Criminal Case Law Update

Hon. Ben Studdard

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Studdard on Criminal Law

Georgia Criminal Case Law Update
2020 Judges Seminar Special Edition

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Includes opinions issued from September 1, 2019, through September 1, 2020

This work grew out of annual presentations on new criminal case law to my colleagues on the State Court bench in Georgia. Collecting those materials, I have attempted to create a survey of Georgia criminal law since 1999 which deals with all issues of criminal law – substance, procedure, evidence, and constitutional issues – in the trial court.

My goal is to report any significant holding of every reported criminal case from the Georgia Court of Appeals and Supreme Court and, where applicable, the federal courts. I attempt to concisely state those holdings, with any relevant facts, where possible quoting from the case. The user can thus know that the case has been accurately reported, and may be able to use those quotes in orders, motions or briefs. I also try to make appropriate cross-references and comparisons to cases on related subjects (including cases which may not reference one another).

Issues which arise solely on appeal or on petition for habeas corpus are beyond the scope of this work. Also, issues unique to juvenile proceedings currently are beyond the scope, as are civil forfeiture proceedings related to criminal prosecutions.

I am grateful to my colleagues for their kind encouragement in this undertaking, as well as their helpful suggestions and comments. I am most grateful, however, to my wife Sherri for her unfailing love and support.

I. ACCUSATION/INDICTMENT

A. FORM OF

1. ESSENTIAL ELEMENT NOT ALLEGED

State v. Heath, S19G0967, ___ Ga. ___, 843 S.E.2d 801, 2020 WL 2820192 (June 1, 2020). *Affirming* 349 Ga.App. 84, 825 S.E.2d 474 (2019), and reversing defendant's convictions for vehicular homicide and serious injury by vehicle, but not a stop sign violation. Defendant received ineffective assistance of counsel who failed to file general demurrer to counts of indictment which charged compound offenses without including all elements of the underlying offenses (i.e., vehicular homicide or serious injury by vehicle based on DUI or reckless driving). State concedes that counsel was deficient, but argues that defendant showed no prejudice because a) she was on notice of the offenses charged, and b) "had a general demurrer been granted, the State would have corrected its error and re-indicted Heath, and it is reasonably probable that the second trial would have had the same result as the first." **1. Notice.** "For purposes of a general demurrer, ... it matters not that the defendant has notice of the charges. That is because 'a general demurrer challenges the *substance* of the indictment and asserts that the indictment is fatally defective and incapable of supporting a conviction.' *Williams v. State*, 307 Ga. 778, 782(2) n.6, 838 S.E.2d 235 (2020) (citation and punctuation omitted). If a defendant can admit each and every fact alleged in the indictment and still be innocent of any crime, the charge is subject to a general demurrer. Id. ... **The State's lack of prejudice argument rests on the faulty premise that it does not matter if the indictment is invalid in substance so long as the defendant had sufficient notice of the charges. But the lack of notice of the charges or allegations goes to the *form* of the indictment, which is challenged by a special demurrer, rather than a general demurrer."** *Overruling Walker v. State*, 329 Ga.App. 369, 765 S.E.2d 599 (2014), and *Coleman v. State*, 318 Ga.App. 478, 735 S.E.2d 788 (2012), "to the extent that they hold that for purposes of considering an ineffective assistance of counsel claim, the failure to assert a valid general demurrer cannot prejudice a defendant when the defendant had sufficient notice of the charges." **2. State's argument that, in response to a general demurrer, it would have simply re-indicted and prevailed at a second trial is faulty because, unlike a special demurrer,** "a general demurrer may be raised after jeopardy has attached and at any time during trial.**[FN2: A general demurrer may also be raised in the form of a motion in arrest of judgment after a verdict in the same term of court.** See *State v. Eubanks*, 239 Ga. 483, 485-86, 238 S.E.2d 38 (1977) ('[A] motion in arrest asserts that the indictment contains a defect on its face affecting the substance and real merits of the offense charged and voiding the indictment, such as failure to charge a necessary element of a crime.' (citation and punctuation omitted)).] See *Allen v. State*, 300 Ga. 500, 502(2), 796 S.E.2d 708 (2017)." State's argument is also faulty because "the *Strickland* inquiry does not consider the likelihood of a future outcome at a different trial, but rather whether there is a reasonable probability that the result of *this trial* would have been different."

II. ATTORNEYS

A. END OF REPRESENTATION

Dos Santos v. State, 307 Ga. 151, 834 S.E.2d 733 (October 21, 2019). **Following defendant's guilty pleas to malice murder and related offenses, trial court erred by denying her motion to withdraw her pleas. 1. The motion was a nullity because she filed it pro se while still represented by plea counsel; thus, the trial court should have dismissed the motion rather than denying it.** *Based on White v. State*, 302 Ga. 315, 806 S.E.2d 489 (October 16, 2017). *Accord, Branner v. State*, 355 Ga.App. 137, 843 S.E.2d 26 (May 7, 2020); *Pounds v. State*, S20A0470, ___ Ga. ___, 846 S.E.2d 48, 2020 WL 3581091 (July 1, 2020); *Ringold v. State*,

S20A0580, ___ Ga. ___, ___ S.E.2d ___, 2020 WL 4593279 (August 10, 2020) (noting that no appeal is available from an order dismissing the motion). **2.** "If it was not clear enough before, these recent decisions – along with our reiteration of *White*'s holding today – should leave no doubt that Georgia lawyers cannot simply abandon their criminal defendant clients immediately after the defendants enter guilty pleas and are sentenced. **Defense counsel are obligated to continue to represent their clients at least until the time for these post-conviction remedies expires (and if such a remedy is timely pursued, until it is resolved)** – unless the lawyer is properly authorized by the trial court to withdraw from the representation or is properly replaced by substitute counsel, events that should be reflected in writing in the record for the case. ... We recognize that these holdings may place difficult burdens on conscientious defense counsel." Recommends that counsel discuss with their clients before guilty plea "the basic processes for (and limitations on) post-conviction challenges to guilty pleas, leaving only the decision to be made about whether to invoke such a process. And when time is tight, plea counsel may protect their client's interests by filing a timely, bare-bones 'placeholder' motion to withdraw guilty plea, which – unlike an untimely motion or an inoperative motion filed pro se by the still-represented client – meets the filing deadline and might be amended later (by conflict-free new counsel if necessary)."

Walker v. State, 308 Ga. 749, 843 S.E.2d 561 (May 18, 2020). Felony murder conviction affirmed, but State's motion to dismiss appeal denied. **Contrary to State's argument, defendant's pro se motion for new trial was valid because trial court orally granted defendant's request to represent himself post-trial.** "After a colloquy in which the trial court advised Appellant of his right to appointed counsel and explained the dangers and disadvantages inherent in self-representation, Appellant indicated that he wished to proceed pro se, and the court made a finding on the record that Appellant had freely, intelligently, and knowingly elected to waive his right to counsel and to represent himself," *distinguishing Tolbert v. Toole*, 296 Ga. 357, 767 S.E.2d 24 (2014) and *White v. State*, 302 Ga. 315, 806 S.E.2d 489 (2017). **"It may have been preferable for the trial court to sign and file with the trial court clerk a written order granting Appellant's request to proceed pro se. However, Uniform Superior Court Rule 4.3, which addresses attorney requests to withdraw as counsel (either with or without the client's consent) and substitutions of counsel in accordance with the client's wishes, currently does not require a written order granting an Appellant's request to proceed pro se.** The State has not pointed us to any other legal authority requiring the entry of a written order to effectuate the removal of counsel when a criminal defendant invokes his constitutional right to self-representation and that request is granted on the record in open court. And unlike in *Tolbert*, nothing in this record suggests that the trial court's oral order was not understood, by the court or the defendant's existing or replacement counsel, to immediately remove Appellant's counsel without the entry of a written order for the purposes of allowing Appellant to proceed pro se."

B. INEFFECTIVE ASSISTANCE OF COUNSEL

1. GUILTY PLEAS, GENERALLY

Nelson v. Wilkey, S20A0013, ___ Ga. ___, 845 S.E.2d 566, 2020 WL 3581140 (June 29, 2020). Following Wilkey's guilty plea to possession of methamphetamine with intent to distribute, habeas court properly granted relief based on ineffective assistance of plea counsel. "[T]he habeas court's findings of fact regarding Wilkey's claim of ineffective assistance of counsel—namely, that Wilkey desired to withdraw his guilty plea prior to sentencing but was not informed by counsel of his absolute statutory right to do so under OCGA § 17-7-93(b)[fn] and that trial counsel failed to give him the benefit of new advice stemming from information learned between the entry of the plea and the sentencing hearing—are supported by the record." In mid-trial, defendant decided to plead guilty to the charge, and did so. Before sentencing thirteen days later

however, defendant learned that a co-defendant had an outstanding warrant, but that the State had failed to arrest her on it despite her presence in court. The warrant undercut her claim to be just a drug user, not a seller. Counsel discussed the development with Wilkey and advised him that he could withdraw his plea any time 30 days after sentencing. In fact, defendant could have withdrawn the plea as a matter of right before sentencing, but could withdraw the plea after sentencing "only to correct a manifest injustice." **"[A] defendant's right to effective assistance of counsel regarding his guilty plea includes the right to be advised about his absolute right to withdraw his guilty plea prior to sentencing and whether he should pursue such a remedy. ... We agree with the habeas court's determination that no reasonable attorney providing constitutionally effective representation would fail to inform a client of an absolute statutory right to withdraw a plea when the attorney had obtained new information that changed the attorney's assessment of the client's case and had not yet fully discussed that information and its relevance with the client.** At the sentencing hearing, plea counsel told the trial court, and the habeas court credited counsel's statement, that she was aware of new information "that certainly would have an effect" on her advice to her client, which amounts to an admission that this new information would have a material effect on her previous advice to her client. Rather than ensuring that Wilkey had the benefit of that different advice before he lost the absolute right to withdraw his guilty plea for any reason, plea counsel allowed the sentencing hearing to proceed. Plea counsel's decision to let sentencing proceed despite this change in circumstances had immediate negative consequences for Wilkey. The effect of plea counsel's failure to advise Wilkey of his statutory right to withdraw his guilty plea prior to sentencing was that, as a matter of law, Wilkey was prevented from withdrawing his guilty plea for any reason." "Here, plea counsel's actions resulted in the imposition of an unnecessary burden on Wilkey, as he had to show a manifest injustice in his motion to withdraw his guilty plea after sentencing. No reasonable lawyer would allow sentencing to go forward under these circumstances."

C. PROSECUTORIAL MISCONDUCT

Dobbins v. State, S20A0402, ___ Ga. ___, 844 S.E.2d 814, 2020 WL 3245965 (June 16, 2020). Malice murder and related convictions affirmed. Trial court denied mistrial based on prosecutor's improper reference to defendant's "prior trial" (which ended in hung jury). Defendant didn't request the court to rebuke the prosecutor for the comment, however, and the court didn't do so. **Held**, any error in failing to do so was harmless, in light of the strong evidence of guilt and other circumstances. **Notes tension in case law as to whether, after objection, "a trial court has a duty to rebuke counsel and give a curative instruction, even in the absence of a specific request for such relief,"** *comparing "O'Neal v. State*, 288 Ga. 219, 221, 702 S.E.2d 288 (2010) (noting that under OCGA § 17-8-75, the court 'shall rebuke' counsel 'where a *proper objection* has been raised') (emphasis supplied)" *with Stephens v. State*, 307 Ga. 731, 734, 838 S.E.2d 275 (2020) ("'[W]here the objection to the prejudicial matter is sustained, the court has no duty to rebuke counsel or give curative instructions unless specifically requested by the defendant.'" quoting *Fleming v. State*, 306 Ga. 240, 243, 830 S.E.2d 129 (2019))" and others. **"But we need not resolve that apparent tension at this time because any alleged error in this case was harmless."**

D. SELF-REPRESENTATION

1. AT TRIAL

Stinson v. State, 352 Ga.App. 528, 835 S.E.2d 342 (October 25, 2019). Statutory rape and child molestation convictions affirmed. **No violation of defendant's right to self-representation by failure to conduct a "reverse *Faretta*" hearing when defendant requested appointment of counsel.** "[T]he Supreme Court of Georgia has held that the determination of whether a defendant

should be allowed to reverse his decision to represent himself (and thus require the court to appoint counsel to represent the defendant) 'is not part of the required *Faretta* colloquy, which simply requires the court to warn a defendant of the dangers that can arise from self-representation.' *Wilkerson* [*v. State*, 286 Ga. 201, 205(2)(b), 686 S.E.2d 648 (2009)]. To the extent Stinson argues that the court failed to notify him at that time that he would not be able to question witnesses or otherwise represent himself at trial, Stinson never asserted that he had a right to do so before or during trial, nor did he ever claim that he was unaware that he would be precluded from doing so if [appointed counsel] represented him. Moreover, Stinson has cited to no authority that requires the trial court to issue written findings to support its ruling that the defendant knowingly and voluntarily waived his right to self-representation, and we note that even *Faretta* does not require a court to make such written findings."

III. CONSTITUTIONAL ISSUES

A. CONFRONTATION

1. FORFEITURE BY WRONGDOING

Lopez v. State, 355 Ga.App. 319, 844 S.E.2d 195 (June 3, 2020). Family violence battery conviction affirmed; victim's pretrial statements were properly admitted under the "forfeiture by wrongdoing exception" to the Confrontation Clause. *Citing Hendrix v. State*, 303 Ga. 525, 813 S.E.2d 339 (April 16, 2018). "We conclude that all three factors were proven by a preponderance of **the evidence to admit Mallory's statements into evidence under the forfeiture by wrongdoing rule. First, Lopez engaged in wrongdoing by pressuring Mallory with the notion that she did not have to comply with the subpoena** to appear for trial and by repeatedly telling her that the State would not be able to proceed with the case without her. See *Hendrix*, supra, 303 Ga. at 529(2), 813 S.E.2d 339 (holding that the defendant engaged in wrongdoing by instructing the victim not to cooperate with the State). Second, Lopez's wrongdoing was **intended to procure Mallory's unavailability** because he repeatedly told her that the State would not be able to proceed with the case against him if she did not cooperate. See *Hendrix*, supra, 303 Ga. at 529(2), 813 S.E.2d 339 (holding that the defendant intended to procure the witness's unavailability by commanding the witness not to cooperate with the State). Finally, **Lopez's wrongdoing did procure Mallory's unavailability** because, although under subpoena, Mallory did not appear for trial. See *Hendrix*, supra, 303 Ga. at 529(2), 813 S.E.2d 339 (holding that the defendant procured the witness's unavailability because the witness stopped cooperating with the State after being threatened by the defendant). Because a preponderance of the evidence showed that Lopez engaged in wrongdoing intended to procure Mallory's unavailability, and that wrongdoing did actually cause her unavailability, the trial court did not abuse its discretion by admitting Mallory's statements under the forfeiture by wrongdoing rule."

2. GENERALLY

Walker v. State, 308 Ga. 749, 843 S.E.2d 561 (May 18, 2020). Felony murder conviction affirmed; no violation of defendant's confrontation rights by admitting certain physical evidence. **"[T]he Confrontation Clause applies only to testimonial statements, not to inanimate objects that cannot be cross-examined like the shell casing and photographs here.** ... *United States v. Herndon*, 536 F.2d 1027, 1029 (5th Cir. 1976) ('[The Confrontation Clause] is by its terms restricted to "witnesses" and does not encompass physical evidence as well.'). See also *State v. Williams*, 913 S.W.2d 462, 465 (Tenn. 1996) (holding that the Confrontation Clause does 'not encompass physical evidence or objects, such as photographs,' and collecting cases); *Starkes v. United States*, 427 A.2d 437, 440 (D.C. 1981) (holding that the defendant's inability to cross-examine a police dog did not violate his rights under the Confrontation Clause)."

State v. Hamilton, 308 Ga. 116, 839 S.E.2d 560 (February 28, 2020). Following grant of motion for new trial, after conviction for felony murder, trial court properly granted immunity motion based on self-defense. Contrary to State's argument, trial court's consideration of trial transcript on consideration of immunity motion (though problematic for other reasons) did not violate the Confrontation Clause of either the state or federal constitutions. "[T]he plain text of those clauses shows that they apply only to the 'accused,' U.S. Const. amend. VI, or to 'person[s] charged with an offense against the laws of this state,' Ga. Const. of 1983, Art. I, Sec. I, Par. XIV. As such, **Confrontation Clause protections are not available for the State to assert.** See *Smith v. State*, 284 Ga. 599, 608, 669 S.E.2d 98 (2008) (recognizing that **Confrontations Clause protections 'belong[ ] to the defendant'**)."

B. DOUBLE JEOPARDY

1. MULTIPLE COUNTS, SAME PROSECUTION

Williams v. State, 307 Ga. 778, 838 S.E.2d 235 (January 27, 2020). *Affirming* 347 Ga.App. 183, 818 S.E.2d 256 (2018), but on different grounds; trial court erred by granting motion to dismiss counts of indictment charging a different count of sexual exploitation of children for each picture possessed on grounds of double jeopardy. Contrary to defendant's contention, pretrial motion to dismiss can't challenge indictment on grounds of "multiplicity" or substantive double jeopardy. **1. Procedural double jeopardy** prohibits "multiple prosecutions for crimes arising from the same conduct." Defendant here has not faced multiple prosecutions. "Because Williams is not faced with multiple or successive prosecutions, the procedural bar on double jeopardy does not apply. **[FN4:** Indeed, the U.S. Supreme Court has squarely rejected an argument that a single indictment with multiple counts can be characterized as multiple prosecutions for federal double jeopardy purposes. See *Ohio v. Johnson*, 467 U.S. 493, 500-502, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) (holding that defendant's plea of guilty to two counts of a multiple-count indictment did not prevent the state from prosecuting the remaining counts, as all counts 'were embraced within a single prosecution')**]**." **2. Substantive double jeopardy** "protects against 'multiple convictions or punishments' for such crimes. *Stephens v. Hopper*, 241 Ga. 596, 598-599(1), 247 S.E.2d 92 (1978); *Keener v. State*, 238 Ga. 7, 8, 230 S.E.2d 846 (1976)." "See also *State v. Marlowe*, 277 Ga. 383, 383 (1), 589 S.E.2d 69 (2003) ('The question of multiple punishments (as opposed to multiple *prosecutions*) for the same criminal conduct is addressed under the rubric of substantive double jeopardy.' (Emphasis in original))." "We have made clear that the doctrine of substantive double jeopardy—concerned as it is with multiple *convictions* and *sentences*—does not come into play until *after* the defendant has been found guilty on multiplicitous counts. ... *State v. Boyer*, 270 Ga. 701, 703-704(2), 512 S.E.2d 605 (1999) (explaining that, just because a defendant 'may not be *sentenced* for more than one crime based on the same criminal act does not mean that the State must choose to charge her with only a single crime' (emphasis in original))." "Because the substantive bar on double jeopardy applies only after the defendant is found guilty, it does not warrant the pretrial dismissal of the charges against Williams, even if those charges are multiplicitous." "See also *Ohio v. Johnson*, 467 U.S. 493, 500, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) ('While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution.')." **3. "A special demurrer, with its demand for greater specificity, may be used to address *procedural* double jeopardy concerns, given that a vague or ambiguous charge, if carried through trial, may not sufficiently inform the defendant of the specific crime of which he was acquitted or convicted.** ... But we have never held that a special demurrer may be used to address *substantive* double jeopardy concerns and obtain a pretrial dismissal or consolidation of multiple counts simply to prevent the possibility of multiple convictions and sentences for the same offense." *Disapproving Christian v. State*, 288 Ga.App. 546, 548(2), 654 S.E.2d 452 (2007) and *State v.*

Thomas, 331 Ga.App. 220, 222 n.10, 770 S.E.2d 301 (2015) on this point. Noting, however, that a multiplicitous indictment might be subject to special demurrer where "an indictment contains multiple counts that are entirely identical, with nothing to distinguish them from each other[; thus,] the indictment would not inform the defendant of what he should be prepared to meet or why the government chose to use multiple identical counts rather than one." **4.** Not decided here: whether this indictment, stating a separate count as to each photo, was multiplicitous.

C. DUE PROCESS

State v. Holland, 308 Ga. 412, 841 S.E.2d 723 (April 6, 2020). In prosecution for first degree vehicular homicide based on hit-and-run, trial court erred by granting plea in bar. OCGA § 40-6-393(b) is not unconstitutional for the reasons advanced by defendant. Unlike other first degree vehicular homicide charges, those based on hit-and-run require no showing "that the defendant's actions in leaving the scene were a contributing cause of the victim's death." "Holland's constitutional challenge asserts that the absence of that element renders the statute irrational, when other versions of first-degree vehicular homicide still include an element of causation as a result of the traffic violation." Supreme Court disagrees, finding that the statute meets a rational basis test for purposes of both due process and equal protection. **1. "The State has argued that requiring drivers who cause serious traffic accidents to remain at or immediately return to the scene and provide or summon aid, and encouraging this conduct by threatening serious punishment, can decrease the severity of victims' injuries or even save victims' lives. The requirement that drivers stay on the scene and provide identification can also simplify resolution of any related civil claims and conserves law enforcement resources, the State posits. This is a reasonable, and not arbitrary or discriminatory, explanation for subjecting hit-and-run drivers who cause a fatal accident to prosecution for first-degree vehicular homicide, even if the State cannot prove that the failure to comply with the requirements of OCGA § 40-6-270(a) was a contributing cause of the victim's death. [FN6:** Of course, it is clear from the text of OCGA § 40-6-393(b) that in order to be convicted of first-degree vehicular homicide based on hit-and-run by leaving the scene of the accident, the accident still needs to cause the death. We are only addressing in this case the constitutionality of the current scheme that does not require the act of leaving the scene of the accident to also be a contributory cause of the death.**]"** The fact that hit-and-run does not always make investigation and prosecution more difficult "is not a proper consideration under a rational basis analysis; **a law does not lack a rational basis merely because the distinctions it draws are 'imperfectly related to the goals desired' or 'overinclusive or underinclusive.'** *Rainer v. State*, 286 Ga. 675, 679(2), 690 S.E.2d 827 (2010) (citation omitted)." **2. Holland's equal protection claim fails for essentially the same reason his substantive due process claim fails — he has not shown that that the different approach taken in OCGA § 40-6-393 (b) lacks a rational basis when compared to the approaches taken to the other types of vehicular homicide. The same reasons that make the statute rationally related to a legitimate public interest also make the different statutory approach the General Assembly adopted in 2008 reasonable. 3. "FN3: We have said — without analysis — that the equal protection clauses of the federal and Georgia constitutions are 'coextensive' and that we 'apply them as one.'** *Harper v. State*, 292 Ga. 557, 560(1), 738 S.E.2d 584 (2013) (citation and punctuation omitted). **Similarly, at least when addressing substantive due process claims, this Court generally has analyzed challenges arising under the due process clauses of the federal and state constitutions together.** See *State v. Nankervis*, 295 Ga. 406, 407-409(1), 761 S.E.2d 1 (2014). Of course, the United States Supreme Court's construction of a federal constitutional provision does not bind our construction of a similar Georgia constitutional provision, which must be construed independently in the light of the Georgia provision's text, context, and history. See *Elliott v. State*, 305 Ga. 179, 187-189(II)(C), 824 S.E.2d 265 (2019). But neither party makes an argument that either of the state

constitutional provisions at issue here — Paragraphs I and II of Article I, Section I — provides a rule substantively different as applied to this case from that of the parallel Fourteenth Amendment provision, and we decline to consider such a question here in the first instance. This case therefore presents no occasion for consideration of whether and in what ways either of the state provisions differs from the parallel federal provision in particular applications."

D. JURY TRIAL

Ramos v. Louisiana, 18-5924, ___ U.S. ___, 140 S.Ct. 1390, 206 L.Ed.2d 583, 2020 WL 1906545 (April 20, 2020). *Reversing Lousiana Court of Appeals* and defendant's conviction for second degree murder, and striking down Louisiana and Oregon provisions for non-unanimous convictions. **The Sixth Amendment right to "trial by an impartial jury" includes the requirement that "[a] jury must reach a unanimous verdict in order to convict."** *Abrogating Apodaca v. Oregon,* 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) *and Johnson v. Louisiana,* 406 U.S. 356, 92 S.Ct. 1620, 92 L.Ed.2d 152 (1972).

E. PRESENCE

1. DEFENDANT DISRUPTIVE

Morman v. State, A20A1456, ___ Ga.App. ___, ___ S.E.2d ___, 2020 WL 5244864 (September 3, 2020). Armed robbery and related convictions affirmed. Where defendant refused to wear clothes to court from holding cell, but also refused to waive his appearance at trial; trial court properly had him brought in "naked, wrapped in a blanket, shackled, and strapped to a chair." At the beginning of trial, defendant refused to dress in either street clothes or even a jail uniform, stated that he was naked and strapped to a chair, and "indicated that he did not wish to attend the trial." "The court and prosecution subsequently agreed that Morman would be brought to court each morning and after lunch each day, always outside the presence of the jury, so the court could inquire if he had changed his mind about attending trial. The court then proceeded to conduct *voir dire* and later, outside the presence of the jury, brought Morman back into the courtroom to again ask if he had changed his mind about attending trial. Once again, Morman indicated that he did not wish to attend the trial and was returned to jail." The next day, after initially indicating that he still did not wish to attend, defendant refused to respond further. Because he would not confirm his desire not to attend after the court explained the proceedings so far, the court "the trial court ensured Morman was positioned behind the defense table in a manner she believed would block the jury's view of his shackles," and proceeded with trial. Defendant made no objection, and appeared to sleep through the session. "In the break that followed, while using the restroom, Morman removed the clothes he had been wearing[fn] and refused to redress. And after returning to the courtroom, Morman was wrapped in a blanket outside of the jury's presence. The deputy in charge of Morman advised the court that, during the break, Morman expressed that he did not wish to be in the courtroom," but defendant refused to confirm this to the court. In the absence of such confirmation, the trial court had defendant covered with a blanket and proceeded with trial. The court had photos of defendant as situated inserted into the record. "As this happened, Morman continued to make comments on the record about being 'a free man,' but he made *no* indication on the record that he did not wish to remain in the courtroom." The court instructed the jury not to give adverse consideration to defendant's silence in the courtroom. When the lunch break arrived, the trial court indicated that it would not continue to have defendant in the courtroom, unclothed with a blanket over him because it was more prejudicial than not being in the courtroom. The court again offered to let defendant sit at the defense table if put on street clothes; "Morman responded that he '[did] not wish to participate in this lynching.' At this point, the court determined that Morman had elected not to participate in the trial, ordered his return to the jail, and said it '[did] not intend to bring him back over other than in the event that the jury convicts for sentencing.' Nevertheless, the court also ordered that if Morman changed his mind

while in the jail, it should be notified immediately and Morman returned to the courtroom in street clothes or his orange jumpsuit because the court would not allow him to return in a blanket." **1.** No due process violation in trying defendant "shackled at the feet and strapped to a chair during trial" where "the photographs in the record show that these restraints on Morman were not visible to the jury, and there is no indication that the jury was otherwise made aware of them. As a result, Morman has failed to show that these forms of restraint interfered with his ability to receive a fair trial." **2.** Defendant waived his right to be tried in street clothes by refusing to wear them, "and the trial court did not err by requiring him to appear in court wrapped in a blanket." **3. No abuse of discretion in having defendant appear before the jury wrapped in a blanket, when he refused to dress or waive his right to be present. "[O]n the record before us, the trial court may very well have concluded that Morman waived his right to attend the proceedings at the outset by his disruptive conduct in refusing to dress.** *See Illinois v. Allen*, 397 U.S. 337, 343, (90 S.Ct. 1057, 25 L.Ed.2d 353) (1970) (explaining that a criminal defendant may waive his right to be present at trial if, 'after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom'); *accord Weaver v. State*, 288 Ga. 540, 542-43(3), (705 S.E.2d 627) (2011); *see also LaGon v. State*, 334 Ga.App. 14, 19(2), 778 S.E.2d 32 2015 ('In addition to an express waiver of his right to be present at trial, a defendant can implicitly waive his right to be present by conducting himself in a disruptive manner before the trial court or by voluntarily absenting himself from the proceedings.'). But the court admirably did its best to balance Morman's rights to appear in street clothes,[cits] represent himself,[cits.] and be present during his own trial.[Cits.] As a result, under the particular facts and circumstances of this case, we conclude that the trial court did not abuse its discretion when Morman appeared before the jury in the manner previously described for a brief portion of his multi-day trial."

F. SILENCE/TESTIMONY BY DEFENDANT

1. COMMENTARY ON DEFENDANT'S SILENCE

State v. Orr, 305 Ga. 729, 827 S.E.2d 892 (May 6, 2019). *Vacating* 345 Ga.App. 74, 812 S.E.2d 137 (2018) and grant of new trial on defendant's convictions for family violence battery and related offenses. **1. "[T]he categorical rule this Court announced in Division 5 of *Mallory v. State*, 261 Ga. 625, 630, 409 S.E.2d 839 (1991), which excludes evidence of a criminal defendant's pre-arrest 'silence or failure to come forward' to law enforcement on the ground that such evidence is always 'far more prejudicial than probative,'" was statutorily abrogated by adoption of the 2013 Evidence Code.** "[T]he new Evidence Code, which took effect on January 1, 2013, precludes courts from promulgating or perpetuating judge-made exclusionary rules of evidence like the one we created in *Mallory*, and instead generally requires trial courts to determine the admissibility of evidence based on the facts of the specific case and the rules set forth in the Evidence Code, including OCGA § 24-4-403." Prosecutor here elicited testimony about defendant's failure to call police about his claim that victim assaulted him. **2.** *Mallory* was expressly not decided based on the constitution, but arose from the U.S. Supreme Court's invitation in *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) "to formulate evidentiary rules defining the situation in which silence is viewed as more probative than prejudicial." *Mallory* pointed to OCGA § 24-3-36, but that section contained no express exclusion of evidence. It was, thus, a judge-made policy decision. **3.** The U.S. Supreme Court has yet to decide whether pre-arrest silence is constitutionally excluded. **4. The 2013 Evidence Code prohibits judge-made rules of exclusion.** Instead, it provides for the general admissibility of relevant evidence in Rule 402, subject to certain following rules of exclusion, Rules 404-418. "Only one rule, however, authorizes the exclusion of relevant evidence based on the *court's* evaluation of the 'prejudice' such evidence could cause: OCGA § 24-4-403 (Rule

403), which grants the *trial court* discretion to exclude relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" But Rule 403 requires case-by-case analysis of probative value and prejudice. "It is therefore clear that Rule 403 provides no authority for an appellate court to direct the exclusion of entire categories of evidence." **5.** In dicta, discusses possibilities that pre-arrest silence may be excluded under various theories under the 2013 Evidence Code, including Rule 403 analysis. **A.** While *Mallory* discussed whether "failure to come forward" amounted to an **adoptive admission**, that theory under new Rule (d)(2)(B) requires a statement by another to which defendant "could be considered to have responded to or acquiesced in by not calling the police"; in this case, the State has pointed to no such statement ... The State likewise presented no evidence that Orr remained silent in response to any specific statement by the police before or after he was arrested. The State did not call an arresting officer to testify, and Orr testified that, rather than remaining silent, he told the police about his head injury after he was arrested." **B.** Silence may be an admission in some circumstances, under Rule 801(d)(2)(A). "The party seeking to introduce evidence under Rule 801(d)(2)(A) must identify the specific **nonverbal conduct** of the opposing party and the fact or facts that it was allegedly intended to assert. Vaguely pointing out that the defendant 'failed to come forward' after a crime will not suffice." **C.** "Certain aspects of a defendant's failure to come forward to the police might also be offered not as a particular assertive statement subject to the hearsay rules, but rather as **circumstantial evidence of guilt. As the Eleventh Circuit has recognized, '"[i]t is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, [is] admissible as evidence of consciousness of guilt, and thus of guilt itself."'** *United States v. Borders*, 693 F.2d 1318, 1324-1325 (11th Cir. 1982) (citation omitted). See also *Renner v. State*, 260 Ga. 515, 517, (397 S.E.2d 683) (1990) ('The fact that a suspect flees the scene of a crime points to the question of guilt in a circumstantial manner.')." *Accord, Torres (January 23, 2020), above.* **D. "[W]e note the United States Supreme Court's admonition that '[i]n most circumstances silence is so ambiguous that it is of little probative force,' especially if the defendant does not later testify inconsistently.** *United States v. Hale*, 422 U.S. 171, 176, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). See also *Johnson v. State*, 151 Ga. 21, 24, 105 S.E. 603 (1921) ('When under arrest and confronted by another in the presence of an arresting officer, silence by the accused is as consistent with the theory that the accused prefers to exercise his right to await trial by the proper tribunal as it is of the consciousness of guilt.')." **E.** "Courts have also cautioned against giving significant weight to certain evidence that a defendant did not come forward to the police after a crime, such as evidence of flight. '[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. ... "[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion."' *Wong Sun v. United States*, 371 U.S. 471, 483 n.10, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (citations omitted). See also *Borders*, 693 F.2d at 1325 (explaining that 'the interpretation to be gleaned from an act of flight should be made cautiously and with a sensitive to the facts of the particular case,' including whether the defendant was aware that he was under investigation or had other reasons to flee and the timing of the flight)." **6.** Questions, but doesn't decide, whether *Mallory* remains viable as to cases decided under the pre-2013 Evidence Code. "There are good reasons to doubt that this Court had the authority to promulgate such exclusionary evidence rules at all, at least after 1983. See Ga. Const. of 1983, Art. VI, Sec. I, Par. IX ('All rules of evidence shall be as prescribed by law.')." *Still not decided, Taylor v. State*, 308 Ga. 57, 838 S.E.2d 774 (February 10, 2020).

Torres v. State, 353 Ga.App. 470, 838 S.E.2d 137 (January 23, 2020). Rape and related convictions affirmed. Trial court properly admitted evidence that defendant promised to speak to an investigator about the victim's allegations, but then failed to do so, instead traveling from Texas to Virginia. *Based on Orr (May 6, 2019), below.* "Such evidence was admissible ... as circumstantial evidence of Torres's consciousness of guilt. See [*Orr*]. See also *United States v. Vu*, 378 Fed App'x. 908, 909 (11th Cir. 2010) ('In considering the evidence, it is reasonable for the jury to infer that a defendant's false statement to police demonstrates consciousness of guilt.'); *Gray v. State*, 347 Ga.App. 235, 238(2), n. 4, 817 S.E.2d 723 (2018) (noting that an attempt to elude the police is circumstantial evidence of consciousness of guilt)."

Glover v. State, S20A0133, ___ Ga. ___, 844 S.E.2d 743, 2020 WL 3244074 (June 16, 2020). Malice murder and false statements convictions affirmed. **Prosecutor's comment in closing argument, referencing defendant's decision to waive his *Miranda* rights and make a statement, was not improper.** "Glover contends that his trial counsel should have objected to the following portion of the prosecutor's closing argument, which addressed the charge of making a false statement: 'One thing [Glover] could do is invoke and [say] I just don't want to talk to you guys anymore. Instead he just goes video schmideo. Nope. He's still insisting he's not there. Because he doesn't know what else they know, right? He doesn't know there's going to be DNA. And, of course, he won't ever find out until much later. So he – though counsel wants to distance himself from this horrendous statement [–] is of all the things in America he could say, one of which is, no thanks. I want a lawyer, which you're allowed to say.[fn]' Characterizing these remarks as 'prohibited,' **Glover argues that *any* comment upon the right to counsel or the right to remain silent is improper and objectionable.** In support of this proposition, Glover cites only one case, *Anderson v. State*, 285 Ga.App. 166, 645 S.E.2d 647 (2007), but the facts of *Anderson* are clearly distinguishable from those present here. In *Anderson*, the trial court declared a mistrial after the prosecutor elicited on direct examination testimony from a police officer that the defendant, during a post-arrest interview, refused to sign a waiver-of-rights form and invoked both his right to remain silent and his right to counsel. Id. at 167, 645 S.E.2d 647. But *Anderson* does not stand for the sweeping proposition that any comment or evidence on the right to silence or right to counsel is per se improper, as Glover argues. **Instead, it is argument or evidence about the defendant's *exercise* of those rights that is generally considered improper."** Thus, no ineffective assistance in failing to object to the argument.

Thomas v. State, 354 Ga.App. 815, 841 S.E.2d 458 (April I, 2020). Rape and aggravated child molestation convictions affirmed. Defendant testified at his first trial, but it ended in a hung jury. Defendant elected not to testify at his second trial; whereupon **the trial court allowed the State to "introduce[] into evidence Thomas's testimony from the first trial, including the colloquy between Thomas and the trial judge in which Thomas elected to testify." "According to Thomas, the admission of the colloquy from the first trial highlighted to the jury his decision not to testify in the second trial.** Thomas acknowledges that admission of the colloquy 'was not a direct, explicit comment on [his] invocation of silence at the second trial,' but he argues that its admission nevertheless violated his rights under the Fifth Amendment to the United States Constitution and Article I, Section I, Paragraph XVI of the Georgia Constitution because it enabled the jury to unfavorably contrast his election to testify at his first trial with his election not to do so at the second trial." **Not plain error because "Thomas cites no legal authority that supports his novel argument, and we have found none."**

Kilpatrick v. State, 308 Ga. 194, 839 S.E.2d 551 (February 28, 2020). Malice murder and related convictions affirmed. Exclusion of evidence of victim's gang membership, at worst, was harmless error. Defendant contended that after he shot and killed victim, he learned that victim had been in a motorcycle gang, and thus didn't come forward for fear of his safety. **Contrary to trial court's**

ruling, defense has never been categorically excluded from bringing up defendant's failure to come forward. "Here, appellant admitted he shot Wilder, who was a stranger to him at that moment in time. The evidence also showed that the victim was unarmed. It is highly probable that the admission of Wilder's alleged gang affiliation would not have contributed to the jury's verdict on the murder charge."

2. SELF INCRIMINATION/ NON-VERBAL

Dunbar v. State, S20A0167, ___ Ga. ___, 845 S.E.2d 607, 2020 WL 3581199 (June 29, 2020). Malice murder and firearm convictions affirmed; no plain error in admitting evidence that defendant refused consent to search her home. Defendant "She asserts that this testimony violated her right against self-incrimination" under the federal and state constitutions. **1. Fifth Amendment.** "It is well-established that **the Fifth Amendment's protection against self-incrimination is limited to *testimonial* evidence.** See *Doe v. United States*, 487 U.S. 201, 207, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988). **As law enforcement's request to search Dunbar's home did not seek testimonial evidence from Dunbar, her Fifth Amendment argument is unavailing.** See id.; see also, e.g., *Gilbert v. California*, 388 U.S. 263, 266-267, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Schmerber v. California*, 384 U.S. 757, 760-765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)." **2. Georgia Constitution.** "Dunbar relies on our holding in *Elliott v. State*, 305 Ga. 179, 824 S.E.2d 265 (2019), to argue that gathering evidence through a search of her home equates to compelling Dunbar to be a witness against herself, and admission of her refusal to consent to that search, therefore, violates her right against self-incrimination. But, *Elliott* is of no help to Dunbar. **While it is true that *Elliott* held that admission of a refusal to consent to a breath test violated the defendant's right against self-incrimination under Paragraph XVI, our holding did not extend to the refusal to consent to *any* search as Dunbar indicates. ...** *Elliott* and our underlying decision in *Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (2017), were careful to distinguish that their scope does not extend to all types of searches, but is limited to breath tests. Thus, Dunbar fails to show that the trial court's admission of this testimony was plain error, as **her argument would require extending the existing precedent embodied in *Elliott* and *Olevik* beyond its current scope."** **3. Due process.** "Dunbar does not argue that the trial court's admission of testimony regarding withdrawal of consent violates her right to **due process** under the Fifth and Fourteenth Amendments to the United States Constitution, so we do not address it here. **But see *United States v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002)." *Runyan*: "the circuit courts that have directly addressed this question have unanimously held that a defendant's refusal to consent to a warrantless search may not be presented as evidence of guilt."**

Boynton v. State, A20A0578, ___ Ga.App. ___, 845 S.E.2d 327, 2020 WL 3286397 (June 18, 2020). Convictions for armed robbery and related offenses affirmed. Trial court erred, but harmless, by "requiring [defendant] to stand and display his tattoos for the jury in violation of his right against self-incrimination," twice so a State's witness could see them and identify him, and once during prosecutor's closing argument.

IV. CONTEMPT

Taylor v. State, 307 Ga. 755, 838 S.E.2d 261 (January 27, 2020). During pretrial proceedings in malice murder prosecution, **court erred in finding defendant guilty of 13 counts of contempt based on 13 obscene words uttered by defendant during "an uninterrupted (albeit brief), profanity-laced tirade."** "[I]n similar contexts, we have held that a defendant may not be convicted of two or more counts of the same crime where the evidence shows that the two counts are part of a single incident," comparing to cases where multiple blows or shots against a single victim in a single transaction held to support a single conviction for aggravated assault.

V. DEFENSES

A. AFFIRMATIVE DEFENSES, GENERALLY

McClure v. State, 306 Ga. 856, 834 S.E.2d 96 (October 7, 2019). *Vacating and remanding* 347 Ga.App. 68, 815 S.E.2d 313 (2018). Following defendant's convictions for aggravated assault, Court of Appeals erred in its analysis of whether defendant was entitled to jury charges on justification in defense of self and justification in defense of habitation. *Overruling* numerous prior cases, Supreme Court holds that **"[a] criminal defendant is not required to 'admit' anything, in the sense of acknowledging that any particular facts are true, in order to raise an affirmative defense.** To the extent a defendant in raising an affirmative defense accepts for the sake of argument that he committed the act alleged in a charge, the defendant may do so only for the limited purpose of raising the affirmative defense at issue." **1.** "OCGA § 16-1-3(1) provides in pertinent part: **'"Affirmative defense" means, with respect to any affirmative defense authorized in [Title 16], unless the state's evidence raises the issue invoking the alleged defense, the defendant must present evidence thereon to raise the issue.'** This provision defines 'affirmative defense' only in terms of the defendant's burden of production." *Accord, Calmer v. State*, S20A0441, ___ Ga. ___, 846 S.E.2d 40, 2020 WL 3581076 (July 1, 2020). **2. "Criminal defendants, like other litigants, are entitled to pursue alternative theories, even when those theories are inconsistent." 3.** "As is the case generally, **'[t]o authorize a requested jury instruction, there need only be slight evidence supporting the theory of the charge.'** *Garner v. State*, 303 Ga. 788, 790(2), 815 S.E.2d 36 (2018).[fn] And the defendant need not present evidence to support the theory of an affirmative defense if the State's evidence raises the issue. *Adams v. State*, 288 Ga. 695, 697(1), 707 S.E.2d 359 (2011); *Chandle*, 230 Ga. at 576(3), 198 S.E.2d 289; OCGA § 16-1-3(1)." Vacated and remanded to determine whether slight evidence supported defendant's charge requests here. *Accord, Pennington v. State*, 306 Ga. 854, 834 S.E.2d 63 (October 7, 2019); *Henry v. State*, 307 Ga. 140, 834 S.E.2d 861 (October 21, 2019). *Followed, Pennington (March 23, 2020), above.*

Pennington v. State, 354 Ga.App. 701, 841 S.E.2d 417 (March 23, 2020). *On remand from* 306 Ga. 854, 834 S.E.2d 63 (2019). Conviction for possession with the intent to distribute a controlled substance near a school reversed; **trial court erred in failing to instruct jury on affirmative defense.** OCGA § 16-13-32.4(g) "provides an affirmative defense to the offense if 'the prohibited conduct took place entirely within a private residence, that no person 17 years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct was not carried on for purposes of financial gain.'" **"'The evidence necessary to justify a jury charge need ouly be enough to enable the trier of fact to carry on a legitimate process of reasoning.'** *Koritta v. State*, 263 Ga. 703, 704-705, 438 S.E.2d 68 (1994)." "There was at least slight evidence at trial that Pennington's possession of methamphetamine took place entirely within the shed which was his residence," and that, although it was within the prohibited proximity to a public school, it was separated by a fence and a wooden area and no one under 17 years was shown to have been inside the shed. Also, "there was at least slight evidence at trial that Pennington did not possess methamphetamine for the purpose of financial gain," but was for Pennington's personal use.

Calmer v. State, S20A0441, ___ Ga. ___, 846 S.E.2d 40, 2020 WL 3581076 (July 1, 2020). Malice murder and related convictions affirmed. **Any error in failing to charge on self-defense and no duty to retreat was harmless. "Here, any weak inference that Calmer acted to prevent death or great bodily injury to himself is wholly undercut by other evidence to the contrary.** Calmer's mother testified that Calmer had stated that he wanted police to come to the house so he could shoot them. The deputies were dressed in their uniforms and announced their

presence by calling out Calmer's first name, even assuming that the sound McRae heard thereafter was the sound of the deputies loudly opening the door. And after shooting Deputy Norris in the head, Calmer stepped over his body and came outside to continue to shoot at Deputy Wilson."

B. IMMUNITY

1. JUSTIFIED USE OF FORCE

State v. Hamilton, 308 Ga. 116, 839 S.E.2d 560 (February 28, 2020). Following grant of motion for new trial, after conviction for felony murder, trial court properly granted immunity motion based on self-defense. **Contrary to State's argument, trial court could consider immunity motion made for the first time after grant of motion for new trial.** "'When a new trial has been granted by the court, the case shall be placed on the docket for trial *as though no trial had been had* ....' OCGA § 5-5-48 (emphasis supplied); see *Bankhead v. State*, 253 Ga.App. 214, 215, 558 S.E.2d 407 (2001) ('Where a new trial has been granted, the case stands ready for trial as if there had been no trial. The effect of the grant of a new trial by an appellate court is to require the case to be heard de novo unless specific direction be given in regard thereto.') (quoting *Reagan v. Reagan*, 221 Ga. 173, 174, 143 S.E.2d 736 (1965)) (punctuation omitted); cf. *Trauth v. State*, 295 Ga. 874, 876, 763 S.E.2d 854 (2014). When the trial court granted Hamilton's new trial, the jury verdict against her was set aside. As a result, when the State elected to retry Hamilton, she was free to seek immunity from prosecution under OCGA § 16-3-24.2 before any new trial was conducted." *Accord, State v. Remy*, 308 Ga. 296, 840 S.E.2d 385 (March 13, 2020) (trial court properly considered motion for immunity made after mistrial).

C. STATUTE OF LIMITATION

Riley v. State, 305 Ga. 163, 824 S.E.2d 249 (February 18, 2019). Malice murder conviction affirmed, but convictions on related offenses vacated and remanded for consideration of tolling of statute of limitations under correct standard. Defendant here was indicted more than 26 years after the crimes, when the State was able to identify him as the perpetrator based on improved fingerprint technology. **1. "'[C]riminal limitations statutes are to be liberally interpreted in favor of repose.'** (Punctuation omitted.) *Toussie v. United States*, 397 U.S. 112, 115 (90 S.Ct. 858, 25 L.Ed.2d 156) (1970)." And "'the burden is unquestionably upon the state to prove that a crime occurred within the statute of limitation, or, if an exception to the statute is alleged, to prove that the case properly falls within the exception.' (Citation and punctuation omitted.) *Harper v. State*, 292 Ga. 557, 563(3) (738 S.E.2d 584) (2013)." **2.** "Under OCGA § 17-3-2(2), the 'person unknown' exception to the general limitation periods allows tolling of the statute of limitation when '[t]he person committing the crime is unknown or the crime is unknown[.]' We have held that the tolling period ends when the State has actual, as opposed to constructive, knowledge of both the defendant's identity and the crime. *Higgenbottom v. State*, 290 Ga. 198, 204(3) (719 S.E.2d 482) (2001)." Court here for the first time interprets "OCGA § 17-3-2(2) to mean that **a statute of limitation is tolled with respect to an 'unknown' person until the State possesses sufficient evidence to authorize the lawful arrest of that person for the crime charged.** ... The amount of actual knowledge required to lawfully arrest an individual is the familiar 'probable cause' standard. ... Thus, **when a defendant makes a prima facie case that the statute of limitation has expired, the State has the burden of proving that it lacked probable cause to arrest the defendant for a time sufficient to deem the indictment or other charging docnment timely.**" ***Accord, Countryman (June 18, 2020), below.***

Countryman v. State, 355 Ga.App. 573, 845 S.E.2d 312 (June 18, 2020). Conviction for computer theft affirmed; evidence supported finding that indictment was brought within tolled statute of

limitation. Defendant entered false information into a National Guard computer, claiming to have passed college classes she actually failed. By doing so, she avoided having to repay tuition assistance the National Guard paid to her college for her classes. Defendant made the false entries between 2007-2011. The fact that defendant made the fraudulent entries was discovered in January, 2015, but defendant contends the National Guard had imputed knowledge by July, 2013. The indictment was filed in July, 2017; she was reindicted in August, 2018, adding language about the tolling of the statute because the crime was unknown until January, 2015. **Held**, **1.** evidence supported finding that the National Guard, and thus the State, "possessed sufficient probable cause to authorize her lawful arrest for the crime in January, 2015. Defendant's argument that the information was available in the National Guard's database at an earlier date "is irrelevant" under OCGA § 17-3-2(2). *Based on Riley v. State*, 305 Ga. 163, 824 S.E.2d 249 (February 18, 2019), *below*. **2. Also rejects defendant's argument that tolling ended when victim was aware of the act of entering the data, without knowledge that it was fraudulent.** Rather, "under *Riley*'s probable-cause-to-arrest standard, the statute of limitation did not begin to run until 'the objective facts known to the [State] establish[ed] a probability that [she] ha[d] been engaged in *illegal* activity,'" *quoting Bostic v. State*, 332 Ga.App. 604, 606, 774 S.E.2d 175 (2015), *disapproving of contrary pre-Riley cases: Holloman v. State*, 133 Ga.App. 275, 211 S.E.2d 312 (1974); *State v. Lester*, 170 Ga.App. 471, 317 S.E.2d 295 (1984) (physical precedent only); *State v. Robins*, 296 Ga.App. 437, 674 S.E.2d 615 (2009); *State v. Bragg*, 332 Ga.App. 608, 774 S.E.2d 182 (2015) (physical precedent only); and *State v. Crowder*, 338 Ga.App. 642, 791 S.E.2d 423 (2016). **3. "[T]he burden is unquestionably on the State to 'prove that a crime occurred within the statute of limitation, or, if an exception to the statute is alleged, to prove that the case properly falls within the exception.'** *Riley*, 305 Ga. at 167(3), 824 S.E.2d 249; [other cits.]. Notably, **whether the State has met this burden is 'for the finder of fact.'** *Crowder*, 338 Ga.App. at 644, 791 S.E.2d 423 (punctuation omitted); *accord Merritt v. State*, 254 Ga.App. 788, 789, 564 S.E.2d 3 (2002). *Cf. Lee v. State*, 289 Ga. 95, 97, 709 S.E.2d 762 (2011) (reviewing whether the evidence supported a jury finding that the crimes occurred within the applicable statute of limitation); *State v. Mullins*, 321 Ga.App. 671, 671, 742 S.E.2d 490 (2013) (affirming trial court's grant of plea in bar where State failed to plead and prove to the court, as factfinder, that the indictment not barred by applicable statute of limitation). ... Importantly, **the determination of when the crime was discovered is 'a factual one.'** *Crowder*, 338 Ga.App. at 644, 791 S.E.2d 423 (punctuation omitted); *accord Campbell*, 295 Ga.App. at 858, 673 S.E.2d 336; *see Merritt*, 254 Ga.App. at 789 (1) (a), 564 S.E.2d 3 ("[T]he key to determining when the statute of limitation begins to run is to find when the offender or offense became known. The State bears the burden of proof in this regard. Whether the State has met this burden is a question for the factfinder." (punctuation and footnote omitted))."

Pauley v. State, 355 Ga.App. 47, 842 S.E.2d 499 (April 27, 2020). Convictions for multiple counts of rape, aggravated sodomy, and related offenses affirmed, but convictions as to one victim reversed; defendant received ineffective assistance where counsel failed to raise expired statute of limitation. **State claimed that the statute was tolled because the crimes were "unknown to the State and the grand jury," but "[victim] M.W. unequivocally testified that she knew that Pauley was the perpetrator of the crimes against her back in 2008. As a result, M.W.'s knowledge was imputed to the State on that date and the period of limitation commenced on this date,"** *citing Duncan v. State*, 193 Ga.App. 793, 793-794, 389 S.E.2d 365 (1989)." Thus, **"trial counsel was deficient in failing to file a general demurrer or a motion in arrest in the judgment** seeking to dismiss these four counts."

Slack v. State, 354 Ga.App. 727, 841 S.E.2d 231 (March 26, 2020). Convictions for aggravated child molestation and child molestation affirmed, but conviction for child cruelty reversed based on failure to allege exception to statute of limitation. "Because the first two counts alleged

conduct against a child under age 16, they invoked the tolling provisions of OCGA § 17-3-2.1(a).[fn] The language of the third count did not invoke the tolling provision, and was subject to dismissal as the indictment was not filed within seven years of the charged conduct.[fn] This is so even though the previous two counts included the tolling language. ... 'In criminal cases, the statute of limitation runs from the time of the criminal act to the time of indictment. Where an exception is relied upon to prevent the bar of the statute of limitation, it must be *alleged and proved.* Indeed, the State bears the burden at trial to prove that a crime occurred within the statute of limitation, or, if an exception to the statute is alleged, to prove that the case properly falls within the exception.' *Taylor v. State*, 306 Ga. 277, 286(3)(b), 830 S.E.2d 90 (2019) (emphasis supplied). **'As no exception was alleged in the indictment, the State was incapable of proving an exception to toll the applicable [seven]-year statute of limitation, as such proof was inadmissible.'** *Moss* [*v. State*], 220 Ga.App. 150, 469 S.E.2d 325 (1996). Thus, even though the evidence at trial was undisputed that V.S. was between seven and eight years old at the time of the abuse, this evidence was inadmissible to prove that the statute of limitation for Count 3 was tolled. See *Jannuzzo v. State*, 322 Ga.App. 760, 761-762, 746 S.E.2d 238 (2013) ('Criminal limitations statutes are to be liberally interpreted in favor of repose. The running of a statute of limitation for a criminal offense is ordinarily not interrupted unless an exception tolls its operation. Exceptions will not be implied to statutes of limitation for criminal offenses, and any exception to the limitation period must be construed narrowly and in a light most favorable to the accused.') (citations and punctuation omitted)." Trial counsel was thus ineffective for failing to seek a jury instruction on statute of limitations (*much less move for directed verdict*).

VI. DUI

A. IMPLIED CONSENT AND CHEMICAL TESTS

1. INDEPENDENT TEST, REQUEST FOR, WHAT CONSTITUTES

Ladow v. State, 256 Ga.App. 726, 569 S.E.2d 572 (July 11, 2002). On de novo review of facts following bench trial, Court of Appeals holds that trial court erred in finding that defendant did not request independent test. As officer finished reading first sentence of implied consent warning, defendant said "I want a blood test." Officer finished reading warning, specifying that the state test would be a blood test. Defendant took the state blood test, never again mentioning an independent test, and none was given. Held, defendant's words were sufficient to invoke her right to independent testing. Contrary to state's argument, officer could not reasonably have believed defendant was attempting to designate the type of state-administered test to be used, as that choice belongs to the officer, not the defendant. **As the implied consent warning does not specify "to the accused any requirements for requesting that test – linguistically, temporally, or otherwise... [a]n accused's right to have an additional, independent chemical test or tests administered is invoked by some statement that reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test."** *See also Johnson (June 12, 2003), above. Accord, Henry v. State*, 355 Ga.App. 217, 843 S.E.2d 884 (May 27, 2020) (defendant's question after reading of implied consent notice, "'so you are saying I can take, my blood, my blood, my doctor can do my blood test and all that?" "reasonably could be construed to be an expression of a desire for such a test"). *Distinguished in State v. Gillaspy*, 270 Ga.App. 111, 605 S.E.2d 835 (October 19, 2004) (Statement "I'll take a blood test," was clearly, in context, a response to officer's request for a state-administered test, not a request for an independent test); *Anderton v. State*, 283 Ga.App. 493, 642 S.E.2d 137 (February 7, 2007) (same as *Gillaspy*); *Brooks v. State*, 285 Ga.App. 624, 647 S.E.2d 328 (May 31, 2007) (trial court could determine that defendant's questions about a blood test were not a request for an independent test, in context); *Fowler v. State*, 294 Ga.App. 864, 670 S.E.2d 448 (November 4, 2008) (request for breath test instead of officer's designated blood test was not a request for independent test). *Followed, but criticized, Wright (July 15, 2016), above.*

Wright v. State, 338 Ga.App. 216, 789 S.E.2d 424 (July 15, 2016). DUI-per se conviction reversed, and DUI-less safe conviction vacated and remanded **1.** Trial court erred by denying motion to suppress implied consent results; **"Wright's statements to the arresting officer could reasonably be construed as a request for an independent test and, therefore, the state-administered test results should have been suppressed."** After agreeing to the officer's request for a breath test, Wright asked, "You said after a period of time I get to submit to another chemical blood test or something like that?" and then asked how soon and the cost of it. After being placed in the patrol car, he asked, ""Where I gotta do my blood test at?" But after submitting to the State breath test, "Wright did not make any further statements about an independent test." *Following Ladow v. State*, 256 Ga.App. 726, 728, 569 S.E.2d 572 (2002), and *Johnson v. State*, 261 Ga.App. 633, 636, 583 S.E.2d 489 (2003), both below, for the test that "[a]n accused's right to have an additional, independent chemical test or tests administered is *invoked by some statement that reasonably could be construed, in light of the circumstances, to be an expression of a desire for such test.*" "By its terms, 'reasonably could' means we must treat a defendant's statements as a request if reasonable people could disagree about whether those statements expressed a desire for an independent test. The fact that Wright's ambiguous statements reasonably could support two different interpretations—either as a request for an independent test or not—requires us to resolve the ambiguity in his favor, because his statements 'reasonably could' be construed as a request for an independent test." **2. Concurring specially to his own majority opinion, Peterson, joined by Dillard and Mercier, criticizes the *Ladow* standard as "requiring too little of a defeudant, because it is not enougb to put all reasonable arresting officers on notice that immediate action is required." Notes that the standard is not required by OCGA § 40-6-392, and is far more generous than the test for invocation of the Sixth Amendment right to counsel, which requires a clear and unambiguous request,** *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). *See also Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (June 1, 2010) (invocation of right to remain silent and terminate interrogation requires clear, unequivocal invocation, analogizing to *Davis*). "Given that the statutory right to an independent test 'is not one of constitutional dimension but a matter of grace bestowed by the Georgia legislature,' *Padidham v. State*, 291 Ga. 99, 101, 728 S.E.2d 175 (2012) (citation and punctuation omitted), I question the necessity of protecting it so much more vigorously than the Sixth Amendment right to counsel that sits at the core of our adversarial system of justice. I see nothing in our law that requires this to be the standard."

2. REFUSAL OF STATE TEST

State v Johnson, 354 Ga.App. 447, 841 S.E.2d 91 (March 12, 2020). In DUI prosecution, trial court properly excluded other acts evidence to the extent it showed refusal of State implied consent breath tests, but erred in suppressing other acts evidence of refusal of State implied consent blood tests. Nothing in *Elliott, Olevik,* or the U.S. Constitution excludes evidence of blood test refusal. "Indeed, *Birchfield* acknowledged that many jurisdictions permit introduction of evidence of refusal of a blood test into evidence at trial, and did not note any problem with such practice. 136 S.Ct. at 2179(V)(C)(1)." *Accord, Hinton v. State,* 355 Ga.App. 263, 842 S.E.2d 67 (April 9, 2020) (jury charge on adverse inferences from refusal of blood test proper); *State v. Voyles*, A18A0771, ___ Ga.App. ___, 846 S.E.2d 170, 2020 WL 3496246 (June 29, 2020).

Liggett v. State, 353 Ga.App. 522, 838 S.E.2d 608 (February 7, 2020). DUI and related convictions affirmed. Admission of evidence that defendant refused a breath test was "a clear and obvious error," although defendant's trial occurred a year before the Supreme Court held that evidence inadmissible in *Elliott v. State*, 305 Ga. 179, 210(IV), 824 S.E.2d 265 (2019).

"'[W]hether an error is considered "clear or obvious" under the second prong of the plain error test is judged under the law existing at the time of appeal, regardless of whether the asserted error in the trial court was plainly incorrect at the time of trial, plainly correct at the time of trial, or an unsettled issue at the time of trial.' (Emphasis omitted.) *Lyman v. State*, 301 Ga. 312, 318(2), 800 S.E.2d 333 (2017)." No plain error reversal, however; **considering the "strong independent evidence that Liggett was under the influence of alcohol, including his own admission of recently drinking a beer, and his failure to offer an explanation for his physical manifestations of being under the influence of alcohol, we conclude that he has failed to affirmatively show that evidence that he refused a breath test and a corresponding charge allowing the jury to infer the presence of alcohol probably affected the jury's decision that he was under the influence of alcohol while driving.** Compare *Wagner v. State*, 311 Ga.App. 589, 591-592(2), 716 S.E.2d 633 (2011) (physical precedent only) (plain prejudicial error occurred where, in addition to inference of the presence of alcohol, the jury was instructed that it could infer that the alcohol impaired the defendant's driving)."

3. SEARCH WARRANTS

Mason v. State, 353 Ga.App. 404, 837 S.E.2d 711 (January 8, 2020). DUI conviction affirmed; search warrant for blood sample was supported by probable cause. Affidavit supporting warrant application recited facts of a single-vehicle accident, and report of witness who "arrived on the scene shortly after the collision [and] advised that he could smell the odor of an alcoholic beverage when he approached" defendant's vehicle. **1. "'Information received from a concerned citizen is inherently more credible and reliable than that received from an anonymous tipster; indeed, it is deemed reliable.'** (Footnote omitted.) *Fleming v. State*, 281 Ga.App. 207, 208-209(2) (635 S.E.2d 823) (2006). Here, although the officer did not include the name of the witness in the search warrant affidavit, the officer identified the witness at the hearing on the motion to suppress. Thus, the trial court was authorized to rely on the presence of an odor of alcohol coming from Mason's SUV, as well as an inference that it came from Mason." **2. "[E]vidence of the odor of alcohol was combined with evidence that the driver lost control of his vehicle and crashed into a tree early on the morning after New Year's Eve. The trial court was therefore authorized to conclude that there was probable cause to search,** that is that there was a fair probability that a test of Mason's blood would reveal evidence that Mason was driving under the influence of alcohol at the time that he ran off the road."

B. SEARCH AND SEIZURE, GENERALLY

Birchfield v. North Dakota, 14-1468, ___ U.S. ____, 136 S.Ct. 2160, 195 L.Ed.2d 560, 2016 WL 3434398 (June 23, 2016). *Reversing* North Dakota Supreme Court; *affirming* Minnesota Supreme Court. **A state-administered breath test is allowable as a search incident to arrest, but a blood test is not.** *Based on Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (June 25, 2014) (rejecting searches of cell phones incident to arrest, balancing suspect's privacy interest with State's interest in immediate officer safety/evidence preservation concerns). **1. Facts.** North Dakota and Minnesota criminalize refusal of state implied-consent testing upon a DUI arrest. Defendant Birchfield refused a blood test in North Dakota and was criminally charged; defendant Bernard refused a breath test in Minnesota and was criminally charged. Defendant Beylund consented to a blood test in North Dakota based on the implied consent warning that he would be criminally charged upon refusal. **2. Both breath and blood tests are Fourth Amendment searches.** "[O]ur cases establish that the taking of a blood sample or the administration of a breath test is a search. See *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616–617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *Schmerber v. California*, 384 U.S. 757, 767–768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)." **3. Search incident to arrest analysis:** "we engage in the same mode of analysis as in *Riley*: **we examine 'the degree to which [they]**

intrud[e] upon an individual's privacy and ... the degree to which [they are] needed for the promotion of legitimate governmental interests.' *Ibid.*" **4.** "Years ago we said that **breath tests do not 'implicat[e] significant privacy concerns.'** *Skinner,* 489 U.S., at 626, 109 S.Ct. 1402. That remains so today. First, **the physical intrusion is almost negligible.** Breath tests 'do not require piercing the skin' and entail 'a minimum of inconvenience.' *Id.,* at 625, 109 S.Ct. 1402. ... **Humans have never been known to assert a possessory interest in or any emotional attachment to *any* of the air in their lungs,"** including deep lung air, contrary to defendant's argument. "Just recently we described the process of collecting a DNA sample by rubbing a swab on the inside of a person's cheek as a 'negligible' intrusion. *Maryland v. King,* 569 U.S. 435, 446, 133 S.Ct. 1958, 1969, 186 L.Ed.2d 1 (2013). We have also upheld scraping underneath a suspect's fingernails to find evidence of a crime, calling that a 'very limited intrusion.' *Cupp v. Murphy,* 412 U.S. 291, 296, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973). A breath test is no more intrusive than either of these procedures." **Breath tests also reveal no personal information beyond "the amount of alcohol in the subject's breath," and "[n]o sample of anything is left in the possession of the police.** Finally, participation in a breath test is not an experience that is likely to cause any great enhancement in the **embarrassment** that is inherent in any arrest. See *Skinner, supra,* at 625, 109 S.Ct. 1402 (breath test involves 'a minimum of ... embarrassment')." *Accord, Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (October 16, 2017) (breath tests are also searches incident to arrest under Georgia Constitution, Art. I, Sec. I, Par. XIII; thus, "there is no need to obtain consent for a breath test to support a warrantless search for Fourth Amendment purposes after a valid arrest."); *Fazio v. State*, 302 Ga. 295, 806 S.E.2d 544 (October 16, 2017); *McMaster v. State*, 344 Ga.App. 222, 809 S.E.2d 478 (January 10, 2018). **5. Defendants do have a significant privacy interest in blood samples. "Blood tests are a different matter. They 'require piercing the skin' and extract a part of the subject's body.** *Skinner, supra,* at 625, 109 S.Ct. 1402; see also [*Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (April 17, 2013)] (opinion of the Court) (blood draws are 'a compelled physical intrusion beneath [the defendant's] skin and into his veins'); *id.,* at 174, 133 S.Ct. at 1573 (opinion of ROBERTS, C.J.) (blood draws are 'significant bodily intrusions')." "In addition, a blood test, unlike a breath test, **places in the hands of law enforcement authorities a sample that can be preserved** and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested." **6. "The States and the Federal Government have a 'paramount interest ... in preserving the safety of ... public highways.'** *Mackey v. Montrym,* 443 U.S. 1, 17, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979)." This interest extends beyond merely removing impaired drivers from the road, but also collecting evidence to support their prosecution. "After pegging inebriation to a specific level of blood alcohol, States passed implied consent laws to induce motorists to submit to BAC testing. ... The laws at issue in the present cases—which make it a crime to refuse to submit to a BAC test—are designed to provide an incentive to cooperate in such cases, and we conclude that they serve a very important function." The fact that, in some cases, it may be possible for officers to obtain timely search warrants is inapposite, because "search incident to arrest" analysis is categorical, unlike the case-by-case analysis conducted to determine exigent circumstances (see *McNeely*). "If a search warrant were required for every search incident to arrest that does not involve exigent circumstances, the courts would be swamped. ... In light of this burden and our prior search-incident-to-arrest precedents, petitioners would at a minimum have to show some special need for warrants for BAC testing." Defendants can't do this as to breath testing, given the limited privacy interest at stake as described above. **Results: "Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great. We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive,**

and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. [The States] have offered no satisfactory justification for demanding the more intrusive alternative without a warrant." Thus, Birchfield couldn't be criminally prosecuted based on refusal to give a blood sample, and Beylund's consent to a blood test based on the threat of criminal prosecution was coerced, not voluntary. Bernard, however, could be criminally prosecuted for refusal of breath test, analogous to prosecution for obstruction. **7. Implied consent suspensions are still reasonable. "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.** See, *e.g., McNeely, supra,* at 160-161, 133 S.Ct., at 1565–1566 (plurality opinion); [*South Dakota v. Neville,* 459 U.S. 553, 560, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)]. [Defendants] do not question the constitutionality of those laws, and **nothing we say here should be read to cast doubt on them.** It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." That limit is reasonableness, which "is always the touchstone of Fourth Amendment analysis, see *Brigham City v. Stuart,* 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). And applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Accord, State v. Baddeley*, 348 Ga.App. 844, 823 S.E.2d 373 (February 6, 2019) (Physical precedent only; "license suspension is a true and legitimate consequence of refusing to submit to or submitting and failing the test.").

C. SELF-INCRIMINATION

Fofanah v. State, A20A0719, ___ Ga.App. ___, 846 S.E.2d 154, 2020 WL 3481371 (June 26, 2020). DUI and related convictions affirmed. Trial court properly denied motion to suppress implied consent breath test, finding that defendant's consent to testing was not coerced. **The statutory warning read by the officer (in 2014) was "not per se coercive," *citing Olevik*, and under the totality of the circumstances, trial court properly found "that Fofanah 'voluntarily consented to the breath test,' noting his unequivocal agreement to submit to testing, his ability to comprehend the conversation with the officers, his coherent responses to questioning, and his ability to follow instructions.** The court also found that the officers were not threatening, yelling, or hostile, nor did they make any threats or promises to obtain Fofanah's consent. The court acknowledged that the officers' advisement to Fofanah that a refusal to submit to the test could be offered into evidence against him at trial was misleading, but nevertheless concluded that the 'advisement does not render the consent in this case involuntary. [Fofanah] did not appear frightened or nervous, and even after being advised of his right to independent tests, made no request for anything other than the breath test given, a minimal intrusion on [his] liberty. It is also notable that he did not once, either at the scene or on the drive to the Sheriff's office, attempt to withdraw his consent to this testing.'" **"[T]he trial court considered the impact of the misleading informed consent notice as instructed by this Court and concluded that, given the totality of the circumstances, Fofanah's consent was voluntary."**

Kallon v. State, 355 Ga.App. 546, 845 S.E.2d 348 (June 18, 2020). Following convictions for DUI and related offenses, trial court's denial of motion to suppress breath test vacated and remanded for further reconsideration under *Elliott v. State,* 305 Ga. 179, 824 S.E.2d 265 (2019). Defendant was arrested for DUI in 2017 and took a breath test. He now contends that the implied consent warning was unconstitutionally, inherently coercive. But *Elliott* "explained at length that its decision was not nullifying its numerous prior holdings — including *Olevik*'s holding — that the implied consent notice itself is not per se coercive. *Elliott*, supra, 305 Ga. at 222(IV)(E), 824

S.E.2d 265. Regarding the implied consent notice, the Court merely noted, '[t]his decision may well have implications for the continuing validity of the implied consent notice as applied to breath tests.' Id. **Clearly, the Supreme Court in *Elliott* never held that the former implied consent notice is unconstitutionally coercive. And if the Supreme Court in *Elliott* was careful to *deliberately* leave open the question of the impact of its decision on the validity of the implied consent notice, this Court will not take it upon itself to construe the Supreme Court's decision as a ruling that the notice is unconstitutionally coercive.** Indeed, while 'this [C]ourt may treat a statute as unconstitutional if it has already been held so by ... the Supreme Court of this state," "this [C]ourt ha[s] no authority to declare an Act of the legislature unconstitutional.' (Citation omitted.) *Pitts v. Gen. Motors Acceptance Corp.*, 130 Ga.App. 333, 335(1), 203 S.E.2d 281 (1973)." And defendant's argument that *Elliott* necessarily means "that the former implied consent notice has always been unconstitutional ... directly undercuts our Supreme Court's repeated cautioning 'that [its] decisions stand only for the points raised by the parties and *decided by the [C]ourt.*' (Emphasis supplied.) *State v. Walker*, 295 Ga. 888, 893, 764 S.E.2d 804 (2014)." "Therefore, we vacate the trial court's ruling on Kallon's motion to suppress and motion in limine and remand this case for the trial court to reconsider **whether Kallon's consent was voluntary under the totality of the circumstances** in light of *Elliott*." *Accord, State v. Henderson*, A20A1293, ___ Ga.App. ___, ___ S.E.2d ___, 2020 WL 5011864 (August 25, 2020) (trial court erred in suppressing breath test results based solely on the wording of the implied consent warning, and not on the totality of the circumstances).

Leggett v. State, 354 Ga.App. 877, 842 S.E.2d 313 (April 20, 2020). Convictions for DUI and related offenses vacated and remanded for consideration of voluntariness of defendant's consent to breath test. **"'Determining the voluntariness of (or lack of compulsion surrounding) a defendant's incriminating statement or act involves considerations similar to those employed in determining whether a defendant voluntarily consented to a search[,]' including such factors as 'the age of the accused, his education, his intelligence, the length of detention, whether the accused was advised of his constitutional rights, the prolonged nature of questioning, the use of physical punishment, and the psychological impact of all these factors on the accused. In determining voluntariness, no single factor is controlling.'** *Olevik v. State*, 302 Ga. 228, 251(3)(b) (806 S.E.2d 505) (2017)." *Accord, Fofanah (June 26, 2020), above.*

State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (May 6, 2019). In DUI prosecution, trial court erred by granting motion to suppress. "[W]e hold that neither the Georgia right against compelled self-incrimination, the Georgia right to due process, nor a Georgia statute prohibiting compelled self-incrimination requires law enforcement to provide [*Miranda* or] similar warnings to persons arrested for DUI before asking them to submit to a breath test." *Overruling* line of cases beginning with *Price v. State*, 269 Ga. 222, 498 S.E.2d 262 (1998), requiring reading of *Miranda* warnings before field sobriety evaluations while in custody. *Accord, Fofanah v. State*, 351 Ga.App. 632, 832 S.E.2d 449 (August 15, 2019); *State v. Blazek*, 353 Ga.App. 127, 836 S.E.2d 213 (November 13, 2019); *Smith v. State*, A20A0512, ___ Ga.App. ___, 844 S.E.2d 869, 2020 WL 3168547 (June 15, 2020).

Elliott v. State, 305 Ga. 179, 824 S.E.2d 265 (February 18, 2019). In DUI prosecution, trial court erred by denying defendant's motion to suppress refusal of state breath test. Since blowing into a breath-testing machine is an affirmative act, and thus cannot be compelled under the Georgia Constitution's privilege against self-incrimination, Art. I, Sec. I, Par. XVI ("Paragraph XVI"), *see Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (October 16, 2017), refusal to take a test may not be used against a defendant at trial. **"Paragraph XVI generally prohibits admission of a defendant's pretrial refusal to speak or act. And we conclude that OCGA §§ 40-5-67.1(b)**

and 40-6-392(d) violate the Georgia Constitution by allowing the admission of a defendant's refusal to submit to a breath test to prove that the defendant had been drinking alcohol."

Olevik v. State, 302 Ga. 228, 806 S.E.2d 505 (October 16, 2017). DUI and related convictions affirmed. Contrary to trial court's holding, and prior case law, **the Georgia Constitution's right against compelled self-incrimination applies to breath tests pursuant to implied consent, *overruling Klink v. State***, 272 Ga. 605, 533 S.E.2d 92 (2000). **1.** Art. I, Sec. I, Par. XVI ("Paragraph XVI") of **the Georgia Constitution has historically been construed to apply to compelled acts, not merely testimony,** since the 1877 Constitution and *Day v. State*, 63 Ga. 668, 669(2) (1879). The Georgia Constitution was construed to embody "the common law principle that 'no man is bound to accuse himself of any crime or to furnish any evidence to convict himself of any crime[.]' Recognizing that the constitutional guaranty against compelled self-incrimination was as broad as the common law right from which it was derived, we noted that **the right 'protects one from being compelled to furnish evidence against himself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against his will which is incriminating in its nature,'"** *quoting Calhoun v. State*, 144 Ga. 679, 681, 87 S.E. 893 (1916). **2.** "In contrast, the right against compelled self-incrimination is not violated where a defendant is compelled only to be present so that certain incriminating evidence may be procured from him," such as by removing his clothing, taking evidence from his body, or taking photographs of him. *Batton v. State*, 260 Ga. 127, 130 (3) (391 S.E.2d 914) (1990); *Drake v. State*, 75 Ga. 413, 414-415 (2) (1885) (taking blood-stained clothes from defendant); *Ingram v. State*, 253 Ga. 622, 634 (7) (323 S.E.2d 801) (1984) (right was not violated by requiring defendant to strip to the waist to allow police to photograph tattoos on his body); *State v. Thornton*, 253 Ga. 524, 525 (2) (322 S.E.2d 711) (1984) (taking impression of defendant's teeth did not compel defendant to perform an act); and others. **3.** And **no violation occurs where defendant consents to perform the act.** "See, e.g., *Scott v. State*, 274 Ga. 476, 478(2)(b) (554 S.E.2d 488) (2001) (accused's right against compelled self-incrimination was not violated when he agreed to hold up sleeve to allow police to photograph tattoos on his arm); *Whippler v. State*, 218 Ga. 198, 203(6) (126 S.E.2d 744) (1962) (defendant's right against compelled self-incrimination not violated where he voluntarily and without objection cooperated in giving fingerprints to police); *Foster v. State*, 213 Ga. 601, 604(3) (100 S.E.2d 426) (1957) (suspect's right was not violated when he agreed to go with police to the crime scene for identification purposes); see also *State v. J.T.*, 155 Ga.App. 812 (273 S.E.2d 214) (1980) (student complied with assistant principal's instruction to 'empty her pockets'). In sum, Paragraph XVI prohibits compelling a suspect to perform an act that itself generates incriminating evidence; it does not prohibit compelling a suspect to be present so that another person may perform an act generating such evidence." As noted in *Birchfield*, a state breath test "requires the cooperation of the person being tested because a suspect must blow deeply into a breathalyzer for several seconds in order to produce an adequate sample. [Cit.] As the State conceded at oral argument, merely breathing normally is not sufficient. ... If the State sought to capture and test a person's naturally exhaled breath, this might well be a different case. But this is not how a breath test is performed. **Sustained strong blowing into a machine for several seconds requires a suspect to breathe unnaturally for the purpose of generating evidence against himself."** **4.** Blood tests, however, do not implicate self-incrimination, *citing Strong v. State*, 231 Ga. 514 (202 S.E.2d 408) (1973) ("Nothing we say here should be understood as casting any doubt on *Strong*'s self-incrimination holding."). **5. "[T]he** totality of the circumstances test to determine the voluntariness of an incriminating statement or act for due process purposes is the same test used to determine the voluntariness of a consent to chemical testing in the DUI context." **6. Georgia's implied consent warning is not inherently coercive on its face. Contrary to defendant's argument, the notice does advise defendants of their right to refuse testing; and while the notice regarding the likelihood of suspension "is not entirely accurate," this** "does not, by

itself, render the notice per se coercive regardless of other circumstances." And "Olevik points to no law requiring a full and explicit explanation of all possible consequences no matter how obvious," such as the fact that test results will be used against him at trial. "Olevik's facial claim rests on the premise that the notice would deceive a reasonable person. On the record before us, although Olevik points out deficiencies in the implied consent notice, **[FN14:** The General Assembly may wish to amend the implied consent notice statute; if it does, among the changes it may consider would be a clearer explication of the right to refuse testing, and a more accurate articulation of the likelihood of license suspension.] there is no evidence that OCGA § 40-5-67.1(b) creates widespread confusion about drivers' rights and the consequences for refusing to submit to a chemical test or for taking and failing that test. *Accord, Fazio v. State*, 302 Ga. 295, 806 S.E.2d 544 (October 16, 2017); *Schmitz v. State*, 302 Ga. 473, 807 S.E.2d 361 (October 30, 2017); *Bergstrom v. State*, 347 Ga.App. 295, 819 S.E.2d 84 (September 14, 2018) ("There is no law requiring a full and explicit explanation of all possible consequences of refusal in this context."); *Fofanah v. State*, 351 Ga.App. 632, 832 S.E.2d 449 (August 15, 2019). **7. Defendant points to no other coercive circumstances in this case.** "Determining the voluntariness of (or lack of compulsion surrounding) a defendant's incriminating statement or act involves considerations similar to those employed in determining whether a defendant voluntarily consented to a search. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (93 S.Ct. 2041, 36 L.Ed.2d 854) (1973) ... Just as the voluntariness of consent to search includes an assessment of the 'psychological impact of all the factors on a defendant,' a significant factor in a due process inquiry is whether a deceptive police practice caused a defendant to confess or provide an incriminating statement. See *United States v. Lall*, 607 F.3d 1277, 1285 (11th Cir., 2010) ('While we look to the totality of the circumstances to determine the voluntariness of [a defendant's] confession, a significant aspect of that inquiry here involves the effect of deception in obtaining a confession.'); [*State v. Chulpayev*, 296 Ga. 764, 779(3)(a) (770 S.E.2d 808) (2015)] (citing *Lall*, 607 F.3d at 1285)). And although 'knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.' *State v. Tye*, 276 Ga. 559, 560(1) (580 S.E.2d 528) (2003) (citation and punctuation omitted); see also *Schneckloth*, 412 U.S. at 227 ('While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the "voluntariness" of an accused's responses, they were not in and of themselves determinative.')." *Accord, Diaz v. State*, 344 Ga.App. 291, 810 S.E.2d 566 (January 23, 2018) (knowledge of the right to refuse not required or determinative). **8. No Georgia *Miranda* warning exists. FN13:** "To the extent Olevik argues that we should impose a *Miranda*-style prophylactic rule to protect suspects' Paragraph XVI rights (rights the scope of which, as we have explained, were well-established long before the Supreme Court's decision in *Miranda*), he does not point us to a single decision of this Court or any textual or historical basis supporting such a step. In the absence of a more complete argument, we decline to address this issue."

VII. EVIDENCE

A. HEARSAY

1. MEDICAL DIAGNOSIS AND TREATMENT

Smith v. State, S20A0119, ___ Ga. ___, 845 S.E.2d 598, 2020 WL 3581185 (June 29, 2020). Felony murder and firearm convictions affirmed. Defendant presented expert witness, a psychologist, to testify that defendant suffered from battered person syndrome (BPS) and PTSD, "how Appellant developed these mental health issues, and how they affected her prior to and on the day of the shooting." Trial court refused to allow the witness to repeat what defendant's non-testifying family members told her about abuse inflicted on defendant by victim over the years of their relationship, finding that the statements "do not qualify as statements made for the purpose

of medical diagnosis or treatment" under OCGA § 24-8-803(4). The State argued that the statements "were made in anticipation of litigation and not for the purposes of a medical diagnosis." **Held, statements made to experts retained to testify at trial are not categorically excluded; they should be analyzed on a case-by-case basis to determine if they qualify under the test adopted in** *State v. Almanza*, 304 Ga. 553, 820 S.E.2d 1 (October 9, 2018)**: "In determining whether a statement is admissible under Rule 803(4), we ask whether: (1) the declarant's motive in making the statement is consistent with the purposes of treatment; and (2) the content of the statement is the type reasonably relied upon by a physician in treatment or diagnosis. See *Almanza*, 304 Ga. at 561(3), 820 S.E.2d 1. '[A]ssessing the validity of the declarant's "motive" is critical' under this test.** Id. at 562 (3), 820 S.E.2d 1." *Also citing United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980) and the Fed. R. Evid. 803(4) Advisory Committee Note (explicitly rejecting the prior rule excluding statements to expert witnesses from admission under this hearsay exception). But any error in excluding the statements here was harmless: the defense was able to present plenty of evidence of her abuse, and the State acknowledged that she had been abused. *Notes that such evidence presented by the State may raise Confrontation Clause issues.*

McEady v. State, A20A0185, ___ Ga.App. ___, 846 S.E.2d 94, 2020 WL 3459043 (June 25, 2020). Rape and related convictions affirmed. Ruling admitting statements made by the victim to a sexual assault nurse examiner (SANE) "as statements made for purposes of medical diagnosis or treatment" was "questionable," but not grounds for reversal. **Rule 803(4). Court questions whether the statements were admissible under the rule because SANE took statements from the victim and examined her for purposes of "a head-to-toe documentation of injuries, including the collection of DNA evidence for analysis seeking the identity of any foreign DNA found. Based on this record — including the fact that hospital staff had independently evaluated E.A., had gathered enough information to make treatment decisions, and had made the decision to admit E.A. for trauma treatment independent of the SANE interview — it is questionable whether the hearsay elicited by the SANE interview in this case was reasonably pertinent to diagnosis and treatment, as opposed to gathering evidence."** *Comparing United States v. Williams*, 578 Fed. Appx. 872, 876(III) (11th Cir. 2014) (unpublished; "holding that a victim's *initial* disclosure *made to a treating nurse* that the victim was 'raped' was admissible); *United States v. Iron Thunder*, 714 F.2d 765, 772-773(II)(B) (8th Cir. 1983) ('Even though [the treating physician's] examination and questioning of [the victim] were pursuant to a standardized protocol designed in large measure to prepare for criminal prosecution, Rule 803(4) applies to statements made for the purpose of medical diagnosis as well as to statements made for the purpose of medical treatment. [The victim] responded to questions by [the treating physician,] which were intended not only to shed light on her physical, emotional, and mental condition, but which also could serve as a basis for treatment.')." **Harmless** because victim didn't identify defendant in the interview; the facts disclosed in the interview (the rape, the victim's injuries) were not in dispute, "did not materially undermine" the defense, and were cumulative of other evidence.

2. NECESSITY EXCEPTION/UNAVAILABLE WITNESS/RESIDUAL EXCEPTION

State v. Hamilton, 308 Ga. 116, 839 S.E.2d 560 (February 28, 2020). Following grant of motion for new trial, after conviction for felony murder, trial court properly granted immunity motion based on self-defense. Trial court's consideration of trial transcript was an abuse of discretion under Rule 804(b)(1), but not under 807. **1. Rule 804(b)(1)** allows use of prior testimony as an exception to the hearsay rule only "*if the declarant is unavailable* as a witness." "The unavailability of a witness … is a statutory prerequisite that a proponent of hearsay evidence has

the burden of proving, and that the trial court must evaluate, before a witness's former testimony may be admitted under Rule 804(b)(1)," *citing United States v. Acosta*, 769 F.2d 721, 722-723 (11th Cir. 1985) ("[t]he burden of proving the unavailability of a witness under Rule 804(a) rests with the proponent of the hearsay evidence"; and "the determination as to the 'unavailability' of a witness whose prior testimony is sought to be introduced into evidence is also the responsibility of the trial judge") (citation omitted). No showing here that the numerous witnesses who testified at trial were unavailable. "To the contrary, the trial court found that 'hav[ing] to determine that each of the above mentioned witnesses were unavailable before considering their trial testimony ... does not lead to the discovery of truth.' In making that finding, the trial court focused on the general objectives set forth at the beginning of the Evidence Code, such as 'the discovery of truth' and 'secur[ing] fairness in administration, eliminat[ing] unjustifiable expense and delay, and promot[ing] the growth and development of the law of evidence.' OCGA § 24-1-1. But it did so to the exclusion of the specific statutory requirements plainly set forth in OCGA § 24-8-804(b)." **2. Rule 807.** "Unlike Rule 804(b)(1), Rule 807 does not by its text require a declarant to be unavailable to admit the declarant's statement into evidence. ... But Rule 807 is not indifferent to availability. Indeed, availability 're-enters the analysis of whether or not to admit statements into evidence ... because of the requirement that the proponent use **reasonable efforts** to procure the most probative evidence on the points sought to be proved.' *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977).[fn] Rule 807 'thus [ ] has a built-in requirement of necessity,' id., and its probativeness requirement necessitates, by its plain terms, some determination by the court that the statement at issue is **'more probative** on the point for which it is offered than any other evidence which the proponent can procure through **reasonable efforts.'** OCGA § 24-8-807(2)." Trial courts thus have "more leeway" in considering availability under Rule 807 than under Rule 804(b)(1). "Having concluded that it was 'undisputed' that the transcripts at issue were trustworthy—a finding that many federal courts consider the 'lodestar of the residual hearsay exception analysis,' 30B Charles Alan Wright, Arthur R. Miller & Jeffrey Bellin, Federal Practice and Procedure § 7063 (2018 ed.) (citation and punctuation omitted)—the trial court focused its Rule 807 analysis on the probativeness of the prior transcripts relative to whether Hamilton could 'offer[ ] any other evidence which' she could 'produce through reasonable efforts.' And under the unique circumstances presented in this case, **we conclude that the trial court did not abuse its discretion when it concluded that it would be 'unreasonable' for Hamilton to 'subpoena each of' the 'nearly thirty witnesses that testified at [her] trial ... and discard[ ] the eight days of testimony already given during her trial' and admitted the transcripts into evidence under Rule 807. [FN13:** We note, however, that the notion that a trial court may aggregate all of the witnesses who testified previously and perform a group analysis under Rule 807 is misguided. Generally speaking, hearsay statements should be analyzed on a declarant-by-declarant basis, assessing which (if any) hearsay exceptions might apply to a given statement based on the facts and circumstances supported by the record.**]" Factors** in reaching this conclusion: case was fully litigated, over eight days, before the same judge hearing the motion; the prior testimony would have been considered anyway, either by way of similar live testimony or as a prior inconsistent statement; both sides had the opportunity to present additional witnesses or newly discovered evidence, but the State declined to present any; and the eight year lapse between trial and motion hearing. "Given this unusual procedural posture, and considering the totality of the circumstances, we cannot say that the trial court abused its discretion by admitting the transcripts from Hamilton's trial and the hearing on her motion for new trial into evidence."

3. OBJECTION AND WAIVER

Mason v. State, 353 Ga.App. 404, 837 S.E.2d 711 (January 8, 2020). DUI conviction affirmed; evidence was sufficient to show that defendant was the driver of the vehicle in question. Police sergeant testified that "[s]he went to the hospital and met with another officer who told her that

the driver, Mason, was in critical condition. Mason did not object to this testimony. '[I]f a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible.' OCGA § 24-8-802."

B. IDENTIFICATION OF DEFENDANT

1. OUTSIDE COURT – PHOTOGRAPHIC LINE-UPS

Roseboro v. State, 308 Ga. 428, 841 S.E.2d 706 (April 6, 2020). Malice murder and related convictions affirmed; no ineffective assistance in failing to file motion to suppress victim's photo identification. Before trial, prosecutor met with victim, gave him co-defendant's cell phone, and asked him to look at the photos on it to see if he recognized anyone in them. "The prosecutor never asked [victim] Ellison to identify Roseboro or the shooter in the case, and no conversation occurred while Ellison was looking through the photos stored on the phone. At some point, Ellison showed the prosecutor a photo from the phone that depicted three males, one of whom was [co-defendant] Anderson, and identified the 'darker-skinned male,' whom the prosecutor knew to be Roseboro, as the shooter.[fn] The prosecutor did not say anything in response to Ellison's identification of Roseboro as the shooter." **1. Failure to comply with procedures for lineups and showups in OCGA § 17-20-2 (reading of admonition, proper number of fillers, etc.) does not mandate exclusion of the identification.** OCGA § 17-720-2(b). Not clear here that this was a procedure to which the code section would apply. **2. "[A]lthough Roseboro specifically argues that the prosecutor did not read an admonition form to Ellison prior to handing him Anderson's phone; that there was an insufficient amount of 'fillers' in the phone's pictures; and that in Ellison's identification photograph, Roseboro is 'the only individual fully framed in the center' of the photo and is 'making an obscene gesture,' none of those circumstances amount to an unduly suggestive lineup procedure in which the prosecutor led Ellison to a 'virtually inevitable identification of [Roseboro] as the perpetrator,'"** *quoting Williams v. State*, 286 Ga. 884, 888, 692 S.E.2d 374 (2010). "Indeed, we have held that the failure to read an admonition form or the fact that a defendant may appear in multiple photos or be in a different position than other individuals in a photo array does not constitute an impermissibly suggestive lineup." "Moreover, because Roseboro has not made a showing that had a motion been filed, the evidence would have been suppressed, we agree with the trial court's conclusion that trial counsel was not deficient. See *Wingster v. State*, 295 Ga. 725, 728, 763 S.E.2d 680 (2014) ('Because [the defendant] has not shown that the photographic lineup identification of him would have been inadmissible had his counsel challenged it, his claim of ineffective assistance fails.')."

C. PHOTOGRAPHS, RECORDINGS AND VIDEOTAPES

1. AUDIO/VIDEO RECORDINGS – EAVESDROPPING

Solis-Macias v. State, A20A1502, ___ Ga.App. ___, ___ S.E.2d ___, 2020 WL 5269291 (September 4, 2020). Child molestation and related convictions affirmed. No error in admitting officer's bodycam video. "On appeal, Solis-Macias argues that Officer Britt's body-camera recording of his investigation and the admission of that recording into evidence was prohibited by OCGA § 16-11-62(2), which provides that '[i]t shall be unlawful for ... [a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view ....' But subsection (D) of this same statute provides 'that it shall not be unlawful ... [f]or a law enforcement officer or his or her agent to use a device in the lawful performance of his or her official duties to observe, photograph, videotape, or record the activities of persons that occur in the presence of such officer or his or her agent ....'[Cit.] And with specific regard to subsection (D), the Supreme Court of Georgia has noted that 'to the extent that OCGA § 16-11-62(2) could

have been construed to apply to the actions of police officers making video recordings of others without their consent after being invited into someone's home, the legislature made clear through a 2015 amendment to OCGA § 16-11-62(2) that police do not have to obtain the consent of all parties being video recorded in a private place and outside of the public view when they record such persons in connection with their duties as police officers. *State v. Cohen*, 302 Ga. 616, 630 (2) (b) n.13, 807 S.E.2d 861 (2017). And in this case, given that it is undisputed Officer Britt was recording his interaction with Solis-Macias and his wife as part of his official duties, the recording was not prohibited by OCGA § 16-11-62(2)."

Weintraub v. State, 352 Ga.App. 880, 836 S.E.2d 162 (October 31, 2019). In prosecution for family violence simple battery, trial court's denial of motion in limine vacated and remanded for application of correct test. Witness Jeter was temporarily sleeping on Weintraub's sofa when Weintraub got into an argument with his wife/victim. Jeter was texting his girlfriend on his phone and decided to record the argument, saying he "'just kind of lifted up my phone to where it was viewable but not noticeable.' Jeter clarified that he did not try to hide his phone by placing it in a corner or covering it with a cushion or blanket. He continued to hold his phone as if he was texting while he recorded the interaction between Weintraub and his wife in the living room. Jeter did not know if his phone was noticeable because he was holding his phone in front of his mid-section, but '[i]t wasn't like [he] was trying to hide it.' Jeter stated that neither Weintraub nor his wife asked him to record the interaction or consented to being recorded, and neither of them gave Jeter any indication that they were aware that he was recording them on his phone. Moreover, Jeter did not tell the couple after the fact that he had recorded the interaction." Weintraub moved to exclude the recording as violating OCGA § 16-11-62, Georgia's Eavesdropping Statute. Trial court denied the motion, ruling that "'recording with an exposed smartphone [does not] constitute[ ] recording "in a clandestine manner,"' as contemplated by OCGA § 16-11-62(1)," and that the video recording was admissible because Jeter was an "occupier" and "resident" in the apartment, and that the recording "was made for the purpose of crime prevention pursuant to OCGA § 16-11-62(2)(C)." "The court further noted that 'because Mr. Jeter was invited to stay at the property and sleep in the living room by the Weintraubs[,] [t]he Weintraubs did not have a reasonable expectation of privacy with respect to Mr. Jeter and his activities.'" **1.** "Because OCGA § 16-11-62 addresses audio and video recordings separately, in cases of a recording with both audio and video images, one portion of the recording could be admissible under the statute even if the other portion is ruled inadmissible." **2. Remanded to consider "whether Jeter's recording of the Weintraubs on bis cell phone took place in a 'private place' with respect to both the audio and video portions of the recording. First, as to the audio recording, the trial court rested its conclusion solely on whether Jeter's recording was done 'in a clandestine manner' under OCGA § 16-11-62(1), without first addressing whether the recording occurred in a 'private place.' Similarly, the trial court jumped to whether the video portion of the recording fell within an exception listed in OCGA § 16-11-62(2)(A) - (D) without first analyzing the threshold issue of whether the recording took place in a 'private place.'"** While the home usually enjoys greater protection than anywhere else, "'[f]or Fourth Amendment purposes, one who begins with a reasonable expectation of privacy in a particular area such as his or her residence can lose that expectation of privacy by inviting a guest into that otherwise private place,'" *quoting State v. Cohen*, 302 Ga. 616, 630(2)(b), 807 S.E.2d 861 (2017), "See, e.g., *United States v. Davis*, 326 F.3d 361, 363, 366 (2d Cir. 2003) (defendant did not have reasonable expectation of privacy to prevent being video-recorded with hidden camera in jacket of confidential informant after inviting confidential informant into his residence to sell drugs to the informant); *State v. Almand*, 196 Ga.App. 40, 41, 395 S.E.2d 609 (1990) (because defendant invited off-duty officer into her apartment, she had no reasonable expectation of privacy). 'However, a person does *not* lose one's reasonable expectation of privacy simply when he or she invites a family member or someone who is more akin to being a member of the household into a

place where one has a reasonable expectation of privacy.' *Cohen*, 302 Ga. at 630-631(2)(b), 807 S.E.2d 861 (emphasis in original). See also OCGA § 16-1-3(15) (defining 'public place' as used in Title 16 as 'any place where the conduct involved may reasonably be expected to be viewed by people *other than members of the actor's family or household*') (emphasis supplied). Moreover, a homeowner does not lose his or her reasonable expectation of privacy in those areas of the home that they intend to remain private. See *Moses v. State*, 328 Ga.App. 625, 628(2)(a), 760 S.E.2d 217 (2014) (homeowner did not lose reasonable expectation of privacy 'by allowing persons such as household residents, family members of residents, or housecleaners access to the house'); *Cohen*, 302 Ga. at 616, 631-632(2)(b), 807 S.E.2d 861 (holding that indictment sufficiently alleged that the recording took place in a 'private place out of public view,' where the housekeeper used a hidden 'spy' camera to record her employer in his bedroom and bathroom)." **3. "[I]f the trial court concludes that the cell phone recording took place in a 'private place,' the court will then have to determine whether, at least with respect to the audio portion of the recording under OCGA § 16-11-62(1), Jeter's recording was done in a 'clandestine manner.'** The statute does not define the word 'clandestine.' See OCGA § 16-11-60," but court refers to various dictionary definitions to suggest secrecy and concealment. While the trial court here concluded that recording with an exposed smartphone was not "clandestine," "the statute does not hinge upon whether the recording device was clandestine, but rather whether the 'record[ing]' was done 'in a clandestine manner.' OCGA § 16-11-62(1). For instance, under the facts of this case, could Jeter's act in switching from texting with his girlfriend to recording the couple's interaction on his smartphone be considered '"clandestine?"' Here, the trial court made no findings as to whether the *manner* in which Jeter was recording was clandestine, considering the greater factual context. On remand, if necessary to address this issue**, the trial court should consider whether any of the facts of this case, including Jeter's act of switching modes on his cell phone while holding his phone as if he were still texting, is of significance with respect to whether the recording was done in 'a clandestine manner.'"**

2. AUDIO/VIDEO RECORDINGS – POLICE BODYCAM VIDEO

Robinson v. State, 308 Ga. 543, 842 S.E.2d 54 (April 20, 2020). Convictions for malice murder, armed robbery, and related offenses affirmed; admission of two police bodycam videos was an abuse of discretion, but harmless in light of overwhelming evidence of guilt. **1. Video of defendant's arrest, a month after the offenses, was irrelevant.** Contrary to State's argument, "the video did not show Robinson's flight; it did not provide any evidence of Robinson's guilt or demeanor at the time he fled to Waycross." But because the jury already knew that defendant had been arrested and charged with murder, "it is highly probable that the arrest video alone did not contribute to the verdict." **2.** Video of the crime scene, including the victim's body lying in a pool of blood minutes after the shooting, was relevant and admissible, though gruesome, *citing* "*Davis v. State*, 306 Ga. 140, 145(3)(b), 829 S.E.2d 321 (2019) (video of deceased victim relevant to show manner of death and to corroborate witness testimony)" *and Plez v. State*, 300 Ga. 505, 508(3), 796 S.E.2d 704 (2017)." **3. "By contrast, the last three minutes of the video showed little of the home and yard, nothing of Moore, and focused primarily on the emotional turmoil of Moore's five-year-old daughter and seven-year-old son. In this portion of the video, the officer picks up the crying children, and takes them outside to a patrol car. The young children asked the officer, 'who shot my daddy?' and repeatedly said, 'I want my daddy.' The prosecutor repeated these requests and questions from the children in opening and closing arguments, and acknowledged to the jury the prosecutor's purpose in introducing the evidence," namely, to "stir your emotion." "This portion of the video did not have even the remotest shred of relevance.** [Cit.] Even viewing the video in the light most favorable to admission, there was no conceivable probative value to the video, so the probative value was substantially outweighed by the danger of unfair prejudice from its emotionally

charged content. Admitting the last three minutes of the recording was plainly an abuse of discretion, particularly when considered in light of the State's problematic closing argument," which was "clearly inappropriate." And unfair prejudice is "more likely ... when the video had no other purported purpose," and "a close call due to the complete lack of probative value for which this video could have been admitted, but ultimately, we conclude that the admission of this portion of the video was harmless in the light of the compelling evidence of Robinson's guilt." "**FN5:** Although we hold in this case ... that the other evidence of the defendant's guilt was strong enough to render harmless the erroneously admitted portions of an officer's body-camera video recording, that will not always be so. The admissibility of these sorts of recordings – and each portion of them – must be considered with care."

Morgan v. State, 307 Ga. 889, 838 S.E.2d 878 (February 10, 2020). Defendant was properly found guilty but mentally ill on charges of murdering her two infant daughters. One police bodycam video was properly admitted; trial court abused its discretion in admitting a second one, but error was harmless. **Relevance.** Both videos "were relevant to show the children's manner of death, the state of the home and where the children were found, Morgan's condition and demeanor as she spoke to the responding officers, as well as to corroborate testimony concerning these matters from the State's lay and expert witnesses." **Probative value. Contrary to defendant's argument, most of the videos were not "of minimal probative value ... given that she had admitted the children's cause of death and the only issue remaining for the jury to determine was whether she was criminally responsible for her acts. Although Morgan confessed that she had drowned her children, the video-recordings were not needlessly cumulative of the manner of death because the State was not required to stipulate to the cause of death and the circumstances surrounding the murders. Generally, 'a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the State chooses to present it.'** (Punctuation and footnote omitted.) *Ross v. State*, 279 Ga. 365, 367(2), 614 S.E.2d 31 (2005). Additionally, the video-recordings were probative of matters other than the children's manner of death. In this case, the State needed to rebut Morgan's insanity defense and to prove beyond a reasonable doubt all of the elements of the crimes charged in the indictment. To those ends, the video-recordings from the officer's body cameras helped illustrate the State's prosecution theory that Morgan had killed her children in a manner that showed deliberation and an awareness of the wrongness of her actions: Morgan chose to drown her children one after another in a tub of water without inflicting cuts or bruises, calmly report her crimes to the police, and then wait for them to take her into custody. **By contrast, the last four minutes of the second video-recording showed little of the home, nothing of Morgan, and focused primarily on the officer's efforts to revive one of the children.** Particularly, with the first recording in evidence, the State had scant, if any, need for this last portion of the second video-recording, a factor which significantly diminished its probative value." **Prejudicial impact.** "In this case, the four-minute-long portion of the second video-recording depicted, from the officer's close-up perspective, a dead baby girl sprawled on a dark hallway floor with water and foam oozing from her nose as the officer futilely tries to pump life back into her tiny, naked body. **Such a video-recording, especially when shown on a large screen, is likely to incite feelings of revulsion, disbelief, shock, sadness, and anger. Under these circumstances, we conclude that this portion of the second video-recording had an undue tendency to suggest that the jury render its decision on an improper basis.** Given this undue tendency, the prejudicial impact of this portion of the recording was unfair." **Balancing.** While most of the videos was not unfairly prejudicial, "the scant probative value of the last four minutes of the second video-recording was substantially outweighed by the danger of unfair prejudice from its emotionally charged content and ... admitting that portion of the recording was an abuse of discretion." **Harmless error because "the video-recordings played a minor role in both the State's case and Morgan's theory of defense given that both the State and Morgan relied**

predominantly on expert testimony. ... And, to the extent that the four minutes of CPR in the second video showed how 'horrific' the crime was, Morgan's defense counsel made use of the inherent horror of the crimes to argue that Morgan had to be insane to do what she did. Given the evidence presented, we see no likelihood that the jury would have weighed the case differently had the trial court excluded the last portion of the second video-recording." **Comment on the dangers of unredacted police videos.** "When used as evidence in a criminal trial, body-camera recordings may provide clear proof of pertinent facts – but they also **may pose significant risks to the defendant's right to a fair trial.** A major concern is that a body camera records everything within its range. Some of the recorded images and sounds will likely be relevant to the matter the officer was there to investigate, but some may be entirely irrelevant, even recognizing the need to provide context for the relevant portions. See OCGA § 24-4-401. The audio-recorded statements of the officer, those with whom he or she interacts, and those of people simply talking in the background may be inadmissible hearsay. See OCGA § 24-8-802.[fn] In addition, video and audio of an event is often **much more emotionally powerful than testimony or even still photographs, so the prejudicial impact of relevant body-camera evidence may substantially outweigh its probative value, particularly in cases involving violent crimes.** See OCGA § 24-4-403. Finally, a video recording is the equivalent of a series of still images, so the playing of a length of body-camera video may be needlessly cumulative. See id. For these reasons, **simply playing a full body-camera recording for a jury will often create unnecessary risks of reversible evidentiary errors. Although it requires more work for the parties and the court before trial, efforts should be made to identify the specific segments of a body-camera recording (which may be only the video or audio component of certain portions) that are properly admissible under the Evidence Code, so that only those segments are admitted into evidence and presented to the jury."**

D. SIMILAR TRANSACTIONS /OTHER ACTS/EXTRINSIC EVIDENCE

1. BALANCING – PREJUDICIAL EFFECT

Watkins v. State, 353 Ga.App. 606, 839 S.E.2d 41 (February 12, 2020). Conviction for felony possession of marijuana reversed; under 2013 Evidence Code, trial court abused its discretion in admitting evidence of a prior family violence battery as Rule 404(b) other acts evidence. "Evidence of the 2008 family violence battery offense served no proper purpose at trial and revealed inflammatory facts regarding Watkins's prior physical abuse of a female. Under these circumstances, 'we cannot say that it is highly probable that the error [in admitting the evidence] did not contribute to the verdict.' *Houseworth* [*v. State*, 348 Ga.App. 119, 131(2)(b), 820 S.E.2d 231 (2018)] (citation and punctuation omitted)."

Green v. State, 352 Ga.App. 284, 834 S.E.2d 378 (October 15, 2019). Aggravated assault and related convictions reversed; trial court erred by admitting other acts evidence. Evidence was substantially more prejudicial than probative. **1. Relevance.** Court could find that the evidence was relevant to prove intent, because "Green 'put his intent at issue by pleading not guilty, and he did not take any affirmative steps to relieve the State of its burden to prove intent.' *Jackson v. State*, 306 Ga. 69, 77(2)(b)(i), 829 S.E.2d 142 (2019)." **2. Probative value** of the evidence, however, "was minimal at best," as the prior incident (shooting a store clerk during a robbery) was **significantly different** from the incident on trial (shooting "through a door following an altercation inside a home"); **prosecutorial need** for the evidence was "negligible," as "as no evidence was presented showing that the shooting was unintentional and Green presented no such defense"; and the probative value was "also diminished by its **temporal remoteness** from the charge act. The shooting took place more than **thirty years** before the charged offense, and Green was released from prison approximately seven years before the charged offense." **3.** The **prejudicial effect** of showing that defendant had "a propensity toward violence" outweighed the

minimal probative value. **4. Harm.** Based on the circumstantial and conflicting evidence in the record, "we cannot say that [the evidence against Green was] so overwhelming, or that the improper character evidence was so marginal, that the jury's verdict was not likely to be impacted," *quoting Sloan (June 28, 2019), below.*

2. PURPOSE – OPPORTUNITY

Jones v. State, 354 Ga.App. 568, 841 S.E.2d 112 (March 13, 2020). Convictions for aggravated sodomy and related offenses affirmed. Trial court properly admitted other acts evidence to show "opportunity." Defendant here was prosecuted for tampering with his victims' drinks at a bar, then taking them back to his residence and molesting them. Defendant denied tampering with their drinks, and contended that he and the victims had consensual sex. State presented two other victims who testified he did the same to them in the same timeframe. Defendant contends that the prosecution had no need for evidence on "opportunity," "because he never disputed that he had the opportunity to be with the victims. However, this Court previously has accepted a definition of 'opportunity' in this context that includes not only 'evidence tending to establish opportunity, in the sense of access to or presence at the scene of the crime[,]' but also 'in the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged.' (Citation and punctuation omitted.) *Sloan v. State*, 351 Ga.App. 199, 207, 830 S.E.2d 571 (2019). Although Jones did not dispute knowing or being with the victims in this case, he disputed the State's allegations that he laced the victims' drinks with a drug to overcome their resistance to his sexual advances. Thus, the jury was required to consider whether Jones had the ability to introduce a substance into a victim's drink that was capable of incapacitating him without being detected."

Sloan v. State, 351 Ga.App. 199, 830 S.E.2d 571 (June 28, 2019). Armed robbery and related convictions reversed; trial court erred by admitting other acts evidence to show opportunity. Offenses here: robberies by knifepoint at or near a bus stop, at time of the last bus of the night. "While there are few cases specifically addressing the circumstances under which opportunity may be a proper purpose for admitting other act evidence, a sister court has recognized 'it as **evidence tending to establish opportunity, in the sense of access to or presence at the scene of the crime or in the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged.'** (Citation and punctuation omitted.) *Emory v. State*, 101 Md.App. 585, 618(10), 647 A.2d 1243 (1994). Here, no special skills or abilities were used during the commission of the crimes, and the State presented no evidence showing where Sloan lived at the time of the 2000 and 2005 armed robberies. *Amey* [*v. State*, 331 Ga.App. 244, 252(1)(c), 770 S.E.2d 321 (2015)] (rejecting State's argument that close proximity of defendant's residence to location of charged offense standing alone authorized proof of prior crimes to show opportunity)." *Accord, Jones (March 13, 2020), above.*

E. STATEMENTS BY DEFENDANT

1. ADOPTIVE ADMISSIONS

Neal v. State, 355 Ga.App. 125, 843 S.E.2d 11 (May 5, 2020). Child molestation convictions affirmed; under 2013 Evidence Code, **evidence of defendant's pre-arrest silence was properly admitted as an adoptive admission.** Victim, daughter of Neal's girlfriend, told her mother in Neal's presence that "Neal had sexual intercourse with her. Neal, who was sitting nearby, said nothing. The girlfriend then hit Neal several times until [her] niece was able to pull her off of him and call the police. The girlfriend shouted accusations at Neal and continued to do so when the police arrived on the scene a few minutes later. Neal's girlfriend was shouting, 'He touched my daughter,' and 'He was with my daughter.' Neal told one of the officers that his girlfriend had hit him but said nothing about the accusations being shouted by her." **1. "The trial court was**

authorized to find that an accusation that a defendant had sexual intercourse with a minor was the type of statement that 'under the circumstances, an innocent defendant would normally be induced to respond,'" *quoting State v. Orr*, 305 Ga. 729, 740(4), 827 S.E.2d 892 (2019) (Citation and punctuation omitted). "Likewise, the trial court was authorized to find that **there were sufficient foundational facts from which the jury could infer that Neal heard, understood, and acquiesced in the accusations made by the daughter and girlfriend, given that the accusations were made in the apartment in his presence. ... Moreover, the trial court was entitled to find that there were no impediments to Neal responding to the accusations." 2. Accusation made in presence of police also was properly admitted.** "Where the accusatory 'statement was made by or in the presence of the police, the defendant's silence may be best explained as a cautious exercise of his right to remain silent.' Paul S. Milich, Georgia Rules of Evidence § 18:4 (updated October 2019). In the present case, however, Neal was not under arrest or police interrogation when he failed to respond to his girlfriend's accusations, and in fact, willingly spoke with the police by telling them that his girlfriend had hit him. Nor has Neal argued that a distinction should be drawn in this case between the accusations made before or after the police arrived on the scene."

Wilkins v. State, 308 Ga. 131, 839 S.E.2d 525 (February 28, 2020). Malice murder convictions affirmed; trial court properly admitted evidence as an adoptive admission. "[Witness] Cooper testified that [co-conspirator] Jones showed him a t-shirt in the trunk of the car Appellant was driving and said: 'This [is] the t-shirt we used to wipe the blood and our prints ... off the gun.' The State offered that testimony as an adoptive admission by Appellant." *Based on OCGA § 24-8-801(d)(2)(B) and State v. Orr*, 305 Ga. 729, 740, 827 S.E.2d 892 (2019): **"'For evidence to qualify as a criminal defendant's adoptive admission under Rule 801(d)(2)(B), the trial court must find that two criteria were met: first, that "'the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond,'" and second, that "'there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement."'** *United States v. Jenkins*, 779 F.2d 606, 612 (11th Cir. 1986) (citation omitted).' *Orr*, 305 Ga. at 740, 827 S.E.2d 892. ... The circumstances to be considered include any 'physical or psychological impediments to the party's responding to the statement (for example, circumstances showing that a party feared to speak would negate any inference that the party agreed or adopted the statement).' Paul S. Milich, Georgia Rules of Evidence § 18:4, at 709 (2019-2020 ed.)." "[T]he trial court could reasonably determine that a statement referring to a bloody shirt in the trunk of the car that Appellant drove up in and was standing next to as the shirt 'we' used to wipe blood and fingerprints off a gun is the kind of statement that would normally prompt an innocent person to clarify that he was not part of the 'we.' Likewise, the trial court's conclusion that Appellant heard, understood, and acquiesced in Jones's statement is supported by Cooper's description of Appellant's position standing by the car door within earshot, as well as the fact that Appellant looked at Jones, briefly at Cooper, and then back at Jones while Jones was speaking. And there is no indication that any particular circumstances impeded Appellant from speaking. Thus, the trial court did not abuse its discretion in determining that Jones's statement was admissible under OCGA § 24-8-801(d)(2)(B)."

2. REINITIATION OF INTERROGATION BY DEFENDANT AFTER INVOKING RIGHTS

State v. Pauldo, S20A0191, ___ Ga. ___, 844 S.E.2d 829, 2020 WL 3245971 (June 16, 2020). In prosecution for malice murder and related offenses, trial court erred in granting motion in limine "to exclude the portions of his custodial interview with police after he invoked his rights to remain silent and to counsel on the ground that police failed to honor Pauldo's invocation of those

rights by continuing to interrogate him." **1. Facts.** Defendant voluntarily met a detective and agent for an interview at the police station. The detective told defendant he wasn't under arrest, asked for biographical information, and *Mirandized* him. "Pauldo then unequivocally asserted his right to remain silent," which the detective noted on the *Miranda* form. Agent then asked Pauldo to submit to gun residue test, or he would get search warrant, and told him his clothes would be needed for evidence "once you get out to the jail," which was the first indication that Pauldo was, in fact, under arrest. Defendant then asked what he was being arrested for and why, "and the detective explained that they had talked to 'a lot of people,' and they had identified him as the shooter. Pauldo then started talking again, saying, 'Sir,' but the detective interrupted to say: 'You've already told me that you wanted your lawyer here. They told you not to talk to me. Now, if you want to talk to me, that's up to you.' Pauldo replied that he did not understand why he was being arrested and that he 'did not do this,' asking again, 'Why am I being arrested?' In response, the detective asked, 'Ray, do you want to talk to me?' Pauldo replied, 'I mean, I will talk to you. I'm sitting here; I'm talking to you now. I'm telling you, like, why ....' The detective again interjected, 'Do you want to talk to me about this incident?' Pauldo replied, 'I will talk to you about this incident, sir[,]' first stating that he was not there, then correcting himself to say that he was there, but asserting that he was not responsible for the shooting. Pauldo then asked the detective, 'What [do] you want to know?' At that point, the detective stated that if Pauldo wanted to talk to the detective, he needed to sign the waiver-of-rights form. The detective again asked Pauldo, 'So you're changing your mind, and you want to talk to me?' Pauldo replied, 'I will talk to you, yeah, to benefit me, anything .... I don't want to be arrested for homicide.'" Pauldo then signed the *Miranda* waiver form agreeing to talk to the officers. **2. Held**, when defendant terminated interrogation, the officers honored the invocation of his rights until defendant himself reinitiated the interrogation. **A. Officers' requests immediately following defendant's refusal to talk "presents a close question," but "were more akin to permissible statements attendant to arrest, custody, and other logistical issues," not interrogation.** ***Citing*** *a majority of other state courts and federal circuits holding that a request to collect evidence from defendant, or DNA, or to search, immediately after invoking Miranda,* "was not equivalent to interrogation." "FN9: [T]he courts have generally reasoned that asking for consent to search is not an interrogation in violation of *Miranda*, that a consent to search is not a self-incriminating statement, and therefore, that the Fifth Amendment provides no basis for suppressing the evidence found in the search." **B. Statements regarding search warrant "were short, were not open-ended, and did not invite further discussion about the details of the investigation.** [Cit.] Neither the requests to consent to a gunshot residue test nor the statement about the search warrant actually resulted in Pauldo providing an incriminating response. He neither agreed nor refused to submit to the test, and he simply acknowledged the detective's statement about the search warrant. Moreover, the detective's statement about the search warrant was made only after Pauldo asked whether he was required to consent to the gunshot residue test. [Cit.] The statement about taking Pauldo's clothing at the jail appears to be a part of his response to Pauldo's question about consenting to the gunshot residue test, explaining that police would get a search warrant to obtain gunshot residue testing and that his clothes also would be taken as evidence at the jail. On balance and after a close review of these statements made by the detective, we conclude that they were not the functional equivalent of interrogation in violation of Pauldo's rights and that the statements were not reasonably likely to elicit an incriminating response, nor should the detective have known that they were reasonably likely to do so.**[FN10:** We caution that our analysis could have reached the opposite conclusion with the addition of just a few words by the detective, for example, if the detective had prefaced his requests and statements about evidence collection to overtly state that he was asking for the evidence *because* Pauldo had invoked his rights. ...] Therefore, the trial court also erred in determining that this exchange between the detective and Pauldo demonstrated a failure to honor Pauldo's rights." Further, the statements regarding getting a search warrant "did not elicit an incriminating response from Pauldo. ... **Pauldo's questions**

about his arrest and his subsequent statements were not in response to the detective's requests to consent to the gunshot residue test or the statements about the search warrant and collecting the clothing. If anything, Pauldo was responding to the detective's statement that Pauldo was going to jail. Thus, because Pauldo's incriminatory statements were not a forseeable result of the requests and statements made by the detective about collecting evidence, they also cannot be considered the product of custodial interrogation, even if we were to assume that the statements constituted interrogation, and the trial court erred in excluding them on that basis. **3. Record shows that** "under the totality of the circumstances, Pauldo knowingly, intelligently, and voluntarily waived his rights under *Miranda*, so as to permit further interrogation. [Cit.] The video recording shows that Pauldo began asking questions about his arrest and the investigation after the detective told Pauldo he was being arrested for homicide, and the detective answered Pauldo's questions. Because law enforcement is permitted to make statements to the defendant about the next steps in the process, such as arrest, and a defendant understandably may ask clarifying questions about his arrest, we do not see this exchange as improper interrogation by the detective or a reinitiation of communication by Pauldo." "We find it significant that, despite the reminder that he had invoked his rights, Pauldo continued to ask questions and make statements, explaining that he was willing to waive his rights because he did not want to be arrested. Also, Pauldo's continued efforts to discuss the case made it unclear whether he wished to talk to the detective or not. Therefore, although the detective asked on several occasions whether Pauldo wanted to talk, these attempts to clarify whether Pauldo was invoking his rights were reasonable in light of this ambiguity and '[did] not run afoul of the *Miranda* right to remain silent,' nor do they indicate that police failed to scrupulously honor Pauldo's rights. [Cit.] Moreover, it was only after the detective asked and Pauldo confirmed that he wished to waive his rights and had Pauldo sign the waiver of rights form under the statement that '[Pauldo] has changed his mind and wishes to talk' that the detective asked Pauldo any questions about the case. We thus conclude that Pauldo reinitiated contact when he asked questions about why he was being arrested and made statements about the crimes being investigated even after being reminded that he had invoked his rights and that these statements and questions 'evinced a willingness and a desire for a generalized discussion about the investigation,'" *quoting Driver (January 13, 2020), below.* "Considering the totality of the circumstances, including Pauldo's age [21], intelligence, education [college junior], his previous consultation with counsel and his mother, his repeated statements that he wanted to talk to avoid being arrested, and the detective's several reminders to Pauldo that he had invoked his rights, we further conclude that Pauldo knowingly, intelligently, and voluntarily waived his rights. Accordingly, we reverse the trial court's grant of Pauldo's motion in limine." **Melton, joined by Bethel, dissents, arguing 1. invocation of right to counsel places a higher burden on State to prove voluntary reinitiation by defendant under** *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981): "As explained by the United States Supreme Court, *Edwards* adds an additional layer of protection for a suspect who invokes his right to counsel by instituting a per se bar to further interrogation in the absence of counsel and raising the standard for a voluntary waiver of this right. *Maryland v. Shatzer*, 559 U.S. 98, 104, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010). No such 'bright-line' rule applies to invoking the right to remain silent." Compare *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975): "Under *Mosley* and its progeny, where a suspect's rights *are* scrupulously honored, law enforcement can — under certain circumstances — re-approach the suspect, provide him a new *Miranda* warning, and, upon a valid waiver, conduct a new interrogation. See *Mosley*, 423 U.S. at 105-106, 96 S.Ct. 321. *Edwards*, on the other hand, does not allow further police-initiated questioning without the suspect having had the benefit of counsel, unless the suspect re-initiates, see *Edwards*, 451 U.S. at 104, creating a presumption of involuntariness for any subsequent waiver of rights that does not arise in a right to remain silent case." **2. Majority errs by considering each inquiry by the officers separately;** "this approach fails to review the *totality of the circumstances* from *the perspective of the suspect*, as is required under the law."

Taken together, the circumstances support the trial court's finding that the officers failed to honor defendant's invocation: there was no break in the discussion; the officers immediately asked for a gun residue test, said defendant had to surrender his clothes and that he was under arrest for homicide (contrary to their prior representations); and said that "a lot of people" had identified him as the shooter. "Thereafter, Pauldo only asked why he was being arrested, to which the detective continually replied 'do you want to talk to me?' until Pauldo agreed to sign a waiver." "[W]hile the police can certainly answer questions such as 'Why am I being arrested?' with generic responses, the detective's responses were far from generic as he answered Pauldo's questions by discussing case-related matters, *including by outlining the evidence against him*. ... Indeed, the record shows that Pauldo did not agree to talk about the case, *at all*, until *after* Detective Knight outlined statements from other witnesses implicating Pauldo in the crime. Considering the totality of the circumstances in the case before us, I cannot conclude that Pauldo was responsible for initiating further conversation with the detective after invoking his right to counsel. **FN17:** To conclude otherwise would condone a post-invocation practice of outlining incriminating evidence to the suspect in an effort to induce him to waive his right to counsel. This is exactly the practice that *Edwards* and its progeny protect against.**]**"

Driver v. State, 307 Ga. 644, 837 S.E.2d 802 (January 13, 2020). Felony murder and related convictions affirmed. Trial court properly admitted defendant's statement to detective after defendant invoked right to counsel, then reinitiated conversation with officer. **1.** "'It is well established that a suspect who asks for a lawyer at any time during a custodial interrogation may not be subjected to further questioning by law enforcement until an attorney has been made available or until the suspect reinitiates the conversation.' *Dozier v. State*, 306 Ga. 29, 35 (829 S.E.2d 131) (2019) (citation and punctuation omitted). See also *Edwards v. Arizona*, 451 U.S. 477, 484-486 (101 S.Ct. 1880, 68 L.Ed.2d 378) (1981). And in the absence of either the suspect's reinitiation of the conversation or the presence of his counsel, 'police must immediately cease interrogation, or its functional equivalent, including any words or actions by law enforcement calculated to elicit an incriminating response.' *Taylor v. State*, 303 Ga. 225, 231 (811 S.E.2d 286) (2018). 'In determining whether the actions of law enforcement constitute an interrogation, courts look primarily to the perceptions of the suspect and not the intent of the officer.' Id. (citation and punctuation omitted). Even where the accused reinitiates the conversation, it must be determined, under the totality of the circumstances, whether he 'freely and voluntarily waive[d] [his] right to counsel.' Id. See also *Rowland v. State*, 306 Ga. 59, 62 (829 S.E.2d 81) (2019). Moreover, 'where the issue is ... a suspect's purported initiation of renewed contact, rather than the propriety of interrogation clearly instigated by police,' **case law applying the definition of 'initiation' applies whether the suspect invoked his right to counsel or his right to silence.** *Mack v. State*, 296 Ga. 239, 245 n.5 (765 S.E.2d 896) (2014) (discussing applicability of *Edwards*, 451 U.S. at 481-487, and its progeny in evaluating a defendant's 'post-invocation "initiation" of contact with police'). As an initial matter, '"initiation" requires not only that the defendant speak up first but also that his words reflect a desire to discuss the investigation at hand,' and a suspect has '"initiated" renewed contact with law enforcement authorities, so as to permit further interrogation, only if the renewed contact by the suspect was not the product of past police interrogation conducted in violation of the suspect's previously-invoked rights.' *Mack*, 296 Ga. at 246, 248." **2.** Here, investigator began to leave the room after defendant invoked his right to counsel; defendant then voluntarily began to tell about the shooting, without being asked. No improper interrogation where investigator, following defendant's invocation, stated "that he would be glad to listen to Driver and his attorney tell what happened from Driver's 'point of view.' Viewed in context, ... this statement does not rise to the level of interrogation because there is no evidence to suggest that the statement was designed to elicit an incriminating response or that Sailors should have known it was reasonably likely to do so. See *State v. Brown*, 287 Ga. 473, 478 (697 S.E.2d 192) (2010) (conversation between the defendant and detectives was not

reasonably likely to elicit an incriminating response when, in context, the conversation related to future discussions that they could have about the case after the defendant had a lawyer)." **3.** After defendant invoked right to counsel, he then asked investigator about his investigation. **Held**, "Investigator Sailors's responses did not violate Driver's previously invoked right to counsel under *Edwards* here because Driver's questions initiated a renewed conversation and 'evinced a willingness and a desire for a generalized discussion about the investigation.' *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-1046 (103 S.Ct. 2830, 77 L.Ed.2d 405) (1983)." *Accord on all points, State v. Pauldo*, S20A0191, ___ Ga. ___, 844 S.E.2d 829, 2020 WL 3245971 (June 16, 2020).

3. VOLUNTARINESS – PUBLIC EMPLOYEES AS DEFENDANTS

Ward v. State, 353 Ga.App. 1, 836 S.E.2d 148 (October 31, 2019). Child molestation and related convictions vacated and remanded for hearing on this issue. Defendant/police officer gave a required internal affairs statement which was suppressed, but prosecution retained a copy of the statement. **1.** Defendant contends that counsel was ineffective "by failing to object to the State's possession and derivative use of Ward's compelled/immunized statement," *citing Kastigar v. United States*, 406 U.S. 441, 453(II), 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). "[B]oth direct use and derivative use of the compelled testimony and evidence is forbidden under the Fifth Amendment privilege. *Kastigar*, 406 U.S. at 453-459(III), 92 S.Ct. 1653." *Also citing Muhammad v. State*, 282 Ga. 247, 250(3), 647 S.E.2d 560 (2007). "'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to [a] prosecution, the [prosecuting] authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence. **This burden of proof ... is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it ... use[d] [was] derived from a legitimate source wholly independent of the compelled testimony.'** *Kastigar*, 406 U.S. at 460(IV), 92 S.Ct. 1653 (citation and punctuation omitted)." **2. In an issue of first impression, rules that standard for derivative use is evidentiary use only, not non-evidentiary uses,** adopting standard used by Eleventh Circuit; *citing United States v. Byrd*, 765 F.2d 1524, 1531(II) (11th Cir. 1985). "Non-evidentiary use 'could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy,'" *citing United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). "*Byrd* adopted a view that 'a violation of the privilege against self-incrimination would not occur ... unless such [derivative] use of the [compelled] testimony resulted in the introduction of evidence not obtained wholly from independent sources.' Id. at 1532(II) (punctuation omitted). In other words, the ruling in *Byrd* provides that there is no *Garrity* violation if the evidence was obtained wholly from independent sources, rather than the compelled testimony. Id." "Therefore, when facing allegations of a *Kastigar* violation, the State must demonstrate that its questioning of witnesses was not derived from compelled testimony. Id. A prosecutor's denials and uncorroborated testimony that he made no use of the compelled testimony are generally insufficient to meet the State's burden of proving the absence of taint under the preponderance of the evidence standard. Id. at 1528-1529(III)(B)(1)." **3.** "Where, as here, the issue was not raised until after the trial in the context of an ineffective assistance of counsel claim, an evidentiary hearing may be conducted during the post-conviction proceedings. See, e.g., *Smith v. State*, 255 Ga. 654, 656(3), 341 S.E.2d 5 (1986) (remanding case to the trial court for a hearing and appropriate findings concerning the issue of ineffective assistance of counsel); *United States v. Hill*, 643 F.3d 807, 879(X)G)(2) (11th Cir. 2011) (court ruling upon the *Kastigar* derivative use issue in the context of defendant's post-conviction motion to dismiss the conviction; remanding case for a post-trial *Kastigar* hearing based on conclusion that 'a thorough evidentiary inquiry, including testimony from all of those

who built and presented the case against [defendant], is necessary for the [ ] court to determine whether the government has carried its burden of proving that there was no derivative use' of the compelled statements); *Byrd*, 765 F.2d at 1533-1534(III) (recognizing that a *Kastigar* hearing may be had after the trial has been concluded)."

Bell v. State, 352 Ga.App. 802, 835 S.E.2d 697 (October 30, 2019). Aggravated sodomy and related convictions affirmed; no ineffective assistance where counsel failed to object to defendant jailer's statement to criminal investigator. Sheriff's department policy required cooperation with an internal affairs investigation, but not a criminal investigation like the one here. The criminal investigator conducting the investigation "testified that Bell would not have been subject to disciplinary action if he had refused to participate in the criminal interview; the criminal investigation would have continued to obtain evidence in other ways. He also testified that he is not aware of any policy, culture, or statement that an employee could be subject to discipline or termination for failing to participate in a criminal investigation." Bell had been a detention officer for seven years and "acknowledged that he had personally received and 'thoroughly read' a copy of the Newton County Sheriff's Office Standard Operating Procedures and the Office of Professional Standards manual." "[W]e find no abuse of discretion in the trial court's determination that any subjective belief held by Bell that he would face termination for failing to answer the questions was unreasonable."

VIII. JURIES AND JURORS

A. ARRAY/GRAND JURY, DISCRIMINATION AGAINST COGNIZABLE GROUPS

Cooper v. State, 352 Ga.App. 783, 835 S.E.2d 724 (October 30, 2019). Drug trafficking conviction affirmed. Trial court properly denied defendant's challenge to trial court's method of jury selection. Contrary to defendant's argument, the Georgia Supreme Court's Jury Composition Rule does not "explain what effort the county must expend to reveal a correct address" when a summons is returned undeliverable; unlike the court in *Ricks v. State*, 301 Ga. 171, 173-174(1), 800 S.E.2d 307 (2017), the court here didn't remove names from the list using "legacy data" in violation of the Rule; and the court's local order did not conflict with the Rule.

State v. Towns, 307 Ga. 351, 834 S.E.2d 839 (October 21, 2019). Trial court properly dismissed indictment charging defendant with murder and armed robbery. When an insufficient number of grand jurors reported in Telfair County, "the presiding judge ... directed the clerk to supplement the number of prospective grand jurors with persons who had been summoned to appear for service as petit jurors, a procedure that is authorized by OCGA § 15-12-66.1." The clerk testified that she reviewed the list of trial jurors summoned for the following day, called four she thought might be immediately available, and was able to get two of them to report right away. "'While both [T.S.] and [B.W.] were randomly selected from the master jury list for inclusion on the traverse jury list, they were not randomly selected to serve on the grand jury. The Clerk of Court chose [T.S.] and [B.W.] purposefully and not at random ....'" **Held, this vitiated the randomness of the grand jury.** "[W]hen 'random' is used in a strict statistical sense, it commonly is understood to refer to the results of a selection process in which each candidate for selection has an equal probability of being chosen." "In this case, it is true that the persons summoned for service as petit jurors were selected at random from the master jury list. But in selecting T.S. and B.W. from that random list to serve on the grand jury, the clerk relied on her personal knowledge of the prospective petit jurors, her own assessment of the extent to which she had the information necessary to contact them, and her estimate of the likelihood that they would be available to report immediately. Those selections were not 'random' in any sense of the word.[fn] The trial court was right to conclude that T.S. and B.W. were not 'cho[sen] at random' for service on the

grand jury and were not, therefore, selected as required by OCGA § 15-12-66.1. **And randomness is an "essential and substantial" provision of Georgia law** "governing the selection of juries [which] vitiates the array, and with respect to an irregular grand jury, the remedy for such a violation is the dismissal of an indictment returned by the grand jury." "The essential gist of the modern scheme is that jury representativeness and impartiality are best guaranteed by inclusivity in the identification of the universe of persons eligible to serve and by randomness in selecting arrays from that universe." **Ellington (joined by Boggs) dissents:** "I disagree with the majority that a violation of an 'essential and substantial' provision of the statutes for selecting and summoning individuals for jury service is one that 'affects the identity of the persons selected for the array from the universe of persons eligible to serve.' Such a standard is too broad, given that one of the basic purposes of the jury selection statutes is to identify individuals who are eligible to serve as jurors.[fn] Rather, I think 'essential and substantial' provisions are those that protect the core values inherent in our jury selection statutes. 'Essential and substantial' has a plain meaning. 'Essential' means 'inherent'[fn] and 'substantial' means 'of considerable importance.'[fn] In the context of selecting jurors for the array or for the grand jury, a violation of an essential and substantial provision is a violation that undermines the integrity of the jury selection process by injecting into that process those defects expressly forbidden in the array or, as in this case, the grand jury. Such a violation, therefore, would act to undermine the inclusivity or randomness of the array,[fn] would result in the seating of a juror who was not eligible to serve,[fn] or would act to deprive the defendant of a right that he was due.[fn]"

B. *BATSON*

1. COGNIZABLE GROUPS, WHAT CONSTITUTES

Hughley v. State, 355 Ga.App. 189, 843 S.E.2d 622 (May 21, 2020). Armed robbery and related convictions affirmed. No prima facie *Batson* violation in State's strikes of both African-American males from venire, leaving three African-American females. **"Hughley argues that the trial court erred in this ruling because his *Batson* challenge was not to the strikes of African-American jurors in general, but the striking of all available African-American males from the jury pool.** Hughley has cited to no United States Supreme Court nor Georgia precedent ruling that the protections of *Batson* extend to combined race-gender groups.[fn] However, in a similar case, the Eleventh Circuit has declined to recognize a race-gender group as a 'cognizable racial group.' See *U.S. v. Dennis*, 804 F.2d 1208 (11th Cir. 1986). 'As an initial matter, **the relevant cognizable racial group, for the purposes of our analysis, is the group of blacks generally and not just black males,** as [Hughley] urge[s]. The test we apply to determine whether [the struck jurors] are members of a cognizable racial group under *Batson*, is the test applied in *Castaneda v. Partida*, 430 U. S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 [(1977)]), cited in *Batson*[.] Such a group is "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Castaneda*, [supra]. The group of blacks generally clearly qualifies under this definition; **[Hughley has] failed to show, however, that black males constitute a distinct, recognizable subclass of individuals who have been singled out for different treatment under the laws not simply as blacks, but as black males.** It would therefore be inappropriate for us to narrow the "cognizable racial group," ... to include only black males and exclude black females.' Id. at 1210(VII)."

C. JUROR NOTES

Murphy v. State, 354 Ga.App. 560, 841 S.E.2d 153 (March 13, 2020). Forgery and theft convictions affirmed. No plain error in trial court's decision to withhold from the parties the information in the deliberating jury's note about their numerical division. "'[T]he numerical division between guilt and innocence during a jury's deliberation is not normally available to a

defendant' and a trial court may omit that information when informing counsel of the contents of a jury note. *Youmans v. State*, 270 Ga.App. 832, 833(1), 608 S.E.2d 300 (2004). We discern no obvious error where, as here, the trial court communicated the substance of the note to counsel, informed counsel of his intended response, expressly sought comment and input from counsel, incorporated that input into the response ultimately given to the jury, and later marked the jury note as an exhibit and put it into the record."

D. VERDICT

1. PUBLICATION

Medina v. State, S20A0505, ___ Ga. ___, 844 S.E.2d 767, 2020 WL 3244171 (June 16, 2020). In prosecution for murder and related offenses, trial court erred by denying plea in bar based on double jeopardy on malice murder count. At first trial, grant of mistrial was proper as to three counts of indictment on which jury announced they were at a "total impasse," split 8-4; but not as to the malice murder count on which they indicated a unanimous decision of acquittal, which was then written on the verdict form and published in open court by the judge. **"When the jury reported its not guilty verdict on the malice murder count and the judge read it in open court, all of the requirements for formally returning a verdict on that count were fulfilled and the verdict became effective."** "The jury's verdict was valid. It was unanimous, in writing, signed by the foreperson, and delivered in open court, where it was read by the judge directly. See *Cantrell v. State*, 266 Ga. 700, 703 n.4, 469 S.E.2d 660 (1996) ('Verdicts acquire their legality from return and publication.' (citation and punctuation omitted)); *Washington v. State*, 333 Ga.App. 236, 245(1), 775 S.E.2d 719 (2015) (explaining that 'in Georgia, verdicts acquire their legality from return and publication,' which occurs 'when [the verdict] is agreed upon by the jury, written out, signed by the jury foreperson, and delivered to the clerk, by the direction and in the presence of the judge')." "In *State v. Sumlin*, 281 Ga. 183, 637 S.E.2d 36 (2006), we held that **'[o]nce the jury returns its verdict, the trial has ended and the time for granting a mistrial has passed,' so a purported mistrial granted 'after the jury had returned its verdict resulted in a void order.'** Id. at 184(1), 637 S.E.2d 36. In other words, a purported mistrial declared on a count for which the jury has already returned a valid verdict is a legal nullity. Thus, no mistrial, consented to or otherwise, actually occurred as to Count 1. And Medina's claim that he may not be retried for malice murder stems not solely from his argument that the trial court should not have declared a mistrial, but is rooted in the publishing of the jury's verdict in open court." Although defense counsel agreed to a mistrial on all counts, the principle that "a defendant who consents to a mistrial may not use the mistrial as a basis for a plea of double jeopardy ... does not apply to the question of whether the jury's verdict of acquittal bars the State from retrying Medina for malice murder. ... And Medina did not ask for the jury's verdict to be returned, and thus there can be no argument that the consent principle that [Ellington's] dissent focuses on as to the mistrial could extend to the verdict."

Corley v. State, 308 Ga. 321, 840 S.E.2d 391 (March 13, 2020). Malice murder and related convictions affirmed; no double jeopardy violation. After first trial, judge declared a mistrial based on a hung jury after four days of deliberations. Contrary to defendant's argument, **note provided to court by jury after first day of deliberations wasn't a "verdict," though it "showed a count of 12 'NG' votes as to malice murder and split votes on the other counts.** The trial court noted that the list provided more information than it wanted to know, but that '[a]gain, you haven't really been deliberating nearly long enough for this to be considered a hung jury.' **The jury never gave any indication that the list it provided to the judge was intended to be a verdict, nor did the jury maintain that it had concluded its deliberations as to any count. Instead, the jury continued deliberating, and when the jury reported—three days later—that it was bopelessly deadlocked (resulting in the trial court declaring a mistrial), it**

was split as to all of the charges, including malice murder. Contrary to Corley's assertions, the first jury never reached a verdict on any count, the trial court properly declared a mistrial, and Corley's claim that she could not be retried for malice murder is without merit. See *State v. Lane*, 218 Ga.App. 126, 127, 460 S.E.2d 550 (1995) ('the trial court was incorrect in ruling that the jury "[arrived] at a not guilty verdict for murder"' where the jury merely had '*handed notes* to the trial court' (emphasis in original))."

2. REPUGNANT VERDICTS

McElrath v. State, 308 Ga. 104, 839 S.E.2d 573 (February 28, 2020). Defendant's verdicts of guilty but mentally ill on felony murder (based on aggravated assault), not guilty by reason of insanity as to malice murder of same victim, vacated as repugnant verdicts and remanded for new trial. Defendant stabbed his adoptive mother 50 times, killing her; the evidence as to the act and defendant's mental state would have supported either verdict. **Repugnant verdicts defined.** "Though they do not involve two guilty convictions, **repugnant verdicts suffer from a similar infirmity as mutually exclusive verdicts; they occur when, in order to find the defendant not guilty on one count and guilty on another, the jury must make *affirmative* findings shown on the record that cannot logically or legally exist at the same time.** Where a jury renders repugnant verdicts, both verdicts must be vacated and a new trial ordered for the same reasons applicable to mutually exclusive verdicts. ... This case falls into the category of repugnant verdicts, as the guilty and not guilty verdicts reflect affirmative findings by the jury that are not legally and logically possible of existing simultaneously. This is because the not guilty by reason of insanity verdict on malice murder and the guilty but mentally ill verdict on felony murder based on aggravated assault required affirmative findings of different mental states that could not exist at the same time during the commission of those crimes as they were indicted, proved, and charged to the jury.[fn] Put simply, **it is not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode against a single victim, even if the episode gives rise to more than one crime.**" *Overruling Blevins v. State*, 343 Ga.App. 539, 808 S.E.2d 740 (2017), to the extent it states that the repugnant verdict rule was abolished by the end of the inconsistent verdict rule in Georgia. *Distinguishing Shepherd v. State*, 280 Ga. 245, 626 S.E.2d 96 (2006), where verdicts of guilty but mentally ill on felony murder (based on possession of firearm by convicted felon), not guilty by reason of insanity as to malice murder of same victim were held to be not mutually exclusive: repugnant verdicts were not discussed. "To the extent that the analysis in *Shepherd* diverges from our analysis in this case, however, *Shepherd* is disapproved."

IX. JURISDICTION

Hines v. State, 353 Ga.App. 710, 839 S.E.2d 208 (February 18, 2020). Convictions for cruelty to children reversed on other grounds, but evidence supported finding of jurisdiction. "Count 2 charged Hines with cruelty to children in the first degree by 'maliciously caus[ing the child] ... physical and mental pain by breaking his left leg. ...' OCGA § 16-5-70(b) provides that '[a]ny person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.' Thus, the child's physical and mental pain, the result of the conduct, is an element of cruelty to children as defined in OCGA § 16-5-70(b). And **undisputed evidence presented at trial showed that the child was present in Georgia for at least some period of time after suffering the older break. Accordingly, even if the conduct occurred outside of Georgia, the result occurred in Georgia, and Hines' argument is without merit."**

X. OFFENSES

A. CRIMES, GENERALLY

Daddario v. State, 307 Ga. 179, 835 S.E.2d 181 (October 31, 2019). Aggravated child molestation conviction affirmed. **1. Contrary to defendant's argument, the injury need not happen at the time of the molestation, but may occur some time later.** "In Georgia, all crimes are defined by statute, see OCGA § 16-1-4, and **every crime has as elements an actus reus and a mens rea, see OCGA § 16-2-1(a) ('A "crime" is a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence.').** See also *In re Jefferson*, 283 Ga. 216, 218, 657 S.E.2d 830 (2008) ('"Like all crimes, [criminal] contempt has an act requirement (actus reus) and a mental component (mens rea)."' (citation omitted)). **In addition, crimes are often defined to include as elements the presence or absence of certain 'attendant circumstances.'** 1 Wayne R. LaFave, Substantive Criminal Law §§ 1.2(c), 6.3(b) (3d ed. Oct. 2018 update) (hereinafter 'LaFave'). See *Bowman v. State*, 258 Ga. 829, 831 & n.4, (376 S.E.2d 187) (1989). For instance, 'bigamy requires a previous marriage, [and] statutory rape that the girl be under age.' 1 LaFave § 1.2 (c). See OCGA §§ 16-6-3 (defining statutory rape), 16-6-20 (defining bigamy). **Crimes are sometimes defined to require, as an additional element, that the conduct produce some 'particular result.'** 1 LaFave § 1.2(b). The most obvious example is murder, which requires that the conduct result in death. See id. § 1.2(c); *Baker v. State*, 250 Ga. 671, 672, (300 S.E.2d 511) (1983) ('[I]t is an essential element of the crime of murder to show that a death occurred ....'). **'The totality of these various items – conduct, mental fault, plus attendant circumstances and specified result when required by the definition of a crime – may be said to constitute the "elements" of the crime.' 1 LaFave § 1.2(c)." "The commission of a crime requires the joint operation of the actus reus and the mens rea, see OCGA § 16-2-1(a), as well as the concurrence of any attendant circumstances that are defined as elements of the crime. See 1 LaFave § 6.3(b). But the same is not true for elements that require a particular result.** Where a crime is defined in terms of the outcome, there can be 'a time lag between the conduct and the result.' Id. The connection that criminal law requires between the conduct and the result is proximate cause."

XI. PLEAS

A. COMPETENCY

Crawford v. State, 355 Ga.App. 401, 844 S.E.2d 294 (June 5, 2020). Following convictions for aggravated battery, rape, and related offenses, denial of motion for new trial vacated and remanded. Pretrial, the State filed a motion for involuntary commitment, and "pursuant to OCGA §§ 17-7-130 and 37-3-81.1, ... the trial court issued an order of commitment, declaring Crawford 'incapable of participating in the defense of his case to a meaningful degree, and that rehabilitative steps should be undertaken to bring [him] to the point of competency[.]' The Georgia Department of Behavioral Health & Developmental Disabilities ('DBHDD') then performed a 90-day competency evaluation on Crawford," and found him competent to stand trial. "Crawford did not file a special plea alleging that he was mentally incompetent to stand trial." **Held, trial court erred by failing to follow the mandate of OCGA § 17-7-130(d) that, after DBHDD's finding of competency, "the court *shall* hold a bench trial to determine the accused's mental competency to stand trial within 45 days of receiving the department's evaluation or, if demanded[.]**(Emphasis supplied.)." Contrary to State's argument, even where defendant filed no special plea of incompetence to stand trial, "'where a question about a defendant's competence is raised, the trial court must hold an "adequate hearing" on the issue.' (Citations and punctuation omitted.) *Wadley v. State*, 295 Ga.App. 556, 557 (672 S.E.2d 504) (2009)." "Here, counsel for Crawford informed the trial court that Crawford, who had a long

history of psychotic episodes, could not communicate with counsel in complete sentences or otherwise. Under these circumstances, the trial court erred when it did not hold a hearing on Crawford's competency to stand trial."

XII. POST-CONVICTION RELIEF/APPEALS

A. APPEALS, OUT OF TIME

Collier v. State, 307 Ga. 363, 834 S.E.2d 769 (October 21, 2019). Nine years after guilty plea to felony murder, defendant filed a pro se motion for out-of-time appeal. **1.** Trial court dismissed the motion without a hearing. Supreme Court vacates and remands for hearing, ***overruling*** **long line of cases holding that "'the trial court must hold an evidentiary hearing to determine whether defense counsel's unprofessional conduct was the cause of the untimeliness only where the motion raises an issue that would have been meritorious on the existing record had a timely appeal been taken.'** (Citations omitted.) *Stephens v. State*, 291 Ga. 837, 839(2), 733 S.E.2d 266 (2012)." *Following Garza v. Idaho*, 17-1026, ___ U.S. ___, 139 S.Ct. 738, 203 L.E.2d 77 (2019); *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.E.2d 985 (2000); and *Ringold v. State*, 304 Ga. 875, 823 S.E.2d 342 (2019). **2.** ***Also overruling*** **"a peculiar line of cases where we have held that a criminal defendant's right to appeal directly from a judgment entered on a guilty plea is qualified in scope; that is, the right to appeal is limited to those cases in which the issue on appeal can be 'resolved by facts appearing in the record.'** That line of cases has its genesis in *Morrow v. State*, 266 Ga. 3, 3-4, 463 S.E.2d 472 (1995) (affirming the denial of a defendant's motion for an out-of-time appeal from his conviction entered on a guilty plea)." **In fact, the right to appeal from a conviction is unequivocal whether following a trial or a guilty plea. "Nothing in OCGA § 5-6-33(a)(1) makes any distinction between judgments entered on a guilty plea or on a verdict after trial.** Likewise, OCGA § 5-6-34(a) provides that '[a]ppeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state: (1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35[.]' Again, judgments on guilty pleas are not excepted." **3. However,** "we hold that the State may raise the defense of 'prejudicial delay' to out-of-time appeal motions filed in the trial court." "'Prejudicial delay,' often referred to as 'laches,' is widely recognized in the common law and in a number of statutes,[cits.] including the habeas statute,[cit.] and has been applied to many categories of remedies in Georgia, including equitable and extraordinary remedies.[cits.] While the doctrine of laches is based on more than the mere passage of time, laches is often applied 'in obedience and in analogy to the statutes of limitations, in cases where it would not be unjust and inequitable to do so.' (Emphasis omitted.) *Grant v. Hart*, 192 Ga. 153, 165(a), 14 S.E.2d 860 (1941).[fn] When a defendant files a motion for an out-of-time appeal in the trial court, the State may argue that the defendant's delay in doing so has unduly prejudiced the State's ability to respond to the motion. Although a motion for an out-of-time appeal is not directly barred by the application of any statute of limitation, the State may argue and the trial court may consider the time periods, factors, and other criteria set out in the most analogous limitation and laches provisions – those found in the Habeas Corpus Act – in determining whether the State's defense has merit and the defendant's motion should be dismissed. See OCGA §§ 9-14-42(c); 9-14-48(e). See also *Wiley v. Miles*, 282 Ga. 573, 577(3), 652 S.E.2d 562 (2007)." Leaves for future determination "the exact parameters of the prejudicial delay defense when raised in motions filed in the trial court, as the State did not raise this defense below. Further, it is not necessary in this case to categorize the out-of-time appeal remedy, to decide more about the process for obtaining it, or to determine whether the process in the trial court should be maintained. In particular, we do not address whether a motion for an out-of-time appeal may be categorized as an extraordinary or equitable

remedy or whether the availability of habeas corpus relief, pursuant to OCGA § 9-14-40 et seq., constitutes an 'adequate remedy at law.'" **Peterson (joined by Blackwell, Boggs and Bethel), concurs specially, noting "that a granted motion for out-of-time appeal from a guilty plea may carry with it a similar opportunity to expand the record with appointed counsel. Although we have not yet held that a granted motion for out-of-time appeal from a guilty plea authorizes not only an appeal but also a motion to withdraw the guilty plea, such a conclusion would appear to be merely a logical extension of statements we have previously made.** See *Gooden v. State*, 305 Ga. 835, 837 n. 3, 828 S.E.2d 302 (2019) (recognizing no discernable basis on which to distinguish motions for new trial and motions to withdraw a guilty plea as to when ineffective assistance claims can be raised). And indeed, the Court of Appeals has already allowed such motions. See *Dawson v. State*, 302 Ga.App. 842, 843-844, 691 S.E.2d 886 (2010). Such an expansion of post-conviction litigation options may have sweeping consequences for our criminal justice system. Indeed, many of the complications arising from our post-conviction relief jurisprudence arise because Georgia is one of few jurisdictions to allow — much less require — expansion of the record for ineffectiveness claims to occur on direct appeal with appointed counsel. The federal system — because of the lack of evidentiary hearings on motions for new trial — resolves most of these issues in habeas."

B. HABEAS CORPUS

Rawles v. Holt, 304 Ga. 774, 822 S.E.2d 259 (December 10, 2018). Following convictions for armed robbery and related offenses, habeas court erred by finding that defendant waived right to seek habeas relief. On motion for new trial, defendant and State agreed to reduced sentence in return for waiver of right to appeal. Agreement didn't, however, expressly waive right to seek habeas relief. Trial court commented that "you can file [for habeas relief] within four years but I believe that would be in violation of your waiver of your right to appeal." No evidence before the habeas court, however, showed any such waiver. While such a waiver is valid and enforceable, *Allen v. Thomas*, 265 Ga. 518, 458 S.E.2d 107 (1995), they must either be signed in writing or revealed by "detailed questioning of the defendant by the trial court." "Thus, the State must show by one or both of these means that Rawles specifically waived his right to file a habeas corpus petition. See *Allen v. Thomas*, 161 F.3d 667, 670(II) (11th Cir. 1998) (employing a somewhat different test for analyzing federal habeas review waiver but concluding that the burden is ultimately on the State to show such waiver). In this case, there was no written waiver, and the colloquy between the trial court and Rawles shows that Rawles understood that he was specifically waiving his right to *appeal* and that Rawles affirmed that he made the decision to waive that right freely and voluntarily. The record does not show, however, that he knowingly waived the right to petition for a writ of *habeas corpus*."

C. NEW TRIAL

1. FILING, HEARING AND PROCEDURE

Allen v. State, 353 Ga.App. 442, 838 S.E.2d 106 (January 15, 2020). Following convictions for armed robbery and related offenses, **trial court erred by denying motion for new trial without conducting hearing on amended motion.** Court conducted hearing on original motion for new trial, and orally announced that it would deny the motion. "After the motion for new trial hearing but prior to the trial court entering a final disposition, Allen filed a second amended motion for new trial alleging that trial counsel provided ineffective assistance of counsel by failing to clarify whether it could ask the challenged proposed general voir dire questions during individual voir dire and by failing to ask the questions during individual voir dire. Allen requested a hearing on his new claims," which were slightly different from his original claim that the trial court improperly limited voir dire. **"Pursuant to OCGA § 5-5-40(b), a motion for new trial 'may be amended any time on or before the ruling thereon.'** '[I]t is elementary that an oral order is not

final nor appealable until and unless it is reduced to writing, signed by the judge, and filed with the clerk.' (Citation, punctuation, and emphasis omitted.) *Titelman v. Stedman*, 277 Ga. 460, 461, 591 S.E.2d 774 (2003). **Accordingly, Allen was entitled to amend his motion for new trial after the trial court made its oral pronouncement from the bench until the trial court filed its final order.** See *Hegedus v. Hegedus*, 255 Ga. 44, 45(1), 335 S.E.2d 284 (1985) (holding that a motion for new trial may be amended at any time prior to the final disposition). 'A]bsent a waiver, a movant for new trial is entitled to a hearing on the motion in the trial court before a ruling is made thereon.' *Sidhu v. Georgia Macon Contractors & Equip.*, 263 Ga.App. 100, 101, 587 S.E.2d 252 (2003)." Defendant's claims of ineffective assistance "relate to matters outside of the record and require trial counsel's testimony."

XIII. PROBATION

A. REVOCATION OF PROBATION

State v. Huffman, 351 Ga.App. 853, 833 S.E.2d 552 (September 18, 2019). Trial court erred by dismissing probation revocation petition for lack of specificity. Defendant was on probation for withholding information from a practitioner (OCGA § 16-13-43); the State alleged that she violated probation by committing new offenses of first degree forgery and theft by deception. "The trial court concluded that ... the petition was inadequate as a matter of law because it 'fail[ed] to allege the victim or the manner in which the alleged crime was committed,' which affected Huffman's 'ability to prepare a defense' and her 'double jeopardy protection.'" Court of Appeals disagrees, *citing Wolcott v. State*, 278 Ga. 664, 667(2), 604 S.E.2d 478 (2004) **(revocation petition comported with due process when it "set forth the crime, the approximate date and the particular venue" of the probation violation). Petition here complied with these requirements by reciting that defendant "did commit the new felony offenses of Forgery-First Degree and Theft by Deception, on or about August 10, 2018, in Houston County, Georgia."** *Distinguishing Jackson v. State*, 301 Ga. 137, 141(1), 800 S.E.2d 356 (2017) (indictment or accusation must set out elements of offense or "allege the facts necessary to establish violation of a criminal statute").

XIV. PROCEDURE

A. CUMULATIVE ERROR/EFFECT

Lofton v. State, S20A0196, ___ Ga. ___, 846 S.E.2d 57, 2020 WL 3581229 (July 1, 2020). Felony murder conviction affirmed. Cumulative effect of actual and assumed errors did not require reversal. "The actual and assumed errors we must consider collectively in this case include: (1) the assumed errors in the trial court's admission of the three Facebook photographs of Appellant with handguns; (2) the assumed error in the trial court's refusal to redact portions of Appellant's interview in which Detective Kenck confronted Appellant with photographs of Appellant with handguns; (3) the assumed error in the trial court's refusal to let Appellant cross-examine Detective Kenck about [co-defendant] Young's demeanor while Young was in the interview room awaiting interview; and (4) trial counsel's assumed deficiency in not objecting to the admission of Appellant's Facebook username and actual deficiency in failing to object to the State's improper closing arguments. Amassed against the potential harm resulting from those actual or assumed evidentiary errors and counsel's deficiencies was, as discussed at length above, a substantial amount of properly admitted evidence that strongly supported Appellant's guilt as a party to the felony murder. Moreover, the jury was charged on parties to a crime, that it was not permitted to be influenced by sympathy for or against either party, and that arguments of counsel are not evidence. **The combined prejudicial effect of the actual and assumed evidentiary errors and deficiencies by counsel is greater than any single error would be, considered in isolation. Analysis of the cumulative prejudicial effect therefore makes this a much closer**

case. However, even when considered as a whole under the most demanding standard that applies to any of the alleged errors, the cumulative prejudicial effect of the actual and assumed evidentiary errors and counsel's deficiencies is not sufficient to outweigh the strength of the properly admitted evidence of Appellant's guilt as a party to felony murder based on armed robbery."

State v. Lane, 308 Ga. 10, 838 S.E.2d 808 (February 10, 2020). Following defendant's convictions for malice murder and related offenses, trial court properly granted motion for new trial, based on cumulative prejudicial effect of trial error (including ineffective assistance of counsel). *Overruling numerous prior decisions rejecting cumulative effect of trial error.* **1.** "We ... overrule our prior decisions and those of the Court of Appeals that hold that the prejudicial effect of multiple trial court errors may not be considered cumulatively in determining whether a criminal defendant is entitled to a new trial, and disapprove any decisions with language to that effect. ... **We hold that the proper approach instead is to consider collectively the prejudicial effect, if any, of trial court errors, along with the prejudice caused by any deficient performance of counsel." 2.** "We note that the only trial court error and deficiencies of counsel that we analyze here involve evidentiary issues. Some other types of error may not allow aggregation by their nature, but that question is not presented here. If a defendant in a future case seeks to argue to the reviewing court that he is entitled to a new trial based on the cumulative effect of errors outside of the evidentiary context, he would do well to explain why the approach that we adopt here should be extended beyond the evidentiary context. And even in the evidentiary context, a defendant who wishes to take advantage of the rule that we adopt today should explain to the reviewing court just how he was prejudiced by the cumulative effect of multiple errors." **3.** Record supports trial court's finding of at least two instances of ineffective assistance of counsel and improper admission of a hearsay statement by a co-conspirator. **Prejudice analysis:** "we bear in mind the relevant standards for the errors at issue. See *Cargle v. Mullin*, 317 F.3d 1196, 1220 (10th Cir. 2003) (**'[T]he appropriate legal standard for a cumulative error claim depends on the harmless-error standard that would apply to the constituent errors.'**); see also [*United States v. Marchan*, 935 F.3d 540, 549 (7th Cir. 2019) ('To establish cumulative error a defendant must show that (1) at least two errors were committed in the course of the trial; (2) considered together along with the entire record, the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial.' (citation and punctuation omitted)). Prejudice from ineffective assistance of counsel requires a showing by the defendant of 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. And, again, a nonconstitutional trial court error is harmless if the State shows that it is 'highly probable that the error did not contribute to the verdict,' an inquiry that involves consideration of the other evidence heard by the jury. *Bannister* [*v. State*, 306 Ga. 289, 301(5)(b), 830 S.E.2d 79 (2019)] (citation and punctuation omitted); *Williams* [*v. State*, 302 Ga. 147, 154-155(3), 805 S.E.2d 873 (2017)]. Because here, as discussed below, prejudice or harm has been shown under either of the applicable standards, **we need not decide exactly how multiple standards may interact under cumulative review of different types of errors**.[fn] And in most cases a difference in the standards will not make a difference in the result; the collective effect of the various errors will be sufficiently harmful to warrant a new trial, or not. But in the rare case in which the application of different standards makes a difference in the outcome, the parties should brief the issue of how the standards interact in that particular case." **"We can think of at least two other standards that might apply to other types of errors.** On ordinary review, the State must prove that a constitutional error was harmless beyond a reasonable doubt. See *Stovall v. State*, 287 Ga. 415, 418(3), 696 S.E.2d 633 (2010). And certain unpreserved trial court errors are subject to plain error review, under which the defendant must show, among other things, that the error probably affected the outcome below, a standard we have equated with the prejudice prong for an

ineffective assistance of counsel claim. See *Hampton v. State*, 302 Ga. 166, 167-169(2), 805 S.E.2d 902 (2017) (error in jury charge); see also *Hightower v. State*, 304 Ga. 755, 759(2)(b), 822 S.E.2d 273 (2018) (trial court expression of opinion on the facts); *Castillo-Velasquez v. State*, 305 Ga. 644, 652-653(4), 827 S.E.2d 257 (2019) (evidentiary error)."

B. DISMISSAL

State v. Banks, 348 Ga.App. 876, 825 S.E.2d 399 (February 28, 2019). In misdemeanor prosecutions, trial court could dismiss without prejudice, but not with prejudice, based on State's failure to provide witness lists pursuant to defense discovery requests under OCGA § 17-16-21. Here, the court's dismissal orders didn't specify whether they were with or without prejudice; those where the statute of limitations had not yet expired were deemed without prejudice, but those where the statute had expired were deemed with prejudice, and reversed. *Accord, State v. Walker*, A20A0544, ___ Ga.App. ___, 846 S.E.2d 438, 2020 WL 3634271 (July 2, 2020) (trial court couldn't dismiss DUI prosecution where State's witness failed to appear, but statute of limitation had run, effectively a dismissal with prejudice; seven judges dissent, would overrule *Banks*).

State v. Remy, 308 Ga. 296, 840 S.E.2d 385 (March 13, 2020). In prosecution for felony murder and related offenses, trial court erred in dismissing new indictment, filed after court-ordered deadline in scheduling order. "The trial court did not cite any authority, and we are unaware of any, allowing a trial court to dismiss a subsequent indictment because it was not filed by a date set forth in a trial court order pertaining to the original case."

C. INMATE ACCESS/RECORDS

State v. Rowe, S20A0504, ___ Ga. ___, 843 S.E.2d 537, 2020 WL 2516490 (May 18, 2020). In capital murder prosecution, trial court's ex parte order sealing certain Department of Corrections (DOC) records affirmed in part, reversed in part. Defendants are accused of murder during a prison escape. Trial court entered orders allowing counsel and expert witnesses to interview defendants and various witnesses, including "an order directing that all ex parte visitation orders be placed in the inmates' files under seal, filed elsewhere under seal, or destroyed." DOC appeals. **Held**, **1.** trial court had the authority to address the matter of records of access to inmates by defense representatives. "[W]e have previously held that **orders directing prison or jail authorities to allow visits by defense team members under appropriately specified conditions are proper. This authority arises out of the statutory provision granting the trial courts the authority '[t]o control, in the furtherance of justice, the conduct of [their] officers and all other persons connected with a judicial proceeding before [them], in every matter appertaining thereto.' OCGA § 15-1-3(4).** See *Zant v. Brantley*, 261 Ga. 817, 818(1), 411 S.E.2d 869 (1992) ('By virtue of his custody of the defendant/movant, the warden was a person "connected with" the pending motion for new trial and was thus subject under OCGA § 15-1-3(4) to the trial court's control of his conduct in the furtherance of justice. Thus, the trial court did not need personal jurisdiction of the warden, a non-party, to issue the order from which this appeal stems.'). In addition, such authority arises out of the court's obligation to protect the constitutional rights of the defendant; therefore, that authority exists even if in contradiction to other non-constitutional sources of law and even if the prison or jail officers addressed in such a visitation order are not joined as a party. See *Pope v. State*, 256 Ga. 195, 212(22), 345 S.E.2d 831 (1986) (holding that the statute that classifies the records of the Board of Pardons and Paroles must yield to a capital defendant's constitutional right to mitigating evidence), disapproved on other grounds by *Willis v. State*, 304 Ga. 686, 706 n. 3 (11)(a), 820 S.E.2d 640 (2018), and overruled on other grounds by *Nash v. State*, 271 Ga. 281, 281, 519 S.E.2d 893 (1999); *James v. Hight*, 251 Ga. 563, 563-564, 307 S.E.2d 660 (1983) (holding that '[t]o the extent that there exists

a conflict between the statutory authority vested in the DOR [now the DOC] to transfer prisoners from one correctional institute to another, and the authority vested in the superior court to enforce the Constitution, the former must yield to the latter' and holding that 'it was not necessary that the Commissioner be joined as a party'). See also *Putnal v. State*, 303 Ga. 569, 582(6) n.10, 814 S.E.2d 307 (2018) ('We remind the trial court that, as a superior court, it has the power to draft ex parte orders directing the official in charge of a place of incarceration housing a defendant in a case pending before it to permit evaluations of the defendant by defense-retained experts in a manner that not only protects the identity of the experts for whom access is granted but also prohibits the official in charge and his staff, including jail personnel, from discussing or disclosing this information or any other information contained in the orders to anyone other than the trial court or the defense.'). Thus, we conclude that **the trial court had the authority to direct the DOC, as a non-party, to take appropriate steps to ensure the rights of Rowe with respect to protecting his defense strategy from disclosure to the prosecution." 2.** "While we conclude that the trial court had the *authority* to address the matter at issue here, we also conclude that **the *scope* of the trial court's order is nonetheless subject to review for an abuse of discretion.** See *Atlanta Newspapers v. Grimes*, 216 Ga. 74, 79(1-5), 114 S.E.2d 421 (1960). Here, the trial court's order was in contravention of a duly enacted regulation regarding the management of inmate records. Specifically, the regulation requires that inmate records be maintained in each inmate's personal prison file. See Ga. Comp. R. & Regs., r. 125-2-4-.05(b). If contravening this regulation were actually necessary to secure Rowe's constitutional rights, we would fully affirm the trial court's decision here. However, we conclude that the portion of the trial court's order directing the removal of the relevant records from inmates' files and sealing them in the legal office of the DOC was an abuse of discretion, at least on the current record. Specifically, **ordering the removal of the records from their usual place to the legal office was unnecessary, when the key issue was controlling the persons who were entitled to examine them. Instead, the trial court should have, as this Court has approved previously, see *Putnal*, 303 Ga. at 582(6) n.10, 814 S.E.2d 307, ordered the prison officials not to disclose any of the relevant visitation records to the prosecuting attorney or the prosecution team or to any person whose access to the records is not reasonably justified.** In ordering a divergence from the otherwise-binding regulation, see Ga. Comp. R. & Regs., r. 125-2-4-.05(b), without sufficient need, the trial court abused its discretion in exercising its authority."

D. PLEA IN BAR

Davis v. State, 307 Ga. 784, 838 S.E.2d 233 90 (January 27, 2020). *Affirming* 347 Ga.App. 757, 820 S.E.2d 791 (2018). Trial court properly denied defendant's pre-indictment plea in bar, based on statute of limitations. Defendant, arrested on warrants for rape, burglary, and related offenses, filed pleas in bar based on statute of limitation. Trial court granted the plea as to some charges and denied as to others. Court of Appeals held that trial court properly denied pleas as "there can be no challenge to an indictment through a special plea in bar until there is an indictment filed." Supreme Court agrees: **"a prosecutor must initiate an action, through an indictment or formal accusation, before a person can file a pleading challenging such action. ... Thus, until either an indictment or an accusation is filed, a prosecutor's action has not commenced and there is nothing for a plea in bar to defeat."**

XV. SEARCH AND SEIZURE

A. ARREST

1. PROBABLE CAUSE

Westbrook v. State, 308 Ga. 92, 839 S.E.2d 620 (February 28, 2020). Malice murder and related convictions affirmed; trial court properly denied motion to suppress evidence found upon

defendant's arrest. **1.** Officers had probable cause to arrest defendant for theft of services based on information from apartment management that he was living in an apartment that was supposed to be vacant. "[T]he detectives were not required to accept as innocent Westbrook's explanation that a friend had given Westbrook permission to stay at the apartment," *citing District of Columbia v. Wesby*, ___ U.S. ____, ____, 138 S.Ct. 577, 588-589, 199 L.Ed.2d 453 (2018) (explaining that "probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts," and that a suspect's innocent explanation should be viewed under the totality of the circumstances and not in isolation). **2. Fact that officer intended to arrest for criminal trespass is irrelevant.** "[I]t is clear that 'an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. See *Whren v. United States*, 517 U.S. 806, 812-813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (reviewing cases); *Arkansas v. Sullivan*, 532 U.S. 769, 121 S.Ct. 1876, 149 L.Ed.2d 994 (2001) (per curiam). That is to say, **his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.'** *Devenpeck v. Alford*, 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004)."

Sexton-Johnson v. State, 354 Ga.App. 646, 839 S.E.2d 713 (February 26, 2020). Conviction for felony obstruction of officer affirmed. Officer had probable cause to arrest automobile passenger for giving false name. **"Officer Hall testified that when he ran a check of the passenger's information on the computer in his patrol car, it came up as false. The information Officer Hall gleaned from the computer report was enough to establish probable cause for the passenger's arrest."**

State v. Gaggini, 321 Ga.App. 31, 740 S.E.2d 845 (March 28, 2013). In DUI prosecution, trial court erred in suppressing intox results. "[C]ontrary to the trial court's ruling, **'hearsay is admissible in determining the existence of probable cause [for arrest].'** *Bell v. State,* 291 Ga.App. 437, 439(1), 662 S.E.2d 248 (2008) (punctuation and footnote omitted)." *Accord, Burkes v. State*, 347 Ga.App. 790, 821 S.E.2d 33 (October 25, 2018) (decided under 2013 Evidence Code, OCGA §§ 24-1-2(c); 24-1-104(a); 24-4-402); *Mason v. State*, 353 Ga.App. 404, 837 S.E.2d 711 (January 8, 2020).

2. WHAT CONSTITUTES

Smith v. State, A20A0512, ___ Ga.App. ___, 844 S.E.2d 869, 2020 WL 3168547 (June 15, 2020). Vehicular homicide and related convictions affirmed; trial court properly denied defendant's motion to suppress. **Contrary to defendant's argument, he wasn't in custody such as to require *Miranda* warnings before being questioned by officers at the scene of his traffic stop. Deputy had defendant sit in the back of his police car to wait out a heavy rain.** "[Deputy] Pounds testified at the suppression hearing that during that time, he allowed Smith to get out of his vehicle to urinate and to smoke a cigarette: 'we were trying to stay out of the rain. It's really raining, so I'm not trying to get wet. He was you know, he could have stayed out there if he wanted to, but he got in. But then he gets back out a couple of times, actually.' At no time did Pounds tell Smith he was under arrest, nor did he place Smith in handcuffs."

Richardson v. State, 353 Ga.App. 368, 837 S.E.2d 524 (January 2, 2020). In hijacking prosecution, trial court erred by suppressing defendant's voluntary, non-custodial, non-*Mirandized* statement at scene of crime. Officers responded to call at apartment complex where victim reported being accosted by a man with a gun. While there, officers saw defendant looking out an apartment window. Officers knocked on the apartment door, handcuffed defendant, and took him to victim, who identified him as the assailant. Defendant made several admissions during this time. Officers then placed him in patrol car and retrieved gun which defendant

admitted was in apartment. **1. Defendant was not in custody.** "It is well-established that the mere use of handcuffs does not, without more evidence of force, render a person's statements during an investigative stop involuntary. *Stringer v. State*, 285 Ga. 842, 844-845 (2) (684 S.E.2d 590) (2009) ('Officers may handcuff a suspect during an investigatory stop when such action is either reasonable under the circumstances to protect themselves or the public, or to maintain the status quo') (citation and punctuation omitted), disapproved on other grounds, *State v. Sims*, 296 Ga. 465, 469 n. 7 (2)(a) (769 S.E.2d 62) (2015). The videotape before us confirms the officers' testimony that they placed Richardson in handcuffs for their own safety and for purposes of conducting a second-tier investigatory stop lasting approximately three minutes. See *Stringer*, 285 Ga. at 845(2); *New York v. Quarles*, 467 U.S. 649, 657 (104 S.Ct. 2626, 81 L.Ed.2d 550) (1984) (no constitutional violation when police failed to read *Miranda* warnings while apprehending a suspect and when 'confronted with the immediate necessity of ascertaining the whereabouts of a gun' discarded by the defendant). '[W]here an accused is neither in custody nor so restrained as to equate to a formal arrest, any statements made to an investigating officer are made under noncustodial circumstances and *Miranda* warnings are not required.' (Citation and punctuation omitted.) *Stallings v. State*, 343 Ga.App. 135, 143(2) (806 S.E.2d 613) (2017). *Miranda* warnings were not necessary during this brief period, which ended when the victim identified Richardson as his assailant and Richardson was taken to the patrol car. See *State v. Price*, 322 Ga.App. 778, 781 (746 S.E.2d 258) (2013) (an investigatory traffic stop 'was not elevated into an arrest by removing [the defendant] from [a] vehicle and handcuffing him' pending the outcome of the investigation)."

B. ARTICULABLE SUSPICION FOR STOP / *TERRY* STOPS

1. CRIMINAL ACTIVITY, OFFICER'S KNOWLEDGE OF

In re: C.B., 353 Ga.App. 383, 837 S.E.2d 544 (January 7, 2020). In delinquency action, juvenile court properly granted C.B.'s motion to suppress evidence obtained from him by officer. Officer lacked articulable suspicion to detain juvenile or probable cause for his arrest. "The record reflects that at about 10:00 p.m., while driving on Highway 19 in Glenwood, Georgia, a police officer saw a person, C.B., wearing a backpack and walking on the side of the road. The officer knew that there had been numerous break-ins within the last two weeks in Glenwood, close to where C.B. was walking. The officer thought it was suspicious to be walking down the street with a backpack at night in an area where break-ins had recently occurred, so he put on his car's blue lights and pulled over in front C.B. to ask C.B.'s name. After the officer got out of the car, he immediately smelled alcohol on C.B.'s breath and then smelled the 'odor of marijuana on him.' When asked, C.B. would not give the officer his name. The officer told C.B. to stay in front of his vehicle until he could get a patrol vehicle there, but C.B. quickly left the scene. The officer followed C.B. in his car, and C.B. eventually came back towards the car. When the officer attempted to put C.B. in handcuffs, C.B. pushed back against the officer. C.B. was eventually placed in handcuffs with the help of other officers who had arrived at the scene. When the officers searched C.B.'s backpack, they found a grinder that contained marijuana residue and a bottle of alcohol." **1. Initial approach was first-tier encounter.** "Even though the officer pulled in front of C.B., there was still room for C.B. to walk past the car. '[G]iven the late hour [and] the hazard presented by vehicles parked on the side of a dark highway,' the use of the officer's blue lights as he pulled over to the side of the road did not necessarily raise the level of interaction, as a reasonable person would still feel free to continue walking away from the officer," *quoting Cash v. State*, 337 Ga.App. 511, 514-515(2), 786 S.E.2d 560 (2016). **2. "[W]ithout a foundation for the officer's ability to detect the odor of marijuana, his testimony regarding the odor of marijuana does not support a reasonable suspicion of illegal activity." 3.** "None of C.B.'s described activities—walking on the side of the road at night, being present in a high-crime area, wearing a backpack, and smelling of alcohol—are a crime in and of themselves, 'nor are they

enough to make an objective determination that [C.B.] was about to be engaged in criminal activity.' *Ewumi v. State*, 315 Ga.App. 656, 661 (1), 727 S.E.2d 257 (2012) (punctuation omitted)." **4. "Finally, the officer's detection of the smell of alcohol on C.B.'s breath does not establish reasonable suspicion of criminal activity. The officer watched C.B. walking and interacted with him but did not testify that C.B. acted intoxicated or that he was obviously underage."**

2. SUSPECTED DRUG ACTIVITY/KNOWN DRUG AREA

Womack v. State, 355 Ga.App. 804, 845 S.E.2d 747 (June 24, 2020). Conviction for marijuana possession reversed; trial court erred by denying motion to suppress. **1. Trial court properly found that initial contact between officer and defendant was first-tier, consensual encounter.** Officer walked up to defendant, who was exiting a tobacco shop, "asked if he could see Womack's identification, and asked for consent to search his person, which Womack gave." **2. Encounter became second-tier, however, when defendant tried to turn away from officer as officer tried to search his backpack, and officer grabbed defendant by the wrist. Officer testified that, at that point, Womack wasn't free to leave. 3. Officer had no articulable suspicion to detain defendant at that time, however.** "The officer testified that when he first saw Womack walk out of the store, '[h]e seemed like a regular person. He just walked out the store.' But because Womack then 'looked around, noticed us and started to power walk off,' the officer developed a suspicion that 'something might be up,' or that Womack was 'committing some kind of crime.' When asked, 'What were you suspicious of at that point?,' the officer replied, 'I was just suspicious of a possible crime.' When asked what made him speak with Womack, the officer replied, 'His demeanor.' But the officer was not certain that Womack even noticed the patrol car before his power walk. He added that he had 'located drugs in backpacks in high crime areas late at night,' but he never testified that seeing Womack wearing a backpack added to his suspicions. The officer also testified that based on Womack 'power walk[ing] away,' he 'believed it was borderline loitering.' The officer referred to unspecified law that (in his own words) provided that 'if somebody notices my vehicle and takes flight, which power walking would be borderline, that is loitering.' Yet the officer also testified that at the time that he made contact with Womack, 'no crime ha[d] been committed.' Finally, the officer himself never testified that he had sufficient information to conduct a tier-two stop." "'At best, the officer's stated reasons raised a subjective, unparticularized suspicion or hunch.' *Walker v. State*, 299 Ga.App. 788, 791(1), 683 S.E.2d 867 (2009)." **4. Contrary to officer's belief, no "loitering" occurred in violation of OCGA § 16-11-36 merely because defendant "powerwalked" away upon seeing the officer's car.** "[T]he officer failed to remember that loitering requires a person to be 'in a place at a time or in a manner not usual for law-abiding individuals.'" **5. Defendant's consent to a search of his person did no extend to the backpack he was wearing.** "It follows that it was reasonable for Womack to pull away when he noticed the officer had grabbed his backpack." "'[A] citizen's ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter. Indeed, even running from police during a first-tier encounter is wholly permissible. And an individual may refuse to answer or ignore the request and go on his way if he chooses, for this does not amount to any type of restraint.' (Citation and punctuation omitted.) *Brown v. GeorgiaCarry.org*, 331 Ga.App. 890, 896, 770 S.E.2d 56 (2015)." **6.** "[B]ecause the officer was not legally authorized to detain Womack when he grabbed his wrist, the subsequent confession that there was marijuana in the backpack was a product of an illegal detention."

Sexton-Johnson v. State, 354 Ga.App. 646, 839 S.E.2d 713 (February 26, 2020). Conviction for felony obstruction of officer affirmed; evidence supported finding the he was in the lawful discharge of his duties. **"When Officer Hall smelled 'an overwhelming amount of unburnt**

marijuana' and alcohol emanating from the vehicle, he was authorized to conduct a brief investigative *Terry* stop because he had a reasonable suspicion that the occupants of the vehicle may be involved in criminal activity. [Cits.] During the course of this second-tier encounter, Officer Hall also was authorized to request identification from the occupants, and when the back-seat passenger gave false information about her identity, the officer had probable cause to arrest her."

3. TRAFFIC OFFENSES – EQUIPMENT/INSURANCE/TAG VIOLATIONS

State v. Williams, 354 Ga.App. 418, 841 S.E.2d 66 (March 12, 2020). In prosecution for possession of methamphetamine with intent to distribute, and related offenses, trial court erred by granting motion to suppress. Officer had articulable suspicion to conduct traffic stop based on apparent window tint violation. **1. "'An officer's belief that a suspect's window tint violates OCGA § 40-8-73.1 is sufficient to justify an investigatory stop, even if the officer later determines from a field test that the window tint did not in fact violate the statute.'** (Punctuation omitted.) *Ciak v. State*, 278 Ga. 27, 30(3), 597 S.E.2d 392 (2004)." "Here, the trial court found that the officer testified that he stopped the vehicle 'based on a supposed window tint violation as codified in OCGA § 40-8-73.1(b)' and that the officer testified that he 'could see himself in the window's reflection.' These findings are sufficient to justify the traffic stop." **2.** "[T]he Supreme Court of Georgia has rejected a defendant's argument that 'a traffic stop based on OCGA § 40-8-73.1 could not be valid because the statute contains too many elements which cannot be ascertained by an officer merely observing a vehicle with tinted windows[, s]pecifically, ... that an officer cannot determine before stopping the car whether ... the tint was applied by the manufacturer or as an after-market modification. ...' *Ciak v. State*, 278 Ga. 27, 30(3), 597 S.E.2d 392 (2004)."

4. TRAFFIC OFFENSES – LICENSE VIOLATIONS

Kansas v. Glover, 18-556, ___ U.S. ___, 140 S.Ct. 1183, 206 L.Ed.2d 412, 2020 WL 1668283 (April 6, 2020). *Reversing Kansas Supreme Court.* In prosecution for driving with revoked license as habitual defender, trial court erred by granting motion to suppress; **officer had articulable suspicion for traffic stop when check of vehicle tag revealed that the owner of a truck had a revoked license. Officer observed no other traffic violations and didn't know Glover, but assumed, correctly, that the registered owner was also the driver. This was a reasonable assumption.** Articulable suspicion "'depends on the factual and practical considerations of everyday life on which *reasonable and prudent men*, not legal technicians, act.' [*Prado Navarette v. California*, 572 U.S. 393, 402, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014)] (quoting *Ornelas v. United States*, 517 U.S. 690, 695, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (emphasis added; internal quotation marks omitted)). Courts 'cannot reasonably demand scientific certainty ... where none exists.' *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). Rather, they must permit officers to make 'commonsense judgments and inferences about human behavior.' *Ibid.*; see also *Navarette*, *supra*, at 403, 134 S.Ct. 1683 (noting that **an officer "'need not rule out the possibility of innocent conduct'"**)." "The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences. The reasonable suspicion inquiry 'falls considerably short' of 51% accuracy, see *United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), for, as we have explained, '[t]o be reasonable is not to be perfect,' *Heien v. North Carolina*, 574 U.S. 54, 60, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014)." Rejects argument of Sotomayor in dissent that deputy's "inference was unreasonable because it was not grounded in his law enforcement training or experience. Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable

suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience. ... The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis." Also rejects dissent's argument that assuming that the owner is the driver allows officers to make stops based on a statistical profile and not on the actions of the individual. "[W]e have previously stated that officers, like jurors, may rely on probabilities in the reasonable suspicion context." **Kagan, joined by Ginsburg, concurs**, noting that the deputy's suspicion here was justified because the owner's license was *revoked* (meaning that he tended to repeatedly violate driving laws and was thus likely to be driving though his license was invalid) as opposed to *suspended* (which could occur with no traffic violations at all). **Sotomayor dissents**: "the reasonable-suspicion inquiry does not accommodate the average person's intuition. Rather, it permits reliance on a particular type of common sense—that of the reasonable officer, developed through her experiences in law enforcement."

C. DETENTION BEYOND INITIAL STOP

State v. Drake, 355 Ga.App. 791, 845 S.E.2d 765 (June 24, 2020). In prosecution for illegal drug possession and related offenses, trial court properly granted motion to suppress, based on detention beyond articulable suspicion for stop. During traffic stop, officers obtained consent to search defendant's vehicle. After the vehicle search, officers then asked to search defendant's person, revealing "a small bottle that Drake acknowledged contained oxycodone and morphine." **1.** "The evidence shows that the traffic citation had been written and therefore the purpose of the stop completed at least five to six minutes before police finished their search of Drake's vehicle. **By seeking Drake's permission to conduct a second search after that time (and at least seven minutes after the completion of the traffic citation), the State 'exceeded the scope of a permissible investigation of the initial traffic stop.'** *State v. Felton*, 297 Ga.App. 35, 37, 676 S.E.2d 434 (2009) (punctuation omitted). In other words, detaining Drake further to request consent to search his person violated his Fourth Amendment rights. *Rodriguez* [*v. United States*, 575 U.S. 348, 356-357, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015)]; *Heard v. State*, 325 Ga.App. 135, 137-138(1), 751 S.E.2d 918 (2013)." Contrary to State's argument, **"Drake's consent to the search of his vehicle at the outset of the traffic stop does not demonstrate that he agreed to be detained further, after that search was completed. Under these circumstances, once the search of the vehicle was completed, the traffic stop was at an end and [Officer] Holly could not thereafter detain Drake and ask for permission to conduct a second search unless Holly had 'a particularized reason to suspect that [Drake was] engaged in some other criminal activity.'**[fn] *Dominguez v. State*, 310 Ga.App. 370, 372, 714 S.E.2d 25 (2011)." Trial court properly concluded "that Drake's consent to the search of his person was neither freely or voluntarily given." **2. Officers had no additioual articulable suspicion, although** "Holly thought he smelled alcohol on Drake; police recovered a partially-consumed container of alcohol in Drake's car; inside of Drake's car, police found a white substance that Holly believed resembled crack cocaine; and in response to police questions, Drake stated that he had previously gotten 'in trouble' because of methamphetamine. Like the trial court, however, we fail to see how any of these facts would lead a reasonable person to believe that Drake was involved in criminal activity related to illegal narcotics." Officer had already determined that defendant wasn't DUI, and the field test of the white substance was negative for cocaine. "Finally, the mere fact that a person admits that at some point in his past he 'got in trouble' because of methamphetamine does not provide a basis for suspecting that the person is somehow currently involved in illegal narcotics activity."

Mullins v. State, 355 Ga.App. 452, 844 S.E.2d 519 (June 10, 2020). Interlocutory appeal in prosecution for possession with intent to distribute a controlled substance, theft by receiving, and

related offenses. **Trial court erred by denying motion to suppress evidence found in search of car after illegally prolonged detention.** Officers stopped rented car "that was involved in a vehicle break-in involving three black males the previous day," according to a license plate reader. The officers observed no traffic offenses; the three occupants had no outstanding warrants, were not personally suspects in the prior vehicle break-in, and refused consent to search. The occupants were detained for 58 minutes while an officer went to watch surveillance video of the vehicle break-in; "that officer reported that no faces could be seen in the video recording, although one of the men in the recording was wearing grey pants and white shoes, which purportedly matched clothing worn by the back seat passenger.[fn] When the occupants denied consent to search the car, the investigator told them that if they did not consent, they would have to wait while she tried to obtain a search warrant." The lead investigator then contacted the rental car company, which advised that none of the occupants was an authorized driver on the rental agreement, and asked that the car be impounded. "As a result, approximately one hour and 52 minutes after the traffic stop began, the investigator told other officers at the scene to impound the vehicle. The three occupants were then removed from the car and placed in handcuffs, although, according to the officer who testified at the hearing, they were not yet under arrest.[fn] Officers then conducted an inventory search of the car, during which they found, among other things, four Xanax pills and several items that had been reported as stolen from another car earlier that day. At that point, police considered the car's occupants to be 'in custody' and advised the men of their *Miranda*[cit.] rights and further questioned them. No search warrant ever was obtained. The officer who testified did not personally attempt to contact any of the drivers authorized by the rental agreement, nor did he know if any other officers did so." **Held, "officers failed to diligently pursue a means of investigation likely to confirm or dispel the suspicion giving rise to the stop, and thus unreasonably prolonged the stop beyond the time needed to effectuate its purpose. ... [T]he State failed to establish why it was reasonable for Mullins to be detained for more than 38 minutes before anyone endeavored to review the surveillance video of the prior day's break-in – which took yet another 20 minutes – and, after that, for another 54 minutes before a decision was made to impound the car and handcuff its occupants." "Even assuming that the generalized clothing match between one of the men in the video recording and the back seat passenger potentially may have warranted further investigation at the time it was discovered, that fact did not become known until 58 minutes after the traffic stop began, at which point officers already had prolonged the traffic stop unreasonably."**

D. EXPECTATION OF PRIVACY

1. COMPUTERS, TELEPHONES, AND OTHER ELECTRONIC DEVICES

Albright v. State, 354 Ga.App. 538, 841 S.E.2d 171 (March 13, 2020). Armed robbery and related convictions affirmed; no ineffective assistance where trial counsel failed to file motion to suppress cell site location information ("CSLI") evidence, prior to the decision in *Carpenter v. United States*, 16-402, ___ U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507, 2018 WL 3073916 (June 22, 2018). **Trial court could find from conflicting evidence presented that defendant lacked standing to challenge the order admitting the evidence on his girlfriend's cell phone.**

2. INMATES

Davis v. State, 307 Ga. 625, 837 S.E.2d 817 (January 13, 2020). Felony murder conviction affirmed. Trial court properly admitted letter written by defendant while he was in jail. Defendant wrote the letter to Thompson, asking Thompson to force someone else, Tillman, to make a videotaped confession to victim's murder, then kill Tillman and make it look like suicide. But the letter was undeliverable and so was returned to the jail by the post office. Defendant had used a

fictitious name on the return address, so jail officials had to open the envelope to see whose file to put it in. **Held, the officers' inspection of the letter "was for security and maintenance purposes, rather than for prosecutorial purposes, [and thus] the search did not violate the Fourth Amendment."** "'A pre-trial detainee's Fourth Amendment expectation of privacy in his cell and personal effects 'is necessarily diminished.'" *Leslie v. State*, 301 Ga. 882, 887 (804 S.E.2d 351) (2017) (quoting *Thomas v. State*, 263 Ga. 85, 87 (428 S.E.2d 564 (1993)); see *Armstead v. State*, 293 Ga. 243, 246 (744 S.E.2d 774) (2013) ('Pretrial detainees have a substantially diminished expectation of privacy for purposes of the Fourth Amendment.'). 'Consequently, **items found during searches conducted for security and maintenance purposes are not within the scope of protection of the Fourth Amendment.**' *Leslie*, 301 Ga. at 887; see also *State v. Henderson*, 271 Ga. 264, 266 (517 S.E.2d 61) (1999) ('[Our prior case law] thus stands for the proposition that the Fourth Amendment does not apply to a search by jail officials of a pre-trial detainee's cell for security and maintenance purposes.')."

Boykins-White v. State, 305 Ga.App. 827, 701 S.E.2d 221 (September 7, 2010). Defendant's convictions for armed robbery and related offenses affirmed; **no ineffective assistance where trial counsel didn't move to suppress "recordings of conversations he had while using the jail's phone."** "OCGA § 16-11-62(4) prohibits any person from intentionally and secretly intercepting a telephone call by use of any device, instrument or apparatus. *Smith v. State,* 254 Ga.App. 107, 108(2)(a) (561 S.E.2d 232) (2002). However, OCGA § 16-11-66(a) provides an exception to this rule where one of the parties to the communication has given prior consent. [fn] Id. Such consent can be either express or implied. This Court has found implied consent to the recording of a phone call when an inmate is told at the beginning of the telephone conversation that the call is subject to being monitored or recorded. Id. at 109(2)(a). In this case, **it is undisputed that Boykins-White was told numerous times during his phone calls that the calls could be recorded or monitored. This is sufficient to establish Boykins-White's implied consent regarding the recording of his phone conversations."** *Accord, Keller v. State*, 308 Ga. 492, 842 S.E.2d 22 (April 20, 2020) ("it is well established that there is no reasonable expectation of privacy in a recorded telephone call made from a jail or prison.").

E. MOTION TO SUPPRESS

1. FORM/TIMING/BASIS OF MOTION

Albright v. State, 354 Ga.App. 538, 841 S.E.2d 171 (March 13, 2020). Armed robbery and related convictions affirmed; defendant waived any Fourth Amendment suppression issue by failing to file a timely written motion, instead raising the issue orally on the third day of trial. "As the State contends, and as the trial court found, to the extent that Albright attempted to make a motion to suppress, it was neither timely nor in writing, and it did not state facts indicating that the search and seizure violated his constitutional rights. See *Gonzalez v. State*, 334 Ga.App. 706, 708-709(1), 780 S.E.2d 383 (2015) (Pursuant to OCGA § 17-7-110 and Uniform Superior Court Rule 31.1, a motion to suppress must be filed within 10 days of defendant's arraignment, unless the trial court extends the time for filing; OCGA § 17-5-30 mandates that a motion to suppress must be in writing and state facts showing the search and seizure was unlawful). When the trial court pointed this out at trial, Albright's counsel agreed that this was the standard for a motion to suppress and conceded that no such written motion had been filed. As a result, the trial court found that Albright had waived any motion to suppress. **'Oral motions [to suppress] are not authorized.** Moreover, this Court has held that a motion to suppress must be filed before trial to effectuate its purpose of avoiding the interruption of trial. Because [Albright] failed to timely interpose a proper motion to suppress, and because he did not offer at trial an explanation for this failure, he waived the right to challenge the admissibility of the evidence on this ground.' (Citations omitted.) *Belcher v. State*, 230 Ga.App. 235, 236(1), 496 S.E.2d 306 (1998).[fn]

Failure to file a timely motion to suppress waives even constitutional errors. *Gonzalez*, 334 Ga.App. at 708(1), 780 S.E.2d 383." *Accord, Evans v. State*, 308 Ga. 582, 842 S.E.2d 837 (May 4, 2020) (motion to suppress must be in writing).

Fraser v. State, 283 Ga.App. 477, 642 S.E.2d 129 (February 6, 2007). Defendant's "Motion in Limine to Suppress Evidence," filed more than three months after arraignment, was untimely. "Our Supreme Court has held that 'OCGA § 17-5-30 and USCR 31.1 require that a motion to suppress evidence seized in an allegedly unlawful search be filed before arraignment.' *Copeland v. State,* 272 Ga. 816, 817(2) (537 S.E.2d 78) (2000); *Van Huynh v. State,* 258 Ga. 663, 664(2) (373 S.E.2d 502) (1988). **A defendant may not circumvent the requirement of a timely, written motion to suppress by couching his motion as a motion in limine.** See *Copeland,* supra, 272 Ga. at 818(2)." "Because his motion to suppress was not timely filed, Fraser failed to preserve his right to challenge the validity of the search and he cannot circumvent the requirements of USCR 31.1 by couching his motion as a motion in limine. See *Copeland,* supra, 272 Ga. at 817-818(2). Moreover, because Fraser's failure to file a timely motion to suppress the seized evidence waived any right to claim that the search which produced the evidence was unconstitutional, 'it follows that he was not entitled to exclusion of testimony describing the physical evidence on the basis that the testimony was the fruit of an unconstitutional search.' *Walker* [*v. State,* 277 Ga.App. 485, 489(3) (627 S.E.2d 54) (2006).]" *Accord, Riley v. State,* A20A1376, ___ Ga.App. ___, ___ S.E.2d ___, 2020 WL 4195203 (July 21, 2020). *Overruled in part on other grounds, State v. Lane*, 308 Ga. 10, 838 S.E.2d 808 (February 10, 2020).

F. SEARCH WARRANTS, GENERALLY

1. CELL PHONES/COMPUTERS

Serdula v. State, A20A0258, ___ Ga.App. ___, 845 S.E.2d 362, 2020 WL 3286734 (June 18, 2020). **Conviction for aggravated sodomy and related offenses affirmed.** Trial court properly denied motion to suppress evidence retrieved from cell phone pursuant to search warrant. **1.** Contrary to defendant's argument, warrant authorizing search of phone would encompass the memory card contained therein. "[T]he search warrant specified that the phone was to be searched for recorded files and videos, and the forensic analyst testified that those files are stored on the memory card, which is retrieved from *inside* the phone." **2. Warrant authorizing search of phone for "recorded files, videos, and all phone activity logs" was sufficiently particular.**

Rickman v. State, S20A0127, ___ Ga. ___, 842 S.E.2d 289, 2020 WL 1908492 (April 20, 2020). Malice murder and firearm convictions affirmed; no ineffective assistance in failing to file motion to suppress. Contrary to defendant's argument, description of items to be seized from her cell phone did not lack particularity. Warrant "allowed officers to search the phone for, among other things, messages, photographs, videos, contacts, and any other application data, 'or any other evidence of the crime of murder.'" Here, the warrants, read as a whole, limited the search of the contents of Rickman's cell phones to items reasonably appearing to be connected to Carter's murder. See *Reaves v. State*, 284 Ga. 181(2)(d), 664 S.E.2d 211 (2008) (**warrants containing residual clauses limiting the items to be seized to those relevant to the crimes identified are sufficiently particular and do not authorize a general search in violation of the Fourth Amendment**). See also *Leili* [*v. State*, 307 Ga. 339, 344(2)(a), 834 S.E.2d 847 (2019)]. Accordingly, Rickman has failed to show that trial counsel was deficient."

Keller v. State, 308 Ga. 492, 842 S.E.2d 22 (April 20, 2020). Convictions for felony murder and related offenses affirmed. No ineffective assistance in failing to seek suppression of evidence found on his cell phone. **Contrary to defendant's argument, the search warrant authorizing search of his phone was sufficiently specific. "[T]he warrant described the particular cell**

phone and its contents to be searched, 'to include telephone logs showing phone numbers and date stamps for account accesses, and the contents of private data, text message data in the user's inbox, sent and received text messages and trash folders, video files, [and] picture files.' See generally *Leili v. State*, 307 Ga. 339, 344(2)(a), 834 S.E.2d 847 (2019) (magistrate authorized to make 'practical, common-sense determination' that electronic equipment may have preserved evidence of relevant crimes, 'though officers could not articulate exactly where those files would be found.')."

Westbrook v. State, 308 Ga. 92, 839 S.E.2d 620 (February 28, 2020). Malice murder and related convictions affirmed. No ineffective assistance in failing to challenge the description of items to be seized from defendant's cell phone. **"[C]ontrary to Westbrook's contention, the use of the phrase 'electronic data' was specific enough to enable a prudent officer to know to look for photographs and videos stored on Westbrook's cell phone.** See *Hawkins v. State,* 290 Ga. 785, 786, 723 S.E.2d 924 (2012) (noting that a cell phone is an 'electronic device' that can be searched for 'electronic data' and describing the types of data that can be discovered as including emails, text messages, and photographs), abrogated on other grounds by *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)."

Leili v. State, 307 Ga. 339, 834 S.E.2d 847 (October 21, 2019). Malice murder and related convictions affirmed; trial court properly denied motion to suppress. Search warrant authorizing seizure of all of defendant's electronics wasn't overbroad. **"'It is universally recognized that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit."** *United States v. Wuagneux*, 683 F.2d 1343, 1349(1)(B) (11th Cir. 1982). At the time the warrant was sought and executed, investigators knew only that a possible murder had occurred in close proximity to the Leili residence; that the couple had fought immediately prior to Dominique's disappearance; that the couple had a history of domestic discord; that Appellant had failed to report his wife missing; and that certain surveillance equipment (both cameras and GPS-tracking devices) could hold evidence related to the crime. The magistrate was authorized to make the 'practical, common-sense' determination that the surveillance cameras and GPS-tracking equipment may have captured evidence of the relevant crimes and that any such evidence would have been stored on electronic devices, though officers could not articulate exactly where those files would be found. Further, though the warrant permitted the seizure of all electronic equipment, when read as a whole, '[t]he warrant[ ] here must be understood as limiting the search to items (in addition to the items specifically mentioned in the warrant) reasonably appearing to be connected to the specific crimes delineated in the warrant[ ].' (Punctuation and citations omitted.) *Reaves v. State*, 284 Ga. 181, 186, 664 S.E.2d 211 (2008). Accordingly, the trial court correctly denied Appellant's motion to suppress with respect to this warrant." *Accord, Keller (April 20, 2020), above.*

Reyes-Castro v. State, 352 Ga.App. 48, 833 S.E.2d 735 (September 25, 2019). Convictions for kidnapping and rape affirmed. No ineffective assistance in failing to challenge search warrant for defendant's phone as over-broad. Officer seized phone after defendant gave statement admitting that he was in front seat of car, texting and talking on his phone, while co-defendant Carcamo was having sex with the victim in the back seat. "Based on that information, the detective believed that the text messages Reyes sent during the rape might contain evidence critical to the investigation of the rape, such as establishing a timeline for the night's events. Further, given his extensive experience as a sexual assault investigator, the detective believed that Reyes might have video recorded or photographed the rape. Thus, although Reyes was not placed under arrest following the first interview, the detective seized Reyes's cell phone and obtained a search

warrant for the contents of the phone." Detective then obtained search warrant "which authorized a search of Reyes's cell phone for '[a]ny and all content [of the phone]; [a]ny and all digital content; [a]ny and all data, to include deleted or recoverable data; [a]ny and all text message content; [c]all logs; [a]ny and all media content, to include videos and photographs, which are being possessed in violation of Georgia Law(s): OCGA § 16-6-1 Rape[.]'" **1.** "Here, given the warrant's **reference to the specific crime at issue and to the specific dates on which the crime was allegedly committed,** as shown in the affidavit, we conclude that the warrant was sufficiently particular to notify the detective, the analyst, and/or any other executing officer of what evidence he or she was authorized to obtain from Reyes's phone and to prevent a general exploratory search of the other downloaded content for evidence of unrelated crimes or other unauthorized purposes. See *Reaves v. State*, 284 Ga. 181, 184-188(2)(d) (664 S.E.2d 211) (2008) (Warrants containing residual clauses limiting the items to be seized to those relevant to the crimes identified were sufficiently particular and did not authorize a general exploratory search in violation of the Fourth Amendment.)." **2.** Fact that warrant left officer some discretion to determine what was relevant evidence didn't make it overbroad. "'[A]lthough a warrant cannot leave the determination of what articles fall within its description and are to be seized entirely to the judgment and opinion of the officer executing the warrant, the degree of specificity in the description is flexible and will vary with the circumstances involved. Specifically, **the particularity requirement only demands that the executing officer be able to identify the property sought with reasonable certainty.'** *Henson v. State*, 314 Ga.App. 152, 155 (723 S.E.2d 456) (2012) (punctuation and footnotes omitted). ... 'We conclude that[,] so long as the determination which he is required to make is a determination of a matter of fact[,] as distinguished from a determination of a matter of opinion[,] the warrant is valid,'" *quoting Reeves* at 187(2)(d) (citation and punctuation omitted). Here, after issuance of search warrant, a technician downloaded all data from the phone, but only provided the officer with data from the time of the offense.

G. SEARCH WARRANTS, PROBABLE CAUSE FOR ISSUANCE

1. GENERALLY

Landers v. State, 355 Ga.App. 69, 842 S.E.2d 525 (April 29, 2020). Interim appeal in prosecution for aggravated child molestation and aggravated sodomy. Trial court erred in denying motion to suppress evidence; **search warrant for portable storage device lacked probable cause.** Defendant had the device in his pocket when arrested; he attempted to discard it, but police seized it and obtained a search warrant to search its contents. Several months later, police obtained a second warrant, similar to the first but adding another paragraph to the affidavit "describing the investigator's prior involvement investigating child sex crimes (not involving Landers) and his opinion that based on his experience and training, such offenders often store evidence of their crimes on electronic storage devices." The trial court held the first affidavit sufficient, but Court of Appeals disagrees: "The affidavit in support of the 2018 search warrant did not establish any connection between the charged crimes of aggravated child molestation and aggravated sodomy and any content that might be on the portable storage device. The 2018 affidavit did not provide any information relating to evidence that could be found on the portable storage device, such as testimony from an alleged victim that Landers photographed certain acts. Furthermore, **the affidavit in support of the 2018 warrant did not include any information that there is a link between an act of child molestation or aggravated sodomy and the likelihood of locating evidence or contraband on the digital storage device,** such as the investigator's statement in the 2019 affidavit that based on his experience and training, child molesters often stored evidence of their crimes on digital storage devices. Indeed, the only statement to come close to establishing a nexus between the charged crimes of aggravated child molestation and aggravated sodomy and the contents of the portable storage device is the following statement: 'Due to Landers attempting

to discard the storage device upon seeing law enforcement [the investigator] believes that there may be evidence on the storage device that is crucial to the ongoing investigation.' However, **'[a] suspicion or "strong reason to suspect" is an insufficient foundation for a finding of probable cause."** *Brown v. State*, 269 Ga. 830, 832(2) (504 S.E.2d 443) (1998) (citations and punctuation omitted). **The investigator's belief that there may be evidence of aggravated child molestation and aggravated sodomy on the portable storage device, as expressed in the affidavit, amounts to no more than a suspicion or strong reason to suspect.** Thus, the 2018 affidavit did not provide the magistrate with a substantial basis for concluding that probable cause existed to issue the 2018 search warrant." Vacated and remanded to "consider the effect of the delay between the 2018 and 2019 search warrants and whether the investigator's 2019 affidavit cured the defect with the 2018 affidavit."

H. SEARCHES

1. CONSENT

Little v. State, 353 Ga.App. 549, 839 S.E.2d 15 (February 10, 2020). Meth trafficking and related convictions reversed; trial court erred by denying motion to suppress. State failed to show that officers' entry into defendant's home was based on voluntary consent as opposed to acquiescence to authority. Narcotics agent Campbell, accompanied by other agents, knocked on the door of the camper where Little lived. Little answered. "Campbell identified himself and the agents, told Little that Campbell had received information that Little was selling large amounts of methamphetamine, and asked if the agents could enter the camper to speak with Little. Little backed up into the camper, and the agents followed him in." **1. Opening door.** "Here, no evidence was presented that the officers identified themselves before Little opened the door, and the record does not indicate that Little was aware of the officers' presence or identity before he opened the door. Consequently, **the act of opening the door, by itself, was not indicative of consent for law enforcement to enter." 2. Allowing entry.** "Moreover, viewed in the light most favorable to the State, the evidence shows that, **when the agents subsequently requested permission to enter, Little made no effort to engage in any discussion of the matter and instead continued to back up into the camper and turn his back on the agents.** Nothing in Campbell's testimony indicates that Little affirmatively or voluntarily granted consent for the agents to enter. His actions rather show–at most– 'a submission to or acquiescence in the express or implied assertion of authority.'" Agent's testimony that Little "backed in indicating to [us] that [we] could enter" "at most reveals only Campbell's subjective interpretation of an otherwise largely equivocal action and thus does not constitute a conflict in the testimony." **3. Defendant's subsequent consent to search was ineffective.** "To eliminate any taint from an allegedly consensual search resulting from a prior illegality, 'there must be proof both that the consent was voluntary and that it was not the product of the prior illegality. Proof of a voluntary consent alone is not sufficient.' (Citation omitted.) *Rogers* [*v. State*, 206 Ga.App. 654, 660(4) (426 S.E.2d 209) (1992)]. The inquiry 'focuses on causation: Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' (Citation and punctuation omitted.) *Pledger v. State*, 257 Ga.App. 794, 797 (572 S.E.2d 348) (2002)." "Here, Little's consent to search is inextricably intertwined with the agents' illegal entry and their immediate observation of drug paraphernalia and weapons in plain view. [Cits.] Our determination is supported by Little's offer that 'he could help [the agents] if [they] could help him,' which appeared to be an immediate response to what the officers saw upon entry."

State v. Harris, 236 Ga.App. 525, 513 S.E.2d 1 (February 1, 1999). In prosecution for cocaine possession and related offense, trial court erred in granting motion to suppress as to passenger, but not as to driver. **1. Trial court erred in finding that defendant did not voluntarily consent**

to search of his car. "Immediately upon being stopped, Harris orally gave the officer permission to search the car. The officer then read and gave to Harris a written consent form which stated that: he was advised of his right to refuse to consent to a search, of his right to withdraw consent at any time, and that the search was being conducted in connection with the investigation of a drug crime; he was not threatened in any manner or promised any reward; and he freely and voluntarily gave his consent with full understanding of his rights. Harris signed the form. **We do not agree that his consent was not valid because the officer indicated on the form that the search was in connection with an investigation of a drug crime when the stop was purportedly for the license violation. There is no evidence Harris was misled about the purpose of the search or that the evidence seized was used for any purpose other than that to which he consented.** Voluntariness of consent must be determined from all the circumstances. *Hestley v. State,* 216 Ga.App. 573, 575(1), 455 S.E.2d 333 (1995). Considering the totality of the circumstances, we find that Harris' consent to the search of his car was valid. See *Raney v. State,* 186 Ga.App. 758, 760, 368 S.E.2d 528 (1988)." "Moreover, Harris orally consented to the search. If oral consent was freely and voluntarily given, written consent was not necessary. [Cit.]" **2.** Trial court did not abuse its discretion in finding that **passenger's "consent" to empty her purse was not voluntarily given.** "[Passenger/co-defendant] Peters claims she did not consent to a search of her purse; she merely acquiesced to the officer's authority. She argues that she was not asked for her consent and was not told she had the right to refuse consent. As noted above, **the officer retrieved the purse from the car, handed it to Peters and 'asked her would she empty the purse.' Without saying anything, she emptied the purse.** Where the state seeks to justify a warrantless search on grounds of consent, it has the burden of proving the consent was freely and voluntarily given. *Sutton v. State,* 223 Ga.App. 721, 724(1), 478 S.E.2d 910 (1996). **Silence in the face of a request for permission to search may sometimes be interpreted as acquiescence, but such acquiescence cannot substitute for free consent.** *State v. Williams,* 226 Ga.App. 346, 348, 486 S.E.2d 637 (1997); *State v. Williams,* 212 Ga.App. 164, 165(1), 441 S.E.2d 501 (1994). While Peters' conduct may well have signaled acquiescence, it did not show consent. See *Miranda v. State,* 189 Ga.App. 218, 221(3), 375 S.E.2d 295 (1988). **Peters was not informed of her right to refuse to consent to a search of her purse and did not give any express consent.** See generally *Rogers v. State,* 206 Ga.App. 654, 660(4), 426 S.E.2d 209 (1992). Under the totality of the circumstances, the trial court's conclusion that the cocaine found in Peters' purse was the product of a non-consensual search was not clearly erroneous. See *State v. Westmoreland,* 204 Ga.App. 312, 314, 418 S.E.2d 822 (1992). Accordingly, we affirm the trial court's grant of Peters' motion to suppress." Driver, however, had no privacy interest in passenger's purse, and trial court thus erred in granting his motion to suppress the contents thereof. *Accord, Little v. State*, 353 Ga.App. 549, 839 S.E.2d 15 (February 10, 2020) ("silence in the face of a request...").

2. CURTILAGE

State v. Newsome, 352 Ga.App. 546, 835 S.E.2d 329 (October 24, 2019). In prosecution for theft by receiving and related drug charges, trial court properly granted motion to suppress, "concluding that the information upon which the search warrants were based was obtained by an unlawful intrusion into the home's curtilage." Officer had information, but admittedly not enough for probable cause, that defendant was in possession of stolen property, so officer went to defendant's apartment for a "knock and talk." When defendant knocked at the front door, however, he got no answer. "[Investigator] Mathews testified that, when conducting a knock and talk procedure, his usual practice is to knock on the back door if no one answers the front door 'because some people have rooms where they're just in the back of the house and they can't hear the front of the house.' He then walked to the back of the residence. Newsome's apartment is located on the second floor of a quadplex, a building which includes three other apartments. The

front door of the apartment is accessible by walking through a common area. The back yard of the apartment is not connected to the front of the apartment by a sidewalk or driveway, and is accessible only by walking through the grass. Newsome's rear door is located on a second-floor deck, which is surrounded by railing, and separated from the adjacent apartment by a wooden privacy partition. The deck can be reached by climbing a flight of stairs which leads to Newsome's apartment only. Mathews ascended the flight of stairs and, upon reaching the back deck, observed a pair of pliers, which 'spark[ed] [Mathews's] interest' because the crime involved the theft of tools. The rear doors of Newsome's apartment are made of glass. As he knocked on the back door, Mathews looked through the glass and observed grinders and other tools on the floor in the apartment. Mathews took pictures of the tools and sent them to the victim, who confirmed that some of the tools belonged to him." **"The record in this case supports the trial court's conclusion that Mathews did not have an implied license to enter the back deck area. There is no evidence that the front door was inaccessible [*distinguishing State v. Zackery*, 193 Ga.App. 319, 320, 387 S.E.2d 606 (1989) (front door inaccessible)], or that Newsome treated the back door as a public entryway. Nor is there evidence that the back door and deck area 'were visible or in plain view from the street or from anywhere the officers were authorized to be upon arriving at the home,'"** *quoting Arp v. State*, 327 Ga.App. 340, 343(1), 759 S.E.2d 57 (2014). "Additionally, the trial court's conclusion that the officer's approach to the rear door, after receiving no response at the front door, was unreasonable given the small size of the apartment and the lack of evidence that it was occupied at the time Mathews attempted to question Newsome, is not clearly erroneous."

3. GOOD FAITH EXCEPTION/INEVITABLE DISCOVERY

Mobley v. State, 307 Ga. 59, 834 S.E.2d 785 (October 21, 2019). *Reversing* 346 Ga.App. 641, 816 S.E.2d 769 (2018), and defendant's convictions for vehicular homicide; trial court erred by denying motion to suppress. Following fatal traffic accident, investigators acting without a search warrant seized the airbag control modules (ACM) from the two vehicles, "entered the passenger compartments of both vehicles, attached a crash data retrieval (CDR) device to data ports in the cars, and used the CDR to download data from the ACMs. The data retrieved from the Charger indicated that, moments before the collision, Mobley was driving nearly 100 miles per hour." The next day another investigator applied for a warrant to seize the ACMs from the vehicles, knowing the data had already been downloaded. A magistrate issued the warrant and the investigator seized the ACMs, but no additional data was retrieved. **1. The retrieval of data from the ACMs was a Fourth Amendment search.** "To retrieve the data, Investigator Hatcher entered the passenger compartment of the Charger and connected a CDR [crash data retrieval] device with the ACM by way of an onboard data port. A personal motor vehicle is plainly among the 'effects' with which the Fourth Amendment—as it historically was understood—is concerned, see *United States v. Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), and **a physical intrusion into a personal motor vehicle for the purpose of obtaining information for a law enforcement investigation generally is a search for purposes of the Fourth Amendment under the traditional common law trespass standard.** See [*United States v. Jones*, 565 U.S. 400, 404(II)(A), 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)] (installation of tracking device on private vehicle and subsequent use of device to monitor vehicle movements is a search). See also *Florida v. Jardines*, 569 U.S. 1, 5, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013). The retrieval of data without a warrant at the scene of the collision was a search and seizure that implicates the Fourth Amendment, regardless of any reasonable expectations of privacy." **2. The data retrieval was an unreasonable search, as it was warrantless and met no recognized exception to the Fourth Amendment. A.** "The automobile exception is inapplicable because the evidence is undisputed that, at the time Investigator Hatcher retrieved the data from the crashed Charger, the Charger not only was already in the custody and control of law enforcement officers but, more importantly,

was not operable. See *United States v. Delva*, 922 F.3d 1228, 1243(IV)(A) (11th Cir. 2019) (automobile exception applies only when vehicle in question is 'readily mobile'). See also *State v. LeJeune*, 276 Ga. 179, 182(2), 576 S.E.2d 888 (2003) (automobile exception did not apply where suspect and his cohort did not have access to vehicle and officers impounded vehicle and had it towed away)." **B. Evidence at hearing failed to reveal any exigent circumstance based on** "imminent danger that the data would be lost or damaged." "See *Davis* [*v. State*, 262 Ga. 578, 583(3), 422 S.E.2d 546 (1992)] (prospective loss of evidence is exigent circumstance only if there is threat that evidence will be destroyed if search is not commenced right away)." **C.** "We caution, however, that these exceptions perhaps could apply to the retrieval of ACM data at the scene of an accident in a case with different facts and a different record." **3. Inevitable discovery exception doesn't apply** because officers hadn't begun process of obtaining warrant when search conducted. "This Court has explained that, for the inevitable discovery exception to apply, "there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct." *Taylor v. State*, 274 Ga. 269, 274-275 (3), 553 S.E.2d 598 (2001) (citation and punctuation omitted), disapproved in part on other grounds in *State v. Chulpayev*, 296 Ga. 764, 783 (3) (b), 770 S.E.2d 808 (2015). ... 'Because a valid search warrant nearly always can be obtained after a search has occurred,' allowing law enforcement to use a warrant from after-the-fact to justify an earlier search would threaten to vitiate the warrant requirement. [*United States v. Satterfield*, 743 F.2d 827, 846(IV)(B)(11th Cir. 1984)]. [Other cit.] There is no evidence that any of the investigating officers applied for a warrant, were preparing an application for a warrant, or even were contemplating a warrant before Investigator Hatcher retrieved the data." **4. Contrary to defendant's argument, OCGA § 17-5-30 is not a statutory rule of exclusion, but** "is most naturally and reasonably understood to be merely a procedural statute, establishing a mechanism for the application of an exclusionary rule" which did not exist in state law at the time of its adoption in 1966. *Casts grave doubt on the validity of Gary v. State*, 262 Ga. 573, 422 S.E.2d 426 (1992) (holding that OCGA § 17-5-30 forecloses application of the good-faith exception recognized federally in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). "[W]e conclude that [*Gary*'s] broader reasoning is unsound, and its understanding of OCGA § 17-5-30 is simply incorrect. ... Today, we disavow the unsound reasoning of *Gary*, hold that it does not extend to any context other than the reliance of an officer in good faith upon the validity of a search warrant, and conclude that, in all other contexts, OCGA § 17-5-30 means what it most naturally and reasonably is understood in context to mean—it establishes a procedure for applying the exclusionary rule but does not itself require the suppression of any evidence." Leaves for another day whether to overrule *Gary* as to good faith reliance on an invalid search warrant.

4. HOTEL ROOMS

Lindsey v. State, 353 Ga.App. 231, 836 S.E.2d 563 (October 29, 2019). Convictions for possession of methamphetamine with intent to distribute and related offenses affirmed; trial court properly denied motion to suppress evidence found in hotel room. Defendant had no reasonable expectation of privacy in the room after expiration of the time period for which the room had been rented. *Based on* OCGA § 43-21-3.2 (after designated checkout time, innkeeper may restrain guest from entering room and remove their property).

5. IMPOUND INVENTORY

Bowler v. State, 355 Ga.App. 77, 842 S.E.2d 546 (April 30, 2020). Convictions for possessing methamphetamine and drug related objects affirmed. Trial court properly denied motion to suppress; impound inventory search was proper following defendant's arrest for loitering.

"Bowler was the sole occupant of the vehicle, which was parked improperly on the side of the store during early morning hours. According to the officer's testimony, there was no one to release the car to, so it was necessary to impound it and conduct an inventory search in order to protect the police department from any liability. Under these circumstances, the officer's conduct was reasonable since 'no one remained to take custody of the vehicle and remove it from the side of the [building]. Because the officer had legitimate grounds for an inventory search, the evidence seized during the search was properly admitted, and the trial court did not err by denying [the] motion to suppress on this ground,'" *quoting Beville v. State*, 322 Ga.App. 673, 677(3)(b) (745 S.E.2d 858) (2013).

Albright v. State, 354 Ga.App. 538, 841 S.E.2d 171 (March 13, 2020). Armed robbery and related convictions affirmed; no ineffective assistance in failing to seek suppression of gun found in his car based on impound inventory search. "Albright presented no evidence that the car was legally or safely parked, or that it could be safely or legally driven by his passenger, who did not testify, or by anyone else. Thus, Albright has failed to meet his burden of showing that, if trial counsel had moved to suppress the shotgun, the motion to suppress would have been granted."

State v. King, 237 Ga.App. 729, 516 S.E.2d 580 (April 22, 1999). After arresting defendant for shoplifting, police properly impounded her car rather than leaving it unprotected in shopping center parking lot. "Impoundment is not generally permissible when the driver is arrested but a reliable friend is present, authorized, and capable of safely removing the vehicle. [Cit.] **In this case, the owner of the vehicle was under arrest, she had implicated her companion in criminal activity, and no one else remained to take custody of the car and remove it from the shopping center premises.** See *Evans v. State,* 216 Ga.App. 21, 24(2), 453 S.E.2d 100 (1995). **Although the officer did not inquire whether King could make other arrangements for the retrieval of her car, he was not required to do so.** *Williams* [*v. State,* 204 Ga.App. 372, 373, 419 S.E.2d 351 (1992)]. ... After the lawful arrest of King, the police became responsible for timely safeguarding King's property, until it could be lawfully disposed of, in the ordinary course of police business. *Jones v. State,* 187 Ga.App. 421, 424, 370 S.E.2d 784 (1988); see *Pierce v. State,* 194 Ga.App. 481, 482, 391 S.E.2d 3 (1990). Impounding the vehicle served the dual purpose of protecting King's property and protecting police from potential claims for lost possessions. *Waggoner* [*v. State,* 228 Ga.App. 148, 149, 491 S.E.2d 88 (1997)]." *Accord, Scott v. State*, 316 Ga.App. 341, 729 S.E.2d 481 (June 22, 2012); *Redding v. State*, 354 Ga.App. 525, 841 S.E.2d 192 (March 13, 2020).

6. PROBATIONERS/PAROLEES

Little v. State, 353 Ga.App. 549, 839 S.E.2d 15 (February 10, 2020). Meth trafficking and related convictions reversed; trial court erred by denying motion to suppress. Non-consensual, warrantless search of defendant's residence wasn't justified by fact that defendant was on probation. No evidence was presented to show that defendant consented to searches as a condition of his probation and no evidence supports State's argument that a search waiver is a 'customary' condition of probation in the trial court's circuit. "[T]he inquiry is whether law enforcement officers are aware of the probation conditions imposed on the *particular individual* and whether that *particular individual* has waived his rights."

7. VEHICLES/"AUTOMOBILE EXCEPTION"

Lowe v. State, 352 Ga.App. 458, 835 S.E.2d 301 (October 23, 2019). In prosecution for trafficking in methamphetamine and related charges, trial court erred by denying motion to suppress. **Search of vehicle was not justified under the automobile exception based on officer's observation of marijuana in passenger's bag.** "Other than proximity there is no

evidence that linked Lowe to the marijuana in the passenger's wallet. Nor are there any other circumstances which might under the totality of the circumstances, justify the search of Lowe's car. The vehicle was stopped for failure to signal before changing lanes – Lowe and her passenger were not suspected of any crimes before that time, officers did not smell marijuana in the car, they did not observe any items inside the car indicative of contraband use, or observe furtive or suspicious movements between the two women. **That her passenger had marijuana in her wallet and was riding in Lowe's vehicle is not sufficient to establish probable cause for a warrantless search under the automobile exception."**

XVI. SENTENCING

A. FIRST OFFENDER/CONDITIONAL DISCHARGE

Seibert v. Alexander, 351 Ga.App. 446, 829 S.E.2d 473 (June 26, 2019). In civil action brought by former criminal defendant against superior court clerk, trial court's dismissal affirmed in part and reversed in part. Defendant "was entitled to have the record properly reflect his discharge under the First Offender Act." Trial court had previously entered an order finding "that Seibert completed his first offender sentence without an adjudication of guilt, ordered that he receive a discharge that completely exonerated him of any criminal purpose, and directed that the Georgia Crime Information Center ('GCIC') be notified of the discharge in accordance with the First Offender Act. The order was filed on December 30, 2014. The clerk then made an entry 'on the criminal docket and all other records of the [c]ourt,' explaining the exoneration effect of the discharge. The clerk's entry was dated December 31, 2014, and the clerk reported the record of discharge to the GCIC. Gwinnett County Superior Court's electronic records pertaining to Seibert read as follows: 'First Offender Completed on 12-22-14' and '1st Offender Discharge on 12-30-14.'" But defendant's sentence ended on May 9, 2001, and under OCGA § 42-8-60 then existing, he was entitled to have the record reflect his discharge as of that date. **"OCGA § 42-8-62(a) ... mandated that the clerk 'enter on the criminal docket and all other records of the court pertaining thereto' a notice of the defendant's discharge and the legal effect thereof.** *State v. Mills*, 268 Ga. 873, 874, 495 S.E.2d 1 (1998) (citing OCGA § 42-8-62(a))." *Also citing Ailara v. State*, 311 Ga.App. 862, 864, 717 S.E.2d 498 (2011).

XVII. WITNESSES

A. PRIVILEGES

1. MARITAL PRIVILEGE – SPOUSAL WITNESS PRIVILEGE (OCGA § 24-5-503)

Morgan v. State, 354 Ga.App. 754, 841 S.E.2d 430 (March 27, 2020). Aggravated assault conviction affirmed; counsel was deficient in concluding that defendant's husband couldn't claim spousal witness privilege. OCGA § 24-5-503 generally provides that a spouse isn't compellable to testify against their spouse, but provides exceptions where "the husband or wife is charged with a crime against his or her spouse," even if the charged crimes were committed against the spouse before they were married. **Crimes charged here, however, weren't committed against defendant's spouse. Husband could invoke spousal privilege to avoid testifying against defendant, even though his testimony related to other acts where he *was* the victim.** No prejudice shown, however, in light of overwhelming evidence of guilt.