UNDERSTANDING CRIMINAL JUSTICE

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

Volume II

GOING TO TRIAL

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Thomas S. Robinson, III, Esq.

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Introduction

Volume I of this series covered a criminal case from a person's first interaction with police through all stages of the case to a trial calendar. The trial calendar is where each side announces ready or not ready for trial. This volume covers the actual trial of the case.

The decision to go to trial is a significant one that a defendant should make only after consultation with his attorney. A trial carries with it a lot of risk. Decisions of juries cannot be predicted and can seem illogical. Further, the judge can sentence a defendant more harshly following a jury trial than he would as part of a plea bargain. *Richardson v. State*, 305 Ga. App. 363 (2010). Attorneys who explain these risks to a client should not necessarily be viewed as trying to make the client take a plea to avoid more work for the attorney. Those attorneys who have fought for clients during a trial understand the dangers and may simply want the client to seriously consider the plea options available to the defendant.

Trial Rights

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. The

Sixth Amendment rights are applicable to the states. *Kesler v. State*, 249 Ga. 462 (1982). The Constitution of Georgia also provides for a public trial for criminal defendants. Const. of Ga. 1983, Art. I, Sec. I, Par. XI (a); *Purvis v. State*, 288 Ga. 865 (2011). The right to a public trial "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Presley v. Georgia*, 130 S. Ct. 721 (2010); 1983 Ga. Const. Art. I, § I, Para. XII.

During a trial in a court of any case in which the evidence is vulgar and obscene or relates to the improper acts of the sexes, and tends to debauch the morals of the young, the judge shall have the right in his discretion and on his own motion, or on motion of a party or his attorney, to hear and try the case after clearing the courtroom of all or any portion of the audience. *Pate v. State,* 315 Ga. App. 205 (2012); OCGA § 17-8-53. Further, in the trial of any criminal case, when any person under the age of 16 is testifying concerning any sex offense, the judge shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters. OCGA § 17-8-54. The partial closure permitted under OCGA § 17-8-54 does not violate a defendant's Sixth Amendment right to a public trial. *Delgado v. State,* 287 Ga. App. 273 (2007).

A defendant also has a right to be present at his trial as well as any stage of the proceedings that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure. *Wedel v. State,* A14 A0622; *Adams v. State,* 316 Ga. 1 (2012). A critical stage in a criminal case is one in which the defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some way. *Huff v. State,* 274 Ga, 110 (2001). This does not include instances where the defendant's presence would be useless. *Lyde v. State*, 311 Ga. App. 512 (2011). This right may be waived if a defendant later fails to object to earlier proceedings in his absence. *Jackson v. State,* 278 Ga. 235 (2004). This does not include the right to be present at bench conferences on legal and scheduling issues. *Zamora v, State,* 291 Ga. 512 (2012). The denial of the right to be present is presumed to be prejudicial. *Peterson v. State,* 284 Ga. 275 (2008).

If a defendant is in jail, his family or lawyer should make sure adequate clothes are provided for him for trial. A defendant, while in the presence of the jury, should be free of indicators of guilt such as wearing shackles or prison clothes, being surrounded by uniformed security personnel, or anything else that might infringe upon the presumption that he is innocent. *Daniels v. State*, 310 Ga. App. 541 (2011). However, the judge has the duty to preserve and enforce order and to prevent interruption,

disturbance, or hindrance to the proceedings. Therefore, where the judge is familiar with the defendant's background of violent and disruptive behavior, it is within the judge's discretion as to the necessity and extent of restraint to be imposed upon a disorderly defendant to prevent disruption of court proceedings. The judge has discretion in requiring a defendant to be handcuffed or shackled for security reasons. *Weldon v. State,* A14A0135; *Mapp v. State*, 197 Ga. App. 7 (1990); *Dennis v. State*, 170 Ga. App. 630 (1984).

A defendant can waive the right to be tried in front of a jury and ask to instead receive a trial before the judge. This is called a bench trial. The State must agree to a bench trial. *Stripling v. State,* 289 Ga. 370 (2011); *Zigan v. State,* 281 Ga. 415 (2006). The right to a jury trial is one of those fundamental rights that a defendant must personally, knowingly, and voluntarily waive. *Walden v. State,* 291 Ga. 260 (2012); *Ealey v. State*, 310 Ga. App. 893 (2011). The State has the burden of showing that a defendant made a knowing, voluntary, and intelligent waiver of the right to a jury trial. *Brown v. State*, 277 Ga. 573 (2004). The waiver does not need to be in any particular form as long as the judge inquires on the record to ensure the waiver is proper. When there is a bench trial, it is presumed that the judge separates admissible evidence from inadmissible evidence and considers only admissible evidence in reaching a decision. *Futch v. State,* 316 Ga. App. 376 (2012);

In the Interest of R.W., 315 Ga. App. 227 (2012); *In the Interest of I.M.W.*, 313 Ga. App. 624 (2012); *Watson v. State*, 274 Ga. 689 (2002).

A defendant must be competent to stand trial. "Competency involves a defendant's mental state at the time of trial." *Wadley v. State*, 295 Ga. App. 556 (2009). Every person is presumed to be competent to stand trial. O.C.G.A. § 16-2-31. Unless there is evidence raising the issue of competency the judge does not have to take further action. A defendant can seek review of his mental competency. *Sims v. State,* 279 Ga. 389 (2005). However, if there is information to raise a doubt about competency the judge is required to conduct a trial to determine the defendant's mental competency. *Powers v. State,* 314 Ga. App. 733 (2012); O.C.G.A. § 17-7-130. The threshold for competency is easily met in most cases. A defendant is competent if he is capable at the time of the trial of understanding the nature of the proceedings going on against him, comprehends his own condition in reference to such proceedings, and is capable of rendering his attorney such assistance as a proper defense to the indictment against him demands. *Page v. State,* 313 Ga. App. 691 (2012). The factors to consider in determining a defendant's ability to assist in his defense include whether the defendant can adequately consult with others, knows the names and functions of those involved with the case, and reasonably understands the rules., the specific charges, the penalties, and the consequences

of the proceedings. *Tiegreen v. State,* 314 Ga. App. 860 (2012).

An indigent defendant does not, however, have a constitutional right to "choose a psychiatrist of his own liking or to receive funds to hire his own." *Page v. State,* 313 Ga. App. 691 (2012); *Callaway v. State*, 208 Ga. App. 508 (1993). A defendant also does not have the right to the presence of counsel or to have his Miranda rights repeated to him during an interview with a state psychologist. *Walker v. State,* 290 Ga. 467 (2012). Once competency has been determined, "the appropriate standard of appellate review is whether after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was incompetent to stand trial." *Sims v. State*, 279 Ga. 389 (2005). Placing the burden on the defendant to prove incompetency is consistent with the principles of due process. *Traylor v. State*, 280 Ga. 400 (2006).

The right to be present and competent includes the right of non-English speaking defendants to the assistance of an interpreter. *Ling v. State,* 288 Ga. 299 (2010).

Chapter 1
Trial Preparation

The trial of a criminal case begins with trial preparation. Trial preparation comes from the moment an attorney meets his client or a prosecutor gets their case. Which witnesses to call and which evidence is absolutely necessary for the prosecution or defense of the case are questions that should be answered early on long before the attorney is asked to announce ready for trial at a trial calendar. Prior to trial, a defendant is entitled to rely upon his lawyer investigating the facts, circumstances, pleadings and laws involved in the case and then offering an informed opinion as to what plea should be entered. *Johnson v. State*, 289 Ga. 532 (2011); *Cammer v. Walker*, 290 Ga. 251 (2011). The attorney has an obligation to make reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary. *Barker v. Barrow,* 290 Ga. 711 (2012).

Standard trial preparation includes interviewing witnesses for both sides, running the criminal histories of the witnesses for the opposing side, obtaining transcripts of all prior court proceedings relevant to the trial of the case, obtaining witness convictions for impeachment, and preparing jury selection questions, an opening statement,

examination questions, and a closing argument. The attorney can also subpoena any documents or records necessary for adequate trial preparation. The attorney can ask the judge for a court order authorizing the release of certain records that might not otherwise be obtainable. The attorney should also determine which laws apply to the case and be prepared to submit written proposed jury instructions to the judge at the beginning of trial. *Uniform Superior Court Rule* 10.3.

The defense should also determine whether the defendant will be testifying during the trial of the case. Finally, the attorney should determine if the defendant is a recidivist for sentencing purposes, and if so, are the earlier convictions valid and unchallengeable.

Witness criminal histories are obtained through the Georgia Bureau of Investigation, Criminal History Division, P.O. Box 370748, Decatur, Georgia 30037-0748, 404 -244-2639. The State does not have to provide the defense with the criminal histories of its witnesses. *Ashmid v. State,* 316 Ga. App. 550 (2012). O.C.G.A. § 35-3-34 (a)(2) provides that the Georgia Bureau of Investigation shall make criminal history records of the defendant or witnesses in a criminal action available to counsel for the defendant upon receipt of a written request from the defendant's counsel. If the defendant does not receive the witness' name and date of birth needed to obtain the

criminal history, defense counsel should request a continuance. *State v. Dickerson,* 273 Ga. 408 (2001).

Transcripts are obtained through the court reporter for a fee. If the defendant is indigent, his attorney can ask the judge to have the government pay the cost for the transcript.

Witnesses

The decision of which witnesses to call is left to the attorney after consultation with the defendant. *Hendricks v. State*, 290 Ga. 238 (2011); *Smiley v.* State, 288 Ga. 635 (2011). The Sixth Amendment to the U.S. Constitution and Article I, Sec. I, Para. XIV of the Georgia Constitution guarantee a Georgia criminal defendant the right to compulsory process for obtaining witnesses in his defense. "Criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

In order to ensure the attendance of a witness, the witness should be placed under subpoena. The defendant cannot rely upon the State to summon a witness when the State had subpoenaed but chose not to call as a witness. *Hill v. State,* S12A0948; *Todd v. State,* 243 Ga. 539 (1979). Subpoenas can be obtained from the clerk of court where the case is

pending. *O.C.G.A. § 24-13-22*. The clerk will issue a subpoena signed and sealed but otherwise blank. The attorney requesting the subpoena will then fill it out before serving it on a witness. O.C.G.A. § 24-10-20; *O.C.G.A. § 24-13-22*. The subpoena may then be served anywhere in the state and by anyone over 18 years of age. *O.C.G.A. § 24-10-21*; *O.C.G.A. § 24-13-24*. The person serving the subpoena can then prove that it was served by filing a return or endorsement on a copy of the subpoena indicating it was served. Subpoenas may also be served by registered or certified mail, and the return receipt will constitute proof of service. O.C.G.A. § 24-10-23; *O.C.G.A. § 24-13-24*. A witness is entitled to a $25.00 fee plus mileage of 20 cents per mile for traveling expenses. O.C.G.A. § 24-10-24; *O.C.G.A. § 24-13-25* (.45 cents per mile).

If the witness fails to honor the subpoena the party that served the subpoena can seek to enforce the subpoena by attachment for contempt, a fine not to exceed $300.00 and imprisonment not to exceed 20 days. Before a witness can be convicted of contempt for failure to appear as a witness, it must be shown that the subpoena was served upon the witness by a means authorized by law. The witness is also entitled to reasonable notice of the charge of contempt, an opportunity to retain counsel, call witnesses, and present evidence to defend against the charge. *Apoian v. State,* 313 Ga. App. 800 (2012). The judge has to consider whether the subpoena was served

within a reasonable time. A reasonable time has to be at least 24 hours before the required testimony. The judge can also grant a continuance. If the subpoena was issued blank, a return should be filed at least six hours before the testimony is required in order to be in a legal position to ask for a continuance. O.C.G.A. § 24-10-25; O.C.G.A. § 24-13-26.

A witness can be compelled to bring certain documents to court by serving the witness with a subpoena for the production of documentary evidence. Subpoenas for the production of documentary evidence are also obtained from the clerk of court. The person who received the subpoena can file a motion asking the judge to quash or modify the subpoena if complying with the subpoena would be unreasonable or oppressive. O.C.G.A. § 24-10-22; O.C.G.A. § 24-13-23.

A witness cannot be arrested on any civil process while attending court under subpoena or while going to or returning from court. Any officer who arrests a witness in those circumstances after being shown the subpoena will be liable for false imprisonment. O.C.G.A. § 24-13-1; O.C.G.A. § 24-13-1.

If a defendant wishes to call as a witness someone who is in a prison or county jail, the defense should make a motion asking the judge for a production order to produce the inmate. O.C.G.A. §

24-10-60; O.C.G.A. § 24-13-60. The motion should specify that the prisoner's presence is required by the ends of justice and that the defendant is financially unable to pay the expenses associated with the production of the prisoner.

Out of State Witnesses

A Georgia court has authority to compel the attendance at a Georgia criminal trial of persons anywhere within Georgia, however, process issued by Georgia courts does not cover out-of-state witnesses. *Hughes v. State*, 228 Ga. 593 (1972) (Georgia's constitutional provision to a criminal defendant of "compulsory process to obtain the testimony of his own witnesses ... is of no benefit when the witnesses reside beyond the jurisdiction of the courts of this State)." *Dimauro v. State*, 310 Ga. App. 526 (2011).

The Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, "is intended to provide a means for a state court to compel the attendance of out-of-state witnesses at criminal proceedings." *Dimauro v. State*, 310 Ga. App. 526 (2011).

Georgia's version of the Uniform Act, O.C.G.A. § 24-10-90 through O.C.G.A. § 24-10-97 is the statutory means by which a witness living in a state

other than Georgia can be compelled to attend and testify at a criminal proceeding in Georgia, and a witness living in Georgia can be compelled to attend and testify at a criminal proceeding in another state. O.C.G.A. § 24-13-90 through O.C.G.A. § 24-13-97. While the statute speaks only to securing the attendance of an out-of-state witness, the scope of the statute has been interpreted in Georgia and several other states to authorize issuance of a summons that requires the out-of-state witness to bring items or documents with the witness. *Yeary v. State,* 289 Ga. 394 (2011); *French v. State*, 288 Ga. App. 775 (2007).

"For a witness from another state to be summoned to testify in this state he must be a necessary and material witness." *Chesser v. State*, 168 Ga. App. 195 (1983). A material witness is one who can testify about matters having some logical connection with the facts of the case. *Cronkite v. State,* A12A0671. Moreover, a party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness. The law requires presentation of sufficient facts to enable both the judge in the demanding state and the judge in the state to which the request is directed to determine whether the witness should be compelled to travel to a trial in a foreign jurisdiction. The party seeking the witness has the burden of showing that the witness sought is a necessary and material witness to the

case. The decision whether to grant the subpoena is within the judge's sound discretion. *Davenport v. State*, 289 Ga. App. 399 (2011); *Holowiak v. State*, 308 Ga. App. 887 (2011).

Motions for Continuance

If an attorney is not prepared to try a case, a motion for continuance should be made. Motions for continuance seeking additional time to prepare for trial are left to the sound discretion of the judge. *Williams v. State,* A12A1623. The judge's ruling on a motion for continuance will be upheld on appeal unless there was a clear abuse of discretion. *Eskew v. State* 309 Ga. App. 44 (2011); O.C.G.A. § 17-8-22; *Loyd v. State*, 288 Ga. 481 (2011).

With a trial at hand, a defendant may realize that he is not satisfied with his current lawyer. Motions for continuance to hire or substitute counsel are also addressed to the sound discretion of the judge, and the judge's ruling will not be overturned unless there was an abuse of discretion. *Tyner v. State,* 313 Ga. App. 557 (2012). In addition, the judge may consider the conduct of a defendant in order to prevent the defendant from using the discharge and employment of counsel as a delay tactic. *Jordan v. State,* 247 Ga. App. 551 (2001). The party requesting the continuance must show that he exercised due diligence. *Coats v. State*, 303 Ga. App. 818 (2010); *Bearden v. State*, 241 Ga. App. 842 (2000). Also, if

a new lawyer is hired before trial, the lawyer should be ready to try the case. "There is no fixed rule as to the number of days that should, of right, be allowed counsel for a defendant after his employment or appointment in a criminal case to prepare the case for trial." *White v. State*, 304 Ga. App. 158 (2010). Mere shortness of time does not by itself show a denial of the rights of the defendant, and mere shortness of time will not reflect an abuse of the judge's discretion in denying a continuance, where the case is not complex and is without a large number of intricate defenses. *Gibbs v. State*, 213 Ga. App. 117 (1994); *Presley v. State*, 307 Ga. App. 528 (2011).

Motions for continuance based on the unavailability of a witness are covered by O.C.G.A. § 17-8-25. That law provides that in all requests for continuance upon the ground of the absence of a witness, it must be shown to the judge that the witness is absent; that he has been subpoenaed; that he does not reside more than 100 miles from the place of trial; that his testimony is material; that the witness is not absent by permission of the lawyer; that the lawyer expects he will be able to obtain the witness' testimony at the next term of court; that the request is not made for the purposes of delay; and the facts the lawyer expects to be proved by the absent witness. Each of the requirements set forth in O.C.G.A. § 17-8-25 must be met before an appellate court may review the exercise of the judge's

discretion in denying a motion for continuance based upon the absence of a witness. *Brown v. State,* 304 Ga. App. 168 (2010).

Trial preparation is important because during the actual trial, it will be difficult for the attorney and defendant to talk during witness testimony or while the judge is addressing an issue.

Chapter 2
Motions in Limine

Prior to trial, it may be appropriate for either side to file motions, called motions in limine, which seek to keep out or limit the introduction of certain evidence.

A motion in limine is a pretrial motion which may be used in two ways: (1) The movant seeks, not a final ruling on the admissibility of evidence, but only to prevent the mention by anyone during the trial of a certain item of evidence or area of inquiry until its admissibility can be determined during the course of the trial outside the presence of the jury; or (2) The movant seeks a ruling on the admissibility of evidence prior to the trial.

Motions in limine do not have to be in writing and can be made just prior to trial because they generally do not call for the testimony of any witnesses. However, caution should be exercised not to lump evidentiary motions into the category of motions in limine and/or to present so many motions in limine that the trial is delayed by a mini motions in limine trial. The judge has an absolute right to refuse to decide the admissibility of evidence which allegedly violates some rule of evidence, prior to trial. *Moore v. State,* S13A1569. The judge can wait to rule on the admissibility of the evidence until it is

offered at trial. *Jones v. State,* 316 Ga. App. 442 (2012); *Holland v. State,* 176 Ga. App. 343 (1985). If, however, the judge decides to rule on the admissibility of evidence prior to trial, the judge's determination of admissibility controls the subsequent course of action, unless modified at trial to prevent manifest injustice. *Kay v. State*, 306 Ga. App. 666 (2010).

A motion in limine will preserve the grounds on which the motion is based for appeal without the need to object again at trial. *Billington v. State,* 313 Ga. App. 674 (2012); *Luckie v. State,* 310 Ga. App. 859 (2011); *Battles v. State*, 290 Ga. 226 (2011); O.C.G.A. § 24-1-103 (a)(2). However, if the judge reserves ruling on evidence, the attorneys still have an obligation to object to the premature mention of that evidence by the other side. *Rogers v. State*, 290 Ga. 401 (2012).

Chapter 3
Jury Selection

Jury selection is the beginning of the actual trial. A panel or group of potential jurors are brought before the judge and attorneys for questioning called voir dire to determine which persons will actually sit as jurors on the case. Although only 30 potential jurors need to be empanelled (O.C.G.A. § 15-12-160), the panel of potential jurors usually ranges from 48 to 72 persons. It is chosen from the county jury list. In cases other than death penalty cases, voir dire does not have to be taken down by the court reporter. O.C.G.A. § 5-6-41(d); *Angulo v. State,* 314 Ga. App. 669 (2012). Only objections or motions during jury selection need to be recorded. O.C.G.A. § 17-8-5; *Dunlap v. State,* 291 Ga. 51 (2012); *State v. Graham*, 246 Ga. 341 (1980). If the attorney wants voir dire to be taken down, a specific request must be made. *Bryant v. State*, 270 Ga. 286 (1998). The appeals court will not speculate on error that may have occurred during jury selection when jury selection is not recorded. *Angulo v. State,* 314 Ga. App. 669 (2012).

The defendant has the right to be present at any proceeding in which the jury composition is selected or changed. *Zamora v. State,* 291 Ga. 512 (2012)). The judge should have no communication with the

jury without the defendant present except as to matters of the comfort and convenience of the jury. *Sammons v. State,* 279 Ga. 386 (2005). This includes bench conferences. *Zamora v. State,* 291 Ga. 512 (2012).

There is no constitutional right that the panel that shows up for the trial will include African-American jurors, or even represent a view of the entire community. *Greene v.* State, 312 Ga. App. 666 (2011). A defendant cannot challenge the jury panel by showing that there are no African-American potential jurors on the panel. The challenge must be made to the procedure for compiling the jury list. *Williams v.* State, 287 Ga. 735 (2010); *Rosser v. State,* 284 Ga. 335 (2008).

Certain persons may be exempt from jury service due to a hardship. Under O.C.G.A. § 15-12-1.1, the judge can excuse a potential juror if he is "engaged in work necessary to the public health, safety or good order, is a full-time student, is the primary caregiver of a child six years of age or younger, is the primary teacher in a home study program," or shows other good cause. The decision to excuse a juror for hardship is in the judge's discretion. *Young v. State,* 290 Ga. 392 (2012). The clerk can be delegated the authority to excuse jurors as long as the excusals do not alter, deliberately or inadvertently, the nature of the jury lists. *Walker v. Hagins,* 290 Ga. 512 (2012). A person who has been placed on First Offender

probation can serve on a jury. *Humphreys v. State,* 287 Ga. 63 (2010).

There are two parts to voir dire: the general questioning of all of the potential jurors at the same time and the individual questioning of each potential juror. General voir dire usually begins by the judge introducing all of the parties. The judge may ask if any potential juror is not a resident of the county where the case is being tried. The judge may also ask whether any potential juror is related by blood or marriage to the parties in the case. The judge or prosecutor will read the indictment. The judge usually asks three questions that are required by statute: 1) Has anyone formed or expressed an opinion as to the guilt or innocence of the accused?; 2) Does anyone have any bias or prejudice resting on their mind for or against the accused?; and 3) Is your mind perfectly impartial between the State and the accused? O.C.G.A. § 15-12-164. If a juror answers one of these statutory questions so as to render him not qualified he should be excused by the judge. *Fuller v. State,* 313 Ga. App. 759 (2012). What usually happens when a juror answers a statutory question is the judge and attorneys follow-up to see if in fact the juror is biased. In following up it is inappropriate for the judge to simply ask questions in a manner which is more an instruction to the juror on what answers are sought than an attempt to determine the juror's bias. *Ivey v. State,* 258 Ga. App. 587 (2002). This is called improper rehabilitation of the

juror by the judge. The judge should err on the side of caution by dismissing, rather than trying to rehabilitate biased jurors. *Ashmid v. State,* 316 Ga. App. 550 (2012).

After the judge asks the group general questions, the prosecutor is allowed to ask general questions of the entire group. When the prosecutor finishes, the defense attorney gets to ask general questions. As questions are asked, the potential jurors hold up their hands or cards with their number to indicate a response to the question. Hypothetical questions during jury selection are discouraged, but may be allowed by the judge. *State v. Newton,* S13G0668; *Ellington v. State,* 292 Ga. 109 (2012).

After the general questioning has concluded, the larger group is broken into smaller groups of usually 12-15 potential jurors for individual questioning. Each side gets to follow up on the responses that the potential juror gave to the general questions as well as question the potential juror generally about their background. If a topic is so sensitive that a potential juror does not feel comfortable discussing it during general or smaller individual questioning, the judge will usually allow the lawyers to question the potential juror outside the presence of the other individuals. *Kerdpoka v. State,* 314 Ga. App. 400 (2012.

The sole purpose of voir dire is to determine the impartiality of potential jurors and their ability to treat the case on the merits with objectivity and freedom from bias and prior inclination. Questions of a technical legal nature and questions that ask the potential juror to prejudge the case are improper in a voir dire examination. *Stewart v. State,* 262 Ga. App. 426 (2003). Since there is often a fine line between asking potential jurors how they would decide the case and questions that merely seek to expose bias or prejudice, the scope of the voir dire examination of necessity must be left to the sound discretion of the judge. *Bryant v. State*, 288 Ga. 876 (2011); *Sallie v. State*, 276 Ga. 506 (2003). According to the Georgia Court of Appeals, "running through the entire fabric of our Georgia decisions is a thread which plainly indicates that the broad general principle intended to be applied in every case is that a juror shall be so free from either prejudice or bias as to guarantee the inviolability of an impartial trial. If error is to be committed, let it be in favor of the absolute impartiality and purity of jurors." *Garduno v. State*, 299 Ga. App. 32 (2009).

In the examination of a potential juror, each attorney has the right to inquire of the individual examined about any matter or thing which would illustrate any interest of the potential juror in the case, including any opinion as to which party ought to prevail, the relationship or acquaintance of the potential juror with the parties or counsel, any fact or

circumstance indicating any inclination, leaning, or bias which the person might have respecting the subject matter of the case or the counsel or parties, and the religious, social, and fraternal connections of the potential juror. O.C.G.A. § 15-12-133; *Collins v. State,* 310 Ga. App. 613 (2011). However, hypothetical questions that would require the juror to prejudge the case are improper. *Polanco v. State,* A14A0617 (possible reaction to large number of counts in the indictment); *Evans v. State,* A14A0513 (possible prejudice from prior convictions). A party has the right to question potential jurors regarding possible racial bias and prejudice. *Legare v. State*, 256 Ga. 302 (1986). Nevertheless, the judge has discretion over the scope of permissible questions and how the voir dire is conducted. *Ramirez v. State*, 279 Ga. 569 (2005); *Meeks v. State*, 269 Ga. App. 836 (2004).

Peremptory Strikes & Challenges for Cause

During jury selection, both the prosecution and defense are given a limited number of peremptory strikes that can be used to remove potential jurors that the party does not believe will be fair to their side. O.C.G.A. § 15-12-165. Both the State and the defense get nine strikes that can be used to strike a potential juror off the jury panel. As long as the strikes are not used based on race, gender or nationality, each side is free to use them as they choose. If there are multiple defendants, the

defendants must split the nine strikes between the defense. *Dixon v. State*, 285 Ga. 312 (2009). The defense attorneys can ask for additional strikes, but the decision is left to the discretion of the judge. Further, if the defendants do not use all of their strikes, it may be impossible to show that they were harmed by the judge's refusal to allow additional strikes. *McIntyre v. State,* 311 Ga. App. 173 (2011); *Denny v. State,* 281 Ga. 114 (2006).

In order to avoid having to use a peremptory strike, the attorney can ask the judge to strike a potential juror because the potential juror clearly cannot be fair to both sides. This is called a challenge for cause. In order to strike a juror for cause, it must be shown that the juror holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence and the judge's instructions on the law to be applied in the case. *Cwikla v. State,* 313 Ga. App. 526 (2012); *Cade v. State*, 289 Ga. 805 (2011).

A potential juror's belief that he can render a fair verdict is not always determinative because "jurors who have expressed a bias may well mistakenly believe they can set aside their preconceptions and inclinations – certainly every reasonable person wants to believe he or she is capable of doing so." *Garduno v. State*, 299 Ga. App. 32 (2009). However, a potential juror's mere "indecisiveness" as to

whether he could be fair and impartial is not sufficient to support a strike for cause. *Grimes v.* State, S14A1162. A judge is not required to excuse a prospective juror who simply expresses reservations about his ability to set aside his personal experiences. *Herrera v. State*, 288 Ga. 231 (2010). Moreover, a potential juror who expresses a willingness to try to be objective and whose bias arises from feelings about the particular crime as opposed to feelings about the defendant may be eligible for service. *Amador v. State,* 310 Ga. App. 280 (2011); *Corza v. State,* 273 Ga. 164 (2000). Similarly, a potential juror who has expressed doubts about his ability to be impartial will be eligible to serve where he also positively testifies that, despite his general doubts, he could set his feelings aside and make a decision based on the facts and law alone. *Cuzzort v. State*, 307 Ga. App. 52 (2010). A juror who because of certain life experiences expresses doubt that he can be impartial if the evidence triggers those experiences does not have to be excused for cause. However, a juror who states that his life experiences will prevent him from listening to the evidence before forming a judgment must be excused for cause. *Brown v. State,* 315 Ga. App. 115 (2012).

In order to be subject to dismissal for cause, a member of the jury panel who is a law enforcement officer must be a full-time sworn police officer with arrest powers. *Blanch v. State*, 306 Ga. App. 631 (2010).

There is no rule that a potential juror cannot be related to a grand juror who returned the indictment in the case. *White v. State,* 310 Ga. App. 306 (2011); *King v. State,* 273 Ga. 258 (2000). A potential juror's relationship to a witness in the case is not grounds to excuse the juror for cause. *Valdez v. State,* 310 Ga. App. 274 (2011); *Spence v. State,* 238 Ga. 399 (1977).

The fact that a potential juror has formed an opinion about the credibility of a witness does not mandate that he be excused for cause. *Sharpe v. State*, 288 Ga. 565 (2011); *Tennon v. State*, 235 Ga. 594 (1975), cert.den. 426 U.S. 908 (96 SC 2231, 48 LE2d 833) (1976).

The decision to strike a potential juror for cause lies within the sound discretion of the judge and will not be set aside absent some manifest abuse of that discretion. *Abdullah v. State*, 284 Ga. 399 (2008); *Smith v. State*, 312 Ga. App. 174 (2011). Since the judge's conclusion on the bias of a juror is based on findings of demeanor and credibility, these findings are given great deference. *Grovner v. State,* 317 Ga. App. 623 (2012). The erroneous decision to allow a challenge for cause is not a basis for appeal if a competent and unbiased jury is finally selected. *Humphreys v. State,* 287 Ga. 63 (2010).

Each juror who has not been stricken for cause is eligible, also called qualified, to serve on the jury.

Since both the State and defense get nine strikes, thirty jurors must be qualified to get a jury of twelve jurors. Each side gets one strike for each alternate juror. A jury with one alternate requires thirty-three qualified potential jurors. Where an otherwise qualified potential juror indicates that he can and will fairly evaluate the evidence, the party who wishes to eliminate him must do so by means of the peremptory strike. *White v. State,* 313 Ga. App. 605 (2012); *Sharpe v. State*, 288 Ga. 565 (2011).

Selecting or Striking the Jury

Once the required number of qualified potential jurors is achieved, the lawyers can start selecting the jury. Jury selection is actually a process of de-selection in which each side gets a chance to make sure a particular potential juror does not get on the jury. The system by which juries are selected does not include the right of any party to select certain jurors, but rather to permit parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors. A defendant has no right to a particular juror. *Cannon v. State*, 288 Ga. 225 (2010).

The actual selection of the jury is usually done silently by the clerk passing a piece of paper back and forth between each side. The prosecution gets the first opportunity to approve of the juror with a check mark or exercise a peremptory strike by

putting S-1. After the prosecutor indicates their position as to juror number one, the defense can either accept the juror by also making a check mark or strike the juror with a peremptory strike indicating such with D-1. This process continues with each potential juror until 12 jurors and one or more alternate jurors have been selected. After discovering that the defense has accepted a particular juror, the State "cannot then change its mind and excuse the juror." *Sakobie v. State*, 115 Ga. App. 460 (1967). However, not every deviation from this rule justifies a reversal of a defendant's conviction. *Cox v. State*, 293 Ga. App. 98 (2008).

BATSON AND MCCOLLUM CHALLENGE

A party may not use its peremptory strikes to strike jurors based on race, gender, or nationality. If a defendant believes the State has used its peremptory strikes in a discriminatory manner, the defendant can raise a motion under *Batson v. Kentucky*, 476 U.S. 79 (1986). Similarly, if the prosecution believes that the defense has exercised peremptory strikes in a discriminatory manner, they can raise a motion under *Georgia v. McCollum*, 505 U.S. 42 (1992).

In evaluating a *Batson* or *McCollum* challenge to the use of peremptory strikes, a judge applies a three-part test: First, the side claiming an improper peremptory strike must make a prima facie showing

of discrimination. They can establish a prima facie case of purposeful discrimination in selection of the jury on evidence that the other side used all their strikes on a certain group. A prima facie case can also be made by showing that the strikes resulted in the "total exclusion" of a group, for example, African-Americans from the jury. *Lemon v. State*, 290 Ga. App. 527 (2008).

Second, the burden of production then shifts to the side making the strike to give a neutral reason for the strike. A neutral reason need not be persuasive, plausible, or even make sense. *Culver v. State,* 314 Ga. App. 492 (2012). However, the reason must be concrete, tangible, neutral and neutrally applied. *Wilkins v. State,* 291 Ga. 483 (2012). Unless discriminatory intent is inherent in the explanation for the strike, the reason given will be accepted as neutral. *Washington v. State,* 310 Ga. App. 775 (2011); *Veasey v. State*, 311 Ga. App. 762 (2011). The reason may be based on the juror's demeanor. *O'Connell v. State,* 294Ga. 379 (2014); *Heard v. State,* S14A0563. A peremptory strike may be based on a jurors belief that law enforcement officers are racially motivated *Quillan v. State,* 279 Ga. 698 (2005).

Third, after hearing from both sides and considering the totality of the circumstances, the judge then decides whether the movant carried his burden of proving that discriminatory intent in fact

motivated the strike. *Thomas v. State*, 274 Ga. 156 (2001); *Turner v. State,* 267 Ga. 149 (1991). The movant may carry his burden of persuasion and win the *Batson* or *McCollum* motion by showing that similarly situated jurors of another group were not struck or that the neutral reason for a strike is so implausible or fantastic that it renders the explanation pretextual.

The judge's decision rests largely upon assessment of the attorney's state of mind and credibility; it therefore lies peculiarly within a judge's province. *Bell v. State*, 306 Ga. App. 853 (2010). A judge's finding as to whether the movant has proven discriminatory intent is entitled to great deference and will not be overturned on appeal unless clearly erroneous. *Ananaba v. State,* A13A2425; *Barnes v. State*, 269 Ga. 345 (1998); *Younger v. State*, 288 Ga. 195 (2010).

When a *Batson* or *McCollum* challenge results in a finding that jury selection process was discriminatory and when the jurors remain unaware of the party who struck them (because the selection was silent), reinstating improperly challenged jurors is appropriate. *Brown v. State*, 307 Ga. App. 797 (2011).

The jury that is selected is administered an oath. O.C.G.A. § 15-12-139. The jury oath is mandatory and the judge's failure to give the oath is reversible

error. *Adams v. State,* 286 Ga. 496 (2010). However, the mere failure of the transcript to reflect whether the jury was sworn does not constitute reversible error. *Hill v. State,* 291 Ga. 160 (2012). Once the oath has been administered, double jeopardy attaches. *Herrington v. State,* 315 Ga. App. 101 (2012). Prior to a jury being sworn, a defendant cannot ask for a mistrial. *White v. State,* 313 Ga. App. 605 (2012). If a defendant believes that potential jurors have been irreparably prejudiced by something that was said or done during jury selection, the proper method is either a "challenge to the poll" or a motion for a postponement to impanel other jurors who had not heard the remark. *Bell v. State*, 311 Ga. 289 (2011).

Jurors are told not to discuss the case with anyone or amongst themselves until they begin deliberations. They are not allowed to conduct any independent research or utilize social media concerning the case. No outside influence should be brought to bear on the minds of the jury. *Fuller v. State,* 313 Ga. App. 759 (2012).

It is customary during a trial to stand as the jury enters and leaves the courtroom.

Removal of Jurors

A juror can be removed from the jury at any time even during deliberations "if good cause is shown to the court that the juror is unable to perform his duty,

or for other legal cause." O.C.G.A. § 15-12-172; *Brown v. State*, 310 Ga. App. 285 (2011); *Moon v. State*, 288 Ga. 508 (2011). A juror can even be removed after the jury has reached and announced its verdict. *Calmes v. State*, 312 Ga. App. 769 (2011); *Murray v. State*, 276 Ga. 356 (2003).

There must be some sound basis upon which the judge decides to remove a juror. For example, a juror can be removed for failing to give accurate information during jury selection. *Johnson v. State,* 289 Ga. 498 (2011); *Suits v. State,* 270 Ga. 362 (1998). A juror can be removed for sleeping during the trial. *Gibson v. State*, 290 Ga. 6 (2011).

The decision to remove a juror from the jury is left to the discretion of the judge. *Tolbert v. State,* 300 Ga. App. 51 (2009). The judge should have a hearing to inquire of the juror regarding the reasons removal may be appropriate. *Crowley v. State,* 315 Ga. App. 755 (2012). Removal of the juror without any factual support or for a legally irrelevant reason is prejudicial. *Butler v. State,* 290 Ga. 412 (2012).

A defendant is entitled to a jury untained by improper influence. *Collins v. State,* 290 Ga. 505 (2012). During a trial the judge should not in any manner communicate with the jury about the case in the absence of the defendant and his attorney. *Ramage v. State,* 314 Ga. App. 651 (2012); *Hanifa v. State,* 269 Ga. 797 (1998). Also, communication

between a juror and the victim's family during trial is improper. *Shank v. State,* 290 Ga. 844 (2012). A witness should not speak with jurors while a trial is ongoing. *Brown v. State,* 314 Ga. App. 198 (2012); *Jones v. State,* 289 Ga. 111 (2011). An unauthorized contact between a juror and a member of the prosecutor's office will not necessarily require a new trial if the two did not discuss the merits of the case. *Chance v. State,* 291 Ga. 241 (2012); *Smith v. State,* 261 Ga. App. 781 (2003). However, some communications do not involve the case and are inconsequential and not prejudicial. *State v. Clements,* 289 Ga. 640 (2011). When improper conduct is shown, there is a presumption that it is harmful to the defendant. *Fuller v. State,* 313 Ga. App. 759 (2012). The State must prove beyond a reasonable doubt that no harm occurred. *Keaton v. State,* 311 Ga. App. 14 (2011).

The first alternate juror takes the place of the removed juror. *Crowley v. State,* 315 Ga. App. 755 (2012).

Chapter 4
Opening Statement

After jury selection, but before opening statements, the judge may give the jury preliminary instructions that explain the procedure of a trial from opening statements to closing arguments. There is no requirement that the judge instruct the jury on substantive matters such as reasonable doubt in the preliminary instructions. *Decapite v. State*, 312 Ga. App. 832 (2011). After these preliminary instructions, the jury will be ready to hear the opening statements of the attorneys.

Opening statements are the opportunity for the attorneys to give the jury an overview of the case. *Franks v.* State, 88 Ga. App. 263 (1988). The attorneys are allowed to tell the jury what they expect the evidence to show during the course of the trial. *Clark v.* State, 271 Ga. 6 (1999). It is not a time for the attorney to argue the case. *Barber v. State,* 317 Ga. App. 600 (2012). Studies indicate that what is said in opening statement has an influence on jurors. Therefore, although an attorney can waive an opening statement, the decision to do so should not be taken lightly. However, the failure to make an opening statement does not amount to ineffective assistance of counsel. *Futch v. State*, 151 Ga. App. 519 (1979).

Uniform Superior Court Rule 10.2 provides: "The district attorney may make an opening statement prior to the introduction of evidence. This statement shall be limited to expected proof by legally admissible evidence. Defense counsel may make an opening statement immediately after the State's opening statement and prior to introduction of evidence, or following the conclusion of the State's presentation of evidence. Defense counsel's statement shall be restricted to expected proof by legally admissible evidence, or the lack of evidence." *Mason v. State*, 197 Ga. App. 634 (1990). A defense attorney can reserve his opening statement until after the State has presented its evidence. However, the judge must allow the defense opening statement to be reserved. *Berryhill v. State*, 235 Ga. 549 (1975); *McKenzie v. State*, 248 Ga. 294 (1981).

Since opening statements are limited to statements concerning legally admissible evidence, attorneys must have a good faith basis that what they say will be proven by admissible evidence. *Ramirez v.* State, 276 Ga. 249 (2003); *Ballamy v.* State, 272 Ga. 157 (2002). Sometimes the judge will prevent an attorney from making a statement about certain evidence in opening until its admissibility can be determined during trial. *Yarborough v. State*, 183 Ga. App. 198 (1987); *Teems v. State*, 256 Ga. 675 (1987.

A prosecutor should confine his opening statement to an outline of what he expects admissible evidence to prove at trial. However, if a prosecutor departs from these guidelines, a conviction will not be reversed if the prosecutor acted in good faith and if the judge instructs the jury that the prosecutor's opening statement is not evidence and has no probative value. The burden is on the prosecutor to show that the failure to offer this proof was in good faith. *Alexander v. State*, 270 Ga. 346 (1998); *Belyeu v. State*, 262 Ga. App. 682 (2003).

It is inappropriate for a prosecutor in a criminal case to discuss in opening statement the evidence the State anticipates the defense will present at trial. *Hargett v. State*, 285 Ga. 82 (2009); *Parker v. State*, 277 Ga. 439 (2003). For example, in *Hargett*, the defense gave notice of its intent to present an alibi defense. The prosecutor in opening statement improperly said that the State was prepared to expose and refute the alibi defense that the State anticipated.

The use of a visual aid is permissible during opening statement. *Phillips v. State*, 287 Ga. 560 (2010).

Chapter 5
Rules of Evidence

The object of all legal investigation is the discovery of the truth. O.C.G.A. § 24-1-2. There are rules of evidence that determine what type of evidence is admissible during a trial. The admission of evidence is within the sound discretion of the judge, and the judge's decisions concerning the admission of evidence will not be reversed on appeal unless the judge abuses that discretion. *Smith v. State*, 265 Ga. App. 236 (2004); *Holowiak v. State*, 308 Ga. App. 887 (2011). The judge is a "minister of justice whose duty is to govern the progress of the trial and where possible, to prevent the introduction of redundant or inadmissible matters." *Crisp v. State,* 310 Ga. App. 98 (2011); *Coleman v. State,* 160 Ga. App. 158 (1981).

Georgia law favors the admission of relevant evidence no matter how slight it's probative value. *Scales v. State,* 310 Ga. App. 48 (2011). Evidence is relevant if it tends to prove or to disprove a material fact at issue, and every act or circumstance which serves to explain or throw light upon a material issue is relevant. *Sailor v. State*, 265 Ga. App. 645 (2004). Even when the relevancy is doubtful, the evidence should be admitted, and its weight left to the determination of the jury. *Mims v. State,* 314 Ga. App. 170 (2012). However, an exception exists if the

potential for prejudice substantially outweighs the probative value of the evidence. *State v. Adams*, 270 Ga. App. 878 (2004); *O.C.G.A. §§ 24-4-101- 24-4-103*.

Direct evidence is evidence which points directly to the question at issue. *Lynch v. State,* 291 Ga. 555 (2012). Direct evidence is evidence which is consistent with either the conclusion offered by the person offering the evidence or its opposite conclusion. Circumstantial evidence is evidence that is consistent with both the proposed conclusion and its opposite. *Rockholt v. State,* 291 Ga. 85 (2012); *Stubbs v. State,* 265 Ga. 883 (1995).

OBJECTIONS & MISTRIALS

If a party believes that inadmissible evidence is being offered into evidence, that party must raise an objection. *Brown v. State,* 310 Ga. App. 835 (2011); *Whitehead v. State,* 287 Ga. 242 (2010). Otherwise, the issue will be considered waived on appeal. O.C.G.A. § 24-1-103. "In order to raise on appeal an error regarding the admissibility of evidence, the specific ground of objection must be made at the time the evidence is offered, and the failure to do so amounts to a waiver of that specific ground." *Fraser v.* State, A14A0863; Knight *v. State,* 311 Ga. App. 367 (2011); *Keaton v. State,* 311 Ga. App. 14 (2011).

An appeals court is a court for the correction of errors of law committed by the judge where proper objection is made. The appeals courts will not consider objections not raised at trial. *Bryant v. State*, 288 Ga. 876 (2011). An issue raised by a co-defendant at trial does not preserve the issue for another co-defendant who does not join in the objection. *Cox v. State*, 242 Ga. App. 334 (2000). If a timely objection is made, the lawyer does not have to renew the objection at the end of the case. *Sledge v. State*, 312 Ga. App. 97 (2011).

Failing to object to evidence which is introduced after a pre-trial motion concerning its admissibility does not waive the grounds for the motion to suppress. However, affirmatively stating that there is no objection in effect concedes the point and waives the grounds of the motion to suppress. *Lightsey v. State,* 316 Ga. App. 573 (2012); *Williams v. State,* 314 Ga. App. 840 (2012); *Monroe v. State,* 272 Ga. 201 (2000).

The attorney must also make sure there is a record of the objection. During trial, jury selection, opening statements, and closing arguments may not be transcribed by the court reporter. If there is an objection during any of these parts of a trial it is important that the objection be put on the record. *Maxwell v. State*, 267 Ga. App. 227 (2004); *Jupiter v. State*, 308 Ga. App. 386 (2011). Further, where the error alleged is that certain evidence has been

wrongfully excluded (not allowed into evidence) there must have been a proffer or offer of proof as to what the evidence would have been so that both the judge and the appellate court can know whether the evidence really exists. *Gawlak v. State,* 310 Ga. App. 757 (2011). The record must show what questions would have been asked or what answers were expected of the witness. *French v.* State, 288 Ga. App. 775 (2007); *Holder v. State,* 242 Ga. App. 479 (2000). In the absence of such a proffer, the error is so incomplete as to prevent its consideration on appeal. *Miceli v. State*, 308 Ga. App. 225 (2011); *See Appendix A, HB 24, O.C.G.A. § 24-1-103.*

An attorney who seeks to have the judge give an instruction to the jury limiting its consideration of certain evidence must request the limiting instruction at the time the evidence is offered. The attorney cannot rely upon an earlier request for a limiting instruction that was granted at the time that the evidence was determined to be admissible. *Smith v. State,* 290 Ga. 768 (2012).

Sometimes an attorney may believe that the harm that has been done cannot be repaired in a way to allow the trial to be fair. Attorneys refer to this as a situation where you cannot un-ring the bell. The Georgia Supreme Court has recognized that "jurors, like other human beings, are unconsciously too much affected by strong mental impressions for these impressions to be nicely segregated from the mass of

evidence." *Murphy v. State*, 290 Ga. 459 (2012); *Chumley v. State*, 282 Ga. 855 (2008). In these circumstances the party can move for a mistrial.

Whether to grant a mistrial is a matter within the discretion of the judge, and that discretion will not be interfered with on appeal unless it is apparent that a mistrial was essential to the preservation of the right to a fair trial. *Warren v State*, 314 Ga. App. 477 (2012); *Belton v. State*, 270 Ga. 671 (1999). The judge has the discretion to decide whether a mistrial is the only corrective measure to take or whether proper curative instructions withdrawing the testimony from the jury's consideration can correct the prejudicial effect. *Smith v. State*, 288 Ga. 348 (2010). The party who requested the mistrial must object to the curative instruction or renew the motion for a mistrial after the curative instruction. *Warren v. State,* 314 Ga. App. 477 (2012); *Maudlin v. State,* 313 Ga. App. 228 (2011).

HEARSAY & HEARSAY EXCEPTIONS

Hearsay is that which does not derive its value solely from the credit of the witness who is testifying, but rests mainly on the truthfulness and competency of other persons. O.C.G.A. § 24-3-1; *Hammock v. State,* 311 Ga. App. 344 (2011); O.C.G.A. §§ 24-8-801- 24-8-825.

Hearsay generally relates to an out of court statement by someone other than the witness. *McClain v. State,* 311 Ga. App. 750 (2011); *Blunt v. State,* 275 Ga. App. 409 (2005). The jury is asked to assume that the out of court person who made the statement was not lying or mistaken when the statement was made. *Hammock v. State,* 311 Ga. App. 344 (2011); *Diaz v. State,* 275 Ga. App. 557 (2005).

When a witness testifies to what he told another person, it is not hearsay. *English v. State,* 288 Ga. App. 436 (2007). Also, anything seen or heard by the witness in the presence of the defendant is admissible and does not constitute hearsay. *Lewis v. State,* 311 Ga. App. 54 (2011). Further, what the defendant said is not considered hearsay and is admissible in the prosecution's case through the testimony of anyone who heard the statement. *Dukes v. State,* 290 Ga. 486 (2012); *Austin v. State,* 286 Ga. App. 149 (2007).

Subject to certain exceptions, hearsay testimony is not admissible during a criminal trial. Further, hearsay has no probative value, and even its introduction without objection does not give it any weight or force whatsoever in establishing a fact. *Cabrera v. State*, 303 Ga. App. 646 (2010). This rule will be changed by the new evidence code. Hearsay that is not objected to will be considered legal evidence. O.C.G.A. § 24-8-802.

There are several exceptions to the rule against hearsay that arise frequently during a criminal trial. When the person who made the statement testifies at trial and is subject to cross-examination, the witness' out of court statements to others can be admitted. *Veasey v. State*, 311 Ga. App. 762 (2011). The witness testifying satisfies the concerns of the hearsay rule. *State v. Woods*, 311 Ga. App. 577 (2011); *Conley v. State*, 257 Ga. App. 563 (2002).

Business records

Business records may be admissible during a trial even though they contain hearsay information. O.C.G.A. § 24-3-14; O.C.G.A. § 24-8-803. Further, the witness testifying about the business records does not have to be the custodian of those records. *Hurst v. State*, 285 Ga. 294 (2009).

In order to introduce a writing under the business records exception to the hearsay rule, a witness must indicate that he is aware of the method of keeping the documents. It is not required that the witness made the records or kept them under his supervision or control. Instead, the witness must be able to testify that the record was made (1) in the regular course of business, and (2) at the time of the event or within a reasonable time of the event. The witness' lack of personal knowledge regarding how the records were created does not render them inadmissible, but merely affects the weight given to the evidence. *Hite*

v. State, 315 Ga. App. 221 (2012); *In the Interest of Hudson*, 300 Ga. App. 340 (2009); *McKinley v. State*, 303 Ga. App. 203 (2010).

Those portions of business records which contain conclusions, opinions, estimates and impressions of third parties who are not present are no admissible under the business records exception to the hearsay rule. *Forrester v. State,* 315 Ga. App. 1 (2012); *Malcolm v. State,* 263 Ga. 369 (1993).

Child Hearsay

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another or performed with or on another in the presence of the child is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the judge finds that the circumstances of the statement provide sufficient indicia of reliability. *Bunn v. State,* S11G0682; O.C.G.A. § 24-3-16; O.C.G.A. § 24-8-820. The child hearsay statute allows testimony even if the hearsay may be bolstering. *Ledford v. State*, 313 Ga. App. 389 (2011).

The Child Hearsay Statute can violate a defendant's right to confrontation because it fails to put the burden on the prosecution to put the child victim on the witness stand to confront the defendant.

The Confrontation Clause concerns can be satisfied by the prosecution giving reasonable pretrial notice of its intent to use child hearsay statements during trial, thus giving the defendant an opportunity to object on Confrontation Clause grounds. If the defendant objects on Confrontation Clause grounds, the State must present the child victim at trial. If the defense fails to object, the State can introduce the statement subject to the judge determining that the circumstances of the statement provide sufficient indicia of reliability. The judge should take reasonable steps to determine if the defendant is waiving any Confrontation Clause objection. *Hatley v. State*, 290 Ga. 480 (2012).

Co-conspirator Statements

After the fact of a conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project, including the concealment phase, shall be admissible against all. O.C.G.A. § 24-3-5; O.C.G.A. § 24-8-801. Co-conspirator statements may only be used to admit statements *against* a conspirator and are not a means by which a defendant/conspirator may introduce exculpatory evidence. *Dennis v. State*, 303 Ga. App. 457 (2010); *Dunbar v. State*, 205 Ga. App. 867 (1992). For example, the defendant cannot introduce evidence that the alleged co-conspirator told another person that the defendant was not involved in the crime.

The State is not required to prove the existence of the conspiracy before the statement can be admitted. The judge can permit the State to admit the statement so long as the State proves during the trial the existence of the conspiracy. *Foster v. State,* 290 Ga. 599 (2012); *Purvis v. State,* 273 Ga. 898 (2001).

The guilty plea of a co-defendant is not admissible at a defendant's trial. *Robinson v. State*, 312 Ga. App. 110 (2011); *Pickney v. State*, 236 Ga. App. 74 (1999).

O.C.G.A. § 24-3-2 is authority for admitting recordings of phone calls between witnesses, co-conspirators, informers, and/or third parties that were made after the crimes at issue and at the direction of law enforcement officers, even when one of the parties to the conversation did not testify at trial. *Redinburg v. State,* 315 Ga. App. 413 (2012); *Bundrage v. State,* 265 Ga. 813 (1995).

Declarations Against Title

Declarations by a person in possession of property in disparagement of his own title shall be admissible in evidence in favor of anyone and against privies of the declarant. O.C.G.A. § 24-3-7.

Dying Declarations

Declarations by any person in the process of death, who is conscious of his condition, as to the cause of his death and the person who killed him, shall be admissible in evidence in a prosecution for the homicide. O.C.G.A. § *24-8-804 (b)*. The testimony introduced as a dying declaration does not have to contain a statement by the deceased to the effect that he is conscious of his impending death at the time the declaration is made. It may be inferred from the nature of the wounds and other circumstances. *Wiggins v. State*, S14A0853.

Former Testimony

The testimony of a witness since deceased, disqualified, or inaccessible for any cause which was given under oath at a previous trial upon substantially the same issue and between substantially the same parties may be proved by anyone who heard it and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies. O.C.G.A. § 24-3-10; O.C.G.A. § 24-8-804 (b).

The party seeking to admit the former testimony must show that he used due diligence in trying to locate the witness and subpoena the witness to court. *Hill v. State,* 291 Ga. 160 (2012); *Thomas v. State,* 290 Ga. 653 (2012); *Dillingham v. State,* 275 Ga. 665 (2002).

The certificate or attestation of the court reporter shall give sufficient validity or authenticity to a copy of a transcript for it to be admitted into evidence. O.C.G.A. § 24-5-31; *Grovner v. State,* 317 Ga. App. 623 (2012).

Medical Diagnosis

Statements made for purposes of medical diagnosis or treatment describing medical history or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admissible in evidence. O.C.G.A. § 24-3-4; O.C.G.A. § 24-8-803.

Necessity

The necessity exception to the hearsay rule allows the admission of evidence that is otherwise hearsay upon a showing of necessity and particularized guarantees of trustworthiness. *Chapel v. State*, 270 Ga. 151 (1998).

O.C.G.A. § 24-3-1 (b) provides that hearsay evidence is admissible in "specified cases from necessity." Hearsay is admissible under the necessity exception if: (1) the declarant of the statement is unavailable; (2) the declarant's statement is relevant

and more probative of a material fact than other evidence that may be obtained and offered; and (3) the statement exhibits specific indicia of reliability. *McNaughton v. State,* 290 Ga. 894 (2012); *Gibson v. State*, 290 Ga. 6 (2011); *Miller v. State*, 289 Ga. 854 (2011); *Butler v. State,* 290 Ga. 425 (2012; O.C.G.A. § 24-8-807.

Offered to Explain Conduct

When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted in evidence not as hearsay but as original evidence. O.C.G.A. § 24-3-2. Statements offered to explain the conduct of a police officer are hearsay and generally may not be used as criminal evidence of a defendant's guilt. *White v. State,* 273 Ga. 787 (2001); *Germany v. State*, 235 Ga. 836 (1977). Only in rare instances will the conduct of an investigating officer need to be explained. *Foster v. State,* 314 Ga. App. 642 (2012); *Williams v. State*, 312 Ga. App. 693 (2011); *Reeves v. State,* 288 Ga. 545 (2011). *Smoot v. State,* 316 Ga. App. 102 (2012). Testimony about what an officer learned during an investigation is not hearsay if the officer does not repeat the statement of an out-of-court declarant. *Bearden v. State,* 316 Ga. App. 721 (2012); *Smith v. State,* 274 Ga. App. 852 (2005).

Res Gestae

Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, shall be admissible in evidence as part of the res gestae. O.C.G.A. § 24-3-3; *Bonilla v. State*, 289 Ga. 862 (2011).

BOLSTERING OF WITNESSES

Under Georgia law, the credibility of a witness is to be determined by the jury. O.C.G.A. § 24-9-80; O.C.G.A. § 24-6-620. The credibility of an alleged victim may not be bolstered by the testimony of another witness. *Gaston v. State,* A12A0962. Thus, a witness may not give an opinion as to whether the alleged victim is telling the truth. *Damerow v. State,* 310 Ga. App. 530 (2011); *Hopson v. State*, 307 Ga. App. 49 (2010).

A witness, even an expert, can never bolster the credibility of another witness as to whether the witness is telling the truth. Accordingly, "testimony that another witness believes the victim impermissibly bolsters the credibility of the victim." *Gregoire v. State*, 309 Ga. App. 309 (2011); *Mann v. State*, 252 Ga. App. 70 (2001) (failure to object to

testimony that "I believed him [the victim]" constituted deficient performance).

Normally, a party may not bolster the truthfulness of its own witness until the witness has been impeached by the other side. *Miller v. State*, 275 Ga. 32 (2002); *State v. Braddy*, 254 Ga. 366 (1985). After a party's witness has been cross-examined, they can be asked on re-direct examination if they are telling the truth and assert their own credibility by testifying that they are telling the truth. *Handley v. State*, 289 Ga. 786 (2011); *Hardy v. State*, 293 Ga. App. 265 (2008); *Miller v. State,* 275 Ga. 32 (2002).

BRUTON

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court of the United States held that the admission of a powerfully incriminating out of court statement of a non-testifying co-defendant can pose a substantial threat to a defendant's right to confront the witnesses against him. This harm cannot be fixed or cured by an instruction to the jury to consider the statement only against the co-defendant who made the statement. This is true even if a defendant's confession is admitted against him at trial. *Laye v. State*, 312 Ga. App. 862 (2011); *Davis v.* State, 272 Ga. 327 (2000). Evidence that violates *Bruton* is not admissible. However, *Bruton* only excludes statements by a non-testifying co-defendant that directly inculpate the defendant. *Bruton* is not

violated if a co-defendant's statement does not suggest the involvement of the defendant on its face and only becomes incriminating when linked with other evidence introduced at trial. *Smith v. State,* 308 Ga. App. 190 (2011).

If the non-testifying co-defendant's statement is redacted to exclude any reference to the defendant or his existence, the statement may be admissible provided the jury is instructed to consider the statement only against the co-defendant who made the statement. *Richardson v. Marsh*, 481 U.S. 200 (1987). The redaction is not adequate if it merely replaces a defendant's name with a blank space, the word deleted, a symbol, or a reference to the defendant's nickname, or by words such as someone, others, or they. *Bray v. Maryland*, 523 U.S. 183 (1998); *Hanifa v. State*, 269 Ga. 797 (1998). Statements that refer directly to someone, often obviously the defendant, are problematic.

A *Bruton* violation requires a new trial unless the error was harmless. *Schneble v. Florida*, 405 U.S. 427 (1972); *Collum v. State*, 281 Ga. 719 (2007).

CHANDLER

Evidence of a victim's specific acts of violence against third parties is admissible when a defendant claims justification and makes a prima facie showing and establishes the existence of the prior violent acts

by admissible evidence. *State v. Hodges*, 291 Ga. 413 (2012); *Hill v. State,* 272 Ga. 805 (2000). A prima facie showing is made by the defendant showing that the victim was the aggressor, the victim assaulted the defendant, and the defendant was honestly trying to defend himself. *Cloud v. State*, 290 Ga. 193 (2011); *Stobbart v. State*, 272 Ga. 608 (2000).

The defendant must prove that the victim actually committed the alleged violent acts. *State v. Hodges,* S11G1820. The evidence may also be admitted not to prove that the alleged act of violence did in fact occur, but to prove the defendant's state of mind at the time of the alleged crime (that he believed the victim had committed the act). However, the evidence must be more than the defendant's unsupported statement as to what he had heard.. *Render v. State,* 288 Ga. 420 (2011); *Arp v. State,* 249 Ga. 403 (1982).

CHARACTER OF THE DEFENDANT

In general, evidence of a criminal defendant's bad character is not admissible unless the defendant first puts his character in issue. *Lee v. State*, 308 Ga. App. 711 (2011). However, there are many exceptions to this rule.

Any statement or conduct of the defendant tending to show consciousness of guilt is admissible. *Anderson v. State,* 315 Ga. App. 679 (2012); *Aldridge v. State,* 229 Ga. App. 544 (1997).

Evidence that incidentally puts the character of the defendant in issue may be admitted if it is otherwise relevant to an issue in the case, such as motive. *Harrison v. State,* 313 Ga. App. 861 (2012).

When a witness gives a nonresponsive answer that impacts negatively on a defendant's character it does not improperly place his character in issue. *Keaton v. State,* 311 Ga. App. 14 (2011); *Boatright v. State*, 308 Ga. App. 266 (2011).

Testimony that a defendant is known to the police does not impermissibly place the defendant's character into issue. *Moore v. State,* 310 Ga. App. 106 (2011); *Johnson v. State*, 302 Ga. App. 318 (2010). Further, a passing reference to a defendant's record does not place his character in issue. *Reese v. State,* 289 Ga. 446 (2011).

Evidence that a defendant had a warrant is not necessarily grounds for a mistrial. *Jackson v.State,* 315 Ga. App. 679 (2012); *Brown v. State,* 268 Ga. 455 (1997). A passing reference to probation does not place a defendant's character in issue. *Gomez v. State,* 315 Ga. App. 898 (2012).

Evidence that an accused has been confined in jail in connection with the case on trial does not place his character into evidence. *Nichols v. State,* A13A2210; *Jackson v. State*, 284 Ga. 484 (2008); *Fields v. State*, 176 Ga. App. 122 (1985). Mug shots of a defendant taken after arrest with regard to the crime for which he is currently being prosecuted do not prejudice the defendant. *Rittenhouse v. State*, 272 Ga. 78 (2000). If a mug shot relating to a previous crime is introduced into evidence, however, it is the equivalent of testimony establishing the defendant's arrest for a prior crime and would therefore impermissibly place his character in evidence. *Roundtree v. State*, 181 Ga. App. 594 (1987) (introduction of photograph with caption indicating date of a prior arrest impermissibly placed defendant's character in evidence). *Butler v. State,* 290 Ga. 425 (2012); *Sharpe v. State*, 288 Ga. 565 (2011).

Gun ownership and the custom of carrying a gun do not, by themselves, show bad character. *Roberts v. State,* A12A1325; *Pate v. State,* 315 Ga. App. 205 (2012); *Sweet v. State,* 278 Ga. 320 (2004).

The existence of a tattoo, in and of itself, does not establish a defendant's propensity to act in accordance with that depicted in the tattoo. *Moore v.*

State, S13A1569; *Belmar v. State,* 279 Ga. 795 (2005).

The circumstances of a defendant's arrest are admissible even if that information incidentally places a defendant's character into issue. *Manuel v. State,* 315 Ga. App. 632 (2012); *Shields v. State*, 203 Ga. App. 538 (1992). The judge abuses his discretion in admitting evidence of the circumstances surrounding the defendant's arrest if the evidence is wholly unrelated to the charged crime., the arrest is remote in time from the charged crime, and the evidence is not otherwise shown to be relevant. *Benford v. State,* 272 Ga. 348 (2000).

Evidence that a defendant fled the scene or fled the jurisdiction of the court while awaiting trial is admissible as consciousness of guilt. *Brown v. State*, 312 Ga. App. 489 (2011); *Sanders v. State,* 290 Ga. 637 (2012).

A lawyer's decision to place a defendant's character in issue is a matter of trial tactics and does not mean the defendant was deprived of the effective assistance of a lawyer. *Fields v. State*, 311 Ga. App. 528 (2011); *Polk v. State*, 225 Ga. App. 257 (1997).

COMMENT ON DEFENDANT'S SILENCE

Under Georgia law, the State may not comment at trial upon a defendant's silence or failure to come forward, even when the defendant testifies on his own behalf. *Harrelson v.* State 312 Ga. App. 710 (2011); *Grissom v. State*, 300 Ga. App. 593 (2009); *Scott v. State* 305 Ga. App. 710 (2010). The State cannot present evidence that the defendant knew the police were looking for him, but failed to contact the police. *Johnson v. State*, 293 Ga. App. 728 (2008); *McClarin v. State*, 289 Ga. 180 (2011). In order for remarks to constitute an impermissible comment on the defendant's silence, "there must be a finding that the prosecutor's manifest intent was to comment on the defendant's failure to testify or that the jury would naturally and necessarily understand the remarks as a comment on the defendant's silence." *Rosser v. State*, 284 Ga. 335 (2008).

An improper comment on a defendant's exercise of his right to remain silent or be represented by counsel does not necessarily require that a defendant's conviction be set aside. *Jefferson v. State*, 312 Ga. App. 842 (2011). To reverse a conviction the evidence of the defendant's election to remain silent must point directly at the substance of the defendant's defense or otherwise prejudice the defendant in the eyes of the jury. *Martin v. State,* 290 Ga. 901 (2012); *Benham v. State,* 259 Ga. 249 (1989); *Gooden v. State,* 316 Ga. App. 12 (2012). Informing the jury of a defendant's termination of a custodial interview and invocation of the right to

counsel does not amount to an improper comment on the right to remain silent warranting the reversal of his conviction. *Rowe v. State*, 276 Ga. 800 (2003). Pointing out that a defendant who waived his Miranda rights and gave an oral statement but also refused to sign a waiver or make a written statement is not a comment on his right to remain silent. *Hill v. State*, 290 Ga. 493 (2012).

A police officer's statement that he wanted to get a statement from the defendant is not a comment on the defendant's assertion of the right to remain silent. *Dunn v. State,* 291 Ga. 551 (2012).

If the defendant first places the evidence before the jury the prosecutor can comment on the evidence. *Kendrick v. State,* 290 Ga. 873 (2012).

CORROBORATION

In felony cases where the only witness is an accomplice, the testimony of the single witness is not sufficient to convict a defendant; corroboration is necessary. O.C.G.A. § 24-4-8; *See Appendix A, HB 24, O.C.G.A. § 24-14-8; Hamm v. State,* S13A1696; *Campbell v. State,* 314 Ga. App. 299 (2012). The State must provide corroboration regarding the identity and participation of the defendant. Simply because an accomplice's testimony is corroborated in most details, it does not follow that his testimony as to the identity and participation of the defendant has

been corroborated. Corroboration of the accomplice as to the time, place and circumstances of the crime, without any connection of the defendant to the crime is not sufficient to support a conviction. *Gilmore v. State,* 315 Ga. App. 85 (2012); *Caldwell v. State,* 227 Ga. 703 (1997). The corroborating evidence must connect the defendant with the crime or lead to an inference that he is guilty. The corroborating evidence does not need to be sufficient by itself to get a conviction. *Johnson v. State*, 288 Ga. 803 (2011). The sufficiency of the corroborating evidence is a question for the jury, but whether the evidence actually amounts to corroboration is a question of law for the judge. *Brookshire v. State,* 230 Ga. App. 418 (1998); *Laye v. State*, 312 Ga. App. 862 (2011). The testimony of two or more accomplices can be used to corroborate each other. *Skipper v. State,* 314 Ga. App. 870 (2012); *Hawkins v. State,* 290 Ga. App. 686 (2008).

A confession alone, uncorroborated by any other evidence, shall not justify a conviction. O.C.G.A. § 24-3-53; *See Appendix A, HB 24, O.C.G.A. § 24-8-823*. The evidence corroborating a confession need not definitely connect the defendant to the crime. Corroboration in any material way is sufficient. *Martinez v. State,* 314 Ga. App. 551 (2012).

A similar transaction can supply the required corroboration of an accomplice's testimony. *Alatise v. State,* 291 Ga. 428 (2012).

JUDICIAL COMMENT ON EVIDENCE

It is error for the judge in any criminal case, during its progress or in his instructions to the jury, to express or suggest his opinion as to what has or has not been proved or as to the guilt of the accused. O.C.G.A. § 17-8-57. This includes referring to a defendant's possible appeal. *Gibson v. State*, 288 Ga. 617 (2011); *Faust v. State*, 222 Ga. 27 (1966). The purpose of this rule is in part to prevent the jury from being influenced by any disclosure of the judge's opinion regarding the credibility of the witnesses. *Murphy v. State,* 290 Ga. 459 (2012).

O.C.G.A. § 17-8-57 does not apply to discussions between the judge and the attorneys regarding the admission of evidence. *Adams v. State*, 312 Ga. App. 570 (2011). Also, comments by the judge giving a reason for his ruling on the admissibility of evidence are not an expression of opinion or comment on the evidence. *Butler v. State,* 290 Ga. 412 (2012)*; Ridley v. State* 290 Ga. 798 (2012).

The judge also should not engage in ex parte (both the State and defense are not present) communications. Such communications are presumptively harmful. *In the Interest of D.D.,* 310 Ga. App. 329 (2011).

To violate O.C.G.A. § 17-8-57 the comments must focus on a disputed issue of fact. *Bugh v. State,* A12A0918. A violation of O.C.G.A. § 17-8-57 is always plain error and the failure of counsel to object will not prevent review on appeal. *State v. Garner,* 286 Ga. 633 (2010).

JUDICIAL NOTICE

If a judge intends to take judicial notice of a fact, he must first announce his intention to do so, and give the parties an opportunity to be heard regarding whether judicial notice should be taken. *Bizzard v. State*, 312 Ga. App. 185 (2011); *See Appendix A, HB 24, O.C.G.A. § 24-2-201*.

POLYGRAPHS

Georgia courts have expressly held "that upon an express stipulation of the parties that they shall be admissible, the results of a lie detector test shall be admissible as evidence for the jury to attach to them whatever probative value they may find them to have." *Jones v. State,* 309 Ga. App. 886 (2011); *Harris v. State*, 308 Ga. App. 523 (2011). Without a prior stipulation, the results of a polygraph are not admissible.

PRIVILEGE

Certain evidence is excluded from a criminal case because it is privileged. *See Appendix A, HB 24, O.C.G.A. §§ 24-5-501*- 24-5-503. The privilege can be waived. *Ingram v. State,* 262 Ga. App. 304 (2003) (waiver of spousal privilege); *Taylor v. Taylor*, 179 Ga. 691 (1934) (waiver of attorney-client privilege).

PUNISHMENT

In Georgia, there is a "general prohibition against evidence advising the jury about the specific sentence that might be imposed against the defendant." *Perkins v. State*, 288 Ga. App. 802 (2007); *Howard v. State*, 286 Ga. 222 (2009).

RE-ENACTMENTS

The use of a reenactment of the crime is a matter left to the discretion of the judge. The party seeking to use the reenactment must show that it is a fair and accurate representation of the events sought to be depicted. *Chance v. State,* S12A0684; *Pickren v. State,* 269 Ga. 453 (1998). The appeals courts have rejected the use of reenactments where the party seeking to use it does not show that the oral testimony would be inadequate to explain the events depicted in the reenactment. *Eiland v. State,* 130 Ga. App. 428 (1973).

RULE OF COMPLETENESS

When an admission is offered into evidence by one side, the other side has the right to have the whole admission and all the conversation connected with it admitted into evidence. O.C.G.A. § 24-3-8; *See Appendix A, HB 24, O.C.G.A. § 24-8-22; Carruth v. State,* 290 Ga. 342 (2012).

SIMILAR TRANSACTIONS

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); *See Appendix A, HB 24, O.C.G.A. § 24-4-404(b)*. 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.

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. *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); *Evans v. State*, 288 Ga. 571 (2011); *Gardner v. State*, 273 Ga. 809 (2001); *See Appendix A, HB 24, O.C.G.A. § 24-4-404(b)* (eliminating bent of mind as an appropriate purpose).

The State can proceed by proffer at the hearing and does not need to present witnesses. *Hinton v. State*, 290 Ga. App. 479 (2008).

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 and domestic violence. *McNaughton v. State,* 290 Ga. 894 (2012); *Payne v. State*, 285 Ga. 137 (2009); *Henderson v. State*, 303 Ga. App. 531 (2010). *See Appendix A, HB 24, O.C.G.A. §§ 24-4-413-414*.

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 be excluded due to the rule of collateral estoppel where the defendant has been tried and acquitted of the alleged

similar transaction. *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). 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 of time goes to the weight and credibility of evidence, not tits admissibility at trial. *McNaughton v. State,* 290 Ga. 894 (2012); *Hinton v. State,* 280 Ga. 811 (2006). When the lapse of time is great the judge must consider whether the evidence is so remote in time that any value it might have is outweighed by its prejudice to the defendant.

A similar transaction committed by a defendant as a juvenile can be admissible. *Jackson v. State,* 291 Ga. 54 (2012).

Certified copies of a defendant's conviction are admissible when they are helpful in proving the identity of the defendant as the perpetrator of the similar transaction and are not the only evidence of the prior crime. *Perry v. State,* 314 Ga. App. 575 (2012).

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 the same objection at the time the evidence is presented at trial. *Whitehead v. State*, 287 Ga. 242 (2010). However, only the objection that was raised pretrial is preserved. *Butler v. State,* 290 Ga. 425 (2012).

VICTIM CHARACTER & RAPE SHIELD

The character of the parties in other transactions is generally not relevant. O.C.G.A. § 24-2-2; *Askew*

v. State, 310 Ga. App. 746 (2011). Therefore, evidence of drug use by the alleged victim is inadmissible when it is intended only to impugn the alleged victim's character. *Robinson v. State,* 272 Ga. 131 (2000); *James v. State,* 270 Ga. 675 (1999). Likewise, the immigration status of a witness is generally not relevant. *Salazar v. State,* 314 Ga. App. 83 (2012); *Sandavol v. State,* 264 Ga. 199 (1994).

The Rape Shield Statute excludes evidence relating to the past sexual behavior of the complaining witness. O.C.G.A. § 24-2-3 (b); *See Appendix A, HB 24, O.C.G.A. § 24-4-412*; *Turner v. State*, 312 Ga. App. 315 (2011). However, evidence relating to the past sexual behavior of the complaining witness may be introduced if the judge finds that the past sexual behavior directly involved the participation of the defendant and finds that the evidence expected to be introduced supports an inference that the defendant could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.

There are other exceptions to the Rape Shield Statute that allow for such testimony when evidence of the alleged victim's sexual activity is relevant to an issue other than consent. *Tidwell v. State*, 306 Ga. App. 307 (2010). Among the exceptions are: (1) to show that someone other than the defendant caused the injuries to a child; (2) to show lack of victim credibility if the alleged victim's prior allegations of

molestation were false; and (3) to show other possible causes for the symptoms exhibited.

VICTIM IMPACT

It is not improper for the State to refer to one of the witnesses as a victim, rather than as an alleged victim. *Hart v. State,* 314 Ga. App. 685 (2012). Even though referring to the witness as the "victim" may technically imply that a crime has been committed, the use of the term "victim" during criminal prosecutions means the witness is the complaining party and allegedly the object of a crime. *Hart v. State,* 314 Ga. App. 685 (2012).

Victim-impact evidence goes to the impact of the crime on the victim, the victim's family, or the community. *In the Interest of W.N.J.*, 268 Ga. App. 637 (2004). Such evidence is admissible only at the sentencing phase of a trial, and admission of victim impact evidence during the guilt or innocence phase of the trial may constitute reversible error. *Lucas v. State*, 274 Ga. 640 (2001); *Anthony v. State*, 282 Ga. App. 457 (2006). Not all testimony that describes how the crime has affected the victim is impermissible in the guilt/innocence phase of trial. Details of context that allow jurors to understand what is being described are not improper when they are necessary to show something sufficiently relevant. *Humphrey v. Lewis,* 291 Ga. 202 (2012).

Chapter 6
Foundations for Evidence

During the trial of a case, an attorney may seek to admit certain tangible evidence. In order for the item to be admissible, a foundation must be laid to show the authenticity of the item. In other words, the attorney seeking to admit the item must show that it is what it is being offered as. *See Appendix A, HB 24, O.C.G.A. § 24-9-901*. This is done by marking the item with an exhibit sticker for identification purposes then showing a witness the exhibit and asking certain foundation questions. The type of foundation questions necessary for the item to be admissible depends on the type of item sought to be admitted.

The other side can object that the item should not be admitted because the appropriate foundation was not established. "Because 'lack of foundation' has no single defined meaning, an objection of 'lack of foundation' generally is of little or no use to a trial judge. For example, 'lack of foundation' can refer to a failure to establish that the item of evidence being offered is the same item it purports to be—often referred to as chain of custody, or it may refer to a failure to establish that the witness is testifying from personal knowledge. Lack of foundation may also refer to a failure to establish that business records meet the requirements of O.C.G.A. § 24-3-14 or that

a party has not established a witness's qualifications as an expert. Because of the varied meanings for 'lack of foundation,' a party making an objection for lack of foundation must specify the foundational element he contends is lacking." *Potter v. State*, 301 Ga. App. 411 (2009).

Chain of Custody

For purposes of proving the chain of custody of an item, there are two types of evidence: fungible and non-fungible. Fungible items are those which all look the same and can be easily substituted one for the other. Non-distinct currency is a fungible item. Non-fungible items, such as fingerprints, are unique and easily distinguishable.

To show a chain of custody adequate to preserve the identity of fungible evidence, the State must prove with reasonable certainty that the evidence is the same as that seized and that there has been no tampering or substitution. *Ashley v. State,* 316 Ga. App. 28 (2012). The State is not required to eliminate every possibility of tampering; it need only show reasonable assurance of the identity of the evidence. *Maldonado v. State*, 268 Ga. App. 691 (2004). The simple fact "that one of the persons in control of a fungible substance does not testify at trial does not, without more, make the substance or testimony relating to it inadmissible." *Collins v.*

State, 290 Ga. 505 (2012); *Gassett v. State*, 289 Ga. App. 792 (2008).

In contrast to fungible evidence, if a piece of tangible evidence is a distinct item that could be recognized from its features from someone who saw it before, that person's testimony identifying the item is sufficient to authenticate it." *Phillips v. Williams*, 276 Ga. 691 (2003); *Roberts v. State*, 232 Ga. App. 745 (1998). The chain of custody requirement does not apply to audio and video recordings. *Rodriguez-Nova v. State*, S14A0808.

Fingerprints

Fingerprints are the type of evidence which need only be properly identified before their admission into evidence. *Roland v. State*, 137 Ga. App. 796 (1976). A proper foundation for the admission of a fingerprint lift card is established through the testimony of the person who prepared it at the scene. *Gildea v. State*, 184 Ga. App. 105 (1987). A fingerprint card may be admitted into evidence without the showing of a chain of custody since it can be readily identified by reference to the subject's fingerprints. *Hill v. State*, 254 Ga. 213 (1985); *White v. State*, 268 Ga. 28 (1997).

Where there is no evidence explaining how a defendant's fingerprints came to be at a crime scene, the jury may conclude that they were put there during

the commission of the crime. *Wright v. State,* 310 Ga. App. 80 (2011); *Rivers v. State,* 271 Ga. 115 (1999).

A detective's testimony regarding the percentage of cases he had worked where fingerprints were not obtained, even if erroneously admitted, is harmless error. *Key v. State*, 146 Ga. App. 536 (1978); *Barbee v. State*, 308 Ga. App. 322 (2011).

DNA

"DNA, like a fingerprint, is unique to a single individual and, therefore ... may be admitted without demonstrating a chain of custody, since it can be readily identified by reference to the defendant's DNA." *Kuykendall v. State*, 299 Ga. App. 360 (2009); *Hines v. State*, 307 Ga. App. 807 (2011).

Emails

The foundation for admitting an email is that for introducing a writing in general. The party offering the email must show its authenticity and genuineness. The face of the writing itself, such as the contents, the letterhead, the signature, etc. do not authenticate the email. There must be other evidence or testimony establishing its genuineness. In the case of an email, the website identifiers and email address by themselves are not enough to self-authenticate the email. *Twiggs v. State,* 315 Ga. App. 191 (2012); *Hollie v. State*, 289 Ga. App. 1 (2009).

Photographs

Georgia has a liberal policy concerning the admission of photographic evidence. *Fields v. Satte*, 311 Ga. App. 528 (2011). Georgia courts recognize that "photographs are inherently more persuasive regarding the existence of the things they depict than testimony regarding those same things." *Stinski v. State*, 281 Ga. 783 (2007). A party lays a foundation for a photograph by showing that it fairly and accurately represents the object, scene, or person depicted. *Jackson v. State*, 309 Ga. App. 796 (2011); *Washington v.* State, 311 Ga. App. 199 (2011). "Any witness familiar with the subject depicted can authenticate a photograph; the witness need not be the photographer nor have been present when the photograph was taken." *Davis v. State*, 253 Ga. App. (2002).

The admission of photographic evidence is at the discretion of the judge. *Philpot v. State*, 311 Ga. App. 486 (2011); *Stewart v. State*, 286 Ga. 669, 670 (2010). Testimony describing the contents of a photograph does not refer to any statements and thus is not hearsay. *Smith v. State,* 316 Ga. App. 102 (2012); *Hammock v. State,* 311 Ga. App. 344 (2011).

Recordings

For a sound recording to be admissible into evidence, it must be shown that the device was capable of recording; that the operator of the device was competent to operate the device; that changes, additions, or deletions have not been made; and that the substance of the recording was freely and voluntarily made, without any kind of duress. Further, the authenticity and correctness of the recordings must be established; the manner of preservation of the record must be shown; and the speakers must be identified. *Central of Ga. R. Co. v. Collins*, 232 Ga. 790 (1974); *Steve M. Solomon, Jr., Inc. v. Edgar*, 92 Ga. App. 207 (1955). The Georgia Supreme Court has recognized, however, that advances in recording technology have somewhat relaxed these foundation requirements. *Saunders v. Padovani*, 258 Ga. 866 (1989).

Poor audio quality resulting in inaudible portions of a recording can be used to attack the weight and credibility of the recording, but does not prevent its admissibility. Admission of a recording of a conversation when part of it is inaudible is in the judge's discretion. *Heard v. State*, 257 Ga. App. 505 (2002). However, when material portions of the recording are inaudible, then the recording should be rejected when it is the only evidence offered as to the statement. *Pierce v. State*, 255 Ga. App. 194 (2002).

A transcript can be given to the jury to read while a recording is played. The State must lay a

foundation for admission of the recording and the judge must give an instruction that the transcript itself is not evidence, but that the jury can use the transcript to assist them in listening to the recording. The transcript should not be part of the evidence that goes out with the jury during deliberations. *Baker v. State,* 316 Ga. 122 (2012); *Turner v. State,* 245 Ga. App. 476 (2000).

A videotape is admissible where the operator of the machine which produced it or one who personally witnessed the events recorded testifies that the videotape accurately portrays the events. *Williams v. State*, 312 Ga. App. 22 (2011).

Surveillance videos are generally not operated by an individual person. O.C.G.A. § 24-4-48 provides that subject to any other valid objection, such items are admissible in evidence when the judge determines, based on competent evidence presented to the judge, that such items tend to show reliably the fact or facts for which the items are offered. Prior to the admission of such evidence the date and time of such recording shall be contained on the evidence and the date and time must be shown to have been made at the same time as the events depicted in the videotape. *See Appendix A, HB 24, O.C.G.A. § 24-9-923*.

Recordings of phone calls that a defendant made from the jail discussing his case can be used against

him during trial. *Boykins-White v. State*, 305 Ga. App. 827 (2010). The State may lay a proper foundation for admission of a recorded telephone conversation of an inmate by showing that: the recording device was working properly and that the recording was accurately made; the manner in which it was preserved; that no alterations have been made to the recording; the identity of the speakers; and that the inmate was aware that the conversation was subject to being recorded. *Lowe v. State*, 310 Ga. App. 242 (2011); *Davis v. State*, 279 Ga. 786 (2005).

It is improper for a witness to testify to the identity of a person in a video or photograph when such testimony tends to establish a fact which the average jurors could decide for themselves. If the defendant's appearance has changed by the time of trial or there is something that makes the witness more likely to identify him the testimony is admissible. *Bryson v. State,* 316 Ga. App. 512 (2012). Therefore, a person not qualified as an expert and who was not the victim of or witness to a crime but who has viewed a surveillance videotape of the commission of the crime, has been permitted to give an opinion of the identity of persons depicted on the videotape if there is some basis for concluding that the person is more likely to correctly identify the defendant from the video than the jury would be able to. *Jackson v. State,* 316 Ga. App. 80 (2012); *Dawson v. State,* 283 Ga. 315 (2008).

Scientific Evidence

Before scientific evidence can be properly admitted, the party offering the evidence must lay a proper foundation. It must be shown that: (1) the general scientific principles and techniques involved are valid and capable of producing reliable results, and (2) the person performing the test substantially performed the scientific procedures in an acceptable manner. *Harper v. State*, 249 Ga. 519 (1982); *Jefferson v. State*, 312 Ga. App. 842 (2011).

Best Evidence Rule / Documents

The best evidence rule holds that when a party wishes to prove the contents of a writing, that is, what the writing says, the party must produce that writing or give an accounting for why the writing cannot be produced. O.C.G.A. § 24-5-4(a); *See Appendix A, HB 24, O.C.G.A. §§ 24-10-1002- 24-10-1004*. Generally, the person seeking to admit the evidence must produce the original, but a duplicate is acceptable in certain circumstances.

Simply because a document is authenticated does not mean it can be admitted over a hearsay objection. The laws that "merely pertain to evidentiary authentication of documents do not remove hearsay considerations." *McGaha v. State,* 221 Ga. App. 440 (1996); *McKinley v. State*, 303 Ga. App. 203 (2010)

Properly certified copies of public records are generally allowable under the best evidence rule. This rule is deemed necessary to preserve the integrity of and access to official records by not removing the originals for use at trial.

Web Pages (Facebook, My Space, You Tube)

To establish the foundation for the admission of a You Tube / My Space photograph of another person holding an assault rifle, the party must establish the photo's origins or source. *Redinburg v. State,* 315 Ga. App. 413 (2012).

Printouts from computers (i.e. Facebook pages) are subject to the same rules of authentication as other documents. *Moore v.* State, S14A0988; *Burgess v. State, 292 Ga. 821 (2013);* Smoot *v. State,* 316 Ga. App. 102 (2012). The printout must first be authenticated as accurately reflecting the content of the page and the image of the page on the computer at which the printout was made. A witness must state that the printout accurately reflects the content of the web page and the image of the page on the computer at which the printout was made. Then the printouts need to be further authenticated as having been posted by a particular source. *Twiggs v. State,* 315 Ga. App. 191 (2012); *Hollie v. State,* 298 Ga. App. 1 (2009). Circumstantial evidence can be used to authenticate the documents. *Simon v. State,* 279 Ga. App. 844 (2006).

The judge's failure to order that bench conferences be recorded is not error unless there is some prejudice to the defendant. *Chatman v. Mancil,* 280 Ga. 253 (2006); *Sinns v. State,* 248 Ga. 385 (1981).

Chapter 7
The Presentation of Evidence
The State's case

The presentation of evidence begins after opening statements. The prosecution has the burden of proof and presents its evidence first.

Prior to witness testimony, either side can invoke the rule of sequestration. O.C.G.A. § 24-9-61; *See Appendix A, HB 24, O.C.G.A. § 24-6-615.* The rule means that witnesses will be examined out of the hearing of the other witnesses. The purpose of the rule is to prevent a witness who has not testified from having his testimony affected by another witness. *Pennington v. State*, 313 Ga. App. 764 (2012). The judge can make an exception to the rule of sequestration and allow the State to have the lead investigator remain in the courtroom to assist in the presentation of the State's case. *Mauldin v. State,* 290 Ga. 574 (2012). The State must show that the investigator's presence is necessary for the orderly presentation of evidence. *Mitchell v. State,* 290 Ga. 490 (2012); *Dockery v. State*, 287 Ga. 275 (2010); *See Appendix A, HB 24, O.C.G.A. § 24-6-615.* The investigator can be allowed to testify after other witnesses. *Kegler v. State,* A12A0967; *Holloman v. State,* 291 Ga. 338 (2012). Further, pursuant to the new evidence code effective January 1, 2013, the

victim of a crime shall be exempt from the rule provided, however, that the judge shall require that the victim be scheduled to testify as early as practical in the case. *See Appendix A, HB 24, O.C.G.A. § 24-6-616, Rule 35.* A violation of the rule does not make the witness' testimony inadmissible, but goes only to the credibility of the witness who heard the earlier witness' testimony. *Hawkins v. State,* 316 Ga. App. 415 (2012; *Rakestrau v. State*, 278 Ga. 872 (2005).

The State calls a witness to the stand and the witness is placed under oath. *See Appendix A, HB 24, O.C.G.A. § 24-6-603.* It will be presumed unless there is proof otherwise that a lawful oath was administered. *Grovner v. State,* 317 Ga. App. 623 (2012). The State then questions the witness through a process called direct examination. During direct examination the attorney is generally not permitted to ask leading questions. *See Appendix A, HB 24, O.C.G.A. § 24-6-611.* A leading question is a question that suggests the answer that is desired. *Milner v. State*, 258 Ga. App. 425 (2002). Under certain circumstances such as child or hostile witnesses the judge can allow the prosecutor to ask leading questions of its own witness. *Perkins v. State*, 226 Ga. App. 613 (1997).

The privilege against self-incrimination allows a witness to avoid answering questions that might support a conviction or create a real and appreciable danger of establishing a link in the chain of evidence

needed to prosecute. *In re Tidwell,* 279 Ga. App. 734 (2006). When a witness invokes the 5th Amendment privilege the judge must first determine if the answers could incriminate the witness. If so, then the decision whether it might must be left to the witness. If the answers would not incriminate the witness, he must testify or be subject to contempt. *Whitman v. State,* 316 Ga. App. 665 (2012).

The judge also has the right to question the witness for the purpose of developing fully the truth of the case. *Dunn v. State,* A13A2417; *Chambers v.* State, 313 Ga. App. 39 (2011); *Price v. State,* 310 Ga. App. 132 (2011). This right should be exercised sparingly because a judge is prohibited from expressing or suggesting his opinion as to what has or has not been proved. *Walker v. State,* 267 Ga. App. 155 (2004). The extent of the examination by the judge is a matter within the judge's discretion *Bush v. State,* A12A0918; *Jackson v. State*, 251 Ga. App. 171 (2001); *Cotton v. State* 308 Ga. App. 645 (2011).

A juror may not ask questions of a witness. However, this rule has been called into question. *Allen v. State*, 286 Ga. 392 (2010); *Cotton v. State* 308 Ga. App. 645 (2011).

There are two types of witnesses, lay witnesses and expert witnesses. A lay witness is any witness who can give testimony relevant to an issue in the case. An expert witness is anyone who, through

training, education, skill, or experience, has particular knowledge that the average juror would not possess concerning questions of science, skill, trade, or similar areas. *Thomas v. State,* 290 Ga. 653 (2012); *Hubert v. State*, 297 Ga. App. 71 (2009). The requirements for qualification as an expert witness are minimal; generally nothing more is required than evidence that the person has been educated in a particular trade, science, or profession. Formal education is not required. *Ashley v. State,* 316 Ga. App. 28 (2012). The jury may believe or disbelieve all or any part of the testimony of a witness, lay or expert. Where a witness' qualifications are established, the witness does not need to be formally tendered and accepted as an expert in order to give expert testimony. *Wilson v. State,* A12A0010; *Fielding v. State,* 278 Ga. 309 (2004).

An expert witness may testify about opinions based on facts within his knowledge or facts admitted into evidence at trial and presented to the expert in the form of hypothetical questions. Where an expert testifies based on facts within evidence the testimony is admissible even if the expert never went to the scene or observed the facts. *Elrod v. State,* 316 Ga. App. 491 (2012). However, when the basis of the expert opinion is totally speculative, and not based on any facts, the opinion has no probative value. *Cronkie v. State,* A12A0671.

Expert testimony is not necessary where the jury may make their own determination. *Walden v. State*, 289 Ga. 845 (2011). The judge can exclude expert testimony on the theory of false confessions on the basis that this knowledge is not beyond the ken of the average juror. *Riley v. State,* 278 Ga. 677 (2004).

A lay witness must testify based upon personal knowledge. *See Appendix A, HB 24, O.C.G.A. § 24-6-602.* A witness who personally observed the event to which he is testifying may state his impressions drawn from and opinions based upon the facts and circumstances observed by him. *Dunn v. State,* 291 Ga. 551 (2012). *Smith v. State*, 290 Ga. 428 (2012). A lay witness is also entitled to give his opinion as to the defendant's behavior so long as it is based on the witness' observation and the witness states the facts upon which the opinion is based. However, a witness generally may not express an opinion on the ultimate issue in the case. *Mangrum v. State*, 285 Ga. 676 (2009). The ultimate issue is the issue to be decided by the jury (such as whether it was self-defense). *See Appendix A, HB 24, O.C.G.A. § 24-7-701.* A mental disease does not necessarily make a witness incompetent to testify. As long as the witness understands his obligation to tell the truth he is competent to testify. *Ellis v. State,* 316 Ga. App. 352 (2012); *Dorsey v. State,* 206 Ga. App. 709 (1992). A witness may refresh his recollection with any document as long as he testifies from his recollection which has been refreshed or can swear positively

from the document. *Ashmid v. State,* 316 Ga. App. 550 (2012).

Evidence that a defendant attempted to influence or intimidate a witness can serve as circumstantial evidence of guilt. *Nguyen v. State,* 273 Ga. 389 (2001). An attempt by a third person to influence a witness is relevant and may be introduced where it is established that the attempt was made with the authorization of the defendant or linked to the defendant. The judge can admit evidence of a threat to a witness that is connected to the defendant if the evidence is relevant to explain the witness' reluctance to testify. *Williams v. State,* 290 Ga. 533 (2012); *Coleman v. State*, 278 Ga. 486 (2004). But a threat not connected to the defendant is not admissible. *Kell v. State*, 280 Ga. 669 (2006).

When a party wants a person to be considered an expert, the witness is questioned about his background, qualifications, and experience. The attorney seeking to have the witness considered an expert then tenders or submits the witness as an expert. The other side can object to the witness being accepted as an expert or question the witness concerning the witness' qualifications. Although a formal tender of an expert witness is preferred, the lack of a formal tender does not prevent the expert from being treated as an expert as long as the opposing party had the opportunity to cross-examine the expert about his credentials and testimony.

Fowler v. State, 294 Ga. App. 864 (2008). The determination of whether to accept or reject an expert witness rests within the sound discretion of the judge *Taylor v. State*, 261 Ga. 287 (1991).

The judge may also call a court appointed expert. *See Appendix A, HB 24, O.C.G.A. § 24-6-614.* The State and defense are given the opportunity to cross-examine an expert that the judge calls as a witness.

An expert may rely upon the statements of others in forming his opinions. *See Appendix A, HB 24, O.C.G.A. §§ 24-6-703 – 24-6-707.* However, those opinions should be given weight only to the extent that the statements upon which he relies are proven reliable. An expert witness cannot merely serve as a conduit for hearsay. *Humphrey v. Morrow*, 289 Ga. 864 (2011).

Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible where the conclusion is one which the jurors would not ordinarily be able to draw for themselves. *Jefferson v. State*, 312 Ga. App. 842 (2011); *See Appendix A, HB 24, O.C.G.A. § 24-7-704.* However, even an expert witness cannot testify that the defendant had the required intent to commit the crime.

An expert may express an opinion as to whether medical or other objective evidence in the case is

consistent with the alleged victim's testimony. *Hart v. State,* 314 Ga. App. 685 (2012); *Ledford v. State*, 313 Ga. App. 389 (2011). Whether to believe an expert witness is up to the jury. *Stanley v. State,* 289 Ga. App. 373 (2008).

Venue

As part of its presentation of evidence, the State must prove venue, that is, the crime was committed in the jurisdiction of the court. *Sherrell v. State,* A12A1001; *Day v. State,* A12A1464. All criminal cases must be tried in the county where the crime was committed. *Article VI, Section II, Paragraph VI of the 1983 Georgia Constitution*; O.C.G.A. § 17-2-2. A witness testifying to venue need not state that the county in which the incident occurred is in the state of Georgia. *Cade v. State*, 289 Ga. 805 (2011).

Proving that a crime took place within a city without also proving that the city is entirely within a county does not establish venue. *Bizzard v. State*, 312 Ga. App. 185 (2011); *Graham v. State*, 275 Ga. 290 (2002).

If a crime is committed on or immediately adjacent to the boundary line between two counties, the crime will be considered as having been committed in either county. *Morey v. State*, 312 Ga. App. 678 (2011); O.C.G.A. § 17-2-2. If it cannot be determined in which county a crime was committed,

it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt it may have been committed. *Rogers v. State*, 290 Ga. 401 (2012).

The State may use both direct and circumstantial evidence to prove venue. *Alexis v. State*, 313 Ga. App. 283 (2011); *Bruce v.* State, 252 Ga. App. 494 (2001).

Public officials are believed to have performed their duties properly, and not to have exceeded their jurisdiction unless clearly proven otherwise. *Taylor v. State,* 315 Ga. App. 687 (2012); *Brinson v. State,* 289 Ga. 150 (2011).

Identity / Party to Crime

The State must also identify the defendant as the person who committed the crime or was a party to the crime. A defendant is usually identified in court by the prosecutor asking the witness to point to the defendant and describe an item of clothing he is wearing. The State then asks the judge to confirm for the record that the defendant has been identified. The defendant cannot avoid an in-court identification by waiving his presence at trial. *Hill v. State,* 290 Ga. 493 (2012); *Smith v. State,* 184 Ga. App. 739 (1987). The in-court identification of the defendant as the perpetrator of the crime is direct evidence of guilt.

Kirkland v. State, 315 Ga. App. 143 (2012); *Ferguson v. State*, 221 Ga. App. 415 (1996).

The State must prove that the Defendant was a party to the crime. O.C.G.A. §16-2-20 defines party to the crime as follows:

(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.

(b) A person is concerned in the commission of a crime only if he:

(1) Directly commits the crime;

(2) Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity;

(3) Intentionally aids or abets in the commission of the crime; or

(4) Intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

A defendant may be indicted, tried, convicted, and punished for a crime even though he did not directly commit the crime if it is proven that he was a party to

the crime. *Tabb v.* State, 313 Ga. App. 852 (2012). It does not matter that the person claimed to have directly committed the crime has not been prosecuted or convicted, has been convicted of a different crime or degree of crime, or is not amenable to justice or has been acquitted. O.C.G.A. § 16-2-21. The defendant does not have to be indicted as a party to the crime to be prosecuted under a party to the crime theory. *Young v. State,* 290 Ga. 392 (2012).

An accomplice to an armed robbery can be convicted of armed robbery even though the accomplice did not possess the weapon. *Brayard v. State,* A13A2318; *Bryson v. State,* 316 Ga. App. 512 (2012).

A person who is present during the commission of a crime but does not directly commit a crime may be convicted upon proof that he was a party to the crime. However, mere presence at the scene of a crime or even approval of the criminal act not amounting to encouragement is not sufficient to show a defendant is a party to a crime. A common criminal intent must be proven. Criminal intent may be inferred from one's conduct prior to, during, and after the commission of the crime. *Jackson v. State,* 314 Ga. App. 272 (2012; *Robinson v. State,* 175 Ga. App. 769 (1985).

A person's mere knowledge that a crime will be committed and failure to take steps to prevent the

crime do not amount to aiding and abetting the crime. But if a person knew of the intended crime and shared in the criminal intent, the person is an aider and abettor. If the defendant was at the scene of the crime and did not disapprove or oppose the crime, a jury may consider that in connection with the defendant's prior knowledge of the crime to determine if the defendant aided and abetted the crime. *Rinks v. State*, 313 Ga. App. 37 (2011). A lookout can be convicted as a party to the crime. *Campbell v. State,* 314 Ga. App. 299 (2012). Standing near a co-defendant during a crime and leaving with the co-defendant can be sufficient proof of party to a crime. *Millender v. State,* 286 Ga. App. 331 (2007).

When an unintended victim is subjected to harm due to an unlawful act intended at someone else, the intent is transferred from the one against whom it was intended to the one who suffered the harm. *Allen v. State,* 290 Ga. 743 (2012); *Brown v. State*, 313 Ga. App. 907 (2012).

Cross Examination

After the State finishes questioning its witness, the defense can ask questions during a process called cross-examination. Leading questions are permitted during cross-examination. A defendant cannot complain about unfavorable testimony from a witness that defense counsel brings out on cross-examination

where the testimony is in response to the defen 291 Ga. 551 (2012)e attorney's questions. *Dunn v. State,* S12A1139.

The Sixth Amendment to the U. S. Constitution guarantees the right of the defendant to be confronted with the witnesses against him. *Miller v.* State, 289 Ga. 854 (2011). The main and essential purpose of the right of confrontation is to secure for the defendant the opportunity of cross-examination. The right to a thorough and sifting cross-examination is also set forth in O.C.G.A. § 24964; *See Appendix A, HB 24, O.C.G.A. § 24-6-611.*

Although a defendant is entitled to a thorough and sifting cross examination of witnesses against him, the judge is given the discretion to limit the scope of cross examination to matters that are material to the issues to be decided by the jury. *Grovner v. State,* 317 Ga. App. 623 (2012). Judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Jimmerson v. State*, 289 Ga. 364 (2011); *Rayner v. State*, 307 Ga. App. 861 (2011). The judge's exercise of its discretion to limit cross-examination will not be disturbed on appeal unless it is abused. *Gonzalez v. State*, 310 Ga. App. 348 (2011); *Chambers v. State*

308 Ga. App. 748 (2011); *See Appendix A, HB 24, O.C.G.A. § 24-6-623* (A witness has the right to be examined only as to relevant matters and to be protected from improper questions and from harsh or insulting demeanor).

In order to raise on appeal the judge's refusal to allow certain questions on cross-examination, the defendant has to make a record outside the presence of the jury. On the record, the attorney must either ask the questions he desires to ask or state to the judge what questions he desires to ask and then make timely objection to the ruling of the judge denying the right to ask the questions. *Abercrombie v. State*, 307 Ga. App. 321 (2010); *Ware v. State*, 307 Ga. App. 782 (2011). In determining whether the limits imposed by the judge were reasonable, the appeals court looks to whether the jury had sufficient information to make a discriminatory appraisal of the witness' motives and bias. *Haggard v. State.* 302 Ga. App. 502 (2010).

Crawford v. Washington

The Supreme Court of the United States clarified the meaning and scope of the right to confrontation of one's accusers in *Crawford v. Washington*, 541 U.S. 36 (2004), holding that "the admission of out-of-court statements that are testimonial in nature violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity

for cross-examination." *Adams v. State,* 316 Ga. App. 1 (2012); *Pitts v. State*, 280 Ga. 288 (2006). Non-testimonial statements are subject to the normal hearsay rules.

Testimonial statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial. Statements made by witnesses to police officers investigating a crime are testimonial in nature when the primary purpose of the statements is to establish or prove past events potentially relevant to later criminal prosecution. *Miller v.* State, 289 Ga. 854 (2011). Such testimonial statements may not be admitted into evidence unless the requirements of *Crawford* are satisfied. Even where such an interrogation is conducted with good faith, introduction of the resulting statements at trial can be unfair to the defendant if they are untested by cross-examination. *Michigan v. Bryant*, 131 S. Ct. 114 (2011); *Philpot v. State*, 309 Ga. App. 196 (2011).

On the other hand, statements made by witnesses to questions of investigating officers are non-testimonial when they are made primarily to enable police assistance to meet an ongoing emergency and not to create a record for trial. Such non-testimonial out-of-court statements are admissible if they meet one of the hearsay exceptions. *Milford v. State,* 291 Ga. 347 (2012); *Pitts v. State*, 280 Ga. 288 (2006).

Introducing a certification containing results of a forensic analysis, as well as a representation that those results are reliable, without eliciting the in-court testimony of the analyst and making the analyst available for cross-examination violates the Confrontation Clause. *Hite v. State,* 315 Ga. App. 221 (2012); *Bullcoming v. New Mexico,* 131 S. Ct. 2705 (2011). The testimony of a lab supervisor who did not perform the tests at issue, but which were conducted by a lab technician who did not testify violates the Confrontation Clause. *Disharoon v. State,* 291 Ga. 45 (2012).

Admission of evidence in violation of *Crawford* will be considered harmless if there is no reasonable probability that the evidence contributed to a guilty verdict. *Richard v. State*, 281 Ga. 401 (2006).

CREDIBILITY & IMPEACHMENT

The defendant seeks to attack the credibility of a prosecution witness by showing through cross-examination possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case. The credibility of a witness may be attacked by any party, including the party calling the witness. O.C.G.A. § 24-9-81; *See Appendix A, HB 24, O.C.G.A. § 24-6-607*; *Pate v. State,* 315 Ga. App. 205 (2012).

To impeach a witness is to prove the witness is unworthy of belief. A witness may be impeached by: (1) Disproving the facts to which the witness testified; (2) Proof of general bad character; (3) Proof that the witness has been convicted of a felony or misdemeanor involving moral turpitude; and (4) Proof of contradictory statements, previously made by the witness, as to matters relevant to the witness' testimony and to the case. Whether a witness has been impeached is for the jury to decide. *Jefferson v. State,* 309 Ga. App. 861 (2011); *Warner v. State,* 281 Ga. 763 (2007); *See Appendix A, HB 24, O.C.G.A. §§ 24-6-608; 24-6-609; 24-6-613; 24-6-621.*

Bias

The bias of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Hewitt v. State*, 277 Ga. 327 (2003); *See Appendix A, HB 24, O.C.G.A. § 24-6-622.*

O.C.G.A. § 24-9-68 provides that the state of a witness' feelings toward the parties ... may always be proved for the consideration of the jury. *Edwards v. State,* 308 Ga. App. 569 (2011); *See Appendix A, HB 24, O.C.G.A. § 24-6-622.* Before a witness is impeached to prove bias, a foundation "must first be

laid by cross-examining the witness sought to be impeached as to his feelings toward the party." *Walker v. State* 308 Ga. App. 176 (2011); *Beam v. State,* 265 Ga. 853 (1995).

The Confrontation Clause of the Sixth Amendment guarantees a defendant the right to show the possible bias f a witness by cross-examining a witness concerning pending criminal charges against the witness for purposes of exposing a witness' motivation in testifying, e.g., bias, partiality, or agreement between the government and the witness." *Mays v. State*, 279 Ga. 372 (2005). Whether or not such a deal existed is not crucial. What counts is whether the witness may be shading his testimony in an effort to please the prosecution. *Douglas v. State,* A14A0649.

A witness currently on probation for a juvenile offense, or with an open or pending case in juvenile court can be impeached to show bias, prejudice or ulterior motives that may influence his testimony. *Pate v. State,* 315 Ga. App. 205 (2012).

Bad Character

Prior to the January 1, 2013, any party may impeach the credibility of a witness by offering evidence of the witness' bad character in the form of reputation, but subject to the following limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness;

(2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise;

(3) In a criminal case, the character for untruthfulness of the defendant may be introduced in evidence only if the defendant testifies and offers evidence of his or her truthful character; and

(4) The character witness should first be questioned as to his or her knowledge of the general character of the witness, next as to what that character is, and lastly the character witness may be asked if from that character he would believe the other witness under oath. Specific instances demonstrating the character should not be brought out except during cross-examination in order to show the extent and basis of the witness' knowledge.

The new evidence code will make changes to the use of character evidence for impeachment. *See Appendix A, HB 24, O.C.G.A. §§ 24-6-608; 24-6-609; 24-4-404; 24-4-405; 24-4-406.*

Prior Convictions

Evidence of a prior conviction is a general attack on the credibility of a witness. *Douglas v. State,* A14A0649. The introduction of evidence of a witness' prior felony conviction is intended to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy person to be truthful in his testimony. *Hines v. State,* 249 Ga. 257 (1982). A witness cannot be impeached by instances of specific misconduct unless that misconduct has resulted in the conviction of a crime. *Luckie v. State,* 310 Ga. App. 859 (2011); *McClure v. State*, 278 Ga. 411 (2004). Evidence of a witness' prior conviction must be tendered and admitted in the form of a certified copy of the conviction and not by testimony alone. *Hudson v. State,* A13A1696.

To use a conviction that is more than ten years old, the party seeking to introduce evidence of a witness' prior convictions must give the other side sufficient advance written notice of the intent to use such evidence so that the other side has a fair opportunity to contest the use of the evidence. O.C.G.A. § 24-6-609. Further, the evidence of a conviction more than ten years old is not admissible unless the judge finds that the probative value of the evidence substantially outweighs prejudicial effect.

Under current law, witnesses can be impeached by evidence of a prior conviction less than ten years

old as long as "the probative value of admitting the evidence outweighs its prejudicial effect to the witness." O.C.G.A. § 24984.1 (a) (1); *But See Appendix A, HB 24, O.C.G.A. § 24-6-609* (evidence admissible unless prejudice substantially outweighs probative value). The end date of the ten-year period is the date the witness testifies or the evidence of the prior conviction is introduced. *Clay v. State,* 290 Ga. 822 (2012).

The judge is required to make express findings when balancing the probative value and the prejudicial effect of the evidence. *Lawrence v. State*, 305 Ga. App. 199 (2010). "Factors to be considered include the kind of felony involved, the date of the conviction, and the importance of the witness' credibility." *Quiroz v. State*, 291 Ga. App. 423 (2008); *Johnson v. State*, 307 Ga. App. 791 (2011).

When a party seeks to impeach a witness with a prior conviction, the specific facts underlying the crime are irrelevant unless the witness attempts to rehabilitate himself by explaining the circumstances of his conviction. *Brown v. State*, 276 Ga. 192 (2003); *Love v. State*, 302 Ga. App. 106 (2010). A party cannot add to his impeachment of a witness with facts underlying the witness' prior convictions unless the witness has attempted to rehabilitate his character, by for example, denying he really committed the crime. *Robinson v. State*, 246 Ga. App. 576 (2000). Further, proof of the conviction is

admissible but not the indictment under which the conviction was entered or the sentence. An indictment represents only accusations against a person, and is not in itself a conviction. *Carter v. State,* 289 Ga. 51 (2011). The better practice is to redact the evidence pertaining to the sentence. *Miller v. State*, 250 Ga. App. 84 (2001).

A witness cannot be impeached based on a prior conviction by evidence of a first offender sentence. *Sanders v. State*, 290 Ga. 445 (2012); *Battles v. State,* 290 Ga. 226 (2011). The first offender record of one who is currently serving a first offender sentence or of one who has successfully completed the first offender sentence may not be used to impeach the first offender based on a prior conviction. *Jackson v. State,* A12A0654; *Christopher v. State,* 314 Ga. App. 809 (2012); *Davis v. State*, 312 Ga. App. 328 (2011). However, the witness can be impeached with a first offender record by showing that the pending charges reveal a potential bias, prejudice, or ulterior motive on the part of the witness to give untruthful or shaded testimony in order to please the State while the witness was still on probation under that plea. *Manley v. State*, 287 Ga. 338 (2010); *Strong v. State*, 308 Ga. App. 558 (2011).

Evidence that a witness has been convicted of a crime shall be admissible if the crime involved dishonesty or making a false statement. Moral turpitude is no longer the standard in assessing

whether convictions can be used for impeachment. *Green v. State,* 291 Ga. 287 (2012). Under O.C.G.A. § 24-9-84.1 (a) (3), evidence that a witness has been convicted of a misdemeanor crime is admissible for purposes of impeachment if the crime involved dishonesty or making a false statement. *See Appendix A, HB 24, O.C.G.A. § 24-6-609*(a)(2). Crimes involving dishonesty or false statement that fall under the statute are limited to "crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." *Clements v. State*, 299 Ga. App. 561 (2009). Generally, theft is not a crime that necessarily involves dishonesty or making a false statement of the sort contemplated by the law. *McClain v. State*, 301 Ga. App. 844 (2010); *Jacobs v. State*, 299 Ga. App. 368 (2009). Thus, the party seeking to use a misdemeanor theft conviction as impeachment evidence must show that the conviction involved fraud or deceit. *Boatright v. State,* 308 Ga. App. 266 (2011).

See Appendix A, HB 24, O.C.G.A. § 24-6-609 (d). (conviction based upon nolo plea not admissible for impeachment; juvenile adjudications not admissible against defendant but may be admissible against witness).

Immunity & Deals with the State

The State has discretion to grant immunity to a witness for the State. O.C.G.A. § 24-9-28; *See Appendix A, HB 24, O.C.G.A. § 24-5-507*. The judge cannot grant immunity and immunity cannot be granted at the request of the defendant. *Brown v. State*, S14A0800; *Dennard v. State*, 313 Ga. App. 419 (2011); *Dampier v. State*, 249 Ga. 299 (1982).

In Georgia, there is a "general prohibition against evidence advising the jury about the specific sentence that might be imposed against the defendant." *Perkins v. State*, 288 Ga. App. 802 (2007); *Howard v. State*, 286 Ga. 222 (2009). However, this evidence "can be admitted only during cross-examination of a State's witness who strikes a deal with the State to avoid prison time." *Gibson v. State*, 308 Ga. App. 63 (2011).

In *State v. Vogleson,* 275 Ga. 637 (2002), the Supreme Court of Georgia ruled that a defendant has the right to cross-examine a co-defendant about the mandatory minimum sentence the co-defendant faced before making a deal with the State and agreeing to testify against the defendant.

Witness Invoking 5th Amendment

If a witness announces his intent to invoke his Fifth Amendment privilege against self-incrimination, the judge must consider the questions that the witness will be asked and decide whether there is a danger that the answers could incriminate the witness. If so, then the decision to answer must be left to the defendant. If the judge decides the answers could not incriminate the witness, the witness is required to answer or face court sanctions. *Brown v. State*, S14A0800; *Cody v. State*, 278 Ga. 779 (2004); *Davis v. State,* 255 Ga. 598 (1986).

Prior Inconsistent/Contradictory Statements

A witness can be impeached by proof of a prior contradictory or inconsistent statement. Inconsistencies in a witness' testimony go to the issue of credibility and not the sufficiency to support a verdict. *Hargrave v. State*, 311 Ga. App. 852 (2011). Even though the witness recants on the stand, his prior inconsistent statement is substantive evidence on which the jury can rely to convict the defendant. *Holsey v. State,* A12A0515.

O.C.G.A. § 24-9-83 provides that, before a witness may be impeached by his prior inconsistent statement, "the time, place, person, and circumstances attending the former statements shall be called to his mind with as much certainty as

possible." *Gunter v. State,* 313 Ga. App. 756 (2012). In this regard, the cross-examiner will ask the witness whether he made the alleged statement, giving its substance, and naming the time, the place, and the person to whom made. *Culver v. State,* 313 Ga. App. 492 (2012). The attorney can then through another witness prove the making of the alleged statement. *Bryant v. State,* 288 Ga. 876 (2011). However, the fact that the witness admits that he made the inconsistent pre-trial statement does not render it inadmissible. *Wilson v. State*, 286 Ga. 141 (2009); *Duckworth v. State*, 268 Ga. 566 (1997). Georgia courts have rejected the assertion that "a prior inconsistent statement is admissible only if the witness denies making the prior statement, but not if he simply disputes the truth of the earlier statement. There is no such 'denial' requirement under O.C.G.A. § 24-9-83." *Cummings v. State*, 280 Ga. 831 (2006); *Johnson v. State,* 289 Ga. 106 (2011).

Although O.C.G.A. § 24-9-83 provides that written contradictory statements be shown or read to the witness there is no similar language requiring audio recordings of prior inconsistent statements to be played for the witness before using them for impeachment. *Cade v. State*, 289 Ga. 805 (2011). Under the new evidence code, neither a written or audio prior statement needs to be shown to the witness. *See Appendix A, HB 24, O.C.G.A. § 24-6-613(a)*.

A prosecutor cannot bolster, or add to, the truthfulness of its own witness by asking the witness if he is telling the truth until the witness has been questioned and impeached by the defense. *Miller v. State*, 275 Ga. 32 (2002). However, if the witness has made a prior contradictory statement, the prosecutor can confront the witness about the prior statement and then ask the witness whether he told the truth then or is telling the truth now. *Hardy v. State*, 293 Ga. App. 265 (2008).

The jury can choose to disbelieve a witness' testimony at trial in favor of the defendant and instead believe a contradictory pretrial statement that inculpates the defendant. *Robinson v. State,* 313 Ga. App. 545 (2012); *Handley v. State*, 293 Ga. App. 265 (2008).

The conviction of a defendant based on the knowing us of perjured testimony by the prosecution violates a defendant's constitutional rights. *Cammon v. State,* 269 Ga. 470 (1998). However, mere inconsistencies between a witness' pretrial statements and their trial testimony is not proof of perjury. There is no requirement that the witness must give consistent evidence. *White v. State,* 315 Ga. App. 54 (2012); *Hayes v. State,* 152 Ga. App. 858 (1980).

It is not necessary to introduce the prior inconsistent statement into evidence before using it for impeachment. *Sims v. State,* A12A1142.

Prior Consistent Statements

A witness' prior consistent statement is admissible if: (1) the veracity of a witness' trial testimony has been placed in issue at trial; (2) the witness is present at trial; and (3) the witness is available for cross-examination. *Sands v. State,* 311 Ga. App. 170 (2011). Unless a witness' veracity is affirmatively placed in issue, the witness' prior consistent statement is pure hearsay which cannot be admitted to corroborate the witness or to bolster the witness' credibility. *Johnson v. State,* 289 Ga. 498 (2011); *Blackmon v. State,* 272 Ga. 858 (2000). "A witness's veracity is placed in issue so as to permit the introduction of a prior consistent statement only if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination." *Decapite v.* State, 312 Ga. App. 832 (2011); *Baugh v. State*, 276 Ga. 736 (2003). Therefore, on direct examination, the State cannot go into the witness' prior consistent statement since the defendant has yet to question the witness. But see *pate v. State,* 315 Ga. App. 205 (2012) (allowing prior consistent statement to be admitted subject to later attack on credibility). In addition, "to be admissible to refute the allegation of ... improper motive, the prior statement must predate the alleged fabrication, influence, or motive." *Mister v. State*, 286 Ga. 303 (2009); *Mims v. State,* 314 Ga. App. 170 (2012); *See Appendix A, HB 24, O.C.G.A. § 24-6-613(b)*.

A party may introduce a prior consistent statement of a forgetful witness where the witness testifies at trial and is subject to cross-examination. *Danenberg v. State,* 291 Ga. 439 (2012); *Williams v. State,* 291 Ga. App. 279 (2008). An attorney can use notes he has taken when listening to a witness' prior statement to impeach that witness at trial. If the attorney has knowledge of a prior statement by a witness which contradicts the testimony of the witness at trial, the attorney can impeach the witness with the prior statement. *James v. State,* 316 Ga. App. 406 (2012).

The prior statement does not have to be admitted into evidence before it can be used for impeachment. *Duckworth v. State,* 268 Ga. 566 (1977).

When a prior consistent statement is erroneously admitted a new trial is required if the hearsay prior consistent statement contributed to the verdict. *Pate v. State,* 315 Ga. App. 205 (2012); *Connelly v. State,* 295 Ga. App. 765 (2009). A jury charge on prior consistent statements should not be given. *Stephens v. State*, 289 Ga. 758 (2011).

Jury Views

Under limited circumstances the jury can go to the scene of the alleged crime for a jury view. *Esposito v. State*, 273 Ga. 183 (2000); *Young v. State*, 290 Ga. 441 (2012).

Stipulations

The parties can stipulate or agree to the admissibility of evidence. A stipulation is an agreement by both sides that certain evidence will be admitted. This is often done by reading a stipulation to the jury. The stipulated evidence can be considered by the jury along with the other evidence in reaching its verdict.

The State is not required to accept a stipulate of evidence and has the right to present its case. *Quinn v. State,* 255 Ga. App. 744 (2002). However, in case in which proof of a prior conviction is an element of the crime, the judge abuses his discretion in rejecting a defendant's offer to stipulate to the prior conviction without disclosing to the jury the nature of the underlying crime, without first weighing the prejudicial effect of disclosing the nature of the conviction. *Old Chief v. United States,* 519 U.S. 172 (1997). For example, a defendant charged with possession of a firearm by a convicted felon may wish to stipulate that he is a convicted felon. The judge must allow a defendant to stipulate to his status as a convicted felon if: (1) the defendant's prior conviction is of a nature likely to inflame the passions of the jury and raise the risk of a conviction

based on improper considerations, and (2) the purpose of the evidence is solely to prove the defendant's status as a convicted felon. *Hill v. State,* 290 Ga. 493 (2012); *Ross v. State,* 279 Ga. 365 (2005).

Directed Verdicts

At the end of the State's case a defendant can make a motion for directed verdict of acquittal asking the judge to find the defendant not guilty as a matter of law. A motion for directed verdict addresses the sufficiency of the evidence. *McKay v. State*, 234 Ga. App. 556 (1998). A directed verdict of acquittal should be granted only where there is no conflict in the evidence and the evidence demands a verdict of not guilty as a matter of law. *Walker v. State,* 310 Ga. App. 223 (2011)*; Dover v. State* 307 Ga. App. 126 (2010). If a motion for directed verdict is made, it must be ruled upon before the jury returns a verdict and the judge sentences the defendant. *State v. Canup*, 300 Ga. App. 678 (2009).

The fact that a directed verdict is granted as to some counts does not mean that it was improper for evidence as to those counts to have been presented to the jury. *Hicks v. State,* 315 Ga. App. 779 (2012).

Rebuttal

The defendant does not have the burden to present any evidence. However, if the defense presents evidence, the State will have the opportunity to present rebuttal evidence. The judge can allow a witness who was not identified by the State to testify in rebuttal as long as the undisclosed witness is a true rebuttal witness and not an important part of the State's main case. *In the Interest of I.M.W.*, 313 Ga. App. 624 (2012); *Allison v. State,* 256 Ga. 851 (1987).

Re-opening the Evidence

The judge has the discretion to deny a party the right to recall a witness who testified previously if the testimony to be given by the witness would be repetitious of the witness' earlier testimony. *Farley v. State,* 314 Ga. App. 660 (2012).

It is within the judge's discretionary power to reopen a case and permit the introduction of further evidence even though the testimony is not in rebuttal of evidence offered by defendant. *Davenport v. State*, 308 Ga. App. 140 (2011); *Riley v. State,* 311 Ga. App. 445 (2011). The judge can even re-open the evidence after the jury has started deliberations. *Adorno v. State,* 314 Ga. App. 509 (2012); *State v. Roberts,* 247 Ga. 456 (1981). The failure to include in the record a proffer of the testimony for which a party seeks to have the evidence re-opened prevents

an appeals court from considering the issue. *Danenberg v. State,* 291 Ga. 439 (2012).

Chapter 8
The Presentation of Evidence
The Defense Case

The defendant does not have any burden to present evidence or testify in his own defense.

The Decision to Testify

No person who is charged in any criminal case shall be compelled to give evidence for or against himself. *Fifth Amendment to the United States Constitution*; *See Appendix A, HB 24, O.C.G.A. § 24-5-506(a)*.

Whether or not to testify in one's own defense is considered a tactical decision to be made by the defendant himself after consultation with his attorney. *Gibson v. State,* 290 Ga. 6 (2011)*; Harris v. State* 308 Ga. App. 456 (2011). Nevertheless, the final decision is left to the defendant. *Cloud v. State*, 290 Ga. 193 (2011); *Hamilton v. State*, 274 Ga. 582 (2001). An attorney cannot assist a defendant in

presenting false evidence. *Miller v. State*, S14A0597. If an attorney believes a defendant intends to present perjured testimony the attorney must attempt to persuade the defendant not to commit perjuy. If the defendant still exercises the right to testify the attorney should let the defendant testify in narrative form as opposed to as directed by the attorney. *Miller v. State*, S14A0597.

If the defendant gave a statement to the police proclaiming his innocence, that statement is not admissible unless the defendant testifies. *Sharpe v. State,* 291 Ga. 148 (2012).

Self-serving statements made by the accused, either before or after the commission of the alleged offense, are inadmissible hearsay. *Robinson v. State*, 246 Ga. App. 576 (2000); *Nunez v. State*, 237 Ga. App. 808 (1999).

The failure of a defendant to testify shall create no presumption against him, and no comment shall be made because of such failure. O.C.G.A. § 24-9-20; *See Appendix A, HB 24, O.C.G.A. § 24-5-506(b)*. In fact, if a defendant does not testify, the judge will instruct the jury that they cannot hold that against the defendant. The defense attorney can also emphasize in closing argument that the jury cannot hold it against the defendant that he chose not to testify. There is no requirement that the judge have an on-the-record discussion with a non-testifying defendant

in order to inform the defendant of the right to testify and to obtain a knowing and intelligent waiver of that right." *State v. Nejad*, 286 Ga. 695 (2010); *Sanford v. State*, 287 Ga. 351 (2010). However, the better practice is to make an inquiry. Nevertheless, if the judge does make an inquiry and the defense attorney indicates the defendant is not ready to make a decision, the judge should not press the defendant for an answer. *Wilmott v. State,* A13A1666.

If a defendant in a criminal case wishes to testify and announces in open court his intention to do so, the defendant may so testify in his own behalf. If a defendant testifies, he shall be sworn as any other witness and may be examined and cross-examined as any other witness. O.C.G.A. § 24-9-20; *See Appendix A, HB 24, O.C.G.A. § 24-5-506(b)*. *Dunham v. State,* 315 Ga. App. 901 (2012).

"A jury has unlimited discretion to accept or reject a defendant's testimony as a whole, or to accept it in part and reject it in part." *Futch v. State,* 314 Ga. App 294 (2012); *Almmodor v. State*, 289 Ga. 494 (2011).

The defendant cannot present evidence of himself without testifying. For example, a defendant cannot show tattoos or the absence of tattoos through another witness without taking the stand because such exhibitions deprive the State of the right to cross-examine him about the tattoos. *Jefferson v. State*, 312 Ga. App. 842 (2011); *Wesley v. State*, 228

Ga. App. 342 (1997); *State v. Battaglia*, 221 Ga. App. 283 (1996).

The Fifth Amendment privilege against self-incrimination protects only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. It does not prohibit the taking of a defendant's blood. *Bowling v. State*, 289 Ga. 881 (2011); *Schmpter v. California,* 384 U.S. 757 (1966).

The right to testify on one's own behalf is a fundamental constitutional right, but that right is not without limitation. Restriction on a defendant's right to testify may not be arbitrary. A requirement that a defendant exercise his right to testify before the evidence is closed does not violate a defendant's rights. *Danenberg v. State,* 291 Ga. 439 (2012).

The defendant cannot choose not to testify at trial then claim on appeal that the State would have been allowed to use improper convictions to impeach him. *Warbington v. State,* 316 Ga. App. 614 (2012); *Linares v. State,* 266 Ga. 812 (1996).

The defendant does not have to testify before his other witness. *Brooks v. Tennessee,* 406 Ga. 605 (1972).

The defendant can be prohibited from introducing evidence for which the foundation has

not been laid, even if the foundation can only be laid through the defendant's testimony. This does not violate the defendant's right against self-incrimination. *Humphrey v. Riley,* 291 Ga. 534 (2012).

DEFENSES

Accident

Georgia law says that no person shall be found guilty of any crime committed by misfortune or accident where there was no criminal scheme, undertaking, or intention (or criminal negligence). An accident is an event that takes place without one's foresight or expectation, which takes place, or begins to exist, without design. O.C.G.A. § 16-2-2.

The defense of accident is available to a defendant charged with a strict liability offense. *Ogilvie v. State*, 313 Ga. App. 305 (2011).

Alibi

The defense of alibi involves the impossibility of the defendant's presence at the scene of the offense. O.C.G.A. § 16-3-40. The evidence of alibi must reasonably exclude the possibility of the defendant's presence. If the evidence is vague or uncertain, the judge does not have to instruct the jury that the defense of alibi applies to the case. *Morey v. State*,

312 Ga. App. 678 (2011); *Dixon v. State*, 157 Ga. App. 550 (1981).

Character (Good)

Merely having no convictions or a clean record is not sufficient evidence of good character. *Pulley v. State,* 291 Ga. 330 (2012).

Coercion

Under the defense of coercion a person is not guilty of a crime, except murder, if the act upon which the supposed criminal liability is based is performed under such coercion that the person reasonably believes that performing the act is the only way to prevent his imminent death or great bodily injury. O.C.G.A. § 16-3-26. *Bush v. State,* A12A0918. The danger of present and immediate violence must coincide with the commission of the act. *Calmes v. State*, 312 Ga. App. 769 (2011); *Gordon v. State*, 234 Ga. App. 531 (1998).

Insanity

Under O.C.G.A. § 16-3-2 a person cannot be found guilty of a crime if at the time of the act the person did not have the mental capacity to distinguish

between right and wrong. When an insanity defense is raised the jury can find the defendant: (1) Guilty; (2) Not guilty; (3) Not guilty by reason of insanity at the time of the crime; (4) Guilty but mentally ill; or (5) Guilty but mentally retarded. *McBride v. State,* 314 Ga. App. 725 (2012). An insanity defense does not require expert testimony. *Motes v. State,* 256 Ga. 831 (1987). However, if the defense chooses to raise insanity through an expert, the State must have the opportunity to have an expert interview the defendant and be available to present evidence. *McBride v. State,* 314 Ga. App. 725 (2012). If the defense of insanity is raised the judge must instruct the jury to consider it in arriving at their verdict. *Morgan v. State,* 224 Ga. 604 (1968).

When a defendant files a notice of an insanity defense, O.C.G.A. § 17-7-130.1 requires the judge to appoint at least one psychiatrist or licensed psychologist to examine the defendant and to testify at trial. Both the prosecution and defense are entitled to cross-examine the court appointed witness and to introduce evidence in rebuttal of the testimony of that witness. *Danenberg v. State,* 291 Ga. 439 (2012); *Tolbert v. State,* 260 Ga. 527 (1990).

Justification

The fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed:

(1) When the person's conduct is justified under O.C.G.A. §16-3-21 (Self-defense and defense of a third person), O.C.G.A. §16-3-23 (defense of self or others, or habitation, or property other than habitation), O.C.G.A. §16-3-24 (to prevent or terminate such other's trespass on or other interference with real property other than a habitation or personal property, O.C.G.A.§16-3-25 (entrapment), or O.C.G.A. §16-3-26 (Coercion);

(2) When the person's conduct is in reasonable fulfillment of his duties as a government officer or employee;

(3) When the person's conduct is the reasonable discipline of a minor by his parent or a person in loco parentis;

(4) When the person's conduct is reasonable and is performed in the course of making a lawful arrest;

(5) When the person's conduct is justified for any other reason under the laws of this state; or

(6) In all other instances which stand upon the same footing of reason and justice as those enumerated in this article.

Justification cannot be based upon an assault which has ended. *Willis v. State,* 316 Ga. App. 258

(2012); *Collier v. State*, 288 Ga. 756 (2011). The mere fact that the person or persons that assaulted the defendant and are departing could return and continue the assault does not mean the defendant claiming justification is in imminent danger. *Cloud v. State*, 290 Ga. 193 (2011); *Carter v. State*, 285 Ga. 565 (2009).

A convicted felon can still raise justification as a defense to possession of a firearm by a convicted felon. *State v. Burks,* 285 Ga. 281 (2009).

Mistake of Fact

Mistake of fact is a defense to a crime to the extent that the ignorance of some fact negates the existence of the mental state required to establish a material element of the crime. *Windhom v. State,* 315 Ga. App. 855 (2012); *Allen v. State,* 290 Ga. 743 (2012); *Jones v. State,* 263 Ga. 835 (1994; O.C.G.A. § 16-3-5.

Other Dude

A defendant is entitled to introduce relevant and admissible evidence suggesting that another person committed the crime for which the defendant is on trial. *Mutazz v. State,* 290 Ga. 389 (2012); *Dawson v. State,* 283 Ga. 315 (2008). The evidence must raise a reasonable inference of the defendant's innocence, and must directly connect the person with

the corpus delicti (the body or essence of the crime), or show that the other person has recently committed a crime of the same or similar nature. *Ridley v. State,* 290 Ga. 798 (2012); *Klinect v. State*, 269 Ga. 570 (1998).

Evidence that merely casts a suspicion on a third person is not admissible. *Heard v. State,* S14A0563; *Curry v. State,* 291 Ga. 446 (2012).

The prosecution can bring a person into the courtroom to be identified in front of the jury to rebut a defense argument that the other person committed the crime. There is no violation of the defendant's right to confront the witnesses against him. *Grady v. State*, 290 Ga. 166 (2011); *Davis v. State*, 255 Ga. 598 (1986).

The testimony of a co-defendant who pleads guilty may be of little value to a defendant. This is because once convicted, a defendant who "seeks to exculpate his co-defendant lacks credibility, since he has nothing to lose by testifying untruthfully regarding the alleged innocence" of his co-defendant. *Silvers v. State*, 278 Ga. 45 (2004).

Cross-Examination & Impeachment

A defendant who testifies is subject to impeachment just as any other witness. However, it is inappropriate for the prosecutor to question a

defendant about the content of his conversations with his attorney. O.C.G.A. §§ 24-9-21, 24-9-24; *Bryant v. State*, 288 Ga. 876 (2011).

A defendant may testify on his own behalf yet upon cross-examination as to matters not testified to on direct examination decline to give testimony which would tend to incriminate him. *Bishop v. Bishop,* 157 Ga. 408 (1924). Thus a defendant may testify in his own defense but refuse to answer questions about a pending similar transaction (404B). *Whitman v. State,* 316 Ga. App. 655 (2012). But See *Dunham v. State,* 315 Ga. App. 901 (2012)(by choosing to testify Dunham submitted himself to cross-examination about similar transaction that was already in evidence).

A plea of nolo contender, also called a no contest plea, cannot be used against a defendant in any other court or proceeding as an admission of guilt or for any other purpose including impeachment. *Hooper v. State*, 284 Ga. 824 (2009); *Pittman v. State,* 265 Ga. App. 655 (2004); *See Appendix A, HB 24, O.C.G.A. § 24-6-609(d)*.

Confessions made during plea negotiations with the prosecutor are not admissible, because they are made in the hope that the defendant will get a better deal than he would otherwise. *Gray v. State*, 240 Ga.

App. 716 (1999); *McMahon v. State*, 308 Ga. App. 292 (2011); *See Appendix A, HB 24, O.C.G.A. § 24-4-410*.

Under O.C.G.A. § 24-9-84.1 a defendant's convictions may be admissible for impeachment. *Damerow v. State,* 310 Ga. App. 530 (2011). The judge can admit the evidence only when he determines that the probative value substantially outweighs its prejudicial effect. O.C.G.A. § 24-9-84.1 (a) (2); O.C.G.A. § 24-9-84.1 (b); *Johnson v. State*, 307 Ga. App. 791 (2011); *Robinson v. State*, 312 Ga. App. 736 (2011); *But See Appendix A, HB 24, O.C.G.A. § 24-6-609(a)* (evidence of conviction less than ten years old admissible if judge finds probative value outweighs prejudicial effect).

To ensure a meaningful analysis of the relevant factors, the judge is required to make express findings when balancing the probative value and the prejudicial effect of such evidence. *Lawrence v. State*, 305 Ga. App. 199 (2010). The judge's finding must be made on the record. *Miller v. State*, 298 Ga. App. 792 (2009). As long as the judge makes express findings, even if made in an order on a motion for new trial, the requirements of the statute are satisfied. *Hogues v. State,* 313 Ga. App. 717 (2012); *Carter v. State*, 303 Ga. App. 142 (2010).

Although the State cannot be the first to introduce bad character evidence of the defendant,

the rules change somewhat after a defendant testifies. Evidence that would be inadmissible as bad character evidence may be admissible to impeach the truthfulness of the defendant's testimony. *Robinson v. State*, 312 Ga. App. 110 (2011); *Keaton v. State,* 311 Ga. App. 14 (2011).

Under O.C.G.A. § 24-9-82 a witness may be impeached by disproving the facts testified to by him. *See Appendix A, HB 24, O.C.G.A. § 24-6-621*. Thus, while a criminal defendant is not subject to impeachment by proof of general bad character until he puts his general good character in evidence, he is subject to impeachment the same as any other witness. Evidence of prior crimes or bad acts can be admitted where such evidence is necessary and relevant to impeach the defendant's specific testimony. *Lucas v. State*, 215 Ga. App. 293 (1994). Where the defendant testifies and admits prior criminal conduct he has raised an issue which may be fully explored by the State on cross examination. *Cobb v. State*, 251 Ga. App. 697 (2001); *Durrence v. State*, 307 Ga. App. 817 (2011).

Chapter 9
Closing Argument

Closing arguments afford an attorney an opportunity for the attorney to use skills and imagination in attempting to convince the jury to rule for their side. Closing arguments do not need to be taken down by the court reporter. O.C.G.A. § 17-8-5; *Dunlap v. State,* 291 Ga. 51 (2012).

The time allowed for closing argument is as follows: (A) Felony cases punishable by the death penalty or life in prison 2 hours each side; (B) Any other felony case 1 hour each side; (C) Misdemeanor cases 30 minutes each side. O.C.G.A. § 17-8-72; O.C.G.A. § 17-8-73; *Uniform Superior Court Rule* 13.1. Before arguments begin, counsel may apply for more time for argument. The attorney must state the reason that additional time is needed. The judge in its discretion may grant extensions. O.C.G.A. § 17-8-74.

The prosecutor is allowed to argue twice. The prosecutor may make an opening closing argument then a second concluding closing argument after the defense closing argument. O.C.G.A. § 17-8-71. The prosecutor can waive the opening closing argument and present one closing argument after the defense closing. Not more than two attorneys shall be

permitted to argue any case for any party except by permission of the judge. In no event shall more than one attorney for each side be heard in concluding argument. O.C.G.A. § 17-8-70; *Uniform Superior Court Rule* 13.3.

Attorneys are granted wide latitude in conducting closing argument. A closing argument is appropriate as long as it is based on the evidence that is properly before the jury or reasonable inferences raised by the evidence. *Smith v. State,* 290 Ga. 428 (2012). Lawyers may make use of well-known historical facts and illustrations so long as the lawyer does not make extrinsic or prejudicial statements that have no basis in the evidence. "Counsel's illustrations during closing argument may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination." *Duffy v. State*, 271 Ga. App. 668 (2005); *Rainly v. State*, 307 Ga. App. 467 (2010). Attorneys are permitted to draw deductions from the evidence and the fact that the deduction may be illogical, unreasonable, or even absurd, is a matter for reply by the adverse counsel, and not for rebuke by the judge. *Tolbert v. State*, 313 Ga. App. 46 (2011).

While the range of discussion during closing argument is wide, counsel should not go outside the facts appearing in the case and bring in extraneous

matters that are not a part of the case. *Lewis v. State,* 317 Ga. App. 218 (2012).

Lawyers must argue what the evidence has shown or inferences from the evidence. *Christopher v. State,* 314 Ga. App. 809 (2012). Lawyers are not allowed to argue their personal opinion or beliefs about the evidence. *Humphrey v. Lewis,* 291 Ga. 202 (2012). It is proper for an attorney to urge the jury to draw inferences from the evidence regarding the credibility of witnesses. *Scott v. State,* 290 Ga. App. 883 (2012). Therefore, a prosecutor can argue that the witnesses were telling the truth, so long as the prosecutor does not state to the jury his personal belief about the truthfulness of a witness. *Wilson v. State*, 306 Ga. App. 827 (2010).

Lawyers should not make negative comments about the opposing lawyer designed to impugn the integrity of the opposing counsel. *Warren v. State,* 314 Ga. App. 477 (2012); *Gissendaner v. State,* 272 Ga. 704 (2000).

Lawyers are not allowed to ask a juror to place themselves in the position of the defendant or alleged victim. *Humphrey v. Lewis,* 291 Ga. 202 (2012); *Christopher v. State,* 314 Ga. App. 809 (2012). This is called a "golden rule" argument and is improper. *Gomez v. State,* 315 Ga. App. 898 (2012); *Tucker v. State,* 313 Ga. App. 537 (2012); *Futch v. State,* 286 Ga. 378 (2010). However, a prosecutor's appeal to

the jurors to convict the defendant for the safety of the community is not improper. *Sanders v. State,* 290 Ga. 637 (2012); *Byers v. State,* 276 Ga. App. 295 (2005).

Analogizing a defendant or a defendant's case to another well known defendant or case is permissible during closing argument if the analogy is supported by the facts in evidence. *Humphrey v. Lewis,* 291 Ga. 202 (2012); *Carr v. State,* 267 Ga. 547 (1997). While a prosecutor may analogize a defendant to historical criminals such as Jessie James, it is improper for the prosecutor to refer to other cases the prosecutor has tried. *Lewis v. State,* 317 Ga. App. 218 (2012).

Although lawyers may not read cases to the jury *Conklin v. State*, 254 Ga. 558 (1985), they may refer to the law that the judge is going to read to the jury during his jury instructions. However, attorneys may not misstate the law in a way that will mislead the jury. *Freels v. State*, 195 Ga. App. 609 (1990); *Long v. State*, 307 Ga. App. 669 (2011).

It is improper for a prosecutor to argue to the jury during the guilt-innocence phase of a trial that if the defendant is found not guilty, the defendant will pose a threat of future dangerousness. *Davenport v. State,* 316 Ga. App. 234 (2012). The failure of defense counsel to object may be found to constitute

deficient performance. *Kemp v. State,* 314 Ga. App. 730 (2012); *Fulton v. State*, 278 Ga. 58 (2004); *Jones v. State*, 288 Ga. 431 (2011).

It is improper for either side to argue about punishment. *Dix v. State*, 307 Ga. App. 684 (2011). Further, no attorney shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the judge or jury because of parole. If counsel for either side in a criminal case makes the argument to or in the presence of the jury, opposing counsel shall have the right immediately to request the judge to declare a mistrial, in which case it shall be mandatory upon the judge to declare a mistrial. Failure to declare a mistrial shall constitute reversible error. O.C.G.A. § 17-8-76.

A prosecutor may not comment upon a defendant exercising his right to remain silent. A prosecutor also cannot attempt to shift the burden of proof to the defendant. However, when the prosecutor argues that the defense should explain certain evidence, that does not necessarily shift the burden of proof or constitute an improper comment on the defendant's failure to testify. *Ward v. State*, 262 Ga. 293 (1992) ("make them explain" argument not improper); *Ingram v. State*, 253 Ga. 622 (1984) (while a prosecutor may not comment on a defendant's failure to testify, he may argue that evidence of guilt has not been contradicted or

rebutted). *Lipscomb v. State,* 315 Ga. App. 437 (2012); *Duffy v. State*, 271 Ga. App. 668 (2005). The prosecutor can argue inferences to be drawn by the defendant's failure to produce witnesses who could have given evidence favorable to the defendant. *Angulo v. State,* 314 Ga. App. 669 (2012); *Tucker v. State,* 313 Ga. App. 537 (2012). A prosecutor is permitted to comment on a defendant's courtroom demeanor in closing argument. *Jeffers v. State*, 290 Ga. 311 (2012); *Hardnett v. State*, 285 Ga. 470 (2009).

Closing arguments are judged in the context in which they are made. *Adams v.State,* 283 Ga. 298 (2008). Therefore, a prosecutor is permitted to state that it is not unusual for the prosecutor's office to dismiss cases or that the investigators and prosecutors would not jeopardize their careers to frame the defendant if those arguments are made in response to a defense closing argument. *Tucker v. State,* 313 Ga. App. 537 (2012); *Manley v. State,* 284 Ga. 840 (2009).

It is up to the judge to determine if an attorney has made an improper comment during closing argument. Objections to a closing argument must be made during the closing argument not at the conclusion of the argument. *Lakes v. State,* 314 Ga. App. 10 (2012). If an attorney during closing argument makes statements of prejudicial matters which are not in evidence, it is the duty of the judge

to intervene and prevent the improper argument. A sustained objection to improper argument of counsel cannot serve as the basis for reversal of a conviction unless there is also a motion for mistrial, denied request to strike the argument, or denied request for curative instructions. *Kyler v. State*, 270 Ga. 81 (1998). If the defense attorney does object to the prosecutor's improper closing argument and the judge sustains the objection, the judge is required by O.C.G.A. § 17-8-75 to give an appropriate instruction to the jury to try to remove the improper impression from their minds, even absent a request from the defense attorney. *O'Neal v. State*, 288 Ga. 219 (2010). The judge may also order a mistrial. O.C.G.A. § 17-8-75. A mistrial is appropriate if it is essential to preserve the defendant's right to a fair trial. It is for the judge to determine whether the granting of a mistrial is the only corrective measure or whether any prejudice can be corrected by withdrawing the matter from the jury's consideration with proper instruction. *Johns v. State*, 274 Ga. 23 (2001); *Dix v. State*, 307 Ga. App. 684 (2011).

In a non-capital case, the failure to object to the State's closing argument waives the right to rely on the alleged impropriety as a basis of reversal. *Scott v. State,* 290 Ga. 883 (2012). When no objection is raised, the test of reversible error is not simply whether or not the argument is objectionable, or even if it might have contributed to the verdict, the test is whether the improper argument in reasonable

probability changed the result of the trial. *Stubbs v. State,* 315 Ga. App. 482 (2012); *Todd v. State,* 261 Ga. 766 (1991).

Chapter 10
Jury Charges/Instructions

After the closing arguments, the judge will instruct the jury on the law that they are to apply to the facts in order to reach a verdict. O.C.G.A. § 5-5-24. The jury instructions are also called the jury charge. Judges do not like there to be any distractions or interruptions when the jury charge is given so spectators who want to see the closing arguments, but not the jury instructions, should leave the courtroom before the judge starts to instruct the jury.

The instructions that the judge gives to the jury are "the lamp to guide the juror's feet in journeying through the testimony in search of a legal verdict." *Langston v. State*, 208 Ga. App. 175 (1993). The instructions that the judge will give to the jury will be discussed by the judge and attorneys during a conference, called a charge conference, that usually occurs prior to closing arguments. A defendant's right to be present is not violated by his absence from the charge conference. *Coleman v. State,* A12A0868. During the charge conference each attorney is given an opportunity to object to the proposed instructions submitted by the other side at the beginning of the trial pursuant to Uniform Superior Court Rule 10.3. The judge will then determine which instructions will

be given and which instructions will not be given. To authorize a jury instruction, there need only be slight evidence supporting the theory of the charge. *Hamm v. State,* S13A1696. The judge does not have to instruct the jury in the exact language that is requested by the attorneys as long as the principle of law is covered. *Willis v. State,* 316 Ga. App. 258 (2012); *Dixson v. State*, 313 Ga. App. 379 (2011). Where a written request to charge is either inaccurate, inapt, incorrect, argumentative or covered in the charge given by the judge, the judge does not err in not giving the requested instruction. *Cordy v. State,* 315 Ga. App. 849 (2012).

All error in the jury charge are presumed to be prejudicial unless it is shown to be harmless. Errors in the jury charge are harmless if there is no reasonable probability that the error misled the jury or permitted a defendants conviction on an erroneous theory. *McGhee v. State,* 316 Ga. App. 661 (2012).

Whether the evidence was sufficient to authorize a jury charge is a question of law. *Robinson v. State*, 277 Ga. App. 133 (2006). Even slight evidence will justify a jury instruction. *Williams v. State*, 312 Ga. App. 22 (2011); *Heard v. State,* 149 Ga. App. 92 (1979). The judge can give a jury instruction even though the instruction was not requested in writing at the beginning of the trial as long as the instruction is authorized by the evidence. *Gagnon v. State,* 240 Ga. App. 754 (1999). Jury instructions that may be

abstractly correct should not be given unless they are authorized by the evidence. *Dean v. State,* 313 Ga. App. 726 (2012).

A criminal defendant is required to inform the judge of the specific objection and the grounds for such objection before the jury retires to deliberate. Any issue is waived on appeal by a failure to object O.C.G.A. § 17-8-58 (a); *Fairwell v. State*, 311 Ga. App. 834 (2011); *Cawthon v. State,* 289 Ga. 507 (2011); *Laster v. State*, 307 Ga. App. 142 (2010). Objections that are made at the charge conference, but not renewed after the actual jury charge, are not preserved for appeal. *White v. State,* 291 Ga. 7 (2012); *Carruth v. State*, 290 Ga. 342 (2012); *Sapp v. State*, 290 Ga. 247 (2011); *Palmer v. State*, 270 Ga. 278 (1998). The existence of a mere verbal inaccuracy in a jury instruction, resulting from a clear "slip of the tongue" and which could not have misled or confused the jury will not provide a basis for reversal of a defendant's conviction. *Green v. State,* 291 Ga. 287 (2012); *Arthur v. Walker*, 285 Ga. 578 (2009); *Render v. State*, 288 Ga. 420 (2011). The appeals courts will review errors in the jury charge that are not objected to at trial but are raised in a motion for new trial, only if plain error is shown. *Kogler v. State,* A12A0967. The inquiry of plain error is whether the instruction was erroneous, whether it was obviously so, and whether it likely affected the outcome of the case. *Kelly v. State*, 290

Ga. 29 (2011); *Guajardo v. State*, 290 Ga. 172 (2011).

Pattern Jury Instructions

Many of the instructions that the judge will give come from a book of pattern jury instructions developed by the Council of Superior Court Judges to aid the process of jury instruction. These pattern jury instructions include instructions covering common areas such as: presumption of innocence, burden of proof, reasonable doubt, evidence, direct and circumstantial, and credibility and impeachment of witnesses. Jury instructions do not need to track exactly the pattern instructions so long as the charge is a correct statement of the law and not confusing or misleading. *Green v. State,* 291 Ga. 287 (2012); *Damerow v. State,* 310 Ga. App. 530 (2011); *Watkins v. State,* 265 Ga. App. 54 (2004). All errors in the jury charge are presumed to be prejudicial unless shown to be harmless. Where two or more jury instructions conflict with one another, a new trial is required. *Able v. State*, 312 Ga. App. 252 (2012).

A jury charge cannot shift the burden of proof to the defendant. *Ward v. State*, 312 Ga. App. 609 (2011).

Offenses / Defenses

The judge will also define the offenses alleged in the indictment and explain the elements that the State must prove for each of the charged offenses. Any defenses will also be explained. The judge must charge the jury on a defendant's sole defense, even without a written request, if there is evidence to support the charge. *Price v. State,* 289 Ga. 459 (2011); *Tarvestad v. State,* 261 Ga. 605 (1991).

Lesser Included Offenses

The judge may also instruct the jury on a lesser offense than that charged in the indictment. Under Georgia law, the finder of fact in a criminal case may be authorized, depending on the evidence, to convict the defendant of a lesser-included offense, instead of the greater charged offense, even though that lesser-included offense is not explicitly presented in the indictment or accusation. O.C.G.A. § 16-1-6; *Bennett v. State*, 244 Ga. App. 149 (2000); *Fulton v. State*, 232 Ga. App. 898 (1998).

A crime is a lesser included crime of another crime when "it is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the other crime." O.C.G.A. § 16-1-6 (1). When a defendant is charged with one offense and when there is some evidence, no matter how slight, presented to the jury that shows that the defendant committed a lesser-included offense, then the judge must, upon

timely written request, instruct the jury on the lesser-included offense. *Tiller v. State,* 314 Ga. App. 472 (2012); *Edwards v. State*, 264 Ga. 131 (1994). On the other hand, where the State's evidence establishes all of the elements of the charged offense and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. *Crowley v. State,* 315 Ga. App. 755 (2012); *White v. State*, 310 Ga. App. 386 (2011). A judge's failure to charge on a lesser included offense, without a written request by the State or the defense, is not error. *Ingram v. State,* A12A0843; *Brown v. State*, 285 Ga. 324 (2009); *Eskew v. State*, 309 Ga. App. 44 (2011).

A judge does not have to give an instruction on a lesser included offense if such an instruction is not requested. *Bryson v. State,* 316 Ga. App. 512 (2012); *Elrod v. State,* 316 Ga. App. 491 (2012)

The jury does not have to reach a decision on the greater offense before they can consider the lesser-included offense. *Arrington v. Collins,* 290 Ga. 603 (2012); *Cantrell v. State,* 266 Ga. 700 (1996).

Edge

Where the jury returns a verdict for voluntary manslaughter, it cannot also find felony murder based upon the same underlying aggravated assault. *Sinkfield v. State*, 262 Ga. 555 (1992).

In *Edge v. State*, 261 Ga. 865 (1992), the Georgia Supreme Court adopted the "modified merger rule" which provides that a felony murder conviction is precluded where it prevents a warranted verdict of voluntary manslaughter. The *Edge* case disapproves the giving of sequential charges which instruct the jury to consider voluntary manslaughter only if they have considered and found the defendant not guilty of malice murder and felony murder. Such instructions limit the jury's full consideration of voluntary manslaughter. The judge does not have to instruct the jury that a finding of passion or provocation will prevent a conviction for felony murder. *Terry v. State,* 291 Ga. 508 (2012). The jury charge as a whole must ensure that the jury considers whether evidence of provocation and passion might authorize a verdict of voluntary manslaughter. *Morgan v. State,* 290 Ga. 788 (2012). There can be no harmful *Edge* violation when the jury convicts on a malice murder charge. *Roscoe v. State*. 288 Ga. 775 (2011); *Cloud v. State*, 290 Ga. 193 (2011).

Variance

If the judge gives a jury charge by reading the entire code section of a crime which specifies that a crime may be committed by more than one method and if the indictment alleges that the defendant committed the crime by only one method, the reading of the entire code section violates due process, unless: (1) a limiting instruction is given; or (2) under

the evidence, there is no reasonable possibility that the jury convicted the defendant of the commission of the crime in a manner not charged in the indictment. *Smith v. State,* 310 Ga. App. 418 (2011); *Johnson v. State*, 309 Ga. App. 665 (2011). Any variance is cured by the judge providing the jury with the indictment and instructing the jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. *Williams v. Kelley,* 291 Ga. 285 (2012).

It is not error to charge on the law of conspiracy when the evidence tends to show a conspiracy, even if a conspiracy is not alleged in the indictment. *Edwards v. State*, 312 Ga. App. 141 (2011).

A judge can instruct the jury to disregard inadmissible testimony, even if there was no objection. *Ranson v. State*, 198 Ga. App. 659 (1991). The judge can also give a curative instruction in its closing charge to the jury rather than at the time of the introduction of the improper testimony. *Birdsong v. State*, 312 Ga. App. 345 (2011); *Mobley v. State*, 235 Ga. App. 151 (1998).

Chapter 11
Jury Deliberations & Verdict

After the judge instructs the jury on the law, the jury will retire to the jury room to begin deliberations. Before the deliberations begin, the judge will hear from the attorneys regarding objections to the jury instructions. The judge will also direct the attorneys to determine which evidence goes back with the jury during deliberations. Many judges also send out a copy of the jury instructions. *Howard v. State,* 288 Ga. 741 (2011).

Continuing Witness Rule

Not all evidence goes with the jury during deliberations. Just because an item like a police report or witness statement is admitted into evidence does not mean the jury will see that item during their deliberations. There is a rule called the continuing witness rule that prohibits certain items from being with the jury during its deliberations. The continuing witness rule prohibits writings from going back with the jury during deliberations when the evidentiary value of such writings depends on the credibility of the maker. *Bryant v.* State, 270 Ga. 266 (1988). The rule is based on the principle that it is unfair and places too much influence on the written piece of evidence to go out with the jury and be read during deliberations, while the testimony is received only

once. *Decapite v.* State, 312 Ga. App. 832 (2011); *Tanner v.* State, 259 Ga. App. 54 (2003). As a general rule, the written statement of an alleged victim or witness should not be in the jury room during the jury's deliberations. The statement becomes a witness, whose testimony continues in the jury room. However, if the statement is "consistent with the theory of defense" it is not reversible error for the statement to go into the jury room. *Clark v. State*, 284 Ga. 354 (2008). According to the Supreme Court, whether the victim's statement is "consistent with the theory of defense" depends upon whether it is advantageous to the defendant, and whether and how defense counsel utilizes that evidence. If the statement contains inconsistencies, it is advantageous to the defendant. If the defendant used the statement to impeach the victim, introduced the statement into evidence, and relied on the statement during opening statement, cross-examination, and closing argument, it is not reversible error for the statement to go into the jury room. *Scott v. State,* 290 Ga. 883 (2012); *Clark v. State*, 284 Ga. 354 (2008).

The types of documents that have been held to be subject to the rule include affidavits, depositions, written confessions, statements and dying declarations. *Sherrell v. State,* A12A1001; *Forrester v. State,* 315 Ga. 1 (2012). The narrative portion of a police report should not go out with the jury. *Sims v. State,* A12A1142. The continuing witness rule does

not apply to demonstrative evidence such as summaries of phone records which serve only to illustrate testimony. *Wilkins v. State,* 291 Ga. 483 (2012). Letters do not violate the continuing witness rule. *Bollinger v. State,* 272 Ga. App. 688 (2005); *Vinyard v. State,* 177 Ga. App. 188 (1985).

A violation of the continuing witness rule does not require reversal if the error was harmless. *Sherrell v. State,* A12A1001.

When a jury during deliberation watches a portion of a video that they were not supposed to view, the judge must determine whether a mistrial is appropriate. The judge must determine whether any prejudicial effect can be corrected by withdrawing the material from the consideration of the jury with proper instructions. *Alatise v. State,* 291 Ga. 428 (2012).

Jury Questions, and Re-Charge

Once the jury has begun its deliberations it may submit questions through the baliff to the judge. These questions may ask for additional evidence which they have discovered they did not have or seek clarification on the law. Any answers to the questions must be given in open court with the defendant and his lawyer present. *Perkins v. State,* 288 Ga. 810

(2011); *Morris v. State,* 257 Ga. 781 (1988). The judge can allow the jury to read a transcript of testimony, but the review of the transcript should take place in the courtroom. *Shank v. State,* 290 Ga. 844 (2012); *Gaither v. State*, 312 Ga. App. 53 (2011); *Watkins v. State*, 273 Ga. 307 (2001). The jury may ask to rehear evidence. The judge may allow the jury to rehear recorded evidence as long as it is done in open court. *McNear v. State,* A13A2071.

Sometimes during jury deliberations the jury will ask for additional instructions on the law. When the judge gives further instructions it is called a recharge. The judge may recharge the jury in full, or only upon the point or points requested. *Terry v. State,* 291 Ga. 508 (2012); *Davis v. State*, 287 Ga. 173 (2010); *Howard v. State*, 288 Ga. 741 (2011); *Ross v. State,* 288 Ga. 741 (2011). The need and scope of additional instructions is left to the sound discretion of the judge. O.C.G.A. § 5-5-24; *Tiegreen v. Satte,* 314 Ga. App. 860 (2012); *Wilcox v. State*, 297 Ga. App. 201 (2009). It is not error for the judge to limit the recharge to the specific point requested by the jury. *Harrelson v. State*, 312 Ga. App. 710 (2011); *Luker v. State*, 291 Ga. App. 434 (2008). The judge may recharge the jury with instructions that were not requested by the jury. The judge may also give instructions that it did not give in the original jury charge. *Dukes v. State,* 290 Ga. 486 (2012) ; *Miner v. State,* 268 Ga. 67 (1997).

Allen Charge

An *Allen* charge is given by the judge when the jury in a criminal trial indicates that it is deadlocked. The *Allen* charge encourages the jurors to re-examine their opinions in continued deliberation and to attempt to reach a unanimous verdict. *Allen v. United States*, 164 U.S. 492 (1896); *Sanders v. State*, 290 Ga. 445 (2012); *Humphreys v. State*, 287 Ga. 63 (2010). The decision of whether to give a jury in disagreement the *Allen* charge, including deciding the length of time a jury may be allowed or required to deliberate before the charge is given, generally lies within the discretion of the judge and will not be disturbed on appeal unless there is a manifest abuse of discretion. *Contreras v. State,* 314 Ga. App. 825 (2012)*; Walker v*. State, 308 Ga. App. 176 (2011).

An *Allen* charge should not pressure a jury to reach a verdict. The Georgia Supreme Court disapproved of language instructing jurors that the case "must be decided by some jury." *Burchette v. State*, 278 Ga. 1 (2004). However, the inclusion of such language does not require that a conviction be reversed where that language was only a small part of an otherwise fair and non-coercive charge. In such cases, the language does not cause the charge to become so "coercive so as to cause a juror to abandon an honest conviction for reasons other than those

based upon the trial or the arguments of other jurors." *Luker v. State*, 291 Ga. App. 434 (2008). Moreover, even in situations where the questionable language is more prominent, other factors, such as the length of deliberations following the *Allen* charge and the results of polling the jury on the verdict, may be considered to determine whether a given charge is unduly coercive. *Scott v. State,* 290 Ga. 883 (2012); *Widner v. State*, 280 Ga. 675 (2006); *Lowery v. State*, 282 Ga. 68 (2007). The Allen charge does not have to include words to the jurors not to surrender their conscientious convictions. *Callahan v. State,* 317 Ga. App. 513 (2012).

The judge cannot instruct the jury that it has to reach a verdict, but can instruct them that any verdict must be unanimous. *Emerson v. State,* 315 Ga. App. 105 (2012); *Dukes v. State,* 290 Ga. 486 (2012).

The judge is not prevented from giving an *Allen* charge simply because the jury volunteered the numerical extent of its division. *Scott v. State,* 290 Ga. 883 (2012); *Sears v. State,* 270 Ga. 834 (1999).

If the jury cannot reach a verdict it is called a hung jury. The judge then declares a mistrial. With limited exceptions, the judge's decision to declare a mistrial following a hung jury does not prevent the defendant from being brought to trial a second time for the same offense. *Roesser v. State,* A12A0135.

Verdict

The jury can be given a verdict form to record their verdict or can do so on the indictment. The fact that a possible guilty option is listed before the not guilty option on the verdict form is not improper. *Mitchell v. State,* 290 Ga. 490 (2012); *Rucker v. State*, 270 Ga. 431 (1999). Once the jury reaches a verdict it must be signed and dated by the foreperson and published in open court. The verdict cannot be unclear. If the jury returns a verdict that is unclear or legally unacceptable, the judge can refuse to accept the verdict and require the jury to continue deliberations. *Ingram v. State,* 290 Ga. 500 (2012). The defendant has no right to insist that the judge accept an unclear verdict. *State v. Freeman,* 264 Ga. 276 (1994). The judge instructing the jury to continue deliberations is not an expression of opinion as to the verdict the judge wants to be returned. *Wade v. State*, 258 Ga. 324 (1998).

Inconsistent Verdicts

A defendant cannot complain that the jury verdict is inconsistent. *Fairwell v. State*, 311 Ga. App. 834 (2011); *Harris v. State*, 310 Ga. App. 460 (2011). For example, a jury can convict a defendant of armed robbery but acquit on possession of a firearm during a felony. The inconsistent verdict rule

was abolished because inconsistent verdicts should not necessarily be interpreted as a windfall to the State at the defendant's expense. *Turner v. State*, 283 Ga. 17 (2008). The basis for this rule is simple. A court "cannot know and should not speculate why a jury acquitted on one offense and convicted on another offense." *Artis v. State*, 299 Ga. App. 287 (2009). The verdict could be the result of mistake, compromise, or lenity exercised in favor of the defendant. *Masood v. State,* 313 Ga. App. 549 (2012); *Reese v. State* 308 Ga. App. 528 (2011); *Smith v. State,* 304 Ga. App. 708 (2010).

The fact that the inconsistency may be the result of lenity, coupled with the State's inability to appeal the not guilty verdict, suggests that inconsistent verdicts should not be reviewable. A defendant cannot challenge an inconsistent verdict on the ground that in their case the verdict was not the product of lenity but of some error that worked against them. *Jamale v. State,* 302 Ga. App. 140 (2010); *Villagomez v. State*, 279 Ga. App. 686 (2006). There is a narrow exception where reversal of an inconsistent verdict may occur in rare circumstances where the trial transcript makes clear the jury's rational for the verdict. *Guajardo v. State*, 290 Ga. 172 (2011); *Turner v. State*, 283 Ga. 17 (2008).

Mutually exclusive verdicts on the other hand may be set aside. *Holcomb v. State*, 310 Ga. App.

853 (2011). Verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other count. *State v.* Owens, S14A0889; Drydenv. *State,* 316 Ga. App. 70 (2012); *Young v. State,* S11A1679; *Jackson v. State,* 278 Ga. 408 (2003). For instance, where the jury found both that the defendant acted with criminal intent and criminal negligence at the same time regarding the same victim. *Flores v. State,* 277 Ga. 780 (2004).

Partial Verdicts

It is not improper for the judge, upon learning that the jury has reached a verdict on one count, to let the jury publish its verdict as to that count and finish its deliberations on the other count. *Walker v. State,* 308 Ga. App. 176 (2011).

Polling The Jury

If a defendant is found guilty, the defense attorney may request that the jury be polled. The judge asks each juror whether the verdict reached was their individual verdict, whether it was their verdict in the jury room and whether it still is their verdict. *Benefield v. State,* 278 Ga. 464 (2004). The failure to request that the jury be polled is not grounds for an ineffective assistance of counsel claim. *Davis v. State,* 311 Ga. App. 699 (2011); *Marshall v. State,* 285 Ga. 351 (2009).

The purpose in polling the jury is to insure that each juror agrees to the verdict and see if there was any coercion in the deliberation process. *Cartwright v. State,* 291 Ga. 498 (2012).

Judgment Notwithstanding the Verdict

Until the judge sentences the defendant he has the power to grant a motion for directed verdict. *State v. Canup,* 300 Ga. App. 678 (2009). However, there is no provision in Georgia law authorizing a judge to entertain a motion for judgement of not guilty notwithstanding a verdict of guilty. *Masood v. State,* 313 Ga. App. 549 (2012); *Colotl v. State*, 313 Ga. App. 42 (2011).

Chapter 12
Sentencing

After a verdict of guilty has been returned by the jury in any felony case, the judge shall dismiss the jury and conduct a pre-sentence hearing. O.C.G.A. § 17-10-2(a)(i). This hearing can take place immediately after the verdict or be set off (continued) to a later date for each side to make a presentation. Whether to continue the presentence hearing is within the judge's discretion. *Young v. State,* 290 Ga. 392 (2012). At the pre-sentence hearing the State can present evidence of the defendant's past convictions (called evidence in aggravation). Any victims can also be heard. The defense gets to present any evidence in mitigation. Repeated rumors are not authorized at a pre-sentence hearing. *Ponds v. State,* 136 Ga. App. 852 (1975).

The Eighth Amendment to the United States Constitution forbids cruel and unusual punishment. A sentence may be cruel and unusual where the sentence is grossly disproportionate to the underlying crime. The penalty attached to a crime is the penalty on the date the crime was committed. *Hahn v. State,* 166 Ga. App. 71 (1883). There is a presumption that a sentence within the statutory limits allowed by law does not violate the Eighth Amendment.

Sevostiyanova v. State, 313 Ga. App. 729 (2012); *Middleton v. State*, 313 Ga. App. 193 (2011).

Aggravation

At sentencing, the State will have the opportunity to present any evidence that it believes should be considered in aggravation. A defendant must be given notice of the State's intent to present evidence in aggravation of punishment. 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. O.C.G.A. § 17-16-4 (a) (5). The purpose of the notice requirement is to give the defendant a chance to examine his record to determine if the prior convictions are in fact his, if he was represented by counsel, and if there is any other defect which would render the convictions inadmissible. *Armstrong v. State,* 264 Ga. 237 (1994). Defense counsel does not have an absolute duty to retrieve and review transcripts of prior plea proceedings. *Barker v. Barrow,* 290 Ga. 711 (2012).

The burden is on the State to produce competent evidence of a prior conviction for purposes of sentencing. *Thomas v. State*, 310 Ga. App. 404 (2011); *State v. Slaton*, 294 Ga. App. 507 (2008). Under Georgia law, the best evidence of a prior

conviction is a certified copy of the conviction itself. *Moret v. State*, 246 Ga. 5 (1980); *Ramsey v. State*, 218 Ga. App. 692 (1995). O.C.G.A. §§ 24-5-2; 24-5-31. Hence, if the defendant timely objects on best evidence grounds, the State must produce a certified copy of the prior conviction in order to prove that the conviction occurred. *Lipscomb v. State*, 194 Ga. App. 657(1990). If there is no objection, the State may prove the prior convictions of a defendant for purposes of sentencing by any means. *Cain v. State,* 253 Ga. App. 100 (2001); *Walker v. State,* 204 Ga. App. 269 (1992). The defendant must object to the admission of the evidence at the time of the sentencing hearing. *Thompson v. State*, 266 Ga. App. 29 (2004); *Jones v. State,* 308 Ga. App. 99 (2009). A defendant must also challenge the constitutionality of a sentencing law at the time of the sentencing hearing. *Jones v. State,* 290 Ga. 670 (2012).

Once the State introduces evidence that the defendant entered a guilty plea and had been represented by counsel, the presumption of regularity attaches and the burden shifts to the defense to show any alleged irregularities. *Bell v. State,* A14A0869. A Defendant can meet this burden by relying on a plea transcript or by providing testimony or other evidence regarding the taking of the plea. A silent record or the mere assertion by the Defendant that his former plea was not made knowingly and voluntarily is insufficient. *Dunham v. State,* 315 Ga. App. 901 (2012).

Recidivist

The main statute covering recidivist sentencing is found at O.C.G.A. § 17-10-7. That statute provides:

(a) Except as otherwise provided in subsection (b) of this Code section, any person convicted of a felony offense in this state or having been convicted under the laws of any other state or of the United States of a crime which if committed within this state would be a felony and sentenced to confinement in a penal institution, who shall afterwards commit a felony punishable by confinement in a penal institution, shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offense.

(b) (1) As used in this subsection, the term "serious violent felony" means a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1.

(2) Any person who has been convicted of a serious violent felony in this state or who has been convicted under the laws of any other state or of the United States of a crime which if committed in this state would be a serious violent felony and who after such first conviction subsequently commits and is

convicted of a serious violent felony for which such person is not sentenced to death shall be sentenced to imprisonment for life without parole. Any such sentence of life without parole shall not be suspended, stayed, probated, deferred, or withheld, and any such person sentenced pursuant to this paragraph shall not be eligible for any form of pardon, parole, or early release administered by the State Board of Pardons and Paroles or for any earned time, early release, work release, leave, or any other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the sentence of life imprisonment without possibility of parole, except as may be authorized by any existing or future provisions of the Constitution.

(c) Except as otherwise provided in subsection (b) of this Code section, any person who, after having been convicted under the laws of this state for three felonies or having been convicted under the laws of any other state or of the United States of three crimes which if committed within this state would be felonies, commits a felony within this state shall, upon conviction for such fourth offense or for subsequent offenses, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.

(d) For the purpose of this Code section, conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction.

When the State in a case other than a death penalty case seeks to sentence a defendant as a recidivist based upon prior guilty pleas, the State has the burden of proving: 1) the existence of the prior guilty pleas and 2) that the defendant was represented by counsel in all felony cases and those misdemeanor cases that resulted in imprisonment. *Beck v. State*, 283 Ga. 352 (2008); *Nash v. State*, 271 Ga. 281 (1999). If the State makes those two showings, the burden shifts to the defendant to produce some evidence showing a violation of his rights or procedural irregularity when the pleas were made. *Wells v. State,* 313 Ga. App. 528 (2012).

While the better practice for the judge to indicate on the sentence which subsection of the recidivist statute applies to the case, the failure to do so does not constitute grounds for reversal. *Smith v. State*, 312 Ga. App. 174 (2011).

If a judge sentences a defendant as a recidivist to the maximum penalty under the mistaken belief that he had no discretion to suspend or probate any part of the sentence, the case can be sent back to the judge

for resentencing. *Reese v. State,* 313 Ga. App. 746 (2012); *Henderson v. State*, 247 Ga. App. 31 (2000).

Restitution

Pursuant to O.C.G.A. § 17-14-3 (a), the judge is authorized in sentencing a defendant to make a finding as to the amount of restitution due any victim. In the event that an appropriate restitution amount has not been established at the time of sentencing, the judge "shall set a date for a hearing to determine restitution." There is no statutory mandate as to when the restitution hearing must occur. *Williams v. State*, 311 Ga. App. 152 (2011). The amount of any restitution is determined at a restitution hearing using a preponderance of the evidence standard. *Turner v. State*, 312 Ga. App. 799 (2011); O.C.G.A. § 17-14-9; *Elsasser v. State*, 313 Ga. App. 661 (2012).

The State has the burden of proof to show the amount of loss sustained by the victim. O.C.G.A. § 17-14-7(b); *Futch v. State,* 314 Ga. App. 294 (2012). The restitution owed cannot exceed the victim's damages. O.C.G.A. § 17-14-9. The award must also be based upon fair market value. *Hawthorne v. State,* 285 Ga. App. 196 (2007).

Damages recoverable through restitution are “all damages which a victim could recover against an offender in a civil action based on the same act or acts for which the offender is sentenced.” *Wilder v. State,* 314 Ga. App. 905 (2012); *Burke v. State,* 201 Ga. App. 50 (1991).

Restitution can be orderd even if the sentence does not include probation. *Callahan v. State,* 317 Ga. App. 513 (2012).

Merger

Under O.C.G.A. § 16-1-7 (a), when the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. *Alvelo v. State,* 290 Ga. 609 (2012). He may not, however, be convicted of more than one crime if one crime is included in the other. Under O.C.G.A. § 16-1-6 (1), one crime is included in another crime where it is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the other crime. *Benn v. State*, 309 Ga. App. 373 (2011); *Hudson v. State*, 309 Ga. App. 580 (2011). In this situation, one of the convictions merges into the other and the defendant is sentenced only on the remaining count.

In *Drinkard v. Walker*, 281 Ga. 211 (2006), the Georgia Supreme Court adopted the "required

evidence" test, set forth in *Blockburger v. United States*, 284 U. S. 299 (1932) to determine when convictions should merge. Under this test, "the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Hopkins v. State,* A14A0908; *Crowley v. State,* 315 Ga. App. 755 (2012); *Washington v. State,* 310 Ga. App. 725 (2011).

A course of conduct can result in multiple violations of the same statute. For example, fleeing from several officers can result in multiple charges of fleeing and attempting to elude. The test to be used to determine if the convictions merge requires determining the "unit of prosecution" or the precise act or conduct involved under the statute. *Smith v. State,* S11A1903.

If one crime is committed prior to the other crime, there is no merger. *Brown v. State,* 314 Ga. App. 198 (2012); *McKenzie v. State,* 302 Ga. App. 538 (2010). If during a continuous crime spree the defendant commits a crime against multiple victims, the defendant may be convicted once of possession of a firearm during commission of a crime as to every individual victim. Mason v. State, 312 Ga. App. 723

(2011).

Felony offenses do not merge into misdemeanors. *Gross v. State*, 312 Ga. App. 362 (2011); *Helmeci v. State*, 230 Ga. App. 866 (1998).

The Rule of Lenity

The rule of lenity applies to statutes that establish different punishments for the same offense. *Lewis v. State,* 291 Ga. 273 (2012). For example, the rule applies where the same conduct would support either a misdemeanor or felony conviction based on the same evidence. *Falagian v. State,* 300 Ga. App. 187 (2009). The rule says that any uncertainty in the statute is resolved in favor of the defendant. The defendant is to receive the lesser of the two punishments. The rule of lenity does not apply to convictions of two felony offenses. *Rolif v. State,* 314 Ga. App. 596 (2012); *Rouen v. State,* 312 Ga. App. 8 (2011).

There is no constitutional right to concurrent, rather than consecutive sentences. *Holsey v. State,* A12A0515; *Simpson v. State,* 310 Ga. App. 63 (2011).

Resentencing

When a defendant is resentenced, or where a sentence is amended, the defendant should be present. However, if resentencing only involves a ministerial function, a defendant need not be present. *Shaheed v. State,* 274 Ga. 716 (2002).

After a defendant begins serving his sentence, that sentence can only be increased through resentencing where the resentencing is allowed by law, and the defendant has no expectation of finality in the original sentence. *Smarr v. State,* 317 Ga. App. 584 (2012); *Williams v. State,* 213 Ga. App. 42 (2005).

Whenever a judge imposes a more severe sentence upon a defendant after a successful appeal, the reasons for doing so must appear on the record. There is a presumption of vindictiveness which may be overcome by objective information on the record justifying an increased sentence. Where the record shows no reasonable likelihood that the increased sentence was the result of vindictiveness there is no basis for a presumption and the burden remains on the defendant to prove vindictiveness. *Callahan v. State,* 317 Ga. App. 513 (2012).

First Offender

After trial the judge can still sentence the defendant as a first offender under O.C.G.A. § 42-8-60. The First Offender Act provides that under

certain circumstances "the court may, without entering a judgment of guilt and with the consent of the defendant: (1) Defer further proceeding and place the defendant on probation as provided by law; *or* (2) Sentence the defendant to a term of confinement as provided by law." A defendant can be sentenced to both prison and probation under the First Offender Act. *Kaylor v. State*, 312 Ga. App. 633 (2011).

The judge can revoke a defendant's first offender status and re-sentence the defendant. The judge is allowed to increase the sentence up to the maximum provided by law for the offense as long as: 1) the defendant was warned of that possibility when he was initially sentenced; and 2) any time served prior to re-sentencing is credited to the new sentence. *Kaylor v. State*, 312 Ga. App. 633 (2011); *Ailara v. State*, 311 Ga. App. 862 (2011); *Roland v. Meadows*, 273 Ga. 857 (2001).

Credit for Time Served

The Department of Corrections, not the judge, is responsible for where the defendant serves his sentence and calculating the amount of credit for time served. *Williams v. State*, 300 Ga. App. 319 (2009); *Anderson v. State,* 290 Ga. App. 890 (2008). A defendant is entitled to credit for time served in connection with and resulting from a court order entered in the criminal case for which the sentence is imposed. *Scott v. State,* 315 Ga. App. 786 (2012);

O.C.G.A. §§ 17-10-9 through 17-10-12; *Cochran v. State,* 315 Ga. App. 488 (2012). The remedy for a dissatisfied defendant is a mandamus or injunction against the Commissioner of the Department of Corrections. *Adams v. State,* 316 Ga. App. 161 (2012). If the sentencing order misdirects the jail or prison on how to calculate the sentence then the remedy is for the judge to strike that language from the order. *Cutter v. State*, 275 Ga. App. 888 (2005).

Sentence Modification

A court only has power to modify or reduce a sentence for a limited period of time. *Brown v. State*, 295 Ga. App. 66 (2008). Except as provided by statute, a judge has no power to modify a valid sentence of imprisonment after the term of court in which it was imposed has expired. *Griggs v. State,* 314 Ga. App. 158 (2012). A motion made during the term of court extends the power to modify the sentence. *Tyson v. State,* 301 Ga. App. 295 (2008). The authority of the judge to modify the sentence does not include the power to vacate the conviction. *Ellison v. State,* 283 Ga. 461 (2008).

Under O.C.G.A. § 17-10-1 (f): "Within one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment

after direct appeal, whichever is later, the court imposing the sentence has the jurisdiction, power, and authority to correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed. Prior to entering any order correcting, reducing, or modifying any sentence, the court shall afford notice and an opportunity for a hearing to the prosecuting attorney. Any order modifying a sentence which is entered without notice and an opportunity for a hearing as provided in this subsection shall be void." *Grady v. State,* 311 Ga. App. 620 (2011).

For misdemeanor sentences under O.C.G.A. § 17-10-3 when the defendant is sentenced to serve the sentence in the county jail, the judge keeps jurisdiction and can modify the sentence at any time. *State v. Sanchez*, 312 Ga. App. 837 (2011).

A void sentence can be modified at any time. *Stokes v. State,* 314 Ga. App. 8 (2012)*; Phillip v.* State, 313 Ga. App. 302 (2011). A sentence is void if the court imposes punishment that the law does not allow. *Mikell v. State*, 309 Ga. App. 608 (2011); *Rooney v. State*, 287 Ga. 1 (2010). When a sentence imposed falls within the punishment allowed by law, the sentence is not void and modification is not required. *Gillespie v. State*, 311 Ga. App. 442 (2011); *Benford v. State,* 316 Ga. App. 95 (2012); *LaBrew v. State,*315 Ga. App. 865 (2012).

The denial of a timely motion to modify may be directly appealed. *Bradberry v. State,* 315 Ga. App. 434 (2012); *Anderson v. State,* 290 Ga. App. 890 (2008).

The judge orally sentences the defendant in open court. The sentence is then put in writing called a written judgment and filed with the clerk of the court. While a judge's oral statements in court may provide insight into his intent, it is the written judgment that controls if there is any discrepancies between the two. *In the Interest of R.W.,* 315 Ga. App. 227 (2012); *State v. Hamby,* A12A1159. Any constitutional challenges to a sentence or sentencing statute must be raised at the time of sentence and are untimely if presented for the first time in a motion for new trial. *Brinkley v. State,* S12A0137.

The denial of a timely motion to modify may be directly appealed. *Bradberry v. State,* 315 Ga. App. 434 (2012); *Anderson v. State,* 290 Ga. App. 890 (2008).

PREPARING FOR APPEAL

Within thirty days of the date the judgment is filed with the clerk of court, a defendant must file a motion for new trial. This preserves the appeal. Usually the lawyer who tried the case will file the motion so that the defendant's appellate rights are

preserved until it can be determined who will represent the defendant on appeal.

Volume III of this series will cover a criminal case on appeal and in the habeas corpus process.

XIII
GLOSSARY

Corroboration Supporting evidence

Exculpatory Tending to show innocence

Inculpate Tending to show guilt

Indicia Signs; indications

Indigent Without funds

Intimate Hint or Suggest

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

Movant The party making the request

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

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

PRE-ORDER VOLUME III
APPEAL AND HABEAS CORPUS

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