UNDERSTANDING CRIMINAL JUSTICE

A Guide to Georgia's Criminal Justice System
Law & Procedure

Volume I:

ARREST TO TRIAL

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Introduction

Understanding Criminal Justice: A Guide to Georgia's Criminal Justice System, Law & Procedure, is intended to guide the reader through the important steps of a criminal case. Volume I begin with the first interaction between police and citizens and continues through each step until the trial of a criminal case.

I pray that this book will be of great value to lawyers, judges, defendants, victims, and the families of defendants and victims. The book is written in a language that is easy to understand for those who are unfamiliar with the specialized legal vocabulary used in the everyday practice of law. There is a glossary of terms that the reader can refer to as he progresses through the book. Although easy to read and follow, the book thoroughly covers important principles of law with citations to legal authority. Attorneys and judges who practice in the criminal law field should find it easy to use the book as a daily source of reference. I hope this book helps you, whatever your need, to understand Georgia's criminal justice process. After all, ignorance of the law is no excuse.

About the Author

Thomas S. Robinson, III, is a criminal defense attorney who handles all types of criminal cases from misdemeanors to appeals. He is a graduate of Stanford University and Emory University Law School. He has worked as the Staff Attorney for the Georgia Supreme Court and as a Senior Assistant District Attorney in the major case division of the Fulton County District Attorney's Office. He has also served as a Municipal Court Judge.

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Chapter 1
Police Encounters, Stops, & Arrests

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the police.

Interactions between police and citizens are generally categorized under the law into three types: (1) Consensual encounters; (2) Brief investigatory stops, which require reasonable suspicion of criminal activity; and (3) Arrests, that must be supported by probable cause. *Barber v.* State, 317 Ga. App. 600 (2012; *Miranda v. State*, 189 Ga. App. 218 (1988); *Lewis v. State,* 307 Ga. App. 593 (2011).

Type One: Consensual Encounters

In a consensual encounter, a police officer may approach a person, ask for identification, and freely question the person without any basis or belief that the person is involved in criminal activity. The officer may not detain the person or create the impression that the person may not leave. *Minor v. State*, 314 Ga. App. 253 (2012). The actions of an officer approaching a person or a stopped vehicle,

requesting to see a driver's license, and asking about possible criminal or suspicious activity fall within the first type of police-citizen encounter. *Bacallao v. State*, 307 Ga. App. 539 (2011). As long as a reasonable person would feel free to decline the officer's request to speak with him or otherwise terminate the encounter, the encounter is consensual, and no reasonable suspicion is required. *Quinn v. State*, 268 Ga. 70 (1997). A reasonable person is someone who is neither guilty of criminal conduct and thus overly apprehensive, yet not insensitive to the seriousness of the circumstances. *State v. Hammond,* 313 Ga. App. 882 (2012); *State v. Wintker,* 223 Ga. App. 65 (1996).

Although the police may approach a person, ask for identification, and question the citizen, the person may refuse to answer or ignore the request and go on his way if he chooses. *Thomas v. State*, 301 Ga. App. 198 (2009). A person's ability to walk away from or otherwise avoid a police officer is the essence of a consensual encounter. *Gattison v.* State, 309 Ga. App. 382 (2011). Even running from the police is permissible. *In re. J.B.,* 314 Ga. App. 678 (2012)*; Santos v. State*, 306 Ga. App. 772 (2010). However, a person who chooses to stop and talk to an officer is required to comply with the officer's reasonable demands including having to show the officer his hands. *Santos v. State*, 306 Ga. App. 772 (2010); *Alvarez v. State,* 313 Ga. App. 567 (2012). Refusal to do so may give rise to a reasonable suspicion that

he poses a threat to the personal safety of the officer therefore justifying a type two investigatory stop.

Type Two: Investigatory Stops

An encounter that begins as a consensual encounter may escalate into an investigatory stop, also called an investigatory detention, covered by the Fourth Amendment. *State v. Taylor*, 226 Ga. App. 690 (1997). Examples of circumstances that might indicate an investigatory stop include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, whether police isolated suspects, or the use of language or tone of voice indicating compliance with the officer's request might be required. *State v. Woods*, 311 Ga. App. 577 (2011); *Cutter v. State*, 274 Ga. App. 589 (2005); *State v. McMichael*, 276 Ga. 735 (2005).

Reasonable Articulable Suspicion

An investigatory stop must be based upon a reasonable suspicion that the person detained is engaged or about to engage in criminal activity. *State v. Hopper,* 293 Ga. App. 220 (2008); *Norton v. State*, 283 Ga. App. 790 (2007). The determination of whether articuable suspicion exists depends upon all the circumstances gathered from the objective observations of the police and the modes or patterns of operation of certain kinds of lawbreakers. *Hilbun v. State*, 313 Ga. App. 457 (2011). In reaching

conclusions, police officers are permitted to make common sense conclusions about human behavior. The evidence must be viewed from the perspective of what action a reasonable police officer would take. *State v. causey*, 246 Ga. App. 829 (2000). While a mere hunch is not enough for an investigatory detention, the police may rely upon their own experiences and training in assessing the circumstances. *In re. J.B.,* 314 Ga. App. 678 (2012). A reasonable suspicion can exist even though there may also be an innocent explanation for the conduct observed. *Johnson v. State,* 313 Ga. App. 137 (2011). Whether there is reasonable articulable suspicion is a legal question. *Harkleroad v. State*, 317 Ga. App. 509 (2012.

The lawfulness of a seizure is determined not by the officer's beliefs but by an objective determination of the totality of the circumstances. *Walker v. State,*314 Ga. App. 67 (2012). "This totality of the circumstances test consists of two elements: (1) The determination must be based upon all the circumstances gathered from objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. The trained police officer makes a determination from these data - this determination can be based upon inferences and deductions that might well elude an untrained person. In reaching such deductions, police officers are authorized to make common sense conclusions about

human behavior. Additionally, the evidence must be viewed from the perspective of what action a reasonable police officer would take. (2) The second element which must be present before a stop is permissible requires that during the process of analyzing the facts as described in the first element, a suspicion must arise that the particular individual being stopped is engaged in wrongdoing." *Jones v. State,* 314 Ga. App. 107 (2012).

Merely being present in an area known to the police for drug activity, without more, is not enough to support a reasonable suspicion that the person is engaged or about to engage in criminal activity. Also, nervousness alone cannot provide reasonable suspicion of criminal activity. *Dominguez v. State*, 310 Ga. App. 370 (2011); *Gonzales v. State*, 255 Ga. App. 149 (2002); *Becoats v. State*, 301 Ga. App. 768 (2009). The fact that the person stopped resembles the description of a suspect may be reasonable suspicion. *Avery v. State,* 313 Ga. App. 259 (2011); *Smith v. State,* 165 Ga. App. 333 (1983).

An officer who has reasonable suspicion to do so may detain a person at gunpoint during an investigatory stop. The fact that an officer is armed does not make the interaction an arrest because "it is often necessary for the police to approach a person with a drawn weapon in order to protect the physical well-being of both the police officers and the public." *Christy v. State,* 315 Ga. App. 647 (2012); *State v.*

Burks, 240 Ga. App. 425 (1999); *Lewis v. State*, 294 Ga. App. 607 (2008). An officer may even handcuff a suspect during an investigatory stop when such action is either reasonable under the circumstances to protect the officer or the public, or to maintain the status quo. *Christy v. State,* 315 Ga. App. 647 (2012); *Stringer v. State,*285 Ga. 842 (2009).

During an investigatory stop where he has reason to believe that he is dealing with an armed and dangerous individual, an officer may conduct a reasonable pat-down for weapons for the protection of the police officer. *Lewis v. State*, 307 Ga. App. 593 (2011). The officer may conduct a pat-down regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed. The officer must, however, have actually concluded that the suspect may be armed or a threat to personal safety and must be able to articulate a basis for his conclusion so that a protective pat-down would not be unreasonable in the given set of circumstances. *Richardson v. State,* A14A0409; *Parnell v. State*, 280 Ga. App. 665 (2006). There must be specific facts that would cause someone to believe that the officer's safety may be in danger. For example, if the officer asks whether a person is armed and the person does have a knife, then there is a reasonable basis for the officer to believe the person might be armed with another weapon. *State v. Kipple*, 294 Ga. App. 420 (2008).

A pat-down, unlike a full search, is conducted for the purpose of ensuring the safety of the officer and of others nearby, not to obtain evidence for use at trial. It is a minimal intrusion reasonably designed to discover guns, knives, clubs, or other weapons that could prove dangerous to a police officer. "Before an officer places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so." *Molina v. State*, 304 Ga. App. 93 (2010). If an officer conducts a pat-down for weapons without sufficient justification, any evidence discovered is not admissible against the person. *Terry v. Ohio*, 392 U.S. 1 (1968). In conducting a pat-down, an officer is authorized to pat-down a person's outer clothing. He may go beneath the surface of the clothing in only two instances: (1) if he comes upon something that feels like a weapon, or (2) if he feels an object whose shape or weight makes its identity as contraband immediately apparent. This is called the "plain feel" doctrine. *Jones v. State,* 314 Ga. App. 247 (2012).

Traffic Stops

A traffic stop is a type two investigatory stop. Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment. *Nunnally v. State*, 310 Ga. App. 183

(2011). An automobile stop is thus subject to the constitutional requirement that it be reasonable under the particular circumstances. The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806 (1996). In other words, an officer is authorized to stop a traveling vehicle if the officer observes a traffic offense. *Worlds v. State,* A14A1112; *Rowe v. State*, 314 Ga. App. 747 (2012). If the officer acting in good faith believes that an unlawful act has been committed, his actions are not made improper by a later determination that the defendant's actions did not constitute a crime according to the law. *White v. State*, A12A1648; *Lancaster v. State*, 261 Ga, App. 348 (2003). Further, it does not matter that the statute under which the officer stops the car was later found to be unconstitutional. *Christy v. State,* 315 Ga. App. 647 (2012); *Ciak v. State,* 278 Ga. 27 (2004).

A radio dispatch may also be sufficient to authorize the stop of a vehicle. *Brandt v. State,*314 Ga. App. 343 (2012); *Boone v. State*, 282 Ga. App. 67 (2006) (radio dispatch concerning truck in which armed robbers had been seen, which described "the truck's color, number of occupants, road of travel, and direction of travel," gave officer reasonable suspicion to stop truck and investigate); *Faulkner v. State*, 277 Ga. App. 702 (2006) (radio dispatch concerning vehicle involved in criminal activity, which described "the color, manufacturer and model

of the vehicle, the number and race of its occupants, and its location and direction of travel," gave officer reasonable suspicion to stop vehicle and investigate); *McNair v. State*, 267 Ga. App. 872 (2004) (radio dispatch concerning car observed leaving crime scene, which described the car, gave officer reasonable suspicion to stop similar car driving away from location of crime scene only minutes later and investigate).

An officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway and to investigate the manner of driving with the intent to issue a citation or warning. *Sims v. State,* 313 Ga. App. 544 (2012). A police officer conducting a routine traffic stop may check for outstanding warrants or criminal histories on the vehicle's occupants. The officer can also request consent to search the vehicle. *Matthews v. State*, 294 Ga. App. 836 (2008). The police may also ask questions unrelated to the purpose of the traffic stop, so long as the questioning does not unreasonably prolong the traffic stop. *Lewis v. Sate*, A15A0099 *Arnold v. State,* 315 Ga. App. 798 (2012); *Salmeron v. State*, 280 Ga. 735 (2006). Simply because someone is detained during a traffic stop does not mean that they are entitled to have their Miranda rights read to them. *State v. Hammond,* 313 Ga. App. 882 (2012).

Because concern for officer safety is present during a traffic stop, officers involved in a traffic stop

may order the driver and any passengers out of the vehicle. *Eaton v. State,* 294 Ga. App. 124 (2008). However, the officer may not perform a pat-down search of the driver or passengers unless the officer has a reasonable basis to believe the person is armed. To search the passenger of a car, the officer must have a reasonable suspicion that the passenger himself poses a threat to the officer. It is not appropriate to conduct a pat-down as a matter of routine or policy. *Ramsey v. State*, 306 Ga. App. 726 (2010). However, if a driver later consents to a search, any drugs discovered are admissible despite any prior illegal pat-down. The key factor is whether the drugs were found during the illegal pat-down or the later search with consent. *Rogue v. State*, 311 Ga. App. 421 (2011).

Once the purpose of a traffic stop has been fulfilled, the continued detention of the car and the occupants amounts to a second investigatory detention. *Harklerod v.* State, 317 Ga. App. 509 (2012); *Salmeron v. State*, 280 Ga. 735 (2006). Any continued detention must be based on a reasonable suspicion that the occupant of the car is engaged in other criminal activity. *Dominguez v. State*, 310 Ga. App. 370 (2011). Conflicting stories by the vehicle's occupants may be a basis for a reasonable suspicion of criminal activity. *Culpepper v. State,* 312 Ga. App. 115 (2011). An officer who lacks reasonable suspicion of other criminal activity exceeds the scope of a permissible investigation of a traffic offense if he

continues to detain and interrogate the person, or seeks consent to search, after the conclusion of the traffic stop or after the tasks related to the investigation of the traffic violation have been accomplished. *Bennett v.* State, A13A2163; St. *Fleur v. State*, 296 Ga. App. 849 (2009). A reasonable time to issue a citation or written warning includes the time necessary to verify the driver's license, insurance, and registration, to complete any paperwork connected with the citation or written warning, and to run a computer check to determine whether there are any outstanding arrest warrants for the driver or the passengers. *Hayes v. State*, 292 Ga. App. 724 (2008). A request for consent to search that occurs at the conclusion of the traffic stop as the officer is returning the person their license and citation does not unreasonably prolong the traffic stop. *Sims v. State*, 313 Ga. App. 544 (2012); *Nix v. State,* 312 Ga. App. 43 (2011); *Davis v. State,* 306 Ga. App. 185 (2010).

An officer may have a trained drug detection dog walk around the exterior of the car while the officer completes his investigation of the traffic stop as long as the stop is not unreasonably prolonged. *Lewis v. State*, A1510099, *Hardaway v. State*, 309 Ga. App. 432 (2011); *State v. Rouse*, 309 Ga. App. 536 (2011). The drug dog's sniffing the exterior of the car is a measure where purpose is detecting evidence does not constitute a search under the Fourth Amendment. *Lewis v. State* A1515A0099, *Jackson v. State,* 314

Ga. App. 272 (2012); *Bowers v. State*, 276 Ga. App. 520 (2005). If the dog alerts on the exterior of the vehicle, the officer has probable cause and may search the vehicle. *Thomas v. State*, 289 Ga. App. 161 (2008); *Rogers v. State*, 253 Ga. App. 863 (2002). The officer cannot complete his investigation and then have the drug dog sniff the vehicle. *Migliore v. State*, 240 Ga. App. 783 (1989); *State v. Long*, 301 Ga. App. 839 (2010*); Beacoats v. State*, 301 Ga. App. 768 (2009); *Bennett v. State*, 285 Ga. App.796 (2007); *Langston v. State,* 302 Ga. App. 541 (2010).

Roadblocks

Roadblocks are an exception to the rules concerning traffic stops. However, in order to justify a roadblock stop, the State must show at a minimum that the decision to create the roadblock was made by supervisory personnel rather than officers in the field; all vehicles are stopped as opposed to random vehicle stops, the delay to motorists is minimal; the roadblock operation is well identified as a police checkpoint; and the screening officers training and experience is sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication. *Williams v. State*, 317 Ga. App. 658 (2013); *LaFontaine v. State*, 269 Ga. 251 (1998). If these factors are met, the appeals court will look at the totality of circumstances to determine if the stop was reasonable. An officer can

be a supervisor even if he also screens motorists at the checkpoint. *Jacobs v. State*, 308 Ga. App. 117 (2011).

Type Three: Arrests

The third type of police citizen encounter is an arrest. An arrest must be based upon probable cause. The amount of evidence necessary to establish probable cause is much less than that level required to prove guilt beyond a reasonable doubt. "The test of probable cause requires merely a probability – less than a certainty but more than a mere suspicion or possibility." *Lewis v.* State, A12A1118; State *v. Burke*, 298 Ga. App. 621 (2009). Probable cause "can rest upon the collective knowledge of the police when there is some degree of communication between them." *Burgeson v. State*, 267 Ga. 102 (1996); *Brown v. State*, 151 Ga. App. 830 (1979).

Arrest Warrants

The determination of probable cause is made when the police officer obtains an arrest warrant from a magistrate judge. The police present an affidavit setting forth the facts they believe support the issuance of an arrest warrant. The judge signs the warrant giving the police the authority to arrest the suspect. O.C.G.A. § 17-4-40; O.C.G.A. § 17-4-41.

An arrest warrant is enough to enter a suspect's

home to arrest the person. *Almodovar v. State*, 289 Ga. 494 (2011). However, the police may not enter a person's home to arrest him without a warrant even if they have probable cause. *Carranza v. State*, 266 Ga. 263 (1996); *McCauley v. State*, 222 Ga. App. 600 (1996). Even where probable cause exists, warrantless intrusion of a person's home is prohibited by the Fourth Amendment, absent consent or a showing of exigent (emergency) circumstances. *Steagald v. United States*, 451 U.S. 204 (1981). Exigent circumstances may exist when a warrantless entry is necessary for the police "to preserve public order, to maintain the peace, and to protect lives, persons, property, health, and morals. In these cases, police do not enter a residence for the purpose of arresting or seizing evidence against an occupant; rather, they enter in response to what they reasonably perceive as an emergency involving a threat to life or property." *Staib v. State*, 309 Ga. App. 785 (2011); *Love v. State*, 290 Ga. App. 486 (2008).

The police are entitled to briefly detain occupants of a house pending a search. *Owens v. State*, A15A0419. Such brief, legal detention does not require Miranda Warning. *Tolliver v. State*, 273 Ga. App. 785 (2001); *Zachary v. State* 262 Ga. App. 646 (2003). An officer can also enter a home to arrest a suspect when the officer has followed the suspect there in hot pursuit. *State v. Nichols*, 225 Ga. App. 609 (1997).

A law enforcement officer may not legally search for a person whom they have an arrest warrant for in the home of a third person. In order to go into the third person's home, the police must have a search warrant, the consent of the third person, or some emergency situation which justifies the officer going into the home. *Looney v. State,* 293 Ga. App. 639 (2008); *Bowden v. State*, 304 Ga. App. 896 (2010); O.C.G.A. § 17-4-3.

If an officer stops an individual outside his home, requests a computer check on the individual, and is told that there is an outstanding arrest warrant for the individual, the officer may lawfully arrest the individual and search him as part of the arrest, and any seized contraband will be admissible to support additional criminal charges against the individual, even if it is later discovered that no valid warrant existed at the time of the arrest. *Coney v. State,* 316 Ga. App. 303 (2012); *State v. Edwards*, 307 Ga. App. 267 (2010); *Harvey v. State*, 266 Ga. 671 (1996). However, an arrest based on a lookout issued in the absence of probable cause is unlawful. *Whiteley v. Warden*, 401 U.S. 560 (1971) (arrest made in reliance on radio bulletin issued by officer who had obtained arrest warrants for the defendant without establishing probable cause was unlawful); *Delarosa v. State*, 304 Ga. App. 4 (2010).

Warrantless Arrest

A police officer may arrest someone even without a warrant for their arrest. This is called a warrantless arrest. A warrantless arrest is valid if there is probable cause to arrest. Probable cause exists if, at the moment the arrest is made, the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information were sufficient to warrant a reasonable person in believing that the accused had committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89 (1964); *Lawrence v. State*, 300 Ga. App. 731 (2009); *Shears v. State*, A15A0076. The determination of whether probable cause existed at the time of arrest is made at a later judicial proceeding. *Sacchinelli v. State*, 161 Ga. App. 763 (1982). In determining whether probable cause existed, the totality of the circumstances must be considered. *Morgan v. State*, 309 Ga. App. 740 (2011). "Circumstantial evidence may give rise to probable cause as long as it is sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *McKenzie v. State*, 208 Ga. App. 683 (1993).

Flight (running from the police) plus other circumstances may be sufficient probable cause to uphold a warrantless arrest. *Jones v. State*, 195 Ga. App. 868 (1990).

An officer may arrest a person without an arrest warrant if an offense was committed in the officer's presence. O.C.G.A. § 17-4-20.

The remedy for an illegal arrest is the exclusion of any evidence obtained as a result of that arrest not the dismissal of the case. *Goodman v. State*,313 Ga. App. 290 (2011); *Austin v. State*, 286 Ga. App. 149 (2007).

In resisting an unlawful arrest, one is justified in using force, but only such force as is reasonably necessary to prevent the arrest. *Walker v. State,* 314 Ga. App. 67 (2012); *Brooks v. State*, 144 Ga. App. 97 (1977). A person being unlawfully arrested is not justified in assaulting a police officer unless the officer has assaulted the person first. *O'Neal v. State*, 311 Ga. App. 102 (2011); *Meadows v. State*, 303 Ga. App. 40 (2010).

Citizen's Arrest

A private person may arrest an offender if the offense is committed in his presence or within his

immediate knowledge. O.C.G.A. § 17-4-60. A private person who makes a citizen's arrest must without any unnecessary delay, take the person arrested before a judge or police officer. O.C.G.A. § 17-4-61 (a); O.C.G.A. § 17-4-62.

Once the police arrest the person, a criminal case has begun. The person arrested becomes known as the defendant. The case is prosecuted on behalf of the State of Georgia, also referred to as the State.

Chapter 2

Counsel

You have the right to an attorney. If you cannot afford an attorney, one will be appointed to represent you at no cost.

The Right to an Attorney

Every defendant has a constitutional right to an attorney. *United States Constitution, Amend. VI; Constitution*; *Ga. Const. Art. 1, § 1, XIV*; *Lewis v. State*, A11A0859. A person on probation has no Sixth Amendment right to counsel at a probation revocation proceeding because it "is not a stage of a criminal prosecution." *Vaughn v. Rutledge,* 265 Ga. 773 (1995).

The right to an attorney is so important that the police cannot question a person who has invoked his right to counsel. *Edwards v. Arizona*, 451 U.S. 477 (1981). The right to counsel is personal and therefore must be invoked by the defendant himself. *Barrett v.* State, 289 Ga. 197 (2011). The right cannot be delegated to a close relative, nor is an attorney, acting on his own, without having talked to the defendant, empowered to invoke the defendant's right to counsel. *Potter v. State*, 283 Ga. 576 (2008). The police are not required to tell a defendant that there is

an attorney retained for him at the police station trying to see the defendant. *Francis v. State*, *S14A0877; Potter v. State*, 283 Ga. 576 (2008). In order for a suspect to properly invoke his right to counsel while under arrest, he must articulate his desire to have counsel so clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. *Wheeler v. State*, 289 Ga. 537 (2011); *Manley v. State*, 287 Ga. 338 (2010).

A defendant can either hire an attorney or be represented by a court appointed attorney. Attorneys who are hired are called private attorneys. It is important for a defendant to make a decision soon after arrest whether to hire a lawyer or use a court appointed lawyer. An attorney who comes into a case early in the process can begin to plan and strategize, subpoena necessary documents such as phone records and videos while they are still in existence, and interview favorable witnesses while their memory is fresh. The attorney can also monitor the case, speak with the prosecutor, and determine whether a speedy trial is appropriate. An attorney will also be needed to handle the preliminary hearing and bond hearing, important events in the early stage of the case that may affect its ultimate outcome.

Hiring a Lawyer

A person who can afford to hire an attorney must hire private counsel. A defendant who hires a lawyer has the right to choose who will represent him. *Laye v. State,*312 Ga. App. 862 (2011). A defendant is entitled to be defended by counsel of his own choosing whenever he is able and willing to hire an attorney and uses reasonable diligence to obtain the attorney. *Calloway v. State,* 313 Ga. App. 708 (2012). While the judge must provide for representation of an indigent criminal defendant, he is not obligated to appoint counsel for a defendant who is not indigent. *Flanagan v. State*, 218 Ga. App. 598 (1995); *Uniform Superior Court Rule* 29.4.

Factors that a defendant should consider in deciding which attorney to hire include: the attorney's background, experience, and expertise in criminal law and with handling cases similar to the defendant's case; the ability of the attorney to devote adequate time to the defendant's case; and whether the defendant can afford the attorney's fees. A lawyer's fees must be reasonable. *State Bar of Georgia Rule 1.5*. Some attorneys accept payment plans that make it easier for a defendant to afford the lawyer's services. Any understanding as to the fee and any payment plan should be put in writing when the attorney is retained. A defendant should not hire a lawyer expecting a certain result, for example, that the case will be dismissed. A criminal defense attorney cannot guarantee a particular result. All the attorney can do is represent the defendant to the best

of the attorney's ability. Contracts that provide for payment based on the favorable conclusion of the case are called contingent fee contracts and are not allowed in criminal cases. *State Bar Rule 1.5(d)*.

Court Appointed Attorneys

The defendant asks to be represented by a court appointed lawyer by filling out an application for appointment of counsel.

When a person is taken to jail the sheriff must: allow the person claiming to be indigent and without counsel to immediately complete an application for an attorney and certificate of financial resources and forward such to the appropriate agency for a determination of indigency; clearly advise the person of their right to a lawyer and that if they cannot afford a lawyer one will be provided to assist them; and accomplish the above procedures as soon as possible after detention. *Uniform Superior Court Rule* 29.3. In order to protect a defendant's right to counsel the Georgia Public Defender Standards Council has guidelines that call for a public defender to visit a defendant within 72 hours of arrest.

Once it is determined that the defendant is indigent, the judge will authorize the appointment of an attorney for the defendant. *Uniform Superior Court Rule* 29.2. The defendant may be ordered as part of his sentence to reimburse the county for the

cost of the court appointed lawyer. O.C.G.A. §17-12-51; *State v. Pless*, 282 Ga. 58 (2007); *Flanagan v. State*, 218 Ga. App. 598 (1995). A defendant does not have the right to be appointed the lawyer of his choice. *Laye v. State,*312 Ga. App. 862 (2011); *Amadeo v. State*, 259 Ga. 469 (1989). The choice of appointed counsel is a matter governed by the judge's sound exercise of discretion and will not be disturbed on appeal unless that discretion is abused. However, when a defendant's choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no opposing considerations of comparable weight, it is an abuse of discretion to deny the defendant's request to appoint the counsel of his choice. *Chapel v. State,* 264 Ga. 267 (1994); *Davis v. State*, 261 Ga.221 (1991).

Whether a defendant hires an attorney or is represented by a court appointed lawyer it is important that the defendant be informed about the criminal justice process. The attorney, after consultation with the client, makes the tactical decisions concerning the case including which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions should be made. *Fortson v. State*, 240 Ga. 5 (1977); *Willis v. State*, 249 Ga. 261 (1982). The defendant, after consultation with his attorney, makes the decision whether to have a jury trial and whether to testify at that trial. The more informed a

defendant is the better he can assist the attorney in defense of the case.

The Attorney-Client Relationship

An attorney and client have a special relationship protected by law. The attorney owes the client a duty of confidentiality, loyalty, and diligence. The duty of the attorney is to the client, not the client's family or the person paying for the attorney. Given the special nature of the attorney-client relationship both attorney and client should be clear when that relationship begins and ends and what services are covered by the attorney-client relationship. The attorney-client relationship ends once the matter for which the attorney was employed or appointed is resolved. *Hill v. State*, 269 Ga. 23 (1998). If the attorney is hired for a specific purpose, for example, to handle the preliminary hearing, the defendant should not expect the attorney to continue working on the case after that hearing.

The attorney-client relationship is protected by the attorney-client privilege. *Waldrip v. Head*, 272 Ga. 572 (2000); *Almond v. State*, 180 Ga. App. 425 (426). Unless the privilege is waived by the client, an attorney cannot share what a client has told him even to a client's family members without violating the attorney-client privilege. *State Bar Rule* 1.6.

A defendant is entitled to an attorney loyal to the defendant and free of any conflict of interest. *Hill v. State*, 269 Ga. 23 (1998); *State Bar Rule* 1.7. An attorney cannot represent or continue to represent a client if there is a significant risk that the attorney's own interests or the attorney's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client. *Lewis v. State,* 312 Ga. App. 275 (2012).

An attorney may represent two defendants charged in the same case unless the State is seeking the death penalty. *Lewis v. State,* 312 Ga. App. 275 (2012); *Ellis v. State*, 272 Ga. 763 (2000); *Zant v. Hill*, 262 Ga. 815 (1993); *Capers v. State*, 220 Ga. App. 869 (1996). Likewise, counsel from the same public defender's office are not automatically disqualified from representing multiple defendants charged in the same case. *Lytle v. State,* 290 Ga. 177 (2011); *Burns v. State,* 281 Ga. 338 (2006). However, such arrangements should be undertaken with great caution due to a potential conflict of interest. *Ellis v. State*, 240 Ga. App. 498 (1999). The potential conflict of interest can rise to an actual conflict of interest if the attorney fails to pursue a theory of defense or possible plea bargain on behalf of one defendant. *Ellis v. State*, 240 Ga. App. 498 (1999). An attorney who represents two or more clients cannot participate in making a guilty plea agreement for all the clients unless each client consents after consultation, including disclosure of

the existence and nature of all pleas involved and of the participation of each person. *State Bar Rule* 1.8; *Tarwater v. State*, 259 Ga. 516 (1989); *Meyers v. State*, 265 Ga. 149 (1995).

A conflict can also exist if a former client is going to be a witness against the defendant. *Perry v. State,*314 Ga. App. 575 (2012). An attorney should avoid a case in which he may end up testifying. *McLaughlin v. Payne,* S14A0220; *Clough v. Richelo,* 274 Ga. App. 129 (2005).

An attorney must provide competent representation. *State Bar Rule* 1.1. An attorney's work load should be controlled so that each case can be handled adequately. An attorney must act with reasonable diligence and promptness in representing a client. This means that an attorney cannot abandon or disregard a defendant's case. *State Bar Rule* 1.3. An attorney must explain a matter to the extent reasonably necessary to permit the client to make informed decisions. An attorney must also keep the client reasonably informed about the status of the case and shall promptly comply with reasonable requests for information. However, an attorney is not required to visit a client at the jail a certain number of times. There exists no magic amount of time which an attorney must spend in actual consultation with his client. *Hendricks v. State,* 290 Ga. 238 (2011); *Murphy v. State,* 314 Ga. App. 753 (2012); *Harris v. State*, 279 Ga. 304 (2005). During a visit the attorney

and client are entitled to privacy. *Wright v. State*, 250 Ga. 570 (1983); *Brown v. Incarcerated Public Defender Clients*, 288 Ga. App. 859 (2007).

Attorneys are members of the State Bar of Georgia and officers of the court. Therefore, they are bound by certain ethical rules that may affect the attorney-client relationship. For instance, an attorney cannot present a witness who the attorney believes will perjure themselves. *Rudolph v. State,* 313 Ga. App. 411 (2011); *Grooms v. State,* 261 Ga. App. 549 (2003); *Nix v. Whiteside*, 475 U.S. 157 (1986). A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Georgia Rules of Professional Conduct.

An attorney takes an oath upon admission to the bar and is considered to speak the truth and be bound by his statements in open court, as lying in open court might cause him to be disbarred. *Gould v. State,* 315 Ga. App. 733 (2012).

Entry and Withdrawal

In any criminal case pending in a superior court, promptly upon agreeing to represent any client, the new attorney shall notify the appropriate calendar clerk in writing and the district attorney. *Uniform Superior Court Rule* 4.6. No attorney shall appear before a superior court until the attorney has entered

an appearance by filing a signed entry of appearance form or by filing a signed pleading in the case. An entry of appearance and all pleadings shall state:

(1) the style and number of the case;

(2) the identity of the party for whom the appearance is made; and

(3) the name, assigned state bar number, and current office address and telephone number of the attorney. *Uniform Superior Court Rule* 4.2.

Upon arraignment *(See Chapter 6)* the attorney who announces for, or on behalf of a defendant, or who is entered as counsel of record shall represent the defendant in that case throughout the trial, unless other counsel and the defendant notify the judge prior to trial that such other counsel represents the defendant and is ready to proceed, or counsel is otherwise relieved by the judge. *Uniform Superior Court Rule* 30.2.

An attorney may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client. Withdrawal is also permitted if the attorney's services were misused in the past even if that would materially prejudice the client. Withdrawal is justified if the client persists in a course of action that the attorney reasonably believes is criminal or

fraudulent. The attorney may also withdraw where the client insists on a repugnant or imprudent objective. *State Bar Rule* 1.16. An attorney may also withdraw if the client refuses to abide by the terms of their agreement for representation concerning fees or court costs or an agreement limiting the purpose of the representation.

An attorney seeking to withdraw from a case must do so by following the applicable laws and rules. This usually means filing a motion to withdraw as counsel of record. The decision whether to grant a motion to withdraw from representation falls within the sound discretion of the judge. Difficulty may be encountered if withdrawal is based on the client's demand that the attorney engages in unprofessional conduct. The judge may wish an explanation for the withdrawal, while the attorney may be required to keep confidential the facts that would constitute such an explanation. The attorney's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. An attorney's request to withdraw will be granted unless in the judge's discretion to do so would delay the trial of the case or otherwise interrupt the orderly operation of the court or be manifestly unfair to the client. *Uniform Superior Court Rule* 4.3; *Calmes v. State,* 312 Ga. App. 769 (2012). When ordered to do so by a judge, a lawyer must continue representation notwithstanding good cause for terminating the representation. *State Bar*

Rule 1.16. Until an order permitting withdrawal is entered the attorney remains counsel of record. *Tolbert v. Toole*, S14A1158.

A client has a right to fire a private lawyer at any time. However, an indigent defendant is not entitled to have his appointed attorney discharged unless the defendant can demonstrate "justifiable dissatisfaction with counsel, such as conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between counsel and client." *Cain v. State,* 310 Ga. App. 442 (2011); *Holsey v.* State, 291 Ga. App. 216 (2008); *Bryant v. State*, 268 Ga. 616 (1997). A defendant is not entitled to a meaningful or cordial relationship with his court appointed lawyer. *Phipps v. State*, 200 Ga. App. 18 (1991); *Morris v. Slappy*, 461 U.S. 1 (1982); *Wood v.* State, 304 Ga. App. 52 (2010); *Taylor v. State*, 298 Ga. App. 145 (2009). If the defendant fails to show justifiable dissatisfaction, the judge may require the defendant to choose between his current attorney and proceeding pro se (representing himself). *Rouse v. State*, 275 Ga. 605 (2002); *Billings v. State*, 308 Ga. App. 248 (2011); *Tucker v. State*, 264 Ga. App. 872 (2003). Even if a defendant files a lawsuit against his court appointed attorney, the judge is not required to take the attorney off the case. *Robinson v. State,* 312 Ga. App. 736 (2012).

Attorneys sometimes have scheduling conflicts that call for them to be in two courtrooms at the same

time. There are certain rules that determine which case the attorney must handle first. When an attorney is scheduled to appear in two or more courts (trial or appellate; state or federal), the attorney shall give prompt written notice of the conflict to opposing counsel, to the clerk of each court, and to the judge before whom each case is set for hearing. The written notice shall contain the attorney's proposed resolution of the appearance conflicts in accordance with the priorities established by the rules. Attorneys confronted by such conflicts are expected to give written notice such that it will be received at least seven days prior to the date of conflict. Scheduling conflicts shall be resolved with the following order of priorities: (1) Criminal (felony) cases shall come before civil actions. Criminal actions in which a demand for speedy trial has been timely filed pursuant to O.C.G.A. § 17-7-170 or § 17-7-171 shall automatically take precedence over all other cases unless otherwise directed by the judge in which the speedy trial demand is pending; (2) Jury trials shall prevail over non-jury matters; (3) Within the category of non-jury matters, the following will have priority: (a) parental terminations, (b) trials, (c) all other non-jury matters including appellate arguments, hearings and conferences; (4) Within each of the above categories the case which was first filed shall take priority. *Uniform Superior Court Rule* 17.1.

Waiver of Right to Counsel

The right to an attorney may be waived. Before a judge can allow a defendant to represent himself, the judge must question the defendant to make sure he is knowingly and intelligently waiving his right to an attorney. The judge must warn the defendant of the dangers of representing himself. *Farretta v. California*, 422 U.S. 806 (1975). To be valid, such waiver must be made with an understanding of the nature of the charges, the range of punishments, possible defenses to the charges, circumstances in mitigation, and all other facts essential to a broad understanding of the case. *Farley v.* State, 317 Ga. App. 628 (2013); *Banks v.* State, 260 Ga. App. 515 (2003); *Prater v. State*, 220 Ga. App. 506 (1996). The judge does not have to discuss each of these factors, as long as it is clear that the defendant was made aware of these dangers. *Cox v.* State, 317 Ga. App. 654 (2012). Although a defendant has the right to represent himself, he does not have the right to act as co-counsel. *Powers v. State,* 314 Ga. App. 733 (2012); *Isaacs v. State,* 259 Ga. 717 (1989).

A defendant's insistence that his court appointed lawyer give in to his demands and pursue a frivolous and baseless line of defense may amount to the equivalent of a knowing and voluntary waiver of counsel. *Calmes v. State,* 312 Ga. App. 769 (2012); *Phipps v. State,* 200 Ga. App. 18 (1991).

A request for self-representation must be made before trial. *Powers v. State,* 314 Ga. App. 733 (2012). A defendant who chooses to and is allowed to represent himself can make a request for counsel after waiving the right if, for example, he discovers he is overwhelmed by the trial process. Whether to grant that request is in the discretion of the judge. *Wilkerson v. State*, 286 Ga. 201 (2009); *Clark v. Zant*, 247 Ga. 194 (1981). However, a defendant cannot, in the middle of trial, assert his right to represent himself. *Thaxton v. State,* 260 Ga. 141 (1990). A defendant's right to counsel may not be insisted upon in a manner that will obstruct the ordinary procedure in courts of justice and deprive judges of the exercise of their power to control the court. *Lynd v. State*, 262 Ga. 58 (1992).

A defendant does not have the right to represent himself and also be represented by an attorney. Therefore, pro se filings by a defendant who has a lawyer are unauthorized and have no legal effect. *Tolbert v. Toole,* S14A1158.

Complaints concerning attorneys should be directed to the State Bar of Georgia, 104 Marietta St. Suite 100, Atlanta, Georgia 30303, (404) 527-8700.

Chapter 3
First Appearance & Preliminary Hearing

The first court date that a defendant will have after arrest is called a first appearance. The first appearance hearing is not a critical stage of the prosecution, and therefore a defendant is not entitled to the presence of a court appointed lawyer at the hearing. However, the 6th Amendment right to counsel does apply to a first appearance. *O'Kelly v. State*, 278 Ga. 564 (2004). Therefore, if a defendant wishes to exercise his right to hire counsel, the hearing must be delayed. The judge is limited to scheduling and other housekeeping matters, but the actual hearing must be reset. *Uniform Magistrate Court Rule* 25.1.

A defendant who is arrested based on an arrest warrant must be brought before a judge for a first appearance within 72 hours after arrest. O.C.G.A. § 17-4-26. A defendant who is arrested without a warrant must be brought before the judge within 48 hours not only for a first appearance but also for a determination of probable cause (preliminary hearing). *Gerstein v. Pugh*, 420 U.S. 103 (1975). Any person arrested without a warrant who is not brought before the judge within 48 hours of arrest must be released unless a warrant has been obtained

within the 48 hours. O.C.G.A. § 17-4-62. The case is not dismissed. The defendant is simply released on bond. Further, failure to hold the hearing within 48 hours does not render a future conviction invalid. *Chiasson v.* State, 250 Ga. App. 63 (2001); *State v. Cade*, 184 Ga. App. 347 (1987).

At the first appearance, a magistrate court judge will inform the defendant of the charges against him and that he has a right to an attorney to defend against the charges. The judge will determine whether the defendant needs a court appointed lawyer. The judge will also tell the defendant that he has the right to a commitment hearing, also known as a preliminary hearing, and when that hearing will be held. *Uniform Superior Court Rule* 26.1. An arrested person who is not notified before the hearing of the time and place of the commitment hearing shall be released. O.C.G.A. 17-4-26.

The magistrate judge shall set bond unless the charge is one of those charges that only a superior court judge can give a bond *(See Bond Chapter 4)*. *Uniform Magistrate Court Rule* 25.1; *Uniform Superior Court Rule* 26.1.

Preliminary Hearing or Commitment Hearing

The next court date that a defendant has is the commitment hearing also called the preliminary

hearing. If the defendant makes bond prior to the hearing there will not be a preliminary hearing. *State v. Gilstrap*, 230 Ga. App. 281 (1988); *Lynn v. State*, 236 Ga. App. 600 (1999); *Uniform Superior Court Rule* 26.1. Although a defendant arrested on a warrant must be brought before a judge within 72 hours, the preliminary hearing does not have to occur within 72 hours. *Tidwell v. Paxton*, 282 Ga. 641 (2007). The preliminary hearing normally takes place within two weeks of arrest. A police officer will usually testify at the hearing. Hearsay is allowed during the hearing, therefore, any alleged victim does not need to testify. *In re R.B*., 264 Ga. 602 (1994).

The purpose of the preliminary hearing is to determine what the facts are (according to the police) that have the defendant in jail. The magistrate judge has to determine if there is probable cause to let the case go forward. The judge is not trying to decide if the defendant is guilty or not guilty, only whether there is probable cause to let the case keep moving through the criminal justice system. *State v. Middlebrooks*, 236 Ga. 52 (1976). Probable cause can exist even if there is a conflict in the testimony. Further, the prosecutor does not have to present all of the evidence; only enough to find probable cause. If there is probable cause, the judge will send the case (also called bind it over) to the appropriate court system, state court for misdemeanors or superior court for felonies. The judge can add charges other than those for which the defendant was arrested.

O.C.G.A. § 17-7-29. If the judge does not find probable cause, the case can be dismissed. If a case is dismissed the district attorney can still present the case to the grand jury and get an indictment. (See, *Chapter 5 Indictments*) *Wells v. Stynchcombe*, 231 Ga. 199 (1973); *Boyce v. State*, 184 Ga. App. 578 (1988).

The benefits of a preliminary hearing include: having cases dismissed early in the process; exposing early in the process weakness in the State's case; gathering impeachment evidence; securing and preserving favorable testimony which might not be available at trial; discovering information about the prosecution's case; and setting forth arguments regarding bond or the need for a psychiatric examination. The defendant can subpoena witnesses to the preliminary hearing. O.C.G.A. § 17-7-28. The defendant can obtain a copy of the transcript from the preliminary hearing by paying the cost of the transcript, or if the defendant is indigent asking the court to have the government pay for the transcript. *Uniform Superior Court Rule* 26.2; *Barnes v. State*, 184 Ga. App. 513 (1987). The transcript can be used to impeach witnesses at a trial. If the defendant testifies at the preliminary hearing his testimony can be used to impeach him at trial.

The magistrate judge can set a bond or lower the bond at the preliminary hearing (unless the charge is one of those charges that only a superior court judge

can give a bond) (*See Bonds Chapter 4*). Often the defense attorney and the prosecutor negotiate for the prosecutor to agree (consent) to a bond in exchange for the defendant waiving his preliminary hearing. The magistrate judge then signs the consent bond order. If the case involves an offense that only a superior court judge can set bond, the defendant will not be able to get bond at the first appearance or the preliminary hearing. However, in some counties the magistrate judge will be given the authority of a superior court judge and can hear all bond motions at the preliminary hearing.

The preliminary hearing is not a required step in a felony prosecution. *State v. Middlebrooks*, 236 Ga. 52 (1976). Thus, a defendant who is convicted will not have his conviction overturned because he did not have a preliminary hearing. While a preliminary hearing is not a required step in a felony prosecution, if a hearing is held, counsel must be provided. *Hannah v. Stone*, 236 Ga. 65 (1976); OCGA § 17-7-24. The case must be reset to get counsel. However, if a defendant does not have a lawyer at his preliminary hearing and then is convicted after trial, his conviction won't be overturned if the appeals court finds the failure to give him a lawyer for the preliminary hearing did not cause him any harm. *Mitchell v. State*, 173 Ga. App. 560 (1985). A defendant who seeks on appeal to challenge his attorney's waiver of the preliminary hearing must

show that he was prejudiced by the waiver. *Cargill v. State*, 255 Ga. 616 (1986).

A defendant who is in jail and wants to assert his right to a preliminary hearing must do so before indictment by filing a habeas corpus petition. *State v. Godfrey*, 204 Ga. App. 58 (1992). Once an indictment is returned by the grand jury or an accusation is drafted by the district attorney, a defendant is not entitled to a preliminary hearing. *Spears v. Johnson*, 256 Ga. 518 (1986); *Pruitt v. State*, 258 Ga. 583 (1988).

Chapter 4
Bond

After a defendant is arrested, he will want to get out of jail on bond. Defendants charged with felonies do not have a right to a bond. *Constantino v. Warren*, 285 Ga. 851 (2009); *Myers v. St. Lawrence,* 289 Ga. 240 (2011). However, defendants charged with most felonies are eligible to receive a bond. Bond can be set at the time the arrest warrant is issued and from a magistrate court judge at the first appearance or at the preliminary hearing. O.C.G.A. § 17-7-24; (*See Chapter 3)*.

A defendant charged with the following offenses can only receive bond from a superior court judge: (1) Treason; (2) Murder; (3) Rape; (4) Aggravated sodomy; (5) Armed robbery; (6) Aircraft hijacking and hijacking a motor vehicle; (7) Aggravated child molestation; (8) Aggravated sexual battery; (9) Manufacturing, distributing, delivering, dispensing, administering, or selling any controlled substance classified under Code Section 16-13-25 as Schedule I or under Code Section 16-13-26 as Schedule II; (10) Trafficking in drugs; (11) Kidnapping, arson, aggravated assault, or burglary if the person, at the time of the alleged kidnapping, arson, aggravated assault, or burglary, had previously been convicted of, was on probation or parole with respect to, or was

on bail for kidnapping, arson, aggravated assault, burglary, or one or more of the offenses listed in paragraphs (1) through (10) above; (12) Aggravated stalking; and (13) Violations of Georgia Street Gang Terrorism Prevention Act.

A person charged with any offense which is bailable only before a judge of the superior court may file a bond motion in superior court as soon as they are arrested. A Rule Nisi (order to be signed by the judge setting a hearing date) should be attached to the bond motion. Once a bond motion has been filed, the superior court judge notifies the district attorney and within ten days of receiving the motion sets a date for the hearing. O.C.G.A. § 17-16-1 (d). However, there is no remedy if the judge takes longer to set the hearing. *Capestany v. State*, 289 Ga. App. 47 (2007). The alleged victim is entitled to notice of the date of the bond hearing. The bond hearing in superior court can occur prior to the preliminary hearing in magistrate court.

The prosecutor can still consent to a bond in superior court only cases. The consent order is submitted to the superior court judge for a signature and no hearing is held. Consent bonds happen more often in cases where there is no alleged victim. Prosecutors often refuse to consent to a bond in victim cases even if the victim consents. If an alleged victim does consent to a bond, the prosecutor may ask that the alleged victim be present in court for

the bond hearing and indicate his consent to the judge. Affidavits from victims and witnesses may be considered but are not as effective as the presence of the person.

"The purpose of a pretrial bond is to prevent punishment before a conviction and to secure the presence of the accused in court for trial." *Alden v. Satte,* 314 Ga. App. 439 (2012); *Ayala v. State*, 262 Ga. 704 (1993). A defendant enters a bond hearing with a presumption of innocence which allows for the setting of bond. The law favors releasing persons prior to trial. *Ayala v. State*, 262 Ga. 704 (1993). There is an exception. If the person is charged with one of the seven serious violent felonies: ((1) Murder or felony murder; (2) Armed robbery; (3) Kidnapping; (4) Rape; (5) Aggravated child molestation; (6) Aggravated sodomy; or (7) Aggravated sexual battery) and has already been convicted of a serious violent felony, there shall be an initial finding, called a presumption, that no condition or combination of conditions will reasonably assure the appearance of the person as required or assure the safety of any other person or the community. This presumption can be overcome or rebutted by evidence showing the contrary.

The defendant has no right to be present at a bond hearing and in some jurisdictions, defendants are not transported to court for bond hearings. While

a bond hearing is an evidentiary hearing the parties often proceed by proffer. A proffer means each lawyer tells the judge what he or she believes the evidence would be. *Cross v. Cook,* 147 Ga. App. 695 (1978). Unless there is an objection, evidentiary proffers by the lawyers during the bond hearing are treated as evidence. *Maloney v. State*, A12A1497.

The defendant has the initial burden of establishing by evidence or proffer that he has ties to the community and poses no significant risk of fleeing, threatening the community, committing another crime or intimidating witnesses. Evidence of ties to the community include: the defendant's length and character of residence in the community, significant ties with family, friends, or institutions in the community, and employment status and history. The defendant's past history of coming to court is relevant to the risk of flight. The defendant's criminal history is relevant to the risk of committing another crime while on bond. Although the presence of family members in the courtroom is not evidence, *Dunn v. Edwards*, 275 Ga. 458 (2002), their presence is usually an indicator of ties to the community. Therefore, defense lawyers generally ask family members to come to court to support a defendant's bond request. Likewise, the prosecutor may, but is not required to have the alleged victim come to the hearing to oppose bond. The defendant may also testify at a bond hearing, however, any testimony given without a Fifth Amendment objection is

admissible against the defendant at trial. *Cowards v. State*, 266 Ga. 191 (1996).

Once a defendant meets his initial burden, the burden shifts to the prosecutor to persuade the judge by a preponderance of the evidence that the defendant is not entitled to bond. The prosecutor must show that the judge should deny bond either to secure the defendant's appearance for court or to protect the community. *Ayala v. State*, 262 Ga. 704 (1993).

The judge then decides whether to set a bond. A judge is authorized to release a person on bond if the judge finds that the person: (1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required; (2) Poses no significant threat or danger to any person, to the community, or to any property in the community; (3) Poses no significant risk of committing any felony pending trial; and (4) Poses no significant risk of intimidating witnesses or otherwise obstructing the administration of justice. The judge may grant bond only if he finds that none of the four risks exist. *Constantino v. Warren*, 285 Ga. 851 (2009). The judge is not supposed to consider the merits (strength or weakness) of the case, the guilt or innocence of the defendant or whether there is probable cause. *Craft v. State*, 154 Ga. App. 682 (1980).

In setting the amount of bond, the primary factor to be considered is the probability of the appearance of the defendant. *Jones v. Grimes*, 219 Ga. 585 (1964). Other factors to be considered are the defendant's ability to pay, the seriousness of the crime, the punishment associated with the offense, the character and reputation of the defendant, the health of the defendant, the probability of the defendant appearing, and past forfeiture of other bonds. *Howard v. State*, 197 Ga. App. 693 (1990); *Spence v. State*, 252 Ga. 338 (1984). The task of the judge in setting the amount of bond is to place the amount high enough to reasonably assure the presence of the defendant when it is required, and at the same time, to avoid a figure higher than that reasonably calculated to fulfill this purpose, and therefore excessive. Excessive bail is the equivalent of a refusal to grant bail and is unconstitutional. United States Constitution, Amendment VIII. In such cases the defendant may file a habeas corpus petition. *Banks v. Waldrop*, 272 Ga. 475 (2000); *Jones v. Grimes*, 219 Ga. 585 (1964); *Hernandez v. State*, 294 Ga. App. 289 (2008). The pretrial habeas corpus petition cannot raise a claim of ineffective assistance of counsel. *Massey v. Lawrence*, 284 Ga. 780 (2009).

The defendant can also file a motion to reduce bond. The process and analysis for a bond reduction are similar to those for a bond hearing but the judge decides whether the bond is appropriate or too high.

When a person is given bond prior to a preliminary or commitment hearing and is later bound over to another court for trial, the original bond shall not terminate but shall be valid to provide for the person's appearance at the trial of the case unless the amount of the bond is set higher by lawful authority, in which case new bond shall be posted. OCGA § 17-6-14(a). The bond does not cover any charges with which the defendant is later charged, even though the additional crimes stem from the same events as those for which the defendant was originally incarcerated and given a bond. O.C.G.A. 17-6-14; *Rainwater v. Langley*, 277 Ga. 127 (2003); *Bryant v. Vowell*, 282 Ga. 437 (2007); *Richardson v. Lawrence,* 289 Ga. 149 (2011).

Instead of setting a higher bond, which may prevent a defendant from being released, a judge may impose restrictions on a defendant's behavior. *Alden v. State,* 314 Ga. App. 439 (2012); *Strickland v. State*, 300 Ga. App. 898 (2009). Reasonable restrictions are restrictions which have some relation to the offense. *Dudley v. State*, 230 Ga. App. 339 (1998). These may include prohibiting contact with the alleged victim, requiring the defendant to report to a pretrial supervision program, house arrest, or a curfew. *Clarke v. State*, 228 Ga. App. 219 (1990); *Uniform Superior Court Rule* 27. Defendants charged with violating the Georgia Street Gang Act require increased bail, and as a condition of bail cannot have

contact of any kind or character with any other member or associate of a criminal street gang and, in cases involving a victim, cannot have contact of any kind or character with any such alleged victim or any member of any such victim's family or household. A bond order can include a defendant's waiver of his 4th Amendment rights. *Rocco v. State*, 267 Ga. App. 900 (2004).

If the judge denies bond, he must explain the reasons for denying bond by setting forth findings of fact. *Lane v. State*, 247 Ga. 387 (1981). A defendant can appeal the denial of bond through the interlocutory procedures set forth in O.C.G.A. § 5-6-34 (b); *Howard v. State*, 194 Ga. App. 857 (1990). A defendant can also file a habeas corpus petition. *Dakeer v. Warren*, 288 Ga. 799 (2011); *Constantino v. Warren*, 285 Ga. 851 (2009). *Hernandez v. State*, 294 Ga. App. 289 (2008). A decision to grant or deny bond will not be set aside on appeal unless there has been a flagrant and manifest abuse of discretion. *Ayala v. State*, 262 Ga. 704 (1993); *Hardy v. State*, 192 Ga. App. 860 (1999).

A defendant who has been incarcerated for 90 days without an indictment is entitled to a bond even if the case is indicted on the 91st day. O.C.G.A. § 17-7-50; *State v. English*, 276 Ga. 343 (2003); *Rawls v. Hunter*, 267 Ga. 109 (1996). The attorney should

immediately file another bond motion. In some jurisdictions when defendants have been incarcerated for 90 days or more without an indictment, the judges will consider a motion to dismiss or indict. If the case is indicted prior to the 90 days the defendant can file a bond motion with the judge who will be handling the arraignment. (*See Chapter 6*). Although A defendant who has been incarcerated for 90 days is entitled to a bond, bond must be granted only on those charges for which the defendant has been incarcerated for 90 days. If the case is indicted by the grand jury and additional charges are added the defendant is not entitled to a bond on the new charges, even though the additional charges stem from the same events as those for which the defendant was originally incarcerated. *Richardson v. Lawrence,* 289 Ga. 149 (2011); *Bryant v. Vowell,* 282 Ga. 437 (2007).

Misdemeanors

According to Georgia law only defendants charged with misdemeanors are entitled to bond as a matter of right. However, conditions can be set on bond in misdemeanor cases and the bond can be revoked. *Clarke v. State*, 228 Ga. App. 219 (1997). A defendant arrested for family violence without a warrant is not eligible for bond until they are taken before a judge. A person charged with DUI per se may be detained for a period of time up to six hours after booking prior to being released on bond.

Bond Forfeiture

A bond forfeiture occurs at the end of the court day upon the failure of the defendant to appear for court. O.C.G.A. § 17-6-71; *Powell v. State,* 313 Ga. App. 535 (2012). The bond becomes forfeited and a warrant issues for the defendant's arrest. A notice is sent to the surety or bonding company. A defendant who has missed court due to lack of notice of the court date or for other justifiable reasons can ask the judge to set aside the bond forfeiture. This is done by filing a motion to set aside bond forfeiture.

Revoking a Bond

A judge has the power to revoke a bond. Revoking a bond involves the deprivation of liberty. Therefore, the defendant is entitled to due process (notice and an opportunity to be heard) before any revocation. *Hood v. Carsten*, 267 Ga. 579 (1997).

Pre-Indictment / Post Indictment Bond

A Defendant who is denied bond prior to an indictment *(See Chapter 5)* being returned is still able to file another bond motion after indictment.

Chapter 5
Indictments & Accusations

The district attorney presents most felony cases to the grand jury for indictment. An indictment is the formal piece of paper charging the defendant with a crime. The role of the grand jury, similar to the role of the judge at a preliminary hearing, is to determine if there is sufficient probable cause for the case to proceed through the criminal justice system. *Barlow v. State*, 127 Ga. 58 (1906); *U.S. v. Mechanik*, 475 U.S. 66 (1986). However, unlike a preliminary hearing, a defendant, except for public officials and peace officers, does not get a chance to present his case to the grand jury. *Orkin v. State*, 236 Ga. 176 (1976); O.C. G.A. § 17-7-52.

The grand jury is composed of citizens of the state, 18 years of age or older, who are not incompetent because of mental illness or mental retardation, who have resided in the county for six months preceding the time of service, and who are the most experienced, upright, and intelligent persons unless exempted by law. The following persons are unable to serve as grand jurors: (1) Any person who holds any elective office in state or local government or who has held any such office within a period of two years preceding the time of service as a grand juror; and (2) Any person who has been convicted of

a felony and who has not been pardoned or had his civil rights restored. O.C.G.A. § 15-12-60. The incompetency of one grand juror makes an indictment void. *State v. Dempsey,* 290 Ga. 763 (2012); *Harper v. State,* 283 Ga. 102 (2008).

The board of jury commissioners compiles a grand jury list of the most experienced, intelligent, and upright citizens of the county to serve as grand jurors. To compile and revise the grand jury list the board of jury commissioners uses the following: (1) A list of all residents of the county who are the holders of drivers' licenses or personal identification cards issued by the Department of Driver Services; (2) The registered voters list in the county; and (3) Any other list of persons resident in the county as may be deemed appropriate by the board of jury commissioners. O.C.G.A. § 15-12-40.

Grand jury proceedings are confidential and thus the defendant is not entitled to a transcript of those proceedings. O.C.G.A. § 15-12-73; *Isaacs v. State*, 259 Ga. 717 (1989). If it appears that a competent witness was sworn and examined before the grand jury, a defendant cannot complain that there was insufficient evidence, or illegal evidence, or no evidence for the indictment. *Isaacs v. State*, 259 Ga. 717 (1989). Under O.C.G.A. § 15-12-74, a grand jury may indict for any crime of which it becomes aware and is not bound by the charges at arrest. *Johnson v. State*, 242 Ga. 822 (1979); *Holmes v.*

State, 306 Ga. App. 656 (2010). Therefore, a defendant can have charges added by the grand jury.

A grand jury can choose to return a "no bill" essentially saying there is no probable cause for the case to proceed. The case can then be represented to the grand jury or another grand jury. *Chafin v. Jones*, 243 Ga. 267 (1979); *State v. Auerswald*, 198 Ga. App. 183 (1998). Two returns of "no bill" by grand juries on the same charge or allegation shall be a bar to any future prosecution of a person for the same offense. However, if the no bills have been obtained by the fraudulent conduct of the person charged or there is newly discovered evidence, upon proof, the judge may allow a third bill to be presented, returned, and prosecuted. O.C.G.A. § 17-7-53.

An indictment takes the following form:

CAPTION Count One (OFFENSE)
BODY

State of Georgia, _____ County.

The grand jurors selected, chosen, and sworn for the County of _____, to wit: (*names of grand jurors*) in the name and behalf of the citizens of Georgia, charge and accuse (*name of the accused*) with the offense of _____; for that the said (*name of the accused*) (*state with sufficient certainty what the accused did to constitute the offense and the*

time and place of committing the offense), contrary to the laws of said state, the good order, peace, and dignity thereof. O.C.G.A. § 17-7-54; *White v. State,* 312 Ga. App. 421 (2011).

Every crime is listed and defined under a particular statute. For example, armed robbery is found at O.C.G.A. § 16-8-41. The statute defines the elements of the crime, in other words, what must be proven to convict a defendant of that crime. An indictment must allege every essential element of the offense. *Henderson v. Hames,* 287 Ga. 534 (2010). An indictment is void to the extent that it fails to allege all the essential elements of the crime or crimes charged. *Davis v. State*, 272 Ga. 818 (2000); *State v. Eubanks*, 239 Ga. 483 (1977). *Henderson v. Hames,* 287 Ga. 534 (2010). Every indictment of the grand jury which states the offense in the terms and language of the statute where the crime is defined or so plainly that the nature of the offense charged may easily be understood shall be considered sufficiently technical and correct. O.C.G.A. § 17-7-54.

The allegations contained in the body of the count of the indictment control over any inconsistent name of the offense in the caption of the indictment. *Jackson v. State,* 316 Ga. App. 588 (2012); *Morris v. State*, 310 Ga. App. 126 (2011); State *v. Barnett*, 268 Ga. App. 900 (2004); *State v. Eubanks*, 239 Ga. 483 (1977). Therefore, if the indictment names theft by deception as the offense in the caption, but the

allegations in the body define the crime of theft by conversion, the incorrect caption may be stricken.

"Unless the character of the place is an essential element of the offense, an indictment which charges the crime to have been committed in a particular county is sufficiently certain as to place." *Gentry v. State*, 235 Ga. App. 328 (1998). As a general rule, if an indictment charges the defendant with committing a crime against a person, the injured person should be identified in the indictment by his correct name, or by some name by which he is generally called, unless the identity of the alleged victim is not a necessary part of the crime charged. *State v. Grube,* 315 Ga. App. 885 (2012); *Dennard v. State,* 243 Ga. App. 868 (2000). The indictment may contain reference to an alias of the defendant. *Brown v. State*, S14A0800.

When a defendant is charged with the violation of a law and the statute contains the word ["or"] in describing the ways a crime may be committed, the indictment, in order to survive a challenge by the defendant, must charge the ways or methods with the word ["and"] if it charges more than one of them. The State does not have to prove all such separate ways or methods alleged in the indictment, but the State makes a case upon its establishment by proof of any one of the ways. *Martin v. State*, 299 Ga. App. 845 (2009); *Kall v. State*, 257 Ga. App. 527 (2002). For example, if a defendant is charged with committing child molestation by touching and kissing

the alleged victim, the indictment must state touching and kissing, but the State only needs to prove one method. *Judice v. State*, 308 Ga. App. 229 (2011).

A grand jury may return another indictment against a defendant even though an indictment is already pending. The second indictment is called a re-indictment. *Trimm v.* State, 297 Ga. App. 861 (2009). However, a re-indictment adding more severe charges may create an appearance that the prosecutor was being vindictive or seeking vengeance against the defendant. The burden is on the prosecution to prove that the decision to re-indict was not based upon a vindictive motive. *Larochelle v. State*, 219 Ga. App. 792 (1996). The State may also re-indict a defendant to change the wording of the indictment even after the case has been reversed on appeal and returned to the trial court. *Dryden v. State,* 316 Ga. App. 70 (2012).

Defendant's accused of misdemeanors are generally charged by accusation. For certain crimes, such as forgery, the law allows the district attorney to draft an accusation (another formal piece of paper charging the defendant) without presenting the case to the grand jury. O.C.G.A. § 17-7-70.1. Felony shoplifting cases in which the defendant has waived the preliminary hearing can be charged by accusation. *Taylor v. State,* 315 Ga. App. 667 (2012). A defendant charged with a felony has a right to be tried on an indictment, but can waive this right by

doing so in writing. Prior to trial, the prosecutor may amend the accusation to change the allegations. O.C.G.A. § 17-7-71 (f); *Wilcox v. State*, 229 Ga. App 227 (1997). Further, the judge is not required to grant a mistrial or continuance if the State amends an accusation after the beginning of the trial and the amendment is not material or prejudicial to the defense. *Kall v. State*, 257 Ga. App. 527 (2002).

If after the return of two "true bills" of indictments by a grand jury on the same offense, charge, or allegation, the indictments are quashed for the second time, such actions will be a bar to any future prosecution of the defendant for the offense, charge, or allegation. O.C.G.A. § 17-7-53.1.

As long as an indictment is proper as to form and substance, the State has a right to prosecute the case to trial. Therefore, there is no basis in Georgia criminal practice for a motion seeking to dismiss an indictment on the ground that the State cannot prove facts essential to the charge. *State v. Benton*, 305 Ga. App. 332 (2010). Similarly, a case cannot be dismissed because the allegations in the indictment are different than what was presented at the preliminary hearing.

Once an indictment is returned by the grand jury or an accusation is drafted by the district attorney, a defendant is not entitled to a preliminary hearing. *Walker v. City of Atlanta*, 238 Ga. 723 (1977). After

an indictment or accusation, the case moves forward to arraignment. (*See Chapter 6*).

A defendant can also be arrested after being indicted. This is called a direct indictment. The district attorney presents the officer directly to the grand jury for probable cause instead of to the magistrate judge at a preliminary hearing. The grand jury will return a warrant for the defendant's arrest. Once the defendant is arrested he will be brought to court for arraignment. (*See Chapter 6*).

An indictment must be returned in open court to be valid. *State v. Brown,* 315 Ga. App. 282 (2012); *Walter v. State,* 310 Ga. App. 223 (2011).

Speedy Trial Demands

In all criminal prosecutions the defendant shall have the constitutional right to a speedy and public trial. A defendant also has a right to a speedy trial created by Georgia statute found at O.C.G.A. § 17-7-170 and O.C.G.A. § 17-7-171. The speedy trial statutes compliment the constitutional right to a speedy trial. Once a case is indicted the time begins to run on a defendant's statutory right to a speedy trial. If a defendant files a speedy trial demand under the statute and is not brought to trial within the time allowed the defendant must be acquitted.

Failure to file a speedy trial demand means a defendant could sit in jail for months or years waiting on a trial date. By the time the case makes it to the next court date after indictment, the time to file a speedy trial demand may have expired. The defendant is under a duty to monitor the status of the case if the defendant wishes to file a speedy trial demand. The defendant cannot complain that he did not file a speedy trial demand because he was not brought to court for arraignment. *Smith v. State*, 207 Ga. App. 762 (1993).

If a defendant was given a court appointed lawyer for the preliminary hearing he is considered represented by counsel. A defendant cannot represent himself and have a lawyer. *Earley v*. State, 310 Ga. App. 110 (2011); *Brooks v. State*, 265 Ga. 548 (1995). Thus, a defendant cannot file a pro se speedy trial demand and also be represented by a public defender. *Trimm v. State*, 297 Ga. App. 861 (2009). The judge will not consider a speedy trial demand filed by a defendant who has a lawyer. *Pless v. State*, 255 Ga. App. 95 (2002); *Maddox v. State*, 218 Ga. App. 320 (1995).

A defendant must assert the right to a speedy trial. In asserting a defendant's right under the statutes, certain procedures must be followed. The speedy trial demand must be filed pursuant to O.C.G.A. § 17-7-171 for cases that are considered capital felonies and O.C.G.A. § 17-7-170 for all other

cases. Murder, armed robbery, and rape are considered capital felonies, thus, O.C.G.A. § 17-7-171 must be followed. *Walker v. State*, 290 Ga. 696 (2012); *Tolbert v. State,* 313 Ga. App. 46 (2011); *White v. State*, 202 Ga. App. 291 (1991)(Armed robbery); *Merrow v. State*, 218 Ga. App 47 (2004) (Rape).

A defendant must file a speedy trial demand during the term in which the indictment or accusation is returned or the next term of court. The terms of court are found in O.C.G.A. § 15-6-3. A complete list is found in Appendix B. A speedy trial demand filed before the indictment or accusation is premature and invalid. *Campbell v. State*, 294 Ga. App. 166 (2008).

The demand for speedy trial must be filed with the clerk of court and served upon the prosecutor and upon the judge to whom the case is assigned or, if the case is not assigned, upon the chief judge of the court in which the case is pending. *State v. Persia,* 183 Ga. App. 24 (1987). The demand for speedy trial must be filed as a separate, distinct, and individual document and shall not be a part of any other pleading or document. *Hudson v. State*, 311 Ga. App. 206 (2011). The demand shall clearly be titled "Demand for Speedy Trial;" reference the Code section (O.C.G.A. § 17-7-170 or O.C.G.A. § 17-7-171) within the pleading; and identify the indictment number or accusation number for which the demand

is being made. *Verscharen v. State,* 188 Ga. App. 746 (1988); *Ferris v. State,* 172 Ga. App. 729 (1984).

A speedy trial demand filed at a term when no jurors are impaneled does not begin to run until the next term. *McIver v. State*, 205 Ga. App. 648 (1992); *Redstrom v. State*, 239 Ga. App. 769 (1999). The defendant has the burden to show that there were qualified jurors impaneled during the court term at which the demand was filed and the succeeding term (17-7-170) or terms (17-7-171). *Union v. State*, 273 Ga. 666 (2001).

If a trial in which there was a speedy trial demand pending results in a hung jury (mistrial), the State meets its obligation under the statute when it re-tries the defendant during the remainder of the term of the mistrial, provided there are jurors impaneled and qualified to hear the case and, if not, in the next succeeding regular term of court, again provided there are jurors impaneled and qualified to hear the case. *State v. Varner*, 277 Ga. 433 (2003). If a defendant appeals after a conviction in a case with a speedy trial demand and the case is overturned on appeal the time for a retrial is limited by the speedy trial demand. After the appeal, jurors must be present and available to serve after the remittitur (document indicating the case is back from appeal) is filed for a court term to count as one of the terms in which the State must try the defendant.

Waiver of Speedy Trial Demand

A defendant can waive his right to a speedy trial. There is no rule that the defendant must be present when his lawyer waives his speedy trial demand. *Twiggs v. State,* 315 Ga. App. 191 (2012). A request for continuance generally waives a speedy trial demand. *Trimm v.* State, 297 Ga. App. 861 (2009). However, a request for a continuance does not amount to a waiver of the speedy trial demand under O.C.G.A. § 17-7-170 as long as the request does not seek to continue the case beyond the term of court. *Thornton v. State*, 301 Ga. App. 784 (2009); *Ingram v. State*, 286 Ga. App. 662 (2007). If the judge continues the case on his own, there is no waiver. *Rice v. State,* 264 Ga. 846 (1995).

The fact that the defendant's attorney had conflicts in his schedule does not amount to a waiver. *Gifford v. State*, 301 Ga. App. 50 (2009). However, the failure of counsel to notify the judge once the conflict is resolved can constitute a waiver of the speedy trial demand. *Fisher v. State*, 273 Ga. 721 (2001). Nor is the filing of a leave of absence a waiver unless the leave causes the case to go beyond the term. *Birts v. State*, 192 Ga. App. 476 (1989); *Jones v. State*, 250 Ga. App. 829 (2003); *Jones v. State*, 276 Ga. 171 (2003); *Linkous v. State*, 254 Ga. App. 43 (2002); *Vonslep v. State*, 253 Ga. App. 881; *State v. Dodge*, 251 Ga. App. 361 (2001); *State v. Summage*, 266 Ga. App 630 (2004).

However, the State cannot manipulate the trial calendar to hamper the speedy trial demand by making it impossible for the defense attorney to be available. *Fisher v. State*, 273 Ga. 721 (2001).

A defendant's motion to quash an indictment (*See Chapter 9)* which causes the State to seek a new indictment waives the demand as to the first indictment only. *Tyner v. State*, 298 Ga. App. 42 (2009). The defendant must file a new speedy trial demand on the new indictment. *Willingham v. State*, 232 Ga. App. 244 (1998). A lawyer's announcement that the lawyer is not adopting the defendant's pro se speedy trial demand constitutes a waiver. *Works v. State*, 301 Ga. App. 108 (2009).

The defendant's failure to be present due to his incarceration in state custody is not a waiver. *Gifford v. State*, 301 Ga. App. 50 (2009); *State v. Collins*, 201 Ga. App. 500 (1991).

A defendant is generally entitled to seven days notice before trial. *Uniform Superior Court Rule* 32.1. However, when a defendant files a speedy trial demand and if compliance with Rule 32.1's notice requirement would cause a violation of the defendant's right to a speedy trial, then a judge can proceed to trial without the required notice. *Compare Clark v. State*, 259 Ga. App. 573 (2003); *Higuera-Hernandez v. State*, 289 Ga. 553 (2011); *Linkous v. State*, 254 Ga. App. 43 (2002).

The entry of a nolle prosequi does not prevent a defendant from claiming the benefits of the speedy trial statute. *Bond v. State*, 212 Ga. App. 608 (1994).

Constitutional Speedy Trial

Both the United States and Georgia Constitutions grant defendants the right to a speedy trial. The constitutional right to a speedy trial applies to delays prior to arrest as well as delays after arrest but prior to trial. *Billingslea v. State*, 311 Ga. App. 490 (2011).

To find a constitutional violation where the delay is prior to arrest and indictment, the judge must find that: (1) the delay caused actual prejudice to the defense; and (2) the delay was the product of deliberate action by the prosecutor designed to gain a tactical advantage. *Hill v. State,* 312 Ga. App. 12 (2011); *Billingslea v. State*, 311 Ga. App. 490 (2011); *Wooten v. State*, 262 Ga. 876 (1993).

An alleged violation of the constitutional right to speedy trial after arrest must be analyzed using the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The four factors under the *Barker* test are: (1) the length of the delay; (2) the reasons for the delay and whether the delay is attributable to the State or defense; (3) the defendant's assertion of the right to a speedy trial; and (4) the prejudice to the defendant. *Ruffin v. State*, 284 Ga. 52 (2008). The factors

should be considered together in a balancing test of the conduct of the prosecution and the defendant. Before getting to the four factors, the judge must first determine if the delay is presumed to be prejudicial thus requiring further analysis. *Harrison v.* State, 311 Ga. App. 787 (2011). Delay is measured from arrest to trial or to the date on which a defendant's speedy trial motion was granted or denied. *State v. Porter*, 288 Ga. 524 (2011). A delay of more than one year raises a presumption of prejudice to the defendant and requires further analysis under the *Barker* test. *Hayes v. State*, 298 Ga. App. 338 (2009); *State v. Pickett***,** 288 Ga. 674 (2011). If the delay is not presumptively prejudicial the claim of a speedy trial violation fails and no further analysis is required. *Carder v. State,* 312 Ga. App. 61 (2011).

Length of Delay. Even though the judge considers the length of time in determining if the amount of delay is presumptively prejudicial, he must also consider the length of delay as one of the four main factors. The question is was the delay uncommonly long. Some delay is a normal part of the criminal justice process. *Sechler v. State*, 316 Ga. 675 (2012).

Reasons for Delay. The responsibility for bringing a case promptly to trial rests with the government including trial and appellate judges. *Ward v. State*, 311 Ga. App. 425 (2011). The weight to be given to the reason for delay depends on the reason given for the delay. The weight can range from deliberate

delay (for harassment or coercion to take a plea) to negligence (the complexity of the case, the need for additional investigation, or the State's inability to locate witnesses despite a good faith effort to do so). Deliberate delay is weighed more heavily. *Hayes v. State*, 298 Ga. App. 338 (2009). Investigative delay is acceptable, but delay undertaken by the government solely to gain tactical advantage over the accused is not acceptable. "Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." *United States v. Lovasco*, 431 U.S. 783 (1977); *Jones v. State*, 284 Ga. 320 (2008).

Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay in determining whether the Sixth Amendment has been violated but, they must "nevertheless... be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Singleton v.* State, 317 Ga. App. 637 (2012); Strunk *v. U.S.*, 412 U.S. 434 (1973). However, "negligence is entitled to minimal weight against the State only where it results either from the prosecution's inadvertent neglect of the case or from solely administrative factors over which the prosecution has no control, such as overcrowded

court dockets or understaffed law enforcement agencies." *Ditman v. State*, 301 Ga. App. 187 (2009). A determination as to whether a case is being prosecuted with the customary promptness depends upon the particular circumstances of the case. *Jackson v. State*, 279 Ga. 449 (2005).

"Where no reason appears for a delay, the delay must be treated as caused by the negligence of the State in bringing the case to trial." *Brannen v. State*, 274 Ga. 454 (2001); *Bell v. State*, 287 Ga. App. 300 (2007).

Even though delay caused by negligence is weighed less heavily than intentional delay, delay due to the negligence of the State can still be weighed heavily against the State. *State v. Brown,* 315 Ga. App. 544 (2012).

Assertion of the Right. Because a defendant may benefit by delaying a trial, a defendant has a responsibility to assert his right to a speedy trial. *Ward v. State*, 311 Ga. App. 425 (2011); *Hester v. State*, 268 Ga. App. 94 (2004). A defendant does not have to wait until an indictment is returned in order to make a demand for speedy trial under the constitution. *State v. Brown,* 315 Ga. App. 544

(2012). The defendant can file a speedy trial demand under the constitution upon arrest. *Glidwell v. State*, 169 Ga. App. 858 (1984). The filing of a speedy trial demand is not required before a defendant can file a plea in bar or motion to dismiss for failure to have a speedy trial on constitutional grounds. *State v. White*, 282 Ga. 859 (2008).

The judge has the discretion to give less weight to this factor when a defendant fails to assert his right during the period between arrest and indictment if he was out on bond and without counsel. *State v. Brown,* 315 Ga. App. 544 (2012); *State v. Gleaton*, 288 Ga. 373 (2010). Also, a defendant cannot be faulted for demanding that the State comply with its discovery obligations (*See Chapter 7*) before asserting the right to a speedy trial. *State v. Shirley,* 311 Ga. App. 141 (2011); *State v. Reimers*, 310 Ga. App. 887 (2011); *State v. Shirley*, 311 Ga. App. 141 (2011); *State v. Ivory*, 304 Ga. App. 859 (2010). But See *Williams v. State,* 290 Ga. 24 (2011)(defendant cannot suggest that he could not assert his right to a speedy trial because discovery was not complete); *Williams v. State,* 300 Ga. App. 797 (2009).

Objecting to the State's request for a continuance or announcing ready for trial is not considered asserting the right to a speedy trial. *Miller v. State,* 313 Ga. App. 552 (2012); *Brannen v. State*, 274 Ga. 454 (2001). A motion to dismiss an indictment on speedy trial grounds that does not request an

immediate trial is not a demand for trial and is not considered an assertion of the right under the *Barker* analysis. *State v. Lively*, 155 Ga. App. 402 (1980).

Prejudice to the Defendant. The prejudice factor weighs most heavily in determining whether a defendant's constitutional rights have been violated. *Simmons v. State*, 290 Ga. App. 315 (2008). In evaluating any prejudice to the defendant, the judge must consider: (1) oppressive pretrial incarceration; (2) anxiety and concern to the defendant; and (3) the possibility of harm to the defense. The third factor is the most serious "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Harris v. State*, 284 Ga. 455 (2008).

The fact that a defendant is incarcerated on other charges may compound the concerns of prejudice. *Johnson v. State,* 313 GA. APP. 895 (2012). Simply saying that memories have faded is not sufficient prejudice. *Stewart v. State*, 310 GA. App. 551 (2011); *Lambert v. State*, 302 Ga. App. 573 (2010). Further, difficulties such as the loss of employment, the break-up of a marriage, and financial difficulties, while "certainly associated with the fact of a defendant's arrest and prosecution, must be shown to be specifically caused by the delay in the defendant's prosecution." *Simmons v. State*, 304 Ga. App. 39 (2010); *Jackson v. State*, 279 Ga. 449 (2005). In order to show prejudice as a result of the

unavailability of a witness, a defendant has to show that the witness could supply material evidence. *Williams v. State,* 290 Ga. 24 (2011). The death of a witness does not automatically show prejudice. *Hill v. State,* 312 Ga. App. 12 (2011).

Because of the difficulty of proving specific prejudice due to the passage of time, the U.S. Supreme Court has explained that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a claim of a speedy trial violation without regard to the other *Barker* factors, it is part of the mix of relevant facts, and its importance increases with the length of delay. *Doggett v. United States*, 505 U.S. 647 (1992). The presumption of prejudice addressed in *Barker* strengthens with the passage of time and, as the delay increases, less specific harm need be demonstrated to conclude that the delay is prejudicial. *State v. Redding*, 274 Ga. 831 (2002). *Williams v. State*, 279 Ga. 106 (2005); *State v. Gleaton*, 288 Ga. 373 (2010). In short, the extent to which a defendant must prove prejudice from a delay in prosecution is directly related to the government's reasonableness in its pursuit of that defendant's case. *Moore v. State*, 294 Ga. App. 570 (2008).

Georgia courts have found that a delay of five years or more may lead to a finding of actual prejudice relieving the defendant of having to show

specific prejudice in his case. In determining whether a pre-trial delay gives rise to a presumption of actual prejudice, the judge must examine the delay relative to all other factors, including the complexity of the case and the evidence existing on the date the State initiated the prosecution.

In a case involving a defendant's constitutional right to a speedy trial, it is necessary for the judge to enter findings of fact and conclusions of law consistent with *Barker* in the order granting or denying the defendant's motion. *McGowan v. State*, 303 Ga. App. 873 (2010). A defendant may appeal from the judge's pretrial denial of the motion to dismiss or plea in bar based upon the alleged denial of the right to a speedy trial. *Johnson v. State,* A11A2220; *Callaway v. State*, 258 Ga. App. 118 (2002). The State may appeal the granting of an acquittal based upon the denial of a speedy trial right. *State v. Benton*, 246 Ga. 132 (1980).

Interstate Detainer Act

A detainer is a written instrument executed by a prosecuting officer to a facility requesting that the facility retain custody of an inmate to deliver the inmate to the requesting authority to stand trial upon a pending indictment. O.C.G.A. § 42-6-1 (3). A detainer cannot be based upon an arrest warrant.

Denson v. State, A12A1112; *State v. Carlton*, 276 Ga. 693 (2003).

The Interstate Agreement on Detainers (IAD) contemplates that if a person is imprisoned in a penal or correctional institution of a party state, and there is pending an untried indictment against him in another party state for which a detainer has been lodged, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint, provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. Further, the request of the prisoner shall be accompanied by the certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. In addition, The written notice and request for final disposition . . . shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the

appropriate prosecuting official and court by registered or certified mail or statutory overnight delivery, return receipt requested. "The right of a prisoner to be tried within 180 days accrues only after the precise operational procedures set forth in the IAD are completely satisfied." State v. McCarter, 314 Ga. App. 542 (2012); O.C.G.A. § 42-6-20.

Statute of Limitations

The statute of limitations sets a limit on when an indictment can be returned. *Flournoy v. State,* 299 Ga. App. 377 (2009). The period of limitations runs from the date of the offense to the date of the indictment. The burden is on the State to prove that the crime occurred within the statute of limitations. *Scales v. State*, 310 Ga. App. 48 (2011); *State v. Tuzman*, 145 Ga. App. 481 (1978).

Under O.C.G.A. § 17-3-1, there is no statute of limitations on a prosecution for murder. Prosecution for crimes punishable by life imprisonment must be brought within seven years except that the prosecution for forcible rape must be brought within 15 years of the commission of the crime and prosecution for armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy and aggravated sexual battery may be brought at any time when DNA evidence is used to establish the identity of the accused. A sufficient portion of the physical

evidence tested for DNA must be preserved and available for testing by the defendant.

Prosecution for all other felonies must be brought within four years except that cases where the alleged victim was under 18 at the time of the alleged crime must be brought within seven years.

If the victim is under 16 years of age at the time of the alleged offense and the alleged crime is cruelty to children, rape, sodomy, aggravated sodomy, statutory rape, child molestation, aggravated child molestation, enticing a child for indecent purposes or incest the statute does not begin to run until the alleged victim is 16 or the violation is reported to law enforcement. O.C.G.A. 7-3-2.1.

If the alleged victim is 65 years or older the statute of limitations does not begin to run until the crime is reported to or discovered by law enforcement. O.C. G.A. § 17-3-2.2.

The following periods are excluded from the statute of limitations period when: (1) the accused is not usually and publicly a resident of the state; (2) the person committing the crime is unknown or the crime is unknown; (3) the accused is a government officer or employee and the crime charged is theft by conversion of public property while such officer or employee; or (4) the accused is a guardian or trustee and the crime charged is theft by conversion of

property of the ward or beneficiary. O.C.G.A. § 17-3-2; *Royal v. State,* 314 Ga. App. 20 (2012).

An indictment brought within the statute of limitations that is quashed or a nolle prosequi entered after it was returned causes the statute of limitations to extend for six months. O.C. G.A. § 17-3-3.

The statute of limitations for misdemeanors is two years.

Under O.C.G.A. § 17-7-50.1 a child within the jurisdiction of superior court must be indicted within 180 days of the date of detention or the case must be transferred to juvenile court. *Nunnally v. State*, 311 Ga. App. 558 (2011).

Chapter 6
Arraignment

The first court date after a case has been indicted is usually the arraignment, also called the plea & arraignment. The arraignment is the opportunity for a defendant to enter a plea of guilty or not guilty to the charges contained in the indictment.

The judge will usually set a date for the arraignment. However, the judge can allow the district attorney to set the date of arraignment. The clerk of the court, at least five days prior to the date set for arraignment, shall mail to the defendant and his attorney of record, if known, notice of the date which has been set for arraignment. O.C.G.A. § 17-7-91(a). Notice of arraignment should also be mailed to any bonding company. *Uniform Superior Court Rule* 30.1.

There may be a considerable delay between the preliminary hearing and arraignment. Therefore, a defendant who is out on bond should make sure the clerk of court has his correct address to mail the notice of arraignment. Otherwise, the defendant will fail to appear for arraignment and a bench warrant will issue for his arrest. O.C. G.A. § 17-7-90.

Other than a possible bond hearing there will not be any court dates between the preliminary hearing and arraignment. There is no requirement that the arraignment occur within any specific period of time after indictment. *Bidd v. State*, 253 Ga. 289 (1984). There is a burden on a defendant to protect his right to a speedy trial. *Simpson v. State*, 150 Ga. App. 814 (1979). Therefore, if a defendant wants a speedy trial, he must make a demand under O.C.G.A. § 17-7-170 or O.C.G.A. § 17-7-171 at the court term at which the indictment or accusation is filed or at the next succeeding regular court term thereafter *even if he has not been brought to court for arraignment*. The terms of court are found at O.C.G.A. § 15-6-3.

A defendant's attorney is authorized to waive arraignment and enter a not guilty plea in his client's absence. *Davis v. State*, 135 Ga. App. 203 (1975). This is usually done by submitting a written waiver of arraignment.

Arraignment is one of those "critical stages" of a criminal case during which an accused is entitled to an attorney. *Carswell v. State*, 244 Ga. App. 516 (2000). Before arraignment the judge will ask whether the defendant is represented by counsel and, if not, inquire into the defendant's financial circumstances. Uniform Superior Court Rule 33.2; *Coney v. State,* 316 Ga. App. 303 (2012). If the defendant desires an attorney and is indigent, the judge will authorize the immediate appointment of

counsel. *Uniform Superior Court Rule 30.2*. A defendant who wants to hire an attorney should have done so before arraignment. However, a defendant is not required to enter a plea until the defendant has had an opportunity to retain counsel, or if the defendant is eligible for appointment of counsel, until counsel has been appointed, or the right to counsel waived. *Uniform Superior Court Rule 33.2*. Further, a defendant with a lawyer shall not be required to enter a plea if the lawyer makes a reasonable request for additional time to represent the defendant's interest, or if the defendant has not had a reasonable time to consult with the lawyer. The attorney who handles the arraignment will have to handle the case through the trial, unless other counsel and the defendant notify the judge prior to trial that such other counsel represents the defendant and is ready to proceed, or the lawyer is allowed to withdraw from the case by the judge. *Uniform Superior Court Rule* 30.2.

At arraignment of the defendant, the indictment or accusation will be read to him and he will be required to answer whether he is guilty or not guilty of the offense charged, which answer or plea shall be made orally by the defendant or his counsel. O.C.G.A. § 17-7-93. The reading of the indictment and oral answer may be waived. The indictment is then signed, joining the issue (the charge in the indictment versus the plea of not guilty) to be decided

by a trial. No trial can occur until issue is joined. *Hardwick v. State*, 231 Ga. 181 (1973).

All pretrial motions, including demurrers (challenges to the form or substance of the indictment) and special pleas, shall be filed within ten days after the date of arraignment, unless the time for filing is extended by the judge. O.C.G.A. § 17-7-110. A motion can be made asking for additional time after receipt of discovery (*See Chapter 7*) to file motions. If this motion is made, an order granting the motion should be attached for the judge's signature. If the judge does not grant an extension, any untimely motions may not be heard, and the defendant will not have any remedy on appeal.

Although the arraignment is the first opportunity after indictment for a defendant to enter a plea of guilty it is not necessarily the last. At arraignment, the prosecutor and defense enter into plea negotiations. (*See Chapter 8*). A plea offer may be communicated to the defendant that the defendant needs time to consider. The prosecutor may serve discovery (*See Chapter 7*) on the defendant at arraignment. The defense attorney may need time to review the discovery. For a variety of reasons, the case may not be ready to be resolved by a plea bargain. The case may be reset, also called further noticed, to another arraignment calendar, a pretrial conference, a status calendar, an inquiry calendar, or a trial calendar, for the parties to engage in further

plea discussions and exchange discovery. *Uniform Superior Court Rule* 7.3

If a defendant does not have an arraignment, the issue must be raised prior to trial. Any error in the lack of arraignment will be considered waived by the failure to raise the issue prior to trial. *Sevostiyanova v. State,* 313 Ga. App. 729 (2012); *Flores v. the State*, 308 Ga. App. 368 (2011).

A defendant who is later convicted is not entitled to a reversal of his conviction because he did not have an attorney at his arraignment. *Coney v. State,* 316 Ga. App 303 (2012); *Bache v. State,* 208 Ga. App. 591 (1993).

Chapter 7
Discovery

Discovery is the process by which the prosecution and defense exchange information about a criminal case. Both sides need this information to decide whether the case can be resolved by a plea agreement or has to be set down for a trial. The process of discovery is controlled by certain rules. The rules of discovery are set out in O.C.G.A. § 17-16-1 thru O.C.G.A. § 17-16-23 known as the Criminal Procedure Discovery Act ("the Act").

The Act applies only to those cases in which the defendant elects by written notice to have it apply. It imposes discovery obligations upon both the defendant and the prosecution. There is no general constitutional right to discovery in a criminal case. Therefore, if a defendant does not elect to have the Act apply to his case he is only entitled to a limited amount of information from the prosecution. See *State v. Lucious*, 271 Ga. 361, 370 (1999), setting forth the information to which a defendant who does not elect to have the discovery rules apply is still entitled.

The prosecution, upon motion by the defendant, has the duty to produce anything that is exculpatory or impeaching. *Brady v. Maryland,* 373 U.S. 83

(1963); *Hendricks v. State,* 290 Ga. 238 (2011). *Brady* is involved when the suppressed evidence is material, that is, if disclosed the result of the proceeding would have been different. *Young v. State,* 290 Ga. 441 (2012).

The defendant opts in, or makes the discovery rules apply to his case by giving written notice to the prosecutor that the rules will apply. When one defendant in a multi-defendant case opts into discovery, it shall apply to all defendants unless their cases are separated for trial.

Once a defendant elects to have the Act apply to his case, he will receive a discovery packet from the prosecutor. The discovery packet contains copies of documents from the prosecution file. The discovery packet gives the defense some indication of the nature of the case against the defendant and helps the defendant frame a defense. For example, the discovery packet will tell the defense if there are eyewitness identifications, statements by the defendant, statements of witness, inconsistencies in statements, and other information that will allow a defense attorney to create motions to suppress and otherwise prepare for trial. It also helps determine if a plea bargain is in the defendant's best interest.

Time for Discovery

Under O.C.G.A. § 17-16-3, every defendant is

entitled prior to arraignment to a copy of the indictment or accusation and a list of witnesses against him. The other provisions of the Act direct the prosecutor to provide discovery ten days before trial unless the judge sets another time. However, as a matter of practice, discovery is usually furnished earlier in the process, often around arraignment. Some judges set scheduling orders which tell the parties when discovery, motions, and other matters are due. Most defense attorneys give the defendant a copy of the discovery, but there is no rule requiring counsel to provide a defendant with copies of all discovery materials.

Discoverable Items

The Act requires the prosecution and the defense to disclose all discoverable material. The rules do not allow discovery of attorney work product. Further, the Act was not intended to apply to public information to which a defendant already has access. *Gonzales v. State*, 286 Ga. App. 821 (2007).

Information about Witnesses

When a defendant opts into discovery under the Act, O.C.G.A. § 17-16-8 (a) requires that the prosecuting attorney furnish to defense counsel "not later than ten days before trial . . . the names, current locations, dates of birth, and telephone numbers of the State's witnesses." The defendant's attorney is

required to furnish the same information within ten days of the prosecutor's notice but no later than five days prior to trial. The statute imposes an affirmative duty on the producing party to attempt to acquire the information. They cannot simply say that it is not within their possession. *State v. Dickerson*, 273 Ga. 408 (2001).

The witness list rule is designed to prevent a party from being surprised at trial by a witness that they have not had an opportunity to interview. *Powers v. State,* 314 Ga. App. 733 (2012). When the identity and involvement of a witness is disclosed to the defendant in the discovery, the purpose of the witness rule is served and the judge can allow the witness to testify even though the witness was not listed on the State's witness list. *Wilkins v.* State, S12A0658; *McLarty v.* State, 238 Ga. App. 21 (1999).The judge may allow an exception to the time rule where good cause is shown and the opposing attorney is given an opportunity to interview the witness. O.C.G.A. § 17-16-8(a); *Chance v. State,* 291 Ga. 241 (2012); *Norris v. State,* 289 Ga. 154 (2011); *Rose v. State,* 275 Ga. 214 (2002). The witnesses are not required to speak to the attorney. *Norris v. State*, 289 Ga. 154 (2011); *Mclarty v. State,* 238 Ga. App. 27 (1999). Either party may call as a witness any person listed on either the prosecution or defense witness list. O.C.G.A. § 17-16-10.

Witness Statements

No later than ten days prior to trial, or at such time as the judge permits, or at the time of any post-indictment pretrial evidentiary hearing other than a bond hearing, the prosecution or the defendant shall produce for the opposing party any written or recorded statement of any witness that is in their possession, custody, or control that relates to the subject matter concerning the testimony of the witness. Under O.C.G.A. § 17-16-1(1), an item within the possession, custody, or control of a law enforcement agency involved in the investigation of the case being prosecuted is within the possession, custody, or control of the prosecution. A party is not entitled to an oral unrecorded statement. *Downs v. State*, 257 Ga. App. 696 (2002).

Statements & Criminal History of Defendant

Under O.C.G.A. § 17-16-4, the prosecutor must disclose to the defendant and make available for inspection, copying, or photographing any relevant written or recorded statements by the defendant, including statements of co-conspirators that are attributable to the defendant. The prosecutor must also furnish the defendant a copy of his criminal history.

Alibi

Upon written demand by the prosecutor within ten days after arraignment, or at such time as the

judge permits, stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days of the demand of the prosecutor or ten days prior to trial, whichever is later, or as otherwise ordered by the judge, upon the prosecutor a written notice of the defendant's intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names, addresses, dates of birth, and telephone numbers of the witnesses, if known to the defendant, upon whom the defendant intends to rely to establish such alibi unless previously supplied. The defendant must give notice of his alibi even if he is the only witness planning to testify to his alibi. *State v. Charbonneau*, 281 Ga. 46 (2006).

The prosecutor shall serve upon the defendant within five days of the defendant's written notice of alibi but no later than five days before trial, whichever is later, a written notice stating the names, addresses, dates of birth, and telephone numbers of the witnesses, if known to the State, upon whom the State intends to rely to challenge the defendant's evidence of alibi, unless previously supplied.

Tangible Items

Under O.C.G.A. § 17-16-4, the prosecution must permit the defendant at a time agreed to by the parties

or ordered by the judge to inspect and copy or photograph books, papers, documents, photographs, tangible objects, audio and visual tapes, films and recordings, or copies or portions thereof and to inspect and photograph buildings or places which are within the possession, custody, or control of the State or prosecution and are intended for use by the prosecuting attorney as evidence in the prosecution´s case-in-chief or rebuttal at the trial. The duty to disclose only exists if the State intends to use the items at trial. *Zamora v.* State, 291 Ga. 512 (2012). The prosecution must also allow inspection or copying of items that were obtained from or belong to the defendant regardless of whether the prosecutor intends to use these items at trial. Evidence that is within the possession, custody, or control of the Forensic Sciences Division of the Georgia Bureau of Investigation or other laboratory for the purpose of testing and analysis may be examined, tested, and analyzed at the facility where the evidence is being held pursuant to reasonable rules and regulations.

The State must allow the defendant at a time agreed to by the parties or ordered by the judge to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report if the State intends to introduce this in evidence at trial. This does not include any material, note, or memorandum relating to the psychiatric or

psychological treatment or therapy of any victim or witness.

Also, the Act does not require the State to have its expert witness prepare a report; rather, it requires that if such a report exists, it be made available to the defendant. *Hullander v. State,* 271 Ga. 580 (1999). The defendant must within ten days of compliance by the prosecutor, but no later than five days prior to trial, permit the inspection or copying of books, papers, documents, etc., physical or mental examinations and of scientific tests or experiments.

The prosecutor shall, no later than ten days prior to trial, or at such time as the judge orders but in no event later than the beginning of the trial, provide the defendant with notice of any evidence in aggravation of punishment that the State intends to introduce in sentencing.

Under O.C.G.A. § 17-5-56 governmental entities in possession of any physical evidence in a criminal case, including, but not limited to, a law enforcement agency or a prosecuting attorney, shall 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. Biological samples collected directly from any person for use as reference materials for testing or collected for the purpose of drug or alcohol testing shall not be

preserved. In a case in which the death penalty is imposed, the evidence shall be maintained until the sentence in the case has been carried out. Evidence in all felony cases 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 shall be maintained for the period of time that the crime remains unsolved or until the sentence in the case is completed, whichever occurs last. A defendant seeking to have certain materials preserved should file a particularized motion specifying which items the defendant seeks preserved. *Clay v. State,* 290 Ga. 822 (2012).

Discovery Violations

There are penalties for failing to abide by the discovery rules. The judge can order compliance with discovery including an opportunity to interview witnesses or the judge can grant a continuance. *Patterson v. State,* 312 Ga. App. 793 (2012). A defendant must request a continuance to cure any prejudice which may have resulted from the prosecution's failure to comply with the rules of the Act. *Jones v. State,* 290 Ga. 576 (2012); *Hayes v. State,* 249 Ga. App. 857 (2001). The requirement that a defendant must ask for a continuance applies even if it would result in the waiver of a defendant's speedy trial demand. *Rosas v. State*, 276 Ga. App. 513 (2005). However, a prosecutor's demand that a defendant waive his right to a speedy trial in order to

receive the discovery to which he is entitled "deprives the defendant of his due process rights under the state and federal constitutions." *Ditman v. State*, 301 Ga. App. 187 (2009).

Only if the judge finds a party that has acted with bad faith and caused the other side prejudice, the judge can prohibit the evidence or witness altogether. O.C.G.A. § 17-16-6. *Wilkins v.* State, 291 Ga. 731 (2012). The judge also has the power to limit discovery upon a sufficient showing that discovery would create a substantial threat of physical or economic harm to a witness. O.C.G.A. § 17-16-4 (d); *Jones v. State,* 290 Ga. 576 (2012; *Boykin v. State,* 264 Ga. App. 836 (2003).

The failure to preserve evidence does not automatically constitute a constitutional violation. *Williams v. State*, A12A1623.

Chapter 8

Guilty Pleas

Most criminal cases are disposed of by a plea bargain. A plea bargain usually begins when a prosecutor makes a plea offer to the defense. Among the factors a prosecutor considers are the nature of the crime alleged, the defendant's criminal history, and any input from the alleged victim. The defense attorney has an obligation to tell the defendant about the plea offer. *In the Interest of K.F.,* 316 Ga. App. 437 (2012); *Lloyd v.* State, 258 Ga. 645 (1988). Once the prosecution makes a plea offer, the defense can make a counter-offer or simply accept the State's offer. The State may withdraw a plea offer at any time before it is accepted, even if the offer was supposed to be open for a certain period of time. *Bailey v. State,* 313 Ga. App. 824 (2012). Unless the State has received some consideration to keep the offer open, it is revocable at will. *Scott v. State*, 302 Ga. App. 111 (2010); *Sparks v. State*. 232 Ga. App. 179 (1998).

The end result of the discussions between the prosecution and defense is a negotiated plea agreement which is in essence a contract between the State and the defendant. *Clue v. State*, 273 Ga. App. 672 (2005); *Gibson v. State,* 257 Ga. App. 134

(2002). The judge cannot participate in the plea negotiations between the prosecution and the defense. The judge's participation in plea negotiations is prohibited as a constitutional matter when it is so great as to render a guilty plea involuntary. *Ealey v. State*, 310 Ga. App. 893 (2011); *McDaniel v. State*, 271 Ga. 552 (1990); *Skomer v. State*, 183 Ga. App. 308 (1987). However, the prosecution and defense can present a proposed plea agreement to the judge, and the judge is allowed to indicate whether he is likely to accept the plea as presented. *Uniform Superior Court Rule* 33.5.

A defendant does not have a right to plead guilty, and the judge is not required to accept the guilty plea. *Bullard v. State* 263 Ga. 682 (1993). If the judge accepts the negotiated plea, the case is over and the defendant receives the sentence he agreed upon. If the judge decides not to accept a negotiated sentence, the defendant can take back the plea of guilty, and the fact that the defendant wanted to plead guilty cannot be used against him at trial. O.C.G.A. § 17-7-93 (b); *Shoemake v. State*, 213 Ga. App. 528 (1994). Likewise, a defendant may not mention during trial the prosecutor's offer of a negotiated plea. *Davis v. State*, 255 Ga. 598 (1986).

In addition to a negotiated guilty plea, a defendant may enter a non-negotiated plea. In a non-negotiated plea sometimes called a blind plea, the prosecutor and defense have not reached any

agreement as to sentence. *Davis v.* State, A12A0674. The defendant pleads guilty without knowing the sentence (thus called a blind plea). The prosecutor tells the judge what he thinks the sentence should be and the defense attorney tells the judge what the defense thinks the sentence should be. The judge then decides the sentence. Whatever the judge decides is final. The defendant cannot take his plea back. *Skinner v. State*, 297 Ga. App. 828 (2009). The judge can sentence the defendant to anything up to the maximum sentence for the crime. The defendant has essentially thrown himself on the mercy of the court and has to accept the sentence the judge imposes. A defendant can enter a blind plea with a cap. The judge decides the sentence, but the parties agree that the maximum sentence will be capped at a certain figure. For instance, a defendant can enter a blind plea to aggravated assault (which carries a sentence of one to twenty years) with a cap of five years. The judge can sentence the defendant to anything up to five years.

Some judges let the defendant take back a blind plea if they don't like the sentence, however, some judges consider a non-negotiated plea to be binding and won't let the defendant withdraw the plea and enter a plea of not guilty.

Entry of Guilty Plea

The decision whether to plead guilty or not guilty

belongs to the defendant, not his attorney. *Cammer v. Walker,* 290 Ga. 251 (2011). The entry of a guilty plea involves the waiver of three federal constitutional rights: the privilege against compulsory self-incrimination (also called the right to remain silent at trial); the right to trial by jury; and the right to confront one's accusers. *Wilson v. Kemp*, 288 Ga. 779 (2011). A defendant entering a guilty plea also gives up all defenses the person may have at trial, except that the indictment charged no crime. *Pineda v. State,* A14A1256; *Carson v. State,* 314 Ga. App. 225 (2012) (includes waiver of argument that sentences merge).

A guilty plea is to be treated as an honest confession of guilt. *Shuler v. State*, 306 Ga. App. 820 (2010). However, sometimes a defendant may enter a guilty plea without admitting that he is in fact guilty of the crime. This plea is called an *Alford* plea after the case *North Carolina v. Alford*, 400 U.S. 25 (1970). However, if the plea is a negotiated plea, the State must agree to the *Alford* plea. Even if the State does not oppose an *Alford* plea, the judge does not have to accept the defendant's *Alford* plea. *Jackson v. State*, 251 Ga. App. 578 (2001). An *Alford* plea carries with it the same consequences of a regular guilty plea, including use in the future to sentence a defendant as a recidivist. *Wynn v. State*, 271 Ga. App. 10 (2004).

A defendant must knowingly, intelligently, and

voluntarily enter a guilty plea. Making a knowing and voluntary plea requires an understanding of the nature of the charge, the rights being waived, and the consequences of the plea. *Pride v. Kemp*, 289 Ga. 353 (2011). To ensure the defendant understands what he is doing a defendant who enters a guilty plea will be asked to give certain responses under oath. The defendant is usually asked if he is the same defendant named in the indictment and whether he has had a chance to read the indictment. He will be asked if he understands the charges against him. He will be asked if he is under the influence of any drugs, alcohol, or medication. The defendant will be asked if he has had enough time to discuss the case with his attorney and whether he is satisfied with the services of his attorney. The prosecutor may and most often does ask the questions. *Green v. State*, 291 Ga. 506 (2012).

The defendant will be informed that he has the right to a trial. At the trial he will have the presumption of innocence, the right to confront and question his accusers, the right to subpoena evidence and witnesses to court, the right to remain silent, the right to testify in his own defense, and the right to the assistance of counsel during trial. The defendant will be informed that if convicted he would have the right to an appeal and the right to an attorney to assist with that appeal. By pleading guilty the defendant waives all of these rights. The defendant also waives all defenses except those that relate to the knowing and

voluntary nature of the plea. *Greason v. State,* 312 Ga. App. 859 (2011); *Tyner v. State*, 289 Ga. 592 (2011); *Moore v. State*, 285 Ga. 855 (2009). While the better practice is for the judge to discuss on the record every essential right a defendant is waiving, the judge can accept a preprinted form, signed by the defendant prior to entering his plea, acknowledging that the defendant understands the rights he is waiving. *Shuler v. State*, 306 Ga. App. 820 (2010).

The judge must also make sure there is a factual basis for the plea. *Uniform Superior Court Rule* 33.9. This is usually done by the prosecutor stating what the evidence would show at trial. Of course this is from the prosecutor's perspective. The factual basis does not have to be true, only what the prosecutor expects to prove, and if proved would support the charges against the defendant in that jurisdiction. *King v. Hawkins*, 266 Ga. 655 (1996). The prosecutor will not set out the defendant's defenses. The prosecutor will also inform the defendant that the judge does not have to accept the negotiated sentence, but if the judge rejects the negotiated sentence the defendant can take back a negotiated plea. *Uniform Superior Court Rule* 33.10. However, the State cannot withdraw a plea because the judge intends to impose a lighter sentence. *State v. Harper*, 279 Ga. App. 620 (2006). Finally, the prosecutor will make sure the defendant has not been promised anything (other than the plea agreement), threatened, or coerced to enter the guilty plea. The

judge must also ensure that the defendant understands that if he is not a U.S. citizen, entering a guilty plea can lead to his deportation. O.C.G.A. § 17-7-93 (c).

After the prosecutor presents the plea, the judge will give the defense attorney an opportunity to speak on the defendant's behalf. The defense attorney will tell the judge about the defendant's background.

Withdrawal of a Guilty Plea

A defendant has an absolute right to withdraw his plea before the sentence is pronounced. *Kaiser v. State*, 285 Ga. App. 63 (2007); OCGA § 17-7-93 (b). After sentencing, withdraw of a plea is in the discretion of the judge. *Gower v. State,* 313 Ga. App. 635 (2012); *Earley v. State*, 310 Ga. App. 110 (2011); *Maddox v. State*, 278 Ga. 823 (2005).

A defendant who enters a guilty plea and then wants to withdraw that guilty plea must make a request (motion) during the same term of court in which he was sentenced. He does not get 30 days to take back his plea. *Smith v. State*, 283 Ga. 376 (2008). The terms of court are found in O.C.G.A. § 15-6-3. (See Appendix B). However, neither the judge nor the prosecutor are required to tell the defendant at the time of the plea that he has to ask to withdraw his plea during the term of court. *Bennett v. State*, 292 Ga. App. 382 (2008); *Ethridge v. State,* 283 Ga. App. 289 (2007).

The request to withdraw the guilty plea can be in the form of a letter to the judge filed with the clerk of court. *McKiernan v.* State, S09A1705. The motion does not have to be served upon the State, but the State must have reasonable notice of the motion. *Mahone v.* State, A12A1280. A defendant who files a motion to withdraw his guilty plea during the term of court is entitled to have a lawyer appointed to assist him in challenging the guilty plea. *Ford v. State,* 312 Ga. App. 80 (2011). *Fortson v. State*, 272 Ga. 457 (2000). The defendant is also entitled to a hearing. *Williams v. State*, 301 Ga. App. 849 (2010); *Banhi v. State*, 252 Ga. App. 475 (2001). After the term of court, the judge has no authority to withdraw a guilty plea, and the defendant must challenge the guilty plea by a habeas corpus action. *Rhone v. State*, 310 Ga. App. 182 (2011); *Davis v. State*, 274 Ga. 865 (2002).

A defendant will not be allowed to withdraw his guilty plea on the basis that he claims he is really innocent. *Shuler v. State,* 306 Ga. App. 820 (2010). The standard for withdrawing a guilty plea after sentencing is manifest injustice. *Shaheed v. State*, 276 Ga. 291 (2003). The definition of manifest injustice depends upon each case. Manifest injustice has been found when: (1) a defendant is denied effective assistance of counsel, or (2) the guilty plea was entered involuntarily or without an understanding of the nature of the charges. *Norwood v.* State, 311 Ga. App. 815 (2011). Manifest injustice does not exist simply because the defendant was

placed into circumstances where he had to make a last-minute drastic decision to enter a plea or was facing family pressure to persuade him to enter a plea. *Detoma v.* State, S14A0936; *Shaheed v.* State, 276 Ga. 291 (2003). Nor is manifest injustice to be found because the defendant's lawyer had not spoken with witnesses nor communicated with him while he remained in custody waiting for trial. *Wyckoff v. State*, 309 Ga. 627 (2011).

When a defendant challenges his guilty plea, the State has the burden of showing that the defendant intelligently and voluntarily entered the plea. The State may meet its burden by using the guilty plea transcript or through other evidence. *Norwood v.* State, 311 Ga. App. 815 (2011). However, when a defendant seeks to withdraw a guilty plea because of ineffectiveness of counsel, he must show that his lawyer's performance was deficient and that but for his lawyer's ineffectiveness a reasonable probability exists that he would have insisted on a trial. *Mahone v. State*, A12A1280.

Although there is no constitutional requirement that a defendant be informed of collateral consequences of a plea, such as parole eligibility, a lawyer's misrepresentations about those consequences in response to his client's specific inquiries may form the basis of an ineffective assistance of counsel claim. *Agnew v. State,* 309 Ga.

App. 163 (2011); *Smith v. Williams*, 277 Ga. 778 (2004); *Rollins v. State,* 277 Ga. 488 (2004).

On a motion to withdraw a guilty plea based on ineffective assistance of counsel, the defendant must show that had it not been for his attorney's deficient representation, a reasonable probability exists that he would have insisted on a trial. *Bailey v. State,* 313 Ga. App. 824 (2012).

First Offender Guilty Pleas

A defendant can enter a guilty plea under the First Offender Act. O.C.G.A. § 42-8-60. There is no adjudication of guilt. After the defendant successfully completes probation he is discharged automatically *Ailara v.* State, 311 Ga. App. 862 (2011, without a criminal conviction. O.C.G.A. § 42-8-62. The first offender is useful in disposing of a criminal case without the adverse effect on job opportunities and voting that a felony conviction might have. The purpose of the first offender law is to allow the first offender an opportunity for rehabilitation without the stigma of a criminal conviction. *State v. Wiley*, 233 Ga. 316 (1974). A person who completes first offender may still be disqualified from holding certain jobs depending on the charges the person pled guilty to and the type of job. O.C.G.A. § 42-8-63.

Whether to sentence a defendant under the First

Offender Act is left to the judge's discretion. *Moore v. State*, 236 Ga. App. 889 (1999). The judge must at least consider the request before making a decision. *Powell v. State*, 271 Ga. App. 550 (2005). The judge cannot use a mechanical sentencing formula or policy as to sentences. *Graydon v. State,* A12A0061. A person cannot enter a guilty plea under the First Offender Act on more than one occasion. O.C.G.A. § 42-8-60 (b). The "one occasion" language in the law means for one or more offenses in an indictment or accusation or for one or more offenses set forth in multiple indictments or accusations that are consolidated or joined for one trial. *Higdon v. State*, 311 Ga. App. 387 (2011). If the cases have not been joined for trial prior to entering the guilty plea, the defendant cannot get first offender for two or more cases even though they are disposed of at the same time.

If the defendant violates the terms of his first offender sentence the judge can revoke his first offender status, ender a finding of guilt and resentence the defendant up to the maximum of the crime minus credit for any time served on probation. *Bliss v. State*, 244 Ga. App. 160 (2000).

Appeal

In seeking to set aside his guilty plea, a defendant can either file a motion to withdraw his guilty plea or appeal the judgment directly to the

appeals court by filing a notice of appeal. A defendant who hopes to appeal from a guilty plea is not required to first file a motion to withdraw the guilty plea before filing a notice of appeal. *Tyner v. State*, 289 Ga. 592 (2011); *Smith v. State*, 281 Ga. 391 (2010). A motion for new trial is not the proper vehicle for appealing from a guilty plea. *Rosenborough v. State*, 311 Ga. App. 456 (2011).

A motion to withdraw guilty plea must be made within the term of court. A defendant then has the right to appeal the denial of his motion to withdraw the guilty plea. *Cruz v. State*, 311 Ga. App. 527 (2011). If the defendant chooses to appeal directly to the appeals court a notice of appeal must be filed in the clerk's office where the plea was made within 30 days. O.C.G.A. § 5-6-38 (a).

There is no absolute right to appeal from a guilty plea. An appeal from a guilty plea is only permitted if the issues the defendant wants to raise can be determined by a review of the transcript of the guilty plea. *Clayton v. State*, 285 Ga. 404 (2009). If the right to appeal was lost either by the lawyer's negligence or the judge's failure to inform the defendant of his right to appeal, the remedy is an out of time appeal. *Cobb v. State*, 265 Ga. 74 (2008). However, in order for an out-of-time appeal to be available on the grounds of ineffective assistance of counsel, the defendant must have had the right to file an appeal in the first place. The ability to decide the

appeal based on the guilty plea transcript thus becomes the deciding factor in determining the availability of an out-of-time appeal when the defendant has pled guilty. Issues regarding the effectiveness of counsel are not reached unless the requirement that the appeal be resolved by the facts in the transcript is met. *Barlow v. State*, 282 Ga. 232 (2007). The transcript of the guilty plea hearing is presumed to be the true, complete, and correct record of what transpired during the hearing. O.C.G.A. § 15-14-5; *Detoma v. State*, S14A0936. If the judge examines the transcript and determines that there is no merit to the defendant's claims, the judge can deny the request for an out of time appeal without conducting a hearing. *Childs v. State*, 311 Ga. App. 891 (2011); *Adams v. State*, 285 Ga. 744 (2009). The defendant can then appeal that decision to the appeals court.

Dead Docket & Dismissals

When a case is placed on the dead docket it is not dismissed. The dead docket is a procedural device by which the prosecution is postponed indefinitely but may be brought back up any time on the decision of the judge. A case is still pending which can be called for trial. The case is dead docketed upon motion to the judge and at the discretion of the judge. Placing a criminal case on the dead docket over a defendant's objection is an abuse of the judge's discretion. *Newman v. State*,

121 Ga. App 692 (1970). The dead docket device may not be used to delay the trial over the defendant's objection. The defendant may still file a demand for a speedy trial on a case that is on the dead docket. Where the case has been placed on the dead docket over the objection of the State, the State may seek review by filing a petition for mandamus. *State v. Creel*, 216 Ga. App. 394 (1995).

The entry of a nolle prosequi, commonly referred to as a dismissal, does not act as an acquittal or bar future prosecution for the same offense. *Phillips v. State*, 298 Ga. App. 520 (2009). The State has the authority to re-indict the defendant for the same offense within the applicable statute of limitations, or within six months after the entry of the nolle prosequi if that occurs later. O.C.G.A. § 17-3-3; *Hicks v. State*, 315 Ga. App. 779 (2012); *Sevostiyanova v. State,* A11A1864; *Bell v. State*, 295 Ga. App. 607 (2009). This is true whether the indictment was quashed or a nolle prosequi was entered.

Furthermore, only the State can dismiss the charges. The victim cannot drop the charges. "The State has both the duty and the right to protect the security of its citizens by prosecuting crime. Because the purpose of criminal law is to serve the public functions of deterrence, rehabilitation, and retribution, it is the State, not the victim that has an interest in criminal prosecutions." *Golden v. State*,

299 Ga. App. 407 (2009). A judge does not have authority to dismiss a case over the State's objection simply because the victim does not want to pursue the case. *State v. Colquitt*, 147 Ga. App. 627 (1978).

Chapter 9
Pretrial Motions

Pretrial motions are one of the most important parts of a criminal case. They present an opportunity for the defense to discover and test the strength and admissibility of the State's evidence against a defendant. Among the various motions that can be filed some of the more common include the following:

Notice Of Defendant's Election To Proceed Under O.C.G.A. 17-16-1 Et Seq. and Demand For Discovery; Motion For Discovery, Inspection, Production and Copying Of Evidence Favorable To The Accused Pursuant To Brady v. Maryland; Motion for In Camera Inspection Of State Files; Motion For Pretrial Disclosure Of Evidence Of Independent and Separate Offenses, Wrongs Or Acts; Motion To Require The State To Reveal Any Agreement Entered Into Between The State And Any Witness; Motion To Preserve The Evidence; Motion To Suppress Illegally Obtained Evidence; Motion to Suppress Pretrial Identification; Motion to Suppress Defendant's Statement; Motion for Severance Of Offenses; Motion to Transfer Case to Juvenile Court; Motion for Funds to Obtain An Expert Witness; Motion for Severance Of Defendants; Demurrer to the Indictment; Motion for Complete Recordation of All Proceedings; Motion Reserving the Right to file Additional Motions; and Motion to Adopt Motions Of Co-Defendants.

There is no motion to have the charges reduced. The prosecutor has brought the charges, and only the prosecution can decide to reduce the charges. The process of asking for the charges to be reduced happens during plea negotiations.

Time for Filing

All pretrial motions, including demurrers (challenges to the form or substance of the indictment) and special pleas, shall be filed within ten days after the date of arraignment, unless the time for filing is extended by the judge. O.C.G.A. § 17-7-110. *Taylor v,* State, A13A1899. The defense may need to review the discovery before deciding which motions to file. In that case, a motion can be made asking for additional time after receipt of discovery to file motions. If the judge does not grant an extension, any untimely motions may not be heard and the defendant will not have any remedy on appeal. *Flournoy v. State*, 299 Ga. App. 377 (2009). There does not need to be a written order granting the extension. *State v.* Mojica, 316 Ga. App. 619 (2012). The defense can also file general motions and then particularize them (make those motions more specific) once discovery is received. If no timely demurrer is filed, the defendant must pursue a motion in arrest of judgment *Jackson v. State*, 284 Ga. App. 619 (2007).

Notices of the States intention to present evidence of similar transactions or occurrences (404b evidence) and notices of the intention of the defense to raise the issue of insanity or mental illness, or the intention of the defense to introduce evidence of specific acts of violence by the victim against third persons, shall be given and filed at least ten days

before trial unless the time is shortened or lengthened by the judge. *Uniform Superior Court Rule* 31.1

CHALLENGES TO THE INDICTMENT

Demurrers, Motions to Quash, and Pleas

A defendant may challenge the indictment by filing a general or special demurrer. O.C.G.A. § 17-7-111. "A general demurrer challenges the *substance* of the indictment, whereas a special demurrer challenges the *form* of the indictment." *State v. Corhen*, 306 Ga. App. 495 (2010); *State v. Horsley*, 310 Ga. App. 324 (2011). A demurrer must attack problems that appear in the indictment. In raising a demurrer the defendant cannot add facts to prove that the indictment is defective. This is called a speaking demurrer and is not proper. *State v. Holmes*, 142 Ga. App. 847 (1977). A speaking demurrer is one which alleges some new matter not shown by the indictment and not generally known or legally presumed to be true. *State v. Grube,* 315 Ga. App. 885 (2012).

A general demurrer challenges the validity of an indictment. Thus, it can be raised at anytime. *State v. Eubanks*, 239 Ga. 483 (1977). If an accused would be guilty of the crime charged if the facts as alleged in the indictment are taken as true, then the indictment is sufficient to withstand a general demurrer; however, if an accused can admit to all of the facts charged in the indictment and still be innocent of a crime, the indictment is insufficient and

is subject to a general demurrer. *Lowe v. State*, 276 Ga. 538 (2003). A general demurrer can challenge a defect in the indictment affecting the substance and merits of the offense charged, such as a failure to charge a necessary element of the offense. *Coleman v. State*, 318 Ga. App. 478 (2012).

A motion to quash an indictment is classified as a general demurrer. *Traylor v. State*, 165 Ga. App. 226 (1983). An indictment cannot be quashed based on sufficiency of the evidence to support it because prior to trial no one knows what the State's evidence will show at trial. *State v. Pattee*, 201 Ga. App. 690 (1991).

By special demurrer, a defendant claims, not that the charge in an indictment is fatally defective and incapable of supporting a conviction, but rather that the charge is imperfect as to form or that the defendant is entitled to more information. *Eubanks v. State*, 239 Ga. 483 (1977). A defendant who has timely filed a special demurrer is entitled to an indictment perfect in form and substance. Each count set forth in an indictment must be wholly complete within itself, and must plainly, fully, and distinctly set out the crime charged in that count. *Smith v. Hardrick*, 266 Ga. 54 (1995).

When determining whether an indictment [or accusation] is sufficient to withstand a special demurrer, the applicable standard is not whether the

indictment [or accusation] could have been made more specific, but whether it contains the elements of the offense intended to be charged, and sufficiently informs the defendant of what he must be prepared to meet. *State v. Meeks*, 309 Ga. App. 855 (2011). When presented with a special demurrer, the judge should examine the indictment [or accusation] from the perspective that the defendant is innocent. Nevertheless, the language of an indictment [or accusation] is to be interpreted liberally in favor of the State, while the defendant's objections to the indictment [or accusation], as presented in a special demurrer, are strictly construed against the defendant. *State v. Corhen*, 306 Ga. App. 495 (2010).

"Generally, an indictment [or accusation] which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely special demurrer." *State v. Meeks*, 309 Ga. App. 855 (2011); OCGA § 17-7-54 (a). Where the evidence does not permit the State to identify a single date on which the offense occurred, the indictment may allege the offense was committed between two dates, the exact date being unknown to the grand jury. *Hutton v. State*, 192 Ga. App. 239 (1989). However, the exception does not apply unless the State first presents evidence to the judge showing that it cannot more specifically identify the dates of the alleged offenses. *Howard v. State*, 281 Ga. App. 797 (2006). If an indictment [or accusation] alleges that a crime occurred between two particular dates, and if

evidence presented to the judge shows that the State can reasonably narrow the range of dates during which the crime is alleged to have occurred, the indictment [or accusation] is subject to a special demurrer. *State v. Layman*, 279 Ga. 340 (2005).

When the exact date of a crime is not a material allegation in the indictment, the State may prove that the crime took place on any date prior to the return of the indictment and within the statute of limitations. *Gordon v. State,* A14A0440. If there is a variation from the dates alleged in the indictment and the dates proved at trial, the variance does not entitle a defendant to a new trial unless the variance surprises or prejudices the defendant by depriving him of an alibi defense. *Adams v. State,* 288 Ga. 695 (2011); *Hutton v. State*, 192 Ga. App. 239 (1989).

Where a count of an indictment or accusation distinguishes it from all other counts, either by alleging a different set of facts or a different date which is made an essential element of the offense, the State may on conviction punish the defendant for the various crimes. *Conley v. State*, 281 Ga. App. 841 (2006). However, if the counts of the indictment allege a range of dates identical with that alleged in another count, and provides no additional facts by which it can be distinguished from the other count it is entirely duplicative and subject to a special demurrer. It does not matter that the count alleges

that it is separate and distinct from other counts in the indictment.

A defendant may also file a plea in bar alleging that the prosecution is barred from proceeding. A motion alleging the statute of limitations has expired, double jeopardy, or a violation of a defendant's right to a speedy trial are examples of a plea in bar.

A defendant can file a plea of misnomer stating that the name in the indictment is incorrect. The plea of misnomer should state the true name of the defendant, that he had never been known by any other name than that, and that he was not known and called by the name which is contained in the indictment.

Immunity

O.C.G.A. § 16-3-24.2 provides statutory immunity for a person using force that arose in self-defense unless the defendant uses a weapon that he was not allowed to carry or possess, for instance because he is a convicted felon. The judge must rule on a motion for immunity prior to trial. *Fair v. State,* 284 Ga. 165 (2008). The defendant must prove by a preponderance of evidence that he is entitled to immunity. *Bunn v. State*, 284 Ga. 410 (2008); *State v. Green*, S11A1037. The judge may only decide the issue before, not after trial. After trial the judge

cannot reconsider his prior ruling. *State v. Hipp,* 314 Ga. App. 520 (2012).

Double Jeopardy

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. *Dahlman v. State*, 311 Ga. App. 465 (2011).

Multiple Crimes

Under OCGA § 16-1-7, a defendant may be prosecuted for more than one crime based upon the same conduct. He may not however, be able to be convicted and punished for both crimes. Further, if several crimes arising from the same conduct are known to the proper prosecuting officer at the time of beginning the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution unless the judge grants a severance of offenses. This provision was "designed to protect an accused against the harassment of multiple prosecutions arising from the same conduct." *Waites v. State*, 238 Ga. 683 (1977).

Same Crime

Under O.C.G.A. § 16-1-8, a prosecution is barred if the accused was formerly prosecuted for the

same crime based upon the same material facts, if the earlier prosecution: (1) Resulted in either a conviction or an acquittal; or (2) Was terminated improperly after the jury was impaneled and sworn or, in a trial before a judge without a jury, after the first witness was sworn or after a plea of guilty was accepted by the court.

In determining whether two offenses arise from the same conduct or transaction, Georgia courts have considered whether the two crimes involve the same parties, circumstances, locations, and times. *State v. Stewart,* A12A0551.

Different Crimes

A prosecution is barred if the defendant was already prosecuted for a different crime or for the same crime based upon different facts, if the earlier prosecution: (1) Resulted in either a conviction or an acquittal and the subsequent prosecution is for a crime of which the defendant could have been convicted during the earlier prosecution, is for a crime with which the defendant should have been charged as a part of the former prosecution (unless the judge ordered a separate trial of such charge), or is for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution or unless the crime was not finished when the former trial began; or (2) Was terminated improperly and the subsequent

prosecution is for a crime of which the accused could have been convicted if the earlier prosecution had not been terminated improperly.

A trial is not improperly terminated if: (1) The defendant consents to the termination or waives by some action his right to object to the termination; or (2) The judge finds that the termination is necessary because: (A) It is physically impossible to proceed with the trial; (B) Prejudicial conduct in or out of the courtroom makes it impossible to proceed with the trial without injustice to the defendant; (C) The jury is unable to agree upon a verdict; or (D) False statements of a juror during jury selection prevent a fair trial.

Federal / State

When a person in a single act breaks the law of two sovereigns, such as the United States and the State of Georgia, the person has committed two distinct offenses and may be prosecuted and punished by each sovereign. This is called the doctrine of dual sovereignty. Successive prosecutions by two separate sovereigns does not violate double jeopardy. Georgia law limits dual sovereignty. O.C.G.A. § 16-1-8(c). The question is whether the prior federal prosecution was for a crime that was within the concurrent jurisdiction of Georgia. *Sullivan v. State,* 279 Ga. 893 (2005).

A prosecution is barred if the defendant was formerly prosecuted in federal court for a crime which is within the concurrent jurisdiction of Georgia if such former prosecution resulted in either a conviction or an acquittal and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution or unless the crime was not finished when the former trial began.

A second prosecution is not barred if: (1) The court had no jurisdiction; or (2) The defendant's conviction was reversed or set aside, unless there was a finding that the evidence was not sufficient to support the conviction.

Insufficient Evidence

There is no basis in Georgia criminal practice for a motion seeking to dismiss an indictment on the ground that the State cannot prove facts essential to the charge. *State v. Benton*, 305 Ga. App. 332 (2010).

SUPPRESSION OF EVIDENCE

Motions to Suppress Illegally Seized Evidence

O.C.G.A. § 17-5-30 establishes a procedure for the return of lawful property seized and the suppression of evidence obtained by unlawful search and seizure. It specifically provides that a motion to

suppress evidence illegally seized "shall be in writing and state facts showing that the search and seizure were unlawful." *Nelson v. State*, 305 Ga. App. 65 (2010); *Young v. State*, 282 Ga. 735 (2007). A motion to suppress deals only with the suppression of tangible/physical evidence. *Walker v. State*, 314 Ga. App. 67 (2012). Motions seeking to keep out testimony are called motions in limine and are made prior to trial. *(See, Vol. II, Understanding Criminal Justice, Going to Trial)*.

Once a motion to suppress is filed the judge must conduct a hearing outside the presence of the jury. *Gray v. State*, 145 Ga. App. 293 (1978). Hearsay testimony is admissible at a motion to suppress hearing. *McDaniel v. State*, 263 Ga. App. 625 (2003). The burden of proof is on the State to prove the lawfulness of the search and seizure. *Davis v. State,* 266 Ga. 212 (1996); *Pope v. State*, 134 Ga. App. 455 (1975). A defendant may testify at the motion to suppress hearing, and the testimony may not be admitted during the trial unless the defendant testifies during the trial. *Smith v. State*, 236 Ga. 12 (1976).

To challenge a search, a defendant must show he had an expectation of privacy in the place that was searched. *English v. State*, 288 Ga. App. 436 (2007). A person who has an expectation of privacy is said to have "standing" to contest the search. *Bowling v. State,* 289 Ga. 881 (2011). A defendant may move

to suppress evidence obtained through an illegal search and seizure only when his own rights were violated. A person who is harmed by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's home has not had any of his Fourth Amendment rights violated.

There is no reasonable expectation of privacy in information that has been voluntarily conveyed to another (for example bank records and phone numbers) and then maintained in the business records of the other. *Hatcher v. State,* 314 Ga. App. 836 (2012). The mere presence of papers bearing a defendant's name, without further evidence connecting a defendant to a residence does not establish that the defendant had a reasonable expectation of privacy. *Brown v. State*, S14A0901.

The defendant must also show that an agent of the government searched theitem in which he had an expectation of privacy. *Hatcher v. State,* 314 Ga. App. 836 (2012).

In challenging a judge's denial of a motion to suppress, a defendant may not argue on appeal grounds that he did not argue and obtain a ruling on from the judge. *Richardson v. State,* A14A0409.

Fruit Of The Poisonous Tree

The fruits of an illegal search or arrest should be suppressed when they bear a significantly close relationship to the underlying illegality. *State v. Driggers*, 306 Ga. App. 849 (2010); *State v. Boppell*, 277 Ga. 595 (2004). When examining whether evidence is the fruit of illegal activity the question is whether the evidence was obtained by exploiting the illegal activity. *Walker v. State,* 314 Ga. App. 67 (2012).

Home

The physical entry into a person's home is the chief evil against which the wording of the Fourth Amendment is directed. The main way to protect against police intrusions into a person's home is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. *Liles v. State*, 311 Ga. App. 355 (2011). The law says that even where probable cause exists, warrantless entry into a person's home is prohibited by the Fourth Amendment, absent consent or a showing of exigent circumstances. *Welchel v. State*, 255 Ga. App. 556 (2002).

Hotels

An individual has a reasonable expectation of privacy in a hotel room only if he: (1) is a registered guest of the room in question; or (2) is staying at least

overnight in the room, at the invitation of the registered guest. *Snider v. State*, 292 Ga. App. 180 (2008). A visitor to a hotel room has no reasonable expectation of privacy in the room. *Watkins v. State*, 285 Ga. 107 (2009); *Smith v. State*, 284 Ga. 17 (2008); *State v. Carter*, 299 Ga. App. 3 (2009).

Although registered guests of a hotel room can have an expectation of privacy in their room, S*mith v. State*, 284 Ga. 17 (2008), one who obtains a room by fraud can have no reasonable expectation of privacy in the room. This rule is similar to the one that a person who is driving a stolen vehicle has no expectation of privacy in the vehicle. *Thomas v. State*, 274 Ga. 156 (2001).

Searches with a warrant

There is a strong preference for searches to be conducted with a warrant. *State v. Palmer*, 285 Ga. 75 (2009). Search warrants are obtained when a police officer presents an affidavit under oath to a judge asking for a search warrant. The officer who submits and signs the affidavit is called the affiant. The affidavit can contain hearsay information from persons other than the affiant. In deciding whether an affidavit creates sufficient probable cause for the issuance of a warrant, the issuing judge must make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before him, including the veracity or reliability and basis of

knowledge of any persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Martinez-Vargas v.* State, A12A0764; Henson *v. State,* 314 Ga. App. 152 (2012). Probable cause cannot be based upon mere conclusions, stating only the affiant's belief that probable cause exists, without detailing the underlying circumstances upon which that belief is based. *Willoughby v. State,* 315 Ga. App. 401 (2012).

A search warrant may issue only upon facts sufficient to show probable cause that a crime is being committed or has been committed. O.C.G.A. § 17-5-21; *Martinez v. State,* 312 Ga. App. 638 (2012). The warrant cannot leave the determination of what articles fall within the description and are to be seized entirely to the judgment of the officer executing the warrant. However, the degree of specificity in the description is flexible and will vary with the circumstances involved. The particularity requirement only requires that the officer be able to identify the property sought with reasonable certainty. *Womack v. State*, A12A0961; *Reaves v. State*, 284 Ga. 181 (2008).

The duty of the judge hearing the motion to suppress is simply to ensure that the judge who issued the search warrant had a substantial basis for concluding that probable cause existed. *Martis v. State*, 305 Ga. App. 17 (2010).

Probable cause to search may be provided by information from a reliable confidential informant. *Hall v. State*, 310 Ga. App. 397 (2011). Probable cause is determined by the totality of the circumstances surrounding (1) the basis of the informant's knowledge; and (2) the informant's veracity or reliability. *James v. State,* 312 Ga. App. 130 (2012); *Wilson v. State*, 249 Ga. App. 560 (2001). A deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. The fact that the informant has a criminal history does not prevent a finding that the informant is reliable. *Zorn v. State*, 291 Ga. App. 613 (2008). The officer is not required to divulge the details regarding the prior cases to establish the informant's reliability. *Butler v. State*, 185 Ga. App. 478 (1988). However, compare *Galgano v. State*, 147 Ga. App. 284 (1978), concluding that a bare assertion that the informant had provided information in the past was insufficient to furnish a basis for determining his reliability.

Anonymous Tips

A tip provided by an informant of unknown reliability will not ordinarily create a reasonable suspicion of criminal activity. However, if the tip is detailed enough to provide some basis for predicting

future behavior of the suspect, reliability may be established if the details are corroborated by the observations of the police. *Register v. State,* 315 Ga. App. 776 (2012); *State v. Dukes,* 279 Ga. App. 247 (2006). The information corroborated will generally need to be a prediction of future behavior. *Vonlinsome v. State,* 213 Ga. App. 619 (1994). However, under certain circumstances an anonymous tip may have sufficient indicia of reliability to justify a stop. *Britton v. State,* 220 Ga. App. 120 (1996). The reliability of an anonymous source of unknown reliability must be corroborated. Hearsay information supplied by an identified citizen is not as suspect as information by an anonymous tipster. A law abiding citizen has built in credibility. *Webb v. State,* 313 Ga. App. 620 (2012); *Manzione v. State,* 312 Ga. App. 638 (2012).

An affidavit is presumed valid unless there is proof that it contained deliberate falsehoods, was made with reckless disregard of the truth, or that the affiant consciously omitted material facts. *Carson v. State,* 314 Ga. App. 515 (2012). If the judge determines that the affidavit contained material misrepresentations or omissions, the false statements must be deleted, the omitted truthful material included, and the affidavit must be re-examined to determine whether probable cause existed to issue the

warrant. *Jones v. State,* 312 Ga. App. 130 (2012); *Jefferson v. State,* 312 Ga. App. 842 (2011).

The search warrant must state with specificity the place or persons to be searched and the things to be seized. O.C.G.A. § 17-5-21. The test for evaluating the particularity of a warrant's premises description is "whether the description is sufficient to enable a prudent officer executing the warrant to locate [the place to be searched] definitely and with reasonable certainty. "Furthermore, the degree of the description's specificity is flexible and will vary with the circumstances involved." "While a description of the place to be searched must be particular enough to guide the executing officer as to where the warrant is to be executed, there is in addition the requirement that the description be sufficiently narrow in the sense of not outrunning the probable cause showing." Under the particularity requirement of the Fourth Amendment, the general rule is that a search warrant for an apartment house or hotel or other multiple-occupancy building will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately. There are, however, exceptions to this general rule. "The warrant of a multi-unit structure will be valid where (1) there is probable cause to search each unit; (2) the targets of the investigation have access to the

entire structure; or (3) the officers reasonably believed that the premises had only a single unit." *Conrad v. State,* A12A0070; *Fair v. State,* 284 Ga. 165 (2008). A search warrant that fails to state with sufficient specificiity what items can be seized is a general warrant and unconstitutional. *Carson v. State,* 314 Ga. App. 515 (2012). If the warrant is issued based on probable cause to search only one residence at a described address, but other residences are also located at that address, the warrant must more specifically describe the property to be searched. *State v. Capps*, 252 Ga. 14 (1996).

The search warrant must be executed within ten days of its signing. O.C.G.A. § 17-5-25. The search warrant shall be issued in duplicate and shall be directed for execution to all peace officers of this state. However, the judicial officer may direct the search warrant to be executed by any peace officer named specially therein. O.C.G.A. § 17-5-24. Further, private citizens, acting under the supervision of the police, can participate in the execution of the warrant. *Twiggs v. State,* 315 Ga. App. 191 (2012).

The police must make a good faith attempt to verbally announce their authority and purpose before entering to execute a search warrant. *State v. Cash,*

316 Ga. App. 324 (2012). The warrant can authorize a “no-knock” entry where the police demonstrate a reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would allow the destruction of evidence. The “no-knock” provision must be based on the facts and circumstances of the case and not the generalized experiences of the officers. *State v. Barnett,* 314 Ga. App. 17 (2012); *State v. Williams,* 275 Ga. App. 612 (2005).

When a search warrant is executed, the duplicate copy shall be left with any person from whom any instruments, articles, or things are seized; or, if no person is available, the copy shall be left in a conspicuous place on the premises from which the instruments, articles, or things were seized." O.C.G.A. § 17-5-24; O.C.G.A. § 17-5-25. However, similar to other statutory warrant requirements, a violation of OCGA § 17-5-25 "does not necessarily authorize evidence suppression." *State v. Stafford*, 277 Ga. App. 852 (2006). On the contrary, OCGA § 17-5-31 provides that "no search warrant shall be quashed or evidence suppressed because of a technical irregularity not affecting the substantial rights of the accused." *Carson v. State,* 314 Ga. App. 515 (2012).

Therefore, "absent some showing of prejudice by the defendant," the failure to leave a signed and dated copy of the warrant is an omission that is "technical in nature and not grounds for suppression." *Brundige v. State*, 310 Ga. App. 900 (2011). Verbal notice should be given prior to using force to enter the property. O.C.G.A. § 17-5-27. The police may detain any person on the premises to be searched. O.C.G.A. § 17-5-28. A written return of everything seized must be filed and a person from whom items were seized can get a list of those items from the court. O.C.G.A. § 17-5-29.

Where a search was conducted lawfully, it does not become invalid simply because the warrant was overbroad. *Jones v. State,* 313 Ga. App. 590 (2012); *Butler v. State,* 130 Ga. App. 469 (1973).

The State can obtain the private medical records of a defendant through a search warrant without notice to the defendant or a hearing on the request. *Jones v. State,* 313 Ga. App. 590 (2012); *King v. State,* 276 Ga. 126 (2003). A defendant is not entitled to notice and an opportunity to be heard prior

to issuing a search warrant. *Bowling v. State,* 289 Ga. 881 (2011).

Staleness

The mere passage of time does not equate with staleness. *Carson v. State,* 314 Ga. App. 515 (2012). To determine if the information in the warrant is current or stale the judge must view the circumstances for indicators that the conditions referenced in the affidavit would continue to exist at the time of the warrant. *Newton v. State,* 313 Ga. App. 889 (2012); *Shivers v. State,* 258 Ga. App. 253 (2002).

Wiretaps

The evidence must have been obtained in a manner not inconsistent with the requirements of both federal and state law. O.C.G.A. § 16-11-64.

Exceptions To The Warrant Requirement

Searches conducted without prior approval of a judge are per se unreasonable under the Fourth Amendment subject to a few exceptions. *Hawkins v. State,* 290 Ga. 785 (2012). The State bears the burden of showing circumstances constituting an exception to the prohibition against warrantless searches and seizures. *State v. Mason*, 273 Ga. App. 596 (2005).

Even where probable cause exists warrantless intrusion of a person's home is prohibited by the Fourth Amendment, absent consent or a showing of exigent circumstances. *Steagald v. United States*, 451 U.S. 204 (1981); *Welchel v. State*, 255 Ga. App. 556 (2002).

Consent

A warrantless search of a residence may be authorized by the consent of any person who possesses common authority over or a sufficient relationship to the premises to be inspected. *Payton v. State*, A13A1980; *Pike v. State*, 265 Ga. App. 575 (2004). When consent is offered as an exception to the warrant requirement, the State bears the burden of showing that the consent was voluntarily given and not the result of duress or coercion or an illegal detention. *Berry v. State,* 313 Ga. App. 516 (2012); *Pledger v. State*, 257 Ga. App. 794 (2002); *Code v. State*, 234 Ga. 90 (1975); *Gray v. State*, 296 Ga. App. 878 (2009). Voluntariness is a question of fact to be

determined by the judge from all of the circumstances. *Maloy v. State*, 293 Ga. App. 648 (2008). "The presence of several police officers does not require a finding of coercion, although it merits close judicial scrutiny." *Silverio v. State*, 306 Ga. App. 438 (2010). The officers cannot misrepresent their authority to enter and search the defendant's property. *Berry v. State,* A11A1502.

A landlord cannot give consent to search a tenant's quarters. *Payton v. State*, A13A1980.

The State has the burden of proving the validity of a consensual search and must show that the consent is given voluntarily. Consent which is the product of coercion or deceit on the part of the police is invalid. *State v. Hamby*, A12A1159. Consent is not voluntary when it is the result of duress or coercion. The voluntariness of any consent is to be determined by the totality of the circumstances using the standard of objective reasonableness. The question is whether a reasonable person would feel free to decline the request to search. *State v. Jordan*, 264 Ga. App. 118 (2003).

Exigent Circumstances

Exigent circumstances may exist when a warrantless entry is necessary for the police "to preserve public order, to maintain the peace, and to protect lives, persons, property, health and morals. In these cases, police do not enter a residence for the purpose of arresting or seizing evidence against an occupant; rather, they enter in response to what they reasonably perceive as an emergency involving a threat to life or property." *Staib v. State*, 309 Ga. App. 785 (2011); *Love v. State*, 290 Ga. App. 486 (2008).

The Automobile Exception

Under the automobile exception to the warrant requirement of the Fourth Amendment, 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 emergency preventing the officer from getting a search warrant. *Shell v. State,* 315 Ga. App. 628 (2012); *O'Neal v. State*, 311 Ga. App. 102 (2011). Because there is no emergency requirement in this context, the warrantless search of an automobile will be upheld so long as there was probable cause to suspect it contained contraband, even if the driver was arrested and handcuffed and the keys were taken from him before the car was searched. *Sarden v. State*, 305 Ga. App. 587 (2010).

The automobile exception allows the entire vehicle to be searched including all containers and packages. *Brown v. State*, 311 Ga. App. 405 (2011).

Roadblocks

Martin v. State, 313 Ga. App. 226 (2011); *Jacobs v. State,* 308 Ga. App. 117 (2011); Hite v. State, 315 Ga. App. 221 (2012); State v. Brown, 315 Ga. App. 154 (2012)

Impound

When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. *Ahmad v. State,* 312 Ga. App. 703 (2011). Evidence discovered during such an inventory search is properly seized without a warrant and is admissible into evidence at a subsequent criminal trial. *Highland v. State*, 144 Ga. App. 594, 595 (241 S.E.2d 477) (1978). However, the police may not impound a vehicle as a way to search for contraband. *State v. Carter* 305 Ga. App. 814 (2010).

Impoundment of a vehicle is valid only if there is some necessity for the police to take custody of the vehicle. *Grizzle v. State*, 310 Ga. App. 577 (2011).

Factors the judge is to consider are: was the offense for which a defendant was arrested related to the vehicle; was the vehicle legally parked in a safe and secure place on private property; whether the owner of the private property requested that the vehicle be removed; and whether the defendant was asked if anyone could come get the vehicle. *State v. Lowe*, 224 Ga. App. 228 (1997); *Fortson v. State*, 262 Ga. 3 (1992); *State v. McCranie*, 137 Ga.App. 369 (1976). As part of an inventory search, the police "may ordinarily inspect the glove compartment, the trunk, on top of the seats as well as under the front seats, and the floor of the automobile." *Arnold v. State*, 155 Ga. App. 581 (1980). The police also may ordinarily examine the contents of bags and containers found in those locations of the vehicle as part of the inventory search. See *Lopez v. State*, 286 Ga. App. 873 (2007); *Grimes v. State*, 303 Ga. App. 808 (2010).

The police are not required to ask the owner of a car what he would like to have done with the car when the owner is arrestee and there is no one present at the scene to take custody of the car and safely remove it. *Scott v. State*, 316 Ga. App. 341 (2012).

Incident to Arrest

As part of a lawful arrest, an officer may search the person of the arrestee. *State v.* Hargis, S13G0645.The arrest of an individual will provide a

basis for searching the passenger compartment of the arrestee's vehicle and any containers therein when it is reasonable to believe evidence related to the crime of arrest might be found in the vehicle. *State v. Taplin,* 315 Ga. App. 622 (2012); *Arizona v. Gant,* 556 U.S. 332 (2009).

Inevitable Discovery

Under the inevitable discovery rule, if the State shows by a preponderance of the evidence that illegally obtained evidence would have been discovered inevitably by lawful means, the evidence is admissible. *Clay v. State,* 290 Ga. 822 (2012); *State v. Woods*, 311 Ga. App. 577 (2011); *Cunningham v. State*, 284 Ga. App. 739 (2007); *Taylor v. State,* 274 Ga. 269 (2001).

Abandonment

A person can abandon any interest or expectation of privacy they have in an item by for example throwing it away. The question is whether under the totality of circumstances, the police officer reasonably believed at the time of the search that the person had given up his interest in the property to such an extent that he no longer had an expectation of

privacy in it. *State v. Browning*, 209 Ga. App. 197 (1993).

The warrantless search and seizure of garbage violates the Fourth Amendment only if the person who discarded the garbage "manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." *California v. Greenwood*, 486 U.S. 35 (1988); *Scott v. State*, 270 Ga. App. 292 (2004); *Perkins v. State*, 197 Ga. App. 577 (1990). The act of placing garbage for collection is an act of abandonment which terminates any Fourth Amendment protection because, absent proof that a person has made some special arrangement for the disposition of his garbage, he has no reasonable expectation of privacy with respect to it once he has placed it for collection. *Brundige v. State*, 310 Ga. App. 900 (2011).

Contraband discarded during flight from police and before a suspect is arrested is admissible as evidence. *Barber v. State*, 317 Ga. Ap. 600 (2012). However, if unlawful police conduct coerces a defendant into abandoning the property, suppression of the evidence may be warranted. *State v. Terrell,* A14A0012; *Edwards v. State,* 239 Ga. App. 44 (1999).

Plain View

Objects within the plain view of an officer who is in a lawful position can be seized. The plain view rule applies only if (1) the initial intrusion which gave rise to the plain view was lawful, (2) the discovery of evidence was inadvertent, and (3) the incriminating nature of the evidence was immediately apparent. *Clay v. State,* 290 Ga. 822 (2012; *Lamar v. State,* 278 Ga. 150 (2004); *Robinson v. State,* 312 Ga. App. 736 (2011); *Reid v. State,* 298 Ga. App. 889 (2009). The plain view doctrine authorizes a police officer to enter a vehicle to seize an illegal item if the facts would justify the issuance of a warrant, that is, if the officer has probable cause to believe the item is contraband. *Arnold v. State,* 315 Ga. App. 798 (2012).

Motions to Suppress Identification

A defendant who has been picked out of a photographic lineup or during a show-up can file a motion to suppress the identification. For the due process clause of the Fourteenth Amendment to come into play in an identification procedure state action

must be involved. *Gandy v. State,* 290 Ga. 166 (2011); *Lyons v. State*, 247 Ga. 465 (1981). *Hall v. State*, 309 Ga. App. 179 (2011). Pretrial identifications cannot be suppressed simply because the witnesses gave inconsistent accounts of the perpetrator. *Funes v. State*, 289 Ga. 793 (2011).

The judge uses a two-part test in determining whether evidence of pre-trial identification should be excluded. *Wright v. State*, S13A1786. First, the judge determines whether the identification procedure was impermissibly suggestive. *Doublette v. State*, 278 Ga. App. 746 (2006). In other words, was the process the witness went through impermissibly suggestive. *Green v. State,* 291 Ga. 287 (2012). The process includes where, when, and how the witness made the identification and anything that was said to the witness before and during the identification process. An identification procedure is impermissibly suggestive when it leads the witness to an all but inevitable identification of a defendant as the perpetrator, or is the equivalent of the authorities telling the witness, "This is our suspect." *Armour v. State,* 290 Ga. 553 (2012). Although it should be avoided, the officer making a statement that the suspect is in the line-up does not make the line-up impermissibly suggestive, *Clark v.* State, 271 Ga. 6 (1999). Slight differences in the size, shading, or clarity of photographs used in an identification line

up will not make the lineup impermissibly suggestive. *Pinkins v. State,* 300 Ga. App. 17 (2009).

A defendant does not have the right to counsel at a pre-indictment line-up. *Brown v. State*, 160 Ga. App. 226 (1981).

If the judge finds that the procedure was impermissibly suggestive, the judge then considers whether there was a substantial likelihood that the suggestive procedure led to an improper identification. *Willis v. State*, 309 Ga. App. 414 (2011). It may be possible that the faulty procedure did not result in the identification. Factors to be considered by the judge in evaluating the likelihood of misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, and (4) the level of certainty demonstrated by the witness at the time of the identification. *Miller v. State*, 266 Ga. App. 378 (2004).

A one on one show up identification occurs when the police bring a victim to the suspect for an identification. Often the suspect is in handcuffs or seated in a police car. A show-up identification has been held to be inherently suggestive, but is not necessarily inadmissible. *Tucker v. State,* 316 Ga. App 119 (2012); *Butler v. Satte,* S11A1827; *Frazier v. State*, 305 Ga. App. 274 (2010). The judge must

still consider the other factors to determine if there was a substantial likelihood of misidentification. *Flint v. State,* 308 Ga. App. 532 (2011); *Law v. State,* 308 Ga. App. 76 (2011)*; Freeman v. State*, 306 Ga. App. 783 (2010). Similarly, displaying a single photograph of the suspect to a witness is impermissibly suggestive. *Leeks v. State*, 309 Ga. App. 724 (2011); *Wright v. State*, 302 Ga. App. (2010). However, the single photo identification should be suppressed only if a substantial likelihood of misidentification exists. *McBride v. State*, 297 Ga. App. 421 (2009). The judge must consider the four factors in evaluating the likelihood of misidentification. *Crawford v. State*, 297 Ga. App. 187 (2009).

A detective's testimony is a sufficient basis for denying a motion to suppress identification. *Gomez v. State*, 305 Ga. App. 204 (2010). The denial of the motion can be proper even if the State did not present the testimony of the witness. *Clark v. State*, 279 Ga. 243 (2005). The fact that there are inconsistencies in the witness' description of the perpetrators does not make the identification inadmissible, but rather is a question of credibility for the jury at trial. *Butler v. State,* 290 Ga. 412 (2012).

Expert Witness On Identification

A defendant can file a motion to obtain funds for an expert on eyewitness identification. Admission of

expert testimony regarding eyewitness identification is in the discretion of the judge. *Johnson v. State*, 272 Ga. 254 (2000). Where eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, judges may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an identification. *Cannon v. State*, 310 Ga. App. 262 (2011). However, the admission or exclusion of this evidence lies within the sound discretion of the judge, whose decision will not be disturbed on appeal absent a clear abuse of discretion. *Frazier v. State* 305 Ga. App. 274 (2010); *Howard v. State*, 286 Ga. 222 (2009).

Motions to Suppress a Statement

A defendant who gave a statement while in police custody incriminating himself can move to suppress the statement. Prior to questioning a suspect who is in custody, the police must read him his rights, also called Miranda warnings. Miranda warnings only apply if a person is in custody. *Heckman v. State,* 276 Ga. 141 (2003). A person is considered to be in custody and Miranda warnings

are required when a person is: (1) formally arrested; or (2) restrained to the degree associated with a formal arrest. *Clay v. State,* 290 Ga. 822 (2012); *Anguiano v. State*, 313 Ga. App. 449 (2011). Unless a reasonable person in the suspect's situation would perceive that he was in custody, Miranda warnings are not necessary. *Soilberry v. State,* 289 Ga. 770 (2011)*; Thompson v. State,* 313 Ga. App. 844 (2012); *Hendrix v. State*, 230 Ga. App. 604 (1997). The focus on the objective circumstances of the interrogation, not the subjective views of either the suspect or the officer. *Sosniak v. State,* 287 Ga. 279 (2010). A spontaneous statement made by the defendant which was not solicited by the police and was not made in response to any form of interrogation is not covered by *Miranda* and is admissible without the warnings having been given. *Maldonado v. State,* 313 Ga. App. 511 (2012); *Phillips v. State*, 285 Ga. 213 (2009). Miranda warnings do not have to be given in situations where the plocie ask questions reasonably prompted by concern for public safety, such as "where is the gun." *Smith v. State,* 264 Ga. 857 (1995); *Bowling v. State,* 289 Ga. 881 (2011). The police may make initial on the scene inquiries without Miranda warnings to discover the nature of the situation at hand as long as the questioning is not aimed at obtaining information to establish a suspect's guilt. *Thompson v. State,* 313 Ga. App. 844 (2012). The failure to advise a suspect of the crimes about which he is to be questioned prior to the Miranda waiver does not negate the knowing and

voluntary nature of the waiver. *McCree v. State,* 313 Ga. App. 101 (2011). The police do not have to tell a suspect which crime he is being questioned about prior to the suspect waiving his Miranda rights. *Ellis v. State,* 316 Ga. App. 352 (2012)*; Gaines v. State,* 179 Ga. App. 623 (1986). When Miranda warnings are required they must be intelligible. *Clay v. State,* 290 Ga. App. 822 (2012).

In order to invoke the right to counsel the suspect must clearly state his desire for an attorney. *Hawkins v. State,* 316 Ga. App. 415 (2012). Completing a form seeking court appointed counsel does not invoke the right to counsel. *Davis v.* State, A14A0927. Once an accused who is in custody makes a clear request for an attorney any police questioning of that individual must cease until an attorney is made available. *Dunlap v. State,* 291 Ga. 51 (2012). The police must honor a person's right to remain silent if the person clearly and unambiguously states he wants to end the questioning. *Mack v. State,* S14A1168; *Dubose v.* State, S13A1842; *Ridley v. State,* 290 Ga. 798 (2012). Where a defendant's right to remain silent was not scrupulously honored, a statement by the defendant can be used only if the defendant initiates communication with the police. *Mack v. State,* S14A1168. The rule that all questioning cease after an accused has requested counsel applies only to custodial interrogations. *Green v. State,* 291 Ga. 287 (2012).

The State can only use an incriminating statement when that statement was "made voluntarily, without being induced by the slightest hope of benefit or remotest fear of injury." *State v. Robinson*, A13A2487; *State v. Brown*, 308 Ga. App. 480 (2011); *Askea v. State*, 153 Ga. App. 849 (1980). The hope of benefit that will make a statement involuntary must relate to the charges facing the suspect and generally refers to the promise of a lighter sentence for confessing. *Millsaps v. State*, 310 Ga. App. 769 (2011); *Clark v. State*, 309 Ga. App. 749 (2011); *White v. State*, 266 Ga. 134 (1996). Asking a suspect to tell the truth is not the hope of benefit that makes a statement inadmissible. The "hope of benefit" must be induced by another. OCGA § 24-3-50; *Ramos v. State*, 198 Ga. App. 65 (1990). A hope that "originates in the mind of the person making the confession and which originates from seeds of his own planting will not exclude a confession." *Nowell v. Satte,* 312 Ga. App. 150 (2011); *Dunson v. State*, 309 Ga. App. 484 (2011). Hope of benefit does not include an officer's statement about how others (the prosecutor or judge) might view the defendant's cooperation and truthfulness, or lack thereof. *Williams v. State,* 314 Ga. App. 840 (2012); *Nowell v. State,* 312 Ga. App. 150 (2011). An officer does not make a hope of benefit by telling the defendant that his cooperation will be made to the prosecutor, or offering to help the defendant. *Edwards v. State,* 312 Ga. App. 141 (2012). A hope of benefit does not exist simply

because the police tell a suspect that he will return home after questioning. *Brown v. State,* 290 Ga. 865 (2012). However, such a promise, particularly if it is broken, could be one of the totality of circumstances that renders a confession involuntary and inadmissible as a violation of constitutional due process. However, the fact that the police promise a suspect something is not enough to render a statement inadmissible. There must be a direct causal connection between the promise and the confession. The promise must lead to the confession. *Pulley v. State,* 291 Ga. 330 (2012).

The remotest fear of injury relates to physical or mental torture. *Williams v. State,* 314 Ga. App. 840 (2012). Suggesting that a suspect might be safer in custody does not make the statement inadmissible. *Mangrum v. State*, 285 Ga. 676 (2009). Telling the suspect that the crime is punishable by death does not make the statement inadmissible. *Funes v. State*, 289 Ga. 793 (2011). The fact that the police told the defendant that he would be arrested if he refused to talk to the police does not amount to coercion making his statements inadmissible. *McCree v. State,* 313 Ga. App. 101 (2011).

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. *Barrett v. State*, 289 Ga. 197 (2011); *Griffin v. State*, 285 Ga. 827,

828 (2009). The fact that a defendant is of below average intelligence or even has moderate mental retardation does not, in and of itself, require the exclusion of the defendant's statement; there must be additional and sufficient evidence that the defendant did not have the capacity to understand and knowingly waive his *Miranda* rights. *Height v. State*, 281 Ga. 727 (2007).

"If the evidence is sufficient to establish that the defendant's statement was the product of rational intellect and free will, it may be admitted even if the defendant was intoxicated when he made the statement. *Frazier v. State*, 311 Ga. App. 293 (2011); *Mullis v. State*, 248 Ga. 338 (1981); *Walker v. State*, 300 Ga. App. 16 (2009).

The State bears the burden of demonstrating the voluntariness of a custodial statement by a preponderance of the evidence. *Amador v. State*, 310 Ga. App. 280 (2011); *State v. Ray*, 272 Ga. 450 (2000). The judge determines the admissibility of a defendant's statement under the preponderance of the evidence standard considering the totality of the circumstances. *State v. Brown*, 308 Ga. App. 480 (2011); *Watkins v. State*, 289 Ga. 539 (2011); *Fowler v. State*, 246 Ga. 256 (1980). A defendant's familiarity with the criminal justice system is a factor that can be consider in weighing the totality of the circumstances. *Humphrey v. State,* 287 Ga. 63

(2010). The lucidity of the defendant and his ability to understand may also be considered. *Folsom v. State,* 286 Ga. 105 (2009).

Sometimes the police question a suspect without administering *Miranda* warnings, gain a statement from the suspect, then administer *Miranda* warnings, and have the suspect repeat that which the suspect has already related, often with little interruption in time. *State v. Kendrick*, 309 Ga. App. 870 (2011). In examining a "two stage" or "question first" interrogation procedure, the judge must determine "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." *Missouri v. Seibert*, 542 U.S. 600 (2004); *State v. Pye,* 282 Ga. 796 (2007). There is no obligation to re-read Miranda if there is a continuing interrogation. *Williams v. State,* 244 Ga. 485 (1979).

Confessions of juveniles must be examined with more care and received with greater caution than those of an adult. *Boyd v. State,* 315 Ga. App. 256 (2012). The State has a heavy burden of showing that a juvenile understood and waived his rights. *Crawford v. State,* 240 Ga. 321 (1977). A juvenile's statement is admissible if, under the totality of the circumstances, the juvenile made a knowing and voluntary waiver of their constitutional rights. *Attaway v. State,* 244 Ga. App. 5 (2000). The fact that a parent was not present is only one factor to

consider. *Allen v. State*, 283 Ga. 304 (2008). The factors to be considered are: (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge ... and the nature of his rights to consult with an attorney and remain silent; (4) whether the accused is held without communication or is allowed to consult with relatives, friends or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) the methods used in the interrogation; (7) the length of the interrogation; (8) whether the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extra judicial statement at a later date. *Taylor v. State,* 315 Ga. App. 667 (2012); *Riley v. State*, 237 Ga. 124 (1976).

A defendant's refusal to sign the Miranda waiver form is not the equivalent of invoking the right to counsel and does not automatically render his statement involuntary and inadmissible. *Rose v. State,* 314 Ga. App. 79 (2012)*; Hill v. State,* 290 Ga. 493 (2012; *Humphreys v. State*, 287 Ga. 63 (2010). *Crawford v. State*, 288 Ga. 425 (2011). Nor does the failure to initial each right waived. *Herbert v. State,* 288 Ga. 483 (2011).

The fact tat there is no written or tape recorded waiver of Miranda rights does not render a statement

inadmissible. *Martinez v. State,* 314 Ga. App. 551 (2012); *State v. Hardy,* 281 Ga. App. 365 (2006).

If a suspect invokes his right to counsel, the police must stop questioning the suspect. *Williams v. State,* 290 Ga. 418 (2012). The pretrial unequivocal statement of a defendant that he wishes to represent himself must be followed by a hearing at it which it is determined whether the defendant knowingly and intelligently waived the right to counsel. *Danenberg v. State*, 291 Ga. 439 (2012). However, if the suspect's statement is not an unambiguous or unequivocal (clear) request for counsel, the officers have no obligation to stop questioning him. *Davis v. United States*, 512 U.S. 452 (1994); *Perez v. State*, 283 Ga. 196 (2008). A suspect's failure to answer certain questions is not the equivalent of a request to end the interrogation. *Rogers v. State,* 290 Ga. 401 (2012).

The use of trickery or deceit to obtain a confession does not make the confession inadmissible as long as the means used are not designed to obtain an untrue statement. *Edwards v. State,* 312 Ga. App. 141 (2012).

A statement obtained in violation of Miranda may not be used in the prosecution's case-in-chief. *Frazier v. State*, 311 Ga. App. 293 (2011). However, it may be used to impeach the defendant's credibility if the defendant testifies as long as the judge finds

that the statement was voluntary. *Arellano-Campos v.* State, 307 Ga. App. 561 (2011); *Linares v. State*, 266 Ga. 812 (1996). A statement that was freely and voluntarily given may still be inadmissible as the fruit of an illegal search and seizure. *Williams v. State,* 314 Ga. App. 840 (2012).

A defendant can also ask the judge to require that the statement be redacted (changed) to take out prejudicial material. For example, there are instances when a police interrogator's comments during an interview require redaction because they contain the officer's opinions and conclusions about the guilt of the defendant and thus would improperly influence the jury. *Axelburg v. State*, 294 Ga. App. 612 (2008). Compare, *Roberts v. State,* 313 Ga. App. 849 (2012) (comments made during interview admissible because they have probative value). The police officer's statements during an interrogation does not constitute sworn testimony. *Brown v. State,* 316 Ga. App. 137 (2012); *Harris v. State,* 278 Ga. 182 (2009). Comments made during an interrogation and designed to elicit a response from a suspect do not amount to opinion testimony, even when a recording of the comments is admitted at trial. *Dubose v.* State, S13A1842. However, such comments should be excluded if the probative value of the comments is outweighed by their tendency to unduly arose the jury's emotions of prejudice, hostility or sympathy. *Roberts v. State,* 313 Ga. App. 849 (2012); *Windhom v. State*, 315 Ga. App. 855 (2012).

MOTIONS FOR SEVERANCE

Severance of Defendants

In every case other than a death penalty case, the judge has broad discretion to grant or deny a motion for severance of defendants. See OCGA § 17-8-4; *Shelton v. State*, 279 Ga. 161 (2005). It is incumbent upon the defendant who seeks a severance to show clearly that the defendant will be prejudiced by a joint trial. *Scruggs v. State,* 309 Ga. App. 569 (2011); *Krause v. State,* 286 Ga. 745 (2010).

In ruling on a severance motion, the judge should consider: (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. *Brooks v.* State, 311 Ga. App. 857 (2011); Harper *v. State*, 300 Ga. App. 757 (2009); *Griffin v. State*, 273 Ga. 32 (2000). Although the judge must consider these factors, he does not have to explain his findings on each factor, *Garmon v. State*, 317 Ga. App. 634 (2012).

Unless there is a showing of resulting prejudice, antagonistic defenses do not automatically require a severance. *Green v. State*, 274 Ga. 686 (2002); *Zafiro v. United States*, 506 U.S. 534 (1993). It is not enough for the defendant to show that he would have a better chance of acquittal at a separate trial or that

the evidence against a co-defendant is stronger. *Butler v. State,* S11A1827; *Kelly v. State*, 267 Ga. 252 (1996). The defendant must show clearly that a joint trial would prejudice his defense, resulting in a denial of due process. *Howard v. State*, 279 Ga. 166 (2005); *Herbert v. State*, 288 Ga. 843 (2011); *Cruz v. State*, 305 Ga. App. 805 (2010).

The simple fact that a defendant desires certain testimony of a co-defendant, which might not be available at a joint trial, is not enough to require severance, absent a showing of prejudice to the defendant. In fact, as a initial matter, when the defendant requests a severance under these circumstances, the defendant must prove: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify if the cases are severed. *Avellaneda v. State*, 261 Ga. App. 83 (2003); *Williams v. State*, 308 Ga. App. 464 (2011); *Brinson v. State*, 288 Ga. 435 (2011).

Bruton

A defendant's Sixth Amendment right to be confronted with the witnesses against him is violated when co-defendants are tried jointly and the custodial statement of a co-defendant who does not testify at trial is used to suggest the involvement of the other

co-defendant in the crime. *Boone v. State*, 250 Ga. App. 133 (2001); *Herbert v. State*, 288 Ga. 843 (2011). *Bruton v. United States*, 391 U.S. 123 (1968). This is called the *Bruton* rule. *Bruton* is not violated if a co-defendant's statement does not incriminate the defendant on its face and only becomes incriminatory when linked to other evidence at trial. *Smith v. State*, 308 Ga. App. 190 (2011).

The prosecution can redact the co-defendant's statement to take out the portions that refer to the defendant. This is done by redacting the statement to eliminate any reference to the defendant and the judge instructing the jury to consider the statement only against the co-defendant who made the statement. However, a co-defendant's statement that merely replaces the defendant's name with a blank or a symbol violates *Bruton* even if the jury is instructed to limit its consideration of the statement. *Anderson v. State*, 311 Ga. App. 732 (2011). Further, co-defendant statements, that refer directly to some person that the jury may infer is the defendant violate the *Bruton* rule. *Davis v. State*, 272 Ga. 327 (2000).

The defendant whose redacted statement is being played does not have the right to introduce other portions of the statement which point to a co-defendant's involvement. An exception exists if the portion of the statement the defendant wants to be admitted points to the co-defendant but also contains the defendant's defense, then the defendant would be

able to admit the statement and the defendants would have to be given separate trials. *Wilson v. State*, 285 Ga. 224 (2009).

Severance of Offenses

A defendant can also ask that certain counts of the indictment be severed. When considering a motion to sever offenses the judge engages in a two-part inquiry. The judge must first determine whether the offenses in the indictment were joined solely because they are of the same or similar character. If they were, severance is required. If they are not, the judge court must then decide whether severance would promote a just determination of guilt or innocence as to each offense. *Willis v. State*, 309 Ga. App. 414 (2011); *Dingler v. State*, 233 Ga. 462 (1975); *Stewart v. State*, 277 Ga. 138 (2003).

There are circumstances in which the law recognizes that offenses are not joined solely because they are of the same or similar character, but rather because there is an independent basis for them to be joined in the indictment. The circumstances that courts have found to create an independent basis for joinder are: (1) if the crimes are so strikingly similar as to evidence a common motive, plan, scheme or bent of mind *Austin v. State*, 286 Ga. App. 189 (2007); (2) where the two offenses demonstrate ongoing criminality or a modus operandi that the totality of the facts demonstrate and designate that

the defendant is the common perpetrator, *Mack v. State*, 163 Ga. App. 778 (1982); and (3) if the evidence is so intertwined that the evidence of one crime will be admissible during a separate trial of the other because of an independent evidentiary basis to prove the other crime. For example, one offense is the predicate of another such as possession of a firearm by convicted felon and felony murder; one offense constitutes the circumstances of arrest of the other, *Jackson v. State,* 316 Ga. App. 128 (2012); *Roundtree v. State*, 270 Ga. 504 (1999); one offense is evidence of flight from the other, *Woolfolk v. State*, 282 Ga. 139 (2007); or one offense is admissible as similar transaction evidence because it tends to prove guilt on the other offense, *Heck v. State,* 313 Ga. App. 571 (2012); *Allen v. State*, 268 Ga. App. 519 (2004). In these cases, severance is not mandatory, but the trial court must still decide whether severance would promote a just determination of guilt or innocence as to each offense. The judge considers whether, in light of the number of offenses charged and the complexity of the evidence, the jury will be able to distinguish the evidence and apply the law intelligently to each offense. *Fielding v. State*, 299 Ga. App. 341 (2009). The appeals court reviews the trial court's determination for abuse of discretion. *Gadson v. State*, 223 Ga. App. 342 (1996); *Loyless v. State,* 210 Ga. App. 693 (1993).

In cases where a felon in possession of a firearm charge is unrelated to another count in the indictment

the trial should be bifurcated so the jury will hear and decide the other charges before learning about the defendant's prior conviction. However, a motion to bifurcate should be denied where the possession of a firearm by a convicted felon charge serves as the underlying felony for a felony murder charge. *Brown v. State*, S14A0800; *Poole v. State*, 291 Ga. 848 (2012).

SIMILAR TRANSACTIONS (404B)

Although the conduct of a defendant in other transactions is generally irrelevant and inadmissible, evidence that a defendant previously committed a similar crime can be used against a defendant during the trial of his case. *Walker v State*, 310 Ga. App. 223 (2011). For example, if a defendant is charged with armed robbery, the State can ask the judge to let the jury hear about a prior armed robbery. The prior event is called a similar transaction. Similar transaction evidence is highly and inherently prejudicial. *Hudson v. State,* 271 Ga. 447 (1999).

"Notices of the State's intention to present evidence of similar transactions or occurrences . . . shall be given and filed at least ten [10] days before trial unless the time is shortened or lengthened by the judge." Uniform Superior Court Rule 31.1. *Perry v. State*, 314 Ga. App. 575 (2012); *Bright v. State,* 314 Ga. App. 589 (2012). Notice of the prosecution's intent to present evidence of similar transactions

"shall state the transaction, date, county, and the name(s) of the victim(s) for each similar transaction or occurrence sought to be introduced. Copies of accusations or indictments, if any, and guilty pleas or verdicts, if any, shall be attached to the notice." "The purpose of the notice requirement contained in USCR 31.3 is to provide a criminal defendant adequate notice of the state's intent to use similar transactions to enable the defendant to resolve questions regarding admissibility of such evidence before trial." *Bright v. State*, 314 Ga. App. 589 (2012).

Before the State can introduce similar transaction evidence, the judge must conduct a hearing under Uniform Superior Court Rule 31.3 (B), and the State must make three affirmative showings as to each prior act. *Griffin v. State,* A14 A0189; *Hickson v. State*, 308 Ga. App. 50 (2011). The State must show that: (1) it seeks to introduce the evidence for an appropriate purpose, such as showing a defendant's identity, intent, course of conduct, and bent of mind; (2) there is sufficient evidence to establish that the defendant committed the independent offense, and (3) there is sufficient connection or similarity between the independent offense and the crime charged so that proof of the former tends to prove the latter. *Williams v. State*, 261 Ga. 640 (1991); *Faniel v. State,* 291 Ga. 559 (2012); *Evans v. State*, 288 Ga. 571 (2011); *Gardner v. State*, 273 Ga. 809 (2001); *Wade v. State*, 295 Ga. App. 45 (2008). After the required showings the judge can admit the similar

transaction evidence unless the probative value is substantially outweighed by the risk of prejudice to the defendant. *Bibb v. State,* 315 Ga. App. 49 (2012). The same test applies whether the similar transaction occurred before or after the charged crimes. *Whitman v. State,* A12A0425; *Ayiteyifio v. State,* 308 Ga. App. 286 (2011).

The judge's failure to make the required findings on the record is harmless error. *Holder v. State,* 314 Ga. App. 36 (2012).

When the similar transaction is admitted for purposes of intent and course of conduct a lesser degree of similarity is required than when such evidence is introduced to prove identity of the defendant as the perpetrator. *Watt v.* State, 317 Ga. App. 551 (2012); *Neal v. State,* 290 Ga. 563 (2012). One of the questions the judge should consider is, "Does the State need this evidence to prove the issue, or can the fact be proved otherwise by less inflammatory evidence?" *Newton v. State,* 313 Ga. App. 889 (2012); *Smith v. State,* 232 Ga. App. 290 (1998).

The State can proceed by proffer at the hearing and does not need to present witnesses. *Hinton v. State*, 290 Ga. App. 479 (2008). A rule 31.3(b) hearing must be held even if not requested by the defendant. An in chambers discussion without the

defendant present is not a proper hearing. *Moore v. State,* 290 Ga. 805 (2012).

There is no requirement that the similar transaction be identical to the crime charged; "the proper focus is on the similarity, not the differences, between the separate crimes and the crime in question." *Waters v. State*, 303 Ga. App. 187 (2010). This rule is most liberally extended in cases involving sexual offenses to show the lustful disposition of the defendant. *Heck v. State,* 313 Ga. App. 571 (2012); *Butler v.* State, 311 Ga. App. 873 (2011); Payne *v. State*, 285 Ga. 137 (2009); *Henderson v. State*, 303 Ga. App. 531 (2010). With regard to the lapse of time, Georgia courts have authorized the admission of similar transaction evidence that is more than 20 years old in sexual abuse cases. The lapse in time generally goes to the credibility of the evidence. It is a factor to be considered when balancing the probative value against its potential prejudice. *Farley v. State,* 317 Ga. App. 628 (2013); *Wheeler v. State,* 290 Ga. 817 (2012). The defendant's youth at the time of the similar transaction should be considered in deciding if the testimony should be admitted. *Ledford v. State,* 313 Ga. App. 389 (2011).

There is no requirement that the earlier act have resulted in a formal criminal charge, prosecution, or conviction. *Hunt v. The State*, 288 Ga. 794 (2011); *Brown v. State*, 201 Ga. App. 473 (1991). However,

evidence of a similar transaction may not admissible under the rule of collateral estoppel where the defendant has been tried and acquitted of the alleged similar transaction. *Faniel v.* State, 291 Ga. 559 (2012); *Banks v. State*, 185 Ga. App. 851 (1988); *Moore v. State*, 254 Ga. 674 (1985). The judge must decide what facts were in issue and necessarily resolved in the defendant's favor at the first trial. *Salcedo v. State*, 258 Ga. 870 (1989). Specifically, "it must be determined whether an issue that *was* in dispute in the previous trial -- and resolved in the defendant's favor -- is what the state is now trying to establish in *this* trial, notwithstanding the previous acquittal." For example, in a rape case if consent was the issue in the first trial and the State seeks to use the similar transaction to show identity then the similar transaction may be admissible despite the acquittal in the former case. *Bell v. State*, 311 Ga. App. 289 (2011).

The similar transaction must be an act. A defendant's statements are not "independent offenses or acts" unless those statements in and of themselves constitute a crime. *Boynton v. State*, 197 Ga. App. 149 (1990); *Newsome v. State*, 288 Ga. 647 (2011).

The decision to admit similar transaction evidence is within the judge's discretion and will not be disturbed on appeal absent an abuse of that discretion. *Flowers v. State*, 269 Ga. App. 443 (2004); *Long v. State*, 307 Ga. App. 669 (2011).

When reviewing the judge's factual findings regarding whether the State satisfied the threeprong test, the appeals courts apply a clearly erroneous standard. Once the judge has a hearing and decides to admit similar transaction evidence against a defendant, the defendant does not have to raise an objection at the time the evidence is presented at trial. *Rogers v. State,* 290 Ga. 401 (2012); *Whitehead v. State*, 287 Ga. 242 (2010). However, only the ground raised pretrial is preserved at trial. *Butler v. State,* 290 Ga. 425 (2012.

The State's obligation to establish the similarity of the offenses does not satisfy the obligation to present proof at trial. *Stephens v. State,* 261 Ga. 467 (1991). Certified copies of convictions are admissible to help establish the identity of the defendant as the perpetrator of the similar transaction, but are not admissible as the only evidence of the previous crime. *Perry v. State,* 314 Ga. App. 575 (2012)

PRIOR AND SUBSEQUENT DIFFICULTIES

Evidence of the defendant's prior acts toward the victim, be it a prior assault, a quarrel, or a threat, is admissible when the defendant is accused of a criminal act against the victim. *Washington v. State,* 312 Ga. App. 68 (2011). *Wall v. State,* 269 Ga. 506

(1998). This evidence, called prior difficulties, is admissible to show the defendant's motive, intent, and bent of mind in committing the act against the victim which resulted in the charges for which the defendant is being prosecuted. *Hammontree v. State*, 283 Ga. App. 736 (2007). Evidence of prior difficulties between the defendant and victim is admissible without notice or a hearing." *Stillwell v. State*, 294 Ga. App. 805 (2008); *O'Toole v. State,* 258 Ga. 614 (1988).

A subsequent difficulty (it happened after the act for which the defendant is being prosecuted) between a defendant and the victim is also admissible as evidence of the relationship between the two, and may show the defendant's motive, intent, and bent of mind in committing the alleged crime against the victim. *Bond v. State*, 283 Ga. App. 620 (2007); *Reed v. State*, 309 Ga. App. 183 (2011).

A defendant's prior substance abuse is admissible as prior difficulties when it explains the friction between the alleged victim and the defendant that led to the crime charged. *Billington v. State,* 313 Ga. App. 624 (2012.

VICTIM'S VIOLENT ACTS

Evidence of specific acts of violence by a victim against third persons is admissible where the defendant claims justification, provides proper notice,

and makes a prima facie or initial showing that the victim was the aggressor. *Chandler v. State*, 261 Ga. 402 (1991). Such *Chandler* evidence is admissible to show the victim's character for violence or tendency to act in accordance with his character as it relates to the defendant's claim of justification. *Barber v. State*, 268 Ga. 156 (1997); *Alexander v. State*, 285 Ga. 166 (2009); *Traylor v. State*, 280 Ga. 400 (2006). The burden is on the defendant seeking to introduce *Chandler* evidence to establish that the victim's prior acts involved violence. *Bennett v. State*, 265 Ga. 38 (1995). "Mere membership in a gang is not a specific act of violence." *Kolokouris v. State*, 271 Ga. 597 (1999); *Daniely v. State*, 309 Ga. App. 123 (2011).

MOTION TO DISCLOSE INFORMANT'S IDENTITY

A judge is required to hold an in-camera hearing to determine whether the State is required to reveal to the defendant the identity of a confidential informant. *Chandler v. State,* A12A1424; *Strozier v. State,* 314 Ga. App. 432 (2012); *Hernandez v. State*, 308 Ga. App 136 (2011); *Moore v. State*, 187 Ga. App. 387 (1988), "The due process concept of fundamental fairness requires that the public interest in protecting the flow of information to law enforcement officials be balanced against the right of the accused to a full and fair opportunity to defend himself." *Roviaro v. United States*, 353 U.S. 53 (1956); *Thornton v. State*,

238 Ga. 160 (1977). Determining whether the State must reveal the identity of the confidential informant involves several steps. First, the defendant must make a showing: (1) that the confidential informant allegedly participated in or witnessed the transaction and his testimony would be material to the defense on the issue of guilt or punishment; (2) that the informant's testimony would be relevant because testimony from witnesses for the prosecution and the defense will be in conflict; and (3) that the informant's testimony is necessary because he would be the only available witness who could corroborate or contradict the testimony of these witnesses. *King v. State,* A13A1983; *Grant v. State*, 230 Ga. App. 330 (1998).

If the defendant meets this initial showing that the informant's testimony could be relevant, material, and necessary, the second step is for the judge to conduct an in-camera hearing to determine whether that initial showing is supported by the informant's actual testimony. If the judge determines, based on this hearing, that "neither the disclosure of the informant's identity nor the contents of his testimony would benefit the defense or serve the discovery of truth," then the inquiry ends and the State is not required to disclose the information. *Gray v. State*, 204 Ga. App. 33 (1992). If, on the other hand, the judge determines that the confidential informant's testimony would lead to exculpatory evidence, then the judge must balance the defendant's right to defend

himself against the State's interest in encouraging the public to share information with law enforcement officials. *Griffiths v. State*, 283 Ga. App. 176 (2006); *Little v. State*, 230 Ga. App. 803 (1998).

CHANGING JUDGES & COUNTIES:

Motions to Recuse the Judge

A defendant can ask for another judge if he feels the judge has a bias or prejudice against him. *Christensen v. State*, 245 Ga. App. 165 (2000). This is called a motion to recuse the judge.

Recusal is required, under judicial ethical standards, whenever a trial judge's "impartiality might reasonably be questioned." *Birt v. State*, 256 Ga. 483 (1986); *Uniform Superior Court Rule* 25.1; *Gude v. State*, 289 Ga. 46 (2011). In order to be disqualifying, the alleged bias must come from an extrajudicial source and result in an opinion of the case based upon something other than what the judge learned from the case. *Rooney v. State*, 311 Ga. App. 376 (2011). Recusal cannot be based upon the judge's prior rulings in similar cases. *Moore v. State*, 313 Ga. App. 519 (2012).

A motion to recuse must be supported by an affidavit. All motions to recuse or disqualify a judge in a particular case or proceeding shall be timely filed in writing and all evidence thereon shall be presented

by accompanying affidavit(s) which shall state the facts upon which the motion is based. The filing and presentation of the affidavit to the judge shall be no later than five days after the affiant first learned of the alleged grounds for disqualification, and not later than ten days prior to the hearing or trial which is the subject of recusal or disqualification, unless good cause is shown for failure to meet such time requirements. In no event shall the motion be allowed to delay the trial or proceeding. *Uniform Superior Court Rule* 25.1; *Hampton v. State*, 289 Ga. 621 (2011).

The affidavit must clearly state the facts and reasons for the belief that bias or prejudice exists, being definite and specific as to time, place, persons and circumstances of extra judicial conduct or statements, which demonstrate either bias in favor of any adverse party, or prejudice toward the moving party in particular, or a systematic pattern of prejudicial conduct toward persons similarly situated to the moving party, which would influence the judge and impede or prevent impartiality in the defendant's case. Allegations consisting of bare conclusions and opinions shall not be legally sufficient to support the motion or require further proceedings *Uniform Superior Court Rule* 25.2

When a judge is presented with a motion to recuse, or disqualify, accompanied by an affidavit, the judge shall temporarily cease to act upon the

merits of the case and shall immediately determine the timeliness of the motion and the legal sufficiency of the affidavit, and make a determination, assuming any of the facts alleged in the affidavit to be true, whether recusal would be warranted. *Braddy v. State*, 316 Ga. App. 292 (2012); *Christensen v. State*, 245 Ga. App. 165 (2000). If it is found that the motion is timely, that the affidavit is sufficient and that recusal would be authorized if some or all of the facts set forth in the affidavit are true, another judge shall be assigned to hear the motion to recuse. *Uniform Superior Court Rule* 25.3

Motions to Change Venue

A motion asking that the case be moved to another county is called a motion for change of venue. *Thomas v. State,* 290 Ga. 653 (2012)*; Ledford v. State*, 289 Ga. 70 (2011). In a motion for a change of venue, the defendant must show that the setting of the trial would be inherently prejudicial. *Murrell v. State,* A12A0225; *Edmond v. State*, 283 Ga. 507 (2008). The judge has the discretion to grant a change of venue and its discretion will not be disturbed absent an abuse of that discretion. Situations where pretrial publicity has rendered a trial setting inherently prejudicial are extremely rare. *Walker v. State,* 289 Ga. 845 (2011); *Miller v. State*, 275 Ga. 730 (2002). The publicity must contain information that was unduly extensive, factually incorrect, inflammatory or reflective of an

atmosphere of hostility. *Happoldt v. State*, 267 Ga. 126 (1996); *Gear v. State*, 288 Ga. 500 (2011).

Chapter 10
Trial Calendars

Once a case has been through arraignment and motions it is placed on a trial calendar. *Strozier v. State,* 546 S.E.2d 290 (2001); *Cuzzart v. State,* 271 Ga. 464 (1999). Although the case is placed on a trial calendar it may not be scheduled for trial right away. Also, plea negotiations can continue between the prosecution and defense in an attempt to resolve the case without a trial.

Cases on the trial calendar are brought in for a calendar call. A defendant is generally entitled to seven days notice before trial. *Uniform Superior Court Rule* 32.1. However, the failure to comply with the notice requirement is assessed on a case by case basis. *Fields v. State*, 310 Ga. App. 455 (2011); *Currington v. State*, 270 Ga. App. 381 (2004).

At calendar call, the attorneys announce whether the case is ready for trial. Sometimes new discovery has become available which requires a continuance of the case to the next calendar call.

The cases which have announced ready at the calendar call are then scheduled for trial during the week or weeks of the trial calendar. The judge arranges the order of cases based on many factors

including: how old the case is; whether the defendant is in jail or on bond; and whether there are scheduling issues with witnesses that require a special setting of the case on a particular date.

Cases that are on the trial calendar but are not brought to trial during that trial term are normally placed back on the trial calendar and brought up at the next calendar call. A case can remain on the trial calendar for months before it is reached for trial. Sometimes older cases are put on status calendars or inquiry calendars to determine if they are still going to need a trial or can be resolved by plea agreement.

Sometimes defendants are required to appear over and over again for trial calendars. For defendants who are out on bond this can mean the continual missing of work. There is really no remedy for this other than asking for a speedy trial early in the case. If the defendant failed to file a timely speedy trial demand he can ask the judge for permission to file a speedy trial demand. The defendant can also file a speedy trial demand under the constitution. (*See Speedy Trial Demands, Chapter 5*).

Volume II of this series will cover the trial of a case from trial preparation to the jury's verdict. To receive a copy of Volume II complete the form on the next page.

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IX
GLOSSARY

Affiant The person who testifies under oath in an affidavit.

Bind Over A case is transferred from magistrate court to state or superior court.

Case-in-chief The prosecution's first presentation of evidence. After the defense case the prosecution can present rebuttal evidence to rebut the evidence offered by the defense.

Certiorari A type of review by a higher appeals court. The higher court issues a writ (order) allowing the appeal to be heard.

Collateral Estoppel A rule that prevents a point that has already been decided from being relitigated in a subsequent case.

Continuance The case is reset.

Demurrer A challenge to the indictment.

Discretion The power to decide.

Exculpatory Something that benefits the defendant.

Extrajudicial Something that occurs outside of the judicial or court process.

Habeas Corpus A civil suit used by those incarcerated to challenge their incarceration.

In-camera hearing A closed or private hearing during which the judge considers evidence.

Indicia of Reliability Something tending to show the information is reliable and trustworthy.

Indictment The formal document charging a defendant with a crime.

Interlocutory Appeal An appeal that takes place while a case is still pending. The appeals court considers an issue so important that it should be decided before the case moves forward.

Invoked To invoke is to ask for.

Leave of absence An attorney's vacation period.

Mandamus A type of appeal ordering that something be done. The parting appealing ask

for a writ (order) of mandamus (directing some action) by the lower court.

Mitigation Tending to lessen a defendant's guilt or the extent to which the defendant should be punished.

Nolle Prossequi A dismissal with the ability (with some limitations) to re-file the charges.

O.C.G.A. Official Code of Georgia Annotated.

Quash To declare void.

Pleading A formal document such as a bond motion.

Preponderance of the evidence A standard of considering evidence which is less than beyond a reasonable doubt but greater than probable cause.

Presumption To consider something to be true.

Prima Facie An initial showing sufficient to allow further analysis.

Pro Se A defendant representing himself.

Proffer A statement by an attorney as to what the evidence if presented would show. An attorney takes an oath upon admission to the bar and is deemed to

speak the truth and to be bound by his statements in open court as a failure to do so might disbar him." *Gould v. State,* A11A2214.

Rebuttal The prosecutions second presentation that comes after the defense presentation of evidence.

Rebutted Disproved.

Remittitur The document which moves a case from the appeals court back to the trial court.

Rule Nisi: An order to be signed by the judge setting a hearing date. This should be attached to any motion requiring a hearing.

Standing The ability to challenge a search.

Totality of Circumstances A type of consideration that weighs all the relevant facts.

USCR Uniform Superior Court Rules.

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