subpoena is served upon an out-of-county witness, service must be accompanied by tender of one day's attendance fee plus traveling expenses to and from the witness' place of residence.⁵

⁴*Parker v. State*, 220 Ga. App. 303, 469 S.E.2d 410 (1996).

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¹*Belton v. State*, 270 Ga. 671, 512 S.E.2d 614 (1999).

²*Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

³*Totten v. State*, 276 Ga. 199, 577 S.E.2d 272 (2003) (grant or denial of

motion for assistance of expert witnesses and other investigative services lies with sound discretion of trial judge).

⁴*Page v. State*, 313 Ga. App. 691, 722 S.E.2d 408 (2012).

⁵O.C.G.A. § 24-13-25.

§ 11:9 Exclusion of witnesses

Upon motion of either party, or on the court's own motion, the court shall order that witnesses other than the parties be excluded during the taking of testimony.¹

Sequestration of witnesses sometimes aids cross-examination. A witness testifying for a party will not have heard an earlier witness' testimony, and the cross-examiner's attack on the second witness will be more effective. Invoking the rule bars a subsequent witness from sitting in the courtroom to hear earlier witnesses. It also bars an earlier witness from "filling in" a later witness in detail about the former witness' testimony. "To serve the goal of the rule of sequestration, witnesses are not only forbidden to receive information regarding other witnesses' testimony, they are forbidden to give such information." Violations of the rule can result in reversal.²

The reasons for sequestration also apply in instances where a witness is provided a transcript of the testimony of an earlier witness.³

Childress seems to override earlier cases which took a more lax view toward one witness communicating with another.⁴

In 1985, former O.C.G.A. § 24-9-61.1 was enacted as an exception to the witness sequestration statute. It provides that the victim of a criminal offense may be entitled to be present in the courtroom subject to the sole discretion of the judge. Under the 2013 Evidence Code, the sequestration provision is located in O.C.G.A. § 24-6-615. The Supreme Court of Georgia has explained:

The Supreme Court of Georgia has explained: The rule of sequestration prevents witnesses from hearing the testimony of other witnesses, see OCGA § 24-6-615, but it does not prohibit witnesses from speaking privately with the attorney who called them. Rather, a trial court has "discretion in permitting, upon request, counsel for one of the parties an opportunity to converse with a witness in the case for limited purposes, and that discretion will not be controlled unless abused."⁵

The provision for victim presence is O.C.G.A. § 24-6-616.

In 2012, the Georgia Supreme Court construed the principles

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¹O.C.G.A. § 24-6-615.

²*Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996).

³*Davis v. State*, 299 Ga. 180, 787 S.E.2d 221 (2016).

⁴See *Kelly v. State*, 118 Ga. 329, 45 S.E. 413 (1903).

⁵*Ward v. State*, 316 Ga. 295, 888 S.E.2d 75 (2023), citing *Smith v. State*, 244 Ga. 814, 818(2), 262 S.E.2d 116 (1979).

of exclusion from, or presence in, the courtroom.⁶ The mother of a felony murder victim was a “victim” under statutory exemption to Georgia’s sequestration rule, and thus, the trial court did not violate equal protection rights of a defendant’s father by excluding him from the trial, while allowing victim’s mother to attend. The defendant’s father and victim’s mother were in similar situations in that both were witnesses who had an interest in the subject matter of the trial; however, differential treatment was rationally related to legitimate state interests in restraining witnesses from tailoring testimony to that of earlier witnesses, and crime victims have the same right to be present as the constitution accorded the defendant.

Despite an order for sequestration, it was proper to allow the parents of an 11-year-old molestation victim to remain in the courtroom during the child’s testimony.⁷ There was no abuse of discretion in failing to sequester a murder victim’s widow after completion of her testimony.⁸

It is within a court’s discretion to allow witnesses to remain in the courtroom (and, thus, hear the testimony of others) if their presence is needed to assist the prosecution or the defense.⁹

Violation of the sequestration rule goes to the weight of the evidence and does not affect the admissibility of the witness’s testimony.¹⁰

In *Mule v. State*,¹¹ two witnesses had been observed conversing outside of the courtroom after one of them had testified but before the second witness had testified. The defendant moved to strike the testimony of both witnesses. The trial court declined the motion and gave a curative instruction. The appeals court affirmed, reasoning, in part, that a violation of the sequestration rule does not mandate the exclusion of such testimony, but it can affect the weight accorded such testimony.

Expert witnesses can also be exempt from the sequestration rule. Such witness are sometimes deemed to be “essential.” As explained by the Georgia Supreme Court:

OCGA § 24-6-615(3) and Federal Rule of Evidence 615(c) preclude trial courts from excluding a witness whose presence a party shows is “essential” to presenting that party’s case. . . . The federal

⁶Nicely v. State, 291 Ga. 788, 733 S.E.2d 715 (2012).

⁷Mullis v. State, 184 Ga. App. 525, 362 S.E.2d 90 (1987).

⁸Mosley v. State, 257 Ga. 382, 359 S.E.2d 653 (1987).

⁹Szorcsik v. State, 303 Ga. 737, 814 S.E.2d 708 (2018).

¹⁰Interest of K. S., 348 Ga. App. 440, 823 S.E.2d 536 (2019); Brown v. State, 301 Ga. 728, 804 S.E.2d 16 (2017).

¹¹Mule v. State, 355 Ga. App. 239, 843 S.E.2d 894, 378 Ed. Law Rep. 1144 (2020).

circuits agree that expert witnesses are not automatically excepted from sequestration as “essential”; that determination remains in the trial court’s discretion. But the drafters of the federal rule recognized that the “essential” witness category would include “an expert needed to advise counsel in the management of the litigation.” In addition, federal courts have explained that the concerns underlying sequestration are generally overcome where an expert witness will give only or primarily opinion rather than factual testimony and may appropriately base that opinion on the testimony of other witnesses. . . . This view rests in part on the recognition that OCGA § 24-7-703, like Federal Rule of Evidence 703, allows expert witnesses to base their opinions on facts or data “perceived by . . . the expert at . . . the hearing.”¹²

A witness who violates the rule by remaining in the court may be adjudged in contempt; though it may go to his credibility, it does not disqualify him.¹³ A trial court could properly allow a witness to testify in violation of the rule of sequestration; where violation of the rule did not make the witness incompetent and the court instructed that in weighing the witness’ testimony, it was proper to take into consideration the fact that the witness was present during the testimony of other witnesses.¹⁴ A curative instruction concerning a witness who violated an order for sequestration may be made at the time the witness testifies, and does not need to be repeated at the end of trial.¹⁵ Nature of cautionary instruction when witness violates order of exclusion, see § 35:10, *infra*. Discussing whether the court must give such an instruction, see *Askew v. State*.¹⁶

How forcefully must the judge police the courtroom to enforce the rule of witness exclusion? The trial court did not abuse its discretion when it failed to enforce the rule of sequestration as to the unidentified individual sitting in courtroom in a proceeding to modify child custody and visitation, even though the former wife’s attorney stated that she might call the individual, where the individual did not eventually testify.¹⁷

Lead investigator can be exempted from the sequestration rule.¹⁸ Investigator is allowed in courtroom despite rule of sequestration, when presence is required.¹⁹ It is not an abuse of discretion to allow a lead investigator to remain in the courtroom

¹²*Davis v. State*, 299 Ga. 180, 787 S.E.2d 221 (2016).

¹³See *Johnson v. State*, 258 Ga. 856, 376 S.E.2d 356 (1989).

¹⁴*Willingham v. State*, 262 Ga. 324, 418 S.E.2d 25 (1992).

¹⁵*Prince v. State*, 257 Ga. 84, 355 S.E.2d 424 (1987).

¹⁶*Askew v. State*, 254 Ga. App. 137, 564 S.E.2d 720 (2002).

¹⁷*Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

¹⁸*Warner v. State*, 281 Ga. 763, 642 S.E.2d 821 (2007).

¹⁹*Lewis v. State*, 283 Ga. 191, 657 S.E.2d 854 (2008).

“to assist the prosecution with the orderly presentation of evidence.”²⁰

In *Skaggs-Ferrell v. State*,²¹ the State did not violate the rule of sequestration by allowing an investigator to remain in courtroom during prosecution for aggravated assault, burglary, and attempted armed robbery, where, in response to defense counsel’s request for rule, State asked trial court to allow investigator to remain in courtroom to assist in the prosecution.²² The trial court may exercise its discretion in allowing a police officer or an investigator to remain in the courtroom based on the district attorney’s statement that such person’s presence is necessary for the orderly presentation of the State’s case.

The point was confirmed again in *Totino v. State*.²³ It was held that a trial court has discretion to grant an exception to the rule of sequestration. The trial court does not abuse its discretion by allowing the investigating officer to remain in the courtroom to assist in the prosecution of the case after the rule of sequestration is invoked or by allowing the investigating officer to testify after all other witnesses called by the State.

In *Brown v. State*,²⁴ two defense witnesses were able to hear the trial judge’s voice while they were sequestered in a conference room. However, the record was devoid of evidence that the witnesses were able to hear the testimony of the witnesses. The Court of Appeals concluded that the lower court erred in declaring a mistrial.

The purpose of the rule of sequestration is to prevent a witness who has not testified, or who has not completed his or her testimony, from overhearing and having his or her testimony affected by the testimony of another witness. By sequestration, the testimony of the witnesses retains any inconsistencies which may exist, the recollections of the witnesses are not unduly refreshed by other witnesses, and the witnesses cannot shape their testimony to support or dispute the testimony of other witnesses. The trial court has the discretion to make exceptions to the rule of sequestration, a violation of which affects the witness’ credibility, and only abuse will warrant reversal.²⁵

§ 11:10 Swearing the witnesses

Before any witness testifies, he must take an oath or

²⁰Upshaw v. State, 300 Ga. 442, 16-7-1(a), 16-8-41(a).
796 S.E.2d 287 (2017); Miller v. State, 23Totino v. State, 266 Ga. App. 265, 596 S.E.2d 749 (2004).
359 Ga. App. 380, 857 S.E.2d 830 (2021) (reaching a similar result).

²¹Skaggs-Ferrell v. State, 266 Ga. App. 248, 596 S.E.2d 743 (2004).
²⁴Brown v. State, 354 Ga. App. 493, 841 S.E.2d 125 (2020).

²⁵In re J.B., 260 Ga. App. 814, 581 S.E.2d 367 (2003).
²²See O.C.G.A. §§ 16-4-1,

affirmation.¹ The court may frame the affirmation according to the religious faith of the witness. It is customary for the witness to raise his right hand during the administration of the oath, but failure to observe such ceremonial incidents does not vitiate the testimony.²

A 2010 amendment to O.C.G.A. § 15-12-68 requires that all witnesses be given an oath prior to testifying to a grand jury.

The oath may be administered by an attorney in the case.³

Where by inadvertence a witness was not sworn before he testified, it is not error to permit the witness to retake the stand and testify under oath that his previous testimony was true.⁴

An objection to testimony on the ground that the witness has not been sworn must be made promptly. If no objection is made, the failure to swear the witness cannot be raised in a motion for new trial or on appeal.⁵

The form of oath was altered by 1997 legislation. O.C.G.A. § 17-8-52 now provides that the witness be asked: “Do you solemnly swear or affirm that the evidence you shall give to the court and jury in the matter now pending before the court shall be the truth, the whole truth, and nothing but the truth? So help you God.” Additional enactments prescribe a similar oath for grand jury witnesses, O.C.G.A. § 15-12-68. Reference is made to the perjury statute, and provision is made for “any oath that substantially complies with the language” in these code sections.

A witness was properly allowed to testify after he stated: “I’m not going to swear, but I promise to tell you the truth.”⁶

Defendant was not entitled to make an unsworn statement or to testify subject to specially-limited cross-examination at trial.⁷

In some situations an oath is not required. Statute governing admission of written medical reports in narrative form allows admission of reports in civil cases without requiring report’s author to take oath; no oral testimony is implicated.⁸

Special dispensation can also be given to children. As stated by the Georgia Court of Appeals, “a child victim is allowed to testify regardless of the child’s ability to understand the nature of an oath. See OCGA § 24-6-603(b) (citations omitted). The child

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¹O.C.G.A. § 24-6-603.

²Am. Jur. 2d, Witnesses § 710.

³Sikes v. State, 105 Ga. 592, 31 S.E. 567 (1898).

⁴Southern Ry. Co. v. Ellis, 123 Ga. 614, 51 S.E. 594 (1905).

⁵Am. Jur. 2d, Witnesses § 710; Reid v. State, 341 Ga. App. 604, 802 S.E.2d 42 (2017).

⁶Chapman v. State, 257 Ga. 19, 354 S.E.2d 149 (1987).

⁷King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000).

⁸Bell v. Austin, 278 Ga. 844, 607 S.E.2d 569 (2005).

simply becomes an unsworn witness.” To this point, Georgia Rule of Evidence 603 contains a subsection (b) that does not appear in Fed. R. Evid. 603. As originally cast, under O.C.G.A. § 24-6-603(b) child witnesses would be deemed competent to testify “in all proceedings involving dependency as defined by Code Section 15-11-2 and in all criminal proceedings in which a child was a victim of or witness to any crime.” In 2023, O.C.G.A. § 24-6-603(b) was amended to add “all proceedings involving termination of parental rights under Article 4 of Chapter 11 of Title 15” to this list.

§ 11:11 Use of interpreter

Where a deaf person is a party or a witness, the court shall appoint a qualified interpreter of the deaf sign language to interpret the proceedings to a deaf person and to interpret his testimony. A qualified interpreter is one who is certified by the National Registry of Interpreters for the Deaf, Georgia Registry of Interpreters for the Deaf or, in the event an interpreter so certified is unavailable, an interpreter whose actual qualifications are otherwise appropriately determined.

O.C.G.A. §§ 24-6-650 through 24-6-658 address the use of sign language and intermediary interpreters for hearing impaired persons in administrative and judicial proceedings.

Sometimes jurors require this form of assistance. Decisions by defendants’ attorneys to not object to the swearing in of two sign language interpreters, who were used to facilitate communications of jurors with juror who was hard-of-hearing, and to not request elaborate instructions on the limited role of sign language interpreters in the jury room, did not constitute deficient performance, as required in order for defendants to prevail on their claims that they received ineffective assistance of counsel during trial for malice murder and related crimes; interpreters for the deaf and hard of hearing were a regular sight at public events, it was common knowledge that their sole purpose was to operate as an accurate conduit for the translation of the signed word into spoken word and vice versa, and there was no indication that any of the jurors misunderstood the interpreters’ limited role.¹

Due process concerns are raised when a foreign language defendant cannot understand the language spoken to him or her; therefore, the use of qualified interpreters is necessary to preserve meaningful access to the legal system for persons who speak and understand only languages other than English. However, in *Ling v. State*,² trial counsel’s failure to secure an interpreter for defendant before and during trial on charge of

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S.E.2d 98 (2008).

¹Smith v. State, 284 Ga. 599, 669

²Ling v. State, 300 Ga. App. 726,

cruelty to a child did not constitute ineffective assistance of counsel, even though Mandarin Chinese was defendant's primary language; trial counsel, police officers, and the county department of family and children services (DFCS) workers all testified that they were able to effectively communicate with defendant. On appeal, however, the Georgia Supreme Court ruled in favor of Ling. The Supreme Court desired that the trial court's findings be made a part of the record and remanded.³ The important role of an interpreter for parties who cannot communicate in English was emphasized.

In a criminal case, a non-English speaking defendant is entitled to a certified interpreter to guide the accused through trial at no cost to the defendant. Officials in Georgia and elsewhere have been warned by the U.S. Justice Department that failure to provide a free interpreter in court-related proceedings is a violation of the Civil Rights Act of 1964.⁴

Interpreters are referenced in Uniform Superior Court Rule 7.3.

In *Choi v. State*,⁵ the defense questioned the accuracy of the interpreter's translation. On voir dire, the interpreter testified she was a native of Korea, belonged to an interpreter association, and had translated on four occasions in Fulton County. The Supreme Court approved a finding that the interpreter was qualified.

On January 13, 2003 the Georgia Supreme Court promulgated rules for a statewide system of interpreters for Georgia courts. A Georgia Commission on Interpreters for Non-English speakers was created. When a judge determines that a party cannot understand English, each non-English speaking defendant will be provided with an interpreter at each step of the proceedings. When appropriate, costs can be assessed upon a defendant. In civil cases, upon request each non-English speaking person shall be provided with a fee schedule and a list of interpreters who have been approved for providing services.

Where the witness cannot speak loudly enough because of a

686 S.E.2d 356 (2009). As noted in the text, this decision was vacated and remanded. See *Ling v. State*, 288 Ga. 299, 702 S.E.2d 881 (2010) (trial court must explain findings on the record). In turn, the Court of Appeals vacated its 2009 decision and remanded the case to the trial court. See *Ling v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

³*Ling v. State*, 288 Ga. 299, 702

S.E.2d 881 (2010).

⁴Johnson, Courts Must Translate New Rules for Interpreters, Athens Banner-Herald A-1 (Aug. 7, 2011) (Georgia Supreme Court Commission on Interpreters has provided rules requiring courts to provide interpreters at no cost).

⁵*Choi v. State*, 269 Ga. 376, 497 S.E.2d 563 (1998).

debility, an interpreter may be used.⁶ When an interpreter is used, the court should appoint a disinterested person. If a disinterested person is unavailable, it is not error to permit a relative of the witness to act as interpreter.⁷

The Supreme Court in *Gomez v. State*⁸ found that a new trial was not warranted due to the fact that defendants shared an interpreter for most of their joint trial. The Court recognized that the preferred practice is for each defendant to have their own interpreter:

to ensure that confidential attorney-client communications are not hindered; when an interpreter must be shared, the court should take measures to ensure that each defendant has adequate opportunities throughout the proceedings to confer confidentially with his or her counsel via the interpreter. Neither Huitron nor his trial counsel, however, ever complained at trial that they were prevented from conferring, confidentially or otherwise. And even on appeal, where Huitron has not suggested that he has any barrier to communication with his counsel, he has not identified anything specific that he was prevented from communicating to trial counsel at any point.

§ 11:12 Giving testimony on television, radio or motion picture

O.C.G.A. § 17-8-55 provides an option for televising away from open court the testimony of a child-victim aged 10 or younger if there is a substantial likelihood that the child will suffer severe emotional or mental distress if required to testify in open court. Such broadcasting shall be live to the jury housed elsewhere in the courthouse.

Right to confront witnesses extended to deprivation case, and trial court's procedure, requiring father to view foster child's courtroom testimony from television monitor in separate room did not violate father's right of confrontation, and father's due process rights were also protected in that child testified in presence of finder of fact and was subject to cross-examination; psychologist testified that, if child testified while father was in room, child's anxiety would be so high that she would freeze up, and court took steps to insure that father could participate in proceedings with assistance of counsel by allowing father to view child's testimony as it occurred and providing a person to run

⁶Conner v. State, 25 Ga. 515, 136 Ga. 46, 70 S.E. 798 (1911).
1858 WL 1990 (1858).

⁸Gomez v. State, 301 Ga. 445,

⁷Western & A.R. Co. v. Deitch, 801 S.E.2d 847 (2017).

notes from the father to his counsel.¹

Trial court improperly allowed video conference testimony from victim during juvenile without conducting an evidentiary hearing. The Georgia Court of Appeals reasoned, in part, that economic considerations associated with video conferencing are insufficient to overcome a defendant's Confrontation Clause interests. The court further added:

Although the seriousness of the victim's injuries, as represented by counsel for the State, was not disputed, the court did not obtain specific evidence as to whether the victim could travel while awaiting a transplant, whether he might have been able to testify in court within a reasonable amount of time in the future, or whether . . . a video deposition in Miami would have been appropriate. The State's representation that there were "reasonable grounds to believe that he will be unable to testify in person" may be true, but it was not supported by any medical testimony. Many victims of violent crimes require hospitalization and significant periods of rehabilitation as a result of their injuries, which can make it difficult for victims to testify in court. But the simple fact that a victim has medical issues or is hospitalized for a period of time does not mean that the State automatically can present the testimony of any such victim via video conference.²

The Georgia Court of Appeals held that the movements of a confidential informant who was provided with a video camera and was instructed by law enforcement to purchase illegal narcotics from the defendant constituted testimonial evidence and violated the defendant's confrontation clause rights. The court found that the video was purposefully made at the behest of law enforcement and the "recording was created under circumstances which would lead an objective witness to reasonably believe that the confidential informant's statements and acts were going to be used against [the defendant] at trial."³

Defense counsel's failure to object when trial court allowed partition to be placed between defendant and her children when they testified was reasonable trial strategy, and thus, did not amount to ineffective assistance; counsel testified that he wanted children to testify face to face, but that he thought motion to have children testify by closed circuit television would be granted, and believed that having children testify with divider in place would prove more favorable to defendant.⁴

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¹In re B.H., 295 Ga. App. 297, 671 S.E.2d 303 (2008).

²In Interest of E. T., 342 Ga. App. 710, 804 S.E.2d 725 (2017).

³State v. Gilmore, 312 Ga. 289, 862 S.E.2d 499 (2021).

⁴Zepp v. State, 276 Ga. App. 466, 623 S.E.2d 569 (2005).

§ 11:13 Witnesses not on list

Prosecution witnesses must be listed or revealed during discovery. The witness list rule is designed to prevent a defendant from being surprised at trial by a witness that the defendant has not had an opportunity to interview.¹ It should be noted, however, that when a witness's name is contained in the indictment, a defendant cannot validly contend that he had been surprised or unable to interview the witness in question through lack of knowledge of such witness.

It was not error for trial court to admit testimony of prosecution witness who was not on list of witnesses furnished to defense where prosecution became aware of witness and of testimony to be presented during course of trial and where opposing counsel had been made aware of the identity of the witness immediately upon the prosecution's learning that the witness possessed information relevant to trial.² No error occurred in permitting state to present unlisted witness where district attorney states that evidence to be presented by witness is newly discovered evidence which the State was unaware of at time witness list was drawn up.³

A witness was properly allowed to testify notwithstanding his omission from the prosecutor's pretrial list where the witness first made himself known during the trial.⁴

In *Kimbo v. State*,⁵ the state notified the defense that it intended to call a forensic technician who had not been previously identified on the witness list or in discovery. The Georgia Supreme Court held that the trial court did not err in admitting the testimony. The Court reasoned that the testimony was brief and limited.

Trial court did not err when it allowed defendant's former girlfriend to testify, even though she was not on the prosecution's witness list. Despite the omission, the court reasoned that defendant was not surprised by the fact that she testified given that she was named in the indictment as a victim.⁶

A trial court properly admitted certificates of a blood alcohol test even though the government did not include the inspector of those certificates on its witness list. The inspector need not be

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273 S.E.2d 155 (1980).

¹Green v. State, 298 Ga. App. 17, 679 S.E.2d 348 (2009); Gassett v. State, 289 Ga. App. 792, 658 S.E.2d 366 (2008).

⁴Hughes v. State, 257 Ga. 200, 357 S.E.2d 80 (1987).

²Thomas v. State, 234 Ga. 635, 217 S.E.2d 152 (1975).

⁵Kimbro v. State, 317 Ga. 442, 893 S.E.2d 678 (2023).

³Stroud v. State, 246 Ga. 717,

⁶Hendrix v. State, 361 Ga. App. 623, 865 S.E.2d 235 (2021).

produced at trial since the certificates are not testimonial in nature.⁷

The State was formerly required to furnish a list of witnesses, but modernly upon request of defense counsel the State must furnish addresses as well, unless the court allows an exception to this requirement.⁸

Calling an unlisted witness as a rebuttal witness against the defendant is not erroneous where counsel for defendant was allowed to interview witness before he testified.⁹

In a negligence action, it was held that the trial court did not abuse its discretion in refusing to allow an expert witness to testify when that witness had not been properly identified pursuant to the court's scheduling order.¹⁰ However, the Georgia Supreme Court reversed, holding that a trial court abuses its discretion in excluding a rebuttal expert based solely on the late identification of the witness. The case was remanded back to the trial court for reconsideration as to whether the witness should be excluded based on application of the proper factors.¹¹ A similar result was reached by the Georgia Supreme Court in *Adams v. Piedmont Henry Hospital, Inc.*¹²

Frequently unlisted witnesses are rebuttal witnesses. Respecting the scope of rebuttal, see § 8:3, *supra*.

§ 11:14 Death of witnesses

Trial court did not err in permitting testimony of State's witness to be read from prior transcript at defendant's third trial, where witness had died since defendant's second trial.¹

When a witness dies, the residual exception to the hearsay rule often comes into play. In order for hearsay to be admitted under the exception, requirements must be satisfied: the statement must concern a material fact, must be probative, and the interest of justice will be served by admission of the statement.²

⁷Smith v. State, 338 Ga. App. 635, 791 S.E.2d 418 (2016).

⁸Superior Court Rule 30.3. See *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986) (overruled on other grounds by, *Manzano v. State*, 282 Ga. 557, 651 S.E.2d 661 (2007)).

⁹Depree v. State, 246 Ga. 240, 271 S.E.2d 155 (1980). See *Wilson v. State*, 257 Ga. 444, 359 S.E.2d 891 (1987).

¹⁰Lee v. Smith, 346 Ga. App. 694, 816 S.E.2d 784 (2018).

¹¹Lee v. Smith, 307 Ga. 815, 838 S.E.2d 870 (2020).

¹²*Adams v. Piedmont Henry Hospital, Inc.*, 365 Ga. App. 257, 878 S.E.2d 113 (2022).

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¹Lingerfelt v. State, 238 Ga. 355, 233 S.E.2d 356 (1977).

²O.C.G.A. § 24-8-807.

In *State v. Stephens*,³ the Georgia Supreme Court affirmed the trial court's determination that a witness statement given to the police regarding a murder implicated the defendant's confrontation clause rights. The witness who provided the statement died prior to trial. The Georgia Supreme Court found that the statement was testimonial, thus triggering the defendant's right to confront the witnesses against him.

³State v. Stephens, 307 Ga. 615, 837 S.E.2d 830 (2020).

Chapter 12

Impeachment of Witnesses

- § 12:1 Impeachment of witnesses; generally
- § 12:2 Impeachment on collateral issues
- § 12:3 Laying foundation to impeach witnesses
- § 12:4 Credibility of witnesses; generally
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§ 12:1 Impeachment of witnesses; generally

“Impeachment of a witness” is any action taken at a trial which tends to impair a witness’ credibility and includes a wide variety of developments.¹ Excluding relevant impeachable evidence would allow “the credibility of a crucial witness to go unchallenged.”²

Courts have remarked that, generally, there are five methods of attack upon the credibility of a witness: (1) by evidence that the witness has made statements inconsistent with the present testimony on a prior occasion; (2) by evidence that the witness is not impartial; (3) by attacking the witness’ character; (4) by attacks on the inability of the witness to properly observe or recount matters that were the subject of direct examination; and (5) by proof through other witnesses that the material facts were not as testified to by the witness.³

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¹See *Black & White Cab Co. v. Cowden*, 64 Ga. App. 477, 13 S.E.2d 724 (1941) (“If a witness has been successfully impeached, he has been shown to be utterly unworthy of credit, and, of course, a witness in this position should not be believed.”). See also *Barkley Company of Arizona v. Commissioner of Internal Revenue*, 89 T.C. 66, 69, 1987 WL 42455 (1987) (impeachment is to “call in question the veracity of a witness, by means of evidence adduced for that purpose, or the adducing of proof that a witness is unworthy of belief”).

²*Hand v. South Georgia Urology*

Center, P.C., 332 Ga. App. 148, 769 S.E.2d 814 (2015) (disapproved of on other grounds by, *Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015)).

³*State v. Parker*, 747 N.W.2d 196 (Iowa 2008) (citing 1 McCormick on Evidence § 33). See also *Belcher v. State*, 344 Ga. App. 729, 812 S.E.2d 51 (2018) (“There are many acceptable methods of attacking the credibility of a witness including, but not limited to, (1) attacking the general character for truthfulness of the witness; (2) showing that, before trial, the witness made statements that are inconsistent with his or her trial testimony; (3) showing bias of the witness; (4) showing that the witness’s capacity to perceive,

*Brady v. Maryland*⁴ requires the prosecution to turn over to a defendant favorable material evidence in its possession. As observed by the Georgia Court of Appeals in *Harris v. State*,⁵ impeachment evidence and exculpatory evidence constitute *Brady* material.

A witness may be impeached by contradictions and inconsistencies in his own testimony.⁶ Such contradictions and inconsistencies may exist in his testimony given on direct examination or may arise through statements made during cross-examination which are in conflict with his direct examination.⁷

In *Haskins v. Georgia Neurosurgical Institute*,⁸ the Georgia Court of Appeals found that the trial court did not err when, in a medical malpractice action, it allowed the defendant to introduce into evidence an informed consent form signed by the patient. On direct examination the patient's wife testified that the doctor did not adequately explain the risks associated with the procedure at issue. The court found that the informed consent form was properly introduced to counter this testimony.

A witness may be impeached by the testimony of other witnesses and by other evidence in the case, such as photographs, documents, models, a view of the premises, etc. However, such impeachment must not be on collateral issues.⁹

Impeachment by reputation witnesses is permitted and the manner of producing testimony follows a routine. First, the usual practice is to ask the impeaching character witness whether he knows the reputation of the principal witness in his neighborhood; second, whether it is good or bad; and finally, if he answers that it is bad, whether from his knowledge of that reputation, he would believe the witness under oath. This was the approach under prior Georgia law.

Georgia's new Evidence Code provides for reputation impeachment under O.C.G.A. § 24-6-608(a), which is patterned after its federal counterpart.¹⁰ Federal courts applying Rule 608(a) maintain that: (1) reputation impeachment may only concern the

recall, or relate the relevant event is impaired; and (5) contradicting the substance of the testimony by the witness.”); Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules §§ 24-6-607, 24-6-608, 24-6-609, 24-6-613, 24-6-620, 24-6-621, 24-6-622 (6th Ed. 2017).

⁴*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

⁵*Harris v. State*, 358 Ga. App. 204, 854 S.E.2d 374 (2021).

⁶O.C.G.A. §§ 24-6-607, 24-6-621.

⁷See § 12:4, *infra*, as to the right of the trier to believe or disbelieve inconsistent or improbable testimony.

⁸*Haskins v. Georgia Neurosurgical Institute, P.C.*, 355 Ga. App. 781, 845 S.E.2d 770 (2020).

⁹See § 12:2, *infra*.

¹⁰See generally *Belcher v. The State*, 344 Ga. App. 729, 812 S.E.2d 51 (2018).

reputation for truthfulness; and (2) is admissible only after the witness's character for truthfulness has been attacked.¹¹

A witness may be impeached by showing his interest, bias, or hostility.¹² These conditions may be apparent on direct examination, be brought out on cross-examination or may be testified to by others. Importantly, “Unlike many other modes of impeachment, attacks on witness bias are constitutionally guaranteed.”¹³

Under proper circumstances, a witness may be impeached by evidence that his reputation for truth and veracity is bad, see § 29:16, *infra*, or that he has been convicted of another crime.¹⁴

A witness may be impeached by prior inconsistent statements.¹⁵ Similar to prior inconsistent statements, but not to be confused with them, are admissions¹⁶ and confessions.¹⁷ A witness may be cross-examined and asked if he has not made statements conflicting with his testimony and may be confronted with his own prior statements or testimony in conflict with his present testimony.¹⁸

Statements taken by police from witnesses or from the accused may be used to impeach. Sometimes when questioning the accused, flaws occur in the manner by which the officer advised the accused of his rights. Can statements obtained when rights are not fully explained be used to impeach?

Evidence which violates constitutional standards of due process, such as unlawfully obtained confessions, may be admitted for impeachment purposes.¹⁹ In *Charlton*, results from a breath test were admissible to rebut testimony of the defendant's expert witness, though the results were initially excluded on the ground that the arresting officer had failed to advise the defendant of his right to have an additional test administered by a qualified person of his own choosing. Other cases on using flawed statements or confession to impeach appear in § 12:4, *infra*.

Only specific kinds of witness impeachment will justify bolstering evidence on redirect, or later. The kind of impeachment attack which allows the proponent of the witness to rehabilitate with prior consistent statements is identified on § 15:11, *infra*.

A witness may be impeached by matters that reflect upon his ability to comprehend and communicate the matters about which

¹¹U.S. v. Candoli, 870 F.2d 496, 27 Fed. R. Evid. Serv. 1270 (9th Cir. 1989).

¹²See § 12:5, *infra*.

¹³Johnson v. State, 348 Ga. App. 667, 824 S.E.2d 561 (2019).

¹⁴See § 16:11, *infra*.

¹⁵See § 16:8, *infra*.

¹⁶See §§ 26:1 to 26:4, *infra*.

¹⁷See §§ 27:1 to 27:9, *infra*.

¹⁸Mobley v. Lyon, 134 Ga. 125, 67 S.E. 668 (1910). See O.C.G.A. § 24-6-613.

¹⁹Charlton v. State, 217 Ga. App. 842, 459 S.E.2d 455 (1995).

he testifies.²⁰ Such limitations may exist at the time of the transaction testified to, at the time of the trial or both. Such limitations include extreme youth or senility, limitations of vision or hearing, insincere or furtive demeanor, impairment of intelligence, lack of keenness or alertness, emotional instability, lack of sobriety, drug addiction, neurosis or psychosis.

Under limited circumstances, expert testimony may be introduced to establish the fact that the witness is suffering from some form of defect which tends to make his testimony unbelievable.²¹

§ 12:2 Impeachment on collateral issues

A witness may be impeached by the testimony of other witnesses and any other evidence which contradicts him, but may not be impeached on collateral issues.¹ If the matter on which the impeaching testimony is introduced is solely to contradict the witness on a collateral matter and is not material or relevant for any other purpose, it is not admissible.²

Contradictory proof must actually impeach testimony to be admissible. In a murder prosecution, O.C.G.A. § 24-6-621 did not authorize the introduction of evidence that another individual may have committed the homicide in question. The Supreme Court of Georgia held that testimony that someone else had entered the residence where the crime occurred on another date, “did not contradict the officers’ testimony that the house was secure on the day the victim was killed” and was properly excluded.³

Federal courts have noted that restrictions on the admission of collateral evidence for impeachment purposes applies most stringently to the introduction of extrinsic evidence offered to contradict a witness’s testimony.⁴ Applying O.C.G.A. § 24-6-613, a 2019 decision from the Georgia Court of Appeals is in accord.⁵

²⁰See, generally, *Conley v. U.S.*, 415 F.3d 183, 190 (1st Cir. 2005).

²¹See § 12:5, *infra*.

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¹See, generally, *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009) (noting Fed. R. Evid. 608 bars impeachment on collateral matters).

²*Friedman v. Odom*, 79 Ga. App. 107, 53 S.E.2d 136 (1949). See also *Scruggs v. State*, 253 Ga. App. 136, 558 S.E.2d 731 (2001); *U.S. v. Williamson*, 202 F.3d 974, 53 Fed. R. Evid. Serv.

1191 (7th Cir. 2000).

³*Hills v. State*, 306 Ga. 800, 833 S.E.2d 515 (2019). See generally Edward J. Imwinkelried, *Evidence of a Third Party’s Guilt of the Crime that the Accused is Charged with: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0*, 47 Loy. U. Chi. L.J. 91 (Fall 2015).

⁴*United States v. Kohli*, 847 F.3d 483, 102 Fed. R. Evid. Serv. 675 (7th Cir. 2017).

⁵*Daniels v. State*, 349 Ga. App. 681, 824 S.E.2d 754 (2019).

Numerous Georgia cases condemn collateral impeachment.⁶ So has the Eleventh Circuit Court of Appeals.⁷

A murder defendant, while cross examining a prosecution witness about his pending criminal charges, was entitled to prove that the witness incorrectly denied one of the charges.⁸

Ownership of an automobile driven by a police officer was not admissible to attack officer's credibility due to his financial inability to personally afford the vehicle.⁹

Impeachment by prior inconsistent statements limited to material issues, and not collateral information, see § 16:8, *infra*.

§ 12:3 Laying foundation to impeach witnesses

Generally, a proper foundation must be laid before impeaching a witness with prior inconsistent statements or acts.¹ In *Smith v. State*,² defendant attempted to testify as to the victim's accusation that another person was the perpetrator of the crimes for which he had been convicted. The trial court sustained the prosecutor's objection that the defendant had failed to establish the proper foundation outside the presence of the jury for the testimony, and the court of appeals affirmed. The rule relied

⁶*Scott v. State*, 309 Ga. 764, 848 S.E.2d 448 (2020) (discrepancy regarding whether a neighbor of a criminal defendant was entitled to carry a firearm was collateral); *Worthy v. Kendall*, 222 Ga. App. 324, 474 S.E.2d 627 (1996) (financial resources of automobile accident victim and her husband were irrelevant to issue of damages in personal injury action arising out of accident and thus testimony on this subject was not subject to impeachment); *Cook v. State*, 221 Ga. App. 831, 472 S.E.2d 686 (1996) (testimony of witness in a trial involving armed robbery that he had never attempted suicide was not subject to impeachment as it was a wholly collateral issue); *Goss v. Total Chipping, Inc.*, 220 Ga. App. 643, 469 S.E.2d 855 (1996) (abrogated on other grounds, *Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459 (1998)) (testimony in personal injury action regarding poor maintenance practices in the past was not sufficiently relevant to be admissible for impeachment purposes); *Warren v. Ballard*, 266 Ga. 408, 467 S.E.2d 891 (1996) (evidence of collateral benefits was not admissible to

impeach a plaintiff). Compare *Tweedell v. State*, 218 Ga. App. 518, 462 S.E.2d 181 (1995) (prosecutor's questions to defense witnesses inquiring when they first discussed defendant's case with defense counsel related to witnesses' credibility, a line of inquiry which was relevant and material); *Hudson v. State*, 218 Ga. App. 671, 462 S.E.2d 775 (1995) (evidence of defendant's attempts to debauch other youths through the guise of a massage was not wholly irrelevant or immaterial to his state of mind and intent).

⁷See *Rosenfeld v. Oceania Cruises, Inc.*, 682 F.3d 1320 (11th Cir. 2012).

⁸*Kinsman v. State*, 259 Ga. 89, 376 S.E.2d 845 (1989).

⁹*Davis v. State*, 181 Ga. App. 28, 351 S.E.2d 458 (1986).

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¹See O.C.G.A. § 24-6-613. See, generally *U.S. v. Feliciano*, 761 F.3d 1202 (11th Cir. 2014).

²*Smith v. State*, 221 Ga. App. 428, 472 S.E.2d 4 (1996).

upon was that of *Strickland v. State*,³ stating that before admitting evidence of prior false accusations by a victim of a crime within the proscription of the rape shield law, the trial court must first determine outside the presence of the jury that a reasonable probability of false accusation exists.

Federally, prior false allegations in sex crimes cases are addressed under Fed. Evid. R. 608(b).⁴ This was recognized by the Georgia Court of Appeals in *Frye v. State*.⁵ That rule is the model for Georgia's O.C.G.A. 24-6-608(b).

In terms of impeachment of an alleged sex crime victim with prior, purportedly false allegations of sexual misconduct, Justice Ellington's 2024 opinion in *Gallegos-Munoz v. State*:⁶ (1) identifies Rules 404(a) and 608(b) in the context of impeachment on these grounds; and (2) explains that courts should apply federal criteria, as opposed to Georgia's "threshold probable-falsity test" in evaluating the admissibility of this evidence.

Chief Judge Dillard of the Georgia Court of Appeals considered federal and state authority in interpreting Georgia Rule of Evidence 608(b) to uphold a trial court's refusal to allow cross-examination into purportedly prior false claims of sexual abuse by the mother of a victim in a child molestation case. The allegations there were from when the mother herself was a child, and unrelated to the case on trial.⁷

Unanimously reversing the Court of Appeals, the Supreme Court of Georgia held that, while highly probative, allowing a criminal defendant to impeach alleged victims of sexual abuse with their prior false allegations of sexual misconduct is not constitutionally mandated.⁸

When impeaching with bias proof, must a foundation be laid? Yes, says *Reese v. State*.⁹ Trial court acted within its discretion by not allowing defense witness to testify concerning an out-of-court statement made by state's witness, even though defense counsel maintained that statement would be submitted for purpose of showing state's witness' bias; no foundation was laid for state witnesses' impeachment on question of state witnesses' bias. Before a witness may be impeached by calling other witnesses to prove acts or declarations showing partiality, a foundation must

³*Strickland v. State*, 205 Ga. App. 473, 422 S.E.2d 312 (1992) (overruled on other grounds by, *State v. Burns*, 306 Ga. 117, 829 S.E.2d 367 (2019)).

⁴*Abram v. Gerry*, 672 F.3d 45 (1st Cir. 2012).

⁵*Frye v. State*, 344 Ga. App. 704, 811 S.E.2d 460 (2018).

⁶*Gallegos-Munoz v. State*, 2024 WL 4204622 (Ga. 2024).

⁷*Douglas v. State*, 340 Ga. App. 168, 796 S.E.2d 893 (2017).

⁸*State v. Burns*, 306 Ga. 117, 829 S.E.2d 367 (2019).

⁹*Reese v. State*, 252 Ga. App. 650, 556 S.E.2d 150 (2001).

first be laid by cross-examining the witness sought to be impeached as to his feelings toward the party.

In *Sharp v. Fagan*,¹⁰ the defense in a personal injury action failed to show that the plaintiff's chiropractor was biased and thus was not entitled to ask the chiropractor whether the plaintiff executed a lien in the chiropractor's favor on cross-examination.

The requirement of a foundation for bias impeachment may be looser in federal courts than is the case in Georgia. Certainly some federal cases require that the witness who is impeached be first given a chance to explain or deny the bias. Confronting him by cross-examination regarding the bias is a needed preliminary step prior to calling extrinsic witnesses to prove up the bias, under these decisions. Other federal cases disagree, and dispense with the need for the preliminary step.¹¹ Georgia judges, on the other hand, generally like to see a foundation laid for a statement which suggests that a witness is biased.

Federal courts, however, have held that witness bias may be proven by any competent evidence, even extrinsic evidence, although a foundation is often required.¹² In this regard, prior to the proffer of extrinsic evidence, federal decisions opine that a witness must be provided an opportunity to explain the circumstances suggesting bias.¹³

While bias impeachment is not specifically mentioned in its text, Fed. R. Evid. 608 is often identified with authorizing bias impeachment.¹⁴ O.C.G.A. 24-6-608 supplements the language of the federal rule to make particularized allowances for bias attacks on witness credibility.¹⁵ Rule 402 is also associated with bias impeachment.¹⁶

Consistent with federal authority, the Georgia Court of Appeals has noted, "OCGA § 24-6-608 does not preclude introduc-

¹⁰*Sharp v. Fagan*, 215 Ga. App. 44, 449 S.E.2d 648 (1994).

¹¹See *Ewing v. U.S.*, 135 F.2d 633, 642 (App. D.C. 1942) (impeaching material "is admissible either by way of cross-examination or by way of contradiction, *without regard to whether the witness has been asked and has made answer concerning it . . .*" (emphasis added); Schmertz and Czapinsky, Bias Impeachment and the Proposed Federal Rules of Evidence, 61 Georgetown L.J. 257, 265-69 (1972).

¹²*U.S. v. Weiss*, 930 F.2d 185, 32 Fed. R. Evid. Serv. 877 (2d Cir. 1991).

¹³*U.S. v. DiNapoli*, 557 F.2d 962, 2 Fed. R. Evid. Serv. 329, 42 A.L.R.

Fed. 936 (2d Cir. 1977); *United States v. Forbes*, 2005 WL 8146317, *4 (D. Conn. 2005).

¹⁴See *U.S. v. Avants*, 367 F.3d 433 (5th Cir. 2004).

¹⁵O.C.G.A. § 24-6-608 ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence.").

¹⁶See *U.S. v. Abel*, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450, 16 Fed. R. Evid. Serv. 838 (1984).

tion of extrinsic evidence to prove a witness's bias."¹⁷

In *Chrysler Group, LLC v. Walden*,¹⁸ the Georgia Supreme Court determined that Georgia's former common law ban on "wealth of the party evidence" did not survive the enactment of Georgia's new Evidence Code and that this evidence, like other forms of potential bias, were subject to consideration under O.C.G.A. §§ 24-4-401, 24-4-402, and 24-4-403.

Since impeachment includes anything that impairs the witness' credibility, it is evident that all forms of impeachment cannot be treated alike. A foundation must be laid where the impeachment is a prior inconsistent statement¹⁹ or a prior conviction of a crime.²⁰ It is important that his attention be called on cross-examination to the particular time and occasion when, the place where, and the person to whom he made the statements.²¹ Traditionally, this was the approach in Georgia. There is ample authority to the effect that a witness may be impeached by proof of prior contradictory statements, where he merely testifies that he does not remember, or has no recollection of making the statements referred to.²² This approach seems to reflect the proper rule. However, a few cases have held to the contrary on the point. Where a witness states that he does not remember, one case holds that as a general rule he cannot be impeached by former statements with respect to the facts which he claims not to remember, *Johnson v. State*,²³ however, when the witness does testify to facts inconsistent with his prior statements, such testimony is subject to proper impeachment.²⁴

In keeping with the federal law, Georgia's 2013 Evidence Code appears to have dispensed with some of these procedural requirements.²⁵ For instance, in a case under Georgia's new Evidence Code, "inconsistent testimony" and "convenient memory lapses" were proper grounds on which to introduce a witness's prior inconsistent statements.²⁶ As noted by Supreme Court of Georgia, "The failure of a witness to remember making a statement, like the witness's flat denial of the statement, may provide the foundation for calling another witness to prove that the state-

¹⁷*Johnson v. State*, 348 Ga. App. WL 1160 (1846).
667, 824 S.E.2d 561 (2019).

¹⁸*Chrysler Group, LLC v. Walden*, 303 Ga. 358, 812 S.E.2d 244 (2018).

¹⁹See § 16:8, *infra*.

²⁰See § 16:11, *infra*.

²¹*Wright v. Hicks*, 15 Ga. 160, 1854 WL 1556 (1854).

²²*Sealy v. State*, 1 Ga. 213, 1846

²³*Johnson v. State*, 255 Ga. 552, 341 S.E.2d 220 (1986).

²⁴*Brown v. State*, 266 Ga. 633, 469 S.E.2d 186 (1996).

²⁵O.C.G.A. § 24-6-613. *See generally* *U.S. v. Simpkins*, 240 Fed. Appx. 334, 342 (11th Cir. 2007).

²⁶*Thompson v. State*, 304 Ga. 146, 816 S.E.2d 646 (2018).

ment was made.”²⁷ In *Neloms v. State*,²⁸ the Supreme Court allowed the prosecution to impeach a defendant who testified to an inability to recall various facts with prior inconsistent statements uttered in the presence of an investigator. Failure to recall making a statement by a witness can, moreover, entitle the cross-examiner to introduce extrinsic evidence of that earlier statement.²⁹

For more on contradiction by prior written statements, see §§ 16:8, 16:10, *infra*. There are specific rules in the Code regarding laying a foundation for the impeachment of a witness.³⁰

The testimony of a third party to the effect that a defendant’s brother had previously told him that the defendant admitted he had done something he wished he had not done was admissible as a prior inconsistent statement in the trial of the defendant for murder for purposes of impeachment of defendant’s brother.³¹

A written document previously made and signed by witness, which is contrary to his testimony, may be introduced in evidence for purpose of impeachment on ground of contradictory statements.³²

In a criminal case, the defendant’s prior inconsistent statements to police can be introduced for purposes of impeachment without prior introduction of evidence on the voluntariness of such prior statements and without resorting to a full blown Jackson-Denno hearing.³³

Inconsistent statement impeachment, there is no requirement that a witness’s prior inconsistent statement be admitted into evidence prior to its use for impeachment.³⁴

§ 12:4 Credibility of witnesses; generally

The jury must determine the credibility of the witnesses,¹ and it is for them to determine the weight to give the statements of

²⁷Hood v. State, 299 Ga. 95, 99(2), 786 S.E.2d 648 (2016).

²⁸Neloms v. State, 313 Ga. 781, 873 S.E.2d 125 (2022).

²⁹Green v. State, 317 Ga. 250, 892 S.E.2d 733 (2023).

³⁰See O.C.G.A. § 24-6-613 (foundation for impeaching witness by means of prior contradictory statements).

³¹Jackson v. State, 258 Ga. 810, 375 S.E.2d 454 (1989).

³²Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979).

³³Wilson v. State, 254 Ga. 679, 333 S.E.2d 589 (1985).

³⁴O.C.G.A. § 24-6-613; Hopkins v. State, 283 Ga. App. 654, 642 S.E.2d 356 (2007).

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¹Hall v. State, 308 Ga. 475, 841 S.E.2d 672 (2020); Morton v. State, 306 Ga. 492, 831 S.E.2d 740 (2019). See also Taylor v. State, 83 Ga. App. 735, 64 S.E.2d 598 (1951).

the respective witnesses.² Where the court is the trier of the facts, it is for it to determine the credibility of witnesses and the weight to be accorded their testimony.³

Violation of the rule of sequestration goes to the credibility of a witness in violation.⁴

The trier of facts may consider the appearance, demeanor or manner of the witness upon the stand in considering the weight to be given to his testimony.⁵

The Supreme Court of Georgia found that a trial court did not commit plain error when it gave the following jury instruction which provided, in part, that jurors could consider “intelligence” when assessing a witness’s credibility:

The jury must determine the credibility of the witnesses. In deciding this, you may consider all the facts and circumstances of the case, including the witnesses’ manner of testifying, their intelligence, their means and opportunity of knowing the facts about which they testify, the nature of the facts about which they testify, the probability or improbability of their testimony, their interest or lack of interest in the outcome of the case, and their personal credibility as you observed it.⁶

The interest of the witness in the outcome of the trial can be considered in passing upon his credibility.⁷ The feelings or bias of a witness are legitimate subjects of inquiry since they bear upon the credibility of a witness.⁸

In determining the credibility of a child witness, the jury may consider the degree a child understands that she is to tell the truth; if the child’s sense of obligation is strong, the child is in effect under oath, and a trial court does not have to conduct a competency hearing in the absence of a specific challenge to a child’s ability to reason.⁹ Additionally, in *Knight v. State*,¹⁰ the court held that no abuse of discretion resulted from the determination that a mentally challenged rape victim was competent to

²*Williamson v. State*, 305 Ga. 889, 827 S.E.2d 857 (2019).

³*Brumbelow v. Mathenia*, 347 Ga. App. 861, 819 S.E.2d 535 (2018), judgment rev’d on other grounds, 308 Ga. 714, 843 S.E.2d 582 (2020). See also *Hardware Mut. Cas. Co. v. Mullis*, 75 Ga. App. 233, 43 S.E.2d 122 (1947).

⁴*Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996). O.C.G.A. § 24-6-615.

⁵*Mustang Transp., Inc. v. W. W. Lowe & Sons, Inc.*, 123 Ga. App. 350, 181 S.E.2d 85 (1971); *Garay v. State*, 314 Ga. 16, 875 S.E.2d 631 (2022);

Goodman v. State, 313 Ga. 762, 873 S.E.2d 150 (2022).

⁶*Redding v. State*, 311 Ga. 757, 858 S.E.2d 469 (2021).

⁷*Jordan v. Fowler*, 104 Ga. App. 824, 123 S.E.2d 334 (1961).

⁸*Freedman v. Housing Authority of City of Atlanta*, 108 Ga. App. 418, 136 S.E.2d 544 (1963).

⁹*Hogue v. State*, 219 Ga. App. 69, 464 S.E.2d 30 (1995).

¹⁰*Knight v. State*, 216 Ga. App. 200, 453 S.E.2d 798 (1995).

testify given that the victim understood the difference between telling the truth and telling a lie.

In *Allison v. State*,¹¹ the Georgia Court of Appeals addressed the admissibility of a child-victim's out of court statements in light of the confrontation clause. The case involved a charge of child molestation and at issue was the admissibility of videotaped statements made by the child-victim with a child forensic interviewer. Over the defendant's objection, the trial court admitted the video. On appeal, the defendant argued that the trial court erred since the child-victim was unavailable for cross-examination, referencing the child-victim's lack of responsiveness to various questions pertinent to the charged conduct. The appellate court disagreed:

While there is a dearth of case law regarding what constitutes availability to testify under OCGA § 24-8-820, there are a number of cases decided under the former Code section that are instructive. Furthermore, we note that the Federal Rules of Evidence do not contain a specific equivalent to OCGA § 24-8-820, so "Georgia precedent should be principally referenced to interpret this Code section." Ronald L. Carlson & Michael Scott Carlson, *Carlson on Evidence*, p. 615 (6th ed. 2018).

* * *

Here, it is undisputed that the victim appeared at trial, took the witness stand, and was available for cross-examination regarding any lack of memory. Contrary to Allison's assertion, there is no requirement that the child victim testify as to Allison's specific actions or the specific contents of her interview video, let alone that the State successfully elicit such testimony on direct examination. The victim's "prior statements and her unresponsive testimony at trial simply presented a question of credibility to the jury; it did not render the prior statements inadmissible under either the Child Hearsay Statute or the Sixth Amendment's Confrontation Clause."¹²

Cases continue to hold that, although a statement obtained in violation of *Miranda* may not be used in the prosecution's case in chief, it may be used to impeach defendant. The trustworthiness of the statement must meet legal standards,¹³ and appropriate limiting instructions should be made before and after the statement is admitted.¹⁴

The State is permitted to use a voluntary statement for impeachment purposes even if a violation of *Edwards v. Arizona*

¹¹*Allison v. State*, 356 Ga. App. 256, 846 S.E.2d 222 (2020).

¹²*Allison v. State*, 356 Ga. App. 256, 846 S.E.2d 222 (2020).

¹³*Linares v. State*, 266 Ga. 812, 471 S.E.2d 208 (1996).

¹⁴*Jones v. State*, 265 Ga. 84, 453 S.E.2d 716 (1995).

has occurred.¹⁵

Sometimes otherwise tainted information from the accused can be used to impeach him. Defendant's statement to informant, concededly elicited in violation of Sixth Amendment, was admissible to impeach his inconsistent testimony at trial.¹⁶

Georgia case law continues to allow *Miranda*-tainted statements to impeach. On the use of evidence not admissible in the state's case-in-chief for impeachment purposes, see *Hogsed v. State*.¹⁷

Impeachment by disproving facts to which a witness testifies and impeachment by contradictory statements previously made by a witness are two separate and distinct forms of impeachment.¹⁸

When a defendant refused to answer any questions, his videotaped statement was inadmissible as a prior inconsistent statement, since he thus gave no testimony in court with which his prior statement could be judged inconsistent.¹⁹

A showing of surprise is not required to impeach a party's own witness. In *Knight v. State*,²⁰ the State was held to be authorized to use a prior inconsistent statement to impeach a witness it had called without a showing of surprise or entrapment. The elimination of the surprise doctrine for impeaching one's own witness was made complete by a provision in the 2005 Criminal Justice Act.²¹

The principle of "falsus in uno, falsus in omnibus" permits the trier to reject all the testimony of a witness who has knowingly and intentionally testified falsely, except insofar as corroborated by other credible evidence.²² While the trier has the right to reject all such testimony, it is not bound to do so.²³ Such falsehood must have been on a material point.²⁴ If the false statement was made through mistake or misapprehension, the jury should not disregard his testimony altogether.²⁵ However, testimony which is

¹⁵*Dyer v. State*, 278 Ga. 656, 604 S.E.2d 756 (2004).

¹⁶*Kansas v. Ventris*, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009).

¹⁷*Hogsed v. State*, 287 Ga. 255, 695 S.E.2d 269 (2010).

¹⁸See *Waszczak v. City of Warner Robins*, 221 Ga. App. 528, 471 S.E.2d 572 (1996).

¹⁹*Barksdale v. State*, 265 Ga. 9, 453 S.E.2d 2 (1995).

²⁰*Knight v. State*, 266 Ga. 47, 464

S.E.2d 201 (1995).

²¹See § 15:12, *infra*.

²²See, generally, *Holton v. Mercer*, 195 Ga. 47, 23 S.E.2d 166 (1942); *Brooker v. Brown*, 307 Ga. App. 10, 703 S.E.2d 692 (2010).

²³*Calhoun v. State*, 17 Ga. App. 515, 87 S.E. 762 (1916).

²⁴*Holbrook v. Rodgers*, 105 Ga. App. 219, 124 S.E.2d 443 (1962).

²⁵*McLendon v. Johnson*, 71 Ga. App. 424, 31 S.E.2d 89 (1944).

willfully and knowingly false must be disregarded in its entirety.²⁶

A jury in arriving at a conclusion upon disputed issues of fact may believe a part of the testimony of a witness or witnesses, and reject another part thereof, it being their duty to ascertain the truth of the case from the opinion they entertain of all the evidence submitted for their consideration.²⁷

Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence, and is not limited in value only to impeachment purposes.²⁸

A hearsay declarant could be impeached by evidence of bad character even though his statements were admitted as part of the *res gestae*.²⁹ This approach is consistent with O.C.G.A. § 24-8-806, which is based on Fed. R. Evid. 806. Under those rules, hearsay declarants are subject to impeachment as though they had in fact testified.³⁰

A witness' participation in a pretrial diversion program is not a conviction admissible for impeachment purposes.³¹

Evidence introduced to impeach a witness by his reputation in the community or neighborhood was admissible even though the "neighborhood" was the penal institution in which the witness was incarcerated and was composed of his fellow inmates since the penal institution was the place where people had had the best opportunity to form a correct estimate of the witness' character.³²

Chief Judge Dillard of the Georgia Court of Appeals has noted that O.C.G.A. § 24-6-608 of Georgia's new Evidence Code "provides very specific, limited methods for attacking or supporting the credibility of a witness by evidence in the form of opinion or reputation."³³

Inconsistency in a child's testimony goes to the child's credibility as a witness, but does not render the child incompetent as

²⁶*Fugitt v. State*, 251 Ga. 451, 307 S.E.2d 471 (1983).

²⁷*Montgomery v. Barrow*, 286 Ga. 896, 692 S.E.2d 351 (2010).

²⁸*Thompson v. State*, 304 Ga. 146, 816 S.E.2d 646 (2018). See also *Petouvis v. State*, 165 Ga. App. 409, 301 S.E.2d 483 (1983).

²⁹*Brantley v. State*, 177 Ga. App. 13, 338 S.E.2d 694 (1985).

³⁰*Blackston v. Rapelje*, 780 F.3d 340 (6th Cir. 2015) (noting "the Confrontation Clause applies not only to those witnesses who appear in court, but to all who 'bear testimony' against the accused").

³¹*Strickland v. State*, 257 Ga. 230, 357 S.E.2d 85 (1987).

³²*Martinez v. State*, 189 Ga. App. 69, 375 S.E.2d 123 (1988).

³³*Belcher v. State*, 344 Ga. App. 729, 812 S.E.2d 51 (2018).

a witness.³⁴

For the admissibility of expert testimony as to the credibility of witnesses, see § 12:6, *infra*.

If a witness testifies that a child molestation victim is trustworthy and that she (the witness) felt that the victim's account of the molestation was credible, this is "improper bolstering." However, since the defense attorney's failure to object to it was a strategy decision, the issue did not provide a basis for reversal.³⁵ For a similar result in the context of bolstering during a prosecution's closing argument, see *Blackmon v. Secretary, Department of Corrections*.³⁶

In *Bedford v. State*,³⁷ the Georgia Supreme Court found that a trial court did not commit plain error when a GBI agent testified regarding the truthfulness of another witness's testimony. The latter witness had given varying accounts regarding the identification of a shooter and the GBI agent testified regarding which of those accounts the agent found more truthful.

The Georgia Court of Appeals found that a defendant was not unfairly prejudiced when the victim of the alleged child abuse was allowed to testify in her National Guard uniform. The court held that this did not constitute improper bolstering.³⁸

Sometimes a witness asserts she is "100% certain" that she saw defendant commit the crime. Should the judge fortify this testimony with an instruction?³⁹

Defense experts who attack the credibility of eyewitness identifications in criminal cases, see § 12:6, *infra*.

§ 12:5 Particular matters affecting credibility

Identifying various impeachment approaches, Chief Judge Dillard of the Georgia Court of Appeals observes:

There are many acceptable methods of attacking the credibility of a witness including, but not limited to, (1) attacking the general character for truthfulness of the witness; (2) showing that, before trial, the witness made statements that are inconsistent with his or her trial testimony; (3) showing bias of the witness; (4) showing

³⁴*Pendergrass v. State*, 168 Ga. App. 190, 308 S.E.2d 585 (1983).

³⁵*Goldey v. State*, 289 Ga. App. 198, 656 S.E.2d 549, 551–52 (2008).

³⁶*Blackmon v. Secretary, Department of Corrections*, 34 F.4th 1014 (11th Cir. 2022).

³⁷*Bedford v. State*, 311 Ga. 329, 857 S.E.2d 708 (2021).

³⁸*Cwik v. State*, 360 Ga. App. 525, 859 S.E.2d 142 (2021).

³⁹See *Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766 (2005) (pattern jury instruction on eyewitness identification, which informs jury they may consider the level of certainty of an identification, struck down by Georgia Supreme Court and is improper).

that the witness's capacity to perceive, recall, or relate the relevant event is impaired; and (5) contradicting the substance of the testimony by the witness. Some, but not all, of these methods of impeachment are explicitly included in the rules of evidence.¹

The 2013 Georgia Evidence Code identifies numerous modes of witness impeachment. O.C.G.A. § 24-6-608(b) references bias impeachment, as does O.C.G.A. § 24-6-622. Impeachment by prior conviction appears in O.C.G.A. § 24-6-609. O.C.G.A. § 24-6-613 encompasses the rules for prior inconsistent statement impeachment. Impeachment by contradiction is covered in O.C.G.A. § 24-6-607 and O.C.G.A. § 24-6-621. As to using past acts of dishonesty and untruthfulness to impeach, a mode of attack not encouraged under pre-2013 Code, see O.C.G.A. § 24-6-608(b).

As discussed in § 13:1, *infra*, no witness is rendered incompetent to testify because of his interest in the case, but such interest may be shown for the purpose of affecting his credibility.² Interest in the outcome does not in itself render a witness unworthy of belief.³

A proper foundation must be laid for subsequent impeachment for bias, just as when impeaching by a prior inconsistent statement.⁴ When impeaching with bias proof, do modern cases require that a foundation be laid? Yes, says *Reese v. State*.⁵ Trial court acted within its discretion by not allowing defense witness to testify concerning an out-of-court statement made by state's witness, even though defense counsel maintained that statement would be submitted for purpose of showing state's witness' bias; no foundation was laid for state witnesses' impeachment on question of state witnesses' bias. Before a witness may be impeached by calling other witnesses to prove acts or declarations showing partiality, a foundation must first be laid by cross-examining the witness sought to be impeached as to his feelings toward the party.

Impeachment with a witness's purported bias is constitutionally protected and entitles the cross-examiner's use of extrinsic evidence.⁶ Generally, the widest latitude should be allowed in the cross-examination of a witness to establish bias.⁷ Many different kinds of facts may be brought out to show interest, or bias, such

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¹*Belcher v. The State*, 344 Ga. App. 729, 812 S.E.2d 51 (2018).

²*Jordan v. Fowler*, 104 Ga. App. 824, 123 S.E.2d 334 (1961).

³*Bowman v. State*, 91 Ga. App. 52, 85 S.E.2d 66 (1954).

⁴*McCauley v. State*, 86 Ga. App. 509, 71 S.E.2d 664 (1952).

⁵*Reese v. State*, 252 Ga. App. 650, 556 S.E.2d 150 (2001).

⁶*Johnson v. State*, 348 Ga. App. 667, 824 S.E.2d 561 (2019).

⁷*Smith v. State*, 161 Ga. 421, 131

as the fact that the witness is a party, *Walraven v. Walraven*.⁸ Normally, matters of interest, bias or hostility are brought out in cross-examining the witness. His answers are not conclusive, and contradictory evidence is admissible even though often apparently collateral in nature.⁹

The Georgia Court of Appeals has observed, “OCGA § 24-6-608 does not preclude introduction of extrinsic evidence to prove a witness’s bias.”¹⁰ Invoking bias as grounds to impeach, however, does not effectuate a bypass of all possible limitations. *Lucas v. State*¹¹ observes, “The right to inquire into partiality and bias, however, is not without limits.” In *Lucas*, the Supreme Court of Georgia determined that the trial court did not abuse its discretion when it disallowed cross-examination of a witness about his immigration status in a murder prosecution. Similarly, bias impeachment remains subject to the requirements and limitations of O.C.G.A. §§ 24-4-401; 24-4-402; and 24-4-403.¹²

Also deemed proper as bearing on the credibility of the witness are his relations with the accused,¹³ interest in the outcome of the suit,¹⁴ or the fact that witness has a suit pending against the same defendant, arising out of the same incident.¹⁵

In *Huerta-Ramirez v. State*,¹⁶ the Georgia Court of Appeals held that a co-defendant’s testimony that the other defendant had him beaten while in prison was admissible as “threat” evidence. The court explained that such evidence “‘is admissible to explain a witness’[] conduct on the stand’ regardless of whether or not the threat is tied to the defendant.” It added that the co-defendant’s threat testimony was admissible “to explain why [the co-defendant] continued to disavow any knowledge of the events.”

Where the prosecuting witness in a criminal case has a civil action pending against the accused arising out of the same incident, such fact is admissible inasmuch as it may affect the witness’ credibility.¹⁷

If a witness has a lawsuit pending against one of the parties, is

S.E. 163 (1925).

⁸*Walraven v. Walraven*, 76 Ga. App. 713, 47 S.E.2d 148 (1948), related to a party, Am. Jur. 2d, Witnesses §§ 876, 877, is an accomplice, see § 13:8, *infra*, or an attorney for a party, see § 13:6, *infra*.

⁹*Schamroth v. State*, 84 Ga. App. 580, 66 S.E.2d 413 (1951).

¹⁰*Johnson v. State*, 348 Ga. App. 667, 824 S.E.2d 561 (2019).

¹¹*Lucas v. State*, 303 Ga. 134, 810

S.E.2d 490 (2018).

¹²*Chrysler Group, LLC v. Walden*, 303 Ga. 358, 812 S.E.2d 244 (2018).

¹³O.C.G.A. § 24-6-622.

¹⁴*Kapplin v. Seiden*, 109 Ga. App. 586, 137 S.E.2d 55 (1964).

¹⁵*Elliott v. Georgia Power Co.*, 58 Ga. App. 151, 197 S.E. 914 (1938).

¹⁶*Huerta-Ramirez v. State*, 357 Ga. App. 123, 850 S.E.2d 218 (2020).

¹⁷*Quinn v. State*, 132 Ga. App. 395, 208 S.E.2d 263 (1974).

that fact admissible? Generally yes, say the cases, and *Presswood v. Welsh*¹⁸ emphasizes the point. A witness called in a car accident trial had a personal injury suit pending against both the plaintiff and defendant drivers. She had been a passenger in defendant's car. Defendant called her as a witness, and plaintiff moved to exclude any evidence of the passenger's lawsuit. The Court of Appeals affirmed the trial court's denial of the motion to exclude. "The interest of a witness in the result" may always be considered.

This text makes the point that "financial interest of the witness is usually relevant." If a witness has a suit pending against one of the parties, or plans to sue in the future over the conduct or actions involved in a case, this may be shown. A 2005 decision illustrates. Defendant's filing of an ante litem notice that she intended to sue a city based on actions of its police officers was a proper basis for cross-examination of the defendant regarding her financial interest in the outcome of a criminal trial for fleeing or attempting to elude a police officer and misdemeanor obstruction of a police officer.¹⁹

The limits of bias impeachment by a defense lawyer in a criminal case were explored in a 2007 case. A defendant is entitled to a reasonable cross examination on the question of whether the witness held a belief that he would receive a personal benefit from testifying favorably for the prosecution, but that is not to say that there are no limits on the cross examiner's inquiry into the potential bias of an adverse witness. On the contrary, a trial court retains wide latitude to impose reasonable limits on such cross examination, especially in the situation in which the interrogation may be only marginally relevant.²⁰

Evidence of a pending charge against a state's witness may be admissible to show the witness' interest in cooperating with the prosecution.²¹ The Constitution gives a defendant the right to cross-examine a witness about leniency given by the prosecution in exchange for testimony on the part of an adverse witness who is himself under charges, and the defense may ask about the scope of any deal the witness may have struck with the State.²²

In criminal cases, the defendant has a constitutional right to impeach with proof of bias.²³

Notwithstanding this fact, however, trial judges still retain

¹⁸*Presswood v. Welsh*, 271 Ga. App. 459, 610 S.E.2d 113 (2005).

¹⁹*Golden v. State*, 276 Ga. App. 538, 623 S.E.2d 727 (2005).

²⁰*Lawton v. State*, 281 Ga. 459, 640 S.E.2d 14 (2007).

²¹*Strickland v. State*, 257 Ga. 230, 357 S.E.2d 85 (1987).

²²*Brown v. State*, 276 Ga. 192, 576 S.E.2d 870 (2003).

²³*Smith v. State*, 276 Ga. 263, 577 S.E.2d 548 (2003).

authority to restrict the ability of parties—even *criminal defendants*—to impeach witnesses on the issue of bias.²⁴ For instance, proponents of bias evidence, however, must demonstrate a factual basis to support claims of witness bias.²⁵ Moreover, trial courts also retain the ability to exclude bias impeachment evidence in criminal cases pursuant to O.C.G.A. § 24-4-403.²⁶

Cases on bias, interest, and motive include *Beam v. State*.²⁷

Financial interest in a case on the part of a witness is usually relevant.²⁸ However, a substantial showing of financial interest of expert witness was needed to warrant introduction of evidence that the defendant doctor in medical malpractice action and expert were insured by same insurance company. Where there was no showing that expert had more than inchoate and financially insignificant interests in outcome of particular case, such evidence is inadmissible. The record was silent as to what kind of mutual insurance policy existed. Under the substantial connection test, the plaintiff must be able to establish that an expert has more connection to a defendant's insurer than that of a policyholder, or in the case of a mutual insurance company, membership. Connection of merely having a common insurance carrier is too attenuated to outweigh the potential prejudice from the admission of evidence that expert and medical malpractice defendant have same insurance companies, even though policyholders in mutual insurance company have, by the very nature of the company, a greater financial stake in the company than do policyholders in other types of insurance companies.²⁹

Former Georgia law established certain parameters for impeachment via prior criminal convictions, many of which have been maintained under O.C.G.A. § 24-6-609. A witness' cred-

²⁴United States v. Rosario-Perez, 957 F.3d 277 (1st Cir. 2020).

²⁵Anthony v. State, 303 Ga. 399, 811 S.E.2d 399 (2018).

²⁶Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244 (2018).

²⁷Beam v. State, 265 Ga. 853, 463 S.E.2d 347 (1995) (defendant was entitled to reasonable cross-examination on issue of whether witness entertained any belief of personal benefit from testifying for prosecution); Orkin Exterminating Co., Inc. v. McIntosh, 215 Ga. App. 587, 452 S.E.2d 159 (1994) (evidence of lesbian relationship between personal injury plaintiff and female witness was admissible to show intimate relations

and witness' potential bias, even though evidence had already been admitted showing close relationship and cohabitation).

²⁸Chambers v. Gwinnett Community Hosp., Inc., 253 Ga. App. 25, 557 S.E.2d 412 (2001).

²⁹Also see Carlisle v. Abend, 288 Ga. App. 150, 653 S.E.2d 388 (2007).

Compare the reasoning in Ede v. Atrium S. OB-GYN, Inc., 71 Ohio St. 3d 124, 1994-Ohio-424, 642 N.E.2d 365 (1994) (in a medical malpractice action, evidence of a commonality of insurance interests between defendant and an expert witness is probative of the expert's bias which outweighs any prejudice).

ibility could be impeached by evidence of a conviction of a crime.³⁰ Specific instances of misconduct could not be used to impeach a witness' character of credibility, however, unless misconduct has resulted in conviction of such crime. Mere indictment, charge, arrest, or trial and acquittal were not legal methods of impeachment.³¹ A plea of nolo contendere with the disposition under the Georgia first offender statute was inadmissible for the purpose of impeaching a witness.³² Juvenile court adjudication of delinquency was not a conviction of a crime for purposes of impeaching a juvenile who was testifying against a defendant.³³

Examining current Georgia Rule of Evidence 609, the Supreme Court of Georgia has observed that O.C.G.A. § 24-6-609 serves the purpose of: "generally allowing for impeachment of a witness's character for truthfulness by evidence of conviction of a felony or of any crime 'if it readily can be determined that establishing the elements of such crime required proof or admission of an act of dishonesty or making a false statement.'"³⁴ Still, Rule 609 impeachment is limited to the fact of the conviction, as opposed to delving into underlying facts of the prior case.³⁵

The Georgia Court of Appeals has explained the fundamentals of prior conviction impeachment:

Read in conjunction, subsections (a)(1) and (b) of OCGA § 24-6-609 provide that prior felony convictions less than ten years old may be introduced for the purpose of attacking the character for truthfulness of a witness if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect.³⁶

Both O.C.G.A. § 24-6-609 and Fed. R. Evid. 609 create distinctions between: (1) testifying criminal defendants versus other witnesses who take the stand;³⁷ and (2) convictions for crimes involving dishonesty or false statement as opposed to other offenses that constitute felonies.³⁸ A federal decision explains the criteria and differentiation:

The standard for admissibility of a prior conviction under Rule 609(a)(1) is heightened when the witness is an "accused." See Fed.

³⁰Hawes v. State, 266 Ga. 731, 422 (2021).
470 S.E.2d 664 (1996).

³¹Smith v. State, 222 Ga. App. 366, 474 S.E.2d 272 (1996).

³²Alto Park Super Mart, Inc. v. White, 216 Ga. App. 285, 454 S.E.2d 580 (1995).

³³Baynes v. State, 218 Ga. App. 687, 463 S.E.2d 144 (1995).

³⁴American Civil Liberties Union, Inc. v. Zeh, 312 Ga. 647, 864 S.E.2d

³⁵See Sinkfield v. State, 318 Ga. 531, 899 S.E.2d 103 (2024). See also United States v. Parson, 2021 WL 4523496 (N.D. Okla. 2021).

³⁶Jordan v. State, 344 Ga. App. 267, 810 S.E.2d 158 (2018).

³⁷See O.C.G.A. § 24-6-609(a)(1); Fed. R. Evid. 609(a)(1)(B).

³⁸See O.C.G.A. § 24-6-609(a)(2); Fed. R. Evid. 609(a)(2).

R. Evid. 609(a)(1). For a witness “other than an accused,” the prior conviction is subject to Rule 403 balancing and will be found inadmissible for impeachment purposes if the conviction’s “probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Fed. R. Evid. 403 (emphasis added). For an accused like the defendant here, however, the prior conviction “shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” Fed. R. Evid. 609(a)(1) (emphasis added). According to the Advisory Committee on Evidence Rules, there is a “special balancing test for the criminal defendant who chooses to testify” because “in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice—*i.e.*, the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes.” Fed. R. Evid. 609 advisory committee’s note.³⁹

When it comes to felony convictions that do not involve dishonesty or false statement, Rule 609 generally subjects the introduction of the prior felony conviction to Rule 403.⁴⁰ In assessing the probative value of a prior conviction introduced for impeachment, Georgia courts continue to utilize federal guideposts relied upon prior to the adoption of Georgia’s new Evidence Code:

Georgia trial courts undertaking the balancing test to determine if a prior conviction was admissible for impeachment purposes were to consider factors including: (1) the kind of felony involved and its impeachment value, (2) the time of the conviction and the defendant’s subsequent history, (3) the similarity between the past crime and the charged crime (lest evidence of a similar crime create an unacceptable risk of prejudice); (4) the importance of the defendant’s testimony; and (5) the centrality of the credibility issue.⁴¹

Georgia and Federal Rules 609 require specific considerations

³⁹U.S. v. Vasquez, 840 F. Supp. 2d 564 (E.D. N.Y. 2011) (emphasis in original).

⁴⁰Thomas v. Wellenreuther, 2022 WL 1026047, 21-1400 (2d Cir. 2022); United States v. Shelledy, 961 F.3d 1014 (8th Cir. 2020).

⁴¹Lawson v. State, 365 Ga. App. 87, 877 S.E.2d 616 (2022) (“while our current evidence code does not require trial courts to engage in this test, these factors continue to be a useful guide in making such a determination because federal courts have employed them under a prior version of the federal evidence rule that is substan-

tively similar to our new evidentiary rule”). See also United States v. Eggleston, 2022 WL 252412 (C.D. Cal. 2022) (“The Court must consider five factors in balancing the probative evidence of a defendant’s prior conviction against its prejudicial effect: ‘(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of defendant’s testimony; and (5) the centrality of defendant’s credibility.’”).

when criminal defendants testify “to protect interest of criminal defendant, not prosecution or non-defendant witness.”⁴² Where a qualifying felony conviction is introduced to impeach a criminal defendant, the trial judge must determine whether the probative value of the impeaching conviction outweighs the prejudicial impact to the accused.⁴³

Impeachment under Rule 609 is based upon the conception that felon status is relevant factor in determining any witnesses’ credibility: “Rule 609 ‘is based on the common sense proposition that one who has transgressed society’s norms by committing a felony is less likely than most to be deterred from lying under oath.’”⁴⁴ An opinion by Presiding Judge Dillard of the Georgia Court of Appeals provides insight:

OCGA § 24-6-609 (a) (1) provides, in part, that evidence an accused (who testifies) has been convicted of a crime punishable by death or imprisonment in excess of one year “shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused.” Furthermore, the introduction of evidence of a prior felony conviction is “intended to afford the jury a basis to infer that the witness’s character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony.” Simply put, the introduction of evidence of a prior crime is “a general attack on the credibility of the witness.”⁴⁵

Regardless of punishment, convictions of offenses involving dishonesty or false statement are not subject to the balancing test of Rule 403.⁴⁶ For offenses involving dishonesty or false statement, neither Georgia nor Federal Rule 609 differentiates between criminal defendants or other testifying witnesses.⁴⁷

The language of O.C.G. A. 24-6-609(c), however, leaves the issue if first offender adjudications open to potential debate. Rather than simply inserting words to the effect of, “adjudications under Georgia’s first offender act,” to the list of nonimpeaching dispositions housed in Fed. R. Evid. 609(c), Georgia lawmakers went a different route. The consequence? The Georgia statute could be read to make the exclusion of first offender treatment contingent upon such subsequent events as a pardon. Future Georgia deci-

⁴²Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919, 15 Fed. R. Evid. Serv. 614 (D. Md. 1983).

⁴³United States v. Peterson, 945 F.3d 144 (4th Cir. 2019).

⁴⁴American Modern Home Insurance Company v. Thomas, 993 F.3d 1068, 115 Fed. R. Evid. Serv. 325 (8th Cir. 2021).

⁴⁵Lawson v. State, 365 Ga. App. 87, 877 S.E.2d 616 (2022).

⁴⁶Altobello v. Borden Confectionary Products, Inc., 872 F.2d 215, 27 Fed. R. Evid. Serv. 953 (7th Cir. 1989).

⁴⁷See generally U.S. v. Ratliff, 346 Fed. Appx. 473 (11th Cir. 2009); U.S. v. Jackson, 863 F. Supp. 1462 (D. Kan. 1994).

sions will likely need to address this choice of terminology. The Eleventh Circuit Court of Appeals has rejected the argument that a Georgia first offender disposition is excluded under Fed. R. Evid. 609(c).⁴⁸

As a usual matter, nolo pleas are not usable for impeachment of witnesses generally.⁴⁹ In the 2004 *Pitmon* ruling, the Court of Appeals sees parallels between nolo contendere pleas and first offender records:

Our decision today finds support in *Matthews v. State*, 268 Ga. 798, 493 S.E.2d 136 (1997). In that case, the Supreme Court held that evidence of a first offender record could not be used to impeach a witness on general credibility grounds. *Id.* at 8-2-803(4), 493 S.E.2d 136. The Court reasoned that under the first offender statute, O.C.G.A. § 42-8-62, there is no adjudication of guilt, and the defendant is protected against the stigma of a criminal record. *Id.* at 802(4), 493 S.E.2d 136, citing *Witcher v. Pender*, *supra* at 802(4), 493 S.E.2d 136.

The reasoning in *Matthews* applies to nolo contendere pleas as well. When the legislature prohibited the use of such a plea “against the defendant in any other court . . . for *any* purpose,” it did not carve out an exception for impeachment. (Emphasis supplied.) O.C.G.A. § 17-7-95(c). Because its holding allowing the use of a plea of nolo contendere for impeachment purposes is in direct conflict with O.C.G.A. § 17-7-95(c), we hereby overrule *Tilley v. Page*, *supra*.

The clarifications provided by *Pitmon* are valuable. The case appears to indicate that nolo pleas are inadmissible to impeach in civil or criminal cases; nor are first offender records relevant for impeachment. Exclusion of pleas of nolo contendere is similarly ordained in the 2013 Georgia Evidence Code.⁵⁰ The Georgia formulation follows Fed. R. Evid. 410.⁵¹

In the cross-examination and impeachment sections of the 2013 Code, under O.C.G.A. § 24-6-609(d), a conviction based on a plea of nolo contendere shall not be admissible to impeach a witness. Nor may a final adjudication of guilt and discharge under first offender treatment be so used.⁵²

The *Pitmon* result was previewed in *Armour v. State*⁵³ which disallowed impeachment of a crime scene investigator by asking

⁴⁸*Wilson v. Attaway*, 757 F.2d 1227, 17 Fed. R. Evid. Serv. 1380 (11th Cir. 1985).

⁴⁹*Pitmon v. State*, 265 Ga. App. 655, 595 S.E.2d 360 (2004) so holds.

⁵⁰O.C.G.A. § 24-4-410.

⁵¹*U.S. v. Jim*, 786 F.3d 802 (10th Cir. 2015) (“Rule 410 provides that evidence of ‘a guilty plea that was later

withdrawn’ or statements that a defendant made when he entered a guilty plea, later withdrawn, are not admissible against that defendant.”).

⁵²O.C.G.A. § 24-6-609(c) (see previous discussion in this section for possible limitations on this restriction).

⁵³*Armour v. State*, 265 Ga. App. 569, 594 S.E.2d 765 (2004).

about his *nolo contendere* plea to a criminal trespass charge. The court ruled that “a plea of *nolo contendere* cannot be used against a defendant in any other court as an admission of guilt or for any purpose.”

Excluding *nolo contendere* pleas from impeachable convictions is specific in the Georgia statute. Federal courts, have allowed the introduction of those pleas for impeachment purposes under Fed. R. Evid. 609, while not authorizing their admission to prove guilt under Fed. R. Evid. 410.⁵⁴

Nolo pleas, while generally inadmissible in felony cases, may be used by prosecutors in drunk driving prosecutions.⁵⁵

For a form of motion for excluding criminal defendant’s prior conviction, consult Appendix C, Form 9, *infra*.

A witness who has been impeached by the introduction of a certified copy of a previous felony conviction, but who has not attempted to rehabilitate her character by explaining the circumstances of the conviction, cannot be cross-examined concerning the facts surrounding the conviction.⁵⁶

Misdemeanor convictions for acts of dishonesty or false statement also qualify as proper impeachment under O.C.G.A. § 24-6-609.⁵⁷ Misdemeanor violations of O.C.G.A. § 3-3-21, Georgia’s alcohol sale and licensing statute, have been determined to be inadmissible impeachment evidence under O.C.G.A. § 24-6-609.⁵⁸

For more cases on prior conviction impeachment, see § 16:11, *infra*.

Impeachment of a victim in prosecution for sex crimes by showing that the victim has made prior false allegations is not barred by rape shield laws because it does not address the victim’s prior sexual behavior but rather her propensity to make false statements about sexual misconduct of others.⁵⁹

Evidence that the victim previously accused someone other than the defendant of sexual misconduct is generally not admissible. There are limited exceptions to this rule, however, including:

⁵⁴See *U.S. v. Wyatt*, 762 F.2d 908, 18 Fed. R. Evid. Serv. 673 (11th Cir. 1985).

⁵⁵See O.C.G.A. § 40-6-391(c)(1).

⁵⁶*Vincent v. State*, 264 Ga. 234, 442 S.E.2d 748 (1994).

⁵⁷*Wofford v. State*, 305 Ga. 694, 827 S.E.2d 652 (2019).

⁵⁸*Monroe v. State*, 315 Ga. 767, 884 S.E.2d 906 (2023).

⁵⁹*Campbell v. State*, 221 Ga. App. 135, 470 S.E.2d 524 (1996) (sexual assault); *Hines v. State*, 221 Ga. App. 193, 470 S.E.2d 787 (1996) (overruled on other grounds by, *State v. Burns*, 306 Ga. 117, 829 S.E.2d 367 (2019)) (child molestation); *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995) (overruled on other grounds by, *State v. Burns*, 306 Ga. 117, 829 S.E.2d 367 (2019)) (incest).

- (1) to show that someone other than the defendant caused the victim's injuries;
- (2) to show that the victim lacks credibility if the victim's prior allegations were false; and
- (3) to show other possible causes for the victim's symptoms.⁶⁰

While highly probative, a criminal defendant's impeachment of alleged victims of sexual abuse with their prior false allegations of sexual misconduct, however, is not a constitutionally protected mode of impeachment and remains subject to the limitations of O.C.G.A. § 24-4-403.⁶¹

Trial court did not err in restricting cross-examination of rape victim as to prior sexual experiences; such evidence is not admissible for impeachment purposes.⁶² However, this rule does not bar evidence of prior false rape accusations by the victim to affect her credibility.⁶³ In order for the defense to proceed, there must be a showing by the defense that false reports were made in the past.⁶⁴

Federally, prior false allegations in sex crimes cases are addressed under Fed. Evid. R. 608(b).⁶⁵ That rule is the model for Georgia's O.C.G.A. 24-6-608(b).⁶⁶

In 2019, Georgia's "rape shield law" was amended and rewritten to more closely track its federal counterpart.⁶⁷ However, Georgia Rule of Evidence 412 remains restricted to criminal cases, whereas the protections of Fed. R. Evid. 412 apply in both civil as well as criminal trials.⁶⁸

In a child molestation case, the defense under former Georgia law was allowed to cross-examine outcry witnesses about their own, personal prior allegations of sexual abuse.⁶⁹ Cases under Georgia's new Evidence Code, however, approve of restrictions on

⁶⁰*Johns v. State*, 253 Ga. App. 207, 558 S.E.2d 426 (2001).

⁶¹*State v. Burns*, 306 Ga. 117, 829 S.E.2d 367 (2019).

⁶²*Nations v. State*, 234 Ga. 709, 217 S.E.2d 287 (1975).

⁶³*Roberts v. State*, 286 Ga. App. 346, 648 S.E.2d 783 (2007).

⁶⁴*Banks v. State*, 250 Ga. App. 728, 552 S.E.2d 903 (2001).

In *Osborne v. State*, 291 Ga. App. 711, 662 S.E.2d 792 (2008), the court ruled the defendant failed to establish that the victim had made several past false allegations of sexual misconduct.

⁶⁵*Abram v. Gerry*, 672 F.3d 45 (1st Cir. 2012).

⁶⁶See generally *Frye v. State*, 344 Ga. App. 704, 811 S.E.2d 460 (2018) (quoting scholarship, "Prior false allegations of sexual misconduct are considered in federal and state courts under Rule 608 (b).").

⁶⁷O.C.G.A. § 24-4-412. See Ga. Laws 2019, Act 31, § 5.

⁶⁸*Truong v. Smith*, 183 F.R.D. 273, 50 Fed. R. Evid. Serv. 1599, 166 A.L.R. Fed. 811 (D. Colo. 1998).

⁶⁹*Goldstein v. State*, 283 Ga. App. 1, 640 S.E.2d 599, 33 A.L.R.6th 609 (2006).

this mode of cross-examination.⁷⁰ Also, victim's prior false allegations may be shown, but accused must first make strong showing that falsity exists.⁷¹

Any questions concerning clarity of witness' memory are properly questions for jury in determining credibility of witnesses.⁷²

There are many facts which may not be brought out as affecting the credibility of a witness, either on cross-examination or by extrinsic evidence. Generally speaking, a witness may be impeached by proof of his bad character for untruthfulness, but testimony as to particular transactions is not permitted except upon cross-examination in seeking the extent and foundation of the witness' knowledge.⁷³ But, the fact that he has been disbarred or suspended from law practice is admissible on the question of a witness' credibility.⁷⁴

While a witness may be impeached with matters which reveal his reputation for untruthfulness, O.C.G.A. § 24-6-608, it is not permissible to show specific delinquencies. Cases on this subject include *Green v. State*.⁷⁵ Under O.C.G.A. § 24-6-608, impeachment via opinion evidence as to the truthfulness of a testifying witness is also authorized.

Georgia was slow to adopt the portion of Federal Evidence Rule 608(b) respecting cross-examination of a witness regarding his own prior acts of dishonesty when those acts are not reduced to a conviction. Defendant failed to preserve for appellate review his claim that the trial court erred when it excluded evidence of specific instances of lying by the victim, in prosecution for child molestation, where defendant failed to make an offer of proof regarding any specific instances of lying by the victim. Generally, instances of specific misconduct could not be used to impeach a witness' character or veracity unless the misconduct has resulted in the conviction of a crime involving moral turpitude.⁷⁶

Specific instances of misconduct could not be used to impeach a

⁷⁰*Douglas v. State*, 340 Ga. App. 168, 796 S.E.2d 893 (2017).

⁷¹*Birkbeck v. State*, 292 Ga. App. 424, 665 S.E.2d 354 (2008).

⁷²*Green v. State*, 242 Ga. 261, 249 S.E.2d 1 (1978), judgment rev'd on other grounds, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

⁷³O.C.G.A. § 24-6-608.

⁷⁴Am. Jur. 2d, Witnesses § 960.

⁷⁵*Green v. State*, 221 Ga. App. 436, 472 S.E.2d 1 (1996) (rape shield statute barred defendant from cross-

examining 13-year-old rape victim concerning past sexual activities with other males); *Wetta v. State*, 217 Ga. App. 128, 456 S.E.2d 696 (1995) (in battery prosecution, evidence of victim's affair with married man nine years earlier and her alleged blackmail of that man, related solely to specific bad acts and not to general bad character, and thus was not admissible to impeach victim).

⁷⁶*Johns v. State*, 253 Ga. App. 207, 558 S.E.2d 426 (2001).

witness' credibility unless the misconduct has resulted in a criminal conviction.⁷⁷ The law changed in 2013. In O.C.G.A. § 24-6-608(b), the Code provides for attacking a witness with prior specific incidents of untruthfulness. However, if a witness who is cross-examined denies the dishonest act, extrinsic evidence of the act may be barred.⁷⁸

Federal courts regularly allowed this mode of impeachment.⁷⁹ Georgia courts have recognized that O.C.G.A. § 24-6-608(b) authorizes it as well.⁸⁰

In 2020, the Georgia General Assembly passed O.C.G.A. § 24-4-419, which excludes certain criminal history information in civil proceedings “against an employer, its employees, or its agents based on the conduct of an employee or former employee,” under several enumerated contexts. This provision has no direct parallel in the Federal Rules of Evidence.

A person who suffers from a mental condition may or may not be competent to testify,⁸¹ but once such a person's competency to testify is established, his mental condition equals only the weight of his testimony.⁸² Indeed, there is a presumption embodied within Federal Rule of Evidence 601 that a person is competent to testify.⁸³

When the witness is a narcotics addict, such a fact is inadmissible in the absence of evidence that the mind of the witness was impaired by narcotics or if the witness is under the influence of drugs at the time he testifies.⁸⁴ It is also proper to bring out the fact that the witness was intoxicated at the time of the transaction testified to.⁸⁵

Impeachment by way of prior inconsistent statements, see

⁷⁷*Gilbert v. State*, 265 Ga. App. 76, 593 S.E.2d 25 (2003).

⁷⁸*Nevada v. Jackson*, 133 S. Ct. 1990, 186 L. Ed. 2d 62 (2013).

⁷⁹See *Bonilla v. Jaronczyk*, 354 Fed. Appx. 579 (2d Cir. 2009) (prisoner's use of false papers to reenter United States illegally was admissible and went to the prisoner's character for truthfulness or untruthfulness). Introduction of false income tax returns was approved under the majority view as Rule 608(b) evidence in *Gaillard v. Jim's Water Service, Inc.*, 535 F.3d 771 (8th Cir. 2008) (inflated returns used to attack credibility of plaintiff in accident injury case).

⁸⁰*Belcher v. State*, 344 Ga. App. 729, 812 S.E.2d 51 (2018).

⁸¹See § 13:7, *infra*.

⁸²*Saxe v. State*, 112 Ga. App. 804, 146 S.E.2d 376 (1965).

⁸³*Jefferson v. State*, 358 Ga. App. 297, 855 S.E.2d 43 (2021).

⁸⁴*Gordon v. Gilmer*, 141 Ga. 347, 80 S.E. 1007 (1914).

⁸⁵*Whitus v. State*, 222 Ga. 103, 149 S.E.2d 130 (1966), judgment rev'd on other grounds, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967), and *Davis v. State*, 223 Ga. 127, 153 S.E.2d 566 (1967).

Armour v. State.⁸⁶ For more on prior inconsistent statement cross-examination, see § 16:8, *infra*.

§ 12:6 Expert testimony as to credibility of witnesses

Under some circumstances, expert testimony may be introduced that tends to impeach a witness. Would it be proper to permit a psychiatrist to sit in the courtroom, observe the witnesses and then characterize the evidence by weighing and passing on the credibility of the testimony? An affirmative answer is given in *U.S. v. Hiss*,¹ but it is unclear how many courts follow.²

Witness (lay or expert) not allowed to say another witness spoke truth.³

The law does not allow witnesses to opine that a party or victim is lying or telling the truth, for credibility is a matter solely within the province of the jury.⁴ An expert witness may not testify as to his opinion of the victim's truthfulness.⁵ Although a medical expert may testify that certain symptoms or history described by a child are consistent with molestation, an expert cannot directly or indirectly vouch for the victim's credibility.⁶ In a child molestation case, the Georgia Court of Appeals found in *Cantrell v. State*⁷ that a question posed by defense counsel "implicitly went to the ultimate issue to be decided by the jury, namely, whether the victim had fabricated the molestation allegations against Cantrell because she did not want to return to an unstable and volatile

⁸⁶*Armour v. State*, 265 Ga. App. 569, 594 S.E.2d 765 (2004) (stating that to impeach witness with prior inconsistent statement, cross-examiner must establish that prior statement contradicts or is inconsistent with in-court testimony, not just a more detailed version, and must first give witness an opportunity to admit, explain, or deny prior contradictory statement); *McEntyre v. Edwards*, 261 Ga. App. 843, 583 S.E.2d 889 (2003) (to impeach with prior inconsistent statement: (1) prior statement must contradict or be inconsistent with witness's in-court testimony; (2) prior statement must be relevant to case; and (3) examining attorney must lay proper foundation with witness).

[Section 12:6]

¹*U.S. v. Hiss*, 88 F. Supp. 559 (S.D. N.Y. 1950).

²See *McCord, Syndromes, Profiles, and Other Mental Exotica*, 66 Or L Rev 1, 47 (1987).

³*Bly v. State*, 283 Ga. 453, 660 S.E.2d 713 (2008). See also *United States v. Woolem*, 765 Fed. Appx. 358 (9th Cir. 2019); *Jimenez v. City of Chicago*, 732 F.3d 710 (7th Cir. 2013).

⁴*Harper v. Patterson*, 270 Ga. App. 437, 606 S.E.2d 887, 194 Ed. Law Rep. 1016 (2004).

⁵See generally *Mangal v. Warden, Perry Correctional Institution*, 2019 WL 7461668 (D.S.C. 2019), report and recommendation adopted, 2020 WL 42859 (D.S.C. 2020); *State v. Ikimaka*, 147 Haw. 207, 465 P.3d 654 (2020).

⁶*Accord, Birkbeck v. State*, 292 Ga. App. 424, 665 S.E.2d 354 (2008) (a witness, even an expert witness, in a child molestation case may not express her opinion on the ultimate issue in the case—i.e., whether the child was molested).

⁷*Cantrell v. State*, 360 Ga. App. 862, 862 S.E.2d 329 (2021).

home life.”

Experts who impugn the integrity of eyewitness identifications continue to be disfavored in Georgia.⁸

On the other hand, a police detective was allowed to provide opinion testimony that, in his experience, there would be “some level of inconsistencies” among witnesses to a crime.⁹

§ 12:7 Impeachment by contradiction

Impeachment by contradiction overlaps with concepts of “curative admissibility,”—also called “opening the door”—and “fighting fire with fire.” These notions apply when a party offers inadmissible evidence before a jury. In that circumstance, the trial court may in its discretion allow the opposing party to offer otherwise inadmissible evidence on the same matter to rebut any unfair prejudice created.¹ The Georgia Supreme Court has admonished that “[L]itigants and trial courts should take care to identify the precise basis in the evidence rules—the ones in our *new* Evidence Code—for an argument that one side has ‘opened the door’ to allow the admission of otherwise inadmissible evidence.”²

In *Hemphill v. New York*,³ the U.S. Supreme Court considered whether a trial court improperly allowed the prosecution to introduce into evidence in a murder case the plea allocution of a third-party who was unavailable to testify at the defendant’s trial. Defendant argued that the plea allocution was hearsay and violated his Confrontation Clause rights. The trial court overruled defendant’s objection, reasoning that the defendant opened the door to the admission of the third-party plea allocution.

The Supreme Court reversed, reasoning, in part:

The upshot is that the role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution’s procedures for testing the reliability of that evidence are followed.

The trial court here violated this principle by admitting uncon-

⁸Crawford v. State, 283 Ga. App. 645, 642 S.E.2d 335 (2007). Accord, Manley v. State, 284 Ga. 840, 672 S.E.2d 654 (2009) (a trial court’s decision on the admission of expert testimony regarding eyewitness identification will not be disturbed on appeal absent a clear abuse of discretion).

⁹Smith v. State, 342 Ga. App. 656, 805 S.E.2d 251 (2017).

[Section 12:7]

¹Bearint ex rel. Bearint v. Dorell Juvenile Group, Inc., 389 F.3d 1339,

65 Fed. R. Evid. Serv. 996 (11th Cir. 2004). See also State v. Huser, 894 N.W.2d 472 (Iowa 2017) (“The doctrine of curative admissibility. . . applies when inadmissible evidence has been entered into the record and the other party seeks to admit further inadmissible evidence to cure the error.”).

²Smith v. State, 299 Ga. 424, 788 S.E.2d 433 (2016) (emphasis original).

³Hemphill v. New York, 142 S. Ct. 681, 211 L. Ed. 2d 534 (2022).

fronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct. For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause.

In an opinion by Judge Dillard of the Georgia Court of Appeals, Georgia formally adopted the concept, recognized by federal courts, of "impeachment by contradiction" under O.C.G.A. § 24-6-607, Georgia's equivalent of Fed. R. Evid. 607:

Specifically, Rule 607 concerns the doctrine of impeachment by contradiction and permits the admission of extrinsic evidence to impeach specific errors or falsehoods in a witness's direct testimony, "subject to Rule 403." Indeed, the federal courts have described impeachment by contradiction as "a means of policing the defendant's obligation to speak the truth in response to proper questions[.]"⁴

Impeachment by contradiction most commonly applies after a witness testifies on direct examination regarding a certain fact. The impeaching party is authorized to prove on cross-examination that the witness lied as to that fact.⁵ Federally, Rule 607 of the Federal Rules of Evidence authorizes impeachment by contradiction, and Rule 403 governs its application.⁶ Therefore, a party may impeach its opposition's testimony with contradictory evidence unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

⁴Hand v. South Georgia Urology Center, P.C., 332 Ga. App. 148, 769 S.E.2d 814 (2015) (disapproved of on other grounds by, Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015)). See also generally Primus v. Target Corp., 532 Fed. Appx. 314 (3d Cir. 2013) ("Although impeachment by contradiction is not specifically formalized in the Federal Rules of Evidence, it is part of the general body of evidentiary law and is a permissible theory of impeachment under Federal Rule of Evidence 607."); Dorn v. Burlington Northern Santa Fe Railroad Co., 397 F.3d 1183, 66 Fed. R. Evid. Serv. 489 (9th Cir. 2005) (impeachment by con-

tradiction is authorized by Rule 607 of the Federal Rules of Evidence).

⁵U.S. v. Castro, 403 Fed. Appx. 653, 84 Fed. R. Evid. Serv. 294 (3d Cir. 2010). See also Sherrod v. Berry, 856 F.2d 802, 26 Fed. R. Evid. Serv. 875 (7th Cir. 1988) ("impeachment by contradiction is a technique well recognized in the federal courts by which specific errors in the witness's testimony are brought to the attention of the trier of fact").

⁶U.S. v. Gilmore, 553 F.3d 266, 78 Fed. R. Evid. Serv. 498 (3d Cir. 2009).

waste of time, or needless presentation of cumulative evidence.⁷

The concept of impeachment by contradiction is broader than corresponding notions under Georgia's prior Evidence Code. For instance, federal cases do not require diametrical opposition between testimony and contradictory fact, as earlier Georgia law at times appeared to require.⁸ Similarly, misrepresentations made during opening statement are correctable in evidence in federal courts.⁹

Accordingly, both the Georgia Supreme Court and Georgia Court of Appeals have recognized that O.C.G.A. § 24-6-621, which carries forward Georgia's former impeachment by contradiction statute, should be read in conjunction with federalized O.C.G.A. § 24-6-607.¹⁰ This point is underscored by the fact that the Supreme Court of Georgia has admonished that earlier Georgia Evidence Code provisions that remain in Georgia's new Evidence Code must be considered in light of new and federally patterned Georgia Rules of Evidence 401, 402, and 403.¹¹ Moreover, further emphasizing the propriety of an aggregated reading of Fed. R. Evid. 607 and Georgia Rule of Evidence 621 precedent is the fact that while the concept of impeachment by contradiction is well-ensconced in federal jurisprudence, Georgia courts often reference that "OCGA § 24-6-621 has no counterpart in the Federal Rules of Evidence."¹²

In a 2017 decision, the Georgia Supreme Court held that a first offender record is admissible as impeachment evidence to disprove or contradict facts so that a jury is not misled by false or deceiving testimony.¹³ That same year, the Georgia Court of Appeals observed that a witness "opens the door" to introduction of their entire criminal history when they deny having a record or multiple convictions.¹⁴ It is improper, however, to confront or attempt to impeach a witnesses with facts that are not within their personal knowledge.¹⁵

The doctrine of impeachment by contradiction provides that ev-

⁷U.S. v. Gilmore, 553 F.3d 266, 78 Fed. R. Evid. Serv. 498 (3d Cir. 2009).

⁸U.S. v. Denetclaw, 96 F.3d 454, 45 Fed. R. Evid. Serv. 605 (10th Cir. 1996).

⁹U.S. v. Klaphake, 64 F.3d 435, 42 Fed. R. Evid. Serv. 1349 (8th Cir. 1995).

¹⁰Corley v. State, 308 Ga. 321, 840 S.E.2d 391 (2020); Sherrod v. State, 355 Ga. App. 441, 844 S.E.2d 508 (2020).

¹¹Corley v. State, 308 Ga. 321, 840 S.E.2d 391 (2020).

¹²Parrish v. State, 362 Ga. App. 392, 868 S.E.2d 270 (2022).

¹³Williams v. State, 301 Ga. 829, 804 S.E.2d 398 (2017).

¹⁴Dimauro v. State, 341 Ga. App. 710, 801 S.E.2d 558 (2017) (overruled on other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹⁵Tran v. State, 340 Ga. App. 546, 798 S.E.2d 71 (2017).

idence that would be inadmissible if offered to impeach a witness's character may be admissible to impeach the veracity of a witness and authorizes impeachment on a collateral issue which is only indirectly material to the issue in the case.¹⁶

During an armed robbery homicide prosecution, the trial court originally determined evidence of domestic abuse by the defendant irrelevant but later admitted it after the defendant, during direct testimony, was dishonest about the incident. In an opinion by Justice Benham, the Georgia Supreme Court approved of the admission of the contradictory proof, and observed that O.C.G.A. § 24-6-621,¹⁷ which generally recreates a former Georgia Evidence Code provision, may be read in conjunction with federal authority and cases falling under O.C.G.A. § 24-6-607, which parallels the corresponding federal rule.¹⁸

¹⁶Williams v. State, 301 Ga. 829, 804 S.E.2d 398 (2017). witness.”

¹⁷“A witness may be impeached by disproving the facts testified to by the ¹⁸Taylor v. State, 302 Ga. 176, 805 S.E.2d 851 (2017); Wynn v. State, 313 Ga. 827, 874 S.E.2d 42 (2022).

Chapter 13

Competency of Witnesses to Testify

- § 13:1 Competency of witnesses; generally
- § 13:2 Time for objecting to competency
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- § 13:11 Competency of private detective or investigator in criminal actions
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§ 13:1 Competency of witnesses; generally

O.C.G.A. § 24-6-601 is “materially identical” to its federal counterpart.¹ This allows for the use of federal authority for guidance in interpreting the Georgia rule.² Under Federal Rule of Evidence 601, “Whether a witness is competent to testify depends on the individual’s ability to observe, to remember, to communicate, and to understand that the oath imposes a duty to tell the truth. Competency is usually an issue for the trier of fact.”³

In civil or criminal cases, no one is disqualified as a witness because of his interest in the event—as a party or otherwise—or because of his conviction of a crime. The defendant in a criminal case is competent to testify, but not compellable. Prior to an amendment in 1962, Georgia law provided that a criminal defendant was neither competent nor compellable.

[Section 13:1]

¹Jefferson v. State, 358 Ga. App. 297, 855 S.E.2d 43 (2021).

²Little v. Jim-Lar Corporation,

352 Ga. App. 764, 835 S.E.2d 794 (2019).

³U.S. v. Roman, 884 F. Supp. 126 (S.D. N.Y. 1995).

Generally speaking, under O.C.G.A. § 24-6-602⁴ witnesses must have personal knowledge concerning the subjects about which they testify, a fact which may be established by that witness's testimony but not through the introduction of inadmissible hearsay.⁵ Trial courts, accordingly, possess the discretion to prevent counsel from asking about topics where there is no demonstration that the witness could answer based on personal knowledge.⁶

When objection is made to the competency of a witness to testify, it is the duty of the court to determine his competency before testimony is taken. This can be done by voir dire examination and, if necessary, by hearing other evidence on the issue.⁷ It is the province of the trial court to determine the competency of witnesses.⁸

Generally, the date of competency or incompetency of a witness as a witness is fixed as of the time he is offered and not the time when the facts testified to occurred.⁹

Everyone is presumed to be competent to testify, even people who possess mental problems. What is required is that the person understand the obligation to tell the truth and an appreciation that failure to tell the truth will result in punishment and sanctions.¹⁰

Under the revised Evidence Code effective January 1, 2013, "every person is competent to be a witness."¹¹

If the witness understands the obligation of the oath and has the ability to give a correct account of matters, then such witness is competent to testify.¹² The fact that a witness was insane or adjudged insane and is in a state sanitarium does not necessarily

⁴"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. The provisions of this Code section are subject to Code Section 24-7-703 and shall not apply to party admissions."

⁵Kirby v. State, 304 Ga. 472, 819 S.E.2d 468 (2018).

⁶Walker v. State, 308 Ga. 749, 843 S.E.2d 561 (2020).

⁷Askins v. State, 210 Ga. 532, 81 S.E.2d 471 (1954). See also U.S. v. Gates, 10 F.3d 765, 766 (11th Cir.

1993).

⁸Central Georgia Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387 (1912).

⁹Whitus v. State, 222 Ga. 103, 149 S.E.2d 130 (1966), judgment rev'd on other grounds, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967).

¹⁰Dumas v. State, 239 Ga. App. 210, 213, 521 S.E.2d 108 (1999).

¹¹O.C.G.A. § 24-6-601. See Davis v. Fairfield Ins. Co., 240 Fed. Appx. 306, 73 Fed. R. Evid. Serv. 288 (11th Cir. 2007).

¹²For the requirement of oath or affirmation, see O.C.G.A. § 24-6-603.

render the witness incompetent.¹³ However, a trial court did not abuse its discretion in daughter's action where physician testified as to mother's impaired mental capacity.¹⁴ Sometimes witnesses are excluded on account of mental incapacity. The trial court does not err by refusing to allow a witness to testify on the ground that she is incompetent, where a doctor might testify under oath and subject to cross examination that the witness is totally irrational.¹⁵

The Georgia Supreme Court interpreted former O.C.G.A. § 24-9-5(b) as excepting children from a competency challenge based solely on the allegation they do not understand the nature of an oath. A similar approach is contained in O.C.G.A. § 24-6-603(b). The court held that children, like adults, are subject to a competency challenge on the ground they do not have the use of reason because of mental retardation.¹⁶

Cocaine addiction did not disqualify a witness' testimony in *Gassett v. State*.¹⁷

Disqualification of attorney, see § 1:12, *supra*.

§ 13:2 Time for objecting to competency

If the incompetency of a witness is known, objection to his testimony should be made before he is examined at all. Permitting the witness to testify without objection can be a waiver of the objection.¹ A motion to exclude the testimony of a witness on the ground of mental incompetency was held properly overruled because no objection to competency had been made prior to examination.²

The burden falls on the party which challenges witness competency. Interpreting Rule 601, a federal decision observes: "Opposing counsel bears the burden of disputing a witness' appreciation of his duty to tell the truth and ability to observe, recall, and communicate events."³ Jurisprudence from the Supreme Court of Alabama agrees: "The rules provide that a witness is competent and will be allowed to testify, unless the opponent can establish a basis for disqualification under one of the

¹³*Conoway v. State*, 171 Ga. 782, 156 S.E. 664 (1931).

¹⁴*Luther v. Luther*, 289 Ga. App. 428, 657 S.E.2d 574 (2008).

¹⁵*Luther v. Luther*, 289 Ga. App. 428, 657 S.E.2d 574 (2008) (Mikell, J.).

¹⁶*Sizemore v. State*, 262 Ga. 214, 416 S.E.2d 500 (1992).

¹⁷*Gassett v. State*, 289 Ga. App.

792, 658 S.E.2d 366 (2008).

[Section 13:2]

¹*Watkins v. State*, 19 Ga. App. 234, 91 S.E. 284 (1917).

²*Watkins v. State*, 19 Ga. App. 234, 91 S.E. 284 (1917).

³*U.S. v. Smith*, 60 F.3d 829 (6th Cir. 1995).

rules of evidence.”⁴

Early case law held that if, during testimony, the competency of the witness becomes doubtful, the jury should be instructed to consider the question, and if they conclude that the witness is incompetent, they are not to consider his testimony.⁵ However, modern O.C.G.A. § 24-1-104(a) provides that the question of whether a witness is qualified is for the court to decide, and under most circumstances, it would seem to be improper to allow the jury to decide the question.

If the incompetency of the witness is only partial, the objection should be made when he is asked to testify concerning matters as to which he is incompetent.⁶

§ 13:3 Competency of felon to testify

A person is not disqualified to testify by reason of a previous conviction and sentence for the commission of a crime.¹ However, proper evidence of a conviction of a crime involving moral turpitude is admissible and goes to the witness’ credibility.²

In *Collins v. State*³ it was held that defendant’s cellmate was a competent witness against the defendant even though the cellmate stood to gain from providing testimony under his plea bargain.

Incompetency of an accused to stand trial must be proved by the defendant at a competency trial by a preponderance of evidence.⁴

§ 13:4 Competency of child to testify

A child is not disqualified to testify merely because of age.¹ The Eleventh Circuit Court of Appeals has observed: “The ultimate test of competence of a young child is whether he has the requisite intelligence and mental capacity to understand, recall and nar-

⁴Ex parte Brown, 74 So. 3d 1039 (Ala. 2011).

⁵Dowdy v. Watson, 115 Ga. 42, 41 S.E. 266 (1902).

⁶Hall v. Hilley, 139 Ga. 13, 76 S.E. 566 (1912).

[Section 13:3]

¹See generally U.S. v. Mills, 597 F.2d 693, 4 Fed. R. Evid. Serv. 1040 (9th Cir. 1979); State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000); Parrish v. Brooks, 856 S.W.2d 522, 525 (Tex. App. Texarkana 1993).

²U.S. v. IMM, 747 F.3d 754 (9th Cir. 2014); Stevenson v. City of Albuquerque, 2020 WL 1906065 (D.N.M. 2020). See also Taylor v. Marsh, 107 Ga. App. 575, 130 S.E.2d 770 (1963).

³Collins v. State, 273 Ga. 93, 538 S.E.2d 47 (2000).

⁴Velazquez v. State, 282 Ga. 871, 655 S.E.2d 806 (2008). See § 9:11, supra.

[Section 13:4]

¹Young v. State, 72 Ga. App. 811, 35 S.E.2d 321 (1945).

rate his impressions of an occurrence.”² The test is not one of age, but whether he has the apparent intelligence and understanding to tell the truth, understands the difference between truth and falsehood and his obligation to tell the truth.³ A child as young as six years has been held to be old enough to testify, if qualified under that test.⁴ Whether a child meets the test and is capable of testifying rests within the sound discretion of the court.⁵

The better practice is for the court or counsel to make a preliminary interrogation of a child to determine his competency to testify as a witness; there can be no objection to the child’s competency where he subsequently shows by his conduct in testifying that he does clearly have sufficient competency to testify.⁶

A child over 14 years of age is presumed to be competent, but that presumption is not conclusive.⁷ While a child over fourteen is presumptively competent, those under fourteen may be found to be competent. However, when a child under 14 years old is presented by a party, upon objection the court must conduct an inquiry into his competency.⁸

According to one case, it cannot be said that the declarations of a child four years of age should not be admitted merely because of his age.⁹ In a case involving child molestation, it was held that a conviction based upon the uncorroborated testimony of the seven-year-old victim was proper where it was shown that the child understood the nature of the oath and where the uncontradicted evidence showed that the child was present in the home of the defendant.¹⁰ By comparison, a trial court properly precluded a defendant from calling as a witness a five-year-old child whom the court found to be inattentive and not responsive during in camera examination, who said that he knew he would be in “big trouble” if he did not tell the truth but was not able to say what the “big trouble” might entail and who said his mother had told

²Bryant v. Mascara, 723 Fed. Appx. 793 (11th Cir. 2018). See also E. C. by Next Friends Mario C. v. Community School Corporation of Eastern Hancock County, 2020 WL 9762908 (S.D. Ind. 2020).

³Anderson v. State, 213 Ga. 844, 102 S.E.2d 483 (1958).

⁴Anderson v. State, 213 Ga. 844, 102 S.E.2d 483 (1958).

⁵Anderson v. State, 213 Ga. 844, 102 S.E.2d 483 (1958); Holloway v. State, 164 Ga. App. 506, 296 S.E.2d 744 (1982).

⁶See Webb v. State, 7 Ga. App. 35, 66 S.E. 27 (1909).

⁷Schamroth v. State, 84 Ga. App. 580, 66 S.E.2d 413 (1951).

⁸Young v. State, 122 Ga. 725, 50 S.E. 996 (1905) (child was 12 years old; accused had a right to have her competency tested, and the lack of this step caused reversible error).

⁹Louisville & N. R. Co. v. Studdard, 34 Ga. App. 570, 130 S.E. 532 (1925).

¹⁰Page v. State, 120 Ga. App. 709, 172 S.E.2d 207 (1969).

him to tell the story he was now telling.¹¹

When a child named Erica testified in *Hayes v. State*,¹² the Supreme Court responded to a challenge to her competency:

As to any question of Erica's competency as a witness because of her age (she was nearly 11-years-old at the time of trial), a child may be subject to a competency challenge based on the ground that the child does not have the use of reason, but a child is not incompetent as a matter of law based on infancy. O.C.G.A. § 2409-5(b); *London v. State*, 274 Ga. 91, 93, 549 S.E.2d 394 (2001); *Norton v. State*, 263 Ga. 448, 449–50, 435 S.E.2d 30 (1993). There is no assertion of Erica's lack of reason.

A four-year-old child abuse victim was properly allowed to testify without her having acknowledged that she would be punished for lying.¹³ In *London v. State*,¹⁴ the challenge to a four-year-old witness was also turned away by the Georgia Supreme Court:

Appellant also contends that the trial court erred in admitting the testimony of Brittany Cansler, who was four years old at the time of trial. More specifically, appellant contends that, because of her age and immaturity, Brittany did not have sufficient reasoning power to answer questions intelligently. At trial, however, appellant challenged Brittany's competency on the ground that she was incompetent as a matter of law because of her infancy. Although a child is subject to a competency challenge on the ground that she does not have the use of reason, see [former] O.C.G.A. § 24-9-5; [former] O.C.G.A. § 24-9-7; *Norton v. State*, 263 Ga. 448, 449–450, 435 S.E.2d 30 (1993); *Sizemore v. State*, 262 Ga. 214, 416 S.E.2d 500 (1992), a child is not incompetent as a matter of law because of her infancy. Accordingly, we conclude that the trial court did not err in denying appellant's motion to prohibit Brittany from testifying on the ground of her infancy.

“Georgia law provides: ‘Before testifying, every witness shall be required to declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.’”¹⁵ Nonetheless, in all cases involving deprivation as defined by O.C.G.A. § 15-11-2, or in criminal cases involving child molestation, and in all other criminal cases in which a child was a victim of or a witness to any crime, any such child shall be

¹¹*Batton v. State*, 260 Ga. 127, 391 S.E.2d 914 (1990). S.E.2d 379 (1987).

¹²*Hayes v. State*, 274 Ga. 875, 560 S.E.2d 656 (2002).

¹³*Grier v. State*, 257 Ga. 539, 361

¹⁴*London v. State*, 274 Ga. 91, 549 S.E.2d 394 (2001).

¹⁵*Bennett v. State*, 334 Ga. App. 381, 779 S.E.2d 420 (2015), citing O.C.G.A. § 24-6-603(a).

competent to testify.¹⁶

Statute regarding a child's competency to testify is constitutional, since the right of a victim to testify in a criminal proceeding is not constitutionally fundamental and may be limited by the state legislature for a legitimate purpose. The asserted purpose of the competency statute is to protect the integrity of the fact-finding process, and its requirements that the witness have sufficient understanding to receive, remember and narrate impressions and is sensible of the obligation to tell the truth are reasonable.¹⁷

The statute establishing a child molestation victim's competency to testify does not violate due process because it allegedly denies a fair trial to one accused of child molestation; it is not fundamentally unfair to require one accused of child molestation to face the accuser even if the accuser is unable to articulate the meaning of the oath, and the defendant had the opportunity to cross-examine the witness before the jury.¹⁸

The 1995 Georgia General Assembly revised former O.C.G.A. § 24-3-16 to expand the coverage of the Child Hearsay Statute. Where a child under the age of 14 makes a statement describing any sexual act performed on the child, that statement is admissible in evidence by the testimony of the person to whom made, if the child is available to testify and there is sufficient indicia of reliability.

Under the former Child Hearsay statute, the trial court was required to rule on a two and a half-year-old's competency to testify before permitting witnesses to testify about statements the child made about the sexual act the defendant allegedly committed upon her.¹⁹ In the 2013 Evidence Code, child hearsay is covered in O.C.G.A. § 24-8-820, which, given that the Federal Rules of Evidence do not contain an equivalent provision, is generally interpreted using Georgia evidence authority.²⁰

The 2013 changes in Georgia Rule of Evidence 820 from its predecessor included changing the witness age provision under 14 to under 16 years and allowing children who witnessed, in addition to those who allegedly experienced abuse, to qualify.²¹

In 2019, O.C.G.A. § 24-8-820 was amended again, to confirm its application "to any motion made or hearing or trial commenced

¹⁶O.C.G.A. § 24-6-603(b); S.E.2d 924 (1991).

Sizemore v. State, 262 Ga. 214, 416 S.E.2d 500 (1992) (except child must have "the use of reason").

¹⁹Hunnicut v. State, 194 Ga. App. 714, 391 S.E.2d 790 (1990).

¹⁷Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989).

²⁰Allison v. State, 356 Ga.App. 256, 846 S.E.2d 222 (2020).

¹⁸Sims v. State, 260 Ga. 782, 399

²¹See Patterson v. State, 350 Ga. App. 540, 829 S.E.2d 796 (2019).

on or after April 18, 2019,” but with the remaining provisions generally remaining consistent with its predecessor.²²

Georgia enacted new O.C.G.A. § 24-8-827 in 2024, which, likewise, has no specific corollary in the Federal Rules of Evidence. Georgia Rule of Evidence 827 provides similar procedures to Rule 820 for statements of persons “17 years of age or older who [are] mentally incapacitated that describe any act of nonconsensual sexual contact or any act of physical abuse performed with or on such mentally incapacitated person by another, or with or on another in the presence of such mentally incapacitated person[.]”

Under the statute making admissible the out-of-court statements of a victim of child molestation whenever the child is available to appear at trial, the defendant’s rights are protected, so long as the witness is made available for confrontation and cross-examination, even if the witness is uncommunicative or unresponsive; if the child is incapable of reiterating the accusation at trial or is unresponsive or evasive during cross-examination, the jury must decide the child’s credibility, taking into consideration the child’s maturity and ability to withstand the pressure and intimidation of the courtroom environment.²³

Whether a child witness is competent to testify within the meaning of the former statute providing that the court shall decide upon capacity of witnesses alleged to be incompetent from infancy is a matter within the trial court’s sound discretion, and the exercise of that discretion will not be disturbed absent abuse.²⁴ Trial court acted within its discretion in determining that eight-year old child witness was competent to testify in robbery trial. Defendant argued that child did not know specifically what would happen to him if he lied in court, but child testified that he understood difference between truth and lie, that it was bad to lie and he could get in trouble if he told lie, that he promised to tell truth, and that if judge asked him to raise his hand and promise to tell truth, he would do so.

Child not incompetent because of infancy, 11-year-old witness, see *Smith v. State*.²⁵ In *McDaniel v. State*,²⁶ the court rejected a challenge to a six-year-old witness. Under the revised Evidence Code effective January 1, 2013, in criminal cases in which a child

²²See O.C.G.A. § 24-8-820(b). See 219, 603 S.E.2d 737 (2004), citing formerly *Grier v. State*, 313 Ga. 236, 869 S.E.2d 423 (2022).

²³*Bright v. State*, 197 Ga. App. 569, 667 S.E.2d 421 (2008).

²⁴*Norman v. State*, 269 Ga. App. 360, 361, 583 S.E.2d 141, 143 (2003).

is a victim or a witness “the child shall be competent to testify.”²⁷

§ 13:5 Competency of spouse to testify for or against other spouse

A husband or wife is competent, but not compellable, to testify for or against the other spouse.¹ That section specifically applies to criminal proceedings.² Courts have recognized that O.C.G.A. § 24-5-505 provides spousal privilege protections in civil proceedings.³

A 1987 amendment to former O.C.G.A. § 24-9-23 provides that the spousal privilege shall not apply in proceedings in which one is charged with a crime against the person of a minor child, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged. In the new Evidence Code, that provision appears in O.C.G.A. § 24-5-503.⁴

The election of one spouse to testify against the other should be made outside the presence of the jury under normal circumstances. If the issue has not been settled prior to the State’s calling the spouse as a witness, defense counsel may at that time indicate to the court that he has a motion to make outside the presence of the jury, and the court shall then excuse the jury, and hear the objection.⁵

A spouse, while a competent witness, cannot be compelled to testify, and that failure to testify is, therefore, not proper subject matter for the State’s closing argument.⁶

For a discussion of the nature and extent of the privilege, see §§ 18:2 to 18:5, *infra*.

§ 13:6 Competency of judge, juror, or attorney to testify

A judge is usually disqualified from testifying as a witness in the very case upon which she is sitting as a judge.¹ This is the

²⁷O.C.G.A. § 24-6-603.

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¹O.C.G.A. § 24-5-503.

²See generally *Morgan v. State*, 354 Ga. App. 754, 841 S.E.2d 430 (2020). See also *Murray v. United States*, 2015 WL 7069345 (S.D. Ga. 2015).

³*Barton v. First Liberty Insurance Corporation*, 2014 WL 11858148 (N.D. Ga. 2014).

⁴*Nix v. State*, 354 Ga. App. 47, 839 S.E.2d 687 (2020).

⁵*Westbrook v. State*, 162 Ga. App. 130, 290 S.E.2d 333 (1982).

⁶*Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983).

[Section 13:6]

¹See Rule 605, Federal Rules of Evidence. See generally *Murray v. Schriro*, 746 F.3d 418 (9th Cir. 2014) (overruled on other grounds by, *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015)) and opinion amended and superseded on other grounds on denial of reh’g en banc, 882 F.3d 778 (9th Cir. 2018).

Georgia rule, embraced in O.C.G.A. § 24-6-605.² Otherwise, the judge is a competent witness.

Federal Evidence Rule 606(a) renders a juror incompetent as a witness in trial of the case in which the juror is sitting.³ Georgia practice is in accord.⁴ For juror testimony after trial to impeach verdict, see §§ 36:3 to 36:13, *infra*, O.C.G.A. § 24-6-606(b), and *Marshall v. State*.⁵ O.C.G.A. § 24-6-606(b) controls juror competency to testify concerning the validity of a verdict, post-trial.⁶ Under Georgia Rule of Evidence 606(b), “[a]lthough jurors may testify about whether they were exposed to ‘extraneous prejudicial information’ or any improper ‘outside influence’ they may not testify about ‘the effect of anything upon the jury deliberations or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict ... or concerning the juror’s mental processes in connection therewith.’ ”⁷

An attorney is neither competent nor compellable to testify for or against his client as to any matter of which he has knowledge, by virtue of the attorney-client relationship.⁸ The attorney is both competent and compellable to testify as to any matter, knowledge of which he may have acquired outside of the attorney-client relation. The Canons of Professional Ethics state that a lawyer should withdraw from a case if he is to testify for his client, except as to merely formal matters. And, in a case which arose in the federal court in Georgia, it was held that the Assistant District Attorneys who prosecuted the case were competent to testify in a subsequent habeas corpus proceeding.⁹ The prosecutor was competent to testify in rebuttal to the defendant’s testimony about what things were supposedly known to the

²*A&M Hospitalities, LLC v. Alimchandani*, 359 Ga. App. 271, 856 S.E.2d 704 (2021).

³*Warger v. Shauers*, 2012 WL 1252983 (D.S.D. 2012), judgment *aff’d*, 721 F.3d 606, 91 Fed. R. Evid. Serv. 1395 (8th Cir. 2013), judgment *aff’d*, 574 U.S. 40, 135 S. Ct. 521, 190 L. Ed. 2d 422, 96 Fed. R. Evid. Serv. 186 (2014).

⁴See generally *Sears v. Sellers*, 106 Fed. R. Evid. Serv. 590 (N.D. Ga. 2018) (comparing O.C.G.A. § 24-6-606 and Fed. R. Evid. 606, observing “the federal rule and the Georgia rule are materially the same”). See also *Savannah, F. & W. Ry. Co. v. Quo*, 103 Ga. 125, 29 S.E. 607 (1897).

⁵*Marshall v. State*, 361 Ga. App. 357, 864 S.E.2d 469 (2021) (observing the general rule that, with limited exception, “[l]ongstanding common law principles [and O.C.G.A. § 24-6-606(b)] prohibit using juror statements or testimony to impeach their own verdict”) (substitution in original).

⁶*McCabe v. State*, 319 Ga. 275, 903 S.E.2d 78 (2024).

⁷*Ballinger v. Watkins*, 315 Ga. 369, 882 S.E.2d 312 (2022) (quotations and omissions in original).

⁸See §§ 18:6 to 18:10, *infra*.

⁹*Irvin v. Zerbst*, 97 F.2d 257 (C.C.A. 5th Cir. 1938).

prosecution.¹⁰

§ 13:7 Competency of atheist, hearing or sight impaired or mentally handicapped, to testify

Under O.C.G.A. § 24-6-601, “Except as otherwise provided in this chapter, every person is competent to be a witness.” That being said, within the framework of Rule 601’s mandates, “a court has the power to rule that a witness is incapable of testifying.”¹ Rule 601 places the burden on the party opposing the witness to establish incompetency to testify.²

The religious belief, or lack of religious belief, of a witness does not render him incompetent to testify.³

No physical defect in any of the senses shall incapacitate a witness. An interpreter may be used to explain the witness’ evidence.⁴

In a family violence prosecution, the defense claimed that the alleged victim was incompetent to testify based upon her supposed “diagnosis of bipolar disorder, drug abuse, cancer treatment, and certain comments she made during her trial testimony.” Relying upon authority interpreting Federal Rule of Evidence 601, on which O.C.G.A. § 24-6-601 is drawn, the Georgia Court of Appeals rejected this argument:

[S]uffering from a mental health condition is not one of the statutory exceptions to Rule 601. Indeed, “Rule 601 allows one not mentally competent to testify, and it assumes that jurors are capable of evaluating a witness’s testimony in light of the fact that [s]he is not mentally competent.” *United States v. Gates*, 10 F3d 765, 766 (I) (11th Cir. 1993) (construing FRE 601). See *Andrews v. Neer*, 253 F3d 1052, 1062–1063 (IV) (8th Cir. 2001) (witness’s “status as an involuntarily committed schizophrenic . . . [did] not ipso facto render him incompetent to testify in federal district court” under FRE 601); *United States v. Roach*, 590 F2d 181, 186 (V) (5th Cir. 1979) (quoting Advisory Committee Note to FRE 601 for proposition that questions of mental capacity are “particularly suited to the jury as one of weight and credibility”). Hence, the fact that the victim had been diagnosed with bipolar disorder, standing alone, did not require the exclusion of her testimony, but rather was a matter that the jury could consider in weighing her testimony and

¹⁰*Watson v. State*, 176 Ga. App. 610, 337 S.E.2d 54 (1985).

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¹*Little v. Jim-Lar Corporation*, 352 Ga. App. 764, 835 S.E.2d 794 (2019). See also *Pettit v. Arizona Board of Regents*, 2011 WL 13141497 (D. Ariz. 2011).

²*U.S. v. Smith*, 60 F.3d 829 (6th Cir. 1995); *Ex parte Brown*, 74 So. 3d 1039 (Ala. 2011).

³O.C.G.A. § 24-6-610; Fed. R. Evid. 610.

⁴O.C.G.A. § 24-6-650. Generally, as to the use of an interpreter, see § 11:11, *supra*.

assessing her credibility.⁵

A person who is incompetent, insane or mentally ill may testify if he understands the nature of his oath and is able to observe, recollect and communicate the facts.⁶ The point is made again in *Wilson v. State*.⁷ However, a person with seriously impaired mental capacity can be denied access to the witness stand.⁸

Where a witness who was 21-years-old did not understand the nature of an oath, did not know the name of the state in which she lived, had never been to school and did not know what she was doing in court, it was proper to find her incompetent to testify.⁹ Where the witness testified that she attended school through the eighth grade, attended church and Sunday school, knew that it was right to tell the truth and could identify the defendant, it was not an abuse of discretion to find her competent to testify.¹⁰ The mere fact that there is evidence to show that a person was insane, or has been previously adjudged insane and is now in a State Hospital, does not of necessity render her incompetent as a witness. The evidence may show that she has lucid intervals, and it is for the jury to determine whether the occurrence to which the witness testified occurred during a lucid interval.¹¹ A prior adjudication of insanity goes to the credit to be accorded to the testimony by the jury.¹²

Witnesses are presumed competent to testify and may be excluded only on grounds of idiocy, lunacy, insanity, drunkenness, or infancy.¹³

For presumptions, see § 20:15, *infra*.

In Georgia, it has been held that one who is an addict or who has used drugs is not incompetent unless it be shown that the witness' mind has been impaired by the drug or is under the influence at the time he testifies.¹⁴ Evidence that the witness is in an intoxicated condition when he undertakes to testify goes to his competency. Evidence that he was intoxicated on the occasion

⁵*Jefferson v. State*, 358 Ga. App. 297, 855 S.E.2d 43 (2021).

⁶*Watkins v. State*, 19 Ga. App. 234, 91 S.E. 284 (1917).

⁷*Wilson v. State*, 270 Ga. App. 311, 605 S.E.2d 921 (2004).

⁸*Luther v. Luther*, 289 Ga. App. 428, 657 S.E.2d 574 (2008).

⁹*Ray v. State*, 32 Ga. App. 513, 124 S.E. 57 (1924).

¹⁰*Lee v. State*, 108 Ga. App. 97, 132 S.E.2d 107 (1963).

¹¹*Conoway v. State*, 171 Ga. 782, 156 S.E. 664 (1931).

¹²*Saxe v. State*, 112 Ga. App. 804, 146 S.E.2d 376 (1965).

¹³*Smith v. State*, 249 Ga. App. 39, 547 S.E.2d 598 (2001).

¹⁴*McDowell v. Preston*, 26 Ga. 528, 1858 WL 2136 (1858) and *Gordon v. Gilmer*, 141 Ga. 347, 80 S.E. 1007 (1914).

concerning which he is to testify goes to his credit.¹⁵

If a party knows before trial that a witness is incompetent on account of his mental condition, he should make objection before the witness has given any testimony.¹⁶ If a witness is competent as to some matters and incompetent as to others, an objection on the ground of incompetency may be made when the witness offers to testify to those matters upon which he is incompetent.¹⁷

§ 13:8 Competency of accomplice as witness

Under Georgia law, all persons, with certain exceptions, are competent to testify.¹ And, as a general rule, the testimony of a single witness is sufficient to establish a fact.² One of the important exceptions stated in the Code is in the case of a felony in which the only witness is an accomplice.³ An accomplice is a competent witness, *Phillips v. State*,⁴ but to warrant a conviction of a felony on the testimony of an accomplice, the accomplice must be corroborated.⁵

Under Georgia's new Evidence Code, this concept is housed under O.C.G.A. § 24-14-8.⁶ Because O.C.G.A. § 24-14-8 replicates a prior Georgia statute that does not appear in the Federal Rules of Evidence, use of earlier Georgia law to interpret the provision is not improper.⁷

In terms of the volume of evidence necessary to satisfy O.C.G.A. § 24-14-8, the Supreme Court of Georgia has explained:

The evidence “need not be sufficient in and of itself to warrant a conviction, so long as it is independent of the accomplice’s testimony and directly connects the defendant to the crime or leads to the inference of guilt. The sufficiency of the corroboration is a matter for the jury to decide.” (Citations and punctuation omitted.) *Parks v. State*, 302 Ga. 345, 348 (806 SE2d 529) (2017). And in considering sufficiency, we “must consider all the evidence admitted by the

¹⁵*Whitus v. State*, 222 Ga. 103, 149 S.E.2d 130 (1966), judgment rev'd on other grounds, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967), and *Davis v. State*, 223 Ga. 127, 153 S.E.2d 566 (1967).

¹⁶*Brunswick & W. Ry. Co. v. Clem*, 80 Ga. 534, 7 S.E. 84 (1888).

¹⁷*Hall v. Hilley*, 139 Ga. 13, 76 S.E. 566 (1912).

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¹O.C.G.A. § 24-6-601.

²O.C.G.A. § 24-14-8.

³*Montanez v. State*, 311 Ga. 843,

860 S.E.2d 551 (2021) (“in felony cases where the only witness is an accomplice to the crimes, that witness’s testimony alone is insufficient to support a defendant’s convictions”).

⁴*Phillips v. State*, 34 Ga. 502, 1866 WL 1171 (1866).

⁵*Lewis v. State*, 311 Ga. 650, 859 S.E.2d 1 (2021). See also *McPherson v. State*, 96 Ga. App. 839, 101 S.E.2d 750 (1958).

⁶*Yarn v. State*, 305 Ga. 421, 826 S.E.2d 1 (2019).

⁷*Foster v. State*, 304 Ga. 624, 820 S.E.2d 723 (2018).

trial court, regardless of whether that evidence was admitted erroneously.” (Citations, punctuation and footnote omitted.) *Cowart v. State*, 294 Ga. 333, 343 (6) (751 SE2d 399) (2013).⁸

Can a defendant’s confession corroborate an accomplice’s testimony, under the rule that a conviction cannot be had on the uncorroborated testimony of an accomplice? Yes, responds the Georgia Supreme Court.⁹ Apparently where the corroboration is clear, it is not error to fail to give the jury an instruction that an accomplice must be corroborated. Chief Justice Benham dissented on the latter point in the instant case, urging that the requested jury charge be given unless there is evidence other than the accomplice’s testimony “which directly connects the defendant to the crime.”

The point about requiring corroboration came up again in *Kelly v. State*.¹⁰ Where more than one accomplice testifies at trial, the testimony of one accomplice may be corroborated by the defendant’s confession or the testimony of another accomplice. The decision in *Herbert v. State*¹¹ agrees that the testimony of one accomplice can corroborate that of another.

Sometimes slight evidence can corroborate.¹² An accomplice’s testimony may be corroborated by circumstantial evidence.¹³ The sufficiency of any corroborating evidence, in cases involving accomplice testimony, is for the trier of fact to decide.¹⁴ Sufficient evidence to corroborate was produced in *Jupiter v. State*.¹⁵

Corroborating evidence is sufficient if it connects the defendant with the crime, tends to show his participation in the crime and, independently of the accomplice’s testimony, would justify an inference of guilt of the accused.¹⁶ There was sufficient corroboration of accomplice by the State’s rebuttal witness and by the defendant to render accomplice testimony admissible in a murder prosecution.¹⁷ Testimony of an accomplice at another murder trial was also sufficiently corroborated by other evidence.¹⁸ It is for the jury to decide whether the testimony of an accomplice has been

⁸*Raines v. State*, 304 Ga. 582, 820 S.E.2d 679 (2018).

⁹*Fleming v. State*, 269 Ga. 245, 497 S.E.2d 211 (1998) (overruled on other grounds by *Hamm v. State*, 294 Ga. 791, 756 S.E.2d 507 (2014)).

¹⁰*Kelly v. State*, 272 Ga. 800, 537 S.E.2d 338 (2000).

¹¹*Herbert v. State*, 288 Ga. 843, 708 S.E.2d 260 (2011).

¹²*Baines v. State*, 276 Ga. 117, 575 S.E.2d 495 (2003).

¹³*Kesler v. State*, 249 Ga. 462, 291 S.E.2d 497 (1982).

¹⁴*Benbow v. State*, 288 Ga. 192, 702 S.E.2d 180 (2010).

¹⁵*Jupiter v. State*, 308 Ga. App. 386, 707 S.E.2d 592 (2011).

¹⁶*Self v. State*, 108 Ga. App. 201, 132 S.E.2d 548 (1963).

¹⁷*Lamb v. State*, 260 Ga. 438, 396 S.E.2d 232 (1990).

¹⁸*Matthews v. State*, 284 Ga. 819, 672 S.E.2d 633 (2009).

sufficiently corroborated.¹⁹

The rule that a conviction cannot be had on the uncorroborated testimony of an accomplice does not apply in misdemeanor cases.²⁰ Nevertheless, the fact that the principal witness in a misdemeanor case is an accomplice may be considered by the jury in weighing the credibility of his evidence.²¹ The requirement of independent corroboration of an accomplice's testimony was set forth in former O.C.G.A. § 24-4-8 and applied to juvenile proceedings.²²

An accomplice has been defined in several ways. He is one who is often present at the commission of the crime, aiding and abetting the perpetrator, with the necessary criminal intent.²³ An accomplice has also been defined as one who could have been indicted for the offense either as a principal or an accessory.²⁴ An accessory after the fact was not an accomplice within the meaning of former O.C.G.A. § 24-4-8.²⁵ It is for the jury to determine whether a witness is an accomplice.²⁶ For this reason, the trial court properly declined to declare a witness an accomplice in response to a jury's question, where the witness could not be an accomplice of an innocent defendant, and, thus, court's determination that witness was an accomplice would have constituted an opinion as to defendant's guilt.²⁷

Evidence corroborating the testimony of an accomplice must be independent of the accomplice's testimony and probative of guilt; to be probative of guilt, the evidence must tend to prove the identity and participation of the accused.²⁸

Criminal defendants are deemed to be "on notice" that that their co-defendants may be called as witnesses against them.²⁹

A person who is a party to a crime may be found guilty of the crime, even though he is not the actual perpetrator.³⁰

For use of accomplice's confession, see § 27:8, *infra*. For the extent of the right to cross-examine an accomplice, see § 16:2,

¹⁹*Evans v. State*, 91 Ga. App. 819, 87 S.E.2d 228 (1955).

²⁰*Branch v. State*, 46 Ga. App. 66, 166 S.E. 685 (1932).

²¹*Dobbs v. State*, 44 Ga. App. 749, 162 S.E. 845 (1932).

²²*In Interest of J.H.M.*, 202 Ga. App. 79, 413 S.E.2d 515 (1991).

²³*Baker v. State*, 121 Ga. 189, 48 S.E. 967 (1904).

²⁴*Harris v. State*, 96 Ga. App. 395, 100 S.E.2d 120 (1957).

²⁵*Mills v. State*, 193 Ga. 139, 17

S.E.2d 719 (1941).

²⁶*Hays v. State*, 9 Ga. App. 829, 72 S.E. 285 (1911).

²⁷*Johnson v. State*, 288 Ga. 803, 708 S.E.2d 331 (2011).

²⁸*Harris v. State*, 165 Ga. App. 186, 299 S.E.2d 393 (1983).

²⁹*Mize v. State*, 269 Ga. 646, 501 S.E.2d 219 (1998); *Green v. State*, 298 Ga. App. 17, 679 S.E.2d 348 (2009); *Gassett v. State*, 289 Ga. App. 792, 658 S.E.2d 366 (2008).

³⁰*Van Huynh v. State*, 258 Ga. 663, 373 S.E.2d 502 (1988).

infra.

Although person may not be convicted of a felony on uncorroborated testimony of accomplice, corroboration not required where there is lack of evidence that witness was an accomplice.³¹

§ 13:9 Competency of witnesses omitted from indictment or list of witnesses

Every person charged with an offense is entitled to obtain a list of the witnesses against him.¹ The defendant must make a demand for such a list. However, a witness is not rendered incompetent by reason of the fact that his name did not appear on the accusation or on the list of witnesses furnished to the accused's attorney.² There is no requirement that the prosecution actually call to testify those persons whose names appear.³

Under O.C.G.A. § 17-16-8(a), within 10 days after compliance with discovery by the prosecutor, defense counsel should provide opposing counsel with the names of defendant's witnesses (no later than five days prior to trial). O.C.G.A. § 17-16-6 provides that if the defendant has failed to comply with discovery requirements, the court may order the defendant to permit discovery or inspection, interview of the witness, grant a continuance, or, upon showing of prejudice and bad faith, prohibit the defendant from introducing the evidence not disclosed or presenting the witness not disclosed, or may enter such other order as it deems just under the circumstances. In *Jones v. State*,⁴ the court implemented the sanction of excusal, and the defense appealed:

The State objected to the first witness called [by defense], arguing that it did not receive proper notice that the defense planned to have the witness testify. Jones' counsel countered that although he was previously aware of this witness and her whereabouts, he had not met her until one hour before trial. The trial court found that Jones acted in bad faith in failing to comply with the notice requirement for discovery, and that this act prejudiced the State's case. The court excluded the witness from testifying.

The Court of Appeals approved the exclusion.

Exclusion of a witness whose name does not appear on the state's witness list applied only where there has been a showing

³¹*Evans v. State*, 288 Ga. App. 103, 653 S.E.2d 520 (2007).

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¹See Rule 30.3, Uniform Superior Court Rules.

²*Cole v. State*, 86 Ga. App. 770,

72 S.E.2d 537 (1952).

³*Cole v. State*, 86 Ga. App. 770, 72 S.E.2d 537 (1952).

⁴*Jones v. State*, 251 Ga. App. 285, 554 S.E.2d 238 (2001).

of bad faith and prejudice to the defense.⁵

Calling an unlisted witness as a rebuttal witness against the defendant is not error where counsel for defendant was allowed to interview witness before he testified.⁶

Although a demand for a list of witnesses must be in writing and served upon the district attorney, it is not error to allow a state's witness not shown on the list, to testify against defendant.⁷ A witness whose name was not included on the State's list of witnesses was properly allowed to testify since the defendant never made a written demand for a list of witnesses.⁸

Although the name of a co-indictee was not contained in the State's furnished list of witnesses, there is no error in allowing the co-indictee to testify, since defendant cannot validly contend that he had been surprised or unable to interview the witness through lack of knowledge of such witness.⁹

When a list of witnesses is demanded, the list must be served on the defendant, not just made available. Thus, an "open file" policy on the part of the State is not sufficient to satisfy a demand for a list of witnesses.¹⁰

When the identity and involvement of a witness are otherwise disclosed to defendant in discovery provided to him by the prosecution, the purpose of the witness list rule is served and the court may allow the state to call the witness even though he or she was not listed on the state's formal witness list.¹¹

§ 13:10 Competency of witnesses omitted from answers to interrogatories

As a general rule, whether to permit a witness whose name did not appear in answers to interrogatories to testify is within the discretion of the court.¹ When a witness whose name did not appear is called, the procedure is to move for a postponement for a sufficient length of time to enable the opposing party to interview the witness, check the facts and secure rebuttal or impeaching

⁵Childs v. State, 287 Ga. 488, 696 S.E.2d 670 (2010).

⁶Depree v. State, 246 Ga. 240, 271 S.E.2d 155 (1980).

⁷Jackson v. State, 166 Ga. App. 252, 305 S.E.2d 4 (1983).

⁸Sexton v. State, 189 Ga. App. 12, 374 S.E.2d 824 (1988).

⁹Blackston v. State, 172 Ga. App. 172, 322 S.E.2d 300 (1984).

¹⁰Rogers v. State, 188 Ga. App. 788, 374 S.E.2d 562 (1988).

¹¹Leger v. State, 291 Ga. 584, 588, 732 S.E.2d 53 (2012).

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¹Annotations: Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings, 63 A.L.R.4th 712; Propriety of allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings, 58 A.L.R.4th 653.

evidence.² The Court in *Nathan v. Duncan*³ stated that a denial of a motion for a postponement in such circumstances would be an abuse of discretion requiring a new trial. If the question should arise once the trial has already begun and the court determines that a postponement would be impractical, a mistrial may be declared.

§ 13:11 Competency of private detective or investigator in criminal actions

Generally, such persons as private detectives and investigators are competent and compellable to give evidence.¹ In one case, it was held that a detective who had been hired by the sheriff to investigate and report violations of the prohibition law was competent to testify in a prosecution for the violation of such a law. The fact of his employment would affect only his credit.²

§ 13:12 Competency of witness under hypnosis

A party wishing to introduce evidence concerning identification with a witness who has been previously hypnotized must, in addition to standard requirements of reliability, show by clear and convincing evidence that the identification did not arise from and was not cemented during the hypnosis.¹

Testimony of friend of alleged murder victim was admissible, even though friend participated in a hypnotic session and recording of session was unavailable; friend provided pre-hypnotic session and post-hypnotic session statements to police, the trial court limited testimony to the pre-hypnotic statements to the extent that the statements differed, and nearly all of the friend's testimony was cumulative of other evidence admitted at trial.² The *Walraven* case is referenced. Federal courts frequently apply an approach which is similar to that used in Georgia's *Watson* decision.³

²*Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966).

³*Nathan v. Duncan*, 113 Ga. App. 630, 149 S.E.2d 383 (1966).

[Section 13:11]

¹O.C.G.A. § 24-6-601.

²*Gordon v. State*, 7 Ga. App. 691, 67 S.E. 893 (1910).

[Section 13:12]

¹*Walraven v. State*, 255 Ga. 276, 336 S.E.2d 798 (1985).

²*Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

³See *Kater v. Maloney*, 459 F.3d 56 (1st Cir. 2006).

Chapter 14

Dead Man's Act

§ 14:1 Disqualification under Dead Man's Act

The general effect of the Dead Man's Act is to render incompetent certain witnesses as to their communications with deceased persons in certain situations.

The disability is absolute in some jurisdictions, preventing the witness from testifying in the case at all, and partial in others, arising only when the witness seeks to testify to some personal transaction had with the decedent, while in other states, instead of disqualifying the witness, it is provided merely that no judgment or decree shall be rendered in his favor founded on his uncorroborated testimony.

Georgia Code § 38-1603, which incorporated the Dead Man's Act, was repealed, and a new Code § 38-1603 was substituted by Georgia Session Laws of 1979, p. 1261, effective July 1, 1979. Accordingly, the Dead Man's Act was abolished July 1, 1979. Under former law, this provision was contained in former O.C.G.A. § 24-9-1. Although the statute was abolished, it contained a saving clause continuing its application to transactions or occurrences which took place prior to July 1, 1979. Accordingly, even before the 2013 evidence code, most of the old law on the Dead Man's Statute was of historical significance. Controversies involving transactions which occurred 35 or more years ago are fading features of the litigation landscape. However, an occasional modern case did arise involving interpretation of the Dead Man's Statute.

In a land title action, a trial witness was also a party and a purchaser of land. Conversations he had with the vendor of the land were inadmissible because of the Dead Man's Statute. The conversations occurred prior to 1979. The deceased declarant died in 1990. The case was tried in 2006. The original transaction and conversations occurred in the 1960s. This case demonstrates how Georgia's old Dead Man's Statute continued to play a role in modern trials.¹

In a pattern like that pursued in Georgia, federal cases are no

[Section 14:1]

S.E.2d 821 (2008).

¹Murray v. Stone, 283 Ga. 6, 655

longer encumbered with “dead man” objections. Rule 601 of the Federal Rules of Evidence does not incorporate a “dead man’s” provision, except for diversity cases where the forum state has such a law.² By and large, cases based upon federal statutes are tried without reference to any objections based upon the Dead Man’s Statute. There is no “grandfather” clause for old transactions in federal law, as occurred in the 1979 Georgia enactment. In the 2013 Georgia Code, O.C.G.A. § 24-6-601 copies the federal rule. With its adoption, the case law citing the Dead Man’s statute appears to be of dated significance.

²See, generally, *Garbutt v. Southern Clays, Inc.*, 460 (M.D. Ga. 1995), 894 F. Supp. 456,

Chapter 15

Examination of Witnesses

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- § 15:2 Materiality of questions asked on direct examination
- § 15:3 Relevancy of questions asked on direct examination
- § 15:4 Admissibility of negative evidence
- § 15:5 Relevance of conduct of party shortly before accident
- § 15:6 Competency of questions asked on direct examination
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- § 15:12 Questions that impeach one's own witnesses
- § 15:13 Testimony that tends to incriminate witnesses
- § 15:14 Necessity for court to warn witnesses of privilege
- § 15:15 Extent of privilege against self-incrimination
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- § 15:17 Inspection of person of accused or witnesses
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- § 15:19 When privilege against self-incrimination is lost
- § 15:20 Use of lie detector (polygraph) tests
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- § 15:22 Manner of examining under statute
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- § 15:24 Witness' first hand knowledge
- § 15:25 Testimony concerning telephone conversations
- § 15:26 Tape recordings of telephone conversations
- § 15:27 Right to confront witnesses
- § 15:28 Continuing witness rule

§ 15:1 Examination of witnesses; generally

One of the elementary rules of evidence is that matters offered in evidence in a case must be relevant to the issues and tend to establish or disprove them. Conversely, all competent evidence of facts and circumstances which are relevant to the issues of a case—that is, all facts and circumstances which afford reasonable inferences or throw light upon the matter or matters contested—is admissible, unless the exclusion of any such fact or circumstance

is required by some established principle of evidence, such as the hearsay evidence rule, the best evidence rule, the rule against unduly prejudicial evidence, or the rule that parol evidence may not be given to vary or contradict written instruments. In other words, whatever to the ordinary reasoning mind is logically probative of a fact in issue is *prima facie* admissible and should not be excluded, unless its admission violates a rule of law or policy.¹ Relevant evidence may be excluded if its probative value is outweighed by certain risks, including risk that it will cause unfair surprise to the other party who has not had time to prepare, that presentation will take an undue amount of time or that the evidence would tend to confuse or mislead the jury.²

In its 2013 Evidence Code, Georgia adopted O.C.G.A. § 24-4-401, which is patterned after Fed. R. Evid. 401 and concerns the rules of relevance. Federal courts have characterized Fed. R. Evid. 401 as a liberal rule that encourages the admission of evidence.³ In interpreting this provision, Georgia courts have relied upon Eleventh Circuit Court of Appeals authority.⁴

In addition, Georgia adopted O.C.G.A. § 24-4-402, which is also modeled on its federal counterpart, Fed.R.Evid. 402, and which “sets a broad standard of admissibility for evidence deemed relevant.”⁵ Preeminent evidence scholars opine that Rule 402 has a dual jurisprudential effect:

The impact [of Rule 402] is two-fold. First, Rule 402 has a prospective effect: it precludes trial judges from future creation of new exclusionary rules of general applicability. Second, and more importantly, the Rule impliedly repeals prior decisional admissibility rules that have not been codified.⁶

Georgia codified the prejudice standard of Fed. R. Evid. 403

[Section 15:1]

¹See *Atlanta Joint Terminals v. Knight*, 98 Ga. App. 482, 106 S.E.2d 417, 79 A.L.R.2d 539 (1958). And see *Am. Jur. 2d, Evidence* §§ 251 et seq.

²*McEachern v. McEachern*, 260 Ga. 320, 394 S.E.2d 92 (1990).

³See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587, 113 S. Ct. 2786, 2794, 125 L. Ed. 2d 469, 37 Fed. R. Evid. Serv. 1 (1993); *U.S. v. Sumner*, 522 Fed. Appx. 806, 810 (11th Cir. 2013).

⁴*Flading v. State*, 327 Ga. App. 346, 759 S.E.2d 67 (2014).

⁵*Chrysler Group, LLC v. Walden*, 303 Ga. 358, 812 S.E.2d 244 (2018). See also *Carlson & Carlson, Carlson*

on Evidence: Comparing Georgia Rules & Federal Rules §§ 24-4-401 to 24-4-403 (6th Ed. 2017).

⁶*Imwinkelreid, Federal Rule of Evidence 402: The Second Revolution*, 6 Rev. Litig. 129 (1987) (“Rule 402 precludes the courts from enforcing uncodified rules of evidence”). See also *Imwinkelried, A Brief Defense of the Supreme Court’s Approach to the Interpretation of the Federal Rules of Evidence*, 27 Ind. L. Rev. 267 (1993) (“Properly construed, Rule 402 abolishes uncodified exclusionary rules of evidence. Thus, even if the exclusionary rule in question is a hoary, well-respected one, the decision overturning the rule is supportable under the Rules.”).

with the adoption of O.C.G.A. § 24-4-403.⁷ This standard has been interpreted as an extraordinary remedy which the courts should invoke sparingly, and the balance should be struck in favor of admissibility.⁸

The ubiquity of Georgia Rules of Evidence 401, 402, and 403 was observed by the Georgia Supreme Court:

By standardizing rules concerning both the presumptive admissibility of relevant evidence and the judicial exclusion of certain otherwise admissible evidence, Rules 401, 402, and 403 overlay the entire Evidence Code, and are generally applicable to all evidence that a party seeks to present.⁹

For a scholarly decision detailing the interplay between O.C.G.A. §§ 24-4-401, 24-4-402, and 24-4-403, see Chief Judge Dillard's opinion in *Hines v. State*.¹⁰

Trial proof must be both logically relevant under Rule 401 and legally relevant under Rule 403 in order to be admissible.¹¹ A federal decision describes that “legal relevance is paramount” and that in “determining legal relevance under Rule 403, the trial judge has broad discretion and is authorized to balance the probative value of the evidence against its prejudicial effect.”¹²

On the latter point, a Georgia Court of Appeals decision observes: “only *one* rule authorizes the exclusion of relevant evidence based on the court's evaluation of the ‘prejudice’ such evidence could cause: OCGA § 24-4-403.”¹³ Applying the balancing test under Rule 403 is fundamentally a matter left to the trial court's discretion.¹⁴ Failing to properly apply the terms of Rule 403, though, represents an abuse of that discretion.¹⁵

This chapter discusses matters in connection with the examination of witnesses, including the materiality and relevancy of questions asked on direct examination.

⁷Williams v. State, 328 Ga. App. 876, 763 S.E.2d 261 (2014).

⁸Flading v. State, 327 Ga. App. 346, 759 S.E.2d 67 (2014) (relying upon Eleventh Circuit Court of Appeals precedent).

⁹Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244 (2018) (“Three rules [401, 402, and 403] provide a backdrop for Georgia's new Evidence Code.”).

¹⁰Hines v. State, 350 Ga. App. 752, 830 S.E.2d 380 (2019).

¹¹See People v. Rath, 44 P.3d 1033 (Colo. 2002).

¹²Verzwyvelt v. St. Paul Fire & Marine Ins. Co., 175 F. Supp. 2d 881, 58 Fed. R. Evid. Serv. 308 (W.D. La. 2001).

¹³Hines v. State, 350 Ga. App. 752, 830 S.E.2d 380 (2019) (emphasis original).

¹⁴Webb v. State, 359 Ga. App. 453, 858 S.E.2d 546 (2021).

¹⁵State v. Brinkley, 316 Ga. 689, 889 S.E.2d 787 (2023) (“The trial court thus misapplied the Rule 403 standard and therefore abused its discretion... Accordingly, we remand for the trial court to apply the correct standard in the first instance.”).

The usual method of examining witnesses and securing their testimony is by oral questions and answers in open court after the witness has been duly sworn.

While a witness may not say whether another witness told the truth or lied when he testified, a pediatrician could testify that the victim's medical history was consistent with molestation.¹⁶

Citing former O.C.G.A. § 24-9-85(b) as applicable to cases where a witness admits he testified falsely and requiring his testimony to be disregarded unless corroborated, the circumstances of *Mathis v. State*¹⁷ did not merit application of the rule.

State's questioning of expert on battered women's syndrome regarding her qualifications in the presence of the jury after expert had already been qualified as an expert in the jury's absence did not constitute impermissible bolstering; ordinarily a jury should know all the qualifications of a witness in order to properly evaluate the testimony.¹⁸

Allowing a party to recall its witness for further direct testimony, see *Lawton v. State*.¹⁹

On the topic of party A calling a witness who is examined on direct by A and then is cross-examined by Party B, followed by party B later calling the same witness during B's case to impeach him, see *Lillard v. Owens*, § 15:21, *infra*.

§ 15:2 Materiality of questions asked on direct examination

The testimony sought to be elicited by a question asked on direct examination must be material—that is, it must relate to the issues of the case.¹ The issues are defined by the pleadings and consist of allegations of fact made by one party and denied by an adversary. The evidence must correspond and be confined to the issues raised by the pleadings.²

Federal Rule of Evidence 401, adopted by Georgia at O.C.G.A. § 24-4-401, incorporates notions of both materiality and probativity by requiring that facts be “of consequence” to satisfy the rule.³ Courts have observed that evidence need not be conclusive or

¹⁶*Atkins v. State*, 243 Ga. App. 489, 533 S.E.2d 152 (2000).

¹⁷*Mathis v. State*, 273 Ga. 508, 543 S.E.2d 712 (2001).

¹⁸*Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004) (overruled on other grounds by *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹⁹*Lawton v. State*, 281 Ga. 459, 640 S.E.2d 14 (2007).

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¹See, generally, *Rivers v. K-Mart Corp.*, 321 Ga. App. 788, 743 S.E.2d 464 (2013); *U.S. v. Delgado*, 668 F.3d 219 (5th Cir. 2012).

²See O.C.G.A. § 24-4-402.

³*Gardetto v. Mason*, 201 F.3d 447, 141 Ed. Law Rep. 156 (10th Cir. 1999).

highly probative to satisfy Rule 401. Direct and circumstantial evidence, evidence that is essentially background or contextual in nature, and even evidence with a minimal probability that the asserted fact exists can suffice.⁴ For Rule 401 purposes, courts look to the elements of the cause of action to determine whether a fact is of consequence.⁵

The trial court has wide discretion in determining relevancy and materiality, and furthermore, where the relevancy or competency is disputed, the evidence should be admitted, and its weight left to the determination of the jury.⁶ Questions of relevancy of evidence, which include the issue of materiality, are for the trial court, and in the absence of an abuse of judicial discretion, the Court of Appeals will not interfere.⁷

§ 15:3 Relevancy of questions asked on direct examination

Even though the admission of marginal evidence is favored, ultimately the admission or exclusion of evidence on grounds of relevancy lies within the sound discretion of the trial court, whose decisions the Court of Appeals will not disturb absent a clear abuse of discretion.¹ Evidence of marginal relevance should be admitted with its weight left to the jury.²

Because Georgia law favors the admission of any relevant evidence no matter how slight its probative value, evidence of even marginal relevance should generally be admitted.³ Evidence is relevant if it renders the desired inference more probable than it would be without the evidence. Every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant.⁴

A trial court's ruling on the admission of evidence which is objected to on the ground of relevancy lies within the sound

⁴Cook v. Rockwell Intern. Corp., 580 F. Supp. 2d 1071 (D. Colo. 2006).

⁵Johnson v. Jennings, 772 Fed. Appx. 822, 109 Fed. R. Evid. Serv. 536 (11th Cir. 2019).

⁶Ortiz v. State, 295 Ga. App. 546, 672 S.E.2d 507 (2009).

⁷Rhone v. Bolden, 270 Ga. App. 712, 608 S.E.2d 22 (2004).

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¹Williamson v. Yang, 250 Ga. App. 228, 550 S.E.2d 456 (2001).

²See generally U.S. v. Vigneau, 187 F.3d 82 (1st Cir. 1999) ("The weight of the evidence was for the jury, and it is not a condition of admitting a specific item of evidence that it be sufficient to prove the case standing by itself.").

³Dodd v. Scott, 250 Ga. App. 32, 550 S.E.2d 444 (2001).

⁴Mottahedeh v. U.S., 2009 WL 6639378 (S.D.Fla. 2009) ("The standard for relevance is whether the information sought might have thrown light upon the matter being investigated.").

discretion of the trial court, and will not be disturbed on appeal.⁵ Generally, any evidence is relevant which logically tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant.⁶ Relevancy is determined by answering the following question: Does the evidence offered render the desired inference more probable than it would be without the evidence?⁷

If evidence is logically relevant, having some tendency to prove or disprove a matter in issue, it does not become inadmissible merely because it is incomplete, weak, or remote.⁸ Merely because a fact is remote in point of time or probative value does not of itself preclude its admissibility, but its admissibility depends to a large extent on the nature and circumstances of the case, and rests largely in the discretion of the trial court.⁹

Although a trial court has discretion in determining the admissibility of evidence, the long-standing rule in Georgia favors the admission of any relevant evidence, no matter how slight its probative value.¹⁰ However, a trial court may exercise its discretion in excluding relevant evidence if it finds that its probative value is substantially outweighed by the risk that its admission will create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.¹¹

Sometimes even relevant evidence will be excluded if it is confusing, cumulative or prejudicial. This is the rule under Federal Evidence Rule 403, which was adopted by Georgia at O.C.G.A. § 24-4-403.

In a highly publicized trial, the defendant was accused of killing his toddler son by leaving him strapped in a car seat in the defendant's vehicle. The child died of hyperthermia after hours of being shut in the car in the June, Georgia heat. The central issue at trial was criminal intent, with the prosecution arguing that the defendant resolved to murder his son so that he could further sexual relationships. The state's proof included "extensive evidence of his extramarital and sometimes illegal sexual activities."

⁵Wright v. State, 301 Ga. App. 178, 687 S.E.2d 195 (2009).

⁶Wright v. State, 301 Ga. App. 178, 687 S.E.2d 195 (2009).

⁷Hinton v. State, 280 Ga. 811, 631 S.E.2d 365 (2006).

⁸Am. Jur. 2d, Evidence § 253.

⁹Big Apple Super Markets of Peachtree, Inc. v. W. J. Milner & Co., 111 Ga. App. 282, 141 S.E.2d 567 (1965).

¹⁰Howard v. State, 286 Ga. 222, 686 S.E.2d 764 (2009). See also Fuller v. State, 295 Ga. App. 439, 672 S.E.2d 438 (2009) (even where relevancy or competency of evidence is doubtful, the evidence should be admitted and its weight left to the jury).

¹¹O.C.G.A. § 24-4-403. See also American Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810 (2008).

The Supreme Court of Georgia reversed the defendant's convictions on Rule 403 grounds in *Harris v. State*:¹²

[E]ven assuming that all of the evidence of sexual activity was relevant to show Appellant's motive, the trial court should have excluded much of this evidence under OCGA § 24-4-403 ("Rule 403") as needlessly cumulative and prejudicial and three entire categories of evidence as highly and unfairly prejudicial: the evidence that Appellant exchanged sexual communications with four minors; the nine full-page pictures of Appellant's erect penis that he sent to girls and women; and the evidence that Appellant hired a prostitute for sex three times.

Prior Georgia practice applies similar—but *not identical*—principles. Evidence related to a mother's sex life in her son's wrongful death action against drivers of cars in crash that killed mother was properly excluded as inflammatory; allowing such evidence as abortions, adoptions, and sex life created a danger of undue prejudice or of confusing or misleading the jury. Irrelevant matters which improperly tend to reflect adversely on the victim's character, which destroy a juror's impartiality, or which only excite the passions of the jurors should not be admitted. Evidence that mother missed work due to pregnancy was not admissible for damages calculation purposes in a wrongful death action against drivers of cars in accident that caused mother's death; prejudicial effect of reason for mother's voluntary absence from work, being that she was a pregnant unmarried woman, outweighed the probative value of the evidence. Witnesses cannot be impeached by showing their lack of chastity where this bears no relevance to the case.¹³

Excluding evidence under Georgia Rule of Evidence 403 is "an extraordinary remedy which should be used only sparingly."¹⁴ Former Georgia law stated that a judge may exercise his discretion in excluding relevant evidence if he finds that its probative value is substantially outweighed by the risk that its admission will create substantial danger of undue prejudice or of confusing the issues or misleading the jury.¹⁵

The fact that objected-to evidence pertains to elements of an offense or claim often overcomes a Rule 403 objection based on

¹²*Harris v. State*, 314 Ga. 238, 875 S.E.2d 659 (2022) ("We need not decide precisely how much evidence the State should have been permitted to offer to support this initial point of its motive theory in order to conclude that a large amount of the evidence that was presented—especially the more prejudicial evidence of vulgar discussions—was *needlessly* cumulative and should

have been excluded under Rule 403.") (emphasis in original).

¹³*Brock v. Wedincamp*, 253 Ga. App. 275, 558 S.E.2d 836 (2002).

¹⁴*Jones v. State*, 301 Ga. 544, 802 S.E.2d 234 (2017).

¹⁵*Shasta Beverages, Inc. v. Tetley USA, Inc.*, 248 Ga. App. 381, 546 S.E.2d 800 (2001).

purported unfair prejudice. In a lawsuit against a caretaker brought by an estate executor alleging undue influence, a 2024 opinion by Presiding Judge Dillard approved the introduction of the caretaker’s text messages containing nude photographs of herself offered to demonstrate her alleged efforts to fraudulently influence the elderly, dementia-suffering deceased.¹⁶ The admission of racist song lyrics against a defendant who allegedly conspired with other hate-group members to commit a racially motivated murder was approved to prove motive and that the defendant was involved, with his co-defendants, in “organized criminal activity”¹⁷ in violation of Texas law.¹⁸

In a federal racketeering prosecution involving an alleged criminal street gang called “SMB,” the Sixth Circuit Court of Appeals determined that certain rap videos were admissible over a Rule 403 objection:

The district court here did not abuse its discretion. To be sure, there was potential for unfair prejudice—the rap videos reference drug dealing and violence, and they contain explicit and sexual language. But the videos also had substantial probative value. To prove its case, the government needed to show that SMB was an enterprise and that the racketeering acts—including murders and attempted murders—related to that enterprise. *Salinas*, 522 U.S. at 62. The rap videos were critical evidence that helped establish both. In the videos, some defendants trumpet their membership in SMB and describe specific acts committed by the group, including lyrics about shooting someone in the “e-y-e.” The videos also direct intimidating and threatening messages at rivals. They therefore help establish that SMB was an enterprise that shared common goals and purposes. And this evidence was especially helpful for establishing the existence of an enterprise here because the government lacked evidence of a formal structure. In short, the district court did not abuse its discretion by concluding that any danger of unfair prejudice did not substantially outweigh the evidence’s significant probative value. See *United States v. Smith*, 967 F.3d 1196, 1205-06 (11th Cir. 2020) (rejecting a similar argument).¹⁹

Rule 403 considerations often arise in the area of expert witnesses. Federal cases not only stress the trial judge’s “gatekeeper” role in determining whether expert testimony may be presented, but also authorizing the exclusion of expert

¹⁶*Baker v. Cuthbertson*, 2024 WL 4141860 (Ga. Ct. App. 2024).

¹⁷Tex. Penal Code § 71.02.

¹⁸*Brosky v. State*, 915 S.W.2d 120 (Tex. App. Fort Worth 1996) (describing the lyrics as from “a band popular among skinheads” and identifying the

defendant and his co-conspirators as “active in white supremacist organizations and identified themselves as ‘skinheads,’ members of a particular segment of the white supremacist movement”).

¹⁹*United States v. Bailey*, 2022 WL 2444930 (6th Cir. 2022).

testimony by the trial bench on Rule 403 grounds.²⁰ The rationale for this deference when it comes to expert opinion has been explained: “The trial judge, having heard the testimony, is in the best position to determine whether such testimony would be confusing or misleading to the jury.”²¹

An Eleventh Circuit opinion provides detail concerning the important role of the trial judge under Rule 403 when it comes to expert witnesses:

Because of the powerful and potentially misleading effect of expert evidence, see *Daubert*, 509 U.S. at 595, 113 S. Ct. at 2798, sometimes expert opinions that otherwise meet the admissibility requirements may still be excluded by applying Rule 403. 16Link to the text of the note Exclusion under Rule 403 is appropriate if the probative value of otherwise admissible evidence is substantially outweighed by its potential to confuse or mislead the jury, see *Rouco*, 765 F.2d at 995, or if the expert testimony is cumulative or needlessly time consuming. See, e.g., *Hull v. Merck & Co., Inc.*, 758 F.2d 1474, 1477 (11th Cir. 1985) (per curiam) (finding that admission of speculative and “potentially confusing testimony is at odds with the purposes of expert testimony as envisioned in Fed. R. Evid. 702”); see also *United States v. Stevens*, 935 F.2d 1380, 1399 (3d Cir. 1991) (finding expert testimony properly excluded because its probative value was outweighed by concerns of “undue delay, waste of time, or needless presentation of cumulative evidence”). Indeed, “the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses.” Weinstein, 138 F.R.D. at 632; see also *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S. Ct. 1119, 1122, 8 L. Ed. 2d 313 (1962). Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse.²²

When the value of real or personal property is in issue, its original cost may be admissible as evidence of value. This is a question of relevancy, depending upon the remoteness of the sale, the nature of the property, whether there have been marked changes in prices, the rate at which the property depreciates in value due to the passage of time or wear and tear, obsolescence and other related factors. If the sale was voluntary and was sufficiently recent, the purchase price is admissible. It then becomes a matter for the trier to determine what weight should be given such

²⁰U.S. v. Garza, 448 F.3d 294, 297, 27 Fed. R. Evid. Serv. 985 (5th Cir. 70 Fed. R. Evid. Serv. 54 (5th Cir. 1989). 2006); Kearney v. Auto-Owners Ins. Co., 422 Fed. Appx. 812 (11th Cir. 2011).

²¹U.S. v. Edelman, 873 F.2d 791,

²²U.S. v. Frazier, 387 F.3d 1244, 65 Fed. R. Evid. Serv. 675 (11th Cir. 2004).

evidence.²³

Logical relevancy is the problem raised by the offer of evidence of sales of other tracts of land in the valuation of subject property.²⁴ The existence of liability insurance normally has no logical relevancy as to any of the issues in the case, but there are exceptions.²⁵

Public policy demands that settlements be encouraged, and they might be deterred by permitting their admission in evidence. The factors that may have influenced such settlement may be too complex for explanation and may have nothing to do with the matter on trial. Accordingly, such settlements are not legally relevant and normally are not logically relevant.²⁶

An example of courts' reluctance to concede logical relevancy is in the case of polygraph tests, an area which has not advanced sufficiently to receive more than meager judicial approval.²⁷

The identity and general background of a victim are relevant issues in a murder trial.²⁸

Will a party's offer to stipulate to a point deprive an adversary's proof on the point of probative worth?²⁹ Some authorities say no. Relevant evidence cannot be kept from the jury by an admission of the fact or a waiver of the requirement of proof.³⁰

Evidence that the defendant was a member of the Ku Klux Klan was relevant where there was conflicting evidence concerning his racial bias and an allegation that he had planned to blame a murder on black victims.³¹

The fact that a criminal defendant's incriminating telephone call from jail was laced with offensive language containing derogatory references to various groups did not mandate its exclusion under Georgia Rule of Evidence 403:

Unfortunate though it may be, the words that Smith used "have lost much of their shock value in contemporary culture." *State v. Alzaga*, 2015 UT App 133, 352 P3d 107, 119 (Utah App. 2015). See also *People v. Edelbacher*, 47 Cal. 3d 983, 254 Cal. Rptr. 586, 766 P2d 1, 16 (Cal. 1989) ("[j]urors today are not likely to be shocked by offensive language"). "These words alone were unlikely to induce the jury to return a conviction based on a generalized assessment of character." *Alzaga*, 352 P3d at 119 (citation and punctuation omitted). Accordingly, we cannot say that the derogatory terms

²³Am. Jur. 2d, Evidence §§ 389, 395 et seq.

²⁴See § 24:23, *infra*.

²⁵See § 29:19, *infra*.

²⁶See § 26:13, *infra*.

²⁷See § 15:20, *infra*.

²⁸*Roper v. State*, 258 Ga. 847, 375 S.E.2d 600 (1989).

²⁹See § 10:6, *supra*.

³⁰*Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980).

³¹*Boutwell v. State*, 256 Ga. 63, 344 S.E.2d 222 (1986).

used by Smith created a risk of unfair prejudice that substantially outweighed the recording's probative value, and we conclude that the trial court did not abuse its discretion when it performed the balancing required by OCGA § 24-4-403 and admitted the audio recording of Smith's phone call from jail.³²

Sometimes evidence shows that a person other than the criminal defendant committed the crime at issue. To be admissible, such evidence must raise a reasonable inference of the defendant's innocence, and must directly connect the other person with the *corpus delicti*, or show that the other person has recently committed a crime of the same or similar nature. In a child homicide prosecution, it was error to refuse the defendant's introduction of testimony that the victim's mother previously abused the 2-year-old victim, as well as other children.³³

On the other hand, in a murder prosecution, where proffered testimony failed to connect the person with the *corpus delicti*, did not "clearly point to someone other than the accused as the perpetrator," and only raised a "bare suspicion" or "conjectural inference" that someone other than the accused committed the crime, the evidence was properly excluded.³⁴

§ 15:4 Admissibility of negative evidence

There may be an issue in a case as to whether a bell rang, a horn sounded or whether something could not be seen. To prove the absence of such sound or sight, evidence may be offered by witnesses who did not see or hear the alleged sight or sound. This is often described as negative evidence.

Negative evidence is admissible if it is relevant. Whether it is relevant depends upon the opportunity of the witness to observe the transaction. If he were in such a position, his negative evidence may be admissible. If the court determines that it is relevant, it is admissible. It then becomes a question for the trier to determine what weight shall be attached to such evidence.

Specific provision for negative evidence is lodged in the Federal Rules of Evidence. Evidence of an absence of an entry in business records to prove the nonoccurrence of a sale or other transaction, see Rule 803(7), Federal Rules of Evidence.¹ O.C.G.A. § 24-8-803(7) is in accord. Sometimes even an unsuccessful search for an official or public record is relevant because it shows that an al-

³²Smith v. State, 302 Ga. 717, 808 S.E.2d 661 (2017). [Section 15:4]

³³Gilreath v. State, 298 Ga. 670, 784 S.E.2d 388 (2016).

³⁴Hills v. State, 306 Ga. 800, 833 S.E.2d 515 (2019).

¹Watkins v. Wells Fargo Bank, N.A., 2017 WL 2399086 (D.N.J. 2017) ("the Federal Rules of Evidence provide that the absence of a record of a regularly conducted activity may be

leged event did not happen.²

Georgia Rule of Evidence 803(10) was applied to allow evidence of the absence of a government record in *Tran v. State*.³

No remedial measures were needed, said a restaurant in a slip-and-fall case. Negative proof, that is, proof that no remedial actions were taken by the eatery after the plaintiff's mishap, was admitted in *Briglevich v. Liberty House Restaurant Corp.*⁴

§ 15:5 Relevance of conduct of party shortly before accident

One of the most difficult questions relating to relevancy relates to testimony that is offered to show what a person was doing some time before an accident, as tending to show what he was doing at the time of the accident. This question is determined by the general rules relating to ruling upon the relevancy of testimony.¹

The cases in this area are in confusion, which is understandable in view of the infinite variety of factual situations that can arise. This variety renders it virtually impossible to establish meaningful rules that can be applied, fairly and consistently, in all cases.

It should be noted that the question of relevancy does not depend solely on distance from the scene of the accident. Traffic in town tends to start and stop. On the open road, it tends to be the same speed for much longer distances. It is for the court to determine, subject to review for abuse of discretion, whether the speed at any particular distance will have sufficient probative force in determining the speed at the point of the collision.

It has been held that testimony of the speed of a vehicle approximately one-half mile from the scene of the accident is admissible on the question of speed at the scene inasmuch as there was additional corroborating evidence.² A similar rule has been applied to the speed of a train.³

Modernly, use by a driver of a controlled substance prior to an

admissible to prove that the matter did not occur").

²See Rule 803(10), Federal Rules of Evidence. See, generally, *Mundo-Violante v. Kerry*, 180 F. Supp. 3d 442, 100 Fed. R. Evid. Serv. 236 (W.D. Va. 2016).

³*Tran v. State*, 340 Ga. App. 546, 798 S.E.2d 71 (2017).

⁴*Briglevich v. Liberty House Restaurant Corp.*, 277 Ga. App. 433,

626 S.E.2d 625 (2006).

[Section 15:5]

¹See § 15:3, *supra*.

²*Central of Georgia Ry. Co. v. Keating*, 45 Ga. App. 811, 165 S.E. 873 (1932), *rev'd on other grounds*, 177 Ga. 345, 170 S.E. 493 (1933).

³*Reed v. Southern Ry. Co.*, 37 Ga. App. 550, 140 S.E. 921 (1927).

accident has been litigated.⁴

§ 15:6 Competency of questions asked on direct examination

The testimony sought to be elicited on direct examination must be competent; it must not be barred by some rule of evidence that excludes such testimony. For various reasons, including consideration of due process and fair play, protection of constitutional guarantees, the efficient disposition of cases and public policy, certain types of evidence are not admissible. For detailed discussion of these rules that exclude testimony that may otherwise be material and relevant, see the appropriate headings in this Handbook.

The question should be confined to a single item, and not contain two or more separate inquiries.¹ It should not be argumentative.² The question should call for a statement of fact, rather than for conclusions conjectures, and opinions, except in those cases where opinion evidence is admissible.³ The question should not be repetitious.⁴

§ 15:7 Form and content of questions on direct examination

Although leading questions are generally allowed only on cross-examination, the trial court has discretion to allow leading questions on direct examination where the witness is nervous, ignorant, or hostile.¹

⁴See, e.g., *R.A. Siegel Co. v. Bowen*, 246 Ga. App. 177, 539 S.E.2d 873 (2000) (evidence that driver may have ingested marijuana 36 hours prior to accident excluded where no evidence linking this fact to driver's ability at time of accident); *Crowe v. State*, 277 Ga. 513, 591 S.E.2d 829 (2004) (evidence that driver may have ingested marijuana as late as one hour prior to accident, together with expert testimony regarding how that could impair driving ability, required admission of the evidence).

[Section 15:6]

¹Compound questions, see *Bright, Carlson, and Imwinklereid*, Objections at Trial 153 (2008).

²*Post v. State*, 201 Ga. 81, 39 S.E.2d 1 (1946).

³See §§ 24:1 et seq.

⁴Asked and answered objection, see *Bright, Carlson, and Imwinklereid*, Objections at Trial 216 (2008).

[Section 15:7]

¹O.C.G.A. § 24-6-611. See also *Slaton v. State*, 303 Ga. 651, 814 S.E.2d 344 (2018); *Issa v. State*, 340 Ga. App. 327, 796 S.E.2d 725 (2017) (witness "testified that she did not want to testify and that she was afraid of the defendants, thus demonstrating both reluctance and nervousness"); *Dumas v. State*, 283 Ga. App. 279, 641 S.E.2d 271 (2007) (witness was native of India; language barrier, leading permitted).

§ 15:8 Improper conduct of counsel in examining witnesses

It shall be the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor.¹

Under Georgia's current Evidence Code, "trial courts have a duty to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to protect witnesses from harassment or undue embarrassment."²

It has been held that the discretion of the court in controlling the conduct of counsel will not be interfered with, unless the conduct is a gross outrage to a party and plainly appears to damage his case.³

See also O.C.G.A. §§ 9-10-185 and 17-8-75 relating to improper conduct of counsel.

Modernly, jurisprudence has featured a number of cases where judges have policed examination of witnesses in order to protect the integrity of the process.⁴

§ 15:9 Leading questions

As a general rule, leading questions are permitted only on cross-examination, but the trial court has wide discretion to permit such questions on direct examination when the needs of justice so require.¹

A question is leading if the contents of the question suggest the

[Section 15:8]

¹O.C.G.A. §§ 24-6-611(a), 24-6-623. For the federal rule, see Fed. R. Evid. 611(a).

²Elkins v. State, 306 Ga. 351, 830 S.E.2d 217 (2019).

³Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130 (1931).

⁴See Butler v. State, 285 Ga. 518, 678 S.E.2d 92 (2009) (trial court did not abuse its discretion in shutting down defense counsel's abusive questioning of witness; defense counsel on cross-examination asked witness four times whether he would tell a lie); Hunnicutt v. State, 276 Ga. App. 547, 623 S.E.2d 714 (2005) (although a defendant is entitled to a thorough and sifting cross examination, a trial court has a duty to protect a witness from

being unfairly dealt with, and it does not abuse its discretion in prohibiting cross-examination questioning in a "rapid-fire" method); Walker v. State, 267 Ga. App. 155, 598 S.E.2d 875 (2004) (thorough cross-examination is a principal means of ascertaining the truth, but a witness has a right to be examined only as to relevant matters and to be protected from improper questions and from harsh and insulting demeanor).

[Section 15:9]

¹O.C.G.A. § 24-6-11(c); Hanson v. State, 86 Ga. App. 313, 71 S.E.2d 720 (1952); Dumas v. State, 283 Ga. App. 279, 641 S.E.2d 271 (2007). See also U.S. v. Rolle, 432 Fed. Appx. 853 (11th Cir. 2011).

answer that is desired by the examiner.² Merely because a question may be answered by “yes” or “no” does not necessarily make it a leading question.

The propriety of allowing leading questions is within the sound discretion of the trial court and is not grounds for reversal, unless it appears that this discretion has been abused and has resulted in substantial injury to the aggrieved party.³

There are numerous situations in which counsel may ask leading questions on direct examination. Leading questions are permitted on direct examination of a witness “to develop the witness’s testimony.”⁴ Counsel may lead the witness as to preliminary matters, and he may lead when the witness is a young child.⁵ Where a witness appears to be unwilling to testify it is within the court’s discretion to permit leading questions, *Barker v. State*,⁶ and where an attorney states that he has been misled by a witness whom he has called, the court may in its discretion permit leading questions.⁷ He may also lead the witness for the purpose of identifying a person in court.⁸

Where, after a series of non-leading questions, the witness is unable to produce a complete account so that his memory is exhausted, it is proper to ask a question that will revive his memory, even though the question is leading.⁹ For the calling of a hostile witness by the court, see § 2:22, *infra*, and for the impeachment of one’s own witness, see § 15:12, *infra*.

Permitting the State to lead a State’s witness by means of questioning in order to impeach the witness by use of his prior statement was found not to be error in *Miller v. State*.¹⁰ The state is allowed to ask leading questions to contend with a language barrier.¹¹ *Culler v. State*¹² allowed the State to treat a witness in a murder trial as hostile witness and use leading questions. The witness attempted to evade the state’s questions, stated he feared

²*Lowe v. Athens Marble & Granite Co.*, 104 Ga. App. 642, 122 S.E.2d 483 (1961).

³*Hanson v. State*, 86 Ga. App. 313, 71 S.E.2d 720 (1952). See *Butler v. State*, 273 Ga. 380, 541 S.E.2d 653 (2001) (the trial court has the discretion to allow leading questions).

⁴*Davis v. State*, 306 Ga. 140, 829 S.E.2d 321 (2019).

⁵*Wade v. State*, 11 Ga. App. 411, 75 S.E. 494 (1912) (overruled on other grounds by *Worthen v. State*, 304 Ga. 862, 823 S.E.2d 291 (2019)); *Grier v. State*, 257 Ga. 539, 361 S.E.2d 379 (1987).

⁶*Barker v. State*, 1 Ga. App. 286, 57 S.E. 989 (1907).

⁷*Barker v. State*, 1 Ga. App. 286, 57 S.E. 989 (1907); *Nalley v. State*, 11 Ga. App. 15, 74 S.E. 567 (1912).

⁸*Paschal v. State*, 89 Ga. 303, 15 S.E. 322 (1892).

⁹*Ethridge v. State*, 163 Ga. 186, 136 S.E. 72 (1926).

¹⁰*Miller v. State*, 261 Ga. 679, 410 S.E.2d 101 (1991).

¹¹*Dumas v. State*, 283 Ga. App. 279, 641 S.E.2d 271 (2007).

¹²*Culler v. State*, 277 Ga. 717, 594 S.E.2d 631 (2004).

for his safety and was nervous about testifying, and stated that he would “rather not” tell the jury what happened at time of shooting. A trial court has discretion to permit leading questions on direct examination when a witness is reluctant, hostile, or overly nervous.

However, errors can be made. Trial court erred in permitting prosecutor to ask leading questions in examination of co-indictee where witness invoked Fifth Amendment with respect to each question. The questions were predicated on transcript of testimony that witness had given at prior commitment hearing when neither accused nor counsel was present, which transcript was not admissible as evidence, and leading question suggested to jury answers which witness previously had given and therefore permitted prosecutor indirectly to place in evidence that which was inadmissible. Since witness also invoked Fifth Amendment on cross-examination, accused was denied right to fair and sifting cross-examination during trial.¹³

§ 15:10 Aiding witnesses by refreshing memory

Normally a witness is put on the stand to tell his story with no help from the examining attorney other than the asking of proper questions. An exception is the rule that permits a witness to refresh his memory as to facts forgotten. In Georgia’s 2013 Evidence Code, this rule appears at O.C.G.A. § 24-6-612.¹ A decision from the Supreme Court of Georgia referenced federal precedent for the proposition: “Rule 612 requires a witness whose memory has been refreshed to testify from his present recollection, rather than to merely restate the contents of the writing... It is the witness’s present refreshed recollection—as opposed to the contents of the writing used to refresh memory—that is the substantive evidence of the matter at issue.”²

The memory of a witness may be refreshed and assisted by the use of any written instrument or memorandum, provided that the witness finally speaks from his recollection thus refreshed.³

In *Miller v. State*⁴ prosecutor properly used copy of police summary of witness’ statements to police on day of murder to refresh witness’ recollection during her testimony, especially where witness did not thereafter merely repeat on the stand what she had told police. Any document may be used to refresh the recollection

¹³*Lingerfelt v. State*, 235 Ga. 139, 218 S.E.2d 752 (1975).

[Section 15:10]

¹*Jones v. State*, 340 Ga. App. 142, 796 S.E.2d 765 (2017).

²*Williams v. State*, 316 Ga. 304, 888 S.E.2d 60 (2023).

³*Kirby v. State*, 304 Ga. 472, 819 S.E.2d 468 (2018).

⁴*Miller v. State*, 275 Ga. 32, 561 S.E.2d 810 (2002).

of a witness, and the document need not have been prepared by the witness.

It is immaterial that the witness saw the memorandum for the first time on the day of the trial, that it was unsigned, that he had no copy of it in his files and that the notations thereon were made by another, provided that the witness, after inspecting the instrument, can relate the facts from his own recollection.⁵

It is essential that the witness, after looking at whatever is shown to him, can say that he now remembers the facts under inquiry and is able to testify to it without regard to the writing. It is not necessary that the memorandum be admissible in evidence.⁶ It has been held proper to permit a witness to refresh her recollection of certain letters that defendant wrote to her and which were suppressed from evidence.⁷

It has been held that it is error to refuse the opposing counsel permission to inspect the writing from which the witness refreshed his memory.⁸ The federal rule applies equally in civil and criminal cases, and there are persuasive arguments that this also is the Georgia approach. On the right of the cross-examiner to see a document which refreshed the recollection of an opposing witness in a civil case, see *Lester v. S. J. Alexander, Inc.*⁹

The *Johnson* approach was confirmed in *Sterling v. State*,¹⁰ holding that while a cross-examiner is not authorized to review documents used to refresh memory prior to the jury being sworn in a jury trial, documents used to refresh after the inception of the trial are open to inspection.

For use of such documents to impeach the witness where they contain prior contradictory statements, see § 16:8, *infra*.

This right to aid the witness through refreshing his present recollection is similar to, but not to be confused with, the doctrine of past recollection recorded, in which situation the document is admitted in evidence if the various tests are met.¹¹

§ 15:11 Prior consistent statements

The 2013 Georgia Evidence Code addresses prior consistent statements of witnesses at two places, O.C.G.A. § 24-6-613(c)

⁵*Smith v. City of Atlanta*, 22 Ga. App. 511, 96 S.E. 334 (1918).

⁶*Schall v. Eisner*, 58 Ga. 190, 1877 WL 2970 (1877).

⁷*Tarwater v. State*, 261 Ga. 655, 409 S.E.2d 660 (1991).

⁸*Johnson v. State*, 259 Ga. 403, 383 S.E.2d 118 (1989). For the federal rule, see Rule 612, Fed. R. Evid.

⁹*Lester v. S. J. Alexander, Inc.*, 127 Ga. App. 470, 473, 193 S.E.2d 860, 862 (1972) (cross-examiner should and does possess the right to quiz the witness concerning the contents of the written instrument).

¹⁰*Sterling v. State*, 267 Ga. 209, 477 S.E.2d 807 (1996).

¹¹See § 25:10, *infra*.

(prior statement admissible to rehabilitate a witness who is charged with fabrication) and O.C.G.A. § 24-8-801(d)(1)(A) and (B) (prior statements when a declarant testifies at trial, and also in instances where a hearsay statement is substitutes for live witness testimony). Under rules comports with those of Georgia’s 2013 Evidence Code, Federal courts have long forbidden witnesses to engage in self-quotation on the witnesses stand: testifying as to self-serving statements that the witnesses themselves previously made that do not fall within any hearsay exception.¹

Broadening the scope from prior Georgia law, O.C.G.A. § 24-6-613 allows for the admission of prior consistent statements if they logically rebut any attack on a witness’s credibility, except for attacks upon his character for truthfulness or evidence of his prior convictions.² Recognizing that limitations on the use of prior consistent statements remain, the Supreme Court of Georgia observes:

A prior consistent statement is not permitted to rehabilitate a general attack on a witness’s credibility, but may be “offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive” if the statement was “made before the alleged recent fabrication or improper influence or motive arose.”³

The Supreme Court of Georgia has explained the expanded pathways for the admission of prior consistent statements under O.C.G.A. § 24-6-613(c):

While the final sentence of the Code section effectively codifies our prior decisional law, see *Cowart*, 294 Ga. at 340 n.10, the first two sentences expand the admissibility criteria to cover prior statements offered to rehabilitate a witness against any attack on a witness’ credibility, other than that based on character or prior convictions, so long as the prior statement “logically rebuts” that attack. See *Walters*, 335 Ga. App. at 13–14. Reading the Code section as a whole, it is clear that a prior consistent statement will be admissible only if (1) the witness’ credibility has been attacked, by some means other than impeachment by evidence of character or prior convictions; and (2) the prior statement “logically rebuts” that attack. Further, if the attack is by a charge of recent fabrication or improper influence or motive, a prior statement may “logically rebut” the attack only if it was made before the alleged fabrication, influence, or motive came about.⁴

[Section 15:11]

¹See *U.S. v. Bradley*, 644 F.3d 1213 (11th Cir. 2011).

²*Walters v. State*, 335 Ga. App. 12, 780 S.E.2d 720 (2015).

³*Abney v. State*, 306 Ga. 448, 831 S.E.2d 778 (2019).

⁴*McGarity v. State*, 311 Ga. 158, 856 S.E.2d 241 (2021).

Accordingly, where, in a murder trial, the thrust of the defendant's cross-examination of a prosecution witness was that he fabricated a different version of events after giving a prior statement, the trial court did not err in admitting the witness's earlier, videotaped interview.⁵

Under Georgia's current Evidence Code, to be admitted, prior consistent statements are required to satisfy O.C.G.A. §§ 24-6-613(c), 24-8-801(d)(1)(A) and are not allowed if their sole purpose is simply to bolster a witness's testimony at trial.⁶ The Georgia rule on bolstering was more lenient in allowing bolstering than its federal counterpart, up until 1998. In a major decision, the Georgia Supreme Court changed directions in *Woodard v. State*.⁷ The court resoundingly aligned Georgia law with Federal Evidence Rule 801(d)(1)(B). "[A] witness' veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination." The defendant's claim that hearsay statements impermissibly bolstered a state witness' veracity was justified. "Unless a witness veracity has affirmatively been placed in issue, the witness' prior consistent statement is pure hearsay evidence which cannot be admitted merely to corroborate the witness, or to bolster the witness' credibility in the eyes of the jury."

In a case directly applying *Woodard*, a defendant's claim of improper bolstering was upheld in *Astudillo v. State*.⁸ Upon trial, an Atlanta police detective read a victim's pretrial statement to the jury. An important historical analysis of Georgia law is contained in the decision:

In *Cuzzort v. State*, a prior statement of a child molestation victim consistent with her trial testimony was admitted to rebut defense counsel's questioning concerning the possibility of recent fabrication and improper influence. Noting that the victim's veracity had been placed in issue and that at trial she was under oath and subject to cross-examination, the majority in *Cuzzort* held that her prior consistent statement was admissible as substantive evidence. Cases such as *Still v. State* held that under *Cuzzort* a prior statement of a witness is admissible as long as the witness is under oath and subject to cross-examination. But in *Woodard v. State*, the Court later disapproved this line of cases as a misinterpretation of *Cuzzort*. *Woodard* reaffirms that a prior consistent statement of a witness is not admissible unless:

⁵Dorsey v. State, 303 Ga. 597, 496 S.E.2d 896, 71 A.L.R.5th 787 814 S.E.2d 378 (2018).

⁶Allen v. State, 315 Ga. 524, 883 S.E.2d 746 (2023).

⁸Astudillo v. State, 244 Ga. App. 612, 536 S.E.2d 271 (2000).

⁷Woodard v. State, 269 Ga. 317,

- (1) the veracity of the witness' trial testimony has been placed in issue at trial;
- (2) the witness is present at trial; and
- (3) the witness is available for cross-examination.

Additionally, *Woodard* holds that a witness' veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during the trial. Usually this sort of attack on a witness comes, if at all, during a hostile cross-examination. Otherwise, "the witness' prior consistent statement is pure hearsay evidence which cannot be admitted merely to corroborate the witness, or to bolster the witness' credibility in the eyes of the jury."

The prior consistent statement must predate the time of the recent fabrication alleged against the witness in order to be admissible.⁹

Woodard was again interpreted in *Blackmon v. State*,¹⁰ where a defense attorney cross-examined along lines suggesting that an assault victim told the story differently on the witness stand than when he was interviewed by defense counsel. The court found an implication that the victim's trial testimony had been fabricated, and approved introduction during redirect examination of the witness' pretrial statement which he had given to the authorities.

However, the rules were violated by the trial court in a 2008 case. Repetition by witness of prior consistent statements made out of court by other witnesses was improper bolstering of other witnesses in *Bly v. State*.¹¹

In *Joines v. State*,¹² the issue was whether challenged hearsay testimony was an admissible prior consistent statement. The Court of Appeals ruled that a prior consistent statement is admissible only where (1) the veracity of a witness's trial testimony has been placed in issue at trial; (2) the witness is present at trial; and (3) the witness is available for cross-examination. Moreover, the court held, "a witness's veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence or improper motive are raised during cross-examination." And although the general credibility of a witness was at issue in the case, "prior consistent statements are not admissible to bolster

⁹Colzie v. State, 289 Ga. 120, 710 S.E.2d 115 (2011).

¹⁰Blackmon v. State, 272 Ga. 858, 536 S.E.2d 148 (2000).

¹¹Bly v. State, 283 Ga. 453, 660 S.E.2d 713 (2008).

¹²Joines v. State, 264 Ga. App. 558, 591 S.E.2d 454 (2003).

general credibility.” Here the court cited *Woodard v. State*, *supra*.¹³

The rule against improper bolstering of witnesses sometimes has exceptions. Although a party normally may not bolster the veracity of an unimpeached witness, the State may rehabilitate a witness whose credibility has been attacked.¹⁴

The bolstering rule and its exceptions were also identified in *Telcom Cost Consulting, Inc. v. Warren*.¹⁵ Again citing *Woodard*, the court set forth circumstances when appropriate bolstering might occur:

Under *Woodard*, a witness’s prior consistent statement is admissible if the veracity of the witness’s trial testimony has been placed in issue, the witness is present, and the witness is available for cross-examination. Here, it is undisputed that the last two factors were met; the only question is whether the veracity of Warren’s trial testimony had been placed in issue. A witness’s veracity is considered to have been placed in issue for this purpose “if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination.” This question is best answered by reciting a portion of plaintiffs’ cross-examination of Warren, when plaintiffs sought to impeach him with his deposition testimony concerning whether he had made a counter-offer regarding the sale of his stock to Lacher: “This is a case about credibility [Warren] maintained one position at one time, then his lawyer told him something different and he changed his position on the record. And the jury needs to know that to assess this man’s credibility.” This colloquy intimates both recent fabrication by Warren and improper influence by his counsel. Warren’s prior consistent statements to his wife on his issue of stock ownership were properly admitted under *Woodard* and *did not constitute a prohibited bolstering of his general credibility*. [Emphasis added.]

On the topic of the lawyer in the case or his witness vouching for the credibility of another witness, see *Evans v. State*.¹⁶

§ 15:12 Questions that impeach one’s own witnesses

Under modern law, when a party calls a witness, the same party can contradict the witness he called with a prior inconsistent statement, if he wishes to do so. Surprise on the part of the direct examiner is no longer a requirement.¹ Federal Evidence Rule 607 provides that the credibility of a witness may be at-

¹³For more on prior consistent statements, see § 29:21, *infra*.

¹⁴*Robinson v. State*, 275 Ga. App. 537, 621 S.E.2d 770 (2005).

¹⁵*Telcom Cost Consulting, Inc. v. Warren*, 275 Ga. App. 830, 621 S.E.2d 864 (2005).

¹⁶*Evans v. State*, 288 Ga. App. 103, 653 S.E.2d 520 (2007) (credibility of victim or state’s witness may not be bolstered by an officer’s testimony).

[Section 15:12]

¹*Pryor v. State*, 198 Ga. App. 588, 402 S.E.2d 338 (1991).

tacked by any party, including the party calling the witness.²

In the 2013 Evidence Code for Georgia, the new statute explicitly copies Fed. R. Evid. 607.³

Impeaching a party's own witness allowed, see *Blackburn v. State*,⁴ wherein the defendant's roommate testified for the state but denied telling the police about certain statements Blackburn made to her. To rebut this testimony, the prosecutor successfully offered the witness' prior statement made to the police. The court stated that a party may impeach its own witness with a prior inconsistent statement.

A showing of surprise is not required to impeach a party's own witness. In *Knight v. State*,⁵ the State was held to be authorized to use a prior inconsistent statement to impeach a witness it had called without a showing of surprise or entrapment.

In *Wilson v. State*,⁶ the State called Powell to the stand. Instead of incriminating the defendant as expected, Powell said he made up his prior story about Wilson's involvement. The prosecutor gained permission to treat Powell as a hostile witness and interrogated him by leading questions. Later, an investigator testified to Powell's prior testimony which impeached him. If a witness is determined by the court to be hostile or unwilling, he may be examined, as if under cross-examination, by the party calling him.

Georgia jurisprudence provides that a party in a civil case can call to the stand an opposing party or agent and subject him to a thorough and sifting cross examination, with the further privilege of impeachment. See O.C.G.A. § 24-6-611(c). This section of the text opened with an analysis of the right to impeach one's own witness with prior contradictions. What about other methods of affecting the credibility of one's own witness?

An issue sometimes arises regarding attacking one's own witness with his past crimes. A party may impeach his or her own witness with a prior inconsistent statement.⁷ What about impeaching one's own witness with a prior conviction? Although the requirement that the impeaching party be surprised by the witness' testimony has been removed, Georgia law still requires as a threshold matter a showing that the witness' trial testimony is inconsistent with his prior statements. Absent this fact, no

²U.S. v. Funt, 896 F.2d 1288 (11th Cir. 1990). 688, 512 S.E.2d 896 (1999).

³O.C.G.A. § 24-6-607, eff. Jan. 1, 2013. ⁵Knight v. State, 266 Ga. 47, 464 S.E.2d 201 (1995).

⁴Blackburn v. State, 266 Ga. 541, 468 S.E.2d 381 (1996). ⁶Wilson v. State, 258 Ga. App. 166, 573 S.E.2d 432 (2002).

Accord, Speed v. State, 270 Ga. S.E.2d 896 (1999). ⁷Speed v. State, 270 Ga. 688, 512 S.E.2d 896 (1999).

impeachment may be made by prior conviction or other means.⁸ Accordingly, as a general rule, before attacking one's own witness with a prior conviction, the attacking party must show that the witness on the stand contradicted his earlier statements.

Former O.C.G.A. § 24-9-81 was revised, in a commendable clarification, to read (in pertinent part) exactly like Fed. R. Evid. 607. This change was contained in the 2005 Criminal Justice Act. The surprise doctrine had been excised from the law by judicial fiat, and the legislature made that approach the official statutory one in the Code. In the 2013 Code, see O.C.G.A. § 24-6-607.⁹

How does impeaching one's own witness work? Suppose that in the hallway outside the courtroom the witness assures the plaintiff's attorney that he will come through for the plaintiff in a car wreck case. "Look," he tells plaintiff's counsel, "I saw the whole thing and your guy—the driver of the silver Honda—had the green light." The witness is now called to the stand.

Q. Will you please state your name?

A. Willis X. Fortson.

Q. Where do you live?

A. 920 Madison Avenue in this city.

Q. What is your business or occupation?

A. Plumber. I have worked for Reliable Plumbing for 12 years.

Q. Going back to last June 12, do you remember something unusual that day?

A. Big accident. I was outside a job near the corner of Broad and High Streets, taking a break and having a smoke. I saw the whole thing.

Q. Could you please tell us what happened?

A. Sure. The silver Honda came from the east on Broad Street, approached the intersection at a high rate of speed, and ran the red light. Then the big crash with the black Cadillac.

Q. Mr. Fortson, I believe you may be mistaken as to the car which ran the red light. Wasn't it the black Cadillac?

A. No way. It was the silver Honda that blew the red light.

Q. Mr. Fortson, I now hand you a signed statement which has been marked plaintiff's exhibit 9 for identification. Will you please look at it?

A. Sure. **(witness does so)**

⁸Jones v. State, 270 Ga. 25, 505 S.E.2d 749 (1998) (overruled on other grounds by, Hamm v. State, 294 Ga. 791, 756 S.E.2d 507 (2014)).

⁹See Edwards v. State, 293 Ga. 612, 748 S.E.2d 870 (2013).

- Q. Does that jog your memory about who ran the red light?
- A. Well, it says at the top “Statement of Willis Fortson,” and that is my signature at the bottom, but no, I say it was the Honda that was in the wrong.
- Q. You do recognize this statement as the one you signed in my office just one month after the wreck?
- A. Yes.
- Q. And you freely signed it, after describing the accident in your own words to my investigator?
- A. Yes.
- Q. Do you remember saying this, and for the record, I am reading from the second paragraph of the witness’ prior statement: “The silver Honda waited for the green light, then went into the intersection real slow.”?
- A. Let me see my writing. (**witness looks at Plaintiff’s Exhibit 9 for identification**) Yes, I guess I did say exactly that.
- Q. What statement was given closer to the time of the accident, your testimony today or the one you just read?
- A. The one I just read, of course.

Plaintiff’s Attorney: That’s all.¹⁰

§ 15:13 Testimony that tends to incriminate witnesses

Under the Georgia Constitution, no person shall be compelled to give testimony which tends in any manner to incriminate him.¹ The privilege against self-incrimination is not dependent upon the nature in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.² The privilege applies both in court and in investigations before quasi-judicial bodies to examinations before legislative bodies and committees and to examinations before an officer or a body that has power to subpoena and compel the attendance of witnesses.³

The purpose of the privilege is to protect the witness from prosecution and punishment based on his own testimony.

A self-incriminating statement made by a party during a hear-

¹⁰R. Carlson, A Student’s Guide to Elements of Proof 98 (2004).

[Section 15:13]

¹See O.C.G.A. §§ 24-5-505 and

24-5-506.

²McCarthy v. Arndstein, 266 U.S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924).

³Am. Jur. 2d, Witnesses §§ 87 to 90, 101, 102.

ing for temporary child support in a paternity suit she had brought against her biological father, who also happened to be the biological father of the child, was not voluntary, thus could not be used against the party in prosecution for incest.⁴

Some jurisdictions hold that the privilege does not protect the witness from giving testimony which tends to bring infamy, disgrace or public contempt upon him or his family. In Georgia, however, the privilege is extended to cover such situations.⁵ The Georgia privilege is more expansive in other respects as well. The Georgia constitutional protection against self-incrimination is broader than the federal protection, because while the United States constitutional protection applies only to “testimony,” the Georgia Constitution applies to both oral and real evidence.⁶

Although the criminal defendant can make a blanket assertion of the privilege against self-incrimination, ordinary witnesses and parties in a civil case must respond to a subpoena and assert the privilege in response to specific questions.⁷

Once a witness has clearly asserted a valid privilege, it is improper for the prosecution to ask the witness leading questions regarding facts in the case.⁸ In civil cases, on the other hand, it is permissible for parties to comment upon a witness’s assertion of the privilege.⁹

The privilege against self-incrimination is personal and applicable to natural persons. Thus, the official records and documents of organizations, such as a corporation, may not be withheld by their custodian under a claim of this privilege, even though certain matters therein contained might tend to incriminate the custodian himself.

A criminal defendant has no standing to raise questions as to the violation of the witness’ rights under Georgia law.¹⁰

The Georgia Supreme Court held that it is not error to allow an eyewitness to invoke the Fifth Amendment to avoid answering a cross-examination question regarding a statement made to the investigating officer the day after the incident, as the officer testified and was cross-examined about the statement.¹¹

⁴Adcock v. State, 263 Ga. 759, 438 S.E.2d 910 (1994).

⁵O.C.G.A. § 24-5-505. But see § 15:19, *infra*.

⁶Fortune v. State, 300 Ga. App. 550, 685 S.E.2d 466 (2009).

⁷Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 630 S.E.2d 77 (2006).

⁸Horne v. State, 281 Ga. 799, 642 S.E.2d 659 (2007).

⁹See, e.g., *In re A.A.*, 293 Ga. App. 471, 667 S.E.2d 641 (2008) (deprivation hearing).

¹⁰Riley v. State, 257 Ga. 91, 355 S.E.2d 66 (1987).

¹¹Jenkins v. State, 260 Ga. 231, 391 S.E.2d 397 (1990).

§ 15:14 Necessity for court to warn witnesses of privilege

It is proper for the court to inform a witness that he has the right to refuse to answer questions which would incriminate or tend to incriminate him.¹ In carrying out this advising function, how much of it can be done in front of the jury? Instruction of witness in front of jury as to his right to refuse to testify and say anything that might tend to incriminate him was not error on ground that procedure prejudicially implied to jury that witness was placing himself in peril by giving testimony.² It should be noted that statutory prohibitions barring comment on defendant's failure to testify apply only when defendant fails to testify and, thus, trial court did not err by instructing defendant, in presence of jury, that he was not obliged to testify.³

§ 15:15 Extent of privilege against self-incrimination

The privilege extends to any proposed evidence that has a tendency to incriminate the witness or to establish a link in the chain of evidence which may lead to his conviction. It extends to the production of books and records which would tend to incriminate him.

In federal practice, a guilty plea is not a waiver of the defendant's privilege against self-incrimination in the sentencing phase of the case, at least before the sentence has been imposed.¹

In a law review article,² the author observes: "The rhetoric of the court in recent years indicates a willingness to embrace the federal testimonial standard" There have been decisions allowing police to swab a suspect's hands and requiring a defendant to strip to the waist and be photographed.³ In 2017, the Georgia Supreme Court, overruling a line of previous decisions, held definitively that the Georgia Constitution's protection against compelled self-incrimination protects against compelled breath tests, and the right to refuse to submit to such testing is a constitutional right.⁴ Because chemical testing of blood, breath or urine implicates Fourth Amendment rights, any consent thereto

[Section 15:14]

¹Tate v. State, 41 Ga. App. 300, 152 S.E. 609 (1930).

²Jones v. State, 162 Ga. App. 502, 291 S.E.2d 103 (1982).

³Bell v. State, 226 Ga. App. 271, 486 S.E.2d 422 (1997).

[Section 15:15]

¹Mitchell v. U.S., 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424

(1999).

²Note, The Georgia Right Against Self-Incrimination, 15 Ga. L. Rev. 1104 (1980).

³See, e.g., State v. Thornton, 253 Ga. 524, 322 S.E.2d 711 (1984) (court-ordered taking of dental impressions from defendant did not violate privilege).

⁴Olevik v. State, 302 Ga. 228, 806 S.E.2d 505 (2017).

must be voluntary. In vehicle cases implied consent warnings must be adequate, but do not need to inform the motorist that alcohol test results may be used in a DUI prosecution.⁵

Just as a criminal defendant has a right to not testify, he also has a right to take the stand.⁶ However, the defendant was not denied constitutional right to testify on his behalf in prosecution for malice murder, where defendant decided, on advice of counsel, not to testify.⁷

Georgia historically has applied an active versus passive conduct distinction to privilege questions. The accused could not be asked to cooperate to supply evidence against himself. However, modernly Georgia seems to be moving to the federal view that seizure of bodily substances does not abridge the privilege against self incrimination. This is true even though a modicum of cooperation is required from the accused. The privilege against self-incrimination protects one from being compelled to testify against himself or otherwise provide the State with evidence of testimonial or communicative nature; testimonial communication must itself, explicitly or implicitly, relate factual assertion or disclose information. Response to a request to take alcohol breath test is neither testimonial nor communicative, but is neutral in effect and not protected by the privilege against self-incrimination. Accordingly, results of driver's alcohol breath test were not protected by privilege against self-incrimination, and thus, failure to give *Miranda* warnings prior to arrests did not require suppression of test results.⁸

Similarly, field sobriety tests are not statements, so the responses are not inadmissible even if no *Miranda* warnings are given.⁹

In connection with field sobriety tests, a 2019 Georgia Supreme Court decision observed that neither “OCGA § 24-5-506(a) or the Georgia Constitution requires law enforcement to warn suspects in custody of their right to refuse to perform an incriminating act.”¹⁰

Stepping away from earlier precedent, in 2022 the Supreme Court of Georgia held that the admission of pre-arrest refusal to

⁵Lutz v. State, 274 Ga. 71, 548 S.E.2d 323 (2001) (overruled on other grounds by, Olevik v. State, 302 Ga. 228, 806 S.E.2d 505 (2017)). Proof of intoxication, see § 29:9, *infra*.

⁶State v. Nejad, 286 Ga. 695, 690 S.E.2d 846 (2010) (“A criminal defendant has a constitutional right to testify in his or her defense, that right is personal to the defendant, and the decision whether to testify is made by

the defendant after consultation with counsel.”).

⁷Lopez v. State, 274 Ga. 663, 558 S.E.2d 698 (2002).

⁸State v. Carraway, 251 Ga. App. 469, 554 S.E.2d 602 (2001).

⁹Razor v. State, 259 Ga. App. 196, 576 S.E.2d 604 (2003).

¹⁰State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (2019).

undergo a sobriety test in trial for driving under the influence (DUI) violates the right against self-incrimination.¹¹

Similarly, Georgia's Constitution precludes the admission into evidence of an intoxicated driving suspect's refusal to submit to a breath test.¹²

However, a criminal defendant's self-incrimination rights were not violated by the introduction of testimony pertaining to his refusal to submit to law enforcement swabbing his hands in order to test for gunshot residue.¹³

For more analysis of the privilege against self-incrimination, see § 18:15, *infra*.

For a discussion of the right to inspect the person or his body, see § 15:17, *infra*.

Questions invading right to silence, see *Bly v. State*.¹⁴

A prosecutor may not make any comment upon a criminal defendant's failure to testify at trial.¹⁵ However, in *Raheem v. State*,¹⁶ the prosecutor's error in commenting on a defendant's failure to testify in murder prosecution was harmless; comment in question did not appear designed to or likely to have urged any negative inference, and trial court had given charge to jury regarding prosecutor's comment. In similar fashion, *Frazier v. State*¹⁷ held that improper reference to a defendant's silence does not automatically require reversal.

Prosecutor's comment during closing argument in felony murder prosecution, asserting that "not one witness came in here to dispute anything that the State's witnesses said," was not an improper comment on defendant's right to remain silent, but instead merely referred to defendant's failure to present evidence.¹⁸

In determining whether a prosecutor has improperly commented on an accused's failure to testify, court must evaluate whether the prosecutor's manifest intention was to comment on the accused's failure to testify or whether the remark was of such a character that a jury would naturally and necessarily take it to be a comment on the accused's failure to testify. In a 2005 case, a prosecutor's statement during closing argument, which declared

¹¹*Ammons v. State*, 315 Ga. 149, 880 S.E.2d 544 (2022). Compare *Keller v. State*, 286 Ga. App. 292, 648 S.E.2d 714 (2007).

¹²*Elliott v. State*, 305 Ga. 179, 824 S.E.2d 265 (2019).

¹³*Williams v. State*, 318 Ga. 83, 896 S.E.2d 109 (2024).

¹⁴*Bly v. State*, 283 Ga. 453, 660 S.E.2d 713 (2008).

¹⁵O.C.G.A. § 24-5-506.

¹⁶*Raheem v. State*, 275 Ga. 87, 560 S.E.2d 680 (2002).

¹⁷*Frazier v. State*, 249 Ga. App. 463, 549 S.E.2d 133 (2001).

¹⁸*Brown v. State*, 278 Ga. 544, 604 S.E.2d 503 (2004).

that state did not have to prove that the crime happened at a specific time, “unless he’s claiming an alibi, which he is not,” did not amount to improper comment on defendant’s failure to testify. In this prosecution for malice murder the prosecutor’s intent was to explain to the jury that state did not have to prove the exact time that the crime occurred, and statement was not of such a character that the jury would naturally and necessarily have taken it as a comment on defendant’s failure to testify.¹⁹

A reference to the defense’s failure to call a potential witness and subject him to cross-examination did not reflect a manifest intention by the prosecutor to comment on the defendant’s failure to testify.²⁰

There was no manifest intention to comment on the defendant’s failure to testify in the prosecutor’s objection to admission of defendant’s self-serving statement, when the statement was offered by the defense.²¹

Privilege to remain silent and its relation to immunity law, see *In re Long*.²²

Generally, a probationer has no Fifth Amendment privilege with regard to questions relevant to the status of his or her probation.²³

A criminal defendant’s effort to establish standing to challenge seizure of evidence often requires him to take the stand at a suppression hearing. Does this testimony on a preliminary matter supply trial evidence against the accused? Has this preliminary testimony broadly waived a defendant’s Fifth Amendment protection when the accused comes to trial? Can the prosecutor use the transcript of the defendant’s suppression hearing testimony in order to convict the accused at a later trial? No, says *Simmons v. U.S.*²⁴

Introduction of suppression hearing testimony to impeach the accused may stand on a different footing from using the testimony as substantive evidence of guilt.²⁵ Georgia allows evidence from bond hearings or committal hearings to be used against a defendant at trial, as well as evidence from probation revocation

¹⁹*Washington v. State*, 279 Ga. 722, 620 S.E.2d 809 (2005).

²⁰*Cockrell v. State*, 281 Ga. 536, 640 S.E.2d 262 (2007).

²¹*Eason v. State*, 283 Ga. App. 574, 642 S.E.2d 207 (2007).

²²*In re Long*, 276 Ga. App. 306, 623 S.E.2d 181 (2005).

²³*Nelson v. State*, 259 Ga. App. 584, 578 S.E.2d 173 (2003).

²⁴*Simmons v. U.S.*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).
Accord, *Culpepper v. State*, 132 Ga. App. 733, 209 S.E.2d 18 (1974).

²⁵*U.S. v. Jaswal*, 47 F.3d 539 (2d Cir. 1995) (suppression hearing testimony may be used to impeach).

hearings.²⁶

Also related to the defendant's appearance as a witness at his suppression hearing are other procedural questions. One is the scope of the prosecutor's cross-examination. Fed. R. Evid. 104(d) provides that when the accused testifies on a preliminary matter, he doesn't open himself up to cross-examination as to other issues in the case. Georgia adheres to this view in the revised Evidence Code effective January 1, 2013.²⁷

For a 2014 law review article addressing this concern. Carlson & Carlson, *Unconstitutionality And the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining The Accused*, 7 J. Marshall L.J. (Aug. 2014).

§ 15:16 Invoking privilege against self-incrimination

As a rule, the privilege must be invoked by the person who possesses it. Under older cases, a witness can only claim the privilege after he has taken the stand and has been asked an incriminating question.¹ The accused in a criminal case is in a different position since he is not required to take the stand at all.

A witness or party cannot be made to claim the privilege in front of the jury. Rather, the court will make a record regarding the matter away from the jury's presence, particularly where a witness' taking of the Fifth might be prejudicial to the cause of one of the litigants. A prosecutor, for example, cannot call to the stand a friend or associate of the accused simply for the purpose of having the witness invoke the privilege when the prosecutor asks about the defendant. Prior knowledge by the prosecutor that the witness plans to claim the privilege dictates careful handling of the matter. By the same token, it is improper for the defense to show the jury that the witness relies on the Fifth Amendment.²

An extension of the foregoing principles involves extended courtroom interrogation of a witness who takes the Fifth. The matter came up in *Allison v. State*.³ The decision cites authorities which condemn procedures under which the State is allowed to call a witness who has notified court and counsel he will not answer any questions, and interrogate him by leading questions. These questions often suggest the guilt of the defendant. This

²⁶*Cowards v. State*, 266 Ga. 191, 465 S.E.2d 677 (1996); *Bobbitt v. State*, 215 Ga. App. 131, 449 S.E.2d 674 (1994) (no violation of Fifth Amendment).

²⁷See O.C.G.A. § 24-1-104(d).

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¹*Pledger v. State*, 77 Ga. 242, 3

S.E. 320 (1887).

²*Sweat v. State*, 226 Ga. App. 88, 485 S.E.2d 259 (1997) (forbidden to parade witness in front of jury for sole purpose of having him invoke the Fifth).

³*Allison v. State*, 259 Ga. App. 775, 577 S.E.2d 845 (2003).

condemned practice was found to have not occurred in Allison.

In a related context, federal decisions have opined that a Fifth Amendment waiver is “proceeding-specific,” such that waiving Fifth Amendment rights for a deposition did not necessarily effectuate a Fifth Amendment waiver for purposes of trial.⁴

Whether to testify in one’s own defense is a tactical decision to be made by the defendant himself after consultation with his trial counsel, and generally, there is no requirement that a trial court interject itself into that decision-making process. After being informed, it is the defendant and not the attorney that is to make the ultimate decision about whether the defendant will testify in his own behalf. Defendant made a knowing, intelligent, and voluntary decision not to testify in a 2006 case, independently of defense counsel’s announcement that the defense would rest following presentation of State’s case. The defendant told trial court that he would not be presenting any evidence.⁵

In a criminal action, what if one of the defendants in a case involving two or more defendants calls a codefendant to the stand for the purpose of firing incriminating questions at him? What if the witness on the stand has already announced he will invoke his right to remain silent as to all questions? In *Billings v. State*,⁶ the Georgia Supreme Court ruled that if it appears that a witness intends to claim the privilege against self-incrimination as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. Neither side has the right to benefit from any inferences the jury may draw simply from a witness’ assertion of the privilege against self-incrimination to questions that have been put to him.

When a claim of privilege is asserted, it is up to the judge to decide if there is a real and appreciable danger that the answer could incriminate the witness. If so, then the decision on whether to answer must be left to the witness, but if the trial court determines that the answers could not incriminate the witness, the witness is required to answer or face the court’s sanction.⁷ If a witness’s refusal to answer a question, whether because the answer could incriminate him or because the witness violates the court’s order to answer, denies a party a thorough and sifting cross-examination of the specifics of the witness’s testimony on direct, then the trial court is authorized to strike that witness’s direct testimony. However, if a witness’s invocation of the privilege against self-incrimination on cross-examination relates to a

⁴In re Flint Water Cases, 53 F.4th 176 (6th Cir. 2022).

⁵Price v. State, 280 Ga. 193, 625 S.E.2d 397 (2006).

⁶Billings v. State, 278 Ga. 833, 607 S.E.2d 595 (2005).

⁷Cody v. State, 278 Ga. 779, 609 S.E.2d 320 (2004).

collateral issue or to his general credibility, then the testimony given on direct examination need not be stricken.

§ 15:17 Inspection of person of accused or witnesses

Under both the Fifth and Fourteenth Amendments to the Constitution, the privilege against self-incrimination guarantees the right to remain silent, unless the individual chooses to speak, and does not extend to situations where testimonial compulsion is not involved. For example, there is no violation of the privilege where a blood sample is taken from the accused and discloses sufficient alcohol in the blood to indicate intoxication.¹

In a gang-homicide prosecution, the Georgia Supreme Court determined: (1) there was probable cause supporting the search warrant to obtain photograph of the defendant's Bloods gang tattoos; and (2) requiring the defendant to lift up his shirt so that the tattoos could be photographed did not violate the defendant's right against self-incrimination.² The defendant's convictions were affirmed.

The exhibition of a criminal suspect does not violate his privilege against self-incrimination. Compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance.³ It is proper to compel an accused to try on a blouse to see if it fits him.⁴

Federal cases are in accord. A decision notes that "the trial court could, if it so concluded, direct Defendant to display his scar to the jury."⁵ A federal district court observes:

It is beyond dispute that the Constitution does not protect Defendant from giving non-testimonial evidence. . . . Federal courts have therefore held that photographing a defendant's tattoos for display to the jury or requiring a defendant to reveal his tattoos to a jury does not run afoul of the Fifth Amendment.⁶

Similarly, there is no violation of the privilege against self-incrimination in the introduction of evidence of measurements or in requiring one to speak for identification, assume a certain

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(1967).

¹*Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

²*Anglin v. State*, 302 Ga. 333, 806 S.E.2d 573 (2017).

³*U.S. v. Wade*, 388 U.S. 218, 221, 87 S. Ct. 1926, 18 L. Ed. 2d 1149

⁴*Holt v. U.S.*, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021 (1910).

⁵*United States v. Spencer*, 2015 WL 13237473 (D. Minn. 2015).

⁶*U.S. v. Nixon*, 2015 WL 4430176 (E.D. Mich. 2015).

stance, walk, or make a particular gesture⁷ or the taking of exemplars such as handwriting.⁸ Modernly, court orders requiring a defendant to try on a jacket for identification purposes or to supply a dental impression will likely be upheld as constitutional.⁹

Using a written statement a defendant made to authorities in an unrelated rape case as a handwriting exemplar in a murder prosecution did not violate the defendant's Fifth Amendment right against self-incrimination, even though the contents of the statement were suppressed in the rape case because of an improper interrogation after the defendant had requested counsel.¹⁰

Taking the fingerprints of a defendant lawfully arrested does not violate his privilege against self-incrimination.¹¹ But, forcing an emetic through a tube to cause the accused to vomit morphine capsules is a violation of due process under the Fourteenth Amendment.¹²

Defendant's privilege against self-incrimination was not violated by his being required to submit to a chemical test to determine whether he had recently fired a firearm.¹³

Requiring a blood test for the purpose of proving or disproving paternity does not compel a defendant to be a witness against himself in violation of either the U.S. or Georgia Constitutions.¹⁴

Requiring defendant to strip to his waist and be photographed neither compelled him to be a witness against himself nor compelled him "to give testimony tending in any manner to be self-incriminating."¹⁵

Generally, police station lineup—as opposed to conventional lineup—is not favored, but is necessary in each case to consider totality of circumstances. Things to consider in determining likelihood of misidentification include opportunity of a witness to view criminal at time of crime, witness' degree of attention, accuracy of witness' prior description of criminal, level of certainty demonstrated by witness at confrontation, and length of time between

⁷*Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

⁸*Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967).

⁹See the analysis in § 18:15, *infra*.

¹⁰*Ward v. State*, 262 Ga. 293, 417 S.E.2d 130 (1992).

¹¹*Bell v. State*, 278 Ga. 69, 597 S.E.2d 350 (2004); *Am. Jur. 2d, Crimi-*

nal Law §§ 799, 1020.

¹²*Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).

¹³*English v. State*, 234 Ga. 602, 216 S.E.2d 851 (1975).

¹⁴*Pinson v. State*, 194 Ga. App. 506, 391 S.E.2d 28 (1990).

¹⁵*Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984). See *Bell v. State*, 278 Ga. 69, 597 S.E.2d 350 (2004) (photographing defendant).

crime and confrontation. In-court identification of defendant was not tainted by improper pretrial identification at police station where victim was kidnapped by hitchhikers and kept in his car at pistol point during four and a half hour drive prior to escaping, and where identification was made shortly after escape.¹⁶

Blood, hair and finger-scraping samples were properly admitted against a defendant where the defendant voluntarily consented to the taking of such samples.¹⁷

Scraping of fingernails which produced incriminating material was approved in *Cupp v. Murphy*.¹⁸ The privilege does not bar minimal intrusions on a suspect's bodily integrity. When major intrusions are involved, like forced surgery to remove a bullet from a defendant's chest, lines have sometimes been drawn.¹⁹

The state cannot compel a person to commit an act which will have the result of creating incriminating evidence against him, whereas the state may force a person to submit to procedures reasonably undertaken to recover existing evidence from him, even to the point of invading his body against his consent.²⁰ Statute requiring any person convicted of felony and incarcerated in state correctional facility to provide sample for DNA analysis to determine identification characteristics did not violate defendant's right under state constitution to not incriminate himself; statute did not force convicted felon to disclose incriminating evidence but only to submit his body for purpose of having evidence removed.²¹

A court order for a psychiatric examination of a defendant which put defendant's attorneys on notice that he would be evaluated for his ability to distinguish right from wrong at the time of the crime was not in violation of the defendant's right not to incriminate himself. The defendant was advised prior to evaluation that he could refuse to answer any questions about his case, problem or mental condition, that anything he said could be brought out in court and that he could stop the examination at

¹⁶*Sherwin v. State*, 234 Ga. 592, 216 S.E.2d 810 (1975).

¹⁷*Pruitt v. State*, 258 Ga. 583, 373 S.E.2d 192 (1988).

¹⁸*Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973).

¹⁹Compare *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (forced removal of bullet from chest of armed robbery suspect barred; compelled surgical intrusion into person's body for evidence deemed

unreasonable) with *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972) (trial court order directing removal of bullet under direction of hospital's chief surgeon was not error).

²⁰*Georgia Peace Officers Standards and Training Council v. Anderson*, 290 Ga. App. 91, 658 S.E.2d 840 (2008).

²¹*Quarterman v. State*, 282 Ga. 383, 651 S.E.2d 32 (2007).

any time for consultation with his attorneys.²²

The trial court's order to compel a psychiatric examination of a murder defendant did not violate his privilege against self-incrimination under the Fifth and Fourteenth Amendments of the U.S. Constitution. This claim was reviewed in federal habeas corpus after the accused was convicted in Cobb County Superior Court of rape and murder. During the trial, the psychiatrist at no time referred to any remarks made to him by the accused. The psychiatrist merely testified that he had interviewed the prisoner.²³

Admission of statements defendant made to state expert during psychological examination did not violate defendant's Fifth Amendment right against self-incrimination in murder trial, where such statements were introduced to rebut defendant's claim of mental illness.²⁴

The use of a wine sample did not violate a defendant's state constitutional right against self-incrimination where the evidence of cocaine metabolites in the defendant's wine was sufficient to authorize his conviction for possession of cocaine where there was also evidence of the period of time necessary for the cocaine to be reduced to metabolites in wine.²⁵

For involuntary intoxication tests, see § 24:33, *infra*.

§ 15:18 Ruling upon existence of privilege against self-incrimination

The appropriate course where a witness invokes his right to remain silent is as follows: First, the trial court must determine if the answers could incriminate the witness. If so, then the decision whether it might must be left to the witness. On the other hand, where the trial court determines the answers could not incriminate the witness, he must testify or be subject to the court's sanction.¹ It is for the court to decide if the danger of incrimination is "real and appreciable."²

The privilege against self-incrimination is analyzed in § 15:15, *supra*. Whether a witness who denied wrongdoing could nonetheless claim a valid Fifth Amendment privilege was adjudicated in

²²Christenson v. State, 261 Ga. 80, 402 S.E.2d 41 (1991). [Section 15:18]

²³Presnell v. Zant, 959 F.2d 1524 (11th Cir. 1992).

²⁴Durham v. State, 281 Ga. 208, 636 S.E.2d 513 (2006).

²⁵Green v. State, 260 Ga. 625, 398 S.E.2d 360 (1990).

¹Williams v. State, 295 Ga. App. 249, 671 S.E.2d 268 (2008).

²Lawrence v. State, 257 Ga. 423, 360 S.E.2d 716 (1987).

Ohio v. Reiner.³ The U.S. Supreme Court held that even if a witness denies all culpability, the Fifth Amendment protection is available to such a witness where the facts sustain a claim of privilege.

§ 15:19 When privilege against self-incrimination is lost

The privilege is not available if the witness has been convicted or acquitted of the crime in question or has been pardoned or received amnesty.¹ The privilege is not available to a witness where it is apparent that the offense that might be disclosed is barred by the statute of limitations.² The existence of a pending motion to set aside a conviction can, however, impact the analysis.³

Like most privileges, the privilege against self-incrimination may be waived, but a waiver of the privilege at one trial generally does not constitute a waiver at a subsequent proceeding.⁴

However, a witness who is previously tried for participating in murder and testifies at his own trial loses his Fifth Amendment privilege against self-incrimination in a subsequent trial of an accomplice for the same crime.⁵

A defendant who testified at his first trial, which resulted in a hung jury, lost his privilege concerning self-incrimination, and although the defendant did not take the stand at his second trial, it was not improper for the prosecution to introduce his prior testimony into evidence.⁶

On retrial of a criminal case, it was proper to admit the testimony of the defendant from his first trial.⁷

The general rule in Georgia that if an accused testifies, with some exceptions, he or she shall be sworn as any other witness and cross-examined as any other witness.⁸ A defendant who testifies on his behalf waives his privilege against self-incrimination to the extent of that testimony.⁹ By taking the stand and testifying that he had driven a car that had been reported stolen,

³*Ohio v. Reiner*, 532 U.S. 17, 121 S. Ct. 1252, 149 L. Ed. 2d 158, 55 Fed. R. Evid. Serv. 1171 (2001).

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¹Am. Jur. 2d, Witnesses §§ 131, 133 to 135, 142, 143.

²*McCormick on Evidence* § 121(a).

³See *Duvall v. State*, 259 Ga. 801, 387 S.E.2d 880 (1990).

⁴*Georgia R.R. & Banking Co. v. Lybrend*, 99 Ga. 421, 27 S.E. 794

(1896).

⁵*Cates v. State*, 245 Ga. 30, 262 S.E.2d 796 (1980).

⁶*Edison v. State*, 256 Ga. 67, 344 S.E.2d 231 (1986).

⁷*Henderson v. State*, 257 Ga. 434, 360 S.E.2d 263 (1987).

⁸O.C.G.A. § 24-5-506(b). See also *McKoy v. State*, 303 Ga. 327, 812 S.E.2d 293 (2018).

⁹*Reedman v. State*, 265 Ga. App. 162, 593 S.E.2d 46 (2003).

defendant waived his privilege against self-incrimination and could be compelled to answer questions regarding his possession of the car.

At minimum, state must grant unconditional use and derivative use immunity to witness in order to remove her privilege not to testify in self-incriminating manner.¹⁰

Attorney may be required to answer questions which are intended to establish that attorney rendered ineffective assistance of counsel, even though answers to these questions may tend to bring him into public disgrace or contempt; materiality of evidence outweighs testimonial privilege.¹¹

§ 15:20 Use of lie detector (polygraph) tests

The results of a polygraph examination are inadmissible except by stipulation of the parties.¹

Where the prosecution offered evidence regarding a lie detector examination which had been given to the victim of an alleged rape and, upon objection, the court excluded such evidence and instructed the jury to disregard the fact that such a test had been given, the failure of the trial court to grant a new trial, if error, was harmless.²

Where two persons were accused of homicide and one pleaded guilty to manslaughter and received 15 year sentence and was chief prosecution witness against the other, who was tried on charge of first degree murder with State seeking death penalty, it was error to admit testimony which revealed that both accused persons had been given polygraph tests since jury might have inferred that, since one accused was allowed to enter plea of voluntary manslaughter while State was demanding death penalty for the other, first had passed lie detector test while second had miserably failed his.³

Results of polygraph test are not admissible in evidence; alleged victim of crime is not required to submit to polygraph test, and his refusal to submit to such test cannot have effect of impeaching him, so that testimony as to such refusal is not admissible for impeachment purposes.⁴

Evidence that the State's key witness had taken a polygraph

¹⁰Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75 (1977). (2008); Norman v. State, 278 Ga. App. 497, 629 S.E.2d 489 (2006).

¹¹Brown v. State, 242 Ga. 536, 250 S.E.2d 438 (1978).

²Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974).

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¹Thornton v. State, 279 Ga. 676, 620 S.E.2d 356 (2005); Hortman v. State, 293 Ga. App. 803, 670 S.E.2d 99

³Stack v. State, 234 Ga. 19, 214 S.E.2d 514, 88 A.L.R.3d 216 (1975).

⁴Houser v. State, 234 Ga. 209, 214 S.E.2d 893 (1975).

test was properly admitted where its purpose was to show the reasons for the investigator's conduct and why he sought an arrest warrant for the defendant; the defendant had opened the door to this type of testimony by focusing on the police investigation in his cross-examination of the investigating officer.⁵ However, Georgia generally continues to exclude lie detector tests except where results are admissible by agreement "or to explain an actor's conduct."⁶ The Georgia Supreme Court addressed a defendant's right to introduce polygraph results in *Robertson v. State*.⁷ Absent a stipulation of admissibility from the State, exclusion was approved.

For a case demonstrating use of a polygraph stipulation wherein the defendant agrees to the admissibility of test results, see *Harris v. State*.⁸

Results of a polygraph test are sufficient corroboration of an accomplice's testimony to justify conviction for statutory rape.⁹

The United States Supreme Court reached a similar decision in 1998. In *U.S. v. Scheffer*,¹⁰ the defendant sought to lay a foundation for the admission of favorable polygraph results. His request was denied, and the denial was approved by the Supreme Court.

Testimony that a prosecution witness took a polygraph test, according to *Cromer v. State*,¹¹ cannot be used to bolster the credibility of a state's witness. A slender exception to the rule of exclusion may exist where such evidence goes not to credibility but to explain motives.

Upon express stipulation of parties that they shall be admissible, results of lie detector test shall be admissible as evidence for jury to attach to them whatever probative value they may find them to have; it is error to rule that polygraph tests are always inadmissible and without probative value.¹²

Evidence that the defendant was willing or unwilling to submit to a polygraph examination is generally not admissible into evidence.¹³ That defendant entered into a stipulation to take a polygraph examination, but later refused to do so, is not proba-

⁵*Carr v. State*, 259 Ga. 318, 380 S.E.2d 700 (1989). 118 S. Ct. 1261, 140 L. Ed. 2d 413, 48 Fed. R. Evid. Serv. 899 (1998).

⁶*Fargason v. State*, 266 Ga. 463, 467 S.E.2d 551 (1996).

⁷*Robertson v. State*, 268 Ga. 772, 493 S.E.2d 697 (1997).

⁸*Harris v. State*, 308 Ga. App. 523, 707 S.E.2d 908 (2011).

⁹*Smith v. State*, 245 Ga. 205, 264 S.E.2d 15 (1980).

¹⁰*U.S. v. Scheffer*, 523 U.S. 303,

¹¹*Cromer v. State*, 253 Ga. 352, 320 S.E.2d 751 (1984).

¹²*State v. Chambers*, 240 Ga. 76, 239 S.E.2d 324 (1977). See *Horne v. State*, 273 Ga. App. 132, 614 S.E.2d 243 (2005) (polygraph testimony not usually admissible, but parties may stipulate to its admissibility).

¹³*Brown v. State*, 175 Ga. App. 246, 333 S.E.2d 124 (1985).

tive and is not admissible into evidence.¹⁴

A prosecutor's stipulation that the defendant could take a lie detector test did not by implication include a stipulation that the results of such test would be admissible.¹⁵

§ 15:21 Calling adverse party or person as witness

Former O.C.G.A. § 24-9-81 allowed a party in a civil case to call the adverse party or an agent of an adverse party for cross-examination. The existing rules respecting this process include O.C.G.A. § 24-6-611(c): "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Leading questions are permitted of hostile witnesses within the trial court's discretion.¹

Federal courts have observed that, although the precise meaning of a witness "identified with an adverse party" is not clearly defined, a few relationships fall within its meaning, including: (a) employee/employer relationships; (b) romantic partners; and (c) law enforcement investigators.²

In *Thomas v. Baxter*,³ the plaintiff properly asserted her right to call an adverse party. In this case, the plaintiff called the owner of a car which she alleged caused her harm. The witness was asked to testify as to the events that took place leading up to the accident. The plaintiff's attorney announced to the court that he was calling the witness under former O.C.G.A. § 24-9-81 for the purpose of cross-examination, and then examined the witness accordingly. After the conclusion of this testimony, the defense counsel began his examination, also using leading questions. The plaintiff objected and the court overruled, allowing the defense counsel to lead the witness. On appeal, the Court of Appeals stated that the general rule is that if a party calls an adverse witness for cross-examination they may examine in accordance, and "the [opposite] party may question him only by direct examination."

Suppose a witness is called by your adversary and you cross-examine him. Can you later call the witness during your case to impeach him with a prior conviction? Yes, said the Georgia

¹⁴*Brown v. State*, 175 Ga. App. App. 570, 771 S.E.2d 218 (2015).
246, 333 S.E.2d 124 (1985).

¹⁵*Gilstrap v. State*, 256 Ga. 20, 342 S.E.2d 667 (1986).
²*Securities and Exchange Commission v. Goldstone*, 317 F.R.D. 147 (D.N.M. 2016).

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³*Thomas v. Baxter*, 234 Ga. App. 663, 507 S.E.2d 766 (1998).
¹*Lopez-Vasquez v. State*, 331 Ga.

Supreme Court in *Lillard v. Owens*:⁴

During appellees' case in chief, the trial court permitted appellees to recall a witness previously cross-examined by counsel for appellees in order that counsel for appellees could impeach her by conviction. Appellants argue on appeal the trial court abused its discretion when it permitted the witness to be recalled to the stand solely for the purpose of impeaching her. "The recalling of a witness for further examination at the instance of either party is always within the discretion of the trial judge' [Cit.]" (*Smith v. State*, 261 Ga. App. 871(3), 583 S.E.2d 914 (2003)), and "this court will never control [that discretion] unless manifestly abused." *Dixon v. State*, 116 Ga. 186 (hdn.5), 42 S.E.357 (1992). In the absence of a showing of a manifest abuse of the trial court's discretion, we conclude there was no error in permitting appellees to recall the witness.

§ 15:22 Manner of examining under statute

When examining an adverse party under O.C.G.A. § 24-6-611, the examiner has the privilege of subjecting such witness to a thorough and sifting examination and with the further privilege of impeachment, as if the witness had testified in his own behalf and were being cross-examined. Unlike Georgia law, Fed. R. Evid. 611(b), generally restricts cross-examination to the scope of the direct examination.¹

The prior Georgia statute has been used in juvenile court. Juvenile court did not violate father's due process rights when it permitted paternal grandparents to call father as an adverse witness, subject to cross-examination, during termination of parental rights proceeding initiated by paternal grandparents.² In another case, the juvenile court did not commit an error of law when it allowed the State to call mother as an adverse witness, during termination of parental rights proceeding; termination of parental rights proceedings were civil in nature, and statute allowed litigants in civil cases to call their opponents for cross-examination.³

Impeaching one's own witness under O.C.G.A. § 24-6-607 by cross-examining the witness is permitted. However, sometimes cross-examination by a party is denied as improper when the party wishes to attack a witness he called. Procedural correctness is required. As noted in § 15:12, *supra*, the testimony of one's own witness can be attacked by prior criminal conviction

⁴*Lillard v. Owens*, 281 Ga. 619, 641 S.E.2d 511 (2007).

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¹*Carlson and Carlson, Unconstitutionality and the Role of Wide-Open Cross-Examination:*

Encroaching on the Fifth Amendment When Examining the Accused, 7 J. Marshall L.J. 269 (2014).

²*In re D.J.*, 279 Ga. App. 355, 631 S.E.2d 427 (2006).

³*In re A.R.A.S.*, 278 Ga. App. 608, 629 S.E.2d 822 (2006).

impeachment only after it is demonstrated that the witness is inconsistent. Other restrictions are sometimes imposed. Defendant was not entitled to examine a defense witness about pending criminal charges to show bias, absent a showing that the defendant was surprised or entrapped by the witness's previous contradictory statement.⁴ However, defendant had right to impeach his own witness as to prior inconsistent statements, even though defendant was not surprised by inconsistent statement.⁵

When a witness called by the state becomes evasive, leading questions may be allowed. State was entitled to ask state's own witness leading questions and admit taped interview with witness into evidence; witness was evasive concerning facts she had stated in her prior interview and also testified to facts that were inconsistent with those she previously stated in the interview.⁶

§ 15:23 Requirements of witness' answer

Whether an answer may be a lengthy narrative of events or shall be limited to brief statements in answer to detailed questions rests largely in the discretion of the trial judge.¹

While it is a proper mode of examination to ask a witness, including a party, to state the facts and let him state them, the trial judge in his discretion may refuse to permit a witness to testify in narrative form, and his ruling will not be reviewed unless that discretion is clearly abused.²

Before a witness testifies as to the contents of a conversation, it is customary for him to establish when and where it took place and who was present, both as a notice to the opposing party and to enable the court to determine whether the hearsay rule applies or whether the conversation is subject to some exception to the hearsay rule.³

Court does not abuse its discretion by permitting witness to testify without stating his address for reasons of embarrassment and family security.⁴

§ 15:24 Witness' first hand knowledge

Normally, a witness can testify only as to matters of which he

⁴Arnold v. State, 284 Ga. App. 718, 757, 758. 598, 645 S.E.2d 68 (2007).

⁵Smith v. State, 261 Ga. App. 871, 583 S.E.2d 914 (2003).

⁶Johnson v. State, 279 Ga. App. 489, 631 S.E.2d 720 (2006).

²Van Winkle v. Wilkins, 81 Ga. 93, 7 S.E. 644 (1888). For objections to narrative answers, see Appendix B, *infra*.

³See §§ 25:1 et seq.

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¹Am. Jur. 2d, Witnesses §§ 717, 488, 271 S.E.2d 792 (1980).

⁴Timberlake v. State, 246 Ga.

has first hand knowledge.¹ The Supreme Court of Georgia has observed: “Under Georgia’s Evidence Code, a lay witness ‘may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter. Evidence to prove personal knowledge may, but need not, consist of the witness’s own testimony.’”²

Because O.C.G.A. § 24-7-701, which addresses lay opinion testimony, is modeled after Fed. R. Evid. 701, Georgia courts look to federal decisions when interpreting it.³ Federal courts have excluded lay opinion testimony where the witness lacks “personal perception and first-hand knowledge of the underlying facts.”⁴ A Tenth Circuit Court of Appeals decision explains: “The perception requirement stems from [Rule 602 of the Federal Rules of Evidence] which requires a lay witness to have first-hand knowledge of the events he is testifying about so as to present only the most accurate information to the finder of fact.”⁵

The burden is on the one offering evidence to lay a foundation by showing that the witness had an adequate opportunity to observe, but if the opponent fails to object, he waives such preliminary proof. If, however, it later appears that the witness lacked opportunity to observe or did not actually observe the fact, the testimony may be stricken.⁶

A lay witness is permitted to give his opinion as to a defendant’s behavior, so long as it is based upon personal observation and the witness states the facts upon which the opinion is based. Thus, witness’s testimony that defendant was shaking a bottle of baby powder in his prison cell to get the powder in the eyes of corrections officers was admissible as a lay witness opinion at a trial for felony obstruction of a corrections officer; the witness was present at the scene, and the witness’s testimony was based on his personal observation of the situation and explanation of the facts upon which his opinion was based.⁷ However, a husband who was not present during the automobile accident in which his wife was injured was not competent to testify as to the events surrounding the accident, in trial on other driver’s liability in husband’s and wife’s action against their automobile insurer to recover unin-

[Section 15:24]

¹O.C.G.A. § 24-6-602.

²Taylor v. State, 315 Ga. 630, 884 S.E.2d 346 (2023).

³Miller v. Golden Peanut Company, LLC, 317 Ga. 22, 891 S.E.2d 776 (2023).

⁴Stevens v. Brigham Young University - Idaho, 588 F. Supp. 3d

1117, 117 Fed. R. Evid. Serv. (Callaghan) 1750 (D. Idaho 2022).

⁵Magoffe v. JLG Industries, Inc., 375 Fed. Appx. 848 (10th Cir. 2010).

⁶Kirby v. State, 304 Ga. 472, 819 S.E.2d 468 (2018). See also McCormick on Evidence § 10.

⁷Moore v. State, 300 Ga. App. 126, 684 S.E.2d 670 (2009).

sured motorist (UM) benefits.⁸

First hand knowledge is not required of an expert witness in answering a hypothetical question.⁹

§ 15:25 Testimony concerning telephone conversations

Although voice identification testimony is generally considered to be direct evidence, under Georgia law such testimony is opinion evidence which is inadmissible unless the witness discloses the basis for his opinion. Proof of telephone conversations may be admissible in evidence when the identity of the person against whom the conversation is sought to be admitted is established by circumstantial as well as direct evidence. Probative value to be accorded identification of defendant by voice recognition is a matter for the jury's determination. In *Brown v. State*,¹ the survivor of an attack which killed her husband testified. She said her daughter Christie and Glenda Brown killed her husband while the witness hid in the bathroom. She identified Brown by voice.

During the time that Mrs. Crider was in the bathroom, she could not see what was happening, but she heard Christie ask, "Do you want any of this makeup?" A female voice replied, "I don't know." Mrs. Crider recognized the voice as belonging to Christie's girlfriend Brown because Brown had telephoned the Crider home "numerous" times to talk to Christie and had identified herself. Mrs. Crider testified that Brown had a "distinctive voice," and "the minute I heard that, I knowed (sic) who that voice belonged to."

The admission of the voice identification testimony was proper.²

Foundation was sufficient to support admission of audio recording, in grantor's action to set aside deed, of message grantor left on grantee's voice mail, explaining that she had changed her mind and had decided not to move out of deeded property; grantee testified that grantor called his cell phone which he was unable to answer, that grantor left a voice mail for him, that he recognized her voice when he retrieved the voice mail, and that the audiotape being transmitted to the court was a recording of

⁸Morton v. Horace Mann Ins. Co., 282 Ga. App. 734, 639 S.E.2d 352 (2006).

⁹See generally Little v. Utah State Div. of Family Services, 667 P.2d 49 (Utah 1983).

See also § 24:36, *infra*.

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¹Brown v. State, 278 Ga. 369, 602

S.E.2d 834 (2004).

²Compare Price v. State, 208 Ga. 695, 69 S.E.2d 253 (1952) (where the testifying witness did not know the other person on the telephone, had not ever heard the voice previously, and the identity of the other person is not otherwise established, the conversation is inadmissible hearsay).

that voice mail.³

Voice identification is taken up in Georgia's new Evidence Code at O.C.G.A. § 24-9-901, which is patterned after Fed. R. Evid. 901. Federal decisions observe that under Rule 901: "Such voice identification need only rise to the level of minimal familiarity. . . . Once minimal familiarity is satisfied, it is for the jury to assess any issues regarding the extent of the witness' familiarity with the voice."⁴

§ 15:26 Tape recordings of telephone conversations

Recordings of telephone conversations are admissible if it is established that they are authentic, accurate and complete.¹

Proper authentication has been held to occur where the speaker on a telephone call provided verifiable information that only the identified party making the call would be likely to possess.²

O.C.G.A. § 16-11-62 establishes criminal penalties for recording the "private conversations" of others that might occur in "private places." Those proscriptions, however, do not apply to those who are parties themselves to those communications.³ The Georgia Supreme Court has recognized Georgia's status as a "one party consent" state, noting that related restrictions and prohibitions apply, "only to a third party's interception of telephone conversations and does not prohibit the actual parties to such conversations from recording and divulging them."⁴

§ 15:27 Right to confront witnesses

In the 1983 Georgia Constitution, the right to confront witnesses is found at Article I, § 1, paragraph XIV.

The Confrontation Clause of the Sixth Amendment of the United States Constitution bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior op-

³Dae v. Patterson, 295 Ga. App. 818, 673 S.E.2d 306 (2009) (overruled on other grounds by, Southall v. State, 300 Ga. 462, 796 S.E.2d 261 (2017)).

⁴U.S. v. Bush, 405 F.3d 909, 67 Fed. R. Evid. Serv. 83 (10th Cir. 2005).

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¹Riceman v. State, 166 Ga. App. 825, 305 S.E.2d 595 (1983). See O.C.G.A. § 24-9-901(b)(6); Dae v. Patterson, 295 Ga. App. 818, 673 S.E.2d 306 (2009) (overruled on other grounds by, Southall v. State, 300 Ga.

462, 796 S.E.2d 261 (2017)).

²Brewner v. State, 302 Ga. 6, 804 S.E.2d 94 (2017).

³O.C.G.A. § 16-11-66(a) ("Nothing in Code Section 16-11-62 shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.").

⁴Griffin v. State, 309 Ga. 516, 847 S.E.2d 168 (2020).

portunity for cross-examination. Because only testimonial statements cause the declarant to be a “witness” within the meaning of the Confrontation Clause, it is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.¹ A statement is considered testimonial for Sixth Amendment purposes if its primary purpose was to establish evidence that could be used in a future prosecution.² The Georgia Supreme Court has held that where testimonial evidence is not present, normal rules regarding the admission of hearsay apply to the admission of the statement.³

The admission of the confession of a codefendant who did not testify, without an opportunity for cross-examination, violates defendant’s Sixth Amendment guarantee of confrontation of witnesses against him.⁴

There was no violation of defendant’s right to confrontation where state was allowed to impeach Codefendants through the use of pretrial statements to police. Police officers who took contested statements testified and were available for cross examination.⁵

The U.S. Supreme Court held that the admission under the residual hearsay exception of a two-and-one-half-year-old’s out-of-court statements made to an examining pediatrician violated the confrontation clause, where the State failed to show that the statements possessed sufficient particularized guarantees of trustworthiness to overcome the presumption that they were inadmissible.⁶

In another confrontation case decided the same day, the U.S. Supreme Court held that the confrontation clause did not absolutely prohibit the State of Maryland—under a state statutory procedure intended to protect children who, according to a trial judge’s determination, would suffer severe emotional distress from testifying in a courtroom in the accused’s presence—from using a one-way closed circuit television procedure for receiving a child witness’ testimony in a child abuse case.⁷

Although the trial court never made a specific finding that the

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¹Danley v. State, 342 Ga. App. 61, 802 S.E.2d 851 (2017).

²Tanner v. State, 301 Ga. 852, 804 S.E.2d 377 (2017).

³Billings v. State, 293 Ga. 99, 745 S.E.2d 583 (2013).

⁴Rachel v. State, 247 Ga. 130, 274 S.E.2d 475 (1981).

⁵Adams v. State, 264 Ga. 71, 440 S.E.2d 639 (1994) (overruled on other grounds by, Carr v. State, 281 Ga. 43, 635 S.E.2d 767 (2006)).

⁶Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638, 30 Fed. R. Evid. Serv. 24 (1990).

⁷Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666, 30 Fed. R. Evid. Serv. 1 (1990).

four-year-old victim of an alleged sexual assault was unavailable to testify, admission of her out-of-court statements under Illinois hearsay exceptions for spontaneous declarations and medical-treatment statements did not violate the accused's confrontation rights, the U.S. Supreme Court held in *White v. Illinois*.⁸ The court noted that the State tried twice to call the child as a witness, but each time the child experienced emotional difficulty and left without testifying, and noted that the defense made no attempt to call the child as a witness. The court explained that because these two exceptions are firmly rooted and such out-of-court statements have substantial probative value that cannot be duplicated simply by the declarant's later testifying in court, the confrontation clause does not require the prosecution to produce the declarant at trial or the trial court to make a specific finding that the declarant is unavailable.

Where the trial court struck all of the child molestation victim's testimony on the basis that she was incompetent because she had demonstrated that she did not understand the nature of the oath, it erred in nevertheless admitting the adult witnesses' hearsay testimony because the victim was not "available to testify" for purposes of the Georgia child hearsay statute. The court said that, since the defendant could not confront and cross-examine the victim, she was not available to testify within the meaning of the statute.⁹

Using the U.S. Supreme Court's decision in *Idaho v. Wright*, supra, as a guide, the Georgia Supreme Court held that circumstances surrounding the making of the videotaped statements of a four-and-one-half-year-old child molestation and sodomy victim likewise failed to establish the inherent reliability of those statements. The court noted that although the child used terminology which would not be expected of a child her age and she had no apparent motive to fabricate, her statements did not meet the test of spontaneity and consistent repetition, and some of her assertions were inconsistent with known facts.¹⁰

The application of a statute governing the admission of testimony as to a child's description of sexual contact or physical abuse did not deprive the defendant of due process or violate his right to confront the witnesses, where the child victims were called by the State and the defendant had the opportunity to cross-examine them without having to call them to the stand.¹¹

The right to confront witnesses does not bar the admission of

⁸*White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848, 33 Fed. R. Evid. Serv. 881 (1992).

⁹*Lang v. State*, 201 Ga. App. 836, 412 S.E.2d 866 (1991).

¹⁰*Rolader v. State*, 202 Ga. App. 134, 413 S.E.2d 752 (1991).

¹¹*Lawhorn v. State*, 257 Ga. 780, 364 S.E.2d 559 (1988).

hearsay evidence which is admissible under many of the established exceptions to the Hearsay Rule.¹²

The Georgia Supreme Court determined that a witness's statement to law enforcement recounting a co-defendant's jailhouse confession to the crime at issue did not violate the Confrontation Clause where offered as a prior consistent statement of that witness.¹³

Under some circumstances, a state court may admit a transcript of the victim's testimony given at the preliminary hearing, even though the victim is not present at the trial. But that procedure deprives the accused of his Sixth Amendment right to confront the witnesses against him unless there has been a good-faith effort to secure the witness' presence. This is true, even though the accused's counsel had had an adequate opportunity to cross-examine the victim at the preliminary hearing.¹⁴ Impeachment of alleged victims of sexual abuse with their prior false allegations of sexual misconduct, although highly probative, is not constitutionally required.¹⁵

A defendant's right to confront and cross-examine witnesses concerning a rape victim's past sexual behavior with others was subject to accommodation of the State's interest in the rape shield statute; the statute does not deny the defendant's confrontation right and is constitutional.¹⁶

Admission of a videotape containing prior consistent out-of-court statements of a prosecution witness had sufficient indicia of reliability to be admissible, even though the witness was a suspect in a murder at the time the videotape was made; the witness was present at trial, under oath and subject to cross-examination.¹⁷

Right of prosecution to use hearsay in the face of *Crawford v. Washington*, see §§ 25:5, 25:32, and 27:8, *infra*. No application of *Crawford* to preliminary hearings, see § 25:3, *infra*.

§ 15:28 Continuing witness rule

Georgia's "continuing witness rule" addresses perceived unfair prejudice attendant to jurors' repeated, cumulative exposure to testimonial evidence, mandating exclusion of certain types of evi-

¹²See §§ 25:4 et seq.

¹³*Franklin v. State*, 298 Ga. 636, 784 S.E.2d 359 (2016).

¹⁴*Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

¹⁵*State v. Burns*, 306 Ga. 117, 829

S.E.2d 367 (2019).

¹⁶*Harris v. State*, 257 Ga. 666, 362 S.E.2d 211 (1987).

¹⁷*Carroll v. State*, 261 Ga. 553, 408 S.E.2d 412 (1991).

dence from the jury room.¹ While the continuing witness rule “regulates which documents or recordings go into the jury room with the jury during deliberations and which ones do not,” the restriction “does not prevent ‘the replaying of recorded statements . . . in the courtroom at the jury’s request during deliberations.’”²

Significantly, the continuing witness rule, a product of earlier judicial decision-making, was not codified as part of Georgia’s 2013 Evidence Code. The primary concerns of the continuing witness rule, eliminating unfair prejudice and the needless presentation of cumulative evidence, are generally the province of O.C.G.A. § 24-4-403.³

The Supreme Court of Georgia has repeatedly admonished that common law lines of former Georgia evidentiary authority have been generally abrogated by Georgia’s new Evidence Code, particularly where the concerns addressed in earlier decisions are now controlled by a federalized statute.⁴ In addition, the Supreme Court of Georgia has recognized that, Federal Rule of Evidence 402, on which Georgia’s Rule 402 was modeled, “was designed to ‘wipe[] the slate clean’ of judicially created limitations on the admissibility of relevant evidence, replacing them with new, codified rules of exclusion.”⁵

To date, Georgia appellate decisions sustaining the application of the continuing witness rule have yet to consider the current application of the continuing witness rule against this “new Code” backdrop.⁶ That said, in *Davis v. State*,⁷ Presiding Judge Dillard of the Georgia Court of Appeals recognized this as an issue, but did not directly opine on the question.

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¹See *Clarke v. State*, 308 Ga. 630, 842 S.E.2d 863 (2020).

²*Lyons v. State*, 309 Ga. 15, 843 S.E.2d 825 (2020).

³See generally *Corley v. State*, 308 Ga. 321, 840 S.E.2d 391 (2020).

⁴See, e.g., *Ballin v. State*, 307 Ga. 494, 837 S.E.2d 343 (2019).

⁵*State v. Orr*, 305 Ga. 729, 827 S.E.2d 892 (2019).

⁶See, e.g., *Keller v. State*, 308 Ga. 492, 842 S.E.2d 22 (2020).

⁷*Davis v. State*, 371 Ga. App. 469, 901 S.E.2d 219 (2024).

Chapter 16

Cross-Examination

- § 16:1 Right to cross-examine witnesses
- § 16:2 Scope of cross-examination
- § 16:3 Form of questions on cross-examination
- § 16:4 Additional matters proper on cross-examination
- § 16:5 Manner of conducting cross-examination
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- § 16:10 Laying foundation for prior inconsistent statements
- § 16:11 Impeachment by proof of prior conviction
- § 16:12 Manner of proving prior conviction
- § 16:13 Right to recall witness for further cross-examination
- § 16:14 Effect of denial of right to cross-examine

§ 16:1 Right to cross-examine witnesses

Cross-examination of adverse witnesses is a matter of right.¹ The right to cross-examine was not abridged in a case where a videotape of a witness telling police officers of the defendant's admission of his participation in crimes, or by the admission of that tape as substantive evidence since the witness was in court and was cross-examined by the defendant's attorney.²

There is a constitutional right to confront and cross-examine witnesses in a criminal case.³

Cross-examination can delve into a wide-array of subjects in host of areas:

There are many acceptable methods of attacking the credibility of a witness including, but not limited to, (1) attacking the general character for truthfulness of the witness; (2) showing that, before

[Section 16:1]

¹Benefield v. Benefield, 224 Ga. 208, 160 S.E.2d 895 (1968). See also, generally, U.S. v. Martinez, 527 Fed. Appx. 822 (11th Cir. 2013); Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules

§§ 24-6-607, 24-6-608, 24-6-611, 24-6-613 (6th Ed. 2017).

²Johnson v. State, 257 Ga. 731, 363 S.E.2d 540 (1988).

³Moss v. State, 275 Ga. 96, 561 S.E.2d 382 (2002).

trial, the witness made statements that are inconsistent with his or her trial testimony; (3) showing bias of the witness; (4) showing that the witness's capacity to perceive, recall, or relate the relevant event is impaired; and (5) contradicting the substance of the testimony by the witness. Some, but not all, of these methods of impeachment are explicitly included in the rules of evidence.⁴

The right to cross-examine adverse witnesses, however, is not boundless. Even topics of cross-examination that have constitutional implications are still subject to limits. Bias impeachment, for example, may be excluded if it does not satisfy the requirements of O.C.G.A. §§ 24-4-401, 24-4-402, and 24-4-403.⁵

Chief Judge Dillard of the Georgia Court of Appeals explained the parameters of witness confrontation rights in a 2019 decision:

As explained by the Supreme Court of Georgia, “[t]he right of cross-examination integral to the Sixth Amendment right of confrontation is not an absolute right that mandates unlimited questioning by the defense.” Indeed, the Confrontation Clause guarantees only “an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”⁶

O.C.G.A. § 24-6-611(c) provides that a party may interrogate the opposing party or a witness identified with an adverse party as if on cross examination.⁷

Each party has right to “thorough and sifting” cross-examination of opposing witnesses.⁸ In criminal cases, this applies to the prosecution, as well as the defense.⁹

For the effect of denial of right to cross-examine, see § 16:14, *infra*. This “wide open” cross-examination rule does not apply in federal courts.¹⁰

Confrontation clause is not violated by admitting declarant's out-of-court statement so long as declarant is testifying as witness and is subject to full cross-examination.¹¹

Admission of a witness' preliminary hearing testimony at trial, due to the witness' death prior to trial, does not abridge the

⁴*Belcher v. The State*, 344 Ga. App. 729, 812 S.E.2d 51 (2018). 472 (1979).

⁵*Chrysler Group, LLC v. Walden*, 303 Ga. 358, 812 S.E.2d 244 (2018).

⁶*Johnson v. State*, 348 Ga. App. 667, 824 S.E.2d 561 (2019).

⁷*Slaton v. State*, 303 Ga. 651, 814 S.E.2d 344 (2018). See also *King v. King*, 238 Ga. 268, 232 S.E.2d 549 (1977).

⁸O.C.G.A. § 24-6-611(b). See *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d

⁹*Parrish v. State*, 362 Ga. App. 392, 868 S.E.2d 270 (2022).

¹⁰See Fed. R. Evid. 611(b). See also Carlson and Carlson, *Unconstitutionality and the Role of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining the Accused*, 7 J. Marshall L.J. 269 (2014).

¹¹*Durham v. State*, 240 Ga. 203, 240 S.E.2d 14 (1977).

defendant's right of cross-examination, where the record shows that defense counsel had extensively cross-examined the witness at the preliminary hearing.¹²

When a witness declines to answer on cross-examination certain pertinent questions relevant to a matter testified about by the witness on direct examination, all of the witness' testimony on the same subject matter should be stricken.¹³

§ 16:2 Scope of cross-examination

The scope and extent of the cross-examination rests largely in the discretion of the court.¹ Under the pre-2013 Code, Georgia cross-examinations were not limited by the scope of the direct, unlike the federal rule. The 2013 Evidence Code retained the former Georgia approach in O.C.G.A. § 24-6-611(b).² This Code section provides a witness may be cross-examined on any relevant matter, and that every party has the right to a thorough and sifting cross-examination,³ the prosecution when it questions a testifying criminal defendant.⁴ The Supreme Court of Georgia has explained: "[O]ur Evidence Code affords criminal defendants '[t]he right of a thorough and sifting cross-examination ... as to the witnesses called against [them].'" OCGA § 24-6-611(b). But 'the right of cross-examination ... is not an absolute right that mandates unlimited questioning by the defense.'"⁵

Accordingly, while the scope of cross-examination is generally subject to the sound discretion of the trial court, that discretion is circumscribed by O.C.G.A. § 24-6-611(b), as well as the Confrontation Clauses of the United States and Georgia Constitutions.⁶ That said, trial courts are empowered to limit or exclude areas of cross-examination under O.C.G.A. § 24-4-403, even when it comes to impeachment for purported witness bias.⁷ Moreover if an area of cross-examination is factually unsup-

¹²Hosick v. State, 262 Ga. 432, 421 S.E.2d 65 (1992).

¹³Harris v. State, 340 Ga. App. 865, 798 S.E.2d 498 (2017); Soto v. State, 285 Ga. 367, 677 S.E.2d 95 (2009).

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¹Hargrove v. State, 291 Ga. 879, 734 S.E.2d 34 (2012); Gordy v. Powell, 95 Ga. App. 822, 99 S.E.2d 313 (1957); Kline v. State, 269 Ga. 570, 573, 501 S.E.2d 810 (1998).

²Lucas v. State, 303 Ga. 134, 810

S.E.2d 490 (2018).

³See, generally, Upshaw v. State, 300 Ga. 442, 796 S.E.2d 287 (2017).

⁴Taylor v. State, 302 Ga. 176, 805 S.E.2d 851 (2017).

⁵Johnson v. State, 316 Ga. 672, 889 S.E.2d 914 (2023) (omissions and substitutions in original).

⁶Lucas v. State, 303 Ga. 134, 810 S.E.2d 490 (2018).

⁷Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244 (2018).

ported, it may be properly excluded.⁸

Although the great majority of American courts are now committed to the rule that cross-examination of a witness is to be restricted to facts and circumstances brought out or connected with matters stated on direct examination of the witness, the rule of the English courts, which does not confine cross-examination to matters upon which the witness was examined in chief, but permits a witness called by one party and examined in chief on any point to be cross-examined by the adverse party on any and all issues in the case, is followed in a number of American jurisdictions.⁹ Under this rule, when a witness is voluntarily called by the party the court cannot restrict the right of cross-examination to points upon which the party examined his witness in chief.

Georgia follows the English rule, thereby it has been held that cross-examination can cover all matters within the knowledge of the witness which are material to the controversy.¹⁰ By adhering to the English rule, Georgia deviates from the Federal Rules of Evidence and places itself in the considerable minority of states.¹¹

However, in the case of one sort of witness, any local state's rules may be circumscribed by federal constitutional notions. There is strong authority in United States Supreme Court criminal cases that when an accused testifies, she waives her privilege against self incrimination only to the extent of subjects she covers on direct. Accordingly, whatever the general scope of cross-examination under state rules, the federal Fifth Amendment arguably requires a narrow rule of cross-examination to be applied when it is the criminal accused on the stand.¹² With other witnesses, the "wide open" or English rule applies even when the witness voluntarily called is examined in chief only on a formal point or on trivial and unimportant matters.

Georgia's retention of the English rule leaves the door open for constitutional challenges based upon the United States Supreme Court precedent referenced in the preceding paragraph. A 2014

⁸Anthony v. State, 303 Ga. 399, 811 S.E.2d 399 (2018).

⁹Cowart v. Strickland, 149 Ga. 397, 100 S.E. 447, 7 A.L.R. 1110 (1919). See also Carlson, Evidence: Teaching Materials For An Age of Science and Statutes 60-61 (7th edition 2012).

¹⁰Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

¹¹Carlson and Carlson,

Unconstitutionality and the Role of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining the Accused, 7 J. Marshall L.J. 269 (2014).

¹²See Carlson, Scope of Cross-Examination and the Proposed Federal Rules of Evidence, 32 Fed B J 244 (1973); McCormick on Evidence § 26. See also Rule 611(b), Federal Rules of Evidence.

law review article explores many of the permutations.¹³

As a general rule, it is always proper to cross-examine a witness to show his interest, bias, attitude, or feelings about the case.¹⁴

Reasonable cross-examination questions, even if unfounded in the record, may be employed to test the skill, learning, and opinions of an expert.¹⁵ This goes for hypotheticals as well as other questions. Georgia seems to be moving to this position.¹⁶

A witness who has been impeached by evidence of a previous felony conviction, but who has not attempted to rehabilitate her character by explaining the circumstances of the conviction, may not be cross-examined concerning the facts surrounding the conviction.¹⁷

A defendant's right to effective cross-examination was not abridged by the refusal to allow him to question the State's witness concerning any arrests of the victim that may have resulted from incidents in which the victim had assaulted other individuals with a knife.¹⁸ In a robbery case, cross-examination which constituted an indirect attempt to elicit inadmissible evidence concerning specific acts of violence by the victim against third parties was properly curtailed.¹⁹

The court did not err in refusing to allow a defendant to cross examine the State's investigator as to why so many of his cases had been dismissed; the investigator was not competent to testify as to the workings of the courts or the prosecutor's office.²⁰

A party is properly allowed to cross-examine as to anything bearing on credibility in the slightest degree.²¹

It was proper to ask a criminal defendant if he knew the whereabouts of and could have called a certain potential witness.²²

While it is usually not proper to ask a witness if another witness in the case is lying, the door can be opened to this form of cross-examination by testimony of the witness on direct that

¹³Carlson & Carlson, Unconstitutionality And the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining The Accused, 7 J. Marshall L.J. (Aug. 2014).

¹⁴See O.C.G.A. § 24-6-608. Rogers v. Black, 121 Ga. App. 299, 173 S.E.2d 431 (1970).

¹⁵Taylor v. Reo Motors, Inc., 275 F.2d 699 (10th Cir. 1960).

¹⁶See § 24:39, *infra*.

¹⁷Vincent v. State, 264 Ga. 234,

442 S.E.2d 748 (1994). See also Woods v. State, 269 Ga. 60, 63, 495 S.E.2d 282 (1998).

¹⁸Brady v. State, 259 Ga. 573, 385 S.E.2d 653 (1989).

¹⁹Strickland v. State, 185 Ga. App. 444, 364 S.E.2d 872 (1987).

²⁰Smith v. State, 178 Ga. App. 19, 341 S.E.2d 901 (1986).

²¹Pound v. Medney, 176 Ga. App. 756, 337 S.E.2d 772 (1985).

²²Burnette v. State, 184 Ga. App. 541, 362 S.E.2d 121 (1987).

many of the State's witnesses had said things that were not true.²³ Officer's statement in videotaped interview of defendant that victim was not lying, although perhaps error, was not fatal to the verdict in *Shelton v. State*.²⁴

A party otherwise protected by a motion in limine can be cross-examined about excluded material where he opens the door.²⁵

In *Helton v. State*,²⁶ the court found no abuse of discretion in allowing State's witness, a Department of Family and Children's Services investigator, to testify on redirect that she believed the child molestation victim was telling the truth. Although such opinion evidence about the credibility of a witness is generally inadmissible, the question was first raised by the defense during cross-examination, thus opening up the door for damaging testimony.

The subject of whether a lawyer can cross-examine witness B in a confrontational manner by asking him if an earlier witness, witness A, lied, is analyzed in R. Carlson, *Were You Lying Then or Are You Lying Now*, 23 Verdict 6, No 3 (1998) (answering "no" to the above question in civil cases).

But a criminal defendant could be asked during cross-examination whether everybody was lying but him, even though the question was somewhat argumentative.²⁷ Generally a witness at a trial, witness A, may not be asked whether another witness (witness B) was lying when B gave his testimony. However, when the criminal defendant is challenged with this form of question, some decisions have approved this sort of inquiry.²⁸

Sometimes this practice is termed "pitting one witness against another." In *Jacobs v. State*,²⁹ the defendant complained that the prosecutor improperly attempted to impeach a witness by asking her if prior witnesses who had given contrary testimony had lied. While Georgia courts have approved this approach when the ac-

²³Whatley v. State, 270 Ga. 296, 509 S.E.2d 45 (1998). See Williams v. State, 239 Ga. App. 30, 521 S.E.2d 27 (1999) (during the State's cross-examination of Williams, he was asked if, having heard the testimony of Davis, which differed from his, she was "not saying the truth").

²⁴Shelton v. State, 251 Ga. App. 34, 553 S.E.2d 358 (2001).

²⁵CSX Transp., Inc. v. Smith, 289 Ga. 903, 717 S.E.2d 209 (2011).

²⁶Helton v. State, 217 Ga. App. 691, 458 S.E.2d 872 (1995).

²⁷Dorsey v. State, 259 Ga. 809, 387 S.E.2d 889 (1990).

²⁸See Hawkins v. State, 281 Ga. App. 852, 637 S.E.2d 422 (2006) (question "Are you calling Officer Goode a liar here?" was objected to as argumentative; citing *Dorsey v. State*, the question was approved); Green v. State, 242 Ga. App. 868, 532 S.E.2d 111 (2000). The Georgia Supreme Court endorsed this approach and cited *Dorsey* approvingly in *Manzano v. State*, 282 Ga. 557, 651 S.E.2d 661 (2007).

²⁹Jacobs v. State, 299 Ga. App. 368, 683 S.E.2d 64 (2009).

cused takes the stand and is impeached, the Court of Appeals in *Jacobs* seems to broaden the reach of this technique. In addition to approving it in connection with the witness mentioned above, another witness was challenged by the prosecutor. “[T]he State asked her [the witness] whether the officers who testified that she had identified Jacobs as the shooter were lying.” The court ruled the question was permissible.

As reported in Carlson, Imwinkelried, Seaman, Beecher-Monas, *Evidence: Teaching Materials for an Age of Science and Statutes* (7th ed. 2012), at 361, the general rule bars this practice.³⁰ Some exceptions have been developed. There is a distinction between asking witness B if witness A was mistaken, versus asking him if witness A was lying. In *United States v. Wallace*,³¹ a prosecutor cross-examined Wallace about whether testimony of other witnesses was “wrong” or “mistaken.” It is improper for an attorney to ask a witness whether another witness lied on the stand. However, prosecutor questions here were deemed to be proper because Wallace was not required to brand another witness as a purveyor of falsehoods. This approach is ably discussed in R. Clark, G. Dekle and W. Bailey, *Cross-Examination Handbook* 163 (2011): Some courts “draw a distinction between asking a witness whether someone else is lying and asking a witness whether she disagrees with another witness. Although this distinction may at first blush seem disingenuous, many courts have found it proper if the questioner avoids the word ‘lying.’”

The cross-examination of a defendant concerning his postarrest silence did not violate the Due Process Clause of the Fourteenth Amendment where, on direct examination, the defendant testified that he had made no statement to the police following his arrest.³² But for later developments on this point, see § 26:9, *infra*. Under O.C.G.A. § 24-8-801(d)(2)(B), evidence of pre-arrest silence is admissible for impeachment purposes where two factors are met:

For evidence to qualify as a criminal defendant’s adoptive admission under Rule 801(d)(2)(B), the trial court must find that two criteria were met: first, that the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and second, that there are sufficient founda-

³⁰See *U.S. v. Harris*, 471 F.3d 507, 511 (3d Cir. 2006) (asking one witness whether another is lying is improper because “such questions invade the province of the jury and force a witness to testify as to something he cannot know”); *Hunter v. State*, 397 Md. 580, 919 A.2d 63 (2007) (error to allow prosecutor to ask five were-they-lying

questions); *Liggett v. People*, 135 P.3d 725 (Colo. 2006) (range of views on the issue, with majority rejecting “were they lying” questions).

³¹*U.S. v. Wallace*, 461 F.3d 15, 70 Fed. R. Evid. Serv. 1012 (1st Cir. 2006).

³²*Jackson v. State*, 258 Ga. 322, 368 S.E.2d 760 (1988).

tional facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.³³

A medical malpractice plaintiff was improperly denied the opportunity to cross-examine the defendant-physician on his pleadings because they had not been admitted into evidence, where the physician's answer merely denied the plaintiff's allegations without expanding or explaining the denials.³⁴

For the use in cross-examination of notes, etc., used by an opposing witness to refresh his recollection, see § 15:10, *supra*. For right to cross-examine as to other crimes and acts of misconduct, see § 29:17, *infra*.

The limits of bias impeachment by a defense lawyer in a criminal case were explored in a 2007 case. A defendant is entitled to a reasonable cross examination on the question of whether the witness held a belief that he would receive a personal benefit from testifying favorably for the prosecution, but that is not to say that there are no limits on the cross examiner's inquiry into the potential bias of an adverse witness. On the contrary, a trial court retains wide latitude to impose reasonable limits on such cross examination, especially in the situation in which the interrogation may be only marginally relevant.³⁵

In 2019, Georgia's rape shield statute, O.C.G.A. § 24-4-412, was amended to more closely adhere to its federal corollary.³⁶ The rape shield law does not unconstitutionally abridge a defendant's right of confrontation.³⁷ Impact of the rape shield law, see *Banks v. State*.³⁸

In *Williams v. State*,³⁹ the Court of Appeals observed that the purpose of the rape shield law is to protect the complaining witness from intrusive inquiries into her history of sexual activity with persons other than the defendant, inquiries which could only be intended to support the inference that the victim consented to intercourse with the defendant. Generally, the rape shield statute prohibits all evidence relating to the past sexual behavior of the complaining witness, including marital history, mode of dress, general reputation for promiscuity, nonchastity or

³³*State v. Orr*, 305 Ga. 729, 827 S.E.2d 892 (2019) (internal quote marks omitted).

³⁴*Carver v. Saye*, 198 Ga. App. 146, 400 S.E.2d 683 (1990).

³⁵*Lawton v. State*, 281 Ga. 459, 640 S.E.2d 14 (2007).

³⁶Ga. Laws 2019, Act 31, § 5.

³⁷*Harris v. State*, 257 Ga. 666, 362 S.E.2d 211 (1987).

³⁸*Banks v. State*, 230 Ga. App. 258, 495 S.E.2d 877 (1998) (“[former] O.C.G.A. 24-2-3 (now O.C.G.A. § 24-4-412) (Rape Shield) assists the truth-seeking process by preventing the jury from becoming inflamed or impassioned and deciding the case on irrelevant and prejudicial evidence.”).

³⁹*Williams v. State*, 263 Ga. App. 597, 588 S.E.2d 790 (2003) (overruled on other grounds by, *White v. State*, 305 Ga. 111, 823 S.E.2d 794 (2019)).

sexual mores contrary to community standards; in other words, her reputation concerning past sexual activity with persons other than the defendant. Given the purposes of the rape shield statute, there appears no meaningful distinction between sexual behavior before and after the crime. In this case the evidence of “past sexual behavior” includes evidence of any sexual behavior by the victim before trial.⁴⁰ The rape shield statute in *Williams* was used to bar admission of evidence of sexual activity between the 12-year-old crime victim and her boyfriend. Evidence that the victim was sneaking boys into her house during the months she claimed she was raped was excluded. The sexual activity between the victim and her boyfriend would not have supported a defense theory that someone else caused her pregnancy. Such evidence would have only led to an inference that victim was engaging in sexual intercourse with others. The court held this would reflect on character without contributing materially to issue of defendant’s guilt or innocence.

In a sex crimes case, can the defense establish that the alleged victim is infected with venereal disease, perhaps to show her “loose” character? No, says the Rape Shield statute. Evidence of a victim’s sexually transmitted disease (STD) was inadmissible under the Rape Shield statute in a molestation prosecution. It could not be determined in this case when a victim had contracted STD, and the law made no distinction between a victim’s behavior and the before or after the crime, and past sexual behavior (excluded by statute) included evidence of any sexual behavior by victim before trial.⁴¹

A child molestation victim could not be cross-examined about prior molestations by other persons.⁴²

The Georgia Supreme Court determined that although impeachment of alleged sexual abuse victims with their prior false allegations of sexual misconduct is highly probative, this particular subject of cross-examination is not constitutionally mandated and may be excluded on Rule 403 grounds.⁴³ On this subject, the Georgia Court of Appeals has recognized that, “Prior false allegations of sexual misconduct are considered in federal and state courts under Rule 608 (b).”⁴⁴ O.C.G.A. § 24-6-608(b) closely follows that federal rule.

Good faith required for a cross-examiner to pose a question to a

⁴⁰O.C.G.A. § 24-4-412.

⁴³*State v. Burns*, 306 Ga. 117, 829 S.E.2d 367 (2019).

⁴¹*Murrell v. Ricks*, 280 Ga. 427, 627 S.E.2d 546 (2006).

⁴⁴*Frye v. State*, 344 Ga. App. 704,

⁴²*Chastain v. State*, 257 Ga. 54, 354 S.E.2d 421 (1987). 811 S.E.2d 460 (2018).

witness, see *Medlock v. State*.⁴⁵

In deciding whether to allow state to cross-examine defendant's character witnesses as to defendant's character, trial court was required to make state show that it had good faith basis for line of questioning and was required to consider such evidence in ruling upon the objection in prosecution for armed robbery and possession of a firearm during the commission of a crime.⁴⁶ When a defendant presents witnesses as to his good character, the state is entitled to cross-examine as to his juvenile record.

A witness has a right to be protected from improper questions and from harsh or insulting demeanor.⁴⁷ Trial judges retain wide latitude to impose reasonable limits on cross examination based on concerns about, among other things, confusion of the issues or interrogation that is repetitive or only marginally relevant. Extent of cross examination can be curtailed if the inquiry is not relevant or material, and such restriction lies within the discretion of the trial court, which will not be disturbed on appeal unless manifestly abused.⁴⁸

Can a cross-examiner ask why the opposing party brought a lawsuit? The reason a plaintiff sues a particular defendant is generally not relevant to any of the issues involved in establishing the plaintiff's cause of action.⁴⁹

§ 16:3 Form of questions on cross-examination

Generally, the content and form of questions asked on cross-examination are subject to many of the same rules as apply to those asked on direct examination.¹ Questions asked on cross-examination must be related to testimony that is material,² relevant,³ and competent.⁴ Each question must consist of a single point.⁵

⁴⁵*Medlock v. State*, 263 Ga. 246, 430 S.E.2d 754 (1993); *State v. Clark*, 258 Ga. 464, 369 S.E.2d 900 (1988).

⁴⁶*Harris v. State*, 296 Ga. App. 465, 675 S.E.2d 236 (2009).

⁴⁷O.C.G.A. §§ 24-6-611(a), 24-6-623.

⁴⁸*Parks v. State*, 294 Ga. App. 646, 669 S.E.2d 684 (2008).

⁴⁹*Corey v. Clear Channel Outdoor, Inc.*, 299 Ga. App. 487, 683 S.E.2d 27 (2009).

[Section 16:3]

¹See O.C.G.A. §§ 24-4-403, 24-6-611.

²See § 15:2, *supra*.

³See § 15:3, *supra*.

⁴See § 15:6, *supra*.

⁵Am. Jur. 2d, Witnesses § 751. See, generally, *Darden v. City of Fort Worth, Texas*, 866 F.3d 698 (5th Cir. 2017) (criticizing the use of "compound questions").

A question may not call for a legal conclusion.⁶ The right of a party to a thorough and sifting cross-examination does not authorize questions which call for conclusions as to matters which could be determined only by the jury. Questions which seek to obtain answers which would state either a conclusion or an opinion that would usurp the province of the jury as to the ultimate issue to be decided are improper.⁷

Nor can questions be argumentative.⁸ Defense counsel's questioning of an accomplice in a prosecution for murder, arson, and burglary, was objectionable on the ground that the questions were argumentative, that they misstated an accomplice's testimony, that they were stated in such a way that they were not intended to elicit responses on the part of the witness, and that they assumed facts not in evidence.⁹ In the 2013 Georgia Evidence Code, unduly argumentative questions may be objected to under O.C.G.A. §§ 24-6-611(a) and 24-6-623. The questions should not be repetitious.¹⁰ If the form of the question is confusing and is objected to on that ground, the court should require the examiner to reframe it.¹¹

Curative instructions under O.C.G.A. § 24-1-105 can be important. In *Grant v. State*,¹² a detective witness's reference during cross-examination to the defendant as a drug dealer known to be in possession of firearms was not reversible error where the trial judge delivered a curative instruction to the jury.

For the cross-examination of expert witnesses, see § 24:39, *infra*.

§ 16:4 Additional matters proper on cross-examination

The fairness doctrine is based on O.C.G.A. § 9-11-32(a)(5). In pertinent part, this statute provides that “[i]f only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part

⁶*Post v. State*, 201 Ga. 81, 39 S.E.2d 1 (1946). See also O.C.G.A. § 24-7-704.

⁷*Wallis v. Odom*, 130 Ga. App. 437, 203 S.E.2d 613 (1973). See also *Montoya v. Ramos*, 2017 WL 3425675 (D.N.M. 2017) (“Any statements that usurp the province of the jury are inadmissible.”).

⁸*Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948). See also *U.S. v. Ashburn*, 98 Fed. R. Evid. Serv. 417 (E.D. N.Y. 2015) (“the court properly controlled the conduct of the trial by proscribing counsel’s ability to ask

improper, argumentative questions”).

⁹*Beadles v. State*, 259 Ga. 519, 385 S.E.2d 76 (1989).

¹⁰Am. Jur. 2d, Witnesses § 854. In Georgia’s 2013 Evidence Code, see O.C.G.A. § 24-4-403.

¹¹*Carroll v. Hill*, 80 Ga. App. 576, 56 S.E.2d 821 (1949). See, generally, *U.S. v. Powers*, 702 F.3d 1 (1st Cir. 2012) (the trial judge “impose[d] reasonable limits on cross-examination in order to avoid confusion of the issues”).

¹²*Grant v. State*, 298 Ga. 835, 785 S.E.2d 285 (2016).

introduced, and any party may introduce any other parts.” Where the plaintiff was cross-examining a witness about a statement he had made in a deposition, the defendant could require the plaintiff to introduce other relevant parts of the deposition during cross-examination, even though the statute also permits the defendant’s later introduction of the other parts of the deposition.¹ A similar approach is seen in O.C.G.A. § 24-1-106.

The witness may be cross-examined as to all matters that are held to have a bearing on his credibility. Such matters are discussed at §§ 12:4 to 12:6, *supra*.

§ 16:5 Manner of conducting cross-examination

It shall be the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor.¹ The Supreme Court of Georgia explains that this is a responsibility of trial judges: “trial courts have a duty to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to protect witnesses from harassment or undue embarrassment.”²

Such limitations do not infringe upon constitutional requirements, as an opinion by Chief Judge Dillard of the Georgia Court of Appeals observes:

[T]rial courts retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.³

It is not improper to limit cross-examination to prevent the repetition of questions. A court properly limited cross-examination on questions which had already been answered more than once.⁴

Cross-examination questions of the defendant’s character witness in a case charging the defendant with the murder of a baby girl as to whether the defendant had beaten his own daughter and of his arrest for burglary several years earlier were proper to

[Section 16:4]

S.E.2d 217 (2019).

¹Brown v. Macheers, 249 Ga. App. 418, 547 S.E.2d 759 (2001).

³Johnson v. State, 348 Ga. App. 667, 824 S.E.2d 561 (2019).

[Section 16:5]

¹O.C.G.A. § 24-6-611(a). See O.C.G.A. § 24-6-623.

⁴Sanders v. State, 257 Ga. 239, 357 S.E.2d 66 (1987); Simmons v. State, 72 Ga. App. 16, 32 S.E.2d 842 (1945).

²Elkins v. State, 306 Ga. 351, 830

test their knowledge of the defendant.⁵ A district attorney must be able to show that questions posed to defendant's character witness were asked in good faith and based on reliable information that can be supported by admissible evidence.⁶

Good faith of the cross-examiner may become an issue. Can a cross-examiner ask witness X about "your prior convictions" while peering at an official looking document, and when witness X denies this sort of past history simply put the document back in the examiner's briefcase? Even if nothing further is said about the episode, what sort of impression is created? Or suppose that an examiner, while cross-examining a witness, "accidentally" drops a lengthy "rap sheet" on the floor? Such theatrics by counsel will sometimes void a verdict. During a trial while the defense counsel was cross-examining the plaintiff about prior criminal convictions, the defense attorney dramatically dropped a lengthy computer printout in front of the jury. Did the jury assume that was the plaintiff's "rap sheet"? The Court of Appeals was concerned with "not only the conscious impropriety of counsel here that we find troubling, but also the nature of the information counsel improperly intended to convey to the jury." The jury found for defendants in this civil rights suit against police. The Eighth Circuit Court of Appeals reversed and remanded for a new trial. The Court of Appeals observed that improper questioning by counsel will warrant a new trial when the questioning conveys improper information about the opposing litigant. The court noted that in determining prejudice, a court must consider the climate in which the questioning occurred.⁷

On the manner of conducting cross-examination, see the text Pozner and Dodd, *Cross-Examination: Science and Techniques* (1993).

A criminal defendant was not allowed to cross-examine police about discrepancies between a police narrative and other evidence, unless the entire narrative was read into the record.⁸

§ 16:6 Testing the witness' knowledge and accuracy

The cross-examiner may bring out on cross-examination matters that show the improbability of his direct testimony, or reveal inconsistencies either in the testimony or between the testimony

⁵Lopez v. State, 259 Ga. 39, 376 S.E.2d 673 (1989).

⁶State v. Clark, 258 Ga. 464, 369 S.E.2d 900 (1988).

⁷Sanders-El v. Wenciewicz, 987 F.2d 483 (8th Cir. 1993) (impression

conveyed that plaintiff was a hardened criminal with a long history of arrests; display discussed in this paragraph referred to by court as the "computer printout fiasco").

⁸Riley v. State, 257 Ga. 91, 355 S.E.2d 66 (1987).

and his conduct as related to the event about which he testified.¹

§ 16:7 Use of prosecution's evidence by defense

The United States Supreme Court has held that the defense is entitled to the production of tangible evidence in the possession of the prosecution provided such evidence is material and that a timely request therefore is made. The suppression by the prosecution of evidence favorable to an accused, upon request, violates due process where the evidence is material either to guilt or to punishment, *Brady v. Maryland*.¹

In Georgia criminal practice, discovery provisions for felony cases were added in 1995. Where a defendant opts into the revised procedures, enhanced discovery can be exacted from the State, but disclosure obligations are imposed upon the defense as well.²

In *Johnson v. State*,³ the Georgia Supreme Court limited state discovery of defendant's experts to those existing, written scientific reports that defense intends to introduce at trial. Since *Johnson*, a change in Georgia statutory law requires expert oral reports to be reduced to writing. If the report is oral or partially oral, all relevant and material oral portions of such report must be taken down in writing and served on opposing counsel. Prosecutors must do so no later than 10 days before trial and defendants no later than five days before trial.⁴

Where a decoy has been used by the police to secure facts upon which the prosecution was based, the court may order identity of the decoy to be disclosed.⁵ Informer disclosure can also be denied by the court. A case-by-case determination will be made where a decoy or an informer is involved.⁶

The informer privilege is not absolute so that the informer may be ordered disclosed when his identity becomes material to the establishment of a defense. Such was the case where the informer was an active participant in the illegal activities which he had disclosed.⁷

Where a magistrate issues a warrant based upon an unnamed

[Section 16:6]

¹Am. Jur. 2d, Witnesses § 958.

[Section 16:7]

¹*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

²See O.C.G.A. § 17-16-20.

³*Johnson v. State*, 265 Ga. 833,

463 S.E.2d 123 (1995).

⁴O.C.G.A. § 17-16-4. See also *Valentine v. State*, 293 Ga. 533, 748 S.E.2d 437 (2013).

⁵*Taylor v. State*, 136 Ga. App. 31, 220 S.E.2d 49 (1975).

⁶*Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729 (1977).

⁷*Roviaro v. U.S.*, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

informer's tip, he may require where he doubts the affiant's credibility that the informer be identified. Similarly, where there has been a search and arrest without a warrant, the judge who hears a motion to suppress has the power to decide whether the informant must be revealed in order for the court to determine the believability of the arresting officer as a witness.⁸

For discovery of prosecution witness pretrial statements and reports in federal practice, see Rule 16, Federal Rules of Criminal Procedure; 18 U.S.C.A. § 3500; *Goldberg v. U. S.*⁹

§ 16:8 Prior inconsistent statement

Prior inconsistent statement rules are contained in O.C.G.A. §§ 24-6-613 and 24-8-801(d)(1)(A) and (B).¹ Under O.C.G.A. §§ 24-6-613(b) and 24-8-801(d)(1)(A), prior inconsistent statements "are not hearsay, and, thus, they may be admitted both for impeachment purposes and as substantive evidence."² Where the declarant testifies at trial, is subject to cross-examination concerning the prior inconsistent statement, afforded an opportunity to explain or deny the prior inconsistent statement, and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement, extrinsic evidence of a prior inconsistent statement may be admitted at trial.³

The foregoing Georgia statutes largely adhere to their federal counterparts. O.C.G.A. § 24-8-801(d)(1)(A), however, in-line with earlier Georgia law, maintains that those prior inconsistent statements are admissible for both impeachment and substantive purposes when introduced against a testifying witness, regardless of whether that witness constitutes a party opponent.⁴ Federal courts, on the other hand, generally differentiate between party and non-party witnesses when it comes to the evidentiary impact of prior inconsistent statements used for impeachment, except where those earlier statements were provided under oath:

There is a distinction between a party witness and a non-party witness. A prior inconsistent statement by a party is an admission that is received as substantive evidence whether it is made under oath or not due to the party being a party opponent. See Fed. R.

⁸*McCray v. State of Ill.*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967).

⁹*Goldberg v. U. S.*, 425 U.S. 94, 96 S. Ct. 1338, 47 L. Ed. 2d 603 (1976).

[Section 16:8]

¹*Thompson v. State*, 304 Ga. 146, 816 S.E.2d 646 (2018).

²*Chambers v. State*, 351 Ga. App. 771, 833 S.E.2d 155 (2019).

³*Smith v. Chandler*, 316 Ga. 321, 888 S.E.2d 171 (2023).

⁴See generally *Chambers v. State*, 351 Ga. App. 771, 833 S.E.2d 155 (2019).

Evid. 801(d)(2)(A)–(E). The same inconsistent statement if spoken by a non-party qualifies as substantive evidence only if it is made under oath; otherwise it can only be used to impeach the credibility of the witness.” U.S. v. DiSantis, 565 F.3d 354 (7th Cir. 2009) (quoting U.S. v. Dietrich, 854 F.2d 1056, 1061 (7th Cir. 1988); Fed. R. Evid. 801(d)(1)(A)).⁵

The witness may be cross-examined as to prior inconsistent statements, but to complete the impeachment with extrinsic evidence, the contradiction must be as to a material matter and not relating to some collateral matter.⁶ In a related context, decisions hold that witnesses may also be impeached “by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.”⁷

Inconsistent statements can be secured from an opponent.⁸ If an inconsistency appears, the witness may be cross-examined from his own document.⁹ This remains true even when the witness admits to the inconsistency during testimony.¹⁰

Vicarious admissions have also formed the basis for impeaching prior inconsistent statements. In one case, the defendant was cross-examined with inconsistent statements his attorney had made on his behalf concerning the crime in question. In *Parrish v. State*,¹¹ the defendant’s conviction was affirmed, with Presiding Judge Dillard of the Georgia Court of Appeals observing:

Federal case law—which is relevant in interpreting our Evidence Code—has held that the federal counterpart to this statute (Federal Rule of Evidence 801(d)(2)(D))—allows statements by an attorney to be admissible against a defendant in criminal cases in certain situations.

In addition, extrinsic evidence of a witness’ prior inconsistent statement may be admitted so long as “the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the

⁵Baptist v. Ford Motor Company, 2018 I.E.R. Cas. (BNA) 107427, 2018 WL 1519153 (N.D. Ill. 2018).

⁶Daniels v. State, 349 Ga. App. 681, 824 S.E.2d 754 (2019). See also Elam v. Concourse Village, Inc., 103 Fed. R. Evid. Serv. 43 (S.D. N.Y. 2017).

⁷U.S. v. Adamson, 291 F.3d 606, 58 Fed. R. Evid. Serv. 1114 (9th Cir. 2002).

⁸See Johnson v. State, 259 Ga. 403, 405, 383 S.E.2d 118 (1989), hold-

ing that a cross-examiner can examine documents which were used by an opposing witness after the start of the hearing or trial.

⁹See generally Riley v. City of Prescott, No. CV-11-08123-PCT-JAT (D. Ariz. February 18, 2014).

¹⁰See generally United States v. Lopez, 870 F.3d 573 (7th Cir. 2017).

¹¹Parrish v. State, 362 Ga. App. 392, 868 S.E.2d 270 (2022).

interests of justice otherwise require.”¹²

The cross-examiner must demonstrate inconsistency, at least upon challenge, when using a prior statement to contradict the witness.¹³ A witness claiming that she or he cannot recall making a statement has been considered to be proof of inconsistency.¹⁴

An interrogatory response of scientist was inadmissible as a prior statement to impeach the scientist as a witness at trial of investor’s suit against scientist and technology company for issuance of additional shares to investor, where response did not contradict scientist’s trial testimony.¹⁵ Before a prior statement can be used to impeach a witness, it must contradict the witness’ testimony given on the stand; proof of a different but not inconsistent statement would not suffice to raise an issue either as to impeachment or as to substantive use. Issue of whether prior statement by witness contradicts statement made at trial is a question of law for the court.

Sometimes the best document to impeach with is the one the witness himself used to refresh his own recollection. As noted in an earlier passage of this section, the cross-examiner can ask to see it.¹⁶ Reaffirmation of same principle in a 1990s case, see *Sterling v. State*.¹⁷ Prosecutor’s right to demand inspection of refreshing document used by defense, see *U.S. v. Nobles*.¹⁸ Other Georgia cases, see *Baxter v. State*.¹⁹

Does the rule of cases like *Baxter* and *Sterling* extend to civil litigation? The answer to this inquiry seems to be in the affirmative.²⁰

There is a distinction between refreshing on the stand, versus reviewing documents pretrial. According to Imwinkelreid, “[T]he courts are in agreement that the privilege [against disclosure] is waived if the witness consults the statement on the stand during

¹²*Brewner v. State*, 302 Ga. 6, 804 S.E.2d 94 (2017). See also *Berkeley County School District v. Hub International Limited*, 2021 WL 1059024 (D.S.C. 2021).

¹³See generally *State v. Cravens*, 132 S.W.3d 919 (Mo. Ct. App. S.D. 2004).

¹⁴*Sconyers v. State*, 318 Ga. 855, 901 S.E.2d 170 (2024).

¹⁵*Williamson v. Yang*, 250 Ga. App. 228, 550 S.E.2d 456 (2001).

¹⁶See *Johnson v. State*, 259 Ga. 403, 405, 383 S.E.2d 118 (1989).

¹⁷*Sterling v. State*, 267 Ga. 209, 477 S.E.2d 807 (1996).

¹⁸*U.S. v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141, 20 Fed. R. Serv. 2d 547 (1975).

¹⁹*Baxter v. State*, 254 Ga. 538, 331 S.E.2d 561 (1985); *Anderson v. State*, 200 Ga. App. 29, 406 S.E.2d 791 (1991) (where defense wants to see document, burden on defense to show it was used to refresh).

²⁰See *Lester v. S. J. Alexander, Inc.*, 127 Ga. App. 470, 473, 193 S.E.2d 860, 862 (1972) (after witness used office memo to refresh his memory, cross-examiner has right to quiz witness on the contents of the written instrument).

his or her testimony at trial.”²¹ Imwinkelreid then addresses the type of privilege claims which are prohibited when a witness refreshes from a document while on the stand. “Under [Federal] Rule 612, the point of agreement is that the waiver extends to any privilege.” In most cases, the privilege which is waived is the attorney-client, but waiver has also been applied to a claim of work product.²² Note the Georgia Code section, which does not apply a waiver when the witness refreshes earlier than on the stand *and* claims a valid privilege.²³

On impeaching one’s own witness, see *Jones v. State*,²⁴ which holds that although the court has removed the requirements of surprise and prejudice from the element of entrapment in the statute, the statute’s plain language still requires as a threshold matter a showing that the witness made a statement inconsistent with the witness’ testimony at trial.

In Georgia, a confession, which is otherwise inadmissible, may be used to impeach the defendant if he gives sworn testimony which is contrary to statements in the confession.²⁵

Other cases have also held that a flawed confession is usable for impeachment.²⁶ There is authority that a judge must instruct the jury that the confession is admitted for the purposes of impeachment only and cannot be considered as establishing guilt. Failure to give such an instruction is reversible error.²⁷

Under former law, a prior inconsistent statement of a witness who has testified and is subject to cross-examination was admissible as substantive evidence over an objection that, simply because it is an out-of-court statement, it is hearsay, or impeaching only.²⁸

Prior jurisprudence held that a prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence and is not limited in value only to impeachment purposes.²⁹

The intent of the drafters of the 2013 Georgia Evidence Code

²¹E. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.12.4(5) (2002).

²²E. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 6.12.4(5) (2002).

²³P. Milich, *Georgia’s New Evidence Code—An Overview*, 28 Ga. St. L. Rev. 379, 399 (2012); O.C.G.A. § 24-6-612.

²⁴*Jones v. State*, 270 Ga. 25, 27, 505 S.E.2d 749 (1998) (overruled on other grounds by, *Hamm v. State*, 294

Ga. 791, 756 S.E.2d 507 (2014)).

²⁵*Colbert v. State*, 124 Ga. App. 283, 183 S.E.2d 476 (1971).

²⁶See *Charlton v. State*, 217 Ga. App. 842, 459 S.E.2d 455 (1995).

²⁷*Colbert v. State*, 124 Ga. App. 283, 183 S.E.2d 476 (1971).

²⁸*Johnson v. State*, 260 Ga. 17, 389 S.E.2d 238 (1990).

²⁹*Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717, 30 A.L.R.4th 404 (1982). The *Gibbons* rule was confirmed in *Holiday v. State*, 272 Ga.

was to carry forward the substantive impact of prior inconsistent statements.³⁰ There is a distinction between witnesses who appear in court for direct and cross-examination versus witnesses who do not appear before the trier of fact, as through the report of a hearsay declaration.³¹

It is error for trial court to refuse to allow defendant in murder trial to impeach a witness' testimony merely because witness failed to deny making prior statements, where witness stated that she failed to recollect making the prior inconsistent statements.³²

Notwithstanding the foregoing rules, there may be a few situations where prior inconsistent statements are impeaching only. The statements of a defendant which were inadmissible as direct evidence due to *Miranda* violations were admissible on impeachment as prior inconsistent statements.³³

Upon proper foundation, an inconsistent statement made by a witness subsequent to his courtroom testimony may be used for impeachment.³⁴

A prior inconsistent statement could not be used for impeachment where the statement was made by counsel for the witness, not the witness himself.³⁵

Witness' prior statement which is inconsistent on material matter with his trial testimony is properly admitted into evidence to impeach his trial testimony; prior inconsistent statement becomes admissible when witness denies having made such statement; when witness admits unequivocally that he made prior inconsistent or contradictory statement, he has thereby impeached himself, and it is not error to exclude prior statement from evidence.³⁶ However, later decisions (and some would argue less well-considered ones) may cast a cloud on the *Dickey* result.

779, 534 S.E.2d 411 (2000), and applies when a prosecutor impeaches her own witnesses with a prior statement.

For the foundation for prosecutor to impeach victim of crime by using victim's prior inconsistent statement, see *Gooch v. State*, 289 Ga. App. 74, 656 S.E.2d 214 (2007) (victim had denied making prior statement).

³⁰See O.C.G.A. § 24-8-801(d)(1)(A). See, generally, *Harvey v. State*, 300 Ga. 598, 797 S.E.2d 75 (2017) (overruled on other grounds by, *Nalls v. State*, 304 Ga. 168, 815 S.E.2d 38 (2018)) (prior inconsistent statements not hearsay).

³¹O.C.G.A. § 24-8-801(d)(1)(B) (as to hearsay declarants, effect is one of impeachment only).

³²*Sprouse v. State*, 250 Ga. 174, 296 S.E.2d 584 (1982).

³³*Hicks v. State*, 256 Ga. 266, 347 S.E.2d 589 (1986).

³⁴*Johnson v. State*, 181 Ga. App. 620, 353 S.E.2d 100 (1987).

³⁵*Johnson v. State*, 255 Ga. 552, 341 S.E.2d 220 (1986).

³⁶*Dickey v. State*, 240 Ga. 634, 242 S.E.2d 55 (1978) as stated in *Southern Bell Tel. and Tel. Co. v. Hodges*, 164 Ga. App. 757, 298 S.E.2d 570 (1982)).

In *Duckworth v. State*,³⁷ the court held that whether a witness admits or denies making a prior written statement which is inconsistent with his trial testimony, the written statement may be admissible.

The point is addressed in *Wilson v. State*,³⁸ wherein the court follows the approach announced in *Duckworth*:

Wilson also claims that a proper foundation was not laid for admission of the prior inconsistent statement into evidence because Seabrook did not deny making the prior statement, and instead admitted that he had made it. However, “the fact that the witness admits that he or she made the inconsistent pre-trial statement does not render it inadmissible. [Cit.]” *Warner v. State*, 281 Ga. 763, 766(3), 642 S.E.2d 821 (2007). See also *Cummings v. State*, 280 Ga. 831, 833(3), 632 S.E.2d 152 (2006) (no “denial” requirement for the admission of a prior inconsistent statement). Therefore, Wilson has failed to show that the trial court erred in admitting the statement into evidence.³⁹

A witness may not be impeached by contradictory statements previously made by him as to immaterial matters.⁴⁰ Impeachment on collateral matters is disfavored. Defendant could not use mother of victim’s prior inconsistent statements on her public assistance application to impeach her testimony during felony murder and aggravated battery trial, where the prior inconsistent statements were irrelevant to the trial.⁴¹

Federal law is in accord. If the inconsistency relates to a collateral matter, extrinsic evidence may not be offered to contradict the witness.⁴²

§ 16:9 Use of testimony before the grand jury to impeach a witness

There is a tendency to erode the secrecy of proceedings before the grand jury. It is only natural that the defendant would wish to obtain all possible information as to what was testified before that body, particularly to impeach a witness who testified before the grand jury and is testifying at the trial. The courts constantly enlarge that right, and in federal cases where a transcript is

³⁷*Duckworth v. State*, 268 Ga. 566, 492 S.E.2d 201 (1997).

³⁸*Wilson v. State*, 286 Ga. 141, 686 S.E.2d 104 (2009).

³⁹To similar effect is *Johnson v. State*, 289 Ga. 106, 709 S.E.2d 768 (2011).

⁴⁰*Haywood v. State*, 283 Ga. App. 568, 642 S.E.2d 203 (2007).

⁴¹*Smith v. State*, 283 Ga. 237, 657

S.E.2d 523 (2008).

⁴²*U.S. v. Bordeaux*, 570 F.3d 1041, 1051 (8th Cir. 2009) (defines collateral matter and distinguishes it from material matter). In *Bordeaux*, the court observed that under Rule 613 there are limitations upon impeaching as to collateral questions, and it was not an abuse of discretion for the district court to exclude a statement relating to collateral issues.

readily available, a government witness may be impeached by inconsistent declarations he made to the grand jury.

Yet, our courts continue to recognize that the veil of secrecy surrounding grand jury proceedings is fundamental to our criminal procedure.¹ However, where the ends of justice require it, the testimony of a grand jury witness may be disclosed.²

Execution of the foregoing disclosure in federal trials is aided by the regular and routine reporting and transcribing of grand jury proceedings in federal procedure. Federal courts allow prior inconsistent statement impeachment with grand jury testimony.³

§ 16:10 Laying foundation for prior inconsistent statements

To impeach a witness with a prior inconsistent statement, the cross-examiner must lay the proper foundation, establish that the prior statement contradicts or is inconsistent with the witness's in-court testimony, and show that the prior statement is relevant.¹ A witness may be recalled in order to lay this foundation.²

Under the 2013 Evidence Code, Georgia allows impeachment both of witnesses who appear at the trial as well as impeachment of hearsay declarants who do not personally appear.³

A 2017 Georgia case held that proof of a “different but not inconsistent statement” does not raise an impeachment issue.⁴

What about a witness who gave a complete and detailed statement earlier, but when he reaches the witness stand, now claims he remembers nothing. For purposes of the statute governing impeachment of witnesses through use of prior inconsistent statements, testimony that a witness does not recall certain details which have previously been included in a prior statement is in-

[Section 16:9]

¹Pittsburgh Plate Glass Co. v. U.S., 360 U.S. 395, 79 S. Ct. 1237, 3 L. Ed. 2d 1323 (1959).

²U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). See 18 U.S.C.A. § 3500.

³See, generally, U.S. v. Dean, 823 F.3d 422, 100 Fed. R. Evid. Serv. 462 (8th Cir. 2016); U.S. v. Jacoby, 955 F.2d 1527, 35 Fed. R. Evid. Serv. 224 (11th Cir. 1992).

[Section 16:10]

¹Davidson v. State, 284 Ga. App. 333, 643 S.E.2d 848 (2007).

²Childress v. State, 266 Ga. 425, 467 S.E.2d 865 (1996).

³O.C.G.A. §§ 24-6-613, 24-8-801(d)(1). See also O.C.G.A. § 24-8-806.

⁴Harvey v. State, 300 Ga. 598, 797 S.E.2d 75 (2017) (overruled on other grounds by, Nalls v. State, 304 Ga. 168, 815 S.E.2d 38 (2018)).

consistent with the prior statement about those details.⁵

Other earlier Georgia cases hold where a witness merely states that he does not remember, he cannot be impeached by the showing of former statements with respect to the facts which he claims not to remember; such is true regardless of whether the witness' failure to remember is real or contrived.⁶ Witness' taped statement that described the events which took place between defendant and victim on the night defendant allegedly committed offenses of rape, kidnapping with bodily injury, aggravated robbery, and armed robbery was not admissible as a prior inconsistent statement to impeach witness; witness did not deny the facts contained in the statement but simply testified at trial that he did not remember them, and under such circumstances, a transcript of witness' taped statement should have been prepared and used to refresh witness' memory. However, there are contrary indications in other cases. Witness, who was a friend of the kidnapping defendant, and who claimed memory loss when he took the stand, was a hostile witness to the State, in view of his clear reluctance to testify against defendant, so state could introduce a police officer's testimony as to a prior inconsistent statement made by a witness during a conversation between officer and witness, wherein witness had stated that defendant had approached witness about providing a false alibi and that defendant had admitted to "chickening out" when it came to actually killing the victim.⁷

Inconsistent statement impeachment, there is no requirement that a witness's prior inconsistent statement be admitted into evidence prior to its use for impeachment.⁸

Disputes continue over the admissibility, as exhibits, of impeaching documents, *after* the impeached witness fully admits the inconsistency. Federal and a majority of courts deny admission to the impeaching document, as an exhibit. Some Georgia case law seems to run contrary to this position, holding that the fact that the witness admits that he or she made an inconsistent pre-trial statement does not render such prior statement inadmissible.⁹ What if the impeachment comes at the hands of a prosecutor impeaching a hostile witness called during the state's case, perhaps a friend of the accused? These facts do not appear to change the rule. The *Warner* case holds that "the fact that the

⁵Green v. State, 317 Ga. 250, 892 S.E.2d 733 (2023). See also Cummings v. State, 280 Ga. 831, 632 S.E.2d 152 (2006).

⁶Hill v. State, 250 Ga. App. 897, 553 S.E.2d 289 (2001).

⁷LeBlanc v. State, 283 Ga. App. 434, 641 S.E.2d 646 (2007).

⁸Hopkins v. State, 283 Ga. App. 654, 642 S.E.2d 356 (2007).

⁹Warner v. State, 281 Ga. 763, 642 S.E.2d 821 (2007).

witness admits that he or she made the inconsistent pre-trial statement does not render it inadmissible.”¹⁰ Certainly, the State may attempt to impeach its own witness.¹¹

Foundation for prosecutor to impeach victim of crime by using victim’s prior inconsistent statement, see *Gooch v. State*.¹²

For more on inconsistent statement impeachment, see § 12:5, *supra*.

§ 16:11 Impeachment by proof of prior conviction

On April 5, 2005, former Governor Perdue signed into law a number of provisions relating to criminal case evidence. These were contained in the Criminal Justice Act of 2005. One of the major revisions related to impeachment by prior conviction. It aligned Georgia with Federal Evidence Rule 609. In 2013, the entire Evidence Code is based upon the federal pattern. Prior conviction impeachment is found in § 24-6-609 of the new enactment.¹ The 2013 incarnation more closely adheres to the federal rule than its predecessor.

Examining O.C.G.A. § 24-6-609, the Supreme Court of Georgia outlined the statute’s purposes as: “generally allowing for impeachment of a witness’s character for truthfulness by evidence of conviction of a felony or of any crime ‘if it readily can be determined that establishing the elements of such crime required proof or admission of an act of dishonesty or making a false statement[.]’ ”² Once again, Georgia Rule of Evidence 609 is patterned after the corresponding federal rule.³ The Eighth Circuit Court of Appeals identified Fed. R. Evid. 609’s underlying rationale: “Rule 609 ‘is based on the common sense proposition that one who has transgressed society’s norms by committing a felony is less likely than most to be deterred from lying under oath.’ ”⁴ In *Lawson v. State*,⁵ Presiding Judge Dillard of the Georgia Court of Appeals recognized parallel considerations underpinning the Georgia rule:

[T]he introduction of evidence of a prior felony conviction [pursuant

¹⁰See § 16:8, *supra*; *Duckworth v. State*, 268 Ga. 566, 569(1), 492 S.E.2d 201 (1997).

¹¹O.C.G.A. § 24-6-607; *Cummings v. State*, 280 Ga. 831, 832(2), 632 S.E.2d 152 (2006).

¹²*Gooch v. State*, 289 Ga. App. 74, 656 S.E.2d 214 (2007) (victim had denied making prior statement).

[Section 16:11]

¹*Jordan v. State*, 344 Ga. App. 267, 810 S.E.2d 158 (2018).

²*American Civil Liberties Union, Inc. v. Zeh*, 312 Ga. 647, 864 S.E.2d 422 (2021).

³See *Sinkfield v. State*, 318 Ga. 531, 899 S.E.2d 103 (2024).

⁴*American Modern Home Insurance Company v. Thomas*, 993 F.3d 1068, 115 Fed. R. Evid. Serv. 325 (8th Cir. 2021).

⁵*Lawson v. State*, 365 Ga. App. 87, 877 S.E.2d 616 (2022).

to O.C.G.A. § 24-6-609] is “intended to afford the jury a basis to infer that the witness’s character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony.” Simply put, the introduction of evidence of a prior crime is “a general attack on the credibility of the witness.”

There are, however, nuances in the treatment of prior convictions under O.C.G.A. § 24-6-609 and Fed. R. Evid. 609. The Georgia and the federal rule each differentiate between: (1) testifying criminal defendants as opposed to other witnesses who take the stand;⁶ and (2) convictions for crimes involving dishonesty or false statement as opposed to other offenses that constitute felonies.⁷

Both Georgia and Federal Rules 609 contain a specific and elevated standard for introduction of impeaching requiring trial courts to evaluate whether the probative value of the impeaching conviction outweighs the prejudicial impact to the criminal defendant: “[E]vidence an accused (who testifies) has been convicted of a crime punishable by death or imprisonment in excess of one year ‘shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused.’”⁸ For testifying witnesses other than a criminal defendant, the introduction of felony convictions that do not involve dishonesty or false statement is generally subject Rule 403 balancing.⁹ Federal courts have explained that this elevated standard felony convictions against the criminally accused reflects the drafters intent, “to protect interest of criminal defendant, not prosecution or non-defendant witness.”¹⁰

Impeachment with convictions for offenses involving dishonesty or false statement, however, are not subject to the balancing test of Rule 403.¹¹ Neither Georgia nor Federal Rule 609 distinguishes between criminal defendants or other testifying witnesses when it comes to impeachment with dishonesty and false statement crime convictions.¹² *Monroe v. State*¹³ noted, however, that misdemeanor violations of O.C.G.A. § 3-3-21, Georgia’s alcohol

⁶See O.C.G.A. § 24-6-609(a)(1); Fed. R. Evid. 609(a)(1)(B).

⁷See O.C.G.A. § 24-6-609(a)(2); Fed. R. Evid. 609(a)(2).

⁸*Lawson v. State*, 365 Ga. App. 87, 877 S.E.2d 616 (2022). See also *United States v. Peterson*, 945 F.3d 144 (4th Cir. 2019).

⁹*Thomas v. Wellenreuther*, 2022 WL 1026047 (2d Cir. 2022); *United States v. Shelledy*, 961 F.3d 1014 (8th Cir. 2020).

¹⁰*Moore v. Volkswagenwerk, A.G.*, 575 F. Supp. 919, 15 Fed. R. Evid. Serv. 614 (D. Md. 1983).

¹¹*Altobello v. Borden Confectionary Products, Inc.*, 872 F.2d 215, 27 Fed. R. Evid. Serv. 953 (7th Cir. 1989).

¹²See generally *U.S. v. Ratliff*, 346 Fed. Appx. 473 (11th Cir. 2009); *U.S. v. Jackson*, 863 F. Supp. 1462 (D. Kan. 1994).

¹³315 Ga. 767, 884 S.E.2d 906 (2023).

sale and licensing statute, are inadmissible impeachment evidence under O.C.G.A. § 24-6-609.

Quoting scholarship, the Georgia Court of Appeals has observed: “Rule 609(a)(1) concerns impeachment of a witness’ truthfulness with evidence of a crime that is punishable by . . . imprisonment in excess of one year under the law which the witness was convicted.”¹⁴ *Jones v. State*¹⁵ held that, in a rape prosecution, the defendant’s “prior conviction for aggravated battery on a pregnant woman” was properly admitted “for the jury to consider in determining whether he testified truthfully.”

Georgia’s rule on prior conviction impeachment was ruled constitutional in *Childs v. State*.¹⁶

Felonies generally are usable under Georgia law to impeach. Felonies are crimes punishable by death or imprisonment of one year or more. Impeachment may also be by crimes of dishonesty or false statement, like the federal pattern.¹⁷ There is a 10-year limit, an exception for crimes which have been pardoned, and provisions controlling impeachment by juvenile adjudications as well as convictions which are on appeal.

Eliminated by Section 14 of the 2005 act is the requirement that a defendant must place his character in issue before he may be impeached. No longer is this special dispensation for defendants in place. Now, as in federal court, if a criminal defendant takes the stand, he may be attacked like any other witness. The revised law follows the federal pattern of decreeing that once an accused person presumes to testify, he or she “may be examined and cross-examined as any other witness.”¹⁸

It should be noted that Georgia’s 2013 Evidence Code removed the word “substantially” from its prejudice balance in order to bring the impeachment standard applicable to criminal defendants into accord with Fed. R. Evid. 609.

Although there is a general 10-year limitation on convictions, exceptions can be made. Probative value of defendant’s prior conviction for interfering with government property substantially outweighed its prejudicial effect in prosecution for interfering with government property and obstruction of a law enforcement officer, though the prior conviction was not admitted as substantive evidence, but rather only to impeach defendant’s credibility

¹⁴*Jones v. State*, 352 Ga. App. 380, 834 S.E.2d 881 (2019) (internal citation omitted; omission original).

¹⁵*Jones v. State*, 352 Ga. App. 380, 834 S.E.2d 881 (2019).

¹⁶*Childs v. State*, 287 Ga. 488, 696

S.E.2d 670 (2010).

¹⁷*Wofford v. State*, 305 Ga. 694, 827 S.E.2d 652 (2019).

¹⁸See O.C.G.A. § 24-5-506(b); *McKoy v. State*, 303 Ga. 327, 812 S.E.2d 293 (2018).

after he denied circumstances giving rise to the prior conviction.¹⁹

Under O.C.G.A. § 24-6-609, where the criminal defendant was paroled on the charge less than 10 years before the trial, Georgia courts are guided by the following factors to determine admissibility: (1) the kind of felony involved and its impeachment value; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime (lest evidence of a similar crime create an unacceptable risk of prejudice); (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Although Georgia's "current evidence code does not require trial courts to engage in this test, these factors continue to be a useful guide in making such a determination because federal courts have employed them under a prior version of the federal evidence rule that is substantively similar to our new evidentiary rule."²⁰ The more stringent "substantially outweighs" standard for impeaching criminal defendants with their prior felony convictions from former Georgia law does not apply even as to those convictions.²¹ Although it is preferred for a trial judge to state the specific factors considered in making its prejudice determination on the introduction of prior conviction impeachment evidence, explicit, on-the-record evaluations are not required.²²

The 10-year provision of the 2005 law was construed in a 2010 case, *Allen v. State*.²³ "Because the language of former § 24-9-84.1(b) mirrors that of Rule 609(b) of the Federal Rules of Evidence . . . we look for guidance to the judicial decisions of the federal courts construing Rule 609(b) and the courts of our sister states construing their statutes modeled on Rule 609(b)." Justice Benham then relied upon precedents from the Seventh, Ninth, and Fifth Circuit Court of Appeals as well as decisions from Delaware, Minnesota, Wyoming, and other states to decide the issue: could defendant use 1992 and March, 1996 prior convictions to impeach a State's witness in a trial held in May, 2006? No, said the court. The priors were too old, and the fact that the witness had been on probation for the past offenses to a point in time

¹⁹*Tate v. State*, 289 Ga. App. 479, 657 S.E.2d 531 (2008).

²⁰*Lawson v. State*, 365 Ga. App. 87, 877 S.E.2d 616 (2022). See also *United States v. Eggleston*, 2022 WL 252412 (C.D. Cal. 2022) ("The Court must consider five factors in balancing the probative evidence of a defendant's prior conviction against its prejudicial effect: '(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subse-

quent history; (3) the similarity between the past crime and the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of defendant's credibility.'").

²¹*Robinson v. State*, 336 Ga. App. 627, 785 S.E.2d 304 (2016).

²²*Redding v. State*, 2024 WL 4350898 (Ga. 2024).

²³*Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

within the 10-year period did not satisfy the rule. Probation is not “confinement.”

Are juvenile offenses treated like adult convictions, and used to impeach the offender? No, says O.C.G.A. § 15-11-38 and O.C.G.A. § 24-6-609. Georgia law provides that the disposition of a child in juvenile court may not be used against such child in any proceeding other than delinquency or unruliness, whether before or after reaching majority, except for bail, plea, or sentencing purposes. Impeaching a witness with evidence of a juvenile record is not permitted. However, in a murder prosecution, refusing to allow the defendant to cross-examine a prosecution witness as to whether the witness was a racist was error.²⁴ First offender record and general impeachment of witnesses, see discussion in *Matthews v. State*.²⁵ Since the first offender statutory scheme was devised to prevent a first offender who had not had an adjudication of guilt entered against him from being treated as if the offender had been convicted, the first offender’s record should not be used if there was no adjudication of guilt. Confirming the point, see *Smith v. State*.²⁶ The first offender record of a defendant’s guilty plea was not admissible to impeach a defendant by showing him to have been convicted of a crime involving moral turpitude.²⁷

Defendant’s plea of nolo contendere to a criminal charge of simple battery was inadmissible for impeachment of the defendant in a subsequent civil trial stemming from the battery since simple battery, a misdemeanor, is not a crime involving moral turpitude.²⁸

First offender pleas came under scrutiny in 2012. Because first offender status is not considered an adjudication of guilt, a witness may not be impeached on general credibility grounds with a first offender sentence that is currently being served.²⁹ However, a first offender plea may be used to contradict facts testified to by the first offender.³⁰

In January 2013, much of the jurisprudence identified in this section of the text book took statutory form. Under O.C.G.A. § 24-6-609, first offender adjudications are declared unavailable for impeachment. The revised Code of Evidence for Georgia places

²⁴*Smith v. State*, 270 Ga. 240, 510 S.E.2d 1 (1998) (overruled on other grounds by, *O’Kelley v. State*, 284 Ga. 758, 670 S.E.2d 388 (2008)).

²⁵*Matthews v. State*, 268 Ga. 798, 493 S.E.2d 136 (1997). See also *Davis v. State*, 269 Ga. 276, 277, 496 S.E.2d 699 (1998).

²⁶*Smith v. State*, 276 Ga. 263, 577

S.E.2d 548 (2003).

²⁷*Witcher v. Pender*, 260 Ga. 248, 392 S.E.2d 6 (1990).

²⁸*Jabaley v. Mitchell*, 201 Ga. App. 477, 411 S.E.2d 545 (1991).

²⁹*Sanders v. State*, 290 Ga. 637, 723 S.E.2d 436 (2012).

³⁰*Carruth v. State*, 290 Ga. 342, 721 S.E.2d 80 (2012).

nolo contendere pleas and juvenile adjudications outside the range of material generally available for impeachment. However, in a criminal proceeding the trial judge may allow evidence of a juvenile adjudication of a witness other than the accused if the evidence “is necessary for a fair determination of the issue of guilt or innocence of the accused.”³¹

The status of first offender adjudications introduced for “prior crimes impeachment” purposes is somewhat equivocal under Georgia’s 2013 Evidence Code. As described in this section, prior Georgia law forbade such use. The language of O.C.G.A. § 24-6-609(c), however, leaves the issue if first offender adjudications open to potential debate. Rather than simply inserting words to the effect of, “adjudications under Georgia’s first offender act,” to the list of nonimpeaching dispositions to the existing language of Fed. R. Evid. 609(c), Georgia lawmakers went a different route. The consequence? The Georgia statute could be read to make the exclusion contingent upon such subsequent events as a pardon. Future Georgia decisions will likely need to address this choice of terminology. The Eleventh Circuit Court of Appeals has rejected the argument that a Georgia first offender disposition is excluded under Fed. R. Evid. 609(c).³²

While O.C.G.A. § 24-6-609 eschews the use of first offender adjudications for general impeachment purposes, they can be utilized to impeach for witness bias.³³

First offender resolutions are also admissible under the doctrine of impeachment by contradiction to disprove or contradict facts so that a jury is not misled by false or deceiving testimony.³⁴

Another Georgia restriction on cross-examination that does not appear federally is located at O.C.G.A. § 24-4-419, passed by the Georgia General Assembly in 2020. Georgia Rule of Evidence 419, precludes the use of certain criminal history information in civil proceedings, “against an employer, its employees, or its agents based on the conduct of an employee or former employee” when several conditions are present.

Away from direct attack during cross-examination of a criminal accused, there are other methods for advancing his past misconduct. Impeachment of a defendant’s character witnesses by evidence of the defendant’s specific bad acts and previous convictions did not have to be limited to convictions of crimes

³¹See O.C.G.A. § 24-6-609.

³²*Wilson v. Attaway*, 757 F.2d 1227, 17 Fed. R. Evid. Serv. 1380 (11th Cir. 1985).

³³*Hall v. State*, 335 Ga. App. 895, 783 S.E.2d 400 (2016).

³⁴*Williams v. State*, 301 Ga. 829, 804 S.E.2d 398 (2017).

involving moral turpitude.³⁵

Bias may also provide a theory for advancing prior misconduct of a trial witness not yet reduced to a conviction involving moral turpitude. Although the fact that a witness has been charged with a crime is no proof that he is a criminal, the existence of pending criminal charges may be relevant; the witness' partiality may be exposed by proof that he hopes to benefit in related cases from his cooperation with the prosecution in this case.³⁶

In connection with *Kinsman v. State*, see *Smith v. State*.³⁷

Impeachment by prior conviction sometimes raises an issue of whether details of the prior offense may be explored. Can a cross-examiner insist upon a right to impeach a witness by delving into the facts underlying a criminal conviction? No, says *Woods v. State*.³⁸ A negative answer is also supplied by *Brown v. State*.³⁹

For more cases on prior conviction impeachment, see § 12:5, *supra*.

For a form of motion for excluding criminal defendant's prior convictions, see Appendix C, Form 9, *infra*.

§ 16:12 Manner of proving prior conviction

Under the federal rule and the dominant practice across the country, an impeaching party usually confronts a witness with a prior conviction during examination of the individual on the stand.¹ Frequently this challenge occurs during cross-examination. Federal courts do not require introduction of certified copies of prior convictions in order to impeach with them at trial.² Under prior law in Georgia, impeachment of a witness had to be accomplished by introduction of the record of conviction and not simply cross-examination of the defendant or witness. The decision in *O'Toole v. State*³ evidences the point that this rule was handed from earlier cases, most of them decided under the old moral turpitude law, which formula has now been superseded

³⁵*Wells v. State*, 261 Ga. 282, 404 S.E.2d 106 (1991).

³⁶*Kinsman v. State*, 259 Ga. 89, 376 S.E.2d 845 (1989).

³⁷*Smith v. State*, 270 Ga. 68, 71, 508 S.E.2d 145 (1998) ("Georgia law does not permit impeaching of a witness by proof merely of his arrest. However, proof of a witness' prior arrest may be admissible where it is relevant for some purpose other than impeachment").

³⁸*Woods v. State*, 269 Ga. 60, 495 S.E.2d 282 (1998).

³⁹*Brown v. State*, 276 Ga. 192, 576 S.E.2d 870 (2003) (specific facts disallowed unless witness attempts to rehabilitate himself by explaining circumstances of conviction).

[Section 16:12]

¹See, e.g., Rule 609, Federal Rules of Evidence.

²*Wilson v. Attaway*, 757 F.2d 1227, 17 Fed. R. Evid. Serv. 1380 (11th Cir. 1985).

³*O'Toole v. State*, 258 Ga. 614, 373 S.E.2d 12 (1988).

by the 2005 statute.⁴ Since Georgia has now adopted the federal rule as its pattern for conviction impeachment, and federal practice allows convictions to be proved by cross-examination, some will argue that this feature of the federal practice is now imported by implication into Georgia practice. And even under the old procedure, a document disclosing a conviction was not invariably required. What occurred when the defendant failed to object to proof of conviction when that proof was adduced by cross-examination?

Absent an objection, the cross-examiner could question a witness about a prior conviction. However, if a best evidence objection was made, the impeaching party had to prove the existence of the prior conviction for a crime of moral turpitude by introducing a certified copy of the conviction.⁵ The point that a certified copy was only required if an objection is asserted by the defense was emphasized again in *Castleberry v. State*.⁶

What if the O'Toole procedure is followed, but the cross-examined witness denies he is the person identified in the impeaching record? How may the cross-examiner connect the witness to the prior crime? Fingerprint records have been utilized, or sought to be so used, for the purpose of impeaching a defendant testifying as a witness in his own behalf.⁷

The law is summarized in Carlson, Imwinkelried, Seaman, Beecher-Monas, *Evidence: Teaching Materials for an Age of Science and Statutes* (7th ed. 2012) at 412:

It is not invariably required that the cross-examiner proceed, at least initially, with a certified copy of the prior conviction. A report that the conviction occurred, secured by the examiner from an official agency, will supply the examiner with a good-faith basis to simply ask the witness about the conviction during cross-examination. It is only when the witness denies the occurrence of the conviction that things get complicated. One authority observes that the usual manner of impeachment with a prior conviction is to ask the witness about it; if denied, the cross-examiner then produces a certified copy of the conviction. K. Blackburn, *The Expansion of Allowable Impeachment: Admission of Juvenile Priors, Misdemeanor Convictions, and Good Faith Cross-Examination by Prosecutors*, 1 Chapman J. Crim. Justice 213, 218 (2009).

If the witness admits the conviction under the general rule, no further inquiry can be made, and no further proof thereof is

⁴See § 16:11, *supra*.

290, 553 S.E.2d 606 (2001).

⁵Harwell v. State, 270 Ga. 765, 512 S.E.2d 892 (1999).

⁷Annotation: Admissibility of bare footprint evidence, 45 A.L.R.4th 1178.

⁶Castleberry v. State, 274 Ga.

admissible.⁸

Impeachment by proof of an indictment, arrest, or trial and acquittal is not permissible.⁹

§ 16:13 Right to recall witness for further cross-examination

Whether a witness may be recalled for further cross-examination rests within the sound discretion of the court.¹ Recalling a witness for cross-examination will generally not be allowed where the matter has already been covered.²

§ 16:14 Effect of denial of right to cross-examine

The right to cross-examine is a substantial right which should never be abridged or denied.¹ If a witness refuses to submit to cross-examination, or refuses to answer pertinent questions, his testimony on direct examination should be stricken.²

A murder conviction was reversed and a new trial ordered where introduction of incriminating statements were used to convict, but where the defendant did not have an opportunity to confront or cross-examine witnesses making the statements.³

However, there are limitations to the guarantee. Under the Georgia statute making admissible the out-of-court statements of a victim of child molestation whenever the child is available to appear at trial, the reviewing court held that a defendant's rights are protected so long as the witness is made available for confrontation and cross-examination; this is true even if the witness is uncommunicative or unresponsive; although the child may be incapable of reiterating the accusation at trial or is unresponsive or evasive during cross-examination, the jury must decide the child's credibility, taking into consideration the child's maturity and ability to withstand the pressure and intimidation of the courtroom environment.⁴

⁸Am. Jur. 2d, Witnesses §§ 926, 970. [Section 16:14]

⁹Whitley v. State, 188 Ga. 177, 3 S.E.2d 588 (1939).

[Section 16:13]

¹Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971).

²Hamilton v. State, 91 Ga. App. 295, 85 S.E.2d 496 (1954).

¹Benefield v. Benefield, 224 Ga. 208, 160 S.E.2d 895 (1968).

²Am. Jur. 2d, Witnesses § 804.

³Knowles v. State, 246 Ga. 378, 271 S.E.2d 615 (1980).

⁴Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990).

Chapter 17

Redirect and Recross-Examination

- § 17:1 Scope of redirect examination
- § 17:2 Form and content of questions on redirect examination
- § 17:3 Refreshing witness' memory on redirect examination
- § 17:4 Explaining and correcting testimony on redirect examination
- § 17:5 Rehabilitating a witness
- § 17:6 Explaining impeaching answers
- § 17:7 Right of recross-examination

§ 17:1 Scope of redirect examination

As a general rule, redirect examination is limited to matters covered by cross-examination. However, it is generally held that the conduct and scope of redirect examination is within the discretion of the trial judge and that her discretion will not be controlled by the appellate court unless it is abused.¹ As stated in R. Carlson, E. Imwinkelried, E. Kionka, and K. Strachan, *Evidence: Teaching Materials for an Age of Science and Statutes* 85 (6th ed. 2007), the trial court may permit the proponent of the witness to exceed the scope of the cross by covering topics which could have been mentioned on direct, but were omitted.

In similar fashion, judicial discretion may play a role when the defense in a civil or criminal case rests, and the opponent's rebuttal case proceeds. In this instance, the trial judge can limit the plaintiff or prosecutor to testimony that "is precisely directed to rebutting new matter or new theories presented by the defendant's case-in-chief."² However, the judge has wide discretion to broaden the scope to permit the plaintiff or prosecutor to introduce evidence mistakenly omitted during the case-in-chief.³ The appellate court will reverse the trial judge's ruling only when there has been a clear abuse of discretion.⁴

[Section 17:1]

¹*Chadwick v. State*, 176 Ga. App. 296, 335 S.E.2d 674 (1985), *aff'd*, 255 Ga. 376, 339 S.E.2d 717 (1986); *Aycock v. State*, 62 Ga. App. 812, 10 S.E.2d 84 (1940).

²*Bowman v. General Motors*

Corp., 427 F. Supp. 234, 1 Fed. R. Evid. Serv. 796 (E.D. Pa. 1977).

³*U.S. v. Tejada*, 956 F.2d 1256 (2d Cir. 1992); *U.S. v. Nussen*, 531 F.2d 15 (2d Cir. 1976).

⁴*U.S. v. Lamb*, 99 Fed. Appx. 843 (10th Cir. 2004); *U.S. v. Walton*, 552

In *Allen v. State*,⁵ the Georgia Supreme Court held that the trial court acted within its discretion in permitting prosecutor to ask a witness during redirect a question that addressed a concern voiced by a juror at the conclusion of defendant's cross-examination of the witness.

In *Helton v. State*,⁶ the court found no abuse of discretion in allowing State's witness, a Department of Family and Children's Services investigator, to testify on redirect that she believed the child molestation victim was telling the truth. Although such opinion evidence about the credibility of a witness is generally inadmissible, the question was first raised by the defense during cross-examination, thus opening up the door for damaging testimony.

In *Jones v. State*,⁷ the Georgia Court of Appeals held that a question on redirect examination that the defendant allegedly improperly placed his character at issue was proper given that it was relevant, material, and was responsive to a line of questions posed by defense counsel on cross-examination regarding why the victim had felt uncomfortable when she saw the defendant interacting with her daughter in a pool.

The scope of redirect examination lies largely within the discretion of the trial court and error will not be found unless the trial court abuses that discretion.⁸

Where evidence was excluded during direct examination of a witness, and the door to the evidence was not opened on cross-examination, the proponent of the witness could not return to the excluded material on redirect, as it exceeded the proper scope of material covered on cross-examination.⁹

Redirecting not unduly limited, see *McClellan v. Evans*.¹⁰

§ 17:2 Form and content of questions on redirect examination

Generally, the rules are the same for redirect as in direct ex-

F.2d 1354 (10th Cir. 1977).

⁵*Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

⁶*Helton v. State*, 217 Ga. App. 691, 458 S.E.2d 872 (1995).

⁷*Jones v. State*, 329 Ga. App. 439, 765 S.E.2d 639 (2014).

⁸*Fletcher v. Estes*, 268 Ga. App. 596, 602 S.E.2d 164 (2004) (where defense asked a witness if she was cer-

tified by a particular organization on cross-examination, the scope of redirect was exceeded when plaintiff's counsel asked about procedural instructions within the organization's manual, rather than asking about the witness' training and qualifications).

⁹*Fluellen v. State*, 264 Ga. App. 19, 589 S.E.2d 847 (2003).

¹⁰*McClellan v. Evans*, 294 Ga. App. 595, 669 S.E.2d 554 (2008).

amination of witnesses.¹

Leading the witness is normally not permitted on direct or redirect examination.²

§ 17:3 Refreshing witness' memory on redirect examination

The usual rules relating to the refreshing of the witness' memory apply to redirect examination.¹

In *Griffin v. State*,² the defense counsel introduced the subject of a burglary investigation by cross-examining the police officers about their reason for going to the defendant's residence, and, on redirect, the prosecution refreshed a police officer's recollection by showing him police reports of the alleged burglary.

§ 17:4 Explaining and correcting testimony on redirect examination

In *Allison v. State*,¹ while cross-examining a witness, defense counsel elicited testimony that she had interpreted the defendant's statement that he was going to do something stupid as evidencing an intent to shoot her rather than to rob or assault others. The court held that defense counsel opened the door to the witness explaining on redirect examination that she thought he was going to shoot her because he had threatened to do so before.

On redirect examination, a witness may be examined to explain the testimony he gave on cross-examination.² The witness may be examined on redirect in order to attempt to neutralize the effect of testimony given on cross-examination and in order to attempt to sustain the witness' credibility.³ Further, it is proper to permit a witness to testify on redirect as to his motives or reasons for his acts or statements which were detailed on cross-examination.⁴

The Georgia rule includes completion of writings when it states that on redirect examination, a witness may be examined to explain his testimony on cross-examination, including drawing

[Section 17:2]

¹See §§ 15:2 et seq.

²See O.C.G.A. § 24-6-611(c).

[Section 17:3]

¹See § 15:10, supra.

²*Griffin v. State*, 291 Ga. App. 657, 662 S.E.2d 767 (2008).

[Section 17:4]

¹*Allison v. State*, 296 Ga. App.

379, 674 S.E.2d 639 (2009).

²*Walton v. State*, 65 Ga. App. 124, 15 S.E.2d 455 (1941).

³*Foster v. State*, 178 Ga. App. 478, 343 S.E.2d 745 (1986); *Walton v. State*, 65 Ga. App. 124, 15 S.E.2d 455 (1941).

⁴*Metts v. State*, 162 Ga. App. 641, 291 S.E.2d 405 (1982); *Green v. State*, 65 Ga. App. 754, 16 S.E.2d 438 (1941).

out the whole of a transaction or conversation. In *Wilkes v. State*,⁵ the court held that where the defendant tendered a letter during cross-examination in which the witness had written that she believed in the defendant's innocence, the prosecution did not improperly place the defendant's character in issue by bringing out on redirect the fact that the letter referred to other charges against the defendant.

A witness may also explain his motives or reasons for acts or statements he testified to on cross-examination. In *Funderburk v. State*,⁶ when the defendant asked the officer on cross-examination whether a chemical test for blood-alcohol level had been administered, the officer could explain on redirect that the test was not administered because of intervention by a city council member friend of the defendant.⁷

Where the cross-examination has brought out only a part of a conversation or transaction, it is proper to bring out the rest of it on redirect examination.⁸

Rule of completeness in federal practice where only part of a document is exposed on cross-examination, see Rule 106, Fed. R. Evid.⁹

§ 17:5 Rehabilitating a witness

A witness may be discredited by his testimony brought out on cross-examination.¹ In that event, he may be rehabilitated through questions asked on redirect examination. On the other hand, he may be discredited through other evidence in the case, such as the fact that he was intoxicated at the time he witnessed the event or that he had been convicted of a felony. Under some circumstances, he may be rehabilitated through his own testimony, and in others, through the testimony of other witnesses.

Where the witness gave answers on direct and cross-examination that are in conflict, he may be asked on redirect to explain such inconsistency.² Where a witness has been shown to have made a statement contradictory to the testimony, it is proper

⁵*Wilkes v. State*, 221 Ga. App. 390, 471 S.E.2d 332 (1996).

⁶*Funderburk v. State*, 221 Ga. App. 438, 471 S.E.2d 535 (1996).

⁷*Duncan v. State*, 213 Ga. App. 394, 444 S.E.2d 583 (1994). See *Dyer v. State*, 295 Ga. App. 495, 672 S.E.2d 462 (2009).

⁸*Fountain v. State*, 149 Ga. 519, 101 S.E. 294 (1919).

⁹See generally *Lopez v. Delta*

International Machinery Corporation, 312 F. Supp. 3d 1115 (D.N.M. 2018), *aff'd*, 764 Fed. Appx. 703 (10th Cir. 2019).

[Section 17:5]

¹*Smith v. Chandler*, 316 Ga. 321, 888 S.E.2d 171 (2023).

²*Nealy v. State*, 239 Ga. App. 651, 522 S.E.2d 34 (1999); *Bivins v. State*, 200 Ga. 729, 38 S.E.2d 273 (1946).

on redirect to give the witness an opportunity to state the facts which will explain or reconcile the statements or to show the meaning of the statement which appears to contradict his testimony.³ A witness may be allowed to read a prior consistent statement for purposes of rehabilitation.⁴ However, only specific kinds of witness impeachment will justify bolstering evidence of this kind on redirect, or later. The kind of impeachment attack which allows the proponent of the witness to rehabilitate with prior consistent statements is identified in § 15:11, *supra*. Prior consistent statements in federal cases, timing requirements, see *Tome v. U.S.*⁵ The 2013 Georgia Evidence Code, O.C.G.A. § 24-6-613, follows a similar approach.⁶

Where witnesses for the state have been impeached with a prior inconsistent videotaped statement, the state could have rehabilitated the witnesses to some extent by establishing the motivation behind the inconsistencies in their statements.⁷

Generally, when the cross-examination of a witness develops that he is biased, the party offering the witness is entitled on redirect examination to show the reasons for such bias.⁸

Under O.C.G.A. § 24-6-613, the failure of a witness to remember making a statement may provide the foundation of calling another witness to prove that the statement was a prior inconsistent statement. In *Murdock v. State*,⁹ the defendant's sister claimed although she remembered placing a 911 call and giving a statement to investigators after the shooting in question, she could not recall the details of the shooting itself or the content of her statement. This authorized an investigating officer to testify about the content of her statement.

§ 17:6 Explaining impeaching answers

If a witness has been impeached with a previous conflicting statement, he should be afforded the opportunity to explain these statements and show the circumstances under which they were made.¹ He may be asked to develop the circumstances under which the statement was made, the sense in which the words of

³*Fox v. State*, 289 Ga. 34, 709 S.E.2d 202 (2011); *Georgia Ry. & Elec. Co. v. Dougherty*, 4 Ga. App. 614, 62 S.E. 158 (1908).

⁴*Jenkins v. State*, 216 Ga. App. 433, 454 S.E.2d 543 (1995).

⁵*Tome v. U.S.*, 513 U.S. 150, 115 S. Ct. 696, 130 L. Ed. 2d 574, 40 Fed. R. Evid. Serv. 1201 (1995).

⁶See *Dorsey v. State*, 303 Ga. 597, 814 S.E.2d 378 (2018); *Belcher v.*

The State, 344 Ga. App. 729, 812 S.E.2d 51 (2018).

⁷*Ely v. State*, 275 Ga. App. 708, 621 S.E.2d 811 (2005).

⁸*Haynes v. Phillips*, 67 Ga. App. 574, 21 S.E.2d 261 (1942).

⁹*Murdock v. State*, 299 Ga. 177, 787 S.E.2d 184 (2016).

[Section 17:6]

¹*Cameron v. State*, 66 Ga. App. 414, 18 S.E.2d 16 (1941).

the impeaching statement were used and the motive which prompted it.² The general, as well as the Georgia, rule is that a witness may explain testimony procured during cross-examination on redirect.³

See §§ 16:8 to 16:10, *supra*, for a discussion of the use of prior inconsistent statements for the purpose of impeaching a witness.

Cases on the admissibility of prior consistent statements on redirect include *Gadson v. State*.⁴

Using prior consistent statements to rehabilitate, see § 15:11, *supra*.

Where defense counsel asked a prosecution witness if he was afraid of the district attorney and if he preferred not to make the district attorney mad, such questions constituted an attack on the credibility of the witness, allowing admission of the witness' prior consistent out of court statements.⁵

Where the witness has been impeached by proof of conviction of a felony, it is proper on redirect to briefly explain the conviction.⁶

Defense counsel impeached a prosecution witness on cross-examination. On redirect, the prosecutor elicited testimony that defense counsel had represented the witness in a preceding trial and had "sold him down the river" to use the conviction as assistance in the case at bar.⁷

§ 17:7 Right of recross-examination

It is within the sound discretion of the trial judge whether to permit recross-examination. Where no new matter is elicited on redirect examination, it is not error to refuse to permit recross-

²*Bivins v. State*, 200 Ga. 729, 38 S.E.2d 273 (1946); *Wynes v. State*, 182 Ga. 434, 185 S.E. 711 (1936).

³See *Dyer v. State*, 295 Ga. App. 495, 672 S.E.2d 462 (2009).

⁴*Gadson v. State*, 264 Ga. 280, 444 S.E.2d 305 (1994) (coindictee's entire statement to law enforcement officials was admissible on redirect, after felony-murder defendant had attempted to impeach coindictee on cross-examination by pointing out inconsistencies between portions of statement in coindictee's trial testimony, to show that, as a whole, state-

ment was consistent with trial testimony); *Wyatt v. State*, 213 Ga. App. 307, 444 S.E.2d 397 (1994) (out-of-court statement offered on redirect of officer was not impermissible hearsay when offered in response to cross-examination of officer, to counter suggestion that certain testimony was recently fabricated).

⁵*Edwards v. State*, 255 Ga. 149, 335 S.E.2d 869 (1985).

⁶See *Johnson v. Ray*, 206 Ga. App. 262, 424 S.E.2d 892 (1992).

⁷*Moore v. State*, 268 Ga. App. 398, 601 S.E.2d 854 (2004).

examination.¹ Where, on the reexamination in chief of a witness, new matter is brought out which is neither explanatory of the first testimony nor in rebuttal of the cross-examination, the opposite party has the right to conduct recross-examination as to such new matter.²

The trial court has discretion to limit the scope of recross-examination, which is not intended for the introduction of new matter. Here, trial court sustained an objection on the ground that on recross-examination defense counsel could not inquire into matters that were not raised on redirect.³

Failure to object to the scope of re-cross examination in a nondeath penalty case can waive the right to appeal the issue.⁴

Federal courts have observed that while recross-examination is not guaranteed under the Confrontation Clause, “[w]hen material new matters are brought out on redirect examination, the Confrontation Clause of the Sixth Amendment mandates that the opposing party be given the right of recross-examination on those new matters.”⁵

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¹Faulk v. State, 47 Ga. App. 804, 171 S.E. 570 (1933).

²Wood v. McGuire’s Children, 17 Ga. 303, 1855 WL 1836 (1855).

³Jones v. State, 265 Ga. App. 97, 592 S.E.2d 888 (2004).

⁴Jones v. State, 318 Ga. App. 342, 733 S.E.2d 400 (2012). But see Parks v. State, 254 Ga. 403, 330 S.E.2d 686, 62 A.L.R.4th 833 (1985).

⁵U.S. v. Kerr, 112 A.F.T.R.2d 2013-5772, 2013 WL 4430917 (D. Ariz. 2013), aff’d, 595 Fed. Appx. 692 (9th Cir. 2014).

Chapter 18

Privileged Communications

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§ 18:1 Nature of privileged communications

For reasons of public policy, communications between persons having certain designated relationships are privileged. Privileged communications—or confidential communications—are not admissible in evidence. Some have existed at common law, while others have been created by statute. In either case, they are not to be confused with those rules of law which render certain persons incompetent to take the stand and testify.¹ Where a privileged communication exists, the witness may be competent to testify as to other information within his knowledge.

The various privileged relations which are recognized in Georgia are set out in O.C.G.A. §§ 24-5-501 to 24-5-509. In addition to the traditional privileged relations, such as husband and wife, attorney to client, psychiatrist to patient, the 2012 legislature added relationships between a family violence or rape victim and

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¹See §§ 13:1 to 13:11, *supra*.

their counselors.²

Statements made in good faith in furtherance of the right of free speech or the right of petition under the United States or Georgia Constitutions in connection with public issues, including communications before legislative, executive, or judicial proceedings or made in connection with official proceedings, may be privileged.³

Discovery disputes sometimes raise privilege questions. Public policy of Georgia does not permit parties to contract privately for confidentiality of documents or testimony, and thereby foreclose others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position; to hold otherwise would not serve the truth-seeking function of discovery in civil litigation.⁴ O.C.G.A. § 9-11-26(b)(1) permits parties to obtain discovery regarding any relevant matter which is not privileged, so long as the information “appears reasonably calculated to lead to the discovery of admissible evidence.” Hence, privileged matter is not discoverable.⁵

§ 18:2 Communications between husband and wife

The common law protects the confidential communications between husband and wife, and Georgia recognizes the privilege.¹

The common-law incompetency of either spouse to testify for or against the other in both criminal and civil cases has been removed by statute. Under O.C.G.A. § 24-5-503, either spouse is competent, but not compellable, to give evidence against the other in any criminal proceeding. The right to assert the marital privilege belongs to the witness, not the accused.²

The Georgia Court of Appeals previously held that a trial court has no obligation to inform a defendant’s spouse of the existence of the marital privilege.³ However, the Supreme Court of Georgia found that a spouse could not have waived her marital privilege under former O.C.G.A. § 24-9-23 because she had not been informed of its existence.⁴ Litigation on the point continues. In

²O.C.G.A. § 24-5-509.

²O.C.G.A. § 24-5-503.

³See O.C.G.A. § 9-11-11.1 and O.C.G.A. § 51-5-7.

³Ingram v. State, 262 Ga. App. 304, 307(4)(a), 585 S.E.2d 211 (2003) (“where a spouse takes the stand and testifies voluntarily, it is presumed that she has waived the marital privilege”).

⁴Barger v. Garden Way, Inc., 231 Ga. App. 723, 499 S.E.2d 737 (1998).

⁵Atlantic Coast Line R. Co. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

⁴Webb v. State, 284 Ga. 122, 127(5), 663 S.E.2d 690 (2008).

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¹O.C.G.A. § 24-5-501.

Geter v. State,⁵ the Court of Appeals held that, because the defendant's wife was aware of the privilege but never asserted it in the trial court, the court had to assume that she waived her right not to testify as a result of her marriage to defendant.⁶

O.C.G.A. § 24-5-503(b) provides that the spousal privilege shall not apply in proceedings in which one is charged with a crime against the person of a minor child, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged. A 2012 amendment provides that the privilege disappears where the husband or wife is charged with a crime against the spouse, or is charged with causing physical damage to property belonging to the marital partner.

§ 18:3 Requirements for privilege to exist between husband and wife

As a general rule, to make a communication between husband and wife privileged, it must be confidential in its nature, or at least not obviously of a different character.¹ Statements made by one spouse to the other in the known presence of a third person are neither confidential nor privileged.²

A conversation between a husband and wife may be testified to by a third party who overhears it, under older cases. This is true whether or not the conversation, as between the husband and wife, is of a confidential character and whether or not the witness' presence was known.³

Regarding overheard oral conversations, there is a modern trend around the country against intentional, unknown eavesdroppers disclosing the contents of otherwise privileged conversations.

§ 18:4 Existence of marital relationship

The communication must have been made during a valid mar-

⁵*Geter v. State*, 300 Ga. App. 396, 685 S.E.2d 342 (2009).

⁶See *Biswas v. State*, 255 Ga. App. 339, 565 S.E.2d 531 (2002) (the testimonial privilege belongs to the spouse, not the defendant in a criminal case; a witness is presumed to have waived the privilege by not invoking it and voluntarily testifying).

[Section 18:3]

¹*Chadwick v. State*, 176 Ga. App. 296, 335 S.E.2d 674 (1985), *aff'd*, 255

Ga. 376, 339 S.E.2d 717 (1986); *Lowry v. Lowry*, 170 Ga. 349, 153 S.E. 11, 70 A.L.R. 488 (1930).

²*Cocroft v. Cocroft*, 158 Ga. 714, 124 S.E. 346 (1924). See *Dempsey v. Kaminski Jewelry, Inc.*, 278 Ga. App. 814, 630 S.E.2d 77 (2006) (privilege between husband and wife does not apply to financial documents seen by third parties).

³*Knight v. State*, 114 Ga. 48, 39 S.E. 928 (1901).

riage; it does not apply if the marriage was void.¹

A 1996 enactment has an impact on privileged communications grounded in a common-law marriage. The enactment provides that common-law marriages shall not be entered into on or after January 1, 1997. Common-law marriages prior to that date are unaffected by the law.

According to Wigmore, the privilege does not apply to conversations or transactions that occurred prior to the marriage, nor is it privileged if it occurred after divorce.² However, if the conversation or transaction occurred during the existence of the marriage relation, the privilege is not terminated by death or divorce.³

The marital privilege not to testify is available to a spouse at the trial of capital murder defendant, even though the defendant claimed that the marriage was moribund.⁴

Georgia law has long applied the rule that a divorced spouse can testify against the other spouse at a trial, at least as to nonconfidential conversations and matters. Confidential spousal communications which occurred during the marriage may be another matter.⁵ Cases have discussed the issue, with decisions in both directions, depending on the facts.⁶

The abolition of common-law marriage is noted in the main text. The privilege applies only to such marriages which occurred prior to January 1, 1997.⁷

§ 18:5 Claiming and waiving privilege

As a general proposition in the area of privilege law, once a party has elected to testify, he cannot invoke a privilege as to matters that he himself has put in dispute.¹ A witness may testify at one proceeding in a case and nonetheless claim privilege subsequently at another stage. However, once a defendant testified to a matter at an earlier trial, it ceased to be a privileged communication, and proof of these statements at his later trial became permissible.² The wife of a capital murder defendant did not waive her marital privilege not to testify at trial by having

[Section 18:4]

¹Brown v. State, 208 Ga. 304, 66 S.E.2d 745 (1951).

²Wigmore § 610.

³Georgia Intern. Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731 (1976); Lingo v. State, 29 Ga. 470, 1859 WL 2721 (1859).

⁴Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991).

⁵O.C.G.A. § 24-5-501.

⁶See Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005) (privilege not allowed).

⁷O.C.G.A. § 19-3-1.1.

[Section 18:5]

¹Dickey v. State, 240 Ga. 634, 242 S.E.2d 55 (1978) (waiver of self-incrimination privilege).

²Felts v. State, 244 Ga. 503, 260 S.E.2d 887 (1979).

testified at a pretrial hearing.³

Who may claim the privilege? Spousal testimonial privilege belongs to the spouse testifying in a criminal proceeding and not to the defendant.⁴ There may be rare occasions when the holder of the privilege is not present, and it becomes opportune for those other than the holders of the privilege to request the judge to invoke it on behalf of the absent person.⁵

There is a general policy against forcing people to claim privileges in front of the jury. This is the case where court and counsel know in advance that a person will claim a valid privilege. There are also exceptions. A trial court did not abuse its discretion in denying defendant's motion for mistrial on the ground that the State had forced the defendant's wife to invoke her marital privilege in front of the jury, where the witness did not decide whether she would actually testify until she took the stand, and once she raised the issue, the trial court immediately sent the jury from the courtroom and resumed the trial after determining that the witness did not wish to testify.⁶

§ 18:6 Privileged communication between attorney and client

The common-law privilege protecting certain communications between an attorney and client is recognized in Georgia, O.C.G.A. § 24-5-501. It is a rule founded in the interest of the administration of justice and is intended to enable a client to place unrestricted and unbounded confidence in his attorney in matters affecting his rights and obligations without danger of having disclosures forced from the attorney on the witness stand.¹ The rule is based upon the principle that no person is under a legal obligation to disclose facts or circumstances which would render questionable his demand for a particular right, or impair his defense to another's demand.²

The attorney-client privilege is narrowly construed since the privilege excludes relevant evidence and, thus, encumbers the

³Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991). Ingram v. State, 262 Ga. App. 304, 585 S.E.2d 211 (2003) (trial court in is not required to advise witness of privilege; voluntary testimony on the part of the witness creates presumption that privilege has been waived).

⁴Ballard v. State, 252 Ga. 53, 311 S.E.2d 453 (1984). See Trammel v. U.S., 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186, 5 Fed. R. Evid. Serv. 737 (1980).

⁵See Nichols v. State, 288 Ga. App. 118, 653 S.E.2d 300 (2007); Braithwaite v. State, 275 Ga. 884, 572 S.E.2d 612 (2002).

⁶Adams v. State, 260 Ga. 298, 392 S.E.2d 866 (1990).

[Section 18:6]

¹Stone v. Minter, 111 Ga. 45, 36 S.E. 321 (1900).

²Stone v. Minter, 111 Ga. 45, 36 S.E. 321 (1900).

truth-seeking process.³ The privilege, however, does not apply when the client consults the attorney in furtherance of a wrongful act⁴ nor does it apply between two or more persons who consult the same attorney on the same matter.⁵ The crime/fraud exception to the attorney privilege applies in Georgia.⁶

Fees and the identity of a client are usually unprotected by privilege if one of these items is relevant and called for in the course of a court proceeding. Although there are exceptions to the general rule that an attorney cannot hide the identity of his client, no good reasons to deviate from the accepted “client identity rule” were discovered in *Tenet Healthcare Corporation v. Louisiana Forum Corporation*.⁷

A corporation is as much entitled to this privilege as an individual.⁸ The *Upjohn* decision has been influential on states as they form their own corporate attorney client protection of confidential communications. Georgia apparently uses a “subject matter” test which is not far from the *Upjohn* pattern.⁹ This is important, because no self-incrimination privilege protects corporations, so reliance upon the attorney-client privilege often provides a corporation with its dominant privilege protection.¹⁰

In Georgia, this privilege is applicable in situations involving communications between in-house corporate attorneys and the management and employees of that corporation. In addition, the privilege can also be applicable in situations involving communications between in-house counsel and an outside law firm. In this latter scenario, whether the privilege applies is dependent upon if (1) there is a genuine attorney-client relationship between the firm’s lawyers and in-house counsel; (2) the communications in question were intended to advance the firm’s interests in limiting exposure to liability rather than the client’s

³St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 746 S.E.2d 98 (2013).

⁴Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. App. 637, 179 S.E. 420 (1935).

⁵Corbett v. Gilbert, 24 Ga. 454, 1858 WL 2232 (1858).

⁶In re Fulton County Grand Jury Proceedings, 244 Ga. App. 380, 535 S.E.2d 340 (2000).

⁷Tenet Healthcare Corporation v. Louisiana Forum Corporation, 273 Ga. 206, 538 S.E.2d 441 (2000).

⁸Radiant Burners, Inc. v. American Gas Ass’n, 320 F.2d 314, 7 Fed. R. Serv. 2d 714, 98 A.L.R.2d 228 (7th Cir.

1963); Fire Ass’n of Philadelphia v. Fleming, 78 Ga. 733, 3 S.E. 420 (1887); Upjohn Co. v. U.S., 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101 (1981).

⁹See Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981).

¹⁰See Classic Art Corp. v. State, 245 Ga. 448, 265 S.E.2d 577 (1980) (under the 5th Amendment, corporation has no privilege, so prosecutor could comment on corporation’s failure to have member of board testify at trial).

interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence, and (4) no exception to the privilege applies.¹¹

The attorney-client privilege does not extend to client communications which are made to an attorney for the purpose of being conveyed by the attorney to a third party nor to the mere fact of employment.¹²

What is the relationship between the attorney-client privilege and work product protection? In his 2012 article, Professor Imwinkelried discusses the interface. In 2010, Federal Rule of Criminal Procedure 26 was amended to shield early drafts of expert reports and the expert's oral communications with counsel from discovery. "The Advisory Committee explained that the purpose of the amendment is to extend the protection of the work product doctrine to such drafts and oral communications."¹³

§ 18:7 Existence of attorney and client relationship

The communication between attorney and client must have been made in the course of professional conduct.¹ It must have been made while the relationship of attorney and client existed.² An attorney-client relationship can be created expressly, such as by a written agreement, or can be inferred from the parties' conduct.³ Legal advice must be sought.⁴ Federal and Georgia case law support the proposition that it is the securing of legal advice which is protected, not the securing of business advice.⁵

A communication with a lawyer is not privileged if made in the furtherance of fraud or crime.⁶

The burden is on the party claiming the existence of a

¹¹St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 746 S.E.2d 98 (2013).

¹²Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007). Accord, Howard v. State, 279 Ga. 166, 611 S.E.2d 3, 24 A.L.R.6th 955 (2005).

¹³Imwinkelried, The Validity of the 2010 Federal Rule of Civil Procedure 26 Amendment Governing the Waiver of Work Product Protection, 37 Dayton L. Rev. 279, 281 (2012).

[Section 18:7]

¹Watkins, Chappell & Co. v. Smith, 17 Ga. 68, 1855 WL 1668 (1855).

²Brown v. Matthews, 79 Ga. 1, 4 S.E. 13 (1887).

³Huddleston v. State, 259 Ga. 45, 376 S.E.2d 683 (1989).

⁴Georgia Cash America, Inc. v. Strong, 286 Ga. App. 405, 649 S.E.2d 548 (2007) (the attorney-client privilege does not extend to business or personal advice).

⁵Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 964 n.4 (N.D. Ill. 2010).

⁶Sullivan v. State, 327 Ga. App. 815, 761 S.E.2d 377 (2014); Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. App. 637, 179 S.E. 420 (1935). See Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). See also Both v. Frantz, 278 Ga. App. 556, 629 S.E.2d 427 (2006), reconsideration denied, certiorari denied (2006).

privileged communication to show that it falls within the rule.⁷ The evidence authorized the trial court to determine that no attorney-client relationship was formed between the defendant and the prosecutor where, when the prosecutor was in private practice, eight years before, the defendant arranged a meeting with him because she was contemplating divorcing the victim, they discussed the nature of contested and uncontested divorces and the fee which the attorney would charge, but there was no discussion of the facts of the case; the attorney never heard from the defendant again, and no fee was charged.⁸

Sometimes a dispute occurs over whether the report of an automobile driver to his own insurance company is privileged. When driver A prepares a report on how an accident happened and sends it to his insurer, can opposing party P discover the document? In the event of legal action by P, is he entitled to see the accident report written by opposing party A? Usually party A or his insurance company will try to block disclosure by asserting a claim of privilege. Courts have sometimes upheld the claim on attorney client privilege grounds or on the basis of work product protection.⁹

§ 18:8 Confidential nature of communication

The communication must have been confidentially made.¹ It is not privileged if it was made in the presence of a third person,² unless such third person was the agent of the attorney or client, or the secretary of the attorney.³ Thus, if two or more persons consult an attorney at law for their mutual benefit and make statements in his presence he may disclose those statements in any controversy between them or their personal representatives

(attorney-client privilege applies to communications concerning a fraud or crime that is completed, but not to those concerning ongoing or future fraud or crimes).

⁷Peterson v. Baumwell, 202 Ga. App. 283, 414 S.E.2d 278 (1991); Parker v. Wellons, 43 Ga. App. 721, 160 S.E. 109 (1931).

⁸Huddleston v. State, 259 Ga. 45, 376 S.E.2d 683 (1989).

⁹Underwriters Ins. Co. v. Atlanta Gas Light Co., 248 F.R.D. 663 (N.D. Ga. 2008).

See People v. Ryan, 30 Ill. 2d 456, 197 N.E.2d 15 (1964); Costley v. State Farm Fire and Cas. Co., 894 S.W.2d 380, 385 (Tex. App. Amarillo

1994).

See also Varuzza by Zarrillo v. Bulk Materials, Inc., 169 F.R.D. 254, 36 Fed. R. Serv. 3d 1271 (N.D. N.Y. 1996) (rejecting attorney client privilege claim, but embracing claim of work product).

[Section 18:8]

¹Coker v. Oliver, 4 Ga. App. 728, 62 S.E. 483 (1908).

²Brown v. State, 195 Ga. App. 872, 395 S.E.2d 73 (1990); Richards v. State, 56 Ga. App. 377, 192 S.E. 632 (1937).

³Rogers v. State, 290 Ga. 18, 717 S.E.2d 629 (2011); Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934).

or successors in interest.⁴

The presence of an interpreter to interpret a client who is not fluent in English will probably not break the privilege. However, the presence of nonessential third parties, sometimes even family members, has been held to do so. The testimony of defendant's mother and sister that they were present at a meeting between the defendant and his attorney and that during that meeting the defendant admitted committing the burglary in question was not barred by the attorney-client privilege since the witnesses were third parties who overheard the conversation.⁵

A communication made to the attorney for the purpose of disclosing it to a third person is not confidential and, therefore, is not privileged. Where, from the nature of the communication between attorney and client and the purpose to be served by such communication, it is evident that the parties intended such communication to be disclosed, no privilege against disclosure exists.⁶ Of this character are pleadings and facts communicated to an attorney to be used in pleading, in an application for the issuance of a patent or for some other purpose that necessarily implies their revelation to the public.⁷ The very nature of the transaction and the circumstances surrounding it are inconsistent with the notion that the communication was ever intended to be confidential.⁸

Older cases hold that an eavesdropper is not barred by the privilege.⁹ However, there is a modern trend to protect disclosure of conversations by unknown, intentional eavesdroppers.¹⁰

⁴Stone v. Minter, 111 Ga. 45, 36 S.E. 321 (1900). See also English v. State, 288 Ga. App. 436, 654 S.E.2d 150 (2007), Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007) (emphasizing narrow construction of attorney-client privilege); McKesson HBOC, Inc. v. Adler, 254 Ga. App. 500, 502–3, 562 S.E.2d 809 (2002) (attorney-client privilege is waived as to documents made for the purpose of disclosure to third parties); Howard v. State, 279 Ga. 166, 611 S.E.2d 3, 24 A.L.R.6th 955 (2005); Martinez v. Housing Authority of DeKalb County, 264 Ga. App. 282, 590 S.E.2d 245 (2003) (even assuming that attorney-client privilege applies to paralegals, conversations with third party government agency are not confidential and not subject to privilege).

⁵Brown v. State, 195 Ga. App. 872, 395 S.E.2d 73 (1990).

⁶Howard v. State, 279 Ga. 166, 611 S.E.2d 3, 24 A.L.R.6th 955 (2005); Fowler v. Sheridan, 157 Ga. 271, 121 S.E. 308 (1924).

⁷Howard v. State, 279 Ga. 166, 611 S.E.2d 3, 24 A.L.R.6th 955 (2005); Fowler v. Sheridan, 157 Ga. 271, 121 S.E. 308 (1924).

⁸Stone v. Minter, 111 Ga. 45, 36 S.E. 321 (1900).

⁹Richards v. State, 56 Ga. App. 377, 192 S.E. 632 (1937).

¹⁰See Sosniak v. State, 287 Ga. 279, 695 S.E.2d 604 (2010), which discusses confidentiality and privacy when defendant and counsel talked, unaware that a video camera was recording.

§ 18:9 Claiming and waiving attorney-client privilege

To claim the privilege, the parties need to establish that the conversation between lawyer and client was private. Both federal and Georgia law support the need for confidentiality, as explained in *Pampered Chef v. Alexanian*.¹ The case also suggests a significant exception:

The protection of the privilege extends to confidential communications made by a client to his lawyer “[w]here legal advice of any kind is sought. . . from a professional legal advisor in his capacity as such.” *Rehling v. City of Chicago*, 207, F.3d 1009, 1019 (7th Cir. 2000). See also *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (quoting 8 John Henry Wigmore, *Evidence in Trials* at 415 Common Law § 2292 (John T. McNaughton rev. 1961)). Thus, “knowing disclosure to a third party almost invariably surrenders the privilege,” *Burden-Meeks*, 319 F.3d at 899; *In re Pebsworth*, 705 F.2d 261, 263 (7th Cir. 1983), and as a general rule, statements made to one’s attorney in the presence of a third person are not within the scope of the attorney-client privilege. *Jenkins*, 487 F.3d at 490; *Evans*, 113 F.3d at 1462. This is so despite the client’s subjective intention not to waive the privilege. *Jenkins*, 487 F.3d at 490; 8 Wigmore, *Evidence* § 2327.

But like all general rules, this one has its exceptions. Where a client communicates with his attorney in the presence of a third person who shares a common legal interest, the attorney-client privilege is not waived as to the information that is exchanged.

While the attorney-client privilege can be waived under certain circumstances, the Supreme Court of Georgia has upheld the exclusion of information conveyed by an attorney absent proof that the client knew about, approved of, and authorized the disclosure.²

If a lawyer makes a mistake and turns over a document which is confidential, is the privilege destroyed? Inadvertent disclosure, particularly during electronic discovery and disclosure, is analyzed in Imwinkelried, *Protecting the Attorney-Client Privilege in Business Negotiations*, 51 *Duquesne L. Rev.* 167 (2013).

During discovery, inadvertent disclosure of protected material does not usually result in waiver of a privilege. In *Alston & Bird, LLP v. Mellon Ventures II, L.P.*,³ attorney documents were produced during discovery and the trial court ordered them returned to the sender, and prohibited the recipient from using the privileged information. The appellate court ruled:

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899 S.E.2d 222 (2024).

¹*Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 964 (N.D. Ill. 2010).

³*Alston & Bird, LLP v. Mellon Ventures II, L.P.*, 307 Ga. App. 640, 706 S.E.2d 652 (2010).

²*State v. Ledbetter*, 318 Ga. 457,

Appellants produced no evidence showing that appellees waived their attorney-client privilege. The disclosure of these e-mails during production by counsel did not preclude later objection to their use by appellees. Therefore, the trial court did not abuse its discretion in ordering these documents returned to appellees.

An attorney is released from the obligations of secrecy imposed by the attorney-client privilege when a client charges negligence, malpractice, or other professional misconduct in an action against the attorney, or when a habeas petitioner claims that he or she was not informed about the consequences of a guilty plea.⁴

A habeas petitioner waives relevant communications protected by the attorney client privilege when he alleges that his counsel made “unreasonable strategic choices.” Similarly, a habeas petitioner waives work-product protection when he provides documents to the opposing party.⁵

One holding the privilege must make timely objection to testimony concerning the privileged communication.⁶ The privilege may be asserted whether the holder is a party to the action or not.⁷ It may be asserted on his behalf by his attorney or agent. In clear situations, the court may act on its own. One asserting that material is protected by the attorney-client privilege must do more than merely assert that it is privileged; he has the burden of showing that conditions necessary to create the privilege actually exist.⁸ A claim of privilege by a witness must be supported by evidence that supports that privilege; a proponent’s bare assertion of a privilege does not carry the proponent’s burden of showing that the privilege applies.⁹

When a witness refreshes his memory on the witness stand from a document, the opposing side has a right to see the refreshing instrument.¹⁰ Mandatory disclosure has been ordered in federal civil cases even where the holder of the document claims attorney-client or work product protection for the document. The rule has also been extended to refreshing from a document during civil depositions. In Georgia’s Northern Federal District in

⁴Waldrip v. Head, 272 Ga. 572, 532 S.E.2d 380 (2000) (overruled on other grounds by, Duke v. State, 306 Ga. 171, 829 S.E.2d 348 (2019)).

⁵Jones v. GDCP Warden, 746 F.3d 1170 (11th Cir. 2014).

⁶Yarbrough v. Yarbrough, 202 Ga. 391, 43 S.E.2d 329 (1947), and cases cited therein.

⁷O’Brien v. Spalding, 102 Ga. 490, 31 S.E. 100 (1897).

⁸Equitable Securities Co. v. Green, 113 Ga. 1013, 39 S.E. 434 (1901).

⁹See Tyson v. Old Dominion Freight Line, Inc., 270 Ga. App. 897, 608 S.E.2d 266 (2004), quoting General Motors Corp. v. Conkle, 226 Ga. App. 34, 486 S.E.2d 180 (1997).

¹⁰Bailey v. State, 254 Ga. App. 420, 562 S.E.2d 803 (2002).

See the 2013 revised Evidence Code at O.C.G.A. § 24-6-612, eff. Jan. 1, 2013.

the case of *Sperling v. City of Kennesaw Dept.*,¹¹ the court ordered disclosure of a narrative prepared by a party for her attorney. The party had read from and relied upon the document during her testimony. By so doing, the court held that she waived the privilege to protect the document from the other side.

Note the Georgia distinction between refreshing while on the stand, versus reviewing it before trial.¹²

This privilege belongs exclusively to the client; even voluntary waiver by the attorney will not disturb this privilege unless the client waives it.¹³ This privilege cannot be asserted by someone who is outside the attorney-client relationship.¹⁴ Note that this privilege may also exist between witnesses for the state and their attorneys in criminal cases.¹⁵

§ 18:10 Termination of attorney-client privilege

The privilege is not terminated by the termination of the attorney-client relationship, nor is it terminated by the death of the client.¹ However, it may be terminated by the client's death if the communication was one which was not intended to be kept confidential after the death. And if the privilege is not terminated, it may be claimed by the heirs and personal representatives of the deceased.²

Federal court privilege law on the foregoing point was clarified in 1998. In *Swidler & Berlin v. U.S.*,³ the United States Supreme Court held that the attorney-client privilege survives the client's death. The dispute cited both civil and criminal cases in support of its holding. The United States Supreme Court's view of the privilege derived from the common law as interpreted in the light of reason and experience, as well as Federal Evidence Rule 501. Although a number of states recognize a testamentary exception

¹¹*Sperling v. City of Kennesaw Dept.*, 202 F.R.D. 325, 50 Fed. R. Serv. 3d 965 (N.D. Ga. 2001).

¹²O.C.G.A. § 24-6-612. See discussion in § 16:8 of this text, *supra*.

¹³See *Avery v. State*, 244 Ga. App. 177, 534 S.E.2d 897 (2000).

¹⁴*White v. Regions Bank*, 275 Ga. 38, 561 S.E.2d 806 (2002) (in will contest, daughter of testator cannot invoke attorney-client privilege as to communications between testator and testator's attorney).

¹⁵See *Rouse v. State*, 275 Ga. 605, 607, 571 S.E.2d 353 (2002) (defendant in a criminal case does not have right

to cross-examine witness for the State with witness's taped interview with his attorney).

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¹*Smith v. Smith*, 222 Ga. 694, 152 S.E.2d 560 (1966); *Spence v. Hamm*, 226 Ga. App. 357, 487 S.E.2d 9 (1997) (overruled on other grounds by, *Pollard v. Great Dane, LLC*, 371 Ga. App. 872, 903 S.E.2d 338 (2024)).

²*McCormick on Evidence* § 94.

³*Swidler & Berlin v. U.S.*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379, 49 Fed. R. Evid. Serv. 1, 40 Fed. R. Serv. 3d 745, 159 A.L.R. Fed. 729 (1998).

to the privilege, the Court noted a general presumption that the privilege survives the client's demise. The Court cited "weighty reasons" for the privilege's duration after death. The promise of post-death confidentiality encourages full and frank communication with lawyers.

An attorney is released from the obligations of secrecy imposed by the attorney-client privilege when a client charges negligence, malpractice, or other professional misconduct in an action against the attorney, or when a habeas petitioner claims that he or she was not informed about the consequences of a guilty plea.⁴ If the client and attorney become embroiled in an attorney malpractice dispute, it is held the attorney can protect herself by disclosing the otherwise privileged communication.

When a habeas petitioner asserts a claim of ineffective assistance of trial counsel, the resulting waiver of the attorney-client privilege is not limited solely to the attorney's testimony, but extends also to documents in trial counsel's files; however, the waiver with respect to such documents is limited, and the state is entitled only to those documents relevant to the specific allegations of ineffectiveness.⁵

§ 18:11 Existence of physician-patient privilege

In Georgia a full privilege for communications between physician and patient exists only where a psychiatrist-patient relationship is present. Communications between psychiatrist and his patient are protected as privileged communications under O.C.G.A. § 24-5-501.¹ The privilege also extends to communications between a client and his or her licensed psychologist, pursuant to O.C.G.A. § 43-39-16.² The confidential communication privilege for psychiatrist-patient conversations encourages patients to talk freely without fear of disclosure.³

For comment on the psychotherapist-patient privilege, see Dubbelday, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 *Emory L.J.* 777 (Summer/Fall 1985). Other references, see *Physician-patient privilege as applied to physician's testimony concerning wound required to be reported to public authority*, 85 *A.L.R.3d* 1196; *Physician's tort*

⁴*Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000) (overruled on other grounds by, *Duke v. State*, 306 Ga. 171, 829 S.E.2d 348 (2019)).

⁵*Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000) (overruled on other grounds by, *Duke v. State*, 306 Ga. 171, 829 S.E.2d 348 (2019)).

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¹See *Kimble v. Kimble*, 240 Ga. 100, 239 S.E.2d 676 (1977).

²*State v. Herendeen*, 279 Ga. 323, 613 S.E.2d 647 (2005).

³*Kennestone Hosp. v. Hopson*, 273 Ga. 145, 538 S.E.2d 742 (2000).

liability for unauthorized disclosure of confidential information about patient, 48 A.L.R.4th 668.

Although there is no general medical privilege in Georgia, statutes extend protection to confidential communications between psychiatrist or licensed psychologist and patient. The psychiatrist-patient privilege covers communications for mental advice with a medical doctor who spends a significant amount of time treating mental illness. The licensed medical doctor with a specialty in internal medicine fits this description in *Wiles v. Wiles*.⁴ The doctor testified she treated one-third of her patients for mental problems.

Amendments to the privilege have expanded coverage, providing protection for privileged communications between a patient and a licensed psychologist, a licensed clinical social worker, a clinical nurse specialist in psychiatrist/mental health, a licensed marriage and family therapist, or licensed professional counselor during the psychotherapeutic relationship. The Act also provides for privileged communications between or among such mental health care providers.

Purpose of psychiatrist-patient privilege is to encourage patient to talk freely without fear of disclosure and embarrassment, thus enabling psychiatrist to render effective treatment of patient's emotional or mental disorders.⁵

A patient's threatening comments to his treating physician made during an appointment and dictated into the doctor's notes were privileged as a matter of law and could not serve as basis for claim of libel by the patient, even when the physician considered the patient to be intimidating to the doctor and his staff.⁶

Testimony regarding information defendant disclosed to counselor was not protected by privilege protecting communications between licensed psychologist and client, where record showed neither that counselor was licensed psychologist nor that defendant was a client.⁷

The case of *Brogdon v. State*⁸ reconfirms the point that there is no full doctor-patient privilege in Georgia for physical injuries or treatment, with the court stating that the legislature has not recognized a privilege protecting a doctor from testifying about his patient. Brogdon told the hospital's doctors about his drink-

⁴*Wiles v. Wiles*, 264 Ga. 594, 448 S.E.2d 681 (1994).

⁵*Cornelius v. Hutto*, 252 Ga. App. 879, 558 S.E.2d 36 (2001).

⁶*Jasarevic v. Foster*, 335 Ga. App. 528, 782 S.E.2d 314 (2016).

⁷O.C.G.A. § 43-39-16. *Gore v. State*, 251 Ga. App. 461, 554 S.E.2d 598 (2001).

⁸*Brogdon v. State*, 287 Ga. 528, 697 S.E.2d 211 (2010).

ing prior to a wreck so they could treat him properly, and they placed reports of these disclosures in the hospital's medical records. Later the prosecutor successfully secured a search warrant for the medical records under O.C.G.A. § 17-5-21. When the defense complained that the statutory protection of privacy of medical records was abridged by this procedure, the court pointed out that the medical records were not seized from the person of the accused, but rather from a third party. On the general right of hospitals or healthcare facilities to protect from disclosure the records of patients, see the privilege for medical information contained in O.C.G.A. § 24-12-1.

Both physicians and hospitals have a general right, subject to exceptions, to keep a patient's medical information confidential. However, a waiver allowing disclosure may be executed by the patient. The privilege of nondisclosure is also "waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any civil or criminal proceeding."

The Georgia Court of Appeals held that a grief journal maintained by the plaintiff who was the wife of the deceased in a wrongful death action against a hospital was privileged under O.C.G.A. § 24-5-501(a) because a licensed associate professional who was acting as agent of licensed professional counselor recommended that she keep the journal.⁹

A defendant employer may rely upon a plaintiff's medical record to defend itself, where it is relevant, against a non-HIPAA (Health Insurance Portability and Accountability Act) lawsuit. Whereas HIPAA prohibits the use of such evidence, that prohibition is inapplicable to non-HIPAA actions.¹⁰

The General Assembly has placed an absolute embargo upon the discovery and use, in civil litigation, of any proceeding records, findings, and recommendations of medical peer-review groups and medical review panels.¹¹ The medical review committee and medical peer-review statutes protect all proceedings and information of a review organization, not just what is included in physical files.¹² To the extent that a hospital's credentialing process involved a peer review committee's evaluation of defendant physician's performance of medical procedures, the information was not discoverable in medical malpractice action, but to extent

⁹Gwinnett Hosp. System, Inc. v. Hoover, 337 Ga. App. 87, 785 S.E.2d 918 (2016).

¹⁰Bailey v. City of Daytona Beach Shores, (no cite as of yet) (March 2014).

¹¹Hospital Authority of Valdosta and Lowndes County v. Meeks, 294 Ga. App. 629, 669 S.E.2d 667 (2008).

¹²O.C.G.A. §§ 31-7-133(a), 31-7-143.

that there was information in hospital's credentialing files that did not involve evaluations of the physician's performance of medical procedures, that information was discoverable.

It is not difficult to understand the waiver concept when suit is filed against a physician. It has been held that once a plaintiff files an action questioning the nature and quality of medical treatment, the qualified right of privacy inuring to the benefit of the patient is waived. In these circumstances, the doctor is authorized to release information and is immune from liability on account of such release.¹³

Psychiatrist-patient privilege is inapplicable to testimony by court-appointed psychiatrist as to incriminating statements made by defendant during course of court-ordered examination.¹⁴

Where psychiatrist examined defendant, who was not at state hospital for treatment, pursuant to court order, psychiatrist-patient privilege does not apply to results of such examination.¹⁵

Discussing the application of a privilege if a court appoints a mental health provider is *Gottschalk v. Gottschalk*.¹⁶

Does a criminal defendant place his medical condition "at issue" when, infected with AIDS, he attempts to bite a police officer? Yes, says the Georgia Court of Appeals, in a case wherein the defendant was charged with aggravated assault with intent to murder after biting a police officer.¹⁷

Pharmacists were included in the shield law in 1993. This privilege was continued in the 2013 Evidence Code.¹⁸ As with medical treatment, a pharmacist can release information under authorization by the patient. Further, "the privilege shall be waived to the extent that the patient places his . . . injuries at issue in any administrative, civil or criminal proceeding."

A licensed applied psychologist was not privileged against disclosure of the fact of his employment by his patients.¹⁹

Disclosure of AIDS confidential information was addressed in a 1988 addition to the Code, providing for authorized disclosure in certain circumstances and to certain specified persons and entities, protecting the discloser from liability where disclosure is authorized. Under current law, see O.C.G.A. § 24-12-20 (AIDS confidential information).

¹³Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982).

¹⁴Leggett v. State, 244 Ga. 226, 259 S.E.2d 476 (1979).

¹⁵Moody v. State, 244 Ga. 247, 260 S.E.2d 11 (1979).

¹⁶Gottschalk v. Gottschalk, 311 Ga. App. 304, 715 S.E.2d 715 (2011).

¹⁷Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13 (1990).

¹⁸O.C.G.A. § 24-12-1(b).

¹⁹Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844 (1969).

Where a third party is present as a necessary or customary participant in the consultation with and treatment by a psychiatrist, such as the communicant's spouse, the confidentiality of psychiatric-patient confidences is preserved.²⁰

A psychiatrist who is appointed by the court for the purpose of conducting a sanity examination does not enter into the relationship contemplated by the statute; therefore, the privilege does not apply.²¹ The privilege is waived when the defense calls the psychiatrist to testify as to the mental condition of the defendant.²²

Sometimes limits are placed on the cross-examination of an expert. Trial court did not abuse its discretion, in murder prosecution, in limiting scope of state's cross-examination of defendant's relationship counselor to preclude elicitation of any testimony concerning contents of any conversations defendant had with psychologist or any inquiry into defendant's psychological state.²³

Generally, court-ordered mental examinations fall outside privilege protection. In *Rogers v. State*,²⁴ that point is made, as well as the principle that since Rogers raised a claim of mental retardation, such affirmative defense which put his mental capacity at issue worked a waiver of privilege claims.

In order to invoke the psychotherapist-patient privilege, the requisite relationship of psychotherapist and patient must have existed, to the extent that treatment was given or contemplated.²⁵ The required relationship to invoke psychotherapist-patient privilege does not exist when the psychotherapist is appointed by the court to conduct a preliminary examination to evaluate a person's mental state because, in such a situation, mental health treatment is not given or contemplated.

²⁰*Sims v. State*, 251 Ga. 877, 311 S.E.2d 161 (1984).

²¹*Massey v. State*, 226 Ga. 703, 177 S.E.2d 79 (1970).

²²*Fields v. State*, 221 Ga. 307, 144 S.E.2d 339 (1965); *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)) (defendant waived psychotherapist/patient privilege by putting mental capacity at issue); *Perkinson v. State*, 279 Ga. 232, 610 S.E.2d 533 (2005) (defendant waived privilege as to school medical records when he put mental capacity at issue); *Trammel v. Bradberry*, 256 Ga. App.

412, 568 S.E.2d 715 (2002) (where Defendant raises mental illness as a defense, defendant waived privilege as to psychiatric records and other communications with mental health professionals during an involuntary commitment).

²³*Buttram v. State*, 280 Ga. 595, 631 S.E.2d 642 (2006).

²⁴*Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31(2007) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

²⁵*In re I.M.G.*, 276 Ga. App. 598, 624 S.E.2d 236 (2005); *State v. Herendeen*, 279 Ga. 323, 613 S.E.2d 647 (2005).

Confidentiality has been extended to photos of deceased persons in the hands of hospitals or medical authorities. Under a 2001 enactment, “no hospital shall release for public use any autopsy photographs or images without the written permission of the family.”²⁶

O.C.G.A. § 24-12-10 refers to the confidential or privileged character of psychiatric or medical records of a patient. Prior to 2004, there was reference to maintaining confidentiality when such records are kept by a health care facility or a physician. Confidentiality was extended to nurse’s medical records under a 2004 enactment.²⁷

Discussing waiver of the substantive right to medical privacy under Georgia law is *Baker v. Wellstar Health System, Inc.*²⁸

While the psychotherapist-patient privilege is not waived by a general claim for emotional damages by a plaintiff in a tort action, under O.C.G.A. § 34-9-207 the patient’s claim for worker’s compensation benefits may dictate a different result. The statute ordains that a claimant for benefits “shall be deemed to have waived any privilege . . . including, but not limited to, communications with psychiatrists or psychologists.”

Georgia courts recognize a mental health expert’s duty to warn intended victims when a patient makes a believable threat of violence.²⁹

§ 18:12 Privileged communications by client to public accountant

In 1977, Georgia Legislature passed O.C.G.A. § 43-3-32 relating to ownership of accountants’ working papers and communications to accountants as confidential.¹ When the 2013 Code was passed, this approach was carried forward.²

§ 18:13 Privileged communications to clergy

By statute communications to ministers, priests, and rabbis are privileged.¹ The clergymen included in the statute are “any Protestant minister of the Gospel,” “any priest of the Roman

²⁶O.C.G.A. § 31-7-75.2.

²⁷O.C.G.A. § 24-12-10.

²⁸*Baker v. Wellstar Health System, Inc.*, 288 Ga. 336, 703 S.E.2d 601 (2010).

²⁹*Bradley Center, Inc. v. Wessner*, 250 Ga. 199, 296 S.E.2d 693 (1982).

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¹See *Crews v. Wahl*, 238 Ga. App.

892, 520 S.E.2d 727 (1999); *Rose v. Commercial Factors of Atlanta, Inc.*, 262 Ga. App. 528, 586 S.E.2d 41 (2003).

²O.C.G.A. § 24-5-501(9).

[Section 18:13]

¹O.C.G.A. § 24-5-502.

Catholic faith,” “any priest of the Greek Orthodox Catholic faith,” and “any Jewish rabbi” or “any Christian or Jewish minister or similar functionary, by whatever name called”

Under O.C.G.A. § 24-5-502, the trial court correctly excluded testimony in a divorce case of communications between the husband, wife and their church pastor since the statements were deemed to have been made during marriage counseling and were, therefore, privileged.²

Cases on clergy privilege, see *Alternative Health Care Systems, Inc. v. McCown*³ and *Willis v. State*.⁴

§ 18:14 Privileged communications to public officers

O.C.G.A. § 24-5-505 provides, in part: “no official persons shall be called on to disclose any State matters of which the policy of the State and the interest of the community require concealment.”

Information from a welfare fraud investigator as to what transpired in court was not conditionally privileged pursuant to a statute providing a privilege for truthful reports of information received from any arresting officer or police authorities.¹

There is public privilege to retain secrecy for informants. “Informer’s privilege” is the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.² Public policy favors nondisclosure of the identity of an informant in the interest of the free flow of information about criminal activity. Further, the identity of a mere tipster is privileged, but where the informer is a witness or participant, or has entrapped a defendant into committing a crime, disclosure could be material to the defense.³

§ 18:15 Miscellaneous privileges

A veterinarian-client privilege was statutorily recognized by a 1986 addition to the Code (former O.C.G.A. § 24-9-29). The statute provided for waiver of the privilege to the extent the client or owner of the animal places the veterinarian’s care and treatment of the animal or the nature and extent of injuries to the animal

²Frost v. Frost, 299 Ga. 278, 787 S.E.2d 693 (2016).

³Alternative Health Care Systems, Inc. v. McCown, 237 Ga. App. 355, 514 S.E.2d 691 (1999); Alpharetta First United Methodist Church v. Stewart, 221 Ga. App. 748, 472 S.E.2d 532 (1996).

⁴Willis v. State, 287 Ga. 703, 699

S.E.2d 1 (2010).

[Section 18:14]

¹Heard v. Neighbor Newspapers, Inc., 259 Ga. 458, 383 S.E.2d 553 (1989).

²Griffiths v. State, 283 Ga. App. 176, 641 S.E.2d 169 (2006).

³Jones v. State, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

at issue in any civil or criminal proceeding. For the 2013 code, see O.C.G.A. § 24-12-31.

The Georgia newsgatherer's privilege was statutorily recognized by a 1990 addition to the Code (O.C.G.A. § 24-5-508). It covers any person, company, or other entity engaged in the gathering and dissemination of news through a print or broadcast media. The 2013 Code added reference to electronic publication. An obligation of disclosure exists when information is sought which is material and relevant, cannot be reasonably obtained by alternate means, and is necessary to the preparation or presentation of the case of the party seeking the information.

O.C.G.A. § 24-5-508 provides that its protection can be waived. State was entitled to subpoena a writer for the Brunswick newspaper for the purpose of authenticating two articles written by her.¹

Where a party validly claims a constitutional privilege, such as the Fifth Amendment privilege against self-incrimination, opposing counsel may not comment upon an opponent's invocation of that privilege in a criminal case. See O.C.G.A. § 24-5-506. In the case of common law or statutory privileges, however, controversy rages as to whether invocation can trigger adverse comment, with a number of courts permitting it.

Even with the Fifth Amendment, the rule on comment in civil cases may be different from the criminal case pattern. A party may invoke his or her privilege against self-incrimination to block discovery proceedings. In a deposition, for example, the privilege is effectively invoked by a deponent asserting the privilege in response to each question for which the privilege is claimed. In a criminal proceeding, a prosecutor is barred from commenting on a defendant's prior invocation of the privilege against self-incrimination. In civil proceedings, however, case law suggests that a party may comment about a witness' prior invocation of privilege when the case reaches trial. There is authority that a party may produce evidence of the fact that an adverse party claimed the privilege against self-incrimination during pretrial discovery.²

In *Sanders v. State*,³ an excellent summary of Georgia law appears. Although a privileged refusal to testify in a civil case cannot be used against that party in a subsequent criminal case, it is permissible in a civil case to draw an unfavorable inference

[Section 18:15]

¹In re Morris Communications Co., 258 Ga. App. 154, 573 S.E.2d 420 (2002).

²See Axson v. National Sur.

Corp., 254 Ga. 248, 327 S.E.2d 732 (1985); Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

³*Sanders v. State*, 259 Ga. App. 422, 577 S.E.2d 94 (2003).

from the privileged refusal to testify in that case. Inferences can be drawn from a party's invocation of privilege, and such inferences may constitute admissions unfavorable to him.

The privilege against self-incrimination is analyzed in § 15:15, *supra*. Whether a witness who denied wrongdoing could nonetheless claim a valid Fifth Amendment privilege was adjudicated in *Ohio v. Reiner*.⁴ The U.S. Supreme Court held that even if a witness denies all culpability, the Fifth Amendment protection is available to such a witness where the facts sustain a claim of privilege.

There has been spirited discussion of how widely the privilege protects a witness both inside and outside the courtroom. Before trial, for example, can a witness who has not waived his Miranda rights be required to sit or stand for a photograph? During a criminal case trial, can a defendant be required to try on a hat or a shirt in front of the jury to determine whether the item fits the accused? Assume the hat or other item of clothing was abandoned at a crime scene, and its use at trial may well incriminate the defendant. Under older Georgia cases, the Georgia constitution prohibits compelling an accused person to furnish evidence against himself by either supplying oral statements or doing an act against his will which is incriminating in nature.

Accordingly, under the older strict view a defendant could not be compelled to incriminate himself by word or deed. For the authorities to forcibly require the defendant to place his foot in tracks near the scene of a burglary and discovering a fit, for example, was prohibited. The courts turned decisions on the question of whether the accused was required to "do an act." If so, the use of evidence derived therefrom was prohibited. See discussion in *Creamer v. State*.⁵

Under this sort of analysis, distinctions were drawn between forcing the accused to cooperate and to "do an act" versus simply taking evidence from his person, such as taking his blood. The latter was allowed. This left open questions such as whether incriminating fingerprints could be secured from an accused. The fingerprinting process requires at least a minimum of cooperative conduct from the accused. Does ordering him to cooperate in the fingerprinting process require him to "do an act," in other words, is he thereby forced to improperly furnish evidence against himself?

Modernly, federal law avoids the unworkable distinctions contained in the old Georgia pattern by applying the Fifth

⁴*Ohio v. Reiner*, 532 U.S. 17, 121 S. Ct. 1252, 149 L. Ed. 2d 158, 55 Fed. R. Evid. Serv. 1171 (2001).
⁵*Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972).

Amendment to oral or written communications, but not simple acts. Under this formula, it is clear the defendant could be required to try on a hat found at the crime scene, in front of the jury. Will the same result obtain today under the more protective Georgia Constitution? That Georgia is moving in the federal direction is attested to by the cases cited in § 15:15, *supra*.⁶

Interpretations continue. In *Razor v. State*,⁷ the court ruled that field sobriety tests are not “statements” so that responses are not inadmissible under the Fifth Amendment.

The privilege for communications between a patient and licensed professional counselor was sought to be invoked to block discovery of school records. Defendant’s assertion of mental retardation defense waived challenge to State’s discovery of his school records as privileged, in trial for capital murder and other crimes.⁸

Waiver of the mediator privilege occurred in *Wilson v. Wilson*.⁹

While a 2009 Act expanded access to child abuse records, it excluded from disclosure to private persons any information which is privileged as a matter of law, and information related to an ongoing criminal investigation or proceeding.¹⁰

The provisions of O.C.G.A. § 24-5-509 were added by the 2012 legislature. They conferred a privilege for communications between domestic violence and sexual assault victims and their intervention contacts. Employees and volunteers at family violence shelters and rape crisis centers often engage in confidential communications with victims.

Library circulation and similar records shall be confidential, subject to exceptions. This privilege appears in O.C.G.A. § 24-12-30.

A 2014 enactment creates the protection of privileged communications between law enforcement officers and peer

⁶See also *Rivers v. State*, 265 Ga. 694, 461 S.E.2d 205, 208 (1995) (requiring accused to submit to taking of photos of himself did not violate Georgia Constitution); *State v. Thornton*, 253 Ga. 524, 322 S.E.2d 711 (1984) (court-ordered taking of dental impressions from defendant did not violate privilege; fingerprinting also allowed); *Meriwether v. State*, 63 Ga. App. 667, 670, 11 S.E.2d 816 (1940) (directing defendant to stand up for identification does not improperly compel him to be a witness against himself).

⁷*Razor v. State*, 259 Ga. App. 196, 576 S.E.2d 604 (2003).

⁸*Perkinson v. State*, 279 Ga. 232, 610 S.E.2d 533 (2005).

⁹*Wilson v. Wilson*, 282 Ga. 728, 653 S.E.2d 702 (2007) (privilege between mediator and participant waived when issue of participant’s competency to sign the agreement is put in issue).

¹⁰The Act amends O.C.G.A. §§ 49-5-40 and 49-5-41.

counselors.¹¹

§ 18:16 Admissibility of medical research information

O.C.G.A. § 24-12-2 makes raw data collected in the course of medical research privileged information and not discoverable. This covers all “medical information, interview responses, reports, statements, memoranda, or other data” relating to the condition or treatment that was gathered during the course of a medical research project. It should be noted that this information is only protected if it meets two conditions. First, if it was provided in support of a study that has been approved by an appropriate oversight committee of a hospital, health care facility, or educational institution. And second, the information was provided with the objective to “develop, study, or report aggregate or anonymous information not intended to be used in any way in which the identity of an individual is material to the results.” However, the confidentiality of this raw research data is waived and thus discoverable in any proceeding in which the researcher has either volunteered to testify or has been hired to testify as an expert by one of the parties.

¹¹O.C.G.A. § 24-5-510.

Chapter 19

Judicial Notice

- § 19:1 Proof excused if fact is judicially noticed
- § 19:2 Making record of facts judicially noticed
- § 19:3 Judicial notice of laws
- § 19:4 Judicial notice of facts concerning the court
- § 19:5 Judicial notice of facts about government, officers, and political subdivisions
- § 19:6 Other facts judicially noticed
- § 19:7 Facts not judicially noticed

§ 19:1 Proof excused if fact is judicially noticed

Judicial notice “is not evidence, but takes the place of evidence. By taking judicial notice of a fact (that is) commonly known, the court avoids the needless formality of introducing evidence to prove an incontestable issue.”¹ Judicial notice of adjudicative facts is the process by which a court recognizes as conclusive certain facts absent formal proof.² O.C.G.A. § 24-2-201 addresses the issue of judicial notice in Georgia trials.³

A party is excused in a civil case from the burden of establishing a fact by formal proof thereof if it is judicially noticed.⁴ Judicial notice of such facts takes the place of proof and is of equal force; it replaces evidence, since it stands for the same thing.⁵

Role of judicial notice is to eliminate formal proof as to: (1) matters of which the general public has common knowledge; (2) facts which are readily ascertainable by reference to some reliable source and are beyond dispute.⁶

The scope of judicial notice has been aptly summarized in an opinion by the United States Court of Appeals for the Eleventh Circuit:

[T]he kinds of things about which courts ordinarily take judicial no-

[Section 19:1]

S.E.2d 405 (2022).

¹McCoy v. State, 341 Ga. App. 216, 799 S.E.2d 354 (2017).

⁴O.C.G.A. § 24-2-201(f) and (g).

²State v. Ogunsuyi, 301 Ga. 281, 800 S.E.2d 542 (2017).

⁵James v. Central of Georgia Ry. Co., 138 Ga. 415, 75 S.E. 431 (1912).

³Riley v. Georgia Association of Club Executives, 313 Ga. 364, 870

⁶O.C.G.A. § 24-2-201; Fitzpatrick v. Harrison, 300 Ga. App. 672, 686 S.E.2d 322 (2009).

tice are (1) scientific facts: for instance, when does the sun rise or set; (2) matters of geography: for instance what are the boundaries of a state; or (3) matters of political history: for instance, who was president in 1958.⁷

A court may take judicial notice of whatever may be known by common observation since a court is presumed to be as well informed as the general public and can take judicial notice of that which everyone knows to be true.⁸ The rule has been broadly stated that courts will take notice of whatever matters are known, or ought generally to be known, within the limits of their jurisdiction. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.⁹

A court may take judicial notice of matters of public knowledge without the introduction of proof, if the matter is one of common, everyday knowledge that all people of average intelligence are presumed to know, and if it is certain and undisputable. In *Triguero v. ABN AMRO Bank N.V.*,¹⁰ the Georgia Court of Appeals took judicial notice of the recent deaths of the trial judge and the court reporter who had previously handled the matter as sufficiently satisfying the requirement of establishing the convenience and burden on a court, in order to uphold a dismissal for forum non conveniens.

Courts have wide discretion in what they consider to be reliably established in order to take judicial notice. For instance, courts have taken judicial notice of DNA evidence and its reliability.¹¹ The 11th Circuit has stated, however, that though such discretion is “wide,” “the taking of judicial notice of facts is ‘a highly limited process.’ [Cit.] The reason for this caution is that the taking of judicial notice bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court.”¹²

⁷*Shahar v. Bowers*, 120 F.3d 211, 47 Fed. R. Evid. Serv. 832 (11th Cir. 1997).

⁸*SEC, Inc. v. Puckett*, 252 Ga. App. 422, 555 S.E.2d 198 (2001); *Cole v. Cates*, 110 Ga. App. 820, 140 S.E.2d 36 (1964).

⁹*City of Savannah v. Jordan*, 142 Ga. 409, 83 S.E. 109 (1914).

¹⁰*Triguero v. ABN AMRO Bank N.V.*, 273 Ga. App. 92, 614 S.E.2d 209 (2005).

¹¹*U.S. v. Beasley*, 102 F.3d 1440, 46 Fed. R. Evid. Serv. 1 (8th Cir. 1996)

(“Moreover, we believe that the reliability of the PCR method of DNA analysis is sufficiently well established to permit the courts of this circuit to take judicial notice of it in future cases. In every case, of course, the reliability of the proffered test results may be challenged by showing that a scientifically sound methodology has been undercut by sloppy handling of the samples, failure to properly train those performing the testing, failure to follow the appropriate protocols, and the like.”).

¹²*Lodge v. Kondaur Capital Corp.*,

In considering its verdict, the jury may use whatever general knowledge and experience they possess in common with the general public, and the judge may charge the jurors to that effect.¹³

It is improper for a judge to take into consideration his actual private knowledge, unless it is a fact that can be judicially noticed,¹⁴ but, where he has the right to take judicial notice of a fact, he may consult, on his own motion, sources that he considers reliable.¹⁵

Appellate courts are empowered to judicially notice certain matters. In *Powers v. Latimer*,¹⁶ the Court of Appeals took judicial notice of a loan receipt from the record in another Court of Appeals case.

Upon review, the reviewing court is required to take judicial notice of all matters which the lower court was required to notice and, in addition, the rules of practice of the lower court.¹⁷

§ 19:2 Making record of facts judicially noticed

As a general rule, the party seeking to have a fact judicially noticed should so move the court.

§ 19:3 Judicial notice of laws

Under O.C.G.A. § 24-2-220, the courts may recognize the following categories of laws: laws of Nations, laws and resolutions of the General Assembly, laws of the United States and laws of other states as published by authority.¹ This includes the laws of other states.²

A 2001 enactment related to judicial notice of ordinances. Certified copies of some ordinances or resolutions may be judicially noticed, and any such copies “shall be self-authenticating and shall be admissible as prima facie proof of any such ordinance or resolution before any court or administrative body.”³ Certification could come from the “public officer, clerk or keeper of the county or municipal records.”

Judicial notice cannot be taken of city or county ordinances,

750 F.3d 1263, 94 Fed. R. Evid. Serv. v. Exum, 209 Ga. 548, 74 S.E.2d 738 603 (11th Cir. 2014). (1953).

¹³Hilburn v. Hilburn, 163 Ga. 23, 135 S.E. 427 (1926).

¹⁴Am. Jur. 2d, Evidence § 15.

¹⁵Rule 201(b)(2), Fed. R. Evid.

¹⁶Powers v. Latimer, 215 Ga. App. 245, 450 S.E.2d 295 (1994).

¹⁷Liberty Bell Mut. Fire Ins. Co.

[Section 19:3]

¹For their authentication, see §§ 23:8 et seq.

²See Coon v. Medical Center, Inc., 300 Ga. 722, 797 S.E.2d 828 (2017).

³O.C.G.A. § 24-2-221.

but they must be alleged and proved.⁴ The proper method of proving a county ordinance is by production of the original or of a properly certified copy.⁵ See *Maxineau v. King*,⁶ which holds that a county ordinance to which a truck driver had pleaded guilty was not in the record on appeal and could not be judicially noticed. In similar fashion, neither appellate court nor trial court may take judicial notice of municipal records; they must be alleged and proved by production of the original or of a properly certified copy.⁷

There has been some confusion in the cases as to whether the laws of other states are judicially recognizable and, if they are, to what extent. The most recent trend is that the laws of other states are to be judicially noticed.⁸

Aside from judicial notice, there are three methods by which the laws of another state may be placed in evidence: first, by testimony of witnesses who are familiar with the law; second, by a certified copy of the constitution, statute or opinion; and, third, by introducing a printed copy, published by authority.⁹

Plaintiff's failure to specify which code provisions the defendant allegedly violated, and the failure to request that the trial court take judicial notice of such provision resulted in there being no basis for the trial court to make a determination as to whether the alleged code violations gave rise to negligence per se.¹⁰

§ 19:4 Judicial notice of facts concerning the court

The court takes judicial notice of its own rules and processes, as well as its decisions,¹ and its own records in the immediate case or proceedings before it,² including all prior proceedings in the main case. An appellate court can take judicial notice of subsequent developments in cases that are a matter of public record and relevant to an appeal before it.³

⁴*Flippen Alliance for Community Empowerment, Inc. v. Brannan*, 267 Ga. App. 134, 601 S.E.2d 106 (2004).

⁵*Prime Home Properties, LLC v. Rockdale County Bd. of Health*, 290 Ga. App. 698, 660 S.E.2d 44 (2008).

⁶*Maxineau v. King*, 304 Ga. App. 217, 695 S.E.2d 732 (2010).

⁷*Younger v. Dunagan*, 318 Ga. App. 554, 733 S.E.2d 81 (2012).

⁸*Duncan Cleaners, Inc. v. Shuman Co.*, 119 Ga. App. 128, 166 S.E.2d 387 (1969).

⁹*Missouri State Life Ins. Co. v.*

Lovelace, 1 Ga. App. 446, 58 S.E. 93 (1907).

¹⁰*Norman v. Jones Lang Lasalle Americas, Inc.*, 277 Ga. App. 621, 627 S.E.2d 382 (2006).

[Section 19:4]

¹*Gamble v. Gamble*, 207 Ga. 380, 61 S.E.2d 836 (1950).

²*South America Managers, Inc. v. Reeves*, 220 Ga. 493, 140 S.E.2d 201 (1965).

³*Serdula v. State*, 344 Ga. App. 587, 812 S.E.2d 6 (2018).

Consider *Johnson v. Allied Recycling*.⁴ In an action brought by a judgment creditor against a judgment debtor alleging conspiracy to avoid their liability through the transfer of assets, creditor filed motion to supplement appellate record with records from the bankruptcy court below. The appeals court granted the motion, concluding that judicial notice could properly be taken “of public records from other proceedings.”

The court in *Petkas v. Grizzard*,⁵ held that a trial court could take judicial notice of the record in a prior suit in the same court, since a trial court can take judicial cognizance of the records on file in its own court. While the court is authorized to do so, it is not so required, and the court may ask for evidence on the issue.

The *Petkas* case has been cited in subsequent decisions. In *Lee v. State Const. Industry Licensing Bd. of Georgia*,⁶ the court reiterated that a trial court may take judicial notice of its own records. However, while this is true of the physical records in another suit in the same court, the rule does not apply to party admissions, or admissions by operation of law, where the other lawsuit involved requests for admissions.⁷ Another distinction relates to uncertified copies of pleadings and orders from other Georgia courts, which are “not competent evidence” of contested facts.⁸ The rule seems to focus upon a judge’s right to notice records on file in her own court. Also, judicial notice could not be taken of the State Building Code.⁹

The Eleventh Circuit held in *Davis v. Self*,¹⁰ which involved a civil rights claim that stemmed from underlying child custody and support cases in Tennessee and Alabama, that the district court properly took judicial notice of the opinions and judgments in those underlying cases. The appeals court noted that many of the orders were submitted as attachments to the plaintiff’s civil rights complaint.

In an appeal from a judgment in juvenile court terminating the parental rights of a mother, the appellant mother claimed the evidence was insufficient to support the court’s ruling. The juvenile court previously adjudicated the children at issue to be deprived

⁴*Johnson v. Allied Recycling, Inc.*, 323 Ga. App. 427, 746 S.E.2d 728 (2013).

⁵*Petkas v. Grizzard*, 252 Ga. 104, 312 S.E.2d 107 (1984). See *Schaff v. State*, 275 Ga. App. 642, 621 S.E.2d 595 (2005) (trial judge may take judicial notice of records on file in her own court).

⁶*Lee v. State Const. Industry Licensing Bd. of Georgia*, 205 Ga. App. 497, 423 S.E.2d 26 (1992).

⁷*Mumford v. Davis*, 206 Ga. App. 148, 424 S.E.2d 306 (1992) (judicial notice relates to matters of fact).

⁸*Commerce Properties, Inc. v. Linthicum*, 209 Ga. App. 853, 434 S.E.2d 769 (1993).

⁹*Joel Properties, Inc. v. Reed*, 203 Ga. App. 257, 416 S.E.2d 570 (1992).

¹⁰*Davis v. Self*, 547 Fed. Appx. 927 (11th Cir. 2013).

and took judicial notice of its deprivation order in the order terminating the mother's parental rights. As she never appealed the deprivation finding, she was therefore bound by the order. However, because the court failed to establish future harms that might be sustained by continued deprivation, the earlier judgment was reversed.¹¹

Where plaintiffs did not attempt to intervene in a superior court action in which a validation order was issued, the trial court was able to take judicial notice of the order at trial.¹²

In summary, the principle seems firmly established in Georgia law. A trial court may take judicial notice of records on file in its own court.¹³

§ 19:5 Judicial notice of facts about government, officers, and political subdivisions

The courts take judicial notice of the localities of municipalities in Georgia,¹ the boundaries, locations, and seats of counties,² proclamations by the governor,³ the fact that a person commissioned by the governor to a particular office is the incumbent of that office,⁴ and the name of the solicitor-general of a given circuit.⁵

Any act performed by State Drug Inspector would be act of State Board of Pharmacy of which court will take judicial notice.⁶

Rules and regulations of County Civil Service Board are not subject to judicial notice.⁷

¹¹In re J.S.B., 277 Ga. App. 660, 627 S.E.2d 402 (2006).

¹²Greene County Bd. of Com'rs v. Higdon, 277 Ga. App. 350, 626 S.E.2d 541 (2006).

¹³See, e.g., Schaff v. State, 275 Ga. App. 642, 621 S.E.2d 595 (2005) (in a case for animal cruelty, court took notice of defendant's prior conviction for DUI, where the conviction occurred in the same court in which the defendant was currently being tried); In re J.P.V., 261 Ga. App. 194, 582 S.E.2d 170 (2003) (juvenile court took notice of its prior order finding the children at issue to be deprived; the orders were unappealed, and the mother failed to object to them, therefore there was no issue with the order being considered when the mother sought reunification services).

[Section 19:5]

¹Seaboard Air Line Ry. v. Peeples, 12 Ga. App. 206, 77 S.E. 12 (1913).

²Fine v. Dade County, 198 Ga. 655, 32 S.E.2d 246 (1944).

³Ragland v. Barringer, 41 Ga. 114, 1870 WL 1932 (1870).

⁴Daniel v. Citizens & Southern Nat. Bank, 182 Ga. 384, 185 S.E. 696 (1936).

⁵Welch v. State, 91 Ga. App. 86, 84 S.E.2d 838 (1954).

⁶Bailey v. State, 259 Ga. App. 293, 576 S.E.2d 668 (2003); State v. Bonini, 236 Ga. 896, 225 S.E.2d 907 (1976).

⁷McClure v. Hightower, 237 Ga. 157, 227 S.E.2d 47 (1976).

Public land surveys are judicially noticed⁸ as well as the population of any Georgia municipality.⁹ In an election contest, the court would take judicial notice of the total number of precincts and returns.¹⁰

Under O.C.G.A. § 50-13-8 of the Administrative Procedure Act (APA), Georgia courts were required to judicially notice rules and regulations promulgated under the APA by Georgia's agencies; on remand, the appeals court was to determine the constitutionality of Georgia's warrantless search of a criminal defendant's commercial vehicle under applicable regulations.¹¹

Neither the Department of Motor Vehicle Safety (DMVS) nor the Public Service Commission (PSC) fall within the group of government entities explicitly excluded by O.C.G.A. § 50-13-2(1) from the APA's provisions; thus, rules and regulations promulgated pursuant to the APA by DMVS or the PSC and thereafter properly adopted by DMVS are required to be judicially noticed by the courts.¹²

Ga. Comp. R. & Regs. Rule 92-3-.06 (a rule that became effective pursuant to the Georgia APA) embodies methods for blood alcohol breath tests approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation; a trial court erred in suppressing the results of a blood alcohol content breath test where the test was conducted in accordance with methods adopted by the Division of Forensic Sciences.¹³

§ 19:6 Other facts judicially noticed

Judicial notice will be taken of any fact that is common knowledge. A matter may be judicially noticed, even though not widely known, if it is so capable of verification as to be beyond controversy.¹

Federal courts have held that a court may take judicial notice of filings of public record and the fact (but not the veracity) of parties' assertions therein.²

In action brought by successor bank seeking the recovery on

⁸Morris v. Hasty, 169 Ga. 781, 151 S.E. 490 (1930).

⁹Harrison v. Hartford Steam Boiler Inspection & Ins. Co., 183 Ga. 1, 187 S.E. 648 (1936), rev'd on other grounds, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

¹⁰Lowe v. Weltner, 118 Ga. App. 635, 164 S.E.2d 919 (1968).

¹¹State v. Ponce, 279 Ga. 651, 619 S.E.2d 682 (2005).

¹²State v. Ponce, 279 Ga. 651, 619 S.E.2d 682 (2005).

¹³State v. Palmaka, 266 Ga. App. 595, 597 S.E.2d 630 (2004).

[Section 19:6]

¹Rives v. Atlanta Newspapers, Inc., 110 Ga. App. 184, 138 S.E.2d 100 (1964), rev'd on other grounds, 220 Ga. 485, 139 S.E.2d 395 (1964).

²Graham v. Catamaran Health Solutions LLC, 2017 WL 3613328 (8th

promissory notes and guarantees, trial court properly took judicial notice of a notice appearing in the Federal Register showing that the original lending bank had failed and that the Federal Deposit Insurance Corporation had been appointed as its receiver.³

A court may judicially notice a custom or usage which is commonly and generally known.⁴ If it is not sufficiently well-known to be judicially noticed, it may be proven by witnesses.⁵

Also judicially noticed is the operation of natural forces⁶ and periods of inflation and deflation.⁷

Judicial notice is taken of geographical facts.⁸ On the other hand, the Georgia Supreme Court did not take notice of a city that falls into multiple counties.⁹ The courts will take judicial notice of facts relating to land lots and districts in various counties, including their shape and relative location,¹⁰ but the Court of Appeals will not take judicial notice as to whether a certain address was inside or outside the city limits of Atlanta.¹¹

While the Court of Appeals may judicially notice the location of cities within a county, it may not judicially notice the location of streets in a city.¹²

It was not error for trial judge in armed robbery prosecution to take judicial notice that United States currency has value.¹³

Judicial notice will be taken of the fact that copper, when exposed to the air, will corrode¹⁴ and that brick is a proper material with which to construct a stairway and that such a stairway is

Cir. 2017) (“in addressing a motion to dismiss, the court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record”).

³Lodge v. Kondaur Capital Corp., 750 F.3d 1263, 94 Fed. R. Evid. Serv. 603 (11th Cir. 2014).

⁴Williamson-Inman & Co. v. Thompson, 53 Ga. App. 821, 187 S.E. 194 (1936).

⁵See § 29:7, *infra*.

⁶Fields v. Jackson, 102 Ga. App. 117, 115 S.E.2d 877 (1960).

⁷Ocilla Southern R. Co. v. McInvale, 26 Ga. App. 106, 105 S.E. 451 (1920).

⁸Seaboard Air Line Ry. v. Peeples, 12 Ga. App. 206, 77 S.E. 12 (1913).

⁹Thompson v. Brown, 288 Ga. 855, 708 S.E.2d 270 (2011) (holding the court would not take judicial notice of Toombs County being venue of the City of Vidalia since the city falls in both Toombs County and Montgomery County).

¹⁰Bennett v. Rewis, 212 Ga. 800, 96 S.E.2d 257 (1957).

¹¹Buice v. Satellite Sec. Corp., 156 Ga. App. 348, 274 S.E.2d 608 (1980); Johnson v. City of Atlanta, 70 Ga. App. 473, 28 S.E.2d 580 (1944).

¹²Collins v. State, 172 Ga. App. 100, 321 S.E.2d 823 (1984).

¹³Stephens v. State, 239 Ga. 446, 238 S.E.2d 29 (1977).

¹⁴Midland Properties Co. v. Farmer, 100 Ga. App. 8, 110 S.E.2d 100 (1959).

not naturally slick and dangerous.¹⁵

Judicial notice may be had for facts of which the general public has common knowledge, which are readily ascertainable by reference to a reliable source.¹⁶

Superior Court could take judicial notice of decennial census figures when determining that county population was below 625,000 people, so that county did not have to comply with statute that required planning departments to make written record of their investigations and findings.¹⁷

In a narcotics prosecution, the court took judicial notice of the weight of a gram of amphetamines.¹⁸ Judicial notice was refused in *Baca v. Baca*.¹⁹

§ 19:7 Facts not judicially noticed

Examples of facts which will not be judicially noticed include the conditions and practices of hotels as to fire hazards,¹ the nature and construction of a hot air furnace,² or that a yellow curb in and of itself meant illegal, and therefore negligent, parking.³

It is not proper for a trial court to judicially notice the pleadings and orders of other courts since those issues are matters which must be proven.⁴

In action alleging a violation of the Fair Debt Collection Practices Act, the 11th Circuit in *Lodge v. Kondaur Capital Corp.*⁵ found that the district court did not abuse its discretion in refusing to take judicial notice of information purportedly from two Web sites. The first web site pertained to information purportedly located on a defendant law firm's web page. In reaching its decision, the 11th Circuit stated that:

Under Rule 201 of the Federal Rules of Evidence, a court “may take

¹⁵*Maloof v. Blackmon*, 105 Ga. App. 207, 124 S.E.2d 441 (1962).

¹⁶*Graves v. State*, 269 Ga. 772, 504 S.E.2d 679 (1998); O.C.G.A. § 24-2-201.

¹⁷West's Ga. Code Ann. § 36-67-3. *Schmitt v. Jackson County*, 267 Ga. App. 764, 601 S.E.2d 169 (2004).

¹⁸*Emilio v. State*, 257 Ga. App. 49, 51, 570 S.E.2d 372, 374 (2002).

¹⁹*Baca v. Baca*, 256 Ga. App. 514, 520, 568 S.E.2d 746, 751 (2002) (notice sought of profit margin of check-cashing companies).

[Section 19:7]

¹*Irwin v. Torbert*, 204 Ga. 111, 49 S.E.2d 70 (1948).

²*Kuhr v. Frizzelle*, 74 Ga. App. 524, 40 S.E.2d 405 (1946).

³*Shirley v. Woods*, 98 Ga. App. 111, 105 S.E.2d 399 (1958).

⁴*Progressive Elec. Services, Inc. v. Task Force Const., Inc.*, 327 Ga. App. 608, 760 S.E.2d 621 (2014) (quoting *NationsBank, N.A. (South) v. Tucker*, 231 Ga. App. 622, 500 S.E.2d 378 (1998)).

⁵*Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 94 Fed. R. Evid. Serv. 603 (11th Cir. 2014).

judicial notice on its own” or “*must* take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed.R.Evid. 201(c) [emphasis added]. Further, Rule 201 states that a court “*may* take judicial notice at any stage of the proceeding.” Fed.R.Evid. 201(d) [emphases added]. [WH2]

The 11th Circuit noted that the claimant failed to provide the information necessary in order for judicial notice to be taken. Specifically, it stated that the claimant “did not provide the district court with screenshots of the websites or the websites’ addresses. Without the necessary information concerning the websites, and in light of the timing of the request, the district court was not required to take judicial notice under Rule 201.”

The 11th Circuit also concluded that the district court did not abuse its discretion in refusing to take judicial notice of a document allegedly found on the “Georgia Press Association Public Notice Website.” It reasoned, in part, that:

The document could not be judicially noticed by the district court because the facts within it were not “generally known within the trial court’s territorial jurisdiction” and could not be “accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” See Fed.R.Evid. 201(b).

In *Childers v. Richmond County*,⁶ superior courts were held to be without authority to judicially notice county ordinances. The Georgia Supreme Court stated:

Upon our review of the record in this case, it is apparent that the Richmond County comprehensive zoning ordinance which the county sought to enforce and which the trial court purported to apply, was not introduced into evidence. “[I]t is well established by numerous decisions of this court that judicial notice cannot be taken by the superior court or this court of city or county ordinances, but they must be alleged and proved.” *Leger v. Ken Edwards Enterprises, Inc.*, 223 Ga. 536, 539, 156 S.E.2d 651 (1967); see [former] O.C.G.A. § 24-1-4; see also *Mayor and Aldermen of City of Savannah v. TWA, Inc.*, 233 Ga. 885, 214 S.E.2d 370 (1975). Accordingly, we hold that the trial court erred in ordering appellants to comply with the terms of an ordinance not properly before the court. Judgment reversed.

The matter of city and county ordinances was later addressed by the legislature. A 2001 enactment related to judicial notice of certain specified ordinances. Certified copies of ordinances or resolutions may be judicially noticed, and any such copies “shall be self-authenticating and shall be admissible as prima-facie proof of any such ordinance or resolution before any court or

⁶*Childers v. Richmond County*, 266 Ga. 276, 467 S.E.2d 176 (1996).

administrative body.”⁷ Certification could come from the “public officer, clerk or keeper of the county or municipal records.”

Although “[a] trial court may take judicial notice of its own records[,]” a trial court cannot take judicial notice of matters that are the subject of proof in the case.⁸

Judicial notice may not be taken of the essential elements of a criminal charge.⁹ In reaching its decision that “there is no basis in the precedent for the taking of judicial notice in this matter,” the court laid down the ground rules for a trial court to take judicial notice of any fact. Essentials included notification of the parties as well as affording the parties an opportunity to be heard.

Venue in criminal cases in Georgia is a matter of constitutional law, and is an essential element of a criminal offense which must be proved beyond a reasonable doubt.¹⁰

Neither an appellate court nor a trial court may take judicial notice of municipal ordinances without production of the original or of a properly certified copy.¹¹

Trial courts should not judicially notice foreign jurisdiction opinions which are unpublished.¹²

Trial court should not have taken judicial notice of a scientific drug testing method, where the test had been given had not been specifically established at trial.¹³

Where the record contained only an uncertified copy of one section of the ordinance containing handwritten deletions and additions, the court could not take judicial notice of the ordinance and consider its language in its decision.¹⁴

⁷O.C.G.A. § 24-2-221.

⁸*Emory Healthcare, Inc. v. Pardue*, 328 Ga. App. 664, 760 S.E.2d 674 (2014) (citations omitted).

⁹*Graves v. State*, 269 Ga. 772, 504 S.E.2d 679 (1998) (judicial notice of venue could not be taken).

¹⁰*In re A.C.*, 263 Ga. App. 44, 587 S.E.2d 210 (2003).

¹¹*Latimore v. City of Atlanta*, 289

Ga. App. 85, 656 S.E.2d 222 (2008). *Accord*, *Bailey v. City of Atlanta*, 296 Ga. App. 679, 675, 675 S.E.2d 564 (2009).

¹²O.C.G.A. § 24-2-220; *Garner v. U.S. Bank Nat. Ass’n*, 329 Ga. App. 86, 763 S.E.2d 748 (2014).

¹³*Grinstead v. State*, 269 Ga. App. 820, 605 S.E.2d 417 (2004).

¹⁴*Fulton Greens Ltd. Partnership v. City of Alpharetta*, 272 Ga. App. 459, 612 S.E.2d 491 (2005).

Chapter 20

Presumptions

- § 20:1 Nature of presumptions
- § 20:2 Irrebuttable presumptions
- § 20:3 Rebuttable presumptions
- § 20:4 Inferences
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- § 20:15 Presumptions of continuance of a condition
- § 20:16 Presumptions about gifts and services
- § 20:17 Presumptions in tort cases
- § 20:18 Other presumptions created by law

§ 20:1 Nature of presumptions

Presumption law in the 2013 Georgia Code of Evidence is contained in O.C.G.A. §§ 24-14-20 through 24-14-29.

A presumption is a rule of law that attaches definite probative value to specific facts or draws a particular inference as to the existence of one fact not actually known arising from its connection with other particular facts which are known or proven.¹ A rebuttable presumption, once established, does not vanish in the face of evidence contrary to the presumed fact; regardless of how much counter evidence the opponent has presented to rebut the presumed fact, the presumption remains alive through jury instructions and can only disappear if the jury decides to discount it.²

[Section 20:1]

¹Am. Jur. 2d, Evidence § 160.

²*Baker v. Baker*, 280 Ga. 299, 627 S.E.2d 26 (2006) (presumption of

An important case in this regard is *Beach v. Lipham*.³ Regardless of how much counter evidence the opponent has presented to rebut a presumption of law, the presumption remains alive through jury instructions and only disappears if the jury decides to discount it. The presumption of due care on the part of physicians, nurses and other medical professionals was at issue in the case.

Subject to constitutional restrictions, the legislature may, without infringing on the judiciary, provide by statute that a certain fact may be prima facie or presumptive evidence of another fact, provided reason and human experience so connect the ultimate fact with the fact proved that the existence of one may be fairly inferred from the other. To have force and validity, the inference of the existence of the ultimate fact from the fact proven must not be purely arbitrary, unreasonable or unnatural, and the evidentiary fact must have some fair relation or natural connection with the fact to be proved and some tendency to prove it.⁴

Permissive presumption, which allows, but does not require, trier of fact to infer elemental fact from proof by prosecutor of basic fact and which places no burden of any kind on defendant, is not inherently unconstitutional, but is to be tested by “rational connection” test under which trier of fact is asked if ultimate fact to be presumed is more likely than not to flow from proven fact.⁵

For the right to an instruction relating to presumptions, see § 35:14, *infra*.

§ 20:2 Irrebuttable presumptions

The law recognizes certain presumptions which, on grounds of public policy, may not be rebutted. They are sometimes known as presumptions of law or conclusive presumptions of law or conclusive presumptions. These are not true presumptions, properly speaking, but are rules of substantive law. In Georgia, they are termed “estoppels.”¹ There is an irrebuttable presumption that only death terminates the ability of a woman to bear children.²

A person is conclusively presumed incapable of committing a crime if he has not attained his 13th birthday when the offense

gift).

³*Beach v. Lipham*, 276 Ga. 302, 578 S.E.2d 402 (2003).

⁴*Tot v. U.S.*, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943).

⁵*Skrine v. State*, 244 Ga. 520, 260 S.E.2d 900 (1979); *Hall v. State*,

244 Ga. 86, 259 S.E.2d 41 (1979).

[Section 20:2]

¹O.C.G.A. § 24-14-26.

²*Williams v. Frierson*, 150 Ga. 797, 105 S.E. 475 (1920); *Haley v. Regions Bank*, 277 Ga. 85, 586 S.E.2d 633 (2003).

was committed.³ A child under seven is conclusively presumed to be incapable of contributory negligence.⁴ There is no presumption in Georgia regarding the inability of a child between the ages of seven and 14 to be guilty of contributory negligence.⁵

A female under the age of consent is conclusively presumed to be unable to give her consent to sexual intercourse.⁶

Lack of consent of the victim is not required to be shown in a statutory rape prosecution.⁷

§ 20:3 Rebuttable presumptions

A second class of presumptions includes those that are rebuttable. They are sometimes known as presumptions of fact. A rebuttable presumption is a substitute for testimony or evidence; it has the force of proof until it is overcome by contradictory evidence. Such presumptions may be rebutted either by evidence which tends to disprove the facts upon which the presumption has been based or by evidence that tends to disprove the presumed fact itself.

The degree of proof required to rebut a presumption varies from a mere preponderance¹ to clear, distinct, positive, and satisfactory evidence.² It is probably safe to say that the degree of proof required depends largely on the nature of the presumption sought to be rebutted. It is for the jury to determine whether a presumption has been rebutted.³

In the case of a will, a rebuttable presumption of undue influence arises when a beneficiary under a will occupies a confidential relationship with the testator, is not the natural object of his bounty, and takes an active part in the planning, preparation, or execution of the will.⁴

The United States Supreme Court has closely scrutinized criminal case presumptions. In *Sandstrom v. Montana*,⁵ the Court

³O.C.G.A. § 16-3-1.

⁴*Harris v. Combs*, 96 Ga. App. 638, 101 S.E.2d 144 (1957).

⁵*Central R. & Banking Co. of Georgia v. Golden*, 93 Ga. 510, 21 S.E. 68 (1894).

⁶*Paige v. State*, 219 Ga. 569, 134 S.E.2d 793 (1964).

⁷*Henry v. State*, 295 Ga. App. 758, 673 S.E.2d 120 (2009); O.C.G.A. § 16-6-3(a).

[Section 20:3]

¹*Overstreet v. Nickelsen*, 170 Ga.

App. 539, 317 S.E.2d 583 (1984); *Strickland v. Strickland*, 201 Ga. 293, 39 S.E.2d 483 (1946).

²*Carter v. Graves*, 206 Ga. 234, 56 S.E.2d 917 (1949).

³*Gibson v. Gibson*, 54 Ga. App. 187, 187 S.E. 155 (1936).

⁴*Davison v. Hines*, 291 Ga. 434, 729 S.E.2d 330 (2012).

⁵*Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

struck down a jury charge that the law presumes that a person intends the ordinary consequences of his voluntary acts. In *Mullaney v. Wilbur*,⁶ the Court overturned an instruction that if the prosecution established intentional homicide, malice was to be implied. In *Francis v. Franklin*,⁷ the Court confirmed the Sandstrom rule and applied it to an instruction that a person is presumed to intend the natural and probable consequences of his acts.

The sort of scrutiny which the United States Supreme Court has accorded presumptions has also been evident in Georgia jurisprudence. In Georgia, an instruction allowing the jury to infer that a person intends the consequences of his acts did not shift the burden on the element of intent. The charge was not worded as a presumption but as a permissive inference.⁸

In the context of ineffective assistance of counsel claims, there is a rebuttable presumption that the judgment rendered by counsel was reasonable.⁹ For more on ineffective assistance of counsel claims, see § 1:4, *supra*.

§ 20:4 Inferences

A third class of presumptions is the weakest of all three forms. They permit the jury to draw an inference of a fact in evidence, they are not a substitute for testimony or evidence. Such inferences include admissions by flight¹ and silence,² spoliation of evidence,³ subornation of perjury,⁴ and failure to produce testimony or witnesses.⁵ When a party is relying on inferences to prove a point, not only must those inferences tend in some proximate degree to establish the conclusion sought, but they must also render less probable all inconsistent conclusions.⁶

Inferences may arise on behalf of a party if there has been a failure of an opponent to preserve evidence. What if the government in a criminal case cannot produce an object and allow the defendant to make pretrial inspection of it because, while it was once in the hands of the police, the evidence has been lost, stolen, discarded or destroyed? Precedent exists, in such situations, for the giving of a jury instruction, permitting the jury to infer from

⁶*Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

⁷*Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

⁸*Alexis v. State*, 273 Ga. 423, 541 S.E.2d 636 (2001).

⁹*Deleon-Alvarez v. State*, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

[Section 20:4]

¹See § 26:11, *infra*.

²See §§ 26:8, 26:9, *infra*.

³See § 26:12, *infra*.

⁴See § 26:12, *infra*.

⁵See § 20:10, *infra*.

⁶*Cowart v. Widener*, 296 Ga. App. 712, 675 S.E.2d 591 (2009).

the party's failure to preserve evidence that the evidence would have been adverse to the nonpreserving party. For example, if fingerprints found at a murder scene are later smudged or discarded by police and rendered useless or unavailable for examination by the defense, the jury charge might tell the jury that a print was found at the crime scene and the jurors can infer it was not the print of the defendant. This is a "spoliation" instruction; since a party in possession of evidence spoiled it, adverse inferences may be drawn against that party. The good faith of the party, as well as the expected admissibility of the evidence at trial, are factors which will play roles in whether a spoliation instruction is appropriate.⁷

In *Daniels v. State*,⁸ the Court of Appeals stated that "[a]ll circumstances [connected] with an accused's arrest are admissible if they are shown to be relevant." Further, the facts established that the defendant was arrested after he fled from police in the victim's car. In this regard, the Court of Appeals held that his possession of the car and his subsequent flight were circumstances from which the jury could infer his guilty of the charged crimes and were thus relevant and admissible.

A person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.⁹ Mere presence at the scene is not sufficient to convict one of being a party to a crime, but criminal intent may be inferred from conduct before, during, and after the commission of a crime.¹⁰

One element that plaintiff must show in a premises liability claim is that the landowner had active or constructive knowledge of the defect which caused injury. Inference of constructive knowledge on part of landowner did not arise when no evidence was shown that water on mall floor could have been discovered by reasonable inspection.¹¹

An inference assisted in convicting the accused in *Johnson v. State*,¹² where the court observed:

The trial court instructed the jury as to the law on "party to a

⁷R. Carlson, 3 Criminal Law Advocacy: Trial Proof 10-4.

⁸*Daniels v. State*, 296 Ga. App. 795, 676 S.E.2d 13 (2009).

⁹*Martinez v. State*, 303 Ga. App. 71, 692 S.E.2d 737 (2010); *Hamilton v. State*, 297 Ga. App. 47, 676 S.E.2d 773 (2009).

¹⁰*Ham v. State*, 303 Ga. App. 232, 692 S.E.2d 828 (2010); *Johnson v. State*, 299 Ga. App. 706, 683 S.E.2d 659 (2009).

¹¹*Chastain v. CF Georgia North Dekalb L.P.*, 256 Ga. App. 802, 569 S.E.2d 914 (2002).

¹²*Johnson v. State*, 276 Ga. 368, 578 S.E.2d 885 (2003).

crime.” Under O.C.G.A. § 16-2-20, one is a party to a crime if he intentionally aids or abets the commission of the crime, or advises, encourages, hires, counsels, or procures another to commit it. That a person is a party to a crime may be inferred from that person’s presence, companionship, and conduct, before and after the crime was committed.

Although the evidence of recent, unexplained or unsatisfactorily explained possession of stolen goods may be sufficient to give rise to an inference that the defendant committed theft by taking, the sufficiency of the evidence to support the conviction must still be adjudged by the totality of the evidence under the reasonable doubt standard applied in *Jackson v. Virginia*.¹³ In *Boivin v. State*,¹⁴ the Georgia Court of Appeals held that evidence supported a finding in prosecution for theft by taking of a utility trailer that defendant provided unsatisfactory explanation for his recent possession of stolen trailer, where defendant admitted that he had neither paid for the trailer nor received ownership documents from the third party from whom he claimed to have purchased it.

In *Budeanu v. State*,¹⁵ the court found that the jury properly inferred from the evidence presented that the defendant attempted to lure underage girls for sex, thus satisfying the asportation requirement for the crime of attempted enticing of a child for indecent purposes.

§ 20:5 Presumptions of innocence

The accused in a criminal case is presumed to be innocent until proven guilty beyond a reasonable doubt.¹ This presumption attends him throughout the trial until overcome by evidence establishing guilt beyond a reasonable doubt.² This presumption is so strong that every reasonable doubt must be resolved in favor of the accused if there is any fact or circumstance that is susceptible to two interpretations.³

The accused is presumed innocent unless and until he or she is

¹³*Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). See O.C.G.A. § 16-8-2; *Boivin v. State*, 298 Ga. App. 411, 680 S.E.2d 415 (2009).

¹⁴*Boivin v. State*, 298 Ga. App. 411, 680 S.E.2d 415 (2009).

¹⁵*Budeanu v. State*, 325 Ga. App. 177, 751 S.E.2d 924 (2013).

[Section 20:5]

¹See O.C.G.A. § 24-14-21.

²*Mobley v. State*, 158 Ga. App. 561, 281 S.E.2d 268 (1981); *Brock v. State*, 91 Ga. App. 141, 85 S.E.2d 177 (1954).

³*Johnson v. State*, 13 Ga. App. 586, 79 S.E. 524 (1913).

convicted in a court of law by a jury of his or her peers.⁴ On appeal from a criminal conviction, however, the evidence must be viewed in the light most favorable to the verdict, and the defendant no longer enjoys the presumption of innocence.⁵

§ 20:6 *Res ipsa loquitur*

“*Res ipsa loquitur*” is a rule of circumstantial evidence that allows an inference of negligence to arise from the happening of an event if the following elements are shown: (1) the injury ordinarily would not occur in the absence of negligence; (2) the injury was caused by an agent or instrument within the defendant’s exclusive control; and (3) the injury was not due to any voluntary action or contribution on the plaintiff’s part.¹ Thus, the doctrine authorizes, but does not require, a jury to infer facts from the circumstances in which the injury occurred, thereby filling the evidentiary gap.² The doctrine does not apply, however, if the cause of the accident is fully explained.

It has been held that the application of the doctrine does not raise a presumption of negligence, but simply authorizes the jury in its discretion to infer negligence.³ It is not a rule of law, but is an inference of fact which is permitted, but not required, to be made by the jury.⁴

The doctrine is applied as a matter of necessity and is based partly on the theory that defendant has, within his knowledge and control, evidence that the plaintiff does not possess and cannot conveniently obtain.⁵ The jury is permitted, under the *res ipsa loquitur* doctrine, to infer that defendant was negligent if it finds that:

- (1) the damage or injury was caused by an agency or instrument which is, or has been, within the control or management of defendant;
- (2) such result was not due to any action of the plaintiff; and
- (3) such result is one that does not normally occur without negligence in the control or management of the agency or

⁴*Ruffin v. State*, 284 Ga. 52, 663 S.E.2d 189 (2008).

⁵*United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016); *Dixon v. State*, 303 Ga. App. 517, 693 S.E.2d 900 (2010). See also *Freeman v. State*, 297 Ga. App. 496, 678 S.E.2d 97 (2009).

[Section 20:6]

¹*Harper v. Barge Air Conditioning, Inc.*, 300 Ga. App. 901, 686 S.E.2d

668 (2009).

²*Giannotti v. Beleza Hair Salon, Inc.*, 296 Ga. App. 636, 675 S.E.2d 544 (2009).

³*Wimpy v. Rogers*, 58 Ga. App. 67, 197 S.E. 656 (1938).

⁴*Bowers v. Fred W. Amend Co.*, 72 Ga. App. 714, 35 S.E.2d 15 (1945).

⁵*Sinkovitz v. Peters Land Co.*, 5 Ga. App. 788, 64 S.E. 93 (1909).

instrument.⁶

The doctrine of *res ipsa loquitur* is applicable where a defendant admits in his answer that he lost control of his car and caused property damage by driving into plaintiff's wall; the doctrine also allows an inference of negligence to arise from the happening of an event, causing injury to another, where it is shown that the defendant was in control of the thing doing the damage and the accident was of a kind which, in the absence of proof of any external cause, does not ordinarily happen without negligence.⁷

For the doctrine of *res ipsa loquitur* to apply, the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it. This does not mean that the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door.⁸

The doctrine of *res ipsa loquitur* is not applicable in medical malpractice cases.⁹

§ 20:7 Presumptions of death after seven years absence

A person may be presumed dead if he has been absent from home and has not been heard from for seven years by those who would naturally hear from him if he were alive.¹ The death is presumed to have occurred at the end of the seven years.²

Inquiry must be made at the last known domicile of the missing person and of the persons most likely to have heard from him.³ The party upon whom devolves the duty of making an inquiry concerning a missing person need exercise only such care as would be exercised by a reasonably prudent person under the same circumstances. The sufficiency of the inquiry is a jury question.⁴

There are actually two presumptions or inferences involved. The first is that when a person is shown to be in life at a given

⁶*Hotel Dempsey Co. v. Teel*, 128 F.2d 673 (C.C.A. 5th Cir. 1942), discussing the Georgia rule. See also *Floyd v. Swift & Co.*, 59 Ga. App. 154, 200 S.E. 531 (1938).

⁷*Hall v. Chastain*, 246 Ga. 782, 273 S.E.2d 12 (1980).

⁸*Sams v. Gay*, 161 Ga. App. 31, 288 S.E.2d 822 (1982).

⁹*Critser v. McFadden*, 277 Ga. 653, 593 S.E.2d 330 (2004). See

O.C.G.A. § 51-1-27.

[Section 20:7]

¹See O.C.G.A. § 24-14-21.

²*Payne v. Home Sav. Bank*, 193 Ga. 406, 18 S.E.2d 770, 140 A.L.R. 1397 (1942).

³*American Nat. Ins. Co. v. Parker*, 55 Ga. App. 346, 190 S.E. 427 (1937).

⁴*American Nat. Ins. Co. v. Parker*, 55 Ga. App. 346, 190 S.E. 427 (1937).

time, an inference arises that he is alive at a subsequent time.⁵ The second is the presumption of death after a seven year absence. Both are questions of fact and are rebuttable.⁶

§ 20:8 Presumptions of validity of marriage

Where a marriage is shown, the law raises a presumption of its validity and the burden is upon the objecting party to prove its invalidity.¹

When the celebration of a marriage is shown, everything necessary to the validity of the marriage, including the contract and the capacity of the parties, is presumed, in the absence of proof to the contrary.²

In conflicting marriages, there is a presumption of validity in favor of the last marriage.³ Where the celebration of a marriage is shown and also a prior marriage, there is no presumption that the prior marriage had been dissolved by divorce.⁴

Where a party to a ceremonial marriage has been previously married and the validity of second marriage is challenged, presumption arises that second marriage is valid until evidence is adduced that spouse of first marriage is living, and only then does O.C.G.A. § 19-3-2 place burden on party contending that second marriage is valid to go forward with evidence and show that first marriage was dissolved by divorce.⁵

A 1996 enactment provides that “no common law marriage shall be entered into in this state on or after January 1, 1997.” Such marriages prior to that date are unaffected by the law.

§ 20:9 Presumptions arising from possession of stolen goods or contraband

Evidence of recent, unexplained, exclusive possession of stolen property by the accused may, of itself, raise an inference of guilt sufficient to warrant a conviction of burglary, provided there are no other facts and circumstances which raise a reasonable doubt of guilt.¹ It is within the province of the trier to disbelieve the

⁵Chapman v. Chapman, 59 Ga. App. 602, 1 S.E.2d 697 (1939).

³Longstreet v. Longstreet, 205 Ga. 255, 53 S.E.2d 480 (1949).

⁶Metropolitan Life Ins. Co. v. Polk, 56 Ga. App. 310, 192 S.E. 472 (1937).

⁴O.C.G.A. § 19-3-2.

[Section 20:8]

⁵Patrick v. Simon, 237 Ga. 742, 229 S.E.2d 746 (1976).

¹Hardeman v. Hardeman, 179 Ga. 34, 175 S.E. 9 (1934).

[Section 20:9]

¹Mathews v. State, 103 Ga. App. 743, 120 S.E.2d 359 (1961).

²Azar v. Thomas, 206 Ga. 588, 57

defendant's explanation of his possession.²

The inference of theft by taking was applied in *Boivin v. State*.³

In determining the conclusiveness of this inference, consideration should be given to the time elapsed since the larceny, as well as to the character of the property stolen and the ease with which it may be sold and transported.⁴

If the state presents evidence that a defendant owned or controlled premises where contraband was found, it gives rise to a rebuttable presumption that the defendant possessed the contraband; although this presumption may be rebutted by showing that others had access to the premises. The "equal access doctrine" applies to rebut the presumption only where the sole evidence of possession of contraband found on the premises is the defendant's ownership or possession of the premises.⁵

A related presumption was explored in *Dilley v. State*.⁶ There is a presumption that contraband found within a vehicle belongs to the driver, particularly when the driver owns, and is in control of, the vehicle. Although this presumption can be overcome by evidence that someone other than the defendant had the opportunity to commit the crime, the issue is one for the jury to decide.

The equal access rule does not apply to eliminate the presumption of possession where all persons allegedly having equal access to the contraband are alleged to have been in joint constructive possession of the contraband. Thus, for example, in cases where the driver and passengers are charged with joint constructive possession of contraband found in the vehicle, the state may rely on the presumption of possession to show that the driver exercised possession and control over the contraband, but the driver is not entitled to rely on the equal access rule to rebut the presumption.⁷

§ 20:10 Presumptions arising from conduct of party

If, at the time of a collision, an employee is operating a vehicle owned by his or her employer, there is a presumption that the

²*Dalton v. State*, 42 Ga. App. 470, 156 S.E. 648 (1931). Jury instructions, see *Byrd v. Hopper*, 234 Ga. 248, 215 S.E.2d 251 (1975).

³*Boivin v. State*, 298 Ga. App. 411, 680 S.E.2d 415 (2009).

⁴*Mathis v. State*, 104 Ga. App. 190, 121 S.E.2d 267 (1961).

⁵*Robinson v. State*, 331 Ga. App. 872, 772 S.E.2d 223 (2015); *Bailey v. State*, 294 Ga. App. 437, 669 S.E.2d 453 (2008); *Taylor v. State*, 303 Ga. App. 88, 693 S.E.2d 118 (2010).

⁶*Dilley v. State*, 265 Ga. App. 170, 593 S.E.2d 356 (2004).

⁷*Ramirez v. State*, 290 Ga. App. 3, 658 S.E.2d 790 (2008).

employee was acting within the scope of his or her employment.¹

Where a party intentionally destroys evidence which is relevant to his case or which he has a duty to preserve, the jury may draw an inference that such evidence would be unfavorable to him, *Bennett v. Associated Food Stores, Inc.*,² but such destruction or spoliation does not relieve the other party of any duty to present evidence to establish any fact which he has the burden of proving.³ Sanction for spoliation, see § 20:4, *supra*.

If a party attempts to corrupt witnesses or jurors, such an attempt is admissible to raise a presumption against that party.⁴

In Georgia, an instruction allowing the jury to infer that a person intends the consequences of his acts did not shift the burden on the element of intent. The charge was not worded as a presumption but as a permissive inference.⁵

When improper juror communication occurs, there is a presumption of harm, and the burden is on the State to show a lack thereof, except that when the substance of the communication is established without contradiction, the facts themselves may establish a lack of prejudice or harm to the defendant.⁶

Despite a division of authority in other jurisdictions, in Georgia the rule is that where irregularity in conduct of juror has been shown presumption is that defendant has been prejudiced and burden is on state to rebut that presumption.⁷

Discovery of a harmful communication with a juror may, but not always, support a finding that there was manifest necessity to grant a mistrial.⁸ Thus, the Court of Appeals has held that defendant was not prejudiced by juror talking with State's witness where statements did not involve deliberation or discussion on merits of the case, but rather, what time jury was supposed to return, and juror indicated that he had formed no opinion about defendant's guilt or innocence.⁹

Where a party in a civil case has been denied right to examina-

[Section 20:10]

¹CGL Facility Management, LLC v. Wiley, 328 Ga. App. 727, 760 S.E.2d 251 (2014).

²*Bennett v. Associated Food Stores, Inc.*, 118 Ga. App. 711, 165 S.E.2d 581 (1968).

³Am. Jur. 2d, Evidence § 177; *Thomas v. Metropolitan Atlanta Rapid Transit Authority*, 300 Ga. App. 98, 684 S.E.2d 83 (2009); *Kitchens v. Brusman*, 303 Ga. App. 703, 694 S.E.2d 667 (2010) (summary judgment inap-

propriate).

⁴Am. Jur. 2d, Evidence § 293.

⁵*Alexis v. State*, 273 Ga. 423, 541 S.E.2d 636 (2001).

⁶*Jones v. State*, 258 Ga. 96, 366 S.E.2d 144 (1988).

⁷*Martin v. State*, 242 Ga. 699, 251 S.E.2d 240 (1978).

⁸*Brown v. State*, 285 Ga. 324, 676 S.E.2d 221 (2009).

⁹*Terrell v. State*, 268 Ga. App. 173, 601 S.E.2d 500 (2004).

tion of jurors individually, error is presumed to be harmful.¹⁰

It is presumed that the appearance entered in a case by a regular practicing attorney is regular and with the authority from the client, unless the proof is to the contrary.¹¹

When attorneys appear in court claiming right to represent person named as party to cause, there is strong presumption that they have authority to do so; when person of full age and laboring under no disability is named as plaintiff in suit filed by duly licensed attorney at law, presumption is that attorney had authority to file suit on behalf of such person.¹² The strong presumption arises from an attorney's appearance in court on behalf of a litigant that he is authorized to appear and to act for that party.¹³

If a party fails to call a witness on a material issue, the jury may draw the inference that the testimony would be adverse to such party.¹⁴ But if one party is as likely to produce the witness as the other party, no presumption will arise against either.¹⁵ Further, an explanation of the reason for not producing a witness may avoid the inference.¹⁶

Where party fails to produce evidence in a civil case which is under his control and reasonably available to him and is not reasonably available to adverse party, an inference may be made that evidence is unfavorable to party which could have produced it but did not.

In *Dingler v. State*,¹⁷ the Court of Appeals held that it is permissible for the state to comment on the general failure of the defense to produce any evidence, since counsel for the state may argue that evidence showing guilt has not been rebutted or contradicted. Further, in *Latty v. State*,¹⁸ the Court of Appeals stated that “[w]hile no legal presumption may arise from a criminal defendant’s failure to introduce certain witnesses, it is proper for the prosecutor to draw an inference of fact from such failure and comment on the failure to the jury when there is competent evidence before the jury that the missing witness has knowledge of material and relevant facts.” In this case for possession of methamphetamine, the State, during cross-examination of the

¹⁰Hill v. Crowell, 244 Ga. 294, 260 S.E.2d 18 (1979).

¹¹Cannon v. Whiddon, 194 Ga. 417, 21 S.E.2d 850 (1942).

¹²Shepherd v. Shepherd, 239 Ga. 22, 235 S.E.2d 538 (1977).

¹³In Interest of M.O., 233 Ga. App. 125, 503 S.E.2d 362 (1998).

¹⁴Oliver v. Fair Jewelers, Inc., of Atlanta, 104 Ga. App. 392, 121 S.E.2d

787 (1961).

¹⁵Bank of Emanuel v. Smith, 32 Ga. App. 606, 124 S.E. 114 (1924).

¹⁶Morgan County v. Glass, 139 Ga. 415, 77 S.E. 583 (1913).

¹⁷Dingler v. State, 293 Ga. App. 27, 666 S.E.2d 441 (2008).

¹⁸Latty v. State, 297 Ga. App. 233, 676 S.E.2d 882 (2009).

defendant, could ask the defendant whether he intended to call a witness, a friend to whom the defendant had allegedly given a ride along with the co-defendant's girlfriend, to corroborate the defendant's defense that he thought that a bag later found to contain methamphetamine belonged to the girlfriend. Even though the defendant claimed on cross-examination that he did not know how to locate the witness, the State was entitled to cast doubt on his story by questioning him about why he had not produced the witness to support his defense.

The same presumption applies to a party who testifies but refuses to answer questions, provided no self-incrimination or privileged communication is involved.¹⁹

§ 20:11 Presumptions of delivery of letter

Where proof of proper mailing is produced, it will be presumed that the letter or communication was received in the ordinary course of the public mails.¹ This is sometimes called the mailbox rule. The "mailbox rule" presumes that a mailed letter was received.²

Georgia law provides that, upon proof that a letter or communication was deposited in the post office or some subdivision of the postal department, properly stamped with sufficient postage, and properly addressed to the addressee, there is a presumption of due receipt thereof.³ Under those circumstances, it is presumed that the letter was received by the addressee in due course of the mail.⁴

When a letter is received in response to an inquiry it is presumed, in the absence of any showing to the contrary, to be the letter of the person whose name is signed to it.⁵

The presumption of delivery may be rebutted by evidence that the letter or communication was not in fact received.⁶ No presumption arises that a letter has been received in the mail unless it is shown the letter (1) was written, (2) was properly addressed to the party, (3) contained correct postage, and (4) was duly mailed in a United States post office.⁷

¹⁹Am. Jur. 2d, Evidence § 188.
[Section 20:11]

¹Am. Jur. 2d, Evidence § 197.

²Schikore v. BankAmerica Supplemental Retirement Plan, 269 F.3d 956 (9th Cir. 2001).

³Carmichael Tile Co. v. McClelland, 213 Ga. 656, 100 S.E.2d 902 (1957).

⁴Womack v. U.S. Fidelity & Guaranty Co., 85 Ga. App. 564, 69 S.E.2d 812 (1952).

⁵Employers Commercial Union Ins. Co. v. Wrenn, 132 Ga. App. 287, 208 S.E.2d 124 (1974).

⁶Tyler v. Jones County Bank, 78 Ga. App. 741, 52 S.E.2d 547 (1949).

⁷Jones v. City of Willacoochee, 299 Ga. App. 741, 683 S.E.2d 683

§ 20:12 Presumptions of delivery of telegram

Upon proof that a properly addressed telegram with the necessary fee therefore was delivered to the telegraph office, there is a presumption that it was delivered to the addressee, Am. Jur. 2d, Evidence § 199, but the presumption does not apply if the telegraph company is a party.¹

The presumption may be rebutted, and the receipt of the telegram may be disproved.²

§ 20:13 Presumptions about individuals

There are a number of presumptions about people. They cover all kinds of human conduct.

There is a presumption that everyone knows the law, and ignorance of the law is not an excuse when the law is violated.¹

Each person is presumed to be sane² and to intend the natural and probable consequences of his voluntary acts.³ Every person is presumed to be of sound mind and discretion, but this presumption may be rebutted.⁴

In *Brannan v. State*,⁵ the trial court instructed the jury, “Every person is presumed to be of sound mind and discretion, but this presumption may be rebutted.”⁶ The Georgia Supreme Court held this presumption of sanity is not unconstitutionally burden-shifting.⁷

In Georgia, an instruction allowing the jury to infer that a person intends the consequences of his acts did not shift the burden on the element of intent. The charge was not worded as a presumption but as a permissive inference.⁸

Everyone is presumed competent to testify, and even where person is shown to have been insane or to have been adjudged insane previously and is presently in state mental hospital, this

(2009).

[Section 20:12]

¹Am. Jur. 2d, Evidence § 199.

²Am. Jur. 2d, Evidence § 199.

[Section 20:13]

¹Taylor v. State, 233 Ga. App. 221, 504 S.E.2d 57 (1998).

²Jones v. Smith, 206 Ga. 162, 56 S.E.2d 462 (1949).

³Gaynor v. Travelers’ Ins. Co., 12 Ga. App. 601, 77 S.E. 1072 (1913).

⁴Butler v. State, 252 Ga. 135, 311 S.E.2d 473 (1984) (overruled on other grounds by, Durrence v. State, 287 Ga. 213, 695 S.E.2d 227 (2010)); O.C.G.A. § 16-2-3.

⁵Brannan v. State, 275 Ga. 70, 561 S.E.2d 414 (2002).

⁶See O.C.G.A. § 16-2-3.

⁷See Parker v. State, 256 Ga. 363, 349 S.E.2d 379 (1986).

⁸Alexis v. State, 273 Ga. 423, 541 S.E.2d 636 (2001).

does not necessarily render such person incompetent to testify.⁹

Rebuttable presumption that defendant was sane, but when certified copy of insanity order was introduced into evidence, counter-presumption was raised.¹⁰ A defendant's sanity is presumed; a defendant has the burden of proving insanity by a preponderance of the evidence; the presentation by a defendant of evidence contrary to the presumption does not, as a matter of law, dissipate it; jurors are permitted to reject the testimony of lay or expert witnesses as to the sanity of the accused and to rely upon the presumption of sanity.¹¹

Every person is presumed to be sober, until the contrary is shown.¹²

In action against railway for death of plaintiff's husband caused when he was struck by a train when he, because of alleged illness, was forced to sit down on tracks; in absence of evidence that he was intoxicated, such condition would not be presumed.¹³

A child under seven years of age is conclusively presumed to be incapable of negligence.¹⁴ A child of tender years is required to exercise only that due care which their capacity, mental and physical, fits them for exercising in the actual circumstances of the occasion and situation under investigation.¹⁵

For presumptions about the capability of a child to commit a crime, see §§ 4:4, 20:2, *supra*.

The presumption is that the grantor in a deed was of sound mind, and the burden of showing that he was mentally incapable is on the complaining party.¹⁶

A proper attestation clause to a duly signed and attested will raises a presumption that the will was properly executed, but the presumption is rebuttable by clear proof to the contrary.¹⁷

In *Wheless v. Gelzer*,¹⁸ it was held that "Georgia law presumes every man to be sane and competent, and as regards either the making of a contract or the giving of a gift, the burden is on the party attacking competency to prove the incompetency asserted. Moreover, proof of a temporary loss of competency creates no presumption that it continued up to the time of execution of the

⁹*Redfield v. State*, 240 Ga. 460, 241 S.E.2d 217 (1978).

¹⁰*Gilbert v. State*, 235 Ga. 501, 220 S.E.2d 262 (1975).

¹¹*Kirk v. State*, 252 Ga. 133, 311 S.E.2d 821 (1984).

¹²Am. Jur. 2d, Evidence § 206.

¹³*Ellis v. Southern Ry. Co.*, 89 Ga. App. 407, 79 S.E.2d 541 (1953).

¹⁴*Harris v. Combs*, 96 Ga. App. 638, 101 S.E.2d 144 (1957).

¹⁵O.C.G.A. § 51-1-5.

¹⁶*Thomas v. Lockwood*, 198 Ga. 437, 31 S.E.2d 791 (1944).

¹⁷*Newton v. Palmour*, 245 Ga. 603, 266 S.E.2d 208 (1980).

¹⁸*Wheless v. Gelzer*, 780 F. Supp. 1373, 1382, 17 U.C.C. Rep. Serv. 2d 592 (N.D. Ga. 1991).

transaction being challenged, and the burden remains on the party alleging incapacity to show such incapacity at the particular time of the transactions being challenged.” Every person is presumed to have normal functions of his body and organs until the contrary is shown¹⁹ so that a mature man is presumed to be virile.²⁰ Mental or physical impairment is never presumed.²¹ Instead, every adult is presumed to be endowed with normal faculties, both mental and physical.²²

There is a strong presumption that a child born in wedlock is legitimate.²³ This presumption can be rebutted only by “clear and convincing proof.”²⁴ The presumption of legitimacy arising from the fact that a child was born during wedlock and within a normal gestation period after separation makes out a prima facie case and places on defendant the burden of going forward to establish a prima facie case in rebuttal.²⁵

The presumption of legitimacy arising from the birth of a child during marriage does not shift the ultimate burden of proof of legitimacy to the husband, who denied paternity.²⁶

What about children born out of wedlock? Do any presumptions arise? A 1993 act amending O.C.G.A. §§ 19-7-45 and 19-7-46 provides that there shall exist a rebuttable presumption of paternity of a child born out of wedlock if there has been performed a scientifically credible parentage-determination genetic test. To raise the presumption, the test must establish at least a 97% probability of paternity. The presumption can be rebutted by competent evidence. Among other tests, testing by DNA probes is recognized. A statute provides that parentage-determination genetic testing shall include, but not be limited to, red cell antigen, human leucocyte antigen (HLA), red cell enzyme, and serum protein electrophoresis tests or testing by deoxyribonucleic acid (DNA) probes.²⁷

There is a presumption that the surviving parent is entitled to custody of the children of the marriage. This presumption can be overcome through the presentation of clear and convincing evidence that the parent is unfit.²⁸

There is a presumption against suicide. In any case where

¹⁹Am. Jur. 2d, Evidence § 205.

²⁰Am. Jur. 2d, Evidence § 205.

²¹Langston v. Allen, 268 Ga. 733, 493 S.E.2d 401 (1997).

²²Murphy v. D’Youville Condominium Ass’n, Inc., 175 Ga. App. 156, 333 S.E.2d 1 (1985).

²³Mims v. State, 43 Ga. App. 100, 157 S.E. 901 (1931).

²⁴Harris v. Shelton, 151 Ga. 615, 107 S.E. 842 (1921).

²⁵O.C.G.A. § 19-7-20.

²⁶Miller v. Miller, 258 Ga. 168, 366 S.E.2d 682 (1988).

²⁷O.C.G.A. § 53-2-3(2)(B)(ii).

²⁸Entrekin v. Friedman, 294 Ga. 429, 754 S.E.2d 14 (2014).

death is an issue and there is nothing to show that it was caused by suicide, there is a presumption that it was caused by an accident.²⁹ This presumption has probative force and is to be weighed by the jury as evidence in cases where the circumstances are consistent with either suicide, accident, or negligent death; the presumption vanishes when contradictory evidence is produced.³⁰

One is presumed to know the truth in regard to facts within his own special means of knowledge, such as his own signature, the business conducted on his own property, and the contents of contracts to which he becomes a party, in the absence of fraud or misrepresentation.³¹

§ 20:14 Presumptions of intoxication from alcoholic content of blood

Revisions of O.C.G.A. §§ 40-6-391 and 40-6-392 in 2001 resulted in attention to the subject of inferences derived from chemical testing for alcohol or drugs. If there was an alcohol concentration in the driver of 0.05 grams or less, the trier of fact may infer there from that the person was not under the influence of alcohol. If there was a concentration of 0.05 but less than 0.08, such fact will not give rise to any inference but may be considered by the trier of fact along with other competent evidence. If at the time of arrest or within three hours after driving the person tested at 0.08, the person is in violation. The statute contains methods for establishing evidence that the person who drew the motorist's blood was qualified to do so.

O.C.G.A. § 40-6-392 addresses the use of chemical tests for alcohol or drugs. It outlines the procedures to be used, specifies who may perform such tests, and provides that a person's refusal to submit to such a test shall be admissible against him in a criminal trial.

A statute which prohibited driving with a blood alcohol level above .12% did not contain any presumptions and, thus, did not create a mandatory presumption in violation of constitutional rights.¹

There is a presumption that a breath test machine is periodically tested for calibration and operation.²

In a prosecution for four counts of vehicular homicide through

²⁹New York Life Ins. Co. v. Jennings, 61 Ga. App. 557, 6 S.E.2d 431 (1939).

³⁰Hamilton v. Metropolitan Life Ins. Co., 71 Ga. App. 784, 32 S.E.2d 540 (1944).

³¹Am. Jur. 2d, Evidence § 221.
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¹Cunningham v. State, 255 Ga. 35, 334 S.E.2d 656 (1985).

²Sapp v. State, 184 Ga. App. 527,

reckless driving, the trial court did not err in refusing to instruct the jury that it was not authorized to find that the defendant was operating a motor vehicle under the influence of intoxicants because the blood test showed 0.04% alcohol, since O.C.G.A. § 40-6-392 was inapplicable because driving under the influence was not an element of the crimes charged, but the blood test was admitted to show the circumstance of defendant's arrest, and in any event the statute does not create an irrebuttable presumption.³

O.C.G.A. § 40-6-392, which defines the level of blood alcohol sufficient to permit an inference that the driver is "under the influence," does not create a burden-shifting presumption of guilt; the statute does not relieve the State of its burden of proving that the accused was "under the influence" and was driving.⁴ In another case, the trial court's decision to give the jury an instruction stating that refusal to submit to breath test could be considered a positive evidence, creating an inference that the test would show presence of alcohol which impaired defendant's driving was improper. It constituted plain error in a prosecution for driving under the influence of alcohol to the extent it was less safe for him to drive (DUI-Less Safe) and child endangerment by driving under the influence of alcohol (DUI-Child Endangerment). This jury instruction substantially affected the state's burden of proof by shifting it to the defendant, requiring defendant to rebut an inference that he was an impaired driver because he refused to submit to a breath test.⁵

Breath alcohol measuring equipment approved by the State Crime Lab is considered accurate if properly operated.⁶

Because individual responses to alcohol vary, the presence of alcohol in a defendant's body, by itself, does not support an inference that the defendant was an impaired driver.⁷

A defendant's refusal to submit to field sobriety tests is admissible as circumstantial evidence of intoxication in prosecution for driving under the influence (DUI), and together with other evidence will support an inference that he was an impaired driver.⁸

For questions relating to expert testimony on blood tests for intoxication, see § 24:33, *infra*. For nonexpert testimony on intoxication, see § 24:9, *infra*. Additional authorities on proof of

362 S.E.2d 406 (1987).

³Collum v. State, 195 Ga. App. 42, 392 S.E.2d 301 (1990).

⁴Lattarulo v. State, 261 Ga. 124, 401 S.E.2d 516 (1991).

⁵Wagner v. State, 311 Ga. App. 589, 716 S.E.2d 633 (2011).

⁶Thrasher v. State, 292 Ga. App. 566, 666 S.E.2d 28 (2008).

⁷State v. Ellison, 271 Ga. App. 898, 611 S.E.2d 129 (2005); O.C.G.A. § 40-6-391(a)(1).

⁸Hazley v. State, 289 Ga. App. 558, 657 S.E.2d 628 (2008).

intoxication, see § 29:9, *infra*.

§ 20:15 Presumptions of continuance of a condition

There are a number of separate presumptions based upon the general rule that a condition once proved to exist will be presumed to continue until the contrary is shown. Such presumptions operate prospectively rather than retrospectively, so that proof of a condition as of a certain date does not create any presumption that the same condition existed earlier.¹

Once the existence of a person, a personal relation or state of things is established by proof, the law presumes that it continues to exist as before until the contrary is shown.² There is a presumption that title or ownership continues.³

A person shown to be alive at a given time is presumed to remain alive until the contrary is shown by some sufficient proof, or in the absence of proof, until a different presumption arises.

Once established, the following facts are also presumed to continue: corporate existence,⁴ a municipal ordinance,⁵ and possession.⁶

This is sometimes referred to as the doctrine of continuity. Under the doctrine or presumption of continuity, once it is unequivocally established that a state of things or a particular status exists, it is presumed that this status or state of things will continue to exist, until the contrary is shown.⁷ Legal status, such as ownership, when proved to exist will be presumed to have continued to exist, until contrary evidence is introduced.⁸ In *Singuefield v. General Oglethorpe Hotel Co.*,⁹ the Court of Appeals held that in view of admission that its principal place of business was in forum at one time and that, while corporation had ceased doing business, it had not been legally dissolved and in absence of production of evidence to contrary, principal place of business, as fixed by charter, had to be presumed to still be in forum for purpose of determining venue.

There are occasional breaks from the foregoing analysis. In

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¹Glenn v. Tankersley, 187 Ga. 129, 200 S.E. 709 (1938).

²Roberts v. Hill, 81 Ga. App. 185, 58 S.E.2d 465 (1950).

³Colonial Finance Co. v. Anthony, 79 Ga. App. 763, 54 S.E.2d 326 (1949).

⁴Humphrey v. Powell, 145 Ga. 458, 89 S.E. 427 (1916).

⁵Brooks v. Carver, 55 Ga. App. 362, 190 S.E. 389 (1937).

⁶American Ry. Express Co. v. Archer, 25 Ga. App. 647, 104 S.E. 92 (1920).

⁷In re Estate of Dunn, 236 Ga. App. 211, 511 S.E.2d 575 (1999).

⁸MALAGA Management Co. v. John Deere Co., 208 Ga. App. 764, 431 S.E.2d 746 (1993).

⁹Singuefield v. General Oglethorpe Hotel Co., 113 Ga. App. 326, 148 S.E.2d 92 (1966).

*Wheless v. Gelzer*¹⁰ it was held that “Georgia law presumes every man to be sane and competent, and as regards either the making of a contract or the giving of a gift, the burden is on the party attacking competency to prove the incompetency asserted. Moreover, proof of a temporary loss of competency creates no presumption that it continued up to the time of execution of the transaction being challenged, and the burden remains on the party alleging incapacity to show such incapacity at the particular time of the transactions being challenged.”

§ 20:16 Presumptions about gifts and services

As between husband and wife, parent and child and brothers and sisters, payment of purchase money by one, and causing the conveyance to be made to the other, shall be presumed to be a gift; but a resulting trust in favor of the one paying the money may be shown and the presumption rebutted.¹ Presumption of a gift between husband and wife could only be overcome by clear, convincing and decisive evidence to a reasonable certainty.² Further, a presumption of a gift arises when a parent delivers personal property into the exclusive possession of a child living separate from the parent. This is a rebuttable presumption.³ Gift of lands by parent to child, presumption, see O.C.G.A. § 44-5-85.

Subsection (c) of O.C.G.A. § 53-12-92 provides that: “If the payor of consideration and transferee of the property are husband and wife, parent and child, or siblings, a gift shall be presumed, but this presumption is rebuttable by clear and convincing evidence.” In *Coe v. Coe*,⁴ the Georgia Supreme Court held that any gift that husband made of personal injury settlement proceeds to the marital unit to purchase home was gift of non-marital property which transformed any separate property into marital property subject to equitable division.

To rebut presumption of gift, it must be shown that resulting trust was contemplated by both parties by way of understanding or agreement.⁵

Where a gift is a substantial benefit to the donee, acceptance is presumed.⁶

Where a child has had exclusive possession of lands which

¹⁰*Wheless v. Gelzer*, 780 F. Supp. 1373, 1382, 17 U.C.C. Rep. Serv. 2d 592 (N.D. Ga. 1991).

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¹See O.C.G.A. § 53-12-28, with different language enacted by Ga. L. 1991, current O.C.G.A. § 53-12-91.

²*Freeman v. Saxton*, 243 Ga. 571,

255 S.E.2d 28 (1979).

³O.C.G.A. § 44-5-84.

⁴*Coe v. Coe*, 285 Ga. 863, 684 S.E.2d 598 (2009).

⁵*Adderholt v. Adderholt*, 240 Ga. 626, 242 S.E.2d 11 (1978).

⁶O.C.G.A. § 44-5-81.

belonged originally to the father without payment of rent for seven years, a conclusive presumption of a gift arises. The presumption does not arise where there is evidence of a loan, a claim of dominion by the father which is acknowledged by the child or a disclaimer of title by the child.⁷

The legal presumption that the person receiving the benefit of services is bound to pay for them under quantum meruit is subject to rebuttal by proof either: (1) that the services were rendered with gratuitous intent by the provider; or (2) that, in the particular circumstances, the law would raise the counter-presumption that the services were not intended to be a charge against the party benefited.⁸

Ordinarily, when one renders service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof; however, this presumption does not usually arise in cases between very near relatives.⁹ Therefore, in order for a close relative to recover for services rendered to a relative under an implied-contract theory, the surrounding circumstances must plainly indicate that it was the intention of both parties that compensation should be made, and negative the idea that the services were performed merely because of that natural sense of duty, love and affection arising out of the relation.

A presumption of undue influence arises as a matter of law when the grantee of a gift of real property stands in a confidential relationship with the grantor of real property, and the grantor is of a weak mentality. In the case of an elderly grantor, a “weak mentality” that can give rise to a presumption of undue influence includes not only feeble-mindedness, but also the domination of the grantor by the grantee, exemplified by the provision of shelter and care.¹⁰

It is presumed that an inter vivos gift to an attorney from his client is based upon fraud and undue influence on the part of the attorney and is invalid.¹¹ This presumption is sufficient to establish a prima facie case, placing the burden on the attorney to show, by clear and convincing evidence, that the gift was free from fraud or undue influence.¹²

There is a rebuttable presumption of undue influence when an

⁷O.C.G.A. § 44-5-85.

⁸O.C.G.A. § 9-2-7. *Hollifield v. Monte Vista Biblical Gardens, Inc.*, 251 Ga. App. 124, 553 S.E.2d 662 (2001).

⁹*Hobby v. Smith*, 250 Ga. App. 669, 550 S.E.2d 718 (2001).

¹⁰*Long v. Waggoner*, 274 Ga. 682, 558 S.E.2d 380 (2002) (granddaughter did not procure deed by undue influence).

¹¹Am. Jur. 2d, Attorneys at Law §§ 123, 126.

¹²Am. Jur. 2d, Attorneys at Law

attorney is one of the principal beneficiaries under a will he has drafted for a client.¹³ This presumption can be rebutted only by evidence that the confidence which the client placed in the attorney was not abused and that the client acted freely and voluntarily.¹⁴

Where persons obtaining substantial benefit under will occupy confidential relationship toward maker and are not natural objects of maker's bounty, a presumption of undue influence arises if will is drawn at request of such persons, the presumption being rebuttable by showing testator acted freely and voluntarily.¹⁵

See § 9:4, *supra*, for special rules relating to the burden of proof in claims against a decedent's estate. Revision of trust provisions in the Code are referenced in § 9:6, *supra*.

§ 20:17 Presumptions in tort cases

Where a vehicle owned by a person and driven by his employee is involved in a collision, a presumption arises that the employee was in the scope of his employment at the time and the employer has the burden to show otherwise; this presumption may be overcome by uncontradicted evidence.¹

In cases where a claimant alleges that a static condition caused the claimant to fall, there is a presumption that the owner of the premises had notice of the hazard.²

The mere happening of an accident does not of itself raise any presumption of defendant's negligence.³ Nor is there any presumption of the absence of proper skill and attention on the part of a physician or surgeon which arises from the mere fact that the patient does not recover or that a cure was not effected.⁴ A rebuttable presumption exists "that medical or surgical services were performed in an ordinary and skillful manner." In a typical case, this presumption can be overcome when "the injured patient . . . presents evidence from expert medical witnesses that the defendants did not exercise due care and skill in perform-

§§ 123, 126.

¹³Am. Jur. 2d, Attorneys at Law

§§ 123, 126.

¹⁴Am. Jur. 2d, Attorneys at Law

§§ 123, 126.

¹⁵Bryan v. Norton, 245 Ga. 347, 265 S.E.2d 282 (1980).

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¹Hicks v. Heard, 297 Ga. App.

689, 678 S.E.2d 145 (2009); O.C.G.A. § 51-2-2.

²Strauss v. City of Lilburn, 329 Ga. App. 361, 765 S.E.2d 49 (2014).

³Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443 (1903).

⁴Hayes v. Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963).

ing their services.”⁵

There is a presumption of negligence where damages are caused by livestock whose owner is required by statute, O.C.G.A. § 4-3-3, to keep them from running at large, and the presumption is normally enough to take the case to the jury; it is for the jury to determine whether defendant’s evidence is sufficient to overcome the prima facie case.⁶

Even where a latent or obscured defect exists on a premises, and the premises owner has no actual knowledge of the defect, it will be inferred that the owner has constructive knowledge of the defect if a reasonable inspection of the premises, that is, one required in the exercise of ordinary care, would have revealed the defect.⁷ However, constructive knowledge of an unknown defect on the part of the premises owner will not be inferred if the defect could only have been discovered by an inspection requiring the exercise of extraordinary care.

§ 20:18 Other presumptions created by law

Presumption arising from failure to produce evidence, see O.C.G.A. § 24-14-22. Presumption from failure to answer a letter when good faith requires an answer, presumption that recipient who does not reply in such situations is presumed to admit and adopt the propriety of acts mentioned in letter, see O.C.G.A. § 24-14-23.

A federal district court did not abuse its discretion in declining a request for an evidentiary hearing pursuant to 28 U.S.C.A. § 2255. In *Winthrop-Redin v. United States*,¹ the defendant claimed that his guilty plea was neither knowingly nor voluntarily entered. In affirming the district court, the 11th Circuit noted, among other things, that the defendant “testified under oath and in detail that his plea had not been induced by threats or force leveled against him or his family.” The court added that “[s]olemn declarations in open court carry a strong presumption of verity.”

Absent proper introduction and proof of the law of a sister state, it is presumed that such foreign law is the same as that of Georgia.²

Constitutionality of a statute is presumed until it is validly

⁵Cope v. Evans, 329 Ga. App. 354, 765 S.E.2d 40 (2014).

⁶Law v. Hulsey, 109 Ga. App. 379, 136 S.E.2d 161 (1964).

⁷Ferguson v. Premier Homes, Inc., 303 Ga. App. 614, 695 S.E.2d 56 (2010); O.C.G.A. § 51-3-1.

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¹Winthrop-Redin v. U.S., 767 F.3d 1210, 1217 (11th Cir. 2014) (quoting Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977)).

²Abruzzino v. Farmers’ &

attacked.³

When construing a statute, there is a presumption that “the General Assembly meant what it said and said what it meant.”⁴ In a bankruptcy case, the 11th Circuit added that “[t]he presumption of consistent usage instructs that ‘[a] word or phrase is presumed to bear the same meaning throughout a text’ and that ‘a material variation in terms suggests a variation in meaning.’”⁵ And in a tax case, the 11th Circuit noted that the Supreme Court has held “where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”⁶

In *Union County v. CGP, Inc.*,⁷ the Supreme Court held that all reasonable presumptions favor the constitutionality of a legislative act, and the burden of showing to the contrary is on the attacking party.

Zoning ordinance is presumed to be valid, and burden is on property owner attacking zoning classification to overcome this presumption by clear and convincing evidence.⁸ Zoning by county’s Board of Commissioners enjoys initial presumption of validity, which property owner must overcome by showing that zoning is significantly detrimental to him and insubstantially related to governing public interests.⁹

In *Jenkins v. Garrison*,¹⁰ the presumption of the regularity of official acts was referenced: “The presumption that a public officer acted properly in the performance of his duty is rebutted when the contrary appears.”¹¹ There is a presumption in favor of regularity and legality of all proceedings in superior court.¹² In addition to a presumption in favor of the regularity and legality of all proceedings in superior court, there is also a presumption

Merchants’ Bank, 168 Ga. App. 639, 309 S.E.2d 911 (1983).

³*County v. Massey*, 299 Ga. 595, 791 S.E.2d 85 (2016); *Georgia Dept. of Community Health v. Northside Hosp., Inc.*, 324 Ga. App. 326, 750 S.E.2d 401 (2013), judgment rev’d on other grounds, 295 Ga. 446, 761 S.E.2d 74 (2014); *Dupre v. Scappaticcio*, 244 Ga. 179, 259 S.E.2d 440 (1979).

⁴*Williams v. State*, 299 Ga. 632, 791 S.E.2d 55 (2016); *Martinez v. State*, 325 Ga. App. 267, 750 S.E.2d 504 (2013).

⁵*In re Failla*, 838 F.3d 1170 (11th Cir. 2016).

⁶*United States v. Spoor Trustee of Louise Paxton Gallagher Revocable Trust*, 838 F.3d 1197 (11th Cir. 2016).

⁷*Union County v. CGP, Inc.*, 277 Ga. 349, 589 S.E.2d 240 (2003).

⁸*Pennington v. Rockdale County*, 244 Ga. 743, 262 S.E.2d 59 (1979); *Smisson Gardens, Inc. v. Doles*, 244 Ga. 468, 260 S.E.2d 865 (1979).

⁹*DeKalb County v. Flynn*, 243 Ga. 679, 256 S.E.2d 362 (1979).

¹⁰*Jenkins v. Garrison*, 265 Ga. 42, 453 S.E.2d 698 (1995).

¹¹*Brantley v. Thompson*, 216 Ga. 164, 115 S.E.2d 533 (1960).

¹²*Hancock v. Oates*, 244 Ga. 175, 259 S.E.2d 437 (1979).

that the clerk gave notice as required.¹³

A trial court's approval of a jury verdict as to damages creates a presumption of correctness that cannot be disturbed on appeal absent compelling evidence, and a reviewing court is powerless to interfere unless it is clear from the record that the verdict of the jury was prejudiced or biased or was procured by corrupt means.¹⁴

Where land is purchased with the money of one person and title is taken in the name of another, and the acts of the parties establish an actual or presumed intention to create a trust, the law raises a resulting trust in favor of the person whose money was used.¹⁵ For the burden of proof in a resulting trust case, see § 9:6, *supra*.

In the absence of evidence to the contrary and where there is no fiduciary relationship, the law will not presume that one has exercised duress or undue influence over another.¹⁶

Intentional child molestation carries with it a presumption of an intent to inflict injury, which presumption is not rebutted by the presentation of the insured molester's own self-serving testimony.¹⁷

The law presumes that possession of property peacefully acquired is lawful in the absence of proof to the contrary.¹⁸ And the person in possession of property is assumed to be the owner in the absence of anything to the contrary.¹⁹

Persons of the same name are presumed to be the same person.²⁰

The 11th Circuit has held that the presumption that forum selection clauses are enforceable can be overcome when "the plaintiff makes a 'strong showing' that enforcement would be unfair or unreasonable under the circumstances."²¹

Where a paper found among the decedent's papers is offered for probate as a will and it appears to have been cancelled or obliterated in material part, a presumption arises that the decedent made the cancellations or obliterations and that he

¹³*Bridgestone/Firestone North American Tire, LLC v. Jenkins*, 261 Ga. App. 20, 582 S.E.2d 9 (2003).

¹⁴*First Southern Bank v. C & F Services, Inc.*, 290 Ga. App. 305, 659 S.E.2d 707 (2008).

¹⁵*McDonald v. Dabney*, 161 Ga. 711, 132 S.E. 547 (1926).

¹⁶*Am. Jur. 2d, Duress and Undue Influence* § 43.

¹⁷*Roe v. State Farm Fire & Cas. Co.*, 259 Ga. 42, 376 S.E.2d 876 (1989).

¹⁸*Am. Jur. 2d, Evidence* § 234.

¹⁹*Hicks v. Hicks*, 193 Ga. 382, 18 S.E.2d 763 (1942).

²⁰*Williams v. State*, 62 Ga. App. 679, 9 S.E.2d 697 (1940).

²¹*Feggestad v. Kerzner International Bahamas Limited*, 843 F.3d 915 (11th Cir. 2016).

intended them to operate as a revocation.²²

The presumption of revocation arises when it is established that a will has been cancelled or obliterated in material part and the burden of proof shifts to the propounder to show that no revocation was intended.²³

The presumption of revocation of a will by obliteration was construed in *Lovell v. Anderson*.²⁴ After the will was offered for probate by the executor of the will, a relative moved to contest the will by filing a caveat contending the testator had revoked his will by material obliterations. Presiding Justice Fletcher held that the obliteration of the names of two of four beneficiaries was material. The statutory presumption of O.C.G.A. § 53-4-44 provides that the intent to revoke a will shall be presumed from the obliteration of a material portion.

The presumption of revocation of a will may be rebutted by circumstantial as well as direct evidence, including declarations of the testator.²⁵

In *Smith v. Srinivasa*,²⁶ the Georgia Supreme Court construed the law relating to situations wherein a will was executed during the lifetime of the testatrix but after her death the original was not found, and a conformed copy was offered for probate. The attorney who prepared the original will testified that the copy was the same as the executed original, and the conformed copy was properly admitted into evidence. The statutory presumption that an executed original is revoked when it cannot be found may be rebutted by circumstantial as well as direct evidence, including declarations of the testatrix. O.C.G.A. § 53-4-46 provides that a presumption of intent to revoke a will arises if a testator's will cannot be found to probate, but that the presumption may be overcome by evidence which shows that there was no intent to revoke. A copy of the will may be probated in these circumstances.

In *Tudor v. Bradford*,²⁷ the Supreme Court, Carley, P.J., held that proponent of a will was required to rebut presumption that original will had been revoked, even though objector had failed to file a caveat objecting to probate of the will on grounds that it was a copy, not an original.

²²*Peterson v. Harrell*, 286 Ga. 546, 690 S.E.2d 151 (2010); *Morris v. Bullock*, 185 Ga. 12, 194 S.E. 201, 115 A.L.R. 700 (1937).

²³O.C.G.A. § 53-4-44. *Wells v. Jackson*, 265 Ga. 181, 453 S.E.2d 690 (1995).

²⁴*Lovell v. Anderson*, 272 Ga. 675,

533 S.E.2d 64 (2000).

²⁵*Thomas v. Sands*, 284 Ga. 529, 668 S.E.2d 731 (2008); O.C.G.A. § 53-4-46(b).

²⁶*Smith v. Srinivasa*, 269 Ga. 736, 506 S.E.2d 111 (1998).

²⁷*Tudor v. Bradford*, 289 Ga. 28, 709 S.E.2d 235 (2011).

In *Strong v. Holden*,²⁸ evidence showing only that the deceased placed a general trust and confidence in the primary beneficiary is not sufficient to trigger the rebuttable presumption that undue influence was exercised in the execution of a will. The evidence must show a confidential relationship wherein the primary beneficiary was capable of exerting the power of leadership over the submissive testator.

In *White v. Regions Bank*,²⁹ a defective jury instruction led to a reversal in a will case. The appellant complained about a fatal flaw in the trial court's jury instruction on the presumption of undue influence when a person who is a primary beneficiary is in a confidential relationship with the benefactor. Georgia courts have recognized that a presumption of undue influence arises where a confidential relationship existed between testator and beneficiary, with the testator being of weak mentality and the beneficiary occupying a dominant position.³⁰ When the presumption arises, the burden is on the beneficiary to show there was no undue influence. In the White case, the trial court informed the jury:

If you find a confidential relationship existed and you further find that there was a gift of realty and that the grantor was in a weakened mentality and feeble minded, you may infer that there was undue influence, but you are not required to do so if the gift is satisfactorily explained.

The Supreme Court agreed with appellant's contention that instructing the jury that it might infer undue influence rather than presume undue influence was erroneous.

In connection with the rule of *White v. Regions Bank*, see *Holland v. Holland*.³¹ "Undue influence" sufficient to invalidate a will amounts to deception or force and coercion operating on the testator at the time of execution such that the testator is deprived of free agency, and the will of another is substituted for his. Evidence showing only an opportunity to influence and a substantial benefit under the will does not show the exercise of "undue influence." A rebuttable presumption of undue influence arises when it is shown that the will was made at the request of a person who receives a substantial benefit, who is not a natural object of the testator's estate and who held a confidential relationship with the testator. However, a person standing in a confidential relation to another is not prohibited from exercising any influence whatever to obtain a benefit to himself. Improper influence

²⁸*Strong v. Holden*, 287 Ga. 482, 697 S.E.2d 189 (2010).

²⁹*White v. Regions Bank*, 275 Ga. 38, 561 S.E.2d 806 (2002).

³⁰*Crumbley v. McCart*, 271 Ga. 274, 275, 517 S.E.2d 786 (1999).

³¹*Holland v. Holland*, 277 Ga. 792, 596 S.E.2d 123 (2004).

must be what the law regards as undue influence, which gives dominion over the will to such an extent as to destroy free agency or constrains one to do against his will what he is unable to refuse. A “confidential relationship” between the person requesting the will and the testator, as an element for a presumption of undue influence, is one where the requester is so situated as to exercise a controlling influence over the will, conduct, and interest of the testator. Evidence showing only that the testator placed a general trust and confidence in the primary beneficiary of the will is not sufficient to trigger the rebuttable presumption that undue influence was exercised. To set aside a will and thus deprive a person of the valuable right to make a will, a stringent standard must be met.

A self-proved will creates a presumption that the requirements of execution and attestation were met and may be admitted to probate without the testimony of any subscribing witness.³² A self-proving affidavit is part of the will and a testator’s signature solely on the affidavit constitutes a signature on the will. Evidence supported a finding that a missing will was not revoked; evidence showed that the beneficiary under will had close relationship with testator and had already received property from testator, that the missing will reflected the testator’s wishes, that testator never mentioned changing or revoking the will to her attorney, and that testator confirmed her intentions in making the will to her guardian. Whether the presumption that a missing will has been revoked is overcome is determined by the trier of fact, and in reviewing the verdict, the evidence must be accepted which is most favorable to the party in whose favor the verdict was rendered.³³ The presumption that a missing will has been revoked may be rebutted by circumstantial as well as direct evidence, including declarations of the testator.³⁴

Until 1966, there was no presumption in Georgia regarding the order of death when two or more persons died simultaneously. Nor was there a presumption that they did die simultaneously.³⁵ In 1966, the General Assembly adopted the Uniform Simultaneous Death Act.³⁶

Where a party offers in evidence an instrument that bears evidence of erasures or interlineations, there is no presumption that they were made either before or after its execution. If such apparent alterations create any suspicion of irregularity, the burden

³²O.C.G.A. § 53-2-40.1(c); *Martina v. Elrod*, 293 Ga. 538, 748 S.E.2d 412 (2013).

³³O.C.G.A. § 53-3-6(a).

³⁴*Westmoreland v. Tallent*, 274

Ga. 172, 549 S.E.2d 113 (2001).

³⁵*Roberts v. Hardin*, 179 Ga. 114, 175 S.E. 362 (1934).

³⁶O.C.G.A. §§ 53-11-1 et seq.

is on the party offering the instrument to show that they were lawful and do not bar recovery.³⁷

For a discussion of the burden of proof and presumptions in a fraud case, see § 9:7, *supra*; for a discussion of burden of proof and presumptions in a constructive trust case, see § 9:6, *supra*.

The law presumes that potential jurors are impartial, and the burden of proving partiality lies with the party seeking to have a juror disqualified.³⁸ The law also presumes that jurors under oath follow the instructions provided by the court.³⁹

Moreover, “[w]hen irregular juror conduct is shown, there is a presumption of prejudice to the defendant, and the prosecution carries the burden of establishing beyond a reasonable doubt that no harm occurred. However, in order for juror misconduct to upset a jury verdict, it must have been so prejudicial that the verdict is deemed inherently lacking in due process.”⁴⁰

In regard to speedy trial claims, a court is required to undertake a two-tiered analysis. First, it must determine whether the trial delay was sufficiently long to be “presumptively prejudicial”; and second, if this prong is satisfied, it must then consider four factors, enunciated by the Supreme Court in *Barker v. Wingo*,⁴¹ to determine whether a defendant’s speedy trial rights were violated. These four factors are the length of the delay, the reasons cited for the delay, whether the defendant was prejudiced by the delay, and whether the defendant asserted his speedy trial rights.⁴²

“In a speedy trial claim, as a delay approaches one year, it generally is presumptively prejudicial.”⁴³

In attacks on competency of trial counsel, a presumption operates to support the conduct of a criminal defendant’s lawyer. The Georgia Supreme Court explains in *Jackson v. State*:⁴⁴

Jackson contends that trial counsel was ineffective in that he failed to investigate and take photographs of the crime scene, failed to consult with Jackson regarding trial strategy, and failed to impeach the State’s witnesses. In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show that counsel’s

³⁷Am. Jur. 2d, Alteration of Instruments § 82.

³⁸Chatman v. State, 283 Ga. App. 673, 642 S.E.2d 361 (2007).

³⁹Trammell v. State, 328 Ga. App. 45, 761 S.E.2d 470 (2014).

⁴⁰Woodruff v. State, 339 Ga. App. 707, 792 S.E.2d 471 (2016); Sallee v. State, 329 Ga. App. 612, 765 S.E.2d 758 (2014).

⁴¹Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

⁴²State v. Bonawitz, 339 Ga. App. 299, 793 S.E.2d 191 (2016); Cawley v. State, 324 Ga. App. 358, 750 S.E.2d 428 (2013).

⁴³West v. State, 339 Ga. App. 279, 793 S.E.2d 180 (2016).

⁴⁴Jackson v. State, 277 Ga. 592, 592 S.E.2d 834 (2004).

performance was deficient and that the deficient performance so prejudiced the defendant that there is a reasonable probability, i.e., a probability sufficient to undermine confidence in the outcome, that but for counsel's unprofessional errors the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Smith v. Francis*, 253 Ga. 782, 783, 325 S.E.2d 362 (1985). "The criminal defendant must overcome the strong presumption that trial counsel's conduct falls within the broad range of reasonable professional conduct. [Cit.]" *Chapman v. State*, 273 Ga. 348, 350 n. 2, 541 S.E.2d 634 (2001).

After reviewing the evidence, the Supreme Court viewed it as sufficient to uphold a verdict of guilty of malice murder. The record of the evidentiary hearing on Jackson's claim of ineffective counsel revealed no merit in those allegations, in the Court's view. "Applying the Strickland standard, we conclude that the trial court's determination that Jackson received effective assistance of counsel was not clearly erroneous."⁴⁵

Under a 2004 enactment, a presumption was created that termination of parental rights is in the best interest of a child when a parent murders the child's other parent.⁴⁶

Spoilation or destruction of evidence creates the presumption that the evidence would have been harmful to the spoliator.⁴⁷ Proof of spoliation raises a rebuttable presumption against the spoliator that the evidence favored the spoliator's opponent, a fact rendering summary judgment inappropriate.⁴⁸

Injury on freight elevator door led to a negligence action.⁴⁹ If proven, a defendant building owner's violation of statute following an elevator accident by repairing, altering, or placing elevator back in service before a state inspection occurred would constitute a form of spoliation of evidence and raise a rebuttable presumption that the evidence garnered from a state inspection would have favored the plaintiff-passenger.⁵⁰

Court found that employer violated National Labor Relations Act when it adopted rule restricting the distribution of certain non-work materials. Regarding the presumptions applicable in this context, the court stated that "[a] rule explicitly restricting protected activity is *per se* unlawful," while "[a]n ambiguous or overbroad rule that employees would reasonably understand to prohibit protected activity . . . is *presumptively* unlawful. "[T]he

⁴⁵See generally *Willingham v. State*, 268 Ga. 64, n. 6, 485 S.E.2d 735 (1997).

⁴⁶O.C.G.A. §§ 15-11-58, 15-11-94.

⁴⁷*American Multi-Cinema, Inc. v. Walker*, 270 Ga. App. 314, 605 S.E.2d 850 (2004).

⁴⁸*Kitchens v. Brusman*, 303 Ga. App. 703, 694 S.E.2d 667 (2010).

⁴⁹*Henson v. Georgia-Pacific Corp.*, 289 Ga. App. 777, 658 S.E.2d 391 (2008).

⁵⁰O.C.G.A. § 8-2-106(c).

employer can rebut [such a] presumption with evidence showing that the rule ‘was *communicated* or *applied* in such a way as to convey an intent clearly to permit’ the protected activity.”⁵¹

To remedy the prejudice resulting from evidence spoliation, a trial court is authorized to charge the jury that spoliation of evidence creates the rebuttable presumption that the evidence would have been harmful to the spoliator. Alternatively, the trial court can dismiss the case, or exclude testimony about the evidence, and this is not an exhaustive list of sanctions a trial court may impose. The trial court has wide latitude to fashion sanctions on a case-by-case basis, considering what is appropriate and fair under the circumstances.⁵²

In a case involving spoliation of evidence, a court may instruct the jury to presume that the missing evidence would have been adverse to the party who failed to produce it, or can remove from the jury’s consideration issues related to the spoliated evidence.⁵³

To similar effect is another 2008 case. Destruction of evidence when that evidence is necessary to pending or contemplated litigation creates the presumption that the evidence would have been harmful to the spoliator.⁵⁴

In *Haley v. Regions Bank*,⁵⁵ the Supreme Court observed that Georgia law conclusively presumes that the possibility of issue is not extinct until death.

In criminal prosecutions, due process of law prohibits jury charges that could be interpreted by reasonable jurors as creating either: (1) a conclusive presumption regarding an essential element or a material allegation of the state’s case, or (2) a presumption that shifts the burden of persuasion on an essential element or material allegation to the defendant.⁵⁶ In *Napier* the judge instructed the jury regarding a presumption to be used to determine venue in a murder case. In the view of the Supreme Court, the jury charge did not shift the burden of proof as to venue. A proper jury instruction in this situation is prescribed by the Court and is contained in this text in § 9:9, *supra*.

A presumption was created by 2008 legislation that presumes that occupancy of a railroad right of way is with the approval of

⁵¹*Mercedes-Benz U.S. International, Inc. v. International Union, UAW*, 838 F.3d 1128 (11th Cir. 2016).

⁵²*Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541, 659 S.E.2d 905 (2008).

⁵³*Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 658 S.E.2d 178

(2008).
⁵⁴*Silman v. Associates Bellemeade*, 294 Ga. App. 764, 669 S.E.2d 663 (2008).

⁵⁵*Haley v. Regions Bank*, 277 Ga. 85, 586 S.E.2d 633 (2003).

⁵⁶*Napier v. State*, 276 Ga. 769, 583 S.E.2d 825 (2003).

the railroad company, but the presumption can be rebutted.⁵⁷

O.C.G.A. 17-10-7(a) requires that in cases involving repeat felonious offenders that a trial court sentence a defendant to “the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense.” It is presumed that a trial judge has exercised this discretion, unless there is affirmative evidence to the contrary.⁵⁸

In the context of easements, a presumption of abandonment from nonuse will not arise “for a time of less than 20 years, as a matter of law.”⁵⁹

Tribal sovereign immunity barred Indian tribe from suit under the Age Discrimination in Employment Act (ADEA). The 11th Circuit stated that though American Indian tribes are not among the list of employers specifically exempted from suit under the statute, common law has extended immunity to Indian tribes. The court also rejected the plaintiff’s argument that the ADEA is a statute of general applicability. To this end, the court noted that the circuit noted the following:

A general statute presumptively governs Indian tribes and will apply to them absent some superseding indication that Congress did not intend tribes to be subject to that legislation. The leading summary of the three circumstances that may defeat the “general statute” presumption is found in a Ninth Circuit case, *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). As the district court recognized, a general statute applies to Indian tribes unless its application would (1) abrogate rights guaranteed under an Indian treaty, (2) interfere with purely intramural matters touching exclusive rights of self-government, or (3) contradict Congress’s intent.⁶⁰

An applicant seeking asylum is not entitled to a rebuttable presumption of well-founded fear of future persecution when the applicant fails to demonstrate that he or she suffered persecution in the past.⁶¹

⁵⁷O.C.G.A. § 24-14-24.

⁵⁸*Cody v. State*, 324 Ga. App. 815, 752 S.E.2d 36 (2013).

⁵⁹*Donald Azar, Inc. v. Mucbe*, 326 Ga. App. 726, 761 S.E.2d 345 (2014).

⁶⁰*Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312 (11th Cir. 2016).

⁶¹*Qinrong Chen v. U.S. Atty. Gen.*, 573 Fed. Appx. 878 (11th Cir. 2014).

Chapter 21

Real and Demonstrative Evidence

- § 21:1 Real and demonstrative evidence distinguished
- § 21:2 Tangible articles having some bearing on transaction in question
- § 21:3 Tangible articles in same condition
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- § 21:11 Admissibility of static models and casts
- § 21:12 Effect of marks or notations on demonstrative evidence
- § 21:13 Displaying personal injuries to jury
- § 21:14 Blood tests in paternity cases
- § 21:15 Exhibiting child in paternity cases
- § 21:16 Authentication of exhibits

§ 21:1 Real and demonstrative evidence distinguished

Real evidence is evidence that is the thing itself, a tangible object having some active role in the transaction in issue, as distinguished from a description of events or documents by a witness. Demonstrative evidence are those items which may or may not be admissible as evidence, but are proper for use in the courtroom to serve as a visual aid to the jury in comprehending the testimony of witnesses, e.g., a plastic model of the human body and a scale model of the scene of the crime. In other words, real evidence has a connection with the case; demonstrative evidence, on the other hand, merely illustrates the testimony, but has little historical connection with the facts of the case.¹

When materials are not introduced but used solely to illustrate testimony, minimum authentication is required.²

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ed.).

¹See Carlson, Successful Techniques for Civil Trials § 3:1 (2d

²Travis v. State, 314 Ga. App. 280, 724 S.E.2d 15 (2012).

This distinction between real evidence and purely demonstrative items plays a role in dictating which items are taken back by the jury during deliberations. Commonly, illustrative aids do not accompany the jury during deliberations, but documents and objects which were part of the facts of the case are taken back. Photographs admitted into evidence as exhibits are regularly taken back and viewed by the jury during deliberations. While courts in other jurisdictions often permit written confessions to go back, Georgia courts do not. Similarly, there is a refusal to allow a party's written statement or deposition to go back. While documents like contracts or office records frequently go out with the jury, "testimonial" items do not. That is, depositions or transcripts of testimony from a prior trial of the same case, embodiments of oral testimony, are barred. Georgia's "continuing witness rule" often plays a role in keeping such items out of the jury deliberation room.³

In Georgia's 2013 Evidence Code, the rules most closely associated with the introduction of real and demonstrative evidence are Georgia Rules of Evidence 401 (relevance), 403 (unfair prejudice), and 901 and 902 (authentication).⁴ O.C.G.A. § 24-6-611(a) also plays a role.⁵ All follow the federal pattern; accordingly, Georgia courts look to federal precedent when applying them.⁶ Notwithstanding these changes, consideration of earlier Georgia authentication law can provide helpful background and context.

§ 21:2 Tangible articles having some bearing on transaction in question

Relevant evidence is that evidence which relates directly or indirectly to the question being tried.¹ Tangible objects (real evidence) which relate directly to the case are admitted into

³It is explained in § 36:6, *infra*.

⁴O.C.G.A. §§ 24-4-401, 24-4-403, 24-9-901, 24-9-902.

⁵*Rickman v. State*, 304 Ga. 61, 816 S.E.2d 4 (2018) ("the mode and order of presenting demonstrative evidence is subject to the reasonable control of the trial court so as to make the presentation effective for the ascertainment of the truth and to avoid needless consumption of time").

⁶*Rickman v. State*, 304 Ga. 61, 816 S.E.2d 4 (2018) (O.C.G.A. §§ 24-4-401, 24-4-403, and 24-6-611(a), mirror Federal Rules of Evidence 401, 403, and 611(a); "Because these provisions

of our new Evidence Code were borrowed from the Federal Rules of Evidence, our interpretation of these provisions is guided by the decisions of the federal appellate courts, especially the United States Supreme Court and the Eleventh Circuit."). See also Carlson & Carlson, *Carlson on Evidence: Comparing Georgia Rules & Federal Rules* §§ 24-4-401 to 24-4-403, 24-6-611, 24-9-901, 24-9-902 (6th Ed. 2017).

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¹See O.C.G.A. § 24-4-401; *Gallant v. Gallant*, 223 Ga. 397, 156 S.E.2d 61 (1967).

evidence.²

For real evidence to be admissible a witness must testify to facts sufficient to establish the connection of the object with the case. Complete chain of custody need not always be shown.³ Cases sometimes distinguish between easily recognized or unique objects versus hard-to-distinguish, fungible items. Chain of custody rules are more rigorously applied in connection with items in the latter category. Where the item is of a fungible nature, such as drugs, the party must establish with reasonable certainty that the substance or object introduced at trial is the same substance or object that came into the custody of the party,⁴ but the party need not negate all possibility of tampering.⁵ For example, the bullets found in a defendant's truck were relevant and admissible in a murder prosecution where the victim was killed by an unspecified handgun; the bullets logically tended to prove that defendant had ammunition for the handgun which he had in his truck the evening before the murder and which he fired in the early morning hours of the day of the murder.⁶

§ 21:3 Tangible articles in same condition

Before a tangible article is admissible, it must usually be shown to be in the same condition as it was at the time in issue;¹ however, an object may be admitted despite a change in condition if the change does not impair its probative value.²

§ 21:4 Connecting tangible articles to accused

Before any article or instrument allegedly used in or affording the means of committing a crime may be admitted, it must be

²Mayor and Aldermen of City of Savannah v. Kicklighter, 55 Ga. App. 169, 189 S.E. 689 (1937); Elder v. Stark, 200 Ga. 452, 37 S.E.2d 598 (1946).

³Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), judgment rev'd on other grounds, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

⁴Mickens v. State, 318 Ga. App. 601, 734 S.E.2d 438 (2012); Palmer v. State, 250 Ga. 219, 297 S.E.2d 22 (1982); Cunningham v. State, 255 Ga. 35, 334 S.E.2d 656 (1985).

⁵Mickens v. State, 318 Ga. App. 601, 734 S.E.2d 438 (2012), quoting Hurst v. State, 285 Ga. 294, 676 S.E.2d

165 (2009) ("When there is only a bare speculation of tampering, it is proper to admit the evidence and let what doubt remains go to the weight."); Kelly v. State, 182 Ga. App. 7, 354 S.E.2d 647 (1987). Also see Houston v. State, 180 Ga. App. 267, 349 S.E.2d 228 (1986).

⁶Hulett v. State, 262 Ga. 194, 415 S.E.2d 642 (1992).

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¹Louisville & N. R. Co. v. Studdard, 34 Ga. App. 570, 130 S.E. 532 (1925).

²Am. Jur. 2d, Evidence § 774.

connected with the accused.¹ The proof connecting the article to the accused may be circumstantial.² Thus, even though articles of clothing were not positively identified as belonging to the accused, they were admissible, as testing indicated they were similar in color and description to the clothing worn by perpetrators of the crimes.³

When the State seeks to introduce into evidence an item that is subject to the chain of custody rule, it must establish with reasonable assurance that the item seized is the same as the item being offered into evidence.⁴

In a murder case, the deceased died from gunshot wound to the head. Nine months after the incident police recovered a pistol from the yard of defendant's girlfriend. Although admission of a gun unconnected to the crime is error, the jury here was correctly authorized to find that the gun was used to shoot the victim.⁵

Law enforcement maintaining records to verify the model, serial number, and location of a recovered and tested firearm can serve as keys to ensuring its admissibility.⁶

Even absent a chain of custody showing, State established authenticity of murder weapon and the single cartridge found at defendant's residence sufficient to render the evidence admissible at trial on charges of murder and aggravated assault; both the gun and the cartridge were distinct and recognizable physical objects which would be identified upon observation, obviating the necessity of a chain of custody showing.⁷

For relaxed proof requirements when evidence is non-fungible physical evidence, letter admitted into evidence, see *Wheeler v. State*.⁸

§ 21:5 Admissibility of photographs

It is well established that photographs of person, things and places, when duly verified and shown by extrinsic evidence to be faithful representations of the subjects as of the time in question,

[Section 21:4]

¹Walker v. State, 173 Ga. App. 473, 326 S.E.2d 833 (1985).

²Grimsley v. State, 225 Ga. 567, 170 S.E.2d 238 (1969); Washington v. State, 243 Ga. 329, 253 S.E.2d 719 (1979).

³Taylor v. State, 243 Ga. 222, 253 S.E.2d 191 (1979). Also see Jung v. State, 237 Ga. 73, 226 S.E.2d 599 (1976).

⁴Walker v. State, 294 Ga. 851,

757 S.E.2d 64 (2014); Armstrong v. State, 274 Ga. 771, 560 S.E.2d 643 (2002).

⁵Hooks v. State, 280 Ga. 164, 626 S.E.2d 114 (2006).

⁶See McDowell v. State, 309 Ga. 504, 847 S.E.2d 309 (2020).

⁷Moore v. State, 285 Ga. 157, 674 S.E.2d 315 (2009).

⁸Wheeler v. State, 290 Ga. 817, 725 S.E.2d 580 (2012).

are admissible in evidence, both in civil and criminal cases, as aids to the jury in arriving at an understanding of the evidence, the situation or condition of objects or premises, the circumstances of an accident, the situation or condition or identity of a person when any such matter is relevant to the issues being litigated. Also, photographs which are relevant to any issue in the case are admissible, even though they may affect the jury.¹

To be admitted, the photographs must be authenticated by a witness who can testify that the photograph is a fair and truthful representation of the thing represented.² It is not necessary to show who took the picture, or where, when or how it was taken.³ However, the liberal nature of this view should not be taken for granted. When the litigated situation and surroundings are subject to change, it must be shown that the photograph is a true representation of the scene at the time of the occurrence in question.⁴

It is not necessary that the photograph be taken immediately after the transaction in question. Even if it were taken two or three years later, it may be admissible provided no substantial change has occurred.⁵ The decision on the admissibility of the photo is within the discretion of the trial court.⁶ The verification of photographs of a railroad crossing taken by daylight six days after the night of the accident was a matter within the discretion of the trial court, and their admission in evidence was not error where the photographer testified that the picture substantially agreed with the local situation as he had seen it on the morning immediately after the accident.⁷

The fact that the photograph offered is an enlargement does not constitute a valid objection, so long as the enlargement would not tend to mislead the jury.⁸ Enlarged photographs have also

[Section 21:5]

¹Goss v. State, 255 Ga. 678, 341 S.E.2d 448 (1986); Ramey v. State, 250 Ga. 455, 298 S.E.2d 503 (1983). Compare Brown v. State, 250 Ga. 862, 302 S.E.2d 347 (1983) (set limits on admissibility of autopsy photographs due to relevancy considerations and prejudicial effect).

²See Henderson v. State, 317 Ga. 66, 891 S.E.2d 884 (2023). See also Cagle Poultry & Egg Co. v. Busick, 110 Ga. App. 551, 139 S.E.2d 461 (1964).

³See Cooper v. State, 317 Ga. 676, 895 S.E.2d 285 (2023). See also Anderson v. State, 206 Ga. 527, 57

S.E.2d 563 (1950).

⁴Brown v. Barnes, 162 Ga. App. 383, 290 S.E.2d 483 (1982); Draffin v. Massey, 93 Ga. App. 329, 92 S.E.2d 38 (1956).

⁵Sylvania Central Ry. Co. v. Gay, 82 Ga. App. 486, 61 S.E.2d 587 (1950).

⁶Williams v. State, 255 Ga. 97, 335 S.E.2d 553 (1985).

⁷Grasham v. Southern Ry. Co., 111 Ga. App. 158, 141 S.E.2d 189 (1965).

⁸Cleveland v. State, 204 Ga. App. 101, 418 S.E.2d 430 (1992); Western & A.R.R. v. Reed, 35 Ga. App. 538, 134 S.E. 134 (1926).

been held admissible in a variety of criminal cases.⁹

Clearly the most difficult decision respecting photographs is whether their dramatic character outweighs the probative quality of the photo. When an “unduly prejudicial” objection is made by the opponent of a photo, the judge must balance the inflammatory nature of the picture against its evidentiary worth. If the photo is more probative than prejudicial, the photo is admitted.¹⁰

Court found that the trial court did not abuse its discretion in admitting photographs that depicted the victim with lacerations to her face and a black eye. Court rejected argument that the photographs were inflammatory and depicted injuries for an aggravated battery charge for which the defendant had been acquitted.¹¹

A color photograph showing a close-up of the remains of a murder victim’s face after extensive animal and insect damage was not unduly prejudicial, inasmuch as the photograph tended to rebut one of the defendant’s hypotheses.¹²

A photograph depicting a portion of the victim’s head showing mutilation resulting from the crime against him and in no way connected with any further mutilation of the body at autopsy was admissible.¹³

Photographs of an infant taken immediately after death were admissible as they were relevant as to the issue of whether the injuries were self-inflicted or accidental.¹⁴

Photographs of the defendant in a WWII German military uniform and of other German memorabilia in defendant’s room were properly admitted to show bent of mind where the murder victim was Jewish.¹⁵

Still photos, like videotapes, are admissible when relevant, even if inflammatory.¹⁶ Probative value of photographs and other exhibits depicting the victims and the crime scene was not substantially outweighed by the danger of unfair prejudice, in prosecution for murder and other crimes.¹⁷ Photographs showing a severely injured victim may, however gruesome, be relevant to

⁹See *Epps v. State*, 216 Ga. 606, 118 S.E.2d 574 (1961).

¹⁰*White v. State*, 903 S.E.2d 891 (Ga. 2024).

¹¹*Long v. State*, 324 Ga. App. 882, 752 S.E.2d 54 (2013).

¹²*Brown v. State*, 260 Ga. 153, 391 S.E.2d 108 (1990).

¹³*Love v. State*, 259 Ga. 468, 383 S.E.2d 897 (1989); *Watkins v. State*, 259 Ga. 648, 386 S.E.2d 132 (1989);

Lemley v. State, 258 Ga. 554, 372 S.E.2d 421 (1988).

¹⁴*Lackey v. State*, 246 Ga. 331, 271 S.E.2d 478 (1980).

¹⁵*Wood v. State*, 255 Ga. 697, 341 S.E.2d 442 (1986).

¹⁶*Thomas v. State*, 274 Ga. 156, 549 S.E.2d 359 (2001).

¹⁷*Rhode v. State*, 274 Ga. 377, 552 S.E.2d 855 (2001).

trial of her alleged assailant and they are not objectionable merely because there is other evidence of severity of those injuries.¹⁸ Color photographs showing victim's injuries shortly after they were inflicted and shortly before trial were admissible to show permanence of victim's injuries, in prosecution for aggravated battery.¹⁹ Photographs of victim's mutilated body and severed head and hands were admissible during the guilt-innocence phase of the trial as relevant to the identity of the victim, the cause of death and whether the defendant acted with malice in killing the victim.²⁰

The Georgia Supreme Court has observed that, under Georgia's new Evidence Code, the general admissibility of autopsy photographs is governed by O.C.G.A. §§ 24-4-401; 24-4-402; and 24-4-403.²¹

Pictures of stabbing victims are often admissible to show the location and nature of wounds. They were admitted for this purpose in *Ottis v. State*,²² despite defendant's arguments that the photographs were unduly gruesome and inflammatory. Using a projector to make a presentation of pictures is allowed.

Pre-autopsy photographs of the location and nature of the victim's wounds were relevant to the issue of death and admissible although duplicative of expert testimony as to the cause of death.²³ Pre-autopsy photos are generally admissible.²⁴

Generally, photographs which depict the victim of a homicide after autopsy incisions are excluded.²⁵ A crime scene video as well as a pre-autopsy photograph of the victim were admitted in.²⁶ Although the videotape was apparently gruesome, its "inflammatory nature stemmed entirely from acts of the defendants and not from alteration or autopsy by the State."²⁷ A photograph of the victim while alive is generally admissible.²⁸

As noted, photos prior to autopsy stand on a stronger ground than photos made later. Pre-incision photos can be relevant. In *Banks v. State*,²⁹ before and after photographs were involved. The Georgia Supreme Court held that pre-incision autopsy photo-

¹⁸Maxwell v. State, 250 Ga. App. 628, 552 S.E.2d 870 (2001).

¹⁹O.C.G.A. § 16-5-24(a).

²⁰Huey v. State, 263 Ga. 840, 439 S.E.2d 656 (1994).

²¹Venturino v. State, 306 Ga. 391, 830 S.E.2d 110 (2019).

²²Ottis v. State, 269 Ga. 151, 496 S.E.2d 264 (1998).

²³Isaac v. State, 263 Ga. 872, 440 S.E.2d 175 (1994).

²⁴Johnson v. State, 289 Ga. 106, 709 S.E.2d 768 (2011).

²⁵Holland v. State, 267 Ga. 833, 483 S.E.2d 584 (1997).

²⁶Berry v. State, 267 Ga. 605, 481 S.E.2d 203 (1997).

²⁷481 SE2d at 211.

²⁸Garcia v. State, 267 Ga. 257, 477 S.E.2d 112 (1996).

²⁹Banks v. State, 281 Ga. 678, 642 S.E.2d 679 (2007).

graphs of murder victim, which depicted location and nature of victim's wounds, were admissible, as they were relevant and material. Post-incision autopsy photographs of the victim, depicting injuries under the victim's scalp and to his brain, were admissible, given that, without the incisions, victim's injuries would not have been visible. A forensic pathologist testified how the different photographs depicted injuries that had not been seen in previously admitted photographs, and each photograph was relevant to some point of the forensic pathologist's testimony. Post-incision autopsy photographs of a murder victim are admissible if necessary to show material fact that becomes apparent only due to the autopsy.

The trial court did not err in admitting into evidence certain autopsy photographs showing the wound to victim's skull where the medical examiner testified that the pictures were relevant to show the extent of the skull fracture suffered and the probative value was not substantially outweighed by the danger of unfair prejudice.³⁰

What about several photos of the same object? *Medlin v. State*³¹ suggests that one basis for objection might be that multiple photos of the same scene or item can become "cumulative." However, eight photos of the victim's head were permitted in *Johnson v. State*.³² The opinion by Justice Carley took a broad view of the admissibility of disturbing photos. Photographs showing the location and nature of a victim's wounds are deemed admissible even if they are duplicative and may inflame the jury, and even if the cause of death is not in dispute.

A 2019 decision under Georgia's new Evidence Code is in accord with Justice Carley's decision: "But simply because more than one witness discussed the photographs does not make the photographs cumulative."³³

Photographs of victim's body at crime scene were properly admitted.³⁴

When a fatal internal injury is not revealed until an autopsy is performed, a post-autopsy photograph is admissible in order to assist the jury's understanding of the circumstances surrounding the victim's death.³⁵

Photographs of the crime scene and of the skeletal remains of victim and her fetus were admissible during a capital murder

³⁰*Brown v. State*, 298 Ga. 880, 785 S.E.2d 512 (2016).

³¹*Medlin v. State*, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

³²*Johnson v. State*, 289 Ga. 106, 709 S.E.2d 768 (2011).

³³*Davis v. State*, 306 Ga. 140, 829 S.E.2d 321 (2019).

³⁴*Simmons v. State*, 282 Ga. 183, 646 S.E.2d 55 (2007).

³⁵*Thomas v. State*, 281 Ga. 550, 640 S.E.2d 255 (2007).

trial because the photographs were relevant.³⁶ Photographs which are relevant to an issue in the case are generally admissible even though they may be horrific.

Pre-autopsy photographs of the victim are admissible to show the nature and extent of his wounds.³⁷

Numerous cases admit pre-autopsy photos to show location and nature of injuries or wounds. What about post-incision photos? Trial court admission of post-incision autopsy photographs of infant victim was not an abuse of discretion, in prosecution for felony murder and aggravated battery, where the medical examiner testified that the full extent of victim's injuries were not detectable prior to the autopsy, and the photographs would assist him in explaining the victim's injuries to the jury. Post-incision autopsy photographs are admissible if necessary to show some material fact that becomes apparent only due to the autopsy.³⁸

In *Tarvin v. State*,³⁹ it was asserted that the trial court erred in admitting into evidence five photographs of the burn victim in the hospital showing medical apparatus attached to her body. The pre-autopsy photos illustrated the nature of the injuries which caused the child's death and were relevant and material to prove the felony murder.

Preautopsy photographs of the victim in the triage room of the hospital were admissible even though they depicted medical instruments attached to the victim's body, and even though other photographs were sufficient to illustrate the victim's wounds; photographs showed injuries inflicted on the victim and dirt on her body, which corroborated testimony that she fell to the ground when she was shot.⁴⁰

Pre-incision as well as post-incision autopsy photos are potentially admissible if they reveal relevant material or conditions.⁴¹

An excellent statement of the Georgia balancing test applicable to dramatic proof generally appears in *Kicklighter v. Woodward*:⁴² "[T]he trial judge may exercise discretion in excluding relevant evidence upon a determination that its probative value is substantially outweighed by the risk that its admission will cre-

³⁶Lewis v. State, 279 Ga. 756, 620 S.E.2d 778 (2005).

³⁷Rojas v. State, 280 Ga. 139, 625 S.E.2d 750 (2006). Accord, see Smith v. State, 280 Ga. 490, 629 S.E.2d 816 (2006).

³⁸Smith v. State, 283 Ga. 237, 657 S.E.2d 523 (2008) (Melton, J.).

³⁹Tarvin v. State, 277 Ga. 509, 591 S.E.2d 777 (2004).

⁴⁰Sheppard v. State, 285 Ga. 36, 673 S.E.2d 852 (2009).

⁴¹Miller v. State, 277 Ga. 707, 593 S.E.2d 659 (2004).

⁴²Kicklighter v. Woodward, 267 Ga. 157, 476 S.E.2d 248 (1996).

ate a substantial danger of undue prejudice or of misleading the jury.”⁴³ Dramatic photographs have been addressed in a number of cases. Autopsy photographs were deemed necessary to demonstrate cause of death in *Thornton v. State*,⁴⁴ thus meeting the necessity exception to *Brown v. State*.⁴⁵ *Brown* is explained earlier in this section and was again distinguished in *Green v. State*.⁴⁶ Pre-autopsy photos taken of the victim 24 hours after her death while she lay on the pathologist’s table showed the location and nature of wounds. The photos did not depict the body after its state had been changed by the pathologist.

The admission of an “in-life” photograph of a homicide victim, taken at his mother’s 40th birthday party, was authenticated by the victim’s mother at trial and did not constitute plain error.⁴⁷ Similarly, the prosecution’s introduction of a photograph of a homicide victim “standing alone against a neutral background” did not lead to reversal in *Gude v. State*.⁴⁸

Dramatic photos show up in civil cases as well. A crank handle broke off a disc harrow and hit the plaintiff in the face in *International Harvester Co. v. Cunningham*.⁴⁹ Pictures of the surgery to reconstruct his face were allowed into evidence, as necessary to show the extent of injuries.

In wrongful death actions photographs of the deceased are admissible to show age, life expectancy and earning capacity. The photographs, however, must be correct likenesses of the deceased at the time of his death.⁵⁰

In determining amount of alimony, photographs of parties’ minor children were admissible to show the age and health of the children.⁵¹

On the issue of the right of a party to introduce a photograph (or other evidence), potentially an inflammatory exhibit, over an opponent’s offer to stipulate everything the photo would show, see the analysis in the Stipulations section of this text, § 10:6, *supra*.

On the ability to authenticate photos absent the presence of

⁴³Friedman v. Friedman, 259 Ga. 530, 384 S.E.2d 641 (1989).

⁴⁴Thornton v. State, 264 Ga. 563, 449 S.E.2d 98 (1994).

⁴⁵Brown v. State, 250 Ga. 862, 302 S.E.2d 347 (1983).

⁴⁶Green v. State, 266 Ga. 550, 468 S.E.2d 365 (1996).

⁴⁷Brown v. State, 309 Ga. 511, 847 S.E.2d 152 (2020).

⁴⁸Gude v. State, 313 Ga. 859, 874 S.E.2d 84 (2022).

⁴⁹International Harvester Co. v. Cunningham, 245 Ga. App. 736, 538 S.E.2d 82 (2000).

⁵⁰Trammell v. Matthews, 86 Ga. App. 661, 72 S.E.2d 132 (1952) (fact that a photograph of the deceased showed him in Navy Uniform was not prejudicial).

⁵¹Worrell v. Worrell, 242 Ga. 44, 247 S.E.2d 847 (1978).

the photographer who took the photos, see *Successful Techniques for Civil Trials* (2d ed.) § 3:4. On the right of the jury to take photographs back to the jury room, see § 21:1, *supra*. Authenticating photos when an authenticating witness is unavailable, see *Phagan v. State*.⁵² *Phagan* also discusses the “silent witness” theory of photographs. That theory of photographs is also explored in the Indiana case of *Bergner v. State*.⁵³

The Meredith Emerson Memorial Privacy Act prohibits dissemination of crime scene photos depicting decapitation and other forms of mutilation.⁵⁴ One of the targets of this legislation was the prevention of commercial dissemination of such photos. Exceptions to the ban on circulation of these images for legal and court proceedings are part of the law.

A 2011 enactment amended O.C.G.A. § 42-1-8 to provide that registered sexual offenders may not photograph minor children without the consent of a parent or guardian.

For a motion in limine to exclude dramatic or gory photographs, consult the Appendix of Forms in this text.⁵⁵

§ 21:6 Admissibility of document copies

Duplicate copies of a writing are admissible to the same extent as an original, unless a bona fide question is raised about the authenticity of the writing, or it would be unfair to admit the duplicate.¹

§ 21:7 Admissibility of motion pictures and videos

Motion pictures are generally admissible in evidence.¹ As with photographs, the admission of a motion picture rests in the discretion of the trial judge.² For admission of the motion picture, a proper foundation must be laid. The foundational requirements for moving pictures are the same as for photographs.³

The authentication requirements for video recordings were

⁵²*Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997), citing former O.C.G.A. § 24-4-48.

⁵³*Bergner v. State*, 397 N.E.2d 1012 (Ind. Ct. App. 1979) (the “silent witness” theory of photographic evidence permits the use of photographs at trial as substantive evidence, as opposed to merely demonstrative evidence).

⁵⁴The Act amends O.C.G.A. § 45-16-27.

⁵⁵See Appendix C, Form 7.

[Section 21:6]

¹O.C.G.A. § 24-10-1003. See *Berman v. Kafka*, 661 Fed. Appx. 621 (11th Cir. 2016).

[Section 21:7]

¹*Long v. General Elec. Co.*, 213 Ga. 809, 102 S.E.2d 9 (1958).

²*Long v. General Elec. Co.*, 213 Ga. 809, 102 S.E.2d 9 (1958).

³*State v. Sapp*, 182 Wash. App. 910, 332 P.3d 1058 (Div. 3 2014). See also § 21:5, *supra*.

described in a 2019 decision:

Under Georgia law, “[g]enerally, a videotape is admissible where ‘the operator of the machine which produced it, or one who personally witnessed the events recorded[,] testifies that the videotape accurately portrayed what the witness saw take place at the time the events occurred.’”⁴

The prosecution’s introduction of a rap music video in which the defendant brandished a firearm was deemed to violate O.C.G.A. § 24-4-403 in *Baker v. State*.⁵

The Supreme Court of Georgia has encouraged the videotaping use of confessions on the grounds that it will protect the defendant’s rights as it will tend to show the true voluntary or involuntary nature of the confession and the condition in which the defendant was at the time of the confession.⁶

Admission of a videotape of the crime scene which showed a crib in a bedroom did not constitute reversible error, even though a baby was not present during the commission of the crimes, in prosecution for felony murder, aggravated assault with intent to rob, armed robbery, and burglary; police officer who identified different areas of the apartment while the videotape was played for the jury did not mention the baby’s crib, and the bedroom with the crib was just a part of the videotape.⁷

Videotapes, like still photos, are admissible when relevant, even if inflammatory.⁸ In *Beasley v. State*,⁹ the defendant urged that the trial court erred in permitting the movie “Natural Born Killers” to be admitted into evidence and shown to the jury. The State introduced evidence that Beasley watched the movie 19 or 20 times, and that he had said he wanted to be like the characters in the movie. The court concluded that the movie was relevant to show Beasley’s bent of mind.¹⁰

In *Pitchford v. State*,¹¹ the court found that the admissibility (and playing) of a videotape in a prosecution for murder, burglary, armed robbery, and related offenses was proper, despite

⁴Moore v. State, 305 Ga. 251, 824 S.E.2d 377 (2019).

⁵Baker v. State, 318 Ga. 431, 899 S.E.2d 139 (2024).

⁶Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

⁷Bonaparte v. State, 274 Ga. 667, 558 S.E.2d 383 (2002).

⁸Thomas v. State, 274 Ga. 156, 549 S.E.2d 359 (2001).

⁹Beasley v. State, 269 Ga. 620, 502 S.E.2d 235 (1998).

¹⁰See Wellons v. State, 266 Ga. 77, 463 S.E.2d 868 (1995) (trial court did not err in permitting jury to view videotape of crime scene when videotape was relevant to show location of body in relation to various evidence and to scene of murder, extent to which defendant had concealed body from view, and relationship of various items of evidence inside apartment, and thus was clearly probative of central issues).

¹¹Pitchford v. State, 294 Ga. 230, 751 S.E.2d 785 (2013).

the fact that it depicted the defendant “smoking marijuana, making crude jokes, and reciting inflammatory rap lyrics.” The court reasoned that, despite the prejudicial nature of the aforementioned items, other content on the video was relevant to the issue of the defendant’s identity and his relationship with the victim.

Authenticating witnesses sufficient to admit videotape from surveillance camera at video store, see *Wade v. State*.¹²

O.C.G.A. § 24-9-923 addresses special provisions for authentication of photos, videotapes, motion pictures and audio recordings when necessitated by the unavailability of a witness who can provide personal authentication. Requirements of authentication of videotape were held not complied with in *Phagan v. State*.¹³ The foregoing statute is discussed along with the foundation requirements for admission of sound recordings and the silent witness theory of photographic evidence.

Videotape has been admitted in civil cases. A videotape of work areas covered by a contract to repair a house had sufficient color and quality to be admissible, even though the witness who made and explained the videotape did not correlate the scene to particular terms of the contract. The body of evidence connected the videotape to the work performed.¹⁴ A defendant was not harmed by the admission of a videotape of her residence made during daylight, whereas the crime occurred at night, and defendant suggested that the scene “might” have been inaccurate.¹⁵

Visual evidence sometimes takes the form of a computer animated videotape of an auto accident, sewer explosion, airplane crash, or other litigated incident. Computer graphics evidence is analyzed in Bright, Carlson & Imwinkelreid, *Objections at Trial* 51 (rev ed. 2008).¹⁶

A computer-generated animation was authenticated in *Cleveland v. Bryant*.¹⁷ An expert successfully laid the foundation by asserting the animation “reflected a fair and accurate representation of his opinion as to how the collision occurred.” The Georgia Supreme Court relied upon a similar standard for authentication in a computer simulation case.¹⁸

Authorities on securing disclosure of “day-in-the-life” videotapes, see Comment, “Day in the life” and surveillance videos:

¹²*Wade v. State*, 274 Ga. 791, 560 S.E.2d 14 (2002).

¹³*Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997).

¹⁴*Paul Davis Systems of Savannah, Inc. v. Peth*, 201 Ga. App. 734, 412 S.E.2d 279 (1991).

¹⁵*Shearer v. State*, 259 Ga. 51, 376 S.E.2d 194 (1989).

¹⁶See *Commercial Union Ins. Co. v. Boston Edison Co.*, 412 Mass. 545, 591 N.E.2d 165 (1992) (computer simulation evidence admissible).

¹⁷*Cleveland v. Bryant*, 236 Ga. App. 459, 512 S.E.2d 360 (1999).

¹⁸*Cornell v. State*, 265 Ga. 904, 463 S.E.2d 702 (1995).

discovery of videotaped evidence in personal injury suits, 97 Dick. L. Rev. 305 to 328 (1993).

Drawings, blackboards, diagrams, charts and models may be used to illustrate a witness' testimony. Only minimal authentication is required where such materials are used in this manner, as opposed to seeking their admission into evidence. In *J.B. Hunt Transport, Inc. v. Brown*,¹⁹ a videotape containing a computerized animation illustrating an expert's opinion was not admitted as substantive evidence but solely to illustrate an expert's opinion of how an accident occurred. This was appropriate. A distinction between real and pictorial evidence is drawn by the court.

Video clips showing three types of horizontal gaze nystagmus were properly admitted where the prosecution introduced them to illustrate what nystagmus looks like during the arresting officer's testimony about conducting the horizontal gaze nystagmus evaluation on a DUI defendant.²⁰

Another distinction which is sometimes drawn is between computer-generated animations versus reenactments of events. "Reenactments of events which are substantially different from the facts of the case and which, because of the differences, might be prejudicial and misleading, should not be used at trial."²¹ In this case the animation was sufficiently similar to the evidence as to amount to an accurate representation of the expert's opinion of how a collision occurred. On reenactments, see *Pickren v. State*.²²

In *Cottrell, Inc. v. Williams*,²³ the court held that use of a videotape by an expert to illustrate the expert's testimony is generally permissible.

Videotapes may be edited.²⁴

§ 21:8 Admissibility of x-ray photographs

X-ray photographs are generally admissible when they are material and relevant.¹ However, the admission of x-rays present a special problem as no one can testify from firsthand or personal observation knowledge that the x-ray is a true and accurate representation of the thing depicted. Therefore, to authenticate the x-ray the witness should identify the x-ray as a picture of the

¹⁹*J.B. Hunt Transport, Inc. v. Brown*, 236 Ga. App. 634, 512 S.E.2d 34 (1999).

²⁰*Monroe v. State*, 340 Ga. App. 373, 797 S.E.2d 245 (2017).

²¹*Cleveland v. Bryant*, 236 Ga. App. 459, 512 S.E.2d 360 (1999).

²²*Pickren v. State*, 269 Ga. 453,

500 S.E.2d 566 (1998).

²³*Cottrell, Inc. v. Williams*, 266 Ga. App. 357, 596 S.E.2d 789 (2004).

²⁴*Billings v. State*, 278 Ga. 833, 607 S.E.2d 595 (2005).

[Section 21:8]

¹*Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978).

person whose condition is in question, verify the physical condition of the person at the time the x-ray was taken, verify the apparatus used was dependable and in good working condition, show that the person who took the picture was qualified and experienced and completely describe the manner in which the x-ray was taken.²

In Georgia, x-rays can also be admitted as a record made in the regular course of business under the business records exception to the hearsay rule.³ To be admitted under this exception, the proper foundation as required by O.C.G.A. § 24-8-803(6) must be laid. It has been held insufficient to merely show that the medical witness had instructed another doctor to take the x-ray and had received the x-ray from the other doctor.⁴ In a subsequent case, however, the expert's personal examination of the x-ray provided a sufficient foundation even though the expert had not examined the patient.⁵

Modernly, the digital transmission of x-rays has been termed "teleradiology" and courts around the country have sometimes approved this form of demonstrative evidence.⁶ The digital motion x-ray (DMX) has also found its way into the courtroom.⁷ Some courts consider the process controversial and have found flaws in DMX evidence.⁸

Authentication of X-rays, see Carlson, *Successful Techniques for Civil Trials* § 3:11 (2d ed.).

§ 21:9 Admissibility of sound recordings in evidence

Sound recordings on tape, wire or other material may be admitted in evidence if otherwise competent, material and relevant, provided a proper foundation has been laid.¹ To be authenticated, it must be established that the recording device was capable of taking evidence, the operator of the device was competent, the recording was authentic and correct, no changes, additions or dele-

²See generally, Scott, *X-Ray Pictures as Evidence*, 44 *Michigan Law Review* 773 (1946).

³*Redd v. State*, 240 Ga. 753, 243 S.E.2d 16 (1978).

⁴*Woodruff v. Naik*, 181 Ga. App. 70, 351 S.E.2d 233 (1986); *Williams v. Southern Ry. Co.*, 99 Ga. App. 503, 109 S.E.2d 343 (1959).

⁵*Southeastern Ambulance Corp. v. Freeman*, 185 Ga. App. 119, 363 S.E.2d 571 (1987).

Compare *Woodruff v. Naik*, 181 Ga. App. 70, 351 S.E.2d 233 (1986).

⁶*Renzi v. Paredes*, 452 Mass. 38, 50, 890 N.E.2d 806, 816 (2008).

⁷*Graftenreed v. Seabaugh*, 100 Ark. App. 364, 367, 268 S.W.3d 905, 911 (2007); *Johnson v. Burkey-Kelly*, 18 Misc. 3d 1126(A), 859 N.Y.S.2d 895 (Sup 2007).

⁸*Fowler v. Schweitzer*, 876 N.E.2d 386 (Ind. Ct. App. 2007), unpublished/noncitable.

[Section 21:9]

¹*Green v. State*, 250 Ga. 610, 299 S.E.2d 544 (1983); *Burke v. State*, 248 Ga. 124, 281 S.E.2d 607 (1981).

tions were made, the recording was properly preserved, the speakers were identified and the testimony was given freely, voluntarily and without duress.²

Relying on O.C.G.A. § 24-9-923, the Supreme Court of Georgia approved the introduction of a defendant's recorded telephone calls, made from jail by the defendant:

Here, the employee of the Dodge County Sheriff's office testified that her job duties included listening to jail calls; that an automated system recorded all jail calls and stored them on a server for four years; that the inmates entered a personal identification number before calling; that Appellant used his own identification number when placing calls; that the system also tracked the phone numbers the inmates dialed; that the system accurately recorded the calls at issue when made; and that no one altered the recordings. In light of this testimony, the trial court was authorized to determine by a preponderance of the evidence that the recordings tended to reliably show that they were the contents of the calls that Appellant placed, and thus did not err, much less plainly err, in admitting them. See *Westbrook v. State*, 308 Ga. 92, 100-101, 839 S.E.2d 620 (2020) (rejecting, under plain error review, argument that audio-recording of jail call was not properly authenticated where the State presented similar testimony as to the recording process); OCGA § 24-1-104(a) ("Preliminary questions shall be resolved by a preponderance of the evidence standard."). See also *Reid v. State*, 306 Ga. 769, 778-779, 833 S.E.2d 100 (2019).³

One of the linchpins for admissibility of tape recordings is voice identification. Identifying a voice, whether for introduction of tape recordings or simply for a witness in the courtroom to identify a speaker who is speaking on a tape, is controlled by a revised Code provision in the 2013 Evidence Code. O.C.G.A. § 24-9-901(b)(5) and (6), effective January 1, 2013, regulate voice and telephone conversations. Lay opinions are permitted when a foundation is laid.⁴

A recording of a 911 call was properly introduced where a detective testified that he had listened to the 911 call made by the witness in question and recognized that witness's voice because he had previously interviewed her.⁵

Where specific voice identification testimony is not present, however, more recent Georgia cases indicate that the content of the recording of a telephone call can be considered in order to

²*Page v. State*, 249 Ga. 648, 292 S.E.2d 850 (1982).

³*Blash v. State*, 318 Ga. 325, 898 S.E.2d 522 (2024).

⁴See § 24:9, *infra*.

⁵*Hughes v. State*, 310 Ga. 453, 851 S.E.2d 580 (2020).

determine the identity of the caller.⁶

Holding that Georgia's 2013 Evidence Code ushers in changes, the Georgia Supreme Court held that jail recordings of a criminal defendant's telephone calls were properly authenticated where it was shown that the jail recording system accurately recorded telephone calls, that the jail's system recorded the defendant's telephone call at the time that he made it, and a witness, who recognized the defendant's voice, testified that the man in the recording sounded like the defendant.⁷

Audio recording of conversation between defendant and victim, his niece, several years after alleged rape incidents had occurred earlier when victim was between the ages of five and eight, was admissible upon showing that defendant's statements made during the conversation were voluntary; victim purchased a digital recorder, concealed it on her person, and confronted defendant about the incidents, conversation occurred in the yard at victim's aunt's house, victim testified that defendant spoke to her willingly, that she did not promise him anything to make the statement, and that she did not threaten him into making it, and officer who advised victim prior to recording testified as well.⁸

A survey of the various jurisdictions shows that it is almost universally held that sound recordings are admissible and the proper foundation for their admission requires only the elements set out in *Page*, supra.⁹ The problem with recording sounds is one of credibility and integrity of the operation. Thus, cross examination of the operator allows the opponent to raise the issue of the witness' credibility.¹⁰

The same foundational requirements apply to the admission of the transcript of the recording as well.¹¹

Foundation for sound recordings and for videotape, see *Phagan v. State*.¹² Sexually explicit photographs and video recordings were properly authenticated; photographs were shown to victims during their testimony and they identified themselves as being fairly depicted therein, and victims also testified that they viewed digital video recordings prior to admission of that evidence and were able to recognize themselves as being fairly depicted in

⁶*Brewner v. State*, 302 Ga. 6, 804 S.E.2d 94 (2017).

⁷*Jones v. State*, 299 Ga. 40, 785 S.E.2d 886 (2016).

⁸*Flournoy v. State*, 299 Ga. App. 377, 682 S.E.2d 632 (2009).

⁹See Carlson, *Successful Techniques for Civil Trials* § 3:24 (2d ed.).

¹⁰*Central of Georgia R. Co. v. Collins*, 232 Ga. 790, 209 S.E.2d 1 (1974).

¹¹See, generally, *Martin v. State*, 179 Ga. App. 551, 347 S.E.2d 247 (1986).

¹²*Phagan v. State*, 268 Ga. 272, 486 S.E.2d 876 (1997).

those recordings as well.¹³

Where a proper foundation is laid for the admission of a taped conversation, and part of the conversation is inaudible, the admission of the evidence is in the trial court's discretion.¹⁴

Where audio tapes are admitted in evidence and part of the conversation is inaudible, the trial court can allow the jury to use transcripts where the court instructs the jury that the tapes themselves, not the transcripts, are the evidence.¹⁵

What about copies of the original recording? A tape recorded conversation between a testator and his attorney was properly authenticated so as to permit its admission, although the tape was a reproduction of the original; the attorney's testimony that the reproduction was the same as the actual conversation was sufficient.¹⁶

On the other hand, a tape recording of an argument between a murder defendant and a victim which took place after the defendant had been jailed for a prior battery of the victim was admissible as probative as to the defendant's motive, intent or bent of mind which the trial court so instructed the jury.¹⁷

The state is entitled to play audio tapes of its witnesses after they are cross-examined.¹⁸

§ 21:10 Admissibility of maps, drawings, diagrams and displays

It is a well-established rule applied in everyday practice in courts that maps, drawings and diagrams illustrating the scenes of a transaction and the relative location of objects, if shown to be reasonably accurate and correct, are admissible in evidence in order to enable the factfinder to understand and apply the established facts to the particular case.¹

There is no requirement that the witness prepare the map, drawing or diagram.² Also, there is prior Georgia authority that

¹³Walthall v. State, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

¹⁴Dyer v. State, 298 Ga. App. 327, 680 S.E.2d 177 (2009).

¹⁵Robertson v. State, 268 Ga. 772, 493 S.E.2d 697 (1997).

¹⁶Saunders v. Padovani, 258 Ga. 866, 375 S.E.2d 853 (1989).

¹⁷Sumpter v. State, 260 Ga. 683, 398 S.E.2d 12 (1990).

¹⁸Warner v. State, 281 Ga. 763,

642 S.E.2d 821 (2007).

[Section 21:10]

¹See generally, Georgia Power Co. v. Green, 207 Ga. 250, 61 S.E.2d 146 (1950) (subdivision map); Parks v. State, 203 Ga. 302, 46 S.E.2d 504 (1948); Savannah Ice Delivery Co. v. Ayers, 127 Ga. App. 560, 194 S.E.2d 330 (1972); Ruff v. State, 150 Ga. App. 238, 257 S.E.2d 203 (1979).

²Fountain v. DeKalb County, 154 Ga. App. 302, 267 S.E.2d 903 (1980).

it is not an impediment that these items are not drawn to scale.³ For a competing view that diagrams drawn to scale are fully admissible in evidence whereas not-to-scale drawings are demonstrative only, see Carlson, *Successful Techniques for Civil Trials* § 3:42 (2d ed.).

Finally, there is no requirement that the diagram be prepared after the incident or crime at issue.⁴

Displays can involve a number of things. Sometimes portions of a jury instruction are enlarged to aid counsel's closing argument. Some discretion is vested with the trial court. In a divorce action, husband's counsel was not permitted to use enlargements of portions of transcripts of wife's deposition and hearing testimony as demonstrative evidence to impeach the wife during cross-examination where the wife admitted that she testified as shown.⁵ *Duckworth* holds that an inconsistent written statement must be exhibited to the witness by the cross-examiner before asking any questions about it. After contradicting a witness with a line from a document, the cross-examiner sometimes requests that the document be received by the court as an exhibit. Whether a witness admits or denies making the written statement, it is admissible in evidence. Finally, a cross-examiner does not have to offer the prior written statement into evidence before impeaching with it. Georgia's relevant impeachment rules are reviewed in §§ 12:3, 16:10, *supra*.

Cases hold that judicial notice can be taken of information obtained from Google Maps.⁶

§ 21:11 Admissibility of static models and casts

A highly publicized trial involved an allegation that the defendant murdered his toddler son by leaving him strapped in a car seat in the back seat of the defendant's vehicle. After hours in the June, Georgia heat, the child died of hyperthermia. With the assistance of an "expert in creating three-dimensional (3-D) computer models," the prosecution created a 3-D model of the car

³*Wallis v. Odom*, 130 Ga. App. 437, 203 S.E.2d 613 (1973); *Waters v. State*, 169 Ga. App. 290, 312 S.E.2d 812 (1983).

⁴See generally, *Jung v. State*, 237 Ga. 73, 226 S.E.2d 599 (1976) (admitted diagram drawn by defendant on a placemat prior to robbery).

⁵*Friedman v. Friedman*, 259 Ga. 530, 384 S.E.2d 641 (1989) (disapproved on other grounds by, *Duckworth v. State*, 268 Ga. 566, 492 S.E.2d 201

(1997)) (disapproving of language in *Friedman* that prior inconsistent statements are not admissible solely because the witness admits making the statement).

⁶*Roman Catholic Archdiocese of Kansas City in Kansas v. City of Mission Woods*, 337 F. Supp. 3d 1122 (D. Kan. 2018); *Cobb Theatres III, LLC v. AMC Entertainment Holdings, Inc.*, 101 F. Supp. 3d 1319 (N.D. Ga. 2015).

which was used for demonstrative evidence at trial. The Supreme Court of Georgia in *Harris v. State*:¹

[T]he 3-D model was probative as to the location of things within the [defendant's car], and although the jury was presented with other evidence showing the interior of the [defendant's car], we cannot say that it was an abuse of discretion for the trial court to conclude that there was probative value in the State's presenting the evidence in a 3-D format allowing, for example, witnesses to show different angles of the Tucson as they testified.

A model or cast may be admitted in evidence if it is material and relevant, subject to establishing that it is an accurate depiction of that which it purports to depict. A replica of a murder weapon was admissible in *McCoy v. State*,² where the original could not be found.

Generally, it is error to admit into evidence a model shown to be inaccurate or incorrect.³ However, a model can be admitted for a limited purpose to show aspects of the model that are not inaccurate or incorrect.⁴

§ 21:12 Effect of marks or notations on demonstrative evidence

Properly verified or authenticated demonstrative evidence is not rendered inadmissible per se because of extraneous matter on it if the individual who made the marks or writings or another witness familiar with the facts explains them or testifies as to their correctness.¹

§ 21:13 Displaying personal injuries to jury

A person may exhibit her wounds or injuries to the jury.¹ It has been held to be reversible error not to allow a defendant to physi-

[Section 21:11]

¹*Harris v. State*, 314 Ga. 238, 875 S.E.2d 659 (2022) (“the 3-D model was not likely to mislead the jury”).

²*McCoy v. State*, 273 Ga. 568, 544 S.E.2d 709 (2001).

³See generally, *Watson v. Elberton-Elbert County Hospital Authority*, 125 Ga. App. 112, 186 S.E.2d 459 (1971), judgment rev'd on other grounds, 229 Ga. 26, 189 S.E.2d 66 (1972); *Mitchell v. J.S. Schofield's Sons Co.*, 16 Ga. App. 686, 85 S.E. 978 (1915).

⁴*Delk v. Sellers*, 149 Ga. App. 439, 254 S.E.2d 446 (1979).

[Section 21:12]

¹*Napier v. Little*, 137 Ga. 242, 73 S.E. 3 (1911).

[Section 21:13]

¹See *Rogers v. State*, 256 Ga. 139, 344 S.E.2d 644 (1986); *Rollins v. State*, 164 Ga. App. 452, 297 S.E.2d 352 (1982) (showed stab wounds and resultant scars); *Moore v. State*, 237 Ga. 249, 227 S.E.2d 330 (1976) (bullet wound scar).

cally exhibit scars he had received from a prior incident.² It is permissible, in a personal injury case, to illustrate the injury by way of physical movement before the jury.³ Also, a plaintiff who had lost both legs in a train wreck was allowed to show that he could walk on his knees slightly.⁴

In a cruelty trial, the prosecution was allowed to present, “in-person” to the jury, a wheelchair-bound, four-year-old, severely disabled victim who was not able to “talk, walk, feed, or toilet himself,” and “groaned several times out loud” after being brought into the courtroom.⁵

Other personal displays and exhibitions, including those by counsel, see Carlson, *Successful Techniques for Civil Trials* §§ 3:12 to 3:15 (2d ed.), *supra*.

§ 21:14 Blood tests in paternity cases

The court may order a party in a disputed paternity suit to submit to blood tests.¹ Such a requirement does not compel the party to become a witness against himself or give incriminating testimony in violation of his constitutional rights.² However, requiring the tested party to pay for the tests prior to the trial does violate his due process rights.³ Under 1993 amendments of O.C.G.A. §§ 19-7-45 and 19-7-46, a positive test by a stipulated percentage raises a presumption of paternity.⁴

State law no longer specifies what type of blood test must be used. The testing specified by O.C.G.A. § 19-7-46(b) or any blood test reasonably accessible is sufficient.⁵

§ 21:15 Exhibiting child in paternity cases

It appears that the exhibit of a child to a jury in a paternity case is allowed.¹ It should be noted that this case does not clearly state that such an action is valid; rather, the court simply did not overturn the trial court’s verdict (there was other evidence considered by the trial court in its decision).

Exhibition of the child has been approved in abandonment

²Daniels v. State, 248 Ga. 591, 285 S.E.2d 516 (1981).

³Pidcock v. West, 24 Ga. App. 785, 102 S.E. 360 (1920).

⁴Southern Ry. Co. v. Brock, 132 Ga. 858, 64 S.E. 1083 (1909).

⁵Freeman v. State, 333 Ga. App. 6, 775 S.E.2d 258 (2015).

[Section 21:14]

¹O.C.G.A. § 19-7-45.

²Raines v. White, 248 Ga. 406, 284 S.E.2d 7 (1981).

³Boone v. State, Dept. of Human Resources ex rel. Carter, 250 Ga. 379, 297 S.E.2d 727 (1982).

⁴See § 20:13, *supra*.

⁵O.C.G.A. § 19-7-45.

[Section 21:15]

¹Travis v. State, 122 Ga. App. 800, 178 S.E.2d 741 (1970).

cases² and in breach of promise actions.³

§ 21:16 Authentication of exhibits

In 2013, Georgia Rules of Evidence 901¹ and 902² became law. Patterned after their federal counterparts, these rules will dictate the parameters for authentication of evidence in a host of circumstances. A 2019 opinion by Presiding Judge Dillard of the Georgia Court of Appeals explained the fundamentals of O.C.G.A. § 24-9-901:

The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. . . [and] the following [is an] example[] of authentication or identification conforming with the requirements of this Code section: . . . Testimony of a witness with knowledge that a matter is what it is claimed to be[.]³

With those statutory upgrades in mind, consideration of earlier Georgia authentication law provides important background and context.

Fingerprints and photographs which were covered by certification of authenticity by the Governor of Florida were admissible under former O.C.G.A. § 24-7-25, now O.C.G.A. § 24-9-922, even though they were copies and not originals.⁴ There is no requirement that authenticity of an exhibit be proven to absolute certainty.⁵

A code section was enacted in 1996 which defined unavailability of an authenticating witness, and broadly provided that unavailability could be established by demonstrating the witness' death, physical or mental illness, lack of memory, and other grounds. Then, subject to any other valid objection, photographs, motion pictures, videotapes, and audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which

²Burton v. State, 107 Ga. App. 792, 131 S.E.2d 579 (1963).

³Morris v. Stanford, 58 Ga. App. 726, 199 S.E. 773 (1938).

[Section 21:16]

¹O.C.G.A. § 24-9-901. See generally Interest of A. A., 362 Ga. App. 426, 868 S.E.2d 812 (2022).

²O.C.G.A. § 24-9-902. See gener-

ally Jones v. State, 345 Ga. App. 14, 812 S.E.2d 337 (2018).

³Johnson v. State, 348 Ga. App. 667, 824 S.E.2d 561 (2019) (omissions and substitution in original).

⁴Smith v. Hart, 243 Ga. 59, 252 S.E.2d 470 (1979).

⁵Sims v. State, 243 Ga. 83, 252 S.E.2d 501 (1979) (exhibit was bullet).

the items are offered.⁶

Strict application of chain of custody rules which are applied to fungible items will be relaxed in connection with distinct physical objects identifiable by observation.⁷ Chain of custody rules relating to blood samples, see *Wilkins v. State*.⁸ Other chain of custody considerations, see § 21:4, *supra*.

Chain of custody rules were reviewed in *Dempsey v. State*.⁹ The defendant was convicted of selling cocaine, and challenged the chain of custody of the substance he sold the undercover officer. *Dempsey* argued that the State failed to exclude the possibility that other lab personnel may have tampered with the evidence. Quoting precedent, the Court of Appeals observed that when the state seeks to introduce fungible material into evidence, it must show a chain of custody which is adequate to preserve the identity of the evidence. Hence, the burden is on the prosecution to show with reasonable certainty that the evidence is the same as that seized and that there has been no tampering or substitution. However, the State need not negate all possibility of tampering, and need only establish reasonable assurance of the identity of the confiscated evidence. Further, in proving chain of custody, the State is not required to show that the substance was guarded each minute it is in one's custody. When there is only a bare speculation of tampering, it is proper to admit the evidence and let what doubt remains go to its weight. Having reviewed the evidence, the Court of Appeals found that the state properly demonstrated the chain of custody of the cocaine.

In *McMillan v. State*,¹⁰ the court found that the trial court did not abuse its discretion in admitting cocaine into evidence. The court rejected defendant's chain of custody argument, concluding that the government established with reasonable assurance that the exhibits contained the substances seized from the defendant at the time of subject traffic stop.

Where a distinctive, hard object is readily identifiable, chain of custody proof is not always required. The Court of Appeals so ruled in the case of a stolen pendant in *Buckley v. State*.¹¹ Proof of chain of custody is not required on non-fungible items.¹² A crack pipe is a "distinct and recognizable physical object" such

⁶O.C.G.A. § 24-9-923.

⁷*Carr v. State*, 267 Ga. 701, 482 S.E.2d 314 (1997) (fingernail polish bottle).

⁸*Wilkins v. State*, 246 Ga. App. 667, 541 S.E.2d 458 (2000).

⁹*Dempsey v. State*, 265 Ga. App. 175, 593 S.E.2d 362 (2004).

¹⁰*McMillan v. State*, 327 Ga. App. 269, 758 S.E.2d 332 (2014).

¹¹*Buckley v. State*, 270 Ga. App. 493, 606 S.E.2d 581 (2004).

¹²*Simmons v. State*, 282 Ga. 183, 646 S.E.2d 55 (2007).

that it is admissible without showing a chain of custody.¹³

On the other hand, materials that are easily confused or tampered with like drugs or blood must be carefully traced. The proponent must establish a reasonable assurance of the identity of the sample. In one case, the state did not establish sufficient chain of custody of a blood sample to provide reasonable assurance of its identity, and results of test on that sample were deemed to be inadmissible in a rape trial. Test results will not be received where there is no testimony at all about handling of blood from time it was taken to time it was tested. The technician did not testify as to how the blood sample was labeled or packaged or how he received it.¹⁴

Chain for DNA evidence, see *Paschal v. State*.¹⁵

The fact that persons in control of a fungible substance do not testify at trial does not, without more, make the substance or testimony relating to it inadmissible. The State need only show with reasonable certainty that the substance tested is the same as that seized, with no tampering or substitution.¹⁶

Chain of custody rules were referenced in a case involving admission of a wallet, checkbook, gloves, and a cap in *Simmons v. State*.¹⁷

Even absent chain of custody showing, state established authenticity of murder weapon and the single cartridge found at defendant's residence as to render the evidence admissible at trial on charges of murder and aggravated assault; both the gun and the cartridge were distinct and recognizable physical objects which would be identified upon observation, obviating the necessity of a chain of custody showing.¹⁸

A printed transcript of instant-message conversation that took place between defendant and victim was properly authenticated, and thus, was admissible in child molestation prosecution; at trial, victim testified that she was actual participant in instant-message session at issue, she remembered conversation and, after reading transcript of exchange, confirmed that words printed on paper were in fact words used in conversation. She further testified that the transcript that was tendered was actually printed from a computer in her home that she had used during

¹³*Washington v. State*, 283 Ga. App. 570, 642 S.E.2d 199 (2007).

¹⁴*Warner v. State*, 277 Ga. App. 421, 626 S.E.2d 620 (2006) (overruled on other grounds by, *White v. State*, 305 Ga. 111, 823 S.E.2d 794 (2019)).

¹⁵*Paschal v. State*, 280 Ga. 430, 628 S.E.2d 586 (2006).

¹⁶*Buckholts v. State*, 283 Ga. App. 254, 641 S.E.2d 246 (2007).

¹⁷*Simmons v. State*, 282 Ga. 183, 646 S.E.2d 55 (2007) (in case of non-fungible physical objects which are easily identifiable, chain proof not required).

¹⁸*Moore v. State*, 285 Ga. 157, 674 S.E.2d 315 (2009).

the conversation, and that printing of the transcript was done in her presence.¹⁹ Electronic computer messages are held to the same standards of authentication as other similar evidence. Evidence was sufficient to establish that defendant was sender of instant-message to victim.

Authentication of exhibits under the Federal Rules of Evidence, see Federal Evidence Rules 901 to 902. Form of proof to proceed through authentication of an exhibit, Q. and A. steps in laying foundation, see Carlson, *Successful Techniques for Civil Trials* § 3:2 (2d ed.).

¹⁹*Hammontree v. State*, 283 Ga. App. 736, 642 S.E.2d 412 (2007).

Chapter 22

View

- § 22:1 General information and right to view
- § 22:2 Requests for view
- § 22:3 Conduct of view
- § 22:4 Nature of view
- § 22:5 Unauthorized view

§ 22:1 General information and right to view

The purpose of the view is to assist the juror's comprehension of the facts in the case. Several states have statutes concerning the right of jury view in certain situations, for example condemnation proceedings, where even in the absence of a statute the judge may have discretion to allow a view. Several factors which are often considered by the court in determining the propriety of a jury view are the complexity of the evidence, the cost in time and effort to allow the view, the time elapsed from the date of the incident until the trial, and the benefit that would be received from the view. The judge may appoint a court official, a bailiff or perhaps a deputy sheriff to accompany the jury to the scene and serve as a "shower" to point out the objects or the scene to be viewed. The jury is restricted in their activity and generally not allowed to make their own measurements, confer with one another while at the scene, ask questions of the "shower" or anyone else present at the scene. As to defendant's presence in a criminal case, see Rule 43, Federal Rules of Criminal Procedure as well as the Georgia authority set forth in § 22:4, *infra*.

The matter of a jury view in Georgia is discretionary.¹ Other

[Section 22:1]

¹*Sutton v. State*, 237 Ga. 418, 228 S.E.2d 815 (1976) (murder—Coweta County); also see *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986) (overruled on other grounds by, *Manzano v. State*, 282 Ga. 557, 651 S.E.2d 661 (2007)) (murder—Muscogee County); *Lingerfelt v. State*, 238 Ga. 355, 233 S.E.2d 356 (1977) (murder—Forsyth County—view denied); *Lackey v. State*, 217 Ga. 345, 122 S.E.2d 115

(1961) (murder—Floyd County); *Harper v. State*, 182 Ga. App. 760, 357 S.E.2d 117 (1987) (sodomy—Hall County—view denied); *Amerson v. State*, 177 Ga. App. 97, 338 S.E.2d 528 (1985), overruled on other grounds by *Watts v. State*, 274 Ga. 373, 552 S.E.2d 823 (2001) (rape, kidnapping—Jones County—view denied, no probative value); *Kennedy v. State*, 177 Ga. App. 688, 341 S.E.2d 17 (1986) (drug violation—Ware County—view allowed even though automobile of different

cases on jury view include *Crowe v. State*.²

The fact that the scene or property has been changed or altered does not limit the judge's discretion, but is merely a factor for his or her consideration.³

In *Bowman v. State*,⁴ the appellant asserted that the trial court's denial of the request for a jury view of an apartment complex on the basis that the area was too dangerous was inconsistent with the ruling on the motion in limine excluding evidence of a dangerous environment in the complex. But, in affirming the trial court, the court of appeals noted that the trial court ruling which excluded the evidence of the dangers was conditional.

The trial court in *Young v. State*,⁵ did not abuse its discretion in denying a jury view where extensive evidence of the scene, including video, photographs, and diagrams, was presented at trial.

In *Ledford v. State*,⁶ it was not error for the trial court to allow the jury a scene view when the vegetation at the scene had changed since the alleged murder. The jury had the original photographs to compare and the view was potentially helpful to the jury to understand the evidence despite the vegetation changes.

In Georgia, there is a statute that refers to jury view in one specific situation. O.C.G.A. § 45-16-37 states that the coroner's jury is not required to view the body.

How do other jurisdictions approach the issue of jury views? Courts often analyze the propriety of a ruling on a request for a jury view under Fed. R. Evid. 403, which was adopted in Geo-

color); *Green v. State*, 167 Ga. App. 548, 306 S.E.2d 354 (1983) (drug violation—Clarke County—denied view); *Thornton v. State*, 161 Ga. App. 296, 287 S.E.2d 749 (1982) (arson—Bibb County—night view denied); *Panos v. Department of Transp.*, 162 Ga. App. 53, 290 S.E.2d 295 (1982) (condemnation—DeKalb County—partial view allowed); *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669 (1980) (obscenity—Fulton County—denied view of places where sexually explicit materials were available); *Megar v. State*, 144 Ga. App. 564, 241 S.E.2d 447 (1978) (kidnapping, sodomy—DeKalb County—allowed view of van).

²*Crowe v. State*, 265 Ga. 582, 458 S.E.2d 799 (1995) (jury view of murder scene was authorized as aid in determining which of defendant's conflicting statements was true, and court properly instructed jury that view was not evidence).

³*Sipple v. Fowler*, 151 Ga. App. 135, 259 S.E.2d 142 (1979) (action for damages—Baldwin County).

⁴*Bowman v. State*, 222 Ga. App. 893, 476 S.E.2d 608 (1996).

⁵*Young v. State*, 290 Ga. 441, 721 S.E.2d 839 (2012).

⁶*Ledford v. State*, 289 Ga. 70, 709 S.E.2d 239 (2011).

rgia's 2013 Evidence Code at O.C.G. A. § 24-4-403.⁷ A 2013 decision from the United States Court of Appeals for the Federal Circuit held that the decision to conduct a site visit is a matter that is subject to the discretion of the trial court, but importantly also noted that any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence.⁸ Similarly, a Louisiana appeals court opined that the decision regarding whether to grant or deny a motion to have a jury view the scene of a crime is within the sound discretion of the trial court.⁹

§ 22:2 Requests for view

The request for a view should be made outside the presence of the jury. However, it is not grounds for a mistrial if the court overrules the request in the presence of the jury before the opposing party has the chance to object.¹ What must a trial lawyer do if opposing counsel, in the presence of the jury, requests a view? The lawyer's proper response, if the court does not remove the jury immediately, is to ask the court to do so. Failure to take this action can be costly. If the opponent of the view objects to the view in the presence of the jury, this approach may be deemed a waiver of the following objection: The movant has improperly made a jury view request in the presence of the jury.²

What if a juror, as opposed to one of the attorneys, asks to go to the scene of an accident or crime? It is within the discretion of the judge to grant a view upon a request from the jury.³ The judge has discretion to order a jury view on the court's own motion.⁴

⁷See *U.S. v. Brewer*, 533 Fed. Appx. 234 (4th Cir. 2013).

⁸*Arkansas Game & Fish Com'n v. U.S.*, 736 F.3d 1364 (Fed. Cir. 2013).

⁹*State v. Duvall*, 747 So. 2d 793 (La. Ct. App. 1st Cir. 1999).

[Section 22:2]

¹*Leverett v. Awnings, Inc.*, 97 Ga. App. 811, 104 S.E.2d 686 (1958) (action on a note Fulton County). Also see *DeKalb County v. McFarland*, 231 Ga. 649, 203 S.E.2d 495 (1974) (injunction—DeKalb County).

²*Hill v. Dixie Pipeline Co.*, 120 Ga. App. 82, 169 S.E.2d 656 (1969) (condemnation—Tift County). Also see *State Highway Dept. v. Sinclair Refin-*

ing Co., 103 Ga. App. 18, 118 S.E.2d 293 (1961) (condemnation—Elbert County); *State Highway Dept. v. Peavy*, 77 Ga. App. 308, 48 S.E.2d 478 (1948) (condemnation—Stewart County); *Shahan v. American Tel. & Tel. Co.*, 72 Ga. App. 749, 35 S.E.2d 5 (1945) (attachment—Walker County).

³*Williams v. State*, 153 Ga. App. 421, 265 S.E.2d 341 (1980) (drug violation—Lowndes County). Also see *Harper v. State*, 182 Ga. App. 760, 357 S.E.2d 117 (1987) (voluntary manslaughter—Baldwin County).

⁴*Pritchett v. Anding*, 168 Ga. App. 658, 310 S.E.2d 267 (1983) (action for damages—Douglas County).

§ 22:3 Conduct of view

The main issue which has arisen in appeals involving the conduct of the view involves the presence of the defendant. In dealing with this question the Georgia Supreme Court has classified views in two categories. If the evidence is too large to bring into the courtroom or it is permanently affixed so that it cannot be moved, then the view of that evidence is an “evidentiary view.” On the other hand, if the view is to enable the jury to better understand the testimony and evidence already introduced, then it is a “scene view.” This delineation was applied by the Supreme Court in *Jordan v. State*,¹ where the court upheld a view of the Georgia State Prison in Reidsville without the presence of the defendant on the grounds that this was a scene view; it was, therefore, not deemed to be evidence, and since it was not evidence, the criminal defendant need not be present. The court stated that views of an automobile about which evidence had been admitted are considered evidentiary views. The court cited *Chance v. State*.² On the other hand, views of damage caused by a crime (e.g., bullet holes in the walls and ceilings) would be a situation involving both types of views (see footnote 23 of *Jordan* opinion). The distinction between a “scene view” and an “evidentiary view” was maintained in *Hensley v. Henry*.³

In summary, if the view is evidentiary the defendant should be present at the view.⁴ If the view is a scene view the defendant need not be present.⁵

The defendant can waive his or her right to presence at a jury view by failure to object to the trial court ruling not allowing the defendant to attend.⁶ However, the waiver must be a knowing and intelligent one.⁷

While civil cases have sometimes shifted on the issue of whether a judge needs to attend the view, in criminal cases it is

[Section 22:3]

¹*Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981) (murder, mutiny—Tattnall County).

²*Chance v. State*, 156 Ga. 428, 119 S.E. 303 (1923); *Durrett v. State*, 135 Ga. App. 749, 219 S.E.2d 9 (1975); *Crawford v. State*, 41 Ga. App. 486, 153 S.E. 380 (1930); and *Palmer v. State*, 155 Ga. App. 368, 271 S.E.2d 24 (1980) as examples.

³*Hensley v. Henry*, 246 Ga. App. 417, 541 S.E.2d 398 (2000).

⁴See *Palmer v. State*, 155 Ga. App. 368, 271 S.E.2d 24 (1980) (drug violation—Richmond County); *Martin v. State*, 160 Ga. App. 275, 287 S.E.2d 244 (1981) (possession of motor vehicle with altered serial number—Hall County).

⁵See *Pritchett v. Anding*, 168 Ga. App. 658, 310 S.E.2d 267 (1983) (action for damages—Douglas County).

⁶*Harwell v. England*, 234 Ga. 640, 217 S.E.2d 154 (1975) (habeas corpus—Habersham County).

⁷*Martin v. State*, 160 Ga. App. 275, 287 S.E.2d 244 (1981).

clear he or she should do so.⁸ It may be prudent for the judge to do so in civil cases as well, to avoid a claim of error.

§ 22:4 Nature of view

There appears to be at least two types of jury views. One type of jury view, the “evidentiary view,” is to permit the jury to view a piece of evidence which is relevant to the case, which evidence is so large or fixed that it cannot be brought into the courtroom. The second type of jury view, the “scene view,” is to permit the jury to view premises relevant to the case to enable the jury to better understand testimony and other evidence previously introduced in court (e.g., a jury view of the scene of the alleged crime). A view of the scene is not “evidence” in the case.¹

In Georgia most views by the jury will qualify as scene views (see § 22:3, *supra*). Generally, the jury views are not evidence in and of themselves. In any case, the verdict cannot rest solely upon a view of the premises.² To make sure the jury understands this, a cautionary instruction should be given either before the view, during the closing instructions or both.³

The jury view has also been used in Georgia as a remedy. In *Forney v. State*,⁴ eight jurors made an unauthorized view of the premises which was discovered after deliberations began. The judge then ordered the entire jury to be taken to the scene.

The text has noted that most views will be deemed not to have evidentiary status. A view is generally not evidence. In this regard, Georgia decisions are like most federal cases. Federal courts do not generally accord evidentiary status to jury views, but there are exceptions like *U.S. v. Gray*.⁵

Apparently the judge in California’s Laci Peterson murder case took a similar approach to a jury view as that employed by many

⁸*Esposito v. State*, 273 Ga. 183, 538 S.E.2d 55 (2000).

[Section 22:4]

¹*Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

²*Department of Transp. v. Driggers*, 150 Ga. App. 270, 257 S.E.2d 294 (1979) (condemnation—Candler County). Also see *Pritchett v. Anding*, 177 Ga. App. 34, 338 S.E.2d 503 (1985) (damages in house construction—Douglas County); *State Highway Dept. v. Andrus*, 212 Ga. 737, 95 S.E.2d 781 (1956) (condemnation).

³*Derrick v. Rabun County*, 107 Ga. App. 229, 129 S.E.2d 583 (1963)

(condemnation). Also see *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986) (overruled on other grounds by, *Manzano v. State*, 282 Ga. 557, 651 S.E.2d 661 (2007)) (murder—Muscogee County); *Atlanta Processing Co. v. Brown*, 227 Ga. 203, 179 S.E.2d 752 (1971) (public nuisance); *Harper v. State*, 182 Ga. App. 760, 357 S.E.2d 117 (1987).

⁴*Forney v. State*, 255 Ga. 316, 338 S.E.2d 252 (1986) (murder—Baldwin County).

⁵*U.S. v. Gray*, 199 F.3d 547, 549, 53 Fed. R. Evid. Serv. 28 (1st Cir. 1999) (jury view considered independent evidence).

Georgia judges. During the murder trial the jury left court for about 40 minutes to view the 14-foot aluminum boat from which prosecutors claimed Scott Peterson dumped his wife's body. The boat was placed in a parking garage in the court complex for the jury view. Before they left the courtroom, the judge instructed jurors not to talk to each other or anyone else, or to take notes. "All you are going to do is look," he said.

§ 22:5 Unauthorized view

What if the jury travels to an accident or crime scene on their own? As the *Forney* case¹ illustrates in the last section, it may not disturb a verdict of conviction. Sometimes jurors are instructed to refrain from this sort of conduct. However, the court's failure to instruct the jury not to conduct an investigation of their own and the foreman's subsequent travel to the highway which was the scene of the crime and obtaining mental impressions from his experience before receiving all the evidence and deliberating did not rise to a level of constitutional significance where the defendant made no request for such a charge before the jury dispersed for the night.²

An opposite result was reached in *Watkins v. State*.³ The Georgia Supreme Court extended confrontation rights to this "unauthorized view" case. The constitutional violation required reversal of the jury's verdict.⁴

In a related context, a 2014 decision applied O.C.G.A. § 24-6-606 to a case in which jurors used cellular telephones to look up definitions of terms during deliberations.⁵

Additional case law on jurors conducting an unauthorized view of the crime or accident scene appear in § 36:12, *infra*, including litigation wherein a juror or jurors took a drive through the neighborhood where the crime occurred.

[Section 22:5]

¹*Forney v. State*, 255 Ga. 316, 338 S.E.2d 252 (1986).

²*Lord v. State*, 194 Ga. App. 749, 392 S.E.2d 17 (1990).

³*Watkins v. State*, 237 Ga. 678, 229 S.E.2d 465 (1976).

⁴Civil cases, see Annotation: Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

⁵*Armstrong v. Gynecology & Obstetrics of DeKalb, P.C.*, 327 Ga. App. 737, 761 S.E.2d 133 (2014).

Chapter 23

Documentary Evidence

- § 23:1 General requirements relating to documentary evidence
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- § 23:24 Authentication of letter
- § 23:25 Business records from domestic or foreign sources
- § 23:26 Authentication of family bible and church records
- § 23:27 Authentication of annuity and mortality tables
- § 23:28 Authentication of ancient documents
- § 23:29 Electronic evidence

§ 23:1 General requirements relating to documentary evidence

Documentary evidence, like any other evidence, when offered, is subject to the same rules of evidence respecting relevancy,

competency or materiality as is oral testimony. Documentary evidence is subject to the best evidence requirement.¹ Rules for authentication of documents appear in the 2013 Code.² Referencing O.C.G.A. § 24-9-901, the Supreme Court of Georgia has observed that “The current Evidence Code now contains a comprehensive authentication statute that is nearly identical to a federal rule.”³

§ 23:2 Procedure in offering and admitting documents in evidence

The lawyer seeking to admit a document in evidence should identify the document, request the reporter to mark it for identification, authenticate it, show it to opposing counsel, offer it into evidence and hand it to the trial judge for inspection.¹

Do documents which are received in evidence go back to the jury room for the jurors to view during deliberations? In a contract dispute, for example, will the contract which is sued upon as well as relevant office records go back? The answer is yes, as a general rule.²

If a paper appears to have been altered materially, the party offering it in evidence shall explain the alteration, unless the paper comes from the custody of the opposite party, or it is proved by an opponent’s admission.³

§ 23:3 When authentication of documentary evidence is excused

While documentary evidence must be authenticated before it can be admitted into evidence, such proof of genuineness may be excused by some action by the adversary. Authentication is not required if the opposing party produces the document and claims a benefit under it, or it is proved by an opponent’s admission.¹

A document bearing a seal purporting to be that of the United States or of any state or political subdivision thereof and bearing a signature purporting to be an attestation shall not require

[Section 23:1]

¹See §§ 23:13 et seq.

²See O.C.G.A. §§ 24-9-901 through 24-9-904, and O.C.G.A. § 24-9-920.

³Baker v. State, 902 S.E.2d 645 (Ga. 2024).

[Section 23:2]

¹See the steps for introducing

exhibits generally, Carlson, Successful Techniques for Civil Trials § 3:2.

²See § 21:1, *supra*.

³O.C.G.A. § 24-10-1007.

[Section 23:3]

¹O.C.G.A. § 24-10-1007. See, generally, Law Co., Inc. v. Mohawk Const. and Supply Co., Inc., 577 F.3d 1164 (10th Cir. 2009).

extrinsic evidence as a condition precedent to admissibility.²

The same is true for municipal records and minutes.³ If a request for admission is made pursuant to O.C.G.A. § 9-11-36 and the party admits to the document's genuineness, the party's admission will dispense with the need for authentication. See also O.C.G.A. § 24-10-1007.

§ 23:4 Authentication of private writings

Private writings include all forms of written documents and instruments which are not recognized as public records: deeds, commercial paper, invoices, bills of sale, receipted bills, bank statements, leases, check stubs, contracts and mortgages, etc.

Writings on a photograph were properly authenticated by someone other than their author, where the words described the scene depicted and the witness had taken the photograph and, thus, knew the writings were accurate.¹

§ 23:5 Authentication of attested documents

O.C.G.A. § 24-9-903 provides the testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.¹

§ 23:6 Authentication of recorded documents

Every recorded deed is admissible in evidence without further proof, unless a party files an affidavit that to the best of his knowledge and belief the deed is a forgery.¹ This section of the Code applies only to properly attested deeds which would be entitled to be recorded.² This section is not applicable to a will admitted to probate.³

If the original of a recorded document is lost or not in the power of the party wishing to use it, the record may be read or the party may use a copy, duly certified by the recorder.⁴ The certificate of attestation of a public officer gives validity to copies of re-

²O.C.G.A. § 24-9-902(1).

³O.C.G.A. § 24-9-902(1).

[Section 23:4]

¹Welch v. State, 257 Ga. 197, 357 S.E.2d 70 (1987).

[Section 23:5]

¹See, generally, U.S. v. Deverso, 518 F.3d 1250, 75 Fed. R. Evid. Serv. 1128 (11th Cir. 2008).

[Section 23:6]

¹O.C.G.A. § 44-2-23.

²Livingston v. Hudson, 85 Ga. 835, 12 S.E. 17 (1890).

³Smith v. Stone, 127 Ga. 483, 56 S.E. 640 (1907).

⁴O.C.G.A. § 24-10-1004. See U.S. v. Lanzon, 639 F.3d 1293, 85 Fed. R. Evid. Serv. 338 (11th Cir. 2011).

cords held in a public office.⁵

§ 23:7 Other rules relating to use of private writings

Private memoranda, such as check stubs, diaries and notations of various kinds, are normally hearsay and inadmissible when offered by the maker thereof.¹

Private memoranda may be useful, although not admissible in evidence, to refresh a witness' memory.² Under proper circumstances, they may also be used and admitted in evidence as business records and books of account³ and as past recollection recorded.⁴

§ 23:8 Authentication of statutes

The existence of the states, their forms of government, national symbols, laws of nations, the General Assembly, the United States and the several states as published by authority, general custom of merchants, world admiralty and maritime courts, political constitution and history of our government and similar matters of public knowledge shall be judicially recognized without the introduction of proof.¹

§ 23:9 Authentication of acts and court decisions

O.C.G.A. § 24-9-922 states that the acts of the legislature of any other state, territory or possession of the United States shall be entitled to full faith and credit in every court in this state.

§ 23:10 Authentication of court papers and records

A court takes judicial notice of its own records.¹ The papers, entries and records of courts may be proved by a copy thereof, certified by the clerk.²

§ 23:11 Authentication of records of counties and municipalities

The papers, entries, records and ordinances or parts thereof of any municipality may be proven by a copy thereof, certified under the hand of the clerk or keeper thereof and the corporate seal, if

⁵O.C.G.A. § 24-9-920.

[Section 23:7]

¹See § 25:1, *infra*.

²See § 15:10, *supra*.

³See § 25:12, *infra*.

⁴See § 25:10, *infra*.

[Section 23:8]

¹See O.C.G.A. § 24-2-220.

[Section 23:10]

¹See § 19:4, *supra*.

²O.C.G.A. §§ 24-10-1005. See O.C.G.A. § 24-9-920.

any.¹ Authentication of county records is provided for in O.C.G.A. § 24-9-920. However, it has been held that the absence of the original instrument may be accounted for by merely showing that it is deposited in public archives and cannot be removed therefrom, thus opening the way for the admission of a copy of the original properly certified by the official custodian of the records.²

§ 23:12 Authentication of records of corporations

Cases on foundation for business records appear in § 25:12, *infra*. In Georgia's 2013 Evidence Code, the business records rule is lodged in O.C.G.A. § 24-8-803(6).

Generally, the secretary or the person acting as secretary is the proper corporate officer to keep the minutes and records of the corporation and the person by whom their authenticity and correctness should be proved.¹

Computerized records are frequently authenticated as business records when foundation is laid. Adequate foundation was laid for plaintiff's prescription drug records, in negligence action; pharmacist testified that records were generated by pharmacy in regular course of business, that records were true and accurate for time period and transactions depicted in records, and that records were maintained in legally authorized computer system that required accuracy of dispensing of medications.² A witness identifying business records does not have to have personal knowledge of the correctness of the records or have made the entry himself.

Modernly, business records may also be authenticated by means of a written declaration of a corporation's custodian of records, or other qualified witness.³

In a 2017 decision, the Georgia Court of Appeals listed certain commercial documents as self-authenticating under Georgia Rule of Evidence 902.⁴

§ 23:13 Best evidence rule

Best evidence provisions in the 2013 Code are contained in O.C.G.A. §§ 24-10-1001 through 24-10-1008. Because these rules

[Section 23:11]

¹O.C.G.A. § 24-9-902 and 24-9-920.

²*Anderson v. Blair*, 121 Ga. 120, 48 S.E. 951 (1904).

[Section 23:12]

¹*Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S.E. 265

(1911).

²*Imm v. Chaney*, 287 Ga. App. 606, 651 S.E.2d 855 (2007).

³See § 23:25, *infra*. See also *Hayes v. State*, 298 Ga. 98, 779 S.E.2d 609 (2015).

⁴*Tselios v. Sarsour*, 341 Ga. App. 471, 800 S.E.2d 636 (2017).

are patterned after their federal counterparts, Georgia courts utilize federal authority when interpreting them.¹

The best evidence which exists of the fact sought to be proven shall be produced, unless its absence shall be satisfactorily accounted for.² It has been stated that the best evidence rule is better referred to as the “original document rule”³ as this rule is restricted to writings and has nothing to do with other evidence.⁴

This rule applies to writings only when the contents of the writing are in issue.⁵

The best evidence rule can be waived by the opposing party.⁶

§ 23:14 Situations calling for “best evidence”

“The purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing.”¹ The best evidence rule in Georgia is comprehensively analyzed in Wilson and Carlson, the Best Evidence Rule Made Better: A Glimpse Into Georgia’s New Evidence Code, Ga. B.J. 12 (Aug. 2013). Topics include electronic evidence, absence of the original writing, duplicates, public records, summaries, and related subjects.

Where the contents of a document are in issue, the original must be produced.²

In a will contest based on undue influence and lack of testamentary capacity, the trial court was held to have properly excluded testimony regarding the existence of a prior will under the best evidence rule. O.C.G.A. § 24-10-1002 requires production of a

[Section 23:13]

¹See *Pierce v. State*, 302 Ga. 389, 807 S.E.2d 425 (2017). See also Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules §§ 24-10-1001, 24-10-1002, 24-10-1003, 24-10-1004, 24-10-1005, 24-10-1006, 24-10-1007 to 24-10-1008 (6th Ed. 2017).

²O.C.G.A. § 24-10-1002. See *U.S. v. Henry*, 307 Fed. Appx. 331 (11th Cir. 2009).

³*Pugh v. Jones*, 131 Ga. App. 600, 206 S.E.2d 650 (1974); *Merrill Lynch, Pierce, Fenner & Smith v. Zimmerman*, 248 Ga. 580, 285 S.E.2d 181 (1981).

⁴*Jones v. Sudduth*, 162 Ga. App. 602, 292 S.E.2d 448 (1982) (also not applicable when writing is collateral

evidence); *Rutledge v. State*, 152 Ga. App. 755, 264 S.E.2d 244 (1979).

⁵*Blue Cross of Georgia/Columbus, Inc. v. Whatley*, 180 Ga. App. 93, 348 S.E.2d 459 (1986); *Young v. State*, 226 Ga. 553, 176 S.E.2d 52 (1970). See also *Telecom Technical Services Inc. v. Rolm Co.*, 388 F.3d 820 (11th Cir. 2004).

⁶*Moret v. State*, 246 Ga. 5, 268 S.E.2d 635 (1980).

[Section 23:14]

¹*Pierce v. State*, 302 Ga. 389, 807 S.E.2d 425 (2017) (quoting *United States v. Trotter*, 837 F.3d 864, 101 Fed. R. Evid. Serv. 511 (8th Cir. 2016)).

²*Hicks v. Hicks*, 196 Ga. 541, 27 S.E.2d 7 (1943). See also *U.S. v. Henry*, 307 Fed. Appx. 331 (11th Cir. 2009).

document where the contents of the writing are at issue.³

The best evidence rule justified exclusion of testimony when such testimony referred specifically to a document, seeking to establish that manufacturer's on-site sewage management systems were listed in that document as systems which had been approved for statewide use by the Department of Human Resources.⁴

§ 23:15 Situations in which "best evidence" is not required

Georgia's best evidence rule is newly contained in O.C.G.A. §§ 24-10-1001 to 24-10-1008.

In some kinds of cases, the fact that there was a writing does not prevent other evidence from being admitted to prove the event or transaction. Nor is it contrary to the best evidence rule that oral testimony of a fact in issue may be primary evidence thereof, although there is written evidence of the same fact, where the essential fact to be proven is neither the existence nor the contents of the writing, but the existence of the independent fact itself, to which the writing is merely collateral or incidental.¹

For the federal best evidence rule, see Fed. R. Evid. 1002. Summaries of voluminous data in federal practice, see Rule 1006, Fed. R. Ev. In Georgia, where there are a large number of books of account, it is permissible to have an expert accountant examine them and give a summarized statement as to what they show, provided the books are made accessible to the court.² Modernly, the summary rule is contained in Georgia statutes at O.C.G.A. § 24-10-1006 and is analyzed in § 23:18, *infra*.

Under the best evidence rule, reconstruction of a defendant's tape recorded statement to police is admissible; unknown to the interviewers, the tape recorder had malfunctioned during a portion of the defendant's statement, and the officers who conducted the interview offered their reconstruction of unrecorded portions, testifying that they were substantially the same as the recorded parts.³

Although a certified copy of a conviction of a crime involving

³*Armstrong v. State*, 310 Ga. 598, 852 S.E.2d 824 (2020). See also *Bishop v. Kenny*, 266 Ga. 231, 466 S.E.2d 581 (1996).

⁴*Jackson County Bd. of Health v. Fugett Const., Inc.*, 270 Ga. 667, 514 S.E.2d 28 (1999).

[Section 23:15]

¹*Walls v. State*, 161 Ga. App. 235, 291 S.E.2d 15 (1982); *Jones v. Sudduth*,

162 Ga. App. 602, 292 S.E.2d 448 (1982); *Hall v. Simmons*, 50 Ga. App. 634, 179 S.E. 272 (1935) (parol evidence admissible to prove the fact of sending a letter and the contents of the letter as the letter was collateral).

²*Cabaniss v. State*, 8 Ga. App. 129, 68 S.E. 849 (1910). See § 23:18, *infra*.

³*McGee v. State*, 260 Ga. 178, 391 S.E.2d 400 (1990).

moral turpitude was formerly the requisite method of proof of the crime for use to impeach a witness, the best evidence rule was waivable, and if no objection was raised, the criminal conviction could be proven through the testimony of the witness.⁴ For an analysis of proving prior convictions through cross-examination of the witness versus proof by certified copy of the record of conviction after the 2005 statutory revision of Georgia impeachment law, see § 16:12, *supra*.

Secondary evidence of a check was permitted in *Murray v. Stone*.⁵

In light of Stone's testimony that her original cancelled checks and bank statements from 1986 were unavailable, it cannot be said that the trial court abused its discretion in allowing plaintiff to introduce two "carbonless copies" of checks showing payments to Audrey Murray and Sarah Stoner in 1986. See *Brookman v. Rennolds*, 148 Ga. 721, 722, 98 S.E. 543 (1919) (inaccessibility of primary evidence and diligence of party are matters within discretion of trial court).

§ 23:16 Use of secondary evidence

Secondary evidence may be used when primary evidence has been lost or destroyed and not as the result of bad faith on the part of the proponent.¹ This principle has been applied to the introduction of video recordings, segments of which were missing.² Testimony from a witness with knowledge can serve to authenticate evidence that has been lost under Fed. R. Evid. 1004.³ O.C.G.A. § 24-10-1004 follows the federal pattern. If the party offering the evidence has withheld or destroyed the original to keep it out of court, the secondary evidence is inadmissible.⁴ Until, however, the nonproduction of the primary evidence has been sufficiently accounted for, secondary evidence is not ordinarily

⁴Harrison v. State, 259 Ga. 486, 384 S.E.2d 643 (1989).

⁵Murray v. Stone, 283 Ga. 6, 655 S.E.2d 821 (2008).

[Section 23:16]

¹See *United States v. Ehmer*, 87 F.4th 1073, 123 Fed. R. Evid. Serv. 754, 117 Fed. R. Serv. 3d 811 (9th Cir. 2023); *Elliott v. Cartagena*, 84 F.4th 481, 122 Fed. R. Evid. Serv. 2048 (2d Cir. 2023).

Palmer v. Wilkins, 163 Ga. App. 104, 294 S.E.2d 355 (1982). See also *United States v. Lanzon*, 639 F.3d 1293, 85 Fed. R. Evid. Serv. 338 (11th

Cir. 2011); *Palmer v. Wilkins*, 163 Ga. App. 104, 294 S.E.2d 355 (1982) (former Georgia law).

²*U.S. v. Codrington*, 76 Fed. R. Evid. Serv. 400 (E.D. N.Y. 2008), *aff'd*, 2009 WL 1766001 (E.D. N.Y. 2009) (Callaghan).

³*United States v. Waters*, 697 Fed. Appx. 760, 103 Fed. R. Evid. Serv. 941 (4th Cir. 2017).

⁴*Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209 (9th Cir. 1998). See also *Renner v. Bank of Columbia*, 22 U.S. 581, 6 L. Ed. 166, 1824 WL 2691 (1824).

admissible.⁵ This is so, given that the best evidence rule requires proponents to produce originals or explain their absence.⁶

Where it is stipulated that the copy of the will is a true and correct copy of the original on file with the County Probate Court, the propounder of the copy is relieved from offering the original will into evidence.⁷

§ 23:17 Where primary evidence is in control of opponent

Secondary evidence may be used if the primary evidence is in the possession of the adverse party and he refuses to produce it,¹ but the adverse party must be given reasonable notice to produce the original. For the federal rule on the issue of an opposing party refusing to produce the original, see Fed. R.Ev. 1004. Georgia now follows this pattern in O.C.G.A. § 24-10-1004.

Generally speaking, the party seeking to prove the contents of a writing must establish a proper excuse for the non-production of the document and that the original did exist. However, under Fed. R. Evid. 1004, where that writing was last in the control of the opposing party, if the proponent of the writing can show that the opponent had control over the document, that the proponent demanded the document from the opponent, and that the opponent has failed to produce the document, secondary evidence may be used to illustrate the existence of the document.²

Copy of a contract containing alterations could not be admitted into evidence where the proponent had lost the original and had not exercised diligence in attempting to obtain a duplicate original from the other party.³

§ 23:18 Secondary evidence of bulky records

Secondary evidence may be used if the original records are so numerous and bulky that their production in court would be impractical. If the books and records themselves are accessible, an expert bookkeeper, accountant or auditor can summarize the

⁵See § 23:19, *infra*.

⁶*Grange Mutual Casualty Company v. Slaughter*, 958 F.3d 1050 (11th Cir. 2020); *Benjamin v. Thomas*, 766 Fed. Appx. 834 (11th Cir. 2019).

⁷*Lamb v. Bryan*, 236 Ga. 237, 223 S.E.2d 122 (1976) (former Georgia law).

[Section 23:17]

¹*Middlebrooks v. Cabaniss*, 193

Ga. 764, 20 S.E.2d 10 (1942), *aff'd*, 194 Ga. 26, 20 S.E.2d 574 (1942).

²*A.F.L. Falck, S.p.A. v. E.A. Karay Co., Inc.*, 722 F. Supp. 12 (S.D. N.Y. 1989).

³*Jeff Goolsby Homes Corp. v. Thomas*, 181 Ga. App. 308, 352 S.E.2d 172 (1986).

contents.¹

Secondary-evidence summaries have been characterized as a hybrid of summaries admitted under Federal Rule of Evidence 1006 and pedagogical-device summaries:

They are not prepared entirely in accordance with Rule 1006 but are more than mere pedagogical devices. In other words, secondary-evidence summaries are admitted in evidence not in lieu of the evidence they summarize but in addition thereto, because in the judgment of the trial court such summaries so accurately and reliably summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence.²

Summaries of voluminous data in federal practice are allowed under Rule 1006, Fed. R. Ev. Georgia law now follows this pattern in O.C.G.A. § 24-10-1006.³ In a 2015 decision involving a company characterized as “a hedge fund but which looked like a Ponzi scheme,” the Eleventh Circuit Court of Appeals approved of a bankruptcy court’s admission of the trustee’s summaries of business records under Federal Rule of Evidence 1006.⁴

The importance of establishing that documents are indeed voluminous to qualify under O.C.G.A. § 24-10-1006 was stressed in *D’Agnese v. Wells Fargo Bank, N.A.*⁵

Amendments to the Federal Rules of Evidence effective December 1, 2024, seek to clarify the distinction between summaries that are admissible as evidence and those that strictly serve as illustrative aids. Fed. R. Evid. 1006 has been “amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted.”⁶ New Fed. R. Evid. 107 was enacted “to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids.”⁷ Thus far, Georgia has not incorporated either of these federal amendments into Georgia’s Evidence Code.

§ 23:19 Proof of loss of primary evidence

The party wishing to admit secondary evidence must put on

[Section 23:18]

¹*Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980); *Jackson v. Meadows*, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

²*U.S. v. Kerley*, 784 F.3d 327 (6th Cir. 2015).

³See, generally, *U.S. v. Scott*, 427 Fed. Appx. 869, 871 (11th Cir. 2011).

⁴*In re Intern. Management Associates, LLC*, 781 F.3d 1262 (11th Cir. 2015).

⁵*D’Agnese v. Wells Fargo Bank, N.A.*, 335 Ga. App. 659, 782 S.E.2d 714 (2016).

⁶Fed. R. Evid. 1006, advisory committee notes to 2024 amendment.

⁷Fed. R. Evid. 107, advisory committee notes to 2024 amendment.

testimony or other facts to support his contention that the primary evidence cannot be found. An affidavit stating that the original is lost or mislaid and cannot be found after a diligent search is in substantial compliance with the proof required.¹ A mere statement that the document is lost is conclusory and is insufficient evidence of diligence.²

The decision as to “diligence” of the search is left to the sound discretion of the trial court.³

§ 23:20 Secondary evidence of public records

A well-defined exception to the requirement of an original document is seen in reference to public records. O.C.G.A. § 24-10-1005 states that certified copies made by public officers of records, documents, papers or other matters in their respective offices shall be primary evidence as to all records or other things required by law to remain in such office. The certification or attestation of said official shall be sufficient to admit the document into evidence.¹

§ 23:21 Copies as primary or secondary evidence

A duplicate copy signed by both parties at the same time as the original constitutes primary evidence.¹ A certified copy of a birth certificate is admissible as prima facie evidence of the facts contained therein and is given the same status as the original.² Also, a carbon original may be admissible as primary evidence.³ A certified copy of a public record is also primary evidence.⁴

§ 23:22 Nature of secondary evidence to be used

Where the primary evidence is not available and its introduction is excused, the Code provides that other evidence of a writing, recording, or photograph shall be admissible.¹

[Section 23:19]

¹Smith v. Atwood, 14 Ga. 402, 1854 WL 1484 (1854).

²Pendley v. Murphy, 112 Ga. App. 33, 143 S.E.2d 674 (1965); Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980).

³Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980); Pendley v. Murphy, 112 Ga. App. 33, 143 S.E.2d 674 (1965).

[Section 23:20]

¹O.C.G.A. § 24-10-1005. Also see

Harden v. Webster, Parmelee & Co., 29 Ga. 427, 1859 WL 2713 (1859).

[Section 23:21]

¹Raulerson v. Jones, 122 Ga. App. 440, 177 S.E.2d 181 (1970).

²Huskins v. State, 245 Ga. 541, 266 S.E.2d 163 (1980).

³Millwood v. State, 166 Ga. App. 292, 304 S.E.2d 103 (1983).

⁴See § 23:20, *supra*.

[Section 23:22]

¹O.C.G.A. § 24-10-1004.

In a child pornography and exploitation prosecution, the in-court identification of the defendant by a retired detective who had investigated him in a prior, similar case was properly admitted.² The witness was part of the presentation of evidence admitted pursuant to O.C.G.A. § 24-4-404(b), and the detective testified that he could recognize the defendant as the person in a webcam video used to entice a minor in earlier case. Because the webcam video had been inadvertently destroyed by law enforcement, the retired detective's testimony was allowed under O.C.G.A. § 24-10-1004.

§ 23:23 Establishing contents of document by oral evidence

Parol evidence provisions in the 2013 Georgia Evidence Code are located in O.C.G.A. §§ 24-3-1 through 24-3-10.

When parol testimony is permitted to establish the contents of a document, the witness must state substantially, but not necessarily exactly, the language of the writing, so that its effect is determined from the language of the writing rather than from the opinion of the witness.¹

Parol evidence is admissible to prove the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transactions between them.²

More on parol evidence, see § 29:27, *infra*.

For blocking admission of evidence with a parol evidence rule objection, see *VATACS Group, Inc. v. HomeSide Lending, Inc.*³ Where an ambiguity exists in the written terms of a contract, parol evidence may be used in ascertaining the parties' intent.⁴ Parol evidence is admissible to explain the meaning of technical terms employed in written contracts.⁵

²*Patch v. State*, 337 Ga. App. 233, 786 S.E.2d 882 (2016). 386, 623 S.E.2d 534 (2005), *aff'd*, 281 Ga. 50, 635 S.E.2d 758 (2006).

[Section 23:23]

¹*Roe v. Doe, ex. dem. Irwin*, 32 Ga. 39, 1861 WL 1311 (1861).

²*Namik v. Wachovia Bank of Georgia*, 279 Ga. 250, 612 S.E.2d 270 (2005).

³*VATACS Group, Inc. v. HomeSide Lending, Inc.*, 276 Ga. App.

⁴*Investment Properties Co., Inc. v. Watson*, 278 Ga. App. 81, 628 S.E.2d 155 (2006).

⁵*Rogers & Sons, Inc. v. Santee Risk Managers, LLC*, 279 Ga. App. 621, 631 S.E.2d 821 (2006).

§ 23:24 Authentication of letter

For a letter to be admitted it must be authenticated.¹ Evidence of authenticity can be supplied by proof of handwriting, or by circumstantial evidence. In the 2013 Evidence Code, rules relating to proof of handwriting and authentication of letters appear in O.C.G.A. § 24-9-901(b)(2), (3), and (4).

Lay opinion testimony from a murder victim's mother, who was familiar with her daughter's handwriting, was sufficient to authenticate the daughter's journal entries.² Decisions under former Georgia law noted that two key elements in letter authentication are the signature and the handwriting.³ Also, authentication of a letter may be established by showing possession by a codefendant who alone would have had knowledge of circumstances or its contents.⁴

Based upon consideration of its content and substance, the Georgia Court of Appeals held that the trial court properly admitted an incriminating letter purportedly authored by the defendant.⁵

Additions to Georgia statutes refer to signature authentication. O.C.G.A. §§ 10-12-3 and 10-12-4 give "electronic signatures" the same legally binding effect as handwritten signatures. Where the authenticity or the integrity of an electronic signature is challenged in court, the proponent of the evidence has the burden of proving that the electronic signature is authentic.⁶

Where a document contains statements only within the knowledge of a particular writer, the genuineness of the document may be proved by circumstantial evidence, and a handwriting expert is not invariably required.

Letters written by an agent are not admissible against the principal, unless they were sent in discharge of the agent's duties and within the scope of his powers.⁷

§ 23:25 Business records from domestic or foreign sources

Under O.C.G.A. § 24-9-902(11) a regularly kept record may be

[Section 23:24]

¹See generally § 23:4, *supra*. See also *U.S. v. Hanna*, 191 Fed. Appx. 921 (11th Cir. 2006).

²*Shellman v. State*, 318 Ga. 71, 897 S.E.2d 355 (2024).

³See generally, *Smith v. Hatgisios*, 233 Ga. 354, 211 S.E.2d 306 (1974); *Cotton States Mut. Ins. Co. v. Clark*, 114 Ga. App. 439, 151 S.E.2d

780 (1966) (execution may be shown by circumstantial evidence).

⁴*State v. Smith*, 246 Ga. 129, 269 S.E.2d 21 (1980).

⁵*Amey v. State*, 337 Ga. App. 480, 788 S.E.2d 80 (2016).

⁶O.C.G.A. § 10-12-4(b).

⁷*Frick Co. v. Smith*, 70 Ga. App. 118, 27 S.E.2d 795 (1943).

authenticated by a written declaration of its custodian certifying the record was made at or near the time of the matters referenced therein, was kept in the regular course of business, and was routinely recorded. In a civil proceeding, O.C.G.A. § 24-9-902(12) provides a similar method for shorthanding the trial proof of records of foreign companies by means of a written declaration of the custodian or other qualified person.

§ 23:26 Authentication of family bible and church records

A family bible and church records may be admitted as exceptions to the hearsay rule, see § 25:25, *infra*, provided they are properly authenticated.

Authenticity of a family bible may be established, either by proof that the entry was made by one who had knowledge of the fact or by proof that the record was accepted by the family as true.¹ In addition, if there is no proof of authorship or handwriting, there must be proof that it was produced from proper custody, presumably by a member of the family who might be expected to have it in his custody.²

Church records must be authenticated to be admissible, and if the member of the clergy who made the entry is available, the record must be authenticated by his or her testimony.³

§ 23:27 Authentication of annuity and mortality tables

By statute, several mortality tables are admissible as evidence of a person's life expectancy.¹

The trial judge, in the exercise of the court's discretion, may refuse to admit mortality tables.²

Life expectancy tables have also been held to be competent evidence as an aid to the jury, but are not binding on the jury.³

Life expectancy tables appear in Carlson, *Successful Techniques for Civil Trials* § 3:21.

§ 23:28 Authentication of ancient documents

Before any document may be admitted under the ancient document rule, see § 25:26, *infra*, as an exception to the hearsay rule,

[Section 23:26]

¹Am. Jur. 2d, Evidence § 874.

²Am. Jur. 2d, Evidence § 874.

³Am. Jur. 2d, Evidence § 875.

[Section 23:27]

¹See O.C.G.A. §§ 24-14-44 and

24-14-45. Also see O.C.G.A. § 51-12-13 for provisions covering the calculation of future earnings.

²*Wells v. Roberts*, 225 Ga. App. 112, 483 S.E.2d 339 (1997).

³*Pollard v. Gorman*, 52 Ga. App. 127, 182 S.E. 678 (1935).

it must be properly authenticated. To establish authenticity of an ancient document, it must be established that the document purports to be more than 20 years old.¹ By some early Georgia decisions, a copy of an ancient document is not admissible as an ancient document; the paper itself must be introduced.²

Documents and writings of all kinds purporting to be 20 or more years old if they are relevant to the inquiry and produced from proper custody and are on their face free from suspicion, are said to prove themselves.³

§ 23:29 Electronic evidence

Georgia appellate courts have recognized that electronic evidence is subject to the same authentication rules as other categories of proof.¹ In a 2019 decision concerning the introduction of text messages, Chief Judge Dillard of the Court of Appeals, articulated the requirements for the admission of electronic evidence under O.C.G.A. § 24-9-901:

Recently, the Supreme Court of Georgia reiterated that “[d]ocuments from electronic sources such as the printouts from a website like Facebook *are subject to the same rules of authentication as other more traditional documentary evidence* and may be authenticated through circumstantial evidence.” Indeed, as we have acknowledged, “there are no special rules under Georgia law governing the authentication of electronic documents or communications.” Finally, once the party seeking to authenticate a document presents a prima facie case that the proffered evidence is what it purports to be, “the evidence is admitted and the ultimate question of authenticity is decided by the [jury].”²

Georgia courts apply the foregoing principles to the introduction of e-mails.³ Similarly, where an investigator testified that he was familiar with the images and the people contained in them, photographs from a criminal defendant’s social medial account

[Section 23:28]

¹See O.C.G.A. § 24-8-803(6).

²Jones v. Morgan, 13 Ga. 515, 1853 WL 1633 (1853); Bryan v. Walton, 14 Ga. 185, 1853 WL 1662 (1853); Bentley v. McCall, 119 Ga. 530, 46 S.E. 645 (1904).

³O.C.G.A. § 24-9-901(b)(8)(C). See, generally, Fulmer v. Connors, 665 F. Supp. 1472, 24 Fed. R. Evid. Serv. 423 (N.D. Ala. 1987).

[Section 23:29]

¹See, e.g., Harris v. State, 313 Ga. 872, 874 S.E.2d 73 (2022).

²Johnson v. State, 348 Ga. App. 667, 824 S.E.2d 561 (2019) (emphasis original).

³Woodruff v. State, 356 Ga. App. 659, 848 S.E.2d 670 (2020); Swearngin v. Rowell, 356 Ga. App. 67, 846 S.E.2d 263 (2020).

were properly admitted.⁴

According to a 2022 decision from Presiding Justice Peterson of the Supreme Court of Georgia, authenticating electronic communications generally requires a twofold demonstration: “[T]hat a particular digital device generated a particular communication, and that a particular person was using the device at the time.”⁵ Similarly, in an appeal of juvenile court case, the Georgia Court of Appeals remarked: “[C]ourts consider a host of factors in determining whether there is evidence sufficient to authenticate text messages under OCGA § 24-9-901(b), such as the device in question being found on the defendant and the content of the relevant text messages.”⁶

E-mails attached to nursing home owner’s affidavit in support of home’s counterclaim, in breach of contract action brought against it by corporation providing therapists, were not admissible without proof of authenticity, although corporation was authorized to use e-mails in its claims against homes without providing further proof of authenticity; homes had produced the e-mails and, by replying on them to support their counterclaims and defenses, they were deemed to have admitted their correctness and authenticity.⁷

Authenticating Facebook evidence was the subject of a 2013 Georgia Court of Appeals decision. On its way to admitting printouts from the Facebook page of “L.P.,” a juvenile charged with gang-related offenses, the Court of Appeals noted that documents from electronic sources are subject to the same rules of authentication as other documents and may be authenticated through circumstantial evidence. The Court of Appeal’s analysis is instructive:

Here, prior to the entry of the Facebook profile page into evidence, the detective testified that he was familiar with L. P.’s street name, “Alley for Real.” The detective accessed Facebook on his computer, conducted a search for “Alley for Real,” and printed the documents from his printer while observing the Facebook profile page for “Alley Forreal.” The detective testified that the printouts fairly and accurately depicted what he observed on his computer screen. The detective, who had previously interviewed L. P., identified L. P. in pictures posted on the Facebook page, and testified that the biographical information listed on Facebook, such as day and month of birth, matched L. P.’s.

Based on this evidence, the trial court was authorized to conclude

⁴Henderson v. State, 317 Ga. 66, 426, 868 S.E.2d 812 (2022).
891 S.E.2d 884 (2023).

⁵Harris v. State, 313 Ga. 872, 874 S.E.2d 73 (2022).
⁷Eastview Healthcare, LLC v. Synertx, Inc., 296 Ga. App. 393, 674 S.E.2d 641 (2009).

⁶Interest of A. A., 362 Ga. App.

that the State sufficiently authenticated the printouts as accurately reflecting the content of the Facebook page, and that the material was posted by L. P.⁸

Printed transcript of instant-message conversation that took place between defendant and victim was properly authenticated, and thus, was admissible in child molestation prosecution. At trial, the victim testified that she was an actual participant in the instant-message session at issue, she remembered the conversation, and after reading a transcript of the exchange, confirmed that the words printed on the paper were in fact the words used in the conversation. She further testified that the transcript that was tendered was actually printed from a computer in her home that she had used during the conversation, and that the printing of the transcript was done in her presence.⁹ Electronic computer messages are held to the same standards of authentication as other similar evidence. This evidence was sufficient to establish that the defendant was the sender of the instant-message to the victim.

Unauthenticated computer print-out summary on group life insurance policy, which contained a comment regarding legal hold being placed on the account, and unauthenticated e-mail correspondence from insurer's representative to a representative of insured's employer acknowledging that insurer's legal department had reviewed the matter, were inadmissible hearsay.¹⁰

The Georgia Electronic Privacy Act makes it unlawful for "Any person intentionally and secretly to intercept by the use of any device, instrument, or apparatus the contents of a message sent by telephone, telegraph, letter, or by any other means of private communications."¹¹

The 2013 Georgia best evidence rule has been expanded to embrace electronically recorded information. This development noted in Wilson and Carlson, *The Best Evidence Rule Made Better*, Ga. B. J. 12, 14 (Aug. 2013) (footnotes omitted):

In keeping with the legislature's passage of the 2009 Uniform Electronic Transactions Act electronic records are given the equivalence of writings for evidentiary purposes under the improved best evidence rule. Thus, Facebook postings and Twitter tweets, not to mention emails, now fall under the scope of the best evidence rule.

What about the application of the rules to computer-based business records? Suppose that electronically prepared and stored documents that are generated in Detroit are needed for a trial in

⁸In re L.P., 324 Ga. App. 78, 749 S.E.2d 389 (2013).

⁹Hammontree v. State, 283 Ga. App. 736, 642 S.E.2d 412 (2007).

¹⁰Greater Georgia Life Ins. Co., Inc. v. Eason, 292 Ga. App. 682, 665 S.E.2d 725 (2008).

¹¹O.C.G.A. § 16-11-62(4).

Atlanta. At first blush, the Atlanta attorney may be uncertain about whether the best evidence rule applies to the material. It does. “The admissibility of computer-based records ‘to prove the content of a writing’ is subject to the best evidence rule set out in [Federal] Rule 1002.” One advantage of Georgia adopting a new evidence code based on the federal rules is that Georgia courts can take advantage of 38 years of federal case law decided under the federal rules of evidence. Federal decisions have made clear that while computerized records of all types are governed by the best evidence rule, duplicate records are admissible upon the appropriate foundation and/or showing that such records should be admitted.

A number of cases have addressed electronic evidence.¹²

In an impersonating an officer case, the defendant sought access to a law enforcement database. The trial court did not err in admitting into evidence a computer-generated record of defendant’s application for that access where there was evidence that that the company had received and maintained the application in the regular course of business, made the record shortly after receipt of the application, the application was formatted according to standard procedures of the company, and defendant had actual notice before trial that the state intended to authenticate via a self-authentication declaration.¹³

¹²See *Hammontree v. State*, 283 Ga. App. 736, 642 S.E.2d 412 (2007) (instant message); *Simon v. State*, 279 Ga. App. 844, 632 S.E.2d 723 (2006) (witness communicated with the defendant at his known e-mail address); *People v. Clevestine*, 68 A.D.3d 1448, 1450-51, 891 N.Y.S.2d 511 (3d Dep’t 2009) (messages from MySpace); *Massimo v. State*, 144 S.W.3d 210 (Tex. App. Fort Worth 2004) (e-mails admissible); *Kearley v. State*, 843 So. 2d 66 (Miss. Ct. App. 2002) (e-mails prop-

erly authenticated); *U.S. v. Siddiqui*, 235 F.3d 1318, 55 Fed. R. Evid. Serv. 301 (11th Cir. 2000) (e-mails properly authenticated); *Twiggs v. State*, 315 Ga. App. 191, 726 S.E.2d 680 (2012) (e-mail printout); *Hollie v. State*, 298 Ga. App. 1, 679 S.E.2d 47 (2009), judgment aff’d, 287 Ga. 389, 696 S.E.2d 642 (2010) (questioning admissibility of an e-mail).

¹³*Chase v. State*, 337 Ga. App. 449, 787 S.E.2d 802 (2016).

Chapter 24

Opinion Evidence

- § 24:1 Requirement that witness testify as to facts
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- § 24:36 Contents of the hypothetical question
- § 24:37 Hypothetical question asked of physician or surgeon
- § 24:38 Answer to hypothetical question

§ 24:39 Cross-examination of expert witnesses

§ 24:1 Requirement that witness testify as to facts

Unless an opinion is permitted under the rules discussed hereafter, the lay witness must confine his answer to a statement of facts, rather than to an inference or to a conclusion.¹

Generally speaking, the opinion or conclusion of a witness upon a fact or facts in issue is incompetent and inadmissible, although there are exceptions to this rule as well settled as is the rule itself, where the issues involve facts and matters calling for special skill and study or where the facts in controversy are incapable of being detailed and described so as to give the jury an intelligible understanding concerning them.

A trial court was required to give curative instructions and admonish an arresting officer, whose statement on cross-examination was that defendant told him what happened “[a]s calmly as could be expected after you just murdered somebody.”²

§ 24:2 Facts distinguished from opinions

Some testimony constitutes a blend of facts and opinions. Actually, the statement of even the most obvious “fact” is a statement of mental processes and perceptions and is therefore, in a sense, an opinion. Some such statements are self-evident when subjected to objective tests, while others are entirely the result of the thought processes of the witness.

§ 24:3 Admissibility of opinions; generally

For various reasons of policy, the rules of evidence permit lay witnesses to state opinions as to certain matters under certain circumstances. Opinions are admissible on a wide variety of subjects.¹ In some cases, the witness need have no special skill, training or experience. In other cases of a more complex nature, the witness must have some special skill, training and experience.

If the matter is one upon which the jury is competent to determine the fact issue, the opinion of an expert is no special aid to the jury in determining the truth and is not admissible.² If the

[Section 24:1]

¹McLendon v. State, 93 Ga. App. 306, 91 S.E.2d 390 (1956).

²Allen v. State, 259 Ga. 303, 379 S.E.2d 513 (1989).

Company, LLC, 317 Ga. 22, 891 S.E.2d 776 (2023) (listing various examples).

²Metropolitan Life Ins. Co. v. Saul, 189 Ga. 1, 5 S.E.2d 214 (1939).

[Section 24:3]

¹Miller v. Golden Peanut

subject is one of common knowledge, as to which the facts can be intelligibly described to the jury and understood by them and they can form a reasonable opinion for themselves, the opinion of an expert will be rejected.³

An expert's testimony is not admissible on issues to be decided by the jury where the expert's conclusion is one that the jurors would be able to draw for themselves.⁴

A 2016 federal case emphasizes the point. A federal district court barred a defense expert on the subject of untrustworthiness of co-conspirator testimony. The expert had opinions on the impact on the jury of accomplice testimony. On appeal, the Court of Appeals ruled that determining credibility is a task for the jury and affirmed the conviction.⁵

A trial court did not abuse its discretion by holding that a neuropsychologist, though qualified to state from which mental dysfunctions the plaintiffs might be suffering, was not competent to testify as to causation to a reasonable degree of medical certainty.⁶

A doctor's medical causation opinion was rejected in *Wilson v. Flack*.⁷ The Eleventh Circuit identified a need for an expert to have expertise specific to the topic at issue to satisfy Rule 702. The court cited with approval the statement that a trial court abuses its discretion by failing to act as a gatekeeper to ensure the reliability of expert testimony.

When a person's conclusions do not depend on scientific knowledge, his otherwise relevant opinions may be admissible as lay opinion testimony. In *Anglin v. State*,⁸ the Georgia Supreme Court approved a GBI agent's conclusion that a grave site was probably dug by a flat shovel as opposed to a rounded one. A flat shovel was found hidden under the defendant's house in this murder case.

In all cases where the cause of disease, injury, or death is not one of common observation or knowledge, physicians and surgeons—medical experts—who, because of their peculiar knowledge and skill, are competent to reach an intelligent conclusion upon the question, may give opinion testimony, derived from their own observation of the person whose condition is in ques-

³Cone v. Davis, 66 Ga. App. 229, 17 S.E.2d 849 (1941). (1992).

⁴Coleman v. State, 257 Ga. 313, 357 S.E.2d 566 (1987).

⁵U.S. v. Benedict, 815 F.3d 377 (8th Cir. 2016).

⁶Chandler Exterminators, Inc. v. Morris, 262 Ga. 257, 416 S.E.2d 277

⁷*Wilson v. Flack*, 2022 WL 4477025.

⁸*Anglin v. State*, 312 Ga. 503, 863 S.E.2d 148 (2021).

tion or from scientific deductions from given facts, as to the probable cause of the disease or injury in question or as to the probable or possible cause of death, provided there are sufficient facts in evidence upon which to base the opinion.⁹ It has also been found necessary to admit the opinions or conclusions of nonexpert witnesses where the facts could not otherwise be adequately presented or described to the jury.¹⁰

When the subject matter relates to subtle or complex facts perceived by the senses, to a series of instances passing under the observation of witnesses, or to a great variety of circumstances and a combination of appearances which are too indefinite and general in their nature to be susceptible of direct proof or which, by reason of the limitations of language, cannot be adequately described and presented to the jury with the same force and clearness as they appeared to the witness, he may state his impressions and opinions based upon the facts and circumstances observed by him or the effect which they produced upon his mind.¹¹

Generally, courts admit opinion testimony as to the disposition, habits, or behavior of animals, and a witness, although he is neither a professional person nor one specially qualified by dealing with animals and their diseases, may testify as to facts, observations, and impressions, separately not adequately presentable, bearing upon the disposition or propensities of an animal, if his observation is found to be sufficient, and to express a summarization of what he saw in the form of a conclusion or opinion. Evidence that a horse which was frightened by a railroad train was nervous and high strung is admissible under the rule admitting opinions from necessity.¹²

Opinions by experts were affected by 2005 legislation in Georgia which created new scientific evidence standards in civil cases. Changes came in Georgia's 2005 Tort Reform Act. A key determinant in product cases often relates to the test for novel scientific proof in such cases. For many years, Georgia practice was controlled in both civil and criminal cases by the *Harper* test. After 2005, civil case practitioners were directed to the *Daubert* standard. See O.C.G.A. § 24-7-702. So were judges. As a result, *Harper* was replaced in product liability, personal injury, medical malpractice and other civil actions.

In a major 2008 case, plaintiff sued Home Depot for injuries

⁹Kelly v. Adams, 84 Ga. App. 450, 51 S.E.2d 395 (1949).
66 S.E.2d 144 (1951); U.S. Cas. Co. v.
Richardson, 75 Ga. App. 496, 43 S.E.2d
793 (1947).

¹¹Shiver v. Tift, 143 Ga. 791, 85
S.E. 1031 (1915).

¹²Shiver v. Tift, 143 Ga. 791, 85
S.E. 1031 (1915).

received from a floor covering product. The trial judge rejected two experts for plaintiff. Neither expert's testimony was shown to be the product of reliable principles and methods under *Daubert*, and thus, the Georgia Supreme Court held that expert testimony was appropriately excluded under the Tort Reform Act. In this products liability action, the trial court's rationale for excluding testimony of the first expert was based on the lack of scientific support of her methods of determining causation; and trial court based its exclusion of the second expert's testimony on unreliable methods he used in reaching his opinion.¹³ What about the fact that criminal cases followed *Harper* and civil cases follow *Daubert*? The fact that the Tort Reform Act imposed more stringent requirements for admission of expert testimony in tort actions than applicable statutes did in criminal and civil condemnation cases did not serve to violate this tort litigant's equal protection rights.

Harper provided guidance in criminal cases for many decades. Early in its reign it supported the introduction of scientific analysis of fibers in the Atlanta child murders.¹⁴ It continued to control admission or exclusion of a wide range of evidence.

The *Harper* standard operated under former O.C.G.A. § 24-7-707. In 2022 that Code section was repealed, and **expert testimony in criminal cases after July 1, 2022, is controlled by O.C.G.A. § 24-7-702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.***¹⁵ **However, since convictions adjudicated prior to the repeal date will continue to be reviewed under *Harper*, material construing the *Harper* standard is reported hereafter.**

In *Riley v. State*¹⁶ it was held that trial court's refusal to allow defense psychologist to testify about false confessions arising from police interrogation techniques was not abuse of discretion, in trial for malice murder and arson; knowledge that a false confession could be obtained by police was implicit in determination of whether confession was voluntary, false confession theory had not reached verifiable stage of scientific certainty, psychologist's research involved reading five published articles and he had no experience or expertise on theory, and theory relied almost exclusively on anecdotal evidence contained in articles involving suspects who were juveniles, mentally retarded, or who had been subjected to interrogation for many hours, which was not case

¹³*Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008).

¹⁴*Williams v. State*, 251 Ga. 749, 312 S.E.2d 40 (1983).

¹⁵*Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 37 Fed. R. Evid. Serv. 1 (1993).

¹⁶*Riley v. State*, 278 Ga. 677, 604 S.E.2d 488 (2004).

here.

Rule 704 bars an expert from stating whether an accused person had the mental state constituting an element of the crime charged in a case. However, that apparently does not prevent expert opinions about the general condition of the accused. In a murder prosecution, an expert's view about whether the actions of a defendant were consistent with a particular condition did not violate the rules. The court held that the testimony was not impermissible under O.C.G.A. § 24-7-704(b).¹⁷

Similarly, the United States Supreme Court held that an expert law enforcement officer's testimony to the effect that most drug couriers—as opposed to the defendant specifically—are generally aware that they are transporting illegal narcotics was not barred by Fed. R. Evid. 704(b).¹⁸

Battered spouses who kill or injure their partner sometimes raise the defense that they acted in self-defense. Expert testimony supporting a claim of battered person's syndrome has been accepted in Georgia. However, it is apparently essential for the defense attorney to couple the profile proof with a self-defense claim in order to proceed with the expert's opinion. Testimony from an expert was rejected in *Virger v. State*,¹⁹ because the accused did not claim self-defense.

The attributes of the victim of domestic violence were analyzed in *Vass v. State*.²⁰ A mental health clinician had academic training and worked with victims of extreme abuse. She explained that relationships sometimes include a cycle of violence followed by a honeymoon phase. The expert related that victims might not report abuse and might give contradictory statements about what happens.

An extension of lay opinion rules occurred in a 2020 case. In a child molestation case involving a victim of Latino descent, a school counselor with knowledge of Latino culture described how Latino culture norms made it difficult for victims to expose child sexual abuse. The court ruled: “[T]he trial court properly exercised its discretion in admitting the testimony as lay opinion evidence.” See O.C.G.A. § 24-7-701.²¹

The admission of expert testimony regarding eyewitness identification is within the discretion of the court.²² More on eyewitness identification, see § 29:28, *infra*.

¹⁷*McCalop v. State*, 316 Ga. 363, 887 S.E.2d 292 (2023).

¹⁸*Diaz v. United States*, 144 S. Ct. 1727, 219 L. Ed. 2d 240 (2024).

¹⁹*Virger v. State*, 305 Ga. 281, 824 S.E.2d 346 (2019).

²⁰*Vass v. State*, 347 Ga. App. 535, 820 S.E.2d 181 (2018).

²¹*Martinez-Arias v. State*, 356 Ga. App. 423, 846 S.E.2d 448 (2020).

²²*Jones v. State*, 273 Ga. 213, 539 S.E.2d 143 (2000).

Crime scene technician's testimony that she did not initially find a knife blade due to the large amount of congealed blood at the scene that likely caused the knife blade to stick to the victim's jeans was admissible; testimony was based on her first-hand observation of crime scene, investigation that she conducted there, and her training as crime scene investigator.²³

§ 24:4 Opinions concerning ultimate issues

In the 2013 Evidence Code, there is a provision that opinion testimony is not barred because it embraces an ultimate issue in the case.¹ This approach is consistent with former Georgia law which held that if an expert opinion would help the jury, an opinion may be given although it refers to the ultimate fact which the jury is to decide.² Although the courts may allow a witness, in a proper case, to give his opinion on an ultimate fact involved in the case, it may be laid down as a general rule that a witness is not permitted to give his opinion on a question of domestic law or upon matters which involve questions of law.³

A number of cases involve prosecution experts telling the jury "this homicide case was no accident." In one case, two defendants were convicted for killing their infant daughter. The State's expert testified that injuries to the child were non-accidental and were caused by blunt force trauma.⁴ On appeal, however, the decision below was vacated because of a defect in the trial court's order denying a motion for new trial. That order needed to specify the manner in which the court found the defense experts to be deficient under the *Harper* standard.

Now that former O.C.G.A. § 24-7-707 has been repealed, the *Harper* standard will probably fall into disuse. For a time, however, it will be called upon as appeals under Rule 707 reach the appellate courts in cases tried prior to July 1, 2022.

Another case also involved an infant's death. The medical examiner's opinion that the homicide resulted from blunt force trauma consistent with being kicked or punched was allowed.⁵

Shooting cases have also invoked this form of expert opinion. In *Eller v. State*,⁶ the medical examiner's testimony that the victim's injuries were inconsistent with an accidental shooting

²³*Rojas v. State*, 280 Ga. 139, 625 S.E.2d 750 (2006). *Saul*, 189 Ga. 1, 5 S.E.2d 214 (1939).

[Section 24:4]

¹See O.C.G.A. § 24-7-704.

²*Metropolitan Life Ins. Co. v. Saul*, 189 Ga. 1, 5 S.E.2d 214 (1939).

³*Metropolitan Life Ins. Co. v.*

⁴*Debelbot v. State*, 305 Ga. 534, 826 S.E.2d 129 (2019).

⁵*Wade v. State*, 304 Ga. 5, 815 S.E.2d 875 (2018).

⁶*Eller v. State*, 303 Ga. 373, 811 S.E.2d 299 (2018).

was permitted.

While the objection “ultimate issue” may be on the wane, objection to testimony because it invades the province of the jury remains an active concept. Typical of questions that have been held to be improper are those which require the witness to judge the probative effect of a fact. In a manslaughter prosecution, the trial court properly refused to allow a defense witness to state his opinion as to whether or not defendant had acted in self defense, since that was the ultimate issue to be decided by the jury.⁷

Invading the province of the jury was a concern in *Lopez v. State*.⁸ In general, expert opinion that a defendant does not have the psychological characteristics of a person who is predisposed to molest minors is a topic which invades the province of the jury as to the ultimate issue. There are questions which a jury must resolve without the assistance of expert opinion. The expert’s testimony was excluded in the *Lopez* case.

In *Johnson v. Liebel*,⁹ the court cautioned against expert ultimate opinions where guidance of this kind is not needed by the jury. A party may not bolster his case as to the ultimate issue with expert testimony when the jury could reach the same conclusion independently. In *Liebel*, the testimony at trial of an expert that the defendant lawyer violated standards of care and this negligence proximately caused damage to the client’s case was deemed appropriate. Following a jury trial the client was awarded \$2 million. In the Supreme Court of Georgia, the *Liebel* decision was reversed on grounds that the expert testimony was not admissible.¹⁰

Decisions are legion barring expert conclusions constituting a mixture of law and fact. To allow such opinions invokes the fact-finding province of the jury. While reviewing these rules, the court found they were not violated in *Carr v. State*.¹¹ The defendant took or received over three million dollars from a 93-year-old widow. He was convicted of RICO violations. The state’s forensic accounting and fraud expert testified that an analysis of the financial records revealed the defendant converted the widow’s funds to his personal use. The conviction was affirmed by the Court of Appeals.

A federal court of appeals held that an expert on illegal drug activity could testify that the amount of drugs found with the defendant were consistent with drug distribution for street use.

⁷*Spradlin v. State*, 160 Ga. App. 32, 703 S.E.2d 702 (2010).
132, 286 S.E.2d 310 (1981).

⁸*Lopez v. State*, 326 Ga. App. 728 S.E.2d 554 (2012).

⁹*Johnson v. Liebel*, 307 Ga. App. 829 S.E.2d 641 (2019).

¹⁰*Leibel v. Johnson*, 291 Ga. 180, 770 S.E.2d 436 (2014).

¹¹*Carr v. State*, 350 Ga. App. 461, 829 S.E.2d 641 (2019).

What are barred are responses that suggest some special knowledge of the defendant's mental processes or that the defendant acted with the necessary mens rea.¹²

Not even an expert can cast his testimony in the form of a legal conclusion.¹³ In a 2011 case, the trial court erred in overruling a defendant's objection to a state officer's testimony characterizing jail in which the defendant was incarcerated as a "penal institution" in prosecution for riot in a penal institution; testimony impermissibly sought to have officer invade the province of the jury in determining whether jail was a penal institution.¹⁴

Another case reached a similar result. The decision in *Clayton County v. Segrest*¹⁵ discusses when ultimate opinions are proper and when they are unacceptable. The terms "reckless disregard" and "proximate cause" are legal terms and are commonly held unacceptable for expert testimony. To the extent the expert opinions incorporated these phrases in this case, they were incompetent legal conclusions.

The *Segrest* case was followed in a 2022 decision which made clear that an expert may not testify to his opinions regarding ultimate legal conclusions, but may testify to an ultimate issue of fact.¹⁶

Opinions of fact are to be distinguished from legal opinions in applying the ultimate issue rule. Where the issue is an ultimate *factual* issue, liberality will be allowed for an expert's opinion cast in factually ultimate form. How "ultimate" can an expert's opinion be? Very much so, says *Collum v. State*.¹⁷ Testimony of a forensic pathology expert witness that child victim's then healing broken rib was the result of an adult strength force was admissible even if it went to the ultimate issue, in a murder prosecution, as the force necessary to break a young child's rib was an issue beyond the ken of the average layman.

In another case, the defendant was not prejudiced by a medical examiner's testimony that the death at issue qualified as a

¹²United States v. Draine, 26 F.4th 1178, 117 Fed. R. Evid. Serv. 1663 (10th Cir. 2022).

¹³DeVooght v. Hobbs, 265 Ga. App. 329, 593 S.E.2d 868, 124 A.L.R.5th 819 (2004) (expert's testimony that any negligent act by nurse was imputable to doctor, in medical malpractice case, was legal conclusion and properly excluded under defendant's motion in limine). See Rayburn v. Georgia Power Co., 284 Ga. App. 131, 643 S.E.2d 385 (2007) (conclusions that job was inherently dangerous and also that Georgia

Power "retained control" over another company's employees).

¹⁴Paul v. State, 308 Ga. App. 275, 707 S.E.2d 171 (2011).

¹⁵Clayton County v. Segrest, 333 Ga. App. 85, 775 S.E.2d 579 (2015).

¹⁶Fireman's Fund Insurance Company v. Holder Construction Group, LLC, 362 Ga. App. 367, 868 S.E.2d 485 (2022).

¹⁷Collum v. State, 281 Ga. 719, 642 S.E.2d 640 (2007).

homicide. In his testimony, the medical examiner was not being asked to render a legal conclusion, the Georgia Supreme Court ruled.¹⁸

Disputes over the ultimate issue rule sometimes implicate lay testimony, as well as expert opinion. Lay opinion is not objectionable simply because it addresses an ultimate issue.¹⁹ This point was made again in a 2021 opinion by the Georgia Supreme Court. In *Butter v. State*,²⁰ the decision observed that the current Evidence Code, unlike former law, does not generally prohibit lay witness testimony on ultimate issue grounds. Again in 2022, the Georgia Supreme Court ruled that the current Evidence Code abolished the prohibition on lay opinion regarding the ultimate issue.²¹

The form of expert testimony was a focus of the Georgia Supreme Court in a 2018 opinion. *Eller v. State*,²² was a murder appeal wherein the defendant claimed a fatal shooting occurred by accident. The state provided expert testimony that the victim's injuries were inconsistent with an accident. The Court ruled that kind of evidence was admissible under former O.C.G.A. § 24-7-707. Nor was the medical examiner's testimony a violation of O.C.G.A. § 24-7-704. Court decisions continue to refine the form of expert opinion under Rule 704. Litigants regularly question whether an expert's courtroom conclusion abridges the rule against an expert opinion which invades the province of jury. The opinion about accident in this case did not.

The presence or absence of causation proof can be important. In a products liability action, the plaintiff's claim was defeated because of the lack of expert evidence that the manufacturer's product caused his medical condition. The plaintiff used a liquid in his vehicle restoration business which he alleged caused a serious medical condition. He sued the manufacturer of the liquid. The manufacturer requested summary judgment, and the Eleventh Circuit ruled it was entitled to summary judgment as a matter of law. The mere possibility that the manufacturer's liquid caused the medical condition is not sufficient. Causation must be proved by showing the defendant's product was a substantial factor in bringing about an injury or illness. In a case like this, expert testimony connecting the product to the medical condition

¹⁸Johnson v. State, 292 Ga. 856, 742 S.E.2d 460 (2013). See also Goodman v. State, 293 Ga. 80, 742 S.E.2d 719 (2013) (ultimate issue rule not violated).

¹⁹Thornton v. State, 307 Ga. 121, 834 S.E.2d 814 (2019) (citing O.C.G.A.

§ 24-7-704).

²⁰Butler v. State, 310 Ga. 892, 855 S.E.2d 551 (2021).

²¹Taylor v. State, 315 Ga. 630, 884 S.E.2d 346 (2023).

²²Eller v. State, 303 Ga. 373, 811 S.E.2d 299 (2018).

is required. Here, where expert testimony fails to support causation, “summary judgment is due to be granted.”²³

The nature of the victim’s injuries played a role in another case. Experts testified that injuries to a three-year old child were severe and came from physical abuse. This testimony was admissible to describe the experts’ opinions as to their cause.²⁴ The cause of an injury is often the topic of expert opinion in criminal cases. For example, an expert’s testimony that a 15-month-old child’s injuries were the result of abuse rather than an accident did not invade the province of the jury.²⁵ In a 2020 case, the Georgia Supreme Court ruled that a physician’s expert testimony that the presence of adult bite marks on the leg of a three-year-old child showed an aggressive act, rather than a playful event, was not improper.²⁶

In *United States v. Duldulao*,²⁷ a physician was accused of liberally dispensing controlled substances at a clinic described by the court as a pill mill. This violated federal law prohibiting distribution of oxycodone, hydrocodone, and the like “not for a legitimate medical purpose.” After conviction of one of the defendants for improperly distributing controlled substances, the defendant appealed the trial court’s admittance of expert testimony. The prosecution had called an expert who defined the term “legitimate medical purpose.” The Eleventh Circuit ruled that while Rule 704 bars an expert from saying “the defendant broke the law and he did it knowingly,” the expert here did not speculate about what was going on in the defendant’s mind. The court affirmed the defendant’s conviction.

§ 24:5 Opinions on ultimate issue in negligence case

A witness is barred from expressing an opinion regarding an ultimate issue in the case when doing so would invade the fact-finding province of the jury. However, ultimate issue testimony is admissible where the conclusion is beyond the ken of the layman. For that reason, an expert may not opine that a driver was at fault or negligent. He may, however, conclude what happened in a car wreck, and describe that for the trier of fact.¹

Testimony regarding the cause of a collision was allowed in a

²³*McCasland v. Pro Guard Coatings, Inc.*, 799 Fed. Appx. 731 (11th Cir. 2020).

²⁴*Gomez v. State*, 301 Ga. 445, 801 S.E.2d 847 (2017).

²⁵*Smith v. State*, 302 Ga. 207, 805 S.E.2d 835 (2017).

²⁶*Robinson v. State*, 309 Ga. 729,

848 S.E.2d 441 (2020).

²⁷*United States v. Duldulao*, 87 F.4th 1239, 123 Fed. R. Evid. Serv. 617 (11th Cir. 2023).

[Section 24:5]

¹*Fouts v. State*, 322 Ga. App. 261, 744 S.E.2d 451 (2013) (“[A]n investigating officer may testify that one of

2020 case. It came from an investigator with 16 years of experience who had conducted traffic investigations and had received training on such investigations.²

A 2016 opinion in a negligence action demonstrates the liberal approach to testimony on ultimate issues in modern practice.³

The witness cannot state that a party was negligent⁴ or was using due care.⁵ No opinions allowed as to negligence.⁶ In Georgia regarding opinions on negligence, see *Steverson v. Hospital Authority of Ware County*.⁷ In *Lawhorne v. Soltis*,⁸ Justice Clarke stated that “opinion evidence is not admissible if the inference drawn is a mixture of law and fact.”

However, an opinion of an expert on a subject relating to skill or science could be given in the form of what “might” have caused the injury.⁹ In professional malpractice cases, there is a general tendency across the country to relax the strict rule against an expert opining whether a process or procedure demonstrated due care or was negligently executed.

Not even an expert can cast his testimony in the form of a legal conclusion.¹⁰ In the 2013 Evidence Code, O.C.G.A. § 24-7-704 is formulated in terms similar to Fed. R. Evid. 704. The Federal Advisory Committee Notes to Rule 704 make clear that while ultimate factual issues may be addressed by an expert, ultimate legal issues (like the question of negligence) are off limits.

§ 24:6 Opinions on ultimate issue in will cases

A witness cannot give his opinion as to capacity to make a will

the drivers was the sole cause of the collision.”).

²*Clack v. Hasnat*, 354 Ga. App. 502, 841 S.E.2d 210 (2020).

³*Holloway v. Kroger Co.*, 335 Ga. App. 705, 782 S.E.2d 805, 807 (2016) (overruled on other grounds by, *Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021)).

⁴*Murray Biscuit Co. v. Hutto*, 119 Ga. App. 377, 167 S.E.2d 182 (1969).

⁵*Central of Georgia Ry. Co. v. Bagley*, 121 Ga. 781, 49 S.E. 780 (1905).

⁶See *Hermitage Industries v. Schwerman Trucking Co.*, 814 F. Supp. 484, 38 Fed. R. Evid. Serv. 1120 (D.S.C. 1993).

⁷*Steverson v. Hospital Authority of Ware County*, 129 Ga. App. 510, 199 S.E.2d 881 (1973) (province of jury to say whether result was caused by negligence; however, witness may be asked whether this was proper medical practice, or whether operation was done in skillful manner).

⁸*Lawhorne v. Soltis*, 259 Ga. 502, 384 S.E.2d 662 (1989).

⁹See § 24:37, *infra*.

¹⁰*DeVooght v. Hobbs*, 265 Ga. App. 329, 593 S.E.2d 868, 124 A.L.R.5th 819 (2004) (expert’s testimony that any negligent act by nurse was imputable to doctor, in medical malpractice case, was legal conclusion and properly excluded under defendant’s motion in limine).

in a will contest case.¹ A witness may testify as to his opinion of the testator's mental condition based on the testator's state of mind in conversations and in his actions of which the witness has actual knowledge.² A subscribing witness to a will can give his opinion as to the testator's sanity at the time of execution without setting out the facts upon which that opinion is based.³ A witness was permitted to give his opinion that the testator appeared "to have sense enough to know who his children were."⁴

Future cases are controlled by O.C.G.A. § 24-7-704 (2013 Code). Opinion testimony from experts regarding sanity is allowed, but it must be cast in a form which avoids invading the province of the jury.⁵

The form of opinion testimony when a testator's sanity is at issue might be shaped around the court's jury charge. A jury instruction defining testamentary capacity in a will contest case might state that "testamentary capacity is that which is necessary to enable the testator to have a deciding and rational desire regarding the disposition of his property"; that this desire must not be "the ravings of a mad man pursuing cravings of an idiot, [or] the childish whims of imbecility"; that the testator must understand "the nature of the testament"; that the testator is "capable of remembering generally the property subject to disposition, and the persons related to him . . . and also of conceiving and expressing . . . [an] intelligible scheme of distribution"; and "[o]ld age and weakness of intellect do not constitute incapacity"; and that it would suffice if "the testator has sufficient intellect to enable him to have a decided and rational desire as to the disposition of his property."⁶

In questioning a testatrix's testamentary capacity, testimony said that she unnecessarily called the fire department to report a non-existent fire. But "[t]he law does not withhold from the aged, the feeble, the weak-minded, the capricious, the notionate, the right to make a will, provided such person has a decided and rational desire as to the disposition of his property." Although perhaps persuasive to a jury, "eccentric habits and absurd beliefs do not establish testamentary incapacity." All that is required to sustain the will is proof that she was capable of forming a certain

[Section 24:6]

¹Smoot v. Alexander, 188 Ga. 203, 3 S.E.2d 593 (1939).

²English v. Shivers, 220 Ga. 737, 141 S.E.2d 443 (1965).

³Tinnerman v. Baldwin, 211 Ga. 532, 87 S.E.2d 65 (1955).

⁴Dyar v. Dyar, 161 Ga. 615, 131 S.E. 535 (1926).

⁵See generally Holmes v. State, 318 Ga. 213, 897 S.E.2d 829 (2024).

⁶Sullivan v. Sullivan, 273 Ga. 130, 539 S.E.2d 120 (2000).

rational desire with respect to the disposition of her assets.⁷

§ 24:7 When opinion on ultimate issue is admissible

There are a few kinds of cases in which an opinion is permitted on an ultimate issue because of the extreme difficulty or impossibility of conveying to the jury sufficient facts upon which to base its finding unless an opinion is permitted. This approach is consistent with O.C.G.A. § 24-7-704.

Where special knowledge is necessary in order to determine intelligently the cause of disease, physical injury, or death, the expression by a medical expert of an opinion as to cause does not invade the province of the jury, although causation is the exact point or an ultimate issue to be decided by the jury.¹

For exceptions, including cases in which the value of property or services is an ultimate issue, see §§ 24:14, 24:15, 24:23, *infra*. Another exception may be found in the case in which the issue in dispute is whether the handwriting is that of a particular individual.²

Cases underline the need for trial counsel to employ an objection other than “ultimate issue, your honor” when resisting an expert’s opinion. Ultimate issue objections are frequently struck down because of O.C.G.A. § 24-7-704. In a termination of parental rights proceeding there was an objection to the opinions from a witness who had been tendered as an expert in child psychology. The objection was made that the expert’s opinion went to the ultimate issue of whether the termination is in the best interests of a child. The objection was rejected by the Court of Appeals: “[T]he testimony of an expert in the form of an opinion is not objectionable on the ground that it embraces an ultimate issue to be decided by the trier of fact.”³

Opinions by lay witnesses can sometimes encompass major issues in a case.⁴ These opinions are controlled by O.C.G.A. § 24-7-701.

§ 24:8 Other limitations on opinion evidence

In addition to the prohibition against opinion evidence which

⁷*Wilson v. Lane*, 279 Ga. 492, 614 S.E.2d 88 (2005).

[Section 24:7]

¹*Lockheed Aircraft Corp. v. Marks*, 88 Ga. App. 167, 76 S.E.2d 507 (1953) (overruled in part on other grounds by, *Fowler v. City of Atlanta*, 116 Ga. App. 352, 157 S.E.2d 306 (1967)).

²See §§ 24:13, 24:24, *infra*.

³*In Interest of R. S. T.*, 345 Ga. App. 300, 812 S.E.2d 614 (2018).

⁴See *Smith v. State*, 281 Ga. 237, 637 S.E.2d 400 (2006) (“it was permissible for the eyewitness to testify, based upon her own observations of the shooting, whether [defendant] acted in self-defense”).

invades the province of the jury, there are other limitations imposed on opinion evidence. As with all evidence, opinion evidence must be material to the issues joined by the pleadings and must be relevant to some issue in the case.

As noted in the prior section, lay opinion is permitted under O.C.G.A. § 24-7-701. However, that statute bars naked speculation by such a witness. In employment discrimination actions, although a witness may testify to observations of the defendant's interactions with other employees, the witness may not speculate as to the motives, racial or otherwise, underlying those interactions. A 2016 federal decision provides lay opinion testimony is only admissible when it is helpful to the jury.¹

A witness cannot express an opinion on a point on which he cannot testify with reasonable conviction.² An expert witness cannot render an opinion on matters which are not within his field unless he can state a factual basis for such opinion. In effect, he then becomes a nonexpert witness as to that topic.³

A witness cannot speculate as to the state of mind of another person.⁴

What level of conviction must an expert have about her opinions in order for them to be admissible? When an expert talks about medical causation or the cause of an explosion or fire, she is not allowed to merely speculate. Causation must be based upon knowledge and information, and the expert's opinion must be firmly rooted in her thinking. A number of Georgia cases have litigated the degree of probability or certainty which an expert must assign to her opinions.⁵

Expert is not required to prove within a reasonable degree of

[Section 24:8]

¹Village of Freeport v. Barrella, 814 F.3d 594, 611, 99 Fed. R. Evid. Serv. 988 (2d Cir. 2016).

²Am. Jur. 2d, Expert and Opinion Evidence §§ 26, 28 to 30.

³Hammond v. State, 156 Ga. 880, 120 S.E. 539 (1923).

⁴New York Life Ins. Co. v. Sumner, 45 Ga. App. 792, 165 S.E. 920 (1932).

⁵See *Connie v. Garnett*, 360 Ga. App. 24, 860 S.E.2d 592 (2021); *Abdul-Majeed v. Emory University Hosp.*, 225 Ga. App. 608, 484 S.E.2d 257 (1997) (overruled on other grounds by, *Ezor v. Thompson*, 241 Ga. App. 275, 526 S.E.2d 609 (1999)) (regarding plaintiff's expert testimony, while

certainty is not required, plaintiff must show probability rather than mere possibility); *Chastain v. Fayette County*, 221 Ga. App. 118, 470 S.E.2d 513 (1996) (expert opinion valuing land taken by applying average per acre value of entire tract gave reason for value opinion that was entirely speculative or conjectural in absence of evidentiary foundation for such conclusion); *Magnan v. Miami Aircraft Support, Inc.*, 217 Ga. App. 855, 459 S.E.2d 592 (1995) (ophthalmologist's testimony originally concluded that eye injuries had healed was not admissible where ophthalmologist admitted he could not give any opinion with reasonable medical certainty that problems were caused by exposure to pesticide).

scientific certainty his opinion of how an accident occurred.⁶

For additional authorities on causation proof standards, see § 24:21, *infra*.

It is a hornbook rule that no witness, lay or expert, can tell the trier of fact that a particular witness was lying, or that another “told the truth” when he testified. Finding that a witness accomplished this purpose indirectly, the Court of Appeals reversed in *Flowers v. State*.⁷ In Georgia, it had been generally deemed improper to ask a witness if another is lying.⁸ However, an exception was made when a prosecutor impeached the accused. In *Dorsey*, the cross-examiner asked the accused if everybody was lying but him.⁹ The court approved the question.

Court of Appeals decisions in 2018 and 2019 continued to emphasize the point that it is generally improper to ask one witness in a trial whether another, earlier witness told the truth when he gave his testimony. Such testimony invades the province of the jury.¹⁰ It is similarly improper to ask a witness, even an expert, whether a witness in a case lied when she gave her testimony.

Sometimes this practice is termed “pitting one witness against another.” In *Jacobs v. State*,¹¹ the defendant complained that the prosecutor improperly attempted to impeach a witness by asking her if prior witnesses who had given contrary testimony had lied. While Georgia courts have approved this approach when the accused takes the stand and is impeached, the Court of Appeals in *Jacobs* seems to broaden the reach of this technique. In addition to approving it in connection with the witness mentioned above, another witness was challenged by the prosecutor. “[T]he State asked her [the witness] whether the officers who testified that she had identified Jacobs as the shooter were lying.” The court ruled the question was permissible.

In summary, there is a contrast between direct examination techniques involving bolstering—asking witness B who is a friend of witness A if A told the truth, and seeking an affirmative answer—versus questions that ask a party about whether an-

⁶*Cottrell, Inc. v. Williams*, 266 Ga. App. 357, 596 S.E.2d 789 (2004). See further *Layfield v. Department of Transp.*, 280 Ga. 848, 632 S.E.2d 135 (2006).

⁷*Flowers v. State*, 220 Ga. App. 814, 468 S.E.2d 199 (1996) (an expert witness may not testify as to his opinion of the victim’s truthfulness).

⁸*Tanksley v. State*, 248 Ga. App. 102, 545 S.E.2d 652 (2001). With *Flowers*, compare *Dorsey v. State*, 259 Ga.

809, 387 S.E.2d 889 (1990).

⁹See *Dorsey v. State*, 259 Ga. 809, 387 S.E.2d 889 (1990).

¹⁰*Strickland v. State*, 348 Ga. App. 892, 825 S.E.2d 379 (2019); *Alexander v. State*, 348 Ga. App. 859, 825 S.E.2d 405 (2019). See also *McKissic v. State*, 347 Ga. App. 226, 818 S.E.2d 684 (2018).

¹¹*Jacobs v. State*, 299 Ga. App. 368, 683 S.E.2d 64 (2009).

other witness lied. Courts generally prohibit the former, while the law seems to be shifting in favor of permitting cross-examination in the latter form.

When the criminal defendant is challenged with this form of question, there are decisions approving this sort of inquiry.¹² This, of course, is vastly different from an expert postulating that a specific witness at a trial testified to lies. Presumably the latter sort of testimony would be barred. A witness, even an expert, can never bolster the credibility of another witness.¹³ Improper bolstering was detected by the Georgia Supreme Court in *Bly v. State*.¹⁴

The credibility of a crime victim may not be bolstered by another witness who opines that the victim was or is “telling the truth.” However, it is not improper for a forensic interviewer to point out consistencies between the victim’s prior statements to the interviewer and another statement which was introduced by the defense. A witness can indicate that a victim was consistent in her story.¹⁵

An expert witness for the defense cannot give an opinion that the victim made false allegations of child molestation.¹⁶ However, an expert witness may testify that the victim’s medical history was consistent with molestation.¹⁷

§ 24:9 Nonexpert opinion; generally

Lay witness opinions are controlled by O.C.G.A. § 24-7-701, which is modeled on Fed. R. Evid. 701 such that Georgia courts look to federal appellate decisions when applying the Georgia rule.¹ There is a wide range of matters about which a witness, under proper circumstances, may give his opinions about individuals.

¹²See *Hawkins v. State*, 281 Ga. App. 852, 637 S.E.2d 422 (2006) (question “Are you calling Officer Goode a liar here?” was objected to as argumentative; citing *Dorsey v. State*, 259 Ga. 809, 387 S.E.2d 889 (1990); the question was approved); *Green v. State*, 242 Ga. App. 868, 532 S.E.2d 111 (2000). The Georgia Supreme Court endorsed this approach and cited *Dorsey* approvingly in *Manzano v. State*, 282 Ga. 557, 651 S.E.2d 661 (2007).

¹³*Mann v. State*, 252 Ga. App. 70, 555 S.E.2d 527 (2001).

¹⁴*Bly v. State*, 283 Ga. 453, 660 S.E.2d 713 (2008).

Accord, see *Rayner v. State*, 307 Ga. App. 861, 706 S.E.2d 205 (2011).

¹⁵*Weaver v. State*, 336 Ga. App. 206, 784 S.E.2d 61 (2016) (disapproved of on other grounds by, *Quiller v. State*, 338 Ga. App. 206, 789 S.E.2d 391 (2016)).

¹⁶*Barlow v. State*, 270 Ga. 54, 507 S.E.2d 416, 87 A.L.R.5th 813 (1998).

¹⁷*Atkins v. State*, 243 Ga. App. 489, 533 S.E.2d 152 (2000).

[Section 24:9]

¹*Miller v. Golden Peanut Company, LLC*, 317 Ga. 22, 891 S.E.2d 776 (2023).

A nonexpert may give his opinion as to a person's age, after describing that person as fully as possible.² He may give his opinion about a person's attitude, for instance that the person appeared pleased or angry³ or excited or calm.⁴

Lay witness may not state his opinion when the facts relied upon may be clearly described for the jury, and the jury can reach its own opinion.⁵

The opinions of nonexpert witnesses who are familiar with a person whose physical condition is in question and have had opportunity for observing him are competent evidence on issues concerning the general health, strength, and bodily vigor of such person, his feebleness or apparent illness or changes in his apparent state of health or physical condition from one time to another. It was proper for plaintiff's wife to testify that he "was still in shock" when he arrived at home following a collision, where she had testified as to his appearance and symptoms.⁶ Accordingly, and as an application of the general rule that lay witnesses may express an opinion when the facts on which it is based are so illusive or evanescent that they cannot practically be laid before the jury, the courts generally recognize the right of a nonexpert to express his opinion respecting the ability to see, hear, smell, or otherwise perceive external stimuli under given circumstances.⁷

Similarly, the nonexpert witness can give his opinion as to the state of a person's health.⁸ According to most courts, in the case of the common diseases and disabilities familiarity with which is a part of general knowledge, one who has observed the patient during his illness and has seen similar cases may testify as to what disease or ailment he thought he had.

Federal Evidence Rule 701, embraced in Georgia as part of the 2013 Evidence Code, permits a broad range of opinions by lay witnesses. Courts regularly deal with the issue of whether a subject can be addressed by lay opinion, or whether expert proof is required. Computer mapping of telephone calls provides an example. The mapping of cellular telephone calls has been held

²Merry Bros. Brick & Tile Co. v. Holmes, 57 Ga. App. 281, 195 S.E. 223 (1938).

³Rooker v. State, 211 Ga. 361, 86 S.E.2d 307 (1955).

⁴Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S.E. 18 (1890).

⁵Hines v. State, 276 Ga. 491, 578 S.E.2d 868 (2003).

⁶General Gas Corp. v. Whitner, 110 Ga. App. 878, 140 S.E.2d 227 (1965); Luke v. U.S., 84 F.2d 823 (C.C.A. 5th Cir. 1936); Northwestern University v. Crisp, 211 Ga. 636, 88 S.E.2d 26 (1955).

⁷Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952).

⁸Elliott v. Georgia Power Co., 58 Ga. App. 151, 197 S.E. 914 (1938).

to bypass the need for expert testimony.⁹

In *Martinez-Arias v. State*,¹⁰ a witness in a child molestation case provided an explanation for the victim delay for supplying outcry for the crime. The conviction was affirmed. The Court of Appeals ruled that lay opinion testimony must be based on first-hand knowledge or observation. Citing O.C.G.A. § 24-7-701(a), the challenged testimony provided context for the lengthy delay in the victim's outcry.

Lines can be drawn in terms of whether lay opinion is acceptable or expert testimony is required. In a federal decision, the Eleventh Circuit Court of Appeals noted that lay witness opinions are allowed if: (1) the witness forms his opinion on his perception; (2) the opinion helps the jury understand the witness's testimony or helps determine a fact in issue; and (3) the opinion is not based on scientific, technical, or other specialized knowledge. In that same case, the court went on to say that expert testimony is allowed, so long as the expert is qualified as an expert by knowledge, skill, experience, training or education.¹¹

A nonexpert witness may also testify as to whether a person was intoxicated.¹² Lay opinion as to intoxication by one who has observed the subject of the opinion is allowed.¹³ Any witness who has observed an individual may state, based on his observations, whether or not the individual was under the influence of alcohol.¹⁴

Shoeprints can sometimes tie a defendant to a crime scene. If a witness who is not a qualified shoeprint identification expert supplies comparison evidence, is this improper lay witness testimony? In 2020 in *Carter v. State*,¹⁵ the Georgia Supreme Court addressed this question. A GBI agent compared footprints at the scene of a murder with the bottom of a defendant's Nike athletic shoes, and he detected a similar pattern. The opinion by presiding Justice Nahmias ruled the agent's testimony was not improper lay testimony. The decision provides valuable insights into evaluating opinion evidence under Rule 701.

Testimony that a wound appeared to be healing because it had

⁹U.S. v. Baker, 496 Fed. Appx. 201 (3d Cir. 2012) ("Given the omnipresent nature of computer mapping software in today's society—websites such as Mapquest.com and Google Earth come to mind—the agent's testimony about his use of the mapping software was not expert testimony and it was not an error for the District Court to properly admit it as fact").

¹⁰Martinez-Arias v. State, 356 Ga. App. 423, 846 S.E.2d 448 (2020).

¹¹U.S. Specialty Ins. Co. v. Burd, 478 Fed. Appx. 653, 88 Fed. R. Evid. Serv. 1031 (11th Cir. 2012).

¹²Spence v. State, 83 Ga. App. 588, 63 S.E.2d 910 (1951).

¹³Luke v. State, 177 Ga. App. 518, 340 S.E.2d 30 (1986) (proper form of jury instruction is set forth).

¹⁴Jones v. State, 168 Ga. App. 106, 308 S.E.2d 209 (1983).

¹⁵Carter v. State, 310 Ga. 559, 852 S.E.2d 542, 546 (2020).

dry skin around it and was hard in appearance provided sufficient foundation for the opinion of the witness that the wound was not a recent wound, and the evidence given involved the kind of information which is within the common knowledge and experience of people.¹⁶

Other matters in the penumbra between fact and opinion to which a nonexpert may testify include whether a wound was the cause of death¹⁷ and whether a person was acting in the scope of his employment.¹⁸

Vocal identifications are within the range of lay opinion. In the 2013 Evidence Code, O.C.G.A. § 24-9-901(b)(5), effective January 1, 2013, recognizes opinion proof to identify a voice. Prior Georgia law also recognized this doctrine.¹⁹

Court decisions have sometimes approved an opinion by a witness that a caller “sounded like a black male,” or other ethnic vocal characterizations. This issue has arisen in criminal and civil cases. In civil cases, aural identification of race has played a role in housing and employment discrimination disputes.²⁰

Whether a shooting appeared to be accidental or in self defense has proved amenable to lay opinion.²¹

In *Patch v. State*,²² Judge Dillard addressed the issue of whether a police witness who had investigated a defendant years earlier could identify Phillip Patch in court as the person shown on photographs and webcam videos which the officer viewed during his earlier investigation of the accused. The photos and videos used in the earlier investigation were not available for the current trial of the defendant who was convicted of pornography and children exploitation violations. The defense claimed improper identification evidence. The court rejected the defense argument, pointing out that O.C.G.A. § 24-7-701 permits a wide range of opinions by lay witnesses. Subsequent Georgia decisions hold that the proponent is not required to make an initial showing that the image is opaque or cloudy prior to introducing lay

¹⁶Horton v. State, 258 Ga. 489, 371 S.E.2d 384 (1988).

¹⁷Reece v. State, 208 Ga. 165, 66 S.E.2d 133 (1951).

¹⁸Essig v. Cheves, 75 Ga. App. 870, 44 S.E.2d 712 (1947).

¹⁹Withers v. State, 282 Ga. 656, 653 S.E.2d 40 (2007).

²⁰See Clifford v. Chandler, 333 F.3d 724, 62 Fed. R. Evid. Serv. 369, 2003 FED App. 0211P (6th Cir. 2003); Clifford v. Com., 7 S.W.3d 371 (Ky. 1999); U.S. E.E.O.C. v. Target Corp.,

460 F.3d 946 (7th Cir. 2006); Robinson, Clifford v. Commonwealth: Admission of Racial Voice Identification Testimony, 94 Ky. L.J. 607 (2005).

²¹Smith v. State, 281 Ga. 237, 637 S.E.2d 400, 401 (2006) (self defense); Government of Virgin Islands v. Knight, 989 F.2d 619, 629–30, 38 Fed. R. Evid. Serv. 416 (3d Cir. 1993) (testimony that it was an accidental shooting).

²²Patch v. State, 337 Ga. App. 233, 786 S.E.2d 882 (2016).

identification testimony based on its contents.²³

Identification of persons from a videotape is allowed provided the witness who gives the opinion had prior interactions with the person in the video.²⁴ A 2016 case confirms the right of a lay witness to identify a defendant in a photo when the witness is more likely than the jury to identify the individual.²⁵ So do Georgia decisions approving lay witness testimony identifying the defendant in video recordings.²⁶ In *Bullard v. State*,²⁷ the Georgia Supreme Court ruled that O.C.G.A. § 24-7-701 allows lay opinion which identifies a defendant in a photo in cases where the witness has a basis which makes it likely that the witness can make an accurate identification.

The Georgia Supreme Court revisited the issue in 2022 and confirmed the message of the *Glenn* case.²⁸ The opinion by Chief Justice Boggs reviewed a convenience store homicide which resulted in the defendant's conviction. The defendant complained on appeal about the evidence used to convict him. The defendant appeared in a video from the convenience store, and a witness identified the defendant as the man appearing on the video at the crime scene. The Court held that testimony identifying a defendant in a surveillance video is admissible as proper lay opinion when there is an appropriate basis for the witness to correctly identify the accused.

The Georgia Supreme Court addressed lay opinion in a 2014 case. In a letter from the jail, the writer instructed the recipient to keep quiet about a shooting. The recipient was allowed to opine about the meaning of a phrase contained in the letter.²⁹

Professor Imwinkelried summarized the scope of lay opinions in a 2015 article. He observed that published decisions admitting lay opinions fall into two categories. The first consists of collec-

²³Cross v. State, 370 Ga. App. 250, 896 S.E.2d 607 (2023).

²⁴Strickland v. State, 302 Ga. App. 44, 690 S.E.2d 638, 640 (2010) (identifying defendant as person in surveillance video purchasing drugs). In accord with this approach in federal courts are *Young v. U.S.*, 111 A.3d 13 (D.C. 2015); *U.S. v. Sanchez*, 789 F.3d 827, 837, 97 Fed. R. Evid. Serv. 1151 (8th Cir. 2015); *U.S. v. Pierce*, 136 F.3d 770, 774, 48 Fed. R. Evid. Serv. 1286 (11th Cir. 1998).

Contra, see *Grimes v. State*, 291 Ga. App. 585, 662 S.E.2d 346 (2008).

²⁵*U.S. v. Houston*, 813 F.3d 282 (6th Cir. 2016).

²⁶*Glenn v. State*, 302 Ga. 276, 806 S.E.2d 564 (2017) (O.C.G.A. § 24-7-701(a) is modeled after the federal rule and when the meaning of the Georgia rule is considered, the Court looks to the decisions of the federal appellate courts). See, further, *Glenn v. State*, 306 Ga. 550, 832 S.E.2d 433 (2019).

²⁷*Bullard v. State*, 307 Ga. 482, 837 S.E.2d 348 (2019).

²⁸*Dickey v. State*, 313 Ga. 593, 872 S.E.2d 297 (2022).

²⁹*Foster v. State*, 294 Ga. 383, 754 S.E.2d 33 (2014).

tive fact opinions, things like intoxication or the speed of a passing vehicle. The second category consists of skilled lay observer opinions, such things as a lay person's opinion about the author of a writing or a person's sanity at a given time.³⁰

The Georgia Supreme Court in 2022 approved opinion testimony in a case involving a lay witness who was not qualified as an expert at trial. The court pointed out that lay witnesses may draw on their professional experience to guide their opinions without necessarily being treated as an expert.³¹

§ 24:10 Nonexpert opinion; evidence on sanity

It is now well established in all except a very few jurisdictions that a nonexpert witness who bases his testimony upon facts and circumstances known to and related by him, may be permitted to give opinion testimony as to the sanity or insanity of a person whose mental condition is being investigated.¹ It has been held or recognized that a witness seeking to express an opinion as to the mental condition of a person under inquiry must not only show that he had adequate opportunity to observe the speech, manner, habits, or conduct of such person, but he must also state the facts and circumstances on which he bases his opinion.² There is an exception in the case of attesting witnesses to a will who are permitted to state their opinion as to the mental condition of the testator at the time the subscribing witnesses signed, without laying any foundation therefor.³

Testimony must be in proper form. Testimony of a lay witness on the ultimate legal conclusion of whether the grantor of a deed had or lacked mental capacity to make a deed had no probative value.⁴

A person's state of mind or mental condition is properly subject of opinion testimony, and after narrating facts and circumstances upon which conclusion is based, nonexpert witness may express his opinion as to state of mind or mental condition of another.⁵ It is held in Georgia that a witness who is giving his opinion that a person was sane, rather than insane, must show long observation

³⁰Imwinkelried, Distinguishing Lay from Expert Opinion, 68 S.M.U. L. Rev. 73, 86 (2015).

³¹Pritchett v. The State, 314 Ga. 767, 879 S.E.2d 436 (2022).

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¹Ryder v. State, 100 Ga. 528, 28 S.E. 246 (1897); Northwestern University v. Crisp, 211 Ga. 636, 88 S.E.2d 26 (1955).

²Martin v. Baldwin, 215 Ga. 293, 110 S.E.2d 344 (1959).

³Tinnerman v. Baldwin, 211 Ga. 532, 87 S.E.2d 65 (1955).

⁴Doster v. Bates, 256 Ga. App. 585, 568 S.E.2d 736 (2002).

Compare Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662, 665 (2006).

⁵Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977).

of that person and state that he never observed anything to indicate insanity.⁶ A trial court is not bound by the opinion of an expert witness as to defendant's mental condition and may find him sane even without positive testimony as to sanity.⁷

Testimony of two lay witnesses who stated that in their opinion defendant knew what he was doing at time of armed robbery and kidnapping was properly admitted, where statements by these witnesses included showing that their opinions were based upon observations of defendant at time of crimes and immediately thereafter.⁸ Where a jail medic made personal observations of a defendant, it was not error to receive his impressions that defendant was not mentally ill.⁹

Lay opinions as to whether another person appeared irrational or on the other hand seemed calm and collected are controlled by O.C.G.A. § 24-7-701.

§ 24:11 Opinion as to speed

An estimate of the speed at which a conveyance or other object was moving at a given time is generally viewed as a matter of common observation rather than expert opinion, and it is well settled that any person of ordinary ability and intelligence having the means or opportunity of observation is competent to testify to the rate of speed of such a moving object.¹ But it must be shown that he is familiar with the speed of the vehicles.²

The fact that the plaintiff saw the defendant's vehicle in motion for only two seconds before the collision did not make the plaintiff's opinion as to the defendant's speed inadmissible.³ The extent of such opportunity goes to the weight rather than the admissibility of such evidence.⁴

An eyewitness's testimony that a delivery truck driver was speeding prior to a collision and that he had thought that the delivery truck driver was going to cause an accident was relevant and admissible in action against the delivery truck driver to re-

⁶McWilliam v. Pattillo, 173 Ga. 771, 161 S.E. 597 (1931). 95 Ga. App. 810, 99 S.E.2d 302 (1957).
See Royalston v. Middlebrooks,

⁷Levitt v. State, 170 Ga. App. 32, 316 S.E.2d 6 (1984). 303 Ga. App. 887, 696 S.E.2d 66, 70 (2010).

⁸Gee v. State, 239 Ga. 583, 238 S.E.2d 356 (1977).

²Collins v. Griffin, 93 Ga. App. 282, 91 S.E.2d 369 (1956).

⁹White v. State, 278 Ga. 355, 602 S.E.2d 594, 597 (2004).

³Shockey v. Baker, 212 Ga. 106, 90 S.E.2d 654 (1955).

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¹Western & Atlantic R. R. v. Hart, App. 377, 145 S.E.2d 384 (1965).
⁴See Presley v. Griffith, 112 Ga.

cover for injuries sustained in a traffic accident.⁵

The witness can state his opinion, even though he cannot be precise, and his opinion can be in the form of an estimate. Such matters go to the weight of the evidence.⁶

Lay opinion on speed of a vehicle was allowed in a 2020 opinion.⁷ “At trial, several witnesses testified that based on the sound of the motorcycle’s engine, [the decedent] was accelerating and driving at a high rate of speed—approximately 80 to 100 miles per hour—just before the collision.” The motorcyclist died as a result of colliding with an automobile. His estate brought a wrongful death action. The court, focusing upon O.C.G.A. § 24-7-701(a), approved the lay opinion testimony, evidence which supported a defense verdict. The opinion strongly suggested the driver was speeding. What about the fact that the witnesses did not view the impact? The court cited authority allowing testimony based upon hearing a vehicle.

An expert may testify as to speed based upon the length of skid marks.⁸

Concerning the use of electronic speed detection devices, see § 24:34, *infra*.

§ 24:12 Stopping distance

One of the most perplexing problems of evidence relates to testimony about the distance required to stop a vehicle going at a particular speed.

A chart showing the stopping distance of a car at a given speed is hearsay, since it is based on extrajudicial observations that are not under oath or subject to cross-examination. Nevertheless, it is held that such charts, when duly authenticated, are admissible to show stopping distances, provided it is shown that the experiments that formed the basis for the chart were performed under conditions substantially the same as those existing at the time and place of the accident in issue.¹

Opinion testimony about stopping distance has been approved.²

⁵Royalston v. Middlebrooks, 303 Ga. App. 887, 696 S.E.2d 66, 70 (2010).

⁶Engle v. Finch, 37 Ga. App. 389, 140 S.E. 632 (1927).

⁷Clack v. Hasnat, 354 Ga. App. 502, 841 S.E.2d 210 (2020).

⁸Reeves v. Morgan, 121 Ga. App. 481, 174 S.E.2d 460 (1970), judgment rev’d on other grounds, 226 Ga. 697, 177 S.E.2d 68 (1970). See § 24:21, *in-*

fra.

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¹Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, 78 A.L.R.2d 218. See § 24:21, *infra*.

²Fouts v. Builders Transport, Inc., 222 Ga. App. 568, 474 S.E.2d 746 (1996) (trial court did not err in per-

§ 24:13 Nonexpert opinions on handwriting

A nonexpert witness may testify as to handwriting, if he is familiar with the handwriting of the person alleged to have made the document in question.¹ Frequently, the evidence offered on a question of the authenticity of a disputed writing or signature is that of persons who are familiar with the handwriting of the alleged writer; the opinion of such a person is universally recognized to be admissible, even though he is not a handwriting expert.² Nonexpert witnesses shown to be familiar with the handwriting or signature of the person whose handwriting or signature is in dispute may, on the basis of such familiarity, express their opinion whether a disputed writing or signature is or is not genuine, but as a general rule, cannot on direct examination testify to their opinion upon the genuineness of handwriting based solely upon a comparison of writings, because as has been pointed out, the members of the jury or the judge are as capable as the witnesses of making the test in that way.³

Q. and A. for proving handwriting, see Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 3:22.

Lay opinion on handwriting is covered in the Georgia Evidence Code.⁴

A 2021 opinion of the Georgia Court of Appeals affirms the propriety of lay opinions on signatures and handwriting from a properly qualified witness.⁵ The sister of an insured testified regarding the signature on an insurance form and opined it was not the genuine signature of the insured, who was deceased. The court ruled the admission of the testimony was within the trial court's discretion.

§ 24:14 Nonexpert opinion on value of personal property

A nonexpert may testify as to the value of personal property.¹ A jury case may be made by testimony of a homeowner or the homeowner's spouse as to purchase price or replacement cost of common items destroyed by fire.² A homeowner or a homeowner's spouse may give opinion evidence concerning the purchase price

mitting a witness to express her opinion about whether a truck could have stopped).

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¹Am. Jur. 2d, Expert and Opinion Evidence §§ 147, 148.

²Williams v. State, 259 Ga. App. 742, 578 S.E.2d 128, 132 (2003); Bruce v. Crews, 39 Ga. 544, 1869 WL 1691 (1869).

³Bruce v. Crews, 39 Ga. 544, 1869 WL 1691 (1869).

⁴See O.C.G.A. § 24-9-901(b)(2).

⁵Spillers v. Brinson, 361 Ga. App. 771, 865 S.E.2d 585 (2021).

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¹O.C.G.A. § 24-7-701.

²Braner v. Southern Trust Ins. Co., 255 Ga. 117, 335 S.E.2d 547 (1985).

or replacement value and approximate age of destroyed household items.

There is no question that professional appraisers and dealers engaged in the business of buying and selling similar property are competent to testify as to value, but it is not necessary that a witness have the status of a professional appraiser or dealer in the class of property in question.³ Owners of property can testify. In any case, of course, where it plainly appears that the owner has no knowledge of the value as to which he expresses an opinion, the presumption arising from ownership is overcome, and his opinion is inadmissible.⁴

In a number of instances, a statement of the facts upon which the owner's opinion of the value of a chattel was based has been held to be a sufficient showing of knowledge on which to predicate his evidence; and in other instances, the fact that the owner was the purchaser of the article has been given weight as indicating knowledgeable competency.⁵

Nonexpert owners of personal property, either under the general rule or under the circumstances of the particular case, have been permitted to testify as to the value of various kinds of personal property, such as animals; standing or severed crops; harnesses, saddles, and the like; motor and other vehicles; business equipment, machines and machinery, and stocks of goods or merchandise; baggage; wearing apparel, personal effects, and jewels or jewelry; furniture and household goods; musical instruments and television sets; sewing machines; and certain other kinds of personalty.⁶

An owner's opinion of value, without the reasons supporting this opinion, has no probative value.⁷

In a criminal case, purchase price alone is not sufficient criterion of value. A felony theft sentence was vacated when the Court of Appeals found there to be inadequate proof that the theft exceeded \$500.⁸

A 2019 case saw things differently when cost of repairs provided the value element. A criminal damage in the second degree charge against a person requires the state to prove the

³Central Georgia Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387 (1912). 763, 125 S.E.2d 545 (1962); Cohn v. Rigsby, 60 Ga. App. 728, 5 S.E.2d 93 (1939).

⁴Mills v. Mangum, 111 Ga. App. 396, 141 S.E.2d 773 (1965).

⁵Baker v. Goddard, 205 Ga. 477, 53 S.E.2d 754 (1949).

⁶See Firemen's Ins. Co. of Newark, N.J. v. Allmond, 105 Ga. App.

⁷In re J.T., 285 Ga. App. 465, 646 S.E.2d 523 (2007).

⁸Buckley v. State, 270 Ga. App. 493, 606 S.E.2d 581 (2004).

damage exceeds \$500. In *Motes v. State*,⁹ a shooter fired four shots into a vehicle, shattering glass and killing a dog. The cost to repair the car exceeded \$500, so the conviction was affirmed.

In car buyer's breach-of-warranty action against car manufacturer, although plaintiff had purchased at least ten cars during plaintiff's lifetime, buyer did not show enough foundation sufficient to express an opinion as to the value of his car.¹⁰ Foundation for opinion on value of auto, see *Dowdell v. Volvo Commercial Finance LLC*.¹¹

The owner of property is considered to be qualified to state his opinion as to value, but in order to have probative value, the opinion must be based upon a foundation that the witness must have some knowledge, experience or familiarity with the value and he must give reasons for the value assessed and also must have had an opportunity for forming a correct opinion.¹²

§ 24:15 Nonexpert opinion on value of real estate

A nonexpert can offer an opinion on the value of real estate.¹ And in a 2018 case, the court approved lay testimony regarding the amount that a house diminished in value as a result of a large tree falling on it.²

A provision not found in the Federal Rules of Evidence is contained in the 2013 Georgia Evidence Code. It provides a special dispensation for opinions as to market value. See O.C.G.A. § 24-7-701(b). Owners of real estate have traditionally occupied a favored position when supplying valuation opinions. The case of *In re Estate of Hubert*³ underlines the point. The witness testified he was familiar with the properties at issue in which he had an ownership interest. The Georgia Supreme Court approved his market value testimony.

The question of the market value of land is not a question of

⁹*Motes v. State*, 352 Ga. App. 707, 834 S.E.2d 565 (2019). S.E.2d 241 (2004).

¹⁰*Monroe v. Hyundai Motor America, Inc.*, 270 Ga. App. 477, 606 S.E.2d 894 (2004) (however, an owner of property can state opinion on value if properly qualified).

¹¹*Dowdell v. Volvo Commercial Finance LLC*, 286 Ga. App. 659, 649 S.E.2d 750 (2007).

See *Sevostyanova v. Tempest Recovery Services, Inc.*, 307 Ga. App. 868, 705 S.E.2d 878 (2011).

¹²*Community Bank v. Handy Auto Parts, Inc.*, 270 Ga. App. 640, 607

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¹*Daniels Mortuary & Crematory, Inc. v. Business Loan Center, LLC*, 270 Ga. App. 875, 608 S.E.2d 545 (2004). See O.C.G.A. § 24-7-701. See also *Oglethorpe Power Corp. v. Estate of Forrister*, 332 Ga. App. 693, 701-02, 774 S.E.2d 755, 763 (2015).

²*Woodrum v. Georgia Farm Bureau Mutual Insurance Company*, 347 Ga. App. 89, 815 S.E.2d 650 (2018).

³*In re Estate of Hubert*, 325 Ga. App. 276, 750 S.E.2d 511 (2013).

art or science. It is a question of fact to be proven like any other fact, so that any person who is acquainted with the land and has knowledge of real estate values in the vicinity is competent to testify as to its value.⁴

In *Department of Transp. v. Southeast Timberlands, Inc.*,⁵ the DOT contended that the trial court erred by allowing a landowner to testify about his opinion of the taken property's value. The witness testified that he thought the property was worth \$1.5 million if used for on-site wetlands mitigation. A property owner may offer his opinion of the value of his property, provided that he shows he has had an opportunity to form a correct opinion. "The question of whether a witness has established sufficient opportunity for forming a correct opinion or has stated a proper basis for expressing an opinion is for the trial court." The Court of Appeals reviewed the trial court's decision for abuse of discretion, and found no abuse. The witness had been a real estate developer for over 30 years.

A case which went a different direction is *Martha K. Wayt Trust v. City of Cumming*.⁶ A homeowner was deemed not a proper witness on the cost to build a bridge to his property.

§ 24:16 Opinions on narcotic addiction

One who has had experience working with narcotics addicts should be competent to state whether a person appears to be an addict based upon such symptoms as unusually red eyes, pupils pointed or contracted, a somnolent state, needle scars on arms or legs, the odor of narcotics on clothing and upon being a known dealer in narcotics.¹

§ 24:17 Matters as to which expert witness may or must testify

Experts, according to former Georgia law, could testify when the subject matter of the testimony was beyond the ken of lay persons.¹ Modernly, Georgia applies the Daubert standard for expert testimony, pursuant to O.C.G.A. § 24-7-702, which gener-

⁴Central Georgia Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387 (1912). S.E.2d 915 (2010).
[Section 24:16]

⁵Department of Transp. v. Southeast Timberlands, Inc., 263 Ga. App. 805, 589 S.E.2d 575 (2003).
[Section 24:17]

⁶Martha K. Wayt Trust v. City of Cumming, 306 Ga. App. 790, 702 S.E.2d 502 (2018).
¹Carroll v. Hayes, 98 Ga. App. 450, 105 S.E.2d 755 (1958).
¹See Parks v. State, 304 Ga. 313, 818 S.E.2d 502 (2018).

ally tracks Fed. R. Evid. 702.² Relying on federal authority, the Supreme Court of Georgia has outlined the fundamentals of lay versus expert opinion testimony:

As an initial matter, because our Rule 701 and Rule 702 are modeled after Rules 701 and 702 of the Federal Rules of Evidence, we look to the decisions of federal appellate courts, especially the United States Supreme Court and the Eleventh Circuit, that have construed and applied these Rules. See *Glenn v. State*, 306 Ga. 550, 555, 832 S.E.2d 433 (2019); *Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 289 n.5, 788 S.E.2d 421 (2016). See generally *State v. Almanza*, 304 Ga. 553, 558 (2), 820 S.E.2d 1 (2018). The Eleventh Circuit has explained that the “prototypical example[] of the type of evidence” admissible as a lay opinion under Rule 701 relates to “the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.” *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.*, 320 F.3d 1213, 1222 (V), 60 Fed. R. Evid. Serv. 841 (11th Cir. 2003) (citation and punctuation omitted). By contrast, expert opinion testimony has been described as a “hypothesis” based on the witness’s scientific, technical, or other specialized knowledge, “[a]nd the ability to answer hypothetical questions is the essential difference between expert and lay witnesses.” *U.S. v. Henderson*, 409 F.3d 1293, 1300 (II) (3), 67 Fed. R. Evid. Serv. 350 (11th Cir. 2005) (citation and punctuation omitted).³

However, where jurors can take the same factors used by the expert and make an informed judgment on their own, expert testimony will be rejected. In a 2020 case, an expert who supported the defendant’s self-defense claim was excluded after the state’s motion in limine, and the Supreme Court ruled there was no abuse of discretion by the trial judge.⁴

A similar rule was applied in a civil case. In *Suzuki Motor of America, Inc. v. Johns*,⁵ the court ruled that expert opinion about product warnings was not required.

What is the standard of proof for measuring an expert’s reliability? An amendment to the Federal Rules of Evidence tweaked Rule 702 to clarify the preponderance standard in that rule. Under that provision, the proponent of expert opinion must establish by a preponderance of evidence that the expert’s opinion reflects a reliable application of the expert’s principles and

²See *Garrison v. State*, 2024 WL 3802691 (Ga. 2024); *Wilson v. State*, 370 Ga. App. 399, 897 S.E.2d 597 (2024).

776 (2023).
⁴*Kilpatrick v. State*, 308 Ga. 194, 839 S.E.2d 551 (2020).

³*Miller v. Golden Peanut Company, LLC*, 317 Ga. 22, 891 S.E.2d 549 (2019).
⁵*Suzuki Motor of America, Inc. v. Johns*, 351 Ga. App. 186, 830 S.E.2d 549 (2019).

methods to the facts of the case. The amendment became effective on December 1, 2023. The Federal Rules of Evidence Advisory Committee noted that some courts have incorrectly determined that a more permissive standard controls the reliability-based elements contained in the rule.⁶ The Advisory Committee also observed that Rule 702 requires that the expert's testimony help the trier of fact to understand the evidence. The committee writes that, unfortunately some courts have applied a higher standard, and then makes this comment: "Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict."

There is a seemingly endless list of areas in which expert testimony has been admitted. It will continue to grow as the complexity of our civilization increases, as knowledge burgeons and as specialization grows.

Expert evidence is not confined to classified or specified professions, but is applicable wherever skill, knowledge or experience in a given field is involved.⁷ The admission of expert testimony regarding eyewitness identification is in the discretion of the court.⁸ Where an average person can draw a conclusion from facts, no expert opinions are needed to guide the jury.⁹

While expert evidence is usually not required to prove causation in a simple negligence case, expert testimony may be required where medical questions involving specialized medical knowledge are needed in establishing causation, a causal link between a defendant's conduct and a plaintiff's injury.¹⁰

Expert testimony is usually essential to prove up a medical malpractice case, with the expert connecting the defendant's negligence to the injury by medical probability or medical certainty.¹¹

The Court of Appeals of Georgia explained in a 2017 decision how the terms of causation play a role in a medical malpractice action. In such an action the medical expert must state her opinion respecting causation in terms stronger than "reasonable medical possibility." Connecting a plaintiff's injury to the

⁶See generally *In re Onglyza (Saxagliptin) and Kombiglyze (Saxagliptin and Metformin) Products Liability Litigation*, 93 F.4th 339, 123 Fed. R. Evid. Serv. 2580, 117 Fed. R. Serv. 3d 1585 (6th Cir. 2024).

⁷See O.C.G.A. § 24-7-702. In 2005 the Georgia legislature adopted Federal Evidence Rule 702 for Georgia, with certain additions. That provision now appears in O.C.G.A. § 24-7-702.

⁸*Manley v. State*, 284 Ga. 840, 672 S.E.2d 654 (2009); *Jones v. State*, 273 Ga. 213, 539 S.E.2d 143 (2000).

⁹*Bly v. State*, 283 Ga. 453, 660 S.E.2d 713 (2008).

¹⁰*Cowart v. Widener*, 287 Ga. 622, 697 S.E.2d 779 (2010).

¹¹*Aleman v. Sugarloaf Dialysis, LLC*, 312 Ga. App. 658, 719 S.E.2d 551 (2011).

negligence of health care providers should be done by causal connection cast in proper terms. There can be no recovery in a medical malpractice case when there is no appropriate testimony that the harm to the patient came from professional negligence.¹²

The point was made in a 2021 case. To recover in a medical malpractice case, a plaintiff must show a violation of the applicable medical standard as well as the fact that the deviation from proper care is the proximate cause of her condition or injury. Causation proof calls for expert testimony, with the expert testifying in terms of either reasonable medical probability or medical certainty when connecting the deviation from care to the injury.¹³

Expert testimony as to *modus operandi* has been held admissible in many criminal cases involving such offenses as gambling, bookmaking, and conducting lotteries and policy games.¹⁴ Such testimony has also been held admissible in prosecutions for a wide variety of other crimes, including narcotics offenses, arson, burglary and larceny, and forgery.¹⁵

A 2020 decision of the Georgia Supreme Court involved a trial where there was a question of whether a person was shot at close range. A forensic pathologist determined that the entrance wound at the back of the victim's head had a partial muzzle imprint, meaning the gun's muzzle was in contact with the skin when it was fired.¹⁶

Standard of care in a profession or trade is a proper object of expert testimony.¹⁷

In medical malpractice suits against professionals, it is almost always necessary that expert testimony establish the parameters of acceptable professional conduct. However, expert testimony is not necessary where the cause of action is not based on professional malpractice, but on a simple negligence theory against a hospital. And where medical experts testify based on personal observation and examination as to cause of death in a simple negligence case, weight given expert testimony is for trier of fact, who need not give it controlling influence.¹⁸ In a medical malpractice suit, the plaintiff must produce expert testimony to prevail at trial, unless actionable negligence clearly appears from other

¹²*Swint v. Mae*, 340 Ga. App. 480, 798 S.E.2d 23 (2017).

¹³*Connie v. Garnett*, 360 Ga. App. 24, 860 S.E.2d 592 (2021).

¹⁴*Brown v. State*, 57 Ga. App. 838, 197 S.E. 77 (1938).

¹⁵See *Dandridge v. State*, 109 Ga. App. 33, 134 S.E.2d 814 (1964).

¹⁶*Casey v. State*, 310 Ga. 421, 851 S.E.2d 550 (2020).

¹⁷*Marquis Towers, Inc. v. Highland Group*, 265 Ga. App. 343, 593 S.E.2d 903 (2004).

¹⁸*Self v. Executive Committee of Georgia Baptist Convention of Georgia, Inc.*, 245 Ga. 548, 266 S.E.2d 168 (1980).

evidence.¹⁹ A hospital patient's action for reinjury to his broken leg while he was being transported in a wheelchair in the hospital was a professional malpractice case requiring expert testimony, and the trial court did not err in so charging the jury.²⁰

Away from the courtroom and much earlier in the case, Georgia requires that an expert supply an affidavit setting forth "at least one negligent act" before an action for damages for professional malpractice goes forward. Guidance on what constitutes a negligent act or omission as well as who is an expert for purposes of this requirement is provided in R. Brussack, *Georgia Professional Malpractice Affidavit Requirement*, 31 Ga. L. Rev. 1031 (1997). The introduction to this article summarizes the Georgia requirement (footnotes omitted):

Section 9-11-9.1 of the Georgia code might be the state's most notorious procedural statute. Enacted in 1987 to protect professionals against the harm done by groundless malpractice litigation, the statute provides that a professional malpractice claim ordinarily must be accompanied by an affidavit executed by an expert. In the affidavit, the expert must substantiate the claim by attesting that some act or omission alleged in the claim was a negligent act or omission—a departure from a professional standard of conduct. During the past decade, Georgia's appellate courts have returned again and again to the problem of what section 9-11-9.1 means, generating scores of decisions on who qualifies as a professional, what constitutes malpractice, who may serve as an expert, what counts as an adequate affidavit, what must be done to claim the benefit of the statute's grace period, and what happens when a party fails in one way or another to satisfy the affidavit requirement. The judicial preoccupation with section 9-11-9.1 has yielded a complex and in some respects counterintuitive body of procedural doctrine that must be mastered by anyone who brings, defends, or judges a professional malpractice claim in the state.

The expert affidavit requirement does not apply to suits against the DOT for negligent highway design. O.C.G.A. § 9-11-9.1(a) was originally enacted as part of the Medical Malpractice Act of 1987. Its purpose was to reduce the number of frivolous suits filed in professional malpractice cases. It has been applied in suits against physicians, attorneys, architects, and engineers. While a health care facility can insist upon compliance with O.C.G.A. § 9-11-9.1(a) when it is sued, the DOT cannot. However, a suit against the DOT based upon professional negligence of the department's employees must still be buttressed by production at trial of an expert who concludes that the agency deviated from

¹⁹*Parker v. Knight*, 245 Ga. 782, 267 S.E.2d 222 (1980). *Hosp. & Medical Center, Inc.*, 195 Ga. App. 858, 395 S.E.2d 68 (1990).

²⁰*Sparks v. Southwest Community*

professional standards.²¹

In 2007, the legislature enacted amendments affecting the elements of an affidavit alleging professional malpractice, as well as the timing of a defendant's answer under certain circumstances.²² The requirement that the professional affidavit must be filed with the complaint in any action alleging professional malpractice may be excused in cases where the filing party is running up against the statute of limitations. To take advantage of this statutory time extension, which allows late filing of the expert's affidavit, the plaintiff's attorney must file with the complaint an affidavit averring that the attorney or her law firm was not retained more than 90 days prior to the expiration for the period of limitations.

The provision for a professional affidavit when a plaintiff charges the defendant with professional misconduct applies to malpractice claims against health care professionals (including medical doctors, nurses, osteopaths and chiropractors), architects, lawyers, engineers, veterinarians, and others. For expert testimony at trial against such professionals, there is a practice requirement for expert witnesses in medical malpractice cases.²³

Just as expert testimony is not required in a trial alleging negligence, a point noted earlier in this section, the affidavit requirement is absent in simple negligence cases. Whether a complaint alleges ordinary negligence or professional malpractice is a question of law for the court to decide.²⁴

Expert legal opinion was permitted concerning applicable federal law where there was an issue concerning the good faith involved in filing a petition for certiorari with the United States Supreme Court.²⁵ An expert was allowed to testify as to whether a child could distinguish between fact and fantasy.²⁶

Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion is one which the jurors would not ordinarily be able to draw for themselves; that is, the conclusion is beyond the ken of the average layman.²⁷

²¹*Minnix v. Department of Transp.*, 272 Ga. 566, 533 S.E.2d 75 (2000).

²²See the 2007 amendment of O.C.G.A. § 9-11-9.1 and O.C.G.A. § 9-11-9.2.

²³O.C.G.A. § 24-7-702(c).

²⁴*Ambrose v. Saint Joseph's Hosp. of Atlanta, Inc.*, 325 Ga. App. 557, 754 S.E.2d 135 (2014) (complaint dis-

missed by trial judge for failure to provide an expert affidavit; held, since claim alleges simple negligence, it was error to dismiss the complaint).

²⁵*International Indem. Co. v. Coachman*, 181 Ga. App. 82, 351 S.E.2d 224 (1986).

²⁶*Eberhardt v. State*, 257 Ga. 420, 359 S.E.2d 908 (1987).

²⁷*Bethea v. State*, 251 Ga. 328,

Where an expert is hired by a party in a criminal proceeding, not called by that party, but called by the opposing party, testimony to the expert's original employment by the first party is irrelevant and could be prejudicial.²⁸

An expert is sometimes attacked on the basis that the expert's opinion lacks sufficient data. Vigorous cross-examination, along with presentation of contrary evidence and jury instructions on the burden of proof are traditional means of attacking shaky, but admissible expert opinion evidence.²⁹

May an expert rely for her courtroom opinion upon reports of other experts in the field? Yes, says O.C.G.A. § 24-7-703. However, the hearsay facts and opinions relied upon by the courtroom expert do not automatically come into evidence simply because they were used by the witness to help her reach relevant conclusions.

The point had been made earlier in *Leonard v. State*.³⁰ An expert's opinion may be based in part on hearsay. "But this does not provide a mechanism by which hearsay that forms the sole basis for an expert's opinion can be placed before the jury in violation of the basic rules of evidence." A testifying expert is not to serve as a conduit for the opinions of other experts.³¹

A 2023 decision from the Georgia Supreme Court pointedly observed that the Georgia Evidence Code does not require that an expert have personal knowledge of the facts supporting the expert's opinion, citing O.C.G.A. § 24-7-703. Rule 703 did not require that an expert who testified in a murder case have interviewed the defendant. In the view of the court, the expert's opinion was based on the expert's review of the evidence. The court found the testimony to be admissible.³²

Further clarification was subsequently articulated by the United States Supreme Court. *Smith v. Arizona*³³ reversed a narcotics conviction where the prosecution used a "substitute expert" who testified to the results of testing performed by a different forensic analyst who did not appear at trial.

As a general rule, Georgia is hostile to reception of records containing expert opinions when the author does not appear for

304 S.E.2d 713 (1983).

²⁸Blige v. State, 264 Ga. 166, 441 S.E.2d 752 (1994).

²⁹Emory University v. Willcox, 355 Ga. App. 542, 844 S.E.2d 889, 379 Ed. Law Rep. 352 (2020).

³⁰Leonard v. State, 269 Ga. 867, 506 S.E.2d 853 (1998).

³¹Webb v. Thomas Trucking, Inc., 255 Ga. App. 637, 566 S.E.2d 390 (2002).

³²McCalop v. State, 2023 WL 3183583.

³³Smith v. Arizona, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024).

cross-examination.³⁴ The decision in *In re C.D.E.*³⁵ illustrates:

The trial court also relied heavily, if not exclusively, on the psychological report to conclude that Deryl is “a walking time bomb” who “presents a danger to his own children.” As discussed above, however, the psychologist who prepared the report did not testify at the hearing and thus was not subject to cross-examination. As we have previously held, “records which contain diagnostic opinions of third parties who are not available for cross-examination are generally inadmissible.” Although there was no objection to the introduction of the report, hearsay evidence has no probative value even when it is admitted without objection.

While an expert can consult reports of other out-of-court experts, she must give her own opinion in court and not simply act as a conduit for the opinions of others.³⁶ This latter point was reiterated in *Rector v. State*,³⁷ which allowed a state’s toxicologist to testify about a report which had been prepared by another doctor. “An expert may base [his] opinions on data gathered by others.” While the expert can base an opinion on hearsay, that does not render the underlying hearsay admissible.³⁸

For additional authorities on the point, see R. Carlson, *Is Revised Expert Witness Rule 703 a Critical Modernization for the New Century?* 52 Fla. L. Rev. 715 (2000).

Federal law is also clear that an expert must form her own opinions. An expert must supply her experience to interpret records which amount to written hearsay, and apply her specialized knowledge to that task. Otherwise the expert is simply repeating hearsay evidence without applying any expertise whatsoever.³⁹

Clearly under O.C.G.A. § 24-7-703, an expert can rely upon trustworthy written hearsay. For example, expert A can rely upon reports from expert B when A testifies. A medical doctor can give her opinions about a patient based upon her treatment of the patient as well as a written diagnosis supplied by another doctor, *even though the latter doctor does not testify in the case*. An expert in aviation accidents can rely upon reports of official

³⁴See *Miller v. State*, 266 Ga. 850, 472 S.E.2d 74 (1996), where a forensic chemist did not testify, admission into evidence of a mere affidavit that reported the results of a drug analysis violated defendant’s constitutional right to confront the witnesses against him.

³⁵*In re C.D.E.*, 248 Ga. App. 756, 546 S.E.2d 837 (2001).

³⁶*Nash v. Compass Bank*, 296 Ga.

App. 874, 676 S.E.2d 28 (2009).

³⁷*Rector v. State*, 285 Ga. 714, 681 S.E.2d 157 (2009).

³⁸*O’Connell v. State*, 294 Ga. 379, 754 S.E.2d 29 (2014) (an expert cannot be used to introduce inadmissible hearsay).

³⁹*Gilmore v. Palestinian Interim Self-Government Authority*, 843 F.3d 958, 102 Fed. R. Evid. Serv. 133, 96 Fed. R. Serv. 3d 555 (D.C. Cir. 2016).

boards of inquiry in order for the expert to reach his own conclusions regarding the cause of an air crash. Such an opinion in Georgia is no longer subject to an “opinion based on hearsay” objection. Georgia law had been moving this direction prior to O.C.G.A. § 24-7-703.⁴⁰ Georgia Rule 702 directs courts of this State to draw from the decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴¹ to interpret the Georgia act. Since *Daubert* is based upon the Federal Rules of Evidence, the Georgia legislature seems to intend for local courts to follow federal expert witness law in areas of questionable interpretation.⁴²

The rationale behind allowing hearsay as a basis for expert testimony was identified in a federal decision: “The purpose of this rule is largely practical: experts generally base their opinions on information which, to be admissible in court, would entail the expenditure of substantial time in producing and examining various authenticating witnesses.”⁴³

In a termination of parental rights proceeding, a witness was tendered as an expert in child psychology. She formed her opinions on three components: interview, observation, and testing. The opposing party objected to the expert’s opinions on the basis of a hearsay objection. When the expert testified that her methods as well as the information she gathered are the type used by others, the objection failed.⁴⁴

Expert bases for opinion testimony was the subject of analysis in *Velazquez v. State*.⁴⁵ Dr. Salinas performed a mental examination on the defendant, then provided an opinion that the accused was capable of assisting the defense. The trial judge allowed Dr. Salinas to refer to an evaluative report by another expert, Dr. Walker, who was not called to testify. Dr. Salinas testified merely that Dr. Walker had performed an examination on defendant, and the opinion of Dr. Salinas relied on the evaluations of Dr. Walker. There was no problem with the trial expert relying upon reports of others, said the Georgia Supreme Court:

There is likewise no merit to Velazquez’s claim that the trial court

⁴⁰See R. Carlson, Experts, Judges and Commentators: The Underlying Debate About an Expert’s Underlying Data, 47 Mercer L. Rev. 481, 488 (1996) (“[A]n expert may state her opinion in a Georgia courtroom, even if the opinion is partly based upon out-of-court declarations of uncalled witnesses”); Roebuck v. State, 277 Ga. 200, 586 S.E.2d 651 (2003) (when expert’s opinion is based on hearsay, law does not mandate exclusion of the opinion).

⁴¹*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,

113 S. Ct. 2786, 125 L. Ed. 2d 469, 37 Fed. R. Evid. Serv. 1 (1993).

⁴²*Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 658 S.E.2d 603 (2008).

⁴³*Factory Mut. Ins. Co. v. Alon USA L.P.*, 705 F.3d 518, 90 Fed. R. Evid. Serv. 638 (5th Cir. 2013).

⁴⁴*In Interest of R. S. T.*, 345 Ga. App. 300, 812 S.E.2d 614 (2018).

⁴⁵*Velazquez v. State*, 282 Ga. 871, 655 S.E.2d 806 (2008).

erred by not granting a new trial in that it allowed Dr. Salinas to offer an opinion about his competency based on hearsay, including Dr. Walker's report and conversations with others. As noted, Dr. Salina's opinion was based on her own interview of Velazquez as well as her review of his medical records and conversations with other experts who had evaluated him for competency. In the situation in which an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, on the other's findings, *Roebuck v. State*, 277 Ga. 200, 202, 586 S.E.2d 651, 655 (2003). Even when an expert's testimony is based on hearsay, the expert's lack of personal knowledge does not mandate the exclusion of the opinion but merely presents a jury question as to the weight which should be accorded the opinion.

The *Velazquez* case was cited 10 years later in *Parks v. State*.⁴⁶ A gang expert for the prosecution testified about a criminal gang based upon his interviews and personal experience on the subject of gang culture, a topic beyond the ken of the average juror.

In 2015, the Georgia Court of Appeals confirmed the point that an expert properly may rely on inadmissible facts such as hearsay in providing an opinion. The underlying data must be a type reasonably relied upon by experts in the particular field.⁴⁷

Does such reliance raise any constitutional issues? Only if the witness is used as little more than a conduit for the underlying hearsay. Where the expert uses the underlying data to help form her opinions but adds her own experience and knowledge to supply conclusions, the Confrontation Clause is not violated.⁴⁸

Can written opinions of technicians or analysts be received, absent the live appearance of the analyst at trial in a criminal case? What if a prosecutor wants to convict a defendant in a drug case on the basis of affidavits from the GBI lab that a substance found on a defendant was narcotics? Defendant objects, but the prosecutor wants to press ahead with purely documentary proof and written opinions. The United State Supreme Court's 2009 decision bars a conviction on these facts. In its decision, the Court cited O.C.G.A. § 35-3-154.1 (Defendant must assert his right to confront analyst 10 days before trial). The Supreme Court labeled to the Georgia statute as a "notice-and-demand" statute. "[N]otice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of

⁴⁶*Parks v. State*, 304 Ga. 313, 818 (2015).
S.E.2d 502 (2018).

⁴⁷*Evans v. Department of Transp.*, 331 Ga. App. 313, 771 S.E.2d 20
⁴⁸*United States v. Rios*, 830 F.3d 403 (6th Cir. 2016).

time in which he may object.”⁴⁹ Such statutes do not violate the Confrontation Clause. However, the Massachusetts procedure which allowed a crime lab report as a substitute for live testimony *over defense objection* violated the *Confrontation Clause* and *Crawford v. Washington*.⁵⁰ Confirming that admission of medical or chemical testing results requires the opportunity to cross-examine is *Briscoe v. Virginia*.⁵¹

A related issue comes into play when a lab supervisor authenticates a test completed by one of her technicians. Can a *Crawford* objection defeat the supervisor’s testimony? No, say some Georgia court opinions. In *Carolina v. State*,⁵² the court ruled that a crime lab supervisor could provide opinions drawn from forensic analysis tests conducted by a lab technician. The United States Supreme Court reviewed a similar issue in *Bullcoming v. New Mexico*,⁵³ but came to a different result. The *Bullcoming* decision ruled that the analyst who conducts the tests and writes the report must testify. *Bullcoming* had a right to confront that person, not a substitute witness. The lab report showing blood alcohol concentration in a DWI case should have been rejected because *Bullcoming*’s right of confrontation was violated. Dissenting Justices Kennedy, Roberts, Breyer, and Alito expressed concerns that decisions like *Bullcoming* imposed chaotic burdens on local crime labs.

In a federal court of appeals case, a chemist who analyzed a substance was on maternity leave. Over defense objection, the supervisor who peer reviewed her work testified to the existence of cocaine. The United States Court of Appeals ruled that the supervisor permissibly testified the substances had been submitted to the crime lab for testing and that the data produced by the chemist indicated, in the supervisor’s opinion, that the substance contained cocaine. Any error in admitting this testimony was harmless. The court emphasized that none of the analyzing chemist’s notes or report were introduced as documentary evidence.⁵⁴

Lab reports were a topic which came up in a 2018 case. A felony

⁴⁹*Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

⁵⁰*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

⁵¹*Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (forensic certificate statute used for forensic scientist to supply a written certificate stating that substance found with defendant was

narcotics).

⁵²*Carolina v. State*, 302 Ga. App. 40, 690 S.E.2d 435 (2010).

⁵³*Bullcoming v. New Mexico*, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).

⁵⁴*U.S. v. Turner*, 709 F.3d 1187 (7th Cir. 2013). See *Moss v. State*, 366 Ga. App. 33, 879 S.E.2d 821 (2022) (discussing supervisor testimony in a DNA case).

murder conviction was followed by an appeal in *Taylor v. State*.⁵⁵ The trial judge allowed the medical examiner who had drawn the blood and ordered testing on the victim to testify that the blood test was negative for drugs, and that he died of his injuries and no other causes. Citing the decision in *Leger v. State*,⁵⁶ along with another case, the Court ruled that the medical examiner could rely on the toxicology screen to inform his opinion that the victim died of his injuries, even though the analyst who performed the test was someone other than the medical examiner. “Here, the State did not seek to admit the toxicology report into evidence.” Instead, the medical examiner used it to inform his opinion. That fact supplied a critical distinction.

More cases on lab reports appear in § 25:14, *infra*, including those which soften the impact of *Crawford*.

Autopsy reports are testimonial and their introduction must comply with *Crawford*, ruled the United States Court of Appeals in a 2012 case. Because the trial expert had not performed the autopsies, their admission into evidence was flawed.⁵⁷

A pain management physician was convicted of dispensing fentanyl without a legitimate medical purpose. The government argued the defendant often prescribed opioids without seeing patients, obtaining informed consent, or keeping accurate records. An expert witness for the prosecution testified the defendant’s treatment of patients was outside the usual course of professional practice. Although the expert was not a board-certified pain management physician, the court held that such a doctor need not be a specialist in the particular medical discipline involved in a case to render expert testimony relating to that discipline. The opinion cited with approval the statement that courts often find that a physician in general practice is competent to testify about problems that a medical specialist typically treats.⁵⁸

§ 24:18 Qualifications required of expert witness

In the 2013 Georgia Evidence Code, qualification of experts is controlled by O.C.G.A. § 24-7-702. In criminal cases, former O.C.G.A. § 24-7-707 previously set forth a liberal standard for admission of opinions by experts in criminal prosecutions. The repeal of former O.C.G.A. § 24-7-707 in 2022 marked a change of

⁵⁵*Taylor v. State*, 303 Ga. 225, 811 S.E.2d 286 (2018).

⁵⁶*Leger v. State*, 291 Ga. 584, 732 S.E.2d 53 (2012).

⁵⁷*U.S. v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012).

⁵⁸*United States v. Ruan*, 966 F.3d 1101, 112 Fed. R. Evid. Serv. 1759 (11th Cir. 2020), vacated on other grounds and remanded, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022).

direction, resulting in experts being controlled by the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹ as provided in Rule 702.² Effective December 1, 2023, Fed. R. Evid. 702 was amended to clarify requirements for proffered expert testimony.³ Georgia has not, to date, adopted the 2023 amendments to the federal rule.

Generally, an expert witness is qualified if because of his skill, training, and experience, an expert is better able to form an accurate opinion as to a technical matter under consideration than is the average person in the community.

The determination of the competency and qualifications of a witness offered as an expert is addressed to the judicial discretion of the trial judge before whom the testimony is offered, and his ruling or determination in this respect with regard to the proposed expert witnesses will not be disturbed by a reviewing court, unless that discretion has been abused or the error is clear and involves a misconception of the law, in which case the judgment of the trial court may be reversed.⁴

The defendant beat and stabbed a homicide victim in 1986. A quarter-century later, in 2012, improved fingerprinting techniques allowed investigators to tie a bloody fingerprint to the defendant. A defense forensic expert was rejected by the trial judge. The expert was not a fingerprint examiner and had not conducted scientific studies on fingerprint evidence. “Under these circumstances, we cannot say the trial court abused its discretion in declining to admit [the witness] as an expert witness with respect to fingerprint evidence.”⁵

In *Everson v. Phoebe Sumter Medical Center*,⁶ the court excluded a physician’s testimony regarding the standard of care applicable to the hospital’s emergency room nurses. A trial court must act as a gatekeeper under O.C.G.A. § 24-7-702 to ensure the qualifications of an expert as well as the relevance and reliability of expert testimony.

The knowledge that is required in order for a witness to be

[Section 24:18]

¹*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 37 Fed. R. Evid. Serv. 1 (1993).

²*Wilson v. State*, 370 Ga. App. 399, 897 S.E.2d 597 (2024).

³Fed. R. Evid. 702, advisory committee notes to 2023 amendment.

⁴*Dandridge v. State*, 109 Ga. App. 33, 134 S.E.2d 814 (1964).

⁵*Riley v. State*, 305 Ga. 163, 824 S.E.2d 249 (2019). Experts with expanded fingerprint experience are treated differently. The Georgia Supreme Court distinguished its ruling in *Riley* from cases where the expert witness had training and experience comparing fingerprints.

⁶*Everson v. Phoebe Sumter Medical Center, Inc.*, 341 Ga. App. 182, 798 S.E.2d 667 (2017), judgment rev’d in part on other grounds, 302 Ga. 364, 806 S.E.2d 533 (2017).

qualified as an expert in a given field may be derived from education in that particular field or profession, or through special knowledge derived from experience.⁷

In *Davis v. State*,⁸ the defendant argued that in a case involving drugs, it was error for a police detective to testify concerning the meaning of terms like “jugging.” The Georgia Supreme Court disagreed, and ruled that an expert’s special knowledge may come from experience. Formal education is not a prerequisite for expert status. There was no error in the admission of this evidence.

A medical examiner’s investigator with special knowledge gained from experience may be qualified as an expert witness, even if he is not a forensic pathologist.⁹

An osteopathic physician was not competent to testify as an expert witness against an allopathic physician, in the absence of competent evidence that the methods of treatment of the injury in question are the same despite the difference in the nomenclature of the schools involved, and the medical malpractice plaintiff’s expert affidavit was therefore insufficient.¹⁰

As noted, a person can be classified as an expert because of his experience as opposed to formal academic training.¹¹ “[F]ormal education on the subject is not a prerequisite for expert status.” In *Carr*, the court permitted two firefighters with 20 and 13 years experience to testify about vapor explosions and use of accelerants. *Carr* was overruled on other grounds in *Chapel v. State*.¹² The point for which *Carr* is cited here remains intact.

Similarly, in *Hines v. State*,¹³ a DNR employee with five years of experience teaching hunter safety courses could testify as to whether the accused misused his firearm in a turkey hunting misadventure.

*Colon v. State*¹⁴ is another opinion reciting the principle that formal education is not always a prerequisite for expert status, since special knowledge may be derived from experience as well as from study. However, in this case a pharmacist who was not a pharmacologist was not allowed to testify as an expert.

⁷Mulkey v. General Motors Corp., 164 Ga. App. 752, 299 S.E.2d 48 (1982), judgment rev’d on other grounds, 251 Ga. 32, 302 S.E.2d 550 (1983).

⁸Davis v. State, 301 Ga. 397, 801 S.E.2d 897 (2017).

⁹Bradley v. State, 254 Ga. 654, 333 S.E.2d 578 (1985).

¹⁰Milligan v. Manno, 197 Ga. App.

171, 397 S.E.2d 713 (1990).

¹¹See Carr v. State, 267 Ga. 701, 482 S.E.2d 314 (1997).

¹²Chapel v. State, 270 Ga. 151, 510 S.E.2d 802 (1998).

¹³Hines v. State, 276 Ga. 491, 578 S.E.2d 868 (2003).

¹⁴Colon v. State, 256 Ga. App. 505, 568 S.E.2d 811 (2002).

*Watson v. State*¹⁵ also applies the principle that a witness can be qualified as an expert in a particular field if the witness demonstrates special knowledge derived from experience. A detective with almost 20 years' experience was qualified to testify about the firearms in this case.

The Georgia Supreme Court echoed this principle in *Burgess v. State*,¹⁶ saying “[a] witness need not be formally educated in the field to be qualified as an expert.” An officer who trained new hires about gangs at the police academy and regularly monitored six county-based gangs was qualified to testify as an expert about gang investigation.

In *Moore v. State*,¹⁷ an expert opined at trial that the victim's murder constituted criminal gang activity and that the accused likely shot the victim for showing disrespect for a gang member.

Experts in gang terminology appear at trial to interpret gang communications.¹⁸ Participants in drug transactions regularly use code words to conceal the nature of their activities. A law enforcement expert can interpret communications based on things like the surrounding context, the expert's training and experience, as well as knowledge of related communications. *U.S. v. Holguin*¹⁹ endorsed the view of the Federal Advisory Committee that so long as the principles and methods are reliable and reliably applied to the facts of the case, this type of testimony should be admitted.

Gang activity was addressed by Justice Boggs in *Parks v. State*.²⁰ A victim died from a gunshot wound after a member of the GMC gang fired into a crowd, and there was testimony that Parks was a member of GMC and directed the shooting. The expert's testimony was proper here because it was based upon firsthand knowledge. The expert had interviewed GMC members and had knowledge of its signs and symbols.

A pathologist was properly allowed to give an opinion concerning the distance of a handgun's muzzle to the head of the decedent at the time the fatal shot was fired, because the opinion was within the pathologist's area of expertise and was based on many years of experience examining gunshot wounds.²¹

In a case where a plaintiff fell off a ladder and incurred a seri-

¹⁵*Watson v. State*, 303 Ga. 758, 814 S.E.2d 396 (2018).

¹⁶*Burgess v. State*, 292 Ga. 821, 742 S.E.2d 464 (2013).

¹⁷*Moore v. State*, 305 Ga. 251, 824 S.E.2d 377 (2019).

¹⁸*Blash v. State*, 318 Ga. 325, 898 S.E.2d 522 (2024).

¹⁹*United States v. Holguin*, 51 F.4th 841, 119 Fed. R. Evid. Serv. 1483 (9th Cir. 2022) (experts played a central role in the government's case).

²⁰*Parks v. State*, 304 Ga. 313, 818 S.E.2d 502 (2018).

²¹*Clifton v. State*, 261 Ga. 825, 412 S.E.2d 277 (1992).

ous brain injury, the manufacturer was sued because of the claim that the ladder was badly designed and an alternate design would have prevented the accident. The jury awarded the plaintiff over \$11 million in damages. On appeal, the defendant attacked the qualifications of a plaintiff's ladder expert because of his advanced age (Dr. Vinson received his bachelor's degree in 1952). The Court of Appeals swept aside the argument as without merit. Defendant Caprum failed to explain how Dr. Vinson's age rendered him unqualified. Furthermore, the expert had authored numerous articles in engineering journals related to aluminum stepladders.²²

A motion on behalf of an indigent criminal defendant for funds with which to obtain the services of a scientific expert should disclose to the trial court, with a reasonable degree of precision, why certain evidence is critical, what type of scientific testimony is needed, what the expert proposes to do regarding the evidence and the anticipated costs for services.²³

On the provision of expert assistance to indigent defendants, see *Ake v. Oklahoma*.²⁴

What about cross-examining an expert before she gives her opinions? In Georgia, does an adversary have the right to insist upon an out-of-order cross-examination of an opposing expert when the inquiry relates to qualifications? A resounding "yes" to this question was supplied in *Dimambro Northend Associates v. Williams*.²⁵

It is clear that a party has the right to a thorough and sifting cross-examination of the experts called by the opposing party. See *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957). We find no Georgia cases which mandate that a party has the right to cross-examine the opposing party's experts on the limited question of their qualifications before those witnesses are allowed to give expert testimony on direct examination. However, we find no Georgia cases which hold that no such right exists. What is clear is that "our courts have uniformly held that for the testimony of an expert witness to be received, his qualification as such must be first proved. [Cits.] If that prerequisite is not met the opinion of the expert must be excluded." *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957). It is likewise clear that the determination of whether this essential prerequisite has been met is within the trial court's exercise of sound discretion. See generally *Hogan v. Olivera*, 141 Ga. App. 399, 401, 233 S.E.2d 428 (1977).

It would seem that a trial court cannot truly be said to have made

²²*Baugh v. Cuprum S.A. de C.V.*, 845 F.3d 838, 102 Fed. R. Evid. Serv. 378 (7th Cir. 2017).

²³*Roseboro v. State*, 258 Ga. 39, 365 S.E.2d 115 (1988).

²⁴*Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

²⁵*Dimambro Northend Associates v. Williams*, 169 Ga. App. 219, 312 S.E.2d 386, 389–390 (1983).

an objective and impartial threshold determination of the admissibility of expert testimony unless the opposing party is afforded the opportunity, if he so requests it, to cross-examine the witness on the question of his qualification before that discretionary determination of admissibility is made by the trial court. In other jurisdictions there is a right to such a preliminary limited cross-examination on the issue of expert qualifications, the denial of which has been held erroneous. See *Davis v. Pennsylvania R. Co.*, 215 Pa. 581, 64 A. 774 (1906). We believe that this should be the rule in Georgia. The discretionary determination of the qualification to give expert testimony should be made only after the trial court has heard all the relevant evidence bearing on this issue. In the instant case appellant requested but was refused a preliminary opportunity to cross-examine Mr. Elliott on his expert qualification. This was error.

On another topic, the issue of whether an expert should be tendered to the court as an expert in a scientific field after completion of qualifications has been addressed. In *Ingram v. State*²⁶ the court states the proper procedure when qualifying an expert:

The opinions of experts may be given. [Former] O.C.G.A. 24-9-67. Although the State did not expressly ask as it should have, after laying the foundation, that the court deem the agent qualified to testify as an expert in drug business methods and language interpretation, the evidence of the agent's training and vast experience upon which knowledge was based were sufficient to qualify him as an expert on these matters.

In *Newberry v. D.R. Horton, Inc.*²⁷ the court stated that “a motion for directed verdict is not an authorized vehicle to challenge the competency of expert opinion testimony on the ground that the witness was not tendered as an expert.”²⁸ Another case dealing with an untendered expert is *Hestley v. State*.²⁹ The court's preference for a formal tender was apparent in *Stephens v. State*:³⁰ “The officer in this case gave his opinion without being tendered or qualified as an expert on the use of illegal drugs. (Citation) This unqualified testimony was not competent evidence of an intent to distribute.”

Absence of a formal tender was not fatal to expert testimony in a 2021 case. A police detective with years of experience as an investigator can give his opinion as to why no DNA evidence occurs in some child sex crime cases, even if he is not formally

²⁶*Ingram v. State*, 178 Ga. App. 292, 342 S.E.2d 765 (1986).

²⁷*Newberry v. D.R. Horton, Inc.*, 215 Ga. App. 858, 859, 452 S.E.2d 560 (1994).

²⁸215 Ga. App. at 860.

²⁹*Hestley v. State*, 216 Ga. App. 573, 455 S.E.2d 333 (1995) (it appears the court tacitly accepted the witness as an expert in the field of burglary investigation).

³⁰*Stephens v. State*, 219 Ga. App. 881, 467 S.E.2d 201 (1996).

tendered as an expert.³¹

Regarding qualifications of experts, court attention was given to establishing expertise by experience as opposed to academic training in the field in a 2008 case. Generally, nothing more is required to qualify an expert than that he has been educated or is experienced in a particular trade or profession; this special knowledge may be derived from experience as well as study and mental application.³² Two witnesses were the object of comment in *Fortner*. A police officer with investigative training and experience on automobile collisions is an expert witness for purposes of a negligence action even if he is not trained to reconstruct traffic accidents; such an officer is allowed to testify about what he observed at accident scene and to give his conclusions from those observations about what happened. In addition, a professional truck driver's opinion testimony that sight view at a railroad crossing was adequate was admissible expert testimony in a negligence action based on a collision between a truck and an oncoming train; testimony was an observation which could not be adequately described and presented to the jury with the same force and clearness as it appeared to the witness, hence his conclusions were permitted.

To qualify as an expert, generally all that is required is that a person must have been educated in a particular skill or profession, and his special knowledge may be derived from experience as well as study.³³ Formal education in the subject at hand is not a prerequisite for expert status. A major with the police department was a qualified expert in the area of blood pattern analysis; the major had been in law enforcement for over 33 years, he had received FBI training in investigation and crime scene evaluation, had attended numerous courses in crime scene reconstruction, including instruction on blood pattern analysis and characteristics of blood patterns, and over the course of his career had investigated hundreds of bloody crime scenes. At the time of the trial, the major was in charge of the investigation division of a police department, where he was involved in crime scene investigations and personally oversaw the work of seven other investigators.

State's questioning of an expert on battered women's syndrome regarding her qualifications, questioning which was done in the presence of the jury after the expert had already been qualified as an expert in the jury's absence did not constitute impermis-

³¹Harris v. State, 358 Ga. App. (Mikell, J.).
204, 854 S.E.2d 374 (2021).

³²Fortner v. Town of Register, 289 Ga. App. 543, 657 S.E.2d 620 (2008).

³³Williams v. State, 279 Ga. 731,
620 S.E.2d 816 (2005).

sible bolstering. Ordinarily a jury should know all the qualifications of a witness in order to properly evaluate the testimony.³⁴

In a medical malpractice action, it is the expert's qualifications, vis-a-vis the area of practice or specialty in which the expert is providing the opinion, rather than the defendant doctor's specialty or area of practice that controls whether the trial court should allow the expert's testimony. The issue of the admissibility or exclusion of expert testimony rests in the broad discretion of the court, and, consequently, the trial court's ruling thereon cannot be reversed absent an abuse of discretion.³⁵

No expert can testify outside the area of his expertise. Opinions about medical diagnoses must be made by a physician. While others with training can testify about medical issues, a medical causation opinion could not be delivered by a registered nurse.³⁶

After the Tort Reform Act of 2005, affiants under the affidavit requirement in medical malpractice cases must meet the qualifications requirement of O.C.G.A. § 24-7-702.³⁷ The affidavit of an orthopedist was filed in a case involving a neurosurgeon in *Abramson v. Williams*.³⁸

Medical malpractice actions impose special expert witness requirements. In most such cases, the plaintiff is required to file with the complaint "an affidavit of an expert competent to testify." O.C.G.A. § 9-11-9.1 spells this out. There are practice and experience requirements. There are also specialty requirements where the defendant doctor is a specialist. Challenges to the affidavit of the plaintiff's expert can occur. A 2020 decision looked at the defendant's objection to an expert's affidavit. The Georgia Court of Appeals held that the plaintiff's filings met the requirements of O.C.G.A. § 9-11-9.1(a).³⁹

In malpractice actions the expert must be a member of the same profession as the defendant doctor. Also, he or she must have actively practiced the specialty for three of the past five years, or been a teacher of the topic for the same period. A pre-trial hearing on these questions is mandated, upon motion of a party.

Epidemiologist was not qualified to render expert opinion as to

³⁴*Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

³⁵*Canas v. Al-Jabi*, 282 Ga. App. 764, 639 S.E.2d 494 (2006), judgment rev'd on other grounds, 282 Ga. 830, 653 S.E.2d 691 (2007).

³⁶*Freeman v. LTC Healthcare of*

Statesboro, Inc., 329 Ga. App. 763, 766 S.E.2d 123 (2014).

³⁷See § 24:17, *supra*, describing the affidavit requirement.

³⁸*Abramson v. Williams*, 281 Ga. App. 617, 636 S.E.2d 765 (2006).

³⁹*Cantrell v. AU Medical Center, Inc.*, 358 Ga. App. 41, 853 S.E.2d 137 (2020).

medical histories of individual patients in wrongful-death action that was brought by worker's heirs against company that mined a form of asbestos to which worker allegedly had been exposed; epidemiologist was not a licensed medical doctor.⁴⁰

When a doctor is sued for malpractice, must he meet the practice requirements for O.C.G.A. § 24-7-702(c) in order to testify in his own behalf? No, says *Chadwick v. Brazell*.⁴¹ "[T]he legislature intended the qualification requirement to apply to a *third party* expert, not a defendant physician."

Statute governing expert witness qualifications in professional malpractice actions is a procedural law that may be applied retroactively. After holding of a hearing to determine whether an expert is properly qualified to provide expert testimony in professional malpractice actions, a trial court's finding regarding expert's qualification will only be reversed on appeal if the trial court abused its discretion in making its ruling.⁴²

In *Brooks v. Green*⁴³ the Supreme Court held that possession of a professional license in Georgia is not essential to qualifying as a courtroom expert. Such fact, however, may affect the weight of the testimony given by the expert witness.

The point made in *Brooks* was confirmed in *Wilson v. Wilson*.⁴⁴ A person need not be a licensed real estate broker, appraiser, or salesman to qualify as an expert sufficiently qualified to give his opinion on the value of property.

However, a neurosurgeon licensed to practice in Great Britain, Germany, Austria, and India, but who was not licensed to practice medicine in any state within United States, was not deemed to be qualified to give expert testimony in medical malpractice action.⁴⁵

A forensic pathologist was not qualified to testify in a medical malpractice case where nothing in his affidavit showed that for three of the last five years preceding the alleged malpractice he was engaged in an active practice involving treatment of the condition at issue.⁴⁶

§ 24:19 Distinction between expert and skilled witnesses

In some states a distinction is drawn between expert and

⁴⁰*Flowers v. Union Carbide Corp.*, 271 Ga. App. 438, 610 S.E.2d 109 (2005).

⁴¹*Chadwick v. Brazell*, 331 Ga. App. 373, 771 S.E.2d 75 (2015).

⁴²*Nathans v. Diamond*, 282 Ga. 804, 654 S.E.2d 121 (2007).

⁴³*Brooks v. Green*, 277 Ga. 722,

594 S.E.2d 629 (2004).

⁴⁴*Wilson v. Wilson*, 277 Ga. 801, 596 S.E.2d 392 (2004).

⁴⁵*Cagle v. Ehirim*, 304 Ga. App. 451, 696 S.E.2d 438 (2010).

⁴⁶*Hendrix v. Fulton Dekalb Hosp. Authority*, 330 Ga. App. 833, 769 S.E.2d 575 (2015).

skilled witnesses.¹

Can a physician provide lay, nonexpert testimony? Yes, says *Jim Tidwell Ford Inc. v. Bashuk*.² The plaintiff claimed that an attorney committed malpractice when defending Tidwell against a slip-and-fall-claim. “Eleventh Circuit case law draws a distinction between expert and lay testimony by a physician. . . . A physician may offer lay testimony if he or she testifies about observations based on personal knowledge, including treatment of a party.” Expert testimony must comply with standards established by *Daubert*.

A police officer can give lay opinion testimony. The defendant was convicted of cruelty to children. A law enforcement officer who was not tendered as an expert witness gave his opinion that the cut to the victim’s arm looked like a knife wound. Citing O.C.G.A. § 24-7-701, the decision by Presiding Judge McFadden pointed out that just because the officer’s experience could have qualified him for expert witness status does not mean that any testimony he gives at trial is considered expert witness conclusions, as opposed to lay witness opinion. The defendant claimed the trial court erred in allowing the officer to testify because he was not tendered as an expert. The Court of Appeals disagreed.³

The point was made again in *Best v. State*.⁴ Nothing in Rule 701(a) prevents an officer from being qualified to provide both lay opinion and expert testimony. Here, it was clear to the Court of Appeals that the county deputy was giving lay witness opinion.

§ 24:20 Expert testimony on matters of business

A properly qualified witness may testify as to the way in which a business or occupation is ordinarily conducted.¹ He may describe particular customs and trade practices or usages in a business or occupation.²

An expert did that in *Medical Center, Inc. v. Bowden*.³ In a dispute over the reasonableness of a bill sent to a patient by a

[Section 24:19]

¹Details are explained in Imwinkelried, Distinguishing Lay from Expert Opinion, 68 S.M.U. L. Rev. 73 (2015).

²*Jim Tidwell Ford, Inc. v. Bashuk*, 335 Ga. App. 668, 782 S.E.2d 721 (2016).

³*Handy v. State*, 350 Ga. App. 490, 829 S.E.2d 635 (2019) (disapproved of on other grounds by, *McClure v. State*, 306 Ga. 856, 834 S.E.2d 96 (2019)).

⁴*Best v. State*, 355 Ga. App. 881, 846 S.E.2d 157 (2020).

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¹*Brown-Rogers-Dixson Co. v. Southern Ry. Co.*, 79 Ga. App. 449, 53 S.E.2d 702 (1949).

²*Gulf Refining Co. v. Smith*, 164 Ga. 811, 139 S.E. 716 (1927).

³*Medical Center, Inc. v. Bowden*, 348 Ga. App. 165, 820 S.E.2d 289 (2018), opinion vacated in part on other grounds, 359 Ga. App. 629, 859 S.E.2d 810 (2021).

hospital, opinions supplied by an expert who was called by the plaintiff were deemed both reliable and relevant. The expert testified there is a standard method among hospitals for calculating the reasonable amount of billed charges, and the medical center's charged rates in this case were higher than comparable hospitals. This led to his conclusion that the rates were unreasonable.

A qualified witness may state the meaning of technical words or phrases and trade names which are unfamiliar to the average person, provided they are not commonly used or generally understood.⁴

In a financial dispute the court held that an accounting expert's damages calculations were reliable. The defendant disagreed with the values the accountant assigned to the cost of insurance and future interest rates. Under Federal Evidence Rule 702, an expert's testimony must be based on sufficient facts and data. In fulfilling its gatekeeping function under *Daubert*, a district court must conduct a preliminary assessment to determine whether an expert's methodology is valid. In evaluating an expert's methodology, the Court of Appeals turned to the four factors identified in *Daubert* as guideposts. In the present case, the disagreement by the defense with the accountant's calculations did not raise a sufficient *Daubert* challenge to exclude the expert's conclusions. The court rejected Wilmington's arguments.⁵

§ 24:21 Expert testimony on how incident occurred

There may be many occasions when a properly qualified expert may interpret the available testimony and express an opinion as to how an incident occurred. A medical examiner who was a qualified autopsist who had performed over 7,000 autopsies, including 20 autopsies in which the cause of death was pulmonary embolism, was qualified to testify to a causal relationship between the blood clot that killed a victim and the gunshot wounds inflicted by a defendant, where his findings and testimony were based on his examination and on medical grounds within his area of expertise.¹

In a 2016 decision, the United States Court of Appeals for the Eleventh Circuit adjudicated the admissibility of opinions by a design defect expert. The Court of Appeals decided that the district court abused its discretion when it excluded the expert's

⁴*Daniel v. Maddox-Rucker Banking Co.*, 124 Ga. 1063, 53 S.E. 573 (1906).
Serv. 3d 572 (4th Cir. 2017).
[Section 24:21]

⁵*Bresler v. Wilmington Trust Company*, 855 F.3d 178, 97 Fed. R. 392 S.E.2d 872 (1990).
¹*Perkins v. State*, 260 Ga. 292, 392 S.E.2d 872 (1990).

testimony that a design defect in a rifle's fire control system caused the death of a deer hunter. Appellate courts review a trial court's exclusion of expert testimony for abuse of discretion. The expert's opinion was reliable and was not based on speculation. The grant of the motion to exclude by the district court was reversed.²

On the other hand, another 2016 decision excluded an expert in a products liability claim that an auto design defect caused the burning and death of a vehicle passenger. A Kia Soul was involved in a car crash, and when the fuel tank ruptured a fire ensued which was fatal to a passenger. The plaintiffs argued that the faulty fuel tank design rendered the vehicle unreasonably dangerous. Their expert was rejected because of the expert's lack of reliance on reliable underlying data.³

Medical expert testimony as to how a medical condition was caused is regularly received. There has been litigation over whether causation can be proved by proof cast in terms of mere possibility, or whether the accident or trauma must be demonstrated to have probably or certainly caused the plaintiff's affliction.⁴ Georgia courts have ruled that the plaintiff's experts in medical malpractice actions are required to state opinions regarding proximate causation in terms stronger than that of medical possibility. The court held that instead of speaking in terms of possibilities, the expert's testimony must show as an evidentiary threshold that the expert's opinion regarding causation is based, at the least, on the determination that "there was a reasonable probability that the negligence caused the injury." In addressing the issue of proximate causation in a medical malpractice action, an expert witness is required to state an opinion in terms of reasonable medical probability or reasonable medical certainty.

A plaintiff in a personal injury case claimed that the collision caused her to suffer a lumbar soft tissue injury. Even though the emergency room physician's deposition disclosed that the x-rays and CAT scan showed no such injury, the plaintiff sought to admit deposition testimony elicited from the physician on cross-examination that it was possible that the soft tissue injury did not manifest itself until after the x-rays and CAT scan were taken. The testimony was ruled inadmissible since it attempted

²*Seamon v. Remington Arms Co., LLC*, 813 F.3d 983, 99 Fed. R. Evid. Serv. 999 (11th Cir. 2016).

³*Sims v. Kia Motors of America, Incorporated*, 839 F.3d 393, 101 Fed. R. Evid. Serv. 801 (5th Cir. 2016).

⁴See *Zwiren v. Thompson*, 276

Ga. 498, 578 S.E.2d 862 (2003), opinion adopted, 261 Ga. App. 97, 581 S.E.2d 727 (2003); *Whidby v. Columbine Carrier, Inc.*, 182 Ga. App. 638, 356 S.E.2d 709 (1987) (overruled on other grounds by, *Pender v. Witcher*, 194 Ga. App. 72, 389 S.E.2d 560 (1989)).

to show the mere possibility of a causal relation between a given event and a subsequent injury.⁵

Medical causation is usually not supportable by possibility proof alone. Nevertheless, medical testimony stated only in terms of a “possible” cause *may* be sufficient when supplemented by probative nonexpert testimony on causation. Medical causation proof, see *Rodrigues v. Georgia-Pacific Corp.*⁶

Generally, however, mere possibility is insufficient. An expert is required to state an opinion regarding causation to the level of reasonable medical probability or reasonable medical certainty in a medical negligence case.⁷ A 2018 decision makes the point that in a medical malpractice case, an expert’s opinion that a defendant’s negligence caused an injury must be based, at the least, on a reasonable probability that the negligence caused the injury.⁸

Although absolute certainty is not required, during a medical malpractice case the expert’s testimony has to provide a causal connection that is more than chance or speculation.⁹

In medical malpractice cases, there must be a substantial connection between a medical error and the injured or damaged condition of the patient. Speculation will not suffice. Connection by a reasonable degree of medical probability or by reasonable medical certainty is required.¹⁰

In presenting an opinion on causation in medical malpractice action, the expert is required to express some basis for both the confidence with which his conclusion is formed, and the probability that his conclusion is accurate.¹¹ To prevail on medical malpractice claim, plaintiff’s expert testimony must show as an evidentiary threshold that the opinion regarding causation is based, at the least, on the determination that there was a reasonable probability that the negligence caused the injury. Expert’s testimony does not satisfy the causation requirement for medical malpractice claim where, for example, he testifies that the negligence “may have contributed” to the injuries and there were other possible causes not attributable to the defendant, that the failure to take x-rays “could” lead to infection, or that the

⁵*Laukaitis v. Basadre*, 287 Ga. App. 144, 650 S.E.2d 724 (2007).

⁶*Rodrigues v. Georgia-Pacific Corp.*, 290 Ga. App. 442, 661 S.E.2d 141 (2008).

⁷*Roberts v. Quick Rx Drugs, Inc.*, 343 Ga. App. 556, 807 S.E.2d 476 (2017).

⁸*Swint v. Alphonse*, 348 Ga. App. 199, 820 S.E.2d 312 (2018).

⁹*EHCA Dunwoody, LLC v. Daniel*, 277 Ga. App. 783, 627 S.E.2d 830 (2006) (however, expert testimony held not speculative here).

¹⁰*Arnold v. Turbow*, 357 Ga. App. 533, 848 S.E.2d 698 (2020).

¹¹*Beasley v. Northside Hosp., Inc.*, 289 Ga. App. 685, 658 S.E.2d 233 (2008).

administration of a drug “may have contributed” to the plaintiff’s injuries.

While expert evidence is usually not required to prove causation in a simple negligence case, expert evidence may be required where a medical question involving specialized medical knowledge is needed in establishing causation, a causal link between a defendant’s conduct and a plaintiff’s injury.¹²

Accident reconstruction experts sometimes testify in motor vehicle collision cases. Such was the case in *Georgia Department of Transportation v. Owens*.¹³ The expert based an opinion about an accident with a dump truck on materials related to the case, including photographs of the scene and the truck. The same decision authorizes reception of expert opinion from a human factors expert regarding factors affecting a driver’s ability to see and perceive the dump truck.

The courts have quoted with approval the statement that the trend is to allow expert opinion testimony reconstructing motor vehicle accidents from physical evidence, provided the expert witness is sufficiently qualified in the particular field, has before him enough physical evidence to provide him with the important variables involved, makes his reasoning process clear to the trier of fact, and forms his conclusion based on the facts and in accordance with common observations and experiences of man.¹⁴

Accident reconstruction proof may involve estimations of speed of cars prior to impact, resolving point of impact between vehicles where that is contested, path of vehicles after collision, and the like.¹⁵

An expert may testify as to speed based upon skid marks.¹⁶ In *Cox v. Allen*,¹⁷ a qualified accident reconstructionist could give an opinion on speed of a vehicle based upon length of skid marks left by a motorist’s vehicle before point of collision.

In a case involving speed of a motorcycle, a police investigator based his conclusions, which were adverse to the motorcyclist, on the fact, in part, that the motorcyclist tested positive for

¹²Cowart v. Widener, 287 Ga. 622, 697 S.E.2d 779 (2010). This paragraph was quoted favorably in Wong v. Chappell, 333 Ga. App. 422, 773 S.E.2d 496 (2015) (regarding the place of medical causation evidence and specialized medical knowledge in a negligence case).

¹³Georgia Dept. of Transp. v. Owens, 330 Ga. App. 123, 766 S.E.2d 569 (2014).

¹⁴Reconstruction of Accident, 10

Am. Jur. Proof of Facts 137.

¹⁵For details, see Carlson, Successful Techniques for Civil Trials (2d ed.) § 4:38.

¹⁶See § 24:11, supra. See also Whidby v. Columbine Carrier, Inc., 182 Ga. App. 638, 356 S.E.2d 709 (1987) (overruled on other grounds by, Pender v. Witcher, 194 Ga. App. 72, 389 S.E.2d 560 (1989)).

¹⁷Cox v. Allen, 256 Ga. App. 53, 567 S.E.2d 363 (2002).

methamphetamine. The expert concluded that the motorcyclist traveled too fast for conditions. The Court of Appeals decided the trial court did not abuse its discretion in allowing this testimony.¹⁸ There was also testimony from a forensic toxicologist with the GBI. He testified about the effects of methamphetamine on behavior and conduct.

Daubert has been applied in the area of accident reconstruction. In *Dilts v. United Group Services*,¹⁹ the testimony was allowed: “[A reconstructionist] performed the necessary calculations and sufficiently relied on the laws of physics and mathematics generally employed in accident reconstruction to determine how the panel dislodged and rotated out of position leading to the death.” Computer reconstructions have likewise been analyzed under *Daubert*.²⁰ Unreliable reconstructions are sometimes excluded under *Daubert*.²¹ A police officer might successfully provide accident reconstruction testimony.²²

The decision in *Green v. State*²³ dealt with accident reconstruction evidence in criminal cases. A victim was killed in an automobile incident. The trial court excluded a defense accident reconstructionist with opinions about vehicle and speed observations about the path which the defendant’s truck took. The trial court ruled there was a violation of rules prescribing disclosure of expert materials by the defense, but the Supreme Court disagreed. The defendant’s conviction was reversed.

In *Johnson v. Knebel*,²⁴ the Georgia Supreme Court advanced guidelines for lay and expert opinions. The court also held that an expert could not testify as to which of two successive collisions caused the plaintiff’s injuries simply by virtue of the fact that the witness was an accident reconstructionist. Some knowledge of anatomy and human physiology is required.

Expert in wrongful death action against the Department of Transportation following driver’s death in traffic collision was au-

¹⁸*Clack v. Hasnat*, 354 Ga. App. 502, 841 S.E.2d 210 (2020).

¹⁹*Dilts v. United Group Services, LLC*, 500 Fed. Appx. 440 (6th Cir. 2012).

²⁰See *Valente v. Textron, Inc.*, 931 F. Supp. 2d 409 (E.D. N.Y. 2013), *aff’d*, 559 Fed. Appx. 11 (2d Cir. 2014) (“courts have repeatedly applied *Daubert* in determining whether a specific accident reconstruction software program is sufficiently reliable”).

²¹See *Warger v. Shauers*, 721 F.3d 606, 91 Fed. R. Evid. Serv. 1395 (8th Cir. 2013) (“The district court excluded

such testimony because it would have been based on a traffic officer’s report it had found inadmissible”).

²²*Flynn v. U.S.*, 527 Fed. Appx. 825 (11th Cir. 2013) (“the police officer who investigated the accident—an officer who was a certified in accident reconstruction—determined that Mr. Flynn was not in control of his vehicle and was at fault for the collision.”).

²³*Green v. State*, 307 Ga. 171, 835 S.E.2d 238 (2019).

²⁴*Johnson v. Knebel*, 267 Ga. 853, 485 S.E.2d 451 (1997).

thorized to testify as to whether a driver in the victim's position could discern that she was approaching a more major road and would therefore be required to yield; expert had visited the intersection and had viewed the photographs of the intersection taken three days after the collision.²⁵

Beaver activity was the cause of excessive water on the roads, said an accident reconstructionist who was allowed to testify in *Georgia Dept. of Transp. v. Miller*.²⁶

An expert testified to his opinion about the cause of a car crash. As recounted by the Court of Appeals, he stated that “loss of control of [the] vehicle was caused by encountering the accumulated water on the road.” In reviewing the expert's opinion, the Georgia Supreme Court approved the expert's testimony and held that an expert is not required to prove within a reasonable degree of scientific certainty his opinion of how an accident occurred.²⁷

“Cause of the accident” evidence was admitted in a 2008 case. Where investigating officer's opinion relating to automobile accident is based on his examination of physical evidence at scene, and not solely on statements of witnesses, and where he does not opine as to ultimate issue of a party's negligence, his opinion on cause of an accident is admissible in a negligence action as an assessment of fact and not a legal conclusion or a conclusion constituting a mixture of law and fact.²⁸ Testimony by the officer who investigated a collision between a truck and an oncoming train, indicating that truck driver disregarded a stop sign at railroad crossing, was admissible expert testimony in negligence action; testimony did not opine as to whether driver was negligent in collision, rather, testimony concerned sequence of events leading up to collision.

The *Fortner* rule was followed in a 2013 case. While accident reconstruction more typically arises in civil disputes, criminal cases have also given rise to reconstruction testimony. In *Fouts v. State*,²⁹ two Georgia state troopers both opined that the collision was caused by Fouts' reckless driving. In the first-degree vehicular homicide prosecution, the court ruled an investigating officer is allowed to testify about his observations and conclusion regarding what happened, including whether one of the drivers

²⁵*Georgia Dept. of Transp. v. Baldwin*, 292 Ga. App. 816, 665 S.E.2d 898 (2008). *Transp.*, 280 Ga. 848, 632 S.E.2d 135 (2006).

²⁶*Georgia Dept. of Transp. v. Miller*, 300 Ga. App. 857, 686 S.E.2d 455 (2009). ²⁸*Fortner v. Town of Register*, 289 Ga. App. 543, 657 S.E.2d 620 (2008).

²⁷*Layfield v. Department of* ²⁹*Fouts v. State*, 322 Ga. App. 261, 744 S.E.2d 451 (2013).

was the “sole cause of the collision.”

The exception expressed in *Fortner*, sometimes referred to as the “investigating officer rule,” was evaluated by the Georgia Supreme Court in a 2024 decision. *Miller v. Golden Peanut Company, LLC*, held that while investigating officers may provide expert opinion testimony arising from automobile accidents that they have investigated, there is no special exemption from *Daubert* for their testimony.³⁰ Instead, accident reconstruction testimony from investigating officers must comport with O.C.G.A. § 24-7-702.

Citing former O.C.G.A. § 24-9-67, the Georgia Supreme Court gave the Georgia statute an interpretation much like Federal Evidence Rule 704 when it said that the scope of admissible expert testimony can include testimony on ultimate issues for the jury. The test is whether the expert’s conclusion is one beyond the ability of jurors to draw from themselves. A crime scene reconstructionist trained in behavioral science with 27 years of experience in the field could relate the reasons why a perpetrator might move or cover a victim’s body.³¹

An expert in crime scene reconstruction can offer conclusions as to details of how a murder was committed; the conclusions could not have been reached by the jury without professional skill and knowledge, and the expert testimony was as consistent with the defense theory as with the prosecution.³²

How “ultimate” can an expert’s opinion be? Very much so, says *Collum v. State*.³³ Testimony of a forensic pathology expert witness that child victim’s then healing broken rib was the result of an adult strength force was admissible even if it went to the ultimate issue, in a murder prosecution, as the force necessary to break a young child’s rib was an issue beyond the ken of the average layman.

The nature of the victim’s injuries played a role in another case. Experts testified that injuries to a three-year old child were severe and came from physical abuse. This testimony was admissible to describe the experts’ opinions as to their cause.³⁴

Another prosecution also involved the nature of the victim’s injuries. In *Robinson v. State*,³⁵ a doctor’s expert opinion that adult bite marks on the leg of a three-year-old child showed an

³⁰*Miller v. Golden Peanut Company, LLC*, 317 Ga. 22, 891 S.E.2d 776 (2023).

³¹*Foster v. State*, 273 Ga. 34, 537 S.E.2d 659 (2000).

³²*McAllister v. State*, 258 Ga. 795, 375 S.E.2d 36 (1989).

³³*Collum v. State*, 281 Ga. 719, 642 S.E.2d 640 (2007).

³⁴*Gomez v. State*, 301 Ga. 445, 801 S.E.2d 847 (2017).

³⁵*Robinson v. State*, 309 Ga. 729, 848 S.E.2d 441 (2020).

aggressive act rather than playful conduct was deemed not to be improper.

However, in *Johnson v. Leibel*,³⁶ the court cautioned against expert ultimate opinions where guidance of this kind is not needed by the jury. A party may not bolster his case as to the ultimate issue with expert testimony when the jury could reach the same conclusion independently. Nonetheless, in *Leibel*, the testimony of an expert that the defendant lawyer violated standards of care and this negligence proximately caused damage to the client's case was deemed appropriate by the Court of Appeals. Following a jury trial the client had been awarded \$2 million. The *Leibel* decision was later reversed. The court below erroneously decided that the expert opinion was admissible here.³⁷ The Georgia Supreme Court said the issue was for the jury to decide and "not properly the subject of expert testimony."

§ 24:22 Expert testimony on value of services

A properly qualified witness may state the usual and customary charge for particular kinds of services in the locality and at the time the services were rendered.¹

In applying this general rule, the courts have made no distinction based on the various types of services rendered, either in their reasoning or their holding, and persons who may be supposed to have some specific knowledge as to the value of their services, such as physicians, attorneys, architects, or real estate brokers, are not put into a different category from those persons whose knowledge of the value of services of the type they performed may be rather limited.²

The value of a medical practice became an issue in a 2010 case. The facts upon which an expert bases his or her opinions as to value of closely held corporation in divorce action involving division of marital property are admissible on either direct or cross-examination, and such bases go to the weight given the testimony by the factfinder, rather than to its admissibility. There is no single best approach to valuing a professional association or practice when dividing marital property in a divorce action, and various approaches or valuation methods can be used.³

³⁶*Johnson v. Leibel*, 307 Ga. App. 32, 703 S.E.2d 702 (2010). v. Plumer, 67 Ga. App. 720, 21 S.E.2d 515 (1942).

³⁷*Leibel v. Johnson*, 291 Ga. 180, 728 S.E.2d 554 (2012).

²*Reserve Life Ins. Co. v. Gay*, 214 Ga. 2, 102 S.E.2d 492 (1958).

[Section 24:22]

³*Miller v. Miller*, 288 Ga. 274, 705 S.E.2d 839 (2010).

¹*Bankers Health & Life Ins. Co.*

§ 24:23 Expert testimony on value of real estate

While a nonexpert familiar with real estate values may testify as to value of real estate, see § 24:15, *supra*, the increasing complexity of real estate valuation makes expert testimony desirable, even necessary, in many cases.

To the extent that the rules on experts in civil cases adopted in 2005 (identified in § 24:17, *supra*) might be interpreted to upset some of the traditional practices in land condemnation cases, such cases are declared exempt from some of the 2005 rules on expert opinion.¹

Applying O.C.G.A. § 24-7-702, a 2014 decision found an appraiser's expert opinion regarding market value was supported by reliable principles.²

Market value for foreclosure sale, see *Nash v. Compass Bank*.³

Where the value of property is in dispute, evidence of sales of comparable property that is not too remote in point of time generally is admissible using one of the following methods: (1) an expert witness, in explaining the basis of his or her opinion as to the value of the property, may refer to other comparable sales of property which the expert took into account and which influenced the expert's opinion; and (2) after a suitable foundation has been laid to show the similarity of the property, the fact and amount of sales of such property may be directly introduced in evidence without requiring the testimony of an expert as a prerequisite to admissibility.⁴

In a condemnation case of .913 acres for a highway construction project, the condemnee contended that the trial court erred in allowing testimony by a DOT expert, contending that he was not qualified as an expert in development. The court found that the trial court did not manifestly abuse its discretion in admitting that expert's opinion given his extensive experience and study as "the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion . . . goes to the weight and credibility of the testimony, not its admissibility."⁵

§ 24:24 Expert testimony on handwriting

Most of the rules pertaining to expert testimony generally ap-

[Section 24:23]

¹O.C.G.A. § 22-1-14(b).

²Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC, 325 Ga. App. 694, 754 S.E.2d 655 (2014).

³*Nash v. Compass Bank*, 296 Ga. App. 874, 676 S.E.2d 28 (2009).

⁴*Henry County v. RJR Management One, LLC*, 290 Ga. App. 241, 659 S.E.2d 676 (2008).

⁵*Woodland Partners Ltd. Partnership v. Department of Transp.*, 286 Ga. App. 546, 650 S.E.2d 277 (2007).

ply to expert testimony on handwriting.

In the revised Evidence Code for Georgia, handwriting experts are largely controlled by general expert witness rules.¹ As described hereafter, one approach contained in former Georgia practice is retained in the 2013 Code and applied when a handwriting comparison is made by an expert. Retained in the 2013 provision is the Georgia approach which requires that handwriting specimens which are used by the expert to identify a writer must be furnished to the opposite party “no later than ten days prior to trial.”²

Since Georgia courts are invited in the revised Evidence Code to consult federal precedent for assistance, decisions like those favoring handwriting experts will be helpful.³

In addition to experts, as well as to the testimony of those who know a person’s handwriting, the statute provides an additional method of proof. The statute provides that other writings, which are proven or acknowledged to be genuine, can be introduced for the purpose of comparison by the jury. Such other papers must be submitted to the opposite party before she announces ready for trial.⁴

§ 24:25 Questioned documents

In addition to questions relating to handwriting, it appears to be permissible in Georgia for properly qualified experts to testify as to questioned documents.¹

§ 24:26 Expert testimony on fingerprints

Fingerprints and expert testimony relating to fingerprints are admissible in evidence.¹

Fingerprint experts were discussed in *Riley v. State*.² An expert proffered by the defense was rejected by the court. Along the way

[Section 24:24]

¹See O.C.G.A. § 24-7-702.

²See O.C.G.A. § 24-9-901(3).

³See *U.S. v. Prime*, 431 F.3d 1147, 68 Fed. R. Evid. Serv. 1288 (9th Cir. 2005).

⁴*Jackson v. Jackson*, 163 Ga. App. 767, 296 S.E.2d 100 (1982).

Lay opinion was allowed in *Cowards v. State*, 266 Ga. 191, 465 S.E.2d 677, 680 (1996).

[Section 24:25]

¹See *Harrison v. State*, 120 Ga. App. 812, 172 S.E.2d 328 (1969); *E.B.*

Martin & Sons v. Bank of Leesburg, 137 Ga. 285, 73 S.E. 387 (1911). See also O.C.G.A. §§ 24-7-702 and 24-9-901(b)(3).

[Section 24:26]

¹*Anthony v. State*, 85 Ga. App. 119, 68 S.E.2d 150 (1951); *McCoy v. State*, 237 Ga. 118, 227 S.E.2d 18 (1976). See also O.C.G.A. § 24-7-702.

²*Riley v. State*, 305 Ga. 163, 824 S.E.2d 249 (2019).

to reaching this conclusion, the Georgia Supreme Court cited other cases wherein fingerprint examiners were qualified to opine on fingerprints where they had training plus on-the-job experience.

§ 24:27 Expert testimony on ballistics

The testimony of a properly qualified ballistics expert is admissible.¹

Expert evidence to identify the weapon from which a shot was fired is generally admissible under the rules governing other forms of expert evidence; it is the modern tendency of the courts to allow the introduction of expert testimony to show that the bullet or cartridge found at the scene of a crime was fired from a particular gun, where it is definitely shown that the witness by whom the testimony is offered is, by experience and training, qualified to give an expert opinion on firearms and ammunition.² Testimony of a firearms expert helped establish that the projectile removed from the victim's body was probably discharged from the handgun identified by the defendant. Even though the expert could not be positive in the identification, there was only one projectile in the victim's body and the defendant had stated, in effect, that the identified weapon had fired the fatal shot.³

A medical examiner's testimony explained the absence of bullet fragments in a wound. The expert was experienced in dealing with certain ballistics issues related to range of fire, soot, stippling, and the trajectory of a bullet through a body. The testimony was held to be admissible.⁴

In a 2019 case, a defendant was convicted of the fatal shooting of her boyfriend. A firearms expert testified that a revolver recovered from the murder scene had fired the fatal shot. The expert also stated there was no chance the weapon had been fired accidentally. The Georgia Supreme Court affirmed the conviction.⁵

In *Evans v. State*,⁶ a ballistics expert testified that the bullet recovered from a shooting victim's skull "could have been fired from Appellant's .22 caliber Jennings pistol."

Forensic evidence showed that the victim of a murder was fatally shot at close range in the back of the head by a gun in

[Section 24:27]

¹*Moughon v. State*, 57 Ga. 102, 1876 WL 3098 (1876). See Imwinkelreid and Tobin, *Comparative Bullet Lead Analysis (CBLA) Evidence*, 28 Okla. City L. Rev. 43 (2003).

²*Gibson v. State*, 178 Ga. 707, 174 S.E. 354 (1934).

³*Anderson v. State*, 258 Ga. 278, 368 S.E.2d 508 (1988).

⁴*Johnson v. State*, 296 Ga. 504, 769 S.E.2d 87 (2015).

⁵*Hopwood v. State*, 307 Ga. 305, 835 S.E.2d 627 (2019).

⁶*Evans v. State*, 306 Ga. 403, 831 S.E.2d 818, 823 (2019).

contact with his scalp. The victim had a partial muzzle imprint, meaning that the gun's muzzle was in contact with the victim's head when it was fired.⁷

§ 24:28 Expert testimony on mental capacity

In the 2013 Georgia Evidence Code, O.C.G.A. § 24-7-704 bars expert opinion relating mental health assessments in criminal cases which invade the province of the jury.

Statements made by accused in course of court-ordered psychiatric examination may constitutionally form basis of opinion testimony by properly appointed experts as to mental capacity at time of offense without violating right of accused not to incriminate himself; this holding does not determine admissibility at trial of confessions or other implicating declarations made by accused to court-appointed medical examiner.¹

In aid of an insanity defense, a defense attorney may secure the services of others to gather information from his client and report to him. Consultants fall into this category. At the request of defense counsel, two mental health experts looked at the defendant. Based on their advice, defendant's attorney hired a forensic psychological expert and pursued a mental illness defense. At trial, defendant was found guilty but mentally ill. Prior thereto, the state asked for the notes from the original two experts who advised the defense. Despite defense objections, the court ordered production of the notes. This violated the attorney-client privilege. Merely raising the insanity defense did not waive that privilege. The court held that the attorney-client privilege applies to a defendant's communications with a non-testifying psychiatric expert. The umbrella of privilege extends to a lawyer's consultants.²

A state psychiatrist's alleged failure to give a defendant adequate *Miranda* warnings prior to interviewing the defendant did not require exclusion of the psychiatrist's rebuttal testimony where the testimony was limited to the defendant's mental state and did not describe any statements by the defendant regarding the crimes for which he was on trial.³

Granting or denying of motions for funds to hire an expert psychiatric witness is within the discretion of the court, and no error will be found in denying motion where defendant had salaried

⁷Casey v. State, 310 Ga. 421, 851 S.E.2d 550 (2020).

[Section 24:28]

¹Presnell v. State, 241 Ga. 49, 243 S.E.2d 496 (1978), judgment rev'd

in part on other grounds, 439 U.S. 14, 99 S. Ct. 235, 58 L. Ed. 2d 207 (1978).

²Neuman v. State, 297 Ga. 501, 773 S.E.2d 716 (2015).

³Tankersley v. State, 261 Ga. 318, 404 S.E.2d 564 (1991).

investigator working on case and was represented by four retained counsel.⁴

The jury was not precluded from finding the defendant guilty, but mentally ill, by the fact that all experts called by both sides agreed that it was highly unlikely that the defendant knew right from wrong at the time of the crime.⁵

§ 24:29 Expert testimony on child abuse syndrome

The trial court erred in prohibiting the defendant from cross-examining in the jury's presence an expert witness who was testifying as to the "indicators" of child abuse syndrome and whether the victim had exhibited certain of those indicators, where the expert had indicated on cross-examination outside the jury's presence that the victim's indicators could have come from her family but that she had ruled them out in this case; it was for the jury to determine whether the indicator exhibited by the victim was inculpatory or exculpatory of the defendant and without the cross-examination the jury was left with the erroneous impression that there was no other explanation for the victim's "indicators" and the witness' opinion other than the acts attributed to the defendant.¹

A DFCS worker was qualified to testify as an expert concerning the child abuse accommodation syndrome, despite the fact that she was not trained as a psychiatrist or psychologist, since she gained her knowledge about child molestation through experience and ongoing training.²

Both a therapist and a psychologist testified that a child victim's demeanor and behavior were consistent with sexual abuse. Their testimony was properly received.³

In a child molestation trial, the court erred in excluding expert testimony that the child did not exhibit the "unusual and inappropriate behavior" typical of a sexually abused child, since such "typical" behavior is not within the ken of the average juror and therefore a proper subject of expert testimony, and the question of whether, notwithstanding the victim's behavior, the victim was

⁴Whitaker v. State, 246 Ga. 163, 269 S.E.2d 436 (1980). See also Meders v. State, 261 Ga. 806, 411 S.E.2d 491 (1992).

⁵Nelms v. State, 255 Ga. 473, 340 S.E.2d 1 (1986).

²Kelly v. State, 197 Ga. App. 811, 399 S.E.2d 568 (1990).

³Reinhard v. State, 331 Ga. App. 235, 770 S.E.2d 314 (2015).

[Section 24:29]

¹Jimmerson v. State, 190 Ga. App. 759, 380 S.E.2d 65 (1989).

or was not molested would remain exclusively for jury resolution.⁴

Testimony by the forensic pathologist who performed the autopsy on the defendant's stepson that the childhood maltreatment or abused child syndrome was the "manner" in which the fatal injuries occurred constituted his opinion that the fatal injuries in fact resulted from child abuse and impermissibly invaded the province of the jury.⁵

A physician's testimony based on a physical examination, that he had an opinion as to whether a child molestation victim had in fact been sexually molested was inadmissible.⁶

§ 24:30 DNA tests

Deoxyribonucleic acid (DNA) identification techniques are based on sound scientific theory, and if proper procedures are followed, analysis of clean, undegraded samples of sufficiently high molecular weight DNA can produce reliable results, as to be admissible in evidence. The admission of DNA test results requires a determination of not just whether general scientific principles and techniques are valid and capable of producing reliable results, but also whether that laboratory substantially performed the scientific procedures in an acceptable manner. These requirements are the result of the novelty of DNA analysis in forensics, the complexity of the tests and the present lack of national standards governing the tests.¹

If DNA testing shows that the alleged father is not the biological father of a child, he may move to set aside a determination of paternity based on newly discovered evidence. O.C.G.A. § 19-7-54 seeks to make paternity law consistent with new genetic tests, and the rule stated in this passage is subject to limited exceptions. Paternity testing which used DNA occurred in *Clark v. State*.² This case held that DNA evidence could be admitted without demonstrating a chain of custody since it could be readily identified by reference to the defendant's DNA.

Many times jurors expect there will be DNA evidence to resolve a case. Where no DNA is present at the site of a criminal episode, is it competent for an officer to testify that it is common to have no DNA in connection with certain crimes? Apparently so, in the

⁴Hall v. State, 201 Ga. App. 626, 411 S.E.2d 777 (1991).

⁵McCartney v. State, 262 Ga. 156, 414 S.E.2d 227 (1992) (overruled on other grounds by, Linson v. State, 287 Ga. 881, 700 S.E.2d 394 (2010)).

⁶Harris v. State, 261 Ga. 386, 405

S.E.2d 482 (1991).

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¹Caldwell v. State, 260 Ga. 278, 393 S.E.2d 436 (1990).

²Clark v. State, 308 Ga. App. 643, 708 S.E.2d 386 (2011).

view of *Harris v. State*.³ This 2021 decision involved child molestation. A detective testified the absence of DNA evidence often occurs in child sex crime cases. The court held the detective was authorized to give this testimony. Under the Evidence Code, doubts as to relevancy should be resolved in favor of admission of the evidence.

2003 legislation authorized felons to ask for DNA testing of evidence used to obtain their conviction, in an effort to prove their innocence.⁴ A prisoner invoked a request under this statute by way of a post-conviction motion, but the application was denied because of destruction of testable evidence without bad faith.⁵

Earlier Georgia law required DNA analysis of persons convicted of certain sex offenses or convicted of a felony and incarcerated in a private or state correctional facility. A 2007 extension to probationers provided that after July 1, 2007, any person placed on probation after a felony conviction of enumerated offenses must supply a sample for DNA testing. The enumerated felonies range from rape and sodomy to drug and armed robbery convictions. A 2011 enactment provided for the collection of DNA from all persons convicted of a felony and incarcerated, sentenced to probation, or placed on parole.⁶ The provisions of law contained in former O.C.G.A. § 24-4-60 and related sections were broadened and moved to Title 35. Title 35 was amended with an extension in 2019. The 2019 Act provides for collection of DNA for persons charged with a felony offense but sentenced as a first offender or under a conditional discharge.⁷

The topic of seizure of material by swabbing inside a person's cheek for a DNA sample came up in 2013 in the United States Supreme Court.⁸ No warrant was required for this search which was conducted pursuant to the Maryland DNA Collection Act, providing that all arrestees charged with serious crimes must furnish a DNA sample. The defendant was convicted of rape.

§ 24:31 Expert testimony on dental evidence

A dentist's testimony regarding dental impressions, x-rays, and photographs taken to match the defendant's teeth to bite marks

³*Harris v. State*, 358 Ga. App. 204, 854 S.E.2d 374 (2021).

⁴O.C.G.A. § 5-5-41.

⁵*Howard v. State*, 289 Ga. 207, 710 S.E.2d 761 (2011).

⁶Ga. Laws 2011, Act 67. The Act redesignated Article 4 of O.C.G.A.

Chapter 24-4 as Article 6A of O.C.G.A. Chapter 35-3. See O.C.G.A. §§ 35-6-160 to 35-6-165.

⁷O.C.G.A. § 35-3-160, as amended by Laws 2019, Act 70, § 1.

⁸*Maryland v. King*, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

was held admissible.¹

§ 24:32 Experiments and demonstrations

The court has discretion to permit an expert or skilled witness to testify as to experiments performed by him, provided the experiment substantially duplicates the conditions shown by the evidence actually to have existed.¹ The burden is on the party offering demonstrative or experimental evidence to lay a proper foundation establishing similarity of circumstances and conditions.² However, this rule does not require that the demonstration be identical to the event at issue.

Slight discrepancies in the conditions at the time of the incident involved and the time of the experiment will not render the experiment inadmissible, but such slight discrepancies go to the weight to be given such evidence.³

An expert may perform an experiment in the course of his testimony, provided it is of such nature that it will aid rather than tend to confuse the jury.⁴

The trial judge has a wide discretion in ruling upon the permissibility of demonstrations in the courtroom.⁵

§ 24:33 Tests for intoxication

O.C.G.A. § 40-6-392, effective January 1, 1991, addresses the use of chemical tests for alcohol or drugs. It outlines the procedures to be used, specifies who may perform such tests, establishes presumptions, and provides that a person's refusal to submit to such a test shall be admissible against him in a criminal trial.¹ In a vehicular homicide case, except where suspect is dead, unconscious, or otherwise in a condition rendering him incapable of refusal, failure of arresting officer to advise suspect of his right to have an additional test for intoxication performed by a qualified person of his own choosing or to refuse to submit to any test renders the results of the intoxication test inadmissible

[Section 24:31]

¹Harris v. State, 260 Ga. 860, 401 S.E.2d 263 (1991).

[Section 24:32]

¹Shelton v. Rose, 116 Ga. App. 37, 156 S.E.2d 659 (1967).

²Monroe v. State, 340 Ga. App. 373, 797 S.E. 2d 245 (2017).

³Atlanta & W.P.R. Co. v. Hudson, 2 Ga. App. 352, 58 S.E. 500 (1907). See Carlson, Successful Techniques for

Civil Trials (2d ed.) § 3:15.

⁴See Christian Const. Co. v. Wood, 104 Ga. App. 751, 123 S.E.2d 151 (1961).

⁵Hudson v. State, 46 Ga. App. 668, 168 S.E. 912 (1933).

[Section 24:33]

¹For presumptions and other evidence in drunk driving cases, see § 20:14, *supra*.

in later proceedings.²

In prosecution for driving under influence of alcohol, admission into evidence of defendant's refusal to take a blood-alcohol test does not violate defendant's constitutional right against self-incrimination.³

In *Smith v. State*,⁴ the defendant was convicted, following a bench trial, of driving under the influence, speeding, and possessing an open container of alcohol. Defendant appealed denial of his motion to suppress. The Court of Appeals held that defendant's request for an independent breath test was unreasonable, and affirmed defendant's conviction. Along the way, the court quoted *Lenhardt v. State*,⁵ regarding applicable standards:

O.C.G.A. § 40-6-392(a)(3) allows one accused of driving under the influence of alcoholic beverages the right to have a chemical analysis of his blood and urine by a qualified person of his own choosing. As this Court has recognized, the "of his own choosing" language is not superfluous. Rather, a suspect is entitled to a meaningful opportunity to choose the testing facility. If the suspect's choice is unreasonable, however, a law enforcement officer is justified in refusing to accommodate the request. The trial court must determine whether, under the totality of the circumstances, the suspect's request was reasonable. The factors the trial court may consider in resolving this issue include the following: (1) availability of or access to funds to pay for the requested test; (2) a protracted delay in the giving of the test if the officer complies with the accused's requests; (3) availability of police time and other resources; (4) location of the requested facilities; and (5) opportunity and ability of [the] accused to make arrangements personally for the testing.

Evidence of the horizontal gaze nystagmus test was admissible in a prosecution for driving under the influence.⁶ Under O.C.G.A. § 40-6-123(b), the defendant was convicted of being less safe to drive. The Court of Appeals reviewed the facts:

The officer administered the HGN test, the one-legged stand, and the alphabet test, but Johnson refused to provide a preliminary breath test in the officer's alco-sensor. After medically qualifying Johnson, the officer performed the HGN test, which he had conducted on "thousands" of individuals, and he detected six out of the six clues of impairment. Based on his observation of Johnson's driving as well as his observation of his physical presentation and Johnson's performance on the field sobriety tests, the officer arrested Johnson for DUI-less safe.

²Rogers v. State, 163 Ga. App. 625 S.E.2d 497 (2005).
641, 295 S.E.2d 140 (1982).

³Wessels v. State, 169 Ga. App. 453, 610 S.E.2d 86 (2005).
246, 312 S.E.2d 361 (1983).

⁴Smith v. State, 277 Ga. App. 81, 65, 744 S.E.2d 921 (2013).

⁵Lenhardt v. State, 271 Ga. App.

⁶Johnson v. State, 323 Ga. App.

Extraction of blood from a DUI suspect is a search. Such a search requires either actual consent from the driver, or a search warrant. Mere recitation to the suspect of the implied consent notice, followed by the suspect allowing withdrawal of his blood, is insufficient. The state must demonstrate an actual consent to the procuring and testing of the blood, or a warrant.⁷

In a 2024 opinion from Presiding Justice Peterson, the Supreme Court of Georgia determined that evidence concerning horizontal gaze nystagmus (“HGN”) testing in DUI prosecutions must satisfy the *Daubert* standard under O.C.G.A. § 24-7-702.⁸

Prosecution of drunk driving cases was the subject of *State v. Frost*.⁹ The Georgia Supreme Court construed O.C.G.A. § 24-4-417. Defendant was arrested for drunk driving and refused the breath test. The state gave notice of its intent to present evidence that he had driven under the influence of alcohol on two prior occasions. This evidence was admissible under Rule 417(a)(1) to show knowledge. In a DUI prosecution, proof that the accused has driven under the influence may be admitted by way of Rule 417 or O.C.G.A. § 24-4-404(b). Such evidence shows awareness to the driver that drinking causes him to be a less safe motorist. When an accused refuses the required test, his refusal is admissible, and the trier of fact may infer from such a refusal that, if the accused had submitted to the test, it would have shown the presence of an intoxicant. In this case, the trial judge correctly allowed proof of both prior cases involving alcohol.

Away from the topic of drunk driving, the subject of intoxication has arisen in other settings. In *Dillard v. State*,¹⁰ evidence that the accused may have been in an alcoholic blackout during the charged incidents was deemed not relevant in a trial for burglary and attempted burglary.

§ 24:34 Electronic speed detection devices

The use of electronic speed detection devices has been recognized by the statute that provides that a case can be made and a conviction obtained if the vehicle exceeded the posted limit in excess of 10 miles per hour.¹ O.C.G.A. § 40-14-17 provides that evidence of speed produced by approved models of laser devices “shall be considered scientifically acceptable and reliable as a speed detection device and shall be admissible for all purposes in

⁷Williams v. State, 296 Ga. 817, 771 S.E.2d 373 (2015).

⁸Garrison v. State, 2024 WL 3802691 (Ga. 2024).

⁹State v. Frost, 297 Ga. 296, 773 S.E.2d 700 (2015).

¹⁰Dillard v. State, 323 Ga. App. 333, 753 S.E.2d 772 (2013).

[Section 24:34]

¹O.C.G.A. § 40-14-8 (exception for school, historic district, and residential zones).

any court, judicial, or administrative proceedings in this state.” Acts 1999. On the ten-miles-over-the-speed-limit requirement, see *Webb v. State*.²

Does a defendant’s failure to object to admission of the evidence of automobile speed gained through the use of a speed detection device dispose of the necessity of proof of a necessary foundation to be presented by the state? See *Johnson v. State*.³ Further applications and interpretations of *Carver* suggest *Johnson* has been overruled on the main point for which it was cited in the text. A defendant must object at trial in order to preserve the challenge to radar on appeal. Decisions after *Carver* seem to interpret that case as a virtually complete overruling of *Johnson*.⁴

The statutory requirements for admissibility for speeding citations issued by state officers, that the police vehicle be visible to approaching motorists for at least 500 feet, do not apply to the state patrol.⁵

The defense of entrapment is inapplicable to the use of such devices.⁶

Under O.C.G.A. § 40-14-9, no speed detection device shall be employed by county, municipal, or campus officers on any portion of the highway which has a grade in excess of 7 percent.

2010 legislation provides that evidence obtained by speed detection devices in a variable speed zone is inadmissible as evidence in court.⁷

§ 24:35 Miscellaneous scientific tests

Effective July 1, 2022, Georgia repealed former O.C.G.A. § 24-7-707. In its place, the legislature modified Code Section 24-7-702 by applying its provisions to all proceedings, not just civil actions. Code Section 24-7-702(f) directly references *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ This development is referenced at multiple places in this text, and it signals a new approach to experts in criminal cases. Also mentioned in the text is the

²*Webb v. State*, 223 Ga. App. 9, 476 S.E.2d 781 (1996).

³*Johnson v. State*, 189 Ga. App. 192, 375 S.E.2d 290 (1988) (overruled on other grounds by, *Carver v. State*, 208 Ga. App. 405, 430 S.E.2d 790 (1993)).

⁴*Turner v. State*, 236 Ga. App. 592, 594, 512 S.E.2d 699, 701 (1999); *Van Nort v. State*, 250 Ga. App. 7, 550 S.E.2d 111 (2001).

⁵*Carver v. State*, 199 Ga. App. 842, 406 S.E.2d 236 (1991).

⁶See § 4:5, *supra*.

⁷Act 460, HB1174, 2010 Georgia General Assembly.

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¹*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 37 Fed. R. Evid. Serv. 1 (1993).

potential impact of the Code change on the *Harper* standard, since the 1980's the standard for whether novel scientific evidence is admissible in criminal cases.

In Georgia, introduction of new or novel expert evidence is controlled by *Daubert* standards. The evolution of court standards for measuring reliability of scientific evidence is sketched later in this section of the text. The current guidelines for courts to follow in determining admissibility of expert opinion is whether an expert's theory or technique has been tested, whether it has been subjected to peer review and publication, the error rate for the technique, the degree or acceptance of the methodology in the relevant professional community, and the expert's experience and training.²

Through early 2022 the controlling test for the admissibility into evidence of a scientific principle or technique in a criminal case was not whether or not it has gained general acceptance by a substantial body of scientific opinion, but rather whether or not the principle or technique had reached a scientific state of verifiable certainty. The decision of the trial court could be based upon the evidence presented by the parties, or the exhibits, treatises, or the rationale of cases in other jurisdictions.³

The rule of *Harper v. State* has been construed numerous times since its inception, which occurred in 1982. In 2015, tests used by a therapist to determine the trauma level suffered by a child in a molestation case were deemed to be reliable, and the *Harper* standard was satisfied. "The State established through the therapist testimony that the use of these assessments has reached a scientific state of verifiable certainty justifying their admission."⁴ Now that former O.C.G.A. § 24-7-707 has been repealed, the *Harper* standard will probably fall into disuse. For a time, however, it will be called upon as appeals under Rule 707 reach the appellate courts in cases tried prior to July 1, 2022.

As noted, after the repeal of Rule 707, appellate courts will continue to deal with O.C.G.A. § 24-7-707 in the future. That is because convictions entered prior to the repeal are controlled by that rule. The point was made in *Nundra v. State*,⁵ where the Georgia Supreme Court adjudicated an appeal, observing: "[a]t the time [defendant] was tried, former O.C.G.A. § 24-7-707 (2013), governing expert testimony, was still in effect." Under that standard, the defendant's complaint about expert testimony was

²Georgia Dept. of Transp. v. Owens, 330 Ga. App. 123, 766 S.E.2d 569 (2014).

test).
⁴Reinhard v. State, 331 Ga. App. 235, 770 S.E.2d 314 (2015).

³Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982) (truth-serum

⁵Nundra v. State, 316 Ga. 1, 885 S.E.2d 790 (2023).

rejected in the appeal.

In Georgia, the *Frye* test for novel scientific evidence does not control. This test made general scientific acceptance the rule for court acceptance of a scientist's opinion. In federal trials, the *Frye* rule controlled many federal courts until 1993. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶ the Supreme Court described *Frye*'s dominant position in state courts for testing scientific expert proof, then rejected it for federal courts (footnotes omitted):

In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. See E. Green & C. Nesson, Problems, Cases, and Materials on Evidence 649 (1983). Although under increasing attack of late, the rule continues to be followed by a majority of courts, including the Ninth Circuit. The *Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine

Frye made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.

What is the fallout from the *Daubert* decision? Lawyers decry a climate of "jukebox" experts: pay your money and select your tune. To deal with the problem of junk science in the courtroom, federal courts (and Georgia civil courts after 2005) need to rigorously apply the factors suggested by the U.S. Supreme Court for testing and approving scientific evidence.

Is a *Daubert* hearing mandated in every case involving scientific or technical evidence? While a hearing by the trial judge on whether offered scientific proof is reliable is often a good idea, it is not required. What is required is that the proponent of expert opinion must establish the validity of the expert's work by a preponderance of the evidence.⁷

The writing and publishing requirement of *Daubert* was emphasized in *HNTB Georgia, Inc. v. Hamilton-King*⁸ and *Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co.*⁹

Georgia cases have rejected scientific evidence when there is a

⁶*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27, 37 Fed. R. Evid. Serv. 1 (1993).

⁷*Scapa Dryer Fabrics, Inc. v. Knight*, 332 Ga. App. 82, 770 S.E.2d 334 (2015), judgment rev'd on other grounds, 299 Ga. 286, 788 S.E.2d 421

(2016).
⁸*HNTB Georgia, Inc. v. Hamilton-King*, 287 Ga. 641, 697 S.E.2d 770 (2010).

⁹*Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co.*, 307 Ga. App. 206, 704 S.E.2d 858 (2010).

gap in proof respecting publication of the expert's theories or an absence of acceptance by peers within the relevant scientific community. A 2017 case illustrates the point.¹⁰ A 2018 decision also found a doctor's theory faulty because it had not been subject to peer review and publication and lacked general acceptance in the scientific community.¹¹

Experts of all kinds are subject to an objection based on the *Daubert* case. The reliability standard of *Daubert* applies to the testimony of engineers and other experts who are not scientists, as well as to scientific evidence. The judge's gatekeeping obligation, requiring the judge to exclude unreliable expert proof, applies not only to scientific proof but also to testimony based on technical and other specialized knowledge.¹²

Daubert recognizes that Rule 702 contemplates that trial courts will serve a gatekeeping role when it comes to the admission of scientific testimony.¹³ The trial court's gatekeeper role was explained in detail in a 2011 case:

At all times when scrutinizing the reliability and relevance of expert testimony, a court must remain mindful of the delicate balance between its role as a gatekeeper and the jury's role as the ultimate fact-finder. A district court's gatekeeper role is not intended to supplant the adversary system or the role of the jury. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are traditional and appropriate means of attacking shaky but admissible evidence. A court may not evaluate the credibility of opposing experts or the persuasiveness of competing scientific studies; instead, its duty is limited to ensuring that the fact-finder weighs only sound and reliable evidence.¹⁴

Reliability of expert proof is a cornerstone of *Daubert*. In determining whether expert testimony is reliable, factors identified in a 2013 case provides guidance:

Reliability is examined through consideration of many factors, including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error for the theory or technique, the general degree of acceptance in the relevant scientific or professional com-

¹⁰Cash v. LG Electronics, Inc., 342 Ga. App. 735, 804 S.E.2d 713, Prod. Liab. Rep. (CCH) P 20141 (2017).

¹¹Smith v. Braswell, 342 Ga. App. 700 (2018). For additional authorities, see R. Carlson, The Curious Case of Differing Literary Emphases, 47 Ga. L. Rev. 851 (2013).

¹²Kumho Tire Co., Ltd. v. Carmi-

chael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238, 50, 50 Fed. R. Evid. Serv. 1373 (1999).

¹³Tampa Bay Water v. HDR Engineering, Inc., 731 F.3d 1171, 86 Fed. R. Serv. 3d 1238 (11th Cir. 2013).

¹⁴Woodard v. Wal-Mart Stores East LP, 86 Fed. R. Evid. Serv. 494 (M.D. Ga. 2011).

munity, and the expert's range of experience and training.¹⁵

In Georgia, the *Harper* standard was replaced in civil cases by the scientific evidence test embraced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁶ For many years *Harper* remained the law for criminal cases, but now appears to have been replaced by O.C.G.A. § 24-7-702.¹⁷

Complying with *Daubert* standards can be challenging. Advice for attorneys confronting this obstacle is contained in R. Carlson, *The Curious Case of Differing Literary Emphases: The Contrast Between the Use of Scientific Publications at Pretrial Daubert Hearings and at Trial*, 47 Ga. L. Rev. 837 (2013).

Judicial notice is sometimes used to overcome a challenge to an expert. It plays a role when an objection is made to an expert on the ground that the expert's field of work has not been validated through trial proof. Where a standard area of medical practice like orthopedic medicine is challenged in this manner, for example, must the proponent of an orthopedic expert witness start from scratch and qualify the practice of orthopedic surgery? The answer is no. When technical or professional evidence comes from an expert in an established field, the judge may take judicial notice of the standard nature of the expert's discipline. Once a procedure has been recognized in a substantial number of courts, Georgia judges may judicially recognize the reliability of the process.¹⁸

The time-saving at trial which results from following this sort of approach is apparent. Of course, new or novel scientific processes cannot take advantage of this doctrine. Innovative or novel techniques must be demonstrated to be reliable through scientific literature and evidentiary proof. Judicial notice is reserved for established processes which have a court "track record." This approach has been recognized in criminal cases. Decisions have repeated the maxim that once a process has been validated in a number of court cases, judicial notice of the process is proper. In federal courts, some decisions have used judicial notice to recognize the reliability of DNA testing.¹⁹

In *Al Amin v. State*,²⁰ an issue was resolved respecting firearms investigation and ballistics identification. "Nor did the court err

¹⁵*Anderson v. Atlanta Gas Light Co.*, 324 Ga. App. 801, 751 S.E.2d 589 (2013).

¹⁶*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 37 Fed. R. Evid. Serv. 1 (1993). See O.C.G.A. § 24-7-702.

¹⁷See the analysis in § 24:3, supra.

¹⁸*Carlson v. State*, 280 Ga. App. 595, 634 S.E.2d 410 (2006).

¹⁹*United States v. Morrow*, 374 F.Supp.2d 51, 61–62 (D.D.C. 2005).

²⁰*Al Amin v. State*, 278 Ga. 74, 597 S.E.2d 332 (2004) (overruled on

in refusing to conduct a *Harper* hearing regarding the admissibility of firearms/ballistic/tool marks evidence.” Repeating the rule that once a procedure has been recognized in a substantial number of courts it may be judicially noticed without receiving evidence, the court quoted *Harper*.²¹ Since ballistics evidence is not novel and has been widely accepted elsewhere and in Georgia courts, the trial judge was authorized to accept the testimony of a ballistics expert without a *Harper* hearing.

To summarize, in criminal cases once a scientific procedure has been recognized in a substantial number of courts, a trial judge may judicially notice that the procedure has been established.²²

The Georgia Supreme Court supplied a resounding endorsement of this approach in a 2018 decision. In *Walsh v. State*,²³ the standard character of HGN tests for impaired driving prompted the court to observe that such tests had reached a state of verifiable certainty. This obviates the need for a proponent of the test to call an expert to attest to the scientific validity of the procedure. A trial court may judicially notice, without receiving evidence, that the procedure is sound and reliable. However, there remains a burden upon the state to show that the officer performing the scientific procedures did so in a correct fashion. The Supreme Court observed that the test here was conducted in a manner contrary to accepted procedures. The Court approved the suppression of the results of the HGN test in this case.

Testimony from employee of state bureau of investigation that hair found on victim matched hair sample from murder defendant was admissible, as hair comparison evidence was not novel and had been widely accepted in state courts.²⁴

An excellent review of prior scientific evidence rules in Georgia criminal cases appears in *Carr v. State*.²⁵ Away from the opinion evidence part of *Carr*, see the explanation of the implicit overruling of *Carr* in *Clark v. State*.²⁶ *Carr* was cited with approval by the Georgia Supreme Court in *State v. Wooten*.²⁷ As noted, Georgia adhered to the position that when scientific evidence is not

other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

²¹*Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982). As noted in this text at several points, with the 2022 repeal of former O.C.G.A. § 24-7-707, the *Harper* standard will likely fall into disuse.

²²See *Whatley v. State*, 270 Ga. 296, 509 S.E.2d 45 (1998) (objections to hair, fiber, fingerprint, ballistics and DNA not asserted at trial cannot be

raised on appeal).

²³*Walsh v. State*, 303 Ga. 276, 811 S.E.2d 353 (2018).

²⁴*Moss v. State*, 275 Ga. 96, 561 S.E.2d 382 (2002).

²⁵*Carr v. State*, 267 Ga. 701, 482 S.E.2d 314 (1997).

²⁶*Clark v. State*, 271 Ga. 6, 515 S.E.2d 155, 159 (1999) (hearsay point).

²⁷*State v. Wooten*, 273 Ga. 529, 543 S.E.2d 721, 723 (2001).

“novel,” its acceptance by courts can be judicially noticed.²⁸ Dog sniffing apparently did not fall into this category. Blaze, a fire-sniffing dog, gave an alert that he smelled hydrocarbons at the scene of a fire, a signal that an accelerant was used to initiate the burning. On the question of whether dog-alerts had reached the state of verifiable certainty required by *Harper v. State*,²⁹ the court reviewed precedents:

The question of what type of evidence constitutes scientific test evidence which should be subjected to the Harper test has not been directly decided by the appellate courts of Georgia, but the test has been applied to a wide range of evidence: a possible genetic basis for violent and impulsive behavior in certain individuals (*Mobley v. State*, 265 Ga. 292, 455 S.E.2d 61 (1995)); breathalyzer tests (*Lat-tarulo v. State*, 261 Ga. 124, 401 S.E.2d 516 (1991)); the phenomenon of sleep talk (*Godfrey v. State*, 258 Ga. 28, 365 S.E.2d 93 (1988)); analysis of fibers (*Williams v. State*, 251 Ga. 749, 312 S.E.2d 40 (1983)); urinalysis for the presence of cannabinoids, using the SYVA EMIT 1000 test (*Smith v. State*, 250 Ga. 438, 298 S.E.2d 482 (1983)); penile plethysmograph evidence (*Gentry v. State*, 213 Ga. App. 24, 443 S.E.2d 667 (1994)); the “on track system” for detecting alcohol and controlled substances (*Hubbard v. State*, 207 Ga. App. 703, 429 S.E.2d 123 (1993)); horizontal gaze nystagmus test for intoxication (*Manley v. State*, 206 Ga. App. 281, 424 S.E.2d 818 (1992)); and the “child sexual abuse accommodation syndrome.”³⁰

On the merits of the *Carr* case, the Georgia Supreme Court ruled that dog alerts to accelerants do not have the scientific reliability necessary to permit their use as substantive evidence of the presence of accelerants. “The erroneous admission of that evidence requires a new trial.”

In earlier days the Georgia courts did not have criminal case responsibilities as broad as federal courts when it came to testing expert assertions. The United States Supreme Court found the trial court gatekeeping function described in the *Daubert* case applicable to all expert testimony, and imposed a duty of scrutiny and inquiry on federal trial judges. This is the impact of the U.S. Supreme Court’s *Kumho Tire* decision. Georgia, however, distinguished between scientific experts versus witnesses whose knowledge is based on skill and experience. The defendant complained in *Belton v. State*,³¹ that admission of shoe print identification testimony was error, that it had not reached a level of verifiable certainty, and the trial court had failed to make appropriate findings under the authority of *Harper v. State*. Two

²⁸Whatley v. State, 270 Ga. 296, 509 S.E.2d 45 (1998) (ballistics, fingerprints, hair and fiber comparisons).

²⁹Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982).

³⁰Rolader v. State, 202 Ga. App. 134, 413 S.E.2d 752 (1991).

³¹Belton v. State, 270 Ga. 671, 512 S.E.2d 614 (1999).

witnesses testified about the comparison of shoes recovered from defendant's residence to shoe prints from the crime scene. According to the Georgia Supreme Court, such testimony did not require screening under the *Harper* standard. "Since Harper and its standards are not applicable to the testimony involved in this case, the trial court did not err in failing to apply it."

In the 1980's the *Harper* standard was advanced by its prominent employment in the famous trial of Wayne Williams for "Atlanta's Child Murders."³² The story of the case is told in J. Mallard, "Unmasking Atlanta's Child Killer."

With the repeal of former O.C.G.A. § 24-7-707 in 2022 the *Harper* standard will probably no longer influence expert practice in criminal cases, but for a time *Harper* will continue to be a presence in Georgia jurisprudence because appeals from cases tried prior to July 1, 2022, are controlled by *Harper*.

§ 24:36 Contents of the hypothetical question

An expert can base her opinion on facts which the expert has observed. Armed with such information, the expert can opine as to a diagnosis in the case of a physician or can forecast for the future where a solid foundation is laid. For example, for the purposes of determining alimony, expert testimony regarding a husband's earnings is not limited to the husband's actual present income but may include the husband's earning capacity to the extent that the wife contends the capacity differs from present income.¹ A foundation must be laid. Where there was no factual basis given for the calculation made and no foundation laid as to the witness' knowledge of the symptoms or causes of Sudden Infant Death Syndrome (SIDS), it was error to admit the opinions of a biostatistician that there was about a 5% chance that the suspected murder victims died of SIDS.² An expert is not allowed to simply speculate.

One way to get record facts before an expert and avoid a "speculative" objection is with a hypothetical question. When an expert testifies as to his opinion, based upon facts which he has observed, it is not necessary that the question be stated hypothetically or that the witness state the factual foundation of his opinion.³ In other cases, a hypothetical will be advantageous.

What are some of the features of the hypothetical question?

³²Williams v. State, 251 Ga. 749, 413 S.E.2d 731 (1992).
312 S.E.2d 40 (1983) (dog hair and carpet fiber analysis).

²Johnson v. State, 261 Ga. 419, 405 S.E.2d 686 (1991).

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³Finley v. Franklin Aluminum Co., 132 Ga. App. 70, 207 S.E.2d 543 (1974).

¹Lowery v. Lowery, 262 Ga. 20,

It should contain a recital of the facts that are to be assumed by the witness and should be sufficiently complete to permit him to form an opinion following a request for his expert opinion.

All matters that are justified by the testimony may be included in the question,⁴ but it is not necessary that the question include all facts in the case.⁵

Where an expert witness has no personal knowledge of the facts, the usual and generally approved procedure for eliciting his testimony is for counsel to present the facts on which opinion testimony is desired by hypothetical questions—questions which, for the purpose of the trial, assume a state of facts which has been shown by the evidence of other witnesses—and ask the expert to state his opinion based on those facts.⁶ However, it must include all the facts upon which the answer is based.⁷

Where the facts are in dispute, counsel is entitled to base a hypothetical question on the testimony, supporting his own theory of the case.⁸

It is not proper to assume facts that are contrary to the evidence.⁹ Normally, a hypothetical question on direct may not include facts which are not in evidence before the trier of the facts.¹⁰ If an expert testifies on direct examination by means of a hypothetical question, the assumed facts must be placed in evidence by testimony or other legal means.¹¹ However, on cross-examination, the rule may be different.¹²

It is not necessary that the assumed facts have been directly testified to if the facts can be reasonably deduced or inferred from the evidence.¹³

There is a developing trend to allow an expert to testify to opinions based on hearsay reports which the expert considers reliable; this testimony can be direct and need not necessarily be cast in a hypothetical format. The opinion of an expert may be

⁴*Zurich Ins. Co. v. Zerfass*, 106 Ga. App. 714, 128 S.E.2d 75 (1962).

⁵*Ellis v. Southern Ry. Co.*, 89 Ga. App. 407, 79 S.E.2d 541 (1953).

⁶*Atlantic & B. Ry. Co. v. Johnson*, 127 Ga. 392, 56 S.E. 482 (1907); *Von Pollnitz v. State*, 92 Ga. 16, 18 S.E. 301 (1893).

⁷*Ellis v. Southern Ry. Co.*, 89 Ga. App. 407, 79 S.E.2d 541 (1953).

⁸*Zurich Ins. Co. v. Zerfass*, 106 Ga. App. 714, 128 S.E.2d 75 (1962).

⁹See *Travelers Ins. Co. v. Hutchens*, 106 Ga. App. 631, 127 S.E.2d 712 (1962). A hypothetical question which

assumed a fact not established by the evidence and was a fact the jury was required to decide was reversible error in *State v. Simms*, 224 N.J. 393, 133 A.3d 609 (2016) (hypothetical question in a drug case should not be used as a prosecution tool to sum up an entire case in a single question).

¹⁰*Elliott v. Georgia Power Co.*, 58 Ga. App. 151, 197 S.E. 914 (1938).

¹¹*Leonard v. State*, 269 Ga. 867, 506 S.E.2d 853 (1998).

¹²See § 24:39, *infra*.

¹³*Beard v. Westmoreland*, 90 Ga. App. 632, 84 S.E.2d 93 (1954).

based in part upon hearsay. When it is based thereon, that fact goes to the weight and credibility of the testimony, not to its admissibility.¹⁴ The 2013 evidence rules for Georgia follow the approach of permitting an expert to factor reliable hearsay into the basis for her opinion.¹⁵ Regarding the subject of hypothetical questions, the 2013 rules permit them, but hypotheticals are not required.¹⁶ Georgia courts have approved hypothetical inquiries based upon assumed facts admitted in evidence.¹⁷

The 2013 Georgia Evidence Code deals with examination of experts in O.C.G.A. § 24-7-705. That Georgia provision is patterned after Federal Evidence Rule 705. In the Federal Rules of Evidence, Rule 705 controls practice respecting hypothetical questions. That rule also controls disclosures of data which forms the basis for an expert's conclusions. In general, experts need not disclose all underlying information on which they rely in forming their opinions.¹⁸ During cross-examination, however, the expert may be required to disclose the facts or data underlying her opinion under Rule 705.¹⁹ As a general matter, an opposing party who challenges the facts underlying the expert's opinion must do so by cross-examination.²⁰

§ 24:37 Hypothetical question asked of physician or surgeon

The Georgia Supreme Court approved hypothetical opinions based upon assumed facts admitted in evidence at trial in *Johnson v. State*.¹ A medical examiner was deemed to have testified within her area of expertise when she opined about why an autopsy did not reveal any bullet fragments in a wound.

A duly qualified physician may upon the basis of facts set forth in proper hypothetical questions, or the testimony given by other witnesses in the case which the expert heard, or more generally,

¹⁴Security Ins. Group v. Brackett, 132 Ga. App. 415, 208 S.E.2d 109 (1974).

¹⁵O.C.G.A. § 24-7-703.

¹⁶O.C.G.A. § 24-7-705; Gipson v. State, 332 Ga. App. 309, 772 S.E.2d 402 (2015) (as in federal court, hypothetical questions are allowed, but not required, under the 2013 Georgia Evidence Code).

¹⁷Johnson v. State, 296 Ga. 504, 769 S.E.2d 87, 90 (n.3) (2015).

¹⁸Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc., 778 F.3d 1059 (9th Cir. 2015).

¹⁹Pineda v. Ford Motor Co., 520 F.3d 237, 75 Fed. R. Evid. Serv. 1269 (3d Cir. 2008) ("Rule 705, together with Rule 703, places the burden of exploring the facts and assumptions underlying the testimony of an expert witness on opposing counsel during cross-examination.").

²⁰In re John Richards Homes Bldg. Co., L.L.C., 439 F.3d 248, 2006 FED App. 0081P (6th Cir. 2006).

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¹Johnson v. State, 296 Ga. 504, 769 S.E.2d 87, 90 n.3 (2015).

upon the basis of the physician's own knowledge gained in the course of his professional attendance upon the person whose condition is in question, or gained upon an examination of such person made to qualify the physician as a witness, state his opinion as to the nature of the disease, injury, or disability from which a person is or was suffering, and as to the facts or causes which probably produced such condition.

There is, of course, no objection to the expression by a qualified physician of an opinion as to the cause of a death or of a particular physical condition, based upon wholly hypothetical questions, where the subject is one requiring superior learning or experience and where the hypothetical questions fairly describe the conditions of the person in question and reflect the testimony before the jury upon that point.² It has also been frequently stated or recognized, in this connection, that a medical opinion as to causation, based on assumed facts which are erroneous or outside the evidence and which the evidence does not attempt to establish, is not admissible.³

Some Georgia cases do not delineate between hypotheticals on direct versus those asked on cross.⁴

Pronouncements relating to hypothetical questions on direct examination were contained in *Reed v. AutoZone Stores, Inc.*⁵ In his slip and fall suit against AutoZone, the plaintiff's lawyer asked Reed's orthopedic surgeon to assume no shoulder problems on the part of Reed prior to the slip and fall. Here is how the question was stated:

Q. I want to ask you to assume that previous to coming to see you on the 27th of May, [Reed] entered an AutoZone parts store and slipped on an oily substance, either motor oil or transmission oil or something related to that, and fell striking his right shoulder on a metal stacking table, something like this bookcase you have here, and then fell to the floor and then slipping on down; that he felt pain in the shoulder, and the pain the shoulder got immediately worse. At that time he was approximately 58 years old with no previous shoulder problems, shoulder injuries. Could that type of acute event be related to the full thickness tear of the rotator cuff

²Kelly v. Adams, 84 Ga. App. 450, 66 S.E.2d 144 (1951).

³Ellis v. Southern Ry. Co., 89 Ga. App. 407, 79 S.E.2d 541 (1953).

⁴See, e.g., Jackson v. State, 276 Ga. 94, 575 S.E.2d 447 (2003) (overruled on other grounds by, Linson v. State, 287 Ga. 881, 700 S.E.2d 394 (2010)) (assumed facts must be placed

in evidence). Compare Taylor v. Reo Motors, Inc., 275 F.2d 699 (10th Cir. 1960) (on cross of an expert, any fact germane to the inquiry *whether testified to or not* may be used for testing the expert).

⁵Reed v. AutoZone Stores, Inc., 277 Ga. App. 860, 627 S.E.2d 792 (2006).

that you found upon surgery?

A. Yes, sir.

Q. All right. And continuing in assuming the same facts I've given you before, in your opinion was his injury and the surgery that you did causally connected?

A. Yes, sir I believe they were causally connected.

AutoZone objected. The trial court sustained the objection because of a perceived problem with the hypothetical facts. This was error. The appellate court cited testimony sustaining Reed's position that he was not suffering from shoulder discomfort prior to, nor at the time of the fall.

As with many Georgia decisions, it was again the case that the court was dealing with hypotheticals on direct when it opined that "the assumed facts must be placed in evidence." Unmentioned is any contrary rule on cross-examination, such as the holding in *Cornelius*.⁶ In *Cornelius*, the expert who was being cross-examined was also the defendant in the case.

§ 24:38 Answer to hypothetical question

As with any other answer, the answer to the hypothetical question must be responsive.¹ A detective apparently gave no definitive answers to questions about hypothetical situations in *Driskell v. State*.²

§ 24:39 Cross-examination of expert witnesses

Most of the general rules relating to the cross-examination of witnesses also apply to the cross-examination of expert witnesses.¹

Vigorous cross-examination of experts was endorsed in *Emory University v. Willcox*.² When an attorney faces an opponent's shaky but admissible expert opinion evidence, a searching cross-examination, contrary evidence, and careful jury instructions are the means of attacking such an opinion.

Defense gathering of materials to impeach an expert, see *State v. Lucious*.³ Under the criminal discovery act, steps were taken in 2003 to insure that if an expert's report is oral or partly oral, the

⁶*Cornelius v. Macon-Bibb County Hosp. Authority*, 243 Ga. App. 480, 533 S.E.2d 420 (2000).

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¹*Paulk v. Thomas*, 115 Ga. App. 436, 154 S.E.2d 872 (1967).

²*Driskell v. State*, 333 Ga. App. 886, 777 S.E.2d 717 (2015).

[Section 24:39]

¹See §§ 16:1 et seq.

²*Emory University v. Willcox*, 355 Ga. App. 542, 844 S.E.2d 889, 379 Ed. Law Rep. 352 (2020).

³*State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999) (defendant in felony criminal case does not have a

parties reduce the oral portion to writing and disclose it.⁴

The expert may be cross-examined as to his knowledge, skill and understanding, *Richards v. Harpe*.⁵ Also, the cross-examiner may, in his hypothetical question, put in facts in evidence omitted from the hypothetical questions asked on direct examination.⁶ Mere abstract questions or questions involving scientific knowledge are not, as a general rule, permissible, although questions are proper which test the value of a witness' opinion, his knowledge, observation, bias, or prejudice.⁷ He may be asked upon what authorities he bases his opinion.

Where an expert relies on the report of another specialist, the expert on the stand can be impeached by observations contained in the report of the outside expert. The Eleventh Circuit Court of Appeals referenced O.C.G.A. § 24-7-705 in a 2014 federal habeas decision in connection with the proposition that "a party may impeach an expert witness with materials the expert relied upon in reaching his opinion, or with materials that draw his very opinion into question."⁸

While a hypothetical to a friendly expert on direct examination must be based on facts in the record, the cross-examiner can stray from it a bit when challenging an adversary's expert on cross. In federal courts, reasonable cross-examination questions, even if unfounded in the record, may be employed to test the skill, learning and opinions of an opposing expert.⁹ Georgia seems to be moving to this position regarding hypotheticals on cross.¹⁰

In *United States v. Stinson*,¹¹ it was deemed improper for a prosecutor to pose hypotheticals to a defense expert when the questions were based on matters not in evidence. However, other

general and unilateral right to scientific work product; such defendant is entitled to discover scientific work product only if he invokes the Criminal Procedure Discovery Act).

⁴O.C.G.A. § 17-6-4.

⁵*Richards v. Harpe*, 42 Ga. App. 123, 155 S.E. 85 (1930).

⁶*Davis v. State*, 153 Ga. 669, 113 S.E. 11 (1922).

⁷*Thompson v. Ammons*, 160 Ga. 886, 129 S.E. 539 (1925).

⁸*Jones v. GDCP Warden*, 746 F.3d 1170 (11th Cir. 2014).

⁹*Taylor v. Reo Motors, Inc.*, 275 F.2d 699 (10th Cir. 1960). However, not all federal courts follow the *Reo* approach. See *U.S. v. Stinson*, 647 F.3d

1196, 1213 (9th Cir. 2011). The restrictive view applied in *Stinson* was not followed in *EOP-Nicollet Mall, L.L.C. v. County of Hennepin*, 723 N.W.2d 270 (Minn. 2006) (when testing the skill or accuracy of an expert the questioner may ask the expert to assume facts that are not in evidence).

¹⁰See *Cornelius v. Macon-Bibb County Hosp. Authority*, 243 Ga. App. 480, 533 S.E.2d 420 (2000) (party to action was expert). But compare *Rowe v. State*, 266 Ga. 136, 464 S.E.2d 811 (1996). Cases from other jurisdictions, see Annotation: Propriety of hypothetical question to expert witness on cross-examination, 71 A.L.R.2d 6.

¹¹*U.S. v. Stinson*, 647 F.3d 1196, 1213–14 (9th Cir. 2011).

authorities allow more flexibility when it comes to hypotheticals on cross.

Fees earned in the current case are always open to exposure, see *Rogers v. Black*,¹² but what about fees earned by the expert in other cases? And what about how many times the expert has testified?¹³

There is Georgia authority which will allow counsel to cross-examine the witness as to the amount he received or expects to receive for testifying as an expert, but not as to compensation received in other cases or for other services, unless such compensation has a material bearing on the interest in the case at the bar.¹⁴ It often does.¹⁵ “Any possible bias or interest on the part of an expert witness is admissible as reflecting on his credibility.”¹⁶ It has been held that the expert may be cross-examined as to testimony he has given in other cases and for which parties he usually testifies.¹⁷ But an expert could not be cross-examined about the reversal of certain other cases in which he had testified.¹⁸ And it was held proper to deny cross-examination on whether juries in prior cases had followed an expert’s recommendations.¹⁹ If the expert states that his opinion is based on books in his field of expertise, counsel is permitted to read from standard books in the field and cross-examine the expert concerning those books. A similar rule applies where, upon cross, a cross-examiner’s book is recognized as a standard by the expert.

Scholarly journals as well as books may be employed to cross-examine experts.²⁰ The *Brannen* case was overruled on other

¹²*Rogers v. Black*, 121 Ga. App. 299, 173 S.E.2d 431, 432–33 (1970).

¹³See *Collins v. Wayne Corp.*, 621 F.2d 777, 6 Fed. R. Evid. Serv. 498 (5th Cir. 1980); *U.S. v. Edwards-Franco*, 885 F.2d 1002 (2d Cir. 1989) (allowing cross about fees in other cases); *Department of Transp. v. Lowery*, 163 Ga. App. 114, 291 S.E.2d 573 (1982) (frequency testimony is allowed, proper to ask how often expert testified in other condemnation cases). Compare *Vaughn v. Protective Ins. Co.*, 243 Ga. App. 79, 532 S.E.2d 159 (2000).

¹⁴*Yearwood v. State*, 201 Ga. 247, 39 S.E.2d 684 (1946).

¹⁵Extent of examination as to fees earned by expert, see *Weaver v.*

Georgia Power Co., 134 Ga. App. 696, 215 S.E.2d 503 (1975); *Hawkins v. South Plains Intern. Trucks, Inc.*, 139 F.R.D. 679 (D. Colo. 1991).

¹⁶*Meacham v. Franklin-Heard County Water Authority*, 302 Ga. App. 69, 690 S.E.2d 186 (2009).

¹⁷*Sutton v. State Highway Dept.*, 103 Ga. App. 29, 118 S.E.2d 285 (1961).

Compare *Carlisle v. Abend*, 288 Ga. App. 150, 653 S.E.2d 388 (2007).

¹⁸*Rogers v. State*, 257 Ga. 590, 361 S.E.2d 814 (1987).

¹⁹*Carter v. State*, 257 Ga. 510, 361 S.E.2d 175 (1987).

²⁰*Brannen v. Prince*, 204 Ga. App. 866, 421 S.E.2d 76 (1992).

grounds in *Gillis v. City of Waycross*.²¹ Requiring a foundation for use of an authoritative treatise to cross-examine, see *Harris v. Tatum*.²²

In federal practice, a lawyer can support and shore up her expert by quoting from a learned treatise. In Georgia, such books are not usable on direct, but can be employed to impeach an expert.²³

Federal Evidence Rule 803(18) permits books on direct to support and shore up a friendly expert as well as on cross to impeach an opposing specialist, but Georgia primarily limits the use of texts to contradiction of opposing experts. An expert may testify as to his opinions derived from a book, and his credibility may be tested by cross-examination reference to a standard treatise in his field of expertise; however, medical articles or texts are not themselves admissible as evidence.²⁴ Future practice in this regard is controlled by O.C.G.A. § 24-8-803(18).

In summary, books of science and art are not admissible to prove the opinions of experts announced therein.²⁵ They are usable on cross examination, however, to impeach. Cross-examination from obsolete or arcane treatises can be rejected.

A trial court in a prosecution for statutory rape can exclude cross-examination asking a physician whether he felt it was unusual to wait two weeks before the victim was examined, because the question was not directed to the physician's area of specialized knowledge.²⁶

In *Johnson v. Riverdale Anesthesia Associates, P.C.*,²⁷ the court ruled it improper cross-examination to quiz a medical witness on whether he or she would do a procedure in the same manner as the defendant doctor. See the comparison in jurisdictions on this point detailed in R. Carlson, *Successful Techniques for Civil Trials* § 4:47 (2d ed; Supp. 2019). Some states allow a cross-examiner to ask a defense expert witness doctor: "If you say the defendant doctor did this procedure the correct way, would you do it that way in your own practice?" Georgia law changed in 2009. Georgia now allows questions about how a testifying witness does a procedure, as a result of *Condra v. Atlanta Orthope-*

²¹*Gillis v. City of Waycross*, 247 Ga. App. 119, 543 S.E.2d 423 (2000).

²²*Harris v. Tatum*, 216 Ga. App. 607, 455 S.E.2d 124 (1995).

²³O.C.G.A. § 24-8-803(18).

²⁴*Fletcher v. Estes*, 268 Ga. App. 596, 602 S.E.2d 164 (2004).

²⁵*Suarez v. Suarez*, 257 Ga. 102, 355 S.E.2d 649 (1987).

²⁶*Payne v. State*, 258 Ga. 711, 373 S.E.2d 626 (1988).

²⁷*Johnson v. Riverdale Anesthesia Associates, P.C.*, 275 Ga. 240, 563 S.E.2d 431 (2002).

dic Group.²⁸ *Johnson* was overruled, the court stating, “Having considered the matter anew in light of recent statutory developments and the practice of other jurisdictions, we have determined that *Johnson* is no longer viable.”²⁹

In addition, while evidence of past misconduct by a witness which does not rise to the level of a criminal conviction is frequently excluded, proof of professional disciplinary actions is sometimes allowed. In *Latimore v. Department of Transp.*,³⁰ a medical expert was asked on cross-examination whether his medical license had ever been suspended. When the witness denied ever losing his license, the defense introduced copies of documents showing that the expert’s license had been revoked.

On the other hand, when an expert is asked whether he is facing a complaint for having sex with one of his patients, a timely objection will often be successful. The Georgia Supreme Court has ruled that such questions amount to improper impeachment.³¹

Prior acts of deception or falsity on the part of a witness are deemed probative of untruthfulness and admissible under O.C.G.A. § 24-6-608(b).

²⁸*Condra v. Atlanta Orthopaedic Group, P.C.*, 285 Ga. 667, 681 S.E.2d 152 (2009).

²⁹Confirming the point is *Griffin v. Bankston*, 302 Ga. App. 647, 691 S.E.2d 229 (2009) (personal practices

testimony).

³⁰*Latimore v. Department of Transp.*, 250 Ga. App. 360, 552 S.E.2d 439 (2001).

³¹*King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000).

Chapter 25

Hearsay Evidence

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§ 25:1 Admissibility of hearsay evidence

Hearsay evidence consists of an out-of-court statement repeated in court and offered for the truth of the matter asserted under

O.C.G.A. § 24-8-801.¹ The general ban on the introduction of hearsay evidence, subject to exemptions and exceptions, is contained in O.C.G.A. § 24-8-802.² Statements by a crime victim to a police officer that the defendant had attacked her, which victim was later killed, was inadmissible hearsay absent an applicable hearsay exception.³

The view that wrongful admission of hearsay irrevocably damages a verdict has softened in recent years. The erroneous admission of hearsay is harmless where legally admissible evidence of the same fact is introduced; in such a case, the hearsay is cumulative and without material effect on the verdict.⁴

To similar effect regarding the impact of hearsay, *Smith v. Stacey*,⁵ holds that the admission of hearsay testimony in a realty dispute is harmless error when it is cumulative of legally admissible evidence showing the same fact.

Under Georgia's 2013 Evidence Code, under a rule patterned after Fed. R. Evid. 802, unobjected to hearsay is no longer "illegal evidence," and can be considered in support of a verdict.⁶

This concept of "illegality" was not the only arcane feature of former Georgia hearsay law. The "old Code" hearsay definition of hearsay did not include the word "statement."⁷ Hearsay exceptions were not fundamentally based on indicia of trustworthiness, as in the Federal Rules of Evidence and Georgia's 2013 Evidence Code, but, rather on "necessity."⁸ Given these central dissimilarities, it is advised to carefully consider the application of prior Georgia hearsay decisions to post-2013 Georgia hearsay rules. Still, review of those opinions can be beneficial for purposes of providing background and context.

What about opinions of witnesses based upon hearsay? Opinions as to real estate value may be based upon hearsay, and the fact that the opinions were based upon hearsay goes merely

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¹*Watson v. State*, 303 Ga. 758, 814 S.E.2d 396 (2018). See also Carlson & Carlson, *Carlson on Evidence: Comparing Georgia Rules & Federal Rules* §§ 24-8-801(a) to (c), 24-8-802 (6th Ed. 2017).

²*State v. Kenney*, 315 Ga. 408, 883 S.E.2d 298 (2023).

³*Pope v. State*, 286 Ga. 1, 685 S.E.2d 272 (2009).

⁴*Morris v. State*, 280 Ga. 179, 626 S.E.2d 123 (2006).

⁵*Smith v. Stacey*, 281 Ga. 601, 642 S.E.2d 28 (2007).

⁶O.C.G.A. § 24-8-802. See *State v. Sutton*, 297 Ga. 222, 773 S.E.2d 222 (2015); *Bradshaw v. State*, 296 Ga. 650, 769 S.E.2d 892 (2015); *McDonald v. West Point Food Mart, Inc.*, 332 Ga. App. 753, 774 S.E.2d 774 (2015). See, generally, *U.S. v. LaDue*, 561 F.3d 855 (8th Cir. 2009).

⁷See former O.C.G.A. § 24-3-1(a) ("Hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons.").

⁸See former O.C.G.A. § 24-3-1(b).

to their weight and not their admissibility.⁹

The Georgia Supreme Court made a similar ruling in a criminal case. In *Roebuck v. State*,¹⁰ the Supreme Court allowed an expert to rely on hearsay. A similar rule is found in O.C.G.A. § 24-7-703.¹¹

Formerly, even unobjected to hearsay was insufficient to sustain a verdict. Disdain for the hearsay rule trumped contemporaneous objection law. In 2013 the approach changed, as reflected in Harper, *Changes Affecting Hearsay Under the New Georgia Evidence Code*, *Fulton Daily Report* 5 (Dec. 4, 2012):

It is worth mention at the outset that a significant change under the new Georgia rules provides that when inadmissible hearsay is not objected to, the objection is waived and such evidence is legal and may support the result of trial, O.C.G.A. § 24-8-802. Until Jan. 1, 2013, in Georgia, even when there is no objection, inadmissible hearsay is illegal evidence and has no probative value.

Admission of hearsay in criminal trials does not always violate an accused's rights of confrontation under the constitutions of either the United States or the State of Georgia.¹² This is particularly the case where the hearsay comes in under a traditional exception to the hearsay rule.

The dying declaration exception supplies a prime example. In Georgia, when a dying declarant was the accuser, a defendant complained that introduction of the declaration improperly denied him the right to cross-examine his accuser. The Georgia Supreme Court disagreed.¹³ Victim's statements to police who discovered him mortally wounded identified the shooter. A *Crawford* (see § 25:32 *infra*) objection did not defeat this evidence.

Georgia's Child Hearsay Statute frequently authorizes introduction of out-of-court statements authored by young victims, including videotaped interviews of child witnesses.¹⁴

Under the Child Hearsay statute (O.C.G.A. § 24-8-820), the trial court was required to rule on a two and one half-year-old's competency to testify before permitting witnesses to testify about statements the child made about the sexual act the defendant al-

⁹O.C.G.A. § 24-7-703; *Toyo Tire North America Mfg., Inc. v. Davis*, 333 Ga. App. 211, 775 S.E.2d 796 (2015). *Daniels Mortuary & Crematory, Inc. v. Business Loan Center, LLC*, 270 Ga. App. 875, 608 S.E.2d 545 (2004).

¹⁰*Roebuck v. State*, 277 Ga. 200, 586 S.E.2d 651 (2003).

¹¹*Clark v. State*, 296 Ga. 543, 769 S.E.2d 376 (2015).

¹²*Higgs v. State*, 256 Ga. 606, 351 S.E.2d 448 (1987).

¹³*Walton v. State*, 278 Ga. 432, 603 S.E.2d 263 (2004).

In accord with the Georgia approach is the United States Supreme Court decision in *Michigan v. Bryant*, 131 S. Ct. 1143, 179 L. Ed. 2d 93, 84 Fed. R. Evid. Serv. 1033 (2011).

¹⁴*Sands v. State*, 291 Ga. App. 639, 662 S.E.2d 374 (2008).

legedly committed upon her.¹⁵

Out-of-court statements by the victim of child molestation to a physician identifying his father as the perpetrator were not admissible under the child hearsay statute since the child was not found competent to testify at the time of the trial, nor were they admissible under the medical history exception to the hearsay rule, but their admission was deemed to be harmless where they were admitted without objection and were cumulative.¹⁶

The foregoing decision, however, was under former Georgia law. Federal courts and state courts where the Federal Rules of Evidence have been adopted routinely admit offender-identity evidence in child abuse prosecutions under the statement for medical diagnosis and treatment exception to the hearsay rule.¹⁷

Most states have special exemptions from strict hearsay law applications when a child witness or victim testifies in a sexual abuse case. These permit adults to whom a minor spoke to report the conversation in court, sometimes in substitution for the minor's courtroom testimony. Georgia's statute underwent amendment in 2013, when the Georgia General Assembly amended O.C.G.A. § 24-8-820. The age of children for which the statute applies was raised from 14 to 16. Children are now able to make statements regarding actions they saw done to others; no longer requiring the incident to have occurred to the child herself. Child hearsay statements may be introduced only if the State provides notice to the defense prior to trial of its intent to use such statements. A defendant may now waive the requirement that the child testify; instead allowing the defendant to cross-examine the individual to whom the child made the statement.

Subsequently, O.C.G.A. § 24-8-820 was amended after the passage of Georgia's 2013 Evidence Code. The current version: (1) establishes that the age of a child covered by the statute is 16 years of age; (2) provides that child witnesses, as well as alleged child victims of abuse, will receive child hearsay protections; and (3) contains specific notice requirement of the proponent of the contended evidence. In 2019, the statute was amended again to include the following language: "This Code section shall apply to any motion made or hearing or trial commenced on or after April

¹⁵*Hunnicut v. State*, 194 Ga. App. 659 Fed. Appx. 376, 101 Fed. R. Evid. 714, 391 S.E.2d 790 (1990). Serv. 133 (9th Cir. 2016); *Webb v.*

¹⁶*Dean v. State*, 198 Ga. App. 133, 401 S.E.2d 40 (1990). *State*, 113 So. 3d 592 (Miss. Ct. App. 2012).

¹⁷See, e.g., *United States v. Nez*,

18, 2019.”¹⁸

O.C.G.A. § 17-8-54 was amended as well, to allow victim assistance coordinators, victim advocates and victim assistance personnel in the courtroom when a child under 16 testifies in a sexual offense case.¹⁹

Earlier history with the child hearsay statute had cast doubt upon one portion of the law. A 1995 expansion of the statute to allow such hearsay from children other than the victim, such as other children who witness the offense, was struck down in *Woodard v. State*.²⁰ The portion of the statute relating to testimony from the victim of the crime was not affected by the ruling. “Therefore, the introduction at Woodard’s trial of hearsay statements made by the child victim in this case, in which she recounted the incident of abuse to the sheriff’s department investigator and DFCS workers, were admitted properly under the statute and present no grounds for review on appeal.”

In the 2012 case of *Bunn v. State*,²¹ the Georgia Supreme Court overruled the portion of the *Woodard* ruling which had struck down as unconstitutional the division of the former statute relating to witnesses of abuse. Young witnesses should have been able to report abuse under the protection of the Child Hearsay Statute, the court ruled. Left intact was the part of *Woodard* relating to introduction of a witness’ prior consistent statements.²² As stated in the *Bunn* case, “our decision today casts no doubt on that portion of *Woodard*.”²³

Fault was found with prior court constructions of the Child Hearsay Statute in *Hatley v. State*.²⁴ The Georgia Supreme Court placed an affirmative duty on the prosecution to put the child victim on the witness stand to confront the defendant.

In *London v. State*,²⁵ the court addressed *Woodard*’s holding of unconstitutionality when the trial court admitted the hearsay of a four-year-old:

The trial court admitted Brittany’s hearsay statements under [former] O.C.G.A. § 24-3-16, the child hearsay statute. After appellant’s trial, we held in *Woodard v. State*, 269 Ga. 317, 321 to 323, 496 S.E.2d 896, 71 A.L.R.5th 787 (1998), that the child hearsay statute was unconstitutional to the extent it permitted the introduc-

¹⁸Ga. L. 2019, p. 81, § 6/HB 424.

¹⁹See *Alexander v. State*, 313 Ga. 521, 870 S.E.2d 729 (2022).

²⁰*Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896, 71 A.L.R.5th 787 (1998).

²¹*Bunn v. State*, 291 Ga. 183, 728 S.E.2d 569 (2012).

²²See § 15:11, *supra*.

²³*Bunn v. State*, 291 Ga. 183, 728 S.E.2d 569 (2012).

²⁴*Hatley v. State*, 290 Ga. 480, 722 S.E.2d 67 (2012).

²⁵*London v. State*, 274 Ga. 91, 549 S.E.2d 394 (2001).

tion into evidence of hearsay statements made by a child under the age of 14 describing physical or sexual abuse inflicted on another person.

The trial judge in *London* decided the statements were admissible under another theory different from the child hearsay statute, and the conviction was affirmed. Justice Sears dissented, finding the error in admitting multiple hearsay statements to be prejudicial.

Child hearsay, outcry by victim four months after alleged molestation, and construction of former O.C.G.A. § 24-3-16, see *Hall v. Vargas*.²⁶

O.C.G.A. § 24-8-827, enacted in 2024, adopts similar procedures to Rule 820 for persons “17 years of age or older who is mentally incapacitated that describes any act of nonconsensual sexual contact or any act of physical abuse performed with or on such mentally incapacitated person by another, or with or on another in the presence of such mentally incapacitated person[.]” Like Georgia Rule of Evidence 820, Rule 827 has no specific corollary in the Federal Rules of Evidence.

A prior hearing to determine the indicia of reliability is not required prior to receiving evidence allowed by the child hearsay statute; a videotaped interview admitted under the child hearsay statute not subject to a “bolstering” objection.²⁷

For a motion in limine to exclude hearsay, see Appendix C, Form 11, *infra*.

Accident reconstruction expert’s report and narrative portion of the police report detailing events surrounding automobile accident were inadmissible hearsay in suit brought by insureds against uninsured motorist (UM) insurer for injuries arising from the accident.²⁸

Statement of insured’s first ex-wife that before insured died, insured showed her a letter he had written requesting a beneficiary change for accidental death policy and told her that he mailed it was hearsay and inadmissible as evidence that insured did substantially all that he could do to effect a change of beneficiary.²⁹

When a witness sits on the stand and tries to repeat his own self serving out-of-court statements, most courts say this consti-

²⁶*Hall v. Vargas*, 278 Ga. 868, 608 S.E.2d 200 (2005). The *Hall* case also reviews rules applicable to prior consistent statements, holding them competent only to rebut claims of recent fabrication.

²⁷*Phillips v. State*, 284 Ga. App.

224, 644 S.E.2d 153 (2007).

²⁸*Morton v. Horace Mann Ins. Co.*, 282 Ga. App. 734, 639 S.E.2d 352 (2006).

²⁹*Stanton v. Fisher*, 290 Ga. App. 274, 659 S.E.2d 692 (2008).

tutes hearsay.³⁰ However, some prior Georgia cases disagreed with this analysis.³¹

After *Culmer*, see *Smashum v. State*.³² More information on this topic is contained in § 29:21 *infra*. The questionable hearsay analysis of *Culmer* and *Webb*, § 29:21, *infra*, has been repeated in subsequent cases. A state's witness in *Fletcher v. State*³³ was visiting with the victim when she told the victim "Fletcher was using drugs." This witness could repeat the comment she earlier made to the murder victim when she testified at trial of the murderer. This is because of the *Culmer* proclamation. The court stated:

Fletcher contends that a State's witness improperly placed his character into evidence by testifying she had told the victim Fletcher was using drugs. However, because Fletcher did not make this specific objection at trial, he procedurally barred from raising it on appeal. Moreover, to the extent Fletcher contends the witness' statement to the victim was inadmissible hearsay, the contention is without merit, as "witness' testimony as to what he (the witness) said is not hearsay." (citing *Culmer*).

This approach is ended by the adoption of the 2013 rules. O.C.G.A. § 24-8-801 copies the federal rule. Under the federal rule, a witness on the stand seeking to repeat a self-serving statement he made to someone earlier when not in court is pure hearsay.³⁴

An insightful observation in a Georgia Supreme Court opinion by Justice Nahmias, would seem to bring Georgia fully in line with federal authority when it comes to witness self-quotation. *Walker v. State*³⁵ explains that Georgia Rule of Evidence 801(d)(2)(A) "recognizes a blanket exclusion from the hearsay rule only for statements by a party-opponent, not for a party's out-of-court statements offered by the party himself."

§ 25:2 Definition of hearsay evidence

Under O.C.G.A. § 24-8-801, hearsay evidence consists of an out-of-court statement repeated in court and offered for the truth

³⁰See Fed. R. Evid. 801.

³¹*Culmer v. State*, 282 Ga. 330, 334–335, 647 S.E.2d 30, 35–36 (2007).

³²*Smashum v. State*, 293 Ga. App. 41, 666 S.E.2d 549 (2008) ("where a witness testifies as to what he or she told another person, it is not hearsay") citing *English v. State*, 288 Ga. App. 436, 654 S.E.2d 150 (2007).

³³*Fletcher v. State*, 284 Ga. 653, 670 S.E.2d 411 (2008).

³⁴See *U.S. v. Bradley*, 644 F.3d 1213 (11th Cir. 2011); *U.S. v. Lewis*, 436 F.3d 939, 69 Fed. R. Evid. Serv. 507 (8th Cir. 2006); *U.S. v. Smith*, 490 F.2d 789 (D.C. Cir. 1974).

³⁵*Walker v. State*, 301 Ga. 482, 801 S.E.2d 804 (2017).

of the statement's content.¹ Statements that are not offered to prove the truth of the matter asserted, however, but which might, for instance explain how an individual was aware of a fact or a person's conduct are admissible as non-hearsay.² While hearsay can include nonverbal conduct of a person, if it not is intended by the person as an assertion, a description of the demeanor of another person, in-and-of-itself, is not hearsay.³

This definition seems to abolish the old Georgia original evidence rule. Under it, the following sort of testimony was occasionally offered as non-hearsay:

- Q. (by prosecutor) Officer, how were you summoned to the scene of this homicide?
- A. The radio dispatcher directed me to Third and Elm. He reported that there had been a shooting at that location, that a white male about six feet tall and approximately 200 pounds had shot an unarmed man, without provocation.
- Q. What did you do?
- A. Proceeded to that location, where we apprehended the defendant.

What about the report of the radio dispatcher? The fact that the arresting officer talked to someone is admissible. But can the content of discussion with third persons be admitted, with the trial court witness serving as the conduit for out-of-court declarations of another declarant? Sometimes hearsay reports and conversations are testified to by an officer under the guise of explaining the officer's subsequent conduct. Although there may be occasional exceptions, the admission of such testimony is usually error.⁴

The Georgia Supreme Court provides this perspective: "This Court has stated that only on rare occasions will the need to explain the conduct of an investigating officer justify the admission of hearsay evidence."⁵

Perhaps the strongest statement condemning hearsay intro-

[Section 25:2]

¹Downer v. State, 314 Ga. 617, 878 S.E.2d 537 (2022).

²Graham v. State, 331 Ga. App. 36, 769 S.E.2d 753 (2015).

³Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256 (2015) (bank customer's testimony that her husband got on the ground when directed to do so during a robbery and that he felt the

same way she had during the crime, was not hearsay).

⁴See, e.g., Harrison v. State, 187 Ga. App. 268, 370 S.E.2d 7 (1988).

⁵Watkins v. State, 273 Ga. 307, 540 S.E.2d 199 (2001) (this case did not present one of the rare instances where officer's conduct was a relevant issue so the trial court erred in admitting hearsay, but error was held to be harmless).

duced to explain officer conduct appears in *Mason v. State*.⁶ Chief Justice Benham advised trial judges to walk wide of error in the proffered admission of such evidence.

The “guise of explaining the officer’s conduct” was not a proper excuse for the introduction of hearsay in *White v. State*.⁷ This case presents a major proclamation by the Georgia Supreme Court respecting whether an officer who attends a lineup with a victim can testify to the victim’s identification of the accused. Such a practice is permitted under the new rules of evidence.⁸ However, the Georgia approach emphasizes that for the officer to so testify, the victim must also appear at the trial or hearing. The exception to the hearsay rule which admits out-of-court identifications requires that the declarant himself “appear, testify and be subject to cross-examination Because the two persons who picked White out of a photographic lineup did not testify at trial, the investigator’s testimony thereof was not admissible under the hearsay exception for pretrial identifications.” In this case the necessity exception did not change the result. Admission of the hearsay was error.

In one article,⁹ the author quotes approvingly the statement that “[j]urors need not revisit the government’s preliminary investigative processes, especially when such low-value evidence comes at such a high price to the accused,” citing *U.S. v. Martin*.¹⁰

The foregoing discussion underlines the point that the fact that someone contacted the officer or other witness is competent, where that point has some relevancy to the case. It is when the trial witness seeks to disclose the contents of what the out-of-court declarant explained to the trial witness that rules are breached. *Johnson v. State*¹¹ addresses exactly that point. Testimony of a police officer, that he had received a tip from an unnamed source regarding a shooting, did not involve recitation of any statement made by person relating the tip, and thus admission of the testimony at a murder trial did not violate defendant’s confrontation rights or violate rule against admission of hearsay. The testimony merely referred to unspecified “information” that officer had come to possess with regard to the case or simply acknowledged that an unnamed source existed. The hearsay rule

⁶*Mason v. State*, 274 Ga. 79, 548 S.E.2d 298 (2001).

⁷*White v. State*, 273 Ga. 787, 546 S.E.2d 514 (2001).

⁸O.C.G.A. § 24-8-801(d)(1)(C). See *U.S. v. Zaldivar*, 292 Fed. Appx. 868 (11th Cir. 2008).

⁹Hervic, *Statements of Bystanders Containing an Accusation of Crimi-*

nal Conduct Offered to Explain Subsequent Police Conduct, 55 U Miami L Rev 777 (2001).

¹⁰*U.S. v. Martin*, 897 F.2d 1368, 1373, 29 Fed. R. Evid. Serv. 910 (6th Cir. 1990).

¹¹*Johnson v. State*, 289 Ga. 22, 709 S.E.2d 217 (2011).

generally prevents witnesses from testifying as to statements made by third parties, but does not bar reference to the fact the witness had been contacted by someone.

Federal decisions, however, have approved the introduction of statements offered to explain law enforcement officer conduct, where not offered to prove the contents of the utterance.¹² More recent Georgia decisions appear to be leaning more in the federal direction, providing that the testimony is elicited for a non-hearsay purpose.¹³

A decision of the Georgia Supreme Court cites the Federal Rules of Evidence as the guide to appropriate resolution of a hearsay definition problem in *Barksdale v. State*.¹⁴ In the trial of Barksdale, the prosecution displayed to the jury a videotaped statement of Williams, a co-indictee (Williams had already pled guilty to a lesser charge). The Georgia Supreme Court held that when Williams refused to testify, his videotaped statement did not qualify either as an admissible prior inconsistent statement nor as a prior consistent statement, resulting in the admission of hearsay evidence. The defendant's conviction was reversed.

§ 25:3 Inapplicability of hearsay rule to certain situations

The hearsay rule does not apply if the making of the statement is the point in issue, as in actions involving libel, slander, or fraud. For instance, in one 2016 case, the victim's text messages were properly admitted to show the effect on the defendant in connection with his motive for committing a murder.¹ Also, when a witness has made prior inconsistent statements (see §§ 16:8 et seq.), under the general rule in this country such statements are not offered for the truth of the facts contained therein, but only to impeach the witness. Past Georgia cases disagree.² Time will tell whether future constructions of O.C.G.A. § 24-6-613 will result in the federal interpretation (prior inconsistent impeaching statements are non-hearsay) or will follow old Georgia law (prior statements are substantive evidence). The movement, however, appears to be toward preserving the earlier Georgia

¹²See *U.S. v. Ibarra-Diaz*, 805 F.3d 908, 98 Fed. R. Evid. Serv. 1234 (10th Cir. 2015); *Lonker v. Chambers*, 2017 WL 1738024 (D. Kan. 2017).

¹³*Watson v. State*, 303 Ga. 758, 814 S.E.2d 396 (2018) ("a hearsay objection would have been properly overruled because the evidentiary value of the witnesses' statements that guided Detective Brown's investiga-

tion was in their existence, not their truth").

¹⁴*Barksdale v. State*, 265 Ga. 9, 453 S.E.2d 2 (1995).

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¹*Gates v. State*, 298 Ga. 324, 781 S.E.2d 772 (2016).

²See § 16:8, *supra*.

approach.³ Finally, “verbal act” statements which are not offered for the truth of the matter are not considered hearsay under Georgia law.⁴ The foregoing point on the sometimes impeaching effect of out-of-court declarations has been litigated. An inconsistent statement used to impeach a criminal defendant, one taken without the necessary *Miranda* warnings, may be considered for impeachment only.⁵

In one area, however, that where a witness or party seeks to repeat in court his self-serving declarations made earlier, confusion abounds. This was evident in the pre-2013 Georgia precedent. The case of *Woodard v. State*⁶ and its progeny are discussed in § 15:11, *supra*. After *Woodard*, there has been some discussion in subsequent cases about whether a witness who takes the stand may bolster himself by repeating his earlier out-of-court statements.⁷

The *Culmer* case is mentioned in § 25:1, *supra*, and *Culmer* and *Woodard* are referenced in § 29:21, *infra*. *Culmer* says that when a witness testifies at trial, nothing he said earlier in an out-of-court setting is hearsay. He may repeat his prior words in court. *Woodard*, on the other hand, says his out-of-court declarations *are* hearsay, and inadmissible. He may *not* repeat his prior, consistent words in court, *unless* he is attacked on the grounds of recent fabrication of trial testimony. To summarize, under prior Georgia law, when a party on the witness stand quotes his own prior words which he had spoken to another person out of court, confusion attended the exchange. *Culmer v. State* and its progeny seemed to encourage such witness self-quotation. *Woodard v. State* barred it. Clarification was needed. The seeming inconsistency of the two holdings merits clarification.

Such clarification appears to have come in the 2013 Code. O.C.G.A. § 24-8-801 follows Fed. R. Evid. 801, which bars witness

³See *Harvey v. State*, 300 Ga. 598, 797 S.E.2d 75 (2017) (overruled on other grounds by, *Nalls v. State*, 304 Ga. 168, 815 S.E.2d 38 (2018)) (prior inconsistent statement admissible to impeach or as substantive evidence).

⁴Also see *Momon v. State*, 249 Ga. 865, 294 S.E.2d 482 (1982).

⁵*Fussell v. State*, 187 Ga. App. 134, 369 S.E.2d 511 (1988). For giving substantive effect to a trial witness' out-of-court declarations, see *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717, 30 A.L.R.4th 404 (1982). See also

Shelton v. Long, 177 Ga. App. 534, 339 S.E.2d 788 (1986).

⁶*Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896, 71 A.L.R.5th 787 (1998).

⁷Compare *Brown v. State*, 250 Ga. App. 147, 550 S.E.2d 701 (2001) (a witness' own testimony about what he said earlier is not hearsay) with *Blackmon v. State*, 272 Ga. 858, 536 S.E.2d 148 (2000) (only when witness on stand has been attacked can his own prior consistent statement be produced; otherwise, it is pure hearsay).

self-quotation.⁸ *Culmer* seemed overruled by statute. The prior statement portion of *Woodard*, on the other hand, appears to remain good law, following in the federal pattern. Under *Woodard*, prior statements are non-hearsay when used to buttress the credibility of a witness whom the cross-examiner claims made up his story. Absent such an attack, prior consistent statements of the witness are generally inadmissible hearsay.

In a 2011 case, it was ruled a violation of the hearsay rule to introduce a prior consistent statement to bolster a trial witness. However, erroneous admission of such hearsay is sometimes harmless error.⁹

The issue of using the prior consistent statements to shore up a witness, absent special circumstances, was discussed by Justice Blackwell in 2013. Citing text authorities, the opinion casts doubt upon the ability of a proponent of a witness to use prior consistent statements to bolster the credibility of the witness, in the absence of legally recognized impeachment of that witness.¹⁰

Traditional rules of evidence generally do not apply in parole revocation proceedings. While hearsay is inadmissible in probation revocation hearings, a different rule controls in parole revocations.¹¹

There being no indication in *Crawford*¹² of a change from the court's previous statements that the right of confrontation is a trial right, the Georgia Supreme Court joined the several States which have addressed this issue in their conclusion that the holding in *Crawford* is not applicable to preliminary hearings.¹³

Preliminary hearings came up again in a 2011 case. In *Bethel v. Fleming*,¹⁴ the court agreed with prosecutors that hearsay is appropriate during such hearings. The Georgia Court of Appeals ruled that DeKalb County's magistrate judges must admit and weigh hearsay evidence in hearings that determine whether there is probable cause to bind criminal cases over to a county grand jury for possible indictment. The reviewing court looked at the 2013 rules of evidence for support:

The General Assembly recently amended the Georgia Code to

⁸See *U.S. v. Bradley*, 644 F.3d 1213 (11th Cir. 2011).

⁹*Moon v. State*, 288 Ga. 508, 705 S.E.2d 649 (2011).

¹⁰*Bradley v. State*, 292 Ga. 607, 740 S.E.2d 100 (2013).

¹¹*Williams v. Lawrence*, 273 Ga. 295, 540 S.E.2d 599 (2001). See O.C.G.A. § 24-1-2(4).

¹²*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004). The *Crawford* decision is analyzed in § 25:32, *infra*.

¹³*Gresham v. Edwards*, 281 Ga. 881, 644 S.E.2d 122 (2007).

¹⁴*Bethel v. Fleming*, 310 Ga. App. 717, 713 S.E.2d 900 (2011), judgment rev'd on other grounds, 291 Ga. 669, 732 S.E.2d 401 (2012).

substantially revise, supersede, and modernize provision relating to evidence “to adopt the Federal Rules of Evidence as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013 . . .” See House Bill No. 24, Ga. L. 2011, p. 1 § 1. Although the amended code sections do not apply in this case, we nevertheless note that they are consistent with our conclusions here. See House Bill No. 24, Ga. L. 2011, p. 3 § 2 (“In criminal commitment or preliminary hearings in any court, the rules of evidence shall apply except that hearsay shall be admissible.”) (to be codified at O.C.G.A. § 17-7-28).

§ 25:4 Exceptions to hearsay rule; generally

Exceptions to the hearsay rule appear in O.C.G.A. §§ 24-8-803 and 24-8-804 of the 2013 Evidence Code. The enumerated exceptions in Evidence Rules 803 and 804 apply to hearsay that possesses certain guarantees of trustworthiness.¹

No other rule of evidence is subject to as many exceptions as the hearsay rule. Even if an out-of-court statement is offered for the truth of the matter contained in the statement, it still may be admissible if it falls within one of the exceptions. The remainder of this chapter is devoted to a consideration of those exceptions.

The hearsay rule has remained in place even as our society has changed and technology has increased. For example, courts have had to decide how the hearsay rule and its exceptions apply to computer data.²

The fashioning of exceptions to the hearsay rule has been the province of rule drafters for decades. In the 2013 Georgia Evidence Code, a comprehensive set of hearsay exceptions appeared. In addition to specifically enumerated exceptions, a “residual” exception is the subject of O.C.G.A. § 24-8-807.³ The 2013 Georgia rule is based upon Fed. R. Evid. 807.⁴ Application of the federal rule is reliant upon circumstantial guarantees of trustworthiness.⁵

In *State v. Kenney*,⁶ the Supreme Court of Georgia explained the requirements of satisfying O.C.G.A. § 24-8-807:

The residual exception to the hearsay rule applies only when “the circumstances under which [the statements] were originally made” establish “exceptional guarantees of trustworthiness.” Rawls v.

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¹United States v. Slatten, 865 F.3d 767 (D.C. Cir. 2017).

²See WGNX, Inc. v. Gorham, 185 Ga. App. 489, 364 S.E.2d 621 (1988).

³Jacobs v. State, 303 Ga. 245, 811 S.E.2d 372 (2018). See also Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules

§ 24-8-807 (6th Ed. 2017).

⁴State v. Hamilton, 308 Ga. 116, 839 S.E.2d 560 (2020).

⁵See U.S. v. Jayyousi, 657 F.3d 1085, 86 Fed. R. Evid. Serv. 745 (11th Cir. 2011).

⁶State v. Kenney, 315 Ga. 408, 883 S.E.2d 298 (2023).

State, 310 Ga. 209, 214(3)(a), 850 S.E.2d 90 (2020) (citations and punctuation omitted). In assessing whether exceptional guarantees of trustworthiness exist, relevant factors include “the trustworthiness of the original declarant” and whether the circumstantial guarantees of trustworthiness “are equivalent in significance to the specific hearsay exceptions enumerated in Federal Rules of Evidence 803 and 804.” *Holmes*, 304 Ga. at 529(2)(a) (citation, punctuation and emphasis omitted). “[S]uch guarantees must be equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history.” *Id.* (citation and punctuation omitted). “A trial court should consider the totality of the circumstances in determining whether to admit evidence pursuant to OCGA § 24-8-807.” *Reyes v. State*, 309 Ga. 660, 668(2)(b), 847 S.E.2d 194 (2020).

Where a husband was accused of the murder of his wife, the victim’s journal entries, which detailed “in her own words” the nature of the marriage and presented no motive to fabricate, were properly admitted under O.C.G.A. § 24-8-807.⁷

In 2019, Fed. R. Evid. 807 was amended.⁸ Georgia has yet to adopt these revisions.

The closest thing to O.C.G.A. § 24-8-807 in prior Georgia law was the necessity exception. Statements were properly admissible under the necessity exception set forth in former O.C.G.A. § 24-3-1(b) where trustworthiness was established by evidence in the record showing no motive to lie, and the statements were consistent with other representations made by the unavailable speaker on the subject matter.⁹

Exceptional guarantees of trustworthiness were established where a hospitalized murder victim identified his assailants to his mother who was at his bedside. Although the victim was in serious condition, he was lucid at the time of his statements, and had no apparent reason to lie to her about the identities of the men who assaulted him.¹⁰

In *Hayes v. State*,¹¹ a hearsay declarant was stabbed to death. He had served as a drug informant and a police officer testified to earlier statements made to the officer by the declarant. The Georgia Supreme Court approved the testimony:

[Former] O.C.G.A. § 24-3-1(b) permits the use of hearsay evidence

⁷*Shellman v. State*, 318 Ga. 71, 897 S.E.2d 355 (2024).

⁸Fed. R. Evid. 807, advisory committee notes to 2019 amendment (“the requirement of an equivalence analysis has been eliminated”).

⁹See *Sneiderman v. State*, 336 Ga. App. 153, 784 S.E.2d 18 (2016)

(disapproved of on other grounds by, *Quiller v. State*, 338 Ga. App. 206, 789 S.E.2d 391 (2016)).

¹⁰*Tanner v. State*, 301 Ga. 852, 804 S.E.2d 377 (2017).

¹¹*Hayes v. State*, 265 Ga. 1, 453 S.E.2d 11 (1995).

“in specified cases from necessity.” An exception to the rule against the admission of hearsay will be allowed “from necessity” where “necessity” and “particularized guarantees of trustworthiness” are established. *Roper v. State*, 263 Ga. 201, 429 S.E.2d 668 (1993); *McKissick v. State*, 263 Ga. 188, 429 S.E.2d 655 (1993). The necessity requirement is met as the statements were made by the victim who is now unavailable due to his death. *Id.* The trustworthiness of Hillman’s statements is provided by the fact that Hillman made the statement to the police officer for whom he had worked and to whom he had provided information about appellant and that he never disavowed the statements.

Under *Cook v. State*,¹² a witness is unavailable under this hearsay exception if the witness is dead or invokes a privilege. The declarant was dead in *Johnson v. State*.¹³ Unavailability was satisfied when a witness claimed a privilege in *Ginn v. State*.¹⁴

Unavailability of the witness is not always satisfied by his presence in another state. In *Lance v. State*,¹⁵ the necessity exception to the hearsay rule did not apply in a capital murder prosecution to defendant’s proffer of the hearsay statements of a witness living in another state whom defendant had not attempted to subpoena under interstate subpoena procedures.

To meet the necessity exception, the State had to show that the declarant was unavailable and that it made reasonable efforts to locate him and secure his presence. The test of unavailability was the same for both the prior testimony exception and the necessity exception.¹⁶

As indicated earlier in this section of the text, the residual exception contained in the 2013 Code replaces the old necessity exception.¹⁷ However, some of the jurisprudence under the former necessity exception may be instructive as courts interpret O.C.G.A. § 24-8-807. That said, cases under the “necessity exception” of Georgia’s former Evidence Code do not control the determination of admissibility under O.C.G.A. § 24-8-807.¹⁸

Does a lineup identification raise hearsay problems? Not if the victim of the crime testifies at trial that she recognized the defendant as her attacker during a lineup conducted after the arrest of the accused. But what if she does not testify? Can an officer who was present provide proof that the victim (or other eye-

¹²*Cook v. State*, 273 Ga. 574, 543 S.E.2d 701 (2001).

¹³*Johnson v. State*, 273 Ga. 345, 541 S.E.2d 357 (2001).

¹⁴*Ginn v. State*, 251 Ga. App. 159, 553 S.E.2d 839 (2001).

¹⁵*Lance v. State*, 275 Ga. 11, 560 S.E.2d 663 (2002).

¹⁶*White v. State*, 273 Ga. 787, 546 S.E.2d 514 (2001).

¹⁷See generally *Bradley v. State*, 292 Ga. 607, 740 S.E.2d 100 (2013).

¹⁸*Reyes v. State*, 309 Ga. 660, 847 S.E.2d 194 (2020).

witness) made a positive identification? No, says *White v. State*,¹⁹ at least in the absence at trial of the eyewitness. An investigator's testimony that the witness to the crime picked the defendant out of a photographic lineup was not admissible under the hearsay exception for pretrial identifications, where the witness did not testify. Presumably, where the identifying declarant testifies at trial, the fact that he made an identification of the accused can also be proved by third party testimony, like that of an investigator or a police officer.²⁰ The 2013 rules appear to continue this approach in 24-8-801(d).

A witness read a newspaper sunrise chart during a trial. Was this proper? The Georgia Supreme Court, in a footnote to its opinion, indicated that a court may take judicial notice of the time of sunrise and sunset. Further, the newspaper publication of the sunrise chart should have been admissible under the "notoriously accurate" exception to the hearsay rule.²¹

In criminal cases, out-of-court hearsay is frequently sought to be introduced against the accused under a hearsay exception. Particularized guarantees of reliability of a hearsay statement, while helpful, cannot always substitute for confrontation and cross-examination. Admission of statements to police made by defendant's uncle, who was deceased at time of defendant's trial for capital murder, was error; statements were testimonial, in that they were the product of police questioning in the course of a murder investigation, and defendant had no opportunity to cross-examine his uncle.²²

On the other hand, some hearsay is properly received in evidence, notwithstanding the restrictions of *Crawford v. Washington*.²³ A *Crawford* violation was harmless where inadmissible testimony was cumulative of other evidence.²⁴ Reversal is not required for a *Crawford* violation where the substance of a witness' statement was cumulative of other proof.²⁵ *Crawford* is not retroactive.²⁶

¹⁹*White v. State*, 273 Ga. 787, 546 S.E.2d 514 (2001).

²⁰See, generally, *U.S. v. Foster*, 652 F.3d 776, 85 Fed. R. Evid. Serv. 1147 (7th Cir. 2011).

²¹*Owens v. State*, 269 Ga. 887, 506 S.E.2d 860 (1998).

²²*Jenkins v. State*, 278 Ga. 598, 604 S.E.2d 789 (2004) (citing *Crawford*). See *Grimes v. State*, 280 Ga. 363, 628 S.E.2d 580 (2006) (statement disallowed).

²³*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004). See *Pitts v. State*, 280 Ga. 288, 627 S.E.2d 17 (2006) (wife made 911 call, then took marital privilege at trial; recording of call received in evidence).

²⁴*Moore v. State*, 283 Ga. App. 533, 642 S.E.2d 163 (2007).

²⁵*Taylor v. State*, 285 Ga. App. 697, 647 S.E.2d 381 (2007).

²⁶*Whorton v. Bockting*, 549 U.S.

No *Crawford* violation was found in *Ohio v. Clark*,²⁷ a child abuse case, where a three-year-old alleged victim's statement identifying the defendant as his attacker to a pre-school teacher was not "procured with a primary purpose of creating an out-of-court substitute for trial testimony."

Although the confrontation requirements of *Crawford* have been tested in the context of other hearsay exceptions, in Georgia the doctrine of necessity has provided the most frequent opportunity for testing *Crawford* against admission of hearsay. A 2006 Georgia Supreme Court decision illustrates. In *Daniels v. State*,²⁸ the common-law wife of Daniels gave police an interview after the stabbing of Anthony Sharpe. She later declined to testify and asserted her marital privilege at the trial of Daniels for murder. The court permitted the state to play the tape of her recorded interview, and Daniels was convicted. On appeal, the Supreme Court upheld his complaint that he was deprived of the opportunity to cross-examine the witness on the content of her recorded statement. Although this constituted error under *Crawford*, the court ultimately ruled it harmless because of the cumulative nature of the evidence.

As an element of the former necessity hearsay exception, necessity was demonstrated when the declarant was deceased, when the statement was shown to be relevant to a material fact, and when the statement was more probative of the material fact than other evidence that may be produced and offered.²⁹

Could an opponent insist that there be corroboration before a declaration was admitted under the necessity objection? No, said the Georgia Supreme Court in *Demons v. State*.³⁰

§ 25:5 Threats

Threats raise problems involving hearsay. Where threats were made by the victim of an assault or homicide against the accused, they are not hearsay when introduced as evidence of the accused's apprehension of danger and the reasonableness thereof. Such threats are admissible as tending to show the circumstances confronting the accused, the extent of his apparent danger, and the motive which influenced him.¹ In this case, the court held that refusal to admit such evidence is prejudicial and reversible

406, 127 S. Ct. 1173, 167 L. Ed. 2d 1, 72 Fed. R. Evid. Serv. 635, 44 A.L.R. Fed. 2d 777 (2007).

²⁷*Ohio v. Clark*, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015).

²⁸*Daniels v. State*, 280 Ga. 349, 628 S.E.2d 110 (2006).

²⁹Former O.C.G.A. § 24-3-1(b).

³⁰*Demons v. State*, 277 Ga. 724, 595 S.E.2d 76 (2004).

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¹*Jarrard v. State*, 206 Ga. 112, 55 S.E.2d 706 (1949).

error. In another case, testimony was not hearsay that, before the crime, a murder victim's family had threatened the defendant, where offered on the issue of the credibility of the defendant's explanation for why he had a weapon.² In the 2013 Georgia Evidence Code, proof of threats can also be accommodated under O.C.G.A. § 24-8-803(3) or if made by the defendant, under § 24-8-801(d)(2).

Threat evidence is also admissible to explain witness conduct on the stand. A witness' testimony regarding his perception of threats can be admissible at trial, especially in the case of where that witness disavows prior identification of the criminal defendant as his attacker. Such testimony has been deemed "particularly relevant."³

§ 25:6 Dying declarations

Changes in the law of dying declarations are contained in Georgia's revised Evidence Code effective January 1, 2013.¹ Dying declarations are no longer restricted to homicide cases. They are admissible in civil proceedings.² The Georgia model is now like the federal rule discussed next in this section. In applying O.C.G.A. § 24-8-804(b)(2), the Supreme Court of Georgia remarked:

Under Federal Rule 804(b)(2), "[a] dying declaration is admissible as an exception to hearsay if the declarant makes the statement while conscious of impending death and under the belief that there is no chance of recovery." (Citation and punctuation omitted.) U.S. v. Peppers, 302 F.3d 120, 137(III)(C)(2) (3d Cir. 2002). See also U.S. v. Lawrence, 349 F.3d 109, 116(II)(B)(1), 62 Fed. R. Evid. Serv. 1333 (3d Cir. 2003) (for statement to be admissible as dying declaration, "the declarant must have spoken with the consciousness of a swift and certain doom" (citation and punctuation omitted)).³

There are several requirements that must be met for a statement to qualify as a dying declaration. First, under the old rule

²Strickland v. State, 257 Ga. 230, 357 S.E.2d 85 (1987).

³Williams v. State, 335 Ga. App. 841, 783 S.E.2d 362 (2016).

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¹O.C.G.A. § 24-8-804(b)(2).

²O.C.G.A. § 24-8-804(b)(2). See Jonas v. Isuzu Motors Ltd., 210 F. Supp. 2d 1373 (M.D. Ga. 2002), aff'd, 58 Fed. Appx. 837 (11th Cir. 2003).

³Leonard v. State, 316 Ga. 827, 889 S.E.2d 837 (2023) ("Georgia Rule 804(b)(2) is materially identical to Federal Rule of Evidence 804(b)(2). When we consider the meaning of such a provision, 'we look to decisions of the federal appellate courts construing and applying the federal Rules, especially the decisions of the United States Supreme Court and the Eleventh Circuit for guidance.'").

the person must have died.⁴ Under the Federal Rules of Evidence the declarant need not actually die, rather she must be merely unavailable to testify.⁵ Georgia now follows this approach.

A second requirement is that the declarant has a settled hopeless expectation of immediate impending death.⁶ The amount of time which lapses between the declaration and death is not the controlling factor.⁷ The issue is whether the declarant believed that death was imminent.⁸ Although the declarant's consciousness can be inferred from his statements, nature of words, and other circumstances,⁹ it must appear to the court that there was at least a probability that the declarant was conscious of his impending death.¹⁰ This can be proven by circumstantial evidence if, for example, the victim had incurred a large and gaping wound in his chest. It is, however, ultimately a jury question as to whether the declarant was "in the article of death."¹¹

Finally, these statements are generally limited to the cause of death and to the identification of the person who committed the homicide.¹²

In contrast to Federal Rule of Evidence 804(b)(2), Georgia limited the use of this exception to the hearsay rule to criminal prosecutions for the death of the declarant.¹³ Georgia has now changed to the federal pattern, and dying declarations can be used in prosecutions for homicide or in civil proceedings.¹⁴

Dying declarations comprise an exception to the Sixth Amendment Right of Confrontation. A 2011 decision by the United States Supreme Court affirms this conclusion, and resoundingly

⁴See generally, *Stembridge v. State of Ga.*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

⁵See Federal Rule 804.

⁶See *Kitchens v. State*, 256 Ga. 1, 342 S.E.2d 320 (1986).

⁷See *McAllister v. State*, 246 Ga. 246, 271 S.E.2d 159 (1980); *Early v. State*, 170 Ga. App. 158, 316 S.E.2d 527 (1984) (survived 54 days); *Cooper v. State*, 182 Ga. 42, 184 S.E. 716, 104 A.L.R. 1309 (1936) (declarant survived 11 months after making declaration).

⁸*Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9 (1943) (overruled on other grounds by, *Howard v. State*, 237 Ga. 471, 228 S.E.2d 860 (1976)).

⁹See *Early v. State*, 170 Ga. App. 158, 316 S.E.2d 527 (1984); *Howard v.*

State, 237 Ga. 471, 228 S.E.2d 860 (1976).

¹⁰*Freeman v. State*, 233 Ga. 745, 213 S.E.2d 643 (1975).

¹¹*Holcomb v. State*, 249 Ga. 658, 292 S.E.2d 839 (1982). Also see *Lloyd v. State*, 257 Ga. 108, 355 S.E.2d 423 (1987); *Kitchens v. State*, 256 Ga. 1, 342 S.E.2d 320 (1986).

¹²*Westberry v. State*, 175 Ga. 115, 164 S.E. 905 (1932).

¹³*Godwin v. Gibson Products Co. of Albany*, 121 Ga. App. 59, 172 S.E.2d 467 (1970); *Miliken v. State*, 8 Ga. App. 478, 69 S.E. 915 (1910); *Wooten v. Wilkins*, 39 Ga. 223, 1869 WL 1660 (1869). Also see *Westberry v. State*, 175 Ga. 115, 164 S.E. 905 (1932).

¹⁴O.C.G.A. § 24-8-804(b)(2).

endorses dying declarations as an exception to the hearsay rule.¹⁵

Dying declarations are sometimes attacked on the grounds that they were incomplete.¹⁶ In a number of older cases, dying declarations were limited to facts of which the decedent had firsthand knowledge; therefore, statements as to opinions, beliefs and conclusions were not admissible. However, under a modern approach to facts and opinions, the two concepts frequently merge, and broad admissibility patterns attend factually based conclusions.¹⁷ The opponent of the declaration may put on evidence of conflicting statements made by the decedent.¹⁸

The manner of communicating a dying declaration has been litigated. Where a victim had communicated to witnesses that he knew the identity of his assailant before he lost the ability to speak and there was ample evidence that the victim was aware that he was “in the article of death,” his nonverbal identification was admissible as a dying declaration.¹⁹ Both written and oral statements are admissible as dying declarations.²⁰ However, the Supreme Court in *Strickland v. State*²¹ held that it was error to allow a written declaration to go to the jury room as it would be given unfair weight.

A victim’s identification of the defendant as his killer was properly admitted as a dying declaration where the victim had suffered third-degree burns over 95% of his body and he was aware of his impending death at the time the identification was made.²²

A felony murder victim’s statements to a nurse identifying her assailant were admissible as dying declarations since the victim was aware that she could be dying at the time she made the statements, and although she did not see the assailant, the fact that she and the defendant shared an apartment and were the only ones in it on the night in question did not render it manifestly impossible for her to have known who killed her.²³

The admissibility of these declarations is not affected by the

¹⁵*Michigan v. Bryant*, 131 S. Ct. 1143, 179 L. Ed. 2d 93, 84 Fed. R. Evid. Serv. 1033 (2011).

¹⁶See *Dixon v. State*, 243 Ga. 46, 252 S.E.2d 431 (1979) (upheld declaration referring only to a woman; the defendant was the only woman at the crime scene); *Kalb v. State*, 195 Ga. 544, 25 S.E.2d 24 (1943) (overruled on other grounds by *Howard v. State*, 237 Ga. 471, 228 S.E.2d 860 (1976)).

¹⁷See §§ 24:2, 24:3, *supra*. See also *Phillips v. State*, 260 Ga. 742, 399 S.E.2d 202 (1991).

¹⁸*Keith v. State*, 175 Ga. 385, 165 S.E. 262 (1932).

¹⁹*Richie v. State*, 258 Ga. 361, 369 S.E.2d 740 (1988).

²⁰*Mixon v. State*, 7 Ga. App. 805, 68 S.E. 315 (1910).

²¹*Strickland v. State*, 167 Ga. 452, 145 S.E. 879 (1928).

²²*Norris v. State*, 258 Ga. 889, 376 S.E.2d 653 (1989) (disapproved on other grounds by *Johnson v. State*, 272 Ga. 254, 526 S.E.2d 549 (2000)).

²³*Phillips v. State*, 260 Ga. 742,

fact the statement was elicited by questions asked of the decedent.²⁴ However, it is a good policy for the judge to instruct the jury as to the weight that should be given to these type declarations.²⁵

A witness asked a shooting victim who it was that shot him, and he named the defendant after a number of questions. The victim died during surgery, and the witness testified to the declarant's identification of the shooter at defendant's trial. After conviction, the defendant argued his rights to cross-examine the accuser were denied under *Crawford v. Washington*.²⁶ Justice Hines responded in *Walton v. State*:²⁷

[A]t trial, Walton did not object to admission of the evidence as violative of his rights of confrontation. Rather, he argued against the reliability of dying declaration and the credibility of Jasmine Hill. There is a distinct difference between a challenge of the admission of evidence based upon the confrontation clause and that based upon an exception to the hearsay rule.²⁸

Although the rules concerning the Confrontation Clause and hearsay evidence generally protect similar values, they do not always prohibit the same evidence. The Confrontation Clause may bar the admission of some evidence that would be admissible under an exception to the hearsay rule. "The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." *Yancey v. State*, 275 Ga. 550, 570 S.E.2d 269 (2002). Consequently, Walton's failure at trial to raise an objection to the admission of the evidence under the Sixth Amendment precludes consideration of the issue on appeal.²⁹

It should be noted, however, that the United States Supreme Court, in *Crawford v. Washington*, declined to extend its holding to dying declarations. Rather, the Court, in its historical analysis, acknowledged that admission of a dying declaration was an exception to the general rule that a prior opportunity to cross-examine was a necessary condition for admissibility of testimonial statements.

399 S.E.2d 202 (1991).

²⁴*Davis v. State*, 204 Ga. 467, 50 S.E.2d 604 (1948). See *Leatherwood v. State*, 65 Ga. App. 805, 16 S.E.2d 515 (1941).

²⁵*Dowdell v. State*, 194 Ga. 578, 22 S.E.2d 310 (1942); *Cooper v. State*, 182 Ga. 42, 184 S.E. 716, 104 A.L.R. 1309 (1936). But, it is not reversible error if the judge does not give this instruction, (*Key v. State*, 177 Ga. 329, 170 S.E. 230 (1933)), unless one party requests such an instruction and the judge refuses. *Coart v. State*, 156 Ga.

536, 119 S.E. 723 (1923); *Kitchens v. State*, 256 Ga. 1, 342 S.E.2d 320 (1986). Also see *Wright v. State*, 254 Ga. 484, 330 S.E.2d 358 (1985).

²⁶*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

²⁷*Walton v. State*, 278 Ga. 432, 603 S.E.2d 263 (2004).

²⁸*Yancey v. State*, 275 Ga. 550, 551-557, 570 S.E.2d 269 (2002).

²⁹*White v. State*, 270 Ga. 804, 809(4)(a), 514 S.E.2d 14 (1999).

§ 25:7 Testimony at former trial

The 2013 Georgia Evidence Code provides that sworn testimony by a witness from another hearing is admissible in a current trial if the witness was placed under oath and the party opposed to the witness had the opportunity to cross-examine on a similar issue at the earlier proceeding.¹

Even though it is hearsay, testimony heard at a former trial may be admitted in evidence when the witness is since deceased, disqualified or inaccessible for any cause and the testimony was given under oath upon substantially the same issues and substantially between the same parties.² See generally on the issue of unavailability, *Higgs v. State*,³ where during a murder trial, hearsay statement of an eyewitness was admissible based on necessity despite lack of any specific exception to the hearsay rule where the eyewitness was unavailable at trial because she had married defendant and refused to testify against him. What about a witness who leaves without a forwarding address, or disappears? The moving party must show that a diligent search was made for the witness.⁴ The inaccessibility of the witness is a determination made within the sound discretion of the court.⁵ The courts have applied this test in a practical fashion.⁶ In the 2013 Code, an expanded approach to the determination of availability appears in O.C.G.A. § 24-8-804(a).⁷

For evidence to be admissible under the prior reported testimony exception, the two actions must involve substantially

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¹O.C.G.A. § 24-8-804(b)(1). See also *Shealey v. State*, 308 Ga. 847, 843 S.E.2d 864 (2020); *In re Inofin Incorporated*, 219 F. Supp. 3d 265 (D. Mass. 2016).

²O.C.G.A. § 24-8-804(b)(1); *Scott v. State*, 309 Ga. 95, 844 S.E.2d 785 (2020). See, generally, *Owens v. Republic of Sudan*, 864 F.3d 751 (D.C. Cir. 2017). Also see *Transamerica Ins. Co. v. Thrift-Mart, Inc.*, 159 Ga. App. 874, 285 S.E.2d 566 (1981); *Tanner v. State*, 213 Ga. 820, 102 S.E.2d 176 (1958) (illness); *Smoak v. State*, 58 Ga. App. 299, 198 S.E. 99 (1938) (beyond the jurisdiction of the court); *Estill v. Citizens' & Southern Bank*, 153 Ga. 618, 113 S.E. 552 (1922) (mental incompetency); *Georgia Chemical Works v. Malcolm*, 186 Ga. 275, 197 S.E. 763 (1938) (incompetent by reason of survivor statute); *Reid v. Harbin Lumber Co. of*

Royston, Inc., 172 Ga. App. 615, 323 S.E.2d 845 (1984) (held party not inaccessible).

³*Higgs v. State*, 256 Ga. 606, 351 S.E.2d 448 (1987).

⁴*Washington v. State*, 253 Ga. 173, 318 S.E.2d 55 (1984).

⁵*State v. Hamilton*, 308 Ga. 116, 839 S.E.2d 560 (2020). See also

Smith v. State, 247 Ga. 453, 276 S.E.2d 633 (1981).

⁶See generally, *Gaither v. State*, 227 Ga. 668, 182 S.E.2d 434 (1971) (court said State could not wait until the trial began to start looking for the witness).

⁷See generally *Allison v. State*, 356 Ga.App. 256, 846 S.E.2d 222 (2020) (“the Code section clearly limits that definition of unavailability to the exceptions included in the Code section”).

the same issues.⁸ The 2013 Code has a provision requiring that the witness be subject to being cross-examined by the adverse party at the prior hearing. A simple opportunity to cross-examine suffices, but the cross-examiner in the earlier case must have had a motive similar to that in the current case. Usually similar issues in the two proceedings will satisfy the rule, with “similar” implying something less than identical.⁹ Nor does it require that all the issues be the same, but merely that the issue to which the former testimony was directed must be the same issue as the one which is offered in the second case.¹⁰ In another case, the issues were held to be substantially the same where the former trial was a criminal case and the case under consideration was a civil action brought by the chief prosecuting witness against the defendant based on the same transaction.¹¹

A key issue is whether the objecting party had adequate opportunity and motive to cross-examine the witness in the previous trial or hearing.¹² A companion case growing out of a common occurrence has been held to meet this requirement.¹³

§ 25:8 Establishing right to use testimony from former trial

The burden is on the party offering testimony from a former trial to show that he is entitled, under the foregoing rules, to introduce such testimony.¹ Under Rule 804(b)(1), adopted by Georgia at O.C.G.A. § 24-8-804(b)(1), federal decisions observe that the proponent has the burden to show by a preponderance of evidence: (1) the witness is unavailable; (2) the party against whom the testimony is offered is the same as in the prior proceeding; and (3) that that party had the same motive and opportunity to examine the witness.² The sufficiency of this proof lies largely in the discretion of the trial court, and the appellate court will not interfere with the decision in the absence of an abuse of that

⁸See generally *de la Gonzalez v. Krystal Co.*, 173 Ga. App. 574, 327 S.E.2d 546 (1985) (held the issues were not substantially the same).

⁹*Atlanta and West Point R.R. v. Venable*, 67 Ga. 697, 1881 WL 3462 (1881).

¹⁰*Craft v. State*, 154 Ga. App. 682, 269 S.E.2d 490 (1980).

¹¹*Heatley v. Long*, 135 Ga. 153, 68 S.E. 783 (1910).

¹²See *Barnes v. State*, 256 Ga.

370, 349 S.E.2d 387 (1986); *Cates v. State*, 245 Ga. 30, 262 S.E.2d 796 (1980); *Craft v. State*, 154 Ga. App. 682, 269 S.E.2d 490 (1980).

¹³*Myrick v. Sievers*, 104 Ga. App. 95, 121 S.E.2d 185 (1961).

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¹*Riley v. State*, 237 Ga. 124, 226 S.E.2d 922 (1976).

²*Bellamy v. City of N.Y.*, 12 Civ. 1025 (E.D.N.Y. May 17, 2017).

discretion.³

For purposes of Georgia Rule of Evidence 804, the term “unavailable as a witness” includes a situation in which the declarant is absent from the hearing and the proponent of the statement has been unable to procure the declarant’s attendance by process or other reasonable means. To establish that a witness is unavailable under Georgia Rule 804(a)(5), the proponent must show that reasonable, good-faith efforts to locate the witness were made.⁴

Federal courts have wrestled with the issue of whether a grand jury record can be used at trial where the witness who gave the testimony is unavailable. Can transcripts of the grand jury testimony of a witness who testified there be read to the jury, if the witness has died or become disabled? Under federal law such a transcript from a preliminary hearing may be receivable, but a different rule controls grand jury testimony. In *U.S. v. Salerno*,⁵ two witnesses testified before a grand jury but invoked their privilege against self-incrimination at trial. At trial, the defense offered their grand jury testimony against the government. The government objected on the ground that there was insufficient similarity of issues between the two proceedings. The argument was not successful in the Court of Appeals, but the government prosecuted an appeal to the Supreme Court. The appeal resulted in the rendition of an opinion by the Court which rejected the lower court’s decision and excluded the grand jury record.⁶

When a state’s witness could not be located for trial after diligent inquiry, the trial court found him to be unavailable and allowed the State to introduce his testimony from the preliminary hearing, citing former O.C.G.A. § 24-3-10. Although a party is entitled to a thorough and sifting cross-examination, when preliminary hearing testimony of an unavailable witness has been subjected to extensive cross examination, it is admissible.⁷

Testimony from first trial of a witness who became unavailable

³Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217 (1983).

⁴Bolling v. State, 300 Ga. 694, 797 S.E.2d 872 (2017).

⁵*U.S. v. Salerno*, 937 F.2d 797, 34 Fed. R. Evid. Serv. 1 (2d Cir. 1991), opinion modified on reh’g, 952 F.2d 623, 34 Fed. R. Evid. Serv. 1 (2d Cir. 1991) and order amended, 952 F.2d 624, 34 Fed. R. Evid. Serv. 1 (2d Cir. 1991) and rev’d, 505 U.S. 317, 112 S. Ct. 2503, 120 L. Ed. 2d 255, 34 Fed. R.

Evid. Serv. 865 (1992), *U.S. v. DiNapoli*, 8 F.3d 909, 38 Fed. R. Evid. Serv. 277, 138 A.L.R. Fed. 739 (2d Cir. 1993).

⁶*U.S. v. Salerno*, 505 U.S. 317, 112 S. Ct. 2503, 120 L. Ed. 2d 255, 34 Fed. R. Evid. Serv. 865 (1992), *U.S. v. DiNapoli*, 8 F.3d 909, 38 Fed. R. Evid. Serv. 277, 138 A.L.R. Fed. 739 (2d Cir. 1993).

⁷*Moody v. State*, 273 Ga. 24, 537 S.E.2d 666 (2000).

was usable in second trial.⁸ However, deposition testimony of allegedly unavailable witness was not admissible under hearsay exception for former testimony in wrongful-death action that was brought by worker's heirs against company that mined a form of asbestos to which worker allegedly had been exposed; heirs made no effort to subpoena witness.⁹

Former testimony issues have come up in other civil cases. In *Pope v. Fields*,¹⁰ videotaped testimony of the testator in her prior suit against her brother was admissible hearsay. The prior testimony was contained in a deposition, and the issues in both proceedings were substantially similar.

§ 25:9 Manner of proving testimony from former trial

Anyone who heard the testimony can probably testify to its content. However, if there is a written transcript of the former testimony, it can be introduced and under some earlier cases has been required as the best evidence.¹ The court used the term best evidence in the dicta of this case, but it seems to have been followed by some courts as a standard practice. A mode of presentation sometimes used is for a person to take the stand and read the witness' answers while the attorney who is the proponent of the transcript reads the questions. Depositions from a previous action are admissible under limited situations pursuant to O.C.G.A. § 9-11-32(a)(5).

§ 25:10 Past recollection recorded

There are two different situations that arise when a witness cannot immediately recall the fact, but is able to do so with the aid of a writing. The first technique is known as present recollection refreshed and requires that the witness be able to testify independently without the writing after he has used the writing to refresh his memory.¹ The refreshing process opens the writing to disclosure. Georgia has broadened the disclosure rules. If a witness uses documents to refresh memory while on the witness stand, then during that hearing or trial the cross-examiner is

⁸Wade v. State, 274 Ga. 791, 560 S.E.2d 14 (2002) ("inaccessible" within meaning of former O.C.G.A. § defined).

⁹Flowers v. Union Carbide Corp., 271 Ga. App. 438, 610 S.E.2d 109 (2005).

¹⁰Pope v. Fields, 273 Ga. 6, 536

S.E.2d 740 (2000).

[Section 25:9]

¹See Galloway v. Hogg, 167 Ga. 502, 146 S.E. 156 (1928).

[Section 25:10]

¹See § 15:10, supra.

entitled to examine such documents.²

The second technique for use of writings when the witness is still unable to remember after having refreshed his memory involves presentation of the content of the document itself. In this situation, the witness can use the writing to assist him provided he shall be willing to swear positively from the paper.³ In order to testify positively from the paper itself, the witness must either have made the paper himself or, at some time when the facts were fresh in his memory, he must have known the facts stated in the paper to be correct.⁴ The companion rule in federal practice is Federal Evidence Rule 803(5).⁵

§ 25:11 Admission of writing for past recollection

While past recollection recorded writings may have been received as exhibits under former law, the 2013 Georgia Code suggests a shift in direction. O.C.G.A. § 24-8-803(5) (effective Jan. 1, 2013) provides that if such material is admitted, “the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.”¹

§ 25:12 Business records

Introduction of business records has been expedited by the enactment of Chapter 9 of the new Evidence Code. This is explained in Harper, *Changes Affecting Hearsay Under the New Evidence Code*, *Fulton Daily Report* 5 (Dec. 4 2012):

The foundational requirements for business records are unchanged, but the process of laying the foundation and authentication is much different. Under the new code, authentication may be made by certification of the custodian of the records or one familiar with the records keeping procedure in lieu of live testimony. If the certification properly recited the foundational elements of O.C.G.A. § 24-8-803(6) as outlined in O.C.G.A. §§ 24-9-902(11) and (12), both requirements are satisfied, and the record may be admitted by the trial judge under O.C.G.A. § 24-1-104(a), employing a preponder-

²O.C.G.A. § 24-6-612. See *Johnson v. State*, 259 Ga. 403, 383 S.E.2d 118 (1989).

³O.C.G.A. § 24-8-803(5). See *Henderson v. State*, 182 Ga. App. 513, 356 S.E.2d 241 (1987), judgment aff'd in part, rev'd on other grounds in part, 257 Ga. 618, 362 S.E.2d 346 (1987); *Cooper v. State*, 174 Ga. App. 464, 330 S.E.2d 402 (1985); *Kelley v. State*, 169 Ga. App. 917, 315 S.E.2d 916 (1984); *Stansall v. Columbian Nat. Life Ins. Co.*, 32 Ga. App. 87, 122 S.E. 733 (1924) (discusses the differences of past and

present recollection).

⁴*Bradshaw v. State*, 162 Ga. App. 750, 293 S.E.2d 360 (1982); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978).

⁵See *U.S. v. Perl*, 492 Fed. Appx. 37 (11th Cir. 2012).

[Section 25:11]

¹See *U.S. v. Porter*, 986 F.2d 1014, 38 Fed. R. Evid. Serv. 128 (6th Cir. 1993).

ance of evidence standard.

Because O.C.G.A. § 24-8-803(6) closely tracks the parallel federal rule, Georgia courts look to federal precedent when considering its application. A decision from Judge McMillian of the Georgia Court of appeals illustrates.¹

Any writing or record made as a memorandum or record of any act, transaction, occurrence or event is admissible as proof of the act, transaction, occurrence or event if the trial judge finds it was made in the regular course of business, that it was the regular course of such business to make the memorandum or record and it was made within a reasonable time of the act, transaction, occurrence or event.² If a writing does not qualify under this exception to the hearsay rule, it may still be admissible on other grounds, see § 25:10, *supra*, or § 26:1, *infra* (party admission); also, even if the writing itself is not admissible, it may be possible to use it to refresh the memory of a witness, see § 15:10, *supra*. Section (d) of former 24-3-14 stated that this code section on business records is to be liberally interpreted and applied.³

It is within the trial court's discretion to determine whether a proper foundation was laid for application of the business records exception to a particular document and whether the circumstances of the document's preparation indicate trustworthiness.⁴ Once the foundational elements of O.C.G.A. § 24-8-803(6) are satisfied, "a rebuttable presumption of trustworthiness of the evidence is created."⁵

What about where records of regularly conducted activity are in the possession of a successor business? Where the acquiring corporation integrates the predecessor's otherwise qualifying business records into its own, they are capable of admission under O.C.G.A. § 24-8-803(6).⁶

The recording of a call made by a county 9-1-1 center qualified as an admissible record of regularly conducted activity under

[Section 25:12]

¹Jones v. State, 345 Ga. App. 14, 812 S.E.2d 337 (2018) ("Where, as in the case of OCGA § 24-8-803(6), Georgia's evidentiary statutes closely track the language of the Federal Rules of Evidence, we look to the federal courts' interpretation of those rules for guidance."). See also Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules § 24-8-803(6) (6th Ed. 2017).

²O.C.G.A. § 24-8-803(6).

³See Redd v. State, 240 Ga. 753,

243 S.E.2d 16 (1978) (murder-Richmond County).

⁴Roberts v. Community & Southern Bank, 331 Ga. App. 364, 771 S.E.2d 68 (2015).

⁵Thompson v. State, 332 Ga. App. 204, 770 S.E.2d 364 (2015), quoting Ronald L. Carlson & Michael Scott Carlson, Carlson on Evidence, p. 546 (3d ed. 2015).

⁶Ciras, LLC v. Hydrajet Technology, LLC, 333 Ga. App. 498, 773 S.E.2d 800 (2015).

Georgia Rule of Evidence 803(6).⁷

Where business records are introduced via a certificate or declaration, notice must be provided.⁸ The certificate itself should contain assurances that the records comply with the hearsay exception.⁹ Under O.C.G.A. § 24-8-803(6), the introductory witness does not need to have first-hand knowledge of the contents of the records or of the authors, or even how the records are created or prepared in order to authenticate the records.¹⁰

For a writing to be admissible under the business records exception to the hearsay rule by means other than a certificate, a foundation must be laid through the testimony of a witness indicating that he is familiar with the method of keeping the records; the witness must also be able to testify that the record was made in the regular course of business, at the time of the event or within a reasonable time of the event.¹¹

Not all regularly kept records will qualify for admission into evidence. Minutes of the meeting of church members were not admissible under the “business records” exception where the clerk pro tem did not state that the records were created at the time of the acts recorded or within a reasonable time thereafter.¹² To similar effect, foundation laid by a technician from an elevator maintenance company for on-line service history reports, sought to be used to demonstrate regular service to an elevator, was lacking in essential elements.¹³

Narrative portion of police report of defendant’s prior arrest was not admissible under business records exception to hearsay rule, and thus police officer could not read into evidence the narrative portion of the police report of which he had no personal knowledge and did not prepare; overruling a number of Court of Appeals decisions.¹⁴

A criminal defendant’s application to create an account with a company that maintained a database used by law enforcement of-

⁷Gregory v. State, 342 Ga. App. 411, 803 S.E.2d 367 (2017).

⁸U.S. v. Collado, 439 Fed. Appx. 845 (11th Cir. 2011).

⁹See, generally, U.S. v. Green, 648 F.3d 569 (7th Cir. 2011).

¹⁰Matthews v. Wells Fargo Bank, 335 Ga. App. 526, 782 S.E.2d 312 (2016).

¹¹Aon Risk Services, Inc. of Georgia v. Commercial & Military Systems Co., Inc., 270 Ga. App. 510, 607 S.E.2d 157 (2004). See also Lorraine v. Markel American Ins. Co., 241 F.R.D. 534, 73 Fed. R. Evid. Serv.

446 (D. Md. 2007).

¹²White Missionary Baptist Church v. Trustees of First Baptist Church of White, Ga., 268 Ga. 668, 492 S.E.2d 661 (1997).

¹³Henson v. Georgia-Pacific Corp., 289 Ga. App. 777, 658 S.E.2d 391 (2008) (no testimony that reports were made in regular course of business and no testimony that reports were made at time of underlying transaction or within a reasonable time thereafter).

¹⁴Brown v. State, 274 Ga. 31, 549 S.E.2d 107 (2001).

ficers to determine whether items sold in pawn shops were stolen fell within the business records exception to the hearsay rule.¹⁵

Mobile telephone company records custodian was not required to have personal knowledge of records for their admission as business records.¹⁶ The testifying witness does not have to have personal knowledge of all information set forth in the document for admission as a business record.¹⁷

Business records exception to the hearsay rule requires that the “foundation must be laid through the testimony of a witness who is familiar with the method of keeping records and who can testify thereto and to facts which show that the entry was made in the regular course of . . . business at the time of the event or within a reasonable time thereafter.”¹⁸

Computerized records are frequently authenticated as business records when foundation is laid. Adequate foundation was laid for plaintiff’s prescription drug records, in negligence action; pharmacist testified that records were generated by pharmacy in regular course of business, that records were true and accurate for time period and transactions depicted in records, and that records were maintained in legally authorized computer system that required accuracy of dispensing of medications.¹⁹ A witness identifying business records does not have to have personal knowledge of the correctness of the records or have made the entry himself.

When company B works closely with company A and generates records used by company A, can an officer of A provide foundation proof to put B’s records into evidence? Yes, says the Georgia Court of Appeals. Before a writing or report made as a memorandum or record of an act, transaction, occurrence, or event is admissible as a business record, a foundation must be laid through the testimony of a witness who is familiar with the method of keeping records and who can testify thereto and to facts which show that the entry was made in the regular course of a business at the time of the event or within a reasonable time thereafter. Invoices sent by a television station to a company that arranged to place clients’ advertising on such stations were business records of company, and thus testimony of company’s president was appropriate to lay the foundation for admission of the invoices into evidence in company’s action against client to recover amounts allegedly owed for placing such advertising, even

¹⁵*Chase v. State*, 337 Ga. App. 578, 642 S.E.2d 205 (2007).
449, 787 S.E.2d 802 (2016).
¹⁶*Santana v. State*, 283 Ga. App. 643 S.E.2d 329 (2007).
696, 642 S.E.2d 390 (2007).
¹⁷*Tubbs v. State*, 283 Ga. App. 606, 651 S.E.2d 855 (2007).
¹⁸*Tindol v. State*, 284 Ga. App. 45,
¹⁹*Imm v. Chaney*, 287 Ga. App.

though invoices were prepared by the respective networks, rather than by company; invoices were prepared pursuant to stations' agreements with company, and invoices were kept by company in its own files as part of its records.²⁰ This approach is sometimes called the integrated records doctrine.

Under O.C.G.A. § 35-3-154.1 the written reports of the state crime laboratory may be received in lieu of live testimony unless the defendant objects in writing at least ten days prior to trial. "The report shall have the effect as if the person who performed the analysis or examination had personally testified." The crime lab employee must accompany the report with an affidavit stating the employee's qualifications and experience. Georgia's inclusion of the objection provision may have been extremely wise. Some state statutes in other jurisdictions simply provide that the head of the lab can authenticate a technician's report, presumably despite any defense objection. As observed in § 25:14 *infra*, the United States Supreme Court has rejected this latter approach; the confrontation rights of the accused are violated by this procedure.

Unlike prior Georgia law, under Georgia's 2013 business records statute, opinions contained in the records are generally admissible.²¹ Opinions in reports created with an eye towards litigation, criminally and civilly, remain barred.²²

The former Georgia ban on opinions in business records was emphasized in 2006. A trial court properly admitted a business record if the evidence showed that the record was made in the ordinary course of business, *was not opinion testimony*, and was properly identified by the person who made it or was conversant with the necessity for its preparation and custody.²³ In the 2013 Georgia Evidence Code, this point of law was changed, and business records may consist of reports, data compilations, and records containing opinions and diagnoses.²⁴

What about accident reports created by an employer, when sought to be admitted by a third party against an employee? Accident reports were admissible under the business records exception to the hearsay rule in an automobile accident case. A motorist's supervisor personally made reports in the regular course of business shortly after a collision occurred based on what the motorist had told him, and both the motorist and the

²⁰Walter R. Thomas Associates, Inc., 855 F. Supp. 2d 510, 88 Fed. R. Inc. v. Media Dynamite, Inc., 284 Ga. Evid. Serv. 174 (D. Md. 2012). App. 413, 643 S.E.2d 883 (2007).

²¹See *Gipson v. U.S.*, 631 F.3d 448 (7th Cir. 2011). ²³*Greene v. Bryant*, 277 Ga. App. 201, 626 S.E.2d 185 (2006).

²²See *Doali-Miller v. SuperValu*, ²⁴O.C.G.A. § 24-8-803(6).

supervisor testified at trial and were available for cross-examination.²⁵

Medical examiner's report, stating that business owner said decedent was not an employee of a landscaping business, was inadmissible hearsay in a wrongful death action brought by the administrator of decedent's estate against the landscaping business and the business owner.²⁶

§ 25:13 Requirements for admission of business records

Because O.C.G.A. § 24-8-803(6) adheres to the language of Fed. R. Evid 803(6), Georgia courts "give consideration and great weight to constructions placed on the Federal Rules by the federal courts."¹ According to the Eleventh Circuit, "[a] document is admissible as a business record under Rule 803(6) if (1) it was made at or near the time of an event by someone with knowledge, (2) it was kept in the regular course of business, (3) it was the organization's regular practice to make such a record, (4) a qualified witness is able to testify to these facts, and (5) the opponent of the document does not show a lack of trustworthiness."²

As noted earlier in this text, under O.C.G.A. § 24-9-902(11) a regularly kept record may be authenticated by a written declaration of its custodian certifying the record was made at or near the time of the matters referenced therein, was kept in the regular course of business, and was routinely recorded. In a civil proceeding, O.C.G.A. § 24-9-902(12) provides a similar method for shorthanding the trial proof of records of foreign companies by means of a written declaration of the custodian or other qualified person.

Where this procedure is not followed, a witness at trial from the company that produced the record may be required to lay a proper foundation. This foundation should include the identification of the writing or record by a witness who is familiar with and can testify to the method of keeping the records and the facts that show the entry was made in the regular course of business and that it was the regular course of the business to make such a memorandum at the time of the event or within a reasonable time thereafter.³ Also, computer printouts are clearly admissible

²⁵Lee v. Thomason, 277 Ga. App. 573, 627 S.E.2d 168 (2006).

²⁶Glover v. Ware, 276 Ga. App. 759, 624 S.E.2d 285 (2005).

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¹Samuels v. State, 335 Ga. App. 819, 783 S.E.2d 344 (2016).

²Carrizosa v. Chiquita Brands International, Inc., 47 F.4th 1278, 119 Fed. R. Evid. Serv. 621 (11th Cir. 2022).

³See WGNX, Inc. v. Gorham, 185 Ga. App. 489, 364 S.E.2d 621 (1988); Growth Properties of Florida, Ltd., IV v. Wallace, 168 Ga. App. 893, 310

in Georgia if the other requirements of this exception are met.⁴

The circumstances surrounding the making of the record and any inaccuracies in the record may go to the weight of the evidence and not its admissibility.⁵

Even though this statute is to be construed liberally, several types of documents will not be admissible under this exception. If a report is an “in house” report prepared in anticipation of litigation, it clearly does not fall under this exception.⁶ Police accident reports have been held to be outside the business records rule.⁷ And a doctor’s testimony regarding a victim’s blood-alcohol level was not admissible under the business records exception.⁸ If the record contains conclusions, opinions, estimates, impressions and recommendations of a third party not before the court, the record generally has not been admissible under this exception.⁹ An exhibit that summarized defendant’s employer’s payroll records was not admissible as a business record to show fraud in obtaining public assistance because it was not made in regular course of business.¹⁰ Finally, documents prepared by a business for use by a government agency in the agency’s investigation and litigation are not done in the regular course of business and therefore not admissible.¹¹

A number of cases underline these points. In one, documentary evidence that was properly established as a business record was

S.E.2d 715 (1983) (admission denied due to improper foundation); *Baxter v. State*, 254 Ga. 538, 331 S.E.2d 561 (1985) (murder-Henry County); *Hill Aircraft & Leasing Corp. v. Cintas Corp.*, 169 Ga. App. 747, 315 S.E.2d 263 (1984) (admitted in-house memorandum).

⁴See *WGNX, Inc. v. Gorham*, 185 Ga. App. 489, 364 S.E.2d 621 (1988); *Wickes Lumber v. Energy Efficient Homes, Inc.*, 157 Ga. App. 303, 277 S.E.2d 298 (1981).

⁵*Whitehead v. Joiner*, 234 Ga. 457, 216 S.E.2d 317 (1975) (complaint to set aside deed-Dooly County); *Murphy v. State*, 182 Ga. App. 791, 357 S.E.2d 147 (1987).

⁶*Reach Out, Inc. v. Capital Associates, Inc.*, 176 Ga. App. 585, 336 S.E.2d 847 (1985).

⁷*Calhoun v. Chappell*, 117 Ga. App. 865, 162 S.E.2d 300 (1968) (re-

ferred to in *Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001)) (police report narrative of which officer had no personal knowledge is inadmissible under business records exception).

⁸*Miller v. State*, 260 Ga. 191, 391 S.E.2d 642 (1990) (overruled on other grounds by, *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896, 71 A.L.R.5th 787 (1998)).

⁹*Hurt v. State*, 239 Ga. 665, 238 S.E.2d 542 (1977) (murder-Putnam County); *Wallis v. Odom*, 130 Ga. App. 437, 203 S.E.2d 613 (1973) (action for damages-Macon County); *Pendley Quality Trailer Supply, Inc. v. B & F Plastics, Inc.*, 260 Ga. App. 125, 578 S.E.2d 915 (2003).

¹⁰*Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980).

¹¹*Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980) (fraud-Chattooga County).

admissible without a showing of who made each entry or when.¹²

A blood test administered by a hospital for the purpose of assisting in defendant's medical treatment was admissible as a business record in his trial for vehicular homicide, even though it did not meet the requirements of O.C.G.A. § 40-6-392, since the test was not for the purpose of establishing a violation of O.C.G.A. § 40-6-391.¹³

§ 25:14 Official records; generally

A certified copy of an official written record is often admissible as an exception to the hearsay rule. Definitions of "public records" as well as "public office" and "public official" appear in O.C.G.A. § 24-8-801(e), (f), and (g). The reasons behind this rule are that it would be inconvenient to require the official to come to court and testify to the matter and that there is a circumstantial probability of trustworthiness due to the fact the official had a legal duty to record the information.¹ A negative of a proposition can be established under the Georgia statutes.² An official's written statement that states that the individual is the official custodian of such a record and has made a diligent search and found no such record is admissible to prove that no such document exists.³ It also should be noted that although an official record may be generally admissible, not all the information contained in the record may be properly introduced into evidence.⁴ In the 2013 Georgia Evidence Code, the certificate or attestation of a public officer gives sufficient validity or authenticity to a copy of a record or document which is kept in the public officer's office.

An autopsy report from a coroner who died before trial was admissible under the business records exception to the hearsay rule.⁵

Admission of defendant's entire driving record when only a portion of it is admissible is reversible error.⁶

Does the *Crawford* doctrine (*Crawford*, see § 25:32, *infra*) bar

¹²McCall v. Parker, 177 Ga. App. 774, 341 S.E.2d 303 (1986).

¹³Jackson v. State, 196 Ga. App. 724, 397 S.E.2d 13 (1990).

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¹O.C.G.A. § 24-8-803(8). See Gaines v. Relf, 53 U.S. 472, 12 How. 472, 13 L. Ed. 1071, 1851 WL 6622 (1851).

²See O.C.G.A. § 24-8-803(10). See, generally, Adkins v. Bank of New

York Mellon, 2017 WL 2215131 (D. Md. 2017).

³O.C.G.A. § 9-11-44(a). See O.C.G.A. § 24-8-803(9).

⁴See §§ 25:16 et seq.

⁵Turner v. State, 273 Ga. 340, 541 S.E.2d 641 (2001).

⁶Ragan v. State, 264 Ga. 190, 442 S.E.2d 750 (1994).

official records which are routinely maintained and promulgated and which are not made in anticipation of prosecution against any particular defendant? Apparently not. Records such as an inspection certificate prepared under O.C.G.A. § 40-6-392(f) are not “testimonial” hearsay under *Crawford*.⁷

Another issue relates to the head of a crime lab or a supervisor testifying to the results of tests run by a lab technician, usually by referencing the report of the technician. The United States Supreme Court considered whether, in the absence of live testimony by the technician, the use of his official report in the manner described is constitutional. In its decision, the Court cited O.C.G.A. § 35-3-154.1 (defendant must assert his right to confront analyst 10 days before trial). The Supreme Court referred to the Georgia statute as a “notice-and-demand” statute. “[N]otice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object.”⁸ Such statutes do not violate the Confrontation Clause. However, the Massachusetts procedure which allowed a crime lab report as a substitute for live testimony *over defense objection* violated the Confrontation Clause and *Crawford v. Washington*.⁹

Introduction of lab results without testimony from the lab researcher who conducted the tests can be an issue in civil or administrative proceedings. In *Neal v. Augusta-Richmond County Personnel Bd.*,¹⁰ a lab report from an independent testing lab was introduced against Neal through the testimony of the county’s medical review officer. It concluded a positive finding for marijuana, and Neal was fired from his firefighter position. The Court of Appeals held that Neal was denied the right to confront anyone involved in conducting the test. The court distinguished other cases in which the court had found the evidence admissible where a supervisor reviewed a chemist’s work for accuracy and then exercised his own judgment as to whether the sample contained marijuana. In *Neal*, however, the medical review officer was simply a conduit for hearsay. Citing *Melendez-Diaz*, the reviewing court found in favor of Neal.

The United States Supreme Court ruled in a similar fashion in

⁷*Rackoff v. State*, 275 Ga. App. 737, 621 S.E.2d 841 (2005). U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

⁸*Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). ¹⁰*Neal v. Augusta-Richmond County Personnel Bd.*, 304 Ga. App. 115, 695 S.E.2d 318 (2010).

⁹*Crawford v. Washington*, 541

a 2011 case. In *Bullcoming v. New Mexico*,¹¹ a blood alcohol report in a DWI case was admitted into evidence. The forensic analyst who ran the test for Bullcoming's blood alcohol concentration did not testify, but another technician from the lab who was familiar with the testing device used to analyze Bullcoming's sample and the New Mexico Scientific Laboratory Division procedures appeared to validate the report. The New Mexico Supreme Court approved introduction of the report, but the United States Supreme Court reversed. The Confrontation Clause does not permit introduction through an analyst who did not personally perform or observe the performance of the test. The dissenting justices worried that this rule would put undue pressure on already overwhelmed state crime labs.

In 2012 the United States Supreme Court softened the approach a bit in a 5-4 decision. The Court upheld a conviction of a Chicago rapist who was found guilty based on a DNA match completed by a crime lab in Maryland. An expert's explanation of a lab test was allowed to take the place of live testimony from the analyst who did the testing.¹² In Georgia, in *Disharoon v. State*,¹³ the court approved DNA when the level of participation by the trial witness "was significantly greater than that of the testifying witness in *Bullcoming*."

Further analysis of this issue appears in § 24:17, *supra*.

§ 25:15 Public records and open records law

Documents which are prepared and maintained or received in the course of operation of a state university or university athletic association are "public records," subject to the Open Records Act; documents which are not so prepared and maintained or received are not "public records," and thus not subject to the requirements of the Act.¹

O.C.G.A. § 24-8-803(8) parallels the corresponding federal rule, which "exempts from the general prohibition against hearsay certain records or statements of a public office."² Quoting scholarship, the Georgia Court of Appeals held that Rule 803(8) is "based on both the necessity for admitting such records and their inher-

¹¹*Bullcoming v. New Mexico*, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).

¹²*Williams v. Illinois*, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012).

¹³*Disharoon v. State*, 291 Ga. 45, 727 S.E.2d 465 (2012).

(1990). O.C.G.A. § 50-18-70(a).

²*U.S. v. Zaruskas*, 814 F.3d 509 (1st Cir. 2016). See also *Davis v. City of New York*, 959 F. Supp. 2d 427, 91 Fed. R. Evid. Serv. 698 (S.D. N.Y. 2013).

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¹*Dooley v. Davidson*, 260 Ga. 577, 397 S.E.2d 922, 64 Ed. Law Rep. 276

ent trustworthiness.”³

Accordingly, the Eleventh Circuit Court of Appeals determined that “routinely and mechanically kept [immigration] records,” for instance, qualify for admission under Rule 803(8).⁴

The Tenth Circuit has observed: “Foundation testimony is usually unnecessary for admissibility under Rule 803(8) . . . ‘[s]ince the assurances of accuracy are generally greater for public records than for regular business records.’”⁵

§ 25:16 Police reports

Police reports based on statements of witnesses are hearsay and not admissible in evidence, as the officer could not, even if he were present, testify to things to which he does not have personal knowledge.¹ However, evidence of a state trooper’s accident investigation report was held to be admissible in *Simmons v. Chicago and Northwestern Transp. Co.*² The report contained no statements of eyewitnesses. The expert testimony was based upon the physical evidence, as well as the laws of physics. The Court of Appeals, in footnote 2 to the opinion, cites with approval the proposition that “eyewitness observations do not satisfy this [trustworthiness] criteria and cannot be used by experts in accident reconstruction.”³ This does not mean that all police reports and traffic records are inadmissible as hearsay, however.⁴ The 2013 Georgia Evidence Code indicates that in civil actions, findings contained in police and other official investigation reports are admissible unless the sources of the information are untrustworthy.⁵

O.C.G.A. § 24-8-803(8) is patterned after its federal counter-

³*Serdula v. State*, 356 Ga.App. 94, 845 S.E.2d 362 (2020) (internal citation omitted).

⁴*United States v. Santos*, 947 F.3d 711, 111 Fed. R. Evid. Serv. 336 (11th Cir. 2020). See also *United States v. Noria*, 945 F.3d 847, 111 Fed. R. Evid. Serv. 164 (5th Cir. 2019).

⁵*U.S. v. Iverson*, 818 F.3d 1015, 99 Fed. R. Evid. Serv. 1325 (10th Cir. 2016) (internal quotations omitted).

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¹*Calhoun v. Chappell*, 117 Ga. App. 865, 162 S.E.2d 300 (1968) (overruled on other grounds by *Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001)).

²*Simmons v. Chicago and*

Northwestern Transp. Co., 993 F.2d 1326, 38 Fed. R. Evid. Serv. 853 (8th Cir. 1993) (FELA case; expert testimony and written report of state patrolman approved).

³Also see *Ryder Truck Rental, Inc. v. Gianotos*, 113 Ga. App. 81, 147 S.E.2d 448 (1966); *Stubbs v. Daughtry*, 115 Ga. App. 22, 153 S.E.2d 633 (1967) (referenced in, *Brown v. State*, 274 Ga. 31, 549 S.E.2d 107 (2001)) (police report narrative of which officer had no personal knowledge is inadmissible under business records exception).

⁴See O.C.G.A. § 40-5-2; *Wallace v. State*, 158 Ga. App. 338, 280 S.E.2d 385 (1981).

⁵O.C.G.A. § 24-8-803(8)(C).

part, Fed. R. Evid. 803(8). A federal civil decision observes that, for both Rules 803(6) and 803(8), the circumstantial guarantees of trustworthiness are sufficient for authentication purposes.⁶

Rule 803(8)'s restrictions on government use of a police report in criminal cases is to protect a criminal defendant's Confrontation Clause rights.⁷ When a criminal defendant seeks to introduce police reports, however, concerns regarding trustworthiness, prejudice, and the Confrontation Clause vanish.⁸

A 1999 Georgia enactment limited public access to police reports on auto accidents. Public disclosure is not required, and disclosure is limited except upon submission of a written statement of need by the requesting party. There is an exception for anyone whose identity is disclosed in the report.⁹

Law enforcement officer testimony about the results of a computer check of a registration tag or driver's license, with nothing more, was determined to be hearsay.¹⁰ On the other hand, police testimony about driving records may be admissible regarding driving records if that information is obtained from a "terminal lawfully connected to the state Crime Information Center," pursuant to Georgia Rule of Evidence 923.¹¹

§ 25:17 Hospital records

To the extent that hospital records reflect facts and events occurring during hospitalization, they are admissible under the business records exception.¹ In addition, diagnostic opinions embraced within written documents are admissible under this exception.²

In *Corbett v. State*,³ the court pointed out that hospital records are admissible as records made in the regular course of a business to the extent that they record an act, transaction, occurrence, or event in the regular course of business of a hospital. The court's review of the hospital records in this case revealed that they contained many recordings of acts, transactions, oc-

⁶*Burgess v. Baltimore Police Department*, 300 F. Supp. 3d 696 (D. Md. 2018). See also Carlson & Carlson, *Carlson on Evidence: Comparing Georgia Rules & Federal Rules* § 24-8-803(8) (6th Ed. 2017).

⁷*United States v. Lundstrom*, 2016 WL 589860 (D. Neb. 2016).

⁸*Bailey v. Lafler*, 209 F. Supp. 3d 955 (W.D. Mich. 2016).

⁹The act containing relevant provisions repealed O.C.G.A. § 35-1-9,

amended O.C.G.A. § 40-5-2 and 50-18-72, and enacted O.C.G.A. § 50-18-77.

¹⁰*Taylor v. State*, 337 Ga. App. 486, 788 S.E.2d 97 (2016).

¹¹*Williams v. State*, 336 Ga. App. 442, 784 S.E.2d 808 (2016).

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¹See §§ 25:12 et seq.

²O.C.G.A. § 24-8-803(6).

³*Corbett v. State*, 266 Ga. 561, 468 S.E.2d 757 (1996).

currences, and events that are normally recorded during the course of a hospital's business, and thus those portions of the records were clearly excepted from the rule prohibiting the admission of hearsay, and were properly admitted by the trial court. To the extent that *Corbett* cast doubt on whether the portions of a hospital record embracing opinions could be admitted, the 2013 statute changes the approach.⁴

§ 25:18 Doctor's reports and records

A doctor's written report is often treated as hearsay and as such is not admissible in evidence.¹ Of course, the doctor could use such a report under the past recollection recorded rule (see § 25:10, *supra*) or the present recollection refreshed rule.²

For workers' compensation hearings a liberal standard is used for admissibility of the reports in these proceedings.³ Also, the doctor's report may be admissible as a business record.⁴

When an expert on the stand forms an opinion based partly on her own treatment of the patient and partly on reports of other doctors who have treated the same patient, there is statutory support for allowing the testifying doctor to state her opinion, even though based on hearsay. However, the doctor is not allowed to read into the record the reports of others, nor are they receivable as exhibits. O.C.G.A. § 24-7-703. There is an exception for cross-examiners. While prohibited on direct, the opposing party can delve into a hearsay report which would be otherwise inadmissible against him.⁵

By adding a new code section the 1997 laws permitted medical reports in narrative form when signed by a doctor or other designated professional to be admitted in evidence. Such reports might include patient history, diagnosis, prognosis, and interpretation of tests as well as the basis therefor. A notice of this evidence must be provided 60 days prior to trial. Medical opinions are specifically allowed.⁶ The earlier Georgia statute was recast and now resides at Georgia Rule of Evidence 826: "[A]ny adverse

⁴O.C.G.A. § 24-8-803(6).

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¹Wooten v. Life Ins. Co. of Ga., 93 Ga. App. 665, 92 S.E.2d 567 (1956); Giles v. Taylor, 166 Ga. App. 563, 305 S.E.2d 154 (1983).

²Stoneridge Properties, Inc. v. Kuper, 178 Ga. App. 409, 343 S.E.2d 424 (1986); Hill v. State, 211 Ga. 683, 88 S.E.2d 145 (1955).

³See O.C.G.A. § 34-9-102; Spell v. Travelers Ins. Co., 147 Ga. App. 160,

248 S.E.2d 292 (1978); Foster v. Continental Cas. Co., 141 Ga. App. 415, 233 S.E.2d 492 (1977).

⁴See O.C.G.A. §§ 24-8-803(6); McCall v. Parker, 177 Ga. App. 774, 341 S.E.2d 303 (1986).

⁵Carlson, In Defense of a Constitutional Theory of Experts, 87 Northwestern L Rev 1182 (1993).

⁶See former O.C.G.A. § 24-3-18.

party shall have the right to cross-examine the person signing the report . . . The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.”⁷ This rule applies in civil cases. In 2023, Subsections (b) and (c) were added to O.C.G.A. § 24-8-826 so that rule would apply to “all juvenile dependency adjudications under Article 3 of Chapter 11 of Title 15 involving injury or disease” and “all termination of parental rights hearings under Article 4 of Chapter 11 of Title 15 involving injury or disease.”

See *Kohl v. Tirado*,⁸ holding that a medical record containing diagnostic opinions may be admitted if the person who entered the opinion qualifies as an expert and relates the facts upon which the entry is based. In addition, in trial of civil cases, a narrative medical report signed by a doctor and containing his or her diagnosis and interpretations is admissible “the same as if that person were present at trial and testifying as a witness.”

Purpose of statute allowing written medical reports in narrative form to be admissible in civil cases is to dispense with the necessity of producing the author of the medical report as a sworn witness at trial, by authorizing admission of the report itself.⁹

Bell was a personal injury action that was brought by a motorist, who sought to admit medical report into evidence under the statute allowing written medical reports in narrative form to be admissible in civil cases without the author appearing at trial. The statute did not violate the alleged tortfeasor’s right to cross-examine the report’s author; the statute expressly allowed the adverse party to cross-examine the author and to provide rebuttal testimony.

What about the authorization in the statute which allows the party to incorporate his expert’s background in the report? Is a failure to do so fatal to introduction of the report? No, says *Bell*. Failure to set forth in a medical report the expert qualifications of the report’s author did not affect admissibility of report, under the statute allowing such reports to be admitted without the author appearing at trial, in this personal injury action arising from automobile accident. The Georgia Supreme Court ruled the alleged tortfeasor had ample opportunity to determine whether report was in fact created by one who is considered a professional under the terms of the statute, and to contest the report’s admissibility on ground that the author lacked expert qualifications to offer any of the opinions expressed therein. Hearsay from

⁷O.C.G.A. § 24-8-826.

⁹*Bell v. Austin*, 278 Ga. 844, 607

⁸*Kohl v. Tirado*, 256 Ga. App. 681, 569 S.E.2d 576 (2002).

S.E.2d 569 (2005), citing former O.C.G.A. § 24-3-18(a).

deceased witnesses, see *Brite v. State*.¹⁰

The written report of testator's neurologist, proffered by caveator in will contest on the issue of testamentary capacity, was inadmissible under exception to rule against hearsay for medical reports in civil cases. The court held the report was not in the required narrative form; while some sections of the report used plain language understandable to a juror, the report relied heavily on unexplained medical terms and abbreviation. It included lab results with minimal interpretation, and failed to set forth an assessment of the patient in story form, such that it would require an expert analysis to clarify its implications.¹¹

§ 25:19 Weather reports

O.C.G.A. § 24-8-803(8) permits the admission of public reports.¹ Also, these reports would probably be admissible as well under the business records exception.² In federal practice, the public records doctrine contained in Federal Evidence Rule 803(8) accommodates the introduction of climate and precipitation records from a U.S. weather station.³

The courts have ruled that letters describing the weather conditions were inadmissible as hearsay.⁴ Also, the courts have not allowed a traffic ticket stating the weather conditions as proof of such conditions since the officer did not testify to the weather conditions.⁵

§ 25:20 Birth and death certificates

Any certificate or certified copy of any birth, stillbirth or death, when properly certified by the Department of Public Health or the local registrar or the county clerk, shall be prima facie evidence of the facts therein stated.¹ However, hearsay evidence

¹⁰*Brite v. State*, 278 Ga. 893, 608 S.E.2d 204 (2005).

¹¹*Prine v. Blanton*, 290 Ga. 307, 720 S.E.2d 600 (2012).

[Section 25:19]

¹*Serdula v. State*, 356 Ga.App. 94, 845 S.E.2d 362 (2020).

²See generally *St. Bernard Parish Government v. United States*, 121 Fed. Cl. 747 (2015).

³See generally *Brandy Ventures, LLC v. Mesa Underwriters Specialty Insurance Company*, 2019 WL 6521348 (E.D. Tex. 2019), report and recom-

mendation adopted, 2019 WL 6492522 (E.D. Tex. 2019); *Tommaseo v. U.S.*, 75 Fed. Cl. 799 (2007).

⁴See *Rodgers v. Cumberland Volkswagen, Inc.*, 167 Ga. App. 826, 307 S.E.2d 721 (1983); *Newport Timber Corp. v. Floyd*, 247 Ga. 535, 277 S.E.2d 646 (1981).

⁵*Spence v. State*, 96 Ga. App. 19, 99 S.E.2d 309 (1957).

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¹O.C.G.A. §§ 31-10-24, 24-8-803(9).

contained in these reports will not be admissible.²

O.C.G.A. § 24-8-803(8) allows certified public records into evidence. In addition, proof of birth and death are referenced at several points in the 2013 Georgia Code. See O.C.G.A. § 24-8-803(9). O.C.G.A. § 24-8-803(11) provides that statements of birth and death contained in regularly kept records of a religious organization come under an exception to the hearsay rule. O.C.G.A. § 24-8-803(19) provides another exception for reputation among family members concerning a person's birth or death. O.C.G.A. § 24-14-47 permits a written finding by a U.S. officer of presumed death to be received as evidence of death.

Courts have wrestled with the issue of the nature of entries contained in death certificates. It was proper for a trial court to strike that portion of a death certificate relating to a contributing cause of death before allowing the certificate to be introduced into evidence since a death certificate is *prima facie* evidence of only the immediate agency of death.³ However, a death certificate is not inadmissible on the ground that it expressed an opinion that death was caused by homicide, where it was undisputed that a homicide had occurred, and the word "homicide" was nothing more than an indication of the immediate agency of death.⁴

Permitting the victim's death certificate to be taken in the jury room was harmless error, where, although it contained hearsay material as to cause of death, the conclusions were supported by other evidence and were merely cumulative.⁵

A 2009 Act provides a deadline for the completion and filing of the medical certification as to the cause and circumstances of death and provides for penalties for failing to meet such deadline. The Act authorizes a coroner to complete and sign a medical certification as to the cause and circumstances of death under certain circumstances. The Act also provides for certain notification requirements when a death occurs in a different county than where the acts or events resulting in the death occurred.⁶

§ 25:21 Subjective and objective symptoms

By virtue of O.C.G.A. § 24-8-803(4), Georgia follows Federal

²See *Carswell v. State*, 171 Ga. App. 455, 320 S.E.2d 249 (1984) (disapproved on other grounds by, *Adcock v. State*, 260 Ga. 302, 392 S.E.2d 886 (1990)) (vehicular homicide); *Quaile v. State*, 172 Ga. App. 421, 323 S.E.2d 281 (1984) (death certificate in vehicular homicide); *King v. State*, 151 Ga. App. 762, 261 S.E.2d 485 (1979) (death certificate in voluntary manslaughter case).

³*Hodges v. Effingham County Hosp. Authority*, 182 Ga. App. 173, 355 S.E.2d 104 (1987).

⁴*Thompson v. State*, 258 Ga. 816, 375 S.E.2d 219 (1989).

⁵*Foster v. State*, 259 Ga. 206, 378 S.E.2d 681 (1989).

⁶The Act amends O.C.G.A. § 31-10-15, 45-16-22, and 45-16-24.

Rule 803(4).¹ Now, statements made for the purpose of medical diagnosis or treatment and describing medical history, past or present symptoms, pain or sensation, or the inception or general character of the cause or the external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admissible in evidence.² A person from whom medical diagnosis or treatment was sought can, of course, testify in open court that such statements were made by a patient.³

A party seeking to introduce a statement under Rule 803(4) could face an objection that testimony admitted pursuant to this hearsay exceptions constitutes “testimonial” evidence, barred by the Sixth Amendment’s Confrontation Clause pursuant to *Crawford v. Washington*.⁴ Opponents of Rule 803(4) proof may also claim that only statements indispensable to medical diagnosis or treatment qualify. In a criminal case, the Fifth Circuit Court of Appeals dispensed with both contentions:

First, whether the statements were testimonial is not part of the Rule 803(4) determination. Second, Rule 803(4) does not require that each statement be “necessary” for medical treatment; it requires that statements be “reasonably pertinent to diagnosis or treatment.”⁵

Importantly, “Rule 803(4) ‘abolished the common-law distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only: the latter usually refers to a doctor who is consulted only in order to testify as a witness.’”⁶ The Supreme Court of Colorado has accordingly observed: “Thus. . . hearsay statements made to a non-treating physician ‘who examines a party for the purpose of diagnosis only’ may be admissible under Rule 803(4) even though that physician was ‘consulted only in order to testify as a

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¹State v. Almanza, 304 Ga. 553, 820 S.E.2d 1 (2018).

²O.C.G.A. § 24-8-803(4). See also, Southern Ry. Co. v. Lawson, 256 Ga. 798, 353 S.E.2d 491 (1987) (medical malpractice); State v. Butler, 256 Ga. 448, 349 S.E.2d 684 (1986) (pediatrician’s report in child molestation case); Davis v. State, 168 Ga. App. 272, 308 S.E.2d 602 (1983).

³See United States v. Kootswatwa, 893 F.3d 1127, 106 Fed. R. Evid. Serv. 955 (9th Cir. 2018); Danai-pour v. McLarey, 386 F.3d 289, 65 Fed. R. Evid. Serv. 615 (1st Cir. 2004); U.S. v. Joe, 8 F.3d 1488, 39 Fed. R. Evid.

Serv. 920 (10th Cir. 1993); U.S. v. Cherry, 938 F.2d 748, 34 Fed. R. Evid. Serv. 132 (7th Cir. 1991); Cook v. Hoppin, 783 F.2d 684 (7th Cir. 1986). See also Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules § 24-8-803(4) (6th Ed. 2017).

⁴Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

⁵U.S. v. Santos, 589 F.3d 759 (5th Cir. 2009).

⁶U.S. v. Farley, 992 F.2d 1122, 36 Fed. R. Evid. Serv. 1304 (10th Cir. 1993).

witness.’”⁷

Statements of a child sex-abuse victim to a Sexual Assault Nurse Examiner (“SANE”), to whom the victim was referred by police, were not barred by the Confrontation Clause of the Sixth Amendment where “the primary purpose of the conversation between [SANE] and [victim] was to medically evaluate and treat the child.”⁸

§ 25:22 Statements made for purposes of medical diagnosis or treatment

O.C.G.A. § 24-8-803(4) sets out “statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admissible in evidence.”¹

A criminal defendant’s testimony that he had been diagnosed with post-traumatic stress disorder was properly excluded as not qualifying under Rule 803(4), with the Supreme Court of Georgia providing guidance on the hearsay exception’s application, differentiating between a statement *for* as opposed to *of* medical diagnosis:

[T]he rule applies to out-of-court statements that patients make to medical professionals to help the patients *get* a diagnosis or treatment. The rule refers to statements “describing medical history, . . . symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof.” OCGA § 24-8-803(4). Those are things a patient would tell a doctor—some of which are uniquely within the patient’s knowledge, like his “pain” and “sensations”—when he is seeking treatment for a complaint or ailment. Such statements are admissible despite being hearsay because the patient has an incentive to tell the truth under those circumstances. See *State v. Almanza*, 304 Ga. 553, 561-562 (3), 820 S.E.2d 1 (2018) (“[S]tatements made to a provider for the purpose of diagnosis or treatment may be admissible because the self-interested motivation of the declarant in wanting effective diagnosis or treatment . . . makes it more likely that the statements made for that purpose are true.”) (citing *White v. Illinois*, 502 U.S. 346, 356, 112 S. Ct. 736, 116 L. Ed. 2d 848, 33 Fed. R. Evid. Serv. 881 (1992)). And when we apply Rule 803(4), we ask whether the statement in question enjoys the “guarantee of trustworthiness” that comes from a patient’s desire to get the right treatment when

⁷Kelly v. Haralampopoulos by Cir. 2016).
Haralampopoulos, 2014 CO 46, 327 [Section 25:22]
P.3d 255 (Colo. 2014).

¹See *Pepe-Frazier v. State*, 331
⁸U.S. v. Barker, 820 F.3d 167 (5th Ga. App. 263, 770 S.E.2d 654 (2015).

he describes his symptoms to a medical professional. See *Smith v. State*, 309 Ga. 240, 245 (2) (b), 845 S.E.2d 598 (2020) (quoting *Almanza*, 304 Ga. at 559 (3)) (a statement may be admissible under Rule 803(4) if (1) the “declarant’s motive in making the statement is consistent with the purposes of treatment” and (2) the statement is of a type “reasonably *relied upon by a physician* in treatment or diagnosis” (emphasis added)). All of which is to say that the language of Rule 803(4), the justification behind it, and our case law applying it all confirm that it generally applies to statements made by patients to medical professionals, not to the resulting diagnoses.²

Courts have observed that by its own terms, Rule 803(4) does not exclude from the hearsay rule statements relating to fault which are not relevant to diagnosis or treatment, accordingly, “[t]he test, when examining whether statements contained in medical records relating to the cause of an injury are admissible hearsay, is whether such statements are of the type reasonably pertinent to a physician in providing treatment.”³ Accordingly, there is a generally recognized differentiation between statements made for the purpose of medical diagnosis (admissible) and statements assigning fault (inadmissible).⁴

Abuse cases, however, particularly those involving children, represent a significant exception to the restriction on statements of fault:

Sexual abuse involves more than physical injury; the physician must be attentive to treating the victim’s emotional and psychological injuries, the exact nature and extent of which often depend on the identity of the abuser. . . . Furthermore, depending upon the nature of the sexual abuse, the identity of the abuser may be pertinent to the diagnosis and treatment of sexually transmitted diseases.⁵

Courts have repeatedly held that the admission of testimony concerning the identity of an alleged abuser pursuant to Rule 803(4) does not offend the Sixth Amendment’s Confrontation Clause as delineated in *Crawford v. Washington*⁶ and its progeny.⁷

In addition to a perpetrator’s identity, contextual details of a

²*Smith v. State*, 318 Ga. 868, 901 S.E.2d 158 (2024) (emphasis in original).

³*Austin v. Walgreen Company*, 2017 WL 3130982 (N.D. Ind. 2017).

⁴*U.S. v. Graham*, 98 Fed. R. Evid. Serv. 1015 (S.D. N.Y. 2015).

⁵*U.S. v. JDT*, 762 F.3d 984, 95 Fed. R. Evid. Serv. 47 (9th Cir. 2014) (internal citations and quotations omitted).

⁶*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

⁷See, e.g., *U.S. v. Chaco*, 801 F. Supp. 2d 1200, 86 Fed. R. Evid. Serv. 60 (D.N.M. 2011); *Ward v. State*, 50 N.E.3d 752 (Ind. 2016); *State v. Koederitz*, 166 So. 3d 981 (La. 2015); *State v. Lukacs*, 188 Ohio App. 3d 597, 2010-Ohio-2364, 936 N.E.2d 506 (1st Dist. Hamilton County 2010).

sexual assault on a child provided to a nurse have been admitted pursuant to Rule 803(4).⁸ Some courts have also extended the admission of perpetrator identify evidence to domestic violence cases.⁹

The fact that a parent or other responsible party conveys symptoms for diagnosis or treatment does not disqualify a statement from admissibility under Rule 803(4).¹⁰

But, under prior Georgia law, a shooting victim's statements to the treating physician concerning the circumstances of the shooting did not fall within this statutory hearsay exception as the victim informed the doctor that the defendant threatened to shoot her if the victim "took another step" towards the defendant's automobile. The statement was not reasonably pertinent to diagnosis or treatment.¹¹

In a 2018 decision reversing the Court of Appeals, however, the Supreme Court of Georgia rejected this restriction from former Georgia law in favor of the broader, federal interpretation of Rule 803(4). Writing for a unanimous court, Justice Peterson explained that statements identifying the alleged perpetrator made during for purposes of medical diagnosis or treatment are admissible where two factors are present:

First, "the declarant's motive in making the statement must be consistent with the purpose of promoting treatment[.]" . . . Second, "the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." . . . These two prongs ensure that the hearsay statement has a sufficient guarantee of trustworthiness while excluding statements beyond the scope of the rule.¹²

The Georgia Supreme Court has remarked that the test articulated in *Almanza* constitutes "a case-specific, fact-intensive inquiry."¹³

This hearsay exception for medical purposes sometimes comes

⁸United States v. Underwood, 859 F.3d 386, 103 Fed. R. Evid. Serv. 912 (6th Cir. 2017).

⁹United States v. John, 683 Fed. Appx. 589, 102 Fed. R. Evid. Serv. 1200 (9th Cir. 2017). See also Saltzburg, Martin & Capra, Federal Rules of Evidence Manual § 803.02[5][b] ("A statement from the child-declarant to medical personnel concerning abuse is ordinarily held admissible under the rule even when the declarant describes sexual abuse and identifies the abuser. . . Courts have occasionally extended the principles established in

child abuse cases to other cases involving domestic abuse, allowing statements from an adult-declarant identifying the perpetrator to be admitted under Rule 803(4).").

¹⁰U.S. v. Yazzie, 59 F.3d 807, 42 Fed. R. Evid. Serv. 29 (9th Cir. 1995); Valmain v. State, 5 So. 3d 1079 (Miss. 2009).

¹¹Howard v. State, 261 Ga. 251, 403 S.E.2d 204 (1991).

¹²State v. Almanza, 304 Ga. 553, 820 S.E.2d 1 (2018).

¹³Smith v. State, 309 Ga. 240, 845

up in United States Supreme Court cases involving child molestation. Although the trial court never made a specific finding that the four-year-old victim of an alleged sexual assault was unavailable to testify, admission of her out-of-court statements under Illinois' hearsay exceptions for spontaneous declarations and medical-treatment statements did not violate the accused's confrontation rights, the U.S. Supreme Court held in *White v. Illinois*.¹⁴ The court noted that the State tried twice to call the child as a witness, but each time the child experienced emotional difficulty and left without testifying, and the defense made no attempt to call the child as a witness. The court explained that because these two exceptions are firmly rooted and such out-of-court statements have substantial probative value that cannot be duplicated simply by the declarant's later testifying in court, the confrontation clause does not require the prosecution to produce the declarant at trial or the trial court to make a specific finding that the declarant is unavailable.

Where the child's statements do not qualify as medical history or otherwise fit a traditional exception to the hearsay rule, admissibility may be denied, depending on the situation. Out-of-court statements by the victim of child molestation to a physician identifying his father as the perpetrator were not admissible under the child hearsay statute since the child was not found competent to testify at the time of the trial, nor were they admissible under the medical history exception to the hearsay rule, but their admission was deemed harmless where they were admitted without objection and were cumulative.¹⁵ This decision, however, was under former Georgia law, and will now likely be considered subject to the countervailing federal interpretations discussed in the earlier portions of this section.

The U.S. Supreme Court held that the admission under the residual hearsay exception of a two-and-one-half-year-old's out-of-court statements made to an examining pediatrician violated the confrontation clause, where the State failed to show that the statements possessed sufficient particularized guarantees of trustworthiness to overcome the presumption that they were inadmissible.¹⁶

Medical record prepared by physician in which there was recorded statement allegedly made by patient indicating that he was not in pain was admissible as exception to hearsay rule; rec-

S.E.2d 598 (2020).

¹⁴*White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848, 33 Fed. R. Evid. Serv. 881 (1992).

¹⁵*Dean v. State*, 198 Ga. App. 133,

401 S.E.2d 40 (1990).

¹⁶*Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638, 30 Fed. R. Evid. Serv. 24 (1990).

ord was made for purpose of diagnosis and treatment, record had been authenticated because it was certified by medical records custodian in physician's office, statement was being offered for impeachment, and statement was admission against interest.¹⁷

Statements by sex-crime victim to a nurse are admissible under the exception for statements made for medical diagnosis or treatment.¹⁸

§ 25:23 Pedigree

Matters of pedigree include descent, relationship, marriages, deaths, and births. By their very nature, they are often based upon hearsay, but are admissible under proper circumstances as an exception to the hearsay rule.¹

In the main foundational case in this area, *Hines v. Donaldson*,² the court stated that birth and family relationship can be proven by general repute in the family and in the declarations of a deceased family member. The court stated that this is an exception because of its general reliability. Under former law, if the declarant was not proved to be deceased, then this exception did not apply.³ Also, earlier law provided that statements of pedigree by one who is a witness in the case will not fall under this exception.⁴ Yet, proof may be established by family reports.⁵ Modernly, the 2013 Code provision contained in O.C.G.A. § 24-8-803(19) sweeps away some of the older restrictions on this hearsay exception.⁶

The relationship of the declarant to the family must be established by independent evidence other than the declarant's statement itself.⁷ Also, an otherwise competent witness who heard an admissible out-of-court pedigree declaration is qualified to testify to it if he can remember the substance of the statement or if he knows the facts and can testify directly to relationship,

¹⁷*Tyson v. Old Dominion Freight Line, Inc.*, 270 Ga. App. 897, 608 S.E.2d 266 (2004).

¹⁸*United States v. Kootswatwa*, 893 F.3d 1127, 106 Fed. R. Evid. Serv. 955 (9th Cir. 2018). See also *State v. Nunes*, 2020 UT App 71, 2020 WL 2072043 (Utah Ct. App. 2020).

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¹O.C.G.A. § 24-8-803(19).

²*Hines v. Donaldson*, 193 Ga. 783, 20 S.E.2d 134 (1942).

³See *Garner v. Wood*, 188 Ga. 463, 4 S.E.2d 137 (1939).

⁴*Crawley v. Selby*, 208 Ga. 530, 67 S.E.2d 775 (1951).

⁵*Ferguson v. Atlanta Newspapers*, 91 Ga. App. 115, 85 S.E.2d 72 (1954).

⁶See also *U.S. v. Santos*, 589 F.3d 759 (5th Cir. 2009).

⁷*Greene v. Almand*, 111 Ga. 735, 36 S.E. 957 (1900); *Wilson v. State*, 173 Ga. 275, 160 S.E. 319 (1931). Also see *Estill v. Estill*, 149 Ga. 384, 100 S.E. 365 (1919).

birth, marriage, or death.⁸

Also, the statements as to pedigree must be made before the controversy arises.⁹ This exception allows testimony by a person as to his own age, as this knowledge would have had to come from reliance on family reputation.¹⁰

For the companion federal rules see Federal Evidence Rules 803(19) and 804(b)(4).

§ 25:24 Mortality and annuity tables

Standard and recognized tables of such matters as mortality and annuities may be admitted as an exception to the hearsay rule.¹ Such tables are not exclusive, but are to be considered by the jury in connection with other evidence relating to the probable life expectancy of such person.²

For an illustrative life expectancy table, see Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 3:51.

§ 25:25 Church records and family bibles

When properly authenticated, see § 23:26, *supra*, a family bible is admissible on such matters as birth, death, and marriage. O.C.G.a. § 24-8-803(19). It also may be possible for a family bible to be admissible under the ancient document rule.¹ Church records may be admissible under O.C.G.A. 24-8-803(11), and also under the business records exception, see § 25:12, *supra*.

§ 25:26 Ancient documents

An ancient document purporting to be a part of the transaction to which it relates shall be admissible in evidence.¹ A copy of the document, however, is not admissible.² There is also a presumption in favor of the validity of ancient deeds and other old instruments when they come from proper custody and possession.³

⁸See *Sellers v. Page*, 127 Ga. 633, 56 S.E. 1011 (1907); *Davis v. State*, 150 Ga. 19, 102 S.E. 445 (1920); *Simeonides v. Zervis*, 127 Ga. App. 506, 194 S.E.2d 324 (1972).

⁹*Mobley v. Pierce*, 144 Ga. 327, 87 S.E. 24 (1915).

¹⁰*Central R.R. v. Coggin*, 73 Ga. 689, 1884 WL 2451 (1884) (other evidence of age, birth certificates, § 25:20, *supra*).

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¹O.C.G.A. §§ 24-14-44, 24-14-45.

²O.C.G.A. § 24-14-45.

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¹See § 25:26, *infra*.

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¹O.C.G.A. § 24-8-803(16).

²*Jones v. Morgan*, 13 Ga. 515, 1853 WL 1633 (1853); *Bryan v. Walton*, 14 Ga. 185, 1853 WL 1662 (1853).

³O.C.G.A. § 24-14-26.

The ancient document rule has been applied to several types of documents, including deeds,⁴ bonds of title,⁵ marriage contracts,⁶ and a will.⁷

For the federal rule see Fed. R. Evid. 803(16) (ancient document is 20 years old).⁸ The 20 year rule has been adopted in Georgia.⁹

For disputes over boundaries and landmarks, see *Gibson v. Rustin*¹⁰ and O.C.G.A. § 24-8-803(20).

§ 25:27 Res gestae

This doctrine has been severely criticized by many legal writers, including Wigmore, McCormick and Cleary, as many of the statements admissible under the res gestae rule would be admissible under some other more specific doctrine. In fact, the Federal Rules of Evidence no longer list res gestae as an exception to the hearsay rule. Nor do the 2013 Georgia evidence statutes.¹ Res gestae concepts live in various aspects of Georgia's 2013 Evidence Code, including hearsay exceptions for present sense impressions, excited utterances and the-existing mental, emotional or physical condition.²

In *Thomas v. State*,³ a shooting victim made statements that were deemed to be nontestimonial. Only testimonial statements come within the meaning of the Confrontation Clause; it is the testimonial character of the statement that separates it from other hearsay and makes it subject to the Confrontation requirement. Statements by a victim to neighbors, paramedics, and deputy as to the identity of the shooter and his vehicle were admissible at a malice murder trial under the prior res-gestae exception to the hearsay rule. Given victim's grave injuries and intermittent loss of consciousness, it was unlikely that she had

⁴McDay v. Metropolitan Life Ins. Co., 51 Ga. App. 791, 181 S.E. 871 (1935).

⁵Beverly v. Burke, 9 Ga. 440, 1851 WL 1450 (1851).

⁶Adams v. Dickson, 23 Ga. 406, 1857 WL 2064 (1857).

⁷Jordan v. Cameron, 12 Ga. 267, 1852 WL 1417 (1852). Also see § 23:28, supra.

⁸See Langbord v. U.S. Dept. of the Treasury, 783 F.3d 441, 91 Fed. R. Serv. 3d 717 (3d Cir. 2015).

⁹O.C.G.A. § 24-8-803(16).

¹⁰Gibson v. Rustin, 297 Ga. App. 169, 676 S.E.2d 799 (2009).

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¹See Hites v. State, 296 Ga. 528, 769 S.E.2d 364 (2015) ("OCGA § 24-8-803 of the new Evidence Code does not use the term 'res gestae.'").

²Williams v. Melton, 733 F.2d 1492, 15 Fed. R. Evid. Serv. 1600 (11th Cir. 1984) ("The four current generally prevalent exceptions that were part of the res gestae label are declarations of present bodily condition, declarations of present mental state or emotion, excited utterances and present sense impressions.").

³Thomas v. State, 284 Ga. 540, 668 S.E.2d 711 (2008).

an ability to deliberate about her identifications or to be influenced by others, and the victim had personal knowledge of the facts that she related. Whether the former res-gestae exception to the hearsay rules should apply depended on factors including (1) the timing of the statement, (2) whether the declarant was able to deliberate about the statement, and (3) whether the declarant was influenced by others prior to making the statement. Additionally, there must be some evidence to show that the declarant had personal knowledge regarding the facts delivered in the statements and was not simply repeating the words of others. The requirements were satisfied here. They were also satisfied in *Kimbrough v. State*.⁴

§ 25:28 Spontaneous declarations

Certain declarations of a spontaneous nature are admissible as an exception to the hearsay bar. This rule was described by Justice Bleckley in *Travelers' Ins. Co. v. Sheppard*¹ when he stated:

There must be no fair opportunity for the will of the speaker to mould or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned. Moreover, his speech, besides being in the present time of the transaction, must be in the presence of it in respect to space. He must be on or near the scene of action or of some material part of the action. His declaration must be the utterance of human nature, of the genus homo, rather than the individual. Only an oath can guarantee individual veracity; but spontaneous impulse may be a sufficient sanction for the speech of man, as such—man distinguished from this or that particular man. True, the verbal deliverance in each instance is that of an individual person; but if the state of his mind be such that his individuality is for the time suppressed and silenced, so that he utters the voice of humanity rather than himself, what he says is regarded by the law as in some degree trustworthy.

Two factors are necessary to bring a statement within this exception to the hearsay rule: (1) absence of time to fabricate; and (2) the statement must relate to the circumstances of the occurrence.² In so holding, several admitted statements in Geor-

⁴*Kimbrough v. State*, 281 Ga. 885, 644 S.E.2d 125 (2007) (detective testimony recounting attack as related by victim).

²*Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S.E. 69 (1915).

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¹*Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S.E. 18 (1890).

gia cases partake of the flavor of Federal Evidence Rule 803(2).³ Georgia placed this approach in its statutes when it adopted the 2013 Georgia Evidence Code.⁴

Because O.C.G.A. § 24-8-803(2) is patterned after Fed. R. Evid. 803(2), Georgia courts therefore look to federal precedent when considering the Georgia rule.⁵ Examining prior Georgia case law on the issue does help provide context and reference when considering future application of the new Georgia rule.

The person making the declaration need not have been an actual participant in the event.⁶ However, she must have had an opportunity to observe personally the matter of which she spoke.⁷ A statement made by a child too young to testify as a witness may be admissible if it meets the tests of a spontaneous declaration.⁸ But, it has been held that the hearsay testimony by a mother of statements a child made while asleep should not be admitted because the testimony lacks “sufficient indicia of reliability.”⁹

The statement need not coincide exactly in time and place to the event. The question is whether there was a lack of time sufficient to allow an opportunity for reflection and invention.¹⁰ The declaration must be a natural and spontaneous utterance that is so closely connected with the transaction in question as to be in effect a part of it, without opportunity for premeditation or design.¹¹ The circumstances of each case will determine whether a statement is so closely connected with the transaction so as to be admissible.¹²

Statements made 20 or 30 minutes after the event have been held to be both admissible and inadmissible.¹³

Statements made some 12 hours or more after an assault, giv-

³See, generally, *U.S. v. Robinson*, 430 Fed. Appx. 761 (11th Cir. 2011).

⁴O.C.G.A. § 24-8-803(2).

⁵See *Jenkins v. State*, 303 Ga. 314, 812 S.E.2d 238 (2018). See also *Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules § 24-8-803(2)* (6th Ed. 2017).

⁶*Atlanta Consol. St. Ry. Co. v. Bagwell*, 107 Ga. 157, 33 S.E. 191 (1899); *Hicks v. State*, 256 Ga. 715, 352 S.E.2d 762 (1987).

⁷*Henderson v. State*, 210 Ga. 680, 82 S.E.2d 638 (1954).

⁸*Grant v. State*, 124 Ga. 757, 53 S.E. 334 (1906).

⁹*Godfrey v. State*, 258 Ga. 28, 365 S.E.2d 93 (1988). For child statements, see further § 25:22, *supra*.

¹⁰*Aetna Life Ins. Co. v. Jones*, 80 Ga. App. 472, 56 S.E.2d 305 (1949).

¹¹*Mitchum v. State*, 11 Ga. 615, 1852 WL 1365 (1852). Compare *Vargas v. State*, 184 Ga. App. 650, 362 S.E.2d 461 (1987).

¹²*Turner v. State*, 212 Ga. 199, 91 S.E.2d 501 (1956); *A. K. Adams & Co. v. Homeyer*, 87 Ga. App. 301, 73 S.E.2d 581 (1952).

¹³See *Boston v. State*, 94 Ga. 590, 20 S.E. 98 (1894). See *contra Clark v. State*, 142 Ga. App. 851, 237 S.E.2d 459 (1977).

ing the victim more than ample time to reflect on the occurrence, were not admissible under this exception to hearsay rule, where the court held it was apparent that the victim's statements were made deliberately and were not spoken as part and parcel of the assault.¹⁴

Where a victim's statements were spontaneous and were made shortly after the occurrence, while the victim was in critical condition from her wounds and at time when she was primarily concerned with obtaining assistance, such statements are admissible in evidence, even though some of the statements were in reply to questions.¹⁵

A rape and aggravated assault defendant was properly precluded from cross-examining the victim concerning a statement he allegedly made to her immediately following the rape about her alleged sexual relationship with her father; the Rape Shield statute supersedes evidentiary exceptions.¹⁶

A narration by an eyewitness to another that is a recital of past events is no longer a spontaneous declaration and is hearsay and inadmissible.¹⁷

A special class of declarations that are included in this exception are complaints made by victims of rapes immediately thereafter. These admissions must be made voluntarily, and must have been a spontaneous outburst or expression of outraged feelings rather than a mere recital of past events.¹⁸ It also must be made at the earliest practical opportunity.¹⁹ Yet, this may be several hours later.²⁰ If the requirements are met, then the entire statement will be admissible; otherwise, the admissible part of the statement will be permitted, the fact of the complaint, but not the details.²¹

§ 25:29 Examples of admissible spontaneous declarations

Georgia's former *res gestae* exception was the forerunner of the modern spontaneous and excited utterance rules contained in

¹⁴*Peebles v. State*, 236 Ga. 93, 222 S.E.2d 376 (1976).

¹⁵*Littles v. State*, 236 Ga. 651, 224 S.E.2d 918 (1976).

¹⁶*Phillips v. State*, 196 Ga. App. 267, 396 S.E.2d 57 (1990).

¹⁷See *Williams v. State*, 144 Ga. App. 130, 240 S.E.2d 890 (1977); *Peebles v. State*, 236 Ga. 93, 222 S.E.2d 376 (1976); *Liberty Mut. Ins. Co. v. Meeks*, 81 Ga. App. 800, 60 S.E.2d 258 (1950).

¹⁸*Hooks v. State*, 215 Ga. 869, 114 S.E.2d 6 (1960).

¹⁹See *Jackson v. State*, 225 Ga. 39, 165 S.E.2d 711 (1969).

²⁰*Richardson v. State*, 172 Ga. App. 12, 322 S.E.2d 66 (1984) (held to be part of *res gestae*).

²¹See *Creswell v. State*, 61 Ga. App. 828, 7 S.E.2d 788 (1940). Also see, generally, *Lynch v. State*, 234 Ga. 446, 216 S.E.2d 307 (1975); *Newman v. State*, 237 Ga. 376, 228 S.E.2d 790 (1976).

O.C.G.A. § 24-8-803(2).¹ This statute is patterned after Fed. R. Evid. 803(2).²

In determining whether statements are made under the stress of the exciting event for purposes of Georgia Rule of Evidence 803(2), Georgia Courts consider the time lapse between the exciting evidence and whether the declarant made the statement spontaneously and in the absence of prompting. It is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance.³

The following have been held to be admissible under the doctrine of spontaneous declarations: statements of a clerk to a business owner who had just arrived immediately after robbery,⁴ statements made while declarant was critically wounded and seeking assistance, even though they were in response to questions,⁵ acts and circumstances forming part of one continuation of a main transaction,⁶ threats to kill deceased made by defendant shortly before homicide,⁷ statements of bystanders to homicide,⁸ statements made while washing blood and burning clothes worn during the commission of crimes,⁹ acts of sodomy four to five hours before murder,¹⁰ statement that “Please don’t go in there because a man just shot a man and he wants to shoot some more,”¹¹ statements made during the commission of murder and rape,¹² and outcry that occurred one hour after the rape, even though it was not made to the first person whom the victim saw.¹³

If a relevant contemporaneous statement is unexcited, it may

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¹Jenkins v. State, 303 Ga. 314, 812 S.E.2d 238 (2018). See also Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules § 24-8-803(2) (6th Ed. 2017).

²U.S. v. Green, 573 Fed. Appx. 820 (11th Cir. 2014) (“We have explained that the excited utterance exception does not require that the statement be made contemporaneously with the startling event. Rather, courts ruling on the exception should consider the totality of the circumstances to determine if the declarant was still under the stress or excitement of the startling event at the time she made the statement.”).

³Akintoye v. State, 340 Ga. App. 777, 798 S.E.2d 720 (2017).

⁴Haralson v. State, 234 Ga. 406, 216 S.E.2d 304 (1975) (overruled on

other grounds by, White v. State, 273 Ga. 787, 546 S.E.2d 514 (2001)).

⁵Little v. State, 236 Ga. 651, 224 S.E.2d 918 (1976).

⁶Mills v. State, 236 Ga. 365, 223 S.E.2d 725 (1976).

⁷Watts v. State, 239 Ga. 725, 238 S.E.2d 894 (1977).

⁸Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977).

⁹Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978).

¹⁰Stevens v. State, 242 Ga. 34, 247 S.E.2d 838 (1978).

¹¹Bridges v. State, 242 Ga. 251, 248 S.E.2d 647 (1978).

¹²Durham v. State, 243 Ga. 408, 254 S.E.2d 359 (1979).

¹³Tucker v. State, 243 Ga. 683, 256 S.E.2d 365 (1979).

nonetheless qualify as a present sense impression under O.C.G.A. § 24-8-803(1).¹⁴ The Supreme Court of Georgia has explained: “To be admitted under this exception, the statement must describe or explain an event or condition that is personally witnessed by the declarant and is essentially contemporaneous to the statement.”¹⁵ Successful introduction of hearsay statement under Fed. R. Evid. 803(1) has been determined to require the following: “(1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration and the event described must be contemporaneous.”¹⁶

§ 25:30 Excited utterances

Excited utterances are a form of spontaneous declarations and are exceptions to the hearsay rule. They are the most spontaneous of such statements: “The critical inquiry [for the excited utterance exception] is whether the declarant is still in a state of excitement resulting from that event when the declaration is made.”¹ In fact, there seems to be little reason to make separate categories for these two exceptions since any excited utterance is typically spontaneous. It seems clear that all three of the hearsay exceptions studied in this area of the text—*res gestae*, spontaneous declarations, and excited utterances—are closely related.²

In federal practice, Federal Evidence Rule 803(2) covers excited utterances.³ So does O.C.G.A. § 24-8-803(2) in Georgia practice.⁴

The most significant practical difference between a present sense impression and an excited utterance lies in the time lapse allowable between event and statement. The exception for present sense impressions requires substantial contemporaneity of event and statement, but recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under the exception for excited utterances, the standard of measurement is the duration of the state of excitement.⁵ Federal decisions have delineated the requirements for Fed. R. Evid. 803(2): “(1) a startling event; (2) the

¹⁴*State v. Zukevich*, 84 Haw. 203, 932 P.2d 340 (Ct. App. 1997).

¹⁵*Downer v. State*, 314 Ga. 617, 878 S.E.2d 537 (2022).

¹⁶*Prescott v. R & L Transfer, Inc.*, 111 F. Supp. 3d 650, 97 Fed. R. Evid. Serv. 1130 (W.D. Pa. 2015).

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¹*Blocker v. State*, 316 Ga. 568, 889 S.E.2d 824 (2023).

²*Hooks v. State*, 215 Ga. 869, 114 S.E.2d 6 (1960).

³*United States v. Bivens*, 2023 WL 2926271 (11th Cir. 2023).

⁴*Jenkins v. State*, 303 Ga. 314, 812 S.E.2d 238 (2018).

⁵*Rhodes v. Arc of Madison County, Inc.*, 920 F. Supp. 2d 1202, 294 Ed. Law Rep. 795, 90 Fed. R. Evid. Serv. 671 (N.D. Ala. 2013).

statement was made while the declarant was under the stress of the event's excitement; and (3) a nexus between the content of the statement and the event.”⁶

According to the Supreme Court of Georgia the trial “the court should consider the totality of the circumstances in determining whether the statement was made while the declarant was ‘still . . . under the stress or excitement that the startling event caused’” when determining whether a statement is admissible under O.C.G.A. § 24-8-803(2).⁷

Statement not deemed spontaneous or excited if delayed, see *Cartwright v. State*.⁸

Georgia is not uniformly receptive to declarations, even if excited, from unidentified declarants.⁹

Until the 2013 Code, declarations by unidentified declarants confused the courts. In *Boler v. State*,¹⁰ there was a crowd of partygoers celebrating high school graduation. Defendant fired a pistol into the crowd and wounded the victim, paralyzing her for life. Upon the arrival of an officer at the crime scene, he asked about the identity of the shooter. “[T]wo unidentified partygoers identified defendant as the gunman.” Under these circumstances, the trial court correctly received the officer’s testimony, testimony which quoted the two bystanders, under the *res gestae* exception.

One month later, the Georgia Supreme Court decided *Lindsey v. State*.¹¹ In this case Lindsey was convicted of a drive-by shooting which killed one woman and wounded another person. The shots came from a car occupied by Lindsey, and the homicide occurred when multiple gunshots were fired into the victim’s home. After the incident a crowd gathered around the victim’s residence and police officers arrived to investigate the crime. As in *Boler*, an unidentified member of the crowd yelled “that Lindsey was the shooter.” The trial judge received the bystander’s declaration in evidence. On the surface, the legal issue is astonishingly simi-

⁶United States v. DeLeon, 418 F. Supp. 3d 682 (D.N.M. 2019).

⁷Blackmon v. State, 306 Ga. 90, 829 S.E.2d 75 (2019).

⁸Cartwright v. State, 242 Ga. App. 825, 531 S.E.2d 399 (2000) (for statement to qualify as *res gestae*, it must be spontaneous; here, lengthy interval defeated statement). O.C.G.A. § 24-8-803(2).

⁹Lindsey v. State, 271 Ga. 657, 522 S.E.2d 459 (1999) (trial witness stated that member of the crowd yelled that Lindsey was the shooter, and this

was held not admissible as an excited utterance); Seed v. Smith & Woods Management Corp., 242 Ga. App. 395, 530 S.E.2d 29 (2000) (rule is that statement by an unidentified witness is hearsay and inadmissible, and only exception in civil cases is where speaker, although unidentified, was clearly an agent or employee of a defendant company).

¹⁰Boler v. State, 240 Ga. App. 90, 522 S.E.2d 676 (1999).

¹¹Lindsey v. State, 271 Ga. 657, 522 S.E.2d 459 (1999).

lar to *Boler*. Yet the Georgia Supreme Court delivered an opposite ruling, finding the admission into evidence of the crowd member's declaration to be reversible error. *Boler* was not cited in the Supreme Court opinion. Lindsey apparently was involved in a later killing. After Lindsey's release in the case described above, a witness who had testified against him in the original Lindsey trial was murdered. The prosecution's theory was that this shooting was a retaliatory one because the witness had earlier testified for the State, and against Lindsey. Lindsey was convicted of this man's homicide.¹²

Both of these cases appear almost back-to-back in the same volume of the Southeastern Reporter. There appeared to be a need to clarify the law on the evidentiary point, which boils down to this: When an excited utterance is offered by a party, must the sponsor of the hearsay identify by name the person who authored the declaration? Georgia decisions seemed to be in conflict, with the Supreme Court embracing one approach and the Court of Appeals another.

Excited utterances from unidentified bystanders, however, have been admitted federally.¹³

The *res gestae* exception, subsequent to the foregoing two cases, allowed testimony about an exchange between a police officer and an unidentified declarant.¹⁴ *Res gestae* was used in a 2011 case to justify an excited statement from an observer named Chico Ellis that "that dude shot that boy." Witnesses who heard the statement testified in *Kitchens v. State*.¹⁵

How do federal courts approach this problem?¹⁶ Federally an excited utterance can come from a named declarant or an anonymous one, as long as declarations from the latter sort of person fit the requirements of the rule.

¹²See *Lindsey v. State*, 295 Ga. 343, 760 S.E.2d 170 (2014).

¹³See *U.S. v. Boyd*, 620 F.2d 129, 5 Fed. R. Evid. Serv. 1336 (6th Cir. 1980).

¹⁴*Segel v. State*, 293 Ga. App. 506, 667 S.E.2d 670 (2008).

¹⁵*Kitchens v. State*, 289 Ga. 242, 710 S.E.2d 551 (2011).

¹⁶See *Miller v. Keating*, 754 F.2d 507, 509, 17 Fed. R. Evid. Serv. 723 (3d Cir. 1985) (unidentified declarant at scene of auto accident; excited utterance exception may authorize statement by anonymous declarant, and "statements by unidentified declarants are not ipso facto inadmissible"); *Cole*

v. Tansy, 926 F.2d 955, 957, 32 Fed. R. Evid. Serv. 405 (10th Cir. 1991) (criminal case; police officer testimony approved when officer testified that officer got information from excited witness to package store holdup, even though witness was unidentified). See also *New York, C. & St. L. R. Co. v. Kovatch*, 120 Ohio St. 532, 7 Ohio L. Abs. 288, 166 N.E. 682 (1929) (*unidentified* child yelled after accident "the engine runned over David").

Annotation, see Admissibility, as part of *res gestae*, of spontaneous utterances of unidentified bystander testified to by an interested party, 50 A.L.R.3d 716 § 7.

As noted in § 25:27, *supra*, the former statute for *res gestae* statements was rejected in the 2013 Code in favor of O.C.G.A. § 24-8-803(2). However, since much of Georgia's prior excited utterance jurisprudence was decided under old *res gestae* law, this text includes a few cases in this and related sections of the book using *res gestae* language.

Telephone calls made during a crime by a victim are frequently excited. Georgia has decided that the determination of whether the recording of a 911 phone call is testimonial for Confrontation Clause purposes should be made on a case-by-case basis.¹⁷ Where the primary purpose of a 911 phone call is to establish evidentiary facts, so that an objective person would recognize that the statement would be used in a future prosecution, then that phone call bears testimony against the defendant and implicates the concerns of the Confrontation Clause. However, where a 911 phone call is made to avert a crime in progress or to seek assistance in a situation involving immediate danger, then the statements made during the phone call are not testimonial for Confrontation Clause purposes. Statements made by a victim during a 911 phone call, in which the victim stated that defendant, who was her husband, had broken into her home, that another man was on the porch, that she needed police to immediately come to her home and help her, that defendant was violating his parole by being in the house, and that defendant was "wanted," were nontestimonial, and thus admission of these statements did not violate defendant's rights under Confrontation Clause. While the victim's statements that defendant had violated his parole and that he was "wanted" came close to providing testimonial evidence, because the crime was still ongoing in her immediate presence when she made such statements, her primary purpose remained the prevention of immediate harm to herself. The victim was unavailable at trial because she claimed the marital privilege. In these circumstances, trial courts must decide whether a 911 caller's primary purpose in making the call has shifted in such a manner as to render portions of the call testimonial in nature for Confrontation Clause purposes, and should selectively redact portions of the recording when that is the case.

Excited utterance exception, see *Roby v. State*.¹⁸

Crawford (see §§ 25:4, 25:6, *supra*, and 25:32, *infra*) has impacted excited utterance law. At the United States Supreme

¹⁷*Pitts v. State*, 280 Ga. 288, 627 S.E.2d 17 (2006).

¹⁸*Roby v. State*, 273 Ga. App. 308, 614 S.E.2d 916 (2005) (excited utter-

ance was not "testimonial," no *Crawford* violation); *Womack v. State*, 273 Ga. App. 300, 614 S.E.2d 909 (2005).

Court level, 2006 decisions discriminate between emergency 911 calls for aid which may as a byproduct yield evidence, versus narrative conversations. An alleged crime victim's emergency 911 call can be used at trial even if he or she does not testify and undergo cross-examination, held a unanimous Supreme Court decision. However, by an 8-1 vote, the justices also ruled that if an alleged victim recounts an incident to police at the scene after it occurs, the account cannot be used at trial unless the defendant is able to cross-examine the accuser. The pair of rulings in cases from Washington and Indiana addressed the Sixth Amendment right of confrontation, which bars the use of "testimonial" statements at trial unless the witness who was unavailable had been cross-examined earlier. In the cases, the justices defined "testimonial" by drawing a line between statements made in emergency situations (admissible) and statements gathered later by police "to establish or prove past events," which the court barred unless there was cross-examination. Both cases arose in domestic violence settings.¹⁹

Georgia seems to have anticipated this sort of result. In caselaw developed earlier in 2006, Georgia recognized a distinction between emergency situations when compared to more relaxed scenarios.²⁰

§ 25:31 Statements of intention and state of mind

Statements of intention and declarations reflecting a person's state of mind can be testified to, where relevant.¹ Qualifying statements under O.C.G.A. § 24-8-803(1) are admissible regardless of the declarant's availability.²

Can the person who overheard the declarations testify? What if a defendant authors a declaration which reveals his motive or lack of motive to commit a crime? In criminal cases the courts usually find incriminating admissions by defendants to be admissible; however, those statements tending to show innocence are sometimes deemed self-serving and therefore inadmissible.³

Statements that a person intends to do a future act are admis-

¹⁹See *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224, 70 Fed. R. Evid. Serv. 472, 30 A.L.R.6th 599 (2006).

²⁰See *Pitts*, *supra*.

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¹O.C.G.A. § 24-8-803(3). See also *U.S. v. Bradley*, 644 F.3d 1213 (11th Cir. 2011).

²*Legree v. State*, 344 Ga. App.

793, 812 S.E.2d 68 (2018). See also *Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules* § 24-8-803(1) (6th Ed. 2017).

³See *Beal v. State*, 255 Ga. 446, 339 S.E.2d 581 (1986); *Arp v. State*, 249 Ga. 403, 291 S.E.2d 495 (1982); *McCray v. State*, 134 Ga. 416, 68 S.E. 62 (1910) (declarations which show intent to commit an act are admis-

sible under federal and Georgia law.⁴

In federal practice, declarations of intent and expressions of state of mind appear in the same rule. In a will case, sometimes a witness is asked what the testator said about a survivor or prospective legatee. The testator's view of another person can be received over a hearsay objection under the state-of-mind exception.⁵

§ 25:32 Declarations against interest

Declarations made by a person against his own criminal or property interest or by a third party against that third party's interest when the fact is essential to the adjudication of the case of the party are all admissible.¹ In *Wiley v. Luke*,² hearsay statements made by a landowner's predecessor in title, which he had given title to the disputed property to the claimant, were admissible in an adverse possession action as statements against interest.

O.C.G.A. § 24-8-804(b)(3) is patterned after Fed. R. Evid. 804(b)(3) and now applies to the admission of declarations against interest in Georgia courts.³ This exception to the hearsay rule is easily confused with admissions, but the two are different.⁴ For declarations against interest, there is no requirement that the declarant be a party to the action.⁵ The speaker, however, must be unavailable for Rule 804(b)(3) to apply.⁶

For a declaration against interest to be admissible: (1) the declarant must be unavailable; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the statement must be

sible). Compare *Teasley v. State*, 202 Ga. 316, 43 S.E.2d 319 (1947) (declarations showing no criminal intent deemed to be self-serving and inadmissible).

⁴Federal Evidence Rule 803(3); O.C.G.A. § 24-8-803(3).

⁵*McDaniel v. McDaniel*, 288 Ga. 711, 707 S.E.2d 60 (2011) (holding will was the product of undue influence and fraud).

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¹See O.C.G.A. § 24-8-804(b)(3). See generally, *United States v. Hardy*, 389 Fed. Appx. 924 (11th Cir. 2010). See also *Hamrick v. Greenway*, 257 Ga. 287, 357 S.E.2d 580 (1987) (former Georgia law).

²*Wiley v. Luke*, 259 Ga. 861, 389 S.E.2d 223 (1990) (former Georgia law).

³See Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules § 24-8-804(b)(3) (6th Ed. 2017).

⁴See §§ 26:1 et seq. See generally *Clements v. State*, 317 Ga. 772, 896 S.E.2d 549 (2023) (statement qualifying as both a party admission and declaration against interest).

⁵*Fowler v. Latham*, 206 Ga. 245, 56 S.E.2d 272 (1949).

⁶*Miller v. Michaels Stores, Incorporated*, 98 F.4th 211 (5th Cir. 2024).

corroborated by circumstances clearly indicating its trustworthiness.⁷

To qualify under Rule 804(b)(3), “The statement ‘[need] not have been sufficient, standing alone, to convict [the declarant] of any crime,’ so long as it would have been ‘probative’ in a criminal case against him.”⁸ Context should always be examined when determining whether statements are self-inculpatory (admissible) or self-serving (inadmissible) for purposes of Rule 804(b)(3).⁹ Admitting participation in criminal street gangs and other criminal enterprises has qualified under Rule 804(b)(3).¹⁰

In a bribery prosecution, the Eleventh Circuit Court of Appeals determined that one coconspirator’s statements to a witness that another coconspirator was paying his rent qualified as declarations against interest and were admissible under Rule 804(b)(3) in a joint trial of co-defendants involved in the conspiracy.¹¹

Federal courts have recognized an interplay between evidence admissible under Rule 804(b)(3) and coconspirator hearsay admissions pursuant to Rule 801(d)(2)(E).¹²

With an effective date of December 1, 2024, Fed. R. Evid. 804(b)(3)(B) is amended to require district courts to examine the extent of corroboration prior to the introduction of declarations against interest in criminal cases.¹³

Under former Georgia law, where a declaration contains both self-serving and dis-serving elements, the declaration will be admitted if the dis-serving elements preponderate over the self-serving elements.¹⁴ If the interests are equally balanced, the declaration is inadmissible.¹⁵

Declarations against penal interests were originally ruled inadmissible in criminal cases.¹⁶ This was under prior Georgia law and before the adoption of Georgia Rule of Evidence 804(b)(3). However, the *Green* case went to the United States Supreme

⁷U.S. v. Ebron, 683 F.3d 105, 88 Fed. R. Evid. Serv. 722 (5th Cir. 2012). See also United States v. Underwood, 654 Fed. Appx. 403 (11th Cir. 2016).

⁸United States v. Dupree, 870 F.3d 62 (2d Cir. 2017) (quoting authority; parentheticals original).

⁹U.S. v. Moses, 148 F.3d 277, 50 Fed. R. Evid. Serv. 175 (3d Cir. 1998).

¹⁰See U.S. v. Desena, 260 F.3d 150, 158, 57 Fed. R. Evid. Serv. 883 (2d Cir. 2001).

¹¹U.S. v. US Infrastructure, Inc., 576 F.3d 1195 (11th Cir. 2009).

¹²See U.S. v. Desena, 260 F.3d 150, 158, 57 Fed. R. Evid. Serv. 883 (2d Cir. 2001).

¹³See Fed. R. Evid. 804, advisory committee notes to 2024 amendment.

¹⁴Massee-Felton Lumber Co. v. Sirmans, 122 Ga. 297, 50 S.E. 92 (1905).

¹⁵Hollis v. Sales, 103 Ga. 75, 29 S.E. 482 (1897); Freeman v. Brewster, 93 Ga. 648, 21 S.E. 165 (1894).

¹⁶See Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), judgment rev’d, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

Court. A rule was announced requiring admission of third-party confessions in proper circumstances.¹⁷ A similar rule was announced in *Chambers v. Mississippi*.¹⁸ The danger in excluding defense proof is also visible in a 1991 Georgia decision. A pretrial quashing of a subpoena—material consisting of stipulations and statements of persons previously tried for the murders that the defendant was charged with committing—was error where the material bore directly on the sole defense that someone other than the defendant committed the crime.¹⁹

While it would seem incumbent upon Georgia trial judges to implement *Chambers v. Mississippi*,²⁰ the ability of defense attorney's to introduce third-party confessions has been mixed. The decision in *Turner v. State*²¹ makes this clear. A letter was offered on behalf of Turner in which a person other than Turner admitted that he, not Turner, had fired the shot which killed a store clerk. "The attorney representing the letter's author testified that he had advised his client to assert his constitutional privilege against self-incrimination should he be called to testify about the letter." The letter was excluded as evidence. The Georgia Supreme Court remanded, using the necessity exception to Georgia's hearsay rule as opposed to the exception for declarations against interest. The *Chambers* case held that reliable and trustworthy statement by a declarant which is self-incriminatory of the declarant must be admitted under the Due Process Clause when it is critical to the defendant's defense, even though it shows that someone other than the defendant is responsible for the crime. The Georgia necessity exception was replaced in the 2013 evidence code, and is discussed in § 25:4, *supra*.

In *Lance v. State*,²² the Georgia Supreme Court stated rules relevant to presentation of exculpatory proof:

A criminal defendant has the right to present evidence tending to show that another person is the guilty party. See *Henderson v. State*, 255 Ga. 687, 341 S.E.2d 439 (1986). In order for such evidence to be admitted, it cannot raise the mere speculation that some other person committed the crime. Instead, "the proffered evi-

¹⁷*Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

¹⁸*Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (testimony rejected by trial court consisted of declarations against penal interest; declarations were well within the basic rationale of the exception for declarations against interest; trial court's exclusion of evidence was unconstitutional and conviction reversed).

¹⁹*Walker v. State*, 260 Ga. 737, 399 S.E.2d 199 (1991).

²⁰*Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (limited *State v. Jenkins*, 195 W. Va. 620, 466 S.E.2d 471 (1995)).

²¹*Turner v. State*, 267 Ga. 149, 476 S.E.2d 252 (1996).

²²*Lance v. State*, 275 Ga. 11, 560 S.E.2d 663 (2002).

dence must raise a reasonable inference of the defendant's innocence ²³

In Georgia, it has often been the case that the declarant's death preceded the effort to advance his declaration against interest.²⁴

It was the long-standing rule in this state that declarations to third persons against the declarant's penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, were not usually admissible in favor of the accused at his trial.²⁵

Another chapter in the history of declarations against interest is the 2011 decision in *Brown v. State*.²⁶ This case reviews a defendant's reliance on *Green v. Georgia* and *Chambers v. Mississippi*, cases cited earlier in this section. The Georgia Supreme Court reaffirms the rule that declarations against penal interest from unavailable declarants which exonerate a defendant are inadmissible.

A 2004 United States Supreme Court case bears upon declarations against interest in Georgia, particularly where the prosecutor seeks to use accomplice or other similar witness statements against a defendant. In *Crawford v. Washington*,²⁷ a conviction was overturned because a declaration against interest was used by the state and the declaration had not been cross-examined. The out-of-court declarant was the wife of Michael Crawford, who had tried to kill a man. After Michael's arrest, she was interrogated. In her statement to police she implicated herself and her husband in the attempted killing. At trial, she did not testify because of the marital privilege. Finding the witness unavailable, the Washington courts allowed her recorded hearsay statement into evidence, under Evidence Rule 804(b)(3) (statement against interest). Justice Scalia reversed. The reason: this rule 804(b)(3) declaration had not been cross-examined. This cross-examination requirement comes from the confrontation clause of the U.S. Constitution, which requires cross-examination of accusers. It applies to statements by witnesses which are made to police and which are testimonial—that is, statements a declarant “would reasonably expect to be used prosecutorially.” Accomplice confessions to police have long been closely scrutinized and

²³*Klinect v. State*, 269 Ga. 570, 501 S.E.2d 810 (1998). See also *Azizi v. State*, 270 Ga. 709, 512 S.E.2d 622 (1999).

²⁴See O.C.G.A. § 24-8-804(b)(3); *Holland v. State*, 185 Ga. App. 117, 363 S.E.2d 589 (1987); *Glaze v. Bailey*, 130 Ga. App. 189, 202 S.E.2d 708 (1973); *Chrysler Motors Corp. v. Davis*, 226

Ga. 221, 173 S.E.2d 691 (1970).

²⁵*Hood v. State*, 273 Ga. App. 430, 615 S.E.2d 244 (2005).

²⁶*Brown v. State*, 288 Ga. 902, 708 S.E.2d 294 (2011).

²⁷*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

looked upon harshly by the United States Supreme Court. The Rule 804(b)(3) declaration in *Crawford* is one of these. Perhaps it is no surprise that the Court requires cross-examination of such declarations, as opposed to a trial court simply finding the statement to be “reliable,” and admitting it.

It should be noted that *Crawford* barred the statement in question was because it was “testimonial” in nature, that is, provided in a setting where it was evident that the statement would be used for official purposes at a later point-in-time.²⁸ Police interrogations to investigating law enforcement officers and grand jury testimony constitute examples of testimonial statements.²⁹

In Georgia, the case of *Demons v. State*³⁰ ruled that a victim’s hearsay statements were not remotely similar to statements which flow from a police investigation. Distinguishing *Crawford*, the excited utterances by the victim were admissible as well as other statements which were introduced under the necessity exception.

Declaration against interest can be admissible after arrest and the object of a conspiracy have been completed. In *United States v. Johnson*,³¹ one indictor’s post-arrest, jail-yard talk to a fellow inmate who was not involved in the accused offense was admissible against a co-defendant on Fed. R. Evid. 804(b)(3) grounds.

Are *Crawford* violations subject to a harmless error analysis? Yes, says *Debro v. State*,³² holding that even if the trial judge may have wrongly admitted evidence, “the error was harmless given the overwhelming evidence of [defendant’s] guilt.”

§ 25:33 Forfeiture by wrongdoing

Do the *Crawford* rules apply when a defendant attacks, intimidates or kills an out-of-court declarant? No, say the revised rules of evidence for Georgia, effective January 1, 2013. A hearsay statement from such a witness will be admitted under O.C.G.A. § 24-8-804(b)(5). The revised Georgia rule adopts the federal pattern.¹

Under federal rules of evidence, if a defendant murders a witness who will testify against the accused, any relevant statements made by the witness in the weeks or months prior to the

²⁸See *U.S. v. Naranjo*, 634 F.3d 1198 (11th Cir. 2011).

²⁹See *U.S. v. Polidore*, 690 F.3d 705 (5th Cir. 2012).

³⁰*Demons v. State*, 277 Ga. 724, 595 S.E.2d 76 (2004).

³¹*U.S. v. Johnson*, 581 F.3d 320 (6th Cir. 2009).

³²*Debro v. State*, 282 Ga. 880, 655 S.E.2d 804 (2008).

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¹See Fed. R. Evid. 804(b)(6).

killing of the witness are admissible.² The defendant forfeits his right to object on hearsay or other grounds, because of his wrongdoing. Under *Giles v. California*,³ in order to invoke this exception to the hearsay rule the prosecutors must establish the victim was killed or run off by the defendant with an intent to silence the witness.

To introduce a statement under the doctrine of forfeiture by wrongdoing, the proponent must demonstrate: (1) that the defendant engaged or acquiesced in wrongdoing; (2) that the wrongdoing was intended to procure the declarant's unavailability; and (3) that the wrongdoing did procure the unavailability.⁴

In *Hickman v. State*,⁵ a murder victim's diary entries identified the defendant as having attempted to rape her. O.C.G.A. § 24-8-804(b)(5) authorized the admission of those diary entries after the trial court found that by a preponderance of the evidence that the defendant had killed her, making the victim unavailable as a witness.

On the other hand, in *Agee v. State*,⁶ the Supreme Court of Georgia reversed a murder conviction where a testimonial statement was introduced under Rule 804(b)(5), but the prosecution failed to demonstrate that the witness's unavailability was "actually procured" by the defendant.

In a few states, prosecutors are barred from using this form of hearsay, even if the absence of the declarant is attributable to the conduct of the accused. Old Georgia law, prior to the 2013 revision, seemed in accord with this latter view.⁷ Prior to the 2013 enactment, Georgia law had no statute on the doctrine of forfeiture by wrongdoing, and case law did not consistently enforce such a forfeiture.

²Fed. R. Evid. 804(b)(6).

³*Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (*Crawford* violated by use of the statement of a deceased witness, unless the witness was killed specifically to silence him; the defendant's intent must be to silence the absented witness, in order for the state to invoke the doctrine of forfeiture by wrongdoing.).

⁴*Hendrix v. State*, 303 Ga. 525, 813 S.E.2d 339 (2018). See also U.S. v.

Scott, 284 F.3d 758, 58 Fed. R. Evid. Serv. 783, 193 A.L.R. Fed. 813 (7th Cir. 2002).

⁵*Hickman v. State*, 299 Ga. 267, 787 S.E.2d 700 (2016).

⁶*Agee v. State*, 310 Ga. 64, 849 S.E.2d 482 (2020).

⁷*Lindsey v. State*, 282 Ga. 447, 651 S.E.2d 66 (2007). See also Carlson & Carlson, *Carlson on Evidence: Comparing Georgia Rules & Federal Rules* § 24-8-804(b)(5) (6th Ed. 2017).

Chapter 26

Admissions

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§ 26:1 Admissions by party opponent

An admission is a statement offered against a party which is that same party's own statement, made in either an individual or representative capacity.¹ It has been wisely remarked that there is no broader avenue to admissibility under the hearsay rule than through the admissions doctrine.² An admission by a party is admissible as substantive evidence when offered by the opponent, as an exemption from the hearsay rule.³ Admissions can be oral or in writing, as well as nonverbal conduct.⁴ The prior

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¹Jones v. State, 339 Ga. App. 95, 791 S.E.2d 625 (2016).

²See generally Jordan v. Binns, 712 F.3d 1123, 91 Fed. R. Evid. Serv. 16 (7th Cir. 2013); U.S. v. Pinalto, 771 F.2d 457, 19 Fed. R. Evid. Serv. 864 (10th Cir. 1985); In re Southeastern Milk Antitrust Litigation, 2012-1 Trade Cas. (CCH) ¶ 77947, 2011 WL 2749579 (E.D. Tenn. 2011).

³O.C.G.A. § 24-8-801(d)(2). See also Clements v. State, 317 Ga. 772, 896 S.E.2d 549 (2023); Chapman v. Milford Towing & Service, Inc., 499 Fed. Appx. 437 (6th Cir. 2012).

⁴See generally, United States v. Biancofiori, 94 F.4th 651 (7th Cir. 2024), for additional opinion, see, 2024 WL 844168 (7th Cir. 2024); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 505 F. Supp. 1190, 6 Fed. R. Evid. Serv. 1329 (E.D. Pa. 1980), aff'd

admissions of a party are admissible as substantive evidence, not just to impeach that party.⁵ Admissions by a party opponent are not to be confused with the declaration against interest doctrine; the rules are entirely different.⁶ Admissions are generally made by parties only; they need not be “against interest” when made, only when offered; and the declarant need not be unavailable, as by his death.⁷

O.C.G.A. § 24-8-801(d)(2) in Georgia’s new Evidence Code applies to admissions and adopts the federal pattern.⁸ Under Rule 801(d)(2)(A), a statement offered against a party which is the party’s own statement is an admission and exempt from hearsay proscriptions.⁹ Moreover, an admission of a party opponent is admissible regardless of whether declarant possessed personal knowledge of the matter asserted.¹⁰ Proponents of admissions under Rule 801(d)(2)(A) have been required to demonstrate by a preponderance of evidence that the opposing party made the statement.¹¹ Cases hold that alleged victims in criminal cases do not qualify as party opponents.¹²

Party admissions do not require a demonstration of guarantees of trustworthiness in order to be admitted.¹³ They are, instead, based rather upon the identity of the speaker. Therefore, admissions do not require foundations to be admissible as substantive

in part, rev’d in part on other grounds, 723 F.2d 238, 14 Fed. R. Evid. Serv. 401 (3d Cir. 1983), decision rev’d on other grounds, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538, 4 Fed. R. Serv. 3d 368 (1986); *Myrick v. State*, 155 Ga. App. 496, 271 S.E.2d 637 (1980) (former Georgia law).

⁵*W. T. Harvey Lumber Co. v. J. M. Wells Lumber Co.*, 104 Ga. App. 498, 122 S.E.2d 143 (1961).

⁶*United Services of America, Inc. v. Empire Bank of Springfield*, 726 S.W.2d 439 (Mo. Ct. App. S.D. 1987).

⁷See generally *Jones v. State*, 339 Ga. App. 95, 791 S.E.2d 625 (2016). See also *U.S. v. Ndubuisi*, 460 Fed. Appx. 436 (5th Cir. 2012); *Abelmann v. SmartLease USA, LLC*, 437 F. Supp. 3d 736 (D.N.D. 2020); *US Equal Employment Opportunity Commission v. Rent-A-Center East Inc.*, 303 F. Supp. 3d 739 (C.D. Ill. 2018).

⁸See generally *Kemp v. State*, 303 Ga. 385, 810 S.E.2d 515 (2018). See also Carlson & Carlson, *Carlson on Evidence: Comparing Georgia Rules & Federal Rules §§ 24-8-801(d)(2)(A), 24-8-801(d)(2)(B), 24-8-801(d)(2)(C) to (E)* (6th Ed. 2017).

⁹*State v. Smith*, 302 Ga. 837, 809 S.E.2d 720 (2018). See also *Melvin, What are the Chances? A Response to Professor Milich’s View of 404(b)*, 9 J. Marshall L.J. 40 (2015-16).

¹⁰*Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 65 Fed. R. Serv. 3d 248 (10th Cir. 2006); *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 52 Fed. R. Evid. Serv. 607 (3d Cir. 1999).

¹¹*Lee v. University of New Mexico*, 500 F. Supp. 3d 1181, 390 Ed. Law Rep. 247 (D.N.M. 2020).

¹²*United States v. Davis*, 2024 WL 222271 (9th Cir. 2024).

¹³*In re Estate of Maggio*, 193 Vt. 1, 2012 VT 99, 71 A.3d 1130 (2012).

evidence.¹⁴

Admissions include guilty pleas,¹⁵ tax records,¹⁶ letters,¹⁷ e-mails,¹⁸ Facebook “chats,”¹⁹ and statements.²⁰ In a racketeering prosecution, the lyrics from the defendant’s rap songs and videos which were “not merely abstract beliefs of the defendants, because the government has tied the lyrics to the actions of the defendants” were admissible under Rule 801(d)(2)(A).²¹ A sex-trafficking defendant’s manuscript, wherein the defendant described the misogynistic behaviors of a “pimp” which paralleled accounts presented at trial, was properly admitted under the party opponent rule.²²

The party against whom the admission is tendered shall have the right to have the whole admission admitted into evidence, and can controvert it with other evidence or explain what was meant by the statement.²³

Admissions do not require the laying of a preliminary foundation such as is required in the case of impeachment of a witness by prior inconsistent statements.²⁴ Admissions and exculpatory statements in civil cases are distinguished from confessions, see § 27:1, *infra*, and in civil cases do not require preliminary proof of voluntariness, as in the case of confessions. Georgia law does provide that an admission is to be scanned with care.²⁵ Testimony and admissions adduced at a criminal trial pursuant to a grant of

¹⁴*Harris v. United States*, 834 A.2d 106 (D.C. Cir. 2003).

¹⁵*U.S. v. Frederick*, 702 F. Supp. 2d 32 (E.D. N.Y. 2009). See also *Kesler v. Veal*, 165 Ga. App. 475, 300 S.E.2d 217 (1983).

¹⁶*U.S. v. Molen*, 113 A.F.T.R.2d 2014-2166, 2014 WL 2118225 (E.D. Cal. 2014). See also *McLendon v. Dunlap Hardware Co.*, 3 Ga. App. 206, 59 S.E. 718 (1907).

¹⁷*U.S. v. Mentor*, 570 Fed. Appx. 894 (11th Cir. 2014). See also *Allen v. Brackett*, 165 Ga. App. 415, 301 S.E.2d 486 (1983); *Hogan v. Tiger Auto Parts, Inc.*, 163 Ga. App. 448, 294 S.E.2d 655 (1982).

¹⁸*U.S. v. Siddiqui*, 235 F.3d 1318, 55 Fed. R. Evid. Serv. 301 (11th Cir. 2000); *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 73 Fed. R. Evid. Serv. 446 (D. Md. 2007).

¹⁹*United States v. Browne*, 65 V.I. 425, 834 F.3d 403, 409, 101 Fed. R. Evid. Serv. 264 (3d Cir. 2016).

²⁰*Seaboard Air Line R. Co. v. Taylor*, 214 Ga. 212, 104 S.E.2d 106 (1958).

²¹*United States v. Graham*, 293 F. Supp. 3d 732 (E.D. Mich. 2017) (noting that the defendants “are seen participating by wearing gang colors, making gang signs, throwing money and singing along to the lyrics in the videos”).

²²*United States v. Biancofiore*, 94 F.4th 651 (7th Cir. 2024), for additional opinion, see, 2024 WL 844168 (7th Cir. 2024).

²³See generally O.C.G.A. §§ 24-1-106, 24-8-822. See also *People v. Short*, 2018 COA 47, 425 P.3d 1208 (Colo. App. 2018); *Faulkner v. Brown*, 92 Ga. App. 602, 89 S.E.2d 583 (1955) (former Georgia law).

²⁴See § 16:10, *supra*. See also *Bridges v. Clark*, 59 A.3d 978 (D.C. 2013).

²⁵See O.C.G.A. § 24-8-823.

immunity from prosecution are admissible.²⁶

Subsequent sections of this chapter identify and delineate any number of actions and inactions of a party which, like a criminal defendant's flight from the scene of an alleged crime, may be introduced into evidence as an "admission by conduct."²⁷

A similar notion has long been embedded in the concept of "implied admissions."²⁸ In addition to flight, "acts of an accused such as escape, attempted suicide, and attempts to bribe may also be evidence of implied admissions or consciousness of guilt."²⁹

This chapter also addresses what are referred to as "vicarious admissions" under O.C.G.A. §§ 24-8-801(d)(2)(C), 24-8-801(d)(2)(D), and 24-8-801(d)(2)(E), which are drafted in-line with their federal counterparts. A Second Circuit decision explains the fundamentals of these rules:

The term vicarious admissions is here used to refer to statements, offered against a party, which were neither made nor "adopted" by the party. Subsections (C), (D), and (E) of Fed.R.Evid. 801(d)(2) spell out the types of vicarious admissions that may be offered against a party as non-hearsay evidence.³⁰

For a form for pretrial adjudication of proof of an admission, see Appendix C, Form 20, *infra*.

The topic of admissions by doctors and other health care providers came up in Georgia's 2005 Tort Reform Act. In civil actions by patients against doctors, any expression of regret or apologies made by the doctor for bad surgical or medical work shall not be viewed as party admissions against the physician.³¹ Admissions law has been affected by O.C.G.A. § 24-4-416. After emergency surgery on a husband, the doctor's statement to the patient's wife, "This was my fault," immediately after that surgery was inadmissible at medical-negligence trial under statute precluding admission of statements or conduct expressing regret, apology, mistake or error in such cases.³²

Admissions containing references to insurance are competent evidence, particularly where the mention of insurance in the out-

²⁶Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217 (1983).

²⁷U.S. v. Ertz, 631 Fed. Appx. 671 (11th Cir. 2015).

²⁸See Elson v. State, 659 P.2d 1195 (Alaska 1983) ("The conduct or demeanor of an accused at the time of arrest, which indicates a consciousness of guilt, has been held to be admissible as an implied admission.").

²⁹State v. Myers, 309 N.C. 78, 305

S.E.2d 506 (1983). See also Aldridge v. State, 229 Ga. App. 544, 494 S.E.2d 368, 73 A.L.R.5th 817 (1997) (former Georgia law).

³⁰U.S. v. Lyles, 593 F.2d 182, 3 Fed. R. Evid. Serv. 928 (2d Cir. 1979).

³¹See section 6(c), 2005 Tort Reform Act, enacting former O.C.G.A. § 24-3-37.1.

³²Airasian v. Shaak, 289 Ga. App. 540, 657 S.E.2d 600 (2008).

of-court statement formed an inextricable part of the statement.³³

After two vehicles collided near the middle of a roadway, one driver sued the other driver. Upon trial, the plaintiff described the alleged negligence of the defendant driver. The plaintiff testified that a white van operated by the defendant had crossed over a double yellow line and continued in the wrong lane before striking her car. She described seeing defendant's vehicle come toward her car and how, despite her efforts to avoid the collision, the van "hit the whole front side of the car." The jury found for the plaintiff and awarded damages. The case raised the question of the impact in a negligence suit of defendant's earlier guilty plea in the same accident to the traffic offense of driving on the wrong side of the road. The Court of Appeals summarized in *Setliff v. Littleton*:³⁴

"Although a guilty plea is an admission against interest and prima facie evidence of the facts admitted, it is not conclusive that [defendant] was negligent and is only a circumstance to be considered with other evidence in a civil action for damages." *Sanders v. Moore*, 240 Ga. App. 730, 731 n. 1, 524 S.E.2d 780 (1999). So even though a certified copy of [defendant's] guilty plea to driving on the wrong side of the road was entered in evidence, [plaintiff] still had to establish not only [defendant's] negligence but also that his negligence caused her alleged damages.

Evidence that driver had been issued citation for failure to maintain lane and that driver's husband had paid citation on behalf of driver, who did not appear in court on the date stated on ticket, was properly admitted in personal injury action brought against driver by motorist, seeking to recover for injuries she allegedly sustained when car she was driving was struck head-on by driver's vehicle; although driver could not sign citation because she was being treated for her injuries, driver was aware at time of accident that she was being cited for failure to maintain lane, and court's charge properly allowed jury to decide whether bond forfeiture should be treated as an admission.³⁵

Where a driver simply pays a fine after pleading not guilty on a traffic citation, pleads nolo contendere, or is adjudicated guilty by a traffic court after pleading not guilty, such payment does not constitute an explicit voluntary admission of guilt which will establish negligence per se.³⁶

Federal Rule of Evidence 801(d)(2) was amended effective

³³*Young v. Carter*, 121 Ga. App. 191, 173 S.E.2d 259 (1970) (insurance statement admitted when an "integral part of an admission").

³⁴*Setliff v. Littleton*, 264 Ga. App. 711, 592 S.E.2d 180 (2003).

³⁵*Burnette v. Brown*, 272 Ga. App. 383, 612 S.E.2d 489 (2005).

³⁶*Hite v. Anderson*, 284 Ga. App. 156, 643 S.E.2d 550 (2007). In criminal cases, see *Teal v. State*, 282 Ga. 319, 647 S.E.2d 15 (2007) (murder

December 1, 2024, to ensure that hearsay statements made by the declarant or principal are admissible against the party when a party stands in the shoes of a declarant or the declarant's principal.³⁷ As of September 2024, Georgia had not adopted this amendment to Fed. R. Evid. 801.

§ 26:2 Admissions by agent, employee or partner of party

Admissions by an agent or attorney in fact, during the existence and in pursuance of his agency, shall be admissible against the principal.¹ The principal need not have knowledge of the admission for it to be admissible.² Similarly, the an agent or employee's personal knowledge of is not a requirement for admission under the wording of Rule 801(d)(2)(D).³

The declaration must have been made while the relationship of employer and employee or principal and agent existed.⁴ Also, the agent must not go beyond his scope of authority.⁵

Before an employee's statement will be admitted against a company, the proponent must make a showing that the employee was the company's agent. This can be established by documentary or circumstantial evidence or otherwise, but the fact of agency cannot be proven alone by out of court declarations of the alleged agent.⁶ Courts remark that "circumstantial evidence may establish the scope, as well as the existence, of the agency relationship" for purposes of Rule 801(d)(2)(D).⁷ Then there is the *res gestae* requirement noted above. Sometimes post-accident statements by employee drivers or store employee declarations are

defendant's statement to his physician that finger injury was caused by a bite from his girlfriend, the victim in the case, admitted as a statement against penal interest).

³⁷See Fed. R. Evid. 801, advisory committee notes to 2024 amendment.

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¹O.C.G.A. § 24-8-801(d)(2)(D). See, generally, *U.S. v. Docampo*, 573 F.3d 1091 (11th Cir. 2009). See also *United States v. Gordon*, 754 Fed. Appx. 171 (4th Cir. 2018); *Nelson v. Dollar Tree, Inc.*, 108 Fed. R. Evid. Serv. 1346 (E.D. Pa. 2019); *Coconut Key Homeowners Ass'n, Inc. v. Lexington Ins. Co.*, 649 F. Supp. 2d 1363 (S.D. Fla. 2009); *Bogue v. Better-Bilt Aluminum Co.*, 179 Ariz. 22, 34, 875 P.2d 1327 (Ct. App. Div. 1 1994).

²See generally *Brookover v. Mary Hitchcock Memorial Hosp.*, 893 F.2d 411, 29 Fed. R. Evid. Serv. 391 (1st Cir. 1990); *National Bank of Tifton v. Smith*, 142 Ga. 663, 83 S.E. 526 (1914).

³*Brookover v. Mary Hitchcock Memorial Hosp.*, 893 F.2d 411, 29 Fed. R. Evid. Serv. 391 (1st Cir. 1990). See also *Weinstein v. Siemens*, 756 F. Supp. 2d 839 (E.D. Mich. 2010).

⁴See generally *Truitt v. Salisbury Bank and Trust Company*, 2020 WL 4208452 (S.D. N.Y. 2020); *Southern Gas Co. v. McAllum*, 95 Ga. App. 525, 98 S.E.2d 397 (1957).

⁵*Smith v. Vaughn*, 37 Ga. App. 558, 140 S.E. 892 (1927).

⁶*McManus v. Turner*, 266 Ga. App. 5, 596 S.E.2d 201 (2004).

⁷*Yepez v. 44 Court Street LLC*, 994 F. Supp. 2d 333 (E.D. N.Y. 2014).

rejected as agency admissions because the speaker was not talking during the *res gestae* of the event.⁸

A driver of a vehicle made a declaration after an accident which the plaintiff sought to use against a company. The driver said that he was on his way to work when the accident occurred. The trial court refused to allow the plaintiff to testify to the driver's declaration. The Court of Appeals affirmed in *Fuller v. Charter South, Inc.*,⁹ explaining:

As a general rule, in going to and from work an employee acts only for his own purposes and not those of his employer. Consequently, "the employer is not to be held liable for an injury occasioned while the servant is en route to or from his work." (Citations and punctuation omitted) *Viau v. Fred Dean, Inc.*, 203 Ga. App. 801, 803, 418 S.E.2d 604 (1992). Agency may be established by the declarations of an agent if there is corroborating evidence to prove the agency. *de la Gonzalez v. Krystal Co.*, 173 Ga. App. 574, 576, 327 S.E.2d 546 (1985). Here, however, no other evidence existed to corroborate [agency].

An attorney is an agent for his client, so an attorney's statements made during course of employment are admissions: "Unequivocal admissions by an attorney, clearly acting within the scope of his authority, are binding on his client. . . . Such admissions may be received in evidence, even if they are hearsay, under the admissions exception to the hearsay rule. [Fed. R. Evid.] 801(d)(2)(D)."¹⁰ That said, federal appellate decisions observe that there is a "more exacting standard. . . for admission of statements by attorneys under Rule 801(d)(2)(D)."¹¹

Courts differentiate between evidentiary admissions and judicial admissions.¹² Considering the issue of vicarious admissions of counsel under Rule 801(d)(2)(D), an Arizona decision explains: "'evidentiary' admissions, in contrast to 'judicial' admissions, are '*not in any sense final or conclusive*'; rather, the opponent of the admission must be given the opportunity to explain or deny the statement so that the trier of fact may determine the

⁸See, e.g., *Brooks v. Kroger Co.*, 194 Ga. App. 215, 390 S.E.2d 280 (1990); O.C.G.A. § 10-6-64.

⁹*Fuller v. Charter South, Inc.*, 216 Ga. App. 211, 453 S.E.2d 754 (1995).

¹⁰*In re Joy Global, Inc.*, 346 B.R. 659 (D. Del. 2006). See also *U.S. v. Wilson*, 788 F.3d 1298, 97 Fed. R. Evid. Serv. 999 (11th Cir. 2015); *Lechoslaw v. Bank of America, N.A.*, 618 F.3d 49 (1st Cir. 2010); *Journal/Sentinel, Inc.*

v. School Bd. of School Dist. of Shorewood, 186 Wis. 2d 443, 521 N.W.2d 165, 94 Ed. Law Rep. 478 (Ct. App. 1994). See also *W. T. Harvey Lumber Co. v. J. M. Wells Lumber Co.*, 104 Ga. App. 498, 122 S.E.2d 143 (1961).

¹¹*U.S. v. Jung*, 473 F.3d 837, 72 Fed. R. Evid. Serv. 296 (7th Cir. 2007).

¹²See, e.g., *In re Applin*, 108 B.R. 253, 29 Fed. R. Evid. Serv. 779 (Bankr. E.D. Cal. 1989).

significance of the statement[.]”¹³

Also, clients are bound by their attorney’s statements made in open court.¹⁴ In the same way, an admission by an officer of a corporation made in execution of his duties is admissible against a corporate party.¹⁵ Also, the admissions of a partner in matters relating to the affairs of the partnership are admissible in evidence against a partnership party.¹⁶

Courts have generally resisted, however, classifying the assertions of government agents, like police officers, as subject to Rule 801(d)(2)(D).¹⁷ Conversely, decisions hold that statements of prosecutors can constitute admissions.¹⁸

Under former Georgia law admissions by agents or attorneys were not admissible in criminal cases in the sense in which they were admissible in civil cases.¹⁹ They were not treated as evidence against the accused unless shown to have been authorized by him.²⁰ Interpreting Georgia’s new Evidence Code, however, Presiding Judge Dillard of the Georgia Court of Appeals remarked that federal case law interpreting Rule 801(d)(2)(D) has authorized the introduction of “statements by an attorney to be admissible against a defendant in criminal cases in certain situations.”²¹

For additional information on the admissibility of counsel’s admissions in criminal cases, see § 26:5, *infra*.

O.C.G.A. § 24-8-801(d)(2)(C) exempts “authorized admissions” from hearsay proscriptions.²² Courts have observed that “Rule 801(d)(2)(D) sets forth a similar, but broader” exclusion from the

¹³Ryan v. San Francisco Peaks Trucking Co., Inc., 228 Ariz. 42, 262 P.3d 863 (Ct. App. Div. 1 2011) (emphasis in original).

¹⁴U.S. v. McKeon, 738 F.2d 26, 15 Fed. R. Evid. Serv. 1409 (2d Cir. 1984); Copeland v. City of Yuma, 160 Ariz. 307, 772 P.2d 1160 (Ct. App. Div. 1 1989). See also National Ass’n for the Advancement of Colored People v. Pye, 96 Ga. App. 685, 101 S.E.2d 609 (1957). Also see Everitt v. Harris, 67 Ga. App. 64, 19 S.E.2d 545 (1942) (letter from attorney held to be an admission).

¹⁵City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 50 Fed. R. Evid. Serv. 422 (11th Cir. 1998). See also Farrar v. Gulf Oil Corp., 208 Ga. 212, 66 S.E.2d 55 (1951).

¹⁶Resolution Trust Corp. v. KPMG Peat Marwick, 1992 WL 252784 (E.D. Pa. 1992). See also McCutchin v.

Bankston, 2 Ga. 244, 1847 WL 1265 (1847).

¹⁷U.S. v. Garza, 448 F.3d 294, 70 Fed. R. Evid. Serv. 54 (5th Cir. 2006).

¹⁸U.S. v. Ganadonegro, 854 F. Supp. 2d 1088, 87 Fed. R. Evid. Serv. 896 (D.N.M. 2012).

¹⁹See generally U.S. v. Valencia, 826 F.2d 169, 23 Fed. R. Evid. Serv. 1005 (2d Cir. 1987); United States v. Doyle, 2018 WL 1902506 (S.D. N.Y. 2018).

²⁰Johnson v. State, 231 Ga. App. 823, 499 S.E.2d 145 (1998).

²¹Parrish v. State, 362 Ga. App. 392, 868 S.E.2d 270 (2022).

²²U.S. v. McGowan, 552 Fed. Appx. 950 (11th Cir. 2014); Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 32 Fed. R. Evid. Serv. 25 (11th Cir. 1991); Huston v. U.G.N., Inc., 2020 WL 2794540 (S.D. Ohio 2020).

hearsay rule than does Rule 801(d)(2)(C).²³ A decision from the Southern District of New York explains that the difference is that Rule 801(d)(2)(C) requires “speaking authority,” while Rule 801(d)(2)(D) does not:

Under Fed. R. Evid. 801(d)(2)(C), statements by a person with “speaking authority” are authorized admissions, and under Fed. R. Evid. 801(d)(2)(D) the statement of an agent or employee concerning a matter within the scope of employment/agency made during that employment/agency is an admission of the employer/principal.²⁴

The Utah Supreme Court held that Rule 801(d)(2)(C) sanctioned defense introduction of a prosecutor’s statements in *State v. Worthen*.²⁵

Companion federal rule, see Federal Evidence Rule 801(d)(2). Both O.C.G.A. § 24-8-801(d)(2)(C) and O.C.G.A. § 24-8-801(d)(2)(D) are drawn comparatively to the corresponding federal provisions.

§ 26:3 Admissions by others: coconspirators

O.C.G.A. § 24-8-801(d)(2)(E) controls the issue of coconspirator hearsay under Georgia’s new Evidence Code.¹ Determining that federal authority should apply to the application of the Georgia rule, Georgia Supreme Court Justice Peterson observed that, “Although OCGA § 24-8-801(d)(2)(E) contains some language the federal rule does not, the additional language in the Georgia rule is drawn from federal case law.”² Federal precedent has long held that the personal knowledge requirement of Rule 602 does not apply to statements of a co-conspirator admissible as non-hearsay under Rule 801(d)(2)(E).³

Admissions by privies in blood, estate and in law are often

²³*U.S. v. Ballou*, 59 F. Supp. 3d 1038 (D.N.M. 2014).

²⁴*Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 262 F. Supp. 2d 251, 61 Fed. R. Evid. Serv. 329 (S.D. N.Y. 2003). See also *Richard M. Morris v. State of New York, Department of Correctional Services, State of New York, Governor’s Office of Employee Relations, New York State Council 82/AFSCME Joint Committee on Quality of Working Life, Council 82/AFSCME, Thomas A. Gibbs, Joseph Puma, Richard Bischert*, 1995 WL 155953 (N.D. N.Y. 1995).

²⁵*State v. Worthen*, 765 P.2d 839 (Utah 1988).

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¹*Downer v. State*, 314 Ga. 617, 878 S.E.2d 537 (2022).

²*Dublin v. State*, 302 Ga. 60, 805 S.E.2d 27 (2017) (“For evidence to be admissible under this rule, the government must prove the existence of a conspiracy by a preponderance of the evidence.”). See also *State v. Wilkins*, 302 Ga. 156, 805 S.E.2d 868 (2017).

³*U.S. v. Goins*, 11 F.3d 441, 38 Fed. R. Evid. Serv. 656 (4th Cir. 1993). See also *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 36 Fed. R. Evid. Serv. 319 (3d Cir. 1992) (“the co-conspirator admission of Rule 801(d)(2) does not require personal knowledge. As noted by the Advisory

admissible against the parties themselves. A statute formerly provided for introduction of admissions by privies.⁴ At common law, the vicarious admission doctrine extended to statements by privies or predecessors in interest.⁵ It can be contended that O.C.G.A. § 24-8-801(d)(2) continues this rule. The term “privity of estate” generally means in this respect a succession in rights.⁶ In accord with the general rule that privity between a person making an admission and a party to an action renders the admission admissible against such party; an admission made by a person since deceased, if relevant, is admissible against any person claiming under him.⁷

The admissibility of a co-conspirator admission under Rule 801(d)(2) does not require personal knowledge. Like other party admissions, its admissibility is premised upon our adversarial system rather than in reliance upon indicia of reliability or trustworthiness.⁸

Declarations by any conspirator during the pendency of the criminal project is admissible against all.⁹ A co-conspirator’s girlfriend was properly permitted to testify concerning statements made by the conspirator during the course of a conspiracy to commit murder.¹⁰ A trial judge may admit testimony of co-conspirators before the conspiracy has been proved, provided that the existence of the conspiracy is afterwards shown during the trial.¹¹ Admission of co-conspirator declarations, see *Waldrip v. State*.¹²

In racketeering cases, statements from co-conspirators that serve to reinforce the underlying purposes of the organization have been deemed in furtherance of the conspiracy.¹³ The same

Committee, Rule 801(d)(2) is designated as an admission against interest; its admissibility is premised upon our adversarial system rather than in reliance upon indicia of reliability or trustworthiness”).

⁴See former O.C.G.A. § 24-3-32.

⁵Carlson et. al., *Evidence: Teaching Materials for an Age of Science and Statutes*, ch. 19, § D1 n.6 (6th ed. 2007).

⁶*Pool v. Morris*, 29 Ga. 374, 1859 WL 2702 (1859).

⁷*Georgia R.R. & Banking Co. v. Fitzgerald*, 108 Ga. 507, 34 S.E. 316 (1899).

⁸*Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 36

Fed. R. Evid. Serv. 319 (3d Cir. 1992). See also *U.S. v. Ferguson*, 246 F.R.D. 107, 74 Fed. R. Evid. Serv. 1278 (D. Conn. 2007) (“the admissibility of statements in furtherance of a conspiracy is not dependent on personal knowledge”).

⁹O.C.G.A. § 24-8-801(d)(2)(E); *Shelton v. State*, 279 Ga. 161, 611 S.E.2d 11 (2005); *Womack v. State*, 273 Ga. App. 300, 614 S.E.2d 909 (2005).

¹⁰*Favors v. State*, 296 Ga. 842, 770 S.E.2d 855 (2015).

¹¹*Denison v. State*, 258 Ga. 690, 373 S.E.2d 503 (1988).

¹²*Waldrip v. State*, 267 Ga. 739, 482 S.E.2d 299 (1997).

¹³*United States v. Arline*, 660 Fed.

holds true for gang prosecutions.¹⁴ The Supreme Court of Georgia has observed that in prosecutions under Georgia’s anti-gang laws, located at O.C.G.A. §§ 16-15-1 et seq., where the other foundational elements are met, statements furthering “the gang’s criminal purposes” are admissible under Rule 801(d)(2)(E).¹⁵

A co-defendant’s rap song lyrics which described various illegal activities of the defendants’ gang, were properly admitted in a federal racketeering prosecution as “statements of a co-conspirator during and in furtherance of the conspiracy”:

The lyrics of the songs mentioned violence, specific types of guns, drug sales, the nicknames of two cooperating witnesses, and details that corresponded with details of the [murder victim] killing. The jury also heard testimony from cooperating witness [name] about how money from the drug distribution supported the label the songs were produced under, as well as testimony about how the lyrics related to the [gang] and how [co-defendant] was picked to be the main rapper.¹⁶

In *Avery v. State*,¹⁷ statements made by a conspirator during the course of a conspiracy are admissible against all conspirators after the fact of conspiracy is proved. The agreement that forms the basis of the conspiracy may be a tacit understanding between the conspirators.

As to the length of time a conspiracy lasts, the United States Supreme Court ruled that a conspiracy is not deemed to automatically terminate simply because the government has defeated the conspiracy’s object.¹⁸

A conspirator’s postarrest statement to police incriminating a coconspirator terminates the conspiracy, rendering the statement admissible only against the declarant.¹⁹

O.C.G.A. § 24-8-801(d)(2)(E) is patterned after Fed. R. Evid. 801(d)(2)(E). Federal courts require the following for admission of co-conspirator’s statement: (1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the statement was made during the course and in furtherance of the conspiracy.²⁰ Georgia decisions apply this test, expecting proof by a preponderance of the

Appx. 35 (2d Cir. 2016).

¹⁴Kemp v. State, 303 Ga. 385, 810 S.E.2d 515 (2018).

¹⁵Henderson v. State, 317 Ga. 66, 891 S.E.2d 884 (2023).

¹⁶United States v. Perry, 35 F.4th 293, 118 Fed. R. Evid. Serv. 720 (5th Cir. 2022).

¹⁷Avery v. State, 269 Ga. 584, 502 S.E.2d 230 (1998).

¹⁸U.S. v. Jimenez Recio, 537 U.S. 270, 123 S. Ct. 819, 154 L. Ed. 2d 744 (2003).

¹⁹O’Neill v. State, 285 Ga. 125, 674 S.E.2d 302 (2009).

²⁰U.S. v. Reeves, 742 F.3d 487 (11th Cir. 2014).

evidence prior to introduction.²¹

Georgia Rule of Evidence 801(d)(2)(E) explicitly provides that a statement made during and in furtherance of a conspiracy, including a statement made during the concealment phase of a conspiracy, is admissible in evidence.²² A retrospective statement, however, regarding matters that have already occurred, and that is not intended to foster involvement in the conspiracy, does not constitute a statement in furtherance of the conspiracy.²³

The Georgia Court of Appeals has observed that nothing in the text of Georgia Rule of Evidence 801(d)(2)(E) requires that the testifying witness also be a co-conspirator for the exception to apply.²⁴

Prior Georgia law allowed for admission of co-conspirator statements during the concealment phase of a conspiracy and language along these lines has been included in Georgia's 2013 statute.²⁵ Federally, if concealment was part-and-parcel to the conspiracy's purpose, statements made to effectuate obfuscation of the crime have been deemed admissible as co-conspirator statements.²⁶

§ 26:4 Admissions to avoid continuance

No continuance shall be allowed by reason of the absence of a witness when the opposite party is willing to admit and does not contest the truth of the facts expected to be proved.¹ Withdrawal of the admission because the witness comes into court after the opposite party has closed his evidence is not allowed.²

For a continuance request based upon missing witness, see *Parker v. State*.³ Continuance requests must show diligence.⁴

§ 26:5 Judicial admissions

Judicial admissions, also known as admissions in solemn

²¹Kirkland v. State, 318 Ga. 639, 898 S.E.2d 536 (2024).

²²Davis v. State, 302 Ga. 576, 805 S.E.2d 859 (2017).

²³State v. Wilkins, 302 Ga. 156, 805 S.E.2d 868 (2017).

²⁴Lawrence v. State, 342 Ga. App. 396, 802 S.E.2d 859 (2017).

²⁵See, e.g., Brooks v. State, 281 Ga. 14, 635 S.E.2d 723 (2006).

²⁶U.S. v. Trent, 306 Fed. Appx. 482, 78 Fed. R. Evid. Serv. 397 (11th Cir. 2009).

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¹O.C.G.A. §§ 9-10-161 and 17-8-32.

²Harris v. McArthur, 90 Ga. 216, 15 S.E. 758 (1892) (overruled on other grounds by, Geer v. Dancer, 148 Ga. 465, 97 S.E. 406 (1918)).

³Parker v. State, 282 Ga. 897, 655 S.E.2d 582 (2008).

⁴See Haygood v. Tilley, 295 Ga. App. 90, 670 S.E.2d 800 (2008) (party's failure to timely retain counsel provided no ground for continuance).

judicio, help define the issues in the case.¹ The general rule is that judicial admissions are admissible at a subsequent trial of the same suit or in another civil or criminal proceeding involving the same issue or in which the admissions are pertinent to the issue.

Decisions observe: “There is ample authority for the proposition that an attorney’s statements may bind the party whom the attorney represents.”² Courts, however, have differentiated between evidentiary and judicial admissions when made by a party’s attorney: “The distinction between judicial and evidentiary admissions is ‘significant’ and ‘should not be blurred by imprecise usage.’ . . . [T]his is because, although both types are admissible, each type’s ‘legal effect is markedly different.’ ”³ In determining that letter from a party’s attorney constituted an evidentiary as opposed to a judicial admission, a federal decision explains:

“Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel . . . ” *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995). Such formal concessions “must be deliberate, clear and unambiguous.” *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010) (internal quotation marks omitted). Essentially all other types of party statements are simply evidentiary admissions, and may thus be admissible evidence under Federal Rule of Evidence 801(d)(2). See *Murray v. United States*, 73 F.3d 1448, 1455 (7th Cir. 1996). The difference between these two types of admissions is crucial, because judicial admissions are conclusive, while evidentiary admissions can later be controverted or explained by the party. *Keller*, 58 F.3d at 1198 n.8.⁴

Judicial admissions have been defined as admissions made in open court or in papers filed with a court. An admission in a pleading is a solemn admission in judicio and as such is binding upon the party, estops the party from denying it or introducing controverting evidence and allows the opposing party to use the admission to establish facts without introducing other evidence.⁵ Where matter is contained in a pleading from which inferences may be drawn, which are beneficial to the opposing party, such inferences may be considered as evidence in the record in the op-

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¹O.C.G.A. § 24-8-801(d)(2)(C) to (D); O.C.G.A. § 24-8-821. See, generally, *In re Kattouah*, 452 B.R. 604 (E.D. Mich. 2011).

²*In re Joy Global, Inc.*, 346 B.R. 659 (D. Del. 2006).

³*Stewart v. Alunday*, 53 N.E.3d

562 (Ind. Ct. App. 2016).

⁴*First Financial Bank, N.A. v. Bauknecht*, 71 F. Supp. 3d 819, 89 Fed. R. Serv. 3d 1667 (C.D. Ill. 2014).

⁵See generally *Venable v. Block*, 138 Ga. App. 215, 225 S.E.2d 755 (1976); *Stallings v. Britt*, 204 Ga. 250, 49 S.E.2d 517 (1948).

posite party's favor and used as evidence before the jury.⁶ A party may make admissions in judicio in their pleadings, motions and briefs.⁷

As a general rule, when judicial admissions are made, “no further evidence is necessary to establish the facts contained therein[.]”⁸ As such, the distinction between judicial and evidentiary admission remains a critical one for litigants:

A judicial admission is binding upon the party making it; it may not be controverted at trial or on appeal. Included within this category are admissions in the pleadings in the proceeding, stipulations and admissions pursuant to request to admit. . . . *Ordinary evidentiary admissions, on the other hand, may be controverted or explained by the party. Within this category fall pleadings in another proceeding, superseded or withdrawn pleadings in the same proceeding, answers to interrogatories, as well as other statements admissible under [Federal Evidence] Rule 801(d)(2).*⁹

Therefore, in drafting pleadings, an attorney would be well advised to take advantage of the notice pleading procedure of the Civil Procedure Act and make as few admissions as necessary to avoid having them used against his client later.

However, an admission in judicio applies only to the admission of a fact and does not apply where the admission is merely the opinion or conclusion of the pleader as to law or fact.¹⁰

Georgia's new Evidence Code addresses judicial admission in several statutes. This includes O.C.G.A. § 24-8-821, a “carried forward” former Georgia evidence provision that does not appear in the Federal Rules of Evidence and pertains strictly to pleadings and does not address other admissions by counsel.

As alluded to by Judge McMillian of the Court of Appeals, however, O.C.G.A. § 24-8-801(d)(2) closely tracks Fed. R.Evid. 801(d)(2), which applies to the issue of judicial admissions federally, making federal precedent pertinent on this issue for Georgia courts.¹¹

Significantly, federal courts have long held that factual conces-

⁶McLendon Elec. Co. v. McDonough Const. Co., 145 Ga. App. 137, 243 S.E.2d 537 (1978), judgment rev'd on other grounds, 242 Ga. 510, 250 S.E.2d 424 (1978).

⁷Mitsubishi Motors Corp. v. Coleman, 290 Ga. App. 86, 658 S.E.2d 843 (2008).

⁸Americans United For Separation of Church and State v. Prison Fellowship Ministries, 395 F. Supp. 2d 805 (S.D. Iowa 2005).

⁹In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation, 735 F. Supp. 2d 277 (W.D. Pa. 2010), aff'd, 683 F.3d 462 (3d Cir. 2012) (quoting commentary; omission and emphasis in original).

¹⁰Clift & Goodrich v. Mincey Mfg. Co., 41 Ga. App. 38, 152 S.E. 136 (1930).

¹¹Hill v. Board of Regents of the University System of Georgia, 351 Ga. App. 455, 829 S.E.2d 193 (2019).

sions made by counsel during opening statement and final arguments constitute judicial admissions.¹² A 2019 decision from the Supreme Court of Georgia left the door open for future consideration of the federal approach under Georgia's new Evidence Code.¹³

The Georgia Court of Appeals held that the admissions of a driver did not bind his employer because the interests of employer and driver were adverse and because the employer could not object to the request for admissions directed at the driver and could not move to withdraw driver's admissions.¹⁴ A personal injury action was brought against driver and employer. The employer showed that its policy did not cover the driver unless his use of the vehicle was with employer's consent and alleged that, on the evening of the accident, the driver was using the truck for personal reasons. The driver did not respond to his request for admissions, thereby admitting them. Subsequently, the plaintiff filed an affidavit in which the driver testified that the employer had given him permission to operate the truck for his personal use. Inasmuch as the interests of the appellant and driver were adverse, the judicial admissions of the latter were not binding on the former under prior O.C.G.A. § 24-3-31(2). Nor were the driver's admissions binding under O.C.G.A. § 9-11-36(b) because the section's terms did not authorize one party to object to a request for admissions directed to another party or to move to withdraw another party's admission.

An admission in open court is an admission in *judicio*; a judicial admission is conclusive.¹⁵ Rule that admissions in *judicio* are binding on the party that makes them does not apply to opinions or legal conclusions.¹⁶ Admissions in *judicio* made by codefendants may be binding upon other defendants only when their interests are joint, and not when their interests are adverse.

Amending pleadings to avoid admission made in earlier pleading, see *Lopez v. El Palmar Taxi*.¹⁷ Admissions in *judicio* in a party's pleadings bind the party so that they cannot put up evidence over objection to contradict such admissions; however, if

¹²U.S. v. Bentson, 947 F.2d 1353, 1356 (9th Cir. 1991). See also Roman, "Your Honor, What I Meant to State Was . . .": A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law, 22 Pepp. L. Rev. 981 (1995).

¹³McKie v. State, 306 Ga. 111, 829 S.E.2d 376 (2019).

¹⁴Batchelor v. State Farm Mut. Auto. Ins. Co., 240 Ga. App. 366, 526 S.E.2d 68 (1999).

¹⁵Rhone v. Bolden, 270 Ga. App. 712, 608 S.E.2d 22 (2004).

¹⁶Walker v. Ace Auto Sales & Leasing, Inc., 294 Ga. App. 267, 668 S.E.2d 877 (2008).

¹⁷Lopez v. El Palmar Taxi, Inc., 297 Ga. App. 121, 676 S.E.2d 460 (2009).

the party amends its pleadings to withdraw the admissions, it may then introduce evidence contravening the admissions.¹⁸

The opinion rule (rule barring legal opinions) was applied to admissions included in court documents. Generally, a pleader is bound by the allegations of his own pleadings unless or until removed by amendment and is not permitted to introduce evidence in denial of such an admission in *judicio*.¹⁹ However, the rule that a pleader is bound by the allegations of his own pleadings, unless or until removed by amendment, and is not permitted to introduce contrary evidence, applies only to admissions of fact, not to opinions or conclusions or law. A transportation and logistical service company, and an insurer that issued the company a commercial general liability (CGL) policy, were not bound by a statement in their amended answer and motion for summary judgment admitting that a property owner was an additional insured under the CGL policy. The admission in *judicio* rule only applied to admissions of fact, not to opinions or conclusions of law, and whether owner was an additional insured under the policy was a question of law.

Before judgment is rendered, a party may withdraw an admission in *judicio*.²⁰

§ 26:6 Judicial admissions in pleadings

Pleadings in prior cases are also usable in a later and different suit as evidence of party admissions.¹ However, they are not considered conclusive and can be explained or rebutted with other evidence: “Prior inconsistent pleadings ‘are controvertible, not conclusive, admissions.’”² There is not a requirement that the parties in the present suit be the same as in the prior action for an admission to be admissible.³ Also, admissions contained in

¹⁸*SAKS Associates, LLC v. Southeast Culvert, Inc.*, 282 Ga. App. 359, 638 S.E.2d 799 (2006).

¹⁹*Ryder Integrated Logistics, Inc. v. BellSouth Telecommunications, Inc.*, 277 Ga. App. 679, 627 S.E.2d 358 (2006), judgment rev’d on other grounds, 281 Ga. 736, 642 S.E.2d 695 (2007).

²⁰O.C.G.A. § 9-11-15(a); *Investment Properties Co., Inc. v. Watson*, 278 Ga. App. 81, 628 S.E.2d 155 (2006).

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¹*Tucker v. Housing Authority of*

Birmingham Dist., 229 Fed. Appx. 820, 73 Fed. R. Evid. Serv. 128 (11th Cir. 2007).

²*Zitz v. Pereira*, 119 F. Supp. 2d 133 (E.D. N.Y. 1999), judgment aff’d, 225 F.3d 646 (2d Cir. 2000). See also *Scott v. Powell Paving Co. of North Carolina*, 43 Ga. App. 705, 159 S.E. 895 (1931); *Harris v. Haralson Farm Supply Co.*, 95 Ga. App. 573, 98 S.E.2d 394 (1957).

³*Bentley v. Ayers*, 102 Ga. App. 733, 117 S.E.2d 633 (1960).

stricken pleadings are admissible.⁴ The weight of this admission is for the jury to decide.⁵

A party may also admit its own prior stricken pleadings to show a change of position between mutually contradictory positions.⁶

§ 26:7 Admissibility of criminal judgment in subsequent civil suit

A judgment record based upon a guilty plea is admissible in a subsequent civil action as the admission of the defendant to establish the facts on which it was rendered, provided it is relevant to the issues of the subsequent action.¹ Such a guilty plea is not conclusive of the issue in the civil case, but is subject to explanations and contradictions and is weighed and considered by the jury with all the other evidence in the case.² A party's conviction in a criminal action does not collaterally estop that party from prosecuting a civil action involving the same subject matter.³

On the other hand, criminal convictions under Georgia's anti-gang prosecution statute, O.C.G.A. § 16-15-4, "shall estop the defendant in any subsequent civil action or proceeding as to matters proved in the criminal proceeding."⁴ The Supreme Court of Georgia, however, has held that private individuals cannot bring nuisance actions under O.C.G.A. § 16-15-7(c) of Georgia's Street Gang Terrorism and Prevention Act.⁵ Significantly, O.C.G.A. § 16-15-8 is not mentioned in that opinion of the Georgia Supreme Court.

Under former law, judgment in a criminal case based upon a not guilty plea, or a plea of *nolo contendere*, was not admissible in a subsequent civil action to establish the facts on which it was rendered.⁶

See O.C.G.A. § 24-4-410 as to the inadmissibility in a civil case

⁴Aiken v. Department of Transp., 171 Ga. App. 154, 319 S.E.2d 58 (1984); Citizens & Southern Realty Investors v. L. G. Balfour Co., 152 Ga. App. 852, 264 S.E.2d 304 (1980); Spurlock v. Commercial Banking Co., 151 Ga. App. 649, 260 S.E.2d 912, 27 U.C.C. Rep. Serv. 1342 (1979).

⁵Joyner v. William J. Butler, Inc., 143 Ga. App. 219, 237 S.E.2d 685 (1977).

⁶Davis v. Calhoun, 128 Ga. App. 104, 195 S.E.2d 759 (1973).

[Section 26:7]

¹Akin v. Randolph Motors, Inc.,

95 Ga. App. 841, 99 S.E.2d 358 (1957).

²Henderson v. Henderson, 94 Ga. App. 64, 93 S.E.2d 822 (1956); Pierce v. Pierce, 241 Ga. 96, 243 S.E.2d 46 (1978).

³Halligan v. Consolidated Management Services, Inc., 258 Ga. 471, 369 S.E.2d 745 (1988).

⁴O.C.G.A. § 16-15-8.

⁵Star Residential, LLC v. Hernandez, 311 Ga. 784, 860 S.E.2d 726 (2021).

⁶Windsor Forest, Inc. v. Rocker, 121 Ga. App. 773, 175 S.E.2d 65 (1970); Akin v. Randolph Motors, Inc.,

of a nolo plea in a criminal case. Also see § 26:1, *supra*, as to the ramifications in a civil case of a vehicle driver's earlier guilty plea, entered in a traffic case to a misdemeanor charge involving the same accident as the civil case.

Additionally, O.C.G.A. § 24-4-419 precludes the admission of certain criminal history information in civil proceedings, "against an employer, its employees, or its agents based on the conduct of an employee or former employee" under several circumstances.

Another way the topic of this section may arise is in an arson case. A warehouse burns down and the owner sues his insurance company for nonpayment of the fire insurance covering the building. Prior to this civil trial, defendant is convicted of felony arson in the criminal courts, in a criminal case over the same fire. Can the criminal arson conviction be entered into the record of the civil case to defeat the property owner's claim? The potential use of a prior conviction in a criminal case to help prove a fact in a civil case is controlled in the 2013 Evidence Code by O.C.G.A. § 24-8-803(22).⁷ This section liberalizes use of prior criminal convictions in Georgia courts.

§ 26:8 Silence of party as admissions in civil cases

Acquiescence or silence, when the circumstances require an answer, denial, or other conduct, may amount to an admission.¹ O.C.G.A. § 24-8-801(d)(2)(B) applies to the introduction of adoptive admission under Georgia's new Evidence Code. Examining case law and scholarship interpreting the parallel federal rule, Fed. R. Evid. 801(d)(2)(B), a federal civil case observed:

In order to constitute an adoptive admission by silence, the offering party must show that, under the circumstances of the case, a failure to respond is so unnatural that it supports the inference that the opposing party acquiesced in the statement.²

Federal decisions have remarked: "[T]he only foundation required for 801(d)(2)(B) adoptive admissions is a showing that they were made or adopted by the opposing party or by its agent on a matter within the scope of that agency; there is no personal-knowledge requirement."³ Admissions may be created when one

95 Ga. App. 841, 99 S.E.2d 358 (1957).

⁷See U.S. v. Jones, 29 F.3d 1549, 93 Ed. Law Rep. 77, 40 Fed. R. Evid. Serv. 737 (11th Cir. 1994).

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¹O.C.G.A. § 24-8-801(d)(2)(B). Also see Mitchell v. Hayden, Stone, Inc., 225 Ga. 711, 171 S.E.2d 280

(1969). See also U.S. v. Rivera, 944 F.2d 1563 (11th Cir. 1991).

²In re Consumers Power Co. Derivative Litigation, 132 F.R.D. 455 (E.D. Mich. 1990).

³BDG Gotham Residential, LLC v. Western Waterproofing Company, Inc., 631 F. Supp. 3d 76 (S.D. N.Y. 2022) (citing numerous sources).

person accuses another in a face-to-face situation and the accused party remains silent. He makes no denial. In addition, the adoptive admissions rule can also operate when a letter containing statements or accusations is received by a party, and he fails to respond. Of course, not all correspondence gives rise to this legal effect. A letter to a person from a stranger usually falls into the category of mail which does not require a response. The case of *Cross v. Tokio Marine & Fire Ins. Co., Ltd.*⁴ provides another example. After citing former O.C.G.A. § 24-4-23 which allows an admission to be created when silence greets a letter sent between business correspondents “in the ordinary course of business,” the court of appeals finds the letter here to be outside the ordinary course of business, and outside the rule.

For analysis of the application of the adoptive admission rule in federal courts in connection with written documents in civil cases, see *In re: General Motors, LLC*.⁵

The following have been deemed to be admissions: failure to object to the entries in a bank book,⁶ failure to dispute a store’s customer statement,⁷ and failure to speak up when a third party represented to another that he owned the property.⁸

However, there have been cases where silence was not deemed to be an admission.⁹

Also when one under a duty to speak fails to do so, he is thereafter estopped to deny what his silence imparts.¹⁰ A requirement is that the statement be within range of the person’s hearing.¹¹

When a party receives a letter in the ordinary course of business and good faith requires an answer, and the party fails to answer, the silence of the party is presumed to admit the correctness of the contents of the letter.¹²

Summarizing the impact of the new evidence code on silence of a party in the face of an incriminating accusation is Harper, *Changes Affecting Hearsay Under the New Georgia Evidence Code*, *Fulton Daily Report* 5 (Dec. 4 2012):

⁴*Cross v. Tokio Marine & Fire Ins. Co., Ltd.*, 254 Ga. App. 739, 563 S.E.2d 437 (2002).

⁵*In re: General Motors LLC*, 2015 WL 8578945 (S.D. N.Y. 2015).

⁶*Cheney v. Bank of Bremen*, 25 Ga. App. 114, 102 S.E. 903 (1920).

⁷*Tribble v. Tribble*, 166 Ga. 850, 144 S.E. 665 (1928).

⁸*Pressley v. Maxwell*, 242 Ga. 360, 249 S.E.2d 49 (1978). See *Forrest Cambridge Apartments, LLC v.*

Redi-Floors, Inc., 295 Ga. App. 840, 673 S.E.2d 318 (2009) (failure to respond to invoices in business dispute).

⁹See *Bowles v. Bowles*, 211 Ga. 461, 86 S.E.2d 318 (1955) (will caveat).

¹⁰*Cheek v. J. Allen Couch and Son Funeral Home*, 125 Ga. App. 438, 187 S.E.2d 907 (1972).

¹¹*Jones v. State*, 65 Ga. 147, 1880 WL 3571 (1880).

¹²O.C.G.A. § 24-14-23. See § 26:10, *infra*.

In Georgia civil cases, the admissibility of silence or acquiescence by a party to a statement which, if untrue, the party would be expected to deny will be decided preliminarily by the trial judge under O.C.G.A. § 24-1-104(b). The trial judge should admit the evidence if a reasonable jury could find that a response was called for if the statement was untrue. If admitted, the judge will instruct the jury on this matter for their ultimate determination as to the weight, if any, the evidence will be accorded.

In civil cases, a presumption arises from an adoptive admission.¹³

§ 26:9 Silence of accused as admissions

Evidence as to silence on the part of the accused after he is arrested and takes advantage of *Miranda* rights should be excluded when objected to, for the defendant is entitled to remain silent, and the prosecution may not use against him the fact that he remained mute or claimed his privilege against self-incrimination.¹ It is reversible error in a criminal case when silence by a person in police custody is used as an admission of guilt and is so argued by a prosecutor. Police interrogation, after administration of *Miranda* warnings, is not such a circumstance as requires an answer or denial.² If an accused remains silent at arraignment he is presumed to enter a plea of “not guilty” and not “guilty.”³

Cross-examination cannot explore the defendant’s silence after arrest, in cases where the defendant stood mute. The Supreme Court ruled as follows:

Our examination of the record shows that the prosecutor did improperly comment on Jackson’s silence by questioning him regarding why he did not come forward after the incident, and report that he had acted in self-defense. However, even if trial counsel’s performance was deficient in failing to object to the prosecutor’s comments, we conclude that Jackson has failed to carry his burden of proof on the prejudice prong of his ineffectiveness claim.

See *Jackson v. State*.⁴ However, reference to a defendant’s silence after arrest does not automatically require reversal.⁵

Currently, “a defendant’s silence may, in certain circumstances,

¹³St. Mary’s Hosp. of Athens, Inc. v. Cohen, 216 Ga. App. 761, 456 S.E.2d 79 (1995).

[Section 26:9]

¹See *Lowe v. State*, 136 Ga. App. 631, 222 S.E.2d 50 (1975).

²*Howard v. State*, 237 Ga. 471,

228 S.E.2d 860 (1976).

³*Windsor Forest, Inc. v. Rocker*, 121 Ga. App. 773, 175 S.E.2d 65 (1970).

⁴*Jackson v. State*, 282 Ga. 494, 651 S.E.2d 702 (2007).

⁵See *Maynard v. State*, 282 Ga.

communicate that he has adopted another person's statement as true, making that statement admissible under OCGA § 24-8-801(d)(2)(B).⁶ Under former Georgia law, however, the rule that a prosecutor may not comment on a defendant's prearrest silence was not limited to a defendant's silence in the face of questions by a state agent. Silence in the face of accusations by third parties seemed to be barred. Nor could his failure to come forward when he knew that he was the target of a criminal investigation be the object of comment, overruling *Glidewell v. State*⁷ and *Morrison v. State*.⁸ The approach of decisions barring argument or questioning regarding pretrial silence was confirmed and reinforced in *Grissom v. State*.⁹

Federal standards allow pre-arrest adoptive admissions as well as such admissions following arrest but prior to *Miranda* warnings.¹⁰

This point was driven home by the Eleventh Circuit Court of Appeals in a 2014 decision: "The government may comment on a defendant's silence if it occurred before the defendant was in custody and given *Miranda* warnings."¹¹

According to the Eleventh Circuit, to introduce an adoptive admission in a criminal case, two criteria must be met: (1) the statement must be such that an innocent defendant would normally be induced to respond; and (2) there must be sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.¹²

Maintaining an incriminating post on a social media account can also constitute an adoptive admission, even if the account holder did not author the text. This was the case in *U.S. v. Tyrell*,¹³ where the Second Circuit Court of Appeals observed: "[W]here an individual is silent regarding an incriminating state-

App. 598, 639 S.E.2d 389 (2006) (however, reversal here).

⁶*Wilkins v. State*, 308 Ga. 131, 839 S.E.2d 525 (2020).

⁷*Glidewell v. State*, 279 Ga. App. 114, 630 S.E.2d 621 (2006).

⁸*Morrison v. State*, 251 Ga. App. 161, 554 S.E.2d 190 (2001). See *Reynolds v. State*, 285 Ga. 70, 673 S.E.2d 854 (2009).

⁹*Grissom v. State*, 300 Ga. App. 593, 685 S.E.2d 492 (2009) (in criminal cases, commenting on defendant's failure to come forward is more prejudicial than probative; as to pre-*Miranda* silence after arrest, it is unfair to use that silence against the

accused).

¹⁰*Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980); *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982); *U.S. v. Rivera*, 944 F.2d 1563 (11th Cir. 1991).

¹¹*U.S. v. Reeves*, 742 F.3d 487 (11th Cir. 2014).

¹²*U.S. v. Joshi*, 896 F.2d 1303, 29 Fed. R. Evid. Serv. 1114 (11th Cir. 1990).

¹³*United States v. Tyrell*, 840 Fed. Appx. 617 (2d Cir. 2021) ("The post was never removed from [Defendant's] account, and there is no indication anywhere that [Defendant] suggested

ment seemingly made on his behalf, we will find an adoptive admission on the assumption that a person will at least deny incriminating statements.”

Similarly, in *United States v. Recio*,¹⁴ determined that rap lyrics posted on the defendant’s Facebook page was admissible as an adoptive admission:

[Defendant] suggests that those who repeat others’ lyrics rarely manifest an adoption of the views expressed in those lyrics, because lyrics are “a different person’s words” and often contain “puffery or braggadocio.” Appellant Reply Br. at 5-6. To be sure, people may quote lyrics to provide criticism or commentary, to relay the lyrics to others, or simply because they like the song. But in some instances, people quote lyrics because they wish to express a certain view and believe that the words of an artist — including a rap musician — express that view especially effectively. Whether someone has adopted lyrics as his own statement thus depends on the particular facts of each case. And as explained above, the facts here were sufficient for a jury to infer that [Defendant] adopted the rap lyric as his own statement.

Federal courts authorize jury instructions on the issue of adoptive admissions in criminal cases.¹⁵ Prior Georgia law considered this error.¹⁶

The Georgia Supreme Court has repeatedly held that the earlier Georgia ban on adoptive admissions in criminal cases was based upon now abandoned statutes, as opposed to constitutional grounds, and declined to find plain error where evidence of pre-Miranda silence was admitted without objection.¹⁷ Scholarship also calls for application of the federal methodology in Georgia.¹⁸

In 2019, a unanimous Supreme Court of Georgia sent Georgia’s prior ban on the admission of pre-Miranda silence to “oblivion.” Justice Nahmias’ opinion in *State v. Orr*¹⁹ held that, under O.C.G.A. § 24-8-801(d)(2)(B), evidence of pre-arrest silence may be introduced where the proponent establishes the following two elements:

For evidence to qualify as a criminal defendant’s adoptive admis-

that he objected to its content.”).

¹⁴*United States v. Recio*, 884 F.3d 230, 105 Fed. R. Evid. Serv. 1227 (4th Cir. 2018) (“[t]he rap lyric in this case was relevant to both Recio’s alleged conduct (carrying a gun) and his motive for doing so (to protect himself)” (parentheticals in original)).

¹⁵*Coleman v. Rowland*, 229 Fed. Appx. 599 (9th Cir. 2007).

¹⁶*Ruiz v. State*, 286 Ga. 146, 686

S.E.2d 253 (2009).

¹⁷See *Eller v. State*, 303 Ga. 373, 811 S.E.2d 299 (2018); *Wright v. State*, 300 Ga. 185, 794 S.E.2d 105 (2016).

¹⁸Melvin, What are the Chances? A Response to Professor Milich’s View of 404(B), 9 J. Marshall L.J. 40 (2015-16).

¹⁹*State v. Orr*, 305 Ga. 729, 827 S.E.2d 892 (2019) (internal quote marks omitted).

sion under Rule 801(d)(2)(B), the trial court must find that two criteria were met: first, that the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and second, that there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.

Under O.C.G.A. § 24-8-801(d)(2)(B), testimony that the defendant in a child molestation case “remained silent when the daughter and girlfriend accused him of having sexual intercourse with the daughter” and the trial court’s instructions on silence as adoptive admissions were properly before the jury.²⁰

In further detailing the law of post-arrest silence, Georgia case law penalizes a defendant who tries to signal to others to keep their mouths shut, when they are talking in the presence of the accused and the police.²¹

On the other hand, the Supreme Court of Georgia has determined that admission of evidence of a suspect’s refusal to consent to a breath test in driving under the influence prosecutions is unconstitutional.²²

§ 26:10 Failure to reply to written statements as admissions

Under Fed. R. Evid. 801(d)(2)(B), “the failure to reply to a letter may be introduced as an admission of the statements contained in the letter when the receiver of the letter remains silent in a situation where a response would seem natural or expected.”¹ The adoptive admissions rule has been applied to the failure to respond to e-mails as well.²

However, “the mere failure to respond to a letter does not indicate an adoption unless it was reasonable under the circumstances for the sender to expect the recipient to respond and to correct erroneous assertions.”³ Where two parties have carried on correspondence in reference to a particular subject and one of the

²⁰Neal v. State, 355 Ga. App. 125, 843 S.E.2d 11 (2020).

²¹White v. State, 276 Ga. 583, 581 S.E.2d 18 (2003) (wife’s statement incriminating her husband was admissible when defendant attempted to signal his wife to be quiet).

²²Elliott v. State, 305 Ga. 179, 824 S.E.2d 265 (2019).

[Section 26:10]

¹Tober v. Graco Children’s Products, Inc., 431 F.3d 572, 68 Fed. R. Evid. Serv. 1212 (7th Cir. 2005)

(“The burden is on the party seeking to introduce the letter to establish that under the circumstances the failure to respond is so unnatural that it supports the inference that the party acquiesced to the statements contained in the letter.”).

²See Rishmawy v. Vergara, 540 F. Supp. 3d 1246 (S.D. Ga. 2021).

³Southern Stone Co., Inc. v. Singer, 665 F.2d 698, 9 Fed. R. Evid. Serv. 1239 (5th Cir. 1982). See also AM General LLC v. Activision Blizzard, Inc., 450 F. Supp. 3d 467 (S.D. N.Y.

parties has written a letter to the other making statements concerning such subject, of which the latter has knowledge and which he would naturally deny if not true, and he fails to answer such letter, his omission, according to some authorities, is evidence tending to show that the statements in the letter sent to him are true.⁴ Some cases suggest that although the failure to reply in this situation is of less weight than silence where the same facts are directly stated to the party.⁵ However, the failure to reply to statements made in a letter which is not part of a mutual correspondence is not considered an implied admission by the addressee of the truth of the statements made.⁶

Most authorities take the position that the duty to respond is reduced, at least, in correspondence situations as opposed to accusations made in face-to-face confrontations. Thus, accusations contained in letters or emails from strangers can be ignored. However, that is not necessarily the case when correspondence comes from business associates or persons in a close relationship with the recipient. Written assertions can form the basis of adoptive admissions in Georgia civil cases.⁷

§ 26:11 Flight or escape as admissions

Evidence to show that a party fled, concealed himself, assumed a false name, or concealed relevant evidence is admissible as an admission of guilt or responsibility: “traditionally, ‘flight has been viewed as an admission by conduct which expresses consciousness of guilt.’”¹ Reflecting flight proof’s high probative value, the Tenth Circuit reversed trial court’s pretrial exclusion of a criminal defendant’s flight in *U.S. v. Martinez*.² “Because of the strength of the rule of admissibility of flight evidence, few cases are to be found in which the evidence is excluded by the trial court.”

Jurisprudence from the Supreme Court of Georgia is in accord

2020).

⁴O.C.G.A. § 24-14-23.

⁵*Western Union Tel. Co. v. Nix*, 73 Ga. App. 184, 36 S.E.2d 111 (1945).

⁶*Western Union Tel. Co. v. Nix*, 73 Ga. App. 184, 36 S.E.2d 111 (1945). Also see *Peninsular Naval Stores Co. v. Parrish*, 13 Ga. App. 779, 80 S.E. 28 (1913).

⁷*Jenkins v. Jenkins*, 300 Ga. App. 703, 686 S.E.2d 324 (2009).

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¹*U.S. v. Martinez*, 681 F.2d 1248, 10 Fed. R. Evid. Serv. 1626 (10th Cir.

1982). See also *United States v. Shirley*, 214 F. Supp. 3d 1124, 101 Fed. R. Evid. Serv. 915 (D.N.M. 2016); *State v. Freeburg*, 105 Wash. App. 492, 20 P.3d 984 (Div. 1 2001) (“Analytically, flight is an admission by conduct.”); *State v. Hunter*, 136 Ariz. 45, 664 P.2d 195 (1983) (“flight or concealment is viewed as an admission by conduct.”).

²*U.S. v. Martinez*, 681 F.2d 1248, 10 Fed. R. Evid. Serv. 1626 (10th Cir. 1982).

with this fundamental principle,³ observing that the “weight to be given to a permissive inference of consciousness of guilt from evidence of flight is left to the discretion of the jury.”⁴ Reversing a trial court’s pretrial exclusion of a defendant’s statement that he did not want to return to confinement, made during his flight from authorities, the Georgia’s Supreme Court observed: “[W]e have said that evidence of flight is generally relevant and supports an inference of consciousness of guilt of the underlying crime regardless of whether any flight-related crime is also charged.”⁵

*United States v. Flores*⁶ likewise determined that a district court’s pretrial exclusion of the government’s flight evidence, based in Fed. R. Evid. 403, was erroneous.

Providing analysis, the Eleventh Circuit Court of Appeals has explained the application of proof a defendant’s flight in criminal cases:

[F]light is an admission by conduct, that provides circumstantial evidence of guilt. . . . Jurors considering such evidence infer (1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged[.]⁷

In addition to “admission by conduct,” the term, “implied admission” is also associated with a criminal defendant fleeing from the crime scene or from authorities: “flight after the crimes were committed supports an inference of consciousness of guilt and constitutes an implied admission.”⁸ Law enforcement’s unsuccessful attempts to apprehend defendant were admissible as evidence indicating flight and, as such, consciousness of guilt on the defendant’s part.⁹ However, desire to submit to custody is admissible to rebut flight evidence.¹⁰ It is a circumstance that may be considered with other evidence as tending to prove guilt or in-

³See generally *Garay v. State*, 314 Ga. 16, 875 S.E.2d 631 (2022) (“Generally, evidence of flight. . . [is] admissible as circumstantial evidence of consciousness of guilt.”) (omission and substitution in original). See also *State v. Frost*, 297 Ga. 296, 773 S.E.2d 700 (2015) (“weight to be given to a permissive inference of consciousness of guilt from evidence of flight is left to the discretion of the jury”).

⁴*State v. Frost*, 297 Ga. 296, 773 S.E.2d 700 (2015).

⁵*State v. Brinkley*, 316 Ga. 689,

889 S.E.2d 787 (2023).

⁶*United States v. Flores*, 2024 WL 2816498 (9th Cir. 2024).

⁷*U.S. v. Ceja*, 543 Fed. Appx. 948 (11th Cir. 2013) (internal citation and quotation omitted).

⁸*People v. Dalton*, 7 Cal. 5th 166, 247 Cal. Rptr. 3d 273, 441 P.3d 283 (Cal. 2019).

⁹*Collins v. State*, 283 Ga. App. 188, 641 S.E.2d 208 (2007).

¹⁰*McDuffie v. State*, 121 Ga. 580, 49 S.E. 708 (1905).

nocence, and the jury can draw whatever reasonable inferences from the flight or nonflight evidence as it thinks proper.¹¹ Flight is a circumstance which may be shown, and a jury is authorized to take such a circumstance into account in determining guilt or innocence of an accused, even though it incidentally puts defendant's character in issue.¹²

Evidence of flight is admissible for similar purposes in civil cases.¹³ Delineating what it characterized as the “modern view among courts that have addressed flight evidence in civil cases,” a Colorado court explains:

In *Karl v. C. A. Reed Lumber Co.*, 275 Cal. App. 2d 358, 79 Cal. Rptr. 852, 854 (Cal. Ct. App. 1969), for example, the court explained that “flight immediately after an accident is a circumstance that may be considered with other facts in the case as tending to show a consciousness of responsibility for the accident.” Similarly, in *Peterson v. Henning*, 116 Ill. App. 3d 305, 452 N.E.2d 135, 138, 72 Ill. Dec. 203 (Ill. App. Ct. 1983), the court explained that “[a] defendant's flight from the scene of the accident can be interpreted as an admission of his negligence for if he were ‘guilt free’ it is reasonable to assume he would stop to ascertain the nature of the accident or the extent of the victim's injuries.” See also *Birch v. Birch*, 755 N.W.2d 144, at *2. . . (“[A] driver's failure to stop creates an inference in the minds of reasonable people that the driver does not wish to be identified and that his wish to be unidentified stems from a fear of the consequences of being known.”) (citation and alteration omitted); *Rock v. McHenry*, 115 S.W.3d 419, 421 (Mo. Ct. App. 2003) (“[I]n civil cases, other courts have held that flight evidence is admissible upon a showing that a defendant fled for the purpose of escaping liability.”).¹⁴

One case cautions against instructing on flight.¹⁵ A defendant was not entitled to an instruction that his lack of flight and voluntary surrender could be considered evidence of innocence.¹⁶

The Supreme Court of Georgia continued its ban on jury instructions covering the issue of flight in a 2020 decision.¹⁷ Georgia's prohibition sprang from personal conjecture advanced in a lone, 1986 concurrence.¹⁸ That hypothesis subsequently became

¹¹See *Anderson v. State*, 153 Ga. App. 401, 265 S.E.2d 299 (1980).

¹²*Hogans v. State*, 251 Ga. 242, 304 S.E.2d 699 (1983).

¹³*Johnson v. Austin*, 406 Mich. 420, 280 N.W.2d 9 (1979) (“Courts. . . have said that flight permits an inference of negligence.”).

¹⁴*Alhilo v. Kliem*, 2016 COA 142, 412 P.3d 902 (Colo. App. 2016).

¹⁵See *Renner v. State*, 260 Ga. 515, 397 S.E.2d 683 (1990) (after date of opinion, error for trial courts to charge on flight).

¹⁶*Scully v. State*, 256 Ga. 683, 353 S.E.2d 29 (1987).

¹⁷*Rawls v. State*, 310 Ga. 209, 850 S.E.2d 90 (2020).

¹⁸*Cameron v. State*, 256 Ga. 225, 345 S.E.2d 575 (1986) (Bell, J.,

adopted into binding Georgia case law.¹⁹

Federal courts, however, authorize jury instructions on a criminal defendant's flight where proper conditions are present.²⁰ Jurisprudence from any number of other states is in accord.²¹

Evidence of flight is not limited to flight from the crime scene at or near the time of the crime, and the lapse of time between the commission of the crime and defendant's flight when a policeman approached him did not render the evidence of flight inadmissible.²²

Former Georgia law on the issue of flight was replete with a wide-array of often episodic "twists and turns" that did not appear in federal jurisprudence.²³ One permutation involved admitting evidence of a criminal defendant's flight from authorities, but not his failure to turn himself in for arrest.²⁴ This existed under numerous abandoned statutes of Georgia's former Evidence Code.

O.C.G.A. § 24-8-801(d)(2)(A) follows Fed. R. Evid. 801(d)(1)(A), which authorizes the evidence of flight as an admission by conduct in federal courts. Federal courts admit both evidence of flight and evading capture as an admission of guilt.²⁵ Federal courts also authorize jury instructions on the issue of flight.²⁶

Evidence as to whether the accused tried to evade capture is as admissible as evidence of flight.²⁷

Evidence that a defendant left the immediate scene of a crime was admissible as showing flight, even though he was a prison

concurring: "I have found most jury instructions to be overlong and abstruse. We should shorten criminal charges by eliminating the instruction on flight, which, while it may be technically correct, is nevertheless unnecessary.").

¹⁹*Renner v. State*, 260 Ga. 515, 397 S.E.2d 683 (1990) (citing Justice Bell's concurrence in *Cameron v. State*, 256 Ga. 225, 345 S.E.2d 575 (1986)).

²⁰See, e.g., *United States v. Wilder*, 834 Fed. Appx. 782 (4th Cir. 2020); *U.S. v. Albury*, 782 F.3d 1285 (11th Cir. 2015); *U.S. v. Martinez*, 190 F.3d 673 (5th Cir. 1999).

²¹See, e.g., *Lowe v. State*, 269 So. 3d 244 (Miss. Ct. App. 2018); *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *State v. Bettis*, 206 N.C. App. 721, 698 S.E.2d 507 (2010).

²²*Hodges v. State*, 169 Ga. App. 70, 311 S.E.2d 506 (1983).

²³See Carlson and Carlson, Don't Ask and Don't Tell the Jury: The Georgia Law of Pre-Arrest Silence, Evasion and Flight, Carlson's Corner, Winter 2007 (Prosecuting Attorneys' Council of Georgia), <http://www.pacga.org/site/content/44>.

²⁴*Reynolds v. State*, 285 Ga. 70, 673 S.E.2d 854 (2009).

²⁵*U.S. v. Kennard*, 472 F.3d 851 (11th Cir. 2006) ("People, including jurors, realize that while '[t]he wicked flee when no man pursueth,' Proverbs 28:1 (KJV), they really flee when law enforcement is looking for them. That is why evidence of flight is admissible and probative.").

²⁶*U.S. v. Carrillo*, 660 F.3d 914, 86 Fed. R. Evid. Serv. 1075 (5th Cir. 2011).

²⁷*Evans v. State*, 288 Ga. 571, 707 S.E.2d 353 (2011).

inmate and could not leave the confines of the prison.²⁸

Evidence of flight is relevant to the issue of whether a defendant acted in self-defense or from malice.²⁹

In *Smith v. State*,³⁰ the State was entitled to present evidence that defendant escaped from jail while awaiting trial for malice murder, felony murder, and aggravated assault. The ability of the court to give a jury instruction on flight has been abolished; however, the ability of the State to offer evidence of flight while a defendant is awaiting trial and to argue that it demonstrates consciousness of guilt remains intact.

§ 26:12 Misconduct of party as admissions

“Admissions can be made expressly or may be inferred from conduct.”¹ It is generally accepted that nonverbal conduct can amount to an admission.² However, conduct that amounts to remedial measures will not be admissible, unless offered for a purpose other than evidence of negligence.³ A criminal defendant’s attempt to influence or intimidate a witness can serve as circumstantial evidence of guilt.⁴ Evidence that the defendant attempted to have a prosecution witness murdered was properly admitted as an admission by conduct.⁵

The introduction of a party’s wrongdoing as an admission by conduct is authorized in civil as well as criminal cases.⁶ Observing that “[a] party’s influencing of a witness to obtain favorable testimony is an admission by conduct regardless of whether it is accompanied by bribery, intimidation, cajolery, or resort to sentiment,” a Texas appellate decision involving an alleged breach of contract provides guidance:

“Admission by Conduct” has been defined as “a wrongdoing committed by a party, in connection with its case, that amounts to an

²⁸*Boutwell v. State*, 256 Ga. 63, 344 S.E.2d 222 (1986).

²⁹*Moore v. State*, 258 Ga. 177, 366 S.E.2d 686 (1988).

³⁰*Smith v. State*, 277 Ga. 508, 591 S.E.2d 805 (2004).

[Section 26:12]

¹*U.S. v. Brown*, 604 F.2d 347 (5th Cir. 1979) (quoting 4 Weinstein’s Evidence P 801(d)(2)(A)(1) at 801-118 (1978)).

²*Smith v. State*, 142 Ga. App. 1, 234 S.E.2d 816 (1977) (overruled on other grounds by, *Newsome v. State*, 288 Ga. 647, 706 S.E.2d 436 (2011)).

³See § 26:14, *infra*. See also Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 2:23.

⁴*Dimauro v. State*, 341 Ga. App. 710, 801 S.E.2d 558 (2017) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

⁵*Fugitt v. State*, 256 Ga. 292, 348 S.E.2d 451 (1986).

⁶*McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 19 Fed. R. Evid. Serv. 673, 84 A.L.R. Fed. 1 (3d Cir. 1985) (“subornation of perjury by a party is strong evidence that the party’s case is weak”).

obstruction of justice and that gives a factfinder reason to believe that the party thinks its case is so weak that it perhaps cannot be won without resorting to improper means.”⁷

Destruction or nonpreservation of evidence reflects adversely upon the party in control thereof and forms an admission of sorts.⁸ The opposing party may be entitled to relief.⁹

The Georgia Court of Appeals has explained: “Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation.”¹⁰ Spoliation of evidence has been recognized as an “admission by conduct.”¹¹ It has also been characterized as an “implied admission.”¹²

Instructions allowing juries to make adverse inferences against spoliators are authorized in both civil and criminal trials in federal courts.¹³ Georgia, however, restricts such instructions to civil disputes.¹⁴

Inferences may arise on behalf of a party if there has been a failure of an opponent to preserve evidence. What if the government in a criminal case cannot produce an object and fails to allow the defendant to make pretrial inspection of it because, while it was once in the hands of the police, the evidence has been lost, stolen, discarded, or destroyed? Precedent exists in such situations for the giving of a jury instruction permitting the jury to infer from the party’s failure to preserve evidence that the evidence would have been adverse to the nonpreserving party. For example, if fingerprints found at a murder scene are later smudged or discarded by police and rendered useless or unavailable for examination by the defense, the jury charge might tell the jury that a print was found at the crime scene and the jurors can infer it was not the print of the defendant. This is a “spoliation” instruction; since a party in possession of evidence spoiled it, adverse inferences may be drawn against that party. The good faith of the party, as well as the expected admissibility of the evidence at trial, are factors which will play roles in whether a spo-

⁷*Meru v. Huerta*, 136 S.W.3d 383 (Tex. App. Corpus Christi 2004).

⁸See *Ex parte Water Works and Sewer Board of City of Anniston*, 328 So. 3d 802 (Ala. 2020) (examining remedies for spoliation of evidence).

⁹*Cooper Tire & Rubber Company v. Koch*, 303 Ga. 336, 812 S.E.2d 256 (2018).

¹⁰*Metropolitan Atlanta Rapid Transit Authority v. Tyler*, 360 Ga.App.

710, 860 S.E.2d 224 (2021).

¹¹*State v. Ish*, 166 Idaho 492, 461 P.3d 774 (2020); *Phillips v. Covenant Clinic*, 625 N.W.2d 714 (Iowa 2001).

¹²*Russell v. East Alabama Health Care Authority*, 192 So. 3d 1170 (Ala. Civ. App. 2015).

¹³*U.S. v. Laurent*, 607 F.3d 895 (1st Cir. 2010).

¹⁴*Howard v. State*, 307 Ga. 12, 834 S.E.2d 11 (2019).

liation instruction is appropriate.¹⁵

While not technically misconduct, courts have addressed whether litigants can point out their opponent's failure to call previously identified witnesses on their behalf. Federal decisions not only approve of parties doing so, but have also authorized "missing witness" instructions to the jury:

The most appropriate version of a "missing witness" instruction, where the facts warrant it, permits the jury to draw an adverse inference against a party failing to call a witness when the witness's testimony would be material and the witness is peculiarly within the control of that party. See *United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1988). In such circumstances, it is more likely than not that the testimony of an uncalled witness would have been unfavorable to the party with such control, and a jury may reasonably draw such an inference. See 8A James Wm. Moore, et al., *Moore's Federal Practice* P 30.09[5] (2d ed. rev. 1995) ("Moore's Federal Practice"). The requirement that the witness be "peculiarly within the control" of the party ensures that the inference is not available to be drawn against a party who, in comparison with an adversary, lacks meaningful or pragmatic access to the witness. *Id.*¹⁶

§ 26:13 Offers of compromise as admissions

An offer to compromise a disputed claim is not admissible as an admission, O.C.G.A. § 24-4-408.¹ The Supreme Court of Georgia has accordingly held that compromise discussions offered to prove liability for punitive damages are barred by Georgia Rule of Evidence 408.²

This is the rule in federal courts.³ *Showan v. Pressdee*⁴ remarks that Fed. R. Evid. 408 "prohibits introducing evidence of actual settlement offers or negotiations for certain prohibited purposes." Specifically, under Fed. R. Evid. 408, evidence of a settlement cannot be used 'to prove or disprove the validity or amount of a disputed claim.'⁵ Federal Rule of Evidence 408, however, allows compromise "evidence admitted 'for another purpose, such as

¹⁵R. Carlson, 3 Criminal Law Advocacy: Trial Proof 10-4 (1993).

¹⁶U.S. v. Caccia, 122 F.3d 136 (2d Cir. 1997).

[Section 26:13]

¹Frost v. Frost, 299 Ga. 278, 787 S.E.2d 693 (2016).

²Whitaker Farms, LLC v. Fitzgerald Fruit Farms, LLC, 2024 WL 4633502 (Ga. 2024).

³Weems v. Tyson Foods, Inc., 665 F.3d 958, 87 Fed. R. Evid. Serv. 301 (8th Cir. 2011).

⁴Showan v. Pressdee, 922 F.3d 1211, 103 Fed. R. Serv. 3d 1034 (11th Cir. 2019).

⁵Simon ex rel. Florida Rehabilitation Associates, PLLC v. Health-south of Sarasota Limited Partnership, 2022 WL 3910607 (11th Cir. 2022).

proving a witness's bias or prejudice.' ”⁶

Relying on federal authority, the Supreme Court of Georgia held that a criminal defendant's request to his mother that she inform prosecutors that he was prepared to negotiate his case was not barred from introduction under Georgia Rule of Evidence 408.⁷

Old Georgia law allowed other statements made during settlement negotiations to be admitted, particularly statements made separately from compromise discussion, notwithstanding they were made at the time that the parties were negotiating a compromise.⁸ Compromise rules have been held to apply to civil and criminal cases.⁹

Do settlement amounts paid by a corporation in other cases come under the privilege for compromise? Yes, says *Mableton Parkway CVS, Inc. v. Salter*.¹⁰ Salter brought suit against a pharmacy company, and the appellate court resolved the controversy regarding proof of settlement:

We find that the trial court abused its discretion by compelling CVS to disclose the amounts it has paid in settling similar tort cases in Georgia. (Former) O.C.G.A. 24-3-37 generally prohibits the admission of settlement negotiations. This furthers the policy of encouraging settlements, as the possibility that the settlement negotiations or amounts paid in settlement could be used against the defendant would obviously have a chilling effect on a defendant's willingness to pursue settlement. “The purpose of this Code section is to encourage settlements and protect parties who freely engage in negotiations directed toward resolution of lawsuits.”

Salter never sought this information in the court below, as such is clearly outside the scope of relevance in the discovery of this case. Nor is Salter able on appeal to articulate how the information would be relevant to this case. As no evidence or rationale supports its holding, the court's sua sponte ordering of the disclosure of settlement amounts was an abuse of its discretion and must therefore be reversed. The remainder of the order is affirmed.

Judgment affirmed in part and reversed in part.

While evidence as to the amount of a settlement or compromise

⁶Alexander v. United States, 2022 WL 17688692 (11th Cir. 2022).

⁷Sauder v. State, 318 Ga. 791, 901 S.E.2d 124 (2024).

⁸Blakely Hardwood Lumber Co. v. Reynolds Bros. Lumber Co., 173 Ga. 602, 160 S.E. 775 (1931); Graves v. Graves, 252 Ga. 27, 310 S.E.2d 901 (1984).

⁹See Sauder v. State, 318 Ga. 791, 901 S.E.2d 124 (2024). See gener-

ally Flading v. State, 327 Ga. App. 346, 759 S.E.2d 67 (2014); Jones v. State, 137 Ga. App. 612, 224 S.E.2d 473 (1976); Reed v. State, 163 Ga. App. 364, 295 S.E.2d 108 (1982); Williams v. State, 178 Ga. App. 216, 342 S.E.2d 703 (1986).

¹⁰Mableton Parkway CVS, Inc. v. Salter, 254 Ga. App. 162, 561 S.E.2d 478 (2002).

in an earlier case is generally excluded, a trial court may admit such evidence when it is relevant to impeachment.¹¹

There is controversy in Georgia respecting whether offers to settle a case are admissible in evidence in the event that the same case where the offer is made later goes to trial. Some of the vintage cases on the topic treated “offers to settle” quite differently from “offers to compromise.” The latter were traditionally deemed inadmissible, while evidence of the former were highly competent, in the view of these authorities.¹² This hairsplitting by the courts sets a trap for the unwary, and problem areas are analyzed in R. Carlson, *Compromise Statements and Compromising Situations*, 23 *Verdict* 6, No 2 (1998) (in Georgia, the terms “settlement” and “compromise” should be judicially repaired; both efforts to settle as well as to compromise deserve privilege protection).¹³

For a companion rule excluding compromise offers in federal practice, see Federal Evidence Rule 408.¹⁴ The modern rule excludes admissions made while discussing settlement unless wholly separate from settlement discussions. Georgia now follows this approach O.C.G.A. § 24-4-408. Protected statements include admissions made in compromise negotiations or mediation.

In a 2014 decision, the Georgia Court of Appeals noted the adoption of a federalized rule on the issue of offers of compromise and reviewed Eleventh Circuit Court of Appeals authority to interpret the provision. In *Flading v. State*,¹⁵ Judge McMillian, writing for the court, also made clear that, as under the federal rule, O.C.G.A. § 24-4-408 would apply in criminal as well as civil cases.

However, merely listing “FRE 408” in correspondence does not invoke the protections of the offer of compromise rule.¹⁶

For a motion in limine to exclude compromise statements, see Appendix C, Form 19, *infra*.

¹¹*Bolah v. Driskell*, 318 Ga. App. 405, 734 S.E.2d 108 (2012).

¹²*P. Milich*, Georgia Rules of Evidence § 18.7 (2002).

¹³See *Houston v. Kinder-Care Learning Centers, Inc.*, 208 Ga. App. 235, 430 S.E.2d 24, 83 Ed. Law Rep. 468 (1993) (“A party’s attempt to compromise cannot be used by the opponent to suggest the party thereby admitted his claim or defense was weak”); *Stover v. Candle Corp. of America*, 238 Ga. App. 657, 520 S.E.2d 7 (1999); *Teasley v. Bradley*, 110 Ga.

497, 35 S.E. 782 (1900); *Pacific Nat. Fire Ins. Co. v. Beavers*, 87 Ga. App. 294, 73 S.E.2d 765 (1952).

¹⁴*U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364 (4th Cir. 2015) (Rule 408 “mandates the exclusion of evidence relating to offers to compromise or settle disputed claims if the evidence is being offered to prove liability on the claim”).

¹⁵*Flading v. State*, 327 Ga. App. 346, 759 S.E.2d 67 (2014).

¹⁶*Rogers v. Dupree*, 340 Ga. App. 811, 799 S.E.2d 1 (2017).

Advice on drafting a presuit demand letter, including guidance on information needed before preparing the document, appears in Blank and Kennedy, *Dynamic Demand Letters*, Trial 28 (Dec. 2009) (“[t]he demand letter should tell a compelling story”).

Admissions induced by an offer to enter into settlement negotiations are inadmissible as evidence.¹⁷ Recorded statement that tenant, injured in fall down stairwell in commercial office building, gave to landlord’s insurance adjuster was inadmissible, in trial of tenant’s negligence action against landlord, as it was an admission induced by an offer to enter into settlement negotiations; adjuster induced tenant to give the statement concerning his version of the incident shortly after tenant sent a proposed settlement letter to the landlord, and tenant gave the statement with a view to a compromise of his claim.

On a separate topic, what if after botched surgery the defendant doctor says “I am sorry about my actions.” In 2005, the legislature declared “off limits” as evidence any expressions by a medical defendant of regret, mistake or apology.¹⁸

§ 26:14 Actions of party after accident as admissions

Courts have admitted a defendant’s flight from the scene of an accident as evidence of consciousness of liability in civil cases.¹ On the other hand, repairs or remedial measures taken by a defendant after the incident which caused the suit are not admissible. “Rule 407 precludes the introduction of subsequent remedial measures, which are measures ‘taken that would have made an earlier injury or harm less likely to occur,’ to prove culpable conduct.”²

In a negligence case, evidence of subsequent remedial measures is not admissible to show that a defendant admits his negligence.³ The reason for the exclusion of such evidence lies in sound public

¹⁷*Nevitt v. CMD Realty Investment Fund IV, L.P.*, 282 Ga. App. 533, 639 S.E.2d 336 (2006).

¹⁸O.C.G.A. § 24-4-416.

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¹*Alhilo v. Kliem*, 2016 COA 142, 412 P.3d 902 (Colo. App. 2016) (surveying numerous jurisdictions). See also *Johnson v. Austin*, 406 Mich. 420, 280 N.W.2d 9 (1979) (“Courts. . . have said that flight permits an inference of negligence.”).

²*United States v. James*, 607 F. Supp. 3d 246, 118 Fed. R. Evid. Serv. 1371 (E.D. N.Y. 2022). See also under

former Georgia law, *Atlantic Coast Line R. Co. v. Sellars*, 89 Ga. App. 293, 79 S.E.2d 35 (1953); *Lacy v. City of Atlanta*, 110 Ga. App. 814, 140 S.E.2d 144 (1964); *Stuckey’s Carriage Inn v. Phillips*, 122 Ga. App. 681, 178 S.E.2d 543 (1970); *Chastain v. Fuqua Industries, Inc.*, 156 Ga. App. 719, 275 S.E.2d 679, 31 U.C.C. Rep. Serv. 79 (1980).

³*Miciotto v. Hobby Lobby Stores, Inc.*, 514 F. Supp. 3d 877, 114 Fed. R. Evid. Serv. 1083 (W.D. La. 2021) (“The Court finds that testimony and/or evidence regarding repairs that Hobby Lobby made to the sidewalk several months after the accident falls

policy which encourages repairs without fear that the repair will be construed as an admission.⁴ There are exceptions to the rule, and in proper circumstances repairs may be admitted. In addition, sometimes the introduction of subsequent repairs constitutes harmless error.⁵

The purpose behind the general rule excluding remedial measures in negligence actions has not changed. Georgia courts under former Georgia law continued to exclude this evidence following an injury based on the sound public policy of encouraging improvements or repairs, and not deterring such activities by the fear that these acts will be construed as an admission of wrongdoing.⁶

For the form of remedial measure objections, see Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 2:23.⁷

Testimony by a restaurant employee that no remedial measures had been made to the floor after invitee's slip and fall was the admissible in a premises liability trial, even though the invitee claimed such testimony was the "flip-side" of the rule prohibiting testimony about subsequent remedial measures and would invite the jury to believe that no such measures were required. The invitee apparently failed to object to the testimony, and the invitee cited to no authority that held that allowing the question was error.⁸

Regarding the scope of the remedial measures exclusionary rule and whether or not it applies in strict liability actions, Georgia seems to embrace the minority view seen in *Ault v. International Harvester Co.*⁹ In *General Motors Corp. v. Moseley*,¹⁰ the court found the *Ault* reasoning persuasive and permitted evidence of subsequent remedial measures in strict liability cases. The *Moseley* court noted that the holding was consistent with the growing trend in other states that have considered the issue.

The *Moseley* court cautioned that when negligence and strict liability theories are asserted jointly in an action, at a minimum,

squarely within the prohibition set forth in Rule 407.").

⁴See *Brixmor New Chastain Corners SC, LLC v. James*, 318 Ga. 17, 896 S.E.2d 544 (2023).

⁵See *Department of Transp. v. Cannady*, 270 Ga. 427, 511 S.E.2d 173 (1999); *Tyson v. Old Dominion Freight Line, Inc.*, 270 Ga. App. 897, 608 S.E.2d 266 (2004).

⁶*Henson v. Georgia-Pacific Corp.*, 289 Ga. App. 777, 658 S.E.2d 391 (2008).

⁷See also Federal Evidence Rule 407 and O.C.G.A. § 24-4-407.

⁸*Briglevich v. Liberty House Restaurant Corp.*, 277 Ga. App. 433, 626 S.E.2d 625 (2006).

⁹*Ault v. International Harvester Co.*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148, 74 A.L.R.3d 986 (1974).

¹⁰*General Motors Corp. v. Moseley*, 213 Ga. App. 875, 447 S.E.2d 302 (1994) (overruled on other grounds by, *Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021)).

the jury must be instructed as to the proper use and limits of the evidence, and that it may be advisable to bifurcate or trifurcate the proceedings. However, this procedural aspect of *Moseley* was abrogated by *Webster v. Boyett*.¹¹ The *Ault* portion of *Moseley* was untouched in this abrogation.

The 2013 Georgia Evidence Code retains the approach of *Moseley* in product liability cases. As to other cases, there is a general rejection of evidence of safety measures taken by a defendant.¹²

§ 26:15 Payment of bills of injured person as admissions

It has been held that the trial court properly excluded statements of a witness for the plaintiff who had been a passenger in the bus at the time of the accident and that the witness had sustained a few bruises, had been paid in full for his injury, and had signed a release.¹

Offers to pay medical and similar expenses are excluded in federal practice.² Georgia follows this approach in O.C.G.A. § 24-4-409.

Federal decisions observe, however, that while Rule 409 “denies admissibility ‘to prove liability for the injury[.]’ Such evidence may be admissible to prove other facts, such as ‘the status of the alleged tort-feasor as employer.’ ”³

Admissions made in a view to a compromise are not proper evidence.⁴

§ 26:16 Self-serving statements

It is a general rule that self-serving declarations—that is, statements or admissions favorable to the interest of the declarant—are not admissible in evidence as of proof of the facts asserted. “Nothing in the Constitution gives an accused the privilege of proffering, through hearsay, his self-serving statements while denying the state access to the rest of the story that could be got at by cross-examination.”¹ This is so unless they fall within an

¹¹*Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459 (1998) (trifurcated procedure should rarely be used in liability case).

¹²O.C.G.A. § 24-4-407.

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¹*Scott v. Torrance*, 69 Ga. App. 309, 25 S.E.2d 120 (1943).

²See Federal Evidence Rule 409. See *Galarnyk v. Hostmark Management, Inc.*, 55 Fed. Appx. 763 (7th Cir.

2003).

³*Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 12 Fed. R. Evid. Serv. 269 (5th Cir. 1982).

⁴See § 26:13, *supra*.

[Section 26:16]

¹*Gacy v. Welborn*, 994 F.2d 305 (7th Cir. 1993). See also *Pena v. State*, 297 Ga. 418, 774 S.E.2d 652 (2015); *Drawdy v. Hesters*, 130 Ga. 161, 60 S.E. 451 (1908).

accepted hearsay exception.² Moreover, the rule is applied whether or not the statements are reduced to writing.³ The vital objection to the admission of this kind of evidence is its hearsay character: “Self-serving statements are not exempted from the hearsay rule by Federal Rule of Evidence 801(d)(2)(A) or any other exemption or exception, and are thus inadmissible hearsay.”⁴ Federal cases are in accord. “Because there is no exception for self-serving hearsay, [Defendant’s] statements are inadmissible.”⁵

²*Sabre Int’l Sec. v. Torres Advanced Enter. Solutions, LLC*, 89 Fed. R. Serv. 3d 1840 (D.D.C. 2014).

³See *Lin v. Lamanna*, 2021 WL 5631775 (E.D. N.Y. 2021); *U.S. v. VanderZwaag*, 2009 WL 2584753 (W.D. Mich. 2009). See also *Stanton v. Stanton*, 213 Ga. 545, 100 S.E.2d 289, 66 A.L.R.2d 1401 (1957).

⁴*U.S. v. Quansah*, 171 Fed. Appx.

51 (9th Cir. 2006). See also *Drawdy v. Hesters*, 130 Ga. 161, 60 S.E. 451 (1908).

⁵*United States v. Matta-Quinones*, 2022 WL 3355109 (D.P.R. 2022). See also *U.S. v. Smith*, 490 F.2d 789 (D.C. Cir. 1974). See also *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 3 Fed. R. Evid. Serv. 490 (5th Cir. 1978).

Chapter 27

Confessions

- § 27:1 Confession distinguished from admission and incriminatory statement
- § 27:2 Requirements of confession
- § 27:3 Confession of juveniles
- § 27:4 Protection of constitutional rights in obtaining confession
- § 27:5 Voluntariness of confession
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§ 27:1 Confession distinguished from admission and incriminatory statement

An admission in a criminal case is an avowal or acknowledgement of facts or circumstances from which guilt may be inferred and which tends to prove the offense charged, but does not amount to a complete confession of guilt.¹ An admission differs from a confession in a criminal case in that a confession acknowledges all of the essential elements of the crime.²

There is also a difference between an incriminating statement and a confession, as the former involves admission of only one or more facts entering into the criminal act, while the latter involves a confession of the entire criminal act. However, it is not uncommon for individuals, even judges, to interchange the terms.³

In criminal cases, distinctions are sometimes made between admissions versus a confession of the entire criminal transaction. The Georgia Supreme Court has defined a confession as “an admission of the main fact, from which the essential elements of

[Section 27:1]

¹Pendergrass v. State, 245 Ga. 626, 266 S.E.2d 225 (1980).

²Walsh v. State, 269 Ga. 427, 499 S.E.2d 332 (1998).

³See Leeks v. State, 255 Ga. 69, 335 S.E.2d 387 (1985) (held defendant was not prejudiced when a statement

he had made to police and which he felt to be less than a confession was referred to as a confession by the trial judge in his charge to the jury; considered in the context of the whole charge, such a passing reference was not prejudicial regardless of the actual character of the statement).

the criminal act may be inferred, without a qualifying exclusion of a necessary ingredient of the crime charged, such as facts or circumstances which show excuse or justification.”⁴

In the 2013 Georgia Evidence Code, admissions are treated in O.C.G.A. §§ 24-8-801(d)(2), 24-8-822 and 24-8-823.

§ 27:2 Requirements of confession

A confession may be oral or written¹ or may be evidenced by gestures in response to questions. It may be a series of answers to questions asked by police.²

The confession must be voluntary³ and must be made after the crime has been committed as distinguished from a statement of intent⁴ or a threat.⁵ The constitutional rights of the accused must be protected; otherwise, any confession that results will be inadmissible.⁶

The totality of the circumstances surrounding a confession must be viewed in order to determine its admissibility into evidence.⁷ The standard for determining admissibility of confessions is preponderance of evidence.⁸ To make a confession admissible, it must have been made voluntarily, i.e., without being induced by another by the slightest hope of benefit or remotest fear of injury.⁹

The fact that a statement may not have been a complete rendition of everything defendant said to investigator affects the weight to be accorded the statement by the factfinder but not the admissibility.¹⁰

§ 27:3 Confession of juveniles

Confessions of juveniles are scanned with more care and received with greater caution than confessions of adults; statutory safeguards are applicable to both criminal and juvenile

⁴Merritt v. State, 292 Ga. 327, 737 S.E.2d 673 (2013) (holding a text message sent to his sister by defendant after his wife’s death stating he strangled his wife was not a mere admission because he confessed the “main fact” of the crime, that he choked and killed his wife).

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¹See Kelley v. State, 160 Ga. App. 343, 287 S.E.2d 68 (1981); Montgomery v. State, 181 Ga. App. 111, 351 S.E.2d 511 (1986); Brown v. State, 83 Ga. App. 650, 64 S.E.2d 313 (1951).

²See Lumpkin v. American Surety Co., 69 Ga. App. 887, 27 S.E.2d 412 (1943).

³See § 27:5, *infra*.

⁴See § 25:31, *supra*.

⁵See § 25:5, *supra*.

⁶See § 27:4, *infra*.

⁷Fields v. State, 232 Ga. 723, 208 S.E.2d 822 (1974).

⁸Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

⁹O.C.G.A. § 24-8-824.

¹⁰Morrow v. State, 226 Ga. App. 833, 487 S.E.2d 669 (1997).

cases.¹ Failure to comply with legal safeguards renders a confession of a juvenile inadmissible in evidence.² Also, a juvenile defendant's confession was admissible, despite the fact that he was not taken before an impartial juvenile intake officer but rather before a member of the county police department, where defendant's mother was present during his interrogation and it was not alleged that officer failed to perform any duty imposed upon him.³

The State has a heavier burden of proof of showing juvenile understood and waived rights than an adult.⁴ However, the presence of a parent, counsel, or other responsible adult is not always required when a minor defendant is giving a statement to police.⁵

In *Heard v. State*,⁶ the defendant who confessed was 15 years old and between the eighth and ninth grades. The fact that his mother was not present was a factor, but was not determinative on the issue of voluntariness. Admission of the confession was approved in this murder prosecution, even though an appeal to religion occurred:

At one point during the interview, one of the detectives confirmed Heard's belief in God and knowledge of the Ten Commandments, called murder a mortal sin to be answered for, and implied the need to confess while he has the chance. Heard argues that these statements constituted coercive interrogation tactics which induced his confession by "the slightest hope of benefit or remotest fear of injury" in violation of O.C.G.A. § 24-3-50. However, "[t]he fact that a confession has been made under a spiritual exhortation . . . or a promise of collateral benefit shall not exclude it." [Former] O.C.G.A. § 24-3-51.

A 13-year-old seventh grader was removed from his classroom by a uniformed police officer and escorted to a school conference room for questioning about burglaries. He confessed. He was not given *Miranda* warnings or the opportunity to call his grandmother. The United States Supreme Court ruled in favor of the defendant's challenge to his confession.⁷ Lower courts had failed to factor in the age of the suspect when making an analysis of whether the confession was voluntary and complied with

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¹*Paxton v. State*, 159 Ga. App. 175, 282 S.E.2d 912 (1981), writ denied, 248 Ga. 231, 283 S.E.2d 235 (1981); *Crawford v. State*, 240 Ga. 321, 240 S.E.2d 824 (1977).

²*Manning v. State*, 162 Ga. App. 494, 292 S.E.2d 95 (1982); *Bussey v. State*, 144 Ga. App. 875, 243 S.E.2d 99 (1978); *Massey v. State*, 243 Ga. 228, 253 S.E.2d 196 (1979).

³*Worthy v. State*, 253 Ga. 661, 324 S.E.2d 431 (1985).

⁴*Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

⁵*Duffy v. State*, 262 Ga. 249, 416 S.E.2d 734 (1992).

⁶*Heard v. State*, 287 Ga. 554, 697 S.E.2d 811 (2010).

⁷*J.D.B. v. North Carolina*, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

Miranda.

The issue to be considered in determining the admissibility of a juvenile's incriminatory statements obtained in violation of the Juvenile Code is whether there was knowing and intelligent waiver by the juvenile of his constitutional rights in making those statements, based on consideration of the age of the accused, education of the accused, knowledge of the accused as to the substance of the charge and the nature of his rights to consult with an attorney, whether the accused was held incommunicado or allowed to consult with relatives or an attorney, whether the accused was interrogated before or after formal charges had been filed, the methods used in the interrogation, the length of interrogation, whether the accused refused to voluntarily give statements on prior occasions, and whether the accused repudiated the extrajudicial statement at a later date.⁸

Failure of police to promptly take juvenile defendant before juvenile court or to contact a juvenile court intake officer as provided by O.C.G.A. § 15-11-19(a)(3) does not, as a matter of law, make the confession inadmissible, nor does fact that confession is made in the absence of defendant's mother. The issue is whether there was a knowing and intelligent waiver by defendant of his constitutional rights in making the incriminating statement, assessed under the totality of the circumstances.⁹

In a 2023 decision, the Supreme Court of Georgia stepped away from strict adherence to the traditional, nine-factor analysis applied to juvenile confessions employed in *Riley v. State*.¹⁰ According to *Clark v. State*,¹¹ courts are to instead examine the totality-of-the-circumstances, considering all the relevant circumstances surrounding a juvenile's confession to determine its admissibility in Georgia criminal prosecutions.

Georgia's former nine-factor test for voluntariness of confession of juveniles is referenced in *Vergara v. State*.¹² A high school senior's confession was admissible in *State v. Roberts*.¹³ Rules for testing confessions by juveniles are contained in *Chapman v.*

⁸*State v. McBride*, 261 Ga. 60, 401 S.E.2d 484 (1991).

⁹*Gilliam v. State*, 268 Ga. 690, 492 S.E.2d 185 (1997). See also *Hall v. State*, 230 Ga. App. 378, 496 S.E.2d 475 (1998) (motion to suppress properly denied when no promises were made, defendant was not threatened in any way, questioning was of short duration, defendant's mother was present at all times, defendant could read and write, and defendant signed his

confession).

¹⁰*Riley v. State*, 237 Ga. 124, 226 S.E.2d 922 (1976).

¹¹*Clark v. State*, 315 Ga. 423, 883 S.E.2d 317 (2023).

¹²*Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

¹³*State v. Roberts*, 273 Ga. 514, 543 S.E.2d 725 (2001) (accused was not a minor).

State.¹⁴ A murder defendant who was 13 years old waived his *Miranda* rights and made an admissible confession.¹⁵ A 16-year-old made a valid confession, and the record of the Jackson-Denno hearing supported its admission into evidence. The defendant was sentenced to life.¹⁶

For juvenile courts, see O.C.G.A. § 15-11-18. Definition of juvenile, “child” means any individual who is under the age of 17 years.¹⁷

In Georgia, the juvenile courts have jurisdiction over all children under age 13 as well as other children, in the case of most crimes, between the ages of 13 and 17. Conviction of a juvenile involved in a serious offense exposes the offender to a potential five-year sentence at the hands of the juvenile court judge. However, under O.C.G.A. § 15-11-5(b)(2), the superior court has exclusive jurisdiction over juveniles who commit seven enumerated crimes: murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery, and armed robbery committed with a firearm. In connection with prosecuting many of these offenses, the juvenile’s confession plays a role.

Children under 13 may not be tried as adults in Georgia. This is not the case in all states, some of which allow 12-year-olds to be tried as adults for murder. Preteens charged with murder in Georgia face a maximum of two years confinement if convicted. However, the juvenile court judge has discretion to add another two years, following a request that she do so by the Department of Juvenile Justice.

§ 27:4 Protection of constitutional rights in obtaining confession

In interpreting the Fourteenth Amendment, the United States Supreme Court has imposed strict rules upon law enforcement officials in obtaining a confession. Failure to observe these rules will render the confession inadmissible.

The decisions of the United States Supreme Court affected the law in Georgia. Impact in this area of the law initially came from the case of *Escobedo v. State of Ill.*,¹ which held that a confession was not admissible in a state court where it was made after the

¹⁴Chapman v. State, 273 Ga. 865, 548 S.E.2d 278 (2001) (when considering waiver of *Miranda* rights by juvenile, court is to consider age of accused, education, methods of interrogation, and other factors).

¹⁵Henry v. State, 264 Ga. 861, 452

S.E.2d 505 (1995).

¹⁶Simon v. State, 269 Ga. 208, 497 S.E.2d 231 (1998).

¹⁷O.C.G.A. § 15-11-2.

[Section 27:4]

¹Escobedo v. State of Ill., 378

accused requested counsel and that request was denied.

The Escobedo holding was greatly expanded in *Miranda v. Arizona*,² which laid down very strict rules to assure the right to counsel during the interrogation phase of a criminal investigation. A confession stemming from custodial interrogation of the defendant is not admissible unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or has been otherwise deprived of his freedom of action in any significant way. In earlier cases, the Court described this as the point at which an investigation had focused on an accused.³

Unless other fully effective means are devised to inform the accused person of his right to silence and to assure a continuous opportunity to exercise it, the following procedural safeguards must be employed:⁴

- (1) Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or assigned.
- (2) While it is possible for defendant to waive these rights, the waiver must be made voluntarily, knowingly and intelligently.
- (3) A valid waiver will not be presumed simply from the fact that a confession was eventually obtained.
- (4) If the defendant indicates in a manner and at any stage of the process that he wished to consult with an attorney before speaking, there can be no questioning.
- (5) If the individual who is under questioning indicates in any manner that he does not wish to be interrogated, the police may not question him. However, silence alone does not signal a wish to terminate the interview.
- (6) The mere fact that the accused may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964). 10 A.L.R.3d 974 (1966).

²*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

³*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694,

⁴*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). On point (5), see *Berghuis v. Thompson*, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

While a suspect has the right to be informed that he has the right to have a lawyer with him during interrogation, see point 1 above, the warnings delivered to the accused in *Florida v. Powell*⁵ sufficiently conveyed this impression.

Where a confession is inadmissible for failure to give the necessary *Miranda* warnings, a subsequent confession given after such warnings will also be inadmissible where the interrogating officers at the subsequent confession were the beneficiaries of the pressures applied at the first confession.⁶

Where objection is made, the court must determine the *Miranda* issue as well as voluntariness. Upon the *Miranda* issue, a law enforcement officer from one county, who claimed to have entered the interrogation room to question the defendant only after the defendant had already invoked his right to counsel during questioning by officers from another county, was nevertheless charged with knowledge of the defendant's invocation of counsel rights and could not proceed with the interrogation unless the defendant initiated contact.⁷ A defendant's statements obtained in custodial interrogation after he invoked his right to counsel are not admissible when made to a second officer with alleged lack of knowledge of defendant's prior request for counsel.⁸

But, a suspect did not invoke his right to counsel under *Miranda* when he inquired if the detective thought he, the defendant, needed a lawyer.⁹

Following a defendant's oral waiver of *Miranda* rights, the defendant's refusal to sign a written waiver of *Miranda* rights and his attempts to condition his discussion of the victim upon receiving a promise of leniency did not invoke the defendant's right to counsel.¹⁰

Since defendant initiated the conversation leading to the confession, and knowingly and intelligently waived his right to counsel, there was no violation of his Fifth or Sixth Amendment rights, and videotaped confession was properly admitted.¹¹

The defendant's statement that he was "completely finished," was not an unequivocal assertion of his right to remain silent. A reasonable law enforcement officer would have understood the defendant to mean only that he had lost patience with the repeated and continued questions. Therefore, the court did not

⁵*Florida v. Powell*, 130 S. Ct. 1195 (2010).

⁶*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

⁷*Ashley v. State*, 261 Ga. 488, 405 S.E.2d 657 (1991).

⁸*State v. Jenkins*, 257 Ga. 741, 363 S.E.2d 551 (1988).

⁹*Byrd v. State*, 261 Ga. 202, 403 S.E.2d 38 (1991).

¹⁰*Williams v. State*, 258 Ga. 281, 368 S.E.2d 742 (1988).

¹¹*Mosher v. State*, 268 Ga. 555, 491 S.E.2d 348 (1997).

err in denying the defendant's motion to suppress the testimony.¹²

When a detective tells a defendant "anything you say in court can be used against you," a defendant's statement was correctly received where the accused was later properly read *Miranda* warnings before he confessed.¹³

Confessions made in violation of *Miranda* may be used to impeach.¹⁴ Involuntary confessions fall into a different category, however.¹⁵

A defendant's statements made after having been twice advised of his *Miranda* rights are voluntary.¹⁶ Both the Georgia Supreme Court and Georgia Court of Appeals have addressed a number of excepted circumstances in which a *Miranda* warning is not required.

An exception to *Miranda* applies to situations in which police officers ask questions that are prompted by a reasonable concern for public safety.¹⁷

Although officers may make initial on-the-scene inquiries without *Miranda* warnings to ascertain the nature of the situation at hand, they may not aim their questioning at obtaining information to establish a suspect's guilt.¹⁸

Miranda warnings are not a prerequisite to the admission of voluntary statements that are not made in response to any form of custodial questioning or interrogation. The term "interrogation" refers not only to express questioning, but also to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."¹⁹

For *Miranda* to apply, the interrogation must be for the purpose of obtaining evidence to establish defendant's guilt. Thus, where the officer came upon a crime scene, statements made to him by the defendant may be admissible as not falling within the *Miranda* rule.²⁰ Statements made to persons who are not law enforcement officers or agents, such as when a suspect converses with a

¹²Cheley v. State, 299 Ga. 88, 786 S.E.2d 642 (2016).

¹³LeMay v. State, 265 Ga. 73, 453 S.E.2d 737 (1995).

¹⁴Jones v. State, 265 Ga. 84, 453 S.E.2d 716 (1995).

¹⁵See § 27:5, *infra*.

¹⁶Graves v. State, 260 Ga. 779, 399 S.E.2d 922 (1991).

¹⁷Bowling v. State, 289 Ga. 881, 717 S.E.2d 190 (2011).

¹⁸Thompson v. State, 313 Ga. App. 844, 723 S.E.2d 85 (2012).

¹⁹Osei-Owusu v. State, 319 Ga. App. 33, 735 S.E.2d 75 (2012).

²⁰See Lebrun v. State, 255 Ga. 406, 339 S.E.2d 227 (1986); Perry v. State, 255 Ga. 490, 339 S.E.2d 922 (1986); Brogdon v. State, 255 Ga. 64, 335 S.E.2d 383 (1985); Hardeman v. State, 252 Ga. 286, 313 S.E.2d 95 (1984); Hudson v. State, 171 Ga. App. 181, 319 S.E.2d 28 (1984); Shy v. State,

private citizen, do not require *Miranda* warnings.²¹ Even when made to a witness who is not a state agent, however, a confession must be voluntary to be admissible for any purpose under O.C.G.A. § 24-8-824.²²

Miranda warnings are not required prior to necessary preliminary inquiries or with respect to voluntary statements not made in response to custodial interrogation.²³ In a murder case, evidence supported a finding that defendant was not subject to custodial interrogation when he gave his first two statements to a detective and thus *Miranda* warnings were not required. The record showed that when defendant voluntarily agreed to give his first statement, he was not a suspect, was not under arrest, and was free to leave, and the record showed that when defendant made the second statement four days later after the detective asked the defendant to clarify some points made in the previous interview, defendant was still considered to be only a witness at that time and was free to leave the police station at any time.²⁴

A murder defendant was not “in custody” for *Miranda* purposes in *Bowling v. State*.²⁵

The definition of what constitutes an interrogation derives from *Rhode Island v. Innis*.²⁶ Georgia addressed the issue in *State v. Brown*.²⁷ In the *Miranda* context, “interrogation” is defined as express questioning by law enforcement officers or its functional equivalent. Interrogation includes any words or action on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. Whether statements by law enforcement are reasonably likely to elicit an incriminating response, for *Miranda* purposes, focuses primarily upon the perceptions of the suspect, rather than the intent of the police. A law enforcement officer’s answers or deflection of direct questions from a suspect regarding what he would be charged

234 Ga. 816, 218 S.E.2d 599 (1975); *Munsford v. State*, 235 Ga. 38, 218 S.E.2d 792 (1975). *Perry v. State* is cited above as well as in § 6:11, *supra*. *Perry* was overruled on its hearsay law interpretations in 2009, but not on the *Miranda* point cited in this section, nor on the point cited in § 6:11, *supra*. *Character v. State*, 285 Ga. 112, 674 S.E.2d 280 (2009).

²¹See *Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982) (abrogated on other grounds by, *Jones v. State*, 261 Ga. 665, 409 S.E.2d 642 (1991)) (filmmaker who requested interview for purpose of making film on death

penalty).

²²*Griffin v. State*, 230 Ga. App. 318, 496 S.E.2d 480 (1998).

²³*Smith v. State*, 264 Ga. 857, 452 S.E.2d 494 (1995).

²⁴*Willoughby v. State*, 280 Ga. 176, 626 S.E.2d 112 (2006).

²⁵*Bowling v. State*, 289 Ga. 881, 717 S.E.2d 190 (2011).

²⁶*Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

²⁷*State v. Brown*, 287 Ga. 473, 697 S.E.2d 192 (2010).

with, when he could go home, whether he would be arrested, when he could use the phone, how the victim was doing, and where he would go next do not constitute “interrogation or its functional equivalent.”

In *Stevenson v. State*,²⁸ at the scene of an accident a driver made statements to a police detective. The Georgia Supreme Court deemed the statements to be voluntary and admissible: “The record reveals that Stevenson’s statement was voluntary, and was not made in response to police interrogation or while in police custody. Thus the trial court did not err in finding that no *Miranda* warnings were required before Stevenson made the statement.” Statements made in noncustodial circumstances do not require *Miranda* warnings.²⁹

Sometimes defendants claim that mental retardation or a mental defect tainted a confession. However, such claims have met with only limited success. In a 2005 case, defendant’s alleged mental illness did not invalidate his numerous voluntary confessions to police that described the murder of the victim. The defendant had a tenth grade education, he had obtained his general equivalency degree and had taken some college courses, and all of his statements were voluntary and were made after defendant had been read *Miranda* rights and had waived them.³⁰

Mere fact that the defendant was 21 years old with a sixth grade education does not lead to the conclusion that he was incapable of knowingly, voluntarily, and intelligently waiving his constitutional rights.³¹ An illiterate defendant’s confession was admissible where the police explained in everyday language the *Miranda* waiver signed by him before interrogation.³² Also, the defendant’s waiver of his *Miranda* rights was not made ineffective because he has a blood-alcohol level of .03.³³ Even when the defendant had an IQ of 85 and some brain dysfunction, this did not render ineffective his waiver of *Miranda* rights.³⁴

In a murder prosecution, even though the defendant claimed to be intoxicated, his confession was voluntary where there was nothing to indicate that defendant’s statements, even if made while intoxicated, were not the product of rational intellect and

²⁸*Stevenson v. State*, 264 Ga. 892, 453 S.E.2d 18 (1995).

²⁹See *Heckman v. State*, 276 Ga. 141, 576 S.E.2d 834 (2003).

³⁰*Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005). To similar effect, see *Barrett v. State*, 289 Ga. 197, 709 S.E.2d 816 (2011).

³¹*Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979).

³²*Livas v. State*, 255 Ga. 340, 338 S.E.2d 266 (1986).

³³*Cunningham v. State*, 255 Ga. 727, 342 S.E.2d 299 (1986). See also *Blackwell v. State*, 259 Ga. 810, 388 S.E.2d 515 (1990) (blood alcohol of 0.32 did not vitiate *Miranda* waiver and confession).

³⁴*Rogers v. State*, 256 Ga. 139, 344 S.E.2d 644 (1986).

free will. The defendant was read his *Miranda* rights and indicated he understood them, knew the police were investigating a death, consented to the interview, and came back for a follow-up interview almost 12 hours after the first and at that time was again reminded of his rights.³⁵

Cases litigating the admissibility of confessions and testing *Miranda* issues include *Moore v. State*.³⁶

For the necessity that counsel be present in court, see § 2:3, *supra*, and for the right to have counsel present at other phases of the proceeding, see § 1:2, *supra*.

Admission of custodial statements was error, and the Georgia Supreme Court reversed defendant's conviction in *Stone v. State*.³⁷ Defendant invoked his Sixth Amendment right to counsel at his initial appearance, such that his subsequent waiver of his Fifth Amendment rights during police initiated interrogation was ineffective, where defendant had filled out several forms indicating his desire to be represented and was in fact represented by counsel at the initial appearance. Once the Sixth Amendment right to counsel has attached and been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective.³⁸

Suspect request for counsel must be unequivocal, overruling *Hatcher v. State*.³⁹ However, where defendant clearly asserts right to counsel, questioning must stop.⁴⁰ *Vergara* further holds that neither investigator's lying nor trickery will automatically render a defendant's confession inadmissible. Once rights have been read and a defendant proceeds to answer questions, a long period of silence by him and refusal to answer some questions does not amount to assertions of the right to remain silent. In-

³⁵*Lewis v. State*, 298 Ga. 889, 785 S.E.2d 520 (2016).

³⁶*Moore v. State*, 263 Ga. 11, 427 S.E.2d 766 (1993) (even if the trial court erred by concluding that there had been a valid *Miranda* waiver it does not follow that the second statement [delivered over three weeks later] was so tainted by the first that it too should have been excluded); *Osborne v. State*, 263 Ga. 214, 430 S.E.2d 576 (1993) (*Miranda* warnings need not be repeated before resuming questioning the day after the initial administration of the warning, so long as defendant acknowledges that his her rights are still in effect); *Philmore v. State*, 263 Ga. 67, 428 S.E.2d 329 (1993) (defendant "gave a voluntary statement and made a knowing and

intelligent waiver of his *Miranda* rights" despite being under the influence of crack cocaine ingested an hour before being questioned by police).

³⁷*Stone v. State*, 296 Ga. App. 305, 674 S.E.2d 31 (2009).

³⁸With *Stone*, compare *Montejo v. Louisiana*, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (law enforcement can continue to seek waiver).

³⁹*Hatcher v. State*, 259 Ga. 274, 379 S.E.2d 775 (1989). See *Perez v. State*, 283 Ga. 196, 657 S.E.2d 846 (2008) (without clear request by accused, questioning may continue) (Carley, J.).

⁴⁰*Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

criminating statements after a period of quiet can be admissible, says the U.S. Supreme Court.⁴¹

A person being subjected to custodial interrogation may articulate a desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent.⁴² Here, a murder defendant's statement during custodial interrogation after being told that his estranged wife was dead that "I can't talk right now" was not an unequivocal assertion of his right to remain silent, and, thus, police were not required to stop interrogating defendant after he made the statement.

While, under *Miranda*, a "suspect who asks for a lawyer at any time during custodial interrogation may not be subjected to further questioning by law enforcement until an attorney has been made available or until the suspect reinitiates the conversation," Georgia law does not necessarily mandate the presence of counsel prior to and during questioning in all circumstances.⁴³

Defendant's statement during police questioning that "I can't go on answering these questions" was not an unambiguous and unequivocal assertion of the right to remain silent; defendant's statement expressed his internal conflict and pain in being asked to recount what had happened.⁴⁴

The activation of the *Miranda* right to counsel has long required a "clear and unequivocal" statement by the defendant that defendant desires counsel.⁴⁵ The Georgia Supreme Court has emphasized the defendant's need to clearly request counsel, and held that repeated questions by the accused concerning the need or right to an attorney did not cross this threshold of clarity, without a single direct statement that the defendant desires an attorney before answering any further questions. In *Reaves v. State*,⁴⁶ the Georgia Supreme Court stated: "[the defendant] asked about a lawyer on ten occasions, and three of her requests for a lawyer, she says, were unambiguous. The number of times that a suspect refers to a lawyer is not controlling."

Standards for admissibility of a defendant's oral statement is the same as for a confession, overruling *Carruthers v. State*,⁴⁷ and related cases. Also, nine-factor test for voluntariness of confes-

⁴¹*Berghuis v. Thompson*, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

⁴²*Weaver v. State*, 288 Ga. 540, 705 S.E.2d 627 (2011).

⁴³*Young v. State*, 309 Ga. 529, 847 S.E.2d 347 (2020).

⁴⁴*Williams v. State*, 290 Ga. 418, 721 S.E.2d 883 (2012).

⁴⁵*Davis v. U.S.*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

⁴⁶*Reaves v. State*, 292 Ga. 545, 739 S.E.2d 368 (2013).

⁴⁷*Carruthers v. State*, 272 Ga. 306, 528 S.E.2d 217 (2000).

sion applies only to confession of juvenile.⁴⁸

Can an officer testify that an accused stood on his Fifth Amendment rights when he was questioned?⁴⁹

§ 27:5 Voluntariness of confession

For the confession to be admissible it must be voluntary.¹ A prima facie showing the confession's voluntary nature must be made before it is admissible.² To meet this standard the prosecutor must show the confession was made without the slightest hope of benefit or remotest fear of injury, *Lemon v. State*,³ and that defendant confessed after having been given his *Miranda* rights.⁴ "Hope of benefit" construed in *State v. Roberts*.⁵ A reward of lighter punishment is generally the "hope of benefit" to which O.C.G.A. § 24-8-824 refers; encouraging a suspect to tell the truth does not constitute hope of benefit so as to render involuntary any statement made thereafter.⁶

In a 2015 case, an FBI Agent's representations to a murder

⁴⁸*Henley v. State*, 277 Ga. 818, 596 S.E.2d 578 (2004).

⁴⁹See *Bly v. State*, 286 Ga. App. 43, 648 S.E.2d 446 (2007), judgment rev'd on other grounds, 283 Ga. 453, 660 S.E.2d 713 (2008), holding it was error for court to allow police officer to testify that after *Miranda* warnings that the defendant responded to one of his follow-up questions by saying that he did not want to say any more and wanted to talk to his attorney.

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¹O.C.G.A. § 24-8-824. See *Pinkston v. State*, 353 Ga. App. 88, 834 S.E.2d 571 (2019).

²*Colbert v. State*, 124 Ga. App. 283, 183 S.E.2d 476 (1971).

³*Lemon v. State*, 80 Ga. App. 854, 57 S.E.2d 626 (1950).

⁴See *Tyler v. State*, 247 Ga. 119, 274 S.E.2d 549 (1981); *Wesley v. State*, 177 Ga. App. 877, 341 S.E.2d 507 (1986) (overruled on other grounds by, *Gilbert v. State*, 193 Ga. App. 283, 388 S.E.2d 18 (1989)); *Pruitt v. State*, 176 Ga. App. 317, 335 S.E.2d 724 (1985); *Stephens v. State*, 164 Ga. App. 398, 297 S.E.2d 90 (1982) (discusses "hope

of benefit" phraseology); *Rounds v. State*, 166 Ga. App. 212, 303 S.E.2d 543 (1983); *Moore v. State*, 179 Ga. App. 488, 347 S.E.2d 318 (1986); *Head v. State*, 180 Ga. App. 901, 350 S.E.2d 854 (1986).

⁵*State v. Roberts*, 273 Ga. 514, 543 S.E.2d 725 (2001) (overruled on other grounds by, *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008)), and *Taylor v. State*, 274 Ga. 269, 553 S.E.2d 598 (2001). Also see the following cases which set out actions which are not violations which destroy voluntariness: *Patrick v. State*, 169 Ga. App. 302, 312 S.E.2d 385 (1983), judgment aff'd, 252 Ga. 509, 314 S.E.2d 909 (1984); *Johnson v. State*, 170 Ga. App. 71, 316 S.E.2d 160 (1984); *Whittington v. State*, 252 Ga. 168, 313 S.E.2d 73 (1984); *Robinson v. State*, 180 Ga. App. 43, 348 S.E.2d 662 (1986), judgment rev'd on other grounds, 256 Ga. 564, 350 S.E.2d 464 (1986).

⁶*State v. Jackson*, 332 Ga. App. 356, 772 S.E.2d 804 (2015) (overruled on other grounds by, *State v. Andrade*, 298 Ga. 464, 782 S.E.2d 665 (2016)); *In Interest of J.L.*, 229 Ga. App. 447, 494 S.E.2d 274 (1997).

suspect violated O.C.G.A. § 24-8-824.⁷ In this case, the agent told the suspect that he was the leader of the murder investigation and that he would “keep the murder warrant off” defendant if the suspect spoke to law enforcement officers, that what he “cared most about was keeping [the suspect] out of jail,” and that “I’m the lead on the case, and as much as you do for me, . . . I will make sure nothing happens to you . . . I got you. Just come and do what I’m asking you to do.” These statements were considered a hope benefit, rendering the suspect’s statements inadmissible.

A confession otherwise admissible is not rendered inadmissible because an officer merely advised the accused that it is best to tell the truth⁸ or because officer stated he wanted to help the defendant.⁹ However, detective’s statement to defendant that his statement would be kept “confidential” barred its admission.¹⁰

Against the defendant’s claim that his statements were involuntary because they were induced by hope of benefit, the Georgia Supreme Court affirmed the conviction in a 2013 murder appeal.¹¹

In ruling on the admissibility of an in-custody statement, the trial court must look at the totality of the circumstances to decide whether the statement was made freely and voluntarily.¹²

Mere showing that one who confessed to crime may have suffered from some mental disability was not a sufficient basis upon which to exclude the statement.¹³ Mental disability did not prevent the accused from waiving *Miranda* rights in *Barrett v. State*:¹⁴ “The mere showing that a defendant who has confessed to a crime may have some mental disability is an insufficient basis upon which to exclude the defendant’s statement.”

At a *Jackson-Denno*, hearing the court rejected a challenge to a defendant’s waiver of *Miranda* rights based upon the defendant being high on ecstasy. The Supreme Court of Georgia affirmed, citing a case where the accused’s statement was deemed to be voluntary “even assuming the defendant had used crack cocaine an hour before his police interview.”¹⁵

The fact that the defendant had been drinking at the time he

⁷State v. Chulpayev, 296 Ga. 764, 770, 770 S.E.2d 808 (2015).

⁸McLeod v. State, 170 Ga. App. 415, 317 S.E.2d 253 (1984).

⁹Cooper v. State, 256 Ga. 234, 347 S.E.2d 553 (1986).

¹⁰Spence v. State, 281 Ga. 697, 642 S.E.2d 856 (2007).

¹¹Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013) (death penalty).

¹²Milnavicius v. State, 290 Ga. 374, 721 S.E.2d 843 (2012).

¹³Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977).

¹⁴Barrett v. State, 289 Ga. 197, 709 S.E.2d 816 (2011).

¹⁵Watkins v. State, 289 Ga. 359, 711 S.E.2d 655 (2011).

gave his statement will not preclude admissibility if the defendant is found coherent and rational so that statement is given knowingly and voluntarily.¹⁶ The intoxication of the accused does not automatically invalidate his or her waiver of *Miranda* rights or render inadmissible the accused's spontaneous statements to the police.¹⁷ In lieu of proof of coercion by law enforcement, the Georgia Supreme Court has held that a criminal defendant's voluntary intoxication does not render that defendant's statement to police involuntary.¹⁸

The fact that the appellant may have been a drug addict and undergoing withdrawal symptoms at the time of his confession would not, standing alone, compel a finding that the confession was involuntarily made.¹⁹ However, confessions made by an insane person are not deemed to be the product of a "rational intellect and a free will," and are not considered to be voluntarily made.²⁰

A defendant's mental condition at the time of the confession, as well as a psychiatrist's testimony and professional relationship with a defendant, was held to be immaterial in a Jackson-Denno hearing on voluntariness in the absence of a finding that there was police coercion in obtaining the confession or in obtaining the waiver of *Miranda* rights.²¹ Also, the fact that the confession was prompted by advice of a relative of the defendant does not make it involuntary.²²

The fact that a defendant is hospitalized, is undergoing treatment, is in pain, or is taking pain medication does not in and of itself, render any statement made involuntary.²³

What if the defendant was injured at the time he was taken into custody? May he be interrogated? Is any resulting confession deemed to be involuntary, and inadmissible? Does questioning a critically wounded prisoner violate his constitutional rights? The United States Supreme Court addressed this last question in

¹⁶*Pittman v. State*, 245 Ga. 453, 265 S.E.2d 592 (1980).

¹⁷*Stanley v. State*, 283 Ga. 36, 656 S.E.2d 806 (2008). See also *Blackwell v. State*, 259 Ga. 810, 388 S.E.2d 515 (1990) (defendant claimed he was too intoxicated to waive *Miranda* rights).

¹⁸*State v. Franklin*, 318 Ga. 39, 897 S.E.2d 432 (2024).

¹⁹*Fields v. State*, 232 Ga. 723, 208 S.E.2d 822 (1974); *Moses v. State*, 245 Ga. 180, 263 S.E.2d 916 (1980) (overruled on other grounds by, *Nagel v. State*, 262 Ga. 888, 427 S.E.2d 490

(1993)).

²⁰*State v. Gardner*, 254 Ga. 264, 328 S.E.2d 546 (1985). Contra, see *Nelms v. State*, 255 Ga. 473, 340 S.E.2d 1 (1986). See also *Cansler v. State*, 261 Ga. 693, 409 S.E.2d 504 (1991).

²¹*Rachals v. State*, 258 Ga. 48, 364 S.E.2d 867 (1988).

²²*Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980); *Cunningham v. State*, 248 Ga. 835, 286 S.E.2d 427 (1982).

²³*Rivera v. State*, 282 Ga. 355, 647 S.E.2d 70 (2007).

2003.²⁴ Questionable interrogation practices came up in the context of a constitutional tort suit. Martinez was injured during a scuffle which accompanied his arrest. One of the officers shot him several times, these shots blinded and paralyzed him. An ambulance arrived for Martinez. A patrol supervisor accompanied Martinez to the hospital and interrogated him while he was receiving emergency medical treatment. Although Martinez was never charged with a crime, Martinez filed suit complaining about the interrogation. He claimed that the supervisor's conduct violated his Fifth Amendment right to silence as well as his due process right to be free from coercive questioning. The Court ruled against Martinez, and held the supervisor's actions did not violate Martinez's constitutional rights and were not grounds for a § 1983 action. Police who conduct custodial interrogations of suspects without first administering the *Miranda* warnings are not alone thereby subject to suits for damages.

The admissibility of a confession which is challenged on the ground that it is not voluntary is a matter for the trial judge to determine in the first instance by hearing out of the presence of the jury.²⁵ Upon objection, a burden falls upon the prosecutor to establish voluntariness.²⁶ What is the measure of proof in carrying this burden? In earlier cases it was generally held that a confession was not admissible in evidence unless and until it was proved to the satisfaction of the court, without question or beyond a reasonable doubt, that it was freely and voluntarily made.²⁷ Ultimately, a preponderance burden was established. Now, the standard for determining admissibility of a confession is the preponderance of the evidence rule.²⁸

Under modern law, the state bears the burden of demonstrating by a preponderance of the evidence that a confession was voluntary.²⁹

In determining whether a confession is admissible in evidence as a voluntary confession, the trial court is necessarily vested with a wide discretion, which must be exercised with great care to the end that no injustice will result to either party.³⁰ To determine whether the State has proven that the confession was made voluntarily, the trial court must consider the totality of the

²⁴*Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003). *Lemon v. State*, 80 Ga. App. 854, 57 S.E.2d 626 (1950).

²⁵*Cardell v. State*, 119 Ga. App. 848, 168 S.E.2d 889 (1969).

²⁶*Maggard v. State*, 259 Ga. 291, 380 S.E.2d 259 (1989).

²⁷*McLemore v. State*, 181 Ga. 462, 182 S.E. 618, 102 A.L.R. 634 (1935);

²⁸*Fowler v. State*, 246 Ga. 256, 271 S.E.2d 168 (1980).

²⁹*Hill v. State*, 281 Ga. 795, 642 S.E.2d 64 (2007).

³⁰*Bryant v. State*, 191 Ga. 686, 13 S.E.2d 820 (1941).

circumstances.³¹ Where no proper and timely objection to the voluntariness of a confession is made, or no request for an examination as to its voluntariness is made, some cases say no preliminary examination or hearing is required with respect to such question, and the defendant cannot, upon an appeal, raise the issue that the court erred in failing to conduct such a preliminary examination.³² If the judge finds the confession was involuntary, it is inadmissible for any purpose.³³ A confession which is involuntary under O.C.G.A. § 24-8-824 may not be used as a prior inconsistent statement to impeach the credibility of an accused who takes the stand and testifies.³⁴ If the judge holds that the State met its burden of showing a *prima facie* case of voluntariness, the question then becomes one of fact for the jury.³⁵

The State cannot resort to imprisonment to compel the accused to answer questions that might incriminate him.³⁶ The following will result in the confession being ruled involuntary: promise of “collateral benefit,”³⁷ promise of not prosecuting the party, or threats of prosecution if no confession is forthcoming.³⁸

Whether there was a custodial situation can be critical. For example, a defendant’s statement to police at a police station was deemed to be a voluntary, noncustodial statement and was therefore admissible in the absence of *Miranda* warnings, even though the defendant was a suspect when he made the statement.³⁹ Threshold questioning does not often trigger the *Miranda* rule.⁴⁰

The defendant was not in custody for *Miranda* purposes when the officer asked him to step out of his vehicle, did not return his license, told him he could not drive in his condition and asked him to perform field sobriety tests, since the circumstances were

³¹*Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979).

³²*McLemore v. State*, 181 Ga. 462, 182 S.E. 618, 102 A.L.R. 634 (1935).

³³*Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

³⁴*State v. Ritter*, 268 Ga. 108, 485 S.E.2d 492 (1997).

³⁵*Doucet v. State*, 153 Ga. App. 775, 266 S.E.2d 554 (1980); *Myrick v. State*, 155 Ga. App. 496, 271 S.E.2d 637 (1980).

³⁶*Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

³⁷*Presnell v. State*, 241 Ga. 49,

243 S.E.2d 496 (1978), judgment rev’d in part on other grounds, 439 U.S. 14, 99 S. Ct. 235, 58 L. Ed. 2d 207 (1978).

³⁸*Goodwin v. State*, 45 Ga. App. 593, 165 S.E. 453 (1932); *Johnson v. State*, 76 Ga. 76, 1885 WL 2258 (1885). Also see *Dickey v. State*, 157 Ga. App. 13, 276 S.E.2d 75 (1981).

³⁹*Vaughn v. State*, 261 Ga. 686, 410 S.E.2d 108 (1991).

⁴⁰See *Jones v. State*, 278 Ga. App. 616, 629 S.E.2d 546 (2006), holding that initial police questions at a crime scene by an officer who was trying to determine why he had been called did not implicate *Miranda*.

more consistent with an ongoing investigation than an arrest.⁴¹

A suspect was held not to be in custody in a 2008 case. In determining whether a suspect is in custody, the question is whether a reasonable person in his situation would believe he was being restrained to the degree associated with a formal arrest. The bright-line rule of *Edwards v. Arizona*, requiring that all questioning cease after an accused has requested counsel, applies only to custodial interrogation; overruling *Nobles v. State*.⁴²

Statements made by a malice murder defendant to the investigating detective one month after the charged crimes were committed were admissible since the defendant was neither in custody nor the focus of the investigation at the time he made the statements so that *Miranda* warnings were not necessary; the defendant had made several telephone calls to police in which he alluded to his knowledge regarding the murder and suggested a time and location to meet the investigating officer in order to give a written statement.⁴³ In *Quedens v. State*,⁴⁴ a video interview with defendant three months after arrest was admissible where appellant initiated the interview.

In addition to the issue of whether the accused was confined in a custodial situation is the question of whether he is being interrogated. Defendant's surreptitiously recorded conversation with coparticipant in murder, after they were placed in back of patrol car, was not result of any custodial interrogation, and thus did not violate *Miranda*.⁴⁵

Interrogation is express questioning by officers or its functional equivalent.⁴⁶ Answering a defendant's questions after the time he invoked *Miranda* rights does not amount to questioning.

Spontaneous statements made during the course of travel due to extradition were admissible.⁴⁷

When a defendant makes a voluntary statement without being questioned or pressured by an interrogator, the statement is admissible even in the absence of *Miranda* warnings; a defendant's voluntary and spontaneous outburst not made in response

⁴¹Keller v. State, 286 Ga. App. 292, 648 S.E.2d 714 (2007).

⁴²Nobles v. State, 191 Ga. App. 594, 382 S.E.2d 637 (1989). See Petty v. State, 283 Ga. 268, 658 S.E.2d 599 (2008).

⁴³George v. State, 260 Ga. 809, 400 S.E.2d 911 (1991).

⁴⁴Quedens v. State, 280 Ga. 355, 629 S.E.2d 197 (2006).

⁴⁵Burgeson v. State, 267 Ga. 102, 475 S.E.2d 580 (1996).

⁴⁶Brown v. State, 288 Ga. 404, 703 S.E.2d 624 (2010) (quoting Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)).

⁴⁷Stokes v. State, 281 Ga. 825, 642 S.E.2d 82 (2007) (overruled on other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

to custodial questioning or interrogation is admissible at trial.⁴⁸ Similarly, in a sex-trafficking prosecution, the introduction of a manuscript in which the defendant described a “pimp” who abused women, and which was voluntarily created by the defendant, did not offend the Fifth Amendment.⁴⁹

Murder defendant’s statements to his father were admissible; father was permitted to question his son, even at the request of the sheriff, without violating the defendant’s *Miranda* rights or his right against self-incrimination, previously exercised when he was questioned by a sheriff’s investigator.⁵⁰

Where defendant’s son clarified words for him the Georgia Supreme Court held that defendant executed a valid waiver of *Miranda* after being advised of his rights with translation help from his son, and defendant did not unambiguously invoke right to counsel.⁵¹

Evidence supported conclusion that confession was knowingly and voluntarily made where defendant was read her *Miranda* rights, stated that she understood her rights, signed a waiver and did not invoke her right to have her lawyer present, where defendant initiated the interview in which she confessed, and where no evidence was introduced to show that her capacity was diminished at the time she confessed.⁵²

In *Edwards v. Arizona*,⁵³ the United States Supreme Court laid down a bright line rule: custodial interrogation of an accused must cease upon the accused’s invocation of the right to counsel.⁵⁴ Violation of *Edwards*, see *Taylor v. State*.⁵⁵ In *Gissendan v. State*,⁵⁶ custodial statements of the accused were suppressed because the defendant was interrogated after she invoked her right to counsel. Questioning of the suspect must cease if there is a request for counsel. However, if a defendant’s words do not amount to an unambiguous or unequivocal request for counsel,

⁴⁸*Velazquez v. State*, 282 Ga. 871, 655 S.E.2d 806 (2008). See also *Tennyson v. State*, 282 Ga. 92, 646 S.E.2d 219 (2007) (admission of post-*Miranda* spontaneous statements made during booking process by defendant who had declined to make a formal statement).

⁴⁹*United States v. Biancofiore*, 94 F.4th 651 (7th Cir. 2024), for additional opinion, see, 2024 WL 844168 (7th Cir. 2024).

⁵⁰*Buttersworth v. State*, 260 Ga. 795, 400 S.E.2d 908 (1991).

⁵¹*Nguyen v. State*, 273 Ga. 389,

543 S.E.2d 5 (2001). For interpreters and *Miranda*, see *Delacruz v. State*, 280 Ga. 392, 627 S.E.2d 579 (2006).

⁵²*Jones v. State*, 268 Ga. 896, 494 S.E.2d 645 (1998).

⁵³*Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

⁵⁴*Walton v. State*, 267 Ga. 713, 482 S.E.2d 330 (1997).

⁵⁵*Taylor v. State*, 274 Ga. 269, 553 S.E.2d 598 (2001).

⁵⁶*Gissendan v. State*, 269 Ga. 495, 500 S.E.2d 577 (1998).

the officers do not have an obligation to stop questioning.⁵⁷ After a suspect requested counsel, he then stated that although he understood he was entitled to have an attorney present while being questioned, he did not want one at that time, and that he wished his interrogation to continue without an attorney present. The Georgia Supreme Court held that “the record shows that Carter did not make an unequivocal invocation of his right to counsel during questioning, and the trial court did not err in admitting his custodial statement into evidence.”⁵⁸ Nor was such a clear invocation of counsel found where the accused stated at the start of custodial interrogation that he “probably should wait on [his] attorney.”⁵⁹

A significant gap in time between the first contact by police with a subject and a subsequent interview days or weeks later can vitiate an initial invocation of 6th Amendment rights. A break in custody for 14 days ends *Edwards* protection against interrogation after a suspect asserted his right to counsel at his initial interview.⁶⁰

Inculpatory statements of a defendant made after the administration of *Miranda* warnings may be introduced into evidence if the suspect waives his rights, or if he makes a spontaneous statement which is not the product of interrogation.⁶¹

Murder defendant’s inculpatory statement to police was knowing and voluntary; defendant voluntarily accompanied officers to police station for questioning, was read his rights immediately after he became a suspect, and was read his rights and signed written waiver immediately prior to giving a taped statement, was read his rights a third time at the beginning of his taped statement, indicated his understanding of those rights, was allowed to speak privately with his uncle during questioning, was not under influence of drugs or alcohol, and was not handcuffed or otherwise restrained prior to making the statement. Defendant’s claim of limited intellect was not supported by testimony of his expert witness.⁶²

The trial court did not abuse its discretion in denying the defendant’s motion to suppress the statement he made to police after they placed him in a patrol car and took him to the victim’s apartment to make sure he was the right suspect before placing him under arrest. Although persons should be apprised of their

⁵⁷*Roundtree v. State*, 270 Ga. 504, 511 S.E.2d 190 (1999).

⁵⁸*Carter v. State*, 269 Ga. 891, 506 S.E.2d 124 (1998).

⁵⁹*Roebuck v. State*, 276 Ga. 136, 575 S.E.2d 895 (2003).

⁶⁰*See Maryland v. Shatzer*, 130 S. Ct. 1213 (2010).

⁶¹*Metts v. State*, 270 Ga. 481, 511 S.E.2d 508 (1999).

⁶²*Boseman v. State*, 283 Ga. 355, 659 S.E.2d 364 (2008).

Miranda rights when formally arrested, a suspect in a criminal investigation is not automatically under arrest upon being placed in the back of a patrol car; rather, a suspect may be temporarily detained in this manner during the investigation without triggering the requirement that *Miranda* rights be given. Here, the officer testified unequivocally that defendant was not under arrest and that he was merely investigating an allegation that someone's car had been stolen.⁶³

Miranda is inapplicable to jail-monitored phone calls. Although the defendant is in custody, such conversation is not the product of an interrogation. Additionally, there is no 4th Amendment expectation of privacy where the prisoner has notice his calls may be recorded.⁶⁴

In *Dickerson v. U.S.*,⁶⁵ the United States Supreme court declined to overrule *Miranda*. In *U.S. v. Patane*,⁶⁶ physical items found as the result of a defendant's voluntary statement, which statement was given without *Miranda* warnings, are nonetheless admissible. Once rights have been read and a defendant proceeds to answer questions, a long period of silence by him and refusal to answer some questions does not amount to assertions of the right to remain silent. Incriminating statements after a lengthy period of quiet can be admissible, says the U.S. Supreme Court.⁶⁷

This section of the text has emphasized that a confession must be voluntary in order to be admissible, over objection. A confession to murder and arson met this test in a 2004 Georgia case. The defendant drove to sheriff's office and agreed to be interviewed, defendant executed *Miranda* waiver, defendant was 31 years old and of average intelligence, he was lucid, sober, and appeared to understand his rights, defendant was free to leave until he admitted that he had set fire that killed his children, and police officers never threatened defendant or made any promises.⁶⁸

Georgia police are not allowed to delay *Miranda* warnings until after they have secured a statement, holds *McDougal v. State*.⁶⁹ In similar fashion, the United States Supreme Court has held that when *Miranda* warnings are given mid-interrogation, after the accused has given an unwarned confession, they are

⁶³*Marshall v. State*, 286 Ga. App. (2004).
86, 648 S.E.2d 674 (2007).

⁶⁴*Preston v. State*, 282 Ga. 210,
647 S.E.2d 260 (2007).

⁶⁵*Dickerson v. U.S.*, 530 U.S. 428,
120 S. Ct. 2326, 147 L. Ed. 2d 405
(2000).

⁶⁶*U.S. v. Patane*, 542 U.S. 630,
124 S. Ct. 2620, 159 L. Ed. 2d 667

⁶⁷*Berghuis v. Thompkins*, 130 S.
Ct. 2250, 176 L. Ed. 2d 1098 (2010).

⁶⁸*Riley v. State*, 278 Ga. 677, 604
S.E.2d 488 (2004).

⁶⁹*McDougal v. State*, 277 Ga. 493,
591 S.E.2d 788 (2004) (clear request
for counsel must be honored).

ineffective.⁷⁰

§ 27:6 Determining admissibility of confession

When no objection is made to the confession, it is admissible without preliminary proof, but when objection is made, it is the duty of the court to receive such evidence as the parties may present concerning the circumstances under which the confession was made.¹ It is incumbent on the trial court to conduct a hearing as to the admissibility of the statement outside the presence of the jury.² In this hearing, the trial court must determine from preponderance of evidence whether the confession was freely and voluntarily given, after the confessor had been given *Miranda* warnings.³

At a *Jackson v. Denno* hearing, a trial court must determine whether a statement was freely and voluntarily made, based upon the totality of the circumstances.⁴ Use of trickery, as long as the means employed are not calculated to procure an untrue statement, does not render the confession inadmissible. However, in looking to the totality of the circumstances, the employment of deceit may result in the inadmissibility of a statement where the particular deception used has induced a party to confess. Thus, while an investigator's deception may not have been intended to procure an untrue statement, when the deception was intended and did induce defendant to confess in hope of receiving a lighter punishment, the confession is properly excluded.

Objections to a confession are frequently raised in a motion to suppress a confession made before trial. The proper procedure is to object to the confession before trial or, at the latest, when it is offered. This is sufficient to raise the issue and require a separate examination and determination of voluntariness.⁵ Defendant's objection to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are reliably determined (a *Jackson v. Denno* hearing). However, there is no constitutional requirement that the trial court conduct, sua sponte, a hearing on the voluntariness absent a contemporaneous challenge to the use of

⁷⁰*Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

[Section 27:6]

¹*Tucker v. State*, 91 Ga. App. 592, 86 S.E.2d 634 (1955).

²*Moody v. State*, 224 Ga. 301, 161 S.E.2d 856 (1968); *Cardell v. State*, 119 Ga. App. 848, 168 S.E.2d 889 (1969).

³*Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976); *State v. Ritter*, 268 Ga. 108, 485 S.E.2d 492 (1997); *O'Neal v. State*, 228 Ga. App. 162, 491 S.E.2d 216 (1997).

⁴*Grier v. State*, 273 Ga. 363, 541 S.E.2d 369 (2001).

⁵*Strickland v. State*, 226 Ga. 750, 177 S.E.2d 238 (1970).

the confession in evidence.⁶

In *Smith v. State*,⁷ the need to object by the defense in order to trigger the hearing requirement was observed: “First, we note that the lack of Jackson-Denno hearing with respect to Smith’s custodial statement did not make a mistrial necessary. Absent a proper objection to a statement’s admission, due process does not require a separate hearing as to the voluntariness of the statement.”

Statements made by a defendant when at the hospital were admissible when, at the *Jackson-Denno* hearing, the detective testified that at no point was the defendant told she was under arrest, that she could not leave, nor asked accusatory questions.⁸

Police assuring an individual that if he would tell the truth then he could go home and care for his elderly mother was merely an admonishment to tell the truth or else face arrest for hindering an investigation with no hope of benefit coming from that type of admonishment.⁹

Lapse of over 11 hours between *Miranda* warnings and defendant’s eventual confession did not taint the confession.¹⁰

Miranda issues will also be tested where a challenge along these lines is made. A 1990 case illustrates: a polygraph examiner does not have to reapprise a defendant of *Miranda* rights immediately before administering a polygraph test where the defendant had been apprised of his *Miranda* rights 24 hours earlier.¹¹

A trial court, upon hearing proof regarding the voluntariness of a confession, must make findings with respect to its ruling.¹² Remand was required where the judge held a Jackson-Denno hearing, but failed to make any rulings or findings on the record explaining his rationale for admitting a confession into evidence.¹³

Even where an arrest is unlawfully made inside a residence without a warrant, a subsequent statement made outside the residence need not be suppressed on federal constitutional grounds.¹⁴

Hearings to admit or exclude confessions were discussed in

⁶Hudson v. State, 250 Ga. 479, 299 S.E.2d 531 (1983); Elder v. State, 162 Ga. App. 425, 291 S.E.2d 565 (1982); Chadwick v. State, 221 Ga. 574, 146 S.E.2d 283 (1965).

⁷Smith v. State, 263 Ga. 782, 439 S.E.2d 483 (1994).

⁸Schutt v. State, 292 Ga. 625, 740 S.E.2d 163 (2013).

⁹Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013).

¹⁰Esposito v. State, 273 Ga. 183, 538 S.E.2d 55 (2000).

¹¹Newberry v. State, 260 Ga. 416, 395 S.E.2d 813 (1990).

¹²Parker v. State, 255 Ga. 167, 336 S.E.2d 242 (1985).

¹³Hicks v. State, 255 Ga. 503, 340 S.E.2d 604 (1986).

¹⁴Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007).

Chumley v. State.¹⁵ In determining the voluntariness and, consequently, the admissibility of a defendant's statement, the trial court addresses the issues outside the present of the jury and, if the statement is determined to be voluntary, it is admitted for the jury to make the ultimate determination as to its voluntariness and, thus, its probity as inculpatory evidence; having made the determination that a statement is voluntary, the trial court should simply admit it into evidence and not inform the jury of its ruling.¹⁶

The Georgia Supreme Court observed in *McDougal v. State*¹⁷ that on review of a trial court's ruling on a motion to suppress, the Supreme Court will uphold a trial court's findings as to disputed facts unless clearly erroneous. In this case the defense sought to suppress the defendant's statement to police. The police must advise a suspect in custody of his *Miranda* rights before interrogation; otherwise, the suspect's ensuing statement is generally inadmissible. A suspect who asks for a lawyer at any time during a custodial interrogation may not be subjected to further questioning by law enforcement until an attorney has been made available or until the suspect reinitiates the conversation. If the police persist in questioning a suspect who has requested that counsel be present, any resulting statements made by the suspect are inadmissible in the State's case-in-chief. There was held to be a violation of these rules in *McDougal*, and this resulted in suppression of a statement.

In the prior two sections of this text the impeachment use of flawed statements and confessions are reviewed. In § 27:5, *supra*, it is established that involuntary confessions may not be so used. However, the text in § 27:4, *supra*, makes the point that *Miranda*-tainted statements may nonetheless be employed by a prosecutor when cross-examining a defendant. In similar fashion a violation of right to counsel does not deprive a constitutionally defective and excluded statement taken from the accused from impeachment use. The U.S. Supreme Court explains in *Kansas v. Ventris*:¹⁸

Whether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated. Sometimes that explicitly mandates exclusion from trial, and sometimes it does not. The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced confession [involuntary confession] is introduced at trial, whether by way

¹⁵*Chumley v. State*, 282 Ga. 855, 591 S.E.2d 788 (2004).
655 S.E.2d 813 (2008).

¹⁶See O.C.G.A. § 17-8-57.

¹⁸*Kansas v. Ventris*, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009).

¹⁷*McDougal v. State*, 277 Ga. 493,

of impeachment of otherwise . . . on the other side of the scale, preventing impeachment use of statements taken in violation of *Massiah* [Sixth Amendment] would add little appreciable deterrence [to police misconduct].

Attention to “Georgia-specific” Evidence Code provisions is important in this realm. For instance, a violation of O.C.G.A. § 24-8-824, which invalidates confessions induced by the “slightest hope of benefit,” will disallow the use of a custodial statement for impeachment purposes. Under that statute, a “hope of benefit” means the hope of a lighter sentence.¹⁹

When a discovery violation led to the exclusion of a recorded confession, the state was still allowed to inquire about what the defendant said during the interview at trial.²⁰

For a form of a motion to suppress a confession, consult the Appendix of Forms in this text.²¹

§ 27:7 Corroboration of confession

A confession alone, uncorroborated by any other evidence, is not sufficient to authorize a conviction.¹ When there is a confession, however, which is corroborated by proof of a corpus delicti, a conviction is authorized.² The corroborating testimony need not, of itself, establish proof of guilt so long as it shows, beyond a reasonable doubt, that, taken with the confession, the crime was perpetrated by the accused.³ However, the amount of evidence necessary to corroborate a confession is left entirely within the provision of the jury, and corroboration in any material particular satisfies this requirement.⁴

A confession, freely and voluntarily made, is evidence of the highest character.⁵ In *Carswell*, the confession was supported by independent witnesses, evidence that the victim was killed in the same manner defendant described in his confession, and evidence of struggle and pursuit between killer and victim was consistent

¹⁹Babbitt v. State, 337 Ga. App. 553, 789 S.E.2d 205 (2016).

²⁰Fuller v. State, 320 Ga. App. 620, 740 S.E.2d 346 (2013).

²¹See Appendix C, Form 1.

[Section 27:7]

¹O.C.G.A. § 24-8-823. See also Baker v. State, 902 S.E.2d 645 (Ga. 2024).

²See Mobley v. State, 101 Ga. App. 317, 113 S.E.2d 654 (1960); Davis v. State, 211 Ga. 76, 84 S.E.2d 46 (1954).

³See Brown v. State, 98 Ga. App. 350, 105 S.E.2d 785 (1958).

⁴Reynolds v. State, 168 Ga. App. 555, 309 S.E.2d 867 (1983); Hargrove v. State, 289 Ga. App. 363, 657 S.E.2d 282 (2008) (confession authorizes a conviction when corroborated by proof of the corpus delicti); Casanova v. State, 285 Ga. App. 554, 646 S.E.2d 754 (2007) (corroboration in any material particular satisfies the requirements of the law).

⁵Carswell v. State, 268 Ga. 531, 491 S.E.2d 343 (1997).

with that described in defendant's confession.

Confession of defendant that he killed victim by shooting him in the back of the head after defendant attended a football game with victim was sufficiently corroborated, and thus the confession could support a conviction for malice murder.⁶

Evidence corroborating the confession included the contract signed by the victim's wife with defendant's fingerprints, discovery of the murder weapon and clothes and mask worn by defendant, and testimony that the murder weapon was purchased by the victim's wife was adequate so as to allow admission of the confession.⁷ Although an uncorroborated confession will not support a criminal conviction, in a civil case such as a forfeiture action, an out-of-court confession is an admission against interest, and its introduction into evidence makes out a prima facie case for the plaintiff.⁸

While O.C.G.A. § 24-8-823 requires corroboration of confessions, not all admissions of guilt constitute a confession. In a confession, the entire criminal act is confessed.⁹

A burglary defendant's pretrial statements either alone or together, did not constitute a confession requiring corroboration but rather were incriminating statements or admissions which could support his conviction.¹⁰

For distinctions between admissions, confessions, and incriminating statements, see § 27:1, *supra*.

§ 27:8 Confession by others

The confession of one joint offender or conspirator made after the enterprise is ended shall be admissible only against himself.¹ Evidence of a confession of a codefendant implicating another defendant cannot be admitted against the defendant at joint trial where the codefendant does not take stand and is not available for cross examination.² A conviction must be set aside when highly prejudicial testimony, such as a confession made by one codefendant who did not testify, was not excluded from evidence.³ The Eleventh Circuit Court of Appeals has therefore observed:

⁶Rogers v. State, 290 Ga. 401, 721 S.E.2d 864 (2012).

⁷Miller v. State, 268 Ga. 1, 485 S.E.2d 752 (1997).

⁸Hall v. State, 226 Ga. App. 486, 486 S.E.2d 710 (1997).

⁹Herrington v. State, 243 Ga. App. 265, 533 S.E.2d 133 (2000).

¹⁰Plumm v. State, 201 Ga. App. 154, 410 S.E.2d 352 (1991).

[Section 27:8]

¹See Bruton v. U.S., 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); Crowder v. State, 237 Ga. 141, 227 S.E.2d 230 (1976). Compare *contra*, Tatum v. State, 249 Ga. 422, 291 S.E.2d 701 (1982).

²Reddish v. State, 238 Ga. 136, 231 S.E.2d 737 (1977).

³Jacobs v. Hopper, 238 Ga. 461, 233 S.E.2d 169 (1977).

“The Confrontation Clause prohibits the admission of a non-testifying defendant’s confession if that confession directly inculcates another defendant.”⁴

In 2023, the United States Supreme Court revisited the *Bruton* rule in *Samia v. U.S.*,⁵ where the non-testifying co-defendant’s confession was redacted to remove direct reference to the accused:

The Confrontation Clause ensures that defendants have the opportunity to confront witnesses against them, but it does not provide a freestanding guarantee against the risk of potential prejudice that may arise inferentially in a joint trial. Here, the Clause was not violated by the admission of a nontestifying codefendant’s confession that did not directly inculcate the defendant and was subject to a proper limiting instruction.

In a joint trial of two or more defendants, the impact in Georgia of a cross-implicating confession is analyzed in R. Carlson, M. Carlson & W. Fleming, *Bruton v. United States: A Basic Guide for Georgia Trial Practitioners*, 27 *Verdict* 10, No 2 (Spring 2002). Among other observations, the point is made that the *Bruton* doctrine would seem to have little application to nonjury trials, since its main thrust is to avoid jury prejudice. In a bench trial of joint defendants, presumably a judge could receive and consider a cross-implicating confession against the confessing party, and ignore its implications for the nonconfessing defendant.⁶

Confessions are made after arrest. What about careless pre-trial statements made by one of two or more defendants. A declaration made by one conspirator “during the pendency of the criminal project” is admissible against other conspirators under O.C.G.A. § 24-8-801(d)(2)(E).

The rule barring free use of a cross-implicating confession in a joint trial has been set forth. Reversal will not always result from violation of the rule, however. It was error to admit the confession of a codefendant who did not testify, but the error was harmless considering the overwhelming evidence of guilt in *Short v. State*.⁷ Also, admission of a codefendant’s confession was not prejudicial to a defendant where all the statements referring to the

⁴United States v. Roberson, 998 F.3d 1237 (11th Cir. 2021).

⁵Samia v. United States, 599 U.S. 635, 143 S. Ct. 2004, 216 L. Ed. 2d 597 (2023).

⁶United States v. King, 910 F.3d 320 (7th Cir. 2018) (“we have held that the blanket rule of *Bruton* ‘is simply inapplicable’ [to bench trials]”); Johnson v. Tennis, 549 F.3d 296 (3d

Cir. 2008) (“We hold that the *Bruton* rule is inapplicable to the incriminating confession of a non-testifying codefendant in a joint bench trial.”); U.S. v. Cardenas, 9 F.3d 1139 (5th Cir. 1993) (“we thus agree with our sister circuits who have determined that *Bruton* is inapplicable to bench trials”).

⁷Short v. State, 256 Ga. 165, 345 S.E.2d 340 (1986).

defendant were edited out.⁸ If such a confession is redacted to eliminate any reference to the complaining defendant, it may be admissible. Also, an alleged *Bruton* violation is subject to scrutiny for harmless error.⁹

On the general rule that the confession of a defendant who does not testify at a joint trial cannot be used to support a codefendant's conviction unless the name of the nonconfessing defendant is redacted, see *Bacon v. State*.¹⁰

Even if the statement of a nontestifying codefendant has been redacted to replace the name of the defendant with a word or symbol, it nevertheless violates a defendant's right of confrontation to admit the statement into evidence when it obviously refers to the defendant and implicates him.¹¹ However, where the statement does not affirmatively implicate the defendant, his right of confrontation is not violated.¹²

Nontestifying codefendant's statement is admissible, with limiting instructions, if it is redacted to eliminate not only defendant's name, but any reference to his existence.¹³ The failure to provide a limiting instruction related to the introduction of a redacted, cross-inculpatory confession has been determined to represent error by the Supreme Court of Georgia.¹⁴

In *Lilly v. Virginia*,¹⁵ the United States Supreme Court held that a defendant's rights under the confrontation clause of Federal Constitution's Sixth Amendment were violated by the introduction at trial of an accomplice's confession which incriminated the defendant for murder. In *Lilly*, the defendant and two accomplices were arrested in Virginia in connection with several crimes, including the theft of liquor and guns and an abduction and murder. Under police questioning, one accomplice admitted to having committed some of the crimes, implicated the defendant in other crimes, and stated that the defendant shot the murder victim. The defendant was tried in state court, separately from his accomplices. At defendant's trial, one of his accomplices was called as a government witness. The accomplice invoked his privilege against self-incrimination under the Federal Constitution's Fifth Amendment, and the government then offered to introduce into evidence the statements the accomplice made to the police

⁸*Depree v. State*, 246 Ga. 240, 271 S.E.2d 155 (1980).

⁹*Gooch v. State*, 249 Ga. App. 643, 549 S.E.2d 724 (2001).

¹⁰*Bacon v. State*, 267 Ga. 325, 477 S.E.2d 122 (1996).

¹¹*Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998).

¹²*Butler v. State*, 270 Ga. 441, 511 S.E.2d 180 (1999).

¹³*White v. State*, 270 Ga. 804, 514 S.E.2d 14 (1999).

¹⁴*Henderson v. State*, 317 Ga. 66, 891 S.E.2d 884 (2023).

¹⁵*Lilly v. Virginia*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117, 51 Fed. R. Evid. Serv. 645 (1999).

after his arrest, arguing that the statements were admissible as declarations of an unavailable witness against penal interest. The defendant objected on the ground that the statements were not actually against the accomplice's penal interest, and that their admission would violate the confrontation clause of the Federal Constitution's Sixth Amendment. The trial judge overruled the objection and admitted the tape recordings and written transcripts of the statements in their entirety. The jury found the accused guilty of several crimes, including capital murder, as to which the trial judge followed the jury's recommendation of a death sentence. The United States Supreme Court reversed. It held that the defendant's Sixth Amendment right to be confronted with the witnesses against him was violated by the admission into evidence of the nontestifying accomplice's confession.

This rule can also cut against the defendant as the court can properly exclude as hearsay the confession of the defendant's partner in crime, which the defendant wishes to introduce in order to clear himself.¹⁶

Some older Georgia cases held that confessions by third persons exonerating the accused are not admissible as hearsay. However, the United States Supreme Court intervened in this dispute. In *Green v. Georgia*,¹⁷ the Court held that Georgia was in error in rejecting such third-party confessions.

The rule followed by authorities addressing this question prior to the 1970s was that a confession by a third person that he committed the crime which the defendant is charged with having committed, even though it is made in expectation of imminent death or by a person jointly indicted with the accused, is not admissible as substantive evidence tending to exculpate the accused unless it constituted a part of the *res gestae*.¹⁸

Against these cases, however, consider *Chambers v. Mississippi*,¹⁹ set forth in the declarations against interest section, § 25:32, *supra*. As noted there, the law continues to evolve, with cases on both sides of the debate. Several decisions in the last decade have rejected confessions or exonerating statements authored by third persons when those statements were offered by the defense to help the accused. This may change as a result of O.C.G.A. § 24-8-804(b)(3) (effective Jan. 1, 2013).²⁰

A 2004 United States Supreme Court case bears upon confes-

¹⁶*Davis v. State*, 255 Ga. 598, 340 Ga. 388, 133 S.E.2d 596 (1963).
S.E.2d 869 (1986).

¹⁷*Green v. Georgia*, 442 U.S. 95, U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).
99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

¹⁸*Bryant v. State*, 197 Ga. 641, 30 S.E.2d 259 (1944); *Cobb v. State*, 219

²⁰See § 25:32, *supra*.

sions or statements by A which incriminate B. Upon B's trial, the decision supports the exclusion of A's statement even when it (A's statement) implicates A in wrongdoing as well as B, and stands as a declaration against A's interests. In *Crawford v. Washington*,²¹ a conviction was overturned because a declaration against interest was used by the state and the declaration had not been cross-examined. The out-of-court declarant was the wife of Michael Crawford, who had tried to kill a man. After Michael's arrest, she was interrogated. In her statement to police she implicated herself and her husband in the attempted killing. At trial, she did not testify because of the marital privilege. Finding the witness unavailable, the Washington courts allowed her recorded hearsay statement into evidence, under Evidence Rule 804(b)(3) (statement against interest). Justice Scalia reversed. The reason: this Rule 804(b)(3) declaration had not been cross-examined. This cross-examination requirement comes from the confrontation clause of the U.S. Constitution, which requires cross-examination of accusers. It applies to statements by witnesses which are made to police and which are testimonial—that is, statements a declarant “would reasonably expect to be used prosecutorially.” Accomplice confessions to police have long been closely scrutinized and looked upon harshly by the Court. The Rule 804(b)(3) declaration in *Crawford* is one of these. Perhaps it is no surprise that the Court requires cross-examination of such declarations, as opposed to a trial court simply finding the statement to be “reliable,” and admitting it.

Key to this analysis is that the statements at issue in *Crawford* were “testimonial” and, thus, barred by the Sixth Amendment.²² Declarations against interest under Fed. R. Evid. 804(b)(3) to nonlaw enforcement officers and have the potential to be admissible.²³

Following *Crawford*, the Supreme Court has demonstrated its willingness to enforce the cross-examination requirement in criminal cases coming from state courts.²⁴

Of course, where the codefendant testifies and is cross-

²¹*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

²²See *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

²³See *U.S. v. Watson*, 525 F.3d 583, 76 Fed. R. Evid. Serv. 594 (7th

Cir. 2008).

²⁴See *Prasertphong v. Arizona*, 541 U.S. 1039, 124 S. Ct. 2165, 158 L. Ed. 2d 727 (2004) (codefendant's statements admitted to convict defendant; defendant's certiorari petition granted, and judgment below vacated and remanded for reconsideration in light of *Crawford*).

examined, complaints under *Bruton* or *Crawford* are blunted.²⁵

Nor is *Bruton* violated when the confession of one defendant does not blame or implicate his co-defendant. A *Bruton* violation of defendant's right to confront witnesses occurs when a co-defendant's confession or statement inculcating the defendant is considered by the jury as evidence against the defendant, who was not a party to the confession; however, the *Bruton* rule is not applicable where the confession of the non-testifying accomplice does not on its face implicate the criminal participation of his co-defendant.²⁶

Confrontation Clause rights were violated when co-defendant who was granted immunity refused to testify and was asked leading questions which incriminated the defendant on trial: "[co-defendant] could not be cross-examined on a statement imputed to but not admitted by him." However, the error was held harmless.²⁷

Referencing *Crawford* and *Bruton* in the same context, Justice Nahmias of the Georgia Supreme Court observed that the *Bruton* rule does not apply to nontestimonial, out-of-court statements.²⁸

Other cases on *Bruton*, see *Polite v. State*.²⁹

In *Zachery v. State*,³⁰ evidence of a co-defendant's guilty plea was not admissible in evidence.

§ 27:9 Use of entire statement

If a confession is admissible, the accused is entitled to request and have the entire conversation admitted in evidence. This includes any exculpatory or self-serving declarations made by him in connection with his confession.¹

This is consistent with the general approach of the rule of completeness, that when a portion of a writing is given in evidence by the proponent of a document, the opposing party can cause admission of the remainder that is relevant to the admit-

²⁵See, e.g., *Napier v. State*, 276 Ga. 769, 583 S.E.2d 825 (2003) (*Bruton* not violated).

²⁶*Sampson v. State*, 279 Ga. 8, 608 S.E.2d 621 (2005). The *Sampson* rule was followed in *Watkins v. State*, 285 Ga. 107, 674 S.E.2d 275 (2009).

²⁷*Horne v. State*, 281 Ga. 799, 642 S.E.2d 659 (2007).

²⁸*Billings v. State*, 293 Ga. 99, 745 S.E.2d 583 (2013).

²⁹*Polite v. State*, 273 Ga. App. 235, 614 S.E.2d 849 (2005); *Hanker-*

son v. State, 275 Ga. App. 545, 621 S.E.2d 772 (2005); *Davis v. State*, 275 Ga. App. 714, 621 S.E.2d 818 (2005); *Burns v. State*, 280 Ga. 24, 622 S.E.2d 352 (2005).

³⁰*Zachery v. State*, 276 Ga. App. 688, 624 S.E.2d 265 (2005).

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¹Am. Jur. 2d, Evidence § 535; O.C.G.A. § 24-8-822; *Long v. State*, 22 Ga. 40, 1857 WL 1774 (1857); *Peterson v. State*, 47 Ga. 524, 1873 WL 2336 (1873).

ted portion.²

Although defendant's statement was exculpatory insofar as he denied being the actual gunman, it was inculpatory of his guilt as a party to the crimes, and therefore the entirety of the statement was admissible.³

Conversely, on the right of the prosecution to display everything in a confession, see *Cunningham v. State*,⁴ where the Georgia Supreme Court held that a statement in defendant's taped confession to police that in the hours leading up to the murder offense he purchased crack cocaine, bought and sold pills in order to purchase more cocaine, then sold some of the crack cocaine he had purchased to the victim and smoked it with the victim, were admissible in a murder prosecution as an integral part of criminal confession; statements were not rendered inadmissible even if language used in the confession indicated that defendant committed other separate offenses.

²See Fed. R. Evid. 106. See also *United States v. Santos*, 947 F.3d 711, 111 Fed. R. Evid. Serv. 336 (11th Cir. 2020); *Lopez v. Delta International Machinery Corporation*, 312 F. Supp. 3d 1115 (D.N.M. 2018), *aff'd*, 764 Fed.

Appx. 703 (10th Cir. 2019).

³*Washington v. State*, 268 Ga. 598, 492 S.E.2d 197 (1997).

⁴*Cunningham v. State*, 279 Ga. 694, 620 S.E.2d 374 (2005).

Chapter 28

Illegally Obtained Evidence

- § 28:1 Prohibition against illegal searches and seizures
- § 28:2 Seizures of persons
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- § 28:17 Arrests and searches based upon an informant's tip
- § 28:18 Eavesdropping and other electronically obtained evidence
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- § 28:20 Mandatory taking of DNA samples

§ 28:1 Prohibition against illegal searches and seizures¹

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

[Section 28:1]

¹This chapter borrows extensively from *Cook's Field Guide to Prosecution in Georgia*, self-published by

University of Georgia School of Law Professor Alan A. Cook. See <https://sites.google.com/view/cooksfieldguide>.

place to be searched, and the persons or things to be seized.²

Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions of privacy wrought by “general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.”³ The Fourth Amendment does not, however, create a “general right to privacy.”⁴

The states are subject to the prohibition against unreasonable searches and seizures contained in the Fourth Amendment of the United States Constitution, but the states have the power to impose higher standards on searches and seizures than required by the Federal Constitution if they choose to do so.⁵ Georgia, however, has not chosen to do so.⁶

Evidence obtained through an illegal search and seizure may be suppressed and held inadmissible in state prosecutions under both federal and state law.⁷

In determining the validity of a search or seizure, a court will look at the totality of the circumstances immediately preceding the search or seizure.⁸ In so doing, a court will be ever mindful that the touchstone of the Fourth Amendment is reasonableness.⁹ Before a court will address the reasonableness of a particular search or seizure, however, it must first determine whether a “search” or “seizure” as defined by the Fourth Amendment has taken place. As will be seen below, these terms have special meaning as they relate to the right of the people to be secure in

²The Constitution of the State of Georgia contains an almost identical search and seizure provision. See Georgia Constitution Article 1, § 1, Paragraph 13.

³*Chimel v. California*, 395 U.S. 752, 761, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

⁴*Katz v. U.S.*, 389 U.S. 347, 350-351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Reese v. State*, 317 Ga. 189, 201, 891 S.E.2d 835 (2023).

⁵*Cooper v. State of Cal.*, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967). See also *Creamer v. State*, 229 Ga. 511, 515(3), 192 S.E.2d 350 (1972).

⁶See *Mobley v. State*, 307 Ga. 59, fn.5, 834 S.E.2d 785 (2019) (suggesting that Georgia’s constitutional search and seizure provision is coex-

tensive with the Fourth Amendment and provides no greater protection against unreasonable searches and seizures).

⁷*Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio L. Abs. 513, 84 A.L.R.2d 933 (1961); *Raif v. State*, 109 Ga. App. 354, 361(1), 136 S.E.2d 169 (1964) (acknowledging the applicability of the federal Exclusionary Rule in state criminal prosecutions).

⁸*U.S. v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002).

⁹*Florida v. Jimeno*, 500 U.S. 248, 250, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991); *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L. Ed. 2d 347, 148 A.L.R. Fed. 739 (1996).

their “persons, houses, papers, and effects.”

Fourth Amendment “searches” and “seizures” may take place in a wide variety of circumstances. The protections of the Fourth Amendment, however, only apply against searches and seizures conducted by government officers and agents—typically police officers—not those by private citizens.¹⁰

§ 28:2 Seizures of persons

Not every encounter between a police officer and a citizen invokes the protections of the Fourth Amendment. Encounters between police officers and citizens come in three varieties (or “tiers”): (1) encounters involving no coercion or detention, which are outside the purview of the Fourth Amendment altogether; (2) brief seizures, which require a police officer to have a reasonable suspicion of criminal wrongdoing; and (3) custodial arrests, which require probable cause.¹

(a) First Tier Encounters.

In a First Tier encounter between a police officer and a citizen, such person is not considered to be “seized” for Fourth Amendment purposes.² Thus, in a First Tier encounter, a police officer may approach a citizen, ask for identification, ask for consent to search, and otherwise freely question the citizen without any basis or belief of criminal activity so long as the officer does not detain the citizen or convey the message that the citizen may not leave.³

(b) Second Tier Encounters.

In *Terry v. Ohio*,⁴ the Supreme Court created the so-called Second Tier (or “investigative detention”) which authorizes a police officer to seize (detain) a person for investigative purposes provided that he has “reasonable suspicion” to believe that the person has committed, is committing, or is about to commit a crime.

“Reasonable suspicion” is more than an unparticularized suspicion or hunch, but less than probable cause.⁵ To meet this

¹⁰*Burdeau v. McDowell*, 256 U.S. 465, 475(1), 41 S. Ct. 574, 65 L. Ed. 1048, 13 A.L.R. 1159 (1921).

[Section 28:2]

¹*Johnson v. State*, 363 Ga. App. 12(1), 869 S.E.2d 177 (2022).

²*U.S. v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *Hilbun v. State*, 313 Ga. App.

457, 721 S.E.2d 656 (2011).

³*Baggett v. State*, 367 Ga. App. 851, 856, 888 S.E.2d 636 (2023).

⁴*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

⁵*Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *U.S. v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989); *Stafford v. State*, 284 Ga. 773, 774, 671

reasonable suspicion standard, a police officer must have a particularized and objective basis for suspecting the person is involved in criminal activity.⁶ An officer's reasonable suspicions need not, however, rule out the possibility of innocent conduct.⁷

A police officer's reasonable suspicion determination may be premised upon reasonably trustworthy hearsay.⁸ Possible sources of hearsay justifying a Second Tier encounter include information from fellow officers,⁹ concerned citizens,¹⁰ confidential informants,¹¹ and anonymous tipsters.¹²

A police-citizen encounter escalates from a First Tier consensual interaction to a Second Tier investigatory detention only when the individual is "seized" by the officer, i.e., only when the officer by means of physical force or show of authority has in some way restrained the liberty of the individual.¹³

A Fourth Amendment "seizure" of a person only occurs when a reasonable person in the citizen's situation would not feel free "to disregard the police and go about his business."¹⁴ Because this is an objective inquiry, a court will not view a police-citizen encounter from the perspective of a nervous or fearful criminal, but rather from that of a law-abiding, innocent citizen.¹⁵

A person is not "seized," however, until: (1) he submits to a show of police authority, or (2) he is under the physical control of police.¹⁶

(c) Third Tier Encounters

A police-citizen encounter escalates from a Second Tier encounter to a Third Tier encounter when a person is formally

S.E.2d 484 (2008) (reasonable suspicion is less than probable cause, but greater than mere caprice).

⁶U.S. v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002); Interest of C. B., 353 Ga. App. 383, 384, 837 S.E.2d 544 (2020).

⁷Baggett v. State, 367 Ga. App. 851, 856, 888 S.E.2d 636 (2023); State v. Walker, 350 Ga. App. 168(2)(a), 828 S.E.2d 402 (2019).

⁸Adams v. Williams, 407 U.S. 143, 147-148, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); Johnson v. State, 363 Ga. App. 12(1), 869 S.E.2d 177 (2022).

⁹Illinois v. Andreas, 463 U.S. 765, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983); Watson v. State, 365 Ga. App. 113(2)(b), 877 S.E.2d 678 (2022).

¹⁰Chambers v. Maroney, 399 U.S.

42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); Johnson v. State, 363 Ga. App. 12(1), 869 S.E.2d 177 (2022).

¹¹Adams v. Williams, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

¹²Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990).

¹³Johnson v. State, 363 Ga. App. 12(1), 869 S.E.2d 177 (2022).

¹⁴Florida v. Bostick, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

¹⁵Florida v. Bostick, 501 U.S. 429, 437-438, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

¹⁶California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991).

arrested or restrained to a degree associated with a formal arrest. The latter is an objective inquiry with the question being whether a reasonable person in the suspect's position would have thought that his detention would not be temporary.¹⁷

A Third Tier encounter or “arrest” must be justified by probable cause. The facts necessary to establish probable cause for arrest are much less than those required to prove guilt beyond a reasonable doubt at trial; the test merely requires a probability—less than a certainty but more than a mere suspicion or possibility.¹⁸

Probable cause to justify an arrest means facts and circumstances within an officer's knowledge—including trustworthy hearsay—that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.¹⁹

§ 28:3 Searches of persons

A Fourth Amendment “search” of a person occurs when the conduct of a government officer or agent intrudes upon a person's “reasonable expectations of privacy” in his body (or the papers and effects that he carries on or about his body). In *Katz v. U.S.*,¹ the Supreme Court held that in order for a person to establish that he had a “reasonable expectation of privacy” in a given circumstance, he must show two things: (1) that he had an actual, subjective expectation of privacy, and (2) that his subjective expectation of privacy was one that society is willing to recognize as reasonable.²

In accordance with the criteria established in *Katz*, a police officer may only lawfully search a person's body under the Fourth Amendment in a few narrowly defined circumstances. These circumstances are described below.

¹⁷*Lopez-Lopez v. State*, 367 Ga. App. 834, 838, 888 S.E.2d 631 (2023); *State v. Bizzard*, 357 Ga. App. 339(1), 850 S.E.2d 775 (2020).

¹⁸*Murphy v. State*, 286 Ga. App. 447, 448, 649 S.E.2d 565 (2007).

¹⁹*Beck v. State of Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Brinegar v. U.S.*, 338 U.S. 160, 175-176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); *Draper v. U.S.*, 358 U.S. 307, 313, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959)

(citing *Carroll v. U.S.*, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790 (1925)); *State v. Bizzard*, 357 Ga. App. 339(1), 850 S.E.2d 775 (2020).

[Section 28:3]

¹*Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

²*Katz v. U.S.*, 389 U.S. 347, 360-61, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Justice Harlan's concurrence).

(a) Search Warrants.³**(b) Consent Searches.**

It is well settled that a valid consent to a search eliminates the need for reasonable suspicion, probable cause, or a search warrant. To justify a warrantless search on the grounds of consent, however, the State has the burden of proving that the consent was freely and voluntarily given under the totality of the circumstances.⁴

Whether a consent to search is in fact “voluntary” (or the product of duress or coercion, express or implied) is a question of fact to be determined from the totality of the circumstances.⁵ Mere acquiescence to the authority asserted by a police officer, however, cannot substitute for free consent.⁶

(c) Terry Frisks

In *Terry v. Ohio*,⁷ the Supreme Court authorized a limited warrantless pat down of a person’s outer clothing during a Second Tier investigative detention—a so-called “*Terry* frisk”—to detect the presence of weapons. A *Terry* frisk is not authorized, however, merely to discover contraband or evidence (of illegal conduct).⁸

A police officer may conduct a *Terry* frisk to discover weapons if he has reasonable suspicion to believe that a person is armed and dangerous.⁹ Before such a search is permitted, however, the Second Tier investigatory stop itself must have been lawful.¹⁰

(d) Searches Incident to Arrest

Warrantless “searches incident to arrest” have also been held to pass constitutional muster provided that the Third Tier arrest

³See § 28:14, *infra*.

⁴*Cruz v. State*, 366 Ga. App. 183(1), 881 S.E.2d 27 (2022); *Winslow v. State*, 315 Ga. 133(2), 880 S.E.2d 530 (2022); *Evans v. State*, 308 Ga. 582(3)(b), 842 S.E.2d 837 (2020).

⁵*Ohio v. Robinette*, 519 U.S. 33, 40, 117 S. Ct. 417, 136 L. Ed. 2d 347, 148 A.L.R. Fed. 739 (1996); *Womack v. State*, 355 Ga. App. 804(1)(a), 845 S.E.2d 747 (2020).

⁶*State v. Turner*, 304 Ga. 356, 359, 818 S.E.2d 589 (2018); *State v. Young*, 339 Ga. App. 306, 311, 793 S.E.2d 186 (2016).

⁷*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

⁸*Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968); *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); *Brown v. State*, 181 Ga. App. 768(1)(a), 353 S.E.2d 572 (1987) (a search exceeding the purpose of a frisk would be constitutionally unreasonable and any evidence obtained thereby must be excluded).

⁹*Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Robusto*, 348 Ga. App. 579, 583, 824 S.E.2d 37 (2019).

¹⁰*Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Ramsey v. State*, 306 Ga. App. 726, 728, 703 S.E.2d 339 (2010).

itself was lawful.¹¹ A warrantless search incident to arrest is deemed constitutionally reasonable (1) to protect the arresting officer from readily accessible weapons, and (2) to prevent the destruction of evidence.¹²

Pursuant to this warrant exception, a police officer may conduct a warrantless search of (1) the arrestee's person, and (2) the area within the arrestee's immediate control.¹³ The area within an arrestee's immediate control is sometimes called "the lunging distance," i.e., the area from which the arrestee might readily gain access to a weapon or destructible evidence.¹⁴ It is not mandatory that the search occur after the arrest. Pre-arrest searches are permissible provided there was probable cause to arrest at the time the search was conducted.¹⁵

The mere fact of a lawful arrest justifies a full search of the person from head to toe - including any containers in his possession or within his immediate control. During such search, a police officer may seize any contraband discovered whether related to the reason for the arrest or not.¹⁶

In *Riley v. California*,¹⁷ however, the Supreme Court held that a police officer may no longer search the digital content of a cell phone seized pursuant to a search incident to arrest. In so ruling, *Riley* recognized the privacy distinctions between a cell phone's digital media and the contents of traditional containers like wallets and purses. After *Riley*, a search warrant will typically be required to access such data.

For many years, a police officer was authorized to search the passenger compartment of an automobile upon the arrest of its driver or one of its passengers.¹⁸ In *Arizona v. Gant*,¹⁹ however, the Supreme Court disavowed the so-called "Belton Rule" and held that a police officer may no longer routinely search the pas-

¹¹*Trammell v. State*, 357 Ga. App. 848, 852, 851 S.E.2d 834 (2020). 2d 685 (1969).

¹²*U.S. v. Edwards*, 415 U.S. 800, 802-803, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974); *Preston v. U.S.*, 376 U.S. 364, 367, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964).

¹³*Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *U.S. v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973) (including misdemeanor offenses); O.C.G.A. § 17-5-1(a); *State v. McCloud*, 344 Ga. App. 595, 598, 810 S.E.2d 668 (2018).

¹⁴*Chimel v. California*, 395 U.S. 752, 762-763, 89 S. Ct. 2034, 23 L. Ed.

¹⁵*Caffee v. State*, 303 Ga. 557, 562, 814 S.E.2d 386 (2018).

¹⁶O.C.G.A. § 17-5-1(b); *U.S. v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); *Gustafson v. Florida*, 414 U.S. 260, 266, 94 S. Ct. 488, 38 L. Ed. 2d 456 (1973).

¹⁷*Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

¹⁸*New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

¹⁹*Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 47 A.L.R. Fed. 2d 657 (2009).

senger compartment of an automobile incident to such arrests.

(e) Exigent Circumstances.²⁰

§ 28:4 Searches of places

For almost four decades in the 20th Century following its decision in *Olmstead v. U.S.*,¹ the U.S. Supreme Court defined a Fourth Amendment “search” of a place as a physical intrusion or trespass by a government officer or agent upon a constitutionally protected area.² In its 1967 decision in *Katz v. U.S.*,³ however, the Supreme Court redefined Fourth Amendment “searches” of places as conduct by a government officer or agent that intrudes upon a person’s “reasonable expectations of privacy” in a given place, e.g., his home, his automobile, or his business.

In *Katz*, the Supreme Court held that in order for a person to establish that he had a “reasonable expectation of privacy” in a given place, he must show two things: (1) that he had an actual, subjective expectation of privacy in the place searched; and (2) that his subjective expectation of privacy in that place was one that society is willing to recognize as reasonable.⁴

Under *Katz*, not every subjective expectation of privacy will be deemed reasonable. Courts must decide whether an expectation of privacy is reasonable for Fourth Amendment purposes on a case-by-case basis (unless such expectation has already been recognized by binding precedent).⁵ The Supreme Court has recognized that reasonable expectations of privacy are established by “societal values” and “societal expectations.”⁶

The Supreme Court has further recognized that a person’s reasonable expectations of privacy are greatest in his home.⁷ And importantly, Supreme Court precedents have regarded the area immediately surrounding and associated with the home—the so-called “curtilage”—as part of the home itself for Fourth Amend-

²⁰See § 28:10, *infra*.

[Section 28:4]

¹*Olmstead v. U.S.*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376 (1928).

²*Olmstead v. U.S.*, 277 U.S. 438, 457, 464-465, 48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376 (1928); *Katz v. U.S.*, 389 U.S. 347, 349-351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

³*Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

⁴*Katz v. U.S.*, 389 U.S. 347, 360, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)

(Harlan, J., concurring).

⁵*O’Connor v. Ortega*, 480 U.S. 709, 718, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).

⁶*Oliver v. U.S.*, 466 U.S. 170, 183, fn.8, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).

⁷*Silverman v. U.S.*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734, 97 A.L.R.2d 1277 (1961) (“[W]hen it comes to the Fourth Amendment, the home is first among equals.”); *State v. Davis*, 356 Ga. App. 769(1), 849 S.E.2d 207 (2020).

ment purposes.⁸

The Supreme Court has identified several recurring factual scenarios, however, in which a person lacks a reasonable expectation of privacy in his property. Among these are the following: abandonment,⁹ open fields,¹⁰ public places,¹¹ public vantage point,¹² semi-private areas,¹³ and plain view.¹⁴

The Supreme Court has also recognized that under the so-called “Third Party Doctrine,” a person typically has no legitimate expectation of privacy in information he voluntarily shares with third parties like the phone company or a banking institution.¹⁵

Katz’s new “reasonable expectations of privacy” theory was long thought to have replaced the Supreme Court’s former recognition of the trespass theory as expressed in cases like *Olmstead*. But in *U.S. v. Jones*,¹⁶ the Supreme Court breathed new life into the trespass theory of Fourth Amendment jurisprudence which is now viewed as supplementing the *Katz* reasonable expectation of privacy test. Thus, a Fourth Amendment “search” of a place is now defined as conduct by a government officer or agent that intrudes upon a person’s reasonable expectations of privacy or involves a trespass upon an area to which a person has a valid claim of constitutional protection.

§ 28:5 Seizures of papers and effects

A Fourth Amendment “seizure” of a “paper or effect” occurs when there is some meaningful interference by a government of-

⁸*Oliver v. U.S.*, 466 U.S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984); *U.S. v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987); *Reese v. State*, 317 Ga. 189(4)(a), 891 S.E.2d 835 (2023); *State v. Davis*, 356 Ga. App. 769(1), 849 S.E.2d 207 (2020).

⁹*California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991).

¹⁰*Oliver v. U.S.*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).

¹¹*Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983); *U.S. v. Knotts*, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983).

¹²*California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

¹³*Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

¹⁴*Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987).

¹⁵*Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); *U.S. v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). But see *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018) (rejecting the warrantless acquisition of cell site location data from a defendant’s wireless phone service provider).

¹⁶*U.S. v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).

ficer or agent with a person's "possessory interest in property."¹ And because the 4th Amendment protects property as well as privacy,² such seizures must ordinarily be preceded by a lawful Fourth Amendment search.³

A person may demonstrate a "possessory interest in property" without providing proof of ownership of that property.⁴ In *Byrd v. U.S.*, it was held that "possession" in the context of a Fourth Amendment seizure is best understood as "the right to exclude others" rather than a strict application of the law of property rights.

§ 28:6 Sanction for obtaining evidence illegally: the exclusionary rule

In *Weeks v. U.S.*,¹ the Supreme Court adopted the Exclusionary Rule as a deterrent to police misconduct that violates the Fourth Amendment.² When invoked, the Exclusionary Rule suppresses (excludes) evidence that was obtained through an unreasonable (unlawful) search or seizure—*unless* an exception to the Exclusionary Rule applies.³

The remedy of exclusion adopted in *Weeks*, however, was initially only applicable to the unlawful actions of federal authorities.⁴ In *Mapp v. Ohio*,⁵ however, the Supreme Court reversed course and made the Exclusionary Rule applicable against

[Section 28:5]

¹*U.S. v. Jacobsen*, 466 U.S. 109, 113, n.5, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984); *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61-62, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) (our cases unmistakably hold that the 4th Amendment protects property as well as privacy).

²*Soldal v. Cook County, Ill.*, 506 U.S. 56, 61-62, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992).

³*Kentucky v. King*, 563 U.S. 452, 462-463, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011) (the 4th Amendment requires that the steps preceding the seizure be lawful).

⁴*Terrence Byrd v. United States*, 584 U.S. 395, 138 S. Ct. 1518, 200 L. Ed. 2d 805 (2018).

[Section 28:6]

¹*Weeks v. U.S.*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) (overruled on other grounds by, *Elkins v. U.S.*, 364 U.S. 206, 80 S. Ct. 1437, 4

L. Ed. 2d 1669 (1960)).

²*Weeks v. U.S.*, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914) (overruled on other grounds by, *Elkins v. U.S.*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960)); *Davis v. U.S.*, 564 U.S. 229, 131 S. Ct. 2419, 2423, 180 L. Ed. 2d 285, 68 A.L.R. Fed. 2d 665 (2011) (the Exclusionary Rule was created by this Court to "compel respect for [this] constitutional guaranty").

³*Illinois v. Krull*, 480 U.S. 340, 347 (II) (A), 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987).

⁴*Wolf v. People of the State of Colo.*, 338 U.S. 25, 33, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949) (incorporating the 4th Amendment through the 14th Amendment but declining to mandate that states employ the same enforcement mechanism adopted in *Weeks*, i.e., the Exclusionary Rule).

⁵*Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio

the unlawful action of state authorities as well. Today, the Exclusionary Rule is applicable in both state and federal prosecutions.

The purpose of the Exclusionary Rule is not to redress the injury to the privacy of the party subjected to the illegal search or seizure, however, but is instead designed to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.⁶

Illegally seized evidence that may be suppressed by an application of the Exclusionary Rule comes in two varieties: (1) tangible or physical evidence obtained as a *direct* result of an unlawful seizure (e.g., drugs, guns, clothing, fibers, intercepted communications), and (2) derivative evidence (so-called “fruit of the poisonous tree”) obtained as an *indirect* result of an unlawful seizure (e.g., admissions, confessions, consents to search).⁷

Application of the Exclusionary Rule often results in the suppression of highly relevant evidence (i.e., murder weapons, drugs, confessions).⁸ As a result, the Supreme Court has rejected the indiscriminate application of the Exclusionary Rule and has held it to be applicable only where its remedial objectives are thought most efficaciously served—that is, where its deterrence benefits outweigh its substantial societal costs.⁹ Accordingly, courts will apply a balancing test—weighing the deterrent benefits versus the societal costs—when deciding whether a particular instance of unlawful police conduct warrants the imposition of the

L. Abs. 513, 84 A.L.R.2d 933 (1961).

⁶U.S. v. Calandra, 414 U.S. 338, 347(III), 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).

⁷Segura v. U.S., 468 U.S. 796, 804-805, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984); Wong Sun v. U.S., 371 U.S. 471, 484-485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Davis, 356 Ga. App. 769, 775(1), 849 S.E.2d 207 (2020).

⁸Davis v. U.S., 564 U.S. 229, 237, 131 S. Ct. 2419, 180 L. Ed. 2d 285, 68 A.L.R. Fed. 2d 665 (2011) (exclusion exacts a heavy toll on both the judicial system and society at large; it almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence); Mowery v. State, 234 Ga. App. 801, 802(2), 507 S.E.2d

821 (1998) (it has been said that “[t]he law does not favor exclusionary rules; they hinder the search for truth.”).

⁹U.S. v. Leon, 468 U.S. 897, 908, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); Utah v. Strieff, 579 U.S. 232, 237-238, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016) (even when there is a 4th Amendment violation, the Exclusionary Rule does not apply when the costs of exclusion outweigh its deterrent benefits); Betancourt v. State, 322 Ga. App. 201(3)(b), 744 S.E.2d 419 (2013), aff’d on other grounds, 294 Ga. 903, 757 S.E.2d 109 (2014) (society must swallow this bitter pill when necessary, but only as a last resort—for exclusion to be appropriate, the deterrent benefits of suppression must outweigh its heavy costs).

Exclusionary Rule.¹⁰ Thus, where suppression fails to yield appreciable deterrence, exclusion is clearly not warranted.¹¹

As a part of this balancing test, the Supreme Court has created several exceptions to the Exclusionary Rule that recognize that it is police “exploitation” of the illegality that is the evil addressed by the Exclusionary Rule, not the illegality itself.¹² Among these exceptions are the following: attenuation,¹³ independent source,¹⁴ inevitable discovery,¹⁵ impeachment,¹⁶ and good faith.¹⁷

¹⁰*Hudson v. Michigan*, 547 U.S. 586, 592, 126 S. Ct. 2159, 165 L. Ed. 2d 56, 23 A.L.R. Fed. 2d 823 (2006); *Carter v. State*, 308 Ga. App. 686, fn. 3, 708 S.E.2d 595 (2011).

¹¹*Davis v. U.S.*, 564 U.S. 229, 131 S. Ct. 2419, 2426-2427, 180 L. Ed. 2d 285, 68 A.L.R. Fed. 2d 665 (2011).

¹²*Watson v. State*, 302 Ga. App. 619, 624(1), 691 S.E.2d 378 (2010).

¹³*Segura v. U.S.*, 468 U.S. 796, 805, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984) (the attenuation exception holds that evidence need not be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint).

¹⁴*Murray v. U.S.*, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988) (the independent source exception provides that illegally discovered evidence may nonetheless be lawfully seized at a later time if such seizure is justified by independent, lawfully gathered information supporting a finding of probable cause for such seizure).

¹⁵*Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984) (the inevitable discovery exception provides that illegally seized evidence may nonetheless be held admissible if such evidence probably would have been discovered inevitably through lawful means).

¹⁶*U.S. v. Havens*, 446 U.S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559, 6 Fed. R. Evid. Serv. 1 (1980) (the im-

peachment exception provides that if defendant lies on direct examination about the very existence of the suppressed evidence, he may be impeached on cross-examination by reference to the excluded evidence). See also *Walder v. U.S.*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954).

¹⁷The good faith exception applies when a police officer’s conduct in making an illegal seizure is based upon his good faith reliance on an erroneous decision by a judicial officer to issue a search warrant lacking probable cause, *U.S. v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), on a subsequently invalidated statute, *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987), on a flawed database maintained by a judicial employee, *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), or on an isolated instance of negligent record-keeping by another police agency, *Herring v. U.S.*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). It should be noted that for many years, based on an erroneous interpretation of Georgia’s search and seizure statute, O.C.G.A. § 17-5-30, Georgia courts did not recognize the good faith exception. Such exception is now recognized in most, but not all, of the scenarios listed above. See *Mobley v. State*, 307 Ga. 59, 834 S.E.2d 785 (2019). See also Justice Peterson’s concurring opinion in *State v. Ledbetter*, 318 Ga. 457, 899 S.E.2d 222 (2024) (wherein he refers to *Gary* as a “misbegotten invention” that should overruled in its entirety).

§ 28:7 Motions to suppress illegally obtained evidence

O.C.G.A. § 17-5-30 provides the framework for the filing and resolution of motions to suppress. A movant who fails to comply with the prerequisites of this statute may have his motion to suppress dismissed or he may inadvertently waive valid Fourth Amendment claims that could have been raised.

O.C.G.A. § 17-5-30(a) provides that “[a] defendant aggrieved by an unlawful search and seizure may move the court . . . to suppress as evidence anything so obtained on the grounds that: (1) The search and seizure without a warrant was illegal; or (2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face, there was not probable cause for the issuance of the warrant, or the warrant was illegally executed.”¹

O.C.G.A. § 17-5-30(b) provides that “[t]he motion shall be in writing and state facts showing that the search and seizure were unlawful. The judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion; and the burden of proving that the search and seizure were lawful shall be on the state. If the motion is granted the property shall . . . not be admissible in evidence against the movant in any trial.”

Thus, per O.C.G.A. § 17-5-30(b), oral motions to suppress are not authorized.² Moreover, the written motion must be particularized, that is, it must put the State on notice regarding why the defendant contends that the search and seizure was illegal so the State will know which witnesses to bring to the hearing and the legal issues to be resolved at that hearing.³

O.C.G.A. § 17-5-30(c) provides that “[t]he motion shall be made only before a court with jurisdiction to try the offense. If a criminal accusation is filed or if an indictment or special presentment is returned by a grand jury, the motion shall be made only before the court in which the accusation, indictment, or special presentment is filed and pending.” Thus, because a motion to suppress may only be filed with a court having jurisdiction to try the case, a committing court, i.e., one conducting a preliminary hearing, lacks the authority to grant such a motion.⁴

Pursuant to O.C.G.A. § 17-7-110 and Uniform Superior Court

[Section 28:7]

¹See §§ 28:15, 28:16, *infra*.

²*Albright v. State*, 354 Ga. App. 538(1)(a), 841 S.E.2d 171 (2020).

³*Young v. State*, 282 Ga. 735, 736, 653 S.E.2d 725 (2007). See also

State v. Conley, 273 Ga. App. 855, 616 S.E.2d 174 (2005) (a trial court may not grant a motion to suppress on a ground not raised in the defendant’s motion to suppress).

⁴*Harbin v. State*, 193 Ga. App. 248, 250(3), 387 S.E.2d 367 (1989).

Rule 31.1, a motion to suppress must be filed within 10 days of a defendant's arraignment, unless the trial court extends the time for filing.⁵ Although a trial court has the discretion to accept the late filing of a motion to suppress and consider the merits of a defendant's untimely motion, a trial court is not required to do so.⁶ And critically, if the issue of an alleged illegal search and seizure is not raised in the trial court, it shall be waived.⁷

A motion to suppress hearing is typically held before the commencement of the trial, but if held during the trial, the judge must receive evidence outside the jury's presence on any issue of fact necessary to determine the motion.⁸

At a hearing on a motion to suppress, the state has the burden of proof and must convince the court that the complained of search or seizure was lawful.⁹

In conducting a motion to suppress hearing, a trial court is permitted to consider hearsay evidence—at least with respect to questions relating to the presence of reasonable suspicion or probable cause.¹⁰ Hearsay and even hearsay upon hearsay may be sufficient to show the same if there is a substantial basis for crediting such hearsay.¹¹ Moreover, preliminary questions concerning the admissibility of evidence—like those raised in a motion to suppress—shall be resolved by the preponderance of the evidence standard.¹² And because the right to confront witnesses is a “trial right,” the Confrontation Clause and *Crawford v. Washington*¹³ (barring “testimonial” hearsay at trial) are inapplicable in motion to suppress hearings.¹⁴

The defendant may choose to testify at a motion to suppress hearing but shall not, by testifying, become subject to cross-examination as to other, unrelated issues, e.g., guilt or innocence.¹⁵ Moreover, if a defendant testifies at a motion to suppress hearing, he does not waive his right to assert his Fifth Amendment privilege at trial (but his suppression hearing

⁵Albright v. State, 354 Ga. App. 538(1)(a), 841 S.E.2d 171 (2020).

⁶Scott v. State, 368 Ga. App. 310, 310, 890 S.E.2d 7 (2023).

⁷Gilmore v. State, 117 Ga. App. 67, 159 S.E.2d 474 (1967).

⁸O.C.G.A. § 17-5-30(b).

⁹Williams v. State, 364 Ga. App. 340, 341, 874 S.E.2d 838 (2022).

¹⁰Mason v. State, 353 Ga. App. 404(2), 837 S.E.2d 711 (2020).

¹¹State v. Perez, 349 Ga. App. 707, 710, 824 S.E.2d 804 (2019).

¹²O.C.G.A. § 24-1-104(a); Colorado v. Connelly, 479 U.S. 157, 168, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986); State v. Barnett, 233 Ga. App. 496(2), 504 S.E.2d 531 (1998).

¹³Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004).

¹⁴Fair v. State, 284 Ga. 165(3), 664 S.E.2d 227 (2008) (the Confrontation Clause is inapplicable in a motion to suppress hearing because a defendant's guilt or innocence is not at issue).

¹⁵O.C.G.A. § 24-1-104(d).

testimony may be used for impeachment purposes if he chooses to testify).¹⁶

If a court denies a motion to suppress evidence, all such evidence shall be admissible at trial and the defendant may not ask the jury to disregard it.¹⁷ Moreover, the defendant is not entitled to a jury instruction allowing the jury to re-adjudicate the issue.¹⁸ If a court grants a motion to suppress evidence, however, the suppressed evidence shall not be admissible in evidence against the defendant at trial.¹⁹

Upon the denial of a motion to suppress, a defendant may seek a discretionary (interlocutory) appeal if the trial judge grants a “certificate of immediate” review within 10 days.²⁰ The state, however, may directly appeal a trial court’s decision to suppress evidence provided that a jury has not been impaneled or jeopardy attached.²¹

§ 28:8 Standing to invoke privilege against illegally obtained evidence

Because Fourth Amendment rights are personal, a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed.¹ Consequently, a defendant may only move to suppress evidence obtained through an alleged illegal search or seizure when his own reasonable expectations of privacy were violated, not those of a third party.² This is the concept of “standing.”

In reviewing a motion to suppress, the threshold question to be addressed by the court is whether the defendant has standing to challenge the alleged unlawful seizure of the evidence.³ The burden of proving standing is upon the person bringing the motion to suppress.⁴

To prove standing, a defendant must demonstrate both a

¹⁶*Simmons v. U.S.*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

¹⁷*Pierce v. State*, 274 Ga. App. 670(2), 618 S.E.2d 700 (2005) (the admissibility of seized evidence is the sole province of the court).

¹⁸*Hamilton v. State*, 185 Ga. App. 749, 365 S.E.2d 542 (1988).

¹⁹O.C.G.A. § 17-5-30(b).

²⁰O.C.G.A. § 5-6-34(b).

²¹O.C.G.A. § 5-7-1(a)(4); O.C.G.A. § 5-7-2(b)(1); *State v. Andrade*, 298 Ga.

464, 782 S.E.2d 665 (2016).

[Section 28:8]

¹*State v. Albritten*, 351 Ga. App. 849, 852, 833 S.E.2d 549 (2019).

²*Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *State v. Jackson*, 243 Ga. App. 330, 533 S.E.2d 433 (2000).

³*Albright v. State*, 354 Ga. App. 538, 543, 841 S.E.2d 171 (2020).

⁴*State v. Albritten*, 351 Ga. App. 849, 852, 833 S.E.2d 549 (2019).

subjective expectation of privacy in the place searched or the thing seized and that such expectation is one that society is willing to recognize as reasonable.⁵

A person always has standing to object to a search or seizure of his own person, but not to searches or seizures conducted upon the person of another.⁶ And a person usually retains a reasonable expectation of privacy in the contents of his or her own wallet, purse, briefcase, backpack, or suitcase—regardless of where such item is found.⁷

The U.S. Supreme Court has recognized that a person's reasonable expectations of privacy are greatest in his home.⁸ And it has been held that a person's status as an overnight guest in the home of another is alone sufficient to show that he had a reasonable expectation of privacy in that home.⁹ A mere "transient visitor" (one who comes and goes), however, does not have a reasonable expectation of privacy in the home of another.¹⁰ But when a person visits a friend's house, he typically retains a right to privacy in all closed containers that he brings with him.¹¹

Courts also typically recognize a person's reasonable expectations of privacy in an apartment that he leases or a motel room that he rents.¹²

Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. An expectation of privacy in commercial premises, therefore, is dif-

⁵Katz v. U.S., 389 U.S. 347, 360-361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring); Wiggins v. State, 346 Ga. App. 722, 724-725, 816 S.E.2d 816 (2018).

⁶Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); Robinson v. State, 226 Ga. App. 406(2), 486 S.E.2d 667 (1997).

⁷State v. McCarthy, 288 Ga. App. 426, 654 S.E.2d 239 (2007).

⁸Silverman v. U.S., 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734, 97 A.L.R.2d 1277 (1961) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.").

⁹Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990); Collins v. Virginia, 584 U.S. 586, 138 S. Ct. 1663, 201 L. Ed. 2d 9 (2018); Doleman v. State, 304 Ga. 740, 744, 822 S.E.2d 223 (2018); Jones v. State, 320 Ga. App. 681, 685, 740 S.E.2d 655 (2013). See also Snider v.

State, 292 Ga. App. 180, 663 S.E.2d 805 (2008) (overnight hotel visitor had standing).

¹⁰Smith v. State, 284 Ga. 17, 21, 663 S.E.2d 142 (2008) (a "casual visitor" as opposed to an overnight guest).

¹¹State v. McCarthy, 288 Ga. App. 426(2), 654 S.E.2d 239 (2007).

¹²Floyd v. State, 237 Ga. App. 586, 516 S.E.2d 96 (1999) (mere visitor to a motel room); Chapman v. U.S., 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961) (consent of landlord insufficient to defeat tenant's reasonable expectations of privacy). See also Minnesota v. Carter, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) (one who was merely present in an apartment leased by a third party for the purpose of packaging drugs was not entitled to claim a reasonable expectation of privacy, hence standing, in the premises).

ferent from, and indeed less than, a similar expectation in an individual's home.¹³ Nonetheless, an employee of a business may have a limited reasonable expectation of privacy in his personal office, desk, and filing cabinets, but not in common areas.¹⁴

The owner of a stopped motor vehicle (or other operator having permission to drive such vehicle) has standing to complain of his detention and the subsequent search of that vehicle.¹⁵ Moreover, a passenger in a stopped motor vehicle is also entitled to assert standing to protest his own detention and the subsequent search of his person.¹⁶ And owners, operators, and passengers may assert standing to protest the search of a closed package or bag that they bring with them into an automobile that is subsequently stopped and searched.¹⁷

§ 28:9 Searches and seizures without a warrant

Not all searches and seizures conducted by government officers and agents without a warrant are illegal. The Fourth Amendment, however, has been interpreted as creating a rebuttable presumption—the so-called “warrant preference”—that all searches and seizures conducted without a warrant are unreasonable.¹ The “reasonableness” of a Fourth Amendment search and seizure will depend upon the existence of: (1) a valid warrant, or (2) a well-recognized exception to the warrant requirement.² This flexible approach to the warrant preference reflects the U.S. Supreme Court's long-held view that the cornerstone (or touchstone) of the Fourth Amendment is the concept of reasonableness in relation to government actions.³

How are these so-called “well-recognized exceptions” to the

¹³*Minnesota v. Carter*, 525 U.S. 83, 90, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998); *New York v. Burger*, 482 U.S. 691, 700, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

¹⁴*O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).

¹⁵*Terrence Byrd v. United States*, 584 U.S. 395, 138 S. Ct. 1518, 200 L. Ed. 2d 805 (2018) (a “non-authorized” person driving a rental car with the permission of the authorized driver nonetheless has standing because he has the “right to exclude others”).

¹⁶*Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

¹⁷*State v. Alford*, 347 Ga. App.

208(1), 818 S.E.2d 668 (2018).

[Section 28:9]

¹*Katz v. U.S.*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Thompson v. Louisiana*, 469 U.S. 17, 19-20, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1984); *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001); *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004).

²*Kentucky v. King*, 563 U.S. 452, 459-460, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011); *Katz v. U.S.*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

³*Ker v. State of Cal.*, 374 U.S. 23, 32-34, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); *Florida v. Jimeno*, 500 U.S.

warrant requirement created? Absent more precise guidance from the founding era, the Supreme Court generally determines whether to exempt a given type of search from the warrant requirement “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”⁴

A few of these well-recognized exceptions to the warrant requirement have already been introduced in this chapter.⁵ Additional well-recognized exceptions to the warrant requirement will be discussed below, beginning with exceptions pertaining to warrantless arrests of persons (in public and private places) followed by warrantless searches of places (and seizures of papers and effects therein).

§ 28:10 Warrantless arrest of persons

The Fourth Amendment has been interpreted as expressing a strong preference that arrests be made pursuant to an arrest warrant issued by a neutral and detached judicial officer.¹ Despite this strong preference, however, the Supreme Court has held that a police officer may make a warrantless arrest when it is “reasonable” to do so. In adopting this flexible standard, the Supreme Court recognized that to require a magistrate to conduct a prior review of any and all arrests would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, it has never invalidated an arrest [in a public place] supported by probable cause solely because the officers failed to secure a warrant.²

It should be noted that Georgia has an arrest statute, O.C.G.A. § 17-4-20, that appears to limit warrantless arrests to offenses occurring in the officer’s presence, but Georgia courts have held

248, 250, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991); *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L. Ed. 2d 347, 148 A.L.R. Fed. 739 (1996); *Flippo v. West Virginia*, 528 U.S. 11, 13, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999); *Padron v. State*, 254 Ga. App. 265(1), 562 S.E.2d 244 (2002).

⁴*Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 2484, 189 L. Ed. 2d 430 (2014); *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).

⁵See §§ 28:1 et seq., *supra*.

[Section 28:10]

¹*Gerstein v. Pugh*, 420 U.S. 103, 112-113, 95 S. Ct. 854, 43 L. Ed. 2d 54, 19 Fed. R. Serv. 2d 1499 (1975) (to implement the 4th Amendment’s protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible).

²*Gerstein v. Pugh*, 420 U.S. 103, 113, 95 S. Ct. 854, 43 L. Ed. 2d 54, 19 Fed. R. Serv. 2d 1499 (1975).

that an arrest that is legal under federal law, i.e., one accompanied by probable cause, is also legal under state law.³

The reasonableness of a warrantless arrest often turns on the location where the arrest takes place.

(a) Arrests in Public Places.

In *U.S. v. Watson*,⁴ the Supreme Court held that police may make a warrantless arrest in a public place so long as such arrest is supported by probable cause—even if there was time to first obtain an arrest warrant. In so ruling, the Supreme Court noted that “[l]aw enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. But we decline to transform this judicial preference into a constitutional rule [and thereby] . . . encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.”⁵

The authority to make a warrantless arrest in a public place applies to misdemeanors and felonies alike.⁶

(b) Arrests in Private Places.

In *Payton v. N.Y.*,⁷ the Supreme Court held that a police officer must ordinarily have an arrest warrant before entering a person’s home to effect his arrest even if the officer has probable cause to arrest him. *Payton* noted that “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there [to] be free from unreasonable governmental intrusion. . . . [T]he Fourth Amendment has drawn a firm line at the entrance to the house.”⁸

With an arrest warrant, on the other hand, a police officer may enter a person’s home to effect his arrest provided that the officer reasonably believes that: (1) the person to be arrested owns or

³O.C.G.A. § 17-4-20; *Hight v. State*, 293 Ga. App. 254(1), 666 S.E.2d 678 (2008); *Durden v. State*, 250 Ga. 325, 297 S.E.2d 237 (1982).

⁴*U.S. v. Watson*, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976).

⁵*U.S. v. Watson*, 423 U.S. 411, 423-424, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976).

⁶*Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) (seatbelt violation); *Arkansas v. Sullivan*, 532 U.S. 769,

121 S. Ct. 1876, 149 L. Ed. 2d 994 (2001) (fine only traffic violation); O.C.G.A. § 17-4-20(a).

⁷*Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

⁸*Payton v. New York*, 445 U.S. 573, 589-90, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). See also *White v. State*, 307 Ga. 601(2), 837 S.E.2d 838 (2020); *Carranza v. State*, 266 Ga. 263(1), 467 S.E.2d 315 (1996).

resides in the home, and (2) the person to be arrested is presently in that home.⁹

Payton “left the door open” (pun intended), however, for warrantless entries into private homes to effect the arrest of an owner or occupier under certain circumstances. Among these are: Consent, Exigent Circumstances, and Hot Pursuit. A brief description of each of these exceptions is provided below.

(c) Consent.

“Consent searches” are Fourth Amendment “searches” but are considered to be one of the “well-recognized exceptions” to the warrant requirement.¹⁰ If a police officer having probable cause to arrest a person in a home obtains consent to enter that home from a person having lawful authority to give such consent, the officer may enter that home without a warrant to effect such arrest provided that such consent was voluntarily given. The legal prerequisites for a voluntary consent to enter a home are substantially the same as those for a voluntary consent to search a person.¹¹

(d) Exigent Circumstances.

In *Warden v. Hayden*,¹² the Supreme Court held that “exigent circumstances” may justify the warrantless entry into a home to protect the occupants. In *Warden*, the police had probable cause to believe that an armed robber had just entered a home and posed a potential threat to the occupants therein. The Supreme Court has held, however, that when police only have probable cause that a misdemeanor offense has been committed, application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned.¹³

(e) Hot Pursuit.

In *U.S. v. Santana*,¹⁴ the Supreme Court held that officers were justified in making a warrantless entry into a heroin dealer’s home while pursuing her in “hot pursuit” as she retreated from the threshold of her open front door into her home. *Santana* concluded that a suspect should not be able to defeat an otherwise

⁹*Lee v. State*, 347 Ga. App. 508(4) (a), 820 S.E.2d 147 (2018); *Jones v. State*, 314 Ga. App. 247(1), 723 S.E.2d 697 (2012).

¹⁰*Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

¹¹See also § 28:3, *supra*, and § 28:12, *infra*, describing consent

searches in other contexts.

¹²*Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967).

¹³*Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

¹⁴*U.S. v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976).

proper arrest that had been set in motion in a public place by retreating into a private place. Moreover, the Supreme Court has held that a warrantless entry into a home in hot pursuit of a misdemeanor suspect does not necessarily violate the Fourth Amendment.¹⁵

§ 28:11 Warrantless searches of places

The U.S. Supreme Court has enumerated a plethora of exceptions pertaining to the warrantless search of places and the seizure of so-called “papers and effects” found therein.¹ Here is a partial list of these so-called “well-recognized exceptions”:

(a) Consent Searches (Places).²

(b) Exigent Circumstances.

Police may conduct a warrantless search when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.³

Thus, police may enter a home without a warrant to apprehend a dangerous person posing an immediate threat of harm, e.g., hostage situations, reports of gunfire, and imminent threats of violence.⁴ Police may also enter a home without a warrant when they have an objectively reasonable basis for fearing the imminent destruction of the evidence before they would be able to obtain a search warrant.⁵ And police may in some circumstances make a warrantless seizure of blood from a drunk driver if neces-

¹⁵*Lange v. California*, 594 U.S. 295, 141 S. Ct. 2011, 210 L. Ed. 2d 486 (2021); cf. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (where hot pursuit was lacking).

[Section 28:11]

¹Justice Scalia once noted (disapprovingly) that “the ‘warrant requirement’ had become so riddled with exceptions that it was basically unrecognizable.” *California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991).

²See § 28:12, *supra*.

³*Mincey v. Arizona*, 437 U.S. 385, 394, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *Kentucky v. King*, 563 U.S. 452, 462, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011).

⁴*Arizona v. Hicks*, 480 U.S. 321,

107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) (gunfire at an apartment building coming from an identifiable unit); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) (armed robbery suspect holed-up in an identifiable house); *Ryburn v. Huff*, 565 U.S. 469, 132 S. Ct. 987, 181 L. Ed. 2d 966 (2012) (teenager had threatened to shoot up his school).

⁵*Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011); *Ker v. State of Cal.*, 374 U.S. 23, 40, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); *Lewis v. State*, 358 Ga. App. 482(1)(b), 855 S.E.2d 708 (2021). But see *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (entry of home to obtain blood alcohol evidence for use in a misdemeanor DUI investigation not justified under “exigent circumstance” exception).

sary to preserve dissipating evidence of alcohol in his blood stream.⁶

(c) Automobile Exception.⁷

(d) Plain View.

Although often referred to as an exception to the warrant requirement, the so-called “plain view” doctrine is not actually an exception at all. A person has no reasonable expectation of privacy for contraband or evidence observed by police in “plain view” from a lawful vantage point. Hence, an officer’s observation of such contraband or evidence does not constitute a Fourth Amendment “search.”⁸

For evidence to be admissible under the plain view doctrine, however, the officer collecting the evidence must not have violated the Fourth Amendment in arriving at the place where he observed the evidence. Moreover, the incriminating nature of the object observed must be immediately apparent. This requirement means that the officer must have probable cause to believe that the item in question is contraband or evidence of a crime.⁹ Additionally, for the plain view doctrine to apply, the item in question must be clearly visible, and the officer may not manipulate it in order to acquire probable cause to believe it is contraband or evidence of a crime.¹⁰

An officer’s plain view observations need not, however, be inadvertent. Thus, it does not matter if an officer proceeds to a place with the hope of being able to view contraband or evidence of a crime—so long as he had a right to go to that place.¹¹

Although the observation of contraband or evidence in plain view is not considered to be a Fourth Amendment “search,” the confiscation of such contraband or evidence may constitute a Fourth Amendment “seizure” if a person claims a valid posses-

where there was no flight or hot pursuit).

⁶*Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). But see *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013) (claimed exigency must be determined on a case-by-case basis).

⁷See § 28:13, *infra*.

⁸*Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); *State v. Schwartz*, 261 Ga. App. 742, 745, 583 S.E.2d 573 (2003).

⁹*Horton v. California*, 496 U.S.

128, 136-137, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *Jones v. State*, 314 Ga. 605(2), 878 S.E.2d 505 (2022) (citing *George v. State*, 312 Ga. 801, 804-805, 865 S.E.2d 127 (2021)).

¹⁰*Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987).

¹¹*Horton v. California*, 496 U.S. 128, 138, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (“The fact that an officer is interested in an item of evidence and fully expects to find it . . . should not invalidate its seizure”); *State v. Preston*, 348 Ga. App. 662, 666, 824 S.E.2d 582 (2019).

sory interest in such property. Nonetheless, such warrantless plain view seizures are typically permitted under another one of the many well-recognized exceptions to the warrant requirement.¹²

(e) Protective Sweeps.

Police may conduct a “protective sweep” of the premises where an arrest takes place if they entertain a reasonable belief that the area to be swept may harbor an individual who poses a threat to officers at the scene of said arrest. Police having such a reasonable belief may search any place where a person might hide, e.g., in closets, under beds, or behind furniture.¹³

(f) Emergency Aid.

Police may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.¹⁴ And in doing so, officers need not have ironclad proof that such entry was absolutely necessary to prevent a serious life-threatening injury.¹⁵

(g) Community Caretaking.

Police may conduct a warrantless search of an automobile (and perhaps other private areas) for weapons (and perhaps other hidden dangers) if such search is designed to protect the public rather than for investigative purposes.¹⁶ This exception does not, however, extend to the search of homes.¹⁷

(h) School Searches.

A public school official may conduct a warrantless search of a student or his belongings at school if “reasonable grounds” exist to suspect a violation of the law or school rules.¹⁸

¹²*Morse v. State*, 288 Ga. App. 725, 729, 655 S.E.2d 217 (2007) (officer may seize without a warrant what he sees in “plain sight”); *State v. Clark*, 263 Ga. App. 480, 588 S.E.2d 254 (2003).

¹³*Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990) (in-house search for other persons who might pose a threat to the arresting officers—evidence observed in plain view admissible); *Causey v. State*, 334 Ga. App. 170(2), 778 S.E.2d 800 (2015); cf. *Thompson v. State*, 369 Ga. App. 366, 893 S.E.2d 127 (2023) (officer entered an apartment after smelling odor of marijuana on pretense of con-

ducting a “protective sweep”).

¹⁴*Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006).

¹⁵*Michigan v. Fisher*, 558 U.S. 45, 49, 130 S. Ct. 546, 175 L. Ed. 2d 410, 58 A.L.R.6th 839 (2009); *Tidwell v. State*, 312 Ga. 459, 465, 863 S.E.2d 127 (2021).

¹⁶*Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).

¹⁷*Caniglia v. Strom*, 593 U.S. 194, 141 S. Ct. 1596, 209 L. Ed. 2d 604 (2021).

¹⁸*New Jersey v. T.L.O.*, 469 U.S.

(i) Special Needs Searches.

In limited circumstances, a search supported by neither warrant nor probable cause can be constitutional when “special needs” other than the normal need for law enforcement provide sufficient justification, e.g., probationers and parolees have a lesser expectation of privacy and may be subject to warrantless searches and seizures on less than probable cause.¹⁹

(j) Administrative Searches.

Companies doing businesses in “closely-regulated” industries have a lesser expectation of privacy that justifies warrantless inspections by government regulators designed to enforce regulatory statutes on less than probable cause—often for safety-related reasons.²⁰

(k) Border Searches.

Border agents may conduct warrantless searches of persons, vehicles, and personal belongings crossing the border into the United States even if agents lack probable cause or reasonable suspicion to believe that contraband or evidence will be found.²¹

§ 28:12 Searches and seizures without a warrant but with consent

A valid consent to a search eliminates the need for either probable cause or a search warrant. To justify a warrantless search on the grounds of consent, the State has the burden of proving that the consent was freely and voluntarily given under the totality of the circumstances. It is only by analyzing all the circumstances of an individual consent that it can be ascertained whether such consent was in fact voluntary or coerced.¹

325, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Ed. Law Rep. 1122 (1985). But see *Patman v. State*, 244 Ga. App. 833, 834, 537 S.E.2d 118 (2000) (disapproved of on other grounds by, *State v. Kazmierczak*, 331 Ga. App. 817, 771 S.E.2d 473 (2015)) and (disapproved of on other grounds by, *Caffee v. State*, 303 Ga. 557, 814 S.E.2d 386 (2018)) (unlike a school official, a school resource officer (SRO) must have probable cause before searching a student, i.e., such search may only be conducted incident to a lawful arrest).

¹⁹*Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987).

²⁰*New York v. Burger*, 482 U.S. 691, 699, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

²¹*U.S. v. Flores-Montano*, 541 U.S. 149, 124 S. Ct. 1582, 158 L. Ed. 2d 311 (2004).

[Section 28:12]

¹*Schneekloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *U.S. v. Drayton*, 536 U.S. 194, 207, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) (state must show that the consent to search was freely and voluntarily given and was not the result of duress or coercion); *Evans v. State*, 308 Ga. 582(3)(b), 842 S.E.2d

A consent to search will normally be held voluntary unless the totality of the circumstances shows that an officer used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the consent. A court may also consider other factors like the accused's age, level of education, and intelligence, the prolonged nature of the questioning, and whether the person was advised of his constitutional rights.² Police seeking a suspect's consent to search are not, however, required to give a *Miranda*-like warning regarding his right to refuse.³

Voluntariness must reflect an exercise of a person's free will and not merely a submission to or acquiescence in the express or implied assertion of authority.⁴

The intrusiveness of a consensual search, including the type, duration, and physical zone of the intrusion, is limited by the permission granted, and only that which is reasonably understood from the consent may be undertaken.⁵ But once voluntary consent is given, it continues until it is either revoked or withdrawn.⁶

Police may seek consent to search (1) from the individual whose property is searched; (2) from a third party who has common authority over the property; or (3) from a third party not having common authority in fact over the property but a police officer could nonetheless have reasonably believed that such third party did.⁷

"Common authority" rests on mutual use of the property by persons generally having joint access or control for most purposes.⁸

If two people having common authority over the same premises

837 (2020); *State v. Burgess*, 349 Ga. App. 486(2), 826 S.E.2d 352 (2019).

²*Martinez v. State*, 347 Ga. App. 675, 678, 820 S.E.2d 507 (2018); *Ray v. State*, 273 Ga. App. 656(2), 615 S.E.2d 812, 29 A.L.R.6th 691 (2005) (no single factor is controlling).

³*Schneckloth v. Bustamonte*, 412 U.S. 218, 234, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *U.S. v. Drayton*, 536 U.S. 194, 206, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002).

⁴*Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); *State v. Burgess*, 349 Ga. App. 486(2)(a), 826 S.E.2d 352 (2019); *Little v. State*, 353 Ga. App. 549, 552, 839 S.E.2d 15 (2020).

⁵*Martinez v. State*, 347 Ga. App. 675, 678, 820 S.E.2d 507 (2018); *State*

v. Fulghum, 288 Ga. App. 746, 747, 655 S.E.2d 321 (2007) ("objective reasonableness" standard).

⁶*Whiting v. State*, 275 Ga. App. 251, 252, 620 S.E.2d 480 (2005).

⁷*Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990); *Massey v. State*, 350 Ga. App. 427, 431, 827 S.E.2d 921 (2019).

⁸*U.S. v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974); *Montgomery v. State*, 353 Ga. App. 843(2), 840 S.E.2d 66 (2020). But see *Chapman v. U.S.*, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961) (a landlord cannot give valid consent to a search of his or her tenant's quarters); *Looney v. State*, 293 Ga. App. 639, 642, 667 S.E.2d 893 (2008) (same). Cf. *State v. West*, 237 Ga. App. 185, 514 S.E.2d

are both present, e.g., a husband and wife, both must consent.⁹ Police officers are not required, however, to find a potentially objecting co-occupant before acting on consent given by another co-occupant.¹⁰ Moreover, an occupant who is lawfully removed from the premises to be searched, e.g., one who has been lawfully detained or arrested, stands in the same shoes as an occupant who is absent for any other reason. Thus, once a non-consenting co-occupant is lawfully removed from the premises, the remaining co-occupant may be approached and may give lawful consent.¹¹

§ 28:13 Searches of automobiles without a warrant

Several exceptions to the warrant requirement have been adopted that permit law enforcement officers to conduct warrantless searches and seizures of motor vehicles. Four of these exceptions will be described below:

(a) Automobile Exception.

Under the “automobile exception” to the warrant requirement, a police officer may search a car without a warrant if he has probable cause to believe the car contains contraband, even if there is no exigency preventing the officer from getting a search warrant.¹ The automobile exception to the search warrant requirement is premised upon two characteristics of automobiles, their ready mobility, and the diminished expectation of privacy in a car.²

Probable cause to search an automobile exists when the facts and circumstances before the officer are such as would lead a reasonably discreet and prudent man to believe that the contents of the vehicle offend the law. This inquiry is based on the totality of

257 (1999) (son living rent-free in mother’s house may not complain re: mother’s consent to search “his” room).

⁹Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006) (wife said “yes,” husband said “no”).

¹⁰Georgia v. Randolph, 547 U.S. 103, 122, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006); State v. Lee, 349 Ga. App. 181, 184, 825 S.E.2d 575 (2019); Burke v. State, 302 Ga. App. 469, 471, 691 S.E.2d 314 (2010) (police are not required to take affirmative steps to locate a potentially objecting co-occupant); Preston v. State, 296 Ga. App. 655, 658, 675 S.E.2d 553 (2009)

(“[W]e do not impose upon law enforcement officers an affirmative obligation to seek out potential objectors.”).

¹¹Fernandez v. California, 571 U.S. 292, 134 S. Ct. 1126, 188 L. Ed. 2d 25 (2014).

[Section 28:13]

¹Carroll v. U.S., 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790 (1925).

²California v. Acevedo, 500 U.S. 565, 579, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991); Lowe v. State, 352 Ga. App. 458, 461-462, 835 S.E.2d 301 (2019).

the circumstances surrounding the transaction.³

The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found.⁴ An officer possessing probable cause may typically search the entire vehicle including packages and containers belonging to passengers.⁵

An “alert” or “hit” by a drug-detection dog on the exterior of an automobile will ordinarily supply the probable cause necessary to authorize a warrantless search of the interior of such automobile.⁶ And where a trained police officer detects the odor of raw, burning, or burnt marijuana coming from a vehicle, the officer has probable cause to conduct a warrantless search of the vehicle provided that the officer’s ability to identify such odors is placed into evidence.⁷

(b) Impound Exception.

Under the “impound exception,” police may impound a vehicle if there is some necessity for the police to take charge of the property. The test is whether, under the circumstances, an officer’s conduct in impounding the vehicle was reasonable. Reasonable necessity for impounding a person’s vehicle has been found where the car cannot be safely or legally driven, the car is illegally or dangerously parked, or the car is connected to a crime for which the person is arrested.⁸

If impoundment is reasonable, police are not required to ask the arrestee if he desires to have someone come get his car or accede to such request (although police frequently do afford arrestees this opportunity).⁹

Police may not use impoundment merely as a medium to search

³U.S. v. Ross, 456 U.S. 798, 805, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); California v. Acevedo, 500 U.S. 565, 573-575, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991) (probable cause to search container seen placed into the trunk of a car); Florida v. Harris, 568 U.S. 237, 243, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013); Williams v. State, 364 Ga. App. 300, 302, 874 S.E.2d 478 (2022); Hill v. State, 351 Ga. App. 58(1), 830 S.E.2d 478 (2019).

⁴Williams v. State, 364 Ga. App. 300, 303, 874 S.E.2d 478 (2022).

⁵Wyoming v. Houghton, 526 U.S. 295, 300-301, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999); Brown v. State, 311 Ga. App. 405, 408(2), 715 S.E.2d 802

(2011).

⁶Florida v. Harris, 568 U.S. 237, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013); Cromartie v. State, 348 Ga. App. 563, 568-569, 824 S.E.2d 32 (2019).

⁷Hill v. State, 351 Ga. App. 58(1), 830 S.E.2d 478 (2019).

⁸Albright v. State, 354 Ga. App. 538(4), 841 S.E.2d 171 (2020); Askew v. State, 326 Ga. App. 859, 861, 755 S.E.2d 283 (2014).

⁹State v. McCloud, 344 Ga. App. 595, 600, 810 S.E.2d 668 (2018); Johnson v. State, 268 Ga. App. 867, 868, 602 S.E.2d 876 (2004).

for contraband.¹⁰ But a vehicle may be impounded if, pursuant to the Automobile Exception, there is probable cause to search it for contraband or evidence and it would not be safe or practical to search it where it is initially seized.¹¹

(c) Inventory Exception.

Under the “inventory exception,” police may inventory the contents of a vehicle if the vehicle has been lawfully impounded in order to (1) protect the vehicle owner’s property while in police custody; (2) protect the police against false claims of theft while the vehicle is in police custody; and (3) protect the police from weapons that might be located in the vehicle.¹² But police agencies must have a clear inventory policy in place to deter officers from using inventories as a ruse for searching for evidence of criminal conduct.¹³

(d) Roadblock Exception.

Under the “roadblock exception,” police may stop all vehicles passing a designated intersection without a search warrant to conduct routine license checks or to ensure driver sobriety provided that certain guidelines are observed.¹⁴ Roadblocks are not permitted, however, if designed solely or primarily to detect ordinary criminal wrongdoing having no nexus to traffic enforcement or highway safety.¹⁵

In *McCoy v. State*,¹⁶ the Georgia Supreme Court stated that in order to prove that a roadblock was constitutional, the State must show that (1) the decision to implement the roadblock was made by supervisory personnel rather than the officers in the field; (2) all vehicles are stopped as opposed to random vehicle stops; (3) the delay to motorists is minimal; and (4) the roadblock operation is well identified as a police checkpoint. And with respect to any secondary screening, e.g., field sobriety testing, the State is only required to show that the initiating officer had rea-

¹⁰*Stroud v. State*, 344 Ga. App. 827, 832, 812 S.E.2d 309 (2018).

¹¹*Chambers v. Maroney*, 399 U.S. 42, 52, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); *Florida v. Meyers*, 466 U.S. 380, 382, 104 S. Ct. 1852, 80 L. Ed. 2d 381 (1984).

¹²*South Dakota v. Opperman*, 428 U.S. 364, 369, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).

¹³*Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990); *Askew v. State*, 326 Ga. App. 859, 862, 755 S.E.2d 283 (2014).

¹⁴*Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (DUI); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) (license and registration).

¹⁵*City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (drug interdiction roadblocks not authorized); *Armentrout v. State*, 332 Ga. App. 370, 373, 772 S.E.2d 817 (2015); *Williams v. State*, 293 Ga. 883, 750 S.E.2d 355 (2013).

¹⁶*McCoy v. State*, 303 Ga. 551, 814 S.E.2d 319 (2018).

sonable articulable suspicion to refer the driver for such further detention and screening.¹⁷

§ 28:14 Searches and seizures with a warrant

As the text of the Fourth Amendment makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness. Supreme Court precedents have determined that where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a search warrant. This is the so-called “warrant preference.” Such a warrant ensures that the inferences to support a search are “drawn by a neutral and detached magistrate instead of being judged by an officer engaged in the often competitive enterprise of ferreting out crime.”¹ In the absence of a search warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement, i.e., one of the so-called “well recognized exceptions.”²

Consequently, all searches and seizures conducted without a search warrant are presumptively unreasonable (and therefore unlawful).³ On the other hand, there is a presumption of validity for searches and seizures conducted with a search warrant.⁴

A search warrant is a court order commanding law enforcement officers to search a particular place for a particular person or a particular thing.⁵ Items and persons that may be seized include the following: (1) instrumentalities of crime—any instruments, articles, or things, including the private papers of any person, used in the commission of the named offense(s); (2) persons / bodies - any person who has been kidnapped or any human fetus or human corpse; (3) fruits of crime - stolen or embezzled property; (4) contraband—any item, substance, object,

¹⁷McCoy v. State, 303 Ga. 551, 553, 556, 814 S.E.2d 319 (2018).

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¹Johnson v. U.S., 333 U.S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948).

²State v. Burgess, 349 Ga. App. 486(1), 826 S.E.2d 352 (2019); Martinez v. State, 347 Ga. App. 675, 678, 820 S.E.2d 507 (2018); Diaz v. State, 344 Ga. App. 291, 297(1), 810 S.E.2d 566 (2018).

³Katz v. U.S., 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); Illinois v. McArthur, 531 U.S. 326, 330, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001); Thompson v. Louisiana, 469

U.S. 17, 19-20, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1984).

⁴U.S. v. Ventresca, 380 U.S. 102, 105-107, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965); Ornelas v. U.S., 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); McConville v. State, 228 Ga. App. 463(2), 491 S.E.2d 900 (1997).

⁵In Georgia, a search warrant commands all peace officers of the state of Georgia to execute the warrant to search the place or person particularly described in the warrant and to seize the instruments, articles, or things particularly described in the search warrant. O.C.G.A. §§ 17-5-23, 17-5-24.

thing, or matter, the possession of which is unlawful; or (5) evidence of crime - any item, substance, object, thing, or matter which is tangible evidence of the commission of the named crime(s).⁶

In Georgia, only a certified peace officer may apply for a search warrant.⁷ And in Georgia, search warrants may only be issued by a “court of inquiry”—courts that may conduct preliminary hearings, e.g., judges of the magistrate, probate, juvenile, state, and superior courts.⁸

A search warrant will only issue upon facts sufficient to show probable cause that a crime is being committed or has been committed and that contraband or evidence of a crime will be found in a particular place.⁹ And Georgia law requires that a judicial officer must evaluate and independently decide whether the officer/affiant has shown probable cause.¹⁰

Probable cause to search exists if there is a fair probability that contraband or evidence of a crime will be found in the place named in the search warrant.¹¹ The test for probable cause is not a hyper-technical one to be employed by legal technicians but is based on the factual and practical considerations of everyday life on which reasonable and prudent men act.¹²

Probable cause is not a high bar; it requires merely a fair probability—less than a certainty but more than a mere suspicion of possibility—which by no means is to be equated with proof by even so much as a preponderance of the evidence.¹³

Probable cause must appear within the “four corners” of the search warrant affidavit (unless supplemented by provable oral

⁶O.C.G.A. § 17-5-21(a).

⁷O.C.G.A. §§ 17-5-20(a); 17-5-21(a); *State v. Burgess*, 349 Ga. App. 486(1), 826 S.E.2d 352 (2019) (a search warrant shall not be issued upon the application of a private citizen).

⁸O.C.G.A. §§ 17-5-21(a); 17-7-20; 15-11-4(a). See also *Joyner v. State*, 347 Ga. App. 159, 817 S.E.2d 822 (2018) (a probate judge was not deprived of this authority simply because there was state court in the county where the search warrant was issued).

⁹O.C.G.A. § 17-5-21; *State v. Britton*, 316 Ga. 283(1), 888 S.E.2d 157 (2023); *Pickens v. State*, 363 Ga. App. 716(1), 872 S.E.2d 480 (2022); *State v. Palmer*, 285 Ga. 75, 77, 673

S.E.2d 237 (2009).

¹⁰O.C.G.A. § 17-5-21; *State v. Burgess*, 349 Ga. App. 486(1), 826 S.E.2d 352 (2019).

¹¹*Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *Perez v. State*, 316 Ga. 433, 440, 888 S.E.2d 526 (2023); *Ray v. State*, 340 Ga. App. 561(1), 798 S.E.2d 82 (2017).

¹²*State v. Perez*, 349 Ga. App. 707, 708, 824 S.E.2d 804 (2019).

¹³*District of Columbia v. Wesby*, 583 U.S. 48, 57, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018); *Mitchell v. State*, 366 Ga. App. 854(3)(b), 884 S.E.2d 535 (2023); *Copeland v. State*, 314 Ga. 44, 49(3), 875 S.E.2d 636 (2022).

testimony).¹⁴ Thus, where a magistrate court issues a warrant without receiving any oral testimony, a reviewing court must focus on the information set forth within the four corners of the search warrant affidavit.¹⁵

In determining whether probable cause exists to issue a search warrant, the magistrate's task is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. On appellate review, a court's duty is to determine if the magistrate had a "substantial basis" for concluding that probable cause existed to issue the search warrant. The decision of a magistrate to issue a search warrant based on a finding of probable cause is entitled to substantial deference by a reviewing court, and even doubtful cases should be resolved in favor of upholding a magistrate's determination that a warrant is proper.¹⁶

It is well settled that an application for a search warrant may be supported by hearsay.¹⁷ Typically, the search warrant affiant only has personal knowledge of some of the investigative facts set forth in the search warrant affidavit. The search warrant affiant, therefore, must often relate investigative facts of which he has no firsthand knowledge. But even if the search warrant affiant has no personal knowledge of any of the facts stated in the search warrant affidavit, hearsay alone may justify the issuance of a search warrant so long as there is a substantial basis for crediting such hearsay as reliable.¹⁸

Possible sources of hearsay that may establish probable cause justifying the issuance of a search warrant include information from fellow officers,¹⁹ concerned citizens,²⁰ confidential infor-

¹⁴*Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 565 (n.8), 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971); *Pailette v. State*, 232 Ga. App. 274, 276, 501 S.E.2d 603 (1998) (oral testimony lacking).

¹⁵*Pickens v. State*, 363 Ga. App. 716, 717, 872 S.E.2d 480 (2022); *Wingate v. State*, 347 Ga. App. 341, 343(2), 819 S.E.2d 502 (2018).

¹⁶*Copeland v. State*, 314 Ga. 44, 49, 875 S.E.2d 636 (2022); *McMurray v. State*, 355 Ga. App. 420(1), 844 S.E.2d 303 (2020).

¹⁷*State v. Britton*, 316 Ga. 283(4), 888 S.E.2d 157 (2023).

¹⁸*U.S. v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965).

¹⁹Police officers are presumed to be credible. This includes the search warrant affiant himself. *Illinois v. Gates*, 462 U.S. 213, 277, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *McConville v. State*, 228 Ga. App. 463(2), 491 S.E.2d 900 (1997).

²⁰Concerned citizens are presumed to be credible. *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); *Durden v. State*, 320 Ga. App. 218, 221(1), 739 S.E.2d 676 (2013).

ments,²¹ and anonymous tipsters.²²

§ 28:15 Attacks on issuance or substance of search warrants

Common search warrant attacks include: (1) insufficient probable cause on the face of the affidavit, (2) false statements or omissions in the affidavit, (3) staleness of information in the affidavit, (4) lack of particularity in describing the place to be searched and/or the person or thing to be seized, and (5) improper or illegal execution of the search warrant.¹

(a) Insufficient Probable Cause.²

(b) False Statements or Omissions.

Search warrant affidavits filed by police affiants in support of search warrant applications are presumed valid.³ But in *Franks v. Delaware*,⁴ the Supreme Court held that a trial court may not rely on this presumption of validity to automatically reject a challenge to the validity of an affidavit alleging that it contains false information or material omissions.⁵

Franks held, however, that before a defendant is entitled to a hearing on such allegations, he must make a substantial offer of proof satisfying the following three conditions:⁶

- (1) Step 1: show that the search warrant affidavit contains inaccurate statements or omissions;
- (2) Step 2: show that such inaccurate statements or omissions were deliberately made or made with reckless disregard for the truth; and
- (3) Step 3: show that any such false statements or omissions were material to the magistrate's probable cause decision.

²¹Confidential informants are not presumed credible. See § 28:17, *infra*.

²²Anonymous tipsters are not presumed credible. See § 28:17, *infra*.

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¹See § 28:16, *infra*.

²See discussion of the prerequisites for a showing of probable cause in § 28:14, *supra*.

³*Ledbetter v. State*, 190 Ga. App. 843(1), 380 S.E.2d 313 (1989); *Ross v. State*, 169 Ga. App. 655, 657, 314 S.E.2d 674 (1984) (overruled on other grounds by, *Watts v. State*, 274 Ga. 373, 552 S.E.2d 823 (2001)).

⁴*Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

⁵*Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *Crow v. State*, 267 Ga. App. 188(4), 598 S.E.2d 824 (2004).

⁶*Franks* is not fully applicable in Georgia, however, because Georgia's search warrant statute, O.C.G.A. § 17-5-30, provides that the burden of evidentiary production is *always* upon the state—thus, the defendant cannot be forced to make the three-step showing required in *Franks* in order to have his challenge heard. *Watts v. State*, 274 Ga. 373(1), 552 S.E.2d 823 (2001).

Under *Franks*, the trial court will exclude the alleged falsehood from its probable cause analysis only if a preponderance of the evidence establishes an intentional or knowing falsehood or a reckless disregard for the truth.⁷ Thus, *Franks* is inapplicable to (1) an affiant's simple negligence or innocent mistake, or (2) an affiant's good faith reliance on false statements or omissions made by others, e.g., confidential informants.⁸

Moreover, even if a court determines that a search warrant affidavit contains a false statement or a material omission, a court will not necessarily grant the motion to suppress. Instead, a court will delete the false statement or add the omitted information and then evaluate whether the remaining information in the search warrant affidavit satisfies the probable cause requirement.⁹

(c) Staleness.

Time—or more accurately, the passage of time—is an element of the concept of probable cause. The relevant inquiry is often whether the factual statements made in the affidavit are sufficient to create a reasonable belief that the conditions described in the affidavit might yet prevail at the time the search warrant is issued. This is the concept of “staleness.”¹⁰

There is no “bright-line” rule for determining when information is too old (stale).¹¹ Courts must assess each case on its own facts. Thus, a magistrate must consider whether, despite the passage of time, a fair probability still exists that evidence subject to seizure will be located at the premises to be searched.¹²

⁷State v. Britton, 316 Ga. 283(2), 888 S.E.2d 157 (2023) (reversing an alleged *Franks* claim where no one testified that alleged misrepresentation in the search warrant affidavit was “intentional, knowing, or reckless”).

⁸Franks v. Delaware, 438 U.S. 154, 155, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

⁹Winn v. State, 345 Ga. App. 359, 363, 813 S.E.2d 400 (2018) (disapproved of on other grounds by, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893 (2021)); Briscoe v. State, 344 Ga. App. 610, 612, 811 S.E.2d 426 (2018); Martinez-Vargas v. State, 317 Ga. App. 232, 236, 730 S.E.2d 633 (2012) (disapproved of on other grounds by, State v. Kazmierczak, 331 Ga. App. 817, 771

S.E.2d 473 (2015)); State v. Palmer, 299 Ga. App. 762, 762-763, 683 S.E.2d 858 (2009); Sullivan v. State, 284 Ga. 358(2), 667 S.E.2d 32 (2008).

¹⁰Rocha v. State, 284 Ga. App. 852, 854, 644 S.E.2d 921 (2007).

¹¹Gerbert v. State, 339 Ga. App. 164, 166, 793 S.E.2d 131 (2016) (the mere passage of time does not equate with staleness); Zorn v. State, 291 Ga. App. 613(3), 662 S.E.2d 370 (2008).

¹²Gerbert, *supra*, at 166 (media capable of storing sexually explicit material, such as computers or hard drives, are unlikely to be affected by the passage of time); Lemon v. State, 279 Ga. 618, 619 S.E.2d 613 (2005) (2 days—simple possession of drugs); Crow v. State, 267 Ga. App. 188, 598 S.E.2d 824 (2004) (2-3 months—pos-

(d) Lack of Particularity.

The Fourth Amendment's "Particularity Clause" is designed to prohibit "general warrants."¹³ This objective is so critical that it is said that particularity is the sine qua non of a valid warrant.¹⁴

In *Andresen v. Maryland*,¹⁵ the Supreme Court explained the need for the particularity requirement as follows: "(T)he problem (posed by the general warrant) is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. . . . (The Fourth Amendment addresses the problem) by requiring a 'particular description' of the things to be seized."¹⁶

Descriptions of items to be seized must be sufficiently particular to enable an officer to reasonably distinguish what should and should not be seized.¹⁷ Although a warrant cannot leave the determination of what articles fall within its description and are to be seized entirely to the judgment and opinion of the officer executing the warrant, the degree of specificity in the description is flexible and will vary with the circumstances involved. Specifically, the particularity requirement only demands that the executing officer be able to identify the property sought with reasonable certainty.¹⁸ Thus, the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit.¹⁹

§ 28:16 Attacks on execution of search warrants

The execution of a search warrant may raise Fourth Amendment concerns in two areas: the scope of execution and the manner of execution.

session with intent to distribute: ongoing criminal drug enterprise).

¹³*Marron v. U.S.*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927); *Minter v. State*, 206 Ga. App. 692(1), 426 S.E.2d 169 (1992).

¹⁴*Willis v. State*, 122 Ga. App. 455, 457, 177 S.E.2d 487 (1970).

¹⁵*Andresen v. Maryland*, 427 U.S. 463, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976).

¹⁶*Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). See also *State v. Cochran*, 135 Ga. App. 47, 48, 217 S.E.2d 181 (1975) (Particularity Clause is not limited, however, to the search warrant affidavit's description of the

things to be seized, but also applies to the description of the places and persons to be searched).

¹⁷*Marron v. U.S.*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927); *State v. Wilson*, 315 Ga. 613, 614-615, 884 S.E.2d 298 (2023); *Reyes-Castro v. State*, 352 Ga. App. 48(1)(b), 833 S.E.2d 735 (2019).

¹⁸*State v. Wilson*, 315 Ga. 613, 614-615, 884 S.E.2d 298 (2023); *Reyes-Castro v. State*, 352 Ga. App. 48(1)(b), 833 S.E.2d 735 (2019).

¹⁹*State v. Wilson*, 315 Ga. 613, 615, 884 S.E.2d 298 (2023); *Palmer v. State*, 310 Ga. 668 (2)(c), 853 S.E.2d 650 (2021).

(a) Scope of Execution.

Officers executing a search warrant must confine their search to areas and containers on the premises where items listed in the search warrant might reasonably be found.¹ As stated in *U.S. v. Evans*,² “If [police] are looking for an adolescent hippopotamus, they can search the living room or garage but not the microwave oven. If they are searching for cocaine, they can search a container large enough to hold a gram, or perhaps less.”³

A search warrant which authorizes the search of a particular dwelling extends by implication to areas within the curtilage of the dwelling.⁴ Any vehicles on the premises belonging to or under the occupant’s control may also be searched.⁵

Unless the affidavit establishes probable cause to search “all persons present,” only specifically identified persons may be searched.⁶ Police may, however, detain all persons present for a reasonable time while the search warrant is being executed.⁷

Ordinarily, police may only seize items that are listed in the search warrant.⁸ The proper inquiry is whether the officers reasonably believed the search warrant authorized the seizure of the items taken.⁹ Police may, however, also seize “mere evidence” of the crime observed in “plain view” even if such items were not specifically named in the search warrant.¹⁰

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¹*U.S. v. Ross*, 456 U.S. 798, 824, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).

²*U.S. v. Evans*, 92 F.3d 540 (7th Cir. 1996).

³*U.S. v. Evans*, 92 F.3d 540, 543 (7th Cir. 1996).

⁴*Thomas v. State*, 300 Ga. App. 265(3), 684 S.E.2d 391 (2009) (detached garage was within curtilage).

⁵*Peacock v. State*, 314 Ga. 709(3), 878 S.E.2d 247 (2022); *McLeod v. State*, 297 Ga. 99, 105, 772 S.E.2d 641 (2015).

⁶*Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

⁷*Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981); *Mercer v. State*, 251 Ga. App.

465, 467, 554 S.E.2d 732 (2001). See also *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005) (detention of all occupants in handcuffs).

⁸*Marron v. U.S.*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927); *Stanley v. Georgia*, 394 U.S. 557, 570-571, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).

⁹*Miller v. State*, 219 Ga. App. 213, 217, 464 S.E.2d 621 (1995).

¹⁰*Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 300, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); *Saffold v. State*, 298 Ga. 643, 646, 784 S.E.2d 365 (2016); *Reaves v. State*, 284 Ga. 236(1), 664 S.E.2d 207 (2008); O.C.G.A. § 17-5-21(b).

(b) Manner of Execution.

The Fourth Amendment ordinarily requires officers to “knock and announce” before entering the premises to be searched.¹¹

In *Hudson v. Michigan*,¹² the Supreme Court recited some of the benefits of the “knock and announce” requirement: (1) it minimizes the risk that sudden entry may provoke a surprised resident to respond with violence in supposed self-defense; (2) it gives a resident time to open the door and avoid property damage (occasioned by a forcible entry); and (3) it gives a resident time to pull on clothes or get out of bed (thus promoting privacy & dignity).¹³ There is, however, no bright-line rule regarding how long police must wait for an answer.¹⁴

This requirement may be dispensed with, however, when knocking and announcing prior to entry may pose a danger to the executing officers or lead to the imminent destruction of evidence.¹⁵ When such dangers are known in advance, a magistrate may include a “no-knock” provision in the search warrant.¹⁶ The exclusionary rule, however, is ordinarily not applicable to “no knock” violations where deterrence benefits are typically outweighed by substantial social costs.¹⁷

§ 28:17 Arrests and searches based upon an informant’s tip

A police officer may gather sufficient probable cause to make an arrest or apply for a search warrant premised in whole or in part on hearsay information supplied by others. However, when that hearsay information comes from an informant or an any-

¹¹*Sabbath v. U.S.*, 391 U.S. 585, 88 S. Ct. 1755, 20 L. Ed. 2d 828 (1968); *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995) (common law principle so embedded in Anglo-American law that it has become a part of 4th Amendment’s “reasonableness” requirement); *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997).

¹²*Hudson v. Michigan*, 547 U.S. 586, 126 S. Ct. 2159, 165 L. Ed. 2d 56, 23 A.L.R. Fed. 2d 823 (2006).

¹³*Hudson v. Michigan*, 547 U.S. 586, 594, 126 S. Ct. 2159, 165 L. Ed. 2d 56, 23 A.L.R. Fed. 2d 823 (2006).

¹⁴*U.S. v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003) (waiting just 15-20 seconds before door breached was reasonable); O.C.G.A.

§ 17-5-27 (requiring a police officer to give or attempt to give verbal notice of his authority and purpose before forcefully entering the premises).

¹⁵*Wilson v. Arkansas*, 514 U.S. 927, 934-936, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995); *Fair v. State*, 284 Ga. 165, 172-173, 664 S.E.2d 227 (2008) (danger to executing officers); *State v. Cochran*, 275 Ga. App. 185(2), 620 S.E.2d 444 (2005), judgment aff’d, 281 Ga. 4, 635 S.E.2d 701 (2006) (same).

¹⁶But see *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997) (no blanket exception for all drug cases).

¹⁷*Hudson v. Michigan*, 547 U.S. 586, 126 S. Ct. 2159, 165 L. Ed. 2d 56, 23 A.L.R. Fed. 2d 823 (2006) (inevitable discovery theory).

mous tipster, courts will apply an extra level of scrutiny.

(a) Confidential Informants.

A “confidential informant” (or “CI”) is an unnamed source often on the periphery of the law that is frequently compensated for his information. Compensation of CI’s may include cash payments, promises to forego prosecution, or favorable plea bargains. Unlike other sources of hearsay information like fellow police officers and concerned citizens, CIs are not presumed to be credible.

For many years, the reliability of a CI’s tip was determined by a strict application of the so-called *Aguilar-Spinelli* two-pronged test: (1) the “veracity prong” focused on a CI’s personal credibility, i.e., his “veracity,” and was established through supporting information in the search warrant affidavit;¹ and (2) the “basis of knowledge prong” focused on information in the search warrant affidavit demonstrating how the CI acquired his knowledge, i.e., his “basis of knowledge.”²

In *Illinois v. Gates*,³ however, the U.S. Supreme Court abandoned a strict application of the *Aguilar-Spinelli* test in favor of the more flexible “totality of the circumstances” test. In *Gates*, law enforcement received an anonymous letter that described in great detail a marijuana trafficking scheme in which a wife would drive her husband’s car from Chicago to Florida to be loaded with drugs, the husband would fly down a few days later to drive the car back to their home in Chicago, and the car’s trunk would be loaded with drugs. The letter also stated that over \$100,000 worth of drugs would be found in the basement of the couple’s home. DEA agents secured a search warrant for the husband’s car and the couple’s home after corroborating every element of the anonymous tip relating to the couple’s unusual travel itinerary. Marijuana was seized from both the husband’s car and the couple’s home as predicted. But because prosecutors could not establish the anonymous tipster’s veracity (the first prong of the *Aguilar-Spinelli* test), the Illinois trial court granted the couple’s motion to suppress. On certiorari, however, the Supreme Court found that ample probable cause had been shown to sustain both of these search warrants. In so ruling, the Court stated that the two *Aguilar-Spinelli* prongs should not be applied in a mechanistic manner to undermine a finding of probable cause but should

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¹*Aguilar v. State of Tex.*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) (magistrate must be able to make an independent assessment of CI’s veracity)

²*Spinelli v. U.S.*, 393 U.S. 410,

89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) (magistrate must be able to determine that the CI’s information is more than a casual rumor).

³*Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

instead be viewed as contributing factors only in a court's practical, common-sense probable cause assessment—one that takes into account the “totality of the circumstances.”

After *Gates*, in determining the overall reliability of a CI's tip, a deficiency in one of the *Aguilar-Spinelli* criteria may be compensated for by a strong showing as to the other or by some other indicia of reliability.⁴

A search warrant affidavit should not merely state the affiant's conclusions, e.g., “the affiant was contacted by a ‘reliable CI’ who stated that.” Rather, an affidavit submitted in support of a search warrant should set forth sufficient facts from which the magistrate can independently determine the trustworthiness of the informer and the reliability of his information.⁵

A CI's “veracity” is typically established by relating the CI's “track record” for providing accurate information in the past. Thus, a search warrant affidavit should reveal details regarding a CI's prior assistance to law enforcement, e.g., the number of times the CI has provided information to law enforcement, the number of seizures based upon such information, and the number of arrests, indictments, and convictions stemming from such information.⁶ A CI's veracity may also be shown if he makes statements against his penal interest⁷ or participates in a “controlled buy.”⁸

A CI's “basis of knowledge” is often an obvious part of his tip, e.g., “I was at the target's residence and personally saw [criminal activity].”⁹ Sometimes, however, the CI's basis of knowledge is not explicitly stated but may be inferred from the detailed nature

⁴*Illinois v. Gates*, 462 U.S. 213, 233, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *Rocha v. State*, 284 Ga. App. 852, 853, 644 S.E.2d 921 (2007); *State v. Donaldson*, 281 Ga. App. 51, 53-54, 635 S.E.2d 345 (2006).

⁵*Ferguson v. State*, 354 Ga. App. 867, 869, 842 S.E.2d 77 (2020).

⁶*Watson v. State*, 365 Ga. App. 113(2), 877 S.E.2d 678 (2022) (CI previously provided information to law enforcement that resulted in convictions and seizure of illegal drugs); *Anthony v. State*, 197 Ga. App. 297(1), 398 S.E.2d 580 (1990) (informant deemed reliable because his information had resulted in three or four prior arrests). Cf. *Heitkamp v. State*, 342 Ga. App. 674(1), 804 S.E.2d 702 (2017) (officers failed to provide information regarding the CI's reputation for being

truthful or reliable).

⁷*U.S. v. Harris*, 403 U.S. 573, 583-584, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971); *Cochran v. State*, 281 Ga. 4, 6, 635 S.E.2d 701 (2006); *Elliott v. State*, 275 Ga. App. 359, 360, 620 S.E.2d 584 (2005).

⁸*Ferguson v. State*, 354 Ga. App. 867, 870, 842 S.E.2d 77 (2020) (a CI's so-called “controlled buy” of narcotics strongly corroborates the reliability of the informant and shows a fair probability that contraband would be found in the seller's residence). See also *Woods v. State*, 346 Ga. App. 323, 816 S.E.2d 156 (2018); *Ibekilo v. State*, 277 Ga. App. 384, 385(1), 626 S.E.2d 592 (2006).

⁹*Rocha v. State*, 284 Ga. App. 852, 853, 644 S.E.2d 921 (2007).

of his tip or its accurate prediction of the suspect's future behavior.¹⁰ In *Draper v. U.S.*,¹¹ for example, the Supreme Court found that a federal agent had probable cause to arrest Draper for a narcotics violation (possession of heroin) after corroborating a CI's very detailed tip. That tip accurately predicted that Draper would be arriving by train from Chicago on one of two specific dates, would fit a specific physical description, would be wearing specific clothing, would be carrying a tan zipper bag, and would be walking very fast.

A CI's identity is considered to be a "state secret."¹² When a CI is deemed to be a "pure tipster," i.e., one who merely passes along information rather than actively participating in the investigation of a suspect, his identity will rarely, if ever, be revealed.¹³

If, however, a CI is determined to be an "informer-participant" or an "informer-witness," a court must determine whether due process requires that the CI's identity be revealed to enable the defendant to call the CI as a defense witness at the trial of the case.

But before ordering a CI's identity to be disclosed, a court will require the defendant to satisfy the following threshold showing of need: (1) the CI's testimony appears to be material to the issue of guilt or punishment; (2) the testimony for the prosecution and defense will be in conflict; and (3) the CI is the only witness who could contradict the testimony of the State's police witnesses.¹⁴

But even if this threshold showing is met, the trial court will then conduct an ex parte in-camera hearing with the CI and weigh the materiality of the informer's likely testimony against the State's privilege not to disclose his name. If the CI's testimony would merely corroborate and bolster the prosecution's theory of the case, there is no need to reveal the CI's name.¹⁵

¹⁰*Solis v. State*, 268 Ga. App. 493, 496-497, 602 S.E.2d 166 (2004); cf. *State v. Dukes*, 279 Ga. App. 247, 250, 630 S.E.2d 847 (2006).

¹¹*Draper v. U.S.*, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959).

¹²O.C.G.A. § 24-5-501(4) (formerly O.C.G.A. §§ 24-9-21, 24-9-27); *Jones v. State*, 289 Ga. App. 767(2), 658 S.E.2d 386 (2008) (public policy in Georgia favors nondisclosure of the identity of an informant in the interest of the free flow of information about criminal activity).

¹³*McCray v. State of Ill.*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62

(1967) (disclosure of CI's identity only required when there are serious questions regarding a defendant's guilt or innocence requiring the CI's testimony); *Woodruff v. State*, 339 Ga. App. 707(2), 792 S.E.2d 471 (2016); *Strozier v. State*, 314 Ga. App. 432(1), 724 S.E.2d 446 (2012).

¹⁴*Roviaro v. U.S.*, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); *Respress v. State*, 267 Ga. App. 654(2), 600 S.E.2d 727 (2004).

¹⁵*Moore v. State*, 187 Ga. App. 387(2), 370 S.E.2d 511 (1988). Cf. *Hernandez v. State*, 291 Ga. App. 562(3), 662 S.E.2d 325 (2008) (overruled on other grounds by,

(b) Anonymous tipsters.

An “anonymous tipster” is an informer whose identity and veracity are unknown to law enforcement. Thus, an anonymous tipster will never be able to satisfy the veracity prong of the *Aguilar-Spinelli* test. In *Illinois v. Gates*,¹⁶ however, the U.S. Supreme Court held that in assessing the “totality of the circumstances” in an anonymous tipster case, “a deficiency in one [prong] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other [prong], or by some other indicia of reliability.”¹⁷ Thus, the *Gates* “totality of the circumstances” test may be satisfied if the anonymous tip is sufficiently detailed or provides an accurate prediction of a suspect’s future behavior.¹⁸

§ 28:18 Eavesdropping and other electronically obtained evidence

Both federal and Georgia law prohibit clandestine intercepting and taping of talk when the interception is by persons not parties to the conversation.¹ Electronic surveillance that violates a reasonable expectation of privacy was held in *Berger v. State of N.Y.*² to require a warrant.³ Although a zone of privacy remains under current law, *Berger* was affected by the Omnibus Crime Control Act.⁴ Eavesdropping requires a showing of probable cause to believe a specific crime has been or is being committed, names of

Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479 (2021)) (conflict between CI’s account and that of an undercover agent).

¹⁶Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

¹⁷Illinois v. Gates, 462 U.S. 213, 233, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

¹⁸Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). See also Burgess v. State, 349 Ga. App. 635(2), 824 S.E.2d 99 (2019) (disapproved of on other grounds by, Hill v. State, 360 Ga. App. 143, 860 S.E.2d 893 (2021)) (corroboration of an anonymous tip). Cf. Florida v. J.L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) (anonymous tip without corroboration held insufficient).

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¹Parrott v. Wilson, 707 F.2d 1262, 13 Fed. R. Evid. Serv. 1149, 36 Fed. R.

Serv. 2d 1070 (11th Cir. 1983); O.C.G.A. § 16-11-62.

²Berger v. State of N.Y., 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967).

³In 2015, the Georgia legislature amended O.C.G.A. § 16-11-62, which pertains to electronic eavesdropping, surveillance, and intercepting of communications that “occur in any private place and out of public view.” Specifically, the new law provides that it is not unlawful, in the absence of consent, for a law enforcement officer to employ a device when performing “his or her official duties to observe, photograph, videotape, or record the activities of persons that occur in the presence of such officer or his or her agent.”

⁴See U.S. v. Koyomejian, 946 F.2d 1450 (9th Cir. 1991).

the suspected persons, description with particularity of the conversations to be overheard, limitation to a short period of time, provisions for termination of the wiretap when the desired information is obtained and a requirement that a return be made to the court.⁵ In Georgia practice, noncompliance with federal law which requires that recordings be submitted to the judge issuing the order allowing for the electronic surveillance immediately upon the expiration of the period of the order and that recordings be sealed under his direction, required suppression of the contents of the recordings of wiretapped telephone conversations, even though the police offered evidence that the recordings had not been tampered with and it was alleged that the defendants had not been prejudiced by the absence of a seal.⁶

Evidence obtained in violation of the Georgia statute, O.C.G.A. § 16-11-67, is not admissible in any court, except to prove violations of the statute. Violation of this statute is a felony. However, the code does not prohibit recording of a communication if the sender and receiver consent or if the communication constitutes a crime or furtherance of a crime and one party consents to the interception of the communication.⁷ Therefore, one person can record a conversation without destroying its evidentiary value.⁸ The circumstances in which law enforcement officers can eavesdrop are set out in O.C.G.A. § 16-11-64.⁹ Also, it is illegal for any person to possess, sell, offer for sale, or distribute an eavesdropping device; however, an eavesdropping device is defined as any instrument that has no normal or customary function other than eavesdropping.¹⁰ This broad definition makes the statutory prohibition less restrictive than appears at first blush since many eavesdropping devices may have utility as security devices.

The consent limitations were changed by a 1993 revision. The consent of only one of the parties is necessary for a third party to record a communication, but no consent is required where the person recording the conversation is a party to it.¹¹

In 2022, O.C.G.A. § 16-11-62 was amended to provide that no person shall “intentionally and in a clandestine manner place, or direct someone else to place, a global positioning system monitoring device, or any other electronic monitoring device, on a motor

⁵See 18 U.S.C.A. §§ 2510 to 2520, Omnibus Crime Control and Safe Street Act.

⁶King v. State, 262 Ga. 147, 414 S.E.2d 206 (1992).

⁷O.C.G.A. § 16-11-66. Also see O'Dillon v. State, 245 Ga. 342, 265 S.E.2d 18 (1980).

⁸Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336 (1974); State v. Birge, 240 Ga. 501, 241 S.E.2d 213 (1978).

⁹Also see State v. Bilbo, 240 Ga. 601, 242 S.E.2d 21 (1978).

¹⁰O.C.G.A. § 16-11-63.

¹¹O.C.G.A. § 16-11-66(a).

vehicle owned or leased by another person without the consent of such person when such person has a protective order . . . against the person who places, or directs another to place, the global positioning system monitoring device or other electronic device.”

When one of the parties to a telephone conversation is under the age of 18, consent to record and disclose these conversations may be given only by order of a judge upon written request. The judge will issue the order allowing for the recording only where there has been a finding of probable cause that a crime has been committed, and the child understands the conversation will be recorded. The child must agree to participate, and it must be the case that participation cannot be harmful to the child. The recording will be kept under seal by the judge until the court orders otherwise, and it cannot be used against the child in any prosecution for delinquency or criminal violations.¹²

The 1993 General Assembly also extended the scope of the consent requirements which now apply to any communication transmitted by a cellular radio telephone.¹³ The intentional interception of such communications is considered an aggravated misdemeanor.¹⁴ In addition, under a 1995 enactment, dissemination of the contents of intercepted communications is an offense. The 1995 act provides that it is a misdemeanor of a high and aggravated nature to broadcast, print, or publish the contents of any unlawfully intercepted communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone.¹⁵

The 2002 “Georgia Support of the War on Terrorism Act” revises definitions relating to wiretapping, provides for an investigative warrant, and authorizes access to stored wire and electronic communications, amending O.C.G.A. § 16-11-64, and enacting O.C.G.A. § 16-11-66.1. Search warrants for production of stored wire or electronic communications shall have statewide application.

The 2002 amendments were intended to harmonize Georgia’s rules with federal standards. The Georgia Supreme Court noted that the territorial jurisdiction of a superior court judge is the judicial circuit in which the judge presides.¹⁶ Authority to issue warrants is generally limited to places within that jurisdiction, subject to statutory exceptions. O.C.G.A. § 16-11-64 did not authorize the issuance of wiretap warrants outside the judicial circuit.

¹²O.C.G.A. § 16-11-66(b); *London v. State*, 333 Ga. App. 332, 775 S.E.2d 787 (2015).

¹³O.C.G.A. § 16-11-66.1.

¹⁴O.C.G.A. § 16-11-66.1(d).

¹⁵See O.C.G.A. § 16-11-66.1.

¹⁶*Luangkhot v. State*, 292 Ga. 423, 736 S.E.2d 397 (2013).

Under what statute do new technologies such as thermal imaging fall for search warrant purposes? The Georgia Supreme Court interpreted the General Assembly's idea of "tangible evidence" in O.C.G.A. § 17-5-21 to mean "evidence that is essentially an object with material form that could be touched by a person."¹⁷

Electronic messages in the form of text messages and emails involving company employees can be monitored by employers when they have a reasonable work-related interest in such communications. Defendant Quon's communications were reviewed by his employer, a police department, to determine whether they were work-related messages or for personal use. In the first ruling of its kind on the privacy of worker text messages and emails, the U.S. Supreme Court said officials could read Quon's messages, some of them sexually explicit.¹⁸

Pen registers are subjected to some of the rules which attend electronic surveillance generally.¹⁹ The 2005 legislature enacted O.C.G.A. § 16-11-64.1, which allowed for prosecutorial application for an order approving the installation and use of a pen register or trap and trace device.²⁰

What about electronic tracking devices placed on cars by police? In *U.S. v. Jones*,²¹ the Supreme Court, Justice Scalia, held that attachment of a Global-Positioning-System (GPS) tracking device to a vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, was a search within the meaning of the Fourth Amendment. Reversal of the defendant's conviction was affirmed.²²

In *Huerta-Ramirez v. State*,²³ the Georgia Court of Appeals found that a trial court did not err in concluding that the defendant lacked an expectation of privacy in a vehicle when the defendant had disavowed ownership in that vehicle. Thus, the placement of a GPS device on the vehicle in the absence of a warrant was proper.

¹⁷*Brundige v. State*, 291 Ga. 677, 735 S.E.2d 583 (2012) (disapproved of on other grounds by, *Tatum v. State*, 319 Ga. 187, 903 S.E.2d 109 (2024)) (holding thermal imaging does not fall under the authorization of § 17-5-21(a)(5)). See also *Kyllo v. U.S.*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) (holding that the use of thermal imaging technology to gather information regarding activities on the interior of home was a "search" within the meaning of the 4th Amendment).

¹⁸*City of Ontario, Cal. v. Quon*, 559 U.S. 1047, 130 S. Ct. 2366, 176 L. Ed. 2d 560 (2010) (9-0 ruling).

¹⁹See *Duncan v. State*, 259 Ga. 278, 379 S.E.2d 507 (1989).

²⁰See also *Smith v. Maryland*, 442 U.S. 735 (1979) (installation and use of a pen register by a telephone company does not constitute a "search" within the meaning of the Fourth Amendment).

²¹*U.S. v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).

²²*Hamlett v. State*, 323 Ga. App. 221, 753 S.E.2d 118 (2013).

²³*Huerta-Ramirez v. State*, 357 Ga. App. 123, 850 S.E.2d 218 (2020).

In *United States v. Blake*,²⁴ the Eleventh Circuit held that a district court properly compelled Apple, the manufacturer of iPads, to assist the FBI in searching a specific device by overcoming the device's security features. The district court had approved a search warrant request to search the iPad. The Eleventh Circuit concluded that "[t]he bypass order was necessary or appropriate to carry out the search warrant the district court had issued, the assistance sought was not specifically addressed by another statute, the bypass order was not inconsistent with Congress' intent, Apple was not too far removed from the underlying controversy, and the burden the order imposed on it was not unreasonable."

Domestic relations cases sometimes involve intercepted conversations. But even if a conversation can be characterized as illegal or immoral, there was no exception in the anti-wiretapping statute to allow taping and introduction of such conversations where the tape recordings had been taped by a husband in violation of the anti-wiretapping statute.²⁵

In *Mobley v. State*,²⁶ the Georgia Supreme Court applied the "trespass theory" of Fourth Amendment searches (revived in *Jones v. U.S.*²⁷) to the search of a vehicle's onboard electronic data recording device (airbag control module or ACM) following a fatal automobile collision. It held that a physical intrusion into a personal motor vehicle for the purpose of obtaining information for a law enforcement investigation generally is a "search" for purposes of the Fourth Amendment. The *Mobley* Court did not reach the defendant's claim that he had a reasonable expectation of privacy in such data but the Court seemed sympathetic to that argument as well.

§ 28:19 Obtaining evidence from bodily substances or by surgery

Evidence concealed within the body of the accused may, where no danger to the life or limb of the prisoner is involved, be removed without violating his rights under the Constitution of the United States not to be subjected to unreasonable searches and seizures or to be compelled to produce evidence against himself. Does the seizure of such evidence force a person to produce evidence against himself? The extraction of such evidence does not violate the prisoner's rights under the Constitution of the State of Georgia or statutory law where he is not forced to

²⁴*United States v. Blake*, 868 F.3d 960 (11th Cir. 2017).

²⁵*Middleton v. Middleton*, 259 Ga. 41, 376 S.E.2d 368 (1989).

²⁶*Mobley v. State*, 307 Ga. 59, 834 S.E.2d 785 (2019).

²⁷*U.S. v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).

himself produce the evidence.¹

Surgery to secure evidence is, however, another matter. It is not a reasonable search to require someone connected to a crime to undergo surgery against his will to remove a bullet lodged an inch from spine, even if medical testimony could be produced that the operation would not be dangerous to health.² However, taking a blood sample, which involves virtually no risk, trauma or pain, is a reasonable intrusion.³

Sometimes the state has the right to obtain evidence from a suspect, but recovery of it requires the assistance of a doctor or dentist. When seizure is accomplished by means of medical or dental procedures and the actual physical gathering of that evidence must necessarily utilize equipment and procedures requiring expert skills and having a high potential for harm to the person being searched, the search is not required to be done by peace officers under O.C.G.A. § 17-5-24. The dental impressions, x-rays, and photographs produced in the search of a defendant's mouth pursuant to warrants were admissible, even though the dentist who actually executed the warrants was not a peace officer.⁴

A trial court did not err in refusing to suppress a bullet as the fruit of an illegal search and seizure where the bullet was surgically removed from the defendant by hospital employees, where it was turned over to the police pursuant to the hospital's policy, and where the police never instructed or requested, either directly or indirectly, that the bullet be removed from the defendant.⁵

Does drug testing of student athletes constitute illegal search and seizure of bodily fluids? Drug testing was examined in *Vernonia School Dist. 47J v. Acton*.⁶ The student athlete drug policy authorized random urinalysis drug testing. Athletes were among the leaders of the drug culture in the Vernonia, Oregon schools, according to the District Court. The urinalysis policy applied to all students participating in interscholastic athletics. Students signed a consent form. Names of tested athletes were blindly drawn from a pool. Acton's parents sued because he refused to

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¹*Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972).

²See discussion in *State v. Haynie*, 240 Ga. 866, 242 S.E.2d 713 (1978). Also see *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (if significant risk to health, procedure is unreasonable and a suspect need not undergo it).

³*Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

⁴*Harris v. State*, 260 Ga. 860, 401 S.E.2d 263 (1991).

⁵*Williams v. State*, 257 Ga. 788, 364 S.E.2d 569 (1988).

⁶*Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564, 101 Ed. Law Rep. 37 (1995).

sign the testing consent forms and was denied participation in football. The Supreme Court concluded that Vernonia's policy was reasonable and hence constitutional, based upon the responsibilities imposed on the school system.

However, urinalysis drug testing of candidates for designated state offices, when mandated by statute, effected a search within the meaning of the Fourth and Fourteenth Amendments.⁷

The process of taking blood from a suspect must follow established norms, as explained in *State v. Poppell*.⁸ Extraction of a suspect's blood constitutes a "search" within the meaning of the Georgia Constitution. In *Poppell* the state failed to show that a murder defendant's consent to taking and testing of his blood was voluntary; police officer testified that there were other officers present when officer asked defendant's consent to have his blood taken, but none of the other officers could recall any conversation about a blood test, and defendant was never advised as to purpose of test, why it was being requested, or whether he had the right to refuse. To eliminate any taint from an involuntary seizure or arrest, there must be proof that the suspect's consent was voluntary and that it was not the product of the illegal detention; proof of a voluntary consent alone is not sufficient. Finally, while it is not always essential under the Fourth Amendment for a person to be told that he may refuse to consent to a warrantless search, Georgia courts have recognized that informing an individual of the right to refuse strengthens the conclusion that the consent was voluntary.

The United States Supreme Court authored an opinion in 2013 about taking blood from a drunk driving suspect. The Supreme Court's decision in *Schmerber v. California*⁹ another drunk driving case, formed the backdrop for the 2013 discussion in *Missouri v. McNeely*.¹⁰ The Court held that the natural metabolism of alcohol in the bloodstream does not present a per se exigency that justifies a blanket exception to the Fourth Amendment's search warrant requirement for nonconsensual blood testing in drunk driving cases. Instead, exigency must be determined case by case. But in *Birchfield v. North Dakota*,¹¹ the Court held that police may compel and take a warrantless breath sample (but not a blood sample) "incident to the arrest" of a DUI suspect. Such a

⁷*Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513, 145 A.L.R. Fed. 657 (1997).

⁸*State v. Poppell*, 277 Ga. 595, 592 S.E.2d 838 (2004).

⁹*Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

¹⁰*Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013).

¹¹*Danny Birchfield North Dakota Steve Michael Beylund v. North Dakota Department of Transportation*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

nonconsensual taking in Georgia, however, would violate Georgia's constitutional self-incrimination provision.¹²

In Georgia, O.C.G.A. § 17-5-21.1 makes it easier for police to secure warrants when drunk drivers refuse to consent. O.C.G.A. § 40-5-67.1 authorizes suspension for one year of driving privileges when a suspected drunk driver refuses to give blood, breath or urine.

A fingerprint may be taken from a person convicted of driving without a license.¹³

§ 28:20 Mandatory taking of DNA samples

Amendments to former O.C.G.A. §§ 24-4-60 through 24-4-63 and 24-4-65 authorized DNA sampling from persons convicted of a felony on and after July 1, 2000, as well as to other prisoners. A 2011 enactment provided for the collection of DNA from all persons convicted of a felony and incarcerated, sentenced to probation, or placed on parole.¹

The foregoing provisions primarily assist detection and prosecution of crime. In a move to aid prisoners who seek to gain a new trial after the expiration of the time for filing a motion for new trial, the 2003 legislature enacted provisions whereby post-conviction DNA testing of evidence could occur in certain criminal cases.²

DNA analysis for all inmates currently imprisoned in a state correctional facility was ordained in a 2004 amendment of former O.C.G.A. § 24-4-60. The act was broadened in 2007 to include some probationers. The 2007 amendment provided for DNA samples to be collected from persons convicted of specified felonies and sexual offenses who are placed on probation rather than incarcerated. Specifically, revised O.C.G.A. § 24-4-60 required DNA analysis not only of persons incarcerated in a state correctional facility, but also of any person placed on probation after a felony conviction of enumerated offenses. The enumerated felonies range from rape and sodomy to drug and armed robbery convictions. In the 2013 Georgia Evidence Code, see O.C.G.A. § 35-3-160(c)(1). As noted in the note to the first paragraph of this section, the provisions of law contained in O.C.G.A. § 24-4-60 and related sections were broadened and moved to Title 35 in 2011.

¹²Olevik v. State, 302 Ga. 228, 806 S.E.2d 505 (2017).

¹³O.C.G.A. § 40-15-121.

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¹Ga. Laws 2011, Act 67. The Act

redesignated Article 4 of O.C.G.A. Chapter 24-4 as Article 6A of O.C.G.A. Chapter 35-3. See O.C.G.A. §§ 35-3-160 to 35-3-165.

²O.C.G.A. § 5-5-41.

The Georgia Department of Corrections can require incarcerated felons to submit saliva samples for DNA profiling, the federal court has ruled. A three-judge panel of the 11th U.S. Circuit Court of Appeals held unanimously that collecting the samples does not violate constitutional guarantees against unreasonable search and seizure or an inmate's right to privacy under the U.S. or Georgia constitutions. The court rejected a challenge by two inmates who claimed the practice is illegal because it forces them to give the samples without their consent. The Georgia law applies to all people convicted of felonies and incarcerated as of July 1, 2000, and all felons imprisoned after that date.³

Some other states have even broader provisions. Under some state statutes, DNA can be collected from people arrested for serious crimes. The constitutionality of such laws was upheld in 2013.⁴ Twenty-six states allow this process in order to help clear unsolved crimes.

³Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005).

⁴Maryland v. King, 569 U.S. 435, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

Chapter 29

Admissibility of Other Types of Evidence

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§ 29:1 Admissibility of circumstantial evidence

To warrant a conviction in a criminal case on circumstantial evidence, the proved facts shall not only be consistent with the

hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.¹ O.C.G.A. § 24-14-6 recreates former O.C.G.A. § 24-4-6 and, because “there is no materially identical federal rule . . . , cases interpreting the current provision are also relevant for cases . . . applying the former provision.”² A jury is authorized to find that the evidence, though circumstantial, is sufficient to exclude every reasonable hypothesis save that of guilt.³ Applying this formula, see *Carter v. State*.⁴

A 2020 decision from the Supreme Court of Georgia ably summarized the legal strictures of circumstantial evidence:

Moreover, “the fact that the evidence of guilt was circumstantial does not render it insufficient.” *Carter v. State*, 305 Ga. 863, 867 (828 SE2d 317) (2019) (citation and punctuation omitted). It is true that “[t]o warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.” OCGA § 24-14-6. But we have made clear that “[n]ot every hypothesis is reasonable,” so “only reasonable hypotheses” must be excluded. *Brown v. State*, 304 Ga. 435, 437 (819 SE2d 14) (2018). In other words, the evidence “need not exclude every conceivable inference or hypothesis—only those that are reasonable,” *Carter*, 305 Ga. at 868 (citation and punctuation omitted; emphasis in original), and “it is principally for the jury to determine whether an alternative hypothesis is reasonable.” *Willis v. State*, 304 Ga. 781, 783 (822 SE2d 203) (2018).⁵

In Georgia, it is “‘clear’ and longstanding precedent [that] the trial court . . . instruct the jury on proof by circumstantial evidence as set forth in former OCGA § 24-4-6 even” in the absence of a request for an instruction.⁶

When the circumstantial evidence supports more than one theory, one consistent with guilt and another with innocence, it does not exclude every other reasonable hypothesis except guilt and is not sufficient to prove the defendant’s guilt beyond a reasonable doubt. Circumstantial evidence is worth nothing in a criminal case, if the circumstances are reasonably consistent with the

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¹O.C.G.A. § 24-14-6. See *Clark v. State*, 309 Ga. 473, 847 S.E.2d 364 (2020); *Jones v. State*, 340 Ga. App. 142, 796 S.E.2d 765 (2017). See also *Johnson v. Warden*, 808 F.3d 1275 (11th Cir. 2015).

²*Shaw v. State*, 307 Ga. 233, 835 S.E.2d 279 (2019).

³*Wilson v. State*, 308 Ga. 306, 840 S.E.2d 370 (2020); *Wehunt v.*

State, 270 Ga. 456, 511 S.E.2d 163 (1999).

⁴*Carter v. State*, 276 Ga. 322, 577 S.E.2d 787 (2003). See also *Bates v. State*, 317 Ga. 809, 896 S.E.2d 581 (2023).

⁵*Clark v. State*, 309 Ga. 473, 847 S.E.2d 364 (2020).

⁶*Gadson v. State*, 303 Ga. 871, 815 S.E.2d 828 (2018).

hypothesis of innocence, as well as the hypothesis of guilt.⁷

When a conviction rests solely upon circumstantial evidence “the proven facts must be consistent with the hypothesis of guilt and must exclude every reasonable theory other than the guilt of the accused.”⁸

Circumstantial evidence must be relevant in order to be admissible. A high-profile Georgia murder trial is illustrative. An attorney was accused of killing his wife, a successful businesswoman, while they were passengers in a car driven by the victim’s best friend. The prosecution theorized a financial motive on the defendant’s part in allegedly committing the homicide. The defense was that the shooting was an accident. In reversing, the Supreme Court of Georgia ruled that the introduction of various items of evidence were irrelevant and introduced in violation of O.C.G.A. § 24-4-401:

- Introduction of evidence of that the victim had a second will, purportedly beneficial to the defendant, was improper absent “evidence of its provisions and [Defendant’s] knowledge of its existence;”
- Evidence of Georgia’s “slayer statute”⁹ was improperly admitted because the provision would not contribute to motive in that “it would prevent [Defendant] from receiving any interest in [Victim’s] estate;” and
- Eliciting testimony about the Defendant directing the best friend to drive to a more distant hospital was also error where there was no evidence presented that the defendant believed the closer hospital was better equipped to handle gunshot wounds.¹⁰

In *Lindley v. State*,¹¹ the Georgia Court of Appeals found that there was insufficient evidence regarding the defendant’s knowing possession of child pornography.

In *Poteet v. State*,¹² a case involving the possession of methamphetamine, drugs were found in a flower pot in a home that the defendant “neither owned nor occupied.” The court observed that the evidence relied upon to prove the defendant’s guilt “other than her presence in the residence where it was located, is the

⁷O’Neill v. State, 285 Ga. 125, 674 S.E.2d 302 (2009).

⁸Jernigan v. State, 357 Ga. App. 415, 848 S.E.2d 707 (2020); Roberts v. State, 296 Ga. 719, 770 S.E.2d 589 (2015).

⁹O.C.G.A. § 53-1-5 (“(a) An individual who feloniously and intentionally kills or conspires to kill or pro-

cures the killing of another individual forfeits the right to take an interest from the decedent’s estate”).

¹⁰McIver v. State, 314 Ga. 109, 875 S.E.2d 810 (2022).

¹¹Lindley v. State, 345 Ga. App. 637, 814 S.E.2d 784 (2018).

¹²Poteet v. State, 358 Ga. App. 82, 853 S.E.2d 671 (2021).

presence of a substance which may or may not be lipstick residue on the pipe, Poteet's gender, and Poteet's admission that she smoked methamphetamine recently enough that she might fail a drug screen. That is all." The court concluded that the circumstantial evidence was insufficient to support the defendant's conviction.

The Supreme Court of Georgia found that evidence was sufficient to support defendant's murder conviction and that it was unnecessary for the jury to find that the defendant's theory that her husband was solely responsible for the murder was reasonable. Evidence established that defendant was alone with her children when her son sustained a blow to his head, her children had sustained injuries that were the byproduct of abuse, and the defendant had a "history of lying" regarding the sources of her children's injuries.¹³

The Georgia Supreme Court found that circumstantial evidence was sufficient to convict a defendant of the murder. Evidence was produced that placed the defendant alone with the victim in the house where the victim died and the court reasoned that the jury was free to exclude other possible explanations for the victim's death.¹⁴

In *Lowe v. State*,¹⁵ the Supreme Court ruled that "[s]ince the reasonable hypothesis rule applies when evidence is entirely circumstantial, the rule was not applicable in this case."

In *Rogers v. State*,¹⁶ the Georgia Supreme Court found that the reasonable hypothesis rule was inapplicable to a murder conviction case before the court. The court concluded that the government's evidence was not entirely circumstantial.

In *Garland v. State*,¹⁷ the Georgia Court of Appeals considered the sufficiency of the evidence in support of misdemeanor convictions involving the Georgia Open Records Act sustained by the defendant, a former aid to an Atlanta mayor. The court held, in part, that the evidence was "sufficient for the jury to infer that Garland knew about Boyd's request for the corrected records, and to further support the jury's determination that Garland was attempting to frustrate access to the records associated with the mayor's brother—and not the records associated with the second requested address—at the time she sent the text messages underlying the accusation."

¹³Black v. State, 296 Ga. 658, 769 S.E.2d 449 (2011).
S.E.2d 898 (2015).

¹⁴Adkins v. State, 314 Ga. 477, 859 S.E.2d 92 (2021).
877 S.E.2d 582 (2022).

¹⁵Lowe v. State, 288 Ga. 662, 706 S.E.2d 533 (2021).
724, 865 S.E.2d 533 (2021).

¹⁶Rogers v. State, 311 Ga. 634,

¹⁷Garland v. State, 361 Ga. App.

In *Hill v. State*,¹⁸ the Georgia Court of Appeals reversed defendant's conviction on various drug charges. The government's case was circumstantial and it was insufficient to sustain the defendant's conviction.

Circumstantial evidence in civil cases, see *Underwood v. Select Tire, Inc.*¹⁹ Where there is both direct evidence and circumstantial evidence to support a conviction, it is not reversible error for the court to fail to charge on circumstantial evidence.²⁰

Where all the evidence is direct, an instruction on circumstantial evidence should not be given.²¹

Instructions on circumstantial evidence were discussed in *Sumlin v. State*:²²

[A] trial court is required to give the instruction on circumstantial evidence only if the defendant so requests. *Yarn v. State*, 265 Ga. 787, 462 S.E.2d 359 (1995). In this case, it is undisputed that Appellant failed to request a charge on circumstantial evidence. Accordingly, there is no merit to this enumeration.

Judgment affirmed.

Venue may be proved by circumstantial evidence, *Goldstein v. State*,²³ as may the corpus delicti.²⁴ Circumstantial evidence was sufficient to support venue in Walton County in a robbery (among other related charges) case.²⁵ Drunken driving can be proven by circumstantial evidence as long as the evidence excludes every other reasonable hypothesis.²⁶

It is also commonly understood that the existence of a conspiracy can be proven by circumstantial evidence.²⁷

Circumstantial evidence can also be used exclusively to authenticate a document.²⁸

Circumstantial evidence can be described as evidence which does not constitute direct proof with regard to the issue of fact or the hypothesis sought to be proven by the evidence; rather, circumstantial evidence constitutes proof of other facts consistent

¹⁸*Hill v. State*, 360 Ga. App. 143, 860 S.E.2d 893 (2021). v. State, 94 Ga. App. 437, 95 S.E.2d 47 (1956).

¹⁹*Underwood v. Select Tire, Inc.*, 296 Ga. App. 805, 676 S.E.2d 262 (2009). ²⁴*Wright v. State*, 199 Ga. 576, 34 S.E.2d 879 (1945).

²⁰*Washington v. State*, 96 Ga. App. 844, 101 S.E.2d 885 (1958). ²⁵*Propst v. State*, 299 Ga. 557, 788 S.E.2d 484 (2016).

²¹*Wise v. State*, 209 Ga. 115, 70 S.E.2d 598 (1952). ²⁶*Brown v. State*, 98 Ga. App. 350, 105 S.E.2d 785 (1958).

²²*Sumlin v. State*, 283 Ga. 264, 658 S.E.2d 596 (2008). ²⁷*Akintoye v. State*, 340 Ga. App. 777, 798 S.E.2d 720 (2017).

²³*Payne v. State*, 338 Ga. App. 677, 791 S.E.2d 451 (2016); *Goldstein v. State*, 94 Ga. App. 437, 95 S.E.2d 47 (1956). ²⁸*United States v. Williams*, 865 F.3d 1328, 104 Fed. R. Evid. Serv. 1 (11th Cir. 2017).

with the hypothesis claimed.²⁹

The character or reputation of the accused, see § 29:12, *infra*, the character of the parties in civil cases, see § 29:15, *infra*, the character of the victim, see § 29:14, *infra*, and the fact that accused has committed other crimes, see § 29:17, *infra*, are all circumstantial evidence that would have a logical tendency to prove or disprove various issues, and may or may not be admissible, depending on considerations of policy, as well as relevancy and materiality.

Presumptions and inferences are closely related to circumstantial evidence.³⁰

Where direct and positive testimony is presented on an issue, the opposing party must show some other fact which contradicts the testimony; if this other fact is direct evidence, that is sufficient to allow the case to go to the jury, but if the other fact is circumstantial evidence, it must be inconsistent with the defendant's evidence, or if consistent, it must demand a finding of fact on the issue in favor of the plaintiff.³¹

To warrant a conviction on circumstantial evidence, the proved facts need exclude only reasonable hypotheses, not bare possibilities that the crime could have been committed by someone else, and questions of reasonableness are generally decided by the jury.³²

In felony cases "where the only witness is an accomplice," corroboration is required. Such corroboration may be entirely circumstantial.³³

In *Gay v. State*,³⁴ the Court of Appeals found that an accomplice's statement to the police that implicated the defendant in armed robberies of taxi cab drivers was sufficiently corroborated. The court observed, among other things, that an identical "telephone number was used to call for taxi cab service[s]," and that the "telephone number was registered to a business owned by [the defendant's] mother" who testified that she authorized her son to use her telephone.

Circumstantial evidence supported prosecution's theory that defendant constructively possessed narcotics. The court found that the defendant "was the driver of the victim's car shortly before the marijuana packaged for distribution was found in plain

²⁹*Southern Ry. Co. v. Georgia Kraft Co.*, 258 Ga. 232, 367 S.E.2d 539 (1988).

³⁰See §§ 20:1 et seq.

³¹*Karwacki v. Georgia Dept. of Transp.*, 276 Ga. App. 628, 624 S.E.2d 171 (2005).

³²*Daugherty v. State*, 283 Ga. App. 664, 642 S.E.2d 345 (2007).

³³*Huff v. State*, 300 Ga. 807, 796 S.E.2d 688 (2017).

³⁴*Gay v. State*, 351 Ga. App. 811, 833 S.E.2d 305 (2019).

view on the front passenger seat and the driver's side floorboard near a handgun linked to [the defendant]." In addition, the defendant fled away in his vehicle (and later on foot) after the police attempted a stop. In addition, the victim denied knowledge of the illegal drugs, and other evidence showed that the defendant and another individual "had acted in concert with one another throughout the night in question."³⁵

Evidence was sufficient to support conviction for possession of marijuana with intent to distribute. Marijuana discovered in car were in "nine little baggies" and eight of those baggies were within a larger "bag on the driver's side floorboard," there was testimony from a sheriff's investigator that such packaging is consistent with the practice employed by narcotics distributors, a loaded firearm was located on the driver's seat, and ammunition was recovered from the defendant.³⁶

Circumstantial evidence was insufficient to support conviction in armed robbery and firearm case where "the State presented evidence that two men, one taller and one shorter, used handguns to take property from the victim, and within minutes the police located [the defendant's] vehicle, which matched the victim's description and contained his stolen belongings as well as two handguns. When stopped, [the defendant] spontaneously stated, 'You got me, I did it.'"³⁷

In *Mannion & Mannion, Inc. v. Mendez*,³⁸ the Georgia Court of Appeals found that the trial court erred in denying a defendant employer's summary judgment motion in a personal injury negligence action. The case involved injuries sustained when the plaintiff was riding a motorcycle and was struck by one of the defendants. In an action for negligence brought against the driver and his employer, the court found that the employer was not vicariously liable for the injuries sustained given that the accident occurred while the defendant driver was on his lunch break and that vicarious liability does not attach to such "personal mission[s]." The court stated that "although circumstantial evidence may preclude summary judgment, '[s]ummary judgment cannot be avoided based on speculation and conjecture.' And, '[a]lthough the plaintiff is entitled to the benefit of all reasonable inferences to be drawn from the evidence, such inferences cannot be based on mere conjecture or possibility or upon evidence which is too uncertain or speculative.'"

³⁵Whaley v. State, 337 Ga. App. 657, 788 S.E.2d 525 (2016).
50, 785 S.E.2d 685 (2016).

³⁶McNorrill v. State, 338 Ga. App. 466, 789 S.E.2d 823 (2016).
³⁸Mannion & Mannion, Inc. v. Mendez, 355 Ga. App. 28, 842 S.E.2d 334 (2020).

³⁷Demps v. State., 337 Ga. App.

Jury determinations, even when based on circumstantial evidence, continue to receive significant deference on appeal:

“[I]t was for the jury to determine the credibility of the witnesses and to resolve any conflicts or inconsistencies in the evidence. Likewise, it was for the jury to decide whether the defense theory . . . was reasonable and not excluded by the other evidence.” (Citations and punctuation omitted.)³⁹

§ 29:2 Circumstantial evidence of criminal intent

In criminal cases, actions of a defendant that are associated with the accused crimes are often admitted as circumstantial evidence of the defendant’s guilt.¹ A criminal defendant’s flight from the scene of the crime or from authorities is exemplary.² The Supreme Court of Georgia has noted that the “weight to be given to a permissive inference of consciousness of guilt from evidence of flight is left to the discretion of the jury.”³ Evidence of flight is admissible, “regardless of whether any flight-related crime is also charged.”⁴

On the subject of evidence of flight, the Eleventh Circuit Court of Appeals has remarked: “People, including jurors, realize that while ‘[t]he wicked flee when no man pursueth,’ Proverbs 28:1 (KJV), they really flee when law enforcement is looking for them. That is why evidence of flight is admissible and probative.”⁵ Classifying flight as an “admission by conduct,” that court has explained the permissible inferences that can be drawn from proof of a criminal defendant’s flight:

[F]light is an admission by conduct, that provides circumstantial evidence of guilt...Jurors considering such evidence infer (1) from the defendant’s behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged[.]⁶

Similarly, as a general matter, the circumstances surrounding

³⁹Blackshear v. State, 309 Ga. 479, 847 S.E.2d 317 (2020) (citing Bamberg v. State, 308 Ga. 340, 343(a) (1), 839 S.E.2d 640 (2020)).

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¹See, e.g., Turner v. State, 315 Ga. 274, 882 S.E.2d 241 (2022) (attempts to influence witnesses); Jenkins v. State, 313 Ga. 81, 868 S.E.2d 205 (2022) (fleeing from a police roadblock).

²See generally Garay v. State, 314 Ga. 16, 875 S.E.2d 631 (2022) (“Generally, evidence of flight. . . [is]

admissible as circumstantial evidence of consciousness of guilt.”) (omission and substitution in original).

³State v. Frost, 297 Ga. 296, 773 S.E.2d 700 (2015).

⁴State v. Brinkley, 316 Ga. 689, 889 S.E.2d 787 (2023) (reversing pre-trial exclusion of the defendant’s incriminating statement made during his flight from authorities).

⁵U.S. v. Kennard, 472 F.3d 851 (11th Cir. 2006).

⁶U.S. v. Ceja, 543 Fed. Appx. 948 (11th Cir. 2013) (internal citation and

a criminal defendant's arrest are relevant and admissible in the prosecution of a case. In a murder prosecution, Georgia's Supreme Court held that despite the fact that the defendant's arrest occurred roughly four months after homicide in question, the prosecution's introduction of evidence of weapons and ammunition found with the defendant at the time of his arrest was neither irrelevant nor unfairly prejudicial.⁷

In an aggravated assault charge based upon an intent to rob, it is not necessary for the state to show that the defendant expressed an intent to rob in so many words, or declared a purpose to carry the intent into effect, because the intention may be gathered from the circumstances of the case as proved.⁸

Evidence was sufficient to support voluntary manslaughter conviction where the defendant supplied his vehicle which contained ammunition, "accompanied Clark, Dixon, and the unknown male to the apartment" in the vehicle, maintained cell phone contact with the men while they were in the dwelling, remained outside in his parked car during the commission of the crime, and served as a getaway driver.⁹

A specific intent is required to convict the accused of certain crimes, such as burglary. Rarely is there direct evidence to prove the necessary intent. As a result, the intent must be inferred from surrounding circumstances. That is to say, the intent can only be established by circumstantial evidence. Malice incorporates an intent to kill and may be implied where facts show that the accused acted with an abandoned and malignant heart, absent a showing of considerable provocation.¹⁰

A statement of intention to perform a specific act may be offered as an exception to the hearsay rule, see § 25:31, *supra*, but that exception is to be clearly distinguished from the proof of the intent, which is an essential element of particular crimes. It was proper to admit evidence that a murder victim had previously been threatened by his killer.¹¹

The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.¹² A person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all

quotation omitted). See also *State v. Freeburg*, 105 Wash. App. 492, 20 P.3d 984 (Div. 1 2001) ("Analytically, flight is an admission by conduct.").

⁷See generally *Harris v. State*, 313 Ga. 225, 869 S.E.2d 461 (2022).

⁸*Squires v. State*, 286 Ga. App. 141, 648 S.E.2d 696 (2007).

⁹*Platt v. State*, 335 Ga. App. 49, 778 S.E.2d 416 (2015).

¹⁰*Latimore v. State*, 262 Ga. 448, 421 S.E.2d 281 (1992).

¹¹*Kettman v. State*, 257 Ga. 603, 362 S.E.2d 342 (1987).

¹²O.C.G.A. § 16-2-4.

other circumstances connected with the act for which the accused is prosecuted.¹³

A criminal defendant's demeanor became an issue in a highly publicized murder prosecution. An attorney was accused a killing his wife, who was a successful businesswoman. While the case was reversed on other grounds, the Supreme Court of Georgia approved of the prosecution introducing evidence of the defendant's conduct at the hospital, after the shooting occurred:

[Defendant] complains that the State elicited irrelevant testimony from hospital personnel that [Defendant] shed "no tears" when told that [victim] had died, that he was very calm, and that he did not appear to be upset or distraught. From this, the State argued in closing that [Defendant] "show[ed] none of the universal signs of grief." The trial court denied McIver's motion in limine to exclude this evidence and admitted it at trial over his objection. Evidence of a defendant's "condition and demeanor" near the time of the alleged crimes generally is relevant and admissible. . . . [T]he trial court did not abuse its discretion in admitting this testimony about [Defendant's] demeanor at the hospital.¹⁴

Evidence of a defendant's attempt to influence or intimidate a witness is circumstantial evidence of guilt. This is true even if the individual who performed the attempted act of intimidation is someone who was acting on behalf of the defendant.¹⁵

The Georgia Court of Appeals has held that evidence of a defendant's joint and separate bad financial condition for one year prior to armed robbery, including evidence of bad checks and overdrawn accounts up to two months before the robbery, was admissible to show possible motive, intent, or bent of mind as to both armed robbery and drug possession offenses.¹⁶

In murder trial, evidence of a previous sexual relationship between defendant and the victim was held admissible to illustrate his motive, although it incidentally put his character in evidence.¹⁷ In the trial of a sex offense, exhibits tending to show a bent of mind towards sexual activity are generally admissible.¹⁸

Other cases on circumstantial evidence, see *Lee v. State*.¹⁹

Necessary criminal intent was found by circumstantial evidence in the case of a driver whose license plate did not match

¹³O.C.G.A. § 16-2-6.

¹⁴McIver v. State, 314 Ga. 109, 875 S.E.2d 810 (2022).

¹⁵Caruthers v. State, 95 Ga. 343, 22 S.E. 837 (1895).

¹⁶Sabree v. State, 195 Ga. App. 135, 392 S.E.2d 886 (1990).

¹⁷Darling v. State, 248 Ga. 485,

284 S.E.2d 260 (1981).

¹⁸Worth v. State, 183 Ga. App. 68, 358 S.E.2d 251 (1987).

¹⁹Lee v. State, 261 Ga. 341, 405 S.E.2d 33 (1991) (past marital difficulties); Power v. State, 260 Ga. 101, 390 S.E.2d 47 (1990) (same); Hamilton v. State, 260 Ga. 3, 389 S.E.2d 225 (1990) (prior difficulties between parties).

the car's registration, along with mismatching stories between passenger and driver concerning putting in job applications in the middle of the night. This evidence led to the discovery of cocaine and marijuana in the vehicle.²⁰

In a child aggravated assault case, the defendant told different stories about how the baby received burns to her body and the treating doctor testified that the locations of the burns were not consistent with the defendant's stories. The doctor explained that the burns were consistent with the baby's body being placed in hot water. The defendant was found guilty, and the appellate court found that the evidence was sufficient to support the jury's verdict, especially since the jury was entitled to reject defendant's claim that he did not have the criminal intent necessary to commit the crimes.²¹

In *Taylor v. State*,²² the Georgia Supreme Court upheld a trial court's decision to admit evidence of defendant's gang affiliation, even though he was not charged pursuant to the Street Gang Terrorism and Prevention Act. The Court stated that "[t]he evidence of appellant's gang affiliation consisted of multiple tattoos that, according to the State's expert witness, bear significant similarities to known gang motifs, and co-indictees Cushenberry and Finley also had such tattoos. Additionally, several pieces of paraphernalia associated with the Bloods gang were found during the search of appellant's bedroom." The admission of such evidence is within the discretion of the court and is assessed pursuant to an abuse of discretion standard.

For another case where the Georgia Supreme Court found the circumstantial evidence sufficient to support a homicide conviction involving a defendant with a gang affiliation, see *Drennon v. State*.²³

§ 29:3 Evidence that will prejudice jury

Evidence having a natural tendency to establish the facts in controversy should be admitted. A party cannot have competent evidence excluded merely because it might arouse feelings of horror and indignation in the jury. Any testimony concerning the details of a murder or other violent crime may have such tendencies, but manifestly this could not suffice to render it incompetent. On the other hand, spectacular exhibits having little probative value, offered for the principal purpose of arousing prejudicial

²⁰Woodard v. State, 289 Ga. App. 643, 658 S.E.2d 129 (2008).

²¹Lee v. State, 275 Ga. App. 93, 619 S.E.2d 767 (2005).

²²Taylor v. State, 304 Ga. 41, 816 S.E.2d 17 (2018).

²³Drennon v. State, 314 Ga. 854, 880 S.E.2d 139 (2022).

emotions, should be excluded promptly.¹

Under Georgia's 2013 Evidence Code, the exclusion of otherwise relevant evidence due to judicial findings of unfair prejudice and related factors is controlled by O.C.G.A. § 24-4-403: "Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In a learned decision, Judge Dillard of the Georgia Court of Appeals noted the similarities between this new Georgia statute and its federal counterpart, as well as the differences between the new Georgia rule and earlier Georgia law:

Prior to the enactment of the new evidence code, Georgia had no direct statutory equivalent to Rule 403, but case law on the issue generally required that a trial court merely balance the probative value of evidence with its prejudicial effect without requiring that the objecting party establish substantial prejudice. In stark contrast, the plain meaning of OCGA § 24-4-403's text makes clear that the trial court may only exclude relevant evidence when its probative value is "substantially outweighed" by one of the designated concerns. Indeed, the Eleventh Circuit has described Rule 403 as "an extraordinary remedy which the . . . court[s] should invoke sparingly, and the balance should be struck in favor of admissibility." Obviously, the reason for such caution is that relevant evidence in a criminal trial is "inherently prejudicial," and, as a result, Rule 403 "permits exclusion only when unfair prejudice substantially outweighs probative value." The primary function of Rule 403, then, is to exclude evidence of "scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect."²

Striking similar chords, the Georgia Supreme Court remarked: "Rule 403 is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence."³

Consistent with this characterization, Rule 403 did not prevent the state in a cruelty prosecution from presenting "in-person" to the jury, a wheel-chair bound, four-year-old, severely disabled victim who was not able to "talk, walk, feed, or toilet himself," and "groaned several times out loud" after being brought into the courtroom.⁴

Similarly, O.C.G.A. § 24-6-611(a) authorized the trial court to allow a service dog to accompany an alleged victim into the

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¹See O.C.G.A. § 24-4-403.

²*Williams v. State*, 328 Ga. App. 876, 763 S.E.2d 261 (2014).

³*State v. Jones*, 297 Ga. 156, 773 S.E.2d 170 (2015).

⁴*Freeman v. State*, 333 Ga. App. 6, 775 S.E.2d 258 (2015).

courtroom during his testimony during a sexual abuse prosecution.⁵

In a felony murder case, trial court properly allowed the government to admit evidence of the defendant's accomplice's gang affiliation, despite the government's failure to indict the defendant on a gang charge. The Georgia Supreme Court reasoned, in part:

The State sought to show a connection between the robbery and murder and the history of the gang, and the foreseeable consequence of Davis' participation in the robbery with Mosley. And as the trial court found, the evidence was also relevant to identify Mosley as the person who communicated with Davis by text shortly after the murder using someone else's phone.⁶

The balance between probative value versus prejudicial impact has marked a number of decisions. Probative value of evidence that there were tensions between testator's older son and older son's daughter was substantially outweighed by undue prejudice in probate proceedings in which older son challenged will on the grounds of lack of testamentary capacity, undue influence, and fraud.⁷

Exclusion of evidence on account of prejudice occurred in a medical malpractice action. Trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.⁸

For the right to show injuries to the jury, see § 21:13, *supra*. For other holdings relating to evidence that might prejudice the jury, see § 30:4, *infra*.

Introduction of rap lyrics in a criminal case caused the United States Court of Appeals to balance probative value against prejudicial impact. The court found that probative value prevailed.⁹

In *Wilson v. State*,¹⁰ the Georgia Supreme Court found that a trial court did not err in admitting a rap video. The Court found that the video was relevant and that the prejudice from the video did not substantially outweigh its probative value. As noted by the Court, "[a] defendant's appearance in a rap video—even one like this one replete with obscenities and racial slurs—is not per

⁵Jones v. State, 354 Ga. App. 568, 841 S.E.2d 112 (2020). (2014). See also Miller v. Cole, 289 Ga. App. 471, 657 S.E.2d 585 (2008).

⁶Davis v. State, 301 Ga. 397, 801 S.E.2d 897 (2017).

⁷McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60 (2011).

⁸O.C.G.A. § 24-4-403; Flading v. State, 327 Ga. App. 346, 759 S.E.2d 67

⁹U.S. v. Belfast, 611 F.3d 783 (11th Cir. 2010).

¹⁰Wilson v. State, 315 Ga. 728, 883 S.E.2d 802 (2023).

se prejudicial.”

A photograph is not inadmissible just because it is gruesome provided that it is material and relevant.¹¹ Such was found in *Calhoun v. State*,¹² where in a felony murder case the Georgia Supreme Court held that crash-scene photographs were properly admissible. Photographs used by a firearms examiner to determine the distance between a handgun and a victim, which showed the victim as well as the victim’s bloodstained shirt, were relevant and thus were not inadmissible on the grounds that they might be termed gruesome.¹³

Trial court did not err in admitting defendant’s booking photograph. The Georgia Court of Appeals stated, “It is well settled that mere admission into evidence of a ‘mug shot’ of the defendant does not indicate that the defendant was guilty of any previous crime and does not place his character in issue. Neither does reference to such a photograph impermissibly place a defendant’s character in issue.”¹⁴

With respect to stipulations offered in order to remove introduction of otherwise prejudicial proof, consider § 10:6, *supra*. In connection with *Jones v. State*,¹⁵ consider *Old Chief v. U.S.*¹⁶

For a ruling that a gruesome photo should have been excluded, see *Brown v. State*.¹⁷ Determining when an exhibit’s probative value outweighs its prejudicial impact is measured in *Ahmed v. Clark*.¹⁸

In a murder prosecution, photographs that incidentally depicted sutures of the victim’s throat wounds made during an emergency tracheotomy were admissible to show the location and identity of the victim’s wounds, even though the wounds had been “changed by authorities” where the alteration to the wound was made in an attempt to save the victim’s life and had left her in a less “grotesque” state than did the defendant’s attack.¹⁹

A photograph that depicts the location of the body, the location and the nature of wounds to the victim, and the crime scene has been held to be relevant and material to the issue of death, as

¹¹See § 21:5, *supra*.

¹²*Calhoun v. State*, 308 Ga. 146, 839 S.E.2d 612 (2020).

¹³*Perez v. State*, 258 Ga. 343, 369 S.E.2d 256 (1988).

¹⁴*Gillespie v. State*, 333 Ga. App. 565, 774 S.E.2d 255 (2015).

¹⁵*Jones v. State*, 253 Ga. 640, 322 S.E.2d 877 (1984) (relevant dramatic photos are not to be excluded on ground that defendant stipulated to

cause of death).

¹⁶*Old Chief v. U.S.*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574, 45 Fed. R. Evid. Serv. 835 (1997).

¹⁷*Brown v. State*, 250 Ga. 862, 302 S.E.2d 347 (1983).

¹⁸*Ahmed v. Clark*, 301 Ga. App. 426, 688 S.E.2d 361 (2009).

¹⁹*Newland v. State*, 258 Ga. 172, 366 S.E.2d 689 (1988).

well as to the issue of concealing a death.²⁰

Thirty-two relevant and material photographs depicting the location and nature of 23 stab wounds were admissible, even though they were possibly duplicative and inflammatory.²¹

When evidence admitted for one purpose is potentially unfairly prejudicial to party, that party is entitled to have the court instruct the jury to limit its consideration of the evidence to the one purpose for which it is admissible.²²

In a murder case, the Georgia Supreme Court found no error of prejudice with the trial court permitting the admission of the victim's post-incision autopsy photographs, which showed the victim's injuries under the scalp and to the brain. The court held that post-incision autopsy photographs are admissible if necessary to show some material fact that becomes apparent only due to the autopsy and, without the incisions, the victim's injuries would not have been visible.²³

Preautopsy photographs of the victim in the triage room of the hospital were admissible even though they depicted medical instruments attached to the victim's body, and even though other photographs were sufficient to illustrate the victim's wounds; photographs showed injuries inflicted on the victim and dirt on her body, which corroborated testimony that she fell to the ground when she was shot.²⁴

Mug shot photos were the object of Georgia Supreme Court concern in 2011. A photograph of a defendant, apparently in a mug shot relating to a prior crime, impermissibly put the defendant's character into evidence and thus was inadmissible at a murder trial.²⁵ The Court held that in general, admission into evidence of mug shots of a defendant taken after arrest with regard to the crime for which he is currently being prosecuted do not prejudice the defendant. However, if a mug shot relating to a defendant's previous crime is introduced into evidence, such a photograph is the equivalent of oral testimony establishing the defendant's arrest for a prior crime and would therefore impermissibly place his character into evidence.

²⁰*Burgan v. State*, 258 Ga. 512, 371 S.E.2d 854 (1988). See also *Roundtree v. State*, 259 Ga. 313, 380 S.E.2d 271 (1989); *Kettman v. State*, 257 Ga. 603, 362 S.E.2d 342 (1987); *Lowery v. State*, 259 Ga. 818, 388 S.E.2d 329 (1990).

²¹*Carter v. State*, 261 Ga. 740, 410 S.E.2d 102 (1991) (overruled on other grounds by, *Sanders v. State*, 281 Ga. 36, 635 S.E.2d 772 (2006)). See also

Holmes v. State, 261 Ga. 714, 410 S.E.2d 295 (1991).

²²*Davis v. State*, 260 Ga. 338, 393 S.E.2d 260 (1990).

²³*Banks v. State*, 281 Ga. 678, 642 S.E.2d 679 (2007).

²⁴*Sheppard v. State*, 285 Ga. 36, 673 S.E.2d 852 (2009).

²⁵*Sharpe v. State*, 288 Ga. 565, 707 S.E.2d 338 (2011).

The Meredith Emerson Memorial Privacy Act prohibits dissemination of crime scene photos depicting decapitation and other forms of mutilation.²⁶ One of the targets of this legislation was the prevention of commercial dissemination of such photos. Exceptions to the ban on circulation of these images for legal and court proceedings are part of the law.

Trial court erred in allowing testimony about defendant's alleged sexual misconduct at the age of twelve. The evidence was more prejudicial than probative. Defendant was a child when the previous events occurred, but an adult at the time of the charged events and no sexual misconduct was alleged to have occurred in the intervening years.²⁷

The Georgia Supreme Court ruled evidence of a nurse's failure to pass a licensing examination was correctly deemed inadmissible in a medical malpractice action against the employing physician. The failure to pass the test was irrelevant and its probative value was substantially outweighed by the danger of undue prejudice.²⁸

In a wrongful death action brought against a physician and a hospital, the Georgia Court of Appeals found that inquiry during cross-examination pursuant to Georgia Rule 608(b) regarding a specific instance of conduct contained in a physician's note did not violate Evidence Rule 403.²⁹

Trial court did not err when it allowed prosecutor during closing arguments to use a rope "to demonstrate the act of strangulation followed by four minutes of timed silence representing the amount of time it allegedly took the victim to die."³⁰

§ 29:4 Admissibility of evidence on collateral issues

Collateral issues may be excluded, in the discretion of the court.¹ Such exclusion is often put on the basis of the irrelevancy of collateral issues.² However, evidence is relevant if it tends to prove some issue in the case.³ Collateral issues have little proba-

²⁶The Act amends O.C.G.A. § 45-16-27.

²⁷Maynard v. State, 282 Ga. App. 598, 639 S.E.2d 389 (2006).

²⁸Snider v. Basilio, 281 Ga. 261, 637 S.E.2d 40 (2006).

²⁹Central Georgia Women's Health Center, LLC v. Dean, 342 Ga. App. 127, 800 S.E.2d 594 (2017).

³⁰Crawford v. State, 297 Ga. 680,

777 S.E.2d 463 (2015).

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¹Ludwig v. J. J. Newberry Co., 78 Ga. App. 871, 52 S.E.2d 485 (1949). See also U.S. v. Ndiaye, 434 F.3d 1270 (11th Cir. 2006).

²See also Wilson v. U.S., 149 F. Supp. 2d 1045 (N.D. Ind. 2001).

³O.C.G.A. § 24-4-401.

tive force in proving some issue in the case.⁴

To admit evidence of an insurance policy in a criminal prosecution, there must be some independent evidence of a nexus between the charged crime and the existence of the insurance policy.⁵ Sometimes such proof is material, not merely collateral. Evidence that a victim carried a \$100,000 life insurance policy, under which the defendant was the sole beneficiary, was held to be admissible in the murder prosecution of the defendant.⁶

As to impeachment of witnesses on collateral issues, see §§ 12:2, 16:8, *supra*.

While a witness may not be impeached based upon a discrepancy relating to a wholly immaterial matter, there was no error in the trial court's admission of impeachment evidence introduced by the State that reflected on the credentials and competency of a defense expert witness, a collateral issue that was indirectly material to the major issue in the case.⁷

In medical malpractice action, trial court abused its discretion in not allowing a urologist to be impeached with data printout evidence from a device at issue in the case. During his deposition, the urologist testified that he had used the device no more than two times after he treated plaintiff with the device and became aware of his injury. However, the data from the device contradicted his testimony.⁸

However, as a general rule there is no impeachment allowed on wholly collateral matters.⁹

The defendant in a kidnapping case argued that the trial court erred in restricting his cross-examination of the victim regarding her work history and prior drug use. The victim testified where she was employed at the time of the incident, but this fact was contested by a copy of her work history that purportedly showed that she was terminated before the assault. The trial court correctly excluded this information as irrelevant.¹⁰

§ 29:5 Admissibility of evidence of similar acts or occurrences

In the 2013 Georgia Code of Evidence, this topic is treated in a

⁴See *U.S. v. Libby*, 475 F. Supp. 2d 73, 72 Fed. R. Evid. Serv. 648 (D.D.C. 2007).

⁵*Stoudemire v. State*, 261 Ga. 49, 401 S.E.2d 482 (1991).

⁶*Jowers v. State*, 259 Ga. 401, 382 S.E.2d 595 (1989).

⁷*Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007) (overruled on other grounds by, *State v. Lane*, 308

Ga. 10, 838 S.E.2d 808 (2020)).

⁸*Hand v. South Georgia Urology Center, P.C.*, 332 Ga. App. 148, 769 S.E.2d 814 (2015).

⁹*Smith v. State*, 283 Ga. 237, 657 S.E.2d 523 (2008); *Haywood v. State*, 283 Ga. App. 568, 642 S.E.2d 203 (2007).

¹⁰*Moody v. State*, 279 Ga. App. 440, 631 S.E.2d 485 (2006).

number of sections. See O.C.G.A. §§ 24-4-404(b), 24-4-413, 24-4-414, 24-4-415, 24-4-417, 24-4-418.¹

O.C.G.A. § 24-4-404(b) is patterned after Fed. R. Evid. 404(b) and provides for the admission of evidence that might otherwise be prohibited due to character evidence prohibitions.² Courts have characterized Fed. R. Evid. 404(b) as a “rule of inclusion.”³ While both rules provide a list of approved purposes for the admission of “other acts” evidence, courts of held that this listing is not exclusive.⁴

A 2020 decision remarked: “the adoption of O.C.G.A. § 24-4-404(b) provides Georgia with a statutory framework for the admission of other acts evidence for non-character purposes.”⁵ Under Georgia Rule of Evidence 404(b), uncharged misconduct is admissible for noncharacter purposes where: “(1) the other acts evidence is relevant to an issue other than the defendant’s character, (2) the probative value is not substantially outweighed by undue prejudice under OCGA § 24-4-403 (‘Rule 403’), and (3) there is sufficient proof that a jury could find by a preponderance of the evidence that the defendant committed the acts.”⁶ Determining prejudice under Georgia Rule of Evidence 403 in this context “calls for a commonsense assessment of all the circumstances surrounding the other act, including [the] proponent’s need for the [Rule 404 (b)] evidence, the overall similarity between the extrinsic act and the offense at issue, and the temporal proximity of the two.”⁷

Criminal defendants, as well as prosecutors, are entitled to introduce other acts evidence with what has been called “reverse 404(b) evidence.”⁸ A 2020 case observes: “the Eleventh Circuit has recognized that a criminal defendant may present Rule 404(b) evidence concerning the prior bad acts of a witness . . . which is sometimes referred to as ‘reverse’ 404(b) evidence.”⁹

In terms of the tests applicable for admission, the Eighth Circuit has explained: “We apply the same factors whether

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¹See Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules §§ 24-4-404(b), 24-4-413 to 24-4-415, 24-4-417, 24-4-418 (6th Ed. 2017).

²U.S. v. Brown, 665 F.3d 1239 (11th Cir. 2011); Irving v. State, 351 Ga. App. 779, 833 S.E.2d 162 (2019).

³U.S. v. Culver, 598 F.3d 740, 81 Fed. R. Evid. Serv. 688 (11th Cir. 2010).

⁴U.S. v. Sanders, 668 F.3d 1298 (11th Cir. 2012).

⁵Sherrod v. State, 355 Ga. App. 441, 844 S.E.2d 508 (2020) (internal citations omitted).

⁶Sherrod v. State, 355 Ga. App. 441, 844 S.E.2d 508 (2020).

⁷Chambers v. State, 351 Ga. App. 771, 833 S.E.2d 155 (2019).

⁸U.S. v. Ushery, 400 Fed. Appx. 674 (3d Cir. 2010); U.S. v. Stevens, 935 F.2d 1380, 33 Fed. R. Evid. Serv. 831 (3d Cir. 1991).

⁹United States v. Fisher, 2020 WL 1034399 (N.D. Fla. 2020).

analyzing ‘regular’ 404(b) evidence or so-called ‘reverse’ 404(b) evidence.”¹⁰ Other courts have opined that “a lower standard of similarity should govern reverse 404(b) evidence because prejudice to the defendant is not a factor.”¹¹

The introduction of evidence pursuant to Rule 404(b) is frequently objected to on the grounds of unfair prejudice. Quoting scholarship, Chief Judge Dillard of the Georgia Court of Court of Appeals explains how Georgia courts make an admissibility assessment when considering that basis:

“Evaluating the balance between probativity and prejudice under Rule 403 calls for a commonsense assessment of all the circumstances surrounding the other act, including [the] proponent’s need for the [Rule 404(b)] evidence, the overall similarity between the extrinsic act and the offense at issue, and the temporal proximity of the two.”¹²

In 2016, the Georgia legislature passed a new statute regarding admissibility of evidence of criminal gang activity. O.C.G.A. § 24-4-418 provides in pertinent part:

In a criminal proceeding in which the accused is accused of conducting or participating in criminal gang activity in violation of Code Section 16-15-4, evidence of the accused’s commission of criminal gang activity, as such term is defined in Code Section 16-15-3, shall be admissible and may be considered for its bearing on any matter to which it is relevant.

It should be recognized that Rule of Evidence 404(b) applies to the admission of evidence that is extrinsic—having occurred separate and apart from the specific events at issue in a given case.¹³ Evidence of uncharged conduct that is part of the same scheme or series of transactions and uses the same *modus operandi* as the charged offenses is admissible as intrinsic evidence, falling outside the scope of Rule 404(b) and its restrictions.¹⁴ Evidence considered intrinsic includes: (1) conduct that arose out of the same transaction or series of transactions as the charged offense; (2) conduct that is necessary to complete the story of the crime; and (3) conduct that is “inextricably intertwined” with the charged offense.¹⁵ The Supreme Court of Georgia vacated a superior court judge’s pretrial exclusion of the accused’s prior

¹⁰United States v. Harry, 930 F.3d 1000, 109 Fed. R. Evid. Serv. 1152 (8th Cir. 2019).

¹¹U.S. v. Seals, 419 F.3d 600 (7th Cir. 2005). See generally Commonwealth v. Yale, 249 A.3d 1001 (Pa. 2021).

¹²Chambers v. State, 351 Ga. App. 771, 833 S.E.2d 155 (2019) (quotation

in original).

¹³U.S. v. Troya, 733 F.3d 1125, 92 Fed. R. Evid. Serv. 660 (11th Cir. 2013).

¹⁴U.S. v. Ford, 784 F.3d 1386 (11th Cir. 2015).

¹⁵U.S. v. Prophete, 522 Fed. Appx. 583 (11th Cir. 2013); Satterfield v. State, 339 Ga. App. 15, 792 S.E.2d 451

shootings offered as intrinsic evidence in *State v. Harris*.¹⁶ That said, the introduction of intrinsic evidence remains subject to the application of O.C.G.A. § 24-4-403.¹⁷

If a prior bad act or conviction is not intrinsic to the charged crime or “extrinsic,” Rule 404(b) determines its admissibility.¹⁸

In what has been referred to as the “*Bradshaw* test,”¹⁹ the Georgia Supreme Court adopted the three part test of the Eleventh Circuit Court of Appeals for the admission of evidence under O.C.G.A. § 24-4-404(b). For admission of other acts evidence, the proponent must demonstrate that: (1) the evidence is relevant to an issue other than defendant’s character; (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and (3) the probative value of the evidence cannot be substantially outweighed by undue prejudice.

The Georgia Supreme also embraced the Eleventh Circuit Court of Appeals’ methodology for evaluation of whether evidence under O.C.G.A. § 24-4-404(b) is barred by O.C.G.A. § 24-4-403.²⁰ This determination lies within the discretion of the trial court and calls for a common sense assessment of all the circumstances surrounding the extrinsic offense including:

1. Prosecutorial need for the extrinsic evidence;
2. Overall similarity between the extrinsic act and the charged offense; and
3. Temporal remoteness of the extrinsic act.

The foregoing comes from *State v. Jones*,²¹ in which the Georgia Supreme Court established the fundamentals for interpretation and application of not only O.C.G.A. § 24-4-404(b), but also O.C.G.A. § 24-4-401 (relevance), O.C.G.A. § 24-4-403 (unfair prejudice), and Georgia’s new Evidence Code, overall. In *Jones*, writing for a unanimous court, Justice Thompson adroitly provided guidance to Georgia litigants in a host of areas. Important considerations from *Jones* include the following:

- In the absence of specific Georgia authority, federal case law should be used to interpret federalized provisions of Georgia’s new Evidence Code, with an emphasis on Eleventh Circuit Court of Appeals precedent.

(2016).

¹⁶*State v. Harris*, 316 Ga. 272, 888 S.E.2d 50 (2023).

¹⁷*Jernigan v. State*, 357 Ga. App. 415, 848 S.E.2d 707 (2020).

¹⁸*U.S. v. Roberts*, 464 Fed. Appx. 796 (11th Cir. 2012).

¹⁹*Bradshaw v. State*, 296 Ga. 650, 769 S.E.2d 892 (2015).

²⁰*State v. Jones*, 297 Ga. 156, 773 S.E.2d 170 (2015).

²¹*State v. Jones*, 297 Ga. 156, 773 S.E.2d 170 (2015).

- It is a “mistake” to rely on former Georgia evidence decisions that interpret abandoned statutes to interpret new and federalized Georgia evidence statute.
- O.C.G.A. § 24-4-404(b) is, by its terms, a “rule of inclusion,” designed to foster the admission of extrinsic evidence.
- The statutory list of non-character grounds for admission of extrinsic evidence in O.C.G.A. § 24-4-404(b) is non-exhaustive.
- Relevance under O.C.G.A. § 24-4-401 is a liberal standard.
- O.C.G.A. § 24-4-403—not O.C.G.A. § 24-4-401—is the primary means to exclude extrinsic evidence offered under O.C.G.A. § 24-4-404(b).
- Judicial exclusion of evidence under O.C.G.A. § 24-4-403 is a limited proposition.
- The Doctrine of Chances is a viable means through which to admit extrinsic evidence under O.C.G.A. § 24-4-404(b).
- A “not guilty” plea triggers the issue of intent for purposes of O.C.G.A. § 24-4-404(b).
- Intent remains at issue for O.C.G.A. § 24-4-404(b) purposes unless the criminal defendant takes affirmative steps to remove it.
- Extrinsic evidence is best referred to as “other acts,” the term “similar transactions” being unduly restrictive.
- O.C.G.A. § 24-4-404(b) authorizes the admission of evidence in both general and specific intent crimes cases.

Jones identifies the Doctrine of Chances, also known as the “doctrine of objective improbability.” Under that principle, “[j]urors are to be allowed to make the logical inferences that successive, similar occurrences were not the product of chance or abnormality but of intentional design.”²² This doctrine has been characterized as a non-character, non-propensity based rationale through which to admit extrinsic evidence pursuant to Rule 404(b).²³

Despite the fact that Rule 404(b) represents a rule of inclusion, evidence sought to be introduced still must pass muster under Rule 403: “[E]ven evidence that is offered for a proper purpose under Rule 404(b) may be excluded under OCGA § 24-4-403.”²⁴ Still, the trial court’s discretion to exclude other acts evidence

²²U.S. v. Kirk, 528 F.2d 1057 (5th Cir. 1976).

²³Imwinkelried, The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The

Doctrines Which Threatens to Engulf the Character Evidence Prohibition, 51 Ohio St. L.J. 575 (1990).

²⁴Gunn v. State, 342 Ga. App. 615, 804 S.E.2d 118 (2017).

pursuant to Rule 403 is by no means limitless.²⁵

In 2017, both the Georgia Supreme Court and Georgia Court of Appeals held that extrinsic evidence under Rule 404(b) is admissible in cases involving general and specific intent offenses.²⁶

The issue of other acts often arises in the context of domestic violence prosecutions. Where the incidents occurred between the defendant and alleged victim in a given case, Georgia decisions, like federal courts, have considered these prior difficulties as intrinsic evidence.²⁷

Additionally, Rule 404(b) has authorized the admission of evidence that the defendant used violence to dominate his partners to explain why an alleged victim was reluctant to testify at trial.²⁸

O.C.G.A. § 24-4-404(b), however, is strictly a means by which to admit other acts or uncharged misconduct evidence for *non-character* purposes. As Justice Peterson of the Georgia Supreme Court observed: “Rule 404(b) is a rule of inclusion, but it does prohibit the introduction of other acts evidence when it is offered for the sole purpose of showing a defendant’s bad character or propensity to commit a crime.”²⁹ Scholarship also analyzes the operation of O.C.G.A. § 24-4-404(b).³⁰

In a case involving malice murder, felony murder and felon in possession of a firearm, the Supreme Court of Georgia found that proffered other acts evidence involving prior aggravated assault convictions were relevant to the defendant’s intent and did not violate Rule 404(b). The Court also found that prior bad act evidence involving the defendant’s involvement in another shooting constituted impermissible propensity evidence.³¹

A burglary conviction was reversed for improper introduction of the defendant’s prior burglary conviction by the Court of Appeals of Georgia. Examining Presiding Judge Dillard’s analysis and determination of error on each of the following grounds in

²⁵See *State v. Williams*, 316 Ga. 249, 887 S.E.2d 285 (2023) (erroneous pretrial bar of other acts evidence in a homicide prosecution: “[W]e vacate the trial court’s ruling and remand for the trial court to reconsider the matter under the proper framework.”).

²⁶*Jones v. State*, 301 Ga. 544, 802 S.E.2d 234 (2017); *Dimauro v. State*, 341 Ga. App. 710, 801 S.E.2d 558 (2017) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

²⁷*Sherrod v. State*, 355 Ga. App. 441, 844 S.E.2d 508 (2020).

²⁸*Chambers v. State*, 351 Ga. App. 771, 833 S.E.2d 155 (2019).

²⁹*Booth v. State*, 301 Ga. 678, 804 S.E.2d 104 (2017).

³⁰Melvin, What are the Chances? A Response to Professor Milich’s View of 404(B), 9 J. Marshall L.J. 40 (2015-16).

³¹*Moon v. State*, 312 Ga. 31, 860 S.E.2d 519 (2021).

*Hewell v. State*³² is instructive:

- **Motive:** “[T]he fact that the accused has committed one kind of crime in the past does not, without more, prove his motive to commit the same kind of crime again. Such logic would make all prior [burglaries] admissible in any [burglary] case.’ Thus, his prior convictions went more to his character to commit these types of crimes than to his motive”;
- **Intent:** “[Defendant] did not dispute stealing the property. . . . Thus, as intent was not in dispute, the probative value of these prior crimes for this purpose is minimal”;
- **Knowledge:** “Here, the crime of burglary does not require a special skill that would require demonstrating [Defendant] possessed this unique knowledge”; and
- **Opportunity:** “[O]ppportunity was not at issue, and the prior burglaries had no connection to the charged acts at issue.”

Presumptive admissibility of prior acts of sexual misconduct in sex crimes prosecutions and lawsuits alleging sexual improprieties is the subject of O.C.G.A. §§ 24-4-413, 414 and 415. “Importantly, Rules 413 and 414 ‘create a rule of inclusion, with a strong presumption in favor of admissibility, and the State can seek to admit evidence under these provisions for any relevant purpose, including propensity.’ ”³³ In addition, the statutes authorize the consideration of the evidence for any purpose by the trier of fact, including propensity to commit sex crimes offenses.³⁴ Federal courts generally agree that prejudice considerations under Fed. R. Evid. 403 can limit the admissibility of evidence under these rules.³⁵

In a 2015 case, the Georgia Court of Appeals recognized that O.C.G.A. § 24-4-414 allows for the introduction of other acts of sexual misconduct for broad purposes, including the accused’s propensity to commit those types of offenses:

Courts interpreting this language have concluded that, in this specific context, showing a disposition toward molestation is a relevant purpose and not unfairly prejudicial in light of the nature of that conduct: “evidence that a defendant engaged in child molestation in the past is admissible to prove that the defendant has a disposition of character that makes it more likely that he did commit the act of child molestation charged in the instant case.” We see no

³²*Hewell v. State*, 360 Ga. App. R. Evid. Serv. 231 (9th Cir. 2004). 81, 860 S.E.2d 608 (2021).

³³*Mulkey v. State*, 366 Ga. App. Appx. 824 (11th Cir. 2013).

427, 883 S.E.2d 173 (2023). See also ³⁵*U.S. v. Sioux*, 362 F.3d 1241, 64 Fed. Appx. 929 (11th Cir. 2010).

reason to depart from the Georgia legislature's recent and clear statement of policy on this issue.³⁶

In a murder and rape case, evidence was sufficient to support defendant's conviction where the victim was found near a disabled truck in a tire company parking lot where the defendant, who was homeless, frequently slept. Evidence included similar transaction evidence consisting of sexual assaults committed by the defendant that took place within an automobile.³⁷

Georgia Rules of Evidence 413 and 414 are the more specific statutes that supersede the provisions of Rule 404(b) in sexual assault and child molestation cases.³⁸ Rule 403 does, however, apply to their application.³⁹ Even so, Georgia decisions have approved of the admission of prior incident of sexual misconduct over four decades old pursuant to those rules.⁴⁰

While Rules 413 and 414 create stronger rules with a strong presumption in favor of admissibility, they are not without limits. Both are limited in application to the admission of the offenses enumerated in the statute and subject to the trial court's discretion to exclude otherwise admissible evidence under Rule 403.⁴¹ A decision from Chief Judge Dillard from the Georgia Court of Appeals explains.⁴² Georgia Supreme Court authority is in accord.⁴³

O.C.G.A. § 24-4-418 applies in cases indicted under Georgia's Street Gang Terrorism and Prevention Act.⁴⁴ Rule 418 is patterned after O.C.G.A. §§ 24-4-413, 24-4-414, and 24-4-415 and similarly applies to facilitate the admission of other acts of criminal gang activity of the accused "for its bearing on any matter to which it is relevant." Where Georgia's anti-gang laws are present in a criminal indictment, the probative weight of gang evidence is increased, as it constitutes an element of the offense.⁴⁵

The Supreme Court of Georgia has held that "evidence regarding the defendant's gang affiliation is relevant and admissible when it is 'intrinsic' to the crimes charged."⁴⁶ The pretrial exclusion of a criminal defendant's other acts of criminal gang activity

³⁶Eubanks v. State, 332 Ga. App. 568, 774 S.E.2d 146 (2015).

³⁷Willis v. State, 304 Ga. 122, 816 S.E.2d 656 (2018).

³⁸Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103 (2017).

³⁹Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11 (2017).

⁴⁰Harris v. State, 340 Ga. App. 865, 798 S.E.2d 498 (2017).

⁴¹Mulkey v. State, 366 Ga. App. 427, 883 S.E.2d 173 (2023).

⁴²King v. State, 346 Ga. App. 362, 816 S.E.2d 390 (2018).

⁴³Wilson v. State, 312 Ga. 174, 860 S.E.2d 485 (2021). *See also* Mulkey v. State, 366 Ga. App. 427, 883 S.E.2d 173 (2023).

⁴⁴O.C.G.A. §§ 16-15-1 et seq.

⁴⁵*See* Bullard v. State, 307 Ga. 482, 837 S.E.2d 348 (2019); Jordan v. State, 307 Ga. 450, 836 S.E.2d 86 (2019).

⁴⁶Fleming v. State, 306 Ga. 240, 830 S.E.2d 129 (2019).

ran afoul of O.C.G.A. § 24-4-418 in : *McKinney v. State*, where the Supreme Court of Georgia affirmed the reversal of the trial court: “[T]he Court of Appeals correctly concluded that Rule 418 ‘does not require the trial court to find any nexus between the alleged conduct and an intent to further gang activity.’”⁴⁷

O.C.G.A. § 24-4-417 is a statute unique to Georgia that provides for the introduction of prior intoxicated driving offenses in certain driving under the influence cases, where the defendant refused sobriety tests or there is a dispute over the identity of the driver of the vehicle was in the case at bar.⁴⁸

Interpreting O.C.G.A. § 24-4-417, the Georgia Supreme Court in *State v. Frost*⁴⁹ determined that both that provision as well as O.C.G.A. § 24-4-404(b) provide conduits for the admission of extrinsic acts evidence in DUI cases. *Frost* also noted that, in the areas where Georgia Evidence Rule 417 applies, admission of the qualifying extrinsic evidence is presumed: “Indeed, the presumption of admissibility in the limited circumstances in which Rule 417(a) (1) applies appears even stronger than the presumptive admissibility of evidence of other acts under Rule 404(b).”

Underscoring the foregoing, in a DUI prosecution where O.C.G.A. § 24-4-404(b), as opposed to O.C.G.A. § 24-4-417, was utilized to introduce prior DUI evidence, Presiding Judge Dillard of the Georgia Court of Appeals admonished:

[E]ven though the trial court did not commit reversible error in this case, we would be remiss in neglecting to advise State prosecutors to exercise circumspection in seeking to admit prior acts evidence in cases like this one. To be sure, the Supreme Court of Georgia has thus far declined to adopt a categorical rule that extrinsic act evidence is inadmissible as to intent in DUI cases because DUI is a crime of general intent; but within the very same opinion our Supreme Court nonetheless noted that “if the State’s threshold to prove intent as an element of a crime is relatively low, as it likely is when the charged crime is one of general intent, then the probative value of the extrinsic act evidence would necessarily be minimal.” So, given this potential pitfall, State prosecutors would be wise to exercise caution before presenting evidence of prior DUI convictions to show intent and first ask themselves whether “what [they] want and what [they] need has been confused,” lest otherwise unobjectionable convictions become candidates for reversal.⁵⁰

Other states have evidence rules that presumptively admit other acts evidence for broad purposes. California, for example,

⁴⁷*McKinney v. State*, 318 Ga. 566, S.E.2d 700 (2015).
899 S.E.2d 121 (2024).

⁴⁸See *Frost v. State*, 328 Ga. App. 858 S.E.2d 546 (2021) (substitute in original).
337, 761 S.E.2d 875 (2014).

⁴⁹*State v. Frost*, 297 Ga. 296, 773

does so for prosecutions involving child, domestic, and elder abuse.⁵¹

As case law interpreting Georgia's 2013 Evidence Code develops, reviewing prior Georgia authority under the former decisions and rules can provide context and potential indication as to the direction that Georgia courts may take in the future.

Evidence of a similar act or occurrence may be admissible under some circumstances. Similarly, evidence that there had not been a similar occurrence prior to the incident in question may also be admissible. These questions are discussed in this section. This category should be clearly distinguished from certain other categories that are often confused with evidence of a similar act or occurrence. Custom and usage are normally applicable to contract cases,⁵² while usual method or practice is applied in tort cases in establishing standards of care.⁵³ The terms are used interchangeably, resulting in much confusion. Another class of similar evidence is evidence of a previous crime, which may be admissible in certain circumstances.⁵⁴

In negligence actions, the courts have generally ruled inadmissible, on the issue of negligence or of contributory negligence at the time of the injury complained of, evidence of similar prior acts of negligence of the defendant or the plaintiff at other places or on other occasions.⁵⁵ However, exceptions apply where the prior acts show causation or tend to prove some fact of the case.⁵⁶

It is a general rule that *res inter alios acta*—that is, the acts and declarations of strangers to the parties to an action are incompetent as evidence. So are acts between one of the parties and a stranger, such as a transaction between the defendant to the current lawsuit and a third person, accomplished at a prior time. Accordingly, as a general rule, the commission of an act cannot be proved by showing the commission of similar acts by the same person or his agents or employees at other times and under other circumstances, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity as to some particulars.⁵⁷

In actions to recover for injuries resulting from the criminal misconduct of third persons on business premises, evidence show-

⁵¹Cal Evid Code § 1109.

⁵²See § 29:7, *infra*.

⁵³See § 29:8, *infra*.

⁵⁴See in addition to this section, § 16:11, *supra* (prior convictions to impeach), and § 29:17, *infra*.

⁵⁵*Pullman Co. v. Schaffner*, 126 Ga. 609, 55 S.E. 933 (1906).

⁵⁶*Fulton-DeKalb Hosp. Authority v. Dawson*, 270 Ga. 376, 509 S.E.2d 28 (1998).

⁵⁷*Underwood v. Atlanta & W. P. R. Co.*, 105 Ga. App. 340, 124 S.E.2d 758 (1962), judgment *aff'd* in part, *rev'd* in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

ing that criminal acts have occurred on the premises in the past is admissible to show that the proprietor had reasonable grounds for apprehending the occurrence of such acts in the future, but only if there is a “substantial similarity” between the prior criminal acts and the criminal act giving rise to the plaintiff’s claim.⁵⁸ In order to prove that the owner had advance notice of the danger of a criminal assault on the premises, evidence is admissible to show a pattern of prior substantially similar criminal assaults which created a known dangerous condition for which a business proprietor may be held liable to invitees.⁵⁹

Before admitting prior occurrences in products liability cases, the rule of “substantial similarity” applies. Evidence of other consumer claims was excluded in *Cooper Tire & Rubber Co. v. Crosby*.⁶⁰

The *Cooper* decision was ably commented upon in Shamp, The Use of Other Incidents to Show Defect in a Product Liability Case, 27 Verdict 36, No 2 (Spring 2002). Opposing the use of other accidents, see Sachs, “Other Accident” Evidence in Product Liability Actions: Highly Probative or an Accident Waiting to Happen?, 49 Okla. L. Rev. 257 (1996).

Fraud on the part of sellers was alleged by the purchasers of a home. Evidence of a prior fraud may be admissible to demonstrate fraudulent intent in a subsequent transaction when the party seeking to introduce such evidence lays a proper foundation, including proof that the prior transaction was fraudulent.⁶¹

In another alleged fraud case, it was held that while evidence of similar fraudulent schemes may be admissible to demonstrate fraudulent intent in the transaction in controversy, this exception is not without limits; to render such evidence admissible, it must be shown that the other transactions were fraudulent, and it must appear that they were so connected in point of time and otherwise with the one in issue as to make it apparent that all were proposed or carried out in pursuance of a common fraudulent purpose.⁶² Evidence that other jewelry store customers had disputes with jeweler was not admissible at trial on customer’s claim that jeweler substituted flawed diamond in ring that customer brought in to be reset as evidence of similar fraudulent

⁵⁸*Metropolitan Atlanta Rapid Transit Authority v. Allen*, 188 Ga. App. 902, 374 S.E.2d 761 (1988).

⁵⁹*Mulligan’s Bar & Grill v. Stanfield*, 294 Ga. App. 250, 668 S.E.2d 874 (2008).

⁶⁰*Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454, 543 S.E.2d 21 (2001) (tire explosion and resulting

auto wreck).

⁶¹*Conway v. Romarion*, 252 Ga. App. 528, 557 S.E.2d 54 (2001) (foundational requirement not met in this case).

⁶²*Ament v. Bennett’s Fine Jewelry*, 249 Ga. App. 683, 549 S.E.2d 501 (2001).

schemes, where customer introduced no evidence regarding time at which prior alleged disputes arose, third incident occurred approximately three years earlier, and customer did not demonstrate any factual connection between previous disputes and her situation.

Georgia's substantial similarity requirement applies in fraud cases, as well as other sorts of litigation. Unless the prior incident involving a third party is substantially similar to the litigated incident, it is deemed to be not relevant. A plaintiff claimed misrepresentation and fraud in *Taylor v. Bennett Chevrolet/Buick, Inc.*⁶³ Plaintiff said a car dealership sold them a car as "new" when it had been in a major wreck. Another motorist's experience with the dealership was deemed not substantially similar to that claimed by plaintiff, and a judgment for the car dealer was approved.

To render evidence of a party's conduct with respect to a third person admissible in an action for fraud against the party, it must be shown that the other transactions were fraudulent, and it must appear that they were so connected in point of time and otherwise with the one in issue as to make it apparent that all were proposed or carried out in pursuance of a common fraudulent purpose.⁶⁴

Although evidence of other problematic incidents involving a product may be relevant and admissible in product liability actions, similarity must be shown. Without a showing of substantial similarity, the evidence is irrelevant as a matter of law.⁶⁵

Lack of similarity was fatal to evidence of other accidents in *Karoly v. Kawasaki Motors Corp.*⁶⁶

In medical malpractice action, it is not error to disallow evidence of an alleged previous act of malpractice on the part of the defendant.⁶⁷

Evidence of undue influence is typically circumstantial and can be shown "by a wide range of testimony."⁶⁸

Objections to evidence of other accidents or lawsuits are frequently asserted by defendants. On the other hand, sometimes the shoe is on the other foot when a defendant landowner or manufacturer attempts to exonerate himself by showing that the

⁶³*Taylor v. Bennett Chevrolet/Buick, Inc.*, 271 Ga. App. 300, 609 S.E.2d 215 (2005).

⁶⁴*Vaughn v. Metropolitan Property & Casualty Insurance Company*, 260 Ga. App. 573, 580 S.E.2d 323 (2003).

⁶⁵*Shasta Beverages, Inc. v. Tetley USA, Inc.*, 248 Ga. App. 381, 546

S.E.2d 800 (2001).

⁶⁶*Karoly v. Kawasaki Motors Corp., U.S.A.*, 259 Ga. App. 225, 576 S.E.2d 625 (2003).

⁶⁷*Laughridge v. Moss*, 163 Ga. App. 427, 294 S.E.2d 672 (1982).

⁶⁸*Slosberg v. Giller*, 341 Ga. App. 581, 801 S.E.2d 332 (2017).

premises or product have created no injury, save perhaps the one in the present case.⁶⁹

Although total identity of conditions at the time of the accident in suit and at the other times involved in the proffered evidence can never be established, the courts are agreed that evidence of the absence of other accidents should not be admitted where the conditions are substantially dissimilar.⁷⁰

For admissibility of testimony about other sales of real estate on the question of value, see § 24:23, *supra*.

In criminal cases, the state is required to give the defendant timely notice of its intent to introduce evidence of defendant's similar transactions as well as evidence of acts categorized as prior difficulties.⁷¹

In murder prosecution, evidence of defendant's motive for the killing was properly admitted. At issue was the admissibility of testimony that recounted statements made by the defendant that he and his family had killed African-Americans in the past. The court held "that the complained-of evidence was not admitted as proof that [the defendant] had committed a prior murder . . . but rather was properly admitted as evidence of [the defendant's] racial animus toward African-Americans as a possible motive for his killing of the African-American victim in this case."⁷²

In a rape prosecution, evidence of prior false accusations of sexual misconduct made by the prosecutrix is admissible to attack the credibility of the prosecutrix and as substantive evidence tending to prove that the instant offense did not occur.⁷³ Before evidence of a prior false accusation by the prosecutrix of sexual misconduct can be admitted, the trial court must make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists. Sexual assault defendants have a burden of coming forward with evidence at the hearing to establish a reasonable probability that a victim had made a prior false accusation of sexual misconduct.

Evidence that the victim previously accused someone other than the defendant of sexual misconduct is generally not admissible. There are limited exceptions to this rule, however, including:

- (1) to show that someone other than the defendant caused

⁶⁹For references, see Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 A.L.R. 5th 371.

⁷⁰*Sammons v. Webb*, 86 Ga. App. 382, 71 S.E.2d 832 (1952).

⁷¹*Loggins v. State*, 260 Ga. 1, 388 S.E.2d 675 (1990). Required notice, see Uniform Superior Court Rule 31.3.

⁷²*Capps v. State*, 300 Ga. 6, 792 S.E.2d 665 (2016).

⁷³*Mills v. State*, 251 Ga. App. 39, 553 S.E.2d 353 (2001).

- the victim's injuries;
- (2) to show that the victim lacks credibility if the victim's prior allegations were false; and
- (3) to show other possible causes for the victim's symptoms.⁷⁴

Federally, prior false allegations in sex crimes cases have been addressed under Fed. Evid. R. 608(b).⁷⁵ That rule is the model for Georgia's O.C.G.A. § 24-6-608(b), as noted in an opinion by Chief Judge Dillard of the Georgia Court of Appeals.⁷⁶ Courts have articulated rigorous standards for the admission of such evidence under Rule 608(b).⁷⁷

Trial court did not abuse its discretion in prohibiting an invitee from introducing prior slip and falls at a restaurant in her opening statement in a premises liability trial, since the prior falls did not occur in the same location nor for the same reason as the invitee's slip and fall. As the trial went on, however, things changed. The invitee later testified that the slippery floor condition contributed to her fall and the invitee was then permitted to introduce evidence of alleged prior slip and falls that occurred due to the same floor condition. In addition, the invitee was able to refer to the prior slip and falls in her closing argument.⁷⁸

In product liability cases, an exception exists to the general rule that similar acts or omissions on other and different occasions are not admissible to prove like acts at a different time or place, when such evidence is relevant to the issues of notice of a defect and punitive damages. However, the other acts must be similar. Evidence of 13 accidents involving sudden acceleration in other vehicles was not deemed to be substantially similar to alleged sudden acceleration that caused a Georgia motorist's accident, and thus, was not relevant, in motorist's products liability action against an automobile manufacturer. Motorist's expert testified as to numerous possible causes for sudden acceleration and that cross-over circuit faults were probable cause of motorist's collision, but he could not identify what caused sudden acceleration in other accidents.⁷⁹

In products liability cases, the "rule of substantial similarity" prohibits the admission into evidence of other transactions, oc-

⁷⁴*Johns v. State*, 253 Ga. App. 207, 558 S.E.2d 426 (2001).

⁷⁵See *Abram v. Gerry*, 672 F.3d 45 (1st Cir. 2012); *U.S. v. Withorn*, 204 F.3d 790, 54 Fed. R. Evid. Serv. 255 (8th Cir. 2000).

⁷⁶*Frye v. State*, 344 Ga. App. 704, 811 S.E.2d 460 (2018) ("Prior false allegations of sexual misconduct are considered in federal and state courts

under Rule 608 (b).").

⁷⁷*Fugett v. State*, 812 N.E.2d 846 (Ind. Ct. App. 2004).

⁷⁸*Briglevich v. Liberty House Restaurant Corp.*, 277 Ga. App. 433, 626 S.E.2d 625 (2006).

⁷⁹*Stovall v. DaimlerChrysler Motors Corp.*, 270 Ga. App. 791, 608 S.E.2d 245 (2004).

currences, or claims unless the proponent first shows that there is a substantial similarity between the other transactions, occurrences, or claims and the claim at issue in the litigation. In an accident case, the showing of substantial similarity must include a showing of similarity as to causation.⁸⁰

§ 29:6 Proof of habits

Generally speaking, evidence as to the habit of a person is admissible assuming, of course, that such evidence is relevant to the issues.¹ According to the Fourth Circuit, “to establish habit solely by use of prior examples, those examples had to be ‘numerous enough’ and ‘sufficiently regular,’ ” but habit “can also be established by a witness’s direct testimony of his general practice.”² Single instances, therefore, have been determined insufficient to establish habit.³

In federal practice, Rule 406 of the Federal Evidence Rules also recognizes habit evidence and admits it when relevant “regardless of the presence of eyewitnesses.” So does O.C.G.A. § 24-4-406.⁴

Given O.C.G.A. § 24-4-406’s similarity to the corresponding federal rule, Georgia courts utilize federal authority in applying Georgia’s rule.⁵ Applying Georgia Rule of Evidence 406, Georgia courts have observed:

According to federal law, habit “describes one’s regular response to a repeated specific situation. . . . [T]he offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere ‘tendency’ to act in a given manner, but rather, conduct that is ‘semi-automatic’ in nature.”⁶

§ 29:7 Custom and usage

In the 2013 Georgia Code of Evidence, this topic is referenced in O.C.G.A. §§ 24-3-5 and 24-4-406.¹

⁸⁰*Parks v. Hyundai Motor America, Inc.*, 294 Ga. App. 112, 668 S.E.2d 554 (2008). See *Cottrell, Inc. v. Williams*, 266 Ga. App. 357, 596 S.E.2d 789 (2004).

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¹*Co-op Cab Co. v. Preston*, 67 Ga. App. 580, 21 S.E.2d 251 (1942).

²*Howard v. City of Durham*, 68 F.4th 934 (4th Cir. 2023).

³*Club Exploria, LLC v. Aaronson*, Austin, P.A., 2022 WL 884317 (11th Cir. 2022).

⁴See, generally, *Leonard v.*

Nationwide Mut. Ins. Co., 499 F.3d 419, 442, 37 A.L.R.6th 785 (5th Cir. 2007).

⁵*Turfgrass Group, Inc. v. Georgia Cold Storage Co.*, 346 Ga. App. 659, 816 S.E.2d 716, 96 U.C.C. Rep. Serv. 2d 148 (2018).

⁶*Evans-Glodowski v. State*, 335 Ga. App. 484, 781 S.E.2d 591 (2016) (omissions and internal quotations original).

[Section 29:7]

¹See *Guidance Endodontics, LLC v. Dentsply Intern., Inc.*, 705 F. Supp. 2d 1265, 1269 (D.N.M. 2010).

Like an individual's habits, a corporation has regular practices.² In the context of the particular company's procedures, these are referred to as the routine practice of an organization.³ How the mail of a particular company is taken out each day falls into this category; the procedure falls into the category of the "routine practice of an organization."

Finally, there is the custom of a trade, industry, or profession. There may be a custom in the industry of building automobiles for mounting fuel tanks in a particular way. A standard of professional practices, as with doctors, constitutes a custom of the profession. This should not be confused with the regular practice of a specific business organization.

Similarly, habit is often confused with "custom and usage" and with "usual method or practice" but should be clearly distinguished, since the rules are different and are applied in entirely different situations. See § 29:6, *supra*, for a discussion of the rules relating to admission of evidence of a person's habits.

A custom or usage may not vary the express terms of a contract,⁴ but it may explain ambiguity in a contract.⁵

See § 24:20, *supra*, for expert testimony on business matters.

§ 29:8 Usual method or practice

The law relating to evidence of usual method and practice often relates to custom and usage, see § 29:7, *supra*, but should not be confused with evidence of personal habits, see § 29:6, *supra*.

Since courts and lawyers have used the terms "custom and usage" and "usual method or practice" interchangeably, we have done so in this book in quoting from reported decision, but limit the discussion in this section to the concept of usual method or practice as it is applied in tort cases.

Custom is relevant in determining the standard of care because it illustrates what is feasible and suggests a body of knowledge that defendant is chargeable with knowing. In most cases, reasonable prudence is in fact common prudence, but strictly is never its measure. The usual practice may never set its own standards however persuasive its usages. In the end courts must decide what is required. There are precautions so imperative that even

²Anderson v. Rugged Races, LLC, 42 F.4th 955 (8th Cir. 2022) (footrace promoter's procedures for building obstacle courses determined to be admissible under Rule 406).

³Rule 406, Federal Rules of Evi-

dence; O.C.G.A. § 24-4-406.

⁴Wight v. Brown, 77 Ga. App. 375, 48 S.E.2d 784 (1948).

⁵See Colfax Gin Co. v. Buckeye Cotton Oil Co., 24 Ga. App. 610, 101 S.E. 697 (1919).

their universal disregard will not excuse their omission.¹

A custom or usage cannot alter or change the standard of conduct required by law, and the fact that a thing is done in the usual way does not excuse failure to exercise proper care or negligent conduct.²

Evidence of custom or usage is admitted for the purpose of assisting the jury to determine the standard of care that would be imposed on defendant³ and upon the plaintiff on the issue of contributory negligence.

§ 29:9 Proof of intoxication

The question of intoxication may arise in a number of ways in the trial of a civil or criminal case. Intoxication may become material in the trial of the case, both as to the ability of a witness who was intoxicated at the time of the event in question and at the time he is called to testify.¹ Intoxication may be a defense in a criminal case where intent is an element of the crime.² For the presumption as to intoxication, see § 24:33, *supra*. Intoxication of the accused may go to the weight to be given a confession.³

Intoxication has been defined as a condition in which a person is under the influence of intoxicating liquors to the extent that his judgment is impaired and his acts or words or conduct is visibly and noticeably affected.⁴

In *Barrett v. Burnette*,⁵ the Georgia Court of Appeals held that the trial court abused its discretion in a negligence action when it failed to allow evidence of the intoxication of the owner of a parked vehicle. The case involved a collision of a car with an unoccupied parked car. As stated by the court:

The main issue in this case was whether Burnette pulled his car to the side or left it in the middle of the road. This determination hinged upon the credibility of the witnesses. Thus, whether Burnette's intoxication after the accident affected his ability to recall where he parked his vehicle or if he was actually intoxicated at the time he parked it was highly relevant and should have been presented for the jury to consider.

O.C.G.A. § 40-6-392, effective January 1, 1991, addressed the

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¹Sams v. Haines, 299 F. Supp. 746 (S.D. Ga. 1969); Wright v. Concrete Co., 107 Ga. App. 190, 129 S.E.2d 351 (1962).

²King v. Harmon, 97 Ga. App. 456, 103 S.E.2d 428 (1958).

³Stuckey's Carriage Inn v. Phillips, 122 Ga. App. 681, 178 S.E.2d 543 (1970).

[Section 29:9]

¹See § 12:1, *supra*.

²See § 4:8, *supra*.

³See § 27:5, *supra*.

⁴Parks v. Maryland Cas. Co., 69 Ga. App. 720, 26 S.E.2d 562 (1943).

⁵Barrett v. Burnette, 348 Ga. App. 838, 824 S.E.2d 701 (2019).

use of chemical tests for alcohol or drugs. It outlined the procedures to be used, specified who may perform such tests, established presumptions, and provided that a person's refusal to submit to such a test shall be admissible against him in a criminal trial.

A 1995 act related to the method of determining whether a breath test was properly conducted, and provided for the collection of two breath samples. In addition, the act changed the implied consent warnings to be given to a driver suspected to be under the influence of alcohol or drugs.⁶

Against a challenge that O.C.G.A. § 40-6-391(a)(5) was unconstitutional when it established a crime for having a blood alcohol concentration of .10 or greater, as measured within three hours of driving, the Georgia Supreme Court upheld the statute.⁷ The statute was supported again, as were the procedures under it, in *Mitchell v. State*.⁸

Revisions of drunk driving laws reflected public concerns over DUI. Elimination of no-contest pleas for drivers with a blood alcohol content exceeding .15% is contained in O.C.G.A. § 40-6-391.1. Under O.C.G.A. § 40-6-392, a person with a reading of .08% gives rise to a presumption that the person is under the influence of alcohol.

The implied consent notice was adjudicated in *State v. Payne*.⁹ When an officer's reading of the notice to a driver deviates from the exact words of the statute, this fact will not result in suppression of evidence unless the officer's words constitute a substantial change in the notice. The Court of Appeals traced the history of the law regarding notice:

O.C.G.A. 40-5-67.1(b) was amended by the legislature effective March 27, 1998, to provide that the implied consent notice "shall be read in its entirety but need not be read exactly so long as the substance of the notice remains unchanged." We held in *State v. Moncrief*, 234 Ga. App. 871, 508 S.E.2d 216 (1998) that the amendment had retroactive effect. Accordingly, the prior opinions of this court relied upon by the trial court requiring the exact statutory

⁶The act amended O.C.G.A. §§ 40-5-67.1 and 40-6-392.

For breath testing, see *Allen v. State*, 286 Ga. App. 469, 649 S.E.2d 583 (2007).

⁷*Bohannon v. State*, 269 Ga. 130, 497 S.E.2d 552 (1998).

⁸*Mitchell v. State*, 269 Ga. 378, 497 S.E.2d 566 (1998).

⁹*State v. Payne*, 236 Ga. App. 338, 512 S.E.2d 292 (1999).

For upholding statutory implied consent notices, see *Klink v. State*, 272 Ga. 605, 533 S.E.2d 92 (2000) (overruled on other grounds by, *Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (2017)), and *Lutz v. State*, 274 Ga. 71, 548 S.E.2d 323 (2001) (overruled on other grounds by, *Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (2017)).

language are no longer applicable. Pursuant to the amendment to O.C.G.A. 40-5-67.1(b), we must determine whether the arresting officer's reading of the implied consent notice to Payne in language that differed from the statute changed the substance of the statutory notice.

The court ruled that the reading did not substantially change the statute. Some of the differences amounted to "minor changes of no substance," in the view of the court.

Officer may request driver to take chemical test if officer has probable cause to believe driver was DUI.¹⁰ Testing rights also inure to the benefit of defendant drivers. For the right of motorist to request a private sobriety test, see *State v. Henry*.¹¹ However, the motorist's request must be a reasonable one.¹² The state has the burden to show it complied with a reasonable request for an independent test, and the trial court will decide if the officer made a proper effort to accommodate the accused's request for an independent test.¹³

An implied consent notice for suspects under age 21 was incorporated in 2001 amendments to O.C.G.A. § 40-5-67.1. Other cases on withdrawal of body specimens and chemical testing, see § 15:15, *supra*.

Evidence supported a conviction of DUI, less safe to drive, in *Brent v. State*,¹⁴ where the defendant had the following problems:

The evidence before the trier of fact was that Brent had alcohol on his breath, registered positive on the alco-sensor, failed all six parts of the HGN test, had substandard performances on the heel-to-toe and 30-second stand tests, and, in the expert opinion of Deputy Ellington, was less safe to drive. A rational trier of fact may find guilt beyond a reasonable doubt from that evidence.

The court held that it was not incumbent upon the State to prove that the defendant committed an unsafe act while he was behind the wheel. The trial court did not err in permitting the deputy to testify that in his professional opinion the defendant was under the influence of alcohol.

In a 2003 decision, the accused drunk driver sought to exclude evidence of results of the Intoxilyzer 500 test on the grounds of inadequate foundation. He was unsuccessful.¹⁵

Intoximeter test results were admissible, even though the State

¹⁰*Snyder v. State*, 283 Ga. 211, 657 S.E.2d 834 (2008).

¹¹*State v. Henry*, 312 Ga. 632, 864 S.E.2d 415 (2021).

¹²*Ritter v. State*, 306 Ga. App. 689, 703 S.E.2d 8 (2010).

¹³*State v. Metzger*, 303 Ga. App. 17, 692 S.E.2d 687 (2010).

¹⁴*Brent v. State*, 270 Ga. 160, 510 S.E.2d 14 (1998).

¹⁵*Scara v. State*, 259 Ga. App. 510, 577 S.E.2d 796 (2003).

failed to furnish the defendant with a copy of test results and despite defendant's timely request therefore, where such failure was inadvertent and there was no showing of prejudice.¹⁶

Prior to trial, an appellant moved to suppress evidence of the State's breath test results, arguing they were inadmissible because they State had a statutory and constitutional duty to immediately inform him of the results. The trial court agreed appellant should have been given "prompt delivery of the breath test result" and granted the motion to suppress. The Court of Appeals reversed. The Georgia Supreme Court ruled that the failure to immediately inform a DUI defendant of test results did not result in a constitutional violation. "We granted a writ of certiorari to the Court of Appeals in *State v. Padidham*, 310 Ga. App. 839, 714 S.E.2d 657 (2011), to determine when the results of State-administered Intoxilyzer 5000 breath test must be given to a defendant accused of driving under the influence (DUI) in violation of O.C.G.A. § 40-6-391. Because we hold that the procedures followed by the State comport with the fundamental fairness required by due process, the decision of the Court of Appeals is affirmed." The Court also held that any deviation from the procedures set forth in the Intoxilyzer 5000 training manual went to the weight, not the admissibility of the state's test results.¹⁷

A blood test administered by a hospital for the purpose of assisting in defendant's medical treatment was admissible as a business record in his trial for vehicular homicide, even though it did not meet the requirements of O.C.G.A. § 40-6-392, since the test was not for the purpose of establishing a violation of O.C.G.A. § 40-6-391.¹⁸ Hospital records containing blood test results and other evidence of intoxication may be targeted by a search warrant.¹⁹

Immunoassay tests performed on the blood of defendant charged with vehicular homicide, driving under the influence, and causing serious injury by vehicle were properly admitted, despite the fact that the test results were not confirmed by another testing method, since a research toxicologist qualified as a forensic toxicologist testified that the tests were performed in accordance with procedures approved by the state crime laboratory.²⁰

¹⁶*White v. State*, 181 Ga. App. 724, 397 S.E.2d 13 (1990).
170, 351 S.E.2d 536 (1986).

¹⁷*Padidham v. State*, 291 Ga. 99, 697 S.E.2d 211 (2010).

¹⁸*Jackson v. State*, 196 Ga. App. 261, 401 S.E.2d 289 (1990).

¹⁹*Brogdon v. State*, 287 Ga. 528, 697 S.E.2d 211 (2010).

²⁰*Jackson v. State*, 198 Ga. App. 261, 401 S.E.2d 289 (1990).

In *Hawkins v. State*,²¹ the Court of Appeals approved field sobriety tests, including the HGN test. On the Walk and Turn test, see *State v. Goolsby*.²²

Although the presence of cocaine in bodily fluids is admissible as direct evidence of the offense of possession of cocaine, it is not admissible where the defendant is charged only with the sale of cocaine.²³

In a civil action for injury damages, chemical test results are admissible in evidence.²⁴ In addition, the judge has discretion in an injury accident case to admit even minimal evidence of alcohol consumption by a driver, leaving to the jury the question of whether alcohol consumption impaired the driver's condition and contributed to the wreck.²⁵

In the 2013 Code, O.C.G.A. § 24-4-417 contains a number of drunk driving provisions, including admission of prior drunk driving history when the accused refuses in the current case to take a breath test or the identity of the driver is in dispute.

§ 29:10 Proof of weight

Under the code provisions relating to opinion evidence, it seems clear that an ordinary witness could testify as to the weight of an object, provided he gave the reasons upon which the opinion was based.¹ An expert could also testify as to weight.²

§ 29:11 Evidence of character and reputation

The terms character and reputation are often used interchangeably, but are not synonymous. Character is what a person really is or does, while reputation is what those who know him, personally or otherwise, believe him to be. Reputation is necessarily based upon what one has heard about another from other people. Therefore, it is hearsay evidence. When proof of reputation is admitted under the rules discussed below, it is admitted as an exception to the hearsay rule.¹

Form of motion in limine to preclude character proof, see the Appendix of Forms in this text.²

Character and reputation proof sometimes plays a role in

²¹*Hawkins v. State*, 223 Ga. App. App. 463, 702 S.E.2d 737 (2010).
34, 476 S.E.2d 803 (1996).

²²*State v. Goolsby*, 262 Ga. App. 867, 586 S.E.2d 754 (2003).

²³*Cross v. State*, 196 Ga. App. 714, 397 S.E.2d 125 (1990).

²⁴O.C.G.A. § 40-6-392(a).

²⁵*Schwartz v. Brancheau*, 306 Ga.

[Section 29:10]

¹O.C.G.A. § 24-7-701.

²O.C.G.A. § 24-7-702.

[Section 29:11]

¹See O.C.G.A. § 24-8-803(19).

²Consult Form 12, Appendix C,

lawyer disciplinary cases, as it did in a 2008 decision. The special master found that the attorney had an excellent personal and professional reputation in light of ten character witnesses, including lawyers, military personnel, and former clients, and concluded that the attorney had an excellent personal and professional reputation in the legal community and the community at large. The court stated that a felony conviction authorized, but did not demand, disbarment under State Bar Rules and Regulations, Georgia Rule of Professional Conduct 8.4(a)(2). Based on the mitigating factors, the absence of aggravating factors, and the discipline in similar cases, a 24-month suspension was proper.³

In a termination of parenting rights case, the court correctly admitted the testimony of the father who, in the face of losing his parental ties, praised the grandparents (who were also the guardians) of the child for their character and rearing of his child and conceded that the child was better off in their custody than in his.⁴

Character witness impeachment was the subject of *Davis v. State*.⁵ Defendant's first-offender record for burglary could not be used at drug trial to impeach defendant's character witness. However, error in trial court's decision to allow the state to impeach defendant's character witnesses with defendant's first-offender record for burglary was harmless, given that evidence against defendant was overwhelming.

§ 29:12 Evidence of character (reputation) in criminal cases

In the 2013 Georgia Evidence Code, this topic appears in O.C.G.A. §§ 24-4-404, 24-4-405, and 24-8-803(21). These rules are based on Fed. R. Evid. 404, 405 and 803(21).

Fed. R. Evid. 404 generally pertains to the admissible types of character and noncharacter evidence.¹ The methods for introducing character evidence are the subject of Fed. R. Evid. 405.² Fed. R. Evid. 803(21) proves a hearsay exception for the introduction of certain character evidence.³

In a 2020 decision, the Supreme Court of Georgia held that, generally speaking, specific other acts of a victim or witness are

infra.

³In re Waldrop, 283 Ga. 80, 656 S.E.2d 529 (2008) For more on disciplining of attorneys, see § 1:10, supra.

⁴In re K.C.R., 283 Ga. App. 593, 642 S.E.2d 214 (2007).

⁵*Davis v. State*, 287 Ga. App. 478, 651 S.E.2d 750 (2007).

[Section 29:12]

¹See *United States v. Akers*, 110 Fed. R. Evid. Serv. 1005 (E.D. Ky. 2019).

²See, generally, *U.S. v. Barry*, 814 F.2d 1400, 22 Fed. R. Evid. Serv. 1560 (9th Cir. 1987).

³See, generally, *Lang v. Cullen*,

generally inadmissible, relegating the defense to character and reputation evidence. *Strong v. State*⁴ left open the issue of whether: “under the current Evidence Code, a victim’s specific acts of violence of which the defendant had personal knowledge may be admissible to show the defendant’s state of mind with respect to a claim of self-defense.”

As case law interpreting Georgia’s 2013 Evidence Code develops, reviewing prior Georgia authority under the former rules can provide context and potential indication as to the direction that Georgia courts may take in the future.

In a criminal case, the prosecution cannot put defendant’s character in issue as part of its case in chief,⁵ but defendant may introduce evidence of good character as part of his defense tending to show that he did not commit the act charged.⁶ Under Georgia’s 2013 Evidence Code, this could be accomplished via a modification to Fed. R. Evid. 405 that appears in O.C.G.A. § 24-4-405 which provides for the introduction of good character evidence through the testimony of the accused.

The generally prevailing rule is that testimony to prove the good or bad character of a party to a civil action or of the defendant in a criminal prosecution must relate and be confined to the general reputation which such person sustains in the community.⁷ Reputation as to a character trait in a criminal case is different from reputation testimony to prove or disprove credibility of a witness. The former relies upon general reputation in the community for the trait at issue, like peacefulness of the defendant. And a proper foundation must be laid. To be admissible at trial, character testimony must rely on the defendant’s general reputation in the community; a witness’ personal knowledge of particular transactions or statements of single individuals cannot be brought into inquiry, except on cross-examination. Witnesses whose opinions of defendant were based on his work and the limited interactions they had with him, and who offered no opinion and claimed no knowledge of defendant’s general reputation in the community, could not testify to murder defendant’s alleged reputation for peacefulness.⁸

Reputation is not what a few persons say or may think about the party in question; it is what the community generally

725 F. Supp. 2d 925 (C.D. Cal. 2010).

⁴*Strong v. State*, 309 Ga. 295, 845 S.E.2d 653 (2020).

⁵*Hooks v. State*, 101 Ga. App. 351, 114 S.E.2d 48 (1960), and *Maxwell v. State*, 262 Ga. 73, 414 S.E.2d 470 (1992) (overruled on other grounds by, *Wall v. State*, 269 Ga. 506, 500 S.E.2d

904 (1998)).

⁶*Wilson v. State*, 215 Ga. 672, 113 S.E.2d 95 (1960).

⁷*Powell v. State*, 101 Ga. 9, 29 S.E. 309 (1897).

⁸*Thomas v. State*, 282 Ga. 894, 655 S.E.2d 599 (2008).

believes.⁹ It follows that evidence of mere rumors of ill repute concerning the party whose character is in issue is not admissible as proof of reputation; mere rumors are not tantamount to reputation, inasmuch as reputation involves a notion of the general estimate of a person by the community as a whole.¹⁰

Regardless of whether the defendant has any other defense and regardless of whether the record contains any other evidence upon which a reasonable doubt as to his guilt could be based, proof of good character may constitute a defense, and the jury, overriding any amount of positive evidence pointing to the defendant's guilt, may acquit upon the reasonable doubt that proof of good character generated in the minds of the jurors.¹¹

While general reputation evidence is the mode of proof on direct, specific acts can be used on cross-examination. Character witnesses may be cross-examined about specific incidents which are at odds with the witness' favorable opinions.¹² There are also times when an occurrence witness is recounting events and along the way propounds an opinion on a party's character. When this occurs, *Walker v. State*¹³ reviews the applicable rules:

When a defendant offers testimony of a witness concerning his general good reputation in the community, the State may explore specific acts of bad conduct on cross-examination of the defendant's witness for the purpose of testing the witness' knowledge of the defendant's reputation. *Jones v. State*, 257 Ga. 753, 363 S.E.2d 529 (1988). By testifying that Walker was not the kind of person who would fight, the defense witness opened the door for the State to ask about a specific incident in which Walker had acted in such a way as to lead the witness to the conclusion that he would be prone to violence when using a particular drug. The testimony was relevant and its admission, even though it reflected adversely on the defendant, was not error.

When a character witness is cross-examined by opposing counsel, there must be a reliable basis for the questions posed on cross-examination.¹⁴

Suppose a party's character witness testifies to the good general character of his friend, the defendant in a case. The opponent cross-examines with specific episodes drawn from the life of the defendant, episodes which are at odds with "good

⁹*Moore v. U.S.*, 123 F.2d 207 (C.C.A. 5th Cir. 1941).

¹⁰*Moore v. U.S.*, 123 F.2d 207 (C.C.A. 5th Cir. 1941).

¹¹*Loomis v. State*, 78 Ga. App. 336, 51 S.E.2d 33 (1948).

¹²See generally *Wood v. State*, 316 Ga. 811, 890 S.E.2d 716 (2023).

¹³*Walker v. State*, 264 Ga. 676, 449 S.E.2d 845 (1994).

¹⁴*Medlock v. State*, 264 Ga. 697, 449 S.E.2d 596 (1994) (questions can inquire about arrests, convictions and bad acts; as to question about DUI charge, failure to invoke a ruling as to a mistrial motion resulted in a waiver).

character.” Are there some specific instances which are off limits when a character witness is cross-examined? Character witness impeachment was the subject of *Davis v. State*.¹⁵ Defendant’s first-offender record for burglary could not be used at drug trial to impeach defendant’s character witness. However, error in trial court’s decision to allow the state to impeach defendant’s character witnesses with defendant’s first-offender record for burglary was harmless, given that evidence against defendant was overwhelming.

State may not introduce evidence of criminal defendant’s bad character unless defendant first introduces evidence of his good character.¹⁶

While the reputation of a victim for violence is generally irrelevant and inadmissible, when there is a prima facie case showing that the deceased was the assailant, the deceased assailed the defendant, and the defendant was honestly seeking to defend himself, the deceased’s general reputation for violence may be admitted.¹⁷

In prosecution for aggravated assault with intent to rape, it is not error to exclude testimony as to defendant’s reputation at his place of work.¹⁸ There was no error in excluding testimony on character where the witness’ basis of opinion was personal belief rather than knowledge of community reputation.¹⁹

A murder defendant’s character was not impermissibly placed into evidence by testimony that he was often involved with homosexuals where such a fact was relevant because the victim was known to be gay.²⁰ The State was permitted to introduce evidence of a murder defendant’s bisexuality to show intent, motive, plan, scheme and bent of mind where there was evidence that the victim was homosexual and evidence of homosexuality related to the facts of the murder.²¹

Witness testimony did not constitute improper character evidence when he testified that he had “[n]ever see[n] [the victim] with a gun” and had not “ever known him to have a gun.” Such testimony, according to the Supreme Court of Georgia, stemmed

¹⁵*Davis v. State*, 287 Ga. App. 478, 651 S.E.2d 750 (2007).

¹⁶*Hales v. State*, 250 Ga. 112, 296 S.E.2d 577 (1982).

¹⁷*Sims v. State*, 251 Ga. 877, 311 S.E.2d 161 (1984).

¹⁸*Foster v. State*, 170 Ga. App. 222, 316 S.E.2d 828 (1984).

¹⁹*Wood v. State*, 255 Ga. 697, 341 S.E.2d 442 (1986). See also *Jones v. State*, 257 Ga. 753, 363 S.E.2d 529 (1988).

²⁰*Flourney v. State*, 257 Ga. 265, 357 S.E.2d 574 (1987).

²¹*Wellborn v. State*, 258 Ga. 570, 372 S.E.2d 220 (1988).

from the witness' personal observations.²²

In criminal cases, the State is entitled to present evidence of the entire *res gestae* of a crime, even if the defendant's character is incidentally placed in issue by a description of uncharged crimes which were part of transaction.²³

In a prosecution for driving under the influence (DUI) and driving while license suspended, the admission of evidence of the reason for the previous suspension of the defendant's driver's license—a prior DUI conviction—improperly placed the defendant's character in issue.²⁴

Evidence of prior difficulties between the homicide victim and the defendant, including beatings of the victim by the defendant, was admissible as evidence of the relationship between the defendant and the victim, and while it may have reflected negatively on the defendant, it did not place his character in evidence.²⁵

Evidence that the day before his arrest for obstructing an officer and obscene and abusive language the defendant borrowed \$10 from the witness to purchase a drug was improperly admitted evidence of defendant's character, which he had not placed in issue. The court also said that there was no competent evidence concerning the type of drug defendant was alleged to have taken or that it would have affected him in such a way as to cause the combative behavior which formed the basis of his arrest.²⁶

The court found that there was no intentional election on the defendant's part to place his character in evidence when he testified on direct that he had never been convicted of a felony or any crimes of violence. The court ruled that the defendant counsel's remark in opening statement that Lindsey had never previously been in trouble, nor his remark that he is not a violent person on direct did not open the door to questions of his character and that the words of the accused (and perhaps his attorney) were inadvertent statements. Evidence of Lindsey's prior arrests could not come in under former O.C.G.A. § 24-9-20(b) since the misleading reference to a clear legal history was deemed to be unintentional.²⁷

Neither owning nor possessing a firearm, without more, imputes bad character. However, a defendant is required to establish a *prima facie* case of justification in the instance in which the defendant seeks to admit evidence of the victim's reputation

²²Ballard v. State, 297 Ga. 248, 773 S.E.2d 254 (2015).

²³Satterfield v. State, 256 Ga. 593, 351 S.E.2d 625 (1987).

²⁴Ledford v. State, 189 Ga. App. 148, 375 S.E.2d 280 (1988).

²⁵Rotino v. State, 259 Ga. 295, 380 S.E.2d 261 (1989).

²⁶Bacon v. State, 201 Ga. App. 639, 411 S.E.2d 783 (1991).

²⁷Lindsey v. State, 282 Ga. 447, 651 S.E.2d 66 (2007).

for carrying a gun.²⁸

§ 29:13 Method of proving character in criminal cases

In the 2013 Georgia Evidence Code, see O.C.G.A. § 24-4-405. Georgia Rule of Evidence 405 is patterned after Fed. R. Evid. 405.

Witness' opinion of a party's character, which is based solely on the witness' personal observation of the party, is an approved mode of character evidence under the 2013 evidence code.¹ Generally, under Rule 405, "Specific instances of conduct may not be introduced during direct examination unless 'a person's character or character trait is an essential element of a charge, claim, or defense.'"² A similar limitation applies to reputation evidence.³

Applying Rule 405, the Supreme Court of Georgia held out the possibility that "under the current Evidence Code, a victim's specific acts of violence of which the defendant had personal knowledge may be admissible to show the defendant's state of mind with respect to a claim of self-defense."⁴ As a general matter, however, *Strong v. State*⁵ held that, in self-defense cases, particular other acts of a victim or witness are generally inadmissible, consigning defendants to character and reputation evidence.⁶

In cases "where self-defense is not an issue," an opinion by Presiding Judge Dillard of the Georgia Court of Appeals determined that "the admission of [uncharged misconduct of an alleged victim] is governed by OCGA § 24-4-404(b), which in addition to prescribing the manner for admitting prior act evidence against a defendant, similarly—for the most part—controls the admission of a victim's prior acts."⁷

A police investigator who testified that he had personal knowledge of defendant's reputation in the community was not precluded from testifying as to the defendant's character and reputation simply because the officer was not a member of the

²⁸*Traylor v. State*, 280 Ga. 400, 627 S.E.2d 594 (2006).

[Section 29:13]

¹O.C.G.A. § 24-4-405. See *U.S. v. Polsinelli*, 649 F.2d 793, 8 Fed. R. Evid. Serv. 412 (10th Cir. 1981); *Wilkerson v. State*, 271 P.3d 471 (Alaska Ct. App. 2012).

²*United States v. Wells*, 2019 WL 3243220 (D. Alaska 2019).

³*White v. State*, 307 Ga. 882, 838 S.E.2d 828 (2020). See also *U.S. v.*

Gregg, 451 F.3d 930, 70 Fed. R. Evid. Serv. 585 (8th Cir. 2006).

⁴*Strong v. State*, 309 Ga. 295, 845 S.E.2d 653 (2020).

⁵*Strong v. State*, 309 Ga. 295, 845 S.E.2d 653 (2020).

⁶See also *Ward v. State*, 318 Ga. 884, 901 S.E.2d 189 (2024).

⁷*Interest of A. G.*, 363 Ga. App. 801, 872 S.E.2d 780 (2022).

defendant's community.⁸

In the penalty phase of a murder case, it was proper to allow testimony that defendant had bragged about the killings, in order to demonstrate his character.⁹

A criminal defendant may not introduce specific acts of good character when the State has introduced specific similar transactions for the purpose of showing scheme and bent of mind, even when the evidence of such transactions incidentally places the defendant's character in issue. A defendant, in order to rebut evidence of similar conduct offered into evidence against him, may produce evidence of his good character by taking the stand himself and testifying as to his past good conduct or by calling third parties to testify as to his general reputation in the community. The defendant may not, however, call third parties to testify to specific acts of past good conduct either to refute the similar transaction evidence or to introduce evidence of his good character.¹⁰

As pointed out in § 29:12, *supra*, character is proved by proof of reputation.¹¹ Generally speaking, specific acts of misconduct may not be shown, even though they may have considerable weight (i.e., logical relevancy) in tending to show that accused committed the act with which he is charged.¹²

The State may explore specific acts of bad conduct on cross-examination of a defendant's character witnesses.¹³ When cross-examining a defendant's character witness, a district attorney must be able to show that the questions posed to the witness were asked in good faith and were based on reliable information that can be supported by admissible evidence.¹⁴ The State's cross-examination of defendant's character witness was not improper, in malice murder trial; the State's questions about specific incidents were asked in good faith and were based upon reliable information and admissible evidence.¹⁵

How early in the examination must the showing of good faith be made? In deciding whether to allow state to cross-examine defendant's character witnesses as to defendant's character, trial

⁸*Catchings v. State*, 256 Ga. 241, 347 S.E.2d 572 (1986). Evid. Serv. 391 (D.N.M. 2019).

⁹*Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987).

¹⁰*Boyce v. State*, 258 Ga. 171, 366 S.E.2d 684 (1988).

¹¹*White v. State*, 307 Ga. 882, 838 S.E.2d 828 (2020).

¹²*Johnson v. State*, 84 Ga. App. 745, 67 S.E.2d 246 (1951). See also *United States v. Boutte*, 110 Fed. R.

¹³*Jones v. State*, 257 Ga. 753, 363 S.E.2d 529 (1988). See also *United States v. Neiheisel*, 771 Fed. Appx. 935 (11th Cir. 2019).

¹⁴*State v. Clark*, 258 Ga. 464, 369 S.E.2d 900 (1988).

¹⁵*Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

court was required to make state show that it had good faith basis for line of questioning and was required to consider such evidence in ruling upon the objection in prosecution for armed robbery and possession of a firearm during the commission of a crime.¹⁶ When a defendant presents witnesses as to his good character, the state is entitled to cross-examine as to his juvenile record to impeach such testimony.

The requirement of a good faith belief in the material a cross-examiner uses to interrogate a witness was reiterated in *Thompson v. State*.¹⁷

When examining a defense character witness concerning other criminal charges brought against the defendant, the prosecuting officer is required to demonstrate that the questions were asked in good faith, and based on reliable information that can be supported by admissible evidence.

Suppose a party's character witness testifies to the good character of his friend, the defendant in a case. The opponent cross-examines with specific episodes drawn from the life of the defendant, episodes which are at odds with "good character." Are there specific instances which are off limits when a character witness is cross-examined? Character witness impeachment was the subject of *Davis v. State*.¹⁸ Defendant's first-offender record for burglary could not be used at drug trial to impeach defendant's character witness. However, error in trial court's decision to allow the state to impeach defendant's character witnesses with defendant's first-offender record for burglary was harmless, given that evidence against defendant was overwhelming.

§ 29:14 Character of victim of assault or homicide

In the 2013 Georgia Evidence Code, see O.C.G.A. §§ 24-4-404 and 24-4-412. While O.C.G.A. § 24-4-404 adheres to its federal counterpart, Fed. R. Evid 404, O.C.G.A. § 24-4-412 was originally patterned after prior Georgia law, but now more closely resembles the federal model.

Under Georgia Rule of Evidence 405, specific other acts of a victim or witness are generally inadmissible, to include self-defense cases.¹ Character and reputation of prosecution witnesses or the victim may, however, be introduced by the defense.² This parallels the application of Rule 405 in federal courts, where the

¹⁶Harris v. State, 296 Ga. App. 465, 675 S.E.2d 236 (2009). [Section 29:14]

¹⁷Thompson v. State, 265 Ga. 677, 461 S.E.2d 528 (1995).

¹⁸Davis v. State, 287 Ga. App. 478, 651 S.E.2d 750 (2007).

¹White v. State, 307 Ga. 882, 838 S.E.2d 828 (2020).

²Strong v. State, 309 Ga. 295, 845 S.E.2d 653 (2020).

admission of specific acts is restricted to cases where character constitutes an essential element.³ In 2017, the Georgia Supreme Court observed that it has held specific acts of violence by crime victims are generally inadmissible, but has left open the question of whether acts of which the defendant was aware are admissible under the 2013 Georgia Evidence Code.⁴

“Reverse 404(b) evidence” is a term used to describe a criminal defendant’s introduction of other acts of prosecution witnesses for noncharacter purposes.⁵ The Eleventh Circuit Court of Appeals recognizes reverse 404(b) evidence.⁶ An important nuance in the Eleventh Circuit, however, is that if the individual against whom the other acts are introduced is not a defendant, the Rule 404(b) factors are considered as part of the Rule 403 analysis.⁷ Numerous decisions of the Eleventh Circuit have, however, questioned this approach.⁸

An opinion from the Georgia Court of Appeals provides insight into the development of reverse 404(b) jurisprudence in Georgia. A juvenile had been accused of shooting his mother’s boyfriend. The juvenile court judge denied the prosecution’s motion to transfer the case to superior court, held pursuant to O.C.G.A. §§ 15-11-561 and 15-11-562. Significantly, the juvenile court allowed the introduction of the boyfriend’s prior act of domestic violence against the juvenile’s mother. The juvenile court’s determination was affirmed, with Presiding Judge Dillard’s opinion remarking that “other acts evidence of alleged victims is generally controlled by Federal Rules of Evidence 404(b)” and “OCGA § 24-4-404(b) is the best vehicle for introducing such evidence under Georgia law.”⁹

The admission of reverse 404(b) evidence is subject to the same rules as when the prosecution attempts to introduce uncharged misconduct.¹⁰ A number of courts, however, maintain that prejudice considerations are reduced in connection with reverse 404(b) evidence.¹¹

With the foregoing in mind, considering earlier Georgia evi-

³U.S. v. Bordeaux, 570 F.3d 1041 (8th Cir. 2009); United States v. Wells, 2019 WL 3243220 (D. Alaska 2019).

⁴Williams v. State, 301 Ga. 712, 804 S.E.2d 31 (2017).

⁵U.S. v. Ushery, 400 Fed. Appx. 674 (3d Cir. 2010); U.S. v. Stevens, 935 F.2d 1380, 33 Fed. R. Evid. Serv. 831 (3d Cir. 1991).

⁶United States v. Fisher, 2020 WL 1034399 (N.D. Fla. 2020).

⁷See U.S. v. Morano, 697 F.2d

923, 12 Fed. R. Evid. Serv. 488 (11th Cir. 1983).

⁸See Ermini v. Scott, 937 F.3d 1329 (11th Cir. 2019); U.S. v. Sellers, 906 F.2d 597, 31 Fed. R. Evid. Serv. 459 (11th Cir. 1990).

⁹Interest of A. G., 363 Ga. App. 801, 872 S.E.2d 780 (2022).

¹⁰United States v. Harry, 930 F.3d 1000, 109 Fed. R. Evid. Serv. 1152 (8th Cir. 2019).

¹¹U.S. v. Seals, 419 F.3d 600 (7th

dence law assists in providing background and context for future Georgia evidence jurisprudence.

Where the accused is charged with an assault or homicide and the defense is self-defense, he may introduce evidence that the person assaulted or killed had a dangerous or turbulent character.¹² Such evidence, however, is generally confined to the victim's reputation in the community or opinion evidence.¹³ Specific acts against third persons often are not admissible.¹⁴ But there are exceptions, as subsequent cases in this section illustrate. As to reputation proof, it has been held, in a murder prosecution, that such evidence is admissible only after the accused has shown *prima facie* that the victim attacked him and he was honestly attempting to defend himself.¹⁵

When self-defense is raised by the defendant, frequently violent character traits or prior aggressive acts of the victim or deceased are sought to be raised by the defense. Georgia's self-defense statute was amended in 1993 to allow, in murder or manslaughter prosecutions, evidence that the defendant had been the object of family violence or child abuse at the hands of the deceased.¹⁶

Given that the defendant had failed to establish a *prima facie* case of self-defense in a felony murder case, the trial court correctly denied defendant the opportunity to ask a witness about the victim's character for violence. As stated by the Georgia Supreme Court, "a murder victim's reputation for violence 'may be offered as evidence by the accused upon the accused making a *prima facie* showing that the victim was the aggressor and was assaulting the accused, who was acting to defend himself.' If such showing is made, evidence of the victim's reputation for violence is then admissible to corroborate the accused's story."¹⁷

Sometimes the accused attempts to malign the victim's character. Prior acts by the victim in the nature of an alleged attempt to fondle a married man and reportedly seeking out young men for sex were not admitted in defense of a murder by stabbing in *Blair v. State*.¹⁸

Evidence of specific acts of violence by a victim against third persons was held admissible where the defendant claimed

Cir. 2005).

¹²Jefferson v. State, 56 Ga. App. 383, 192 S.E. 644 (1937).

¹³Griffin v. State, 309 Ga. 860, 849 S.E.2d 191 (2020).

¹⁴Jefferson v. State, 56 Ga. App. 383, 192 S.E. 644 (1937); Faulkner v. State, 261 Ga. 655, 411 S.E.2d 268 (1991).

¹⁵Dennis v. State, 216 Ga. 206, 115 S.E.2d 527 (1960); Sims v. State, 251 Ga. 877, 311 S.E.2d 161 (1984).

¹⁶O.C.G.A. § 16-3-21.

¹⁷Morris v. State, 303 Ga. 192, 811 S.E.2d 321 (2018).

¹⁸Blair v. State, 273 Ga. 668, 543 S.E.2d 685 (2001).

justification. A defendant claiming justification and seeking to introduce evidence of specific acts of violence by the victim against third persons should notify the trial court of such intention prior to trial.¹⁹

In a murder trial, the trial court properly declined to admit evidence that victim lived a “drug lifestyle” and was therefore likely to be armed at the time of the incident at issue. The Georgia Supreme Court noted that it had previously “rejected the contention that a victim’s alleged involvement in the drug trade, without more, would tend to show that the victim was armed so as to support a defendant’s claim of self-defense.” It further stated even if the “lifestyle evidence” had been relevant, it would have been inadmissible since it was not in the form of opinion or reputation testimony.²⁰

In murder trial, after laying a proper foundation, defendant may offer proof of specific prior acts of the victim toward defendant that demonstrate defendant’s reasonable belief that his use of force was necessary in order to defend himself.²¹ Thus, in the absence of such a demonstration, a defendant may not introduce such specific act evidence.²²

Evidence of bad reputation, opinion or acts of a victim in a violent crime case is often referred to as “*Chandler* evidence,” after the case referenced in the preceding paragraph. With the adoption of the new Evidence Code, it is likely that the breadth of such evidence will be impacted both as a legal and practical matter. Federal cases generally do not allow specific, unrelated acts of a victim in order to support self-defense, as character is not considered an essential element of such a claim.²³ Resort to Fed. R. Evid. 404(b) is generally the conduit for such evidence and then only where the defendant was aware of the victim’s prior acts.²⁴ Victim reputation for violence, however, is not subject to those restrictions federally and is generally admissible in self-defense cases.²⁵ In federal courts, defense introduction of violent victim’s character can lead to the prosecution introducing evidence of the same traits of the defendant.²⁶

Underscoring the foregoing, in a 2015 case, the Georgia

¹⁹*Chandler v. State*, 261 Ga. 402, 405 S.E.2d 669 (1991). Discussing *Chandler* evidence, see *Slaughter v. State*, 292 Ga. 573, 740 S.E.2d 119 (2013).

²⁰*Wilson v. State*, 302 Ga. 106, 805 S.E.2d 98 (2017).

²¹*Wiseman v. State*, 249 Ga. 559, 292 S.E.2d 670 (1982).

²²*Mullins v. State*, 299 Ga. 681,

791 S.E.2d 828 (2016).

²³*U.S. v. Gulley*, 526 F.3d 809 (5th Cir. 2008).

²⁴*Gregg v. U.S.*, 683 F.3d 941 (8th Cir. 2012).

²⁵*U.S. v. Emeron Taken Alive*, 262 F.3d 711, 57 Fed. R. Evid. Serv. 1545 (8th Cir. 2001).

²⁶*U.S. v. Caldwell*, 257 Fed. Appx. 764 (5th Cir. 2007).

Supreme Court determined that *Chandler* was vacated by the terms of Georgia's new Evidence Code: "*Chandler*, however, was decided under Georgia's old evidence code, and, it related specifically to the application of that old code. . . . Therefore, the evidentiary rule set forth in *Chandler* does not remain viable under the new evidence code."²⁷

The identity and general background of the victim are relevant issues in a murder trial.²⁸

Testimony against victim allowed, see *Davenport v. State*.²⁹

The rape shield statute (O.C.G.A. § 24-4-412), which prohibits admission of all evidence pertaining to the reputation of the complaining witness concerning past sexual activity with persons other than the defendant, prohibited the introduction of evidence that the victim contracted gonorrhea three months before she was raped and one month before the birth of a child, wore sexually suggestive clothing and acted promiscuously when she frequented night clubs, and demanded money from another man threatening to claim that he raped her.³⁰ Broad coverage is the rule, and the statute has caused the exclusion of evidence that the victim continued to have sex with multiple men after she was raped, even though she claimed she was traumatized.³¹ Excluded also was evidence that the victim had been working as a prostitute.³²

The statute does not apply in all sexual offenses. For example, in *Robinson v. State*,³³ it was held that the rape shield statute did not apply to prosecution for child molestation and sexual battery, disapproving *Purvis v. State*.³⁴

The rape shield statute does not prohibit evidence that the victim had lied about sexual misconduct by men other than the defendant, since the evidence does not involve the victim's past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct; however, the trial court should make a threshold determination, outside the presence of the jury, that a reasonable probability of falseness exists.³⁵

Exceptions to the rape shield law were discussed in *Wagner v.*

²⁷*Mohamud v. State*, 297 Ga. 532, 773 S.E.2d 755 (2015).

²⁸*Roper v. State*, 258 Ga. 847, 375 S.E.2d 600 (1989).

²⁹*Davenport v. State*, 283 Ga. 171, 656 S.E.2d 844 (2008).

³⁰*Ford v. State*, 189 Ga. App. 395, 376 S.E.2d 418 (1988).

³¹*Birdsong v. State*, 298 Ga. App. 322, 680 S.E.2d 159 (2009).

³²*Moorer v. State*, 290 Ga. App. 216, 659 S.E.2d 422 (2008).

³³*Robinson v. State*, 308 Ga. App. 562, 708 S.E.2d 303 (2011).

³⁴*Purvis v. State*, 301 Ga. App. 648, 689 S.E.2d 53 (2009).

³⁵*Smith v. State*, 259 Ga. 135, 377 S.E.2d 158 (1989) (overruled on other grounds by, *State v. Burns*, 306 Ga. 117, 829 S.E.2d 367 (2019)).

Accord, see *Roberts v. State*, 286

State.³⁶ Evidence of prior false accusations by a rape victim does not fall within the proscription of the rape shield law but before admitting such evidence the trial court must determine outside the presence of the jury that a reasonable probability exists that such accusations were false.³⁷ Also, when a victim voluntarily testifies to her lack of sexual experience, she waives her protection under the rape shield statute and may be impeached with proof of prior sexual acts.

The Rape Shield Law did not prohibit questions concerning a victim's past conduct of a nonsexual nature.³⁸

In a sex crimes case, can the defense establish that the alleged victim is infected with venereal disease, perhaps to show her "loose" character? No, says the Rape Shield statute. Evidence of a victim's sexually transmitted disease (STD) was inadmissible under the Rape Shield statute in a molestation prosecution. It could not be determined in this case when a victim had contracted STD, and the law made no distinction between a victim's behavior before or after the crime, and past sexual behavior (excluded by statute) included evidence of any sexual behavior by the victim before trial.³⁹

A physician's testimony concerning the victim's physical condition after the alleged rape was not evidence of the victim's past sexual behavior in violation of the rape-shield statute, rather was relevant to defendant's claim that he did not penetrate the victim because of her gross physical condition; it was also admissible to impeach the victim's claim that she was diagnosed with vaginal infections after the alleged rape and to challenge the victim's claim that the defendant was the cause of her vaginal infections.⁴⁰

A 10-year-old child molestation victim's credibility was improperly bolstered by testimony of a police officer to the effect that he found the victim, whose videotaped statement he had viewed, to be credible. The court said that the victim's credibility was exclusively within the jury's province and admission of bolstering testimony was reversible error.⁴¹

Reversing the Court of Appeals, the Georgia Supreme Court held that the trial court's exclusion of evidence regarding the rape victim's claim that she was previously raped by another man was proper. The court explained that the rule in *Smith v. State*, *supra*, authorizing evidence of prior false accusations of

Ga. App. 346, 347, 648 S.E.2d 783 (2007).

³⁶Wagner v. State, 253 Ga. App. 874, 560 S.E.2d 754 (2002).

³⁷O.C.G.A. § 24-4-412.

³⁸George v. State, 257 Ga. 176, 356 S.E.2d 882 (1987).

³⁹Murrell v. Ricks, 280 Ga. 427, 627 S.E.2d 546 (2006).

⁴⁰White v. State, 201 Ga. App. 53, 410 S.E.2d 441 (1991).

⁴¹Guest v. State, 201 Ga. App. 506, 411 S.E.2d 364 (1991).

rape was inapplicable, since there was no evidence that the victim accused any individual in connection with the claim.⁴²

In 2019, Georgia's rape shield statute, O.C.G.A. § 24-4-412, was amended to more closely adhere to Fed. R. Evid. 412.⁴³ That said, Georgia Rule of Evidence 412 only applies in criminal cases. Federal Rule of Evidence 412 may be invoked in civil litigation.⁴⁴

See *Payne v. Tennessee*⁴⁵ in which the U. S. Supreme Court held that the Eighth Amendment does not prohibit a jury at the sentencing phase of a capital trial from considering victim impact evidence relating to a murder victim's personal characteristics and the emotional impact of the murder on the victim's family. The court also held, overruling earlier cases to the contrary, that the Eighth Amendment does not prohibit a prosecutor from arguing such evidence at the sentencing hearing.

Under the foregoing case, the State could defend the conduct and reputation of the deceased. Legislative activity took the form of a separate statute when testimony on behalf of victims of violent crimes was approved. Under O.C.G.A. § 17-10-1.2, victim impact statements are allowed. The victim (if alive), the family of the victim or other appropriate witnesses are authorized to provide, prior to sentencing, evidence of the impact of the defendant's crime on the victim, the family of the victim, and the community.

Evidence of the reputation of a victim's companion for violence could have had no bearing on defendant's conduct, since defendant did not even know who companion was at time of homicide.⁴⁶

A defendant claimed that the trial court erred by refusing to allow him to introduce evidence of the murder victim's criminal record and of the presence of cocaine in the victim's bloodstream at the time of death, after the State opened the door to such evidence by having the victim's mother testify as to the victim's good character; however, the defendant did not attempt to introduce any such bad character evidence following the introduction of the alleged good character evidence.⁴⁷ Evidence that metabolites of cocaine were found in the murder victim's bloodstream was properly excluded since the defendant failed to demonstrate how the victim's use of cocaine contributed in any way to behavior by the victim that might have constituted provo-

⁴²*Postell v. State*, 261 Ga. 842, (1991).
412 S.E.2d 831 (1992).

⁴³Ga. Laws 2019, Act 31, § 5.

⁴⁴*Sheffield v. Hilltop Sand & Gravel Co., Inc.*, 895 F. Supp. 105, 42 Fed. R. Evid. Serv. 923 (E.D. Va. 1995).

⁴⁵*Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720

⁴⁶*Johnson v. State*, 259 Ga. 428, 383 S.E.2d 115 (1989) (overruled on other grounds by, *Wilson v. State*, 277 Ga. 195, 586 S.E.2d 669 (2003)).

⁴⁷*Williams v. State*, 262 Ga. 422, 420 S.E.2d 301 (1992).

cation and therefore would have been relevant to a defense of involuntary manslaughter.⁴⁸

The trial court properly excluded evidence regarding a conflict between the murder victim and Reggie Williams, one of the men lifting weights with the victim at the time of the crime. Appellant did not assert a defense of justification and thus evidence of the murder victim's character was irrelevant and inadmissible.⁴⁹

In a murder case, the defense attempted to introduce the victim's immigration status as character evidence. The trial court correctly limited the cross-examination by refusing to allow questioning on immigration status. The immigration status of a victim is not relevant to the matter being tried, namely whether defendant committed the crimes charges.⁵⁰

Character of, and past misconduct by, the victim can play a role in self defense cases. However, evidence of a homicide victim's prior violent acts must be excluded unless a defendant first makes a prima facie showing of justification for his actions; to make this showing, the defendant must produce sufficient evidence to prove that: (1) the victim was the aggressor; (2) the victim assaulted the defendant; and (3) the defendant was honestly trying to defend himself.⁵¹

Exception to the general rule that a victim's character is not relevant or admissible in a murder trial occurs when defendant claims justification and offers evidence that the victim was the first aggressor. This permits defendant to present evidence of both victim's general reputation for violence and specific acts of violence against third persons.⁵² Defendant must make a prima facie showing of justification as a prerequisite to admission of evidence of victim's violence. A prima facie case of justification needed for admission of evidence of victim's violence requires a showing that the victim was the aggressor, that victim assaulted the defendant, and that defendant was honestly trying to defend himself at the time of the killing. Defendant did not establish a prima facie case of justification needed to admit evidence of "prior incident evidence" in *Traylor*.

§ 29:15 Proof of character in civil cases

O.C.G.A. § 24-4-404(b) controls the admission of other acts evidence offered for noncharacter purposes. The Third Circuit Court of Appeals has observed, "Rule 404(b) applies equally to civil, as

⁴⁸Hawes v. State, 261 Ga. 164, 402 S.E.2d 714 (1991).

⁴⁹Ruffin v. State, 283 Ga. 87, 656 S.E.2d 140 (2008).

⁵⁰Junior v. State, 282 Ga. 689, 653

S.E.2d 481 (2007).

⁵¹Milner v. State, 281 Ga. 612, 641 S.E.2d 517 (2007).

⁵²Traylor v. State, 280 Ga. 400, 627 S.E.2d 594 (2006).

well as criminal, cases.”¹

As civil case law under Georgia Rule of Evidence 404(b) develops, examining authority under former Georgia evidence precedent can continue to provide instructive context.

In actions for injuries received as a result of the defendant’s negligence, evidence as to the manner in which the defendant had operated other motor vehicles on other occasions is generally inadmissible.² Similarly, evidence relating to the plaintiff’s character for prudence or recklessness is inadmissible on the question of whether the plaintiff exercised due care on the occasion in question.³

The trial court erred by allowing the investigating police officer to give expert testimony about the charter bus driver’s character and driving habits. Evidence about the charter bus driver’s character and driving habits was inadmissible in a negligence action. Thus, such should not be admitted on retrial.⁴

The general rule in civil cases excluding evidence bearing upon the character or reputation of the parties to the action is subject to an important exception in cases where, because of the nature of the action, the character or reputation of a party becomes a matter in issue; in such cases, evidence with reference to such party’s character or reputation is admissible. Defamation cases are frequently cited as an example of the exceptional situation.

In a defamation case, the trial court erred in granting summary judgment on the candidate’s claim for defamation by radio broadcast and fliers that attacked the plaintiff’s character during a political campaign.⁵

In an action against the driver of an automobile and the owner thereof for wrongful death, in which the owner was charged with furnishing the automobile to the driver, knowing the driver to be incompetent, evidence as to the driver’s reputation as an incompetent driver is admissible against the owner, but not against the driver.⁶

Similarly, under the doctrine of negligent entrustment, a party is liable if he entrusts someone with an instrumentality with actual knowledge that the person to whom he has entrusted the

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¹*Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 62 Fed. R. Evid. Serv. 1159 (3d Cir. 2003).

²*Hawkins v. Benton Rapid Exp.*, 82 Ga. App. 819, 62 S.E.2d 612 (1950) (overruled in part on other grounds by, *Wilson v. Harrell*, 87 Ga. App. 793, 75 S.E.2d 436 (1953)).

³*Atlanta & W.P.R. Co. v. Smith*, 94 Ga. 107, 20 S.E. 763 (1894).

⁴*Purcell v. Kelley*, 286 Ga. App. 117, 648 S.E.2d 454 (2007).

⁵*Howard v. Pope*, 282 Ga. App. 137, 637 S.E.2d 854 (2006).

⁶*Healan v. Powell*, 91 Ga. App. 787, 87 S.E.2d 332 (1955).

instrumentality is incompetent by reason of age or inexperience, physical or mental condition, or known habit of recklessness.⁷

And in an action to recover on a life insurance policy, in which the insurer contended that the insured had willfully misrepresented a material fact, evidence of the insured's good character is admissible on the issue of whether such a misrepresentation had been made.⁸

§ 29:16 Reputation for truth and veracity

In the 2013 Georgia Evidence Code, see O.C.G.A. § 24-6-608. This statute is based on Fed. R. Evid 608.¹

It is proper in both civil and criminal cases to impeach a witness, whether a party or not, by offering testimony of his bad character for truthfulness.² Such evidence is limited solely to reputation for truth and veracity and cannot include reputation for other character traits.³ In the 2013 Evidence Code, evidence of opinion concerning truthfulness or untruthfulness was included as grounds to impeach.⁴

The witness called to testify as to reputation for truth and veracity must be asked whether he knows that reputation before he can be asked what it is, under the Code. The inquiry concerning reputation is limited to the witness' neighborhood or among his associates,⁵ but the witness called to testify as to the reputation need not live in the neighborhood in question.⁶

Under former law, a witness who stated that such a reputation was good or bad could then be asked whether he would believe the challenged witness under oath. There is no similar provision. O.C.G.A. § 24-6-608. Georgia decisions indicate that this exclusion signals legislative rejection of the prior line of questioning.⁷

For the purpose of testing the witness' knowledge as to reputation, specific acts may be raised on cross-examination.⁸

As observed by Chief Judge Dillard of the Georgia Court of Ap-

⁷Gunn v. Booker, 259 Ga. 343, 381 S.E.2d 286 (1989). Supp. 3d 1122 (D.N.M. 2019).

⁸Lawler v. Life Ins. Co. of Ga., 91 Ga. App. 443, 85 S.E.2d 814 (1955). ³See generally State v. Martinez, 2008-NMSC-060, 145 N.M. 220, 195 P.3d 1232 (2008).

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¹See, generally, U.S. v. Dring, 930 F.2d 687, 32 Fed. R. Evid. Serv. 816 (9th Cir. 1991).

²O.C.G.A. § 24-6-608. See generally Wilson v. City of Chicago, 6 F.3d 1233, 38 Fed. R. Evid. Serv. 1280 (7th Cir. 1993); New Mexico ex rel. Balderas v. Real Estate Law Center, P.C., 409 F.

⁴O.C.G.A. § 24-6-608.

⁵Pethel v. State, 89 Ga. App. 8, 78 S.E.2d 428 (1953).

⁶Pethel v. State, 89 Ga. App. 8, 78 S.E.2d 428 (1953).

⁷Gaskin v. State, 334 Ga. App. 758, 780 S.E.2d 426 (2015).

⁸Hyde v. State, 70 Ga. App. 823, 29 S.E.2d 820 (1944).

peals, pursuant to O.C.G.A. § 24-6-608(a), witness credibility may be supported by opinion or reputation evidence subject to two limitations: (1) the evidence may only refer to character for truthfulness; and (2) evidence of truthful character is only admissible “after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.”⁹

Section 16 of the 2005 Criminal Justice Act provides for character evidence in the form of reputation proof directed at the truthfulness or untruthfulness of the witness. A witness may be attacked by proof that his reputation for telling the truth is unfavorable. After a witness has been impeached, he may be bolstered by reputation evidence of truthful character. Reputation proof is clearly made the point of O.C.G.A. § 24-6-608 in this 2005 legislation, which provides a new sentence for the opening O.C.G.A. section: “Any party may impeach the credibility of a witness by offering evidence of the witness’s bad character in the form of *reputation*.” (emphasis added) Character evidence under this section may refer only to reputation for truthfulness or untruthfulness, and unfavorable evidence in this form may be presented by a prosecutor after a defendant supplies his own good character witnesses who talk about the defendant’s favorable reputation for telling the truth. Finally, the 2005 additions provide for bolstering a witness called by a party through the means of good reputation proof, but that opportunity only arises after the witness testifies and is attacked.

§ 29:17 Evidence of other crimes

In the 2013 Georgia Evidence Code, see O.C.G.A. § 24-4-404(b).¹ In applying Georgia Rule of Evidence 404(b), Judge Reese of the Georgia Court of Appeals explains:

When examining the admissibility of evidence under OCGA § 24-4-404(b), the Supreme Court of Georgia has adopted the three-part test applied by the Court of Appeals of the Eleventh Circuit, which states “(1) the evidence must be relevant to an issue other than defendant’s character; (2) the probative value must not be substantially outweighed by its undue prejudice; (3) the government must offer sufficient proof so that the jury could find that defendant committed the act.”²

Referencing scholarship, Presiding Judge Dillard of the Court

⁹Belcher v. The State, 344 Ga. App. 729, 812 S.E.2d 51 (2018).

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¹See State v. Jones, 297 Ga. 156, 773 S.E.2d 170 (2015). See also Melvin, What are the Chances? A Response to

Professor Milich’s View of 404(B), 9 J. Marshall L.J. 40 (2015-16); Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules § 24-404(b) (6th Ed. 2017).

²Hewell v. State, 360 Ga. App. 81, 860 S.E.2d 608 (2021).

of Appeals of Georgia detailed the balance struck in the second step of Georgia's test to admit Rule 404(b) proof:

Evaluating the balance between probativity and prejudice under Rule 403 calls for a commonsense assessment of all the circumstances surrounding the other act, including [the] proponent's need for the [Rule 404 (b)] evidence, the overall similarity between the extrinsic act and the offense at issue, and the temporal proximity of the two.³

O.C.G.A. § 24-4-404(b) is borrowed from Federal Rule of Evidence 404(b).⁴ Decisions observe: "[Fed. R. Evid. 404(b)] does not specify that evidence is only admissible to prove the defendant's motive, opportunity, or intent . . . other crimes evidence 'may be admissible 'to explain the conduct of the police, . . . the victim, an informer, a government witness, or the defendant.'"⁵

For the admission of other acts evidence in the prosecution of sexual misconduct, see O.C.G.A. §§ 24-4-413 and 24-4-414.⁶ For prosecutions over driving under the influence, see O.C.G.A. § 24-4-417.⁷ In gang prosecutions, see O.C.G.A. § 24-4-418.⁸

For updated Georgia case law on the issue of other acts evidence, see § 29:5, *supra*. Because of case law under Georgia's new Evidence Code continues to develop, reference to prior Georgia evidence cases assists in providing context for future appellate decisions.

Similar transaction evidence must satisfy three elements to be admitted: (1) the evidence must be introduced for a proper purpose; (2) the evidence must establish by a preponderance of the evidence that the defendant perpetrated the similar transaction; and (3) the two transactions must be sufficiently similar or connected so that the existence of the former transaction tends to prove the latter transaction.⁹

Under Fed. R. Evid. 404(b), the prosecution need only show by

³Webb v. State, 359 Ga. App. 453, 858 S.E.2d 546 (2021).

⁴State v. Frost, 297 Ga. 296, 773 S.E.2d 700 (2015).

⁵U.S. v. Green, 617 F.3d 233, 247, 83 Fed. R. Evid. Serv. 537 (3d Cir. 2010).

⁶Wilson v. State, 312 Ga. 174, 860 S.E.2d 485 (2021). See also Mulkey v. State, 366 Ga. App. 427, 883 S.E.2d 173 (2023).

⁷State v. Frost, 297 Ga. 296, 773 S.E.2d 700 (2015).

⁸Anglin v. State, 302 Ga. 333, 806 S.E.2d 573 (2017).

⁹Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007). In this case, evidence that defendant's prior home had burned down shortly after he had told his then-wife to leave house with dog and spend night at parents was relevant similar transaction evidence, in trial for malice murder and arson, to show motive and course of conduct, in order to prove defendant's responsibility for instant fire of victim's home. In both cases, defendant acted suspiciously prior to fire, both fires occurred at homes to which defendant had access, defendant had incurred substantial debt prior to each fire and reaped financial benefit as result of each fire.

a preponderance of the evidence that a jury could believe that the defendant committed the other act in question.¹⁰

Much of the litigation over evidence of other crimes involves similar transaction evidence. Proof of an earlier bad act sometimes helps to prove that a defendant committed a later crime, which latter crime is the subject of prosecution. The pastor of a small evangelical church was charged with molesting four boys in *Sands v. State*.¹¹ The prosecutor brought in evidence of the defendant's attack on another adolescent boy.

A 2011 decision by the Georgia Supreme Court affirms the introduction of prior incident testimony to establish a course of conduct, bent of mind, and knowledge or intent on the part of the defendant with respect to the litigated acts.¹² In Georgia's new Evidence Code, effective in 2013, the categories of intent and knowledge survive from the foregoing list as reasons to receive "other acts" in evidence.¹³

In criminal cases, the prosecution may not introduce evidence of the commission of other crimes by the accused merely to show accused's criminal tendency or disposition.¹⁴

Such evidence is admissible where proof of one crime tends to establish the other.¹⁵

In order for independent criminal acts to be admissible, it must be shown that the defendant was the perpetrator of the independent crime and that there is a sufficient similarity of the former independent crime that it tends to prove the latter crime.¹⁶

In *Mitchell v. State*¹⁷ the Georgia Supreme Court supplied the essential requirements when "other acts" evidence is offered:

Mitchell contends that the trial court erred in admitting evidence of a prior aggravated assault conviction as a "similar transaction." Although evidence of independent misconduct is not generally admissible, it may be admissible, after notice and a hearing, pursuant to Uniform Superior Court Rule 31.3, if the State makes three showings:

- (1) that the evidence is offered, not to raise an improper inference regarding the character of the defendant, but for a proper purpose;

¹⁰See *Huddleston v. U.S.*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771, 25 Fed. R. Evid. Serv. 1 (1988).

¹¹*Sands v. State*, 311 Ga. App. 170, 716 S.E.2d 225 (2011).

¹²*Griffin v. State*, 288 Ga. 833, 708 S.E.2d 258 (2011).

¹³O.C.G.A. § 24-4-404(b).

¹⁴*Pass v. State*, 227 Ga. 730, 182

S.E.2d 779 (1971), as stated in *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729 (1977).

¹⁵*Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971).

¹⁶*Weathersby v. State*, 262 Ga. 126, 414 S.E.2d 200 (1992).

¹⁷*Mitchell v. State*, 265 Ga. 71, 453 S.E.2d 731 (1995).

- (2) that there is sufficient evidence that the defendant committed the independent act; and
- (3) the charged offense to demonstrate that the independent act is logically relevant to a material issue in dispute in the trial.¹⁸

The trial court is required to conduct a hearing on these issues.¹⁹

The requirements drawn from the *Williams* case—similarity between the independent offense and the crime charged sufficient to demonstrate that the former tends to prove the latter, and a hearing on the issue—were applied in *Moore v. State*.²⁰ The *Moore* case illustrates how “other crimes” evidence is admissible against the accused even when it occurs after the charged offense. Several months after he apparently killed one man with a hammer, the defendant allegedly struck another man with a two-by-four. This “other act” occurred at a construction site. In *Moore*, this evidence “was admitted to show course of conduct, common plan or scheme, and bent of mind and intent, proper purposes under *Williams*.” The victim of the construction site assault positively identified Moore as his assailant. Moore argued there was not a sufficient connection between the independent assault and Aman’s killing and described what he considers to be substantial dissimilarities between the two acts. In reviewing whether there were sufficient similarities that exist to create a connection between the independent act and the instant act such that the former tends to prove the latter, trial courts are advised to focus on the similarities between the two acts rather than the dissimilarities.²¹ While there must be proof of a sufficient similarity between the independent offense and the instant crime charged, the two crimes need not be carbon copies of one another to be admissible. Emphasizing out that the “other act” need not be identical to the charged offense, the Supreme Court affirmed the conviction.

Prior difficulties between the victim and the defendant were at issue in *Wall v. State*.²² Advance notice to the defendant of prior similar occurrences in this situation is less critical to the defense than in other cases. Presumably the accused knows about his prior conduct with the victim.²³ However, prior difficulties between the defendant and persons not the victim of the crime for

¹⁸See *Williams v. State*, 261 Ga. 640, 642, 409 S.E.2d 649 (1991).

¹⁹*Prince v. State*, 264 Ga. 867, 452 S.E.2d 497 (1995) (narrowed by, *Wall v. State*, 269 Ga. 506, 500 S.E.2d 904 (1998)); *Young v. State*, 281 Ga. 750, 642 S.E.2d 806 (2007).

²⁰*Moore v. State*, 273 Ga. 11, 537

S.E.2d 334 (2000).

²¹*Farley v. State*, 265 Ga. 622, 458 S.E.2d 643 (1995).

²²*Wall v. State*, 269 Ga. 506, 500 S.E.2d 904 (1998).

²³To similar effect, see *Clark v. State*, 278 Ga. App. 412, 629 S.E.2d 103 (2006).

which the defendant is presently being tried remain subject to the notice provisions of Uniform Sup. Ct. Rule 31.

There can be a distinction between prior crimes and those cases wherein the additional crimes are deemed to be “part of a single continuous crime spree,” according to the Georgia Supreme Court. Holding that the notice provision of Uniform Superior Court Rule 31 is inapplicable where the added crimes were part of a single but continuous criminal episode is *Beasley v. State*.²⁴

A hearing is also unnecessary where evidence which may be offered as a similar crime is actually admitted for a different purpose, to show motive.²⁵

Other crimes which resulted in an acquittal did not thereby become irrelevant, nor did the acquittal dictate their exclusion in *Dowling v. U.S.*²⁶ Similarly, in Georgia the fact that a prior charge was no-billed, does not rob it of admissibility.

Evidence that narcotics defendant had previously sold cocaine to an undercover agent in the same location was admissible as a similar transaction, notwithstanding that the prosecution for the earlier sale resulted in a hung jury and mistrial; there need not be even a criminal charge relating to a similar offense for it to be admissible.²⁷

There is no requirement that a similar transaction result in a charge or conviction before it is admissible.²⁸

In *State v. Belt*,²⁹ the defendant was indicted for possession of cocaine with intent to distribute. Following a Uniform Sup. Ct. Rule 31.3(B) hearing, the trial court ruled that evidence regarding the defendant’s conviction for two previous cocaine sales was admissible for the limited purposes of showing identity, intent and state of mind. The similar transaction evidence was admitted at trial. Defense counsel made no oral or written request for a limiting instruction and no limiting instruction was given. On appeal, the defendant asserted that the trial court erred in failing to instruct the jury that the similar transaction evidence was admitted for limited purposes and was to be considered only for those limited purposes. The Georgia Supreme Court observed that while the better practice is for the judge to give a limiting instruction, the judge is not required to do so in the absence of a

²⁴*Beasley v. State*, 269 Ga. 620, 502 S.E.2d 235 (1998). 110 S. Ct. 668, 107 L. Ed. 2d 708, 29 Fed. R. Evid. Serv. 1 (1990).

²⁵*Cummings v. State*, 273 Ga. 547, 544 S.E.2d 429 (2001) (evidence as to motive is relevant, even though it may incidentally place the defendant’s character in issue).

²⁶*Dowling v. U.S.*, 493 U.S. 342,

²⁷*Randolph v. State*, 198 Ga. App. 291, 401 S.E.2d 310 (1991).

²⁸*Rogers v. State*, 285 Ga. App. 568, 646 S.E.2d 751 (2007).

²⁹*State v. Belt*, 269 Ga. 763, 505 S.E.2d 1 (1998).

request.

Prior act evidence in the form of a voluntary manslaughter committed by the defendant 17 years earlier was properly admitted in a murder prosecution. The trial judge allowed the evidence to show “the course of conduct and bent of mind of the defendant.” In addition, “[t]he 17-year lapse in this case is mitigated somewhat by the fact that appellant was incarcerated for eight of those years.”³⁰

The lapse of time between the prior occurrences and the offenses charged goes to the weight and credibility of testimony of similar transactions, not to its admissibility. The 14-year interval between prior rape conviction and current rape charge, standing alone, was not enough to require that evidence of the prior rape be excluded as a similar transaction, particularly where defendant was incarcerated for the first offense during most of the interval.³¹

Is a prior DUI conviction admissible as similar transaction evidence in a subsequent DUI prosecution? Yes, says *Reese v. State*.³² In order for similar transaction evidence to be properly admissible, the State must establish a permissible purpose for admitting the evidence, sufficient evidence that the defendant committed the prior act, and sufficient similarity between the two acts that proof of the former tends to prove the latter. Defendant’s prior driving under the influence (DUI) conviction was properly admitted as similar transaction evidence in a DUI prosecution; state introduced evidence of the prior DUI offense for the purpose of showing defendant’s bent of mind to consume alcohol and then operate a motor vehicle; state showed that defendant was the perpetrator of prior DUI, and state showed that proof of prior DUI tended to prove the charge of driving under the influence. Introduction of a prior driving under the influence (DUI) conviction to show bent of mind in a subsequent DUI prosecution is a permissible purpose.

Evidence that the defendant had previously pled guilty to the second degree rape of a 13-year-old girl was admissible as similar transaction evidence, in prosecution for child molestation and aggravated child molestation; both crimes involved the sexual abuse of young girls. In crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim as to the acts charged. Evidence of similar transactions need not be identical to be admitted, and in cases involving sexual offenses,

³⁰*Mullins v. State*, 269 Ga. 157, 903 (2001).
496 S.E.2d 252 (1998).

³¹O.C.G.A. § 16-6-1. *Banks v. State*, 250 Ga. App. 728, 552 S.E.2d 650, 556 S.E.2d 150 (2001).

³²*Reese v. State*, 252 Ga. App. 650, 556 S.E.2d 150 (2001).

that rule is to be liberally construed. Absent an abuse of discretion, the Court of Appeals will not disturb a trial court's determination that similar transaction evidence is admissible.³³

Similar transaction evidence of prior assault was admissible in felony murder trial to show defendant's intent, bent of mind, and course of conduct in stabbing felony murder case, even though murder victim did not use racial epithet and assault victim had used one, and knife in prior assault was larger than that used in murder, where, in both instances, defendant was verbally provoked, he had opportunity to retreat, friends encouraged him to retreat, he engaged victims, he stabbed victims in a lethal manner, and he later claimed self-defense.³⁴

Defendant's prior conviction for aggravated assault was admissible as similar transaction evidence in defendant's trial for rape and statutory rape, although victim of prior crime was adult woman, whereas in charged incident victim was a minor, where both incidents occurred in the early morning hours in a bedroom where defendant had been invited, and both involved forcible sexual assault. In the area of sexual offenses, the admissibility of similar transaction evidence is liberally construed. When forcible sexual assaults are involved, there is sociological evidence to support conclusion that this type of deviant sexual behavior is a sufficiently isolated abnormality, so that proof of propensity of defendant to engage in it is at least admissible, and to this extent, proof of the one tends to establish the other. In the area of sexual offenses, defendant's prior crime need not be identical to the charged crime to be admissible as similar transaction. Prior indictment charging defendant with rape was admissible in defendant's trial for rape and statutory rape, although in prior trial defendant pleaded guilty to lesser offense of sexual battery, where lesser offense involved same intent as rape, state presented testimony of victim of prior similar transaction, and her testimony supported the charge in the indictment.³⁵

The prior conviction of a defendant for theft by taking was admissible to show identity, motive, plan, scheme, and bent of mind in a prosecution for robbery by force; in both of the charged crimes and earlier conviction, the perpetrator had offered to assist the victim in either finding watermelons or loading them on the victim's truck.³⁶

Evidence of independent offenses involving robberies was properly admitted to establish identity in a murder prosecution

³³*Johns v. State*, 253 Ga. App. 207, 558 S.E.2d 426 (2001).

³⁴*Greene v. State*, 274 Ga. 220, 552 S.E.2d 834 (2001).

³⁵*Wagner v. State*, 253 Ga. App. 874, 560 S.E.2d 754 (2002).

³⁶*Carter v. State*, 199 Ga. App. 843, 406 S.E.2d 238 (1991).

of a defendant who had bragged that he had robbed and killed a man for \$10; there was sufficient evidence to establish that the defendant committed the independent offenses: all crimes occurred within a short span of time and all involved robberies for small amounts of money where gun was either used or was threatened to be used.³⁷

If evidence of other crimes is being presented to prove the identity of the perpetrator of the offense charged, a long list of similarities between or among the crimes might be necessary to show that the crime on trial bears the defendant's "criminal signature."³⁸

In prosecution for malice murder and arson, evidence of other uncharged crimes of arson and plans to murder his wife were admissible, even though they spanned a decade, given the similarity with the charged crimes.³⁹

The due process rights of a defendant charged with murder in the death of his infant daughter were not violated by introduction of evidence of the daughter's prior rib and rectal injuries, since proof of the daughter's battered child status was relevant to establishing that her death was the result of an intentional act and not an accident.⁴⁰

Prior convictions on guilty pleas to possession of cocaine were improperly admitted in the instant prosecution for cocaine possession where the State merely introduced certified copies of the guilty pleas. The court held that given the Supreme Court's express statements that the State bears the burden of presenting the requisite evidence of similarity to the jury, this duty was not obviated by the fortuitous circumstance of the accused having elected to testify concerning the prior offenses.⁴¹

Admission of defendant's prior conviction for selling cocaine constituted reversible error where the prosecution did not present at trial evidence of sufficient similarity; the State's establishment of a prima facie case of similarity at the requisite pretrial hearing does not satisfy its obligation to present proof on that issue at trial.⁴²

Evidence of a nine-year-old conviction for burglary with intent to commit theft at a female victim's residence should not have been admitted in defendant's trial on charges of burglary and

³⁷Kemp v. State, 261 Ga. 804, 411 S.E.2d 711 (1992).

³⁸Maggard v. State, 259 Ga. 291, 380 S.E.2d 259 (1989).

³⁹Chastain v. State, 260 Ga. 789, 400 S.E.2d 329 (1991).

⁴⁰Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385, 33 Fed. R. Evid. Serv. 305 (1991).

⁴¹Little v. State, 202 Ga. App. 7, 413 S.E.2d 496 (1991).

⁴²Stephens v. State, 261 Ga. 467, 405 S.E.2d 483 (1991).

criminal attempt to commit rape; there was no proof that a sexual assault was the motivation or even that the female victim was at home when the earlier crime was committed, and the evidence was too sparse to show factually that the earlier crime was of sufficient similarity to warrant its admission.⁴³

As a precondition to the admission of similar crimes evidence, the State is not required to specify with particularity which of the issues the similar crime evidence was being offered to prove. If similar crime evidence is relevant to the issues at hand and probative of identity, motive, plan, scheme, bent of mind or course of conduct, then the State may offer the evidence to prove any and all such issues.⁴⁴

To summarize some of the rules, there must be proof of similarity and that the accused was the perpetrator of the other crime. Lapse of time is an important factor when considering the other crime, but age of the independent crime is not wholly determinative. When the age of the event is 31 years in the past, however, it is usually too remote.⁴⁵ On the other hand, incidents of sexual abuse and incest from the 1970's were properly allowed in a rape and incest case which was finally resolved in 2007.⁴⁶

For notice required of prosecution for other crimes evidence, see Uniform Superior Court Rule 31.3. A prosecutor's notice of intent to present similar transaction evidence appears in Appendix C, Form 10, *infra*.

Sometimes the notice requirement is relaxed when the evidence is elicited solely for impeachment.⁴⁷

Once a conspiracy has been shown, evidence of other crimes committed by one of the conspirators, in furtherance of the common purpose of the conspiracy, is admissible against the other conspirators.⁴⁸

In a case which drew vigorous dissent, "bent of mind" provided a nexus between a prior transaction and the defendant's current sex crime.⁴⁹ At issue was whether the prior rape of an adult woman was similar to a current aggravated child molestation. The court states:

No Georgia case holds that the difference in age of the victims is

⁴³*Burney v. State*, 201 Ga. App. 64, 410 S.E.2d 172 (1991).

⁴⁴*Cridiso v. State*, 200 Ga. App. 342, 408 S.E.2d 153 (1991).

⁴⁵*Gilstrap v. State*, 261 Ga. 798, 410 S.E.2d 423 (1991).

⁴⁶*Williams v. State*, 284 Ga. App. 255, 643 S.E.2d 749 (2007).

⁴⁷*Minter v. State*, 258 Ga. 629, 373 S.E.2d 359 (1988) (disapproved on other grounds by, *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000)).

⁴⁸*Daniels v. State*, 58 Ga. App. 599, 199 S.E. 572 (1938).

⁴⁹*Payne v. State*, 285 Ga. 137, 674 S.E.2d 298 (2009).

alone determinative of similarity. Our precedent consistently holds that it is the totality of the similar facts surrounding the crimes which are properly considered in a similar transaction analysis. See, e.g., *Hinton v. State*, supra; *Williams v. State*, supra; *Hunt v. State*, 233 Ga. 329, 211 S.E.2d 288 (1974); *Enurah v. State*, 279 Ga. App. 883, 633 S.E.2d 52 (2006); *Barrett v. State*, 253 Ga. App. 357, 559 S.E.2d 108 (2002); *Morgan v. State*, supra. Indeed in *Kingsley v. State*, 268 Ga.App 729, 603 S.E.2d 78 (2004), the Court of Appeals held that where there are sufficient similarities between crimes (forcible sodomy), a mere difference in age of the victims (one is an adult and the other is a child) will not render the prior transaction inadmissible.

Admission of the evidence was approved. However, in their dissent, Justices Sears, Hunstein and Carley complained that “[t]he majority uncritically adopts the State’s argument that the prior transaction evidence here was admissible to show Payne’s ‘course of conduct’ and ‘bent of mind.’”

Similar transaction evidence must satisfy three elements to be admitted: (1) the evidence must be introduced for a proper purpose; (2) the evidence must establish by a preponderance of the evidence that the defendant perpetrated the similar transaction; and (3) the two transactions must be sufficiently similar or connected so that the existence of the former transaction tends to prove the latter transaction.⁵⁰ Evidence that defendant’s prior home had burned down shortly after he had told his then-wife to leave house with dog and spend night at parents was relevant similar transaction evidence, in trial for malice murder and arson, to show motive and course of conduct, in order to prove defendant’s responsibility for instant fire of victim’s home. In both cases, defendant acted suspiciously prior to fire, both fires occurred at homes to which defendant had access, defendant had incurred substantial debt prior to each fire and reaped financial benefit as result of each fire.

In another case, similar transaction evidence that defendant committed another armed robbery two days after he allegedly committed the charged armed robbery and felony murder offenses was admissible to show defendant’s course of conduct or bent of mind. The victim of the later robbery positively identified defendant as the perpetrator, later robbery occurred within blocks of charged offenses, and in both prior and later robberies, defendant used a drawn gun to demand money and threatened to shoot when the victim protested or resisted.⁵¹

For more on similar crime evidence in robbery cases, see *Morgan*

⁵⁰*Bryant v. State*, 282 Ga. 631, 651 S.E.2d 718 (2007).

⁵¹*Simpson v. State*, 282 Ga. 508, 651 S.E.2d 732 (2007).

v. State.⁵²

Similar transaction proof was instrumental in achieving a conviction against Julia Lynn Turner in a case of homicide by antifreeze poisoning.⁵³ The Supreme Court of Georgia held that evidence concerning the death of defendant's boyfriend was admissible to show a common scheme, during defendant's prosecution for the death of her husband; defendant was intimate with both men, both men went to the hospital complaining of flue-like symptoms soon before they died, both men died of antifreeze poisoning, defendant was the last person to see either man alive, both men died shortly after defendant served them gelatin and defendant collected substantial money in connection with the deaths of the men. Similar transaction evidence is admissible where (1) it is introduced for a proper purpose, (2) sufficient evidence shows that the accused committed the independent offense, and (3) a sufficient connection or similarity exists between the independent offense and the crime charged so that proof of the former tends to prove the latter.

To be admissible as similar transaction evidence, a transaction does not have to mirror every detail in order to authorize its admission; rather, the proper focus is upon the similarities between the incidents and not upon the differences. Where similar transaction evidence is admitted for the purpose of showing bent of mind, a lesser degree of similarity is required than if introduced to prove identity.⁵⁴

Crimes committed with a unique pattern is a theory which has been used for a number of years to authorize similar crimes evidence, including use in the famous trial of Wayne Williams for "Atlanta's Child Murders."⁵⁵

Defendant raising an alibi defense does not limit the purposes for which the state can introduce similar transaction evidence.⁵⁶

A co-defendant has no standing to object to admission of similar transaction evidence that does not implicate him/her.⁵⁷

Similar transaction law authorizes admission of acts prior and subsequent to the offense at bar.⁵⁸

It is improper for a prosecutor to cross-examine a criminal defendant about the punishment received on prior convictions

⁵²*Morgan v. State*, 287 Ga. App. 569, 651 S.E.2d 833 (2007) (evidence of other robberies).

⁵³*Turner v. State*, 281 Ga. 647, 641 S.E.2d 527 (2007).

⁵⁴*Collum v. State*, 281 Ga. 719, 642 S.E.2d 640 (2007).

⁵⁵*Williams v. State*, 251 Ga. 749, 312 S.E.2d 40 (1983).

⁵⁶*Biggs v. State*, 281 Ga. 627, 642 S.E.2d 74 (2007).

⁵⁷*Guyton v. State*, 281 Ga. 789, 642 S.E.2d 67 (2007).

⁵⁸*Hayward-El v. State*, 284 Ga. App. 125, 643 S.E.2d 242 (2007).

admitted as similar transactions.⁵⁹

Evidence that a defendant charged with murdering his wife had bit another woman during oral sex was admissible as other crimes evidence; the evidence was a similar transaction tending to prove the defendant's bent of mind, showing that the obsessive and violent sexual nature of the defendant fit the profile of a hypothetical sexual attacker, which the defendant attempted to offer as an alternative to his guilt, and the evidence proved the defendant's motive by showing his intimate and obsessive relationship with the woman he bit.⁶⁰

In a 2005 case, the defendant claimed that the trial court erred in admitting the similar transaction testimony of [Teresa Coleman] concerning her affair with defendant. Denying the claim, the Georgia Supreme Court deemed it "waived because appellant failed to object to the testimony at the time it was introduced at trial."⁶¹ We additionally note that the trial court did not err in admitting this evidence. The trial court conducted a hearing pursuant to Uniform Superior Court Rule 31.3(B) at which Coleman testified that approximately three years before the murders she had had an extramarital affair with appellant and when she attempted to end the relationship appellant became obsessive and abusive. Coleman's testimony was properly offered to show intent, motive and bent of mind.⁶² The state was not required to identify a single purpose for which the similar transaction evidence was offered, but correctly offered it for the multiple purposes of proving motive, bent of mind and intent.⁶³

Whether evidence is taken at a similar transaction hearing is a matter within the court's discretion. Production of evidence is not automatically required at the hearing. In one case, it was held that the trial court did not err by allowing the prosecutor to state in his place what he expected the similar transaction evidence to show *without producing such evidence* at the hearing.⁶⁴ Prosecuting attorneys are permitted to state directly to the court in a similar transactions hearing what evidence they are prepared to produce, and such a statement by a prosecuting attorney alone is sufficient to establish the admissibility of similar transactions evidence.⁶⁵ When the state relies upon the statements of the prosecuting attorney to make the required showing for the admis-

⁵⁹Collins v. State, 283 Ga. App. 188, 641 S.E.2d 208 (2007).

⁶⁰Peppers v. State, 261 Ga. 338, 404 S.E.2d 788 (1991).

⁶¹Smith v. State, 268 Ga. 42, 485 S.E.2d 189 (1997).

⁶²See Williams v. State, 261 Ga. 640, 409 S.E.2d 649 (1991).

⁶³Williams v. State, 279 Ga. 731, 620 S.E.2d 816 (2005).

⁶⁴Traylor v. State, 217 Ga. App. 648, 458 S.E.2d 682 (1995).

⁶⁵Parker v. State, 244 Ga. App. 419, 535 S.E.2d 795 (2000).

sibility of similar-transaction evidence, there is no per se right to an *evidentiary* hearing on the matter, only to a hearing, nor any mandatory obligation to produce testimonial evidence to support the admissibility of the similar-transaction evidence.⁶⁶

Is the time limit for the prosecution to provide advance-of-trial notice of similar crimes evidence affected by a defendant's procedural moves? One case imposes a waiver under Georgia law when it comes to notice of similar transaction evidence. Where a criminal defendant files a speedy trial demand, this case states that he can no longer claim that he is owed "ten days notice" in advance of trial of the State's similar transaction evidence.⁶⁷

Fact that similar transaction witness, who was to testify that he was victim of similar shooting by defendant, was paralyzed as result of being shot by defendant, did not preclude admission of otherwise relevant similar transaction evidence in prosecution for malice murder and possession of firearm; prejudicial impact of otherwise relevant evidence was matter for jury instruction and was not factor in admissibility of evidence.⁶⁸

In *Pace v. State*⁶⁹ the court pointed out that when deciding whether an independent offense should be admitted, the trial court's proper focus is on the similarity, not the differences, between the offense and the crime for which the defendant is being tried. In *Pace*, the trial judge in an armed robbery case admitted a prior robbery against Pace, and the ruling was upheld on appeal. In *Clark v. State*,⁷⁰ the trial judge admitted a prior burglary in a burglary prosecution. The trial court gave a detailed limiting instruction at the time of the admission of the evidence and at the close of the case. The trial court's actions were approved by the Court of Appeals.

Similar transactions need not be proved beyond a reasonable doubt.⁷¹ Also, evidence that the intended victim had been in an ongoing confrontation with defendant and that defendant had previously attempted to shoot the intended victim on the same street where an innocent bystander was shot and killed was relevant similar transaction evidence, in a trial for felony murder arising from shooting death of innocent bystander.

Away from a similar transaction analysis, evidence of other crimes may become admissible in the form of proof of prior convic-

⁶⁶Uniform Superior Court Rule 31.3(B); *High v. State*, 271 Ga. App. 388, 609 S.E.2d 722 (2005).

⁶⁷*Brown v. State*, 275 Ga. App. 281, 287, 620 S.E.2d 394 (2005).

⁶⁸*Heyward v. State*, 278 Ga. 342, 602 S.E.2d 831 (2004).

⁶⁹*Pace v. State*, 272 Ga. App. 16, 611 S.E.2d 694 (2005).

⁷⁰*Clark v. State*, 272 Ga. App. 89, 611 S.E.2d 741 (2005).

⁷¹*McKee v. State*, 277 Ga. 577, 591 S.E.2d 814 (2004) (preponderance of evidence).

tions for felony crimes, introduced for the purpose of impeaching a witness.⁷²

Statutory aggravating circumstance of prior capital felony convictions may be established by proof of out-of-state convictions that are clearly comparable to Georgia felony offenses.⁷³

§ 29:18 Race, color, nationality, wealth or poverty

Normally, the race, color, or nationality of a party is not admissible in the trial of a case.¹ In a murder prosecution, the Supreme Court of Georgia rebuked the prosecution's PowerPoint slide which contained a bullet point reading "KKK," implicating racial animus on the defendant's part, despite there being "no evidence was produced at trial to support any inference that the Ku Klux Klan was relevant to this case."²

In *Thomas v. Home Depot USA, Inc.*,³ plaintiff brought a race discrimination action against Home Depot arising from the rescission of an offer of employment. The Eleventh Circuit found that the district court erred when it excluded a statement from a store manager that "some African Americans are rabble rousers." As explained by the circuit court:

The "rabble rouser" comment is clearly relevant to the question of whether Canthal acted with discriminatory motive. The comment was made allegedly by one store manager to another store manager—who was also the ultimate decision-maker in this case—during a conversation about Canthal's decision to hire Plaintiff and that occurred close in time to Canthal's offer of employment. The comment, thus, cannot be characterized as a stray remark unrelated to the decisional process.

The wealth or poverty of a party is generally not admissible.⁴ But it might become admissible in cases where the financial circumstances of a party were directly in issue, as where exemplary damages are sought.⁵

Evidence of wealth was admissible in *United States v. Clay*,⁶ a Medicaid health fraud case. The court allowed such evidence but

⁷²See § 16:11, *supra*.

⁷³*Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (1988).

[Section 29:18]

¹Am. Jur. 2d, Evidence § 438.

²*McIver v. State*, 314 Ga. 109, 875 S.E.2d 810 (2022) ("We have repeatedly noted that in the absence of relevance, racial bias or prejudice should not be injected into the proceedings, as such issue could tend to de-

stroy the impartiality of the jury and because it would not be relevant.").

³*Thomas v. Home Depot USA, Inc.*, 731 Fed. Appx. 889 (11th Cir. 2018).

⁴*Brackin v. Brackin*, 222 Ga. 226, 149 S.E.2d 485 (1966).

⁵See § 33:8, *infra*.

⁶*United States v. Clay*, 832 F.3d 1259 (11th Cir. 2016).

restricted it to the compensation the officers received from WellCare. This restriction “was necessary to show that the defendants had an incentive to maximize WellCare’s profits” and was evidence of the officers’ financial motive to commit the crimes alleged.

But it should be noted that Georgia’s new evidence code modified the common law rule which had allowed such evidence “‘where position or wealth [was] *necessarily involved*,’ and was, at its core, a rule of relevancy.” The Court continued:

[B]ecause the new Evidence Code borrowed federal language for its generally-applicable relevance rules—Rules 401 and 402—Georgia’s common law rule relating to the relevance of party-wealth evidence is no longer independently in force. . . . Because the common law party wealth rule was itself a rule of relevance, and because there is no specific exclusionary rule in the new Evidence Code carrying forward the common law’s general exclusionary rule for that type of evidence, Georgia courts must consider party-wealth evidence under the parameters of the new Evidence Code. . . .

This is not to say that party-wealth evidence is now admissible in Georgia—it is frankly quite difficult to see how it would be relevant in nearly any case, at least not involving punitive damages. As the Tenth Circuit has said, “Comments on the wealth of a party have repeatedly and unequivocally been held highly prejudicial, and often alone have warranted reversal.” (citation omitted). Indeed, federal courts applying Federal Rules of Evidence 401 and 402 are in agreement that in cases where punitive damages are not in issue, evidence of a party’s wealth or financial status is generally inadmissible unless directly relevant to issues in the case.

The court added that such evidence might be admissible on an impeachment theory. It noted that:

witnesses’ compensation *may* be relevant and admissible to show bias under Rules 401, 402, and 622, or for other permissible purposes, depending on the facts of the case. But we also emphasize that such evidence, like other evidence, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, under Rule 403.⁷

Opposing counsel sought to elicit testimony as to the amount of attorney’s fees which the party owed and her ability to pay them without a successful result at trial. “The general rule is that evidence of the wealth or worldly circumstances of a party litigant is never admissible, except in those cases where position or wealth is necessarily involved.”⁸ One party’s need for money is irrelevant in most cases. The trial court did not abuse its discretion in limit-

⁷Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244 (2018) (internal quote marks omitted).

⁸Northwestern University v. Crisp, 211 Ga. 636, 641, 88 S.E.2d 26 (1955); Investment Properties Co., Inc.

ing the cross-examination on the wealth issue.⁹

The fact that the accused may be of a different race or ethnicity from the victim does not in and of itself make the identification procedure impermissibly suggestive, especially when there are other individuals in the line-up having roughly the same characteristics and features as the accused. While some of the photographs contained in the record are of individuals different in appearance, by virtue of race and otherwise, from the accused, there are others of men clearly resembling him.¹¹ For more on identification procedures, see § 29:28, *infra*.

§ 29:19 Evidence of liability insurance

As general rule, evidence of insurance coverage is so prejudicial by nature that it should not be admitted unless it is clearly relevant and, as with any generally prejudicial evidence, in determining its admissibility, the trial court should not admit it unless its relevance outweighs its prejudice.¹

Georgia Rule of Evidence 411 is fashioned after the corresponding federal rule. A 2020 federal decision described the application of Rule 411:

Federal Rule of Evidence 411 bars the admission of evidence of liability insurance “to prove whether the person acted negligently or otherwise wrongfully,” yet permits a court to “admit this evidence for another purpose, such as proving a witness’s bias or prejudice or proving agency, ownership, or control.” Fed. R. Evid. 411. The list of enumerated exceptions in Rule 411 is illustrative, not exclusive, and courts have “held that evidence of liability insurance coverage was admissible as bearing upon a relevant material issue other than agency, employment, ownership, or control.” 40 A.L.R. Fed. 541. “In determining whether to admit or exclude evidence about insurance that is offered for a purpose other than to prove a party acted negligently, the district court must apply the principles of [Rule] 403 to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.” *Pinkham v. Burgess*, 933 F.2d 1066, 1072 (1st Cir. 1991) (citing 10 J. Moore & H. Bendix, *Moore’s Federal Practice* § 411.04 (2d ed. 1988 & Supp. 1990-91)); see Fed. R. Evid. 403 (“The court may

v. Watson, 278 Ga. App. 81, 628 S.E.2d 155 (2006).

⁹Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396 (2006).

¹¹Humphrey v. State, 281 Ga. 596, 642 S.E.2d 23 (2007).

2019). See also McClellan v. Evans, 294 Ga. App. 595, 669 S.E.2d 554 (2008). Also see Morton v. Horace Mann Ins. Co., 282 Ga. App. 734, 639 S.E.2d 352 (2006) (uninsured motorist case; insured’s action against insurer).

[Section 29:19]

¹O.C.G.A. § 24-4-411. See Burke v. Regalado, 935 F.3d 960 (10th Cir.

exclude relevant evidence if its probative value is substantially outweighed by a danger of[, inter alia,] unfair prejudice[.]”²

Motive has been held to serve as valid reason to introduce the issue of insurance coverage in criminal cases.³ In a decision under Georgia’s new Evidence Code, the Georgia Supreme Court held that O.C.G.A. § 24-4-403, as opposed to former Georgia evidence authority, should be applied to evaluate the prejudicial effect of the admission of insurance evidence offered to demonstrate motive.⁴

What about the related circumstance where a criminal defendant, accused of murder, may have been a beneficiary in the homicide victim’s will? A highly publicized trial in which an attorney was indicted for the killing of his wife, a successful business woman, provides insight. Reversing the defendant’s murder conviction, the Supreme Court of Georgia in *McIver v. State*⁵ determined that such evidence was barred by O.C.G.A. § 24-4-401, absent proof of the will’s terms or the defendant’s knowledge of them:

Here the State’s evidence arguably showed the possibility of a second will, and such a will might be relevant to motive if evidence of its provisions and McIver’s knowledge of its existence were shown. However, the State here did not offer evidence sufficient to “make the existence of any fact that is of consequence to the determination of the action more probable or less probable” under Rule 401. It was therefore irrelevant and inadmissible, and the trial court abused its discretion in admitting it.

A decision from former Georgia law stated, whether defendant has liability insurance has no weight in proving defendant’s liability, so evidence thereof is not relevant and is inadmissible.⁶

It has been held that a mistrial is not automatically required when testimony pertaining to liability insurance is elicited. A mistrial is required only when the testimony is so prejudicial that its effect cannot be erased from the minds of the jury.⁷ Insurance injected into case unintentionally by motorist, motorist

²*Atlanta Channel, Inc. v. Solomon*, 2020 WL 1984296 (D.D.C. 2020).

³*State v. Stenson*, 132 Wash. 2d 668, 940 P.2d 1239 (1997); *People v. Elkhatab*, 632 P.2d 275 (Colo. 1981).

⁴*Ballin v. State*, 307 Ga. 494, 837 S.E.2d 343 (2019).

⁵*McIver v. State*, 314 Ga. 109, 875 S.E.2d 810 (2022) (“the State argued that the mere existence of a supposed second will, with no evidence

of its provisions or of [defendant’s] knowledge of or access to it, was relevant to show that [defendant] had a financial motive to kill [his wife] and to show that when he shot her, he did so with the intent to kill or at least violently injure her”).

⁶*Patillo v. Thompson*, 106 Ga. App. 808, 128 S.E.2d 656 (1962).

⁷*Wallace v. Cates*, 120 Ga. App. 228, 170 S.E.2d 40 (1969).

rebuked by judge; no mistrial, see *Defusco v. Free*.⁸ For inadvertent disclosure of liability insurance, see § 31:5, *infra*.

Defendant may not bring out his liability insurance to obtain a mistrial, new trial, or reversal. Defendant may not usually bring out the fact that he does not have liability insurance or is uninsured.

Where the defendant makes a statement amounting to an admission of liability, it will not be rendered inadmissible by the fact that the jury may incidentally be apprised thereby of the fact that the defendant is covered by liability insurance.⁹

In exceptional cases, the existence of liability insurance may be shown where relevant to an issue in the case.¹⁰ Generally, however, all references to insurance should be kept out of the trial of a personal injury action, unless such disclosure is clearly necessary.¹¹ In an ordinary negligence case, not only is a liability insurance policy of a litigant not admissible in evidence, but disclosure to the jury of the mere existence of such contract is ground for a mistrial.¹²

Evidence of a physician's professional liability insurance is generally inadmissible in a medical malpractice case because such evidence could motivate a jury to award increased damages. The appellate court held the court below correctly ruled that an insurance endorsement that could be considered a prior inconsistent statement was more prejudicial than probative. The trial court correctly excluded the evidence.¹³ See also the discussion of the *Carlisle* and *Ede* cases in § 12:5, *supra*.

§ 29:20 Use of discovery depositions

A district attorney's agreement to cooperate in taking the deposition of a witness did not make the deposition admissible at trial.¹

Objections to the form of a question or answer, errors, or irregularities occurring at the oral examination in the manner of taking the deposition, in the oath or affirmation, or in the conduct of any person, and errors and irregularities of any kind which

⁸*Defusco v. Free*, 287 Ga. App. 313, 651 S.E.2d 458 (2007).

⁹*Pruitt v. Pierce*, 100 Ga. App. 808, 112 S.E.2d 327 (1959); *Young v. Carter*, 121 Ga. App. 191, 173 S.E.2d 259 (1970). See § 26:1, *supra*.

¹⁰*Goldstein v. Johnson*, 64 Ga. App. 31, 12 S.E.2d 92 (1940).

¹¹*Fleet Transport Co., Inc. v. Holland*, 166 Ga. App. 337, 304 S.E.2d

76 (1983).

¹²*Central of Georgia R. Co. v. Wooten*, 163 Ga. App. 622, 295 S.E.2d 369 (1982).

¹³*King v. Zakaria*, 280 Ga. App. 570, 634 S.E.2d 444 (2006).

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¹*Hullender v. State*, 256 Ga. 86, 344 S.E.2d 207 (1986).

might have been corrected if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.²

All or any part of a deposition, whether or not the deponent is a party, may be used by any party for any purposes if the court finds that at the time of the trial:

- (1) deponent is dead; or
- (2) deponent is out of the country, unless it appears that the absence of deponent was procured by the party offering the deposition; or
- (3) deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or
- (4) the party offering the deposition has exercised due diligence but has been unable to procure the attendance of the deponent by subpoena; or
- (5) because of the nature of the business or occupation of the witness it is not possible to secure his personal attendance without manifest inconvenience to the public or third persons; or
- (6) that the witness will be a member of the General Assembly and that the session of the General Assembly will conflict with the session of the court in which such case is to be tried.³

If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it that is relevant to the part introduced, and any party may introduce any other parts.⁴

Substitution of parties does not affect the right to use depositions previously taken. If an action in any court of this or any other state or of the United States is dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be originally taken therefor.⁵

A person who desires to perpetuate his own testimony or that of any other person may file a verified petition in the superior court of the county in which the witness resides. Notice must be served upon all expected adverse parties.⁶

Where a party seeks to read a deposition to the jury at trial, some courts require pretrial objection to the pages and lines,

²O.C.G.A. § 9-11-32(d).

³O.C.G.A. § 9-11-32(a)(3).

⁴O.C.G.A. § 9-11-32(a)(5).

⁵O.C.G.A. § 9-11-32(a)(5).

⁶O.C.G.A. § 9-11-27.

identifying the lines which the objecting party challenges.⁷

O.C.G.A. § 9-11-30 provides that a party desiring to take the deposition of any person shall give reasonable notice in writing to every other party to the action. Chapter 11 of Title 9 was amended to provide for nonstenographic depositions in addition to the stenographic record. A 1996 amendment of O.C.G.A. § 9-11-30 makes videotaping of depositions available at the option of the taking party, unless the court orders otherwise.

Discovery depositions are to be distinguished from depositions for preservation of evidence in criminal cases. O.C.G.A. § 24-13-130 provides for the taking of such a preservation deposition when the testimony is material to the case and the witness is in imminent danger of death, or is about to leave the state and there are reasonable grounds to believe that such witness will not attend the trial, as well as other specified grounds. A 2013 amendment of O.C.G.A. § 24-13-130 adds the testimony of anyone 72 years of age or older to the list of testimonies subject to preservation under this section.

The court correctly admitted a deposition even though the subject walked out before the deposition was completed. There was no evidence in the record of an attempt to complete the deposition or take any other steps to obtain the discovery before the court ruled on the motion for summary judgment. Therefore, there was no abuse of discretion by the trial judge in considering the deposition.⁸

The injured party argued that the deposition testimony of her primary care physician was improperly excluded at trial. The appellate court held that the admissibility of deposition testimony was within the sound discretion of the trial court. The injured party did not object to the exclusion of the doctor's deposition and, thus, waived any error in the exclusion of the deposition testimony.⁹

Disputes between attorneys during discovery were the object of a 1996 amendment of Georgia Uniform Superior Court Rule 6.4(B):

Prior to filing any motion seeking resolution of a discovery dispute, counsel for the moving party shall confer with counsel for the opposing party in a good faith effort to resolve the matters involved. At the time of filing the motion, counsel shall also file a statement

⁷See, e.g., L. Civ. R. 30.1, Rules for the U.S. District Court for the Southern District of Georgia, effective September 1, 1994 (rules for civil cases).

⁸See O.C.G.A. § 9-11-32. *Scott v.*

LaRosa & LaRosa, Inc., 275 Ga. App. 96, 619 S.E.2d 787 (2005).

⁹*Hughes v. Rearick*, 275 Ga. App. 753, 621 S.E.2d 850 (2005).

certifying that such conference has occurred and that the effort to resolve by agreement the issues raised failed. This rule also applies to motions to quash, motions for protective order and cases where no discovery has been provided.

§ 29:21 Self-serving declarations

One of the most troublesome rules of evidence is that which excludes “self-serving declarations”—that is, extrajudicial statements, oral and written, made by a party and offered by him in support of his own case.¹ Federal decisions admonish: “Self-serving statements are not exempted from the hearsay rule by Federal Rule of Evidence 801(d)(2)(A) or any other exemption or exception, and are thus inadmissible hearsay.”² The self-serving declaration does not, of course, purport to exclude all evidence that serves or supports the proponents’ cause, since virtually all evidence is introduced and accepted for that purpose.

Under traditional notions, extrajudicial statements, oral or written, not made under oath and not subject to cross-examination, and whether made by a party or anyone else, are hearsay and therefore inadmissible unless subject to some exception to the hearsay rule. Therefore, the self-serving declaration rule is treated herein under the hearsay rule.³

According to federal precedent, “[n]othing in the Constitution gives an accused the privilege of proffering, through hearsay, his self-serving statements while denying the state access to the rest of the story that could be got at by cross-examination.”⁴ Bolstering is disallowed.⁵ So is vouching.⁶

Can a witness freely describe multiple out-of-court conversations she had prior to trial, laced with self-serving declarations, over a hearsay objection? Usually no (majority rule), but perhaps “yes” in some former Georgia courts.⁷ The *Webb* case is a 1980 Court of Appeals decision which holds that the hearsay rule does not apply to what the witness himself said. A different line of reasoning appears in *Woodard v. State*⁸ and in decisions following *Woodard* which require an attack on a witness in order to bolster

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¹U.S. v. Bradley, 644 F.3d 1213 (11th Cir. 2011).

²U.S. v. Quansah, 171 Fed. Appx. 51 (9th Cir. 2006).

³See §§ 25:1 et seq.

⁴Gacy v. Welborn, 994 F.2d 305 (7th Cir. 1993).

⁵Bly v. State, 283 Ga. 453, 660 S.E.2d 713 (2008). See § 26:16, supra.

⁶See § 15:11, supra.

⁷See Culmer v. State, 282 Ga. 330, 647 S.E.2d 30, 35–36 (2007) (Benham, J) (testimony deemed not hearsay because “a witness’ testimony as to what he (the witness) said is not hearsay,”) (citing Webb v. State, 154 Ga. App. 395, 397, 268 S.E.2d 438 (1980)).

⁸Woodard v. State, 269 Ga. 317, 496 S.E.2d 896, 71 A.L.R.5th 787 (1998).

him with his own prior statements.⁹ For a case applying applicable rules and *admitting* a prior consistent statement because the witness was sufficiently attacked on cross, see *Brown v. State*.¹⁰

With Georgia's adoption of the federal hearsay standards as part of its new Evidence Code, the federal ban on witness self-quotation in lieu of an applicable hearsay exception should normalize this area of law.¹¹

Georgia's "rule of completeness" allows exculpatory statements when part of a larger narrative and is explored in detail in the 2016 case of *Morales v. State*.¹²

In a burglary case, during cross-examination of one of the responding officers, the defendant's counsel asked the officer about the defendant's statement that he was looking for a place to sleep when the officer found the defendant on the porch. The State objected, arguing that the defendant's alleged statement was self-serving hearsay. The trial court correctly sustained the objection as the statement could be construed to show that he did not have the requisite intent to commit burglary.¹³

Self-serving declarations are inadmissible hearsay unless the declarant testifies and is subject to cross-examination. The defendant is allowed to declare his innocence in court; he is not allowed to avoid this opportunity by pre-trial declarations of innocence.¹⁴

Parker is cited in *Kennedy v. State*.¹⁵

A federal case identified these issues and precluded defendants from eliciting exculpatory statements made during interviews with police officers. In *U.S. v. Mitchell*,¹⁶ the court precluded Mitchell from eliciting exculpatory statements to the effect that he had co-operated with law enforcement, that he had denied killing anyone, and that he and Orsinger had been drinking in

⁹See also *Baugh v. State*, 276 Ga. 736, 738, 585 S.E.2d 616 (2003) (reversible error). Compare *Fletcher v. State*, 284 Ga. 653, 657, 670 S.E.2d 411 (2008); *Brown v. State*, 250 Ga. App. 147, 550 S.E.2d 701 (2001). Following *Woodard*, see *Connelly v. State*, 295 Ga. App. 765, 673 S.E.2d 274 (2009). The correct rule was applied in *Duggan v. State*, 285 Ga. 363, 677 S.E.2d 92 (2009).

¹⁰*Brown v. State*, 287 Ga. App. 857, 652 S.E.2d 807 (2007) (veracity of victim's step-sister was placed in issue during cross-examination, and thus step-sister's statements to police were admissible as prior consistent state-

ments).

¹¹See O.C.G.A. § 24-8-801.

¹²*Morales v. State*, 337 Ga. App. 614, 788 S.E.2d 535 (2016).

¹³*Griffith v. State*, 286 Ga. App. 859, 650 S.E.2d 413 (2007).

¹⁴*Parker v. State*, 276 Ga. 598, 581 S.E.2d 7 (2003).

¹⁵*Kennedy v. State*, 277 Ga. 588, 592 S.E.2d 830 (2004). Also see *Culmer v. State*, 282 Ga. 330, 647 S.E.2d 30 (2007).

¹⁶*U.S. v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007).

Gallup. The *Mitchell* court held that these statements were inadmissible hearsay; as Mitchell was attempting to introduce them himself, they were not party-opponent admissions, nor did the fact that they were made in a more broadly self-inculpatory confession bring them within the statement-against-interest exception.

§ 29:22 Physical and mental examination of parties and others

The court may order that a party whose mental or physical condition is in issue and persons in his custody or legal control submit to a physical or mental examination.¹ If requested by the party against whom an order is made or the person examined, the party causing the examination to be made shall deliver a copy of a detailed written report of the examining physician. If the examining physician fails or refuses to make a report, the court may exclude his testimony if offered at trial.

Absent a special plea of insanity, the court is not under a duty to grant a psychiatric examination to the defendant.²

After a fingerprint placed the defendant at the scene of the armed robbery, he received an evaluation of his mental competence at the time of the offenses and his competency to stand trial for the charges. Therefore, the court did not err by not ordering an additional mental evaluation at the time of the trial.³ Competence to stand trial is explained in § 9:11, *supra*. An accused may complain that he is incompetent to stand trial, or that he was insane at the time of the commission of the crime,⁴ or both.

After a criminal case conviction, the defendant challenged the court's decision to deny post-trial funding for an independent psychiatric evaluation. The defendant argued that his inconsistent answers at trial warranted such a evaluation. The trial court did not abuse its discretion in denying the funds for the evaluation.⁵

In 2008 the legislature required persons convicted of driving without a license to be fingerprinted.⁶

§ 29:23 Intelligence and psychological tests

Intelligence and psychological tests fall into the general cate-

[Section 29:22]

352, 593 S.E.2d 885 (2004).

¹O.C.G.A. § 9-11-35.

⁴See § 4:6, *supra*.

²*Jones v. State*, 246 Ga. 109, 269 S.E.2d 6 (1980).

⁵*Dyer v. State*, 278 Ga. 656, 604 S.E.2d 756 (2004).

³*LaCount v. State*, 265 Ga. App.

⁶O.C.G.A. § 40-5-121.

gory of scientific evidence. The courts have tended to be reluctant in admitting such tests and have depended largely upon the acceptance that a particular test has within the scientific community.

The court properly admitted testimony from a licensed psychologist who specialized in evaluating and treating sexual abuse victims and perpetrators. The psychologist testified that she conducted a battery of psychological tests, and the defendant scored high in categories indicating that she suffered from sexual fears and high emotional distress, had an unusually high level of sexual preoccupation, and exhibited atypical sexual behaviors for her pre-adolescent age group, among other things.¹

In a child molestation case where the father was the accused, the court approved a discovery request for review of the children's psychological evaluations to prove up the mother's testimony. After a debate over the admissibility of such records, the court affirmed the determination that the records were subject to the mental health privilege and that a remand for an in camera review was required.²

The defendant tried to prove up his insanity claim; however, the court found that defendant failed to meet his burden of proving that he was mentally retarded by a preponderance of the evidence since expert testimony established that six intelligence quotient tests administered to him during his lifetime, with scores of 78, 84, 85, 68, 66 (which, due to a mathematical error, should have been 70) and 89, while indicating borderline intellectual functioning, did not indicate mental retardation. Additionally, there was testimony that defendant checked out prison library books on a regular basis and was able to use the computer.³

§ 29:24 Income tax returns

If offered for the truth of their contents, income tax returns are hearsay as extrajudicial writings not made under oath. However, they may be used for any proper purpose, such as impeachment,¹ admissions,² or under present recollection refreshed³ or past recollection recorded rules.⁴

Tax returns are evidence, but are not always binding upon

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¹Davenport v. State, 278 Ga. App. 16, 628 S.E.2d 120 (2006).

²State v. Herendeen, 279 Ga. 323, 613 S.E.2d 647 (2005).

³Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007) (overruled on

other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

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¹See § 16:8, supra.

²See §§ 26:1 et seq.

³See § 15:10, supra.

⁴See § 25:10, supra.

finder of fact.⁵

In *United States v. Shabazz*,⁶ the Eleventh Circuit found that Federal Rule of Evidence 404(b) allowed the introduction of uncharged fraudulent tax returns given that they were “inextricably intertwined” with the charged scheme.

When the income of a litigant is in issue, the opposing party has the right to ascertain, by the discovery process, the relevant facts as disclosed to the government for tax purposes. Such information is usually not privileged.⁷

After conflicting accounting reports, the court correctly admitted income tax records for more information. Since the trial court sits as finder of fact and the determination of income frequently involves resolving conflicts in evidence, there was no error.⁸

In the jury’s consideration of negligence damages from a car accident, the plaintiff’s complete financial picture was presented to the jury, which included the plaintiff’s income tax returns for the two previous years and a bankruptcy petition he filed two years earlier.⁹

§ 29:25 Computations

Evidence of computations would seem to be proper. For admission of summaries of bulky records, see § 23:18, *supra*.

A plaintiff contested the timeliness the court’s computation of a non-party request for the production of documents on whether the request was made within the statutorily allowable time of 13 days. The request for a directed verdict was denied. When the judge proposed to charge the jury on the statute regarding the computation of days, plaintiff’s counsel did not repeat her request for a “directed verdict,” and obtained no ruling on the issue, therefore, she “waived appellate review of this enumeration of error.”¹

In a contract construction dispute, the trial court apparently incorrectly computed attorney fees and costs. This amount poses a question of law for the court and is subject to *de novo* review.²

⁵*Mullinax v. Mullinax*, 234 Ga. 553, 216 S.E.2d 802 (1975).

⁶*United States v. Shabazz*, 887 F.3d 1204 (11th Cir. 2018).

⁷*McCormick on Evidence* § 112.

⁸*Facey v. Facey*, 281 Ga. 367, 638 S.E.2d 273 (2006).

⁹*The Pep Boys-Manny, Moe & Jack, Inc. v. Yahyapour*, 279 Ga. App.

674, 632 S.E.2d 385 (2006).

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¹*Haughton v. Canning*, 287 Ga. App. 28, 650 S.E.2d 718 (2007).

²*Toombs v. Meyer M. Cardin Living Trust No. 2*, 279 Ga. App. 682, 632 S.E.2d 410 (2006) (trial court’s computation of interest and fees was deemed to be erroneous).

§ 29:26 Proof of corporate existence

It has been held in a criminal prosecution for burglary, the ownership of the place burglarized was laid in a name that signified a corporation. Therefore, a presumption arose that it was a corporation, and in the absence of proof to the contrary, it was not necessary for the State to prove the fact of incorporation.¹ Similarly, in a civil case where the name of an entity imparts a corporation, the presumption is that it is a corporation. The presumption is rebuttable.²

The articles of incorporation, properly authenticated, are admissible to show the existence of a corporation.³

In a case involving a disputed corporate existence of a temple, the trial court correctly ruled that there was a corporate existence since all members of an association were given the requisite notice of a meeting and that more than fifty percent of the members appeared at the meeting and voted unanimously to elect the one faction to the board.⁴

In a condominium association dispute, a resident contended that she was entitled to summary judgment because the association, an administratively dissolved corporation, lacked the capacity to sue when it filed its complaint. The appeals court ruled that the superior court properly concluded that the association had legal capacity to sue because reinstatement of its corporate status allowed it to resume its business as if the administrative dissolution never occurred.⁵

§ 29:27 Parol evidence

In the 2013 Georgia Evidence Code, see O.C.G.A. § 24-3-1.

Due to the unfortunate choice of names for the rule relating to modifying written documents by oral evidence, the early writers fell into the trap of treating this rule as a rule of evidence.¹ Some writers point out that it is largely a rule of substantive law and not a rule of evidence. But whatever the courts or textwriters may think of the rule, it is now universally accepted and is

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¹Hill v. State, 117 Ga. App. 721, 161 S.E.2d 917 (1968).

²Villa Rica Mfg. Co. v. General American Life Ins. Co., 55 Ga. App. 328, 190 S.E. 49 (1937).

³Collins v. Armour Fertilizer Works, 18 Ga. App. 533, 89 S.E. 1054 (1916).

⁴Nguyen v. Tran, 287 Ga. App. 888, 652 S.E.2d 881 (2007).

⁵Williams v. Martin Lakes Condominium Association, Inc., 284 Ga. App. 569, 644 S.E.2d 424 (2007).

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¹Albany Federal Sav. & Loan Ass'n v. Henderson, 198 Ga. 116, 31 S.E.2d 20 (1944).

prescribed in some states by statute.²

The great majority of attempts to modify or nullify written contracts are in the nature of affirmative defenses and must be plainly set forth in the answer or reply. These include such matters as payment, release, fraud, failure of consideration, and statute of frauds.³

Once the pleadings have been properly drawn, most questions concerning the parol evidence rule relate to whether evidence offered to affect a written contract is material under the issues created by the pleadings and to whether it is relevant as tending to prove or disprove some fact in issue.

Consequently, the parol evidence rule is largely beyond the scope of a handbook on trial practice, and those aspects are left for consideration in texts on pleading and substantive contract law.⁴ However, some situations involving the rule may arise for the first time at the trial and so highlight incidents of the rule are included here.

Whenever the terms of a written contract or other instrument are susceptible of more than one interpretation, or an ambiguity arises, or the intent and object of the instrument cannot be ascertained from the language employed therein, parol or extrinsic evidence may be introduced to show what was in the minds of the parties at the time of making the contract or executing the instrument and to determine the object for or on which it was designed to operate.⁵ But, extrinsic evidence to explain an ambiguity in a contract becomes admissible only when the contract remains ambiguous after the pertinent rules of construction have been applied.⁶

Parol testimony may be admitted to show a distinct collateral understanding that does not vary or contradict the writing itself.⁷

The parol evidence rule is not involved when testimony is offered to explain the parties intent, rather than to explain or vary the terms themselves.⁸ Where an ambiguity exists in the written terms, parol evidence may be used in ascertaining the parties'

²O.C.G.A. §§ 24-3-1 et seq.; *Cooper v. Vaughan*, 81 Ga. App. 330, 58 S.E.2d 453 (1950).

³O.C.G.A. § 9-11-8(c).

⁴For the general rules for the construction of contracts, see O.C.G.A. § 13-2-2.

⁵*Dorsey v. Clements*, 202 Ga. 820, 44 S.E.2d 783, 173 A.L.R. 509 (1947).

⁶*Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989).

⁷*Taylor v. Career Concepts, Inc.*, 184 Ga. App. 551, 362 S.E.2d 128 (1987).

⁸*Tate v. Teachers' Retirement System of Georgia*, 257 Ga. 365, 359 S.E.2d 649, 41 Ed. Law Rep. 789 (1987).

intent.⁹ When questions of fact remained as to the parties' intent regarding an easement agreement, summary judgment was unwarranted. The language of the easement agreement was ambiguous so that parol evidence was admissible to show the parties' intent.¹⁰ When construing a contract, a court will look to parol evidence to determine the parties' intent only where the written document is ambiguous.¹¹

The intent of parties to a release of some defendants may be proven by parol.¹²

Parol evidence was improperly admitted where the promissory note upon which plaintiffs were suing was complete and unambiguous and where defendant did not claim that any fraud, accident, or mistake induced him to sign the agreement.¹³

When a contract is complete on its face and evidence is offered to explain an ambiguity, which evidence contradicts terms of a written instrument, it should not be admitted.¹⁴ Parol evidence is admissible to explain an ambiguity in a written contract, but is inadmissible to add to, take from, or vary the writing itself; thus, parol evidence can be considered only to resolve a specific ambiguity in a document, not to alter the entire document.

Extraneous evidence usually cannot vary the terms of a written deed.¹⁵ A written instrument is considered the true, complete understanding of the parties, and provides better evidence than parol.¹⁶ However, ambiguity in a deed may be cured by parol proof. If the description in a deed is ambiguous but sufficient to furnish a key to the boundary, extrinsic evidence may be used to correctly apply the description to the true boundary intended by the parties.¹⁷

Parol evidence is admissible to explain ambiguities in a settlement agreement incorporated into a divorce decree.¹⁸

Where the terms of a will are plain and unambiguous, they must control. Parol evidence cannot be used to contradict or give

⁹Investment Properties Co., Inc. v. Watson, 278 Ga. App. 81, 628 S.E.2d 155 (2006).

¹⁰McGuire Holdings, LLLP v. TSQ Partners, LLC, 290 Ga. App. 595, 660 S.E.2d 397 (2008).

¹¹UniFund Financial Corp. v. Donaghue, 288 Ga. App. 81, 653 S.E.2d 513 (2007).

¹²Posey v. Medical Center-West, Inc., 257 Ga. 55, 354 S.E.2d 417 (1987).

¹³Citizens & Southern Trust Co. (Georgia), N.A. v. Johnson, 201 Ga. App. 464, 411 S.E.2d 543 (1991).

¹⁴Wachovia Bank of Georgia v. Namik, 265 Ga. App. 80, 593 S.E.2d 35 (2003), judgment rev'd on other grounds, 279 Ga. 250, 612 S.E.2d 270 (2005).

¹⁵Hornsby v. Holt, 257 Ga. 341, 359 S.E.2d 646 (1987).

¹⁶Hornsby v. Holt, 257 Ga. 341, 359 S.E.2d 646 (1987).

¹⁷Turner v. City of Tallapoosa, 289 Ga. 138, 709 S.E.2d 211 (2011).

¹⁸Bradley v. Frank, 264 Ga. App. 772, 592 S.E.2d 138 (2003).

new meaning to that which is expressed clearly in the will.¹⁹ Blocking admission of evidence with a parol evidence rule objection, see *VATACS Group, Inc. v. HomeSide Lending, Inc.*²⁰

“Parol evidence is admissible to prove a mistake in a deed or any other contract required by law to be in writing.”²¹ Appellants sought reformation of the deeds on the basis of a mutual mistake of fact—a scrivener’s error that mistakenly described the property sold. Since reformation was a possible remedy in this case, the trial court erred in granting the defense’s motion in limine to exclude parol evidence.²²

Statute authorizes the use of contemporaneously-executed writings to provide necessary terms not contained in the document at issue or to correct obvious errors in the document at issue.²³

More cases on parol evidence, see § 23:23, *supra*, and particularly section 34 of Appendix B, *infra*.

§ 29:28 Evidence of identification

Issues frequently arise at two levels. First, the witness on the stand seeks to identify a defendant in the courtroom as an attacker, or criminal perpetrator. Next, the witness seeks to refer to the fact that she (the witness) picked the defendant out of a lineup the day after an assault on her. The latter form of testimony is allowed under O.C.G.A. § 24-8-801(d)(1)(C).¹ According to the Eleventh Circuit Court of Appeals, “Rule 801(d)(1)(C) provides that a statement is not hearsay where it involves the identification of a person made after the declarant observed the person and the declarant testifies and is subject to cross-examination.”² A federal district court observed: “A prior identification will be excluded only if the procedure that yielded the identification is ‘so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law.’”³

Another area where identification can become an issue is where a witness seeks to identify an individual—*often a criminal defen-*

¹⁹*Chattowah Open Land Trust, Inc. v. Jones*, 281 Ga. 97, 636 S.E.2d 523 (2006). *Inc. v. City of Warm Springs*, 285 Ga. 322, 676 S.E.2d 178 (2009).

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²⁰*VATACS Group, Inc. v. HomeSide Lending, Inc.*, 276 Ga. App. 386, 623 S.E.2d 534 (2005), *aff’d*, 281 Ga. 50, 635 S.E.2d 758 (2006).

²¹O.C.G.A. § 24-3-7.

²²*Amin v. Guruom, Inc.*, 280 Ga. 873, 635 S.E.2d 105 (2006).

²³See *White House Inn & Suites*,

¹See generally *United States v. Cardena*, 842 F.3d 959, 101 Fed. R. Evid. Serv. 1431 (7th Cir. 2016).

²*U.S. v. Zaldivar*, 292 Fed. Appx. 868 (11th Cir. 2008).

³*United States v. Woodford*, 2019 WL 5457854 (E.D. N.Y. 2019).

dant—from a photograph or video recording. A decision from Presiding Judge Dillard of the Court of Appeals explains that, “when ‘there is some basis for concluding that a witness is more likely than the jury to correctly identify a defendant as an individual depicted in relevant photographs, then lay opinion testimony identifying a defendant in those photographs is admissible under [O.C.G.A. § 24-7-701(a)].’”⁴

Addressing voice identification, a federal decision opined: “To admit ‘an opinion as to the identity of a speaker,’ the offering party simply needs to show ‘that the identifier has heard the voice of the alleged speaker at any time.’”⁵

In-court identifications are sometimes complicated by constitutional objections. However, a suggestive pretrial identification procedure used by a television reporter did not render inadmissible an eye-witness’ in-court identification.⁶

An in-court identification may be allowed notwithstanding a suggestive confrontation procedure, provided the witness has a sufficient independent basis for identification.⁷

Rules on lineups and photo spreads were reviewed in *Humphrey v. State*.⁸ A witness’ in-court identification of defendant was admissible in the prosecution for malice murder even if the pretrial photographic identification procedures were tainted; the in-court identification did not depend on prior identifications but had an independent origin. An unduly suggestive procedure is one which leads the witness to the virtually inevitable identification of the defendant as the perpetrator and is equivalent to the authorities telling the witness, “This is our suspect.” The fact that the accused may be of a different race or ethnicity does not in and of itself make the identification procedure impermissibly suggestive, especially when there are other individuals in the line-up having roughly the same characteristics and features as the accused. In *Kirkland v. State*,¹⁰ a second photo lineup administered using the same photos from the first lineup viewed by the same witness was not unduly suggestive.

One recurring issue here is the degree to which the eyewitness’s level of certainty should be considered by the jury. The

⁴Goforth v. State, 360 Ga. App. 832, 861 S.E.2d 800 (2021).

⁵United States v. Hall, 20 F.4th 1085, 117 Fed. R. Evid. Serv. 230, 117 Fed. R. Evid. Serv. 1193 (6th Cir. 2022).

⁶Pope v. State, 256 Ga. 195, 345 S.E.2d 831 (1986), appeal after remand 257 Ga. 32, 354 SE2d 429, cert den 484 US 873, 98 L. Ed. 2d 159, 108 S.

Ct. 207, overruled on other grounds by Nash v. State (1999) 271 Ga. 281, 519 SE2d 893.

⁷Baty v. State, 257 Ga. 371, 359 S.E.2d 655 (1987).

⁸Humphrey v. State, 281 Ga. 596, 642 S.E.2d 23 (2007).

¹⁰Kirkland v. State, 318 Ga. 639, 644, 898 S.E.2d 536 (2024).

Georgia Supreme Court in *Brodes v. State*⁹ rejected a jury instruction informing jurors they could consider the witness's level of certainty in determining the reliability of the identification. "[T]he idea that a witness's certainty in his or her identification of a person as a perpetrator reflected the witness's accuracy has been 'flatly contradicted by well-respected and essentially unchallenged empirical studies.'"

Can a violation of *Brodes* be harmless error? In a murder case, a witness identified the defendant by his street name from a photographic lineup and in court. A jury charge that provided that a witness's level of certainty could be considered in assessing the reliability of identification testimony was harmless error. The identification witness already knew defendant, recognized his gold teeth, and identified him in a photographic lineup by his street name. Further, there was significant corroborating evidence.¹⁰

A victim's identification of the defendant as his killer was properly admitted as a dying declaration where the victim had suffered third-degree burns over 95% of his body and he was aware of his impending death at the time the identification was made. Also, expert testimony concerning the accuracy rate for eyewitness identification of blacks by whites—that showing a photograph to a witness makes the witness more likely to identify the person in that photograph as the guilty party in a subsequent lineup, and that there is no correlation between a witness' confidence in an eyewitness identification and the accuracy of that identification—was properly excluded, since the determination of a witness' credibility concerning eyewitness identification is within the exclusive province of the jury and was thus offered as a conclusion as to what a layperson could surmise on his own and since the expert in question had not examined the witnesses.¹¹

Norris was overruled in part by *Johnson v. State*.¹² However, experts who impugn the integrity of eyewitness identifications continue to be disfavored in Georgia.¹³

Hearsay law regarding pretrial identification procedures is included in §§ 25:2 and 25:4, *supra*.¹⁴

Testimony established that a murder occurred in the course of

⁹*Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766 (2005).

¹⁰*Woodruff v. State*, 281 Ga. 235, 637 S.E.2d 391 (2006).

¹¹*Norris v. State*, 258 Ga. 889, 376 S.E.2d 653 (1989).

¹²*Johnson v. State*, 272 Ga. 254, 526 S.E.2d 549 (2000) (stating that the admissibility of expert testimony re-

garding the reliability of eyewitness testimony is within the trial court's discretion and such testimony is not excluded as a matter of law).

¹³*Crawford v. State*, 283 Ga. App. 645, 642 S.E.2d 335 (2007).

¹⁴Experts and the validity of eyewitness identifications, see § 24:3, *supra*, citing *Jones v. State*, 273 Ga. 213, 539 S.E.2d 143 (2000).

an attempted armed robbery that was incidental to and followed directly from the defendant's participation in the sale of marijuana to the victim. Roberts's identification as a drug dealer was, therefore, part of the *res gestae*. Therefore, there was no error in admitting that evidence even though it incidentally placed his character in issue.¹⁵

In 2001 and 2002, two men, one of them brandishing a pistol, approached three victims and demanded money. One of the victims in 2001 was pistol-whipped, and one of the victims in 2002 was fatally shot. At trial, two of the three victims of the 2001 incident identified defendant as the gunman. The third victim of the 2001 incident, who had also been a victim in 2002, could not identify defendant in court as the assailant, but stated that the same man who carried out the 2001 assault committed the 2002 killing. The court correctly allowed a detective to testify that after the 2002 shooting, the third victim had picked defendant's photograph out of a lineup. Evidence of an extrajudicial identification was admissible not only to corroborate an identification made at trial, but as independent evidence of identity, although the witness failed to repeat an extrajudicial identification in court.¹⁶

Different races in lineup, see § 29:18, *supra*.

The testimony of a single witness may be sufficient to establish a fact. However, where the single witness is an accomplice, then that testimony must be corroborated.¹⁷

§ 29:29 Admissibility of evidence regarding seat belts

O.C.G.A. § 40-8-76.1 was amended in 1999 to mandate that the failure of an occupant of a motor vehicle to wear a safety belt in any seat of a motor vehicle which has a seat safety belt or belts shall not be considered evidence of negligence or causation, shall not otherwise be considered by the finder of fact on any question of liability, and shall not be evidence used to diminish any recovery for damages arising out of the operation of the vehicle.

Applying O.C.G.A. § 40-8-76.1, the Supreme Court of Georgia has held that, "evidence of [a] victim's failure to wear a seatbelt generally is not relevant evidence of causation in criminal cases."¹

The trial court erroneously charged the jury that they could, in considering damages, take into account evidence of the couple's

¹⁵Johnson v. State, 272 Ga. 254, 526 S.E.2d 549 (2000). Roberts v. State, 282 Ga. 548, 651 S.E.2d 689 (2007).

¹⁶Hall v. State, 282 Ga. 294, 647 S.E.2d 585 (2007).

¹⁷Barber v. State, 314 Ga. 759, 879 S.E.2d 428 (2022).

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¹State v. Mondor, 306 Ga. 338, 830 S.E.2d 206 (2019).

alleged failure to use an available seat belt upon the satisfactory proof or showing that the couple did not use their seat belts and that their injuries might have been reduced by use of a seat belt. However, this charge ran directly contrary to O.C.G.A. § 40-8-76.1(d), which prohibited the use of evidence of the failure of an occupant of a motor vehicle to wear a seat safety belt as evidence of negligence or causation or to diminish any recovery for damages in any civil action. Thus, a new trial was required.²

After an armed robbery, the defendants were involved in a high speed chase when their car hit a retaining wall and killed one of the suspects. The State's medical expert had testified outside of the jury's presence that use of a seat belt would not have prevented the driver's fatal injuries. One defendant acquiesced in the granting of the State's motion to exclude evidence regarding the driver's seat belt usage, and the other defendant had expressly agreed to the State's motion. Thus, neither could complain about the ruling.³

For the elimination of certain exceptions to the required use of safety belts in passenger cars, see 2010 amendment to O.C.G.A. § 40-8-76.1.

Federal courts considering seatbelt use evidence have utilized Federal Rules of Evidence 401, 402, and 403 to consider the issue.⁴

It is acceptable practice for police to authorize a roadblock to look for DUI drivers, seat belt violations, defective equipment, and traffic law violations. Law enforcement's purpose was to assure that drivers had their licenses, had insurance, and were not impaired. The written instructions that the officer manning the roadblock used to authorize the roadblock were correctly admitted in evidence.⁵

§ 29:30 Evidence that someone other than the accused committed the crime

Sometimes a criminal defendant's strategy is to point the finger of guilt at another person as the responsible party. A Fifth Circuit Court of Appeals decision explains the fundamental requirements for the introduction of third-party culpability evidence:

[U]nder Rule 403, while "[e]vidence of third-party guilt is admis-

²King v. Davis, 287 Ga. App. 715, 652 S.E.2d 585 (2007).

³Mitchell v. State, 282 Ga. 416, 651 S.E.2d 49 (2007).

⁴See generally Green v. Ford Motor Co., 2012 WL 10670462 (N.D. Miss. 2012); In re: General Motors

LLC Ignition Switch Litigation, 2016 WL 3996243 (S.D. N.Y. 2016). See also Morton v. Brockman, 184 F.R.D. 211 (D. Me. 1999).

⁵Overton v. State, 270 Ga. App. 285, 606 S.E.2d 306 (2004).

sible if the evidence by itself or along with other evidence demonstrates a nexus between the third party and the crime charged,” that nexus cannot be merely “speculative because ‘speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice.’” U.S. v. Settle, 267 Fed. Appx. 395, 398 (5th Cir. 2008) (quoting U.S. v. Jordan, 485 F.3d 1214, 1219, 73 Fed. R. Evid. Serv. 998 (10th Cir. 2007)); see also Holmes v. South Carolina, 547 U.S. 319, 327, 126 S. Ct. 1727, 164 L. Ed. 2d 503, 70 Fed. R. Evid. Serv. 70 (2006) (explaining that evidence of third-party guilt “may be excluded where it does not sufficiently connect the other person to a crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant’s trial” (quoting 40A Am. Jur. 2d, *Homicide* § 286 (1999))).¹

Relying on O.C.G.A. § 24-4-401, the Supreme Court of Georgia held in *Pittman v. State*,² that third-party culpability evidence was properly excluded where the intended cross-examination of an investigator did “not raise a reasonable inference of [Defendant’s] innocence.”³ *Pittman*, however, points out that demonstrating a “reasonable inference of innocence” was a standard applied in former Georgia law. Accordingly, future Georgia cases may well focus on federal authority on the issues of third-party guilt.

Scholarship identifies two general approaches to the introduction of third-party culpability evidence, noting that the majority of jurisdictions place more rigorous demands on those seeking to advance third-party guilt as a defense.⁴

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¹United States v. Gomez-Fajardo, 2022 WL 1744554 (5th Cir. 2022).

²Pittman v. State, 318 Ga. 819, 901 S.E.2d 90 (2024).

³Pittman v. State, 318 Ga. 819,

901 S.E.2d 90 (2024).

⁴Imwinkelried, *Evidence of a Third Party’s Guilt of the Crime that the Accused is Charged with: The Constitutionalization of the SODDI (Some Other Dude Did It) Defense 2.0*, 47 Loy. U. Chi. L.J. 91 (Fall 2015).

Chapter 30

Objections to Evidence

- § 30:1 Right to object to improper testimony
- § 30:2 Need for objection to improper evidence
- § 30:3 Timeliness of objections and motions in limine
- § 30:4 Stating grounds for objection
- § 30:5 Ruling on objection
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- § 30:7 Need for formal exception or mistrial motion
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§ 30:1 Right to object to improper testimony

Normally, of course, any party may object to any evidence that is not material (under the issues drawn by the pleadings) or is not relevant (has no probative weight to establish any fact in issue) or is not competent under one of the exclusionary rules of evidence. However, there are exceptions.

A party may have a right to object, but loses that right by failure to make timely objections.¹ In such circumstances, claims of error are, at best and as a general matter, relegated to plain error review.²

Or a party may lose the right to object if that party has previously opened the door by introducing evidence of a similarly improper character.³ There is a view which provides that if objection is made during direct examination, neither cross-examination nor introduction of evidence on the same subject matter to which the objection was directed shall constitute a waiver of the objection.

On the need to make timely objections under the 2013 Georgia

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¹Christmas v. City of Chicago, 682 F.3d 632, 82 Fed. R. Serv. 3d 744 (7th Cir. 2012). See also § 30:3, *infra*.

²Griffin v. State, 309 Ga. 860, 849 S.E.2d 191 (2020); Wilson v. State, 370 Ga. App. 399, 897 S.E.2d 597 (2024). See also Race v. Smith, 2022 WL 3649650 (11th Cir. 2022).

³See generally Sherrod v. State, 355 Ga. App. 441, 844 S.E.2d 508 (2020); Hand v. South Georgia Urology Center, P.C., 332 Ga. App. 148, 769 S.E.2d 814 (2015) (disapproved of on other grounds by, Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015)). See also Fraser v. State, 52 Ga. App. 92, 182 S.E. 418 (1935).

Evidence Code, see O.C.G.A. § 24-1-103.⁴ Because O.C.G.A. § 24-1-103 is patterned after the corresponding federal rule, Georgia courts look to federal authority when applying the Georgia rule.⁵

There are a number of rules regarding the waiver of objection. When the trial judge admits objectionable evidence subject to the condition that counsel connect it with later evidence, any objection is waived if opposing counsel fails to make a motion to strike.⁶

During a deposition, can a witness who is being deposed routinely interrupt the answering of an opposing counsel's questions in order to get advice from his lawyer? Answering "no" to this question is *Hall v. Clifton Precision, a Div. of Litton Systems, Inc.*⁷ Private conferences during depositions are only available for very limited purposes, holds this case, which also rules that a deposition the attorney for a witness may not make an objection that suggests an answer to a witness.

Courts often impose formal requirements which guide counsel's assertion of objections at trial. For example, in federal courts in Georgia's southern district, lawyers are commanded to "[r]ise when addressing the Court or jury and when making objections." Also, when objecting, counsel is barred from using objections "for the purpose of making a speech, recapitulating testimony, or attempting to guide the witness." Argument upon the objection will not be heard until permission is given or argument is requested by the Court.⁸

Lawyers sometimes refrain from objecting as a matter of trial strategy. Usually it is unwise to object at every possible point where a successful objection can be made. Tactical considerations frequently suggest otherwise. In a 2018 decision reviewing a lawyer's performance in a criminal case, the Georgia Supreme Court recognized that decisions as to whether to raise a specific objection "are ordinarily matters of trial strategy."⁹

⁴Hines v. State, 350 Ga. App. 752, 830 S.E.2d 380 (2019).

⁵See Chrysler Group, LLC v. Walden, 303 Ga. 358, 812 S.E.2d 244 (2018); Gaskin v. State, 334 Ga. App. 758, 780 S.E.2d 426 (2015). See also Carlson & Carlson, Carlson on Evidence: Comparing Georgia Rules & Federal Rules § 24-1-103 (6th Ed. 2017).

⁶See generally U.S. v. Dougherty, 895 F.2d 399, 29 Fed. R. Evid. Serv. 700 (7th Cir. 1990); Woolwine v. Furr's,

Inc., 106 N.M. 492, 1987-NMCA-133, 745 P.2d 717 (Ct. App. 1987). See also City of Jefferson v. Maddox, 116 Ga. App. 51, 156 S.E.2d 553 (1967).

⁷Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525, 27 Fed. R. Serv. 3d 10 (E.D. Pa. 1993).

⁸LR 83.13, Rules for the U.S. District Court for the Southern District of Georgia.

⁹Eller v. State, 303 Ga. 373, 811 S.E.2d 299, 307 (2018).

§ 30:2 Need for objection to improper evidence

Failure to object waives the right to contest evidence.¹ This is the Georgia rule.² Federal courts agree. Federal Rule of Evidence 103(a)(1) requires that a timely objection or motion to strike must “stat[e] the specific ground of objection, if the specific ground was not apparent from the context.”³ Failure to make a “lack of foundation” objection can doom an appeal based on the ground that a foundation for evidence is lacking.⁴

In order for counsel to exclude improper testimony and to preserve for review any erroneous rulings on the admissibility of evidence, a timely and proper objection must be made. Failure to object to improper evidence when it is offered is normally held to be a waiver of the objection.⁵ To preserve an objection upon a specific ground for appeal, the objection must be made at trial upon that specific ground; objection on specific grounds waives the grounds not asserted for purposes of ordinary appellate review.⁶

Objections to evidence, including confessions, may be waived through nonobjection at trial.⁷

Failure to object below to admission of complained of testimony (allowing State to reveal to jury that, during interview with law enforcement agent, defendant had exercised his right to an attorney and remained silent) constitutes waiver, and defendant cannot complain on appeal.⁸

Absent objection by the defense, a trial judge is under no obligation to exclude evidence, even if a policeman indicates that he continued custodial interrogation of the defendant after the defendant requested an attorney.⁹

Citing O.C.G.A. § 24-1-103(a)(1), the Georgia Supreme Court approved the admission of surveillance videos which supported a criminal gang activity charge. At trial, the accused did not object to the videos. On appeal, the Court observed that where a party fails to make an objection, a claim of error is not preserved for

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¹See *Pierce v. State*, 302 Ga. 389, 807 S.E.2d 425 (2017). See also *Robinson v. State*, 283 Ga. 229, 657 S.E.2d 822 (2008).

²O.C.G.A. § 24-1-103.

³*Hirst v. Inverness Hotel Corp.*, 50 V.I. 1122, 544 F.3d 221, 77 Fed. R. Evid. Serv. 728 (3d Cir. 2008).

⁴*Grissom v. State*, 296 Ga. 406, 768 S.E.2d 494 (2015).

⁵*Georgia Power Co. v. Harwell*, 113 Ga. App. 653, 149 S.E.2d 376 (1966).

⁶*Pittman v. State*, 318 Ga. 819, 901 S.E.2d 90 (2024). See also *Hyde v. State*, 291 Ga. App. 662, 662 S.E.2d 764 (2008).

⁷*Reeves v. State*, 241 Ga. 44, 243 S.E.2d 24 (1978).

⁸*Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978).

⁹*Nixon v. State*, 255 Ga. 656, 340 S.E.2d 7 (1986).

appellate review.¹⁰

This text observes that when damaging evidence comes into the record at trial without an objection, waiver usually results from this inaction. An exception to this principle occurs when a patient fails to object to a discovery request for that person's psychiatric records. The psychiatrist-patient privilege is an important one, and a party's silence and failure to act in response to a request for privileged matter from a nonparty healthcare facility does not waive the party's privilege by implication.¹¹ In summary, objection to a discovery request for a party's psychiatric records is not waived by inaction according to this case, and failure to file an objection was not the type of decisive conduct that justified an inference of intent to waive this important privilege contained in O.C.G.A. § 24-5-501.

In the general run of cases, however, objection is the required procedure. In 2017 the Georgia Court of Appeals observed that there is no more fundamental principle of appellate review than the one barring consideration of evidentiary objections which were not raised at trial.¹²

Merely making the objection may not be enough, if the court does not rule on it. However, there is a helpful ruling in this situation that holds when the judge fails to rule on an objection, that is the same as overruling the objection.¹³ Moreover, if evidence is conditionally admitted, the original objection must be renewed or it is waived.¹⁴

Sometimes judicial questioning merits an objection. In his questioning, the trial judge violated O.C.G.A. § 17-8-57, effectively disparaging defendant's psychiatric defense. Although there was no objection by counsel, the Georgia Supreme Court applied the plain error rule to reverse.¹⁵

A trial judge apparently directed that the doors to the courtroom be closed and locked during the time that the jury was charged. The defendant complained on appeal to the Georgia Supreme Court that the trial judge violated his right to a public trial. However, because the defendant failed to make a contemporaneous objection to locking the courtroom, the appeal was denied. Reversal is required only if the defendant properly

¹⁰Moore v. State, 305 Ga. 251, 824 S.E.2d 377 (2019).

¹¹Kennestone Hosp. v. Hopson, 273 Ga. 145, 538 S.E.2d 742 (2000).

¹²Mashburn Construction, L.P. v. CharterBank, 340 Ga. App. 580, 798 S.E.2d 251 (2017).

¹³Lynn v. State, 140 Ga. 387, 79 S.E. 29 (1913).

¹⁴Bryan v. Barnett, 205 Ga. 94, 52 S.E.2d 613 (1949).

¹⁵Paul v. State, 272 Ga. 845, 537 S.E.2d 58 (2000).

objected at trial.¹⁶

Sometimes attorneys tell the trial judge “that I would like the record to show my continuing objection to this line of testimony.” Continuing objections eliminate the need to repeat an objection where the trial court’s ruling on the first objection clearly covers subsequent proceedings and the court has granted a party the right to have a continuing objection. However, if the court does not specifically grant a right to a continuing objection, it is counsel’s duty to object to testimony as it is offered.¹⁷

Objections not raised at trial cannot be raised for the first time on appeal.¹⁸ Perhaps the only escape from this conclusion is the plain error rule. O.C.G.A. § 103(d) identifies this doctrine, and the concept is discussed in *Henderson v. United States*.¹⁹ Plain error is also discussed in *United States v. MacKay*.²⁰

Under O.C.G.A. § 24-1-103, where no objection is made when evidence is introduced at trial, appellate consideration is limited to plain error.²¹ The Georgia Supreme Court has held that plain error review under Georgia Rule of Evidence 103 applies in civil as well as criminal appeals.²²

Applying the plain error standard in a civil case is *Cannon v. Barnes*.²³ In a wrongful death action emanating from an auto collision, no plain error was found in the trial court’s denial of a directed verdict motion nor in the giving of a jury charge.

Absent plain error, a rule of waiver is relentlessly applied by Georgia courts. Counsel must make a proper objection on the record at the earliest possible time to preserve for review the point of error.²⁴ Where an entirely different objection is presented on appeal, the Court of Appeals cannot consider it because the Court of Appeals is a court for review and correction of error committed in the trial court.²⁵ In addition to being alert to a party’s lack of objection, a reviewing court will scan the trial record for other conduct revealing a voluntary waiver of rights. Defendant waived his right to confront a child witness in a prosecution for two

¹⁶*Morris v. State*, 308 Ga. 520, 842 S.E.2d 45 (2020).

¹⁷*Telcom Cost Consulting, Inc. v. Warren*, 275 Ga. App. 830, 621 S.E.2d 864 (2005); *Stolte v. Fagan*, 291 Ga. 477, 731 S.E.2d 653 (2012) (overruled on other grounds by *Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021)).

¹⁸*Slack v. State*, 265 Ga. App. 306, 593 S.E.2d 664 (2004).

¹⁹*Henderson v. U.S.*, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013).

²⁰*U.S. v. MacKay*, 715 F.3d 807 (10th Cir. 2013).

²¹*Bozzie v. State*, 302 Ga. 704, 808 S.E.2d 671 (2017).

²²*Chrysler Group, LLC v. Walden*, 303 Ga. 358, 812 S.E.2d 244 (2018).

²³*Cannon v. Barnes*, 357 Ga. App. 228, 850 S.E.2d 436 (2020).

²⁴*Stacey v. State*, 292 Ga. 838, 741 S.E.2d 881 (2013).

²⁵*In re Singleton*, 323 Ga. App. 396, 744 S.E.2d 912 (2013).

counts of rape, four counts of aggravated child molestation, three counts of aggravated sodomy and two counts of child molestation, where he not only failed to object but affirmatively declined the opportunity to question her before the jury.²⁶

How is plain error measured? The Georgia Supreme Court employs a four-prong test to determine whether plain error occurred: (1) there must be a legal error that is not affirmatively waived; (2) the error must be clear or obvious; (3) the error must affect the outcome of the trial court proceeding; and (4) the error must seriously affect the fairness, integrity or public reputation of a judicial proceeding.²⁷ In *Jordan v. State*,²⁸ the court noted that the concept of plain error has evolved, and that a new version of the rule is present in the 2013 Georgia Evidence Code:

Until January 1, 2013 that doctrine applied only to alleged error in three circumstances not present in this case: “the sentencing phase of a trial resulting in the death penalty, a trial judge’s expression of opinion in violation of OCGA § 17-8-57, and a jury charge affecting substantial rights of the parties as provided under OCGA § 17-8-58(b) [when no objection was made at trial].” *Durham v. State*, 292 Ga. 239, 240(2), 734 S.E.2d 377 (2012) (noting that “[t]he new Evidence Code will change the rule in cases tried after January 1, 2013, allowing a court to consider plain errors affecting substantial rights” more generally).

While plain error can excuse the failure to make a trial objection, the legal error must be obvious, rather than subject to reasonable dispute. Also, the error must have affected an appellant’s substantial rights.²⁹

The four-prong test mentioned above received judicial construction in a 2021 decision of the Supreme Court of Georgia.³⁰ Appellate review of a prior conviction can terminate if there is a failure by the appellant to establish one of the four elements. “We need not analyze the other elements of the plain error test if the appellant fails to establish any one of them.”

Mentioned earlier in this section was the role of plain error when a party fails to make an objection at trial. It also is an important doctrine when a defendant fails to make an adequate

²⁶*Walker v. State*, 322 Ga. App. 158, 744 S.E.2d 349 (2013).

²⁷*Stacey v. State*, 292 Ga. 838, 741 S.E.2d 881 (2013). See also *Kemp v. State*, 303 Ga. 385, 810 S.E.2d 515 (2018) (to establish plain error under O.C.G.A. § 24-1-103, litigants “must point to an error that was not affirmatively waived, the error must have been clear and not open to reasonable dispute, the error must have

affected his substantial rights, and the error must have seriously affected the fairness, integrity or public reputation of judicial proceedings.”).

²⁸*Jordan v. State*, 322 Ga. App. 252, 744 S.E.2d 447 (2013).

²⁹*Nations v. State*, 303 Ga. 221, 811 S.E.2d 292 (2018).

³⁰*Flood v. State*, 311 Ga. 800, 860 S.E.2d 731 (2021).

offer of proof. An adequate offer of proof describes the excluded evidence, and then identifies the grounds for admitting the evidence, i.e., an explanation why it is admissible.³¹ A defective offer of proof led the Tenth Circuit United States Court of Appeals to explore whether reversal of a conviction on the ground of plain error was potentially in the picture. Since a finding of plain error requires discovering an error which affects substantial rights, the court looked to see if the alleged error was prejudicial. It was difficult to find plain error because the defective offer of proof failed to reveal a record which disclosed an error.

In a formula similar to that applied in Georgia, the Fourth Circuit reviewed the doctrine's requirements:

Accordingly, to prevail on appeal, Ventura must show: (1) there was an error; (2) the error was "clear or obvious rather than subject to reasonable dispute"; (3) "the error affected [his] substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings"; and (4) "the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262, 130 S. Ct. 2159, 176 L.Ed.2d 1012(2010) (internal quotation marks omitted).³²

A 2015 Georgia decision establishes four prongs to consider when analyzing a jury charge for plain error: (1) there must be an error or defect that has not been intentionally relinquished or abandoned, (2) the legal error must be clear or obvious, rather than subject to reasonable dispute, (3) the error must have affected the appellant's substantial rights which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings, and (4) if the above three prongs are satisfied, the appellate court has the discretion to remedy the error-discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.³³

Admission or exclusion of items of evidence sometimes forms the basis for plain error review. A fatal stabbing and murder charge ultimately led to examination of the record for plain error. The defendant said that chain or custody rules here were not complied with when the prosecution presented the knives at trial. The defendant did not challenge the chain of custody at trial. Absent evidence of tampering with evidence, plain error was not found.³⁴

Claims that the trial court erred when instructing the jury are

³¹U.S. v. Harry, 816 F.3d 1268 (10th Cir. 2016).

³²U.S. v. Fuertes, 805 F.3d 485, 98 Fed. R. Evid. Serv. 264 (4th Cir. 2015).

³³Weyer v. State, 333 Ga. App. 706, 776 S.E.2d 304 (2015).

³⁴Moore v. State, 306 Ga. 500, 831 S.E.2d 736 (2019).

also a feature of some appeals. To prevail, a criminal defendant must establish that an error was clear or obvious.³⁵

In *Benton v. State*,³⁶ the defendant complained about the admission against him of a photograph. However, because Benton did not object to the admission of the photograph at trial, review of the issue under Georgia's revised Evidence Code is limited to review for plain error.

Continuing objections were referenced in *Moore v. Wellstar Health System, Inc.*³⁷ On appeal, a party claimed the trial court erred by allowing hearsay in a medical malpractice case. The opponent urged that any error was waived by the appellant's failure to secure a continuing objection. The appellate court rejected the opponent's contention.

Violations of the rule barring comments by the trial judge on the evidence in a criminal case formerly did not require an objection. Alleged violations of O.C.G.A. § 17-8-57 were measured under the "plain error" standard.³⁸ In 2015 the statute was amended to require a party to make a timely objection to judicial conduct identified in the statute. As revised, some conduct by the trial judge requires an objection in order to preserve the error for appellate review, unless it falls into the category of plain error. However, Section (c) of the statute requires automatic reversal and the grant of a new trial when the trial court expresses an opinion as to the guilt of the accused. Although the defendant failed to object to the statement in a rape trial, the court's expression of opinion as to guilt mandated a new trial, in the view of presiding Judge Dillard. Plain error review was not required.³⁹

While comment on the defendant's guilt are unwelcome, a trial judge may properly propound questions to a witness, comment on pertinent evidentiary rules, and control the conduct of counsel.⁴⁰ When judicial conduct overreaches, however, an objection is often required. Absent an objection, review generally will be by the plain error standard.

A similar rule applied when no objection is made to a jury instruction. Discussion of application of the plain error rule to jury instructions appears in *Alexander v. State*.⁴¹

³⁵Complaints about the instructions were rejected in *Wright v. State*, 315 Ga. 459, 883 S.E.2d 294 (2023); *Willis v. State*, 315 Ga. 19, 880 S.E.2d 158 (2022).

³⁶*Benton v. State*, 301 Ga. 100, 799 S.E.2d 743 (2017).

³⁷*Moore v. WellStar Health System, Inc.*, 349 Ga. App. 834, 824

S.E.2d 787 (2019).

³⁸See *Grissom v. State*, 296 Ga. 406, 768 S.E.2d 494 (2015).

³⁹*Jones v. State*, 352 Ga. App. 380, 834 S.E.2d 881 (2019).

⁴⁰*Bamberg v. State*, 308 Ga. 340, 839 S.E.2d 640 (2020).

⁴¹*Alexander v. State*, 348 Ga. App. 859, 825 S.E.2d 405 (2019).

§ 30:3 Timeliness of objections and motions in limine

The objection to improper evidence should be made as soon as the ground for objection becomes apparent.¹ Evidentiary objections made after the close of the evidence are untimely.² Decisions applying O.C.G.A. § 24-1-103 restrict appellate review to plain error where objections are untimely.³

Challenges to opening statements or closing arguments that were not first raised in the trial court are waived. In a murder appeal, the accused apparently conceded he did not object at trial to a point of prosecution argument that he complained about. The court ruled: “As a result, his claim is not preserved for review.”⁴

An objection need not be made at the time evidence is offered where its inadmissibility does not become apparent until later, as where its proponent fails to connect it up.⁵

Once the trial begins, objections to evidence or improper arguments need to be timely, as noted in the text. In *Sharpe v. Department of Transp.*,⁶ the Georgia Supreme Court emphasized this requirement, rejecting the use of a motion to strike made at any point before the jury retires as a procedural tool to object to evidence, except in limited instances.

Early and prompt objection practice is the policy of Georgia. A 2013 decision by the Supreme Court makes this clear. Counsel must make a proper objection on the record at the earliest possible time to preserve for review the point of error.⁷

The need to make timely objections or other requests for relief was underlined in *Spear v. State*.⁸ The doctrine of waiver was vigorously applied by the Georgia Supreme Court, as illustrated by this passage:

Spear raises a series of issues the appellate review of which was waived for a variety of reasons: consideration of the denial of a motion for mistrial was waived by failing to renew the motion after curative instructions, *Ford v. State*, 269 Ga. 139, 498 S.E.2d 58 (1998); review of the failure to give limiting instructions regarding independent act evidence was waived by failing to request it, *State v. Belt*, 269 Ga. 763, 505 S.E.2d 1 (1998); review of the admission of

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¹Hart v. State, 227 Ga. 171, 179 S.E.2d 346 (1971).

²Whitehead v. State, 287 Ga. 242, 695 S.E.2d 255 (2010).

³Simmons v. State, 299 Ga. 370, 788 S.E.2d 494 (2016).

⁴Mathews v. State, 314 Ga. 360, 877 S.E.2d 188 (2022).

⁵City of Jefferson v. Maddox, 116 Ga. App. 51, 156 S.E.2d 553 (1967).

⁶Sharpe v. Department of Transp., 267 Ga. 267, 476 S.E.2d 722 (1996).

⁷Stacey v. State, 292 Ga. 838, 741 S.E.2d 881 (2013).

⁸Spear v. State, 270 Ga. 628, 513 S.E.2d 489 (1999).

independent act evidence was waived by failing to object to the evidence when offered, *Smith v. State*, 268 Ga. 42, 485 S.E.2d 189 (1997); review of the admission of evidence putting Spear's character in issue was waived by failing to object, *Ford v. State*, 256 Ga. 375, 349 S.E.2d 361 (1986); review of an allegedly improper opening statement was waived by failing to object, *Burgeson v. State*, 267 Ga. 102, 475 S.E.2d 580 (1996); review of allegedly improper closing argument was waived by failing to object, *Metts v. State*, 270 Ga. 481, 511 S.E.2d 508 (1999); any error in the lack of arraignment was waived by Spear's failure to raise the issue prior to verdict, *Frazier v. State*, 204 Ga. App. 795, 420 S.E.2d 824 (1992).

In another case the Supreme Court took the same approach.⁹ A gang investigator educated jurors about the location of criminal gangs, without objection. "Accordingly, appellant waived review of this issue on appeal."

A defendant waives the right to complain about a prosecutor's closing argument when he does not object to the comment at the time it is made but waits until the end of the closing argument to move for a mistrial.¹⁰

Objections to closing arguments are reviewed in § 34:13, *infra*. An objection to a closing summation made after the argument has concluded is untimely.¹¹

In order to complain on appeal about a judge improperly closing a courtroom, a litigant must promptly object at trial.¹²

Sometimes it is advisable to make an objection to evidence before trial. This is done through a motion in limine. Pretrial motions *in limine* are often associated with Rule 103:

Indeed, Rule 103(d) of the Federal Rules of Evidence mandates that the court must conduct a jury trial to the extent practicable so that inadmissible evidence is not suggested to the jury by any means. FED. R. EVID. 103(d). Pretrial motions *in limine* are an important mechanism to effectuate this goal of insulating the jury from inadmissible evidence and further the purpose of the rules, generally, to administer the proceedings "fairly. . . to the end of ascertaining the truth and securing a just determination." Fed. R. Evid. 102; see *Banks v. Vilsack*, 958 F. Supp. 2d 78, 82 (D.D.C. 2013) (citing Fed. R. Evid. 103(d)). Moreover, "[a] pretrial ruling, if possible, may generally be the better practice, for it permits counsel to make the necessary strategic determinations." *United States v. Jackson*, 627 F.2d 1198, 1209, 201 U.S. App. D.C. 212 (D.C. Cir. 1980).¹³

⁹*Burgess v. State*, 292 Ga. 821, 742 S.E.2d 464 (2013).

¹⁰*Butler v. State*, 273 Ga. 380, 541 S.E.2d 653 (2001).

¹¹*Young v. Griffin*, 329 Ga. App. 413, 765 S.E.2d 625 (2014) (overruled

on other grounds by, *Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021)).

¹²*Morris v. State*, 308 Ga. 520, 842 S.E.2d 45 (2020).

¹³*Corrigan v. Glover*, 254 F. Supp.

Both Georgia¹⁴ and federal appellate¹⁵ decisions have encouraged resolution of weighty evidentiary issues in advance of trial: “District judges should ‘encourage counsel to bring motions in limine on evidentiary questions. . . . [P]retrial rulings on critical evidentiary questions permit the trial to be conducted more efficiently and effectively.’ ”¹⁶

Forms for such motions appear in this text and in Carlson, *Successful Techniques for Civil Trials* (2d ed.) §§ 1:3, 1:63 to 1:71. Georgia cases on motions in limine appear in the same text. Carlson at § 1:21. In criminal cases, the pretrial objection based on constitutional grounds is a motion to suppress.

As noted, the primary method of objecting on evidentiary grounds before trial is through the use of a motion in limine. A number of Georgia cases raise motion in limine questions.¹⁷

Other cases on motions continue to be litigated by the courts, in both civil and criminal cases.¹⁸ The court noted that in Georgia, evidence of any traffic court initiation or disposition of a case against a party is inadmissible unless the party entered a plea of guilty, thereby admitting liability. The trial court granted the defendant’s motion in limine which barred the jury from considering that its driver paid a fine in traffic court.

Rules of practice relating to motions were articulated in a 2019 decision by the Georgia Supreme Court.¹⁹ The following passage from the decision affirms the need for trial judges to exercise care

3d 184 (D.D.C. 2017).

¹⁴*Morgan v. State*, 307 Ga. 889, 838 S.E.2d 878 (2020) (“before trial, efforts should be made to identify the specific [evidence in question] that are properly admissible This pre-trial work can eliminate the need to resolve objections during trial and can preclude post-trial challenges to aspects of [evidence in question] that—had more attention been paid to the [evidence in question]—would not have been deemed necessary to present as evidence.”).

¹⁵*U.S. v. Layton*, 767 F.2d 549, 18 Fed. R. Evid. Serv. 1322 (9th Cir. 1985) (“There is general agreement that pre-trial hearings are extremely useful where important and complex admissibility issues are presented, since any inquiry into the facts is best made out of the earshot of the jury.”).

¹⁶*Palmerin v. City of Riverside*, 794 F.2d 1409, 21 Fed. R. Evid. Serv. 1

(9th Cir. 1986).

¹⁷See *Computer Communications Specialists, Inc. v. Hall*, 188 Ga. App. 545, 373 S.E.2d 630 (1988) (statements made in settlement offers); *Collins v. Davis*, 186 Ga. App. 192, 366 S.E.2d 769 (1988) (evidence of insurance); *Glenridge Unit Owners Ass’n, Inc. v. Felton*, 183 Ga. App. 858, 360 S.E.2d 418 (1987) (insurance).

¹⁸See *Givens v. State*, 273 Ga. 818, 546 S.E.2d 509 (2001) (trial court did not err in granting state’s motion in limine to introduce motive evidence of defendant’s adulterous relationship with third party); *Waszczak v. City of Warner Robins*, 221 Ga. App. 528, 471 S.E.2d 572 (1996) (evidence of nolo contendere plea to traffic citation is inadmissible in action arising out of incident giving rise to citation, since it is not admission of guilt).

¹⁹*Lewis v. State*, 306 Ga. 455, 831 S.E.2d 771 (2019).

and judgment when excluding evidence.

A party's motion in limine to exclude evidence as inadmissible "should be granted only if there is no circumstance under which the evidence is likely to be admissible at trial." *Grant v. State*, 305 Ga. 170, 172 (3) 824 S.E.2d 255, 260 (2019) (citation and punctuation omitted). Given the framework, "the grant of a motion in limine excluding evidence as a judicial power which much be exercises with great care." *Andrews v. Wilbanks*, 265 Ga. 555, 556, 458 S.E.2d 817 (1995). We review a trial court's denial of a motion in limine for an abuse of discretion. *Grant*, 305 Ga. at 172 (3), 824 S.E.2d 255.

In *Ray v. Ford Motor Co.*,²⁰ the plaintiff contended that the trial court erred in granting Ford's motion in limine to exclude evidence and expert testimony about a Ford database listing prior instances of inadvertent vehicle movement in cars lacking the ignition/transmission interlock device. Ray sought to introduce this evidence to demonstrate that Ford had notice of such incidents when it made the decision to omit the interlock device from the 1989 Mustang. Held, the trial court did not err in granting Ford's motion in limine where Ray did not provide enough information to allow the court to determine whether incidents in the database were substantially similar to Ray's accident.

In *Orr v. CSX Transp., Inc.*,²¹ the trial court declined to rule on the motion and instructed the plaintiff to renew his objection to the evidence at trial. When the plaintiff did not do this, the appellate court held the plaintiff failed to preserve the issue for appeal. Record-making and motions in limine were topics involved in *Morris v. Southern Bell Tel. & Tel. Co.*,²² and *Estate of Sam Farkas, Inc. v. Dougherty County School System*.²³ Motions in limine are frequently filed in Georgia courts.

A motion in limine sought to preclude an expert casting his testimony in the form of a legal conclusion.²⁴

²⁰*Ray v. Ford Motor Co.*, 237 Ga. App. 316, 514 S.E.2d 227 (1999).

²¹*Orr v. CSX Transp., Inc.*, 233 Ga. App. 530, 505 S.E.2d 45 (1998).

²²*Morris v. Southern Bell Tel. & Tel. Co.*, 180 Ga. App. 145, 348 S.E.2d 573 (1986) (where trial court properly reserved ruling until trial, no error was appealable when proffered evidence was not objected to at trial).

²³*Estate of Sam Farkas, Inc. v. Dougherty County School System*, 178

Ga. App. 135, 342 S.E.2d 501 (1986) (on appeal where transcript of motion in limine hearing was supplied, error could not be detected without producing trial transcript as well).

²⁴*DeVooght v. Hobbs*, 265 Ga. App. 329, 593 S.E.2d 868, 124 A.L.R.5th 819 (2004) (expert's testimony that any negligent act by nurse was imputable to doctor, in medical malpractice case, was legal conclusion and properly excluded under defendant's motion in limine).

In *Travelers Prop. Casual Co. of Am. v. SRM Grp., Inc.*,²⁵ a dispute broke out over workers' compensation insurance premiums. The insured company sought to introduce evidence that their new insurance company endorsed the disputed coverage. The defendant insurance company filed motions in limine to exclude the evidence, and the trial court denied the motion. The court reasoned that the evidence was probative because it demonstrated the plaintiff's breach of contract claim by showing the differences in coverage.

Timing of motions in limine can be important. In the U.S. District Court for the Southern District of Georgia, unless otherwise directed such motions in civil cases shall be filed no later than five (5) days prior to the pretrial conference, if practicable; otherwise, up to the time of the trial.²⁶ Responses or a reply memorandum are generally due within 15 days of service of the motion.

In the Northern District, a special pretrial objection rule controls *Daubert* objections (see § 24:35, *supra*, for details on *Daubert*). An objection that an expert's science is not reliable must generally be filed no later than the date that the proposed pretrial order is submitted.²⁷

While the law in some jurisdictions requires a trial objection to be made even though the same point was made in an earlier motion in limine, Georgia imposes this requirement of double objections in a particular circumstance.

When a party wins during the pretrial motion stage and later at trial the opposing party violates the motion ruling, objection responsibilities are triggered. However, the Georgia law is different when a party loses at the motion stage. The decision in *Hale v. State*,²⁸ reiterates the point that when a party makes a motion in limine to block a point of evidence and loses, with the judge making a firm ruling to that effect, the denial of the pretrial motion preserves the issue for appellate review. In *Hale*, the defense counsel objected to evidence at trial without giving any basis for the objection, but had protected the record by means of the prior pretrial motion. The 2013 Georgia Evidence Code is in accord with this approach.²⁹

Federal law takes the same position and several cases underline

²⁵*Travelers Property Casualty Company of America v. SRM Group, Inc.*, 348 Ga. App. 136, 820 S.E.2d 261 (2018), rev'd in part on other grounds, 308 Ga. 404, 841 S.E.2d 729 (2020).

²⁶LR 7.4, Rules for the U.S. District Court for the Southern District of Georgia, effective September 1,

1994.

²⁷N.D.Ga. L.R. 26.2.

²⁸*Hale v. State*, 214 Ga. App. 899, 449 S.E.2d 520 (1994).

²⁹See O.C.G.A. § 24-1-103(a) (after a definitive ruling by the court, party need not renew the objection).

the point. When objections are made pre-trial and definitive rulings are delivered which are adverse to the movant, contemporaneous objections at trial are not necessary. In a firearms prosecution the defendant moved pre-trial under Rule 103 to exclude testimony that a key prosecution witness served as chaplain. The trial court disagreed and allowed such references. On appeal, the government argued that the defendant's failure to renew an objection at trial constituted a waiver of the issue. The Eleventh Circuit Court of Appeals disagreed: "Mr. Davis properly presented the 'chaplain' issues in advance. The court ruled definitively on the issue. Mr. Davis's objection is fully preserved."³⁰

A companion rule was established in 2010 for similar transaction proof in criminal cases. Like the rule for motions in limine that when a party loses a motion in limine he need not renew objection at trial, objecting attorneys who are disappointed by an adverse ruling at a similar transaction hearing need not reiterate defense objections at trial.³¹

In *CSX v. Smith*,³² the defendant was not required to object to evidence encompassed by his pretrial motion to exclude evidence. This is also the view embraced in O.C.G.A. § 24-1-103(a).

The rules shift when the movant wins at the motion in limine stage, as noted earlier in this section of the text. A 2021 decision by the Georgia Supreme Court provides the formula for objection responsibilities at trial for the litigant who prevailed with a pre-trial motion in limine. When a ruled-upon motion ruling is allegedly violated at trial, the movant must make a contemporaneous objection to preserve the error.³³ Other courts have ruled in similar fashion. In *Miller v. Allman*,³⁴ the trial judge approved a defense motion to prohibit an opponent's "golden rule" argument. At trial, when the opponent made an alleged "golden rule" argument, there was no objection. On appeal, the state's highest court ruled against the defense. When a party which successfully moves in limine to exclude evidence or argument, that party must protect the motion ruling with a trial objection when an alleged violation of the ruling occurs. The court held the defendant waived the issue by failing to object.

There is a competing rule.³⁵ In *Grant v. Ryan*,³⁶ the trial court precluded specific evidence. When a violation of the ruling oc-

³⁰U.S. v. Davis, 779 F.3d 1305 (11th Cir. 2015). 858 S.E.2d 479 (2021).

³¹Whitehead v. State, 287 Ga. 242, 695 S.E.2d 255 (2010).

³²CSX Transp., Inc. v. Smith, 289 Ga. 903, 717 S.E.2d 209 (2011).

³³Williams v. Harvey, 311 Ga. 439,

³⁴Miller v. Allman, 240 W. Va. 438, 813 S.E.2d 91 (2018).

³⁵See generally King v. State, 346 Ga. App. 362, 816 S.E.2d 390 (2018).

³⁶Grant v. Ryan, 2014 WL 4977775 (D. Ariz. 2014).

curred at trial, counsel did not object. The petitioner was convicted, and his request for post-conviction relief caused the court to review the rules respecting record-making requirements. The court held: “Having already obtained a definitive ruling on the motion in limine, trial counsel was not required to interpose an objection to preserve the issue of any violation of that order for appeal. . . . [N]o renewed objection was necessary for appeal.” To similar effect is *Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*.³⁷ The trial court granted the appellant’s exclusionary motion to bar certain evidence, but later the evidence was introduced. On appeal, the Appellee argued the Appellant had not preserved the issue for appeal because of a failure to object to the evidence at trial. The appeals court held the if a trial court makes a dispositive ruling on evidence by granting a motion in limine, then the issue is preserved for appeal.

Georgia motions objecting to proof of subsequent remedial measures, criminal record of a witness, collateral source evidence, and marital status of a surviving spouse in a wrongful death action, as well as comments on the absence of any need to renew a lost motion when the challenged evidence is offered at trial are matters discussed in J. Barrow, How to “Unring” the Bell: Effective Use of Motions in Limine, 27 Verdict 25, No. 2 (Spring 2002).

“Constitutional objections must be specifically asserted before the entry of a verdict in order to be preserved for appeal.”³⁸

When a prosecutor loses a motion in limine, may she appeal in advance of trial? Adverse decisions on pretrial evidentiary motions suppressing or excluding evidence received attention in the Georgia legislature. In 2013, the Georgia General Assembly amended O.C.G.A. § 5-7-1 to allow the state to appeal, an order, decision, or judgment excluding certain forms of evidence. The appeal must be made at least 30 days prior to the trial and ruled on before the impaneling of a jury or the defendant being put in jeopardy, whichever comes first. Required is the provision that the state file a notice of appeal within two days of such order and the prosecuting attorney certify the appeal is not being done for the purpose of delay but that the evidence is substantial proof of a material fact. In a 2012 decision, Justice Nahmias noted the federal right of the government to evidentiary appeals.³⁹ Other Georgia cases similarly noted that a prosecutor’s right to appeal

³⁷*Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 148 Idaho 479, 224 P.3d 1068 (2009).

³⁸*Jordan v. State*, 283 Ga. App. 85, 640 S.E.2d 672 (2006). See also *Phillips v. State*, 284 Ga. App. 224, 644

S.E.2d 153 (2007) (constitutional challenge to aggravated sodomy statute not raised until appeal was waived).

³⁹*Leitch v. Fleming*, 291 Ga. 669, 732 S.E.2d 401 (2012) (Nahmias, J., concurring, comparing O.C.G.A. § 5-7-

was a feature of federal practice.⁴⁰

Does a party's withdrawal of a motion in limine waive any objection to admission of the evidence which is the target of the motion? Not under the facts of *Nations v. State*.⁴¹ The defendant's withdrawal of his written motion in limine did not waive a claim of error respecting Rule 404(b) evidence where the motion addressed only the question of impeachment by evidence of prior convictions.

Some sample forms for placing a pretrial objection in a motion in limine are set out in Appendix C, *infra*.

§ 30:4 Stating grounds for objection

Under O.C.G.A. § 24-1-103, if a party does not assert the basis of its objection to the trial court, the claim of error is not preserved for ordinary appellate review.¹ Vague objections do not satisfy this standard.² Objecting on one ground does not preserve purported error on other grounds and relegates any subsequent appeal to plain error review.³

When a hearsay objection is needed in order to block evidence, a failure to object on that ground waives the issue. While a defendant objected to testimony at trial, the failure to raise a hearsay objection doomed an appeal based on that ground.⁴

The specific grounds for the objection must be stated. A general objection is ineffective to establish error if the evidence is received. An objection, which comprises the mere statement, "I object to that" is too general.⁵ Merely stating incompetency, irrelevancy and immateriality as grounds for an objection may not be enough.⁶ An objection on the ground that the question is leading must be specifically made.⁷ All grounds for objection must be stated at the time of the objection. Any grounds not raised are waived.⁸

Dramatic exhibits and photographs are sometimes met with a

1(a)(4) to 18 U.S.C.A. § 3731).

⁴⁰See, e.g., *State v. Tyson*, 273 Ga. 690, 544 S.E.2d 444 (2001) ("Historically, the prosecution in the United States has had a limited right to appeal in criminal cases").

⁴¹*Nations v. State*, 303 Ga. 221, 811 S.E.2d 292 (2018).

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¹See *Department of Transportation v. 0.095 Acres of Land*, 368 Ga. App. 426, 890 S.E.2d 301 (2023).

²*Wallace v. State*, 303 Ga. 34, 810

S.E.2d 93 (2018).

³*Anthony v. State*, 303 Ga. 399, 811 S.E.2d 399 (2018).

⁴*Leggett v. State*, 331 Ga. App. 343, 771 S.E.2d 50 (2015).

⁵*Griffin v. State*, 123 Ga. App. 820, 182 S.E.2d 498 (1971).

⁶*Middleton v. Waters*, 205 Ga. 847, 55 S.E.2d 359 (1949).

⁷*Etheridge v. Hooper*, 104 Ga. App. 227, 121 S.E.2d 323 (1961).

⁸*Lamon v. Perry*, 33 Ga. App. 248, 125 S.E. 907 (1924).

“prejudicial” objection. For example, photographs of murder victims taken at the scene of homicides are frequently objected to on this ground. Although grisly, sometimes such photos are received.⁹ Other decisions reject the exhibits.

Two cases illustrate. Photographs are sometimes blocked when an objection on “prejudicial” grounds is made.¹⁰ On the other hand, Georgia courts are often liberal in admitting this form of proof over a claim that it is unduly prejudicial. Trial court admission of five photographs of burn victim in the hospital showing medical apparatus attached to her body was permitted in a case where the defendant was charged with murder, arson, and other crimes. The photographs illustrated the nature of the injuries that caused the victim’s death and were relevant to prove felony murder.¹¹

What about an objection that the photographer is not the authenticating witness? Proper foundation was laid for introduction of photographs by showing that photographs were true and accurate representations of the area in a land line dispute case; it was not necessary to show that the witness himself had taken the photographs or that he had them in his custody.¹²

With photos, a party sometimes offers to stipulate in order to preclude admission of a dramatic exhibit against him, adding force to his “prejudicial” objection when the opponent forges ahead with trial proof. Can a prosecutor brush aside a proffered stipulation and insist on proving up items that may inflame the jury? No, says *Old Chief v. U.S.*¹³ The prosecutor and trial judge spurned a defendant’s offer to admit his prior conviction, with the prosecutor choosing instead to prove up the “full record” of the conviction. Applying an undue prejudice vs. probative worth analysis, the Supreme Court found this to be error. After the defendant’s offer to stipulate that he was previously convicted, the full record of the conviction had a low probative value and a high prejudicial impact. For the Georgia rules on this issue, see § 10:6, *supra*.

On the asked and answered objection, see *Phyfer v. State*,¹⁴ which found no abuse of discretion in trial court’s refusal to allow questions repeated that had been asked and fully answered. Also prohibited were questions asked in a rapid fire fashion.

⁹See § 21:5, *supra*.

¹⁰*Long v. State*, 265 Ga. App. 605, 595 S.E.2d 93 (2004).

¹¹*Tarvin v. State*, 277 Ga. 509, 591 S.E.2d 777 (2004).

¹²*Sackett v. L. L. Minor Co., Inc.*, 244 Ga. 375, 260 S.E.2d 37 (1979).

¹³*Old Chief v. U.S.*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574, 45 Fed. R. Evid. Serv. 835 (1997).

¹⁴*Phyfer v. State*, 259 Ga. App. 356, 577 S.E.2d 56 (2003) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

For a comprehensive list of grounds for objections, see the Appendix to this text as well as Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 2:2; Bright, Carlson & Imwinkelreid, *Objections at Trial* (2008) (objections from “addressing juror by name” through alphabet of objections to “vague”).

In *Jackson v. Heard*,¹⁵ the court observed that Georgia law favors the admission of any relevant evidence, no matter how slight its probative value may be, and, on the balance, evidence of even doubtful relevance should be admitted. In a car crash case, however, one driver’s history of prostitution was barred under a motion in limine. A grant of motion in limine excluding evidence is a judicial power which must be exercised with great care. But a trial judge has the discretion to exclude even relevant evidence if the judge finds that the probative value of the evidence is substantially outweighed by the risk that its admission will unduly prejudice or mislead the jury or confuse the issues being tried.

On the point that an effective objection requires a specific, appropriate ground for the objection, see *Long v. State*.¹⁶

On the need to specify exactly where a deficiency in proof exists, see *Warner v. State*,¹⁷ holding that an objection of lack of foundation must specify the foundational element that is contended to be lacking. The court stated:

Warner complains that the recorded interviews of Lewis and Roberts were improperly admitted as the State failed to lay the proper foundation for the introduction of the statements, i.e., the State failed to establish the time, place, person, and circumstances of any prior interview of the witness by the lead detective or any other law enforcement officer. However, Warner fails to show that he objected below to the lack of foundation with the specificity required for such an objection, i.e., an objection of lack of foundation must specify the foundational element that is contended to be lacking. *Tolver v. State*, 269 Ga. 530, 532(2), 500 S.E.2d 563 (1998). Therefore, the issue is not preserved for appeal. *Id.*

Just as trial objections must be specific, so must pretrial objections which are embraced in motions in limine. General motions are disfavored. A 2021 decision of the Supreme Court of Georgia dealt with a motion seeking to exclude statements, arguments, or evidence “offered predominantly to overly inflame the emotions of the jury.” Concurring Justice Bethel emphasized the need for motions to be tailored to the specific issues, and for litigants to avoid

¹⁵*Jackson v. Heard*, 264 Ga. App. 595 S.E.2d 93 (2004).
620, 591 S.E.2d 487 (2003).

¹⁷*Warner v. State*, 281 Ga. 763,
¹⁶*Long v. State*, 265 Ga. App. 605, 642 S.E.2d 821 (2007).

“broad boilerplate motions.”¹⁸

Other courts agree. *United States v. Gulley*,¹⁹ holds that motions in limine to exclude purportedly prejudicial evidence must be properly particularized. In *Jones v. Setzer*,²⁰ the court ruled that “in order for a violation of a trial court’s evidentiary ruling to serve as a basis for a new trial,” the ruling must be specific enough in its prohibitions, and the violation must be clear.

§ 30:5 Ruling on objection

Normally, the court will rule on the objection as soon as it is made, and no assignment of error can be made unless there is a ruling on the objection.¹ Where the trial court does not make a definitive ruling on an evidentiary objection, O.C.G.A. § 24-1-103 constrains appellate consideration to plain error review.²

The absence of a judicial ruling made the appeal more difficult in *Wilson v. State*.³ The record in the case made plain that the trial court did not make a definite ruling on the admissibility of certain challenged evidence. Consequently, the Supreme Court’s review was limited to one for plain error.

In *State v. Harris*,⁴ the Supreme Court of Georgia, however, explored a trial court’s duty to enter written orders, rejecting arguments that the prosecution waived its pretrial appellate rights by failing to comply with a trial court’s direction to prepare a proposed order.

Where the testimony of an expert witness was erroneously excluded, but at a later time during the trial the same testimony by the same witness was admitted, the error of the previous exclusion was sufficiently remedied and made harmless.⁵

Where evidence was initially admitted, then excluded upon a party’s motion, the moving party later asserted that the original admission of the evidence constituted prejudicial error. Since the trial court had given an instruction to disregard the evidence when it was withdrawn, the defendant lost his right to appeal by failing to renew his objection or move for a mistrial after the trial court’s curative instruction.⁶

¹⁸*Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021).

¹⁹*U.S. v. Gulley*, 722 F.3d 901 (7th Cir. 2013).

²⁰*Jones v. Setzer*, 224 W. Va. 483, 686 S.E. 2d 623.

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¹See *Bryan v. Barnett*, 205 Ga. 94, 52 S.E.2d 613 (1949).

²*Wilson v. State*, 301 Ga. 83, 799 S.E.2d 757 (2017).

³*Wilson v. State*, 301 Ga. 83, 799 S.E.2d 757 (2017).

⁴*State v. Harris*, 316 Ga. 272, 888 S.E.2d 50 (2023).

⁵*Ward v. Handley*, 132 Ga. App. 412, 208 S.E.2d 189 (1974).

⁶*Jones v. State*, 265 Ga. 84, 453

Any erroneous rulings during trial on questions and issues of damages are harmless error when the jury returns a verdict in favor of the defendant.⁷

When evidence is offered, part admissible and part inadmissible and the objection is to the evidence as a whole, it is not error to admit the whole.⁸

§ 30:6 Motion to exclude inadmissible evidence

Under Georgia Rule of Evidence 103, “(a) Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and: (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]”¹

If inadmissible evidence has been received over objection, it should be stricken on motion.² But a party who brings out inadmissible testimony has no right to have it excluded on his own motion³ unless the objectionable evidence is contained in an answer that is not responsive.⁴ Where a question has been asked and answered and the answer is unresponsive or is objectionable on some ground other than the impropriety of the question, a motion to strike the answer should be made.⁵

If evidence is received upon the assurance that its competency will be established by later evidence that is not forthcoming, a motion should be made to strike such evidence.⁶ Similarly, a motion should be made to strike the testimony of a witness whose competency was in doubt and who was permitted to testify subject to proof of such competency, which proof is not forthcoming.⁷

O.C.G.A. § 24-1-104(b) controls situations where a lawyer offers evidence of seemingly questionable admissibility but offers to “connect it up” by providing later information which will make its relevancy clear. A judge is entitled to admit the evidence subject to the promise of other evidence which will connect it up. If the

S.E.2d 716 (1995).

⁷Finley v. Franklin Aluminum Co., 132 Ga. App. 70, 207 S.E.2d 543 (1974).

⁸Seabrooks v. State, 251 Ga. 564, 308 S.E.2d 160 (1983).

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¹Taylor v. State, 303 Ga. 225, 811 S.E.2d 286 (2018) (citing O.C.G.A. § 24-1-103(a)(1)).

²West End Cab Co. v. Collier, 109 Ga. App. 555, 136 S.E.2d 512 (1964).

³Birmingham Lumber Co. v. Brinson, 94 Ga. 517, 20 S.E. 437 (1894).

⁴See § 15:23, *supra*.

⁵Mickle v. Moore, 188 Ga. 444, 4 S.E.2d 217 (1939).

⁶Sutton v. Ford, 155 Ga. 863, 118 S.E. 747 (1923).

⁷See Rouse v. Fussell, 106 Ga. App. 259, 126 S.E.2d 830 (1962); City of Jefferson v. Maddox, 116 Ga. App. 51, 156 S.E.2d 553 (1967).

later evidence fulfills the promise, the situation is without error.⁸ However, a failure of later proof sets up a challenging situation. The opponent of evidence must object again, and move to strike, promptly after the supporter of the evidence rests.⁹ Provisionally admitted evidence remains in the record and supports a verdict, unless stricken. Failing to renew the objection or moving to strike the evidence waives the point. Absent a renewed challenge to the evidence, no valid assignment of error can be made to the unconnected evidence.¹⁰ Conditionally admitted evidence in bench trials, and the steps needed to address a failure to connect up, are topics which occur more rarely than in jury trials, but the issue does come up from time to time.¹¹

Objections to evidence must be raised as soon as ground for objection becomes apparent, and generally this means that objection must be made at time evidence is offered; however, if evidence was admissible when offered and later appears to be inadmissible, the complaining party may prevent its inclusion in evidence by making motion to strike or rule it out at that time.¹²

The motion should point out the particular parts of the testimony that are improper.¹³ A motion to strike out testimony will be denied if a portion of the testimony at which it is directed is proper.¹⁴ The court cannot be expected to sort the evidence, striking the objectionable items.¹⁵

While any error in admitting inadmissible evidence is normally cured by striking it and instructing the jury to disregard it, the situation may be sufficiently serious that it can be cured only by a mistrial, see §§ 31:1 et seq.

For inadvertent disclosure of liability insurance, see § 31:5, *infra*.

Motions in limine, see discussion and cases in § 30:3, *supra*. Forms for motions in limine appear in the Appendix C, *infra*.

§ 30:7 Need for formal exception or mistrial motion

No formal exception need be taken to any ruling or action of

⁸See *U.S. v. Coplan*, 703 F.3d 46 (2d Cir. 2012).

⁹*U.S. v. Anderson*, 933 F.2d 1261, 33 Fed. R. Evid. Serv. 170 (5th Cir. 1991).

¹⁰*Jackson v. State*, 222 Ga. App. 843, 476 S.E.2d 615 (1996); *Timberlake v. State*, 246 Ga. 488, 271 S.E.2d 792 (1980); *U.S. v. Dougherty*, 895 F.2d 399, 29 Fed. R. Evid. Serv. 700 (7th Cir. 1990); *U.S. v. Bolick*, 917 F.2d 135, 31 Fed. R. Evid. Serv. 803 (4th Cir. 1990).

¹¹See *Cunningham v. State*, 248 Ga. 835, 286 S.E.2d 427 (1982).

¹²*Brown v. Techdata Corp., Inc.*, 238 Ga. 622, 234 S.E.2d 787 (1977).

¹³*Lingo v. Phoenix Hermetic Co.*, 31 Ga. App. 547, 121 S.E. 253 (1924).

¹⁴*Payne v. Franklin County*, 155 Ga. 219, 116 S.E. 627 (1923).

¹⁵See *Lingo v. Phoenix Hermetic Co.*, 31 Ga. App. 547, 121 S.E. 253 (1924).

the court in any matter or proceeding in order to make the ruling or action a ground for review.¹

However, a motion for a mistrial based on the introduction (over objection) of tainted evidence is generally necessary where counsel wishes to claim on appeal that a mistrial was improvidently denied. As described in a 2019 Georgia Supreme Court case, the defendant objected to a line of testimony elicited by the prosecution during the direct examination of a GBI agent. Although an objection was made by the defense, no mistrial motion was asserted. Later, a recess was taken for lunch, and before the jury returned to the courtroom, defense counsel moved for a mistrial. The Supreme Court ruled against the defense claim that the trial court erred by denying a mistrial. Because the motion was not made contemporaneously with the testimony complained about, any error is not preserved.²

§ 30:8 Offer of proof

This topic is referenced in the new Georgia Evidence Code at O.C.G.A. § 24-1-103.

Where an objection has been sustained, it is proper for counsel to make an offer of proof of what he expects to prove by that question and the subsequent questions of the same nature. In the absence of such a showing, it is impossible to determine whether error was committed by the ruling and whether the error was harmful.¹ It appears that counsel must state the answer expected in order to perfect the record.² But where documentary evidence is concerned the rule is not applied as strictly.³

In *Williams v. State*,⁴ the Georgia Supreme Court explained where, under O.C.G.A. § 24-1-103, offers of proof become pertinent:

Where an appellant challenges the admission of evidence, we are concerned with the sufficiency of the appellant's objection; here, however, where the appellant challenges the exclusion of evidence, we are concerned with the sufficiency of the showing that the appellant, as proponent of the evidence, made at trial.

The *Williams* court went on to provide further guidance:

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¹O.C.G.A. § 9-11-46.

²*Coley v. State*, 305 Ga. 658, 827 S.E.2d 241 (2019). More on the issue of the timing of mistrial motions, see section 31:1, *infra*.

[Section 30:8]

¹*Smith v. State*, 318 Ga. 868, 901 S.E.2d 158 (2024). See also *State*

Highway Dept. v. Whitehurst, 106 Ga. App. 532, 127 S.E.2d 501 (1962).

²*Cohen v. Cohen*, 196 Ga. 562, 27 S.E.2d 28 (1943).

³*Athens Mfg. Co. v. Malcolm*, 134 Ga. 600, 68 S.E. 329 (1910). See also *Foster v. National Ideal Co.*, 119 Ga. App. 773, 168 S.E.2d 872 (1969).

⁴*Williams v. State*, 302 Ga. 147, 805 S.E.2d 873 (2017).

“This provision does not require a formal offer of proof in every instance, as it expressly states that error also may be preserved if the substance of the evidence is apparent from the record.” *Lupoe v. State*, 300 Ga. 233, 247 (11) (794 SE2d 67) (2016) (citation and punctuation omitted). But the rule also requires that the *reason* for offering the evidence in question be apparent to the trial court. See *id.*⁵

Under older cases, the offer is not made until the witness has been sworn, placed on the stand, the question asked, and an objection thereto sustained by the court.⁶ Modernly, an oral statement by counsel describing the evidence he intends to admit can suffice as an offer of proof.⁷ A proper offer describes the evidence and what it tends to show, and second, identifies the grounds for admitting the evidence. From such an offer an appellate court can determine whether exclusion of the evidence by the trial judge affected the substantial rights of the offering party.

A mere indication by the judge that he will not admit certain evidence is not enough without an offer of proof.⁸ The offer must show what the answer would be and that it is material.⁹

The rule requiring disclosure of the evidence sought to be introduced is not ordinarily applied to questions asked on cross-examination,¹⁰ but the judge, in his discretion, can require that counsel show the relevancy of the question.¹¹

Defendant failed to preserve for appellate review his claim that the trial court erred when it excluded evidence of specific instances of lying by the victim, in prosecution for child molestation, where defendant failed to make an offer of proof regarding any specific instances of lying by the victim.¹² In addition, instances of specific misconduct may not be used to impeach a witness' character or veracity unless the misconduct has resulted in the conviction of a crime involving moral turpitude.

Courts must exercise care to not unduly interfere with a lawyer while the attorney is making an offer of proof. There has sometimes been judicial interruption of an offer of proof. In *Gomez v. Innocent*,¹³ while a lawyer was making an offer of proof, “before counsel had finished, the trial court cut off the proffer.” As a

⁵*Williams v. State*, 302 Ga. 147, 805 S.E.2d 873 (2017) (emphasis and quotation original).

⁶*Seaboard Air Line Ry. v. Vaughn*, 19 Ga. App. 397, 91 S.E. 516 (1917).

⁷*U.S. v. Harry*, 816 F.3d 1268 (10th Cir. 2016).

⁸*Daughtry v. Georgia Power Co.*, 61 Ga. App. 505, 6 S.E.2d 454 (1939).

⁹*Page v. Brown*, 192 Ga. 398, 15

S.E.2d 506 (1941).

¹⁰*Cohen v. Cohen*, 196 Ga. 562, 27 S.E.2d 28 (1943).

¹¹*Cox v. Norris*, 70 Ga. App. 580, 28 S.E.2d 888 (1944).

¹²*Johns v. State*, 253 Ga. App. 207, 558 S.E.2d 426 (2001).

¹³*Gomez v. Innocent*, 323 Ga. App. 1, 746 S.E.2d 645 (2013).

result of the decision to truncate the proffer, the Court of Appeals held it was error not to allow counsel to complete the record.

Offers of proof are covered in the 2013 Georgia Evidence Code at O.C.G.A. § 24-1-103(a)(2).

Several cases decided after the 2013 Code emphasize the primacy of offers of proof. A 2017 decision illustrates. In *Aguilar v. State*,¹⁴ the court observed that the rule is well settled that there must have been a proffer or offer of a definitive sort so that both the trial court and the appellate court can know the nature of the excluded proof.

¹⁴*Aguilar v. State*, 340 Ga. App. 522, 798 S.E.2d 60 (2017).

Chapter 31

Mistrial

- § 31:1 Nature of mistrial
- § 31:2 Right to have mistrial declared
- § 31:3 Grounds for declaring mistrial
- § 31:4 Effect of disappearance of admitted exhibits during trial
- § 31:5 Disclosure of liability insurance
- § 31:6 Discharge for inability of jury to arrive at verdict
- § 31:7 Insufficient grounds for declaring mistrial

§ 31:1 Nature of mistrial

Courts have authority to discharge a jury from giving any verdict whenever, in the court's opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.¹ The decisions of the Georgia Supreme Court and the U.S. Supreme Court “emphasize that whether the required degree of necessity for a mistrial has been shown is a matter best judged by the trial court.”²

The Supreme Court of Georgia stated that trial judges should “give careful, deliberate, and studious consideration to whether the circumstances demand a mistrial, with a keen eye toward other, less drastic, alternatives, calling for a recess if necessary and feasible to guard against hasty mistakes.” It added that “[w]here it is clear from the record that the trial court actually exercised its discretion in deciding to grant a mistrial, the Double Jeopardy Clause generally will not bar retrial.”³

In *Oliver v. State*,⁴ the trial court properly granted defendant's motion for a mistrial for manifest necessity on account of the prosecution's effort to put into evidence material which the defense claimed to be irrelevant and prejudicial. The defendant argued that retrial was barred by double jeopardy. The Court of

[Section 31:1]

770 S.E.2d 840 (2015).

¹Carman v. State, 304 Ga. 21, 815 S.E.2d 860 (2018) (citing U.S. v. Perez, 22 U.S. 579, 6 L. Ed. 165, 1824 WL 2694 (1824)).

³Harvey v. State, 296 Ga. 823, 770 S.E.2d 840 (2015).

²Harvey v. State, 296 Ga. 823,

⁴Oliver v. State, 216 Ga. App. 76, 453 S.E.2d 746 (1995).

Appeals disagreed, and responded: “The record and transcript do not affirmatively establish that the conduct of the State was motivated either by bad faith or with an intent to harass or prejudice appellant’s right to fair trial”

Generally, when a defendant makes a motion for mistrial, he waives any claim of double jeopardy but, where the prosecutor has goaded the defense into making the mistrial motion in order for the prosecution to avoid reversal of a conviction because of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial, the Double Jeopardy Clause will stand as bar to retrial.⁵

In *Whatley v. State*,⁶ the court held that the prohibition against double jeopardy did not bar the defendant’s retrial. The court found that the prosecutor did not engage in misconduct, and even if misconduct occurred, the government’s failure to provide information or reports relevant to a medical examination was not done with the intent of provoking a mistrial.

In *Ledford v. State*,⁷ the Georgia Court of Appeals held in a driving under the influence case that the trial court properly found that a mistrial was not warranted given that the government prosecutor did not goad the defense into a mistrial request. Rather, the court found that the prosecutor had “negligently asked a routine foundation question” regarding a video that the government sought to admit into evidence “that resulted in the police officer’s response about” a horizontal gaze nystagmus test.

Retrial after the granting of a defendant’s mistrial motion and aborting the first trial is frequently challenged by a defendant. Much of the litigation surrounds the issue of whether a prosecutor goaded the defense into making the mistrial motion.⁸ “The inquiry is whether the prosecutor intended to goad the defendant into moving for a mistrial and thus terminate the trial. What is critical is the objective of the prosecutor’s conduct.”⁹ In *Bryant v. State*,¹⁰ it was ruled that the state was not guilty of such misconduct.

In *Mathis v. State*,¹¹ it was ruled that the trial court did not abuse its discretion by denying a plea in bar based on prosecutorial misconduct when there was at least some evidence to sup-

⁵*Mathis v. State*, 276 Ga. App. 587, 623 S.E.2d 674 (2005). v. State, 286 Ga. 325, 687 S.E.2d 455, 457 (2009).

⁶*Whatley v. State*, 326 Ga. App. 81, 755 S.E.2d 885 (2014).

⁹*Harris v. State*, 344 Ga. App. 193, 810 S.E.2d 563 (2018).

⁷*Ledford v. State*, 341 Ga. App. 222, 799 S.E.2d 359 (2017).

¹⁰*Bryant v. State*, 305 Ga. App. 238, 699 S.E.2d 433 (2010).

⁸*Mazza v. State*, 292 Ga. App. 168, 664 S.E.2d 548, 551 (2008); *Roscoe*

¹¹*Mathis v. State*, 367 Ga. App. 588, 887 S.E.2d 664 (2023).

port the trial court's conclusions that the prosecution was not attempting to goad the defense.

The power to discharge the jury ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious reasons.¹² And where there is no manifest necessity for discharging the jury, such discharge is improper and defendant is entitled to be discharged to protect him against double jeopardy, assuming the defendant did not consent to the discharge.¹³

Retrial after a mistrial because the jury was hopelessly deadlocked (which is to be determined in the discretion of the trial court) does not constitute double jeopardy.¹⁴

Occasionally a mistrial is granted at the request of the state.¹⁵ If defendant consents to a mistrial, he may not thereafter utilize the mistrial as the basis of a plea of double jeopardy.¹⁶

Where defense counsel objects to remarks made by district attorney in closing argument but does not move for mistrial, and where trial court sustains objection and admonishes jury to disregard improper remarks, it is not error for the trial court not to have granted a mistrial sua sponte.¹⁷ "When an improper argument is made, opposing counsel may obtain appellate review of the trial court's ruling simply by objecting. . . .

A party who seeks a mistrial must make a prompt motion as soon as the party becomes aware of the underlying event.¹⁸

A motion for mistrial is premature until such time that the trial has commenced, which occurs when a jury has been empaneled and sworn.¹⁹ This does not, however, relieve a party from the requirement that timely corrective action must be requested to avoid a waiver.

In *Smith v. State*,²⁰ a prospective juror made a comment during voir dire that she believed the gun involved in the case was stolen from her husband's vehicle. The defense did not seek corrective

¹²See *Hill v. State*, 221 Ga. 65, 142 S.E.2d 909 (1965).

¹³*Oliveros v. State*, 120 Ga. 237, 47 S.E. 627 (1904).

¹⁴*Glass v. State*, 250 Ga. 736, 300 S.E.2d 812 (1983). See also *Johnson v. State*, 261 Ga. 678, 409 S.E.2d 500 (1991); *Logan v. State*, 371 Ga. App. 310, 899 S.E.2d 505 (2024).

¹⁵*Varner v. State*, 285 Ga. 334, 676 S.E.2d 209, 211 (2009).

¹⁶*State v. Grayson*, 332 Ga. App. 862, 775 S.E.2d 222 (2015); *McCor-*

mick v. Gearinger, 253 Ga. 531, 322 S.E.2d 716 (1984).

¹⁷*Coleman v. State*, 243 Ga. 715, 256 S.E.2d 452 (1979).

¹⁸*Thomas v. State*, 310 Ga. 579, 853 S.E.2d 111 (2020); *Burrell v. State*, 301 Ga. 21, 799 S.E.2d 181 (2017); *Dublin v. State*, 302 Ga. 60, 805 S.E.2d 27 (2017).

¹⁹*Horton v. State*, 310 Ga. 310, 849 S.E.2d 382 (2020).

²⁰*Smith v. State*, 276 Ga. 97, 575 S.E.2d 450 (2003).

action. After a jury was empaneled and sworn, defense moved for a mistrial based on the prospective juror's remark. The Georgia Supreme Court found that the motion for mistrial came too late.

A mistrial cannot be granted after a jury verdict has been rendered.²¹

In *Kirkland v. State*,²² the defendant failed to move for a mistrial when he claimed that the prosecution improperly placed the defendant's character in issue. Thus, the court held, the defendant waived this issue on appeal.

"When an improper argument is made, opposing counsel may obtain appellate review of the trial court's ruling simply by objecting [T]he defendant is not required to renew his objection or move for a mistrial after the trial court overrules the objection."²³

Timeliness of the motion is sometimes a concern. In *Mckee v. State*,²⁴ it was held that motion for mistrial which is not made at the time the questions objected to are answered is not timely and will be considered as waived because of the delay in making it.

In *Womack v. Johnson*,²⁵ defense counsel showed photographs to the jury during his opening statements. The photographs, however, had not been shown to opposing counsel or the court prior to their use, and they were not listed in the pretrial order. The following day, plaintiff's counsel moved for a mistrial. The Georgia Court of Appeals held that counsel failed to preserve the issue for appellate review given his failure to move for a mistrial "at the earliest possible opportunity," which was during opening statements.

Sumlin v. State,²⁶ emphasizes that the court's curative action needs to be prompt when an improper argument, demonstration, or testimony appears,²⁷ as does the opponent's call for a cure. In a footnote, the *Sumlin* court observed:

Compare *Dukes v. State*, 273 Ga. 890, 548 S.E.2d 328 (2001) (curative instructions sufficient where promptly given at conclusion of offending testimony); *Stanley v. State*, 250 Ga. 3, 295 S.E.2d 315 (1982) (curative instructions sufficient where given "immediately"

²¹Riley v. State, 356 Ga. App. 606, 848 S.E.2d 474 (2020).

²²Kirkland v. State, 334 Ga. App. 26, 778 S.E.2d 42 (2015).

²³Bolden v. State, 272 Ga. 1, 525 S.E.2d 690 (2000).

²⁴Mckee v. State, 258 Ga. App. 99, 572 S.E.2d 740 (2002).

²⁵Womack v. Johnson, 328 Ga. App. 543, 762 S.E.2d 428 (2014).

²⁶Sumlin v. State, 283 Ga. 264, 658 S.E.2d 596 (2008).

²⁷Thomas v. State, 322 Ga. App. 734, 746 S.E.2d 216 (2013) (mistrial was not required after government detective allegedly commented on defendant's character during direct examination. Detective's comment was inadvertent and the court gave prompt curative instructions).

following improper testimony). Compare also *Spickler v. State*, 276 Ga. 164, 575 S.E.2d 482 (2003) (mistrial not warranted where trial court “promptly halted” prosecutor’s improper demonstration).

Failure to renew a motion for mistrial after a court’s admonishment and curative instruction waives the issue on appeal.²⁸ “A renewal of a motion for mistrial ‘must occur immediately; it is not timely if it comes at the close of all the evidence, at the close of the State’s evidence, or following the completion of the witness’s testimony and that of a subsequent witness.’”²⁹ Mistrial motion was denied as untimely where motion was not made at time incident forming basis for motion occurred, but only after several other witnesses had testified.³⁰ Any claim concerning the prosecutor’s use of peremptory challenges to strike members of the defendant’s race from the jury should be raised prior to the time the jurors are sworn.³¹ A motion for mistrial was untimely where based on supposed irregularities in jury selection, but made after five witnesses had already testified.³²

When a juror volunteered during voir dire an opinion that the defendant was guilty, failure to declare a mistrial was not erroneous; the judge promptly instructed the prospective jurors to respond only to the questions and not make extraneous remarks; the juror in question was stricken for cause.³³

In *Coleman v. State*,³⁴ the Georgia Supreme Court found that the trial court in a malice murder prosecution properly denied defendant’s mistrial request. The Court reasoned:

Almost immediately after the informant uttered the offending statements, the trial court conferred with the parties and then gave a lengthy curative instruction to the jury, telling the jurors that the informant’s testimony was inadmissible, that it did not prove that Coleman had done anything, and that they should “disregard that evidence in its entirety, not hold it against Mr. Coleman in any way, [and] not weigh it or consider it in any manner in your deliberations in this case.”³⁵

An attorney’s failure to object to a trial court’s comment purportedly in violation of O.C.G.A. 17-8-57 (which, in general,

²⁸*Hartsfield v. State*, 294 Ga. 883, 757 S.E.2d 90 (2014).

²⁹*Long v. State*, 324 Ga. App. 882, 752 S.E.2d 54 (2013).

³⁰*Thomas v. State*, 256 Ga. 616, 351 S.E.2d 453 (1987).

³¹*State v. Sparks*, 257 Ga. 97, 355 S.E.2d 658 (1987).

³²*Riley v. State*, 257 Ga. 91, 355 S.E.2d 66 (1987).

³³*Graves v. State*, 260 Ga. 779, 399 S.E.2d 922 (1991).

³⁴*Coleman v. State*, 301 Ga. 720, 804 S.E.2d 24 (2017).

³⁵*Coleman v. State*, 301 Ga. 720, 804 S.E.2d 24 (2017); Similarly, in *United States v. Garcia*, 683 Fed. Appx. 838 (11th Cir. 2017), the Eleventh Circuit found that a mistrial was not warranted, due, in part, to the fact that curative instructions had been provided by the district court.

prohibits a court from expressing its opinion regarding the defendant's guilt during the course of a trial) does not preclude appellate review. Such an alleged error is subject to a plain error review standard.³⁶

In *Walker v. State*,³⁷ the Georgia Supreme Court found that the trial court did not err in denying defendant's motion for mistrial in murder case where trial judge erroneously admitted into evidence the defendant's prior conviction regarding a domestic violence incident. The trial judge gave the jury a curative instruction.

In *Bostick v. State Farm Mutual Automobile Insurance Company*,³⁸ the Eleventh Circuit found that the district court properly removed a juror during jury deliberations who was being verbally abusive and threatening without declaring a mistrial.

In other cases, defendants have been more successful.

A mistrial should have been granted where the State did not give the defendant notice of its intent to refer to a prior trial and period of incarceration, and then referred to such prior trial during the sentencing phase of a murder trial; however, as the error occurred in the sentencing phase, the conviction could be upheld and the mistrial applied only to the sentencing phase.³⁹

Consider *Beck v. State*.⁴⁰ A trial court's rulings were upheld that double jeopardy barred reprosecution of a defendant on charges of child molestation after a mistrial was granted due to the prosecutor's violation of an order that excluded evidence of similar transactions; the trial court orally ruled that the prosecutor had deliberately intended to goad the defense counsel into asking for a mistrial.

The trial court abused its discretion in refusing to grant a mistrial after the prosecutor referred in closing argument to the defendant's driver's license suspension, a fact that had not been admitted into evidence and upon which no basis for admission existed.⁴¹

Trial court did not abuse its discretion in refusing to order a mistrial where the evidence of the defendant's guilt was "overwhelming." Defendant complained that the government had improperly introduced similar transaction evidence. The court

³⁶Hicks v. State, 326 Ga. App. 46, 755 S.E.2d 855 (2014).

³⁷Walker v. State, 306 Ga. 44, 829 S.E.2d 121 (2019).

³⁸Bostick v. State Farm Mutual Automobile Insurance Company, 774 Fed. Appx. 600 (11th Cir. 2019).

³⁹Wright v. State, 255 Ga. 109, 335 S.E.2d 857 (1985).

⁴⁰Beck v. State, 261 Ga. 826, 412 S.E.2d 530 (1992).

⁴¹Chapman v. State, 202 Ga. App. 267, 414 S.E.2d 240 (1991).

held that any error in admitting such evidence was harmless.⁴²

§ 31:2 Right to have mistrial declared

The declaration of a mistrial is not a matter of right, but is addressed to the sound discretion of the court, *Moon v. State*,¹ and that discretion will not be disturbed unless there is some abuse of the discretion.² Generally, a trial court abuses its discretion in denying a mistrial request only when the order of a mistrial is necessary to preserve the right to a fair trial.³

The question of whether the trial court violated the statute prohibiting a judge in a criminal case from expressing his opinion regarding what has been proved is not reached unless an objection or a motion for mistrial is made.⁴

During a poll of the jury, the twelfth juror responded after the jury had announced its verdict that it was not her verdict. The judge returned the jury for further deliberations. A short time later an *Allen*-type charge was given, and a final verdict of conviction was ultimately achieved. Defendant's motion for mistrial after the jury poll as well as motions made later were deemed to be properly denied.⁵

Mistrial was not required when the prosecutor's father, a senior superior court judge, entered the courtroom to observe the trial behind the bench. The father left the co

In *Simmons v. State*,⁶ the trial court did not abuse its discretion when denying defendant's mistrial motion in murder case "in response to 'emotional outbursts' of the victim's family members and friends." In *Shy v. State*,⁷ defendant in murder trial did not have right to have mistrial declared on basis of outburst of victim's mother in court, or fact that victim's sister was visibly upset during trial and fell to floor at one point; court did not err in refusing to declare mistrial where court instructed jury to disregard outburst and to eradicate it from their minds.

A trial court was upheld in failing to direct a mistrial when the district attorney allegedly made improper remarks in the jury's presence where the codefendant's attorney specifically stated that

⁴²Johnson v. State, 294 Ga. 610, 757 S.E.2d 49 (2014).

[Section 31:2]

¹Moon v. State, 120 Ga. App. 141, 169 S.E.2d 632 (1969).

²Hill v. State, 221 Ga. 65, 142 S.E.2d 909 (1965); Wilkins v. State, 291 Ga. 483, 731 S.E.2d 346 (2012).

³Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

⁴Rowe v. State, 266 Ga. 136, 464 S.E.2d 811 (1996).

⁵Rouse v. State, 265 Ga. 32, 453 S.E.2d 30 (1995).

⁶Simmons v. State, 308 Ga. 327, 840 S.E.2d 365 (2020).

⁷Shy v. State, 234 Ga. 816, 218 S.E.2d 599 (1975) (disapproved of on other grounds by, State v. Folsom, 285 Ga. 11, 673 S.E.2d 210 (2009)).

he did not want a mistrial, and the defendant's attorney agreed that a cautionary instruction was sufficient.⁸ The trial court in a civil case may, upon the motion of either party, grant a mistrial for improper remarks of counsel. As an alternative, the court has a duty on objection to improper conduct by counsel to rebuke counsel and endeavor to remove the improper impression from the jurors' minds by proper instructions.⁹

Defendant failed to preserve for appellate review his argument that the trial court erred by denying his motion for mistrial, in prosecution for child molestation, where defendant failed to renew his motion for a mistrial after the trial court gave a curative jury instruction, nor was there a request for additional limiting or curative instructions. The granting or refusing of a motion for mistrial is within the discretion of the trial judge, and the Court of Appeals will not disturb the trial judge's decision absent an abuse of discretion.¹⁰

For cases discussing the conduct of counsel as a potential ground for the opposing party to request a mistrial, see *Gordon v. State*.¹¹

For cases discussing juror conduct as a potential ground for mistrial, see *McCabe v. State*.¹²

§ 31:3 Grounds for declaring mistrial

Among the grounds for a mistrial are the death or serious illness of a party, a juror, or the judge.¹ Death or serious illness in the immediate family of a juror may also warrant the declaration

⁸*Beach v. State*, 258 Ga. 700, 373 S.E.2d 210 (1988).

⁹*Counts v. Moorehead*, 232 Ga. 220, 206 S.E.2d 40 (1974).

¹⁰*Johns v. State*, 253 Ga. App. 207, 558 S.E.2d 426 (2001).

¹¹*Gordon v. State*, 250 Ga. App. 80, 550 S.E.2d 131 (2001) (prosecutor's statements and questioning relating to defendant's pre-arrest and post-arrest silence warranted mistrial); *Shaw v. Brannon*, 253 Ga. App. 673, 560 S.E.2d 289 (2002) (trial court acted within its discretion, in lawsuit by car driver against truck driver and dairy company for injuries sustained in vehicle collision, by issuing curative instruction rebuking counsel, rather than granting mistrial, in response to comments of car driver's lawyer asking jury during closing argument to return verdict of over \$1 million in order to send message to company; trial court rebuked attorney by instructing jury that sending a message was not an issue that the lawyer could go into and that he should make his arguments in other areas); *Cooper v. State*, 372 Ga. App. 75, 903 S.E.2d 770 (2024) (trial court properly exercised its discretion by giving an appropriate curative instruction rather than granting a mistrial after the state improperly placed the defendant's character into evidence with "brief and isolated" references to other crimes).

¹²*McCabe v. State*, 319 Ga. 275, 903 S.E.2d 78 (2024).

[Section 31:3]

¹Am. Jur. 2d, Trial § 1717.

of a mistrial.² Also, a mistrial may be declared when serious illness afflicts a member of the family of one of the attorneys involved in a litigation.³

In *Hightower v. State*,⁴ the Georgia Supreme Court affirmed a trial court's decision to declare a mistrial based on manifest necessity due to a judicial emergency in Fulton County due to COVID-19.

The court may discharge the jury when one or more members of the jury have been guilty of such misconduct as to render their discharge necessary in order to prevent the frustration of the ends of justice or which is of such a nature as reasonably to indicate that a fair and impartial trial cannot be had.⁵

A party may move to withdraw a juror or for a mistrial based upon the misconduct of a juror where that misconduct is of such nature as reasonably to indicate that a fair and impartial trial cannot be had, as where a juror has accepted favors from a party, counsel, or an interested person.⁶

For right to mistrial where juror reads account of case, see § 36:4, *infra*.

Where it appears that a juror, through false answers on voir dire or otherwise, was accepted on the jury when he should not have been, the court may discharge the jury.⁷

An unauthorized separation of the jury or unauthorized absence of a juror may be ground for a mistrial where it seems probable that the jury was tampered with, Am. Jur. 2d, Trial § 1727, but a mere harmless separation of a juror will not require a mistrial.⁸

A jury may be discharged for acts or statements, which would influence their verdict, made in their presence and out of the presence of the court, unless jurors testify that such facts will not influence their verdict and an admonitory instruction is given.⁹

The 11th Circuit found that prosecutor commented that referenced defendant's failure to testify did not warrant habeas relief. Defendant's counsel moved for a mistrial. The prosecutor stated, "Raheem didn't take the stand but you heard his video taped statement. And I submit to you that it ain't true." The 11th Circuit reasoned:

²Am. Jur. 2d, Trial § 1719.

³*Carman v. State*, 304 Ga. 21, 815 S.E.2d 860 (2018).

⁴*Hightower v. State*, 315 Ga. 399, 883 S.E.2d 335 (2023).

⁵Am. Jur. 2d, Trial §§ 1722 to 1726.

⁶*Alabama Great Southern R. Co. v. Brown*, 140 Ga. 792, 79 S.E. 1113 (1913).

⁷Am. Jur. 2d, Trial § 1720.

⁸See § 36:5, *infra*.

⁹Am. Jur. 2d, Trial § 1742.

The prosecutor's comment was made in passing to explain the videotaped testimony; the evidence of Raheem's guilt was overwhelming; and the trial court clearly instructed the jury that it was barred from drawing any inference from Raheem's failure to testify. There is no way to conclude from the record that this passing comment, in context, had a "substantial and injurious effect or influence in determining the jury's verdict."¹⁰

Mistrial not improperly granted when bailiff informed court that a witness had approached and spoken with jurors.¹¹

In *Meadows v. State*,¹² the Georgia Supreme Court found that the trial court improperly declared a mistrial due, in part, to an unsubstantiated account regarding jury deliberations provided by a deputy sheriff. In *Meadows*, the trial court declared a mistrial on account of jury safety. The Georgia Supreme Court held that this conclusion was "at best, only tenuously supported by the record." The Court noted that the trial court's decision was based upon a jury note and several reports by a deputy sheriff regarding contentious deliberations. The Supreme Court reasoned, in part:

what the deputy heard was not perceived by him or by the judge as so dire or dangerous as to require immediate intervention; instead, the deputy left the area outside the jury room to consult with the judge in chambers about what he believed were overly contentious deliberations, and the judge then went to the courtroom to tell the parties that he was declaring a mistrial, before bringing the jurors in. . . . Most significantly, the trial court did nothing to try to confirm the deputy's reports with the jurors by asking if any of them felt the least bit unsafe during their deliberations.

Mention that a state's witness took a polygraph and she "checked out" should have justified a motion for mistrial in *Morris v. State*.¹³

The absence of the accused from a trial where his presence was necessary is ground for discharging the jury.¹⁴

See § 2:3, *supra*, for a discussion of conduct of a party that may give rise to a mistrial.

A mistrial should have been granted after testimony referring to a subject excluded by in limine ruling and where, despite in limine motion by defense attorney and discussion as to proposed redaction of defendant's statement to comply with in limine ruling and instructions by both the court and prosecutor to testify-

¹⁰*Raheem v. GDCP Warden*, 995 F.3d 895 (11th Cir. 2021). 813 S.E.2d 350 (2018).

¹¹*Reed v. State*, 267 Ga. 482, 480 S.E.2d 27 (1997). ¹³*Morris v. State*, 264 Ga. 823, 452 S.E.2d 100 (1995).

¹²*Meadows v. State*, 303 Ga. 507, ¹⁴Am. Jur. 2d, Trial § 1735.

ing detective, the detective gave testimony relating that same information to the jury in another fashion.¹⁵ Disregard of a motion in limine by mentioning excluded material can justify a mistrial.¹⁶ The Supreme Court ruled that defense counsel did not give an adequate notice of alibi in *Tubbs v. State*.¹⁷ After defense counsel went into the subject of alibi during opening statement, the judge declared a mistrial. The Supreme Court approved:

When defense counsel mentions evidence in opening statement despite having failed to give a required notice or make a preliminary showing, the trial court does not abuse its discretion in granting a mistrial. *Laster v. State*, 268 Ga. 172, 486 S.E.2d 153 (1997). “Under these circumstances, the public’s interest in granting the state one fair opportunity to present evidence to an impartial jury outweighs the accused’s right to have his trial completed before a particular jury.” *Laster v. State*, supra at 175(3), 486 S.E.2d 153. “Accordingly, . . . in this case, declaration of a mistrial was not an abuse of discretion and retrial is not barred by double jeopardy. [Cits.]” *Pleas v. State*, 268 Ga. 889, 495 S.E.2d 4 (1998).

Trial court’s comments after animal behaviorist testified did not constitute improper comments on the evidence, and thus defendant was not entitled to a mistrial; testimony of the animal behaviorist, which dealt with whether scratches on defendant’s thigh were made by a cat, as defendant claimed, was at times humorous, the court’s comment was a follow-up on the humor that was felt in the courtroom at the time, and the trial court admonished the jury that its comments were not comments on the evidence and that it meant no disrespect to defense counsel.¹⁸

It was within a trial court’s discretion to refuse a mistrial request when the court opted instead to give an *Allen* charge after the jury twice asked the court “Do we have to agree on all counts or can we be deadlocked on one?” After the charge, the jury returned a unanimous verdict.¹⁹

In *Kessler v. State*,²⁰ the prosecutor allegedly made improper statements regarding sentencing matters during closing arguments, to which defense counsel lodged objections. However, defense counsel moved for a mistrial only after the first of the two objections. The Georgia Supreme Court found that the trial court did not err in denying a mistrial, given that it instructed the jury that it was not to consider sentencing matters in render-

¹⁵*King v. State*, 261 Ga. 534, 407 S.E.2d 733 (1991).

¹⁶*Mazo v. State*, 224 Ga. App. 744, 481 S.E.2d 831 (1997).

¹⁷*Tubbs v. State*, 276 Ga. 751, 583 S.E.2d 853 (2003).

¹⁸*Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004) (overruled on

other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹⁹*Muthu v. State*, 337 Ga. App. 97, 786 S.E.2d 696 (2016).

²⁰*Kessler v. State*, 311 Ga. 607, 858 S.E.2d 1 (2021).

ing its verdict and that sentencing for a judicial function.

Trial court did not err in refusing to grant a mistrial when a government detective impermissibly conversed with some of the jurors during a break in the trial. Though a presumption of prejudice attaches in such a situation, the presumption was overcome beyond a reasonable doubt in this instance. The court explained that “the trial court questioned the detective and the three jurors at issue. All four testified under oath that Russell’s case was not discussed at all, and that the principal topics were unrelated matters of the weather and the detective’s animals. The three jurors affirmed that neither their opinions about the case nor their impartiality had been affected by the brief contact with the detective.”²¹

In *Ford v. State*,²² the Georgia Supreme Court held that trial courts have broad discretion to fashion appropriate remedies for the violation of discovery statutes, including whether to grant a mistrial.

§ 31:4 Effect of disappearance of admitted exhibits during trial

A difficult situation develops when exhibits that have been admitted in evidence disappear before the final arguments and the jury retires to deliberate. It is possible to obtain a mistrial due to the disappearance of exhibits.

District court did not abuse its discretion in child sex crimes case when it admitted six images at trial but then later excluded them. The 11th Circuit concluded that the record failed to “suggest[] that the admission and brief publication of the images created incurable prejudice.”¹

§ 31:5 Disclosure of liability insurance

Evidence of a litigant’s insurance could lead a jury to increase damages, and is error.¹ O.C.G.A. § 24-4-411 bars proof of insurance in most cases.

In an ordinary negligence case, not only is a liability insurance policy of a litigant not admissible in evidence, but disclosure to

²¹*Russell v. State*, 293 Ga. 526, 748 S.E.2d 393 (2013).

²²*Ford v. State*, 319 Ga. 215, 903 S.E.2d 1 (2024); see also *Platt v. State*, 319 Ga. 1, 901 S.E.2d 114 (2024) (trial courts’ broad discretion to grant or deny a mistrial also applies to whether to grant a mistrial as a remedy under O.C.G.A. § 17-6-6).

[Section 31:4]

¹*United States v. Nicholson*, 24 F.4th 1341 (11th Cir. 2022).

[Section 31:5]

¹*Chambers v. Gwinnett Community Hosp., Inc.*, 253 Ga. App. 25, 557 S.E.2d 412 (2001).

the jury of the mere existence of such contract is ground for a mistrial.² The grant of mistrial is not automatic, and “it is only where the testimony is so obviously prejudicial in its nature that its adverse effect cannot be eradicated from the minds of the jury or its consequences avoided by proper cautionary instructions from the court, that a mistrial should be granted.”³

In *Georgia Trails & Rentals, Inc. v. Rogers*,⁴ the Georgia Court of Appeals found that a trial court’s curative instruction remedied a witness’s reference to bedding at his residence having been paid for by an insurance company. “[E]vidence of insurance will rarely be admissible in a personal injury tort action . . . even to counter a false impression created by other testimony. This is because evidence of collateral benefits is readily subject to misuse by a jury.”

An unresponsive or inadvertent answer to a proper question that tends to disclose existence of insurance is not normally ground for a mistrial.⁵

However, if the fact of insurance is brought to the attention of the jury and it is determined that instructions to disregard such fact would not be sufficient to remove the prejudicial effect, then it would be appropriate to grant a mistrial.⁶

An exception to the general rule, that evidence relating to the wealth of the parties and the existence or absence of insurance coverage is inadmissible, occurs when issues concerning those matters are made relevant by the parties.⁷

§ 31:6 Discharge for inability of jury to arrive at verdict

Where there is delay in arriving at the verdict, it is recommended that the jury be brought back into the courtroom in the presence of parties and counsel. The judge, on the record, should ask the foreman if they are able to arrive at a verdict, and if not, the proper instruction should be read to them urging them to listen to each other’s arguments with an open mind and to make every reasonable effort to reach a verdict.

²Central of Georgia R. Co. v. Wooten, 163 Ga. App. 622, 295 S.E.2d 369 (1982); Mintah v. Arms, 251 Ga. App. 572, 555 S.E.2d 466 (2001).

³Woods v. Heath, 372 Ga. App. 22, 903 S.E.2d 705 (2024).

⁴Georgia Trails & Rentals, Inc. v. Rogers, 359 Ga. App. 207, 855 S.E.2d 103 (2021).

⁵Steinmetz v. Chambley, 90 Ga. App. 519, 83 S.E.2d 318 (1954).

⁶Heinz v. Backus, 34 Ga. App. 203, 128 S.E. 915 (1925).

⁷See Whelan v. Moone, 242 Ga. App. 795, 531 S.E.2d 727 (2000) where defendant asserted that the plaintiff’s damages could have been avoided if the plaintiff had followed the defendant’s recommendation to have the surgery, evidence that the plaintiff could not afford the surgery is admissible.

The *Allen* charge informs a deadlocked jury that absolute certainty cannot be expected, that the case will have to be retried using the same evidence, and that the minority ought to give more weight to the opinions of the majority. It can be phrased so that it is “mild” or “strong,” depending upon how strongly it urges dissenting jurors to accede to the will of the majority. It has been approved in many states and in the federal courts.¹

After the jury has deliberated a substantial time and they seem unable to reach a verdict, an *Allen* charge might be appropriate. The charge must be given so as not to be coercive; it must not cause a juror to abandon an honest conviction for reasons other than those based upon the trial or the other juror’s arguments. However, when an *Allen* charge is unsuccessful and the trial is hopelessly deadlocked, a mistrial is necessary.² After an *Allen* charge, the accused is entitled to have the jury remain together a reasonable length of time before they are discharged for inability to agree on a verdict.³ Mere inability to agree is not the test. It must appear, from the length of time they have been deliberating and their inability to agree, that it may fairly be presumed that they will never agree.⁴

Regarding modified *Allen* charges, the 11th Circuit made the following observations:

In the larger debate over modified *Allen* charges, two other points deserve mention.

First, modified *Allen* charges sometimes help the defendant. The reported decisions almost all involve convictions not because the charges always help the government but because when they help the defendant—when the jury keeps deliberating and returns a not-guilty verdict—the government cannot appeal; the acquittal ends the case, and no opinion is written Mr. Davis objected to the *Allen* charges here, but many defendants in other cases have asked that such a charge be given and that deliberations continue. Acquittals have sometimes resulted.

Second, declaring a mistrial can impose a cost not just in time and resources but in the quality of justice. Cross-examinations may be best when conducted just once, without a dress rehearsal. Sometimes a second trial is better, but often it is not. So it is best not to declare a mistrial too soon. Knowing how soon is too soon is not always easy. Have the jurors run the issues to ground, or are they bailing out early? Are they still communicating, or are they so mad at one another that further progress is unlikely? A district judge, watching the jurors file back into the courtroom and looking them

[Section 31:6]

¹*Allen v. U.S.*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896) as stated in *Williams v. State*, 322 Md. 35, 585 A.2d 209 (1991).

²*Wells v. State*, 297 Ga. App. 153, 676 S.E.2d 821 (2009).

³Am. Jur. 2d, Trial § 1744.

⁴Am. Jur. 2d, Trial § 1744.

in the eye, can make a better judgment on this than an appellate court reading the cold record. We are rightly slow to second guess a district court's exercise of discretion on these issues.⁵

The trial court in *Sanders v. State*⁶ did not err in giving the jury a pattern *Allen* charge after eight hours of deliberation, even though the jury foreman indicated that another 20 minutes of discussion would in fact be fruitful to reaching a verdict.

In *U.S. v. Anderson*,⁷ the 11th Circuit found that a district court's minor deviations from the circuit's pattern instructions regarding *Allen* charges was not coercive. The court found that the district judge's use of "synonymous or near-synonymous terms and phrases" did not "render the court's modified *Allen* charge any more confusing or coercive than the pattern instruction."

In *Burchette v. State*,⁸ the Georgia Supreme Court held that, although a portion of the charge given was inaccurate and should no longer be given in criminal trials, considering the *Allen* charge as a whole, it was not impermissibly coercive.

Claims that an *Allen* charge was coercive were rejected in *Gamble v. State*⁹ and *United States v. Castronuovo*.¹⁰

It was not error for a trial court to retry the felony murder charge against the defendant where the jury deadlocked on the felony murder count but convicted the defendant on the underlying felonies supporting the felony murder charge. The Georgia Supreme Court held that the felony murder count was a greater offense to which jeopardy did not attach, even though the lesser offenses were related to the felony murder offense.¹¹

A defendant was not entitled to have an "Allen" charge given a second time when one juror remained unwilling to reach a verdict in murder trial.¹² No manifest necessity to terminate trial over defendant's objection was found where jury deliberated only 13 minutes and jury foreman indicated that jury probably could have reached verdict.¹³ No abuse of discretion was found in giving the "Allen" charge to a jury which announced that it was a hung

⁵U.S. v. Davis, 779 F.3d 1305 (2007).
(11th Cir. 2015).

⁶*Sanders v. State*, 290 Ga. 445, 721 S.E.2d 834 (2012).

⁷*United States v. Anderson*, 1 F.4th 1244 (11th Cir. 2021).

⁸*Burchette v. State*, 278 Ga. 1, 596 S.E.2d 162 (2004).

⁹*Gamble v. State*, 291 Ga. 581, 731 S.E.2d 758 (2012). See also *Lowery v. State*, 282 Ga. 68, 646 S.E.2d 67

¹⁰*U.S. v. Castronuovo*, 649 Fed. Appx. 904, 100 Fed. R. Evid. Serv. 470 (11th Cir. 2016).

¹¹*Smith v. State*, 292 Ga. 478, 738 S.E.2d 621 (2013).

¹²*Burleson v. State*, 259 Ga. 498, 384 S.E.2d 659 (1989).

¹³*Cobb v. State*, 246 Ga. 619, 272 S.E.2d 296 (1980).

jury after it had been out two hours.¹⁴ The decision whether or not or when to give the “Allen” charge is within the sound discretion of the trial judge.¹⁵

It was not error for the court to give an “Allen” charge after several hours of jury deliberation, even though the jury had not given any indication that it was deadlocked.¹⁶ A judge can refuse to order a mistrial and an *Allen* instruction can be given in Georgia when jurors send out a note that they are deadlocked, and this includes situations where the judge inquires into the numerical split, as long as she does not inquire (in a criminal case) how many are for “guilty” and how many for “not guilty.”¹⁷

In *Smith v. State*,¹⁸ the Georgia Supreme Court found that trial judge properly refused to grant a mistrial in a felony murder case. Defendant alleged that a mistrial request submitted during the jury deliberation phase was warranted since the jurors were hopelessly deadlocked. The trial court denied the motion and instead instructed them to continue their deliberations and gave a modified *Allen* charge. The Supreme Court reasoned, in part, that the trial lasted almost a week, that the jury had indicated it was in a stalemate after only one afternoon of deliberations, that the jurors were “quite communicative” with the court during their deliberations, that the *Allen* charge provided by the court was appropriate, and the instructions to the jury to continue their deliberations were not coercive.

In *Bannister v. State*,¹⁹ the Georgia Supreme Court found that the trial court did not err in denying defendant’s mistrial motion after the jury announced it could not reach a decision. The Court noted that after five days of evidence and six hours of deliberation there were two hold-out jurors. After at least another five hours of deliberation the jury indicated that it was deadlocked. Thereafter an *Allen* charge was provided and the jurors again deliberated. The jurors eventually convicted the defendant of some crimes and acquitted him of others.

§ 31:7 Insufficient grounds for declaring mistrial

Where defense counsel failed to move for a change of venue, his later motion for a mistrial, after the prosecution rested, on the ground that the case was tried in the newspapers was properly

¹⁴*Griner v. State*, 162 Ga. App. 338 S.E.2d 274 (1986).
207, 291 S.E.2d 76 (1982).

¹⁵*Epps v. State*, 168 Ga. App. 79, 308 S.E.2d 234 (1983) (jury out two hours, giving *Allen* charge not erroneous).

¹⁶*Kilpatrick v. State*, 255 Ga. 344,

¹⁷*Gibson v. State*, 272 Ga. 801, 537 S.E.2d 72 (2000).

¹⁸*Smith v. State*, 302 Ga. 717, 808 S.E.2d 661, 664 (2017).

¹⁹*Bannister v. State*, 306 Ga. 289, 830 S.E.2d 79 (2019).

denied.¹ Improper comments by the court do not normally warrant the discharge of the jury, Am. Jur. 2d, Trial § 1733, nor is the misconduct of counsel normally ground for discharging the jury if the nature of such misconduct is such that its effect can be cured by an admonition to the jury.²

When will a mistrial be declared because the jury was exposed to prejudicial information? In *Banks v. State*,³ the trial judge denied a motion for mistrial. The Georgia Supreme Court, citing a related case, stated the guidelines:

When prejudicial matter is improperly presented to the jury, a mistrial is appropriate if it is essential to preserve the defendant's right to a fair trial. [Cit.] It is for the trial court to determine whether the granting of a mistrial is the only corrective measure or whether any prejudice can be corrected by withdrawing the testimony from the jury's consideration under proper instruction from the court.⁴

Sometimes jurors read about a trial in a newspaper after they have been selected to be on the jury. In a 2005 case a juror's exposure to a newspaper article recounting events of the first day of the trial did not warrant the mistrial in the prosecution for malice murder. The jurors stated that article did not affect their ability to fairly and impartially decide the case, jurors did not discuss the matter, and the article merely contained a summary of the first day of the trial and did not contain any prejudicial information to which jurors had not been exposed during the first day.⁵ When jurors have been exposed to news material concerning a case, the decision whether to grant a mistrial is within the trial court's discretion.

Similarly, the Georgia Supreme Court reached the same result in *Sanders v. State*,⁶ where the court found a mistrial was not warranted based upon the fact that some of the jurors were familiar with the case based upon a article in a local newspaper.

A trial court did not abuse its discretion in denying a motion for a mistrial lodged during jury selection. In *Murray v. State*,⁷ "[d]uring jury deliberations, one of the jurors informed the court that he might be uncomfortable rendering a decision because he recognized Murray's wife as a cashier at a store where he shops."

[Section 31:7]

¹Hooks v. State, 215 Ga. 869, 114 S.E.2d 6 (1960).

²Am. Jur. 2d, Trial § 1736.

³Banks v. State, 281 Ga. 678, 642 S.E.2d 679 (2007).

⁴Brown v. State, 278 Ga. 544, 548(7), 604 S.E.2d 503 (2004).

⁵Washington v. State, 279 Ga. 722, 620 S.E.2d 809 (2005).

⁶Sanders v. State, 299 Ga. 639, 791 S.E.2d 37 (2016).

⁷Murray v. State, 328 Ga. App. 192, 761 S.E.2d 590 (2014).

During questioning by the court, the juror indicated that he could render a fair and impartial verdict. Given this response, the trial court denied the mistrial motion and permitted the juror to return to deliberations. The Court of Appeals of Georgia noted “that a mistrial would not have been an appropriate remedy in this situation; rather, the proper remedy, if necessary, would have been replacement of the juror with an alternate.”

The Georgia courts continue to promulgate standards respecting grants and denial of mistrial motions.

The Supreme Court of Georgia has observed that “[t]he propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial cannot be determined by the application of any mechanical formula.”⁸

The Supreme Court of Georgia found in *Bedford v. State*⁹ that a trial court did not err in refusing to grant defendant’s motion for a mistrial based upon prosecutor comments made during closing argument. No objection was lodged at the time the comments were uttered. Instead, an objection was lodged only after the prosecutor had completed summation and after the jury had departed from the courtroom. The court found that the motion was untimely.

Although consideration of a mistrial is frequently triggered by a party’s motion, if there is a manifest necessity for a mistrial, a trial court is required to act sua sponte.¹⁰

In another case where there was an absence of proof on a matter mentioned by a prosecutor in opening, mistrial was not required. Although a prosecutor should confine her opening statement to an outline of what she expects to prove, the fact that there was a failure of a witness with personal knowledge of the very point made by the prosecutor to appear at trial was not fatal to the State. Other evidence on the point had come out at trial, rendering the trial court’s denial of a motion for mistrial to be not reversible error.¹¹

The mere fact that the judge erroneously comments upon the evidence does not create a necessity authorizing the discharge of a jury.¹²

Prosecutor’s comments to jury that they should not acquit

⁸Laguerre v. State, 301 Ga. 122, 799 S.E.2d 736 (2017).

⁹Bedford v. State, 311 Ga. 329, 857 S.E.2d 708 (2021).

¹⁰Prescott v. State, 357 Ga. App. 375, 850 S.E.2d 812 (2020) (trial court did not err in failing to grant mistrial; defendant failed to submit a motion and failed to identify any prejudicial

statements); Wright v. State, 276 Ga. 419, 577 S.E.2d 782 (2003) (but mistrial not required in this case even if defense had moved for that relief).

¹¹Ramirez v. State, 276 Ga. 249, 577 S.E.2d 558 (2003).

¹²Oliveros v. State, 120 Ga. 237, 47 S.E. 627 (1904).

defendant, as this would reward him for escaping from jail, was not grounds for a mistrial; a solicitor may argue that necessity for enforcement of the law and has considerable latitude of expression in this regard.¹³ In *United States v. Moran*,¹⁴ the 11th Circuit held that a district court did not abuse its discretion in denying a motion for mistrial based upon prosecutor statements during closing arguments. It was argued that the prosecutor had, inter alia, implied that the defense attorneys were aware of their clients' guilt. The district court sustained the objection and gave a curative instruction. The 11th Circuit deemed the instruction to be sufficient, concluding that the comments did not substantially prejudice the defendants.

Motion for mistrial was properly denied based upon questions posed by prosecutor during voir dire to prospective jurors regarding their willingness to hold participants to a crime equally culpable and whether they had any knowledge of the case.¹⁵

In *Fleming v. State*,¹⁶ the Supreme Court of Georgia found that the trial court did not abuse its discretion in denying defendant's mistrial motion based on the failure of the trial judge to sua sponte declare a mistrial. Defendant claimed that the prosecutor's closing argument was improper in that it raised matters that had not been admitted into evidence. The Court noted that the prosecutor improperly "played a portion of Tupac Shakur's song for the jury," and that the defendant's objection was sustained. The Court concluded that there was no duty upon the court to rebuke the prosecutor, and even if there was such a duty, it was harmless error. Thus, the trial court did not err "by not declaring a mistrial sua sponte."

In case involving abuse of a disabled adult, victim was asked while on the witness stand to identify her attacker. She responded that he was wearing "prison clothes." Actually, the defendant was dressed in civilian attire. An objection was lodged and a motion for a mistrial was submitted. The Georgia Court of Appeals affirmed the defendant's conviction and commented that "not only did additional testimony establish that Cawthon was not wearing prison clothes, the jury could see what he was wearing for themselves."¹⁷

In *Kimbro v. State*,¹⁸ the Georgia Supreme Court held that a

¹³Johnson v. State, 246 Ga. 126, 269 S.E.2d 18 (1980).

¹⁴U.S. v. Moran, 778 F.3d 942, 96 Fed. R. Evid. Serv. 1065 (11th Cir. 2015).

¹⁵Herrington v. State, 300 Ga. 149, 794 S.E.2d 145 (2016).

¹⁶Fleming v. State, 306 Ga. 240, 830 S.E.2d 129 (2019).

¹⁷Cawthon v. State, 350 Ga. App. 741, 830 S.E.2d 270 (2019).

¹⁸Kimbro v. State, 317 Ga. 442, 893 S.E.2d 678 (2023). See also Perkins v. State, 313 Ga. 885, 873 S.E.2d 185

trial court did not abuse its discretion when it denied a motion for mistrial when an investigator testifying for the state made a brief reference to serial killers, and the trial court immediately and thoroughly instructed the jury to disregard the reference.

The 11th Circuit held in *United States v. Barsoum*,¹⁹ that a trial court did not abuse its discretion when it refused to grant a mistrial on account of a prosecutor's remarks in the presence of the jury. In *Barsoum*, defense counsel lodged an objection in regards to Federal Rule of Evidence 801(d)(2)(E). In response, the prosecutor made certain statements in the presence of the jury arguing that, in his opinion, the government had established a conspiracy. The trial court ultimately provided a curative jury instruction, which instructed the jury that it was their duty to determine the existence of the conspiracy, and that comments by the litigators is not evidence. The 11th Circuit held:

A defendant must show substantial prejudice to be granted a mistrial. Substantial prejudice occurs where there is a reasonable probability that, without the remarks, the result of the trial would have been different. However, "when a district court gives a curative instruction, [we] will reverse only if the evidence is so highly prejudicial as to be incurable by the [instruction]." We cannot conclude that the prosecutor's remark was so highly prejudicial that it could not be cured by an instruction. This is the exact circumstance for which curative instructions are intended. Especially where, as here, the defendant helped formulate the instruction given, and where that instruction specifically identified the prosecutor's controversial statement and reminded the jury that it was their decision whether or not a conspiracy had been proved, the instruction cured any prejudice. Because the instruction eliminated any reasonable probability that the result of the trial would have been different, we affirm. [Citations omitted.]

Trial judge's instructions to jury to disregard statement by prosecutor as to his personal belief in defendant's guilt were sufficient to support denial of motion for mistrial.²⁰

The Eleventh Circuit found that a district court did not err in denying defendant's mistrial request after a prosecutor stated during rebuttal argument that the defense "also had subpoena power." The prosecutor's statement was responsive to a statement by defense counsel "that the government had failed to subpoena phone records or the pictures testified about at trial."²¹

In a conspiracy to obstruct justice case, the Eleventh Circuit found that the district court did not err when it denied defendant's

(2022).

¹⁹U.S. v. Barsoum, 763 F.3d 1321 (11th Cir. 2014).

²⁰Hoerner v. State, 246 Ga. 374,

271 S.E.2d 458 (1980).

²¹United States v. Alvarez, 732 Fed. Appx. 729 (11th Cir. 2018).

motion for mistrial based, in part, upon the prosecutor's references to guilty pleas having been entered by other individuals connected to the case.²²

Trial court did not err when it denied mistrial motion after prosecutor stated that defense counsel was attempting to deceive the jury. The Georgia Supreme Court noted that the jury did not appear to "take the 'deceiving' remark seriously," and the trial court twice provided the jury with curative jury instructions.²³

Trial court did not abuse its discretion in denying mistrial motion when after witness testified to improper character evidence the court sustained defendant's objection and gave a curative limiting instruction.²⁴

In *Pinkney v. State*,²⁵ the Georgia Court of Appeals held that trial court did not err in denying defendant's mistrial motion when defense counsel made misstatements during his opening statements, when such misstatements were arguably attributable to the government, where an investigator witness's testimony corrected the misstatement, and where the court instructed the jury that comments made by counsel during opening and closing statements are not evidence.

In *Evans v. State*,²⁶ the Georgia Court of Appeals found that the trial court acted within its discretion when it refused to grant a motion for mistrial where the trial court instructed the jury to disregard improperly admitted similar occurrence evidence, as well as evidence admitted in regard to additional counts which dismissed pursuant to a directed verdict.

In *Thomas v. State*,²⁷ the Georgia Court of Appeals found that the trial court acted within its discretion when it denied defendant's motion for a mistrial based upon the alleged improper introduction of character evidence. Defendant had been convicted of aggravated assault, robbery, and kidnapping, among other crimes, and had alleged that the prosecution had improperly introduced evidence of his character when it admitted testimony indicating that stolen electronic items had been recovered from his vehicle.

A defendant's mistrial motion was properly denied, even though the jury foreman slept through more than half of the jury instructions, because the defendant did not object until after a guilty

²²United States v. Pegg, 812 Fed. Appx. 851 (11th Cir. 2020).

²³Jordan v. State, 305 Ga. 12, 823 S.E.2d 336 (2019).

²⁴Dorsey v. State, 331 Ga. App. 486, 771 S.E.2d 167 (2015).

²⁵Pinkney v. State, 332 Ga. App. 727, 774 S.E.2d 770 (2015).

²⁶Evans v. State, 328 Ga. App. 16, 761 S.E.2d 443 (2014).

²⁷Thomas v. State, 355 Ga. App. 111, 843 S.E.2d 1 (2020).

verdict had been returned.²⁸

Where a witness mentioned that a criminal defendant had taken a lie detector test and the test was not admitted into evidence, no mistrial was necessary as no inferences were raised concerning the test results.²⁹

The trial court did not err in denying a motion for mistrial after the defendant's arresting officer, on cross-examination, said that the defendant told him what had happened "as calmly as could be expected after you just murdered someone," since the court admonished the officer and gave the jury a curative instruction.³⁰

In *Johnson v. State*,³¹ the Georgia Court of Appeals found there was no abuse of discretion where a trial court refused to declare a mistrial after a letter written by the defendant to the victim was introduced into evidence. The appeals court declared that the court could have properly declared a mistrial had just circumstances been presented. However, it concluded that "it was not an abuse of discretion to deny [the defendant's] motion for mistrial and instead grant a continuance to permit the defense time to adjust his trial strategy in light of the letter, particularly given that [the defendant] wrote the letter."

Although a police officer improperly put the defendant's character into evidence by referring to his prior arrests, a mistrial was not required where the court cured the error by instructing the jury to disregard the testimony.³² Evidence admitted at trial that the defendant had spent time in jail in connection with his current case did not constitute impermissible character evidence warranting a mistrial.³³ In *Mitchell v. State*,³⁴ the Georgia Court of Appeals held the trial court did not err in denying defendant's motion for mistrial based upon an officer's "passing reference" to the defendant's pretrial incarceration status.

Outcries and emotional disturbances by spectators do not

²⁸*Foster v. State*, 255 Ga. 425, 339 S.E.2d 256 (1986).

²⁹*White v. State*, 255 Ga. 210, 336 S.E.2d 777 (1985).

³⁰*Allen v. State*, 259 Ga. 303, 379 S.E.2d 513 (1989).

³¹*Johnson v. State*, 328 Ga. App. 702, 760 S.E.2d 682 (2014).

³²*Lewis v. State*, 255 Ga. 681, 341 S.E.2d 434 (1986).

³³*Rivers v. State*, 296 Ga. 396, 768 S.E.2d 486 (2015) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

³⁴*Mitchell v. State*, 337 Ga. App. 841, 789 S.E.2d 797 (2016) (disapproved of on other grounds by, *Quiller v. State*, 338 Ga. App. 206, 789 S.E.2d 391 (2016)). See also *Jordan v. State*, 303 Ga. 709, 814 S.E.2d 682 (2018) ("[A] passing reference to defendant's incarceration does not place his character in evidence."); *Wade v. State*, 304 Ga. 5, 815 S.E.2d 875 (2018) (witness's "statements simply referenced Appellant's prior incarceration; and the trial court provided a curative instruction, which the jury is presumed to have followed").

require the discharge of the jury, Am. Jur. 2d, Trial §§ 1738, 1739, nor is a mistrial required where counsel is unable to produce testimony.³⁵

No grounds for a mistrial will be found where displays of emotion by a spectator do not interrupt or interfere with the orderly proceedings of trial or attract the attention of the jury.³⁶

A mistrial was not required where a spectator cried out “I hope they burn both of you,” but the judge had the spectator immediately removed, and then questioned the jury and gave them appropriate instructions.³⁷

Court properly denied mistrial motion based upon state’s purported comment upon defendant’s right to invoke counsel and right to remain silent. The court reasoned that “[t]he prosecutor’s question, though highly improper, suggested only that Appellant may have, or ‘reportedly,’ requested an attorney, and there was no response from Dr. Boyer. To the extent that the jury could have inferred that Appellant had requested an attorney, we cannot say that such an inference was particularly prejudicial or, as Appellant asserts, detrimental to his defense.”³⁸

Courts continue to deal with outbursts from spectators. In *Wright v. State*,³⁹ an outburst by the victim’s mother in a murder case did not require a mistrial. The judge eventually ordered the mother from the courtroom, and also forbade the wearing of T-shirts by spectators which bore the victim’s picture.

In *Thompson v. State*,⁴⁰ the Supreme Court of Georgia found that the trial court did not err in denying a motion for mistrial after a witness on cross-examination “said repeatedly, over the trial court’s reprimands, ‘Y’all done killed somebody’ and ‘Y’all going to hell.’” The Supreme Court referenced the “lengthy” curative instruction provided by the trial court.

In *Walker v. State*,⁴¹ the Georgia Court of Appeals found that the trial court did not abuse its discretion when it denied a motion for mistrial after hearsay testimony was improperly introduced in contravention of an earlier court order. The appellate court observed, inter alia, that the court provided a curative

³⁵Am. Jur. 2d, Trial § 1745.

³⁶*Battle v. State*, 254 Ga. 666, 333 S.E.2d 599 (1985).

³⁷*White v. State*, 255 Ga. 210, 336 S.E.2d 777 (1985).

³⁸*Ragan v. State*, 299 Ga. 828, 792 S.E.2d 342 (2016).

³⁹*Wright v. State*, 276 Ga. 419, 577 S.E.2d 782 (2003).

⁴⁰*Thompson v. State*, 304 Ga. 146, 816 S.E.2d 646 (2018).

⁴¹*Walker v. State*, 295 Ga. 688, 763 S.E.2d 704 (2014). See also *Mangram v. State*, 304 Ga. 213, 817 S.E.2d 682 (2018) (upholding trial court’s denial of mistrial motion; witness made hearsay statement referencing a “bounty” on victim but trial court gave sufficient curative instruction).

jury instruction, that the government attorney did not “intend . . . to elicit the fleeting testimony at issue,” that there was no mention of co-defendant Flowers, and there was “substantial other evidence” to prove what was said by testifying witness.

In *Freeman v. State*,⁴² the Georgia Court of Appeals held that the trial court did not abuse its discretion in refusing to grant a mistrial in regard to the government’s “access to real-time court reporting via an Internet feed on a laptop at counsel’s table.” The appellate court reasoned that defense counsel had been aware of the system’s existence, that defense counsel had not requested access to it, that the government had not concealed its employment of the system, that the trial court had been unaware that government counsel, but not defense counsel, had been availing itself of the system, that defense counsel “was able to see and hear everything in the courtroom,” that defense counsel, upon request, was afforded access to the system, and that defense counsel could not identify how he was harmed.

See §§ 3:1 et seq., for a discussion of voluntary and involuntary dismissals. Mistrial declarations and double jeopardy, see § 31:1, *supra*.

⁴²*Freeman v. State*, 328 Ga. App. 756, 760 S.E.2d 708 (2014).

Chapter 32

Directed Verdict

- § 32:1 Right of court to direct verdict
- § 32:2 Procedure in moving for directed verdict
- § 32:3 Determining right to directed verdict
- § 32:4 Directing verdict for variance
- § 32:5 Permitting amendments to conform to evidence
- § 32:6 Negligence and contributory negligence as questions of law or fact
- § 32:7 Willful and wanton misconduct; law or fact
- § 32:8 Motion by both parties for directed verdict
- § 32:9 Ruling on motion for directed verdict
- § 32:10 Duty of jury to render verdict as directed

§ 32:1 Right of court to direct verdict

Under proper circumstances, the court may direct a verdict in favor of either party, even though the effect of such action is to deprive a party of his right to a jury trial.¹

The court has authority to direct a verdict when the law allows it.² It may direct a verdict on its own motion.³

A directed verdict is appropriate when there is no conflict in the evidence as to any material issue, and the evidence introduced, construed most favorably to the party opposing the motion, demands a particular verdict.⁴ In considering motion for a directed verdict, the court must view the evidence in the light most favorable to the nonmovant.⁵

Even in instances where such evidence can be characterized as “slight,” such evidence is sufficient to defeat a directed verdict

[Section 32:1]

¹See *Crowe v. Holloway Development Corp.*, 114 Ga. App. 856, 152 S.E.2d 913 (1966).

²O.C.G.A. § 9-11-50.

³See *North Georgia Feed & Poultry Co. v. Ultra-Life Laboratories*, 118 Ga. App. 149, 162 S.E.2d 803 (1968); *Kelly v. Chrysler Corp.*, 129 Ga. App. 447, 199 S.E.2d 856 (1973).

⁴*Jordan v. H. J. Russell & Company*, 371 Ga. App. 8, 899 S.E.2d 514 (2024); *Thompson v. Ledbetter*, 254 Ga. App. 179, 561 S.E.2d 476 (2002).

See *Ramcke v. Georgia Power Co.*, 306 Ga. App. 736, 703 S.E.2d 13, 15 (2010).

⁵*Miranda v. Fulton DeKalb Hosp. Authority*, 284 Ga. App. 203, 644 S.E.2d 164 (2007).

motion.⁶

Cases standing for the proposition that a motion for a directed verdict should be granted where there is no conflict in evidence as to any material issue, and evidence introduced, with all reasonable deductions therefrom, demands a particular verdict include *Johnson v. Hodge*.⁷

It appears that the court has power to partially direct a verdict.⁸

When, in a criminal case, at the close of the State's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the Court may and on motion of the defendant shall make a finding or direct the jury to return a verdict of not guilty, enter a judgment of acquittal and discharge the defendant.⁹

It is error to refuse to direct verdict for acquittal where evidence demands a verdict of not guilty.¹⁰ Regardless of the trial court's use of "new trial" nomenclature, the court in effect granted a directed verdict where the essence of its ruling was to find as a matter of law that there was no evidence that the defendant had committed the alleged trespass.¹¹

The court must grant a directed verdict where plaintiff's claims arise from the breach of an agreement that is unenforceable as a matter of law.¹²

Trial court was reversed for directing a verdict of acquittal based upon an incorrect date where the accusation did not allege that the date was material.¹³

In breach of contract action, trial court, which denied defendant's motion for directed verdict, erred in concluding that plaintiff and his incorporated business were not separate entities.

⁶*Rivers v. South Auction and Realty*, 351 Ga. App. 179, 830 S.E.2d 636 (2019).

⁷*Johnson v. Hodge*, 223 Ga. App. 227, 477 S.E.2d 385, 31 U.C.C. Rep. Serv. 2d 781 (1996) (because the undisputed evidence showed that the plaintiff did not meet his duty to seek enforcement of the instrument within the applicable statute of limitations, the trial court erred in failing to direct the verdict for the defendant); *Andrews v. Rentz*, 266 Ga. 782, 470 S.E.2d 669 (1996) (evidence fell short of showing a lack of testamentary capacity and thus the trial court properly directed verdict on issue); *Morey v. Brown Mill Co.*, 220 Ga. App. 256, 469 S.E.2d 387 (1996) (evidence demanded verdict for the merchant, and thus the trial court

was correct in granting the merchant's motion).

⁸*Georgia Chemical Works v. Malcolm*, 186 Ga. 275, 197 S.E. 763 (1938); *Brackett v. Cartwright*, 231 Ga. App. 536, 499 S.E.2d 905 (1998) (affirming trial court's grant of partial directed verdict on damages).

⁹O.C.G.A. § 17-9-1.

¹⁰*Barnes v. State*, 245 Ga. 609, 266 S.E.2d 212 (1980).

¹¹*State v. Seignious*, 197 Ga. App. 766, 399 S.E.2d 559 (1990).

¹²*Fellows v. All Star, Inc.*, 272 Ga. App. 262, 612 S.E.2d 86 (2005).

¹³*State v. Swint*, 284 Ga. App. 343, 643 S.E.2d 840 (2007).

Thus, the lower court erred when it allowed a jury “to award [the plaintiff] costs incurred by the [incorporated entity] in establishing its business.”¹⁴

In *State v. Lewis*,¹⁵ the Georgia Court of Appeals found that a trial court that dismissed a criminal action prior to trial against the defendant (seemingly as directed verdict, though there was some uncertainty in the record) acted “without authority to act as it did.” The court stated that “neither the trial court nor this Court can undertake an analysis of the sufficiency of the evidence prior to trial.”

In reviewing a motion for directed verdict, the trial and appellate courts have the same basic task: each must determine as a matter of law whether the evidence was sufficient under the clear and convincing standard.¹⁶

§ 32:2 Procedure in moving for directed verdict

The motion for a directed verdict should contain specific grounds.¹

A motion for directed verdict will be lost unless it is made with specificity. In *Dearing v. A.R. III, Inc.*,² when the judgment debtor’s wife aimed her motion for directed verdict at judgment creditor’s entire fraudulent transfer case, but the evidence was sufficient to support that case on one of two grounds for finding fraudulent conveyance, the trial court properly denied directed verdict motion.

The timing of the motion is important. The motion may be made at the close of the opponent’s evidence or at the conclusion of the case.³ When the plaintiffs moved for a directed verdict at the close of their evidence, the motion was untimely.⁴ In *Georgia Farm Bureau Mut. Ins. Co. v. Hyers*,⁵ a motion for a directed verdict made after the jury was charged and had begun deliberations was untimely.

There is no requirement to move for directed verdict at the

¹⁴Georgia Dermatologic Surgery Centers, P.C. v. Pharis, 339 Ga. App. 764, 792 S.E.2d 747 (2016).

¹⁵State v. Lewis, 350 Ga. App. 506, 829 S.E.2d 785 (2019).

¹⁶Ambling Management Co. v. Purdy, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

[Section 32:2]

¹See O.C.G.A. § 9-11-50.

²Access Management Group, L.P.

v. Hanham, 345 Ga. App. 130, 812 S.E.2d 509 (2018), judgment rev’d in part on other grounds, 305 Ga. 414, 825 S.E.2d 217 (2019); *Dearing v. A.R. III, Inc.*, 266 Ga. 301, 466 S.E.2d 565 (1996).

³O.C.G.A. § 9-11-50(a).

⁴Hall v. Lofton, 275 Ga. 162, 563 S.E.2d 128 (2002).

⁵Georgia Farm Bureau Mut. Ins. Co. v. Hyers, 291 Ga. App. 316, 661 S.E.2d 682 (2008).

close of all the evidence, if a motion for directed verdict was previously requested at the close of the opposing party's evidence.⁶

§ 32:3 Determining right to directed verdict

On a motion for directed verdict the evidence must be construed in the light most favorable to the party against whom the motion is sought.¹ A directed verdict is authorized only when there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a particular verdict.²

The granting of a directed verdict is a very grave matter since, by such act, the case is taken away from the jury, and the court substitutes its own judgment for the combined judgment of the jury.³ The court must therefore view the evidence in the light most favorable to the party against whom the motion is sought, or the party who secured the jury verdict.⁴

Neither directed verdicts nor a j.n.o.v. should be granted when the evidence is in conflict. Rather, such verdicts should be rendered only when no evidence exists to support the jury's verdict.⁵

If the plaintiff has made out his case and no evidence tending to contradict it is offered, the court has a duty to direct a verdict.⁶

A verdict based on speculation is improper, and it is improper to direct a verdict where the expert testimony that forms the support for it is based on speculation.⁷

Under the "self-contradictory testimony rule," the testimony of a party who testifies on her behalf at trial is construed against her whenever it is self-contradictory, and whenever the only evidence in support of a claim is such testimony, the other party is entitled to a directed verdict.⁸

A party may, by his own testimony, conclusively bar his claim

⁶*Lexmark Carpet Mills, Inc. v. Color Concepts, Inc.*, 261 Ga. App. 622, 583 S.E.2d 458 (2003).

[Section 32:3]

¹*Reiss v. Howard Johnson's, Inc.*, 121 Ga. App. 119, 173 S.E.2d 95 (1970).

²*Lanier Home Center, Inc. v. Underwood*, 252 Ga. App. 745, 557 S.E.2d 76 (2001).

³*Service Merchandise, Inc. v. Jackson*, 221 Ga. App. 897, 473 S.E.2d 209 (1996); *Kroger Co. v. Schoenhoff*, 324 Ga. App. 619, 751 S.E.2d 438 (2013).

⁴*Outdoor Systems, Inc. v. Woodson*, 221 Ga. App. 901, 473 S.E.2d 204 (1996).

⁵*Scapa Dryer Fabrics, Inc. v. Knight*, 332 Ga. App. 82, 770 S.E.2d 334 (2015), judgment rev'd on other grounds, 299 Ga. 286, 788 S.E.2d 421 (2016).

⁶*Lansdale Clothes, Inc. v. Wright*, 217 Ga. 817, 125 S.E.2d 502 (1962).

⁷*See City of Atlanta v. Hightower*, 177 Ga. App. 140, 338 S.E.2d 683 (1985).

⁸*James v. Georgia Department of*

or defense. It is for the court to determine whether a plaintiff, whose only evidence is his own contradictory testimony, has offered an explanation for the contradiction that is reasonable enough to avoid summary judgment or directed verdict.⁹

A criminal defendant was entitled to a directed verdict where the legislature repealed the law under which he was charged without including a saving clause.¹⁰

In civil action alleging malicious prosecution, false imprisonment, and intentional infliction of emotional distress, trial court did not err in denying motions for directed verdict submitted by plaintiff's former company employer and its owner.¹¹

If there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions, demand a particular verdict, such a verdict shall be directed.¹²

An injured motorist, who was a high jumper, filed a negligence action for injuries sustained in a vehicular incident. The injured motorist was successful after a jury trial and was awarded \$2,000,000. Defendant argued on appeal that the trial court erred when it denied his motion for directed verdict as to the injured motorist's lost future earnings. In affirming the trial court, the Georgia Court of Appeals reasoned:

Smith presented evidence, through his doctor, that the accident caused Smith's injuries "to a reasonable degree of medical certainty." After the accident, the injury worsened until surgery was medically necessary. The doctor opined that the injury negatively impacted Smith's high-jumping performance, including his performance at the Olympics. The doctor also testified that because of the injury and the resulting surgery, Smith had sustained a permanent injury, and would be unable to achieve the high-jumping status he reached prior to the injury and unable to return to the Olympics.

Smith's agent testified that prior to the surgery Smith was ranked fifth in the world and that a high jumper ranked in the top ten in the world would make approximately \$4,000,000 over his career and a top five high jumper would make around \$6,000,000. Smith's agent opined that if not for the surgery he had to undergo as a result of the accident, Smith would have earned "conservatively about a million dollars" over the course of his career. Smith's agent also testified that, if not for the surgery, he would have been able to

Public Safety, 337 Ga. App. 864, 789 S.E.2d 236 (2016); *Thompson v. Ezor*, 272 Ga. 849, 536 S.E.2d 749 (2000).

⁹*Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 343 S.E.2d 680 (1986).

¹⁰*Sablon v. State*, 182 Ga. App. 128, 355 S.E.2d 88 (1987).

¹¹*Carly Ray Industries, Inc. v. Mays*, 354 Ga.App. 638, 841 S.E.2d 100 (2020).

¹²See O.C.G.A. § 9-11-50(a). For directed verdict rules in contract cases, see *Huckaby v. Cheatham*, 272 Ga. App. 746, 612 S.E.2d 810 (2005).

negotiate a contract for Smith in 2017, and under that contract he would have had the potential to make \$2.5 million.

We find that Smith presented some evidence tending to show what he was capable of earning both before and after the injury and, therefore, some evidence of diminished earning capacity.¹³

In *Legacy Academy, Inc. v. PACU Enterprises, Inc.*,¹⁴ it was held that the trial court erred in denying Legacy Academy's directed verdict motion on claim for advertising fees. Given "that PACU's obligation under the franchise agreement to pay the advertising fees was fixed and absolute" there was no duty to mitigate damages.

The defendant in *Smith v. State*¹⁵ was not entitled to a directed verdict, though it was a criminal case and the state depended on circumstantial evidence. The defendant claimed that under former O.C.G.A. § 24-4-6 the state failed to produce circumstantial evidence that did not exclude "all reasonable hypotheses save that of her guilt[.]" but the court held that such determinations were for the factfinder alone.

Notwithstanding the requirement of former O.C.G.A. § 24-4-6 that circumstantial evidence to support a criminal jury verdict must "exclude every other reasonable hypothesis save that of the guilt of the accused[.]" the trial court in *Brown v. State*¹⁶ did not err in denying the defendant's motion for a directed verdict. The defendant claimed that positive, credible evidence supported his innocence, but the Georgia Supreme Court held that the presence of evidence to support the state's theory of defendant's guilt was sufficient to leave the question to the jury as to whether the state's evidence met the standard of former O.C.G.A. § 24-4-6.¹⁷

§ 32:4 Directing verdict for variance

Prior to the adoption of the Civil Practice Act, former Ga. Code Ann. § 81-116 provided that no nonsuit shall be awarded for any formal variance between the allegations and the proof.

The CPA abolished the nonsuit from Georgia practice. Under the liberal amendment provisions of the CPA, there appears to be little, if any, problem whenever there is a variance between the

¹³Lee v. Smith, 346 Ga. App. 694, 816 S.E.2d 784 (2018), judgment rev'd in part on other grounds, 307 Ga. 815, 838 S.E.2d 870 (2020).

¹⁴Legacy Academy, Inc. v. PACU Enterprises, Inc., 349 Ga. App. 403, 825 S.E.2d 905 (2019).

¹⁵Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012).

¹⁶Brown v. State, 291 Ga. 892, 734 S.E.2d 23 (2012).

¹⁷In the 2013 Georgia Evidence Code, see O.C.G.A. § 24-14-6.

pleadings and the evidence.¹

O.C.G.A. § 9-11-15 allows for liberal amendments. The pleadings are not an end in themselves but only a method to assist in reaching the merits of the case.²

§ 32:5 Permitting amendments to conform to evidence

A pleading may be amended at any time, before or after judgment, to conform the pleadings to the evidence.¹

An amendment may not be permitted if the objecting party would be prejudiced in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet the evidence. Such amendments may be allowed even after judgment.

Eleventh Circuit “cases make clear that ‘a [pro se] plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice’—at least, that is, where ‘a more carefully drafted complaint might state a claim.’ ”²

In *Alberto v. Secretary, Florida Department of Corrections*,³ the Eleventh Circuit found that the district court erroneously dismissed an inmate’s pro se complaint without leave to amend. Alberto had been convicted in Washington state but was serving his sentence in a Florida prison. In his 42 U.S.C.A. § 1983 complaint he alleged that he had been wrongfully denied access to legal materials relevant to his Washington conviction. “[A] pro se plaintiff’s failure to include a proper defendant is a curable defect. . . . This is the case even if the district court believes that merely ‘amending to include the proper defendant would not save the complaint.’ . . . And we cannot say that Alberto, if given the chance to amend his complaint, could not include additional allegations stating a claim.”

If evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended. This can be done freely when the presentation of the merits of the action will not be undercut and the opposing party fails to satisfy the prohibiting limitation that admission of such evidence would prejudice them in maintaining

[Section 32:4]

¹O.C.G.A. § 9-11-15.

²*Block v. Voyager Life Ins. Co.*, 251 Ga. 162, 303 S.E.2d 742 (1983).

[Section 32:5]

¹O.C.G.A. § 9-11-15.

²*Silberman v. Miami Dade Transit*, 927 F.3d 1123, 103 Fed. R. Serv. 3d 1420 (11th Cir. 2019).

³*Alberto v. Secretary, Florida Department of Corrections*, 770 Fed. Appx. 467 (11th Cir. 2019).

their action or defense upon the merits.⁴

Once the issues in a case are narrowed for trial, the complaint stands only upon those facts adduced at trial by the plaintiff. Once a verdict is returned and the case is over or a motion for directed verdict is sustained, it is too late to make amendments to conform to the evidence. There ought to be an end to litigation somewhere, sometime, and some court ought to be empowered to say that the case is finished.⁵

§ 32:6 Negligence and contributory negligence as questions of law or fact

Where there is evidence fairly tending to show that the negligence charged was the proximate cause of the injury, the question is one of fact for the jury.¹ If there is a difference of opinion as to whether the injury was proximately caused by the negligence of defendant, so that reasonable minds could differ, there is a question of fact for the jury.² As stated in *Jai Ganesh Lodging, Inc. v. David M. Smith, Inc.*:³

Except in **plain**, palpable and undisputed cases where reasonable minds cannot differ as to the conclusions to be reached, questions of negligence, proximate cause, including the related issues of foreseeability, assumption of risk, lack of ordinary care for one's own safety, lack of ordinary care in avoiding the consequences of another's negligence, contributory and comparative negligence are for the jury.⁴

However, occasionally the issue is one for the judge. A plaintiff in a negligence action must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result; mere possibility of such causation is not enough, and when the matter remains one of pure speculation or conjecture or probabilities are at best evenly balanced, it becomes the duty of the court to direct the verdict for the defendant.⁵

A directed verdict will be granted in a medical negligence ac-

⁴Kim v. McCullom, 222 Ga. App. 439, 474 S.E.2d 654 (1996).

⁵Kace Investments, L.P. v. Hull, 278 Ga. App. 477, 629 S.E.2d 26 (2006).

[Section 32:6]

¹Stone's Independent Oil Distributors v. Bailey, 122 Ga. App. 294, 176 S.E.2d 613 (1970).

²Young v. Tate, 112 Ga. App. 603, 145 S.E.2d 747 (1965).

³Jai Ganesh Lodging, Inc. v. David M. Smith, Inc., 328 Ga. App. 713, 760 S.E.2d 718 (2014).

⁴Jai Ganesh Lodging, Inc. v. David M. Smith, Inc., 328 Ga. App. 713, 760 S.E.2d 718 (2014), citing McCray v. FedEx Ground Package System, Inc., 291 Ga. App. 317, 661 S.E.2d 691 (2008).

⁵Niles v. Board of Regents of University System of Georgia, 222 Ga. App. 59, 473 S.E.2d 173, 111 Ed. Law

tion in instances where there is insufficient evidence of causation. “[S]peculation or guesswork” is insufficient to defeat a motion for directed verdict.⁶ In a medical malpractice case, causation must be established through expert testimony.⁷

The Court of Appeals of Georgia found that the trial court erred in granting a directed verdict in dental malpractice case. The court determined “that a jury issue existed as to whether [the dentist] complied with the standard of care in interpreting [the plaintiff’s] x-ray and failing to refer him for further evaluation, and whether the failure to accurately interpret [the x-ray] led to further complications such that a more drastic surgical procedure was required in 2011 than would have been required in 2008.”⁸

In a negligence action, whether a duty exists upon which liability can be based is a question for the jury. The decision in *Ford Motor Co. v. Reese* confirms that negligence is a matter for the jury to decide.⁹

Negligence can be a question of law only in plain, palpable and indisputable cases.¹⁰

Other cases standing for the proposition that questions of negligence are ordinarily matters for resolution by the jury include *Food Lion, Inc. v. Williams*.¹¹

Rep. 984 (1996); *Nelson v. Polk County Historical Soc., Inc.*, 216 Ga. App. 756, 456 S.E.2d 93 (1995). See *Sumner v. Ideal Steel Products, Inc.*, 222 Ga. App. 681, 475 S.E.2d 708 (1996) (trial court did not err in granting defendant a directed verdict where evidence showed the plaintiff knew there was no guardrail and that the ladder could fall through the metal decking); *Budget Rent-a-Car of Atlanta, Inc. v. Webb*, 220 Ga. App. 278, 469 S.E.2d 712 (1996) (where the evidence was undisputed that the driver fell asleep at the wheel and the wreck resulted therefrom, the driver bore the burden and was negligent as a matter of law); *Hitchcock v. McPhail*, 221 Ga. App. 299, 471 S.E.2d 256 (1996) (trial court properly directed verdict where evidence demanded conclusion that the defendant was negligent and the defendant cited no evidence from which a jury could reasonably find otherwise).

⁶*Central Georgia Women’s Health Center, LLC v. Dean*, 342 Ga. App. 127, 800 S.E.2d 594 (2017).

⁷*Walker v. Giles*, 276 Ga. App. 632, 624 S.E.2d 191 (2005).

⁸*Ouanzin v. Coast Dental Services, Inc.*, 354 Ga. App. 168, 840 S.E.2d 686 (2020).

⁹*Ford Motor Co. v. Reese*, 300 Ga. App. 82, 684 S.E.2d 279 (2009).

¹⁰*Johns v. Secress*, 106 Ga. App. 96, 126 S.E.2d 296 (1962).

¹¹*Food Lion, Inc. v. Williams*, 219 Ga. App. 352, 464 S.E.2d 913 (1995) (trial court correctly denied the defendant’s motion for directed verdict when evidence supported reasonable inference that defendant’s employee did not act with dispatch to warn patrons when she confronted a known and obvious hazard, as required by store policy); *Department of Human Resources v. Thomas*, 217 Ga. App. 174, 456 S.E.2d 724 (1995) (evidence which authorized the jury to conclude that the plaintiff had shown that the defendant had actual knowledge of the presence of foreign substance on which the plaintiff slipped, did not demand a

§ 32:7 Willful and wanton misconduct; law or fact

The seriousness and manner of inflicting blows on a victim is ordinarily a question of fact to be decided by jury.¹

The question of willful and wanton misconduct is ordinarily one of fact for the jury and will not be taken from them if there is any evidence to support the charge.²

“Wanton conduct,” as required for a showing of punitive damages in a tort action, is that which is so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent.³

Appellate court found the plaintiff assumed the risk of willful and wanton misconduct by agreeing to car surf with the defendant. The plaintiff assumed the risk that the defendant might drive recklessly by changing speed or direction in a sudden manner.⁴

Chrysler was not entitled to a directed verdict regarding a claim alleging it acted with reckless and wanton disregard for human life. Chrysler’s argument that “there were 27 million vehicles being driven on the road with rear-mounted fuel tanks at the time of the NHTSA’s investigation into Jeep vehicles” amounted to a jury question. In addition, the court found that “Chrysler knew that locating fuel tanks midship provided safety benefits, that it was possible to locate the fuel tank in the 1999 Grand Cherokee midship, and, most significantly, that Chrysler knew that gas tanks in 1999 Grand Cherokees were vulnerable and would be crushed in rear impacts.”⁵

In a fraud and legal malpractice action, the Georgia Court of Appeals held in *Stewart v. McDonald*⁶ that there was a jury question regarding the award of punitive damages against the attorney. Accordingly, the trial court erred in directing a verdict on this claim.

§ 32:8 Motion by both parties for directed verdict

When both parties move for a directed verdict, that alone is not equivalent to consent by both parties to have the case decided by

verdict for the defendant).

[Section 32:7]

¹Arnett v. State, 245 Ga. 470, 265 S.E.2d 771 (1980).

²See Drake v. McGlashan, 103 Ga. App. 96, 118 S.E.2d 589 (1961).

³Wardlaw v. Ivey, 297 Ga. App. 240, 676 S.E.2d 858 (2009).

⁴Teems v. Bates, 300 Ga. App. 70, 684 S.E.2d 662 (2009).

⁵Chrysler Group, LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754 (2016).

⁶Stewart v. McDonald, 347 Ga. App. 40, 815 S.E.2d 665 (2018).

the judge.¹ If there is some doubt on the evidence, the court should deny both motions and submit the case to the jury.² Fact that both parties move for directed verdict does not constitute a waiver by each party to have the fact issues decided by a jury if such fact issues remain. The trial court should not decide disputed questions of fact on cross-motions for directed verdict.³

§ 32:9 Ruling on motion for directed verdict

A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts. A party whose motion is denied may offer evidence subsequently. He does not have to reserve the right to do so, and he may offer evidence to the same extent as if the motion had not been made.¹

Directed verdict of acquittal is not the proper remedy where the list of witnesses was not furnished to the defendant; the motion should be for continuance or mistrial.²

Usually a ground not raised in a motion for directed verdict will not support affirmance on appeal; however, even when the movant fails to specify in the motion the particular ground urged on appeal, if the state of evidence is such that the verdict would still be demanded were the plaintiff's case reopened, the trial court's error in granting the motion for directed verdict despite the movant's failure to specify the proper ground is harmless.³

In *Carden v. Burckhalter*,⁴ the court stated the rule for standard of review to be that a directed verdict cannot be granted if there is "any evidence" to support a contrary verdict. Directed verdict should be granted when all the evidence demands a particular verdict. A trial judge cannot grant a motion for directed verdict on any issue if "any evidence" exists to support that issue.

Appellate court reviews de novo the trial court's ruling on a motion for directed verdict. A directed verdict should not be granted if there is any reasonable inference supported by the evi-

[Section 32:8]

¹Roberts v. Wilson, 198 Ga. 428, 31 S.E.2d 707 (1944).

²See Miller v. Edwards, 50 Ga. App. 131, 177 S.E. 758 (1934).

³Walker v. Bush, 234 Ga. 366, 216 S.E.2d 285 (1975).

[Section 32:9]

¹O.C.G.A. § 9-11-50.

²Haynes v. State, 245 Ga. 817, 268 S.E.2d 325 (1980).

³Boykin v. North, 218 Ga. App. 435, 461 S.E.2d 598 (1995).

⁴Carden v. Burckhalter, 214 Ga. App. 487, 448 S.E.2d 251 (1994).

See Kroger Co. v. Schoenhoff, 324 Ga. App. 619, 751 S.E.2d 438 (2013).

dence which would authorize a verdict to the contrary.⁵

O.C.G.A. § 9-11-50(b) allows the trial court to defer ruling on a motion for a directed verdict and submit the case to the jury subject to a later determination of the legal questions raised by the motion. Can a trial judge deny directed verdict, yet later grant a motion for a new trial to the moving party? Yes, if the verdict is strongly against the weight of the evidence.⁶

Whether an interest in property had been voluntarily gifted from one party to another was an issue for the jury and a trial court erred when it granted a j.n.o.v. on the issue.⁷

When an erroneous grant of a directed verdict to a defendant would require a new trial, and particularly where other defendants have been found guilty on the basis of extensive evidence, it is preferable, on grounds of judicial economy, to grant judgment n.o.v. (See § 38:7, *infra*) rather than try the entire matter again as to that defendant with the prospect of resulting prejudice to all parties.⁸

In a criminal case, a trial court did not err in denying a defendant's motion for directed verdict of acquittal when physical evidence and expert testimony suggested the defendant's guilt.⁹

§ 32:10 Duty of jury to render verdict as directed

It is virtually a universal rule that the jury must render a verdict as directed. But when a verdict is directed, the fact that it is not signed by the jury does not render the judgment illegal.¹

The practice in some courts, to facilitate the execution of the verdict and to avoid possible refusal to sign, is to hand the form of the verdict to the jury and request that they sign it while sitting in the jury box.

⁵Harper v. Barge Air Conditioning, Inc., 300 Ga. App. 901, 686 S.E.2d 668 (2009).

⁶Beasley v. Paul, 223 Ga. App. 706, 478 S.E.2d 899 (1996) (citing O.C.G.A. §§ 5-5-20, 5-5-50).

⁷Crook v. Foster, 333 Ga. App. 36, 775 S.E.2d 286 (2015).

⁸Hickman v. Allen, 217 Ga. App. 701, 458 S.E.2d 883 (1995).

⁹Hughes v. State, 297 Ga. App. 217, 676 S.E.2d 852, 853 (2009).

[Section 32:10]

¹Morgan v. Mize, 118 Ga. App. 534, 164 S.E.2d 565 (1968).

Chapter 33

Damages

- § 33:1 General principles relating to damages
- § 33:2 Nominal damages
- § 33:3 General and special damages
- § 33:4 Foreseeability of damages
- § 33:5 Speculative, remote or consequential damages
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- § 33:10 Instructions on damages in personal injury cases
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- § 33:16 Attorney's fees
- § 33:17 Liquidated damages and penalties
- § 33:18 Comparative negligence
- § 33:19 Injuries to real property
- § 33:20 Collateral source rule

§ 33:1 General principles relating to damages

Damages are the compensation awarded to a party for injury done.¹

See Carlson, *Successful Techniques for Civil Trials* (2d ed.), for illustrative damage awards in burn cases, contract disputes, personal injury and product cases and other forms of litigation.

The measure of damages is in the discretion of the jury, and neither the trial court nor the appellate court should interfere, unless the damages awarded are either so small or so excessive as to justify the inference of gross mistake or undue bias.²

A party seeking damages carries the burden of demonstrating the amount of loss in a manner which enables the trial court to

[Section 33:1]

¹O.C.G.A. § 51-12-4.

²Graham Bros.' Const. Co., Inc.

v. C. W. Matthews Contracting Co., Inc., 159 Ga. App. 546, 284 S.E.2d 282 (1981).

calculate that party's loss with a reasonable degree of certainty.³

Referencing O.C.G.A. § 51-12-33(b), the Georgia Court of Appeals stated that when it is alleged that more than one person caused an injury to person or property, the trier of fact shall apportion the total damages among the responsible parties.⁴

The Eleventh Circuit stated that “[u]nder Georgia law, ‘[l]ost wages and earnings is recoverable where the evidence shows the amount of loss with reasonable certainty.’ *Olariu v. Marrero*, 248 Ga.App. 824, 549 S.E.2d 121, 124 (2001). ‘Loss of future earnings is recoverable where evidence is presented on the permanency of plaintiff’s injury, the effect of injury on earnings, and the monetary amount thereof.’ *Id.*”

Can an employer who has paid worker’s compensation benefits to an employee be impleaded by a defendant in a tort action brought against the defendant by the employee? No, says the Georgia Supreme Court, and the rule covers coemployees as well. A third-party complaint was filed by a defendant against the plaintiff’s coworker in *Weller v. Brown*.⁵ The Georgia Supreme Court held that a third-party cannot seek contribution from a third-party defendant who cannot be held directly liable to the plaintiff.

A UGA Redcoat Marching Band captain tried to settle his case against a van driver and owner after an accident which left the UGA student in a coma for weeks. Chief Justice Fletcher’s opinion affirmed a judgment of more than \$1.7 million on behalf of James Brightman because Cotton States Mutual Insurance Company did not respond within the prescribed time to a settlement request for the insured’s policy amount of \$300,000. They paid the policy limits after the plaintiff won a judgment against the van driver and owner. According to Justice Fletcher, Cotton States acted unreasonably in failing to tender its policy limits in response to Brightman’s earlier settlement offer.⁶

In *Geico Indemnity Co. v. Whiteside*,⁷ the Georgia Supreme Court found that Geico was obligated to pay a default judgment sum that had been entered against one of its insured clients, even though Geico did not have notice of the law suit and the default award exceeded the limits of the policy. The court reasoned, in part, that Geico breached its duty to settle.

³Nelson v. Hamilton State Bank, 331 Ga. App. 419, 771 S.E.2d 113 (2015).

⁴Northwest Georgia Contracting, LLC v. St. Germain, 350 Ga. App. 568, 829 S.E.2d 814 (2019).

⁵Weller v. Brown, 266 Ga. 130,

464 S.E.2d 805 (1996).

⁶Cotton States Mut. Ins. Co. v. Brightman, 276 Ga. 683, 580 S.E.2d 519 (2003).

⁷GEICO Indemnity Company v. Whiteside, 311 Ga. 346, 857 S.E.2d 654 (2021).

In an action by a purchaser against a seller's accountant for negligently misrepresenting seller's inventory at \$86 million when an audit by another accounting firm placed the value at \$16 million, the measure of damages is an out-of-pocket standard, not the benefit-of-the-bargain standard.⁸

Perhaps no topic in the field of damages has more occupied the United States Supreme Court than the subject of punitive damages. In 2007 the Court added a further refinement to punitive damages law by restricting a plaintiff's award to harms visited upon the plaintiff by a defective or dangerous product, but disallowing verdicts in a plaintiff's favor for damages to nonparties.⁹

However, government entities are shielded from punitive damages awards.¹⁰

Evidence of pain and suffering, medical expenses, lost wages, and property damage supported a damages award of \$1,437,000 to the driver in an automobile collision case; there was sufficient evidence of the driver's condition after he regained consciousness to support the award of damages for pain and suffering, medical expenses and treatments which were necessary after the accident. The family had to stop raising chickens, family was paid average of \$30,000 for each flock they raised, and they usually raised five or six flocks per year, and there was sufficient evidence of the value of the driver's truck to support award of damages for loss of personal property.¹¹

In a 2010 development, the Georgia Supreme Court took a major step in the damages field by declaring unconstitutional the flat cap on noneconomic compensatory damages in medical malpractice cases, the cap contained in O.C.G.A. § 51-13-1. The holding in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*¹² was applied retroactively. The statutory cap was held to infringe upon a litigant's right to jury trial.

The gross amount of revenue minus expenses equals the amount of recovery for lost profits.¹³ Ordinarily, anticipated profits are too speculative to be recovered, but where the business has been established, has made profits and there are definite, certain, and reasonable data for the ascertainment, and

⁸BDO Seidman, LLP v. Mindis Acquisition Corp., 276 Ga. 311, 578 S.E.2d 400 (2003).

⁹See the *Philip Morris* case in § 33:7, *infra*.

¹⁰*City of Kingsland v. Grantham*, 342 Ga. App. 696, 805 S.E.2d 116 (2017) (overruled on other grounds by, *Quynn v. Hulsey*, 310 Ga. 473, 850

S.E.2d 725 (2020)).

¹¹*Lee v. Thomason*, 277 Ga. App. 573, 627 S.E.2d 168 (2006).

¹²*Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (2010).

¹³*Kitchen v. Hart*, 307 Ga. App. 145, 704 S.E.2d 452 (2010).

such profits were in the contemplation of the parties at the time of the contract, they may be recovered even though they cannot be computed with exact mathematical certainty. To recover lost profits one must show the probable gain with great specificity as well as expenses incurred in realizing such profits.

Restitution to the victim of a crime by the defendant can be a form of redress or damages. Georgia allows restitution.¹⁴ However, O.C.G.A. 17-14-7(b) allows a criminal defendant to establish the burden on his financial resources in an attempt to lessen the restitution.

§ 33:2 Nominal damages

By law some damage is inferred from the invasion of a property right even if no evidence is given as to any particular sum for the loss. The plaintiff is entitled to what is termed nominal damages if he proves violation by the defendant of a property right.¹

Nominal damages may be recovered both in contracts and torts actions. Where there has been no actual damage in a breach of contract case, the plaintiff can recover nominal damages which will cover and carry his costs.²

The Georgia Court of Appeals stated the general rule regarding the recovery of nominal damages; that in breach of contract actions nominal damages are recoverable that are “sufficient to cover the costs of bringing the action” and a party is entitled to such damages even in the absence of actual damages.³

In a misappropriation of trade secrets and breach of contract action, the Eleventh Circuit found that the district court erred in granting the plaintiff actual damages on its contract claim. Instead, the Eleventh Circuit found that the plaintiff was entitled only to nominal damages given the plaintiff’s failure to demonstrate the actual damages that were sustained. In reaching its result, the circuit distinguished between restitution and actual damages, stating:

Actual damages for breach of contract . . . “are given as compensation for *the injury sustained* as a result of the breach of a contract.” O.C.G.A. § 13-6-1 (emphasis added). The fundamental difference between restitution and actual damages, therefore, is that the former is measured by the defendant’s gain, while the latter is mea-

¹⁴Overby v. State, 315 Ga. App. App. 326, 130 S.E.2d 234 (1963).
735, 728 S.E.2d 278 (2012) (citing
O.C.G.A. § 17-14-2(2)).

²O.C.G.A. §§ 13-6-6, 13-6-12.

[Section 33:2]

³Wanna v. Navicent Health, Inc.,
357 Ga. App. 140, 850 S.E.2d 191
(2020).

¹Pure Oil Co. v. Dukes, 107 Ga.

sured by the plaintiff's loss.⁴

As to torts, if the injury is small, or mitigating circumstances are strong, the plaintiff can recover nominal damages only.⁵

In an excessive force case, a plaintiff can seek nominal damages, even if he sustains no compensable injury.⁶

Nominal damages are awarded: (1) where no actual damage flows from the injury, or (2) where the violation of a right is shown, substantial damages claimed, and some actual loss proved, and yet the damages are not susceptible of reasonable certainty of proof as to their extent.⁷

Just because nominal damages may be awarded does not mean they *must* be awarded. The Georgia Court of Appeals has held on occasion that a trier of fact may properly decline to award even nominal damages despite the defendant's liability having been definitively established.⁸

"A prayer for nominal damages cannot save [a] case from mootness."⁹

§ 33:3 General and special damages

General damages are what the law presumes flow from any tortious act without proof as to amount, and special damages are such as must be proved to flow from a tortious act in order for a party to recover.¹

A party must present proof of special damages, and a generalized statement is insufficient to make this showing.²

There is no mathematical rule by which special damages for pain and suffering may be ascertained; the only rule recognized by law for determining such damages is the enlightened conscience of fair and impartial jurors.³

The measure of general damages on a tenant's claim for constructive eviction is the present value of the amount, if any, by which the rental value, which is the value of the use of the premises, for the unexpired term exceeds the rent agreed to under

⁴AcryliCon USA, LLC v. Silikal GmbH, 985 F.3d 1350 (11th Cir. 2021).

⁵O.C.G.A. § 51-12-4.

⁶Saunders v. Duke, 766 F.3d 1262 (11th Cir. 2014).

⁷King v. Brock, 282 Ga. 56, 646 S.E.2d 206 (2007).

⁸Cotto Law Group, LLC v. Benevides, 362 Ga. App. 850, 870 S.E.2d 472 (2022).

⁹Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia, 868 F.3d 1248 (11th Cir. 2017).

[Section 33:3]

¹O.C.G.A. § 51-12-2.

²Veatch v. Aurora Loan Services, LLC, 331 Ga. App. 597, 771 S.E.2d 241 (2015).

³Hogan v. Malcom, 107 Ga. App. 241, 129 S.E.2d 808 (1963).

the lease for the unexpired term.⁴

A claimant bringing an action under the Federal Employer's Liability Act may "recover special damages for past and future lost wages and medical expenses, as well as general damages for pain and suffering."⁵

The Georgia Court of Appeals stated in *Norman v. Xytex Corporation*,⁶ "damages for wrongful conception 'include expenses for the unsuccessful medical procedure which led to the pregnancy, pain and suffering, medical complications, costs of delivery, lost wages, and loss of consortium,' but do not include the costs of raising the child, because 'a parent cannot be said to have suffered an injury in the birth of a child.'"

§ 33:4 Foreseeability of damages

A party is entitled to recover all damages that are the natural and proximate consequence of the act complained of in a tort case, whereas a party alleging breach of contract may recover those damages that may reasonably be considered to have been within the contemplation of the parties.¹

Jury instruction on bailment was warranted at trial of negligence action by freight owner against delivery truck owner that collided with tractor trailer in which the freight was being carried, even though the owner of the delivery truck was a non-party to the bailment contract between the freight owner and carrier. The instruction was relevant to the issue of the foreseeability of carrier's handling of the salvageable freight after the accident.²

§ 33:5 Speculative, remote or consequential damages

In a tort action, if the damages are only the imaginary or possible result of the tortious act or if there are other contingencies that are preponderant in causing the injury, such damages are

⁴*Myung Sung Presbyterian Church, Inc. v. North American Ass'n of Slavic Churches & Ministries, Inc.*, 291 Ga. App. 808, 662 S.E.2d 745 (2008).

⁵*Central of Georgia Railroad Company v. Ross*, 342 Ga. App. 27, 802 S.E.2d 336 (2017).

⁶*Norman v. Xytex Corporation*, 350 Ga. App. 731, 830 S.E.2d 267

(2019), *aff'd in part, rev'd in part* on other grounds, 310 Ga. 127, 848 S.E.2d 835 (2020).

[Section 33:4]

¹*Olsen & Co. v. Lunsford*, 99 Ga. App. 215, 108 S.E.2d 304 (1959).

²*Axcen Scandipharm, Inc. v. Schwan's Home Service, Inc.*, 299 Ga. App. 49, 681 S.E.2d 631 (2009).

too remote to allow recovery against the wrongdoer.¹ Damages traceable to the wrongdoer's act, but which are not its legal or natural consequence, are too remote and contingent to allow recovery.²

A plaintiff may not recover for emotional distress arising from a fear of contracting a disease until he begins to manifest symptoms of the disease.³

Though plaintiff, who had an easement interest in a shopping area complex, was properly compensated for interference with his interest in a condemnation action, plaintiff was not entitled to consequential damages for his contiguous property. As stated by the court in *White v. Department of Transportation*,⁴ it is axiomatic that:

in order for a condemnee to recover consequential damages to the remainder of his property when only a part is taken, it must appear that the damages to the remainder proximately and naturally arose from the condemnation and taking of the *condemnee's own property*. "Consequential damages to a contiguous tract of land having a different ownership from that in which the taking occurs may be real and may in fact exist, but a *separate owner's claim for consequential damages to his land contiguous to the tract where the taking occurs cannot be asserted in a condemnation action*. Consequential damages to 'the remainder of the tract in which the taking occurs' are the only consequential damages that may be recovered in the condemnation action."⁵

Similarly, a patient who became upset about the possibility that she had been exposed to HIV through a blood transfusion could not recover for negligent infliction of emotional distress. HIV tests on the patient were negative. For recovery, there must be some reasonable connection between a defendant's act and damages. Without factual evidence of causal connection, damages are considered fanciful and too speculative to form the basis for recovery. A wrongdoer is not responsible in a negligence action for a result which is merely possible, but only for a consequence which is probable according to ordinary experience.⁶

Damages in a contract action are disallowed as being too remote whenever they cannot be traced solely to the breach of

[Section 33:5]

¹O.C.G.A. § 51-12-8.

²O.C.G.A. § 51-12-9.

³*Fulmore v. CSX Transp., Inc.*, 252 Ga. App. 884, 557 S.E.2d 64 (2001).

⁴*White v. Department of Transportation*, 343 Ga. App. 491, 806 S.E.2d 860 (2017).

⁵*White v. Department of Transportation*, 343 Ga. App. 491, 806 S.E.2d 860 (2017) (quoting *Department of Transp. v. Simon*, 151 Ga. App. 807, 261 S.E.2d 710 (1979), judgment *aff'd*, 245 Ga. 478, 265 S.E.2d 777 (1980)).

⁶*Johnson v. American National Red Cross*, 276 Ga. 270, 578 S.E.2d 106 (2003).

contract or they are not capable of exact computation.⁷ The Eleventh Circuit explained the difference between direct damages and consequential damages:

Actual damages under Georgia law may be direct or consequential. Direct damages “arise naturally and according to the usual course of things from [the] breach.” Consequential damages, by contrast, arise “as the probable result of [the] breach.” The key distinction between direct damages and consequential damages is that the former compensate for the value of the promised performance, while the latter compensate for additional losses incurred as a result of the breach.⁸

In an action brought by a lender against borrowers for amounts owed on a promissory note, trial court erred in granting summary judgment as to damages sustained by plaintiff. Plaintiff failed to offer court a basis upon which it could calculate the amount of loss with a reasonable degree of certainty.⁹

Trial court improperly awarded civil damages pursuant to a criminal statute. Given that the penal statute did not authorize the imposition of civil damages, the trial court erred. Georgia Court of Appeals found that “civil liability may only be authorized under a penal statute when the General Assembly has *expressly provided* for a private right of action in the textual provisions of that statute,[cit.] ‘not extrapolated from the public policy the statute generally appears to advance.’”¹⁰

A plaintiff telecommunications carrier could not recover loss of use damages based on a hypothetical rental market theory after the defendant severed plaintiff’s transmission cable during an excavation.¹¹ The plaintiff made use of its own spare replacement transmission lines, had no need to rent substitutes, and could show no market for rental of such substitutes on an hourly basis. Because the plaintiff could show no monetary loss other than cost of repair, the court held that the plaintiff’s theory of a hypothetical rental market to measure loss of use would not support the plaintiff’s loss of use damages.

Lost profits in a breach of contract action are recoverable as direct damages when such “profits ‘represent the benefit of the bargain (such as a general contractor suing for the remainder of the contract price less is saved expenses).’” In *Mitchell & Associ-*

⁷O.C.G.A. § 13-6-8; see also *Ajigbolamu v. Milne*, 371 Ga. App. 710, 902 S.E.2d 687 (2024).

⁸*AcryliCon USA, LLC v. Silikal GmbH*, 985 F.3d 1350 (11th Cir. 2021).

⁹*Gregg v. First Citizens Bank & Trust Co., Inc.*, 328 Ga. App. 87, 761

S.E.2d 514 (2014).

¹⁰*Somerville v. White*, 337 Ga. App. 414, 787 S.E.2d 350 (2016).

¹¹*MCI Communications Services v. CMES, Inc.*, 291 Ga. 461, 728 S.E.2d 649 (2012).

ates v. Global Systems Integration,¹² the Georgia Court of Appeals found that a computer services contractor was entitled to lost profits due to subcontractor's breach of contractual obligations.

Request for damages in breach of contract case was not so speculative as to bar action, where plaintiff failed to provide specific figures as to amounts expended on production costs prior and subsequent to production stoppage due to defendant's negligence, but was able to show that expenses remained essentially the same during stoppage.¹³

In a premises liability and ordinary negligence action, trial court did not err in admitting edited medical bills over defendant's objection. The Georgia Court of Appeals "has held that all that is required is 'that it be shown that medical expenses were incurred in connection with the treatment of the injury, disease or disability involved in the subject of litigation at the trial, which may be done by lay testimony.' " Where the plaintiff introduced lay testimony that the disputed bills pertained to the injury sustained at issue in the case, and the defendant failed to cross-examine the witness, the trial court did not err in admitting the medical bills.¹⁴

The fact that a jury was presented with a range of values from which to arrive at an estimate of compensable business losses did not render such evidence unduly speculative.¹⁵

In *Pickren v. Pickren*,¹⁶ it was held that the statute governing damages for injury to plaintiff's peace, happiness, or feelings of plaintiff in tort action did not create cause of action for emotional injuries from breach of contract or tortious interference with contract.¹⁷

The Georgia Court of Appeals held that plaintiffs (who were boaters) were not entitled to damages for negligent infliction of emotional distress given that the defendant homeowners were not the legal guardians of an adult son (who fired a shot in the direction of plaintiffs) who was residing at their premises.¹⁸

In *Pampattiwar v. Hinson*,¹⁹ the appeals court held that the trial court did not err in determining that an attorney was entitled to damages for "wounded feelings" pursuant to O.C.G.A.

¹²*Mitchell & Associates, Inc. v. Global Systems Integration, Inc.*, 356 Ga. App. 200, 844 S.E.2d 551 (2020).

¹³*Bennett v. Smith*, 245 Ga. 725, 267 S.E.2d 19 (1980).

¹⁴*Emory Healthcare, Inc. v. Pardue*, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

¹⁵*DeKalb County v. Glaze*, 189

Ga. App. 1, 375 S.E.2d 66 (1988).

¹⁶*Pickren v. Pickren*, 265 Ga. App. 195, 593 S.E.2d 387 (2004).

¹⁷See West's Ga. Code Ann. § 51-12-6.

¹⁸*Ghali v. Miles*, 355 Ga. App. 266, 843 S.E.2d 922 (2020).

¹⁹*Pampattiwar v. Hinson*, 326 Ga. App. 163, 756 S.E.2d 246 (2014).

§ 51-12-6. The attorney sought, and obtained, damages for fraud from a former client due to his misrepresentations. She claimed that the entire injury she suffered was to her peace, happiness or feelings.

§ 33:6 Duty to lessen damages

An injured person is bound to lessen damages as far as practicable by the use of ordinary care and diligence when he is injured by the negligence of another, but not in the case of a willful tort.¹

When a person suffers damages as a result of a breach of contract, he is bound to use ordinary care and diligence to lessen damages as far as is practicable.²

There was no jury issue as to whether a bank was obliged pursuant to O.C.G.A. § 13-6-5 to mitigate its damages as to the plaintiff borrower's breach of the promissory note. Section 13-6-5 does not apply in situations where, as here, there is an absolute promise to pay.³

Where the plaintiff sets up the correct measure of damages under the facts alleged, it is not necessary for him to allege in the complaint that he had undertaken to lessen or mitigate such damages.⁴

In addition to its impact on the amount of damages, plaintiff misconduct or inattentiveness to remedial conduct can even defeat a claim. Evidence that a patient failed or refused to follow medical instructions may raise issues of contributory and comparative negligence in a medical malpractice case.⁵

§ 33:7 Liability for exemplary or punitive damages

In 1987, O.C.G.A. § 51-12-5.1, concerning punitive damages, was added. Liability is predicated on clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or the entire want of care that would raise the presumption of conscious indifference to consequences. The statute further provides for a limit of \$250,000, except in product liability cases or in other tort cases in which the defendant is found to have acted or failed to act with the

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S.E.2d 513 (2013).

¹Holbrook v. Town of Norcross, 121 Ga. 319, 48 S.E. 922 (1904).

⁴Breman v. Rodbell, 31 Ga. App. 358, 120 S.E. 697 (1923).

²O.C.G.A. § 13-6-5.

⁵DeVooght v. Hobbs, 265 Ga. App. 329, 593 S.E.2d 868, 124 A.L.R.5th 819 (2004).

³Hewitt v. Community & Southern Bank, 324 Ga. App. 713, 751

specific intent to cause harm.¹

O.C.G.A. § 51-12-5.1(b) provides that: “Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.” Whether the tort was sufficiently aggravating to authorize punitive damages is generally a jury question, and a jury may award punitive damages even where the clear and convincing evidence only creates an inference of the defendant’s conscious indifference to the consequences of his acts.²

When a tort has not been established, there cannot be a recovery of punitive damages.³ In addition, decisions remark that an intentional tort is a condition precedent for an award of punitive damages in Georgia.⁴

In a foreclosure action, trial court did not err in denying defendant’s motion for summary judgment on plaintiff’s punitive damages claim. Though punitive damages are awardable in foreclosure cases, the Georgia Court of Appeals found that a genuine issue of material fact existed as to whether appellant’s actions amounted to “an entire want of care such that it raised the presumption of conscious indifference to the consequences.”⁵

O.C.G.A. § 51-12-6 was correspondingly amended to provide that no punitive damages under O.C.G.A. § 51-12-5 or 51-12-5.1 shall be awarded where the entire injury is to the peace, happiness, or feelings of the plaintiff.

O.C.G.A. § 51-12-5.1 expressly requires a bifurcation of the punitive damages issue. The trier of fact first decides whether to award punitive damages, then reconvenes to decide the amount to be awarded.⁶ The punitive damages statute precludes trial courts from separating compensatory and punitive damages claims in a bifurcated trial. In terms of trial management, the jury decides liability, the amount of compensatory damages, and liability for punitive damages in the first phase of a bifurcated case, and the amount of punitive damages in the second phase.

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¹*Ballistics Research, Inc. v. BRI Funding, LLC*, 336 Ga. App. 77, 783 S.E.2d 678 (2016).

²*Mr. Transmission, Inc. v. Thompson*, 173 Ga. App. 773, 775(2), 328 S.E.2d 397 (1985).

³*Bartenfeld v. Chick-fil-A, Inc.*, 346 Ga. App. 759, 815 S.E.2d 273 (2018).

⁴*Heinisch v. Bernardini*, 2014 WL 5872698 (S.D. Ga. 2014).

⁵*BAC Home Loans Servicing, L.P. v. Wedereit*, 328 Ga. App. 566, 759 S.E.2d 867 (2014), judgment rev’d on other grounds, 297 Ga. 313, 773 S.E.2d 711 (2015).

⁶*Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459 (1998).

While trifurcation of proceedings is an option, it should be rarely used. Prior similar acts may be admitted, in the discretion of the court. They will be excluded when probative value is substantially outweighed by the risk they will confuse, mislead, or create prejudice. This balancing test provides needed flexibility.

In *Peacock v. HCP III Eastman, Inc.*,⁷ defendant's verdict was reversed because the trial court denied plaintiff's motion to produce evidence of past accident reports which were deemed relevant to the issue of punitive damages.

Citing O.C.G.A. § 51-12-5.1, the Georgia Supreme Court pointed out that only tort actions where it is proved by clear and convincing evidence that the defendant's actions were willful, wanton, or demonstrated "want of care," punitive damages may be allowed. Something more than the mere commission of a tort is needed for the imposition of punitive damages.⁸

In *Hughes v. First Acceptance Insurance Company of Georgia*,⁹ the Georgia Court of Appeals affirmed a trial court's granting of defendant's motion for summary judgment on the issue of punitive damages and attorney's fees. The court found that plaintiff made no showing that "the insurer acted with [a] conscious indifference to the consequences" when it failed to settle the case. An insurer acts in bad faith in rejecting a settlement offer when it acts unreasonably when presented with an offer to settle a case.

In *Hoever v. Marks*,¹⁰ the 11th Circuit found in a § 1983 action where the plaintiff prisoner prevailed in his claim before a jury that he was entitled to seek punitive damages. This decision constituted a course correction for the circuit. The circuit had previously held that the Prisoner Litigation Reform Act barred punitive damages.

Trial court's granting of summary judgment as to punitive damages was reversed in a suit against an apartment complex owner and an off-duty police officer at the complex. Questions of fact remained as to whether the tort was sufficiently aggravating to authorize punitive damages.¹¹

However, apparently an instruction that the jury must find that a defendant acted with specific intent to cause harm is not generally warranted. Rejecting the need for such an instruction and approving a major award of damages, the Court of Appeals

⁷*Peacock v. HCP III Eastman, Inc.*, 230 Ga. App. 726, 497 S.E.2d 253 (1998). (2017), rev'd on other grounds, 305 Ga. 489, 826 S.E.2d 71 (2019).

⁸*MDC Blackshear, LLC v. Littell*, 273 Ga. 169, 537 S.E.2d 356 (2000).

⁹*Hughes v. First Acceptance Insurance Company of Georgia, Inc.*, 343 Ga. App. 693, 808 S.E.2d 103

¹⁰*Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021).

¹¹*Miller v. City Views at Rosa Burney Park GP, LLC*, 323 Ga. App. 590, 746 S.E.2d 710 (2013).

held that punitive damages in the amount of \$257 million, which award was roughly 1.3 times the \$197 million in compensatory damages, would not be deemed excessive. The jury's award in this business dispute was affirmed in *Time Warner Entertainment Co., L.P. v. Six Flags Over Georgia, LLC*.¹²

In a punitive damage case, the trier of fact must determine whether there was personal injury or death involved or whether there was merely damage to property, and whether negligence was active or passive; the trier of fact must then decide if there was any evidence of willful misconduct, malice, fraud, wantonness, oppression or that entire want of care that would raise a presumption of conscious indifference to the consequences.¹³ Recovery of punitive damages may be authorized where the circumstances of the tort show an entire want of care and indifference to the consequences; willful and intentional misconduct is not essential.¹⁴

Exemplary damages cannot be awarded in the absence of any finding of compensatory damages.¹⁵ If a party does not recover general damages, punitive damages will not be allowed.¹⁶ Failure of automobile dealership's customer to succeed on underlying tort claims against automobile manufacturer precluded award of punitive damages and attorney's fees against manufacturer.¹⁷ More than a mere tort is required to receive a punitive award, and even gross negligence may be insufficient.¹⁸ Punitive awards are given for the purpose of punishing, penalizing, or deterring.¹⁹ An appellate court will overturn the award of punitive damages if it is so excessive or inadequate as to shock the judicial conscience.²⁰

Under Georgia law, employers may be vicariously liable for punitive damages arising from the acts or omissions of their employees if such tortious conduct is committed in the course of the employer's business, within the scope of the employment, and is

¹²*Time Warner Entertainment Co., L.P. v. Six Flags Over Georgia, LLC*, 245 Ga. App. 334, 537 S.E.2d 397 (2000), judgment vacated, 534 U.S. 801, 122 S. Ct. 24, 151 L. Ed. 2d 1 (2001) and opinion reinstated in part, 254 Ga. App. 598, 563 S.E.2d 178 (2002).

¹³*WMH, Inc. v. Thomas*, 260 Ga. 654, 398 S.E.2d 196 (1990).

¹⁴*Hoffman v. Wells*, 260 Ga. 588, 397 S.E.2d 696 (1990).

¹⁵*Howell v. Ansley*, 169 Ga. App. 935, 315 S.E.2d 476 (1984).

¹⁶*Norman v. Williams*, 220 Ga.

App. 367, 469 S.E.2d 366 (1996).

¹⁷*DaimlerChrysler Motors Company, LLC v. Clemente*, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

¹⁸*Banks v. ICI Americas, Inc.*, 266 Ga. 607, 469 S.E.2d 171 (1996); *Poverty Destroyed Forever, LLC v. Visio Financial Services, Inc.*, 360 Ga. App. 691, 859 S.E.2d 612 (2021).

¹⁹*Southeastern Sec. Ins. Co. v. Hotle*, 222 Ga. App. 161, 473 S.E.2d 256 (1996).

²⁰*Roberts v. Chapman*, 228 Ga. App. 365, 492 S.E.2d 244 (1997).

sufficient to authorize a recovery of punitive damages under O.C.G.A. § 51-12-5.1.²¹

As a general rule, contract cases do not give rise to punitive damages.²² It has been held that punitive damages are not recoverable for breach of contract, even though the breach may be in bad faith.²³

Provision of Tort Reform Act setting forth substantive and procedural rules to govern punitive damage awards in tort actions does not preclude argument of counsel in regard to punitive damages at the latter stage of a bifurcated tort trial, and a trial court's refusal to allow such argument constitutes a denial of a party's fundamental right to be represented by counsel at all stages of a trial.²⁴

An award of punitive damages against MARTA (Metropolitan Atlanta Rapid Transit Authority) would violate public policy as a matter of law, since such awards would seriously damage the public interest; an award of punitive damages against a governmental entity punishes only the taxpayers, who took no part in the commission of the tort.²⁵

Negligence, even gross negligence, is inadequate to support a punitive damages award.²⁶

Punitive damages are unavailable under the Georgia Computer Systems Protection Act (GCSPA).²⁷

In a Title VII action, the recovery of punitive damages is subject to the higher management standard. That standard requires proof "that the discriminating employee was high[] up the corporate hierarchy, or that higher management countenanced or approved [his] behavior."²⁸

Clear and convincing evidence supported the jury's award of punitive damages, in breach of contract and fraud action involv-

²¹*Atlantic Star Foods, LLC v. Burwell*, 368 Ga. App. 79, 84, 889 S.E.2d 202, 207 (2023).

²²*Parker v. Crider Poultry, Inc.*, 249 Ga. App. 381, 549 S.E.2d 711 (2001), judgment rev'd on other grounds, 275 Ga. 361, 565 S.E.2d 797 (2002).

²³*Parsells v. Orkin Exterminating Co., Inc.*, 172 Ga. App. 74, 322 S.E.2d 91 (1984); *Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987). However, see *Zieve v. Hairston*, 266 Ga. App. 753, 598 S.E.2d 25 (2004).

²⁴*McClure v. Gower*, 259 Ga. 678, 385 S.E.2d 271 (1989).

²⁵*Metropolitan Atlanta Rapid Transit Authority v. Boswell*, 261 Ga. 427, 405 S.E.2d 869 (1991).

²⁶*Newitt v. First Union Nat. Bank*, 270 Ga. App. 538, 607 S.E.2d 188 (2004). See *Boeing Co. v. Blane Intern. Group*, 276 Ga. App. 672, 624 S.E.2d 227 (2005) (even gross negligence insufficient to hold a party liable for punitive damages).

²⁷*Lyman v. Cellchem International, Inc.*, 300 Ga. 475, 796 S.E.2d 255 (2017). See O.C.G.A. §§ 16-9-90 et seq.

²⁸*Equal Employment Opportunity Commission v. Exel, Inc.*, 884 F.3d 1326 (11th Cir. 2018).

ing hair replacement company's unauthorized use of hair replacement client's before and after pictures on television commercials; company representative admitted that he lied to client when he told him that the commercials were only running on one station and that he knew that the commercials were running on two stations, company vice-president admitted that company representative had "done it before," and company representative laughed and told client that he would make him famous when client confronted him about the commercials.²⁹

In a products trial over a malfunctioning instrumentality where an assortment of prior accidents involving several other people were shown in evidence, can a plaintiff's attorney argue as follows: "Members of the jury, you have seen injuries caused by the manufacturer's product to other people around the country. Punish the manufacturer for its harm caused to John Plaintiff in this case by voting an award to John which sets an example on behalf of all who have been injured by the product." No, says the United States Supreme Court. In *Philip Morris USA v. Williams*,³⁰ the Supreme Court ruled that a jury may not "use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." The Court adds that the Due Process Clause prohibits asking for damages "to punish for harm caused strangers." Regarding evidence of other harms, however, the Court seems to suggest that such evidence is proper when it goes to show reprehensibility. "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible"³¹

Clients were entitled to discovery of law firm's financial records in connection with their punitive damages claim against firm *Smith v. Morris, Manning & Martin, LLP*.³² Plaintiff is not entitled to discover information concerning a defendant's personal financial resources absent an evidentiary showing by affidavit, discovery responses, or otherwise that a factual basis exists for plaintiff's punitive damages claim.

§ 33:8 Amount of exemplary damages

In 1987, O.C.G.A. § 51-12-5.1, concerning punitive damages,

²⁹*Zieve v. Hairston*, 266 Ga. App. 753, 598 S.E.2d 25 (2004).

³⁰*Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007).

³¹*Philip Morris, USA*, 127 S. Ct. at 1064. See also *Brookview Holdings*

v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559 (2007) (for punitive damages, there must be circumstances of aggravation or outrage).

³²*Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

was added. It places a limit of \$250,000 except in product liability cases or in other tort cases in which the defendant is found to have acted, or failed to act, with the specific intent to cause harm. In *Taylor v. Devereux Foundation, Inc.*,¹ the Georgia Supreme Court held that the punitive damages cap in O.C.G.A. § 51-12-5.1 does not violate the separation of powers or equal protection guarantees in the Georgia constitution.

O.C.G.A. § 51-12-5.1 limits the amount of liability in punitive damage awards in a number of cases. This cap on punitive damages applies in some, but not all, tort actions. The statute also contains a revision of product liability damages. It supplies a provision that 75% of any amounts awarded under subsection (e)(2) as punitive damages shall be paid to the State, less attorney's fees and litigation costs.

Interpreting the statute requiring that 75% of punitive damages awarded in a products case go to the state treasury, see *Ford v. Uniroyal Goodrich Tire Co.*²

In *Elliott v. McDaniel*,³ the court held that in order to authorize removal of the \$250,000 cap on punitive damages in nonproducts actions, there must be a finding that defendant acted with specific intent to cause harm. In further proceedings in the *McDaniel* case, the Georgia Supreme Court ruled that a party wishing to avoid the cap through the specific intent exception in future cases must request both an instruction and a separate finding on the intent issue.⁴

Under the current formulation of O.C.G.A. § 51-12-5.1(f), the removal of the cap on punitive damages turns on either specific intent to harm the plaintiff or harm caused while the defendant was “under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired.”

In 1996, the *BMW of North America, Inc. v. Gore*⁵ held a \$2 million punitive damages award to be grossly excessive in relation to the State's interest in deterring improper conduct. The award had been made when the plaintiff purchased a new BMW

[Section 33:8]

¹*Taylor v. Devereux Foundation, Inc.*, 316 Ga. 44, 885 S.E.2d 671 (2023).

²*Ford v. Uniroyal Goodrich Tire Co.*, 267 Ga. 226, 476 S.E.2d 565 (1996) (this case also demonstrates that torts arising from products liability actions are exempted from the punitive damages cap).

³*Elliott v. McDaniel*, 224 Ga. App. 848, 483 S.E.2d 104 (1996).

⁴*McDaniel v. Elliott*, 269 Ga. 262, 497 S.E.2d 786 (1998) (but reversing Court of Appeals decision limiting punitive damages to \$250,000 in this case).

⁵*BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

automobile which had been repainted, a fact he discovered later. The ratio between actual damages and the amount of punitive damages was deemed too great.

However, in Georgia, punitive damages in the amount of \$257 million, which award was roughly 1.3 times the \$197 million in compensatory damages, was not deemed excessive. The jury's award in this business dispute was affirmed in *Time Warner Entertainment Co., L.P. v. Six Flags Over Georgia, LLC*.⁶

The United States Supreme Court continues to address due process challenges to large punitive awards. In *State Farm Mut. Auto. Ins. Co. v. Campbell*,⁷ the plaintiff contended that State Farm refused to settle in bad faith. The Supreme Court held that an award of \$145 million in punitive damages on a \$1 million compensatory judgment violated due process. Grossly excessive punitive awards which are not proportionate to the wrong committed will be set aside as unreasonable, and the wealth of the defendant cannot justify an otherwise unconstitutional award. The decision has led some commentators to suggest that punitive damage awards are presumptively capped at single-digit multiples of compensatory awards.⁸

Georgia courts have been hesitant to draw a magic mathematical proportionality line between actual and punitive damages.⁹

In medical malpractice action, jury awarded compensatory and punitive damages against the defendants. Finding that the trial court did not abuse its discretion in denying defendants' motion for new trial or j.n.o.v., the appeals court reasoned:

Although we do not mechanically look to the ratio between general and punitive damages to resolve the question of excessiveness, that ratio is some evidence of whether the jury's award was infected by undue prejudice or bias. (citation omitted). In the present case, the trial court reduced the jury's award of punitive damages from a

⁶*Time Warner Entertainment Co., L.P. v. Six Flags Over Georgia, LLC*, 245 Ga. App. 334, 537 S.E.2d 397 (2000), judgment vacated, 534 U.S. 801, 122 S. Ct. 24, 151 L. Ed. 2d 1 (2001) and opinion reinstated in part, 254 Ga. App. 598, 563 S.E.2d 178 (2002).

⁷*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 60 Fed. R. Evid. Serv. 1349, 1 A.L.R. Fed. 2d 739 (2003).

⁸Chalmers, *Litigation News* 1 (July 2003).

⁹See *Oglethorpe Power Corp. v. Sheriff*, 210 Ga. App. 299, 436 S.E.2d 14 (1993) (compelling punitive awards to be mathematically proportionate would create a judicial barrier to deterring defendants). See also *Kent v. A.O. White*, 253 Ga. App. 492, 559 S.E.2d 731 (2002) (punitive damages may be given even where actual damages are small; here, punitive award was about 45 times higher than actual damages), overruled in part by *Time Warner Entertainment Co. v. Six Flags Over Georgia, LLC*, 254 Ga. App. 598, 563 S.E.2d 178 (2002) (courts must defer to jury's factual decision-making process).

combined \$2.5 million to \$250,000 because the jury found that none of the defendants exhibited an intent to harm Kim. (citation omitted). The \$2.5 million punitive damage award rendered by the jury was approximately 2.5 times the \$900,000 awarded in compensatory damages. The trial court did not abuse its discretion in denying the motion for new trial or j.n.o.v. on this ground because there is no evidence that the award of punitive damages was “infected by undue passion and prejudice.”¹⁰

The United States Supreme Court held in *O’Gilvie v. U.S.*¹¹ that an award of punitive damages received in a suit for personal injuries was not excludable from taxable gross income. In *Cohen v. de la Cruz*,¹² the Court held, in interpreting the fraud exception to bankruptcy protection, that an award of punitive damages was not discharged by a declaration of bankruptcy where it was the result of fraud of the debtor.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,¹³ the United States Supreme Court held that despite the broad discretion that state jurisdictions possess with respect to the imposition of punitive damages, the Due Process Clause of the Fourteenth Amendment imposes limits on that discretion. One key to whether the damages are grossly excessive is the sort of award imposed in other cases for comparable misconduct. Here, the jury awarded \$50,000 in compensatory damages and \$4.5 million in punitive damages. In federal cases, the de novo standard of review controls the appeals of awards.

The “Civil Litigation Improvement Act of 2000” was enacted by the Georgia legislature and limited the amount of the supersedeas bond for the punitive damages portion of a civil judgment to \$25 million. The act references the sort of judgment to which this limitation applies (foreign judgments), the conditions under which the monetary limitation is inapplicable, and contains a provision for a stay of enforcement of foreign judgments until appeals are concluded or the time for taking appeals has expired.

The statutory limit of \$250,000 on punitive damages is constitutional, since, if punitive damages can be eliminated, as the court has held previously, they can be circumscribed. The court also held that the statutory limit means that \$250,000 is the maximum amount that the fact-finder may award to any one plaintiff as punitive damages—regardless of the number of defendants and regardless of the number of theories of recovery

¹⁰Georgia Clinic, P.C. v. Stout, 323 Ga. App. 487, 747 S.E.2d 83 (2013).

¹¹O’Gilvie v. U.S., 519 U.S. 79, 117 S. Ct. 452, 136 L. Ed. 2d 454 (1996).

¹²Cohen v. de la Cruz, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341

(1998).
¹³Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674, 58 (2001).

arising out of the same transaction, occurrence, or series of transactions or occurrences.¹⁴

Law on the ratio of punitive to compensatory damages is ably discussed in *M. Terry, Preserving Punitive Damages on Appeal*, 28 *Verdict* 25 (Fall 2003).

In 2008 the United States Supreme Court ruled that punitive damages could not exceed compensatory damages, in a case where a jury awarded \$507.5 million in compensatory damages. A required 1:1 ratio of punitive to compensatory damages resulted in reduction of a \$2.5 billion award of punitive damages against an oil company.¹⁵

The ratio between actual and exemplary damages is often a key factor, as summarized in Brooks & Josephson, *Everything You Wanted to Know About Punitive Damages* 18, Lumpkin Inn of Court (Oct. 2008). The authors describe a relevant federal case, then conclude with a helpful summary of Georgia law:

When calculating the ratio between compensatory damages and punitive damages, courts are often faced with the problem of categorizing certain payments. Whether a payment is categorized as compensatory or punitive can be constitutionally significant because the categorization can greatly change the ratio of punitive damages to compensatory damages. The Eleventh Circuit recently addressed this issue in *Action Marine, Inc. v. Continental Carbon, Inc.*, 481 F.3d 1302 (11th Cir. 2007).

In *Action Marine*, a group of property owners sued Continental Carbon, a chemical manufacturing business located in Phenix City, Alabama (near Columbus, Ga.). *Id.* at 1306–08. The property owners alleged that Continental Carbon repeatedly, knowingly, and intentionally emitted a pollutant known as carbon black, which caused substantial damage to nearby residential and commercial property. Rather than fix the emission leaks, Continental allegedly engaged in a strategy of “denial, deception, and subterfuge.” *Id.* at 1308. Accordingly, punitive damages were sought.

The jury awarded compensatory damages that collectively totaled \$1,915,000 and punitive damages of \$17.5 million. Also, the jury awarded \$1,294,000 in attorney’s fees. *Id.*

[In order to succeed on a claim for punitive damages, the plaintiff must show “by clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.” O.C.G.A. § 51-12-5.1(b). The general rule in Georgia is that punitive damages are capped at \$250,000. O.C.G.A. § 51-12-5.1(g). In order to receive an award of punitive damages the plaintiff must also be awarded

¹⁴*Bagley v. Shortt*, 261 Ga. 762, 128 S. Ct. 2605, 171 L. Ed. 2d 570 410 S.E.2d 738 (1991).

¹⁵*Exxon Shipping Co. v. Baker*,

compensatory damages. *Vernon Library Supplies, Inc. v. Ard*, 249 Ga. App. 853, 855 (2001). Under the punitive damages statute “seventy-five percent of any amounts awarded [in a products liability case] . . . as punitive damages, less a proportionate part of the cost of litigation, including reasonable attorney’s fees . . . shall be paid into the treasury of the state.” O.C.G.A. § 51-12-5.1(e)(2). The Suggested Pattern Jury Instructions for Civil Cases, issued by the Council of Superior Court Judges of Georgia, contains several jury charges on punitive damages.]

§ 33:9 Pleading aggravated damages

An allegation that plaintiff is entitled to aggravated damages is proper only where there is an allegation of willful, wanton, oppressive, or malicious conduct.¹ “Wanton conduct,” as required for a showing of punitive damages in a tort action, is that which is so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent.²

There must be a right under the pleadings to recover general, special, or nominal damages in order to recover aggravated damages, because such damages are additional in nature. On the right to aggravated damages, see O.C.G.A. § 51-12-5 (now applicable only to torts prior to July 1, 1987). If no other damages are recoverable, exemplary damages could not be additional to anything, and therefore are not recoverable either³ except if a tort is willfully committed, in which case it would be held that damages may be recovered for wounded feelings alone.⁴

Where a person willfully repeats a trespass, a cause of action exists for aggravated damages.⁵

Aggravated damages for negligence have been allowed in cases involving motor vehicle collisions.⁶

§ 33:10 Instructions on damages in personal injury cases

An award for future pain and suffering need not be reduced to

[Section 33:9]

¹*Willis v. Hill*, 116 Ga. App. 848, 159 S.E.2d 145 (1967), judgment rev’d on other grounds, 224 Ga. 263, 161 S.E.2d 281 (1968).

²*Wardlaw v. Ivey*, 297 Ga. App. 240, 676 S.E.2d 858 (2009).

³*Beverly v. Observer Pub. Co.*, 88 Ga. App. 490, 77 S.E.2d 80 (1953).

⁴*Barry v. Baugh*, 111 Ga. App.

813, 143 S.E.2d 489, 23 A.L.R.3d 645 (1965). See the 1987 revision limiting punitive damages in O.C.G.A. § 51-12-6 (damages to feelings).

⁵*Dalon Contracting Co. v. Artman*, 101 Ga. App. 828, 115 S.E.2d 377 (1960).

⁶*Floyd v. Morgan*, 60 Ga. App. 496, 4 S.E.2d 91 (1939); *Jackson v. Co-op Cab Co.*, 102 Ga. App. 688, 117 S.E.2d 627 (1960).

present cash value.¹

Abrogating a series of prior Georgia cases, in 2000 the Georgia Supreme Court announced that in a claim concerning negligent conduct where a mother and child suffered physical impact, the mother could recover emotional damages from witnessing the mortal injury to her child, and she is not limited to emotional trauma restricted to her own physical injuries. A recovery for emotional distress is allowed only where there is some impact on the plaintiff, however, and the impact must be physical injury. There is a caveat. With regard to emotional distress damages, there is no necessity of an impact when the alleged conduct directed toward the plaintiff is malicious, willful, or wanton.²

In Georgia, damages for mental distress are not recoverable in the absence of physical injury when the claim is premised on ordinary negligence; however, when the claim is for intentional misconduct, damages for mental distress may be recovered without proof of physical injury.³

Parents were not entitled to recover for emotional distress of witnessing their child's injury when cement display fountain in nursery fell on child, where there was no evidence that parents sustained direct physical impact and resulting physical injury, along with the child, when fountain fell. The only exception to the requirement that the parent sustain a direct physical impact and resulting physical injury, along with the child, for a parent to recover for the emotional distress of witnessing the child's injury is when the alleged conduct directed toward the plaintiff is malicious, willful, or wanton.⁴

In action brought by a flight attendant against a corporate owner of an airport, the Georgia Court of Appeals found that the attendant was not entitled to recover emotional distress or mental suffering damages. The appeals court discussed negligent conduct claims, Georgia's impact rule, and the pecuniary loss rule. The court stated that claimants asserting negligent conduct may recover for emotional distress "only where there is some impact on the plaintiff, and that impact must be a physical injury." It added that there are three elements to Georgia's impact rule: "(1) a

[Section 33:10]

¹Valdosta Housing Authority v. Finnessee, 160 Ga. App. 552, 287 S.E.2d 569 (1981).

²Lee v. State Farm Mut. Ins. Co., 272 Ga. 583, 533 S.E.2d 82, 89 A.L.R. 5th 711 (2000).

³Hamilton v. Powell, Goldstein, Frazer & Murphy, 252 Ga. 149, 311 S.E.2d 818 (1984); Dodd v. City of

Gainesville, 268 Ga. App. 43, 601 S.E.2d 352 (2004) (when the defendant's conduct is malicious, willful, or wanton, recovery for negligent infliction of emotional distress can be had without the necessity of a physical impact).

⁴Pike Nurseries, Inc. v. Allen, 253 Ga. App. 312, 558 S.E.2d 834 (2002).

physical impact to the plaintiff; (2) the *physical impact causes physical injury* to the plaintiff; and (3) the *physical injury* to the plaintiff *causes the plaintiff's* mental suffering or *emotional distress*.” The court added that emotional distress damages are recoverable under the pecuniary loss rule “only if the plaintiff has suffered a pecuniary loss and has suffered an injury to the person, albeit not physical.”⁵

The Georgia Supreme Court reversed prior precedent, in part, and disallowed the recovery of pecuniary damages. As explained in *Mayorga v. Benton*:⁶

In *Nationwide Mut. Fire Ins. Co. v. Lam*, a husband and wife were involved in an automobile accident in which their vehicle was damaged. 248 Ga. App. at 135, 546 S.E.2d 283. Although the wife suffered no physical injury, she alleged that the accident aggravated a preexisting mental illness, the treatment of which resulted in medical expenses. *Id.* We concluded that the wife suffered a pecuniary loss based upon her medical bills and the damage to personal property in the accident. *Id.* at 138 (2), 546 S.E.2d 283. We then found that she had suffered “an injury to her person, consisting of aggravation of her preexisting mental illness, which before the collision had been stable for years.”

Mayorga overruled this portion of *Lam*. In so doing, the Court observed, “[i]f we do not insist on a workable limiting principle as a prerequisite to recognition of new exceptions to the physical impact rule, the exceptions will soon swallow the rule.”

In action by tenant against landlord claiming wrongful eviction, the tenant was not entitled to damages for intentional infliction of emotional distress.⁷ The Georgia Court of Appeals noted that “to recover for intentional infliction of emotional distress, [the tenant] was required to show that Lyons’s conduct inflicted emotional distress so severe that no reasonable person could be expected to endure it.” The court found that the tenant failed to “remotely suggest . . . that this conduct caused him to suffer emotional distress, severe or otherwise.”

In action brought by a tenant against landlord alleging, inter alia, a violation of the Fair Housing Act, and intentional infliction of emotional distress, the Eleventh Circuit found that actions of the landlord did not constitute extreme and outrageous conduct. It was alleged that the landlord, inter alia, retaliated against the tenant for exercising her right to speech, continuously told her to move “because of her race and familial status,”

⁵*Brock v. Atlanta Airlines Terminal Corporation*, 359 Ga. App. 226, 857 S.E.2d 74 (2021). 665, 875 S.E.2d 908 (2022).

⁷*Fennelly v. Lyons*, 333 Ga. App. 96, 775 S.E.2d 587 (2015).

⁶*Mayorga v. Benton*, 364 Ga. App.

required that she move during the holiday season with less than 30 days notice, and sent in excess of \$4,500 of her “funds through regular mail during the holiday season.”⁸

In breach of contract action, the Court of Appeals held that for plaintiff to recover for intentional infliction of emotional distress, the complaining party must show “conduct that is of such serious import as to naturally give rise to such intense feelings of humiliation, embarrassment, fright or extreme outrage as to cause severe emotional distress.”⁹

Where the plaintiff seeks recovery for loss of wages, partial loss of earning capacity, pain and suffering, and special damages for medical expenses, the court should instruct the jury as to the rules governing the measure of each even without a written request to do so.¹⁰

The charge to the jury should make it clear that the measure of damages for pain and suffering—that is, the enlightened conscience of the jury—does not apply to the other items for which recovery is sought.¹¹

A charge as to future pain and suffering is authorized where there is testimony that the plaintiff has been injured and some two years later at the time of trial is still suffering from such injuries, even without positive medical testimony as to permanency.¹²

Lost wages and earnings are recoverable where the evidence shows the amount of loss with reasonable certainty.¹³ Loss of future earnings are recoverable where evidence is presented on the permanency of plaintiff’s injury, the effect of injury on earnings, and the monetary amount thereof.¹⁴

Trial court did not abuse its discretion in admitting evidence of the plaintiff’s disciplinary sanctions that had been imposed by his employer prior to plaintiff’s slip and fall accident. Plaintiff sought to recover lost future wages from his employer after he sustained a knee injury while ascending stairs at a facility owned by his former employer. Given that the plaintiff was seeking to recover lost future wages, the defendant was entitled to introduce evidence which allowed the jury to consider that the defendant

⁸Moore v. Camden Property Trust, 816 Fed. Appx. 324 (11th Cir. 2020).

⁹Roberts v. JP Morgan Chase Bank, National Association, 342 Ga. App. 73, 802 S.E.2d 880 (2017).

¹⁰Porter v. Bland, 105 Ga. App. 703, 125 S.E.2d 713 (1962).

¹¹Canada Dry Bottling Co. v. Campbell, 112 Ga. App. 56, 143 S.E.2d

785 (1965).

¹²National Upholstery Co. v. Padgett, 111 Ga. App. 842, 143 S.E.2d 494 (1965).

¹³Piedmont Newnan Hosp., Inc. v. Barbour, 333 Ga. App. 620, 774 S.E.2d 822 (2015).

¹⁴Olariu v. Marrero, 248 Ga. App. 824, 549 S.E.2d 121 (2001).

was in danger of losing his job at the time of the incident.¹⁵

When someone suffers an injury to his person or property by the tort of another and is, as a result, unable for a time to practice his profession or occupation, he is entitled to recover his lost earnings as an element of his damages.¹⁶

It is normally within the discretion of the trial court to instruct the jury as to whether or not they may consider the effects of inflation in determining damages; but where the court has refused to charge the jury that the effects of inflation may be considered in determining damages to be awarded for future pain and suffering or loss of future earnings and where there is evidence that a present yardstick for compensation is not the same as a past yardstick, there can be harmful error.¹⁷

It was proper to admit Carlisle Mortality Tables and to instruct the jury regarding the use of such tables or matters relating to future and permanent pain and suffering where medical testimony confirmed permanent pain and suffering arising from a cervical sprain injury.¹⁸

In a personal injury case where damages sought for the diminution of one's capacity to earn money are combined with damages sought for the diminution of one's capacity to work and labor, the measure of such damages involves numerous considerations, among which are the earnings before the injury, earnings after the injury, and probability of increased or decreased earnings in the future.¹⁹

Evidence was sufficient to support a loss of consortium award of \$938,000 to the wife of a driver injured in automobile accident; the wife testified that since the collision, she was required to help her husband put his socks on every day, husband was unable to remember things and had become moody, quiet, sad, and depressed, and she stated that he was a completely different person after accident and that his whole personality changed.²⁰ *Lee* also holds that "consortium" means the marital rights and duties of the spouses inter se, and the concept includes the reciprocal rights and duties of society, companionship, love, affection, aid services, cooperation, sexual relations, and comfort, such being special rights growing out of the marriage covenants. Damages for loss of consortium are not capable of exact pecuniary measure and must be left to the enlightened conscience of

¹⁵*Smith v. CSX Transp., Inc.*, 325 Ga. App. 314, 751 S.E.2d 604 (2013).

¹⁶*French v. Dilleshaw*, 313 Ga. App. 834, 723 S.E.2d 64 (2012).

¹⁷*Leonard v. Kirkpatrick*, 118 Ga. App. 277, 163 S.E.2d 340 (1968).

¹⁸*Graham v. Clark*, 114 Ga. App. 825, 152 S.E.2d 789 (1966).

¹⁹*Wright v. Lail*, 219 Ga. 607, 135 S.E.2d 418 (1964).

²⁰*Lee v. Thomason*, 277 Ga. App. 573, 627 S.E.2d 168 (2006).

impartial jurors taking into consideration the nature of the services, society, companion ship and all the circumstance of the case. Although consortium includes sexual relations, it also includes nonsexual aspects of a marital relationship. Lost wages are not an element of damages in a loss of consortium claim.²¹

Where plaintiff seeks as an element of damages the future loss of a spouse's consortium, evidence of age and life expectancy of both husband and wife is essential to jury's determination of award inasmuch as the recovery for future loss of consortium must be based on the shorter of the two life expectancies.²² Damages for current loss of consortium, like damages for pain and suffering, are general damages, and any award must be left to the enlightened conscience of impartial jurors.²³

Table for expectation of life for men and women, see Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 3:21.

Damages for a personal injury plaintiff with preexisting conditions came up in *Setliff v. Littleton*.²⁴ The defense complained about the court's damage instructions in the case because "[t]here was no evidence in the record to show Plaintiff/Appellee Kelly Littleton was an 'egg shell' plaintiff." The Court of Appeals ruled that the record supported the trial court's instructions. The defense apparently tried to attribute Littleton's knee problems to an origin other than the auto accident. They also ascribed plaintiff's condition to a combination of preexisting conditions and degenerative problems. Accordingly, since a charge may be given when there was slight evidence to sustain it, and here there was evidence to support the damage instructions, the reviewing court found no error.

§ 33:11 Damages to personal property

Damages in auto repair cases came under study in *State Farm State Farm Mut. Auto. Ins. Co. v. Mabry*.¹ Even if a wrecked car is adequately repaired, an insured party is entitled to collect the difference between the repaired car and the pre-loss value, which frequently will exceed the cost of repairs. Insureds brought a class action against State Farm. The Georgia Supreme Court held that an automobile policy provision requiring the insurer to pay for loss to the insured's car required the insurer to pay for

²¹Magill v. Edd Kirby Chevrolet, Inc., 277 Ga. App. 619, 627 S.E.2d 207 (2006).

²²Cody v. Peak, 113 Ga. App. 676, 149 S.E.2d 521 (1966).

²³Hightower v. Landrum, 109 Ga. App. 510, 136 S.E.2d 425 (1964).

²⁴Setliff v. Littleton, 264 Ga. App. 711, 592 S.E.2d 180 (2003).

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¹State Farm Mut. Auto. Ins. Co. v. Mabry, 274 Ga. 498, 556 S.E.2d 114 (2001).

diminution in value of the repaired vehicles, even if the repairs returned the vehicles to pre-loss condition in terms of appearance and function; the policy required the insurer to make the insured whole and thus to pay for the difference in value if the repairs did not restore the market value prior to the accident. The undertaking of an automobile insurer to cover the actual loss or damage must be taken as the primary obligation under which the measure of the liability would be the difference between the value of the property immediately before the injury and its value immediately afterwards; the stipulation that liability does not exceed the cost of repair or replacement must be construed as a subordinate provision, limiting or abating the primary liability, to be pleaded defensively if the insurer would diminish or limit the amount of recovery by reason thereof. The insurer's obligation, however, will be measured by the pre-loss value of the car.

In an action to recover damages to a vehicle, where the owner has undertaken to make proper and necessary repairs, the owner may, in establishing such damages, include such proper and necessary expenses, provided such items are the direct and proximate result of the collision, and represent the reasonable value of such necessary material and labor and provided the aggregate of these amounts, together with hire on the machine while rendered incapable of being used, and the value of any additional permanent impairment, does not exceed the value of the machine before the injury, with interest thereon.²

Loss of use damages for an automobile totally destroyed by fire is not recoverable, as such damages are permissible only where the vehicle is repairable.³

In an action brought by a motorist against a county board of commissioners and sheriff for damages arising from injuries allegedly sustained when motorist's truck struck a pothole on a road maintained by the county, the Georgia Court of Appeals found that the trial court properly granted summary judgment in favor of the defendants on the basis of sovereign and qualified immunity.⁴

Where the property is repaired or replaced, but not otherwise, an element of damages is the reasonable rental value of similar property used during the time reasonably required for repair or replacement.⁵

A jury may make findings concerning the cash values of com-

²*Letteer v. Archer*, 160 Ga. App. 373, 287 S.E.2d 89 (1981). of Com'rs, 328 Ga. App. 579, 760 S.E.2d 9 (2014).

³*Rich v. Strickland*, 168 Ga. App. 107, 308 S.E.2d 206 (1983). ⁵*Globe Motors, Inc. v. Noonan*, 106 Ga. App. 486, 127 S.E.2d 320

⁴*Davis v. Effingham County Bd.* (1962).

mon and familiar property when a homeowner or a homeowner's spouse gives opinion evidence concerning the approximate age and purchase price or replacement value of destroyed household items; it is not necessary that there be testimony as to the condition of each item immediately prior to the loss.⁶

Following *Braner*, another case arose where Allstate tried to argue that because the homeowner's daughter did not testify to the approximate date of purchase of the household items on the list, the plaintiff's proof of damage was insufficient to withstand a motion for directed verdict. However, the trial court did not err in ruling that the items on the list were within the general ken of a jury, such that denying the insurer's motion for directed verdict as to personal property damages was not error.⁷

The value of personal property may be established both by expert opinion evidence and otherwise.⁸

In action against a kennel owner arising from the death of a dog, the Supreme Court of Georgia stated that pet dogs are considered the personal property of its owner and "that the proper measure of damages recoverable . . . for the negligent injury and death of [an owner's] dog includes both the dog's fair market value plus interest *and* any reasonable medical costs and other expenses they incurred in treating the animal for its injuries."⁹

§ 33:12 Damages in wrongful death cases

In an action by the widow for the wrongful death of her husband, the jury may determine the value of the life of the decedent according to his age, health, habits, and the money he was earning at the time of his death.¹

In 1998, O.C.G.A. § 51-4-2 was amended by a provision relating to the share of a surviving spouse of a decedent in a wrongful death action, providing that the surviving spouse shall receive no less than one-third of any amount recovered under the statute.

"Georgia is unique in its measure of damages for a wrongful death act, because it uses the value of the decedent's life to him." A wrongful death claim accrues when the decedent dies rather

⁶*Braner v. Southern Trust Ins. Co.*, 255 Ga. 117, 335 S.E.2d 547 (1985).

⁷*Allstate Indem. Co. v. Payton*, 289 Ga. App. 202, 656 S.E.2d 554 (2008).

⁸*Jain v. Carload Delivery Service, Inc.*, 189 Ga. App. 95, 375 S.E.2d 99

(1988).

⁹*Barking Hound Village, LLC v. Monyak*, 299 Ga. 144, 787 S.E.2d 191 (2016).

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¹*Gordy v. Powell*, 95 Ga. App. 822, 99 S.E.2d 313 (1957).

than at the time of the infliction of the injuries causing the death.²

The measure of damages for the wrongful death of a mother brought by her son is not the son's loss from his mother's absence, but the mother's loss from not being able to raise her son.³ Evidence related to a mother's sex life would not be admissible as rebuttal testimony in son's wrongful death suit against drivers of cars that crashed and killed mother, where testimony regarding abortions, adoptions, or her sex life were not relevant to questions of whether his mother was a good person and a good mother to her child, and not relevant to show mother's loss to herself of opportunity to be a parent to her son.⁴

Punitive damages are not available in a wrongful death action.⁵

In cases where there is no person entitled to sue under the wrongful death statute—that is, husband, father, wife, mother, and child—the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin; the amount of recovery must be the full value of the life of the decedent.⁶

§ 33:13 Damages in breach of contract cases

Where a plaintiff seeks damages for the violation of a contract by the defendant, the measure of his damages is not what he has suffered by performing his part, but what he has suffered as a result of the defendant's failure to perform.¹

The burden is on the party seeking damages to show both the breach and the damages, and this must be done by evidence that will furnish the jury with sufficient data to enable them to estimate with reasonable certainty the amount of the damages.²

Trial court erred in directing verdict in favor of defendant, where plaintiff produced evidence sufficient for the jury to calculate the plaintiff's damages with reasonable certainty. Plaintiff produced evidence of the amounts billed to the subject accounts, as well as the commissions that would be owed on those bills. The burden then shifted to the defendant "to show what portion, if any, of those earned commissions was not yet payable

²Alvista Healthcare Center, Inc. v. Miller, 296 Ga. App. 133, 673 S.E.2d 637 (2009).

³O.C.G.A. § 51-4-2(a).

⁴Brock v. Wedincamp, 253 Ga. App. 275, 558 S.E.2d 836 (2002).

⁵Truelove v. Wilson, 159 Ga. App. 906, 285 S.E.2d 556, 1 Ed. Law Rep. 1349 (1981).

⁶O.C.G.A. § 51-4-5.

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¹State Highway Dept. v. Knox-Rivers Const. Co., 117 Ga. App. 453, 160 S.E.2d 641 (1968) as stated in National Distributing Co., Inc. v. Department of Transp., 157 Ga. App. 789, 278 S.E.2d 648 (1981).

²Bennett v. Associated Food Stores, Inc., 118 Ga. App. 711, 165 S.E.2d 581 (1968).

because the accounts were past due.” The defendant failed to produce any such evidence.³

Damages recoverable for a breach of contract are such as arise naturally and normally from the breach of such contract, and such as the parties contemplated when the contract was made, as the probable result of the breach.⁴ Parties may agree to limit the damages due if the contract is breached.⁵

A trial court may award incidental damages in addition to specific performance if necessary to make the injured party whole. In *Gwinnett County v. Old Peachtree Partners, LLC*,⁶ the Georgia Court of Appeals held that Old Peachtree was entitled to present evidence of its incidental expenses incurred as a result of a breach of a settlement agreement by the county. Specifically, it could prove the costs it incurred by having to maintain insurance coverage (from the time of the intended closing date under the contract to the actual closing date) on the property at issue.

A special damages rule applies to an action based on a contract to sell real property. In *Roba v. Dotson*,⁷ the court held that the plaintiff could recover the standard damages calculated as the difference between the contract price and the fair market value of the property at the time of breach. However, the court denied plaintiff’s collection of taxes, interest on the loan securing the property, and maintenance costs associated with the breach. Under Georgia law, damages beyond the standard benefit of the bargain enunciated in O.C.G.A. §§ 13-6-2 and 13-6-8 must be specified in the contract itself for the plaintiff to collect.

Unless the loss of profits from a breach of contract are capable of definite ascertainment and are traceable directly to acts of the other party, they are not recoverable.⁸

Lost profits are sometimes too speculative to allow recovery; however, in a proper case they may be recovered. Exact mathematical certainty is not required. If the plaintiff can show (1) the

³*Willesen v. Ernest Communications, Inc.*, 323 Ga. App. 457, 746 S.E.2d 755 (2013).

⁴O.C.G.A. § 13-6-2.

⁵“While the general rule of our case law may allow parties to recover incidental damages in addition to being awarded specific performance of a contract, parties to a contract may agree to limit the amount of damages due if the contract is breached, and they are bound by that agreement. If the language of an agreement is plain and unambiguous, the court must afford its literal meaning, despite a

party’s contention that it understood the contract to mean something else.” *DonRob Investments, L.P. v. 360 Residential, LLC*, 363 Ga. App. 312, 324, 870 S.E.2d 874, 883 (2022) (internal citations omitted).

⁶*Gwinnett County v. Old Peachtree Partners, LLC*, 329 Ga. App. 540, 764 S.E.2d 193 (2014).

⁷*Roba v. Dotson*, 315 Ga. App. 721, 727 S.E.2d 542 (2012).

⁸*Kingston Pencil Corp. v. Jordan*, 115 Ga. App. 333, 154 S.E.2d 650 (1967).

business is established; (2) has a history of earning profits; (3) “definite, certain, and reasonable” data exist to ascertain the amount of lost profits; and (4) “such profits were in the contemplation of the parties at the time of the contract,” lost profits might be awarded. To recover lost profits in a breach of contract action one must show the probable gain with great specificity as well as expenses incurred in realizing such profits; in short, the gross amount minus expenses equals the amount of recovery.⁹

Lost profit may also be recoverable in a tort action. When a profitable business enterprise is rendered unable to earn profits for a time by the tort of another, it may be entitled to recover its lost profits.¹⁰

Restitution, damages, and specific performance are three remedies for breach of contract.¹¹

As a general rule, breach of contract cases do not give rise to punitive damages.¹² Punitive damages may not be awarded in a suit on a contract, even if the refusal to pay was in bad faith.¹³ Exemplary damages were barred in a suit on a contract for the difference in value between a used car, which was fraudulently sold to plaintiff, and what the value would have been of a new car as represented to plaintiff, instead of tort for fraud and deceit.¹⁴

Businesses, including limited liability entities, cannot recover damages based upon intentional or negligent infliction of emotional distress since such businesses “lack ‘the cognizant ability to experience emotions.’”¹⁵

Generally, the measure of damages for defective workmanship is the cost to repair the defect.¹⁶

§ 33:14 Excessive or inadequate damages

The question of damages being one for the jury, the court

⁹Triad Drywall, LLC v. Building Materials Wholesale, Inc., 300 Ga. App. 745, 686 S.E.2d 364 (2009); EZ Green Associates, LLC v. Georgia-Pacific Corp., 331 Ga. App. 183, 770 S.E.2d 273 (2015).

¹⁰French v. Dilleshaw, 313 Ga. App. 834, 723 S.E.2d 64 (2012).

¹¹PMS Const. Co., Inc. v. DeKalb County, 243 Ga. 870, 257 S.E.2d 285 (1979).

¹²Parker v. Crider Poultry, Inc., 249 Ga. App. 381, 549 S.E.2d 711 (2001), judgment rev’d on other grounds, 275 Ga. 361, 565 S.E.2d 797

(2002) and opinion vacated on other grounds, 257 Ga. App. 202, 570 S.E.2d 668 (2002).

¹³Combined Contractors, Inc. v. Welch, 160 Ga. App. 790, 288 S.E.2d 229 (1982).

¹⁴Nichols v. Williams Pontiac, Inc., 95 Ga. App. 752, 98 S.E.2d 659 (1957).

¹⁵Osprey Cove Real Estate, LLC v. Towerview Construction, LLC, 343 Ga. App. 436, 808 S.E.2d 425 (2017).

¹⁶Simmons v. Boros, 255 Ga. 524, 341 S.E.2d 2 (1986).

should not interfere unless the damages are either so inadequate or so excessive as to be improper.¹

The Georgia Supreme Court authored a major pronouncement regarding a party's refusal to accept the amount determined by the judge to be proper, after deciding the jury's award of damages was clearly inadequate or excessive. In the case of an excessive award, for example, the trial court may condition the grant of a new trial on the refusal of the adversely affected party to accept the reduced award. The statute's language supports this holding.² The Georgia Supreme Court held the remittitur permitted under this statute did not violate the state constitution's guarantee of a jury trial.³ The court cites to *Dimick v. Schiedt*.⁴

Concerning additur and remittitur, see rules controlling these steps in Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 5:1.

The court will take judicial notice of the normal increase or decrease of the value of the dollar in determining whether a verdict was or was not excessive.⁵ The court may direct a verdict against a party on the issue of liability in a proper case and submit only the issue of damages to the jury.⁶

A verdict to be found so excessive as to infer undue bias or prejudice must "carry its death warrant upon its face," be "monstrous indeed," "must shock," or "appear exorbitant," and an appellate court may not interfere with the trial court's refusal to set a verdict aside as excessive unless the record clearly shows that the jury's verdict was prejudicial, biased, or procured by corrupt means.⁷

Award of over \$2.1 million in compensatory damages was not excessive in negligence action arising from collision of 51-year-old plaintiff's motorcycle with automobile, as a result of which he sustained injuries that ultimately required amputation of his left leg below the knee.⁸

Remittitur in Georgia, see T. Eaton, *Of Frivolous Litigation and Runaway Juries*, 41 Ga. L. Rev. 431, 436 (2007).

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¹See O.C.G.A. §§ 13-6-4, 51-12-12.

²O.C.G.A. § 51-12-12.

³*Lisle v. Willis*, 265 Ga. 861, 463 S.E.2d 108 (1995).

⁴*Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S. Ct. 296, 301, 79 L. Ed. 603, 95 A.L.R. 1150 (1935) ("Where the verdict is excessive . . . the remittitur has the effect of merely lopping off an

excrescence").

⁵*Ocilla Southern R. Co. v. McInvale*, 26 Ga. App. 106, 105 S.E. 451 (1920).

⁶*Smith-East Produce Co. v. Williams*, 112 Ga. App. 620, 145 S.E.2d 794 (1965).

⁷*Smith v. Miliken*, 247 Ga. 369, 276 S.E.2d 35 (1981).

⁸*Hart v. Shergold*, 295 Ga. App. 94, 670 S.E.2d 895 (2008).

A jury's award cannot be successfully attacked so as to warrant a new trial unless it is so flagrantly excessive or inadequate, in the light of the evidence, as to create a clear implication of bias, prejudice, or gross mistake on the part of the jurors.⁹

Damages award of \$698,500 was deemed to be excessive and thus warranted a new trial in expelled student's breach-of-contract action that arose from a private college's failure to abide by its student handbook regarding expulsion procedures. The verdict was the result of mistake as to proper measure of damages. The most that the expelled student could recover was lost wages for additional time needed to obtain the degree, cost of tuition required to repeat classes, and refund of tuition payment, and the verdict greatly exceeded possible damages that could be awarded under a proper measure of damages.¹⁰

A trial court's approval of a jury verdict as to damages creates a presumption of correctness that cannot be disturbed on appeal absent compelling evidence, and a reviewing court is powerless to interfere unless it is clear from the record that the verdict of the jury was prejudiced or biased or was procured by corrupt means.¹¹

§ 33:15 Interest

Jurisdictions vary in their approach to interest. Under varying interpretations, it may accrue on a claim from its inception, rather than simply the date on which judgment was achieved.¹ A number of Georgia cases have dealt with this subject of interest.

All judgments in this state bear lawful interest on the principal amount recovered.² 2003 legislation changed the interest rate paid to plaintiffs for the time between a court judgment and actual defendant payment.³

Unless the parties to contract stipulate to a different interest rate, a 7 percent interest rate is applied. As found by the Georgia Court of Appeals in a case involving a dispute between a homeowners association and bank:

OCGA § 7-4-2 governs the rate of interest in contracts where the interest rate is not specified. Because 'the maximum legal rate' specified in the Declaration was not definite and ascertainable, the trial court erred in awarding 18 percent interest rather than the 7 percent provided for by OCGA § 7-4-2.

⁹Lee v. Thomason, 277 Ga. App. 573, 627 S.E.2d 168 (2006). S.E.2d 707 (2008).

¹⁰Morehouse College, Inc. v. McGaha, 277 Ga. App. 529, 627 S.E.2d 39, 207 Ed. Law Rep. 429 (2005).

¹¹First Southern Bank v. C & F Services, Inc., 290 Ga. App. 305, 659

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¹Carlson, Successful Techniques for Civil Trials (2d ed.) § 5:1.

²O.C.G.A. § 7-4-12.

³O.C.G.A. § 7-4-12(a).

The Unlimited Damages Interest Act, O.C.G.A. § 51-12-14 (UDIA) is referenced in *Security Life Ins. Co. of America v. St. Paul Fire & Marine Ins. Co.*⁴ The UDIA is a statutory means by which an injured party may demand an amount of unliquidated damages from the tortfeasor prior to litigation and, should the tortfeasor decline to meet the injured party's demand, receive damages in the form of prejudgment interest if "the judgment is for an amount not less than the amount demanded."⁵

In contract cases, by statute, O.C.G.A. § 13-6-13, where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of legal interest from that time until recovery. The same rule, in substance, has been held to apply in tort cases.⁶

All liquidated demands, where, by contract or otherwise, the sum to be paid is fixed or certain, bear interest from the time the party shall become liable and bound to pay them; if payable on demand, from the time of the demand, and in the case of promissory notes payable on demand, the law presumes a demand instantly and gives interest from date.⁷

Once interest matures on an obligation, the interest itself becomes a liquidated obligation, and thereafter interest will run at the legal rate upon the interest, as well as upon the principal.⁸

All accounts of merchants, tradesmen, or mechanics, and all other commercial accounts become due when a statement is rendered, and after 30 days shall bear interest from the due date until paid.⁹

Open accounts bear interest from their due date, and a creditor may bring suit for the principal due and interest to the time of filing suit and also recover the interest due from the time of filing suit to the date of judgment.¹⁰

§ 33:16 Attorney's fees

Expenses of litigation are not generally allowed as a part of the damages, but if the defendant has acted in bad faith or has been stubbornly litigious or has caused the plaintiff unnecessary

⁴*Security Life Ins. Co. of America v. St. Paul Fire & Marine Ins. Co.*, 278 Ga. 800, 606 S.E.2d 855 (2004).

⁵O.C.G.A. § 51-12-14(a).

⁶*Southern Ry. Co. v. Groover*, 41 Ga. App. 746, 154 S.E. 706 (1930).

⁷O.C.G.A. § 7-4-15.

⁸*Walton v. Johnson*, 213 Ga. 108, 97 S.E.2d 310 (1957).

⁹O.C.G.A. § 7-4-16.

¹⁰*Swink v. Prater*, 90 Ga. App. 266, 82 S.E.2d 901 (1954).

trouble and expense, the jury may allow them.¹ When a defendant refuses to acknowledge fault in a clear liability situation, one writer advises counsel to add a claim for attorney fees and costs under O.C.G.A. § 13-6-11.²

Attorney fees may also be awarded under O.C.G.A. § 16-11-129. When an applicant for a firearms license is wrongly denied a permit and prevails in a court action to secure the license, he is entitled to recover costs and fees.³

In federal court, an award of attorney fees in the amount of \$1,294,000 was litigated in *Action Marine, Inc. v. Continental Carbon Inc.*⁴

Section 362(k)(1) of the Bankruptcy Code provides, in pertinent part, that “an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees.” The Eleventh Circuit explained the scope of this section in *In re Horne*:⁵ “Congress did not say those costs and attorneys’ fees were limited to ending the stay violation, but rather spoke to a full recovery of damages including fees and costs incurred from violating a stay. This explicit, specific, and broad language permits the recovery of attorneys’ fees incurred in stopping the stay violation, prosecuting a damages action, and defending those judgments on appeal.”

Parties may agree by contract to pay attorney fees with respect to the collection of a promissory note “as a part of such debt if the note is collected by or through an attorney after maturity[.]” However, if the promissory note allows “for ‘reasonable’ attorney fees without specifying any specific fraction, ‘such provision shall be construed to mean 15 percent of the first \$500.00 of principal and interest owing on such note . . . and 10 percent of the amount of principal and interest owing thereon in excess of \$500.00.’ ”⁶

Before attorney’s fees may be awarded in Georgia, a hearing is required. The party opposing the fees has a right to confront and cross-examine the witnesses presented by the party seeking the fees.⁷

An excellent review of attorney fees in civil rights cases ap-

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¹O.C.G.A. § 13-6-11. See *Spring Lake Property Owners Ass’n, Inc. v. Peacock*, 260 Ga. 80, 390 S.E.2d 31 (1990); *McDonogh v. O’Connor*, 260 Ga. 849, 400 S.E.2d 310 (1991).

²See T. Hobson, *Attorney’s Fees in Clear Liability Cases*, Verdict 22 (Spr. 2010).

³See *Hill v. Clarke*, 310 Ga. App.

799, 714 S.E.2d 385 (2011).

⁴*Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302 (11th Cir. 2007).

⁵*In re Horne*, 876 F.3d 1076 (11th Cir. 2017).

⁶*Bloom v. Camp*, 336 Ga. App. 891, 785 S.E.2d 573 (2016).

⁷*Giovanno v. Fabec*, 804 F.3d 1361, 93 Fed. R. Serv. 3d 166 (11th Cir.

pears in *Fox v. Vice*.⁸ Our legal system generally requires each party to bear his own litigation expenses including attorney fees, win or lose. However, in some federal and state cases, statutes shift the burden of fees from one party to another. Congress approved this pattern to reward prevailing parties in civil rights cases. Plaintiffs may receive fees under 42 U.S.C.A. § 1988 even if they are not victorious on every claim. The Court cites *Hensley v. Eckerhart*⁹ for the principle that a court should compensate the plaintiff for the time his attorney spent remedying a breach of civil rights in cases where the plaintiff wins. This is so even if the plaintiff failed to prevail on every contention. Analogous principles indicate that a defendant may deserve fees for defending against frivolous civil rights claims brought by the plaintiff.

The 11th Circuit found that a mother who brought an action under the Individuals with Disabilities Education Act was not entitled to attorney fees since she was not a prevailing party. The court reasoned:

As the Supreme Court has put it, to merit attorney's fees under the prevailing party standard, a party must achieve "some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). That did not happen here. The record shows that Molly was referred for a special education evaluation before her mother set this suit in motion; in other words, Molly's eventual IEP was not the fruit of this litigation. Nor did Molly's mother receive the compensatory education services she sought. Because Molly's mother did not achieve any substantive benefit from this litigation, we see no abuse of discretion in the district court's denial of her attorney's fees request.¹⁰

The mere refusal to pay a debt is not the same as stubborn litigiousness and will not support an award of attorney's fees.¹¹

"Bad faith," as a ground for awarding costs of litigation, is bad faith arising out of the transaction upon which the complaint is based and refers to a time prior to the institution of the action.¹²

Trial court did not abuse its discretion in awarding attorneys fees pursuant to O.C.G.A. § 13-6-11, which authorizes such fees in instances "where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." Here, evidence was introduced to show bad

2015).

⁸*Fox v. Vice*, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011).

⁹*Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

¹⁰*J.N. next friend of M.N. v. Jefferson County Board of Education*,

12 F.4th 1355, 395 Ed. Law Rep. 74 (11th Cir. 2021).

¹¹*Brannon Enterprises, Inc. v. Deaton*, 159 Ga. App. 685, 285 S.E.2d 58 (1981).

¹²*Brannon Enterprises, Inc. v. Deaton*, 159 Ga. App. 685, 285 S.E.2d 58 (1981).

faith on the part of the defendant in relation with his promise to marry the plaintiff.¹³

Court improperly granted bad faith attorneys fees under O.C.G.A. § 13-6-11 when it granted judgment on the pleadings. The plain language of the statute authorizes such damages when a jury decides that such damages shall be awarded. Accordingly, “a trial court is not a trier of fact on a motion for judgment on the pleadings.”¹⁴

Attorney’s fees may be awarded where defendant has acted in bad faith or has been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense; this section applies to equity cases.¹⁵

The Georgia Court of Appeals, in action that alleged that a homeowner falsely represented the condition of the home, stated that attorney’s fees may be recoverable when a valid intentional tort claim, “such as fraud,” has been set forth.¹⁶

Attorney’s fees may not be recoverable where there is a bona fide controversy.¹⁷ Even in situations where a bona fide controversy exists, attorney fees may still be awarded by a jury. As noted by the Georgia Court of Appeals in *Atlanta Emergency Services, LLC v. Clark*,¹⁸ “[i]n this regard, bad faith warranting an award of attorney fees must have arisen out of the transaction on which the cause of action is predicated, and it may be found in defendant’s carrying out the provisions of the contract, that is, in how defendant acted in his dealing with the plaintiff. Thus, defendants can be held liable for attorney fees if they committed the breach [of contract] in bad faith.” Attorney’s fees were properly awarded where the evidence revealed no bona fide controversy as to liability.¹⁹

In a declaratory judgment action, an award of attorney’s fees to the plaintiff pursuant to O.C.G.A. § 13-6-11, under which attorney’s fees are not recoverable where there exists a bona fide controversy between the parties, was improper where substantial uncertainty and disagreement between the parties led the plaintiff to seek a declaratory judgment as to whether a contract

¹³Kelley v. Cooper, 325 Ga. App. 145, 751 S.E.2d 889 (2013).

¹⁴Caldwell v. Church, 341 Ga. App. 852, 802 S.E.2d 835 (2017).

¹⁵Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977).

¹⁶Napier v. Kearney, 359 Ga. App. 196, 855 S.E.2d 78 (2021).

¹⁷Turner v. Wilmouth, 161 Ga. App. 2, 288 S.E.2d 839 (1982).

¹⁸Atlanta Emergency Services, LLC v. Clark, 328 Ga. App. 9, 761 S.E.2d 437 (2014) (internal quotations and citations omitted).

¹⁹Matthews v. Neal, Greene & Clark, 177 Ga. App. 26, 338 S.E.2d 496 (1985).

existed between the parties.²⁰

In a negligence action, homeowners who sought bad faith attorney's fees pursuant to O.C.G.A. § 13-6-11 were not entitled to recovery since the opposing party's motion for directed verdict on the underlying issue was granted.²¹

Attorney's fees for stubborn litigiousness were unwarranted in a case alleging violation of easements, since the trial court found that there was no bad faith in defending the action because there was an arguable question of fact in its defense.²²

O.C.G.A. § 9-15-14 provides for an award of attorney's fees and expenses of litigation where an attorney brings or defends an action lacking substantial justification.

"An award [of attorneys fees] under OCGA § 9-15-14(b) is within the discretion of the trial court and is not automatic."²³

The term "lacks substantial justification" set forth in O.C.G.A. § 9-15-14, which provides for an award of attorney's fees and costs in an action that lacks substantial justification, signifies conduct which is substantially frivolous, substantially groundless, or substantially vexatious.²⁴ The statute regarding assessment of litigation costs and attorney's fees for frivolous action does not limit recovery to the prevailing party in a lawsuit. The statute protects any party who has been the subject of frivolous actions and defenses regardless of whether that party has succeeded at trial.²⁵

Imposition of \$1,000 frivolous appeal penalty upon a property owner and his attorney was warranted in the owner's action asserting breach of contract and related claims against the property owner's association based on the association's alleged failure to honor an agreement to dock and store owner's airboat, where attorney could not reasonably have believed that appeal would result in reversal of trial court's decision in favor of the association.²⁶

The judge who found the attorney in contempt in the underlying case should have recused himself from hearing the claim for attorney's fees and costs under O.C.G.A. § 9-15-14 against the

²⁰General Hospitals of Humana, Inc. v. Jenkins, 188 Ga. App. 825, 374 S.E.2d 739 (1988).

²¹Auto-Owners Insurance Company v. Dolan, 342 Ga. App. 179, 803 S.E.2d 104 (2017) (overruled on other grounds by, Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479 (2021)).

²²Candler v. Wickes Lumber Co., 195 Ga. App. 239, 393 S.E.2d 99 (1990).

²³Nugent v. A1 American Refrigeration, LLC, 346 Ga. App. 147, 816 S.E.2d 87 (2018).

²⁴Yost v. Torok, 256 Ga. 92, 344 S.E.2d 414 (1986).

²⁵Betallic, Inc. v. Deavours, 263 Ga. 796, 439 S.E.2d 643 (1994).

²⁶Campbell v. Landings Ass'n, Inc., 311 Ga. App. 476, 716 S.E.2d 543 (2011).

same attorney.²⁷

As explained later in this section, another provision of the Code also allows fees. In *Riddell v. Riddell*,²⁸ the Georgia Supreme Court stated:

O.C.G.A. § 9-15-14(b) authorizes an award of reasonable and necessary attorney fees upon a finding that an action or any part thereof lacked substantial justification, was interposed for delay or harassment, or an attorney or party unnecessarily expanded the proceeding by other improper conduct. “The damages authorized by § 9-15-14 ‘are intended not merely to punish or deter litigation abuses but also to recompense litigants who are forced to expend their resources in contending with (abusive litigation).’ [Cit.]” *O’Keefe v. O’Keefe*, 285 Ga. 805, 806 (684 S.E.2d 266) (2009). An award of fees under “O.C.G.A. § 9-15-14(b) is discretionary and the standard of review is abuse of discretion.” *Haggard v. Bd. Of Regents, etc.*, 257 Ga. 524, 527 (4) (c) (360 S.E.2d 566) (1987).²⁹

Bad faith penalties and attorney’s fees are available under O.C.G.A. § 33-4-6 upon an insurer’s bad faith refusal to pay claims. However, such fees are not awardable if an insurer had reasonable cause for refusing to pay.³⁰

Attorney’s fees in criminal cases, see *Fogarty v. State*.³¹

In addition to O.C.G.A. § 9-15-14, there are other statutory provisions for attorney’s fees. Fees are available under O.C.G.A. § 13-6-11 where a party acts in bad faith, has been stubbornly litigious, or caused unnecessary trouble. A party opposing a claim for fees has a right to challenge the alleged value of legal services.³² Attorney’s fees under O.C.G.A. § 13-6-11, see *Gateway Bank & Trust v. Timms*.³³

Award of attorney’s fees in a contempt case is proper.³⁴ However, attorney’s fees are not available in condemnation actions.³⁵ Proper construction of Georgia Constitution does not

²⁷*Houston v. Cavanagh*, 199 Ga. App. 387, 405 S.E.2d 105 (1991).

²⁸*Riddell v. Riddell*, 293 Ga. 249, 744 S.E.2d 793 (2013).

²⁹*Riddell v. Riddell*, 293 Ga. 249, 744 S.E.2d 793 (2013) (citing *Abt v. Abt*, 289 Ga. 166, 167, 709 S.E.2d 806 (2011)).

³⁰*Progressive American Ins. Co. v. Horde*, 259 Ga. App. 769, 577 S.E.2d 835 (2003).

³¹*Fogarty v. State*, 270 Ga. 609, 513 S.E.2d 493 (1999), cited in § 1:4, *supra*.

³²*Kwickie/Flash Foods, Inc. v. Lakeside Petroleum, Inc.*, 256 Ga. App. 556, 568 S.E.2d 816 (2002).

³³*Gateway Bank & Trust v. Timms*, 259 Ga. App. 299, 577 S.E.2d 15 (2003) (award of attorney’s fees warranted in trover action for wrongful repossession of flatbed trailer).

³⁴*Kaufmann v. Kaufmann*, 246 Ga. 266, 271 S.E.2d 175 (1980).

³⁵*Department of Transportation v. Worley*, 244 Ga. 783, 263 S.E.2d 436 (1979).

require an award of attorney's fees in eminent domain cases.³⁶

A claim for attorney's fees was denied considering totality of circumstances, including a substantial award of permanent alimony from which trial court could have correctly found that party seeking fees was fully capable of paying her own attorneys.³⁷

In an alimony modification action, the court, exercising its discretion, may grant attorney's fees as may be necessary to insure a proper defense after consideration of the present financial circumstances of the parties.³⁸

Where an application for modification of child support is filed by a party obligated to pay alimony, the court may require such party to pay reasonable expenses of litigation, including attorney's fees, incurred by such party's former spouse, either on behalf of the former spouse or children or both, in defending the claim.³⁹

Granting of attorney's fees to a spouse in a divorce action is usually left to the discretion of the court and is within the inherent power of the court.⁴⁰ The issue of attorney's fees in divorce cases is remedial and ought to be considered broadly by the trial court.⁴¹ However, in numerous cases a denial of fees has been held to be the proper outcome. O.C.G.A. § 19-6-2 is construed in *Hunter v. Hunter*.⁴² Denial of attorney fees to the wife in divorce proceedings was adequately supported by the trial court's consideration of the parties' relative financial positions.

In a divorce action, trial court acted within its discretion in divorce proceeding in awarding wife \$16,000 in attorney's fees, where trial court considered evidence of financial circumstances of husband and wife and evidence that wife had incurred over \$16,000 in litigation expenses over course of proceeding.⁴³

Attorney's fees for obtaining annulment are allowable as "responsibility occasioned by such marriage."⁴⁴

Attorney's fees, as well as exemplary damages, are recoverable in an action for fraud and deceit in a sale if the seller willfully and deliberately concealed a material fact upon which the buyer acted to his detriment and if the seller acted in bad faith in ac-

³⁶*DeKalb County v. Trustees, Decatur Lodge No. 1602, B. P. O. Elks*, 242 Ga. 707, 251 S.E.2d 243 (1978).

³⁷*Wilson v. Wilson*, 243 Ga. 637, 256 S.E.2d 334 (1979).

³⁸*Hilsman v. Hilsman*, 245 Ga. 555, 266 S.E.2d 173 (1980).

³⁹*Wright v. Wright*, 246 Ga. 81, 268 S.E.2d 666 (1980).

⁴⁰*Ford v. Ford*, 245 Ga. 569, 266

S.E.2d 183 (1980).

⁴¹*Crecelius v. Brooks*, 258 Ga. 372, 369 S.E.2d 743 (1988).

⁴²*Hunter v. Hunter*, 289 Ga. 9, 709 S.E.2d 263 (2011).

⁴³*Arkwright v. Arkwright*, 284 Ga. 545, 668 S.E.2d 709 (2008).

⁴⁴*McKinney v. McKinney*, 242 Ga. 607, 250 S.E.2d 470 (1978).

completing the deceit as part of the sale.⁴⁵

Where plaintiffs seek injunctive relief and damages and the jury fails to find damages, but injunctive relief is granted, the jury may award attorney's fees based on the evidence that the defendants have acted in bad faith, been stubbornly litigious, or caused the plaintiffs unnecessary trouble and expense; it being only necessary to show the existence of any one of the three statutory conditions to recover attorney's fees.⁴⁶

When a court assesses attorney fees against a party, a hearing on the matter is required.⁴⁷ O.C.G.A. § 9-15-14 requires a hearing prior to an award of fees under that statute.⁴⁸

Attorney's fees are available to the prevailing party when there is a finding that the opposing party made a claim which lacked justifiable issue of law or fact. However, the trial court must make express findings of fact to support an award of fees under O.C.G.A. § 9-15-14.⁴⁹

O.C.G.A. § 9-15-14 was construed in *O'Leary v. Whitehall Construction*,⁵⁰ along with discussion of offer of judgment statutes.

In *Daniel v. Smith*,⁵¹ the court held that the question of an award of attorney fees as damages, including the issues of whether the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, is for the jury.⁵² When bad faith is not an issue and the only asserted basis for a recovery of attorney fees is either stubborn litigiousness or the causing of unnecessary trouble and expense, there is not any evidence to support an award if a bona fide controversy clearly exists between the parties. It is for the jury to determine whether there was a bona fide controversy, unless the facts preclude such a finding as a matter of law.

Under O.C.G.A. § 9-11-68 (2005 Tort Reform Legislation), Georgia provided for offers of judgment, designed to promote settlement of tort cases. Recovery of attorney fees could be had when a plaintiff or a defendant made an offer of judgment and the opponent failed to accept, in cases where the judgment finally obtained was unfavorable to the rejecting party. Unfavorable in the foregoing sense is defined in *L. Brown*, Georgia's New Battleground, 39 Ga. Law Advocate 15 (Spring/Summer 2005).

⁴⁵Jackson v. Hatch, 115 Ga. App. 623, 155 S.E.2d 676 (1967).

⁴⁶Adams v. Cowart, 224 Ga. 210, 160 S.E.2d 805 (1968).

⁴⁷Rice v. Grubbs, 281 Ga. 614, 641 S.E.2d 514 (2007).

⁴⁸Moore v. Moore, 307 Ga. App. 889, 706 S.E.2d 465 (2011).

⁴⁹Gilchrist v. Gilchrist, 287 Ga. App. 133, 650 S.E.2d 795 (2007).

⁵⁰O'Leary v. Whitehall Const., 288 Ga. 790, 708 S.E.2d 353 (2011).

⁵¹Daniel v. Smith, 266 Ga. App. 637, 597 S.E.2d 432 (2004).

⁵²See O.C.G.A. § 13-6-11.

There has been litigation over the validity of O.C.G.A. § 9-11-68. In *Smith v. Salon Baptiste*,⁵³ the Georgia Supreme Court held that this law does not violate Georgia's constitutional right of access to the courts. Justice Carley explained:

O.C.G.A. § 9-11-68 was enacted as part of the Tort Reform Act of 2005. *Fowler Properties v. Dowland*, 282 Ga. 76, 77 (1) (646 SE2d 197) (2007). It provides that either party may serve upon the other party a written demand or offer to settle a tort claim for a specified amount of money. O.C.G.A. § 9-11-68 (a). Moreover, if either party's settlement demand or offer is rejected, that party may be entitled to recover attorney's fees pursuant to O.C.G.A. § 9-11-68 (b) This Court has previously concluded that O.C.G.A. § 9-11-68 (b) (1) is unconstitutional as a retrospective law, but has found it unnecessary to pass on other attacks upon the constitutionality of that code section. *Mikesell v. RP Motorsports*, 283 Ga. 476, 477 (660 SE2d 534) (2008); *Fowler Properties v. Dowland*, supra at 79 (2).

The Supreme Court ruled that the trial court erred when it found that the statute impeded access to the courts. "Because the trial court based its order denying the motion for attorney's fees on erroneous findings that O.C.G.A. § 9-11-68 is unconstitutional, that order must be reversed."

Sometimes a lawyer sues his former client to collect fees. In *Abrams v. Putney*,⁵⁴ a lawyer sued to collect \$68,214 for work done in a personal injury action and for efforts expended to collect this fee. The court found in favor of the attorney.

O.C.G.A. § 16-5-94(d) provides a "trial court [with] the discretion to award costs and attorney fees only where the petition results in the entry of a court order or a consent agreement designed to end the conduct constituting stalking. The statute does not provide the trial court with the discretion to award costs and fees where no such order or consent agreement is entered—i.e., where the court never rules on the merits of the petition."⁵⁵

In *Ford v. Ford*,⁵⁶ the court found that the parties to a divorce action entered into a settlement agreement which prohibited the recovery of attorney's fees.

§ 33:17 Liquidated damages and penalties

If the parties agree by contract what the damages for a breach of their contract shall be, the damages are said to be liquidated, and unless the agreement violates some principle of law, the par-

⁵³*Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

⁵⁴*Abrams v. Putney*, 304 Ga. App. 626, 697 S.E.2d 269 (2010).

⁵⁵*Durrance v. Schad*, 345 Ga. App. 826, 815 S.E.2d 164 (2018).

⁵⁶*Ford v. Ford*, 349 Ga. App. 45, 825 S.E.2d 449 (2019).

ties are bound thereby.¹

The courts hold valid agreed provisions for damages when they are construed as liquidated damages and hold invalid agreed provisions for damages when they are construed as penalties; the cardinal tests are the intention of the parties and the reasonableness or unreasonableness of the amount fixed, according to the certainty and ease or the difficulty in ascertainment of the actual damages, and according to the similarity or disproportion between the amount provided and the actual probable loss.²

The court in *Gwinnett Clinic, Ltd. v. Boaten*³ delineated the requirements for a valid liquidated damages agreement: “[A] liquidated damages clause is enforceable if (1) the injury caused by the breach of the contract is difficult or impossible to accurately estimate; (2) the parties intended to provide for damages rather than a penalty; and (3) the sum stipulated upon by the parties is a reasonable pre-estimate of the probable loss.”

In *J.P. Carey Enterprises, Inc. v. Cuentas, Inc.*,⁴ the Georgia Court of Appeals found that a liquidated damages provision failed all three of the aforementioned prongs. Thus, the trial court did not err in granting summary judgment against J.P. Carey Enterprises.

The defaulting party on a contract bears the burden of demonstrating that a liquidated damages clause is an unenforceable penalty. In *Pierre v. St. Benedict's Episcopal Day School*,⁵ the appeals court found that a parent, who signed a contract obligating her to pay a year's tuition for each of her children in the event a withdrawal notice was not received by a certain date, did not satisfy her burden of proving that such a provision constituted a penalty. The court found that the clause was a liquidated damages provision.

Nonbreaching party who has agreed to accept liquidated damages cannot elect after breach to take actual damages should they prove greater than sum specified; breaching party cannot complain that actual damages are less than those specified as liquidated damages; liquidated damages become maximum as well as minimum amount that can be collected; retention of right to

[Section 33:17]

¹O.C.G.A. §§ 13-6-1, 13-6-7; *MMA Capital Corp. v. ALR Oglethorpe, LLC*, 336 Ga. App. 360, 785 S.E.2d 38 (2016).

²*National Manufacture & Stores Corp. v. Dekle*, 48 Ga. App. 515, 173 S.E. 408 (1934).

³*Gwinnett Clinic, Ltd. v. Boaten*,

340 Ga. App. 598, 798 S.E.2d 110 (2017).

⁴*J.P. Carey Enterprises, Inc. v. Cuentas, Inc.*, 361 Ga. App. 383, 864 S.E.2d 588 (2021).

⁵*Pierre v. St. Benedict's Episcopal Day School*, 324 Ga. App. 283, 750 S.E.2d 370, 298 Ed. Law Rep. 1058 (2013).

elect specific performance of contract does not render purported liquidated damages provision invalid.⁶

Liquidated damage clause in written rental contract between self-storage facility and customer, directing customer not to store items in the storage unit worth more than \$5,000 without obtaining insurance coverage, was enforceable. The facility had no way of knowing what goods the customer would store in their units; thus, they could not accurately estimate the possible damages. Plus, the only reason for the clause was to cap the facility's liability.⁷

A judge could not limit damages to those set out in the contract without first determining whether the contract damages clause was a reasonable pre-estimate of probable loss.⁸

Penalties in bonds are not liquidated damages even if called such; unless they are reasonable, the law will give only the actual damages where it is capable of computation.⁹

A trial court does not abuse its discretion when it grants a default judgment and enters a damage award without an evidentiary hearing when such "damages are capable of mathematical computation."¹⁰

§ 33:18 Comparative negligence

The doctrine of comparative negligence is the law of this state.¹ A plaintiff's negligence is to be compared to the aggregate negligence of all joint tortfeasors in determining the plaintiff's right of recovery. Unless the plaintiff's negligence is equal to or greater than the aggregate negligence of all of the defendants, the plaintiff may recover. Therefore, a plaintiff whose comparative fault exceeds that of one defendant but does not exceed that of another defendant is entitled to a judgment against both defendants, assuming that the rule of joint and several liability among joint tortfeasors is applicable in the case.²

The trial court was not required to use a special verdict form to allow the jury to apportion fault in an automobile collision case;

⁶*Southeastern Land Fund, Inc. v. Real Estate World, Inc.*, 237 Ga. 227, 227 S.E.2d 340 (1976).

⁷*Lancaster v. Susa Partnership, L.P.*, 300 Ga. App. 567, 685 S.E.2d 474 (2009).

⁸*Godbee v. Clement Investments, N.V.*, 177 Ga. App. 81, 338 S.E.2d 486 (1985).

⁹O.C.G.A. § 13-6-3.

¹⁰*Annon Consulting, Inc. v.*

BioNitrogen Holdings Corp., 650 Fed. Appx. 729 (11th Cir. 2016).

[Section 33:18]

¹O.C.G.A. § 51-11-7, 46-8-291.

²*Union Camp Corp. v. Helmy*, 258 Ga. 263, 367 S.E.2d 796 (1988). Discussing statutory changes, see Note, *The Effect (or Noneffect) of the 2005 Amendments to O.C.G.A. Sections 51-12-31 and 51-12-33 on Joint Liability in Georgia*, 44 Ga. L. Rev. 215 (2009).

the court's instruction that the jury reduce plaintiff's recovery in proportion to her negligence provided adequate guidance concerning the comparative negligence rule.³

O.C.G.A. §§ 51-12-31 and 51-12-33 are not unconstitutionally vague, says the Georgia Supreme Court.⁴ In *McReynolds v. Krebs*,⁵ the Georgia Supreme Court ruled that damages must be apportioned among persons who are liable according to the percentage of fault of each person.

§ 33:19 Injuries to real property

Plaintiff is entitled to damages for injury to real property where liability is proved. The general measure of damages for injuries to real property is the difference in value before and after the injury, and the only exception is when there is a more definite equitable and accurate way by which the damage may be determined.¹

The measure of damages for injury to a building is usually the amount necessary to restore it to its condition before the injury, and this should be shown by the cost of repairs to the building.² Ordinarily, where there is injury to the building, but not to the land, the measure of damages is the cost of restoration of building to original condition unless restoration to original condition would be an absurd undertaking.³ Cases decided in the 1980s confirm these principles. One held that the correct measure of damages for injury to realty is the difference in the value of the property before and after the injury. However, the cost of repairs is the appropriate measure of damages if injury is to the building alone.⁴

Cost of restoration of property may not be disproportionate to the diminution in the property's value; rather, the cost of repair must be reasonable and bear some proportion to the sustained injury. State law recognizes that the cost to repair or restore land may be an appropriate measure of damages as long as restoration would not be an absurd undertaking; this is true even though

³Lee v. Thomason, 277 Ga. App. App. 141, 118 S.E.2d 716 (1961).
573, 627 S.E.2d 168 (2006).

⁴Couch v. Red Roof Inns, Inc., 291 Ga. 359, 729 S.E.2d 378 (2012).
²City of Elberton v. J. C. Pool Realty Co., 111 Ga. App. 765, 143 S.E.2d 407 (1965).

⁵McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (2012).
³Holland Furnace Co. v. Willis, 120 Ga. App. 733, 172 S.E.2d 149 (1969).

[Section 33:19]

¹Dekalb County v. Speir, 341 Ga. App. 774, 801 S.E.2d 627 (2017);
⁴Oglethorpe Realty Co., Inc. v. Hazzard, 172 Ga. App. 98, 321 S.E.2d 820 (1984).
Mercer v. J & M Transp. Co., 103 Ga.

repair costs exceed the diminution in value.⁵

A 2011 decision underlines these points. The general rule for the measure of damages involving real property is the diminution of the fair market value of the property and/or the cost of repair or restoration.⁶ In measuring damages involving real property, repair or restoration costs can be used even though they exceed the diminution in value of the property, but they are limited where restoration to the condition at the time of destruction would be an absurd undertaking.

In a breach of contract action brought by homeowners against a home insurer, the insurer was not in breach when it elected to pay the homeowners for their loss and abandoned its restoration activities. In *Clary v. Allstate Fire and Casualty Insurance Company*,⁷ the Georgia Court of Appeals reasoned:

If an insurer elects to repair a damaged home, it satisfies its obligations under the contract only if it restores the property to its former, pre-loss condition. (citation omitted) Furthermore, even when an insurer restores damaged real property to its pre-loss condition, it may *also* be liable to pay for any post-repair diminution in value. (citation omitted). This flows from the principle that Georgia law favors full recovery, that is, that an injured party be placed, “as nearly as possible, in the same position it would have been if the injury had never occurred.”

Where the condemnees chose to introduce evidence of the post-condemnation value of the remainder of their property, the condemnor was entitled to introduce evidence showing that taking part of the parcel increased the value of the remainder.⁸

Damages for defective construction are the difference between the value of property as built and its value if properly built.⁹

Where plaintiff’s fences and ornamental trees were destroyed by fire from defendant’s trains, the measure of damages was the diminution in value of the premises from the injury caused by the fire.¹⁰

Damages are recoverable pursuant to an inverse condemnation theory. Though counties are generally not liable for nuisance claims, liability may attach “when it ‘causes a nuisance to exist which amounts to a taking of property of one of its citizens for

⁵Ridley v. Turner, 335 Ga. App. 108, 778 S.E.2d 844 (2015); Wise v. Tidal Const. Co., 270 Ga. App. 725, 608 S.E.2d 11 (2004).

⁶Mayfield v. State, 307 Ga. App. 630, 705 S.E.2d 717 (2011).

⁷Clary v. Allstate Fire and Casualty Insurance Company, 340 Ga. App. 351, 795 S.E.2d 757 (2017).

⁸Ivy Inn, Inc. v. Metropolitan Atlanta Rapid Transit Authority, 255 Ga. 557, 340 S.E.2d 600 (1986).

⁹Pritchett v. Anding, 177 Ga. App. 34, 338 S.E.2d 503 (1985).

¹⁰Louisville & N. R. Co. v. Kohlruss, 124 Ga. 250, 52 S.E. 166 (1905).

public purposes.’ ”¹¹

§ 33:20 Collateral source rule

Georgia law prohibits presentation to the jury of evidence of payment of damages by a collateral source.¹

Georgia follows the “collateral source rule,” by which a wrongdoer is not entitled to have the damages for which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, wholly independent of him, or stated more succinctly, the wrongdoer may not be benefited by collateral payments made to the person he has wronged. See “collateral source” cases collected in²

An effort was made to abolish the rule by amending O.C.G.A. § 51-12-1. The amendment of O.C.G.A. § 51-12-1—which provided that all financial sources available to compensate plaintiff, whether governmental or private sources, were admissible—is unconstitutional under the Georgia constitution, since it allowed a jury to consider inherently prejudicial evidence, i.e., collateral sources, which could be misused and will mislead the jury, since such evidence is allowed only as to plaintiff’s sources.³ The equal protection portion of Denton—the extent to which it suggested a new equal protection analysis—was modified and clarified in *Grissom v. Gleason*.⁴

Under the “collateral source rule,” a tortfeasor cannot diminish the amount of his liability by pleading payments made to the plaintiff under the terms of a contract between the plaintiff and a third party who was not a joint tortfeasor.⁵ In Georgia, the collateral source rule bars the defendant from presenting evidence of payments of expenses from a third party in order for a defendant to reduce his damages.⁶

In *Stephens v. Castano-Castano*,⁷ the Georgia Court of Appeals held that the trial court erred in not allowing Stephens to question a physician regarding his financial interest in the litigation.

¹¹*Pribeagu v. Gwinnett County*, 336 Ga. App. 753, 785 S.E.2d 567 (2016).

[Section 33:20]

¹*Olariu v. Marrero*, 248 Ga. App. 824, 549 S.E.2d 121 (2001) (motion in limine used to exclude).

²*Cincinnati, New Orleans & Texas Pacific Railway Company v. Hilley*, 121 Ga. App. 196, 173 S.E.2d 242 (1970).

³See *Denton v. Con-Way Southern Exp., Inc.*, 261 Ga. 41, 402 S.E.2d 269

(1991).

⁴*Grissom v. Gleason*, 262 Ga. 374, 418 S.E.2d 27 (1992).

⁵*Rabun & Associates Const., Inc. v. Berry*, 276 Ga. App. 485, 623 S.E.2d 691 (2005).

⁶*Harper v. Barge Air Conditioning, Inc.*, 313 Ga. App. 474, 722 S.E.2d 84 (2011).

⁷*Stephens v. Castano-Castano*, 346 Ga. App. 284, 814 S.E.2d 434 (2018).

In so holding, the court found that such evidence was not barred by the collateral source rule but was relevant because it goes to the bias of the witness. The court reasoned, in part:

The evidence sought to be introduced by Stephens is not payment of Castano's medical bill by some third party, nor does it show a write-off, waiver, or reduction of the bill, as may lead a jury to reduce improperly a plaintiff's award of damages. Rather, Stephens simply sought to introduce evidence that Dr. Chappuis entered into an arrangement whereby the physician would be paid from the proceeds of Castano's recovery.

The court added that the physician's "financial interest in the outcome of the case is highly relevant to the issue of his credibility and potential bias. . . . If Castano receives a large verdict amount, then Dr. Chappuis has a near certain chance of fully and quickly recovering the costs of the treatment provided to Castano at no initial cost."

Chapter 34

Closing Arguments

- § 34:1 Right to make closing arguments
- § 34:2 Court's control of closing arguments
- § 34:3 Right to open and close arguments
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§ 34:1 Right to make closing arguments

The right to present arguments to the jury is a valuable and substantial right that should never be denied.¹

Counsel may argue on the facts in evidence and any reasonable inference or conclusion, which can be drawn therefrom.² Counsel cannot argue on facts that are not in evidence.³

Positing facts outside of the record can lead to reversal. The Supreme Court of Georgia reversed a murder conviction where, during closing argument, “[t]he District Attorney referred to a number of matters not in evidence concerning his role and authority in choosing whom to indict, his sworn duty not to indict those who have not committed a crime, and his sole authority to determine whom to indict.”⁴

The right to present closing argument is a valuable and substantial one which all litigants have in the trial of cases, jury or bench trial, and one which should never be denied. In *Wilson v. Wilson*,⁵ the Georgia Supreme Court concluded: “Accordingly,

[Section 34:1]

¹Madison v. Montgomery, 206 Ga. 199, 56 S.E.2d 292 (1949).

²Lassiter v. Poss, 85 Ga. App. 785, 70 S.E.2d 411 (1952).

³Lassiter v. Poss, 85 Ga. App. 785, 70 S.E.2d 411 (1952).

⁴Caldwell v. State, 313 Ga. 640, 872 S.E.2d 712 (2022).

⁵Wilson v. Wilson, 277 Ga. 801,

the trial court committed reversible error in refusing to allow Wife's counsel to make a closing argument." Justice Fletcher's dissent complained as follows: "Even without a showing of prejudice, the majority opinion will require the reversal of any bench trial in which the trial judge denied a party's request to present closing argument. Although the rule is clear in Georgia that parties have an absolute right to closing argument in a jury trial, there is no justifiable reason to extend that rule to bench trials." Notwithstanding, there is a right to close in nonjury cases, unless waived.⁶

Abridgement of the right to argue can be total, or partial. Even the latter is deemed to be a serious error. In one case the trial court's abridgement of defendant's right to closing argument during a malice murder trial, which occurred when the court prohibited defense counsel from making specific references to the possible punishment State's witnesses would have received if they had not made a plea-bargain deal to testify, was harmful and entitled defendant to new trial. The two witnesses at issue were the source of evidence connecting the defendant to the weapons used in committing the crimes, and trial court's ruling prevented defense counsel from attacking the credibility of those witnesses.⁷

The foregoing decision follows up on other cases where a trial court excluded a portion of a closing argument on the grounds that it was too speculative, only to have the decision reversed on appeal. In *Head v. State*,⁸ defense counsel attempted to analogize his client's situation to that of Richard Jewell, the security guard who was wrongly identified as a suspect in the 1996 Atlanta Olympics bombing. The analogy was based on the grounds that the investigation was highly publicized, and eventually Jewell was cleared of all suspicion in the case, and counsel sought to make the connection that the case at bar was also discussed in the media, and that police had mistakenly focused their investigation on the defendant. The trial court did not allow the argument, stating that there was no reasonable basis for the analogy. On appeal, however, it was determined that the argument should have been allowed, but that the error was harmless because defense counsel was able to make other references to the possibility that the defendant had been mistakenly targeted during the police investigation.

When a trial court limited a wife's closing argument to seven

596 S.E.2d 392 (2004) (divorce action).

⁶Jenkins v. Sallie Mae, Inc., 286 Ga. App. 502, 649 S.E.2d 802, 223 Ed. Law Rep. 1014 (2007).

⁷Palma v. State, 280 Ga. 108, 624 S.E.2d 137 (2005).

⁸Head v. State, 276 Ga. 131, 575 S.E.2d 883 (2003).

minutes, she claimed she was denied the right to argue. The Supreme Court said the trial judge has the right to limit time, and since the husband had seven minutes, the Supreme Court affirmed the trial court.⁹

§ 34:2 Court's control of closing arguments

Time allotted by the court for closing arguments, see Uniform Superior Court Rule 13.1. Under the Superior Court Rules capital felony arguments are limited to two hours per side, felonies generally to one hour per side, misdemeanors to 30 minutes each, and civil cases to two hours for each side.

The trial court did not impermissibly violate the statute requiring that counsel be given two hours for closing arguments in a murder case, though the trial court stated to the jury that the law gave each side “an hour” for closing arguments, where defense counsel did not object. Defense counsel then gave his closing argument, and the trial court never interrupted counsel's argument nor indicated to him that he had limited time.¹

Time constraints on arguments are imposed in Georgia by both statutes and court rules. In civil cases, O.C.G.A. § 9-10-180 limits the time for arguments, as does Uniform Superior Court Rule 13.1. As noted, civil cases generally are controlled by a one hour argument limitation under the Uniform Superior Court Rules, with a caveat for appeals from magistrate courts (30 minutes per side on such appeals). Extensions may be granted by the court.

Where the defendant was charged with five counts of assault with intent to murder, all of which arose out of the same incident, the court did not err in refusing to allow a one-hour argument for each count.²

When a trial court limited a wife's closing argument to seven minutes, she claimed she was denied the right to argue. The Supreme Court said the trial judge has the right to limit time, and since the husband had seven minutes, the Supreme Court affirmed the trial court.³

O.C.G.A. § 9-10-182 addresses the number of counsel who may argue. It provides that not more than two counsel from each side shall be permitted to argue any case, except by express leave of the court; and in no case shall more than one counsel be heard in conclusion.

⁹Alexandrov v. Alexandrov, 289 Ga. 126, 709 S.E.2d 778 (2011).

[Section 34:2]

¹Brown v. State, 288 Ga. 902, 708 S.E.2d 294 (2011).

²Hand v. State, 88 Ga. App. 775, 77 S.E.2d 746 (1953).

³Alexandrov v. Alexandrov, 289 Ga. 126, 709 S.E.2d 778 (2011).

In federal court in Georgia, the civil local rules of the U.S. District Court for the Northern District of Georgia provide in Local Rule 39.3. ATTORNEYS: AT TRIAL the following:

Limitations on Participation.

(1) *Witness Examination.* Unless the court permits otherwise, only one (1) attorney on each side shall examine or cross-examine a witness.

(2) *Argument to the Jury.*

(a) Unless the court permits otherwise, the merits of an action or proceeding shall not be argued by more than two (2) attorneys on each side.

(b) The party bearing the burden of persuasion at trial shall be entitled to open and close the arguments to the jury.

(c) If the party waives the party's right to make an opening argument, the party's rebuttal argument is limited to those matters argued by the opposing party in that party's closing argument.

(3) *Attorney as Witness.* In this court, an attorney for a party who is examined as a witness in an action or proceeding and who gives testimony on the merits shall not be permitted to argue the merits of the case or proceeding, either to the court or to the jury, except with the permission of the court. [Effective April 15, 1997].

Under those statutes, subject to leave of the court, misdemeanor cases are limited to one-half hour per side, noncapital felonies to one hour per side and capital felonies to two hours per side. Courts have discretion to extend the time for argument but are limited to 30 extra minutes in misdemeanor cases.

In Georgia courts, for the number of counsel and time limits in criminal cases, see O.C.G.A. §§ 17-8-70 to 17-8-76. Time limits are also controlled by Uniform Superior Court Rule 13.1. Reversals have occurred where the defendant in a criminal case did not receive full time for argument. In *Massey v. State*,⁴ the trial court erred in limiting defendant's closing argument. "O.C.G.A. § 17-8-73 provides that in cases involving capital felonies, counsel shall be limited to two hours for each side in which to argue their case to the jury Accordingly, it was error as a matter of law to refuse to permit appellant the two hours of closing argument to which he was statutorily entitled."

A similar result occurred in *Chapman v. State*.⁵

As to time limits in federal courts, the trial court may regulate the length of time consumed by counsel in closing argument.⁶

⁴*Massey v. State*, 270 Ga. 76, 508 S.E.2d 149 (1998).

⁵*Chapman v. State*, 273 Ga. 865, 548 S.E.2d 278 (2001) (for purpose of statute setting time limits, malice

murder and felony murder are "capital felonies" even when death penalty is not sought).

⁶*U.S. v. Alonso*, 740 F.2d 862, 16 Fed. R. Evid. Serv. 265 (11th Cir.

Setting a time limit of 36 minutes for each side for closing arguments was not an abuse of discretion, despite one defendant's claim that he was unfairly limited to 12 minutes and was thus prevented from fully pointing out deficiencies in the government witness' testimony.⁷ A limit of 14 minutes to present a closing argument did not violate the defendant's due process rights in a multicount, multiple defendant case.⁸

Statute governing number of counsel who may argue a criminal case does not limit the number of attorneys assisting in the case on behalf of a party; overruling *Wells v. State*.⁹ Trial court's error in refusing to permit both of defendant's attorneys to participate in the middle argument at closing was reversible error, even though defendant's right to make a closing argument was not completely abridged, considering that the evidence, though sufficient to find defendant guilty of rape, was not so overwhelming that it rendered any other version of events virtually without belief.¹⁰

§ 34:3 Right to open and close arguments

The right to open and close the argument is normally with the party having the burden of proof.¹ There are some exceptions to this rule. Where the defendant admits a prima facie case on behalf of the plaintiff, he is entitled to open and close to the jury, assuming both sides present evidence.²

Where the defendant does not admit a prima facie case and does not introduce any evidence, he is entitled to open and close to the jury and it is error to deny that right.³ This is true even if the defendant is called to the stand by the plaintiff for cross-examination and the defendant's attorney interrogates him.⁴

A 1997 legislative enactment specifies the circumstances under which the plaintiff or the defendant in a civil action will give opening and concluding arguments.⁵ The statute was construed

1984).

⁷U.S. v. Alaniz, 148 F.3d 929, 49 Fed. R. Evid. Serv. 977 (8th Cir. 1998).

⁸U.S. v. Okoronkwo, 46 F.3d 426 (5th Cir. 1995). Other cases, see Federal Procedural Forms, L. Ed. § 77:238.

⁹Wells v. State, 177 Ga. App. 419, 339 S.E.2d 392 (1986) (overruled by, Sheriff v. State, 277 Ga. 182, 587 S.E.2d 27 (2003)).

¹⁰Sheriff v. State, 277 Ga. 182, 587 S.E.2d 27 (2003), citing O.C.G.A. § 17-8-70.

[Section 34:3]

¹Turner v. Elliott, 127 Ga. 338, 56 S.E. 434 (1907).

²Canada Dry Bottling Co. v. Campbell, 112 Ga. App. 56, 143 S.E.2d 785 (1965).

³American Cas. Co. v. Seckinger, 108 Ga. App. 262, 132 S.E.2d 794 (1963).

⁴Jones v. Chambers, 94 Ga. App. 433, 95 S.E.2d 335 (1956).

⁵O.C.G.A. § 9-10-186.

in *Hussey v. Hussey*.⁶ The case observes that the plaintiff generally is entitled to opening and concluding arguments, then considers a situation in a domestic relations case where the right shifted to the defendant.

When separate defendants are represented by different counsel, and when neither defendant presents evidence, both attorneys have the right to open and close. Deprivation of this opportunity can result in reversible error.⁷

The prosecutor was not confined to rebuttal and was not precluded from making a closing argument where the prosecutor had waived opening argument but reserved the right to close and defense counsel in turn waived closing argument.⁸ Prosecutor can waive first speech and still give a full second speech.⁹

After close of evidence, trial court, in its discretion, may permit party having opening and concluding argument to waive opening statement and make full presentation regarding legal and factual facets of case to jury following final argument of adverse party.¹⁰

Although confirmed by the Georgia Supreme Court, the Bradham rule has been criticized. See a review of the authorities that disfavor sandbagging by the party with the burden of proof cited in Carlson, Competency and Professionalism in Modern Litigation: The Role of the Law Schools, 23 Ga. L. Rev. 689, 717–19 (1989) (“the party with the right to go last has the obligation to go first”). Codes of professionalism frown upon the party with the burden of proof failing to stake out the ground upon which that party relies in an initial speech, so that the opponent can intelligently respond. This sort of sandbagging was addressed in the Code of Trial Conduct of the American College of Trial Lawyers, which provides in Standard 22 that the honesty required of counsel bars him from “withholding positions in his opening argument upon which his side then intends to rely.”

The Criminal Justice Act of 2005 places Georgia in line with the majority of states that provide that the State, the party with the burden of proof, has the right to conclude closing statements at trial. Section 10 of the Act amends O.C.G.A. § 17-8-71 to simply read: “After the evidence is closed on both sides, the prosecuting attorney shall open and conclude the argument to the jury.” Ap-

⁶*Hussey v. Hussey*, 273 Ga. 735, 545 S.E.2d 880 (2001).

⁷*Givens v. State*, 264 Ga. 522, 448 S.E.2d 687 (1994).

⁸*Dixon v. State*, 196 Ga. App. 15, 395 S.E.2d 577 (1990).

⁹*Warren v. State*, 281 Ga. App. 490, 636 S.E.2d 671 (2006); *English v. State*, 282 Ga. App. 552, 639 S.E.2d

551 (2006) (state allowed to waive first speech and yet have unrestricted closing). Accord, *Lewis v. State*, 283 Ga. 191, 657 S.E.2d 854 (2008) (no right of defendant to conclude last even though no evidence is presented by defense).

¹⁰*Bradham v. State*, 243 Ga. 638, 256 S.E.2d 331 (1979).

parently gone is the old rule allowing the defense to conclude if no defense evidence is presented. The proviso for that option is deleted in the 2005 amendment, which concludes the section as follows: “The defendant shall be entitled to make a closing argument *prior* to the concluding argument of the prosecuting attorney.” (Emphasis added.) However, O.C.G.A. § 17-10-2 continues to allow, in the sentencing phase, “in cases where the death penalty may be imposed, the prosecuting attorney [to] open and the defendant or defendant’s counsel shall conclude the argument.”

These new provisions applied to all trials beginning on or after July 1, 2005. The words of Governor Perdue when signing the Act summarized the philosophy and design of the legislation: “The Criminal Justice Act of 2005 revises provisions in Georgia’s criminal law that restore balance in the prosecution of criminal cases. With these changes to our criminal procedures, prosecutors will be better able to remove dangerous criminals from the streets and uphold the rights of crime victims, leading to a safer Georgia.”

The closing argument rule was discussed in a 2008 Georgia Supreme Court decision:

Petty argues that the trial court erred by denying his motion to require the State to give an initial closing argument. O.C.G.A. 17-8-71 provides that “[a]fter the evidence is closed on both sides, the prosecuting attorney shall open and conclude the argument to the jury.” Notwithstanding the use of the word “shall,” we have long held that the trial court, in its discretion, may permit a waiver of the initial closing argument. *Bradham v. State*, 243 Ga. 638, 256 S.E.2d 331 (1979). Although O.C.G.A. 17-8-71 was amended in 2005 prior to Petty’s trial, the amendment made no changes to this portion of the statute. Thus, *Bradham* is still controlling authority. *Lewis v. State*, 283 Ga. 191 (3), 657 S.E.2d 854 (2008). As Petty has not shown that the trial court abused its discretion by allowing the State to waive its initial closing argument, this enumeration of error has no merit.¹¹

As mentioned in this section, the practice of waiving initial final argument or “sandbagging” has been criticized by commentators and the American College of Trial Lawyers. The Supreme Court of Delaware’s condemnation took on constitutional proportions in *Baker v. State*.¹² In *Bailey v. State*,¹³ that court reversed a conviction admonishing: “Counsel should not conceal or

¹¹Petty v. State, 283 Ga. 268, 658 S.E.2d 599 (2008).

¹²Baker v. State, 985 A.2d 389 (Del. 2009) (“Due process and fundamental fairness dictate that it is unfair

and often highly prejudicial for plaintiffs or State’s counsel to avoid treatment of certain issues in the opening summation so as to deprive defense counsel of the opportunity to reply.”).

withhold his position. He should play the cards dealt him face up and in his rightful turn. He has no right to sneak an ace out of the discards and play it later.”

In federal criminal cases, F.R.C.P. 29.1 precludes sandbagging as an option: “Closing arguments proceed in the following order: (1) the government argues; (2) the defense argues; and (3) the government rebuts.” Federal prosecutors are limited to a fair response to the defendant’s argument.¹⁴ Significantly, the House Judiciary Committee which approved the federal rule opined that when the government waives its first argument, it thereby waives its last.¹⁵

The defendant in a civil case is entitled to the opening and concluding argument when he introduces no evidence, and a denial of this right is error requiring the grant of a new trial.¹⁶ The rule that the defendant in a civil case is entitled to the opening and concluding argument when he has admitted a prima facie case in behalf of the plaintiff applies only where both parties have introduced evidence.¹⁷

After the injured party in a automobile negligence case read parts of a deposition into the record, the defense read parts of a deposition not related to the parts that the injured party read. Therefore, the defendant lost her right to opening and concluding closing argument.¹⁸

§ 34:4 General rules governing closing arguments

In arguments to the jury, attorneys have wide latitude in commenting upon evidence in the record and drawing reasonable inferences and conclusions from the evidence.¹ On appeal, closing arguments are to be judged within the context in which they were made.²

As a general proposition, the only limit upon the latitude oc-

¹³Bailey v. State, 440 A.2d 997 (Del. 1982).

¹⁴U.S. v. Smith, 700 F.2d 627 (11th Cir. 1983).

¹⁵Notes of the Committee on the Judiciary, House Report No. 94-247. See also U.S. v. Sarmiento, 744 F.2d 755, 78 A.L.R. Fed. 1 (11th Cir. 1984). For an article comparing Georgia and Federal criminal final argument rules under pre-2005 Georgia law, see Carlson and Carlson, The Right to Open and Conclude Final Arguments, Fall 2004 (Prosecuting Attorneys’ Council of Georgia), <http://www.pacga.org/site/content/44>.

[org/site/content/44](http://www.pacga.org/site/content/44).

¹⁶Kia Motors America, Inc. v. Range, 276 Ga. App. 360, 623 S.E.2d 514 (2005).

¹⁷O.C.G.A. § 9-10-186.

¹⁸Rouse v. Polott, 274 Ga. App. 226, 617 S.E.2d 185 (2005).

[Section 34:4]

¹Georgia Power Co. v. Walker, 101 Ga. App. 454, 114 S.E.2d 159, 80 A.L.R.2d 1264 (1960).

²Booth v. State, 301 Ga. 678, 804 S.E.2d 104 (2017).

curs when prejudicial influence may be exerted upon the jury.³ It is permissible to read and comment upon the pleadings in the case.⁴

It is not permissible to read Supreme Court decisions to the jury.⁵ Prosecutors are not allowed to read from law books in argument. The decision in *Wilson v. Kemp*⁶ addressed the propriety of a prosecutor reading a passage from a 19th century Georgia case, *Eberhart v. State*,⁷ as stated in *Zant v. Campbell*.⁸ The passage states that society demands that crime be punished, “and the false humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society.” The Supreme Court of Georgia had previously condemned the use of the Eberhart quote in closing argument. The Wilson appeal also raised the right of the prosecutor to read before the jury a passage from the United States Supreme Court’s opinion in *Gregg v. Georgia*.⁹ The prosecutor told the jury: “We would like to call the Court’s attention to what is generally considered among legal scholars, and anyone who had given much thought to the subject, the four generally accepted reasons for punishment.” There followed reference to Gregg, cited as recognizing that some offensive crimes demand the extreme penalty. The prosecutor’s use of such passages was improper argument. It rendered the trial proceedings fundamentally unfair. The court stated: “We need not address the effect of either argument alone. However, the combined effect of the Eberhart quote and the Gregg quote is highly prejudicial.”¹⁰

A prosecutor’s quotation of Eberhart was condemned again in *Presnell v. Zant*.¹¹

It is permissible for counsel to use a blackboard and models or such devices during his argument to illustrate his points.¹²

Counsel may present to the jury his view of the law in closing argument.¹³

Trial court acted within its discretion in murder trial in allow-

³*Black & White Cab Co. v. Clark*, 67 Ga. App. 170, 19 S.E.2d 570 (1942).

⁴*Purvis v. Atlanta Northern Ry. Co.*, 145 Ga. 517, 89 S.E. 571 (1916); *Hankinson v. Hankinson*, 168 Ga. 156, 147 S.E. 106 (1929).

⁵*Barfield v. State*, 89 Ga. App. 204, 79 S.E.2d 68 (1953).

⁶*Wilson v. Kemp*, 777 F.2d 621 (11th Cir. 1985).

⁷*Eberhart v. State*, 47 Ga. 598, 609–610, 1873 WL 2356 (1873).

⁸*Zant v. Campbell*, 245 Ga. 368,

265 S.E.2d 22 (1980).

⁹*Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

¹⁰777 F.2d at 627.

¹¹*Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992).

¹²*Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961) (overruled in part on other grounds by, *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (1982)).

¹³*Ransone v. Christian*, 56 Ga. 351, 1876 WL 3011 (1876).

ing prosecutor to sit in witness chair as he addressed jury during closing argument. Counsel is permitted wide latitude in closing argument, and any limitation of argument is a matter for the trial court's discretion.¹⁴

In civil cases, a statute provides a presumption against a party who has evidence to “repel a claim or charge” but omits to produce it.¹⁵

The Georgia Supreme Court recognized that prosecution statements in closing can violate a defendant's Sixth Amendment right of confrontation when the remarks inject new evidence into the case. However, the prosecutor's declarations were deemed collateral in *Sumlin v. State*.¹⁶ There was an issue of whether, if the defendant had bleached his hands to remove evidence, his hands would have been stinging when he saw other people. Since there was no such “stinging hands” evidence, he claimed he was innocent. Here is how the prosecutor responded:

During closing argument, the prosecutor improperly injected new evidence when, after first conducting a demonstration in which she poured bleach on her hands, she stated near the conclusion of her argument that her hands “ain't yet stinging from the bleach.” The trial court sustained appellant's objection to this comment and, after appellant moved for mistrial, reserved its ruling on the motion and gave the jury a curative instruction. After the verdict was returned, appellant renewed his motion for mistrial. The trial court's erroneous granting of that motion was reversed in *State v. Sumlin*, 281 Ga. 183, 637 S.E.2d 36 (2006). Appellant now argues that the denial of his mistrial motion was error and that the curative instruction was insufficient to correct the error. However, appellant did not renew his motion immediately after the trial court gave the curative instruction. Instead, he delayed doing so until after the jury returned its verdict. This issue was thus not preserved for appellate review. *Pearson v. State*, 277 Ga. 813, 596 S.E.2d 582 (2004) (party cannot during trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later).

The Georgia Supreme Court has observed that it is appropriate for prosecutors to urge the jury to convict for the safety of the community or to curb an epidemic of violence in the community, and it is not improper to emphasize to the jury its responsibility to enforce the law. Accordingly, a prosecutor's entreaty to a murder trial jury that, “[Y]ou all have to have the courage to speak up and talk for a community that's too scared to talk for itself,” and that she was tired of having to talk with the victims of violence and see witnesses and children in neighborhoods that

¹⁴*Watkins v. State*, 278 Ga. 414, 603 S.E.2d 222 (2004).

¹⁶*Sumlin v. State*, 283 Ga. 264, 658 S.E.2d 596 (2008).

¹⁵O.C.G.A. § 24-14-22.

are terrorized by criminals, did not lead to reversal.¹⁷

The following “send a message” argument was approved in a 2020 decision from the Supreme Court of Georgia:

I’m just going to ask you to do something. I’m going to ask you to send a message that [it] doesn’t matter if it’s in a Chevron on Campbellton Road or a high-rise in Buckhead, the police, like they did in this case, they’re going to do their job. They’re going to send the evidence to the crime lab. They’re going to find eyewitnesses. They’re going to get it on video. The D.A.’s office is going to do its job, no matter who the victim is. And the juries in this community are going to do their job. They’re going to take the law, they’re going to apply it to the evidence, they’re going to use their common sense, and they’re going to find them guilty.¹⁸

§ 34:5 Comments on court’s instructions

Questions of law are normally to be argued to the court, questions of fact to the jury. However, counsel in his argument may give the jury his view of the law, subject to correction by the court in its charge.¹

Counsel may discuss and argue the law in closing argument. Counsel has every right to refer to the law that the court is going to give in the charge. It is error for the trial court to prohibit counsel from discussing the law.²

A Georgia Supreme Court decision dealing with the issue of self-defense in a murder prosecution is illustrative. Georgia statutory law precludes the application of the doctrine of self-defense where an individual is involved in a felony: “A person is not justified in using force. . . if he. . . [i]s attempting to commit. . . felony[.]”³ At trial, the defendant testified that he was in the area where the murder occurred in order to purchase illegal narcotics, which constitutes a felony. The prosecutor was, accordingly, entitled to argue to the jury that the defendant’s own testimony precluded self-defense.⁴

However, reading law to the jury from appellate cases is error.⁵

The normal practice is for the court to hold a conference with

¹⁷Faust v. State, 302 Ga. 211, 805 S.E.2d 826 (2017).

¹⁸Arnold v. State, 309 Ga. 573, 847 S.E.2d 358 (2020).

[Section 34:5]

¹Warmock v. State, 56 Ga. 503, 1876 WL 3055 (1876). See also Freels v. State, 195 Ga. App. 609, 394 S.E.2d 405 (1990) (reading law to jury incorrect, but it is counsel’s right to urge his legal position).

²Minter v. State, 266 Ga. 73, 463 S.E.2d 119 (1995).

³O.C.G.A. § 16-3-21.

⁴Rayton v. State, 314 Ga. 29, 875 S.E.2d 708 (2022) (“the prosecutor’s argument referred to applicable law that the court did include in its jury charge”).

⁵Tumlin v. State, 274 Ga. 309, 553 S.E.2d 592 (2001) (but conviction not reversed).

counsel, prior to closing arguments, to decide upon the charge to be given.

The propriety of an attorney arguing law and the court's instructions is taken up in Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 7:10, citing *Georgia Cas. & Sur. Co. v. Jernigan*.⁶

§ 34:6 Arguments about damages

Counsel shall be allowed, in personal injury cases, to argue the worth or monetary value of pain and suffering.¹ Such argument must conform, however, to the evidence or reasonable deductions from the evidence. In *Kennebeck v. Glover*,² plaintiff's argument that "defendants often calculate [pain and suffering damages] by multiplying a plaintiff's medical expenses by some number" was determined as "well within the wide latitude afforded to counsel in closing arguments."

Even though the Tort Reform Act specifically provides for the receipt of evidence and not arguments of counsel, at the latter stage of a bifurcated tort trial, counsel has the right to make argument in regard to the amount of punitive damages.³

It was not error for the trial court to allow the plaintiff's counsel to set forth figures of the plaintiff's damages not reduced to present cash value where the court charged the jury as to its duty to reduce the loss of future earnings to present cash value and told them how to do it.⁴ *Arnold v. Liggins*⁵ upheld the trial court's denial of the defendant's motion for new trial where the amount being claimed for lost earnings during the plaintiff's closing argument exceeded the amount identified in the pre-trial order: "The remedy for failure to plead special damages is to move for a more definite statement of the plaintiff's claim,' and [defendant] did not make such a motion."

It is grossly improper to argue the defendant's ability to pay.⁶

⁶*Georgia Cas. & Sur. Co. v. Jernigan*, 166 Ga. App. 872, 305 S.E.2d 611 (1983) (counsel not allowed to read law from Code or appellate opinions, but may state his legal position).

[Section 34:6]

¹*See generally* Arnsdorff v. Fortner, 276 Ga. App. 1, 622 S.E.2d 395, 14 A.L.R.6th 767 (2005).

²*Kennebeck v. Glover*, 294 Ga. App. 822, 670 S.E.2d 459 (2008) (plaintiff's "counsel made no prejudicial references to specific damage awards in

other cases but rather discussed a possible method for calculating pain and suffering damages").

³*McClure v. Gower*, 259 Ga. 678, 385 S.E.2d 271 (1989).

⁴*Union Camp Corp. v. Daley*, 188 Ga. App. 756, 374 S.E.2d 329 (1988).

⁵*Arnold v. Liggins*, 368 Ga. App. 544, 890 S.E.2d 446 (2023).

⁶*Chattanooga, R. & C.R. Co. v. Huggins*, 89 Ga. 494, 15 S.E. 848 (1892).

However, in *Thomas v. Alligood*,⁷ counsel for a hospital defendant's isolated comment that "the defendants were not 'getting rich' while taking care of people," under the circumstances of that case, did not lead to reversal.

Sometimes a lawyer tells the jury to award the kind of damages they would like if they had been injured in the manner suffered by the plaintiff. This is a "golden rule" argument, and these arguments are discussed in § 34:8, *infra*.

Georgia decisions have approved of "per diem" arguments in civil cases.⁸ Similarly, authority from the Eleventh Circuit Court of Appeals has allowed "unit of time" arguments in civil cases.⁹

§ 34:7 Comments on conduct of opposition

Georgia courts evaluate allegedly disparaging remarks in the context in which they were made. For instance, a prosecutor's comments during closing argument that the defense's contentions were "'[a]s reasonable as saying that aliens came down and shot [victim],' that the argument 'd[id not] compute with common sense,' and that 'they are insulting your intelligence[,] [t]hey're insulting the whole process, and they're insulting and disrespecting [victim's] memory,'" when considered in context, constituted a challenge to the reasonableness of the defense theory and not an improper *ad hominem* attack on defense counsel.¹

In a civil case, counsel may comment on the failure of a party to take the stand or his failure to deny testimony attributing conduct or statements to him, and he may comment upon the failure of his adversary to produce an available witness related to or associated with him or under his control who might reasonably be assumed to have information on a material issue in the case.² Counsel may comment upon the failure of his adversary to produce evidence material to the issues of the case, which is in his possession or under his control³ and may comment upon the failure of his adversary to offer in evidence an evidence deposi-

⁷*Thomas v. Alligood*, 358 Ga. App. 703, 856 S.E.2d 80 (2021) ("Based upon the particular facts and circumstances of this case, we cannot say that the isolated remark in a case in which the trial court also gave a sympathy charge was so prejudicial as to require a new trial.").

⁸*Hardwick v. Price*, 114 Ga. App. 817, 152 S.E.2d 905 (1966) ("It would be paradoxical to hold that damages in totality are inferable from the evidence but that when this sum is divided into segments representing days,

months or years, the inference vanishes.").

⁹*Showan v. Pressdee*, 922 F.3d 1211, 103 Fed. R. Serv. 3d 1034 (11th Cir. 2019).

[Section 34:7]

¹*Stryker v. State*, 318 Ga. 769, 900 S.E.2d 579 (2024) (some substitution in original).

²*Miller v. Coleman*, 213 Ga. 125, 97 S.E.2d 313 (1957).

³See § 20:10, *supra*.

tion taken by him.⁴

Decisions have provided latitude when counsel responds to opposition. A conviction was affirmed where a prosecutor characterized a murder defendant as a “psychopath,” after the defense had used that term to refer to the victim.⁵

The Supreme Court of Georgia held that the prosecution referring to the defendant as a “devil,” when made in response to defense opening statement and closing argument, was acceptable in a 2020 case:

Thus, when the prosecutor referred to the [defendants] brothers as devils, he was using the same colorful language used by the defense. The prosecutor, however, was using that language to rebut the attack on the credibility of the State’s witnesses and to argue that it was the defendants who were less credible, as well as more culpable, than [prosecution witnesses]. This is permissible argument.⁶

Argument in a murder trial that the defendant “fled like a coward and came in here today, two years later, with a story that centers around all the evidence,” and that the defendant’s claim of “being robbed, that’s the first we ever heard of that,” appropriately questioned the veracity of the defendant’s testimony that he was forced to shoot the victim in self-defense.⁷

It is not proper to argue that the defendant did not ask for a physical examination of the plaintiff under court order and that such failure amounted to an admission that the plaintiff was injured as seriously as was alleged.⁸

Complained of portion of prosecutor’s closing argument was comment on defendant’s failure to produce evidence, not prohibited comment on defendant’s failure to testify.⁹ Defense counsel was not deficient in failing to object to a prosecutor’s comment in closing that “there has been no evidence exonerating” the defendant and “no evidence pointing to somebody else as being the real killer.” The Supreme Court of Georgia held that, viewed in context, “the prosecutor was simply highlighting that Appellant’s theory of the case—that someone other than Appellant was the fourth attacker—was illogical based on the evidence.”¹⁰

Where witness is known, competent, and compellable to testify as to material facts of which he is cognizant, counsel may properly comment in his argument before jury on failure of party to whom

⁴See § 20:10, *supra*.

⁵*Walker v. State*, 312 Ga. 232, 862 S.E.2d 285 (2021).

⁶*Styles v. State*, 309 Ga. 463, 847 S.E.2d 325 (2020).

⁷*Clark v. State*, 299 Ga. 552, 787 S.E.2d 212 (2016).

⁸*Bradford v. Parrish*, 111 Ga. App. 167, 141 S.E.2d 125 (1965).

⁹*White v. State*, 242 Ga. 21, 247 S.E.2d 759 (1978).

¹⁰*Thompson v. State*, 318 Ga. 760, 900 S.E.2d 607 (2024).

witness is accessible to produce witness' testimony.¹¹ However, it is improper for counsel to comment on the failure of the opposing party to produce certain witnesses where it did not appear that the opposing party knew the witnesses or had the power to produce them.¹²

Although it was not deemed to be prejudicial error, the trial court should have allowed defense counsel to comment in closing argument on the State's failure to call the victim's brother as a witness.¹³

It was not improper for a prosecutor to comment on the failure of the defense to introduce evidence of prior inconsistent statements in impeachment of state witnesses, even though no such prior inconsistent statements were known to exist.¹⁴

The scope of prosecution argument was explored in *Appling v. State*.¹⁵ After cross-examining state witnesses as to their ability to identify defendants as present at the crime scene, the defendants testified. They admitted they were there. When the prosecution criticized the defense approach, the Georgia Supreme court decided whether the criticism was justified:

Appellants maintain that the trial court erred by allowing the State to characterize the defense as a "fraud" during closing argument. The prosecutor argued that the defense cross-examination of State witnesses was a fraud because when appellants ultimately testified, they both admitted certain facts in issue, e.g., their presence at the scene. The wide leeway given to argue all reasonable inferences that may be drawn from the evidence during closing argument, see *Smith v. State*, 279 Ga. 48(2), 610 S.E.2d 26 (2005), encompasses pointing out inconsistencies in a defendant's testimony and urging that, on that basis, the defendant lied. *Nichols v. State*, 281 Ga. 483, 640 S.E.2d 40 (2007). The fact that the inconsistencies argued here were within the defense as a whole does not require a different result.

Another case involving complaints about the closing argument is *Banks v. State*:¹⁶

During closing argument, in discussing the defense theory, the prosecutor said:

But that defense is used so much we have a name for it. We call it the whore defense. And basically what it is, is you try to run down

¹¹*Thompson v. Colter*, 242 Ga. 784, 251 S.E.2d 526 (1979).

¹²*Daughtry v. Georgia Power Co.*, 61 Ga. App. 505, 6 S.E.2d 454 (1939).

¹³*Harris v. State*, 269 Ga. 731, 505 S.E.2d 467 (1998).

¹⁴*Forney v. State*, 255 Ga. 316, 338 S.E.2d 252 (1986).

¹⁵*Appling v. State*, 281 Ga. 590, 642 S.E.2d 37 (2007) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹⁶*Banks v. State*, 281 Ga. 678, 642 S.E.2d 679 (2007).

the victim so bad, you call them a whore to where either people don't care or think they deserved it. That's what that is. It's designed to play on prejudices they're hoping you have. In other words, it's designed on the low opinion of you. That is what that defense is.

Defense counsel objected that this argument attacked him “personally,” accusing him of trickery; he did not request a remedy. On appeal, the Georgia Supreme Court found no fault in the trial judge’s response to the situation, which was to tell the jury that no aspersions were to be cast on defense counsel. As for the prosecutor, “counsel is permitted wide latitude in closing argument”

These two cases, *Appling* and *Banks*, underline the point that defense tactics and strategy are proper objects of prosecutor comment, where the facts of the case justify the prosecutor’s argument.

On the other hand, disparaging opposing counsel directly and personally is not favored. In a murder case, the Supreme Court of Georgia disapproved of “the prosecutor’s use of inflammatory language tending to impugn the character of trial counsel or her direct personal attacks on trial counsel.”¹⁷ The prosecution in *London v. State*¹⁸ “characterized trial counsel [for the defense] as ‘very smug’” and told the jury “that trial counsel [for the defense] ought to ‘apologize to the victim’s family.’”

§ 34:8 Improper remarks of counsel, generally

It is impractical for the courts to lay down definitive guidelines as to what may and what may not be said in arguments to the jury; the degree of impropriety that constitutes reversible error depends not only upon the language used but also upon the circumstances in which it is used; a judgment will be reversed only when it is reasonably clear that improper remarks influenced the jury in a manner that resulted in substantial prejudice to a party.¹

The Georgia rules on the proper boundaries of closing argument were outlined and summarized in R. Carlson and M. Carlson, *Outrageous Opponents: How to Stop Them in Closing Argument*, 6 Geo B J 12 (Feb, 2001).

In both criminal and civil trials, once an objection to improper argument is sustained, the trial court is required to take corrective measures to remedy the harm caused by the impropriety,

¹⁷*London v. State*, 308 Ga. 63, 838 S.E.2d 768 (2020). [Section 34:8]

¹⁸*London v. State*, 308 Ga. 63, 838 S.E.2d 768 (2020). ¹*Black & White Cab Co. v. Clark*, 67 Ga. App. 170, 19 S.E.2d 570 (1942).

even when there is no specific remedy request.² When the objection is not timely made, the standard of review for reversible error is whether the improper argument, in reasonable probability, changed the result of the trial.³

In a child molestation prosecution, earlier sexual abuse charges against the defendant were dismissed on speedy trial grounds, but admitted at trial pursuant to O.C.G.A. § 24-4-413. In her closing argument, the prosecutor told the jury that in the prior case, the defendant “skated on a technicality” and “didn’t go in court and let a jury listen to the evidence and let a jury make a decision.” On appeal, the defense argued that “the trial court erred in failing to *sua sponte* admonish the State’s prosecutor for improperly characterizing the dismissal of the earlier charges.” Affirming, Presiding Judge Dillard observed that “a trial judge has no obligation under OCGA § 17-8-75 to ‘rebuke a prosecuting attorney or give a curative instruction in the absence of a timely objection.’”⁴

Any argument which importunes the jury to place itself in the position of the victim may violate the prohibition against “golden rule” arguments.⁵

“Golden rule” arguments are proscribed in civil and criminal cases.⁶ In criminal cases, in a classic “golden rule” argument, the State cannot ask the jurors to put themselves in the victim’s place.⁷ The *Hayes* decision suggests there may be a difference in asking jurors to put themselves in the place of a witness, as opposed to a party or the victim.

This point was underscored in *Favors v. State*,⁸ where a prosecutor’s isolated invitation to jurors to “imagine what would be going through” the victims’ minds, did not violate Golden Rule proscriptions.

The rules governing this form of argument are rehearsed in *Ledford v. State*.⁹ The court determined that the prosecutor’s rhetoric did not violate established guidelines:

²*Stolte v. Fagan*, 291 Ga. 477, 731 S.E.2d 653 (2012) (overruled on other grounds by, *Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021)).

³*Brockman v. State*, 292 Ga. 707, 739 S.E.2d 332 (2013).

⁴*Mulkey v. State*, 366 Ga. App. 427, 883 S.E.2d 173 (2023).

⁵*McClain v. State*, 267 Ga. 378, 477 S.E.2d 814 (1996) (also holds that a future danger argument is not proper during guilt phase of capital case).

⁶See *Myrick v. Stephanos*, 220 Ga. App. 520, 472 S.E.2d 431 (1996), identifying the argument as one which suggests to jurors that they put themselves in the shoes of one of the parties.

⁷*Hayes v. State*, 236 Ga. App. 617, 512 S.E.2d 294 (1999).

⁸*Favors v. State*, 296 Ga. 842, 770 S.E.2d 855 (2015).

⁹*Ledford v. State*, 289 Ga. 70, 709 S.E.2d 239 (2011). See *Coghlan v. State*, 319 Ga. App. 551, 737 S.E.2d

Ledford contends that the prosecutor violated the proscription against “golden rule” arguments by urging the jury to think about the unpleasant way in which the victim had died. This argument was made as part of the prosecutor’s argument that Ledford had acted with malice. “A ‘golden rule’ argument is one that, regardless of the nomenclature used, asks the jurors to place themselves in a victim’s position.” *Braithwaite v. State*, 275 Ga. 884, 885(2)(b), 572 S.E.2d 612 (2002). We hold that this argument was not improper.

The prosecutor’s argument in *Hines v. State*¹⁰ was held to not abrogate “golden rule” guidelines. The argument asked the jury not to revictimize the victim, but did not entreat the jury to place themselves in the victim’s shoes with regard to the crime committed. Nor did the arguments in *Clonts v. State*¹¹ or *Chinn v. State*.¹² In *Braithwaite v. State*,¹³ the Georgia Supreme Court repeated its opposition to “golden rule” appeals to the jury, but deemed the error in this case to be harmless due to overwhelming proof of guilt.

Prosecutor’s personal analogy about military brotherhood, illustrating how people with close relationships, like the defendants, could jointly execute a quickly formed plan, did not improperly inject extrinsic evidence into a murder case.¹⁴

It is improper to suggest that the jury imagine how the assault felt to the victim, or to put themselves in the victim’s place.¹⁵

In *Gomez v. State*,¹⁶ a golden rule argument was not detected. “Rather, the comments appealed to their [the jury’s] desire to create a safe community. And a prosecutor generally may appeal to the jury to convict for the safety of the community.” Nor were rules against golden rule violated in *Sanders v. State*.¹⁷ The *Sanders* court also confirms the propriety of a prosecutor commenting about a defendant’s flight.

Statements of counsel and argument based upon facts and circumstances proved, or upon legitimate inference therefrom do not exceed the bounds of proper debate and are not to be

332 (2013); *Humphrey v. Lewis*, 291 Ga. 202, 728 S.E.2d 603 (2012) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹⁰*Hines v. State*, 246 Ga. App. 835, 541 S.E.2d 410 (2000).

¹¹*Clonts v. State*, 260 Ga. App. 143, 579 S.E.2d 1 (2002).

¹²*Chinn v. State*, 276 Ga. 387, 578 S.E.2d 856 (2003).

¹³*Braithwaite v. State*, 275 Ga. 884, 572 S.E.2d 612 (2002).

¹⁴*Arnold v. State*, 309 Ga. 573, 847 S.E.2d 358 (2020).

¹⁵*Braley v. State*, 276 Ga. 47, 572 S.E.2d 583 (2002).

¹⁶*Gomez v. State*, 305 Ga. App. 204, 699 S.E.2d 395 (2010).

¹⁷*Sanders v. State*, 290 Ga. 637, 723 S.E.2d 436 (2012).

discouraged by the court.¹⁸

But assumptions and statements of fact not based on the evidence may not be argued to the jury and may be prejudicial.¹⁹

The “inflammatory” objection has a long history in Georgia. In civil cases, *Continental Cas. Co. v. Wilson-Avery, Inc.*²⁰ instructed as follows: “Remarks of counsel amount to misconduct and may require corrective action or mistrial even where the remarks are in some way related to the evidence if the argument is unfairly calculated to arouse passion or prejudice.”

It is proper for counsel to comment on the fact that a witness is available and was not called by opposing counsel, because of the presumption that his testimony would be adverse to that party.²¹

It is improper, after voir dire, to address a juror by name during trial of the case.²²

LR 83.14 of the civil case rules for the U.S. District Court for the Southern District of Georgia provides that during arguments “no juror should be addressed individually, or by name.”

Counsel may not refer to evidence that has been excluded or has been stricken.²³ Nor should he refer to what has been done in other cases.²⁴

It is improper and may be reversible error to suggest to the jury that evidence received for a limited purpose may be considered by them for any other purpose.

Where opposing counsel has indulged in improper conduct, it is not always proper to retaliate in kind.²⁵ However, such retaliation may not require a mistrial or reversal if the comments of both counsel referred to the same matter and were equally prejudicial.²⁶

A motion in limine to restrain an opponent’s improper “golden

¹⁸*Georgia Power Co. v. Walker*, 101 Ga. App. 454, 114 S.E.2d 159, 80 A.L.R.2d 1264 (1960).

¹⁹See *Malone Freight Lines v. Pridmore*, 86 Ga. App. 578, 71 S.E.2d 877 (1952).

²⁰*Continental Cas. Co. v. Wilson-Avery, Inc.*, 115 Ga. App. 793, 156 S.E.2d 152 (1967).

²¹*City of Atlanta v. Feeney*, 42 Ga. App. 135, 155 S.E. 370 (1930).

²²*Atlanta Stove Works, Inc. v. Hollon*, 112 Ga. App. 862, 873, 146 S.E.2d 358, 366 (1965) (“It has been held in other jurisdictions that it is improper to single out a particular

juror, address him by name, and personally appeal to him,” and Georgia disapproves of such a practice).

²³*Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961) (overruled in part on other grounds by, *Scherer v. Scherer*, 249 Ga. 635, 292 S.E.2d 662 (1982)).

²⁴*Atlantic Coast Line R. Co. v. Coxwell*, 93 Ga. App. 159, 91 S.E.2d 135 (1955).

²⁵*Banks v. Kilday*, 88 Ga. App. 307, 76 S.E.2d 642 (1953).

²⁶*Reserve Life Ins. Co. v. Peavy*, 98 Ga. App. 268, 105 S.E.2d 465 (1958).

rule” argument appears in this text’s Appendix of Forms.²⁷

§ 34:9 Improper remarks in criminal cases

The general principle is that counsel may not do or say anything in argument, the only effect of which will be to inflame the passion or arouse the prejudice of the jury against defendant without throwing any light on the question for decision.¹

In a high-profile prosecution where an attorney was accused of the murder of his wife, the prosecution displayed a PowerPoint slide with a bullet point reading “KKK” during his closing argument. The Supreme Court of Georgia determined that this was “aimed at suggesting that [the defendant] was racially biased,” despite the fact that “the State ultimately acknowledged that no evidence was produced at trial to support any inference that the Ku Klux Klan was relevant to this case.” While the defense failed to timely object, and the defendant’s murder conviction was reversed on other grounds, the Supreme Court of Georgia made the prosecution’s folly clear: “We have repeatedly noted that in the absence of relevance, ‘racial bias or prejudice should not be injected into the proceedings, as such issue could tend to destroy the impartiality of the jury and because it would not be relevant.’ ”²

Inflammatory arguments have been condemned in a number of cases. In *Bell v. State*.³ Justice Benham announces a warning: The wide range of discussion previously allowed in closing argument does have its limitations. He suggests that the Georgia Supreme Court will look with favor on future opportunities to examine the scope traditionally given attorneys in closing argument. In the *Bell* case, reference in argument to “extraneous and prejudicially inflammatory material” caused defendant’s conviction to be reversed. Review of argument errors will fall under this standard: “[T]he grant of a mistrial for improper argument should be liberally exercised where counsel abuses the right of argument by prejudicing the case of the opposite party”

There was no transcript record of the closing argument in *Bell*, presumably because the trial court refused the defense request for same. While this is a matter of discretion by the trial court, Presiding Justice Hunt questioned “whether that discretion was

²⁷See Appendix C, Form 23.
[Section 34:9]

¹See *Collins v. State*, 86 Ga. App. 157, 71 S.E.2d 99 (1952).

²*McIver v. State*, 314 Ga. 109, 875 S.E.2d 810 (2022).

³*Bell v. State*, 263 Ga. 776, 439 S.E.2d 480 (1994).

not abused under the circumstances of this case.”⁴

In the felony murder of an eight-year-old, the prosecutor sang “Happy Birthday” to the deceased during her closing argument with the courtroom lights dimmed and brought out a cake with candles. Failure to object to this display was fatal to the defendant’s complaint about it.⁵

It is reversible error where the prosecution grossly mischaracterizes the law and ineffective assistance of counsel for defense lawyers to fail to object to the argument. In a 2020 decision, the Supreme Court of Georgia determined that the state’s argument that proof beyond a reasonable doubt requires something less than 51 percent certainty was “obviously wrong,” and “there is no good reason that any reasonably competent lawyer would fail to object to such an egregious misstatement of the law.”⁶

According to the Supreme Court of Georgia, a prosecutor’s remark that acquitting a criminal defendant would require the jurors to violate their oath came “uncomfortably close to—and may well cross over—the boundaries of permissible argument.”⁷

A criminal defendant’s convictions were reversed where, during closing arguments, the state repeatedly raised the issue of defendant’s post-arrest silence, despite the fact that defense counsel did not object.⁸

Vacating and remanding a murder conviction, the Supreme Court of Georgia expressed:

[S]erious concern regarding the State’s closing argument during trial that flatly stated that proof beyond a reasonable doubt in this murder case does not require the jury to be even 51 percent sure—in other words, requires less than even the preponderance of the evidence required to meet the burden of proof in a civil case. That is obviously wrong.⁹

A new trial is required where, after proper objection to unduly inflammatory remarks, the court fails to rebuke counsel. The court must also endeavor, by instructions to the jury, to remove the prejudicial effect of the remarks.¹⁰ Counsel need not repeat the inflammatory comments in making her objection. The trial judge’s role is clear: the court is not a mere moderator at a meeting, preserving order, but is a minister of justice with a duty to

⁴439 SE2d at 481 n 1.

⁵Smith v. State, 288 Ga. 348, 703 S.E.2d 629 (2010).

⁶Debelbot v. State, 308 Ga. 165, 839 S.E.2d 513 (2020).

⁷Walker v. State, 312 Ga. 232, 862 S.E.2d 285 (2021).

⁸Dumas v. State, 337 Ga. App. 124, 786 S.E.2d 508 (2016).

⁹Debelbot v. State, 305 Ga. 534, 826 S.E.2d 129 (2019).

¹⁰Brown v. State, 110 Ga. App. 401, 138 S.E.2d 741 (1964).

govern the progress of a trial.¹¹ The *Brown* case provides an excellent collection of principles of law reaching “back across the opinions of both this court and the Supreme Court of Georgia to the Great Charter at Runnymede” dedicated to eradicating improper and prejudicial argument. “Georgia jurists among those most revered have emphatically condemned appeals to juries based on irrelevant prejudice.”¹²

It is likely, given the modern emphasis of the bench and bar on professionalism and civility, that searching review of closing arguments will increase. Was the lawyer courteous, even while firmly advocating for his client, or did he seek to inflame? This will doubtless be a key question in future appellate review of closing arguments.

While no legal presumption of guilt arises from the failure of the defendant to introduce witnesses and it is error for the prosecutor to argue such a presumption, it is proper for the prosecutor to argue an inference of fact that can be drawn from such failure.¹³ The witnesses must be competent, accessible and cognizant of material, relevant facts.¹⁴

A lawyer may comment in closing on an opponent’s failure to call certain witnesses who hold relevant facts, unless the witness who did not testify invoked a privilege.¹⁵

A broad permission to argue and draw deductions from the evidence appears in *Payne v. State*.¹⁶ The prosecutor may draw inferences during closing argument from defendant’s nonproduction of witnesses.¹⁷

It was not an improper remark during closing argument for a prosecutor to comment on a corporate defendant’s failure to call a member of the board to testify since a corporation cannot avail itself of right against self-incrimination.¹⁸

Mistrial motions are sometimes made during an opponent’s closing. However, there was no abuse of discretion in the trial court’s denial of motion for mistrial where the prosecutor improperly remarked during closing that defense counsel and defendant had fabricated testimony, but where trial court gave a

¹¹138 SE2d at 746.

¹²138 SE2d at 746.

¹³*Pace v. State*, 121 Ga. App. 251, 173 S.E.2d 464 (1970).

¹⁴*Byington v. State*, 106 Ga. App. 247, 126 S.E.2d 698 (1962), judgment rev’d on other grounds, 218 Ga. 440, 128 S.E.2d 329 (1962).

¹⁵*Morgan v. State*, 267 Ga. 203, 476 S.E.2d 747 (1996).

¹⁶*Payne v. State*, 273 Ga. 317, 540 S.E.2d 191 (2001).

¹⁷*Isaac v. State*, 263 Ga. 872, 440 S.E.2d 175 (1994).

¹⁸*Classic Art Corp. v. State*, 245 Ga. 448, 265 S.E.2d 577 (1980).

sufficient curative instruction.¹⁹

Sometimes a prosecutor follows up on the defendant's opening which was given earlier in the case, and references matters promised by the defense in opening which were left unfulfilled. Comment about failure to introduce evidence referenced or promised in opening statement is allowed. Comment upon the accused's silence is not. Prosecutor's comment upon the defense failure to provide evidence or testimony substantiating representations made in its opening statement was allowed in a case where the defendant failed to testify.²⁰

In a case where the defense asserted in opening statement what witnesses, including the defendant, would testify to, and then failed to present that testimony, or have the defendant testify, the trial court did not err in allowing the State to argue in closing: "I ask you to keep in mind that we told you in opening statement what we thought the evidence would show, and I ask you to think through the evidence . . . and ask yourselves if we did what we said we would do. And I also want you to think back on defense counsel's opening and ask yourselves if they did what they said they would do."²¹ The prosecutor as well as the defense counsel are equally able to comment on the failure of the other to present certain witnesses as long as there is competent evidence before the jury that a missing witness has knowledge of material and relevant facts.²²

It is proper for the prosecutor to dwell on the evil results of crime and to urge fearless administration of the law.²³

While "send a message" arguments have not always been warmly received in civil cases, see § 34:13, *infra*, there is apparently little problem with this argument in criminal cases.²⁴

What message a potential verdict would send to the community is often a subject of argument. This mode of summation has been

¹⁹*Brown v. State*, 264 Ga. 48, 441 S.E.2d 235 (1994).

²⁰*Salters v. State*, 244 Ga. App. 219, 535 S.E.2d 278 (2000) ("Although the better practice is clearly not to refer to the defendant by name, standing alone, this is not controlling. In context, the statements by prosecuting counsel were not an impermissible reference to Salter's failure to testify but a response to argument made in the defense's opening statement claiming the proof of certain evidence").

²¹*Day v. State*, 203 Ga. App. 186, 416 S.E.2d 548 (1992) ("Because no

such evidence was in fact presented, the jury could reasonably have interpreted the state's attorney's comment as a reference to that omission rather than as a reference to the defendant's failure to testify").

²²*Spear v. State*, 270 Ga. 628, 513 S.E.2d 489 (1999).

²³*See Terhune v. State*, 117 Ga. App. 59, 159 S.E.2d 291 (1967).

²⁴*See Carr v. State*, 267 Ga. 547, 480 S.E.2d 583 (1997): "It is not improper for a prosecutor to appeal to a jury to convict in order to 'send a message' to the community."

approved in Georgia in criminal cases. In *Green v. State*,²⁵ the issue was what sort of message a “not guilty” verdict would send:

[The prosecutor said in] closing argument that a “not guilty” verdict would send a message to the community that insults alone justified the offended person shooting the insulter. But closing argument references to what message a “not guilty” verdict would send to the community regarding safety or principles of right and wrong are permissible forms of argument. “A prosecutor may appeal to the jury to convict for the safety of the community or to send a message to others that criminal activities will be punished.” We discern no error here.

Citing Georgia precedent, the Georgia Supreme court held that a prosecutor may appeal to the jury to convict for the safety of the community or to send a message to others that criminal activities will be punished and may also impress on the jury its responsibility in that regard.²⁶

The message of *Price* was reinforced in *Walker v. State*.²⁷

Prosecutor’s statement during closing argument in prosecution for malice murder and armed robbery, to effect that jury had “opportunity to define what is acceptable in [the] community[,]” did not warrant a mistrial, where, read in context, the prosecutor appropriately urged jury to speak on behalf of community and rid it of robbers and murderers.²⁸

The trial court properly granted the defendant’s motion for a new trial after determining that it improperly overruled the defendant’s objection to the state’s comments concerning the defense’s failure to prove innocence by taking a breath test in a DUI case.²⁹

The Georgia Supreme Court detected “an extensive pattern of inappropriate and, in some cases, illegal [prosecutorial] conduct in the course of the trial [of *State v. Carr*].” He found the prosecutor’s closing argument replete with “patent misrepresentations of fact.”³⁰ The closing argument discussion in *Carr* was cited

²⁵*Green v. State*, 244 Ga. App. 697, 536 S.E.2d 565 (2000).

²⁶*Price v. State*, 280 Ga. 193, 625 S.E.2d 397 (2006).

²⁷*Walker v. State*, 282 Ga. 774, 653 S.E.2d 439 (2007) (argument not improper that urged the jury to send a message to those who would consider similar crimes).

²⁸*Gibson v. State*, 283 Ga. 377, 659 S.E.2d 372 (2008).

See also *Collins v. State*, 283

Ga. App. 188, 641 S.E.2d 208 (2007) (prosecutor inviting the jury to “set the standard in our community that this is not tolerated. This is not how a woman is going to be treated in our community” not improper).

²⁹*State v. Mitchell*, 326 Ga. App. 370, 756 S.E.2d 609 (2014).

³⁰*Carr v. State*, 267 Ga. 701, 482 S.E.2d 314 (1997). See explanation of *Carr* overruling contained in *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155, 159 (1999) (hearsay law interpretation).

with approval in *State v. Wooten*.³¹

Misstatements of the evidence were criticized in *Fincher v. State*.³² The trial judge failed to perform the duty imposed by O.C.G.A. § 17-8-75 in the face of these, but the failure was held to not contribute to the guilty verdict.

The fact that the deductions may be illogical, unreasonable or even absurd is a matter for reply by opposing counsel, not for rebuke by the court.³³ Prosecutor's reference to defendant as living in an "animal kingdom" was not ground for mistrial where there was testimony describing group of people who lived together in one house and whose conduct was grossly immoral.³⁴

In a rape case, prosecutor's argument that characterized the defendant as a brute, a beast, an animal, and a mad dog who did not deserve to live was within limits of proper argument.³⁵

Colorful language sometimes marks a summation.³⁶

Analogies in closing argument, see *Dixon v. State*.³⁷

A prosecutor does not exceed the bounds of an acceptable closing argument in a murder case by asking the jury to recall two unrelated cases involving defendants who, like the defendant in the instant case, were in their early teenage years.³⁸

Is it permissible for a lawyer in closing argument to compare the case at trial to other well-known cases, or parties? Yes, says the Georgia Supreme Court in *Hudson v. State*.³⁹ The prosecutor compared Hudson to well-known murderers Charles Manson, David Berkowitz and Jeffery Dahmer. The court stated: "It is permissible to use well-known cases to illustrate a legal principle." A list of cases where this technique was used appears in *Braithwaite v. State*.⁴⁰

However, a prosecutor's references in closing argument to two well-known but unrelated criminal cases involving a drug-related triple murder and serial rapist exceeded the scope of proper argu-

³¹*State v. Wooten*, 273 Ga. 529, 543 S.E.2d 721, 723 (2001).

³²*Fincher v. State*, 276 Ga. 480, 578 S.E.2d 102 (2003).

³³*Jordan v. State*, 78 Ga. App. 879, 52 S.E.2d 505 (1949).

³⁴*Wheeler v. State*, 220 Ga. 535, 140 S.E.2d 258 (1965).

³⁵*Miller v. State*, 226 Ga. 730, 177 S.E.2d 253 (1970), judgment vacated in part on other grounds, 408 U.S. 938, 92 S. Ct. 2867, 33 L. Ed. 2d 758 (1972).

³⁶See *Peterson v. State*, 282 Ga. 286, 647 S.E.2d 592 (2007) (referring

to defendant as "evil" and "untruthful" permissible during closing argument).

³⁷*Dixon v. State*, 285 Ga. 312, 677 S.E.2d 76 (2009) (overruled on other grounds by, *Whitehead v. State*, 287 Ga. 242, 695 S.E.2d 255 (2010)).

³⁸*Cooper v. State*, 260 Ga. 549, 397 S.E.2d 705 (1990).

³⁹*Hudson v. State*, 273 Ga. 124, 538 S.E.2d 751 (2000).

⁴⁰*Braithwaite v. State*, 275 Ga. 884, 572 S.E.2d 612, 619 (2002) (Sears, J., concurring).

ment and entitled defendant to a mistrial.⁴¹

Analogies in closing argument were approved in *Carr v. State*.⁴² Providing there is an evidentiary basis for the illustrations, a prosecutor's reference to well-known defendants like Charles Manson, Jim Jones or the Menendez brothers have been allowed.

Demonstrations during closing, see *Braley v. State*,⁴³ where the prosecutor had the jury sit for five minutes in silence to illustrate the portion of time the victim was under attack. Such a demonstration was proper, said the court.

In jury argument in *Thornton v. State*,⁴⁴ the prosecutor's arguments that the defendant had acted as "judge, jury and executioner" and had "imposed the death penalty" was not deemed to be improper. The court noted that no contemporaneous objection had been made. Further, asking the jury to "imagine the pain" that the victim endured was not reversible error, nor was it improper to urge the jury to convict in order to deter child abuse in the community. However, other cases have ruled it improper to direct the jury to "imagine the pain."⁴⁵ Lack of objection was identified as a problem in *Hittson v. State*,⁴⁶ where the prosecutor compared the defendant's rights at the time of the trial to the victim's rights at the time of the crime. Name-calling sometimes marks closing arguments. The recipient of the remarks sometimes objects on the ground of inappropriate characterization. The Georgia Supreme Court discussed characterization in *Simmons v. State*.⁴⁷ Apparently the State characterized the defendant as a mean liar who shed false tears at trial. No error was found. The Court further found that metaphorical characterizations of the defendant as an "animal" and "snake" were not sufficient to constitute reversible error. Although the court held these errors to be harmless, it nonetheless stated that "[W]e find it unnecessary and undesirable for prosecutors to resort to such characterizations."⁴⁸

Prosecutor's comment during closing argument pointing out murder defendant's lack of emotion at trial during the display of autopsy photos of her child was not improper, as the comment

⁴¹*Bell v. State*, 263 Ga. 776, 439 S.E.2d 480 (1994).

⁴²*Carr v. State*, 267 Ga. 547, 480 S.E.2d 583 (1997).

⁴³*Braley v. State*, 276 Ga. 47, 572 S.E.2d 583 (2002).

⁴⁴*Thornton v. State*, 264 Ga. 563, 449 S.E.2d 98 (1994).

⁴⁵See § 34:8, *supra*.

⁴⁶*Hittson v. State*, 264 Ga. 682,

449 S.E.2d 586 (1994) (overruled on other grounds by, *Nance v. State*, 272 Ga. 217, 526 S.E.2d 560 (2000)).

⁴⁷*Simmons v. State*, 266 Ga. 223, 466 S.E.2d 205 (1996) (overruled on other grounds by, *Wall v. State*, 269 Ga. 506, 500 S.E.2d 904 (1998)).

⁴⁸*Simmons v. State*, 266 Ga. 223, 466 S.E.2d 205, 211 (1996) (overruled on other grounds by, *Wall v. State*, 269 Ga. 506, 500 S.E.2d 904 (1998)).

was based on a reasonable inference from the evidence. The permissible scope of closing argument is vast and the content of closing argument is not improper when it is based on a reasonable inference from the evidence.⁴⁹ Prosecutors have wide latitude to argue inferences from the evidence.⁵⁰

Although a district attorney may draw conclusions from facts proven, urging his personal belief as to the defendant's guilt is improper.⁵¹ That said, a prosecutor's urging the jury to believe the state's witnesses' identification of the defendant "because they had no reason to lie or identify the wrong person" did not impermissibly inject the prosecutor's personal belief as to the veracity of witnesses into the trial.⁵²

Lawyers are sometimes chastised by appellate courts for going beyond the record in closing. In addition to arguing facts outside the record, an attorney's expression of her personal belief in the ultimate issues at trial can draw trial or appellate rebuke. In *Purvis v. Toole*,⁵³ the trial judge told an attorney to "stay away" from personal opinions regarding veracity and credibility of opposing witnesses.

Noting that it has long been the rule in Georgia that a district attorney may not state to the jury counsel's personal belief in defendant's guilt, Chief Justice Benham found numerous references by the prosecutor to her personal beliefs in *Carr v. State*.⁵⁴ The decision stated: "We conclude that the conduct of the prosecuting attorney in this case demonstrated her disregard of the notions of due process and fairness, and was inexcusable." The court noted that the special responsibility of the prosecutor is to see that justice is done, not merely to convict.

However, not all "I think" or "I don't believe" statements are error.⁵⁵

The topic arose again in *Mason v. State*.⁵⁶ It is improper for counsel to state his personal belief in the veracity of a witness, but it is not improper for counsel to urge the jury to draw this conclusion from the evidence.

Another proclamation against the prosecutor expressing a personal belief or opinion as to the truth or falsity of any testimony, the veracity of a witness or the guilt of the accused

⁴⁹Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012).

⁵⁰Williams v. State, 290 Ga. 533, 722 S.E.2d 847 (2012).

⁵¹Hoerner v. State, 246 Ga. 374, 271 S.E.2d 458 (1980).

⁵²Lee v. State, 317 Ga. 880, 896 S.E.2d 524 (2023).

⁵³Purvis v. Toole, 207 Ga. App. 189, 427 S.E.2d 565 (1993).

⁵⁴Carr v. State, 267 Ga. 701, 482 S.E.2d 314 (1997).

⁵⁵Carr v. State, 267 Ga. 547, 480 S.E.2d 583 (1997).

⁵⁶Mason v. State, 274 Ga. 79, 548 S.E.2d 298 (2001).

appears in *Woods v. State*.⁵⁷

Prosecutor's statement during closing argument that defendant would not hesitate to lie "to you or to anybody to get out of a conviction" was not ground for mistrial, where such statement was made in response to defense counsel's statement that defendant's accomplice had good reason to lie, and where there were conflicts in defendant's accomplice's testimony.⁵⁸

Improper remarks by prosecutor concerning trial judge's expectation of guilty verdict can be sufficiently countered by jury instruction that jury is sole fact finder and should not interpret on judge's actions as an expression of his opinion.⁵⁹

The prosecutor stating, during closing argument, that the defendant hoped the jury would not apply the law was permissible, since a reasonable inference to this effect could be drawn from the facts of the case.⁶⁰

It was not improper for prosecutor in murder case to draw attention of jurors to defendant's demeanor with a comment that the defendant could not look at jury.⁶¹

Where drug transactions took place at an apartment complex and near a school, it was not improper for a prosecutor to argue that defendant's narcotics sales likely contributed to children's exposure to and use of drugs.⁶²

A prosecutor may not comment upon a defendant's election to remain silent. In *Wellons v. State*,⁶³ the defendant complained about a prosecutor's remarks. Specifically, the prosecutor said, "only two people know what went on in that apartment," and "there's only two people who can tell us how long that horror lasted." The Georgia Supreme Court held that these comments were not improper because the defendant had not shown that the prosecutor manifested an intent to comment on the defendant's silence. Further, the court found it highly unlikely that the jury interpreted the prosecutor's remarks as a comment on the defendant's silence. Finally, the Georgia Supreme Court found that the trial court correctly charged the jury in stating that no adverse inferences should be drawn from the defendant's silence. Thus, the Court concluded that even if there was error, it constituted harmless error, and the conviction was affirmed.

The rule that a prosecutor may not make any comment upon a

⁵⁷*Woods v. State*, 275 Ga. 844, 573 S.E.2d 394 (2002). 687 S.E.2d 438 (2009).

⁵⁸*Ladson v. State*, 248 Ga. 470, 285 S.E.2d 508 (1981). ⁶¹*Johnson v. State*, 256 Ga. 588, 351 S.E.2d 202 (1987).

⁵⁹*Ledford v. State*, 254 Ga. 656, 333 S.E.2d 576 (1985). ⁶²*Lee v. State*, 181 Ga. App. 570, 353 S.E.2d 67 (1987).

⁶⁰*Arrington v. State*, 286 Ga. 335, 463 S.E.2d 868 (1995). ⁶³*Wellons v. State*, 266 Ga. 77,

criminal defendant's failure to testify at trial has a constitutional and a statutory basis.⁶⁴ However, in *Raheem v. State*,⁶⁵ the prosecutor's error in commenting on defendant's failure to testify in murder prosecution was harmless; comment in question did not appear designed to or likely to have urged any negative inference, and trial court had given charge to jury regarding prosecutor's comment.

A prosecutor did not improperly comment on a defendant's failure to testify by stating during closing arguments that the defendant had not shown a bit of remorse and that there had never been any expression or anything by the defendant which indicated remorse.⁶⁶

A prosecutor did not comment on the defendant's right to remain silent with a comment that the defendant had not disputed the content of a police officer's testimony.⁶⁷

A prosecutor's reference to "your" sheriff in closing argument was not objectionable and did not amount to misconduct.⁶⁸

Although his line of inquiry approached forbidden comment upon the defendant's right to remain silent, a prosecutor did not impermissibly comment on the defendant's failure to testify by asking a private investigator defense witness on cross-examination whether he had ever had the opportunity to talk to the defendant and whether it would have been helpful in his investigation to have had the benefit of talking to the defendant.⁶⁹

In closing argument, the prosecutor did not improperly comment on the defendant's right to remain silent after his arrest, when he argued that the first time the jury heard a particular version of defendant's story was during the prosecution's cross-examination of the defendant; the defendant was not asked specifically why he did not respond by way of explanation when confronted with an incriminating situation after having been advised of his right to remain silent.⁷⁰

The prosecutor's reference to the DUI defendant's refusal to submit to a blood-alcohol test was a proper subject for comment in closing argument and was not an impermissible comment on the defendant's right to remain silent, since the refusal of a defendant to submit to such a test is admissible under O.C.G.A.

⁶⁴O.C.G.A. § 24-5-506(b).

⁶⁵*Raheem v. State*, 275 Ga. 87, 560 S.E.2d 680 (2002).

⁶⁶*Johnson v. State*, 261 Ga. 236, 404 S.E.2d 108 (1991).

⁶⁷*Thomas v. State*, 257 Ga. 24, 354 S.E.2d 148 (1987).

⁶⁸*Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988).

⁶⁹*Turner v. State*, 258 Ga. 97, 365 S.E.2d 822 (1988).

⁷⁰*Wilson v. State*, 259 Ga. 55, 376 S.E.2d 676 (1989).

§ 40-6-392.⁷¹

Citing former O.C.G.A. § 24-3-36, which provided that acquiescence or silence, when circumstances require an answer, denial, or other conduct, may amount to an admission, the Georgia Supreme Court held that, in criminal cases, a comment upon defendant's silence or failure to come forward is far more prejudicial than probative and will not be allowed even where defendant has not received *Miranda* warnings and where he takes the stand in his own defense. The court overruled *Fraley v. State* (1986) to the extent it conflicts.⁷² Modernly, see O.C.G.A. § 24-8-801(d)(2)(B) and *State v. Orr*.⁷³

Relevant developments concerning the law of admissions created by the silence of the accused, see § 26:9, *supra*.

Although the use of the word “prejudice” in a discussion of the objective of a closing argument is not encouraged, the prosecutor's use of it in the instant case did not constitute reversible error, since it was made in response to defendant's objecting in the presence of the jury that the prosecutor was attempting to inflame the jury and the prosecutor was merely responding with appropriate counterargument.⁷⁴

In *Payne v. Tennessee*,⁷⁵ the U.S. Supreme Court held that the Eighth Amendment does not prohibit a jury, at the sentencing phase of a capital trial, from considering victim impact evidence relating to a murder victim's personal characteristics and the emotional impact of the murder on the victim's family. The court also held, overruling earlier cases to the contrary, that the Eighth Amendment does not prohibit a prosecutor from arguing such evidence at the sentencing hearing.

Future dangerousness may be a proper subject for argument in the sentencing phase of a capital case, but not in noncapital cases.⁷⁶

*Carter v. State*⁷⁷ involved a murder conviction. An issue was raised as to whether a prosecutor could argue that the accused posed a danger to community safety during the first phase of a capital trial. The point has been the object of legal development

⁷¹*Givens v. State*, 199 Ga. App. 709, 405 S.E.2d 898 (1991).

⁷²*Mallory v. State*, 261 Ga. 625, 409 S.E.2d 839 (1991) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)).

⁷³*State v. Orr*, 305 Ga. 729, 827 S.E.2d 892 (2019) (authorizing the introduction of a defendant's silence or failure to come forward in Georgia criminal cases and commenting that

Georgia's former ban on this evidence as headed to “oblivion”).

⁷⁴*Jones v. State*, 198 Ga. App. 264, 401 S.E.2d 299 (1990).

⁷⁵*Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

⁷⁶*Sterling v. State*, 267 Ga. 209, 477 S.E.2d 807 (1996).

⁷⁷*Carter v. State*, 269 Ga. 891, 506 S.E.2d 124 (1998).

over time, with a change in the law occurring after Carter's conviction. In current trials during the guilt-innocence phase of the case, a prosecutor's remarks about defendant's future dangerousness are not allowed. However, for a number of reasons, including the time of the defendant's trial as well as "overwhelming evidence" of guilt, the court did not overturn the conviction.

Many jurisdictions permit the jury in a capital case to consider the future dangerousness of the accused. This is during the sentencing trial. If he poses a likely danger to society, he may be an apt candidate for the death penalty. Aggravating factors also play a role.⁷⁸ As the Supreme Court observed in that case, prosecutors in South Carolina "like those in other states that impose the death penalty, frequently emphasize a defendant's future dangerousness in their evidence and argument at the sentencing phase; they urge the jury to sentence the defendant to death so that he will not be a danger to the public if released from prison." Capital cases are tried in two-stage trials. The first trial, or phase, decides if the defendant committed the crime. If the answer is "yes" a second phase proceeds, in front of the same jury. This sentencing phase considers the circumstances of the crime, the defendant's character, prior criminal record, age, background and future dangerousness as the jury fixes appropriate punishment.

Unlike capital punishment cases, in most criminal prosecutions the judge fixes the punishment after the jury decides that a defendant is guilty. This will be the approach in the general run of felony cases. In these cases potential length of punishment is not usually a legitimate object of argument by the attorneys. Were the rule otherwise, prosecutors would argue how little time the defendant might serve, in order to convince the jury to convict the accused of the highest crime charged. Conversely, defense attorneys would raise the specter of long incarceration, even though the judge may ultimately give probation to a convicted offender. Because sentencing is a judicial function, possible length thereof is normally "off limits" during jury argument.

Capital cases are different. Here, the jury decides the sentence. After conviction, the jury can decide between death and one or another of the forms of life imprisonment. For this reason, the jury can be told that a life sentence means life without parole, where this statement is accurate. In first degree murder cases about half the states provide for imprisonment without parole as an alternative to capital punishment. A variation on this pattern allows juries, when they decide to sentence the accused to life, to

⁷⁸*Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) illustrates.

specify whether the defendant should or should not be eligible for parole.⁷⁹

As noted, in most states the judge does the sentencing in noncapital offenses, and in those cases the jury is not informed of the range of available sentences. Jury argument and the court's instructions should be purged of such references in these courts. This rule includes the principle that juries are not usually instructed concerning the consequences of an insanity acquittal.⁸⁰ The Supreme Court applied the foregoing rule to bar a jury instruction informing jurors that extended civil commitment might flow from a finding of not guilty by reason of insanity. However, a number of states that have considered the question endorse use of such a jury instruction in cases involving insanity claims by the defendant.

In criminal cases, length of sentence and the prospect of probation or parole are usually off limits during argument. However, in *Saunders v. State*,⁸¹ the reviewing court found that prosecutor's argument did not improperly invoke the prospect of parole or clemency.

O.C.G.A. § 17-8-76 states that no attorney in a criminal case may advert to pardon, parole, or clemency as prospects for alleviating the sentence. Mention of such matters gives rise to sanctions.

A prosecutor's closing argument reference to the possibility that the record would be reviewed did not amount to an impermissible comment on the possibility of appellate review.⁸²

Counsel is permitted to make reference to matters within the common knowledge of reasonable people.⁸³

The State was entitled to refer in closing argument to the defendant's purchases of a number of items with proceeds of the crime, although the items themselves were not admitted into evidence, but where there was testimony to the purchases.⁸⁴

In *Hammond v. State*⁸⁵ the Georgia Supreme Court reviewed an argument that the accused had violated the law of God. Trial counsel made no objection to this argument. Such an argument has been condemned as an "inflammatory appeal to the jurors'

⁷⁹Ga. Code Ann § 17-10-31.1(a).

⁸⁰*Shannon v. U.S.*, 512 U.S. 573, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994), explains: "The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury."

⁸¹*Saunders v. State*, 198 Ga. App.

666, 402 S.E.2d 542 (1991).

⁸²*Taylor v. State*, 261 Ga. 287, 404 S.E.2d 255 (1991).

⁸³*R. Carlson, Argument to the Jury*, 33 St L U L 787, 805 (1989).

⁸⁴*Lee v. State*, 258 Ga. 82, 365 S.E.2d 99 (1988).

⁸⁵*Hammond v. State*, 264 Ga. 879, 452 S.E.2d 745 (1995).

private religious beliefs.”

However, the court ruled that the sentencing trial was not unfair. Another argument in the foregoing case drew sharp comments from Justice Benham:

“[T]here is no life without parole in Georgia. So one day [the defendant] will be a free man.” When the assistant district attorney uttered those words during his argument to the jury in the sentencing phase of appellant’s trial, a mistrial was appellant’s for the asking. All he had to do was ask. Yet appellant’s trial counsel did not think to ask because he did not know to ask. If trial counsel had but asked, appellant automatically would have received a new sentencing trial instead of being given a death sentence.

O.C.G.A. 17-8-76 states:

(a) No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury because pardon, parole, or clemency may be granted . . .

(b) If counsel for either side in a criminal case argues to or in the presence of the jury as provided in subsection (a) of this Code section, opposing counsel shall have the right immediately to request the court to declare a mistrial, in which case it shall be mandatory upon the court to declare a mistrial. Failure to declare a mistrial shall constitute reversible error.

The majority mentioned another pertinent point contained in the prosecutor’s summation:

It was not improper to ask the jury to consider the issue of Hammond’s future dangerousness based on the evidence presented at trial.⁸⁶

Reference to religion took center stage in another case. In *Carruthers v. State*,⁸⁷ the Georgia Supreme Court reversed a jury’s death sentence for a murder. The court held that the assistant district attorney overstepped the line in directly quoting religious authority as mandating a death sentence. Specifically, the State urged the jury to impose a death sentence because the Bible stated that society must deter criminals by taking the life of persons who kill other people. The court said that by citing specific passages, counsel invoked a higher moral authority and diverted the jury from the discretion provided to them under state law. Therefore, the court found that defendant’s right to due process was abridged when the trial court allowed inappropriate arguments from the Bible, over objection.

Biblical arguments are sometimes complained about on

⁸⁶*Vance v. State*, 262 Ga. 236, 416 S.E.2d 516 (1992). 306, 528 S.E.2d 217 (2000) (overruled on other grounds by, *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008)).

⁸⁷*Carruthers v. State*, 272 Ga.

appeal.⁸⁸

The prosecutor argued as follows in *Lewis v. State*:⁸⁹

Now, ladies and gentlemen, let me talk to you. There are many of you who are Christians and what I say to you does not in any way suggest to you that any religious materials demand the death penalty at all, instead I think that it helps us understand the concept of deterrence and retribution and for this I speak to you. Romans tells us that every person is subject to the governing authorities. And in fact in [Matthew] it says, who so sheddeth man's blood by man shall his blood be shed.

The Court of Appeals described what happened next:

Lewis's counsel objected that the prosecutor was trying to inject biblical law into the case and moved for a mistrial. In a bench discussion outside the hearing of the jury, the prosecutor cited cases which held that while a prosecutor cannot urge the imposition of the death penalty based upon religious beliefs or teachings, he can "allude to such principles of divine law relating to the transactions of men as may be appropriate to the case." [cites omitted] However, the trial court sustained Lewis's objection in part, told the prosecutor not to "read passages" from the Bible, and instructed the jury [to disregard the biblical references].

On appeal, the Supreme Court distinguished *Carruthers v. State*.⁹⁰ Here, the court affirmed the conviction of Lewis and his death sentence.

The topic of religion in final argument is comprehensively treated in Brooks, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments*, 33 Ga. L. Rev. 1113 (1999).

"Ask yourself what Jesus would do," implored defense counsel in *King v. State*.⁹¹ The trial court stopped the argument and instructed the jury to disregard the comment. Since it is improper for a prosecutor to argue that religion commands the imposition of the death penalty, the same general standard commands the defense not to argue that religion requires the imposition of a sentence other than death.

⁸⁸See *King v. State*, 282 Ga. 505, 651 S.E.2d 711 (2007) (counsel may allude to such principles of divine law relating to transactions of men as may be appropriate to the case); *Walker v. State*, 282 Ga. 774, 653 S.E.2d 439 (2007) (argument urging that the "wicked flee when no man pursueth" in connection with the defendant's flight and stating that the jury might be "the Lord's fisherman to handle" the defendant's accountability for his

crimes was properly allowed).

⁸⁹*Lewis v. State*, 277 Ga. 534, 592 S.E.2d 405 (2004).

⁹⁰*Carruthers v. State*, 272 Ga. 306, 528 S.E.2d 217 (2000) (overruled on other grounds by, *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008)) (error found).

⁹¹*King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000).

When the Bible may and may not be used in closing in Georgia is traced in R. Carlson and M. Carlson, *Outrageous Opponents: How to Stop Them in Closing Argument*, *Geo B J* 12 (Feb 2001).

Bible reference did not create reversible error.⁹²

A prosecutor's argument that defendant would have denied being at the crime scene was improper, where it was not a reasonable inference from the evidence.⁹³

In *Navarro v. State*⁹⁴ the prosecutor's reference to defendant's failure to deliver an opening was not "burden-shifting."

Prior authorities in this section addressed expressions of personal opinions by trial counsel, golden rule arguments, counsel pointing to an opponent's unproduced evidence, comment upon a defendant's refusal to testify, facts outside the record, and future dangerousness of the accused. Those topics plus the subject of improper vouching for a party's witnesses occupy the remainder of this section, including decisions related to those forms of argument.

In *Allen v. State*,⁹⁵ the prosecutor did not improperly express a personal opinion regarding the veracity of a witness when the prosecutor argued that the witness had no reason to lie. During the prosecutor's closing argument in a prosecution for murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony, the foregoing argument was in response to defendant's testimony on cross-examination that the witness had lied. Counsel may address during closing argument possible motives for a witness's testimony.

In *Jackson v. State*,⁹⁶ trial counsel's failure to object to the prosecutor's closing argument did not constitute ineffective assistance of counsel, in a prosecution for malice murder. The prosecutor's use of phrases such as "I think" was held to not render the prosecutor's argument an impermissible statement of personal opinion.

On golden rule arguments, see *Braley v. State*.⁹⁷ Some Georgia cases suggest that there may be a difference in asking jurors to put themselves in the place of a witness, as opposed to a party or the crime victim.⁹⁸

⁹²Powell v. State, 308 Ga. App. 489, 707 S.E.2d 877 (2011).

⁹³Walker v. State, 281 Ga. 521, 640 S.E.2d 274 (2007).

⁹⁴Navarro v. State, 279 Ga. App. 311, 630 S.E.2d 893 (2006).

⁹⁵Allen v. State, 277 Ga. 502, 591 S.E.2d 784 (2004).

⁹⁶Jackson v. State, 281 Ga. 705, 642 S.E.2d 656 (2007).

⁹⁷Braley v. State, 276 Ga. 47, 572 S.E.2d 583 (2002) (holding that it is improper to suggest that the jury imagine how the assault felt to the victim).

⁹⁸See the *Hayes* decision, main

Golden rule arguments, see *Jackson v. State*.⁹⁹

What if a defendant points to the state's failure to call a witness? Is there a right to a jury instruction in this situation, to go along with the defendant's argument? The issue was explored in *Petty v. State*.¹⁰⁰ Petty contended that the trial court erred by refusing to give a requested jury charge that was intended to address the State's failure to call a witness. Acknowledging that former O.C.G.A. § 24-4-22, which created a rebuttable presumption arising from the failure to introduce certain evidence, does not apply to criminal cases, *Petty* relied on *Morgan v. State*¹⁰¹ as the basis for the request. The Georgia Supreme Court responded:

Morgan . . . merely holds that defense counsel may draw inferences from the failure to introduce evidence and comment accordingly during closing argument if there is supporting evidence properly before the factfinder. Id. After preliminary remarks to the jury, Petty's counsel did begin his closing by saying, "The first question that comes to mind to me is, where is Ervin Fox? Are you satisfied about this?," and he referred back to this point later in the argument. Because defense counsel was not prohibited from arguing that the jury should draw an inference favorable to Petty from the State's failure to call Fox, and because the trial court's instructions to the jury regarding the State's burden of proof and reasonable doubt substantially covered the principle set forth in Petty's requested charge, see generally *Walker v. State*, 282 Ga. 406, 651 S.E.2d 12 (2007), we find no error.

Judgment affirmed.

All the Justices concur.

In the 2013 Code, the rebuttable presumption referred to in *Petty* is contained in O.C.G.A. § 24-14-22.

If a prosecutor says defendant gave a different reason for shooting the victim right after arrest than that offered at trial, changing her story, this comment does not violate constitutional rights.¹⁰²

Often prosecutors will point to specific evidence that the defense failed to present. Georgia courts hold this to be an appropriate technique. It is an especially allowable one where the defense has produced evidence to demonstrate innocence. The prosecutor's remarks may include, among other things, witnesses

text. § 34:8, *supra*.

⁹⁹*Jackson v. State*, 282 Ga. 494, 651 S.E.2d 702 (2007) (defining "golden rule" argument as one which, either directly or by implication, tells the jurors that they should put themselves in the injured person's place and render such a verdict as they

would wish to receive were they in the injured person's position).

¹⁰⁰*Petty v. State*, 283 Ga. 268, 658 S.E.2d 599 (2008).

¹⁰¹*Morgan v. State*, 267 Ga. 203, 476 S.E.2d 747 (1996).

¹⁰²*Sheppard v. State*, 285 Ga. 36, 673 S.E.2d 852 (2009).

the defense did not call or documents the defense did not produce.¹⁰³ Comment on unproduced documents, see *Biswas v. State*.¹⁰⁴ Failure of the defense to rebut or explain the State's evidence may be the subject of comment.¹⁰⁵ Similarly, in federal courts, highlighting a defendant's failure to call certain witnesses has also been approved.¹⁰⁶

Prosecutor's comment during closing argument in felony murder prosecution, asserting that "not one witness came in here to dispute anything that the State's witnesses said," was not an improper comment on defendant's right to remain silent, but instead merely referred to defendant's failure to present evidence.¹⁰⁷

Reference to defense's failure to call a potential witness and subject him to cross-examination did not reflect a manifest intention to comment on the defendant's failure to testify.¹⁰⁸

There was no manifest intention to comment on the defendant's opportunity to testify when a reference to defendant's right to testify was contained in the prosecutor's objection to admission of defendant's self-serving prior statement. Evidence of defendant's prior out-of-court statement was embraced in the testimony of a trial witness; the exchange with the prosecutor came during defense cross-examination of a witness (an officer), and occurred when the prosecutor objected to a defense request for evidence sought from the officer.¹⁰⁹

Nor was improper comment made in *Jennings v. State*.¹¹⁰

In *Joines v. State*,¹¹¹ the Court of Appeals observed that the permissible scope of closing argument is vast. Counsel may draw from the evidence properly before the factfinder any inference apparently reasonable and legitimate. Counsel should be allowed considerable latitude of speech; and so long as extraneous facts are not injected or improper language used, the trial judge should

¹⁰³*Isaac v. State*, 263 Ga. 872, 874, 440 S.E.2d 175, 178 (1994).

¹⁰⁴*Biswas v. State*, 255 Ga. App. 339, 565 S.E.2d 531 (2002).

¹⁰⁵*Ellison v. State*, 265 Ga. App. 446, 594 S.E.2d 675 (2004). See *Pearson v. State*, 277 Ga. 813, 596 S.E.2d 582 (2004) (prosecutor allowed to argue defendant had not rebutted State's evidence; also proper for prosecutor to comment on absence of evidence corroborating defendant's testimony).

¹⁰⁶*U.S. v. Thing*, 88 Fed. Appx. 182, 185 (9th Cir. 2004).

¹⁰⁷*Brown v. State*, 278 Ga. 544, 604

S.E.2d 503 (2004).

¹⁰⁸*Cockrell v. State*, 281 Ga. 536, 640 S.E.2d 262 (2007).

¹⁰⁹*Eason v. State*, 283 Ga. App. 574, 642 S.E.2d 207 (2007).

¹¹⁰*Jennings v. State*, 282 Ga. 679, 653 S.E.2d 17 (2007) (portion of prosecutor's summation which was complained about was actually a comment on Jennings' failure to produce evidence, not a prohibited comment on refusal to testify).

¹¹¹*Joines v. State*, 264 Ga. App. 558, 591 S.E.2d 454 (2003).

not interfere. Upon the facts in the record, and upon the deductions the attorney may choose to draw therefrom, an attorney may make almost any form of closing argument the attorney desires. Notwithstanding these liberal rules, however, it was not error to preclude defense counsel from arguing, during closing argument, the consequences of the jury's verdict. Jones claimed the trial court erred in sustaining the state's objection to defense counsel's argument that "no one should have to suffer the consequences that may arise from a conviction of these charges." The Court of Appeals disagreed. "It is not error to preclude counsel from arguing, during closing argument, the consequences of the jury's verdict."

Facts outside the record are also "off limits." In *Kyler v. State*¹¹² the district attorney displayed a ream of computer paper to the jury during closing argument and stated that it was Kyler's arrest record. Kyler moved for a mistrial, which the trial court denied. The trial court, however, gave a curative instruction to the jury, informing jurors that "since the . . . particular document being referenced by counsel is not in evidence, you are not to suspect, speculate or infer as to . . . what is contained in any document not in evidence, and therefore those items should not be used by you or considered by you in reaching your decision in this case." The Supreme Court held the district attorney had improperly injected into closing argument prejudicial material that had not been introduced into evidence at trial; but that the error was harmless considering the trial court's curative instruction and the overwhelming evidence of Kyler's guilt.

Jones v. State,¹¹³ a 2013 case, is an example of what can happen when a trial court fails to take appropriate action after an objection to improper remarks made during closing arguments. In *Jones*, the prosecuting attorney commented on the defendant's alleged gang association where no such evidence was presented at trial. Defense counsel timely objected and asked for a mistrial, which was denied. The prosecuting attorney then reiterated the previous comments after he had said he would retract his statement. At that point defense counsel again objected, but asked for an admonishment and a curative instruction. Both of these requests were denied and the trial court gave the jury the standard jury charges that opening and closing arguments were not evidence. The Georgia Supreme Court stated that when a prejudicial matter not in evidence is improperly injected during closing argument, it is the duty of the court, after an objection, to interpose and prevent those statements from occurring while taking steps to remove the improper impression from the jury or, in

¹¹²*Kyler v. State*, 270 Ga. 81, 84–85, 508 S.E.2d 152 (1998).

¹¹³*Jones v. State*, 292 Ga. 656, 740 S.E.2d 590 (2013).

extreme cases, order a mistrial. The conviction was reversed in *Jones*.

In *Fincher v. State*,¹¹⁴ the prosecuting attorney apparently misstated the evidence in the case on at least two occasions. The first occurred during a portion of the argument seeking to refute the defendant's testimony, when the prosecutor stated that no blood was found on the porch. The undisputed evidence was that blood was found on the porch. The prosecutor also attributed to one witness testimony given by other witnesses. Defense counsel objected to each misstatement and moved for a mistrial upon conclusion of the argument, but the court overruled the objections and offered no comment or curative instruction to the jury. The Georgia Supreme Court held the trial judge failed to perform the duty imposed by O.C.G.A. § 17-8-75 in the fact of the remarks. However, the judge's failure was not sufficient to overturn the guilty verdict.

A prosecutor's remarks on matters not in evidence can infringe upon a defendant's right to confront the witnesses against her, but to assert this right the defense must object on this ground.¹¹⁵

Even if a prosecutor, during closing argument, impermissibly raised the specter of defendant's "future dangerousness," made a "golden rule" argument, and stated his personal belief about a witness's veracity, and defense counsel was deficient for failing to object and move for mistrial in response to prosecutor's remarks, defendant was not prejudiced thereby. The defense counsel did not render ineffective assistance, in a prosecution for aggravated assault and other offenses. Evidence of defendant's guilt was overwhelming, and it was highly probable that any improper argument did not contribute to defendant's convictions.¹¹⁶

While future dangerousness is often an improper subject during trial on the merits, the sentencing phase may be different. Sentencing arguments addressing future dangerousness are not improper if based on evidence adduced at trial.¹¹⁷

When a prosecutor urged that legal repercussions served to ensure the credibility of police officers, a federal criminal case was reversed. The prosecutor also urged the jury to convict in or-

¹¹⁴*Fincher v. State*, 276 Ga. 480, 578 S.E.2d 102 (2003).

¹¹⁵*Clemons v. State*, 265 Ga. App. 825, 595 S.E.2d 530 (2004).

¹¹⁶*Lloyd v. State*, 280 Ga. 187, 625 S.E.2d 771 (2006).

¹¹⁷*Henry v. State*, 278 Ga. 617, 604 S.E.2d 826 (2004).

See *Rivera v. State*, 282 Ga. 355, 647 S.E.2d 70 (2007) ("The trial court did not abuse its discretion in denying a mistrial or failing to give curative instructions, based on the state's narrowly tailored and logical argument that the defendant presented a future danger to female employees in the prison system") (death penalty case).

der to alleviate societal problems.¹¹⁸

Prosecutor's comments during closing argument that State witness's testimony "sounds just like the truth to me" and that "[i]t's got the ring of truth to it," constituted improper vouching for witness's credibility, in trial for aggravated assault.¹¹⁹

The state's closing argument comment that investigators and others would not sacrifice their careers to frame defendant did not constitute an opinion about the veracity of the witnesses.¹²⁰

§ 34:10 Improper remarks in civil cases

It is improper for counsel to make statements to the jury of prejudicial matters that are not in evidence. When a litigant's closing argument is not based on the evidence and is improper under the law, and the trial court overrules his opponent's objection and request for a mistrial on that basis and fails to take corrective action, and appellate court will reverse a judgment if it finds that the uncorrected improper argument could have affected the jury's verdict.¹

It is improper for counsel to state his personal belief as to the evidence.² References to the wealth or property of a party are normally improper.³ Of course, the presence of a punitive damages claim may affect this rule. The need to set a figure for exemplary damages often makes reference to the wealth of a tortfeasor relevant. Bifurcated trials and punitive damages generally, see the McClure Case in § 34:6, *supra*. The rule identified in this section of the text references conduct when wealth of a party is not relevant, however, but rather when that issue is injected simply to prejudice. An appeal to prejudice against a corporation is improper.⁴ Comment on wealth of opposing party was stricken in the case of *Muskett v. Sketchley Cleaners*.⁵

It is highly improper in an argument to the jury to ask that the jurors place themselves in the position of a party, or to compare

¹¹⁸U.S. v. Weatherspoon, 406 F.3d 636 (9th Cir. 2005).

¹¹⁹Collier v. State, 266 Ga. App. 345, 596 S.E.2d 795 (2004). See also Woods v. State, 275 Ga. 844, 573 S.E.2d 394 (2002) (assistant district attorney stated personal belief as to veracity of witnesses, but there must be objection to remarks).

¹²⁰Manley v. State, 284 Ga. 840, 672 S.E.2d 654 (2009).

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¹Steele v. Atlanta Maternal Fetal Medicine, P.C., 271 Ga. App. 622, 610

S.E.2d 546 (2005) (overruled on other grounds by, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009)).

²Georgia Power Co. v. Puckett, 181 Ga. 386, 182 S.E. 384 (1935).

³Veazey v. Glover, 47 Ga. App. 826, 171 S.E. 732 (1933).

⁴Brunswick & W.R. Co. v. Wiggins, 113 Ga. 842, 39 S.E. 551 (1901).

⁵Muskett v. Sketchley Cleaners, Inc., 297 Ga. App. 561, 677 S.E.2d 731 (2009).

the situation of a party with their own.⁶ “Golden rule” arguments are analyzed in § 34:8, *supra*.

Other civil cases involving improper argument, see *Counts v. Moorehead*.⁷

Counsel is permitted wide latitude in closing argument, and any limitation of argument is a matter for the trial court’s discretion; indeed, during closing argument, counsel may draw from the evidence properly before the factfinder and may draw any inference which is apparently reasonable and legitimate.⁸

During closing argument in a will contest trial which lasted six days, the losing party urged that opposing counsel “provided an incorrect legal opinion as to the standard of care a lawyer must provide when preparing a will in Georgia.” Although an objection had been made to the allegedly improper misstatement of law, the Georgia Supreme Court responded that “Counsel is permitted wide latitude in closing argument”⁹

Send-a-message arguments in civil cases, see *Shaw v. Brannon*.¹⁰ Compare the criminal practice allowing such arguments as detailed in § 34:9, *supra*. More on civil case applications of the prohibition of such remarks, see § 34:13, *infra*.

In *Steele v. Atlanta Maternal Fetal Medicine, P.C.*,¹¹ the trial court erred by failing to issue curative instructions to the jury upon the objection of improper argument by plaintiff’s counsel in a medical malpractice action. Plaintiffs’ action arose from the stillbirth of their baby. During closing argument, defendants’ counsel stated that plaintiff’s expert had indicated that the fetus died within a few hours of the delivery, when in fact the expert had refused to specify a time of death. Upon appeal, the judgment of the trial court was reversed.

⁶*Doe v. Moss*, 120 Ga. App. 762, 172 S.E.2d 321 (1969).

⁷*Counts v. Moorehead*, 232 Ga. 220, 206 S.E.2d 40 (1974) (references to prior claim not at issue in case held sufficiently prejudicial regardless of corrective actions taken by trial court); *Locklear v. Morgan*, 129 Ga. App. 763, 201 S.E.2d 163, 167 (1973) (plaintiff counsel’s remark that client “would be delighted to get off in this case for fifty or sixty thousand dollars” introduced facts sufficient to prejudice jury).

⁸*Kennebeck v. Glover*, 294 Ga. App. 822, 670 S.E.2d 459 (2008). *Accord*, *Davenport v. Yawn*, 297 Ga. App.

685, 678 S.E.2d 148 (2009) (counsel may make “almost any form of argument he desires”).

⁹*Lillard v. Owens*, 281 Ga. 619, 641 S.E.2d 511 (2007).

¹⁰*Shaw v. Brannon*, 253 Ga. App. 673, 560 S.E.2d 289 (2002) (trial court rebuked attorney by instructing jury that sending a message was not an issue in the case).

¹¹*Steele v. Atlanta Maternal Fetal Medicine, P.C.*, 271 Ga. App. 622, 610 S.E.2d 546 (2005) (overruled on other grounds by, *Smith v. Finch*, 285 Ga. 709, 681 S.E.2d 147 (2009)).

In *Sangster v. Dujinski*,¹² counsel was held to have argued matters which were forbidden by a court's order, and plaintiff's verdict was reversed. The trial court granted a motion in limine to keep out evidence of defendant's prior traffic citations, criminal charges, and use of alcohol and marijuana. Despite the order, the reviewing court found that plaintiff's counsel from opening statement onward, made references to matters the trial court excluded. The trial court did not grant a mistrial nor did it issue a verbal rebuke before the jury. The Court of Appeals reversed the trial court, determining that no amount of instruction could have cured counsel's problematic argument.

Trial court was correct to curtail an argument on an issue the court had removed from consideration in *Lee v. Georgia Power Co.*¹³

Timely, proper objections are required to preserve errors made during opposing counsel's closing argument.¹⁴

§ 34:11 Remarks in argument about liability insurance

In the ordinary negligence case, the disclosure of the existence of liability insurance is grounds for a mistrial.¹ Such conduct is reversible error if done deliberately and cannot be cured by striking the comment or instructing the jury to disregard it.²

Evidence of a litigant's insurance could lead a jury to increase damages, and is error.³

For plaintiff's counsel to say that the defendant does not care about the amount of the verdict is to deliberately imply the existence of insurance, and failure to sustain an objection thereto is prejudicial error.⁴

For mistrial as a result of improper injection of insurance, see § 31:5, *supra*.

Suggestion by insured party during closing argument indicated he alone would have to personally pay judgment, see *McClellan v. Evans*.⁵ Indications by a plaintiff's counsel that the opposing party is insured are improper. On the other hand, assertions

¹²*Sangster v. Dujinski*, 264 Ga. App. 213, 590 S.E.2d 202 (2003).

¹³*Lee v. Georgia Power Co.*, 296 Ga. App. 719, 675 S.E.2d 465 (2009).

¹⁴*Haskins v. Georgia Neurosurgical Institute, P.C.*, 355 Ga.App. 781, 845 S.E.2d 770 (2020).

[Section 34:11]

¹*Patillo v. Thompson*, 106 Ga. App. 808, 128 S.E.2d 656 (1962).

²See *Rodgers v. Styles*, 100 Ga. App. 124, 110 S.E.2d 582 (1959).

³*Chambers v. Gwinnett Community Hosp., Inc.*, 253 Ga. App. 25, 557 S.E.2d 412 (2001).

⁴See *Thomas Milling Co. v. Branch*, 118 Ga. App. 857, 165 S.E.2d 907 (1968).

⁵*McClellan v. Evans*, 294 Ga. App. 595, 669 S.E.2d 554 (2008).

by a litigant that he has no insurance are equally improper.

§ 34:12 Use of charts and diagrams in arguments

It is permissible to use blackboards, models, and similar devices to illustrate counsel's contentions during the argument.¹

Counsel can write on a blackboard the dollar-figure of services rendered by a deceased wife, even though there has been no specific evidence as to the value of such services, since their value is incapable of exact proof.²

A camera may be used, easily and conveniently, to photograph and preserve for review any chart or blackboard used in argument.

O.C.G.A. § 9-10-183 contains a specific provision relating to visual aids. It provides in the trial of any civil action, counsel for either party shall be permitted to use a blackboard and models or similar devices in connection with argument to the jury for the purpose of illustrating counsel's contentions with respect to the issues which are to be decided by the jury, provided that counsel shall not in writing present any argument that could not properly be made orally.

Prosecution's demonstration of victim's position at time of fatal shooting was admissible in state's closing argument at defendant's murder trial, where demonstration illustrated what was already before the jury through forensic and photographic evidence and witness testimony, and was consistent with defendant's own description of the scene.³ A key factor in the Georgia cases is whether the demonstration (here using two prosecutors to demonstrate an execution-style shooting) introduces new evidence; if so, it is error. If not, it is proper advocacy.

Demonstration during closing, see *Braley v. State*.⁴

Trial court did not err in allowing counsel to play tape recording to jury during course of closing argument, where tape and cassette had been introduced into evidence with reservation of possibility of later playing and where there had been no objection then raised.⁵

[Section 34:12]

¹Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961) (overruled in part on other grounds by, Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982)); O.C.G.A. § 9-10-183.

²Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970).

³Perry v. State, 274 Ga. 236, 552

S.E.2d 798 (2001).

⁴Braley v. State, 276 Ga. 47, 572 S.E.2d 583 (2002) (jury asked to sit for five minutes in silence to illustrate length of time that victim was under attack).

⁵White v. Georgia Power Co., 237 Ga. 341, 227 S.E.2d 385 (1976) (overruled on other grounds by, DeKalb County v. Trustees, Decatur Lodge No.

§ 34:13 Correcting improper conduct of counsel

When counsel indulges in improper conduct, opposing counsel should object promptly and obtain a ruling on his objection.¹ Normally, a failure to object will amount to a waiver of the error. Georgia courts regularly hold that in order to preserve possible error for appeal, parties must make timely objections to any comments believed to be inappropriate during closing arguments or else they waive appellate review.²

Objections to flawed openings or closings need to be timely. In *Stolte v. Fagan*,³ 15 minutes after argument was too late:

Stolte did not contemporaneously object to defense counsel's comment that the jury could trust Fagan. Rather, she waited until counsel finished the closing argument and the court had taken a 15 minute break to raise the issue again. "[B]oth the Supreme Court and this court have consistently held that . . . objections based upon improper closing argument are untimely when first made after the closing argument has concluded." *Hamilton v. Shumpert*, 299 Ga. App. 137, 143–144 (3) (682 S.E.2d 159) (2009). See also *Whitley v. Gwinnett County*, 221 Ga. App. 18, 24 (10) (470 S.E.2d 724) (1996) ("Pretermittting the propriety of [references in opening and closing arguments to defendant's unblemished record and fine reputation], because the record shows that [appellant] failed to contemporaneously object to them, her argument is waived on appeal."); *Vega v. La Movida, Inc.*, Ga. App. 311, 316 (3) (670 S.E.2d 116) (2008) (holding that the time to object is when the impropriety occurs at trial). Therefore, Stolte has waived any objection to the comment that the jury could trust Fagan.

On appeal, the need for prompt objections was affirmed by the Supreme Court of Georgia.⁴ Upon proper objection in a civil case, a judge has an independent duty to take remedial action without any additional request from counsel.

The same prompt objection rule operates in Georgia's federal courts. Many arguments are subject to being stricken upon challenge by opposing counsel, but a timely objection is necessary to ensure protection. Will the judge police the proceedings on her own by interrupting or stopping the offending counsel? A 1993 case answers this question. Counsel for the injured plaintiffs in a

1602, B. P. O. Elks, 242 Ga. 707, 251 S.E.2d 243 (1978)), as stated in *Jotin Realty Co., Inc. v. Department of Transp.*, 174 Ga. App. 809, 331 S.E.2d 605 (1985).

[Section 34:13]

¹*Saxon v. Toland*, 114 Ga. App. 805, 152 S.E.2d 702 (1966).

²*Goodman v. State*, 293 Ga. 80,

742 S.E.2d 719 (2013); *Hall v. State*, 292 Ga. 701, 743 S.E.2d 6 (2013).

³*Stolte v. Fagan*, 311 Ga. App. 123, 714 S.E.2d 339 (2011), rev'd on other grounds, 291 Ga. 477, 731 S.E.2d 653 (2012).

⁴*Stolte v. Fagan*, 291 Ga. 477, 731 S.E.2d 653 (2012).

products liability action against an auto manufacturer used his closing argument to render a “send the message” argument. The argument was deemed to be improper by the court in the context of the case. The court cited what it described as counsel’s effort “to incite the jury into a xenophobic rage.”⁵ However, a timely objection to the closing argument is necessary, and this is the rule even when the argument is found to be inflammatory, prejudicial, and improper. The court provides a helpful formula when it suggests that the prudent course of action for a complaining counsel would be “to object at the first mention of improper argument and again raise the objection after [plaintiff’s counsel] finished his closing if he continued utilizing his improper remarks, as he did here.”⁶

The case of *Haygood v. Auto-Owners Ins. Co.*⁷ further underlines the need for an objection.

In Georgia, contemporaneous objections during closing arguments are even required where the opponent violates a previously ruled on motion in limine.⁸

In a criminal case, how far must the defense go in pursuing relief, after making a meritorious objection? If a request for rebuke of the prosecutor or a curative instruction is not followed by court action, is this error? The decision in *O’Neal v. State*⁹ ruled that a defendant who objected to a prosecutor’s improper argument during closing argument preserved for review the issue of whether the trial court erred in failing to give an appropriate curative instruction to the jury. This was so even though the defendant failed to obtain a ruling on his request for a curative instruction.¹⁰ “Nowhere in the statute is there a requirement for defense counsel to specifically request additional remedies after interposing an objection to the improper statements made by a prosecutor.”¹¹

Where objection is made to improper argument, the objection is sustained and counsel corrected and the jury is instructed to disregard it, the improper argument cannot usually be made the basis of reversal, but it may be considered in passing on a motion for new trial in determining whether the complaining party has

⁵Neal v. Toyota Motor Corp., 823 F. Supp. 939 (N.D. Ga. 1993).

⁶823 F Supp at 945.

⁷Haygood v. Auto-Owners Ins. Co., 995 F.2d 1512, 38 Fed. R. Evid. Serv. 1471 (11th Cir. 1993).

⁸Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479 (2021).

⁹O’Neal v. State, 288 Ga. 219, 702 S.E.2d 288 (2010).

¹⁰O’Neal v. State, 288 Ga. 219, 702 S.E.2d 288 (2010), disapproving Brooks v. State, 183 Ga. 466, 188 S.E. 711, 108 A.L.R. 752 (1936).

¹¹O’Neal v. State, 288 Ga. 219, 702 S.E.2d 288 (2010).

received a fair trial.¹²

In criminal cases, failure to object to improper argument by the prosecutor normally waives the right to raise the point on review.¹³ In *Mullins v. State*,¹⁴ the Supreme Court of Georgia addressed a defendant's contention that waiver does not apply and the conviction must be reversed if the prosecutor's argument was improper and it was reasonably probable that it changed the result of the trial. The Supreme Court disagreed. Overruling five Court of Appeals decisions, the Supreme Court held that the "reasonable probability" test applies "only in this Court, and then only in the limited context of our appellate review of a capital case. In the appeal of a noncapital case in either appellate court, the defendant's failure to object to the State's closing argument waives his right to rely on the alleged impropriety of that argument as a basis for reversal."

A lawyer is not allowed to personally vouch for the credibility of a witness. However, an objection is usually required when an opponent does so. Except in capital cases, failure to lodge an objection to such conduct will generally result in waiver of the error. In *Metts v. State*,¹⁵ the Georgia Supreme Court summarized the applicable law. An objection to improper closing argument must be voiced when the alleged impropriety occurs at trial in order that the trial court may take remedial action, if necessary. While most cases hold that such failure to act constitutes a waiver of the right to raise the issue on appeal, a few have allowed review in the absence of an objection when there is a "reasonable probability" that, but for the improper argument, the result of the trial would have been different. The Georgia Supreme Court resolved the seeming discrepancy in the standard of appellate review by holding that the "reasonable probability" test is applicable only to the review of a criminal case in which the death penalty was imposed.¹⁶

Prosecutor's comment in closing argument as to the convictions of a codefendant (not on trial) was allowed where there was no timely objection and because they had been mentioned in the defendant's opening statement.¹⁷

If the argument is highly improper, the court may reprimand counsel, but such reprimand should be administered in a temper-

¹²See *Wallace v. Cates*, 120 Ga. App. 228, 170 S.E.2d 40 (1969).

¹³*Johnson v. State*, 226 Ga. 511, 175 S.E.2d 840 (1970).

¹⁴*Mullins v. State*, 270 Ga. 450, 511 S.E.2d 165 (1999).

¹⁵*Metts v. State*, 270 Ga. 481, 511 S.E.2d 508 (1999).

¹⁶See *Mullins v. State*, 270 Ga. 450, 511 S.E.2d 165 (1999).

¹⁷*Butler v. State*, 273 Ga. 380, 541 S.E.2d 653 (2001) ("Butler's own counsel first mentioned Swain's convictions in opening statement in an obvious attempt to discredit Swain's anticipated testimony").

ate manner.¹⁸ In a proper case or when counsel persists in improper conduct he may be found in contempt of court.¹⁹

By statute in Georgia, argument of facts outside the record requires vigorous attention by the trial judge. Once an objection is made to the misconduct, the court shall rebuke counsel “and by all needful and proper instructions to the jury endeavor to remove the improper impressions from their minds.” Declaration of a mistrial is also a possibility.²⁰

Objections to closing arguments are listed in Carlson, *Argument to the Jury: Passion, Persuasion, and Legal Controls*, 33 St. Louis U.L.J. 787 (1989). Golden rule arguments, arguments outside the record, expression of personal beliefs, inappropriate name-calling, and inflammatory appeals to emotion are analyzed. The foregoing article concludes:

The network of ethical, procedural, and constitutional rules governing modern jury summation provides tools to control the overzealous courtroom orator. However, although prophylactic doctrines are in place and available to restrain uninhibited advocacy, they must be asserted in order to be effective. A checklist of the law of summation must be readily at the hand—and in the head—of the trial attorney. It has been wisely observed that opposing counsel’s conduct in argument cannot be anticipated. Whereas the attorney can map out objections to evidentiary proof in advance, thanks to pretrial discovery, the objecting attorney does not have that luxury in closing. Swift and accurate must be hallmarks of counsel’s challenges to improper argument.²¹

A thumbnail reference to commonly used trial objections appears here. It is similar to the list of objections contained in Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 7:15, but with several additions:

- Addressing jurors by name
- Appeal to passion or prejudice
- Arguing matter outside the record
- Beliefs of counsel substituted for evidence
- Bible invoked to mandate specific verdict
- Comments on failure of a witness to testify, when witness was equally (or more) available to the party who is making the adverse comment
- Damages improperly argued. Generally, reference to the damages claimed is proper, but asking jurors to stand in the shoes of the plaintiff—the “golden rule” argument—is not

¹⁸See § 2:11, *supra*.

cases) and 17-8-75 (criminal cases).

¹⁹See §§ 5:1 to 5:7, *supra*.

²¹*Id.* at 820.

²⁰O.C.G.A. §§ 9-10-185 (civil

- Evidence distorted or misstated
- Excluded matter mentioned
- Golden Rule
- Improper demonstration by counsel
- Inflammatory
- Insurance
- Intensively instructing the jury on the law
- Irrelevant issue suggested
- Misleading court and jury
- Misrepresenting the law
- Personal attack on counsel, party, witness
- Personal opinion on merits
- Racial, religious or sectional prejudice
- Reading law to the jury
- Silence of accused mentioned by prosecutor
- Vouching personally for witness
- Wealth of defendant pilloried. “He can certainly afford to pay, why not make him do so?” (Exception: punitive damage case)

Chapter 35

Instructions

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§ 35:1 Office and purpose

The Supreme Court of Georgia has observed:

Jury instructions are the lamp to guide the jury's feet in journeying through the testimony in search of a legal verdict. The office of a charge by the court is to give to the jury such instruction touching the rules of law pertinent to the issues involved in a pending trial as will enable them intelligently to apply thereto the evidence submitted, and from the two constituents law and fact make a verdict.¹

The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a proper verdict, so far as it is competent for the court to assist them. The chief object contemplated in the charge is to explain the law of the case, to bring out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. One of the

[Section 35:1]

614 S.E.2d 766 (2005).

¹Brodes v. State, 279 Ga. 435,

most important duties of the court is to expound the law to the jury, and the instructions should inform the jury as to the law of the case applicable to the facts in such a manner that they may not be misled.²

The jury should act as a body and should be charged as a body. The individual jurors are not to be addressed in the charge in a way to discourage mental harmony and concert. It is not incumbent upon the court to stimulate their individuality by charging at the prisoner's written request that each juror must be satisfied for himself from the evidence of the guilt of the defendant before he can lawfully agree to a verdict of guilty.³

Guidelines for instructions were given in *Chase v. State*.⁴ A murder conviction was reversed because of an omission in the jury instructions. The Supreme Court explained that the jury must be given an appropriate instruction as to the law on each substantive point or issue involved in the case. When a given instruction fails to provide the jury with the proper guidelines for determining guilt or innocence, it is clearly harmful and erroneous as a matter of law. The failure to inform the jury of an essential element of the crime charged is reversible error, because the jury is left without appropriate guidelines for reaching its verdict. The trial court is responsible for the correct exposition of the law, and the trial court is not excused from ensuring that it accurately and completely states the law for all issues on which it instructs the jury.

The Supreme Court repeated its emphasis on the need for correct instructions in another case, and again advised that failure to inform the jury of an essential element of the crime charged is reversible error, because the jury is left without appropriate guidelines for reaching its verdict.⁵

§ 35:2 General requirements for jury instructions

Jury instructions must comport with current and proper law. Correspondingly, reliance on pattern jury charges is not necessarily a panacea. A scholarly opinion by Presiding Judge Dillard of the Georgia Court of Appeals emphasizes this point. In a negligence action, Georgia's Georgia Suggested Pattern Jury Instructions for civil cases employed a preponderance of the evidence standard which did not reflect Georgia's adoption of its new and federalized rules of evidence in 2013. Instead, the

²*Bird v. U S*, 180 U.S. 356, 21 S. Ct. 403, 45 L. Ed. 570, 1 Alaska Fed. 671 (1901).

³*Maddox v. State*, 233 Ga. 874, 213 S.E.2d 654 (1975).

⁴*Chase v. State*, 277 Ga. 636, 592 S.E.2d 656 (2004).

⁵*King v. Waters*, 278 Ga. 122, 598 S.E.2d 476 (2004).

instruction in question, among other shortfalls, relied on a provision of former Georgia law that was not maintained in 2013—or since. *White v. Stanley*¹ concluded that: “[T]he trial court’s instruction on preponderance-of-the-evidence standard was erroneous.”

In all cases, at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may present to the court written requests that it instruct the jury on the law as set forth therein.² This statute applies to civil cases.

If either party so requests, the judge must write out his instructions, although this is not required if a court reporter is present.³

Every party has the right to have the law applicable to his case stated fairly, clearly, distinctly and conveyed to the jury with substantial accuracy so that it may not be misled to the prejudice of the party. Such party has the right to have the jury instructed upon his theories of recovery or defense. Failure to give a party these rights, which are tantamount to a fair and just trial, will require reversal if the case is close upon its facts or if the evidence is conflicting, and the failure is material.⁴

Some cases appear to recognize the “harmless error” doctrine, which disregards error in some isolated instruction when other in the series may explain it and renders it harmless.⁵

Some cases hold that when an erroneous charge is given and the court subsequently gives the correct charge, the error is not cured unless the jury is expressly informed of the error and instructed to ignore the erroneous charge.⁶

Jury instructions must be read and considered as a whole in determining whether the charges contained error and it is not reversible error to fail to charge in the exact language requested when the charge given adequately covers the correct legal principles.⁷

Georgia law is arrayed against trial judges expressing their opinions on evidence, and instructions must steer clear of this prohibition. In prosecution for offenses including aggravated assault, police officer testified to statement by victim’s five-year-old daughter. Jury instruction that substantially tracked the language of the child hearsay statute, including the requirement

[Section 35:2]

¹*White v. Stanley*, 369 Ga. App. 330, 893 S.E.2d 466 (2023).

²O.C.G.A. § 5-5-24.

³O.C.G.A. § 9-10-5.

⁴*Turner v. Tomberlin-Sheetz Architects, Inc.*, 112 Ga. App. 661, 145 S.E.2d 743 (1965); *Lincoln Life Ins.*

Co. of Ga. v. Anderson, 109 Ga. App. 238, 136 S.E.2d 1 (1964).

⁵*McCowen v. Aldred*, 88 Ga. App. 788, 78 S.E.2d 66 (1953).

⁶*Dixie Ohio Exp., Inc. v. Brackett*, 106 Ga. App. 862, 128 S.E.2d 642 (1962).

⁷*Kinsey v. State*, 326 Ga. App. 616, 757 S.E.2d 217 (2014).

of a finding by the court that circumstances of statement provide “sufficient indicia of reliability,” violated another statute prohibiting expression of opinion by judge as to what has been proven and required reversal of conviction. The jury could have reasonably taken the instruction to be an expression or opinion of judge that minor child’s statements were reliable.⁸

§ 35:3 Power and duty of court

The trial court should instruct the jury on the defendant’s sole defense, even without written request for the instruction if there is some evidence to support the instruction.¹ Where alibi was the sole defense and was sustained by some evidence, it was reversible error not to charge upon it even in the absence of a request.² A court properly gave an instruction on alibi despite the lack of any request therefor.³

A trial court may have an affirmative duty to instruct the jury on an issue at trial even if a party’s request for such instruction contains errors justifying the trial court’s denial of the particular charge requested. In *Hendley v. Evans*,⁴ the plaintiffs asserting the borrowed servant doctrine in a medical malpractice case submitted jury charges to the court that failed to require a finding regarding professional skill or judgment. Accordingly, the trial court did not err in refusing those particular charges. However, the Court of Appeals also found that the borrowed servant doctrine was such a vital and controlling issue in the case that the trial court erred in refusing to instruct the jury at all on the matter.

Although a trial court is required to inform counsel of its proposed actions with regard to submitted requests to charge, the court is not required to give such notice to counsel of the giving of a jury charge that, though unrequested, is clearly warranted by the evidence.⁵

An error in failing to inform counsel before closing argument of its rejection of the defendant’s requests for certain jury instructions was, under the circumstances, not grounds for reversal where the charges requested were not supported by the evidence at trial and the error caused no harm to the defendant.⁶

Responses by the court to questions from the jury foreman dur-

⁸*Rolland v. State*, 296 Ga. App. 889, 676 S.E.2d 296 (2009).

[Section 35:3]

¹*Tarvestad v. State*, 261 Ga. 605, 409 S.E.2d 513 (1991).

²*Pollard v. State*, 236 Ga. 587, 224 S.E.2d 420 (1976).

³*Eberhart v. State*, 257 Ga. 600, 361 S.E.2d 821 (1987).

⁴*Hendley v. Evans*, 319 Ga. App. 310, 734 S.E.2d 548 (2012).

⁵*Henson v. State*, 258 Ga. 600, 372 S.E.2d 806 (1988).

⁶*Bentley v. State*, 261 Ga. 229,

ing recharge did not constitute an improper expression of opinion by the court where there was no indication that the court assumed certain things as facts and intimated to the jury what it believed the evidence to be.⁷

§ 35:4 Writing out requests for instructions

A request to charge must be in writing. It is never error to deny an oral request.¹

Exact language of request to charge need not be given when the same principles are fairly given to jury in general charge of court.² A charge not given in the language requested is nonetheless proper if in substantial compliance with the request.³

Even though written request to charge has been made by state or accused, trial court's failure to so charge is not error if: (1) written request to charge has not been made "at or before close of evidence," or (2) evidence does not warrant such requested charge.⁴ Absent a written request for a charge on a lesser included offense, made at or before the close of the evidence, the failure to so charge is not error.⁵

In the absence of a specific request to charge, it is not error for the trial court to not give a charge. A criminal defendant is ordinarily required to present written requests for any desired jury instructions, and he is relieved of this duty only where the omission is clearly harmful and erroneous as a matter of law in that it fails to provide the jury with the proper guidelines for determining guilt or innocence. Trial courts are not required to instruct juries in felony murder prosecutions that the charges and defenses relating to each codefendant being tried are different, where a defendant failed to show that he never requested such an instruction and failed to provide any recitation of the charge which he claimed should have been given.⁶

Under O.C.G.A. § 5-5-24(b), the duty is on the defendant to request jury instructions, and defendant is relieved of this duty only in those circumstances where the omission is clearly harmful and erroneous as a matter of law in that it fails to provide the

404 S.E.2d 101 (1991).

⁷Turner v. State, 259 Ga. 873, 388 S.E.2d 857 (1990).

[Section 35:4]

¹Slaughter v. Linder, 122 Ga. App. 144, 176 S.E.2d 450 (1970).

²Phelps v. State, 245 Ga. 338, 265 S.E.2d 53 (1980).

³Alexander Underwriters General Agency, Inc. v. Lovett, 182 Ga.

App. 769, 357 S.E.2d 258 (1987). See Jones v. State, 258 Ga. 25, 365 S.E.2d 263 (1988).

⁴Bouttry v. State, 242 Ga. 60, 247 S.E.2d 859 (1978).

⁵Howe v. State, 250 Ga. 811, 301 S.E.2d 280 (1983); Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005).

⁶Stinchcomb v. State, 280 Ga. 170, 626 S.E.2d 88 (2006).

jury with the proper guidelines for determining guilty or innocence.⁷

§ 35:5 Time for tendering instructions

At the close of the evidence or at any earlier time that the court reasonably directs, any party may tender instructions.¹ At the same time, counsel shall deliver copies to counsel for the other parties.

The timing of counsel's requests for particular instructions in federal court may vary from the state pattern. For example, in federal courts in Georgia's southern district requests to charge must cite appropriate supporting legal authorities, and shall be submitted "at the opening of the trial or at such other time as the assigned Judge may direct."² In criminal cases, all requests to charge and proposed voir dire questions must be filed at least seven (7) days before jury selection.³

§ 35:6 Requests covered by instructions given

The pattern jury instructions controlled the result in *Huckabee v. State*.¹ The defendant wanted his own charge given on the subject of witness credibility. The court responded:

A trial court juror's refusal to give a jury charge in the exact language requested by a defendant is not error if the charge given by the trial court substantially covers the applicable principles of law. *Stewart v. State*, 286 Ga. 669(6), 690 S.E.2d 811 (2010). Here, the trial court gave the pattern charge for "immunity or leniency granted a witness" that appears in § 1.31.80 of the Council of Superior Court Judges of Georgia, Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (4th ed.), rather than appellant's requested version. Inasmuch as the pattern charge was a correct statement of the law, there was no error in giving this charge. *Id.*; *Salyers v. State*, 276 Ga. 568(4), 580 S.E.2d 240 (2003).

As a general rule, a court is not bound to charge in the precise language of a request. Failure to give requested jury instructions in the precise language requested does not warrant reversal where the instruction given substantially covers the applicable principles of law.² On the other hand, it has also been held that, even though a judge may by a general proposition of law have

⁷*Prine v. State*, 237 Ga. App. 679, 515 S.E.2d 425 (1999).

[Section 35:5]

¹O.C.G.A. § 5-5-24.

²LR 51.1, Rules for the U.S. District Court for the Southern District of Georgia (rules for civil cases).

³L. Cr. R. 30.1, Rules for the U.S. District Court for the Southern District of Georgia.

[Section 35:6]

¹*Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

²See *Walker v. State*, 282 Ga.

covered a request, it is nevertheless error requiring a new trial to refuse a request that applies the principle to a specific defense or to a distinct matter in issue.³

In *Hilton v. State*,⁴ the Supreme Court observed that jury charges are not to be evaluated in isolation, but rather must be considered as a whole.

§ 35:7 Modification of requests

Unless it is otherwise provided by statute, the court may modify requested instructions and give them to the jury. For example, if a requested instruction asked is erroneous, the court may refuse it or, in its discretion, modify it so as to correct the error therein.¹ A requested instruction must be a proper one; the court is not bound to modify or qualify it so as to remedy the defect.²

§ 35:8 Objections to instructions

Legislative attention was given to the topic of raising objections to the jury charge in 2007, and the 2007 enactment requires specific objection to the charge prior to the jury retiring for deliberations. Failure to raise such objections precludes appellate review, except under limited circumstances. See the 2007 enactment of O.C.G.A. § 17-8-58 in the criminal trial provisions of the Georgia Code. Adding new Code section 17-8-58, the 2007 enactment provides:

- (a) Any party who objects to any portion of the charge to the jury or the failure to charge the jury shall inform the court of the specific objection and the grounds for such objection before the jury retires to deliberate. Such objections shall be done outside of the jury's hearing and presence.
- (b) Failure to object in accordance with subsection (a) of this Code section shall preclude appellate review of such portion of the jury charge, unless such portion of the jury charge constitutes plain error which affects substantial rights of the parties. Such plain error may be considered on appeal even if it was not brought to the court's attention as provided in subsection (a) of this Code section.

Enforcing the objection requirement contained in the foregoing

406, 651 S.E.2d 12 (2007), where defendant was not given the precise language requested regarding DNA evidence and impeachment.

³*Werk v. Big Bunker Hill Mining Corp.*, 193 Ga. 217, 17 S.E.2d 825 (1941). *Werk* was construed in *Smoky, Inc. v. McCray*, 196 Ga. App. 650, 396 S.E.2d 794 (1990).

⁴*Hilton v. State*, 288 Ga. 201, 702 S.E.2d 188 (2010).

[Section 35:7]

¹*Southern Exp. Co. v. Newby*, 36 Ga. 635, 1867 WL 1573 (1867).

²*Seaboard Air Line Ry. v. Blackshear*, 11 Ga. App. 579, 75 S.E. 902 (1912).

statute is the decision in *Colzie v. State*.¹ The court ruled that since the defendant did not specifically object to the jury charge on any grounds set forth in the appeal, he waived his right to urge error in the charge. Waiver of the right to successfully appeal due to lack of objection was also found in *Jones v. State*.²

Where no objection is made to a jury charge at trial, appellate review for plain error is required whenever an appealing party properly asserts an error in jury instructions. The plain error test authorizes reversal of a conviction if: (1) the instruction was erroneous; (2) the error was obvious; (3) the instruction likely affected the outcome of the proceedings; and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings.³

No party may raise on appeal the failure to give an instruction unless he shall have tendered it.⁴ To preserve the record, the proper specific objection must be raised or it is waived.⁵ Absent a timely written request for a charge on a lesser included offense, the failure of the trial court to so charge the jury is not error.⁶

In *State v. Kelly*,⁷ the Georgia Supreme Court addressed the duty of an appellate court to consider alleged jury instruction errors to which no objection was asserted at trial. Failure to promptly object waives any instruction error, but an avenue is retained for plain errors. “Appellate review for plain error is required whenever an appealing party properly asserts an error in jury instructions.” The federal standard for plain error was adopted. Kelly complained about failure of the trial court to instruct the jury that it was required to find that the underlying felony in a felony murder case was one that created a foreseeable risk of death. The Supreme Court disagreed.

Failure of the trial court to deliver a requested instruction to the jury which correctly states the law, is relevant to the case and is not otherwise covered in the general charge can be reversible error. In *Coile v. Gamble*,⁸ a requested charge was rejected, and this gave rise to the following observation by the reviewing court. “In order for a refusal to charge to be error, the request

[Section 35:8]

¹*Colzie v. State*, 289 Ga. 120, 710 S.E.2d 115 (2011).

²*Jones v. State*, 289 Ga. 145, 710 S.E.2d 127 (2011).

³*Van v. State*, 294 Ga. 464, 754 S.E.2d 355 (2014).

⁴*Houseworth v. Abbott*, 219 Ga. 304, 133 S.E.2d 249 (1963); *Willis v. State*, 258 Ga. 477, 371 S.E.2d 376 (1988) (failure to charge on lesser

included offense is not error absent a request to charge).

⁵*Littlejohn v. City Council of Augusta*, 115 Ga. App. 646, 155 S.E.2d 711 (1967).

⁶*Moore v. State*, 283 Ga. 151, 656 S.E.2d 796 (2008).

⁷*State v. Kelly*, 290 Ga. 29, 718 S.E.2d 232 (2011).

⁸*Coile v. Gamble*, 270 Ga. 521, 510 S.E.2d 828 (1999).

must be entirely correct and accurate; adjusted to the pleadings, law, and evidence; and not otherwise covered in the general charge.” The court concluded: “We agree with appellants that the trial court’s failure to give their requested charge on a critical legal defense constituted substantial error and the trial court therefore erred by denying appellants’ motion for new trial.”

The instruction allowing jurors to disregard the testimony of one who testifies falsely must be requested. Absent a request, the trial court does not err by failing to charge the jury on this point.⁹

A trial court’s failure to charge the jury on the issue of reconciling conflicts in testimony was not harmful error where no request to charge was made.¹⁰

It is not necessary to give the exact language of a request to charge when the applicable principles are fairly covered by the charge as given.¹¹

One who objects to giving or failing to give an instruction should state distinctly the objectionable matter and grounds of objection, but no particular formality is imposed on his manner of doing so.¹² It is not a good exception to a charge, which states a correct principle of law applicable to a case, that the charge does not include another applicable principle.¹³ The exception should be to the omission, not to the instruction given.¹⁴ Where the trial court inquires whether there was an objection and defendant’s counsel states that he reserves right to object in his motion for new trial or appeal, there is no waiver.¹⁵

Where defendant withdrew his written request for an instruction, defendant cannot complain on appeal of the trial court’s failure to give that instruction.¹⁶ Where counsel in a civil case was given a suitable opportunity to object to charge given and gave his approval of the charge by stating that he had no objection thereto, he is precluded on appeal from urging that the charge was not as complete as it should have been.¹⁷

Caveators in will contest based on testator’s alleged lack of capacity were required to make a written request to charge a def-

⁹Blackstock v. State, 270 Ga. 117, 213, 160 S.E.2d 406 (1968).
506 S.E.2d 130 (1998).

¹⁰Massengale v. State, 264 Ga. 51, 441 S.E.2d 238 (1994).

¹¹McCoy v. State, 273 Ga. 568, 544 S.E.2d 709 (2001).

¹²A-1 Bonding Service, Inc. v. Hunter, 125 Ga. App. 173, 186 S.E.2d 566 (1971), judgment aff’d, 229 Ga. 104, 189 S.E.2d 392 (1972).

¹³Moore v. Crowe, 117 Ga. App.

¹⁴Atkinson v. Harvey, 109 Ga. App. 541, 136 S.E.2d 543 (1964).

¹⁵White v. State, 243 Ga. 250, 253 S.E.2d 694 (1979).

¹⁶Graham Bros.’ Const. Co., Inc. v. C. W. Matthews Contracting Co., Inc., 159 Ga. App. 546, 284 S.E.2d 282 (1981).

¹⁷Turner v. Wilmouth, 161 Ga. App. 2, 288 S.E.2d 839 (1982).

inition of capacity to contract before probate court concluded its instruction to jury; oral request was not sufficient.¹⁸

§ 35:9 Number of instructions

Trial judge has authority to recharge on a point when the jury requests it.¹

In general, the overall charge should avoid repetition. It has been held, however, that it is not error to repeat a certain principle so long as undue emphasis is not given to that principle.²

Where the judge referred to the plaintiff's previous injury seven times in his charge, three of which were requested by the plaintiff and three by the defendant, it was held that the charge did not give undue emphasis to the matter.³

Repeating twice the three charges on fraud did not result in such undue emphasis on the charges as to result in an unfair statement of law; thus, giving the repetitive charges was not reversible error.⁴

§ 35:10 Cautionary instructions

While the term "cautionary instructions" apparently has not been defined precisely, it includes those instructions of a general nature that guide the jury in their deliberations and includes such matters as their duty to follow the law, their duty to determine the facts from the evidence, and the fact that sympathy and prejudice should not influence them.

The giving or refusing of cautionary instructions has been said to be in the discretion of the court, which will not be controlled unless manifestly abused.¹

It was not reversible error to fail to give unrequested instruction on the credibility of an unsequestered witness when the court allowed the investigating officer to remain in the courtroom to assist the prosecutor.² Trial court did not abuse its discretion in denying defendant's motion to sequester the lead detective of the case during the testimony of other witnesses because (1) the

¹⁸Kersey v. Williamson, 284 Ga. 660, 670 S.E.2d 405 (2008).

[Section 35:9]

¹Johnson v. State, 281 Ga. 770, 642 S.E.2d 827 (2007).

²Grasham v. Southern Ry. Co., 111 Ga. App. 158, 141 S.E.2d 189 (1965).

³Miller v. Dean, 113 Ga. App. 869, 150 S.E.2d 191 (1966).

⁴Southern Cellular Telecom, Inc. v. Banks, 208 Ga. App. 286, 431 S.E.2d 115 (1993).

[Section 35:10]

¹Bass v. African Methodist Episcopal Church, 155 Ga. 57, 116 S.E. 816 (1923).

²Null v. State, 261 Ga. 180, 402 S.E.2d 721 (1991).

case was old due to the fact that defendant had already been convicted but was granted a new trial; (2) it was the prosecutor's first murder trial; and (3) the lead detective played a prominent role in assembling the case against the defendant and was therefore an invaluable resource to the prosecutor as the trial progressed.³

A charge on the violation of a sequestration order was appropriate where a discharged witness discussed his testimony with a witness who had yet to testify.⁴

A cautionary instruction must be given when a defendant's otherwise inadmissible statements to police are used for impeachment purposes; however, failure to so instruct may or may not require reversal, depending on total circumstances.⁵

Patient was not entitled to jury instruction, which stated that testimony of party who offers himself as witness in his own behalf at trial is to be construed most strongly against him when it is self-contradictory, vague, or equivocal, in action against psychiatrist, where psychiatrist was not sole witness testifying in his own behalf, psychiatrist's testimony was not necessarily self-contradictory, and jury was instructed on witness credibility and impeachment.⁶ The instruction is appropriate only where the party is the sole witness on his own behalf.

Cautionary jury instructions in a criminal trial are not favored since in most instances they are productive of confusion and tend to restrict the jury's untrammelled consideration of the case.⁷

§ 35:11 Instructions on issues

A trial court has a duty to charge the jury on the applicable law on an issue supported by the evidence, and a party is entitled to a jury charge on a specific issue when there is slight evidence, direct or circumstantial, to support it.¹

In civil cases, instructions are guided by the pleadings and evidence. No instruction should be given by the court either on its own motion or at the request of counsel which tenders an issue that is not presented by the pleadings or supported by the ev-

³Butler v. State, 285 Ga. 518, 678 S.E.2d 92 (2009). More on sequestration, see § 11.9.

⁴Rogers v. State, 257 Ga. 590, 361 S.E.2d 814 (1987).

⁵Wilson v. State, 254 Ga. 679, 333 S.E.2d 589 (1985).

⁶Cornelius v. Hutto, 252 Ga. App. 879, 558 S.E.2d 36 (2001).

⁷See Fincher v. State, 289 Ga.

App. 64, 656 S.E.2d 216 (2007) where it was not error for the judge refusing to give a cautionary charge to the jury informing them that the law did not permit them to arrive at their verdict based "upon sympathy for any party or prejudice against any party."

[Section 35:11]

¹Teems v. Bates, 300 Ga. App. 70, 684 S.E.2d 662 (2009).

idence² or which deviates therefrom in any material respect.

If the pleadings contain a plain statement of the matter in controversy, the language used therein may be employed in presenting the issues to the jury, but it is better practice, particularly where the pleadings are technical, for a court to give the jury a succinct statement of the issues with proper instructions as to the law.³

The scope of an instruction in a particular case, whether civil or criminal, is to be determined not only by the pleadings therein, but also by the evidence in support of the issues; and even though an issue is raised by the pleadings, it is not proper to give an instruction thereon where there is no basis for it in the evidence.⁴

Where does the evidence come from which guides the instructions? May it be drawn from sources outside the evidentiary portion of the trial, outside of the simple Q. and A. of witness examinations? Presumably so. Admissions might be made in statements or arguments. In *White v. State*,⁵ the court suggested that evidence, including the defendant's own opening, in which he suggested that someone else shot two of the victims to death, authorized the trial court's jury instruction on party to a crime.

§ 35:12 Peremptory instructions

The term "peremptory instruction" has not been defined precisely, but generally refers to those instructions providing that, if the jury finds that certain facts exist or do not exist, they shall find for one party or the other.

The main objection to such instructions is that they are argumentative; but, the courts have approved such charges.¹

An instruction, prefaced with the language "if you find from the evidence in this case that . . .", was not one-sided, argumentative, or opinionative" and was not error on part of trial court judge.²

§ 35:13 Slanted and argumentative instructions

Instructions that are argumentative constitute error and should

²*Sheftall v. Zipperer*, 133 Ga. 488, 66 S.E. 253 (1909).

³*Jones v. McElroy*, 134 Ga. 857, 68 S.E. 729 (1910).

⁴*Lefkoff v. Sicro*, 189 Ga. 554, 6 S.E.2d 687, 133 A.L.R. 738 (1939) (overruled in part on other grounds by, *Drewry v. State*, 208 Ga. 239, 65 S.E.2d 916 (1951)); *Sikes v. Sikes*, 153 Ga.

725, 113 S.E. 416, 24 A.L.R. 1324 (1922).

⁵*White v. State*, 289 Ga. 511, 712 S.E.2d 834 (2011).

[Section 35:12]

¹*McHone v. Williams*, 111 Ga. App. 747, 143 S.E.2d 63 (1965).

²*Tate v. Gibson Products Co.*, 137 Ga. App. 615, 224 S.E.2d 465 (1976).

not be given.¹

Argument, which lies properly within the domain of counsel in the case, finds no place in instructions of the court. A court should not give and may properly refuse argumentative instructions.²

In a prosecution for armed robbery, kidnapping, hijacking a motor vehicle, and aggravated assault, the trial court correctly refused to give the defendant's proposed jury charge concerning DNA evidence; the requested charge was argumentative and instructions given to the jury concerning DNA evidence issue were sufficient. Plus, the charge summed up the facts favorable to the defendant's theory of innocence.³

Similarly, the instructions should not unduly emphasize particular matters by singling them out and giving them undue prominence.⁴ But that is not a complete bar against an instruction that points out a particular issue, fact or matter.⁵ There was no error in giving repetitious instructions on a particularly complex portion of the law.⁶

An argumentative instruction is one that appears to argue the case on either side.⁷

§ 35:14 Other rules applicable to instructions

Even though the trial court may be required to give general instructions on the issues without request from counsel, it is generally considered to be the duty of counsel to assist the court in the function of instructing the jury. It is an established general rule that when a party is of the opinion that the instructions given by the court are not explicit enough upon certain points or do not cover all phases of the case, he should call the attention of the court to that fact and tender other and fuller instructions or request the court to give such further instructions as he desires.¹

In § 35:15, *infra*, the obligation of the court to recharge the jury when the jury requests it in criminal cases is discussed. Civil cases also echo that refrain. When a jury requests clarification on a specific point, the trial court should reply by providing a correct

[Section 35:13]

¹English v. Shivers, 220 Ga. 737, 141 S.E.2d 443 (1965).

²Lefkoff v. Sicro, 189 Ga. 554, 6 S.E.2d 687, 133 A.L.R. 738 (1939) (overruled in part on other grounds by, *Drewry v. State*, 208 Ga. 239, 65 S.E.2d 916 (1951)).

³Gonzalez v. State, 277 Ga. App. 362, 626 S.E.2d 569 (2006).

⁴Slater v. Dodd, 108 Ga. App.

879, 134 S.E.2d 848 (1964).

⁵Scholle Atlanta Corp. v. Nealy, 110 Ga. App. 775, 140 S.E.2d 88 (1964).

⁶Wendlandt v. Shepherd Const. Co., Inc., 178 Ga. App. 153, 342 S.E.2d 352 (1986).

⁷Thomas v. Barnett, 107 Ga. App. 717, 131 S.E.2d 818 (1963).

[Section 35:14]

¹Lowry v. Lowry, 170 Ga. 349, 153 S.E. 11, 70 A.L.R. 488 (1930).

statement of the law that responds to the jury's request.²

Error in giving instructions can lead to reversal of a conviction. Giving of an unlawful charge in a malice murder trial that "the law presumes an intention to kill and malice will be implied" from the use of a deadly weapon was not harmless; fact that fatal shot was fired from a distance of three or more feet was not inconsistent with defendant's story of a struggle and did not overwhelmingly establish that defendant acted with malice when he shot victim.³

The failure to give the charge of reckless conduct in the form provided by the reckless conduct statute in a prosecution of a defendant for felony-murder was harmless error; the court charged concerning criminal negligence, which was defined as reckless conduct; in addition, the evidence was overpowering as to the defendant's guilt so that any error did not contribute to the verdict in case.⁴

If a jury charge recites the entire statutory definition of a crime and the indictment or accusation does not, the deviation may violate due process unless a limiting instruction is given.⁵

It is the duty of the court to instruct the jury as to the burden of proof.⁶ Normally, it is also the duty of the court to give instructions to guide the jury in determining the credibility of the witnesses, if requested.⁷

Where both the preponderance of evidence standard and the clear and convincing evidence standard apply, the trial court is obligated, even in the absence of a request to charge, to define both standards to avoid confusing the jury.⁸

A charge on circumstantial evidence must be given on the defendant's request where the State's case depends, in whole or in part, on circumstantial evidence.⁹

If the principle of circumstantial evidence is to be instructed upon at all, the better practice is to charge both the pattern jury instruction book's definition of circumstantial evidence and the cautionary language of the statute regarding a conviction based on circumstantial evidence, but whether failure to so instruct

²Long Leaf Industries, Inc. v. Mitchell, 252 Ga. App. 343, 556 S.E.2d 242 (2001).

³Warren v. State, 283 Ga. 42, 656 S.E.2d 803 (2008).

⁴Carter v. State, 260 Ga. 575, 398 S.E.2d 21 (1990).

⁵Gilliland v. State, 325 Ga. App. 854, 755 S.E.2d 249 (2014).

⁶Barrow v. Georgia Lightweight

Aggregate Co., 103 Ga. App. 704, 120 S.E.2d 636 (1961) (disapproved on other grounds by, OB-GYN Associates of Albany v. Littleton, 259 Ga. 663, 386 S.E.2d 146 (1989)).

⁷Rogers v. Saye, 106 Ga. App. 453, 127 S.E.2d 161 (1962).

⁸Clarke v. Cotton, 263 Ga. 861, 440 S.E.2d 165 (1994).

⁹Postell v. State, 261 Ga. 842, 412 S.E.2d 831 (1992).

requires reversal will depend on the facts of each case.¹⁰

A court is prohibited from commenting on the facts, and its charge should be entirely free from any suggestion as to the weight of evidence. It is proper, however, to give an instruction that the jury may disregard all the testimony of a witness who has sworn falsely as to any material matter.¹¹

In the case of evidence admissible only against certain of joint defendants or relating to one only of several counts the use and application thereof should be limited by proper instructions.¹² However, when evidence is admitted for one purpose, it is not error for court to fail to instruct jury to limit its consideration to one purpose for which it is admissible, in the absence of a request to so instruct jury.¹³

A charge that “once a witness has been successfully impeached his testimony shall not be believed unless it is sustained by other competent evidence” is not in accord with the law.¹⁴

Disciplinary rules have the effect of law and are proper charges to the jury in cases that directly or indirectly, involve conduct of attorneys.¹⁵

For instructions on failure to produce a witness or evidence and similar matters, see § 20:10, *infra*. For the right to an instruction on certain kinds of prior inconsistent statements, see §§ 16:8, 35:10, *supra*.

Instructions should be based on the evidence, and should not be given if not based upon evidence in the case.¹⁶ The accused is not entitled to an instruction on a defense, such as insanity or intoxication, where there was no evidence before the jury to raise such an issue.¹⁷

The judge presiding at a trial should, while instructing the jury, be careful not to mislead them or to allow them to be misled by others. He may not, either on his own motion or at the request of either party, give an instruction which as applied to the facts is misleading or well calculated to mislead or which will tend to

¹⁰*Terrell v. State*, 258 Ga. 722, 373 S.E.2d 751 (1988) (abrogated on other grounds by, *Robinson v. State*, 261 Ga. 698, 410 S.E.2d 116 (1991)).

¹¹*Beardsley v. Suburban Coach Co.*, 83 Ga. App. 381, 63 S.E.2d 911 (1951).

¹²*Southern Ry. Co. v. Chambers*, 126 Ga. 404, 55 S.E. 37 (1906).

¹³*Harrell v. State*, 241 Ga. 181, 243 S.E.2d 890 (1978).

¹⁴*Adams v. State*, 255 Ga. 356, 338 S.E.2d 860 (1986).

¹⁵*Cambron v. Canal Ins. Co.*, 246 Ga. 147, 269 S.E.2d 426 (1980).

¹⁶*Burgess v. State*, 117 Ga. App. 284, 160 S.E.2d 411 (1968).

¹⁷*Strozier v. State*, 116 Ga. App. 777, 159 S.E.2d 182 (1967).

confuse the jury in the consideration of the issues in the case.¹⁸ Instructions will be considered as a whole, and where the jury has not been misled and the complaining party's rights have not been prejudiced by minor irregularities, such errors will not be deemed grounds for reversal.¹⁹

As illustrative of misleading instructions, it may be pointed out that instructions are misleading when they tend to lead the jury to a wrong conclusion on the facts, when they place the burden of proof on the wrong party or give the jury an erroneous impression as to the degree of proof required, and when they tend to give the impression that the jury is to disregard competent evidence in the case.²⁰

Accident instruction which advises jury that no one would be held liable in instances where an occurrence takes place in the absence of negligence by any party was repudiated in *Tolbert v. Duckworth*.²¹

The test in determining whether an instruction is misleading or confusing is whether, under the evidence and the circumstances of the trial, ordinary jurors would understand it.²²

Great care must be exercised if language from a reported case is paraphrased in an instruction to be sure that it is not misleading or it will be error.²³ But it is not the recommended practice in Georgia to convert language of judicial decisions into instructions, although to do so may not be error.²⁴

Trial court's failure to define the terms "mentally ill" and "mentally retarded" in its insanity instruction and advise the jury of the consequences of a verdict of guilty but mentally ill or guilty but mentally retarded, i.e., that defendant would be incarcerated, warranted reversal of defendant's convictions for malice murder. In this case, the jury was required to understand the legal distinctions between insanity, mental illness, and mental retardation, but never given the guidance necessary to reach such an understanding.²⁵

Although the court should define technical words or expressions used in sections of the Code, it need not define self-

¹⁸Central Georgia Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387 (1912).

¹⁹Thomas v. Barnett, 107 Ga. App. 717, 131 S.E.2d 818 (1963).

²⁰Lowry v. Lowry, 170 Ga. 349, 153 S.E. 11, 70 A.L.R. 488 (1930).

²¹Tolbert v. Duckworth, 262 Ga. 622, 423 S.E.2d 229, 21 A.L.R.5th 852

(1992).

²²Thomas v. Barnett, 107 Ga. App. 717, 131 S.E.2d 818 (1963).

²³See Ware v. Martin, 209 Ga. 29, 70 S.E.2d 446 (1952).

²⁴City of Summerville v. Sellers, 94 Ga. App. 152, 94 S.E.2d 69 (1956).

²⁵Foster v. State, 283 Ga. 47, 656 S.E.2d 838 (2008).

explanatory words of ordinary understanding.²⁶ But, an error in failing to adequately define malice as an element of statutory aggravating circumstance of aggravated battery was not harmless in the sentencing phase of a murder prosecution, where the evidence that the defendant committed an aggravated battery was not overwhelming and the conviction of murder rested on evidence barely meeting the standard required by *Jackson v. Virginia* and the death penalty was imposed.²⁷

The U.S. Supreme Court held, in an appeal from a state appellate court decision affirming a death sentence that, although the trial court used a limiting instruction to define the “especially heinous, atrocious, or cruel” aggravating factor, instruction was not constitutionally sufficient.²⁸

The trial court’s error of instructing jury to consider elements of negligence in a particular order amounted to harmful error in *Critser v. McFadden*.²⁹

What about a verbal stumble by a judge when reading her instructions to the jury? The topic has been addressed by the Georgia Supreme Court. A mere verbal inaccuracy in a jury instruction resulting from a slip of the tongue which does not clearly mislead or confuse the jury is not reversible error.³⁰

The trial judge apparently gave a dynamite charge after a will contest trial which lasted six days. The Georgia Supreme Court held that any alleged error in the trial court’s conversation with the jury while delivering the dynamite charges was not preserved for appellate review in the absence of an objection in the trial court.³¹

An erroneous and injurious instruction is not cured by a correct statement of law in another part of the charge to the jury; the incorrect charge was not expressly withdrawn from the jury’s consideration nor was the jury’s attention directed to the correction.³²

Where the jury instruction given is an accurate statement of law and substantially covers the principles in the requested instruction, failure to give the instructions in the exact language

²⁶*McCallister v. Doe*, 181 Ga. App. 602, 353 S.E.2d 89 (1987).

²⁷*Wade v. State*, 258 Ga. 324, 368 S.E.2d 482 (1988).

²⁸*Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990).

²⁹*Critser v. McFadden*, 277 Ga. 653, 593 S.E.2d 330 (2004).

³⁰*Delacruz v. State*, 280 Ga. 392, 627 S.E.2d 579 (2006).

³¹*Lillard v. Owens*, 281 Ga. 619, 641 S.E.2d 511 (2007). For the use of the “Allen type” or “dynamite” instruction to compel a jury to arrive at a verdict, see § 31:6, *supra*.

³²*Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.*, 285 Ga. App. 22, 645 S.E.2d 536 (2007).

requested is not error.³³

§ 35:15 Special rules relating to instructions in criminal cases

There was no error by the trial court when it failed to charge jury on the lesser included offense of simple battery where defendant was indicted for assault with a deadly weapon and evidence showed beyond a reasonable doubt that an assault was committed with a deadly weapon. Also, there was no basis for an instruction on involuntary manslaughter where the victims were placed in a reasonable apprehension of injury and defendant stated he fired his weapon in self-defense.¹ However, where a case contains some evidence, no matter how slight, that shows that the defendant committed a lesser offense, then court should charge the jury on that defense.²

If there is any evidence tending to prove an alibi, the trial court should give a proper instruction on that issue, whether or not the defendant testified or otherwise offered evidence.³ If there is no evidence tending to prove that the defendant was at another place during the time of the commission of the crime, the trial court properly refused to submit any instruction on alibi.⁴

The failure to give a charge on venue does not require a new trial.⁵

To give a charge in a criminal case that the “burden is on the accused to establish his alibi, not beyond a reasonable doubt, but to the reasonable satisfaction of the jury,” is impermissibly burden-shifting and requires reversal.⁶

The correct approach to an alibi instruction was supplied in *Swindle v. State*.⁷ The trial court’s charge on alibi included the following:

The evidence presented with respect to time and place must be such as reasonably excludes a possibility of the presence of the defendant at the scene of the alleged offense. Presence of the defendant at the scene of the crime alleged is an essential element in the crime set forth in the indictment, and the burden of proof is

³³Fowler Properties, Inc. v. Dowland, 282 Ga. 76, 646 S.E.2d 197 (2007).

[Section 35:15]

¹Hall v. State, 264 Ga. 85, 441 S.E.2d 245 (1994).

²Edwards v. State, 264 Ga. 131, 442 S.E.2d 444 (1994); see also Allen v. State, 902 S.E.2d 615 (Ga. 2024)..

³Jenkins v. State, 96 Ga. App. 86, 99 S.E.2d 474 (1957).

⁴Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971).

⁵Faulkner v. State, 295 Ga. 321, 758 S.E.2d 817 (2014).

⁶Barfield v. Dampier, 241 Ga. 168, 243 S.E.2d 876 (1978).

⁷Swindle v. State, 274 Ga. 668, 558 S.E.2d 385 (2002).

upon the [S]tate to prove such beyond a reasonable doubt.

Appellant urges that the first sentence erroneously suggested that he had the burden of proof as to the alibi defense. However, he requested the instruction and is, therefore, precluded from attacking it on appeal.

Whatley v. State, 270 Ga. 296, 300, 509 S.E.2d 45 (1998). Moreover, in *Chapel v. State*, 270 Ga. 151, 157, 510 S.E.2d 802 (1998), we recognized that a charge on alibi “would be correct and better without” the first sentence, but concluded there was no reversible error because “the final sentence is clear in instructing that the burden of proof rests completely with the [S]tate.” Judgment affirmed.

Under former cases, it was proper to instruct that, unless impeached, witnesses were presumed to speak the truth.⁸ Then there was a change. Although the charge on the presumption of truthfulness should no longer be given, it is not unconstitutionally burden shifting.⁹ An instruction that improperly shifted the burden to a murder defendant to disprove intent was harmless where intent was conceded by the defense.¹⁰

There was no burden shifting in an instruction that the jury could “infer that the acts of a person of sound mind and discretion are the product of that person’s will, and you may infer that a person of sound mind and discretion intends the natural and probable consequences of that person’s acts” coupled with a further instruction that the making or not making of such inferences was up to the jury.¹¹ However, it has been further held that an instruction that “a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted . . .” unconstitutionally shifts the burden to a criminal defendant to prove his lack of intent.¹²

During the 1980s, the United States Supreme Court struck down as unconstitutional a jury charge that the law presumes that a person intends the ordinary consequences of his voluntary acts. Justice Marshall’s decision in the *Williams* case, *supra*, then struck down a similar Georgia jury charge. It created a mandatory but rebuttable presumption. About two weeks later, the Georgia Supreme Court decided *Flynn*. The jury instruction in *Flynn* authorized the jury to infer (not presume) that a person intends the probable consequences of his acts. Without referencing the *Williams* case decision, the court upheld the instruction

⁸*Preston v. State*, 257 Ga. 42, 354 S.E.2d 135 (1987). S.E.2d 304 (1986).

⁹*Roundtree v. State*, 194 Ga. App. 655, 391 S.E.2d 682 (1990). ¹¹*Flynn v. State*, 255 Ga. 415, 339 S.E.2d 259 (1986).

¹⁰*White v. State*, 255 Ga. 731, 342 S.E.2d 669 (1986). ¹²*Williams v. Kemp*, 255 Ga. 380, 338 S.E.2d 669 (1986).

by emphasizing that the charge created a permissive inference.

The matter came up again in 1987. The decision in *Thompson v. State*¹³ held it proper to charge that the jury may infer that a person of sound mind and discretion intends the natural and probable consequences of his acts. Again, the *Williams* case was not discussed.

More recently, the difference between a presumption and an inference proved to be critical. An instruction allowing the jury to infer that a person intends the consequences of his acts did not shift the burden on the element of intent. The charge was not worded as a presumption but as a permissive inference.¹⁴

The United States Supreme Court also cast doubt on instructions that tell jurors to imply malice from certain acts, and the Georgia courts have addressed this issue.

An instruction that malicious intent can be presumed is unconstitutional burden-shifting and is properly refused even when requested by the defense.¹⁵

Inferring intent to kill from use of a deadly weapon was deemed erroneous in *Harris v. State*.¹⁶ A similar point was addressed in *Pace v. State*.¹⁷

Applying the *Harris* rule, see *Cochran v. State*.¹⁸

An instruction in a malice murder prosecution that malice must be implied where no considerable provocation appears and where all circumstances of the killing show an abandoned and malignant heart is proper.¹⁹

An instruction that the jury could infer intent to kill where a person of sound mind and discretion intentionally and without justification used a deadly weapon or instrument in a manner in which such weapon or instrument is ordinarily used and thereby caused the death of a human being did not constitute an impermissible shift of the burden of proof from the prosecution to the defendant.²⁰

Reversible error occurred in a murder case involving the defense of justification, since nowhere in the charge was the jury

¹³*Thompson v. State*, 257 Ga. 481, 361 S.E.2d 154 (1987).

¹⁴*Alexis v. State*, 273 Ga. 423, 541 S.E.2d 636 (2001).

¹⁵*Brantley v. State*, 256 Ga. 136, 345 S.E.2d 329 (1986).

¹⁶*Harris v. State*, 273 Ga. 608, 543 S.E.2d 716 (2001) (abrogating several prior cases).

¹⁷*Pace v. State*, 274 Ga. 69, 548 S.E.2d 307 (2001) (charge that malice

and intent were presumed from use of deadly weapon was error).

¹⁸*Cochran v. State*, 276 Ga. 283, 576 S.E.2d 867 (2003) (failure to instruct on intent in accord with *Harris* was not simply harmless error).

¹⁹*Baisden v. State*, 258 Ga. 425, 369 S.E.2d 762 (1988).

²⁰*Wood v. State*, 258 Ga. 598, 373 S.E.2d 183 (1988).

informed that when the affirmative defense of justification is raised the State has the burden of proving the absence of the elements of that affirmative defense, nor was the jury told that if they believed the defendant to have been justified, it would have been their duty to acquit him.²¹ *Coleman v. State* holds that reversible error does not occur in a murder case when a judge refuses to tell the jury that if they believed the defendant to have been justified, it would have been their duty to acquit the defendant. A jury charge in a drunk driving case, which included all of the provisions of the statute that he allegedly violated, was reversible error where the record indicates that the jury was confused about the charge and no remedial instruction was given. The court noted that the charge and accusation both contained the statutory references to drugs, as well as to intoxicating liquors, although there was no evidence that the defendant was under the influence of any drugs.²²

Where, in a prosecution for a crime involving a specific intent, there is evidence as to the defendant's intoxication at the time of the commission of the offense, but not otherwise, he is entitled to an instruction on the law applicable to the effect of intoxication on criminal liability, including the charge that in determining the question of intent, it is proper to take into account the defendant's condition as drunk or sober, unless the instruction is already given in substance.²³

It was not error for a trial court to charge the jury on voluntary intoxication, even though the defendant did not rely on the defense of involuntary intoxication where the defendant conceded that he was drinking on the night the crimes took place.²⁴

An instruction on voluntary intoxication was not warranted in a felony-murder prosecution because the defendant failed to carry her burden of showing that intoxication negated her intent to commit the underlying felony of aggravated assault.²⁵

A charge on involuntary manslaughter is never required when the defendant relies upon the defense of self-defense.²⁶

In an instruction to the jury on self-defense that "in order to justify the use of deadly force, . . . it must appear that the person

²¹*Anderson v. State*, 262 Ga. 7, 413 S.E.2d 722 (1992) (overruled on other grounds by, *Coleman v. State*, 264 Ga. 253, 443 S.E.2d 626 (1994)).

²²*Anderson v. State*, 262 Ga. 26, 413 S.E.2d 732 (1992).

²³*Allen v. State*, 187 Ga. 178, 200 S.E. 109, 120 A.L.R. 495 (1938).

²⁴*Robinson v. State*, 258 Ga. 279, 368 S.E.2d 513 (1988). See *Gee v.*

State, 261 Ga. 178, 402 S.E.2d 719 (1991).

²⁵*Horton v. State*, 258 Ga. 489, 371 S.E.2d 384 (1988).

²⁶*Horton v. State*, 258 Ga. 489, 371 S.E.2d 384 (1988); *Johnson v. State*, 259 Ga. 235, 378 S.E.2d 859 (1989).

attacked was so situated and endangered that he honestly believed . . . he was in imminent danger . . .,” the words “it must appear” did not have the effect of shifting the burden of proof to the accused.²⁷

No error in court’s refusal to charge, on request, that where there is some evidence of self-defense, the defendant does not have the burden to prove he acted in self-defense, but that the State must prove beyond a reasonable doubt that he did not act in self-defense.²⁸

A murder defendant was not entitled to an instruction on self defense based on his belief that he was being subjected to voodoo spells by the victim.²⁹

Both the defenses of accident and self-defense can properly be instructed in the same case, depending on the facts. There is no hard and fast rule that they are mutually exclusive.³⁰

Where an instruction on accident is given, the defendant is entitled to an additional instruction on justification even where there is only slight evidence that the weapon went off accidentally at the time he was preparing to defend himself and his children.³¹

Evidence did not require a trial judge to give a jury charge on the defense of accident where defendant showed utter disregard for the victim’s safety and showed criminal negligence that precluded a charge on accident.³²

When the trial court fails to give a requested charge on the State’s burden of disproving an affirmative defense, this is reversible error if the requested instruction is a correct statement of the law.³³

A mistake of fact instruction is required even when mistake of fact is not the sole defense.³⁴

A trial court properly refused to give a defendant’s requested charge concerning mere presence at the scene of a crime, where the trial court’s general charge covered the same principle of law as the requested charge and yet was not subject to objections raised by the State with respect to the requested charge.³⁵

A jury instruction on reasonable doubt does not violate a

²⁷Lemley v. State, 245 Ga. 350, 264 S.E.2d 881 (1980).

²⁸Walston v. State, 245 Ga. 572, 266 S.E.2d 185 (1980).

²⁹McDaniel v. State, 257 Ga. 345, 359 S.E.2d 642 (1987).

³⁰Turner v. State, 262 Ga. 359, 418 S.E.2d 52 (1992).

³¹Koritta v. State, 263 Ga. 703, 438 S.E.2d 68 (1994).

³²Patrick v. Head, 262 Ga. 654, 424 S.E.2d 615 (1993).

³³Stinson v. State, 273 Ga. 519, 544 S.E.2d 118 (2001).

³⁴Adcock v. State, 260 Ga. 302, 392 S.E.2d 886 (1990).

³⁵Hutchins v. State, 261 Ga. 366, 404 S.E.2d 548 (1991).

defendant's right to due process on the ground that it charged two different standards of proof, i.e., proof beyond a reasonable doubt and proof to a moral and reasonable certainty, where the instruction properly defines reasonable doubt and the reference to "moral and reasonable certainty" does not, standing alone, lessen the burden of proof required for a conviction.³⁶

Similarly, the trial court's instruction to the jury on reasonable doubt which stated that a "moral and reasonable certainty is all that can be expected in a legal investigation" did not lessen the burden of proof necessary to obtain a conviction.³⁷

In another case, the U.S. Supreme Court held that an instruction in a state homicide trial, defining "reasonable doubt" in terms of "grave" or "substantial" uncertainty and of need for "moral certainty," violated the due process clause.³⁸

A charge to the jury that it is their duty to convict if they believe the defendant guilty beyond a reasonable doubt is proper.³⁹ A charge that proof "must be to the satisfaction of the jury" is not error if a proper charge on reasonable doubt is also given.⁴⁰ It is proper to instruct that evidence of good character may, by itself, create reasonable doubt.⁴¹

In its charge to the jury, a trial court's use of several illustrations, using facts somewhat analogous to those in the case being tried, was not an impermissible expression of opinion as to what would or would not be sufficient circumstantial evidence to carry the State's burden of proof. The use of these illustrations to explain to the jury the difficult concept of the differences between direct and circumstantial evidence was not improper, especially since the jury was charged as to the law of direct and circumstantial evidence, the jury was not advised as to which facts occurred in the case at issue and the judge instructed them that nothing he had said during the trial was intended to intimate, hint, or suggest which side should prevail.⁴²

No error, absent request, to fail to charge on circumstantial evidence, the State's evidence being almost totally direct evidence.⁴³ However, in close or doubtful criminal case composed solely of

³⁶Bradford v. State, 261 Ga. 833, 412 S.E.2d 534 (1992).

³⁷Brown v. State, 264 Ga. 48, 441 S.E.2d 235 (1994).

³⁸Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990) (disapproved on other grounds by, Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385, 33 Fed. R. Evid. Serv. 305 (1991)).

³⁹Sears v. State, 259 Ga. 671, 386 S.E.2d 360 (1989).

⁴⁰Kettman v. State, 257 Ga. 603, 362 S.E.2d 342 (1987).

⁴¹Kettman v. State, 257 Ga. 603, 362 S.E.2d 342 (1987).

⁴²Mayne v. State, 258 Ga. 36, 365 S.E.2d 270 (1988).

⁴³Burger v. State, 245 Ga. 458, 265 S.E.2d 796 (1980).

circumstantial evidence, court erred in failing to charge on circumstantial evidence even without request therefor.⁴⁴

Where the State's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request, regardless of whether the jury is authorized to find that the direct evidence presented by witness testimony has been impeached.⁴⁵

Instructions on circumstantial evidence were discussed in *Sumlin v. State*.⁴⁶

Appellant [who was convicted] also contends that the trial court erred by failing to instruct the jury on the law of circumstantial evidence as set forth in [former] O.C.G.A. § 24-4-6. However, where, as here, see Division 1, *supra*, the State presents both direct and circumstantial evidence, a trial court is required to give the instruction on circumstantial evidence only if the defendant so requests. *Yarn v. State*, 265 Ga. 787, 462 S.E.2d 359 (1995). In this case, it is undisputed that Appellant failed to request a charge on circumstantial evidence. Accordingly, there is no merit to this enumeration.

Judgment affirmed.

Instructions in circumstantial evidence cases must be carefully drawn. When the circumstantial evidence supports more than one theory, one consistent with guilt and another with innocence, it does not exclude every other reasonable hypothesis except guilt and is not sufficient to prove the defendant's guilt beyond a reasonable doubt. Circumstantial evidence is worth nothing in a criminal case, if the circumstances are reasonably consistent with the hypothesis of innocence, as well as the hypothesis of guilt.⁴⁷

Formerly a flight instruction was proper in prosecution of a defendant, for example, where defendant ran upon seeing police who responded to a domestic disturbance call.⁴⁸ Hereafter, while the State may offer evidence of and argue flight, it shall be reversible error for a trial court in a criminal case to charge the jury on flight.⁴⁹ The adoption of Georgia's 2013 Evidence Code may alter this analysis.⁵⁰

A defendant was not entitled to an instruction that an inference of his innocence could be drawn from the flight of a

⁴⁴*Williams v. State*, 239 Ga. 12, 235 S.E.2d 504 (1977).

⁴⁵*Robinson v. State*, 261 Ga. 698, 410 S.E.2d 116 (1991).

⁴⁶*Sumlin v. State*, 283 Ga. 264, 658 S.E.2d 596 (2008).

⁴⁷*O'Neill v. State*, 285 Ga. 125, 674 S.E.2d 302 (2009).

⁴⁸*Rozier v. State*, 259 Ga. 399, 383 S.E.2d 113 (1989).

⁴⁹*Renner v. State*, 260 Ga. 515, 397 S.E.2d 683 (1990).

⁵⁰See § 26:11, *supra*.

codefendant.⁵¹

Pre-voir dire instructions on procedural issues are not required, but they may be given in the discretion of the court.⁵²

The failure of the court to ask defense counsel if he had any exceptions to the instructions given preserved the defendant's right to appeal on the instructions generally.⁵³

The giving of an unsolicited *Allen* charge was not error where the jury had been deliberating for over seven hours, notwithstanding that the jury had not indicated it was deadlocked.⁵⁴

The *Allen* instruction frequently brings about a verdict after several hours of deliberation. When jurors send out a note indicating they are unable to agree, judges sometimes inquire about the numerical split of the jury, prior to delivery of the *Allen* charge. The court must be careful not to ask about the nature of the division, that is, how many are for a guilty verdict. In federal courts it is error for the judge to make any inquiry at all into the numerical division of a deadlocked jury, unlike Georgia.⁵⁵

Allen charge did not coerce jury, which returned verdict two hours later.⁵⁶

Trial court's statement to a jury, after sending it back for more deliberations following its fourth note that it could not reach a unanimous verdict, that "Both sides would like to have a verdict" if possible was not coercive; the statement did not imply in any way that a verdict was required, and, moreover, the statement immediately followed a proper *Allen* charge and an explanation from trial court that it in no way wished to force a verdict.⁵⁷

Allen charge given after two days, see *Durham v. State*.⁵⁸

In *Mayfield v. State*,⁵⁹ the Georgia Supreme Court followed *Gibson* and approved an *Allen* charge after the trial court ascertained the numerical divisions.

The trial court is not precluded from giving an *Allen* charge

⁵¹*Mendez v. State*, 185 Ga. App. 1, 363 S.E.2d 262 (1987).

⁵²*Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987).

⁵³*Collins v. State*, 176 Ga. App. 634, 337 S.E.2d 415 (1985) (holding modified on other grounds by, *Inman v. State*, 182 Ga. App. 209, 355 S.E.2d 119 (1987)).

⁵⁴*Sanders v. State*, 257 Ga. 239, 357 S.E.2d 66 (1987).

⁵⁵*Gibson v. State*, 272 Ga. 801, 537 S.E.2d 72 (2000) (*Allen* charge given after seven hours of deliberation;

merely asking jury to identify the extent, but not the nature of the jury's division prior to charge, is appropriate).

⁵⁶*Chumley v. State*, 282 Ga. 855, 655 S.E.2d 813 (2008).

⁵⁷*Manley v. State*, 284 Ga. 840, 672 S.E.2d 654 (2009).

⁵⁸*Durham v. State*, 273 Ga. 142, 539 S.E.2d 137 (2000). More on *Allen*, see § 31:6, *supra*.

⁵⁹*Mayfield v. State*, 276 Ga. 324, 578 S.E.2d 438 (2003).

simply because the jury volunteered the nature of its division.⁶⁰

That a jury had requested a recharge on murder and manslaughter did not necessitate a recharge on mutual combat.⁶¹

Where the jury requests the court to recharge them on any point, it is the court's duty to do so, and it was error for the court to fail to reinstruct the jury upon their request as to the definition of murder and manslaughter.⁶² Additionally, it has been held that when a jury requests a charge or recharge on a particular point, it is within the discretion of the judge to also give, or not give, additional instructions.⁶³

For additional instructions when jury requests a recharge, see *Dukes v. State*.⁶⁴

When the jury sends the judge a note regarding an instruction, the judge may in her discretion recharge entirely or recharge only on the specific question. In *Peake v. State*,⁶⁵ the trial court reread the instruction on conspiracy, and this was not error.

A trial court does not err when it recharges only on a specific question as long as the recharge taken alone does not leave an erroneous impression in the minds of the jury.⁶⁶

Providing jurors with a written copy of the instructions is a permissible option.⁶⁷

Criminal homicide cases sometimes require the trial judge to instruct the jury on both felony murder and voluntary manslaughter charges. A Georgia holding requires some precision in the charge to the jury:

A sequential charge requiring the jury to consider voluntary manslaughter only if they have considered and found the defendant not guilty of malice murder and felony murder is not appropriate where there is evidence that would authorize a charge on voluntary

⁶⁰*Scott v. State*, 291 Ga. 156, 728 S.E.2d 238 (2012).

⁶¹*Welch v. State*, 257 Ga. 197, 357 S.E.2d 70 (1987).

⁶²*Edwards v. State*, 233 Ga. 625, 212 S.E.2d 802 (1975).

⁶³*Walter v. State*, 256 Ga. 666, 352 S.E.2d 570 (1987).

⁶⁴*Dukes v. State*, 290 Ga. 486, 722 S.E.2d 701 (2012).

⁶⁵*Peake v. State*, 247 Ga. App. 374, 545 S.E.2d 309 (2000).

⁶⁶*See Quiroz v. State*, 291 Ga. App. 423, 662 S.E.2d 235 (2008):

When the jury requests the court to recharge [it] on any point it is the

court's duty to do so. Such further instruction must be in plain, clear language . . . calculated to enlighten rather than confuse the jury. Where a jury, which has been fully and properly charged, requests a recharge on a specific question, it is within the discretion of the trial court whether to recharge entirely or to recharge only on the specific question. It is not error to recharge only on the specific question so long as the recharge taken alone does not leave an erroneous impression on the minds of the jury.

⁶⁷*See McCaskell v. State*, 285 Ga. App. 592, 646 S.E.2d 761 (2007) (no error to provide jury with written jury charge).

manslaughter. The “sequential” charge eliminates the jury’s full consideration of voluntary manslaughter because, if it concludes a felony murder occurred, it would not then go on to consider evidence of provocation or passion which might authorize a verdict for voluntary manslaughter. Instead, the trial court should instruct the jury so as to ensure adequate consideration of charges for both forms of homicide. To the extent *Hill v. State*, 259 Ga. 655, 657, 386 S.E.2d 133 (1989); *Alexander v. State*, 247 Ga. 780, 784, 279 S.E.2d 691 (1981), and *Harrell v. State*, 249 Ga. 48, 51, 288 S.E.2d 192 (1982) conflict with this opinion, they are overruled.⁶⁸

The rule in *Edge* applied retroactively to cases on direct review or cases that were not yet final, so long as the defendant preserved the issue for appeal in the trial court.⁶⁹ If the defendant fails to preserve the issue for appeal at trial, even where an improper jury charge was given, or a conviction for voluntary manslaughter and aggravated assault was merged into a felony murder conviction, the judgment of the trial court will not be reversed.⁷⁰

Edge applies only where the jury charge includes consideration of felony murder and voluntary manslaughter, when the underlying felony is aggravated assault.⁷¹ *Edge* does not apply to cases where the underlying felony in a felony murder charge does not require the jury to consider evidence of provocation or passion, which is necessary for a conviction on voluntary manslaughter.⁷²

In *Sims v. State*,⁷³ the rule of *Edge* was not extended to a conviction for felony murder when the underlying felony is possession of a firearm by a convicted felon.

Where a defendant was convicted of malice murder, the jury considered intent to kill, which necessitates consideration of any evidence of provocation; therefore, a sequential jury charge in violation of the *Edge* rule does not constitute reversible error.⁷⁴ If there is evidence that the jury considered the issue of provocation in its deliberations on a felony murder charge, there is no reversible error if the jury was given a sequential charge.⁷⁵

Defendants are not entitled to a charge on voluntary manslaughter in compliance with *Edge* if the evidence does not war-

⁶⁸*Edge v. State*, 261 Ga. 865, 414 S.E.2d 463, 466 (1992).

⁶⁹*Taylor v. State*, 262 Ga. 584, 422 S.E.2d 430 (1992). See *Lee v. State*, 262 Ga. 593, 423 S.E.2d 249 (1992) (*Edge* applied to cases not yet final at the time *Edge* was decided).

⁷⁰*Wilson v. State*, 262 Ga. 588, 422 S.E.2d 536 (1992) (overruled on other grounds by, *Sanders v. State*, 281 Ga. 36, 635 S.E.2d 772 (2006)).

⁷¹*Alexander v. State*, 263 Ga. 474, 435 S.E.2d 187 (1993).

⁷²*Philmore v. State*, 263 Ga. 67, 428 S.E.2d 329 (1993).

⁷³*Sims v. State*, 265 Ga. 35, 453 S.E.2d 33 (1995).

⁷⁴*Terry v. State*, 263 Ga. 294, 430 S.E.2d 731 (1993).

⁷⁵*Stewart v. State*, 262 Ga. 894, 426 S.E.2d 367 (1993).

rant it, even where aggravated assault and malice murder charges merged under the felony murder rule.⁷⁶

The court found that the evidence did not support a voluntary manslaughter charge concerning a two-year-old victim, because the court felt it was nearly impossible to conceive of a situation in which a two-year-old child could provoke a reasonable person to kill him.⁷⁷

Edge principles were invoked to reverse in *Mitchell v. State*.⁷⁸ A felony-murder conviction was based on the same assault underlying a voluntary manslaughter conviction. *Edge* holds that where a jury returns a verdict for voluntary manslaughter, it cannot also return a verdict for felony murder based on the same assault.

In somewhat similar fashion, a defendant may not be sentenced on both a felony murder charge and the underlying felony that was alleged by the indictment to support the felony murder charge.⁷⁹

The nonapplication of *Edge* principles where felony murder is not involved was made clear in *Jackson v. State*:⁸⁰

Of course, under *Edge v. State*, 261 Ga. 865, 414 S.E.2d 463 (1992), it would be an improper sequential charge to direct the jury to consider voluntary manslaughter only if it finds the defendant not guilty of felony murder. However, our decision in *Edge* is not applicable here since this case involves malice murder rather than felony murder and involuntary manslaughter rather than voluntary manslaughter.⁸¹

Edge was held to be inapplicable in *Suits v. State*,⁸² because *Edge* concerned a sequential charge on felony murder and voluntary manslaughter and this case concerned a sequential charge on malice murder and manslaughter.

In *Palmer v. State*,⁸³ defendant's claim that the trial court erred by giving a sequential jury charge in violation of *Edge* was defeated by a Supreme Court finding that properly timed objections had not been made.

An improper sequential charge under *Edge* can be cured or cor-

⁷⁶*Witherspoon v. State*, 262 Ga. 2, 475 S.E.2d 637 (1996).
412 S.E.2d 829 (1992).

⁷⁷*Isaac v. State*, 263 Ga. 872, 440 S.E.2d 175 (1994).

⁷⁸*Mitchell v. State*, 266 Ga. 197, 467 S.E.2d 503 (1996).

⁷⁹*Davie v. State*, 265 Ga. 800, 463 S.E.2d 112 (1995).

⁸⁰*Jackson v. State*, 267 Ga. 130,

⁸¹*Smith v. State*, 265 Ga. 495, 496, 458 S.E.2d 347 (1995); *McNeal v. State*, 263 Ga. 397, 435 S.E.2d 47 (1993).

⁸²*Suits v. State*, 270 Ga. 362, 507 S.E.2d 751 (1998).

⁸³*Palmer v. State*, 270 Ga. 278, 507 S.E.2d 755 (1998).

rected by a prompt curative instruction.⁸⁴

When does an assault conviction merge into a murder conviction? If the same evidence used to prove the aggravated assault is also used to prove the malice murder, then the aggravated assault conviction merges into the malice murder conviction as a matter of fact.⁸⁵ Here, however, the crimes did not merge as a matter of fact.

Failure to inform jury that defendant had to have attempted to commit “violent” injury on his wife in order to be guilty of aggravated assault was reversible error in *Chase v. State*.⁸⁶

Court’s charge to jury that no inference may be drawn from defendant’s failure to testify did not constitute comment by judge on defendant’s silence and did not violate defendant’s rights under Fifth Amendment.⁸⁷ In criminal prosecution, it is not error for court to instruct jury that it is to make no assumption or draw any conclusion from defendant’s failure to testify; however, it is not error for court to fail to so charge jury in absence of timely written request.⁸⁸

Trial court erred in failing to charge jury, upon written request of defendant to do so, that defendant’s failure to testify in his own favor shall not create presumption against him.⁸⁹

A trial court is not required to instruct the jury to make an independent determination regarding the voluntariness of a custodial statement or the waiver of his constitutional rights where no evidence of nor claim of involuntariness or constitutional violation appears.⁹⁰

Given the statute mandating that a specific charge on the disposition of defendants found not guilty by reason of insanity and guilty but mentally ill be given in all cases in which the defense of insanity is interposed, where the evidence entitled a defendant charged with murder and rape to instructions on possible verdict of guilty but mentally ill, the failure to charge the jury concerning the disposition of a defendant found to be guilty but mentally ill was error.⁹¹

The failure of a trial court to give a separate instruction detailing the jury’s duty to consider each charge and indictment against

⁸⁴*Drake v. State*, 272 Ga. 797, 537 S.E.2d 336 (2000) (curative instruction given 30 minutes after main charge).

⁸⁵*Farley v. State*, 277 Ga. 622, 593 S.E.2d 328 (2004).

⁸⁶*Chase v. State*, 277 Ga. 636, 592 S.E.2d 656 (2004). See West’s Ga. Code Ann. § 16-5-20(a)(1).

⁸⁷*Stapleton v. State*, 235 Ga. 513,

220 S.E.2d 269 (1975).

⁸⁸*Woodard v. State*, 234 Ga. 901, 218 S.E.2d 629 (1975).

⁸⁹*Clay v. State*, 236 Ga. 398, 224 S.E.2d 14 (1976).

⁹⁰*Faulkner v. State*, 295 Ga. 321, 758 S.E.2d 817 (2014).

⁹¹*Spraggins v. State*, 258 Ga. 32, 364 S.E.2d 861 (1988).

each defendant separately and to remind the jury that the guilt of one defendant did not require the return of a similar verdict against a codefendant was not error, where the trial court's instructions as a whole, especially that portion concerning the need for 12 separate and independent verdicts and the acceptability of mixture of guilty and not guilty verdicts, adequately covered the area.⁹²

A trial court does not have to charge the jury on accomplice testimony *sua sponte*, absent a request by the defendant.⁹³

Where there was corroboration for testimony of accomplices, court was not required to charge jury that testimony of accomplice should be received with caution and viewed with skepticism.⁹⁴

Where a trial court did give a thorough charge on corroboration, the trial court's refusal to give the defendant's requested charge on corroboration of accomplice testimony did not prejudice the defendant.⁹⁵

A defendant was not entitled to an instruction that there were procedural advantages in not presenting any witnesses.⁹⁶

It is improper to charge that words or gestures alone are always inadequate to reduce murder to manslaughter.⁹⁷ Written request to charge voluntary manslaughter must be given if there is slight evidence to support it.⁹⁸

It was harmful error where the judge charged the felony murder rule but did not define the elements of a felony that would make the rule applicable to the evidence.⁹⁹ However, a definition is not required in instructions regarding those words which are found in common usage and understood by people of ordinary experience. Homicide is such a word.¹⁰⁰

It was error for a trial court to instruct the jury that self-defense is not a defense to felony-murder.¹⁰¹

A defendant charged with malice murder and felony-murder was not entitled to an instruction on involuntary manslaughter

⁹²George v. State, 260 Ga. 809, 400 S.E.2d 911 (1991).

⁹³Woodard v. State, 260 Ga. 825, 400 S.E.2d 311 (1991).

⁹⁴Tamplin v. State, 235 Ga. 20, 218 S.E.2d 779 (1975), judgment vacated in part on other grounds, 235 Ga. 774, 221 S.E.2d 455 (1975).

⁹⁵Myers v. State, 260 Ga. 412, 395 S.E.2d 811 (1990).

⁹⁶Leggett v. State, 256 Ga. 274, 347 S.E.2d 580 (1986).

⁹⁷Hambrick v. State, 256 Ga. 688, 353 S.E.2d 177 (1987).

⁹⁸Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982).

⁹⁹Edwards v. State, 233 Ga. 625, 212 S.E.2d 802 (1975).

¹⁰⁰Mitchell v. State, 283 Ga. 341, 659 S.E.2d 356 (2008).

¹⁰¹Heard v. State, 261 Ga. 262, 403 S.E.2d 438 (1991) (overruled on other grounds by, State v. Kazmierczak, 331 Ga. App. 817, 771 S.E.2d 473 (2015)).

based on his alleged use of excessive force in self-defense.¹⁰²

Because a conference with the court to discuss jury instructions involves “essentially legal argument,” a defendant does not have a constitutional right to attend.¹⁰³

In a criminal trial, the jury resumed deliberations after hearing the trial court’s modified *Allen* charge and subsequently returned a verdict finding defendant guilty of felony murder and aggravated assault. The Georgia Supreme Court in *McKee v. State*,¹⁰⁴ described what happened next. During the poll of the jury, one juror answered “I don’t know” when asked whether the verdict was freely and voluntarily made. McKee moved for a mistrial when the judge sent the jury back for more deliberations. The jury later returned a verdict, again finding McKee guilty of felony murder and aggravated assault. When McKee complained on appeal that his motion for mistrial had not been granted, the Supreme Court denied relief.

For instructions when defense of insanity is interposed, see § 4:6, *supra*.

Though not burden-shifting, the charge that “where the defense of justification is offered, it is the duty of the jury to consider it along with all the testimony in this case, and if the evidence, taken as a whole, raises reasonable doubt in the mind of the jury of the defendant’s guilt, then you should acquit him” could have the possibility of being confusing in a close case.¹⁰⁵ The charge contains two truisms, that the jury must consider evidence of an affirmative defense and that the jury should acquit the defendant if the totality of the evidence raises a reasonable doubt of guilt, and serves no valuable purpose since those basic ideas are covered in other standard instructions. Since the instruction is so general, it could be seen to dilute the message of other more specific charges concerning affirmative defenses. Therefore, although the charge remains a correct statement of the law and does not serve to shift the burden of proof, it should no longer be given.

In 2012, the Georgia Supreme Court held that a trial court is not required to instruct the jury that it cannot find a defendant guilty of felony murder if the underlying homicide resulted from passion or provocation.¹⁰⁶ The court’s holding overruled *Russell v.*

¹⁰²*Pullin v. State*, 257 Ga. 815, 364 S.E.2d 848 (1988). 591 S.E.2d 814 (2004).

¹⁰³*Moss v. State*, 275 Ga. 96, 561 S.E.2d 382 (2002). ¹⁰⁵*Preston v. State*, 282 Ga. 210, 647 S.E.2d 260 (2007).

¹⁰⁴*McKee v. State*, 277 Ga. 577, S.E.2d 669 (2012). ¹⁰⁶*Terry v. State*, 291 Ga. 508, 731 S.E.2d 669 (2012).

*State*¹⁰⁷ and instead established the clarified rule that a trial court must only inform the jury as to the legal effect a finding of provocation or passion could have in mitigating a felony murder charge.

The trial court did not commit reversible error in instructing the jury regarding the defendant's arson charge but included elements not charged in the complaint in *Sharpe v. State*.¹⁰⁸ There, the Georgia Supreme Court found that the trial court's instruction that the jury must find the defendant guilty beyond a reasonable doubt as to every element of a crime charged, as well as a lack of evidence that the jury convicted the defendant on the crime not charged in the complaint, made this error harmless.

§ 35:16 Correcting erroneous instructions

If the trial judge learns that he has given an erroneous instruction, he may correct the mistake and avoid the need for a new trial or reversal. To correct the mistake, the proper procedure is for the judge to read it to the jury and state that he is withdrawing it and that they should give it no consideration whatsoever.¹

The charge should avoid conflict. Jury instruction which required defense verdict for the hospital if the jury found no professional negligence conflicted with other instructions which authorized the jury to consider ordinary negligence.²

The fact that the court gave a correct charge at first will not avail to defeat an exception to a subsequent erroneous instruction. Conversely, as a rule, a misdirection is not cured by a subsequent statement of a correct principle, unless the judge calls the jury's attention to the incorrect statement and retracts or modifies it or unless the context shows that one charge is in fact a correction or modification of the other.³

Trial court's recharge on aggravated assault was sufficient to correct any possible error that occurred in the court's initial charge to the jury on that crime; thus, the erroneous instructions on intent and malice did not require reversal of the aggravated assault conviction, where the erroneous instructions were given specifically on the malice murder charge.⁴

Bringing jury back into court and recharging jury shortly after

¹⁰⁷*Russell v. State*, 265 Ga. 203(3), 455 S.E.2d 34 (1995).

¹⁰⁸*Sharpe v. State*, 291 Ga. 148, 728 S.E.2d 217 (2012).

[Section 35:16]

¹*Executive Committee of the Baptist Convention v. Ferguson*, 213 Ga. 441, 99 S.E.2d 150 (1957).

²*See Dent v. Memorial Hosp. of Adel*, 270 Ga. 316, 509 S.E.2d 908 (1998), where conflict was not harmless.

³*Sutton v. Ford*, 144 Ga. 587, 87 S.E. 799 (1916).

⁴*Pace v. State*, 274 Ga. 69, 548 S.E.2d 307 (2001).

jury had retired was sufficient to correct any omission in original charge.⁵

Improper preliminary instructions given to the jury during voir dire were satisfactorily corrected by giving proper instructions at the close of the case.⁶

An error in instructions does not throw doubt on a guilty verdict where the error could only have benefited the defendant.⁷

§ 35:17 Disposition of instructions

In earlier cases it was error to send the written charge out with the jury.¹ In 1986, the statute regarding the writing out of jury instructions was amended to provide that the written charges may be sent out with the jury during its deliberations.²

Cases have dealt with the issue of sending the written instructions out with the jury.³ These cases not only condone the delivery of written instructions to the jury, but were promotive of the practice as assisting the jury to understand the relevant law to apply to the case. So does another decision, holding that submission to the jury of written instructions that the court had given orally was proper.⁴

⁵Shepherd v. State, 236 Ga. 787, 225 S.E.2d 312 (1976).

⁶Cochran v. State, 256 Ga. 113, 344 S.E.2d 402 (1986).

⁷Cohen v. State, 257 Ga. 544, 361 S.E.2d 373 (1987).

[Section 35:17]

¹Gholston v. Gholston, 31 Ga. 625, 1860 WL 2426 (1860).

²O.C.G.A. § 9-10-5. In this text, see § 36:6, *infra*.

³See Anderson v. State, 262 Ga. 26, 413 S.E.2d 732 (1992) and Reese v. State, 241 Ga. App. 350, 526 S.E.2d 867 (1999).

⁴Stubbs v. Ray, 245 Ga. App. 785, 539 S.E.2d 179 (2000).

Chapter 36

Conduct of Jury

- § 36:1 General conduct of jury and those dealing with it
- § 36:2 Conduct of jurors during trial
- § 36:3 Communications with jurors before and during trial
- § 36:4 Jurors reading newspaper accounts of trial
- § 36:5 Separation of jury during trial
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§ 36:1 General conduct of jury and those dealing with it

The jury is an intrinsic part of our judicial system. A highly complex set of rules has developed governing the conduct of the jury, what it can see and do and how it operates. These rules overlay every aspect of the jury trial from the time the prospective jurors are called until they are discharged.

Great caution must be exercised, both by the court and counsel, to avoid getting before the jury matters that are not admissible in evidence. This is often difficult because the judge must know certain information before making a ruling, and it is not practical to determine the admissibility of all evidence out of the hearing of the jury. The problem is compounded when counsel attempts to get something to the jury that is not admissible and does so under the guise of determining its admissibility.

Finder of fact, the jury, must determine the facts of a case from the evidence, rather than from matters which are extrinsic to the record.¹

A defendant's sixth amendment right is violated when a juror, who essentially becomes an unsworn witness, intentionally gathers extra-judicial evidence that is highly prejudicial to the ac-

[Section 36:1]

685 S.E.2d 323 (2009).

¹In re Hudson, 300 Ga. App. 340,

cused and communicates that information to other jurors in the jury room.²

§ 36:2 Conduct of jurors during trial

Jurors should not discuss the case among themselves, Am. Jur. 2d, Trial § 1610, or begin to make up their minds until they retire to begin their deliberations.

It is not error for counsel to ask the jurors to take notes,¹ but the judge may refuse to permit it.²

When the court is hearing arguments concerning matters of law, it has discretion to determine whether the jury shall remain in the box or be sent to the jury room. The better practice, however, is to send the jury to the jury room when matters are being argued that might be improper evidence.³

A defendant is not prejudiced by having prospective jurors present in courtroom during calendar call, observing disposition of guilty pleas and imposition of sentences in other cases.⁴

As to misconduct by jurors, that may be ground for a mistrial, see § 31:3, *supra*. For discharge of jury for inability to agree, see § 31:6, *supra*.

Sometimes jurors ask questions during a trial. In *Allen v. State*,⁵ the judge stopped the juror from asking his question orally and directed him to write it down. In the Supreme Court's opinion, Justin Benham took the opportunity to point out that Georgia does not bar questioning of witnesses by jurors, although the questions must go through the trial judge. Prior to *Allen*, many reviewers classified Georgia as one of a minority of states that prohibited any questions from jurors to witnesses during the course of a trial. Legal observers in Georgia disagreed. Georgia practice, clarified by *Allen*, was summarized by Justice Benthams as follows: "While jurors in Georgia courts may not ask questions to witnesses directly, a trial court may receive written questions from the jury and ask those questions which the court finds proper, or allow counsel for either party to ask a testifying witness the questions found to be proper."⁶ The Court explained that trial courts must "properly instruct" the jury that jury questions

²*Satterwhite v. State*, 235 Ga. App. 687, 509 S.E.2d 97 (1998). More on jury "free enterprise," see § 36:12, *infra*.

[Section 36:2]

¹*J.B. Simmons Lumber Co. v. Toccoa Furniture Co.*, 26 Ga. App. 758, 107 S.E. 340 (1921).

²*Vaughn v. State*, 17 Ga. App.

268, 86 S.E. 461 (1915).

³See *Slaughter v. Heath*, 127 Ga. 747, 57 S.E. 69 (1907).

⁴*McBrayer v. State*, 259 Ga. 513, 383 S.E.2d 879 (1989).

⁵*Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

⁶*Allen v. State*, 286 Ga. 392, 397, 687 S.E.2d 799 (2010).

must be in “appropriate form”; that is, (1) in writing and (2) submitted “to the trial court at the conclusion of the [questioned] witnesses’ testimony.”⁷

Trial court abused its discretion by allowing jury to discuss evidence during trial breaks in medical malpractice action and by allowing jury to submit to the court some questions for witnesses; procedures implemented by court encouraged the jury to take an active, inquisitorial role, made the trial judge to some extent the jury’s mouthpiece in pursuing its own version of facts, and correspondingly reduced counsel’s control over presentation of evidence. A trial court may receive written questions from the jury and ask those questions the court finds proper, but as when propounding its own questions to witnesses, must exercise great caution to avoid the appearance of commenting on the evidence. While Georgia law permits a trial judge to propound questions to any witness for the purpose of developing the truth, a trial judge as a neutral administrator of justice must scrupulously avoid the appearance of taking the side of one litigant over another and thus influencing the jury’s verdict.⁸

For replacement of sleeping jurors, see *Gibson v. State*.⁹

§ 36:3 Communications with jurors before and during trial

While jurors may not ask questions of witnesses directly, a trial court may receive written questions from the jury and ask those questions which the court finds proper, or allow counsel for either party to ask a testifying witness the questions found to be proper. Hence, in *Allen v. State*,¹ the Georgia Supreme Court held that the trial court acted within its discretion in permitting the prosecutor to ask a witness during re-direct a question that addressed a concern voiced by a juror at the conclusion of defense counsel’s cross-examination of the witness regarding position of shell casings.

A person commits embracery when he: (a) with intent to influence a person summoned or serving as a juror, communicates with him otherwise than is authorized by law, in an attempt to influence his action as a juror; or (b) summoned as a juror, accepts anything of value offered to him with the understanding that it is given with the intent of influencing his action as a

⁷*Allen v. State*, 286 Ga. 392, 397, 687 S.E.2d 799 (2010).

⁸*Steele v. Atlanta Maternal Fetal Medicine, P.C.*, 271 Ga. App. 622, 610 S.E.2d 546 (2005) (overruled on other grounds by, *Smith v. Finch*, 285 Ga. 709, 681 S.E.2d 147 (2009)).

⁹*Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011).

[Section 36:3]

¹*Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

juror.

For a discussion of the effect of publicity on the jury, see § 2:15, *supra*.

Parties and other persons connected with a case on trial or having some interest therein, including counsel, witnesses, and relatives of parties, should carefully avoid private communications and social intercourse with jurors. This rule is based on the policy of the law to keep the jurors free from influences tending to prejudice them against or in favor of either party and is designed to maintain integrity of judicial procedure and impartial administration of justice. Every appearance of evil should be avoided and every precaution taken to guard against matters tending to influence the jury in their deliberation on their verdict.²

Where one of the lawyers and a juror were playing cards openly in presence of adverse counsel and others, court did not err in refusing to grant a mistrial, although counsel should refrain from social contact with jurors.³

Generally, the communication of a juror with a third person, which is nothing more than idle remarks, is a mere irregularity, which is not cause for a new trial.⁴ But, where the sheriff tells a juror what a witness said, the verdict must be set aside, regardless of the merits of the case.⁵

Any error in seating potential jurors close enough to overhear discussions between a murder defendant and his counsel was harmless where defense counsel questioned the only juror who overheard such remarks and was satisfied that there was not any harm.⁶

Where the jury is not under the rule of sequestration, it is not sufficient to show that jury was allowed to disperse; rather, the defendant must show not only a contact between the juror and a third person but that such conduct related to the case.⁷

The presence of the county's chief law enforcement officer in the jury room bringing in the indictment constitutes communication with the jury within the meaning of the statute (O.C.G.A. § 15-12-140), which imposes upon the bailiff the duty of permitting no one to communicate with the jury while in the jury room

²Alabama Great Southern R. Co. v. Brown, 140 Ga. 792, 79 S.E. 1113 (1913).

³Robbins v. Brannon, 145 Ga. 262, 88 S.E. 971 (1916).

⁴Doyal v. State, 70 Ga. 134, 1883 WL 2886 (1883); Suple v. State, 133

Ga. 601, 66 S.E. 919 (1909).

⁵Cross v. State, 18 Ga. App. 275, 89 S.E. 451 (1916).

⁶Brooks v. State, 258 Ga. 20, 365 S.E.2d 97 (1988).

⁷Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980).

and which warrants a mistrial.⁸

Even though the defendant's case was not discussed, reversal was required where during a break in the trial a juror phoned the prosecution's chief witness, a policeman, to report a second crime perpetrated by a second individual.⁹

Bailiff is to make no communication to jury and is to permit no one to communicate with them except by leave of court; where communication between bailiff and jury is shown, there is rebuttable presumption of harm.¹⁰

A bailiff's expression of opinion to a juror about the homicide defendant's guilt required a new trial.¹¹

[W]e take this opportunity to require trial courts to have jurors' communications submitted to the court in writing; to mark the written communication as a court exhibit in the presence of counsel; to afford counsel a full opportunity to suggest an appropriate response; and to make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications counsel deems appropriate before the jury is exposed to the instruction.¹²

§ 36:4 Jurors reading newspaper accounts of trial

The question as to the effect of a juror's or prospective juror's reading or otherwise learning of an account of the trial may arise at several stages of the trial. The pretrial publicity may charge the atmosphere so as to deprive the defendant of a fair trial and cause bias among the prospective jurors.¹ Or, after they are selected, the juror may learn of an account of the trial by reading or hearing other reports on it, which would have an improper effect on his verdict.

It is improper for jurors to read newspaper accounts of the progress of a trial or relating to the case on trial.²

Where a juror said that he "believed" he could serve without prejudice and render a just verdict, trial court did not err in allowing him to serve, even though he had read newspaper accounts and seen pictures concerning the case.³ Highly prejudicial reporting of a trial will deprive a defendant of a fair trial, *Irvin v.*

⁸*McMichael v. State*, 252 Ga. 305, 313 S.E.2d 693 (1984).

⁹*Lamons v. State*, 255 Ga. 511, 340 S.E.2d 183 (1986).

¹⁰*Battle v. State*, 234 Ga. 637, 217 S.E.2d 255 (1975).

¹¹*Lockridge v. State*, 260 Ga. 528, 397 S.E.2d 695 (1990).

¹²*Lowery v. State*, 282 Ga. 68, 646 S.E.2d 67 (2007).

[Section 36:4]

¹See §§ 2:15 and 6:17, *supra*.

²*Styles v. State*, 129 Ga. 425, 59 S.E. 249 (1907).

³*Tant v. State*, 123 Ga. App. 760, 182 S.E.2d 502 (1971).

Dowd;⁴ but it was held in the same case that it is not required that a prospective juror be totally ignorant of the facts and issues involved and that most well qualified jurors will have formed some impression or opinion as to the merits in an important case, it being sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Test for closing proceedings when substantial probability of damaging publicity exists, see *Press-Enterprise Co. v. Superior Court of California for Riverside County*.⁵

While a mistrial may be granted because of prejudicial newspaper publicity during the trial, there must be proof that some of the jurors read the offending articles.⁶

Sometimes jurors read about a trial in a newspaper after they have been selected to be on the jury. In a 2005 case a juror's exposure to a newspaper article recounting events of the first day of the trial did not warrant a mistrial in a prosecution for malice murder. The jurors stated that the article did not affect their ability to fairly and impartially decide the case, jurors did not discuss the matter, and the article merely contained a summary of the first day of the trial and did not contain any prejudicial information to which jurors had not been exposed during the first day.⁷ When jurors have been exposed to news material concerning a case, the decision whether to grant a mistrial is within the trial court's discretion.

§ 36:5 Separation of jury during trial

It is not the normal practice to require the jury to be kept together prior to their retiring to deliberate in civil cases or in most criminal cases.

Except in capital cases, the matter is addressed to the sound discretion of the judge.¹ Under O.C.G.A. § 15-12-142, a jury sworn to hear a capital case must be sequestered after they have been selected to hear the case; however, the trial court may permit the jury dispersal with the consent of defendant or defendant's counsel.²

No reversible error was found when chief bailiff was allowed to separate two jurors from the others by taking them to jog three or four times at a local track. Defense counsel appeared to have

⁴*Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959).

⁵*Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).

⁷*Washington v. State*, 279 Ga. 722, 620 S.E.2d 809 (2005).

[Section 36:5]

¹O.C.G.A. § 15-12-142.

⁶*Marshall v. U.S.*, 360 U.S. 310,

²*Perault v. State*, 162 Ga. App. 294, 291 S.E.2d 122 (1982).

consented, but even if there was no consent, the State was held to have carried its burden of demonstrating no harm.³

Once the jury retires to consider its verdict, it is error to permit them to separate without the consent of the parties.⁴

A juror who violates the order prohibiting separation may be found in contempt.⁵

Trial court's decision to sequester a jury was not an abuse of discretion in a murder prosecution, even though the defendant requested that the jury not be sequestered. The defendant failed to show how he was harmed by the jury being sequestered.⁶

§ 36:6 Items taken by jury to jury room

In 1986, the statute regarding the writing out of jury instructions was amended to provide that the written charges may be sent out with the jury during its deliberations.¹

All properly introduced documentary and demonstrative evidence will be taken into jury room when jury retires, including photographs, guns, and other objects; jury may examine and evaluate objects taken to jury room, so long as their examinations and tests do not have the effect of introducing new evidence.² The Georgia Supreme Court has held that a jury can review evidence that has been admitted even when that evidence was not published or explained during trial.³

While many courts do not send demonstrative and visual aids out with the jury, see § 21:1, there are occasional exceptions. It is up to the trial court's discretion whether demonstrative evidence may be sent back to jury deliberations.⁴ When demonstrative evidence is merely used to help clarify a piece of evidence or testimony, it is not error for it to be sent back to jury deliberations.⁵

Written testimony may not normally go out with the jury.⁶

While the trial court has discretion to allow the jury to rehear

³Huey v. State, 263 Ga. 840, 439 S.E.2d 656 (1994).

⁴Western Union Tel. Co. v. Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944).

⁵See in this text § 5:5, supra.

⁶Lewis v. State, 279 Ga. 756, 620 S.E.2d 778 (2005).

[Section 36:6]

¹O.C.G.A. § 9-10-5. See § 35:17, supra.

²Carson v. State, 241 Ga. 622,

247 S.E.2d 68 (1978).

³Green v. State, 317 Ga. 250, 253-54, 892 S.E.2d 733 (2023).

⁴Chance v. State, 291 Ga. 241, 728 S.E.2d 635 (2012) (holding demonstrative evidence that is speculative and assumes facts not in evidence should not go back with the jury).

⁵Smith v. State, 292 Ga. 620, 740 S.E.2d 158 (2013).

⁶Tibbs v. Tibbs, 257 Ga. 370, 359 S.E.2d 674 (1987); Wilkins v. State, 291 Ga. 483, 731 S.E.2d 346 (2012).

a recorded statement in open court, the “continuing witness rule” is violated when the jury is allowed to bring recorded statements into the jury room during deliberations.⁷

The continuing witness rule prohibits writings of specific kinds from going out with the jury. These include answers to written interrogatories, written dying declarations, and signed statements of witnesses. If the document is little more than a reduction to writing of the person’s oral statements, then the writing is not given to the jury. A death certificate is not among those documents which are prohibited.⁸

The continuing witness rule was enforced and confirmed in a 2011 case from the Georgia Supreme Court. The “continuing witness rule” prohibited the admission of notes used by a nonparty witness that were merely cumulative of the witness’s testimony. Testator’s attorney’s notes were properly excluded from evidence in will contest by continuing witness rule, where attorney refreshed his recollection with the notes and then testified from memory about the will discussions, making the contents of the notes cumulative.⁹

Notes made during trial by jurors are different. The Georgia Court of Appeals upheld a trial court’s instructions for the jury to share notes taken during the trial against the defendant’s continuing witness rule attack.¹⁰

Although all writings introduced in lieu of testimony from the witness stand, which depend entirely for their value on the credibility of the maker, should not be in the possession of the jury during their deliberations, no error will be found if timely objection is not made.¹¹

Where defendant merely objected to the admission into evidence of written transcripts of his incriminating statements, but made no objection to the jury’s taking the transcripts to the jury room, the trial court committed no error in permitting the transcripts to go to the jury room.¹²

Allowing the narrative portion of a police report to go out with a jury may violate the continuing-witness rule.¹³ The court in

⁷McNear v. State, 326 Ga. App. 32, 755 S.E.2d 844 (2014).

⁸Bryant v. State, 270 Ga. 266, 507 S.E.2d 451 (1998).

⁹McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60 (2011).

¹⁰Miller v. State, 307 Ga. App. 598, 705 S.E.2d 697 (2011).

¹¹Stidem v. State, 246 Ga. 637, 272 S.E.2d 338 (1980).

See also Foster v. State, 259 Ga. 206, 378 S.E.2d 681 (1989).

¹²Gribble v. State, 248 Ga. 567, 284 S.E.2d 277 (1981).

¹³Hopkins v. State, 283 Ga. App. 654, 642 S.E.2d 356 (2007).

Hopkins cited *Broadnax-Woodland v. State*.¹⁴ The theory of the rule was stated:

In Georgia the “continuing witness” objection is based on the notion that written testimony is heard by the jury when read from the witness stand just as oral testimony is heard when given from the witness stand. But, it is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once.

A continuing witness objection can be made at two points in the case: (1) when the exhibit is tendered or (2) before exhibits are sent out with the jury. However, in *Hopkins*, defendant could not complain on appeal that trial court erred in sending a police report to the jury over his continuing-witness objection; report was tendered into evidence by the defendant, and thus any error was self-induced.

Although it is error to allow over defendant’s objections tape recordings of defendant’s statements to go to the jury room, if it is highly probable because of the overwhelming evidence against the defendant that the playing of the statement in the jury room did not contribute to the judgment, the error then will be deemed harmless.¹⁵

Trial court erred by allowing child victim’s videotaped statement to go to the jury room, over the objection of defense counsel, in prosecution for child molestation and first degree cruelty to children. This case also held that the trial court has discretion to allow the jury to rehear recorded statements, if it is done in open court.¹⁶ The replay of testimony requested by the jury during the presentencing phase of a felony-murder and armed robbery trial is within the sound discretion of the trial court.¹⁷

Where exhibit of fingerprint was properly admitted into evidence, there was no error in allowing it to be sent out with the jury.¹⁸

In child support or alimony actions, the jury may take the par-

¹⁴*Broadnax-Woodland v. State*, 265 Ga. App. 669, 670 ¶ 1, 595 S.E.2d 350 (2004) (trial court erred in admitting police report into evidence, and allowing it to go out with the jury, over defendant’s continuing witness objection) and *Kent v. State*, 245 Ga. App. 531, 533 ¶ 3, 538 S.E.2d 185 (2000) (allowing victim’s written statement to go out with the jury violated the continuing witness rule).

¹⁵*Owens v. State*, 248 Ga. 629, 284 S.E.2d 408 (1981).

¹⁶*Summage v. State*, 248 Ga. App. 559, 546 S.E.2d 910 (2001) (regarding what goes out with jury, continuing witness rule invoked by defense).

¹⁷*Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982) (abrogated on other grounds by, *Jones v. State*, 261 Ga. 665, 409 S.E.2d 642 (1991)).

¹⁸*Heard v. State*, 170 Ga. App. 130, 316 S.E.2d 504 (1984). See *Fields v. State*, 266 Ga. 241, 243, 466 S.E.2d 202 (1996) (it is error to allow jury to take written or recorded statements

ties' Rule 24.2 affidavits into the jury room.¹⁹

The "continuing witness" objection is based on the notion that written testimony is heard by the jury when read from the witness stand, just as oral testimony is heard when given from the witness stand; but it is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once.²⁰

Although the trial court erred in permitting the search warrant and affidavit to be sent into the jury room as an additional witness, the error was harmless, since the evidence was overwhelming that the defendant was the suspect named in the search warrant.²¹

It is proper to send documentary evidence out with the jury.²² But it is improper to send interrogatories and depositions out, because they are in lieu of testimony.²³

In a murder prosecution, permitting the death certificate that contained hearsay information that the victim was beaten in an altercation and that the cause of death was homicide in the jury room was harmless error, as conclusions in the death certificate were supported by other evidence and were merely cumulative.²⁴

Further details on what may be taken back, see Carlson & Carlson, *Successful Techniques for Civil Trials* (2d ed.) § 3:41.

Act of the trial court in allowing the jury to take a business card with notations on the back of it with them to the jury room during deliberations for libel trial did not violate the continuing witness rule; the business card contained notations of things for executive to say during meeting with employees, the business card was not the equivalent of an affidavit or deposition, and executive was not allowed to testify at trial as to the statements that he made during the meeting.²⁵

Victim's statement went out with the jury in *Clark v. State*.²⁶

Georgia's continuing witness rule was developed under former Georgia decisional law and is not specifically housed in any current Georgia evidence statute. Its sustainability, at least as

into the jury room during deliberations unless statements are consistent with defendant's theory of case).

¹⁹Tibbs v. Tibbs, 257 Ga. 370, 359 S.E.2d 674 (1987).

²⁰McAlpine v. Leveille, 258 Ga. 422, 369 S.E.2d 907 (1988).

²¹Nelson v. State, 197 Ga. App. 898, 399 S.E.2d 748 (1990).

²²Whitehead v. Seymour, 120 Ga.

App. 25, 169 S.E.2d 369 (1969).

²³Whitehead v. Seymour, 120 Ga. App. 25, 169 S.E.2d 369 (1969).

²⁴Foster v. State, 259 Ga. 206, 378 S.E.2d 681 (1989).

²⁵Hayes Microcomputer Products, Inc. v. Franza, 268 Ga. App. 340, 601 S.E.2d 824 (2004).

²⁶Clark v. State, 284 Ga. 354, 667 S.E.2d 37 (2008).

traditionally configured, has been questioned in some decisions.²⁷

§ 36:7 Control of jury during deliberations

Bailiffs are charged with control of the jury, and it may be error to leave the jury in charge of one not given authority to act as bailiff and not sworn.¹

Where the bailiff fails to remain with the jury at all times, there must be a new trial.² In one case it was held that a new trial was not required where bailiff was in jury room during deliberations, the State having made a satisfactory explanation.³

The presence of an alternate juror in the jury room during deliberations was harmless error, where the affidavits of the other jurors established that the alternate juror did not influence any juror or the jury's verdict.⁴

Trial counsel should have objected when county sheriff, who had provided key testimony for the state during the defendant's trial, assumed the duties of a bailiff for half of a four-day period of trial, even if the sheriff never discussed the case directly with jurors.⁵

§ 36:8 Manner of conducting deliberations

In a capital case, the jury need not elect a foreman at the sentencing phase, since it has already done so at the guilt phase.¹

The replacement of a regular juror with an alternate juror during jury deliberations was harmless error where the alternate juror was drawn from the same source in the same manner, had the same qualifications as the other jurors, and listened to the same evidence and charge of court.²

Trial court may replace juror, even jury foreman, during deliberation when juror advises the court of a previous relationship with a member of the defendant's family.³

²⁷See, e.g., *Davis v. State*, 371 Ga. App. 469, 901 S.E.2d 219 (2024). S.E.2d 255 (2009).

[Section 36:7]

¹*Meyers v. Clark*, 100 Ga. App. 845, 112 S.E.2d 300 (1959).

²*Fisher v. State*, 102 Ga. App. 505, 116 S.E.2d 640 (1960).

³*Brinkins v. State*, 29 Ga. App. 189, 114 S.E. 721 (1922).

⁴*State v. Newsome*, 259 Ga. 187, 378 S.E.2d 125 (1989).

⁵*Bass v. State*, 285 Ga. 89, 674

[Section 36:8]

¹*Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987).

²*Ballentine v. State*, 194 Ga. App. 560, 390 S.E.2d 887 (1990).

³See *Carr v. State*, 282 Ga. 698, 653 S.E.2d 472 (2007) where trial court was advised by the jury foreman that he had prepared a tax return for the defendant's sister but did not realize it until he saw the defendant's sister on the first day of the trial; the

§ 36:9 Rules governing arrival at verdict

Trial judge is not bound to accept a jury's feeling that deliberations are hopelessly deadlocked.¹

It is within the discretion of the trial court to give an *Allen* charge to the jury; the decisive factor is the jury's inability to reach a verdict, not the length of the deliberation.²

It is within the trial court's discretion, rather than that of the jury, to decide when a jury is hopelessly deadlocked and a mistrial is required.³

The jury should not be influenced by sympathy or prejudice.⁴ It should consider the evidence, but not the law, in the light of its own observations and experiences in the affairs of life.⁵

In deciding whether any fact has been proved, it is proper for the jury to consider the number of witnesses testifying on one side or the other as to that fact, but the preponderance is not necessarily with the greater number.⁶

They should not participate in a "quotient verdict"—that is, one arrived at by totaling the verdict of each individual juror and dividing by 12—but such a verdict is not void where the jury agreed that the quotient would be their verdict after the averaging process has taken place.⁷ Where the jurors make a prior agreement to abide by a quotient verdict, such verdict will be invalidated.⁸

The fact that the jury returned a verdict very promptly does not indicate that the losing party did not have a fair trial, so that no reversal will be had even though the entire time that elapsed between the time the jury retired and when they returned their verdict was only 10 minutes.⁹

§ 36:10 Communications with jury during deliberations

An illustration of a judge communicating directly with a

jury foreman did not promptly inform the court of knowing the defendant's sister as he was instructed to do, following his voir dire representation that he did not know any of the defendant's relatives.

[Section 36:9]

¹Todd v. State, 243 Ga. 539, 255 S.E.2d 5 (1979).

²Johnson v. State, 293 Ga. App. 32, 666 S.E.2d 452 (2008).

³Johnson v. State, 293 Ga. App. 32, 666 S.E.2d 452 (2008).

⁴Sellers v. White, 104 Ga. App.

148, 121 S.E.2d 385 (1961).

⁵Housing Authority of City of Decatur v. Schroeder, 113 Ga. App. 432, 148 S.E.2d 188 (1966), judgment rev'd on other grounds, 222 Ga. 417, 151 S.E.2d 226 (1966).

⁶O.C.G.A. § 24-14-4.

⁷Cromer & Thornton v. Underwood, 64 Ga. App. 519, 13 S.E.2d 860 (1941).

⁸City of Columbus v. Ogletree, 102 Ga. 293, 29 S.E. 749 (1897).

⁹Patillo v. Thompson, 106 Ga. App. 808, 128 S.E.2d 656 (1962).

deadlocked jury to decide if the court will declare a mistrial appeared in *Renico v. Lett*.¹ When a judge talks to the jury, and the discussion involves substantive matters, care should be taken in a criminal case to have the accused present.²

Questions from jurors should be in writing.³

The Georgia Supreme Court has approved of the following for communications between jurors and trial courts: (1) have jurors' communications submitted to the court in writing; (2) mark the written communication as a court exhibit in the presence of counsel; (3) afford counsel a full opportunity to suggest an appropriate response; and (4) make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications counsel deems appropriate before the jury is exposed to the instruction.⁴

In *Burtts v. State*,⁵ the trial judge denied the jury's request to see the transcript of an eyewitness' statements to police. The statements had been read in open court during the trial. The trial judge denied the jury's request, which denial had been put in writing. While there had been a deviation from the rule that the trial judge should not in any manner communicate with the jury about the case in the absence of the accused and his counsel, the Supreme Court found "no reasonable probability that the erroneous communication contributed to the verdict."⁶

*Hanifa v. State*⁷ was heavily relied upon in *Fuller v. State*.⁸ In *Fuller*, the trial judge went to the jury room and communicated

[Section 36:10]

¹*Renico v. Lett*, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010).

²*Wells v. State*, 297 Ga. App. 153, 676 S.E.2d 821 (2009):

The trial court's communication at issue in this case was not relating to the comfort and convenience of the jury, but was instructive to the jurors who sought guidance in light of their inability to reach unanimous decisions on several counts Given the necessary considerations and significant ramifications, instruction to the deliberating jury concerning its reported deadlocked status on several counts constituted a substantive communication at a critical stage in Wells' criminal prosecution . . . such communication having occurred outside the presence of Wells and his attorney mandates reversal of Wells' convictions.

³*Lowery v. State*, 282 Ga. 68, 646

S.E.2d 67 (2007):

[W]e take this opportunity to require trial courts to have jurors' communications submitted to the court in writing; to mark the written communication as a court exhibit in the presence of counsel; to afford counsel a full opportunity to suggest an appropriate response; and to make counsel aware of the substance of the trial court's intended response in order that counsel may seek whatever modifications counsel deems appropriate before the jury is exposed to the instruction.

⁴*Grant v. State*, 295 Ga. 126, 757 S.E.2d 831 (2014).

⁵*Burtts v. State*, 269 Ga. 402, 499 S.E.2d 326 (1998).

⁶See also *Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998).

⁷*Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998).

⁸*Fuller v. State*, 277 Ga. 505, 591

with the jury on two occasions after the close of evidence, accompanied both times by the prosecuting attorney and defense counsel, but without Fuller. A colloquy between the trial judge and the jury is a part of the proceedings to which the defendant and counsel are entitled to be present. However, in order for a defendant to complain about his absence from the process, there must be an objection to the court's procedure. The right to be present can be waived by lack of objection.

A judge may send a jury back to the jury room with the admonition to endeavor in a spirit of conciliation to harmonize their views. He may do so where the jury announces its inability to agree and also where it does not so announce. There is authority to the effect that a court may warn a jury not to be obstinate, telling them to lay aside prejudice and pride of opinion, to listen to argument and reason, or to give due regard and weight to the opinions of their fellows in an effort to reach a verdict. But a court goes too far where it suggests that jurors endeavor to accommodate their views to those of the others and come to an understanding if humanly possible, where it tells disagreeing jurors that it is their duty to yield up their personal views, where it authorizes disagreeing jurors to render a compromise verdict by sacrificing their conscientious opinions merely for the sake of reaching an agreement.⁹

Trial court did not err where, in response to question sent by jurors asking whether they could sentence defendant to life sentence without any possibility of parole, trial judge instructed bailiff to instruct jurors that court could not answer that question; although communications with jury are to be discouraged except in open court with all persons present, communication did not amount to instruction or charge to jury, and no reversible error transpired.¹⁰ Generally, the bailiff must not act as an interpreter of jurors' questions and the trial judge's answers. The bailiff must not answer questions posed by jurors based upon his or her own perception of the questions, law or evidence. Any inquiries by jurors ultimately related to their decision process must be directed to the judge without interpretation by the bailiff or any other court personnel. Finally, any answers to such questions must be given in open court with the accused and the accused's counsel present.¹¹

S.E.2d 782 (2004).

⁹Alabama Great Southern R. Co. v. Daffron, 136 Ga. 555, 71 S.E. 799 (1911).

¹⁰Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975).

¹¹Morris v. State, 257 Ga. 781, 364 S.E.2d 571 (1988).

In *Gibson v. State*,¹² Gibson contended on appeal that the trial court erred by referring to the appellate review of his case when responding to a jury question about trial exhibits that were not sent out with the jury. The Supreme Court agreed, finding that the judge's statements improperly referenced appellate review when the judge said if he gave the jury certain exhibits "we would have to try the case all over again . . . [I]t would be reversible error for me to give you all the exhibits." Since violations of O.C.G.A. § 17-8-57 are subject to plain error review, the absence of an objection did not prevent reversal of Gibson's conviction of murder.

Although the bailiff improperly communicated with a juror by responding to her inquiry concerning the difference between malice murder and felony murder, the State successfully carried its burden of rebutting the presumption of harm when it presented the juror's testimony that she had not been influenced by the information and had not passed it on to her colleagues and the negative response of the remaining jurors as to whether they had been influenced by anything the bailiff told the juror that she might have related to them.¹³

Gag gifts to the judge and bailiff from the jurors were the object of United States Supreme Court concern in *Wellons v. Hall*,¹⁴ where the petitioner's case was remanded. Subsequent federal district court review of the case did not disturb the sentence of Wellons.

Where instructions are not sent out with the jury, they sometimes ask to hear particular instructions again. In this text, court responses to jury requests to recharge are contained in §§ 35:14 and 35:15, *supra*. In *Sharpe v. Department of Transp.*,¹⁵ issues were raised regarding the methods used by the trial court when responding to jury questions. During jury deliberations in a condemnation case, the jury sent the judge questions concerning two witnesses. As to one inquiry, the court responded by replaying a portion of the testimony of an expert, with the expert explaining how to perform a calculation. An additional question was contained in a note from the jury requesting dollar figures used by another expert. Over one party's objection, the court responded by writing dollar amounts on the note. On appeal, the objecting party relied on the rule against sending a writing that substitutes for testimony out with the jury during deliberations,

¹²*Gibson v. State*, 288 Ga. 617, 706 S.E.2d 412 (2011).

¹³*Carter v. State*, 261 Ga. 740, 410 S.E.2d 102 (1991) (overruled on other grounds by, *Sanders v. State*, 281 Ga. 36, 635 S.E.2d 772 (2006)).

¹⁴*Wellons v. Hall*, 130 S. Ct. 727, 175 L. Ed. 2d 684 (2010).

¹⁵*Sharpe v. Department of Transp.*, 270 Ga. 101, 505 S.E.2d 473 (1998).

because it places undue emphasis on the testimony. An issue was thus raised regarding the proper way to respond to jury inquiries. Generally, a trial court has discretion in replaying portions of testimony in response to jury questions, or in having testimony read back to the jury. However, when the writing was returned to the jury by the judge, separate issues were raised. The matter was resolved on a procedural ground. The objection to the judge's action was insufficient, in the view of the court. When the judge proposed to answer the jury inquiry, the objection was made that no response should be given to the specific question and the jury should simply be told "you should use your collective memories." The Supreme Court ruled that this objection only raised the question of whether it was proper to respond, and did not raise the issue of the judge's method used to communicate with the jury. "[The party's] objection did not reach the specific issue of the method chosen by the trial court to submit the testimony to the jury." For this reason, any error in the court's manner of response was waived.

Any error in trial court's response to jury's request during deliberations to listen again to tapes of defendant's interview with investigators and conversations between defendant and cellmate before trial, which was to send tapes and tape player to jury room, was not reversible error in murder trial, even though standard practice was to bring jury back into open court to rehear tapes.¹⁶

Trial judge may, in his discretion, comply with request of jury to hear during their deliberation portion of trial testimony; however, this procedure should be conducted in presence of the defendant and his counsel.¹⁷ Trial judge may, in its discretion, permit the jury at their instigation to rehear requested parts of the evidence after they have retired and begun deliberations; the court may also, in its discretion, refuse such a request. Whether the trial court will require the court reporter to read former testimony to the jury during deliberations in response to the jury's request to rehear evidence is a matter resting in its sound discretion.¹⁸

The Georgia rule is that trial judge, in his discretion, may permit jury at their request to rehear in defendant's presence requested testimony after beginning deliberation; fact that testimony was replayed from tape recording rather than reread

¹⁶*Bridges v. State*, 279 Ga. 351, 613 S.E.2d 621 (2005).

¹⁷*Watkins v. State*, 237 Ga. 678, 229 S.E.2d 465 (1976).

¹⁸*Fowler Properties, Inc. v. Dowland*, 282 Ga. 76, 646 S.E.2d 197 (2007).

from stenographic notes is of no legal consequence.¹⁹ In a criminal case, a court may properly refuse to answer the jury's questions about parole.²⁰ A court did not err in refusing to answer a jury's request for a definition of life imprisonment.²¹

Where counsel for the defendant in a murder prosecution offered no objection at trial to the trial court's refusal to allow the jurors, after beginning deliberations and upon their request, to rehear certain testimony, such ruling could not be complained of for the first time on appeal. Whether or not to grant the jury's request to rehear portions of the evidence is within the discretion of the trial judge. A judgment will not be reversed because the trial court declines to aid the jury in recalling the evidence and refuses a request to have certain testimony read back.²²

May the trial court reopen the evidence after the jury has commenced deliberations? Yes, says *Buckley v. State*.²³ At issue was the introduction into evidence of a stolen pendant with a gold half Krugerrand coin surrounded by diamonds. The jury wanted to see it, after deliberations began. The Court of Appeals stated the applicable rules of law: "First, the State was not required to establish chain of custody since the pendant 'was a distinct and recognizable physical object which could be identified upon mere observation.'²⁴ Second, '[e]ven after jury deliberations have begun, the trial court, in the sound exercise of discretion, may reopen the evidence and allow the admission of new evidence.' (Citation and punctuation omitted.)"²⁵

Defendant's absence from trial court's ex parte meeting with juror that resulted in trial court dismissing juror and replacing juror with alternate violated defendant's state constitutional right to be present at all trial proceedings; defendant did not waive her right to be present at ex parte meeting, defendant did not want juror replaced, and defendant repudiated trial counsel's apparent silent waiver of her right to be present at ex parte meeting at first opportunity.²⁶

In *Phillips v. Harmon*,²⁷ the trial court responded to a note from the jury during the course of their deliberations without ever advising the parties or their counsel that the communication

¹⁹*Johns v. State*, 239 Ga. 681, 238 S.E.2d 372 (1977).

²⁰*Childs v. State*, 257 Ga. 243, 357 S.E.2d 48 (1987).

²¹*Cohen v. State*, 257 Ga. 544, 361 S.E.2d 373 (1987).

²²*Smith v. State*, 280 Ga. 161, 625 S.E.2d 766 (2006).

²³*Buckley v. State*, 270 Ga. App. 493, 606 S.E.2d 581 (2004).

²⁴*Attaway v. State*, 259 Ga. App. 822, 827(3), 578 S.E.2d 529 (2003).

²⁵*Gardner v. State*, 263 Ga. 197, 429 S.E.2d 657 (1993).

²⁶*Sammons v. State*, 279 Ga. 386, 612 S.E.2d 785 (2005).

²⁷*Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015).

had taken place. This violated the defendant's constitutional right to be present for all trial proceedings.

The defendant in *Shank v. State*,²⁸ was not prejudiced by a meeting between a juror and his friend, the stepfather of the victim. The substance of the conversation undisputedly amounted to the stepfather saying "we're waiting on y'all" and the juror responding "I'm going upstairs."

§ 36:11 Eavesdropping on deliberations

It is improper for anyone to be with the jury during their deliberations, but it is not necessarily grounds for a mistrial if it is shown that the person's presence was due to mistake and he did not communicate with any of the jurors.¹

New trial was not required when unauthorized person visited the jury in the deliberation room during the trial for the purpose of providing refreshments to the jurors.²

A defendant in a child molestation prosecution was not entitled to new trial even though wife's divorce lawyer made contact with the jury while it deliberated because there was no showing that the lawyer actually entered the jury room, only that the witnesses saw the lawyer near the jury room.³

§ 36:12 Improper conduct of jurors

A request for a new trial may be pursued on grounds of misconduct by the jury in the course of trial or deliberations. Decisions on such motions for new trial are within the "sound discretion of the trial judge," and "[u]nless there is an abuse of discretion, the appellate court will not upset the trial judge's determination."¹

In what way can a litigant establish juror misconduct? The Georgia Court of Appeals has recognized that "there is a dearth of Georgia law on this point."² Evidence in support of a motion for new trial can be submitted in the form of an affidavit, with oral testimony by the affiant at a hearing upon such motion. The subjects for such testimony appear in O.C.G.A. § 24-6-606(b).

A 2014 decision applied O.C.G.A. § 24-6-606 to a case in which

²⁸*Shank v. State*, 290 Ga. 844, 725 S.E.2d 246 (2012).

[Section 36:11]

¹*Southern Ry. Co. v. Brown*, 126 Ga. 1, 54 S.E. 911 (1906).

²*Post-Tensioned Const., Inc. v. VSL Corp.*, 143 Ga. App. 148, 237 S.E.2d 618 (1977).

³*Linto v. State*, 292 Ga. App. 482, 664 S.E.2d 856 (2008).

[Section 36:12]

¹*Newson v. Foster*, 261 Ga. App. 16, 17, 581 S.E.2d 666, 667 (2003).

²*Dryman v. Watts*, 268 Ga. App. 710, 711, 603 S.E.2d 51, 53 (2004).

jurors used cellular telephones to look up definitions of terms during deliberations.³

There are a number of activities of jurors that are held to be improper.

Since a juror's acceptance of favors from a party puts him under obligation to the party and tends to bias his judgment, and since, moreover, it is the policy of the law to keep the jury system and the verdicts free from suspicion, the acceptance of favors is not permitted. When it is made to appear that a juror has accepted favors, that fact will justify a declaration of mistrial and will vitiate the verdict,⁴ and this is true, according to many authorities, regardless of the existence of any intention to influence the juror.

The rule embraces favors extended by a party, his attorney, a third person at the request of the party and includes such acts as furnishing food, drinks, cigars, transportation, lodging, and entertainment.⁵

Evidence that one juror was overheard stating that it was the defendant's gun used in the murder and robbery, even assuming that it showed deliberation by the jury before the jury was charged, did not require a mistrial where curative instructions were adequate.⁶

Trial spectators reported overhearing jurors discussing the case during a recess and prior to verdict in *Sims v. State*.⁷ However, the Georgia Supreme Court noted that factors which might prejudice a verdict seemed to be absent from the reported conversations. "The jurors statements to one another did not involve extrajudicial information, or demonstrate that they were deliberating the case prior to the close of evidence, or that one juror was attempting to persuade another on any issue or testimony in the case. While the violation of the court's instructions was clearly erroneous, the error was not so prejudicial as to have contributed to the conviction." The evidence was presented at a hearing on a motion for a new trial, and relief was denied.

In another case, evidence indicated that a juror assessed evidence fairly and impartially, even though during voir dire, juror

³*Armstrong v. Gynecology & Obstetrics of DeKalb, P.C.*, 327 Ga. App. 737, 761 S.E.2d 133 (2014) ("When jurors consider extrinsic evidence, we require a new trial if the evidence poses a *reasonable possibility of prejudice* to the defendant. Prejudice is not presumed. The defendant has the burden of demonstrating prejudice by a preponderance of credible evidence.").

⁴*Alabama Great Southern R. Co. v. Brown*, 140 Ga. 792, 79 S.E. 1113 (1913).

⁵*Alabama Great Southern R. Co. v. Brown*, 140 Ga. 792, 79 S.E. 1113 (1913).

⁶*Lee v. State*, 258 Ga. 481, 371 S.E.2d 389 (1988).

⁷*Sims v. State*, 266 Ga. 417, 467 S.E.2d 574 (1996).

did not respond when panel was asked general voir dire questions concerning knowledge of case, and at hearing on motion for new trial, defendant presented testimony tending to show that juror knew and discussed facts of case before trial, visited the crime scene, and was pressured to find defendant guilty, where such testimony was contradicted by juror and two other jurors, who denied allegations of misconduct or wrongdoing.⁸

Juror was properly dismissed from trial of child molesting case, and replaced by an alternate, after deliberations had begun, where juror on voir dire denied knowing defendant, but later admitted acquaintance.⁹ Statute providing for juror dismissal and replacement gives a trial court discretion to discharge a juror and replace him or her with an alternate at any time, and the Court of Appeals will not reverse, as long as the trial court's exercise of discretion has a sound legal basis. Another case approving dismissal of a juror during deliberations is the Georgia Supreme Court's decision in *Chinn v. State*.¹⁰ Removal of a juror after judge concluded the juror slept during presentation of the evidence was approved on appeal.¹¹

The replacement of a juror with an alternate juror usually requires some hearing or inquiry into the situation by the trial court. Dismissal of a juror without an independent judicial inquiry is improper.¹²

In *Cain v. State*,¹³ the trial judge summoned a juror for questioning regarding allegations that the juror refused to deliberate. Soon thereafter, the court dismissed a different juror after discovering that the juror had prior convictions he failed to reveal on voir dire.

Contact by a juror with persons outside the jury and discussion of the merits of the pending case are disapproved activities. The decision in *Boler v. State*¹⁴ explains:

The trial court did not abuse its discretion by replacing a juror with an alternate juror after the jury began deliberations when it was discovered that the replaced juror met with a relative during a lunch break and that this relative stated her opinion as to defendant's innocence. The replaced juror's relative explained to the

⁸*Armstrong v. State*, 274 Ga. 771, 560 S.E.2d 643 (2002).

⁹O.C.G.A. § 15-12-172. *Wooten v. State*, 250 Ga. App. 686, 552 S.E.2d 878 (2001).

¹⁰*Chinn v. State*, 276 Ga. 387, 578 S.E.2d 856 (2003).

¹¹*Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011) (trial court investigated why juror could not perform his

duties).

¹²*Dunn v. State*, 308 Ga. App. 103, 706 S.E.2d 596 (2011) (conviction reversed because of court's dismissal of juror).

¹³*Cain v. State*, 259 Ga. App. 634, 577 S.E.2d 860 (2003).

¹⁴*Boler v. State*, 240 Ga. App. 90, 522 S.E.2d 676 (1999).

trial court: “I told her I didn’t feel like he was guilty because there was no evidence. No solid evidence.”

The trial court’s discharge of the juror in question had a sound basis in that it served the legally relevant purpose of preserving the integrity of the judicial process.

A defendant was not entitled to a new trial based on juror misconduct even though the juror made negative comments about a witness based on personal knowledge during deliberations where all 12 jurors testified that the verdict was not affected by the comments.¹⁵

In *Glover v. State*,¹⁶ the court analyzed misconduct related to juror nondisclosure of information upon voir dire examination:

To be entitled to a new trial based on a voir dire examination, a defendant must show that: (1) the juror failed to answer honestly a material question on voir dire; and (2) a correct response would have provided a valid basis for a challenge for cause. The rationale for this rule is that a “trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenges process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination.”

. . .

[A juror named Wise did not reveal prior law enforcement work] Although we have adopted the rule that a full-time police officer who is challenged for cause in a criminal case must be excused, we have declined to extend the rule to other law enforcement personnel who are not sworn officers and do not have the power to arrest. Thus, we have found no error when the trial court in criminal cases refused to strike for cause prospective jurors who worked as corrections officers, security guards, and law enforcement instructors who had previously worked as a sworn police officer. Because a juror’s prior experience in law enforcement is not a valid grounds for a challenge for cause, we hold that Glover is not entitled to a new trial based on Wise’s failure to disclose that he had worked previously in law enforcement.

Intentional gathering of extrajudicial evidence, highly prejudicial to accused, by members of jury and communication of that information to other jurors in closed jury room is inimical to present jury system, cannot be ignored and requires reversal of judgment based on jury’s verdict.¹⁷

The unauthorized visit to a crime scene by eight jurors was made harmless by the judge’s subsequent order that the entire

¹⁵*Joachim v. State*, 263 Ga. 816, 552 S.E.2d 804 (2001).
440 S.E.2d 15 (1994).

¹⁷*Watkins v. State*, 237 Ga. 678,
¹⁶*Glover v. State*, 274 Ga. 213, 229 S.E.2d 465 (1976).

jury be taken to visit the scene.¹⁸

When a juror took a drive through the neighborhood where the crime occurred, this triggered an appeal in *Wagner v. State*.¹⁹ The court questioned the driver as well as the remaining jurors. Two jurors indicated they felt that the juror's observation of the scene had some influence on that juror's thinking about the case, but the overwhelming impression left by the jurors was that they had admonished that juror for doing something they had been instructed not to do and that the information had not and would not play any part in their decision in the case. In considering possible juror misconduct, the trial court must consider whether a reasonable possibility exists that the improper action contributed to the jury's verdict.²⁰ In *Wagner*, it did not.

In *Steele v. State*,²¹ the Court of Appeals wrestled with the sort of jury conduct which results in a new trial:

All four defendants enumerate as error the refusal of the trial court to grant a new trial based upon the conduct of a juror during deliberations. The jurors requested a recharge on the definitions of felony murder and voluntary manslaughter shortly before ending deliberations for the evening. During the overnight recess, one juror copied a portion of the 1971 World Book Encyclopedia containing definitions of manslaughter, voluntary manslaughter, involuntary manslaughter, and a statement of the "usual penalty in the U.S." for these offenses, which differs from the penalty in Georgia. The juror read from her notes to the other members of the jury, and other jurors testified they relied on that information in reaching their verdict. At least one juror testified she specifically relied upon the information regarding sentencing. There is a presumption of prejudice to the defendant when an irregularity in the conduct of a juror is shown and the burden is on the prosecution to prove beyond a reasonable doubt that no harm has occurred. [Cit.] *Lamons v. State*, 255 Ga. 511, 512, 340 S.E.2d 183 (1986). "There is no question that the juror's study of 'law' other than that charged by the trial court was misconduct and though it was honest in its intent, it was nevertheless intentional . . . the question to be determined here is whether such study or gathering of extrajudicial law was 'so prejudicial that the verdict must be deemed inherently lacking in due process.'" [Cit.] Under the particular facts of this misconduct, in light of the trial evidence, we are compelled to hold that it was . . . The extrajudicial law was prejudicial, particularly as it pertained to sentencing. This is true not only because the information was not in accord with Georgia law (see O.C.G.A. § 16-5-2) but because sentencing is a matter outside the purview of the jury. See *Howard v. State*, 213 Ga. App. 542, 543, 445 S.E.2d 532 (1994).

¹⁸*Forney v. State*, 255 Ga. 316, 338 S.E.2d 252 (1986).

¹⁹*Wagner v. State*, 253 Ga. App. 874, 560 S.E.2d 754 (2002).

²⁰*Brooks v. State*, 265 Ga. 548, 550, 458 S.E.2d 349 (1995).

²¹*Steele v. State*, 216 Ga. App. 276, 454 S.E.2d 590 (1995).

Therefore, we cannot say it was highly probable the verdict was not affected by the jury misconduct. Under these circumstances, the use of extrajudicial law was so prejudicial as to be inherently lacking in due process. This jury misconduct cannot be ignored, and it requires a reversal of the jury's verdict and a new trial.

Steele reveals important conclusions about Georgia law. When extraneous information comes before a jury, the jury's verdict is subject to attack. Further, a presumption of prejudice may be raised in this situation which the beneficiary of the verdict must rebut.

Action of juror in walking to bench and reading to rest of jury from judge's charge book was irregularity presumptively prejudicing defendant, but State overcame presumption where only matter read was correct statement of law that judge had previously read to jury.²²

Gag gifts to the judge and bailiff from the jurors were the object of United States Supreme Court concern in *Wellons v. Hall*,²³ where the petitioner's case was remanded. Subsequent federal district court review of the case did not disturb the sentence of Wellons.

A juror who receives or agrees to receive a bribe may also be punished for contempt.²⁴ It is also improper for them to conduct experiments relating to the issues of the case in the jury room, but such experiments are not ground for a new trial unless they can be shown to have prejudiced the losing party.

It is permissible for counsel to contact jurors after a trial regarding possible jury misconduct.²⁵

§ 36:13 Treatment of improper conduct on part of jurors

Juror misconduct does not always necessitate a mistrial in a criminal case, and the trial judge's decision as to the grant or denial of a mistrial in such cases will not be reversed absent an abuse of discretion.¹ For instance, in *Lawrence v. State*,² the Georgia Court of Appeals held that the defendant in an assault and armed robbery prosecution was not entitled to a new trial on the basis of juror's outside-the-courtroom examination of the victim's head injuries, where the trial court dismissed the juror within minutes of the inappropriate contact with the victim, and it did

²²*Millsaps v. State*, 180 Ga. App. 766, 493 S.E.2d 180 (1997).
509, 351 S.E.2d 81 (1986).

[Section 36:13]

²³*Wellons v. Hall*, 130 S. Ct. 727,
175 L. Ed. 2d 684 (2010).

¹*Lawrence v. State*, 289 Ga. App.
163, 657 S.E.2d 250 (2008).

²⁴See § 5:5, *supra*.

²*Lawrence v. State*, 289 Ga. App.

²⁵See *Sears v. State*, 268 Ga. 759, 163, 657 S.E.2d 250 (2008).

not appear that the juror had the opportunity to discuss the contact with the other jurors.

The court can use the power of contempt to punish misconduct by a juror.³ A juror who separates himself from his associates and mingles with the general public is guilty of contempt.⁴

Where communication from the bailiff to the jury is shown, the burden is on the State to rebut any presumption of harm.⁵

The rest of the jury panel was not automatically disqualified when, in violation of the judge's instructions, three potential jurors indicated to the others that they knew of a previous trial involving the defendant.⁶

A trial court was not required to disqualify an entire jury panel in a malice murder prosecution because of one prospective juror's comment that "anyone that kills someone should go to the chair," where that juror was subsequently excused and defense counsel did not request curative instruction, did not move to disqualify entire panel or for a continuance in order to obtain another jury panel, and did not reduce his challenge to the array to writing.⁷

Misconduct of jurors as a ground for impeachment of jury verdict, see §§ 36:12, *supra*, 37:8, *infra*.

³O.C.G.A. § 15-1-4.

⁴*State v. Helvenston*, RM Charlt. (Ga.) 48 (1820).

⁵*Morris v. State*, 257 Ga. 781, 364 S.E.2d 571 (1988).

⁶*Walraven v. State*, 255 Ga. 276, 336 S.E.2d 798 (1985).

⁷*Roberts v. State*, 259 Ga. 441, 383 S.E.2d 872 (1989).

Chapter 37

Verdict

- § 37:1 General provisions relating to verdict
- § 37:2 Objections to form of verdict
- § 37:3 Revising or amending verdict
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- § 37:5 Construction of general verdict
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§ 37:1 General provisions relating to verdict

The verdict shall cover the issues made by the pleadings and shall be for the plaintiff or defendant.¹

The court may require a special verdict in the form of a special written finding upon each issue of fact.²

The test of the sufficiency of a general verdict is whether it expresses the intent of the jury so that the court can understand it and enter judgment thereon.³

The verdict must be the unanimous verdict of all the jurors.⁴ It normally is in writing, but need not be. If it is a general verdict, it is sufficient for the jury to pronounce their verdict by their foreman in open court.⁵

Before the waiver of a criminal defendant to an unanimous verdict can be effective, the consent of government counsel and the sanction of the court must be had.⁶

Verdicts are to be reasonably construed and are not to be

[Section 37:1]

¹O.C.G.A. § 9-12-1.

²O.C.G.A. § 9-11-49.

³Calhoun v. Babcock Bros. Lumber Co., 199 Ga. 171, 33 S.E.2d 430 (1945).

⁴Ball v. State, 9 Ga. App. 162, 70 S.E. 888 (1911).

⁵See Knight v. Knight, 209 Ga. 131, 70 S.E.2d 770 (1952).

⁶Glass v. State, 250 Ga. 736, 300 S.E.2d 812 (1983).

avoided except in cases of necessity.⁷ In criminal cases the jury shall give a general verdict of “guilty” or “not guilty.”⁸

Where a jury rendered a verdict for voluntary manslaughter, it could not also find felony-murder based on the same underlying aggravated assault; the felony of assault could not support the felony-murder conviction where there was no malice to be transferred.⁹

On appeal of a conviction based on a jury verdict, the court must examine the evidence in a light most favorable to support the verdict.¹⁰

When instructions are given on both malice murder and felony murder, the verdict should indicate which basis the jury used to support a finding of guilt.¹¹

When the elements of malice and an underlying felony both exist in a murder case, the law does not preclude verdicts of guilty of both malice and felony murder, although where there is a single victim, the defendant may be sentenced on either but not both.¹²

It is better to omit preprinted terms of “guilty” and “not guilty” from any verdict form submitted to the jury and to require the verdict to be completed by the hand of the jury.¹³

The use of a jury verdict form preprinted with the words “Guilty” and “Not Guilty,” however, does not constitute error unless the form would mislead jurors of reasonable understanding, or the trial court erroneously instructed the jury on the presumption of innocence, the state’s burden of proof, the possible verdicts that could be returned, or how the verdict should be entered on the printed form. In and of itself, merely listing the possible guilty verdict options before the “Not Guilty” option does not render the verdict form misleading so as to constitute reversible error.¹⁴

The trial court was not required to use a special verdict form to allow the jury to apportion fault in an automobile collision case; the court’s instruction that the jury reduce plaintiff’s recovery in proportion to her negligence provided adequate guidance concerning the comparative negligence rule.¹⁵

⁷O.C.G.A. § 17-9-2.

⁸O.C.G.A. § 17-9-2.

⁹Edge v. State, 261 Ga. 865, 414 S.E.2d 463 (1992).

¹⁰Anderson v. State, 245 Ga. 619, 266 S.E.2d 221 (1980).

¹¹Adams v. State, 255 Ga. 356, 338 S.E.2d 860 (1986).

¹²Smith v. State, 258 Ga. 181, 366 S.E.2d 763 (1988).

¹³Chapman v. State, 258 Ga. 214, 367 S.E.2d 541 (1988).

¹⁴Van v. State, 294 Ga. 464, 754 S.E.2d 355 (2014).

¹⁵Lee v. Thomason, 277 Ga. App. 573, 627 S.E.2d 168 (2006).

In *Shepherd v. State*,¹⁶ the defendant was convicted of felony murder, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime upon a verdict of guilty but mentally ill. However, the defendant was found not guilty of malice murder by reason of insanity. Defendant appealed. The Georgia Supreme Court held that the defendant could properly be found not guilty of malice murder by reason of insanity, and guilty but mentally ill as to felony murder, aggravated assault, and firearm offenses, even though all offenses occurred simultaneously against same victim. The inconsistent verdict rule has been abolished, but apparently the rule against mutually exclusive verdicts remains. Verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other. The rule against mutually exclusive verdicts applies to multiple guilty verdicts which cannot be logically reconciled. When a reasonable probability exists that two mutually exclusive verdicts have been rendered, the two verdicts cannot stand and a defendant is granted a new trial. In this case, however, the rule was not violated and the verdicts were affirmed.

Georgia has rejected the inconsistent verdict rule, and thus, a defendant cannot attack as inconsistent a jury verdict of guilty on one count and not guilty on a different count.¹⁷ Rules on mutually exclusive verdicts and the abolition of the inconsistent verdict rule are explained in *Turner v. State*.¹⁸ Jury's finding that defendant was not guilty of malice murder because the shooting of the victim was justified was inconsistent with finding the defendant guilty of felony murder and aggravated assault based on the same conduct.¹⁹ The Georgia Supreme Court abolished the rule that inconsistent verdicts in irreconcilable conflict in criminal cases always warrant reversal of the result.²⁰

An exception to the abolition of the inconsistent verdict rule applies when "instead of being left to speculate about the unknown motivations of the jury the appellate record makes transparent the jury's reasoning why it found the defendant not guilty

¹⁶*Shepherd v. State*, 280 Ga. 245, 626 S.E.2d 96 (2006).

¹⁷*Conway v. State*, 281 Ga. 685, 642 S.E.2d 673 (2007).

See *Reese v. State*, 308 Ga. App. 528, 707 S.E.2d 913 (2011), applying the Georgia rule which bars "inconsistent verdict" challenges. See also *Brown v. State*, 289 Ga. 259, 710 S.E.2d 751 (2011). For the rule in civil cases, see § 38:1, *infra*. In a civil case, a verdict that is contradictory and

repugnant is void. Mutually exclusive verdicts in criminal cases are further explored in § 37:9, *infra*.

¹⁸*Turner v. State*, 283 Ga. 17, 655 S.E.2d 589 (2008).

¹⁹*Turner v. State*, 283 Ga. 17, 655 S.E.2d 589 (2008).

²⁰*Milam v. State*, 255 Ga. 560, 341 S.E.2d 216 (1986) relying upon *U.S. v. Powell*, 469 U.S. 57, 105 S. Ct. 471, 83, 83 L. Ed. 2d 461 (1984).

of one of the charges, there is no speculation, and the reasoning for abolishing the rule does not apply.”²¹

The law of verdicts was also explored in a 2007 case. Jury verdicts finding defendant guilty of malice murder, but not guilty by reason of insanity of aggravated assault were not mutually exclusive; offences were against the same victim and occurred simultaneously.²² Verdicts are mutually exclusive and cannot stand only if two guilty verdicts are returned and a finding of guilty on one count logically excludes a finding guilty on another count. In this case, the verdicts were affirmed.

Put another way, verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other.²³

The Eleventh Circuit has stated that “as long as the guilty verdict is supported by sufficient evidence, it must stand, even in the face of an inconsistent verdict on another count.”²⁴

Be advised that the distinction between inconsistency and mutual exclusivity in verdicts is more than mere nomenclature in Georgia jurisprudence. Generally speaking, “inconsistent” verdicts may stand.²⁵ “Mutually exclusive” verdicts may not.²⁶

That said, in 2015, the Georgia Supreme Court examined the mutually exclusive verdict rule, effectively limiting it. Specifically departing from prior Georgia case law, Justice Blackwell’s scholarly opinion in *State v. Springer*,²⁷ held that “multiple guilty verdicts for the same conduct that are based on varying levels of mens rea are not mutually exclusive.”

The Supreme Court has explained that “repugnant verdicts occur when, in order to find the defendant not guilty on one count and guilty on another, the jury must make affirmative findings shown on the record that cannot logically exist at the same time.”²⁸

§ 37:2 Objections to form of verdict

Trial court has great discretion in formulating the special

²¹Lee v. State, 300 Ga. App. 214, 684 S.E.2d 348 (2009).

²²Taylor v. State, 282 Ga. 502, 651 S.E.2d 715 (2007).

²³Wilmott v. State, 326 Ga. App. 1, 755 S.E.2d 818 (2014).

²⁴United States v. Green, 981 F.3d 945, 113 Fed. R. Evid. Serv. 2405 (11th Cir. 2020).

²⁵Taylor v. State, 327 Ga. App. 288, 758 S.E.2d 629 (2014).

²⁶Allaben v. State, 294 Ga. 315, 751 S.E.2d 802 (2013).

²⁷State v. Springer, 297 Ga. 376, 774 S.E.2d 106 (2015).

²⁸Feder v. State, 319 Ga. 66, 901 S.E.2d 561 (2024) (quoting State v. Owens, 312 Ga. 212, 216 (1)(b), 862 S.E.2d 125 (2021)).

verdict form it deems appropriate.¹

If a jury verdict form is improper, it is incumbent upon a party to make its objections as to the irregularity of the form at the time of its rendition or the objection is waived.²

Printed verdict form stating “We the jury find the defendant _____ guilty” was provided merely for convenience of jury and did not intimate any opinion on guilt or innocence as jury clearly understood that their verdict was to be based on evidence in case.³

§ 37:3 Revising or amending verdict

The superior court may, in a proper case, mold the verdict so as to do full justice to the parties and in the same manner as a decree in equity.¹

A verdict may be amended as to make it conform to the pleadings, if the error shall plainly appear upon the face of the record.²

A verdict may be amended in mere matter of form after the jury has dispersed; but after it has been received and recorded, and the jury dispersed, it may not be amended in matter of substance, either by what the jurors say they intended to find or otherwise.³

Where the jury returns an ambiguous verdict, the court has the right, before they have been discharged to advise them that such verdicts are inconsistent, and to send them back to reconsider their verdicts.⁴

The court should consider the entire record and endeavor to construe the intent of the jury, where the verdict is irregular in form, but it cannot merely assert that which the jury ought to have intended, and there must be a reasonable basis upon which to find what the jury did intend.⁵

In a divorce action, the court’s invalidation of the portion of the jury verdict that provided that the parties would pay their own court and attorney’s fees and the court’s award of litigation expenses to the wife, worked a change in matter of substance of the jury’s allocation of resources between the parties, and thus the

[Section 37:2]

¹City of Atlanta v. Broadnax, 285 Ga. App. 430, 646 S.E.2d 279 (2007).

²Waller v. Rymer, 293 Ga. App. 833, 668 S.E.2d 470 (2008).

³Jackson v. State, 237 Ga. 663, 229 S.E.2d 345 (1976).

[Section 37:3]

¹O.C.G.A. § 9-12-5.

²O.C.G.A. § 9-12-6.

³O.C.G.A. §§ 9-12-7, 17-9-40.

⁴Lowery v. Morton, 200 Ga. 227, 36 S.E.2d 661 (1946).

⁵See Davis v. Wright, 194 Ga. 1, 21 S.E.2d 88 (1942).

verdict could not stand.⁶

§ 37:4 Power of court to have jury reconsider defective verdict

The law allows the jury all reasonable opportunity, before their verdict is put on record and they are discharged, to discover and declare the truth according to the judgment.

It is proper for a court to send a jury back out to correct errors on the verdict form. In *Jones v. State*,¹ the jury returned verdict with scrivener's error on a statutory aggravating circumstance; the judge sent the jury back out, without commenting on the verdict, to complete the form.

Trial court was permitted to send the jury back to the deliberation room when the original jury verdict found the defendant guilty of both felony murder and voluntary manslaughter. After the court re-instructed the jury and asked the jury to clarify the verdict, the trial court was permitted to accept the subsequent verdict of finding the defendant guilty of only felony murder.²

Where a capital jury's original sentencing verdict included an insufficient finding of statutory aggravating circumstances, the court could properly return the jury to the jury room for further deliberation; the court was not required to accept the verdict and, because of the deficiency in form, impose a life sentence.³

Defendants in *Kitchin v. Reidelberger*,⁴ waived any objection to the trial court's instruction to the jury to reconsider whether or not it would award the plaintiff punitive damages after its initial verdict awarded no such damages. There, the jury returned with a verdict awarding attorney's fees not sought in the complaint and damages for a nuisance claim that both parties agreed the court would decide. Sending the jury back to conform the verdict to those parameters, the trial court also admonished the jury to reconsider whether or not to award punitive damages, without objection by any party. The Court of Appeals ruled that the defendants' objection to the punitive damages award once the jury returned the second time was too late.

When the jury has been permitted to depart, it is no longer possible for the court to reassemble the jury and instruct them to correct the error in the form of verdict, if the error is one of

⁶Stone v. Stone, 258 Ga. 716, 373 S.E.2d 627 (1988).

[Section 37:4]

¹Jones v. State, 273 Ga. 231, 539 S.E.2d 154 (2000) (overruled on other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

²Davis v. State, 278 Ga. 305, 602 S.E.2d 563 (2004).

³Wade v. State, 261 Ga. 105, 401 S.E.2d 701 (1991).

⁴Kitchin v. Reidelberger, 311 Ga. App. 135, 714 S.E.2d 361 (2011).

substance.⁵

It is generally held that where the jury in a civil case has sealed their verdict, separated, and come into court upon its reconvening to return their verdict, their power over it has not yet ceased, and they may be allowed to correct or amend it⁶ in substance as well as in form, although contrary holdings have been made in a number of cases. Thus, where the jury in a civil case seal their verdict and separate, and, upon their coming into court to return their verdict, it is found to be defective in failing to assess the amount of damages, it is generally held that the court may require the jury to assess such damages and insert the amount in the verdict, either in open court or on retiring to the jury room.⁷

A trial court reasonably interpreted a verdict form that stated “we the jury find the defendant undecided,” due to the jury’s marking out “not guilty” and replacing it with “undecided,” to mean that the jury was either not unanimous or had not decided yet whether the defendant was guilty and properly instructed the jury to continue deliberating.⁸

§ 37:5 Construction of general verdict

Because artificial expressions and words are sometimes employed in framing a verdict, the first object in the construction of a verdict is to learn the intent of the jury, and when this can be ascertained, such effect should be given to the verdict, consistent with legal principles and construing it as a whole, as will most nearly conform to the jury’s intent.¹

Where there is any ambiguity or the verdict is vague and if there is any reasonable basis from which to deduce the jury’s intention, that intent will be ascertained and given effect. Where the jury includes in its verdict a recommendation, such as for safety measures at an intersection, it is treated as surplus and is of no effect on the verdict.²

Jury’s award of \$100,000 to home remodeling contractor that exceeded the \$45,000 in damages proven by the contractor as the amount owed, could not be construed as awarding the contractor \$55,000 in punitive damages because the jury was not charged on punitive damages. The jury was not given the “clear and convincing evidence” standard for awarding punitive damages,

⁵O.C.G.A. § 9-12-7.

404 S.E.2d 436 (1991).

⁶Mitchell v. Langley, 143 Ga. 827, 85 S.E. 1050 (1915).

[Section 37:5]

⁷Mitchell v. Langley, 143 Ga. 827, 85 S.E. 1050 (1915).

¹Wood v. McGuire’s Children, 17 Ga. 361, 1855 WL 1842 (1855).

⁸Kimmel v. State, 261 Ga. 332,

²See Ryner v. Duke, 205 Ga. 280, 53 S.E.2d 362 (1949).

and the proceedings had not been properly bifurcated.³

§ 37:6 Special verdict

A trial judge did not err in refusing to require a special verdict of the jury where defendant wished jury to answer questions as to whether jury found two witnesses had been impeached; whether to require jury to return special verdict is within the discretion of court.¹

To similar effect, see *Sims v. Heath*.² A trial court did not abuse its discretion by not submitting to the jury special interrogatories which would have asked the jury to find whether the defendant had certain “diminished capacities.”³

The law continues to accord the trial judge discretion in employing special verdicts. In a 2011 case, the reviewing court ruled that the form of a verdict and the submission of a special verdict are within the discretion of the trial court, and absent an abuse of that discretion, the court’s choice will not be overturned on appeal.⁴

In 2012, the Georgia Supreme Court held that the use of special verdict forms in apportioning fault to nonparties under O.C.G.A. 51-12-33 does not violate a plaintiff’s constitutional right to a jury trial, due process, or equal protection.⁵

§ 37:7 Impeachment of verdict

The old prohibition against the impeachment by a juror of his own verdict extended to both affidavits and oral testimony offered at a hearing.¹

Georgia’s new Evidence Code, however, provides in O.C.G.A. § 24-6-606(b) for limited grounds by which a juror may challenge that juror’s own verdict, including:

1. Extraneous prejudicial information that was improperly brought to the juror’s attention;

³First Southern Bank v. C & F Services, Inc., 290 Ga. App. 305, 659 S.E.2d 707 (2008).

[Section 37:6]

¹Taylor v. State, 245 Ga. 501, 265 S.E.2d 803 (1980).

²Sims v. Heath, 258 Ga. App. 681, 577 S.E.2d 789 (2002) (form of verdict and submission of special verdict to jury is within trial court’s discretion).

³Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007) (overruled on

other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

⁴Hewitt Associates, LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697 (2011).

⁵Couch v. Red Roof Inns, Inc., 291 Ga. 359, 729 S.E.2d 378 (2012).

[Section 37:7]

¹See PIE Nationwide, Inc. v. Prickett, 189 Ga. App. 77, 374 S.E.2d 837 (1988).

2. Outside influence improperly brought to bear upon any juror; or
3. A mistake in entering the verdict onto the verdict form.²

An additional exception has been applied when a juror's racial biases motivated a criminal conviction.³

In *Warger v. Shauers*,⁴ the United States Supreme Court held that Rule 606(b) precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during voir dire.

As Georgia case law under O.C.G.A. § 24-6-606(b) continues to develop, review of pre-2013 case law should provide insight and context.

In criminal cases the general prohibition against impeaching verdicts with juror testimony was required to give way in the face of constitutional confrontation concerns. In *Watkins v. State*,⁵ the Georgia Supreme Court found that two jurors who made an unauthorized visit to the scene of the crime had become unsworn witnesses against the defendant.⁶

The general prohibition against allowing a jury to impeach its own verdict must succumb to the right to a fair trial in certain cases. The jurors' affidavit about their communications with the bailiff raised the specter that the bailiff may have offered extrajudicial advice in *Turpin v. Todd*.⁷

Jurors are usually not permitted to impeach their own verdict, but this rule yields to exceptions. See O.C.G.A. § 24-6-606(b). In criminal cases when jurors make unauthorized visits to the crime scene, courts have permitted this fact to be shown. However, to set aside a jury verdict solely because of irregular jury conduct, the conduct must be so prejudicial that the verdict is inherently lacking in due process.⁸

Witness' reference to defendant's drug use was not enough to

²See *Poppell v. Cardinal Health, Inc.*, 319 Ga. 670, 906 S.E.2d 389 (2024). See also *U.S. v. Cavallo*, 790 F.3d 1202 (11th Cir. 2015) ("except for testimony concerning extraneous prejudicial information or improper outside influence, Rule 606(b)(1) prohibits a juror from providing testimony or other evidence about anything that happened or occurred during deliberations"). The Georgia Court of Appeals has reviewed federal authority when considering the application of O.C.G.A. § 24-6-606(b). *Armstrong v. Gynecology & Obstetrics of DeKalb, P.C.*, 327 Ga. App. 737, 761 S.E.2d 133 (2014).

³See *United States v. Brown*, 934 F.3d 1278 (11th Cir. 2019).

⁴*Warger v. Shauers*, 135 S. Ct. 521, 190 L. Ed. 2d 422, 96 Fed. R. Evid. Serv. 186 (2014).

⁵*Watkins v. State*, 237 Ga. 678, 229 S.E.2d 465 (1976).

⁶See *Hammock v. State*, 277 Ga. 612, 592 S.E.2d 415 (2004).

⁷*Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900 (1997).

⁸*Butler v. State*, 270 Ga. 441, 511 S.E.2d 180 (1999).

allow impeachment of the jury verdict finding the defendant guilty of armed robbery based on the jury's feelings that the defendant had a drug problem and hoped the court would sentence the defendant to drug treatment.⁹

§ 37:8 Impeachment by matters extrinsic to verdict

The rule that the testimony of jurors will not be received to impeach their verdict is subject in many jurisdictions to a recognized exception that affidavits of jurors may be received to show matters occurring during the trial not essentially inherent in the verdict.

The difference between jurors speaking against their own verdict in criminal versus civil cases was made stark in two decisions handed down in 2003 and 2004. In *Hammock v. State*,¹ a juror made some measurements and shared the information with other jurors. The information led to finding the defendant guilty. A new trial was granted by the Georgia Supreme Court because confrontation rights are violated when a juror gathers and relays prejudicial material. On the other hand, jurors in a civil case visited an accident scene on their own and relayed information gathered there to other jurors. Still, no new trial resulted, and the Court of Appeals cited the no-impeachment rule in Georgia.²

The distinction between civil and criminal cases is obliterated in the 2013 Georgia Evidence Code. O.C.G.A. § 24-6-606(b), effective January 1, 2013, allows jurors to attack their own verdicts where they factored extraneous prejudicial information into their thinking and deliberations.³

For more information on the application of this new Evidence Code provision, see § 37:7, *supra*.

§ 37:9 Mistake or clerical error in verdict

Evidence of jurors may be received to show what really was the verdict agreed on, in order to prove that, through mistake or otherwise, it was not correctly expressed; although there is some authority to the effect that even a mistake in the nature of a clerical error in the verdict cannot be proved by the testimony of the jurors.¹ In any event, to warrant a change in the written verdict and final judgment thereon, proof of the mistake must be

⁹*Young v. State*, 258 Ga. App. 16, 17, 581 S.E.2d 666, 667 (2003).
238, 573 S.E.2d 487 (2002).

[Section 37:8]

¹*Hammock v. State*, 277 Ga. 612, 592 S.E.2d 415 (2004).

²*Newson v. Foster*, 261 Ga. App.

³See generally *Poppell v. Cardinal Health, Inc.*, 319 Ga. 670, 906 S.E.2d 389 (2024).

[Section 37:9]

¹Am. Jur. 2d, Trial §§ 1913 to

clear beyond peradventure, and if the slightest doubt lurks in the mind of the judge, he should confine relief to the granting of a new trial.

In the new Evidence Code for Georgia, effective January 1, 2013, clerical mistakes in entering the verdict can be corrected under O.C.G.A. § 24-6-606(b), which provides for juror testimony by affidavit or otherwise that “there was a mistake in entering the verdict onto the verdict form.” Beyond clerical errors, verdicts are sometimes attacked on grounds that the verdict was ambiguous, or that it violated the rule against mutually exclusive verdicts.

On an ambiguous verdict, see *Ingram v. State*.²

Trial court found the verdict was not ambiguous as to whether the jury found the defendant guilty of malice or felony murder because count one of the indictment alleged the defendant’s act of malice murder and count two alleged felony murder, and the jury returned a guilty verdict on count one and no verdict on count two.³

A trial court’s instructions to the jury and the form of the verdict unambiguously showed that the jury found defendant guilty of malice murder, contrary to the defendant’s claim that the verdict was ambiguous in that it did not specify the crime of which the jury found the defendant guilty.⁴

Mutually exclusive verdicts are defined in *Smith v. State*⁵ and *Drake v. State*.⁶ Where there was a reasonable probability that the jury returned a mutually exclusive verdict by finding that the defendant acted with both criminal intent and criminal negligence at the same instant, reversal of convictions for involuntary manslaughter and aggravated assault occurred.⁷

In *Middleton v. State*,⁸ the Supreme Court of Georgia held that a criminal defendant preserves his ability to challenge mutually exclusive verdicts in instances when the defendant fails to object at the time the verdicts are rendered. This overruled various Court of Appeals decisions reaching a contrary result.

In civil cases where contradictory verdicts occur, that fact may

1920.

²*Ingram v. State*, 290 Ga. 500, 722 S.E.2d 714 (2012) (felony murder and voluntary manslaughter).

³*Love v. State*, 268 Ga. 484, 490 S.E.2d 88 (1997).

⁴*Hanson v. State*, 258 Ga. 564, 372 S.E.2d 436 (1988) (overruled on other grounds by, *Benefield v. State*, 278 Ga. 464, 602 S.E.2d 631 (2004)).

⁵*Smith v. State*, 288 Ga. 348, 703 S.E.2d 629 (2010) (rule applies to multiple guilty verdicts which cannot be reconciled).

⁶*Drake v. State*, 288 Ga. 131, 702 S.E.2d 161 (2010).

⁷Additional discussion of the law of mutually exclusive verdicts is contained in § 37:1 *supra*.

⁸*Middleton v. State*, 309 Ga. 337, 846 S.E.2d 73 (2020).

result in the jury's decision being overturned. A judgment cannot be entered on such a verdict.⁹ Although a jury verdict that is contradictory is void, verdicts are to be reasonably construed and not avoided unless from necessity.¹⁰ Special verdicts can occasionally lead to inconsistent results, and whether to use a special verdict is addressed in § 37:6, *supra*.

§ 37:10 Sealed verdict

The court may allow or direct the sealing of the verdict.¹ But it has been held that a sealed verdict is not authorized without the consent of counsel.²

After the judge conferred with the State and the defendant and both parties agreed, the jury was permitted to return a sealed verdict with the following instructions: agree on a verdict, write the verdict on the back of the indictment, have the jury foreman sign and date the back of the indictment, seal the verdict, have the foreman endorse his name and the date on the outside of the sealed envelope, then return the sealed verdict to the court. The Clerk of Court was then instructed to hold the verdict, unopened, until the jury was empanelled in a co-defendant's case. After the co-defendant's jury was empanelled, the sealed verdict would be opened and published.³

After being given consent by plaintiff and defendant, jury permitted to return sealed verdict and disperse.⁴

Counsel may consent to rendition of sealed verdict in judge's absence if judge states to counsel that, unless there is an objection, the judge would go to his home in another county, and that the verdict should be sealed and returned to sheriff. The verdict is not a nullity on the ground that the judge never received the verdict nor received in open court.⁵

§ 37:11 Polling jurors

Ordinarily the right of either party to have the jury polled is not absolute and is discretionary with the court.¹ In criminal cases, however, some decisions hold that the defendant has an

⁹See § 38:1, *infra*.

¹⁰*Hewitt Associates, LLC v. Rollins, Inc.*, 308 Ga. App. 848, 708 S.E.2d 697 (2011).

[Section 37:10]

¹See *Smith v. Jones*, 185 Ga. 236, 194 S.E. 556 (1937).

²*Barfield v. Mullino*, 107 Ga. 730, 33 S.E. 647 (1899).

³*Arkwright v. State*, 223 Ga. 768, 158 S.E.2d 370 (1967).

⁴*Koon v. Atlantic Coast Line R. Co.*, 90 Ga. App. 877, 84 S.E.2d 703 (1954).

⁵*Malcom Bros. v. Pollock*, 52 Ga. App. 772, 184 S.E. 659 (1936).

[Section 37:11]

¹*Patillo v. Thompson*, 106 Ga.

absolute right to have the jury polled.² On the other hand, there is case law that a state court defendant does not have a fundamental due process right under the Sixth Amendment to poll the jury.³

Polling is the process of calling the jurors individually after the verdict is announced to inquire of each one if such is his verdict.⁴

Minimum requirements of a jury poll are met by asking two questions, “Was that your verdict in the jury room?” and “Is it now your verdict?”⁵ Where each juror during a jury poll responds affirmatively to the questions “Was that your verdict in the jury room?” and “Is it now your verdict?” and indicates that his verdict was reached voluntarily, the verdict is unanimous; this principle holds true even where a juror states that he had difficulty reaching the verdict or continues to have reservations about the same.

What about a request by counsel to re-poll a jury, particularly where counsel suspects a juror may break ranks with the rest? Any error in a trial court’s refusal to re-poll a juror whose bodily language and facial expressions allegedly indicated disagreement with a verdict was not reversible error at trial for cocaine trafficking.⁶

There is no uniformity in, nor statutory authority for, polling a jury, although it is a material right derived from common law. The objective of polling the jury is to ascertain before the public and prisoner that the verdict agreed upon in the jury room is still the unanimous verdict of the jury. A motion to poll the jury must be made after the verdict is read and before sentence is passed.⁷

A request to poll the jury was timely where it was made after the jury had announced its verdict and gone to lunch, but before its dismissal.⁸

Unanimity of verdict was not affected by initial response of juror that verdict returned was not her verdict where, prior to ruling on mistrial motion, juror stated that she had misunderstood question and affirmed that her verdict was in accord with the verdict returned.⁹

What judicial actions are appropriate when the court hears

App. 808, 128 S.E.2d 656 (1962).

²McCullough v. State, 10 Ga. App. 403, 73 S.E. 546 (1912).

³Hanson v. State, 258 Ga. 564, 372 S.E.2d 436 (1988) (overruled on other grounds by, Benefield v. State, 278 Ga. 464, 602 S.E.2d 631 (2004)).

⁴See Black v. Thornton, 31 Ga. 641, 1860 WL 2427 (1860).

⁵Daugherty v. State, 283 Ga.

App. 664, 642 S.E.2d 345 (2007).

⁶Daugherty v. State, 283 Ga. App. 664, 642 S.E.2d 345 (2007).

⁷Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980).

⁸Coleman v. State, 256 Ga. 306, 348 S.E.2d 632 (1986).

⁹Scruggs v. State, 181 Ga. App. 55, 351 S.E.2d 256 (1986).

indications of lack of total consensus during the jury poll? In *Rouse v. State*,¹⁰ the Georgia Supreme Court studied this problem:

During a poll of the jury, all 12 jurors acknowledged their verdict both in the jury room and thereafter in the courtroom; however, there was a lack of unanimity when asked if the verdict was reached freely and voluntarily. One juror responded, “well, no, not really, not freely . . . I have some question about it.” A second juror responded that she reached her verdict, “with reservations,” while two others stated that it was arrived at, “with difficulty.” The court then recharged that the verdict “must be the free and voluntary verdict of each and every juror,” and the jury was sent back for “further deliberations.” Rouse’s counsel asked the court for further explanation of a “free and voluntary verdict,” while the State requested something in the nature of an Allen charge. The court declined to give either. The jury returned 30 minutes later with the identical verdict; and upon being repolled, expressed no reluctance. The indication of “reservations” does not prevent the verdict from being unanimous. The requirement is that a juror agree to a verdict . . . the juror[s] on two occasions answered affirmatively that the verdict was [theirs] in the jury room and still [theirs] upon being polled. *Young v. State*, 239 Ga. 53, 60, 236 S.E.2d 1 (1977). See also *Hanson v. State*, 258 Ga. 564, 372 S.E.2d 436 (1988).

It is within the trial court’s discretion to determine the need and breadth of additional jury instructions. *Golden v. State*, 263 Ga. 521, 436 S.E.2d 11 (1993). We find no abuse of discretion in the court’s refusal to give additional instructions.

The court in *Rouse* observed that during a poll of the jury, occasionally a juror responds after the jury has announced its verdict that it is not her verdict. The judge often returns the jury for further deliberations and a short time later may give an *Allen*-type charge. A final verdict of conviction which ultimately results from this process is not usually subject to successful legal attack. This is so even if the defense moves for a mistrial right after the jury poll.¹¹

In *Murray v. State*,¹² after publishing the verdicts of guilty, the jurors were polled. When asked if the verdict was his, one juror responded “no.” The judge returned the jury to the jury room for additional deliberations. Shortly, the judge got a note from the foreman that the dissenting juror had violated his oath by discussing the case with a nonjuror. It was revealed that the dissenting juror had been approached by someone with a favorable opinion of the accused. The judge replaced the juror with an alternate. Conviction affirmed.

¹⁰*Rouse v. State*, 265 Ga. 32, 453 S.E.2d 30 (1995).

¹¹For the *Allen* charge, see §§ 31:6, 35:5, *supra*.

¹²*Murray v. State*, 276 Ga. 396, 578 S.E.2d 853 (2003). See *Cartwright v. State*, 291 Ga. 498, 731 S.E.2d 353 (2012).

In a criminal trial, the jury resumed deliberations after hearing the trial court's modified *Allen* charge and subsequently returned a verdict finding defendant guilty of felony murder and aggravated assault. The Georgia Supreme Court in *McKee v. State*¹³ described what happened next. During the poll of the jury, one juror answered "I don't know" when asked whether the verdict was freely and voluntarily made. The trial court then informed the jury that "we need to have a verdict which is unanimous for all twelve of you. And let me ask that you return to the jury room and resume your deliberations." McKee moved for a mistrial, contending that any verdict returned would be coerced given the length of deliberations and the circumstances revealed by the polling. The trial court denied the motion. The jury later returned a verdict, again finding McKee guilty of felony murder and aggravated assault. The jury was polled and all the jurors affirmatively acknowledged that the verdict was their own and freely and voluntarily made. The trial court noted for the record that it paid particular attention to the response made by juror Baugh, who had originally expressed doubts about her verdict, and that the court was "satisfied that she answered in the affirmative because that was what her verdict was." When McKee complained on appeal that his motion for mistrial had not been granted, the Supreme court denied relief.

¹³*McKee v. State*, 277 Ga. 577, 591 S.E.2d 814 (2004).

Chapter 38

Judgment

- § 38:1 Entry of judgment
- § 38:2 Duty of clerk to enter judgment
- § 38:3 Effect of entry of judgment
- § 38:4 Amount of judgment
- § 38:5 Inclusion of interest in judgment
- § 38:6 Allowance of court costs
- § 38:7 Arrest of judgment and judgment notwithstanding verdict
- § 38:8 Modification of judgment
- § 38:9 Res judicata effect of judgment

§ 38:1 Entry of judgment

A judge's oral pronouncement does not become a final, appealable judgment until the judgment is reduced to writing, signed by the judge, and filed with the clerk.¹

A judgment is the law's last word in a judicial controversy. It is the result of the application of legal principles to the state of facts presented to the court. It may be defined as the court's official and final consideration and determination of the respective rights and obligations of the parties, as those rights and obligations presently exist, upon matters submitted to the court in an action or proceeding. A more precise definition is that a judgment is the conclusion of the law upon the matters contained in the record.² Divorce decrees "should resolve all contestable issues" and "no divorce decree shall be granted unless all contestable issues in the case have been finally resolved."³

All judgments must be signed by the judge and filed with the clerk. The judgment is considered entered when it is filed with

[Section 38:1]

¹Noble v. Noble, 345 Ga. App. 799, 815 S.E.2d 150 (2018); State v. Perry, 349 Ga. App. 475, 825 S.E.2d 902 (2019); Rocha v. State, 287 Ga. App. 446, 651 S.E.2d 781 (2007), quoting Sharp v. State, 183 Ga. App. 641, 642(1), 360 S.E.2d 50 (1987).

²Gibson v. Robinson, 90 Ga. 756,

16 S.E. 969 (1893). The Georgia Supreme Court has held that an order revoking first-offender status and adjudicating guilt is a final judgment. Howard v. State, 319 Ga. 114, 902 S.E.2d 551 (2024).

³Rodgers v. Rodgers, 358 Ga. App. 223, 854 S.E.2d 558 (2021).

the clerk. The judgment is not effective until it is entered.⁴

Regarding partial final judgments,

[a] district court must follow a two-step analysis in determining whether [it] may properly be certified under Rule 54(b). *Lloyd Noland Found.*, 483 F.3d at 777. First, the court must determine that its final judgment is, in fact, both final and a judgment. *Id.* . . . That is, the court’s decision must be “final” in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action, and a “judgment” in the sense that it is a decision upon a cognizable claim for relief. *Id.* . . . Second, if the district court determines that its decision is a final judgment, the district court must then determine that there is no just reason for delay in certifying it[s] [decision] as final and immediately appealable. *Id.* . . .; see Fed. R. Civ. P. 54(b). This second determination requires the district court to consider ‘judicial administrative interests—including the historic federal policy against piecemeal appeals—and the equities involved.’⁵

A “consent judgment” is one entered into by stipulation of the parties with the intention of resolving a dispute, and generally is brought to the court by the parties so that it may be entered by the court, thereby compromising and settling an action.⁶ In regards to sentencing, it was observed in *Hendrix v. State*⁷ that “[a] defendant’s acquiescence to an illegal sentence, either through plea negotiations or a failure to object to the sentence, cannot render an otherwise illegal sentence valid through waiver. That is because a void sentence in law amounts to no sentence at all.”

“A ruling ‘constitutes a final judgment within the meaning of OCGA § 5-6-34(a)(1) where it leaves no issues remaining to be resolved, constitutes the court’s final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court.’ ”⁸

A “modified gag order is an appealable judgment, either because it is appealable as a final judgment under the collateral order doctrine, or because it functionally amounts to an

⁴O.C.G.A. § 9-11-58; *Tate v. Tate*, 340 Ga. App. 361, 797 S.E.2d 227 (2017); *Mondy v. Magnolia Advanced Materials, Inc.*, 341 Ga. App. 141, 797 S.E.2d 506 (2017), judgment aff’d, 303 Ga. 764, 815 S.E.2d 70 (2018).

⁵*Peden v. Stephens*, 50 F.4th 972, 113 Fed. R. Serv. 3d 1326 (11th Cir. 2022) (internal quotes omitted).

⁶*Elrod v. Reliance Development Company, LLC*, 350 Ga. App. 113, 828

S.E.2d 126 (2019); *Brown & Williamson Tobacco Corporation v. Gault*, 280 Ga. 420, 627 S.E.2d 549 (2006).

⁷*Hendrix v. State*, 351 Ga. App. 584, 831 S.E.2d 517 (2019).

⁸*Mughni v. Beyond Management Group, Inc.*, 349 Ga. App. 398, 825 S.E.2d 829 (2019); *Valley v. South Atlantic Conference of Seventh-Day Adventist*, 347 Ga. App. 131, 817 S.E.2d 704 (2018).

injunction.”⁹

Georgia courts have declared that “[a] judgment must conform to the verdict [OCGA § 9-12-9]; and likewise it must follow the true meaning and intent of the finding of the jury.”¹⁰

In a civil case, a verdict that is contradictory and repugnant is void, and no valid judgment can be entered thereon.¹¹ Judgment entered on a contradictory verdict will be set aside. The failure to object to a verdict form submitted to the jury does not waive review of an inconsistent verdict claim, even if the potential for an inconsistent verdict is evident from the face of the form.¹² Failure to object to an inconsistent verdict before the jury is dismissed does not waive a challenge to the verdict.¹³

§ 38:2 Duty of clerk to enter judgment

It is the duty of the clerk to enter the judgment, and entry of judgment shall be without delay for taxing costs.¹

An oral announcement or a direction by the judge is not a judgment until and unless it is reduced to writing² and is entered.³

The Eleventh Circuit rejected a party’s claim that a clerk improperly signed a judgment order against him denying his requested relief. The court reasoned the Fed. R. Civ. P. 58(b)(1)(c) authorizes a clerk to “prepare, sign, and enter the judgment when . . . the court denies all relief.”⁴

The Georgia Court of Appeals has observed that “[w]hile a judge’s oral statements on the record may provide insight into the intent of [his] subsequent written judgment, any discrepancies between the two must be resolved in favor of the written judgment.”⁵

§ 38:3 Effect of entry of judgment

Generally, a judgment is not effective until it is entered by the

⁹WXIA-TV v. State, 303 Ga. 428, 811 S.E.2d 378 (2018).

¹⁰Wooten v. Williams, 342 Ga. App. 511, 803 S.E.2d 782 (2017).

¹¹Anthony v. Gator Cochran Const., Inc., 288 Ga. 79, 702 S.E.2d 139 (2010).

¹²Anthony v. Gator Cochran Const., Inc., 288 Ga. 79, 702 S.E.2d 139 (2010), overruling Brannan Auto Parts v. Raymark Industries, 183 Ga. App. 82, 357 S.E.2d 807 (1987).

¹³Anthony v. Gator Cochran Const., Inc., 288 Ga. 79, 702 S.E.2d 139 (2010), overruling Ford Motor Co.

v. Tippins, 225 Ga. App. 128, 133 (5) (b), 483 S.E.2d 121 (1997).

[Section 38:2]

¹See O.C.G.A. § 9-11-58.

²Simmons v. State Farm Mut. Auto. Ins. Co., 111 Ga. App. 738, 143 S.E.2d 55 (1965).

³Dunagan v. Sims, 119 Ga. App. 765, 168 S.E.2d 914 (1969).

⁴Bufkin v. Scottrade, Incorporated, 812 Fed. Appx. 838 (11th Cir. 2020).

⁵Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11 (2017).

clerk.¹

A judgment that is ambiguous and uncertain may be read in connection with the entire record and construed accordingly. Where, on the whole record, the scope of the judgment can be ascertained, it will be construed in accordance with that record, as influenced by the applicable statutes and rules of procedure and by the character and object of the proceeding culminating in the judgment. Under this rule, it is proper to consider the pleadings.²

Only an entered decision or judgment is appealable.³

§ 38:4 Amount of judgment

The general rule is that a final judgment for money must specify the amount awarded or the means for determining that amount. Such award must be certain and definite as to the amount thereof or be susceptible of being made so by proper construction or by mere mathematical computation. Thus, the requisite element of certainty is deemed to be present where the exact amount of the judgment may be ascertained by the subtraction of one named sum from another named sum, as provided in the judgment.¹

What if the trier of fact wants to give the plaintiff a full measure of recovery, and perhaps then some? The judgment cannot exceed the amount demanded in the ad damnum, but in view of the liberality permitted in making amendments in the pleadings,² no serious problem is presented here. The question would have to be raised in the trial court or it could not be raised on appeal.

“A final judgment that exceeds all available insurance coverage—regardless of whether it results from a consensual settlement or a jury verdict—constitutes an ‘excess judgment’ that can satisfy the causation element of an insurer-bad-faith claim under Florida law.”³

In an action to set aside a deed purporting to convey real prop-

[Section 38:3]

¹Tolbert v. Toole, 296 Ga. 357, 767 S.E.2d 24 (2014) (overruled on other grounds by, Johnson v. State, 315 Ga. 876, 885 S.E.2d 725 (2023)); Bowen v. State, 239 Ga. 517, 238 S.E.2d 62 (1977).

²Chappell v. Small, 194 Ga. 143, 20 S.E.2d 916 (1942).

³Rocha v. State, 287 Ga. App. 446, 651 S.E.2d 781 (2007), quoting Sharp v. State, 183 Ga. App. 641,

642(1), 360 S.E.2d 50 (1987).

[Section 38:4]

¹Hutcheson v. Hutcheson, 197 Ga. 603, 30 S.E.2d 107 (1944); Moody v. Muscogee Mfg. Co., 134 Ga. 721, 68 S.E. 604 (1910).

²See § 32:5, *supra*.

³McNamara v. Government Employees Insurance Company, 30 F.4th 1055 (11th Cir. 2022).

erty, a trial court was authorized to determine the fair market value of the property and to enter a money judgment after the verdict setting the deed aside.⁴

Georgia law requires that every judgment be certain and definite as to its amount.⁵

§ 38:5 Inclusion of interest in judgment

In all cases where judgment may be obtained, such judgment shall be entered up for the principal sum due, with interest, provided the claim upon which it was obtained draws interest; but no part of such judgment shall bear interest, except the principal that may be due on the original debt.¹ The legal rate of interest is established in O.C.G.A. § 7-4-2.

Interest on judgments is a question that arises after the entry of the judgment and is therefore beyond the scope of extended treatment in this Handbook.²

§ 38:6 Allowance of court costs

Except where express provision therefore is made in a statute, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs; but costs against the State of Georgia, its officers, agencies and political subdivisions shall be imposed only to the extent permitted by law.¹

It is generally not error to award court costs to prevailing party.²

Federal Rule of Civil Procedure 54(d)(1) provides that costs should generally be extended to the prevailing litigant. Limitations are delineated in 28 U.S.C.A. § 1920.³

⁴Hudson v. Hudson, 258 Ga. 692, 373 S.E.2d 372 (1988).

⁵See Stephens v. State Farm Mut. Auto. Ins. Co., 236 Ga. App. 758, 513 S.E.2d 508 (1999) where judgment for “the lesser of \$425,000 or the amount of liability insurance benefits applicable” was an insufficient judgment because the court did not make a finding as to the existence of availability of insurance coverage; therefore clerk, without such finding, could not enter a judgment for the prevailing party.

[Section 38:5]

¹O.C.G.A. § 9-12-10.

²Trial court permitted to apply

post-judgment interest to the award of attorney fees as part of the original debt under O.C.G.A. § 9-12-10. Davis v. Whitford Properties, Inc., 282 Ga. App. 143, 637 S.E.2d 849 (2006).

[Section 38:6]

¹O.C.G.A. § 9-11-54.

²See Hancock County Bd. of Tax Assessors v. Dickens, 208 Ga. App. 742, 431 S.E.2d 735 (1993), where court costs were awarded to landowners, prevailing party, in a dispute about an ad valorem tax on their standing timber.

³Johnston v. Borders, 36 F.4th 1254, 112 Fed. R. Serv. 3d 2004 (11th Cir. 2022).

§ 38:7 Arrest of judgment and judgment notwithstanding verdict

Under certain circumstances, proceedings after the trial to enforce the judgment can be stayed.¹

Trial court improperly granted portion of motion for supersedeas bond which abated post-judgment interest given that plaintiff homeowners association had filed its notice of appeal, thus “divest[ing] [the trial court] of jurisdiction to rule on whether post-judgment interest was abated pursuant to OCGA § 9-11-67, which would, in effect, modify or alter the judgment.”²

The court properly dismissed a motion for judgment notwithstanding the verdict where the movant failed to provide a trial transcript.³

In *Stone v. Williams General Corp.*,⁴ the defendants argued that the trial court erred in denying their motion for new trial or in the alternative for a j.n.o.v. because there was insufficient evidence to support a claim of misappropriation of trade secrets. The Court of Appeals disagreed. A judgment notwithstanding the verdict (JNOV) is properly granted only when there can be only one reasonable conclusion as to the proper judgment; if there is any evidentiary basis for the jury’s verdict, viewing the evidence most favorably to the party who secured the verdict, it is not error to deny the motion. The grant or denial of a motion for new trial is a matter within the sound discretion of the trial court and will not be disturbed if there is any evidence to authorize it.⁵

The grant of a judgment notwithstanding verdict motion before the jury returned its verdict was void and would be reversed with directions that judgment be entered on the jury’s verdict.⁶

A trial court’s judgment must reasonably conform to the “reasonable intendment of the verdict upon which it is based.” A trial court’s amended judgment on remand “to incorporate a survey that excluded a portion of the new road from the easement [did] not conform to the reasonable intendment of the verdict and the evidence presented at trial” and was reversed and remanded on

[Section 38:7]

¹See O.C.G.A. § 9-11-62.

²*Northside Bank v. Mountainbrook of Bartow County Homeowners Association, Inc.*, 338 Ga. App. 126, 789 S.E.2d 378 (2016).

³*White v. Dilworth*, 178 Ga. App. 226, 342 S.E.2d 709 (1986). In *Sims v. Heath*, 258 Ga. App. 681, 577 S.E.2d 789 (2002), standards for granting motions for judgment notwithstanding

the verdict were articulated.

⁴*Stone v. Williams General Corp.*, 266 Ga. App. 608, 597 S.E.2d 456 (2004), judgment rev’d on other grounds, 279 Ga. 428, 614 S.E.2d 758 (2005).

⁵*Gary v. Brown*, 356 Ga. App. 550, 848 S.E.2d 161 (2020).

⁶*Vinson v. Piedmont Housing, Inc.*, 198 Ga. App. 814, 403 S.E.2d 96 (1991).

appeal.⁷

In *Bowen v. Savoy*,⁸ the Supreme Court of Georgia held that opening a default judgment did not require that defendants set forth a reasonable explanation regarding why they did not file a timely answer. In reaching this holding, the Court signaled their disapproval of prior precedent that could have been interpreted as requiring such a showing “under the proper case ground.” *Bowen* was an action involving three sisters. The executor of the estate brought an action against her two sisters alleging a misappropriation of funds from the estate. A motion to dismiss was filed. After it was denied months later, an untimely answer was filed. However, by this time a default judgment had been entered. The sisters then moved to have the default judgment opened.

“[T]rial courts have ‘very ample powers’ to open defaults and that the proper-case ground for opening a default should be liberally applied so as to keep with the policy of deciding cases on their merits.”⁹

“Under OCGA § 9-11-55(b), a prejudgment default may be opened on one of three grounds if four conditions are met. The three grounds are: (1) providential cause, (2) excusable neglect, and (3) proper case; the four conditions are: (1) showing made under oath, (2) offer to plead instant, (3) announcement of ready to proceed with trial, and (4) setting up a meritorious defense. The question of whether to open a default on one of the three grounds noted above rests within the discretion of the trial judge.”¹⁰

A motion to set aside a default judgment was improperly granted where the movant, the defendant, never filed an answer to the complaint during the many years the suit was pending, nor did anything upon receiving explicit notice from plaintiff that defendant never agreed to any settlement and a warning that plaintiff intended to proceed with the case notwithstanding that defendant sent plaintiff’s attorney a check in apparent settlement. The court said that even if the attorney, who had since been disbarred and was serving time in jail, had apparent authority to settle the claim on behalf of the plaintiff, the statutory requirements for setting aside a judgment still had to be met once a default judgment was entered, and the facts indicated that mov-

⁷R. C. Acres, Inc. v. Mommies Properties, LLC, 338 Ga. App. 569, 790 S.E.2d 824 (2016).

⁸*Bowen v. Savoy*, 308 Ga. 204, 839 S.E.2d 546 (2020).

⁹*Matter of Boyd*, 315 Ga. 390, 882 S.E.2d 339 (2022).

¹⁰*Youd v. Beskin*, 364 Ga. App. 333, 874 S.E.2d 831 (2022).

ant was not free from negligence.¹¹

A motion to set aside verdict and vacate judgment (as distinguished from motion in arrest of judgment) is not an appropriate remedy in a criminal case.¹²

The standard for granting a JNOV is the same as that for a motion for directed verdict. Judgment notwithstanding the verdict is warranted only when no conflict exists as to any material issue and the evidence presented, together with all reasonable inferences, demands a certain verdict. The appellate court reviews the denial of JNOV and denial of motion for directed verdict under the any evidence standard.¹³ Also, caselaw suggests that parties must move for a directed verdict as a precursor to a motion for JNOV.¹⁴

Employer who filed JNOV motion was not entitled to attorney fees and interest when it failed to move for directed verdict as to its claims.¹⁵

§ 38:8 Modification of judgment

A trial court has plenary power to amend, correct or revoke its orders and judgments during the term at which they are entered for the purpose of promoting justice.¹

That power to amend generally “ends with the term in which judgment was entered.” However, a trial court is empowered to “correct clerical mistakes in orders ‘arising from oversight or omission’ at any time, upon its own initiative or on a party’s motion. OCGA § 9-11-60 (g).”²

“[A]s a general rule, in civil actions other than injunctions, a trial court, ‘upon the filing of a notice of appeal, loses jurisdiction to modify or enforce a judgment which is the subject of the ap-

¹¹First Dixie Properties, Inc. v. Chrysler Corp., 202 Ga. App. 145, 413 S.E.2d 464 (1991).

¹²Waye v. State, 239 Ga. 871, 238 S.E.2d 923 (1977).

¹³Lee v. Smith, 346 Ga. App. 694, 816 S.E.2d 784 (2018), judgment rev’d in part on other grounds, 307 Ga. 815, 838 S.E.2d 870 (2020) (citing the “any evidence test”); Bacon v. Volvo Service Center, Inc., 266 Ga. App. 543, 597 S.E.2d 440 (2004).

¹⁴James E. Warren, M.D., P.C. v. Weber & Warren Anesthesia Services, LLC, 272 Ga. App. 232, 612 S.E.2d 17

(2005).

¹⁵Avion Systems, Inc. v. Bellomo, 338 Ga. App. 141, 789 S.E.2d 374 (2016).

[Section 38:8]

¹Medical Center of Central Georgia, Inc. v. Cancel, 356 Ga. App. 529, 848 S.E.2d 150 (2020); Maines v. State, 330 Ga. App. 247, 765 S.E.2d 382 (2014) (overruled on other grounds by, Collier v. State, 307 Ga. 363, 834 S.E.2d 769 (2019)).

²Ekhurutomwen v. Jamison, 356 Ga. App. 807, 849 S.E.2d 235 (2020).

peal during the period of supersedeas.’ ”³

Trial judge has no authority to modify judgment based on verdict of jury by ordering presentation to another jury of issue of whether condemnees were entitled to additional compensation for attorney fees and expenses of litigation.⁴

The Georgia Court of Appeals found in a negligence action against Food Lion that the trial court acted within its discretion to amend the judgment order to include attorney’s fees and costs.⁵

A trial judge may write off a portion of a jury verdict which is illegal, so long as it can be determined and is separable.⁶

Modification of original judgment is improper when judgment is reasonable interpretation of the intent of the jury verdict regarding alimony payments, no clerical errors or omissions occur, and defendant/husband waives right to attack judgment or appeal.⁷

A trial court does not have the power to modify the terms of a divorce decree in a contempt proceeding.⁸

The Eleventh Circuit explained the difference between contempt orders and conditional orders. It explained:

Conditional orders reflect an ongoing effort by the district court to prod the contemnor into compliance. . . . A district court has essentially “place[d] the keys of the prison cell in the contemnor’s pocket” by encouraging the contemnor to comply with the order prior to the imposition of any sanctions. . . . [But] “[w]hen a sanction is entered as a result of the contempt finding,” it “render[s] the contempt judgment final.”⁹

In *Eden v. Eden*,¹⁰ it was found that the trial court improperly altered an earlier settlement agreement. In *Eden*, a sister brought a contempt action against her brother and his wife. Though a contempt remedy was unavailable, the court found that the court erred when it unilaterally modified the terms of an earlier settlement agreement, which included a provision requiring a payment

³*Serdula v. State*, 356 Ga. App. 94, 845 S.E.2d 362 (2020).

⁴*Department of Transp. v. Kenney*, 238 Ga. 173, 231 S.E.2d 767 (1977).

⁵*Stevens v. Food Lion, LLC*, 341 Ga. App. 644, 801 S.E.2d 340 (2017).

⁶*Fletcher v. C.W. Matthews Contracting Co., Inc.*, 322 Ga. App. 751, 746 S.E.2d 230 (2013).

⁷*Ardnt v. Dudley*, 245 Ga. 127, 263 S.E.2d 159 (1980).

⁸*See Killingsworth v. Killingsworth*, 286 Ga. 234, 686 S.E.2d 640

(2009) where it was error for the trial court, in a contempt proceeding, to order a former husband to pay his former wife \$1,850 in cash instead of transferring half of his 401(k) funds, which was required under the divorce decree, because that constituted a modification of the decree.

⁹*U.S. Commodity Futures Trading Commission v. Escobio*, 946 F.3d 1242, 105 Fed. R. Serv. 3d 1294 (11th Cir. 2020) (citations omitted).

¹⁰*Eden v. Eden*, 344 Ga. App. 864, 812 S.E.2d 317 (2018).

of a \$700 monthly payment to the sister.

In *Tremble v. Tremble*,¹¹ the trial court entered a final judgment and decree in a divorce action, then a second judgment which was filed after expiration of the term in which the first judgment was filed. The wife filed a motion to set aside the second judgment. The Georgia Supreme Court announced a number of rulings. The Court held that a judge's power to revise, correct, revoke, modify or vacate a judgment does not extend beyond the same term of court, unless a motion to modify or vacate was filed within the same term of court. Clerical errors and irregularities in a judgment, if they appear on the face of the record, may be corrected by the trial court even after expiration of the term in which the judgment was filed. A motion for new trial that is filed prior to the entry of the judgment on the jury's verdict is premature and invalid, and no amendment can be filed to such a void motion.

Although post-majority child support obligations created by contract are not subject to involuntary modification, parties may alter the effect of the rule against involuntary modification of post-majority child support by their voluntary contract.¹²

When a trial court enters an arbitration award, its order must conform with the arbitrator's award. For example, the trial court erred in *Kent v. Mitchell*,¹³ when it modified an arbitration award against the defendant's law firm to reflect an award against the defendant personally.

Trial court which amended judgment after jury verdict to reflect conviction for a firearm charge as opposed to robbery did not err given that the change was a clerical rather than substantive correction.¹⁴

§ 38:9 Res judicata effect of judgment

The purpose of the doctrine of res judicata is to prevent the re-litigation of claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action.¹

"The general rule is 'that a former judgment binds only as to the facts in issue and events existing at the time of such judg-

¹¹*Tremble v. Tremble*, 288 Ga. 666, 706 S.E.2d 453 (2011). [Section 38:9]

¹²*Katz v. Katz*, 258 Ga. 184, 366 S.E.2d 766 (1988).

¹³*Kent v. Mitchell*, 319 Ga. App. 115, 735 S.E.2d 110 (2012).

¹⁴*United States v. Davis*, 841 F.3d 1253 (11th Cir. 2016).

¹*Crowe v. Elder*, 290 Ga. 686, 723 S.E.2d 428 (2012); *James v. Intown Ventures, LLC*, 290 Ga. 813, 725 S.E.2d 213 (2012).

ment, and does not prevent a re-examination even of the same questions between the same parties, if in the interval the material facts have so changed or such new events have occurred as to alter the legal rights or relations of the litigants.’”²

When determining whether an action is barred by *res judicata*, a federal court applies the law of the state of its location.³

In divorce and alimony cases, issues which were actually litigated cannot be re-litigated. However, issues which could have been adjudicated, but were not, can be re-litigated.⁴

Application of the Georgia Code requires holding that constitutional issues presented for decision on appeal are barred by doctrine of *res judicata*; identical issues were presented to federal courts and final judgment obtained in that forum has binding *res judicata* and collateral estoppel effect, regardless of correctness of rulings.⁵

Res judicata and collateral estoppel are distinguished in *Cincinnati Ins. Co. v. MacLeod*.⁶ This case also applies the doctrine of judicial estoppel, covered in this text in § 1:8, *supra*.

Like *res judicata*, collateral estoppel requires the identity of the parties or their privies in both actions; however, unlike *res judicata*, collateral estoppel does not require identity of the claim, and so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim.⁷

The 11th Circuit distinguished *res judicata* and collateral estoppel:

“For *res judicata* to bar a subsequent case, four elements must be present: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases.” (citation omitted)
“For collateral estoppel to be invoked 1) the issue must be identical in the pending case to that decided in the prior proceeding; 2) the issue must necessarily have been decided in the prior proceeding; 3) the party to be estopped must have been a party or have been adequately represented by a party in the first proceeding; and 4) the precluded issue must actually have been litigated in the first

²*Choi v. Immanuel Korean United Methodist Church*, 327 Ga. App. 26, 755 S.E.2d 354 (2014).

³*Laskar v. Peterson*, 771 F.3d 1291, 311 Ed. Law Rep. 20 (11th Cir. 2014).

⁴*Hardman v. Hardman*, 295 Ga. 732, 763 S.E.2d 861 (2014).

⁵*Chilivis v. Dasher*, 236 Ga. 669, 225 S.E.2d 32 (1976).

⁶*Cincinnati Ins. Co. v. MacLeod*, 259 Ga. App. 761, 577 S.E.2d 799 (2003).

⁷*Cost Management Group, Inc. v. Bommer*, 327 Ga. App. 164, 755 S.E.2d 537 (2014).

proceeding.” (citation omitted).⁸

And the Georgia Court of Appeals provided this distinction:

The doctrine of *res judicata* prevents the re-litigation of all claims which *have already been adjudicated*, or which could have been adjudicated, between identical parties or their privies in identical causes of action. Three prerequisites must be satisfied before *res judicata* applies—(1) identity of the cause of action, (2) identity of the parties or their privies, and (3) *previous adjudication on the merits by a court of competent jurisdiction*. On the other hand, the related doctrine of collateral estoppel precludes the re-adjudication of an issue that has *previously been litigated and adjudicated on the merits* in another action between the same parties or their privies. Like *res judicata*, collateral estoppel requires the identity of the parties or their privies in both actions. However, unlike *res judicata*, collateral estoppel does not require identity of the claim—so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim.⁹

“A privy has generally been defined as one who is represented at trial and who is in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right.”¹⁰

The *res judicata* doctrine barred a habeas corpus petitioner from claiming insufficiency of the evidence against him when he had litigated that claim on direct appeal.¹¹

The Georgia Court of Appeals applied *res judicata* to block an attack on the validity of a custody judgment in *Bates v. Bates*.¹² There, the parties litigated in Fulton County over a motion to set aside a Henry County adoption decree. Since the appellant had the full opportunity to attack the validity of any judgment made by the Fulton County judge but failed to do so, the issue was fully litigated and the appellant could not later assert that the judgment was null and void in a separate proceeding.

Judgment in action alleging fraud to cancel warranty deed is not *res judicata* in action to establish lost note and security deed and to recover balance due on note, since proof necessary to sustain latter action is entirely different and requires reliance on

⁸United States v. Beane, 841 F.3d 1273 (11th Cir. 2016).

⁹Morgan County v. Gay, 352 Ga. App. 555, 834 S.E.2d 576 (2019), quoting Body of Christ Overcoming Church of God, Inc. v. Brinson, 287 Ga. 485, 696 S.E.2d 667 (2010).

¹⁰Gary v. Dollar Thrifty Automotive Group, 329 Ga. App. 320, 763

S.E.2d 354 (2014), quoting Butler v. Turner, 274 Ga. 566, 555 S.E.2d 427 (2001).

¹¹Head v. Thomason, 276 Ga. 434, 578 S.E.2d 426 (2003) (overruled on other grounds by, State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (2020)).

¹²Bates v. Bates, 317 Ga. App. 339, 730 S.E.2d 482 (2012).

warranty deed sought to be set aside in former action.¹³

Trial court was authorized to find that dismissal of first complaint was for want of prosecution, that such dismissal operated as adjudication on merits, and that such adjudication therefore barred second suit under rule of res judicata.¹⁴

“A voluntary dismissal with prejudice constitutes a ‘judgment on the merits for purposes of res judicata’ with regard to the same parties and the same cause of action.”¹⁵

When an application for determination of dischargeability is filed and adjudicated in bankruptcy court, that judgment is res judicata in other courts.¹⁶

Res judicata bars further action between a plaintiff and a defendant where a bankruptcy court, under the bankruptcy laws, made a final adjudication on the issue of fraud.¹⁷

A 2006 decision by the Georgia Supreme Court repeated a formula for applying res judicata which is seen in many cases. In order for the res judicata doctrine to apply, three prerequisites must be satisfied: (1) identity of the parties or their privies; (2) identity of the cause of action; and (3) previous adjudication on the merits by a court of competent jurisdiction.¹⁸

The essence of this formula was stated in a 2008 Court of Appeals decision. In order for res judicata to bar a subsequent action, three requirements must be met: (1) the first action must have involved an adjudication by a court of competent jurisdiction; (2) the two actions must have an identity of parties and subject matter; and (3) the party against whom the doctrine of res judicata is raised must have had a full and fair opportunity to litigate the issues in the first action.¹⁹

The absence of a requirement of identity of claims in collateral estoppel cases was recited in *Ruth v. Herrmann*.²⁰ A distinction is made between identity of parties versus identity of claims. Both collateral estoppel and res judicata require identity of parties, or privity. But unlike res judicata, collateral estoppel does not

¹³*Eaton v. Weatherby*, 239 Ga. 795, 239 S.E.2d 8 (1977).

¹⁴*Paul v. Bennett*, 241 Ga. 158, 244 S.E.2d 9 (1978).

¹⁵*Department of Transp. v. Revco Discount Drug Centers, Inc.*, 322 Ga. App. 873, 746 S.E.2d 631 (2013).

¹⁶*Kiplinger v. Kiplinger*, 242 Ga. 465, 249 S.E.2d 254 (1978).

¹⁷*Anderson Oil Co., Inc. v. Benton Oil Co.*, 246 Ga. 304, 271 S.E.2d 207 (1980).

¹⁸*Brown & Williamson Tobacco Corporation v. Gault*, 280 Ga. 420, 627 S.E.2d 549 (2006).

¹⁹*Executive Fitness, LLC v. Healey Bldg. Ltd. Partnership*, 290 Ga. App. 613, 660 S.E.2d 26 (2008); *Starship Enterprises of Atlanta, Inc. v. Gwinnett County*, 319 Ga. 293, 903 S.E.2d 55 (2024) (reiterating Georgia’s test for res judicata).

²⁰*Ruth v. Herrmann*, 291 Ga. App. 399, 662 S.E.2d 726 (2008).

require identity of the claim; so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be relitigated, even as part of a different claim. Collateral estoppel precludes retrial of issues that were actually litigated and decided in the previous action, or that necessarily had to be decided in order for the previous judgment to have been rendered.

Where the burden of proof on an issue in the new case is lower than it was in the previous case, the parties are not collaterally estopped from litigating the issue.²¹

Where issues common to both federal and state actions are ruled upon in earlier federal proceeding, collateral estoppel operates to prevent re-litigation of such issues in subsequent state action. In *Meagher v. Quick*,²² the concepts of res judicata and collateral estoppel are discussed. Three requisites must be satisfied before res judicata applies: (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction. Unlike res judicata, collateral estoppel does not require identity of the claim—so long as the issue was determined in the previous action and there is identity of parties, that issue may not be relitigated, even as a part of a different claim. Collateral estoppel bars not only relitigation of issues actually litigated and decided by a prior action, it also precludes issues that necessarily had to be decided in order for previous judgment to have been rendered.

Given that the jury convicted defendant of five counts based upon the crime of aggravated assault, yet acquitted him of aggravated assault, “there is no way that a rational jury could have found [the defendant] guilty of those crimes without also finding that he committed the aggravated assault.” Thus, collateral estoppel did not bar a retrial of the defendant on the counts against him which had been vacated.²³

Trial court erred in finding that res judicata precluded borrower’s claim against lender where claims being litigated were based upon events that occurred subsequent to the borrower’s voluntary dismissal of two earlier cases.²⁴

The Georgia Supreme Court found in *Coen v. CDC Software Corp.*²⁵ that plaintiff’s defamation action was not barred by res judicata. In a previous suit, plaintiff alleged that defendant had

²¹Copelan v. Copelan, 294 Ga. 840, 755 S.E.2d 739 (2014).

²²Meagher v. Quick, 264 Ga. App. 639, 594 S.E.2d 182 (2003).

²³Giddens v. State, 299 Ga. 109, 786 S.E.2d 659 (2016).

²⁴Humphrey v. JP Morgan Chase Bank, N.A., 337 Ga. App. 331, 787 S.E.2d 303 (2016).

²⁵Coen v. CDC Software Corporation, 304 Ga. 105, 816 S.E.2d 670 (2018).

improperly denied him the payment of monies that were owed him pursuant to his employment agreement. In his second action, plaintiff alleged that he had been defamed by defendant. As stated by the court, “[a]lthough both of Coen’s lawsuits are related to the termination of his employment with CDC, the two suits are based on different wrongs and different sets of operative facts; accordingly, the suits contained different causes of action and the second suit is not barred by res judicata.”

Appendices

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APPENDIX A

Fast Finder Table

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APPENDIX B

Carlson's Annotated Georgia Trial Objections

Checklist of Common Objections

1. Addressing Juror by Name. It is improper, after voir dire, to address a juror by name during trial of the case. *Atlanta Stove Works, Inc. v. Hollon*, 112 Ga. App. 862, 873, 146 S.E.2d 358, 366 (1965) (“It has been held in other jurisdictions that it is improper to single out a particular juror, address him by name, and personally appeal to him,” and Georgia disapproves of such a practice).

2. Ambiguous and Confusing. *Carroll v. Hill*, 80 Ga. App. 576, 56 S.E.2d 821 (1949); *Equity Lifestyle Properties, Inc. v. Florida Mowing And Landscape Service, Inc.*, 556 F.3d 1232 (11th Cir. 2009).

Holloway v. State, 283 Ga. App. 823, 643 S.E.2d 286 (2007) (trial judges retain wide latitude to impose reasonable limits on cross examination based on concerns about, among other things, confusion of the issues or interrogation that is repetitive or only marginally relevant).

3. Argumentative. O.C.G.A. 24-6-622 (it shall be the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor); *Pitts v. Bode*, 198 Ga. App. 787, 403 S.E.2d 66 (1991); *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *U.S. v. Williams*, 181 Fed. Appx. 805 (11th Cir. 2006).

Hawkins v. State, 281 Ga. App. 852, 637 S.E.2d 422 (2006) (prosecutor is allowed to challenge defendant’s truthfulness on cross-examination by asking defendant if he is calling another witness a liar); question “Are you calling Officer Goode a liar here?” was objected to as argumentative, but question was approved).

4. Assuming Facts Not in Evidence. O.C.G.A. 24-4-401 (Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly, and irrelevant matter should be excluded); *Doughty v. State*, 175 Ga. App. 317, 333 S.E.2d 402 (1985); *Beadles v. State*, 259 Ga. 519, 385 S.E.2d 76 (1989). See *U.S. v. Almanzar*, 634 F.3d 1214 (11th Cir. 2011).

Fincher v. State, 276 Ga. 480, 578 S.E.2d 102 (2003) (prosecutor stated no blood was found on porch when undisputed evidence was that blood was found on porch); Walker v. State, 281 Ga. 521, 640 S.E.2d 274 (2007) (prosecutor's argument that defendant would have denied being at the crime scene was improper, where it is not a reasonable inference from the evidence).

5. Authentication or Identification of Evidence. O.C.G.A. § 24-9-901. Objections based on authentication or foundation defects often require expansion. Objection to evidence on the ground of lack of foundation, without stating what the proper foundation should be, is insufficient and presents nothing for consideration on appeal. Hudgins v. State, 186 Ga. App. 883, 369 S.E.2d 54 (1988).

Warner v. State, 281 Ga. 763, 642 S.E.2d 821 (2007) (an objection to lack of foundation must specify the foundational element that is contended to be lacking to preserve issue for appeal); Wegman-Fakunle v. State, 277 Ga. App. 198, 626 S.E.2d 170 (2006) (when admitting photograph into evidence it is not necessary that witness have taken the photograph himself or was even present when the photograph was taken so long as he is familiar with the scene depicted in photograph); Postell v. State, 279 Ga. App. 275, 630 S.E.2d 867 (2006) (to show a chain of custody adequate to preserve the identity of fungible evidence, State must prove with reasonable certainty that evidence is same as that seized and there was no tampering or substitution); Simmons v. State, 282 Ga. 183, 646 S.E.2d 55 (2007) (proof of chain of custody not required on non-fungible items); Washington v. State, 283 Ga. App. 570, 642 S.E.2d 199 (2007) (crack pipe a "distinct and recognizable physical object" such that it is admissible without showing a chain of custody).

The objection to a defect in the authentication proof for an opponent's exhibit often takes the form of "objection, improper foundation." Case law suggests more may be needed to make a successful objection. Newman v. State, 239 Ga. 329, 236 S.E.2d 673, 675 (1977), articulates the rule that "[o]bjection on the ground of a lack of proper foundation without stating what the proper foundation should be is insufficient and presents nothing for consideration on appeal." See Rucker v. State, 266 Ga. App. 293, 596 S.E.2d 639 (2004) (holding issue whether contraband seized under "plain feel doctrine" was correctly permitted into evidence was waived where defendant could not show he argued there was failure to lay proper foundation at trial and did not assert what proper foundation should be); Caves v. Columbus Bank & Trust Co., 264 Ga. App. 107, 589 S.E.2d 670, 674 (2003) (rejecting appellant director's argument that bank's accounting figures lacked foundation "as to where [the figures] came from" where

director did not specify the foundational element he alleged was missing).

6. Bad Acts Inadmissible. O.C.G.A. § 24-4-404(b) controls introduction to prior bad acts. Noncompliance with the notice requirement contained in Unif. Super. Ct. R. 31 can result in exclusion.

Williams v. State, 261 Ga. 640, 409 S.E.2d 649 (1991), established the rules for introduction of pattern conduct and prior similar bad acts under Unif. Super. Ct. R. 31; *Hogan v. State*, 272 Ga. App. 19, 611 S.E.2d 689 (2005) (where similar transaction evidence is otherwise admissible, a time lapse goes to the weight and credibility of evidence and does not demand exclusion); *Ellis v. State*, 282 Ga. App. 17, 637 S.E.2d 729 (2006) (failure of State to attach indictment and to fully comply with USCR 31.3(B) does not require automatic reversal); *Collins v. State*, 283 Ga. App. 188, 641 S.E.2d 208 (2007) (improper for a prosecutor to cross-examine a criminal defendant about the punishment received on prior convictions admitted as similar transactions).

7. Best Evidence Rule Violated. O.C.G.A. § 24-10-1002; *Bostic v. State*, 183 Ga. App. 430, 359 S.E.2d 201 (1987).

Lumley v. State, 280 Ga. App. 82, 633 S.E.2d 413 (2006) (when a writing is lost, destroyed, or inaccessible, the party who desires to offer the contents of such writing, must account for his inability to produce it despite the exercise of due diligence; moreover, merely asserting the loss, without showing diligence in attempting to provide the writing, will not do); *Eley v. State*, 266 Ga. App. 45, 596 S.E.2d 660 (2004). For purposes of best evidence rule, when a writing is lost, destroyed, or inaccessible, a party who desires to offer contents of such writing must account for his inability to produce it despite the exercise of due diligence; question of due diligence is within sound discretion of trial court.

8. Bolstering Before Impeachment. *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896, 71 A.L.R.5th 787 (1998). Absent an attack on a witness by way of cross-examination or otherwise, it is improper to introduce pretrial statements by the witness to corroborate the witness or bolster his credibility. *Davis v. State*, 307 Ga. 746, 838 S.E.2d 263 (2020). See also *Castaneda v. State*, 360 Ga. App. 316, 861 S.E.2d 171 (2021) (improper bolstering).

Chauncey v. State, 283 Ga. App. 217, 641 S.E.2d 229 (2007) (in no circumstances may a witness's credibility be bolstered by the opinion of another, even an expert, as to whether the witness is telling the truth; the credibility of a witness is a matter exclusively for determination by the factfinder); *Thompson v. State*, 281 Ga. App. 627, 636 S.E.2d 779 (2006) (although a party may not normally bolster the credibility of an unimpeached witness by using prior consistent statements, a party may rehabilitate a witness whose veracity has been challenged); *Johnson v.*

State, 265 Ga. App. 777, 595 S.E.2d 625 (2004) (prior consistent statement constituted double hearsay and would be admissible only after defendant's veracity had been placed in issue).

9. Business Record Not Established. Essential requirements for business records are set forth in O.C.G.A. 24-8-803(6). Opinions are allowed in Georgia business records.

Greene v. Bryant, 277 Ga. App. 201, 626 S.E.2d 185 (2006) (for evidence to be admissible as a business record, a foundation must be laid through the testimony of a witness indicating he is familiar with the method of keeping the records); *Santana v. State*, 283 Ga. App. 696, 642 S.E.2d 390 (2007) (mobile telephone company records custodian was not required to have personal knowledge of records for their admission as business records); *Tindol v. State*, 284 Ga. App. 45, 643 S.E.2d 329 (2007) (business records exception to the hearsay rule requires, "that the 'foundation must be laid through the testimony of a witness who is familiar with the method of keeping records and who can testify thereto and to facts which show that the entry was made in the regular course of . . . business at the time of the event or within a reasonable time thereafter'"); *Tubbs v. State*, 283 Ga. App. 578, 642 S.E.2d 205 (2007) (testifying witness not required to have to have personal knowledge of all information set forth in document for admission as a business record).

After the *Greene* case noted in the prior paragraph, the 2013 Georgia Evidence Code created a procedure for introducing business records through certification. O.C.G.A. § 24-9-902(11), (12).

10. Character Evidence. Rules of character evidence are reviewed in §§ 29:11 to 29:16.

O.C.G.A. 24-4-404, O.C.G.A. 24-6-608; *Adams v. State*, 284 Ga. App. 534, 644 S.E.2d 426 (2007) (for impeachment purposes, crime of dishonesty involves crime that bears upon a witness's propensity to testify truthfully); *Hernandez v. State*, 238 Ga. App. 796, 520 S.E.2d 698 (1999) (addressing mode and manner of impeaching; evidence of accusation or conviction of crime inadmissible to demonstrate general bad character).

11. Coconspirator Statement Inadmissible. Corroboration required to justify conviction on word of accomplice, see *Willingham v. State*, 242 Ga. App. 472, 530 S.E.2d 224 (2000).

O.C.G.A. 24-8-801 allows admission if legal requirements are satisfied. *Dickerson v. State*, 280 Ga. App. 29, 633 S.E.2d 367 (2006) (to render an out-of-court statement admissible, the State must make a prima facie showing of the existence of the conspiracy, without regard to the declarations of the co-conspirator).

12. Collateral Matter. *Worthy v. Kendall*, 222 Ga. App. 324, 474 S.E.2d 627 (1996) (irrelevant matter not usable to impeach); *Smith v. State*, 283 Ga. 237, 657 S.E.2d 523 (2008) (general rule

is no impeachment allowed on wholly collateral matters); *Cook v. State*, 221 Ga. App. 831, 472 S.E.2d 686 (1996) (collateral issue); § 12:2.

In *Barber v. City of Chicago*, 725 F.3d 702, 92 Fed. R. Evid. Serv. 14 (7th Cir. 2013), the court pointed out that impeachment by contradiction into collateral matters elicited on cross-examination is generally not allowed. As stated in *U.S. v. Cowling*, 648 F.3d 690 (8th Cir. 2011), evidence of a collateral matter is not admissible.

Moody v. State, 279 Ga. App. 440, 631 S.E.2d 485 (2006) (while a witness may be impeached about collateral issues indirectly material to the case, she may not be impeached because of a discrepancy in a wholly immaterial matter); *Haywood v. State*, 283 Ga. App. 568, 642 S.E.2d 203 (2007) (impeachment must concern relevant issues); *Brinson v. State*, 276 Ga. 671, 581 S.E.2d 548 (2003) (collateral material only admissible in unusual circumstances; here, to show accuracy of defendant's initial statement to police).

13. Competency. General rule of competency, see O.C.G.A. 24-6-601.

Collins v. State, 273 Ga. 93, 538 S.E.2d 47 (2000) (plea bargain by the defendant's cell mate in another case in exchange for testimony against the defendant did not render the testimony inadmissible; the cell mate remained a competent witness, even though he stood to gain from the testimony); *Kitfield v. Henderson, Black & Greene*, 231 Ga. App. 130, 498 S.E.2d 537 (1998) (wife of independent contractor who brought breach of contract action against corporation was interested party, and, thus, testimony by wife that company vice president, who is now deceased, had told her that lifetime contract would go to her if anything happened to her husband was not admissible under statute holding that witness who is interested party is not competent to testify if witness would be incompetent for any cause, where wife was officer and agent for her husband's corporation). The *Kitfield* case applied Georgia's old Dead Man's Statute to 1964 conversations, where the company officers and speakers were now deceased.

14. Cross Examination Scope. O.C.G.A. 24-6-611(b) (the right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him. If several parties to the same case have distinct interests, each may exercise this right); *Duckworth v. State*, 268 Ga. 566, 492 S.E.2d 201 (1997). Georgia's rule is one of wide open cross. The Georgia rule differs from the narrower Federal rule.

Hopson v. State, 281 Ga. App. 520, 636 S.E.2d 702 (2006) (party is entitled to thorough and sifting cross, but trial court may use its discretion to restrict scope to relevant issues and trial court

has broad discretion to limit scope of re-cross, which is not intended for introduction of new matter); *Heidler v. State*, 273 Ga. 54, 537 S.E.2d 44 (2000) (testimony related to defendant's criminal conduct as juvenile was admissible under Georgia's wide-open rule of cross-examination as distinct from the narrower federal rule). The limits of bias impeachment by a defense lawyer in a criminal case were explored in a 2007 case. A defendant is entitled to a reasonable cross examination on the question of whether the witness held a belief that he would receive a personal benefit from testifying favorably for the prosecution, but that is not to say that there are no limits on the cross examiner's inquiry into the potential bias of an adverse witness. On the contrary, a trial court retains wide latitude to impose reasonable limits on such cross examination, especially in the situation in which the interrogation may be only marginally relevant. *Lawton v. State*, 281 Ga. 459, 640 S.E.2d 14 (2007).

When the prosecution exposes a defendant to wide-open cross-examination there may be a constitutional problem. The issue is explored in R. Carlson and M. Carlson, *Unconstitutionality and the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining the Accused*, 7 J. Marshall L.J. 269 (2014) (exploring defendant's right to tailor his direct and testify free from cross-examination on unexplored topics).

15. Dead Man's Statute. Former O.C.G.A. 24-9-1 (no "dead man's" disqualification applicable to transactions or occurrences after July 1, 1979).

Foster v. Ramsey, 245 Ga. App. 118, 536 S.E.2d 550 (2000) (witness can testify to conversations with deceased person, if the conversation took place after the repeal of the Dead Man's Statute on July 1, 1979). Dead Man's Statute was used to block testimony in the *Kitfield* case, objection 13, *supra*.

16. Exhibit Foundation. *Sims v. State*, 243 Ga. 83, 252 S.E.2d 501 (1979).

Wegman-Fakunle v. State, 277 Ga. App. 198, 626 S.E.2d 170 (2006) (when admitting photograph into evidence it is not necessary that witness have taken the photograph himself or was even present when the photograph was taken so long as he is familiar with the scene depicted in photograph); *Postell v. State*, 279 Ga. App. 275, 630 S.E.2d 867 (2006) (to show a chain of custody adequate to preserve the identity of fungible evidence, State must prove with reasonable certainty that evidence is same as that seized and there was no tampering or substitution); *Wise v. State*, 321 Ga. App. 39, 740 S.E.2d 850 (2013) (chain of custody); *Sandoval v. State*, 260 Ga. App. 61, 579 S.E.2d 75 (2003) (absent affirmative evidence of tampering, challenges to evidence that focus on the period before the state took possession of items are governed by general rules of relevance and authentication).

17. Expert Testimony Improper. Georgia conformed its law to the federal pattern in 2022 when it passed legislation to make Rule 702 the controlling provision in all proceedings, civil and criminal. An expert may base a courtroom opinion in part upon hearsay under O.C.G.A. § 24-7-703. *Evans v. Department of Transp.*, 331 Ga. App. 313, 771 S.E.2d 20 (2015). However, where written hearsay evidence forms part of the expert's basis for her opinions, those documents are not admissible. R. Carlson, *Experts, Judges, and Commentators: The Underlying Debate About an Expert's Underlying Data*, 47 Mercer L. Rev. 481 (1996). O.C.G.A. § 24-7-703.

Nichols v. State, 278 Ga. App. 46, 628 S.E.2d 131 (2006) (an expert may not base his expert opinion solely on the hearsay opinion of another expert, thereby acting as a mere conduit for the opinion of the first); *Harper v. Patterson*, 270 Ga. App. 437, 606 S.E.2d 887, 194 Ed. Law Rep. 1016 (2004) (an expert witness may not testify as to his opinion of the victim's truthfulness); *John Crane, Inc. v. Jones*, 262 Ga. App. 531, 586 S.E.2d 26 (2003), *aff'd*, 278 Ga. 747, 604 S.E.2d 822 (2004) (the opinion of experts on any question of science, skill, trade, or like questions shall always be admissible, and such opinions may be given on the facts as proved by other witnesses; however, not even an expert can give an opinion based solely on reports which have been prepared by others and which are not in evidence). Expert witness may not state a legal conclusion as to the ultimate issue. *Rayburn v. Georgia Power Co.*, 284 Ga. App. 131, 643 S.E.2d 385 (2007) (conclusions that job was inherently dangerous and also that Georgia Power "retained control" over another company's employees). However, opinions of fact are to be distinguished from legal opinions in applying the ultimate issue rule. Where the issue is an ultimate *factual* issue, liberality will be allowed for an expert's opinion cast in factually ultimate form. How "ultimate" can such expert's opinion be? Very much so, says *Collum v. State*, 281 Ga. 719, 642 S.E.2d 640 (2007). Complaints that experts improperly testified to ultimate issues were rejected in *Watson v. State*, 289 Ga. 39, 709 S.E.2d 2 (2011) (expert did not testify regarding ultimate issue of whether Watson was guilty of the charged crimes). But see *Leibel v. Johnson*, 291 Ga. 180, 728 S.E.2d 554 (2012) (flawed introduction of expert opinion). Expert opinion was rejected in *Butler v. Union Carbide Corp.*, 310 Ga. App. 21, 712 S.E.2d 537 (2011) (expert's theory not adequately supported by scientific opinion). Sometimes expert testimony is barred because it is deemed not helpful to the jury; or the subject is not so specialized that it is considered to be beyond the ken of jurors. In Georgia practice, in most cases a witness is not allowed to conclude that another witness was truthful, or on the other hand was lying. Witness A may not vouch for the credibility of

witness B. Nor may witness C say that witness D lied when he testified. Generally one witness may not be pitted against another. The credibility of all witnesses is for the jury. In addition, legal conclusions will not be received from an expert when the expert phrases her opinion in conclusive legal terms. Asking an expert whether a party's conduct violated a particular state statutory standard, or whether the party is guilty of a crime, is typically not allowed in cases where the jury is instructed to decide that issue. See *Clayton County v. Segrest*, 333 Ga. App. 85, 775 S.E.2d 579 (2015), where ultimate opinions were rejected. The terms "proximate cause" and "reckless disregard" were embraced in expert opinions which violated the prohibition of opinion on legal standards.

18. Foundation Lacking. *Smith v. State*, 221 Ga. App. 428, 472 S.E.2d 4 (1996) (foundation for impeachment of victim of crime lacking); § 12:3 (rules for laying foundation for impeaching a witness).

Clements v. State, 279 Ga. App. 773, 632 S.E.2d 702 (2006) (before evidence of previous false allegations made by the victim may be admitted, the trial court must determine outside the jury's presence that a reasonable probability of falsity exists; a "reasonable probability" is a probability sufficient to undermine confidence in the witness; the burden is on the defendant to show this reasonable probability exists); *Mann v. State*, 244 Ga. App. 756, 536 S.E.2d 608 (2000) (stating 2-part rule that (1) before evidence that victim in sex offense case made previous false allegations of molestation can be admitted, the trial court must make a threshold determination, outside the presence of the jury, that a reasonable probability of falsity exists; and (2) defendant has the burden of coming forward with evidence establishing a reasonable probability that the victim made a prior false allegation). In *Rucker v. State*, 266 Ga. App. 293, 596 S.E.2d 639 (2004) the court confirms the requirement that a party objecting to lack of foundation must point out what a proper foundation should be. So does the court in *Warner v. State*, 281 Ga. 763, 642 S.E.2d 821 (2007). See also *Objection 5*, *supra*.

19. Habit Evidence. O.C.G.A. § 24-4-406. In *Feinberg v. Durga*, 189 Ga. App. 733, 377 S.E.2d 33 (1988), the plaintiff was a pedestrian who was injured after having been hit by a motorist. An acquaintance testified that the plaintiff always looked both ways before crossing a street or stepping in front of moving traffic. The Court of Appeals allowed such testimony as a "fixed and uniform habit." Evidence of a driver's driving record may be relevant to show he is habitually negligent in a negligent hiring and retaining case. *Smith v. Tommy Roberts Trucking Co.*, 209 Ga. App. 826, 435 S.E.2d 54 (1993).

Before a court may admit evidence of habit, an offering party

must establish the degree of specificity and frequency of uniform response that insures admission of evidence of conduct that is semi-automatic in nature. *Nelson v. City of Chicago*, 810 F.3d 1061 (7th Cir. 2016).

Green v. State, 279 Ga. 687, 620 S.E.2d 788 (2005) (although a witness may have no distinct or independent recollection of the details of a fact occurring in the course of the routine of his business, he may testify as to his fixed and uniform habit in such cases and state that he knows that he did not vary from that habit); *Craig v. Holsey*, 264 Ga. App. 344, 590 S.E.2d 742 (2003) (evidence of motorist's prior criminal conviction and probation for possession of a controlled substance was relevant to issue of whether on day of automobile accident motorist's actions showed willful misconduct, wantonness, or entire want of care that would raise presumption of conscious indifference to consequences, and thus driver was entitled to cross-examine motorist concerning prior conviction during punitive-damages phase of driver's personal injury action against motorist, who allegedly was under the influence of drugs and alcohol at time of accident).

20. Harassment. O.C.G.A. 24-6-623 (it shall be the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor); *Palmer v. Taylor*, 215 Ga. App. 546, 451 S.E.2d 486 (1994); *Schneider v. State*, 267 Ga. App. 508, 603 S.E.2d 663 (2004) (trial court may exercise its broad discretion to protect a witness from harsh and insulting demeanor). See *Small v. Florida Dept. of Corrections*, 470 Fed. Appx. 808 (11th Cir. 2012).

21. Hearsay Rule Violated. Hearsay is a statement "other than one made by the declarant *while testifying*." O.C.G.A. § 24-8-801(c). Hearsay may consist of oral or written, words intended as an assertion, or assertive conduct. See *U.S. v. Bradley*, 644 F.3d 1213 (11th Cir. 2011). Party admissions fall into an exception to the Georgia hearsay rule. Incoming text messages to a criminal defendant's cell phone may be admissible to provide context to the defendant's outgoing text messages that are admissible as party admissions. *McClure v. State*, 361 Ga. App. 399, 864 S.E.2d 601 (2021).

22. Hypothetical Questions. *Reed v. AutoZone Stores, Inc.*, 277 Ga. App. 860, 627 S.E.2d 792 (2006) (if an expert testifies by hypothetical question, the assumed facts must be placed in evidence by testimony or other legal means); *Kohl v. Tirado*, 256 Ga. App. 681, 569 S.E.2d 576 (2002) (proper mode of examining expert witness, where he is not testifying from his knowledge, is to ask him hypothetical questions). Under O.C.G.A. § 24-7-705, hypothetical questions are allowed but not required. Courts have approved hypothetical inquiries based upon assumed facts admitted in evidence. *Johnson v. State*, 296 Ga. 504, 769 S.E.2d 87, 90

(n.3) (2015). Prosecutors should not be allowed to cross-examine with guilt-assuming hypotheticals. *U.S. v. Hough*, 803 F.3d 1181 (11th Cir. 2015).

23. Immaterial. O.C.G.A. 24-4-401. *Southern Ry. Co. v. Lawson*, 256 Ga. 798, 353 S.E.2d 491 (1987) (test for relevancy). A general “irrelevant” objection is often deemed insufficient to show error where more specific targeting of objectionable material is needed. *Luxenberg v. Griffith*, 237 Ga. App. 201, 514 S.E.2d 63 (1999).

H.D. McCondicchie Properties v. Georgia Dept. of Transp., 280 Ga. App. 197, 633 S.E.2d 558 (2006) (evidence that does not bear directly or indirectly on the questions being tried should be excluded as irrelevant); *Chambers v. Gwinnett Community Hosp., Inc.*, 253 Ga. App. 25, 557 S.E.2d 412 (2001) (defining relevant evidence); *Langley v. National Labor Group, Inc.*, 262 Ga. App. 749, 586 S.E.2d 418, 422 (2003) (holding irrelevant and inadmissible affidavit having “no logical bearing on any material fact in issue as true or untrue”); *Schroeder v. State*, 261 Ga. App. 879, 583 S.E.2d 922, 925 (2003) (holding videotape of party at which defendant arrested not admissible to impeach deputy’s testimony where tape only showed events prior to deputy’s arrival and events relating to contested testimony was not on tape).

See *Rivers v. K-Mart Corp.*, 321 Ga. App. 788, 743 S.E.2d 464 (2013); *Flading v. State*, 327 Ga. App. 346, 759 S.E.2d 67 (2014).

24. Impeachment Improper. *Barksdale v. State*, 265 Ga. 9, 453 S.E.2d 2 (1995). See *U.S. v. Scott*, 592 F.2d 1139, 1143, 4 Fed. R. Evid. Serv. 230 (10th Cir. 1979) (certified copy of prior conviction is not needed under Rule 609; rap sheet can be used to cross-examine on prior convictions). Impeachment by prior conviction is covered in O.C.G.A. § 24-6-609 (general 10-year limit on age of prior conviction, but exceptions can be made). Impeachment by prior inconsistent statement, see O.C.G.A. § 24-6-613.

Riggins v. State, 279 Ga. 407, 614 S.E.2d 70 (2005) (proper to impeach with testimony as to witness’s reputation for lack of truthfulness); *Moxley v. Moxley*, 281 Ga. 326, 638 S.E.2d 284 (2006) (overruled on other grounds by, *Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021)) (admission of impeaching testimony prior to testimony sought to be impeached is harmless); *Griffin v. State*, 262 Ga. App. 87, 585 S.E.2d 145 (2003) (setting forth three-pronged test for cross-examiner seeking to impeach witness with prior inconsistent statement); *Armour v. State*, 265 Ga. App. 569, 594 S.E.2d 765 (2004) (investigating police officer’s report summarizing interviews of witnesses who testified they saw defendant leaving scene of arson was not admissible as prior inconsistent statements of witnesses). To impeach a witness with a prior inconsistent statement, the cross-examiner must lay the proper foundation, establish that the prior

statement contradicts or is inconsistent with the witness's in-court testimony, and show that the prior statement is relevant. *Davidson v. State*, 284 Ga. App. 333, 643 S.E.2d 848 (2007). What about a witness who gave a complete and detailed statement earlier, but when he reaches the witness stand, now claims he remembers little or nothing? For purposes of the statute governing impeachment of witnesses through use of prior inconsistent statements, testimony that a witness does not recall certain details which have previously been included in a prior statement is deemed to create inconsistency; impeachment of the trial witness with the prior statement about details is permitted, where witness at trial says he cannot recollect important facts. *Cummings v. State*, 280 Ga. 831, 632 S.E.2d 152 (2006). A 2022 case aligned with this approach is *Neloms v. State*, 313 Ga. 781, 873 S.E.2d 125 (2022). A witness responded to questions by saying "I can't remember." The Georgia Supreme Court held that when a witness claims lack of memory, the witness can be impeached with statements the witness made at an earlier meeting.

25. Judicial Notice Improper. O.C.G.A. § 24-2-201; *Graves v. State*, 269 Ga. 772, 504 S.E.2d 679 (1998); § 19:7, *supra*. See *Sentinel Offender SVCS., LLC v. Glover*, 296 Ga. 315, 766 S.E.2d 456 (2014).

Mann v. State, 285 Ga. App. 39, 645 S.E.2d 573 (2007) (if a trial court intends to take judicial notice of a fact, it must first announce its intention to do so on the record and afford the parties an opportunity to be heard regarding whether judicial notice should be taken).

26. Judicial Questioning of Witnesses. Allowed, see *Johnson v. State*, 270 Ga. 234, 507 S.E.2d 737 (1998). Counsel must object to same in order to complain later, see *Beavers v. State*, 132 Ga. App. 94, 207 S.E.2d 550 (1974). Generally, see § 2:21, *supra*. With *Beavers*, compare *Ledford v. State*, 289 Ga. 70, 709 S.E.2d 239 (2011).

Milner v. State, 270 Ga. App. 80, 606 S.E.2d 91 (2004) (a trial judge should not intervene to explain every ambiguity in the testimony); *Craft v. State*, 274 Ga. App. 410, 618 S.E.2d 104 (2005) (where defendant fails to object at trial to the trial court's questioning of witness, he waives this issue on appeal); *Grooms v. State*, 261 Ga. App. 549, 583 S.E.2d 216 (2003) (allowing trial court discretion in examining witness).

27. Leading. O.C.G.A. 24-611(c) "Leading questions are generally allowed only in cross-examination. However, the court may exercise discretion in granting the right to the party calling the witness to lead direct when such an approach is needed to develop the testimony, or when an adverse party is called." See *Hayes v. State*, 268 Ga. 809, 493 S.E.2d 169 (1997).

LeBlanc v. State, 283 Ga. App. 434, 641 S.E.2d 646 (2007)

(trial court may allow counsel to ask leading questions on direct of “hostile witness”); *Dumas v. State*, 283 Ga. App. 279, 641 S.E.2d 271 (2007) (trial court may allow counsel to ask leading questions on direct where there was language barrier with witness and court reporter had problems understanding witness); *Butler v. State*, 273 Ga. 380, 541 S.E.2d 653 (2001) (trial court has discretion to allow leading questions when the witness is reluctant to testify).

28. Liability Insurance Improper. O.C.G.A. § 24-4-411. *Loman v. Reville*, 215 Ga. App. 356, 450 S.E.2d 707 (1994); § 31:5.

Chambers v. Gwinnett Community Hosp., Inc., 253 Ga. App. 25, 557 S.E.2d 412 (2001) (stated that it is “settled law that evidence of a litigant’s insurance is generally inadmissible” because it tends to emphasize something that is usually irrelevant and may have an adverse effect on quality of jury’s deliberations and conclusions); *Mintah v. Arms*, 251 Ga. App. 572, 555 S.E.2d 466 (2001) (disclosure of liability insurance to jury is ground for mistrial). In an ordinary negligence case, not only is a liability insurance policy of a litigant not admissible in evidence, but disclosure to the jury of the mere existence of a contract is ground for a mistrial. *Morton v. Horace Mann Ins. Co.*, 282 Ga. App. 734, 639 S.E.2d 352 (2006) (uninsured motorist case; insured’s action against insurer).

29. Misconduct of Counsel. O.C.G.A. 17-8-75 provides remedies for “Improper conduct by counsel” when it states: “Where counsel in the hearing of the jury makes statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent them. On objection made, the court shall also rebuke the counsel and by all needful and proper instruction to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender.” See also O.C.G.A. 9-10-185 (civil cases). Misconduct is identified in *Carr v. State*, 267 Ga. 701, 482 S.E.2d 314 (1997) (stating that prosecuting attorney should have been rebuked by trial judge for patent misrepresentations of fact such as using a chart falsely indicating that a defense expert had not disagreed with a specific opinion by a state’s witness). *Carr* was implicitly overruled on other grounds in 270 Ga. 151, 510 SE2d 802. See *Clark v. State*, 271 Ga. 6, 515 S.E.2d 155 (1999). Standard 22, America College of Trial Lawyers Code of Trial Conduct (1987 rev.) provides: “A lawyer should never knowingly misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook.”

Jackson v. State, 271 Ga. App. 317, 609 S.E.2d 643 (2004) (where defendant did not object at trial to prosecutor’s arguing facts not in evidence, he waived the issue on appeal); *Booker v.*

State, 242 Ga. App. 80, 528 S.E.2d 849 (2000) (prosecutor's reference during closing argument to murder cases he had successfully prosecuted, without testimony in the record, constituted improper comments on facts not in evidence); *Gordon v. State*, 250 Ga. App. 80, 550 S.E.2d 131 (2001) (prosecutor's statements and questioning relating to defendant's pre-arrest and post-arrest silence warranted mistrial); *Shaw v. Brannon*, 253 Ga. App. 673, 560 S.E.2d 289 (2002) (trial court acted within its discretion, in lawsuit by car driver against truck driver and dairy company for injuries sustained in vehicle collision, by issuing curative instruction rebuking counsel, rather than granting mistrial, in response to comments of car driver's lawyer asking jury during closing argument to return verdict of over \$1 million in order to send message to company; trial court rebuked attorney by instructing jury that sending a message was not an issue that the lawyer could go into and that he should make his arguments in other areas).

30. Multiple Question. *Stargel v. State*, 210 Ga. App. 619, 436 S.E.2d 786 (1993) (compound question excluded).

31. Narrative. *Mullins v. State*, 147 Ga. App. 330, 248 S.E.2d 708 (1978) (holding that trial court did not err in refusing to allow defendant to give narrative testimony when he testified in his own behalf).

32. Offer of Compromise. O.C.G.A. 24-4-408. In *Flading v. State*, 327 Ga. App. 346, 759 S.E.2d 67 (2014), Judge McMillian relied upon Eleventh Circuit Court of Appeals precedent in applying O.C.G.A. § 24-4-408. "Federal Rule of Evidence Rule 408 and its exceptions apply to both criminal and civil proceedings." See *Houston v. Kinder-Care Learning Centers, Inc.*, 208 Ga. App. 235, 430 S.E.2d 24, 83 Ed. Law Rep. 468 (1993) (holding that exclusion of defendant's question, "What is it going to take to make you folks happy?" was appropriate because the statement was an offer to compromise a claim still being disputed.); *Topeka Machinery Exchange, Inc. v. Stoler Industries, Inc.*, 220 Ga. App. 799, 470 S.E.2d 250, 29 U.C.C. Rep. Serv. 2d 1227 (1996) (holding that evidence regarding a refund or repair excluded because it contained an offer of compromise).

Nevitt v. CMD Realty Investment Fund IV, L.P., 282 Ga. App. 533, 639 S.E.2d 336 (2006) (admissions or propositions made with a view to a compromise are not proper evidence); *Elrod v. Elrod*, 272 Ga. 188, 526 S.E.2d 339 (2000) (pre-trial admissions by landowner or her agents as to validity of claimed easement were irrelevant and inadmissible in landowner's action to quiet title to that easement, as they were made with view to compromising easement holder's questionable claim); *Mableton Parkway CVS, Inc. v. Salter*, 254 Ga. App. 162, 561 S.E.2d 478 (2002) (trial court abused its discretion by compelling CVS to disclose

the amounts it has paid in settling similar tort cases in Georgia; court relied upon the general prohibition of admission of settlement negotiations). See *Flading v. State*, 327 Ga. App. 346, 759 S.E.2d 67 (2014) (application to criminal cases).

33. Opinion Rule and Legal Conclusions. O.C.G.A. § 24-7-704. See *Mitchell v. State*, 154 Ga. App. 399, 268 S.E.2d 360 (1980) (holding that experts cannot state legal conclusions). Modernly, while ultimate factual opinions are competent, ultimate legal opinions are barred. In *Clayton County v. Segrest*, 333 Ga. App. 85, 775 S.E.2d 579 (2015), opinions which embraced legal terms like “proximate cause” and “reckless disregard” were improper.

Rayburn v. Georgia Power Co., 284 Ga. App. 131, 643 S.E.2d 385 (2007) (expert witness may not state a legal conclusion as to the ultimate issue); *Morris v. State*, 268 Ga. App. 325, 601 S.E.2d 804 (2004) (generally, in no circumstances may a witness’ credibility be bolstered by the opinion of another, even an expert, as to whether the witness is telling the truth); *Pittman v. State*, 274 Ga. 260, 553 S.E.2d 616 (2001) (“a witness generally is not permitted to express his or her opinion regarding an ultimate issue in the case because to do so would invade the fact-finding province of the jury”); *In the Interest of J.T.*, 285 Ga. App. 465, 646 S.E.2d 523 (2007) (“An owner’s opinion of value, without the reasons supporting this opinion, has no probative value”).

34. Parol Evidence Rule. See § 29:27. O.C.G.A. § 24-3-1.

Parol evidence is not admissible to contradict or construe an unambiguous contract. *Weatherly v. Weatherly*, 292 Ga. App. 879, 665 S.E.2d 922 (2008). Parol evidence may be admissible for purposes other than explaining the parties’ agreement where the instrument memorializing the agreement is ambiguous.

A 2013 decision illustrates the sort of ambiguity which authorizes the entry of parol proof. A promissory note, stating that it was given in exchange “for value received” but failing to specify the nature of the consideration that borrowers received in exchange for executing the note was ambiguous as to whether borrowers received consideration, so as to permit admission of parol evidence regarding the specific nature of the consideration. *Nash v. Township Investments, LLC*, 320 Ga. App. 494, 740 S.E.2d 236 (2013).

Trial court would not consider parol evidence in form of documents written years after employment agreement was executed, to interpret unambiguous noncompete clause in agreement. *Azzouz v. Prime Pediatrics, P.C.*, 296 Ga. App. 602, 675 S.E.2d 314 (2009). Nor would the Georgia Court of Appeals permit parol evidence to explain the intention of the parties where an action is brought on an unambiguous contract. *Brazeal v. Newpoint Media Group*,

LLC, 331 Ga. App. 49, 769 S.E.2d 763 (2015).

Parol evidence and deeds, see *Vineville Capital Group, LLC v. McCook*, 329 Ga. App. 790, 766 S.E.2d 156 (2014).

Parol evidence and wills, see *Rice v. Pager*, 663 S.E.2d 172 (2008). Deeds, see *Second Refuge Church of Our Lord Jesus Christ, Inc. v. Lollar*, 653 S.E.2d 462 (2007).

Investment Properties Co., Inc. v. Watson, 278 Ga. App. 81, 628 S.E.2d 155 (2006) (parol evidence admissible in contract dispute to determine parties' intent); *Rome Healthcare LLC v. Peach Healthcare System, Inc.*, 264 Ga. App. 265, 590 S.E.2d 235 (2003) (nursing home management company's master agreement with owners of several individual nursing homes was not admissible under parol evidence rule to show attendant circumstances of making of agreement; agreement was not ambiguous and contained merger clause stating that contract constituted entire agreement); *Forest Commodity Corp. v. Lone Star Industries, Inc.*, 255 Ga. App. 244, 564 S.E.2d 755 (2002) ("[w]here parties have reduced to writing a complete and certain agreement, the court will, in the absence of fraud, mistake, or accident, conclusively presume that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements is inadmissible to add to, take from, or vary a written contract"). Parol evidence is admissible to explain the meaning of technical terms employed in written contracts. *Rogers & Sons, Inc. v. Santee Risk Managers, LLC*, 279 Ga. App. 621, 631 S.E.2d 821 (2006).

35. Polygraph. See § 15:20, *supra*; *U.S. v. Pavlenko*, 845 F. Supp. 2d 1321, 87 Fed. R. Evid. Serv. 1069 (S.D. Fla. 2012). See also *Lynn v. State*, 310 Ga. 608, 852 S.E.2d 843 (2020) (passing reference by witness to polygraph; trial court's prompt curative instruction negated prejudice).

Horne v. State, 273 Ga. App. 132, 614 S.E.2d 243 (2005) (polygraph testimony not usually admissible, but parties may stipulate to its admissibility); *Waldrip v. Head*, 279 Ga. 826, 620 S.E.2d 829 (2005) (polygraph results may be admissible by the defense in the sentencing phase of a death penalty case, even absent a stipulation by the State, if a sufficient showing of the polygraph's reliability is made); *Thompson v. State*, 257 Ga. App. 426, 571 S.E.2d 158 (2002), judgment *aff'd* in part, *rev'd* in part on other grounds, 277 Ga. 102, 586 S.E.2d 231 (2003) (stating that doubt exists as to the complete reliability of lie detector tests but allows admissibility of lie detector tests upon express stipulation of the parties).

36. Prejudicial. O.C.G.A. § 24-4-403. Rule 403 is only a bar to evidence that is unfairly prejudicial, not merely prejudicial. The trial court has broad discretion in determining the relevancy of

evidence. *Burris v. Gulf Underwriters Ins. Co.*, 787 F.3d 875 (8th Cir. 2015). Balancing test, see *U.S. v. Troya*, 733 F.3d 1125 (11th Cir. 2013).

The inclusionary approach for federal and Georgia courts allows introduction of dramatic and sometimes gruesome proof. Still, there will be evidence and exhibits that cross the line. In a 2020 case, the United States Court of Appeals for the Eleventh Circuit found testimony about marital discord fell into this category. In a suit by a widow against a tobacco company, the court rejected evidence of difficulties in the domestic life of the widow and her deceased husband. *Sowers v. R.J. Reynolds Tobacco Co.*, 975 F.3d 1112 (11th Cir. 2020).

A decision by the Georgia Supreme Court in 2020 also found unfair prejudice in an item of evidence. *Robinson v. State*, 308 Ga. 543, 842 S.E. 2d 54 (2020).

Williams v. State, 269 Ga. App. 512, 604 S.E.2d 592 (2004) (unless the potential for prejudice in the admission of evidence substantially outweighs its probative value, the Georgia rule favors the admission of any relevant evidence, no matter how slight its probative value); see also *Webb v. State*, 277 Ga. App. 355, 626 S.E.2d 545 (2006); *Byrd v. State*, 277 Ga. App. 397, 626 S.E.2d 598 (2006) (prosecutorial misconduct which is prejudicial will justify retrial of case if defendant can show State was purposefully attempting to secure a mistrial); *Long v. State*, 265 Ga. App. 605, 595 S.E.2d 93 (2004) (abuse of trial court's discretion to admit a photograph where potential to "unduly arouse the jury's emotions of prejudice, hostility, or sympathy" outweighed extremely low probative value); *Jackson v. Heard*, 264 Ga. App. 620, 591 S.E.2d 487 (2003) (prejudicial effect of evidence that driver was prostitute generally outweighed its probative value and was properly excluded, except for impeachment purposes); *Banks v. State*, 281 Ga. 678, 642 S.E.2d 679 (2007) (mistrial is remedy where prejudicial matter is presented and party's rights are thereby affected).

37. Prior Conviction Inadmissible. O.C.G.A. § 24-6-609. See § 16:11. Both Georgia and federal law endorse the philosophy that prior convictions demonstrate a less-than-truthful attitude. "One side of the equation in this case is the theory, which Congress endorsed, that felons are less credible." *U.S. v. Chaco*, 801 F. Supp. 2d 1217 (D.N.M. 2011).

In 2005, Georgia shifted from the moral turpitude standard to a new formula. O.C.G.A. § 24-6-609 (to impeach, counsel may employ crimes of dishonesty or false statement, or offenses punishable by death or imprisonment of one year or more). Cases construing the statute include *Adams v. State*, 284 Ga. App. 534, 644 S.E.2d 426 (2007) (misdemeanor theft did not qualify for impeachment); *Blanch v. State*, 293 Ga. App. 750, 667 S.E.2d 925

(2008) (prior misrepresentation conviction was appropriate for impeachment). For construction of the 10-year provision, see *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010) (convictions deemed to be too old).

Payne v. State, 273 Ga. App. 483, 615 S.E.2d 564 (2005) (when defendant impeached a crime victim, certified record of prior conviction that victim alleged was not him was inadmissible; once victim denied being person named in certified record, burden shifted to defendant to establish that victim was in fact individual named in exhibit); *McClure v. State*, 278 Ga. 411, 603 S.E.2d 224 (2004) (a witness cannot be impeached by instances of specific misconduct unless that misconduct has resulted in the conviction of a crime); *Allen v. State*, 275 Ga. 64, 561 S.E.2d 397 (2002) (“Instances of specific misconduct may not be used to impeach a witness’ character of veracity unless the misconduct has resulted in the conviction of a crime”); *Johns v. State*, 253 Ga. App. 207, 558 S.E.2d 426 (2001) (same). With *Allen*, compare O.C.G.A. § 24-6-608(b).

Regarding the former requirement of a certified copy of conviction to impeach, see *U.S. v. Scott*, 592 F.2d 1139, 1143, 4 Fed. R. Evid. Serv. 230 (10th Cir. 1979) (certified copy of prior conviction is not needed under Rule 609; rap sheet can be used to cross-examine on prior convictions). Impeachment by prior conviction is covered in O.C.G.A. § 24-6-609 (general 10-year limit on age of prior conviction, but exceptions can be made). Impeachment by prior inconsistent statement, see O.C.G.A. § 24-6-613.

38. Prior Inconsistent Statement. O.C.G.A. § 24-6-613. Improper use of such statements may be objected to, see § 16:8.

Davidson v. State, 284 Ga. App. 333, 643 S.E.2d 848 (2007) (proper foundation for impeaching witness with prior inconsistent statement); *Warner v. State*, 281 Ga. 763, 642 S.E.2d 821 (2007) (fact that the witness admits that he or she made an inconsistent pre-trial statement does not render such prior statement inadmissible); *Armour v. State*, 265 Ga. App. 569, 594 S.E.2d 765 (2004) (stating that to impeach witness with prior inconsistent statement, cross-examiner must establish that prior statement contradicts or is inconsistent with in-court testimony, not just a more detailed version, and must first give witness an opportunity to admit, explain, or deny prior contradictory statement); *McEntyre v. Edwards*, 261 Ga. App. 843, 583 S.E.2d 889 (2003) (to impeach with prior inconsistent statement: (1) prior statement must contradict or be inconsistent with witness’s in-court testimony; (2) prior statement must be relevant to case; and, (3) examining attorney must lay proper foundation with witness). Where trial witness says on the stand he has no recollection of important details, but they are contained in the witness’ earlier statement, may he be impeached by the statement?

Yes, say Georgia courts. See Objection 24, *supra*. The range of potential impeachment material includes social media posts which conflict with the declarations of a party at trial. Impeachment with Facebook posts was an issue in *Calhoun v. Walmart Stores East, LP*, 818 Fed. Appx. 899 (11th Cir. 2020). The Eleventh Circuit Court of Appeals pointed out that Federal Rule of Civil Procedure 26 does not require pretrial disclosure of evidence offered “solely for the impeachment.” The Facebook posts reflecting that the plaintiff worked as a personal trainer after the incident at the Walmart which allegedly injured her were approved.

39. Privileges. O.C.G.A. 24-5-501 provides that certain admissions and communications will be excluded on grounds of public policy. Among these are:

- (1) Communications between husband and wife;
- (2) Communications between attorney and client;
- (3) Communications among grand jurors;
- (4) Secrets of state;
- (5) Communications between psychiatrist and patient;
- (6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;
- (7) Communications between patient and a licensed clinical social worker; clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor during the psychotherapeutic relationship; and
- (8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient’s communications which are otherwise privileged by paragraph (5), (6), or (7) of this Code section.
- (9) Communications between accountant and client as provided by Code Section 43-3-29.

Other privileges, see Ch 18, *supra*; O.C.G.A. §§ 24-5-509, 24-5-510.

Prior law, see former O.C.G.A. 24-9-21; *Dempsey v. Kaminski Jewelry, Inc.*, 278 Ga. App. 814, 630 S.E.2d 77 (2006) (spousal communications privilege did not apply to disclosure of financial documents); *Little v. State*, 280 Ga. App. 60, 633 S.E.2d 403 (2006) (state not required to reveal identity of confidential informant where defendant failed to show that informant was the only person whose personal knowledge could confirm or refute a

material defense to charged offense); *State v. Herendeen*, 279 Ga. 323, 613 S.E.2d 647 (2005) (in order to invoke the statutory mental health privilege, the requisite relationship of mental health provider and patient must have existed, to the extent that treatment was given or contemplated); *Perkinson v. State*, 279 Ga. 232, 610 S.E.2d 533 (2005) (defendant's assertion of mental retardation defense waived challenge to State's discovery of his school records as privileged, in trial for capital murder and other crimes). A 2015 decision by the Georgia Supreme Court rejected a claim of clergy-communicant privilege. Although the accused sought out a pastor at a church and spoke to the minister, the defendant did not assert the privilege at trial when his disclosures were introduced. *Crosdale v. State*, 297 Ga. 244, 774 S.E.2d 87 (2015). Attorney-client privilege covers lawyer's consultants, see *Neuman v. State*, 297 Ga. 501, 773 S.E.2d 716 (2015). Privilege against self incrimination, see *Cockrell v. State*, 281 Ga. 536, 640 S.E.2d 262 (2007) (reference to defense's failure to call a potential witness and subject him to cross-examination did not reflect a manifest intention by the prosecutor to comment of the defendant's failure to testify; *Eason v. State*, 283 Ga. App. 574, 642 S.E.2d 207 (2007) (no manifest intention to comment on the defendant's failure to testify in prosecutor's objection to admission of defendant's self-serving statement, when statement was offered by the defense).

A federal appeals court held that where a husband is victimizing his wife, an exception to the marital privilege applies. The law permits the spouse to testify to the crime. Other circuits have also recognized this exception. *United States v. White Owl*, 39 F.4th 527 (8th Cir. 2022).

The privilege against self-incrimination received attention from the Georgia Supreme Court in 2022. A drunk driving suspect refused to provide a urine sample. Following Georgia precedent which held that a DUI suspect may refuse a breath test and adverse comment on the refusal is barred, the Court ruled similarly regarding refusal to supply a urine specimen. *Awad v. State*, 313 Ga. 99, 868 S.E.2d 219 (2022). See also *Ammons v. State*, 315 Ga. 149, 880 S.E.2d 544 (2022).

40. Qualifications. *Watkins v. State*, 259 Ga. 648, 386 S.E.2d 132 (1989) (holding that an expert witness need only be competent as an expert in his own particular field). See O.C.G.A. § 24-7-702.

An expert may be qualified by academic training or by experience, or both. *Rangel v. Anderson*, 202 F.Supp. 1361, 1369 (S.D. Ga. 2016). See *Fielding v. State*, 278 Ga. 309, 602 S.E.2d 597 (2004) (an expert witness is anyone who, through training, education, skill, or experience, has particular knowledge that the average juror would not possess concerning questions of science, skill, trade, or the like); *Rowe v. State*, 276 Ga. 800, 582 S.E.2d 119

(2003) (formal education in particular subject is not prerequisite for status as expert; person may be qualified as expert when person's knowledge is derived from experience as well as study); *Mayo v. City of Stockbridge*, 285 Ga. App. 58, 646 S.E.2d 79 (2007) (to qualify as an expert witness, special knowledge may be derived from experience as well as study); *Hall v. State*, 255 Ga. App. 631, 566 S.E.2d 374 (2002) (requirements for qualification as expert witness are minimal; generally, nothing more is required than that person has been educated in a particular trade, science, or profession); *Manesh v. Baker Equipment Engineering Co.*, 247 Ga. App. 407, 543 S.E.2d 61 (2000) (same rule applies in civil cases).

41. Rape Case, Matter Not Relevant. O.C.G.A. 24-4-412 (rape shield law); *Banks v. State*, 230 Ga. App. 258, 495 S.E.2d 877 (1998).

Warner v. State, 277 Ga. App. 421, 626 S.E.2d 620 (2006) (overruled on other grounds by, *White v. State*, 305 Ga. 111, 823 S.E.2d 794 (2019)) (rape shield normally protects evidence of witness's prior sexual relationships); *Williams v. State*, 263 Ga. App. 597, 588 S.E.2d 790 (2003) (overruled on other grounds by, *White v. State*, 305 Ga. 111, 823 S.E.2d 794 (2019)) (evidence of prior sexual activity inadmissible as to complaining witness as time frames of sexual activity indicated that it would not have supported defense theory that someone else caused victim's pregnancy); *Callahan v. State*, 256 Ga. App. 482, 568 S.E.2d 780 (2002) (intent of Rape Shield Statute is to exclude evidence which might reflect on the character of the witness without contributing materially to the issue of the guilt or innocence of the accused); *Alford v. State*, 243 Ga. App. 212, 534 S.E.2d 81 (2000) (evidence of mode of victim's dress on night of rape inadmissible).

42. Refreshing Recollection. O.C.G.A. § 24-6-612. *McEntyre v. McRae*, 240 Ga. App. 148, 522 S.E.2d 731 (1999).

Kell v. State, 280 Ga. 669, 631 S.E.2d 679 (2006) (it is not proper to use a report prepared by another to refresh a witness's recollection in situations where the witness has no personal knowledge of the correctness of the report). Compare *Penland v. State*, 258 Ga. App. 659, 574 S.E.2d 880 (2002) permits a witness to refresh and assist his memory by the use of any written instrument or memorandum and does not require the written document so used to have been prepared by the witness, so long as the witness testifies from personal recollection). The narrow view espoused by *Kell* was the approach followed in a 2019 decision. In *Earwood v. State*, 350 Ga. App. 26, 827 S.E.2d 719 (2019) the Court of Appeals ruled that under no set of circumstances can a witness's memory be refreshed by a document she cannot identify containing a report she cannot verify.

43. Relevancy Lacking. O.C.G.A. 24-4-401 provides that evi-

dence must relate to the questions being tried by the jury and bear upon the issues. See *Southern Ry. Co. v. Lawson*, 256 Ga. 798, 353 S.E.2d 491 (1987) (test for relevancy). A general “irrelevant” objection is often deemed insufficient to show error where more specific targeting of objectionable material is needed. *Luxenberg v. Griffith*, 237 Ga. App. 201, 514 S.E.2d 63 (1999).

H.D. McCondichie Properties v. Georgia Dept. of Transp., 280 Ga. App. 197, 633 S.E.2d 558 (2006) (evidence that does not bear directly or indirectly on the questions being tried should be excluded as irrelevant). See Objection 23, *supra*.

Under the 2013 Georgia Evidence Code, a party making an objection that evidence is irrelevant has an uphill battle. This is because the revised Code is based upon an inclusionary model. The case of *Harris v. State*, 358 Ga. App. 204, 854 S.E.2d 374 (2021), tells us that evidence which tends, even slightly, to illustrate a fact is probative and relevant. Doubt as to relevancy is to be resolved in favor of admission of evidence and against exclusion.

Sometimes, however, a close examination of an exhibit reveals an absence of relevancy. A portion of a videotape fell into this category in *Robinson v. State*, 308 Ga. 543, 842 S.E.2d 54 (2020). Part of the video showed crying children reacting to a homicide. The court ruled: “This portion of the video did not even have the remotest shred of relevance.”

44. Religion. O.C.G.A. § 24-6-610. *Cohen v. Lowe Aviation Co., Inc.*, 221 Ga. App. 259, 470 S.E.2d 813 (1996).

Henry v. State, 278 Ga. 617, 604 S.E.2d 826 (2004) (a sentencing body should not resort to religion or any other source except Georgia law when deciding on an appropriate sentence); *Cole v. State*, 261 Ga. App. 809, 584 S.E.2d 37 (2003) (stating that prosecutors should avoid references to religion which invite jurors to base their verdict on extraneous matters not in evidence); *Carruthers v. State*, 272 Ga. 306, 528 S.E.2d 217 (2000) (noting that biblical references inject the often irrelevant and inflammatory issue of religion).

45. Remedial Measures. O.C.G.A. § 24-4-407. *Department of Transp. v. Cannady*, 270 Ga. 427, 511 S.E.2d 173 (1999); *Ratliff v. CSX Transp., Inc.*, 219 Ga. App. 53, 464 S.E.2d 1 (1995).

General Motors Corp. v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994), disapproved on other grounds in *Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459 (1998) (evidence of subsequent remedial measures is normally not allowed in negligence actions, but is allowed in strict liability cases); *Wynn v. City of Warner Robins*, 279 Ga. App. 42, 630 S.E.2d 574 (2006) (evidence of remedial measures normally inadmissible in negligence actions because it goes against public policy of encouraging safety

through remedial action); *John Crane, Inc. v. Jones*, 262 Ga. App. 531, 586 S.E.2d 26 (2003), *aff'd*, 278 Ga. 747, 604 S.E.2d 822 (2004) (evidence of subsequent remedial measures inadmissible as conflicting with public policy of encouraging safety through remedial action, for the instituting of remedial safety measures might be discouraged if such conduct is admissible as evidence of negligence); *McCorkle v. Department of Transp.*, 257 Ga. App. 397, 571 S.E.2d 160 (2002) (same).

46. Repetitive. *Phyfer v. State*, 259 Ga. App. 356, 577 S.E.2d 56 (2003) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)) (trial court refused questions that had been asked and answered); *Bryant v. State*, 226 Ga. App. 135, 486 S.E.2d 374 (1997) (court did not abuse its discretion in limiting cross examination to relevant issues and precluding repetitive questions); *City of Waycross v. Beaty*, 157 Ga. App. 765, 278 S.E.2d 697 (1981) (“it has been held that the exclusion of unnecessarily repetitive questions which have been previously propounded and answered does not constitute an abuse of discretion”). This objection applies only when the same counsel repeatedly asks the same question. If the question comes from opposing counsel during cross-examination, it is proper to allow the question at least once (even though asked and answered on direct). “Redundant” or “asked and answered” are other ways of stating this objection. *Pitts v. Bode*, 198 Ga. App. 787, 403 S.E.2d 66, 69 (1991).

Holloway v. State, 283 Ga. App. 823, 643 S.E.2d 286 (2007) (trial judges retain wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things, confusion of the issues or interrogation that is repetitive or only marginally relevant); *Medlin v. State*, 285 Ga. App. 709, 647 S.E.2d 392 (2007) (absent a showing of prejudice, photographs were subject to exclusion on the basis that they were “cumulative” of other evidence); *Kier v. State*, 247 Ga. App. 431, 543 S.E.2d 801 (2000) (stating that trial court may curtail unduly repetitive inquiries and may exercise reasonable judgment in determining when a subject is exhausted); *Mckee v. State*, 258 Ga. App. 99, 572 S.E.2d 740 (2002) (introduction of evidence that is merely cumulative of other evidence which had been admitted without objection at trial is within the trial court’s discretion).

Trial judges retain wide latitude to impose reasonable limits on cross examination based on concerns about, among other things, confusion of the issues or interrogation that is repetitive or only marginally relevant. Extent of cross examination can be curtailed if the inquiry is not relevant or material, and such restriction lies within the discretion of the trial court, which will not be disturbed on appeal unless manifestly abused. *Parks v. State*, 294 Ga.App 646, 669 S.E.2d 684 (2008).

47. Scientific Evidence. Former O.C.G.A. § 24-7-707 regarding admissibility of expert opinion in criminal cases was repealed in 2022. As of July 1, 2022, the standard for admissibility in criminal cases is the same as in civil cases. See O.C.G.A. § 24-7-702.

48. Scope of Examination. O.C.G.A. § 24-6-611(b). *Klinect v. State*, 269 Ga. 570, 501 S.E.2d 810 (1998).

Walsh v. State, 283 Ga. App. 817, 642 S.E.2d 879 (2007) (admission of evidence rests in the trial court's sound discretion, and evidence should be admitted if it is admissible for any legitimate purpose); *Watson v. State*, 278 Ga. 763, 604 S.E.2d 804 (2004) (overruled on other grounds by, *State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020)) (a defendant is entitled to introduce relevant and admissible testimony tending to show that another person committed the crime for which the defendant is tried; however, the proffered evidence must raise a reasonable inference of a defendant's innocence, and must directly connect the other person with the *corpus delicti*, or show that the other person has recently committed a crime of the same or similar nature).

Georgia follows the wide-open rule on scope of cross-examination. The Georgia approach compared to the federal rule is traced in R. Carlson and M. Carlson, *Unconstitutionality and the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining the Accused*, 7 J. Marshall L.J. 269 (2014).

49. Sequestration Rule Violated. *Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996) (invoking the rule bars a subsequent witness from sitting in the courtroom to hear earlier witnesses, and also bars an earlier witness from "filling in" a later witness); O.C.G.A. 24-6-615; § 11:9, *supra*. Credibility impeached by showing of violation of sequestration rule, see *Childress v. State*, 266 Ga. 425, 467 S.E.2d 865 (1996). See also *McNeil v. State*, 229 Ga. App. 149, 493 S.E.2d 570 (1997).

Pollio v. State, 278 Ga. App. 729, 629 S.E.2d 583 (2006) (where defendant fails to object at trial to violation of sequestration rule, he waives the issue for appeal); *Howse v. State*, 273 Ga. App. 252, 614 S.E.2d 869 (2005) (allowing a witness to be excepted from the rule of sequestration lies within the sound discretion of the trial court, and it is not abuse to except investigating officer from rule of sequestration where prosecutor states that allowing officer to stay in court will assist in prosecution); *Craft v. State*, 254 Ga. App. 511, 563 S.E.2d 472 (2002) (violation of rule of sequestration goes to credibility rather than admissibility of testimony; remedy for violation is to request a jury charge to that effect).

50. Speculative. *Pettis v. State*, 224 Ga. App. 77, 479 S.E.2d 460 (1996) (finding that question calling for witness to speculate

was improper but not error because the question was not prejudicial); *Grissett v. State*, 199 Ga. App. 547, 405 S.E.2d 542 (1991) (holding that court properly sustained an objection to a question asked of assault defendant about whether he would have shot the victim if the victim had left as the defendant had requested; objection proper because the question required the defendant/witness to speculate).

Taylor v. State, 272 Ga. 744, 534 S.E.2d 67 (2000) (holding that question calling for state's witness to speculate as to whether defendant or another shooter would have been more likely to utter certain words was inadmissible in murder prosecution). Although absolute certainty is not required, during a medical malpractice case the expert's testimony has to provide a causal connection that is more than chance or speculation. *EHCA Dunwoody, LLC v. Daniel*, 277 Ga. App. 783, 627 S.E.2d 830 (2006) (however, expert testimony held not speculative here).

51. Stipulated. *Worth v. Douglas Production Credit Ass'n*, 173 Ga. App. 808, 328 S.E.2d 421 (1985) (conclusive effect); § 10:5, *supra*; *In re R.J.M.*, 295 Ga. App. 886, 673 S.E.2d 527 (2009).

Arnold v. State, 274 Ga. App. 187, 617 S.E.2d 169 (2005), judgment rev'd on other grounds, 280 Ga. 487, 629 S.E.2d 807 (2006) and opinion vacated, 280 Ga. App. 206, 634 S.E.2d 438 (2006) (parties may stipulate anything factual, and may sometimes waive the benefit of statutory or constitutional provisions, but they cannot by stipulation fix or change the law); *Stanley v. Hart*, 254 Ga. App. 258, 562 S.E.2d 186 (2002) (holding that a stipulation is binding and evidence contrary to stipulation is not admissible). On stipulating to admission of polygraph results, see *Objection 35, supra*.

52. Summaries. O.C.G.A. § 24-10-1006. Objections to summaries can include an objection that the underlying records are not voluminous, so a summary is not needed. *D'Agnese v. Wells Fargo Bank, N.A.*, 335 Ga. App. 659, 782 S.E.2d 714 (2016). Another objection may be on the point that the underlying records which are summarized were never made available to the opposing party. *Tafel v. Lion Antique Cars & Investments, Inc.*, 297 Ga. 334, 773 S.E.2d 743 (2015). On the value of summaries and the application of the summary rule to electronic data, see *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 73 Fed. R. Evid. Serv. 446 (D. Md. 2007). The provisions of Chapter 10 of the 2013 Georgia Evidence Code are analyzed in M. Wilson and R. Carlson, *The Best Evidence Rule Made Better*, Georgia Bar Journal 12 (August 2013). See *U.S. v. Carter*, 506 Fed. Appx. 853, 292 Ed. Law Rep. 616 (11th Cir. 2013). The rule on summaries was addressed in *United States v. Manahe*, 2023 WL 2314950 (D. Me. 2023). The decision holds that properly prepared Rule 1006 summaries can be used by the jury during jury deliberations. This

marks a difference between such summaries versus pedagogical devices. The court lists the foundation requirements for Rule 1006 summaries. In addition, the decision observes that Rule 1006 does not require that underlying documents be introduced into evidence.

53. Unresponsive. *Sorrells v. State*, 267 Ga. 236, 476 S.E.2d 571 (1996). See *Shelnutt v. State*, 255 Ga. App. 157, 564 S.E.2d 774 (2002).

Fulton v. State, 278 Ga. 58, 597 S.E.2d 396 (2004) (defendant was not entitled to mistrial after witness improperly injected defendant's character into issue by referring to defendant's prior misconduct; information came out in an answer not responsive to the question which witness was asked during cross-examination by defense counsel, where trial court offered to give curative instruction, but defense counsel declined to have a curative instruction given); *Hunt v. State*, 268 Ga. App. 568, 602 S.E.2d 312 (2004) (no grant of mistrial after State's expert witness testified as to her opinion on ultimate issue; trial court promptly gave curative instruction directing jury to disregard witness's unresponsive answer to prosecutor's question, to extent that witness had improperly expressed her opinion on ultimate issue); *Holt v. State*, 248 Ga. App. 334, 546 S.E.2d 83 (2001) (no abuse of discretion for denial of mistrial following a comment that was unresponsive to question asked).

APPENDIX C

Forms

A. CRIMINAL CASE FORMS

Form 1	Motion to suppress defendant's oral statement because of <i>Miranda</i> violation
Form 2	Certificate of service
Form 3	Certificate of service; alternate form
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Form 5	Motion to suppress illegally seized evidence
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Form 9	Defense motion to bar reference to defendant's prior conviction
Form 10	Prosecutor's notice of similar transaction evidence
Form 11	Prosecution motion in limine to bar hearsay evidence
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Form 13	Memorandum of Law
Form 14	Prosecution motion to admit evidence
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B. CIVIL CASE FORMS

Form 17	Defense motion in limine to exclude prior accidents
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Form 19	Motion in limine to exclude statements made during compromise negotiations
Form 20	Motion in limine to admit opposing party's oral admission
Form 21	Pretrial conference proposed order
Form 22	Subpoena for production of evidence
Form 23	Motion in limine to restrain improper argument

◆ **Author's Comment:** To aid realism, some of the subse-

quent forms contain names of parties or witnesses. These names have no relation to actual persons, living or dead. Any reference to a real person is accidental, and unintended.

A. CRIMINAL CASE FORMS

Form 1 Motion to suppress defendant's oral statement because of *Miranda* violation; Criminal case

In the Superior Court of _____ County
State of Georgia

State of Georgia

v

Indictment No. _____

Defendant

Motion to suppress defendant's statements

Comes now the defendant in the above cause and moves the court to exclude and suppress statements made by him shortly prior to his arrest. The evidence of any statements made by the accused should be excluded on the following grounds.

1. On December 18, 20__ the defendant was stopped by Athens police officers on Lumpkin Street in downtown Athens, Georgia, and placed in the back of a squad car for general questioning.

2. The police officers had no warrant nor probable cause; rather, the defendant was subjected to exploratory questioning in a custodial setting about his knowledge of crime in the downtown community.

3. The police officers represented to the defendant that they suspected him of a burglary which had occurred at the Mayfair Restaurant depot the prior night; when the defendant denied this, he stated that he had been at a gambling event on the night of the burglary, which gambling incident forms the basis for the current criminal charge against the accused. No *Miranda* warnings were given at any time during the interrogation.

4. Defendant was not free to leave the police vehicle wherein the foregoing interrogation took place; accordingly, the detention of the defendant was improper, and the subsequent custodial interrogation violated defendant's rights under the Fifth and Sixth Amendments of the United States Constitution, as well as Georgia law.

5. The conduct of the police was in contravention of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). Upholding *Miranda* rights in Georgia, see *Taylor v. State*, 274 Ga. 269, 553 S.E.2d 598 (2001). Confession

law in Georgia, see *State v. Folsom*, 286 Ga. 105, 686 S.E.2d 239 (2009); *Pulley v. State*, 291 Ga. 330, 729 S.E.2d 338 (2012).

6. In the Eleventh Circuit, *Miranda* rights are explained in *U.S. v. Street*, 472 F.3d 1298 (11th Cir. 2006). *Miranda* violation, see *U.S. v. Lall*, 607 F.3d 1277 (11th Cir. 2010).

7. The suspect here was “in custody” for *Miranda* purposes when restrained in the back of the Athens patrol car. Defining custody are *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011); *U.S. v. Brown*, 441 F.3d 1330, 69 Fed. R. Evid. Serv. 738 (11th Cir. 2006); *Bailey v. State*, 801 S.E.2d 813 (2017); *State v. Folsom*, 285 Ga. 11, 673 S.E.2d 210 (2009).

Wherefore, defendant prays that the Court conduct a hearing in accordance with *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964), and exclude from evidence in this case any admissions or statements made by the accused.

Date
 Defense attorney’s address
 and telephone
 State bar number
 Certificate of service

 Attorney for defendant

Author’s Comment. In this text, the rules regarding constitutional protections when statements are secured from a defendant by police appear in §§ 27:4, 27:5.

Form 2 Certificate of service

In the Superior Court of _____ County
 State of Georgia

State of Georgia
 v

 Defendant

Indictment No. _____

Certificate of service

This notice certifies that I have on this date served the prosecutor in the above entitled case with a copy of the Motion to Suppress Defendant’s Statements by depositing that document in an authorized depository for United States mail, along with a correctly addressed envelope, with first-class postage affixed.

Attorney for defendant

Date
Defense attorney's address and telephone
State bar number

Form 3 Certificate of service; Alternate form

In the Superior Court of _____ County
State of Georgia

State of Georgia

v

Defendant

Indictment No. _____

Certificate of service

This is to certify that I have this day served a copy of the foregoing document(s) upon counsel for the defendant _____ (*name*) by means of (_____) hand delivery, or (_____) depositing same in the United States mail in a properly addressed envelope bearing correct postage.

Done this _____ day of _____, 20__

Assistant District Attorney

Prosecutor's address and telephone
State bar number

Form 4 Order granting suppression motion

In the Superior Court of _____ County
State of Georgia

State of Georgia

v

Indictment No. _____

Defendant

Order granting motion to suppress

After the defendant in the above-entitled matter filed a motion to suppress statements allegedly made by him shortly prior to his arrest, the matter came on for hearing before this court. Following an evidentiary hearing and argument by counsel, this court finds that the initial detention of the defendant was illegal, and that the custodial interrogation which followed complied with neither the United States Constitution nor Georgia law.

Accordingly, it is ordered, adjudged and decreed that the fruits of the interrogation are hereby excluded and suppressed, and any statements made by defendant while detained in the squad car be excluded from evidence in this case.

Done this _____ day of _____, 20__

Judge

Form 5 Motion to suppress tangible object

In the Superior Court of _____ County
State of Georgia

State of Georgia

v

Defendant

Indictment No. _____

Motion to suppress illegally seized evidence

Comes now the defendant in the above cause and hereby moves the court to exclude and suppress from evidence a knife seized by police from his apartment. As justification for his motion the defendant states the following grounds.

1. Officers of the _____ police department were investigating the defendant for an assault which occurred on January 17, 20__; pursuant thereto they secured a search warrant for his apartment at _____ Street in the city of _____, Georgia which warrant authorized search for "weapons and any other evidence connected with the assault upon Mr. Walker Y. Stout."

2. Pursuant thereto, the officers executed the warrant by entering defendant's apartment on January 19, 20__, and searching

every room, confiscating a shotgun, pictures of the defendant with his wife, a baseball bat, and other items along with the knife in question. The victim Walker Stout was allegedly stabbed in the assault complained about.

3. The issuance of the search warrant by the Magistrate and the conduct of the search by police violated the United States Constitution and the laws of Georgia in the following particulars:

(a) The affidavit relied upon by the Magistrate contained incorrect and false information when it stated that an informant reported information to the effect that the defendant admitted the crime to him, and that evidence of the crime was stored in defendant's apartment; in fact, no such conversation by the defendant with an informant or any other person ever took place;

(b) The warrant was not supported by probable cause;

(c) The warrant as issued was overly broad and permitted a general search, which is prohibited by law;

(d) The execution of the warrant by the officers of the _____ police department exceeded the bounds of lawful search when the officers ransacked the defendant's apartment.

4. Searches under warrants unsupported by probable cause are condemned under standards promulgated in cases like *Watts v. State*, 274 Ga. 373, 552 S.E.2d 823 (2001); *State v. Owens*, 285 Ga. App. 370, 646 S.E.2d 340 (2007); *State v. Pando*, 284 Ga. App. 70, 643 S.E.2d 342 (2007).

5. Tips from anonymous informants and sources do not invariably supply probable cause. In *Lewis v. State*, 323 Ga. App. 709, 747 S.E.2d 867 (2013), a tip from such a source failed to establish reasonable suspicion of criminal activity. The information "failed to provide any detail whatsoever" which could be corroborated by the deputy as showing inside information.

6. Warrants which are defective cannot form an appropriate basis for search under the "good faith" exception to the Fourth Amendment, because Georgia does not recognize such an exception. *Gary v. State*, 262 Ga. 573, 422 S.E.2d 426 (1992).

Wherefore, defendant respectfully requests the Court to conduct a hearing on this motion and pursuant thereto to exclude all evidence seized as a result of the search of defendant's residence, including the knife which was illegally seized.

Attorney for defendant

Date
 Attorney's address and telephone
 Certificate of service

Form 6 Verification

In the Superior Court of _____ County
 State of Georgia

State of Georgia
 v

 Defendant

Indictment No. _____

Verification

Before me the undersigned officer, duly authorized by law to administer oaths, personally appeared the undersigned affiant, who after being duly sworn deposes and affirms that the facts stated in the foregoing Motion are true and correct to the best of (his/her) knowledge and belief.

 Affiant

Sworn and subscribed to before me this _____ day of _____, 20__

 Notary Public

My commission expires _____, 20__

Author's Comment. Whether a motion is accompanied by a verification does not follow a uniform pattern in Georgia. Goger, Daniel's Criminal Trial Practice Forms § 1-9 (5th ed 2002) ("Georgia lawyers seem to have no uniformity in the verification or nonverification of various forms which are used in criminal cases"). In the event that local practice suggests the desirability of a verification, a form has been supplied here.

Form 7 Defense motion to exclude dramatic photographs

In the Superior Court of _____ County

State of Georgia

State of Georgia

v

Indictment No. _____

Defendant**Motion in limine to exclude photographs**

Comes now the defendant in the above cause and moves the court to exclude emergency room photographs of the alleged victim of the offense charged herein, upon the following grounds.

1. The photographs in question were taken in the emergency room of St. Francis Hospital in _____, Georgia on July 9, 20____. They portray the alleged victim of the assault which has been charged against the defendant in this case, showing the victim in a bloody and disheveled condition.

2. The victim of the assault, which offense the defendant denies committing, incurred a broken nose and a stab wound to his left cheek. Photographs of these injuries will be offered in evidence by the prosecution. They are bloody, emotional and duplicative.

3. Defendant offers to stipulate that the victim incurred a broken nose as well as a wound of about two inches in length at his left cheek, while denying the defendant was the perpetrator. In view of this offer, the relevancy of the photographs are reduced while their inflammatory nature becomes paramount.

4. Georgia law requires the court to balance probative worth of potential dramatic evidence against its prejudicial impact. O.C.G.A. § 24-4-403. So do federal courts. *U.S. v. Gibbs*, 797 F.3d 416 (6th Cir. 2015); *Burris v. Gulf Underwriters Ins. Co.*, 787 F.3d 875 (8th Cir. 2015). On the effect of a stipulation regarding prejudicial evidence, see *Old Chief v. U.S.*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574, 45 Fed. R. Evid. Serv. 835 (1997). Also, duplicative or repetitive photographs cannot be admitted. *Williams v. State*, 250 Ga. 553, 300 S.E.2d 301 (1983); *Medlin v. State*, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

5. In addition to barring unduly prejudicial exhibits, Georgia rules prohibit irrelevant evidence. The general test for pictorial evidence is that it must comply with O.C.G.A. § 24-4-401 and be relevant, as well as not unfairly prejudicial. In cases involving crime scene photographs as well as videos, the Georgia Supreme Court makes clear that exhibits without probative value are not welcome in Georgia trials. *Robinson v. State*, 308 Ga. 543, 842 S.E.2d 54 (2020). See also *Morgan v. State*, 307 Ga. 889, 838 S.E. 2d 878 (2020).

Wherefore, defendant prays that the Court conduct a hearing and exclude the described photographs of the victim from

evidence. In the alternative, the defendant requests that the court limit the State to offering a single photograph of the victim in the emergency room, and not allow double or multiple pictorial representations.

Attorney for defendant

Date

Defense attorney's address and telephone

State bar number

Certificate of service

Author's Comment. In this text, see the rules on inflammatory photographs reviewed in §§ 21:5, 29:3.

Form 8 Motion for new trial: juror misconduct

THE [NAME OF COURT] COURT OF [NAME OF COUNTY]
COUNTY

STATE OF GEORGIA

[Name of plaintiff],
Plaintiff

CIVIL ACTION
NO. [Number of case]

v.

[Name of defendant],
Defendant

MOTION FOR NEW TRIAL

Defendant [Name of defendant] respectfully moves this court to set aside and vacate the jury verdict rendered against him in this case on [date of verdict], and to grant a new trial. This motion is based on the following fact and points of law.

1. On the afternoon of [date of submission to jury], this automobile accident personal injury case was submitted to the jury for deliberations and decision. The jury could not reach a resolution of the case that afternoon, so deliberations continued again the next day. When the problems in achieving a decision persisted, the foreperson resorted to an outside source for information. He used his cellular telephone to look up expert information on the Internet regarding stopping distances and skid marks. Relying upon this information, he reported to the other jurors that the defendant driver could not have been travelling at a safe speed. He said the length of skid marks established that the defendant driver, laying down 90 feet of skid marks, meant he was moving at 50 m.p.h. in a 35 m.p.h.

travel zone. Shortly after this information was shared, the jury voted a verdict of \$2 million for the plaintiff.

2. Extraneous prejudicial information improperly came before the jury as a result of the foreperson's Internet search. The skid mark chart contained in the accident reconstruction source consulted by the foreperson suggested various stopping distances for vehicles on dry pavement. Not consulted by the foreperson was research disclosing the enhanced stopping distance required during rainy conditions and wet weather. Skid marks of similar length mean different things if the pavement is soaked. Skid marks of 90 feet on dry pavement suggest a speed of 50 m.p.h., whereas on wet pavement they suggest a speed between 33 and 36 m.p.h. It was raining at the time of the accident in this case.
3. The prejudice created by the foreperson's misconduct evidenced itself in two ways. First, it injected a false element of negligence into the case, the conclusion that the defendant driver was travelling at a prohibited speed, which was untested by any cross-examination. In addition, it caused jurors to conclude that the testimony of the defendant driver in other respects was flawed, in addition to the conclusion that he was lying when he delivered observations about his speed at the time of the accident. The affidavit of juror [name of juror], a juror in this case, is attached hereto attesting to these facts. It discloses jury activity at odds with the court's careful instruction to jurors to avoid any electronic searches for evidence.
4. O.C.G.A. 24-6-606(b) allows the court to hear evidence of jurors using extraneous prejudicial information. This marks a change in Georgia law, which prior to 2013 barred courts from receiving juror testimony or affidavits which disclosed jury misconduct.
5. When there is uncontradicted proof that outside sources of information were consulted, as here, and the extraneous information raises a strong possibility that prejudice occurred, the remedy is a new trial. See *Chambers v. State*, 321 Ga. App. 512, 739 S.E.2d 513 (2013) (juror searched the internet and discovered law relating to issues in the case. "We find that there is at least a reasonable possibility that the extra-judicial information contributed to the conviction, and that the verdict must therefore be deemed inherently lacking in due process"). See also *U.S. v. Perkins*, 748 F.2d 1519 (11th Cir. 1984) (when jurors consider extrinsic evidence, a new trial is required if the evidence poses a reasonable possibility of prejudice).
6. This remedy is not the exclusive province of criminal case practice. O.C.G.A. 24-6-606(b) applies in civil and criminal cases.

Several of the jurors in this case violated the court's instruction barring them from securing information from extra-judicial sources, as explained in this motion. For the foregoing reasons, counsel requests the court to grant this motion. It is based upon the records in this case, and on the affidavit of juror [name of juror], attached hereto.

[Date of document]

[Signature of attorney]

Attorney for defendant

[Attorney's address, telephone number, and state bar number]

[Attach affidavit of juror]

NOTES TO FORM

Commentary:

The above grounds based upon juror misconduct may be coupled with grounds asserting bad jury instructions, new evidence, false testimony, improper introduction of testimony, and others.

Cases on motions for new trial based upon claims of juror misconduct include *Warger v. Shauers*, 135 S. Ct. 521, 190 L. Ed. 2d 422, 96 Fed. R. Evid. Serv. 186 (2014) (**juror misrepresentation was put forth in response to questions asked during jury selection**); *Armstrong v. Gynecology & Obstetrics of DeKalb, P.C.*, 327 Ga. App. 737, 761 S.E.2d 133 (2014) (**application of O.C.G.A. 24-6-606(b) to juror's use of cell phones to secure information during deliberations; although impropriety was established, prejudice was not presumed and must be demonstrated**).

On the issue of establishing prejudice when a juror conducts Internet research about a case, see *R. Morelli, The Connected Juror's Effect on the Sixth Amendment Right to an Impartial Jury and Georgia's Presumption of Prejudice*, 7 J. Marshall L.J. 527 (2014).

Forms for juror affidavits supporting new trial motions appear in *R. Carlson, Successful Techniques for Civil Trials* § 8:37 (juror traveled to scene of accident). They are also contained in *Am. Jur. Pleading and Practice Forms, New Trial* §§ 87-93 (2006). The above source also contains responses for answering new trial motions based upon alleged juror misconduct. See responses to new trial motions contained in *Am. Jur.*, *supra*, commencing at § 94.

Other Georgia cases, see *Hammock v. State*, 277 Ga. 612,

592 S.E.2d 415 (2004), wherein a juror testified at a hearing on a motion for new trial that another juror made measurements relevant to the case. Before the jurors learned of this they could not arrive at a decision, but after hearing about the independent measurements, the jury unanimously reached a verdict. The Georgia Supreme Court reversed the jury's decision. The case of *O'Donnell v. Smith*, 294 Ga. 307, 751 S.E.2d 324 (2013), reviews Georgia episodes of unsanctioned visits by jury to the crime scene. This case raised issues of juror's search of the Internet. In *Gardiner v. State*, 264 Ga. 329, 444 S.E.2d 300 (1994), juror affidavits were carefully considered by the trial judge, who ultimately rejected them under the old, pre-2013 law.

Federal authorities, see *U.S. v. Lawson*, 677 F.3d 629 (4th Cir. 2012) (information obtained via Wikipedia searches constitutes extraneous information); *Shillcutt v. Gagnon*, 827 F.2d 1155, 23 Fed. R. Evid. Serv. 1068 (7th Cir. 1987).

The interface of motions for new trial and appeal rights is reviewed in *N. Ramachandrappa, Post-Trial Motions and Appeals, Verdict 24* (Spring 2015).

Form 9 Defense motion to bar reference to defendant's prior conviction

In the Superior Court of _____ County
State of Georgia

State of Georgia

v

Defendant

Indictment No. _____

Motion in limine to bar conviction evidence

Comes now the defendant in the above cause and moves the court to exclude from evidence or argument any reference to a prior criminal conviction of the accused. It is anticipated that the State will try to use the conviction to impeach the defendant, in the event he testifies in this case. Exclusion is sought on the following grounds.

1. Defendant was previously convicted of the misdemeanor offense of criminal trespass in _____, Georgia, on September 9, 20__.

2. The offense of criminal trespass is not a felony and use of such offenses to impeach a party is incompetent under Georgia law. See *Maxwell v. State*, 250 Ga. App. 628, 552 S.E.2d 870 (2001). Under the statutory formulation for prior crimes impeach-

ment contained in O.C.G.A. § 24-6-609, trespass is not an offense involving dishonesty or false statement, nor is it a felony punishable by imprisonment in excess of one year. Under the 2013 Georgia Evidence Code, impeaching convictions must be those misdemeanors which partake of dishonesty, or felonies generally. The crime sought to be used by the prosecutor in this litigation fits neither of these categories. Federal law also bars misdemeanors for impeachment purposes unless the misdemeanor partakes of dishonesty or false statement. *Clarett v. Roberts*, 657 F.3d 664, 86 Fed. R. Evid. Serv. 873 (7th Cir. 2011). Further, in the assault charge which is the subject of the current indictment, the prior misdemeanor offense of criminal trespass has no bearing upon the instant case. Its only impact, if mentioned by the State, will be to prejudice the jury against the accused. O.C.G.A. § 24-4-403.

3. Oral objections during trial of the current assault case to any reference by the prosecution to defendant's old offense will be unsatisfactory. Mere mention of the former crime in any context will have a damaging emotional impact on the jury. Admonitions or instructions by the court to disregard the information will not purge the taint created by such reference.

Wherefore, defendant moves the Court to direct the Assistant District Attorney to refrain from any reference to defendant's prior offense, and also direct her to instruct all State's witnesses to avoid mentioning defendant's prior conviction.

Attorney for defendant

Date

Defense attorney's address and telephone

State bar number

Certificate of service

Author's comment. Cases on use of prior convictions to impeach an accused appear in §§ 12:5, 16:11 and 16:12.

Form 10 Prosecutor's notice of similar transaction evidence

In the Superior Court of _____ County

State of Georgia

State of Georgia

v

Defendant

Indictment No. _____

**Notice of prosecution's intent to present evidence of
similar transactions**

Comes now the prosecution in the above cause and hereby provides notice for the State's intent to present evidence in the pending case of defendant's prior similar acts and transactions. Under O.C.G.A. § 24-4-404(b) (common scheme or plan). This notice is supplied pursuant to Uniform Superior Court Rule 31.3. The notice is based upon the following facts and circumstances.

1. A copy of this notice is being served upon the defense attorney in the pending case more than ten (10) days prior to trial, in compliance with Uniform Superior Court Rule 31.1.

2. The present case concerns charges against the accused for the crime of aggravated assault. Two prior assaults committed by him in similar fashion are listed and briefly described in Exhibit "A" attached hereto and by this reference made a part hereof. The assault which is charged in this case occurred on May 30, 20—. Prior thereto, during the previous year on April 16 and July 23, 20—, the defendant assaulted other people. Both the April and July assaults were without provocation, exactly like the current case.

3. The police reports relating to the April and July assaults referenced in paragraph 2 of this notice contain the date, county, and names of the victims for each similar occurrence. In addition, an indictment was handed down in one of the cases. Copies of these documents are attached hereto and by this reference made a part hereof.

Wherefore, the State requests approval from this Honorable Court to present evidence of similar transactions during the forthcoming trial of the pending case, and respectfully asks the court to hold a hearing on this request.

Assistant District Attorney

Date

Prosecutor's address and telephone

State bar number

Certificate of service

(Attach Exhibit "A" and documents)

Author's Comment. Cases on prior crimes and other similar wrongs, see § 29:17.

**Form 11 Prosecution motion in limine to bar hearsay
evidence**

In the Superior Court of _____ County
State of Georgia

State of Georgia

v

Indictment No. _____

Defendant

Motion in limine to prevent introduction of hearsay

Comes now the prosecution in the above cause and hereby moves the court to enter an order preventing the presentation of hearsay evidence. Upon reliable information, the State believes the defense will attempt to present two damaging and inadmissible hearsay declarations. This motion is based upon the following grounds.

1. The defendant is charged with first degree vehicular homicide over the death of Rufus Abercrombie, a passenger in defendant's vehicle. Another passenger in the car, Carlos Gilbert, was sleeping in the back seat at the time of the wreck.

2. When police officer Rick Smith arrived on the scene, he encountered a car piled into a utility pole at the side of the roadway. He saw a crowd gathered, and the defendant and Gilbert walking about, talking and arguing. When the officer asked what happened, the defendant asserted he collided with the pole at the result of Mr. Abercrombie becoming violent and taking a swing at him, causing defendant to lose control of the vehicle. The argument after the crash apparently was caused by the refusal of the passenger to confirm the story presented by the accused. However, the defendant repeated his remarks to the officer.

3. It is the State's theory of the case that no such conflict occurred between defendant and passenger. Rather, the wreck occurred as a result of defendant's drinking and reckless driving. An open bottle of liquor was located under the driver's seat and was found by Officer Smith when he searched the car. The story of a fight was conceived by the defendant to cover up his wrongdoing.

4. It is anticipated that during the cross-examination of Officer Smith at trial, the defense counsel will ask the officer to repeat the defendant's statements which exonerate him and explain the accident from the defendant's perspective. In addition, when the third occupant of the car, witness Gilbert appears as a witness for the State, he will be cross-examined with similar intent by the defense, seeking to put forth the defense theory of the case without the defendant taking the stand.

5. When a party attempts to have a witness repeat the party's

prior self-serving declarations, this violates the hearsay rule. Former Georgia law was ambiguous on this point. Now, the 2013 Georgia Evidence Code bans repetition of self-serving declarations when made by the accused or, as here, through examination of third parties. See O.C.G.A. § 24-8-801. A prior Georgia case which made a correct application of the law is *Griffith v. State*, 286 Ga. App. 859, 650 S.E.2d 413 (2007) (defense asked officer to relate defendant's pretrial statements which were helpful to the defense; State made a sound objection that the question asked for self-serving hearsay). Federal law also bars such hearsay. *U.S. v. Mitchell*, 502 F.3d 931, 964 (9th Cir. 2007).

Wherefore, the State moves the court to direct the defense attorney to refrain from asking questions which are designed to elicit hearsay in the particulars identified here. Oral objections during trial of this pending assault case will be unsatisfactory. The mere asking of questions regarding hearsay statements which are damaging to the State's case will distract and confuse the jury. The prosecution prays that the court conduct a hearing on this request, and exclude from evidence in this case the hearsay attempt to exonerate the defendant through the purported self-serving statement to another person.

Assistant District Attorney

Date
 Prosecutor's address and telephone
 State bar number
 Certificate of service

Author's Comment. The law of hearsay and self-serving declarations is explained in § 29:21, *supra*.

Form 12 Motion in limine by prosecution to exclude evidence of witness' character; motion and memorandum of law¹

In the Superior Court of _____ County
 State of Georgia

State of Georgia
 v

¹This form is based on a motion and memorandum prepared by Michael S. Carlson, Deputy Chief Assistant District Attorney, Cobb Judicial Circuit.

DefendantIndictment No.

**Motion in limine to exclude evidence of witness'
character**

Comes now the State of Georgia and moves the court in limine to exclude inadmissible evidence regarding witness Walter X. Carlstrom, a witness to be called by the State, and presents the following grounds.

1. According to the above-styled indictment, the trial of this case will involve a determination of the guilt or innocence of the defendant for the murder of _____ (*name of victim*)

2. A witness to the killing, Mr. Walter X. Carlstrom, will be called by the State to testify in the murder trial of the defendant.

3. The State believes that the defendant will attempt to cross-examine, present testimony or otherwise make reference to the character of Mr. Carlstrom regarding two past incidents, one involving the arrest of Mr. Carlstrom for criminal damage of property as well as an unsubstantiated claim of assault allegedly committed by Mr. Carlstrom. In neither event was there a criminal conviction.

4. Any testimony, evidence or mention of any kind at the trial of this case of any aspect of the witness' character or reputation for assault would be irrelevant and inadmissible, as would evidence of any act of purported property damage by the witness.

5. Nor is such evidence competent under Georgia's 2013 Evidence Code. See O.C.G.A. § 24-4-404.

6. An objection during the course of the trial of this case to a defense attempt to proffer testimony or ask cross-examination questions in the areas set forth above, even if sustained with proper instructions to the jury, would not remove the prejudicial effect of such evidence. As such, this timely motion is being made by the State prior to trial in order to avoid such prejudice.

WHEREFORE, the State respectfully moves this Court to enter an order in limine barring any cross-examination, evidence or reference of any kind concerning the character of the witness Walter Carlstrom, as well as barring examination about any purported acts of misconduct by the witness, as explained in this motion and supporting memorandum of law.

Respectfully submitted this _____ day of _____, 20__

Assistant District Attorney

Judicial Circuit
Address and telephone
State Bar Number
Certificate of Service

Form 13 Memorandum of Law

In the Superior Court of _____ County
State of Georgia

State of Georgia

v

Defendant

Indictment No. _____

Memorandum of law in support of the State's motion in limine to exclude evidence of witness' character.

Comes now the State of Georgia and files its above-styled memorandum and states the following to the court.

Facts

On September 7, 20___, defendant pursued the victim by following the victim's car into a Wal-Mart parking lot on North _____ Road in _____, Georgia. When the victim alighted from his car the defendant, armed with a pistol, pulled up alongside the victim and shot him three times. The fatal shot penetrated the victim's skull. The victim was unarmed. The defendant fled the area after he killed the victim. Witness Walter Carlstrom was approaching his car with packages from the store when the defendant pulled up and shot the victim. The victim had parked near the Carlstrom car. The witness saw the defendant shoot the victim, and flee in his vehicle. Mr. Carlstrom witnessed the entire shooting episode from a distance of a few feet away.

The State believes that the accused will attempt to cross-examine Mr. Carlstrom about an assault on a patron of Brud's Tap, a tavern in Athens, Georgia. This event allegedly occurred 17 months ago, on June 19, 20___. No criminal charges ever came from the tavern incident. They will also try to impeach him with a prior arrest for criminal damage to property on September 18,

20—. Mr. Carlstrom admits to being arrested on this date. He maintained (and maintains) his innocence concerning this incident, and charges in the matter were dismissed prior to trial.

Argument and citation of authority

1. Specific uncharged acts of purported misconduct which are not reduced to a conviction are inadmissible to impeach a witness. The only exception may be prior acts of untruthfulness. Evidence, argument or reference of any kind to specific acts of misconduct alleged against a witness are strictly banned under Georgia law. The Georgia Court of Appeals has made clear that a defendant is not allowed to introduce “prior bad acts” of a witness. “Although [former] OCGA 24-9-84 provides that a witness may be impeached by a showing of general bad character, specific acts of bad character are not admissible.” *Heaton v. State*, 214 Ga. App. 460, 448 S.E.2d 49 (1994). In similar fashion *Wetta v. State*, 217 Ga. App. 128, 456 S.E.2d 696 (1995), concluded: “The proffered testimony related solely to specific bad acts and not to the general bad character of the victim. Therefore, the testimony was not admissible.” See *Miller v. State*, 325 Ga. App. 764, 754 S.E.2d 804, 811 (2014). See also *U.S. v. Hands*, 184 F.3d 1322, 53 Fed. R. Evid. Serv. 124 (11th Cir. 1999), corrected, 194 F.3d 1186 (11th Cir. 1999), holding that disconnected charges relating to a different form of misconduct in a narcotics prosecution violated Federal Evidence Rule 403.

2. Mere arrests which are not reduced to a judgment of conviction are inadmissible. *Smith v. State*, 270 Ga. 68, 71, 508 S.E.2d 145 (1998); *Clarke v. State*, 221 Ga. 206, 144 S.E.2d 90 (1965) (a witness cannot be impeached by merely proving that he was charged or indicted for a criminal offense). As held in *Smith v. State*, 222 Ga. App. 366, 474 S.E.2d 272 (1996), specific instances of misconduct may not be used to impeach a witness’ character or credibility, unless the misconduct has resulted in conviction of a crime. Accordingly, the prior arrest of Mr. Carlstrom for criminal damage to property is off limits for impeachment purposes. Nor does it fit the pattern of the 2013 impeachment statute, O.C.G.A. § 24-6-609. It is not a conviction of dishonesty nor of a felony punishable by imprisonment exceeding one year, all as required by the statute in order to impeach.

3. Prejudicial information is subject to exclusion. Georgia law provides that evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” See O.C.G.A. § 24-4-403.

The two incidents claimed against the witness are irrelevant, and can have no other function than to prejudice the jury against the witness' testimony. See *Jenkins v. State*, 215 Ga. App. 540, 451 S.E.2d 457 (1994). On the court's function, upon proper objection, to weigh prejudicial impact, see generally *State v. Jones*, 297 Ga. 156, 773 S.E.2d 170 (2015), holding that trial courts must undertake in each case a considered evaluation of the probative value of the evidence and determine whether the relevancy of the evidence is substantially outweighed by the danger of unfair prejudice.

4. When proof of bad character of a witness is presented by a party under the 2013 Evidence Code, it must be in a particular form. Evidence of bad character may be produced against a witness if that evidence is in the form of reputation or opinion proof. O.C.G.A. § 24-6-608(a). The only other way to attack a witness is in a manner which is relevant to this case is by cross-examining him with specific instances of misconduct *related to untruthfulness*. In this litigation, any prior incidents do not partake untruthfulness under the case facts. Thus, all avenues for introduction are foreclosed.

Conclusion

The reasons which preclude a defendant from proceeding with the intended impeachment in this case are clear and well established. This type of evidence is irrelevant to the guilt or innocence of the defendant and is inadmissible. The defendant is barred at law from introducing proof and/or argument concerning "bad" or "specific" act evidence in this case. Accordingly, the State's motion in limine to exclude inadmissible evidence and argument should be granted.

Respectfully submitted this _____ day of _____, 20__

Assistant District Attorney

Judicial Circuit
Address and telephone
State Bar Number
Certificate of Service

Author's Comment. Specific acts of bad character are not admissible, see § 12:5 of this text. It is noted there that Georgia has embraced Federal Evidence Rule 608(b) which allows cross-examination of a witness about the witness' own prior acts of dishonesty, even where the witness was never convicted. However, neither of Mr. Carlstrom's prior incidents partake of untruthfulness.

On prior convictions, the rule requiring dishonesty or felony offenses for impeachment of a witness is explained in text §§ 12:5 and 16:8.

Form 14 Prosecution motion in limine to admit evidence
MOTION FOR PRETRIAL ORDER OF ADMISSIBILITY

In the Superior Court of _____ County
State of Georgia

(Title Of Action)

No. _____

Comes now the prosecution in the above-entitled action and moves the court for an order in limine approving the right of the prosecutor to use the Haydock-Klein Textbook of Criminal Psychiatry during cross-examination of a physician who will be called by the defense in this case.

This motion is made upon the following grounds.

1. When this case is tried, the defendant will assert a mental defense and will call Dr. Wilber X. Steinberg who will endeavor to exonerate the defendant on the ground that defendant did not know right from wrong at the time he committed the violent homicide which is the subject of this litigation.

2. Statements in the 2019 edition of the medical treatise referenced in this motion will contradict the defense psychiatrist in important particulars, including the methodology and tests which Dr. Steinberg used to reach his conclusions.

3. The standard character of the Haydock-Klein text is so undisputed as to be an appropriate subject for judicial notice. It is a standard reference source in medical and mental health graduate programs around the country, and in Georgia.

4. A learned treatise which is widely recognized may be judicially noticed under O.C.G.A. § 24-8-803(18) and used to cross-examine an expert.

5. A motion in limine may be used to exclude evidence or to secure the admissibility of evidence (as here) prior to trial. *Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021).

WHEREFORE, the court is requested to rule in limine that the described text is judicially noticed for purposes of cross-examining the psychiatric expert.

Dated this ____ day of _____, 20__.

 Assistant District Attorney
 _____ Judicial Court
 Address and Telephone
 State Bar Number
 Certificate of Service

◆ **Author's Comment:** Use of learned treatises to cross-examine an expert is discussed in § 24:39, *supra*.

Form 15 Defense motion to suppress: roadblock stop²

In the Superior Court for the County of _____
 State of Georgia

State of Georgia v. _____

Criminal Action File No. _____

MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE

COMES NOW the Defendant in the above-styled case, by and through counsel, and hereby files the within Motion to Suppress, showing his Honorable Court as follows:

1. On or about June 6, 20__, while driving a vehicle, Defendant was stopped by _____ County police officers at a road block on Highway ____ in _____ County, Georgia. In the course of said stop, police officers detained Defendant and his passenger, _____, and police then conducted a warrantless search of the vehicle, the passenger and the passenger's purse.
2. As a result of the aforesaid warrantless stop, detention and search by police, Defendant and the passenger were arrested and charged with the criminal offenses of Possession of Methamphetamine and Possession with Intent to Distribute Methamphetamine. As a further result of said detention and search, the State has filed petition for revocation of probation against Defendant based upon Defendant's arrest and conviction on August __, 20__.
3. Defendant shows that the roadblock at which his vehicle was stopped by police on the above date was unconstitutional under *LaFontaine v. State*, 269 Ga. 251, 497 S.E.2d 367 (1998), Phillips

²This form is based upon a motion prepared by Karen S. Wilkes of _____ the Georgia bar.

v. State, 287 Ga. 560, 697 S.E.2d 818 (2010), as well as City of Indianapolis v. Edmond, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000), and its progeny, for the following reasons:

- a) The decision to implement the roadblock was not made by supervisory personnel and did not have a legitimate primary purpose;
- b) In the course and execution of the roadblock, police officers utilized random vehicle detention instead of stopping all vehicles travelling on said roadway;
- c) As executed, the roadblock caused a delay to motorists that was lengthy and unreasonable;
- d) The roadblock operation was not sufficiently identified as a police checkpoint;
- e) The screening officer's training and experience were not sufficient to qualify him to make an initial determination as to which motorists should be investigated further;
- f) The screening officer's actions with regard to this Defendant were unreasonable under the totality of the circumstances then existing.

In addition to the above, Defendant shows that the warrantless detention and search of the vehicle and passenger were unreasonable and unconstitutional for the following reasons:

- a) The police stopped Defendant's vehicle without probable cause and without reasonable and articulable suspicion that the vehicle or any occupant thereof was engaged in or about to be engaged in criminal activity or was otherwise subject to seizure.
 - b) The police detained Defendant and the passenger without probable cause and without reasonable and articulable suspicion that they were engaged in or about to be engaged in criminal activity.
 - c) The police searched the vehicle and the person and property of the passenger without probable cause, without consent, without lawful arrest, without the presence of exigent circumstances or any other recognized exception to the warrant requirement embodied in the State and Federal Constitutions.
4. Based on the above facts and circumstances, the warrantless stop, detention and search of Defendant's vehicle and passenger were unreasonable and violated the Defendant's rights under the Fourth Amendment to the U.S. Constitution and Article I, Section I, Paragraph XIII of the Georgia Constitution. Therefore pursuant to the provisions of O.C.G.A. § 17-5-30, any and all items or objects seized by police as a result of such actions should be suppressed by the Court, and no testimony, statements, conclusions or other references concerning such

matters should be allowed or considered as evidence in the trial of this case. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Morris v. State*, 265 Ga. App. 186, 593 S.E.2d 360 (2004).

WHEREFORE, the Defendant prays as follows:

- a) That the Court hold evidentiary hearings on this motion; and,
- b) That the Court allow Defendant to submit written briefs and argument in support of this motion subsequent to any hearing; and,
- c) That the Court grant the within motion to suppress, and prohibit the State from offering any testimony or evidence concerning items and objects seized by police in violation of the State and Federal Constitutional and Statutory rights enumerated above, and
- d) That the Court grant Defendant such other and further relief deemed just and proper in this case.

Respectfully submitted

Counsel for Defendant
Address
Georgia Bar No. _____

Form 16 Certificate of service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing **MOTION TO SUPPRESS** upon the District Attorney of _____ County via hand delivery.

This ____ day of _____, 20__

Counsel for Defendant
Address and Telephone
Georgia Bar No.

B. CIVIL CASE FORMS

Form 17 Defense motion in limine to exclude prior accidents

The _____ Court of

County
State of Georgia

_____,
Plaintiff

v

Defendant

Civil Action No. _____

Motion in limine to exclude proof of prior accidents

Defendant moves this court in the above-styled action for an order excluding from the trial of this case any evidence or reference to vehicle accidents and injuries occurring in Marathon Marauder cars during years prior to the date of the accident involved in this case. The grounds for this motion are as follows.

1. This is a products liability case against an automobile company, Marathon Motors, Inc. It involves a crash between a Ford pickup truck which rear-ended a 2013 Marathon Marauder automobile which was being driven by plaintiff. The plaintiff was stopped in her car at a stop sign. Plaintiff in this suit claims negligent design of the Marathon fuel system. She alleges burns from the fire which occurred after the Ford truck struck the car, and she further claims the fuel tank was negligently positioned in her car in a place too close to the rear bumper of her auto.

2. Plaintiff seeks to put into evidence her proof that five 2012 Marathon Marauders caught fire upon impact in accidents. These accidents all occurred prior to the collision in this case. Defense contends that none of these other crashes occurred in a manner similar to the facts of the present case. Further, they involved a different model year of vehicle (2012 cars) than the 2013 Marauder which plaintiff was driving in this case.

3. Evidence concerning the accident history of 2012 Marathon Marauders has no place in a trial involving a 2013 Marauder. Such proof will mislead the jury, and is irrelevant in assessing the fuel system integrity of the manufacturer's 2013 cars.

4. Such proof will prolong the trial, create a danger of confusing the jury, and prejudice the jury's consideration of relevant evidence.

5. As noted, none of these other accidents occurred in a manner similar to the facts in the present case. Further, they involved a different model year of vehicle (2012 cars) than the 2013 Marauder which plaintiff was driving in this accident. Georgia law is exacting on the point that proof of prior accidents must reflect only those incidents which are "substantially similar" to the facts in the litigated case. *Cooper Tire & Rubber Co. v. Crosby*, 273

Ga. 454, 543 S.E.2d 21, Prod. Liab. Rep. (CCH) ¶ 16010 (2001); Karoly v. Kawasaki Motors Corp., U.S.A., 259 Ga. App. 225, 576 S.E.2d 625 (2003).

6. While O.C.G.A. § 24-4-404(b) applies in civil cases, nothing involved in the prior crashes qualifies for admission into evidence under Rule 404(b). See generally *Duran v. Town of Cicero, Ill.*, 653 F.3d 632, 80 Fed. R. Serv. 3d 94 (7th Cir. 2011) (remoteness of prior incidents).

Wherefore, defendant prays that the court enter an order denying the admission of any testimonial or documentary evidence relating to the accidents or injuries occurring during the operation of 2012 Marathon automobiles, and directing the plaintiff's attorney to instruct witnesses called by her to avoid this topic.

Attorney for defendant

Date

Defense attorney's address and telephone

State bar number

Certificate of service

Author's Comment. Cases controlling similar transaction evidence in civil cases contained in § 29:5 of this text.

Form 18 Order granting motion in limine

The _____ Court of
_____ County

State of Georgia

_____, Civil Action No. _____

Plaintiff

v

Defendant

Order

Defendant Marathon Motor Company has moved in limine for an order excluding from the trial of the case any plaintiff's evidence relating to accidents involving 2012-model-year Marathon Marauders, and directing the plaintiff's attorney to instruct all witnesses called by her to refrain from comment upon such matter.

Upon hearing of the motion, it is hereby ORDERED this

_____ day of _____, 20—, that the aforesaid motion is granted, the described evidence is hereby excluded, and plaintiff's attorney is directed to instruct witnesses called by the plaintiff accordingly.

Judge, Superior Court
_____ County, Georgia

Form 19 Motion in limine to exclude statements made during compromise negotiations

The _____ Court of
_____ County
State of Georgia

_____, Civil Action No. _____
Plaintiff
v

Defendant

Motion in limine to exclude compromise statements

Comes now the defendant and respectfully moves this court in limine for an order excluding and denying the admission of any testimonial or documentary evidence relating to statements or offers of compromise made by the defendant during the course of compromise negotiations. In support hereof, the defense supplies the following grounds.

1. Prior to the time that either side was represented by counsel, the plaintiff made two telephone calls to the defendant corporation's vice president and had one face-to-face meeting with this person, vice president Joseph Scott.

2. Vice president Scott, while denying the validity of plaintiff's claim during these conversations, discussed and attempted to compromise the dispute. An amount was offered to compromise the matter, in order to reach a settlement. A document was also exchanged.

3. Defendant anticipates that the plaintiff will attempt to offer evidence, both documentary and testimonial, relating to vice president Scott's conversations with the plaintiff. Such testimony is barred under Georgia law which excludes compromise statements. O.C.G.A. 24-4-408.

4. Federal cases enforcing Federal Evidence Rule 408 add

emphasis to this analysis. The 2013 Georgia provision is based on Federal Evidence Rule 408. Federal cases are rigorous in their exclusion of compromise discussions. *Ray Communications, Inc. v. Clear Channel Communications, Inc.*, 673 F.3d 294 (4th Cir. 2012); *Weems v. Tyson Foods, Inc.*, 665 F.3d 958, 87 Fed. R. Evid. Serv. 301 (8th Cir. 2011).

Wherefore, defendant moves this honorable court for an order excluding any evidence relating to or concerning any statements made or documents advanced, including compromise offers, during compromise negotiations between the defendant's representative and the plaintiff.

Attorney for defense

Date
Defense attorney's address and telephone
State bar number
Certificate of service

Author's Comment. Cases regarding admissibility or exclusion of offers of compromise as admissions appear in § 26:13 of this text.

Form 20 Motion in limine to admit opposing party's oral admission

The _____ Court of
_____ County

State of Georgia

_____, Civil Action No.

Plaintiff

v

Defendant

Motion in limine to admit opposing party's oral admission

Plaintiff moves this court in the above-styled action for an order in limine approving the right of plaintiff to produce evidence of statements made by defendant corporation's president when he admitted defendant's liability in this case. The grounds for this motion are as follows.

1. Plaintiff was injured when he was making delivery of industrial supplies to the defendant's manufacturing plant. There

was an explosion in the area of the plant where the plaintiff was working, and he suffered burns as well as broken legs.

2. In a conversation with the plant's safety director the following day, the president of the defendant corporation stated: "We should have replaced the old boiler that exploded. We should have done that a year ago, but at least we had a bunch of insurance to take care of the injuries."

3. The safety supervisor who took part in this conversation is Walter Cross. Mr. Cross has since left the defendant's employ, and will be called as a witness for the plaintiff in the forthcoming trial. His testimony is critical in a case where the defendant company denies liability and denies that any faulty equipment was in use at the time of the explosion.

4. The president's declaration to Mr. Cross stands as the admission of a party opponent. O.C.G.A. 24-8-801(d)(2)(D).

5. A motion in limine may be used in two ways, either to object to evidence or to secure advance-of-trial admission of an item of evidence. *Williams v. Harvey*, 311 Ga. 439, 858 S.E.2d 479 (2021).

Wherefore, the court is requested to rule in limine that Mr. Cross will be permitted to relate his conversation with the corporation's president. Such ruling will expedite the trial, reduce consumption of trial time by eliminating needless objections, and enable the litigants to efficiently plan for trial.

Attorney for plaintiff

Date

Attorney's address and telephone

State bar number

Certificate of service

Author's Comment. Admissions by an agent, employee or partner of a party are treated in § 26:2 of this text.

Form 21 Pretrial conference proposed order

In the Superior Court of _____ County

State of Georgia

(*Style of Case*)

Civil Action, Case No. _____

Pretrial Order

The following constitutes a Pretrial Order entered in the above-styled case after conference with counsel for the parties:

App. C

TRIAL HANDBOOK FOR GEORGIA LAWYERS

(1) The name, address and phone number of the attorneys who will conduct the trial are as follows:

Plaintiff _____

Defendant _____

Other _____

(2) The estimated time required for trial is: _____

(3) There are no motions or other matters pending for consideration by the court except as follows: _____

(4) The jury will be qualified as to relationship with the following: _____

(5)

a. All discovery has been completed, unless otherwise noted, and the court will not consider any further motions to compel discovery except for good cause shown. The parties, however, shall be permitted to take depositions of any person(s) for the preservation of evidence for use at trial.

b. Unless otherwise noted, the names of the parties as shown in the caption to this order are correct and complete and there is no question by any party as to the misjoinder or nonjoinder of any parties.

(6) The following is the Plaintiff's brief and succinct outline of the case and contentions: (*Use space as needed*) _____

(7) The following is the Defendant's brief and succinct outline of the case and contentions: (**Use space as needed**) _____

(8) The issues for determination by the jury are as follows: _____

(9) Specifications of negligence including applicable code sections are as follows: _____

(10) If the case is based on a contract, either oral or written, the terms of the contract are as follows (or, the contract is attached as an Exhibit to this order): _____

(11) The types of damages and the applicable measure of those damages are stated as follows: _____

(12) If the case involves divorce, each party shall present to the court at the pretrial conference the affidavits required by Rule 24.2

(13) The following facts are stipulated: _____

(14) The following is a list of all documentary and physical evidence that will be tendered at the trial by the Plaintiff or Defendant. Unless noted, the parties have stipulated as to the authenticity of the documents listed and the exhibits listed may be admitted without further proof of authenticity. All exhibits shall be marked by counsel prior to trial so as not to delay the trial before the jury.

a. By the Plaintiff: _____

b. By the Defendant: _____

(15) Special authorities relied upon by Plaintiff relating to peculiar evidentiary or other legal questions are as follows: _____

(16) Special authorities relied upon by Defendant relating to peculiar evidentiary or other legal questions are as follows: _____

(17) All requests to charge anticipated at the time of trial will be filed in accordance with Rule 10.3.

(18) The testimony of the following persons may be introduced by depositions: _____

Any objection to the depositions or questions or arguments in the depositions shall be called to the attention of the court prior to trial.

(19) The following are lists of witnesses the

a. Plaintiff will have present at trial: _____

b. Plaintiff may have present at trial: _____

c. Defendant will have present at trial: _____

d. Defendant may have present at trial: _____

Opposing counsel may rely on representation that the designated party will have a witness present unless notice to the contrary is given in sufficient time prior to trial to allow the other party to subpoena the witness or obtain his testimony by other means.

(20) The form of all possible verdicts to be considered by the jury are as follows: _____

(21)

a. The possibilities of settling the case are: _____

b. The parties do/do not want the case reported.

c. The cost of take-down will be paid by: _____

d. Others matters: _____

Submitted by:

It is hereby ordered that the foregoing, including the attachments thereto, constitutes the pretrial order in the above case and supersedes the pleadings which may not be further amended except by order of the court to prevent manifest injustice.

This _____ day of _____, 20__

Author's Comment. The foregoing proposed order needs to be completed by counsel for each party in preparation for the pretrial conference. It is an official form which appears in Rule 7.2, Georgia Uniform Superior Court Rules. For more on pretrial conferences and pretrial orders, see § 2:24 of this text.

Form 22 Subpoena for the production of evidence

State of Georgia
(Your County) County

To:

You are hereby required to be and appear at the (Your County) County Superior Court before _____, Judge of Superior Court, in Room _____ of the (Your County) County Courthouse at _____ o'clock A.M./P.M. on the _____ day of _____ 20__, and to bring with you into said Court certain _____ to be used as evidence by _____ in a certain case pending in said Court between _____ and _____, Case No. _____

The following are hereby subpoenaed: _____

Herein fail not, under penalty of law.

Witness, _____, Judge of said Court this _____ day of _____ 20__

If you have questions contact attorney for plaintiff/defendant

_____, (Your Name), Clerk

Superior Court

Phone: _____

Author's Comment. Most of this is from an official form, with minor updating of dates by the author. Form SC-9, Uniform Rules for Georgia Superior Courts. In this text, see §§ 11:1, 11:4.

Form 23 Motion in limine to restrain improper argument

The _____ Court of
_____ County

State of Georgia

_____, Civil Action No. _____

Plaintiff

v

Defendant

Motion in limine to prevent "Golden Rule" argument

Plaintiff moves this court in the above-styled action for an order restraining defense counsel from mentioning or urging jurors to apply the "Golden Rule" to decide the case, or to otherwise put themselves figuratively in the position of the defendant. The grounds for this motion are as follows.

1. This is a slip-and-fall case involving plaintiff's claim for injury damages after he fell on ice outside the Mom and Pop Food Mart, Inc. in _____, Georgia, on _____, 20__.

2. In three recent cases wherein the counsel for the defendant has appeared, he has urged the jury to "put yourself in the position of the defendant company," or to "do for the defendants what you would want done for you if you had been wrongfully sued." Transcript passages from two of these trials are marked Exhibit "A" and "B" and are attached hereto. The argument reflected in Exhibit A was delivered in the case of _____ vs. _____ on December 12, 20__. The argument passage contained in Exhibit B was delivered to the jury in the case of _____ vs. _____ on October 9, 20__.

3. This manner of argument, in its various forms and permutations, has been vigorously condemned in Georgia jurisprudence

in both civil and criminal cases. See *Myrick v. Stephanos*, 220 Ga. App. 520, 472 S.E.2d 431 (1996) (civil cases); *Braithwaite v. State*, 275 Ga. 884, 572 S.E.2d 612 (2002) (criminal cases); *Jackson v. State*, 282 Ga. 494, 651 S.E.2d 702 (2007).

4. Oral objections during trial on this personal injury case will be unsatisfactory. The mere interjection by the defense of a suggestion that jurors apply their self-interest as a guide to their decision asks them to substitute emotion for logic and reason. Admonitions and instructions from the court are unlikely to purge the taint of this form of misconduct.

Wherefore, the plaintiff moves the court to direct the defense attorney to refrain from mentioning, alluding to or arguing that jurors should apply their own self-interest in deciding this litigation. Widely known as a “golden rule” argument, defendant should be admonished to steer clear of arguments which request that jurors vote the sort of verdict they would like, in the event they had been sued.

Attorney for plaintiff

Date

Attorney’s address and telephone

State bar number

Certificate of service

(Attach Exhibits “A” and “B”)

Author’s Comment. “Golden rule” arguments are explained in § 34:8 of this text and in R. Carlson and M. Carlson, *Outrageous Opponents: How to Stop Them in Closing Argument*, Geo. B. J. 12 (Feb 2001). A motion in limine is an appropriate methodology for raising the issue of potentially damaging arguments. Efforts to restrain improper arguments by means of a motion in limine have occurred in Georgia in the past. See, e.g., *Gielow v. Strickland*, 185 Ga. App. 85, 363 S.E.2d 278 (1987). See also *Brown v. State*, 276 Ga. 192, 576 S.E.2d 870 (2003).

APPENDIX D

Georgia Rules of Evidence

Author's Note

Set out hereafter is the introductory material from Ga. Laws 2011, Act 52, followed by O.C.G.A. §§ 24-1-1 through 24-10-1008. These provisions from Title 24 correspond to Articles I through X of the Federal Rules of Evidence. The Georgia sections are companions to their federal counterparts, often with identical or highly similar language. The only major exception is Georgia Chapter 3. It deals with the parol evidence rule, while federal Article III relates to presumptions. After Georgia Chapter 10, there are four additional Georgia chapters. These chapters do not contain new rules of evidence, but reprint prior laws, renumbering them. Those four chapters can be summarized as follows:

- Chapter 11. Establishment of lost or destroyed records and papers.
- Chapter 12. Confidential or privileged information; medical and pharmacy information; AIDS information; library records and records of a veterinarian.
- Chapter 13. Securing witnesses and evidence; witness fees; subpoenas; securing testimony from prisoners; witnesses and evidence located outside the state; preserving testimony when a witness is near death or about to flee; depositions in criminal cases.
- Chapter 14. Burden of proof and presumptions; circumstantial evidence; impact of testimony of single witness; presumption from failure to produce evidence; failure to respond to a letter; mortality tables; finding of presumed death.

SECTIONS 1 AND 2 FROM GEORGIA LAWS 2011, ACT 52

SECTION 1.

It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such in-

interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals. It is the intent of the General Assembly to revise, modernize, and reenact the general laws of this state relating to evidence while adopting, in large measure, the Federal Rules of Evidence. The General Assembly is cognizant that there are many issues regarding evidence that are not covered by the Federal Rules of Evidence and in those situations the former provisions of Title 24 have been retained. Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained.

SECTION 2.

The Official Code of Georgia Annotated is amended by repealing in its entirety Title 24, relating to evidence, and enacting a new Title 24 . . . West's Code of Georgia Annotated

Title 24. Evidence

Chapter 1. General Provisions

Article 1. Construction and Application

§ 24-1-1. Object of evidence

The object of all legal investigation is the discovery of truth. Rules of evidence shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-1-2. Same rule in all courts and cases; exceptions

(a) The rules of evidence shall apply in all trials by jury in any court in this state.

(b) The rules of evidence shall apply generally to all nonjury trials and other fact-finding proceedings of any court in this state subject to the limitations set forth in subsections (c) and (d) of this Code section.

(c) The rules of evidence, except those with respect to privileges, shall not apply in the following situations:

- (1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Code Section 24-1-104;
- (2) Criminal proceedings before grand juries;

- (3) Proceedings for extradition or rendition;
 - (4) Proceedings for revoking parole;
 - (5) Proceedings for the issuance of warrants for arrest and search warrants except as provided by subsection (b) of Code Section 17-4-40;
 - (6) Proceedings with respect to release on bond;
 - (7) Dispositional hearings and custody hearings in juvenile court; or
 - (8) Contempt proceedings in which the court, pursuant to subsection (a) of Code Section 15-1-4, may act summarily.
- (d) (1) In criminal commitment or preliminary hearings in any court, the rules of evidence shall apply except that hearsay shall be admissible.
- (2) In in rem forfeiture proceedings, the rules of evidence shall apply except that hearsay shall be admissible in determining probable cause or reasonable cause.
- (3) In presentence hearings, the rules of evidence shall apply except that hearsay and character evidence shall be admissible.
- (4) In administrative hearings, the rules of evidence as applied in the trial of nonjury civil actions shall be followed, subject to special statutory rules or agency rules as authorized by law.
- (e) Except as modified by statute, the common law as expounded by Georgia courts shall continue to be applied to the admission and exclusion of evidence and to procedures at trial. (Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Article 2. Rulings and Admissibility

§ 24-1-101. *[Reserved]*

§ 24-1-102. *[Reserved]*

§ 24-1-103. **Rulings on evidence**

(a) Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:

- (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
- (2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal.

(b) The court shall accord the parties adequate opportunity to state grounds for objections and present offers of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer of proof in question and answer form.

(c) Jury proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, including, but not limited to, making statements or offers of proof or asking questions in the hearing of the jury.

(d) Nothing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the court.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-1-104. Preliminary Questions

(a) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b) of this Code section. In making its determination, the court shall not be bound by the rules of evidence except those with respect to privileges. Preliminary questions shall be resolved by a preponderance of the evidence standard.

(b) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be conducted out of the hearing of the jury when the interests of justice require or when an accused is a witness and requests a hearing outside the presence of the jury.

(d) The accused shall not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the proceeding.

(e) This Code section shall not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-1-105. Limited admissibility

When evidence which is admissible as to one party or for one purpose but which is not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-1-106. Remainder of or related writings or recorded statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Chapter 2. Judicial Notice

Article 1. General Provisions

§ 24-2-201. Judicial notice of adjudicative facts

(a) This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) A court may take judicial notice, whether or not requested by a party.

(d) A court shall take judicial notice if requested by a party and provided with the necessary information.

(e) A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.

(f) Judicial notice may be taken at any stage of the proceeding.

(g) (1) In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.

(2) In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Article 2. Applicability

§ 24-2-220. Matters judicially recognized

The existence and territorial extent of states and their forms of government; all symbols of nationality; the laws of nations; all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority; the laws of the United States and of the several states thereof as published by authority; the uniform rules of the courts; the administrative rules and regulations filed with the Secretary of State pursuant to Code Section 50-13-6; the general customs of merchants; the admiralty and maritime courts of the world and their seals; the political makeup and history of this state and the federal government as well as the local divisions of this state; the seals of the several departments of the government of the United States and of the several states of the union; and all similar matters of legislative fact shall be judicially recognized without the introduction of proof. Judicial notice of adjudicative facts shall be governed by Code Section 24-2-201.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-2-221. Authentication of ordinances and resolutions of counties and municipal corporations

When certified by a public officer, clerk, or keeper of county or municipal records in this state in a manner as specified for county records in Code Section 24-9-920 or in a manner as specified for municipal records in paragraph (1) or (2) of Code Section 24-9-902 and in the absence of contrary evidence, judicial notice may be taken of a certified copy of any ordinance or resolution included within a general codification required by paragraph (1) of subsection (b) of Code Section 36-80-19 as representing an ordinance or resolution duly approved by the governing authority and currently in force as presented. Any such certified copy shall be self-authenticating and shall be admissible as prima-facie proof of any such ordinance or resolution before any court or administrative body.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Chapter 3. Parol Evidence Rule**§ 24-3-1. Admissibility of parol contemporaneous evidence**

Parol contemporaneous evidence shall be generally inadmissible to contradict or vary the terms of a valid written instrument.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-3-2. Admissibility where part only of stipulations is in writing

If the writing does not purport to contain all the stipulations of the contract, parol evidence shall be admissible to prove

other portions thereof not inconsistent with the writing; collateral undertakings between parties of the same part among themselves would not properly be looked for in the writing.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-3-3. Explanation of ambiguities

(a) All contemporaneous writings shall be admissible to explain each other.

(b) Parol evidence shall be admissible to explain all ambiguities, both latent and patent.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-3-4. Surrounding circumstances

The surrounding circumstances shall always be proper subjects of proof to aid in the construction of contracts.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-3-5. Usage

Evidence of known and established usage shall be admissible to aid in the construction of contracts as well as to annex incidents.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-3-6. Rebuttal of equity; discharge of contract; subsequent agreement; enlargement of time; change of place of performance

Parol evidence shall be admissible to rebut an equity, to discharge an entire contract, to prove a new and distinct subsequent agreement, to enlarge the time of performance, or to change the place of performance.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-3-7. Mistake in deed or contract in writing

Parol evidence shall be admissible to prove a mistake in a deed or any other contract required by law to be in writing.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-3-8. Showing invalidity of writing

Parol evidence shall be admissible to show that a writing either was originally void or subsequently became void.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-3-9. Denial or explanation of receipts for money

Receipts for money shall always be only prima-facie evidence of payment and may be denied or explained by parol.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-3-10. Blank endorsements, explanation of

Blank endorsements of negotiable paper may always be explained between the parties themselves or those taking with notice of dishonor or of the actual facts of such endorsements.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Chapter 4. Relevancy**§ 24-4-401. Definitions**

As used in this chapter, the term “relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-402. Relevant evidence generally admissible; irrelevant evidence inadmissible

All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-403. Exclusion of relevant evidence due to prejudice, confusion, or waste of time

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-404. Character evidence not admissible to prove actions; exceptions; other crimes

(a) Evidence of a person’s character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion, except for:

(1) Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under paragraph (2) of this subsection, evidence of the same trait of character of the accused offered by the prosecution;

(2) Subject to the limitations imposed by Code Section 24-4-412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same; or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; or

(3) Evidence of the character of a witness, as provided in Code Sections 24-6-607, 24-6-608, and 24-6-609.

(b) Evidence of other crimes, wrongs, or acts shall not be

admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-405. Proving character

(a) In all proceedings in which evidence of character or a trait of character of a person is admissible, proof shall be made by testimony as to reputation or by testimony in the form of an opinion.

(b) In proceedings in which character or a trait of character of a person is an essential element of a charge, claim, or defense or when an accused testifies to his or her own character, proof may also be made of specific instances of that person's conduct. The character of the accused, including specific instances of the accused's conduct, shall also be admissible in a presentencing hearing subject to the provisions of Code Section 17-10-2.

(c) On cross-examination, inquiry shall be allowable into relevant specific instances of conduct.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-406. Habit or routine

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with such habit or routine practice.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-407. Subsequent remedial measures

In civil proceedings, when, after an injury or harm, remedial measures are taken to make such injury or harm less likely to recur, evidence of the remedial measures shall not be admissible to prove negligence or culpable conduct but may be admissible to prove product liability under subsection (b) or (c) of Code Section 51-1-11. The provisions of this Code section shall not require the exclusion of evidence of remedial measures when offered for impeachment or for another purpose, including, but not limited to, proving ownership, control, or feasibility of precautionary measures, if controverted.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-408. Compromise and offers to compromise

(a) Except as provided in Code Section 9-11-68, evidence of:

(1) Furnishing, offering, or promising to furnish; or

(2) Accepting, offering, or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

(c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-409. Furnishing, offering, or promising to pay medical bills or similar expenses

Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury shall not be admissible to prove liability for the injury.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-410. Inadmissibility of pleas, plea discussions, and related statements

Except as otherwise provided by law, evidence of the following shall not, in any judicial or administrative proceeding, be admissible against the criminal defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere;

(3) Any statement made in the course of any proceedings in which a guilty plea or a plea of nolo contendere was entered and was later withdrawn, vacated, or set aside; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn, vacated, or set aside;

provided, however, that the statements described in paragraphs (1) through (4) of this Code section shall be admissible in any proceeding wherein another statement made in the course of

the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it or in a criminal proceeding for perjury or false statement if the statement was made by the accused under oath, on the record, and in the presence of counsel or after the accused voluntarily waived his or her right to counsel.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-411. Liability insurance

In all civil proceedings involving a claim for damages, evidence that a person was or was not insured against liability shall not be admissible except as provided in this Code section. This Code section shall not require the exclusion of evidence of insurance against liability in proceedings under Code Section 40-1-112 or when such evidence is offered for a relevant purpose, including, but not limited to, proof of agency, ownership, or control, and the court finds that the danger of unfair prejudice is substantially outweighed by the probative value of the evidence.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2013, Act 33, § 24, eff. April 24, 2013.)

§ 24-4-412. Sex offense cases; complaining witness' past sexual behavior

(a) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; trafficking persons for labor servitude or sexual servitude in violation of Code Section 16-5-46; aggravated sodomy or sodomy in violation of Code Section 16-6-2; statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; keeping a place of prostitution in violation of Code Section 16-6-10; pimping in violation of Code Section 16-6-11; pandering in violation of Code Section 16-6-12; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.

(b) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; trafficking persons for labor servitude or sexual servitude in violation of Code Section 16-5-46; aggravated sodomy or sodomy in violation of Code Section 16-6-2;

statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; keeping a place of prostitution in violation of Code Section 16-6-10; pimping in violation of Code Section 16-6-11; pandering in violation of Code Section 16-6-12; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, the court may admit the following evidence relating to the past sexual behavior of the complaining witness, following the procedure described in subsection (c) of this Code section:

(1) Evidence of specific instances of a victim's or complaining witness's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(2) Evidence of specific instances of a victim's or complaining witness's sexual behavior with respect to the defendant if it supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution;

(3) Evidence of specific instances of a victim's or complaining witness's sexual behavior with respect to the defendant or another person if offered by the prosecutor; and

(4) Evidence whose exclusion would violate the defendant's constitutional rights.

(c) The procedure for introducing evidence as described in subsection (b) of this Code section shall be as follows:

(1) If a party intends to offer evidence under subsection (b) of this Code section, the party must:

(A) File a motion that specifically describes the evidence and states the purpose for which it is to be offered; and

(B) Do so at least three days before trial unless the court, for good cause, sets a different date; and

(2) Before admitting the evidence under this Code section, the court shall conduct an in camera hearing to examine the merits of the motion.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2019, Act 31, § 5, eff. April 18, 2019; Laws 2020, Act 521, § 24, eff. July 29, 2020.)

§ 24-4-413. Prior offenses in criminal sexual assault proceedings

(a) In a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which

it is relevant.

(b) In a proceeding in which the prosecution intends to offer evidence under this Code section, the prosecutor shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(d) As used in this Code section, the term “offense of sexual assault” means any conduct or attempt or conspiracy to engage in:

(1) Conduct that would be a violation of Code Section 16-6-1, 16-6-2, 16-6-3, 16-6-5.1, 16-6-22, 16-6-22.1, or 16-6-22.2;

(2) Any crime that involves contact, without consent, between any part of the accused’s body or an object and the genitals or anus of another person;

(3) Any crime that involves contact, without consent, between the genitals or anus of the accused and any part of another person’s body; or

(4) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-414. Prior offenses in criminal child molestation proceedings

(a) In a criminal proceeding in which the accused is accused of an offense of child molestation, evidence of the accused’s commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the state intends to offer evidence under this Code section, the prosecuting attorney shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that the prosecuting attorney expects to offer, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described under this Code section.

(d) As used in this Code section, the term “offense of child molestation” means any conduct or attempt or conspiracy to engage in:

(1) Conduct that would be a violation of Code Section 16-

6-4, 16-6-5, 16-12-100, 16-12-100.2, or 16-12-100.3;

(2) Any crime that involves contact between any part of the accused's body or an object and the genitals or anus of a child;

(3) Any crime that involves contact between the genitals or anus of the accused and any part of the body of a child; or

(4) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-415. Prior offenses in civil sexual assault or child molestation proceedings

(a) In a civil or administrative proceeding in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or an offense of child molestation, evidence of that party's commission of another offense of sexual assault or another offense of child molestation shall be admissible and may be considered as provided in Code Sections 24-4-413 and 24-4-414.

(b) A party who intends to offer evidence under this Code section shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(d) As used in this Code section, the term:

(1) "Offense of child molestation" means any conduct or attempt or conspiracy to engage in:

(A) Conduct that would be a violation of Code Section 16-6-4, 16-6-5, 16-12-100, 16-12-100.2, or 16-12-100.3;

(B) Any crime that involves contact between any part of the accused's body or an object and the genitals or anus of a child;

(C) Any crime that involves contact between the genitals or anus of the accused and any part of the body of a child; or

(D) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child.

(2) "Offense of sexual assault" means any conduct or attempt or conspiracy to engage in:

(A) Conduct that would be a violation of Code Section

16-6-1, 16-6-2, 16-6-3, 16-6-5.1, 16-6-22, 16-6-22.1, or 16-6-22.2;

(B) Any crime that involves contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;

(C) Any crime that involves contact, without consent, between the genitals or anus of the accused and any part of another person's body; or

(D) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-416. Conduct of health care providers in civil proceedings

(a) As used in this Code section, the term “health care provider” means any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43 or any hospital, nursing home, home health agency, institution, or medical facility licensed or defined under Chapter 7 of Title 31. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity composed of such health care providers.

(b) In any claim or civil proceeding brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which is made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relates to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2013, Act 33, § 24, eff. April 24, 2013.)

§ 24-4-417. Prior violations in Code Section 40-6-391 proceedings

(a) In a criminal proceeding involving a prosecution for a violation of Code Section 40-6-391, evidence of the commission of another violation of Code Section 40-6-391 on a different occasion by the same accused shall be admissible when:

(1) The accused refused in the current case to take the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident;

(2) The accused refused in the current case to provide an adequate breath sample for the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident; or

(3) The identity of the driver is in dispute in the current case and such evidence is relevant to prove identity.

(b) In a criminal proceeding in which the state intends to offer evidence under this Code section, the prosecuting attorney shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that the prosecuting attorney expects to offer, at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-4-418. Admissibility of evidence of criminal gang activity

(a) In a criminal proceeding in which the accused is accused of conducting or participating in criminal gang activity in violation of Code Section 16-15-4, evidence of the accused's commission of criminal gang activity, as such term is defined in Code Section 16-15-3, shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the prosecution intends to offer evidence under this Code section, the prosecutor shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(Laws 2016, Act 606, § 6, eff. May 3, 2016.)

§ 24-4-419. Criminal history record information; admissibility

(a) As used in this Code section, the term "criminal history record information" shall have the same meaning as set forth in Code Section 35-3-30.

(b) In a civil proceeding against an employer, its employees, or its agents based on the conduct of an employee or former employee, criminal history record information shall not be admissible if:

(1) The nature of such criminal history record information

is not relevant to the facts underlying such proceeding or the veracity of the witness;

(2) Prior to the act giving rise to such proceedings, criminal history record information was restricted or sealed as provided in Code Section 35-3-37, or a pardon for such conduct was granted; or

(3) Such criminal history information is for an arrest or charge that did not result in a conviction.

(Laws 2020, Act 582, § 3-1, eff. Jan. 1, 2021.)

Chapter 5. Privileges

§ 24-5-501. Confidential communications excluded on grounds of public policy

(a) There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:

(1) Communications between husband and wife;

(2) Communications between attorney and client;

(3) Communications among grand jurors;

(4) Secrets of state;

(5) Communications between psychiatrist and patient;

(6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;

(7) Communications between a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor and patient;

(8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this subsection; and

(9) Communications between accountant and client as provided by Code Section 43-3-29.

(b) As used in this Code section, the term:

(1) "Psychotherapy" means the employment of psychotherapeutic techniques.

(2) "Psychotherapeutic techniques" shall have the same meaning as provided in Code Section 43-10A-3.

(Laws 2011, Act 52, § 2; Laws 2014 Act 492, § 2-1, eff. July 1, 2014.)

§ 24-5-502. Communications to ministers, priests and rabbis

Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or any Christian or Jewish minister or similar functionary, by whatever name called, shall be deemed privileged. No such minister, priest, rabbi, or similar functionary shall disclose any communications made to him or her by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, rabbi, or similar functionary be competent or compellable to testify with reference to any such communication in any court. (Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-5-503. Husband and wife as witnesses for and against each other in criminal proceedings

(a) A husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other.

(b) The privilege created by subsection (a) of this Code section or bycorresponding privileges in paragraph (1) of subsection (a) of Code Section 24-5-501 or subsection (a) of Code Section 24-5-505 shall not apply in proceedings in which:

(1) The husband or wife is charged with a crime against the person of a child under the age of 18, but such husband or wife shall be compellable to give evidence only on the specific act for which the accused is charged;

(2) The husband or wife is charged with a crime against his or her spouse;

(3) The husband or wife is charged with causing physical damage to property belonging to the husband and wife or to their separate property; or

(4) The alleged crime against his or her current spouse occurred prior to the lawful marriage of the husband and wife.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2012, Act 586, § 1, eff. Jan. 1, 2013.)

§ 24-5-504. Law enforcement officers or employees testifying in criminal proceedings not compelled to reveal home address

Any law enforcement officer or nonsworn employee of a law enforcement agency testifying in his or her official capacity in any criminal proceeding shall not be compelled to reveal his or her home address. Such officer or employee may be required to divulge the business address of his or her employer, and the court may require any law enforcement officer or nonsworn em-

ployee of a law enforcement agency to answer questions as to his or her home address whenever such fact may be material to any issue in the proceeding.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2023, Act 33, § 3, eff. July 1, 2023.)

§ 24-5-505. Privilege of party or witness

(a) No party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate such party or witness or which shall tend to bring infamy, disgrace, or public contempt upon such party or witness or any member of such party or witness's family.

(b) Except in proceedings in which a judgment creditor or judgment creditor's successor in interest seeks postjudgment discovery involving a judgment debtor pursuant to Code Section 9-11-69, no party or witness shall be required to testify as to any matter which shall tend to work a forfeiture of his or her estate.

(c) No official persons shall be called on to disclose any state matters of which the policy of the state and the interest of the community require concealment.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-5-506. Person not compellable to testify for or against self; testimony of accused in criminal case

(a) No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.

(b) If an accused in a criminal proceeding wishes to testify and announces in open court his or her intention to do so, the accused may so testify. If an accused testifies, he or she shall be sworn as any other witness and, except as provided in Code Sections 24-6-608 and 24-6-609, may be examined and cross-examined as any other witness. The failure of an accused to testify shall create no presumption against the accused, and no comment shall be made because of such failure.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-5-507. Immunity from prosecution for persons ordered to testify or produce evidence in criminal prosecutions; contempt

(a) Whenever in the judgment of the Attorney General or any district attorney the testimony of any person or the production of evidence of any kind by any person in any criminal proceeding before a court or grand jury is necessary to the public interest, the Attorney General or the district attorney may request in writing the superior court to order such person to testify or produce the evidence. Upon order of the court, such person shall not be excused on the basis of the privilege against

self-incrimination from testifying or producing any evidence required, but no testimony or other evidence required under the order or any information directly or indirectly derived from such testimony or evidence shall be used against the person in any proceeding or prosecution for a crime or offense concerning which he or she testified or produced evidence under court order. However, such person may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing, or contempt committed in testifying or failing to testify or in producing or failing to produce evidence in accordance with the order but shall not be required to produce evidence that can be used in any other court of this state, the United States, or any other state. Any order entered under this Code section shall be entered of record in the minutes of the court so as to afford a permanent record thereof, and any testimony given by a person pursuant to such order shall be transcribed and filed for permanent record in the office of the clerk of the court.

(b) If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as set forth in this Code section, such person may be adjudged in contempt and committed to the county jail until such time as such person purges himself or herself of contempt by testifying as ordered without regard to the expiration of the grand jury. If the grand jury before which such person was ordered to testify has been dissolved, such person may purge himself or herself by testifying before the court.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-5-508. Qualified privilege for persons, companies, or other entities engaged in news gathering or dissemination

Any person, company, or other entity engaged in the gathering and dissemination of news for the public through any newspaper, book, magazine, radio or television broadcast, or electronic means shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

- (1) Is material and relevant;
- (2) Cannot be reasonably obtained by alternative means;
- and
- (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-5-509. Definitions; privilege for agent

(a) As used in this Code section, the term:

(1) “Agent” means a current or former employee or volunteer of a program who has successfully completed a minimum of 20 hours of training in family violence and sexual assault intervention and prevention at a Criminal Justice Coordinating Council certified victim assistance program.

(2) “Family violence” shall have the same meaning as provided in Code Section 19-13-1.

(3) “Family violence shelter” means a program whose primary purpose is to provide services to family violence victims and their families that is not under the direct supervision of a law enforcement agency, prosecuting attorney’s office, or a government agency.

(4) “Family violence victim” means a person who consults a family violence shelter for the purpose of securing advice or other services concerning an act of family violence, an alleged act of family violence, or an attempted act of family violence.

(5) “Government agency” means any agency of the executive, legislative, or judicial branch of government or political subdivision or authority thereof of this state, any other state, the District of Columbia, the United States and its territories and possessions, or any foreign government or international governmental or quasi-governmental agency recognized by the United States or by any of the several states.

(6) “Negative effect of the disclosure of the evidence on the victim” shall include the impact of the disclosure on the relationship between the victim and the agent and the delivery and accessibility of services.

(7) “Program” means a family violence shelter or rape crisis center.

(8) “Rape crisis center” means a program whose primary purpose is to provide services to sexual assault victims and their families that is not under the direct supervision of a law enforcement agency, prosecuting attorney’s office, or a government agency.

(9) “Services” means any services provided to a victim by a program including but not limited to crisis hot lines, safe homes and shelters, assessment and intake, counseling, services for children who are victims of family violence or sexual assault, support in medical, administrative, and judicial systems, transportation, relocation, and crisis intervention. Such term shall not include mandatory reporting as required by Code Section 19-7-5 or 30-5-4.

(10) “Sexual assault” shall have the same meaning as

provided in Code Section 17-5-70.

(11) “Sexual assault victim” means a person who consults a rape crisis center for the purpose of securing advice or other services concerning a sexual assault, an alleged sexual assault, or an attempted sexual assault.

(12) “Victim” means a family violence victim or sexual assault victim.

(b) No agent of a program shall be compelled to disclose any evidence in a judicial proceeding that the agent acquired while providing services to a victim, provided that such evidence was necessary to enable the agent to render services, unless the privilege has been waived by the victim or, upon motion by a party, the court finds by a preponderance of the evidence at a pretrial hearing or hearing outside the presence of the jury that:

(1) In a civil proceeding:

(A) The evidence sought is material and relevant to factual issues to be determined;

(B) The evidence is not sought solely for the purpose of referring to the victim’s character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim’s prior inconsistent statements;

(C) The evidence sought is not available or already obtained by the party seeking disclosure; and

(D) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim; or

(2) In a criminal proceeding:

(A) The evidence sought is material and relevant to the issue of guilt, degree of guilt, or sentencing for the offense charged or a lesser included offense;

(B) The evidence is not sought solely for the purpose of referring to the victim’s character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim’s prior inconsistent statements;

(C) The evidence sought is not available or already obtained by the party seeking disclosure; and

(D) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim.

(c) If the court finds that the evidence sought may be subject to disclosure pursuant to subsection (b) of this Code section, the court shall order that such evidence be produced for the

court under seal, shall examine the evidence in camera, and may allow disclosure of those portions of the evidence that the court finds are subject to disclosure under this Code section.

(d) The privilege afforded under this Code section shall terminate upon the death of the victim.

(e) The privilege granted by this Code section shall not apply if the agent was a witness or party to the family violence or sexual assault or other crime that occurred in the agent's presence.

(f) The mere presence of a third person during communications between an agent and a victim shall not void the privilege granted by this Code section, provided that the communication occurred in a setting when or where the victim had a reasonable expectation of privacy.

(g) If the victim is or has been judicially determined to be incompetent, the victim's guardian may waive the victim's privilege.

(h) In criminal proceedings, if either party intends to compel evidence based on this Code section, the party shall file and serve notice of his or her intention on the opposing party at least ten days prior to trial, or as otherwise directed by the court. The court shall hold a pretrial hearing in accordance with subsection (b) of this Code section and determine the issue prior to trial.

(Laws 2012, Act 586, § 2, eff. Jan. 1, 2013.)

§ 24-5-510. Peer counselor privilege

(a) As used in this Code section, the term:

(1) "Client" means a public safety officer.

(2) "Peer counselor" means:

(A) An employee of the Office of Public Safety Support within the Department of Public Safety; or

(B) An individual who is certified by the support coordinator of the Office of Public Safety Support within the Department of Public Safety pursuant to subsection (b) of Code Section 35-2-163 who is an employee of a public entity that employs public safety officers and who is designated by the executive head of such public entity.

(3) "Public entity" shall have the same meaning as provided for in Code Section 35-2-160.

(4) "Public safety officer" means a peace officer, correctional officer, emergency health worker, firefighter, highway emergency response operator, jail officer, juvenile correctional officer, probation officer, or emergency services dispatcher.

(b) Except as provided in subsection (c) of this Code section,

communications between a client and a peer counselor shall be privileged. A peer counselor shall not disclose any such communications made to him or her and shall not be competent or compellable to testify with reference to any such communications in any court.

(c) The privilege created by subsection (b) of this Code section shall not apply when:

(1) The disclosure is authorized by the client, or if the client is deceased, by his or her executor or administrator, and if an executor or administrator is not appointed, by the client's next of kin;

(2) Compelled by court order;

(3) The peer counselor was an initial responding public safety officer, witness, or party to an act that is the subject of the counseling;

(4) The communication was made when the peer counselor was not performing official duties; or

(5) The client is charged with a crime.

(d) The privilege created by this Code section shall not be grounds to fail to comply with mandatory reporting requirements as set forth in Code Section 19-7-5 or Chapter 5 of Title 30, the "Disabled Adults and Elder Persons Protection Act."

(Laws 2014, Act 542, § 1, eff. July 1, 2014; Laws 2020, Act 521, § 24, eff. July 29, 2020; Laws 2020, Act 569, § 1, eff. Jan. 1, 2021.)

Chapter 6. Witnesses Generally

Article 1. General Provisions

§ 24-6-601. Rule of competency

Except as otherwise provided in this chapter, every person is competent to be a witness.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-602. Personal knowledge of witness

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. The provisions of this Code section are subject to Code Section 24-7-703 and shall not apply to party admissions.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-603. Oath or affirmation

(a) Before testifying, every witness shall be required to declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do

so.

(b) Notwithstanding the provisions of subsection (a) of this Code section, in all proceedings involving dependency as defined by Code Section 15-11-2, in all proceedings involving termination of parental rights under Article 4 of Chapter 11 of Title 15, and in all criminal proceedings in which a child was a victim of or witness to any crime, the child shall be competent to testify, and the child's credibility shall be determined as provided in this chapter.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2013, Act 127, § 4-41, eff. Jan. 1, 2014; Laws 2023, Act 247, § 1, eff. July 1, 2023.)

§ 24-6-604. Interpreters

Except as provided in Code Sections 24-6-656 and 24-6-657 or by the rules promulgated by the Supreme Court of Georgia pursuant to Code Section 15-1-14, an interpreter shall be subject to the provisions of Code Section 24-7-702. Interpreters shall be required to take an oath or affirmation to make a true translation.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-605. Judge as witness

The judge presiding at the trial shall not testify in that trial as a witness. No objection need be made in order to preserve this issue.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-606. Juror as witness

(a) A member of the jury shall not testify as a witness before that jury in the trial of the case in which the juror is sitting. If a juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify by affidavit or otherwise nor shall a juror's statements be received in evidence as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the jury deliberations or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-607. Who may impeach

The credibility of a witness may be attacked by any party,

including the party calling the witness.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-608. Character and conduct of witness

(a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness; and

(2) Evidence of truthful character shall be admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence. Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

(1) Concerning the witness's character for truthfulness or untruthfulness; or

(2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) The giving of testimony, whether by an accused or by any other witness, shall not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-609. Impeachment by evidence of conviction of crime

(a) *General rule.* For the purpose of attacking the character for truthfulness of a witness:

(1) Evidence that a witness other than an accused has been convicted of a crime shall be admitted subject to the provisions of Code Section 24-4-403 if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused; or

(2) Evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it

readily can be determined that establishing the elements of such crime required proof or admission of an act of dishonesty or making a false statement.

(b) *Time limit.* Evidence of a conviction under this Code section shall not be admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for such conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old, as calculated in this subsection, shall not be admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, certificate of rehabilitation, or discharge from a first offender program.* Evidence of a final adjudication of guilt and subsequent discharge under any first offender statute shall not be used to impeach any witness and evidence of a conviction shall not be admissible under this Code section if:

(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year; or

(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Nolo contendere pleas and juvenile adjudications.* A conviction based on a plea of nolo contendere shall not be admissible to impeach any witness under this Code section. Evidence of juvenile adjudications shall not generally be admissible under this Code section. The court may, however, in a criminal proceeding allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence of the accused.

(e) *Pendency of appeal.* The pendency of an appeal shall not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal shall be admissible.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-610. Religious beliefs or opinions

Evidence of the beliefs or opinions of a witness on matters of religion shall not be admissible for the purpose of proving that by reason of the nature of the beliefs or opinions the witness's credibility is impaired or enhanced.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-611. Mode and order of interrogation and presentation

(a) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (1) Make the interrogation and presentation effective for the ascertainment of the truth;
- (2) Avoid needless consumption of time; and
- (3) Protect witnesses from harassment or undue embarrassment.

(b) A witness may be cross-examined on any matter relevant to any issue in the proceeding. The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against the party. If several parties to the same proceeding have distinct interests, each party may exercise the right to cross-examination.

(c) Leading questions shall not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions shall be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-612. Writing used to refresh memory

(a) If a witness uses a writing to refresh his or her memory while testifying, an adverse party shall be entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness.

(b) If a witness uses a writing to refresh his or her memory before testifying at trial and the court in its discretion determines it is necessary in the interests of justice, an adverse party shall be entitled to have the writing produced at the trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness. If the writing used is protected by the attorney-client privilege or as attorney work product under Code Section 9-11-26, use of the writing to refresh recollection prior to testifying shall not constitute a waiver of that privilege or protection. If it is claimed that the

writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions of such writing not so related, and order delivery of the remainder of such writing to the party entitled to such writing. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to an order under this Code section, the court shall make any order justice requires; provided, however, that in criminal proceedings, when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2013, Act 132, § 1-4, eff. July 1, 2013.)

§ 24-6-613. Prior statement of witness

(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time; provided, however, upon request the same shall be shown or disclosed to opposing counsel.

(b) Except as provided in Code Section 24-8-806, extrinsic evidence of a prior inconsistent statement by a witness shall not be admissible unless the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require. This subsection shall not apply to admissions of a party-opponent as set forth in paragraph (2) of subsection (d) of Code Section 24-8-801.

(c) A prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility. A general attack on a witness's credibility with evidence offered under Code Section 24-6-608 or 24-6-609 shall not permit rehabilitation under this subsection. If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the prior consistent statement shall have been made before the alleged recent fabrication or improper influence or motive arose.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-614. Calling and interrogation of witnesses by court

(a) The court may, on its own motion, call a court appointed expert, call a witness regarding the competency of any party, or call a child witness or, at the suggestion of a party, call such witnesses, and all parties shall be entitled to cross-examine such witnesses. In all other situations, the court may only call

witnesses when there is an agreement of all of the parties for the court to call such witnesses and all parties shall be entitled to cross-examine such witnesses.

(b) The court may interrogate witnesses whether called by itself pursuant to subsection (a) of this Code section or by a party.

(c) Objections to the calling of witnesses by the court or to interrogation by the court may be made at the time or at the next available opportunity when the jury is not present.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-615. Exclusion of witnesses

Except as otherwise provided in Code Section 24-6-616, at the request of a party the court shall order witnesses excluded so that each witness cannot hear the testimony of other witnesses, and it may make the order on its own motion. This Code section shall not authorize exclusion of:

(1) A party who is a natural person;

(2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or

(3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-616. Victim of criminal offense entitled to be present during prosecution

Subject to the provisions of Code Section 17-17-9, the victim of a criminal offense shall be entitled to be present in any court exercising jurisdiction over such offense.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Article 2. Credibility

§ 24-6-620. Determination of credibility of witness

The credibility of a witness shall be a matter to be determined by the trier of fact, and if the case is being heard by a jury, the court shall give the jury proper instructions as to the credibility of a witness.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-621. Impeaching witness

A witness may be impeached by disproving the facts testified to by the witness.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-622. Witness's feelings and relationship to parties

The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-623. Protection of witness

It shall be the right of a witness to be examined only as to relevant matters and to be protected from improper questions and from harsh or insulting demeanor.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Article 3. Use of Sign Language and Intermediary Interpreter in Administrative and Judicial Proceedings

§ 24-6-650. Policy of state

It is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, cannot readily understand or communicate in spoken language and who consequently cannot equally participate in or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commissions, departments, and boards of this state and its political subdivisions unless qualified interpreters are available to assist such persons.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-651. Definitions

As used in this article, the term:

(1) “Agency” means any agency, authority, board, bureau, committee, commission, court, department, or jury of the legislative, judicial, or executive branch of government of this state or any political subdivision thereof.

(2) “Court qualified interpreter” means any person licensed as an interpreter for the hearing impaired pursuant to Code Section 15-1-14.

(3) “Hearing impaired person” means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone.

(4) “Intermediary interpreter” means any person, including any hearing impaired person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between the variance of sign language by acting as an intermediary between a hearing impaired person and a qualified interpreter.

(5) “Proceeding” means any meeting, hearing, trial, investigation, or other proceeding of any nature conducted by an agency.

(6) “Qualified interpreter” means any person certified as an interpreter for hearing impaired persons by the Registry

of Interpreters for the Deaf or a court qualified interpreter.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-652. When interpreter shall be provided by agency

(a) The agency conducting any proceeding shall provide a qualified interpreter to the hearing impaired person:

(1) Whenever the hearing impaired person is a party to the proceeding or a witness before the proceeding; or

(2) Whenever a person who is below the age of 18 years is a party to the proceeding or a witness before the proceeding conducted by an agency whose parents are hearing impaired persons or whose guardian is a hearing impaired person.

(b) A hearing impaired person shall notify the agency not less than ten days, excluding weekends and holidays, prior to the date of the proceeding of the need for a qualified interpreter. If the hearing impaired person received notice of the proceeding less than ten days, excluding weekends and holidays, prior to the proceeding, such person shall notify the agency as soon as practicable after receiving such notice.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-653. Procedures for providing interpreter by arresting law enforcement agency

(a) An arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever a hearing impaired person is arrested for allegedly violating any criminal law or ordinance of this state or any political subdivision thereof.

(b) (1) Except as provided in paragraph (2) of this subsection, no interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken upon a hearing impaired person unless a qualified interpreter has been provided or the law enforcement agency has taken such other steps as may be reasonable to accommodate such person's disability. No answer, statement, admission, or other evidence acquired through the interrogation of a hearing impaired person shall be admissible in any criminal or quasi-criminal proceedings unless such was knowingly and voluntarily given. No hearing impaired person who has been taken into custody and who is otherwise eligible for release shall be detained because of the unavailability of a qualified interpreter.

(2) If a qualified interpreter is not available, an arresting officer may interrogate or take a statement from such person, provided that if the hearing impaired person cannot hear spoken words with a hearing aid or other sound amplification device, such interrogation and answers thereto shall be in writing and shall be preserved and turned over to the

court in the event such person is tried for the alleged offense.
(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-654. Procedures for providing interpreter by court

(a) A court shall provide a court qualified interpreter to any hearing impaired person whenever the hearing impaired person has been provided with a public defender or court appointed legal counsel.

(b) The court qualified interpreter authorized by this Code section shall be present at all times when the hearing impaired person is consulting with legal counsel.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-655. Waiver of right to use of interpreter

Whenever a hearing impaired person shall be authorized to be provided a qualified interpreter, such person may waive the right to the use of such interpreter. Any such waiver shall be in writing and shall be approved by the agency or law enforcement agency before which the hearing impaired person is to appear. In no event shall the failure of a hearing impaired person to request an interpreter be deemed to be a waiver of the hearing impaired person's right to a qualified interpreter.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-656. Determination that interpreter is able to communicate with hearing impaired person

Whenever a hearing impaired person shall be authorized to be provided a qualified interpreter, the agency or law enforcement agency shall determine whether the qualified interpreter so provided is able to communicate accurately with and translate information to and from the hearing impaired person. If it is determined that the qualified interpreter cannot perform these functions, the agency or law enforcement agency shall obtain the services of another qualified interpreter or shall appoint an intermediary interpreter to assist the qualified interpreter in communicating with the hearing impaired person.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-657. Oath; privilege

(a) Prior to providing any service to a hearing impaired person, any qualified interpreter or intermediary interpreter shall subscribe to an oath that he or she will interpret all communications in an accurate manner to the best of his or her skill and knowledge. The Supreme Court of Georgia may by rule of court prescribe the form of the oath for interpreters and intermediary interpreters for use in court and other judicial proceedings.

(b) Whenever a hearing impaired person communicates with any other person through the use of an interpreter and under circumstances which make such communications privileged or otherwise confidential, the presence of the interpreter shall not vitiate such privilege and the interpreter shall not be required to disclose the contents of such communication.

(c) Whenever a qualified interpreter is required by this article, the agency or law enforcement agency shall not begin the proceeding or take any action until such interpreter is in full view of and spatially situated so as to assure effective communication with the hearing impaired person.

(d) The agency or law enforcement agency may, upon its own motion or upon motion of any party, witness, or participant, order that the testimony of the hearing impaired person be electronically and visually recorded. Any such recording may be used to verify the testimony given by the hearing impaired person.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-6-658. Compensation

Any qualified interpreter or intermediary interpreter providing service under this article shall be compensated by the agency or law enforcement agency requesting such service.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Chapter 7. Expert Witnesses

§ 24-7-701. Layperson testimony; market value testimony

(a) If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences shall be limited to those opinions or inferences which are:

- (1) Rationally based on the perception of the witness;
- (2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and
- (3) Not based on scientific, technical, or other specialized knowledge within the scope of Code Section 24-7-702.

(b) Direct testimony as to market value is in the nature of opinion evidence. A witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned opinion.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-7-702. Expert testimony; qualifications as expert

(a) Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the

facts as proved by other witnesses.

(b) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise, if:

(1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(2) The testimony is based upon sufficient facts or data;

(3) The testimony is the product of reliable principles and methods; and

(4) The expert has reliably applied the principles and methods to the facts of the case.

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this

paragraph:

- (i) Is a member of the same profession;
 - (ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or
 - (iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and
- (D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. In all civil proceedings, a hearing and any ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.

(e) In all civil proceedings, an affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

(f) It is the intent of the legislature that, in all proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 37 Fed. R. Evid. Serv. 1 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508, 48 Fed. R. Evid. Serv. 1, 177 A.L.R. Fed. 667 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238, 50 Fed. R. Evid. Serv. 1373 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

(g) This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34 or in administrative proceedings conducted pursuant to Chapter 13 of Title 50.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2022, Act 743, § 1, eff. July 1, 2022.)

§ 24-7-703. Bases of Opinion Testimony by Experts

The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-7-704. Opinion embracing ultimate issue; mental state of accused in criminal proceeding

(a) Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of an accused in a criminal proceeding shall state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-7-705. Disclosure of underlying facts or data to expert opinion

An expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. An expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-7-706. Court appointed experts

Except as provided in Chapter 7 of Title 9 or Code Section 17-7-130.1, 17-10-66, 29-4-11, 29-5-11, 31-14-3, 31-20-3, 44-6-166.1, 44-6-184, or 44-6-187, the following procedures shall govern the appointment, compensation, and presentation of

testimony of court appointed experts:

(1) The court on its own motion or on the motion of any party may enter an order to show cause why any expert witness should not be appointed and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. Each appointed expert witness shall be informed of his or her duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. Each appointed expert witness shall advise the parties of his or her findings, if any. Except as provided in Article 3 of Chapter 12 or Article 6 of Chapter 13 of this title, such witness's deposition may be taken by any party. Such witness may be called to testify by the court or any party. Each expert witness shall be subject to cross-examination by each party, including a party calling the witness;

(2) Appointed expert witnesses shall be entitled to reasonable compensation in whatever sum the court allows. The compensation fixed shall be payable from funds which may be provided by law in criminal proceedings and civil proceedings involving just compensation for the taking of property. In other civil proceedings, the compensation shall be paid by the parties in such proportion and at such time as the court directs and thereafter charged in like manner as other costs;

(3) In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness; and

(4) Nothing in this Code section shall limit a party in calling expert witnesses of the party's own selection.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2012, Act 585, § 3, eff. Jan. 1, 2013.)

§ 24-7-707. Repealed by Laws 2022, Act 743, § 2, eff. July 1, 2022

Chapter 8. Hearsay

Article 1. General Provisions

§ 24-8-801. Definitions

As used in this chapter, the term:

(a) "Statement" means:

- (1) An oral or written assertion; or
- (2) Nonverbal conduct of a person, if it is intended by

the person as an assertion.

(b) “Declarant” means a person who makes a statement.

(c) “Hearsay” means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) “Hearsay” shall be subject to the following exclusions and conditions:

(1) Prior statement by witness.

(A) An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement under Code Section 24-6-613 or is otherwise admissible under this chapter.

(B) If a hearsay statement is admitted and the declarant does not testify at the trial or hearing, other out-of-court statements of the declarant shall be admissible for the limited use of impeaching or rehabilitating the credibility of the declarant, and not as substantive evidence, if the other statements qualify as prior inconsistent statements or prior consistent statements under Code Section 24-6-613.

(C) A statement shall not be hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person; and

(2) Admissions by party-opponent.

Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is:

(A) The party’s own statement, in either an individual or representative capacity;

(B) A statement of which the party has manifested an adoption or belief in its truth;

(C) A statement by a person authorized by the party to make a statement concerning the subject;

(D) A statement by the party’s agent or employee, but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to

make a statement admissible under this subparagraph.

The contents of the statement shall be considered but shall not alone be sufficient to establish the declarant's authority under subparagraph (C) of this paragraph, the agency or employment relationship and scope thereof under subparagraph (D) of this paragraph, or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subparagraph (E) of this paragraph.

(e) "Public office" means:

(1) Every state department, agency, board, bureau, commission, division, public corporation, and authority;

(2) Every county, municipal corporation, school district, or other political subdivision of this state;

(3) Every department, agency, board, bureau, commission, authority, or similar body of each such county, municipal corporation, or other political subdivision of this state; and

(4) Every city, county, regional, or other authority established pursuant to the laws of this state.

(f) "Public official" means an elected or appointed official.

(g) "Public record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form and created in the course of the operation of a public office.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-802. Hearsay rule

Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-803. Hearsay exceptions, availability of declarant immaterial

The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter;

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

(3) Then existing mental, emotional, or physical condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless such statements relate to the execution, revocation, identification, or terms of the declarant's will and not including a statement of belief as to the intent of another person;

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but shall not itself be received as an exhibit unless offered by an adverse party;

(6) Records of regularly conducted activity. Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification. The term "business" as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph;

(7) Absence of entry in records kept in accordance with

paragraph (6) of this Code section. Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) of this Code section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

(8) Public records and reports. Except as otherwise provided by law, public records, reports, statements, or data compilations, in any form, of public offices, setting forth:

(A) The activities of the public office;

(B) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, against the accused in criminal proceedings, matters observed by police officers and other law enforcement personnel in connection with an investigation; or

(C) In civil proceedings and against the state in criminal proceedings, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office, evidence in the form of a certification in accordance with Code Section 24-9-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry;

(11) Records of religious organizations. Statements of birth, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization;

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other

person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter;

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like;

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable law authorizes the recording of documents of that kind in such office;

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document;

(16) Statements in ancient documents. Statements in a document in existence 20 years or more the authenticity of which is established;

(17) Market reports and commercial publications. Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in the witness's particular occupation;

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage or among a person's associates or in the community concerning a person's birth, adoption, marriage,

divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history;

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community or state or nation in which such lands are located;

(21) Reputation as to character. Reputation of a person's character among associates or in the community;

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but shall not affect admissibility; or

(23) Judgment as to personal, family, or general history or boundaries. Judgments as proof of matters of personal, family, or general history or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-804. Hearsay exceptions, declarant unavailable

(a) As used in this Code section, the term “unavailable as a witness” includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the declarant's statement;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant's

attendance or testimony, by process or other reasonable means.

A declarant shall not be deemed unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. If deposition testimony is admissible under either the rules stated in Code Section 9-11-32 or this Code section, it shall be admissible at trial in accordance with the rules under which it was offered;

(2) In a prosecution for homicide or in a civil proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death;

(3) A statement against interest. A statement against interest is a statement:

(A) Which a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate a claim by the declarant against another or to expose the declarant to civil or criminal liability; and

(B) Supported by corroborating circumstances that clearly indicate the trustworthiness of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability;

(4) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated or a statement concerning the foregoing matters and death also of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have ac-

curate information concerning the matter declared; or

(5) A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-805. Hearsay within hearsay

Hearsay included within hearsay shall not be excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-806. Credibility of declarant

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, shall not be subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party shall be entitled to examine the declarant on the statement as if under cross-examination.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-807. Residual exception

A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:

- (1) The statement is offered as evidence of a material fact;
- (2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Article 2. Admissible Statements

§ 24-8-820.

(a) A statement made by a child younger than 16 years of age describing any act of sexual contact or physical abuse performed with or on such child by another or with or on another in the presence of such child shall be admissible in evidence by the testimony of the person to whom made if the proponent of such statement provides notice to the adverse party prior to trial of the intention to use such out-of-court statement and such child testifies at the trial, unless the adverse party forfeits or waives such child's testimony as provided in this title, and, at the time of the testimony regarding the out-of-court statements, the person to whom the child made such statement is subject to cross-examination regarding the out-of-court statements.

(b) This Code section shall apply to any motion made or hearing or trial commenced on or after the effective date of this subsection.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2013, Act 84, § 13, eff. July 1, 2013; Laws 2019, Act 31, § 6, eff. April 18, 2019.)

§ 24-8-821. Admissions in pleadings

Without offering the same in evidence, either party may avail himself or herself of allegations or admissions made in the pleadings of the other.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-822. Entire conversation admissible when admission given in evidence

When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-823. Weight of admissions or confessions

All admissions shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify a conviction.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-824. Confessions must be voluntary

To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-825. Confessions under spiritual exhortation or promise of secrecy or collateral benefit

The fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral ben-

efit shall not exclude it.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-8-826. Medical reports

(a) Upon the trial of any civil proceeding involving injury or disease, any medical report in narrative form which has been signed and dated by an examining or treating licensed physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a witness; provided, however, that such report and notice of intention to introduce such report shall first be provided to the adverse party at least 60 days prior to trial. A statement of the qualifications of the person signing such report may be included as part of the basis for providing the information contained therein, and the opinion of the person signing the report with regard to the etiology of the injury or disease may be included as part of the diagnosis. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within 15 days of being provided with the report. Further, any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony. The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.

(b) In all juvenile dependency adjudications under Article 3 of Chapter 11 of Title 15 involving injury or disease, any medical report in narrative form as described in subsection (a) of this Code section and notice of intention to introduce such report shall first be provided to the adverse party at least five days prior to the adjudication hearing. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within three days of being provided with the report. All other provisions contained in subsection (a) of this Code section concerning medical reports in narrative form shall be applicable to juvenile dependency cases.

(c) In all termination of parental rights hearings under Article 4 of Chapter 11 of Title 15 involving injury or disease, any medical report in narrative form as described in subsection (a) of this Code section and a notice of intention to introduce such report shall first be provided to the adverse party at least 15 days prior to the adjudication hearing. Any adverse party

may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within seven days of being provided with such report. All other provisions contained in subsection (a) of this Code section concerning medical reports in narrative form shall be applicable to parental rights hearings.

(d) The medical narrative shall be presented to the jury as depositions are presented to the jury and shall not go out with the jury as documentary evidence.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013; Laws 2023, Act 247, § 2, eff. July 1, 2023.)

§ 24-8-827. Admissibility of statements of mentally incapacitated adults

(a) As used in this Code section, the term “mentally incapacitated” means a mental impairment that substantially affects a person’s ability to provide personal protection; provide necessities, including, but not limited to, food, shelter, clothing, medical, or other healthcare; carry out the activities of daily living; or manage his or her resources.

(b) A statement made by a person who is 17 years of age or older who is mentally incapacitated that describes any act of nonconsensual sexual contact or any act of physical abuse performed with or on such mentally incapacitated person by another, or with or on another in the presence of such mentally incapacitated person, shall be admissible in evidence by the testimony of the person to whom such statement was made if the proponent of such statement provides pretrial notice to the adverse party of the intention to use such out-of-court statement and if such mentally incapacitated person testifies at the trial, unless the adverse party forfeits or waives such person’s testimony as provided in this title, and, at the time of the testimony regarding such out-of-court statement, the person to whom the mentally incapacitated person made such statement is subject to cross-examination regarding the out-of-court statement.

(Laws 2024, Act 482, § 1, eff. July 1, 2024.)

Chapter 9. Authentication and Identification

Article 1. General Provisions

§ 24-9-901. Requirement of authentication or identification

(a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification

conforming with the requirements of this Code section:

(1) Testimony of a witness with knowledge that a matter is what it is claimed to be;

(2) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation;

(3) Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated. Such specimens shall be furnished to the opposite party no later than ten days prior to trial;

(4) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;

(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker;

(6) Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone service provider to a particular person or business, if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone;

(7) Evidence that a document authorized by law to be recorded or filed and in fact recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept;

(8) Evidence that a document or data compilation, in any form:

(A) Is in such condition as to create no suspicion concerning its authenticity;

(B) Was in a place where it, if authentic, would likely be; and

(C) Has been in existence 20 years or more at the time it is offered;

(9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result; or

(10) Any method of authentication or identification

provided by law.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-9-902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility shall not be required with respect to the following:

(1) A document bearing a seal purporting to be that of the United States or of any state, district, commonwealth, territory, or insular possession thereof or the Panama Canal Zone or the Trust Territory of the Pacific Islands or of a political subdivision, department, officer, or agency thereof or of a municipal corporation of this state and bearing a signature purporting to be an attestation or execution;

(2) A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) of this Code section having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine;

(3) A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make such execution or attestation and accompanied by a final certification as to the genuineness of the signature, official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to such execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to such execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that such documents be treated as presumptively authentic without final certification or permit such documents to be evidenced by an attested summary with or without final certification;

(4) A duplicate of an official record or report or entry therein or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with paragraph (1), (2), or (3) of this Code section or complying with any law of the United

States or of this state, including Code Section 24-9-920;

(5) Books, pamphlets, or other publications purporting to be issued by a public office;

(6) Printed materials purporting to be newspapers or periodicals;

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin;

(8) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments;

(9) Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law;

(10) Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic;

(11) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration of its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters;

(B) Was kept in the course of the regularly conducted activity; and

(C) Was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration; or

(12) In a civil proceeding, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) Was kept in the course of the regularly conducted activity; and

(C) Was made by the regularly conducted activity as a regular practice.

The declaration shall be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-9-903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness shall not be necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-9-904. Definitions

As used in this article, the term:

(1) "Public office" shall have the same meaning as set forth in Code Section 24-8-801.

(2) "Public officer" means any person appointed or elected to be the head of any entity included in paragraph (1) of Code Section 24-9-902.

(3) "Telephone service provider" shall have the same meaning as "voice service provider" as set forth in Code Section 46-5-231.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Article 2. Documentary Evidence

§ 24-9-920. Exemplifications

The certificate or attestation of any public officer either of this state or any county thereof or any clerk or keeper of county, consolidated government, or municipal records in this state shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper or file, or other matter or thing in such public officer's respective office, or pertaining thereto, to admit the same in evidence.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-9-921. Competency to identify medical bills

(a) Upon the trial of any civil proceeding involving injury or disease, the patient or the member of his or her family or other

person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from:

- (1) A hospital;
- (2) An ambulance service;
- (3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or
- (4) A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist.

(b) Such items of evidence need not be identified by the one who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary. However, nothing in this Code section shall be construed to limit the right of a thorough and sifting cross-examination as to such items of evidence.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-9-922. Laws and judicial proceedings of other states

The acts of the legislature of any other state, territory, or possession of the United States, the records and judicial proceedings of any court of any such state, territory, or possession, and the nonjudicial records or books kept in the public offices in any such state, territory, or possession, if properly authenticated, shall have the same full faith and credit in every court within this state as they have by law or usage in the courts of such state, territory, or possession from which they are taken.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-9-923. Admissibility of photographs, motion pictures, video recordings, and audio recordings when necessitated by unavailability

(a) As used in this Code section, the term “unavailability of a witness” includes situations in which the authenticating witness:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the authentication;
- (2) Persists in refusing to testify concerning the subject

matter of the authentication despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the authentication;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the authentication has been unable to procure the attendance of the authenticating witness by process or other reasonable means.

An authenticating witness shall not be deemed unavailable as a witness if his or her exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of an authentication for the purpose of preventing the witness from attending or testifying.

(b) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.

(c) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings produced at a time when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator shall be admissible in evidence when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered, provided that, prior to the admission of such evidence, the date and time of such photograph, motion picture, or video recording shall be contained on such evidence, and such date and time shall be shown to have been made contemporaneously with the events depicted in such photograph, motion picture, or video recording.

(d) This Code section shall not be the exclusive method of introduction into evidence of photographs, motion pictures, video recordings, and audio recordings but shall be supplementary to any other law and lawful methods existing in this state.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-9-924. Copies of records of Department of Public Safety or Department of Driver Services in other states

(a) Any court may receive and use as evidence in any

proceeding information otherwise admissible from the records of the Department of Public Safety or the Department of Driver Services obtained from any terminal lawfully connected to the Georgia Crime Information Center without the need for additional certification of such records.

(b) Any court may receive and use as evidence for the purpose of imposing a sentence in any criminal proceeding information otherwise admissible from the records of the Department of Driver Services obtained from a request made in accordance with a contract with the Georgia Technology Authority for immediate on-line electronic furnishing of information.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

Chapter 10. Contents of Writings, Recordings, and Photographs

§ 24-10-1001. Definitions

As used in this chapter, the term:

(1) “Writing” or “recording” means letters, words, or numbers, or their equivalent, set down by handwriting, type-writing, printing, photostating, magnetic impulse, or mechanical or electronic recording or other form of data compilation.

(2) “Photograph” includes still photographs, X-ray films, video recordings, and motion pictures.

(3) “Original” means the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

(4) “Duplicate” means a counterpart produced by the same impression as the original or from the same matrix or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, chemical reproduction, or other equivalent techniques which accurately reproduce the original.

(5) “Public record” shall have the same meaning as set forth in Code Section 24-8-801.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-10-1002. Requirements of original

To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-10-1003. Admissibility of duplicates

A duplicate shall be admissible to the same extent as an original unless:

- (1) A genuine question is raised as to the authenticity of the original; or
- (2) A circumstance exists where it would be unfair to admit the duplicate in lieu of the original.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-10-1004. Admissibility of other evidence of contents

The original shall not be required and other evidence of the contents of a writing, recording, or photograph shall be admissible if:

- (1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
- (2) No original can be obtained by any available judicial process or procedure;
- (3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
- (4) The writing, recording, or photograph is not closely related to a controlling issue.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-10-1005. Public records

The contents of a public record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by duplicate, certified as correct in accordance with Code Section 24-9-902 or Code Section 24-9-920 or testified to be correct by a witness who has compared it with the original. If a duplicate which complies with this Code section cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-10-1006. Summaries of voluminous works

The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-10-1007. Proving contents by testimony, deposition, or written admission

The contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

§ 24-10-1008. Functions of court and jury

When the admissibility of other evidence of the contents of writings, recordings, or photographs under the rules of evidence depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Code Section 24-1-104; provided, however, that when an issue is raised as to:

- (1) Whether the asserted writing, recording, or photograph ever existed;
- (2) Whether another writing, recording, or photograph produced at the trial is the original; or
- (3) Whether other evidence of the contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

(Laws 2011, Act 52, § 2, eff. Jan. 1, 2013.)

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