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# BENCHBOOK

for the Municipal Courts of Georgia

Written, Compiled, and Edited by the Honorable Glen Ashman

Judge, City of East Point Municipal Court

2017 MUNICIPAL COURTS BENCHBOOK<sup>1</sup>

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## PREFACE TO THE 2017 EDITION

The requirements to properly operate a Municipal Court have changed extensively in the past several years. As always, this book is designed to be a resource to assist Georgia judges in the efficient, fair and proper operation of a court, and to provide a useful overview of statutes, case law, procedure, practices, forms and solutions.

Major changes this year include new material on probation and failure to appear. Almost every citation has been checked and often updated. Many sections received updates to reflect recent changes in procedure. A significant change is inclusion, in Chapter 14, of numerous forms, in English and Spanish, which are recommended by the Council of **Municipal Judges**. **The book maintains, in that chapter and elsewhere, additional “unofficial forms.”** Those additional forms, while not approved by any body, may be of use to some courts in their operations.

This has been another challenging year for me due to health issues, so I want to give special thanks to my wife Pam, to my father Ed (who passed away in August), and my children Kevin and Michelle for their patience and support, and a special thanks to all my fellow judges for their prayers and help.

Many other people helped behind the scenes. Judge David Hobby, my co-chairman, spent countless hours getting volunteers, organizing the update, editing sections, and otherwise doing a lot of work. **This year’s book would not** have been completed without his contributions. Judges Phyllis Collins, Ryan Hope, Michael Greene, Lisa Reeves and **Matthew Jordan rewrote and edited portions of this year’s book and stepped in as last minute volunteers after other** judges on the Benchbook committee lacked time to do the many hours needed to get this completed. Attorney Jana J. Edmondson-Cooper of Georgia Legal Services Program authored our chapter on Interpreters.

As always, the staff at ICJE provided assistance. Tiffany Sargent and Douglas Ashworth deserve thanks, as does all of ICJE where behind the scenes efforts are the rule and never the exception.

**Many of our state’s present and former judges, and several attorneys have provided assistance and material in past** years. Large portions of their past writings fill parts of the Benchbook. These include Judge Rashida Oliver, Judge Leslie Spornberger Jones, Judge Charles Barrett, Judge Timothy Wolfe, Judge Harry Bowden, Judge W. Keith Barber, **Judge George Barron, Judge J. Michael (“Mike”) Green, Judge Thomas C. Bobbitt III,** Judge Gary Jackson, Judge Maurice H. Hilliard, Jr., Judge Robert Whatley, Judge Ben Studdard, Judge John G. Cicala, Jr., Judge Rodger Rozen, Judge Gary Nobles, Judge L’Erin F. Barnes, Attorney Jim Martin, Attorney Jennifer Ammons, and Attorney Vicki Judd. Many other judges, and their staff, have left their mark, and it would be impossible to begin to name them all.

Finally, I want to acknowledge the assistance of the staff, especially LaShawn Murphy, at the Administrative Office of the Courts. She helped find volunteers, and often kept the effort organized. I need to also thank James Rodatus and Mike Cuccaro who assisted in an update of citations across the Benchbook.

I want to encourage the readers of this Benchbook to explore the possibility of contributing time to ICJE and the judges’ council. Over the past decade and a half, I have learned both from editing this book and from teaching at **ICJE seminars, and there is a great personal reward from the experience of sharing one’s expertise** and ideas with fellow Judges. Suggestions for additions to this Benchbook, as well as comments, forms, and corrections, are welcome, and can be emailed to the Editor at [geaatl@msn.com](mailto:geaatl@msn.com).

Glen Ashman, Associate Judge of East Point Municipal Court, Editor 2017 Update

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# CHAPTER 1: JURISDICTION, OFFENSES AND GENERAL INFORMATION

## 1.1 MUNICIPAL COURT JURISDICTION

### 1.1.1 GENERAL

#### DEFINITION OF JURISDICTION

Jurisdiction is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties.

#### GEORGIA CONSTITUTION

The judicial power of the state shall be vested exclusively in the following classes of courts: magistrate courts, probate courts, juvenile courts, state courts, superior courts, Court of Appeals, and Supreme Court. Magistrate courts, probate courts, juvenile courts, and state courts shall be courts of limited jurisdiction. In addition, the General Assembly may establish or authorize establishment of municipal courts and may authorize administrative agencies to exercise quasi-judicial powers. Municipal courts shall have jurisdiction over ordinance violations and such other jurisdiction as provided by law. Except as provided in this paragraph and in section X, municipal courts, county recorder's courts and civil courts in existence on June 30, 1983, and administrative agencies shall not be subject to the provisions of this article. The General Assembly shall have the authority to confer "by law" jurisdiction upon municipal courts to try state offenses. Ga. Const., Art. VI, Sec. 1, Par. 1.

#### KOLKER V. STATE

The Constitution provision that municipal courts shall have jurisdiction over ordinance violations and such other jurisdiction as provided by law authorizes the general assembly to vest municipal courts with jurisdiction over state misdemeanor offenses. *Kolker v. State*, 260 Ga. 240, 391 S.E.2d 391 (1990). Compare *Wojick v. State*, 260 Ga. 260, 392 S.E. 2d 525 (1990).

## FOREIGN NATIONALS (INCLUDING ILLEGAL ALIENS)

The 2011 General Assembly passed new legislation concerned illegal aliens in Georgia. This legislation is under current challenge in the federal courts. It may have some effect on municipal courts in that it appears to authorize and direct local law enforcement to report suspected immigration law violations to the federal government and appears to sanction municipalities that fail to comply.

In *Arizona v. United States*, 567 U.S. \_\_\_, 132 S. Ct. 2492 (2012) the United States Supreme Court addressed an **Arizona statute with some similarities to Georgia's, but litigation continues as to the Georgia statute.**

The general issue of foreign nationals in United States courts is one that did not have clear guidance until rulings from state and federal courts from 2002 to 2010. It is clear that foreign nationals have the same rights in Court as an American citizen. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the U.S. Supreme Court held that the 14<sup>th</sup> Amendment required due process and equal protection even for illegal or undocumented aliens.

The Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, 1967 WL 18349 (ratified by the United States on November 24, 1969, but rejected by President Bush in 2005) provides that an arresting **authority must advise a foreign national's consular post of the arrest**, and inform the person arrested of his right to contact consular officials. Police rarely take this step in the United States.

The U.S. Supreme Court has held that a treaty violation does not allow an individual defendant to seek suppression as relief under the Vienna Convention. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). See also, *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001). Additionally, the Georgia Supreme Court has held that international treaties do not create individual rights which can be privately enforced in Court proceedings. *Villegas v. State*, 273 Ga. 823, 826 (6), 546 SE2d 504 (2001). It would thus appear that a violation of the Convention does not deprive a Court of jurisdiction.

On March 31, 2004, in *Avena and other Mexican Nationals*, the International Court of Justice (the 'World Court') found, that the United States violated Articles 5 and 36 under the Vienna Convention on Consular Relations of April 24, 1963 concerning Mexican nationals who were convicted and sentenced to death in U.S. state courts in California, Texas, Illinois, Arizona, Arkansas, Florida, Nevada, Ohio, Oklahoma, and Oregon in that Mexican citizens who were charged and convicted of crimes in the U.S. were not told that they had to the right to consular assistance and access under the Vienna Convention.

In *Medellin v. Dretke*, 544 U.S. 660 (2005) the U.S. Supreme Court, discussed the issue as to whether the death sentences of 51 Mexicans on U.S. death rows should be reversed due to the convention violations. After a last minute intervention by President Bush asking states to review those cases again, the Supreme Court issued an unsigned opinion that left the issue unresolved, although the case can be refiled after state courts review this issue. President Bush also announced a United States intention to withdraw from the Convention. Given the *Sanchez-Lamas* case, above, it appears that the federal courts will not give relief for a Vienna Convention violation, and, given *Lopez*, above, it also seems clear that state courts in Georgia will not give relief for such violations.

There is, at least according to the state Supreme Court, no requirement that a DUI defendant have an interpreter when implied consent warnings are read, so in some regards some defendants may be less equal than others. See, *Rodriguez v. State*, 275 Ga. 283, 565 S.E. 2d 458 (2002).

The U.S. Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), expanded on the rights of non-citizens, holding the Sixth Amendment requires criminal defense attorneys to advise their immigrant clients of the possible deportation consequences of a guilty plea. The case overturned a contrary decision by the Supreme Court of Kentucky.

#### JURISDICTION TO SENTENCE REQUIRES APPOINTED INDIGENT COUNSEL

O.C.G.A. §36-32-1(f) states that, effective January 1, 2005, “Any municipal court operating within this state and having jurisdiction over the violation of municipal ordinances and over such other matters as are by specific or general law made subject to the jurisdiction of municipal courts shall not impose any punishment of confinement, probation, or other loss of liberty, or impose any fine, fee, or cost enforceable by confinement, probation, or other loss of liberty, as authorized by general law or municipal or county ordinance, unless the court provides to the accused the right to representation by a lawyer, and provides to those accused who are indigent the right to counsel at no cost to the accused. Such representation shall be subject to all applicable standards adopted by the Georgia Public Defender Standards Council for representation of indigent persons in this state.” **(emphasis added)** Simply binding a case over to state or superior court in lieu of appointing counsel arguably may not comply with this state mandate.

Note that in the 2004 General Assembly Extended Session HB 1 EX was passed, allowing municipal courts to charge a \$50 application fee for those seeking indigent representation. These funds are to be used to assist municipal court in meeting its own indigent defense needs and could be waived by the court for hardship. It probably is a good **practice to waive the fee in any case where there is a question about the Defendant’s ability to afford** the fee. Some courts have added the \$50 to fines in cases where a Defendant is convicted.

In 2011 the General Assembly rewrote the structure of the Public Defender Standards Council, which continues to impact local courts.

#### JURISDICTION TO HEAR CASE REQUIRES WAIVER OF TRIAL BY JURY

A municipal court cannot hear a case where there is, under state law, the right to trial by jury unless there is a waiver on the record of a jury trial. It is a good practice, when using written waivers, to use one far more specific than the one on a Uniform Traffic Citation. Such waivers are extensively discussed in Chapter 6 of this Benchbook, and extensive forms also are found in that Chapter. Complex questions may arise if a person is charged with a local ordinance violation not triable by jury, but the language of the ordinance is substantially similar to state statutes.

## WHO CAN SERVE AS A MUNICIPAL COURT JUDGE?

Since July 1, 2011, no one can serve as a Municipal Court Judge unless he or she is an active member in good standing with the State Bar of Georgia. An exception exists for any Judge who was in office on June 30, 2011, as long as that Judge stays in compliance with the training requirements of O.C.G.A. §36-32-27. See O.C.G.A. §36-32-1.1.

## LOCATION OF A JUDGE WHEN SIGNING WARRANTS

O.C.G.A. §17-4-44 appears to authorize a judge to sign a warrant **anywhere in the state: “Warrants may be issued in any county...”** Since **May 6, 2013, amendments to O.C.G.A. §17-4-47 and O.C.G.A. §17-5-21.1** allow a municipal judge to issue arrest and search warrants by electronic means such as computers, Skype, video conferencing, facsimile and so on. This can be done even when a judge is out of his jurisdiction. However the judge must still be within the state of Georgia.

## CORRECTION OF CRIMINAL HISTORIES

On July 1, 2013, a new O.C.G.A. §35-3-37 went into effect. If a person claims that their criminal history is **“inaccurate, incomplete or misleading”** they can petition the court that originally had jurisdiction. That means that if the original case was heard in **Municipal Court, the judge of that court can order that the criminal history be “modified, corrected, supplemented or amended.”** This is something that municipal judges previously could not hear. Note that a municipal court can only hear cases that were heard in that municipal court, and it appears that the Superior Court would have concurrent jurisdiction in the matter. The statute contains detailed procedures and time limits.

## 1.2 JURISDICTION OF STATE OFFENSES

The following statutes specifically grant jurisdiction to Municipal Courts over the offenses addressed (*note that this list was expanded and changed in 2012*):

O.C.G.A. §36-32-6:	Possession of one ounce or less of marijuana
O.C.G.A. §36-32-7:	Operating a motor vehicle without effective insurance
O.C.G.A. §36-32-8:	Operating a motor vehicle without a certificate of emission
O.C.G.A. §36-32-9:	Shoplifting valued \$500 or less, first and second offenses only (this changed in 2012 from \$300)
O.C.G.A. §36-32-10:	Sale and possession of alcoholic beverages involving underage persons (first offense only)
O.C.G.A. §36-32-10.1:	Criminal trespass (only in counties with no state court)
O.C.G.A. §40-5-121:	Driving while license suspended or revoked (except the fourth or subsequent conviction for driving without a license in 5 years is a felony)
O.C.G.A. §40-5-124:	Jurisdiction over traffic offenses, generally (see also O.C.G.A. §40-6-372)
O.C.G.A. §40-6-13: 40-6-11	Proof of insurance offenses (including motorcycles) in O.C.G.A. §§40-6-10 and 40-6-11
O.C.G.A. §40-6-208:	Parking violations in mass transit lots
O.C.G.A. §40-6-226:	Handicapped parking
O.C.G.A. §40-6-252:	Private parking lot restrictions
O.C.G.A. §36-32-6.1	Possession of drug related objects (this was added in 2012)
O.C.G.A. §40-6-391:	Driving under the influence
NOTE: Effective July 1, 2008, the fourth DUI in 10 years is a felony, so check dates on prior DUIs carefully. The penalty for the fourth DUI, which cannot be tried in municipal court, is 1-5 years in jail (all but 90 days can be suspended), at least 60 days community service (unless defendant is sentenced to at least three years in prison) and five years probation, less time served, plus all the other penalties for a third offense DUI. The fourth DUI in five years cannot be tried in a municipal court after July 1, 2008.	
O.C.G.A. §40-6-395:	Fleeing or attempting to elude
O.C.G.A. §16-7-48:	Allows municipalities to enact littering ordinances other than the state statute O.C.G.A. §16-7-47
O.C.G.A. § 16-12-120	Cities can prohibit consumption of beverages in public transit buses

### 1.3 CHART OF MINIMUM, POSSIBLE AND MAXIMUM SENTENCES FOR OFFENSES

NOTE: The General Assembly frequently changes penalties. Always consult the current edition of the Georgia Code, and your city charter, as to appropriate minimum and maximum fines. Unless a minimum is clearly stated, there is no minimum sentence.

Additionally the State mandates numerous surcharges on fines that in many cases must be added to the fine amounts listed. Note that surcharges are not added to civil penalties, such as red light camera violations, but are added to most criminal penalties.

*NOTE: O.C.G.A. §40-13-22 provides that municipal courts are limited to the maximum sentences in their city charter even where state law allows a longer sentence. There are many exceptions where state law sets a mandatory minimum sentence (such as DUI and most traffic offenses) or otherwise allows a city judge to impose a sentence longer than the city charter allows. It is important for all city judges to review their charters and determine maximum and minimum sentences allowed in their city. O.C.G.A. §36-35-6 states that the maximum penalty for a city ordinance is 6 months imprisonment and a \$1,000 fine. O.C.G.A. §15-7-84 says that penalties cannot exceed those permitted by city charter.*

<i>CODE SECTION</i>	<i>OFFENSE</i>
3-3-23(a)(1)	Furnishing alcohol to person under 21 First offense except Fulton County (see note below) 12 months and/or \$1,000 Subsequent offense except Fulton County (see note below) 12 months and/or \$5,000
3-3-23(a)(2)	Purchase or possession of alcohol by person under 21 First offense except Fulton County (see note below) 6 months and/or \$300 and 6 months license suspension Under 21--license revocation Subsequent offense 12 months and or \$1,000 and 12 months license suspension except Fulton County (see note below) Under 21--license revocation
	Since 2015 minor in possession of alcohol offenses (MIPs) are punishable by citation only, and not arrest. This is to prevent minors who are caught in possession of alcohol but not violating any other law, from being arrested, fingerprinted and having a criminal record.

CODE SECTION

OFFENSE

3-3-23(a)(3) Misrepresentation of age by person under 21 to obtain alcohol  
First offense except Fulton County (see note below)  
12 months and/or \$1,000 + License revocation  
Subsequent offense except Fulton County (see note below)  
12 months and/or \$5,000 + License revocation

Since 2015 minor in possession of alcohol offenses (MIPs) are punishable by citation only, and not arrest. This is to prevent minors who are caught in possession of alcohol but not violating any other law, from being arrested, fingerprinted and having a criminal record.

3-3-23(a)(4) Purchasing alcohol for person under 21  
First offense except Fulton County (see note below)  
12 months and/or \$1,000  
Subsequent offense except Fulton County (see note below)  
12 months and/or \$5,000

3-3-23(a)(5) Misrepresenting identity of using false ID to obtain alcohol  
First Offense except Fulton County (see note below)  
12 months and/or \$1,000 + License revocation  
Subsequent offense except Fulton County (see note below)  
12 months and/or \$5,000 and license revocation

Since 2015 minor in possession of alcohol offenses (MIPs) are punishable by citation only, and not arrest. This is to prevent minors who are caught in possession of alcohol but not violating any other law, from being arrested, fingerprinted and having a criminal record.

*NOTE: HB 1501, effective July 1, 2006, changes the maximum fine for alcohol beverage license violations only in counties or municipalities that issue over 300 licenses (at present only Fulton County is believed to meet that requirement). In those jurisdictions, the maximum fine is \$2,500.*

16-13-32 Possession of Drug Related Objects  
Maximum 1 year and/or \$1,000 fine

16-7-43 Littering  
Minimum \$200 fine.  
Maximum \$1,200 fine.  
Optional order to pick up trash on public or private property

CODE SECTION

OFFENSE

16-8-14

Theft by Shoplifting (under \$500)

First Offense

12 months and/or \$1,000

Second offense

12 months and \$250-\$1,000

Third offense

Upon conviction of a third offense for shoplifting, where the first two offenses are either felonies or misdemeanors, or a combination of a felony and a misdemeanor, as defined by this Code section, in addition to or in lieu of any fine which might be imposed, the defendant shall be punished by imprisonment for not less than 30 days or confinement in a "special alternative incarceration-probation boot camp," probation detention center, diversion center, or other community correctional facility of the Department of Corrections for a period of 120 days or shall be sentenced to monitored house arrest for a period of 120 days and, in addition to either such types of confinement, may be required to undergo psychological evaluation and treatment to be paid for by the defendant; and such sentence of imprisonment or confinement shall not be suspended, probated, deferred, or withheld.

Fourth offense

NOT TRIABLE IN MUNICIPAL COURT: O.C.G.A. §16-8-14 (b)(1)(C) states upon conviction of a fourth or subsequent offense for shoplifting, where the prior convictions are either felonies or misdemeanors, or any combination of felonies and misdemeanors, as defined by this code section, the defendant commits a felony and shall be punished by imprisonment for not less than one nor more than ten years; and the first year of such sentence shall not be suspended, probated, deferred, or withheld.

16-11-39

Disorderly conduct

*Note: The state has a statute which is a misdemeanor (not triable in city courts). However, the statute specifically allows cities to have their own ordinance.*

16-11-41

Public drunkenness

*Note: The state has a statute which is a misdemeanor (not triable in city courts). However, the statute specifically allows cities to have their own ordinance.*

CODE SECTION

OFFENSE

16-13-2(b) Possession less than ounce of marijuana  
12 months and/or \$1,000 and license suspension

*NOTE: O.C.G.A. §16-13-2 allows for deferred dispositions without adjudication of guilt in marijuana cases. Be aware of the consequences of a marijuana conviction before you sentence. It may **result in a driver's license suspension, inability to enter the military, ineligibility** for college scholarships and government housing, and other consequences.*

40-1-8 CDL license holder not wearing a seat belt while driving a Commercial vehicle  
Max. Fine \$50 (no surcharges or points)

40-2-5 Misuse of license plate  
12 months and \$500 - \$5,000

40-2-6 Altered license plate  
12 months and/or \$1,000

40-2-6.1 Plastic and other coverings over license plate prohibited  
12 months and/or \$1,000

40-2-7 Removing license plate or affixing license plate to unauthorized vehicle  
12 months and/or \$1,000

40-2-8 Failure to register vehicle / no tag  
\$100 per violation (but each day can be charged as a separate violation O.C.G.A. §40-2-8(a)  
But see O.C.G.A. §40-2-8.1 below

40-2-8(c) No county decal  
First offense \$25  
Subsequent offense \$100  
No fine on specialty plates that lack space for county decal

40-2-8.1 If re-validation decal purchased prior to issuance of citation \$25

40-2-20 Failure to register vehicle  
\$100

40-2-37(e) Using government license plate on private vehicle  
12 months and/or \$1,000

40-2-41 Improper tag display/covers/frames on license plate  
12 months and/or \$1,000

CODE SECTION

OFFENSE

40-2-135.1	Failure to pay highway toll--allows for suspension of registration (see also O.C.G.A. §32-10-64)
40-5-20	Driving without a license / Expired license 12 months and/or \$1,000 Vehicle must be impounded See O.C.G.A. §40-5-21 for exceptions (The fourth conviction within 5 years is a felony)
40-5-29	Driving without a license on person \$10 if license is shown to Court
40-5-30	Restricted licenses--violation of terms 12 months and/or \$1,000 Court can order up to 6 month suspension

*NOTE: HB 1124 amended this statute in 2010 to create an affirmative defense where the restriction is for vision and the defendant no longer needs contacts or glasses.*

*NOTE: DDS, under House Bill 258 from 2010, can issue a restricted learner's permit to a child with a handicapped parent or guardian that allows the child to drive with that parent or guardian. Also, effective in 2010 under SB 6, suspensions resulting from violation of this statute are now discretionary with the trial court.*

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-5-58	Violation probationary license 12 months and/or \$1,000
40-5-75	Person with Limited Driving Permit violating Permit or any traffic law License must be surrendered to Court and forwarded to State for revocation
40-5-120	Unlawful use of license or Georgia ID Card 12 months and/or \$1,000 License suspension

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-5-121	<p>Driving while license suspended</p> <p>First offense in five years 2 days-12 months and/or \$500-\$1,000</p> <p>Subsequent offense in five years 10 days-12 months and/or \$1,000-\$2,500 (See also O.C.G.A. §40-5-75[f] -\$750-\$5,000/12 months) Note: 4<sup>th</sup> conviction in 5 years is a felony 1-5 years in jail/fine \$2,500-\$5,000</p>
40-5-122	<p>Permitting non-licensed person to drive 12 months and/or \$1,000</p>
40-5-123	<p>Permitting unauthorized minor to drive 12 months and/or \$1,000</p>
40-5-125	<p>Possession or use of fake or fictitious <b>driver's license or ID card</b> Changed to a felony in 2015 and no longer triable in municipal court License suspension</p>
40-5-143	<p>Possession of more than one commercial license Felony offense per O.C.G.A. §40-5-159 (<i>not triable in municipal court</i>)</p>
40-5-146	<p>Operating commercial vehicle without a license \$500 to \$1,000 and up to 12 months per O.C.G.A. §40-5-159</p>
40-5-179	<p>Fraudulent ID card \$1,000 and/or 12 months</p>

NOTE: HB 258, effective July 1, 2010 allows judges to authorize the issuance of a limited driving permit for drivers age 18 and over who have a suspension under O.C.G.A. §40-5-57.1 for a 4-point speeding ticket.

Note: O.C.G.A. §40-6-187 requires that the sentencing court must specify the amount by which a person convicted exceeded the speed limit. Additionally, the UTC must state if the offense did or

Note: In 2009 HB 160 amended O.C.G.A. §40-6-189, by creating a "super speeder" offense for anyone traveling 75+ mph on a two lane road or 85+ mph on a four lane road. The new offense will have an additional \$200 fine imposed by the Department of Driver Services within 30 days of adjudication. Failure to pay the fee imposed within 90 days after receipt of the notice shall result in the suspension of the driver's license or driving privileges of the offender, and an additional \$50 fee. These additional fees are not paid or assessed by the sentencing court.

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-6-1	<p>General speeding offenses: (see also 40-6-180 below)            Second and subsequent offenses: \$1,000 and/or 12 months</p> <p>First offenses:            Up to 5 miles over limit: NO FINE            6-10 miles over limit: \$25 maximum            10-14 miles over limit: \$100 maximum            15-19 miles over limit: \$125 maximum            20-23 miles over limit: \$150 maximum            24-33 miles over limit: \$500 maximum            34 miles and over limit: up to \$1,000 and/or 12 months</p> <p>Exception: Work Zones (40-6-188): \$100-\$2,000 and/or 12 months</p>
40-6-2	<p>Failure to obey person directing traffic            12 months and/or up to \$1,000</p>
40-6-10	<p>No Insurance            12 months and/or \$200-\$1,000</p>
40-6-10	<p>No Proof of Insurance            \$25 maximum <i>This only applies to a vehicle not in the State database.</i></p>
40-6-11(b)	<p>No insurance motorcycle            12 months and/or \$1,000</p>
40-6-11(c)	<p>No proof of insurance motorcycle            \$25 maximum <i>This only applies to a vehicle not in the State database.</i></p>
40-6-14	<p>Sound Violation            12 months and/or \$1,000</p>

*CODE SECTION*

*OFFENSE*

40-6-15

Driving with Suspended Registration

1<sup>st</sup> offense: Up to 12 months \$500 minimum/\$1,000 maximum

2<sup>nd</sup> offense: minimum 10 days maximum 12 months  
\$1,000 minimum/ \$2,500 maximum fine

*Note: be sure that the suspension was not in error*

40-6-16

Failure to Change Lane for an Emergency Vehicle

Effective April 20, 2006 this was changed to a maximum fine of \$500

40-6-16.1

Unlawful passing of garbage trucks by other vehicles (new in 2015)  
Maximum fine \$250

40-6-17

Traffic-control device preemption emitters banned for  
Non-emergency vehicles  
12 months and/or \$1,000

40-6-20

Failure to obey traffic control device  
12 months and/or \$1,000

*NOTE: In cities that use red light camera enforcement, there is no criminal or traffic charge but there is a maximum civil penalty of \$70 (not a moving violation and no points).*

**NOTE: On July 12, 2005, an unofficial Attorney's General opinion was issued, which says cities using red light cameras for civil red light tickets may charge a civil penalty not to exceed \$70.00, and no state or other surcharges may be added to that amount.**

*CODE SECTION*

*OFFENSE*

40-6-25

Displaying unauthorized signs, signals or markings  
12 months and/or \$1,000

40-6-26

Interfering with traffic control devices, railroads signs or signals  
12 months and/or \$1,000

40-6-40

Driving on wrong side of roadway  
12 months and/or \$1,000

40-6-42

Improper passing  
12 months and/or \$1,000

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-6-46	Passing in a no-passing zone 12 months and/or \$1,000
40-6-47	Violation one-way streets 12 months and/or \$1,000
40-6-48	Improper lane change or usage 12 months and/or \$1,000
40-6-49	Following too closely 12 months and/or \$1,000
40-6-50	Crossing a gore or misuse of emergency lane 12 months and/or \$1,000
40-6-52	Improper lane usage by trucks on multilane roads 12 months and/or \$1,000
40-6-53	Improper lane usage by buses and on multilane roads 12 months and/or \$1,000
40-6-54	HOV lane violations  1 <sup>st</sup> offense: \$75 maximum 2 <sup>nd</sup> offense: \$100 maximum 3 <sup>rd</sup> offense and thereafter: \$150 maximum (Points assessed starting on 4 <sup>th</sup> offense)
40-6-55	Failure to yield to a bicycle in a designated bicycle lane 12 months and/or \$1,000
40-6-56	Improper passing of a bicycle by an automobile/motor vehicle 12 months and/or \$1,000
40-6-70 and 40-6-71	Failure to yield to right of way 12 months and/or \$1,000
40-6-72	Disregarding stop and yield sign 12 months and/or \$1,000
40-6-74	Failure to yield to emergency vehicle 12 months and/or \$1,000
40-6-75	Failure to yield to highway construction and maintenance crew and vehicles 12 months and/or \$1,000

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-6-76	Failure to yield to funeral procession \$100 maximum
40-6-77	Serious injury due to right of way violation resulting in collision with motorcyclist, pedestrian, bicyclist, or farmer transporting vehicles hauling agricultural products, livestock, farm machinery, or farm products  First offense: a fine of not less than \$250  For a second or subsequent offense within a five-year period of time, as measured from the dates of previous arrests for which convictions were obtained or pleas of nolo contendere were accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted: by a fine of not less than \$500 nor more than \$1,000 and imprisonment for not less than ten days nor more than 12 months. Any fine imposed under this paragraph shall be mandatory and shall not be suspended or waived or conditioned upon the completion of any course or sentence.
40-6-90	Failure to obey pedestrian control device 12 months and/or \$1,000
40-6-91	Failure to yield to pedestrian in pedestrian crosswalk 12 months and/or \$1,000
40-6-92	Pedestrian crossing at other than a crosswalk 12 months and/or \$1,000
40-6-94	Failure to yield to blind pedestrian 12 months and/or \$1,000
40-6-95	Pedestrian under the influence Maximum: \$500
40-6-96	Walking in roadway where sidewalk available 12 months and/or \$1,000
40-6-97	Pedestrian soliciting rides or business 12 months and/or \$1,000
40-6-98	Driving through a safety zone 12 months and/or \$1,000
40-6-99	Pedestrian must yield to emergency vehicles 12 months and/or \$1,000
40-6-120	Improper turn 12 months and/or \$1,000

Note: On June 8, 2009, the Georgia Supreme Court, in *McNair v. State*, 285 Ga. 514, 678 S.E.2d 69 (Ga. 2009), O.C.G.A. §40-6-120(a)(2) was struck down as unconstitutionally vague. That portion of the statute deals with the method of making left hand turns at intersections. However, on July 1, 2010 the problem was corrected by a revised O.C.G.A. §40-6-120(a)(2) which corrected the constitutional

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-6-121	Illegal U-Turn 12 months and/or \$1,000
40-6-122	Improperly starting a parked vehicle 12 months and/or \$1,000
40-6-123	Failure to signal 12 months and/or \$1,000
40-6-126	Improper use of center lane 12 months and/or \$1,000
40-6-140	Disregarding railroad signal 12 months and/or \$1,000
40-6-141	Disregarding stop sign at railroad crossing 12 months and/or \$1,000
40-6-142	Taxis, certain trucks, limos, and buses must stop at railroad crossing 12 months and/or \$1,000
40-6-143	Operating heavy slow moving equipment at railroad crossings 12 months and/or \$1,000
40-6-144	Emerging from alley or driveway improperly 12 months and/or \$1,000
	Driving a vehicle on a sidewalk (also in same code section) 12 months and/or \$1,000
	(Exception: Local ordinances can allow children 12 and other to drive bicycles on sidewalks)
40-6-161	School bus must have headlights on 12 months and/or \$1,000
40-6-163	Failure to stop for school bus 12 months and/or \$1,000
40-6-164	School bus not allowing children to safely disembark 12 months and/or \$1,000
<i>CODE SECTION</i>	<i>OFFENSE</i>

40-6-180	Too fast for conditions 12 months and/or \$1,000
40-6-181	See 40-6-1 above for penalties <i>Note: 40-6-187 requires that the sentencing court must specify the amount by which a person convicted exceeded the speed limit.</i>
40-6-184	Impeding traffic flow; minimum speed; driving too slow in left lane Note: This statute was amended in 2014 to keep slower traffic out of passing/left hand lanes 12 months and/or \$1,000
40-6-185	Driving too fast on a bridge 12 months and/or \$1,000
40-6-186	Racing on streets or highways 12 months and/or \$1,000 License suspension Under 21- License revocation
40-6-188	Violation speed limit in construction site 12 months and/or \$100-\$2,000
40-6-200	Improper parking 12 months and/or \$1,000
40-6-201 (repealed 2007)	Leaving a vehicle unattended on roadway 12 months and/or \$1,000
40-6-203	Improper stopping, standing or parking 12 months and/or \$1,000
40-6-205	Obstructing intersections 12 months and/or \$1,000
40-6-208	Illegal parking at transit stations 12 months and/or \$1,000

NOTE: Some cities use parking tickets that violate this code section. **The statute says that “at a minimum” a citation must** show: (1) The nature of the violation; (2) The amount of the fine which will be levied for such violation; (3) That the cited individual has the right to contest the citation and be given an opportunity to be heard; (4) The location of the court in which the cited individual must appear within five days of the date of the citation to contest same; and (5) The location at which fines may be paid.

CODE SECTION

OFFENSE

40-6-226	Violation handicapped parking \$100-\$500 (Applies to private as well as public property O.C.G.A. §40-6-227)
40-6-226	Refusal of property owner to designate handicapped parking areas \$150 per parking space, plus \$5 per day
40-6-240	Improper backing 12 months and/or \$1,000
40-6-241	Attentive driving: due care 12 months and/or \$1,000
40-6-241.1	Cell Phone Usage while Driving (Effective July 1, 2010): HB 23 prohibits anyone under 18 with either a learners permit or Class D license from talking or texting on any wireless device while driving. Exceptions are made for reporting crimes and for a GPS. The fine is \$150 (no surcharges) and 1 point. Fines are doubled for accidents.  SB 360 prohibits anyone 18 or over, or anyone with a Class C from reading, writing, or sending a text message while driving. The fine is \$150 (no surcharges) and 1 point.
40-6-241.2	Texting and driving – commercial (effective 2015) shall be subject to a civil penalty not to exceed \$2,750 in addition to any criminal fines applicable to the violation. Any employer who knowingly allows, requires, permits, or authorizes a driver to drive a commercial motor vehicle in violation of O.C.G.A. § 40-6-241.2 shall be subject to a civil penalty not to exceed \$11,000. No person shall operate a commercial motor vehicle on any public road or highway of this state while: (A) holding a wireless telecommunications device to conduct a voice communication; (B) using more than a single button on a wireless telecommunications device to initiate or terminate a voice communication; or (C) reaching for a wireless telecommunications device in such a manner that requires the driver to maneuver so that he or she is no longer in a seated driving position properly restrained by a safety belt.
40-6-242	Driving with obstructed view 12 months and/or \$1,000
40-6-243	Opening/closing vehicle doors 12 months and/or \$1,000
40-6-244	Riding in a house trailer on a highway 12 months and/or \$1,000
<i>CODE SECTION</i>	<i>OFFENSE</i>
40-6-245	Horn use required on certain mountain highways

	12 months and/or \$1,000
40-6-246	Coasting 12 months and/or \$1,000
40-6-247	Following emergency vehicle too closely 12 months and/or \$1,000
40-6-248	Crossing a fire hose 12 months and/or \$1,000
40-6-250	Driving with headphones 12 months and/or \$1,000
40-6-251	Laying drags 12 months and/or \$1,000
40-6-252	Vehicle in private parking lot in violation of restrictions  1 <sup>st</sup> offense: Up to \$50 2 <sup>nd</sup> offense: Up to \$100 3 <sup>rd</sup> offense: Up to \$150
40-6-253	Possession of open container while operating vehicle \$200
40-6-254	Failure to secure load 12 months and/or \$1,000
40-6-255	Drive off without paying for gasoline \$100 and/or 60 days
40-6-270	Hit and run If no death or serious injury  1 <sup>st</sup> offense: \$300- \$1,000 and/or 12 months 2 <sup>nd</sup> offense: \$600-\$1,000 and/or 12 months 3 <sup>rd</sup> offense: \$1,000 and/or 12 months  Death or serious injury: Felony
40-6-271	Striking unattended vehicle 12 months and/or \$1,000
40-6-272	Striking fixed object 12 months and/or \$1,000

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-6-273	Failure to report accident 12 months and/or \$1,000
40-6-291	Most traffic laws apply to bicycles Same penalties as for a motor vehicle
40-6-292	Excess passenger on bicycle 12 months and/or \$1,000
40-6-292	Children or infants on bicycles 12 months and/or \$1,000
40-6-295	Carrying items on a bicycle that impair keeping two hands on handlebars 12 months and/or \$1,000

*CODE SECTION*

*OFFENSE*

40-6-296

Lights on bicycles used at night  
12 months and/or \$1,000

40-6-315

Operating motorcycle without helmet  
\$1,000 and/or 12 months

40-6-361

40-6-362

and 40-6-363

Limits and rules for low-speed vehicles on highways  
\$1,000 and/or 12 months

NOTE: Read the statute carefully. There are two sets of rules for proper equipment on such vehicles. Counties and cities that have enacted ordinances on the subject before January 1, 2012 can have different equipment rules than the state statute. This provision was made in part for Peachtree City but may affect some other localities as well.

*CODE SECTION*

*OFFENSE*

40-6-390

Reckless driving  
\$1,000 and/or 12 months

*CODE SECTION*

*OFFENSE*

40-6-391

DUI

1<sup>st</sup> offense in 5 years: \$300 - \$1,000 and 12 months  
40 hrs community service (20 hrs if BAC is under .08)  
clinical evaluation unless waived by court  
treatment program if recommended in evaluation

2<sup>nd</sup> offense in 5 years: \$600 - \$1,000 and 12 months (must serve 72 hours in jail)  
30 days community service  
confiscate car tags  
ignition interlock  
photo in paper  
clinical evaluation (and treatment if recommended)

3<sup>rd</sup> offense in 5 years: \$1,000-\$5,000 and 12 months (must serve 15 days in jail)  
30 days community service  
confiscate car tags  
ignition interlock  
photo in paper clinical evaluation (and treatment if recommended)

Note: Above fines do not include mandatory surcharges

DUIs will involve a license suspension

*AS TO OFFENSES AFTER JULY 1, 2008, THE 4<sup>th</sup> OFFENSE IN TEN YEARS IS A FELONY*

O.C.G.A. §15-21-112 imposes as an additional penalty in D.U.I. a sum equal to the lesser of \$26.00 or 11 percent of the original fine.

The 12 Months is mandatory (can be probated except for mandatory minimum jail time).

NOTE: Read the statute closely as to fines. A Judge can suspend up to one-half the fines in some DUIs where the defendant undergoes treatment.

NOTE: Effective July 1, 2010, the newspaper ad required on a second or subsequent conviction should not include a street address, pursuant to HB 898.

NOTE: Effective July 1, 2008, the 4th DUI in ten years is a felony, so check dates on the prior DUIs carefully. The penalty for the 4th DUI (not triable in municipal court) is 1-5 years in jail (all but 90 days can be suspended), at least 60 days community service (unless defendant is sentenced to at least three years in prison) and 5 years probation, less time served, plus all the other penalties for a third offense DUI.

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-6-391.3	DUI (School bus driver) As per 40-6-391 except fine is \$1,000-\$5,000
40-6-393(b)	Homicide by vehicle 2 <sup>nd</sup> degree 12 months and/or \$1,000 License suspension

*CODE SECTION*

*OFFENSE*

40-6-395

Fleeing or attempting to elude officer

First offense in 10 years  
10 days to 12 months (10 days must be served)  
\$500-\$5,000  
License suspension  
Under 21- License revocation

Second Offense in 10 years  
30 days-12 months (30 days must be served)  
\$1,000-\$5,000  
License suspension  
Under 21- License revocation

Third Offense in 10 years  
90 days-12 months (90 days must be served)  
\$2,500-\$5,000  
License suspension  
Under 21- License revocation

Note: subparagraph (A) of paragraph (5) of Code Section 40-6-395 reads as follows:“(5)(A) Any person violating the provisions of subsection (a) of this Code section who, while fleeing or attempting to elude a pursuing police vehicle or police officer in an attempt to escape arrest for any offense other than a violation of this chapter, operates his or her vehicle in excess of 30 miles an hour above the posted speed limit, strikes or collides with another vehicle or a pedestrian, flees in traffic conditions which place the general public at risk of receiving serious injuries, or leaves the state shall be guilty of a felony punishable by a fine of \$5,000 or imprisonment for not less than one year nor more than five years or both.”

40-6-397

Aggressive Driving  
\$5,000 and/or 12 months

40-7-4

Operation of off-road vehicle without brakes or mufflers/ Using off-road vehicle on private property without permission  
12 months and/or \$1,000

40-7-5

Operation of an off-road vehicle in violation of time/location  
Restrictions in local ordinance  
Minimum penalty: \$25 per O.C.G.A. §40-7-6  
(generally a civil penalty not a misdemeanor) - no maximum is specified.

40-8-20

Failure to use headlights  
12 months and/or \$1,000

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-8-22	Improper headlights 12 months and/or \$1,000
40-8-23	Improper tail lights 12 months and/or \$1,000
40-8-24	Improper reflectors 12 months and/or \$1,000
40-8-25	Improper brake lights 12 months and/or \$1,000
40-8-27	Failure to flag load 12 months and/or \$1,000
40-8-50	Defective equipment 12 months and/or \$1,000
40-8-73	Windshields and wipers 12 months and/or 1,000
40-8-73.1	Window tint 12 months and/or \$1,000

NOTE: In *Ciak v. State*, 278 Ga. 27, 597 S.E.2d 392 (Ga. 2004), the Georgia Supreme Court held that a portion of O.C.G.A. §40-8-73.1, is unconstitutional because it applies only to Georgia residents. In response, a new §40-8-73.1 was passed and became effective May 2, 2005. O.C.G.A. §40-8-73.1 was amended in 2006 to create a medical exemption from the law for those whose vision requires tinted or reflective glass. The statute was again amended in 2007 to exempt vehicles owned by private detectives, security officers, certain governments, and certain government employees.

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-8-74	Defective tires 12 months and/or \$1,000
40-8-76.1	Seat Belts (Adult): \$15 (no state surcharges) But compare O.C.G.A. §40-1-8 (CDL holder driving commercial vehicle \$50 maximum with no surcharges)
40-8-76 and 40-8-76.1	Child restraint (children under age 8) First offense: \$50 (no surcharges or court costs) Subsequent offense: \$100 (no surcharges or court costs)

**NOTE: The statute was amended June 3, 2010 so that it now applies to pick-up trucks (which formerly were excluded).**

In 2015, HB 325 changes the definition of passenger vehicle from meaning vehicles transporting 10 or fewer passengers to vehicles transporting 15 or fewer passengers. Older vehicles were grandfathered at 10 passengers.

NOTE: Effective July 1, 2004, the law was changed so that the age requirement for child restraints was raised from those under 4 years old to children under the age of 6. The statute was again amended June 3, 2010 so that it now applies to pick-up trucks (which formerly were excluded). The statute was again amended in 2011 to increase the age requirement to age 8.

<i>CODE SECTION</i>	<i>OFFENSE</i>
40-8-79	Under 18 in back of pick-up truck 12 months and/or \$1,000
40-8-90	Illegal display of blue or other emergency lights 12 months and/or \$1,000
40-8-116	Unlawful operation of School Bus 12 months and/or \$1,000
40-8-181	Visible emissions from Vehicle (see also O.C.G.A. §40-8-183) Minimum \$10 /maximum \$25 fine

## 1.4 PROBATION

NOTE: Please see chapter 5 of the Benchbook for a more detailed discussion of probation.

Municipal courts have the authority to sentence a person to probation. O.C.G.A. §42-8-102 (a). The maximum probation period cannot exceed the maximum sentence of confinement allowed in the case. O.C.G.A. §42-8-102 (b). **Fines or costs can be, in the court's discretion, a condition precedent to probation.** O.C.G.A. §42-8-102 (c). The court retains jurisdiction to revoke and modify the probation during its term. O.C.G.A. §42-8-102 (d) – (f). O.C.G.A. §42-8-35 lists allowable conditions of probation.

NOTE: On May 11, 2007, revisions to O.C.G.A. §§17-10-1.3 and 42-9-43.1 require a court to consider **the legality of a defendant's presence in the United States on decisions** about probation.

### 1.4.1 PRIVATE PROBATION SERVICES

The Judge of a municipal court with the approval of the governing body for the municipality may contract with a private corporation for probation services. See O.C.G.A. §42-8-101(b)(1). The rules for this were significantly changed in 2015. HB 310 is the enabling legislation for a new Department of Community Supervision (Department), which will be governed by a nine member Board of Community Supervision. The powers, functions, and duties of the Board of Corrections, State Board of Pardons and Paroles, Board of Juvenile Justice, Department of Juvenile Justice, and the County and Municipal Probation Advisory Council will all be transferred to the Board. Although the Board will have rule making authority, all rules of the superseded agencies shall remain in effect unless and until the Department issues new rules and regulations.

The Board sets guidelines for the imposition of community service as a condition of probation, particularly for traffic offenses, ordinance offenses, and minor traffic offense. Felony pretrial release and diversion programs may be established by the Department, which will also set standards for pretrial release and diversion programs. Administrative sanctions, including electronic monitoring, probation bootcamp, and community service may be imposed by the Department for probationers who violate the terms and conditions of their sentence. Any probationer arrested on a warrant for an alleged violation of probation will be granted an informal preliminary hearing within fifteen days unless they sign a waiver. The probationer will have rights to appeal. *Portions of these requirements may not apply to non-felony probation, such as administrative hearings and preliminary hearings. However, best practice suggests that municipal courts may be wise to hold prompt hearings for anyone arrested for probation violation. It is clear that someone may not be jailed for inability to pay fines.*

## 1.4.2 COURT OPERATED PROBATION SERVICES

A court can set up its own probation system with the consent of the city's governing body. O.C.G.A. §42-8-101(b)(2).

## 1.4.3 TRANSFER OF PROBATION TO A COUNTY OR ANOTHER CITY

O.C.G.A. §42-8-102 (g) allows the transfer of probation to another court system where a Defendant resides.

## 1.4.4 LICENSE SUSPENSION AS A CONDITION OF PROBATION

In traffic cases, a Judge may suspend a driver's license as a condition of probation. *Brock v. State*, 165 Ga. App. 150, 299 SE 2d 71 (1983). Note the suspension cannot exceed the length of probation and there is no limited permit. Note the suspension on the back of the UTC or a separate order sent in with the UTC (doing both may be a good idea).

## 1.4.5 DRUG AND ALCOHOL TESTING AS A CONDITION OF PROBATION

O.C.G.A. §42-8-104(a)(13) allows courts to order periodic screenings for drugs and alcohol. This section also allows courts to assess costs, and the probation officer or private probation officer, as the case may be, to collect the costs or a portion of the costs, as determined by the court, of such screenings from the probationer.

## 1.4.6 COMMUNITY SERVICE AS A CONDITION OF PROBATION

O.C.G.A. §42-3-52 and O.C.G.A. §36-32-5 allow community service as a condition of probation. O.C.G.A. §42-3-52(e) provides that "Community service hours may be added to original court ordered hours as a disciplinary action by the court."

O.C.G.A. §42-3-52(b)(1) sets a minimum and maximum amount of community service. In misdemeanors, it must be at least 20 hours, and may not be over 250, to be completed in one year. (The maximum in felonies is 500 hours over three years).

## 1.4.7 BANISHMENT AS A CONDITION OF PROBATION

O.C.G.A. §42-8-104(a)(6) allows courts to banish a probationer as a condition of Probation but the banishment must be to an area that consists of at least one judicial circuit and if the probationer is required to participate in a service or program as a condition of probation such service or program must be available in the banished area.

## 1.4.8 HIGH SCHOOL OR GED AS A CONDITION OF PROBATION

O.C.G.A. §17-10-1 (c) allows a sentencing judge to require a minor defendant to obtain a G.E.D. or high school diploma.

## 1.4.9 WAIVER OF PROBATION FEES AND OTHER MONIES ASSESSED BY COURT

OGCA §42-8-102(e) directs courts to waive, modify, or convert fines, statutory surcharges, probation supervision fees, and any other moneys assessed by the court or a provider of probation services upon a determination by the court prior to or subsequent to sentencing that a defendant has a significant financial hardship. A probationer is presumed to have a significant financial hardship if they have a developmental disability, are totally or permanently disabled, are indigent, or have been released from confinement within the preceding 12 months having been incarcerated for more than 30 days before release.

## 1.5 PRETRIAL DIVERSION

H.B. 718 effective July 1, 2006 allows prosecuting attorneys in Municipal Courts to create and administer pre-trial diversion programs. The act amended O.C.G.A. §§15-18-80 and 15-18-81 and added a new O.C.G.A. §15-18-82.

## 1.6 WORK GANGS

O.C.G.A. §36-30-8 allows a city to organize work gangs.

## 1.7 MANDATORY SURCHARGES ON FINES

Most fines issued by Georgia Courts, including Municipal Courts, bear mandatory surcharges which must be collected and remitted. Many of the statutes create a criminal liability for failure to collect surcharges. The details of such surcharges change with some frequency, and since they are largely administered in most courts by clerical staff, are beyond the scope of this Benchbook. Nonetheless, Judges need be aware that they exist.

In many cases they will substantially affect the total amount paid by a Defendant.

There are at least 25 surcharges. Amongst the surcharges that exist in Georgia (not all in all courts) are:

ADR: Alternative Dispute Resolution  
BSITF: Brain and Spinal Injury Trust Fund  
CTF: **Children’s Trust Fund**  
CVEF: Crime Victims Emergency Fund  
DATE: Drug Abuse Treatment and Education Fund  
JAIL: Local Jail Fund  
**JOSHUA’S LAW: Georgia Driver’s Education Commission**  
LCVAP: Local Crime Victims Assistance Program  
PCJRF: Probate Court Judges Retirement Fund  
**POAB: Peace Officers’ Annuity and Benefit**  
POPT: Peace Officer & Prosecutors Training  
SCCA: Super Court Clerk Cooperative Authority  
SGF: State General Fund  
(A.K.A.- Crime Lab Fee, State Treasury, Probation Fee)  
SPCCR: Superior Court Clerk Retirement  
**SRF: Sheriff’s Retirement Fund**

There were extensive changes at the time Georgia passed indigent defense legislation in 2004. Additionally, in 2005, a 5% surcharge **was added via what is known as Joshua’s Law**.

A comprehensive list of the surcharges mandated by state law, plus forms, case law, and other guidance, can be **found on the internet in the “Bluebook” maintained by the Georgia Administrative Office of Courts:**  
<http://www.georgiacourts.org/aoc/publications/bluebook.pdf>.

Additional information can be found on this web page from the Administrative Office of Courts:  
<http://www.georgiacourts.org/aoc/courtfee.html>, or use this contact information: Email: CourtFees@gaoc.us  
Phone: 404-651-6204 Mailing address: Court Fees Program, P.O. Box 38258, Atlanta, GA 30334.

Some local courts assess costs or surcharges in addition to the state mandated fees. Be sure these are authorized by appropriate local legislation or the city charter.

## 1.8 WEAPONS IN COURTROOMS

Full time judges in Georgia have long been allowed to carry firearms in Court.

Effective July 1, 2006, O.C.G.A. §16-11-130 allows permanent part-time municipal court judges the same rights as full time judges.

## 1.9 MANDATORY CONTINUING EDUCATION FOR JUDGES AND CLERKS

State law requires all municipal court Judges to attend continuing judicial education each year. This applies to full-time, part-time and *pro hac vice* judges. The requirement is 20 hours in the first year of service and 12 hours in future years. Courses must be approved. Most approved courses are offered through the Institute for Continuing Judicial Education in Georgia (ICJE). For more information on the courses, contact Tiffany Sargent at (706) 369-5807.

State law requires that the municipality pay for the annual tuition, and costs of attendance.

Effective July 1, 2006, municipal court clerks also must receive annual training pursuant to O.C.G.A. 36-32-13(b). 16 hours are required in the first year. 8 hours are required in subsequent years.

## 1.10 SECURITY AND INTEGRITY OF CRIMINAL JUSTICE INFORMATION

GBI Regulation §140-2.08 creates minimum requirements for Municipal Court records storage that a court must meet.

NOTE: GBI and GCIC regulations require that all personnel associated with the maintenance, processing include most court clerks, and may include judges. All court personnel who handle such files must sign a state-approved awareness statement, and the court must maintain a copy in its files or dissemination of criminal history information must receive special training.

### 1.10.1 CRIMINAL HISTORY RECORD

Information collected by criminal justice agencies, including courts, police and probation, consisting of identifiable personal information and notations of arrests, detention, accusations, dispositions, sentences and other criminal information is considered Criminal History Record Information (CHRI). Examples include a criminal fingerprint card, final disposition reports (OBTS), rap sheets (state, local or FBI).

Many laws apply to both the privacy and use of such records by a Court.

O.C.G.A. §16-9-90 sets a criminal fine of up to \$50,000 and imprisonment for up to 15 years for unauthorized non-criminal justice use or personal use of the Criminal Justice Information System (CJIS), either to request or disseminate information. O.C.G.A. §35-3-38 provides criminal penalties for misuse and negligent handling of GCIC files. Additionally, the state may impose administrative sanctions on a violator, and there can be liability for misuse in a civil court.

There are strict time limits for submission of information to the state that forms part of a criminal history. A fingerprint card must be submitted within 24 hours of arrest, excluding weekends and holidays, to the Georgia Crime Information Center (GCIC). This card, usually submitted by police, forms the basis for a CHRI. Without it, there is no criminal history for a case. A final disposition report (OBTS) must be submitted by the Court to GCIC within 30 days of a reportable disposition.

For additional information on the GCIC, see <http://gicweb.gbi.state.ga.us/cjis/ori/>.

### 1.10.2 OPEN RECORDS ACT

O.C.G.A. §50-18-70, the state Open Records Act, deals with public access to certain records. It is important for Courts to have a policy, preferably written, regarding such requests, to ensure both compliance with the act, and

compliance with limitations on the release of CHRI. GBI regulation §140-2.10 provides procedures for individuals to inspect their own criminal histories, and also authorizes, with proper release and identification, release of histories to attorneys.

### 1.10.3 MOTOR VEHICLE RECORDS

The rules as to use and dissemination of Motor Vehicle Records can be found in O.C.G.A. §§40-5-2 and 40-2-130.

### 1.10.4 DRIVER'S HISTORY

**Driver's history information is available for the Department of Driver's Services (DDS) and the use of it is controlled by O.C.G.A. §40-5-2.**

## 1.11 DRESS CODES, RELIGIOUS ATTIRE, CHILDREN, AND CELLULAR PHONES

Many courts have in place a dress code, as well as rules about electronic devices such as cell phones. It is advisable for such a policy to be written and posted for the public outside the courtroom and courthouses.

A 2007 controversy in the Valdosta Municipal Court, where a court officer banned traditional Islamic attire for a woman that covered her face, made national news. So did a 2008 case in Douglasville Municipal Court, where a judge jailed a woman who wore religious headgear. On July 22, 2009, the Judicial Council of Georgia voted unanimously to allow religious and medical headgear into Georgia courtrooms. The new policy also allows a person to request a private inspection if a security officer wants to conduct a search. Specifically, the adopted policy states: **“Head coverings are prohibited from the courtroom except in cases where the covering is worn for medical or religious reasons. To the extent security requires a search of a person wearing a head covering for medical or religious reasons, the individual has the option of having the inspection performed by a same-sex officer in a private area. The individual is allowed to put his or her own head covering back on after the inspection is complete.”**

Given the many religious and traditional practices in America, a court must consider what religious and other exceptions to basic rules are necessary to respect those traditions and practices. Such matters may also raise issues of religious freedom under the state and federal Constitutions.

The following is the dress code set by Judge Charles L. Barrett III on April 26, 2006, for the Municipal Court of Duluth according to the *Gwinnett Daily Post*

*“It is hereby ordered that all persons entering in the courtroom as spectators or participants shall be dressed in the following manner: Males: shall wear shoes, long pants and collared shirts that are tucked in. Females: shall wear shoes, dresses, skirts or long pants with blouses, sweaters or casual dress shirts. Shorts, tank tops, bare midriffs and halter tops are not acceptable dress for court. All pagers and cellular telephones brought into the courtrooms shall be kept in the off mode at all times.”*

The following is the dress code for the Municipal Court of Johns Creek (the asterisks designated items that only attorneys may have in Court):

*To maintain the integrity and decorum of the Johns Creek Municipal Court, the following items and attire are not allowed while court is in session. Individuals not adhering to these rules will not be allowed to enter the courtroom, so please dress appropriately for court appearances.*

*laptops \**  
*I-pads \**  
*newspapers \**  
*magazines \**  
*books \**  
*ripped or torn jeans*  
*baggy pants that fall below the waist*  
*shorts*  
*tank tops*  
*halter necks or bare midriffs*  
*hair curlers or hats*  
*bare feet*  
*tank tops*  
*muscle shirts*  
*clothing with emblems that condone illegal or inappropriate activity*  
*clothing depicting violence, sexual acts, profanity or illegal drugs*  
*sunglasses*

## 1.12 FIRST APPEARANCE HEARINGS

As a general rule, persons arrested must be brought before a judge in a short time period. There is no grace period for holidays and weekends.

In *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) the U.S. Supreme Court held that **“there must be, in every arrest, a judicial determination of probable cause within 48 hours of arrest. Where an arrested individual does not receive a probable cause determination within 48 hours...the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends.”** See also O.C.G.A. §17-4-62, requiring that a person be brought before a judge within 48 hours of arrest.

There is also a time limit on hearings for arrests for probation violations. See, *Battle v. State*, 254 Ga. 666, 672, 333 S.E.2d 599, 604 (1985). Additionally, a 1988 Georgia Attorney General unofficial opinion letter states folks arrested by probation officers must have their hearing within 72 hours if the arrest was by warrant and 48 hours if no warrant was involved. 1988 Ga. Op. Atty. Gen. 112 (Ga.A.G.), Ga. Op. Atty. Gen. No. U88-14, 1988 WL 247702. New 2015 legislation, O.C.G.A. §42-3-114 says any probationer arrested on a warrant for an alleged violation of probation will be granted an informal preliminary hearing within fifteen days unless they sign a waiver, however it is not clear if this is applicable in non-felony cases. Nonetheless, best practice suggests cities should hold prompt initial hearings using the above 48 hour standard.

## 1.13 PUBLIC ACCESS TO COURTROOMS

On August 23, 2013, the Judicial Qualifications Commission (JQC) issued **Opinion 239** which states “**Absent specific legal authority, public access to court proceedings should be unfettered and unobstructed.**” The Commission cited *Presley v. Georgia*, 558 U.S. 209, 213-16, 130 S. Ct. 721, 723-25 (2010) (which held that a DeKalb County judge had violated the Constitutional right to a public trial by her restrictions on courtroom access.)

The Commission stated “We issue this opinion to clarify how the open courtroom issue relates to our role as this state's regulatory body for the judiciary and in specific response to requests by judges for guidance as to how best to ensure compliance with the law regarding public access to **judicial proceedings.**” The commission held that “**judges who do not adhere to the open courtroom principles outlined in Presley may be in violation of the Code of Judicial Conduct, as well as the Constitution of the United States and the Constitution of the State of Georgia.**”

The Commission acknowledged that “*Presley* is not, however, an absolute prohibition on closed proceedings...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. Such circumstances will be rare...**” The Commission stated that “**the closure must be no broader than necessary to protect that interest (and) the trial court must consider reasonable alternatives to closing the proceeding...** Upon such a showing, the court must provide notice and opportunity to be heard to the opposing party, and must make a finding, on the record, that the proceeding can be properly closed consistent with the standard set forth in *Presley.*”

The Commission specifically stated that it is improper to have court personnel or bailiffs asking people to “state their business prior to being allowed to enter a public courtroom” and that blanket prohibitions such as no children, litigants only, no spectators, and the like are improper. The Commission did state “We recognize, however, the authority of the judge to maintain the integrity and decorum of the courtroom, and in no way expect a judge to permit loud or unruly children or adults to disrupt court proceedings” but said this is to be addressed on a case-by-case basis and not broadly. “The courtroom closures, which are the subject of this opinion, are ones where there are no findings of fact or an order in a specific case, but rather a systematic exclusion of the public by the court. Although many of these blanket exclusions are often based on logistical concerns (i.e., too little space, too many cases on the calendar, etc.), such concerns cannot be resolved by the blanket exclusion of the public, or a specified class or portion thereof, without violating both the law and the Code of Judicial Conduct. Although we recognize that many courtrooms do not have adequate space, we urge members of the judiciary to consider options and alternatives appropriate under the circumstances that may allow individuals to view and participate in proceedings, including, but not limited to, viewing rooms, additional seating, smaller calendars, or dividing the docket between morning and afternoon calendars.”

Judge Leslie Spornberger Jones of the Athens-Clarke County Municipal Court issued an order which addresses the above Commission opinion and it is reproduced here in its entirety:

IN THE MUNICIPAL COURT OF ATHENS-CLARKE COUNTY  
STATE OF GEORGIA

In Re: The Openness and Transparency \*  
**of Court Proceedings and the Public's Right** \*  
to Attend Court Proceedings and \*  
General Courtroom Policies \*

STANDING ORDER REGARDING THE OPENNESS AND TRANSPARENCY  
OF COURT PROCEEDINGS AND THE PUBLIC'S RIGHT TO ATTEND COURT PROCEEDINGS  
AND GENERAL COURTROOM POLICIES

The openness and transparency of court proceedings are Constitutional principles preserved in the First<sup>2</sup> and Sixth<sup>3</sup> Amendments of the Constitution of the United States and in Paragraph 11<sup>4</sup> of the Bill of Rights of the Constitution of the State of Georgia. In light of these controlling principles, this court is open to the public, and guarantees to the public the right to access the Court to observe its hearings, proceedings, and trials, and to review its records.

Understanding that the public has a right to be present at court proceedings, this court takes every reasonable measure to accommodate public attendance at court proceedings, no matter whether any party to the proceedings has asserted the right.

At times, however, “the right to an open 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.” See generally *Presley v. Georgia*, 130 S.Ct. 721 (2010). In such *exceedingly rare* instances, the Court will always verify that “an overriding interest is likely to be prejudiced” by the proceedings remaining open. When such an overriding interest exists, the Court will make the closure “no broader than necessary” to protect that interest. And, before closing any proceeding because such an overriding interest exists, the Court will always consider and attempt to use all reasonable alternatives to closing the proceedings.

When, in the *exceedingly rare* case the Court closes its hearings, proceedings, or trials, or seals its records, the Court will make adequate findings to support the closure or sealing. The Court will publish these findings in a written order, which shall be filed with the Clerk of Municipal Court, and shall be available for review by the public.

The public should be aware that to guarantee not only public access, but also to guarantee the court runs efficiently and safely, court personnel may ask persons attending court to sit in a certain area, to stand or form a line in a certain area, or to move to a different courtroom in this building. All such requests will only be made as necessary to ensure complete access to this court by all interested persons and all members of the public desiring to be present. In all such cases, the Court will remain open to the public so that all persons desiring to be present may be able to do so, and the Court shall provide adequate signage and/or information so that the public is aware of any changes to the Court’s normal schedule.

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2 “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

3 “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.”

4 “In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.”

The public is also hereby notified that as this is a court of law, the Court will not allow distractions to invade, interrupt, or otherwise disturb the dignity and solemnity of court proceedings. Use of cell phones in the courtroom and in the hallway is generally prohibited. All cell phones should be turned completely off in the courtroom. Clothing should be appropriate for court. Children are permitted in the courtroom. However, if a child becomes unruly or disruptive, we may ask that you remove the child immediately from the court so as not to cause a disruption.

It is SO ORDERED this the 25<sup>th</sup> of October, 2013.

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Leslie Spornberger Jones, Judge  
Municipal Court of Athens-Clarke County

## 1.14 TAX INTERCEPTS TO COLLECT FINES

In 2014, the legislature passed Act 478 (House Bill 1000) which amended O.C.G.A. §§48-7-160 through 48-7-170 and enacted O.C.G.A. §§48-7-162.1 and 48-7-165.1. The effective date is January 1, 2015. The act provides for collection of certain court fines **and fees by intercept of a defendant's state income tax refund.**

Here are the most relevant parts of the code sections:

*§48-7-162.1. (Effective January 1, 2015) Submission of debts through Administrative Office of the Courts*

*(a) Submission of debts through the Administrative Office of the Courts shall be the sole manner through which debts owed to courts may be submitted to the department for collection under this article. The Administrative Office of the Courts shall be authorized to enter into written contracts for the performance of administrative functions and duties under this article by one or more administrative entities consisting of nonprofit Georgia corporations, except for a public utility, in existence on or before January 1, 2012, whose income is exempt from federal income taxation pursuant to Section 115 of the Internal Revenue Code of 1986, or third party vendors approved by the department.*

*(b) Any claim submitted by a court through the Administrative Office of the Courts shall be subordinate to all claims submitted by claimant agencies.*

§48-7-165.1. (Effective January 1, 2015) Hearing; final determination of debt

(a) (1) Except as otherwise provided in subsection (d) of this Code section, if the Administrative Office of the Courts receives written notice from the debtor contesting the setoff or the sum upon which the setoff is based within 30 days of the debtor being notified of the debt setoff, the Administrative Office of the Courts shall notify the court to whom the debt is owed that the sum due and owing shall not be disbursed pursuant to this article until the court to whom the debt is owed has granted a hearing to the debtor and obtained a final determination on the debt under this Code section and provided evidence of such final determination to the Administrative Office of the Courts. Such sum due and owing shall not be disbursed to the debtor or the court to whom the debt is owed prior to such final determination.

(2) The hearing required under this Code section shall be conducted after notice of such hearing is provided to the debtor by certified mail or personal service. When personal service is utilized, such personal service shall be made by the officers of the court designated by the judges of that court or any other officers authorized by law to serve process.

(b) (1) The officers of the court designated by the judges of that court submitting debts to the Administrative Office of the Courts shall appoint a hearing officer for the purpose of conducting hearings under this Code section. The officers of the court shall adopt appropriate procedures to govern the conducting of hearings by the hearing officer. A written or electronic copy of such procedures shall be provided to a debtor immediately upon the receipt of notice from a debtor under subsection (a) of this Code section.

(2) Issues that have been previously litigated shall not be considered at a hearing. The hearing officer shall determine whether the debt is owed to the court and the amount of the debt. Such determination shall be in writing and shall be provided to the debtor and the Administrative Office of the Courts within five days after the date the hearing is conducted.

(3) If the debtor or the court disagrees with the determination of the hearing officer, either party may appeal that determination by filing a petition in the superior court not later than ten days following the date of the hearing officer's written determination. The superior court judge shall conduct a hearing and shall render a final determination in writing and shall transmit a copy to the hearing officer, the debtor, and the Administrative Office of the Courts not later than ten days after the date of that hearing.

(4) The losing party to such proceeding as provided for in paragraph (3) of this subsection shall pay any filing fees and costs of service, except that the officers of the court designated by the judges of that court shall be authorized to waive such fees and costs. The court submitting the debt to the Administrative Office of the Courts shall be responsible for attorneys' fees of the debtor who is contesting the setoff in cases where the superior court finds in favor of the debtor.

(c) If a court submits a debt for collection under this article following final determination of the debt in accordance with this Code section and the Administrative Office of the Courts is notified by the department that no refund proceeds are available or sufficient for setoff of the entire debt, such claim shall remain valid until sufficient refund proceeds are available for setoff as provided in subsection (b) of Code Section 48-7-164 and are not subject to further appeal.

## 1.15 SPECIAL NOTE ON 17 YEAR-OLD TRAFFIC OFFENDERS

Due to what appeared to be a legislative oversight, 17 year-old traffic violators became subject to juvenile court jurisdiction and could not be tried in municipal court. Judges and others have expressed an intent is to try and correct this during the 2015 legislative session. This arose from 2013 changes in the new Juvenile code that required, likely because of a typographical error, certain citations issued to 17 year-olds to be handled in Juvenile Court unless they are considered delinquent acts. See O.C.G.A. §15-11-2(10) for the definition of child, O.C.G.A. §15-11-10 for a statement of exclusive jurisdiction, and O.C.G.A. §15-11-630 for a list of more serious traffic offenses that are excluded.

The 2015 General Assembly fixed this. HB 361 amends Chapter 11 of Title 15 of the O.C.G.A., to enact reforms recommended by the Georgia Council on Criminal Justice Reform with respect to juveniles. The bill cleans up language to clarify that 17-year-old drivers will be treated as adults for traffic offenses.

## 1.16 FAILURE TO APPEAR IN MUNICIPAL COURTS

SENATE BILL 176

**Effective July 1, 2017, the court may not issue a bench warrant without first notifying the accused that he/she failed to appear.**

### Requirements

- The court must mail notice to the accused, who failed to appear for his/her initial court date as stated on the uniform traffic citation, before issuing a bench warrant.
- The notice must be dated.
- The notice must allow the accused thirty (30) days from such date to:
  - ✓ Dispose of his/her charges OR
  - ✓ Waive arraignment and plead not guilty
- If the case is not disposed of within 30 days, the court shall forward the accused driver's license number to the Department of Driver Services ("DDS"), within five (5) days.
  - ✓ The court may issue a bench warrant for the accused's arrest.
  - ✓ DDS will suspend the accused driver's license and driving privileges.
- DDS will reinstate the driver's license once the case has been finally adjudicated

and the accused driver submits proof of the final adjudication<sup>1</sup> and pays the restoration fee.

**Not Applicable- SB176 ONLY applies to minor violations under Title 40. Does not apply to any of the below violations of Title 40:**

- For which a driver's license may be suspended for a first offense by the commissioner of driver services;
- Covered under § 40-5-54; OR
- Covered under § 40-6-15

## Cases

. <i>Kolker v. State</i> , 260 Ga. 240, 391 S.E.2d 391 (1990).....	2
<i>Arizona v. United States</i> , 567 U.S. ____, 132 S. Ct. 2492 (2012) .....	3
<i>Battle v. State</i> , 254 Ga. 666, 672, 333 S.E.2d 599, 604 (1985) .....	42
<i>Brock v. State</i> , 165 Ga. App. 150, 299 SE 2d 71 (1983).....	30
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<i>Medellin v. Dretke</i> , 544 U.S. 660 (2005) .....	3
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O.C.G.A. §36-32-27 .....	5
<i>Presley v. Georgia</i> , 558 U.S. 209, 213-16, 130 S. Ct. 721, 723-25 (2010) .....	43
<i>Rodriguez v. State</i> , 275 Ga. 283, 565 S.E. 2d 458 (2002).....	3
<i>Sanchez-Llamas v. Oregon</i> , 548 U.S. 331 (2006) .....	3
<i>United States v. Jimenez-Nava</i> , 243 F.3d 192, 195 (5th Cir. 2001) .....	3
<i>Villegas v. State</i> , 273 Ga. 823, 826 (6), 546 SE2d 504 (2001) .....	3
<i>Wojcik v. State</i> , 260 Ga. 260, 392 S.E. 2d 525 (1990) .....	2
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886), .....	3
O.C.G.A. §42-8-104 (a)(13) .....	30
O.C.G.A. §42-3-52.....	30.
O.C.G.A. §36-32-5.....	30
O.C.G.A. §42-3-52(e).....	30
O.C.G.A. §42-3-52(b)(1).....	30
O.C.G.A. §42-8-104(a)(6).....	30
O.C.G.A. §42-8-102(e).....	31



## CHAPTER 2: DOUBLE JEOPARDY

### 2.1 GENERAL

The concept of double jeopardy is one of the oldest in Western civilization. In 355 B. C. Athenian statesmen Demosthenes said that the "law forbids the same man to be tried twice on the same issue." The Romans codified this principle in the Digest of Justinian in 533 A. D. "The right not to be put in jeopardy a second time for the same cause is as sacred as the right of trial by jury, and is guarded with much care by the common law and by the Constitution." *Hines v. State*, 41 Ga. App. 294, 152 S.E. 616 (1930).

There are two separate aspects of double jeopardy in Georgia:

1. Procedural - a person cannot be prosecuted twice for crimes arising from the same criminal conduct. (Prohibition against multiple convictions)

This prohibition is intended to prevent harassment of an accused by successive prosecutions or the threat of the same. *Waites v. State*, 238 Ga. 683, 235 S.E.2d 4 (1977). See, also, *Dean v. State*, 309 Ga. App. 459, 711 S.E.2d 42 (2011).

2. Substantive - all crimes from the same criminal conduct must be tried in a single prosecution. (Prohibition against successive prosecutions)

This limitation is intended to prevent excessive punishment. *State v. Estevez*, 232 Ga. 316, 206 S.E. 2d 475 (1974) overruled on other grounds by *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (Ga. 2006).

### 2.2 TEXTUAL BACKGROUND

#### 2.2.1 UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Amendment V.

**The 'twice put in jeopardy' language of the Constitution relates to the potential or risk that an accused for a second time will be convicted for the same offense for which he was initially tried.** *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

In *Martinez v. Illinois*, 572 U.S. \_\_\_\_, 134 S. Ct. 2070, 188 L.Ed.3d 1112 (2014), the U.S. Supreme Court took the very rare step of deciding the whole case just based on the petition filed with them requesting review. The Supreme Court summarily reversed the Illinois Supreme Court for flouting the Constitution and allowing an egregious violation of the Fifth Amendment. As far as the High Court was concerned, there was no need to read legal briefs or hear

arguments. It simply reversed the lower court's decision in what is the judicial version of a slap upside the back of Illinois' head. Esteban Martinez was indicted in 2006 on aggravated battery and mob action against Avery Binion and Demarco Scott, who were also convicted felons. Illinois' prosecutors said the state required them in the courtroom to testify for trial to proceed to a conviction. For months, a date for trial would be set, then the prosecutor would tell the judge at the last moment that Illinois required a continuance until another day. Each time, Binion and Scott would be subpoenaed but would simply not show. The prosecutors would tell the judge that they have no idea where these convicted felons are. Finally the county judge said it was time for this case to proceed or be dismissed and issued warrants so that the prosecutors could use the police to find them and bring them to court. After resetting the trial yet again to May 17, 2010, Binion and Scott were still nowhere to be found. The day of the trial, the judge moved things further back to give prosecutors every opportunity but told them he would issue no more delays. The prosecutor told the judge he wouldn't be participating under these circumstances. The jury was sworn in, and the judge ordered Illinois to make its case. The prosecutor refused to do so.

So Martinez's defense lawyer requested the judge to issue a directed verdict of not guilty for Martinez, since the prosecution was offering no argument and presenting no evidence against him. The judge agreed, and Martinez was cleared of both charges. Illinois appealed, and the Illinois Appellate Court ruled for the prosecution that the lower court should just continue granting continuances under the prosecution said they were ready for the case to move forward. The court ordered a new trial.

Martinez objected that the Fifth Amendment's Double Jeopardy Clause would not allow another trial after he had been found not guilty. Nonetheless the Illinois Supreme Court affirmed the appeals court, ordering a new trial. The U.S. Supreme Court summarily reversed the Illinois court.

## 2.2.2 GEORGIA CONSTITUTION

Jeopardy of life or liberty more than once forbidden. No person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial. Ga. Const., Art. I, Sec. 1, Par. 16.

NOTE: The interpretation of the law in this area changed in 2003. In *State v. Perkins*, 256 Ga. App. 855, 569 S.E.2d 910 (2002), overruled on other grounds by *State v. Perkins*, 262 Ga. App. 62, 582 S.E.2d 680 (2003)) the Court upheld a plea in bar as to a vehicular homicide prosecution in Superior Court when the defendant had already been convicted on a lesser included offense of reckless driving in probate court. The Perkins case was reversed by the State Supreme Court on May 5, 2003 - *State v. Perkins*, 276 Ga. 621, 580 S.E.2d 523 (Ga. 2003) - and the Supreme Court essentially adopted the dissent from the Court of Appeals, and held that O.C.G.A. 40-6-376(d) divested the probate court of jurisdiction in the reckless driving case when the person also had been charged with vehicular homicide.

## 2.2.3 OFFICIAL CODE OF GEORGIA ANNOTATED - O.C.G.A.

Double jeopardy in Georgia is controlled by the following three statutes. They are triggered only after the defendant is initially placed in jeopardy. *Caldwell v. State*, 171 Ga. App. 680, 320 S.E.2d 888 (1984).

In a bench trial, jeopardy attaches when the judge in a court of competent jurisdiction begins to receive evidence. *United States v. Pitts*, 569 F.2d 343 (5th Cir. 1978) cert. denied, 436 U.S. 959, 98 S.Ct 3076, 57 L.Ed.2d 1125 (1978).

*O.C.G.A. §16-1-6: Conviction for lesser included offenses*

*An accused may be convicted of a crime included in a crime charged in the indictment or accusation.*

*A crime is so included when:*

*(1) 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 crime charged; or*

*(2) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.*

*O.C.G.A. §16-1-7: Multiple prosecution for same conduct*

*(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. [The accused] may not, however, be convicted of more than one crime if:*

*(1) One crime is included in the other; or*

*(2) The crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other is to prohibit a specific instance of such conduct.*

*(b) If the several crimes arising from the conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution. O.C.G.A. 16-1-7(b).*

*(c) When two or more crimes are charged as required by subsection (b) of this Code section, the court in the interest of justice may order that one or more of such charges be tried separately. O.C.G.A. §16-7-1(c)*

NOTE: The double jeopardy clause of state constitution does not prohibit additional punishment for a separate offense that the legislature has deemed appropriate to warrant a separate sanction. See, *Mathis v. State*, 273 Ga. 508, 543 S.E.2d 712 (Ga. 2001); GA Const. Art. 1, §1, Par. 18.

In *Dean v. State*, 309 Ga. App. 459, 711 S.E.2d 42 (2011), a court found that a trial court erred as to double jeopardy in attempting to try a case in Superior Court after a prior prosecution in a lower court. In that case a state trooper wrote multiple tickets for a series of offenses that occurred in Catoosa County, and ended up in the city limits of Ringgold. He sent the city cases to Municipal Court, which transferred them to Superior Court after a jury demand, **and sent other cases to Probate Court. The court said all the offenses occurred from the “same conduct” as used in O.C.G.A. §16-1-7(b)** and the case also turned on the fact that the same District Attorney that sought to prosecute in Superior Court prosecuted the case in Probate Court.

Note that the fact that all the offenses were known the prosecutor is a significant factor as to the ban on the second case in a higher court. See also *Anderson v. State*, 200 Ga. App. 530, 408 S.E.2d 829 (1991), which concerns similar facts to the *Dean* case in Clarke County, and *Barlowe v. State*, 286 Ga. App. 133, 648 S.E.2d 471 (2007).

However, absent *actual knowledge* by the prosecutor in both cases, two cases arising from the same transaction or similar facts, one under a local ordinance and one under a different state law, are allowed in Georgia. See, *Chandler v. State*, 305 Ga. App. 526, 699 S.E.2d 840 (2010) (following too close in one court and DUI in another) and *Fuller v. State*, 305 Ga. App. 825, 700 S.E.2d 723 (2010) (prostitution business cited for no business license in Recorder's Court and prostitution in State Court).

Compare, *Nicely v. State*, 305 Ga. App. 387, 699 S.E.2d 774 (2010) (cocaine case and traffic case from same arrest, both known the prosecutor - double jeopardy bars prosecution).

*16-1-8: When Prosecution Barred by Former Prosecution*

*(a) A prosecution is barred if the accused was formerly prosecuted for the same crime based upon the same material facts, if such former prosecution:*

*(1) Resulted in either a conviction or an acquittal; or*

*(2) Was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts or after a plea of guilty was accepted by the court.*

*(b) A prosecution is barred if the accused was formerly prosecuted for a different crime or for the same crime based upon different facts, if such former prosecution:*

*(1) Resulted in either a conviction or an acquittal and the subsequent prosecution is for a crime of which the accused could have been convicted on the former prosecution, is for a crime with which the accused should have been charged on the former prosecution (unless the court ordered a separate trial of such charge), or is for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution or unless the crime was not consummated when the former trial began; or*

*(2) Was terminated improperly and the subsequent prosecution is for a crime of which the accused could have been convicted if the former prosecution had not been terminated improperly.*

*(c) A prosecution is barred if the accused was formerly prosecuted in a district court of the United States for a crime which is within the concurrent jurisdiction of this state if such former prosecution resulted in either a conviction or an acquittal and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution or unless the crime was not consummated when the former trial began.*

*(d) A prosecution is not barred within the meaning of this Code section if:*

*(1) The former prosecution was before a court which lacked jurisdiction over the accused or the crime; or*

(2) Subsequent proceedings resulted in the invalidation, setting aside, reversal, or vacating of the conviction, unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict.

(e) Termination under any of the following circumstances is not improper:

(1) The accused consents to the termination or waives by motion to dismiss or other affirmative action his right to object to the termination; or

(2) The trial court finds that the termination is necessary because:

(A) It is physically impossible to proceed with the trial;

(B) Prejudicial conduct in or out of the courtroom makes it impossible to proceed with the trial without injustice to the defendant;

(C) The jury is unable to agree upon a verdict; or

(D) False statements of a juror on voir dire prevent a fair trial.

See *Shah v. State*, 288 Ga. App. 788, 655 S.E.2d 347 (2007) barring a second DUI trial where the Defendant had been acquitted. The court at that point could not grant a new trial so as to try him again on the same facts.

#### 2.2.4 PROSECUTION IN MULTIPLE COUNTIES: THE PERKINSON RULE

In *Perkinson v. State*, 273 Ga. 491, 542 S.E.2d (2001), Perkinson was convicted in Bartow County for felony murder. He was then indicted in DeKalb County for multiple crimes including kidnapping and armed robbery, all arising out of the same transaction. In that the kidnaping and armed robbery were the basis for the felony murder conviction in Bartow county, the Supreme Court held that the state was barred by double jeopardy from prosecuting the underlying felonies in the second county (DeKalb).

#### 2.2.5 STATE V. PERKINS

In *State v. Perkins*, 256 Ga. App. 855, 569 S.E.2d 910 (2002), overruled on other grounds by *State v. Perkins*, 262 Ga. App. 62, 582 S.E.2d 680 (2003)) the Court upheld a plea in bar as to a vehicular homicide

prosecution in Superior Court when the defendant had already been convicted on a lesser included offense of reckless driving in probate court. The *Perkins* case was reversed by the State Supreme Court on May 5, 2003 - *State v. Perkins*, 276 Ga. 621, 580 S.E.2d 523 (Ga. 2003) - and the Supreme Court essentially adopted the dissent from the Court of Appeals, and held that O.C.G.A. §40-6-376 (d) divested the probate court of jurisdiction in the reckless driving case when the person also had been charged with vehicular homicide.

## 2.3 LESSER INCLUDED CRIMES CHECKLIST

A crime is included in another crime when:

1. It is established by the same or less than all the facts of the crime charged; OR
2. It is established by a less culpable mental state than the crime charged; OR
3. There is a less serious injury or risk of injury to the same person, property or public interest; OR
4. A lesser kind of culpability established its commission.

## 2.4 MULTIPLE PROSECUTION CHECKLIST

An accused may not be convicted of more than one crime if:

1. One crime is included in the other; OR
2. One differs only in that it is defined as a specific instance of a generally prohibited crime; OR
3. The prosecuting officer knows of all the crimes at the time of commencing prosecution.

BUT, if a crime occurs in two jurisdictions, the second may not prosecute if the crime would be a lesser included offense of the crime in the first, even where the prosecuting officers are different.

## 2.5 SUCCESSIVE PROSECUTIONS CHECKLIST

An accused may not be prosecuted for a crime if:

1. It is based on the same material facts as a previous prosecution and
  - a. It resulted in a previous conviction or acquittal; OR
  - b. The previous trial was terminated improperly
2. It is based on different facts from a previous conviction or acquittal and
  - a. The accused could have been convicted for it in the previous prosecution;  
OR
  - b. The crime should have part of the previous prosecution; OR
  - c. The crime involves the same conduct; OR
  - d. The crime was not consummated when the former trial began.
3. The accused has previously been convicted or acquitted for the same conduct in a United States District Court

## 2.6 CITATIONS: CASES

### 2.6.1 GENERAL

A conviction in a municipal court of a municipal ordinance is "jeopardy." *Holcomb v. Peachtree City*, 187 Ga. App. 258, 370 S.E.2d 23 (1988).

The more serious crime should be prosecuted first in order to avoid a conviction for the lesser crime barring subsequent prosecutions for more serious crimes. *Keener v. State*, 238 Ga. 7, 230 S.E.2d 846 (1976). See also *Dean v. State*, 309 Ga. App. 459 (2011), where a court found that a trial court erred as to double jeopardy in attempting to try a case in Superior Court after a prior prosecution in a lower court.

Prosecutions for separate municipal and state offenses arising in a single transaction are not barred. 1986 Op. Atty. Gen. No. U86-32.

The applicable legislation was intended to affect successive prosecutions for state crimes, not successive state and municipal prosecutions. *Burroughs v. State*, 244 Ga. 288, 260 S.E.2d 5 (1979).

Double Jeopardy does not attach when a prior conviction is reversed on grounds of trial error as opposed to sufficiency of the evidence. *Glisson v. State*, 192 Ga. App. 409, 385 S.E.2d 4 (1989), overruled on other grounds by *Livingston v. State*, 268 Ga. 205, 486 S.E.2d 845 (Ga. 1997).

Statute governing multiple prosecution for same crimes does not preclude successive state and municipal prosecutions, only successive prosecutions for state crimes. *Fuller v. State*, 169 Ga. App. 468, 313 S.E.2d 745 (1984).

One jurisdiction may not prosecute a case where the offense in that jurisdiction is a lesser included offense of the offense in the other jurisdiction, and the matters involve one set of occurrences that are in fact one in the same. (In this case the underlying felony for a felony murder conviction in one county was a felony committed in another county). *Perkinson v. State*, 273 Ga. 491, 542 S.E. 2d 92 (2001).

Where a prosecutor functions in two courts, even though different staff may be assigned to the two courts, one is deemed to have knowledge of prosecutions in the other for double jeopardy purposes. *Mack v. State*, 249 Ga. App. 424, 547 S.E. 2d 697 (2001).

The Court upheld a plea in bar as to a vehicular homicide prosecution in Superior Court when the defendant had already been convicted on a lesser included offense of reckless driving in probate court. *State v. Perkins*, 256 Ga. App. 855, 569 S.E.2d 910 (2002).

No Double Jeopardy based on entry into pretrial diversion on related charges in another county. *Palmer v. State*, 331 Ga. App. 433, 801 S.E.2d 300 (2017).

State's prosecution for fleeing or attempting to elude an officer, obstruction, reckless driving, and speeding was not barred by double jeopardy after defendant plead guilty in municipal court as there was no evidence that municipal court prosecuting attorney was aware of Superior Court charges or offenses which happened outside municipality. *Millsaps v. State*, 341 Ga. App. 337, 801 S.E.2d 63 (2017).



## 2.6.2 DRIVING OFFENSES

Driving under the Influence is a lesser included offense of first degree vehicular homicide and a person shall not be convicted of both offenses. *Duncan v. State*, 183 Ga. App. 368, 358 S.E.2d 910 (1987).

An exception to this occurs if the victim had not yet died when the person was prosecuted for the traffic offenses. *Herrera v. State*, 175 Ga. App. 740, 334 S.E.2d 339 (1985)

Driving on the wrong side of the road is a lesser included offense of second degree vehicular homicide and a person shall not be convicted of both offenses. *Rank v. State*, 179 Ga. App. 28, 345 S.E.2d 75 (1986).

Improper passing and reckless driving are lesser included offenses of vehicular homicide. *Nash v. State*, 179 Ga. App. 702, 347 S.E.2d 651 (1986), overruled on other grounds by *Atlanta Independent School System v. Lane*, 266 Ga. 657, 469 S.E.2d 22 (1996).

Paying a speeding ticket does not bar prosecution for DUI because paying a fine is not a prosecution. *Collins v. State*, 177 Ga. App. 758, 341 S.E.2d 288 (1986).

Proceedings in municipal court do not bar subsequent state court proceedings on the same offense if the municipal court lacked jurisdiction to hear the charge. *State v. Millwood*, 242 Ga. 244, 248 S.E.2d 643 (1978).

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## CHAPTER 3: CRIMINAL TRESPASS

### 3.1 GENERAL

#### 3.1.1 JURISDICTION

The municipal court of each municipal corporation in counties *where there is no state court* is granted jurisdiction, concurrent with the jurisdiction of any other court within the county also having jurisdiction, to try and dispose of any case prosecuting criminal trespass if the offense occurred within the corporate limits of such municipal corporation. O.C.G.A. §36-32-10.1(a). In counties with a state court, municipal courts must bind over criminal trespass cases to a higher court.

NOTE: O.C.G.A. §36-32-10.1(c) provides that the Defendant has a right to have the case transferred to the Court in that county with general jurisdiction over misdemeanor cases.

#### 3.1.2 O.C.G.A. §16-7-21

There are various forms of criminal trespass:

*(a) intentional damage to any property of another without consent of that other person and the damage thereto is \$500 or less or knowing and malicious interference with the possession or use of the property of another person without consent of that person. O.C.G.A. §16-7-21(a)*

*(b) Entry upon the land or premises of another person or into any part of any vehicle, railroad car, aircraft or watercraft of another person for an unlawful purpose. O.C.G.A. §16-7-21 (b)(1)*

*(c) Entry upon the land or premises of another person or into any part of any vehicle, railroad car, aircraft, or watercraft of another person after receiving, prior to such entry, notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant that such entry is forbidden. O.C.G.A. §16-7-21(b)(2)*

*(d) Remaining upon the land or premises of another person or within the vehicle, railroad car, aircraft, or watercraft of another person after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant to depart. O.C.G.A. §16-7-21 (b)(3)*

*(e) A person commits the offense of criminal trespass when he or she intentionally defaces, mutilates, or defiles any grave marker, monument, or memorial to one or more deceased persons who served in the military service of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof, or a monument, plaque, marker, or memorial which is dedicated to, honors, or recounts the military service of any past or present military personnel of this state, the United States of America or any of the states thereof, or the Confederate States of America or any of the states thereof if such grave marker, monument, memorial, plaque, or marker is privately owned or located on land which is privately owned.*

### 3.1.3 WHO CAN BAR SOMEONE FROM THE PREMISES

*NOTE: Under subsection (b) of this Code section, permission to enter or invitation to enter given by a minor who is or is not present on or in the property of the minor's parent or guardian is not sufficient to allow lawful entry of another person upon the land, premises, vehicle, railroad car, aircraft, or watercraft owned or rightfully occupied by such minor's parent or guardian if such parent or guardian has previously given notice that such entry is forbidden or notice to depart.*

*Sheehan v State*, 314 Ga. App. 325, 723 S.E.2d 724 (2012) contains an interesting discussion of who can give notice to someone not to be on the premises. "A final judgment and decree of divorce was entered, dissolving the marriage of Sheehan and her husband. The divorce decree provided, among other things, that Sheehan was "not to be on the property of [her ex-husband]'s residence, place of employment, · [and] is to have no contact with [her ex-husband] · until further Order of the Court." The ex-husband testified that he had given Sheehan copies of the order on multiple occasions. The ex-husband's employer operated a business in a small complex, consisting of a one-story suite of offices with approximately four to five other businesses. On November 11, 2008, Sheehan drove to her ex-husband's place of employment, where he had worked as a forensic engineer for the past eighteen years. Sheehan entered the building and was told by the receptionist to wait in the lobby. But instead of complying, Sheehan rushed past the receptionist, and walked around a corner to her ex-husband's office. Her ex-husband was shortly thereafter seen walking to his office, and after a few minutes, escorting Sheehan, who was cursing and yelling, to her vehicle outside. The ex-husband went back inside the building, and the receptionist, afraid that Sheehan might re-enter the building, went to her boss's office. The receptionist testified that after Sheehan cursed and yelled some more and "pounded" on a glass wall from outside, the "boss" asked Sheehan to leave. At some point Sheehan drove away. Sheehan was accused of criminal trespass for that she did "unlawfully knowingly and without authority, enter upon the land or premises of [her ex-husband's work place] after receiving, prior to such entry, notice from the owner or rightful occupant · in violation of O.C.G.A. § 16-7-21(b)(2)." Sheehan's conviction was reversed. The Court held that "there was no evidence that the owner, rightful occupant, or authorized representative of the owner or rightful occupant of the premises gave Sheehan prior notice to not enter the premises. The evidence was that pursuant to a divorce decree, Sheehan was prohibited from being on the property of her ex-husband's work place until further order of the court. Under O.C.G.A. § 15-1-4(a)(3), a court may inflict

punishment for contempt of court in response to, among other things, “[d]isobedience or resistance by any party, or other person or persons to any lawful writ, process, order, rule, decree, or command of the courts.” While a court may inflict punishment for contempt, this was not a contempt of court proceeding.”

See also, *Osborne v. State*, 290 Ga. App. 188, 189 (665 S.E.2d 1) (2008) (criminal trespass conviction reversed where there was no evidence that when a police officer working security at a movie theater gave notice to the defendant to not return to the premises, he was acting as the authorized representative of the theater owner; no one from the theater testified at trial; court noted that notice given the following night however, was sufficient, when the manager had signed a criminal trespass warning forbidding the defendant from returning to the theater and the warning was served upon the defendant by a security officer); *Jackson v. State*, 242 Ga. App. 113, 114 (528 S.E.2d 864) (2000) (criminal trespass conviction reversed because there was no evidence that patrolman was acting as the authorized representative of the owner or rightful occupant of the apartment when patrolman warned defendant to stay away from the apartment); *Hope v. State*, 193 Ga. App. 202, 204(1)(b) (387 S.E.2d 414) (1989) (criminal trespass conviction affirmed where city owned the airport and defendant argued that the police officer who prohibited his return to the airport was not the owner, rightful occupant, or authorized representative of the owner or rightful occupant; we held that a police officer, whether possessing power of arrest or not, is a representative of the city of which he is a sworn officer while protecting the property of that city and is authorized to bar him from property) ; *W.L.N. v. State*, 170 Ga. App. 689, 690(1) (318 S.E.2d 80) (1984) (affirming adjudication of delinquency for violation of O.C.G.A. § 16-7-21(b)(2) where appellant remained on premises upon being given notice by an apartment complex maintenance supervisor, as an authorized representative of the owner, to depart from the premises)

### 3.1.4 PUNISHMENT

A person who commits the offense of criminal trespass shall be guilty of a misdemeanor. O.C.G.A. §16-7-21(c).

NOTE: O.C.G.A. §36-32-10.1(d) limits the right to impose a fine or punishment by imprisonment to **those set forth in the municipality’s charter even if this is less than the fine or punishment available** in a court of general misdemeanor jurisdiction. O.C.G.A. §36-32-10.1(c) states that if a Defendant requests that the case be transferred to a state court of general jurisdiction, the case must be transferred.

### 3.1.5 NOTICE

Notice is an essential element of the offense of criminal trespass, and must be proven by the state beyond a reasonable doubt at trial. *Rayburn v. State*, 250 Ga. 657(2) (300 S.E.2d 499) (1983).

## 3.2 INTENTIONAL DAMAGE OR KNOWING INTERFERENCE

### 3.2.1 INTENTIONAL DAMAGE OR KNOWING CHECKLIST

1. Did defendant intentionally damage...
2. The property of another person...
3. Without the owner's consent...
4. In an amount of \$500 or less

OR

1. Did defendant knowingly and maliciously interfere...
2. With the possession or use...
3. Without the owner's consent

### 3.2.2 CITATIONS: CASES

It is immaterial under O.C.G.A. §16-7-21(a) whether the defendant was actually on the property of another so long as the State proves knowing interference with the use of another's property. *Kerr v. State*, 193 Ga. App. 165, 387 S.E.2d 355 (1989).

Where there is no evidence as to whether the amount of damage done to another's property is more or less than \$500, no conviction can stand under O.C.G.A. §16-7-21(a). *Johnson v. State*, 156 Ga. App. 411, 274 S.E.2d 778 (1980).

### 3.3 UNLAWFUL ENTRY

#### 3.3.1 UNLAWFUL ENTRY CHECKLIST

1. Did defendant knowingly and without authority...
2. Enter upon the land or premises...
3. Of another person...
4. Or into any part of any vehicle, railroad car, aircraft, or watercraft of another person...
5. For an unlawful purpose.

#### 3.3.2 CITATIONS: CASES

Notice is not a requirement under O.C.G.A. §16-7-21(b) (1). *Moore v. State*, 197 Ga. App. 9, 397 S.E.2d 477 (1990).

Under O.C.G.A. §16-7-21(b)(1), "**Unlawful purpose**" means a purpose to violate a positive criminal law. *Mixon v. State*, 226 Ga. 869, 178 S.E.2d 189 (1970).

## 3.4 ENTRY AFTER PRIOR NOTICE

### 3.4.1 ENTRY AFTER PRIOR NOTICE CHECKLIST

1. Did defendant knowingly and without authority...
2. Enter upon the land or premises of another person...
3. Or enter into any part of any vehicle, railroad car, aircraft, or watercraft of another person...
4. After receiving prior to such entry notice from:
  - a. The owner,
  - b. The rightful occupant, or
  - c. An authorized representative of the owner, upon proper identification as such...
5. That such entry is forbidden.

### 3.4.2 CITATIONS: CASES

Notice is an essential element of O.C.G.A. §16-7-21(b)(2) and must be reasonable under the circumstances, as well as sufficiently explicit to appraise the trespasser what property he is forbidden to enter. *Rayburn v. State*, 250 Ga. 657, 300 S.E.2d 499 (1983).

Both criminal intent and entry without permission of a person legally entitled to withhold the right are elements of violating O.C.G.A. §16-7-21(b) (2). *State v. Raybon*, 242 Ga. 858, 252 S.E.2d 417 (1978).

Prosecutrix's admonition that defendant was to stay away from her "everywhere" satisfied the statutory notice requirement [O.C.G.A. §16-7-21(b) (2)] even though she did not explicitly forbid entrance to her office. *Stockwell v. State*, 198 Ga. App. 206, 400 S.E.2d 709 (1990).

*Sheehan v State*, 314 Ga. App. 325, 723 S.E.2d 724 (2012) contains an interesting discussion of who can give notice to someone not to be on the premises. "A final judgment and decree of divorce was entered, dissolving the marriage of Sheehan and her husband. The divorce decree provided, among other **things, that Sheehan was "not to be on the property of [her ex-husband]'s residence, place of employment, [and] is to have no contact with [her ex-husband] until further Order of the Court."** The ex-husband testified that he had given Sheehan copies of the order on multiple

occasions. The ex-husband's employer operated a business in a small complex, consisting of a one-story suite of offices with approximately four to five other businesses. On November 11, 2008, Sheehan drove to her ex-husband's place of employment, where he had worked as a forensic engineer for the past eighteen years. Sheehan entered the building and was told by the receptionist to wait in the lobby. But instead of complying, Sheehan rushed past the receptionist, and walked around a corner to her ex-husband's office. Her ex-husband was shortly thereafter seen walking to his office, and after a few minutes, escorting Sheehan, who was cursing and yelling, to her vehicle outside. The ex-husband went back inside the building, and the receptionist, afraid that Sheehan might re-enter the building, **went to her boss's office. The receptionist testified that after Sheehan cursed and yelled some more and "pounded" on a glass wall from outside, the "boss" asked Sheehan to leave.** At some point Sheehan drove away. Sheehan was **accused of criminal trespass for that she did "unlawfully knowingly and without authority, enter upon the land or premises of [her ex-husband's work place] after receiving, prior to such entry, notice from the owner or rightful occupant - in violation of O.C.G.A. §16-7-21(b)(2)."** **Sheehan's conviction** was reversed. The Court held that "there was no evidence that the owner, rightful occupant, or authorized representative of the owner or rightful occupant of the premises gave Sheehan prior notice to not enter the premises.

*Osborne v. State*, 290 Ga. App. 188, 189 (665 S.E.2d 1) (2008) (criminal trespass conviction reversed where there was no evidence that when a police officer working security at a movie theater gave notice to the defendant to not return to the premises, he was acting as the authorized representative of the theater owner; no one from the theater testified at trial; court noted that notice given the following night however, was sufficient, when the manager had signed a criminal trespass warning forbidding the defendant from returning to the theater and the warning was served upon the defendant by a security officer)

*Jackson v. State*, 242 Ga. App. 113, 114 (528 S.E.2d 864) (2000) (criminal trespass conviction reversed because there was no evidence that patrolman was acting as the authorized representative of the owner or rightful occupant of the apartment when patrolman warned defendant to stay away from the apartment)

*Hope v. State*, 193 Ga. App. 202, 204(1)(b) (387 S.E.2d 414) (1989) (criminal trespass conviction affirmed where city owned the airport and defendant argued that the police officer who prohibited his return to the airport was not the owner, rightful occupant, or authorized representative of the owner or rightful occupant; we held that a police officer, whether possessing power of arrest or not, is a representative of the city of which he is a sworn officer while protecting the property of that city and is authorized to bar him from property)

## 3.5 Remaining after Notice to Depart

### 3.5.1 REMAINING AFTER NOTICE TO DEPART CHECKLIST

1. Did defendant knowingly and without authority...
2. Remain upon the land or premises of another person...
3. Or remain within the vehicle, railroad car, aircraft, or watercraft of another person...
4. After receiving notice from:
  - a. The owner,
  - b. The rightful occupant, or
  - c. An authorized representative of the owner or rightful occupant, upon proper identification as such...
5. To depart.

## 3.6 ADDITIONAL CASE LAW

The legislative intent of O.C.G.A. §16-7-21(b)(3) is to criminalize an act of peaceful but unauthorized continued presence on public property for purposes other than those to which the property has been dedicated. *Brooks v. State*, 170 Ga. App. 440, 317 S.E.2d 552 (1984).

In order to prove a violation O.C.G.A. §16-7-21(b)(3), the State must prove that the defendant had actual knowledge that they were on the land or premises of the person requesting the defendant's departure. *Bowman v. State*, 258 Ga. 829, 376 S.E.2d 187 (1989).

But see: *Haygood v. State*, 255 Ga. App. 81, 483 S.E.2d 302 (1997). The Court of Appeals declined to extend the rule **in Bowman to a property line dispute where there was no evidence to support the defendant's misidentification of the property line.**

In some cases, the defendant may be on the property of another under the "authority" of the free speech guarantees of the First Amendment of the United States Constitution, thereby preventing establishment of the "without authority" element. *Langton v. State*, 261 Ga. 878, 413 S.E.2d 708 (1992).

Criminal trespass is a lesser included offense of burglary. *Jones v. State*, 169 Ga. App. 872, 315 S.E.2d 305 (1984).

Defendant who has a legal and binding contract to remain on another's land cannot be convicted of criminal trespass without revocation of the right to be on the land by someone legally entitled to revoke such right. *Davis v. State*, 147 Ga. App. 107, 248 S.E.2d 181 (1978).

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<i>Kerr v. State</i> , 193 Ga. App. 165, 387 S.E.2d 355 (1989).....	7
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<i>Mixon v. State</i> , 226 Ga. 869, 178 S.E.2d 189 (1970).....	8
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<i>Sheehan v State</i> , 314 Ga. App. 325, 723 S.E.2d 724 (2012).....	4, 9
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<i>Stockwell v. State</i> , 198 Ga. App. 206, 400 S.E.2d 709 (1990).....	9
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## CHAPTER 4: PRETRIAL DIVERSION

### 4.1 PRE-TRIAL DIVERSION IN GENERAL

Pretrial diversion is an option available to municipal courts. Although many Courts had such programs, formally or informally, in the past, H.B. 718, effective July 1, 2006, specifically allows prosecuting attorneys in Municipal Courts to create and administer pre-trial diversion programs. (O.C.G.A. §§15-18-80, 15-18-81, and 15-18-82). See also O.C.G.A. §16-13-2 regarding conditional discharge for possession of controlled substances as first offense.

The exact nature of such programs varies, but typically a Defendant must complete various conditions by a fixed date, and, if he does, his case is dismissed with no adjudication. Common conditions include, but are not limited to:

- Not violating the law
- Attendance in school or obtaining a GED
- Community service
- Payment of court costs in lieu of a fine
- Anger management training
- Writing an essay
- Obtaining employment
- Driving improvement school

This list is by no means intended to be inclusive and this is an area that lends itself to creative personalized orders for a particular defendant.

### 4.2 CONDITIONAL DISCHARGE PROGRAM

The Conditional Discharge Program is a diversionary program for first offenders of misdemeanor substance abuse-related and theft-related offenses. The program offers a second chance to qualified offenders by helping them to set goals to become better adjusted and better educated citizens within the community. The program is designed to benefit the community by reducing court costs, caseloads, and by saving bed space in the county jail for offenders of more serious crimes. The program monitors the offender's progress in classes and it employs random substance abuse urine testing. Failure to attend scheduled classes or positive substance abuse urine testing or both may terminate the offender from the program. Termination from the program will result in the offender's case being recalled for standard sentencing in court. Successful completion of the program allows the offender to have his original cases cleared by diversion with an adjudication of a dismissal of the original case and a restriction of the original arrest.

Further information regarding the specifics of several such programs may be obtained from:

Officer Gary Wisham, Program Coordinator  
Columbus Police Department  
P.O. Box 1340  
Columbus, Georgia 31993 (706) 596-7262

Ms. Ruth M. Bebko, Assistant Solicitor General  
Pre-Trial Diversion Program  
State Court - Municipal Court  
155 E. Washington Street  
Athens, Georgia 30603-1226 (706) 613-3215

Ms. Shavon Chambers, Coordinator  
TLC (Teens Learning Control)  
Atlanta Municipal Court  
150 Garnett St. SW  
Atlanta, Georgia (404) 588-5905 or 5904

#### 4.2.1 ENABLING STATUTE

*O.C.G.A. 16-13-2: Conditional discharge for possession of controlled substances as first offense; dismissal of charges.*

*(a) Whenever any person who has not previously been convicted of any offense under Article 2 or Article 3 of this chapter or any statute of the United States or any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drug, pleads guilty to or is found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug, the court may without entering a judgment of guilt and with the consent of such person defer further proceedings and place him on probation upon such reasonable terms and conditions as the court may require, preferably terms which require the person to undergo a comprehensive rehabilitation program, including, if necessary, medical treatment, not to exceed three years, designed to acquaint him with the ill effects of drug abuse and to provide him with knowledge of the gains and benefits which can be achieved by being a good member of society. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may occur only once with respect to any person.*

*(b) Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, and such person would have qualified for the conditional discharge provided for in this Code section but for the fact the judge chose not to avail himself of the authority granted by this Code section or that the person violated the conditions imposed by the court, shall be guilty of a misdemeanor and punished by imprisonment for a period*

*not to exceed 12 months or a fine not to exceed \$1,000 or both, or public works not to exceed 12 months. Subsequent offenses of a possession of one ounce or less of marijuana shall be punished as a misdemeanor.*

#### 4.2.2 CASES

Granting first offender status is **completely within the court's discretion**. *Stinnett v. State*, 214 Ga. App 224, 447 S.E.2d 165 (1994).

First offender status may be included in a negotiated plea agreement. *State v. Barrett*, 215 Ga. App. 401, 458 S.E.2d 82, **rev'd on other grounds** 265 Ga. 489, 458 S.E.2d620 (1995).

## 4.3 FORMS AND DOCUMENTS

### 4.3.1 SAMPLE PRE-TRIAL DIVERSION ORDER, MUNICIPAL COURT OF EAST POINT

The Honorable Glen Ashman of East Point Municipal Court created this order before the Court employed a solicitor. Currently, most pre-trial programs are handled by the solicitor, but this order may be useful to Courts that lack a solicitor or a solicitor-run program.

IN THE MUNICIPAL COURT OF EAST POINT  
STATE OF GEORGIA

City of East Point  
vs.

CASE NUMBER(S): \_\_\_\_\_

CHARGES: \_\_\_\_\_

\_\_\_\_\_  
*Defendant*

PRE-TRIAL DIVERSION ORDER DEFERRING DISPOSITION

Upon consideration of this case, it has been determined that Defendant is a candidate for pretrial diversion (Deferred Disposition. Under this Order, Defendant has the option to complete, prior to the new hearing day set in this Order, the following voluntarily and successfully. If Defendant does so, this Court will enter an Order dismissing the Charges against Defendant. If Defendant fails to complete the following, the Defendant shall appear for arraignment, and the case shall proceed, and this Order shall have no further effect. The following must be completed to obtain a dismissal (all items checked must be completed):

\_\_\_\_\_ Complete \_\_\_\_\_ Hours of Community Service under the City Community Service Program

\_\_\_\_\_ Payment of \$ \_\_\_\_\_ Court Costs in this action to cover the expense of prosecution

\_\_\_\_\_ Completion of a 1500 word (or longer) essay (not plagiarized, and well researched), on the  
\_\_\_\_\_ Dangers of marijuana usage \_\_\_\_\_ Dangers of alcoholism \_\_\_\_\_ Juvenile crime

Until final disposition of this case, Defendant must by all laws of the State of Georgia, the United States and all cities and counties where Defendant is.

\_\_\_\_\_ Attend school regularly, or a GED program

\_\_\_\_\_ Attend \_\_\_\_\_ A.A. or N.A. meetings a week (Defendant may elect to substitute any alcohol or drug abuse program acceptable to the Court).

\_\_\_\_\_ Other: \_\_\_\_\_

A hearing on this matter is set for \_\_\_\_\_ o'clock \_\_\_\_\_ .M. on \_\_\_\_\_, 20\_\_\_\_ at which time this case will either be dismissed pursuant to this Order or Arraigned.

Ordered this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

\_\_\_\_\_  
JUDGE, MUNICIPAL COURT

I understand the above terms and agree voluntarily to them and understand I must appear on the Court date above or a warrant will be issued for my Failure to Appear. I understand that I am not required to seek a Dismissal under this order, have a right to have my case tried or heard in Court, have a right to trial by Jury, have a right to counsel, and have all other rights enumerated on the citation against me. I have been advised that it is in my interest to discuss this matter with an Attorney before proceeding.

Dated: \_\_\_\_\_

Defendant

### 4.3.2 SAMPLE CONDITIONAL DISCHARGE ORDER, MUNICIPAL COURT OF AMERICUS

The Honorable Mike Greene provided this order, used in the Americus Municipal Court.

IN THE MUNICIPAL COURT  
FOR THE CITY OF AMERICUS, GEORGIA

Case: \_\_\_\_\_

Defendant

ORDER GRANTING CONDITIONAL DISCHARGE PURSUANT TO O.C.G.A. § 3-3-23.1(c)

The above-styled action, having come before the Court upon the Defendant's alleged violation of O.C.G.A. § 3-3-23;

The Defendant (or the Attorney for the Defendant) having made a request to proceed with this case pursuant to O.C.G.A. § 3-3-23.1(c);

The Defendant appearing entitled to the relief provided by said provision; and,

The City Attorney or arresting officer offering no objection,

IT IS ORDERED, ADJUDGED and DECREED that a CONDITIONAL DISCHARGE be entered for and on behalf of the Defendant named above, pursuant to O.C.G.A. § 3-3-23.1(c);

IT IS FURTHER ORDERED that as a condition of the Court granting a dismissal of the case (a) the Defendant shall pay a fine (with all applicable surcharges, taxes and costs) in the amount shown elsewhere in the records of the Court in full and within six (6) months from the date of this order; (b) the Defendant complete all community service in the amount shown elsewhere in the records of the Court in full and within six (6) months from the date of this order; (c) the Defendant not violate any federal or state law relating to alcoholic beverages within six (6) months from the date of this order; (d) that the Defendant not be found to be ineligible for relief under O.C.G.A. § 3-3-23.1(c); (e) the Defendant make written request to the Court for a dismissal more than six (6) months but within twelve (12) months from the date of this order; and, (f) the Defendant be monitored by Court (or its designated agent) and the defendant pay said cost thereof as due for a period of six (6) months from the date of this order.

SO ORDERED, this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
J. Michael Greene  
Judge, Municipal Court

### 4.3.3 SAMPLE PRE-TRIAL DIVERSION ORDER, MUNICIPAL COURT OF ROSWELL

The Honorable Maurice H. Hilliard, Jr., Retired Judge of the Roswell Municipal Court, created this Pre-Trial Diversion Order.

IN THE MUNICIPAL COURT  
OF ROSWELL, GEORGIA

STATE OF GEORGIA

CASE NO.

-Vs-

\_\_\_\_\_ d/o/b: \_\_\_\_\_  
Defendant OLN: \_\_\_\_\_

ORDER

The above matter has been before the Court for resolution, the Defendant having been charged with: \_\_\_\_\_

Through negotiations between the Solicitor and Counsel for the Defendant the matter has been settled to the satisfaction of all parties hereto as follows:

- \_\_1. The Defendant has entered a plea of guilty to the charge of \_\_\_\_\_ but same is not to be entered on the Court docket, and shall not be reported to any government agencies at this lime.
- \_\_2. The Defendant is to pay a fine in the amount of \$\_\_\_\_\_ including costs, and State mandated assessments). Such fine and costs may be paid through probation, but must be paid in full in regular installments by \_\_from the Defendant's own personal earned (documented as to source) income.
- \_\_3. The Defendant is to report to the Roswell Probation Office in person within \_\_\_\_\_ hours, and shall pay a monthly supervision fee in the amount of \$39.00 each month in addition to the fine and costs indicated above. The Defendant shall report in person to the Probation Officer assigned to this case as directed by the Probation Officer.
- \_\_4. The Court may review the case in \_\_\_\_\_ months, to determine compliance and progress of the Defendant, and may grant partial relief from supervision, reporting, and/or payment of supervision fees.
- \_\_5. The Defendant is to perform \_\_\_\_\_ hours of community service at a location approved by the Probation Officer, and same must be documented on the letterhead of the recipient of such services. All such service shall be completed and documentation as to satisfactory completion of same must be delivered to, and in the hand of, the Probation Officer no later than \_\_\_\_\_
- \_\_6. **The Defendant's privilege to operate a motor vehicle is hereby suspended as a condition of probation for a period of 30 days, and thereafter until such time as the Defendant satisfactorily completes a State approved Risk Reduction Program, and provides a 500 word essay summarizing the materials learned in such program. It is a condition of the sentence that there be no driving by the Defendant during this period of suspension, which suspension shall be effective as of \_\_\_\_\_. The Defendant is banned from driving without a valid Georgia Driver's license, and proof of insurance, both of which must be in the Defendant's possession when driving.**
- \_\_7. **The Defendant may not take into the Defendant's system any alcoholic beverages, drugs, or narcotics of any nature whatsoever during the term of this matter without the express consent of the Probation Officer. Prescription drugs properly prescribed by a licensed physician or dentist for this Defendant are permitted provided the Probation Office is made aware of same at the time of filling such prescription.**
- \_\_8. The Defendant may not be in the presence of alcohol or drugs. Exception is made for prescription drugs as set forth in the above paragraph, and the Defendant may be present in an establishment licensed for the sale of alcohol.
- \_\_9. All terms and conditions set forth on the order of probation given to the Defendant by the Probation Office in connection herewith, and which by this reference is incorporated herein, and made a part hereof, shall be strictly complied with, and adhered to, Any violation shall automatically convert this to a plea of guilty in this case resulting in a report of conviction being forwarded to all appropriate local, State, and Federal

governmental agencies for inclusion in the Defendant's criminal, and driving, history, and the Defendant may be taken into custody, and held until a probation revocation hearing can be held.

\_\_10. This case is to be handled as a pretrial diversion matter as contemplated by 35-3-37 (d) 7 (E) of the Georgia Code so that if the Defendant complies with, completes, and satisfies all conditions hereof in a timely manner expungement of the arrest record in this matter shall occur, and is by this reference specifically provided for as a term and condition of this agreement. Counsel for the Defendant is required to submit an order reciting successful completion this program, and reciting that expungement of the record was one of the conditions of this agreement as contemplated by the aforementioned Code Section on \_\_\_\_\_

This \_\_\_\_ day of \_\_\_\_\_, 200\_.

MAURICE H. HILLIARD, JR., Judge,  
MUNICIPAL COURT OF ROSWELL

Approved, and agreed to this \_\_\_\_ day of \_\_\_\_\_, 200\_.

MILTON BARWICK, Solicitor

Attorney for Defendant  
Georgia State Bar No. \_\_\_\_\_

By:

DEFENDANT

#### 4.3.4 SAMPLE DRUG EVALUATION ORDER, ENGLISH AND SPANISH VERSIONS, MUNICIPAL COURT OF ATHENS-CLARKE COUNTY

The Honorable Kay Giese, Retired Judge of the Municipal Court of Athens-Clarke County, created this Drug Evaluation Order, provided to Defendants in English and Spanish.



EN EL TRIBUNAL MUNICIPAL DEL CONDADO DE CLARKE-ATHENS

EL ESTADO DE GEORGIA v.

Numero de Caso: MU-\_\_\_\_\_

\_\_\_\_\_

ORDEN DE SOMETERSE A EVALUACIÓN POR ABUSO DE SUSTANCIAS TOXICAS

Al acusado(a) se le ordenó someterse a una evaluación de sustancias tóxicas en:

( ) Un centro de evaluación y tratamiento, aprobado por el Departamento de Recursos humanos de Georgia.

( ) Otro: \_\_\_\_\_

Al acusado (a) se le ordenó mostrarle a su Oficial de Libertad Condicional (Probation) prueba de la evaluación:

( ) Dentro de 15 días a partir de la fecha de ésta Orden.

( ) Dentro de 15 días a partir de que el acusado salga de la cárcel.

Esta Orden de Evaluación por Abuso de Sustancias Tóxicas se ha solicitado por las razones siguientes:

( ) El acusado(a) es un ofensor(a) reincidente de DUI.

( ) El acusado(a), quien en la actualidad está bajo Libertad Condicional (Probation) por \_\_\_\_\_, ha violado su libertad condicional al poseer alcohol y/o drogas.

( ) Otro: \_\_\_\_\_

El Acusado (a) tiene que seguir todas las recomendaciones hechas como parte de la evaluación. Si la evaluación indica que es necesario un programa de tratamiento por abuso de sustancias tóxicas, el Acusado (a) tiene que completar el programa de abuso de sustancias en la forma en que se le ordene.

Ordenado así, este día \_\_\_\_\_ de \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Juez del Tribunal Municipal

He leído esta Orden de Evaluación por Abuso de Sustancias Toxicas y comprendo que tengo que cumplirla como condición de mi libertad condicional (probation).

\_\_\_\_\_  
Acusado

\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_  
Fecha

\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_  
Oficial de Libertad Condicional Fecha

4.3.5 SAMPLE PRE-TRIAL DIVERSION GUIDELINES, MUNICIPAL COURT OF ATHENS-CLARKE COUNTY

## **Pretrial Diversion Program Guidelines & Procedures**

### **State Court of Clarke County**

### **Municipal Court of Athens-Clarke County**

Pursuant to the provisions of O.C.G.A. § 15-18-80, the Solicitor's Office has created a Pretrial Diversion Program to be implemented in the State Court of Clarke County and Municipal Court of Athens-Clarke County. As required by statute, the following written guidelines are established for acceptance into, and administration of, the Program.

#### **PARTICIPANT ELIGIBILITY**

Persons charged with a misdemeanor offense or ordinance violation may be eligible to participate in the Pretrial Diversion Program, provided that the person has not been convicted of or received first offender treatment for a felony offense. Persons who have previously participated in a pretrial intervention program will also not be eligible to participate except in limited circumstances as determined appropriate the Solicitor General. These decisions will be made on case by case basis. Convictions for prior traffic and misdemeanor offenses shall not automatically exclude an offender from eligibility. However, the Solicitor will take into consideration any prior offenses in determining whether it is appropriate for a person to participate in the Program and what conditions will be required of the participant. No person will be refused entry into the Program because of indigence. If a potential participant or current participant is found to be indigent, program fees and supervision fees may be waived in part or in total. Additional community service hours or other program requirements may be added in the discretion of the Solicitor-General's Office as a substitute for any fees waived.

As specified in O.C.G.A. § 15-18-80, a person is excluded from consideration for Pretrial Diversion if they are charged with any offense that provides a mandatory minimum sentence of incarceration or imprisonment that cannot be probated,

suspended or deferred. Any person charged with DUI under O.C.G.A. § 40-6-391 is excluded from consideration for Pretrial Diversion.

## **PROGRAM REQUIREMENTS**

The Solicitor's Office has established the following general guidelines for the most common offenses committed by persons participating in Pretrial. However, these are general guidelines only. The Solicitor's Office has discretion to establish the requirements of Pretrial on a case-by-case basis provided that the requirements comply with the provisions of O.C.G.A. § 15-18-80.

Underage Possession of Alcohol: 6 months; \$200 program fee + supervision fees; 30 hours community service; no less than two random drug and alcohol screens which includes the baseline test; substance abuse evaluation and any recommended treatment.

Underage Possession of Alcohol and Possession of a False Identification Document: 18 months, \$300 program fee + supervision fees; 60 hours community service; no less than three random drug and alcohol screens which includes the baseline test; substance abuse evaluation and any recommended treatment.

Possession of Marijuana: 12 months; \$300 program fee + supervision fees; no less than three random drug and alcohol screens which includes the baseline test; 40 hours community service; substance abuse evaluation and any recommended treatment.

Theft by Shoplifting: 6 months; \$200 program fee + supervision fees; 40 hours community service; Project Turning Point.

## **PROCEDURE**

### **1. Entry Into the Program**

Before arraignment, the Solicitor's Office will screen cases for persons who appear to be eligible for Pretrial. At arraignment, the Solicitor's Office will interview those persons to determine if they are interested in participation. The Solicitors Office will inform the Defendant or the Defendant's attorney that Pretrial is an option to entering a plea and that the Defendant can forego the opportunity to enter into the Pretrial program and plead not guilty and assert their right to a trial. The Solicitor's Office will also inform the Defendant or the Defendant's attorney about the requirements of Pretrial should the Defendant enter into the program and the Solicitor's authority to remove the Defendant from the program if the Defendant is not compliant with the program's terms and conditions. If after being told the requirements for Pretrial a Defendant expresses an interest in the program, the Solicitor's Office will give the Defendant the written Pretrial Diversion Agreement outlining the specific requirements of the program, which will depend upon the particular offense(s) involved.

If after the screening process the Solicitor determines that a Defendant is eligible and wants to participate in Pretrial, the Solicitor will call that person forward to talk with the Judge. The Judge will review the written Pretrial Diversion Agreement with the Defendant to make certain that the Defendant understands the requirements of Pretrial. The Judge will tell the Defendant that if he/she successfully completes the program, the Solicitor's Office will dismiss the charge(s) against him/her and the arrest record will be restricted. The Judge will state that if the Defendant does not successfully complete Pretrial, the case will be brought back to Court and the Defendant may not receive credit for anything done as part of Pretrial. If the Judge is satisfied that the Defendant understands the requirements and wants to participate, the Judge, the Solicitor, and the Defendant will sign and date the Pretrial Agreement. The Defendant will be given a copy of the Agreement and will meet with a probation officer that day.

### **2. Victim Notification**

The Solicitor's Office will make reasonable attempts to notify a victim prior to allowing a Defendant to participate in the program. Any input provided by a victim will be considered in the decision to place a Defendant in the Pretrial program.

### **3. Participant Supervision**

All Pretrial participants will be supervised by the Clarke County Probation Office. Unless otherwise ordered, all participants in the Pretrial program will be required to report monthly to the probation officer. For those Defendants who do not live in Athens, the Solicitor's Office will need to determine in advance what the reporting arrangements will be. Any alternative reporting arrangements will be noted on the written Pretrial Agreement.

The effective date of supervision is the day the presiding judge signs the agreement placing the offender in the program. Once a participant enters into the program, the probation officer will explain the requirements and conditions of the program and will keep and maintain a complete file documenting the progress of each participant.

All program fees and supervision fees will be paid to and collected by the Clarke County Probation Office. All program fees will then be entered into the Clarke County General Fund and the supervision fees will be used to fund the Pretrial Supervision Officers and the Athens-Clarke County Drug Court Program pursuant to an agreement reached with the Athens-Clarke County Government in 2004 that the supervision fees would be used in this manner. Any restitution that is part of the Pretrial Agreement shall be collected by Clarke County Probation for distribution to the alleged victim.

The Clarke County Probation Office will establish a list of approved sites for community service work and provide that list to each Pretrial participant required to perform community service hours. If the participant does not live in an area where he or she can reasonably report to one of the approved sites, the participant can

perform community service hours at a location approved by the Clarke County Probation Office. All community service hours must be performed in accordance with policies established by the Clarke County Probation Office.

Random drug and alcohol screens include but are not limited to breath tests and urine tests. Unless the participant lives an unreasonable distance from Athens-Clarke County, all urine testing will be conducted by the Athens Drug Lab. The fees associated with testing at the Athens Drug Lab will be collected by Clarke County Probation and submitted to the Clarke County Finance Department for distribution to the Athens Drug Lab. The Athens Drug Lab will immediately forward all Pretrial participant test results to Clarke County Probation for review.

#### **4. Program Completion**

After a Defendant successfully completes the requirements of Pretrial, the Clarke County Probation Officer supervising the participant will notify the Solicitor's Office via e-mail. The Solicitor's Office then will submit a nolle prosequi to the Judge.

#### **5. Removal From The Program**

In the event a participant violates a condition of the Pretrial program, the probation officer will notify the participant via phone, e-mail, or in person that the violation(s) will be reviewed by the Solicitor's Office for potential removal from the program. The probation officer will send a violation report via e-mail to the Solicitor's Office containing all of the facts relating to the particular violation(s). The Solicitor-General or an Assistant Solicitor-General will then determine whether the participant will remain eligible for the program or should be removed from the program. If the participant is removed from the program, the Solicitor's Office will notify the Clerk of the State Court or Municipal Court, depending on the location of the case, that the participant has been removed from the program and will need a date to appear in court to further answer to the pending criminal charges. The respective clerk's office will then send notice to the defendant to appear back in court for the original charge(s).

## **RESTRICTION**

Cases dismissed through successful completion of the Pretrial program will be eligible for restriction pursuant to O.C.G.A. 35-3-37(2)(A).

## 4.4 COMMUNITY COURTS

### 4.4.1 COMMUNITY COURTS IN GENERAL

The Center for Court Intervention has a website with extensive information on community courts at <http://www.courtinnovation.org/>. This is an excerpt from the website:

Community courts are neighborhood-focused courts that attempt to harness the power of the justice system to address local problems. They can take many forms, but all focus on creative partnerships and problem solving. They strive to create new relationships, both within the justice system and with outside stakeholders such as residents, merchants, churches and schools. And they test new and aggressive approaches to public safety rather than merely responding to crime after it has occurred. The first community court in the country was the Midtown Community Court, launched in 1993 in New York City. Since then, over 30 community courts, inspired by the Midtown model, are in operation or planning around the country... International interest in community courts is also increasing. For example, pilot community court projects have opened in Liverpool and the Salford section of Manchester, England, and in November 2006 the British government announced plans to create ten new community courts within two years. Seventeen community court projects are already in operation in South Africa, and a "Neighbourhood Justice Centre" opened in Melbourne, Australia in March 2007. A community court project in Vancouver, Canada is slated to open in September 2007.

#### 4.4.2 CITY OF ATLANTA COMMUNITY COURT

**The Municipal Court of Atlanta's Community Court division processes what are commonly known as "quality of life crimes", such as prostitution, disorderly conduct, panhandling and low level drug offenses. Former Chief Judge Barbara A. Harris and then Presiding Judge William R. Riley established the Community Court in March of 2000 with the support of the Atlanta City Council and Central Atlanta Progress. Today, The Honorable Clinton E. Deveaux is the Presiding Judge of the Community Court.**

The Community Court is committed to the dual principles of restorative justice and rehabilitation. Emerging in the **1990's, The Restorative Justice Movement seeks to heal the damage crime does to the victim, the community and the offender.** Restorative Justice proponents believe that with low-level offenses the criminal justice system can better serve the community by using alternative sentencing options, such as community service and treatment programs, to **allow individuals to give back to the community, "right the wrong" they have committed and make life changes that will reduce the likelihood that they will offend again.**

Restorative Justice proposes finding new solutions to chronic problems that have historically proven resistant to traditional judicial strategies. Such problems include addiction, mental illness, family dysfunctions and **homelessness. Atlanta's Community Court takes a non-traditional approach to working with offenders with similar problems, using sentencing alternatives and legal sanctions to promote rehabilitation and address the underlying causes of criminal behavior.** The Court maintains that it has a clear interest, both ethical and financial, in ensuring that offenders receive services that address the root causes of the criminal behavior, thereby preventing future offenses. Additionally, diverting those guilty of violating quality of life ordinances from incarceration reserves costly jail space for those who pose a greater risk to public safety.

## CHAPTER 4—APPENDIX A: PARTIAL LIST OF COMMUNITY COURTS—PAST AND PRESENT

This partial list of community courts is provided to give contact information for Georgia Municipal Courts to assist them in consideration and implementation of local community court and restorative justice programs. This list is provided by the Center for Court Innovation:

**CALIFORNIA:** Downtown San Diego Community Court Project—Opened in October 2002, the court covers misdemeanors committed by adults in eight downtown neighborhoods, consisting of approximately 2.2 square miles. The catchment area includes business districts, entertainment areas, residential areas, and mixed-use districts. The courtroom, which operates two days a week, is located in the San Diego Superior Court building.

Types of cases: Misdemeanors that impact quality of life, including disturbing the peace, petty theft, vandalism, trespass, possession of marijuana, drinking in public, open alcohol container in public, and urinating in public.

Community involvement: **The Downtown Community Court’s Advisory Board meets bi-monthly.** It is chaired by the director of a downtown social service agency, and is composed of representatives from the downtown business community, **Downtown San Diego Partnership, San Diego Superior Court, San Diego City Attorney’s Office, Office of the Public Defender, San Diego Police Department, and San Diego County Health and Human Services Agency.**

Contact information: Downtown San Diego Partnership Community Court Project 1111 6th Avenue, Ste. 101 San Diego, CA 92101  
Marisol Meza Downtown Community Court Coordinator [mmeza@downtownsandiego.org](mailto:mmeza@downtownsandiego.org)  
Commissioner Robert Rice.

**COLORADO:** Denver Community Court—Opened in September 2003, the court covers seven neighborhoods—Cole, Clayton, Skyland, City Park, City Park West, Five Points and Whittier. The courtroom, which operates five days a week, is located in the Cole neighborhood, in a storefront with senior affordable housing above.

Types of cases: Juvenile municipal offenses (assault, curfew, shoplifting, etc.).

Community involvement: Resident based neighborhood organizing groups, commercial groups and business alliances, community based advisory board to the court, Community Court Working Council, formalized planning group.

Contact information: Denver Community Court 3280 Downing Street, Unit E Denver, Colorado 80205, Loree Greco  
Community Court Planner [Grecol@ci.denver.co.us](mailto:Grecol@ci.denver.co.us)

**CONNECTICUT:** Hartford Community Court—Opened in November 1998, the court covers the City of Hartford, plus five suburban towns—Avon, Bloomfield, Canton, Farmington, and West Hartford. The courtroom, which operates five days a week and handles over 7,000 cases a year, is located in a former car dealership, across the street from central criminal and civil court facilities.

Types of cases: "Nuisance" cases, both nonviolent misdemeanors and municipal ordinance violations such as breach of peace; trespass, disorderly conduct; prostitution; larceny; criminal mischief; loitering; graffiti; public drinking; unreasonable/excessive noise; and public indecency.

Community involvement: The Court regularly attends community meetings and often meets with residents who stop by the Court; community members recommend community service projects directly to the Court through a telephone hotline.

Contact information: Hartford Community Court, Superior Court State of Connecticut, 80 Washington Street, Hartford, CT 06106 Judge Curtissa R. Cofield, Chris Pleasanton, Coordinator [chris.pleasanton@jud.state.ct.us](mailto:chris.pleasanton@jud.state.ct.us)

Waterbury Community Court—Opened in October 2000, the court covers the greater Waterbury area. The court session, which operates two days a week, is located in the Judicial Superior Court.

Types of cases: Breach of peace, disorderly conduct, low level larceny, prostitution, low level crimes, motor vehicle.

Community involvement: Neighborhood groups; clean-ups involve residents and City of Waterbury agencies.

Contact information: Waterbury Community Court, 400 Grand Street, Waterbury, CT 06702, Jim Coviello Court Planner, [James.Coviello@jud.ct.gov](mailto:James.Coviello@jud.ct.gov), Judge Wilson Trombley [Wilson.Trombley@jud.ct.gov](mailto:Wilson.Trombley@jud.ct.gov)

DISTRICT OF COLUMBIA: Washington, DC: East of the River Community Court—The court covers the Anacosta neighborhood of Washington DC, East of the Potomac; police districts 6D and 7D. The courtroom, which operates five days a week, is located in the main courthouse.

Types of cases: Misdemeanor, quality of life offenses; prostitution, property offenses

Community involvement: Court staff attends numerous community meetings and is in the process of forming a community advisory board. The Court has also used community forums to solicit feedback from community members about problems in their neighborhoods.

Contact information: East of the River Community Court, 500 Indiana Avenue, N.W. Washington, D.C. 20001, Dan Cipullo, Director Criminal Division, Superior Court of the District of Columbia, Mike Francis, Community Court Coordinator, [francismo@dcsc.gov](mailto:francismo@dcsc.gov), Judge Ann O. Keary.

Washington, DC – Traffic and Misdemeanor Community Court—Opened in January 2002, the court hears all Superior Court D.C. traffic violations and D.C. misdemeanor cases.

Types of cases: Disorderly conduct, aggressive panhandling, possession of an open container of alcohol, and drinking or urinating in public.

Contact information: Moultrie Courthouse, Courtroom 115 Washington, D.C. 20001, Mike Francis, Community Court Coordinator, [francismo@dcsc.gov](mailto:francismo@dcsc.gov), Magistrate Judge Michael McCarthy

FLORIDA: West Palm Beach Community Court—Opened in August 1999, the court covers the West Palm Beach Weed and Seed area. The courtroom operates five days a week.

Types of cases: Low level, non-violent misdemeanor crimes such as trespassing, public intoxication, open container, prostitution, etc.

Community involvement: Citizens Advisory Board (meets quarterly); Citizens Clean-up Committee (identifies community service projects); Door-to-door conditions survey; Door-to-door brochure distribution (information about services).

Contact information: West Palm Beach Community Ct Project, 638 6<sup>th</sup> Street, West Palm Beach, FL 33401, Faith Martin, Community Court Coordinator, FMARTIN@co.palm-beach.fl.us, Judge Cory Ciklin

Westgate Community Justice Center—Opened in May 2006, the court covers unincorporated Palm Beach County. The courtroom operates five days a week with community services available Saturday and evenings.

Types of cases: Low level, non-violent misdemeanor crimes such as trespassing, possession of marijuana under 20 grams, open container, solicitation for prostitution, etc.

Community involvement: Community Advisory Board (meets quarterly); Community surveys & brochure distribution (information about services).

Contact information: Community Justice Service Center – Westgate 4215 Cherry Road, West Palm Beach, Florida 33409 Faith Martin, Community Court Coordinator, FMARTIN@co.palm-beach.fl.us, Judge Cory Ciklin

GEORGIA: Atlanta Community Court—Opened in March 2000, the court covers the entire City of Atlanta. The courtroom, which operates five days a week and is located in the central courthouse.

Types of cases: Violations and selected misdemeanors. Most frequent charges are: possessions of marijuana, prostitution; theft by shoplifting; fare evasion; disorderly conducts; teenage driving infractions; senior driving infractions; domestic violence and DUIs.

Community involvement: Community service projects are often referrals from City Council and the 24 neighborhood planning units; community clean-ups involve residents. Office of Court Programs staff regularly attends neighborhood and NPU meetings. Court has started its own non-profit, The Restorative Justice Center, which will raise awareness, advocacy, and funds for court programming. A new housing court, using the principals of restorative justice, is planned. Court programs include The Gateway 24/7 Homeless Center, Community Service, Reunification, Neighborhood Restorative Justice Boards, Benefits Procurement, SSI, VA, HIV/AIDS, Men and Women In-custody Treatment Programs, Teens Learning Control (teenage drivers), and Programmatic Probation.

Contact information: Atlanta Municipal Court, 170 Garnett Street, SW, Atlanta, GA 30303, Phillip McDonald, Court Programs Administrator, pmcdonald@atlantaga.gov

INDIANA: Indianapolis Community Court—Opened in April 2001, the court covers 28 police beats throughout the Southeast portion of Indianapolis, and operates an afternoon docket five days a week.

Types of cases: Low-level misdemeanors such as public intoxication, prostitution, disorderly conduct, criminal mischief, possession of alcohol by a minor, drug possession, public indecency, shoplifting, criminal trespass, vehicle violations, indecent exposure, resisting law enforcement, probation violations.

Community Involvement: **Advisory board meetings; periodic “town hall” forums; community impact panels, in which members of the public discuss the impact of low-level crime with offenders; a Community Service Work Crew for the Court that operates six days per week.**

Contact information: Indianapolis Community Court, 902 Virginia Avenue, Indianapolis, IN 46203, Magistrate Louis F. Rosenberg, lrosenbe@indygov.org, Tina Thien, Court Coordinator, TTHIEN@Indygov.org

Dakota County, Minnesota Community Court—Opened in October 2002, the court covers West St. Paul, South St. Paul and Inver Grove Heights, Minnesota. The courtroom, which operates on the first Thursday of each month, is located in the Northern Service Center, in West St. Paul.

Types of cases: Quality of life crimes; problem properties-ordinance violations.

Community involvement: Community members trained in restorative justice; volunteer at court to help link offenders to social services.

Contact information: Community Court Dakota County, Dakota County Judicial Center, 1560 Highway 55, Hastings, Minnesota 55033, Judge Leslie M. Metzen, [Dakota@courts.state.mn.us](mailto:Dakota@courts.state.mn.us)

Minneapolis – Hennepin County Community Court—Opened in June 1999, the court covers the Third Police Precinct, in South Minneapolis—an area with approximately 100,000 residents. The courtroom, which operates one day a week, is located in the Hennepin County Government Center in downtown Minneapolis.

Types of cases: Non-violent felony and misdemeanor property offenses committed within the 3rd precinct and all nuisance abatement cases for the City of Minneapolis. Cases include: auto theft, burglaries and prostitution.

Community involvement: 30-member Community Advisory Council.

Contact information: Hennepin County Community Court, C-1251 Government Center, 300 South Street, Minneapolis, MN 55487, Judge Richard Hopper, [richard.hopper@courts.state.mn.us](mailto:richard.hopper@courts.state.mn.us),

St. Paul Community Court—Opened in 2000, the court covers the entire St. Paul area. The courtroom, which operates once a week, is located in the District Court building.

Types of cases: Quality of life crimes, prostitution and petty larceny.

Community involvement: The local Community Prosecutor is actively involved with community groups and serves as a liaison between the court and the community; also, a peace keeping circle program outreaches to the African American Community.

Contact information: St. Paul Community Court, Ramsey County District Court, 15 West Kellogg Boulevard, St. Paul, MN 55102, Jessica McConaughey, [jessica.mcconaughey@stpaul.mn.us](mailto:jessica.mcconaughey@stpaul.mn.us), Judge George T. Stephenson

NEW YORK: Babylon Community Court—Opened in September 2006, the court covers town of Babylon, Suffolk County Long Island. The court operates 5 days per week.

Types of cases: Low level criminal cases, civil nuisance cases

Contact information: Babylon Community Court, Suffolk County 2nd District Courthouse, 30 East Hoffman Avenue, Lindenhurst, NY 11757-5011, Laura Psoinas, Law Secretary, [LPsoinas@courts.state.ny.us](mailto:LPsoinas@courts.state.ny.us), Judge Patrick Barton

Harlem, Manhattan Community Justice Center—Opened in May 2001, the court covers East and Central Harlem. **The courtroom, which operates five days a week, is located in a renovated former magistrate's courthouse.**

Types of cases: Juvenile parole reentry, adult parole reentry, juvenile low level quality of life offenses or status offenses, housing.

Community involvement: Justice Center staff regularly attends local community meetings. Additionally, the Justice Center co-leads a network of local organizations dedicated to preventing and treating youth substance abuse.

Contact information: Harlem Community Justice Center, 170 East 121<sup>st</sup> Street, New York, NY 10035, Raye Barbieri, Project Director, RBARBIER@courts.state.ny.us

Hempstead Community Court—Opened in June 1999, the court covers Nassau County, New York, and targets, in particular, New Castle, Roosevelt, Uniondale, and the Villages of Hempstead and Freeport. The courtroom, which operates three days a week, is located in the Community Justice Center.

Types of cases: Misdemeanors and violations.

Community involvement: Weed and Seed Community involvement.

Contact information: Hempstead Community Court, Nassau County District Attorney's Office, 99 Main Street, Hempstead, NY 11550, John Nanavarkis, Community Court Coordinator, jnanavra@courts.state.ny.us, Judge Anna Anzalone,

Midtown Community Court—Opened in October 1993, the court covers three police precincts within Midtown Manhattan, and has borough-wide jurisdiction over prostitution-related arrests. The courtroom, which operates five days a week, is located in a former magistrate's courthouse in Midtown Manhattan.

Types of cases: **"A" misdemeanors and violations committed with the catchment area, such as prostitution, petit larceny, unlicensed vending, theft of services, drug possession and low-level sales, public drinking, disorderly conduct, and public urination; small claims cases.**

Community involvement: Advisory Board; Community Conditions Panel; community impact panels, in which members of the public discuss the impact of low-level crime with offenders; Community Initiatives Planner, a full-time staff person who is devoted to working on community projects and is the "go to person" for community members, local police, community service **projects for youth, etc.**; **court's staff is active in Mayor's Midtown Citizens' Committee**; Police Precinct Councils; Community Boards.

Contact information: Midtown Community Court, 314 West 54th Street, New York, NY 10019, Angela Tolosa, atolosa@courts.state.ny.us, Project Director, Judge Richard Weinberg

Red Hook, Brooklyn, Community Justice Center—Opened in April 2000, the court covers three police precincts in South Brooklyn. The courtroom, which operates five days a week, is located in a former Catholic school in the neighborhood.

Types of cases: Misdemeanors, such as disorderly conduct, drug possession, and prostitution, and Class D and E felonies such as assault, contempt (violating a court's order of protection), and selected burglary/trespass offenses (Criminal Court); New York City Housing Authority cases (Housing Court), Juvenile Delinquency and Family Offense (Family Court)

Community involvement: Red Hook Public Safety Corps; Red Hook Youth Court; Red Hook Youth Baseball League; annual door-to-door conditions survey; Open Houses; Community Advisory Board; Project Toolkit; TEACH (Teens Educating About Community Health), a peer-lead HIV and Substance Abuse prevention program.

Contact information: Red Hook Community Justice Center, 88 Visitation Place, Brooklyn, NY 11231, James Brodick, Project Director, JBRODICK@courts.state.ny.us

Syracuse Community Court—Opened in July 2001, the court covers the entire city of Syracuse. The courtroom, which operates one day a week, is located in a County building that also houses the police and fire department.

Types of cases: Local ordinances such as open container, loitering, littering, noise violations; misdemeanors not included.

Community involvement: Community Advisory Committee; Continual Neighborhood and City clean-up; **Court's** representative attends Neighborhood Watch meetings.

Contact information: Syracuse Community Court, 511 South State Street, Room 212, Syracuse, NY 13202, Judge Karen Uplinger, Judge Langston McKinney, Matthew Brown, Community Court Coordinator, mlbrown@courts.state.ny.us

OREGON: Gresham Community Court--The court opened in March 1998, and operates one day a week.

Types of cases: Most non-violent, non person-to-person misdemeanors and violations are eligible to remain in Community Court for final resolution, i.e., a community service sentence and dismissal of first case. More serious misdemeanors are set for the pre-trial docket in the regular court system.

Community involvement: Community Advisory Board; citizens and police help identify community service projects; **court staff attends local community meetings; coordinator and District Attorney's Office staff person taught a class** on community justice and Community Courts at Portland State University for three years; on-site Theft Accountability Class designed by Community Court personnel held at local non-profit social service agency in the NE community.

Contact information: Gresham Community Court, Gresham Circuit Courthouse, 150 W. Powell Blvd, Gresham, OR 97030, Gayle Brooks, Community Court Coordinator, gayle.brooks@mcda.us, Judge Steve Todd

Westside Community Court—Opened in April, 2001 the court covers central precinct area-population approximately 111,000. The courtroom operates Monday to Friday 1:30 to 5PM.

Types of cases: Most non-violent, non person-to-person misdemeanors and violations are eligible to remain in Community Court for final resolution, i.e., a community service sentence and dismissal of first case. More serious misdemeanors are set for the pre-trial docket in the regular court system.

Community involvement: Community Advisory Board; citizens and police help identify community service projects; **court staff attends local community meetings; coordinator and District Attorney's Office staff person taught a class** on community justice and Community Courts at Portland State University for three years.

Contact information: Westside Community Court, Justice Center, 1120 SW 3<sup>rd</sup> Avenue, Portland, OR 97204, Gayle Brooks, Community Court Coordinator, gayle.brooks@mcda.us, Judge Steve Evans

Overland Park Community Court – Clackamas County—Opened in January 2005, the court covers Overland Park section of North Clackamas County (Portland to the north, Southeast King Road to the south, Milwaukee to the west and Southeast 82nd Avenue to the east.) The courtroom operates every Monday.

Types of cases: Misdemeanors such as theft and criminal mischief in Overland Park area.

Community involvement: Volunteers from the community will handle reception and the court may assign volunteer mentors to offender. Community members are part of the court steering committee and regularly attend planning

meetings. Community members (with assistance of Community Corrections) have drafted a community projects referral form to be used for CSW projects.

Contact information: Overland Park Community Court, Clackamas County's Sunnybrook Building, 9101 S.E. Sunnybrook Blvd. Clackamas, Oregon 97015, Judge Douglas Van Dyk, douglas.v.vandyk@ojd.state.or.us

PENNSYLVANIA: Philadelphia Community Court—Opened in February 2002, the court covers ten police districts, spanning Center City, University City, and North and South Philadelphia. The courtroom, which operates five days a week, is located in a former office building.

Types of cases: All summary offenses; 12 misdemeanors including auto theft, retail theft, vandalism, prostitution, minor drug possession, disorderly conduct.

Community involvement: Involved in development and planning; currently putting together community advisory board.

Contact information: Philadelphia Community Court, 1401 Arch Street, 2<sup>nd</sup> Floor, Philadelphia, PA 19102, Bill Babcock, Community Court Coordinator, william.babcock@phila.gov, Judge Wendy Pew, Judge Deborah Griffin, Judge Frank Palumbo

TENNESSEE: Memphis, Frayser Community Court—Opened in February 2000, the court covers the Frayser neighborhood, in Northwest Memphis. The courtroom, which operates one day per week, is located in a storefront in a neighborhood shopping center.

Types of cases: Criminal misdemeanors and city environmental code violations committed within Ward 123. Offenses include: low-level drug possession; criminal trespass; disorderly conduct; prostitution; vandalism; illegal dumping & littering; high grass; substandard housing; and fire code violations.

Community involvement: Community Advisory Board; Memphis/Shelby County Crime Commission

Contact information: Frayser Community Court, 3134A North Thomas, Memphis, TN 38127, Randy Nevels, Community Prosecutor, Randy.Nevels@scdag.com, Frank Cooper Court Clerk, fcooper@co.shelby.tn.us, Judge Larry E. Potter

Memphis, Whitehaven Community Court—Opened in September 2002, the court covers **Memphis' southern** neighborhoods. The courtroom, which operates twice a month, is located in an old church building donated by the airport authority.

Types of cases: Environmental cases; mainly nuisance, violations of housing code, health code violations, zoning violations and fire codes violations.

Community involvement: **The court was established in part as a result of residents' demand and with their involvement.** The court partnered with an industrial group, neighborhood groups and Community Developments groups.

Contact information: Whitehaven Community Environmental Court, 4225 Airways Blvd., Whitehaven, TN, Judge Larry Potter, lpotter@co.shelby.tn.us

TEXAS: Downtown Austin Community Court—Opened in October 1999, the court covers the downtown Austin business district, the West Campus area of the University of Texas and selected portions of East Austin neighborhood. The courtroom, which operates five days a week, is located in a storefront building.

Types of cases: Public order offenses committed within Downtown Austin. Class C Misdemeanors and City Ordinance violations, not including traffic infractions or offenses committed by a minor.

Community involvement: Community Advisory Board; Community Conditions Panel

Contact information: Downtown Austin Community Court, 719 East 6<sup>th</sup> Street, P.O. Box 13464, Austin, TX 78701, Greg Toomey, Coordinator, gregory.toomey@ci.austin.tx.us

Dallas Community Court—Opened in October 2004, the court covers the South Dallas/Fair Park neighborhood. The courtroom, which operates one day a week, is located in the Martin Luther King, Jr. Community Center, which houses 25 different social service agencies, a medical clinic, a day care facility, and a library.

Types of cases: **“Quality of life” Class C** misdemeanor crimes. Typical offenses include assaults, manifestation of prostitution, possession of drug paraphernalia, illegal dumping, and code violation.

Community involvement: The court has established partners within the South Dallas/Fair Park area with local churches, neighborhood organizations, non-profit organizations, both within the justice system and out. Court staff attends community meetings to identify community service projects. The court staff is prepared to answer questions and give tours. Community verifiers visit the work sites of community service projects, and staff is actively involved in social service coalitions and neighborhood meetings.

Contact information: Dallas Community Court, 2922 Martin Luther King, Jr. Blvd., Dallas, Texas 75215, Roxann Pais roxann.pais@dallascityhall.com

San Antonio Community Court—Opened in May, 2006, the court covers San Antonio City Limits, City Wide. The courtroom operates Monday through Friday from 8:00 AM till 3:00 PM.

Types of cases: “Quality-of-life” ordinances, such as sleeping or urinating in public, public intoxication, and minor offenses often associated with drug use and first two offenses of prostitution.

Community Involvement: City of San Antonio Municipal Council Members Private and Public Businesses.

Contact Information: San Antonio Community Court, Frank D. Wing Municipal Court Building, 401 S. Frio St. San Antonio, TX 78207, Ernest Rodriguez, Community Court Liaison, erodriguez3@sanantonio.gov

WASHINGTON: Seattle Community Court—Opened in March 2005, the court covers Downtown and surrounding neighborhoods (First Hill, Lower Queen Anne, South Lake Union, Pike-Pine, Belltown, International District, Pioneer Square, Central Business District, Capitol Hill, and South Downtown Seattle.) The Community court is open for business on Tuesdays and Thursdays; Court Resource Center is open Monday through Friday.

Types of cases: Nonviolent street crimes such as shop-lifting, panhandling and public drinking.

Community involvement: Community Court Advisory Council (Downtown Seattle Association; Metropolitan Improvement District; Department of Corrections; Homeless Advocates; Columbia Legal Services; King County Community Corrections; Department of Social and Health Services; Seattle Police Department; King County Drug Court; Associated Council for the Accused; Seattle Mental Health.)

**Contact information: Seattle Community Court, Municipal Court of Seattle, 600 Fifth Avenue, Seattle, WA 98104, Lorri Cox Senior, Court Specialist, Lorri.Cox@seattle.gov, Judge Ron A. Mamiya**

## Cases

<i>State v. Barrett</i> , 215 Ga. App. 401, 458 S.E.2d 82, rev'd on other grounds 265 Ga. 489, 458 S.E.2d620 (1995) .....	3
<i>Stinnett v. State</i> , 214 Ga. App 224, 447 S.E.2d 165 (1994) .....	3

# CHAPTER 5: TRAFFIC LAW

## 5.1 JURISDICTION

### 5.1.1 GENERAL

#### SCOPE

Municipal courts are granted jurisdiction to try cases and impose sentences in all misdemeanor traffic cases in which the defendant waives trial by jury and the offense arises within the territorial limits of the court's jurisdiction. O.C.G.A. §40-13-21(b). The Constitution provision that municipal courts shall have jurisdiction over ordinance violations and such other jurisdiction as provided by law authorizes the general assembly to vest municipal courts with jurisdiction over state misdemeanor offenses. *Kolker v. State*, 260 Ga. 240, 391 S.E.2d 391 (1990).

NOTE: O.C.G.A. §36-32-1(f)-(h) state that, effective January 1, 2005, that if a municipal court does not **“provide” an indigent defendant with counsel “at no cost to the accused”, with the representation being in compliance with the standards “adopted by the Georgia Public Defender Standards Council”, a municipal court may NOT “impose any punishment of confinement, probation or other loss of liberty, or impose any fine, fee or cost enforceable by confinement, probation or other loss of liberty...”** Simply binding a case over to state or superior court in lieu of appointing counsel arguably may not comply with this state mandate.

EXCEPT Municipal courts specifically do not have jurisdiction over violations of O.C.G.A. §40-6-393, vehicular homicide.

Includes:

1. All violations of the Uniform Rules of the Road found in O.C.G.A. §40-6-1 et seq., including violations by motorcycle drivers as per O.C.G.A. §40-6-11;
2. Other traffic violations in Title 40, EXCEPT vehicular homicide O.C.G.A. §40-6-393; and,
3. Violations of insurance requirements set forth in O.C.G.A. §40-6-10 through 40-6-13.

#### APPEALS

Appeals are to superior court on the municipal court record as certified by the presiding judge. O.C.G.A. §40-13-28. An appeal is not *de novo*, there is no new trial and it is based on the municipal court record. Appeals must be filed within 30 days under O.C.G.A. §5-3-20. Costs must be paid pursuant to O.C.G.A. §5-3-22. O.C.G.A. §5-3-28 requires a record to be forwarded to the higher court within ten (10) days of the filing of notice of appeal.

## VENUE

Venue refers to the location at which a court with jurisdiction may hear and determine a case. *Black's Law Dictionary* 1557 (6th ed. 1990). See O.C.G.A. §17-2-2.

NOTE: Venue must be proven in every case. A Court cannot take judicial notice of venue. See *Robinson v. State*, A03A388 (March 11, 2003) where the State failed to prove that Jonesboro was in Clayton County. See also, *In Re B.R.*, 289 Ga. App. 6 (2007).

## JURIES

A municipal court cannot hear a case where there is, under state law, the right to trial by jury unless there is a waiver on the record of a jury trial. *Smith v. State*, 270 GA. App. 759, 608 S.E.2d 35 (2004): **“The record is insufficient to determine whether Smith knowingly, voluntarily and intelligently waived his right to a jury trial. Therefore the judgment must be vacated.”** *Smith* further held **“While this Court** has found...a written waiver to be adequate, waiver in open court is preferred. The best practice is a written waiver and a waiver in open court.

## EXCLUSIVE JURISDICTION OF THE MUNICIPAL COURTS

O.C.G.A. §40-13-29 says **“In all counties except those having city, county, or state courts**, the judge of the probate court shall have exclusive jurisdiction of all traffic misdemeanor cases originating in the county outside of municipal corporations, and the judge of the municipal court in each municipal corporation shall have exclusive jurisdiction of **traffic misdemeanor cases originating inside the corporate limits of municipalities.”**

Judge Ben Studdard, of the State Court of Henry County, provided the following analysis of the code section to the state’s judges in an email distributed by the State Administrative Office of Courts in July, 2006:

**“The Court of Appeals** held in *Govert v. State*, 257 Ga. App. 80, 570 S.E.2d 393 (August 20, 2002) that this code section a) does not apply in counties having a state court, and b) does not take away jurisdiction from a state or superior court; rather, state traffic offenses committed within a municipality would be within the concurrent jurisdiction of the municipal, state and superior courts. *Govert* does not specifically say, but apparently from the text of the statute, that the municipal court *would* have exclusive jurisdiction *as opposed to the probate court* in a county without a **‘city, county or state court.’”**

Compare, *Poole v. State*, 229 Ga. App. 406, 494 S.E.2d 251 (1976) which appears to give concurrent jurisdiction to the State and municipal courts.

## 5.1.2 TRAFFIC JURISDICTION CHECKLIST

The court has jurisdiction if:

1. The Defendant is charged with a violation of:
  - a. the Uniform Rules of the Road; or
  - b. a traffic violation found in Title 40 EXCEPT for vehicular homicide O.C.G.A. §40-6-393; or
  - c. the insurance requirements set forth in O.C.G.A. §§40-6-10 to 40-6-13; or,
  - d. a municipal traffic ordinance.

AND

2. The offense arises from within the territorial limits of the municipality;

AND

3. The Defendant has validly waived the right to a jury trial.

AND

4. The Court has in place an indigent defense system

### 5.1.3 JUVENILES

#### DEFENDANT UNDER AGE OF SEVENTEEN (17)

Any traffic offense committed by anyone under the age of 17 must be handled by juvenile court. O.C.G.A. §15-11-10(2).

EXCEPT: Homicide by vehicle, manslaughter resulting from the operation of a vehicle, any felony in the commission of which a motor vehicle is used, racing on highways or streets, using a motor vehicle in fleeing or attempting to elude an officer, fraudulent accident, driving under the influence of alcohol or drugs, possession of a controlled substance or marijuana, and any other offense for which driving privileges may be suspended or revoked for an adult. O.C.G.A. §15-11-10(2) (somewhat changed by O.C.G.A. § 15-11-630).

#### DEFENDANT AGE OF SEVENTEEN (17)

A 17 year old defendant must appear before the same court as an adult O.C.G.A. §15-11-5.

NOTE: License suspension rules for under 18 and under 21 drivers are stricter than for other drivers. Nolo pleas are counted as convictions for certain offenses. These under 21 penalties are discussed in more detail in the license suspension portion of this Chapter.

NOTE: Driving under the influence penalties for people under 21 years of age are harsher than for adults. See O.C.G.A. §§40-6-391(a)(4) and 40-6-391(k).

### 5.1.4 SIMILAR CHARGES

Where the facts constitute violations which could be charged under more than one Code section, the municipal court must have either jurisdiction under the particular state law section alleged to have been violated or a municipal ordinance violation.

NOTE: Watch for double jeopardy and merger problems. See Chapter 2, Double Jeopardy and Merger.

### 5.1.5 MULTIPLE VIOLATIONS

Since the superior court has concurrent jurisdiction with all of the lower courts concerning traffic offenses, all offenses arising from the same actions must be tried together where the court has jurisdiction of all offenses. O.C.G.A. §16-1-7(b); and 1958-59 Op. Att'y Gen. 71. See also O.C.G.A. §40-6-376 (d) **which renders "null and void"** decisions by a lower court as to cases where vehicular homicide is charged and there is an additional charge from the same conduct in that lower court.

NOTE: The interpretation of the law in this area changed in 2003. In *State v. Perkins*, 256 Ga. App. 855, 569 S.E.2d 910 (2002), overruled on other grounds by *State v. Perkins*, 262 Ga. App. 62, 582 S.E.2d 680 (2003) the Court upheld a plea in bar as to a vehicular homicide prosecution in Superior Court when the defendant had already been convicted on a lesser included offense of reckless driving in probate court. The Perkins case was reversed by the State Supreme Court on May 5, 2003—*State v. Perkins*, 276 Ga. 621, 580 S.E.2d 523 (Ga. 2003) - and the Supreme Court essentially adopted the dissent from the Court of Appeals, and held that O.C.G.A. §40-6-376(d) divested the probate court of jurisdiction in the reckless driving case when the person also had been charged with vehicular homicide.

### 5.1.6 TRAFFIC VIOLATIONS BUREAUS IN THE POST-GENG ERA

#### ESTABLISHMENT

Under O.C.G.A. §40-13-50, a judge of any court with jurisdiction over traffic offenses may provide, by written order for the establishment of a traffic violations bureau for the disposition of certain traffic cases.

NOTE: *Geng v. State*, 276 Ga. 428 (2003) had a dramatic impact on Traffic Violations Bureaus. The case was a speeding case from Atlanta in which a request for a jury trial was denied under O.C.G.A. §40-13-60 and the case **was transferred to Atlanta's** Traffic Violations Bureau. The Supreme Court reversed the conviction on Constitutional grounds (the denial of a jury trial in a case where incarceration was possible, if the fine was not paid). It should be noted that in 2004, SB 497 eliminated the Atlanta Traffic Court, and SB 498 gave the Atlanta Municipal Court the jurisdiction over traffic law in Atlanta.

#### CLERK(S)

In order to establish a bureau, the judge must name a clerk or deputy clerk(s) for the bureau whose duty is to maintain, for four years, a traffic offense card for each defendant. O.C.G.A. §40-13-51; 40-13-52; and 40-13-59.

## JURISDICTION

The court must provide to the clerk a list of the traffic offenses which are to be handled by the traffic violations bureau. O.C.G.A. §§40-13-50 and 40-13-53.

The following offenses may NOT be handled by a traffic violations bureau:

1. Any offense for which a driver's license may be suspended by the commissioner of public safety;
2. Any motor vehicle registration violation;
3. Violation of Code Section 40-5-20 (**driving without a valid driver's license**);
4. Speeding in excess of 30 miles per hour over the posted speed limit; or,
5. Any offense which would otherwise be a traffic violations bureau offense but which arose out of the same conduct or occurred in conjunction with an offense which is excluded from the jurisdiction of the traffic violations bureau. O.C.G.A. §40-13-53(b).
6. Any case in which there is a jury trial demand. *Geng v. State*, 578 S.E.2d 115, 276 Ga. 428 (2003). There must be a clear waiver of jury trial on the record for a Traffic Violations Bureau to hear a case. See, *Smith v. State*, 608 S.E.2d 35, 270 Ga. App. 759 (2004).

## BONDS

For offenses within the traffic violations bureau's jurisdiction, the arresting officer may permit the violator to be released on a personal recognizance bond upon being served with a citation and complaint.

If the officer has reasonable and probable grounds to believe that the accused will not obey the citation and agreement to appear, the officer may:

1. Require the accused to surrender his driver's license. O.C.G.A. §40-13-53(a); or,
2. Bring the person to the traffic violations bureau for posting of a cash bond for his appearance in accordance with the schedule established by the court. O.C.G.A. §40-13-57.

Within 72 hours of the hearing date, if the defendant has posted a cash bond and failed to appear, then the court issues an order forfeiting the bond. The clerk enters this order with the citation and marks the driver's traffic offense card to reflect the matter. O.C.G.A. §40-13-59.

## CLASSIFICATION OF VIOLATIONS

Any traffic violation under the jurisdiction of the traffic violations bureau will be characterized and classified as a traffic violation and shall not be considered a misdemeanor. O.C.G.A. §40-13-60. But see, *Geng v. State*, 578 S.E.2d 115, 276 Ga. 428 (2003), declaring the part of O.C.G.A. §40-13-60 denying the right to trial by jury as unconstitutional.

Whenever a traffic violation is transferred from another court to a court which has a traffic violations bureau, if the offense is classified as a traffic violation on the bureau's schedule of the receiving court, the violation is handled by the bureau. *Id.*

There a defendant demands a trial on a traffic violation, it is tried before a judge of the court which established the bureau. Such request does not result in loss of jurisdiction by the bureau. *Id.*

### 5.1.7 RED LIGHT CAMERAS

O.C.G.A. §40-6-20 authorizes cities to issue civil citations for red light violations using automated red light cameras. The local government must first obtain, after a public hearing and traffic engineering study, a state permit (see O.C.G.A. §40-14-21). Cities must submit annual reports on each camera to the state DOT.

O.C.G.A. 40-14-22 prohibits changes in timing on the yellow and red signals after installation of cameras.

O.C.G.A. 40-14-23 requires posting of warning signs at camera intersections.

A civil citation cannot be issued if the driver is also cited criminally. O.C.G.A. 40-6-20(f)(8). Citations must be issued by a sworn law enforcement officers. O.C.G.A. 40-6-20(f)(3).

O.C.G.A. 40-6-20(f)(5), enacted in 2009, requires a second (and any subsequent) summons issued by certified mail if the vehicle owner does not appear at the initial hearing. The maximum fine, including surcharges and costs, is \$70.00.

## 5.2 ARREST

### 5.2.1 UNIFORM TRAFFIC CITATION (UTC)

#### PURPOSE

UTC serves as the citation, summons, accusation, or other instrument of prosecution for the offense or offenses charged, and as the record of the disposition of the matter by the court. O.C.G.A. §40-13-1.

1. The UTC may be used as the basis for the prosecution of any of the following misdemeanor violations:
  - a. of the laws relating to the operation and licensing of motor vehicles and operators;
  - b. width, height, and length of vehicles and loads;
  - c. motor common carriers and motor contract carriers; and,
  - d. road taxes on motor carriers. O.C.G.A. §17-7-71(b)(1).
  - e. as of March 10, 2003, the UTC can be used for non-traffic city ordinance cases.

NOTE: UTCs may now be used for non-traffic violations. Until March 10, 2003, based on *Shaver v. Peachtree City*, 253 Ga. App. 212, 558 S.E.2d 409 (2001), it had been held that UTCs must only be used for traffic citations. However, that case was appealed, and in *Peachtree City v. Shaver*, 276 Ga. 298, 578 S.E.2d 409 (decided March 10, 2003), the Georgia Supreme Court reversed the Court of Appeals and said a UTC could be used for underage possession of alcohol. Nonetheless, it may be a better practice to promulgate a form dedicated to other offenses (one per offense).

2. Each UTC should:
  - a. Specifically identify the alleged offense or offenses;
  - b. Have a unique identifying number which serves as the docket number for the case, O.C.G.A. §40-13-1;
  - c. the date upon which the person is to appear and answer charges, O.C.G.A. §17-4-23(a); and,
  - d. the name of the arresting officer and the name of the officer who observed the offense if different. O.C.G.A. §17-4-23.

## RECEIPT ACTS AS ARREST

Receipt of an UTC by the accused is technically an arrest, whether or not the person is taken into custody. O.C.G.A. §§17-4-1, 17-4-23(a).

No warrant is needed if:

1. the offense is committed in the officer's presence; or,
2. the information is received by the arresting officer from a law enforcement officer who did observe the offense being committed. O.C.G.A. §17-4-23.

NOTE: Where an accident has occurred, a citation may be issued by the investigating officer regardless of whether the offense was committed in the presence of any law enforcement officer. O.C.G.A. §17-4-23.

## RECORDS

Full and complete records of all citations received should be maintained in order to facilitate locating a missing ticket and relieve the judge from any suspicion if a citation is claimed to have been delivered yet no record appears on the municipal court traffic records.

Any individual in the municipal court should always sign a receipt for a citation received from any source.

Any citation sent to another agency should be so noted and a receipt should be obtained from the receiving agency.

NOTE: Proper completion of a UTC by the Court is essential.

The Defendant should sign the back of the Court copy. If the Defendant forfeits a cash bond without appearance, bond forfeiture should be checked on the reverse.

The back of the UTC should be completed to show relevant information as to the plea and disposition even if the Court uses a separate sentencing order.

Any change or reduction in the original charge should be noted in the disposition on the reverse (include code sections). DDS now asks that a single line be drawn through the charge on the front of the ticket (a change from past procedure), with the new charge written on the front, initialed by the Judge or Clerk.

If the offense mandates a suspension of license, either the license or DPS 250 A (lost license affidavit), and DPS 1190 (service of suspension) should be attached to the UTC before submission to DDS.

**If the Court is ordering its own suspension, DDS requires the following language: “As a condition of probation, the driver’s license is suspended for a period of \_\_\_\_\_” (the period cannot exceed the probation period.)**

UTC convictions should be forwarded to DDS within ten days (O.C.G.A. §40-5-53).

If a UTC is lost, convictions may be sent to DDS on Form DPS 32C (one charge per form).

The following are not reported to DDS: nolle prossed, warnings, dismissals, voided tickets, and dead dockets. First offender convictions are reportable (1982 Ga. Attorney General Opinion 82-64 and O.C.G.A. §40-6-391(f)).

Effective in 2010, a UTC must have a space in the speeding section to indicate whether or not it was a two lane road (HB 160).

## 5.2.2 UTC ADEQUACY CHECKLIST

Does the UTC:

1. Allege a misdemeanor violation of one of the following:
  - a. the laws relating to the operation and licensing of motor vehicles and operators;
  - b. width, height, and length of vehicles and loads;
  - c. motor common carriers and motor contract carriers; and,
  - d. road taxes on motor carriers. O.C.G.A. §17-7-71(b)(1).
2. Specifically identify the alleged offense or offenses (best practice, one offense per UTC);
3. The date upon which the person is to appear and answer charges;
4. Have a unique identifying number, O.C.G.A. §40-13-1; and,
5. Have the name of the law enforcement officer who observed the offense being committed if other than the arresting officer. O.C.G.A. §17-4-23.
6. *Effective in 2010, a UTC must have a space in the speeding section to indicate whether or not it was a two lane road.*

## 5.2.3 WARRANT

### APPLICABILITY

A traffic case may be commenced upon an arrest warrant. O.C.G.A. §40-13-21. A warrant is normally used only when the alleged violator cannot be issued a citation.

### REQUIREMENTS

O.C.G.A. §17-4-40 sets forth the statutory requirements for issuance of an arrest warrant.

#### 5.2.4 PRELIMINARY HEARING

An accused who either has no bail bond or is unable to afford bond and who requests a preliminary hearing is entitled to a hearing. However, the posting of bail bond constitutes a waiver of the right to a preliminary hearing. At a preliminary hearing, evidence must be presented by the prosecutor and can be presented by defendant. Guilt or innocence is not an issue at a preliminary hearing. The only issue is whether or not sufficient legal reason exists to bind the case over for trial.

#### 5.2.5 PROBABLE CAUSE

There must be probable cause for any arrest or traffic citation.

## 5.3 PRETRIAL RELEASE: RECOGNIZANCE, DEPOSIT OF LICENSE OR BOND

### 5.3.1 GENERAL

The Defendant in a traffic case may be released from custody pending the trial of his case upon providing any of the following, as appropriate:

1. Personal recognizance;
2. Deposit of driver's or chauffeur's license in lieu of bail;
3. Cash bond;
4. Bail bond; or
5. Property bond.

### 5.3.2 PERSONAL RECOGNIZANCE RELEASE

#### DEFINITION

An agreement by the accused to appear in court when his case is called.

## APPLICABILITY

The law authorizes an arresting officer to accept personal recognizance as the sole condition of release only in accordance with:

1. The Nonresident Violator Compact:
  - a. The provisions concerning operation of a Traffic Violations Bureau; or
  - b. The provisions of O.C.G.A. §17-6-3 relating to recognizance bonds for military personnel.
  
2. Nonresident Violator Compact
  - a. The Driver License Compact (DLC) and Nonresident Violator Compact (NRVC) are agreements between the jurisdictions to promote highway safety by sharing and transmitting driver and conviction information. As of mid-2004 the DLC and the NRVC are being revised and combined into the new Driver License Agreement.
  - b. The Nonresident Violator Compact is a reciprocal agreement among the signatory states which provides the same privileges and sanctions for nonresident traffic violators as resident motorists. The purposes include:
    - i. allows for defendants in traffic cases who reside in subscribing states to be released without posting bond for non-serious offenses;
    - ii. discourages taking of driver's license as bail and encourages release upon the personal recognizance of the accused; and,
    - iii. establishes a procedure by which the nonresident either complies with the terms of the traffic citation issued, or upon proper notice, has his driver's license suspended in his home state, until he satisfies the Georgia citation.

NOTE: O.C.G.A. §17-6-12 prohibits release on an own recognizance bond for the following offenses:

- (1) A serious violent felony as such term is defined in Code Section 17-10-6.1; or
- (2) A felony offense of:
  - (A) Aggravated assault;
  - (B) Aggravated battery;
  - (C) Hijacking a motor vehicle
  - (D) Aggravated stalking;
  - (E) Child molestation;
  - (F) Enticing a child for indecent purposes;
  - (G) Pimping;
  - (H) Robbery;
  - (I) Bail jumping;
  - (J) Escape;
  - (K) Possession of a firearm or knife during the commission of or attempt to commit certain crimes;
  - (L) Possession of firearms by convicted felons and first offender probationers;
  - (M) Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine;
  - (N) Participating in criminal street gang activity;
  - (O) Habitual violator; or
  - (P) Driving under the influence of alcohol, drugs, or other intoxicating substances.

A person charged with any of the above bail restricted offenses shall not be released on bail on his or her own recognizance for the purpose of entering a pretrial release program, a pretrial release and diversion program, or a pretrial intervention and diversion program as provided for in Article 4 of Chapter 18 of Title 15, or Article 5 of Chapter 8 of Title 42, or pursuant to Uniform Superior Court Rule 27, unless an elected magistrate, elected state or superior court judge enters a written order to the contrary specifying the reasons why such person should be released upon his or her own recognizance.

#### DLC/NRVC MEMBER STATUS AS OF 2013

The Driver License Compact is no longer being pushed since it is being superseded by the new Driver License Agreement (DLA) which also replaces the Non-Resident Violator Compact. As planned by the AAMVA, when the Driver License Agreement is ratified by Driver License Compact members, it will be no longer relevant.

All states are members of NRVC except Michigan, Wisconsin, California, Montana, Oregon, and Alaska. The District of Columbia also is a member.

All states are members of DLC except for Georgia, Michigan, Wisconsin, Tennessee (dropped out in 1997), Nevada (dropped out in 2007) and Massachusetts.

Note: Some Canadian provinces (Ontario and Quebec) exchange drivers information with some states (although not Georgia).

NRVC ONLY: Georgia, Massachusetts, Nevada, Tennessee

DLC ONLY: Alaska, California, Montana, Oregon

BOTH: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia (Washington, D. C.), Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming.

NOT IN EITHER: Michigan, Wisconsin

The practical **result of the above is that driver's histories and records may be especially difficult for Georgia Courts to obtain from these states: Alaska, California, Montana, Michigan, Oregon, and Wisconsin.**

### 5.3.3 DISPLAY OF DRIVER'S LICENSE

O.C.G.A. §17-6-11 has been changed extensively from a pre-1998 provision where driver's licenses generally were

surrendered when a traffic ticket was issued. It provides as follows:

*Any other laws to the contrary notwithstanding, any person who is apprehended by an officer for the violation of the laws of this state or ordinances relating to:*

*(1) traffic, including any offense under Code Section 40-5-72 or 40-6-10, but excepting any other offense for which a license may be suspended for a first offense by the commissioner of motor vehicle safety, any offense covered under Code Section 40-5-54, or any offense covered under Article 15 of Chapter 6 of Title 40;*

*(2) the licensing and registration of motor vehicles and operators;*

*(3) the width, height, and length of vehicles and loads;*

*(4) motor common carriers and motor contract carriers; or*

*(5) road taxes on motor carriers as provided in Article 2 of Chapter 9 of Title 48 upon being served with the official summons issued by such apprehending officer, in lieu of being immediately brought before the proper magistrate, recorder, or other judicial officer to enter into a formal recognizance or make direct the deposit of a proper sum of money in lieu of a recognizance ordering incarceration, may display his or her driver's license to the apprehending officer in lieu of bail, in lieu of entering into a recognizance for his or her appearance for trial as set in the aforesaid summons, or in lieu of being incarcerated by the apprehending officer and held for further action by the appropriate judicial officer. The apprehending officer shall note the driver's license number on the official summons. The summons duly served as provided in this Code section shall give the judicial officer jurisdiction to dispose of the matter.*

*(b) Upon display of the driver's license, the apprehending officer shall release the person so charged for his or her further appearance before the proper judicial officer as required by the summons.*

See also O.C.G.A. §17-6-2 (a)(1): " In all cases wherein a licensed driver of this state has been arrested, incarcerated, and charged with a violation of state law and where said violation is a misdemeanor, the sheriff of the county wherein the violation occurred shall be authorized, unless otherwise ordered by a judicial officer, after the individual has been incarcerated for not less than five days, to accept that individual's driver's license as collateral for any bail which has been set in the case, up to and including the amount of \$1,000, provided such license is not under suspension or has not expired or been revoked."

## 5.3.4 CASH BOND

### SCHEDULE

The court may establish a cash bond schedule for all offenses and order the municipal police to utilize the schedule. O.C.G.A. §§17-6-1(f); 17-6-5; and, 17-7-20.

If an offense occurs which is not on the bond schedule, the court must determine bond within 48 hours after arrest if the Defendant is held in jail. O.C.G.A. §17-4-62.

### RECEIPTS

The clerk of court, or the judge if there is no clerk, is required to furnish a book of blank receipts to the officer authorized to accept cash bonds. The receipts are to be numbered consecutively, in triplicate. Each receipt must contain the information required by O.C.G.A. §17-6-6 and the three copies must be delivered as provided in this Code section.

The original receipt and cash bond must be delivered to the court by the next business day. O.C.G.A. §17-6-6.

In order to minimize the paperwork connected with these receipts, the numbers on the receipts should correspond to the consecutive numbers on the UTCs, and each police officer in the jurisdiction should be assigned a separate book of blank receipts and a set of UTCs with corresponding numbers.

## 5.3.5 BAIL BOND

### DEFINITION

A bail bond is a contract of an individual or corporation that the accused will appear for trial. If the accused fails to appear, then under the contract the bond is forfeited. O.C.G.A. §17-6-2.

The sheriff of each county is responsible for approving the sureties on a bail bond. O.C.G.A. §17-6-2.

The amount of the bail bond must be reasonable and is normally at least twice the amount of a cash bond.

### GUARANTEED ARREST BOND

This is a type of bail bond which is issued by an automobile or trucking club which, when signed by the accused, must be accepted in lieu of an ordinary bail bond of \$1,000 or less in any court of the state for most motor vehicle violations. O.C.G.A. §33-24-50(a).

However, it need not be accepted for driving under the influence or any felony. O.C.G.A. §33-24-50(c).

### 5.3.6 PROPERTY BOND

A type of bail bond insuring that a defendant who cannot post a cash or regular bond, but who has real property of value, can be released pending trial.

The property is usually real property.

O.C.G.A. §17-6-5 **provides “the sheriff** may not prohibit the posting of property bonds. Additional requirements for the use of real property may be determined at the discretion of the sheriff. The sheriff shall not prohibit a nonresident of the county from posting a real property bond if such real property is located in the county in which it is offered as bond and if such property has sufficient unencumbered equity to satisfy the sheriff’s posted rules and **regulations as to acceptable sureties.”**

## 5.4 ARRAIGNMENT PROCEDURE, GUILTY PLEAS AND WAIVER OF RIGHTS

NOTE: Chapter 6 of this book contains a detailed discussion and suggested forms.

### 5.4.1 KNOWING AND VOLUNTARY WAIVER OF RIGHTS

Georgia Courts have held that there must be some personal interaction between the trial judge and a defendant before a defendant can knowingly and voluntarily waive any Constitutional rights. *Jones v. State*, 212 Ga. App. 676, 442 S.E.2d 908 (1994); *Waire v. State*, 211 Ga. App. 69, 438 S.E.2d 142 (1993); *Washington v. City of Atlanta*, 201 Ga. App. 876, 412 S.E.2d 624 (1991); *Turner v. State*, 162 Ga. App. 806, 293 S.E.2d 67 (1982). The Georgia Court of Appeals held in *Turner* that “it is difficult to imagine a mass arraignment procedure which could satisfy the trial court’s burden.” 162 Ga. App. at 806, 293 S.E.2d at 68. In Georgia, a trial court judge must “investigate as long and as thoroughly as the circumstances of the case before him demand” to determine that a defendant has knowingly and voluntarily waived any rights.

In *Foskey v. Battle*, 277 Ga. 480, 591 S.E.2d 802 (2004), the Georgia Supreme Court held that a procedure where “petitioner had been advised of his ‘legal rights’ by completing a ‘transcript of proceedings’ with his counsel” was insufficient. In that case the “transcript of proceedings” was a pre-printed form consisting of 19 questions with typewritten answers, and the Court may have been swayed by an oral transcript that indicated Defendant did not appear to understand the form.

The Court in *Foskey* held:

“It is error for a trial court to accept a guilty plea without an affirmative showing that it was intelligent and voluntary since a guilty plea which is not voluntary and knowing is “obtained in violation of due process and is therefore void.” *Boykin v. Alabama*, 395 U.S. 238, 243 (89 S.Ct. 1709, 23 L.Ed.2d 274) (1969). The entry of a guilty plea involves the waiver of three federal constitutional rights: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one’s accusers (*id.*), and the trial court has a duty to ensure that the defendant understands the constitutional rights being waived. *Knight v. Sikes*, 269 Ga. 814 (1) (504 S.E.2d 686) (1998); *Bowers v. Moore*, 266 Ga. 893 (1) (471 S.E.2d 869) (1996).”

NOTE: If a court has a prosecutor and the prosecutor speaks with Defendants who are unrepresented before arraignment or other hearings, the Court must first advise the Defendant of their rights. See *Pinkerton v. State*, 262 Ga. App. 858, 586 S.E.2d 743 (2003).

### 5.4.2 FACTUAL BASIS FOR THE PLEA

Uniform Superior Court Rule (USCR) 33.9 requires a trial court to ascertain a factual basis for a defendant’s plea. *Watt v. State*, 204 Ga. App. 839, 420 S.E.2d 769 (1992). Georgia courts require the prosecutor to make a presentation or summary of evidence that the State would have presented at trial or at the very least, some discussion by the court, on the record, as to the factual basis of the charges. *Id.*

Uniform Municipal Court Rule 25.9, concerning *Determining the Accuracy of Plea* also requires a factual basis before a plea may be entered, and is modeled on USCR 33.9.

### 5.4.3 PROCEDURE WHEN NO PROSECUTING ATTORNEY IS PRESENT

When a defendant is prepared to enter a guilty plea, but no prosecuting attorney is present to make a proffer or summary of evidence revealing the underlying factual basis in support of the charge, it has become accepted practice **to: (a) allow an arresting officer to present the prosecution's evidentiary summary, or (b) rely upon facts and statements (including hearsay) reported in the police record of arrest, in order to furnish the factual basis for weighing and accepting, or denying, a guilty plea.** Some Courts have created affidavits that officers may sign prior to trial to give the basis for the charge, and some Courts rely in part on remarks an officer may place on the UTC. When neither a prosecuting attorney nor another representative of law enforcement is present to carry forward the case against the accused, many Judges feel that the court should avoid taking on this role and decline to accept any guilty pleas.

### 5.4.4 NOLO CONTENDERE PLEAS

Acceptance of nolo contendere plea is entirely a matter of discretion for the court. O.C.G.A. §17-7-95. There is no individual right to enter or compel acceptance of such a plea. In no event may a court accept a nolo plea when the charge is DUI **and the defendant's blood alcohol level is more than .15 at any time within 3 hours after driving or being in control of any moving vehicle.** O.C.G.A. §40-6-391.1(a). Moreover, the court in accepting a nolo plea on a DUI charge must follow a number of specific procedures related to sufficient grounds for entry of the plea, **examination of the driver's record, and disposition of the offender.** See O.C.G.A. §40-6-391.1. (See also Chapter 15 of this Benchbook.)

### 5.4.5 PROCEEDING PRO SE AND WAIVER OF RIGHT TO COUNSEL

A defendant has the right to counsel, if the defendant will actually receive a jail sentence. *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). The constitutional right to counsel attaches when a defendant is put on trial for any offense for which he could be sentenced to a term of imprisonment. *Jones v. Wharton*, 253 Ga. 82, 316 S.E.2d 749 (1984). *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.E.2d 888 (2002) expands this right to make it clear that where an indigent is given a probated or suspended prison sentence that there is a Sixth Amendment right to appointed counsel. See also *Barnes v. State*, 275 Ga. 499, 570 S.E.2d 277 (2002) and the remand in that case, *Barnes v. State*, 261 Ga. App. 112, 581 S.E.2d 727 (2003) in which an initialed waiver of right to counsel with no showing on the record of the defendant being made aware of the dangers of proceeding without counsel was held to be invalid. *Banks v. State*, 260 Ga. App. 515, 580 S.E.2d 308 (2003) contains a discussion of the scope of the required showing; simply telling a Defendant it is unwise to proceed without counsel without a detailed discussion of rights is insufficient.

The *Shelton* rule has been somewhat modified by a subsequent ruling. On March 8, 2004 in *Iowa v. Tovar* (541 U.S. 77), Case no. 02-1541, the United States Supreme Court ruled that while people pleading guilty to crimes are entitled to an attorney, judges don't have to warn them of the disadvantages of not seeing a lawyer. In the 9-0 ruling, the court reaffirmed that people facing prison time are entitled to attorneys at critical stages of the process, including a plea hearing. The ruling overturned an Iowa Supreme Court decision that said judges must tell defendants of the disadvantages of pleading guilty without consulting a lawyer. The Court said that states are free to adopt their own **rules, but such warnings are not required by the Constitution. The decisions of Georgia's courts appear to require a higher standard than Iowa v. Tovar.**

Simply finding that a Defendant is not indigent is insufficient. Even if the Defendant is found not to be indigent, the Court must still obtain an informed waiver of counsel separate from its finding as to the right to indigent counsel. See, *Godlewski v. State*, 256 Ga. App. 35, 567 S.E.2d 704 (2002).

NOTE: O.C.G.A. §36-32-1(f)-(h) state that, effective January 1, 2005, that if a municipal court does not **“provide” an indigent defendant with counsel “at no cost to the accused”, with the representation being in compliance with the standards “adopted by the Georgia Public Defender Standards Council”, a municipal court may NOT “impose any punishment of confinement, probation or other loss of liberty, or impose any fine, fee or cost enforceable by confinement, probation or other loss of liberty...”** **Simply binding a case over** to state or superior court in lieu of appointing counsel arguably may not comply with this state mandate. The 2004 General Assembly in Extended Session passed HB 1 EX, allowing municipal courts to charge a \$50 application fee for those seeking indigent representation. These funds are to be used to assist municipal court in meeting its own indigent defense needs and can be waived by the court for hardship.

SEE Chapter 6 for a more extensive discussion of this issue.

## 5.4.6 DIALOGUE

### Court Pre-Arrestment Statement in Traffic Court on Criminal Charges

NOTE TO THE COURT: The following dialogue and form are intended as a guide. Georgia courts require some degree of personal interaction between the trial judge and each individual defendant in order for the trial judge to ascertain whether the defendant has knowingly and voluntarily waived his constitutional rights.

You are scheduled for arraignment today on a traffic charge considered a crime in the State of Georgia. An arraignment is for the Court to advise you of the official charge, and allow you to enter a plea to that charge.

Three pleas are acceptable in Traffic Court here today.

They are as follows:

1. GUILTY PLEA - A plea of guilty admits you are guilty of the traffic charge or charges before the court today. Upon that plea, the court will enter what the Court considers the appropriate fine, probation, or jail sentence.
2. NOLO CONTENDERE PLEA - Acceptance of a nolo plea is entirely a matter of discretion with the court. A plea of Nolo Contendere neither admits nor denies the charge or charges, but states that you are not contesting this charge and do not want a trial. A plea of Nolo Contendere admits that the State could prove the legal elements of the charge or charges, if not rebutted or challenged by your own evidence, and that you waive or give up the taking of sworn testimony for that purpose. A plea of Nolo Contendere shall not be used against you in any other court or proceedings as an admission of guilt or otherwise or for any purpose; and the plea shall not be deemed a plea of guilty for the purpose of effecting any civil disqualification of you to hold public office, to vote, to serve upon any jury, or any other civil disqualification imposed upon a person convicted of any offense under the laws of this State.
3. NOT GUILTY - A plea of Not Guilty denies guilt and causes the case to be set for trial, where witnesses will be subpoenaed to appear, the Police Officer will appear, and you will appear with your witnesses for trial before a judge or judge and jury. As a defendant in a criminal case, you have certain absolute constitutional rights:
  - a. You have the right to know the official charge or charges, which will be read to you here today;
  - b. You have the right to a trial before a judge or a judge and jury;
  - c. The burden upon the State is to produce witnesses to establish to the judge (in a judge trial) or a jury (in a jury trial) that you are guilty of the charge or charges beyond a reasonable doubt;
  - d. You have the right to question any witness the State calls to testify;

- e. You have the right to call witnesses of your own at your trial and have a right to use the subpoena of the Court to subpoena those witnesses if they will not come voluntarily;
- f. You have the presumption of innocence throughout the trial;
- g. As a criminal defendant, you have the right to remain silent: that is, you are never required to testify at trial and exercise of that right may not be considered by the judge or jury in deliberation as to guilt or innocence;
- h. You have the right to testify at trial and have your testimony considered by the same standards as all other witnesses;
- i. You have the right to an attorney to represent you in this charge or charges; if you cannot afford **an attorney, and there is any possibility in the Judge's opinion, that jail time might be imposed,** you have a right to have an attorney appointed by the Court at the State's expense;
- j. You also have the right to discuss this matter with an attorney before entering any of the three pleas of Guilty, Nolo Contendere, or Not Guilty.

Upon your entering a plea of Guilty or Nolo Contendere here today, you are saying to the Court the following:

- 1. That you understand the charge;
- 2. That you give up your right to a trial before a judge or judge and jury;
- 3. That you give up your right to an attorney to represent you at the trial;
- 4. That you give up your right to appeal the facts of this case, unless you have specifically reserved your rights to appeal a pre-trial matter;
- 5. That no threats or promises have been used to coerce you into pleading Guilty or No Contest;
- 6. That you understand the maximum and minimum penalties involved in this charge or charges, including **driver's license privileges which may be affected;**
- 7. That a plea of Guilty admits the charge or charges - or that a plea of Nolo Contendere does not contest the charge;
- 8. That you are freely and voluntarily entering a plea of Guilty or Nolo Contendere, as what you yourself have decided to do to dispose of this case;

9. That upon the Court accepting the plea of Guilty or No Contest, you will have thirty days to appeal the sentence and judgment of the Court and could have an attorney appointed for such an appeal if you could not afford an attorney.

You have the right to have your plea of Guilty or No Contest reported by a court reporter or electronic device. By advising the Court you want this done, these arrangements will be made before entry of a plea.

This court, by the judge's signature on an acceptance of plea form, certifies that you appeared on \_\_\_\_\_ at \_\_\_\_\_M., and have been advised of all of these rights, privileges and immunities as just explained, or as listed above.

NOTE TO THE COURT: The following form of acceptance is intended as a guide. However, Georgia courts require some degree of personal interaction between the trial judge and each individual defendant in order for the trial judge to ascertain whether the defendant has knowingly and voluntarily waived his constitutional right to trial. In *Foskey v. Battle*, 277 Ga. 480, 591 S.E.2d 802 (2004), **the Georgia Supreme Court held that a procedure where "petitioner had been advised of his 'legal rights' by completing a 'transcript of proceedings' with his counsel" was insufficient. In that case** the "transcript of proceedings" was a pre-printed form consisting of 19 questions with typewritten answers, and the Court may have been swayed by an oral transcript that indicated Defendant did not appear to understand the form.

Chapter 6 of this Benchbook contains additional forms used by several Georgia courts that may be preferable to the below form, which was prepared a number of years ago for this book. The Chapter 6 forms more heavily focus on the right to counsel and jury trial.

#### 5.4.7 FORM

MUNICIPAL COURT, CITY OF \_\_\_\_\_, TRAFFIC DIVISION

Citation No. \_\_\_\_\_

State of Georgia vs. \_\_\_\_\_

PLEA OF GUILTY OR NOLO CONTENDERE TO CRIMINAL CHARGE IN TRAFFIC COURT

I have appeared on the below-listed in Traffic Court, City of \_\_\_\_\_, Georgia, was advised by the Judge of the criminal charge(s) against me, and have entered a plea of Guilty or Nolo Contendere to charge(s) before the Judge.

I have sworn under oath before the Judge that I understand the following:

1. The nature of the charge(s);
2. The difference between the pleas of Guilty, Nolo Contendere, and Not Guilty and the effect of each plea;
3. The right to trial before a judge or a judge and jury;
4. The right to an attorney and the right to have an attorney appointed if I cannot afford one if the judge is considering a jail sentence on this charge;
5. The right to require the State to establish my guilt beyond a reasonable doubt;
6. The right to question the witnesses at trial;
7. The right to call witnesses of my own at trial and have those witnesses subpoenaed by the Court;
8. The right to have the presumption of innocence until the State proves my guilt beyond a reasonable doubt;
9. The right to remain silent and not have that fact considered by the Judge or jury at trial;
10. The right to testify at trial, and have my testimony considered by the same standards as the other witnesses; and
11. That I understand the maximum and minimum sentences involved listed on the reverse side of this document.

By pleading Guilty or Nolo Contendere, I have sworn under oath before the Judge that I wish to give up the above-listed rights and have the Judge impose the sentence the Judge deems appropriated.

I am not under the influence of any alcohol or drugs at this time, and I fully understand the Judge's instructions, and what my rights are.

I understand I have the right to speak to the Judge concerning the sentence before sentencing, and to appeal the judgment and sentence imposed within thirty days, with the right to an attorney to be appointed for such an appeal if I cannot afford one.

I understand I also have the right to have this plea of Guilty or Nolo Contendere officially reported by a court reporter or other electronic device, and I am not requesting the Judge call for a court reporter or electronic device for this plea of Guilty or Nolo Contendere, hereby waiving this right.

---

Defendant

Sworn to by the above-named Defendant before me on the day of \_\_\_\_\_, 19\_\_\_. I find the change of plea to be by a Defendant who appears alert and intelligent, who understands the nature of the charge and the consequences of changing the plea to Guilty or Nolo Contendere.

---

Municipal Court Judge

## 5.4.8 DIALOGUE ARRAIGNMENT & TRIAL

NOTE TO THE COURT: The following dialogue is intended as a guide. While the better practice is for courts to have separate arraignment and trial dates, it is recognized that a number of jurisdictions so not conduct arraignments and trials separately.

### COURT STATEMENT IN TRAFFIC COURT WHEN THERE IS NO SEPARATE ARRAIGNMENT

Ladies and gentlemen, my name is \_\_\_\_\_. I am the Municipal Court Judge for the City of \_\_\_\_\_; and I will be presiding over court tonight. Before I call the calendar, I am going to take a few minutes to explain the procedures of this Court as well as explain certain constitutional rights you have when you are charged with a crime or traffic offense.

**I will call tonight's calendar twice. The first time I call your name please stand and** I will ask how you pleads to the charges. You have several options. You may plead guilty, not guilty, ask for a nolo contendere plea, or you may ask for a pretrial conference with the Solicitor. The second time I call the calendar, you will have the opportunity to come forward and explain your situation to me.

Before I can accept any plea from you, I am required to make sure that you understand that you have certain constitutional rights which are very important, so please listen very carefully to what I am about tell you. First and foremost, you are presumed innocent and you remain innocent unless and until the City proves beyond a reasonable doubt that you are guilty of the crime or traffic violation for which you are charged. You have the right to have lawyer present to represent you in these proceedings. If you want to hire a lawyer, say so when I call the calendar **the first time; and I will continue your case to the officer's next court date, to allow you to hire an attorney.**

Additionally, you have the right to present witnesses for me to talk to and you have the right to question witnesses who testify against you. You have the right to testify in your own behalf, and what I mean by that is to take an oath to tell the truth and tell me what is going on with your case. By the same token, you have the absolute right to remain silent, and I will not and do not hold that against you. If there is any possibility that you would go to jail if you are found guilty, you also have the right to have a lawyer appointed by the Court to represent you at no expense to you. If you are facing the possibility of jail time, I will talk with you individually about you right to have a lawyer represent you.

You have a right to a trial by jury, and the right to a public defender if you are eligible for one. However, if you proceed with your trial in this courtroom tonight, you will be waiving or giving up the right to a jury trial and the right to a public defender. You will do that by signing this white waiver / affidavit form. [READ THE FORM TO ALL IN THE COURTROOM].

If you are found guilty tonight, I have the authority to impose a fine up to a \$1,000 on each charge, and a jail sentence of up to 12 months unless you are charged with a violation of a City ordinance. In that case the maximum sentence for a City code violation is \_\_\_\_\_. If you do not have an aggravated situation, and you are found guilty, I will probably only fine you.

The following paragraph is optional as a number of courts believe the concept of surcharges on the fine is confusing to defendants. Therefore, many judges choose not to explain the surcharge concept, but simply advise the defendant of the total fine amount which includes the surcharges. You can adapt the amounts to fit your court.

Please understand that if you are found guilty and I fine you, there will be a 25 percent surcharge added to your fine by the clerk. This surcharge is required in all cases. Half is assessed by \_\_\_\_\_ County and half is assessed by the State of Georgia. Everyone who pays a fine must pay this surcharge. For example, if your fine is \$100, the total you will pay the clerk tonight will be \$125.

## FOR CITIES WITH PROBATION SERVICES

If you cannot pay your fine in total today, I will put you on probation so that your fine can be paid over time. However, there is an additional \_\_\_\_\_ per month supervision fee for cases paid through probation. In most cases, once the fine is paid, probation ends and so does this monthly fee.

There are two rights which you do not have tonight. The first is to talk among yourselves while court is in session. Each and every one of you will get my undivided attention, but it is difficult for me to pay close attention to your case when people are talking in the background. If you want to talk, please leave the courtroom. Second, you may be unhappy with the decision I make; and if you are unhappy with my decision, you do not have the right to take it out on anybody who works here. These people are doing the jobs and I expect you to show them the same courtesy that you expect to be given at your job. If you are displeased with my decision, you have an absolute right to appeal any of my decisions to the Superior Court of \_\_\_\_\_ County. If you want to appeal my decision, please tell the clerk when you pay your fine, and she will hold your payment as an appeal bond. I am not your lawyer and do not represent any of you, but I will tell you two things about these appeals. First, most if not all of these appeals must **be filed in the Superior Court of \_\_\_\_\_ County within thirty days of today's date.** Second, most if not all of these appeals have very technical pleading requirements. Consequently, you may very well want to talk to with a lawyer in preparing your appeal, so that you do not lose your right to appeal on a technicality.

## 5.5 FAILURE TO APPEAR FOR ARRAIGNMENT

### 5.5.1 BOND FORFEITURE

#### CASH BONDS FOR NON-SUSPENDABLE OFFENSES

If a cash bond has been posted by an accused who fails to appear, without legal excuse, the court may order the cash bond to be forfeited, without the necessity of complying with the statutory procedure for forfeiture of statutory bail bonds. O.C.G.A. §17-6-8.

A judgment ordering the case disposed of may be entered by the court and the bond proceeds are applied in the same manner as fines. *Id.*

If the court does not enter a judgment disposing of the case, the forfeiture of the cash bond does not bar a subsequent prosecution for the offense charged. *Id.*

A bond forfeiture occurs at the end of the court day upon the failure of appearance of the principal of any bond or

recognizance given for his appearance. O.C.G.A. §17-6-70(a).

The judge may ensure proper documentation of the forfeiture in any of the following manners:

1. marking the appropriate space on the back of the citation and signing it; or,
2. by ordering the forfeiture in open court or by written order and allowing the clerk to complete the paperwork.

A cash bond forfeiture should not be treated as a conviction for any offense if conviction for that offense results in mandatory suspension of the driver's license, since the presence of the accused in court is required for such an offense. O.C.G.A. §40-13-58.

#### OTHER APPEARANCE BONDS

Forfeiture of an appearance bond other than a cash bond and forfeiture of a cash bond for a suspendable offense which mandates a court appearance require adherence to statutory notice requirements. Such an appearance bond may not be forfeited unless:

1. the clerk of the court gave the surety at least 72 hours' written notice, exclusive of weekends and holidays, before the appearance time required of the defendant; HOWEVER,
2. such notice is not necessary if the time for appearance is on the bond or if the defendant was given the date and time in open court. O.C.G.A. §17-6-70(b).

NOTE: Service of the arraignment notice by certified mail appears to be sufficient.

NOTE: Since a UTC is not issued by the clerk of the court, the notice contained in a UTC does not **seem to fulfill this requirement of 72 hours' prior notice. Therefore, if only a UTC was** issued by the arresting officer, an arraignment notice must be served upon the defendant by the clerk of the court.

If the 72 hours' advance notice has been given, at the end of the day on which the defendant fails to appear, the bond is ordered forfeited and an execution hearing must be ordered to be held no sooner than 120 days and no later than 150 days after the failure to appear. O.C.G.A. §17-6-71.

Notice of such hearing must be served upon the surety by certified mail or personal service within ten days after the failure to appear. Id..

Legal excuses for failure to appear include:

1. mental or physical disability; and,
2. detention in a penal or mental institution. O.C.G.A. §17-6-72.

#### FORFEITURE OF NON-CASH BONDS CHECKLIST

Forfeiture of non-cash appearance bonds and cash bonds for a suspendable offense require that:

1. Surety must have received 72 hours' written notice prior to forfeiture; UNLESS,
  - a. the appearance date is within 72 hours of the notice and the time for the appearance is on the bond, or
  - b. the defendant was given the date in open court.
2. At the end of the day on which the defendant fails to appear, the bond is ordered forfeited and an execution hearing must be ordered to be held no sooner than 120 days and no later than 150 days after the failure to appear.
3. Notice of such execution hearing is served upon the surety by certified mail or personal service within ten (10) days after the failure to appear.

#### LEGAL EXCUSES FOR FAILURE TO APPEAR CHECKLIST

The defendant is legally excused for failure to appear if he shows:

1. Mental or physical disability; or
2. Detention in a penal or mental institution.
3. In its discretion a court can consider other emergencies and health reasons.

## 5.5.2 SUSPENSION OF LICENSE

### GENERAL

DPS Form 912 must be used to notify a defendant of the suspension of his driver's license due to his failure to comply with the terms of the traffic citation in two instances:

1. Where the defendant has not deposited his driver's license with the court or posted bond;
2. Where a Georgia resident has posted his driver's license as collateral pursuant to O.C.G.A. §17-6-2.

### NO DEPOSIT OF LICENSE OR POSTING BOND

The following is the procedure for handling an accused who failed to appear without having deposited his driver's license or posting bond.

If such an accused fails to respond to the citation by appearing in court or paying the fine and costs by the appearance date, the court shall notify the licensing authority in the driver's state to suspend the driver's license until the fine and costs are paid. DPS Form 912.

The following procedure must be used in mailing out the various copies of DPS Form 912:

1. The "Defendant's Notice" copy is mailed to the address given by the accused.
2. The "Home Jurisdiction Copy" is mailed to the Revocation and Suspension Section of DPS.
3. If the accused is a resident of a state which is a party to the Nonresident Violator Compact, that notice will be forwarded to the accused's state of licensing.
4. Upon receipt of all fines and penalties, the "Defendant's Receipt" copy is completed and given to the accused, and the "Home Jurisdiction - Suspension Withdrawal" copy is sent directly to DPS.
5. The "Court Copy" should be retained as part of the permanent records of the trial court.

### 5.5.3 BENCH WARRANT

The Code specifically allows a judge, if the accused fails to appear as specified in the citation, to issue a warrant ordering the apprehension of the person and commanding that he be brought before the court to answer the charge contained in the citation and the charge of his failure to appear as required. O.C.G.A. §17-4-23(b).

Under this code section, a UTC is a sufficient basis for issuance of a warrant, regardless of whether the UTC contains an affidavit of the arresting officer. 1990 Op. Att'y Gen. U90-2.

NOTE: O.C.G.A. §40-13-63 **provides “The willful failure of** any person to appear in accordance with the written promise contained on the citation and complaint and served upon such person shall constitute an offense which shall be punishable by fine in an amount not to exceed \$200.00 or by confinement in jail for **a period not to exceed three days.”**

O.C.G.A. §17-4-23(b) **provides “(b) If the accused person fails to appear as specified in the citation, the** judicial officer having jurisdiction of the offense may issue a warrant ordering the apprehension of the person and commanding that he be brought before the court to answer the charge contained within the citation and the charge of his failure to appear as required. The person shall then be allowed to make a reasonable bond **to appear on a given date before the court.”**

## 5.6 TRIAL

### 5.6.1 SEQUENCE AND LEGAL BASIS OF TRIAL COMPONENTS

The following discussion is based on Judge **William Daniel's** *Georgia Criminal Trial Practice* and *Georgia Handbook on Evidence*. Both of these books are an excellent resource. They provide detailed accounts of the aspects of trial and they would be useful resources for the judge.

#### STANDARD OF PROOF

The State must be able to prove its allegations against the defendant beyond a reasonable doubt. Through the **evidence, the State must overcome the defendant's statutory presumption of innocence**. It is not necessary that the State **prove the defendant's guilt beyond all doubt**. **Instead, beyond all reasonable doubt refers to the degree of proof necessary for a reasonable person to reach a finding of guilt to a mental and moral certainty.**

#### OPENING STATEMENTS

**"The purpose of the opening statement is to inform the ... court of the nature of the case, and to give an outline of the proof the party anticipate[s] presenting. Recounting the evidence already presented and suggesting the conclusion demanded by that evidence is the subject matter of closing argument."** *Franks v. State*, 188 Ga. App. 263, 372 S.E.2d 831 (1988).

The State is entitled to make its opening statement first. In his or her opening statement, the solicitor should state what he or she expects to prove based on legally admissible evidence. It is reversible error to allow the solicitor to refer to evidence which is inadmissible at trial.

The defense may present its opening statement after the State's **opening statement or at the conclusion of the State's case-in-chief**.

#### PRESENTATION OF THE EVIDENCE

The State must present evidence to prove each element of the crime of which the defendant is accused. Both the State and the defense are entitled to some presumptions which have been created either statutorily or judicially. These include the presumption that all witnesses are telling the truth and the flight of the accused, if not satisfactorily explained, raises an inference of guilt.

Presumptions may, through the evidence, be rebutted. For a detailed analysis of the presentation of evidence, presumptions, and inferences. See Daniel, *Georgia Handbook on Criminal Evidence*, 2d ed.

At the close of the State's case, **the defendant may move for a directed verdict of acquittal. The judge should grant this motion "unless viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.** *Lee v. State*, 247 Ga. 411, 276 S.E.2d 590 (1981).

**The defense is under no obligation to present any evidence. The prosecution may not refer to the defendant's failure to testify if that is the defendant's choice.**

A Municipal Court Judge may take judicial notice of a city ordinance (but not venue). O.C.G.A. §24-2-221.

#### CLOSING ARGUMENTS

Both the prosecution and the defense are entitled to give closing arguments.

NOTE: The Criminal Justice Act of 2005, effective July 1, 2005, changed the rules for opening and closing arguments. Regardless of whether the defense presents a defense or not, the state has the right to close. Previously, if the defense called no witnesses and presented no evidence, the defense closed.

In misdemeanor cases, both the prosecution and the defense are limited to a half an hour for their closing arguments. O.C.G.A. §17-8-72.

Generally, there are few limitations on closing arguments. They are meant to be persuasive. However, neither attorney may urge his personal beliefs regarding the guilt or innocence of the defendant nor the truthfulness of the witnesses. Neither can refer to comments made by a witness to the attorney privately. The prosecutor cannot say that he attempts to only try the guilty. Nor can the defense attorney say that he only represents the innocent.

## 5.6.2 COMMON TRAFFIC OFFENSES

### FAILURE TO YIELD RIGHT OF WAY - O.C.G.A. §40-6-72

When approaching a yield sign, a driver shall slow down to a speed reasonable to existing conditions, and if required to for safety reasons, shall stop

1. at a clearly marked stop line, or
2. if no stop line, before entering a crosswalk, or
3. if no crosswalk, at the point nearest to intersecting roadway to be able to see approaching traffic.

After slowing or stopping, the driver shall yield right of way to any vehicle

1. that is in the intersection, or
2. that is approaching on another roadway in such a manner as to pose an immediate danger during the time that the driver is moving across or is within the intersection or junction of roadways.

In the event of a collision, if a driver has driven past a yield sign and has failed to stop, it is prima facie evidence of his failure to yield.

The penalty for a conviction of the offense of failure to yield the right of way is a fine not to exceed \$1,000, or imprisonment not to exceed 12 months, or both.

### FAILURE TO YIELD RIGHT OF WAY CHECKLIST

Did the defendant...

fail to slow down and stop if necessary...

for a vehicle that is in an intersection; or

for a vehicle that is approaching on another roadway in such a manner as to pose an immediate danger?

Penalty:

Fine not exceed \$1,000 or

imprisonment not to exceed 12 months or

both.

SPEEDING - O.C.G.A. §§40-6-181, 40-6-180, 40-6-187 AND 40-6-189

The maximum lawful vehicle speeds are set forth in O.C.G.A. §40-6-181. 40-6-187 requires that the traffic citation show the maximum lawful speed, and that a sentencing court must specify the amount by which a person convicted exceeded the speed limit.

The use of radar and laser speed detection devices carries with it certain evidentiary problems. The provisions for using these devices are set out in O.C.G.A. §40-14-1 et seq.

The penalty for a conviction of the offense of speeding (first offense) is as follows:

Up to 5 miles over limit: NO FINE  
6-10 miles over limit: \$25 maximum  
10-14 miles over limit: \$100 maximum  
15-19 miles over limit: \$125 maximum  
20-23 miles over limit: \$150 maximum  
24-33 miles over limit: \$500 maximum  
34 miles and over limit: up to \$1,000 and/or 12 months

Exception: Work Zones (O.C.G.A. §40-6-188):  
\$100-\$2,000 and/or 12 months

The second offense carries a fine of up to \$1,000 and/or 12 months.

See also, O.C.G.A. §40-6-180 covering too fast for conditions:  
12 months and/or \$1,000

Where the offender is under age 21, and the speed is in excess of 24 miles per hour over the speed limit, a license suspension will result as a consequence of a plea of conviction.

Note: In 2009 HB 160 amended O.C.G.A. §40-6-189, by creating a "super speeder" offense for anyone traveling 75+ mph on a two lane road or 85+ mph on a four lane road. The new offense will have an additional \$200 fine imposed by the Department of Driver Services within 30 days of adjudication. Failure to pay the fee imposed within 90 days after receipt of the notice shall result in the suspension of the driver's license or driving privileges of the offender, and an additional \$50 fee. These additional fees are not paid or assessed by the sentencing court.

NOTE: Objection to radar evidence must be made at the time of trial. The defendant must get an evidentiary ruling on the admissibility of this evidence. *Carver v. State*, 208 Ga. App. 405, 430 S.E.2d 790 (1993) overruled on other grounds by *Felix v. State*, 217 Ga. 534, 523 S.E.2d 1 (1999).

## ADMISSIBILITY

### Who can operate

Speed detection devices can only be operated by full-time registered or certified peace officers of the county. O.C.G.A. §40-14-2(c) and 35-8-12

NOTE: Speed detection devices cannot be used where any arresting officer or official of the court having jurisdiction is paid on a fee system. O.C.G.A. §40-14-2(b).

## CERTIFICATION

No state, county, municipal, or campus law enforcement agency may use speed detection devices unless the agency possesses a license in compliance with Federal Communications Commission rules, and unless each device, before being placed into service and annually after being placed in service, is certified for compliance by a technician possessing a certification as required by the Department of Public Safety. O.C.G.A. §40-14-4.

NOTE: State must establish all foundational elements, such as the introduction of evidence as to **the State Patrol's licensing and annual certification of its radar devices. *Brown v. State*, 204 Ga. App. 629, 240 S.E.2d 35 (1992)**, overruled on other grounds, *Carver v. State*, 208 Ga. App. 405, 430 S.E.2d 790 (1993) overruled on other grounds by *Felix v. State*, 217 Ga. 534, 523 S.E.2d 1 (1999).

Each county, municipal, or campus law enforcement officer using a radar device shall notify each person against whom the officer intends to make a case based on the use of the radar device that the person has the right to request the officer to test the radar device for accuracy. This notice shall be given prior to the time the citation and complaint or ticket is issued. O.C.G.A. §40-14-5(b).

Each state, county, municipal, or campus law enforcement officer using a radar device shall test the device for accuracy and record and maintain the results of the test at the beginning and end of each duty tour. O.C.G.A. §40-14-5(a).

## WHEN SPEED DETECTION DEVICES CAN BE USED

To be able to use speed detection devices, each county, municipality, college, and university must post signs on every highway which comprises a part of the state highway system at that point on the highway which intersects the corporate limits of the municipality, the county border of the boundary of the college or university campus. These signs shall warn approaching motorists that speed detection devices are being used. No such devices shall be used within 500 feet of any warning sign. O.C.G.A. §40-14-6(a). However, see *Frasard v State*, 322 Ga. App. 468, 745 S.E.2d

716 (2013), holding the state is not required to prove the existence of such signs in a speeding prosecution.

Each county, municipality, college or university shall also post signs warning approaching motorists of changes in the speed limit. These signs shall be clearly visible from every lane of traffic, in any traffic conditions and shall not be placed in such a manner that the view of such sign is subject to being obstructed by any other vehicle on the highway. No devices shall be used within 500 feet of any such warning sign. O.C.G.A. §40-14-6(b).

NOTE: This section requires that the device itself shall not be 500 feet from the county or municipal boundary. However, it does not forbid the penetration of the radar beam into the 500-foot zone. *State v. Vickery*, 184 Ga. App. 468, 361 S.E.2d 678, cert. denied, 184 Ga. App. 910, 361 S.E.2d 678 (1987).

No stationary speed detection device shall be employed by county, municipal, college, or university law enforcement officers where the vehicle from which the device is operated is obstructed from view of approaching motorists or is otherwise not visible for a distance of at least 500 feet. O.C.G.A. §40-14-7.

NOTE: State must present the necessary foundation, including proof of visibility of the police vehicle as required by this section, before evidence of speed gained through the use of a speed detection device is admissible. *Johnson v. State*, 189 Ga. App. 192, 375 S.E.2d 290 (1988), overruled on other grounds, *Carver v. State*, 208 Ga. App. 405, 430 S.E.2d 790 (1993) overruled on other grounds by *Felix v. State*, 217 Ga. 534, 523 S.E.2d 1 (1999).

No county, city, or campus officer shall be allowed to make a case based on the use of any speed detection device, unless the speed of the vehicle exceeds the posted speed limit by more than ten miles per hour and no conviction shall be had thereon unless such speed is more than ten miles per hour above the posted speed limit. EXCEPT, these limitations do not apply in properly marked school zones one hour before, during, and one hour after the normal hours of school operation, in properly marked historic districts, and in properly marked residential zones. O.C.G.A. §40-14-8.

NOTE: An area with a speed limit of 35 or over is not a residential zone per O.C.G.A. §40-14-8.

Evidence obtained by county or municipal law enforcement officers using speed detection devices within 300 feet of a reduction of speed sign inside an incorporated municipality or 600 feet of a reduction of speed sign outside an incorporated municipality is inadmissible. Also, evidence obtained using speed detection devices within 30 days of the posting of a new speed reduction sign is inadmissible. O.C.G.A. §40-14-9.

Speed detection devices shall not be used on a portion of a highway with a greater than 7 percent grade. O.C.G.A. §40-14-9.

ADMISSIBILITY OF RADAR AND/OR LASER (LIDAR) EVIDENCE CHECKLIST

Was the device

1. Certified;
2. Tested before and after each tour of duty;
3. Operated by a qualified peace officers;
4. Used in a permissible area
  - a. More than 500 feet from a sign warning that speed detection devices are used;
  - b. More than 500 feet from a change in speed limit sign;
  - c. The vehicle in which the device is used can be seen from at least 500 feet;
  - d. More than 300 feet of a reduction of speed sign within an incorporated municipality;
  - e. More than 600 feet of a reduction of speed sign outside an incorporated municipality;
  - f. Used on a road with less than 7% grade?

Did the speed of the vehicle exceed the posted speed limit by more than 10 miles per hour?

If the answer to any of these is no, then the radar evidence is inadmissible.

EXCEPTION: It is admissible if it was used in a school or residential speed zone.

NOTE: Defendant must object to radar evidence at trial. *Carver v. State*, 208 Ga. App. 405, 430 S.E.2d 790 (1993) overruled on other grounds by *Felix v. State*, 217 Ga. 534, 523 S.E.2d 1 (1999).



## RECKLESS DRIVING - O.C.G.A. §40-6-390

Any person who drives any vehicle in reckless disregard for the safety of persons or property commits the offense of reckless driving and is guilty of a misdemeanor.

The penalty for a conviction of the offense of reckless driving is a fine not to exceed \$1,000 or imprisonment not to exceed 12 months or both. [Offender under 21 years of age: license revocation.]

The court, in its discretion, may stay or suspend the execution of the sentence or place the defendant on probation.

### CASES

Exact location of the offense is not material. It is not necessary for the state to prove that the defendant drove recklessly in a certain block of a road as alleged in the indictment. *Chavous v. State*, 205 Ga. App. 455, 422 S.E.2d 327 (1992).

*Ayers v. State*, 272 Ga. 733, 534 S.E.2d 76 (2000) suggests that driving under the influence of marijuana can be reckless driving.

Going too fast can be reckless driving. *State v. Deshazier*, 155 Ga. App. 526, 271 S.E.2d 664 (1980).

Driving in the wrong lane can be reckless. *Shadix v. State*, 179 Ga. App. 664, 347 S.E.2d 298 (1986).

Reckless driving does not require a victim, and all that must be shown is a reckless disregard for person or property. *Howard v. State*, 301 Ga. App. 230, 687 S.E.2d 257 (2009).

## RECKLESS DRIVING CHECKLIST

Did the defendant...

drive any vehicle...

in reckless disregard for the safety...

of persons or property?

Penalty:

Fine not to exceed \$1,000 or

imprisonment not to exceed 12 months or both.

Under 21 - license revocation.

The judge, in his discretion, may stay or suspend the execution of the sentence, or place the defendant on probation.

## RACING - O.C.G.A. §40-6-186

No person shall drive any vehicle on a highway in this state in a race, speed competition, drag race or acceleration contest, test of physical endurance, exhibition of speed or acceleration or for the purpose of making a speed record. No person shall participate in any manner in any such race.

Violation of this statute is a misdemeanor. License suspension.  
Offender under 21 years of age = license revocation.

## DEFINITIONS

Racing - use of one or more vehicles in an attempt to outgain, outdistance, or prevent another vehicle from passing, to arrive at a given destination ahead of another vehicle or vehicles, or to test the physical stamina or endurance of drivers over long-distance driving routes.

Drag race - the operation of two or more vehicles from a point side by side at accelerated speeds in a competitive attempt to outdistance each other or the operation of more vehicles over a common selected course from the same point to the same point for the purpose of comparing relative speeds or power of acceleration.

## CASES

In the case of an occupant who was neither the driver nor the owner of the car, the State must prove positive wrongful acts. Simply being in the car is not enough to warrant conviction under this statute. *Snell v. McCoy*, 135 Ga. App. 832, 219 S.E.2d 482 (1975).

One cannot be convicted of racing unless he acts with intention or criminal negligence. *Snell v. McCoy*, 135 Ga. App. 832, 219 S.E.2d 482 (1975).

## RACING CHECKLIST

Did the defendant knowingly...

drive any vehicle...

on a highway of this state...

in a race, or

speed competition, or

drag race or acceleration contest, or

test of physical endurance, or

exhibition of speed or acceleration, or

for the purpose of making a speed record?

Did the defendant participate in the above in any manner?

Penalty:

Fine not to exceed \$1,000 or

imprisonment not to exceed 12 months or

both. License suspension. Under 21 - license revocation.

The judge, in his discretion, may stay or suspend the execution of the sentence, or place the defendant on probation.

## DRIVING UNDER THE INFLUENCE - O.C.G.A. §40-6-391

A person shall not drive or be in actual physical control of any moving vehicle while:

1. Under the influence of alcohol to the extent that it is less safe for the person to drive;
2. Under the influence of any drug to the extent that it is less safe for the person to drive;
3. Under the intentional influence of any glue, aerosol, or other toxic vapor to the extent that it is less safe for the person to drive;
4. Under the combined influence of any two or more of the substances specified in paragraphs (1) through (3) to the extent that it is less safe for the person to drive;
5. **The person's alcohol concentration is 0.08 grams or more at any time within three hours after such driving or being in actual physical control ended;**
6. Subject to the provisions of subsection (b) of this Code section, there is any amount of marijuana or controlled substance, as defined in Code Section 16-13-21, present in the person's **blood or urine, or both**, including the metabolites and derivatives of each or both without regard to whether or not any **alcohol is present in the person's breath or blood.** O.C.G.A. §40-6-391(a). The Georgia Supreme Court has declared O.C.G.A. §40-6-391 (a) (6) unconstitutional vis a vis marijuana due to the lack of relation between the legislative distinction between legal and illegal marijuana use (see O.C.G.A. §40-6-391 (b)) and the public safety purpose.

Vehicle is broadly construed, and includes a golf cart. *Simmons v. State*, 281 Ga. App. 252, 635 S.E.2d 849 (2006).

It is not a crime merely to occupy a parked automobile while under the influence of alcohol. *Ferguson v. City of Doraville*, 186 Ga. App. 430, 367 SE2d 551 (1988).

Prior DUIs may potentially be used as evidence at trial. See *State v. Jones*, 297 Ga. 156, 773 S.E.2d 170 (June 1, 2015). Reversing 326 Ga. App. 658, 757 S.E.2d 261 (2014). Under 2013 Evidence Code, Court of Appeals erred by holding that evidence of defendant's prior DUI wasn't relevant to show knowledge and intent in defendant's current DUI prosecution. Under the "liberal" relevance standard of new O.C.G.A. § 24-4-401, "which deems evidence relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,'" evidence that defendant intentionally drove while under the influence on a prior occasion was relevant to his intent on this occasion; and contrary to the Court of Appeals' holding, the fact that DUI is a general intent crime doesn't make the defendant's intent irrelevant. "[W]e hold, consistent with the underlying principles of the rule prohibiting other acts evidence offered for an impermissible purpose, that other acts evidence may be relevant under Rule 404(b), without regard to whether the charged crime is one requiring a specific or general intent, when it is offered for the permissible purpose of showing a criminal defendant's intent and knowledge."

NOTE: Different alcohol levels apply as to drivers under age 21 (0.02) and drivers with a CDL (commercial) license (0.04).

**NOTE: The phrase "driving under the influence," with respect to both alcohol and drugs and the phrase "to the extent it is less safe for the person to drive" are not two separate elements; but are equivalent concepts describing the same physical condition. *Kevezz v. State*, 265 Ga. 78, 454 S.E.2d 441 (1995).**

NOTE: The fact that any person charged with violating this Code section is or has been legally entitled to use a drug shall not constitute a defense against any charge of violating this Code section; provided, however, that such person shall not be in violation of this Code section unless such person is rendered incapable of driving safely as a result of using a drug other than alcohol which such person is legally entitled to use. O.C.G.A. §40-6-391(b). But see *Love v. State*, 517 S.E.2d 53, 271 Ga. 398 (Ga., 1999), holding O.C.G.A. §40-6-391 (b)(6) unconstitutional as to marijuana, which leaves the status of DUI marijuana cases somewhat in question. *Ayers v. State*, 272 Ga. 733, 534 S.E.2d 76 (2000) suggests that driving under the influence of marijuana can be reckless driving.

## DUI ADMINISTRATIVE LICENSE SUSPENSIONS

Note: Since Municipal Courts do not deal with these suspensions, this section is a brief summary of the process and is not intended to be a technical "how-to." The below is a general summary of the procedure as in existed in 2001. An administrative driver's license suspension is an entirely different suspension than the suspension that is generated by a DUI conviction.

NOTE: Effective July 1, 2008, the 4th DUI in ten years is a felony (this deals only with offenses after that date), so check dates on the prior DUIs carefully. The penalty for the 4th DUI (not triable in municipal court) is 1-5 years in jail (all but 90 days can be suspended), at least 60 days community service (unless defendant is sentenced to at least three years in prison) and 5 years probation, less time served, plus all the other penalties for a third offense DUI.

If a driver is arrested for DUI, the arresting officer should read the Georgia Implied Consent Notice at the time of the arrest and request that the driver take one or more State administered chemical test. Breath tests are performed on the Intoxilyzer 5000<sup>®</sup>. Blood and urine tests are also sometimes used.

If a person refuses to take the requested State administered chemical test, or takes the test and has a BAC of 0.08 grams if age 21 or over (0.02 if under 21, and 0.04 if operating a commercial vehicle), the officer is required by law to submit a sworn report to the Department of Public Safety to initiate an administrative license suspension hearing based on the "per se" violation. This hearing is separate and apart from any criminal hearing (plea or trial) and is conducted by the Office of State Administrative Hearings (OSAH). The driver has ten business days to request an administrative hearing. (Do not count weekends, state holidays, or the day of the arrest).

If the arresting officer initiates a refusal suspension, and one does not request a hearing in a timely manner, then on the 31<sup>st</sup> day after the arrest, the driver's license will be suspended for one to five years depending on what is in the driver's history. No limited permit is allowed, even for a first ever DUI charge. The same penalty applies if one requests a hearing in a timely manner but loses at the administrative hearing.

For a first offense within five years, if the officer initiates a "per se" suspension (one based on the BAC), and if one does not request a hearing in a timely manner, then on the 31<sup>st</sup> day after the arrest, one's driver's license will be suspended for one year. There may be a 30-day work permit. After that permit expires, one can receive early reinstatement of a driver's license if one completes DUI school and pays the appropriate reinstatement fee (\$200.00 via mail and \$210.00 if you apply in person). The same penalty applies if one requests a hearing in a timely manner

but loses at the administrative hearing.

For a second offense within five years, if one does not request a hearing in a timely manner, or loses at the hearing, the suspension is three years with no work permit. The same rules apply on a third offense except the suspension can be five years.

If one receives an administrative suspension because of a "per se" alcohol level, all of that suspension time will be credited against any license suspension based on a Court conviction or guilty plea. However, there is no such credit for a refusal case.

## DRIVING UNDER THE INFLUENCE CHECKLIST

A person shall not drive or be in actual physical control of any moving vehicle while:

1. Under the influence of alcohol to the extent that it is less safe for the person to drive;
2. Under the influence of any drug to the extent that it is less safe for the person to drive;
3. Under the intentional influence of any glue, aerosol, or other toxic vapor to the extent that it is less safe for the person to drive;
4. Under the combined influence of any two or more of the substances specified in paragraphs (1) through (3) to the extent that it is less safe for the person to drive;
5. **The person's alcohol** concentration is 0.08 grams or more at any time within three hours after such driving or being in actual physical control ended (0.02 for under 21 drivers and 0.04 for a CDL); or
6. Subject to the provisions of subsection (b) of this Code section, there is any amount of marijuana or controlled substance, as defined in Code Section 16-13-21, present **in the person's blood or urine, or both, including the metabolites and derivatives of** each or both without regard to whether **or not any alcohol is present in the person's** breath or blood. O.C.G.A. §40-6-391(a). (Note that the marijuana portion of the statute has been ruled unconstitutional.)

## GEORGIA'S DUI STATUTE AND PENALTIES

### IMPORTANT MANDATORY SENTENCE NOTE:

In *State v. Lin*, 268 Ga. App. 702, 603 S.E.2d 315 (2004), the Court of Appeals ruled that an 11 month & 29 day sentence for a DUI was an illegal sentence and remanded for re-sentencing. The ruling was based on O.C.G.A. 40-6-391(c)(1)(E), which requires a total of 12 months of combined confinement and probation for a first DUI conviction. The defendant had asked for the 11 month/29 day sentence in light of immigration concerns. The court sentenced accordingly, but the state appealed.

O.C.G.A. 40-6-391(c)(1)(E) is applicable to DUI cases only.

O.C.G.A. §40-6-391, **Georgia's main DUI statute**, is lengthy and should be read closely. It is internet-accessible at [http://www.legis.state.ga.us/cgi-bin/gl\\_codes\\_detail.pl?code=40-6-391](http://www.legis.state.ga.us/cgi-bin/gl_codes_detail.pl?code=40-6-391).

NOTE: O.C.G.A. §15-21-112 imposes as an additional penalty in D.U.I. of a sum equal to the lesser of \$26.00 or 11 percent of the original fine.

### ADMISSIBILITY ISSUE—REFUSAL AND IMPLIED CONSENT

In any criminal trial, the refusal of the defendant to permit a chemical analysis to be made of his blood, breath, urine, or other bodily substance at the time of his arrest shall be admissible in evidence against him. O.C.G.A. §40-6-392(d).

O.C.G.A. Section 40-5-67.1 (d.1) specifically authorizes a law enforcement officer to obtain a search warrant for blood testing even after a refusal to submit to State testing.

Note that implied consent warnings do not have to be understood by the Defendant to be valid. There is no requirement that a DUI defendant have an interpreter when implied consent warnings are read, so a Defendant who does not understand English does not have a right to have his warning translated. See *Rodriguez v. State*, 275 Ga. 283, 565 S.E. 2d 458 (2002).

### PERFORMANCE OF TEST

**Chemical analysis of the person's blood, urine, breath, or other bodily substance, to be considered valid under this Code section**, shall have been performed according to the methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation on a machine which was operated with all its electronic and operating components prescribed by its manufacturer properly attached and in good working order and by an individual possessing a valid permit issued by the Division of Forensic Sciences for this purpose.

The Division of Forensic Sciences of the Georgia Bureau of Investigation shall approve satisfactory techniques or methods to ascertain the qualifications and competence of individuals to conduct analyses and to issue permits, along with requirements for properly operating and maintaining any testing instruments, and to issue certificates certifying that instruments have met those requirements, which certificates shall be subject to termination or

revocation at the discretion of the Division of Forensic Sciences. O.C.G.A. §40-6-392(1)(1)(A).

When a person shall undergo a chemical test at the request of a law enforcement officer, only a physician, registered nurse, laboratory technician, emergency medical technician, or other qualified person may withdraw blood for the purpose of determining the alcoholic content therein, provided that this limitation shall not apply to the taking of breath or urine specimens. O.C.G.A. §40-6-392(a)(2)

The person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. Justifiable failure or inability to obtain an additional test shall not preclude the admission of evidence relating to the test or tests taken at the direction of the law enforcement officer. O.C.G.A. §40-6-392(a)(3)

Upon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or his attorney. The arresting officer at the time of arrest shall advise the person arrested of his rights to a chemical test or tests according to this Code section. O.C.G.A. §40-6-392(a)(4)

#### QUALIFIED PERSON TO DRAW BLOOD

A certification by the office of the Secretary of State or by the Department of Human Resources that a person was a **licensed or certified physician, physician's assistant, registered nurse, practical nurse, medical technologist, medical laboratory technician, or phlebotomist** at the time the blood was drawn shall be admissible into evidence for the purpose of establishing that such person was qualified to draw blood as required by this Code section. O.C.G.A. §40-6-392(e)

Certification of the breath-testing instrument:

Each time an approved breath-testing instrument is inspected, the inspector shall prepare a certificate which shall be signed under oath by the inspector and which shall include the following language:

*"This breath-testing instrument (serial no. \_\_\_\_\_) was thoroughly inspected, tested, and standardized by the undersigned on (date \_\_\_\_\_) and all of its electronic and operating components prescribed by its manufacturer are properly attached and are in good working order."*

When properly prepared and executed, as prescribed in this subsection, the certificate shall, notwithstanding any other provision of law, be self-authenticating, shall be admissible in any court of law and shall satisfy statutory requirements. O.C.G.A. §40-6-392 (f).

## TWO SEQUENTIAL BREATH TESTS

For arrests made on or after January 1, 1995, where the state selects breath testing, two sequential breath samples shall be requested for the testing of alcohol concentration. For either or both of these sequential samples to be **admissible in the state's** case-in-chief, the readings shall not differ from each other by an alcohol concentration of greater than 0.02 grams and the lower of the two results shall be determinative for accusation and indictment purposes and administrative license suspension purposes. O.C.G.A. §40-6-392(a)(1)(B).

## ADMISSIBILITY OF BLOOD CHEMICAL ANALYSIS CHECKLIST

Implied consent

Did the defendant...

refuse to permit...

a chemical analysis to be made...

of his blood, urine, breath or other bodily substance?

If yes, this is admissible as evidence against the defendant.

Was the test administered...

by a qualified person...

according to approved methods...

on a certified testing instrument?

If a breath test:

Were two sequential breath samples taken; and

did the results vary by no more than .02 grams?

## DUI NOLO CONTENDERE PLEAS

The decision to accept a plea of nolo contendere to a charge of violating Code Section §40-6-391 shall be at the sole discretion of the judge, but if such plea is accepted, the penalties provided for in subsection (c) of O.C.G.A. §40-6-391 shall be imposed.

However, no such plea of nolo contendere shall be accepted if the person charged with violating Code Section 40-6-391 had an alcohol concentration of more than 0.15 at any time within three hours after driving or being in control of any moving vehicle from alcohol consumed before such driving or being in control ended. O.C.G.A. §40-6-391.1(a)

If the defendant has not been convicted of or had a plea of nolo contendere accepted to a charge of violating Code Section 40-6-391 with the previous five years no such plea shall be accepted unless, at a minimum, the following conditions are met:

1. the defendant has filed a verified petition with the court requesting that such plea be accepted and setting for the facts and special circumstances necessary to enable the judge to determine that accepting such plea is in the best interest of justice; and
2. **the judge has reviewed the defendant's driving records that are on file with the Department of Public Safety.** O.C.G.A. §40-6-391.1(b).

The judge, as a part of the record of the disposition of the charge, shall set forth, under seal of the court, his reasons for accepting the plea of nolo contendere. O.C.G.A. §40-6-391.1 (c).

NOTE: The judge is under no obligation to accept a nolo contendere plea simply because the petition is acceptable on its face. *Robinson v. State*, 173 Ga. App. 285, 326 S.E.2d 245 (1985).

## DUI NOLO CONTENDERE PLEA CHECKLIST

Did the defendant...

have a blood alcohol content...

of more than 0.15 grams?

If yes, no nolo contendere plea shall be accepted.

Did the defendant...

have a conviction or nolo contendere plea...

for violation of 40-6-391...

in the past 5 years?

If yes, no nolo contendere plea shall be accepted.

To accept a plea of nolo contendere, the following minimum conditions shall be met:

1. The defendant has filed a verified petition
  - a. Requesting such plea be accepted, setting out facts and circumstances as to why accepting the plea would be in the best interest of justice; and
2. The judge has reviewed the **defendant's driving records.**
3. The judge shall set forth, under seal of court, his reasons for accepting the plea.

## DUI INFERENCES AND PRESUMPTIONS

O.C.G.A. §40-6-392(b) provides inferences and presumptions in DUI trials:

*(b) Except as provided in subsection (c) of this Code section, upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of Code Section 40-6-391, the amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, may give rise to inferences as follows:*

*(1) If there was at that time an alcohol concentration of 0.05 grams or less, the trier of fact in its discretion may infer therefrom that the person was not under the influence of alcohol, as prohibited by paragraphs (1) and (4) of subsection (a) of Code Section 40-6-391; or*

*(2) If there was at that time an alcohol concentration in excess of 0.05 grams but less than 0.08 grams, such fact shall not give rise to any inference that the person was or was not under the influence of alcohol, as prohibited by paragraphs (1) and (4) of subsection (a) of Code Section 40-6-391, but such fact may be considered by the trier of fact with other competent evidence in determining whether the person was under the influence of alcohol, as prohibited by paragraphs (1) and (4) of subsection (a) of Code Section 40-6-391.*

*(c)(1) In any civil or criminal action or proceeding arising out of acts alleged to have been committed in violation of paragraph (5) of subsection (a) of Code Section 40-6-391, if there was at that time or within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or being in actual physical control ended an alcohol concentration of 0.08 or more grams in the person's blood, breath, or urine, the person shall be in violation of paragraph (5) of subsection (a) of Code Section 40-6-391.*

*(2) In any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of subsection (i) of Code Section 40-6-391, if there was at that time or within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or being in actual physical control ended an alcohol concentration of 0.04 grams or more in the person's blood, breath, or urine, the person shall be in violation of subsection (i) of Code Section 40-6-391.*

*(3) In any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person in violation of subsection (k) of Code Section 40-6-391, if there was at that time or within three hours after driving or being in actual physical control of a moving vehicle from alcohol consumed before such driving or being in actual physical control ended an alcohol concentration of 0.02 grams or more in the person's blood, breath, or urine, the person shall be in violation of subsection (k) of Code Section 40-6-391.*

*(d) In any criminal trial, the refusal of the defendant to permit a chemical analysis to be made of his blood, breath, urine, or other bodily substance at the time of his arrest shall be admissible in evidence against him.*

## DUI AND THE UTC - A LOOK AT *TAYLOR V. STATE*

*Taylor v. State*, 265 Ga. App. 637, 595 S.E.2d 344 (Ga. App., 2004) contains an excellent discussion of how to deal with the multiple types of DUI on a UTC and is thus reproduced here in its entirety:

TAYLOR V. STATE, 265 GA. APP. 637, 595 S.E.2D 344 ADAMS, JUDGE.)(2004)

*Fred Gilbert Taylor Jr. was tried by jury and convicted of driving under the influence of alcohol, having an open container, and driving on a suspended license. He appeals only the conviction of driving under the influence.*

*The evidence shows that after midnight on May 12, 2002, Officer Thigpen of the Sardis Police Department received a call that an accident had occurred. At the scene, Thigpen saw a white car in a ditch with the front end in the air. Taylor was sitting in the back seat among several opened and unopened cans of beer. The hood of the car was still warm, the keys were in the ignition, and the radio was on. Taylor said that he had not been driving, rather someone named "Danny" had been driving but had fled. Yet there were no tracks in the eight-to-twelve-inch-high grass in the direction that Taylor indicated the driver had gone. And the officer saw a wet spot on Taylor's jeans that was consistent with the location of a wet spot on the front seat. Taylor's breath smelled of alcohol and he had difficulty standing up straight. His blood-alcohol level after the accident was 0.223 grams. The State also introduced evidence of a similar transaction in which Taylor was earlier convicted of driving under the influence in North Carolina. The State did not introduce any evidence that Taylor was under the influence of drugs or toxic vapors.*

*With regard to driving under the influence, the court charged that Taylor could be convicted under any of four scenarios: driving under the influence of alcohol-less safe; driving under the influence of drugs-less safe; driving under the influence of any two or more of either drugs, alcohol, and toxic vapors-less safe; and having a blood-alcohol level of .08 or more within three hours of driving. The jury returned a verdict finding Taylor guilty of "driving under the influence."*

*1. Taylor contends that the trial court erred by failing to grant his motion to dismiss the DUI charge for failure of the Uniform Traffic Citation to place him on notice of the charge. He contends that the Uniform Traffic Citation only indicated that he was charged with O.C.G.A. §40-6-391(a)(4), which prohibits driving under the combined influence any two or more of drugs, alcohol, or toxic vapors to the extent that it is less safe to drive.[fn1] He asserts that he was not on proper notice that he was going to be tried under either subsection (a)(1) (DUI, alcohol, less safe) or subsection (a)(5) (DUI - alcohol concentration of .08 and above).*

*The Uniform Traffic Citation is separated into five sections: Violator, Violation, Location, Summons, and Officer Certification. In the violation section, there are three boxes. The first is obviously for speeding. The second is marked "DUI," and it indicates what type of test has been administered, the result of the test, and who administered the test. The third box is entitled "Offense (Other than above)." In this section, the officer can enter the name of an offense, indicate a code section, and write in other remarks. By their location and appearance, and based on the title of the third box, we conclude that each box is used to indicate violations against the defendant. A fair construction of the second box shows that it indicates a violation of O.C.G.A. §40-6-391(a)(5) (unlawful alcohol concentration). See *Clarrington v. State*, 178 Ga. App. 663, 667(6) (344 S.E.2d 485) (1986) ("After conviction, an indictment will be construed most strongly in favor of the State").*

*On Taylor's Uniform Traffic Citation, the second box shows that Taylor had his breath tested and that the test results were ".223." Therefore, Taylor was on notice of a charge of unlawful alcohol concentration under §40-6-391(a)(5). Compare *Shelton v. State*, 216 Ga. App. 634 (1) (455 S.E.2d 304) (1995) (where Uniform Traffic Citation charged defendant with a violation of §40-6-391 as a whole and indicated his blood-alcohol level, defendant was on notice of the charges against him).*

*In the third section, Taylor was charged with "DUI," and the officer indicated that the offense was "in Violation of Code Section 40-6-391 A-4." Under Georgia law, "the description of the offense charged prevails over any Code section cited." (Punctuation omitted.) In the Interest of B.C.G., 235 Ga. App. 1, 3(1) (508 S.E.2d 239) (1998). Here, the description of the offense was "DUI" or driving under the influence. The Supreme Court has held that the phrase "driving under the influence" describes those subsections of O.C.G.A. §40-6-391(a) that prohibit a person from driving when they are under the influence of alcohol, drugs, or toxic vapors to the extent that it is less safe for the person to drive. *Kevinezz v. State*, 265 Ga. 78, 81 (2)(b) (454 S.E.2d 441) (1995). See O.C.G.A. §40-6-391(a)(1)-(4). Accordingly, Taylor was also on notice that he was charged with subsections (1) through (4), which includes driving under the influence of alcohol to the extent that it is less safe to drive. See O.C.G.A. §40-6-391(a)(1).*

*We conclude that Taylor was on notice of a charge of violating subsections (1) through (5) of O.C.G.A. §40-6-391.*

*2. Taylor contends that the evidence was insufficient to convict. But, there was evidence from which a jury could conclude that Taylor was guilty of driving under the influence of alcohol in a less safe manner and guilty of having a blood-alcohol level of 0.08 or more within three hours of driving. O.C.G.A. §40-6-391 (a)(1) & (5).*

*3. Taylor contends that the trial court improperly charged the jury on subsections (a)(1) and (a)(5). But, our holding in Division 1 resolves this issue against Taylor.*

*Judgment affirmed. Andrews, P.J., and Barnes, J., concur.*

*[fn1] Prior to July 1, 1996, subsection (a)(4) pertained to driving with an unlawful blood-alcohol concentration. See Ga. L. 1994, p. 1600, §8; compare Ga. L. 1996, p. 1413, §1.*

## SECOND IN FIVE DUI DRIVER'S LICENSE SUSPENSIONS

Every Georgia resident convicted of a 2/5 DUI arising from an incident that occurred on or after July 1, 2001 is subject to the ignition interlock requirements of O.C.G.A. §§40-6-391(c) and 42-8-110, et seq. As of January 1, 2013, a defendant is eligible for issuance of an ignition interlock limited driving permit after serving the first 120 days of the 18 month license suspension. The amount of time the defendant must hold the ignition interlock limited driving permit is calculated depending upon the law in effect on the date of the incident that triggered the 2/5 DUI conviction. After presenting monthly monitoring reports for the required number of months, the defendant is eligible for issuance of a limited driving permit without the interlock restriction for the balance of the suspension, if any. If the Court that imposed the 2/5 DUI conviction waives the interlock requirement due to undue financial hardship on the defendant, then he/she is not eligible for a limited driving permit for the first 12 months of the suspension after which he/she would be eligible for issuance of a limited driving permit without the interlock restriction for the balance of the suspension.

Incident Date	Interlock Requirement
July 1, 2001 to December 31, 2012	6 months
January 1, 2013 to June 30, 2013	8 months
July 1, 2013 or later	12 months

After presenting monthly monitoring reports for the required number of months, the defendant is eligible for issuance of a limited driving permit without the interlock restriction for the balance of the suspension, if any. If the Court that imposed the 2/5 DUI conviction waives the interlock requirement due to undue financial hardship on the defendant, then he/she is not eligible for a limited driving permit for the first 12 months of the suspension after which he/she would be eligible for issuance of a limited driving permit without the interlock restriction for the balance of the suspension.

Interlock permit issuance requirements as of July 1, 2013:

1. Certificate of completion from DUI Drug or Alcohol Use Risk Reduction Program
2. Documentation of clinical treatment enrollment or permission from DUI court program
3. Documentation of ignition interlock device installation
4. \$25 permit fee
5. Addition requirements for full reinstatement:
  - a. Documentation of clinical treatment completion
  - b. Documentation of interlock monitoring for the appropriate number of months, *supra*
  - c. \$210.00 reinstatement fee (\$200.00 if paid by mail)

## DRIVING WITHOUT A VALID OPERATOR'S PERMIT (SUSPENDED OR REVOKED) - O.C.G.A. §40-5-121

Any municipal court shall be authorized to impose the punishment provided in this Code Section upon a conviction of violating any ordinance adopting the provisions of this Code Section. O.C.G.A. §40-5-121(d). There is an exception. The fourth offense in five years is a felony and is not triable in municipal court.

Except for habitual violators, any person who drives a motor vehicle on a highway of this state at a time when his or her privilege to do so is suspended, disqualified or revoked shall be guilty of a misdemeanor for the first conviction and a high and aggravated misdemeanor for the second or subsequent convictions within 5 years.

Penalty for first conviction within 5 years shall be imprisonment of not less than 2 days nor more than 6 months and the court may impose a fine of not less than \$500 nor more than \$1,000. Penalty for second and third conviction within 5 years shall be imprisonment for not less than 10 days nor more than 12 months and the court may impose a fine of not less than \$1,000 nor more than \$2,500.

Until July 1, 2006, a charge of driving with suspended or disqualified license shall not be made where suspension is a result of failure to respond to a citation for a traffic violation under 40-5-56 or an insurance cancellation unless the officer had verified service date and that date is placed on the uniform citation. This requirement was removed by Act 590 HB 1253 effective July 1, 2006.

*Wilson v. State*, 278 Ga.App. 420, 629 S.E.2d 110 (Ga. App., 2006) holds that a certified copy of the defendant's driving history is one way, but not the only way, to prove a suspension. A prosecutor's testimony that he gave the defendant a Notice of Suspension, and an admission by Defendant to the officer that he knew he was driving with a suspended license also are proof.

NOTE: This section requires mandatory imprisonment of not less than two days nor more than six months upon the first misdemeanor conviction. The sentence may be suspended or probated pursuant to the authority provided in O.C.G.A. §17-10-1(a). 1992 **Op. Att'y Gen. No. U92-10**.

The five year period measured from date of first arrest to the date of the current arrest. Only one plea of nolo contendere can be accepted within a 5-year period. No limited driving permit is available.

Many violations of driving with a suspended license involve persons who were eligible to have had a license reinstated but did not. Since conviction for a suspended license may have additional ramifications for reinstatement of a license, some judges, in their discretion, defer disposition of these cases to give a Defendant time to get their license reinstated and then allow a plea to a lesser offense, such as no license or invalid license.

Habitual violators are sentenced under different rules. O.C.G.A. §40-5-58(c).

### CASES

Actual or legal notice to the defendant of the suspension of his license is an element of the offense of driving with a suspended license. *State v. Brooks*, 194 Ga. App. 465, 390 S.E.2d 673 (1990).

Because the equal protection clause of the 14<sup>th</sup> Amendment doesn't deny the state the power to treat different classes of people in different ways, the General Assembly could have reasonably concluded that habitual violators

are more dangerous than those who have had their licenses suspended or revoked. Thus, habitual violators are subject to a different sentencing structure. *Gaines v. State*, 260 Ga. 267, 392 S.E.2d 524 (1990).

But the prosecutor is not required to charge a habitual violator with an O.C.G.A. §40-5-58 felony. It is up to his discretion. *Noeske v. State*, 181 Ga. App. 778, 353 S.E.2d 635 (1987).

#### DRIVING WITHOUT A LICENSE CHECKLIST

Did the defendant...

drive a motor vehicle...

on a highway of this state...

when his privilege to do so

was suspended, or

disqualified, or revoked?

First offense - misdemeanor

Imprisonment of not less than 2 days nor more than 6 months; and

Fine of not less than \$500 nor more than \$1,000.

Sentence may be suspended or probated.

Second or subsequent offense - high and aggravated misdemeanor

Imprisonment of not less than 10 days nor more than 12 months; and

Fine of not less than \$1,000 nor more than \$2,500.

## DRIVING WITHOUT INSURANCE - O.C.G.A. §40-6-10

NOTE: Given the possibility of a Defendant being convicted of no insurance (and losing his license) in a situation where he has insurance but the state database is or was incorrect, consider requiring such Defendants to obtain a letter from their insurance agent or company verifying that their policy was in effect on the date of their citation.

The requirements for proof of insurance look simple on paper and more complex in practice. The design is to allow a police officer to be able to verify insurance by a hookup between insurers and the state, with no need to show other proof. The implementation was delayed more than once, and Courts may have to use some common sense in determining whether a driver has reasonably complied with the law. Additionally, problems happen. Insurers **send in reports with incorrect numbers and police computers go down. Nonetheless, the state's computer database** is the only official proof of insurance in most cases.

The intent was that beginning at a point in time, amended in 2002 to February 1, 2003 insurance cards would no longer be proof of insurance when questioned by law enforcement or when renewing a vehicle registration. Instead a state maintained database, the Georgia Electronic Insurance Compliance System, (GEICS), was to be used to verify vehicle insurance coverage. Insurance companies, agents and any other insurers issuing or renewing any policy of motor vehicle liability insurance will be required to provide all the insurance information to the DDS within 30 days that coverage begins. Upon writing a policy, the insurance company uploads to the state's computers with the vehicle's identification number (VIN) and the policy's effective date. This is cross-referenced with the tag database, which also tracks vehicles by their VIN number. In the same way police officers can now pull up a vehicles registration to see whether it's stolen, they would immediately know whether the vehicle pulled over is insured. The database is also be utilized in County Tax Commissioner's offices when vehicle owners go to obtain or renew vehicle tags.

Unfortunately, there have been problems and delays in implementing this and a new delay was approved in the 2003 legislative session. Even with the system working and in place, common sense from police and the courts may help avoid injustice due to glitches. The 2003 statute provided that until December 31, 2003 drivers should carry an insurance card and use it as proof, and in most cases after that date it is not proof, but insurers should still issue them. The cards still should be shown in case of accidents to other parties in an accident, and may serve as proof in other states.

The statute does allow for certain documents to function as proof of insurance on a temporary basis:

If the policy providing such coverage was applied for within the last 30 days, a current written binder for such coverage for a period not exceeding 30 days from the date such binder was issued shall be considered satisfactory proof or evidence of required minimum insurance coverage.

If the vehicle is operated under a rental agreement, a duly executed vehicle rental agreement shall be considered satisfactory proof or evidence of required minimum insurance coverage.

If the owner acquired ownership of the vehicle within the past 30 days... but the vehicle is currently effectively provided with required minimum insurance coverage under the terms of a policy providing required minimum insurance coverage for another motor vehicle, then a copy of the insurer's declaration of coverage under the policy providing such required minimum insurance coverage for such other vehicle shall be considered satisfactory proof or evidence of required minimum insurance coverage for the vehicle, but only if accompanied by proof or evidence that

the owner acquired ownership of the vehicle within the past 30 days.

If the vehicle is insured under a fleet policy as defined in Code Section 40-2-137 providing the required minimum insurance coverage or if the vehicle is engaged in interstate commerce and registered under the provisions of Article 3A of Chapter 2 of this title, the insurance information card issued by the insurer shall be considered satisfactory proof of required minimum insurance coverage for the vehicle.

If the vehicle is insured under a certificate of self-insurance issued by the Commissioner of Insurance providing the required minimum insurance coverage under which the vehicle owner did not report the vehicle identification number to the Commissioner of Insurance, the insurance information card issued by the Commissioner of Insurance shall be considered satisfactory proof of required minimum insurance coverage for the vehicle, but only if accompanied by a copy of the certificate issued by the Commissioner of Insurance.

The statute requires

*Every law enforcement officer in this state shall determine if the operator of a motor vehicle subject to the provisions of this Code section has the required minimum insurance coverage every time the law enforcement officer stops the vehicle or requests the presentation of the driver's license of the operator of the vehicle. If a law enforcement officer of this state determines that the owner or operator of a motor vehicle subject to the provisions of this Code section does not have proof or evidence of required minimum insurance coverage, the arresting officer shall issue a uniform traffic citation for operating a motor vehicle without proof of insurance. If the court or arresting officer determines that the operator is not the owner, then a uniform traffic citation may be issued to the owner for authorizing the operation of a motor vehicle without proof of insurance.*

The statute further states

*If the person receiving a citation under this subsection shows to the court having jurisdiction of the case that required minimum insurance coverage was in effect at the time the citation was issued, the court shall return the driver's license upon payment of may impose a fine not to exceed \$25. The court shall not in this case forward a record of the disposition of the case to the department and the driver's license of such person shall not be suspended.*

## CASES

**Defendant's inability to present proof of insurance** does not establish that he knowingly operated a motor vehicle without effective insurance. *Jones v. State*, 195 Ga. App. 569, 394 S.E.2d 387 (1990).

Failure to keep insurance and driving a vehicle without liability insurance are separate offenses. *Jones v. State*, 195 Ga. App. 569, 394 S.E.2d 387 (1990).

## FAILURE TO PROPERLY USE PASSENGER SAFETY RESTRAINTS - O.C.G.A. §40-8-76 AND 40-8-76.1

Each occupant of the front seat of a passenger vehicle shall be restrained by a seat safety belt. Exceptions:

1. A driver or passenger frequently stopping and leaving the vehicle or delivering property from the vehicle, if the speed of the vehicle between does not exceed 15 miles per hour;
2. **Written doctor's excuse**

3. Official certificate **stating can't wear**
4. Operating vehicle in reverse
5. Vehicle with a model year before 1965
6. Vehicle not required to be equipped with seat belts under federal law
7. A passenger vehicle operated by a rural letter carrier of the United States Postal Service while performing duties as a rural letter carrier
8. Newspaper delivery person
9. Person performing emergency service

Failure to comply does not constitute a criminal act nor a violation of an ordinance, nor is it a moving traffic violation purposes of O.C.G.A. §40-5-57 (Suspension or revocation of license of habitually negligent or dangerous driver; point system.)

Failure to comply for adults does carry a fine of not more than \$15. The penalty for failure to secure a seat safety belt on a minor over age 6 is not more than \$25.

Children under age 6 anywhere in the car must be in a properly installed child safety seat. Upon a first conviction of an offense under this subsection, the defendant shall be punished by a fine of not more than \$50. Upon a second or subsequent conviction of an offense under this subsection, the defendant shall be punished by a fine of not more than \$100. No court shall impose any additional fees or surcharges to a fine for such a violation.

NOTE: Effective July 1, 2010, an exemption for pick-up trucks was removed.

## FAILURE TO PROPERLY USE PASSENGER RESTRAINTS CHECKLIST

Did each occupant...

of the front seat...

have a seat safety restraint?

Was there a statutorily acceptable excuse?

Failure to comply is not a criminal act.

Penalty:

See Chapter 1 of the Benchbook.

## FLEEING OR ATTEMPTING TO ELUDE - O.C.G.A. §40-6-395

It is unlawful for any driver willfully to fail or refuse to stop his or her vehicle or otherwise to flee or attempt to elude a pursuing police vehicle or police officer when given a visual or audible signal to stop. The officer must be in uniform with his or her badge prominently displayed and vehicle must be marked as an official police vehicle. Signal can be by hand, voice, emergency vehicle light or siren.

Failing to stop for blue lights and a siren, even if there is no other probable cause for a traffic stop, is an independent criminal act that supports a conviction. *State v. Stillely*, 261 Ga. App. 868, 584 S.E.2d 9 (2003).

NOTE: Act 522, S.B. 64, enacted in 2006, amended O.C.G.A. §§40-1-7, 40-6-16 and 40-8-91. Amongst its provisions was to allow motorists being stopped by a marked police vehicle to continue to drive **until a “reasonably safe location” provided that they maintain a legal speed and either use their flashers or turn signals.**

For a first conviction:

1. a fine of not less than \$500 nor more than \$5,000. This fine cannot be suspended, stayed or probated, and
2. imprisonment for not less than 10 days nor more than 12 months. Any period of imprisonment in excess of 10 days may be suspended, stayed or probated at the discretion of the judge.

For a second conviction within 10 years:

1. a fine of not less than \$1,000 nor more than \$5,000, and
2. imprisonment of not less than 30 days nor more than 12 months.

For a third or future conviction within 10 years:

1. a fine of not less than \$2,500 nor more than \$5,000, and
2. imprisonment of not less than 90 days nor more than 12 months.

Subparagraph (A) of paragraph (5) of Code Section 40-6-395 reads as follows:“(5)(A) Any person violating the provisions of subsection (a) of this Code section who, while fleeing or attempting to elude a pursuing police vehicle or police officer in an attempt to escape arrest for any offense other than a violation of this chapter, operates his or her vehicle in excess of 30 miles an hour above the posted speed limit, strikes or collides with another vehicle or a pedestrian, flees in traffic conditions which place the general public at risk of receiving serious injuries, or leaves the state shall be guilty of a felony punishable by a fine of \$5,000 or imprisonment for not less than one year nor more than five years or both.”

NOTE: For the purpose of imposing a sentence, a nolo contendere plea constitutes a conviction.

NOTE: If the payment of the mandatory fine would impose an economic hardship, the judge in his or her discretion, may order the defendant to pay in installments.

#### KEY CASES ON FLEEING/ATTEMPTING TO ELUDE:

*Reynolds v. State*, 209 Ga. App. 628, 434 S.E.2d 166 (1993). One warning to stop is enough.

*State v. Stillely*, 261 Ga. App. 868, 584 S.E.2d 9 (2003). Unanimous 12 judge full court ruling, which is unusual, and likely was sending a message to Defendants.

Failing to stop for blue lights and siren is probable cause for a traffic stop even when there otherwise is no probable cause for a stop *Phillips v. State*, 162 Ga. App. 471 (1982) and *Weir v. State*, 260 Ga. App. 96 (2003) and *Spence v. State*, 263 Ga. App. 25 (2003) are useful cases to review if faced with legal issues as to the sufficiency of the charges and elements of the crime.

NOTE: Obstruction of an officer, O.C.G.A. §16-10-24 is a lesser included charge of fleeing or attempting to elude. See, *Gibson v. State*, A03A1724 (Court of Appeals, January 28, 2004).

FLEEING OR ATTEMPTING TO ELUDE CHECKLIST

Did the defendant...

willfully fail or...

refuse to stop his vehicle or...

otherwise to flee or...

attempt to elude...

a pursuing police vehicle of officer...

after being given a visual or audible signal?

Penalty:

For first conviction:

fine of not less than \$500 nor more than \$5,000 (cannot be suspended, stayed or probated) and imprisonment for not less than 10 days nor more than 12 months (all but **10 days may be suspended, stayed or probated at the judge's discretion.**

For second conviction within 10 years:

fine of not less than \$1,000 nor more than \$5,000 and

imprisonment of not less than 30 days nor more than 12 months.

For third or future conviction within 10 years:

fine of not less than \$2,500 nor more than \$5,000 and

imprisonment of not less than 90 days nor more than 12 months.

NOTE: The judge, in his discretion, may order the defendant to pay in installments if the fine would cause an economic hardship.

AGGRESSIVE DRIVING O.C.G.A. §40-6-397

In 2001, Georgia added the new offense of aggressive driving. O.C.G.A. §40-6-397 provides “A person commits the offense of aggressive driving when he or she operates any motor vehicle with the intent to annoy, harass, molest, intimidate, injure, or obstruct another person, including without limitation violating Code Section 40-6-42, 40-6-48, 40-6-49, 40-6-123, 40-6-184, 40-6-312, or 40-6-390 with such intent...Any person convicted of aggressive driving shall be guilty of a misdemeanor of a high and aggravated nature.”

The maximum penalty is 12 months in jail and a \$5,000 fine.

A single act of aggressive driving can be charged as multiple offenses when there are multiple victims. *State v. Burrell*, 263 Ga. App. 207, 587 S.E.2d 298 (2003).

#### HIT AND RUN O.C.G.A. §40-6-270

“Any driver involved in an accident resulting in injury or death of any person or damage to vehicle driven... shall stop as close thereto as possible and return to the scene and (a) Give name, address, and registration number, (b) show driver’s license to the other party (c) render aid, if required.

O.C.G.A. §40-6-270 sets mandatory minimum fines and suspensions.

The statute applies to any driver in any collision. See, *Bellamy v. Edwards*, 181 Ga. App. 887, 354 S.E.2d 434 (1987).

Compare these related offenses: O.C.G.A. §40-6-271 striking an unattended vehicle, O.C.G.A. §40-6-272 striking a fixed object and O.C.G.A. §40-6-273 duty to report accidents.

#### CELL PHONE USAGE O.C.G.A. §40-6-241.1

Cell Phone Usage while Driving (Effective July 1, 2010):

HB 23 prohibits anyone under 18 with either a learners permit or Class D license from talking or texting on any wireless device while driving. Exceptions are made for reporting crimes and for a GPS. The fine is \$150.00 (no surcharges) and 1 point. Fines are doubled for accidents. SB 360 prohibits anyone 18 or over, or anyone with a Class C from reading, writing, or sending a text message while driving. The fine is \$150.00 (no surcharges) and 1 point.

## 5.7 PUNISHMENT

### 5.7.1 GENERAL

#### MISDEMEANOR AND CIVIL PUNISHMENT

Except as otherwise provided by law, misdemeanors are punished by a fine not to exceed \$1,000 or confinement not to exceed twelve (12) months, or both. O.C.G.A. §17-10-3(a).

Misdemeanors of a high and aggravated nature are punished by a fine not to exceed \$5,000 or by confinement not to exceed twelve (12) months. O.C.G.A. §17-10-4.

Although specific statutes may provide a lower maximum sentence, this does not prevent the court from requiring that sentences for different offenses be served consecutively.

Persons charged with red light cases made with red light cameras under O.C.G.A. 40-6-20 are charged with a civil violation and not a criminal one. The maximum penalty is a \$70 assessment, and no surcharges may be added to that.

NOTE: Fines and jail sentences cannot, except as permitted by state statute (such as most Title 40 traffic cases) exceed what is permitted in a city charter.

NOTE: Criminal fines are not discharged by the Bankruptcy of a Defendant. 11 U.S.C. 523. Note that the filing of most (not all) bankruptcies creates an Automatic Stay prevents collection of criminal fines and restitution until the bankruptcy proceeding is completed if it is filed after the fine/restitution is imposed. If the fine/restitution is imposed after the bankruptcy is filed then the Automatic Stay has no effect.

#### SUPPLEMENTAL OR ALTERNATIVE PUNISHMENTS

In addition to or instead of any other penalty provided for the punishment of a misdemeanor traffic offense, or punishment of a municipal ordinance involving a traffic offense, a judge may impose any one or more of the following:

1. Reexamination by The State when the judge has good cause to believe that the convicted licensed driver is incompetent or otherwise not qualified to be licensed (see section 5.100 of this manual);
2. Attendance at, and satisfactory completion of, a driver improvement course meeting standards approved by the court;
3. Within the limits of the authority of the charter powers of a municipality or the punishment prescribed

by law in other courts, imprisonment at times specified by the court or release from imprisonment upon such conditions and at such times as may be specified; or

4. Probation or suspension of all or any part of a penalty upon such terms and conditions as may be prescribed by the judge. The conditions may include driving with no further motor vehicle violations during a specified time unless the driving privileges have been or will be otherwise suspended or revoked by law; reporting periodically to the court or a specified agency; and performing, or refraining from performing, such acts as may be ordered by the judge. O.C.G.A. §17-10-3(e).
5. O.C.G.A. §42-3-52 allows community service as a condition of probation. It also provides that **“Community service hours may be added to original court ordered hours as a disciplinary action by the court.** The minimum number of hours per offense is 20; the maximum is 250.
6. Effective July 1, 2006 prosecuting attorneys in Municipal Courts can create and administer pre-trial diversion programs. See O.C.G.A. §§15-18-80, 15-18-81 and 15-18-82.

NOTE: The above supplemental or alternative punishments are not available for licensed drivers sentenced as habitual offenders under O.C.G.A. §40-5-58 or DUI offenses sentenced under O.C.G.A. §40-6-391. In *State v. Lin*, 268 Ga. App. 702, 603 S.E.2d 315 (2004), the Court of Appeals ruled that an 11 month & 29 day sentence for a DUI was an illegal sentence and remanded for re-sentencing. The ruling was based on O.C.G.A. 40-6-391(c)(1)(E), which requires a total of 12 months of combined confinement and probation for a first DUI conviction. The defendant had asked for the 11 month/29 day sentence in light of immigration concerns. The court sentenced accordingly, but the state appealed. O.C.G.A. 40-6-391(c)(1)(E) is applicable to DUI cases only.

## USE OF PRIOR CONVICTIONS IN SENTENCING

Prior convictions can be used in sentencing (and in some crimes, such as DUI and suspended license cases, affect the minimum sentence).

NOTE: In *Allen v. State*, A03A2526 (Court of Appeals, February 2, 2004), it was **held that “A prior plea that may not have been entered into voluntarily cannot be used in aggravation of a defendant’s sentence. See *Donaldson v. State*, 244 Ga. App. 89, 91-92(5) (534 S.E.2d 839) (2000). Here, Allen correctly advised the court that his 1997 DUI plea was left blank in the area where Allen was supposed to sign to indicate that he was aware of all of the rights that he was waiving before entering his plea.”**

### 5.7.2 MANDATED SENTENCES

A chart of minimum and maximum sentences is found in Chapter One of this Benchbook.

### 5.7.3 SUSPENDED AND PROBATED SENTENCES, AND RESETS TO PAY

NOTE: Appendix G in this chapter contains a detailed discussion of probation conditions and revocation hearings.

#### GENERAL

Unless otherwise provided by law, the judge may suspend execution of the sentence or place the defendant on probation. O.C.G.A. §17-10-1(a). The maximum probation period cannot exceed the maximum sentence of confinement allowed in the case. O.C.G.A. §42-8-100 (b). Fines or costs can be, in **the court’s discretion, a condition** precedent to probation. O.C.G.A. §42-8-100 (c). The court retains jurisdiction to revoke and modify the probation during its term. O.C.G.A. §42-8-100 (d). The Judge of a municipal court with the approval of the governing body for the municipality may contract with a private corporation for probation services. See O.C.G.A. §42-8-100(g)(1).

Without formal probation, a Judge also can simply allow a Defendant an extension of time to pay a fine and reset their court date to complete disposition.

After a presentence hearing, even a statutory minimum period of incarceration can be suspended or probated. O.C.G.A. §17-10-1(a).

The judge may also authorize a fine to be satisfied by community service. O.C.G.A. §17-10-1(d).

When there is a DUI conviction involving a Blood Alcohol Content of .08 or more, the defendant **MUST** be imprisoned for at least 24 hours.

Due to a 2014 audit of misdemeanor probation, recommendations of Governor Deal and the Criminal Justice Reform

Council, and the Supreme Court decision in *Sentinel Offender Services v. Glover et. al*, Georgia probation law as pertains to municipal courts was significantly re-written, culminating in HB 310. This bill became effective on July 1, 2015 and has been signed by Governor Deal. The heart of the bill as applied to municipal courts is contained in Part III COUNTY AND MUNICIPAL PROBATION ADVISORY COUNCIL, SECTION 3-2, which starts at page 21, line 697. In some instances new language and provisions have been created and in others, old language was taken from different code sections and re-organized (and in some instances tweaked) O.C.G.A. §42-8-100 et. Seq. Article 6.

Key Changes:

- The County and Municipal Probation Advisory Council** is now under the aegis of the DCS (Department of Community Supervision) not the AOC.
- Reporting requirements for private probation providers have been enhanced with increased disclosure/transparency.** O.C.G.A. §42-8-108, page 35, line 1202
- Probationer's are accorded enhanced rights to obtain information, records, and documents from the private probation provider.** O.C.G.A. §42-8-109.2; page 37, line 1271
- There is no difference between the powers and authority of "probation officers"** (those employed directly by the city) and "private probation officers"(employed by a private corporation enterprise, agency or entity)
- When the act becomes effective on July 1, 2015,** "(it) shall apply to sentences entered on or after such date." Page 119, line 4135
- The Sentinel case eliminated tolling** of sentences for misdemeanor cases, whether or not probation involved a private probation provider or government provider. However, HB 310 has revived tolling for misdemeanors in our municipal court system. Page 24, line 800. O.C.G.A. §42-8-102. The logistics of creating a tolling order are covered at page 29, line 967. O.C.G.A. §42-8-105. The grounds for tolling are now failure to report to the probation supervisor or failure to appear in court for a revocation hearing.

Note, the old ground contained in O.C.G.A. §42-8-36 of *non est inventus* (not found in the jurisdiction of the court) has been eliminated. Special rules now exist for resets to pay and converting probation to community service, and dealing with indigents.

## DEFINITIONS

Suspended sentences are sentences which are totally abolished if the defendant meets a specific condition precedent.

The conditions may be established by the court as a part of the sentence and must be adhered to during the period of time the defendant could have been confined.

Probated sentences are sentences which require the defendant to meet various continuing conditions in order to avoid incarceration for the remainder of the sentence. O.C.G.A. §42-8-38(c).

Probation supervision must terminate no later than two years from the commencement of probation supervision unless specifically extended or reinstated by the sentencing court upon notice and a hearing and for good cause shown, except that in cases involving the collection of fines, restitution, or other funds, the period of supervision remains in effect for so long as any such obligation is outstanding, or until termination of the sentence, whichever occurs first. O.C.G.A. §17-10-1(a)(2).

## AUTHORIZED CONDITIONS

The court has the authority to pattern the conditions of probation to correspond to the seriousness of the offense and to require the defendant to make restitution, or to complete education classes, treatment, seminars, or any such program to assure rehabilitation. **This could include, for example, driver's training, getting a G.E.D, or alcohol/drug rehabilitation programs.** O.C.G.A. §§17-14-1 through 17-14-16.

Community service may be one of the conditions of probation. O.C.G.A. §42-3-52

O.C.G.A. §42-3-52(e) **provides that "Community service hours may be added to original court ordered hours as a disciplinary action by the court."**

The probationer may be required to make restitution to the city for the costs of medical care while incarcerated or for expenses incurred as a result of misconduct by the inmate. O.C.G.A. §42-8-35.

H.B. 692 effective April 27, 2006 allows Courts to banish Defendants as a condition of probation but the banishment must be an area that consists of at least one judicial circuit and cannot be to an area that does not provide any of **the program or services included in a Defendant's sentence.**

**In traffic cases, as a condition of probation, a Judge may suspend a driver's license.** *Brock v. State*, 165 Ga. App. 150, 299 SE 2d 71 (1983). The suspension cannot exceed the length of probation and there is no limited permit. A Judge should note the suspension on the back of the UTC or a separate order sent in with the UTC (both may be a good idea).

O.C.G.A. §42-8-104(a)(13) allows courts to order periodic screenings for drugs and alcohol. This section also allows courts to assess costs, and the probation officer to collect the costs or a portion of the costs, as determined by the court, of such screenings from the probationer.

O.C.G.A. §42-8-34, effective July 1, 2009 authorizes a court to impose a \$10.00 per day fee as a condition of probation for a defendant sentenced to a day reporting center if the defendant is not indigent or unemployed.

The following is a suggested form, in English and in Spanish, for delayed reporting to pay a fine, from Kay A. Giese, Judge, Municipal Court of Athens-Clarke County. An additional form follows from another court that does not include a suspended jail term.

IN THE MUNICIPAL COURT OF ATHENS-CLARKE COUNTY, STATE OF GEORGIA

STATE v. \_\_\_\_\_ Case Number MU-\_\_\_\_\_

SUSPENDED SENTENCE

The Defendant is Sentenced to 10 days in confinement, but that confinement sentence is suspended upon payment of a fine of \$ \_\_\_\_\_ no later than \_\_\_\_\_, 20\_\_\_\_.

The fine can be paid at the Municipal Court Clerk's Office, located in the Clarke County Courthouse, 325 East Washington Street, Athens, GA, or the fine can be mailed to: Municipal Court, Post Office Box 1705, Athens, Georgia 30603-1705. If the Defendant does not pay the fine before the date noted above, the Defendant must come back to Court on \_\_\_\_\_, 20\_\_\_\_ at 9:00 a.m. to show cause why the fine was not paid. If the fine is not paid and the Defendant fails to appear in Court to show cause, a contempt warrant will issue and the Defendant will be arrested.

So Ordered this \_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. \_\_\_\_\_  
Judge of Municipal Court

I have read this sentence and have received a copy. I have served a copy on the Defendant.

\_\_\_\_\_/\_\_\_\_\_/20\_\_\_\_      \_\_\_\_\_/\_\_\_\_\_/20\_\_\_\_  
Defendant                      Date                      Clerk                      Date

TRIBUNAL MUNICIPAL DEL CONDADO DE CLARKE-ATHENS – ESTADO DE GEORGIA

LA FISCALIA EN CONTRA DE \_\_\_\_\_ NUMERO DE CASO \_\_\_\_\_

SENTENCIA SUSPENDIDA

El Acusado está Sentenciado a 10 días de reclusión, permaneciendo esta sentencia de reclusión suspendida, hasta que sea pagada la multa de \$ \_\_\_\_\_ no más tarde de \_\_\_\_\_, 20\_\_\_\_. La multa puede ser pagada en la Oficina del Secretario del Tribunal Municipal, situada en la Sala de Tribunales en el Condado de Clarke, 325 East Washington Street, Athens, GA, o puede ser enviada por correo a: Municipal Court, Post Office Box 1705, Athens, Georgia 30603-1705. Si el Acusado no paga la multa antes de la fecha indicada arriba, tiene que regresar al Tribunal en la fecha \_\_\_\_\_20\_\_\_\_ a las 9 a.m para explicar la razón por la cual la multa no fue pagada. Si la multa no fue pagada y el Acusado no comparece ante el tribunal para explicar la causa, se emitirá una orden de detención por desacato y el Acusado será arrestado.

Ordenado así en este día \_\_\_\_\_ de \_\_\_\_\_,20\_\_\_\_. \_\_\_\_\_  
Juez del Tribunal Municipal

He leído esta sentencia y he recibido copia de la misma. Le he entregado una copia al acusado.

\_\_\_\_\_/\_\_\_\_\_/200\_\_\_\_      \_\_\_\_\_/\_\_\_\_\_/20\_\_\_\_  
Acusado                      Fecha                      Secretaria                      Fecha

The following is another suggested form for resetting fines to pay from Judge Glen Ashman of the East Point Municipal Court.

IN THE MUNICIPAL COURT FOR THE CITY OF EAST POINT  
STATE OF GEORGIA

CITY OF EAST POINT

Citation Number(s) \_\_\_\_\_

Vs.

\_\_\_\_\_  
Defendant

ORDER RESETTING CASE

This Court has ordered the Defendant to pay fines in the amount of \$ \_\_\_\_\_. The Court has reset this case to \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_\_ M. The Defendant is ORDERED to appear at that time to pay the fine. The fine may be paid at any time prior to that date, at the Court Department Clerk's office, and, if paid in full, attendance at the reset hearing is not required.

Should Defendant be unable for financial, medical or other reasons to pay in full, the Defendant shall bring to the reset hearing: (1) such partial payment as the Defendant can afford, plus (2) documents that would show the Court an inability to pay or hardship, and documents that show the defendant's assets and income, including but not limited to documents such as doctor's notes, hospital records, paycheck stubs, unemployment paperwork, notice of termination from work, disability benefits notices, welfare benefits and other paperwork. The Court will then determine whether additional time can be granted, whether community service can be done in lieu of a fine, whether the sentence can be probated, whether Defendant should be incarcerated, or whether other remedies are proper.

A failure to appear at the reset hearing will result in a warrant for Defendant's arrest and may result in incarceration, additional fines and other penalties. A copy of this Order has been served personally on Defendant in Court.

SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Judge, East Point Municipal Court

## DELAYED REPORTING

In lieu of suspending a sentence, or probation, a Judge may order a Defendant to serve a jail sentence on weekends, evenings, or at a date in the future. This may be useful in allowing a Defendant to maintain his employment, education or family obligations.

The following is a suggested form for delayed reporting from Judge Mike Greene of the Americus Municipal Court.

IN THE MUNICIPAL COURT  
FOR THE CITY OF AMERICUS, GEORGIA

\_\_\_\_\_  
Defendant

Ticket Number:  
Charge:

ORDER DELAYING SERVICE OF JAIL TIME

The above named defendant, having been sentenced to \_\_\_\_\_ hours in jail in the above case (the 'Service Time') in addition to other orders entered in this case, IT IS ORDERED the defendant shall complete the Service Time in full immediately unless (a) the defendant files a lawful appeal of the case or (b) the defendant complies with the following terms and conditions:

1. Defendant shall surrender on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_ p.m. (the 'Report Time') to Cpl. Eddie Davis of the Americus Police Department at 119 South Lee Street, Americus, Georgia (the 'Report Location') to complete the Service Time;
2. Defendant shall complete the entire Service Time consecutively and continuously;
3. Defendant shall be given credit toward Service Time beginning from the Report Time if the defendant reports to the designated Report Location at or before the designated Report Time;
4. If the Defendant fails to report at the designated Report Time and at the designated Report Location then, without further order of the Court, the defendant shall be immediately arrested and jailed until such Service Time is completed.

SO ORDERED,

\_\_\_\_\_  
J. Michael Greene, Judge, Municipal Court of Americus, Georgia

I hereby consent to and agree to abide by this Order Delaying Service of Jail Time and I acknowledge I am to receive a copy of this order after I sign it but before I leave Court and that I will not leave Court today until I receive my copy of the signed order, this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Defendant

(If represented by an Attorney)

I hereby approve this Order Delaying Service of Jail Time and have explained the same to the defendant, this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Attorney at Law

## RESTITUTION

Restitution to a victim is a common condition of probation. See O.C.G.A. §17-14-6. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the state. The burden of demonstrating the financial resources of the offender or person being ordered to pay restitution and the financial needs of his or her dependents shall be on the offender or person being ordered to pay restitution. However, in *Taylor v. State*, 295 Ga. App. 689, 673 S.E.2d 7 (January 6, 2009), it was held that the trial court erred in imposing victim restitution **where victim had settled all civil claims against defendant.** “O.C.G.A. §17-14-6(b) specifically provides that ‘[t]he ordering authority shall not order restitution to be paid to a victim or victim’s estate if the victim or victim’s estate has received or is to receive full compensation for that loss from the offender as a result of a civil proceeding.’ (Emphasis supplied.) Therefore, because the victim’s estate settled with the insurance companies and dismissed with prejudice its claims against Taylor for damages arising from the collision, the estate is estopped as a matter of law from seeking any additional compensation from Taylor in a future civil proceeding. See *Robinson v. Stokes*, 229 Ga. App. 25, 27(1) (493 S.E.2d 5) (1997) (‘a voluntary dismissal with prejudice operates as a judgment on the merits for purposes of res judicata’) (citation omitted). Thus, pursuant to O.C.G.A. §17-14-6(b), the court was not authorized to order Taylor to pay the estate restitution. **The restitution order must be reversed.**” (Note: Cert. granted on another issue, S09G0881, April 28, 2009).

## SPECIAL REQUIREMENTS FOR RESTITUTION (RESTITUTION ACT OF 2005)

A Judge may order restitution to a crime victim or government as a condition of a probated sentence. The Crime Victims Restitution Act of 2005 requires:

1. In any case where a state, county or city government, and an individual shall both receive restitution, the victim receives it first.
2. 50% of all payments from the person ordered to pay restitution must be used for restitution rather than fines and fees if fines are also ordered.
3. Courts must have their staff, under the Act, review restitution orders at least twice a year for compliance.
4. Restitution may be done via mandatory wage assignment.
5. Restitution may be to a business or individual.

## 5.7.4 REVOCATION OF PROBATION

IMPORTANT NOTE: There are Constitutional issues in revoking probation solely because someone cannot pay a fine. If that is a ground for revocation, be sure there are also other grounds, such as a failure to report, arrest, violation of terms of probation, leaving the jurisdiction, etc. On a failure to pay, always explore other options such as extensions of time, community service and the like.

### GROUNDS FOR REVOCATION

The court may not revoke any part of any probated or suspended sentence unless the defendant admits the violation alleged or unless the evidence produced at the revocation hearing establishes by a preponderance of the evidence the violation alleged. O.C.G.A. §42-8-34.1(a).

### PROBATION REVOCATION HEARING

A probation revocation hearing may be instituted either by:

1. The court issuing a rule nisi ordering a party to show cause why his probation should not be revoked for alleged violations of probation; or
2. The probation supervisor arresting and returning the probationer to the court granting the probation upon the supervisor's belief that a term of the probation has been violated.
  - a. The supervisor need not obtain an arrest warrant if he believes the probationer has violated the terms of the probation.
  - b. Upon arrest, the court may commit or release the probationer or may dismiss the charge. If the charge is not dismissed, the court must give the probationer an opportunity to be heard fully at the earliest possible date.
3. After the hearing, the court may revoke, modify or continue the probation.
  - a. If probation is revoked, the court may order the execution of all or part of the original sentence; however, the time the probationer served under probation is considered time served. O.C.G.A. §42-8-38.
  - b. The resulting confinement must be served in a probation detention center, probation boot camp, diversion center, weekend lock up, local jail or detention facility, or other community correctional alternative available to the court or provided by the Department of Corrections, UNLESS the probation is revoked for a violation which constitutes:
    - i. a subsequent felony;
    - ii. a misdemeanor involving physical violence and bodily injury; or,

iii. a serious infraction in an alternative confinement facility. O.C.G.A. §17-10-1(a)(3).  
Read O.C.G.A. 42-8-34.1(d) as to the maximum time for revocation.

## CASES

The normal rules of evidence are not controlling in probation revocation hearings. *Sellers v. State*, 107 Ga. App. 516, 130 S.E.2d 790 (1963).

## TOLLING OF PROBATION

O.C.G.A. §42-8-105 (effective July 1, 2015) sets forth the requirements for tolling a defendant's probation.

The running of a probated sentence may be tolled upon the failure of a probationer to appear in court for a revocation hearing or to report as directed to his or her probation officer. Such failure shall be set forth in an affidavit from the probation officer. If the allegation is failure to report, the affidavit must include the information set forth in (b)(1)(A-E). The clerk of court, OR THE JUDGE if no clerk, shall transmit a copy of the tolling order to GCIC within 30 days of the filing of the order.

Any unpaid fines, restitution, or other moneys owed as a condition of probation shall be due when the probationer is arrested. If the entire balance of the probation is revoked, all conditions of probation, including any moneys owed, shall be negated. If only part of the probation is revoked, the court shall determine the remaining amount of moneys owed by the probationer. (f).

## CONTENT OF RULE NISI FOR PROBATION REVOCATION HEARING—CHECKLIST

The rule nisi initiating a probation revocation hearing should:

1. Include the specifics of the alleged violation;
2. State a specific time and place that the probationer is to appear;
3. Indicate that the probationer will be required to show cause why the probation should not be revoked.

## 5.7.5 NOTICE OF SUSPENSION OR REVOCATION OF LICENSE

### REVOCATION

Revocation of a license is the termination of a person's license which cannot be renewed or restored until an application presented and acted upon after the expiration of the applicable period of time. O.C.G.A. §40-5-1(16).

Any person who is declared to be a habitual violator must have his license suspended. See 5.66, *infra*.

### SUSPENSION

Suspension of a license is the temporary withdrawal of a person's license for a period specifically designated. O.C.G.A. §40-5-1(17).

Conviction of the following offenses requires suspension, or extension of suspension, of the violator's driving privileges:

1. any of the offenses listed in 5.66 *infra* concerning habitual violator status O.C.G.A. §40-5-63;
2. driving without insurance O.C.G.A. §40-5-70;
3. driving on suspended license O.C.G.A. §40-5-121(b);
4. failure to respond to a citation O.C.G.A. §40-5-56; and
5. accumulating fifteen (15) or more points in any consecutive 24-month period O.C.G.A. §40-5-57; and 5.67, *infra*. (Under 21 drivers have stiffer rules as to points, as to commercial drivers).
6. In such cases, the law requires the sentencing court to notify the defendant of the suspension of his license at the time of sentencing on forms provided by The State. O.C.G.A. §40-5-54(b). The court should require the surrender of the driver's license, which is then forwarded to The State within ten (10) days after the conviction. O.C.G.A. §40-5-53; 40-5-54.

### NOLO CONTENDERE PLEA FOR DUI

Upon acceptance of a nolo contendere plea for driving under the influence, the driver's license must be taken and forwarded to the Department of Drivers Services.

## COMMERCIAL VEHICLE OPERATORS

Operators of commercial vehicles are held to special standards under recent laws. For example, blood alcohol levels required for a conviction are lower and suspension statutes are stricter than for other drivers. O.C.G.A. §40-6-391(i).

It is a misdemeanor for a person to operate a moving commercial vehicle while there is .04 percent or more by weight of alcohol in such person's blood, breath or urine O.C.G.A. §40-6-391(i). Any person is disqualified from driving a commercial vehicle for not less than one year if convicted of a first offense of such misdemeanor or a first violation of any offense specified in O.C.G.A. §40-5-54, or if such person in connection with driving a commercial vehicle refuses to submit to an alcohol concentration test as provided for in O.C.G.A. §40-6-92(a)(1). O.C.G.A. §40-5-151(a).

### 5.7.6 HABITUAL VIOLATOR STATUS

#### DEFINITION

A habitual violator is a person who has been convicted within the United States three or more times within a five (5) year period, as measured from the dates of previous arrests for which convictions were obtained to the date of the most recent arrest for which a conviction was obtained, of any of the following serious offenses: O.C.G.A. §40-5-58.

1. Driving under the influence O.C.G.A. §40-6-391;
2. Vehicular Homicide O.C.G.A. §40-6-393, feticide O.C.G.A. §40-6-393.1, or serious injury by vehicle O.C.G.A. §40-6-394;
3. Fleeing or attempting to elude a police officer O.C.G.A. §40-6-395(a);
4. Manslaughter resulting from operation of a vehicle O.C.G.A. §40-6-393(c);
5. Any felony in the commission of which a motor vehicle is used O.C.G.A. §40-5-54;
6. Hit and run or leaving the scene of an accident O.C.G.A. §40-6-270;
7. Racing on highways and streets O.C.G.A. §40-6-186;
8. Impersonating a law enforcement officer O.C.G.A. §40-6-395(c);

9. Fraudulent or fictitious use of or application for a license O.C.G.A. §40-5-125.

NOTE: Some of the offenses which count toward habitual violator status are felonies, or can be felonies under certain circumstances, and in such cases would not be handled by the municipal court. However, the court should be aware of the entire list since the third offense, which leads to habitual violator status, might be a misdemeanor.

## NOTICE

The judge or prosecutor must give personal notice to a defendant when such defendant is declared to be a habitual violator. Within three days, the judge or prosecutor must forward to The State the order declaring that the defendant is a habitual violator. O.C.G.A. §40-5-58(b).

When the records of The State reveal that a person is a habitual violator, the department notifies such person by certified mail or personal service that his license has been revoked and that it is unlawful for him to operate a motor vehicle in this state unless he obtains a probationary license.

## PROBATIONARY LICENSE

A probationary license is issued only after the expiration of a certain period of time and only upon application of the person declared to be a habitual violator showing that certain conditions have been met, and may have attached to it conditions to ensure that the license will be used by the licensee only to avoid extreme hardship. O.C.G.A. §40-5-58(e).

Any habitual violator driving without a probationary license is guilty of a felony. O.C.G.A. §40-5-58(c).

Any probationary licensee who is convicted of violating any state law or local ordinance involving an offense listed in O.C.G.A. §40-5-54 or §40-6-391 is guilty of a felony. O.C.G.A. §40-5-58(e)(6).

## 5.7.7 ACCUMULATION OF POINTS

### GENERAL

Points are placed upon the violator's record by the Department of Public Safety upon a receipt of a copy of the Uniform Traffic Citation after conviction of a moving violation, except that once every five years attendance by the violator at a driver improvement clinic may result in no points being assessed. O.C.G.A. §40-5-57(c). See also Section D below regarding Zero Point Orders.

The following are the point assessments under current law:

Aggressive driving . . 6 points

Reckless driving . . 4 points

Unlawful passing of a school bus . . 6 points

Improper passing on a hill or a curve . . 4 points

Exceeding the speed limit by more than 14 miles per hour but less than 19 miles per hour . . 2 points

Exceeding the speed limit by 19 miles per hour or more but less than 24 miles per hour . . 3 points

Exceeding the speed limit by 24 miles per hour or more but less than 34 miles per hour . . 4 points

Exceeding the speed limit by 34 miles per hour or more . . 6 points

Disobedience of any traffic-control device or traffic officer . . 3 points

Too fast for conditions . . 0 points

Possessing an open container of an alcoholic beverage while driving . . 2 points

Failure to adequately secure a load, except fresh farm produce, resulting in loss of such load onto the roadway which results in an accident . . 2 points

Violation of child safety restraint requirements, first offense . . 1 point

Violation of child safety restraint requirements, second or subsequent offense . . 2 points

4<sup>th</sup> Offense HOV Lane violation . . 1 point

All other moving traffic violations which are not speed limit violations . . 3 points ("all other moving traffic violations" means violations while the vehicle is moving.)

NOTE: 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> offense HOV lane violations carry no points but must be reported to the State.

According to The State, no points are assessed for offenses which require mandatory suspension of the driver's license or for offenses which count toward habitual violator status.

Drivers under 18 and 21 have special rules as to points. O.C.G.A. §40-5-57.1.

Note there are no points for:

1. Driving too fast for conditions;
2. Driving less than 15 miles per hour over the speed limit;
3. Failure to report an accident.

Convictions for any offense where no points are assessed should be placed on the docket of the court having jurisdiction, but no report of the conviction should be forwarded to the State.

~~NOTE: There are mandatory license suspensions for gasoline drive off cases (O.C.G.A. §40-6-255 and 40-5-57.2 on a 2<sup>nd</sup> and subsequent offense.) All convictions, including a 1st offense, must be reported to the State. O.C.G.A. §40-5-57.2 was repealed in 2015.~~

## LICENSE SUSPENSION

Any violator who accumulates 15 or more points in any consecutive 24-month period will have his driver's license suspended. (The driver's license of any person under 18 years of age who has accumulated a violation point count of four or more points under Code Section 40-5-57 in any consecutive 12 month period shall be suspended, with a plea of nolo contendere considered a conviction).

1. The license of any person whose license is suspended for the first time as a result of the assessment of points pursuant to O.C.G.A. §40-5-57 must be reinstated by the department immediately upon receipt by the department of a certificate of completion of an approved defensive driving course or an approved DUI Alcohol or Drug Use Risk Reduction Program and the payment of a restoration fee \$210.00, or \$200.00 when such reinstatement is processed by mail. O.C.G.A. 40-5-84(c).
2. Once in a five-year period, the total number of points accumulated by any driver must be reduced by seven points, but to not less than zero points, upon the satisfactory completion by the driver of an approved defensive driving course or a DUI Alcohol or Drug Use Risk Reduction Program and the submission of a certificate by the driver to the department. O.C.G.A. §40-5-86.

## NOLO CONTENDERE PLEAS

A second or subsequent plea of nolo contendere within a five-year period to an offense for which points are assessed is considered a conviction for the purpose of assessing points. O.C.G.A. §40-5-57(c)(1)(B). A court can accept a subsequent plea of nolo contendere during the five-year period but DDS will treat it as a conviction for the purpose of assessing points.

## ZERO POINT ORDERS

Under O.C.G.A. §40-5-57 (c)(1)(C) a zero point order for any traffic offense can be issued by a judge.

NOTE: If a driver is under 21, and a zero point order is issued for an offense that would otherwise be a 4 point offense under 40-5-57(c)(1)(A) **a zero point order will not save the driver's license**. The actual conviction for the offense itself still is treated by DDS as a reason for suspension.

## 5.7.8 FIRST OFFENDER TREATMENT

### GENERAL

If the defendant has not previously been convicted of a felony, and if he has not previously received first offender treatment O.C.G.A. §42-8-60, he must be informed of the availability of first offender treatment at the time of imposition of sentence. O.C.G.A. §42-8-61. This preferential treatment is not available for defendants charged with driving under the influence. O.C.G.A. §40-6-391(f).

### PROCEDURE

Upon a plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant:

1. Defer further proceedings and place the defendant on probation, or
2. Sentence the defendant to a term of confinement.

If the defendant violates the terms of probation or is convicted of another crime during the period of probation, the court may enter an adjudication of guilt and proceed as otherwise provided by law. O.C.G.A. §42-8-60 (but see *Collins v. State*, 338 Ga. App. 886, 792 S.E.2d 134 (2016) as State must specifically petition for revocation of First Offender status and Court must specifically revoke the First Offender status and enter an adjudication of guilt).

### DISCHARGE

Upon successful completion of the terms of probation or upon release, the defendant must be discharged without court adjudication of guilt. The discharge completely exonerates the defendant and does not affect any of his civil rights.

1. The defendant is not considered to have a criminal conviction. O.C.G.A. §42-8-62.
2. The court may not sentence the defendant to first offender treatment, or discharge the defendant, unless the court has reviewed his criminal record on file with the Georgia Crime Information Center. O.C.G.A. §42-8-60.
3. Cases in which the defendant receives first offender treatment must be reported to The State. The State then administratively processes such cases in the same manner as any other conviction. 1982 Op. Att'y Gen. No. 82-64.

### RETROACTIVE FIRST OFFENDER

O.C.G.A. §42-8-66 does allow for retroactive exoneration of guilt and discharge in certain situations but must be pursued via petition to Superior Court (but see *Bishop v. State*, 341 Ga. App. 590, 802 S.E.2d 39 (2017) and *White v. State*, S17A0874 (2017) for limitations on this provision).

## 5.7.9 MODIFICATION OF SENTENCE

### MOTION TO CHANGE OR MODIFY

A motion to change or modify a sentence or judgment for violation of a traffic law may be made at any time prior to the expiration of the term of court following the term at which judgment and sentence were pronounced, or within 90 days of the time judgment and sentence were pronounced, whichever time period is greater, by the defendant and accepted by the court. O.C.G.A. §40-13-32(f).

If a *nunc pro tunc* order is entered by the court outside the term of court and is not a clerical error, under this Code provision, so long as the modification is based upon a motion filed within 90 days of judgment, The State need not be concerned about the term of court, nor with compliance with the procedural requirements of subsection (a) of O.C.G.A. §40-13-32. 1989 Op. Att'y Gen. No. 89-22.

### REQUIREMENTS

No court having jurisdiction over traffic cases may change or modify a traffic law sentence or judgment rendered pursuant to a conviction, plea of guilty, or plea of nolo contendere after 90 days from the date of judgment, except for the purpose of correcting clerical errors, unless there is strict compliance with all of the following requirements:

1. A motion to change or modify the sentence or judgment is made by the defendant to the court rendering the judgment;
2. Notice, including a copy of the motion and rule nisi, is given to the prosecuting official who brought the original charge at least ten days prior to the motion hearing; and
3. A hearing is held with opportunity for the state to be heard. O.C.G.A. §40-13-32(a).
4. If the original judgment is changed or modified in accordance with this procedure, the judge must certify to The State that such change or modification is a true and correct copy of the change or modification and that the requirements set forth above have been met. O.C.G.A. §40-13-32(b).

## 5.8 REPORTS

### 5.8.1 CONVICTION REPORTS

#### GENERAL

Within ten (10) days after a person is convicted of a violation of any traffic law, other than regulations concerning standing or parking, the court must forward to The State a copy of the UTC, showing the disposition. O.C.G.A. §40-5-53.

Courts may satisfy this reporting requirement by transmitting the information contained in the UTC by electronic means, provided that The State has first given approval to the reporting court for the electronic reporting method used. O.C.G.A. §40-5-53(c).

Effective July 1, 2003, for each conviction report received electronically, The State pays to the clerk of the court \$0.40. O.C.G.A. § 40-5-53. Effective in 2005 most paper reports have been abolished.

For this purpose, "conviction" includes:

1. forfeiture of bail or collateral, except where the case remains open despite forfeiture of bail;
2. payment of a fine;
3. a plea of guilty; or
4. a finding of guilty, regardless of whether the sentence is suspended, probated or rebated. O.C.G.A. §40-5-1.

Nolo contendere pleas should be reported unless they concern a parking or standing violation.

If the conviction is reported electronically, The State does not need to receive a copy of the citation form UNLESS the violator is not a Georgia resident. If the violator is a nonresident, The State sends a copy of the citation to the home state.

#### MANDATORY SUSPENSION OF DRIVER'S LICENSES

Offenses involving mandatory suspension of the driver's license require the court to obtain any license then in the driver's possession and forward it to The State within ten (10) days. O.C.G.A. §40-5-53.

The court must also transmit within ten (10) days a copy of notice of suspension form which the court gave to the defendant. O.C.G.A. §40-5-54(b).

#### SERIOUS TRAFFIC OFFENSES

Serious traffic offenses must be reported on the individual's criminal record through the Georgia Crime Information Center (GCIC).

Without a fingerprint card, the state cannot add the OBTS report **form to the offender's record**. Make sure the Defendant has been fingerprinted and that the prints have been submitted to the State.

At the time of the booking procedures for a serious offense, the processing agency should prepare the Offender Based Tracking System (OBTS) report form. The OBTS should be completed by the court upon disposition of the case and forwarded to GCIC at the address on the OBTS form.

## 5.8.2 MONTHLY REPORTS AND REMITTANCES OF FINES

### GENERAL

Except for the specific amounts payable to other entities as explained infra, the balance of all fines and forfeitures for the preceding month must be paid to the municipal treasury by the fifteenth day of each month. O.C.G.A. §40-13-26.

Such payment must be accompanied by a report stating:

1. the total of all fines and forfeitures collected
2. the number of cases adjudicated;
3. the amounts of monies paid to various funds;
4. any other costs and to whom paid;
5. the balance that is being turned over to the municipal treasury;
6. the name of the defendant in each case; and,
7. the fine imposed in each case. *Id.*

### SURCHARGES AND OTHER AMOUNTS TAKEN FROM FINES

The court has the responsibility of sending various amounts for several organizations and funds from the fines, forfeitures, and surcharges collected each month. These are discussed in more detail in Chapter 1, Section 1.5 of this book. These must be collected. In some cases there are criminal and other penalties for a failure to collect and remit these funds.

## 5.8.3 OTHER

### ADMINISTRATIVE OFFICE OF THE COURTS QUARTERLY REPORT

The Administrative Office of the Courts (AOC) requests a report from each court. The report is submitted on the forms furnished by the AOC and includes all of the activity for the previous quarter. For details call (404) 656-5171.



## 5.9 COMMERCIAL DRIVER OFFENSES

NOTE: Be careful about taking judicial notice of Public Service Commission rules. In *Ponce v. State*, A041856 (Ga. Court of Appeals May 5, 2006), the Court held it was error to do so because some rules are not promulgated as required by the Georgia Administrative Procedures Act.

### 5.9.1 SCOPE

To the extent that these code and regulation references, which specifically pertain to commercial motor vehicles, are in conflict with other Georgia law applied to motor vehicle violations or general driver licensing provisions, these shall prevail with respect to commercial motor vehicle operators. Where silent, the general traffic and driver provisions of this chapter shall apply. O.C.G.A. §40-5-141.

### 5.9.2 GENERAL PROSCRIPTION

No person may operate a commercial motor vehicle unless:

1. that person has been issued
2. and is in immediate possession of
3. **a commercial driver's license**
4. valid for the vehicle he/she is driving. O.C.G.A. 40-5-146(a).

No person may operate a commercial motor vehicle while his/her driving privilege is suspended, revoked or canceled. O.C.G.A. 40-5-146(b).

Any driver operating in violation of these restrictions (A & B) is guilty of a misdemeanor, and, upon conviction will be fined not less than \$500, and any commercial driving privileges held by such driver shall be suspended for a period of 6 months. O.C.G.A. §40-5-159(c).

No person who drives a commercial motor vehicle **shall have more than one driver's license**. O.C.G.A. §40-5-143.

Any driver operating in violation of this restriction (C) is guilty of a felony, and, upon conviction will be punished by:

1. A civil penalty of \$2,500 for each offense; and
2. A fine of \$5,000, imprisonment for not more than 90 days, or both, for each offense. O.C.G.A. §40-5-159(a)(1) & (a)(2).

### 5.9.3 SYSTEM OF COMMERCIAL DRIVER LICENSING

CLASSIFICATIONS; O.C.G.A. §40-5-150(B)

#### CLASS "A"

1. **Vehicle, or combination of vehicles, has a manufacturer's gross vehicle weight rating (GVWR) of 26,001 pounds, and**
2. Vehicle or vehicles being towed have a GVWR of 10,001 pounds or more.

#### CLASS "B"

1. Single vehicle has a GVWR of 26,001 pounds or more, or
2. Towing vehicle has a GVWR of 26,001 pounds or more, and
3. Vehicle or vehicles being towed have a GVWR of 10,000 pounds or less.

#### CLASS "C"

1. Single vehicle has a GVWR of less than 26,001 pounds, or
  - a. Towing vehicle has a GVWR of less than 26,001 pounds, and
2. Vehicle or vehicles being towed have a GVWR of 10,000 pounds or less, and
3. Vehicle is designed to carry 16 or more passengers, including the driver, or
  - a. Vehicle is used in the transportation of hazardous materials which require the vehicle to be placarded.

#### **Class "P" (Commercial driver's instruction permit)**

Holder of a CDL instruction permit may drive a commercial motor vehicle on a highway only when:

1. **accompanied by the holder of a commercial driver's license** valid for the type of vehicle driven
2. who occupies a seat beside the individual
3. for the purpose of giving driving instruction. O.C.G.A. §40-5-147(c)(3).

Note: A holder of a valid CDL may drive vehicles in all lesser classes (except motorcycles, class "M"); therefore the holder of a valid class "A" license may legally drive a class "B" vehicle, though she does not hold a valid class "B" license. O.C.G.A. §40-5-150(d).

#### REQUIRED LICENSE CLASSIFICATIONS CHECKLIST

Question: Are there two (or more) vehicles (or a vehicle & trailer(s)) one towing the other(s)?

Question: Is the combined weight of the vehicles (or vehicle & trailer(s)) more than 26,000 pounds?

Question: Is the weight of the vehicle(s) being towed more than 10,000 pounds?

If all questions are answered yes, a Class A CDL is the only appropriate license.

Question: If it is a single vehicle (i.e. no vehicle or trailer is being towed), is the weight of that vehicle more than 26,000 pounds?

Question: If there is one vehicle towing another (or a trailer), is the weight of the towing vehicle more than 26,000 pounds?

Question: If there is one vehicle towing another (or a trailer), is the weight of the towed vehicle (or trailer) less than 10,000 pounds?

If all relevant questions are answered yes, either a Class A or Class B CDL is appropriate.

Any single vehicle or combination of vehicles (or vehicle & trailer) that does not yield a positive response to all relevant questions in either group of questions respectively, but that is either:

1. Designed to transport 16 or more passengers, to include the driver; or
2. Is used in the transportation of hazardous materials which require the vehicle to be placarded under 49 C.F.R. Part 172, subpart F;

Requires, at a minimum, a Class C CDL. Either a Class A or Class B CDL is appropriate as well, as long as accompanied by the proper endorsements.

## ENDORSEMENTS & RESTRICTIONS; O.C.G.A. §40-5-150(c)

These operate as augmentations of or limitations upon the privileges accompanying the various forms of commercial driver's licenses.

1. "H"- Authorizes the driver to drive a vehicle transporting hazardous materials.
2. "T"- Authorizes driving double or triple trailers.
3. "P"- Authorizes driving vehicles carrying 16 or more passengers, including the driver.
4. "N"- Authorizes driving tanker vehicles; does not apply to portable tanks under 1,000 gallons.
5. "X"- Represents a combination of hazardous materials (H) and tank vehicle (T) endorsements.
6. "L"- Restricts the driver to operation of vehicles not equipped with air brakes.

## EXEMPTIONS; O.C.G.A. §40-5-142(7)(C)

**Drivers of the following are not required to obtain a commercial driver's license.**

1. Recreational vehicles for personal use.
2. Military vehicles.
3. Emergency vehicles.
4. Farm vehicles (not used for hire, or not driven more than 150 miles from the farm.)

## TOW TRUCK OPERATORS

Tow truck operators are required to have a CDL, and the tow truck and its towed vehicle are treated the same as any other powered unit towing a non-powered unit. However, in certain instances, tow truck operators are not required to obtain an endorsement to tow vehicles which would otherwise require an endorsement.

**"First moves"**- From site of breakdown/accident to nearest appropriate repair facility, no endorsement is needed.

**"Subsequent moves"**- Towing from one repair or disposal facility to another does require the proper endorsement.

In no event are tow truck operators required to obtain a passenger (P) endorsement. Ga. P.S.C. Fact Sheet # 37.

#### 5.9.4 IMPLIED CONSENT TO CHEMICAL TEST

Any person who drives a commercial motor vehicle anywhere in the state shall be deemed to have given consent to a chemical test or tests of that person's **blood, breath or urine for the purpose of determining that person's alcohol concentration or the presence of other drugs**, subject to a probable cause determination by the administering officer and a warning **from that officer about the effect of a refusal of the test on that person's driving privileges**. O.C.G.A. §40-5-153.

If the driver refuses the test, that driver shall be disqualified from operating a commercial motor vehicle for 1 year, and private motor vehicles as provided by O.C.G.A. §40-5-67.1.

#### 5.9.5 DISQUALIFICATION OF DRIVING PRIVILEGES

Any person who is to or does drive or operate a commercial motor vehicle while having any (i.e. less than 0.04%) measurable alcohol in his/her system or who refuses to submit to a chemical test to determine his/her alcohol or drug content, must be placed out of service for 24 hours, notwithstanding other applicable code sections. O.C.G.A. §40-5-152.

Any person is disqualified from driving a commercial motor vehicle for a period of not less than 60 days, if:

1. Convicted of 2 serious traffic violations committed in a commercial motor vehicle arising from separate incidents occurring within a 3-year period as measured from the dates of arrests from which convictions were obtained. O.C.G.A. §40-5-151(f).

**"SERIOUS TRAFFIC VIOLATION"** MEANS:

1. Speeding 15 or more miles per hour above the posted speed limit;
2. Reckless driving, as defined under state or local law,
3. Following another vehicle too closely, as defined under state or local law,
4. Improper or erratic lane change which presents a risk to any other vehicle, but not including failure to signal a lane change; or
5. A violation, arising in connection with a fatal accident, of state law or local ordinance, relating to motor vehicle traffic control, excluding parking, weight, length, height and vehicle defect violations. O.C.G.A. 40-5-142(22).

Any person is disqualified from driving a commercial motor vehicle for a period of not less than 120 days, if:

1. Convicted of 3 serious traffic violations committed in a commercial motor vehicle arising from separate incidents occurring within a 3-year period as measured from the dates of arrests from which convictions were obtained. O.C.G.A. §40-5-151(f).

Any person is disqualified from driving a commercial motor vehicle for a period of not less than 1 year, if:

2. Convicted of a 1<sup>st</sup> violation of:
  - a. Homicide by vehicle, as defined by O.C.G.A. §40-6-393;
  - b. Hit and run or leaving the scene of an accident in violation of O.C.G.A. §40-6-270;
  - c. Racing on highways or streets;
  - d. Using a motor vehicle in fleeing or attempting to elude an officer;
  - e. Fraudulent or fictitious use or application for a license;
  - f. Using a commercial motor vehicle in the commission of a felony;
  - g. Driving a commercial motor vehicle while there is 0.04% or more by weight of alcohol in the blood, breath or urine of the driver. O.C.G.A. §40-5-151(a)(1); or
  - h. Refusal to submit to a chemical test (**blood, breath or urine**) to determine the driver's alcohol concentration while driving. O.C.G.A. §40-5-151(a)(2).

Any person is disqualified from driving a commercial motor vehicle for a period of not less than 3 years, if:

1. Convicted of a 1<sup>st</sup> violation of any of the aforementioned violations (1(a) - (g)), where the vehicle being operated is transporting hazardous material required to be placarded under Section 105 of the Hazardous Material Transportation Act. O.C.G.A. §40-5-151(b).

Any person is disqualified from driving a commercial motor vehicle for life, if:

1. Convicted of 2 or more violations of:
  - a. Any offense outlined above in 5.95 (D)(1)(a-f), (also found in O.C.G.A. §40-5-54(a)); or
  - b. Driving a commercial motor vehicle while there is 0.04% or more by weight of alcohol in the blood, breath or urine of the driver, or in violation of the general proscriptions of O.C.G.A. §40-6-391; or
  - c. Any combination of those offenses arising from two or more separate incidents. O.C.G.A. §40-5-151(c); or
  - d. Where that person knowingly uses a commercial motor vehicle in the commission of any felony involving the manufacture, distribution or dispensing of a controlled substance, to include possession with intent. O.C.G.A. §40-5-151(e).

Any person is disqualified from driving a commercial motor vehicle based on conviction for the following violations of out-of-service orders:

1. 1<sup>st</sup> Violation: Disqualification for a period of not less than 90 days and not more than 1 year.
2. 2<sup>nd</sup> Violation: Disqualification for a period of not less than 1 year and not more than 5 years.
3. 3<sup>rd</sup> or Subsequent Violations: Disqualification for a period of not less than 3 years and not more than 5 years. O.C.G.A. §40-5-151(g).

## 5.9.6 COMMERCIAL DRIVER TRAFFIC VIOLATION NOTICE REQUIREMENTS

### CONVICTION

Any driver of a commercial motor vehicle holding a license issued by the state of Georgia, who is convicted of violating any state law or local ordinance relating to motor vehicle traffic control in any other state or Canada, other than parking violations, within 30 days of the date of conviction, shall notify the Department of Public Safety. O.C.G.A. §40-5-144(a). Note: If the court makes notification, the responsibility of the driver in this regard is waived. O.C.G.A. §40-5-144(a)

Any driver of a commercial motor vehicle holding a license issued by the state of Georgia, who is convicted of violating any state law or local ordinance relating to motor vehicle traffic control in this or any other state or Canada, other than parking violations, within 30 days of the date of conviction, shall notify his/her employer in writing. O.C.G.A. §40-5-144(a).

### SUSPENSION/REVOCATION/CANCELLATION

**Any driver who's CDL** is suspended, revoked or canceled by any state, for any period of time, shall notify his/her employer of that fact before the end of the business day following the date the driver herself is notified. O.C.G.A. §40-5-144(c).

## NOTIFICATION REQUIREMENTS CHECKLIST

Question: Who must the driver notify upon conviction of a motor vehicle traffic violation of any sort (excluding parking violations) outside the state of Georgia?

If the driver is convicted in any state (or Canada) other than Georgia, that driver must notify:

1. the Georgia Department of Public Safety; and
2. **That driver' employer (in writing).**

Question: When must notification be given?

Within 30 days of the date of conviction.

Question: Who must the driver notify upon conviction of a motor vehicle traffic violation of any sort (excluding parking violations) within the state of Georgia?

If the driver is convicted within the state of Georgia that driver must notify his/her employer (in writing).

Question: When must notification be given?

Within 30 days of the date of conviction.

Question: Who must the driver notify when his/**her Commercial driver's license is suspended**, revoked, canceled or the driver is otherwise disqualified from driving a commercial motor vehicle for any period of time?

Such driver must notify his/her employer of such fact.

Question: When must notification be given?

Before the end of the business day following the date the driver received notice of such action.

## 5.9.7 PUBLIC SERVICE COMMISSION REGULATION OF COMMERCIAL MOTOR VEHICLES

### AUTHORITY

In augmentation of the requirements under Title 40 of the O.C.G.A., in particular Article 7: “The Uniform Commercial Driver’s License Act”, the Public Service Commission of Georgia, as to the motor vehicles within its jurisdiction, shall have the authority to promulgate rules designed to promote safety. Any such rules and regulations deemed necessary shall include the following:

1. Every motor vehicle and all parts thereof shall be maintained in a safe condition at all times; and the lights, brakes, and equipment shall meet such safety requirements as the commission shall establish;
2. Every driver employed to operate a motor vehicle for a motor common or contract carrier shall be at **least 18 years of age, of temperate habits and good moral character, possess a valid driver’s license,** not use or possess prohibited drugs or alcohol while on duty and shall be fully competent to operate the motor vehicle under his/her charge;
3. Accidents arising from or in connection with the operation of motor common or contract carriers shall be reported to the commission in such detail and in such manner as the commission may require; and
4. The commission shall require every motor common and contract carrier to have attached to each unit or vehicle such distinctive markings or tags as shall be adopted by the commission. O.C.G.A. §§40-8-2 and 46-7-28.

### PENALTIES

Every officer, agent or employee of any corporation, and every person who fails to comply with any order, rule or regulation of the Public Service Commission, or who aids or abets therein, shall be guilty of a misdemeanor. O.C.G.A. §46-7-38.

## RELEVANT GENERAL REGULATIONS

### HOURS OF SERVICE OF DRIVERS

#### Maximum Driving Time

No driver shall drive:

1. More than 10 hours following 8 consecutive hours off duty; or
2. For any period after having been on duty 15 hours following 8 consecutive hours off duty. F.M.C.S.R. §395.3

Except:

1. A driver who encounters adverse weather conditions, and because of those condition cannot safely complete the 10-hour run, may drive not more than 2 additional hours in order to complete the run or reach safety F.M.C.S.R. §395.1(b)(1); or
2. A driver making local retail deliveries within a 100-mile radius of the driver's work-reporting location, during the period from December 10 to December 25 each year F.M.C.S.R. §395.1(f).

### RECORD OF DUTY STATUS

Drivers must keep an accurate record of their drive, on-duty & off-duty status time for every 24-hour period and the 7 preceding days, in accordance with F.M.C.S.R. §395.8.

### OUT-OF-SERVICE ORDERS

Any violation of the maximum driving time limitations or record of duty status requirement set out above will result in an out of service order for that driver. F.M.C.S.R. §395.13.

### DRIVER VEHICLE INSPECTION REPORTS

Every driver shall be required to prepare, at the completion of each work day, a vehicle inspection report in accordance with F.M.C.S.R. §396.11.

Before driving a commercial motor vehicle, the driver shall:

1. Be satisfied that the motor vehicle is in safe operating condition;
2. Review the last driver vehicle inspection report; and
3. Sign the report, only if defects or deficiencies noted have been corrected. F.M.C.S.R. §396.13.

## PROJECTING LOADS

Whenever the load upon any vehicle extends to the rear 4 or more feet from the bed or body of the vehicle, there shall be displayed at the extreme rear end of the load an amber strobe light, which shall be functioning at any time of the day or night when the vehicle is operated on any highway or parked on the shoulder. In addition, a red flag shall also be affixed to the extreme rear of the load. O.C.G.A. §40-8-27 & PSC Rule 1-14-1.04, Sec. 393.11PL.

## RAILROAD CROSSINGS

Buses transporting passengers and hazardous materials haulers shall not cross railroad tracks unless that driver first:

1. Stops within 50 feet of, and not closer than 15 feet to the tracks; and
2. Thereafter ascertains that no train is approaching; in addition
3. The driver must not shift gears while crossing the track. F.M.C.S.R. §392.10

All other commercial motor vehicles, upon approaching a railroad crossing, shall be driven at such speed as will allow the vehicle to be stopped before reaching the first rail. F.M.C.S.R. §392.11

## IMMEDIATE NOTICE OF CERTAIN HAZARDOUS MATERIALS INCIDENTS

At the earliest practicable moment, any carrier who transports hazardous materials shall give notice to the Department of Transportation (and the Centers for Disease Control where necessary) after each incident that occurs during the course of transportation (to include loading, unloading and storage) in which:

As a direct result of hazardous materials-

1. A person is killed;
2. A person receives injuries requiring hospitalization;
3. Estimated damage exceeds \$50,000;
4. An evacuation of the public occurs lasting more than 1 hour; or
  - a. One or more major transportation arteries are closed for 1 hour or more.
5. Fire, breakage, spillage or suspected radioactive or infectious contamination occurs;
  - a. There is release of a marine pollutant exceeding 119 gallons liquid, or 882 lbs. solid; or
  - b. A situation or continuing danger to life exists at the scene of the accident that, in the judgment of the carrier should be reported. Title 49 C.F.R. 171.15

## 5.9.8 EMPLOYER LIABILITIES

### DUTIES IMPOSED UNDER ARTICLE 7 OF TITLE 40, CHAPTER 5 OF THE O.C.G.A.

Employers must require driver applicants to provide the names, addresses, dates of employment and reasons for leaving all previous employers for which the applicant was the driver of a commercial motor vehicle for the period of 10 years preceding the application. O.C.G.A. §40-5-145(a).

**Any employer who reports fraudulent information to the Department of Public Safety regarding an employee's employment or experience, as required under 49 C.F.R. Part 383, shall be guilty of a misdemeanor and shall be fined not less than \$500 upon conviction. O.C.G.A. §40-5-159(b).**

No employer may knowingly allow or authorize a driver to drive a commercial motor vehicle during any period:

1. **In which the driver's license has been suspended, revoked, canceled or the driver has otherwise been disqualified from driving a commercial motor vehicle; or**
2. **In which the driver has more than one driver's license. O.C.G.A. §40-5-145(b)**

Note: The 5.98(A)(2) violation (found at O.C.G.A. §40-5-145(b)) is a felony offense, punishable by 1) a civil penalty of \$2,500 for each offense, and 2) a fine of \$5,000, imprisonment for not more than 90 days, or both, for each offense. O.C.G.A. §40-5-159(a).

### MAXIMUM DRIVING TIMES

Employers shall not permit or require drivers to operate commercial motor vehicles for any period of time in excess of the maximum driving times set forth in F.M.C.S.R. §395.3.

### ANNUAL INSPECTION

Each commercial motor vehicle (including trailers) operated must be annually inspected in accordance with Title 49 CFR, 396.17. Evidence of this inspection must be maintained onboard each vehicle and a copy of the inspection report must be retained by the carrier.

### VEHICLES PLACED OUT-OF-SERVICE DUE TO DEFECTS

**No motor carrier shall require or permit any person to operate any vehicle declared and marked "Out of Service" until all defects which required the out-of-service declaration have been corrected. Title 49 CFR, 396.9(c)(2).**

### DRUG & ALCOHOL TESTING

All employers of commercial motor vehicle operators are required to implement and maintain drug and alcohol screening and testing programs in accordance with Federal Motor Carrier Safety Regulations (F.M.C.S.R.) §382. In addition to pre-employment, random & reasonable suspicion testing, employers are required to conduct post-accident testing of employees within 8 hours after an accident, where practicable. Furthermore, if such test is not administered within 2 hours of the accident, the employer must prepare and maintain a record stating the reasons that the test was not promptly administered. F.M.C.S.R. §382.

## 5.10 COURT SEIZURE OF DRIVERS LICENSES FOR RETESTING

### 5.10.1 ORDERING A RETEST

O.C.G.A. §40-5-59 allows the State to seize and order a retest of someone's license. Judge Mike Greene of the Americus Municipal Court, designed an order for this purpose allowing a Court to forward a license to The State (**found in section 5.102 below**). **Judge Greene says "I use it for anyone I feel is a danger to the public (i.e. old age, usually were the family comes and says granddad does not need to be driving but we can't stop him). But, they can get their license back if they pass the test. It works great for old age issues but may not work for drug abuse."**

### 5.10.2 FORM: COURT-ORDERED LICENSE SEIZURE

IN THE MUNICIPAL COURT  
FOR THE CITY OF AMERICUS, GEORGIA

_____	)	Citation #: *
Defendant	)	Case #: *
	)	<b>Driver's License #: *</b>
	)	Date of Birth: *

#### ORDER SEIZING DRIVER'S LICENSE PURSUANT TO O.C.G.A. §40-5-59

This matter having come before the Court, the Defendant having been present in Court and the Court having taken evidence, the Court makes the following FINDINGS OF FACT:

(1) That the Defendant is ( ) incapacitated by reason of disease, mental or physical disability or ( ) the Defendant is otherwise not qualified to be licensed; all to the extent that the Defendant is incapable of safely operating a motor vehicle; and,

(2) That allowing the Defendant to operate a motor vehicle on the public highways would place both the Defendant and the general public in imminent danger of harm.

NOW THEREFORE, IT IS ORDERED:

**(1) That the driver's license of the Defendant be seized by the Clerk of the Court;**

**(2) That a copy of this order and the Defendant's driver's license be forwarded to the Georgia Department of Drivers Services, P. O. Box 80447, Conyers, GA 30013 for proceedings pursuant to O.C.G.A. §§40-5-59; and,**

**(3) That a copy of this order be sent to the Defendant at the address on Defendant's drivers license.**

SO ORDERED, this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
J. Michael Greene, Judge  
Municipal Court, City of Americus

## 5.11 - PARKING TICKETS

Parking tickets are often issued on forms other than a UTC. Most tickets are issued under municipal ordinances, so the specific requirements will vary depending on the jurisdiction.

However, one state statute specifically affects parking tickets at public transportation stations. O.C.G.A. §40-6-208 **requires that the citation contain “at a minimum,” the following information:**

1. The nature of the violation;
2. The amount of the fine which will be levied for such violation;
3. That the cited individual has the right to contest the citation and be given an opportunity to be heard;
4. The location of the court in which the cited individual must appear within five days of the date of the citation to contest same; and
5. The location at which fines may be paid.

NOTE: A UTC cannot be used for parking at public transportation stations.

An amended O.C.G.A. §40-5-24 (b) went into effect January 1, 2002. It creates a Class D provisional **driver's** license, sets certain curfews, and sets certain rules specific to new drivers (many of whom will be teens). The new statute is set forth below:

#### 40-5-24. INSTRUCTIONAL PERMITS

Any resident of this state who is at least 16 years of age and who, for a period of at least 12 months, had a valid instruction permit issued under subsection (a) of this Code section may apply to the department for a Class D driver's license to operate a noncommercial Class C vehicle if such resident has otherwise complied with all prerequisites for the issuance of such Class D driver's license as provided in subsection (a) of this Code section, provided that a resident at least 16 years of age who has at any age surrendered to the department a valid instruction permit or driver's license issued by another state or the District of Columbia or who has submitted to the department proof, to the satisfaction of the department, of a valid instruction permit or driver's license issued by another state or the District of Columbia may apply his or her driving record under such previously issued permit or driver's license toward meeting the eligibility requirements for a Class D driver's license the same as if such previously issued permit or driver's license were an instruction permit issued under subsection (a) of this Code section.

(2) The department shall, after all applicable requirements have been met, issue to the applicant a Class D driver's license which shall entitle the applicant, while having such license in his or her immediate possession, to drive a Class C vehicle upon the public highways of this state under the following conditions:

(A) Any Class D license holder shall not drive a Class C motor vehicle on the public roads, streets, or highways of this state between the hours of 12:00 Midnight and 6:00 A.M. eastern standard time or eastern daylight time, whichever is applicable; and

(B)(i) Any Class D license holder shall not drive a Class C motor vehicle upon the public roads, streets, or highways of this state when more than three other passengers in the vehicle who are not members of the driver's immediate family are less than 21 years of age.

(ii) During the six-month period immediately following issuance of such license, any Class D license holder shall not drive a Class C motor vehicle upon the public roads, streets, or highways of this state when any other passenger in the vehicle is not a member of the driver's immediate family; provided, however, that a Class D license holder shall not be charged with a violation of this paragraph alone but may be charged with violating this paragraph in addition to any other traffic offense.

(3) A person who has been issued a Class D driver's license under this subsection and has never been issued a Class C driver's license under this chapter will become eligible for a Class C driver's license under this chapter only if such person has a valid Class D driver's license which is not under suspension and, for a period of not less than 12 consecutive months prior to making application for a Class C driver's license, has not been convicted of a violation of Code Section 40-6-391, hit and run or leaving the scene of an accident in violation of Code Section 40-6-270, racing on highways or streets, using a motor vehicle in fleeing or attempting to elude an officer, reckless driving, or convicted of any offense for which four or more points are assessable under subsection (c) of Code Section 40-5-57 and is at least 18 years of age.

NOTE: If a driver violates the conditions of a Class D license the proper charge is O.C.G.A. §40-5-24 and not §40-5-30, which some police officers mistakenly use. A violation of §40-5-24 does not generate a suspension.

## CHAPTER 5—APPENDIX B: KEY GEORGIA DUI DECISIONS (1997-2015)

The following is a list of some of the significant cases over the past several years (they are not in any particular order, but were selected as they cover issues that are common in DUI cases) – Note: 2016 and 2017 have had a few more key DUI decisions that continue to make nuanced changes in the law. *As so many DUI cases occur annually, the Benchbook editor and committee decided updating this index to current years would be unwieldy. This appendix is preserved for historical reasons but will not be updated every year, and judges should research DUI law when making rulings as it changes too frequently to fully cover here.*

*Hills v. State*, 291 Ga. App. 873, 663 S.E.2d 265 (2008). Intoxilyzer source code generally not discoverable. See also *Cronkite v. State*, 293 Ga. 476 (2013) as to situations where it is contended the Intoxilyzer may produce erroneous results.

*Williams v. State*, 296 Ga. 817, 771 S.E.2d 373 (Ga. 2015). DUI and related convictions remanded for consideration of defendant's claim that "Georgia's implied consent statute, O.C.G.A. § 40-5-55,[fn] is unconstitutional as applied in his case because consent obtained solely under the statute does not amount to voluntary consent for purposes of the Fourth Amendment and the related provision of the State Constitution." Only evidence of consent to testing here was defendant's "yes" when asked to submit to blood and urine tests following reading of the implied consent notice. "There was no other conversation about consent for the testing, i.e., the officer did not ask Williams 'if [Williams] was willing to freely and voluntarily give a test.' The officer 'read [Williams] the implied consent and that was pretty much the end of it.' It 'was an ordinary DUI,' there 'were no exigent circumstances,' and no search warrant was obtained."

*State v. Jones*, 297 Ga. 156, 773 S.E.2d 170 (Ga., 2015), reversing 326 Ga. App. 658, 757 S.E.2d 261 (2014). Under 2013 Evidence Code, Court of Appeals erred by holding that evidence of **defendant's prior DUI wasn't relevant** to show knowledge and intent in defendant's current DUI prosecution. 1. Under the "liberal" relevance standard of new O.C.G.A. §24-4-401, "which deems evidence relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,'" evidence that defendant intentionally drove while under the influence on a prior occasion was relevant to his intent on this occasion; and contrary to the Court of Appeals' holding, the fact that DUI is a general intent crime doesn't make the defendant's intent irrelevant. "[W]e hold, consistent with the underlying principles of the rule prohibiting other acts evidence offered for an impermissible purpose, that other acts evidence may be relevant under Rule 404(b), without regard to whether the charged crime is one requiring a specific or general intent, when it is offered for the permissible purpose of showing a criminal defendant's intent and knowledge."

*State v. Stewart*, 649 S.E.2d 525, 286 Ga. App. 542 (Ga. App. 2007). If Defendant is read the implied consent warning, **it doesn't matter** if he does not understand it. See also *Rodriguez v. State*, 275 Ga. 283, 565 S.E. 2d 458 (2002). There is no requirement that a DUI defendant have an interpreter when implied consent warnings are read.

*Wallace v. State*, 325 Ga. App. 142, 751 S.E.2d 887 (2013). Improper statement by officer in implied consent discussion (telling Defendant a refusal cannot be used against him) grounds to suppress breath test. See also, *Sauls v. State*, 293 Ga. 165 (2013), incorrect statement on effect of refusal requires suppression of test.

*Avery v. State*, 311 Ga. App. 595, 716 S.E.2d 729 (2011). **"Give me some more tests please" is not necessarily a request for an independent test if the person isn't specific.**

*Luckey v. State*, 313 Ga. App. 502, 722 S.E.2d 114 (2012) Requesting an independent test but not saying where you want the test done is not a request for an independent test.

*Rosandich v. State*, 289 Ga. App. 170, 657 S.E.2d 255 (2008). Even where breath test results are suppressed, they can be admissible for impeachment purposes.

*Jacobsen v. State*, 306 Ga. App. 815, 703 S.E.2d 376 (2010). Maintenance logs for the Intox 5000 are irrelevant to a DUI case.

*Parker v. State*, 296 Ga. 586, 769 S.E.2d 329 (February 16, 2015). Reversing 326 Ga. App. 217, 756 S.E.2d 300. 1. Trial court erred by holding that it couldn't consider hearsay in deciding "whether an out-of-state person is a material witness to a Georgia criminal proceeding under our State's Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-13-90 et seq. (the 'out-of-state witness act')." "

*Massey v. State*, 331 Ga. App. 430, 771 S.E.2d 122 (March 20, 2015). Interlocutory appeal in DUI prosecution. Trial court correctly ruled that defendant who refused implied consent testing wasn't entitled to discovery pursuant to O.C.G.A. § 40-6-392(a)(4) concerning blood test obtained by forced draw pursuant to search warrant.

*Johnson v State*, 323 Ga. App 65, 744 S.E.2d 921 (2013) and *Duncan v. State*, 305 Ga. App. 268, 699 S.E.2d 341 (2010). Improperly done Horizontal Gaze Nystagmus test may be admissible in DUI case. Compare *Bravo v. State*, 304 Ga. App. 243, 696 S.E.2d 79 (2010) (error to admit same test) and Compare *Sultan v. State*, 289 Ga. App 405, 657 S.E.2d 311(2008). Then look at *State v. Tousley*, 271 Ga. App. 874, 611 S.E.2d 139 (2005) To attack the reliability of HGN testing generally, a defendant may offer evidence to show that in practice HGN testing is prone to human error. Compare *State v. Pierce*, 266 Ga. App. 233, 596 S.E.2d 725 (2004). Regarding the horizontal gaze nystagmus (HGN) field test: "the HGN test is an accepted, common procedure that has reached a state of verifiable certainty in the scientific community" meeting the *Harper v. State* standard and "is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol." Also, regarding HGN tests, see *Stewart v. State*, 280 Ga. App. 366, 634 S.E.2d 141 (2006), in which a failure to ask about head injuries prior to doing HGN testing was not fatal to their admissibility and see *Webb v. State*, 277 Ga. App. 355, 626 S.E.2d 545 (2006) holding that HGN can help prove less safe DUIs in refusal cases.

*Simmons v. State*, 281 Ga. App. 252, 635 S.E.2d 849 (2006). Vehicle is broadly construed, and includes a golf cart.

*Hinton v. State*, 289 Ga. App 309, 656 S.E.2d 918 (2008). Littering is enough probable cause for DUI case.

*Brandon v. State*, 308 Ga. App. 239, 706 S.E.2d 772 (2011). Skid marks are probable cause for a DUI stop.

*Parker v. State*, 307 Ga. App. 61 (2010). Dangerous lane change probable cause for a DUI stop.

*Jaffray v. State*, 306 Ga. App. 469, 702 S.E.2d 742 (2010). Evidence of a numerical blood alcohol amount is probative of a DUI less safe charge.

*Love v. State*, 271 Ga. 398, 517 S.E.2d 53 (1999). DUI law unconstitutional as to marijuana. (But see *Ayers v. State*, 272 Ga. 733 (2000). Driving under the influence of marijuana can be reckless driving).

*State v. Lin*, 268 Ga. App. 702, 603 S.E.2d 315 (2004). An 11 month & 29 day sentence for a DUI was an illegal sentence and remanded for re-sentencing. The ruling was based on O.C.G.A. 40-6-391(c)(1)(E), which requires a total of 12 months of combined confinement and probation for a first DUI conviction. The defendant had asked for the 11 month/29 day sentence in light of immigration concerns. The court sentenced accordingly, but the state appealed. O.C.G.A. 40-6-391(c)(1)(E) is applicable to DUI cases only.

*State v. Lanes*, 287 Ga. App. 311, 651 S.E.2d 456 (2007). Observing a car parked in a closed gas station at 2:45 AM with the driver "slumped down" was not probable cause for a DUI arrest.

*Davis v. State*, 286 Ga. App. 443, 649 S.E.2d 568 (2007). Two Intoxilyzer tests 11 minutes apart are sequential.

*Chancellor v. Dozier*, 283 Ga. 259, 658 S.E.2d 592 (2008). Implied consent law constitutional. There is no need to advise the driver of every possible consequence. Also, if a CDL license holder is driving a non-commercial vehicle,

they can be given the non-commercial notice.

*State v. Morgan*, 289 Ga. App. 706, 658 S.E.2d 237 (2008). Blood test done without reading implied consent warning is inadmissible.

*Reynolds v. State*, 306 Ga. App. 1, 700 S.E.2d 888 (2010). Seeing a person near a hit and run accident without proof that he owned, drove or operated the car insufficient to prove DUI.

*Horne v. State*, 286 Ga. App. 712, 649 S.E.2d 889 (2007). DUI can be shown in three ways: (1) Manner of driving, (2) **Refusal to take either field sobriety tests or blood/breath tests, or (3) officer's own observations of defendant being less than safe to drive.**

*Ferega v. State*, 286 Ga. App. 808, 650 S.E.2d 286 (2007). Admission of refusal to perform field sobriety tests does not violate 5<sup>th</sup> amendment prohibition against self-incrimination.

*Dodds v. State*, 288 Ga. App. 231, 653 S.E.2d 828 (2007). Officer had probable cause to arrest for under 21 DUI even without probable cause for less than safe DUI.

*Simmons v. State*, 281 Ga. App. 252, 635 S.E.2d 849 (2006). Defendant can be convicted of DUI while driving a golf cart. (See also *Coker v. State*, 261 Ga. App. 646 [2003])

*Stewart v. State*, 280 Ga. App. 366, 634 S.E.2d 141 (2006). Lack of NHTSA-certification not grounds to make field sobriety test inadmissible.

*State v. Norris*, 281 Ga. App. 193, 635 S.E.2d 810 (2006). Court suppressed alco-sensor tests given after Defendant was in custody. Defendant was not given Miranda or implied consent warnings.

*Lumley v. State*, 280 Ga. App. 82, 633 S.E.2d 413 (2006). Photocopy of Intoxilyzer report not admissible

*Peters v. State*, 281 Ga. App. 385, 636 S.E.2d 97 (2006). Proof of time elapsed between driving and blood test is necessary.

*Webb v. State*, 277 Ga. App. 355, 626 S.E.2d 545 (2006). An officer may testify that the results on an HGN examination **enabled him to form an opinion that the driver's BAC was over .10 (the driver was charged with a less than safe DUI).**

*Lenhardt v. State*, 271 Ga. App. 453, 271 Ga. App. 453 (2006). Good discussion of when and how right to an independent test is violated.

*Hoffman v. State*, 275 Ga. App. 356, 620 S.E.2d 598 (2005). Refusal to submit to field sobriety tests admissible as circumstantial evidence of intoxication.

*State v. Collier* 279 Ga. 316, 612 S.E.2d 281 (2005). Curtailed the ability of police to collect evidence of drug and alcohol use by drivers involved in serious auto accidents. In a unanimous ruling, the court held that once a driver declines to give a blood and urine sample under the state's "implied consent" law, police cannot obtain a search warrant to force the driver to submit to the test. An amended O.C.G.A. 40-5-67.1. (d)(1) effective July 1, 2006 effectively appears to reverse this ruling.

*Drogan v. State*, 272 Ga. App. 645, 613 S.E.2d 195 (2005). A driver who operates a vehicle while under the influence of alcohol to the extent that it is less safe for him to drive is guilty of DUI under O.C.G.A. 40-6-391(a)(1) "There is no requirement that the driver actually commit an unsafe act... The State need only prove that alcohol impaired the defendant's driving ability. Methods of proof may include evidence of (i) erratic driving behavior, (ii) refusal to take field sobriety tests and the breath or blood test, and (iii) the officer's own observations (such as smelling alcohol and observing strange behavior) and resulting opinion that the alcohol made it **less safe for the defendant to drive.**"

*Capps v. State*, 273 Ga. App. 696, 615 S.E.2d 821 (2005). Officer testifies field sobriety tests are 91% accurate in determining BAC over .08

*Bius v. State*, 254 Ga. App. 634, 563 S.E.2d 527 (2002). Drive out tag alone not probable cause for DUI stop.

*Lutz v. State*, 274 Ga. 71 (2001). Georgia implied consent law is constitutional.

*Edge v. State*, 226 Ga. App 559, 487 S.E.2d 117 (1997). 90 minute delay in giving implied consent warning is okay (But see *Dawson v. State*, 227 Ga. App. 38, 488 S.E.2d 114 (1997) 45 minute delay is not okay). Note: Given the variation in cases, this is an issue which may have to be addressed on a case by case basis by trial courts, and is likely to cause further appeals.

*Berkow v. State*, 243 Ga. App. 698, 534 S.E.2d 433 (2000). Intoximeter test results taken when Defendant is not observed for the 20 minutes before the test are admissible.

*State v. Frost*, 297 Ga. 296, 773 S.E.2d 700 (2015). CRIMINAL PRACTICE: DUI. Evidence that the defendant had driven under the influence of alcohol on two prior occasions was relevant to prove knowledge in his trial for DUI-less safe.

*Williams v. The State*, 296 Ga. 817, 771 S.E.2d 373 (2015). Compliance with statutory implied consent requirements does not equate to actual and voluntary consent to qualify as an exception to the constitutional mandate of a warrant.

## CHAPTER 5—APPENDIX C: TRAFFIC JUDGES LISTSERV

The Administrative Office of Courts (AOC) maintains a Traffic Judges Listserv, which is open to all Georgia Judges dealing with Traffic Cases. It gives a quick and effective means to ask fellow Judges questions and discuss issues of interest. **A large number of Georgia's municipal, magistrate and probate court judges are members.**

To subscribe simply call the AOC at 404-651-6325.

## CHAPTER 5—APPENDIX D: T.I.P.S – TRAFFIC INFORMATION PROCESSING SYSTEM

T.I.P.S. is a no cost software program that allows courts to transmit traffic citations to the Georgia Department of Drivers Services (DDS) electronically. It was developed by the Administrative Office of Courts and **Governor's Office** of Highway Safety.

For more information go to [www.georgiacourts.org/aoc/tips](http://www.georgiacourts.org/aoc/tips) , email [mcqueenk@gaoc.us](mailto:mcqueenk@gaoc.us) or call 404-463-5420.

## CHAPTER 5—APPENDIX E: USEFUL CONTACT INFORMATION: GEORGIA DEPT. OF DRIVERS SERVICES (DDS)

DDS website: [www.dds.ga.gov](http://www.dds.ga.gov) (Forms, manuals, information and resources)

DDS address: PO Box 80447, Conyers GA 30013 Courts only use this number: 678-413-8765

For legal issues, judges may contact Attorney Vicki Judd at DDS by email [vjudd@dds.ga.gov](mailto:vjudd@dds.ga.gov). Do not give out Ms. **Judd's contact** information to the public. The public information number at DDS is (678) 413-8400 (1 (866) 754-3687 (Inside Georgia but outside the Metro Atlanta Area)

## CHAPTER 5—APPENDIX F: ADDITIONAL FORMS

Request/Order to Bind Over Case (Courtesy Judge Thomas Bobbitt III of Alamo)  
Order Correcting Clerical Order (Courtesy Judge Maurice H. Hilliard Jr. of Roswell)  
Order for Bond (Courtesy Judge Gary Jackson, Municipal Court of Atlanta)  
Motion/Order to Seal Record (Courtesy Judge Gary Jackson, Municipal Court of Atlanta)  
Order That No Points Be Assessed (Courtesy Judge Gary Jackson, Municipal Court of Atlanta)

REQUEST TO BIND OVER CASE

IN THE MUNICIPAL COURT OF ALAMO, GEORGIA

CITY OF ALAMO,  
Plaintiff,

DOCKET NO.:

vs.

MOTION

Defendant.

The Defendant, having been charged with certain offense(s) in violation of both the laws of the State of Georgia and the Code of the City of Alamo, does move the Court for the following relief:

The Defendant does hereby request a transfer of the foregoing case to the Superior Court of Wheeler County, and does hereby demand a Jury trial in the Superior Court of Wheeler County.

RESPECTFULLY SUBMITTED, this \_\_\_\_ day of \_\_\_\_\_, 20

DEFENDANT'S ATTORNEY

DEFENDANT

ORDER

The Court, after hearing the above captioned motion, does hereby transfer the foregoing case to the Superior Court of Wheeler County. for a Jury trial. The Clerk, and the City of Alamo are hereby ordered to transfer any cash bond, or property bond in this matter to the Superior Court of Wheeler County instanter.

SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_, 20

THOMAS C. BOBBITT. III  
Judge  
MUNICIPAL COURT OF ALAMO

ORDER CORRECTING CLERICAL ERROR

IN THE MUNICIPAL COURT

OF  
ROSWELL, GEORGIA

STATE OF GEORGIA

CASE NO. \_\_\_\_\_

-VS

\_\_\_\_\_  
Defendant

d/o/b \_\_\_\_  
OLN: \_\_\_\_

ORDER CORRECTING CLERICAL ERROR

O. C. G. A. 40-13-32 provides in part as follows:

- (a) No court having jurisdiction over cases arising out of the traffic laws of this state shall change or modify a traffic law sentence or judgment rendered pursuant to a conviction, plea of guilty except for the purpose of correcting clerical errors therein

It appearing to the Court that a clerical error occurred in dealing with the above described case in that a report of bond forfeiture was erroneously entered, and that such clerical error has now been compounded **by the Defendant's having received notice of the suspension of his privilege to operate a motor vehicle** on the public streets and roadways of Georgia, and it further appearing that the above case was dismissed on motion of the Solicitor of the Municipal Court of Roswell and approved by the Court, now, therefore, after due consideration by the Court, it is

ORDERED AND ADJUDGED, that the Clerk of this Court is hereby directed to correct the error in this case **by indicating on the Court's Docket that this case was dismissed; and it is further**

ORDERED that a certified copy hereof be forwarded to the Department of Driver Services of the State of Georgia for their use in correcting the record in this case, and in removing the suspension of the **Defendant's Driver's License**. It is further

ORDERED, that a certified copy of this order be furnished to the Defendant, through his Counsel, for subsequent delivery to his insurance agent in case of any further misunderstanding regarding the outcome of this case.

This     day of \_\_\_\_ 20\_\_

MAURICE H. HILLIARD, JR., Judge  
MUNICIPAL COURT OF ROSWELL

Agreed, and consented to this \_\_ day of     . 20\_\_  
MILTON C. BARWICK, Solicitor

ORDER FOR BOND

ATLANTA MUNICIPAL COURT

STATE OF GEORGIA

STATE OF GEORGIA,

vs.

Defendant.

\* BOOKING NO. \_\_\_\_\_  
\* CASE NO. \_\_\_\_\_  
\* CHARGE: \_\_\_\_\_  
\*  
\*

ORDER FOR BOND

The aforesaid matter having come before this Court on a regularly scheduled Bond Hearing, it is hereby ORDERED:

That bond be set at \_\_\_\_\_ total bond.

That bond be denied for the following reason(s):

- (a) \_ The accused poses a significant risk of fleeing from the jurisdiction of the court or failing appear in Court when required.
- (b) The accused poses a significant threat or danger to any person, to the community, or to any property in the community.
- (c) The accused poses a significant risk of committing a felony pending trial.
- (d) The accused poses a significant risk of intimidating witnesses or otherwise obstructing the administration of justice.

The defendant shall be allowed to sign his or her own Bond PROVIDED THAT the Defendant shall first consent to be admitted to the Probation Pre-Trial Release Program, and shall, as a condition to this Bond, comply with each and every guideline of the Probation PreTrial Release Program. Otherwise, good security must be given for bond.

Other findings, considerations, conditions:

SO ORDERED this day of \_\_\_\_\_ 20

JUDGE GARY E. JACKSON  
Atlanta Municipal Court

Consented to: \_\_\_\_\_

MOTION AND ORDER TO SEAL

IN THE ATLANTA MUNICIPAL COURT

STATE OF GEORGIA

CITY OF ATLANTA

)

Case No.: -

PLANTIFF

)

vs.

)

DEFENDANT

)

MOTION TO SEAL

COMES NOW, the above named Defendant in the above styled case and shows the Court as follows:

(1)

Defendant was arrested on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_ for violation of the \_\_\_Official Code of Georgia \_\_\_Atlanta City Code of Ordinances,

\_\_\_\_\_

(2)

The foregoing case was dismissed on the \_\_\_ day of \_\_\_\_\_ 20. Pursuant to the laws of Georgia, \_\_\_\_\_ Defendant requests the record of the above arrest be sealed.

WHEREFORE, Defendant prays that the records of his/her arrest for the above charges be sealed.

Attorney for Defendant/Pro Se

IN THE ATLANTA MUNICIPAL COURT

STATE OF GEORGIA

CITY OF ATLANTA

)

Case No.: -

PLANTIFF

)

vs.

)

—

)

DEFENDANT

ORDER

The above Motion to Seal is hereby GRANTED and the arrest record of the above named defendant is hereby SEALED to all but criminal justice officials.

IT IS SO ORDERED, this \_\_\_ day of \_\_\_\_\_, 20

Gary E. Jackson  
Judge, Atlanta Municipal Court  
NO POINTS ORDER

ORDER FOR NO POINTS TO BE ASSESSED

IN THE MUNICIPAL COURT OF ATLANTA  
STATE OF GEORGIA

CITY OF ATLANTA \* Citation No.: \_\_  
\*

\*Date: \_\_\_\_\_

vs. \*

\* Charge:  
\*

\_\_\_\_\_\* Plea: \_\_\_\_\_

Defendant \*

DOB: \_\_\_\_\_ \*

ORDER FOR NO POINTS TO BE ASSESSED

The court having accepted the attendance of the above named defendant to a **driver's improvement clinic** for the above violation; after the issuance of citation and prior to the scheduled court date or, this court having ordered the above named-defendant to **complete a driver's improvement clinic for the above violation, and the same having been completed.**

It is herein ORDERED that no points shall be added to the driving record of the above-defendant in Compliance with section 40-5-57(c) O.C.G.A. §, PROVIDED that such treatment has not been accepted by the Department of Driver Services within the last five years.

SO ORDERED, this \_\_\_ day of \_\_\_\_\_ .20

Gary E. Jackson  
Judge, Municipal Court of Atlanta

## CHAPTER 5—APPENDIX G: PROBATION CONDITIONS AND PROBATION REVOCAATION HEARINGS

*Appendix G is material supplied by Judge Timothy Wolfe and is reproduced with his express permission.*

### Overview of the New (2015) Probation Law as it Affects Municipal Courts: What you Need to Know About HB 310

*Municipal Court Law and Practice Update* October 7-9, 2015

Timothy W. Wolfe Copyright ©2015

Associate Judge, *Municipal Courts of Dunwoody and Smyrna*

Associate Judge, *Magistrate Court of Cobb County*

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#### I. BACKGROUND

Due to a 2014 audit of misdemeanor probation, recommendations of Governor Deal and the *Criminal Justice Reform Council*, and the Supreme Court decision in *Sentinel Offender Services v. Glover et. al*, Georgia probation law as pertains to municipal courts was significantly re-written, culminating in HB 310. This bill becomes effective on July 1, 2015 and has been signed by Governor Deal. Citations below are to the Georgia Code and to HB 310 by page and line number. In this paper, portions of the probation bill are quoted verbatim with quotation marks, and in other instances, they are summarized or re-organized for clarity in presentation.

The heart of the bill as applied to municipal courts is contained in Part III COUNTY AND MUNICIPAL PROBATION ADVISORY COUNCIL, SECTION 3-2, which starts at page 21, line 697. In some instances new language and provisions have been created and in others, old language was taken from different code sections and re-organized (and in some instances tweaked) O.C.G.A. §42-8-100 et. seq. Article 6.

Phrases that are in bold within the text are the emphasis of this author. When editorial comments are made, I use the term “Note”.

## II. Administrative Changes:

- The *County and Municipal Probation Advisory Council* is now under the aegis of the DCS (Department of Community Supervision) not the AOC.
- Reporting requirements for private probation providers have been enhanced with increased disclosure/transparency. O.C.G.A. § 42-8-108, page 35, line 1202
- **Probationer’s are accorded enhanced rights to obtain information, records, and documents from the private probation provider.** O.C.G.A. §42-8-109.2; page 37, line 1271
- There is no **difference between the powers and authority of “probation officers” (those employed directly by the city) and “private probation officers”(employed by a private corporation enterprise, agency or entity)**
- When the act becomes effective on July 1, 2015, **“(it) shall apply to sentences entered on or after such date.”** Page 119, line 4135

## III. Substantive Changes in The Setting and Revocation of Probation

### A. Tolling

The Sentinel case eliminated tolling of sentences for misdemeanor cases, whether or not probation involved a private probation provider or government provider. However, HB 310 has revived tolling for misdemeanors in our municipal court system. Page 24, line 800. O.C.G.A. §42-8-102. The logistics of creating a tolling order are covered at page 29, line 967. O.C.G.A. §42-8-105. The grounds for tolling are now failure to report to the probation supervisor or failure to appear in court for a probation revocation hearing. (Thus other hearings pertaining to probation such as a compliance hearing would not be grounds for tolling). Note, the old ground contained in O.C.G.A. §42-8-36 of *non est inventus* (not found in the jurisdiction of the court) has been eliminated.

Probationers have a duty to keep probation officers informed of their whereabouts and contact information, including residence and mailing address, telephone number and e-mail. Page 29, line 961; O.C.G.A. §42-8-105

Moreover, if the ground of failure to report to the probation officer is utilized, it must be a minimum of two times. Page 29 line 975, and the affidavit filed by the probation official must contain at a minimum as per O.C.G.A. & 42-8-105 (b)(1) the following:

- (A) **“The probationer has failed to report to his or her probation officer or private probation officer, as the case may be, on at least two occasions;**
  
- (B) **The officer has attempted to contact the probationer at least two times by telephone or email at the probationer’s last known telephone number or e-mail address, which information shall be listed in the affidavit;**

(C) The officer has checked local jail rosters and determined the probationer is not incarcerated:

(D) **The officer has sent a letter by first class mail to the probationer's last known address, which shall be listed on the affidavit, advising the probationer that the officer will seek a tolling order if the probationer does not report to such officer, either by telephone or in person, within ten days of the date on which the letter was mailed; and**

(E) The probationer has failed to report to the probation officer or private probation officer, as the case may be, as directed in the letter set forth in subparagraph (D) of this paragraph and ten days have passed since the **date on which the letter was mailed**".

Page 29, line 989 (O.C.G.A. §42-8-105):

**"In the event the probationer reports to his or her probation officer or private probation officer, as the case may be, within the time prescribed in subparagraph (D) of paragraph (1) of this subsection, the probationer shall be scheduled to appear on the next available court calendar for a hearing to consider whether the probation sentence should be tolled. (Note, this is the first time a hearing has been available in a tolling application)**

Upon receipt of the affidavit required by subsection (b) of this Code section, the court may in its discretion, toll the probated sentence.

Note, the failure to report sets out the specific duties of the probation officer to contact the probationer. As to the other ground for tolling, (failure to appear at a probation revocation hearing), the probation officer still has a duty in the tolling petition of **"stating efforts to contact the probationer."**

Page 29, line 971. However, unlike failure to report, it's not clear as to exactly what efforts should be made and when.

The effective date of the tolling of the sentence shall be the date the court enters a tolling order and shall continue until the probationer personally reports to the probation officer, as the case may be, taken into custody in this state or is otherwise available to the court, whichever occurs first. Page 29, line 995.

Any tolled period of time shall not be included in computing creditable time served on probation or as any part of the time that probationer was sentenced to serve.

Any unpaid fines, restitution, or other moneys owed as a condition of probation shall be due when the probationer is arrested; provided, however, that if the entire balance of his or her probation is revoked, all the conditions of probation, including moneys owed, shall be negated by his or her imprisonment. If only part of the balance of probation is revoked, the court **shall determine the probationer's responsibility for the amount of unpaid** fines, restitution, and other moneys owed that shall be imposed upon his or her return to probation after release from imprisonment and may reduce arrearages under the same circumstances and conditions as set forth in subsection (f) of Code Section 42-8-**102**". (Note, the bold part above is a change from the prior statute).

B. Issues of Inability of Defendants to Pay Fines and Fees and the application of *Bearden v. Georgia*

Background: A significant portion of the revised areas of the law pertain to a probationer's inability to pay fines and fees and alternatives to the traditional payment of these obligations. This issue is really a subset of the requirement of "willfully" violating a condition of probation. Georgia appellate courts have followed the United States Supreme Court case of *Bearden v. Georgia*, 461 US 660 (1983). This case set up the following standard: "In revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons

for failure to pay. If the probationer willfully refused to pay, the court may revoke probation and sentence the defendant to imprisonment...If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. **Only if alternative measures are not adequate to meet the state's interests in punishment and deterrence may the court imprison a probationer who has made bona fide efforts to pay.**" At 672. Two seminal Georgia cases interpreting *Bearden* are: *Johnson v. State*, 307 Ga. App. 570, 707 S.E. 2d 373 (2011) and *Odom v. State*, 312 Ga. App. 403 (2011) Note: In short, HB 310 has increased the scope of inquiry required of judges, above and beyond *Bearden*.

C. **Pre-Sentence Consideration of the Defendant's Ability to Pay**

Page 24, line 802; O.C.G.A. §42-8-102

**"Probation conditions may include the payment of fines, fees and restitution.** With probation supervision, probation supervision fees are specifically authorized. In determining the financial obligations, other than restitution to impose on the defendant, the court may consider the following criteria

1. **The Defendant's financial resources and other assets;**
2. **The Defendant's earnings and other income;**
3. **The defendant's financial obligations, including obligations to dependents;**
4. The period of time during which the probation order will be in effect;
5. The goal of the punishment being imposed; and
6. Any other factor the court deems appropriate;

The Court may convert fines, statutory surcharges and probation supervision fees to community service on the same basis as it allows a defendant to pay a fine through community service on the same basis set forth in O.C.G.A. §17-10-1 (d)." (which sets out the hourly rate of community service at the minimum wage or an amount specified by the trial judge). Page 24, line 815.

D. Modification or waiver of fines, statutory surcharges, probation supervision fees and any other moneys assessed by the court or a provider of probation services (Determination made pre or post sentencing) O.C.G.A. §42-8-102, page 25, line 818).

Note, the following definitions are utilized in making this determination:

A. Developmental Disability shall have the same meaning as set forth in O.C.G.A. §37-1-1 (8) (which is):

*"Developmental disability" means a severe, chronic disability of an individual that:*

*(A) Is attributable to a significant intellectual disability, or any combination of a significant intellectual disability and physical impairments;*

*(B) Is manifested before the individual attains age 22;*

*(C) Is likely to continue indefinitely;*

*(D) Results in substantial functional limitations in three or more of the following areas of major life activities:*

*(i) Self-care;*

*(ii) Receptive and expressive language;*

*(iii) Learning;*

*(iv) Mobility;*

*(v) Self-direction; and*

*(vi) Capacity for independent living; and*

*(E) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance which are of lifelong or extended duration and are individually planned and coordinated.*

B. **'Indigent'** means an individual who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the individual has other resources that might reasonably be used without undue hardship for such individual or his or her dependents. (Note this is similar to the guidelines for court appointed attorney)

C. **'Significant financial hardship'** means a reasonable probability that an individual will be unable to satisfy his or her financial obligations for two or more consecutive months

D. 'Totally and Permanently disabled' shall have the same meaning as set forth in O.C.G.A. §49-4-80 (4) (which is):

*"Totally and permanently disabled" means any person not less than 18 nor more than 65 years of age who has a medically demonstrable disability which is permanent and which renders him incapable of performing any gainful occupation within his competence".*

Unless rebutted by a preponderance of the evidence that a defendant will be able to satisfy his or her financial obligations without undue hardship to the defendant or his dependents, a defendant shall be presumed to have a significant financial hardship if he or she:

- A. Has a developmental disability
- B. Is totally and permanently disabled
- C. Is Indigent; or
- D. Has been released from confinement within the preceding 12 months and was incarcerated for more than 30 **days before his or her release"**.

Note: “significant financial hardship has two definitions: The one listed in subsection C above (in bold) OR A-D, directly above.

Upon determination by the court, prior or subsequent to sentencing, that Defendant has a significant financial hardship or inability to pay or there are any other extenuating factors which prohibit payment or collection, the court SHALL waive, modify or convert fines, statutory surcharges, probation supervision fees and any other moneys assessed by the court or a provider of probation services page 25, line 830.

**“Provided however, that the imposition of sanctions for failure to pay such sums shall be within the discretion of the court through judicial process or hearing”** page 25, line 834.

“Absent a waiver, the court shall not revoke a probationary sentence for failure to pay fines, statutory surcharges, or probation supervision fees without holding a **hearing, inquiring into the reason for the probationer’s** failure to pay, and if a probationary sentence is revoked, making an express written determination the probationer has not made sufficient bona fide efforts to pay and the **probationer’s failure to pay was willful or that adequate** alternative types of punishment do not exist. (Note: The language in bold is essentially from *Bearden v. Georgia*, supra.) Should the probationer fail to appear at such hearing, the court **may, in it’s discretion revoke the probated sentence”**. Page 25, line 852.

The sentencing judge retains jurisdiction over defendants on probation throughout the term of sentence: and allows judges to: revoke, rescind any or all of sentence; modify or change the sentence, including tolling (as long as during the original sentence period.) If a probationer is otherwise found to be eligible for modification or termination, he or **she won’t be deemed ineligible for such change solely due to** his or her failure to pay fines, statutory surcharges or probation supervision fees. Page 25 line 846; page 26, line 859. All of the above references to page 25 are in O.C.G.A. §42-8-102.

E. Limits on Revocation for Failure to Report or Failure to Pay Fines, Statutory Surcharges or Probation Supervision Fees: (page 26, line 863; O.C.G.A. §42-8-102)

At a revocation hearing , upon proof that probationer has violated probation for failure to report, failure to pay fines, statutory surcharges or probation supervision fees, the court must consider alternatives to confinement and consider if conduct was willful. If an alternative is not warranted you can revoke the balance of sentence or a maximum of 120 days, whichever is less. (Note the 120 day cap would not apply if violations occurred other than failure to report or monetary obligations fines, statutory surcharges or probation supervision fees). For failure to comply with other general provisions of probation/suspension alternatives to confinement must be considered and if not warranted, a judge can revoke the balance of the sentence, or a period not to exceed two years, whichever is less. **“Alternatives to confinement are considered to be: community service, modification of the terms of probation or any other alternative deemed appropriate by the court.” Page 26, line 866; OC.G.A. §42-8-102.**

Note: The criteria and standards for community service are now at O.C.G.A. §42-3-50 et. seq. (formerly O.C.G.A. §42-8-70 et. seq.) and are at page 11, line 372 of the new bill. The provisions are essentially the same as existed under the old statute.

F. General Conditions of Probation

Municipal Courts now have their own list of what are commonly accepted as **“General Conditions”** O.C.G.A. §42-8-104 (page 27, line 898). However, these are essentially the same as the prior scheme in which municipal courts had utilized conditions in the State Wide Probation section of the law (O.C.G.A. §42-8-35) **Although this statute was not labeled as “General Conditions”, the court of appeals identified them as such in *Hill v. State*, 270 Ga. App. 114 (2004).** However, in the new law, note that at condition 13, in terms of evaluation, testing, rehabilitation **programs and periodic drug/alcohol screenings ordered by the court, “the Court may assess and the (probation officer)...shall be authorized to collect the costs or a portion of the costs as determined by the court of such evaluations, testing,**

rehabilitation programs, and screenings from the probationer”. At conditions 14 and 15, fees for electronic monitoring and devices to detect alcohol or drug use are to be paid by probationers, but limited by the contractual rate between the court and the provider of the services. Also at condition 16, provision is made for residential or non-residential treatment as indicated by a risk and needs assessment with the same basis for payment of costs as in 13, above. Page 28, lines 936. (Note, the Driving under the Influence code section (O.C.G.A. §40-6-391) contains its own mandated probation conditions).

The new statute also allows, in appropriate circumstances, for the creation of additional special conditions of probation unless otherwise prohibited by law, page 28, line 957. O.C.G.A. §42-8-104.

G. **Limits on “Pay only”** Probation page 26 line 882, O.C.G.A. §42-8-103

If the sole reason a defendant is placed on probation is because he or she is unable to pay the court imposed fines or statutory surcharges, probation fees are limited to three months “regardless of the number of cases for which a fine and statutory surcharge were imposed or that the defendant was sentenced to serve consecutive sentences”; provided, however, that collection of any probation supervision fee shall terminate as soon as all court imposed fines and statutory surcharges are paid in full.” The term “pay only” “shall not include circumstances where restitution has been imposed or other probation services are deemed appropriate by the court.” Furthermore, if “pay only” probation is later converted to a sentence that involves community service, the probation officer may petition to have monthly supervision fees reinstated to monitor the probationer’s compliance. (The probationer would be entitled to a hearing on this request).

***(End of Judge Wolfe’s presentation)***

## CHAPTER 5—APPENDIX H: OTHER PROBATION ISSUES

### EVIDENTIARY ISSUES AND QUANTUM OF PROOF

Despite the reduced standard for revocation, admissible evidence is still necessary. *Young v. State*, 265 Ga. App. 425, 594 S.E. 2d 667 (2004).

An issue that has often come up in a probation revocation setting is the admission of hearsay evidence. In 2011, the Georgia legislature made a sweeping change of the evidence code by adopting a large portion of the *Federal Rules of Evidence* (FRE) and this became effective January 1, 2013. As a preliminary matter, the legislature specifically **intended that the “new” rules of evidence would apply to probation revocation hearings.** (O.C.G.A. §& 24-1-2(b); however, they are not intended to apply to proceedings to revoke parole. O.C.G.A. §24-1-2(c)(4). Federal appellate decisions pertaining to the new Georgia rules will be used for interpretation when new statutes from the federal rules are used. **The “new” Georgia hearsay rule (particularly the definition of hearsay) adopted from the FRE is substantially similar to the “old” hearsay rule, and thus Georgia appellate decisions will continue to be applied.** However, one of the most significant aspects of the new evidence code is the requirement to object to hearsay. O.C.G.A. §24-8-802 **now provides that: “Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible.” Thus the application of prior hearsay decisions will of course be affected by this code section.**

In *Smith v. State*, 283 Ga. App. 317, 641 S.E. 2d 296 (2007) **the state had moved to revoke accused’s probation based on the criminal offenses of possession of cocaine and theft by receiving stolen property.** The only witness at the hearing was a police officer from the Athens-Clarke County police department and, from the record, the receiving **stolen property was the only basis for the revocation. In reversing the revocation of Smith’s probation, the court ruled that the element of the articles being stolen was purely based on hearsay from the victim reporting the crime to the officer and was, therefore, not competent. See also *Boatner v. State*, 312 Ga. App. 147, 717 S.E. 2d 727 (2011): “Hearsay evidence has no probative value and is inadmissible in a probation revocation proceeding.”**

However, even if hearsay statements were improperly admitted, if they are cumulative of other competent evidence that is sufficient to revoke probation, then the revocation will stand. *Walker v. State, supra*,

There is another line of cases that considers the use of hearsay based on Sixth Amendment confrontation grounds. However, the courts have held that constitutional protections in a probation revocation do not rise to the same level as a criminal trial. *Ware v. State, supra*, citing *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

However, keep in mind that Confrontation Clause objections are waived if not made at trial. *Walton v. State*, 278 Ga. 432, 603 S.E. 2d 263 (2004). This case also contains a discussion of the interplay between hearsay objections and confrontation clause objections.

### SCIENTIFIC TESTS AND PROCEDURES

In *Mann v. State*, 285 Ga. App. 39, 645 S.E. 2d 573 (2007), the Court of Appeals thoroughly reviewed the standard for a scientific test in the context of a probation revocation hearing. **One of the grounds of the defendant’s revocation petition was that he possessed cocaine based on a positive urine test. The probation officer had tested the defendant’s urine using a “Roche OnTrack TesTstik”. The probation officer was the sole witness to verify the test and the defendant objected to the admissibility of the test since it lacked an expert laying a proper foundation for its accuracy. The grounds of the appeal were that the test was improperly admitted because it had not reached “a scientific state of verifiable certainty.” The court held that the state failed to establish the reliability of the test with expert testimony and there was no admissible evidence that a substantial number of courts have recognized**

**the reliability of the test. The test was not at the level of “verifiable certainty” that would have allowed the court to use judicial notice without the necessity of receiving evidence.**

In terms of the reliability of scientific tests, **the “new” Georgia evidence code, effective January 1, 2013, continues to provide the dichotomy that existed prior thereto:** In civil cases, the courts will look to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) as well as other federal cases cited in O.C.G.A. § 24-7-702. However, criminal cases will continue to be governed by *Harper v. State*, 249 Ga. 519, 292 S.E. 2d 389 (1982), which would of course involve probation revocation hearings. Essentially, *Harper* provides that **scientific procedures or techniques must have “reached a scientific stage of verifiable certainty”**. **The trial court can make its determination from evidence presented to it at trial by the parties (including expert testimony) or “may base its determination on exhibits, treatises or the rationale of other cases in other jurisdictions.”** Once a procedure has been recognized in a substantial number of courts, the trial judge may recognize it by judicial notice.

In *Gaddis v. State*, 310 Ga. App. 189 (2011), a different result was reached than the *Mann* case, *supra* in that the **“OnTrak TesTstik” had reached a status of verifiable certainty.** The trial court was allowed to take judicial notice of **another court’s ruling and there was also expert testimony concerning the widespread and accepted use of this particular test.**

### III. STATUTORY AND CONSTITUTIONAL RIGHTS

#### RIGHT TO APPOINTED COUNSEL

*Banks v. State*, 275 Ga. App. 326, 620 S.E. 2d 581 (2005) Georgia established a limited right to appointed counsel in probation revocation hearings. The *Banks* case was based on a seminal U.S. Supreme Court case on probation revocation *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

Presumptively, it may be said that counsel should be provided in cases where, after being informed of {her} right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that {she} has not committed the alleged violation of the conditions upon which {she} is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing {upon} a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for {herself}. (Citing *Scarpelli*.)

The court in *Banks* points out that *Scarpelli* makes no distinction for **“technical” probation violations** or for probation violations involving new criminal charges pending in a different jurisdiction. *Banks*, at 328.

The analysis in *Banks* would of course not obviate the need for the probationer to qualify for appointed counsel under the appropriate indigent guidelines, which is a separate issue. Furthermore, those probation violators who do not qualify for appointed counsel should be given reasonable opportunity to retain counsel and a continuance granted for the hearing.

On January 1, 2005, O.C.G.A. §36-32-2(f) became effective:

Any municipal court operating within this state and having jurisdiction over such other matters as are by specific or general law made subject to the jurisdiction of municipal courts shall not impose any punishment of confinement, probation, or other loss of liberty, or impose any fine, fee or cost enforceable by confinement, probation, or other loss of liberty, as authorized by general law or municipal or county ordinance, unless the court provides to the accused the right to representation by a lawyer, and provides to those accused who are indigent the right to counsel at no cost to the accused. Such representation shall be subject to all applicable standards adopted by the Georgia Public Defender Standards Council for representation of indigent persons in this state.

This code section was cited in *Nguyen v. State*, 282 Ga. 483, 651 S.E. 2d 681 (2007). This case involved a *Petition for Writ of Habeas Corpus* from a conviction in a municipal court for violating a city ordinance. The Court of Appeals remanded the case to the habeas court to determine if the accused was advised of her right to counsel and knowingly and intelligently waived that right.

Typically, conditions of probation will include the payment of fines, restitution and probation fees on a monthly basis throughout the term of probation. In a case arising out of Georgia, the U.S. Supreme Court has held that probation may not be automatically revoked (solely) for failure to pay a fine unless a finding is made that the probationer has failed to make sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist.

If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence, may the court imprison a probationer who has made sufficient bona fide efforts to pay. *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

Two recent cases (2011) have interpreted the *Bearden* standard with varying results: *Johnson v. State*, 307 Ga. App. 570, 707 S.E. 2d 373 (2011) and *Odom v. State*, 312 Ga. App. 403, 718 S.E. 2d 329 (2011). In *Johnson*, the trial court **revoked the defendant's probation based on his failure to pay court-ordered fines and fees**. In an evidentiary hearing, Johnson testified as to his attempts to find work as well as the lack of family resources. The court inquired into his age as well as physical and mental capacity to work. The Court of Appeals reversed and remanded the case, because the trial court failed to inquire into the reasons for non-payment and further failed to consider alternatives to imprisonment if lack of payment was despite bona fide efforts. **"In the instant case, the trial court made no express or written findings as to the reasons for Johnson's failure to pay or as to the inadequacy of alternative punishments."**

However, in *Odom*, the decision upheld the trial court revoking the defendant's probation for failure to pay court ordered restitution and failing to report. Testimony at the hearing was that *Odom* was behind on the restitution and **hadn't worked in three years, partially because of arrests for probation violations**. He claimed he had made efforts to find work, including searching the internet and talking to friends. The trial court found that he could have looked for work **"beneath his skill level" to do whatever it takes to pay the restitution. Although the court didn't use the magic words of a failure to make "sufficient bona fide efforts to acquire the resources to pay."** There was a sufficient finding that *Odom's* efforts were not sufficient and not a valid reason to avoid payment.

A defendant who has had his probation revoked must be informed by the trial court of his right to appeal the revocation. *Kreps v. Gray*, 234 Ga. 745, 218 S.E. 2d 1 (1975). If the probationer is unrepresented, then he would have to be directly informed, but if represented, it is presumed that the attorney would understand this right. However, even with counsel there is an issue of whether the client knowingly waived the right to appeal. Failure to abide by the rule in this case can allow for an out-of-time appeal.

Appeals from municipal courts are governed by certiorari to the Superior Court. *Russell v. City of East Point*, 261 Ga. 213, 403 S.E. 2d 50 (1991). See also O.C.G.A. §5-4-3 and O.C.G.A. §40-13-28.

#### SCOPE OF FOURTH AMENDMENT RIGHTS UNDER PROBATION CONDITIONS

It has long been held that Fourth Amendment Rights apply to probationers, absent a waiver. *Fox v. State*, 272 Ga. 163, 527 S.E. 2d 847 (2000).

The background for Georgia appellate decisions is based on two U.S. Supreme Court cases: *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987) and *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). Both of these cases upheld warrantless searches by recognizing reduced Fourth Amendment rights for probationers, replacing probable cause with **"reasonable suspicion."** *Griffin* was based on the state of Wisconsin

using a valid probation regulation while Knights was based on a consent to search provision as a condition of probation.

*Jones v. State*, 282 Ga. 784, 653 S.E. 2d 456 (2007) recognized both of these decisions but in this instance held that **the state “has pointed out no such law, legally authorized regulation or sentencing order stripping Jones of his Fourth Amendment rights not to have his home searched without a warrant.”** In holding that most of the evidence seized should have been suppressed, the court noted that a special condition of probation of submitting to a warrantless search was not checked on the probation form.

Generally, these issues are litigated on the basis of a special condition of a waiver of Fourth Amendment rights:

*...A search conducted pursuant to a special condition of probation need not be made as a routine incident of the probation supervision process. The rule is that there must be some conduct reasonably suggestive of criminal activity to “trigger” the search. It can be prompted by a good-faith suspicion arising from routine police investigative work. Accordingly as a general rule, the police can search a probationer, who is subject to such a special condition of probation, at any time, day or night, and with or without a warrant, provided there exists a reasonable or good-faith suspicion for search, that is, the police must not merely be acting in bad faith or in an arbitrary or capricious manner (such as searching to harass probationer). Reece v. State, 257 Ga. App. 137, 140 (2002).*

In *Reece*, the “reasonable suspicion” was satisfied by the probationer reporting to the probation officer in a “drugged” condition and the probation officer having information from witnesses that the probationer had been using illegal drugs at his house.

In *Brooks v. State*, 292 Ga. App. 445, 664 S.E. 2d 827 (2008), the defendant was tried for a violation of the VGCSA and possession of a firearm by a convicted felon. **The court upheld the trial court’s denial of a motion to suppress a warrantless search.** The defendant asserted that, although there was a waiver of Fourth Amendment rights as a condition of probation that he had specifically objected to it on the record. The court held that the defendant was aware of the condition and could have withdrawn from the plea agreement. (This was distinguished from *Fox v. State*, 272 Ga. 163, 527 S.E. 2d 847 (2000) in which a warrantless search waiver was imposed after the plea had been entered without the defendant having knowledge of the condition since it **wasn’t in the plea bargain**). In *Brooks*, **the court upheld the search as being conducted on “reasonable grounds” because the officers were relying on two anonymous tips that the defendant possessed methamphetamine on his property.** These tips were received in close proximity and were pursuant to an advertised “tip line.” Further, the agent testified that the defendant had complained of being watched and acted “nervous and paranoid.”

In *Evans v. State*, 318 Ga. App. 706, 734 S.E. 2d 527 (2012), the court considered the issue of a search without a warrant and the absence of a special condition of probation that waived Fourth Amendment rights. The court used a “reasonable cause” analysis in denying a motion to suppress. Holding that there was reasonable cause to arrest the accused based on information that had been received, the subsequent search of contraband in plain view was authorized as a search incident to arrest.

Despite the case law that gives probationers Fourth Amendment rights, in 2011, the Georgia Supreme Court held that the exclusionary rule no longer applies to probation revocation hearings. *State v. Thackston*, 289 Ga. 412, 716 S.E. 2d 517 (2011). To further seal this issue, the court also overruled a series of cases that held that illegally seized evidence was inadmissible in probation revocation hearings. At foot note No. 2.

## CHAPTER 5—APPENDIX I: BANKRUPTCY AND CRIMINAL FINES

Criminal fines are not discharged by the Bankruptcy of a Defendant. 11 U.S.C. §523.

However, the filing of most (not all) bankruptcies creates an automatic stay prevents collection of criminal fines and restitution until the bankruptcy proceeding is completed if it is filed after the fine/restitution is imposed. If the fine/restitution is imposed after the bankruptcy is filed then the Automatic Stay has no effect.

Not all bankruptcy filings have an automatic stay, and in some, the stay expires. Upon receipt of a bankruptcy notice, a municipal court needs to research the case to determine the status of the stay and the effect on fines.

The punishment for violation of the stay can include contempt fines and jail, so caution is mandated. As long as the stay is in effect, even the mailing of payment reminder letters must be discontinued.

Note that the stay can be lifted by order of the bankruptcy court. The stay does not prevent the sentencing of a defendant to jail or most other sentencing. Its effect deals with collection of money. As such, revocation of probation and contempt hearings may be affected.

## CHAPTER 5—APPENDIX J: LIMITED DRIVING PERMITS

O.C.G.A. §40-5-64 authorizes limited driving permits for the following:

1. School related suspensions
2. Points suspension (1<sup>st</sup> in 5 years)
3. DUI and mandatory offenses (1<sup>st</sup> in 5 years)
4. Administrative license suspension (1<sup>st</sup> in 5 years)
5. Speeding, if age 18 or over, and 24-34 MPH over limit, and approved by the Judge

There is a \$25 fee for permits. Permits expire as follows:

1. School suspensions (on 18<sup>th</sup> birthday)
2. One year after issuance for DUI, points or mandatory suspension
3. 30 days after an administrative suspension (see O.C.G.A. §40-5-67.2)
4. 6 months after installation of an ignition interlock
5. Reinstatement of license.

Permits can be renewed for a \$5 fee until reinstatement.

Permits can be used ONLY for the following:

1. Driving to/from work or doing normal duties of occupation
2. Receive medical care or get prescription drugs
3. Attend college or school where enrolled as a student
4. Attend meetings at alcohol or drug abuse/addiction organizations
5. Attend court ordered driver education or drug/alcohol programs

Permits cannot be used for:

1. Going to court-ordered community service
2. Going to see probation officer
3. Going to court hearings or probation revocations.

ANY state law or local ordinance traffic violation (even a seat belt) revokes the limited permit, as does a violation of any term of the permit. A revoked permit cannot be reinstated for six months.

On the next page is the DDS Form that allows traffic judges to give a limited permit to an under 21 year old (and over 18) driver with a speeding case. The procedure is to serve the defendant, suspend their license, and then give them this form. The defendant then goes to DDS and DDS will give out the permit. The defendant does not have to go to DDS in Conyers, any DDS office can give out the permit.

**GEORGIA DEPARTMENT OF DRIVER SERVICES**  
2206 East View Parkway, P.O. Box 80447, Conyers Georgia 30013  
Phone: (678) 413-8400

**Nathan Deal**  
Governor

**Gregory C. Dozier**  
Commissioner

AUTHORIZATION FOR ISSUANCE  
OF LIMITED DRIVING PERMIT

This form is to be used when a Court wishes to authorize issuance of a limited **driving permit for a driver's license suspension imposed pursuant to** O.C.G.A. §§40-5-57.1 for a speeding ticket in which the defendant is at least 18 years old on the date he/she applies for such permit, and his/her speed on the speeding conviction must be 24-33 miles per hour above the posted speed.

**Defendant's Name:** \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip code: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ Age: \_\_\_\_\_

**Today's Date:** \_\_\_\_\_

License Number: \_\_\_\_\_

Offense: Speeding Actual Speed: \_\_\_\_\_ Posted Speed: \_\_\_\_\_

Incident Date: \_\_\_\_\_ Case Number: \_\_\_\_\_

Disposition Date: \_\_\_\_\_

Court: \_\_\_\_\_

\_\_\_\_\_  
**Judge's Signature**

Print Name: \_\_\_\_\_

Phone Number: \_\_\_\_\_

This form should be given to the Defendant. He/she should take the form to a DDS Customer Service Center. Locations, hours and other information can be found at [www.dds.ga.gov](http://www.dds.ga.gov) or 678-413-8400.

## CHAPTER 5—APPENDIX K: UPDATED LIST AND SUMMARY OF NEW STATUTES

SB 100 (Effective 7/1/2016): A BILL to be entitled an Act to amend Title 40 of the Official Code of Georgia Annotated, relating to motor vehicles and traffic, so as to provide for applicability with current federal regulations in the safe operations of motor carriers and commercial motor vehicles; to provide for definitions; to provide for registration and regulation of for-hire intrastate motor carriers and intrastate motor carriers; to provide for related matters; to provide for an effective date and applicability; to repeal conflicting laws; and for other purposes. The Act amends O.C.G.A. Sections 3-3-23.1, 19-11-9.3, 20-2-320, 20-2-690, 20-2-690.2, 20-2-697, 20-2-701, 40-1-1, 40-1-8, 40-2-1, 40-2-20, 40-2-140, 40-5-2, 40-5-6, 40-5-22, 40-5-25, 40-5-27, 40-5-28, 40-5-54, 40-5-57.1, 40-5-63, 40-5-64, 40-5-75, 40-5-81, 40-5-100, 40-5-121, 40-5-150, 40-5-171, 40-6-15, and 42-8-112 and repeals O.C.G.A. Section 40-5-57.2.

HB 579 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Article 1 of Chapter 6 of Title 40 of the Official Code of Georgia Annotated, relating to general provisions regarding uniform rules of the road, so as to provide for the operation of certain vehicles upon the highways when used in connection with agricultural pursuits; to provide for conditions; to provide for related matters; to repeal conflicting laws; and for other purposes. The Act amends O.C.G.A. Sections 40-6-305, 40-6-306, 40-6-307

HB 747 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Code Section 40-1-8 of the Official Code of Georgia Annotated, relating to safe operation of motor carriers and commercial motor vehicles, so as to update the reference date to federal regulations regarding the safe operation of motor carriers and commercial motor vehicles; to provide for related matters; to repeal conflicting laws; and for other purposes. amend Code Section 40-1-8 of the Official Code of Georgia Annotated

HB 767(Effective Date 7/1/2016): A BILL to be entitled an Act to amend Article 1 of Chapter 6 of Title 40 of the Official Code of Georgia Annotated, relating to general provisions regarding uniform rules of the road, so as to add utility service vehicles to the "Spencer Pass Law"; to provide a procedure for passing stationary utility service vehicles; to provide for definitions; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 777 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Code Section 40-6-165 of the Official Code of Georgia Annotated, relating to operation of school buses, so as to allow school bus drivers to use cellular telephones in a similar manner as a two-way radio; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 166 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Chapter 6 of Title 40 of the Official Code of Georgia Annotated, relating to the uniform rules of the road, so as to provide for the safe operation of a lightweight motorcycle or motor vehicle through an inoperative traffic-control signal; to repeal certain provisions relating to handlebars; to provide for a short title; to provide for related matters; to repeal conflicting laws; and for other purposes.

## CHAPTER 5—APPENDIX L: UPDATED TRAFFIC CASES

*Rodriguez v. United States*, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015). Absent reasonable suspicion, police **extension of a traffic stop in order to conduct a dog sniff violates the Constitution’s shield against unreasonable seizures.**

*State v. Allen*, 298 Ga. 1, 799 S.E.2d 248 (2015). Extension of a traffic stop was Constitutional because a computer **records check on the stopped car’s passenger is part of the authorized mission of the traffic stop and such a records check was conducted with reasonable diligence.**

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## CHAPTER 6: INDIGENT DEFENSE AND THE RIGHT TO COUNSEL

### 6.1 JURISDICTION TO SENTENCE REQUIRES APPOINTED INDIGENT COUNSEL /COSTS

O.C.G.A. §36-32-1(f)-(h) states that, effective January 1, 2005, that if a municipal court does not “provide” an indigent defendant with counsel “at no cost to the accused”, with the representation being in compliance with the standards “adopted by the Georgia Public Defender Standards Council”, a municipal court may NOT “impose any punishment of confinement, probation or other loss of liberty, or impose any fine, fee or cost enforceable by confinement, probation or other loss of liberty...” Simply binding a case over to state or superior court in lieu of appointing counsel arguably may not comply with this state mandate.

*Nguyen v. State*, 282 Ga. 483, 651 S.E.2d 681 (2007). By statute, any defendant in a municipal court proceeding must be afforded the right to counsel and, if indigent, the opportunity to apply for appointed counsel, before being subject to loss of liberty or any fine, fee or cost. “We ... disagree with the habeas court’s resolution of the merits of Nguyen’s habeas petition that, because Nguyen was not sentenced to a term of imprisonment or a suspended or probated sentence, she was not entitled to counsel as a matter of constitutional right. See *Jackson v. State*, 257 Ga. App. 715 (572 S.E.2d 60) (2002).

NOTE: A municipal court without an indigent defense system cannot fine, jail or otherwise sentence defendants.

### 6.2 \$50 APPLICATION FEE FOR COURT APPOINTED COUNSEL

In the 2004 General Assembly Extended Session HB 1 EX was passed, allowing municipal courts to charge a \$50 application fee for those seeking indigent representation. These funds are to be used to assist municipal court in meeting its own indigent defense needs and could be waived by the court for hardship. It probably is a good practice to waive the fee in any case where there is a question about the Defendant’s ability to afford the fee. Some courts have added the \$50 to fines in cases where a Defendant is convicted.

In 2006, SB 503 added a requirement that the \$50 application fee is added as a condition of any parole unless it was paid or waived at the time of sentencing.

#### 6.2.1 RECOVERY OF ATTORNEY'S FEES FROM DEFENDANT

SB 203, effective July 1, 2006, allows a municipality or county to recover the cost of appointed counsel if a Defendant is later found not to be indigent.

In 2006, the Georgia Court of Appeals held, in *Pless v. State*, 279 Ga. App. 798, 633 S.E.2d 340 (2006), that the General Assembly had eliminated the authority of trial courts to order restitution of court appointed attorneys fees when it passed HB 1EX.

The Georgia Supreme Court has reversed the Court of Appeals, and has held that trial courts may still order recovery of attorney’s fees from a Defendant. *State v. Pless*, 282 Ga. 58, 646 S.E.2d 202 (2007).

In the *Pless* case, as a condition of probation, Pless, who had court appointed counsel, was ordered to pay \$1226 in restitution for attorney’s fees.

## 6.3 WHEN IS THERE A RIGHT TO APPOINTED COUNSEL?

The right to counsel is based in the U.S. Constitution's **Sixth Amendment**:

***"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."***

A defendant has the right to appointed counsel, if the defendant will actually receive a jail sentence. *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). The constitutional right to counsel attaches when a defendant is put on trial for any offense for which he could be sentenced to a term of imprisonment. *Jones v. Wharton*, 253 Ga. 82, 316 S.E.2d 749 (1984). The burden is on the trial court to ensure that if a defendant in this situation proceeds to trial without benefit of counsel, then the waiver of counsel must be made knowingly and intelligently. To be valid, such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the matter.

*Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.E.2d 888 (2002) expands this right to make it clear that where an indigent person is given a probated or suspended prison sentence that there is a Sixth Amendment right to appointed counsel. See also *Barnes v. State*, 275 Ga. 499, 570 S.E.2d 277 (2002) and the remand in that case, *Barnes v. State*, 261 Ga. App. 112, 581 S.E.2d 727 (2003) in which an initialed waiver of right to counsel with no showing on the record of the defendant being made aware of the dangers of proceeding without counsel was held to be invalid. In *Shelton*, the Court held as follows:

*Defendant-respondent Shelton represented himself in an Alabama Circuit Court criminal trial. The court repeatedly warned Shelton about the problems self-representation entailed, but at no time offered him assistance of counsel at state expense. He was convicted of misdemeanor assault and sentenced to a 30-day jail term, which the trial court immediately suspended, placing Shelton on two years' unsupervised probation. The Alabama Supreme Court reversed Shelton's suspended jail sentence, reasoning that this Court's decisions in Argersinger v. Hamlin, 407 U. S. 25, and Scott v. Illinois, 440 U. S. 367, require provision of counsel in any petty offense, misdemeanor, or felony prosecution, Argersinger, 407 U. S., at 37, "that actually leads to imprisonment even for a brief period," id., at 33. The State Supreme Court concluded, inter alia, that because a defendant may not be imprisoned absent provision of counsel, Shelton's suspended sentence could never be activated and was therefore invalid. Held: A suspended sentence that may "end up in the actual deprivation of a person's liberty" may not be imposed unless the defendant was accorded "the guiding hand of counsel" in the prosecution for the crime charged. Argersinger, 407 U. S., at 40. Pp. 4-19... The Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant's violation of the terms of his probation where the State did not provide him counsel during the prosecution of the offense for which he is imprisoned. A suspended sentence is a prison term imposed for the offense of conviction.*

The *Shelton* rule has been somewhat modified by a subsequent ruling. On March 8, 2004 in *Iowa v. Tovar*, 541 US 77 (2004) , the United States Supreme Court ruled that while people pleading guilty to crimes are entitled to an attorney, judges don't have to warn them of the disadvantages of not seeing a lawyer. In the 9-0 ruling, the court reaffirmed that people facing prison time are entitled to attorneys at critical stages of the process, including a plea hearing. The ruling overturned an Iowa Supreme Court decision that said judges must tell defendants of the disadvantages of pleading guilty without consulting a lawyer. The Court said that states are free to adopt their own rules, but such warnings are not required by the Constitution. (In that the Georgia Courts have taken a more expansive view of knowing waivers than the federal courts, it would be good practice to document the disadvantages of proceeding without counsel are known to the defendant)

NOTE: Under *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764, 152 L.E.2d 888 (2002) the right to counsel for an indigent exists even in cases where no actual jail time will be imposed, if the case involves probation or a suspended jail sentence.

Waiver of counsel requires more than a showing of a knowledge of the right to counsel; there must also be evidence on the record of a relinquishment of this right. A 2008 Court of Appeals case, *Watkins v. State*, 291 Ga. App. 343, 662 S.E.2d 544 (2008), is a case that must be studied closely as to the scope and extent of the record, and as to what is a knowing and intelligent waiver. It is reproduced in its entirety in Appendix A of this chapter. It should be noted that *Watkins* is somewhat limited by *State v. Evans*, 285 Ga. 67, 673 S.E.2d 243, (2009) in which the Court noted that **while there must be proof of a knowing and intelligent waiver, the Court is not required to probe the defendant's case and advise as to possible legal strategies.** See also, *Woods v. State*, 235 Ga. App. 894, 510 S.E. 2d 848 (1999) v ; *Hamilton v. State*, 233 Ga. App. 463, 504 S.E.2d 525 (1998); *Kirkland v. State*, 202 Ga. App. 356, 414 S.E.2d 502 (1995). **"In other words, the record should establish that the defendant knows what he is doing in choosing self-representation and this choice is made with his eyes open."** *Hamilton*, 233 Ga. App. at 466, and *Clarke v. Zant*, 247 Ga. 194, 275 S.E.2d 49 (1981).

A waiver of counsel form without more may not be sufficient to show a knowing and intelligent waiver of the right to counsel, as the trial court bears the serious and weighty responsibility of conducting an investigation to assure that the waiver is intelligent and competent. See, *Watkins v. State*, 291 Ga. App. 343, 662 S.E.2d 544 (2008), and *Deren v. State* 237 Ga. App. 387, 515 S.E.2d 191 (1999). As a result, when a defendant faces actual imprisonment, the court should individually advise the defendant of his right to counsel, and if counsel is waived, obtain a waiver on the record which advises the defendant of: (1) the nature of the charges, (2) the statutory offenses included within the charges, (3) the range of allowable punishments, (4) the possible defenses to the charges and circumstances in mitigation, and (5) all other facts essential to a broad understanding of the matter. If recording devices are not available, the court may want to consider using a detailed waiver of right to counsel form, beyond **the customary guilty plea waiver of rights form, which could be used in conjunction with the Court's determination** that the waiver of right to counsel is made knowingly and intelligently while the defendant elects to proceeding for trial. See also *Banks v. State*, 260 Ga. App. 515, 580 S.E.2d 308 (2003) reversing a conviction where, although there **was an extensive discussion by the court with the defendant about why he should obtain counsel, that Defendant's insistence on proceeding pro se was not a waiver of counsel as the Court did not review Defendant's specific legal rights.**

How far must a court go in advising a defendant of his rights, so as to determine a knowing and voluntary waiver? In *State v. Evans*, 285 Ga. 67, 673 S.E.2d 243 (2009), reversing Court of Appeals at 288 Ga. App. 304, 653 S.E.2d 503 (2007). The case holds that **Court of Appeals used wrong criteria for determining whether defendant's waiver of right to counsel at trial was valid. "In reversing the trial court, the Court of Appeals relied upon prior statements of that Court that 'to effect a valid waiver, the trial court should advise the defendant of (1) the nature of the charges against him, (2) any statutory lesser included offenses, (3) the range of possible punishments for the charges, (4) possible defenses, (5) mitigating circumstances, and (6) any other facts necessary for a broad understanding of the matter.'** *Evans*, supra at 307(1), 653 S.E.2d 503 (Citation omitted.). **And, examining this 'six-part test,' the Court of Appeals declared that the trial court erred in its discharge of these imposed responsibilities, stating that 'the trial court failed to discuss with Evans any lesser included offense. The trial court also failed to explain to Evans either the element of intent or the fact that he could be convicted as a party to that crime, even though both of these principles related directly to the defense theories articulated by Evans.'** *Evans*, supra at 307(1), 653 S.E.2d 503. However, regarding this six-part test, this Court has held that it is not incumbent upon the trial court to address each of the six points with the defendant. *Wayne v. State*, 269 Ga. 36, 38(2), 495 S.E.2d 34 (1998). **Rather, '[t]he record need only reflect that the accused was made aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver.'** *Jones v. State*, 272 Ga. 884, 886(2), 536 S.E.2d 511 (2000) (Citations and punctuation omitted.). We take this opportunity to again reiterate that the rote application of the six-part test used by the Court of Appeals is not mandated, and a defendant's waiver of his right to counsel is valid if the record reflects that the **defendant 'was made aware of the dangers of self-representation and nevertheless made a knowing and**

**intelligent waiver.’ [fn] Id. Nor is it required that the trial court probe the defendant’s case and advise the defendant as to legal strategies to ensure that a waiver is intelligently made. Indeed, the defendant’s ‘technical legal knowledge’ is irrelevant to the question of whether he validly waives his right to be represented by counsel. Lamar v. State, 278 Ga. 150, 153, 598 S.E.2d 488 (2004).”**

The right to counsel is not limited to trial. It also attaches to other proceedings:

Preliminary Hearing: *Coleman v. Alabama*, 399 U.S. 1 (1970)

Arraignment: *Hamilton v. Alabama*, 368 U.S. 52 (1961)

Sentencing: *U.S. v. Tucker*, 404 U.S. 443 (1971)

Probation hearings: *Mempha v. Ray*, 389 U.S. 128 (1967)

NOTE: There MUST be a record of a waiver of the right to counsel by pro se defendants. See *Watkins v. State*, reproduced in full as Appendix A in this chapter. In *McCants v. State*, 255 Ga. App. 133, 564 S.E.2d 532 (2002), which involved drag racing charges, the Court ruled: **“where a defendant with a Constitutional right to counsel proceeds pro se, the State must show that he was made aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver of counsel... [W]e recently recognized the heavy burden placed on the State in this regard. The State may carry this burden by showing a valid waiver through either a trial transcript or other extrinsic evidence.”** See also *Middleton v. State*, 254 Ga. App. 648, 563 S.E.2d 543 (2002) and *Hightower v. State*, 252 Ga. App. 811, 557 SE2d 434 (2001). But, on March 8, 2004, in *Iowa v. Tovar*, the U.S. Supreme Court held that while people pleading guilty are entitled to an attorney, judges do not have to warn them of the dangers of proceeding without counsel. 541 U.S. 77 (2004). The Supreme Court did say that states are **free to require such warnings (and the recent rulings of Georgia’s appellate courts appear to do so)** but they are not required by the United States Constitution.

## 6.4 WHO IS INDIGENT?

O.C.G.A. §17-12-2(6)(A), passed in 2006, set new standards. The bill redefined an “indigent person” to mean any person whose maximum income is less than 125% of the federal poverty level for misdemeanors and 150% of that level for felonies. The statute provides (although this may face future Constitutional challenge) that no person earning over 150% of the federal poverty level shall be considered indigent. In 2008, the Georgia General Assembly reduced the income number, for misdemeanors, to 100% of the federal poverty level.

The guidelines don’t fully determine indigence. In *Thomas v. State*, 297 Ga. App. 416, 677 S.E.2d 433 (2009), the trial court’s denial of appointed counsel based on defendant’s family’s income was upheld. A court may specifically consider of “other resources that might reasonably be used to employ a lawyer” besides defendant’s own income. (In that case, a 19-year old defendant had \$428 monthly earnings, but lived with his mother and stepfather, who earned \$4000 monthly.

The determination cannot be made solely by an indigent defense office. The Judge must make a finding as to indigence. See, *Raines v. State*, 242 Ga. App. 727, 531 S.E.2d 158 (2000). *Ford v. State*, 254 Ga. App. 413 (2002) states that while staff may interview defendants as to indigency, judges must make the actual decision.

Even if the Defendant is found not to be indigent, the Court must still obtain a waiver of counsel separate from its finding as to the right to indigent counsel. See, *Godlewski v. State*, 256 Ga. App. 35, 567 S.E.2d 704 (2002). This raises interesting, and as yet not fully answered questions where a Defendant cannot afford counsel, does not meet the numerical standards, and requests counsel anyway.

## 6.5 CAN A DEFENDANT CHOOSE WHO THE COURT APPOINTS AS COUNSEL

*Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011) held that a Court may properly deny a Defendant's request to replace appointed counsel with counsel of his choice. However the Court did also hold that it would be an "abuse of discretion" to deny such a motion when there are "objective considerations favoring the appointment of the preferred counsel and there are no countervailing considerations of comparable weight..."

## 6.6 GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL

The Georgia Public Defender Standards Council is an independent agency within the judicial branch of the state government of Georgia. The mission of the Georgia Public Defender Standards Council is "to ensure, independently of political considerations or private interests, that each client whose cause has been entrusted to a circuit public defender receives zealous, adequate, effective, timely, and ethical legal representation, consistent with the guarantees of the Constitution of the State of Georgia, the Constitution of the United States and the mandates of the Georgia Indigent Defense Act of 2003; to provide all such legal services in a cost efficient manner; and to conduct that representation in such a way that the criminal justice system operates effectively to achieve justice." The Georgia Public Defender Standards Council is located at Suite 200 104 Marietta Street Atlanta, Georgia 30303. (404) 232-8900 or (800) 676-4432 Fax: (404) 651-5706. Their website is <http://www.gpdsc.com/>.

## 6.7 RIGHT TO A JURY

There is a right to trial by jury in most criminal, ordinance and traffic cases in Georgia. That right is grounded in both the state and federal Constitutions. The Sixth Amendment to the U.S. Constitution provides in part "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." However, see *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989), which holds that crimes with a maximum penalty of six months or a \$1000 fine are petty offenses that do not require a jury trial. (Note that the maximum penalty for most Georgia traffic offenses is up to one year in jail. Note also that many city charters limit the maximum sentence in city ordinance cases to 6 months or less). Notwithstanding the above, in Georgia, there must be a waiver of trial by jury to proceed with most, if not all, cases. See *Smith v. State*, 270 Ga. App. 759, 608 S.E.2d 35 (2004) and *Hawes v. State*, 281 Ga. 822, 642 SE2d 92 (2007).

NOTE: Unless there is a written waiver of a jury trial, a municipal court lacks jurisdiction to hear a case. The waiver on the back of a Uniform Traffic Citation is likely insufficient.

## 6.8 KNOWING AND VOLUNTARY WAIVER OF RIGHTS

Georgia Courts have held that there must be some personal interaction between the trial judge and a defendant before a defendant can knowingly and voluntarily waive any Constitutional rights. See, *Watkins v. State* (in appendix A of this chapter). See also, *Jones v. State*, 212 Ga. App. 676, 442 S.E.2d 908 (1994); *Waire v. State*, 211 Ga. App. 69, 438 S.E.2d 142 (1993); *Washington v. City of Atlanta*, 201 Ga. App. 876, 412 S.E.2d 624 (1991); *Turner v. State*, 162 Ga. App. 806, 293 S.E.2d 67 (1982). The Georgia Court of Appeals held in *Turner* that “it is difficult to imagine a mass arraignment procedure which could satisfy the trial court’s burden.” 162 Ga. App. at 806, 293 S.E.2d at 68. In Georgia, a trial court judge must “investigate as long and as thoroughly as the circumstances of the case before him demand” to determine that a defendant has knowingly and voluntarily waived any rights.

In *Foskey v. Battle* 277 Ga. 480, 591 S.E.2d 802 (2004), the Georgia Supreme Court held that a procedure where “petitioner had been advised of his ‘legal rights’ by completing a ‘transcript of proceedings’ with his counsel” was insufficient. In that case the “transcript of proceedings” was a pre-printed form consisting of 19 questions with typewritten answers, and the Court may have been swayed by an oral transcript that indicated Defendant did not appear to understand the form. The Court in *Foskey* held:

*“It is error for a trial court to accept a guilty plea without an affirmative showing that it was intelligent and voluntary since a guilty plea which is not voluntary and knowing is “obtained in violation of due process and is therefore void.”* Boykin v. Alabama, 395 U.S. 238, 243 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). *The entry of a guilty plea involves the waiver of three federal constitutional rights: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one’s accusers (id.), and the trial court has a duty to ensure that the defendant understands the constitutional rights being waived.* Knight v. Sikes, 269 Ga. 814 (1) (504 S.E.2d 686 (1998); Bowers v. Moore, 266 Ga. 893 (1) (471 S.E.2d 869) (1996).”

In *Hawes v. State*, 281 Ga. 822, 642 SE2d 92 (2007) the Court held:

***“It is the duty of a trial court to establish that the defendant understands the constitutional rights being waived, and the record must reveal the defendant’s waiver of those Constitutional rights... [T]he State has the burden to demonstrate that the plea was voluntarily, knowingly and intelligently made.”***

In *Jacobs v. State*, 299 Ga. App. 368, 371(1), (2009) a waiver was found valid where the trial court asked sufficient questions in open court to determine whether defendant’s waiver was knowing, voluntary, and intelligent.

See also, *Arnold v. Howerton, Warden*, 282 Ga. 66, 646 S.E.2d 75 (2007) for a detailed discussion of a case where a conviction was reversed even with an extensive (albeit incomplete) discussion of rights in which the Defendant was represented by counsel. However, the Court says “As this Court has previously noted, Boykin does not command the use of any precise ‘magic words’ in establishing that a defendant understands the rights he is waiving by pleading guilty.” On April 16, 2010, the Court of Appeals, in *Guise v. State*, 303 Ga. App. 791, 694 S.E.2d 378 2010, made it clear that even where counsel for a defendant waives a jury trial, there still must be an oral colloquy between the Judge and the Defendant showing a knowing waiver. See also UMCB 25.8:

NOTE: If a court has a prosecutor and the prosecutor speaks with Defendants who are unrepresented before arraignment or other hearings, the Court must first advise the Defendant of their rights. See *Pinkerton v. State*, 262 Ga. App. 858, 586 S.E.2d 743 (2003).

## 6.8.1 RIGHTS OF NON-CITIZENS

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court decided that criminal defense attorneys must advise non-citizen clients about the deportation risks of a guilty plea. The case extended the Supreme Court’s prior decisions on criminal defendants’ Sixth Amendment right to counsel to immigration consequences. The duties

of Counsel recognized in Padilla are broad. After Padilla, where the law is unambiguous, attorneys must advise their criminal clients that deportation "will" result from a conviction. Second, where the immigration consequences of a conviction are unclear or uncertain, attorneys must advise that deportation "may" result. Finally, attorneys must give their clients some advice about deportation—counsel cannot remain silent about immigration. The Supreme Court noted that even as the Supreme Court of Kentucky denied Padilla's claim based on the collateral consequence of deportation, the Commonwealth amended its plea bargain agreement forms to include deportation as a possible outcome. In *Chaidez v. United States*, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013), the Supreme Court held that Padilla would not be applied retroactively.

Georgia Uniform Municipal Court Rule 25.8(c)(2) specifically requires a judge to inform a defendant, prior to accepting a plea of guilty or nolo contendere, that the plea may affect a Defendant's immigration status.

## 6.8.2 REQUIRED FINDINGS BY JUDGE

**Georgia's Uniform Municipal Court Rules require certain findings by a Judge in every plea of guilty or no contest.** Those requirements are as follows:

### Determining Voluntariness of Plea.

The judge shall not accept a plea of guilty or nolo contendere without first determining, on the record, that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the judge should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence leniency which must be approved by the judge, the judge must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the judge. The judge shall then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

### Defendant to Be Informed.

The judge shall not accept a plea of guilty or nolo contendere from a defendant without first determining on the record that the defendant understands the nature of the charge(s);

Informing the defendant on the record that by entering a plea of guilty or nolo contendere one waives:

The right to trial by jury;

The presumption of innocence;

The right to confront witnesses against oneself;

The right to subpoena witnesses;

The right to testify and to offer other evidence;

The right to assistance of counsel during trial;

The right not to incriminate oneself; and that by pleading not guilty or remaining silent and not entering a plea, one obtains a jury trial; and

Informing the defendant on the record:

Of the terms of any negotiated plea;

That a plea of guilty may have an impact on his or her immigration status if the defendant is not a citizen of the United States;

Of the maximum possible sentence on the charge, including that possible from consecutive sentences and enhanced sentences where provided by law; and/or

Of the mandatory minimum sentence, if any, on the charge. This information may be developed by questions from the judge, the district attorney or the defense attorney, or a combination of any of these.

Determining Accuracy of Plea.

Notwithstanding the acceptance of a plea of guilty or nolo contendere, judgment shall not be entered upon such plea without such inquiry on the record as may satisfy the judge that there is a factual basis for the plea.

Nolo Contendere Checklist

The defendant may enter a plea of nolo contendere

In all cases except capital offenses (with some exceptions for multiple traffic and DUI cases; and

Only upon the consent and approval of the judge.

Upon entry of the plea, the judge shall thereupon impose sentence. O.C.G.A. §17-7-95

## CHAPTER 6--APPENDIX A: *WATKINS V. STATE* (2008)

Note: Read this case in the context of *State v. Evans*, 285 Ga. 67, 673 S.E.2d 243 (February 23, 2009). Reversing Court of Appeals at 288 Ga. App. 304, 653 S.E.2d 503 (2007)

*Evans* holds that Court of Appeals used wrong criteria for determining whether defendant's waiver of right to counsel at trial was valid. "In reversing the trial court, the Court of Appeals relied upon prior statements of that Court that 'to effect a valid waiver, the trial court should advise the defendant of (1) the nature of the charges against him, (2) any statutory lesser included offenses, (3) the range of possible punishments for the charges, (4) possible defenses, (5) mitigating circumstances, and (6) any other facts necessary for a broad understanding of the matter.' *Evans*, supra at 307(1), 653 S.E.2d 503 (Citation omitted.). And, examining this 'six-part test,' the Court of Appeals declared that the trial court erred in its discharge of these imposed responsibilities, stating that 'the trial court failed to discuss with Evans any lesser included offense. The trial court also failed to explain to Evans either the element of intent or the fact that he could be convicted as a party to that crime, even though both of these principles related directly to the defense theories articulated by *Evans*.' *Evans*, supra at 307(1), 653 S.E.2d 503. However, regarding this six-part test, this Court has held that it is not incumbent upon the trial court to address each of the six points with the defendant. *Wayne v. State*,

**269 Ga. 36, 38(2), 495 S.E.2d 34 (1998). Rather, '[t]he record need only reflect that the accused was made aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver.'** *Jones v. State*, 272 Ga. 884, 886(2), 536 S.E.2d 511 (2000) (Citations and punctuation omitted.). We take this opportunity to again reiterate that the rote application of the six-part test used by the Court of Appeals is not mandated, and a defendant's waiver of his right to counsel is valid if the record **reflects that the defendant 'was made aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver.'** [fn] **Id. Nor is it required that the trial court probe the defendant's case and advise the defendant as to legal strategies to ensure that a waiver is intelligently made. Indeed, the defendant's 'technical legal knowledge' is irrelevant to the question of whether he validly waives his right to be represented by counsel.** *Lamar [v. State]*, **278 Ga. 150, 153, 598 S.E.2d 488 (2004).**"

WATKINS v. THE STATE.  
A08A0480.

COURT OF APPEALS OF GEORGIA, FOURTH DIVISION

*2008 Ga. App. LEXIS 503; 2008 Fulton County D. Rep. 1624* 291 Ga. App. 343 (2008)

May 1, 2008, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BY THE COURT.

DISPOSITION: [\*1] Judgment reversed and case remanded.

#### HEADNOTES

##### Georgia Advance Headnotes

(1) Criminal Law & Procedure. Counsel. Right to Counsel. State did not meet its burden of showing that defendant received sufficient information and guidance from the trial court upon which to knowingly and voluntarily relinquish his right to counsel, and reversal of a judgment was warranted. On appeal, defendant argued that the trial court erred in allowing him to represent himself; defendant requested court-appointed counsel before his trial began; and, the trial court denied his request, relying on the waiver forms signed by defendant and defendant's indication that there had been no change in his circumstances, without any discussion whatsoever with defendant to ensure that he fully appreciated both the nature and consequences of the constitutional right that he had relinquished and the repercussions of such a waiver, which was required to effect a valid waiver.

(2) Criminal Law & Procedure. Criminal Offenses. Crimes Against the Person. Assault & Battery. Evidence was sufficient at trial to support a conviction under the standards of *Jackson v. Virginia*. The trial court was authorized to believe the victim, rather than defendant, and find him guilty of battery.

JUDGES: MIKELL, Judge. Smith, P. J., and Adams, J., concur.

OPINION BY: MIKELL

OPINION  
Mikell, Judge.

After a bench trial in which Gemayle Watkins represented himself, he was convicted of misdemeanor battery and sentenced to twelve months to serve ten days in confinement and the balance of the sentence on probation. On appeal, Watkins challenges the sufficiency of the evidence and argues that the trial court erred in allowing him to represent himself. (1) Because we find that the state did not meet its burden of showing that Watkins received sufficient information and guidance from the trial court upon which to knowingly and voluntarily relinquish his right to counsel, we reverse.

The record shows that on June 5, 2007, Watkins appeared at an arraignment calendar where he plead not guilty, received notice of a non-jury trial date of July 11, 2007, and signed two waiver forms. On the first form, Watkins checked the box indicating that he wanted a non-jury trial and initialed two of several paragraphs, both of which provided that he understood his right to be represented by an attorney and carefully considered the advantages of speaking with an attorney and the dangers of proceeding [\*2] without one. The second of the two paragraphs also stated as follows: "I freely, voluntarily, knowingly and intelligently WAIVE AND GIVE UP MY RIGHT to be represented by an attorney in this case. I want to proceed to trial without an attorney and to REPRESENT MYSELF AT TRIAL before the Court." The second form informed defendants of their right to an attorney, whether hired or court appointed, and of the application fee to apply for a court-appointed attorney. It also advised of several areas where an attorney's assistance would be helpful, warned of the danger of proceeding without counsel, and explained the maximum sentence (12 months incarceration) and the fine associated with the charged offense.

When Watkins appeared for his bench trial, the following colloquy occurred:

Court: Mr. Watkins, you have indicated previously in writing and submitted to the Court that you wanted to give up your right to make application for a court-appointed attorney and proceed today to a non-jury trial and that you wanted to represent yourself. Is that correct?

Mr. Watkins: Yes.

Court: And that is not what you want to do now?

Mr. Watkins: Yeah.

Court: What is it you want to do now?

Mr. Watkins: I want [\*3] to get a court-appointed lawyer.

Court: So has there been some change in circumstance, Mr. Watkins?

Mr. Watkins: Yes.

Court: What is that?

Mr. Watkins: I just want to get a lawyer, a court-appointed lawyer.

Court: Pardon me.

Mr. Watkins: I just want to get a court-appointed lawyer.

Court: No, sir. That's not what I asked you. What I asked you was: Has there been some change in your circumstance that prevented you from hiring an attorney to represent you in this case because you previously waived your right to legal representation through a court-appointed attorney?

Mr. Watkins: No. There was no change.

Court: If there is no change, Mr. Watkins, then it's incumbent upon you to provide the legal representation in the case. Okay?

Mr. Watkins: All right.

Court: So you're going to proceed today?

Mr. Watkins: Yes, I'm waiting on my witness to come.

Court: So, Mr. Watkins, your witness is here?

Mr. Watkins: Yes.

Court: So you're ready to go?

Mr. Watkins: Yes.

The trial court then gave Watkins a form entitled "Waiver of Right to the Assistance of Counsel During Trial." The court checked a box on the form that indicated that Watkins intended to represent himself at trial and told Watkins to [\*4] initial by the checkmark if that is what he wanted to do, and to read the form from top to bottom. Watkins wrote his initials next to the checkmark, and the trial proceeded.

1. Watkins argues on appeal that he was denied his right to counsel, and we agree.

"When an accused is placed on trial for any offense, whether felony or misdemeanor, for which [he] faces imprisonment, the constitutional guarantee of right to counsel attaches." <sup>1</sup> This constitutional right "invokes, of itself, the protection of a trial court, in which the accused whose life or liberty is at stake is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." <sup>2</sup> The "[w]aiver of counsel requires more than a showing of a knowledge of right to counsel; there must also be *evidence of relinquishment* of this right. In other words, the record should establish that the defendant knows what [he] is doing in choosing self-representation and that [his] choice is made with eyes open." <sup>3</sup>

1 (Citation and punctuation omitted.) *Hamilton v. State*, 233 Ga. App. 463, 465-466 (1) (b) (504 SE2d 236) (1998). [\*5] See also *Braswell v. State*, 240 Ga. App. 510 (1) (523 SE2d 904) (1999).

2 (Citation omitted.) *Clarke v. Zant*, 247 Ga. 194, 196 (275 SE2d 49) (1981). Accord *McCall v. State*, 232 Ga. App. 684, 686 (1) (503 SE2d 578) (1998).

3 (Citations and punctuation omitted; emphasis in original.) *Hamilton*, *supra* at 466 (1) (b).

"The determination of whether the defendant's waiver was knowing and voluntary depends upon the particular facts and circumstances in each case, including the defendant's background, experience, and conduct." <sup>4</sup> In making that determination, "a trial judge must investigate as long and as thoroughly as the circumstances of the case demand" <sup>5</sup> and on appeal, the state bears the burden of demonstrating that the trial court provided the defendant with the information and guidance necessary for a knowing and intelligent waiver. <sup>6</sup>

4 (Citation and punctuation omitted.) *Evans v. State*, 288 Ga. App. 304, 306 (1) (653 SE2d 503) (2007).

5 (Citation and punctuation omitted.) *Id.*

6 *Id.*

In this case, Watkins requested court-appointed counsel before his trial began. The trial court denied his request, relying on the waiver forms signed by Watkins and Watkins's indication that there had been no [\*6] change in his circumstances, <sup>7</sup> without any discussion whatsoever with Watkins to ensure that he fully appreciated both the nature and consequences of the constitutional right that he had relinquished and the repercussions of such a waiver, which is required to effect a valid waiver. <sup>8</sup> Although we acknowledge that there is no magic language that a trial judge must use to determine whether a defendant has made a valid waiver of his right to counsel, <sup>9</sup> "the record should reflect a finding on the part of the trial court that the defendant has validly chosen to proceed pro se. The record should also show that this choice was made after the defendant was made aware of his right to counsel and the dangers of proceeding without counsel." <sup>10</sup> Because there was no such evidence in the record of any discourse between the court and Watkins, we must reverse and remand this case to the trial court for a new trial. <sup>11</sup>

7 Whether the circumstances to which the court and Watkins referred pertained to Watkins's indigence or diligence in securing representation is not mentioned in the record. Watkins does not raise on appeal the question of the court's failure to inquire as to his indigence or diligence. [\*7] We have held, however, that an abuse of discretion occurs when a trial court forces a defendant to proceed to trial without the assistance of counsel but does not inquire into the defendant's indigency status or attempts to retain private counsel. *Ford v. State*, 254 Ga. App. 413, 416 (563 SE2d 170) (2002).

8 *Evans*, *supra* at 307 (1).

9 *Hamilton*, *supra*.

10 *Clarke*, *supra* at 197. Accord *Holt v. State*, 244 Ga. App. 341, 343 (1) (535 SE2d 514) (2000). See also *Evans*, *supra* ("most effective way of ensuring this understanding [of defendant's appreciation of his rights] is for the trial judge to discuss these matters with the defendant, and such a discussion should be placed on the record"); *Hamilton*, *supra* (fitting and appropriate for determination of a proper waiver to appear upon the record).

11 See *Hamilton, supra at 469 (1) (c)* (no knowing relinquishment of right to counsel where trial court did not provide either a record with sufficient particularity regarding the information given to inform defendant of his right to counsel or to set forth the findings of fact upon which the conclusions of law were based). See generally *Ford, supra at 415-416* (trial court abused its discretion when it forced [\*8] defendant to proceed to trial without the assistance of counsel after denying defendant's request for counsel and failing to inquire as to lack of counsel). Compare *Annaswamy v. State, 284 Ga. App. 6, 7-8 (1) (642 SE2d 917) (2007)* (valid waiver found where in addition to evidence that defendant signed waiver form, trial court questioned him about his waiver of the right to counsel); *Bollinger v. State, 272 Ga. App. 688, 691 (1) (613 SE2d 209) (2005)* (valid waiver found where record shows with convincing clarity that the defendant knowingly, understandingly and voluntarily waived the right of representation by counsel and made a decision to represent himself).

2. Watkins also challenges the sufficiency of the evidence. Pursuant to *O.C.G.A. § 16-5-23.1 (a)*, a person commits the offense of misdemeanor battery when he intentionally causes substantial physical harm or visible bodily harm to another. *Subsection (b)* of this Code section defines "visible bodily harm" as "bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to [\*9] body parts."

(2) Viewing the evidence with all inferences in favor of the fact finder's conclusion as we must on appeal from a bench trial, and giving due regard to the trial court's opportunity to judge witness credibility, 12 we find that the evidence was sufficient at trial to support a conviction under the standards of *Jackson v. Virginia*. 13 In this case, the victim testified that on the day before the incident in question occurred, March 30, 2007, she told Watkins that she no longer wished to be in a relationship with him; that she nevertheless agreed to meet with Watkins on March 30 to talk about the relationship; that when she called someone to pick her up from Watkins's house, he snatched her phone from her and began to stomp on it; that Watkins pushed her out of the house as she tried to get her phone then punched her in the right eye with a closed fist; that they fought; and that she tried to call 911 several times. The victim identified photographs that depicted the injuries caused by Watkins, which included a bruise on her shoulder, a black eye, a gash on her chest, and a bruise on her cheek, and testified that she sustained other injuries that were not photographed. Watkins [\*10] testified that the victim started the altercation, that he repeatedly asked her to leave and tried to force her out of the house, and that the victim sustained a black eye because he threw the cell phone at her after she hit him in the eye with a lamp.

12 *Stadnisky v. State, 285 Ga. App. 33, 34 (1) (645 SE2d 545) (2007)*.

13 *443 U. S. 307 (99 S. Ct. 2781, 61 LE2d 560) (1979)*.

"The victim's testimony alone is sufficient to establish guilt [and] [t]o the extent [that it] conflicted with [Watkins]'s, it was the function of the trial court as the trier of fact-not this Court-to resolve the conflict. Thus, the trial court was authorized to believe [the victim] rather than [Watkins] and find [him] guilty of [battery]." 14

14 (Footnotes omitted.) *Marshall v. State, 286 Ga. App. 86, 87 (1) (648 SE2d 674) (2007)*.  
*Judgment reversed and case remanded. Smith, P. J., and Adams, J., concur.*

## CHAPTER 6--APPENDIX B: STATE STANDARDS FOR MUNICIPAL COURT INDIGENT DEFENSE

### MEMORANDUM

To: Mike Mears Director Georgia Public Defender Standards Council

From: Jim Martin Chief Legal Officer

Date: June 22, 2004

Re: Proposed Standards Council internal operating procedure for issues concerning the Municipal Courts.

---

I. What are the requirements for (checklist) compliance with the provisions of O.C.G.A. § 36-32-1 (f) (g) and (h) which read as follows:

(f) Any municipal court operating within this state and having jurisdiction over the violation of municipal ordinances and over such other matters as are by specific or general law made subject to the jurisdiction of municipal courts shall not impose any punishment of confinement, probation, or other loss of liberty, or impose any fine, fee, or cost enforceable by confinement, probation, or other loss of liberty, as authorized by general law or municipal or county ordinance, unless the court provides to the accused the right to representation by a lawyer, and provides to those accused who are indigent the right to counsel at no cost to the accused. Such representation shall be subject to all applicable standards adopted by the Georgia Public Defender Standards Council for representation of indigent persons in this state.

(g) Any municipal court operating within this state that has jurisdiction over the violation of municipal or county ordinances or such other statutes as are by specific or general law made subject to the jurisdiction of municipal courts, and that holds committal hearings in regard to such alleged violations, must provide to the accused the right to representation by a lawyer, and must provide to those accused who are indigent the right to counsel at no cost to the accused. Such representation shall be subject to all applicable standards adopted by the Georgia Public Defender Standards Council for representation of indigent persons in this state.

(h) Any municipality or municipal court may contract with the office of the circuit public defender of the judicial **circuit in which such municipality is located as a means of complying with the municipality's or municipal court's** legal obligation to provide defense counsel at no cost to indigent persons appearing before the court in relation to violations of municipal ordinances, county ordinances, or state laws.

The requirements of these subsections are summarized as follows:

(1) In order to be able to do any of the following, a municipal court is required to provide to the accused the right to representation by a lawyer:

(a) impose any punishment of confinement, probation, or other loss of liberty, or impose any fine, fee, or cost enforceable by confinement, probation, or other loss of liberty, as authorized by general law or municipal or county ordinance; or

(b) hold a committal hearing in regard to the violation of municipal or county ordinances or such other statutes as are by specific or general law made subject to the jurisdiction of municipal courts.

(2) In order to be able to do any of the following, a municipal court is required to provide an indigent person accused of a crime the right to counsel at no cost to the accused. The representation is subject to all applicable standards adopted by the Georgia Public Defender Standards Council for representation of indigent persons in this state:

(a) impose any punishment of confinement, probation, or other loss of liberty, or impose any fine, fee, or cost enforceable by confinement, probation, or other loss of liberty, as authorized by general law or municipal or county ordinance; or

(b) hold a committal hearing in regard to the violation of municipal or county ordinances or such other statutes as are by specific or general law made subject to the jurisdiction of municipal courts.

(3) There are no standards adopted by the Georgia Public Defender Standards Council applicable to the representation in municipal court at this time. The current standards are guidelines. In order to become effective the standard has to go through the procedure established in O.C.G.A. § 17-12-8 (c) which provides as follows:

The initial minimum standards promulgated by the council pursuant to this Code section and which are determined by the General Oversight Committee for the Georgia Public Defender Standards Council to have a fiscal impact shall be submitted by the council to the General Assembly at the regular session for 2005 and shall become effective only when ratified by joint resolution of the General Assembly and upon the approval of the resolution by the Governor or upon its becoming law without such approval. The power of the council to promulgate such initial minimum standards shall be deemed to be dependent upon such ratification; provided, however, the minimum standards promulgated by the council shall be utilized as a guideline prior to ratification. Any subsequent amendments or additions to the initial minimum standards promulgated by the council pursuant to this Code section and which are determined by the General Oversight Committee for the Georgia Public Defender Standards Council to have a fiscal impact shall be ratified at the next regular session of the General Assembly and shall become effective only when ratified by joint resolution of the General Assembly and upon the approval of the resolution by the Governor or upon its becoming law without such approval.

**None of the Standards Council's standards have completed that procedure.**

(4) The Standards Council is developing form contract language for the purposes of a circuit public defender office **contracting with a municipality or municipal as a means of complying with the municipality's or municipal court's** legal obligation pursuant to O.C.G.A. § 36-31-1 to provide defense counsel at no cost to indigent persons appearing before the court in relation to violations of municipal ordinances, county ordinances, or state laws. The following is draft language that is being considered as part of that contract:

Section 1.06 Compliance with Standards. The Public Defender Office agrees to provide the representation described in this Article in a professional manner consistent with the standards adopted by the Georgia Public Defender Standards Council. The Public Defender Office specifically agrees to provide services to the City in the courts covered by this agreement in a manner that will comply with the requirements of O.C.G.A. § 36-32-1.

II. How will compliance be determined?

Although the Standards Council has not taken action on this issue and is receptive to suggestions about what its role should be in determining compliance with its standards once they become effective, it appears that subsections (f), (g) and (h) of O.C.G.A. § 36-32-1 are self-executing and do not need formal action by the Standards Council. It is the **staff's commitment to work with local governments** to implement the new system during calendar year 2005.

III. Who is to collect the \$50 application fee for indigent defense representation provided in O.C.G.A. § 15-21A-6; when does the fee become effective; when and how is the fee collected; and to whom is the fee paid?

(1) Who is to collect the \$50 application fee for indigent defense representation provided in O.C.G.A. § 15-21A-6?

O.C.G.A. § 15-21A-6 (b) provides as follows:

Any person who applies for or receives legal defense services under Chapter 12 of Title 17 shall pay the entity providing the services a single fee of \$50.00 for the application for, receipt of, or application for and receipt of such

services. The application fee may not be imposed if the payment of the fee is waived by the court. The court shall waive the fee if it finds that the applicant is unable to pay the fee or that hardship will result if the fee is charged.

O.C.G.A. § 15-21A-6 (e) provides as follows:

(e) A public entity other than an entity providing legal defense services under Chapter 12 of Title 17 may charge, in addition to any other fee or surcharge authorized by law, a \$50.00 application fee unless waived by the court for inability to pay or hardship. Any such fee shall be retained by the entity providing the services or used as otherwise provided by law and shall not be subject to payment to the authority or deposit into the state treasury.

The initial determination is whether or not the entity is providing legal services under Chapter 12 of Title 17. This determination is complicated by the fact that the system for providing services for indigent defendants in criminal cases changes on January 1, 2005; and by the fact that some services are provided by the State under Chapter 12 of Title 17; and some services are provided by local entities. O.C.G.A. § 17-12-34 (b), which is effective until January 1, 2005, authorizes the State to operate an indigent defense program in limited circumstances. The State will officially begin operating a program in the Cordele Judicial Circuit on July 1, 2004. This will be the only program the State officially operates until January 1, 2005. After January 1, 2005, pursuant to O.C.G.A. § 17-12-23 (a), the State will begin operating an indigent defense program in most judicial circuits. These are the entities that are providing services under Chapter 12 of Title 17. All local public programs are public entities other than an entity providing legal defense services under Chapter 12 of Title 17.

(2) When does the fee become effective?

O.C.G.A. § 15-21A-6 is in **Section 10 of HB 1EX, which according to Section 27 of this bill, becomes effective “upon approval of this Act by the Governor or upon its becoming law without such approval.” The Governor signed HB 1EX into law on June 15th; therefore, § 15-21A-6 which includes the application fee became effective on June 15th.**

(3) When and how is the fee collected?

The collection procedure to be used by the State public defender in the Cordele Judicial Circuit beginning July 1, 2004 and by the State circuit public defenders beginning on January 1, 2005 is being developed by the Cordele Judicial Circuit Public Defender. The local programs have the right under O.C.G.A. § 15-21A-6(e) to decide whether or not to collect the application fee and when and how it is collected. Some suggestions that we are considered for the State circuit defender offices are as follows:

(a) As part of the intake of a new client have the client sign a statement agreeing to pay the fee and the means of payment: e.g. payment now, credit card payment, payment in installments, or payment at the end of the case. Also on this form would be a request for waiver option.

(b) If the application fee had not been paid at the end of the case, the fee would be included in the sentence if a sentence is imposed.

(4) To whom is the fee paid?

The State public defender programs providing services under Chapter 12 of Title 17 collect the application fee pursuant to O.C.G.A. §15-21A-6 and **pay it to the Superior Court Clerks’ Cooperative Authority for deposit into the State general fund.** The local entities retain the application fee for use by the entity providing the services or for use as otherwise provided by law. The local entities are not subject to payment to the authority or deposit into the state treasury.

## CHAPTER 6--APPENDIX C: 2017 HHS POVERTY GUIDELINES

(Note that these may change after publication of the Benchbook.)

The 2017 poverty guidelines are in effect as of January 26, 2017.

2017 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA	
PERSONS IN FAMILY/HOUSEHOLD	POVERTY GUIDELINE
For families/households with more than 8 persons, add \$4,180 for each additional person.	
1	\$12,060
2	\$16,240
3	\$20,420
4	\$24,600
5	\$28,780
6	\$32,960
7	\$37,140
8	\$41,320

## CHAPTER 6--APPENDIX D: SUGGESTED FORMS AS TO A DEFENDANT'S RIGHTS

**Note:** There are a variety of forms Georgia Courts have created to address creating a record of Defendant's rights and acknowledgment of those rights. There is not "one ideal one-size-fits-all" document, as the procedures and needs of courts, and the oral interaction with defendants differs. See also the sample forms/checklists in Chapter 5 in addition to those in this chapter.

What many Courts do is to initially do a mass announcement to the entire courtroom, followed by each Defendant completing a paper form or record, and then an individualized one on one discussion between the Judge and the Defendant to determine if a Defendant understands his rights and has made a knowing and intelligent waiver of his or her rights. Some courts are showing a video-taped mass announcement. The Council of Municipal Court Judges has a professionally created video available to all Municipal Courts at <http://georgiacourts.org/councils/municipal/video.html>.

NOTE: The following forms are intended as a guide for Courts. However, Georgia case law requires some degree of personal interaction between the trial judge and each individual defendant, in order for the trial judge to ascertain whether the defendant has knowingly and voluntarily waived his constitutional rights connected with trial. Before using any form in this Appendix, read this Chapter carefully.

The following form was provided by Judge John Cicala (WAIVER OF RIGHTS/GUILTY OR NO CONTEST PLEA):

IN THE MUNICIPAL COURT OF THE CITY OF HAPPY VILLAGE  
STATE OF GEORGIA

STATE OF GEORGIA

V.

CITATION No. \_\_\_\_\_

CHARGES : \_\_\_\_\_

WAIVER OF RIGHTS FORM TO ENTER PLEA OF GUILTY OR NOLO CONTENDERE

PLEA: \_\_\_GUILTY \_\_\_NOLO CONTENDERE

I HAVE READ AND UNDERSTAND THE FOLLOWING:

I have a right to have the charge or charges against me explained so that I understand the nature of offense(s) with which I am charged. I have a right to a trial and if I am charged with a traffic violation (Or other violation of State Law) to have my case tried by a jury.

I have a right to confront the witnesses against me; that is to see, hear and question all witnesses with anything to say against me.

I have a right to remain silent and not incriminate myself. I know that I cannot be made to plead guilty or testify against myself. I understand that I also have the right to obtain subpoenas from the court in order to make witnesses on my behalf attend a trial.

I have a right to testify in my own behalf at trial. I understand that if I exercise this right I could be asked questions by the solicitor and that what I say could be used against me.

I have a right to represent myself or to be represented by an attorney that I hire. I understand that if I am unable to afford an attorney, the court may appoint one to represent me if I qualify under court guidelines.

I understand that if I am convicted at trial, I have 30 days to seek a review of the conviction by a court that can review my conviction through the appeal process. I understand that the appeal process is one which may be complicated and that I may wish to have the advice of an attorney if I am considering the possibility of an appeal of any decision of the trial court.

I understand that if I am on probation or parole and I plead guilty to the charges against me, my plea could be used against me to revoke (that is take away) all or any part of my probated sentences or my parole and that I could go to jail. If I am not a citizen of the United States, any plea of guilty or nolo contendere could also have a negative effect on my immigration status and my chances of staying in this country.

I understand that, generally, the maximum penalty that can be imposed on me for a violation of a traffic law is a *fine of up to \$1,000.00 and up to 12 months in jail*. I further understand that there are certain violations of State traffic law for which I can be fined up to \$5,000.00. There are certain violations of State traffic law for which there must be imposed minimum fines and/or minimum jail sentences. I further understand that the court will explain these minimum sentences to me if my case is one where such sentences might be imposed. I understand that the maximum penalty that can be imposed on me for a violation of a non-traffic city ordinance is a *fine of up to \$1,000.00 and up to 60 days in jail*.

I understand that the court of the Georgia Department of Public Safety may suspend my license to drive based on **the charges which have been brought against me. The Court also has the authority to suspend my driver's license** as a condition of probation, or as a part of a Court order in connection with my case.

I understand that the court does not have to accept a plea of *Nolo Contendere* (no contest).

I understand that if I am placed on probation by this court, I will have to comply with the terms and conditions of the *Sentence of Probation*, including the payment of any fine during the period of probation or until the probation is terminated by an order of the court.

My decision to enter this plea of *guilty* or *nolo contendere* is made freely and voluntarily without threat or fear to me or to anyone closely related to or associated with me. No promises have been made to me in connection with this plea other than the plea bargain, if any, stated by the solicitor in open court.

I have reviewed this form and been advised by the court and I understand and knowingly and intelligently waive (give up) each of the above stated rights.

---

DEFENDANT

---

DEFENDANT'S ATTORNEY

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SOLICITOR, Municipal Court

I find that the defendant has appeared in open court and entered a plea. The defendant understands his/her rights and has knowingly and intelligently waived those rights, including the right to trial, the right to confront the state's witnesses, the right against self-incrimination, the right to be represented by an attorney, and the right to a speedy and public trial. There is a factual or legal basis for the plea. I find that the defendant was present in court when I reviewed the above listed rights form with those assembled for arraignment, or that the defendant had his rights reviewed with him individually prior to his entry of a plea in this matter. The defendant's *Waiver of Rights* and the plea entered have been made freely and voluntarily.

IT IS ORDERED this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ that the defendant's plea of *guilty* or *nolo contendere* is entered, accepted and filed with the Court.

---

The Honorable Frank Smiley  
Judge of the Municipal Court  
City of Happy Village, Utopia

The following form is one created by Judge Glen Ashman. It is adapted as to spacing from a form previously used in East Point Municipal Court. This form can be used for Guilty, Not Guilty and Nolo Pleas. (The current East Point form is also in this Appendix)

IN THE MUNICIPAL COURT OF EAST POINT, GEORGIA  
ACKNOWLEDGMENT OF MY LEGAL RIGHTS AND MY RIGHT TO LAWYER

PLEASE INITIAL EACH PARAGRAPH IF YOU UNDERSTAND AND ACKNOWLEDGE YOUR RIGHTS.

\_\_\_\_\_ 1. I understand that the charges against me carry a maximum sentence of six or twelve months in jail and a fine of \$1,000.00 or a combination of the two. (Aggravated misdemeanors may carry a fine of up to \$5000.00). Some city ordinance cases have a smaller maximum fine.

\_\_\_\_\_ 2. I understand that I have a right to be represented by a Lawyer.

\_\_\_\_\_ 3. I understand that the Judge may give me a sentence to serve time in jail, pay a fine or successfully complete probation. If all or part of my sentence is probated and I violate the terms and conditions of probation, I could be sentenced to serve time in jail.

\_\_\_\_\_ 4. I understand that if I am facing the possibility of jail or probation and I cannot afford a Lawyer, a lawyer will be appointed to represent me. I will be required to provide information about my income and assets so that the court can decide whether I can afford a lawyer.

\_\_\_\_\_ 5. I understand that a lawyer is trained in law and legal procedure and can:

- A. Help me understand the charge(s) against me;
- B. determine whether the charge(s) against me are legally sufficient;
- C. explain my rights to you and answer your questions about your case;
- D. determine whether I have any defenses to the charge(s), such as, defects in the citation or accusation, misidentification, alibi or reliance on the presumption of innocence and the prosecutions burden to prove my guilt beyond a reasonable doubt or some other defense;
- E. file Motions and make objections to prevent the prosecution from using evidence that is not legally admissible against me;
- F. prepare for and conduct a trial;
- G. require witnesses to come to the trial by using subpoenas;
- H. help me decide whether I should ask for or give up a jury trial for misdemeanors, whether to testify or remain silent, and whether to ask for a trial or enter a plea of Guilty or Nolo Contendere to some or all of the charges pending against me;
- I. Make sure all my rights are protected

\_\_\_\_\_ 6. I understand that I can proceed without a Lawyer and that there are certain dangers and disadvantages to giving up my right to a Lawyer. Some of them are: (a) I will have to follow the rules of law and legal procedure in the same manner as a Lawyer would even though I am not one, (b) I may not be aware of all the

possible defenses and circumstances that could help the judge decide; (c) I will be required to make strategic decisions, such as what witnesses to call and whether to testify; (d) it would be difficult to challenge my conviction on appeal if I do not object to anything improper during my trial or because the trial proceedings were not recorded.

\_\_\_\_\_ 7. I understand that when deciding whether I want to be represented by a Lawyer, I must not be under the influence of drugs or alcohol.

\_\_\_\_\_ 8. I understand that by entering a plea of guilty or nolo contendere ( no contest) I waive: My right to trial by judge or jury; my right to be presumed innocent; my right to confront and cross examine witnesses; my right to testify and offer evidence on my behalf; my right to subpoena witnesses; my right to the assistance of counsel during trial; my right to remain silent and not testify and my right to be represented by a private lawyer or a public defender if I am eligible.

\_\_\_\_\_ 9. I understand that if I enter a plea of guilty or nolo contendere in this case, there will be no further trial or hearing and a fine or sentence or both may be imposed. I further understand that by entering a plea I may affect a possible appeal.

\_\_\_\_\_ 10. I understand that if I am not a citizen of the United States, a plea of guilty or nolo contendere may have a negative impact on my immigration status.

I now desire to enter my plea. It is freely and voluntary. I have not been told what sentence will be imposed. No promises or threats have been made to me by any prosecutor, lawyer, police officer or other person, to induce me to enter this plea.

PLEASE CIRCLE ONE OF THE RESPONSES BELOW

I hereby state that I (AM) (AM NOT) under the influence of drugs or alcohol.

I hereby state that I (AM)(AM NOT) able to read and write.

HAVING BEEN COMPLETELY AND FULLY INFORMED OF ALL MY RIGHTS,

\_\_\_\_\_I am knowingly and willfully WAIVING my right to jury trial

OR

\_\_\_\_\_I would like a JURY TRIAL and understand that an appearance bond may be required

PLEASE CHOOSE ONE OF THE OPTIONS BELOW

\_\_\_\_\_I hereby plead NOT GUILTY

\_\_\_\_\_I hereby plead GUILTY \_\_\_\_\_I hereby plead NOLO CONTENDERE

PLEASE CHOOSE ONE OF THE OPTIONS BELOW

\_\_\_\_\_I have been informed of the dangers of proceeding without a lawyer and understand that I am waiving my right to have a lawyer represent me.

OR

\_\_\_\_\_I desire to hire a Lawyer and request time to do so.

OR

\_\_\_\_\_I desire a lawyer but cannot afford to hire one. I request that this court appoint a Lawyer to represent me.

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Date

ORDER

As Judge of the Municipal Court, I am satisfied that the Defendant affirmatively chooses to knowingly and voluntarily forego his or her right to counsel with full appreciation of the dangers and disadvantages of self-representation.

This \_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Municipal Court Judge

ORDER APPOINTING COUNSEL

Based on the foregoing, the Court hereby appoints an attorney to represent the Defendant.

\_\_\_\_\_  
Municipal Court Judge Date: \_\_\_\_\_

The following form was supplied by the Clerk of the Johns Creek Municipal Court and is designed for Guilty or Nolo Pleas:

IN THE MUNICIPAL COURT OF JOHNS CREEK  
STATE OF GEORGIA  
CITY OF JOHNS CREEK

CASE # \_\_\_\_\_

v.

\_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_  
City State Zip

\_\_\_\_\_  
Phone No

PLEA PROCEEDING RECORD, ACKNOWLEDGEMENT AND WAIVER OF RIGHTS

I, the Defendant, acknowledge by signing of this document and by entering a plea of GUILTY\_\_\_\_\_ or NOLO CONTENDRE \_\_\_\_\_, to the charges against me that I:

- 1) Understand the nature of the charges;
- 2) Give up the right to a trial by jury;
- 3) Give up the presumption of innocence until proven guilty beyond a reasonable doubt;
- 4) Give up the right to ask questions of those witnesses against me;
- 5) Give up the right to subpoena witnesses on my behalf, if I want them, and have the Court make them appear;

- 6) Give up the right to testify in a trial and to offer other evidence;
- 7) Give up the right to help of an attorney at trial;
- 8) Give up the right to remain silent, and not to testify against myself, and, that by pleading not guilty or not saying, I would receive a trial by jury;
- 9) Acknowledge that this plea has been entered into freely, voluntarily, and understandingly by me, and that no person has made any promise or threat to me to influence my decision to plead;
- 10) Acknowledge that the plea of Guilty or Nolo Contendere has a factual basis, and the presentation to the Court is true;
- 11) Realize that each charge or ticket received could result in the Judge sentencing me to a fine of up to \$1,000 and up to 12 months in jail, but that is not necessarily the sentence that I would receive. (SEE EXCEPTIONS BELOW);
- 12) Realize that if the charge or ticket received is for second offense or more in five (5) years for driving while license suspended or revoked, it could result in the Judge sentencing me to a fine of up to \$2,500 and up to 12 months in jail;
- 13) Realize that if the charge or ticket received is for third offense or more in five (5) years for driving under the influence, it could result in the Judge sentencing me to a fine of up to \$5,000 and up to 12 months in jail;
- 14) Understand that if you are not a citizen of the United States, your plea of guilty may have an impact on your immigration status.

\_\_\_\_\_ Date: \_\_\_\_\_  
 Defendant

I hereby certify that I have made an inquiry and am satisfied that there is factual basis to support this Defendants plea of Guilty or Nolo Contendere and that the Plea is voluntarily made by the Defendant, and that no promise, threat or force was used to induce the Defendant to enter this plea.

I hereby certify that I have made an inquiry and am satisfied that there is factual basis to support this Defendants plea of Guilty or Nolo Contendere and that the Plea is voluntarily made by the Defendant, and that no promise, threat or force was used to induce the Defendant to enter this plea.

This \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
 Judge Municipal Court of Johns Creek

The following form is used for Not Guilty Pleas. Source: Judge W. Keith Barber of Statesboro, Georgia

IN THE MUNICIPAL COURT OF STATESBORO, GEORGIA  
 ARRAIGNMENT RECORD OF THE COURT

Defendant: \_\_\_\_\_ Case No. \_\_\_\_\_

I am the defendant in the above referenced case. I am not presently under the influence of alcohol or drugs and am not suffering from any mental or physical disability.

I hereby enter a plea of not guilty. In pleading not guilty, I elect to have a non-jury trial and voluntarily and knowingly waive my right to trial by jury and consent to being tried by a judge as to the facts and law of my case and as to my guilt or innocence.

I understand that notice of my trial will be sent to my last known address, and that failure to notify the court of a change of address and failure to appear at future hearings will result in the issuance of a bench warrant for my arrest. Unless I submit change of address information in writing to the Municipal Court Administrator, I want notice of my trial date and time to be sent to me at the following address:

\_\_\_\_\_

I make the following election concerning a lawyer to represent me:

I elect not to be represented by a lawyer. I will represent myself. I voluntarily waive my right to be represented by a lawyer. I understand the nature of the charges against me and the consequences of a plea or conviction. I understand the dangers of proceeding without a lawyer, which include:

The possibility of a jail sentence

The enforcement of the rules of evidence by the Court

Strategic decisions as to the calling of witnesses and/or the right to testify must be made by me;

Issues must be properly preserved and transcribed in order to raise the issues on appeal;

The law provides for possible defenses such as justification, alibi, misrepresentation and entrapment, among others, along with the right to rely on the presumption of innocence, on which a lawyer could provide advice.

I desire to be represented by a lawyer, and I will pursue all diligent and reasonable efforts to obtain a lawyer so as to not cause delay to the trial. If I have not timely hired a lawyer, I understand that I will be deemed to have voluntarily waived my right to an attorney and will be representing myself without a lawyer, knowing that I may encounter all the dangers discussed in the previous section.

I declare that I am indigent, cannot afford to hire an attorney and hereby request appointment of a lawyer.

Date: \_\_\_\_\_

\_\_\_\_\_ Judge \_\_\_\_\_ Defendant

The following form from Judge Keith Barber of Statesboro is used for Guilty and Nolo Pleas:

IN THE MUNICIPAL COURT OF STATESBORO, GEORGIA  
ARRAIGNMENT RECORD OF THE COURT

Defendant: \_\_\_\_\_ Case No. \_\_\_\_\_

Charges: \_\_\_\_\_

I am the defendant in the above reference case. I am not presently under the influence of alcohol or drugs and am not suffering from any mental or physical disability.

( ) I hereby enter a plea of guilty or nolo contendere to the charges listed above.

( ) In pleading guilty or nolo contendere, I hereby acknowledge that I am waiving or giving up the following rights:

- The right to a trial by jury;
- The right to be presumed innocent until proven guilty;
- The right to cross examine or question witnesses that testify against me;
- The right to subpoena witnesses;
- The right to present evidence at trial;
- The right to testify myself, although I understand I have a constitutional right to remain silent and not testify and that my silence would not be held against me.

( ) I am not represented by a lawyer. I will represent myself and voluntarily waive my right to be represented by a lawyer. I understand the dangers of proceeding without a lawyer, which include:

- The possibility of a jail sentence;
- The enforcement of the rules of evidence by the court
- Strategic decisions as to the calling of witnesses and/or the right to testify must be made by me;
- Issues must be properly preserved and transcribed in order to raise the issues on appeal;
- The law provided for possible defenses such as justification, alibi, misrepresentation and entrapment, among others, along with the right to reply on the presumption of innocence, on which a lawyer could provide advice.

I understand that if I cannot afford to hire my own attorney and want one; a lawyer will be appointed to represent me at city expense.

Date: \_\_\_\_\_

\_\_\_\_\_  
Defendant

W. Keith Barber \_\_\_\_\_  
Judge Clerk Initials

ORIENTATION FOR ARRAIGNMENT (Source: Judge John Cicala, Jr. of DeKalb County Records Court.) This form is rather different from what is used in many courts, but may also prove useful.

Defendant: \_\_\_\_\_ Case # \_\_\_\_\_

Citation(s) \_\_\_\_\_

### Orientation For Arraignment

This form is designed to familiarize you with the Arraignment procedure, and to provide some general information to you so that you will be able to make a decision about how you want to handle your Municipal Court case. Please note that nothing contained in this document is legal advice, or designed to substitute for sound legal advice. Also, please note that the information contained in this form is not exhaustive or all inclusive, by any means. It is strongly suggested that you obtain legal advice regarding your legal position and the legal consequences of the charges against you from a person qualified to give legal advice, i.e. an attorney admitted to the practice of law in the State of Georgia. The Judge cannot give you legal advice. The Prosecutor/City Solicitor cannot give you legal advice. The Clerk of the Court cannot give you legal advice. You should not get legal advice from your Aunt Ethel (unless she

went to law school and passed the bar exam), or your lucky astronomy mood watch. Please seek the advice of a qualified attorney regarding personal legal matters that can have far reaching impact on your freedoms and privileges, including, but not limited to, your driving privileges.

**Arraignment (First Appearance):** This is the stage of the proceedings in which the Court determines whether you are aware of the nature of the charge(s) against you and how you intend to address the charge(s). This document will address some of the options that you have, and hopefully give you information helpful to your reaching a decision on how to handle your case.

**Presumption of Innocence:** You are in fact Innocent in this Court of the offense charged against you, until and unless: a) YOU decide to enter a guilty plea, volunteer information saying you are guilty of the charge against you; or, b) proper evidence has been received in open court at trial, that ultimately results in you being found Guilty beyond a reasonable doubt.

**Trials in the Municipal Courts:** They are held on select trial days. You will not have a trial on the same day you appear for arraignment. With certain narrow exceptions, the Legislature of the State of Georgia has not empowered municipal judges with the authority to empanel jurors at this level of Court. If you have a trial in the municipal court, your trial will be conducted by the Judge sitting as the trier of fact and law, without the assistance of a jury.

**Jury Trial:** Jury trials are only available in those cases in which someone has been charged with a violation of a State statute, or, if you have not been charged with a violation of a state statute, there is a comparable state statute under which your case may be bound over for trial by jury.

**Waiver of Jury Trial:** The General Assembly has directed that no municipal court in Georgia may handle your case locally unless and until you sign a written waiver of your right to a trial by jury. To keep your case in the municipal court (unless you are charged/accused of a City Ordinance Violation) you must: a) read through the Affidavit Prior to Entering Plea form, b) select how you wish to plea, c) sign this orientation form and the waiver of jury trial and plea form. You must bring the completed forms to the Judge before the Judge can talk with you about your case.

**Your Appeal Rights:** If you elect to have a trial of your case in the municipal court and you are not happy with the outcome after trial, you have the right to appeal the decision here to the next appropriate Court. There is a process for appeal outlined in the Georgia Code. There are strict Appeal requirements, including a filing deadline (from the date your case is handled and Judgment is entered), and the creation of a legally sufficient record (accomplished by having a Court Reporter present to take down the proceeding at YOUR expense). If this is the first time you are appearing on your case, you are eligible to ask for your court date to be rescheduled so that you have the chance to consult with an Attorney before deciding how to handle things, including learning more about a possible Appeal of your case, if necessary, after a trial.

**Announcement Options at Arraignment:**

**Not Guilty Bench Trial:** You disagree with the charge against you. This forms an issue between you and the City of Auburn which must be resolved by way of a trial. Your case stays in Auburn and is tried here or you can later work through to a disposition without a trial; you must fill out the waiver and advisement of rights form.

**Not Guilty Jury Trial:** Your case is transferred to the next appropriate Court for further disposition. You are on the same bond, or return to court requirement, until you are notified to appear in the next court. You must make sure that the Clerk of the Court here in Auburn has your current mailing address for you to receive your next notification to appear in Court. If you move prior to receiving your next notice to appear in Court, it is YOUR RESPONSIBILITY to notify the appropriate court of your change of address. Your failure to do so may result in the issuance of a warrant for your arrest for failure to appear at your next court appearance.

**Guilty:** You understand and admit that you were wrong. For example: you know that you were speeding, or did make the turn where you shouldn't have, or you did roll through the STOP sign, etc. This plea forms no issue between you and the City of Auburn requiring a trial. Your case can be resolved in Auburn, usually the same day as arraignment. You must fill out the waiver and advisement of rights form. You may still make an explanation to the

Court in connection with your guilty plea, as to the circumstances surrounding the violation(s). That explanation will not impact the determination of guilt or innocence in your case. Explanations in connection with guilty pleas go toward the issue of aggravation (increase) or mitigation (decrease) of punishment only.

Guilty - Alford Plea: You believe (in your own mind and heart) that you are NOT Guilty, but you ALSO believe that the evidence against you is strong enough that the Judge will probably decide against you. So, you would rather end your case today without coming back for a trial. Your case stays in Auburn; you must fill out the waiver and advisement of rights form. Nolo Contendere: This is handled much the same way as a Guilty Plea. The advantage to you is the Department of Drivers Service (DDS) may not assess points to your driver's license. However, the violation itself will still appear on your driving history. This is a discretionary plea (the Judge must agree to accept the Nolo Plea) and a Nolo can only be used one time every five (5) years for the various types of offenses for which it is available. In some types of cases, it may have the benefit of not suspending your license. There are other types of offenses for which nolo pleas can be to your advantage. In order to assess whether it can help you in your case, you should speak to an attorney in order to get proper legal advice. The Judge, the Solicitor and the Clerk of the Court cannot give you legal advice regarding your case. You must fill out the waiver and advisement of rights form prior to requesting a plea of nolo contendere.

Pre-Trial: You may talk with the City Solicitor (the Prosecutor) about your case and see what sentence options the Solicitor will recommend to the Judge. Understand that if you chose to represent yourself and you speak with the Solicitor about your case, that nothing you say is privileged. In other words, anything that you say to the Solicitor may be used against you at a subsequent trial if you are unable to reach a plea agreement with the Solicitor in regard to your case. NOTE: Only the Judge decides and enters the Sentence. Even AFTER talking with the Solicitor, you are not obligated to enter a guilty plea to the charges against you and you may still ask for a trial. If you do chose to have a trial, your case will be reset to a future bench trial date in the city, or transferred to next appropriate Court for trial by jury.

Reset, Please: There are various reasons why you may not be prepared to dispose of your case today.

a) You may be charged with an offense that carries with it on conviction a license suspension or mandatory jail time, such a DUI, Leaving the Scene of an Accident, Fleeing and Eluding Police, Aggressive Driving, Driving w/Suspended License, Driving Without Insurance, etc., and you would like to hire an Attorney; or,

b) You are just nervous at Arraignment, you may ask for a Reset. In so doing, you may either Waive Arraignment or not. It is usually better NOT to Waive Arraignment on your own if possible because it is a critical stage of the Criminal Justice Proceedings and important matters hinge on when Arraignment occurs.

c) You are under 21 and still under someone else's (i) roof and/or (ii) insurance umbrella, and (iii) there is no parent/guardian with you; you should strongly consider having your case continued in order to afford yourself the opportunity to have a parent/guardian with you, and giving your parent/guardian the opportunity to appear with you in court. There are unique consequences which attach to an under 21 year old driver in the State of Georgia which may severely impact their driving privileges.

d) Anyone charged with a state law violation of Title 16, Title 3, or an offense which carries mandatory minimum penalties under the law, such as jail time or suspension of your driver's license, DUI, Driving w/No Insurance, Aggressive Driving, Driving while license suspended, Leaving the Scene of an accident/ Failure to Report, or CDL Violation: PLEASE, seek legal counsel.

e) If you have a CDL license, please strongly consider hiring an attorney to represent you in Court.

Miscellaneous matters:

Public Defender: If you are indigent and qualify for the services of the public defender, the Court will assign the public defender (an attorney to defend you) to speak with you about your case and represent you before the Court. There is an application which you must fill out and there is a Fifty Dollar (\$50.00) fee that you may be required to pay at the time of application. That fee is established by the Georgia Legislature in connection with application for indigent representation and can be waived under extreme circumstances by the Court.

Defensive Driving: All under 21 year old violators (and possibly some over 21 year old violators) who plead guilty or nolo contendere, or are found guilty after a trial will be attending a defensive driving course to be determined by the Court.

IMPORTANT: If your case is reset from today's date for any reason, do not leave the courtroom today until you receive a written notice with your new return court date issued by the Clerk.

I have received and read the Orientation for Arraignment information form and understand the options that I have prior to proceeding with my case.

---

Date Signature of Person Receiving the Violation

The following plea and waiver form is from Chief Judge Rashida Oliver of East Point Municipal Court

#### PLEA AND WAIVER

You have the right to be represented by an attorney if facing the possibility of jail or probation for charges pending against you. If you are not financially able to employ an attorney of your own choice, you have a right to apply for a Court Appointed Attorney. The application requires proof of income and a showing that you are indigent according to the Federal Poverty Guidelines. There is also a \$50.00 application fee. Upon proper proof the Court will appoint an attorney to represent you. An attorney can help you (1) understand the charge or charges against you; (2) determine whether a legally sufficient accusation has been filed against you; (3) determine whether you have any defense to the charge or charges against you, possible defenses may include but are not limited to self-defense, alibi, misidentification, accident, and reliance on the presumption of innocence and the State's burden to prove you guilty on all elements of the charge or charges against you beyond a reasonable doubt; (4) prepare and conduct any trial held on the charge or charges against you; (5) determine what evidence is legally admissible against you; (6) file motion and make objections to exclude evidence which is not legally admissible against you; (7) determine what evidence you would be able to present in your defense; (8) file motions to obtain information from the prosecution, such as police reports, scientific reports, witness statements, video or audiotapes, photographs, etc.; (9) make strategic decisions as to the calling of witnesses and whether or not you should testify at trial;(10) Properly preserve legal issues for appeal in the event that you are convicted at trial; (11) conduct plea negotiations on your behalf if you desire to plead guilty to the charge or charges against you; (12) make sure all of your rights as a defendant in a criminal case are protected.

It is dangerous to proceed to trial as a Pro Se Litigant without the assistance of an attorney. When you proceed without an attorney you recognize that (1) you will have to follow the same rules of law and legal procedure as an attorney; (2) you may not be aware of all the possible defenses and circumstances that could help the judge decide your case; (3) you will be required to make strategic decisions; (4) it would be difficult to challenge your conviction on appeal if you do not object to anything improper during your trial or because the trial proceedings were not recorded.

The charge or charges against you (as to each offense) for state offenses carries a possible maximum jail term of twelve (12) months confinement and a fine of \$1,000.00; for city ordinance violations carries a possible maximum

jail term of six (6) months confinement and a fine of \$1,000.00. I further understand that the maximum penalty under the law for a misdemeanor of a high and aggravated nature is twelve (12) months confinement and a fine of \$5,000.00. If convicted after a trial, the Judge has the discretion to sentence you to a jail term and/or fine within the range outlined above.

I reserve the right to enter a plea until I have had an opportunity to speak with an attorney.

I am going to hire my own attorney  . I would like to apply for a Court Appointed Attorney  .

#### WAIVER OF RIGHT TO BE REPRESENTED BY AN ATTORNEY

I have read or had read to me all of the foregoing section. I understand the information contained in this section and have no questions which need to be answered before I sign this acknowledgement. I understand the right I have to be represented by an attorney in the criminal case against me. I have considered the advantages of having an attorney represent me. I have considered and understand the dangers proceeding without the assistance of an attorney. Knowing and understanding these things it is my desire not to be represented by an attorney in this case. I freely, voluntarily, and knowingly waive, that is, give up, my right to be represented by an attorney in this case. It is my desire to proceed in this case without an attorney and to represent myself.

This \_\_\_\_\_ day of \_\_\_\_\_, 2013.

Defendant

Witness

I understand that by entering a plea of guilty or nolo contendere (no contest) I waive: my right to trial by judge or jury; my right to be presumed innocent; my right to confront and cross examine witnesses; my right to testify and offer evidence on my behalf; my right to subpoena witnesses; my right to the assistance of counsel during trial; my right to remain silent and not testify and my right to be represented by a private lawyer or a public defender if I am eligible.

I understand that if I enter a plea of guilty or nolo contendere in this case, there will be no further trial or hearing and a fine or sentence or both may be imposed. I further understand that by entering a plea I will waive my right to an appeal.

I understand that if I am not a citizen of the United States, a plea of guilty or nolo contendere may have a negative impact on my immigration status.

I hereby plead NOT GUILTY CHOOSE ONE:  I am knowingly and willfully WAIVING my right to a jury trial.

I would like a JURY TRIAL.

Updated 6/17/2013

**EN EL TRIBUNAL MUNICIPAL DEL CONDADO DE ATHENS-CLARKE, ESTADO DE GEORGIA  
DECLARACIÓN DEL ACUSADO**

El Estado v. \_\_\_\_\_ Número del Caso MU \_\_\_\_\_

Acusación(es): \_\_\_\_\_

Mi nombre completo es: \_\_\_\_\_ me declaro culpable / nolo contendere de la(s)

acusación(es) \_\_\_\_\_

Comprendo que tengo el derecho de declararme no culpable de cualquier acusación contra mí. Comprendo que si me declaro no culpable y pido un juicio tengo los siguientes derechos bajo la ley:

El derecho a un juicio público y rápido. El derecho a un juicio con jurado o a un juicio sin jurado.

El derecho a hacer que el Estado pruebe la(s) acusación(es) contra mí, más allá de una duda razonable.

El derecho a enfrentar, ver, escuchar y contra-interrogar a todos los testigos llamados a declarar contra mí.

El derecho a citar testigos a mi favor y hacerlos testificar en el juicio.

El derecho a testificar y a presentar otras evidencias en mi favor.

El derecho a que se me presuma inocente de la(s) acusación(es) pendiente(s) contra mí.

El derecho a permanecer en silencio durante el juicio. Comprendo que si permanezco callado y no testifico en el juicio, mi silencio no puede ser considerado, ni usado, como evidencia contra mí.

El derecho a tener la ayuda de un abogado en todas las fases de los procedimientos. Comprendo que si no puedo costear un abogado, el tribunal puede nombrar uno para que me represente.

Comprendo que al declararme culpable / nolo contendere, estoy renunciando o abandonando cada uno de los derechos enumerados antes.

Comprendo, que de acuerdo con la ley, el castigo máximo por cada acusación de delito menor (misdeamenor) es de doce (12) meses de reclusión y una multa de \$1,000. Comprendo, que de acuerdo con la ley, el castigo máximo por cada violación de una ordenanza es de seis (6) meses de reclusión y una multa de \$1,000. Comprendo, que de acuerdo con la ley, el castigo máximo por un delito menor de naturaleza grave y con agravantes es doce (12) meses de reclusión y una multa de \$5,000. Comprendo que si no soy ciudadano de los Estados Unidos, la declaración de culpabilidad puede afectar mi estado de inmigrante.

(\_\_\_\_) Comprendo que un abogado puede encontrar defensa para la(s) acusación(es) pendiente(s) contra mí u ofrecer evidencia en mi nombre, que pueda ser beneficiosa para mí. Sin embargo, estoy procediendo sin la representación de un abogado y renuncio libre y voluntariamente a mis derechos de tener uno que me represente en la(s) acusación(es) pendiente(s).

(\_\_\_\_) Estoy representado por un abogado, cuyo nombre es \_\_\_\_\_, He discutido con mi abogado los hechos que conozco acerca de la(s) acusación(es) pendiente(s) contra mí y creo que mi abogado está completamente informado de este asunto. Mi abogado me informó de la naturaleza de cada acusación y de cualquier defensa posible. Pienso que mi abogado me ha representado de una forma competente y estoy satisfecho con los consejos y la orientación que me ha dado.

Al presentar mi declaración de culpabilidad / nolo contendere, declaro que nadie me ha prometido nada, de ningún género, con respecto a recibir indulgencia por presentar mi declaración de culpabilidad y nadie me ha amenazado o forzado para que presente mi declaración de culpabilidad / nolo contendere. No estoy bajo influencia de alcohol o drogas en este momento. Mi decisión de declararme culpable es libre y voluntaria, con total entendimiento de la(s) acusación(es) pendiente(s) contra mí.

\_\_\_\_\_  
Acusado

\_\_\_\_\_  
Morris L. Wiltshire, Solicitor

\_\_\_\_\_  
Abogado del Acusado

Habiendo presentado el acusado su declaración de culpabilidad / nolo contendere y estando el Tribunal satisfecho de que el Acusado comprende la naturaleza de la(s) acusación(es), las consecuencias de declararse culpable / nolo contendere y que está presentando su declaración libre y voluntariamente, el Tribunal acepta la declaración del Acusado.

En este día \_\_\_\_\_ de \_\_\_\_\_ 200\_\_\_\_\_.

\_\_\_\_\_  
Kay A. Giese, Juez del Tribunal Municipal

RIGHTS AND WAIVER FORM (Another form: Spanish) from Judge George Barron of the College Park and Hapeville Municipal Courts.

#### LOS DERECHO SOBRE UN ABOGADO Y LAS DESVENTAJA DE NO TENER UNO

1. Los cargos contra usted lleva una sentencia maxima de seis o doces meses en carcel y multa de \$1,000.00, o la combinacion de los dos. Por casualidad de tiempo en carcel tiene usted el derecho de obtener representacion de abogado. El Juez puede darle una sentencia de servir tiempo en carcel pero sin embargo puedes ser suspendida. Esto sinifica que no tiene que servir la sentencia si pagas la multa o si completa la libertad condicional. Si todo or parte de su sentencia es autenticada y usted violar las reglas de su autenticada puedes servir la sentencia en carcel. Iniciales\_\_\_\_\_.

2. Si necesitas abogado y no tienes los recursos un abogado sera asignado a representarlo. Se requiere proveer informaciones de su ingresos y su propiedad para que le Tribunal pueda decidir si no tienes los recursos para un abogado. Iniciales\_\_\_\_\_

3. El abogado es una persona capacitado en la lea y procedimiento legal. Un abogado puede (1) Ayudarle a comprender los cargos; (2) Determinar si los cargos sobre usted son legalmente suficiente; (3) Explicar su derechos y contestar preguntas sobre su caso; (4) Ver si tiene alguna defensa sobre los cargo, como si no eres la persona que comitio las ofensa, y lo que hizo es dependencia justificada sobre la suposicion de su inocencia y los cargos procesamiento para demostrar culpabilidad al respecto de su innocencia o otra defensa; (5)Presentar mocion y objeciones para evitar el procesamiento usando evedencia contra usted que no son legalmente acetable; (6) Preparar y conducir el juicio; (7) Exigir testigo que se presente en el juicio a cerca de citacion; (8) Ayudarte decidir que hacer si pide o rendirse juicio, atestar o quedarse callado y pedir juicio o declararse culpable o NOLO Contendre para alguno o todo los cargo; (9) Asegura protégé su derecho; y (10) Apelar su caso a la corte superior si eres culpable. Inicial\_\_\_\_\_

4. Puedes exigir su derecho de tener abogado, comoquiera hay peligro y desventaja en no tener abogado. Alguno son: (a) Es necesario seguir la regla de procedimiento aunque no eres abogado; (b) Es necesario tomar desiciones estrategico y tal tomar testigo; (c) puede que no eres consciente a las defensa y las circunstancia que es necesario en considerar su sentencia; (d) Seria muy dificil poner en duda su condena si no hiso objeciones o si el juicio no esta grabado. Inicial\_\_\_\_\_

5. En decidiendo si nesecita abogado, no puedes estar bajo la influencia del alcohol o narcotico. Esta usted bajo la influencia del alcohol o narcotico? Si No

6. (i) Que grado termino en la escuela? \_\_\_\_\_ (ii) Puede leer y escribir?\_\_\_\_\_ (iii) Comprende lo que leo?\_\_\_\_\_ Si hay algo que no comprende el Juez se lo explicara.

DECISION EN RESPECTO A UN ABOGADO

He sido detalladamente y completamente informado de la informacion que He leído y lo que le Juez me ha explicado, ahora la siguiente decision: Pido Ser representado por un abogado. Y que yo no tengo los recurso para contratar un abogado. Iniciales\_\_\_\_\_

Yo no deseo ser representado por un abogado y entiendo y he considerado las a ventajas de tener un abogado. Deseo seguir a delante y representarme por mi mismo. Yo renuncio mis derechos de ser representado por un abogado. Iniciales\_\_\_\_\_

\_\_\_\_\_  
Firma

\_\_\_\_\_  
Fecha

ORDER APPOINTING COUNSEL

Based upon the foregoing, the Court hereby appoints an attorney to represent the defendant. This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Municipal Court Judge

FINDING OF WAIVER OF COUNSEL

As Judge of the Municipal Court I am satisfied that the Defendant affirmatively chooses to knowing and voluntarily forgo his or her right to counsel with a full appreciation of the dangers and disadvantages of self-representation. This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Municipal Court Judge

APPLICATION FOR APPOINTED COUNSEL from Judge George Barron of the College Park and Hapeville Municipal Courts.

IN THE MUNICIPAL COURT FOR THE CITY OF COLLEGE PARK  
STATE OF GEORGIA

CITY OF COLLEGE PARK )

Vs )

Citation Nos. \_\_\_\_\_

\_\_\_\_\_ )

Defendant )

\_\_\_\_\_

\_\_\_\_\_

APPLICATION FOR APPOINTMENT OF COUNSEL AND  
CERTIFICATE OF FINANCIAL RESOURCES

I AM THE DEFENDANT IN THE ABOVE STYLED ACTION. I CANNOT AFFORD TO HIRE A LAWYER TO ASSIST ME. I DO WANT THE COURT TO PROVIDE ME WITH A LAWYER. I UNDERSTAND THAT I AM PROVIDING THIS INFORMATION IN THIS DECLARATION IN ORDER FOR THE COURT TO DETERMINE MY ELIGIBILITY FOR A COURT APPOINTED LAWYER, PAID BY THE CITY OF COLLEGE PARK, TO DEFEND ME.

1. NAME:

HOME ADDRESS:

BIRTHDATE:

AGE\_\_\_\_\_

SOCIAL SECURITY NO.:

2. IF YOU ARE CURRENTLY EMPLOYED ANSWER THE FOLLOWING QUESTIONS: HOW LONG

NAME OF EMPLOYER: .TELEPHONE #

CURRENT TAKE HOME PAY (AFTER TAXES): (WEEKLY, MONTHLY OR OTHER)

3. IF YOU ARE CURRENTLY UNEMPLOYED ANSWER THE FOLLOWING QUESTIONS:

HOW LONG: .LIST ANY OTHER SOURCES OF INCOME SUCH AS WELFARE OR DISABILITY INCOME AND THE AMOUNT RECEIVED PER WEEK ON ;MONTH:

4. ARE YOU MARRIED? .NAME OF SPOUSE:

IS YOUR SPOUSE EMPLOYED? .BY WHOM: .TELEPHONE #

WHAT IS YOUR SPOUSES INCOME AFTER TAXES? MONTHLY, WEEKLY OR OTHER

5. HOW MANY CHILDREN LIVE IN YOUR HOME? .AGES:

6. LIST DEPENDENTS (OTHER THAN SPOUSE AND CHILDREN) IN YOUR HOME. GIVE NAMES, RELATIONSHIP AND AMOUNT YOU CONTRIBUTE TO THEIR SUPPORT:

7. DO YOU OWN A MOTOR VEHICLE? GIVE YEAR AND MODEL:

WHAT IS THE BALANCE, IF ANY, OWED ON THE VEHICLE?

8. DO YOU OWN A HOME? .VALUE: .BALANCE OWED ON LOAN:

9. AMOUNT OF YOUR MONTHLY RENT OR MORTGAGE PAYMENT:

10. LIST ANY CHECKING, SAVINGS OR OTHER DEPOSITS WITH ANY BANK OR FINANCIAL INSTITUTION AND THE AMOUNT OF ANY BALANCES:

11. LIST ANY OTHER ASSETS OR PROPERTY, INCLUDING REAL ESTATE, JEWELRY, NOTES, AND/OR STOCKS:

12. LIST ALL INDEBTEDNESS AND AMOUNTS OF EACH PAYMENT:

13. LIST ANY EXTRAORDINARY LIVING EXPENSES AND AMOUNT(S), SUCH AS REGULARLY OCCURRING MEDICAL EXPENSES:

14. LIST ANY COURT ORDERED SUPPORT THAT YOU CURRENTLY PAY:

15. DO YOU UNDERSTAND THAT WHETHER YOU ARE CONVICTED OR ACQUITTED, THE CITY OF COLLEGE PARK MAY **SEEK REIMBURSEMENT FROM YOU FOR ATTORNEY'S FEES PAID FOR YOU IF YOU SHOULD BECOME FINANCIALLY ABLE TO PAY OR REIMBURSE THE CITY BUT REFUSE TO DO SO.**

I HAVE READ (OR HAD READ TO ME) THE ABOVE QUESTIONS AND ANSWERS. MY RESPONSES ARE CORRECT TO THE BEST OF MY KNOWLEDGE. I SWEAR THAT THE INFORMATION GIVEN HEREIN IS TRUE AND UNDERSTAND THAT A FALSE ANSWER TO ANY QUESTION MAY RESULT IN A CHARGE OF PERJURY.

So sworn this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Defendant

Sworn to and subscribed before me this \_\_\_\_ day of \_\_\_\_\_20\_\_.

Notary Public/Judge

Application Approve/Denied.

Appointment of Counsel to represent the Defendant is hereby approved.

This \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_ Judge

APPLICATION FOR APPOINTED COUNSEL (ANOTHER FORM) by Jim Martin, former chief legal officer of the Georgia Public Defender Standards Council.

APPLICATION FOR PUBLIC DEFENDER SERVICES

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_ COUNTY, STATE OF GEORGIA

STATE v. \_\_\_\_\_

Defendant / Child

Case No. (S) \_\_\_\_\_ CHARGE(S) \_\_\_\_\_

Date of Arrest \_\_\_\_/\_\_\_\_/\_\_\_\_

Name \_\_\_\_\_ Last First Middle

Address \_\_\_\_\_

Telephone (Home) \_\_\_\_\_ (Work) \_\_\_\_\_

The person through whom you can always be contacted: \_\_\_\_\_

Address \_\_\_\_\_

Telephone (Home) \_\_\_\_\_ (Work) \_\_\_\_\_

Sex ? Male ? Female Date of Birth \_\_\_\_/\_\_\_\_/\_\_\_\_

Place of Birth \_\_\_\_\_ Social Security Number \_\_\_\_/\_\_\_\_/\_\_\_\_

Do you speak English? ( ) Yes ( ) No

Are you a U.S. Citizen? ( ) Yes ( ) No

Race: \_\_\_\_\_

IMMIGRATION STATUS:

( ) Undocumented ( ) Legal Permanent Resident\* (Green Card Holder)

( ) Visa Holder ( ) Work Permit\* Holder ( ) Amnesty Applicant

( ) Other – Describe \_\_\_\_\_

Citizenship Status \_\_\_\_\_

Marital Status ( ) Single ( ) Married ( ) Divorced ( ) Separated

Spouse's Name \_\_\_\_\_

# of Dependents that you currently support: \_\_\_\_\_

I pay \$ \_\_\_\_\_, receive \$ \_\_\_\_\_ in court ordered Child Support payments, per: \_\_\_\_\_ week, \_\_\_\_\_ month.

State the age and sex of each child for which you pay child support

Prior Military Service:

Branch \_\_\_\_\_ Years \_\_\_\_\_ to \_\_\_\_\_

Education: Highest grade completed: \_\_\_\_\_

Other Training \_\_\_\_\_

Are you disabled? ( ) No ( ) Yes, Type of Disability \_\_\_\_\_

Employed? ( ) Yes ( ) No

If Yes, Occupation: \_\_\_\_\_

Employer: Name \_\_\_\_\_

Address \_\_\_\_\_

Telephone \_\_\_\_\_

Job Title \_\_\_\_\_

Length of Employment \_\_\_\_\_

#### INCOME & ASSETS

Income: Net income (total salary and wages, minus deductions required by law, including court ordered child support payments):

\$ \_\_\_\_\_ per week \$ \_\_\_\_\_ bi weekly \$ \_\_\_\_\_ per month

\$ \_\_\_\_\_ per year

#### Spouse's Earnings:

\$ \_\_\_\_\_ per week \$ \_\_\_\_\_ bi weekly \$ \_\_\_\_\_ per month

\$ \_\_\_\_\_ per year

Other Benefits:

Social Security \$ \_\_\_\_\_ Veterans' Benefits \$ \_\_\_\_\_

Worker's Compensation \$ \_\_\_\_\_ Other \$ \_\_\_\_\_

Things I Own:

Cash \$ \_\_\_\_\_ Savings Account \$ \_\_\_\_\_ Bank Accounts \$ \_\_\_\_\_

Stocks & Bonds \$ \_\_\_\_\_ Jewelry \$ \_\_\_\_\_

Certificates of Deposit \$ \_\_\_\_\_ Equity in Real Estate \$ \_\_\_\_\_

Equity in other Tangible Property \$ \_\_\_\_\_

Equity in Motor Vehicles

Type: \_\_\_\_\_ \$ \_\_\_\_\_ Type: \_\_\_\_\_ \$ \_\_\_\_\_

Type: \_\_\_\_\_ \$ \_\_\_\_\_ Type: \_\_\_\_\_ \$ \_\_\_\_\_

For Each Vehicle, state the following: \_\_\_\_\_ Year \_\_\_\_\_ Make

\_\_\_\_\_ Year \_\_\_\_\_ Make \_\_\_\_\_ Year \_\_\_\_\_ Make

I am \_\_\_\_\_ in jail \_\_\_\_\_ out on bond. Total Bond Amount \$ \_\_\_\_\_

Who posted you Bond? Name: \_\_\_\_\_

Address \_\_\_\_\_

Telephone \_\_\_\_\_

I receive AFDC: ( ) Yes ( ) No. I receive Supplemental Security Income (SSI) : ( ) Yes ( ) No

State any other source of income or additional assets not specifically requested above: \_\_\_\_\_  
\_\_\_\_\_

BY MY SIGNATURE BELOW, I SWEAR UNDER THE PENALTY OF PERJURY THAT THE INFORMATION CONTAINED HEREIN IS TRUE AND BASED UPON MY PERSONAL KNOWLEDGE, AND I REQUEST THAT THE CIRCUIT **PUBLIC DEFENDER'S OFFICE REPRESENT ME, OR THE MINOR CHILD OR TAX-DEPENDANT PERSON** I AM PARENT OR GUARDIAN OF, IN THE ABOVE STYLED CASE(S). FURTHER, I AGREE TO IMMEDIATELY REPORT ANY CHANGE IN MY FINANCIAL SITUATION TO THE CIRCUIT DEFENDER OFFICE OR TO THE COURT.

If the Defendant/child is unable to read, write or understand English, the person assisting in the completion of this document must complete the "Assistance" section below.

This \_\_\_\_\_ day of \_\_\_\_\_ 200\_\_\_\_.

Name (Print): \_\_\_\_\_

Signature: \_\_\_\_\_

ASSISTANCE

The understated person provided assistance to the Defendant/child with the completion of this form due to their inability to read and write.

Name: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

The following form for Application for Counsel was supplied by Judge Charles Barrett of Duluth Municipal Court

YOU MAY NOT BE ELIGIBLE FOR

DULUTH MUNICIPAL COURT

APPOINTED COUNSEL ON

3276 Buford Highway

PROBATION REVOCATION CASES

Duluth, GA 30096

RETURN FORM TO:

Clerk of Court: Sharon H. Wallace

IN THE MUNICIPAL COURT OF THE CITY OF DULUTH  
STATE OF GEORGIA

STATE OF GEORGIA/CITY OF DULUTH

WARRANT #: \_\_\_\_\_

Vs.

CITATION #: \_\_\_\_\_

\_\_\_\_\_  
Defendant

City \_\_\_\_\_ of \_\_\_\_\_ Duluth  
Offense(s): \_\_\_\_\_

IN JAIL: \_\_\_\_\_ OUT ON BOND: \_\_\_\_\_ ARREST DATE: \_\_\_\_\_

APPLICATION FOR APPOINTMENT OF COUNSEL AND  
AFFIDAVIT OF FINANCIAL RESOURCES

I want the court to provide me with a lawyer; I understand that I am providing the information in this declaration in order for the court to determine my eligibility for a court appointed lawyer or public defender, paid by City of Duluth, to defend me against the charge listed above.

Full Name:

\_\_\_\_\_

Last

First

Middle

Address:

\_\_\_\_\_

City

State

Zip Code

Date of Birth: \_\_\_\_/\_\_\_\_/\_\_\_\_ Social Security #: \_\_\_\_\_-\_\_\_\_\_-\_\_\_\_ Work Tele #: (\_\_\_\_)-\_\_\_\_-\_\_\_\_\_

Home Tele #:(\_\_\_\_)-\_\_\_\_-\_\_\_\_ Cell Tele #:(\_\_\_\_)-\_\_\_\_-\_\_\_\_  \_\_\_\_\_  E-Mail  
Address: \_\_\_\_\_ 1. Are the charges against you ALL City of \_\_\_\_\_ Duluth \_\_\_\_\_ Charges?  
Yes No

IF NOT, What else are you charged with?

\_\_\_\_\_

2. Employer (self-employed, describe job):

\_\_\_\_\_

3. How are you paid? (Check one):  weekly  bi-weekly  monthly  
What is your TOTAL take home pay? \_\_\_\_\_

\_\_\_\_\_

4. \_\_\_\_\_ If \_\_\_\_\_ unemployed, \_\_\_\_\_ how \_\_\_\_\_ long?

\_\_\_\_\_

5. Do you receive any of the following sources of income? If so, how much?

Unemployment \$ \_\_\_\_\_ Welfare \$ \_\_\_\_\_ Disability \$ \_\_\_\_\_

Retirement \$ \_\_\_\_\_ Child Support \$ \_\_\_\_\_ Other \$ \_\_\_\_\_

6. Are you married? \_\_\_\_\_ If YES, is your spouse employed? \_\_\_\_\_

What is your spouse's take home pay? \$ \_\_\_\_\_

How is your spouse paid? (Check one):  weekly  bi-weekly  monthly

7. Number of children living in the home: \_\_\_\_\_  
Ages: \_\_\_\_\_

8. How many others living in the home? \_\_\_\_\_ if so, are they employed? \_\_\_\_\_

What is their take home pay? \$ \_\_\_\_\_

9. Do you own a home? \_\_\_\_\_ What is its value? \$ \_\_\_\_\_  
How much do you owe? \_\_\_\_\_

Do you own any other property? \_\_\_\_\_  
What is its value? \$ \_\_\_\_\_ How much do you owe? \$ \_\_\_\_\_

10. List your checking and/or saving accounts and other deposits with any bank or financial institution and the amount in each account.

\_\_\_\_\_

\_\_\_\_\_

11. List other assets, including cars, antiques, jewelry, coins, collectibles, notes, bonds, stocks, etc.

\_\_\_\_\_

\_\_\_\_\_

12 List any unusual living expenses and medical expenses and amount(s).

\_\_\_\_\_

\_\_\_\_\_

13. Have you tried to hire an attorney? Yes or No  
How much can you pay for your defense? \$ \_\_\_\_\_

14. Have you ever had an attorney appointed to represent you in Gwinnett County?

Yes, if yes, name of attorney \_\_\_\_\_

No

#### AFFIDAVIT OF DEFENDANT APPLICANT

I understand and agree that whether I am convicted or acquitted, the City of Duluth may seek reimbursement of attorney's fees paid on my behalf, if I am able, or it is determined that I am able, to reimburse the City.

I have read, or had read to me, the above questions and statements. I SWEAR that the answers I have given are true and correct. I also understand that a false answer to any questions may result in my being charged with a crime.

Sworn to and subscribed before me

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public/Clerk/Judge

\_\_\_\_\_  
(Signature of Defendant)

ORDER OF THE COURT

Having considered the above matter, it is the finding of this court that the above named Defendant  
[ ] IS [ ] IS NOT indigent under the criteria established under current Federal Guidelines.

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Judge, City of Duluth Municipal Court

ORDER OF THE COURT

STATE OF GEORGIA/CITY OF DULUTH

WARRANT

#: \_\_\_\_\_

Vs.

CITATION

#: \_\_\_\_\_

\_\_\_\_\_  
Defendant

The Court, having found that the above-named Defendant is indigent under the applicable criteria, it is ordered that  
\_\_\_\_\_, Attorney at Law be, and said Attorney hereby is, appointed to represent the  
above-referenced Defendant pursuant to the Indigent Defense System of this Court. The statutory application fee,  
of \$50.00,

[ ] IS [ ] IS NOT waived.

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Judge, City of Duluth Municipal Court

## Cases

<i>Alabama v. Shelton</i> , 535 U.S. 654, 122 S.Ct. 1764, 152 L.E.2d 888 (2002) .....	5
<i>Annaswamy v. State</i> , 284 Ga. App. 6, 7-8 (1) (642 SE2d 917) (2007) .....	16
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<i>Bowers v. Moore</i> , 266 Ga. 893 (1) (471 S.E.2d 869) (1996) .....	9
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<i>Braswell v. State</i> , 240 Ga. App. 510 (1) (523 SE2d 904) (1999) .....	15
<i>Clarke v. Zant</i> , 247 Ga. 194, 275 S.E.2d 49 (1981) .....	6
<i>Coleman v. Alabama</i> , 399 U.S. 1 (1970) .....	7
<i>Deren v. State</i> 237 Ga. App. 387, 515 S.E.2d 191 (1999) .....	6
<i>Ford v. State</i> , 254 Ga. App. 413 (2002) .....	8
<i>Ford v. State</i> , 254 Ga. App. 413, 416 (563 SE2d 170) (2002) .....	15
<i>Foskey v. Battle</i> 277 Ga. 480, 591 S.E.2d 802 (2004) .....	9
<i>Godlewski v. State</i> , 256 Ga. App. 35, 567 S.E.2d 704 (2002) .....	8
<i>Guise v. State</i> , 303 Ga. App. 791, 694 S.E.2d 378 2010 .....	10
<i>Hamilton v. Alabama</i> , 368 U.S. 52 (1961) .....	7
<i>Hamilton v. State</i> , 233 Ga. App. 463, 504 S.E.2d 525 (1998) .....	5
<i>Hawes v. State</i> , 281 Ga. 822, 642 SE2d 92 (2007) .....	9
<i>Hightower v. State</i> , 252 Ga. App. 811, 557 SE2d 434 (2001) .....	7
<i>Holt v. State</i> , 244 Ga. App. 341, 343 (1) (535 SE2d 514) (2000) .....	16
<i>In Chaidez v. United States</i> , 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013) .....	10
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<i>Jackson v. State</i> , 257 Ga. App. 715 (572 S.E.2d 60) (2002) .....	3

<i>Jacobs v. State</i> , 299 Ga. App. 368, 371(1), (2009) .....	9
<i>Jones v. State</i> , 212 Ga. App. 676, 442 S.E.2d 908 (1994) .....	9
<i>Jones v. State</i> , 272 Ga. 884, 886(2), 536 S.E.2d 511 (2000) .....	6
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<i>Scott v. Illinois</i> , 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) .....	4
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## CHAPTER 7: APPOINTING QUALIFIED INTERPRETERS

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(Judge Melodie H. Clayton and Judge Dax E. López, eds.)

### 7.1 INTRODUCTION

Georgia courts are required to provide qualified interpreters, without cost, to limited English proficient (LEP) and Deaf/Hard of Hearing (DHH) participants.[1] As of 2011, the right to an interpreter in Georgia applies in all cases, criminal and civil, as well as court-managed administrative forums and functions.[2] The expense of providing an interpreter in any legal proceeding is borne by the local court or appropriate governing body.[3] **The Supreme Court of Georgia Commission on Interpreters (“COI” / “Georgia Commission on Interpreters”/ “the Commission”)** provides interpreter licensing, regulatory and education services for Georgia courts so they can ensure the rights of non-English speaking and DHH persons.[4] Commission staff is available to provide guidance to courts in order to help courts meet their language access obligations. Courts are encouraged to contact Commission staff regarding their language access questions, concerns and/or needs.[5]

### 7.2 FEDERAL AND STATE AUTHORITY

- A. Title VI of the Civil Rights Act of 1964, [42 U.S.C. § 2000d](#)
- B. [Lau v. Nichols, 444 U.S. 563 \(1974\)](#)
- C. Executive Order 13166, 65 FR 50121 (August 2000)
- D. U.S. Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 F.R. 41,455 (June 2002) (DOJ Guidance)
- E. [Liese v. Indian River Cnty. Hosp. Dist., 701 F.3d 334, 336 \(7th Cir. 2012\)](#)
- F. [Ramos v. Terry, 279 Ga. 889, 622 S.E.2d 339 \(2005\)](#)
- G. [Ling v. State, 288 Ga. 299, 702 S.E.2d 881 \(2010\)](#)
- H. *State v. Tunkara*, 298 Ga. 488, 782 S.E.2d 278 (2016)
- I. Supreme Court of Georgia Rule on Use of Interpreters for Non-English Speaking and Hearing Impaired Persons (*Rule*)
- J. [O.C.G.A. §§ 24-6-652](#) through 658; [O.C.G.A. § 15-6-77\(e\)\(4\)](#)
- K. Uniform Superior Court Rule 7.3 (amended 07/13/2017)

L. Judicial Council of Georgia 2017 ADA Judicial Handbook

### 7.3 DETERMINING IF A FOREIGN LANGUAGE OR SIGN LANGUAGE INTERPRETER IS REQUIRED

#### 7.31 REQUEST BY COUNSEL/*PRO SE* LITIGANT

Protocol varies from judicial circuit to judicial circuit. Judges are encouraged to confirm what the protocol or practice is in their circuit. Examples include:

1. Verbal/Written request to **Judge's Law Clerk /Administrative Assistant**
2. Verbal/Written request to the District Court Administrator
3. Verbal/Written request to specified point-person within the judicial circuit
4. **Verbal/Written request to the court Clerk's office**

#### 7.32 SUA SPONTE

The decision maker may make a determination to inquire into the necessity for an interpreter based upon his or her observations.

#### 7.33 EXAMINATION

1. Examination by the Judge
  - a. Upon request, or *sua sponte*, the decision maker (generally the judge presiding over the case) may voir dire the litigant or witness to determine his/her level of English comprehension. To make that determination, the decision maker should normally include questions on the following:
    - i. Identification (e.g., name, address, DOB, place of birth)
    - ii. Active Vocabulary

Questions should be **phrased to avoid "yes" or "no" replies**.

1. *"How did you come to the proceeding today?"*

2. *“What kind of work do you do?”*
3. *“Describe what you see in the room.”*
4. *“What have you eaten today?”*

iii. The civil or criminal proceeding

1. *“What is the purpose of the proceeding?”*
2. *“What is your understanding of my role as the judge?”*
3. *“What is your understanding of the legal rights you have as a party or defendant in this case?”*
4. *“What is your understanding of your responsibilities as a witness in this case?”*

[Rule](#), Appendix A (II)(C).

#### 7.34 DETERMINATION ON THE RECORD

An interpreter is needed and an interpreter shall be appointed when the decision maker determines that (1) the party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel; or (2) the witness cannot speak English so as to be understood directly by counsel, the decision maker, and/or the jury. After examination the decision maker should state his or her conclusion on the record, and the file in the case should be clearly marked and data entered electronically when appropriate by personnel to ensure that an interpreter will be present when needed in any subsequent proceeding. *Rule*, Appendix A (II)(D).

### 7.35 PRE-APPEARANCE INTERVIEW

For good cause, the decision maker should authorize a pre-appearance interview between the interpreter and the party or witness, good cause exists if the interpreter needs clarification on any interpreting issues, including but not limited to: colloquialisms, culturalisms, dialects, idioms, linguistic capabilities and traits, regionalisms, register, slang, speech patterns, or technical terms. [Rule](#), Appendix A (II)(E).

NOTE: In some instances, the decision-maker may skip the voir dire process and **appoint the interpreter based solely on counsel's or the pro se litigant's written and/or verbal request.** The Rule does not mandate the court to voir dire the LEP/DHH individual.

NOTE: The fact that an individual speaks or understands some English does not preclude the individual from the right to have an interpreter appointed by the court.

## 7.4 APPOINTMENT OF QUALIFIED INTERPRETERS

If an interpreter is required, the courts should ensure that a *qualified* interpreter is appointed. Trial court judges are encouraged to consider the vital importance of appointing qualified interpreters, whether foreign language or sign language, to assist in legal proceedings. When an unqualified or no interpreter is appointed, the court risks substantive injustice and due process violations because of possible incompetent interpretation (including inaccuracies due to paraphrasing, summarization and omission) and breach of confidentiality. Unqualified interpreters often lack the required technical skills to competently interpret legal terms of art or comprehend nuanced usage of words whose definitions often vary from country to country. Moreover, unqualified interpreters are often unaware of the ethical obligations legal interpreters in Georgia are required to abide by when providing interpretation services. As a result, unqualified interpreters may advise or coach LEP or DHH participants, unbeknownst to the court, on what to say or not say when responding to questions asked by attorneys and judges.

#### 7.41 APPOINTMENT OF SIGN LANGUAGE INTERPRETERS

- A. **“Court qualified” or “Qualified”** - To be recognized as a court qualified interpreter or qualified interpreter in Georgia, an interpreter must hold a current certification from the [Registry of Interpreters for the Deaf](#) (RID).[6] These designations are defined by the Official Code of Georgia. [See, O.C.G.A. §§ 24-6-652](#) through 658. [Rule](#), Appendix A (I). *See also*, Supreme Court of Georgia Commission on Interpreters Bench Card for Working with Deaf and Hard of Hearing Persons and Sign Language Interpreters in the Courtroom
  
- B. For legal proceedings, courts should first try to use certified sign language interpreters who hold this credential: *SC:L (Specialist Certificate: Legal) Preferred* or other recommended credentials based on demonstrated specialized knowledge of legal system, language, and court settings.[7]
  
- C. If an SC:L interpreter cannot be located, interpreters with the following RID certifications may also be used. However, it is recommended that they have additional specialized training in legal interpreting:[8]
  1. NIC (National Interpreter Certification), Master
  2. NAD V (National Association of the Deaf: Certification – Master)
  3. CI and CT (Certificate of Interpretation and Certificate of Transliteration)
  4. CDI (Certified Deaf Interpreter)
  5. CSC (Comprehensive Skills Certificate)

#### 7.42 APPOINTMENT OF FOREIGN LANGUAGE INTERPRETERS

- A. Licensing Designations by the Commission[9]
  1. Certified - individuals competent in court interpretation as demonstrated by successful completion of an oral and written examination demonstrating competence in interpreting as provided for by the Georgia Commission on Interpreters and the completion of required continuing education providing familiarity with the Georgia

court system and the roles and responsibilities of interpreters within that system. In lieu of the examination, the Commission may recognize federal certification or certification of states participating in the national Consortium for State Court Interpreter Certification. [Rule](#), Appendix B (II)(A)

2. Conditionally Approved - individuals appearing competent in court interpretation that have completed mandatory classroom training and passed a written examination demonstrating familiarity with the Georgia court system and the roles and responsibilities of interpreters within that system. Also, such individuals must have achieved a sufficient score on an oral examination as determined by the Georgia Commission on Interpreters. It is intended that a court will choose an interpreter from this category only if a Certified Interpreter is not available. [Rule](#), Appendix B (II)(B) (Emphasis Added)
3. Registered – individuals appearing competent in court interpretation that have completed mandatory classroom training and passed a written examination demonstrating familiarity with the Georgia court system and the roles and responsibilities of interpreters within that system. This list will only include those interpreters interpreting a language for which no national certification exam is available. Qualification tests for this list may also test language and interpretation skills. It is intended that a court will choose an interpreter from this category only if a Certified Interpreter or Conditionally Approved Interpreter is not available. [Rule](#), Appendix B (II)(C)(Emphasis Added)

NOTE: The Rule requires courts to make a diligent effort to appoint a Certified interpreter. If a Certified interpreter is unavailable, a Conditionally Approved interpreter or a Registered interpreter is to be given preference. There will be occasions when it is necessary to utilize a telephonic language service or other less-qualified interpreter. Faced with a need, where no interpreter is available locally, courts should weigh the need for immediacy in conducting a hearing against the potential compromise of due process, or the potential of substantive injustice, if interpreting is inadequate. Unless immediacy is a primary concern, some delay might

be more appropriate than the use of a telephonic language service. ([Rule](#), Section I, Commentary) *See also*, Supreme Court of Georgia Commission on Interpreters Benchcard for Working with Limited English Proficient Persons and Foreign Language Interpreters in the Courtroom

- B. Rare or other Languages for which the Commission has no Licensed Interpreter
  1. On occasions where a foreign language interpreter is needed for a rare/indigenous language or other language for which COI has no licensed interpreter, courts are encouraged to contact COI. COI frequently assists courts in securing a qualified interpreter who speaks a language that is not included on the COI Registry.
  2. Where COI is unable to assist the court with securing an interpreter in the needed language, the court may consider contacting a commercial interpretation/translation service provider who can provide an in-person interpreter.
    - I. When contacting a commercial interpreter, the court is encouraged to inquire about whether the interpreters have any specialized training in legal/court room settings.
    - II. The court is also encouraged to specifically request a certified or other licensed interpreter.
  3. The court should consider the following before appointing an individual who is not licensed, or otherwise qualified, to interpret and who is a member of the rare language community:
    - I. Potential conflicts of interest (e.g., the interpreter may know the participant who requires the interpretation **services) possibly resulting in the interpreter's inability to be impartial.**
    - II. Heightened risk of breach of confidentiality.
    - III. **Interpreter's ability to interpret accurately and competently** (e.g., familiarity with legal terms of art).

4. *Other Resources for Finding Interpreters of Rare Languages*

National Center for State Courts National Registry (forthcoming Fall 2015)

7.43 APPOINTMENT OF NON-LICENSED INTERPRETERS

- A. If, after a diligent search by the court, a certified or other licensed interpreter cannot be found or is unavailable, the court should weigh the necessity of having the proceeding at that time without a licensed interpreter or with an unlicensed interpreter against continuing the proceeding to a later date when a qualified, licensed interpreter is available.
- B. If the court determines that the use of a non-licensed interpreter is warranted then:

Refer to COI's [Instructions for Use of a Non-Licensed Interpreter](#).<sup>[10]</sup> It is recommended that when a non-professional interpreter is used that the court **personally verify a basic understanding of the interpreter's role, on the record, by** explaining the following to the interpreter:

- a. Do not discuss the pending proceedings with a party or witness, outside of professional employment in the same case.
- b. Do not disclose communications between counsel and client.
- c. Do not give legal advice to a party or witness. Refer legal questions to the attorney or to the court.
- d. Inform the court if you are unable to interpret a word, expression, special terminology, or dialect, or have doubts about your linguistic expertise or ability to perform adequately in a particular case.
- e. Interpret all words, including slang, vulgarisms, and epithets, to convey the intended meaning.

- f. Use the first person when interpreting statement made in the first person. (For example, a statement or questions should not be introduced with the words, “He says . . .”)
- g. Direct all inquiries or problems to the court and not to the witness or counsel. If necessary you may request permission to approach the bench with counsel to discuss the problem.
- h. Position yourself near the witness or party without blocking the view of the judge, jury, or counsel.
- i. Inform the court if you become fatigued during the proceedings.
- j. Interpret everything even objections.
- k. If the court finds good cause under section III (E), above, hold a pre-appearance interview with the party or witness to become familiar with speech patterns and linguistic traits and to determine what technical or special terms may be used. Counsel may be present at the pre-appearance interview.
- l. During the pre-appearance interview with a non-English speaking witness, give the witness the following instructions on the procedure to be followed when the witness is testifying:
  - i. The witness must speak in a loud, clear voice so that the entire court and not just the interpreter can hear.
  - ii. The witness must direct all responses to the person asking the question, not to the interpreter.
  - iii. The witness must direct all questions to counsel or to the court and not to the interpreter. The witness may not seek advice from or engage in any discussion with the interpreter.
  - iv. During the pre-appearance interview with a non-English speaking party, give the following instructions on the procedure to be used when the non-English speaking party is not testifying:
    - (1) The interpreter will interpret all statements made in open court.

- (2) The party must direct any questions to counsel. The interpreter will interpret all questions to counsel and the responses. The party may not seek advice from or engage in discussion with the interpreter.
  - (3) At the end of the proceeding, the court/clerk should make a diligent effort to secure a certified or other licensed interpreter for any future legal proceedings regarding that case.
- c. Being bilingual does not qualify an individual to serve as an interpreter automatically.[11]
  - d. Children should never be used to interpret. It is also inappropriate for bilingual attorneys, relatives or friends of the LEP participant, judges or courthouse staff to serve as an interpreter in a legal proceeding.[12]
  - e. When a non-licensed or other less-qualified interpreter is used, it is recommended that the decision maker personally verify a basic **understanding of the interpreter’s role on the record.** [Rule](#), Appendix A (II)(F), Commentary.
  - f. **The term “decision maker” includes judges, magistrates, special masters, commissioners, hearing officers, arbitrators, neutrals or mediators.** [Rule](#), Appendix A (II)(A)

#### 7.44 USE OF TELEPHONIC INTERPRETERS

- A. It is important to note that while telephonic interpreters are often very helpful, especially in rural areas where access to qualified interpreters is limited, telephonic interpreters are best suited for instances when no certified or other qualified interpreter is available in person.[13]
- B. Telephonic interpreters are also best suited for legal proceedings of short duration.[14]

- C. According to the National Association of Judicial Interpreters and Translators, telephone interpreting can be problematic in some circumstances.[15] For example, if individuals are hard of hearing or elderly, or struggling with mental illness, telephone interpreting can be too confusing.[16]
- D. It is also important to consider that interpreters accessed through commercial services may not necessarily be specialists in legal interpreting specifically.[17] Courts are encouraged to ask about a telephonic interpreters professional training and credentials. Courts are encouraged to request telephonic language vendors to provide an interpreter that is preferably licensed by the Commission on Interpreters (foreign language interpreters), Registry of Interpreters for the Deaf (sign language interpreters, or other industry-recognized credentialing entity.

#### 7.45 RECORD OF INTERPRETER TESTIMONY

##### A. Foreign Language Interpreters

1. Generally - Where a Certified interpreter is used, no record shall generally be made of the non-English testimonial statements. [Rule](#), Section VII(A)(1)
  - a. Where a challenge is made to the accuracy of an interpretation, the court shall first determine whether the interpreter is able to communicate accurately with and interpret information to and from the non-English speaking person. [Id.](#)
  - b. If it is determined that the interpreter cannot perform these functions, arrangements for another interpreter should be made, unless testimony that is cumulative, irrelevant, or immaterial is involved. [Id.](#)
  - c. Where the court determines that the interpreter has the ability to communicate effectively with the non-English speaker, the court shall resolve the issue of the contested interpretation and the record to be made of the contested testimony in its discretion. [Id.](#)
  - d. Any transcript prepared shall consist only of the English language spoken in court. [Id.](#)

2. Criminal Cases – In criminal cases, whenever a Certified interpreter is not utilized, the court shall make an audio or audio-visual recording of any testimony given in a language other than English. [Rule](#), Section VII(A)(2)
3. Civil Cases – In civil cases, whenever a Certified interpreter is not utilized and the party was denied the right to an interpreter of his or her own choosing, the court shall make an audio or audio-visual recording of any testimony given in a language other than English. [Rule](#), Section VII (A)(3)

#### B. Sign Language Interpreters

The testimony of a hearing impaired person may be recorded as provided for in the Official Code of Georgia.[18] [Rule](#), Section VII (B)

#### 7.46 ADDITIONAL PRACTICAL CONSIDERATIONS

- A. Direct questions, in the first person, to the participant and not to the interpreter.
- B. Avoid the use of jargon/colloquialisms and slang.
- C. Speak at a moderate pace and use succinct statements or phrases.
- D. Permit the interpreter to finish speaking before asking a follow-up question or making additional statements.
- E. When the court knows a case requires the use of an interpreter, the court should schedule the case to allow for more time.
- F. Breaks: Courts are encouraged to be mindful that interpreters should be permitted to take breaks, as needed, to ensure continuous competent interpretation. According to

the National Association of Judicial Interpreters and Translators, scientific studies have shown that mental fatigue sets in after approximately 30 minutes of sustained simultaneous interpretation, resulting in a marked loss in accuracy. This is regardless of how experienced or talented the interpreter may be.[19]

- G. Use of Multiple Interpreters: When proceedings are expected to take significant amounts of time, courts are encouraged to appoint more than one interpreter. **According to the National Association of Judicial Interpreters and Translators, “it is unrealistic to expect interpreters to maintain high accuracy rates for hours, or days, at a time without relief. If interpreters work without relief in proceedings lasting more than 30-45 minutes, the ability to continue to provide a consistently accurate translation may be compromised.”[20]**
- H. A participant may be able to speak or understand some English; however the court should be attentive to the possibility that participant will need an interpreter later in the legal proceeding or other future legal proceeding.
- I. The court should be aware that an LEP or DHH participant may refuse court-provided interpretation and/or translation services for various reasons, including but not limited to:
1. The participant may not identify as LEP/DHH and does not believe that she or he needs the assistance of an interpreter.
  2. The participant does not understand the interpreter is *neutral*, appointed by the court, because opposing counsel requested that the court appoint an interpreter. (*This is most frequent where one party is represented by counsel and the opposing party is pro se.*)
- J. If the participant refuses to use the court-appointed interpreter, the court should establish on the record that:
1. The participant is LEP/ DHH.

2. The court provided the participant with a certified or other qualified interpreter (if no certified interpreter was available) free of charge.
  3. The participant refuses to use the interpreter and insists on communicating without any language assistance from the court-appointed interpreter.
  4. This preserves the record in case of an appeal asserted by the participant that his or her right to due process was violated because he or she was prevented from fully participating in a legal proceeding due to a language barrier.
  5. The court should be aware that court may need to appoint an interpreter - **despite the participant's refusal** - to ensure that due process is not jeopardized.
- K. If the participant insists on using his or her own interpreter (e.g., family member, friend, etc.), then the court should inform the participant that it is inappropriate to use a non-licensed interpreter in a legal proceeding when a certified or other qualified interpreter is available.
- L. When the court has documents it would like translated for a proceeding, courts should provide those documents to a qualified translator as much in advance of the hearing as practicably possible. Certified translators may be found through the American Translators Association, [www.atanet.org](http://www.atanet.org), or the Atlanta Association of Interpreters and Translators, [www.aait.org](http://www.aait.org).
- M. If the court would like the interpreter appointed in the case to sight translate the documents, then the court is encouraged to notify the interpreter of this request as soon as is practicable in advance of the proceeding. The court is encouraged to provide the documents, in advance, to the interpreter so that the interpreter may determine if she has the required skills to serve as a translator and if so, familiarize herself with the documents and vocabulary prior to the legal proceeding.
- N. Remember – **The Supreme Court Rule applies to “all criminal and civil proceedings in Georgia where there are non-English speaking persons in need of interpreters.** [See](#)

also [Ling v. State, 288 Ga. 299 \(702 SE2d 881\) \(2010\)](#). All other court-managed functions, including information counters, intake or filing offices, cashiers, records rooms, sheriff's offices, probation and parole offices, alternative dispute resolution programs, *pro se* clinics, criminal diversion programs, anger management classes, detention facilities, and other similar offices, operations and programs, shall comply with Title VI of the Civil Rights Act of 1964." [Rule](#), Appendix A (II)(Emphasis Added).

NOTE: The terms "interpreter"/"interpretation" and "translator"/"translation" should not be used interchangeably. The former specifically refers to the oral rendering of verbal communications from one language to another. The latter refers specifically to the written rendering of written communications from one language to another. This is an important distinction for courts to consider when they are requesting assistance from commercial and other interpretation and/or translation service providers in order to ensure they solicit the appropriate type of language assistance desired.

NOTE: Keep a copy of the Interpreter's Oath in the case file.

*"Do you solemnly swear or affirm that you will faithfully interpret from (state the language) into English and from English into (state the language) the proceeding before this court in an accurate manner to the best of your skill and knowledge?"*

[Rule](#), Section VI (C)

## 7.5 RISK OF REVERSIBLE ERROR<sup>5</sup>

Courts are encouraged to consider the risks involved in appointing an unqualified interpreter or no interpreter at all, including the case being reversed or remanded on appeal.

### 7.51 INTERPRETER ISSUES ON APPEAL<sup>6</sup>

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<sup>5</sup>See, Edmondson-Cooper, Jana J. "Is it Reversible Error?: Due Process and Access to Justice for LEP and DHH Individuals," Georgia Courts Journal (March 2015) available at <http://journal.georgiacourts.gov/it-reversible-error>

<sup>6</sup>Benmaman, Virginia, *Interpreter Issues on Appeal*, **PROTEUS** Vol. IX, No. 4 -- **FALL 2000 (Official Blog of the National Association of Judicial Interpreters and Translators)**

- A. Primary issues on appeal include (1) failure to appoint an interpreter; (2) appointment of uncertified interpreters; (3) existence of bias and conflict of interest; (4) lack of confidentiality; (5) ineffective assistance of counsel; (6) bilingual attorneys serving as interpreters; (7) “shared/borrowed interpreters”[23] and (8) accuracy of interpretation.
- B. Based on the review and analysis of several hundred appellate opinions from across the country, according to the National Association of Judicial Interpreters and Translators, it has been concluded that the majority of issues raised on appeal are **procedural and beyond the interpreter’s control.**[24]
- C. Objections to interpreting errors must be made during the proceedings and preserved for the record.[25] Many interpreting issues are in fact resolved at the trial court level.[26]
- D. Errors not preserved on the record cannot be raised on an appeal to which the “**abuse of discretion” standard applies.**[27] Review under the “plain error” standard is far more stringent, and for the appeal to succeed a showing must be made of a substantial violation of the fundamental rights to a fair trial.[28]

#### 7.52 SUPREME COURT OF GEORGIA

- A. [Ramos v. Terry, 279 Ga. 889, 893; 622 S.E.2d 339 \(2005\)](#)
1. “**a court abuses its discretion when it selects an interpreter who is not qualified, sworn, and impartial. [Gopar-Santana v. State, 862 So.2d 54 \(Fla.App. 2003\)](#). We conclude it is an abuse of discretion to appoint someone to serve as interpreter who is neither certified nor registered as an interpreter without ensuring that the person appointed is qualified to serve as an interpreter, without apprising the appointee of the role s/he is to play, without verifying the appointee’s understanding of the role, and without having the appointee agree in writing to **comply with the interpreters’ code of professional responsibility.**”**

2. In *Ramos*, the Supreme Court also notes “in the case at bar, the habeas court quickly determined Ramos was in need of an interpreter and sought the services of an interpreter who had a history of satisfactory participation in court proceedings. When that interpreter proved unavailable, the habeas court, concerned about inconvenience to the sole witness, resorted to using a prison employee whose qualifications to serve as an interpreter were her ability to speak Spanish and her presence. No information about her background in language skills, e.g., whether she was a native of a country where Spanish is spoken, whether she was fluent in English, whether she previously had translated in a court proceeding, whether she had taken and passed the interpreter exams administered by Georgia or another state, whether the Spanish she spoke was compatible with the Spanish spoken by Ramos, and her professional standing in the interpreter community, was obtained before the habeas court decided to appoint her as the interpreter in this matter . . . . Following her appointment, the prison employee/interpreter was not given the suggested instructions on interpreting in a courtroom setting and her understanding of the interpreter’s role was not verified, and she was not required to agree in writing to comply with the court interpreters’ code of professional responsibility.” [Id. at 892](#).
3. Additionally, *Ramos* highlights the failure to interpose a timely objection to an interpreter’s qualifications constitutes a waiver of the issue on appeal. [Id. at 893](#).

B. [Ling v. State, 288 Ga. 299; 702 S.E.2d 881 \(2010\)](#)

1. Meaningful access to justice must be provided in *all* Georgia courts, including civil courts, for persons who are limited English proficient in order to comply with federal law.
2. Specifically, the Court’s opinion stated “vigilance in protecting the rights of non-English speakers is required in all of our courts.” [Id. at 884](#).

## 7.6 SUPREME COURT OF GEORGIA COMMISSION ON INTERPRETERS

- A. Created in 2003 to secure the rights of non-English speaking persons utilizing the state court system by establishing a statewide plan for the use of interpreters in Georgia courts during the presentation of civil or criminal matters.
- B. Mission: provide interpreter licensing, regulatory and education services for Georgia Courts so they can ensure the rights of non-English speaking persons.
- C. 18 members composed of judges, lawyers, academia, legislators, and interpreters.
  - 1. Full list available at <http://coi.georgiacourts.gov/content/commission-members-and-staff>
  - 2. Each class of court has a member who serves as a liaison to the Commission.
- D. Two staff persons available to provide assistance to judges and court personnel.[29]
  - 1. Mr. John Botero, Program Director, Office of Certification and Licensing
  - 2. Ms. Bianca Bennett, Education and Certification Officer

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ENDNOTES

[1] See, Supreme Court of Georgia Rule for the Use of Interpreters for Non-English Speaking and Hearing Impaired Persons (“Rule”), available at [http://coi.georgiacourts.gov/sites/default/files/coi/Rule%20on%20Interpreters%20-%20FINAL\\_JULY.pdf](http://coi.georgiacourts.gov/sites/default/files/coi/Rule%20on%20Interpreters%20-%20FINAL_JULY.pdf) (Last visited November 25, 2017). See also, Judicial Council of Georgia Position Statement, 2017 ADA Judicial Handbook, available at [http://afptc.georgiacourts.gov/sites/default/files/afptc/ADA%20Judicial%20Handbook%202017\\_Oct-Update.pdf](http://afptc.georgiacourts.gov/sites/default/files/afptc/ADA%20Judicial%20Handbook%202017_Oct-Update.pdf) (Last visited November 25, 2017).

[2] See, Rule, Appendix A available at [http://coi.georgiacourts.gov/sites/default/files/coi/Rule%20on%20Interpreters%20-%20FINAL\\_JULY.pdf](http://coi.georgiacourts.gov/sites/default/files/coi/Rule%20on%20Interpreters%20-%20FINAL_JULY.pdf) (Last visited November 25, 2017)

[3] See, Rule, Appendix A (VII)(B) available at [http://coi.georgiacourts.gov/sites/default/files/coi/Rule%20on%20Interpreters%20-%20FINAL\\_JULY.pdf](http://coi.georgiacourts.gov/sites/default/files/coi/Rule%20on%20Interpreters%20-%20FINAL_JULY.pdf) (Last visited November 25, 2017)

[4] See, COI Mission Statement *available at* <http://coi.georgiacourts.gov/> (Last visited November 25, 2017)

[5] COI - Administrative Office of the Courts, 244 Washington Street, SW - Suite 300, Atlanta, Georgia 30334 / E-mail: [gcr.interpreters@georgiacourts.gov](mailto:gcr.interpreters@georgiacourts.gov) / Telephone: (404) 463-3808 / Fax: (404) 651-6449 / Website: <http://coi.georgiacourts.gov/>

[6] A list of “court qualified” or “qualified” sign language interpreters in Georgia is available at - <http://coi.georgiacourts.gov/content/locate-interpreter> (Last visited November 25, 2017)

[7] Supreme Court of Georgia Commission on Interpreters “*Working with Deaf or Hard of Hearing Persons and Sign Language Interpreters in the Court Room – A Bench Card for Judges*” available at <http://coi.georgiacourts.gov/content/forms-brochures> (Last visited November 25, 2017)

[8] *Id.*

[9] The Commission maintains an [on-line registry](#) of all qualified foreign language interpreters in Georgia licensed by the Commission as well as licensed American Sign Language interpreters licensed by the Registry of Interpreters for the Deaf.

[10] Direct Link -

<http://coi.georgiacourts.gov/sites/default/files/coi/Model%20Form%2C%20Instructions%20for%20Use%20of%20Non-licensed%20Interpreter.doc>

[11] “It is critically important to ensure that interpreters are competent and not merely bilingual. A bilingual person may inaccurately interpret or roughly interpret a summary of communications between the court and an LEP person, they may have a conflict of interest, or they may even be adverse. Under these circumstances, an LEP person is denied meaningful access to court operations in a way that a fluent English speaker is not. The DOJ Guidance emphasizes the importance of interpreter competency and states: ‘Competency requires more than self-identification as bilingual. Some bilingual staff and community volunteers, for instance, may be able to communicate effectively in a different language when communicating information directly in that language, but not be competent to interpret in and out of English.’ DOJ Guidance, [67 Fed. Reg. at 41,461.](#)” *U.S. DOJ Letter to NC Administrative Office of the Courts, p. 9 (March 8, 2012) available*

at [http://www.justice.gov/crt/about/cor/TitleVI/030812\\_DOJ\\_Letter\\_to\\_NC\\_AOC.pdf](http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf)  
(Last November 25, 2017)

[12] GA Administrative Office of the Courts Brochure: *Working with Foreign Language Interpreters in the Courtroom* available at <http://coi.georgiacourts.gov/content/forms-brochures> (Last visited November 25, 2017)

[13] See, *National Association of Judicial Interpreters & Translators (NAJIT) Position Paper-Telephone Interpreting in Legal Settings* (February 2009) available at <https://najit.org/wp-content/uploads/2016/09/Telephone-Interpreting-1.pdf> (Last visited November 25, 2017)

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] [O.C.G.A. § 24-6-657](#)

[19] See, *National Association of Judicial Interpreters & Translators (NAJIT) Position Paper-Team Interpreting in the Courtroom* (March 2007) available at [https://najit.org/wp-content/uploads/2016/09/Team-Interpreting\\_052007.pdf](https://najit.org/wp-content/uploads/2016/09/Team-Interpreting_052007.pdf) (Last visited November 25, 2017)

[20] *Id.*

[21] See, Edmondson-Cooper, Jana J. *“Is it Reversible Error?: Due Process and Access to Justice for LEP and DHH Individuals,”* Georgia Courts Journal (March 2015) available at <http://journal.georgiacourts.gov/it-reversible-error> (Last visited November 25, 2017)

[22] Benmaman, Virginia, *Interpreter Issues on Appeal*, PROTEUS Vol. IX, No. 4 -- FALL 2000 (*Official Blog of the National Association of Judicial Interpreters and Translators*)

[23] Failing to appoint more than one interpreter when a case involves more than one LEP/DHH litigant or witness.

[24] *Id.*

[25] [Id.](#)

[26] [Id.](#)

[27] [Id.](#)

[28] [Id.](#)

[29] COI - Administrative Office of the Courts, 244 Washington Street, SW - Suite 300, Atlanta, Georgia 30334 / E-mail: [gcr.interpreters@georgiacourts.gov](mailto:gcr.interpreters@georgiacourts.gov)/ Telephone: (404) 463-3308 / Fax: (404) 651-6449 / Website: <http://coi.georgiacourts.gov/>

## CHAPTER 8: LOCAL ORDINANCES

### 8.1 AUTHORITY FOR CODE ENFORCEMENT

#### 8.1.1 POWERS OF MUNICIPAL COURTS/SCOPE OF LOCAL ORDINANCES

Municipal Courts' powers of code enforcement must be defined and adopted in the municipality's charter, *Porter v. City of Atlanta*, 259 Ga. 526, 384 S.E.2d 631 (1989), cert. denied, 494 U.S. 1004, 110 S. Ct. 1297, 108 L.Ed.2d 474 (1990), through state enabling legislation. See O.C.G.A. §36-61-11 for mandated provisions), and the "Municipal Home Rule Act of 1965," O.C.G.A. §36-35-1 et. seq. This Act gives cities the right "to adopt clearly reasonable ordinances ... relating to property, affairs, and local government for which no provision has been made by general law and which are not inconsistent with the Constitution or any charter provision applicable thereto." O.C.G.A. §36-35-3.

Municipalities, in general, have powers which are granted: 1) by general law; 2) by local legislation; and 3) by implication from powers expressly granted. See *Kelly v. City of Marietta*, 253 Ga. 579, 322 S.E.2d 885 (1984); *Goodman v. City of Atlanta*, 246 Ga. 79, 268 S.E.2d 663 (1980); and *Irwin v. Torbert*, 204 Ga. 111, 49 S.E.2d 70 (1948).

In Article VI, Section 1, Paragraph 1 of the Constitution, Municipal Courts are expressly recognized and their jurisdiction is established as being "over ordinance violations and such other jurisdiction as provided by law". The Georgia statutes were amended accordingly. In *Yield, Inc. v. City of Atlanta*, 145 Ga. App. 172, 244 S.E.2d 32 (1978), the Georgia Court of Appeals held that the Municipal Court had jurisdiction over an action brought by the city concerning the abatement of nuisances in cities. See additionally O.C.G.A. §41-2-5.

In *Shirley v. City of Commerce*, 220 Ga. 896, 142 S.E.2d 784 (1965), the Georgia Supreme Court sanctioned the constitutional challenge to the validity of city ordinances in a Mayor's Court, (now Municipal Court), with an appeal therefrom as otherwise provided by law. Accord, *Bazelle v. Mayor and Council of the City of Athens*, 113 Ga.App. 776, 149 S.E.2d 724 (1966); and *Keith v. State*, 173 Ga.App. 462, 326 S.E.2d 826 (1985).

Municipalities do not have unlimited power to criminalize behavior. O.C.G.A. §36-35-6 (2) (A) prohibits creating a local crime for anything that has been preempted by state law.

Municipalities have the power to adopt ordinances which govern unfit buildings or structures and other public and private nuisances. See O.C.G.A. § 41-2-5 et. seq. The statutory provisions for this power in the Municipal Courts are enumerated in O.C.G.A. §§41-2-5 through 41-2-9 and should be considered for guidance, at least, by the Judge along with the Municipal Charter of his/her jurisdiction, that is, if the municipal governing authority has not adopted the state code as its official code, as allowed under the State Abatement of Nuisance Code. See O.C.G.A. §§41-2-7 through 41-2-11. Notice also that the municipal abatement ordinance may not only provide for greater relief than the state abatement code, but both the local and state code can be used by the court together in ruling upon a case or issue. See O.C.G.A. §41-2-16, which provides:

*Nothing in [this] code ... shall be construed to abrogate or impair the powers of the courts ... to enforce any provisions of its local enabling Act, its charter, or its ordinances as regulations nor to prevent or punish violations thereof; and the powers conferred by this article shall be in addition to and supplemental to the powers conferred by any other law. O.C.G.A. §41-2-16.*

In 2006, the General Assembly authorized state and local governments to employ private professional providers to review building plans and perform inspections that could otherwise be done by a fire marshal, inspector or code official. See amended O.C.G.A. §§8-2-26 and 25-2-14.

In 2009, O.C.G.A. Chapter 36-44 was repealed and reenacted, with significant changes to municipalities' redevelopment powers.

## 8.1.2 MUNICIPAL CHARTER AND JURISDICTIONAL LIMITATIONS

Municipal Charters set forth the powers, jurisdiction, sentences and remedies of the Municipal Courts. The charter powers are in addition to the powers that are set forth in state statutes. In most cities, the charter and ordinance provisions, limit the Municipal Court to six (6) month sentences and a fine limitation of Five Hundred (\$500) Dollars, or up to One Thousand (\$1,000) Dollars, plus any state or local mandated "add-on" assessments, such as the state 10% P.O.P.A. surcharge, and local law library charge. However, the charter provisions may vary from city to city in the penalties that are permitted to be imposed. Some state statutes, such as with the offense of DUI, which convey jurisdiction to Municipal Courts, may extend the powers of the Municipal Courts beyond the chartered imposed limitations. Therefore, it is important that the sentencing Judge consider both local and state provisions. See O.C.G.A. §§41-2-5 and 41-2-16, and Chapter 1 of this Benchbook.

## 8.1.3 THE IMPORTANCE OF CODE ENFORCEMENT

Economic growth and business development increasingly has become the focus of many local governments. The development of building codes are increasingly being utilized as part and parcel of economic planning strategies. Municipal Courts will be called upon for more vigorous enforcement of the building and inspection codes, as their business communities become more involved in downtown (urban) development, and its significance grows in the attraction of new industries. The local Chamber of Commerce will look more to the building officials and to the courts for swift and proper enforcement of code violations. See *Nations v. Downtown Development Authority of the City of Atlanta*, 255 Ga. 324, 338 S.E.2d 240 (1985) where Underground Atlanta area was declared "a slum and blighted area" within the meaning of the Downtown Development authority Law, O.C.G.A. §§36-42-1 through 36-42-15. (Atlanta sought to condemn the old "Underground Atlanta" structures and the remedial measures sought in that case were to correct code violations, and to destroy, replace and refurbish the existing structures in order to revitalize the famous Underground Atlanta).

## 8.1.4 REASONS FOR COURTS' INVOLVEMENT

There appear to be three principle reasons that emerge as to why local governments and the Municipal Court Judges should take an active role in increased code enforcement:

1. local government's exposure to liability and lawsuits for lack of enforcement;
2. public policy considerations; and
3. the economic benefit to be derived from a more aesthetically pleasant community when there is a pursuit to attract industry.

Several communities in Georgia have shown this interest by establishing a city/county clean community commission.

### 8.1.5 LOCAL GOVERNMENT'S EXPOSURE TO LIABILITY

Trial Courts may in certain circumstances hold local governments liable for damages for failure to abate a nuisance, whether private or public. See *Mayor of Dalton v. Wilson*, 118 Ga. 100, 44 S.E. 830 (1903); (re-affirmed in *Koehler v. Massell*, 229 Ga. 359, 191 S.E.2d 830 (1972)). But see also O.C.G.A. §36-33-1, wherein the General Assembly **reaffirmed local governments' sovereign immunity, stating:**

*[p]ursuant to Article IX, Section II, Paragraph IX of the Constitution of the State of Georgia, the General Assembly, except as provided [herein], declares it is the public policy of the State of Georgia that there is no waiver of the sovereign immunity of municipal corporations of the state and such municipal corporations shall be immune from liability for damages. O.C.G.A. §36-33-1.*

By virtue of this provision, the General Assembly has reaffirmed local governments' sovereign immunity.

A 1983 decision has brought into question the practical effect of the sovereign immunity reaffirmation statute which the General Assembly passed in 1985, to wit: O.C.G.A. §36-33-1, which was tacked on to legislation requiring a license for the operation of an ambulance service. See generally, P. Sentell, *The Law of Municipal Tort Liability in Georgia*, 125, 177 (4th Ed. 1988). See also *Wilmoth v. Henry County*, 251 Ga. 643, 309 S.E.2d 126 (1983), wherein the Supreme Court held that pursuant to the 1983 Constitutional Amendment that permits waiver of sovereign immunity by the state, its "departments" and its "agencies", to the extent of liability insurance, local governments may come under the definitions of "departments" and "agencies" under that amendment, by implication, which diminished their immunity status).

In addition, O.C.G.A. §36-33-1 permits liability in specific situations:

1. A municipal corporation shall not waive its immunity by the purchase of liability insurance, *except* as provided in Code Section §33-24-51 [waiver of governmental immunity in cases arising from the use of motor vehicles], or unless the policy of insurance issued covers the occurrence for which the defense of sovereign immunity is available, and only to the extent of the limits of such insurance policy. [Emphasis supplied.]

2. Municipal corporations shall not be liable for failure to perform or errors in performing their legislative or judicial powers. *For neglect to perform or improper or unskillful performance of their ministerial duties, they shall be liable.* [Emphasis supplied.]

This section does not create a duty on the part of cities to perform all acts properly and skillfully; it simply creates **an exception from sovereign immunity for cities' negligence in proprietary or nongovernmental matters** and did not **apply where defendant's waiver** of sovereign immunity was undisputed. *City of Buford v. Ward*, 212 Ga.App. 752, 443 S.E.2d 279 (1994).

Damages are based on depreciation of property value. See P. Sentell, *Municipal Liability in Georgia: The "Nuisance" Nuisance*, 12 Ga. St. B.J. (1975).

In addition to decreased property value which is recoverable in a damages action, also a defendant may now recover special damages, including the value of loss of use of such property, just as in general tort actions. *Duffield v. DeKalb County*, 242 Ga. 432, 249 S.E.2d 235 (1978); and see generally *Purser v. DeKalb County*, 188 Ga. 250, 3 S.E.2d 574 (1939), which deals with the liability of both municipalities and counties).

#### 8.1.6 PUBLIC POLICY CONSIDERATIONS

The General Assembly, on July 1, 1981, established the Department of Community Affairs. O.C.G.A. §50-8-1. On July 1, 1991, the Georgia General Assembly enacted the "Rural Facilities Economic Development Act" for the development of comprehensive plans for economic growth and development of distressed areas. O.C.G.A. §50-8-210. These enactments reflect a public policy of increased effort to establish local code enforcement emphasis throughout Georgia.

## 8.1.7 ECONOMIC CONSIDERATIONS

In *Inner Visions, Ltd. v. City of Smyrna*, 260 Ga. 902, 400 S.E.2d 915 (1991), the Georgia Supreme Court held that an applicant was erroneously denied a license for the sale of non-alcoholic drinks and live entertainment, based upon a zoning violation. The Court rejected the city's reasoning that due to the applicant being in violation of the building code, the license could be denied. The Court held that the applicant was still entitled to a consideration for issuance of a license under the existing zoning ordinance, and stated:

*...if the condition of the building did not comply with the City's building code, [applicant] would have been entitled to the issuance of a license contingent upon compliance. Id. 260 Ga. at 902-03, quoting Gifford-Hill & Co., Inc. v. Harrison, 229 Ga. 260, 265, 191 S.E.2d 85 (1972).*

The obvious implication is that code enforcement is the responsibility of the city's code enforcement officer. Enforcement is the way to avoid the municipality's futile defense as well as the costly litigation of a mandamus action in Superior Court. That is, by bringing a noncompliance action to the Municipal Court for remedies under the local ordinance, rather than arbitrarily denying a privilege license as the remedy and inviting a lawsuit, the city or county can affirmatively care for its own business.

## 8.2 CASE INITIATION

### 8.2.1 DUE PROCESS REQUIREMENTS

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be held to answer ... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; ..." Georgia's Constitution correspondingly provides that "[n]o person shall be deprived of life, liberty or property except by due process of law." Ga. Const., Art.I, Sec.1, Par. 1.

Due process has been interpreted to mean nothing more than "fundamental fairness." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1971). It is fundamental to any proceeding that one be given: (a) prior notice of the charge, with sufficient particularity, and (b) a fair opportunity to be heard before any adverse action is taken against him. Ga. Const., Art. I, Sec. 1, Par. 14; *Powell v. Texas*, 392 U.S. 514, 88 S.Ct 211, 20 L.Ed.2d 1254 (1968); *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 14 L.Ed.2d 654 (1960); *Shuttlesworth v. Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 1254 (1965).

## 8.2.2 PROCEDURES

Applicable municipal charter provisions will generally set forth the case initiation procedures. A letter could be sent by certified first class mail to afford prior notice and opportunity to comply before a matter is taken to the Municipal Court for adjudication. Federal and State constitutional provisions and state statutes, generally, should be considered for important due process protections that are afforded defendants who are charged. Sending a letter to a violator by the code enforcement officer before a summons is issued in cases involving building code enforcement and removal of junked vehicles, whether or not the ordinance requires it, helps satisfy a sense of total fairness because ample opportunity for compliance has been afforded prior to the hearing.

The judge should look to the municipality's charter for specific direction on how the case should proceed. If there is no specified procedure in the charter, the judge should turn to O.C.G.A. §41-2-9, and normatively comply with the procedures set out for nuisance abatement.

## 8.2.3 SERVICE OF PROCESS

The method of service is the same as in civil actions generally with a return to be filed with the Court. That is, with a citizen of majority age, service is to be perfected "in person" or by leaving a copy at the place of his residence, even if the alleged defendant lived outside the state. Non-residents are to be served in same manner as provided under the Civil Practice Act, such as "posting" or by "certified mail" to the last known address. O.C.G.A. §41-2-12 (a), (b), (c).

In nuisance abatement cases authorized by state law, service of the complaint is to be made "...upon each person in possession of said property, each owner, and each party in interest[.]" O.C.G.A. §41-2-12. All three possible defendants must be served in a particular case.

If the property belongs to a minor, the guardian or official representative is to be served in same general manner. If no official adult exists or is unknown, then the Probate Judge is to be served the minor's petition.

## 8.2.4 HEARING

Under the Georgia Constitution, Article I, Section 1, Paragraph 14, every person charged with an offense shall be entitled to prior written notice of the accusation, as well as to demand and receive a list of the witnesses who will appear to prosecute the specified allegations. Moreover, an accused shall have the right to compulsory process to obtain evidence from that person's own witnesses; and the person charged shall also have the right to confront accusers.

Under the Georgia Constitution, Article I, Section 1, Paragraph 12, a person charged with an offense shall be entitled to defend against that charge in a court of the state.

Under the Georgia Constitution, Article I, Section 1, Paragraph 16, a person charged with an offense cannot be compelled to give self-incriminating testimony.

Under the Georgia Constitution, Article I, Section 1, Paragraph 28, any rights enumerated in the State Constitution do not deny people inherent rights which they otherwise enjoy, such as the accused's presumption of innocence, or the right to make the government prove its accusations beyond a reasonable doubt, or the right to jury trial if subject to a penalty of more than six months imprisonment, and the right to benefit of legal counsel if subject to any amount of imprisonment.

The standards of routine criminal procedure (including federal and state constitutional criminal procedure) inform the practice norms for hearings conducted on local ordinance violations. Local ordinance violations are regarded as being more like criminal than civil proceedings, and are sometimes called quasi-criminal. Nevertheless, the norms of criminal practice govern these proceedings. *City of Atlanta v. Stallings*, 198 Ga. 510, 32 S.E.2d 256 (1944); *DeKalb Co. v. Gerard*, 207 Ga.App. 43, 427 S.E.2d 36 (1993).

Therefore, the prosecuting governmental authority (the city) must proceed first in the presentation of evidence to sustain its allegations. The person charged possesses the privilege of responding to this presentation with rebuttal evidence, or can sit back and force the city to prove its case. The burden of proof is on the city, with the accused enjoying a presumption of innocence; and the standard of proof is beyond a reasonable doubt. O.C.G.A. §16-1-5. Normally, the prosecution has the right to speak first in case opening and case closing argument, except in an instance where the defense puts forward no evidence and then the accused can proceed both first and last in the closing argument. O.C.G.A. §17-8-71.

## 8.2.5 REQUIREMENTS FOR MEETING PROCEEDINGS MEETING CONSTITUTIONAL DUE PROCESS CHECKLIST

1. Notice of charges by Civil Complaint or Petition and Summons (complaint should be sufficiently adequate to allow the offender to frame a response to the charge). O.C.G.A. §41-2-9.
2. Notice of hearing by Notice of Motion pursuant to O.C.G.A. 9-11-7(b)(1) or general court or police summons. Notice should include time, date and location of the hearing.

3. Service of Process by a City officer not less than ten days prior to the date of hearing but not more than 30 days before convening the hearing. O.C.G.A. §41-2-9.
4. When the hearing is convened, the judge must determine the offender's answer. If the charge is contested, then a hearing must be held.
5. The City must produce evidence sufficient to persuade a fair-minded impartial judge of the merits of its case beyond a reasonable doubt. The defendant has no burden of proof.

## 8.3 INFIRMITIES/POTENTIAL DEFENSES

### 8.3.1 VAGUENESS

If a statute "conveys sufficiently definite warning as the proscribed conduct when measured by common understanding and practices," it is not unconstitutionally vague. *Cleveland v. State*, 260 Ga. 770, 771, 399 S.E.2d 472 (1991); *Porter v. City of Atlanta*, 259 Ga. 526, 527, 384 S.E.2d 631 (1989).

The Georgia Supreme Court in applying the *Cleveland* test in *Satterfield v. State*, 260 Ga. 427, 395 S.E.2d 816 (1990), found O.C.G.A. §16-11-39(3) to be unconstitutionally vague. This statute made it a misdemeanor to engage "in indecent or disorderly conduct in the presence of another in a public place...." The Court held that the phrase "indecent or disorderly conduct" is not defined and provides no "fair warning to persons of ordinary intelligence as to what [the statute] prohibits so that they may act accordingly." *Id.* 260 Ga. at 428, 395 S.E.2d at 817.

### 8.3.2 CONSTITUTIONALITY OF ORDINANCES

Ordinances are usually challenged on the ground that they violate either the State or Federal Constitution. Georgia courts have established three things that must be shown in order to raise the question of constitutionality:

1. the statute or particular part or parts of a statute which is being challenged must be stated and pointed out with fair precision;
2. the provision of the constitution which is claimed to have been violated must be clearly designated; and
3. it must be shown wherein the statute or the designated part of it violates the constitutional provisions. *Marchman & Marchman Inc. v. City of Atlanta*, 250 Ga. 64, 295 S.E.2d 311 (1982). In addition, portions of an ordinance may be found unconstitutional without affecting the validity of other portions of the ordinance. *Bazelle v. Mayor and Council of the City of Athens*, 113 Ga. App. 776, 149 S.E.2d 724 (1966).

Note that there is no right to a direct appeal to the Georgia Supreme Court of Constitutional issues since *Russell v. City of East Point*, 261 Ga. 213, 403 S.E. 2d 50 (1991), reproduced at section 8-72 of this Handbook. Some prior case law had hinted at such a right. Review of municipal cases is solely by certiorari to the Superior Court.

### 8.33 VAGUENESS OF AN ORDINANCE CHECKLIST

1. Does the statute convey sufficiently definite warning as the prescribed conduct so that a person could reasonably understand what is prohibited or regulated?
2. It provides fair warning to persons of ordinary intelligence as to what they may not do.

### 8.3.4 CONSTITUTIONALITY OF AN ORDINANCE CHECKLIST

To challenge the constitutionality of an ordinance:

1. The challenged statute or part thereof must be stated and pointed out with fair precision;
2. The provision of the Constitution claimed to be violated is clearly designated; and
3. It must be shown that the statute or part thereof violates that Constitutional provision.

## 8.4 LOITERING

Loitering ordinances are likely a fertile area for future court challenges on Constitutional grounds.

### 8.4.1 CONSTITUTIONALITY OF LOITERING STATUTES AND ORDINANCES

In *Chicago v. Morales*, 527 US 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999), Chicago's anti-loitering law, which other cities looked to as a model for reclaiming the streets in gang-infested neighborhoods, was declared unconstitutional by the Supreme Court on the ground that it gave the police too much discretion to single out innocent people.

### 8.4.2 O.C.G.A. §16-11-36(A)

"A person commits the offense of loitering or prowling when he is in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in **the vicinity.**" O.C.G.A. §16-11-36 (a).

### 8.4.3 JOHNSON V. ATHENS-CLARKE COUNTY

*Johnson v. Athens-Clarke County*, 272 Ga. 384, 529 S.E.2d 613 (2000) was a case to determine whether Athens-Clarke County's anti-loitering ordinance is unconstitutional on its face and as applied. Johnson was arrested for a violation of Athens-Clarke County Municipal Ordinance 3-5-23, Loitering or Prowling. The arresting officer had observed Johnson in the same place four times, having told Johnson to move along twice the previous day and twice the day of the arrest, the last time 45 minutes before the arrest. Johnson was sitting on a wall at an intersection when the officer approached and asked whether he was visiting anyone. Johnson said he was not, admitted he lived a mile away, and when asked why he was there, asked why the officer was harassing him. The officer testified in municipal court that the location was a known drug area and that he believed Johnson was involved in illegal drug activity because he came back to the same location, behavior the officer testified was characteristic of illegal drug activity. No evidence of drug related activity was found. Johnson was found guilty and filed a petition for certiorari to superior court. After a hearing, the superior court affirmed the sentence imposed by the municipal court.

Johnson contended the ordinance was unconstitutional on its face because it is too vague to give persons of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct; because it is subject to arbitrary enforcement in that there is not standard other than the arresting officer's opinion of whether a person is loitering; because the ordinance is overbroad in that it makes criminal such constitutionally protected activities as the right to associate, the right to come and go or remain, and the right to be left alone when not interfering with the rights of others; because the ordinance violates the principle of separation of powers by delegating to the individual police officer the legislative duty of defining the scope of the law; because the ordinance permits search and seizure without probable cause; and because the ordinance conflicts with O.C.G.A. §§16-11-36, a general statute

on the same subject, by redefining loitering. Athens-Clarke County contended that the ordinance is substantially the same as O.C.G.A. §16-11-36, which has been upheld against the same challenges.

The Supreme Court **rejected the statute as too vague and accepted Johnson’s challenge.**

#### 8.4.4 LOITERING - OPPORTUNITY TO LEAVE

In *Insenhower v. State*, 324 Ga. App. 380, 750 S.E.2d 703 (2013), the court held that the evidence did not support a conviction for loitering when the evidence showed the Defendant left when asked by an officer to do so. A Defendant must be given a reasonable time to leave.

### 8.5 NUISANCE

Judge Robert T. Whatley of the Austell Municipal Court, in the Winter 2003 Municipal Courts Bulletin, wrote: “A close examination of O.C.G.A. §41-1, et seq., gives all municipal courts civil powers to abate nuisances, by ordering repair, demolition, clean-up, and other remedies too numerous to mention and containing many pages in the Code. An analysis of these powers would lead to think that they were in superior court. The powers are vast and seemingly would parallel a lengthy superior court-**type case and come close to injunctive powers.**”

In Article VI, Section 1, Paragraph 1 of the Constitution, Municipal Courts are expressly recognized and their jurisdiction is established as being “over ordinance violations and such other **jurisdiction as provided by law.**” The Georgia statutes were amended accordingly. In *Yield, Inc. v. City of Atlanta*, 145 Ga. App. 172, 244 S.E.2d 32 (1978), the Georgia Court of Appeals held that the Municipal Court had jurisdiction over an action brought by the city concerning the abatement of nuisances in cities.

Municipalities have the power to adopt ordinances which govern unfit buildings or structures and other public and private nuisances. See O.C.G.A. §41-2-5 et. seq. The statutory provisions for this power in the Municipal Courts are enumerated in O.C.G.A. §§41-2-5 through 41-2-9 and should be considered for guidance, at least, by the Judge along with the Municipal Charter of his/her jurisdiction, that is, if the municipal governing authority has not adopted the state code as its official code, as allowed under the State Abatement of Nuisance Code. See O.C.G.A. §§41-2-7 through 41-2-11. Notice also that the municipal abatement ordinance may not only provide for greater relief than the state abatement code, but both the local and state code can be used by the court together in ruling upon a case or issue. See O.C.G.A. §41-2-16, which provides:

Nothing in [this] code...shall be construed to abrogate or impair the powers of the courts...to enforce any provisions of its local enabling Act, its charter, or its ordinances as regulations nor to prevent or punish violations thereof; and the powers conferred by this article shall be in addition to and supplemental to the powers conferred by any other law. O.C.G.A. §41-2-16.

## 8.6 COMMON ORDINANCES

Many Georgia municipal codes are now available on the internet at no charge at:

[http://www.municode.com/resources/code\\_list.asp?stateID=10](http://www.municode.com/resources/code_list.asp?stateID=10).

Municipal ordinances may criminalize a variety of behavior. Common ordinances address such matters as:

1. Curfews
2. Disorderly conduct
3. Loitering
4. Obstruction
5. Nuisance
6. Traffic and parking
7. Uses of property/zoning
8. Prostitution
9. Gambling
10. Alcohol sales and consumption

11. Signage
12. Littering
13. Nude or adult entertainment
14. Building codes

O.C.G.A. §36-35-6(2)(A) prohibits municipalities from creating a local crime where the state has preempted that area by general law.

## 8.7 APPEALS AND CERTIORARI

### 8.7.1 RIGHT TO APPEAL IN GENERAL

The right of appeal from municipal courts is set forth in O.C.G.A. §40-13-28. An appeal is not a de novo review, but rather is a review on the record, with that record being one certified by the municipal court. O.C.G.A. §5-4-1 and *Franklin v. Recorders Court of Albany*, 174 Ga. App. 498 (1985) **provide for the procedure to appeal a recorder's court decision**, which is an application for certiorari to the Superior Court.

It should be noted that there are several municipal courts in Georgia which have been created under local legislation that may not fully follow the pattern of other local courts. These include courts for combined city-county governments. The legislation creating such courts should also be consulted as to appeals.

Section 5-602 of the Charter for the City of Columbus, which has a consolidated government with Muscogee County, contains a procedure where some decisions of the Recorders Court in ordinance violation cases can be appealed to the City Court.

## 8.7.2 RUSSELL V. CITY OF EAST POINT: DIRECT APPEALS

*Russell v. City of East Point*, 261 Ga. 213, 403 S.E.2d 50 (1991) outlines well the appellate process for City ordinance (and other municipal cases). It is reproduced below in its entirety, as it also addresses another issue, the Constitutional one, that is sometimes raised in ordinance cases. Russell attacked the lack of a jury trial in city court, amongst other challenges:

*CLARKE, Chief Justice. Larry Russell was convicted in the City Court of East Point of violating city ordinances by keeping six derelict vehicles and by allowing weeds, litter and debris to accumulate on his property. On appeal, he raises various errors of the trial court and challenges the constitutionality of the ordinances. The City of East Point moves this court to dismiss the appeal on the ground that there is no right of direct appeal to the Supreme Court from the City Court of East Point. We agree and grant the motion to dismiss.*

*Russell argues that the judgment of the City Court of East Point is directly appealable to the Supreme Court because Art. VI, Sec. VI, Par. II of the Constitution of Georgia of 1983 gives the Supreme Court exclusive appellate jurisdiction over cases in which the constitutionality of an ordinance is drawn in question. In support of his argument, Russell cites Kariuki v. DeKalb County, 253 Ga. 713 (324 S.E.2d 450) (1985), which held that a direct appeal from the recorder's court to this court was available in cases challenging the constitutionality of an ordinance. We now hold that Kariuki is in conflict with other decisions of this court and overrule it.*

*In City of Atlanta Bd. of Zoning Adjustment v. Midtown North, 257 Ga. 496 (360 S.E.2d 569) (1987), we noted that the provisions of the constitution govern which appellate court has jurisdiction of the subject matter of an appeal, but applicable statutes determine the method of pursuing the appeal. Id. at n. 1. Therefore, although Art. VI, Sec. VI, Par. II of the Constitution of Georgia of 1983 gives the Supreme Court exclusive appellate jurisdiction over cases involving the constitutionality of an ordinance, it does not change the procedure for bringing an appeal before this court. For this reason we held in Trend Development Corp. v. Douglas County, 259 Ga. 425 (383 S.E.2d 123) (1989), that cases challenging the constitutionality of a zoning ordinance must not only be reviewed by the Superior Court, but must also follow the procedure for discretionary review set forth in O.C.G.A. §5-6-35 (a)(1).*

*The City Court of East Point is not a constitutional court, but is instead a recorder's court of that city created by special act. Ga. L. 1972, pp. 2151, 2195, §92. No provision of the constitution or laws of the state provides a direct appeal from the recorder's court to this court. See generally O.C.G.A. §§5-6-34 and 5-6-35. Instead, the proper method of review is by certiorari to the Superior Court. Ga. L. 1972, p. 2151, §105.*

*In conclusion, we hold that Art. VI, Sec. VI, Par. II of the Constitution of 1983 dictates that this court, rather than the Court of Appeals, has jurisdiction over the subject matter of this appeal. It does not, however, create a right of direct appeal from non-constitutional courts and other inferior tribunals. In so holding, we overrule Kariuki, supra. This action is therefore dismissed without prejudice to appellant's right to proceed by certiorari to the superior court.*

*Appeal dismissed. All the Justices concur, except Bell, J., who dissents.*

*Before Judge Ashman, East Point Municipal Court.*

NOTE: O.C.G.A. §5-4-3 sets forth general procedures and bond requirements for a certiorari to the Superior Court.

## 8.8 CONTEMPT OF COURT

### 8.8.1 DEFINITION OF CONTEMPT AND SCOPE OF POWER

#### 8.8.1.1 DEFINITION OF CONTEMPT

##### TYPE OF BEHAVIOR

1. Disregard for or disobedience to command of the court; OR
2. Interruption of court by disorderly or insolent conduct either in its presence or so near thereto as to disturb its proceedings or impair due respect for the authority, justice or dignity of the court. *Wood v. State*, 103 Ga.App. 305, 119 S.E.2d 261 (1961), rev'd. 370 U.S. 375, 82 S.Ct. 1364, 6 L.Ed.2d 569 (1962).

##### EFFECT OF BEHAVIOR

Conduct must constitute "clear and present danger to orderly administration of justice." Some interference with the Court's administration of justice must actually result or be imminently threatened. *Wood v. Ga.*, 370 U.S. 375, 82 S.Ct. 1364, 6 L.Ed.2d 569 (1962); *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985).

But see *In Re Jefferson*, 283 Ga. 216, 657 S.E.2d 830 (2008) which, as to attorneys, announced a new test for **contempt "in the context of courtroom advocacy,"** replacing the "clear and present danger to the orderly administration of justice" test from *Garland v. State*, 253 Ga. 789, 790(2), 325 S.E.2d 131 (1985) with a "more complete" test considering both act and intent. As to the act, adopts an "imminent threat" of disruption standard; as to intent, adopts an objective/subjective standard: "contempt may be found only where the attorney 'knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding

the outermost limits of his proper role and hindering rather than facilitating the search **for truth.**' *In re Dellinger*, 461 F.2d 389, 400 (7th Cir., 1972)."

### 8.8.1.2 INHERENT AUTHORITY

Every court has the inherent power to protect the integrity of its proceedings and processes. Ga. Const., Art. VI, Sec. 1, Par. 4.

#### CONSTITUTIONAL COURTS

Constitutional courts, under Georgia Law, are free to define contemptuous acts or behavior. But, restrictive legislation is permitted to constrain the criminal sanctions such courts can impose in punishment for direct or indirect bad conduct.

#### MUNICIPAL COURTS

Similarly, the municipal courts' scope of punitive sanctioning power for criminal contempt could be limited, if the General Assembly chose to enact legislation...**restricting** the criminal sanctions available for direct or indirect bad behavior. This could be accomplished either by general law, or local law such as a city's charter.

NOTE: Judges **should check their city's charter regarding powers** related to contempt of court. Sentences may not exceed what is stated in the charter.

#### STATE COURTS

Georgia law contains no acknowledgment that the legislature can limit the civil or remedial sanctions available to the State's courts, when faced with instances of direct or indirect bad conduct and a court elects to pursue civil or remedial rather than criminal or punitive sanctions.

### 8.8.1.3 LIMITATIONS ON CONTEMPT POWER

“[C]ourts should limit their orders to the least possible exercise of power required, and should not impose punishment without first affording minimum due process to the accused.” *In Re August E. Siemon*, 264 Ga. 641 (1994).

The power of the court to punish for contempt is limited by the right of free speech and depends upon the setting of the conduct. *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985).

#### IN-COURT STATEMENTS

In-court statements are subject to reasonable control, the court's power is broad but not limitless.

#### OUT-OF COURT STATEMENTS, PROCEEDINGS PENDING

Out-of-court statements during pendency of proceedings may constitute contempt if there is clear and present danger, but the balance with free speech rights is delicate and the court must proceed carefully.

#### OUT-OF-COURT STATEMENTS, PROCEEDINGS COMPLETE OR JUDGE NO LONGER INVOLVED

It is almost impossible to show clear and present danger following the end of proceedings or concerning a judge who will no longer be involved in the case.

### 8.8.1.4 EXERCISE OF CONTEMPT—POWER OF LAST RESORT

A judge should never enter a finding of contempt where conduct has destroyed objectivity or even engaged judge's emotions. *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985). See also *In re: Jefferson*, 283 Ga. 216, 657 S.E.2d 830 (February 25, 2008), which partially overrules *Garland*.

NOTE: *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131(1985) contains the following excellent analysis (but see the note below about *Garland* being overruled in 2008 and note the additions to the analysis that are now required):

*The identification of a statement as constituting clear and present danger to the orderly administration of justice can be made only after taking into account the setting in which the statement is made. The possible settings are numerous, but four broad ones come to mind*

*immediately: statements made in court, statements made out of the court but while a judicial proceeding is pending, statements made out of the court during the pendency of a judicial proceeding but concerning a judge who is no longer involved in the proceeding, and statements made out of the court where no proceeding is pending.*

*Each of these must be viewed differently. The broad authority of a judge to preserve good order in the courtroom by the use of contempt power is well recognized and must be preserved if the courts are to perform their public duty. Therefore in-court statements and conduct are subject to reasonable control. Out-of-court statements during the pendency of a judicial proceeding which might influence the outcome of the proceeding may also create a clear and present danger to the orderly administration of justice. However, in this instance, the balance between orderly administration of justice and the right of free speech becomes more delicate and must be more carefully examined by the court. **Bridges v. California** ... The case before the court here bears similarity to each of the last two of the four broad settings described above. The judge about whom the statements were made has recused himself and even if further proceedings were pending, influences upon him would have no impact upon such proceedings. Additionally, it appears that while the criminal case against Garland's client is still pending, there has been no further investigation into possible involvement by Garland or his associate in the escape.*

*With these observations in mind we consider the nature of contemptuous statements. Justice Black observed in *Bridges v. California*... "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect..."*

*The statements here were made outside of the courtroom. They could not have the effect of intimidating the court in a pending trial because Judge Cato had recused himself from the *Brown* case before the statements were made. The question, then, is whether these statements created a clear and present danger to the administration of justice. Reducing the remarks to those aimed directly at Judge Cato, we find that appellant said he had conducted a "sham proceeding" and unlawfully and improperly conducted an inquisition. He said that this was an effort to turn tragedy into political hay for Judge Cato. Finally, he said that Judge Cato's actions violated the canons of judicial ethics and constituted slander. We do not condone statements of this nature. Civility and courtesy should be hallmarks of the legal profession, and statements or conduct which offend this precept are not favored. However, we are dealing here with the narrow issue of criminal contempt and its even narrower limitation of clear and present danger. We are not dealing with the broader areas of civil actions for libel or slander or disciplinary proceedings against an attorney. Viewing this case in the context of the restraints by which we are bound, we cannot find the statements **present a clear and present danger to the administration of justice.**"*

## New Test for Contempt in the Context of Courtroom Advocacy

*In re: Jefferson*, 283 Ga. 216, 657 S.E.2d 830 (February 25, 2008). Announces **new test for contempt “in the context of courtroom advocacy,”** replacing the “clear and present danger to the orderly administration of justice” test from *Garland v. State*, 253 Ga. 789, 790(2), 325 S.E.2d 131 (1985) with a “more complete” test considering both act and intent.

As to the act, adopts an “imminent threat” of disruption standard; as to intent, adopts an objective/subjective standard: “contempt may be found only where the attorney ‘knows or reasonably should be aware in view of all the circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth.’ *In re Dellinger*, 461 F.2d 389, 400 (7th Cir., 1972).” “[W]e hold that an attorney may be held in contempt for statements made during courtroom proceedings only after the court has found (1) that the attorney’s statements and attendant conduct either actually interfered with or posed an imminent threat of interfering with the administration of justice and (2) that the attorney knew or should have known that the statements and attendant conduct exceeded the outermost bounds of permissible advocacy. Because contempt is a crime, the evidence must, of course, support these findings beyond a reasonable doubt. See *In re Burton*, 271 Ga. 491 (3) (521 SE2d 568) (1999).

To assist in its analysis, it may be helpful for the court to consider the following non-exhaustive list of factors:

1. the extent to which the attorney was put on notice prior to the contempt citation that a continuation of the offending statements would constitute contempt;
2. the likely impact of the offending statements on the deliberations of the fact-finder, which calculus incorporates both the nature and timing of the offending conduct and whether the fact-finder is a judge or jury;
3. whether the offending statements occurred as an isolated incident or constituted a pattern of behavior;
4. the significance of the particular issue in question to the case as a whole and the relative gravity of the case; and
5. the extent, if any, to which the trial court provoked the offending statements with its own improper statements.

See Louis S. Raveson, *Advocacy and Contempt - Part Two: Charting the Boundaries of Contempt: Ensuring Adequate Breathing Room for Advocacy*, 65 Wash. L. Rev. 743, (IV) (D-I) (Oct. 1990).” Vacating and remanding 284 Ga.App. 877, 645 S.E.2d 349 (March 30, 2007).

## 8.8.1.5 TYPES OF CONTEMPT

### CIVIL

Civil contempt is a tool to force obedience to a court's order to do or refrain from doing an act. *Cobb v. Black*, 34 Ga. 162 (1865).

It is remedial and the contemnor may be imprisoned until he or she performs act or agrees to adhere to order. *Ensley v. Ensley*, 239 Ga. 860, 328 S.E. 2d 920 (1977). It is said that the contemnor has the key to the jailhouse door since compliance ends civil contempt. It is considered a civil proceeding.

### CRIMINAL - DIRECT AND INDIRECT

Criminal Contempt consists of acts done or words spoken involving disorderly or insolent conduct disturbing the proceedings or impairing due respect for the authority, justice or dignity of the court such that there is a clear and present danger to the orderly administration of justice. *Wood v. Ga.*, 370 U.S. 375, 82 S.Ct. 1364, 6 L.Ed.2d 569 (1962); *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985).

The purpose of criminal contempt is punitive, not remedial. It is considered a criminal proceeding subject to criminal due process safeguards including:

1. proof beyond a reasonable doubt, *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985) and
2. right to counsel *McDaniel v. State*, 202 Ga.App. 409, 414 S.E.2d 536 (1992).

Punishment is limited to 10 days or a \$200 fine or both. O.C.G.A. §15-10-2.

Criminal Contempt can remain an issue even after contemnor has ceased defying the court and belatedly complied with a court order. As is seen below, the procedure in criminal contempt varies depending upon whether it is direct or indirect contempt:

1. Direct criminal contempt involves disorderly or disrespectful acts committed in the presence or so near the presence of the court as to obstruct the administration of justice.
  - a. This means within the judge's sensory perception (e.g., sight, hearing, etc.) *White v. State*, 71 Ga.App. 512, 31 S.E.2d 78 (1944).

- b. The court must be able to "act on its own knowledge of the facts." *McDaniel v. State*, 202 Ga.App. 409, 414 S.E.2d 536 (1992); *Moody v. State*, 131 Ga.App. 355, 358, 206 S.E.2d 79 (1974).
2. Indirect criminal contempt involves contemptuous behavior outside of the court's sensory presence. *Herring v. State*, 165 Ga. 254, 140 S.E. 491 (1927).

#### 8.8.1.6 DISOBEDIENCE OF COURT ORDERS

To find contempt from a disobedience of a court order, one must find that

1. The accused had actual knowledge of the court order *Lassiter v. Swift & Co.*, 204 Ga. 561, 50 S.E.2d 359 (1948);
2. The order was definite enough to put the accused on notice of what conduct was prohibited *Schiselman v. Trust Co. Bank*, 246 Ga. 274, 271 S.E.2d 183 (1980); and,
3. The accused was able to comply, but willfully refused to do so *In Re Brookins*, 153 Ga.App. 82, 264 S.E.2d 580 (1980); *A. H. Robins Co. v. Fadely*, 299 F.2d 557 (5th Cir., 1962).

#### 8.8.2 DIRECT CRIMINAL CONTEMPT—O.C.G.A. §15-1-4

##### 8.8.2.1 ON THE RECORD

Record all proceedings (if not feasible, the court must draw a very detailed order with finding of facts and conclusion of law).

##### 8.8.2.2 NOTIFICATION

Notify the accused of observed contemptuous conduct. *Mayberry v. Pa.*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971). Notification must be given immediately after the conduct if using summary procedure. *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985).

Notice must contain all factual elements of contemptuous conduct. *Mayberry v. Pa.*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971).

NOTE: **The definition of “contempt” is not limited to** O.C.G.A. §15-1-4. See *Bradley v. State*, 111 Ga. 168, 36 S.E. 630 (1900).

### 8.8.2.3 OPPORTUNITY TO SPEAK—ALLOCATION

Give the accused the opportunity to speak for allocution. Ask accused for any reason why he shouldn't be punished for contempt.

1. Accused may show cause why conduct not contempt.
2. Accused may show mitigating factors.
3. Accused may apologize to court.

*Mayberry v. Pa.*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); *Dowdy v. Palmour*, 251 Ga. 135, 304 S.E.2d 52 (1983); Daniel, *Ga. Criminal Trial Practice*, 27-4.

### 8.8.2.4 PRONOUNCE SENTENCE AND DRAFT ORDER

Must pronounce sentence at once in summary proceedings. *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974); *Spruell v. State*, 148 Ga.App. 99, 250 S.E.2d 807 (1978).

## 8.8.3 INDIRECT CRIMINAL CONTEMPT

### 8.8.3.1 WRITTEN NOTIFICATION

Notify the accused in a written document (Rule Nisi) of:

1. All factual elements of alleged contemptuous conduct;

2. Date, time and place of hearing. *Martin v. Waters*, 151 Ga.App. 149, 259 S.E.2d 153 (1979);
3. Hearing held to SHOW CAUSE why accused should not be held in contempt and punished. *Carson v. Ennis*, 146 Ga. 726, 728, 92 S.E. 221 (1917); and,
4. That accused may bring legal counsel to the hearing.

NOTE: Have the accused PERSONALLY SERVED with the Rule Nisi. *Anthony v. Anthony*, 240 Ga. 155, 240 S.E.2d 45 (1977).

#### 8.8.3.2 SUBPOENA WITNESSES

Witnesses may be subpoenaed.

#### 8.8.3.3 APPOINT PROSECUTOR

The Judge may proceed without a prosecutor, but this is not the preferred manner of handling contempt hearings. In all situations, and wherever possible, the Judge should appoint a prosecutor to handle the case.

#### 8.8.3.4 HOLD HEARING

1. Put proceedings on record. If this is not feasible, judge must make complete finding of facts in order.
2. Check to find out if the accused has an attorney (not required, but better practice.)
3. Check to find out if witnesses are present.

4. No jury is necessary. *Bennett v. Bagwell & Stewart, Inc.*, 216 Ga. 290, 116 S.E.2d 288 (1960); *Codispoti v. Pa.*, 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974).
5. Hear evidence (allow accused to cross-examine, testify and present evidence).
6. Give accused opportunity for allocution to show why act not contempt, to show mitigating factors or to apologize to the court. *Mayberry v. Pa.*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971).
7. Must find contempt beyond a reasonable doubt. *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985).

### 8.8.3.5 CONTEMPT HEARING CHECKLIST

1. Are the proceedings on record?
  - a. If not, the court MUST make complete finding of facts in order.
2. Does the accused have an attorney? Not required, but better practice.
3. Are the witnesses present?
4. No jury is necessary.
5. Hear evidence - allow accused full opportunity to cross-examine, testify, present evidence.
6. Allow accused to explain why act was not contempt, OR allow accused the opportunity to apologize.
7. Standard of Proof - Beyond a Reasonable Doubt
8. Read *In Re Jefferson*, 283 Ga. 216 (2008) for a discussion of factors to weigh.

### 8.8.3.6 PRONOUNCE SENTENCE AND DRAFT ORDER

1. Must be sustained by evidence beyond reasonable doubt. *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985).
2. Must be in dispassionate manner showing judge is not personally reacting or injecting himself in the controversy. *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974); *In Re Crane*, 253 Ga. 667, 324 S.E.2d 443 (1985).
3. Should fully state facts found sustaining contempt.
4. Should state that conduct interfered with or obstructed the business of the court or impaired due respect for the authority, justice, or dignity of the court. *Wood v. State*, 103 Ga.App. 305, 119 S.E.2d 261 (1961), rev'd 370 U.S. 375, 82 S.Ct. 1364, 6 L.Ed.2d 569 (1962).
5. State that the accused is found guilty of indirect criminal contempt.
6. The order covering all of the above matters should be in writing.
7. State and put in order the sentence imposed (maximum 10 days, or \$200.00, or both). O.C.G.A. §15-10-2(7).
8. Sign order.
9. File order as part of record.

### 8.8.4 CIVIL CONTEMPT—INDIRECT

#### 8.841 WRITTEN NOTIFICATION—SEE SAMPLE FORM, SECTION 6.64 BELOW

Notify the accused in writing (Rule Nisi) of:

1. All factual elements of alleged contemptuous conduct;
2. Date, time and place of hearing;
3. That hearing held to SHOW CAUSE why accused should not be held in contempt and punished;
4. That accused may bring legal counsel to the hearing (not required, but better practice);

NOTE: Have the accused PERSONALLY SERVED with above written form of Rule Nisi. Palls City Co. v. Athens Coca-Cola Bottling Co., 130 Ga. 559, 61 S.E. 230 (1908).

#### 8.8.4.2 SUBPOENA WITNESSES

Witnesses may be subpoenaed.

#### 8.8.4.3 HOLD HEARING

1. Put proceedings on record. If this is not feasible, judge must make complete finding of facts in order.
2. Check to find out if the accused has an attorney.
3. Check to find out if witnesses are present.
4. No jury is necessary.

5. Hear evidence (all accused to cross-examine, testify and present evidence).
6. Must find that the accused had ACTUAL KNOWLEDGE of the Court's order that was violated to attach the accused for contempt. *Lassiter v. Swift & Co.*, 204 Ga. 561, 50 S.E.2d 359 (1948).
7. Must find the Court's Order definite enough to put the accused on notice of what is prohibited conduct. *Schiselman v. Trust Co. Bank*, 246 Ga. 274, 271 S.E.2d 183 (1980).
8. Must find that the defendant was able to comply but willfully refused to do so. *In Re Brookins*, 153 Ga.App. 82, 264 S.E.2d 580 (1980); *A.H. Robins Co. v. Fadely*, 299 F.2d 557 (5th Cir., 1962).
9. May find civil contempt by preponderance of the evidence. *Wagner v. Commercial Printers, Inc.*, 203 Ga. 1, 45 S.E.2d 205 (1947).

#### 8.8.4.4 CIVIL CONTEMPT HEARING CHECKLIST

1. Are proceedings on record? If not, **MUST** make complete finding facts in order.
2. Does the accused have an attorney? Not required, but better practice.
3. Are the witnesses present?
4. No jury is necessary.
5. Hear evidence - allow accused full opportunity to cross-examine, testify, present evidence.
6. **MUST FIND:**
  - a. **Accused had ACTUAL KNOWLEDGE of court's order;**
  - b. **Court's order was DEFINITE** enough to put the accused **ON NOTICE** of prohibited conduct; and
  - c. Accused was able to comply, but willfully refused to do so.
7. Standard of Proof - Preponderance of the Evidence

#### 8.8.4.5 PRONOUNCE JUDGMENT AND DRAFT ORDER

1. Recite order or decree, and duties imposed on accused, and that the ORDER CLEARLY SETS THESE OUT.
2. Recite findings that the accused had ACTUAL KNOWLEDGE of the Court's Order violated.
3. Recite FINDINGS OF FACT constituting contempt by the accused.
4. Recite that the accused was ABLE TO COMPLY and that failure to comply was due to the accused's willful CONTEMPT rather than to inability;
5. Recite that all of this is shown by the PREPONDERANCE OF EVIDENCE.
6. Adjudicate the accused in CIVIL CONTEMPT OF COURT.
7. Set conditions of purge.
8. Order the accused imprisoned (OR fined) until purge or further order of the court; NOT limited to 10 days. *Ensley v. Ensley*, 239 Ga. 860, 238 S.E.2d 920 (1977).
9. Draft written Order incorporating ALL of the above.
10. Sign Order.
11. File Order as part of record.

#### 8.8.5 CITATIONS

### 8.8.5.1 STATUTES

Court Rules are enforceable by statutory authority. O.C.G.A. §15-1-5.

Failure to pay money ordered—A court may not imprison a defendant when he or she denies that money is in his or her power or control unless a jury trial is held on the issue. O.C.G.A. §15-1-4.

Grounds for imposition of summary punishment. O.C.G.A. §15-1-4.

Power to enforce order in the Court's immediate presence or so close thereto as necessary to prevent disturbance or hindrance of its proceedings. O.C.G.A. §15-1-3.

Power to compel obedience to Court's judgments and orders. O.C.G.A. §15-1-3.

### 8.8.5.2 CASES

Failure to remain at calendar call when directed by the court is direct contempt subject to summary punishment. *In Re Booker*, 195 Ga.App. 561, 394 S.E.2d 791 (1990). Decision discusses whether conduct heard over telephone is within direct sensory perception of the judge and subject to direct contempt treatment but case does not provide precedent on that matter. The safer practice would be to treat it as indirect contempt.

Georgia Supreme Court cases establish that contempt power is constitutionally based—i.e., judge is not limited to the above statutory grounds although statutory limits on length of sentence do apply e.g., *Bradley v. State*, 111 Ga. 168, 36 S.E.2d 630 (1900).

Harassment of juror outside the courthouse is indirect, not direct, contempt. Must give notice of hearing, time to prepare, afford right of counsel, and not rely on hearsay. *McDaniel v. State*, 202 Ga App. 409, 414 S.E.2d 536 (1992).

The act of appearing in court in an impaired state is a direct contempt. *In re: K.J.*, 340 Ga. App. 798, 801 S.E.2d 9 (2017).

8.8.6 FORMS

8.861 ORDER—DIRECT CRIMINAL CONTEMPT

**MUNICIPAL COURT OF \_\_\_\_\_**

**IN RE:**

**CONTEMPT ORDER**  
**DIRECT CRIMINAL CONTEMPT**

Whereas the above captioned contemner has committed acts which interfered with or obstructed the business of this Court, or have impaired due respect for the authority, justice, and dignity of this court to wit:

It further being found beyond a reasonable doubt that said contemner committed said acts and committed them in the immediate presence of this court;

Said contemner is hereby found to have committed Direct Criminal Contempt and it is therefore;

ORDERED that said contemner be:

- (a) Committed to the common jail of \_\_\_\_\_ for \_\_\_\_\_ days;
- (b) Ordered to pay fines of \$\_\_\_\_\_.;

So ordered this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Judge, Municipal Court of \_\_\_\_\_

8.8.6.2 RULE NISI—INDIRECT CRIMINAL CONTEMPT

**MUNICIPAL COURT OF \_\_\_\_\_**

**IN RE:**

**RULE NISI**  
**INDIRECT CRIMINAL CONTEMPT**

Whereas the above captioned alleged contemner is alleged to have committed acts which interfered with or obstructed the business of this Court, or to have impaired due respect for the authority, justice, and dignity of this Court to wit:

Now therefore it is hereby ORDERED that said contemner be served forthwith with a copy of this Rule Nisi and appear before this Court at \_\_\_ o'clock \_\_.m. on the \_\_\_ day of \_\_\_\_\_, 20\_\_, there to show cause of any he have why he should not be held in contempt of Court. Hearing will be held in Room \_\_\_\_\_ of the \_\_\_\_\_ Courthouse located at \_\_\_\_\_.

Said accused contemner may bring legal counsel to said hearing if desired.

So ordered this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Judge, Municipal Court of \_\_\_\_\_

I hereby certify that said accused contemner has been personally served by me with a copy of this Rule Nisi at \_\_\_ o'clock \_\_.m. on the \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Deputy Sheriff

8.8.6.3 ORDER - INDIRECT CRIMINAL CONTEMPT

MUNICIPAL COURT OF \_\_\_\_\_

IN RE:

**CONTEMPT ORDER**  
**INDIRECT CRIMINAL CONTEMPT**

Whereas the above captioned contemner was alleged to have committed acts which interfered with or obstructed the business of this Court, or to have impaired due respect for the authority, justice, and dignity of this court to wit:

And whereas said contemner was served with a Rule Nisi stating a date, time and place of a hearing to be held before this Court for accused contemner to show cause why he should not be held in contempt;

And whereas the accused contemner was informed that he might bring legal counsel to said hearing;

And whereas said hearing was held and contemner did not show cause why he should not be held in contempt, but evidence was presented showing beyond a reasonable doubt that the contemner did knowingly and willfully commit said acts of contempt.

NOW, THEREFORE, the Court finds beyond a reasonable doubt that said contemner is guilty of Indirect Criminal Contempt and it is therefore;

ORDERED that said contemner be:

- (a) Committed to the common jail of \_\_\_\_\_ for \_\_\_\_\_ days;
- (b) Ordered to pay fines of \$\_\_\_\_\_.\_\_;

So ordered this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Judge, Municipal Court of \_\_\_\_\_

**MUNICIPAL COURT OF \_\_\_\_\_**

**IN RE:**

**RULE NISI**  
**CIVIL CONTEMPT**

Whereas the above captioned alleged contemner is believed to have violated an ORDER of this Court, said order attached as Exhibit I hereto, and

Whereas it is believed that said alleged contemner possessed actual knowledge of the existence of said order and the contents thereof;

Whereas it is believed that said order is sufficiently deemed to place alleged contemner on notice of what conduct is prohibited;

Whereas it is believed that said alleged contemner was able to comply with said order but that he willfully failed to do so by:

Now therefore it is hereby ORDERED that said contemner be served forthwith with a copy of this Rule Nisi and appear before this Court at \_\_\_ o'clock \_\_.m. on the \_\_\_ day of \_\_\_\_\_, 20\_\_, there to show cause of any he have why he should not be held in contempt of Court. Hearing will be held in Room \_\_\_\_\_ of the \_\_\_\_\_ Courthouse located at \_\_\_\_\_.

Said accused contemner may bring legal counsel to said hearing if desired.

So ordered this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Judge, Municipal Court of \_\_\_\_\_

I hereby certify that said accused contemner has been personally served by me with a copy of this Rule Nisi at \_\_\_ o'clock \_\_.m. on the \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Deputy Sheriff



8.8.6.5 ORDER—INDIRECT CIVIL CONTEMPT

MUNICIPAL COURT OF \_\_\_\_\_

IN RE:

**ORDER: CIVIL CONTEMPT**

Whereas the above captioned contemner was alleged to have committed acts in violation of a lawful ORDER of this Court said order attached hereto as Exhibit I, and said acts being that accused did \_\_\_\_\_

And whereas accused contemner was served with a Rule Nisi scheduling a hearing date, time and place of a hearing to be held before this Court for accused contemner to show cause why he should not be held in contempt;

And whereas said hearing was held and evidence considered establishing that accused contemner did perform the acts described above and that said acts were in violation of this Court's Order attached. Said evidence further established that the accused contemner did have actual knowledge of the existence of said Order and that said Order did impose duties upon him. That the accused contemner was able to comply with said Order but did willfully fail to do so.

Whereas all the above was established at the Rule Nisi hearing by a preponderance of the evidence.

Now therefore this Court finds that contemner is in Civil contempt of the Court and it is therefore;

ORDERED that said contemner be:

- (a) Committed to the common jail of \_\_\_\_\_ for \_\_\_\_\_ days; OR
- (b) Ordered to pay fines of \$\_\_\_\_\_.;

Until he purges himself of contempt by:

Upon satisfactory evidence presented to the Court that contemner has purged himself of contempt, the Court shall order release of the contemner.

So ordered this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Judge, Municipal Court of \_\_\_\_\_

## CHAPTER 8—APPENDIX A: UPDATED LIST AND SUMMARY OF NEW STATUTES

HB 1025 (Act 569): A BILL to be entitled an Act to amend Article 4 of Chapter 10 of Title 15 of the Official Code of Georgia Annotated, relating to violation of ordinances of counties and state authorities, so as to change provisions relating to service of accusations of or citations for violations of ordinances under certain circumstances; to provide for judgments when service is perfected under such circumstances; to provide for related matters; to repeal conflicting laws; and for their purposes.

HB 727 (Effective 4/26/2016): A BILL to be entitled an Act to amend Chapter 10 of Title 25 of the O.C.G.A., relating to regulation of fireworks, so as to revise provisions relating to the sale, use, or explosion thereof; to amend Chapter 60 of Title 36 of the O.C.G.A., relating to general provisions regarding local government provisions applicable to counties and municipal corporations, so as to provide for certain further regulations by counties, municipal corporations, and consolidated governments; to amend Article 7 of Chapter 13 of Title 48 of the O.C.G.A., relating to taxation of consumer fireworks, so as to provide for local excise taxation of consumer fireworks and the collection of such excise tax; to provide for related matters; to provide for an effective date; to repeal conflicting laws; and for other purposes.

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## CHAPTER 9: BEYOND STATUTES AND CASE LAW – WHAT MAKES A GOOD JUDGE

### 9.0 WHY DOES THIS MATTER?

The subject of judicial ethics is more than an academic discussion. The American Judicature Society reports that **“between 1980 and the end of 2002, approximately 294 (U.S.) judges had been removed from office as a result of state judicial discipline proceedings. In 2003, 13 judges (or in two cases former judges) were removed from office, 20 resigned or retired in lieu of discipline pursuant to agreements with judicial commissions that were made public, one judge resigned pursuant to an agreement that also included a public reprimand, and two former judges were barred from serving in judicial office... [I]n addition to the judges who were removed or agreed to resign or retire, 82 judges (or former judges in 10 cases) were publicly sanctioned in 2003.”** (Source: Winter 2004 *Judicial Conduct Reporter*).

On July 15, 2015, The Atlanta Journal-Constitution reported:

**More than five dozen Georgia judges have stepped down from the bench in disgrace since the state’s judicial watchdog agency began aggressively policing ethical conduct eight years ago. More lately, however, the jurists aren’t just leaving the court in disgrace. Some are leaving in handcuffs. Former Chief Judge Amanda Williams of the Brunswick Judicial Circuit, now under indictment in Fulton County. Earlier this month, former North Georgia magistrate Bryant Cochran was sentenced to five years in prison by a federal judge who said Cochran had destroyed the public’s faith in the judiciary. In June, a one-time influential chief judge from Brunswick was indicted by a Fulton County grand jury. And a specially appointed district attorney is now considering similar charges against a former DeKalb judge. These criminal prosecutions were brought after the state Judicial Qualifications Commission launched investigations of the judges. Instead of being allowed to step down from the bench and return to a law practice, these judges are hiring criminal defense lawyers. “I don’t remember seeing anything like this — so many judges facing criminal prosecution,” said Norman Fletcher, former chief justice of the Georgia Supreme Court. “I do think it puts a black cloud over the judiciary.” Cochran, a Murray County magistrate for eight years, was convicted of orchestrating a plot to plant drugs on a woman shortly after she publicly accused him of propositioning her in his chambers.**

Former Judge Patricia M. Wald was appointed to the U.S. Court of Appeals for the District of Columbia Circuit in 1979. She served as chief judge of the Circuit from 1986 until 1991. She left the federal bench in 1999 to serve two years as a judge on the International Criminal Tribunal for the Former Yugoslavia.

She was asked this question: **“What, in your opinion, makes a good judge?”**

**Her reply: “I think what goes into a good judge is, first of all, a full and accurate knowledge of what the facts are in the case before her; she needs that in order to identify what are the issues that have to be decided and what are the limits to what she can decide. Most of us are skeptical of the notion of using a case as a vehicle for giving our views on the world at large or even some area of the law if it isn’t necessary to decide the case. A good judge also has to look hard at what are the restraints that the law--statute, precedent, or Constitution--impose on her options. In the case of statutes, my views on the permissibility and wisdom of looking at legislative history to see what the drafters were about are well known. But when some part of a law has not been interpreted before and its text or**

history doesn't give a clear answer to what it means, the judge has to exercise judgment. That's both the most challenging and the most anxiety-ridden part of the job. (The same goes for Constitutional cases.) If you have legitimate discretion to go one way or another, you try and reckon what the consequences will be both in the immediate case and in other cases that may come up and fall under the same law. Then, of course, respect for ones' colleagues and for **the lawyers and witnesses who come before you is critical.**" (Source: **The Third Branch: The** Newsletter of the Federal Courts from Administrative Office of the U.S. Courts March 2002 issue Volume 34 Issue 3 . The full interview can be viewed online at: [http://www.uscourts.gov/ttb/mar02ttb/interview.html\\_](http://www.uscourts.gov/ttb/mar02ttb/interview.html_)).

## 9.1 TEN COMMANDMENTS FOR A JUDGE

For many Georgians, the only Judge they will ever see is a Municipal Court Judge. Their experience will shape their opinion of all courts and the entire legal system.

That raises the question of what we can do as Judges to make that experience one that will not only be fair and proper but will also be perceived as fair and proper. The list that follows is common sense, but Judges forget common sense:

1. Be on time. If the calendar starts at 8:00 AM, do not expect everyone else to set their alarm and race to court if you like sitting back reading the paper and drinking coffee at 8:21 AM, oblivious to your courtroom packed with impatient defendants, counsel and witnesses.

2. Be courteous and polite and show respect. Address Defendants and witnesses by their titles and last names (such as **Dr. Smith, Ms. Jones and Mr. Wilson**). **Use sir and ma'am as appropriate.**

Note: It should go without saying that ethnic and gender references that are inappropriate should not be used by a Judge, or court personnel.

3. Be patient. Not everyone is well-versed in legal procedure.

4. Be fair. Firm is great. Tough is great. But do the right thing. Be able to sleep with your decisions.

5. **Don't lose your sense of humor.** Court is not a place for a lot of humor, but humorous moments happen. Don't lose your humanity. Judges are allowed to smile, and even laugh.

6. Rely on your clerks. You are the Judge **and you make the decisions, but don't ignore that they understand the forms and paperwork.**

7. Be creative. Unusual situations may warrant non-traditional sentencing.

Note: You have broad discretion as to conditions of probation. You also have broad discretion in requirements for a pretrial diversion of a case.

8. Talk to your fellow Judges. They are a wealth of information and a resource that is readily available.

Note: Every Municipal Judge gets at least one valuable opportunity a year, at their mandatory training, to speak with fellow Judges. **Don't limit yourself to just** those times.

9. **You are not a "fine machine."** Your job is not to balance the city budget, but rather is to do justice. Impose fines **when they are appropriate, but don't ignore ability to pay and alternatives like community service.** It is not appropriate to jail someone simply because they cannot afford a fine.

NOTE: There are minimum fines and sentences discussed elsewhere in this Benchbook that cannot be ignored. There are creative ways to deal with this situation when it will work a hardship. Pretrial diversion, or reducing a charge to a lesser included offense, or dead docketing a charge can be a tool that is useful in such situations.

10. Bend over backwards as to rights. **Be sure Defendants understand what is happening. And don't hesitate to** appoint counsel, use a translator or do other steps that are necessary in a case.

## 9.2 THE PURPOSE OF COURTS

**“Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial.”** *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

HB 691 (Effective 7/1/2016): A BILL to be entitled an Act to amend Article 1 of Chapter 32 of Title 36 of the Official Code of Georgia Annotated, relating to municipal courts generally, so as to provide the removal of appointed municipal court judges under certain circumstances; to provide for procedure; to provide for related matters; to repeal conflicting laws; and for other purposes.

## 9.3 COURTS' DUTIES TO LAWYERS

The following are from the U.S. 7th Circuit Court of Appeals Standards for Professional Conduct, and set standards for the Judges of that Court:

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.
2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.
3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.
4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.
5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.
6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.
7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.

8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.

9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.

11. We will not adopt procedures that needlessly increase litigation expense.

12. We will bring to lawyers' attention uncivil conduct which we observe.

## 9.4 GEORGIA DISCIPLINARY PROCEEDINGS AND THE CANONS OF JUDICIAL ETHICS

### 9.4.1 THE JUDICIAL QUALIFICATIONS COMMISSION

Art. VI, Sec. 7, Para. 7 of the Georgia Constitution created a Judicial Qualifications Commission (JQC) which can review allegations of willful misconduct in office, failure to perform duties, habitual intemperance, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or a disability interfering with the performance of duties. The JQC also can act when a Judge is under criminal indictment. The ultimate decision making lies with the Georgia Supreme Court, after JQC review, and the results can include removal from office, suspension with or without pay, or a public or private reprimand.

### 9.4.2 THE GEORGIA CANONS OF JUDICIAL ETHICS

The Supreme Court of Georgia on May 14 formally approved a complete revision of the state's Code of Judicial Conduct. The changes will take effect Jan. 1, 2016. Read them at:  
<http://www.gabar.org/newsandpublications/announcement/upload/Georgia-Code-of-Judicial-Conduct-final-May-22-2015.pdf>

**The new code largely follows the ABA's model code in content and numbering.** Notable changes from the old code include:

- **Heightened standards for lawyers who routinely serve as pro tempore judges, limiting their representation to temporary or emergency appearances if they intend to continue practicing in the courts in which they serve as judges.**

- Clarification of rules for when judges may charge for wedding ceremonies
- **Making public judges' annual financial disclosure statements of quasi-judicial and extra-judicial activities and gifts.**  
Judges' financial reports are now filed under seal at the Supreme Court and are traditionally only available to the high court and the state Judicial Qualifications Commission.
- **The addition of domestic partners in disclosure provisions regarding potential conflicts of interest and other impartiality issues that might lead to a judge's disqualification.**
- **A requirement that judges' staff members and court officials adhere to the same judicial ethics standards that the judges follow.**
- **Requiring that a judge who has been arrested or charged with a "serious crime" as defined by the code (including driving under the influence of drugs or alcohol) must report the charges to the state watchdog agency, the Judicial Qualifications Commission.**
- **Enhanced reporting requirements for judges regarding any suspected disability—including drug or alcohol abuse, mental health issues or dementia—on the part of other judges or lawyers.**
- **A rule that will in most cases make it impossible for judges seeking an elective nonjudicial post to remain on the bench for the duration of a campaign and still adhere to the ethics code.**
- **New standards for reporting gifts, gratuities and other extra-judicial compensation.**

(source for above summary: Fulton County Daily Report at <http://www.dailyreportonline.com/id=1202726920410/High-Court-Approves-Revised-Judicial-Ethics-Code?slreturn=20150811203155>)

## 9.5 JQC ADVISORY OPINIONS

### 9.5.1 PURPOSE AND USE OF JQC ADVISORY OPINIONS

The Georgia JQC is authorized to render advisory opinions concerning a proper interpretation of the Canons of Judicial Conduct and to publish and disseminate the same. It is a defense to a complaint under those rules that a judge complained against has acted in accordance with and in reliance upon any such advisory opinion.

## 9.5.2 ACCESSING JQC ADVISORY OPINIONS

The full text of all Advisory Opinions since 1994 is available on the Internet at <http://www.gaiqc.com/opinions.cfm>.

## 9.6 OTHER SOURCES FOR JUDICIAL ETHICS INFORMATION

### 9.6.1 CORNELL SCHOOL OF LAW

There are a number of excellent internet sites with extensive ethical information for Judges and lawyers. The Cornell School of Law has an extensive listing at this Internet web site: <https://www.law.cornell.edu/ethics/>

### 9.6.2 THE NATIONAL JUDICIAL COLLEGE

The National Judicial College offers a free web-based self-study course for new judges called “Taking the Bench.” To find out more about the course, and to register, go to: <http://www.judges.org/web-self-study/index.html>. The class is beneficial as a brush-up for judges who have been on the bench, as well.

## 9.7 BROADER ETHICAL GUIDELINES

Many Judges are of course members of various religious faiths. While it is not appropriate to practice religion on the bench, it is very appropriate to be guided by the ethical rules of one’s faith, within the parameters of the law. Not all ethical rules appear in law books, or Canons of Ethics, and a Judge must not only follow the law but also do equity. **The Golden Rule (“Do unto others as you would want others to do unto you”) is an excellent guideline for a Judge.** Perhaps the simplest way to say it is to remember that you should always follow your internal moral compass.

## 9.8 JUDGES AND SOCIAL MEDIA

Most states, including Georgia, do not have specific rules as to Judges using social media, such as Facebook, Twitter, LinkedIn, Pinterest, and blogs. Obviously, potential conflicts can arise. Does a Judge need to disclose (or recuse) that he is a Facebook friend with a party, a lawyer or prosecutors? (Answer: maybe). Does a Judge need to avoid commenting on pending matters in his court? (Answer: likely yes) Should a judge watch what he posts? (Answer: obviously yes). Can elected judges have a website? (Answer: likely yes).

Jeremy M. Miller in “Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance),” 33 PEPPERDINE L. REV. 575, 578 (2012) wrote “Judges should not, and are not, expected to live

isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge".

In Florida, a judge may not preside over a case where he is Facebook friends with an attorney representing either of the parties. See *Domville v. Florida* (Fla. App. 2012). But that seems to be a minority view. Compare that with *Clore v. Clore*, 135 So.3d 264 (Ala. Civ. App., 2013), which was a divorce proceeding where the trial court entered an order dividing the marital property and awarding some rehabilitative alimony to the ex-wife. She sought a new trial, alleging that the trial judge's Facebook friendship with the parties' daughter tainted the proceedings. The trial judge denied the motion, stating in part: "Facebook is a social networking site where the word 'friend' is used in a way that doesn't have anything to do with the way before this Facebook.com ever existed-the way we used the word 'friend' ... Just because a person is connected to me on here in this manner doesn't have anything to do with a personal relationship. I don't have a personal relationship with this friend. We all live in a small town. I have heard both of you all's names. I heard the daughter's name before we came in here today." The appeals court agreed.

See also Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (2010) (designation as an ESM follower does not, in and of itself, indicate the degree or intensity of judge's relationship with the person).

In Opinion 13-39, dated May 28, 2013, New York's Judicial Advisory Committee held "that the mere status of being a "Facebook friend," without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned or that there is an appearance of impropriety based solely on having previously "friended" certain individuals who are now involved in some manner in a pending action."

ABA Formal Opinion 462 February 21, 2013 "Judge's Use of Electronic Social Networking Media" says "A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with **relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety...**The Committee will use the term **"electronic social media" ("ESM") to refer to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons...**Judges must assume that comments posted to an ESM site will not remain within **the circle of the judge's connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients...**The judge should not form relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as ex parte communications concerning pending or impending matters in violation of Rule 2.9(A), and avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10...A judge who has an ESM connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.<sup>11</sup> In this regard, context is significant.<sup>12</sup> Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.<sup>14</sup> The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis

for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge...Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting."

In a recent survey, for judges who stood for political election, 60.3% used social media sites. 2012 CCPIO New Media and Courts Survey: A Report of the New Media Committee of the Conference of Court Public Information Officers (July 31, 2012), available at <http://ccpio.org/blog/2010/08/26/judges-and-courts-on-social-media-report-released-on-new-medias-impact-on-the-judiciary/>. But as to other candidates, see Nevada Comm'n on Jud. Disc. Op. JE98-006 (Oct. 20, 1998) ("In expressing his or her views about other candidates for judicial or other public office in letters or other recorded forms of communication, the judge should exercise reasonable caution and restraint to ensure that his private endorsement is not, in fact, used as a public endorsement.").

See following article illustrating the importance of self-restraint. Follow link for related materials.

<https://www.washingtonpost.com/news/post-nation/wp/2016/10/15/you-got-a-bad-attitude-agitated-judge-tears-off-robe-tackles-man-in-courtroom-video-shows/>

The Washington Post

Post Nation

# ‘You got a bad attitude’: Agitated judge tears off robe, tackles man in courtroom, video shows

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By Amy B Wang October 15, 2016

The robe came off.

A Michigan judge, growing increasingly frustrated with a defendant who was talking back to him, stormed down from his bench and rushed to help subdue the man as he resisted being handcuffed.

Though the incident took place in December, video footage of the scuffle was published this week on [Mlive.com](#). It showed a rare instance of a judge physically intervening in a courtroom situation — something that at least one of the Michigan judge’s colleagues said was justified in this case.

The four-minute, profanity-laced video showed the defendant, Jacob Larson, accusing Jackson County Circuit Court Judge John McBain of being “buddy-buddy” with a woman Larson had been accused of stalking for about a year, Mlive reported.

The hearing was about Larson’s alleged violation of a personal protection order against the woman, who in the video is seated at a table next to Larson but whose face is blurred.

The video shows that the hearing began calmly but escalated quickly as McBain questioned Larson about his persistent Facebook messages to the woman, despite a personal protection order against him.

“It’s like ‘Fatal Attraction’ kind of stuff that I warned you about last time,” McBain said, referring to the 1987 film in which Glenn Close plays an obsessive stalker. “I told you to just leave her alone. She was a classmate of yours. She apparently has no interest in —”

“I want *her* to tell me to leave me alone,” Larson said, motioning toward the woman as he interrupted the judge.

That seemed to irritate McBain, whose voice became noticeably sharper as he responded: "You know what? *I* told you to leave her alone. And apparently that didn't get through loud and clear. So today, you're going to jail for three days."

What followed was an escalating exchange in which Larson accused the judge of being "buddy-buddy" with the woman and McBain declaring that the defendant has "a bad attitude."

As Larson continued interrupting the judge, McBain upped his jail sentence.

"Forty-five days ... 93 days in the county jail," McBain told Larson. "You want to go for a year? Try it right now."

A court officer seen in the video told Mlive.com that as he tried to take Larson into custody, the defendant "tensed up" and tried to fight him. Larson and the officer, identified by Mlive.com as Jared Schultz, struggled as Larson continued to point and talk to the woman.

"Tell me to leave you alone!" he said. "Tell him right now!"

"Tase his a-- right now!" McBain shouted, as he threw off his judge's robe, ran over to the two men and then physically helped pin Larson to the ground. Throughout the scuffle, Larson is heard cursing periodically.

*(Warning: The video contains profanity.)*

This was not the first time McBain's comments as a judge have made the news. In 2014, he told a convicted murderer that he hoped she died in prison, Mlive.com reported.

"Sometimes, I think a judge needs a little fire in the right kind of cases," McBain told the news site at the time.

McBain did not respond to an email sent to his office Friday. A woman who answered the phone for the Jackson County courts system said the judge was not taking calls regarding the video.

"There is one thing I don't tolerate is disruptions in my courtroom," McBain told Mlive.com, adding that Larson was "totally disturbing the decorum of the court."

McBain told the news site that it was the first time he has had to physically restrain someone in his courtroom.

Jackson County Chief Circuit Judge Thomas Wilson told the Associated Press that McBain's actions were allowable.

"A judge has the power to take whatever action is necessary to maintain order in the courtroom," Wilson told the AP.

According to Mlive.com, Larson was accused of stalking the woman for about a year but blamed his behavior on her:

“Obsessed” for reasons she did not know, he was a high school classmate of the woman, and sent her 22 Facebook messages after McBain signed the order in August 2015 and before the December hearing. “He’s not leaving me alone,” the woman, now 22, told the judge.

McBain noted that he “pretty clearly and unequivocally” warned Larson to avoid contact with the woman.

“She’s instigating it,” Larson replied and talked about pictures she posted wearing a lot of makeup and with her “hair done and all that stuff, the full nine.”

Since the courtroom incident, Larson again violated the protection order in July, after he sent the woman 20 friend requests on Instagram, according to a detailed case report obtained by The Washington Post.

The woman went to Larson’s Instagram and discovered a video he had made with her name as the title, the report said. In the video, Larson reportedly referred to the protection order and said “if he can’t have her, no one can,” implying that the two had a dating relationship. The woman told police the two of them had never had a dating relationship and that their only connection was that they had gone to the same school, according to the report.

Larson has since been charged with aggravated stalking and is scheduled to appear in court again Dec. 2, [according to Jackson County court records](#).

Mlive.com reported that McBain has recused himself from Larson’s cases pertaining to the protection order after witnessing his behavior in the courtroom.

Formerly a prosecuting attorney, McBain was elected to the Jackson County Circuit Court bench in 2002, according to his [bio](#) on a county webpage. In 2007, he was appointed chief judge pro-tempore in the Jackson County Circuit Court.

**Read more:**

[\*Judge could lose job for berating rape victim: ‘Why couldn’t you just keep your knees together?’\*](#)

[\*American kills himself in Taiwan courtroom after drug conviction\*](#)

[\*The machines that could rid courtrooms of racism\*](#)

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## CHAPTER 9--APPENDIX A: CODE OF ETHICS FOR GEORGIA MUNICIPAL COURT CLERKS

A profession has an obligation to state its basic values and ethical standards for guiding the conduct of its practitioners. Indeed, an ethical code of conduct is one of several defining characteristics of a profession. Properly drafted ethical codes articulate general values, principles, and standards to guide the decision-making and conduct of practitioners in paradigm professions at the top end of the spectrum and in occupations aspiring to become developing professions, at the other end of the spectrum.

Municipal court clerks in Georgia may decide to aspire to have their occupation develop into an emerging profession. If so decided, this ethical code would be one practical step toward professionalizing their occupation. The code articulates the core values and ethical standards for which municipal court clerks are accountable to their courts, local governments, colleagues, the public and themselves.

Ethical codes are not collections of minute rules that infallibly prescribe in great detail how exactly practitioners of a profession should act in all conceivable particular situations. Because of their general nature, values and standards set forth in ethical codes cannot exactly fit each concrete situation in all its complexity, richness, and uniqueness. Code applications must take into account the concrete contexts, distinguishing features and facts of specific situations, in addition to potential conflicts among relevant general values and standards of ethical conduct.

This code does not rank-order general values, principles, and standards and specify which among them always more important and must override others in case of conflict. Responsible and defensible ethical decision-making in any given situation requires informed judgment in applying relevant ethical principles in their situation-specific order of priority. A litmus test for the soundness of ethical judgments would be **the decision makers' comfort level if their ethical judgments were both publicized in the local media and also scrutinized by an expert board of their peers.**

This code of ethics for municipal court clerks in Georgia conforms with and supports the core values and ethical principles enunciated in the Model Code of Conduct of the National Association for Court management. It also **complies with and mirrors those prescriptions of the American Bar Association's Model Code of Judicial Conduct and of the Georgia State Bar's Code of Judicial Conduct that are relevant to non-judicial personnel in the municipal courts of Georgia.**

### A. Preamble: Mission of Municipal Court Clerks in Georgia

The Mission of municipal court clerks in Georgia is threefold: (1) to assure the administrative efficiency of the court, **(2) to protect the court's ethical integrity, and (3) to help maintain public confidence in the court's fairness in dispensing justice impartially.**

In carrying out their mission, **Georgia municipal court clerks' primary duties include the following:**

1. Performing administrative tasks for the court (for example, assisting police officers, attorneys, city solicitor, indigent counsel, and municipal court judges with court cases, processing arrest warrants, collecting fines and court costs, accounting for daily receipts, filling closed and pending cases, submitting monthly reports and payments to the Georgia Court Clerks' Authority, **preparing and managing the court's annual budget, and so on).**

2. Providing information to and serving as liaison between the citizenry at large and the court, thereby influencing public perception of the court.
3. Balancing obligations to the public, to judges, to court staff, to city government, and to standards of judicial conduct applicable to non-judicial court employees.
4. Complying with court procedures.
5. Managing the court staff.

The mission of municipal court clerks in Georgia is based on a set of core values and ethical principles. Some of the most important among them include the following:

#### B. Core Values and Ethical Principles of Georgia Municipal Court Clerks

##### 1. Lawfulness

To uphold federal, state, and local laws.

##### 2. Propriety

To maintain high standard of personal conduct and avoid even the appearance of impropriety that can harm the reputation of and diminish public trust in the court (for example, refrain from soliciting or receiving gratuities or **favors or promises of the same by using one's position at the court, interfering in court proceedings, letting one's responsibilities at the court be compromised, oneself unduly influenced, or independence of judgment impaired, engaging in actions or outside employment in conflict with duties at the court).**

##### 3. Financial probity

To account accurately and fully for all court receipts and financial transactions.

##### 4. Integrity

To act honestly, truthfully, and above reproach.

##### 5. Impartiality

To treat all stakeholders in the court equitably, fairly, and neutrally.

##### 6. Confidentiality

To protect confidential information, never use it for personal advantage or disclose it, except for lawful reasons.

##### 7. Service

To provide courteous and timely service to all stakeholders in the court, respectful of their human dignity and personal worth.

##### 8. Competence

To know all aspects of the job and continually perfect job skills.

#### 9. Motivation

To perform job responsibilities and apply job knowledge and skills with dedication and a positive attitude.

#### 10. Information

To provide accurate, understandable, timely, and, within legal constraints, complete information to all stakeholders but without giving legal advice.

#### 11. Non-discrimination

To avoid discriminatory, biased, or prejudicial acts or words based on race, color, gender, age, religion, national origin, language, appearance, disability, marital status, sexual orientation, socio-economic status, or political affiliation.

#### 12. Non-harassment

To refrain from harassing another either sexually or non-sexually.

## CHAPTER 10: THE GEORGIA RULES OF EVIDENCE

*Note: Portions of this Chapter are courtesy of the State Bar of Georgia.*

In a historic vote on the last day of the 2011 legislative session, the Georgia Senate passed a comprehensive revised Evidence Code, patterned on the Federal Rules of Evidence. The measure, which was signed into law by the Governor, replaced the existing Georgia evidence statutes, found in Title 24 and elsewhere in the Georgia Code, **many of which were enacted in the 1860s. HB 24 was largely based on proposed legislation produced by the Bar's** Evidence Study Committee and adopted by its Board of Governors.

With the new code, Georgia joined 43 other states that have enacted evidence codes or rules based on the Federal Rules of Evidence.

It should be noted that HB 24 retains certain longstanding Georgia evidence doctrines, such as wide-**open**, **“sifting”** cross-examination, but incorporates most of the substance and the organization of the Federal Rules.

The new law became effective on January 1, 2013. A copy of the legislation, which is about 132 pages in length, is available at <http://www.legis.ga.gov/Legislation/20112012/111368.pdf>

A full summary of a 132 page statute and the complete rules of evidence is beyond the scope of this benchbook, but given the many changes from established practice, some highlights of the legislation are presented here. Every judge should read the full statute. The following summary is excerpted from the State Bar of Georgia's **analysis** of the legislation at [http://www.gabar.org/public/pdf/news/proposed\\_new\\_evidence\\_rules.pdf](http://www.gabar.org/public/pdf/news/proposed_new_evidence_rules.pdf) :

**Court Decides Preliminary Questions of Admissibility** - In Georgia, most questions regarding the admissibility of evidence are determined by the trial judge but there are a few areas in which Georgia law holds that the admissibility question is ultimately one for the jury. The new rules reflect the modern trend of leaving all admissibility questions to the trial judge. The jury, of course, continues to be the final arbiter of the weight to be accorded admitted evidence. *See*, new O.C.G.A. § 24-1-104.

**Definition of Hearsay** - The new rules use the Federal Rules, assertion-oriented definition of hearsay — hearsay is an out-of-court statement offered to prove the truth **of the matter asserted**. **Georgia's statutory definition of hearsay** is taken from Professor **Greenleaf's** 1853 treatise on evidence. Analytically, the two definitions are basically the same but the federal definition is more familiar and easier to understand and apply in a trial setting. The federal definition makes it clear that out-of-court statements offered only to establish the fact that they were made or heard, and not to prove the truth of the matter asserted, are nonhearsay. This definition meshes well with the traditional common law categories of nonhearsay - - effect on hearer, verbal act, and so forth. *See*, new O.C.G.A. §24-8-801.

**Party's Own Statements** - In Georgia, a party generally cannot offer his own out-**of court statements if they are “self-serving”**. **Under the** new rules, they are admissible even if self-serving, if they have a relevant, nonhearsay use or come within a hearsay exception. The rule that a party may not testify to his own self-serving statements has its origin in the old rule that a party was incompetent to testify on his own behalf because a party could not be trusted to tell the truth. Georgia repealed party incompetency about 120 years ago, as did everyone else, on the theory that it is better to have whatever evidence a party could give and let the jury take the self-serving nature of the evidence into account in weighing the evidence.

Admissions by Agents - **Georgia's agency admission rule has a confusing history**, due in large part to the overlap of two, inconsistent statutes - - one in the Evidence Code and one in the Title on Agency - - that both speak to the **admissibility of an agent's statements against his principal. But even the most liberal readings of these statutes limit** admissibility to statements of the agent which are authorized by the principal. Since few employees are authorized to make statements damaging to their employers, the Georgia rule is quite restrictive in effect. The new rules only require that the statement have been made during the agency relationship and that the subject matter of the **statement fall within the scope of the agent's duties.** See, new O.C.G.A. § 24-8-801(d)(2)(C) and (D).

Statements of Co-Conspirators - The new rule makes many changes. See, new O.C.G.A. § 24-8-801(d)(2)(E).

Res Gestae - The new **rules retire the term "res gestae."** While the **obscurity** of this concept may have been useful when the theory of hearsay exceptions was still growing, most jurisdictions have come to replace it with specific rules covering several classes of statements that experience (primarily with the *res gestae* concept) has proved are especially trustworthy. See, new O.C.G.A. §24-8-803 (1),(2),(3).

Business Record Exception - Current Georgia law and the new rules differ in two respects.

(1) The Georgia rule does not allow opinions in the record. The new **rules do. Thus, for example, an appraiser's report** as to the value of certain property could be admissible under the new rule but not under Georgia law. Expert opinions in the record still would have to qualify under the rules governing expert testimony. Moreover, the court can exclude business **records when "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."**

(2) With the exception of a special statute admitting medical narratives in certain civil cases, Georgia requires that a witness lay any foundation necessary to the admission of a business record. The new rules allow the use of an affidavit to lay this foundation if the proponent gives opposing parties notice and an opportunity to examine the records before trial. See, new O.C.G.A. §§24-8-803(6); 24-9-902(11).

Public Records Exception - Georgia has dozens of statutes regarding the admissibility of specific public records scattered all over the Official Code of Georgia. Together, their coverage is similar to new O.C.G.A. § 24-8-803(8)(A), admitting the routine records of any public agency. Georgia uses its general business record exception for admitting public records not specifically covered by statute. Again, this does not permit statements of opinion in the record. New O.C.G.A. § 24-8-803(8)(B) and (C) admit matters observed and reported pursuant to duty and factual findings resulting from duly authorized investigations, though these provisions are unavailable to the prosecution in criminal cases.

Learned Treatises - In Georgia, an expert may refer to treatises and other learned publications on direct but the expert may not disclose the pertinent contents of the publication. The contents may be inquired into on cross. The new rule allows relevant portions of a treatise to be read to the jury on direct if it is shown that the work is considered a reliable authority in the particular field. See, new O.C.G.A. § 24-8- 803(18).

Hearsay Exceptions Requiring the Unavailability of the Declarant

(1) The new **rules define "unavailability" more broadly than Georgia's comparable standard of "inaccessibility."** The new rules include failure of memory or an **unjustified refusal to testify as making that witness "unavailable to testify at trial."** Moreover, for several hearsay exceptions such as dying declarations and statements against interest, current Georgia law requires that the declarant be dead at the time of trial while the new rules only require that the **declarant be "unavailable."** See, new O.C.G.A. §24-8-804.

(2) In Georgia, a dying declaration is admissible only in a prosecution for homicide of the declarant. The new rules admit dying declarations in any civil case as well. See, new O.C.G.A. §24-8-804(b)(2).

(3) Statements Against Interest - In Georgia criminal cases, statements against penal interest are inadmissible. Under the new rules, a statement against penal interest would be admissible if offered by the prosecution or the defense if there exists corroborating circumstances that clearly indicate the trustworthiness of the statement. See, new O.C.G.A. §24-8-804(b)(3).

Expert Opinion Testimony - **Georgia's rules regarding expert testimony in civil cases**, passed in 2005, are based on the Federal Rules. The rules in criminal cases are based on pre-existing Georgia law. The new rules on expert testimony would apply in both civil and criminal cases. Comparing the new rules to traditional Georgia law (still applied in criminal cases) there are two major differences.

(1) Georgia law allows an expert to base an opinion on inadmissible hearsay but the parameters are unclear. Georgia does not require that the hearsay on which the expert relied be of a type reasonably relied upon by experts in the field. **Moreover, it is unclear if an expert's opinion can be based entirely on inadmissible hearsay. Finally, it is unclear** if and when an expert may disclose inadmissible hearsay on which the expert relied. The new rules allow an expert to base his opinion on any facts or data, whether admitted or not, if they are of a type reasonably relied upon by experts in the particular field. An expert may not disclose inadmissible hearsay on which the expert relied in forming an opinion unless the court finds that the probative value of disclosing the hearsay in order to assist the jury in **understanding the expert's opinion substantially outweighs the unfair prejudice to the opposing party.** See, new O.C.G.A. § 24-7-703.

(2) **Georgia's rules regarding** the role of the trial judge in reviewing and excluding unreliable scientific testimony in criminal cases are unclear. Some cases suggest that expert evidence must be based on scientific theories or principles that have reached a stage of scientific certainty. Other cases limit this requirement to scientific tests and procedures, allowing expert testimony based on novel or controversial scientific theories to go to the jury without any screening by the trial court for scientific reliability. In civil cases, the courts are to apply Federal Rules 702 and *Daubert* to such issues. The new rules would apply the same principles to criminal and civil cases. The trial court would have a gatekeeping role designed to exclude expert testimony that is not based on reliable principles or methods or is not supported by sufficient data or is the product of unreliable methodology. See, new O.C.G.A. § 24-7-702.

Character Evidence - Existing Georgia law and the new rules are quite similar. Both generally exclude character evidence to prove that a person acted in conformity therewith and recognize the same exceptions to this general rule. There are, however, a few changes. When character evidence is admissible, the Georgia Code allows reputation testimony, but not opinion testimony. The new **rules allow both. As one Georgia court wrote, "[I]t is an evidentiary anomaly that in proving general moral character [Georgia] law prefers hearsay, rumor, and gossip, to personal knowledge of the witness."** See, new O.C.G.A. §§ 24-4-405, 24-6-608.

Under both existing Georgia practice and the new rules, a criminal defendant has the right to present evidence of his own good character. The State may not offer **evidence of the accused's character except in rebuttal. In Georgia,** any evidence of the **accused's good character opens the door to any evidence the state might have, no matter how broad, of the defendant's bad character. The door is completely open or completely closed.** The new rules open the door only to the extent relevant in rebuttal. An accused charged with larceny, for example, might present evidence of his general character as law abiding or of a specific trait such as honesty because both are relevant to answer the crime charged. If the accused presents evidence that he is law abiding, the door is wide open for rebuttal. But if the

accused limits his character evidence to his honesty, on the other hand, the state is correspondingly limited in rebuttal. *See*, new O.C.G.A. § 24-4-404. **Georgia's exception for independent crimes and acts, the "similar transaction rule," has become quite expansive and includes an exception for proving "bent of mind," a category recognized by no other American jurisdiction.** The new rule is based on Federal Rule 404(b) and should bring Georgia practice more in line with how this issue is handled in the rest of the country. Many Georgia cases have urged a careful balancing of probative value and unfair prejudice in the consideration of similar transaction evidence but one Georgia Supreme Court case states that such balancing is not necessary. The new rules clarify that the trial court should engage in this balancing.

Use of Character Evidence to Impeach a Witness - Two major differences:

(1) Reputation testimony. Under Georgia law, one can attack or bolster the credibility of a witness with reputation **evidence as to the witness' general character. Only "general" character**, not character for a specific trait such as veracity, is allowed. General bad character evidence is not admitted against a criminal defendant, even if he testifies, unless he puts his character in issue. Under the new rules, a witness' **credibility may be attacked with reputation or opinion evidence specific to his veracity.** General good or bad character evidence is not allowed. A criminal defendant is not exempted from this rule if he testifies. *See*, new O.C.G.A. §§ 24-6-608, 24-4-403.

(2) Specific Instances of Conduct. Both current Georgia law and the new rules allow raising specific instances of conduct on cross-examination of a character witness **to test the extent and foundation of the witness' knowledge.** The major difference is that under current practice, the witness testifies to general character and thus the cross-examination can raise any conduct that tests that broad assertion. The new rules limit the direct examination to evidence regarding veracity and thus any specific instances of conduct raised on cross are limited to those that are probative of the **subject's veracity.** *See*, new O.C.G.A. § 24-6-608.

Current Georgia law does not allow a party to impeach a witness by asking the witness on cross-examination about instances, unrelated to the case, in which the witness has acted untruthfully. The new rules allow this inquiry, **subject to the court's discretion.** *See*, new O.C.G.A. § 24-6-608(b).

Use of Prior Convictions to Impeach - The Criminal Justice Act of 2005 revamped the rules for impeaching witnesses, including the defendant in a criminal case, with that **witness' prior convictions.** *See*, current O.C.G.A. § 24-9-84.1. These changes were generally based on Federal Rule 609 and are carried forward in this proposal with minor changes to improve clarity. *See*, new O.C.G.A. § 24-6-609.

Prior Inconsistent Statements - Georgia follows the rule of **Queen Caroline's case**, requiring that a witness be shown his prior statement before he can be impeached upon it. The new rules do not require this foundation. It is only necessary under the new rules that the witness have an opportunity to explain or deny the statement. In practice, this means the prior statement must be introduced on cross-examination of the declarant.

Competency of Juror to Impeach Verdict - In Georgia, a juror is competent only to sustain, never to impeach, a verdict. An exception for external influences exists in criminal cases, but not in civil cases. The new rules make the juror incompetent to sustain or impeach a verdict but provide an exception for evidence of external information improperly brought to bear upon any juror in any case, civil or criminal. *See*, new O.C.G.A. § 24-6-606(b).

Authentication and Identification - Existing Georgia law and the new rules are consistent, though the new rules are broader in some areas, such as identification of parties to a phone conversation and self-authentication of

commercial paper, notarized documents, etc. The new rules pull together all authentication rules into one, clear set. See, new O.C.G.A. § 24-9-901, 24-9-902.

Best Evidence Rule - **Georgia's best evidence rule** consists mainly of 19th Century statutes. **Georgia's rule, for example, does not apply to photos or videos but only writings.** The new rules apply to all forms of recordation. Georgia requires that in most cases in which an writing must be produced, the proponent must produce the original or else account for why the original cannot be produced before being allowed to use a copy. The new rules allow the use of copies unless the opponent cites specific reasons why the court should insist on production of the original. See, new O.C.G.A. §24-10-1001 through 24-10-1008.

Exclusion of Evidence Because of Prejudice, Confusion, or Waste of Time.

**Although Georgia cases have recognized the trial court's authority to balance the** probative value of the evidence against its unfairly prejudicial effect, the cases are inconsistent on the **standard and scope of the trial court's** authority. The new rules give the trial court discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or undue delay. This standard applies to all evidence except where specific evidence rules expressly set a different standard. See, new O.C.G.A. §24-4-403.

Rape Victim Shield Law. **Although the policy behind Georgia's current rape shield law** and the new rule are the same, there are several differences in coverage and application. See, new O.C.G.A. § 24-4-412.

(1) The new rule expressly applies to all cases in which the criminal defendant is charged with a sexual offense.

(2) When the defendant claims consent as a defense, the Georgia rule allows evidence **of the victim's reputation,** past boyfriends, and details of past sexual experiences. The new rule limits the evidence to specific instances of conduct between the victim **and the accused, excluding any other evidence regarding the victim's past sexual** behavior.

(3) The new rule has a provision admitting evidence that another person was the source of semen, injury, pregnancy, or other physical or psychological evidence of the offense. Existing Georgia law has no such provision (though Georgia case law has recognized such an exception).

Use of plea bargain discussions. The new rules bar the use of plea bargain discussions with the prosecution and colloquies with the court concerning a plea agreement or the voluntariness of a guilty plea. Georgia courts may exclude a **confession as involuntary if it was induced "by the slightest hope of benefit."** Georgia courts do not apply current O.C.G.A. § 24-3-37 (**excluding statements made "with a view to a compromise"**) to criminal cases. **The main purpose of the new rules' broad** protection of plea discussions is to encourage responsible plea bargaining. This is consistent with current Georgia practice. (See, e.g., Unif. Sup. Ct. Rule 33.6 -**"Consideration of Plea in Final Disposition"**). See, new O.C.G.A. § 24-4-410.

Offers to Compromise - Settlement Negotiations - Georgia law and the new rules are substantially similar though the new rules are simpler in two respects. (1) Georgia courts have **made some arduous distinctions between "offers to settle" and "offers to compromise."** The new rules simply require that liability or damages be in dispute. (2) **Georgia has struggled with "collateral admissions"** - - statements made in the course of presenting an offer to compromise but not themselves made with a view to a compromise. The new rules cover such statements if they are part of the settlement negotiations or a mediation. See, new O.C.G.A. § 24-4-408.

Subsequent Remedial Measures - Existing Georgia law and the new rule share the same underlying principle --- evidence of subsequent remedial measures is generally inadmissible to prove negligence. However, Georgia cases suggest that the rule does not apply in product liability cases. The new rule would apply in such cases. See, new O.C.G.A. § 24-4-407.

Habit Routine Practice - Georgia law has slowly recognized the admissibility of evidence of habit evidence but it **generally does not allow a third party to testify to another's habit.** The new rule has no such restriction. If adequate foundation is laid showing how the witness would be familiar with the subject's habit or routine, the witness may testify to it. See, new O.C.G.A. § 24-4-406.

Refreshing Recollection - Under current Georgia law in criminal cases, a party may ask to examine any materials a witness has reviewed since the trial began to refresh his recollection and prepare his testimony for trial. The new rules extend this right to **all cases and provide that when the court "in its discretion determines it is necessary in the interests of justice," the court may allow** the opposing party to examine any documents used by the witness to refresh his recollection before he testified, without any time limit. The purpose is to facilitate inquiry into the relevant issue of how much of **the witness' testimony on direct is based on his personal knowledge and memory and** how much is based on information supplied by others. See, new O.C.G.A. § 24-6- 612.

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# CHAPTER 11: SEARCHES AND WARRANTS

## 11.1 SEARCHES AND WARRANTS

### GENERAL NOTE

A complete discussion of the rules for searches, legal (and illegal) stops, search warrants and arrest warrants could fill several books. This chapter is designed to address only a few basics. The basic rules for searches lie in the Fourth Amendment to the US Constitution:

*“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”*

Section 1 Paragraph XIII of the Georgia Constitution contains the same language:

*“The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.”*

In *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d1081 (1961), the Supreme Court ruled that the Fourth Amendment applies to the states by way of the Due Process Clause of the Fourteenth Amendment.

*Mapp* also discusses the exclusionary rule, which means that, in most cases, illegal seized evidence will be inadmissible in court. Additionally where evidence that falls within the scope of the exclusionary rule led law enforcement to other evidence, which they would not otherwise have located, then the exclusionary rule applies to the related evidence found subsequent to the excluded evidence as well. Such subsequent evidence has taken on the name of “fruit of the poisonous tree.”

However not all illegally seized evidence is excluded at trial. The exclusionary rule is not triggered when courthouse errors lead police officers to mistakenly believe that they have a valid search warrant, because excluding the evidence would not deter police officers from violating the law in the future. See *Arizona v. Evans*, 541 U.S. 1115 S.Ct. 1185, 131 L.Ed.2d 34 (1995).

Only judges may issue search warrants. To obtain a warrant, law enforcement officers must show that there is probable cause to believe a search is justified. Officers must support this showing with sworn statements (Affidavits), and must describe in particularity the place they will search and the items they will seize. Judges must consider the totality of the circumstances when deciding whether or not to issue the warrant. When issuing a search warrant, the judge may restrict the when and how the police may conduct the search. The Fourth Amendment does not require officers seeking a warrant to show that the people or places to be searched committed any crime. Rather, they merely need to show probable cause that the sought-after evidence is there. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978), where the Supreme Court allowed police to search a student newspaper, where the newspaper was not implicated in any criminal activity but police suspected it had photographic evidence of the identities of demonstrators who assaulted police officers.

When conducting a search, police may only search the places and people listed on their search warrant, and may only search for the sought-after evidence. Accordingly, officers may only search places where they might reasonably find the evidence. For example, officers searching for a rifle may not look in a small jewelry box.

## 11.2 PROBABLE CAUSE

The Fourth Amendment requires probable cause to believe that the search will uncover criminal activity or illegal contraband. In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Supreme Court stated that probable cause to search is a flexible, common-sense standard. See also *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) which defines probable cause as a "substantial chance" or "fair probability" of criminal activity. The *Oxford Companion to American Law* defines probable cause as "information sufficient to warrant a prudent person's belief that the wanted individual had committed a crime (for an arrest warrant) or that evidence of a crime or contraband would be found in a search (for a search warrant)."

## 11.3 MOTIONS TO SUPPRESS AND MOTIONS IN LIMINE

The main time a Court will be concerned with the validity of a search will be in a Defendant files a motion to suppress evidence or objects to admission of a statement.

As a general rule, a motion should be filed prior to written entry of plea. *Sartin v. State*, 201 Ga. App. 612, 613(2), 411 S.E.2d 582 (1991).

It also generally must be made before Defendant announces ready for trial. *Highfield v. State*, 198 Ga. App. 530, 402 S.E.2d 125 (1991).

Motions must be written in most cases and the failure to file a written motion waives a later objection. *Cranford v. State*, 275 Ga. App. 474, 621 S.E.2d 470 (2005). Oral motions may be allowed at trial where a defendant did not know of the existence of the search prior to trial. *Rucker v. State*, 250 Ga. 371, 297 S.E.2d 481 (1982).

**"Only tangible physical evidence is subject to motions to suppress. Testimony is outside the scope of a motion to suppress and should be objected to on the trial."** *Shaw v. State*, 247 Ga. App. 867, 869 (1), 545 S.E.2d 399 (2001). See *Brundige v. State*, 291 Ga. 677, 735 S.E.2d 583 (2012) for an interesting discussion of what is, and is not tangible evidence ("anomalous heat loss" is not tangible evidence.) In addition to oral objections to testimony, a motion in limine may be used as to testimony. *Maxwell v. State*, 285 Ga. App. 685, 647 S.E.2d 374 (2007).

For a discussion of what a motion to suppress should contain see *Lavelle v. State*, 250 Ga. 224, 297 S.E.2d 234 (1982) (warrantless search), *Hill v. State*, 222 Ga. App. 839 (1996) (warrantless search), *Cadle v. State*, 131 Ga. App. 175, 205 S.E.2d 529 (1974) (warrant).

A Court must determine if a Defendant has standing to suppress a search. Under *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), a defendant has standing to object to the admission of unconstitutionally seized evidence only if such seizure violated his own Fourth Amendment rights; a defendant may not assert another person's rights. *Jones v. State*, 292 Ga. 656, 740 S.E.2d 590 (Ga. 2013) held that a defendant lacked standing to

challenge the search of his own gym bag at a friend's apartment because he never articulated a possessory interest in the bag. See also *Jackson v. State*, 243 Ga. App. 330, 533 S.E.2d 433 (2000).

A Court also should determine if the Defendant has a legitimate expectation of privacy as to the area searched. In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court ruled that the amendment's protections do not apply when the searched party lacks a "reasonable expectation of privacy." Also see *Keishian v. State*, 202 Ga. App. 718, 415 S.E.2d 324 (1992), *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2558 (1980), *U.S. v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (dealing with vehicle searches) and *Migliore v. State*, 240 Ga. App. 783, 525 S.E.2d 166 (1999) (searches of clothes).

**An initial statement by a Defendant that "it's not mine" even if soon recanted is common and it will be grounds to deny a motion to suppress.** See *Ledford v. State*, 247 Ga. App. 412, 543 S.E.2d 107 (2000).

In *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), the U.S. Supreme Court held that evidence illegally found without a search warrant is admissible if the same evidence is later found and legally seized based on information independent of the illegal search.

In *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419 (2011) the court held that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. In other words, if a court decision after the date of the search was violated changes Fourth Amendment law, it may be ignored for purposes of exclusion of evidence.

## 11.4 PROBLEMS WITH SEARCH WARRANTS

Searches with a search warrant are presumed valid, but evidence found in such a search can be subject to suppression for many reasons. The most common reasons include:

1. Failure to swear in the affiant and the presentation to the judge of testimony and evidence not under oath. The way to avoid this is simple; swear in the officer or affiant before even looking at his affidavit or asking him anything, and make sure that the affidavit is detailed and contains all the facts orally presented
2. Defects in the evidentiary basis presented to the judge (in other words, be sure that the information in the affidavit is accurate and complete)
3. Errors and defects in the descriptions and language in the affidavit and warrant (such as a wrong or missing apartment number or wrong VIN) But see *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 n.6, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986), rejecting the defendant's assertion, based on *Heller*, that only a single copy rather than all copies of allegedly obscene movies should have been seized pursuant to warrant. Also, *Norton v. State*, 320 Ga. App. 327, 739 S.E.2d 782 (2013) (warrant that should have said methamphetamine instead of marijuana was a mere typographical error; motion to suppress denied)
4. Lack of actual probable cause
5. Problems with the execution of the warrant, such as no-knock clauses and exceeding the scope of the warrant

6. Imprecise language (such as “seizing all illegal objects found” rather than specifics)

## 11.5 GOOD FAITH MISTAKES

Federal courts have held that the Fourth Amendment does not require suppression when a warrant is issued and executed in good faith, but Georgia law requires suppression. Compare *Gary v. State*, 262 Ga. 573, 422 S.E.2d 426 (1992) with *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (evidence seized by officers relying in good faith on a warrant was still admissible, although the warrant was later found to be defective) and see also; O.C.G.A. §17-5-30 (mandating suppression). Bear in mind that Georgia case law is more restrictive in favor of suppression than federal law. See also *Davis v. State*, 266 Ga. 212, 465 S.E.2d 438 (1996). But, compare *Norton v. State*, 320 Ga. App. 327, 739 S.E.2d 782 (2013) (warrant that should have said methamphetamine instead of marijuana was a mere typographical error; motion to suppress denied). See also; *State v. New*, 331 Ga. App. 139, 770 S.E.2d 239 (March 12, 2015) (trial court properly granted motion to suppress; search based on probation Fourth Amendment waiver was invalid as defendant’s probation had been terminated, notwithstanding officers’ good faith belief that defendant was still on probation. O.C.G.A. § 17-5-30, Georgia’s exclusionary rule, contains no good-faith exception.)

The rule for a traffic stop is apparently different. “Where an officer’s honest belief that a traffic violation has actually occurred proves to be incorrect, the officer’s mistaken-but-honest belief may nevertheless demonstrate the existence of at least an articulable suspicion and reasonable grounds for the stop. In that situation, we must then decide whether the officer’s motives and actions at the time and under all the circumstances, including the nature of the officer’s mistake, if any, were **reasonable and not arbitrary or harassing.**” *Camacho v. State*, 292 Ga. App. 120, 663 S.E.2d 364 (2008). See also, *Dixon v. State*, 271 Ga. App. 199, 609 S.E.2d 148 (2005) (officer had a mistaken belief that Georgia’s dim your headlight law applied to a divided highway).

In *Heien v. North Carolina*, 574 U.S. \_\_\_, 135 S. Ct. 530, 190 L.Ed.2d 475, 2014 WL 7010684 (2014), it was held that a police officer’s reasonable mistake of law can provide the individualized suspicion required by the Fourth Amendment to the United States Constitution to justify a traffic stop. The U.S. Supreme Court ruled that a police officer in North Carolina lawfully stopped a car with a faulty brake light - and then found a stash of cocaine in the vehicle - even though driving with one working light is not illegal in the state. In an 8-1 decision, the court ruled against Nicholas Heien, who had argued that the sandwich bag of cocaine found in the April 2009 search should not have been allowed as evidence when he was charged with drug trafficking because the Surry County Sheriff’s Department sergeant had no valid reason to stop the car. Heien, who consented to the search of the car after he was stopped, pleaded guilty and was given a maximum prison term of two years. Chief Justice John Roberts wrote on behalf of the court that the officer’s mistake in believing that it was illegal to drive with one working light was not sufficient to violate Heien’s right to be protected from an unlawful search under the U.S. Constitution’s Fourth Amendment.

Under court precedent, a vehicle stop is valid only if the officer has “reasonable suspicion” that the driver broke a law. The court concluded in the North Carolina case that “reasonable mistakes of law” like those made by the officer in question do not make a search invalid.

## 11.6 WARRANTLESS SEARCHES IN GENERAL

Not all searches require a warrant. But the general rule is that warrantless searches, absent exigent circumstances, are unreasonable. The general rule of law governing scrutiny of warrantless searches was stated by the Georgia Supreme Court in *State v. Slaughter*, 252 Ga. 435, 436, 315 S.E.2d 865 (1984):

“Searches are conducted either with or without a search warrant. **‘The most basic constitutional rule in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’ The exceptions are ‘jealously and carefully drawn,’ and there must be ‘a showing by those who seek ... that the exigencies of the situation made that course imperative.’** “[T]he burden is on those seeking the exemption to show the need for it.” *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) (citations omitted). Because the burden is on those officers who conduct a search without a warrant to show that the search was conducted pursuant to an exception to the Fourth Amendment warrant requirement, it can be said that a search without a warrant is presumed to be invalid and **“the burden is on the state to show that the warrantless search was valid.”** *Mincey v. Arizona*, 437 U.S. 385, 390-391, 98 S.Ct. 2408, 2412-2413, 57 L.Ed.2d 290 (1978); *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948). **“Once a defendant files a motion to suppress alleging an illegal search and seizure, the state bears the burden of proving that the search is lawful.”** *State v. Kuhnhausen*, 289 Ga. App. 489, 657 S.E.2d 592 (2008), citing *State v. King*, 287 Ga. App. 680, 652 S.E.2d 574 (2007).

*Evans v. State*, 318 Ga. App. 706, 734 S.E.2d 527 (2012) contains an excellent discussion of warrantless searches for probationers and states that the statutory notice probationers have of limitations on their rights **“diminishes their expectation of privacy.”** In *Evans*, drugs found in a warrantless search by a probation officer acting on a tip given to police by an anonymous informer were ruled admissible without a warrant even absent probable cause. The court referenced a standard of **“reasonable cause.”**

## 11.7 PAT DOWNS: WARRANTLESS SEARCH AND FRISK

Under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) law enforcement officers are permitted to conduct a limited warrantless search on a level of suspicion less than probable cause under certain circumstances. In *Terry*, the Supreme Court ruled that when a police officer witnesses “unusual conduct” that leads that officer to reasonably believe “that criminal activity may be afoot”, that the suspicious person has a weapon and that the person is presently dangerous to the officer or others, the officer may conduct a “pat-down search” (or “frisk”) to determine whether the person is carrying a weapon. To conduct a frisk, officers must be able to point to specific and articulatory facts which, taken together with rational inferences from those facts, reasonably warrant their actions. A vague hunch is insufficient. Such a search must be temporary and questioning must be limited to the purpose of the stop.

A Terry search need not be limited to a stop and frisk of the person, but may extend as well to a protective search of the passenger compartment of a car if an officer possesses “a reasonable belief, based on specific and articulable facts . . . that the suspect is dangerous and . . . may gain immediate control of weapons.” *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (suspect appeared to be under the influence of drugs, officer spied hunting knife exposed on floor of front seat and searched remainder of passenger compartment). Similar reasoning has been applied to uphold a “protective sweep” of a home in which an arrest is made if arresting officers have a reasonable belief that the area swept may harbor another individual posing a danger to the officers or to others. *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). See also *State v. Snead* 326 Ga. App. 345, 756 S.E.2d 581 (2014) (okay to open car door to secure weapon after Defendant was already removed from car).

In *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), a narrower view was asserted, the primacy of warrants was emphasized, and a standard by which the scope of searches pursuant to arrest could be ascertained was set out:

“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting

officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'--construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence... There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs--or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant."

In *Lewis v. State*, 307 Ga. App. 593, 705 S.E.2d 693 (2011) the court upheld a pat down in a high crime area known for armed robberies. But compare *Daniels v. State*, 307 Ga. App. 216, 704 S.E.2d 466 (2010) where there was no cause for a pat down. And see, *Williams v. State*, 318 Ga. App. 715, 734 S.E.2d 535 (2012) (cocaine suppressed; officer had no right to demand defendant remove an item from his pocket that the officer could not identify in a pat down).

## 11.8 MOTOR VEHICLE CHECKPOINTS, DRUG DOGS AND RANDOM SEARCHES

Checkpoints may briefly detain motorists. In *Michigan v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), the Supreme Court allowed random sobriety checkpoints to locate drunk drivers. In *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), the Supreme Court allowed discretionless immigration checkpoints. See also *Jacobs v. State*, 308 Ga. App. 117, 706 S.E.2d 737 (2011).

**Random checks for driver's license and insurance** have been upheld in many, but not all cases. Drug sniff cases have proven more problematic.

*Michigan v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), (upholding a sobriety checkpoint at which all motorists are briefly stopped for preliminary questioning and observation for signs of intoxication). But see *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), in which the Supreme Court stated that, absent articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile is unreasonable. In *Prouse*, the Court cautioned that it was not precluding the States from developing methods for spotchecks, such as questioning all traffic at roadblocks, that involve less intrusion or that do not involve unconstrained exercise of discretion. 440 U.S. at 663.

The use of a drug dog to smell exterior of car during a traffic stop **and "the ordinary inquiries incident to such a stop"** is not a search and need not be supported by articulable suspicion of drugs. *Illinois v. Caballes*, 543 U.S. 405 (2005). See also, *Florida v. Harris*, 133 S. Ct. 1050, 185 L. Ed. 2d 61, 81 USLW 4081 (2013) and *Wilson v. State*, 318 Ga. App. 59, 733 S.E.2d 365 (2012) (detection dog walked around outside of vehicle and smelled marijuana).

*Rodriguez v. United States*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1609, 191 L.Ed.2d 492, 2015 WL 1780927 (2015) greatly narrowed dog sniff traffic stops. It held that a traffic stop can't be prolonged for "seven or eight" minutes for drug dog sniff absent consent from driver or probable cause. The Fourth Amendment does not tolerate such a "de minimis" seizure beyond that necessary to conduct the traffic stop, and a drug dog sniff is not part of such mission. In this case an officer stopped defendant and gave him a written warning for driving on the shoulder of the highway. **The driver refused the officer's request asking "for permission to walk his dog around Rodriguez's**

vehicle. Rodriguez said no." The officer detained defendant anyway, awaiting arrival of back-up before conducting free-air sniff around exterior of car, which revealed presence of drugs in car.

In *Duncan v. State*, 331 Ga. App. 254, 770 S.E.2d 329 (2015). In a prosecution for speeding and methamphetamine possession, the trial court erred in denying motion to suppress. After giving Duncan a speeding citation and returning her license, the officer asked "a series of questions about her probation, including why she was on probation, what were the conditions of her probation, and whether she was reporting in a timely manner. Duncan informed the officer that she was on probation for possession of methamphetamine and driving under the influence. Then, the officer asked Duncan whether she was using drugs and if she had any drugs in the car. Duncan, who appeared very nervous and had labored breathing, responded that she did not have any drugs in the car. The officer then asked for and received Duncan's consent to search the car," where he found "a small amount of methamphetamine in a glass pipe in a zippered pouch on the passenger seat." "The State argues that the overall length of the detention - by the officer's estimate, no more than 12 minutes - was reasonable. However, in assessing the reasonableness of an investigative stop, no 'bright-line' or rigid time limitation is imposed."

See also; *Bodiford v. State*, 328 Ga. App. 258, 761 S.E.2d 818 (July 14, 2014). (drug prosecution: trial court erred by denying motion to suppress. Officer improperly continued detention beyond articulable suspicion for stop. During traffic stop, officer didn't radio for license check until he had already written warning citation, six-and-one-half minutes after stop began.) *Matthews v. State*, 330 Ga. App. 53, 766 S.E.2d 515 (2014). (Cocaine conviction reversed: trial court erred by denying motion to suppress, based on prolonged detention without articulable suspicion. Officer expanded traffic stop into drug investigation "because, among other things, the officer observed that Matthews was extremely nervous, was driving a borrowed vehicle, and was traveling out of state but had no luggage. But this court has held that similar facts did not provide 'a particularized and objective basis for suspecting that [a driver] was, or was about to be, engaged in criminal activity.')

**However one may still have more protection at home than in one's vehicle.** In *Florida v. Jardines*, 133 S. Ct. 1409, 185 L. Ed. 2d 495, 81 USLW 4209 (2013) the U.S. Supreme Court said it was an illegal search when an officer took a drug dog to the front door of a home to sniff the air and obtain cause to get a search warrant based on what the dog seemed to sniff.

What about random searches other than motor vehicles? See *Gaioni v. Folmar*, 460 F. Supp. 10 (MD Alabama 1978) (random warrantless searches of patrons at a rock concert for drugs violates Fourth Amendment).

## 11.9 CONSENT SEARCHES

Fourth Amendment rights may be waived, and one may consent to search of his person or premises. *Amos v. United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654 (1921); *Zap v. United States*, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946); *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

The burden is on the prosecution to prove the voluntariness of the consent. *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

The fact that police state that without consent they will obtain search warrant does not generally render consent invalid. *Butler v. State*, 272 Ga. App.557, 612 S.E.2d 865 (2005) (room in house) and *Code v. State*, 234 Ga. 90, 93, 214 S.E.2d 873 (1975) (automobile). But that is not always the case, especially in DUI implied consent cases. *Collier v. State*, 266 Ga. App. 762, 612 S.E.2d 281 (2004), **aff'd 279 Ga. 316 (2005)**( threatening to get warrant invalidates implied consent warning).

One occupant of the premises can give consent for a search even if co-occupants do not. This is a complex area that is fact dependent as to whether an occupant is an owner or a guest, and whether he has access and authority over areas searched. See *Niles v. State*, 325 Ga. App. 621, 754 S.E.2d 406 (2014), and *Fernandez v. California*, 134 S. Ct. 1126, 188 L.Ed.2d 25, 82 USLW 4102 (2014). See also, *Payton v. State*, 326 Ga. App. 846, 755 S.E.2d 261 (2014).

The type, duration, and area for a search are limited by the nature of the permission granted. *Shuler v. State*, 282 Ga. App. 706, 639 SE2d 623 (2006). But should additional probable cause occur during the consent search, the search may extend past the scope of the consent. *Hayes v. State*, 292 Ga. App. 724, 665 S.E.2d 422 (2008).

Consent can be withdrawn during a search. Withdrawal of consent does not by itself provide probable cause for a lengthy detention of defendant and additional search. *Montero v. State*, 245 Ga. App. 181, 537 S.E.2d 429 (2000) (defendant refused search of taped package and was improperly held pending arrival of drug dog).

Consent may not be procured in an improperly extended traffic stop. See *Duncan v. State*, 331 Ga. App. 254, 770 S.E.2d 329 (March 18, 2015).

## 11.10 OPEN FIELDS AND PLAIN VIEW

In *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) the Court held that the Fourth Amendment did not protect "open fields" and that, therefore, police searches in such areas as pastures, wooded areas, open water, and vacant lots need not comply with the requirements of warrants and probable cause. See also *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (approving warrantless intrusion past no trespassing signs and around locked gate, to view field not visible from outside property). See also *Geiger v. State*, 295 Ga. 190, 758 S.E.2d 808 (2014) (open field behind house but near shed in yard can be searched without warrant) and *California v. Ciraolo*, 476 U.S. 207, 213(II), 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

Somewhat similar is the rule that objects falling in the "plain view" of an officer who has a right to be in the position to have that view are subject to seizure without a warrant. *Washington v. Chrisman*, 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982) (officer lawfully in dorm room may seize marijuana seeds and pipe in open view); *United States v. Santana*, 427 U.S. 38, 49 L.Ed.2d 300, 96 S.Ct. 2406 (1976) ("plain view" justification for officers to enter home to arrest after observing defendant standing in open doorway); *Harris v. United States*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968) (officer who opened door of impounded automobile and saw evidence in plain view properly seized it); *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (officers entered premises without warrant to make arrest because of exigent circumstances seized evidence in plain sight). See also; *Cupe v. State*, 327 Ga. App. 642, 760 S.E.2d 647 (2014) (officers went to defendant's home at night, investigating a nearby burglary; the victim had seen defendant acting strangely in the vicinity. Shining a light in a car parked a few feet from defendant's door, the officers saw items taken in the burglary. "We note that '[t]he use of a flashlight to see what would otherwise be in "plain view" falls within the "plain view" standard.').

The plain view doctrine is limited, however, by the probable cause requirement: officers must have probable cause to believe that items in plain view are contraband before they may search or seize them. *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) (police lawfully in apartment to investigate shooting lacked probable cause to inspect expensive stereo equipment to record serial numbers). On the other hand, trickery to create plain

view may work. *Herring v. State*, 279 Ga. App. 162, 630 S.E.2d 776 (2006) (officers used deceit to lure a person to open door and step out and then had their plain view).

**Plain view can apply to a person's pockets.** In *Ramsey v. State*, 306 Ga. App. 726, 703 S.E.2d 339 (2010) an officer saw a bulge in Defendant's watch pocket that he thought might have been a "narcotic" and the bulge felt like a narcotic. A motion to suppress was denied.

## 11.11 SEARCHES OF THOSE ON PROBATION, BOND OR PAROLE

Defendants may waive their Fourth Amendment rights as a condition of probation, bond, parole, deferred disposition or drug court order, allowing searches based upon less than probable cause (and this is not uncommon). In such cases the standard for a search is usually **“reasonable and good-faith suspicion” rather than probable cause.** *U.S. v. Knights*, 534 U.S. 112 (2001) (probation); *Reece v. State*, 257 Ga. App. 137, 570 S.E.2d 424 (2002) (probation); *Rocco v. State*, 267 Ga. App. 900, 601 S.E.2d 189 (2004) (bond); *Dean v. State*, 151 Ga. App. 847, 261 S.E.2d 759 (1979) (parole). See also *Higgins v. State*, 58 Ga. App. 480, 199 S.E. 158 (1938) where a radio call identifying a specific **suspicious vehicle and officer’s own suspicions were enough to justify** a vehicle stop, and then a subsequent search. *State v. Thackston*, 289 Ga. 412, 716 S.E.2d 517 (2011), reversing 303 Ga. App. 718 (2010) is important as to what happens when a search is challenged. The exclusionary rule does not apply in probation revocations.

## 11.12 SEARCHES ON SCHOOL PROPERTY

In *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1984) the Court set forth the principles governing searches by public school authorities. The Fourth Amendment applies to searches conducted by public school officials because “school officials act as representatives of the State, not merely as surrogates for the parents.” However, “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.” Neither the warrant requirement nor the probable cause standard is appropriate, the Court ruled. Instead, a simple reasonableness standard governs all searches of students’ persons and effects by school authorities. A search must be reasonable at its inception, i.e., there must be “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”

## 11.13 SEARCHES AT THE JAIL/SEARCHES INCIDENT TO ARREST

Searches **of prison cells by prison administrators are not limited even by a reasonableness standard.** **“The Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.”** *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). A search **of defendant’s person and property** after arrest during his jail booking does not require a warrant. *Morrison v. State*, 272 Ga. App. 34, 611 SE2d 720 (2005).

Searches of a vehicle incident to arrest are also generally valid. See *Kirkland v. State*, 316 Ga. App. 310, 728 S.E.2d 907 (2012) (cocaine found in vehicle where driver had already been arrested for marijuana in his pocket admissible) and *State v. Hargis*, 294 Ga. 818, 756 S.E.2d 529 (2014), **reversing 319 Ga, App 432 (officer could retrieve defendant’s wallet from car seat).** See also *Williams v. State*, 316 Ga. App. 821 (2012) and *Thornton v. United States*, 541 U.S. 615 (2004).

## 11.14 THE LOITERING “EXCEPTION” TO THE FOURTH AMENDMENT

O.C.G.A. §§16-11-36(b) makes failure to answer questions **about one’s ID a circumstance that creates an “alarm”** (the legislative method of creating probable cause) as a basis for arrest under loitering statute. Obviously this fact dependent situation presents opportunities for challenge by defendants.

## 11.15 INVENTORY SEARCHES

Can you search the vehicle once you arrest the occupants? Once you get the occupants out, the search, unless there is a warrant, becomes questionable. It all depends on which court is ruling.

In the case of *Arizona v. Gant*, 129 S.Ct. 1710, 173 L.Ed.2d 485, 77 USLW 4285, 556 U.S. 332 (2009) the Supreme Court held that the police can search a car following arrest only if they could have a reasonable belief that the person arrested "could have accessed his car at the time of the search" or "that evidence of the offense for which he was arrested might have been found therein." But see *Dover v. State*, 307 Ga. App. 126, 704 S.E.2d 235 (2010) holding that the impound of a vehicle and subsequent search were not unreasonable. Two years later, the same Georgia Court of Appeals, in *Capellan v. State*, 316 Ga. App. 467, 729 S.E.2d 602 (2012) rejected an inventory search for an impounded vehicle on the basis that the police department had no established policy as to how to conduct such searches. But where police have a policy on when to inventory impounded cars, the same court approved a warrantless search in *Tyre v. State*, 323 Ga. App. 37, 747 S.E.2d 106 (2013). Impound searches without a warrant have also been rejected in *Shaw v. State*, 324 Ga. App. 670, 751 S.E.2d 478 (2013).

## 11.16 AIRPORT SEARCHES

Airport searches have been held to a different standard than other searches. See *United States v. Moreno*, 475 F.2d 44 (5<sup>th</sup> Cir. 1972), cert denied 414 U.S. 840 (1973). Since the September 11, 2001 terrorist attack, challenges to airport screenings have generally been unsuccessful.

## 11.17 NO KNOCK WARRANTS

Normally, law enforcement officers executing a search warrant may not immediately force their way into a residence. Instead, they must first knock and announce their identity and intent. Then, they must wait a reasonable amount of time to allow an occupant to open the door. Only after waiting may the police force entry. Police may break the knock-and-announce rule when it is reasonable to do so. These exceptions must be determined on a case-by-case basis. For example in *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997), the Supreme Court ruled that states may not allow a blanket exception to the knock-and-announce rule for all searches in felony drug cases.

## 11.18 INEVITABLE DISCOVERY

Where a search might for other reasons be illegal, but the evidence inevitably would have been found by legal means, courts may apply the doctrine of inevitable discovery. Recent examples include *Wilder v. State*, 320 Ga. App. 497, 740 SE 2d 241 (2013) (tapes of sex acts found in briefcase), *Schweitzer v. State*, 319 Ga. App. 837, 738 S.E.2d 669 (2013) (drugs in purse) and *Foster v. State*, 321 Ga. App. 118, 741 SE 2d 240 (2013) (drugs in vehicle). See also *Teal v. State*, 282 Ga. 319, 647 S.E.2d 15 (2007) and *State v. Folk*, 238 Ga. App. 206, 521 S.E.2d 194 (1999).

## 11.19 HOT PURSUIT

Searches that happen while police are in hot pursuit and follow someone onto private property are legal without a warrant. See *Ahmed v. State*, 322 Ga. App. 154, 744 S.E.2d 345 (2013). But compare, *Mitchell v. State*, 323 Ga. App. 739, 747 S.E.2d 900 (2013) where a search **two hours after police had been searching for a suspect was not still "hot pursuit."**

See also, *State v. Walker*, 295 Ga. 888, 764 S.E.2d 804 (2014) reversing 323 Ga. App. 558, 747 S.E.2d 51 (July 12, 2013); trial court properly denied motion to suppress, as defendant wasn't seized by officer's order to take his hands out of his pockets, given that defendant then turned and ran instead of complying with the officer's order. Defendant sought suppression of items he threw down as he ran. The Supreme Court held that the Court of Appeals "went astray" in finding that the officer's order constituted a seizure.

## 11.20 ELECTRONIC SEARCHES

*Riley v. California*, \_ U.S. \_ , 134 S.Ct. 2473, 189 L.Ed.2d 430, 2014 WL 2864483 (2014) is a key case. The Court unanimously held that police may not conduct warrantless searches of cell phones incident to arrest absent exigent circumstances; distinguishing *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). *Robinson* authorized police to search all containers on an arrestee's person, in that case, a cigarette pack found to contain heroin. Defendant was arrested and cell phones were searched incident to arrest, leading to the discovery of incriminating photographs, call records and other information. The court held that searches of cell phones serve neither of the two main purposes for searches incident to arrest recognized by the Court: "the need to disarm and **to discover evidence... Digital data stored on a cell phone cannot itself be used as a weapon to harm** an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon-say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one."

A court will not suppress a non-Defendant's text messages based on Defendant's motion. *Hampton v. State*, 295 Ga. 665, 763 S.E.2d 467 (2014). (Defendant had no federal or state statutory right to suppression of text messages from cell phone not shown to be his.) See also; *United States v. Booker*, 2013 WL 2903562 (N.D.Ga., 2013).

In *Ross v. State*, 296 Ga. 636, 769 S.E.2d 43 (February 2, 2015) the trial court properly denied motion to suppress "Sprint cell phone 'tower dump' records that police obtained by court order pursuant to federal law, 18 U.S.C. § 2703(d)." Tower dump records were used in this murder case to show telephone contact between Ross and Coleman and were owned by Sprint. To the extent federal law prohibited release of the records, the remedy is a civil action pursuant to 18 USC § 2707, not suppression.

## 11.21 EXIGENT CIRCUMSTANCES

In *Parker v. State*, 296 Ga. 199, 766 S.E.2d 60 (November 17, 2014), a murder case, the trial court properly denied **Parker's** motion to suppress evidence obtained by officers "by peering through a crack in the locked doors of a detached garage at the shared marital residence while conducting a safety/wellness check on the victim... (The intrusion) was minimal and that under the facts presented it was reasonable for the deputies to attempt to ascertain whether the victim was home and in need of assistance but unable to come to the door... Moreover, once the deputies determined the victim's vehicle was not on the premises and it appeared no one was home, they concluded their safety/wellness check and left."

## 11.22 CHECKLIST FOR A VALID SEARCH WARRANT

1. **Is affiant a Georgia certified peace officer? O.C.G.A. §17-5-20.**
  - a. **Local police officers and sheriff's deputies should be certified, but when in doubt, verify.**
2. **Does the affidavit show probable cause that a crime was committed or that illegal contraband is located at the site to be searched?**
  - a. **If not, is there additional oral testimony presented to support probable cause (if additional testimony is presented, note it in the warrant, or have the officer supplement his affidavit).**
3. **Does the affidavit appear to be based on reliable information?**
  - a. **Beware the confidential informant (CI)!**
  - b. **Does the affidavit state why the CI is reliable?**
4. **Is location of property to be searched in the correct city (or county)?**
  - a. **In other words, is it within the jurisdiction of your court? O.C.G.A. §15-6-23**
5. **Is there a clear and particular description of the person or place to be searched, and also of the person or items to be seized?**
  - a. **Make sure that unit and apartment numbers, VIN's, etc. are correct.**
6. **Did you swear in the officer?**
  - a. **Is the affidavit in writing and was it signed in front of you under oath?**
  - b. **See O.C.G.A. §17-5-21.1 if a warrant is sought by video or electronic means.**
7. **Does the affidavit contain specifics as to time and date?**
8. **Is the affidavit timely? O.C.G.A. §17-5-22 (But see Jones v. State, 289 App. 767 (2008) where a typo as to the date was not fatal)**
9. **Does the warrant show the title and identity of the Judge? O.C.G.A. §17-5-22**
10. **Was the warrant recorded on the docket? O.C.G.A. §17-5-22**
11. **Is there an extra copy signed in duplicate? O.C.G.A. §17-5-24/17-5-25 require a copy of the warrant, affidavit and exhibits to be left with the person/place searched.**

**12. Is the warrant directed to all peace officers in the state? (It can be directed to a specific officer). O.C.G.A. §17-5-23/17-5-24**

**13. Does it require execution within ten days? O.C.G.A. §17-5-25**

**14. Does it require a written return and inventory? O.C.G.A. §17-5-29**

**15. Does the affiant seek a "No Knock" or "other parties" provision?**

**a. If so, is there a clear reason stated that either is necessary?**

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## CHAPTER 12: COLLECTION OF FINES AND FEES

### 12.1: THE PROBLEM OF NON-PAYMENT OF FINES IN GENERAL

A Defendant who does not pay criminal fines poses a problem for the trial court.

Before acting as to criminal remedies, such as incarceration, a Court must make findings that there is an ability to pay, as one cannot penalize the Defendant for an actual inability to pay using jail. When one has a truly indigent Defendant, alternatives such as community service, probation and suspending fines become options.

There is another option - civil collections.

Some cities now turn over unpaid fines to collection agencies. The fact that unpaid criminal fines are non-dischargeable in bankruptcy helps, although courts must note that the automatic stay in both Chapter 7s and 13s may delay collection efforts.

### 12.2 COLLECTION FROM STATE INCOME TAX REFUNDS

2015 brings a new option for Courts, state tax refund intercepts for unpaid fines and court fees. HB1000, effective January 1, 2015 amends Title 48, relating to revenue and taxation, so as to provide for setoff debt collection against state income tax refunds for fines and fees owed to courts. The bill establishes a process by which delinquent court fines and fees can be deducted from the **debtor's state income tax refund. It allows courts to submit unpaid fine and fee data for amounts greater than \$25 to the Administrative Office of the Courts (AOC).** The AOC may then consolidate the unpaid debt information and submit it to the Georgia Department of Revenue, which will deduct the unpaid fine/fees from state income tax refunds. The Department will send the deducted funds to the AOC for distribution to the requesting court.

In 2014, the legislature passed Act 478 (House Bill 1000) which amended O.C.G.A. §§ 48-7-160 through 48-7-170 and enacted O.C.G.A. 48-7-162.1 and 48-7-165.1. The effective date is January 1, 2015. The act provides for collection of certain court fines **and fees by intercept of a defendant's state income tax refund.**

Here are the most relevant parts of the code sections:

*§48-7-162.1. (Effective January 1, 2015) Submission of debts through Administrative Office of the Courts*

*(a) Submission of debts through the Administrative Office of the Courts shall be the sole manner through which debts owed to courts may be submitted to the department for collection under this article. The Administrative Office of the Courts shall be authorized to enter into written contracts for the performance of administrative functions and duties under this article by one or more administrative entities consisting of nonprofit Georgia corporations, except for a public utility, in existence on or before January 1, 2012, whose income is exempt from federal income taxation*

pursuant to Section 115 of the Internet Revenue Code of 1986, or third party vendors approved by the department.

(b) Any claim submitted by a court through the Administrative Office of the Courts shall be subordinate to all claims submitted by claimant agencies.

§48-7-165.1. (Effective January 1, 2015) Hearing; final determination of debt

(a) (1) Except as otherwise provided in subsection (d) of this Code section, if the Administrative Office of the Courts receives written notice from the debtor contesting the setoff or the sum upon which the setoff is based within 30 days of the debtor being notified of the debt setoff, the Administrative Office of the Courts shall notify the court to whom the debt is owed that the sum due and owing shall not be disbursed pursuant to this article until the court to whom the debt is owed has granted a hearing to the debtor and obtained a final determination on the debt under this Code section and provided evidence of such final determination to the Administrative Office of the Courts. Such sum due and owing shall not be disbursed to the debtor or the court to whom the debt is owed prior to such final determination.

(2) The hearing required under this Code section shall be conducted after notice of such hearing is provided to the debtor by certified mail or personal service. When personal service is utilized, such personal service shall be made by the officers of the court designated by the judges of that court or any other officers authorized by law to serve process.

(b) (1) The officers of the court designated by the judges of that court submitting debts to the Administrative Office of the Courts shall appoint a hearing officer for the purpose of conducting hearings under this Code section. The officers of the court shall adopt appropriate procedures to govern the conducting of hearings by the hearing officer. A written or electronic copy of such procedures shall be provided to a debtor immediately upon the receipt of notice from a debtor under subsection (a) of this Code section.

(2) Issues that have been previously litigated shall not be considered at a hearing. The hearing officer shall determine whether the debt is owed to the court and the amount of the debt. Such determination shall be in writing and shall be provided to the debtor and the Administrative Office of the Courts within five days after the date the hearing is conducted.

(3) If the debtor or the court disagrees with the determination of the hearing officer, either party may appeal that determination by filing a petition in the superior court not later than ten days following the date of the hearing officer's written determination. The superior court judge shall conduct a hearing and shall render a final determination in writing and shall transmit a copy to the hearing officer, the debtor, and the Administrative Office of the Courts not later than ten days after the date of that hearing.

(4) The losing party to such proceeding as provided for in paragraph (3) of this subsection shall pay any filing fees and costs of service, except that the officers of the court designated by the judges of that court shall be authorized to waive such fees and costs. The court submitting the debt to the Administrative Office of the Courts shall be responsible for attorneys' fees of the debtor who is contesting the setoff in cases where the superior court finds in favor of the debtor.

(c) If a court submits a debt for collection under this article following final determination of the debt in accordance with this Code section and the Administrative Office of the Courts is notified by the department that no refund proceeds are available or sufficient for setoff of the entire debt, such

*claim shall remain valid until sufficient refund proceeds are available for setoff as provided in subsection (b) of Code Section 48-7-164 and are not subject to further appeal.*

## 12.3 - MORE ABOUT CIVIL COLLECTION OF FINES

Judge Gary E. Jackson of the Atlanta Municipal Court is an acknowledged expert on civil collections and he has graciously allowed materials he prepared for an ICJE seminar in 2011 to be reprinted as part of the Benchbook. Judge Jackson was a key figure in the passage of the afore-mentioned tax intercept bill. The remainder of Chapter 12, written before the tax-intercept bill was passed, is his work.

## COLLECTING DELINQUENT FINES

Gary E. Jackson, Judge, Atlanta Municipal Court  
June 23, 2011  
SAVANNAH, GEORGIA

### I. INTRODUCTION

**Before we begin today's discussion, let me note that no court** exists for revenue purposes: Courts exist to insure that the law is followed so that an orderly society is maintained. **Traffic Courts are particularly vulnerable to "revenue pressure" but as the Supreme Court** of Georgia stated, in considering parking meter cases, a parking meter ordinance **can be invalid if it is a "revenue measure and it... appear[s] that the scheme of the ordinance is such that receipts will continuously and by substantial amount exceed the cost of installation, maintenance, and regulation."** *Ashley v. Greensboro*, 206 GA. 800, 804 58 S.E.2d 815, 817 (1950) (emphasis added). Similarly radar or speed detection device cases are highly regulated to avoid a **"revenue abuse" situation**. See O.C.G.A. §40-14-2(b) (fee systems prohibited) and §40-14-11 (DDS Commissioner may investigate and suspend/revoke speed detection device; presumption of impropriety if fines **greater than 40% of law enforcement agency's budget**). **More succinctly, "the purpose of the Uniform Rules of the Road (O.C.G.A. §40-6-1 et seq.) is to promulgate the safe and expeditious movement of vehicular traffic on the highways."** *Crook v. State*, 156 GA. App. 756 275 S.E.2d 794 (1982). See also 1975 OP. Atty Gen No. 75-117.

This is not to say that we judges exist in a vacuum. We may be a separate, independent branch of government, but our budgets are created by our respective City Councils. **With today's economy, we cannot blindly proceed without** some reasonable consideration of the economics of our court.

**There are, of course, two sides to the economic equation of a Court's budget: revenues and expenses.** Today we will discuss the former only, but do not overlook the latter: there is nothing wrong with operational efficiency and if my own experiences have taught me anything, reductions in force (RIF) and cost cutting are on the budget menu annually. Expenses must be carefully monitored and constantly re-evaluated. However, we will leave that discussion for another day.

Today, we will examine only a small part of the revenue side: how to collect a delinquent fine. We are not going to discuss how much a fine should be. You are all independent Judges, vested with a great deal of discretion. Since most traffic laws in Georgia are misdemeanors, O.C.G.A. §40-13-26(a), fines can range as high as \$1,000 plus state surcharges. There are even aggravated misdemeanors that can have up to \$5,000 in fines. See, e.g., aggressive driving under O.C.G.A. §40-6-397 (see O.C.G.A. §17-10-4) and third time driving with a suspended license under O.C.G.A. §40-5-121 (up to a \$2,500 fine). Your decision on how much to fine is guided by your intelligence, training, and experience as applied to the facts of each case. What we will talk about is what a court can do if a fine is not paid. **How does a court collect a fine if a defendant does not pay?"**

## II. WHAT IS THE LEGAL STATUS OF A FINE?

When a defendant is ordered to pay a fine, that order is a judgment of the court. O.C.G.A. §9-12-10. Like any money judgment, it may or may not be collected. As I used to say, when I practiced collection law for 25 years, (and excuse me if I paraphrase our 16<sup>th</sup> President):

You can get a judgment some of the time;  
You can collect some judgments all of the time;  
You cannot collect every judgment all of the time.

When I was given a judgment to collect by a client or another attorney, the first thing I had to determine was if the judgment was valid. Did the originating court have proper jurisdiction? In collecting a fine, this should not be an issue because in most cases the defendant appeared in open court, and (hopefully) properly waived her right to an attorney (if the defendant was pro se), a jury trial (in traffic, simple marijuana, shoplifting, etc. cases), etc. I have yet to encounter a defendant refusing to pay a delinquent fine, who is claiming lack of jurisdiction except in a **“stolen identity” setting**. Moreover, challenges are severely time limited under O.C.G.A. §40-13-33 and its 180 day time limitation period. So most of the time, the fine is a valid judgment.

## III. CONVERTING THE FINE TO A WRIT OF EXECUTION (FIERI FACIAS)

So here we are: the court has issued a sentence with a fine that remains unpaid. Perhaps the court, either through its Clerk or Solicitor (if it has one) has called or written to try to collect the fine, but with no results. How do you **“force the issue?”**

As we have learned, a fine is a judgment of your court, just like any other judgment in any other court, whether that be a magistrate, state, or superior tribunal. In a civil case, a writ of execution called a writ of fieri facias or fi.fa is issued after an order is signed by a judge. O.C.G.A. §9-13-1. However, most unpaid fines arise from criminal cases (traffic is probably the highest volume) and the question of whether a writ of execution (fi fa) can issue to collect a criminal fine was settled over 138 years ago in *McMeekin v. State*, 48 GA 335 (1873). The defendant was found guilty **“of the offense of helping open a tippling house [bar] on the Sabbath day”**, *id*; was ordered to pay a \$300 fine, but did not do so. The Georgia Supreme Court’s **Opinion framed the issue (and the answer)** as follows: **“We think the decision in *Brock v. State*, 22 GA 98 1857, settles the question whether the imprisonment was part of the penalty, and that it was only a means of enforcing the collection of the fine.**

If a defendant in a criminal case is fined, and refuses to pay the fine imposed, can it be collected by an execution against his goods? etc. There is the judgment against him for a specific amount, and section 3584 of the Code provides that “the Judge of any Superior Court may frame and cause to be issued by the clerk any writ of execution to carry into effect any lawful judgment or decree rendered in his Court.” It is contended that this section refers only to civil cases. But is not this a power inherently existing in the Court? And why should it be limited to civil any more than to criminal judgments? In one case, it is a debt due an individual; indeed, in civil cases it may also be for a debt due the State. In a criminal case the judgment is for a penalty, and it may be said due the State, and some of the authorities call it a debt of record. In *The King vs. Woolf*, 1 Chitty, 236, (18 English Criminal Law Reports,) the point was distinctly made and decided, that a *levari facias* might issue for a fine. Abbot, Chief Justice, said: “It seems to me that the case of *The King vs. Wade*, in which it was ruled that though one be in execution for a fine to the King, yet a *levari facias de bonis et catallis* lies, is a decisive authority in the present case. It is an authority founded upon the general principle of the common law, and shows that a *levari facias* may issue for a fine due the King, a fine being in fact a debt of record.” Bayley, Judge, said: “The only question we have to consider is. Whether the crown has a right to issue a *levari facias* for the debt in question, and upon that point, it seems to me, on principle, there can be

no doubt. Indeed, the question is not discussed on principle; it is not shown in any respect to be inconsistent with legal principle. The only thing that is said is, that this is a new mode of proceeding. \* \* \* \*

By the judgment, the debt becomes a debt to the King of record, and it is payable to the King *instanter*. To say that the crown shall not be at liberty so sue out an execution for its debt, is to place the crown in a worse situation than that in which the subject stands." The case of *The King vs. Woolf* was decided in 1819; that of *The King vs. Wade*, more than one hundred years before that time. In Virginia, the Court of Appeals, in *Pifer vs. The Commonwealth*, 14 Grattan Reports, 716, a case not involving directly this question, seem to consider it as an unquestionable right in the State. "The judgment in term is final; execution may have been issued and levied out of the property of the defendant," and also, "the judgment for the fine and costs would be final and execution could issue and be collected." To the same purport: See 8 Wend., 203; Bishop's Cr. Prac, sec. 870; Bac. Abr., vol. 4, 244.

We do not see any reason why this rule does not exist in Georgia, nor why the State should not be able to protect itself in enforcing its judgments against the necessity that might occur, either of discharging or supporting, for an **indefinite period, an obstinate defendant.**" *Id.*, 48 GA at 337-339. The *McMeekin* decision has been followed consistently over the years. *Hall v. State*, 155 GA. App. 724 272 S.E.2d 578 (1980) and *Ward v. State*, 195 GA. App. 166 393 S.E.2d 21 (1990).

What does a Writ of Execution look like? At the end of these notes, Exhibit A is attached and that is a blank form that is prepared by the Clyde Castleberry Company in Covington, GA (770-787-1031)/Clyde Castleberry Company.com). This fi.fa. form is generally used throughout Georgia by most magistrate, state, and superior courts.

#### IV. THE ADVANTAGES OF A WRIT OF FI.FA.—A LIEN ON THE DEFENDANT’S ASSETS/ AN ADDITIONAL PUBLIC RECORD OF THE DEBT

Why is it important to have a writ of execution/fi fa? The issuance of the writ and having it filed with a Clerk of Superior Court is the only way a **lien can be placed on all the defendant’s assets.** O.C.G.A. §9-12-86(h), states as follows:

*No judgment, decree, or order or any writ of fieri facias issued pursuant to any judgment, decree, or order of any superior court, city court, magistrate court, municipal court, or any federal court shall in any way affect or become a lien upon the title to real property until the judgment, decree, order, or writ of fieri facias is recorded in the office of the clerk of the superior court of the county in which the real property is located and is entered in the indexes to the applicable records in the office of the clerk.*

*Id.*, emphasis added. Note that the language of O.C.G.A. §9-12-86(h) further supports the idea that a writ of fi.fa. can be issued by a Municipal Court----after all, how could a lien issued by a Municipal Court ever encumber real property if a Municipal Court did not have the power to issue a writ in the first place? Note that a lien on all the defendant’s real property is only established by recording the fi.fa. on the G.E.D. in the county where the property is located. O.C.G.A. §9-12-86. This is may not necessarily be in the county where the judgment was rendered. Even if you think, maybe the defendant owns property in a “foreign county”, record your judgment there and everywhere property might be located. Record it immediately as any judgments or other matters recorded before your judgment is recorded will have priority over you. O.C.G.A. §9-12-81 and see 11B E.G.L. Executions §64 (1988 Rev.). When I was in private practice, I once recorded a pre-judgment attachment lien at 12:01 p.m. in Henry County and “beat” a second mortgage recorded at 12:10 p.m. for the same debtor. TIME IS OF THE ESSENCE! (By the way, the case was a \$40,000 dispute and as a young lawyer on a contingency, that fee was a big boost to my morale, to say the least!)

Normally in a civil case, to have a writ fi. fa. issued by a Clerk of Court and recorded by the Clerk of Superior Court on the General Execution Docket (G.E.D.) requires costs to be paid to the various clerks. O.C.G.A. §§9-12-94 and 15-6-77. You, however do not have to pay anything! Look at O.C.G.A. §17-10-20(a), which states as follows:

*In any case in which a fine or restitution is imposed as part of the sentence, such fine and restitution shall constitute a judgment against the defendant. Upon the request of the prosecuting attorney, it shall be the duty of the clerk of the sentencing court to issue a writ of fieri facias thereon and enter it on the general execution docket of the superior court of the county in which such sentence was imposed. Such fieri facias may also be entered on the general execution docket in any county in which the defendant owns real property.*

**ld., emphasis added. If your court has a Solicitor, all he/she needs to do is issue a “request” (I suggest it be in writing) to your clerk and the fi. fa. will be issued. (This is a ministerial act for which your clerk has no discretion.)**

The only restriction on this procedure is set forth in O.C.G.A. §17-10-20(b):

*If, in imposing sentence, the court sets a time certain for such fine or restitution to be paid in full, no execution shall issue upon the writ of fieri facias against the property of the defendant until such time as the time set by the court for payment of the fine or restitution shall have expired.*

**If the defendant has been placed on probation or has been given “Time to Pay”, then the fi.fa. cannot** be issued until there is a failure to pay. The probation officer needs to issue an affidavit under O.C.G.A. §42-8-34.2 (See Exhibit B) and the court can issue an order (Exhibit C).

Now that a fi. fa. has been issued, what next? Send it to the Clerk of Superior Court in your county and (after it is returned to your office) to the county where the defendant resides (look at the address on the ticket), or may own real property. Unlike the private attorney, the Municipal Court does not have to pay the Clerk of Superior Court anything to file the writ on the G.E.D.! O.C.G.A. §17-10-20(g) specifically states:

*No fees, costs, or other charges authorized by law in civil cases shall be charged by a clerk of superior court for entering a judgment arising out of a criminal case on the general execution docket or for any action brought by the state to enforce such judgment.*

Does it matter that the Defendant does not own any real estate? No, because the credit bureaus (Equifax, Experian, and TransUnion) will pick up this public information and place it on the credit reports of the defendant. What happens when they go to get a loan to buy a car or a house, or rent an apartment, or apply for a credit card? The unpaid fine shows up! There is a good chance the defendant will come to Municipal Court and pay the fine to get this off their credit record. The City of Atlanta is now reporting unpaid parking fines and the results have been good. See a recent news story at Exhibit D.

## V. CAN A LICENSE BE SUSPENDED FOR FAILING TO PAY A FINE?

**Probably many of you in attendance today are wondering “Can the court suspend a defendant’s license for failing to pay a fine?”** After all, a license (or Georgia driving privileges for an out of state driver) is suspended for failing to appear in court when the case is initially on the calendar and every subsequent court appearance through plea or trial date. **The short answer is “No” because of the language of O.C.G.A. §40-5-56(a):**

*Notwithstanding any other provisions of this chapter or any other law to the contrary, the department shall suspend the driver’s license or privilege to operate a motor vehicle in this state of*

*any person who has failed to respond to a citation to appear before a court of competent jurisdiction in this state or in any other state for a traffic violation other than a parking violation.*

*Id.*, emphasis added. **When a defendant does not pay a fine, it is not a question of failing to “appear”, it is an issue of failing to “pay”** and O.C.G.A. §40-5-56(a) will not allow a court to suspend a license for a failing to pay a fine. (And we know an “FTA” suspension almost always results in the defendant coming back to court----they got arrested somewhere else and must appear in your court before the “new” ticket can be addressed.)

**Or, can the “FTA” §40-5-56(a) help after all? Suppose you give a defendant “time to pay” a fine (no probation) and he doesn’t show up to court next month? That driver did “fail to appear” on that calendar and, yes, I believe the standard Form 912 can issue in this situation. The 912 issues not because the driver failed to pay the fine, but because he did not appear to either pay or explain why the fine could not be paid. Has anyone of you tried this approach? Does anyone know DDS’ position?**

Recall, if a defendant is placed on probation, the procedure for issuing a fi.fa. is changed, as O.C.G.A. §17-10-20(b) says a fi.fa. cannot be issued if time has been given for a fine to be paid. Recall also that O.C.G.A. §42-8-34.2(a) requires a probation officer to execute an affidavit (Exhibit B) to be followed by a court order (Exhibit C), and this activity occurs without any Solicitor participation. Now, in the probation setting, suppose on sentencing date, a defendant in a traffic case is placed on 12 months probation and at the time of the initial sentencing, the defendant is personally served with a Notice to Appear in court 11 months from the sentence date on a **“Probation Status Calendar”**. If the fine is paid in full, the case closes out and is no longer on that Probation Status Calendar. However if the defendant does not pay in full (or otherwise has not completed all terms of probation) and does not **“appear”** in 11 months, then there is an FTA. **Wouldn’t** O.C.G.A. §40-5-56(a) then apply? **Can’t a Form 912 issue** then? I do not see any legal distinction from failing to appear on arraignment, trial, on probation calendar: An FTA, is an FTA and §40-5-56(a) does not make any distinction regarding what type of **“Appearance”** calendar is involved.

It seems to me that if a court makes it a Standard Operational Procedure (SOP) to automatically reset every probation sentence to a future Probation Status Calendar, the 912 form procedure can be used. We already know how effective O.C.G.A. §40-5-56(a) is---does anyone have any thoughts on this approach?

## VI. OTHER WAYS TO COLLECT UNPAID FINES

Sometimes the writ of fi.fa. is not enough to collect a judgment. The defendant may not have any real estate, may not be applying for a loan, and simply claim have no funds to pay the judgment. However, there are additional ways to collect the judgment other than by voluntary payment from the defendant. One of my favorite ways to collect a **judgment during my 25 + years as a collection attorney was to file a garnishment against the defendant’s bank account, or against the defendant’s employer, or both.** This can be done under O.C.G.A. § 17-10-20 (c) which **authorizes not only garnishments but levies and foreclosures and “...all other actions provided for the enforcement of judgments in the state of Georgia and in other states and foreign nations...”** A court judgment for an unpaid fine can proceed like any other judgment in a civil case or any other case: a creditor say, the Atlanta Municipal Court can collect a judgment like any other creditor.

A garnishment is essentially a separate **lawsuit filed against a defendant’s bank account or the defendant’s employer** (as a garnishee) and lists the traffic/criminal court defendant as the defendant in the garnishment action. The garnishment action is a civil case filed in the county where the financial institution or the employer is based. Normally a private garnishing creditor has to pay a filing fee because a garnishment case is a civil case, and, like any civil case, the clerk of the court charges a filing fee. However the Municipal Court is not required to pay any court costs **“up front.”** O.C.G.A. § 42-8-34.2 (c). The only time court costs are collected is if the garnishment is successful **by seizing a defendant’s bank account or garnishing 25% of the defendant’s net take home salary,** after deductions for taxes. Then, and only then, the defendant pays the garnishment court costs.

Of course, we as judges will not be filing garnishment actions. Garnishment cases would be filed by the Solicitor of our court. The garnishment action is very simple: an Assistant Solicitor simply fills in the blanks on a pre-issued form obtained from the garnishment court, and the case is sent over to a state or magistrate court for filing. It is not difficult to trace a defendant's bank account because often the defendant has paid probation at least some of the time and used a check. The existence of the account upon which a previous payment has been made via check can be confirmed and the garnishment action can be filed in a matter of minutes. Since a defendant on probation is often currently employed (I presume that information is within your Probation **Department's file**), **employment can be confirmed and a garnishment action against the defendant's employer can also be filed** rather easily. While this is additional work for the Solicitor, most of it is routine and can easily be taught to an office clerk. An Assistant Solicitor will simply sign off on the pleadings and they will be filed in court in any county whether the defendant has either a bank account, employment, or both.

Another thing we can do to collect unpaid fines is to sell the judgment to a third party. Writs of fi.fa. are transferable and can be sold, even at a discount. O.C.G.A. §9-13-34. We can sell our fi.fas just like any other creditor and this will secure instant funds and will allow our cases to be closed.

If this procedure of using fi.fas. and filing garnishments to collect a judgment sounds simple, it is, because Georgia is a **"creditors' state."** I made a fairly good living for over 25 years filing garnishments to collect judgments not only in cases for clients that I prosecuted but for other lawyers. I recommend these procedures as they would place Municipal Courts on the forefront of collecting delinquent fines and would generate much good will from the citizens who will see that our judgments mean something, and that we are carefully watching our costs and expenses.

## VII. OTHER CONSIDERATIONS

Before we all start issuing writ of fi.fa. and selling our judgments for unpaid fines, there are some practical considerations to ponder. Our Superior Court Clerks no doubt are under-staffed and over worked. Does the City of Atlanta want to **send over 10,000 fi.fa.'s** to the clerk to record at no charge? What will that do to intergovernmental relations? Perhaps a **trial run of 100 fi.fa.'s** may be the best way to proceed. **Or perhaps, our court could "loan" of** few of our own clerks to Superior Court and they can be sworn as deputy clerks in that office to perform the actual recording and G.E.D. book preparation.

Does your city really want to get involved in selling fines? Selling a fi.fa. judgment to collect a fine is legal, but is it politically a good idea? Fulton County sells its tax liens and the fallout is legendary. While selling a judgment for an unpaid fine is an attractive investment to put on the open market for bids (a fine cannot be discharged in bankruptcy---see Kelly v. Robinson, 479 US 36 (1986)) . . . but is that the right thing to do?

Also, how do you deal with surcharges when a fine is sold? One position is that surcharges are not owed at the time of a fi.fa. is sold because the fine is not being paid by the defendant or anyone on his behalf---only the judgment is being sold. The other position is that the Court is collecting some money as a result of the fine, although the balance will be written off by the Court. No doubt the Superior Court Clerks' **Cooperative Authority will look at** O.C.G.A. §15-21A-4(a) (1) and take the latter side: money was paid towards the fine and surcharges are due. What happens when the transferee of the fine collects the judgment from the defendant? Does the transferee/investor now pay the Authority? This issue is simply not addressed under current Georgia law. Does anyone have any solution to this problem?

One other consideration is a legislative solution. Currently, if someone owes back child support, the State of Georgia **can get a "set off" of a State income tax refund under** O.C.G.A. §48-7-160 et. seq. In fact there are 8 types of State owed obligations that can intercept a state income tax refund check under O.C.G.A. §48-7-164. Why not add an unpaid court fine to this list?

The American Bar Association passed a resolution on February 14, 2011 urging Congress to enact legislation similar to H.R. 1956 and S. 3989 (11<sup>th</sup> Congress) that would amend the federal tax code to let states intercept federal tax refunds to collect delinquent fines. The American Bar Association has some other ideas regarding court efficiency, but not all of them may be proper for your court.

## VIII. CONCLUSIONS

First, let me thank you for listening. **I hope I haven't bored you or kept you too long from Savannah's fine restaurants and other activities.**

Second, let me thank the Institute of Continuing Judicial Education for allowing me the privilege to teach. I always learn more from the attendees than they learn from me, so teaching is a great benefit to me as a Judge. Teaching will benefit you, too. Call ICJE---they are always looking for new talent. You will enjoy working with ICJE. I know I have.

## EXHIBIT A: WRIT OF FIERI FACIAS

WRIT OF FIERI FACIAS

IN THE

COURT OF GEORGIA

CIVIL ACTION NUMBER

Plaintiff(s) VS.

JUDGMENT DATE

Defendant(s)

Plaintiff's Attorney - Name, Address & Telephone

Name:

Address:

Telephone & Area Code:

Fi. Fa. in Hands of:

To all and singular the sheriffs of the State and their lawful deputies:

In the above styled case, and on the judgment date set out, the plaintiff(s) named above recovered against the defendant(s) named above, judgment in the following sums:

CANCELLATION

The within and foregoing Fi.Fa. having been paid in full the Clerk of Superior Court is hereby directed to cancel it of

record this day of

Signature:

Title:

Therefore, YOU ARE COMMANDED, that of the goods and chattels, lands and tenements of said defendant(s), and

YOU cause to be made the several sums set out in the foregoing recital of the judgment in this case and have the said several sums of money before the Magistrate Court of this County at the next term of court, with this Writ to render to said plaintiff(s) the principal, interest, attorney fees and costs aforesaid.

Witness the Honorable Judge of Said Court, this the

day of

CLERK

Principal

Interest \$ Interest - Other Attorney's Fees Court Costs

Total NOTE:

with future interest upon said principal amount from the date of judgment at the legal rate.

ESPECIALLY/ONLY of the following described property, to wit:

By:

Deputy Clerk

Entered on General Execution Docket , at Page this day of ,

A diligent search was made and no property of the defendant(s)

has been found in this County, on which to levy this Fi.Fa.

This the day of\_\_

Deputy Sheriff

STATE OF GEORGIA, COUNTY OF

STATE OF GEORGIA, COUNTY OF

I have this day executed the within Fi.Fa. by levying upon  
and seizing the following described property of defendant(s),

I have this day executed the within Fi.Fa. by levying upon  
and seizing the following described property of defendant(s).

to-wit:

to-wit:

Levied at Levied at Georgia, this\_\_ day of Georgia. this day of

Deputy Sheriff

Deputy Sheriff

THE PROPERTY DESC	RIBED IN LEVY WAS	THE PROPERTY DESC	RIBED IN LEVY WAS
KNOCKED DOWN TO		KNOCKED DOWN TO	
Sheriff's Service	\$	Sheriff's Service	\$
Sheriff's Commission	\$	Sheriff's Commission	S
Sheriff's Deed	\$	Sheriff's Deed	S
Sheriff's Levy	\$	Sheriff's Levy	\$
Advertising Fee	\$	Advertising Fee	\$
Other	S	Other	S
Total	\$	Total	S
Net Proceeds	S	Net Proceeds	S

Sheriff

EXHIBIT B: AFFIDAVIT OF PROBATION OFFICER IN SUPPORT OF WRIT OF FIERI FACIAS

IN THE MUNICIPAL COURT OF  
STATE OF GEORGIA

CITY OF

TICKET NO.

Vs.

SENTENCE DATE:

Defendant

REVOCAION ORDER  
DATE: OFFENSE(S)

AFFIDAVIT OF PROBATION OFFICER IN SUPPORT  
OF ISSUANCE OF WRIT OF FIERI FACIAS

Comes Now the undersigned probation officer, and makes the following statement under oath for consideration by this Court:

My name is , and I am employed as a Probation Officer by: \_\_\_\_\_.

My current assignments include supervision of the probation cases from the City of \_\_\_\_\_ Municipal Court. I was assigned the supervision of the above captioned case and probationer through the City of \_\_\_\_\_ Municipal Court.

The Defendant in the above-referenced case has failed to pay into the probation office of this Court, under the sentence attached hereto as exhibit "A", the sum of. The total amount of fine, costs, and/or restitution due at the time this affidavit is given is \_\_\_\_\_. The total amount due is for fines owed to the City of \_\_\_\_\_, and does not include any probation supervision fees. The balance of the imposed fine, costs, and/or restitution ordered in the above case was not collected by the probation office due to the Defendant's failure to pay the amount ordered while under sentence.

Probation has made diligent efforts to collect the amount due from the Defendant and has been unable to do so at this time. The efforts made by probation in this matter include attempting to contact the Defendant at his last known work and home addresses. Probation also attempted contact via mail and through personal contacts of family or friends which the Defendant had listed on his information sheet at the time of the initial intake interview, and as

supplemented during the course of probation. Probation has been unsuccessful in collecting the outstanding balance after exercising all reasonable methods at the disposal of probation.

The undersigned hereby respectfully requests that this Court exercise the authority granted under O.C.G.A. §42-8-34.2 and make the outstanding balance a judgment of this Court and issue a writ of Fieri Facias against the Defendant for the amount of the outstanding balance not collected.

Further Affiant says not.

This day of , 20\_\_\_\_\_.

Probation Officer

Sworn to and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Notary Public

my commission expires:

EXHIBIT C: ORDER FOR CONVERSION OF FINES TO CIVIL JUDGMENT

IN THE MUNICIPAL COURT OF  
STATE OF GEORGIA

CITY OF

TICKET NO.

SENTENCE DATE:

REVOCATION ORDER

DATE: Vs.

OFFENSE(S)

Defendant

ORDER FOR CONVERSION OF FINES

TO CIVIL JUDGMENT UNDER O.C.G.A. § 42-3-34.2

Upon consideration of the foregoing affidavit, the Court issues the following order.

The Court finds that the defendant is delinquent in the payment of fines, costs, or restitution or reparation, as was ordered by the court as a condition of probation. The defendant's probation officer has executed a sworn affidavit wherein the amount of arrearage is set out. In addition, the affidavit contained a succinct statement as to what efforts the department has made in trying to collect the delinquent amount, as required by statute. The affidavit has been submitted to this Court for approval, and the Court hereby approves the affidavit as submitted by probation.

The Court further orders that the arrearage in the amount of shall be collectable through issuance of a writ of fieri facias by the Clerk of this Court. The department, or any other authorized entity, may enforce such collection through any judicial or other process or procedure which may be used by the holder of a writ of execution arising from a civil action.

So ordered this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

The Honorable  
Judge of the Municipal Court

City of Municipal Court

The clerk shall mail copies of this order to:  
The Defendant at his/her last known  
address; Defendant's counsel (when  
applicable); City Attorney; Solicitor of the  
Municipal Court; Probation Officer

## EXHIBIT D: WSB.COM DRIVER: UNPAID PARKING TICKET HURT MY CREDIT SCORE

Posted: 6:06 pm EDT May 4, 2011 Updated: 8:18 pm EDT May 4, 2011

ATLANTA -- An unpaid parking ticket may not seem like a big deal to some, but Channel 2 Action News has learned if you don't pay in the city of Atlanta, it could put a big dent in your credit score.

Nicole Will told Channel 2's Tom Regan her credit score dropped 20 points after she neglected to pay a \$25 parking ticket. She said in two weeks the ticket doubled to \$50. "You wouldn't think an unpaid parking ticket would bring strikes against your credit report," Will said.

Two months after she received the ticket, Will said she got notices from collection agencies and soon learned her impressive credit score of 775 had fallen to 755.

"It's not like I didn't pay a credit card or defaulted on a car loan," Will said.

Park Atlanta, a privatized ticket collection program, the city of Atlanta is now forwarding delinquent parking tickets to a collection agency.

The unpaid fine is treated like any other unpaid consumer bill and can show up on credit scores, impacting everything from mortgages to consumer loans.

A city official told Regan told an unpaid parking is a debt obligation and a delinquent violator is given sufficient time and warning to pay a ticket before it is forwarded to a collection program.

Some drivers parking on the street in downtown Atlanta told Regan the policy is unfair.

"I think that is ridiculous, parking has nothing to with your credit," Katie Schmid said.

"It's a bit extreme going after someone's credit score for a parking ticket," added Emma Doss.

Regan checked with several other metro Atlanta counties regarding their parking violation policies and found that other counties, including Cobb and DeKalb, did not forward unpaid parking tickets to collection agencies.

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## Cases

<i>Crook v. State</i> , 156 GA. App. 756 275 S.E.2d 794 (1982).....	4
<i>Hall v. State</i> , 155 GA. App. 724 272 S.E.2d 578 (1980).....	6
<i>McMeekin v. State</i> , 48 GA 335 (1873) .....	5
<i>Ward v. State</i> , 195 GA. App. 166 393 S.E.2d 21 (1990) .....	6

CHAPTER 13: UNIFORM RULES  
MUNICIPAL COURTS OF THE  
STATE OF GEORGIA

Always check <http://www.georgiacourts.org/content/uniform-rules-municipal-court> for updates

Source: Council of Municipal Court Judges

## **RULE 1. PREAMBLE**

These rules are promulgated pursuant to the inherent powers of the Supreme Court of Georgia in order to provide for the speedy, efficient and inexpensive resolution of disputes and prosecutions. It is not the intention, nor shall it be the effect, of these rules to conflict with the Constitution or substantive law, either per se or in individual actions, and these rules shall be so construed and in case of conflict shall yield to substantive law. It is not the intent of these rules, nor shall these rules be construed, to require any municipal, recorder or any other court deemed a municipal court, to become or remain a court of record or to employ the services of any personnel, including solicitors or prosecuting attorneys, unless otherwise provided by general law, charter or ordinance.

### **1.1 Repeal of Local Rules.**

All local rules of the municipal courts shall expire effective February 3, 2010. If any municipal court by action of a majority of its judges (or failing this, by action of its chief judge) proposes to prevent any local rule from expiring pursuant to Rule 1.1, then a proposal to prevent the local rule from expiring must be presented to the Court for approval 30 days prior to the expiration date as stated in Rule 1.1. Only those rules reapproved by the Supreme Court of Georgia on or after February 3, 2010, shall remain in effect after that date. Rules timely resubmitted shall remain in effect until action by the Supreme Court of Georgia.

### **1.2 Authority to Enact Rules Which Deviate From the Uniform Rules.**

(a) The term "local rules" will no longer be used in the context of the Uniform Municipal Court Rules.

(b) Each municipal court by action of a majority of its judges (or failing this, by action of its chief judge), from time to time, may propose to make and amend rules which deviate from the Uniform Municipal Court Rules, provided such proposals are not inconsistent with general laws, these Uniform Municipal Court Rules, or any directive of the Supreme Court of Georgia. Any such proposals shall be filed with the clerk of the Supreme Court of Georgia; proposals so submitted shall take effect thirty (30) days after approval by the Supreme Court of Georgia. It is the intent of these rules that rules which deviate from the Uniform Municipal Court Rules be restricted in scope.

(c) The municipal court, by action of a majority of its judges (or failing this, by action of its chief judge), may continue to promulgate rules which relate only to internal procedure and do not affect the rights of any party substantially or materially, either to unreasonably delay or deny such rights, and provided that those rules shall not conflict with these uniform rules. These rules, which will be designated "internal operating procedures," do not require the approval of the Supreme Court. "Internal operating procedures," as used in these Uniform Municipal Court Rules, are defined as rules which relate to case management, administration, and operation of the court or govern programs which relate to filing costs in civil actions, costs in criminal matters, case management, administration, and operation of the court.

(d) Notwithstanding these uniform rules, the municipal court, by action of a majority of its judges (or failing this, by action of its chief judge), may promulgate experimental rules applicable to pilot projects, upon approval of the Supreme Court, adequately advertised to the local bar, with copies to the State Bar of Georgia, not to exceed a period of one year, subject to extension for one additional year upon approval of the Supreme Court. At the end of the second year, any such pilot

projects will be allowed to sunset unless approved by the Supreme Court to remain in effect for a longer period of time.

(e) Rules which are approved as deviations from the Uniform Municipal Court Rules and internal operating procedures of courts shall be published by the court in which the rules are effective. Copies must be made available through the clerk of the municipal court for the city where the rules are effective, and shall be posted on the adopting municipal court's website, if such exists. Any amendments to deviations from the Uniform Municipal Court Rules or to internal operating procedures must be published and made available through each municipal court clerk's office within fifteen (15) days of the effective date of the amendment or change. Summaries of amendments or deviations shall be published once per week for two consecutive weeks in the newspaper in which legal announcements are customarily made by the municipality in which the municipal court is located, and shall be provided to the State Bar of Georgia and all local bar associations serving the municipality.

(f) Internal operating procedures effective in any court must be filed with the Supreme Court even though Supreme Court approval is not needed for these rules.

### **1.3 Matters of Statewide Concern.**

The following rules, to be known as "Uniform Municipal Court Rules," are to be given statewide application.

### **1.4 Deviation.**

These rules are not subject to local deviation except as provided herein. A specific rule may be superseded in a specific action or case or by an order of the court entered in such case explaining the necessity for deviation and served upon the attorneys or pro se parties in the case.

### **1.5 Amendments.**

The Council of Municipal Court Judges shall have a permanent committee to recommend to the Supreme Court such changes and additions to these rules as may from time to time appear necessary or desirable. The State Bar of Georgia and the Uniform Rules Committee Chairpersons of the Council of each class of court shall receive notice of the proposed changes and additions and be given the opportunity to comment.

### **1.6 Publication of Rules and Amendments.**

These rules and any amendments to these rules shall be published in the advance sheets to the *Georgia Reports*. Unless otherwise provided, the effective date of any amendment to these rules is the date of publication in the advance sheets to the *Georgia Reports*.

## **RULE 2. DEFINITIONS**

### **2.1 Attorney.**

The word "attorney" as used in these rules refers to any person admitted to the State Bar of Georgia and any person who has been properly admitted to the court pro hac vice. Pro se litigants are governed by the same rules as attorneys.

### **2.2 Judge.**

The word "judge" as used in these rules refers to any person serving or acting as a judge of a municipal court in the State of Georgia. The term "chief judge" shall be that judge designated as such by the municipality according to its charter and ordinances, or failing that, the sole judge designated or elected as municipal court judge by the municipality, and in the case of municipal courts with more than one municipal court judge, by majority vote of the municipal court judges, for such term as may be provided by charter, ordinance, or internal operating procedures adopted in accordance with these uniform rules.

### **2.3 Clerk.**

Unless the context of these rules requires otherwise, the word "clerk" as used in these rules refers to the person designated according to the charter and ordinances of the municipality, as the primary person most directly responsible for the administration of a municipal court other than a judge of the municipal court. If provided by the charter or ordinances of the municipality, the chief judge may designate deputy clerks who shall have the same authority as the clerk.

### **2.4 Assigned Judge.**

The term "assigned judge" as used in these rules refers to the judge to whom an action is assigned in accordance with these rules; or, if the context permits, in municipal courts having approved local rules permitting a general calendaring system, to the trial judge responsible for the matter at any particular time.

### **2.5 Gender Neutral Pronouns.**

The pronoun "he" shall include "she" and vice versa, unless the context clearly indicates otherwise; the pronoun "her" shall include "him" and vice versa, unless the context clearly indicates otherwise.

## **RULE 3. HOURS OF COURT OPERATION**

The hours of court operation shall be set by the chief judge of each court and shall be recorded with the clerk of the municipal court. Such information shall include the following:

- (1) Normal hours and location of court.
- (2) Emergency after-hours availability of judges and the names of such judges; provided, however, that personal telephone numbers and address information need not be included in the public records of the clerk.
- (3) Holidays during which the court will be closed and a plan for the availability of judges on such days.
- (4) Days on which the court holds hearings and the times and locations of such hearings.

## **RULE 4. ASSIGNMENT OF CASES**

### **4.1 Case Assignment.**

Unless provided by approved internal procedures or pursuant to assignment by the chief judge, cases shall not be assigned to a particular judge. Provided, however, that once any judge has first heard sworn testimony or made any ruling in a case other than the granting of an arrest or search warrant, the setting of bail and the initial finding of probable cause, or the granting of a continuance, that case shall thereafter be considered only by that judge, except upon the approval

of that judge. In municipal courts served by more than one judge, the clerk of court shall schedule the presiding of those judges over the various court calendars according to a plan approved by a majority of those judges. This rule shall not apply to probation revocation hearings.

## **4.2 Recusal.**

### **4.2.1 Motions.**

All motions to recuse or disqualify a judge presiding in a particular case or proceeding shall be timely filed in writing and all evidence thereon shall be presented by accompanying affidavit(s) which shall fully assert the facts upon which the motion is founded. Filing and presentation to the judge shall be not later than five (5) days after the affiant first learned of the alleged grounds for disqualification, and not later than ten (10) days prior to the hearing or trial which is the subject of recusal or disqualification, unless good cause be shown for failure to meet such time requirements. In no event shall the motion be allowed to delay the trial or proceeding.

### **4.2.2 Affidavit.**

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

### **4.2.3 Duty of the trial judge.**

When a judge is presented with a motion to recuse, or disqualify, accompanied by an affidavit, the judge shall temporarily cease to act upon the merits of the matter and shall immediately determine the timeliness of the motion and the legal sufficiency of the affidavit, and make a determination, assuming any of the facts alleged in the affidavit to be true, whether recusal would be warranted. If it is found that the motion is timely, the affidavit sufficient and that recusal would be authorized if some or all of the facts set forth in the affidavit are true, another judge shall be assigned to hear the motion to recuse. The allegations of the motion shall stand denied automatically. The trial judge shall not otherwise oppose the motion.

### **4.2.4 Procedure upon a motion for disqualification.**

The motion shall be assigned for hearing to another judge, who shall be selected in the following manner:

- (a) If within a single-judge municipality, the most senior in service District Representative judge serving on the Executive Committee of the Council of Municipal Court Judges shall select the judge;
- (b) If within a two-judge municipality, the other judge, unless disqualified, shall hear the motion;
- (c) If within a multi-judge municipality, composed of three (3) or more judges, selection shall be made by use of the municipality's existing random, impartial case assignment method. If the

municipality does not have random, impartial case assignment rules, then assignment shall be made as follows:

- (1) The chief judge of the municipality shall select a judge within the municipality to hear the motion, unless the chief judge is the one against whom the motion is filed; or
- (2) In the event the chief judge is the one against whom the motion is filed, the assignment shall be made by the judge of the municipality who is most senior in terms of service other than the chief judge and who is not also a judge against whom the motion is filed; or
- (3) When the motion pertains to all active judges in the municipality, the most senior in service District Representative judge serving on the Executive Committee of the Council of Municipal Court Judges shall select a judge outside the municipality to hear the motion.
- (d) If the most senior in service District Representative judge serving on the Executive Committee of the Council of Municipal Court Judges is the one against whom the motion is filed, the District Representative judge within the district next senior in time of service shall serve in this selection process instead.

If the motion is sustained, the selection of another judge to hear the case shall follow the same procedure as outlined above.

- (e) If all judges within a municipality are disqualified, including all District Representative judges, the matter shall be referred by the disqualified most senior in service District Representative judge to the most senior in service District Representative judge of an adjacent district for the appointment of a judge who is not a member of the district to preside over the motion or case.

#### **4.2.5 Selection of judge.**

In the instance of any hearing on a motion to recuse or disqualify a judge, the challenged judge shall neither select nor participate in the selection of the judge to hear the motion; if recused or disqualified, the recused or disqualified judge shall not select nor participate in the selection of the judge assigned to hear further proceedings in the involved action.

#### **4.2.6 Findings and ruling.**

The judge assigned may consider the motion solely upon the affidavits, but may, in the exercise of discretion, convene an evidentiary hearing. After consideration of the evidence, the judge assigned shall rule on the merits of the motion and shall make written findings and conclusions. If the motion is sustained, the selection of another judge to hear the case shall follow the same procedure as established in Rule 4.2.4 above. Any determination of disqualification shall not be competent evidence in any other case or proceedings.

#### **4.2.7 Voluntary recusal.**

If a judge, either on the motion of one of the parties or the judge's own motion, voluntarily disqualifies, another judge, selected by the procedure set forth in Rule 4.2.4 above, shall be assigned to hear the matter involved. A voluntary recusal shall not be construed as either an admission or denial to any allegations which have been set out in the motion.

## **RULE 5. DOCKETS**

### **5.1 Docket Categories.**

Each municipal court shall keep a docket for criminal cases, arrests and search warrants, and a separate docket for all other actions.

### **5.2 Time of Docketing.**

Actions shall be entered by the clerk, deputy clerk, or judge in the proper docket immediately or within a reasonable period after being received in the clerk's office.

## **RULE 6. WITHDRAWAL OF PAPERS FROM THE MUNICIPAL COURT**

No original papers may be withdrawn from the municipal court. However, copies of any documents may be obtained by any party or the attorney for any party upon payment of copy costs to the clerk. All court records are public and are to be available for inspection in accordance with and as limited by the Georgia Open Records Act, as amended.

## **RULE 7. DUTIES OF ATTORNEYS AND ALL PARTIES**

### **7.1 Notification of Representation.**

No attorney shall appear in his or her representative capacity before a municipal court until he or she has entered an appearance by filing a signed entry of appearance form or by filing a signed pleading in a pending action. An entry of appearance shall state (1) the style and case number; (2) the identity of the party for whom the appearance is made; and (3) the name and current office address, telephone number and bar number of the attorney.

### **7.2 Withdrawal of Counsel.**

(a) An attorney appearing of record in any action pending in any municipal court, who wishes to withdraw as counsel for any party therein, shall submit a written request to an appropriate judge of the court for an order of court permitting such withdrawal. Such request shall state that the attorney has given due written notice to the affected client respecting such intention to withdraw ten (10) days (or such lesser time as the court may permit in any specific instance) prior to submitting the request to the court or that such withdrawal is with the client's consent. Such request will be granted unless in the judge's discretion to do so would delay the trial of the action or otherwise interrupt the orderly operation of the court or be manifestly unfair to the client. The attorney requesting an order permitting withdrawal shall give notice to the solicitor or prosecuting attorney, if any, and shall file with the clerk in each such action and serve upon the client, personally or at that client's last known address, a notice which shall contain at least the following information:

- (1) That the attorney wishes to withdraw;
- (2) That the court retains jurisdiction of the action;
- (3) That the client has the burden of keeping the court informed respecting where notices, pleadings or other papers may be served;
- (4) That the client has the obligation to prepare for trial or hire other counsel to prepare for trial when the trial date has been set;
- (5) That if the client fails or refuses to meet these burdens, the client may suffer adverse consequences, including, in criminal cases, bond forfeiture and arrest;

(6) The dates of any scheduled proceedings, including trial, and that holding of such proceedings will not be affected by the withdrawal of counsel;

(7) That service of notices may be made upon the client at the client's last known address; and

(8) That unless the withdrawal is with the client's consent, the client has the right to object within ten (10) days of the date of the notice.

(b) The attorney seeking to withdraw shall prepare a written notification certificate stating that the above notification requirements have been met, the manner by which such notification was given to the client, and the client's last known address and telephone number. The notification certificate shall be filed with the court and a copy mailed to the client and all other parties. The client shall have ten (10) days prior to entry of an order permitting withdrawal or such lesser time as the court may permit within which to file objections to the withdrawal. After the entry of an order permitting withdrawal, the client shall be notified by the withdrawing attorney of the effective date of the withdrawal; thereafter all notices or other papers may be served on the party directly by mail at the last known address of the party until new counsel enters an appearance.

### **7.3 Duty to Utilize Assigned Judge; Notification of Previous Presentation to Another Judge.**

Attorneys shall not present to any judge any matter or issue in any case which has been assigned to or a ruling made by another judge, except under the most compelling circumstances. In that event, any attorney doing so shall first advise the judge to whom the matter is presented that the action is assigned to or a ruling has been made by another judge. Counsel shall also inform the assigned or previous ruling judge as soon as possible that the matter was presented to another judge. Attorneys shall not present to a judge any matter which has been previously presented to another judge without first advising the former of the fact and result of such previous presentation.

### **7.4 Prohibition on Ex Parte Communications.**

Except as authorized by law or by rule, judges shall not initiate, permit or consider ex parte communications by interested parties or their attorneys concerning a pending or impending proceeding. Where circumstances require ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or the merits of the case are authorized, provided:

1. The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication; and

2. The judge takes reasonable steps to promptly notify all parties of the substance of the ex parte communication and allows an opportunity to respond.

### **7.5 Duty to Attend and Remain.**

Attorneys and parties having matters on calendars, unless excused by the judge, are required to be in court at the call of the matter and to remain until otherwise directed by the court. The failure of any attorney or party in this respect shall subject that attorney or party to the contempt powers of the court.

## **RULE 8. RESOLUTION OF CONFLICTS-STATE AND FEDERAL COURTS**

(a) An attorney shall not be deemed to have a conflict unless:

(1) The attorney is lead counsel in two or more of the actions affected; and

(2) The attorney certifies that the matters cannot be adequately handled, and the client's interest adequately protected, by other counsel for the party in the action or by other attorneys in lead counsel's firm; certifies compliance with this rule and has nevertheless been unable to resolve the conflicts; and certifies in the notice a proposed resolution by list of such cases in the order of priority specified by this rule.

(b) When an attorney is scheduled for a day certain by trial calendar, special setting or court order to appear in two or more courts (trial or appellate; municipal, state or federal), the attorney shall give prompt written notice as specified in paragraph (a) above of the conflict to opposing counsel, to the clerk of each court and to the judge before whom each action is set for hearing (or, to an appropriate judge if there has been no designation of a presiding judge). The written notice shall contain the attorney's proposed resolution of the appearance conflicts in accordance with the priorities established by this rule and shall set forth the order of cases to be tried with a listing of the date and data required by paragraphs (b) (1)-(4) as to each case arranged in the order in which the cases should prevail under this rule. In the absence of objection from opposing counsel or the courts affected, the proposed order of conflict resolution shall stand as offered. Should a judge wish to change the order of cases to be tried, such notice shall be given promptly after agreement is reached between the affected judges. Attorneys confronted by such conflicts are expected to give written notice such that it will be received at least seven (7) days prior to the date of conflict. Absent agreement, conflicts shall be promptly resolved by the judge or the clerk of each affected court in accordance with the following order of priorities:

- (1) Criminal (felony) actions shall prevail over civil actions;
- (2) Jury trials shall prevail over non-jury matters, including trials and administrative proceedings;
- (3) Appellate arguments shall prevail over trials, hearings and conferences;
- (4) Within each of the above categories only, the action which was first filed shall take precedence.

(c) Conflict resolution shall not require the continuance of the other matter or matters not having priority. In the event any matter listed in the letter notice is disposed of prior to the scheduled time set for any other matter listed or subsequent to the scheduled time set but prior to the end of the calendar, the attorney shall immediately notify all affected parties, including the court affected, of the disposal and shall, absent good cause shown to the court, proceed with the remaining case or cases in which the conflict was resolved by the disposal in the order of priorities as set forth heretofore.

## **RULE 9. LEAVES OF ABSENCE**

### **9.1 Leaves for Thirty (30) Calendar Days or Less.**

An attorney of record shall be entitled to a leave of absence for thirty (30) days or less from court appearance in pending matters which are neither on a published calendar for court appearance, nor noticed for a hearing during the requested time, by submitting to the clerk of the court at least thirty (30) calendar days prior to the effective date for the proposed leave, a written notice containing:

- (a) A list of the actions to be protected, including the action numbers, and date and time of any previously calendared appearance;
- (b) The reason for leave of absence; and
- (c) The duration of the requested leave of absence.

A copy of the notice shall be sent, contemporaneously, to the judge before whom an action is pending and all opposing counsel. Unless opposing counsel files a written objection within ten

(10) days with the clerk of the court, with a copy to the court and all counsel of record, or the court responds denying the leave of absence, such leave will stand granted without entry of an order. If objection is filed, the court, upon request of any counsel, will conduct a conference with all counsel to determine whether the court will, by order, grant the requested leave of absence.

The clerk of the court shall retain leave of absence notices in a chronological file for two (2) calendar years; thereafter, the notices may be discarded.

Leaves of absence for particular cases shall be docketed with the particular case affected by that leave of absence.

**9.2 Leaves for More Than Thirty (30) Calendar Days.** (Or those either on a published calendar, noticed for a hearing, or not meeting the time requirements of Rule 9.1 above.) Application for a leave of absence for more than thirty (30) calendar days, or those either on a published calendar, noticed for a hearing, or not submitted within the time limits contained in Rule 9.1 above, must be in writing, filed with the clerk of the court, and served upon opposing counsel at least ten (10) days prior to submission to the appropriate judge of the court in which the action is pending. This time period may be waived if opposing counsel consents in writing to the application. This procedure permits opposing counsel to object or to consent to the grant of the application, but the application is addressed to the discretion of the court. Such application for leave of absence shall contain:

- (a) A list of the actions to be protected, including the action number;
- (b) The reason for leave of absence; and
- (c) The duration of the requested leave of absence.

### **9.3 Excusal from Court Appearances.**

A Rule 9.1 or 9.2 leave when granted shall relieve any attorney from all trials, hearings, depositions and other legal appearances in that matter. This rule shall not extend any deadline set by law or the court.

## **RULE 10. TERMS OF COURT**

Where statutes or case law of general application in this state require action within a term of court, in the municipal court this shall signify within one hundred eighty (180) days; where action is required by the next term of court, this shall signify after one hundred eighty (180) days; and on or before three hundred sixty-five (365) days, unless by charter, ordinance or internal operating procedure term of court is otherwise defined.

## **RULE 11. ELECTRONIC AND PHOTOGRAPHIC NEWS COVERAGE OF MUNICIPAL COURT PROCEEDINGS**

Unless otherwise provided by rule of the municipal court or otherwise ordered by the assigned judge after appropriate hearing (conducted after notice to all parties and counsel of record) and findings, representatives of the print and electronic public media may be present at and unobtrusively make written notes and sketches pertaining to any judicial proceedings in the municipal courts. However, due to the distractive nature of electronic or photographic equipment, representatives of the public media utilizing such equipment are subject to the following restrictions and conditions:

- (a) Persons desiring to broadcast/record/photograph official court proceedings must file a timely written request with the judge involved prior to the hearing or trial, specifying the particular calendar/case or proceedings for which such coverage is intended; the type equipment to be used in the courtroom; the trial, hearing or proceeding to be covered; and the person responsible for installation and operation of such equipment.
- (b) Approval of the judge to broadcast/record/photograph a proceeding, if granted, shall be granted without partiality or preference to any person, news agency, or type of electronic or photographic coverage, who agrees to abide by and conform to these rules, up to the capacity of the space designated therefor in the courtroom. Violation of these rules will be grounds for a reporter/technician to be removed or excluded from the courtroom and held in contempt.
- (c) The judge may exercise discretion and require pooled coverage which would allow only one still photographer, one television camera and attendant, and one radio or tape recorder outlet and attendant. Photographers, electronic reporters and technicians shall be expected to arrange among themselves pooled coverage if so directed by the judge and to present the judge with a schedule and description of the pooled coverage. If the covering persons cannot agree on such a schedule or arrangement, the schedule and arrangements for pooled coverage may be designated at the judge's discretion.
- (d) The positioning and removal of cameras and electronic devices shall be done quietly and, if possible, before or after the court session or during recesses; in no event shall such disturb the proceedings of the court. In every such case, equipment should be in place and ready to operate before the time court is scheduled to be called to order.
- (e) Overhead lights in the courtroom shall be switched on and off only by court personnel. No other lights, flashbulbs, flashes or sudden light changes may be used unless the judge approves beforehand.
- (f) No adjustment of the central audio system shall be made except by persons authorized by the judge. Audio recordings of the court proceedings will be from one source, normally by connection to the court's central audio system. Upon prior approval of the court, other microphones may be added in an unobtrusive manner to the court's public address system.
- (g) All television cameras, still cameras and tape recorders shall be assigned to a specific portion of the public area of the courtroom or specially designed access areas, and such equipment will not be permitted to be removed or relocated during the court proceedings.
- (h) Still cameras must have quiet functioning shutters and advancers. Movie and television cameras and broadcasting and recording devices must be quiet running. If any equipment is determined by the judge to be of such noise as to be distracting to the court proceedings, then such equipment can be excluded from the courtroom by the judge.
- (i) Reporters, photographers, and technicians must have and produce upon request of court officials credentials identifying them and the media company for which they work. (j) Court proceedings shall not be interrupted by a reporter or technician with a technical or an equipment problem.
- (k) Reporters, photographers, and technicians should do everything possible to avoid attracting attention to themselves. Reporters, photographers, and technicians will be accorded full right of access to court proceedings for obtaining public information within the requirements of due process of law, so long as it is done without detracting from the dignity and decorum of the court.
- (l) Other than as permitted by these rules and guidelines, there will be no photographing, radio or television broadcasting, including videotaping pertaining to any judicial proceedings on the

floor where the trial, hearing or proceeding is being held or any other floor whereon is located a courtroom, whether or not the court is actually in session.

(m) No interviews pertaining to a particular judicial proceeding will be conducted in the courtroom except with the permission of the judge.

(n) A request for installation and use of electronic recording, transmission, videotaping or motion picture or still photography of any judicial proceeding shall be evaluated pursuant to the standards set forth in OCGA § 15-1-10.1.

(o) A request for media access to a court proceeding shall be in substantially the following form:

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

CASE NAME \_\_\_\_\_

CASE NO. \_\_\_\_\_

REQUEST FOR ELECTRONIC AND PHOTOGRAPHIC  
MEDIA ACCESS TO COURT PROCEEDINGS

Pursuant to Uniform Municipal Court Rule 11, the undersigned hereby requests permission to record, photograph or televise all or portions of the proceedings in the above captioned case.

This request is for the following scheduled hearing (provide date, time, etc.):

\_\_\_\_\_

The following equipment will be installed in the courtroom:

\_\_\_\_\_

The person who will be responsible for the installation and operation of this equipment is:

\_\_\_\_\_

The undersigned requests courtroom access prior to the scheduled event for the purpose of setting up equipment, as follows:

\_\_\_\_\_

The undersigned hereby certifies that the equipment to be installed and the locations and operation of such equipment will be in conformity with the rules and guidelines issued by the court.

\_\_\_\_\_  
Signature and date

\_\_\_\_\_  
Print name, title, and organization/company name

\_\_\_\_\_  
Organization/company address and contact telephone number

APPROVED: \_\_\_\_\_

Judge, Municipal Court of \_\_\_\_\_

## **RULE 12. COMPLETION OF QUARTERLY CASELOAD REPORTS**

In order to compile accurate data on the operation of the municipal courts, each chief judge shall ensure the accurate completion and timely submission of the Quarterly Caseload Reports sent to them by the Administrative Office of the Courts.

## **RULE 13. NOTICE OF SELECTION OF MUNICIPAL COURT JUDGES AND CLERKS OF COURT**

Whenever a judge or clerk of a municipal court shall take the oath required for office in OCGA § 15-10-3, the clerk of court shall forward to the Administrative Office of the Courts the name and title of the person taking the oath; the name of the person being succeeded, if applicable; the term of the office, if applicable; the date assuming duties; and the address and telephone number the official wishes to use for business correspondence.

## **RULE 14. AT&T LANGUAGE LINE SERVICE**

The AT&T Language Line Service is authorized for use in the municipal courts whenever foreign language interpretation is required in preliminary or administrative matters, subject, however, to the Rules for Use of Interpreters for Non-English Speaking Persons, as amended.

## **RULE 15. TELEPHONE AND VIDEO CONFERENCING 15.1**

### **Telephone Conferencing.**

The trial court on its own motion or upon the request of any party may in its discretion conduct pre-trial or post-trial proceedings by telephone conference with attorneys for all affected parties, to the extent that such conferences do not impair or deny the rights of criminal defendants pursuant to the United States and Georgia Constitutions. The trial judge may specify:

- (a) The time and the person who will initiate the conference;
- (b) The party who is to incur the initial expense of the conference call, or the apportionment of such costs among the parties, while retaining the discretion to make an adjustment of such costs upon final resolution of the case by taxing same as part of the costs; and (c) Any other matter or requirement necessary to accomplish or facilitate the telephone conference.

### **15.2 Video Conferencing.**

(a) The following matters may be conducted by video conference:

1. Determination of indigence and appointment of counsel;
2. Hearings on appearance and appeal bonds;
3. Initial appearance hearings and waiver of extradition hearings; Rule 15.2 (e) (4) below notwithstanding, public access to these hearings may provided by a video-conferencing system meeting the requirements of Rule 15.2 (e) (2) and (3);
4. Probable cause hearings;
5. Applications for and issuance of arrest warrants;
6. Applications for and issuance of search warrants;
7. Arraignment or waiver of arraignment;
8. Pretrial diversion and post-sentencing compliance hearings;
9. Entry of pleas in criminal cases;

10. Impositions of sentences upon pleas of guilty or nolo contendere;
11. Probation revocation hearings in which the probationer admits the violation, and in all misdemeanor cases;
12. Post-sentencing proceedings in criminal cases;
13. Acceptance of special pleas of insanity (incompetency to stand trial);
14. Situations involving inmates with highly sensitive medical problems or who pose a high security risk;
15. Testimony of youthful witnesses;
16. Appearances of interpreters.

Notwithstanding any other provisions of this rule, a judge may order a defendant's personal appearance in court for any hearing.

(b) Confidential Attorney-Client Communication. Provision shall be made to preserve the confidentiality of attorney-client communications and privilege in accordance with Georgia law. In all criminal proceedings, the defendant and defense counsel shall be provided with a private means of communications when in different locations.

(c) Witnesses. In any pending matter, a witness may testify via video conference. Any party desiring to call a witness by video conference shall file a notice of intention to present testimony by video conference at least thirty (30) days prior to the date scheduled for such testimony. Any other party may file an objection to the testimony of a witness by video conference within ten (10) days of the filing of the notice of intention. In civil matters, the discretion to allow testimony via video conference shall rest with the trial judge. In any criminal matter, a timely objection shall be sustained; however, such objection shall act as a motion for continuance and a waiver of any speedy trial demand.

(d) Recording of Hearings. A record of any proceedings conducted by video conference shall be made in the same manner as all such similar proceedings not conducted by video conference. However, upon the consent of all parties, that portion of the proceedings conducted by video conference may be recorded by an audio-visual recording system and such recording shall be part of the record of the case and transmitted to courts of appeal as if part of a transcript. (e) Technical Standards. Any video-conferencing system utilized under this rule must conform to the following minimum requirements:

1. All participants must be able to see, hear, and communicate with each other simultaneously;
2. All participants must be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding, either by video, facsimile, or other method;
3. Video quality must be adequate to allow participants to observe each other's demeanor and nonverbal communications; and
4. The location from which the trial judge is presiding shall be accessible to the public to the same extent as such proceeding would if not conducted by video conference. The court shall accommodate any request by interested parties to observe the entire proceeding.

## **RULE 16. ADMINISTRATION OF OATHS**

A clerk of the municipal court may administer the oath and sign the jurat for affidavits, including those in support of arrest warrants and search warrants. This rule shall not be interpreted as otherwise affecting the responsibilities of a judge in hearing applications for arrest and search warrants.

## **RULE 17. HEARINGS ON ISSUANCE OF SEARCH WARRANTS**

Whenever the hearing on the issuance of a search or arrest warrant is not recorded, the judge shall make a written notation or memorandum of any oral testimony which is not included in the affidavit, upon which the judge relies in issuing such warrant.

## **RULE 18. BAIL IN CRIMINAL CASES 18.1**

### **Misdemeanor Cases.**

Bail in misdemeanor cases shall be set as provided in OCGA §§ 17-6-1 and 17-6-2, and as provided by applicable municipal charter or ordinance.

### **18.2 Felony Cases.**

Bail in felony cases shall not be set by the municipal court in those cases which by law the bail may be set only by a superior court judge, unless a specific order has been executed for setting felony bonds by the superior court in the county of the municipality. All defendants in custody on the authority of the municipal court must be presented to the municipal court for initial appearance within the time requirements of OCGA §§ 17-4-26 and 17-4-62 for further consideration of bail.

### **18.3 Categories of Bail.**

The court may set bail which may be secured by:

- (1) Cash-by a deposit with the municipal court clerk, municipal treasurer's office, municipal law enforcement or by internal operating procedure of an amount equal to the required cash bail;  
or
- (2) Property-by real estate located within the State of Georgia with unencumbered equity, not exempted, owned by the accused or surety, valued at double the amount of bail set in the bond;  
or
- (3) Recognizance--in the discretion of the court;
- (4) Professional-by a professional bail bondsman authorized by the sheriff and in compliance with the rules and regulations for execution of a surety bail bond.

Bail may be conditioned upon such other specified and reasonable conditions as the court may consider just and proper. The court may restrict the type of security permitted for the bond although the local governing body shall determine what sureties are acceptable when a surety bond is permitted.

### **18.4 Amendment of Bail.**

The municipal court has the authority to amend any bail previously authorized by the municipal court under the provisions of OCGA § 17-6-18.

### **18.5 Bail on Bind Over or Jury Demand.**

Whenever a municipal court has set bail on cases that are bound over to another court for any reason, the bond shall be transferred to that agency or court.

## **RULE 19. DISMISSAL AND RETURN OF WARRANTS**

### **19.1 Dismissal of Warrant.**

Any dismissal of a warrant of the municipal court prior to a hearing, trial or transfer to other courts shall be made exclusively by the municipal court.

### **19.2 Assessment of Costs.**

When, in a criminal action, costs are assessed by the court upon the dismissal of a warrant, the amount of costs assessed shall be as set according to the municipal charter, ordinances, or local rule.

## **RULE 20. INITIAL APPEARANCE/COMMITMENT HEARINGS**

### **20.1 Initial Appearance Hearing.**

As soon as is reasonably practicable following any arrest but no later than forty-eight (48) hours if the arrest was without a warrant, or seventy-two (72) hours following an arrest with a warrant, unless the accused has made bond in the meantime, the arresting officer or other law enforcement officer having custody of the accused shall present the accused in person before a municipal judge or other judicial officer for first appearance.

At the first appearance, the municipal judge or judicial officer shall:

- (a) Inform the accused of the charges;
- (b) Inform the accused that he has a right to remain silent, that any statement made may be used against him, and that he has the right to the presence and advice of an attorney, either retained or appointed;
- (c) Determine whether or not the accused desires and is in need of an appointed attorney and, if appropriate, advise the accused of the necessity for filing a written application;
- (d) Inform the accused of his or her right to a later pre-indictment commitment hearing, unless the first appearance covers the commitment hearing issues, and inform the accused that giving a bond shall be a waiver of the right to a commitment hearing;
- (e) In the case of warrantless arrest, make a fair and reliable determination of the probable cause for the arrest unless a warrant has been issued before the first appearance; (f) Inform the accused of the right to grand jury indictment in felony cases and the right to trial by jury, and when the next grand jury will convene;
- (g) Inform the accused that if he or she desires to waive these rights and plead guilty, then the accused shall so notify the judge or the law enforcement officer having custody, who shall in turn notify the judge.
- (h) Set the amount of bail if the offense is not one bailable only by a superior court judge, or so inform the accused if it is.

### **20.2 Commitment Hearing.**

- (a) A municipal court judge, in his or her discretion<sup>1</sup> may hold a commitment hearing even though the defendant has posted a bail bond.
- (b) At the commitment hearing by the court of inquiry, the judicial officer shall perform the following duties:
  - (1) The judicial officer shall explain the probable cause purpose of the hearing.
  - (2) The judicial officer shall repeat to the accused the rights explained at the first appearance as listed in Rule 20.1 above.

- (3) The judicial officer shall determine whether the accused intends to plead "guilty," "nolo contendere" or "not guilty," or waives the commitment hearing.
- (4) If the accused intends to plead guilty or waives the hearing, the court shall immediately bind the entire case over to the court having jurisdiction of the most serious offense charged.
- (5) If the accused pleads "not guilty," the court shall immediately proceed to conduct the commitment evidentiary hearing unless, for good cause shown, the hearing is continued to a later scheduled date.
- (6) The judicial officer shall cause an accurate record to be made of the testimony and proceeding by any reliable method.
- (7) The judicial officer shall bind the entire case over to the court having jurisdiction of the most serious offense for which probable cause has been shown by sufficient evidence and dismiss any charge for which probable cause has not been shown.
- (8) On each case which is bound over, a memorandum of the commitment hearing shall be entered on the warrant by the judicial officer. The warrant, bail bond, and all other papers pertaining to the case shall be forwarded to the clerk of the appropriate court having jurisdiction over the offense for delivery to the district attorney. Each bail bond shall contain the full name, telephone number, residence, business and mailing addresses) of the accused and any surety.
- (9) A copy of the record of any testimony and the proceedings of the first appearance and the commitment hearing shall be provided to the proper prosecuting officer and to the accused upon payment of the reasonable cost for preparation of the record.
- (10) A judicial officer, conducting a commitment hearing, is without jurisdiction to make final disposition of the case or cases at the hearing by imposing any fine or punishment, except where the only charge arising out of the transaction at issue is the violation of a municipal ordinance.

(c) At the commitment hearing, the following procedures shall be utilized:

- (1) The rules of evidence shall apply except that hearsay may be allowed;
- (2) The prosecuting entity shall have the burden of proving probable cause; and may be represented by a law enforcement officer, a district attorney, a solicitor, or otherwise as is customary in that court;
- (3) The accused may be represented by an attorney or may appear pro se; and
- (4) The accused shall be permitted to introduce evidence.

### **20.3 Private Citizen Warrant Application Hearings.**

(a) Upon the filing of an application for an arrest warrant by a person other than a peace officer or law enforcement officer, and if the court determines that a hearing is appropriate pursuant to OCGA § 17-4-40, the court shall give notice of the date, time and location of the hearing to the applicant and to the person whose arrest is sought by personal service or by first class mail to the person's last known address or by any other means which are reasonably calculated to notify the person of the date, time and location of the hearing. (b) At the warrant application hearing the court shall:

- (1) Explain the probable cause purpose of the hearing;
- (2) Inform the accused of the charges;
- (3) Inform the accused of the right to hire and have the advice of an attorney, of the right to remain silent, and that any statement made may be used against him or her.

- (c) The warrant application hearing shall be conducted in accordance with OCGA § 17-440 (b) (4) and (5) and Rule 20.2 (c) of these rules.
- (d) A copy of the record of any testimony and the proceedings of the warrant application hearing, if available, shall be provided to the proper prosecuting officer and to the accused upon payment of the reasonable cost for preparation of the record.
- (e) The judge conducting a warrant application hearing is without jurisdiction to make final disposition of the case or cases at the hearing by imposing any fine or punishment.

## **RULE 21. APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS**

The municipal court shall have a procedure and forms consistent with state law in order to determine indigence and to appoint counsel to defendants who apply and qualify for appointed counsel. The applications shall be available through the clerk of the municipal court. The rules of municipal courts shall embrace and include OCGA § 17-12-1 et seq. The Georgia Public Defender Standards, as amended, are incorporated by reference to the extent that they are applicable to municipal courts.

## **RULE 22. ARRAIGNMENT**

### **22.1 Calendar.**

The judge or the judge's designee shall set the time of arraignment unless arraignment is waived either by the defendant or by operation of law. Notice of the date, time and place of arraignment shall be delivered to the clerk of the court and sent to attorneys of record, defendants and bondsmen.

### **22.2 Call for Arraignment.**

At or before arraignment, the court shall inquire whether the accused is represented by an attorney and, if not, advise the accused of the right to indigent defense counsel and the procedures by which an attorney's assistance may be obtained.

At arraignment, the accused, upon a plea of not guilty, may exercise his or her right to have the case bound over to the appropriate state or superior court for a trial by jury. If the accused desires a trial in municipal court before a judge without a jury, the accused shall so signify by executing a written waiver of the right to trial by jury at arraignment. Thereafter, the prosecution may, within ten (10) days, exercise its right to a trial by jury by filing a notice of binding the case over to the appropriate state or superior court. Failure of the prosecution to demand that the case be bound over for jury trial shall be deemed a waiver of the prosecution's right to trial by jury. Thereafter, a revocation of either the accused's or the prosecution's waiver of the right to trial by jury shall be effective only upon written application to the court, which shall approve such revocation unless the court makes specific findings that the revocation will substantially delay or impede the cause of justice.

Upon the call of the case for arraignment the accused, or the attorney for the accused, shall answer whether the accused pleads guilty or not guilty or desires to enter a plea of nolo contendere to the offense or offenses charged; a plea of not guilty shall constitute a joining of the issue.

## **RULE 23. MOTIONS, DEMURRERS, SPECIAL PLEAS, ETC.**

### **23.1 Time for Filing.**

All motions, demurrers, and special pleas shall be made and filed at or before the time set by law, unless time therefor is extended by the judge in writing prior to trial. Notices of the prosecution's intention to present evidence of similar transactions or occurrences and notices of the intention of the defense to raise the issue of insanity, mental illness, or mental competency shall be given and filed at least ten (10) days before trial unless the time is shortened or lengthened by the judge. Such filing shall be in accordance with Rules 23.2 - 23.4.

### **23.2 Time for Hearing.**

All such motions, demurrers, special pleas and notices shall be heard and considered at such time, date, and place as set by the judge. Generally, such will be heard at or after the time of arraignment and prior to the time at which such case is scheduled for trial.

### **23.3 Notice of Prosecution's Intent to Present Evidence of Similar Transactions.**

- (a) The prosecution may, upon notice filed in accordance with Rule 23.1, request of the court in which the charging instrument is pending, leave to present during the trial evidence of similar transactions or occurrences.
- (b) The notice shall be in writing, served upon the defendant's counsel, and shall state the transaction, date, county, and the name(s) of the victim(s) for each similar transaction or occurrence sought to be introduced. Copies of accusations or indictments, if any, and guilty pleas or verdicts, if any, shall be attached to the notice. The judge shall hold a hearing at such time as may be appropriate, and may receive evidence on any issue of fact necessary to determine the request. The burden of proving that the evidence of similar transactions or occurrences should be admitted shall be upon the prosecution. The prosecutor may present during the trial evidence of only those similar transactions or occurrences specifically approved by the judge.
- (c) Evidence of similar transactions or occurrences not approved shall be inadmissible. In every case, the prosecuting attorney and defense attorney shall instruct their witnesses not to refer to similar crimes, transactions or occurrences, or otherwise place the defendant's character in issue, unless specifically authorized by the judge.
- (d) If upon the trial of the case the defense places the defendant's character in issue, evidence of similar transactions or occurrences, as shall be admissible according to the rules of evidence, shall be admissible, the above provisions notwithstanding.
- (e) Nothing in this rule is intended to prohibit the prosecution from introducing evidence of similar transactions or occurrences which are lesser included alleged offenses of the charge being tried, or are immediately related in time and place to the charge being tried, as part of a single, continuous transaction. Nothing in this rule is intended to alter the rules of evidence relating to impeachment of witnesses.
- (f) This rule shall not apply to sentencing hearings.

### **23.4 Notice of Intention of Defense to Raise Issue of Insanity, Mental Illness or Mental Competency.**

Uniform Superior Court Rules 28.3, 31.4 and 31.5, as amended from time to time, and as applicable to municipal courts, are hereby adopted verbatim.

## **RULE 24. CRIMINAL TRIAL CALENDAR**

### **24.1 Calendar Preparation.**

All cases shall be set for trial within a reasonable time after arraignment. The clerk, judge or the judge's designee shall prepare a trial calendar, shall if applicable deliver a copy thereof to the clerk of court, and shall give notice in person or by mail to each counsel of record, the bondsman (if any) and the defendant at the last address indicated in court records, not less than seven (7) days before the trial date. The calendar shall list the dates that cases are set for trial, the cases to be tried at that session of court, the case numbers, the names of the defendants and the names of the defense counsel.

### **24.2 Removal from Calendar.**

No case shall be postponed or removed from the calendar except by the judge.

## **RULE 25. PLEADING BY DEFENDANT**

### **25.1 Alternatives.**

(a) A defendant may plead guilty, not guilty, or in the discretion of the judge, nolo contendere. A plea of guilty or nolo contendere should be received only from the defendant personally in open court, except when the defendant is a corporation, in which case the plea may be entered by a duly authorized attorney at law or a corporate officer. In misdemeanor, traffic and municipal ordinance cases, upon the request of a defendant who has made, in writing, a knowing, intelligent and voluntary waiver of his right to be present, the court may accept a plea of guilty or nolo contendere in absentia.

(b) A defendant may plead nolo contendere only with the consent of the judge. Such a plea should be accepted by the judge only after due consideration of the views of the parties and the interest of the public in the effective administration of justice. A plea of nolo contendere shall be handled under these rules in a manner consistent with a plea of guilty.

### **25.2 Aid of Counsel-Time for Deliberation.**

(a) A defendant shall not be called upon to plead before having a reasonable opportunity to retain counsel, or if the defendant is eligible for appointment of counsel, until counsel has been appointed or right to counsel waived. A defendant with counsel shall not be required to enter a plea if counsel makes a reasonable request for additional time to represent the defendant's interest, or if the defendant has not had a reasonable time to consult with counsel.

(b) A defendant without counsel should not be called upon to plead to any offense without having had a reasonable time to consider this decision. When a defendant without counsel tenders a plea of guilty or nolo contendere to an offense, the court shall not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, following the admonitions from the court required in Rule 25.8.

### **25.3 Propriety of Plea Discussions and Plea Agreements.**

(a) In cases in which it appears that the interests of the public in the effective administration of criminal justice (as stated in Rule 25.6) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. The prosecuting attorney should engage in plea discussions or reach a plea agreement with the defendant only through

defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(1) To make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(2) To seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or (3) To seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

#### **25.4 Relationship Between Defense Counsel and Client.**

(a) Defense counsel shall conclude a plea agreement only with the consent of the defendant, and shall ensure that the decision to enter or not enter a plea of guilty or nolo contendere is ultimately made by the defendant.

(b) To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him in reaching a decision.

#### **25.5 Responsibilities of the Trial Judge.**

(a) The trial judge shall not participate in plea discussions.

(b) If a tentative plea agreement has been reached, upon request of the parties, the trial judge may permit the parties to disclose the tentative agreement and the reasons therefor in advance of the time for the tendering of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the judge will likely concur in the proposed disposition if the information developed in the plea hearing or presented in any pre-sentence report is consistent with the representations made by the parties. If the trial judge concurs but the final disposition differs from that contemplated by the plea agreement, then the judge shall state for the record what information in any pre-sentence report or hearing contributed to the decision not to sentence in accordance with the plea agreement.

(c) When a plea of guilty or nolo contendere is tendered or received as a result of a plea agreement, the trial judge shall give the agreement due consideration, but notwithstanding its existence, must reach an independent decision on whether to grant charge or sentence leniency under the principles set forth in Rule 25.6 of these rules.

#### **25.6 Consideration of Plea in Final Disposition.**

(a) It is proper for the judge to grant charge and sentence leniency to defendants who enter pleas of guilty or nolo contendere when the interests of the public in the effective administration of criminal justice are thereby served. Among the considerations which are appropriate in determining this question are:

(1) That the defendant by entering a plea has aided in ensuring the prompt and certain application of correctional measures;

(2) That the defendant has acknowledged guilt and shown a willingness to assume responsibility for conduct;

- (3) That the leniency will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;
  - (4) That the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;
  - (5) That the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;
  - (6) That the defendant by entering a plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.
- (b) The judge should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law merely because the defendant has chosen to require the prosecution to prove the defendant's guilt at trial rather than to enter a plea of guilty or nolo contendere.

### **25.7 Determining Voluntariness of Plea.**

The judge shall not accept a plea of guilty or nolo contendere without first determining, on the record, that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the judge should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence leniency which must be approved by the judge, the judge must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the judge. The judge shall then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

### **25.8 Defendant to Be Informed.**

The judge shall not accept a plea of guilty or nolo contendere from a defendant without first:

- (a) Determining on the record that the defendant understands the nature of the charge(s);
- (b) Informing the defendant on the record that by entering a plea of guilty or nolo contendere one waives:
  - (1) The right to trial by jury;
  - (2) The presumption of innocence;
  - (3) The right to confront witnesses against oneself;
  - (4) The right to subpoena witnesses;
  - (5) The right to testify and to offer other evidence;
  - (6) The right to assistance of counsel during trial;
  - (7) The right not to incriminate oneself; and that by pleading not guilty or remaining silent and not entering a plea, one obtains a jury trial; and
- (c) Informing the defendant on the record:
  - (1) Of the terms of any negotiated plea;
  - (2) That a plea of guilty may have an impact on his or her immigration status if the defendant is not a citizen of the United States;

- (3) Of the maximum possible sentence on the charge, including that possible from consecutive sentences and enhanced sentences where provided by law; and/or
- (4) Of the mandatory minimum sentence, if any, on the charge. This information may be developed by questions from the judge, the district attorney or the defense attorney, or a combination of any of these.

### **25.9 Determining Accuracy of Plea.**

Notwithstanding the acceptance of a plea of guilty or nolo contendere, judgment shall not be entered upon such plea without such inquiry on the record as may satisfy the judge that there is a factual basis for the plea.

### **25.10 Stating Intention to Reject the Plea Agreement.**

If the trial court intends to reject the plea agreement, the trial court shall, on the record, inform the defendant personally that (1) the trial court is not bound by any plea agreement; (2) the trial court intends to reject the plea agreement presently before it; (3) the disposition of the present case may be less favorable to the defendant than that contemplated by the plea agreement; and (4) that the defendant may then withdraw his or her guilty plea as a matter of right. If the plea is not then withdrawn, sentence may be pronounced.

### **25.11 Plea Withdrawal.**

- (a) After sentence is pronounced, the judge shall allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.
- (b) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw a plea of guilty or nolo contendere as a matter of right once sentence has been pronounced by the judge.

## **RULE 26. RECORD OF PROCEEDINGS**

A verbatim mechanical recording or a contemporaneous paper record, or both, of the proceedings at which a defendant enters a plea of guilty or nolo contendere shall be made and preserved for a minimum of two years. The record shall include:

- (a) The inquiry into the voluntariness of the plea (as required in Rule 25.7);
- (b) The advice to the defendant (as required in Rule 25.8);
- (c) The inquiry into the accuracy of the plea (as required in Rule 25.9); and, if applicable,
  - (d) The notice to the defendant that the trial court intends to reject the plea agreement and the defendant's right to withdraw the guilty plea before sentence is pronounced.

## **RULE 27. PRESERVATION OF EVIDENCE**

### **27.1 Maintenance of Criminal Evidence.**

Prior to and during the trial or hearing:

The clerk of the municipal court in possession of documents, electronic documents, audio and video recordings of whatever form, exhibits, and other material objects or any other case file, shall maintain a log or inventory of all such items with the case number, party names, description of the item, the name and official position of the custodian, and the location of the storage of the items.

Dangerous or contraband items shall be placed in the custody of the clerk of the municipal court or his/her designee and be maintained in the courthouse or other such location as allowed by law and be available during court proceedings and accessible to the court reporter. Unless retained in the original case file, all such items admitted as evidence shall be identified or tagged by the clerk or court reporter with the case number and the exhibit number and be recorded in the evidence log or inventory. The clerk of the municipal court shall update the log or inventory to show the current custodian and the location of the evidence. Dangerous or contraband items shall be transferred to the chief of police, sheriff or other appropriate law enforcement agency along with a copy of the log or inventory. The chief of police or sheriff or other law enforcement agency shall acknowledge the transfer with a signed receipt, and the receipt shall be retained with the log or inventory created and maintained by the clerk of the municipal court. The clerk of the municipal court and the chief of police or sheriff or other law enforcement agency shall each maintain a log or inventory of such items of evidence. In all cases, the clerk of the municipal court shall be granted the right of access to such items of evidence necessary to complete the transcript of the case. In any case in which no court reporter was retained, the clerk of the municipal court shall keep and store the evidence or ensure that it is maintained in an appropriate location.

Evidence in the possession of the clerk of the municipal court or court reporter, during court proceedings, shall be maintained in accordance with the provisions of OCGA § 17-5-55 and other applicable law. The designated custodian shall be responsible for the recording of the evidence log or inventory, the name of the counsel or party, the date, and the purpose for the release of any such items of evidence. Subsequent to admission of any item into evidence by the Court, no substitution for the item admitted into evidence shall be made except by leave of the Court. Any counselor party seeking to make a substitution for admitted evidence after the close of evidence shall file a motion for an order authorizing such substitution. Upon granting of an order for substitution, the order shall be entered into the log or inventory.

The log or inventory of any evidence separated from the original case file shall be maintained in the original case file.

Upon the expiration of the time for the filing of an appeal during which no appeal has been filed by any party, the clerk of the municipal court, court reporter, chief of police, sheriff or other law enforcement agency may, and shall upon written request, return any item of admitted evidence to the counselor party who tendered the same; provided, however, that no item which is contraband or illegal to possess in the state of Georgia shall be returned to any counsel or party, and all such items shall, upon the expiration of the time for the filing of an appeal during which no appeal has been filed by any party, be delivered over to the chief of police or sheriff of the county for appropriate disposition. Upon the expiration of the time for the filing of an appeal during which no appeal has been filed by any party, the clerk of the municipal court, court reporter, chief of police or sheriff or other law enforcement agency may notify in writing the counsel or party who tendered any item(s) admitted in evidence in the possession of such clerk, court reporter, chief of police or sheriff or other law enforcement agency, to retrieve such item(s) within thirty (30) days of the written notice, and, upon the failure of the counselor party to retrieve same within such thirty (30) days, the clerk, court reporter, chief of police or sheriff or law enforcement agency may dispose of the item(s).

## **27.2 Maintenance of Civil Evidence.**

(a) Prior to and during the trial or hearing:

The clerk of the municipal court in possession of documents, electronic documents, audio and video recordings of whatever form, exhibits, and other material objects or any other case file, shall maintain a log or inventory of all such items with the case number, party names, description of the item, the name and official position of the custodian, and the location of the storage of the items. Dangerous or contraband items shall be placed in the custody of the clerk of the municipal court or designee and be maintained in the courthouse or other such location as allowed by law and be available during court proceedings and accessible to the court reporter. Unless retained in the original case file, all such items admitted as evidence shall be identified or tagged by the clerk or court reporter with the case number and the exhibit number and be recorded in the evidence log or inventory. The clerk of the municipal court shall update the log or inventory to show the current custodian and the location of the evidence.

(b) Once the trial is concluded:

Dangerous or contraband items shall be transferred to the chief of police or sheriff or other appropriate law enforcement agency along with a copy of the log or inventory. The sheriff or other law enforcement agency shall acknowledge the transfer with a signed receipt, and the receipt shall be retained with the log or inventory created and maintained by the clerk of the municipal court. The clerk of the municipal court and the chief of police, sheriff or other law enforcement agency shall each maintain a log or inventory of such items of evidence. In all cases, the clerk shall be granted the right of access to such items of evidence necessary to complete the transcript of the case. In any case in which no court reporter was retained, the clerk of the municipal court shall keep and store the evidence or ensure that it is maintained in an appropriate location.

Evidence in the possession of the clerk of the municipal court or court reporter shall be maintained in accordance with the law. The designated custodian shall be responsible for the recording of the evidence log or inventory, the name of the counselor party, the date, and the purpose for the release of any such items of evidence. Subsequent to admission of any item into evidence by the Court, no substitution for the item admitted into evidence shall be made except by leave of the Court. Any counselor party seeking to make a substitution for admitted evidence after the close of evidence shall file a motion for an order authorizing such substitution. Upon granting of an order for substitution, the order shall be entered into the log or inventory. The log or inventory of any evidence separated from the original case file shall be maintained in the original case file. Upon the expiration of the time for the filing of an appeal during which no motion for new trial or appeal has been filed by any party, the clerk of the municipal court, court reporter, chief of police, sheriff or other law enforcement agency may, and shall upon written request, return any item of admitted evidence to the counselor party who tendered the same; provided, however, that no item which is contraband or illegal to possess in the state of Georgia shall be returned to any counselor party, and all such items shall, upon the expiration of the time for the filing of an appeal during which no motion for new trial or appeal has been filed by any party, be delivered over to the chief of police or sheriff of the county for appropriate disposition. Upon the expiration of the time for the filing of an appeal during which no motion for new trial or appeal has been filed by any party, the clerk of the municipal court, court reporter, chief or police, sheriff or other law enforcement agency may notify in writing the counsel or party who tendered any item(s) admitted in evidence in the possession of such clerk, court reporter, chief of police, sheriff or law enforcement agency, to retrieve such item(s) within thirty (30) days of the written notice, and, upon the failure of the counselor party to retrieve same within such thirty (30) days, the clerk, court reporter, chief of police, sheriff or law enforcement agency may dispose of the item(s).

**RULE 28. COURTROOM ATTIRE**

Head coverings are prohibited in the courtroom except in cases where the covering is worn for medical or religious reasons. To the extent security requires a search of a person wearing a permitted head covering, the individual has the option of having the inspection performed by a same-sex officer in private. The individual is allowed to replace his or her own head covering after the inspection is complete.

## CHAPTER 14: USEFUL FORMS

### **FORMS FROM THE MUNICIPAL JUDGES EXECUTIVE COUNCIL**

These are CMuJ Standardized Forms approved by the Council

*(Each form is followed by the form in Spanish)*

Amendment to Accusation without Waiver

Amendment to Accusation

Application for Appointment of Counsel and Certificate of Financial Resources

Orientation for Arraignment

Court Appointed Attorney Letter Not Approved

Court Appointed Attorney Letter Approved

Order Continuing Case to another Court Date

Defendant's Guilty/ Nolo Contendere Plea Statement and Waiver of Rights

Waiver of Right to a Jury Trial

Waiver of Right to an Attorney

### **MISCELLANEOUS FORMS FROM VARIOUS COURTS**

Order to Bind Case to State Court

Order to Bind Case to Superior Court

Bond Order

Notice of Bond forfeiture Hearing

Order for Completing Disability Awareness Requirements

Requirements for B.S.A. Disability Awareness Merit Badge.

Certificate of Eligibility for Ignition interlock Limited Driving Permit

Continuance Notice Official Notice of Court Date Rescheduling

Conditional Discharge

Waiver and Plea

Proof of Attendance

Criminal Arrest Warrant

State Warrant for Arrest

Defendant's Demand for A Jury Trial

Defendant's Waiver of Jury Trial and Request for A Plea and Compliance Date

Opening Remarks/Statement for Court

Order Establishing Court Dress Code

Motion to Enter Plea in Absentia

Defendant's Statement in Support of Motion to Enter Plea in Absentia

Order Accepting Defendant's Plea in Absentia

First offender or Conditional Discharge

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, ) Case No.:  
Defendant )

**AMENDMENT TO ACCUSATION WITHOUT WAIVER**

The prosecuting official in this matter hereby amends the original accusation in this matter in which the Defendant was charged with \_\_\_\_\_, in violation of O.C.G.A. § \_\_\_\_\_. The prosecutor amends said charge to \_\_\_\_\_, in violation of O.C.G.A. § \_\_\_\_\_, or City/County Ordinance No. \_\_\_\_\_.

Respectfully submitted this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Prosecutor

Acknowledgment of Amended Accusation

The undersigned Defendant acknowledges service of the amended accusation.

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Defendant

TRIBUNAL MUNICIPAL/DEL CONDADO DE \_\_\_\_\_  
ESTADO DE GEORGIA

\_\_\_\_\_, ) Acusación/Notificación: \_\_\_\_\_  
Acusado )

ENMIENDA A LA ACUSACIÓN  
SIN LA RENUNCIA

El funcionario de la fiscalía en este asunto, \_\_\_\_\_,  
por la presente enmienda la acusación original en la causa en la cual se imputó al acusado  
\_\_\_\_\_, en infracción de la Sección \_\_\_\_\_ del  
*Código Oficial Comentado de Georgia (OCGA*, por sus siglas en inglés). El fiscal enmienda  
el cargo a \_\_\_\_\_, en infracción de la Sección  
\_\_\_\_\_ del *Código Oficial Comentado de Georgia*, o de la Sección  
\_\_\_\_\_ de la Ordenanza Municipal/del Condado N.º \_\_\_\_\_.

Queda a su debida consideración el día \_\_\_\_ de \_\_\_\_\_ de 20 \_\_\_\_.

\_\_\_\_\_  
Fiscal

Acuse de recibo de la acusación enmendada

El acusado suscrito admite notificación de la acusación enmendada.

El día \_\_\_\_ de \_\_\_\_\_ de 20 \_\_\_\_.

\_\_\_\_\_  
Acusado

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, ) Case No.:  
Defendant )

**AMENDMENT TO ACCUSATION**

The prosecuting official in this matter hereby amends the original accusation in this matter in which the Defendant was charged with \_\_\_\_\_, in violation of O.C.G.A. § \_\_\_\_\_. The prosecutor amends said charge to \_\_\_\_\_, in violation of O.C.G.A. § \_\_\_\_\_, or City/County Ordinance No. \_\_\_\_\_.

Respectfully submitted this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Prosecutor

Acknowledgment of Amended Accusation

The undersigned Defendant acknowledges service of the amended accusation. The Defendant further waives arraignment on said charge and waives any statutory or constitutional notice, rights to file responsive pleadings, and the right to trial, with or without assistance of a jury.

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Defendant

TRIBUNAL MUNICIPAL/DEL CONDADO DE \_\_\_\_\_  
ESTADO DE GEORGIA

\_\_\_\_\_, ) Acusación/Notificación: \_\_\_\_\_  
Acusado )

ENMIENDA A LA ACUSACIÓN

El funcionario de la fiscalía en este asunto, \_\_\_\_\_,  
por la presente enmienda la acusación original en la causa en la cual se imputó al acusado  
\_\_\_\_\_, en infracción de la Sección \_\_\_\_\_ del  
*Código Oficial Comentado de Georgia (OCGA*, por sus siglas en inglés). El fiscal enmienda  
el cargo a \_\_\_\_\_, en infracción de la Sección  
\_\_\_\_\_ del *Código Oficial Comentado de Georgia*, o de la Sección  
\_\_\_\_\_ de la Ordenanza Municipal/del Condado N.º \_\_\_\_\_.

Queda a su debida consideración el día \_\_\_\_ de \_\_\_\_\_ de 20 \_\_\_\_.

\_\_\_\_\_  
Fiscal

Acuse de recibo de la acusación enmendada

El acusado suscrito admite notificación de la acusación enmendada. El acusado además  
renuncia a la instrucción formal de cargos respecto a tal acusación y renuncia a toda  
notificación legal o constitucional, a los derechos a interponer contestación a la acusación y  
al derecho a juicio, con o sin jurado.

El día \_\_\_\_ de \_\_\_\_\_ de 20 \_\_\_\_.

\_\_\_\_\_  
Acusado

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, ) Case No.:  
Defendant )

**In Jail:** \_\_\_\_\_ **Out on Bond:** \_\_\_\_\_ **Arrest Date:** \_\_\_\_\_

**APPLICATION FOR APPOINTMENT OF COUNSEL AND CERTIFICATE OF  
FINANCIAL RESOURCES**

I am the defendant in the above-styled action. I am charged with the offense(s) of

\_\_\_\_\_ which is/are a misdemeanor. I can / cannot afford to hire a lawyer to assist me. I do / do not want the court to determine my eligibility for a Court-Appointed lawyer to defend me on the above charges.

1. Name \_\_\_\_\_ Phone No. \_\_\_\_\_

Mailing Address \_\_\_\_\_

Birth Date \_\_\_\_\_ Age \_\_\_\_\_ SS No. \_\_\_\_\_

Highest grade completed in school \_\_\_\_\_ Sex \_\_\_\_\_ Race \_\_\_\_\_

2. Secondary contact: Name \_\_\_\_\_

Phone No. \_\_\_\_\_

3. If employed, employer is \_\_\_\_\_

City / State \_\_\_\_\_

Net take home pay is (gross pay minus state, federal, and social security taxes):

\$ \_\_\_\_\_ (weekly) OR \$ \_\_\_\_\_ (monthly).

4. If unemployed, how long? \_\_\_\_\_

List other sources of income such as unemployment compensation, welfare or disability income and the amounts received per week or month: \$ \_\_\_\_\_

5. Are you married? \_\_\_\_\_ Is spouse employed? \_\_\_\_\_ If yes, by whom? \_\_\_\_\_

\_\_\_\_\_ Spouse's net income \$ \_\_\_\_\_ (week)

6. Number of children living in home \_\_\_\_\_ Ages \_\_\_\_\_

7. Dependents other than spouse or children in home (names, relationship, amount contributed to support) \$ \_\_\_\_\_

8. Do you own or are you purchasing a motor vehicle? Yes / No

Year and Model: \_\_\_\_\_ Amount owed on vehicle \$ \_\_\_\_\_

Year and Model: \_\_\_\_\_ Amount owed on vehicle \$ \_\_\_\_\_

9. Do you own a home? Yes / No \_\_\_\_\_ Value \$ \_\_\_\_\_

The amount in each account \$ \_\_\_\_\_

10. Amount of house payment or rent payment per month \$ \_\_\_\_\_

11. List checking or savings or other deposit accounts with any bank or financial institution and

12. List any other assets or property, including real estate, jewelry, notes, bonds or stocks:

\_\_\_\_\_ Value \$ \_\_\_\_\_

\_\_\_\_\_ Value \$ \_\_\_\_\_

\_\_\_\_\_ Value \$ \_\_\_\_\_

13. List indebtedness and amount of payments \_\_\_\_\_

14. List any extraordinary living expenses and amount (such as regularly occurring medical bills

15. Child support payable under any court order: \$ \_\_\_\_\_

16. *Do you understand that whether you are convicted or acquitted the City of \_\_\_\_\_ may seek reimbursement of attorney's fees paid for you if you become financially able to pay or reimburse the city? \_\_\_\_\_ (Defendant's initials)*

I have read (had read to me) the above questions and answers, and they are correct and true.

The undersigned swears that the information given herein is true and correct and understands that a false answer to any item may result in a charge of perjury.

This \_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Defendant's signature

Interview performed by: \_\_\_\_\_ Date: \_\_\_\_\_

TRIBUNAL MUNICIPAL/DEL CONDADO DE \_\_\_\_\_  
ESTADO DE GEORGIA

\_\_\_\_\_, ) Acusación/Notificación: \_\_\_\_\_  
Acusado )

En reclusión \_\_\_\_\_ Libre bajo fianza \_\_\_\_\_ Fecha del arresto \_\_\_\_\_

**SOLICITUD PARA EL NOMBRAMIENTO DE UN ABOGADO Y  
CERTIFICACIÓN DE MEDIOS ECONÓMICOS**

Soy el acusado en la causa del epígrafe. Se me acusa de infringir la ley de la siguiente manera:

\_\_\_\_\_, delito(s) menor(es). Cuento / No cuento con los medios económicos para contratar a un abogado que me ayude en la causa. Deseo / No deseo que el tribunal determine si cumplo con los requisitos para que me nombre un abogado de oficio que me defienda contra los cargos arriba indicados.

1. Nombre y apellidos \_\_\_\_\_ Teléfono \_\_\_\_\_  
Dirección postal \_\_\_\_\_  
Fecha de nacimiento \_\_\_\_\_ Edad \_\_\_\_\_ N.º de seguro social \_\_\_\_\_  
Nivel de escolaridad \_\_\_\_\_ Sexo \_\_\_\_\_ Raza \_\_\_\_\_
2. Contacto secundario: Nombre y apellidos \_\_\_\_\_ Teléfono \_\_\_\_\_
3. Si tiene empleo, el patrono es \_\_\_\_\_  
Ciudad / Estado \_\_\_\_\_ Los ingresos netos son (los ingresos brutos menos los impuestos federales, estatales y de seguro social)  
\$ \_\_\_\_\_ (semanales) \$ \_\_\_\_\_ (mensuales)
4. Si no tiene empleo, ¿desde hace cuánto tiempo? \_\_\_\_\_ Haga una lista de otras fuentes de ingresos como prestaciones por desempleo, asistencia social o incapacidad y las cantidades recibidas semanal o mensualmente  
\_\_\_\_\_.
5. ¿Es casado? \_\_\_\_\_ ¿Tiene empleo su cónyuge? \_\_\_\_\_ Si lo tiene, ¿quién es el patrono?  
\_\_\_\_\_ Ingresos netos del cónyuge \$ \_\_\_\_\_  
(semanales)
6. Número de hijos que viven en el hogar \_\_\_\_\_ Edades \_\_\_\_\_

7. Personas a cargo aparte del cónyuge y los hijos que vivan en el hogar (nombres, relación o parentesco y cantidad que usted contribuye a su manutención)

\_\_\_\_\_.

8. ¿Es propietario de un vehículo automotor o va a comprar un vehículo? Sí / No

\_\_\_\_\_

Año y modelo \_\_\_\_\_ ¿Cuánto debe de la letra de pago? \_\_\_\_\_

9. ¿Es propietario de una vivienda? Sí / No Valor \$ \_\_\_\_\_ Adeudo de hipoteca \$ \_\_\_\_\_.

10. Cantidad mensual del alquiler o la hipoteca \$ \_\_\_\_\_.

11. Lista de las cuentas corrientes o de ahorros, u otras cuentas de depósito en cualquier banco o institución financiera y la cantidad en cada cuenta \_\_\_\_\_.

12. Lista de todos los demás bienes o propiedades, incluidos bienes inmuebles, joyas, pagarés, bonos o acciones

\_\_\_\_\_

13. Lista de las deudas y las cantidades a pagar

\_\_\_\_\_

14. Lista de todos los gastos extraordinarios del costo de vida y las cantidades (como cuentas médicas habituales)

\_\_\_\_\_

15. Pagos por manutención de menores ordenados por un tribunal

\_\_\_\_\_

16. *¿Entiende usted que, bien sea que se le condene o se le absuelva de los cargos, el Municipio de \_\_\_\_\_ podría tratar de obtener reembolso por los honorarios del abogado que le ayudó si en algún momento cuenta usted con los medios económicos para pagar o reembolsar al Municipio?*

\_\_\_\_\_ (Iniciales del acusado)

He leído (o me han leído) las preguntas y respuestas anteriores y son fieles y verdaderas. El suscrito jura que la información que se incluye en este documento es verdadera y fiel, y que entiende que una respuesta falsa a cualquiera de las preguntas puede tener como consecuencia una acusación de perjurio.

El día \_\_\_\_\_ de \_\_\_\_\_ de 20\_\_\_\_\_.

\_\_\_\_\_  
Firma del acusado

Entrevista efectuada por: \_\_\_\_\_

Fecha: \_\_\_\_\_

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, ) Case No.:  
Defendant )

**ORIENTATION FOR ARRAIGNMENT**

This information is designed to provide information to you so that you will be able to make a decision about how you want to handle your Municipal Court case. Please note that nothing contained in this document is legal advice, or designed to substitute for sound legal advice. It is suggested that you obtain legal advice regarding your legal position and the legal consequences of the charges against you. The Judge cannot give you legal advice. The Prosecutor/City Solicitor cannot give you legal advice. The Clerk of the Court cannot give you legal advice.

Arraignment (First Appearance): This is the stage of the proceedings in which the Court determines whether you are aware of the nature of the charge(s) against you and how you intend to address the charge(s).

Shield of Protection: Innocence: You are in fact Innocent in this Court until and unless:

- (a) YOU decide otherwise and volunteer information saying you are guilty, or
- (b) Proper Evidence has been received in open court at Trial that ultimately results in you being found Guilty Beyond a Reasonable Doubt.

Bench Trials: The only kind of Trial you can get here is a “Bench” (Judge) Trial. The Legislature of the State of Georgia has not empowered municipal judges with the authority to empanel jurors at this level of Court. You may have a trial, however, your trial will be conducted by the Judge sitting as the trier of fact and the trier of law, without the assistance of a jury.

Jury Trial: Jury trials are only available in the event that you have been charged with a violation of a State statute, or there is a comparable state statute under which your case may be bound over for trial by jury. Your physical location in the City of \_\_\_\_\_ at the time you were charged with your particular violation will determine what Court your case would be bound over to in the event that you, or the City Solicitor requests the case be bound over for trial by jury.

To Keep Your Case Here: The General Assembly in Georgia has directed that no “City Court” anywhere in Georgia may handle your case locally unless and until you sign a written Waiver of your right to a Jury Trial. To keep your case in the Municipal Court of the City of \_\_\_\_\_ (unless you are charged/accused of a City Ordinance Violation) you must:

- a) select how you wish to plea,
- b) sign this form and the waiver of jury trial and plea form, and
- c) bring the completed form with you and hand it to the Judge before the Judge can talk with you about your case.

Your Appeal Rights: If you elect to have a trial of your case in the Municipal Court of the City of \_\_\_\_\_ and you are not happy with the outcome after trial, you have the Right

to Appeal the decision here to the next appropriate Court. There is a process for appeal outlined in the Georgia Code. There are strict Appeal requirements, including a filing deadline (from the date your case is handled and Judgment is entered), and the creation of a legally sufficient “record” (accomplished by having a Court Reporter present to take down the proceedings at YOUR expense). If this is the first time you are appearing on the charges you currently have pending, you are eligible to ask for your court date to be rescheduled so that you have the chance to consult with an Attorney before deciding how to handle things, including learning more about a possible Appeal of your case.

#### Announcement Options at Arraignment:

“Not Guilty ~ Bench Trial”: You disagree with the charge against you. This forms an “issue” between you and the City of \_\_\_\_\_ which must be resolved by way of a trial. Your case stays in the Municipal Court of the City of \_\_\_\_\_ and is tried here or you can later work through to a disposition without a trial; you must fill out the waiver and advisement of rights form.

“Not Guilty ~ Jury Trial”: Your case is physically ‘transferred’ to the next appropriate Court for further disposition. You are on the same ‘bond’ or return to court requirement until you are notified to appear in the next court. You must make sure that the Clerk of the Municipal Court of this City, \_\_\_\_\_, has your current mailing address for you to receive your next notification to appear in Court. If you move prior to receiving your next notice to appear in Court, it is YOUR RESPONSIBILITY to notify the appropriate court of your change of address. Your failure to do so may result in the issuance of a warrant for your arrest for failure to appear at your next court appearance.

“Guilty”: You understand and admit that you WERE wrong. For example: you know that you were speeding, or did make the ‘turn’ where you shouldn’t have, or you did run into another car, or you cannot show that the car was insured on the day that you got stopped, or you did “roll” through the STOP sign, etc. This plea forms no “issue” between you and the City of \_\_\_\_\_, therefore, your case is resolved in the Municipal Court of the City of \_\_\_\_\_, usually the same day; you must fill out the waiver and advisement of rights form. You may still make an explanation to the Court as to the circumstances surrounding the violation(s), however, that explanation does not impact the determination of guilt or innocence in your case. Explanations in connection with guilty pleas go toward the issue of aggravation (increase) or mitigation (decrease) of punishment, only.

“Guilty ~ Alford Plea”: You believe (in your own mind and heart) that you are NOT Guilty, but you ALSO believe that the evidence against you is strong enough that the Judge will probably decide against you. So, you would rather end your case today without coming back for a trial. Your case stays in the Municipal Court of the City of \_\_\_\_\_; you must fill out the waiver and advisement of rights form.

“Nolo Contendere”: This is handled much the same way as a Guilty Plea. The advantage to you is that the Department of Motor Vehicle Safety (DMVS) may not assess points to your driver’s license. However, the violation itself will still appear on your driving history. It is a discretionary plea (the Judge must agree to accept the Nolo Plea) and a “Nolo” can only be used one time every five (5) years for the various types of offenses for which it is available. In some types of cases, such as “No Insurance”, it can have the benefit of not suspending your license.

There are other types of offenses for which a nolo pleas can be to your advantage. In order to assess whether it can help you in your case, you should speak to an attorney in order to get proper legal advice. The Judge and the Solicitor cannot give you legal advice regarding your case. The Clerk of the Court cannot give you legal advice regarding your case. You must fill out the waiver and advisement of rights form.

Pre-Trial”: You may talk with the City Solicitor (the Prosecutor) about your case and see what sentence options he will recommend to the Judge if you tender some kind of Guilty Plea. Understand that if you chose to represent yourself and you speak with the Solicitor about your case, that nothing you say is “privileged”. In other words, anything that you say to the Solicitor may be used against you at a subsequent trial if you are unable to reach a plea agreement with the Solicitor in regard to your case. NOTE: Only the Judge decides and enters the Sentence. Even AFTER talking with the Solicitor, you may still ask for a Trial, here or by a jury (in the case of a charge involving a violation of a state statute). If you do opt for a trial, your case will be re-set to a future bench trial date in the city, or transferred out of the City of \_\_\_\_\_ for a Jury Trial.

“Re-set, Please” (continuances):

- (1) (a) You are charged with an offense that carries with it on conviction a license suspension or mandatory jail time, such a DUI, Leaving the Scene of an Accident, Fleeing and Eluding Police, Aggressive Driving, Driving w/Suspended License, Driving Without Insurance, etc., and you would like to consult with or hire an Attorney , or  
(b) you are just nervous at Arraignment, you may ask for a Re-Set. In so doing, you may either Waive Arraignment or not. It is usually better NOT to Waive Arraignment on your own if possible because it is a “critical” stage of the Criminal Justice Proceedings and important matters ‘hinge’ on when Arraignment occurs.
- (2) You are under 21 and still under someone else’s (i) roof and/or (ii) insurance umbrella, and (iii) there is no parent or guardian with you; you should strongly consider a “re-set” to have a parent with you. There are unique consequences which attach to an under 21 year old driver in the State of Georgia which may severely impact their driving privileges.
- (3) Anyone charged with a violation of Title 16, Title 3, or an offense which carries mandatory minimum penalties under the law, such as jail time or suspension of your driver’s license, DUI, Driving w/No Insurance, Aggressive Driving, Driving while license suspended, Leaving the Scene of an accident/ Failure to Report, or CDL Violation: PLEASE, seek legal counsel.

Miscellaneous matters:

Public Defender: If you are indigent and qualify for the services of the public defender, the Court will assign the public defender (an attorney to defend you) to speak with you about your case and represent you before the Court. There is an application which you must fill out and there is a Fifty Dollar (\$50.00) fee that you must pay at the time of application. That fee is established by the Georgia Legislature in connection with application for indigent representation and can be waived under extreme circumstances by the Court.

Defensive Driving: All under 21 year old violators who plead guilty or nolo contendere, or are found guilty after a trial will be attending a defensive driving course to be determined by the Court.

**IMPORTANT:** Do not leave Court today until you receive a Written Notice with your new return court date issued by the Clerk.

I have received and read the Orientation for Arraignment information form and understand the options that I have prior to proceeding with my case.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Person Receiving the Violation

TRIBUNAL MUNICIPAL/DEL CONDADO DE \_\_\_\_\_  
ESTADO DE GEORGIA

\_\_\_\_\_, ) Acusación/Notificación: \_\_\_\_\_  
Acusado )

ORIENTACIÓN PARA LA INSTRUCCIÓN DE CARGOS

Esta orientación está encaminada a proporcionarle información de modo que pueda tomar una decisión sobre cómo actuar respecto a su causa en el tribunal municipal. Favor de tener presente que nada de lo incluido en este documento constituye asesoría jurídica ni está concebido para sustituir el buen asesoramiento jurídico. Se le sugiere que obtenga asesoría jurídica respecto a su situación legal y sobre las consecuencias de los cargos presentados en su contra. Ni el juez, ni el fiscal/procurador municipal, ni el secretario judicial pueden ofrecerle asesoría jurídica.

Instrucción de cargos (primera comparecencia): En esta etapa del proceso el juez determina si está usted enterado de la índole de todo cargo presentado en su contra y cómo desea usted actuar al respecto.

Salvaguardias de protección: Inocencia:

De hecho, usted es inocente en este tribunal hasta y a menos que:

- (a) USTED decida lo contrario y ofrezca información que indique su culpabilidad, o
- (b) Se hayan recibido pruebas adecuadas en un juicio en sesión pública del tribunal, que tengan como resultado definitivo un veredicto de su culpabilidad sin que quepa duda razonable.

Juicio sin jurado: El único tipo de juicio que puede tener aquí es un juicio (ante el juez) sin jurado. La Legislatura del estado de Georgia no ha dotado a los jueces municipales de la autoridad para integrar jurados a este nivel de los tribunales. Puede tener un juicio, pero en este juicio será el juez quien decida tanto los asuntos de hecho como los asuntos de derecho, sin la ayuda del jurado.

Juicio por jurado: Los juicios por jurado solo se celebran en caso de que se le acuse de infringir las leyes estatales o de que exista una ley estatal comparable bajo la cual se pueda consignar su causa a juicio por jurado. Su ubicación en la ciudad de \_\_\_\_\_ al momento en que se le acusara del incumplimiento específico de la ley determinará a qué tribunal se asignará su causa si usted, o el procurador municipal, solicita que se consigne la causa a juicio por jurado.

Para que la causa permanezca en este tribunal: La Asamblea General de Georgia ha dispuesto que ningún “juzgado municipal” de Georgia tiene la autoridad de entender su causa a menos y hasta que usted haya firmado un documento de renuncia al derecho a un juicio por jurado. Para mantener su causa en el tribunal municipal de la ciudad de \_\_\_\_\_ (a menos que se le acuse/inculpe de infringir una ordenanza municipal) tiene usted que:

- a) seleccionar cómo desea contestar a los cargos,

- b) firmar este formulario y el formulario de renuncia y contestación a los cargos, y
- c) presentar el formulario ya completado y entregárselo al juez antes de que el juez pueda hablar con usted sobre su causa.

Los derechos de apelación: Si decide ir a juicio en su causa en el tribunal municipal de la ciudad de \_\_\_\_\_ y no se siente satisfecho con el resultado del juicio, tiene derecho a apelar la decisión de este tribunal ante el próximo tribunal competente. Existe un proceso de apelación que se describe en el *Código de Georgia*. Existen requisitos estrictos para el proceso de apelación, lo que incluye una fecha límite para interponer la apelación (a partir de la fecha en que se entienda la causa y se registre la sentencia), y la creación de actas jurídicamente válidas (esto se logra al tener un estenógrafo presente, cuyo costo sufragará USTED, que asiente en actas todos los procedimientos). Si esta es la primera vez que comparece usted respecto a los cargos pendientes, tiene derecho a solicitar que se aplase la causa para tener la oportunidad de consultar con un abogado antes de decidir cómo proceder. Esto incluye obtener más información sobre una posible apelación en su causa.

Opciones sobre cómo pronunciarse en la instrucción de cargos:

“No culpable ~ Juicio sin jurado”: Está en desacuerdo con los cargos presentados en su contra. Esto crea un “conflicto” entre usted y el municipio de \_\_\_\_\_ que ha de resolverse mediante un juicio. Su causa permanece en el tribunal municipal de la ciudad de \_\_\_\_\_ y el proceso tiene lugar aquí, o puede más tarde llegar a una resolución de la causa sin un juicio. Tiene que llenar el formulario de renuncia y advertencia de derechos.

“No culpable ~ Juicio por jurado”: Se transfiere el proceso de la causa al próximo tribunal competente para resolución. Se encuentra bajo la misma “fianza” o requisito de comparecencia hasta que se le notifique de su comparecencia en el próximo tribunal. Tiene que asegurarse de que el secretario judicial del tribunal municipal de esta ciudad, \_\_\_\_\_, tenga al día su dirección postal para que pueda usted recibir su próxima notificación de comparecencia en el tribunal. Si se muda antes de recibir la próxima notificación de comparecencia, es RESPONSABILIDAD DE USTED notificar al tribunal apropiado sobre el cambio de dirección. Si no notifica usted debidamente al tribunal, podría tener como consecuencia que se expida una orden de arresto por falta de comparecencia en la próxima fecha fijada para la causa.

“Culpable”: Usted entiende y admite que SÍ cometió el error. Por ejemplo: usted sabe que sí iba a exceso de velocidad, o hizo un “viraje” indebido, o chocó a otro automóvil, o se “comió” el PARE, o no puede demostrar que tenía seguro contra accidentes el día que lo pararon, etc. Esta declaración no crea un “conflicto” entre usted y el municipio de \_\_\_\_\_, por lo tanto, su causa se resuelve en el tribunal municipal de la ciudad de \_\_\_\_\_, por lo general el mismo día. Tiene que llenar el formulario de renuncia y advertencia de derechos. Puede ofrecerle de todos modos una explicación al tribunal sobre las circunstancias de toda transgresión de la ley que se le atribuya. Sin embargo, esta explicación no afectará la determinación de culpabilidad o inocencia en su causa. Las explicaciones relacionadas con las declaraciones de culpabilidad son solo pertinentes al asunto de las circunstancias agravantes (aumento) o atenuantes (disminución) del castigo.

“Culpable ~ Declaración Alford”: Usted cree y siente que NO es culpable, pero TAMBIÉN opina que las pruebas en su contra tienen suficiente solidez como para que el juez probablemente decida en su contra. Por lo tanto, prefiere concluir su causa aquí y hoy sin regresar para un juicio.

La causa permanece en el tribunal municipal de la ciudad de \_\_\_\_\_. Tiene que llenar el formulario de renuncia y advertencia de derechos.

“No me opongo (*nolo contendere*)”: La causa se ventila de manera muy similar a la declaración de culpabilidad. Tiene la ventaja de que el Departamento de Vehículos Automotores (*DDS*, por sus siglas en inglés) no puede imponerle puntos negativos a la licencia de conducir. Sin embargo, la transgresión permanecerá en su historial de conductor. Constituye una declaración al criterio del juez (no es válida a menos que el juez también acceda a la declaración de “no me opongo”), y solo puede utilizarse una vez cada cinco (5) años para los varios tipos de transgresiones para los que es aceptable. En algunos tipos de causas, como en caso de no tener seguro contra accidentes, puede brindarle el beneficio de que no se le suspenda la licencia de conducir. Existen otros tipos de transgresiones en los que puede ser ventajosa una declaración de “no me opongo”. Para determinar si puede serle de utilidad en su causa, debe consultar con un abogado para obtener la asesoría jurídica apropiada. Ni el juez ni el procurador pueden brindarle asesoría jurídica respecto a la causa. El secretario del tribunal tampoco puede ofrecerle asesoría jurídica respecto a la causa. Tiene que llenar el formulario de renuncia y advertencia de derechos.

“Diligencias previas al juicio”: Puede hablar con el procurador municipal (el fiscal) sobre la causa y determinar qué opciones de imposición de la pena recomendaría al juez si usted decidiera presentar algún tipo de declaración de culpabilidad. Es preciso advertirle que, si decide representarse a sí mismo y hablar con el procurador sobre su causa, nada que usted diga constituye “comunicación confidencial”. En otras palabras, todo lo que usted le diga al procurador puede ser usado en su contra en cualquier juicio posterior si no logra negociar un convenio declaratorio con el procurador respecto a la causa. **NOTA:** Solo el juez decide y asienta la pena. Incluso **DESPUÉS** de hablar con el procurador puede aún solicitar un juicio, bien sea aquí o por jurado (si se le acusa de infringir una ley estatal). Si se decide por un juicio, se aplazará la causa a otra fecha para un juicio sin jurado en este municipio, o se la transferirá fuera de la ciudad de \_\_\_\_\_ para un juicio por jurado.

“Aplazamiento, por favor” (postergaciones):

- (1) (a) Puede solicitar un aplazamiento si se le acusa de un delito que acarrea suspensión de la licencia de conducir o condena obligatoria de privación de libertad, como conducir bajo la influencia de una bebida alcohólica, abandonar el lugar de un accidente, darse a la fuga y eludir a la policía, conducir de manera agresiva, conducir con licencia suspendida, conducir sin seguro contra accidentes, etc., y desea consultar o contratar a un abogado,  
  
(b) o si simplemente se siente nervioso durante la instrucción de cargos. Al solicitar el aplazamiento, puede renunciar o no a la instrucción formal de cargos. Por lo general, y si es posible, es mejor **NO** renunciar por su cuenta a la instrucción de cargos, porque ésta es una etapa crucial del proceso de justicia penal y existen asuntos importantes que girán alrededor de cuándo ha tenido lugar la instrucción de cargos.
- (2) Si es menor de 21 años y aún (i) vive bajo el techo de otra persona o (ii) se halla bajo el seguro general de otra persona, y (iii) no se halla presente con usted uno de sus padres o un tutor legal, debe considerar seriamente un aplazamiento para que lo acompañe el padre o la madre. Existen consecuencias excepcionales para un conductor menor de 21 años en el estado de Georgia que pueden afectar gravemente su privilegio de conducir.
- (3) A todas las personas acusadas de infringir el Título 16, el Título 3, o de un delito que

acarree penas mínimas obligatorias conforme a la ley, como privación de libertad o suspensión de la licencia de conducir, tal como conducir bajo la influencia de una bebida alcohólica, conducir sin seguro contra accidentes, conducir de manera agresiva, conducir con licencia suspendida, abandonar el lugar de un accidente/incumplimiento de la obligación de notificar, o incumplimiento de las leyes relacionadas con la licencia de conducir comercial (*CDL*, por sus siglas en inglés), FAVOR de obtener asesoría jurídica.

Asuntos varios:

Abogado de oficio: Si es insolvente y cumple con los requisitos, el tribunal le nombrará un abogado de oficio (un abogado que lo defienda) para que hable con usted sobre su causa y lo represente ante el tribunal. Tendrá que llenar una solicitud para los servicios de este abogado y pagar honorarios de cincuenta dólares cuando efectúe la solicitud. La Legislatura de Georgia fija esta cuota para la solicitud de representación letrada para personas insolventes y, en circunstancias extremas, el tribunal puede absolverle del pago.

Curso de técnicas para conducción segura: Todos los infractores menores de 21 años que se declaren culpables, o que no se opongan a los cargos (*nolo contendere*), o que reciban un veredicto de culpabilidad después del juicio han de asistir a un curso de técnicas para conducción segura que determinará el tribunal.

**IMPORTANTE:** No se vaya del tribunal hoy hasta que el secretario del tribunal le entregue una notificación impresa con la fecha en la que ha de regresar al tribunal.

He recibido y leído este formulario de información titulado *Orientación para la instrucción de cargos* y entiendo cuáles son mis opciones antes de proceder con la causa.

---

Firma de la persona acusada de la transgresión Fecha

**\*LETTERHEAD OF COURT**

Mr./Ms. \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_, GA \_\_\_\_\_

Re: Court Appointed Attorney

Your request for a court appointed attorney has been reviewed. At this time, based on the documentation you provided this office, you do not meet federal guidelines to qualify for assistance.

If you wish to have counsel represent you, it will be your responsibility to obtain your own attorney.

Please be advised your case has been set for \_\_\_\_\_, 20\_\_ at \_\_\_\_\_ in the \_\_\_\_\_ Municipal Court.

Sincerely,

\_\_\_\_\_  
Clerk of Court  
\_\_\_\_\_ Municipal Court

**\*LETTERHEAD OF COURT**

FECHA

Sr./Sra. \_\_\_\_\_

Dirección

Ciudad, GA \_\_\_\_\_

Con referencia a: El abogado nombrado por el tribunal

Hemos evaluado su solicitud de un abogado nombrado por el tribunal. En este momento, basado en los documentos que usted presentó a esta oficina, no cumple con los requisitos federales para obtener ayuda.

Si desea obtener la representación de un abogado, será su responsabilidad contratar a un abogado por su cuenta.

Le notificamos que se ha fijado fecha para su causa el \_\_\_\_\_ de 20\_\_\_\_, a las \_\_\_\_\_, en el Tribunal Municipal de \_\_\_\_\_.

Atentamente,

\_\_\_\_\_  
Secretario judicial

Tribunal Municipal de \_\_\_\_\_

**\*LETTERHEAD OF COURT**

Mr./Ms. \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_, GA \_\_\_\_\_

Re: Court Appointed Attorney

You were interviewed by this office for a court appointed attorney. The attorney that is being assigned to you is:

Attorney \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_, GA \_\_\_\_\_  
(\_\_\_\_)-\_\_\_\_-\_\_\_\_

It will be necessary for you to contact the attorney as soon as possible and make an appointment to discuss your case.

Sincerely,

\_\_\_\_\_  
Clerk of Court  
\_\_\_\_\_ Municipal Court

**\*LETTERHEAD OF COURT**

Fecha

Sr./Sra. \_\_\_\_\_

Dirección

Ciudad, GA \_\_\_\_\_

Estimado(a) \_\_\_\_\_:

Se le entrevistó en esta oficina para obtener la ayuda de un abogado nombrado por el tribunal. El abogado que se le ha asignado es:

Abogado \_\_\_\_\_

Dirección \_\_\_\_\_

Ciudad \_\_\_\_\_, GA \_\_\_\_\_

(\_\_\_\_) \_\_\_\_-\_\_\_\_

Es necesario que se comunique con el abogado lo antes posible y haga una cita para hablar sobre su causa.

Atentamente,

\_\_\_\_\_  
Secretario judicial

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

)

), Case No.:

)

Defendant

**ORDER CONTINUING CASE TO ANOTHER COURT DATE**

The Court hereby CONTINUES the above-styled case. The case is being continued for the following reason(s):

<input type="checkbox"/>	<b>ATTORNEY'S SCHEDULING CONFLICT</b> due to the Defendant's Attorney's scheduling conflict.	<input type="checkbox"/>	<b>HIRE AN ATTORNEY</b> to allow the Defendant time to hire an attorney.
<input type="checkbox"/>	<b>CRIME LAB REPORT</b> to allow the State time to obtain the Crime Lab Report(s).	<input type="checkbox"/>	<b>DISCOVERY</b> to allow the parties time to review evidence and/or documents pertinent to the case.
<input type="checkbox"/>	<b>ILLNESS OR HOSPITALIZATION</b> due to the illness and/or hospitalization of the Defendant and/or a necessary and material witness.	<input type="checkbox"/>	<b>INTERPRETER</b> to provide an Interpreter for the Defendant and/or a witness.
<input type="checkbox"/>	<b>MATERIAL WITNESS SCHEDULING CONFLICT</b> due to a scheduling conflict of a necessary and material witness.	<input type="checkbox"/>	<b>OBTAIN A VALID DRIVER'S LICENSE</b> to allow the Defendant time to obtain a valid driver's license.
<input type="checkbox"/>	<b>PROVIDE PROOF OF INSURANCE COVERAGE</b> to allow the Defendant time to provide proof of insurance coverage.	<input type="checkbox"/>	<b>PROOF OF CURRENT REGISTRATION</b> to allow the Defendant time to provide proof of current registration for the vehicle involved.
<input type="checkbox"/>	<b>PUBLIC DEFENDER APPLICATION</b> to allow the Defendant time to complete an application with the Public Defender's Office.	<input type="checkbox"/>	<b>REASONABLE ACCOMMODATIONS</b> to provide reasonable accommodations as requested.
<input type="checkbox"/>	<b>PROOF OF COMPLETION OF CLASS OR PROGRAM</b> to allow the Defendant time to complete the following class and/or program, and provide proof of the same to the Court:  _____.	<input type="checkbox"/>	<b>OTHER REASON:</b>

The Defendant is hereby ordered to appear in the Municipal Court on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ a.m./p.m. for:

Arraignment     Evidentiary Hearing     Motion Hearing     Trial

**Should the Defendant fail to appear in Court on the said day at the said time, the Defendant shall be subject to a Bench Warrant being issued for the Defendant's arrest.**

It is SO ORDERED. This the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge, Municipal Court of \_\_\_\_\_

ACKNOWLEDGEMENT OF SERVICE

I do hereby certify that I have received a copy of this Order on this date, and I understand that I must appear in Court on the Court date listed above.

\_\_\_\_\_  
Defendant's Signature and Date

\_\_\_\_\_  
Defendant's Attorney's Signature and Date

TRIBUNAL MUNICIPAL/DEL CONDADO DE \_\_\_\_\_  
ESTADO DE GEORGIA

)

) Acusación/Notificación: \_\_\_\_\_

)

Acusado \_\_\_\_\_

ORDEN DE APLAZAMIENTO DE LA CAUSA

Por la presente, el tribunal APLAZA la causa del epígrafe. Se aplaza la causa por el (los) siguiente(s) motivo(s):

<input type="checkbox"/>	<b>CONFLICTO DE FECHA DEL ABOGADO</b> Debido a un conflicto de fecha/horario del abogado del acusado.	<input type="checkbox"/>	<b>CONTRATACIÓN DE ABOGADO</b> Para conceder al acusado tiempo de contratar a un abogado.
<input type="checkbox"/>	<b>INFORME DEL LABORATORIO FORENSE</b> Para conceder tiempo al Estado de obtener el (los) informe(s) del laboratorio médico forense.	<input type="checkbox"/>	<b>PROPOSICIÓN DE PRUEBA</b> Para conceder a las partes tiempo de estudiar las pruebas o los documentos pertinentes a la causa.
<input type="checkbox"/>	<b>ENFERMEDAD U HOSPITALIZACIÓN</b> Debido a enfermedad u hospitalización del acusado o de un testigo necesario y esencial.	<input type="checkbox"/>	<b>INTÉRPRETE</b> Para proporcionar los servicios de un intérprete al acusado o a un testigo.
<input type="checkbox"/>	<b>CONFLICTO DE FECHA DE UN TESTIGO ESENCIAL</b> Debido a un conflicto de fecha/horario de un testigo necesario y esencial.	<input type="checkbox"/>	<b>OBTENCIÓN DE LICENCIA DE CONDUCIR VÁLIDA</b> Para conceder al acusado tiempo para obtener una licencia de conducir válida.
<input type="checkbox"/>	<b>CONSTANCIA DE COBERTURA DE SEGURO</b> Para conceder al acusado tiempo para proporcionar constancia de cobertura de seguro.	<input type="checkbox"/>	<b>CONSTANCIA DE COMPROBANTE DE MATRÍCULA</b> Para conceder al acusado tiempo para proporcionar comprobante de matrícula válida del automóvil en cuestión.
<input type="checkbox"/>	<b>SOLICITUD DEL ABOGADO DE OFICIO</b> Para conceder al acusado tiempo de llenar una solicitud para el Servicio de Defensoría Pública.	<input type="checkbox"/>	<b>ADAPTACIONES RAZONABLES</b> Para proporcionar modificaciones o ajustes razonables, según se solicitara.
<input type="checkbox"/>	<b>CONSTANCIA DE CUMPLIMIENTO DE CLASE O PROGRAMA</b>	<input type="checkbox"/>	<b>OTRO MOTIVO:</b>

	<b>Para conceder al acusado tiempo de completar el siguiente programa o clase, y proporcionar constancia de su cumplimiento al tribunal:</b> _____.	
--	--	--

**Por la presente se ordena al acusado comparecer ante el Tribunal Municipal**

**el día \_\_\_\_\_ del mes de \_\_\_\_\_ de \_\_\_\_\_, a las \_\_\_\_\_ a.m./p.m.**

**para:**  Instrucción de cargos     Audiencia de presentación de pruebas     Audiencia para peticiones judiciales     Juicio

**Si el acusado no comparece ante el tribunal en la fecha y hora fijadas, se expone a que se expida en su contra una orden de arresto inmediata.**

Si el acusado no comparece ante el tribunal en la fecha y hora fijadas, se expone a que se expida en su contra una orden de arresto inmediata.

RESUÉLVASE, el día \_\_\_\_\_ del mes de \_\_\_\_\_ de \_\_\_\_\_.

\_\_\_\_\_  
Hon. Juez del Tribunal Municipal de \_\_\_\_\_

CONSTANCIA DE NOTIFICACIÓN JUDICIAL

Por la presente certifico que he recibido copia de esta orden en la fecha que consta y que entiendo que tengo que presentarme en el tribunal en la fecha arriba indicada.

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Firma del acusado y fecha

---

Firma del abogado del acusado y fecha

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, ) Case No.:  
Defendant )

**DEFENDANT’S GUILTY/ NOLO CONTENDERE PLEA STATEMENT AND WAIVER OF RIGHTS**

**To the Defendant:** Please CAREFULLY read and answer each question either by circling your answer or filling in the blank.

**BASIC INFORMATION ABOUT YOU AND YOUR UNDERSTANDING**

- |  |           |
|--|-----------|
| 1. How old are you? I am _____ years old.  |           |
| 2. Can you read and write?   | YES or NO |
| 3. Are you under the influence of any drugs, alcohol, or medications that would affect your ability to understand what’s going on today? | YES or NO |
| 4. Do you understand what you are charged with in this case?   | YES or NO |

**ABOUT YOUR ATTORNEY**

- |   |           |
|---|-----------|
| 5. Do you have an attorney representing you here today on this case?                                  | YES or NO |
| 6. Who is your attorney? My Attorney is:<br>_____.  |           |
| 7. Have you had enough time to talk with your attorney about this case?                               | YES or NO |
| 8. Do you feel as if your attorney has done everything he or she could have to help you in this case? | YES or NO |
| 9. Are you satisfied with the legal services your attorney has provided you in this case?             | YES or NO |

**IF YOU ARE NOT A UNITED STATES CITIZEN...**

- |  |           |
|--|-----------|
| 10. Do you understand that if you are not a United States citizen and you enter a plea here today, that you could be removed from the United States and could also be prevented from returning to the United States? | YES or NO |
| 11. Do you understand that this Court does not have any power over your legal status in the United States?   | YES or NO |

**YOUR TRIAL RIGHTS**

- |  |           |
|--|-----------|
| 12. Do you understand that if you enter this plea and are charged with a County ordinance violation or a State petty offense that you are giving up the right to a trial in front of a judge?  | YES or NO |
| 13. Do you understand that if you enter this plea and are charged with a State misdemeanor or any State traffic or criminal violation that is not a petty offense that you are giving up the right to a trial in front of a judge or judge and jury? | YES or NO |

At a trial of this case, you would have all of the following rights:

- the right to confront—that is to see, hear, question, and cross-examine witnesses that would testify against you at trial;
  - the right to testify or not testify as you should choose at a trial;
- the right to require the State or County to prove the case against you beyond a reasonable doubt;
- the right to be presumed innocent until sufficient evidence is presented against you to prove guilt beyond a reasonable doubt;

*Continued on back of page...*



- the right to use the subpoena power of the court to bring in witnesses and evidence and have them presented on your behalf at a trial;
- the right to appeal any errors of law that might occur or any sentence that might be imposed on you after a trial; and
- the right to have an attorney help you with any appeal of any conviction or sentence imposed after a trial.

14. DO YOU UNDERSTAND ALL OF THE RIGHTS THAT YOU WOULD HAVE AT A TRIAL? YES or NO

15. DO YOU WANT TO GIVE UP ALL YOUR TRIAL RIGHTS AND ENTER A PLEA HERE TODAY? YES or NO

#### ABOUT THE COURT'S SENTENCE

16. Do you understand that if you have worked out a plea agreement with the State or County, that the Court does NOT have to accept that plea? YES or NO

17. Do you understand that in any case the Court can sentence you up to the maximum of the law, which could be: YES or NO

- as much as 6 months in confinement and/or as much as \$1,000 in fines for County Ordinance violations?
- as much as 12 months in confinement and/or as much as \$1,000 in fines for State and traffic violations?

18. Do you understand that if you are charged with more than one violation, that the court can sentence you on each charge separately and consecutively? YES or NO

#### YOUR CERTIFICATION AND SIGNATURE

By signing this form, I hereby state that I understand all of the rights I am giving up by entering this plea, that I want to enter this plea of my own free will, and that no one has threatened or coerced me to enter this plea. I also hereby certify that all of my answers are true and correct.

\_\_\_\_\_

Defendant

\_\_\_\_\_

Date

\_\_\_\_\_

Defendant's Attorney of Record

\_\_\_\_\_

Date

#### THE COURT'S FINDINGS AND RECORD

The above plea having been tendered by the Defendant in open court, the Court is satisfied that the Defendant understands the nature of the charge(s), understands the consequences of entering this plea, understands the rights being waived by entering this plea, and is entering his or her plea freely and voluntarily, without the hope of benefit or fear of injury. The Court further finds that acceptance of the Defendant's plea serves the interests of justice, and the Court accepts the Defendant's plea.

This the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ Judge, Municipal Court of \_\_\_\_\_

During the colloquy, the Court further advised the Defendant of: \_\_\_\_ possible license suspension \_\_\_\_ OTHER: \_\_\_\_\_

During this plea, the Defendant required an Interpreter of: \_\_\_\_\_, and such Interpreter was present, and the Defendant appeared to understand such Interpreter.

TRIBUNAL MUNICIPAL/DEL CONDADO DE \_\_\_\_\_  
ESTADO DE GEORGIA

)

\_\_\_\_\_  
Acusado

) Acusación/Notificación: \_\_\_\_\_

)

**DECLARACIÓN DE CULPABILIDAD/NO ME Opongo Y RENUNCIA DE DERECHOS DEL ACUSADO**

**Al acusado:** Favor de leer y contestar CUIDADOSAMENTE cada una de las siguientes preguntas, bien sea haciendo un círculo alrededor de la respuesta o llenando el espacio en blanco.

**INFORMACIÓN BÁSICA SOBRE SU PERSONA Y SOBRE SU CAPACIDAD DE COMPRENSIÓN**

- |   |         |
|---|---------|
| 1. ¿Qué edad tiene? Tengo _____ años de edad.   |         |
| 2. ¿Sabe leer y escribir?   | SÍ o NO |
| 3. ¿Se halla bajo la influencia de algún medicamento, droga o bebida alcohólica que pudiera afectar su capacidad de entender lo que está sucediendo aquí hoy? | SÍ o NO |
| 4. ¿Entiende de qué se le acusa en esta causa?  | SÍ o NO |

**LOS SERVICIOS DEL ABOGADO**

- |  |         |
|--|---------|
| 5. ¿Lo acompaña hoy un abogado que lo represente en esta causa?                                    | SÍ o NO |
| 6. ¿Quién es su abogado? Mi abogado es:<br>_____.  |         |
| 7. ¿Ha tenido suficiente tiempo para consultar con su abogado sobre este asunto?                   | SÍ o NO |
| 8. ¿Piensa que el abogado ha hecho todo lo posible por ayudarle en este asunto?                    | SÍ o NO |
| 9. ¿Está satisfecho con los servicios jurídicos que le ha proporcionado el abogado en este asunto? | SÍ o NO |

**SI NO ES CIUDADANO DE LOS ESTADOS UNIDOS ...**

- |  |         |
|--|---------|
| 10. ¿Entiende que, si no es ciudadano de los Estados Unidos y asienta una declaración en esta causa, se le podría expulsar del país y también se le podría prohibir la entrada a los Estados Unidos? | SÍ o NO |
| 11. ¿Entiende que este tribunal no tiene potestad alguna sobre su condición jurídica en los Estados Unidos?  | SÍ o NO |

**LOS DERECHOS DE UN ACUSADO EN EL JUICIO**

- |   |         |
|---|---------|
| 12. ¿Entiende que, si se le acusa de una infracción a una ordenanza del condado o de una contravención a nivel estatal y asienta una declaración en esta causa, renuncia al derecho a un juicio ante un juez?   | SÍ o NO |
| 13. ¿Entiende que, si se le acusa de un delito menor a nivel estatal o de cualquier infracción penal o de tránsito a nivel estatal que no sea una contravención y asienta una declaración en esta causa, renuncia al derecho a un juicio ante un juez o ante un juez y un jurado? | SÍ o NO |

*Continuar* **al** **dorso** **de** **la** **página...**



En el juicio sobre esta causa, tendría los siguientes derechos:

- El derecho a carearse, es decir, a ver, oír, interrogar y contrainterrogar a los testigos que presten declaración en su contra en el juicio;
- El derecho a prestar declaración o a abstenerse de prestar declaración según lo decida en el juicio;
- El derecho a exigir que el Estado o el Condado prueben los cargos en su contra sin que quepa duda razonable;
- El derecho a que se suponga su inocencia a menos que se presenten pruebas suficientes en su contra para comprobar culpabilidad sin que quepa duda razonable;
- El derecho a utilizar la potestad del tribunal para expedir órdenes judiciales para la comparecencia de pruebas y testigos a su favor en el juicio;
- El derecho a apelar cualquier error de derecho que pueda ocurrir o cualquier pena que se le imponga después del juicio; y
- El derecho a tener un abogado que le ayude con el proceso de apelación sobre cualquier fallo condenatorio o pena impuesta después de juicio.

14. ¿ENTIENDE USTED TODOS LOS DERECHOS QUE TENDRÍA EN UN JUICIO? SÍ o NO

15. ¿DESEA, AQUÍ Y AHORA, RENUNCIAR A TODOS LOS DERECHOS DEL JUICIO Y ASENTAR UNA DECLARACIÓN? SÍ o NO

#### LA IMPOSICIÓN DE LA PENA

16. ¿Entiende que, si ha negociado un convenio declaratorio con el Estado o el Condado, el tribunal NO está obligado a aceptar tal acuerdo? SÍ o NO

17. ¿Entiende que en cualquier caso el tribunal podría imponerle condena con el máximo rigor de la ley, a saber: SÍ o NO

- un máximo de seis meses de reclusión o un máximo de \$1,000 en multas, o ambos, por infracciones de las ordenanzas del condado?
- un máximo de doce meses de reclusión o un máximo de \$1,000 en multas, o ambos, por infracciones de las leyes estatales y de tránsito?

18. ¿Entiende que, si se le acusa de más de una infracción a la ley, el tribunal puede imponerle condenas separadas y sucesivas por cada cargo? SÍ o NO

#### CONSTANCIA Y FIRMA

Al firmar este formulario, por el presente declaro que entiendo todos los derechos a los que renuncio al asentar esta declaración, que deseo asentar esta declaración de mi libre albedrío y que nadie me ha amenazado ni coaccionado para que me declare de tal manera. También hago constar por el presente que todas mis respuestas son fieles y verdaderas.

\_\_\_\_\_

Acusado

\_\_\_\_\_

Fecha

\_\_\_\_\_

Abogado oficial del acusado

\_\_\_\_\_

Fecha

## **DETERMINACIÓN Y ACTAS DEL TRIBUNAL**

El acusado ha asentado la declaración que consta arriba en sesión pública del tribunal, el tribunal está satisfecho que el acusado comprende la índole del (los) cargo(s), entiende las consecuencias de asentar esta declaración, entiende los derechos a los que renuncia al asentar la declaración y que así se declara de manera libre y voluntaria, sin esperanza de merced o temor de agravio. El tribunal además concluye que aceptar tal declaración redunda en interés de la justicia y acepta la declaración del acusado.

El día \_\_\_\_ de \_\_\_\_\_ de \_\_\_\_.

Hon. Juez, Tribunal Municipal de \_\_\_\_\_

Durante el diálogo con el acusado, el tribunal además le advirtió sobre: \_\_\_\_ la posible suspensión de la licencia de conducir  
\_\_\_\_OTRAS ADVERTENCIAS: \_\_\_\_\_

Durante esta declaración, el acusado tuvo necesidad de los servicios de un intérprete de: \_\_\_\_\_, el

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, ) Case No.:  
Defendant )

**WAIVER OF RIGHT TO A JURY TRIAL**

I, \_\_\_\_\_, the Defendant in this case, understand that I am charged with the offense(s) listed above, and that the following charge(s) in this case are violations of State law: \_\_\_\_\_.

Because these violations are State misdemeanor violations, I understand that I have a right to either a bench trial in the Municipal Court or a jury trial in State Court on this case.

I understand that a bench trial in this Court is a trial in which the Municipal Court Judge would hear the evidence in my case and determine whether I am guilty or not guilty of the offense(s) listed above.

I also understand that a jury trial is a trial in State Court in which a Jury of six of my peers, presided over by a Judge, would hear the evidence in my case and determine whether I am guilty or not guilty of the offense(s) listed above.

I understand that I have a right to a trial; and based on what I understand of the differences between a bench trial and a jury trial, I am waiving my right to have a Judge and Jury hear my case; and demand that the Municipal Court Judge hear my case.

This the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Defendant

TRIBUNAL MUNICIPAL/DEL CONDADO DE \_\_\_\_\_  
ESTADO DE GEORGIA

\_\_\_\_\_, ) Acusación/Notificación: \_\_\_\_\_  
Acusado )

**RENUNCIA AL DERECHO DE JUICIO POR JURADO**

El que suscribe, \_\_\_\_\_, el acusado en este proceso, entiendo que se me acusa del delito o los delitos indicados arriba y que el cargo o los cargos que figuran a continuación y que se me imputan en esta causa constituyen una infracción de las leyes estatales:

\_\_\_\_\_.

Entiendo que, en esta causa, tengo derecho a un juicio ante un juez en el tribunal municipal o ante un jurado en el tribunal estatal, ya que estas infracciones constituyen delitos menores a nivel estatal.

Entiendo que, en un juicio ante el juez de este tribunal, el juez del tribunal municipal examinaría las pruebas y determinaría si soy o no culpable del cargo o los cargos indicados arriba.

Entiendo además que, en un juicio ante un jurado en el tribunal a nivel estatal, un jurado de seis conciudadanos, sobre el que presidiría un juez, examinaría las pruebas y determinaría si soy o no culpable del cargo o los cargos indicados arriba.

Entiendo que tengo derecho a un juicio y, basado en lo que comprendo sobre las diferencias entre el juicio ante el juez y el juicio ante el jurado, renuncio a mi derecho a que se presente la causa ante un juez y un jurado y pido que sea el juez del tribunal municipal quien entienda en la causa.

El día \_\_\_\_\_ de \_\_\_\_\_ de \_\_\_\_\_.

\_\_\_\_\_  
Acusado

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, ) Case No.:  
Defendant )

**WAIVER OF RIGHT TO AN ATTORNEY**

You also have the right, if you choose, to REPRESENT YOURSELF in this case. HOWEVER, if you choose to represent yourself, you must be advised that you do so **AT YOUR OWN RISK**.

An attorney would use his or her LEGAL SKILL, EXPERIENCE and KNOWLEDGE to help you understand your case and help you choose the best way(s) to defend the case. An attorney could help you:

1. UNDERSTAND the charge or charges you have been charged with;
2. DETERMINE whether the State or County has filed a legally sufficient accusation against you;
3. DECIDE if you have any defense(s) to the charge or charges made against you, which may include, but may not be limited to, self-defense, alibi, misidentification, accident, and reliance on the presumption of innocence and the State's burden to prove you guilty to all of the elements of the charge or charges filed against you beyond a reasonable doubt;
4. DETERMINE what evidence you would be able to present in your defense;
5. PREPARE AND CONDUCT any trial held on the charge or charges made against you;
6. DETERMINE what evidence could legally be admitted against you;
7. FILE MOTIONS AND MAKE OBJECTIONS to exclude evidence that could not be legally admitted against you or to admit favorable evidence that could help you in the case if you chose to present evidence;
8. FILE MOTIONS TO GET INFORMATION from the State or County, such as police reports, scientific reports, witness statements, video or audiotapes, photographs, or to review any physical evidence in the case;
9. MAKE STRATEGIC DECISIONS about whether you should call witnesses or present evidence at trial;
10. DECIDE whether you should testify or not testify at any hearing, proceeding, or trial;
11. MAKE APPROPRIATE OBJECTIONS AND PRESERVE ISSUES for appeal if you were convicted at trial;
12. CONDUCT plea negotiations with the State or County on your behalf;
13. DECIDE if you should plead to the charge(s) or have a trial; and
14. MAKE SURE THAT ALL OF YOUR RIGHTS AND PRIVILEGES AS A DEFENDANT IN A CRIMINAL OR TRAFFIC CASE ARE PROTECTED.

Additionally, **if you are charged with a traffic offense**, an attorney could help you understand whether YOUR PRIVILEGE TO DRIVE IN THE STATE OF GEORGIA could be affected if you were found guilty after a trial, and whether POINTS COULD BE ASSESSED ON YOUR GEORGIA DRIVER'S LICENSE if you were found guilty after a trial.

If you are found guilty after your trial, the Judge will then hold a Sentencing Hearing and decide what the punishment, if any, should be in the case. Please note that at this Sentencing Hearing, THE JUDGE CAN SENTENCE YOU UP TO THE MAXIMUM OF THE LAW for EACH OFFENSE for which you have been found guilty.

**WAIVER OF RIGHT TO AN ATTORNEY**

By signing this form below, I state that I understand all of my rights with regard to an attorney and I waive the right to have an attorney represent me, as well as to have one appointed to help me with my case.

This the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Defendant

TRIBUNAL MUNICIPAL/DEL CONDADO DE \_\_\_\_\_  
ESTADO DE GEORGIA

\_\_\_\_\_, ) Acusación/Notificación: \_\_\_\_\_  
Acusado )

**RENUNCIA DEL DERECHO A UN ABOGADO**

Tiene también derecho, si lo desea, a REPRESENTARSE A SÍ MISMO en esta causa. SIN EMBARGO, si así lo decide, es preciso informarle que lo hace **BAJO SU ÚNICA Y EXCLUSIVA RESPONSABILIDAD**.

El abogado emplearía sus DESTREZAS, EXPERIENCIA Y CONOCIMIENTOS JURÍDICOS para ayudarle a entender las circunstancias de su causa y a decidir la mejor manera de presentar una defensa. El abogado le ayudaría a:

1. ENTENDER el cargo o los cargos que se le imputan;
2. DETERMINAR si el Estado o el Condado ha presentado en su contra una acusación con suficiente fundamento jurídico;
3. DECIDIR si existe alguna defensa contra cualquier cargo presentado en su contra, lo que podría incluir, entre otras, legítima defensa, coartada, error de identificación, suceso accidental y confianza en la presunción de inocencia y la obligación del Estado de comprobar, sin que quepa duda razonable, su culpabilidad respecto a cada uno de los elementos de todo cargo presentado en su contra;
4. DETERMINAR cuáles pruebas podría presentar en su defensa;
5. PREPARAR Y TRAMITAR cualquier juicio que se celebre referente a todo cargo que se le impute;
6. DETERMINAR cuáles pruebas podrían admitirse jurídicamente en su contra;
7. INTERPONER PEDIMENTOS Y PRESENTAR OBJECIONES con el fin de excluir pruebas que no podrían admitirse jurídicamente en su contra o para aceptar pruebas favorables que podrían ayudarle en la causa si decidiera presentar pruebas;
8. INTERPONER PEDIMENTOS PARA OBTENER LA INFORMACIÓN en posesión del Estado o el Condado, como informes de policía, informes científicos, declaraciones de testigos, grabaciones de audio o video, fotografías, o para evaluar todas las pruebas materiales que existan en la causa;
9. TOMAR DECISIONES ESTRATÉGICAS sobre si ha de citar testigos o presentar pruebas en el juicio;
10. DECIDIR si debe o no prestar declaración en cualquier audiencia, diligencia o juicio;
11. PRESENTAR LAS OBJECIONES APROPIADAS Y SALVAGUARDAR ASUNTOS para apelación si mediara un veredicto de culpabilidad en el juicio;
12. NEGOCIAR a su favor convenios declaratorios con el Estado o el Condado;
13. DECIDIR si debe declararse culpable del cargo o de los cargos o si debe ir a juicio; y
14. ASEGURARSE DE QUE SE PROTEJAN TODOS LOS DERECHOS Y PRIVILEGIOS DE LOS QUE GOZA COMO ACUSADO EN UN PROCESO

PENAL O DE TRÁNSITO.

Además, **si se le imputa una transgresión de tránsito**, el abogado podría ayudarle a entender si SU PRIVILEGIO DE CONDUCIR EN EL ESTADO DE GEORGIA podría verse afectado si mediara un veredicto de culpabilidad en un juicio y si CABRÍA LA POSIBILIDAD DE QUE LE IMPUSIERAN PUNTOS NEGATIVOS A LA LICENCIA DE CONDUCIR DE GEORGIA si mediara un veredicto de culpabilidad en un juicio.

Si media un veredicto de culpabilidad después del juicio, el juez celebrará una audiencia para imponer la pena y decidir el castigo pertinente, si lo hubiere. Se le advierte que, en esta audiencia de imposición de la pena, EL JUEZ PUEDE CONDENARLE CON EL MÁXIMO RIGOR DE LA LEY por CADA UNO DE LOS DELITOS en los que haya mediado un veredicto de culpabilidad.

**RENUNCIA DEL DERECHO A UN ABOGADO**

Al colocar mi firma al calce de este documento, declaro que entiendo todos los derechos con respecto al abogado y que renuncio al derecho a un abogado que me represente, así como a que se me nombre un abogado de oficio que me ayude en el proceso.

El día \_\_\_\_\_ de \_\_\_\_\_ de \_\_\_\_\_.

\_\_\_\_\_  
Acusado

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
)

**ORDER TO BIND CASE TO STATE COURT OF \_\_\_\_\_ COUNTY**

The defendant have been brought before this Court in connection with the charges set forth, and

- Defendant request case be bound over to State Court for Trial
- Defendant bound over by operation of law per City Solicitor
- Defendant is bound over by order of the Court

IT IS HEREBY ORDERED that the Defendant be committed to the custody of the \_\_\_\_\_ County Sheriff or post bond in the sum or sums designated below to assure defendant's appearance in the STATE COURT OF \_\_\_\_\_ COUNTY, GEORGIA for the listed offenses.

Ticket No.                      Ticket Date                      Statute / Charge                      Bond Amount

**SO ORDERED**, this \_\_\_\_\_

\_\_\_\_\_  
Judge

**DEFENDANT'S ADDRESS**

**ATTORNEY OF RECORD, ADDRESS**

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Defendant is:               Released on Bond               Transferred to \_\_\_\_\_ County Jail

Original bindover and bond received at Sheriff's Officer by \_\_\_\_\_ on  
\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_.

- Citations/Accusations               OBTS               Incident Report
- Arrest Booking Report               Waiver

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**ORDER TO BIND CASE TO SUPERIOR COURT OF \_\_\_\_\_ COUNTY**

The defendant have been brought before this Court in connection with the charges set forth, and

- DEFENDANT REQUESTS CASE BE BOUND OVER TO SUPERIOR COURT FOR JURY TRIAL
- DEFENDANT IS BOUND OVER BY OPERATION OF LAW PER CITY SOLICITOR.
- DEFENDANT IS BOUND OVER BY ORDER OF THE COURT.

IT IS HERBY ORDERED that the Defendant be committed to the custody of The \_\_\_\_\_ County Sheriff or post bond in the sum or sums designated below to assure Defendant's appearance in the SUPERIOR COURT OF \_\_\_\_\_ COUNTY, GEORGIA for the listed offenses.

<u>Ticket No.</u>	<u>Ticket Date</u>	<u>Statute / Charge</u>	<u>Bond Amount</u>
-------------------	--------------------	-------------------------	--------------------

Sex:                  Race:                  DOB:                  Hgt:                  Wgt:                  SSN:

SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge

Defendant is:                   Released on Bond                   Transferred to \_\_\_\_\_ County Jail

Original bindover and bond received at Sheriff's Officer by \_\_\_\_\_ on  
\_\_\_\_\_/\_\_\_\_\_/\_\_\_\_\_.

- |  |  |  |                                  |
|--|--|--|----------------------------------|
| <input type="checkbox"/> Citations/Accusations | <input type="checkbox"/> OBTS                  | <input type="checkbox"/> Incident Report | <input type="checkbox"/> Warrant |
| <input type="checkbox"/> Photograph            | <input type="checkbox"/> Arrest Booking Report | <input type="checkbox"/> Waiver          |                                  |
| <input type="checkbox"/> Bond                  | <input type="checkbox"/> E-Warrant             |  |                                  |

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant, ) Case No.:  
\_\_\_\_\_ )

**BOND ORDER**

The above-styled action having come on for First Appearance and the Defendant having been present and having waived her right to be represented by counsel, and the Court having received evidence from Defendant Person, \_\_\_\_\_ and the Court having ordered Defendant Person released on a \$1,000 OR bond further orders the following conditions of the OR Bond: (initial below)

- \_\_\_\_\_ 1. Defendant must be respectful to his/her parent/guardian at all times (no cursing, swearing, disruptive or threatening behavior);
- \_\_\_\_\_ 2. Defendant must notify his/her parent/guardian of his/her whereabouts at all times;
- \_\_\_\_\_ 3. Defendant must adhere to a \_\_\_\_\_ a.m./p.m. curfew Monday through Sunday;
- \_\_\_\_\_ 4. Defendant must study for at least three (3) hours each day;
- \_\_\_\_\_ 5. Defendant must obey the rules and mandates of his/her parent's/guardian's household;
- \_\_\_\_\_ 5. Defendant shall not have any overnight visitors and all daytime visitors must be with the consent of Defendant's parents;
- \_\_\_\_\_ 6. Defendant shall refrain from any activity, conduct, speech, or behavior that would cause his/her parent/guardian shame.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Judge

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**NOTICE OF BOND FORFEITURE HEARING**

Bond Amount:

Attorney:

FTA Date:

The above case having been called in open court in its regular order and the defendant having failed to appear, a hearing in the matter has been set for

MONDAY, \_\_\_\_\_, at 2:00 pm

In the Roswell Municipal Court. The principal and surety/sureties are hereby given notice of said hearing and ordered to show cause why the bond should not be forfeited, judgment entered and execution issued against you as provided by law.

Certified mail receipt Number:

\_\_\_\_\_  
Clerk

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**ORDER FOR COMPLETING DISABILITY AWARENESS REQUIREMENTS**

FAILURE TO COMPLY WITH THIS ORDER WILL RESULT IN A  
WARRANT FOR YOUR ARREST.

Your case has been set for \_\_\_\_\_ at \_\_\_\_\_, at which time you are to provide proof of completion of the requirements contained within this order for disability awareness, and pay:

- ( ) A fine in the amount of \$ \_\_\_\_\_.
- ( ) Court costs/fees in the amount of \$ \_\_\_\_\_.

If these requirements are completed prior to the above date, you may submit this in person and pay the required amount, at which time the court date would be cancelled. If this is not completed you are required to appear in court on the above date.

\_\_\_\_\_  
Judge / Clerk of Court                      Date                      Defendant                      Date

---

Proof of Completion of the above requirements is hereby acknowledged and/or all applicable fines/fees paid.

\_\_\_\_\_  
Judge / Clerk of Court                      Date

---

You have been ordered to complete the following requirements as outlined by the Boy Scouts of America for the Disability Awareness Merit Badge. These requirements are to be completed, documented and furnished along with any fines and fees to the Roswell Municipal Court.

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**REQUIREMENTS FOR B.S.A. DISABILITY AWARENESS MERIT BADGE.**

1. \_\_\_\_\_ Visit an agency that works with physically, mentally, emotionally or educationally disabled people, collect publications about the agencies activities on behalf of its members. Learn what is being done through training, employment and education of their members. Indicate in your own written words, what you learned, and what is being done by this agency on behalf of the people it serves.
2. \_\_\_\_\_ Speak with a person with a disability, or read an article or book by or about a person with a disability, and report in your own written words what you learned about that persons experience in dealing with a disability.
3. \_\_\_\_\_ Locate and study literature about the accessibility or non-accessibility of public and private places to disabled persons.

Locate, observe and document, in writing:

- a) Five places with good accessibility
- b) Five places with poor accessibility
- c) Your school, church or place of employment

4. \_\_\_\_\_ Display, in a public place, the materials you have collected for the above requirements, so that others can be made more aware of citizens with disabilities. *(This requirement will be completed when the above is completed and furnished to the Roswell Municipal Court.)*

**\*\* If you have any questions you may contact the Roswell Municipal Court at (770) 641-3790 \*\***

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
)

**CERTIFICATE OF ELIGIBILITY FOR  
IGNITION INTERLOCK LIMITED DRIVING PERMIT**

WHEREAS the above-named defendant is subject to a driver's license suspension imposed pursuant to O.C.G.A. §40-5-63(a)(2) for a second conviction for a violation of O.C.G.A. §40-6-391 within five (5) years as calculated between the incident dates; and,

The Court having determined the following (please initial only one box):

\_\_\_\_\_ The Defendant is authorized to obtain an ignition interlock limited driving permit, if eligible, because he/she has served at least 120 days of the license suspension required for such conviction and has enrolled in a drug or DUI court program in this Court;

\_\_\_\_\_ The Defendant is authorized to obtain an ignition interlock limited driving permit, if eligible, because he/she has served at least 120 days of the license suspension required for such conviction and he/she has enrolled in clinical treatment as provided in O.C.G.A. §§40-5-63.1 and 40-5-1 (16.2);

\_\_\_\_\_ The Defendant is not authorized to obtain an ignition interlock limited driving permit until further order from this Court;

\_\_\_\_\_ The Court waives the ignition interlock requirement because such would subject the Defendant to undue financial hardship.

This \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Judge

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**CONTINUANCE NOTICE**

Your new court date is: the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_.

Pursuant to the Court's standing order regarding community service in lieu of prosecution, I have elected to participate in the community service program offered. I hereby acknowledge and agree to the following terms:

1. I agree to complete twelve (12) hours of community service before the date set out above.
2. I agree to provide to the court (Room 210, Roswell Municipal Court) documentation signed by an authorized representative of the 501(c)(3) non-profit charity organization for which I performed community service attesting to the completion of the required 12 hours.
3. I agree to pay \$50 court costs.

If I do the community service, provide required documentation, and pay the court costs by the date listed above I understand that the court will dismiss the charge(s) against me.

I understand and acknowledge that if I fail to comply with the above listed requirements, the offer to complete community service in lieu of prosecution will be withdrawn and I must appear in court on the date listed above. I understand that I will then be subject to prosecution for the charges pending against me. Furthermore, I understand that failure to appear in court on the date listed above shall result in a bench warrant issuing for my arrest and subject my driver's license to suspension by the State of Georgia.

Conditions acknowledged this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Defendant

\*\*\* LETTERHEAD OF COURT \*\*\*

OFFICIAL NOTICE OF COURT DATE RESCHEDULING  
FOR

Case No:

New Court Date is: \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

Your Court Date has been changed to the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. This is your official notification. Please be advised that a Bench Warrant may be issued and your license suspended by the State of Georgia should you fail to appear.

If you have any questions please contact the address above.

\_\_\_\_\_  
Attorney

\_\_\_\_\_  
Defendant

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

CONDITIONAL DISCHARGE

WHEREAS, the above-named defendant has been found guilty of the above-stated offense(s) and WHEREAS, said defendant has not previously availed himself of the Provisions of a Conditional Discharge under (Ga. Laws, pp. 1083, O.C.G.A. 16-13-2 Controlled Substances) or (O.C.G.A. 3-3-23.1 Underage Possession); NOW, THEREFORE, the defendant consenting hereto, it is the judgment of the Court that no judgment of guilt be imposed at this time, but further proceedings are deferred and defendant is hereby sentenced to a period of confinement of \_\_\_\_\_ months/days in the City of Roswell Jail.

IT IS FURTHER ORDERED that then defendant pay a fine in the amount of \_\_\_\_\_ plus all applicable surcharges and pay restitution of \_\_\_\_\_.

HOWEVER, it is the further order by the Court, that upon the service of \_\_\_\_\_ months/days of the above sentence the remainder of \_\_\_\_\_ months/days may be served on probation/suspended PROVIDED that the said defendant complies with the following general and other conditions herein imposed by the Court as part of this sentence.

IT IS FURTHER ORDERED by the Court that upon violation of the terms of probation, or upon the Court determining that the defendant is or was not eligible for sentencing under this article, the Court may enter an adjudication of guilt and proceed to sentence the defendant to the maximum sentence provided by law with credit for any prior compliance with the terms of the original Conditional Discharge Order. Upon fulfillment of the terms of the probation, upon release of the defendant by the Court prior to the termination of the period thereof, or upon release from confinement, whichever occurs latest, the defendant shall stand discharged of said offense charged and shall be completely exonerated of guilt of said offense charged and that a copy of this Order shall be forwarded to the Office of the State Probation System of Georgia, Georgia Crime Information Center, and the Identification Division of the Federal Bureau of Investigation.

GENERAL CONDITIONS OF PROBATION SUSPENDED SENTENCE

The defendant having been granted the privilege of serving all or part of the above-stated sentence on probation, hereby is sentenced to the following general conditions of probation:

- 1) Do not violate the criminal laws of any government unit.
- 2) Avoid injurious and vicious habits – especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully.
- 3) Avoid persons or places of disreputable or harmful character.

- 4) Report to the Probation Parole Supervisor as directed and permit such Supervisor to visit you at home or elsewhere.
- 5) Work faithfully at suitable employment insofar as may be possible.
- 6) Do not change your present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of Probation Supervisor.
- 7) Support your legal dependents to the best of your ability.

**OTHER CONDITIONS PROBATION SUSPENDED SENTENCE**

- 1) ATTEND: Risk Reduction Program Defensive Driving School Theft & Shoplifting Offenders Program. Within \_\_\_\_\_ days.
  - 2) Evaluate and treat as needed for (violence) (alcohol/drug dependency) (deviant behavior) see Addendum A. Evaluate within \_\_\_\_\_ days.
  - 3) Pay fine (restitution/surcharge) by \_\_\_\_\_; in Equal Monthly Installments over first \_\_\_\_\_ months. Restitution/fines to be paid first.
  - 4) Provide \_\_\_\_\_ (hours community service).
- 
- 5) Pay probation supervisory/suspension fee of \$ \_\_\_\_\_ per month.  
\_\_\_\_\_ UNDUE hardship found.
  - 6) Avoid any (violence) (contact) (entry) with (into)  
\_\_\_\_\_.
  - 7) Probation/suspended sentence may/shall terminate upon complete payment and completion of any special conditions (after \_\_\_\_\_ months).
  - 8) Do not drink any alcohol or take any drugs without a prescription.
  - 9) Submit to random alcohol & drug testing at defendant's expense.
  - 10) Other: \_\_\_\_\_

It is the further order of the Court, and the defendant is hereby advised that the Court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The defendant shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may re-sentence the defendant to the maximum sentence provided by law with credit for any prior compliance with the terms of the original Conditional Discharge Order.

The defendant was represented by the honorable \_\_\_\_\_, Attorney at Law who was  
\_\_\_\_\_ Appointed \_\_\_\_\_ Retained

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
Judge

Copy received and conditions acknowledged:

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Defendant's Attorney

Reported by \_\_\_\_\_  
Solicitor General (Assistant)

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, ) Case No.:  
Defendant )

**\*\* FOR PAYABLE OFFENSES ONLY \*\***  
**WAIVER AND PLEA**

I, hereby enter my written, rather than personal appearance in the court case resulting from the above referenced violation(s). I understand that by paying my fine and not personally appearing before the court I am waiving any right that I might have had to a trial by judge or jury and to be represented by counsel. I further understand that by paying the fine, I have pled guilty to the offense(s) as charged.

\_\_\_\_\_  
Defendant Date

**RESET NOTICE**

Having entered my above waiver and plea, and having requested an extension to pay the assessed fine(s), I understand that this case has been rescheduled to:

\_\_\_\_\_, \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_AM / PM

to pay fines and fees totaling \$ \_\_\_\_\_. I understand that no further resets will be granted.

\_\_\_\_\_  
Defendant Date

Maurice H. Hilliard Jr., Judge  
Krista K. Young, Solicitor  
Robby Barkley, Court Administrator

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
)

**PROOF OF ATTENDANCE**

TO WHOM IT MAY CONCERN:

This document is proof that \_\_\_\_\_ was in attendance at the Roswell Municipal Court at the date and time indicated below.

This form must be signed by a Court Representative. If you have any questions or need additional information, please call us at the number listed above.

Thank you.

\_\_\_\_\_  
Court Representative

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, ) Case No.:  
Defendant )

**CRIMINAL ARREST WARRANT**

Personally appeared the undersigned prosecutor, who on oath says that, to the best of their knowledge and belief, the above stated accused,  
\_\_\_\_\_ on \_\_\_\_\_, did commit the  
offense of \_\_\_\_\_,  
O.C.G.A. § \_\_\_\_\_, at \_\_\_\_\_, in the  
City of \_\_\_\_\_, \_\_\_\_\_ County, Georgia and against the person of \_\_\_\_\_ and the State of Georgia.

The facts upon which this affidavit for arrest is based are as follows:  
\_\_\_\_\_ did commit the offense of \_\_\_\_\_ in that he/she  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_,  
contrary to the Laws of this State, the good order peace and dignity thereof.

Sworn and subscribed before me this \_\_\_\_\_.

\_\_\_\_\_  
Prosecutor

\_\_\_\_\_  
Judge

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**STATE WARRANT FOR ARREST**

To any Sheriff, Deputy Sheriff, Marshal, Coroner or Peace Officer of this State -  
GREETINGS: For sufficient cause made known to me in the above affidavit, incorporated by  
reference herein, and other sworn testimony, you and each of you are hereby commanded to  
arrest the accused, \_\_\_\_\_, named in the above affidavit, charged by the  
prosecutor therein with the above offense against the Laws of this State at the time, place and  
manner named in the above affidavit, and bring the accused before me or some other Judicial  
Officer of the state to be dealt with as the law directs. HEREIN FAIL NOT.

Given under my hand and seal this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge, Roswell Municipal Court

**ORDER FOR BOND**

It is hereby ordered that the above named Defendant be and is hereby granted bail to be  
made in CASH ONLY in the amount of \_\_\_\_\_. (This bond amount includes all  
applicable assessments and surcharges.)

This the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge, Roswell Municipal Court

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**DEFENDANT’S DEMAND FOR A JURY TRIAL**

Having appeared in Roswell Municipal Court for an initial arraignment and having been advised of my right to a Jury Trial, I hereby elect to exercise my right to a Jury Trial and request that my case be bound over to the State Court of \_\_\_\_\_ County for prosecution.

\_\_\_\_\_, Attorney \_\_\_\_\_, Defendant

Citation No.                      Offense/Charge                                      Amount Due\*\*

\*\* \$0.00 NO FINE AMOUNT INDICATES A MANDATORY COURT APPEARANCE.

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**DEFENDANT'S WAIVER OF JURY TRIAL AND REQUEST FOR A PLEA AND COMPLIANCE DATE**

COMES NOW, the Defendant in the above styled action and voluntarily and freely with full knowledge of the consequences thereof waives his/her right to a trial by Jury in the State Court of \_\_\_\_\_ County.

The Defendant further requests that this matter be placed on a plea/compliance calendar at \_\_\_\_\_ a.m./p.m. on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

This the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
DEFENDANT:

\_\_\_\_\_  
ATTORNEY: BAR #:

**\*LETTERHEAD OF COURT**

DISPOSITION

NAME:

ADDRESS:

DOB:

COURT CLOSED DATE:

STATUS/DISPOSITION:

CHARGE:

CODE SECTION:

CASE NUMBER:

DATE OF VIOLATION:

CITATION#

PLEA:

AMOUNT PAID:

VERDICT:

COMMENTS:

The following Opening “speech”/arraignment statement for Court was provided by Judge John Cicala:

### **OPENING REMARKS/STATEMENT FOR COURT**

Good afternoon ladies and gentlemen. Please be seated.

This is the Municipal Court for the City of \_\_\_\_\_. If your citation is returnable to another Court, you are probably in the wrong place at the wrong time, and should check with our clerk at the break after my comments.

We are here for the \_\_\_\_\_, \_\_\_\_\_ arraignment calendar. There is also a \_\_\_\_\_ calendar today, which I will go into at the appropriate time.

The solicitor is going to make some announcements after which I will give you further instruction.

-----

You have just had some announcement from the solicitor, but I also have some announcements I need to make before we proceed with court today.

You are here today because you have been charged with a violation of the law.

In many cases you have been charged with a violation of the Uniform Rules of the Road, that is you have been given a traffic citation, but you need to understand this court has jurisdiction over certain other kinds of cases including violation of the Georgia Controlled Substances Act, possession of marijuana in an amount less than one ounce, misdemeanor shoplifting, and ordinance violations.

Generally this court can impose punishment of up to twelve months in jail and fines of up to \$1,000 for each charge unless the charge is a misdemeanor of a high and aggravated nature in which case the maximum punishment can be up to twelve months in jail and fines of up to \$5,000.00 for each charge.

So as you can see, the punishment that can be imposed by this court can be quite severe.

Now you have an absolute right to enter a plea of not guilty to the charges that have been brought against you. You have the right to an attorney. If you cannot afford an attorney, one can be appointed for you. You have the right in most cases, but not all, to have your case bound over to the (state court) (superior court) for a jury trial. You also have the right to have a non-jury trial before this court, but you need to understand that if you want a trial, jury or non-jury, that no trials will occur today. If you want a non-jury trial before this court, your case will be set over to our next available non-jury trial date on \_\_\_\_\_.

If you enter a plea of not guilty, be it to a jury or non-jury trial, at the time of a trial, you will

have all of the Constitutional protections we all have if charged with a violation of the law. That is, at the time of a trial, you will have :

The right to the presumption of innocence,

The right to be proven guilty beyond a reasonable doubt as to each and every element of the charges brought against you,

The right to hear, see, and cross examine any witnesses called to testify against you,

The right to subpoena witnesses in your own behalf, even if they don't want to appear,

The right to testify, or not testify as you choose. The Constitution guarantees you the right to remain silent and you cannot be compelled to testify against yourself, and the fact that you decline to testify cannot be held against you,

And, finally at a trial, you have the right to offer other evidence that is otherwise legally admissible.

All of these rights you have at the time of a trial, but this is not the purpose of court today.

Today is what is known as an arraignment day. That is, the purpose of court today is for me to inform you of the charges brought against you, and to ask you how you wish to plea to those charges. If you wish to dispose of your case by way of a plea, that can be accomplished today, but again, no trials will occur today.

If you are under the age of twenty one, let me have your close personal attention. If you are under the age of twenty one and you have been charged with a violation of the uniform rules of the road that results in four or more points being assessed against your license, that falls into a category of must appear cases. That is you must appear in front of this court. It is not an offense for which you have the option to pay and leave.

Now, generally speaking, must appear cases are the more severe kinds of cases, such as DUI, shoplifting, possession of marijuana, but if you are under the age of 21 and have been charged with a driving offense that results in four or more points being assessed against your driving record, that is a must appear before the court because it can result not only in the suspension of your driver's license, but you having to retake the driver's license exam before you get your driver's license back, and this court has the obligation to see that any plea that may be entered is entered freely, voluntarily, KNOWINGLY, and intelligently. And to assure myself that you understand the implications, that is a must appear case.

If you have been charged with the offense of no proof of insurance there are two elements of no proof of insurance.

The first is a minor charge wherein the maximum penalty is \$25. That is a circumstance in which the vehicle you were operating did in fact have insurance on the date and time of the stop. If you

are here today and you have proof that the vehicle you were operating on the day and time of the stop did in fact have insurance coverage, I am going to be taking a break shortly and you can bring the proof up to the clerk, and once the insurance has been verified you will be given the opportunity, if you wish, to pay and leave. Do not however, even think about bringing up false evidence of insurance, because the clerk is going to call the insurance company to verify that coverage was in effect on the day and time of the stop. If you produce false evidence of insurance you will get yourself in to further trouble.

Now the second charge of no insurance, that is operating a vehicle without insurance on the day and time of the stop, is a major traffic violation and is a must appear because it can result in the suspension of your driver's license.

If you are charged with an expired tag, or no tag on your vehicle, when I take the recess in a few minutes, if you now have evidence that you have acquired the tag you can bring the evidence to the clerk and be provided the opportunity if you so desire , to pay and leave.

If today is your original court date, because of the announcements you have heard both from the solicitor as well as me, you may have decided that you may want to consult with an attorney, or retain an attorney, or check as to the availability of witnesses in your case. So, if today is your original court date, and you have not had a continuance before, during the break, you can see the court clerk, and ask for a continuance with no questions being asked. If, however, you have had a continuance before and are asking for a second continuance, you will need to see me and give me an explanation as to why you need a second continuance.

If you do not have an attorney representing you, and you have decided you want to speak to the solicitor in your own behalf for the purpose of entering into a negotiated plea, during the recess you can see the clerk and the clerk can pull your file and send it to the solicitor. If you wait until I call the docket later and then request to speak to the solicitor, your file will be on the bottom of the stack.

Now the reason I take a recess so early in the court session is I have found by experience that between those that want to pay and leave, produce evidence of insurance, produce evidence of a tag, or get a continuance, that I can get a lot of people out of here and that those that remain will be the ones I need to see.

When I take the recess, I am respectfully requesting that you form a single file line to see the clerk. The court staff will treat you with courtesy, dignity, and respect, and I expect you to do the same for them. It is not their fault you are here today so don't take it out on them.

I find it usually takes about \_\_\_\_\_ minutes for the recess, but again I can get a lot of people out of here quickly.

I want to assure each and every one of you that we will get to your case as quickly as possible. Someone will be dead last, but we will work as quickly as possible while giving full attention to each case.

Also, if you have a cell phone, beeper, or an alarm clock, please turn it off and during the break remove it from the courtroom. Should you fail to do so and it goes off we will speak about it later and you won't be happy with the outcome of the conversation.

Now I want to talk to you about how we are going to proceed procedurally.

While we are in recess the solicitor will be entering into negotiated pleas. When I return to the bench, I will take any pleas that have been negotiated.

Following that I will begin the call of the docket. When I call your name I want you to come up. I will tell you what you have been charged with. This is the arraignment process I told you about. The following are the options that you have available, and they are the only options you have available.

1. If you do not have an attorney representing you and you want your case bound over to the (state) (superior) court, you will see the clerk to fill out some paper work.
2. If you do not have an attorney, you enter a plea of not guilty, and you ask for a non-jury trial before this court, you will see the clerk and sign a return slip to the next available non-jury trial date. Please understand if you request a non-jury trial before this court that you will be expected to actually try the case on that date. There will be no continuances from that date without a legal excuse.
3. If you do not have an attorney representing you, and you would like to speak to the solicitor in your own behalf to try and negotiate a plea, then we will send your file to the solicitor and you will be called in order.
4. If you have an attorney representing you and your attorney is not present don't get upset. We are not the only court holding sessions today and your attorney may be in another court. Your attorney should have filed what is called an entry of appearance with this court and if applicable a conflict letter letting me know what other courts he or she has to be in. If we have heard from your attorney and they are in a trial and will not be present we will reset your case. If we have not heard from your attorney, we will hold your case for your attorney's arrival. Rest assured of this, no one is going to talk to you about your case without your attorney being present.
5. If you do not have an attorney representing you, and you would like an appointed attorney, you can request to be interviewed to determine if you qualify for an appointed attorney. You do not get an appointed attorney merely because you request for one. You will see the clerk and an interview will be scheduled to determine if you qualify.
6. If you do not have an attorney representing you and you do not want to speak to the solicitor for the purpose of entering into a negotiated plea, you can enter a non-negotiated plea of guilty. If you do so I will send your file to the solicitor for a recommendation. In a non-negotiated plea, the solicitor can offer what is called circumstances in aggravation. For example, this is your tenth speeding case. You have the right to offer what is called circumstances in mitigation. That is any circumstances wherein you feel the punishment should be lessened. But understand, in a non-negotiated plea, it is totally within the discretion of the court as to what the punishment will be.

These are the options you have available to you.

To quickly recap things. If you want to pay a payable offense and leave, if you want to produce evidence of insurance, if you want to produce evidence that you have acquired a tag, if you want a continuance, or if you wish to see the solicitor, you can see the clerk during the recess. Again, form a single line and they will get to you as quickly as possible. When I return to the bench we will proceed as I have outlined.



IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**MOTION TO ENTER PLEA IN ABSENTIA**

COMES NOW the Defendant, through his undersigned Counsel of record, and in support of this motion shows this Court the following:

1.

On or about the 17<sup>th</sup> day of March, 2008, the Defendant was charged with a traffic violation under O.C.G.A. §40-6-48, within the city limits of Duluth, Gwinnett County, in the State of Georgia.

2.

The Defendant is currently attending college at Georgia State University and has no private transportation available to him. The Defendant is currently in the middle of his semester studies and it would be burdensome to require the Defendant to miss classes to travel to Gwinnett County, Georgia to dispose of this case. Counsel for the Defendant and for the State have entered into a negotiated plea arrangement in this matter and the case is scheduled for disposition on September 29<sup>th</sup>, 2008.

3.

The Defendant has executed a statement in support of his motion to enter this plea in absentia. As part of that statement, the Defendant has executed a waiver of his rights as would be required under Georgia Law prior to the Court accepting his guilty plea in this matter. That statement also contains the Defendant's understanding of the plea negotiation reached through his Counsel and the Counsel for the state in this matter. Further, the Defendant, by and through his Counsel, acknowledges that there is a factual basis under which it would be appropriate for the Defendant to enter his plea of guilty in this matter.

4.

Counsel for the State has no opposition to the plea in this matter being entered in absentia.

Wherefore, the undersigned attorney for the Defendant requests that the Court examine the motion and supporting documents submitted by the Defendant in this matter and, after due consideration, enter an order allowing the plea of guilty in this matter to be accepted in absentia with the Defendant's personal appearance waived, by agreement of all parties.

Respectfully submitted, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Attorney For Defendant  
Georgia Bar #

Certificate of Service

A copy of the foregoing Motion and supporting documents, as well as the proposed order have been hand delivered to Counsel for the State, or placed with the united States Postal Service for delivery to the Solicitor of this Court, with adequate postage thereon to assure first class delivery.

Address for delivery by mail:

Office of the Solicitor of the State Court  
Justice and Administration Center  
Justice Street  
Justice, Georgia 30000

This \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

---

Attorney for Defendant  
Georgia Bar #

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**DEFENDANT’S STATEMENT IN SUPPORT OF  
MOTION TO ENTER PLEA IN ABSENTIA**

COMES NOW the Defendant, and in support of this motion shows this Court the following:

1.

On or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, I was charged with a traffic violation under O.C.G.A. §40-6-48, within the city limits of \_\_\_\_\_, \_\_\_\_\_ County, in the State of Georgia.

2.

I am now attending college at Out of State University and have no private transportation available to me. I am currently in the middle of my semester studies and it would be burdensome and require me to miss classes to travel to Gwinnett County, Georgia to dispose of this case. It is my understanding that my attorney, \_\_\_\_\_, has negotiated a plea in the above referenced case, and that my case is scheduled for disposition on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

3.

It is my understanding through my attorney, \_\_\_\_\_, that the prosecuting attorney will recommend a sentence which includes the payment of a fine in the amount of One Hundred (\$100) Dollars, plus the usual surcharges assessed in connection with said fine. I also understand that my guilty plea would be entered to an amended accusation charging me with the offense of failure to obey the provisions of title 40 of the Georgia Code under code section O.C.G.A. §40-6-1.

4.

I understand this recommendation is not binding upon the trial judge. I understand that I am charged with an offense that is a misdemeanor. I understand that upon conviction the Court can impose a sentence of up to twelve (12) months imprisonment in the county jail and a fine of One Thousand (\$1,000) Dollars, or both, for the charge against me. I understand that if the Court chooses not to accept the plea as negotiated between my attorney and the Solicitor's office that I may withdraw this plea and return on another date for trial. I also understand that by entering a plea of guilty to an offense, that I give up certain rights which are afforded to me under the Constitution of the United States, the Constitution of the State of Georgia and the statutory authority of the state of Georgia. I understand that I am waiving the following rights by entering a plea of guilty:

- a) The right to a trial with or without a jury.
- b) The right to confront and cross examine any witness against me.
- c) The right to present witnesses and evidence on my behalf.
- d) The right to examine all physical and documentary evidence against me.
- e) The right to remain silent.
- f) The right to assistance of counsel during a trial.
- g) The right to have free counsel appointed to represent me if I am indigent.
- h) The right to appeal to a higher court, except in certain limited circumstances.
- i) The right to require the State to prove the case against me beyond a reasonable doubt.

6.

I hereby authorize my attorney to enter a Guilty plea on my behalf and in my absence to the charge of DUI. I hereby request and consent that my case may be disposed of in my absence, and I hereby waive my presence at such disposition. I further certify that I am entering this plea in absentia willingly and voluntarily, without any threat or coercion from any source whatsoever. I am not under the influence of any alcohol or drugs at the time of making this statement and have weighed all the consequences of my decision prior to deciding to enter my plea of guilty. I am not operating under any mental, physical, or legal disability which would invalidate this plea. No one has promised me anything in return for making this plea, other than what was represented to me to be the plea offered by the State and is reflected in this document.

This the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Defendant

IN THE MUNICIPAL COURT OF \_\_\_\_\_  
STATE OF GEORGIA

\_\_\_\_\_, )  
Defendant ) Case No.:  
\_\_\_\_\_ )

**ORDER ACCEPTING DEFENDANT’S PLEA IN ABSENTIA**

The foregoing Motion to Enter Defendant’s Pleas in Absentia having been read and considered by the Court, IT IS HEREBY ORDERED:

The Defendant’s Plea in Absentia is accepted by the Court. It appears to the Court through statements of the Defendant’s Counsel, and through examination of documents in support of the Defendant’s motion, that there is just cause for the Court to accept the Defendant’s plea of guilty to the accusation against him, in absentia. The Court further finds that the Defendant has been advised of his rights to appear before the Court in connection with the charge against him and has waived his personal appearance. The Court further finds that the Defendant has knowingly and willingly entered his plea of guilty in absentia, and that the Defendant has stipulated that there is a factual basis which would support the entry of the Defendant’s guilty plea in this matter.

So Ordered this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge

Order prepared and submitted by:

Counsel for Defendant  
Georgia Bar #

FIRST OFFENDER OR CONDITIONAL DISCHARGE

FIRST OFFENDER OR CONDITIONAL DISCHARGE

(If designated by the Court)

The Defendant consenting hereto, it is the judgment of the Court that no judgment of guilt be imposed at this time but that further proceedings are deferred and the Defendant is hereby sentenced to confinement at such institution as the Commissioner of the State Department of Corrections or the Court may direct, with the period of confinement to be computed as provided by law.

Upon violation of the terms of probation, upon conviction for another crime during the period of probation, or upon the Court's determination that the Defendant is or was not eligible for sentencing under the First Offender Act or for Conditional Discharge, the Court may enter an adjudication of guilt and proceed to sentence the Defendant to the maximum sentence as provided by law.

Upon fulfillment of the terms of this sentence, or upon release of the Defendant by the Court prior to the termination of this sentence, the Defendant shall stand discharged of said offense without court adjudication of guilt and shall be completely exonerated of guilt of said offense charged.

For Court's Use:

[Empty rectangular box for court use]

The Hon. \_\_\_\_\_, Attorney at Law, represented the Defendant by:

employment; or  appointment.

SO ORDERED this \_\_\_\_ day of \_\_\_\_\_ Month \_\_\_\_\_, 20\_\_\_\_.

Hon. Robert Alexander, Judge  
State Court of Jackson County

**FIREARMS** – If you are convicted of a crime punishable by imprisonment for a term exceeding one year, or of a misdemeanor crime of domestic violence where you are or were a spouse, intimate partner, parent, or guardian of the victim, or are or were involved in another similar relationship with the victim, it is unlawful for you to possess or purchase a firearm including a rifle, pistol, or revolver, or ammunition, pursuant to federal law under 18 U.S.C. § 922(g)(9) and/or applicable state law.

**Acknowledgment:** I have read the terms of this sentence or had them read and explained to me. If all or any part of this sentence is probated I certify that I understand the meaning of the order of probation and the conditions of probation. I understand that violation of a condition of probation could result in revocation of all time remaining on the period of probation.

\_\_\_\_\_  
Defendant

## CHAPTER 15: SOVEREIGN CITIZENS

### INTRODUCTION

This chapter was written by Judge Gary E. Jackson, Judge of the Atlanta Municipal Court and Judge John C. Cicala, Jr. previously of the DeKalb County Recorder's Court. It was originally presented at ICJE seminars in June and October, 2013. It is used with their express permission.

Probably all of you, at one time or another have encountered a defendant who claims to be a "sovereign citizen." Alternatively, you may have had a litigant who claims to be a "flesh and blood man," or who uses, or perhaps disavows a name with all capital letters, with a copyright (©) designation, or a colon (:). This same person may complain that the flag on your bench, if adorned with fringes, is a "navy flag", or "admiralty flag" and therefore divests your court of any jurisdiction over him, or the case at issue.

Short of reacting like Barney Fife to an Ernest T brick throwing incident and exclaiming "He's a nut!" be aware that these people who appear in your court and make these pronouncements are quite serious in their beliefs, are fully committed to their "legal" positions in court, and, on rare occasions, are willing to act in a violent manner to maintain their beliefs. Our purpose this afternoon is to educate you in the Sovereign Citizens Movement and its history so that you can recognize its occurrence in your courtroom and be prepared to resolve these cases in an orderly, efficient manner. The materials contained herein are somewhat more voluminous and detailed than may be needed in dealing with these types of cases. In fact, you will probably have more background and research than the average sovereign citizen that meanders into your court. Better that you have the knowledge **and don't need it**.

We will begin with a history of sovereign citizenship and an explanation of the words and terms you are likely to encounter in these cases.

### SOVEREIGN CITIZENSHIP-ORIGINS AND MEANINGS

#### WHAT IS "SOVEREIGN CITIZENSHIP?"

Perhaps the best history of the Sovereign Citizenship movement is found on the web site of the Southern Poverty Law Center (SPLC or "Center") which was founded by attorney Morris Dees. The SPLC, whose main office is in Montgomery, AL, describes the "Sovereign Belief Systems" as follows:

*The contemporary sovereign belief system is based on a decades-old conspiracy theory. At some point in history, sovereigns believe, the American government set up by the founding fathers — with a legal system the sovereigns refer to as "common law" — was secretly replaced by a new government system based on admiralty law, the law of the sea and international commerce. Under common law, or so they believe, the sovereigns would be free men. Under admiralty law, they are slaves, and secret government forces have a vested interest in keeping them that way. Some sovereigns believe this perfidious change occurred during the Civil War, while others blame the events of 1933, when the U.S. abandoned the gold standard. Either way, they stake their lives and*

*livelihoods on the idea that judges around the country know all about this hidden government takeover but are denying the sovereigns' motions and filings out of treasonous loyalty to hidden and malevolent government forces.*

Though this all sounds bizarre, the next layer of the argument becomes even more implausible. Since 1933, the U.S. dollar has been backed not by gold, but by the "full faith and credit" of the U.S. government (in fact, President Franklin D. Roosevelt ended private ownership of gold in large amounts in 1933; governments could still sell gold for dollars to the U.S. Treasury for a fixed amount after that, until that practice was ended by President Richard Nixon in 1971). According to sovereign "researchers," this means that the government has pledged its citizenry as collateral, by selling their future earning capabilities to foreign investors, effectively enslaving all Americans. This sale, they claim, takes place at birth. When a baby is born in the U.S., a birth certificate is issued, and the hospital usually requires that the parents apply for a Social Security number at that time. Sovereigns say that the government then uses that birth certificate to set up a kind of corporate trust in the baby's name — a secret Treasury account — which it funds with an amount ranging from \$600,000 to \$20 million, depending on the particular variant of the sovereign belief system. By setting up this account, every newborn's rights are cleverly split between those held by the flesh-and-blood baby and the ones assigned to his or her corporate shell account.

The sovereigns believe evidence for their theory is found on the birth certificate itself. Since most certificates use all capital letters to spell out a baby's name, JOHN DOE, for example, is actually the name of the corporate shell identity, or "straw man," while John Doe is the baby's "real," flesh-and-blood name. As the child grows older, most of his legal documents will utilize capital letters, which means that his state-issued driver's license, his marriage license, his car registration, his criminal court records, his cable TV bill and correspondence from the IRS all will pertain to his corporate shell identity, not his real, sovereign identity.

The process sovereigns have devised to split the straw man from the flesh-and-blood man is called "redemption," and its purpose is two-fold. Once separated from the corporate shell, the newly freed man is now outside of the jurisdiction of all admiralty laws. More importantly, by filing a series of complex, legal-sounding documents, the sovereign can tap into that secret Treasury account for his own purposes. Over the past 30 years, hundreds of sovereigns have attempted to perfect the process by packaging and promoting different combinations of forms and paperwork. While no one has ever succeeded, for the obvious reason that these theories are not true, sovereigns are nonetheless convinced with the religious certainty of a true cult believer that they're close. All it will take, say the promoters of the redemption scam, is the right combination of words.<sup>1</sup>

A similar story was aired on CBS 60 Minutes. See Tab P.

Sovereign Citizens have their own nomenclature and use words and phrases that seem, on their face, based on legal origins; but on closer examination are void of any true meaning. For example, when a Sovereign Citizen writes **"Accepted for Value" on a Court Order setting forth a fine to be paid, he believes the fine will be paid by a secret government Treasury account. While the term "Accepted for Value" does have a legal basis in the Uniform Commercial Code (see O.C.G.A. §§ 11-3-303 and 11-3-409), the term has no meaning in a Title 40 criminal traffic case. A dictionary of some of the terms you may encounter is attached as TAB A.**

## CONSPIRACY THEORIES

The origins and philosophy of the sovereign citizen movement are heavily based upon one or another of government conspiracy theories. This most certainly helps to explain the popularity of the movement and the willingness of a large segment of the population to accept the sovereign beliefs. After all, how many of you remember your first

social security cards being imprinted on their face with “FOR SOCIAL SECURITY PURPOSES - NOT FOR IDENTIFICATION”.

Over the years, the term “conspiracy theory” has taken on negative connotation and is typically used to describe paranoid visions of the government, or some other powerful entity, utilizing covert agents to manipulate or influence events. The term is sometimes used to automatically dismiss claims that are deemed ridiculous, misconceived, paranoid, unfounded, outlandish, or irrational. The rub that you get to is that subscribers to conspiracy theories, which come in as many varieties as the theories themselves, analyze their reasoning process to distinguish conspiracy thinking from rational criticism.

Those of you who lived through “Watergate” will remember that the government dismissed claims that President Richard Nixon and his aides conspired to engineer and then subsequently cover up the break-in of the Democratic headquarters as unfounded conspiracy nuts trying to grab their 15 minutes of fame. Once it was proven, Watergate went from unfounded conspiracy theory, to investigative journalism, to historical analysis.

How many people think that JFK was really murdered by a sole gunman?

Conspiracy theories were once limited to fringe audiences, but have now become commonplace in the main stream media, and predominant in other than main stream media. Many people are convinced that democracy is being replaced by conspiracy as the dominant motivating force of political action. Anthropologists, such as Todd Sanders and Harry G. West, suggest that presently a large cross section of Americans gives credence to at least some conspiracy theories. (Transparency and Conspiracy: Ethnographies of Suspicion in the New World Order, edited by Harry G. West, Todd Sanders). This, at least in part, explains the popularity and attraction of the sovereign citizen movement.

## WHY SOVEREIGN CITIZENS JOIN THE MOVEMENT: MOTIVES & INTENT

The Southern poverty Law Center (SPLC) tracks and often litigates against a number of “hate groups” and has looked at the origin of the Sovereign Citizens Movement and the adherents who are drawn to this doctrine. The SPLC notes:

In the early 1980s, the Sovereign Citizens Movement mostly attracted white supremacists and anti-Semites, mainly because sovereign theories originated in groups that saw Jews as working behind the scenes to manipulate financial institutions and control the government. Most early sovereigns and some of those who are still on the scene, believed that being white was a prerequisite to becoming a sovereign citizen. They argued that the 14th Amendment to the Constitution, which guaranteed citizenship to African Americans and everyone else born on U.S. soil, also made black Americans permanently subject to federal and state governments, unlike themselves.<sup>2</sup>

One might wonder how anyone, much less an African American, can be duped into believing in Sovereign Citizenship. The SPLC offers the following explanation:

*In the late 2000s and early 2010s, most new recruits to the sovereign citizens movement are people who have found themselves in a desperate situation, often due to the economy or foreclosures, and are searching for a quick fix. Others are intrigued by the notions of easy money and living a lawless life, free from unpleasant consequences. Many self-identified sovereigns today are black and apparently completely unaware of the racist origins of their ideology. When they experience some small success at using redemption techniques to battle minor traffic offenses or local licensing*

*issues, they're hooked. For many, it's a political issue. They don't like taxes, traffic laws, child support obligations or banking practices, but they are too impatient to try to change what they dislike through traditional, political means.*

In times of economic prosperity, sovereigns typically rely on absurd and convoluted schemes to evade state and federal income taxes and hide their assets from the IRS. In times of financial hardship, they turn to debt-and mortgage-elimination scams, techniques to avoid child support payments, and even attempts to use their redemption techniques to get out of serious criminal charges.

Once in the movement, it's an immersive and heady experience. In the past three decades, the redemptionist subculture has grown from small groups of like-minded individuals in localized pockets around the nation to a richly layered society. Redemptionists attend specialized seminars and national conferences, enjoy a large assortment of alternative newspapers and radio networks, and subscribe to sovereign-oriented magazines and websites. They home-school their children so that a new generation will not have to go through the same learning curve that they did to see past the government's curtain to the common-law utopia beyond.

While the techniques sold by promoters never perform as promised, most followers are nonetheless content to be fighting the battle, and they blame only the judges, lawyers, prosecutors and police when their gurus' methods fail. While most have never achieved financial success in life, they take pride in engaging the government in battle, comparing themselves to the founding fathers during the American Revolution.<sup>3</sup>

Does this make any rational sense? No, but we are not dealing with rationally thinking people, in a conventional sense. **You, as a judge in one case, do not have the time (nor probably the ability) to “de-convert” these people away from their beliefs. Don't even try: leave that for the experts.** Just concentrate on the one case before your court on this one day, and go forward. These cases have all the makings of being a time vampire, and you are acting under the added impediment of being the symbol of oppression.

**Now, don't get** me wrong, a lot of these people are very rational, very intelligent and, most of all, very dedicated to their particular brand of the sovereign citizen philosophy. It is up to you to find the proper, professional, and efficient way to deal with these persons when they appear in your court, and one size does not fit all.

## HOW DO SOVEREIGN CITIZENS ACT TO ENFORCE THEIR BELIEFS?

The most common form of activity of a Sovereign Citizen is to file a myriad of motions, claims, liens, etc. in cases in **which they are a party against people whom they perceive are “on the other side,”** such as plaintiffs, prosecutors, clerks, and especially judges. Violence can even occur when the paper trail reaches its unsuccessful end.

## PAPER WARS

As you will quickly learn, Sovereign Citizens love to file paper: motions, liens, copyright claims, UCC forms—you name it, they file it. See some examples at Tab B. These litigants seem to be searching for the right combination of words that can be used to win their cases. So far, the Holy Grail has not been found, but that does not keep Sovereign Citizens from looking for it!

In some cases, your Clerk will be flooded with all kinds of pleadings, some simply beyond comprehension. This to be expected, because as the SPLC notes:

*The weapon of choice for sovereign citizens is paper. A simple traffic violation or pet-licensing case can end up provoking dozens of court filings containing hundreds of pages of pseudo-legal nonsense. For example, a sovereign was involved in 2010 in a protracted legal battle over having to pay a dog-licensing fee. She filed 10 sovereign documents in court over a two-month period and then declared victory when the harried prosecutor decided to drop the case. The battle was fought over a three-year dog license that in Pinellas County, Fla., where the sovereign lives, costs just \$20. Tax cases are even worse. Sovereign filings in such legal battles can quickly exceed a thousand pages. While a normal criminal case docket might have 60 or 70 entries, many involving sovereigns have as many as 1,200. The courts are struggling to keep up, and judges, prosecutors and public defenders are being swamped.<sup>4</sup>*

Many of these filings use language that is unique to the Sovereign Citizens Movement. See TAB A. Often Sovereign Citizens engage in paper wars or “paper terrorism” and file liens against judges, clerks, and other public officials.<sup>5</sup> Liens and false tax forms have even been filed to discourage federal judges and prosecutors who are assigned these cases.<sup>6</sup>

Obviously, these filings are bogus, useless, and time consuming, but there are ways to eliminate or reduce these filings.<sup>7</sup> See Tab B. Last year over 250,000 cases were filed in the Atlanta Municipal Court—the odds favor every one of our 8 judges seeing a Sovereign Citizen at least once every year. It is estimated anywhere from 250,000 to a half million people either declare themselves to be or adhere in some form to the Sovereign Citizens Movement.<sup>8</sup> So do the math: this is a real problem.

**If you glance at the pleadings, they seem to have some basis in law, but “on further review,” they are a worthless waste of paper.** I once told a Sovereign Citizen defendant his filings were nothing more than “legal garbage.” This harsh, if not overly critical/rude approach is not advised because (1) Sovereign Citizens, however misguided they are, are sincere in their beliefs, and (2) have been known to react in a violent manner.<sup>9</sup>

What appears to be truly odd, is that in almost every case, all the litigants I have encountered who espouse Sovereign Citizenship are of African-American descent. However, as we learned earlier, the movement has its origins in racism and anti-Semitism!<sup>10</sup> Because the philosophy seems to depend if not originate in the passage of the 14<sup>th</sup> Amendment, which guaranteed full rights to all citizens, Sovereign Citizens take the position that the people who benefited from the 14<sup>th</sup> Amendment have rights only created by the federal government and are not, therefore “Sovereign” in the “true” sense. **Since white people had “rights” before the passage of the 14<sup>th</sup> Amendment, whites only are “Sovereign.” Citizens “created” after the civil war cannot exist as “Sovereigns” because their rights were created by the federal government.** Thus, it makes no sense at all to try to understand how a Black American would

claim to be a member of a movement that denies his very existence, but such is indeed what you may see in your courtrooms, if you hear a Sovereign Citizen case.

In its discussion of the violent activities of Joseph and Jerry Kane, who killed two police officers and wounded two more, before they were themselves killed in a blazing gun battle; the SPLC asked the same question we did a moment ago: **“Why do they do it?”** The Center notes “... many self-identified Sovereigns are black and apparently completely unaware of the racist origins of their ideology.”<sup>11</sup>

I do not suggest you try to understand this paradox. However, it is vital that you avoid lapsing into a racial approach **to Sovereign Citizenship: that will not “solve” this problem and may lead to a JQC inquiry.** I caution all of you **“to keep your head while others are losing theirs.”** These cases can morph into violence, and if you smother these litigants with kindness, you may avoid trouble.

## VIOLENCE

Things can get out of hand as you will conclude from hearing the story of father and son Sovereign Citizens, Jerry and Joseph Kane. **They often dressed in ties and white suits, and while driving a white “church van” with a “questionable” out-of-state license plate,** the Kanes were pulled over in West Memphis, Arkansas by two patrolmen. Armed with an AK-47, the 16 year old Joseph Kane killed both officers, striking them 25 times, including after they lay in a roadside ditch. After having fled the homicide scene, the Kanes were later confronted, engaged in a fierce gun battle, and were finally themselves killed. See Tab C for the full story.

There have been many other Sovereign Citizens involved in violent and fatal incidents. George Sibley and Linda Lyon killed an Alabama police officer in 1997 when he stopped them to inquire about their **“Sovereign Citizens”** license tags.<sup>12</sup>

In September, 2011, the FBI issued a law enforcement Bulletin entitled **“Sovereign Citizens: A Growing Domestic Threat to Law Enforcement”** that describes the Sovereign Citizens Movement as **“domestic terrorism.”**<sup>13</sup> The Bulletin notes that since 2000, six law enforcement officers have been killed by Sovereign Citizens and that the Oklahoma City bomber, Terry Nichols, was a Sovereign Citizen.<sup>14</sup> Since that Bulletin, the SPLC notes that two more officers were killed in Louisiana.<sup>15</sup>

The testimony of Dr. Heidi L. Beirich, the SPLC’s Director of Intelligence Project, to the US Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights is attached as Tab D. That testimony highlights not only violent activities of Sovereign Citizens, but those of similar groups such as the Patriots and other radical, right wing groups. See Tab E which also contains a list of all know Patriot groups in Georgia.

## GEORGIA ACTIVITIES

Georgia has seen its share of publically reported activities of so called “Sovereign Citizens.” Just this past March, a Kennesaw woman, who was under indictment for squatter activities in illegally occupying foreclosed homes in DeKalb County, forged a federal judge’s signature on a court order in a lawsuit that she had filed against two Superior Court Judges and the State of Georgia. In that suit, Sovereign Citizen Susan Weidman claimed she and 3 others had won a \$65 million settlement for false arrest, etc., but that underlying suit had actually been dismissed in federal court. When she later came to Cobb County for a hearing on her efforts to collect on this non-existent judgment; she was arrested. Meanwhile, she had also filed suit against the Governor, two DA’s, and DeKalb County! The saga is set forth in a newspaper article at Tab F.

By now, many of you have heard about the “Moorish Nation” of Eatonton, Georgia and its leader, Dwight York, who went to federal prison for, among other things, child rape. See Tab G. Nonetheless, Sovereign Citizens continue to file “Moorish American Name Declarations” such as that found at Tab H.

Can anyone here relate a similar tale? Have you been the target of a Sovereign Citizen?

## SOLUTIONS - HOW TO DEAL WITH SOVEREIGN CITIZENS

The problems of Sovereign Citizens are real and they need to BE addressed both in the courtroom and outside as well. Here are some ways to proceed.

### LEGISLATIVE

As we have seen, Georgia is not alone in facing the myriad of problems created by Sovereign Citizens. In 2012, the General Assembly passed HB 997 to address false lien filings. O.C.G.A. § 16-10-201 reads as follows:

*§ 16-10-20.1. Filing false liens or encumbrances against public employees*

*(a) As used in this Code section, the term:*

*(1) “Public employee” means every person employed by the executive, legislative, or judicial branch of state government, or any department, board, bureau, agency, commission, or authority thereof, and any person employed by a county, municipality, consolidated government, or local board of education.*

*(2) “Public officer” shall have the same meaning as set forth in Code Section 21-5-3.*

*(b) Notwithstanding Code Sections 16-10-20 and 16-10-71, it shall be unlawful for any person to knowingly file a false lien or encumbrance in a public record or private record that is generally available to the public against the real or personal property of a public officer or public employee on account of the performance of such public officer or public employee’s official duties, knowing or having reason to know that such lien or encumbrance is false or contains a materially false, fictitious, or fraudulent statement or representation.*

*(c) Any person who violates subsection (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment of not less than one nor more than ten years, a fine not to exceed \$10,000.00, or both.*

HB 997 also amended Georgia's RICO Statute to allow prosecution of conspirators by adding the following language in Section 2 therein:

*Said title is further amended by revising division (9)(A)(xx) of Code Section 16-14-3. Relating to definitions for the "Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act," as follows: "(xx) Article 4 of Chapter 10 of the title and Code Sections 16-10-20, 16-10-20.1, 16-10-23, and 16-10-91, relating to perjury and other falsifications."*

Previously, Congress addressed the issue by passing the Court Security Improvement Act of 2007 (HR 660, 110<sup>th</sup> Cong.) which makes it a felony to file false liens against federal officials, P.L. 110-177 (Jan. 7, 2008). See, e.g., 18 USC §73-1521, which prohibits retaliation against federal judges and law enforcement officers by filing false claims or slanders of titles.

## COURT PERSONNEL TRAINING

Your Clerk may be of help as well. In Superior Court, when a civil action is filed with a pauper's affidavit, O.C.G.A. §9-15-2(d) applies. That section reads as follows:

*(d) When a civil action is presented for filing under this Code section by a party who is not represented by an attorney, the clerk of court shall not file the matter but shall present the complaint or other initial pleading to a judge of the court. The judge shall review the pleading and, if the judge determines that the pleading shows on its face such a complete absence of any justiciable issue of law or fact that it cannot be reasonably believed that the court could grant any relief against any party named in the pleading, then the judge shall enter an order denying filing of the pleading. If the judge does not so find, then the judge shall enter an order allowing filing and shall return the pleading to the clerk for filing as in other cases. An order denying filing shall be appealable in the same manner as an order dismissing an action.*

While that statute will not help most of us who toil in Municipal Court as this is a CPA Section, and most of our cases are criminal, it can be of use in the following situation: a Sovereign Citizen files a **pro se, pauper's suit against you** in Superior Court to enjoin you from conducting a trial in your court. A trained Superior Court docket clerk can **"intercept" this suit, bring it to the Superior Court Judge, and it may not even get filed, or sent to the Sheriff for service on you.**

Oddly, as a judge in Atlanta Municipal Court, I have actually used §9-15-2(d) in a civil, land use/nuisance case under a City Ordinance when a pauper started filing frivolous claims. The Atlanta City Code has Section 62-56 which reads "...the Municipal Court shall be controlled by the rules of practice governing the Superior Court, so far as they are applicable to the Municipal Courts..." **My clerk knew our procedures, saw the frivolous suit, and brought it to my attention. So, check your own city's code and charter as well!**

## PROACTIVE LITIGATION

If you are tired of being sued, you can always turn things around! Become a plaintiff yourself and file for a Bill of Peace under O.C.G.A. § 23-3-110. **You can even get a "perpetual injunction" to stop the Sovereign Citizen once and for all times.** See Rolleston Living Trust v. Kennedy, 277 Ga. 541 (2004). Just remember, we are only Municipal Court

Judges, so we, ourselves, cannot issue our own Bill of Peace—you must sue in Superior Court. 1957 Op. Atty. Gen. p. 66.

The Attorney General has gone into Court to file complaints to remove false liens. See Tab I.

The solutions offered under A, B, and C, above are what I would refer to as prolonging the agony. In other words, they require your devoting more attention to the subject, and potentially the input and/or action on the part of others, such as the city attorney, clerk of court, etc. Those persons may, or may not, be educated in this problematic area, thus requiring you to devote even more time as an educator.

## CONTEMPT POWER

**Of course, there is always the use of the Court's inherent power to hold anyone in Contempt.** See O.C.G.A. §§15-1-3(1) and 15-1-4. I will not even attempt to delve into this subject, except to refer you to the Benchbook, and Judge Glen Ashman's excellent discussion therein. **Most of what I have seen is direct contempt: Sovereign Citizens who refuse to answer simple, direct questions such as their name or how they are pleading to a charge. This is "direct" contempt, and you should have the experience to deal with this activity.**

Remember, if a Sovereign Citizen refuses to plead, the defendant is deemed to plead not guilty, and if he refuses to affirmatively waive a jury trial, send it to your State/Superior Court like any other bind-over O.C.G.A. §§17-7-94 and 40-13-23. While it is true, you will be passing the problem off to another court, sometimes, that is the only thing you can do. Of course not all of your sovereign citizen cases will be based upon offenses which are able to be bound over for jury trial. In that event, you will simply conduct a trial to the best of your ability under the circumstances and make sure that the Defendant has been advised of the appeal process in the event of a negative outcome from their perspective.

## POLICE TRAINING

While we are judges and not the police, **we both may be mutual targets of the Sovereign Citizens' paper wars, and maybe even worse activities.** Look at Tab J, a detailed account of two Greensboro, NC detectives who have developed a comprehensive training system so we, as public officials, can have the information needed to combat the problems associated with Sovereign Citizens. Maybe sending your chief bailiff to that training course is a good idea.

## IN COURTROOM SUGGESTIONS

Perhaps the best way to cope with a Sovereign Citizen is to have advance knowledge from your clerks, bailiff, and **staff. They need to be trained to give you a "heads up" so you can be prepared. Additional security** should be called into the courtroom.

One idea is to try and isolate the defendant. Put the Sovereign Citizen's **case last in your docket. That way the courtroom is clear so (1) the Sovereign Citizen has no audience to whom he can preach, and (2) should violence occur, possible injury to the general public is reduced. Then listen, and listen again to the Sovereign Citizen's arguments.** Then respectfully make upon rulings, like any other case. If the litigant refuses to cooperate, there is always a 6 month sentence or a contempt sentence available.

**It may sometime be better to take a Sovereign citizen case "under advisement" and issue a ruling by mail, at a later date.** However, a written opinion may generate an appeal. So, you can see, there is a balancing act in many of these cases.

## REAL WORLD CASES

While the Sovereign Citizens may not be from Area 51 in Nevada, as the 1950's movies used to conclude, "We are not alone." Here are some citations to actual cases that illustrate Sovereign Citizens activities.

*U.S. v. DeLatorre*, 2008 U.S. Dist. LEXIS 7530 (N.D. Ill 2008) is well written opinion that rebuts and denounces many Sovereign Citizens arguments including lack of jurisdiction, "flesh and flood man," capitalized letters, victory by default, etc. See Tab K.

*Molina v. Wrigley*, 2008 U.S. Dist. LEXIS 4814 (ED Cal 2008) denounces the "capital letters" argument and dismisses the entire petition on preliminary review under special court rules dealing with habeas corpus cases. See Tab L. This is an example why Georgia needs an O.C.G.A. § 9-15-2(d) type Rule to cover criminal cases.

*U.S. v. Mitchell*, 405 F. Supp. 2d 602 (D MD 2005) is a criminal case that rebuts UCC claims, capital letter defenses, and the FRCP. See Tab M. As Judge Davis wrote "These arguments are patently without merit. Perhaps they would even be humorous—were the stakes not so high." *Id.* 405 F. Supp. 2d at 603. Judge Davis refers to the National Center for the State Courts' book *The Anti-Government Movement Guide Book* (1999) and there are examples therein describing the history, origins, and beliefs of the Sovereign Citizens Movement.

There are many other examples of cases like those listed above. *Joyner v. Borough of Brooklyn*, 1999 U.S. Dist. LEXIS 5721 (ED NY 1999) is my favorite "flag fringer" opinion. See Tab N. Joyner got 25 years to life in a New York state court and sued every judge, lawyer, etc. associated with his case in a 19 page, single spaced complaint. He claimed he could not get a fair trial because the American flags in the courtroom were adorned with yellow fringes, which rendered them as flags of a foreign state or power. He also sued for \$125 million in damages! Not surprisingly the "flag fringe" argument is not new and the New York district court cited 6 other cases in support of its FRCP 12(b)(6) dismissal of Joyner's case.

Brooklyn also experienced a Housing Court defendant, Jason Robert Williams, who attempted to pay a \$7655 fine via a "lawful bill of exchanges." It didn't work. *NY Law Journal*, Sept 6, 2012. See Tab O.

Things are happening in Texas, too. *U.S. v. Greenstreet*, 912 F. Supp. 224 (ND TX 1966) was a dismissal of a Sovereign Citizen's false liens filed against the federal Dep't of Agriculture and FMHA employees. Another Texas false lien case is *U.S. v. Brum*, 2005 US Dist LEXIS 21208 (ED TX 2008) wherein a defendant who engaged in interstate travel to commit murder sued judges and others involved in his voluntary guilty plea.

## CONCLUSION

The list of cases can go on and on. Eventually, if you stay on the bench long enough you will encounter a Sovereign Citizen. We hope you feel a little more prepared after hearing from us today. Thank you.

## FOOTNOTES

1. Website of Southern Poverty Law Center (SPLC) found at <http://www.splcenter.org/get-informed/intelligence-files/ideology/sovereign-citizens-movement#.UZzkYiHD9kh>
2. *Id.* found at <http://www.splcenter.org/get-informed/intelligence-files/ideology/sovereign-citizens-movement#.UZzmFiHD9kg>

3. Id.
4. Id.
5. See discussion at page 18, infra.
6. Id. at pages 18-21, 24, infra and See TAB I.
7. Id.
8. SPLC website found at <http://www.splcenter.org/get-informed/intelligence-files/ideology/sovereign-citizens-movement#.UZzmFiHD9kg>
9. See discussion at pages 16-17, infra.
10. See fn. 8 above.
11. Id.
12. See Tab C, at pages 6-7.
13. SPLC website found at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/winter/law-enforcement-takes-on-the-sovereig#.UZzq3SHD9kg>
14. SPLC website found at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2002/summer/patriot-free-fall#.UZzjCHD9kg>
15. See TAB D for testimony of Dr. Heidi L. Beirich on the violent activities of Sovereign Citizens.
16. Id.

## ADDITIONAL RESOURCES

- SPLC website

<http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/fall/sovereign-idioticon-a-dictionary-of-the#.UZzk7SHD9kg>

- WORLD WIDE RELIGIOUS NEWS <http://www.wwrn.org>

WIKIPEDIA – (Cannot be used in Court Opinions)

[http://en.wikipedia.org/wiki/Sovereign\\_citizen\\_movement](http://en.wikipedia.org/wiki/Sovereign_citizen_movement)

[http://rationalwiki.org/wiki/Sovereign\\_citizen](http://rationalwiki.org/wiki/Sovereign_citizen)

- Public Safety sites

<http://articles.latimes.com/2013/apr/05/nation/la-na-sovereigns-20130406>

<http://www.policeone.com/investigations/articles/6176998-10-tips-and-tactics-for-investigating-Sovereign-Citizens/>

- The Sovereign Citizen Network

<http://www.sovereign-citizenship.net/home.html>

## GENERAL APPENDIX

### GENERAL APPENDIX – APPENDIX A: SIGNIFICANT CASES

#### DUI

*Zilke v. the state*, 299 ga. 232 (June 20, 2016).

Under OCGA §17-4-23, POST-certified campus officers are not authorized to arrest individuals for traffic offenses **that occur more than 500 yards from campus provided the offense occurs in officer's presence.**

*State v. Young*, 334 Ga. App 161 (Oct 14, 2015).

There is sufficient evidence for an officer to have probable cause for an arrest less-safe DUI when: (1) the officer smelled alcohol on person, (2) person admitted to officer that he had been drinking, (3) and the totality of the circumstances support probable cause.

*Barghi v. State*, 334 Ga. App. 409, *cert. denied* 2016 Ga. LEXIS 235 (Oct. 14, 2015).

The state may amend accusations for less-safe DUI after the 2-year statute of limitations period, so long as the original accusation was filed within the statute of limitations deadline and prosecution on the amended accusation is not precluded by a statute of limitations defense.

*Blanks v. State*, 334 Ga. App 626, *cert. denied* 2016 Ga. LEXIS 182 (Nov. 3, 2015).

There is reasonable basis for an officer to perform a traffic stop when information came from an anonymous tip if the tipster was an eyewitness to the illegal act.

*State v. Oyeniyi*, 335 Ga. App. 575, 577 (Feb. 4, 2016).

OCGA §40-5-67.1(b)(2) includes an implied consent for one-year suspension of license upon refusal to make chemical/breath after traffic stop. It is enough for implied consent that officer reads the exact language of the statute, and the suspect need not also be advised of all possible things that could affect the mandatory suspension.

#### MISDEMEANORS

*Williams v. State*, 334 Ga. App. 195 (Oct. 19, 2015)

In the context of OCGA §40-6-2, a “lawful order” means “an order within the officer's scope of responsibility in directing traffic,” with the Court of Appeals adopting the interpretation of an Ohio Municipal Court.

#### CRIMINAL PROCEDURE

*Hyde v. State*, 2016 Ga. LEXIS 387 (Ga. May 23, 2016)

Defendant moved to vacate a void sentence as a recidivist to life in prison without the possibility of parole, after his conviction for malice murder was affirmed on appeal, 275 Ga. 693, 572 S.E.2d 562 (2002). The Superior Court,

Fulton County, Ural Glanville, J., denied the motion. Defendant appealed. The Supreme Court, Thompson, C.J., held that recidivism statute did not allow defendant to be punished as a recidivist. Reversed and remanded with direction.

Holding: The Supreme Court, Thompson, C.J., held that recidivism statute did not allow defendant to be punished as a recidivist. Reversed and remanded with direction. Notice: Not final until expiration of the rehearing period. This opinion is uncorrected and subject to revision by the court.

Stanbury v. State, 299 Ga. 125 (May 23, 2016)

In a case where defendant was convicted of murder, pursuant to former O.C.G.A. § 24-4-8 (now codified at O.C.G.A. § 24-14-8), the trial court committed plain error by not providing a jury charge on the necessity of corroboration of the accomplice's testimony because by failing to give the required accomplice corroboration charge and instead charging the jury that the testimony of a single witness, if believed, was generally sufficient to establish a fact, the trial court impermissibly empowered the jury to find defendant guilty based solely on the accomplice's testimony; while there was sufficient corroborating evidence to support a verdict, that evidence was in no way overwhelming; the outcome of the trial court proceedings was likely affected by the error; and the error seriously affected the fairness, integrity, or public reputation of the proceedings.

Darling v. McLaughlin, 299 Ga. 106 (May 23, 2016)

The Court held that the habeas court erred by only considering the factors outlined in O.C.G.A. § 9-11-41(a)(1) to determine whether petitioner's voluntary dismissal was proper and should have analyzed whether voluntary dismissal might otherwise be available upon order of the court and upon the terms and conditions as the court deems proper pursuant to § 9-11-41(a)(2).

Outcome: Judgment vacated; case remanded to habeas court for further proceedings. Notice: Not final until expiration of the rehearing period. This opinion is uncorrected and subject to revision by the court.

## TRAFFIC

*Zilke v. the state*, 299 ga. 232 (June 20, 2016).

See DUI for holding.

*Barghi v. State*, 334 Ga. App. 409, cert. denied 2016 Ga. LEXIS 235 (Oct. 14, 2015).

See DUI for holding.

## EVIDENCE

State v. Brown, 333 Ga. App. 643 (2015)

**Exclusion of evidence is not appropriate where the State can not produce informal investigator's notes because OCGA §17-16-1 does not require those to be discoverable.**

## SEARCHES

State v. Cook, 337 Ga. App. 205 (May 25, 2016).

Where a warrantless search for marijuana has taken place, the search will not be lawful if the officer who conducted it did not personally smell marijuana and if the security officer who allegedly smelled it does not testify.

## GENERAL APPENDIX: APPENDIX B: UPDATED LIST AND SUMMARY OF NEW STATUTES

### JURISDICTION

HB 927 (Act 626): A BILL to be entitled an Act to amend Title 15 of the O.C.G.A., relating to courts; to amend Chapter 6 of Title 5, Part 7 of Article 1 of Chapter 1 of Title 7, Chapter 6 of Title 9, Chapter 2 of Title 21, Article 3 of Chapter 4 of Title 23, Chapter 2 of Title 44, and Code Section 48-5-17, relating to certiorari and appeals to appellate courts generally, receivership powers and procedures generally, extraordinary writs, elections and primaries generally, decrees, recordation and registration of deeds and other instruments, and proceedings to determine county entitled to return and payment; to amend Chapter 2 of Title 15 of the O.C.G.A., relating to the Supreme Court; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 513 (Effective 7/1/2016)A BILL to be entitled an Act to amend Article 3 of Chapter 11 of Title 9 of the Official Code of Georgia Annotated, relating to pleadings and motions, so as to revise provisions regarding the procedure for claims asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances; to revise definitions; to amend Chapter 5 of Title 51 of the Official Code of Georgia Annotated, relating to libel and slander, so as to revise a cross-reference; to provide for related matters; to provide for an effective date and applicability; to repeal conflicting laws; and for other purposes.

HB 691 (Effective 7/1/2016): A BILL to be entitled an Act to amend Article 1 of Chapter 32 of Title 36 of the Official Code of Georgia Annotated, relating to municipal courts generally, so as to provide the removal of appointed municipal court judges under certain circumstances; to provide for procedure; to provide for related matters; to repeal conflicting laws; and for other purposes.

House Bill 691 (AS PASSED HOUSE AND SENATE)

By: Representatives Tanner of the 9<sup>th</sup>, Willard of the 51<sup>st</sup>, Welch of the 110<sup>th</sup>, Caldwell of the 131<sup>st</sup>, and Golick of the 40<sup>th</sup>

A BILL TO BE ENTITLED  
AN ACT

1 To amend Article 1 of Chapter 32 of Title 36 of the Official Code of Georgia Annotated,  
2 relating to municipal courts generally, so as to provide for the removal of appointed  
3 municipal court judges under certain circumstances; to provide for procedure; to provide for  
4 related matters; to repeal conflicting laws; and for other purposes.

5 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

6 **SECTION 1.**

7 Article 1 of Chapter 32 of Title 36 of the Official Code of Georgia Annotated, relating to  
8 municipal courts generally, is amended by revising subsection (a) of Code Section 36-32-2,  
9 relating to appointment of judges, as follows:

10 "(a) Notwithstanding any other provision of this chapter or any general or local Act, the  
11 governing authority of each municipal corporation within this state having a municipal  
12 court, as provided by the Act incorporating the municipal corporation or any amendments  
13 thereto, is authorized to appoint a judge of such court. Any person individual appointed  
14 as a judge under this Code section shall possess such qualifications as set forth in Code  
15 Section 36-32-1.1 and shall receive such compensation as shall be fixed by the governing  
16 authority of the municipal corporation ~~and shall serve at the pleasure of the governing~~  
17 ~~authority.~~ Any individual appointed as a judge under this Code section shall serve for a  
18 minimum term of one year and until a successor is appointed or if the judge is removed  
19 from office as provided in Code Section 36-32-2.2. Such term shall be memorialized in  
20 a written agreement between such individual and the governing authority of the municipal  
21 corporation or in an ordinance or a charter. With respect to an individual serving as a  
22 municipal court judge in a consolidated government, the local Act shall determine the term  
23 of such judge."

24 **SECTION 2.**

25 Said article is further amended by adding a new Code section to read as follows:

- 26 "36-32-2.2.
- 27 (a) As used in this Code section, the term 'judge' means an individual serving as an  
28 appointed municipal court judge.
- 29 (b)(1) A judge may be removed during his or her term of office by a two-thirds' vote of  
30 the entire membership of the governing authority of the municipal corporation for:
- 31 (A) Willful misconduct in office;  
32 (B) Willful and persistent failure to perform duties;  
33 (C) Habitual intemperance;  
34 (D) Conduct prejudicial to the administration of justice which brings the judicial office  
35 into disrepute; or  
36 (E) Disability seriously interfering with the performance of duties, which is, or is likely  
37 to become, of a permanent character.
- 38 (2) A municipality may define in its charter further conduct that may lead to a judge's  
39 removal.
- 40 (c) Removal proceedings pursuant to subsection (b) of this Code section may be initiated  
41 only by written petition setting forth the grounds for removal of a judge signed by one or  
42 more members of the governing authority of the municipal corporation. Upon submission  
43 of the petition to remove the judge to such governing authority, the governing authority  
44 may consider the petition and determine if the petition relates to and adversely affects the  
45 administration of the office of the judge and the rights and interests of the public. If it is  
46 determined at a public meeting by a majority vote of the governing authority of the  
47 municipal corporation that there is an adverse impact, the judge may be suspended  
48 immediately and without further action for up to 60 days pending the final determination  
49 pursuant to subsection (e) of this Code section. A judge suspended pursuant to this  
50 subsection shall continue to receive the compensation from his or her office until the final  
51 determination on the petition or expiration of the suspension.
- 52 (d) If by the expiration of the suspension period no formal resolution of the petition has  
53 been made, the judge shall be reinstated.
- 54 (e) Removal proceedings shall consist of an open and public hearing held by the governing  
55 authority of the municipal corporation, provided that the judge against whom such charges  
56 have been brought shall be furnished a copy of the charges at least ten days prior to the  
57 hearing. At the conclusion of the hearing, the governing authority of the municipal  
58 corporation shall determine whether or not to remove the judge from office. The governing  
59 authority of the municipal corporation may adopt rules governing the procedures at such  
60 hearings, provided that such hearings comport with due process. The right of certiorari  
61 from the decision to remove a judge from office shall exist, and such certiorari shall be

62 obtained under the sanction of a judge of the superior court of the circuit in which the  
63 governing authority of the municipal corporation is situated.

64 (f) This Code section shall not affect the power and authority of the Judicial Qualifications  
65 Commission to discipline, remove, or cause the involuntary retirement of judges.

66 (g) Any vacancy in a judgeship created by the removal of a judge pursuant to this Code  
67 section may be temporarily filled by the governing authority of the municipal corporation  
68 for a period not longer than 90 days by any individual qualified by law to serve as a  
69 municipal court judge. If after the conclusion of the removal proceedings, including the  
70 appeal period, there is a vacancy for such judgeship, the governing authority of the  
71 municipal corporation may appoint a judge in the same manner as set forth in Code Section  
72 36-32-2.

73 (h) The provisions of this Code section shall expressly supersede any conflicting local law  
74 of this state; provided, however, that this Code section shall not apply to a local Act  
75 creating a municipal court for a consolidated government."

76 **SECTION 3.**

77 All laws and parts of laws in conflict with this Act are repealed.

## LOCAL ORDINANCES/CRIMINAL SANCTIONS

HB 89 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Code Section 16-13-32.6 of the Official Code of Georgia Annotated, relating to manufacturing, distributing, dispensing, or possessing with intent to distribute controlled substances or marijuana in, on, or within drug-free commercial zones, so as to change the date of incorporation of local ordinances by reference; to repeal conflicting laws; and for other purposes.

HB 492 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Chapter 11 of Title 16 of the Official Code of Georgia Annotated, relating to offenses against public order and safety, so as to revise provisions regarding carrying in unauthorized locations; to amend Article 4 of Chapter 18 of Title 50, relating to the inspection of public records, so as to provide for the disclosure of records relating to licensing and possession of firearms between the judges of the probate court; to provide for related matters; to repeal conflicting laws; and for other purposes.

## CRIMINAL LAW

HB 72 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Title 16, Article 1 of Chapter 8 of Title 17, Chapter 5 of Title 30, and Title 31 of the O.C.G.A., relating to crimes and offenses, general provisions for trial, protection of disabled adults and elder persons, and health, respectively, so as to expand and clarify protection of disabled adults and elder persons; to provide for and revise definitions; to repeal provisions relating to exclusion of evidence obtained during the execution of an inspection warrant; to provide for related matters; to repeal conflicting laws; and for other purposes.

SB 193 (Act 518): A BILL to be entitled an Act to amend Code Section 16-5-23.1 of the Official Code of Georgia Annotated, relating to battery, so as to change penalty provisions relating to family violence battery; to provide for a definition; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 759 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Article 3 of Chapter 19 of Title 15 of the Official Code of Georgia Annotated, relating to the regulation of the practice of law, so as to provide that certain activities by financial institutions shall not constitute the unauthorized practice of law; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 783 (Act 603): A BILL to be entitled an Act to amend Chapter 13 of Title 16 of the Official Code of Georgia Annotated, relating to controlled substances, so as to change certain provisions relating to Schedules I and IV controlled substances; to change certain provisions relating to the definition of dangerous drug; to provide for restricted dangerous drugs; to provide for penalties for certain violations relating to restricted dangerous drugs and nonprescription injectable insulin; to provide for an effective date; to repeal conflicting laws; and for other purposes.

HB 792 (Act 616): A BILL to be entitled an Act to amend Part 3 of Article 4 of Chapter 11 of Title 16 of the Official Code of Georgia Annotated, relating to carrying and possession of firearms, so as to authorize the carrying, possession, and use of electroshock weapons by persons who are students or who are employed at a public institution of postsecondary education; to provide for a definition; to provide for conditions; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 949 (Act 484): A BILL to be entitled an Act to amend Article 3 of Chapter 9 of Title 16 of the Official Code of Georgia Annotated, relating to illegal use of financial transaction cards, and Chapter 80 of Title 36 of the Official Code of Georgia Annotated, relating to general provisions applicable to counties, municipal corporations, and other governmental entities, so as to revise a definition; to revise provisions of law relating to government purchasing cards and government credit cards; to provide for the issuance of government purchasing cards and government

credit cards; to provide for the conditions for such issuance; to provide for related matters; to provide an effective date; to repeal conflicting laws; and for other purposes.

SB 193 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Code Section 16-5-23.1 of the Official Code of Georgia Annotated, relating to battery, so as to change penalty provisions relating to family violence battery; to provide for a definition; to provide for related matters; to repeal conflicting laws; and for other purposes.

SB 270 (House Second Reader): A BILL to be entitled an Act to amend Part 3 of Article 4 of Chapter 11 of Title 16 of the Official Code of Georgia Annotated, relating to carrying and possession of firearms, so as to authorize persons who are qualified retired law enforcement officers to carry a handgun anywhere within this state; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 779 (Vetoed V8): A BILL to be entitled an Act to amend Title 16 of the Official Code of Georgia Annotated, relating to crimes and offenses, so as to regulate the use of unmanned aircraft systems and images captured by such systems; to provide for definitions; to provide for exceptions; to provide for penalties and a civil right of action; to provide for venue; to amend Code Section 27-3-151 of the Official Code of Georgia Annotated, relating to activity prohibited in the taking of wildlife, so as to regulate the use of unmanned aircraft systems in connection to hunting and fishing; to provide for related matters; to repeal conflicting laws; and for other purposes.

#### CRIMINAL PROCEDURE

HB 513 (Effective Date 7/1/2016) : A BILL to be entitled an Act to amend Article 3 of Chapter 11 of Title 9 of the Official Code of Georgia Annotated, relating to pleadings and motions, so as to revise provisions regarding the procedure for claims asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances; to revise definitions; to amend Chapter 5 of Title 51 of the Official Code of Georgia Annotated, relating to libel and slander, so as to revise a cross-reference; to provide for related matters; to provide for an effective date and applicability; to repeal conflicting laws; and for other purposes.

HB 874 (Act 606): A BILL to be entitled an Act to amend Article 9 of Chapter 11 of Title 15, Title 16, Chapter 4 of Title 24, and Code Section 42-5-18 of the O.C.G.A., relating to access to hearings and records, crimes and offenses, relevant evidence and its limits, and items prohibited for possession by inmates, respectively, so as to improve the ability to prosecute street gang terrorism; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 900 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Part 2 of Article 2 of Chapter 13 of Title 16 of the Official Code of Georgia Annotated, relating to electronic database of prescription information, so as to authorize the retention of data base information for two years; to provide for delegates of prescribers and dispensers to access data base information under certain conditions; to revise language relating to subpoenas and search warrants; to provide for accessing database information for purposes of investigation of potential abuse; to provide for the release of non-patient specific data to the agency for instructional, drug abuse prevention, and research purposes; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 905 (Act 597): A BILL to be entitled an Act to amend Code Section 15-11-710, Title 19, and Chapter 5 of Title 49 of the Official Code of Georgia Annotated, relating to exchange of information, domestic relations, and programs and protection for children and youth, so as to change provisions relating to child abuse; to correct a cross-reference; to change and provide for defined terms; to change provisions relating to protocol committees on child abuse; to remove certain reporting requirements to the child abuse registry; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 941 (Effective Date 7/1/2016): A BILL to be entitled an Act to amend Chapter 12 of Title 15, Chapter 7 of Title 17, and Chapter 11 of Title 45 of the O.C.G.A., relating to juries, pretrial proceedings, and miscellaneous offenses concerning public officers and employees, respectively, so as to provide for procedure for review of incidents involving a peace officer's use of deadly force that results in death or serious bodily injury; to provide for related matters; to repeal conflicting laws; and for other purposes.

HB 976 (Act 599): A BILL to be entitled an Act to amend Article 5 of Chapter 18 of Title 50 of the Official Code of Georgia Annotated, relating to state records management, so as to provide for minimum retention periods for video recordings from law enforcement surveillance devices, law enforcement body-worn devices, or devices located on or inside of a law enforcement vehicle; to provide for a definition; to provide for exceptions; to provide for presumptions, civil liability, and fees; to provide for related matters; to repeal conflicting laws; and for other purposes.

SB 304 (Act 338): A BILL to be entitled an Act to amend Code Section 35-3-34 of the Official Code of Georgia Annotated, relating to disclosure and dissemination of criminal records to private persons and businesses, resulting responsibility and liability of issuing center, and provision of certain information to the FBI in conjunction with the National Instant Criminal Background Check System, so as to allow for the preservation of a person's involuntary hospitalization information received by the Georgia Crime Information Center; to provide for related matters; to repeal conflicting laws; and for other purposes.

SB 331 (Act 361): A BILL to be entitled an Act to amend Code Section 15-11-2 and Title 19 of the Official Code of Georgia Annotated, relating to definitions for the Juvenile Code and domestic relations, respectively, so as to provide that causing a child to be conceived as a result of violating certain prohibitions relating to certain offenses is an additional ground for terminating parental rights; to revise definitions; to provide that causing a child to be conceived as a result of violating certain prohibitions relating to certain offenses is an additional ground for losing parental rights and is relevant in certain adoption proceedings; to provide for related matters; to repeal conflicting laws; and for other purposes.

SB 367 (Act 460): A BILL to be entitled an Act to provide for comprehensive reform for offenders entering, proceeding through, and leaving the criminal justice system so as to promote an offender's successful reentry into society, benefit the public, and enact reforms recommended by the Georgia Council on Criminal Justice Reform; to repeal conflicting laws; and for other purposes. Act to amend Code Section 15-6-2 of the O.C.G.A

## GENERAL APPENDIX: APPENDIX C: HISTORICAL AND CURRENT TRACKING OF LEGISLATION

See the following webpage for **historical and current tracking of legislation which was passed through the governor's office** for legislative sessions 2011 through 2017:

<https://gov.georgia.gov/legislation/2017>

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